

IN THE MISSOURI SUPREME COURT

Case No. 084372

STATE EX REL. CINDY KERTZ,

Relator,

v.

THE HONORABLE MARGARET M. NEILL,

Respondent.

**On Petition For Writ Of Mandamus
Directed To
Honorable Margaret M. Neill
Circuit Judge, Missouri Circuit Court
Twenty-Second Judicial Circuit**

REPLY BRIEF OF RELATOR

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JURISDICTIONAL STATEMENT

Set forth in Relator's Brief.

STATEMENT OF FACTS

Set forth in Relator's Brief.

POINTS RELIED ON

- I. RELATOR IS ENTITLED TO A WRIT OF MANDAMUS COMPELLING RESPONDENT TO VACATE HER ORDER OF DECEMBER 18, 2001 GRANTING THE MOTION TO TRANSFER VENUE, BECAUSE VENUE WAS PROPER UNDER §508.040 AT THE TIME SUIT WAS FILED; VENUE SHOULD HAVE BEEN DETERMINED BASED ON THE PARTY IN THE CASE AT THE TIME SUIT WAS FILED, AND THIS COURT'S DECISION IN *STATE EX REL. LINTHICUM V. CALVIN*, 57 S.W.3D 855 (MO. BANC 2001) SHOULD BE OVERRULED.**

Section 351.588, RSMo

Crabtree v. Bugby, 967 S.W.2d 66, 71, 72 (Mo. banc 1998)

II. RELATOR IS ENTITLED TO A WRIT OF MANDAMUS COMPELLING RESPONDENT TO VACATE HER ORDER OF DECEMBER 18, 2001 GRANTING THE MOTION TO TRANSFER VENUE, BECAUSE IF §508.010 APPLIED AS RESPONDENT HELD, DEFENDANT BURLINGTON NORTHERN SANTA FE IS A RESIDENT OF THE CITY OF ST. LOUIS, MAKING VENUE APPROPRIATE UNDER §508.010(2), RSMO.

Section 508.040, RSMo

Section 358.588, RSMo

Section 351.375, RSMo

Section 508.010, RSMo

State ex rel. SSM Health Care St. Louis v. Neill, 78, SW3d 140, 144 (Mo. banc 2002)

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Section 351.625, RSMo

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KC Motorcycle Escorts, L.L.C. v. Easley, 53 S.W.3d 184, 187 (Mo.App.2001)

ARGUMENT

POINT I

RELATOR IS ENTITLED TO A WRIT OF MANDAMUS COMPELLING RESPONDENT TO VACATE HER ORDER OF DECEMBER 18, 2001 GRANTING THE MOTION TO TRANSFER VENUE, BECAUSE VENUE WAS PROPER UNDER §508.040 AT THE TIME SUIT WAS FILED; VENUE SHOULD HAVE BEEN DETERMINED BASED ON THE PARTY IN THE CASE AT THE TIME SUIT WAS FILED, AND THIS COURT'S DECISION IN *STATE EX REL. LINTHICUM V. CALVIN*, 57 S.W.3D 855 (MO. BANC 2001) SHOULD BE OVERRULED.

A. Standard for Issuance of Writ of Mandamus

Set forth in Relator's Brief.

B. Mummert Should Control This Case; *Linthicum* Should Be Overruled

The tenor of Respondent's entire brief is that the intent of the legislature as embodied by statute should be given effect. Relator agrees.

Relator is not attempting to change the law. Relator is simply asking this Court to follow the long line of cases prior to *Linthicum*, to read the legislature's duly passed statutes *in pari materia*, and to recognize and hold that foreign and domestic corporations are to be treated differently.

Respondent's several pro-*Linthicum* arguments ring hollow. First, Respondent glosses over the plain-language statutory arguments in Relator's brief and embarks upon a purported "public policy" argument. Respondent argues that defendant Pobst should not be subjected to venue in the City of St. Louis because that would be inconvenient and unfair. In essence Respondent's "public policy" argument is a *forum non conveniens* argument and should not be entertained in addressing this strict statutory interpretation case.

Based upon Respondent's self-serving assumptions regarding the legislative intent behind venue statutes, Respondent seems to claim that the lack of "for all purposes" language in § 351.588 and the "except a foreign corporation" language in the definitions at the beginning of Chapter 351 are without meaning. With no legal foundation other than assumption, Respondent contends that it is unreasonable to expect these litigants to try this case in the City of St. Louis, primarily because it is so far from Pobst's home. This argument is specious for several reasons: Missouri (geographically speaking) simply is not that large, litigating this case in St. Louis City is as convenient as St. Louis County, Pobst and other engineers like him repeatedly travel the rail lines throughout many counties in the state and can expect to be hailed into the courts in any of those

counties, and plaintiffs should be free to select the forum of their choice based upon the courts available to them by statute. Respondent decries Relator's arguments as absurd for hauling Pobst to downtown St. Louis to litigate this case. This argument is deceptively attractive until one considers that BNSF is fighting to haul Pobst seven miles further to adjudicate this case in St. Louis County. One could suppose that BNSF would make the same inconvenience and fairness argument if it had located its registered agent in far Northwest Missouri.

Respondent also claims that *stare decisis* should operate to avoid this Court revisiting *Linthicum*. *Stare decisis* should not operate, as here, to create absurd results. “[The Supreme] Court should not lightly disturb its own precedent...in the absence of a recurring injustice or absurd results.” Crabtree v. Bugby, 967 S.W.2d 66, 71, 72 (Mo.anc 1998).

Linthicum, combined with the new Rule 51.045, has created absurd and cumbersome results. Post *Linthicum*, it is not uncommon for litigation firms to argue multiple venue motions each week – many of which have been argued before. An inordinate amount of judicial resources are being expended to address repeatedly-raised venue challenges. Litigants are being shifted from circuit court to circuit court and are losing trial dates. Scheduling orders are being vacated, modified, reargued and reentered. Time is being lost and will continue to be lost for litigants as long as *Linthicum* is followed. This heretofore unencountered procedural wrangling comes from the

abandonment of the only bright-line rule that makes sense and is easy to apply: venue attaches at the time of filing. *Linthicum* should be overruled.

POINT II

RELATOR IS ENTITLED TO A WRIT OF MANDAMUS COMPELLING RESPONDENT TO VACATE HER ORDER OF DECEMBER 18, 2001 GRANTING THE MOTION TO TRANSFER VENUE, BECAUSE IF §508.010 APPLIED AS RESPONDENT HELD, DEFENDANT BURLINGTON NORTHERN SANTA FE IS A RESIDENT OF THE CITY OF ST. LOUIS, MAKING VENUE APPROPRIATE UNDER §508.010(2), RSMO.

A. Standard For Issuance Of Writ Of Mandamus

Set forth in Relator's Brief.

B. BNSF Resides in the City

Under §508.040 RSMo. a railroad may be properly sued in any county where it maintains tracks. *Id.*; See also Resp's. Brief at 26. Given that BNSF is a foreign corporation that owns tracks throughout this state, owns tracks in the City of St. Louis and operates its trains through the City, by common law and statute BNSF resides in the City.

Respondent tries to gloss over the clear intent of the legislature in enacting statutes that simply treat domestic and foreign corporations differently. See § 358.588 and § 351.375.

Though referring to different statutes (§§ 508.010 and 508.040), Respondent makes Relator's point very well:

“The very existence of the two separate statutes illustrates the legislative intent...” Resp's. Brief at 33.

“...[B]y enacting two separate statutes, the General Assembly intended for a distinction to be made...when determining venue.” Resp's. Brief at 31.

More importantly, this Court has recently noted that statutory interpretation must “sufficiently take into account the difference in wording between” similar statutes. State ex rel. SSM Health Care St. Louis v. Neill, 78, SW3d 140, 144 (Mo. banc 2002).

Without admitting that Missouri's statutory scheme treats foreign and domestic corporations differently for venue purposes, Counsel for respondent details the various mergers that brought BNSF to its present corporate configuration. Respondent argues that the effect of these mergers is that BNSF is afforded the benefits that accrue to domestic Missouri corporations by virtue of BNSF's merger with St. Louis-San Francisco Railway Company – a Missouri Corporation. It is interesting to note that St. Louis-San Francisco Railway Company, upon whom BNSF relies to argue it should be treated as a domestic corporation, at the time of last filing maintained its registered agent within the City of St. Louis (i.e. 906 Olive Street). See Respondent's Brief at A-16. As such, this

constitutes another independent ground upon which venue is proper in the City of St. Louis.

The foreign corporation statute, § 351.588 is a specific corporate statute as relates to BNSF. The rules of statutory construction are clear that in situations where the same subject matter is addressed in general terms in one statute and in specific terms in another, and there is a "necessary repugnancy" between statutes, the more specific statute controls over the more general. Community Bancshares, Inc. v. Secretary of State, 43 S.W.3d 821, 825, n. 12 (2001), citing to, Greenbriar Hills Country Club v. Director of Revenue, 935 S.W.2d 36, 38 (Mo. banc 1996); and State ex rel. City of Springfield v. Smith, 125 S.W.2d 883, 885 (Mo. banc 1939). The specific statute here contemplates foreign corporations may be sued where they do business.

Importantly for the Court's consideration of the issue in this case, the 1990 re-enactment of § 351.588 by the General Assembly deleted the reference to § 351.375 that its predecessor, §351.625 carried. Cf. §351.625, RSMo 1986, with § 351.588, RSMo 1998. This purposeful removal of the reference to § 351.375 in the foreign corporation statute removes all doubt as to whether § 351.375 applies to foreign corporations – § 351.375 clearly does not apply to foreign corporations after 1990.

In another self-serving assumption, Respondent argues that the legislative intent of the General Assembly was to insure that individuals are subject to suit in a limited number of venues. To the contrary, under Missouri's statutory scheme individuals are subject to suit anywhere in our state. Venue depends upon where defendants live; where

the plaintiff lives and where the defendants may be found; where co-defendants live; where co-defendants maintain agents and offices; where an incident occurred, etc. See generally, Chapter 508 RSMo. Here, the co-defendant happens to be a corporate railroad defendant with significant corporate assets and operations in the City of St. Louis. By choice BNSF changed its registered agent to St. Louis County – presumably when CT Corporation Systems moved to St. Louis County. Likely without any other change to its business or operations, BNSF now argues that it is a corporate apparition within the City and that the “for all purposes” language in the domestic corporation statute ensures this is so. BNSF should not be allowed to find shelter in a statute applicable only to domestic corporations.

C. The Evolution Of Foreign Corporate Residence

See Relator’s Brief.

D. An Easy Solution: Read The Corporate Statutes And Venue Statutes

In Pari Materia

Statutes are considered to be *in pari materia* when they relate to the same person or thing, to the same class of persons or things, or have the same purpose or object. The doctrine of *in pari materia* requires that statutes relating to the same subject matter be construed together even though the statutes are found in different chapters and were enacted at different times. State ex rel. Director of Revenue v. Gaertner, 32 S.W.3d 564, 566 (Mo. banc 2000). Under the statutory construction of *in pari materia*, statutes that

relate to the same subject matter are to be read together to determine their meaning. Pavlica v. Dir. Of Revenue, 71 S.W.3d 186, 189 (Mo. App. W.D. 2002); KC Motorcycle Escorts, L.L.C. v. Easley, 53 S.W.3d 184, 187 (Mo.App.2001). The only way to determine the meaning of each of the statutes at issue here is to read them together. If this Court harmonizes and gives meaning to the plain language of each statute, the only clear result is that BNSF resides in the City and Respondent's order transferring venue must be vacated.

CONCLUSION

For each and every reason set forth herein and in Relator's Brief Relator requests this Court make the Alternative Writ of Mandamus absolute.

Respectfully submitted,

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I hereby certify that two copies of Respondent's Brief and a disk with a copy of Reply Brief of Relator was hand delivered this 26th day of August, 2002, and addressed as follows:

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RULE NO. 84.06(b) CERTIFICATE

I hereby certify that this Reply Brief complies with the limitations contained in Rule No. 84.06(b) and that this brief contains 2,115 words according to the word count of MS Word.

RULE NO. 84.06(g) CERTIFICATE

I hereby certify that this disk has been checked for viruses in compliance with Rule No. 84.06(g) and that it is virus free.

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