IN THE SUPREME COURT OF MISSOURI

SC85451

STATE OF MISSOURI, ex rel. THE DOE RUN RESOURCES CORPORATION, *et al*., Relators,

vs.

HON. MARGARET M. NEILL,
Presiding Judge, Twenty-Second Judicial Circuit, City of St. Louis,
Respondent.

On a Petition for Writ of Prohibition
or, in the Alternative, Petition for Writ of Mandamus

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JURISDICTIONAL STATEMENT

Relators The Doe Run Resources Corporation *et al*. brought this prohibition proceeding to challenge a venue determination by Respondent, Hon. Margaret M. Neill, then Presiding Judge of the Circuit Court for the City of St. Louis (Order of July 16, 2002, Appendix hereto, A1 *et seq*.). The underlying action, Doyle v. Fluor Corporation et al., No. 012-8641, is a putative class action seeking recovery for damages to real property that plaintiffs allege resulted from the operation of a lead smelter.

The Court of Appeals granted a preliminary order in prohibition, and made that order permanent in an opinion and order of May 20, 2003. This Court granted Respondent's application for transfer on September 30, 2003. Relators now pray that this Court order the entry of a permanent writ of prohibition. The jurisdiction of this Court to grant original remedial writs derives from Article V, Section 4.1 of the Constitution of Missouri and to hear cases on transfer after opinion derives from Article V, Section 10 of the Constitution of Missouri.

STATEMENT OF FACTS

Introduction

For more than a century, The Doe Run Resources Corporation ("Doe Run") and its predecessors have operated a primary lead smelter in Herculaneum, Missouri. Herculaneum is in Jefferson County. Eight Herculaneum residents have brought a putative class action against Doe Run and others alleging that emissions from the smelter have damaged real property in Herculaneum. Doyle v. Fluor Corporation et al., No. 012-8641 (Circuit Court, City of St. Louis). This prohibition action presents the question whether the City of St. Louis is a permissible venue for that action.

The only alleged connection between the Doyle case and the City of St. Louis is the presence of Marvin K. Kaiser, a City resident, as a Defendant. Mr. Kaiser first came to work for Doe Run in December 1993 and serves as its chief financial officer. (Kaiser Affidavit, Ex. 9, Tab J, ¶ 1)[1].

Plaintiffs allege that venue is proper under R.S.Mo. §508.010(3)(2000)[2] because the defendants include both corporations and individuals and one of the individuals -- Mr. Kaiser -- lived in the City of St. Louis at the time suit was filed and service was made. (Reply to Motion to Dismiss or Transfer, Ex. 14, ¶ 5). Relators, who are the Defendants in Doyle, contend that Mr. Kaiser was pretensively joined and therefore

[1] All exhibits referred to in this brief are exhibits to the Petition for Writ of Prohibition or, in the Alternative, Petition for Writ of Mandamus, filed in the Court of Appeals by Relators on August 2, 2002.

[2] All references to the Revised Statutes of Missouri are to R.S.Mo. (2000).

should be disregarded in determining venue (Motion, Ex. 9, ¶ 7).[3] They assert that, because there is no other St. Louis resident who is a defendant, and the cause of action did not arise in the City, venue is improper, and the case should be transferred to a proper venue. (Id., ¶¶ 5-7).

[3] The resolution of the venue issue in this case could affect the determination of the propriety of a City venue in a total of twelve cases pending in the Circuit Court for the City of St. Louis. Counsel for the Doyle plaintiffs have brought eight similar actions against Doe Run and other defendants in the City of St. Louis, all involving alleged injury from lead exposure in either Jefferson County or St. Francois County, and all involving attempts to create City venue in the same manner as in Doyle. The eight other cases brought by the same counsel are Mitchell v. Fluor Corporation, et al., Case No. 012-8638; Dowd v. Fluor Corporation, et al., Case No. 012-8639; Figge v. Fluor Corporation, et al., Case No. 012-8640; Stotler v. Fluor Corporation, et al., Case No. 012-10196; Stotler v. Fluor Corporation, et al., Case No. 012-10197; Mullins v. Fluor Corporation, et al., Case No. 022-1117; Mullins v. Fluor Corporation, et al., Case No. 022-1118; and Gross v. Fluor Corporation, et al., Case No. 022-1381. Separate counsel representing a different group of plaintiffs have brought three actions against Doe Run and others in the City, also relying on the presence of Mr. Kaiser as a defendant to create venue. Warden et al. v. Fluor Corporation et al., No. 022-10635, (filed September 12, 2002); Browning et al. v. Fluor Corporation et al., No. 032-10108, (filed September 9, 2003); Johnson et al. v. Fluor Corporation et al., No. 032-10109, (filed September 9, 2003).

Respondent found that the joinder of Mr. Kaiser was not pretensive and that venue was therefore proper. She denied Relators' motions to dismiss or transfer. (Order, App., A7).

The *Doyle* Action

James Doyle, Sheri Doyle, Lawrence Casey, Joseph McCoy, Christenna McCoy, Matt McKinstry, Ronald Naucke and Pat Naucke filed the Doyle case in the Circuit Court for the City of St. Louis on July 9, 2001. (Class Action Petition, Ex. 2). They alleged that they lived in Herculaneum. (Id., ¶ 2). Their case is a putative class action seeking recovery on theories of negligence, strict liability, trespass and nuisance for damage to Herculaneum properties that plaintiffs own. (Id.). The damage was allegedly caused by releases of lead and other heavy metals from the Herculaneum smelter. (Id., ¶ 1).

As the case now stands, the Doyle plaintiffs have sued six corporations in addition to Doe Run. Four of those corporations -- Fluor Corporation ("Fluor"), Homestake Lead Company of Missouri ("Homestake"), A.T. Massey Coal Company ("A.T. Massey"), and Doe Run Investment Holding Company ("Doe Run Investment") -- are alleged to have been partners of Doe Run at various times in the operation of the smelter. (Third Amended Petition, Ex. 8, ¶¶ 19 through 29). Defendant D.R. Acquisition Corporation ("D.R. Acquisition") is Doe Run's current corporate parent. (Id., ¶ 30). Defendant The Renco Group, Inc. ("Renco") is D.R. Acquisition's corporate parent, and therefore Doe Run's corporate grandparent. (Id.).

There are four individual defendants: Leslie McCraw, Bruce Clark, Ira Rennert and Marvin Kaiser. (Id., ¶¶ 4, 5, 11, 13). All of the individuals except Mr. Kaiser live

in states other than Missouri. (Id.). All of the defendants in Doyle, corporate and individual, are Relators here.

The Jefferson County *Dixon* Case

From 1995 until July 9, 2001, three of the Doyle plaintiffs (James Doyle, Sheri Doyle and Lawrence Casey) had prosecuted a putative class action seeking recovery for damage to real property in Herculaneum allegedly caused by emissions from the smelter. They brought their action, Dixon v. Doe Run et al., Case No. CV195-5117-CC-J1, in the Circuit Court of Jefferson County. (Dixon Second Amended Petition, Ex. 9, Tab A). Dixon involved a medical monitoring claim as well as property damage claims. The Doyle suit presents only claims for property damage.[4] (Id.). The same lawyers brought both cases. (Compare Dixon Second Amended Petition, Ex. 9, Tab A, with Doyle Third Amended Petition, Ex. 8). The plaintiffs never sued Mr. Kaiser in the Jefferson County action. (Dixon Second Amended Petition, Ex. 9, Tab A).

On December 5, 2000, Judge M. Edward Williams denied the Dixon plaintiffs' Motion for Class Certification. (Order, Ex. 9, Tab B). Judge Williams refused to certify either a property damage class or a medical monitoring class. (Id.). Thereafter, plaintiffs filed an Amended Motion for Class Certification in the Dixon action (Amended Motion, Ex. 9, Tab C). They again sought certification of a property damage class. (Id.). On July 9, 2001, plaintiffs dismissed the Dixon case without prejudice. (Notice of Dismissal, Ex.

[4] The medical monitoring claim has been filed in the City of St. Louis but with different class representatives. See Mitchell v. Fluor Corporation, *et al.*, Case No. 012-8638. See footnote 3, supra.

9, Tab D). Their Amended Motion for Class Certification had not been argued or ruled upon.

Initial Pleadings in the *Doyle* Case

On July 9, 2001, the same day they dismissed their Jefferson County case, the Doyles and Mr. Casey (now joined by the five other plaintiffs) filed Doyle in the City of St. Louis. (Petition, Ex. 2). They sought to bring the action on behalf of the same class they had sought to represent in their Amended Motion for Class Certification in the Dixon case. (Compare Doyle Petition, Ex. 2, ¶¶ 25 and 26, with Dixon Amended Motion for Class Certification Ex. 9, Tab C, ¶¶ 3 and 4).

The Doyle plaintiffs first sought to create venue in the City of St. Louis using a Linthicum-style[5] two-step procedure. In their Petition, plaintiffs named only three defendants (Bruce Clark, Leslie McCraw, and Fluor Corporation (Petition, Ex. 2)), none of which was a Missouri resident.[6] This purportedly made venue proper in the City under R.S.Mo. §508.010(4), which allows a plaintiff to pick any county in Missouri as the venue when no defendant is a Missouri resident. (Petition, Ex. 2, ¶ 6).

On July 10, 2001, a day after filing the Doyle Petition, the plaintiffs filed a First Amended Petition adding as defendants five additional corporations: Doe Run, Homestake, A.T. Massey, Doe Run Investment, and D.R. Acquisition. (First Amended

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[5] See State ex rel. Linthicum v. Calvin, 57 S.W.3d 855 (Mo. banc 2001).

[6] Bruce Clark is an Arizona resident. (Petition, Ex. 2, ¶ 5). Leslie McCraw is a South Carolina resident. (Id., ¶ 4). Fluor is a Delaware corporation with its headquarters in California and is not now authorized to do business in Missouri. (Id., ¶ 3; Affidavit of S.F. Hull, Ex. 9, Tab H).

Petition, Ex. 3). Fluor (the original corporate defendant in Doyle), as well as Doe Run, Homestake, A.T. Massey, and Doe Run Investment had been defendants in the Dixon case. (Dixon Second Amended Petition, Ex. 9, Tab A).

D.R. Acquisition is a Missouri corporation. (Marucheau Affidavit, Ex. 9, Tab E). Doe Run is a New York corporation with its principal place of business and registered agent in St. Louis County. (Id.). None of the corporate Defendants has a registered agent in the City of St. Louis. (Motion to Dismiss or Transfer, Ex. 9, ¶ 6; Plaintiffs' Reply, Ex. 14, ¶ 6). None of the corporate defendants has an office for the conduct of its usual and customary business in the City of St. Louis. (Affidavit of Wayne Kirk, Ex. 9, Tab I; Affidavit of Roger L. Nicholson, Ex. 9, Tab G; Nicholson Affidavit, Ex. 9, Tab F; Marucheau Affidavit, Ex. 9, Tab E).

In response to the First Amended Petition, Defendants filed a Motion to Dismiss or, in the alternative, to Transfer for Improper Venue (Ex. 4). They argued, *inter alia*, that venue should be determined on the basis of the then-pending pleading, the First Amended Petition, rather than the original Petition. Defendants contended that, since some of the corporate defendants in the First Amended Petition were Missouri residents for venue purposes, and none of the defendants was a resident of the City of St. Louis, § 508.010(4) did not apply and City venue was not proper. (Id.).

The Second and Third Amended Petitions

In October 2001, this Court issued its decision in State ex rel. Linthicum v. Calvin, 57 S.W.3d 855 (Mo. banc 2001). Thereafter, with leave of court granted over defendants' objection, (Exs. 5 and 6), the Doyle plaintiffs filed a Second Amended

Petition (Ex. 7) on November 28, 2001 and a Third Amended Petition (Ex. 8) on December 12, 2001. In these pleadings, Plaintiffs no longer relied on R.S.Mo. § 508.010(4) as the basis for venue; instead they simply cited § 508.010. (Ex. 7, ¶ 12; Ex. 8, ¶ 14). They added three new defendants, Ira Rennert, Renco and Mr. Kaiser, the sole City resident defendant.[7] (Ex. 8).

Plaintiffs contended that the presence in the case of Mr. Kaiser, a Missouri citizen who resided in the City of St. Louis, made venue proper in the City under R.S.Mo. § 508.010(3). (Reply to Motion to Dismiss or Transfer, Ex. 14, ¶ 5). Plaintiffs admitted that they did not contend that their cause of action accrued in the City of St. Louis. (Id.).

Plaintiffs' allegations of wrongdoing on the part of Mr. Kaiser were contained in paragraphs 33 and 34 of the Third Amended Petition. The full text of those paragraphs was as follows:

> 33. Defendant Marvin K. Kaiser is an officer of Defendant Doe Run Resources Corporation. At all times Defendant Kaiser was acting jointly and in conspiracy with the other Defendants and other unnamed co-conspirators. Defendant Kaiser had and had an economic motive and personally benefited from the conspiracy. The objectives of the conspiracy included to fail to adequately control the emissions from the Doe Run Smelter that Defendants knew were being deposited in the

[7] Ira Rennert is an individual resident of New York. (Third Amended Petition, Ex. 8, ¶ 13). Renco is a New York corporation with its principal place of business and registered agent in New York. (Id., ¶ 12). Renco does not have a registered agent in St. Louis (Ex. 13, Sadlowski Aff.).

Class Geographic Area and/or to not implement adequate pollution controls at the Doe Run Smelter and/or to violate the Ambient Air Quality Standard because of the cost and reduction of profits, value, bonuses and the value of wages, stock and/or stock options of Doe Run as well as other Corporate Defendants. Defendant Kaiser had actual or constructive knowledge of and participated in, an actionable wrong of Defendants which included the acts and omissions of Defendants described herein.

34. During times relevant herein Defendant Kaiser was and is Vice President and Chief Financial Officer for the Doe Run Resources Corporation and the Doe Run Company. As an officer of Doe Run, Defendant Kaiser, is liable to Plaintiffs and the Plaintiff Class because he had actual or constructive knowledge of Doe Run's wrongful conduct and participated in it; this liability is in addition to and independent of any liability based on conspiracy. In particular, Defendant Kaiser's responsibilities, actions and omissions included but were not limited to approval of expenditures for pollution control equipment and measures, expenditures for the purchase of contaminated properties around the Doe Run Smelter as pollution buffers around the Doe Run Smelter and expenditures for the remediation of properties. Defendant Kaiser further had authority and did represent financial assurances to the State of Missouri for the purpose of complying with state environmental laws.

As Chief Financial Officer, Mr. Kaiser had involvement in the budgeting process including setting environmental goals for the smelter, and the pollution control budget that included the purchase of contaminated properties. Defendant Kaiser participated in and approved budgets which delayed or rejected implementation of proper pollution control measures and remediation of properties in the Class Geographic Area defined below. During Defendant Kaiser's tenure at Doe Run Resources Corporation and The Doe Run Company the Doe Run Smelter has continued to violate the National Ambient Air Monitoring Standard for lead. Defendant Kaiser also had knowledge of technologies owned by The Doe Run Company that were available to remediate contaminated soil which were not used. Defendant Kaiser also had knowledge of the release of emissions from the Doe Run Smelter to the Class Geographic Area defined below and failed to inform Plaintiffs and the Plaintiff Class or take action to eliminate or reduce the release of metals and other toxic substances. Through these responsibilities, actions and omissions, Defendant Kaiser had actual or constructive knowledge of and participated in an actionable wrong by Defendants, which included the acts of Defendants described herein.

Defendants' Renewed Venue Motions

In response to the Third Amended Petition, on January 11, 2002, Relators again filed Motions to Dismiss or, in the alternative, to Transfer for Improper Venue (Ex. 9).[8] They argued that Mr. Kaiser should be disregarded for venue purposes because he was pretensively joined for the purpose of creating venue. (Ex. 9, ¶ 7). At the same time, Defendant Kaiser moved to dismiss the Third Amended Petition as to himself on the basis that this Petition failed to state claims upon which relief could be granted. (Ex. 11).

Defendants supported their venue motion with exhibits showing the history of the Jefferson County Dixon case and affidavits establishing that none of the corporate defendants had offices or registered agents in the City of St. Louis. (Ex. 9, Tabs A through I). They also filed affidavits of Mr. Kaiser, (Ex. 9, Tab J), Barbara Shepard, Doe Run's Vice President - Human Resources (Ex. 9, Tab K), and Jeffrey Zelms, Doe Run's President (Ex. 12).

Doe Run's Affidavits

The testimony of the Doe Run officers, given by affidavit, was as follows. Mr. Kaiser is Doe Run's Executive Vice President and Chief Financial and Administrative Officer. (Ex. 9, Tab J, ¶ 1). Prior to October 2001, his title was Vice President-Finance and Chief Financial Officer. His office is in St. Louis County,

[8] The motion of Doe Run, *et al*., addressed to the Third Amended Petition, with attachments, is Ex. 9. The other corporate and individual Relators filed separate motions on the same grounds. The Defendants never pleaded in response to the Second Amended Petition, because the Third Amended Petition was filed before the time for Defendants to respond to the Second Amended Petition had expired.

Missouri, at 1801 Park 270 Drive, St. Louis, Missouri 63146. (Id.). At the time suit was filed against him, his personal residence was in the City of St. Louis. Mr. Kaiser had first joined the predecessor partnership (also known as The Doe Run Company) as Chief Financial Officer in December 1993. (Id.).

Mr. Kaiser does not have and has never had authority over those corporate officers and employees of Doe Run who have the responsibilities for environmental affairs. (Id., ¶ 2). These corporate officers and employees performing the environmental function for Doe Run report directly to Jeffrey Zelms, the Vice-Chairman, President and Chief Executive Officer ("CEO") of The Doe Run Resources Corporation, to whom Mr. Kaiser also reports. (Kaiser Aff., Ex. 9, Tab J, ¶ 2; Zelms Aff., Ex. 12, ¶ 4). Mr. Kaiser defers to these corporate officers and employees having direct responsibility for Doe Run's environmental function on all decisions about budgeting and determining the level of expenditures to control emissions from the Herculaneum smelter, about implementing pollution controls at the smelter, and about taking measures to comply with National Ambient Air Quality Standards. (Kaiser Aff., Ex. 9, Tab J, ¶ 2).

In his capacity as Chief Financial Officer, Mr. Kaiser is one of six corporate managers or officers who must each sign Authorizations for Expenditures for approval of expenditures made by Doe Run. (Kaiser Aff., Ex. 9, Tab J, ¶ 3). His role in this process is to ensure that expenditures are properly authorized, funded and accounted for. (Id.). He has never provided judgments about whether any particular environmental expenditure should or should not be made. (Id.). Mr. Kaiser has never refused to approve an Authorization for Expenditure on an environmental project. (Id).

In his Affidavit, Mr. Zelms confirmed that responsibility for environmental compliance at the smelter rests with persons other than Mr. Kaiser, including Dan Vornberg, Doe Run's Vice-President - Environmental, and the General Manager of the smelter, both of whom report to Mr. Zelms directly or through lines of reporting that do not include Mr. Kaiser. (Ex. 12, ¶¶ 4-5). In her Affidavit Barbara Shepard, Doe Run's Vice President of Human Resources, confirmed that Mr. Kaiser was the only Doe Run employee who resided in the City. (Ex. 9, Tab K, Shepard Aff., ¶ 4).

Plaintiffs' Response and Exhibits

In response to Doe Run's motion, Plaintiffs filed a Memorandum of Law supported by 32 exhibits. (Ex. 15). The exhibits included publicly available materials reflecting reported environmental conditions at the smelter and in Herculaneum (Ex. 15, Ptff. Exs. 1 through 10)[9]; a number of "Authorization for Expenditure" forms bearing the signature of Mr. Kaiser and the five other executives whose sign-off was required on capital expenditures (Ex. 15, Ptff. Exs. 12-15, 17-19, 22-24, and 30-32); other Doe Run budget and financial documents (Ex. 15, Ptff. Exs. 11, 16); documents related to Doe Run's replacement of soil at certain properties in Herculaneum (Ex. 15, Ptff. Exs. 20 and 21); examples of financial assurance documents that Mr. Kaiser signed on behalf of the company (Ex. 15, Ptff. Exs. 25 and 26); a newspaper article quoting Mr. Kaiser on the subject of Doe Run's financial condition (Ex. 15, Ptff. Ex. 27); a memorandum of a

[9] All of Plaintiffs' Exhibits are attached to Ex. 15 to the Petition in Prohibition, Plaintiffs' Memorandum in Opposition filed in the trial court. They can be found behind Tab 15 to the Petition in Prohibition. Relators refer to them here using the format "Ex. 15, Ptff. Ex. __)."

meeting of the Doe Run "Herculaneum Communications Team" (Ex. 15, Ptff. Ex. 28); and an article that appeared in "Metals Weekly Report" (Ex. 15, Ptff. Ex. 29). In Plaintiffs' Memorandum (Ex. 15), they argued that these documents supported the allegations of paragraphs 33 and 34 of the Third Amended Petition.

Defendants filed a responsive memorandum (Ex. 16), supported by additional affidavits of Mr. Kaiser and Mr. Zelms, addressing the specific matters raised in Plaintiffs' reply.

Respondent's July 16, 2002 Order

The motion of Doe Run *et al*. to dismiss or transfer and the separate motion of Mr. Kaiser to dismiss for failure to state a claim for relief were argued and submitted to Respondent on March 18, 2002. (Ex. 17). On July 16, 2002, Respondent issued an order denying Defendants' Motions. (Ex. 1 to Petition; Appendix A1). Respondent held both that Plaintiffs had stated a claim against Mr. Kaiser for his alleged participation in claimed tortious activity of the corporation and that at the time suit was brought, there was information to support a reasonable legal opinion that a claim existed as to Mr. Kaiser. (App., A6-A7).

On August 2, 2002, Relators filed this writ application in the Court of Appeals. They prayed for a writ of prohibition or, in the alternative, a writ of mandamus. On August 16, the Court of Appeals entered a Preliminary Order in Prohibition. On May 20, 2003, following briefing and oral argument, the Court of Appeals entered an opinion and order making the Preliminary Order permanent. This Court granted transfer on

Respondent's application. Relators now pray that this Court order that the Preliminary Order be made permanent.

POINTS RELIED ON

I. RELATORS ARE ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY ACTION OTHER THAN DISMISSING DEFENDANT MARVIN KAISER AND TRANSFERRING THE *DOYLE* CASE TO A PROPER VENUE, BECAUSE VENUE IS IMPROPER WHEN IT RESTS ON THE PRESENCE OF A DEFENDANT WHO WAS PRETENSIVELY JOINED AS SHOWN BY THE FACE OF THE PLEADINGS; THE PLEADINGS SHOW THAT DEFENDANT MARVIN KAISER WAS PRETENSIVELY JOINED IN THAT (A) HIS ACTIONS ALLEGEDLY GIVING RISE TO LIABILITY WERE SAID TO HAVE BEEN TAKEN IN HIS CORPORATE CAPACITY, RATHER THAN IN ANY INDIVIDUAL CAPACITY; AND (B) PLAINTIFFS HAVE NOT PLEADED FACTS SHOWING THAT MR. KAISER'S ACTIONS AMOUNTED TO ACTIVE PARTICIPATION IN A TORT OF THE CORPORATION OR THAT MR. KAISER CONSPIRED WITH ANYONE.

State ex rel. Linthicum v. Calvin, 57 S.W.3d 855 (Mo. banc 2001)

Lynch v. Blanke Baer & Bowey Krimko, Inc., 901 S.W.2d 147 (Mo. App. E.D. 1995)

Fusz v. Spaunhorst, 67 Mo. 256, 264 (Mo. banc 1878)

Premier Bank v. Tierney, 114 F. Supp.2d 877 (W.D. Mo. 2000)

II. ALTERNATIVELY, RELATORS ARE ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY ACTION OTHER THAN DISMISSING DEFENDANT KAISER AND TRANSFERRING THE *DOYLE* CASE TO A PROPER VENUE, BECAUSE VENUE IS IMPROPER WHEN IT RESTS ON THE PRESENCE OF A DEFENDANT WHO WAS PRETENSIVELY JOINED AS OBJECTIVELY DETERMINED BASED ON THE INFORMATION AVAILABLE TO THE PLAINTIFF AT THE TIME THE CLAIM WAS FILED; THERE WAS PRETENSIVE JOINDER HERE IN THAT FACTS KNOWN BY OR AVAILABLE TO PLAINTIFFS AT THE TIME THEY SUED MR. KAISER SHOWED HE HAD NO RESPONSIBILITY FOR ENVIRONMENTAL OPERATIONS AT THE SMELTER, DID NOT HAVE FINAL APPROVAL OF CAPITAL EXPENDITURES OR BUDGETS, AND DID NOT IN ANY WAY CONSPIRE OR PARTICIPATE IN ANY CORPORATE TORTS.

State ex rel. Coca Cola Bottling Co. v. Gaertner, 681 S.W.2d 445 (Mo. banc 1984)

State ex rel. Toastmaster, Inc. v. Mummert, 857 S.W.2d 869 (Mo. App. E.D. 1993)

State ex rel. Ford Motor Co. v. Bacon, 63 S.W.3d 641 (Mo. banc 2002)

ARGUMENT

RELATORS ARE ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY ACTION OTHER THAN DISMISSING DEFENDANT MARVIN KAISER AND TRANSFERRING THE *DOYLE* CASE TO A PROPER VENUE, BECAUSE VENUE IS IMPROPER WHEN IT RESTS ON THE PRESENCE OF A DEFENDANT WHO WAS PRETENSIVELY JOINED AS SHOWN BY THE FACE OF THE PLEADINGS; THE PLEADINGS SHOW THAT DEFENDANT MARVIN KAISER WAS PRETENSIVELY JOINED IN THAT (A) HIS ACTIONS ALLEGEDLY GIVING RISE TO LIABILITY WERE SAID TO HAVE BEEN TAKEN IN HIS CORPORATE CAPACITY, RATHER THAN IN ANY INDIVIDUAL CAPACITY; AND (B) PLAINTIFFS HAVE NOT PLEADED FACTS SHOWING THAT MR. KAISER'S ACTIONS AMOUNTED TO ACTIVE PARTICIPATION IN A TORT OF THE CORPORATION OR THAT MR. KAISER CONSPIRED WITH ANYONE.

A. Standard of Review.

A prohibition action is an original proceeding brought to confine a lower tribunal to the proper exercise of its jurisdiction. State ex rel. Linthicum v. Calvin, 57 S.W.3d 855, 856 (Mo. banc 2001). Prohibition is a discretionary writ. The writ will issue "to prevent an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra-jurisdictional power." Id. The use of prohibition "may be appropriate to prevent unnecessary, inconvenient, and expensive litigation." Id.

One proper use of prohibition is to prevent a court from proceeding with an action when venue is improper. "Because improper venue is a fundamental defect, a court that acts when venue is improper acts in excess of its jurisdiction." State ex rel. SSM Health

Care St. Louis v. Neill, 78 S.W.3d 140, 142 (Mo. banc 2002) (citing State ex rel. City of St. Louis v. Kinder, 698 S.W.2d 4, 6 (Mo. banc 1985)). Accordingly, "[p]rohibition lies to bar the trial court from taking any further action, except to transfer the case to a proper venue." Id. (quoting State ex rel. Etter, Inc. v. Neill, 70 S.W.3d 28, 32 (Mo. App. E.D. 2002)).

Relief by mandamus can also be appropriate where a trial court improperly denies a Motion to Dismiss or to Transfer for Improper Venue. State ex rel. Reedcraft Mfg. Co., Inc. v. Kays, 967 S.W.2d 703, 704 (Mo. App. S.D. 1998) (citing State ex rel. Domino's Pizza, Inc. v. Dowd, 941 S.W.2d 663, 664 (Mo. App. E.D. 1997)). Relators here have invoked both prohibition and mandamus. The authority of this Court to act if it concludes that Respondent is proceeding in the absence of jurisdiction is thus clear.

Venue here turns on a question of pretensive joinder. When a trial court resolves an issue of pretensive joinder on the basis of a written record, as occurred here, no deference needs to be given to any trial court assessment of credibility. Hefner v. Dausman, 996 S.W. 2d 660, 663 (Mo. App. S.D. 1999).

If Mr. Kaiser Was Pretensively Joined, Venue is Improper Here.

Venue "is determined solely by statute," with the statutory scheme intended "to provide a convenient, logical and orderly forum for litigation." State ex rel. Rothermich v. Gallagher, 816 S.W.2d 194, 196 (Mo. banc 1991). Plaintiffs have acknowledged that the statutory basis for their claim to City venue is R.S.Mo. § 508.010(3). (Plaintiffs' Rule 51.045 Reply to Defendants' Venue Motion, Ex. 14, ¶ 5). Section 508.010(3) provides:

> **508.010 - Suits by summons, where brought.** Suits instituted by summons shall, except as otherwise provided by law, be brought:
>
> * * *
>
> (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 . . .

Section 508.010(3) applies here because some (but not all) of the defendants are Missouri residents (the Missouri residents included Mr. Kaiser and DR Acquisitions, a Missouri corporation) and some of the defendants are not Missouri residents.[10] Mr. Kaiser's presence is crucial to City venue, because none of the defendant corporations has a registered office in the City of St. Louis, and none of the other individual defendants reside in the City. (Under § 508.010, a corporation is deemed a resident of the county where its registered agent is located. R.S. Mo. § 351.375(2); State ex rel. Smith v. Gray, 979 S.W.2d 190 (Mo. banc 1998)). The only defendant whose City residence could make City venue proper under § 508.010(3) is therefore Mr. Kaiser. However, his City residence does not create venue because he was pretensively joined.

[10] In her Suggestions in Opposition to issuance of the writ filed in the Court of Appeals Respondent argued that § 508.010(2) applies here. (Respondent's Suggestions in Opposition at 6-7). That subsection provides, "When there are several defendants, and they reside in different counties, the suit may be brought in any such county." Whether subsection (2) or (3) applies makes no difference to the argument, because under either subsection at least one defendant must reside in the forum county.

Mr. Kaiser Was Joined Solely to Create Venue in the City; His Joinder was Pretensive Under the Established Tests for Pretensive Joinder.

"Courts will not permit plaintiffs to engage in the pretense of joining defendants for the sole purpose of obtaining venue." State ex rel. Malone v. Mummert, 889 S.W.2d 822, 824 (Mo. banc 1994). That Mr. Kaiser was joined for exactly this purpose -- obtaining venue in the City -- is obvious from reading the Statement of Facts, above.

Plaintiffs litigated for five years in the Circuit Court of Jefferson County without suing Mr. Kaiser. They lost in that court on the crucial issue of class certification. They dismissed their case. On the same day, they refiled their case in the City. They still did not sue Mr. Kaiser, but rather attempted to create City venue using the Linthicum two-step procedure. Only after this Court decided Linthicum, so that Plaintiffs were out of other options to create City venue, did they finally find it necessary to add Mr. Kaiser as a defendant. (Second Amended Petition, Ex. 5). Even then, as they added Mr. Kaiser to the case, Plaintiffs did not sue other Doe Run employees who (unlike Mr. Kaiser) do have the environmental responsibility for the smelter and overall responsibility for management of the company. None of those other employees live in the City. Plaintiffs have in fact not sued any other present Doe Run employee, but rather singled out Mr. Kaiser because of his City residence.[11]

[11] The only former Doe Run employee Plaintiffs has sued is Bruce Clark, an Arizona resident, whose presence (along with that of former Fluor chief executive officer Leslie McCraw) was necessary to satisfy the first step of the Linthicum two-step, by making the case as originally filed one brought against both corporations and individuals, none of whom resided in Missouri.

The Plaintiffs' motive is clear. It is the motive that this Court condemned in Malone: the joinder of a defendant solely to create venue. If the outcome of this writ application turned solely on Plaintiffs' subjective motive for joining the resident defendant, then, the correct outcome would be evident. Mr. Kaiser was added solely to create venue, his presence should be disregarded, and City venue is improper.

Perhaps because (unlike in this case) motive is sometimes difficult to ascertain, this Court has held that whether a defendant is pretensively joined does not turn on a subjective test of the plaintiff's reasons for joining the resident defendant. Rather, the Court has adopted a two-pronged, objective test for determining pretensive joinder. The joinder of Mr. Kaiser as a defendant in this case is pretensive under a proper application of this test.

The Court articulated the current test for pretensive joinder in State ex rel. Coca Cola Bottling Co. of Mid-America v. Gaertner, 681 S.W.2d 445, 447 (Mo. banc 1984) using this language: "Courts recognize pretensive joinder (1) where the pretensive nature of the joinder appears on the face of the pleadings and (2) where there is in fact no cause of action against the resident defendant." (internal quotation omitted). The Court further described the two prongs of the test in State ex rel. Malone v. Mummert, 889 S.W.2d at 825, citing earlier cases:

> [T]here are two possible avenues open for attacking joinder on the ground that it is pretensive: First, the party can assert that the facts pleaded in the petition are not true; and second, the party can claim that the facts, even if

true, do not support a valid claim based on substantive law. [Citations omitted].

The two prongs of the test for pretensive joinder are disjunctive. Joinder is pretensive if either prong is satisfied. Hefner v. Dausmann, 996 S.W.2d 660, 663 (Mo. App. S.D. 1999).

In this case Relators invoke both prongs of the test for pretensive joinder, in the alternative. In this first Point Relied On, Relators confine themselves to the face of the pleadings. They show that the facts pleaded about Mr. Kaiser in paragraphs 33 and 34 of Third Amended Petition, even if true, would not authorize relief against him under the substantive law. In their second Point Relied On, Relators show that even if (contrary to Relators' first argument) the pleaded facts state a claim for relief against Mr. Kaiser, those pleaded facts are not true. Moreover, Relators show (as the law of pretensive joinder requires when the defendant seeks to go beyond the pleadings) that the plaintiffs had no objectively reasonable basis for belief that those facts were true at the time they filed their pleadings.

Plaintiffs Have Not Stated Claims Against Mr. Kaiser On Which Relief Can Be Granted Either under Existing Law or on the Basis of a Non-Frivolous Argument for Modification or Reversal of Existing Law or Establishment of New Law.

In applying the first prong of the test for pretensive joinder -- whether the petition states a claim against the resident defendant for venue purposes -- the court "asks whether, after reasonable inquiry of the law under the circumstances, plaintiffs have put forward a claim either under existing law, under a non-frivolous argument for the

extension, modification or reversal of existing law, or under a non-frivolous argument for the establishment of new law." State ex rel. Malone v. Mummert, 889 S.W.2d at 825. Plaintiffs' claims against Mr. Kaiser do not meet this test.

Plaintiffs' claims against Mr. Kaiser are of two kinds: that he himself knew of and participated in a tort of Doe Run, and so is directly liable as a tortfeasor, and that he conspired with others to commit torts, and so is liable as a conspirator. The Third Amended Petition is legally insufficient under either theory.

Active Participation in a Corporate Tort

The first principle of the law of corporations is that of limited liability. The corporation is a legal entity distinct from any natural person who acts on the corporation's behalf. A corporation's shareholders, directors and officers are not, simply by virtue of their status, parties to the corporation's contracts, 21 West, Inc. v. Meadowgreen Trails, Inc., 913 S.W.2d 858, 882 (Mo. App. E.D. 1995). Nor are they liable for the corporation's torts simply because they hold corporate office. Lynch v. Blanke Baer & Bowey Krimko, Inc., 901 S.W.2d 147, 153-54 (Mo. App. E.D. 1995). Rather, in the ordinary course the shareholders are free to invest in its stock, and the directors and officers are free to conduct its business, without risk of loss beyond such investment as they might have made in the corporation.

There are exceptions to the principle of limited liability. One of those exceptions applies where an officer knows of and actively participates in a corporate tort. Under this exception, a corporate officer is individually liable when the officer actively participates in the tort of the corporation, thus violating an independent duty owed to a third person.

In that circumstance, the rule of limited liability does not apply. The officer who participates is liable to the third person, as would be any tortfeasor.

This Court articulated the standard for applying this principle as long ago as 1878. "Nothing short of active participancy in a positively wrongful act intendedly and directly operating injuriously to the prejudice of the party complaining will give origin to individual liability." Fusz v. Spaunhorst, 67 Mo. 256, 264 (Mo. banc 1878) (emphasis added). The language quoted from Fusz remains a correct statement of Missouri law today. This Court has repeatedly applied the rule of Fusz in assessing claims of officer and director liability. See Wolfersberger v. Miller, 327 Mo. 1150, 1165, 39 S.W.2d 758, 764 (Mo. 1931) ("To hold an officer of a corporation for acts done, it must be shown by evidence of probative force that he had actual or constructive knowledge of the actionable wrong and participated therein"); Patzman v. Howey, 340 Mo. 11, 21, 100 S.W.2d 851, 856 (Mo. 1936) ("An officer of a corporation is not liable for the tort of an agent of the corporation, even though the corporation might be, unless he had some participation in it"); Kreuger v. Schmiechen, 364 Mo. 568, 572, 264 S.W.2d 311, 313-14 (Mo. 1954) ("Directors of such corporations, absent participation in the wrong, are not personally liable in tort for the negligence of the agents and servants of the corporation").

It has been suggested that the issue can best be analyzed as one of duty.

> [I]t seems that the true basis of liability should be the violation by the officer or servant of some duty owed to the third person by reason whereof injury results to such third person. Certainly the managing officer of a corporation would not be liable to a third person for any injury resulting

> from a neglect of duty unless that duty was one he owed to such third person.

Darling & Co. v. Fry, 24 S.W.2d 722, 723 (Spgfd.App. 1930), see also Premier Bank v. Tierney, 114 F. Supp.2d 877, 886-87 (W.D. Mo. 2000) (corporate director has no duty to advise creditors of corporate wrongdoing prior to insolvency). Unless a plaintiff suing a corporate officer can establish that the officer breached some additional duty owed to a third person, the officer is not liable.

Plaintiffs try to plead facts that would bring their claim against Mr. Kaiser within this "active participation" exception. A careful review of their allegations directed toward him (Third Amended Petition ¶¶ 33 and 34, pp. 16-18, supra) shows that their attempt falls far short of the mark. The conclusory allegations (e.g., "he had actual or constructive knowledge of Doe Run's wrongful conduct and participated in it") should be disregarded. Allegations that he failed to do certain things (e.g., that he "failed to inform Plaintiffs and the Plaintiff class or take action to eliminate or reduce the release of metals . . .") are not actionable absent facts giving rise to a duty on his part to do those things. Most of the few actions Mr. Kaiser is alleged actually to have taken, such as "approval of expenditures for environmental purposes" are not tortious. The substance of Plaintiffs' complaint against Mr. Kaiser is his participation in the corporate budgeting process. He is alleged to have approved budgets "which delayed or rejected implementation of proper pollution control measures."[12]

[12] In addition to his alleged participation in the budgeting and expenditure process, plaintiffs claim Mr. Kaiser is liable because he represented financial assurance to the State of Missouri. As shown in the Second Point Relied On, below,

Those actions do not even approach the kind of active participation in corporate torts for which officers can be and have been held liable under Missouri law This is best shown by comparing the facts that Plaintiffs plead in this case with the facts present in Missouri decisions where the "active participation" theory of liability has been applied. Both Plaintiffs (in their submissions to Respondent) and Respondent (in her order denying Relators' venue motion) have cited a number of these decisions. In each of those case, the officer in question did far more than participate in a budget process.

Plaintiffs have relied most heavily on Curlee v. Donaldson, 233 S.W.2d 746 (St.L. App. 1950). In Curlee, a landowner authorized a corporation to cut timber on his land. Id. at 749. At some point during the project, it became apparent that timber had been cut from the adjoining tract of land, owned by the plaintiff. Id. at 750. The plaintiff sued for trespass, and named both the corporation and its president as defendants. Id. at 748. The plaintiff won a verdict and judgment against both the corporation and the president, and the Court of Appeals affirmed. Id. at 754.

In doing so, the Court concluded that by ordering and directing the woodcutters to the tract where they were authorized to cut and by failing to provide supervision, the president became liable for the trespass. Id. The court emphasized the complete control that the corporate president had over the woodcutting operation. The individual

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in the case of one permit that Doe Run holds, the applicable regulation requires that the chief financial officer sign a corporate guaranty of financial responsibility. 10 C.S.R. 45-6.030(2)(C). Mr. Kaiser accordingly did so. Plaintiffs nowhere allege that any financial assurance document that Mr. Kaiser signed on behalf of Doe Run was in any way false or caused anyone injury.

defendant in Curlee, in addition to being president, was the treasurer and general manager of the corporation. Id. at 749. He was one of three directors and stockholders. Id. The court found that the president had "complete control over the cutters." Id. In fact, the president testified that his control included "the wood cutting operations on the property--including everything, to the best of my (his) ability." Id. When the foreman in direct charge of wood-cutting resigned, the president failed to replace him. Id.

In contrast, by the terms of Plaintiffs' own allegations, Mr. Kaiser's role in Doe Run was limited to mere involvement in the budgetary process of the company. (Third Amended Petition, Ex. 8, ¶ 34). Mr. Kaiser is not alleged to be the president or general manager of Doe Run. (Id.). He is not alleged to have had any kind of management authority over the day-to-day activities of the lead smelter or in the area of environmental compliance. (Id.). There simply is no comparison between the level of involvement, and thus degree of culpability, of the corporate president and co-owner in the Curlee case and of Mr. Kaiser in this one.

A second decision on which Plaintiffs rely is Grothe v. Helterbrand, 946 S.W.2d 301 (Mo. App. S.D. 1997). Grothe is another case, like Curlee, where the individual defendant was a shareholder in a closely held corporation, was its president and general manager, and actively participated in the tort. 946 S.W.2d at 303-304. The Grothe defendant made some of the misrepresentations that induced plaintiff to leave silver with the corporation, which silver the corporation then improperly converted. Id. The Court of Appeals reversed a directed verdict that had been entered in favor of the individual defendant, doing so on the basis of the defendant's personal false representation to the

plaintiff. Mr. Kaiser is not alleged to have the same authority as did the individual defendant in Grothe; nor is it alleged that Mr. Kaiser made misrepresentations to anyone.

Boyd v. Wimes, 664 S.W.2d. 596, 598 (Mo. App. W.D. 1984), also involved a closely held corporation and an individual owner, who held many corporate offices. In that case, the owner allegedly participated in the conversion of plaintiffs' escrow funds. Unremarkably, the individual was held subject to liability. Id.

The earliest of the cases Plaintiffs have cited is Robinson v. Moark-Nemo Consol. Min. Co., 163 S.W. 885, 178 Mo. App. 531 (Mo. App. 1914). In that case, two officers of a mining corporation were found liable for a trespass, which consisted of permitting mine tailings to be discharged on property adjoining the mine. 163 S.W. at 886. The court attached importance to the fact that the two officers were the "managers" of the mine and were "managing, conducting and directing" its operations. Id. at 889. Mr. Kaiser was not the manager of the smelter, and was not managing, conducting and directing its operations. Plaintiffs do not allege that he was.

Respondent cited two construction fraud cases, Osterberger v. Hites Const. Co., 599 S.W.2d 221 (Mo. App. E.D. 1980) and Constance v. B.B.C. Dev. Co., 25 S.W.3d 571 (Mo. App. W.D. 2000) in support of her holding (Order, App. A6). Both cases involved corporate presidents who actively participated in fraudulent schemes. In Osterberger, the president of the defendant corporation made a practice of signing general warranty deeds to home purchasers without disclosure of outstanding deeds of trust, Osterberger v. Hites Const. Co., 599 S.W.2d at 229; the court found that he could be held liable for fraud. Id. In Constance, the court held that a corporation's president who had

guaranteed the corporation's construction loans could be found liable for fraud, Constance v. B.B.C. Dev. Co., 25 S.W.3d at 589-90. The president had been present and remained silent when the general contractor, in the presence of a prospective buyer, made statements about the property that the president knew to be false. Id. at 579. These cases show the kind of participation that is necessary before a corporate officer can be held individually liable for the corporation's torts; there is no allegation of such participation in Doyle.

As is seen in these cases, Missouri courts have stressed that personal liability of corporate officers stems from personal participation in the tort and/or direct supervisory authority and control over those personally committing the tort. In the case at bar, Mr. Kaiser is not alleged to have any responsibility whatsoever for the operation of the Herculaneum smelter or any responsibility for Doe Run's environmental compliance. Holding him personally liable for Doe Run's alleged torts would extend an individual's liability for a corporation's torts far beyond the narrow circumstances in which Missouri case law now permits the imposition of such liability.

The limits of this theory of liability are exemplified by the decision of the Court of Appeals in Lynch v. Blanke Baer & Bowey Krimko, Inc., 901 S.W.2d 147, 153-54 (Mo. App. E.D. 1995). In Lynch, a former employee of a corporation sued for wrongful discharge in the Circuit Court of the City of St. Louis. Lynch v. Blanke Baer & Bowey Krimko, Inc., 901 S.W.2d at 148. The plaintiff named as defendants both his corporate employer (a resident of St. Louis County for venue purposes), id. at 150, and the corporation's president (a resident of the City of St. Louis), id. at 150, who personally

fired the plaintiff. Id. at 154. On Defendants' motion, the trial judge found that the corporate president had been pretensively joined, dismissed the case against him, and transferred the action against the corporation to St. Louis County. Id. at 152-53. The Court of Appeals affirmed the actions of the trial court. Id. at 154.

The Lynch Court emphasized the fact that the plaintiff specifically pleaded that the corporate president who terminated him was alleged to be "*acting for*" the corporation. Id. at 153 (emphasis in original). The Court stated:

> When liberally construed, plaintiff's petition does not state facts setting out a cause of action against individual defendant Bryant [the corporate president]. There are no allegations that Bryant individually participated in the wrongful discharge. Plaintiff's petition clearly states that Bryant was *acting for* defendant Blanke Baer [the corporation] when he terminated plaintiff. While defendant Bryant may have had actual knowledge of the wrongful discharge, we find that defendant Bryant did not participate in an individual capacity in the discharge.

Id. at 154 (emphasis in original).

The case at bar is similarly bereft of any factual allegations of direct participation by the defendant officer in the corporate tort. Mr. Kaiser is alleged to have acted only in his corporate capacity, not in any individual capacity.

In her Application for Transfer filed in this Court, Respondent cited an excerpt from Fletcher's treatise on the law of corporations:

> Corporate officers, charged in law with affirmative official responsibility in the management and control of the corporate business, cannot avoid personal liability for wrongs committed by claiming that they did not authorize and direct that which was done in the regular course of that business, with their knowledge and with their consent or approval, or such acquiescence on their part as warrants inferring such consent or approval.

3A FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS ("FLETCHER"), § 1135, at 206 (rev. ed. 2002) (Application for Transfer at 6). In Curlee, supra, the Court of Appeals had cited comparable language from an earlier edition of Fletcher's treatise. Curlee v. Donaldson, 233 S.W.2d 746, 754 (St.L. App. 1950).

This treatise excerpt should not be read to imply that a corporate officer can be held liable, on the basis of "acquiescence" in a tort, when the officer did not personally participate in the tort or control those who committed it. As shown above, Curlee turned in large measure on the fact that the president of the corporation had "complete and 'one-man' control" of the company business, and so could be held liable for the trespass at issue, a situation not alleged to be present here. 233 S.W.2d at 754. Fletcher's treatise, in the sentences immediately following the excerpt quoted above, continues:

> However, more than mere knowledge may be required in order to hold an officer liable. The plaintiff must show some form of participation by

> the officer in the tort, or at least show that the officer directed, controlled, approved, or ratified the decision which led to the plaintiff's injury.

3A FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS, § 1135, at 206-207 (rev. ed. 2002) (citations omitted). Elsewhere Fletcher states, citing extensive authority from Missouri and elsewhere, "An officer or director of a corporation is not personally liable for torts of the corporation or of its other officers and agents merely by virtue of holding corporate office, but can only incur personal liability by participating in the wrongful activity." Id., § 1137, at 209 (citations omitted).

Plaintiffs and Respondent have not cited any decision, nor has Relators' research yielded any, in which a financial officer of a corporation was found liable in tort to a third party simply by reason of the officer's participation in the budgeting process. Perhaps recognizing this, Respondent invokes the rule that joinder is not pretensive if the plaintiffs' claim against the resident defendant rests on "a non-frivolous argument for the extension, modification or reversal of existing law" (Transfer Application ¶ 18). This is admittedly a liberal standard, but it is not a standard that is satisfied in every case. State ex rel. Shelton v. Mummert, 879 S.W.2d 525 (Mo. banc 1994) (plaintiffs' detailed policy arguments for modification of existing law related to uninsured motorist coverage are insufficient to keep joinder from being pretensive). If it were otherwise, no joinder could be pretensive. No matter how well-settled or long established the existing law, the plaintiff could argue that the law should be changed to allow the claim. Where the law is settled, and has been settled for a long time, as it is here, plaintiffs should not be allowed

to argue for its reversal as a pretext to create venue. Plaintiffs' claims that Mr. Kaiser participated in a corporate tort are plainly insufficient, even under the liberal standard for pretensive joinder.

Because the Third Amended Petition does not allege facts showing that Mr. Kaiser had management control over the Herculaneum smelter or Doe Run's environmental compliance practices, or that Mr. Kaiser otherwise actively participated in the commission of a tort, the Third Amended Petition fails to state a claim against him, even under pretensive joinder standards.

2. Conspiracy

In addition to contending that Mr. Kaiser "participated" in tortious corporate conduct, the Doyle Plaintiffs allege that Mr. Kaiser can be held individually liable for conspiracy. In her Order, Respondent pointed out that "an identity between agent and principal leads to a legal impossibility, because two entities that are not legally distinct cannot conspire with one another." (Order, App., A5). She correctly characterized Plaintiffs' conspiracy allegations as "conclusory" and did not rely on them in finding that Plaintiffs had stated a claim. (Order, App., A6).

A claim of conspiracy has these elements: "(1) two or more persons; (2) with an unlawful objective; (3) after a meeting of the minds; (4) committed at least one act in furtherance of the conspiracy; and, (5) the plaintiff was thereby damaged." Rice v. Hodapp, 919 S.W.2d 240, 245 (Mo. banc 1996); State Farm Mut. Auto. Ins. Co. v. Weber, 767 S.W.2d 336, 338 (Mo. App. E.D. 1989). In determining whether a plaintiff has sufficiently stated a claim for conspiracy, conclusions of the pleader are not to be

considered. Rather, the grounds of a civil conspiracy must be set out with the same certainty and particularity as an ordinary civil action against a single defendant. See Royster v. Baker, 365 S.W.2d 496, 500 (Mo. 1963).

Judged by these standards, the Third Amended Petition (Ex. 8) in the Doyle suit is insufficient to state a conspiracy claim against Mr. Kaiser. The only facts that Plaintiffs plead against Mr. Kaiser in the conspiracy paragraph, ¶ 33, are conclusory allegations that he conspired with others not to comply with the environmental laws, and that he benefitted as a result.

There is no factual allegation showing that Mr. Kaiser had any responsibility for matters of environmental compliance or for attainment of the ambient air quality standard. No other individual with whom he allegedly had a "meeting of the minds" to violate the law is identified. This omission is fatal. Cf. Gibson v. Brewer, 952 S.W.2d 239, 245 (Mo. banc 1997) (in a case involving alleged sexual abuse by a priest, in which it was alleged that the diocese conspired with the priest because it knew or should have known he was committing sexual misconduct, and hid that conduct from the public, the Court held that plaintiff did not state a claim for conspiracy because plaintiff's allegations did not support an inference of a "meeting of the minds").

Further, as Respondent stated, a corporation cannot conspire with its agents. Creative Walking, Inc. v. American States Ins. Co., 25 S.W.3d 682, 688 (Mo. App. E.D. 2000). Plaintiffs allege merely that Mr. Kaiser conspired with Doe Run or other unknown persons within the Doe Run organization to violate the environmental laws. Such a conspiracy is not actionable, because there is only one actor -- the corporation.

Plaintiffs argue that Mr. Kaiser was acting to his personal benefit in conspiring (Third Amended Petition, Ex. 8, ¶ 33), but they cite no such benefit that he received. They refer to amounts he received as compensation for his work for Doe Run, but a corporate officer's receipt of his salary and bonuses is not the kind of individual benefit that can take the case out of the general rule that a corporation cannot conspire with its agents. See Wiles v. Capitol Indemnity Corp., 75 F. Supp.2d 1003, 1006 (E.D. Mo. 1999), aff'd, 280 F.3d 868 (8th Cir. 2002) (law firm's receipt of compensation from its client for services performed does not bring it within the "personal benefit" exception to the general rule that an agent cannot conspire with the agent's principal; the Court stating that the agent's acceptance of compensation for acts within the scope of the agency does not bring the exception into play); Colonia Ins. Co. v. City National Bank, 988 F. Supp. 1242, 1251 (W.D. Ark. 1997) (employee's receipt of a $10,000 bonus did not constitute the personal benefit that would mean the employee was acting outside the scope of her employment in participating in the alleged conspiracy).

The Third Amended Petition fails to state a claim against Mr. Kaiser for conspiracy, just as it fails to state a claim that he personally participated in a tort. That the Third Amended Petition falls far short of stating a claim against Mr. Kaiser on any theory establishes that he was pretensively joined under the first prong of the test for pretensive joinder. Accordingly, venue is improper in the City of St. Louis. This Court should make the Preliminary Order in Prohibition permanent.

ALTERNATIVELY, RELATORS ARE ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY ACTION OTHER THAN DISMISSING DEFENDANT KAISER AND TRANSFERRING THE *DOYLE* CASE TO A PROPER VENUE, BECAUSE VENUE IS IMPROPER WHEN IT RESTS ON THE PRESENCE OF A DEFENDANT WHO WAS PRETENSIVELY JOINED AS OBJECTIVELY DETERMINED BASED ON THE INFORMATION AVAILABLE TO THE PLAINTIFF AT THE TIME THE CLAIM WAS FILED; THERE WAS PRETENSIVE JOINDER HERE IN THAT FACTS KNOWN BY OR AVAILABLE TO PLAINTIFFS AT THE TIME THEY SUED MR. KAISER SHOWED HE HAD NO RESPONSIBILITY FOR ENVIRONMENTAL OPERATIONS AT THE SMELTER, DID NOT HAVE FINAL APPROVAL OF CAPITAL EXPENDITURES OR BUDGETS, AND DID NOT IN ANY WAY CONSPIRE OR PARTICIPATE IN ANY CORPORATE TORTS.

Even if they were true, the facts pleaded in paragraphs 33 and 34 of the Third Amended Petition would not afford a basis for relief against Mr. Kaiser. This is sufficient to establish that Plaintiffs joined him pretensively. The case for pretensive joinder is even stronger, however, because the facts pleaded in paragraphs 33 and 34, to the extent they attribute wrongdoing to Mr. Kaiser, are simply not true. Rather, they are demonstrably false. Moreover, Plaintiffs had the means of knowing the allegations were false at the time they pleaded them.

As with the first Point Relied On, because Respondent decided the issue of pretensive joinder based on a written record only, her action should be reviewed under a standard that makes no allowance for any credibility determinations. Hefner v. Dausman,

996 S.W. 2d 660, 663 (Mo. App. S.D. 1999). Nor are any credibility determinations required in assessing the truth of Plaintiffs' allegations against Mr. Kaiser. Plaintiffs have not adduced any evidence, documentary or otherwise, that supports the version of the facts pleaded.

A. The Test Under the Second Prong Is Whether the Plaintiff's Belief That the Plaintiff Has a Valid Claim Against the Resident Defendant Is Reasonable.

Pretensive joinder of the second type occurs when the pleading on its face states a claim against the resident defendant, but "there is in fact no cause of action against the resident defendant." State ex rel. Coca Cola Bottling Co. v. Gaertner, 681 S.W.2d 445, 447 (Mo. banc 1984). This Court has said of this second prong of the test for pretensive joinder, "joinder is pretensive if accomplished without an honest belief, based on the law and the evidence, that a justiciable claim exists against the party joined." Id. at 447-448.

That Plaintiffs' belief in their claims against Mr. Kaiser may be sincerely held is irrelevant to this analysis. It is not enough to support venue that the plaintiff's belief in the case against the resident defendant be honest. The plaintiff's belief must also be reasonable. As the Court of Appeals has stated, if "the information available at the time the petition was filed would not support a reasonable legal opinion that a case could be made against the resident defendant," joinder is pretensive. State ex rel. Toastmaster, Inc. v. Mummert, 857 S.W.2d 869, 871 (Mo. App. E.D. 1993) (joinder of plaintiff's uninsured motorist carrier was pretensive where there was a clear policy exclusion precluding coverage for the accident at issue). The question is whether there can be "a realistic belief that under the law and the evidence a justiciable claim exists." Id.

B. The Allegations of Paragraphs 33 and 34 of the Third Amended Petition Are Not True, and Plaintiffs Had No Reasonable Basis for Belief That They Were True at the Time They Sued Mr. Kaiser.

The facts that Respondent found form the basis for a claim against Mr. Kaiser are that he "knew of the environmental goals and budget for the smelter, and, with this knowledge, approved budgets that would reject or delay the implementation of appropriate pollution control methods, thereby violating pollution standards." (Order, App., A6). These facts are not true, and there is no reasonable basis for belief that they are true.[13]

Mr. Kaiser and Mr. Zelms have filed detailed affidavits refuting the allegation that Mr. Kaiser approved budgets that would reject or delay the implementation of appropriate pollution standards, or that he conspired with anyone to violate the environmental laws. (Ex. 9, Tab J; Ex. 12; Supplemental Affidavits of Kaiser and Zelms Attached to Ex. 16.) The Court may appropriately consider those affidavits in ruling on the pretensive joinder issue. See Mo. Sup. Ct. R. 55.28, State ex rel. Kyger v. Koehr, 831 S.W.2d 953, 955-56 (Mo. App. E.D. 1992) (considering affidavits in ruling that individual defendant store manager was pretensively joined to create venue in a slip and fall case). If accepted, Relators' affidavits completely negate the basis of Plaintiffs'

[13] In this brief, Relators demonstrate the falsity of the allegations specific to Mr. Kaiser. The allegations as to Doe Run, including the allegation that Doe Run failed to comply with requirements imposed upon it by environmental regulatory authorities, are also false, but will be addressed when the claims against Doe Run are adjudicated on the merits.

pleaded claims against Mr. Kaiser. Plaintiffs filed no contrary affidavits before Respondent, and the facts stated in the affidavits should therefore be accepted as true. See State ex rel. Ford Motor Co. v. Bacon, 63 S.W.3d 641, 644 (Mo. banc 2002) (facts stated in uncontroverted affidavit in support of venue motion accepted as true).

Plaintiffs did provide thirty-two exhibits to Respondent. (Ex. 15, Ptff. Exs. 1 through 32). These exhibits supposedly establish the factual basis for Plaintiffs' claims. Most of those exhibits are the product of Plaintiffs' discovery efforts in the period of time that the Dixon case was pending in Jefferson County. From the filing of Dixon in 1995 to the joinder of Mr. Kaiser in Doyle in November 2001 more than six years passed. Plaintiffs had this entire time to conduct discovery and research to determine Mr. Kaiser's role at Doe Run. In the course of the Dixon case, Doe Run furnished to the Plaintiffs more than 69,000 documents, comprising hundreds of thousands of pages. (Doe Run's Reply, Ex. 16 at 11). That Plaintiffs use only a handful of these documents to establish their purported case against Mr. Kaiser demonstrates the truth of the situation: Mr. Kaiser's name appears on only a very few documents related to Herculaneum, because he had no supervisory responsibility for environmental matters or for operation of the smelter.

Review of the exhibits that Plaintiffs did tender shows that they do not afford a "reasonable basis for belief" that Mr. Kaiser engaged in the conduct pleaded. They do not show that he either conspired with anyone to violate the environmental laws or knowingly approved budgets or expenditures that would delay the implementation of environmental laws. Plaintiffs' discussion of the exhibits is lengthy (Plaintiffs'

Memorandum, Ex. 15, at 19-29), making necessary the following detailed rebuttal. In the end, the analysis is simple. Nothing in the documents that Plaintiffs offer comes close to making out a case of personal liability on Mr. Kaiser's part.

(1) Documents Concerning General Environmental Conditions

Plaintiffs' first ten exhibits (Ex. 15, Ptff. Exs. 1 through 10) do not mention Mr. Kaiser at all. They are publicly available documents reflecting general environmental conditions in Herculaneum. Plaintiffs devoted much of their argument before Respondent (Plaintiffs' Memorandum, Ex. 15 at 21) to demonstrating that those conditions are not satisfactory. The issue before Respondent and now before this Court is not whether environmental conditions in Herculaneum are or were unsatisfactory. Rather, the issue is whether there was, at the time Mr. Kaiser was sued, an objectively reasonable basis for belief that he both knew of and participated in tortious conduct that gave rise to those alleged conditions. There is no such basis.

(2) The Smelting Division 1994 Budget

The first argument that Plaintiffs made specific to Mr. Kaiser is that "the budgeting process in which he was involved included setting environmental goals." (Ex. 15 at 22). They attached to their memorandum (Ex. 15, Ptff. Ex. 11) the "Herculaneum Smelting Division 1994 Budget." The budget is dated "9-9-93," and so was prepared three months before Mr. Kaiser joined Doe Run in December of that year. (Kaiser Supplemental Affidavit, ¶ 4.a). That budget, as do all Doe Run annual budgets, contains a number of expenditures for environmental control purposes. It also sets out goals related to the environment. It is not surprising that Doe Run's budgets should do

this. Expenditures for environmental compliance are an important and regular part of Doe Run's business. However, Plaintiffs offer no evidence in their possession at the time of filing the Third Amended Petition -- and there is no such evidence -- that Mr. Kaiser's participation in the budget process involved the establishment of those goals.

Rather, as Mr. Kaiser stated in his affidavit (and as nothing in the produced documents contradicts), Mr. Kaiser's role in the budgeting process did not include setting environmental goals. As he stated, "The budgeting process to set specific environmental goals for the Herculaneum Smelter, the pollution control budget for the purchase of contaminated properties and implementation of pollution control measures, and remediation of properties in the alleged class geographic area are carried out by those corporate officers and employees of Doe Run with environmental responsibilities. I have had no role in this budgeting process to set specific environmental goals for the Herculaneum Smelter." (Ex. 9, Tab J, ¶ 5.c.). That Mr. Kaiser participated in certain aspects of the overall budgeting process does not mean that he had any role in setting environmental goals.

(3) Approval of Authorizations for Expenditures

Much of Plaintiffs' argument relates to Mr. Kaiser's role in approving certain authorizations for expenditures that had environmental purposes. Many of Plaintiffs' exhibits are Authorization for Expenditure ("AFE") forms that Mr. Kaiser approved and signed. (Ex. 15, Ptff. Exs. 12, 13, 14, 15, 17, 18, 19, 22, 23, 24, 30, 31 and 32). Every single one of the AFE forms offered by Plaintiffs bears Mr. Kaiser's signature, indicating his approval of the expenditure in question. Plaintiffs did not offer any exhibit showing that Mr. Kaiser ever disapproved an environmental capital expenditure, and in his affidavit he stated that he had not. (Kaiser Aff., Ex. 9, Tab J, ¶ 3). The approval of expenditures for environmental purposes is hardly participation in a plan not to comply with the environmental laws.

Each of the projects to which these forms referred originated with, and the Authorization for Expenditure form was prepared by, someone else, principally James L. Lanzafame, who does have responsibility for environmental matters at the Herculaneum Smelter. As Mr. Kaiser's Affidavit reflects, Mr. Kaiser is one of six corporate managers or officers who must sign each such Authorization for Expenditure. His role is insuring "that expenditures are properly authorized, funded and accounted for." (Kaiser Supplemental Affidavit Attached to Ex. 16, ¶3). That Mr. Kaiser, in this limited role, approved authorizations for expenditures (which were ultimately also approved by the President of the company, Jeffrey Zelms, and the Chairman, Ira Rennert) does not mean that Mr. Kaiser participated in tortious conduct of the corporation.

(4) Property Purchases

Plaintiffs contended that their position is supported by two Authorization for Expenditure Forms related to property purchases. (Ex. 15, at 23; Ptff. Exs. 12 and 13). Plaintiffs did not explain how Mr. Kaiser's signature (along with the other five required signatures) on forms authorizing the expenditure of money to buy properties constituted a tort.

(5) Cancellation of Expenditures

Plaintiffs next argued (Ex. 15 at 23) that Mr. Kaiser participated in tortious conduct because certain environmental expenditures that were included in the budget were subsequently canceled. They attached a series of excerpts from the company's "Capital & Major Expenditure Report." (Ex. 15, Ptff. Ex. 15). Mr. Kaiser's name appears nowhere in these documents. These are not the company's budgets, but documents tracking expenditures over the course of a given fiscal year against amounts budgeted. (Kaiser Supplemental Affidavit Attached to Ex. 16, ¶4.d). It is not surprising that a corporation with a budget the size of Doe Run's would from time to time cancel projects. There is nothing in the documents to suggest that any individual cancellation, or all of the cancellations together, were tortious. Most importantly, there is no indication that Mr. Kaiser participated in any decision to cancel any of these projects.

(6) Construction of a Weather Tower

Plaintiffs next argued (Ex. 15 at 24) that Mr. Kaiser somehow engaged in tortious conduct by signing off on the expenditure of $11,000 for a new weather tower. (Ex. 15, Ptff. Exs. 17 and 18). The history of this action is as follows. In an Authorization for

Expenditure in November 1996, originated by David Bailey at the Herculaneum Smelter (Ex. 15, Ptff. Ex. 18), the persons responsible had authorized the expenditure of $250,000 for plant paving. In January 1997, they approved the expenditure of $11,000 to install a new weather tower as part of the development of a new State Implementation Plan for control of lead; the $11,000 was to come from the paving budget. (Ex. 15, Ptff. Ex. 17). This proposal originated with Mr. Lanzafame at the smelter, and was approved not only by Mr. Kaiser but by five others including the company President, Mr. Zelms, and its Chairman, Mr. Rennert.

Mr. Kaiser's approval of this authorization was in keeping with his limited role in approving such authorizations; that is, making sure that the funds were properly authorized, funded and accounted for. There is nothing in the documents suggesting that it was Mr. Kaiser who decided that it was appropriate to spend $11,000 out of the $250,000 paving budget to construct a new weather tower. Plaintiffs argued that spending the money on the weather tower rather than on paving "affects Doe Run's net worth, affecting Kaiser's bonuses." (Ex. 15 at 24). Nowhere did they explain how spending money on one capital expenditure rather than another affects the net worth of the company, or how that could in any way affect Mr. Kaiser's bonus.

(7) Baghouse Modifications

Plaintiffs next made a similar argument, that a capital expenditure of $100,000 requested by Mr. Bailey at the Herculaneum Smelter and approved by the President and Chairman of the company, in which Mr. Kaiser also concurred, somehow constituted tortious conduct on the part of Mr. Kaiser. (Ex. 15 at 24; Ptff. Ex. 19). Plaintiffs did not

suggest that the project involved -- modifying a baghouse so that maintenance could be done without shutting down the plant -- was, in fact, tortious. The argument, rather, was that it was somehow tortious to decide to spend the money this way rather than on property purchases. Plaintiffs cited no authority holding that the Defendants had a tort duty to buy property in Herculaneum to the exclusion of other expenditures. There is no suggestion that Mr. Kaiser's role in approving this change went beyond his limited role of insuring that expenditures were properly funded, authorized and accounted for.

(8) Soil Replacements

Plaintiffs asserted that "Kaiser participated in the decision to do soil replacement on certain properties and not others within the Class Geographic Areas." (Ex. 15 at 24). They attached two documents containing the schedule of properties to be remediated in 1995 and 1996. (Ex. 15, Ptff. Exhibits 20 and 21). Neither of those documents has Mr. Kaiser's name on it. There is no factual evidence that Mr. Kaiser ever participated in such a decision, and in fact he did not. (Kaiser Supplemental Affidavit, Ex. 16, ¶4.f).

(9) Venting the Dross Reverbaratory Furnaces

Plaintiffs next contended that Mr. Kaiser somehow participated in a decision to delay the implementation of a ventilating system for process gases from the dross reverbaratory furnaces. (Ex. 15 at 24, Ptff. Exs. 22 and 23).[14] Exhibit 22 shows that in November 1994, as one of six persons participating in the AFE process, Mr. Kaiser

[14] At page 25 of their Memorandum, Ex. 15, Plaintiffs referred to these documents as Exhibits 21 and 22; it is clear from the context that they are referring to Exhibits 22 and 23.

approved the expenditure of $115,000 to design and cost a ventilation system for the process gases from the Dross reverbaratory furnaces. This was Phase I of the project, "Design and Cost." As Ptff. Ex. 22 shows, the estimated completion of this Phase I was March 1995 (four months after the date of the authorization).

About a year later, in January 1996, Mr. Bailey at the smelter proposed that Phase II of this project be completed; that is, that the system that had been designed be purchased and installed. Mr. Kaiser, as Chief Financial Officer, signed the Authorization for Expenditure for this project as well. (Ptff. Ex. 23). The latter document indicated that adjustments would be made in the 1996 capital budget "to stay within approved guidelines." Plaintiffs argued that this shows that there was a "delay in the completion of these pollution controls," but the documents simply do not reflect that. The project was designed in one fiscal year, and (as planned) was implemented in the next. There is no indication that there was any delay necessary to stay within "approved guidelines."

(10) Blast Furnace Air Control System

Plaintiffs next argued that Mr. Kaiser somehow committed a tort because in authorizing the installation of an air control system on a blast furnace, authorization was given for only one furnace rather than use of the same system on both furnaces. (Ex. 15 at 24). Plaintiffs assumed, first, that installing an air control system on one furnace rather than both Herculaneum blast furnaces was done for improper reasons. They also wrongfully assumed that Mr. Kaiser, who is not an engineer, had something to do with the engineering decision to first install this system on only one furnace. This proposal was originated by Mr. Bailey and approved by all those in the authorization process,

including Mr. Zelms, the President, and Mr. Rennert. There is nothing in the documents to suggest that Mr. Kaiser had any expertise in the proper implementation of a particular kind of air control system or in making the judgment whether it was appropriate to implement that system on one blast furnace rather than another.

(11) Financial Assurance Documents

Plaintiffs next argued that Mr. Kaiser's signature on financial assurance documents furnished to the state somehow indicates "that he understood Doe Run's environmental obligations to the state and took part in attempting to comply with them." (Ex. 15 at 25). The two financial assurance documents attached to Plaintiffs' Memorandum (Ex. 15, Ptff. Exs. 25 and 26) were filings made by Doe Run under the Metallic Minerals Waste Management Act, R.S.Mo. §§444.350 et seq. Under that statute, a company that operates a metallic minerals waste management area (like the slag pile at the Herculaneum smelter) is required to apply for and obtain a permit. Doe Run had applied for and obtained the permit for this area many years before Mr. Kaiser joined the company. Like many environmental statutes, this Act permits the company to use a company guaranty to demonstrate financial assurance; that is, to demonstrate that it has the means to carry out closure of the waste storage area after operations at the site are completed.

The statute requires that a company guaranty be in the form of a "letter, duly executed by an officer of the company." R.S.Mo. §444.368.6. The applicable regulations of the Missouri Department of Natural Resources require that the officer signing the letter be the company's chief financial officer. 10 C.S.R. 45-6.030(2)(C).

The amount of the penal sum in any such guaranty is $1,000 per acre covered by the site. R.S.Mo. § 444.368.2. That Mr. Kaiser submitted a document, which by regulation only he could sign, that committed Doe Run to pay the amounts in question does not indicate that he in any way participated in any decision in determining those amounts (which were actually fixed by statute), much less in any environmental decisions with respect to the slag pile. These exhibits do not establish that Mr. Kaiser participated in any tortious conduct.

(12) Financing Lead Clean-Up Obligations

Plaintiffs next contended (Ex. 15 at 26) that Mr. Kaiser was "clearly involved in handling the financing of lead clean-up obligations." They cited a memorandum of an August 11, 1994 meeting that Mr. Kaiser did not attend. (Ex. 15, Ptff. Ex. 28). At that meeting, company President Zelms said that money for Herculaneum soil cleanups would come out of the "Old Lead Belt" money pool. The minutes then read, "Kaiser has indicated that there will be a limited liability set up on the opening books as he now sees it." This clearly refers to some kind of accounting entry. That Mr. Kaiser indicated something about accounting for some obligation that might have been environmental does not mean that he participated in any environmental decision. In a Supplemental Affidavit, (Supplemental Affidavit, attached to Ex. 16, ¶4.k.) Mr. Kaiser confirmed that this entry does not reflect any environmental decision-making on his part.

(13) Receipt of a Magazine Article

The next fact that allegedly made Mr. Kaiser a tortfeasor (Ex. 15 at 26) was that he was one of thirteen distributees within Doe Run to whom Dick Amastadi, a Doe Run

marketing executive, circulated a published article about lead. (Ex. 15, Ptff. Ex. 29). The article referred specifically to the significant progress Doe Run had made in reducing lead emissions. (Article, p. 2). The distribution list was not very exclusive. One of the distributees was "Lunch Room." Mr. Kaiser's receipt of the article hardly makes him a tortfeasor.

(14) Additional AFE's

Plaintiffs next returned to the Authorizations for Expenditures, citing three additional expenditures. (Ex. 15, Ptff. Exs. 30, 31 and 32). Each of the expenditures was an improvement. Two of them were intended to improve the monitoring of emissions (Ex. 31) and reduce emissions from fugitive dust (Ex. 32). That Mr. Kaiser signed them, as part of the process of insuring that capital expenditures were properly authorized, funded and accounted for, does not establish that he proposed the changes, participated in the decision to implement them, or had the final say in approving them.

(15) Newspaper Interview

Finally, the Plaintiffs cited a newspaper article (Ex. 15 at 27, citing Ptff. Ex. 26) in which Mr. Kaiser was interviewed extensively about the company's financial condition and stated generally that the company was striving to meet its environmental responsibilities. This article does not tend to prove any of the allegations of wrongdoing in Paragraphs 33 and 34.

Nowhere in their pleadings do Plaintiffs assert that Mr. Kaiser failed in the performance of any of the duties traditionally assigned to a chief financial officer. Rather, they charge Mr. Kaiser with causing what is alleged to be an inadequate record of

environmental compliance. Environmental compliance is not the duty of chief financial officers in general or of Doe Run's Chief Financial Officer in particular.

Nowhere in any of the documents Plaintiffs have identified is there any proof that Mr. Kaiser personally disapproved any environmental expenditure, limited any budget item for environmental compliance, or took any action to keep Doe Run from complying with its environmental obligations. The most that has been shown is that he approved expenditures and budgets. Plaintiffs do not show that Mr. Kaiser disapproved money for anything. Authorizing budgets and expenditures does not make Mr. Kaiser a participant in a corporate tort, and Plaintiffs have no reasonably objective basis for belief that he is.

The case at bar is not like the usual pretensive joinder case, where the plaintiff files the lawsuit early in the plaintiff's investigation of the facts. In such a case a plaintiff might be entitled to some leeway on the issue whether there was a "reasonable basis for belief" that there is a claim to be made. Here, Plaintiffs had the full five years in which their Jefferson County case was pending, as well as the first four and a half months in which the Doyle case was pending before Respondent, to investigate the facts and to conduct discovery. It is not enough to defeat pretensive joinder for the plaintiffs to assemble a stack of exhibits, and argue that the exhibits prove something that they simply do not prove.

Relators' affidavits completely negate the basis for Plaintiffs' claims against Mr. Kaiser. The documents that Plaintiffs rely on do not refute the affidavits. On the basis of the information available, including the product of their extensive Dixon discovery efforts, Plaintiffs did not have an objectively reasonable basis for belief that Mr. Kaiser

was a tortfeasor at the time they sued him. Even if the facts pleaded against Mr. Kaiser stated a claim for relief (and as shown above, they did not), there was no basis to believe that those facts, to the extent they attributed wrongdoing to Mr. Kaiser, were true. Mr. Kaiser was pretensively joined under either prong of the applicable test.

C. There Are Strong Policy Reasons Why A Permanent Writ Of Prohibition Should Issue Here.

Plaintiffs received an adverse ruling on class certification in Jefferson County. To avoid this ruling, they dismissed the Dixon case after it had been pending for more than five years, and sought a new forum -- the City of St. Louis -- for the same claims. They unsuccessfully attempted a Linthicum-style two step filing procedure. Only after the futility of that effort became evident did Plaintiffs attempt to create a basis for City venue by suing Mr. Kaiser, whom they had known about for years.

It would not serve the interests of fairness or judicial economy if a plaintiff could escape a venue in which there had been an adverse result on an important pretrial issue by refiling the case in a new forum and adding an individual defendant with no real connection to the case. That is the result that will follow if Respondent's order stands.

There are additional policy considerations here. To subject an individual officer to the risk of ruinous potential personal liability because of corporate actions in which the officer did not participate would not serve the public interest. Permitting the assertion of such claims would only deter competent individuals from holding corporate offices. The public as well as the various stakeholders that make up a modern corporation -- the employees and creditors as well as the officers, directors and shareholders -- would not

be served if competent persons were unnecessarily deterred from service as corporate officers.

Moreover, permitting plaintiffs to lay venue in a chosen forum by trumping up allegations against corporate officers would not serve the public interest. The purpose of venue laws is to afford the parties a ready and convenient forum in which to prepare and try their cases. In recent years, plaintiffs have come to believe that they are well-served if they can sue in the City of St. Louis. See Linthicum, 57 S.W.3d at 858-62 (Opinion of Wolff, J., dissenting and concurring in part).

To allow venue in a suit against a corporation to be laid in the City simply because a single corporate executive lives in the City, regardless of the executive's actual status as a tortfeasor, would only discourage executives and their families from living in the City. A person like Mr. Kaiser who moved to the St. Louis area to work for a company headquartered in St. Louis County would have every reason not to live in the City. Similarly, if a corporation not headquartered in the City were considering hiring an executive, it would be reluctant to hire a City resident. Doing so might make the City a proper venue for lawsuits against the company, even if the executive had no liability for the claims asserted.

Nothing in our venue statutes requires this result. A plaintiff can choose a particular venue if an individual defendant against whom the plaintiff can legitimately assert a proper claim lives there. Where the only way to add a defendant in the plaintiff's preferred venue is by pretensive joinder, however, the plaintiff may not properly choose that venue.

Relators have shown that Marvin Kaiser was pretensively joined here, so that Respondent is exceeding her jurisdiction in proceeding with the Doyle case. The preliminary order should be made permanent.

CONCLUSION

For the reasons stated, this Court should direct that a permanent order in prohibition issue. Respondent should be ordered to take no action in Doyle v. Fluor Corporation et al., No. 012-8641 other than dismissal of the claims against Mr. Kaiser and transfer of the case to a proper venue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing brief in paper form (and, where indicated, one copy of the foregoing brief on disk) have been mailed, United States postage prepaid, on October _____, 2003, to:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with Supreme Court Rules 55.03 and 84.06(b) is proportionately spaced, using Times New Roman, 13 point type, and contains 15,273 words, excluding the cover, certificate of service, the certificate of compliance required by Rule 84.06(c), signature block, and appendix.

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