

IN THE MISSOURI SUPREME COURT

No. SC84218

**STATE OF MISSOURI ex rel.
VEE-JAY CONTRACTING CO.,**

Relator,

vs.

**THE HONORABLE MARGARET M. NEILL,
Presiding Judge of the Missouri Circuit Court,
Twenty-Second Judicial Circuit (St. Louis City),**

Respondent.

Original Proceeding in Mandamus

BRIEF OF RESPONDENT

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JURISDICTIONAL STATEMENT

This is an original proceeding in Mandamus to Compel Respondent, the Honorable Margaret M. Neil, to grant Vee-Jay's Motion to Transfer for Improper venue and transfer the underlying action to St. Louis County.

Pursuant to Article V, Section 4, of the Missouri Constitution, the Missouri Supreme Court is authorized to issue extraordinary original remedial writs.

STATEMENT OF FACTS

Respondent, the Honorable Margaret M. Neill, denied Relator Vee-Jay Contracting Co.'s Motion to Transfer for Improper Venue. (*See Exhibit H.*) Relator filed this petition for writ of mandamus, requesting that the Missouri Supreme Court compel Respondent to grant Relator's Motion to Transfer for improper venue and transfer the underlying action to St. Louis County.

The facts relevant to this petition for writ of mandamus follow. Plaintiff filed her original petition in Cause No. 992-08044, in which she asserted claims of negligence for injuries that allegedly occurred on a parking lot at Lambert-St. Louis International Airport and named two defendants, the City of St. Louis and McCarthy Brothers Construction Co. (*See Exhibit A.*) In her Petition, Plaintiff claimed that venue was proper in the City of St. Louis, because "the subject property is owned, operated and maintained by Defendant, City of St. Louis, and technically located within the City of St. Louis. Venue of this matter is in the City of St. Louis further because suits brought against municipal corporations must be brought in the county where they are located and the City of St. Louis is located in the County of St. Louis City." (*See Exhibit A, § 2.*) Thereafter, Plaintiff, when it was shown that she was a statutory employee of the city of St. Louis, dismissed her claim against the City of St. Louis. (*See Exhibit B.*) Plaintiff then filed her First Amended Petition, in which Relator was added as a defendant. (*See Exhibit C.*) The defendants named in Plaintiff's First Amended Petition were McCarthy

Brothers Construction Company, Inc., Interface Construction Company and Relator Vee-Jay Cement Contracting Company, Inc. (See Exhibit C.) The three named defendants were corporations, all of which had principal places of business in St. Louis County. (See Exhibits A and G.) In her First Amended Petition, Plaintiff's only allegation concerning venue was as follows:

“That venue on [sic] this matter lies in the City of St. Louis because the subject property is owned, operated and maintained by Defendant, City of St. Louis, and technically located within the City of St. Louis. Venue of this matter is in the City of St. Louis further because suits brought against Municipal corporations must be brought in the county where they are located and the City of St. Louis is located in the County of St. Louis.”

(See Exhibit C.)

Relator was served with the First Amended Petition on June 26, 2001. (See Exhibit D.) On July 26, 2001, Relator filed its Motion to Transfer for Improper Venue. (See Exhibit F.) In its Motion to Transfer for Improper Venue, Relator noted that the Missouri Supreme Court has taken judicial notice that Lambert St. Louis Airport, which is where the cause of action allegedly accrued, is located in St. Louis County. See *State v. Boyd*, 492 S.W.2d 787, 792 (Mo. 1973). Furthermore, it also pointed out that the City of St. Louis was no longer a defendant at the time

Relator was named a defendant. (See Exhibit F, ¶¶ 3-4.) On or about December 3, 2001, Relator filed its Supplement to its Motion to Transfer for improper venue, in which it filed certified copies from the Secretary of State's office showing that Defendants' principal places of business were in St. Louis County. (See Exhibit G.) The plaintiff in the underlying action never filed a response to Relator's Motion to Transfer for Improper Venue. (See Exhibit B.)

Respondent denied Relator's Motion to Transfer for improper venue. (See Exhibit H.) Thereafter, Relator filed in the Missouri Court of Appeals, Eastern District, its Petition for Writ of Mandamus and Suggestions in Support of its Petition for Writ of Mandamus. The Missouri Court of Appeals, Eastern District, denied the Petition for Writ of Mandamus, with the Honorable Lawrence G. Crahan dissenting.

Relator then filed its Petition for Writ of Mandamus and Suggestions in Support thereof in this Court. Subsequently, Respondent filed her Suggestions in Opposition with this Court. On February 6, 2002, this Court issued its preliminary writ, with an alternative writ of mandamus ordered to issue. Respondent thereafter filed her writ answer/return. This brief follows.

POINTS RELIED ON

- I. **RELATORS ARE NOT ENTITLED TO A WRIT OF MANDAMUS TO COMPEL RESPONDENT TO VACATE HER ORDER DENYING RELATOR’S MOTION TO TRANSFER BASED ON IMPROPER VENUE AND TO TRANSFER THE UNDERLYING ACTION TO ST. LOUIS COUNTY & RESPONDENT WAS NOT REQUIRED PURSUANT TO MISSOURI SUPREME COURT RULE 51.045 TO TRANSFER THIS ACTION TO A COURT WHERE VENUE IS PROPER:**
- A. **Relator claims that no Reply to Relator’s Motion to Transfer for Improper Venue was Filed in the Underlying Action and Rule 51.045 Requires Relator to Order a Transfer to a Court Where Venue is Proper when No Reply is Filed; and**
- B. **Relator Refuted Plaintiff’s Allegations Regarding Venue Lying in the City of St. Louis and Relator “did not” establish that Venue in St. Louis County is Proper, Because the Cause of Action Accrued in St. Louis County and Defendants are All Residents of St. Louis County.**

Supreme Court Rule of Civil Procedure 51.045

ARGUMENT

I. RELATORS ARE NOT ENTITLED TO A WRIT OF MANDAMUS TO COMPEL RESPONDENT TO VACATE HER ORDER DENYING RELATOR’S MOTION TO TRANSFER BASED ON IMPROPER VENUE AND TO TRANSFER THE UNDERLYING ACTION TO ST. LOUIS COUNTY & RESPONDENT WAS NOT REQUIRED PURSUANT TO MISSOURI SUPREME COURT RULE 51.045 TO TRANSFER THIS ACTION TO A COURT WHERE VENUE IS PROPER:

A. Relator claims that no Reply to Relator’s Motion to Transfer for Improper Venue was Filed in the Underlying Action and Rule 51.045 Requires Relator to Order a Transfer to a Court Where Venue is Proper when No Reply is Filed.

The precise language of Rule 51.045, governing transfer of venue when venue is improper, “does not” mandate that venue be transferred to St. Louis County in the underlying action. Rule 51.045 of the Rules of Civil Procedure states as follows:

(a) An action filed in the court where venue is improper shall be transferred to a court where venue is proper if a motion for such transfer is timely filed. Any motion to transfer venue shall be filed:

- (1) Within the time allowed for responding to an adverse party's pleading, or**
- (2) If no responsive pleading is permitted, within thirty days after service of the last pleading.**

If a motion to transfer venue is not timely filed, the issue of improper venue is waived.

- (b) Within ten days after the filing of a motion to transfer for improper venue, an opposing party may file a reply denying the allegations in the motion for transfer. If a reply is filed, the court shall determine the issue.**

If the issue is determined in favor of the movant or if no reply is filed, a transfer of venue shall be ordered to a court where venue is proper . . .

Relator argues that under 51.045(b), if no reply to the motion to transfer for improper venue is filed, the court "shall" order a transfer of venue to a court where venue is proper. Relator further argues that this language is mandatory in nature.

Looking back to 51.045(a) the Rule states, "An action filed in the court where venue is improper shall be transferred to a court where venue is proper if a motion for such transfer is timely filed. Relator claims that Respondent "Within ten days after the filing of a motion to transfer for improper venue, an opposing party may

file a reply denying the allegations in the motion for transfer. If a reply is filed, the court shall determine the issue.”

Relator would be correct in their argument if indeed “venue was initially improper”, which it was not.

B. Relator Refuted Plaintiff’s Allegations Regarding Venue Lying in the City of St. Louis and Relator did not Establish that Venue in St. Louis County is Proper.

Relator asserts that the City of St. Louis had been pretensively joined solely to create venue in the city of St. Louis. They presented no evidence that none of the defendants has an office or agent in the City of St. Louis. Under Missouri Law the party asserting improper venue has the burden of persuasion and proof. Coale v. Grady Bros. Siding and Remodeling, Inc., 865 S.W.2d 887, 889 (Mo.App.S.D. 1993); Cuba’s United Ready Mix v. Bock Concrete, 785 S.W.2d 649, 650 (Mo.App. 1990); Pierce v. Pierce, 621 S.W.2d 530, 531 (Mo.App.1981).

Section 508.040, the corporate venue statute that Relator contends is applicable, provides that suits against corporations shall be commenced “either in the county where such corporations shall have or usually keep an office or agent for the transaction of their usual and customary business.” Section 508.040 does not limit venue to the county in which a corporation has its principal place of business,

as Relator suggests. Rather it refers to any county in which it has an office or agent.

Relator has not presented any competent evidence that no defendant has an office or agent in the City of St. Louis, and Relator has failed in its burden of proof and persuasion.

In addition, the Supreme Court ruled in State ex rel. Linthicum v. Calvin, No. SC83558 (Mo.banc October 23, 2001), that for purposes of 508.010,¹ a suit instituted by summons is “brought” whenever a plaintiff brings a defendant into a lawsuit, whether by original petition or by amended petition. The Court further states, however, that where a defendant is dismissed from a lawsuit, State ex rel. DePaul Health Center v. Mummert, 870 S.W.2d 820 (Mo.banc 1994), still applies. See also, Bottger v. Cheek, 815 S.W.2d 76 (Mo.App. 1991), holding that if venue is properly vested in the first instance, the subsequent dismissal of the resident does not divest the court of venue. Thus, where a defendant has been dismissed from a lawsuit such defendant may only be disregarded for purposes of venue if a showing of pretensive joinder is made.

The Supreme Court said in Lithicum that the rule it was adopting was intended to prevent newly added defendants from having venue rights different from the original defendants. The holding in Lithicum does not mean that a non-pretensively joined defendant that is subsequently dismissed is to be disregarded for

venue purposes by newly added defendants but must be considered for the original defendants.² Thus, when new defendants are added and venue is reconsidered, all original or subsequently named defendants must be considered, whether dismissed or not, absent a showing of pretensive joinder. Relator has not established that the City of St. Louis was pretensively joined and venue is thus proper pursuant to Sec. 508.050.

¹ The only applicable statutes in this case are 508.040 and 508.050.

² The Supreme Court specifically stated that a suit is brought against the original defendants when the original petition is filed, but it is brought against the additional defendants when they are added.

CONCLUSION

WHEREFORE, this court should “not” issue an absolute writ in mandamus and compel Respondent to grant Relator’s Motion to Transfer for improper venue.

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Court, Twenty-Second Judicial Circuit)	
(St. Louis City),)	
Respondent.)	

CERTIFICATE OF COMPLIANCE

COMES NOW counsel for Respondent, The Honorable Margaret M. Neil and for its certificate of compliance, states as follows:

- 1. The undersigned does hereby certify that Respondent’s brief filed herein complies with the page limits of Rule 360 and contains 2,497 words of proportional type.**
- 2. Microsoft Word was used to prepare Respondent’s brief.**
- 3. The undersigned does hereby certify that the diskette provided with this notification has been scanned for viruses and is virus-free.**

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that two copies of the foregoing brief and one copy of accompanying disks were mailed, postage prepaid, to the following this 8th day of May, 2002: The Hon. Margaret M. Neill, Presiding Judge, Division 1, Missouri Circuit Court, Twenty-Second Judicial Circuit, Civil Courts Building, 10 N. Tucker, St. Louis, Missouri 63101; Mr. Thomas J. Magee and Mr. Robyn Greifzu Fox and Catherine Vale Jochens, Attorney's for Vee-Jay, 200 N. Broadway, Suite 700, St. Louis, MO 63102; and Ms. Zora Manjencich, Attorney for Defendant McCarthy Brothers Construction Co., 515 North Sixth Street, Suite 2400, St. Louis, Missouri 63101.

APPENDIX