

**IN THE MISSOURI SUPREME COURT**

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**No. SC84218**

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**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.**

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**Original Proceeding in Mandamus**

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**BRIEF OF RELATOR**

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## **JURISDICTIONAL STATEMENT**

This is an original proceeding in mandamus to compel Respondent, the Honorable Margaret M. Neill, to grant Relator'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 and failed to transfer the underlying case to St. Louis County where venue is proper. (*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 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. (*See* Exhibits I and J, respectively.) The Missouri Court of Appeals, Eastern District, denied the Petition for Writ of Mandamus, with the Honorable Lawrence G. Crahan dissenting. (*See* Exhibit K.)

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.

**POINT RELIED ON**

**I. RELATORS ARE 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, BECAUSE RESPONDENT WAS REQUIRED PURSUANT TO MISSOURI SUPREME COURT RULE 51.045 TO TRANSFER THIS ACTION TO A COURT WHERE VENUE IS PROPER, IN THAT:**

- A. 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 Established 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

*American Family Mutual Ins. Co. v. Koehr*, 832 S.W.2d 7 (Mo. App. E.D. 1992)

*State of Missouri ex rel. Etter, Inc., v. Neill*, 2002 WL 200975 (Mo. App. E.D. 2002)

**ARGUMENT**

**I. RELATORS ARE 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, BECAUSE RESPONDENT WAS REQUIRED PURSUANT TO MISSOURI SUPREME COURT RULE 51.045 TO TRANSFER THIS ACTION TO A COURT WHERE VENUE IS PROPER, IN THAT:**

**A. 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, mandates 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 . . .**

[Emphasis added.] Thus, 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. This language is mandatory in nature.

In *State ex rel. American Family Mutual Ins. Co. v. Koehr*, 832 S.W.2d 7 (Mo. App. E.D. 1992), the Court of Appeals construed virtually identical language in Rule 51.04<sup>1</sup> to be mandatory in nature, divesting the trial court of any discretion in ordering a change of venue when no reply is filed. *Id.* at 8. The court specifically stated as follows:

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<sup>1</sup> Rule 51.04, which sets forth the procedure for obtaining a change of venue for cause if the inhabitants of the county are prejudiced against the party applying for the change of venue, states in pertinent part as follows:

Rule 51.04(e) specifically states that if no denial [to an application for change of venue based on cause] is filed, a change of venue “shall be ordered.”

The words “shall be ordered” are mandatory in nature and divest the trial court of any discretion in ordering a change of venue when no denial is filed.

*Id.* Because *State ex rel. American Family* was decided well in advance of the adoption of Rule 51.045, the Rules Committee was therefore presumably aware of the construction that the Court of Appeals had placed on the language and therefore intended it to have the same effect.

**Relator Refuted Plaintiff’s Allegations Regarding Venue Lying in the City of St. Louis and Relator Established 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.**

In the case at bar, Relator was added as a defendant in Plaintiff’s First Amended Petition. *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855 (Mo. banc 2001), and its

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(e) The adverse party, within five days after the filing of the application for change of venue, may file a denial of the cause or causes alleged in the application. . . . If a denial is filed, the court shall hear evidence and determine the issues. If they are determined in favor of applicant, or **if no denial is filed, a change of venue shall be ordered** to some other county convenient to the parties and where the cause or causes do not exist. . . .

progeny requires a redetermination of venue at the time of the filing of the First Amended Petition, when Relator was first brought into the lawsuit. Plaintiff's First Amended Petition names three defendants—McCarthy Brothers Construction Company, Interface Construction Company, and Vee-Jay Cement Contracting Company, Inc. However, there are only two counts, and they are against McCarthy Brothers Construction Company and Vee-Jay Cement Contracting Company, Inc. The First Amended Petition did not include a claim against the City of St. Louis, nor was the City of St. Louis named as a defendant.

In Count I, Plaintiff makes only the following allegations regarding venue:

2. 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 City.

(*See Exhibit C.*)

Plaintiff erroneously refers to the City of St. Louis as a defendant. Plaintiff voluntarily dismissed her claim against the City of St. Louis with prejudice prior to filing her First Amended Petition. Plaintiff did not name the City of St. Louis in her First Amended Petition. Thus, it is inconsequential where suits against municipal corporations

must be brought. In its Motion to Transfer for Improper Venue, Relator points out that the City was no longer a defendant at the time Relator was added as a defendant. (Exhibit F, ¶¶ 3-4.)

In this case, at the time Relator was brought into the lawsuit, the three named defendants were all corporations. Thus, the corporate venue statute, Section 508.040 R.S.Mo., applies. *Judy v. Insurance Co. of Pennsylvania*, 892 S.W.2d 647 (Mo. App. W.D. 1994). Section 508.040 states as follows:

Suits against corporations shall be commenced either in the county where the cause of action accrued, or in case the corporation defendant is a railroad company owning, controlling or operating a railroad running into or through two or more counties in this state, then in either of such counties, or in any county where such corporations shall have or usually keep an office or agent for the transaction of their usual and customary business.

Despite Plaintiff's allegations to the contrary, Lambert St. Louis International Airport, which is where the cause of action allegedly accrued, is in St. Louis County, and not in St. Louis City. *See State v. Boyd*, 492 S.W.2d 787, 792 (Mo. 1973) (in which this Court took judicial notice that Lambert St. Louis Airport is located in St. Louis County). Thus, the cause of action accrued in St. Louis County. Plaintiff brought this to Respondent's attention in its Motion to Transfer for Improper Venue. (*See* Exhibit F, ¶ 7.) Furthermore, in the underlying matter, Relator also filed certified copies of

documents from the Missouri Secretary of State's office showing that all three corporate defendants are residents of St. Louis County and their principal places of business are in St. Louis County. (*See* Exhibit G.)

Regardless, Respondent found it determinative that Relator did not present evidence that none of the defendants has an office or agent in the City of St. Louis. However, the Court of Appeals' decision in *State of Missouri ex rel. Etter, Inc., v. Neill*, 2002 WL 200975 (Mo. App. E.D. 2002), which holds that the party challenging venue does not have the burden of disproving all possible bases for venue (whether pleaded or not), defeats that argument.

In *Etter*, the plaintiffs brought a dram-shop action against two St. Louis County bar owners. The two bar owners were both corporations, one of which (Relator) had been administratively dissolved. To assert their claim and achieve service of process against Relator, Plaintiffs petitioned that the court appoint a resident of St. Louis City as defendant ad litem. Plaintiffs filed their cause of action in St. Louis City, and the only allegation concerning venue was that the defendant ad litem was a city resident. The bar owners moved to transfer venue from the city, claiming that the residence of the defendant ad litem provided no basis for city venue. The respondent denied the transfer. In denying the transfer, respondent did not find that the defendant ad litem's residence provided a basis for city venue. Rather, she found that the bar owners had failed to adduce evidence that Relator had ceased doing business or that it did not maintain an office or agent in the city for its usual and customary business. Relator then asked for

reconsideration and provided respondent with an affidavit that at the time of the suit's filing it had ceased doing business and that it had never maintained an office or agent in the city for the transaction of business. Respondent again denied transfer, finding that there was no basis for reconsidering the prior ruling, and that Relator had waived the issue by failing to adduce evidence at the earlier hearing. Relator then filed a petition for writ of prohibition, seeking to compel transfer of venue.

The Court of Appeals granted the petition for writ of prohibition, ordering that respondent refrain from all action except transfer of the underlying cause to a proper venue. The Court of Appeals found that there was no basis for city venue based merely on the residence of the defendant ad litem. Furthermore, the court found no fault with the challenge to venue, stating as follows:

. . . Rule 51.045 requires a motion to transfer venue be filed within the time allowed for a responsive pleading or venue is waived by operation of that rule and Rule 55.27(g). Clearly such rules anticipate that a basis for venue will be pleaded, as indeed it was here. When a basis for venue is pleaded, we can hardly fault relator for adducing evidence in opposition to the pleaded basis. Relator correctly, and timely, challenged venue predicated on the basis of defendant ad litem's residence. Respondent would fault relator for not disproving all bases for venue, whether pleaded or not. **While relator bore the burden of persuasion and proof, it does not need**

**to disprove bases for venue that were never pleaded to meet those burdens.** Nor do we find any reason to disallow relator's supplementation of the record where respondent seeks to uphold venue on a basis that was never pleaded.

*Id.* at 2.

Here, the only basis for venue that was pleaded was that “the subject property is owned, operated and maintained by Defendant, City of St. Louis, and technically located within the City of St. Louis” and that venue against municipal corporations, such as the City of St. Louis, must be brought in the county where the municipal corporation is located. (*See* Exhibit C.) In its Motion to Transfer for improper venue, Relator cited *State v. Boyd*, 492 S.W.2d 787 (Mo. 1973), in which this Court has taken judicial notice that Lambert St. Louis Airport, which is where the cause of action allegedly accrued in this case, is located in St. Louis County. (*See* Exhibit F, § 7.) Furthermore, Relator pointed out that, at the time of the filing of the First Amended Petition in which Relator was added as a defendant, the City of St. Louis was no longer a party to the action. (*See* Exhibit F, ¶¶ 3-4.) Thus, Relator refuted all allegations regarding venue in its Motion to Transfer.

In addition, by filing the certified copies from the Secretary of State's office, Relator was merely showing where venue would be proper based on the defendants' having places of business in St. Louis County. According to *Etter*, Defendants did not have a burden to disprove all unpleaded bases for venue in the City of St. Louis, notably,

that Defendants did **not** have offices in St. Louis City for the transaction of usual and customary business. Thus, Defendants sustained their burden of persuasion and proof on the issue of improper venue.

Finally, in her Order Denying Relator's Motion to Transfer, Respondent emphasizes that Relator did not sustain its burden of proof that the City of St. Louis was pretensively joined to establish venue, which argument Relator set forth in its Motion to Transfer for Improper Venue. However, the issue of whether the City of St. Louis was pretensively joined is moot in the face of *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855 (Mo. banc 2001), which was decided after Relator's Motion to Transfer for Improper Venue was filed. At the time that Relator was added as a defendant, the City of St. Louis had already been voluntarily dismissed from the action by Plaintiff. Under *State ex rel. DePaul Health Ctr. v. Mummert*, 870 S.W.2d 820 (Mo. banc 1994), this Court held that venue is determined as the case stands when "brought." The court in *Linthicum* further expounded on this by stating that a suit instituted by summons is "brought" whenever a plaintiff brings a defendant into a lawsuit, whether by original petition or amended petition. Thus, at the time Relator was added as a defendant, the suit was "brought." Under *DePaul*, venue is determined as the case stands when "brought," or in this case when Relator was added as a defendant. At that time, only the three corporate defendants were named as defendants; thus, whether venue as to the City of St. Louis was proper and whether the City of St. Louis was pretensively joined are moot points under *Linthicum*

and *DePaul*. Quite simply, Relator has refuted every plead theory of venue, and has sustained its burden to show that venue is proper in St. Louis County.

## CONCLUSION

Because Plaintiff in the underlying action did not file a response to the Motion to Transfer for Improper Venue, Rule 51.045 mandates that Respondent “shall” transfer this action to a court where venue is proper. Relator has shown that St. Louis County is a court where venue is proper. Furthermore, Relator refuted Plaintiff’s grounds for asserting venue in the City of St. Louis. This Court should issue an absolute writ in mandamus and compel Respondent to grant Relator’s Motion to Transfer for improper venue and transfer this cause to St. Louis County.

Respectfully submitted,

**MOSER and MARSALEK, P.C.**

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Presiding Judge of the Missouri Circuit )  
Court, Twenty-Second Judicial Circuit )  
(St. Louis City), )  
Respondent. )

**CERTIFICATE OF COMPLIANCE**

COMES NOW counsel for Relator State of Missouri ex rel. Vee-Jay Contracting Co., and for its certificate of compliance, states as follows:

1. The undersigned does hereby certify that Relator’s brief filed herein complies with the page limits of Rule 360 and contains 4,339 words of proportional type.
2. Microsoft Word was used to prepare Relator’s brief.
3. The undersigned does hereby certify that the diskette provided with this notification has been scanned for viruses and is virus-free.

**MOSER and MARSALEK, P.C.**

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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 10th day of April, 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. John Anderson and Mr. Herman Praszkie, Attorney for Plaintiff Florida Murray, 1007 Olive Street—Third Floor, St. Louis, Missouri 63101; and Ms. Zora Manjencich, Attorney for Defendant McCarthy Brothers Construction Co., 515 North Sixth Street, Suite 2400, St. Louis, Missouri 63101.

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