

IN THE SUPREME COURT OF MISSOURI

**STATE OF MISSOURI, ex rel.
STEVE DOWDY AND KIERRA DOWDY, A MINOR,
BY AND THROUGH HER FATHER AND
NEXT FRIEND, STEVE DOWDY,**

Relators,

vs.

**THE HONORABLE MARGARET M. NEILL AND THE
HONORABLE BARBARA W. WALLACE,**

Respondents.

Case No. SC84400

RELATORS' REPLY BRIEF

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS.....	1
TABLE OF AUTHORITIES	2
JURISDICTIONAL STATEMENT.....	5
STATEMENT OF FACTS.....	5
POINTS RELIED ON.....	5
INTRODUCTION.....	6
ARGUMENT	8
POINT I.....	8
POINT II.....	12
POINT III.....	16
POINT IV.....	20
POINT V.....	25
CONCLUSION.....	27
CERTIFICATION OF COMPLIANCE WITH RULE 84.06(c).....	30
CERTIFICATE OF SERVICE	31

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<i>Blue Springs Bowl v. Spradling</i> , 551 S.W.2d 596, 601 (Mo. banc 1977).....	10
<i>Budding v. SSM Healthcare Systems</i> , 19 S.W.3d 678, 682 (Mo. banc 2000).....	26
<i>Evans v. Eno</i> , 903 S.W.2d 258 (Mo. App. 1995).....	23
<i>Hall v. Brookshire</i> , 285 S.W.2d 60 (Mo. App. 1955).....	27
<i>Leis v. Massachusetts Bonding & Ins. Co.</i> , 125 S.W.2d 906 (Mo. App. 1939).....	23
<i>Powell v. Bowen</i> , 214 S.W. 142 (Mo. banc 1919).....	10
<i>State ex rel. Bowden v. Jensen</i> , 359 S.W.2d 343 (1962).....	9, 12, 14
<i>State ex rel. Columbia National Bank v. Davis</i> , 284 S.W. 464 (Mo. banc 1926).....	10
<i>State ex rel. DePaul Health Center v. Mummert</i> , 870 S.W.2d 820 (Mo. banc 1994).....	16, 21, 22, 23
<i>State ex rel. England v. Koehr</i> , 849 S.W.2d 168 (Mo. App. 1993).....	12
<i>State ex rel. Henning v. Williams</i> , 131 S.W.2d 561 (Mo. banc 1939)..	10, 27
<i>State ex rel. Linthicum v. Calvin</i> , 57 S.W.3d 855 (Mo. banc 2001).....	7, 8, 11, 16, 18, 19, 20, 21, 22, 27
<i>State ex rel. O'Keefe v. Brown</i> , 235 S.W.2d 304 (Mo. banc 1951).....	11, 13

Weir v. Brune, 256 S.W.2d 810 (Mo. 1953)..... 23

Welsh v. Continental Placement, Inc., 627 S.W.2d 319
(Mo.App. 1982)..... 23

STATUTES

PAGE

Chapter 351, RSMo. 2000.....	15
Section 351.375, RSMo. 2000.....	8, 9, 13, 14, 15
Section 351.375.2, RSMo. 2000.....	15
Section 351.582, RSMo. 2000.....	13
Section 351.586, RSMo. 2000.....	9, 10
Section 351.588, RSMo. 2000.....	9, 13, 14
Section 351.620, RSMo. 2000.....	9, 12, 14
Section 351.625, RSMo. 1986.....	9, 12, 14
Section 351.690(4), RSMo. 2000.....	15
Section 508.010, RSMo. 2000.....	6, 8, 11, 13, 18, 19, 21, 25, 26
Section 508.010(4), RSMo. 2000.....	19, 20, 27
Section 508.040, RSMo. 2000.....	6, 7, 8, 9, 11, 12, 14, 15, 17, 18, 19, 21, 22, 25, 26, 27

RULES OF CIVIL PROCEDURE

PAGE

Rule 67.02.....	24, 25
-----------------	--------

CONSTITUTIONAL PROVISIONS

PAGE

Mo. Const. Art. V, §4..... 5

Mo. Const. Art. XI, §10..... 14

JURISDICTIONAL STATEMENT

Relators adopt and incorporate by reference their Jurisdictional Statement in Relators' Brief. (Rel.' Brief, p.10). Respondents agree that "this Court has jurisdiction of this writ proceeding under Article V, §4, of the Missouri Constitution." (Resp. Brief, p. 11).

STATEMENT OF FACTS

Relators adopt and incorporate by reference their Statement of Facts in Relators' Brief. (Rel. Brief, pp. 11-15).

POINTS RELIED ON

POINTS I - IV

Relators adopt and incorporate by reference Points I-IV of Relators' Brief. (Rel. Brief, pp. 18-25).

POINT V

A DETERMINATION REGARDING WHETHER FOREIGN CORPORATIONS RESIDE ONLY WHERE THEY MAINTAIN THEIR REGISTERED AGENT OR OFFICE SHOULD BE BASED UPON THE LEGISLATIVE INTENT EXPRESSED IN STATUTES AS INTERPRETED CONSISTENTLY WITH THE RULES OF STATUTORY CONSTRUCTION, AND NOT BASED ON ANY PERCEIVED PUBLIC POLICY CONTRARY TO THAT EXPRESSED IN THE VENUE STATUTES.

INTRODUCTION

BNSF relies completely upon the dismissed defendant, Drapp, and Drapp's "venue rights" or "rights" under §508.010. Drapp is mentioned at least thirty-seven times in Respondents' Brief, an average of almost once every other page. Drapp's "venue rights" or "rights" under §508.010 are referred to no less than nineteen times. While BNSF's concern for Drapp's "venue rights" is fervently expressed, its arguments on Drapp's behalf are not relevant to the facts before the Court. There is no individual defendant in the underlying lawsuit as it stands, nor was there when originally filed. Mr. Drapp's "venue rights" would not be affected if this Court were to decide Relators' lawsuit against BNSF should be tried in Anchorage, Alaska. He is not a party. The case will not be tried against him in any venue.

Respondents' Brief demonstrates BNSF's real concern is not where litigation against Drapp can be brought, but whether it can remove litigation brought against *it* from Missouri courts to federal court. BNSF wants the venue statutes interpreted to render §508.040 virtually meaningless as to BNSF because it could not be sued in the full range of venues specified in §508.040 without its acquiescence. If BNSF is joined with an individual defendant, BNSF argues §508.040 does not apply, and venue is determined under §508.010. If BNSF is sued individually, in a venue proper under §508.040, BNSF can remove the case to federal court because it is a foreign corporation. Thus, litigation against it will end up in federal court or in a venue permissible under §508.010. That is not an exaggeration. Those are the facts.

Yet the Legislature's intent that railroads be sued in any county where they operate could not be more plainly spelled out in §508.040, the statute BNSF seeks to avoid while ironically peppering Respondent's Brief with exhortations to give effect to legislative intent. Perhaps recognition of the clear statutory language establishing venue in suits against railroads led BNSF to rely so much on arguments regarding *Drapp's* "venue rights". BNSF simply cannot argue in good faith that suits against *it* are improperly venued in the City of St. Louis.

Relators will, however, accept some of the responsibility for the breadth of BNSF's arguments. Relators concede that in asking this Court to reexamine, with a fresh outlook, venue issues that have plagued litigants for decades, Relators raise their own broad arguments regarding statutory interpretation. Relators do not want to simply ask this Court to reconsider Linthicum and rehash old arguments. That adds nothing to venue jurisprudence. Instead, Relators attempt to put the Linthicum opinion in the context of earlier cases, carefully analyzing and considering those decisions, as well as note the post-Linthicum confusion demonstrated by the case at bar.

Whatever the reason, Respondents chose to focus their argument almost exclusively on broad concepts such as *stare decisis* and the "venue rights" of a non-party while avoiding the circumstances presented by the underlying case. **However, Judge Neill misapplied and/or misinterpreted State ex rel. Linthicum v. Calvin, 57 S.W.3d 855 (Mo. banc 2001), and this Court need not overturn a single precedent to return Relators' lawsuit to the City of St. Louis where it belongs.**

Although BNSF asserts at p. 43 that "Plaintiffs cannot be allowed to utilize the corporate venue statute as a means to extend the venue of a civil action against an individual defendant", that is not what Relators urge. There is no individual defendant and venue is not being extended against any party. **Instead, BNSF seeks to utilize the general venue statute to *limit* the venue of civil actions against *it* under the corporate venue statute.** While Relators believe §508.040 has not been properly applied, §351.375 does not relate to foreign railroad corporations or set their residence for determining venue under §508.010, and *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855 (Mo. banc 2001) should be reconsidered, particularly if it may be applied as urged by BNSF, the arguments on those general issues should not distract from the particular facts and circumstances presented by the litigants in the underlying litigation. Those facts do not involve an individual defendant, much less one being deprived of "venue rights".

ARGUMENT

I. RELATORS ARE ENTITLED TO A PERMANENT ORDER OF PROHIBITION AND/OR MANDAMUS PROHIBITING RESPONDENT, THE HONORABLE BARBARA W. WALLACE, FROM EXERCISING JURISDICTION OVER THE UNDERLYING CASE EXCEPT TO RETRANSFER THE UNDERLYING CASE TO THE CITY OF ST. LOUIS AND FURTHER ORDERING RESPONDENT, THE HONORABLE MARGARET M. NEILL, TO VACATE HER MARCH 18, 2002 ORDER TRANSFERRING VENUE FROM THE CITY OF ST. LOUIS, BECAUSE VENUE IS PROPER IN THE CITY OF ST. LOUIS IN THAT THE

DEFENDANT IN THE UNDERLYING CASE DOES BUSINESS IN THE CITY OF ST. LOUIS AND OPERATES A RAILROAD IN THE CITY OF ST. LOUIS AND THE APPLICATION OF ACCEPTED CANONS OF STATUTORY CONSTRUCTION AND RECOGNITION OF THE LEGISLATIVE INTENT EXPRESSED IN §508.040 SUBJECTS A CORPORATION TO VENUE IN ANY COUNTY WHERE IT DOES BUSINESS OR WHERE IT OPERATES A RAILROAD.

Mindful of this Court's admonition against rearguing points covered in the initial brief, Relators will not repeat their discussion of the historical interpretation of §508.040, the proper statutory construction of §508.040, and reasons why §508.040, a specific venue statute, should control over more general venue statutes.

Rather than respond to the issues raised by Relators, BNSF has chosen to invoke broad arguments regarding legislative inaction, *stare decisis*, and the ghost of defendants past. **As to legislative inaction, BNSF conveniently ignores the legislative *action* undermining the basis upon which *State ex rel. Bowden v. Jensen*, 359 S.W.2d 343 (1962) was decided.** The Legislature repealed §§351.620 and 351.625 and replaced them with §§351.586 and 351.588, which deleted §351.625's reference to §351.375. Thus, BNSF's statement that "with full knowledge of this Court's decision interpreting §351.375 . . . the General Assembly has not enacted any legislation disapproving of those prior decisions," Resp. Brief, p. 38, is absolutely inaccurate. Instead, legislation *was* enacted eliminating any basis for applying that domestic corporation statute to a foreign corporation. In short, foreign corporations have specific statutes pertaining to them, and

domestic corporations have other specific statutes applying to them. This concept has apparently confused BNSF to the point that it somehow reaches the conclusion that "if one followed Relators' argument, a foreign corporation would not be required to comply with the requirement to maintain a registered agent in the state for service of process." There is no need to rely upon the domestic corporation registered agent statute, because, as noted above, §351.586 requires foreign corporations authorized to transact business in the state to continuously maintain a registered office and a registered agent.

Despite the legislative action noted above, given BNSF's reliance on legislative inaction, it is worth mentioning Courts have noted that legislative inaction is a "tenuous basis for determining legislative intent," Blue Springs Bowl v. Spradling, 551 S.W.2d 596, 601-602 (Mo. banc 1977), a "weak reed upon which to lean" and a "poor beacon" to follow in construing a statute. 3 Southerland Statutory Construction, §49.10, p. 291.

BNSF also invokes the doctrine of *stare decisis*. It has been said that "the strong respect for precedent which is ingrained in our legal system is a reasonable respect which balks at the perpetuation of error, and it is the manifest policy of our courts to hold the doctrine of *stare decisis* subordinate to legal reasons and justice, and to depart therefrom when such departure is necessary to avoid the perpetuation of pernicious error." Powell v. Bowen, 214 S.W. 142, 148 (Mo. banc 1919) (Graves, J., dissenting). Furthermore, BNSF's reliance on *stare decisis* is particularly inappropriate here, where *Relators* are urging that this Court follow the precedent of State ex rel. Columbia National Bank v. Davis, 284 S.W. 464 (Mo. banc 1926) and State ex rel. Henning v. Williams, 131 S.W.2d 561 (Mo. banc 1939), and where the cases BNSF relies upon addressed prior versions of

the business statutes and factual circumstances distinguishable from those presented here. BNSF cites no case involving the application of §508.040 or §508.010 to a railroad or a foreign railroad corporation. As noted elsewhere in this brief, railroads are given unique treatment under §508.040, and the application of the general business statutes to railroads is specifically limited.

BNSF makes several incredible and inaccurate statements in Respondents' Brief, one of which occurs in its *stare decisis* argument. BNSF states that "this Court must decide this matter in accordance with the O'Keefe and Linthicum decisions -- cases that this fact pattern mirrors." Resp. Brief, p. 45. The Linthicum distinctions were discussed in Relators' original brief and are touched on again in Point IV of this Reply Brief , but the fact pattern of this case simply does not "mirror" that of Linthicum. Nor can O'Keefe, which did not involve a railroad, did not involve §508.040, and did not involve a corporation sued as a sole defendant, but instead presented multiple original defendants, be said to "mirror" the circumstances presented here. It is important to correct the misperception of O'Keefe that BNSF seeks to perpetuate. At p. 26 of Respondents' Brief, BNSF inaccurately states that "for over half a century this Court has repeatedly and consistently held that RSMo. §508.040 is applicable if a suit is initiated solely against one or more corporations but if an individual is joined with the corporation as a defendant, RSMo. §508.010 is applicable." This is, apparently, a reference to O'Keefe, which was handed down in 1951. However, **O'Keefe did not hold that §508.040 is only applicable if suit is initiated solely against one or more corporations. Neither §508.040 nor its predecessor was an issue in O'Keefe.**

The specific issues raised by Relators have not been decided by this Court. As to the general issues implicated, both Relators and BNSF cite precedent, recent and distant, which they contend supports their position. The difference is that Relators have shown logic and the rules of statutory construction support application of the precedent they invoke, while the precedent cited by BNSF, particularly *State ex rel. Bowden v. Jensen*, 359 S.W.2d 343 (Mo. banc 1962), insofar as it pertains to foreign corporations, has yet to be re-evaluated in light of legislative enactments with respect to the statutes governing foreign corporations which call that precedent into question, and BNSF avoids discussion of the implications of the specific provision of §508.040 which prescribes where suits against railroads shall be commenced.¹

II. RELATORS ARE ENTITLED TO A PERMANENT ORDER OF PROHIBITION AND/OR MANDAMUS PROHIBITING RESPONDENT, THE HONORABLE BARBARA W. WALLACE FROM EXERCISING JURISDICTION OVER THE UNDERLYING CASE EXCEPT TO

¹ Relators are aware of *State ex rel. England v. Koehr*, 849 S.W.2d 168 (Mo. App. 1993). That Court of Appeals' decision, although handed down on February 9, 1993, appears to consider the issue as if §351.620 and §351.625, repealed in 1990, were still in effect, even quoting that part of *Bowden* which cited §351.620. *Id.* at 169-170. It is quite possible that when the suit in *England* was filed, the legislative change was not yet in effect. Regardless, *England* cannot be said to have reexamined *Bowden* in light of the new foreign corporation statutes.

RETRANSFER THE UNDERLYING CASE TO THE CITY OF ST. LOUIS, MISSOURI AND FURTHER ORDERING RESPONDENT, THE HONORABLE MARGARET M. NEILL, TO VACATE HER MARCH 18, 2002 ORDER TRANSFERRING VENUE FROM THE CITY OF ST. LOUIS CIRCUIT COURT, BECAUSE VENUE IS PROPER IN THE CITY OF ST. LOUIS EVEN IF §508.010, RSMO., IS APPLIED IN THAT BURLINGTON NORTHERN IS A FOREIGN CORPORATION AND §351.375, RSMO., DOES NOT APPLY TO FOREIGN CORPORATIONS OR SET THEIR RESIDENCE FOR PURPOSES OF DETERMINING VENUE UNDER §508.010, RSMO., EXCLUSIVELY WHERE THE CORPORATION LOCATES ITS REGISTERED OFFICE.

BNSF erroneously claims that §351.582, providing that a foreign corporation is “subject to the same duties, restrictions, penalties, and liabilities” as a domestic corporation, requires the residence of a foreign corporation for venue purposes be determined pursuant to §351.375, which pertains to domestic corporations. To reach that conclusion, BNSF excises §351.582's modifying phrase “except as otherwise provided by this chapter” and continues to ignore the existence of §351.588, the foreign corporation counterpart to §351.375.

BNSF then weaves its incorrect assertion that §351.375 applies to foreign corporations together with the O’Keefe reasoning to conclude §351.375 limits the residence of a foreign corporation to the county where it maintains its registered office or agent for determining venue pursuant to §508.010 when individual defendants are joined

with a foreign corporate defendant. BNSF particularly relies upon *State ex rel. Bowden v. Jensen*, 359 S.W.2d 343 (Mo. banc 1962). However, *Bowden* considered §§351.620 and 351.625, which were repealed in 1990. Section 351.625 was replaced by §351.588, which omitted any “all purpose” language regarding residence and deleted the prior reference to §351.375. There is no longer any statutory support for applying §351.375 to foreign corporations, and that part of the *Bowden* holding has been negated by legislative action.

BNSF seeks to avoid the statutes applying to foreign corporations by citing Mo. Const. Art. XI, §10, which discusses consolidation of Missouri railroads with railroads organized under the laws of other states or the United States. After admitting in ¶4 of their Answer to Relators' Petition for Writ of Mandamus and/or Prohibition that it is a Delaware corporation, BNSF argues, for the first time, that it is "afforded the same status as a domestic corporation under Missouri law." In other words, BNSF wants to have it both ways. When it removes a case to federal court, it wants to be considered a "foreign corporation." When it benefits its effort to avoid a particular state venue, it defines itself as a "domestic corporation" so it can argue that it resides only in St. Louis County. Ironically, in its effort to divest the City of St. Louis Circuit Court of venue and §508.040 of meaning, BNSF chooses to rely upon a constitutional provision designed to allow the courts of this State to "*retain jurisdiction* in all matters which may arise as if said consolidation had not taken place." Mo. Const. Art. XI, §10. That provision emphasizes that Missouri's public policy is to maintain jurisdiction over and regulation of railroads operating in this State, which militates *against* BNSF's attempt to apply a distorted

interpretation to Missouri's venue statutes so that it may remove litigation against it to federal court. It is also another example of how railroads are treated differently than other entities, including other corporations.

Assuming without concession that BNSF correctly asserts §351.375 generally defines the sole "residence" of foreign as well as domestic corporations for venue purposes, **BNSF incorrectly argues that §351.375.2 applies to a *railroad* corporation to restrict venue in actions against railroads joined with a non-corporate defendant.**

Missouri's legislature enacted a specific venue provision applying to railroads establishing that railroad litigation *shall* be commenced in any county in which the railroad operates even if no corporate office is maintained in that county. §508.040. That language in §508.040 is broader than that applying to other corporations. **The General Assembly expressly limited the application of Chapter 351 so that it could not be read to negate specific provisions such as §508.040 pertaining to railroads and other heavily regulated industries.** Section 351.690(4) provides:

Only those provisions of this chapter which supplement the existing laws applicable to railroad corporations . . . and which are not inconsistent with, or in conflict with the purposes of, or are not in derogation or limitation of, such existing laws, shall be applicable to the type of corporations mentioned above in this subdivision . . .

Applying §351.375 to railroad corporations to change and limit permissible railroad litigation venues is in derogation of the intent of the legislature expressed in §508.040 and preserved in §351.690(4).

III. RELATORS ARE ENTITLED TO A PERMANENT ORDER OF PROHIBITION AND/OR MANDAMUS PROHIBITING RESPONDENT, THE HONORABLE BARBARA W. WALLACE, FROM EXERCISING JURISDCITION OVER THE UNDERLYING CASE EXCEPT TO RETRANSFER TO THE CITY OF ST. LOUIS, MISSOURI, AND FURTHER ORDERING RESPONDENT, THE HONORABLE MARGARET M. NEILL, TO VACATE HER MARCH 18, 2002 ORDER TRANSFERRING VENUE FROM THE CITY OF ST. LOUIS CIRCUIT COURT, BECAUSE THIS COURT SHOULD RECONSIDER ITS DECISION IN STATE EX REL. LINTHICUM V. CALVIN, 57 S.W.3D 855 (MO. BANC 2001) IN THAT THE LINTHICUM DECISION WAS NOT CONSISTENT WITH THE PURPOSE OF MISSOURI VENUE STATUTES; WAS CONTRARY TO CANONS OF STATUTORY CONSTRUCTION AND MISSOURI APPELLATE COURT PRECEDENT; FAILED TO RECOGNIZE THE INTERRELATIONSHIP OF JOINDER AND VENUE; AND WAS BASED UPON A MISUNDERSTANDING OF STATE EX REL DEPAUL HEALTH CENTER V. MUMMERT, 870 S.W.2D 820 (MO. BANC 1994) AND THE SIGNIFICANCE OF ITS SEVERANCE OF VENUE AND PERSONAL JURISDICTION ISSUES.

Relators will not repeat the arguments presented in their original brief as to why this Court should reconsider its decision in State ex rel. Linthicum v. Calvin, 57 S.W.3d

855 (Mo. banc 2001). However, once again, BNSF's response is inaccurate and irrelevant to this case.

The heart of Respondents' Brief concerning Point III is found on p. 66. There BNSF claims that Drapp "was added to prevent removal of the case to federal court" and that Relators' filing of the suit against BNSF in the City of St. Louis under §508.040, which clearly applied to that pleading, was somehow an attempt to "improperly create venue." BNSF, if honest, has to admit that there was no attempt to create venue against BNSF in the City of St. Louis. None was necessary. The Legislature provided that railroads can be sued where they operate and BNSF operates in the City of St. Louis. **Furthermore, preventing removal, which BNSF asserts was Relators' motive, is not the same thing as creating venue.** This is a blatant appeal by BNSF for this Court to interpret Missouri's venue statutes not as the Legislature intended, but in such a manner that it may remove litigation to federal court. Once again, BNSF's argument betrays the weakness of its position. **BNSF knows that venue against it is proper in the City of St. Louis, it simply wants to be able to remove the case to federal court from that proper venue.** This Court should address the correct interpretation of the Missouri statutes at issue consistent with legislative intent and canons of construction without allowing distortion by consideration of removal. While BNSF attempts to read into Missouri's venue statute a legislative intent to allow it to remove cases brought against it in Missouri to federal court, no language in the statute supports BNSF's argument and this Court should not read into the statute an intent to facilitate removal when none exists.

BNSF also seems to suggest that the initial petition in this case, which was filed against BNSF only, should have been premised upon §508.010. Resp. Brief, p. 62. In other words, BNSF asserts that Relators should have ignored §508.040. This argument reveals BNSF's real motivation, which is to effectively eliminate the application of §508.040, the statute enacted by the Missouri Legislature establishing venue against railroads. **BNSF claims that if Respondents' ruling is upheld "only causes of action subject to improper venue are transferable" and ignores that the underlying case was filed in a proper venue and then transferred.**

Finally, BNSF contends that ignoring §508.040 when corporations are joined with individuals is necessary to keep that specific statute "from swallowing RSMo. §508.010", the general venue statute, Resp. Brief, p. 27, and that Linthicum "was necessary to maintain the protection of individuals and prevent forum shopping." Resp. Brief, p. 59. Again, there is no individual defendant here to be protected and there was no forum shopping against BNSF. As demonstrated in Relators' Brief, it is actually §508.010 that has been allowed to swallow §508.040. If the choice presented is one statute applying to the exclusion of the other, it is clear that the specific statute on railroads should govern over the general venue statute. However, Relators do not agree that allowing litigation to proceed in the same venue where it is properly filed against a corporate defendant after joinder of an individual defendant "swallows" §508.010. Section 508.010 does not give an individual defendant an expectation, much less a "right", to be sued where he resides, or even where he resides or the cause of action

accrued. Where there is a co-defendant, the individual defendant can be sued in any venue appropriate against the co-defendant.

Furthermore, in its effort to take advantage of Linthicum, BNSF distorts the situation confronting this Court in that case. There, a potential conflict existed between the various provisions of §508.010, and the Court did not rule on or interpret §508.040. Under §508.010, suit may be brought "in any county in this state" only "when all the defendants are non-residents of the state." §508.010(4). That specific provision arguably does not apply once resident defendants are added because no longer are "all the defendants" non-residents of Missouri. In contrast to that language before the Court in Linthicum, there is nothing in §508.040 requiring that all defendants be corporations. Relators based venue upon §508.040, and that venue statute's does not make it inapplicable when a non-corporate defendant is added to the lawsuit. While in Linthicum, addition of a resident defendant arguably destroyed the premise upon which venue was based, no such argument can be made here. BNSF is still a corporation and §508.040 still applies. There is nothing that makes the *original* venue in the City of St. Louis against BNSF improper.

As illustrated by the above, it is not the result in Linthicum so much as the breadth of that holding, and its susceptibility to interpretations such as Respondents', that have created uncertainty and problems for litigants. This Court attempted to give effect to the legislative intent expressed in §508.010(4). However, defendants such as BNSF have reacted to that case by seizing upon it as an open invitation to challenge venue under other statutes, such as §508.040, which do not contain §508.010(4)'s mandate that *all*

defendants be of a certain character before venue is proper. BNSF has taken a case designed to protect Missouri residents from being sued anywhere in the state under §508.010(4), which requires all defendants be non-residents, and applied it in this case where §508.010(4) is not an issue, no individual defendant is in the underlying litigation, no "scheme" was "employed by Relators to create venue", and BNSF's concern is not venue creation but its ability to remove litigation.

IV. RELATORS ARE ENTITLED TO A PERMANENT ORDER OF PROHIBITION AND/OR MANDAMUS PROHIBITING RESPONDENT, THE HONORABLE BARBARA W. WALLACE, FROM EXERCISING JURISDICTION OVER THE UNDERLYING CASE EXCEPT TO RETRANSFER IT TO THE CITY OF ST. LOUIS AND FURTHER ORDERING RESPONDENT, THE HONORABLE MARGARET M. NEILL, TO VACATE HER MARCH 18, 2002 ORDER TRANSFERRING VENUE FROM THE CITY OF ST. LOUIS CIRCUIT COURT, BECAUSE VENUE IS PROPER IN THE CITY OF ST. LOUIS IN THAT THE UNDERLYING CASE WAS ORIGINALLY BROUGHT AGAINST BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, A SINGLE CORPORATE DEFENDANT OPERATING A RAILROAD AND DOING BUSINESS IN THE CITY OF ST. LOUIS, BURLINGTON NORTHERN IS CURRENTLY THE SOLE DEFENDANT, AND RESPONDENT JUDGE NEILL MISAPPLIED AND/OR MISINTERPRETED THIS COURT'S DECISION IN STATE EX REL. LINTHICUM V. CALVIN, 57 S.W.3D 855

**(MO. BANC 2001) IN FINDING ST. LOUIS CITY VENUE IMPROPER
AGAINST BURLINGTON NORTHERN.**

In response to Point IV of Relators' Brief, BNSF makes the amazing assertion that "Relators cannot distinguish the facts in this case with the facts in State ex rel. DePaul Health Center v. Mummert or State ex rel. Linthicum v. Calvin . . .", apparently implying that the facts of those two cases were identical.

Relators provide the following chart for the Court's convenience:

	<u>DePaul</u> ¹	<u>Linthicum</u> ²	<u>Dowdy</u>
Originally filed against	Individual and corporate defendants	Single non-resident individual	Foreign railroad corporation
Venue statute applied to original petition	§508.010	§508.010	§508.040
Changes in Parties after filing	Individual defendant dismissed	Six additional defendants added	Employee of corporate defendant added, then dismissed
Venue proper under original petition?	No	Arguable (see p. 19 of Reply Brief)	Yes
Was the venue motion ruled on filed by an individual defendant?	No (DePaul)	Yes (Giles and Linthicum)	No (BNSF)

¹ State ex rel. DePaul Health Center v. Mummert, 870 S.W.2d 820 (Mo. banc 1994).

² State ex rel. Linthicum v. Calvin, 57 S.W.3d 855 (Mo. banc 2001).

Are the parties seeking venue transfer original parties?	Yes (DePaul)	No (Giles was added after filing)	Yes (BNSF only current defendant and only BNSF's motion was granted)
Party seeking to change venue asked court to consider in venue determination	Original petition	Amended petition expressing current status of parties	Neither original petition or current status of parties and pleadings
In determining venue, court considered	Original petition, not current status of parties and pleadings	Amended petition expressing current status of parties	Neither original petition or current status of parties and pleadings

Only this case presents underlying litigation originally filed against a foreign railroad corporation. Only this case involves application of §508.040. Only in Relators' lawsuit was a subsequent defendant added then dismissed. And only in the underlying case here did the trial court consider neither the original petition nor the current status of the parties and pleadings. With respect to other factors noted in the chart, unlike Linthicum, the underlying litigation does not present for consideration a venue motion filed by an individual defendant and, in contrast to Linthicum, the party seeking transfer was an original party to the litigation, not one added after filing. Unlike the situation in DePaul, venue under the Relators' petition was proper against the moving party. Relators do not ignore the holding in Linthicum. This is simply not a Linthicum case.

BNSF's Point IV argument also contains a red herring. Respondents have come up with the novel theory that despite the fact that this Court in DePaul considered the original petition rather than the current status of the parties or pleadings in determining

venue, Relators here have “abandoned” their original petition through amendment and “cannot rely on the original petition for any purpose.” Resp. Brief, p. 70.

The cases cited by BNSF do not even remotely address the issue of venue. In *Weir v. Brune*, 256 S.W.2d 810 (Mo. 1953), this Court confronted the question of whether “Counts II and III [of Plaintiff’s Petition] not having been disposed of, the appeal is premature and should therefore be dismissed.” *Id.* at 11. In *Welsh v. Continental Placement, Inc.*, 627 S.W.2d 319 (Mo. App. 1982), the court was presented with a statute of limitations issue which turned upon whether allegations in an amended pleading could be said to “relate back” for purposes of the statute of limitations to claims originally filed then dismissed. In *Leis v. Massachusetts Bonding & Ins. Co.*, 125 S.W.2d 906 (Mo. App. 1939), the court considered a motion to set aside a default judgment in which the defendant argued that default judgment could not be entered against it in light of its answer to the original petition despite its demurrer to the amended petition. *Id.* at 908. Finally, in *Evans v. ENO*, 903 S.W.2d 258 (Mo. App. 1995), the court addressed the propriety of summary judgment entered in favor of the plaintiffs on a suit to recover a deficiency on a promissory note after a foreclosure sale. Unfortunately for the plaintiffs, “there was no evidence of the foreclosure sale price in the record”, the only reference to the sale price having been in the original petition. *Id.* at 260. The court noted that an abandoned pleading “is generally not admissible into evidence except for use as an admission against the interest of the pleader.” *Id.*

BNSF’s theory that venue cannot be determined based on an “abandoned pleading” is contrary to DePaul and unsupported by the authority it cites; furthermore, its

application in this case would lead to a result diametrically opposed to that BNSF hopes to achieve. If a so called “abandoned pleading” cannot be considered in determining the propriety of venue, then venue in this case should not be determined based upon Relators’ First Amended Petition as urged by BNSF. Insofar as that petition contained allegations and claims against Drapp, those claims were also "abandoned" in light of his dismissal and have no more relevance in this action. **The pleadings before the court at the time of BNSF’s November 12th “memorandum” and the trial court’s transfer of venue did not contain any claim against Drapp, who had already been dismissed when BNSF attempted to renew Drapp's venue motion.**

In an attempt to avoid the logical consequence of its “abandoned pleadings” argument, BNSF distinguishes between an “amended pleading” dismissing an individual defendant and dismissal under Rule 67.02. BNSF does not explain the significance of this purported “distinction”. It appears BNSF is conceding that had Relators filed a Second Amended Petition omitting the claim against Drapp rather than a dismissal of those claims pursuant to Rule 67.02, the First Amended Petition upon which BNSF relies, naming BNSF and Drapp, would have been "abandoned" and irrelevant for determining venue. Not surprisingly, BNSF cites no authority for that “distinction” and **with all due respect Relators submit that it would be absurd to conclude that proper venue in this case turns on whether Relators filed a Second Amended Petition dismissing Drapp instead of dismissal under Rule 67.02.**

Rather than provide a reason for this Court to find venue against BNSF improper in the City of St. Louis, BNSF's argument demonstrates fallacies in its position. BNSF

knows that if this Court looks at the original petition, venue is proper in the City of St. Louis. BNSF also knows that if this Court considers only the pleadings and parties as they currently exist, venue is proper in the City of St. Louis. Thus, **BNSF has attempted to create a distinction where none exists so that it can say Relators' filing of an amended petition means this Court cannot consider the original petition for any purpose, yet the further amendment of the pleadings by dismissal of Drapp under Rule 67.02 somehow leaves the First Amended Petition, including the claim against Drapp, intact. BNSF cannot have it both ways.**

V. A DETERMINATION REGARDING WHETHER FOREIGN CORPORATIONS RESIDE ONLY WHERE THEY MAINTAIN THEIR REGISTERED AGENT OR OFFICE SHOULD BE BASED UPON THE LEGISLATIVE INTENT EXPRESSED IN STATUTES AS INTERPRETED CONSISTENTLY WITH THE RULES OF STATUTORY CONSTRUCTION, AND NOT BASED ON ANY PERCEIVED PUBLIC POLICY CONTRARY TO THAT EXPRESSED IN THE VENUE STATUTES.

In Points I - IV, BNSF proclaims that it urges a result intended by the Missouri Legislature. Respondents' Brief insists that legislative intent and *stare decisis* are the only paths this Court may travel to interpret §§508.010 and 508.040. It seems that the outcome of BNSF's argument, BNSF's conclusion that the Missouri Legislature did not intend BNSF to be subject to suit anywhere it operates a railroad, including the City of St. Louis, flies in the face of the plain language of §508.040 and BNSF overreached.

Although, considering the brazenness with which BNSF filed a memorandum renewing the motion to transfer venue or in the alternative to dismiss on behalf of its former co-defendant after his dismissal, the considerable ingenuity BNSF showed in bootstrapping its entire brief to that former party is in character.

However, in Point V, BNSF abandons all pretense of arguing legislative intent and reveals its true motivation. BNSF asks this Court to base its interpretation of §§508.010 and 508.040 upon what BNSF perceives to be the salutary "public policy" of preventing an increase in the number of lawsuits "filed in the City of St. Louis or other perceived plaintiff's venues." The clear implication of BNSF's argument and the obvious result if adopted by the Court is that legislative intent would not only be ignored, but deliberately dismissed. BNSF knows full well that the courts' role in interpreting statutes is to ascertain the intent of the Legislature, not to substitute their own determination of public policy. Where the Legislature has spoken on a subject, such as it has with venue, "the courts must defer to its determinations of public policy." Budding v. SSM Healthcare Systems, 19 S.W.3d 678, 682 (Mo. banc 2000).

Regardless of what BNSF wants the public policy of Missouri to be, it is clear what it is: railroads can be sued in the City of St. Louis or anywhere else they operate their railroad. Relators have not created venue in the City of St. Louis against BNSF. Venue against BNSF in the City of St. Louis was and is proper under §508.040. Respondents' Brief's blatant attempt to convince this Court to ignore the legislative intent expressed by the plain language of the venue statutes should be rejected and the venue statutes applied as written. Furthermore, BNSF's invitation to this Court to make its

ruling based upon whether a venue is "preferred" by plaintiffs or by defendants exposes the inadequacy of its arguments.

CONCLUSION

The arguments on the issues before this Court have been thoroughly briefed and Relators will not make this conclusion redundant. However, Relators do believe it necessary to respond to Respondents' conclusion, which is, like the oratory described in *Hall v. Brookshire*, 285 S.W.2d 60, 66 (Mo. App. 1955) "noteworthy only because of the ease with which [BNSF] crowded into one short paragraph such an abundance of misinformation." Although BNSF claims "never has this Court held that §508.040 shall apply in such circumstances", *State ex rel. Henning v. Williams*, 131 S.W.2d 56 (Mo. banc 1939) held exactly that regarding §508.040's predecessor. Although BNSF states "Linthicum properly recognized the intent of the General Assembly to limit venue when individuals are joined in a suit with a corporation", Linthicum addressed litigation involving a non-resident individual under §508.010(4), and the corporate venue statute, §508.040, was never before the Court. Finally, in what it no doubt intended as a *coup de grace*, BNSF says "Linthicum also properly rejected the very scheme employed by Relators to create venue" although the "scheme" BNSF refers to in Linthicum was apparently motivated by a desire to obtain venue in a Missouri circuit court where it would not have existed without the two step process, while in this case, venue was not created against BNSF and BNSF has alleged that Relators' motivation was to prevent removal.

While BNSF pays lip service to the concepts of respecting legislative intent and *stare decisis*, this Court can only reach BNSF's conclusions if it joins BNSF on the wrong side of Alice's looking glass. BNSF disparages Relators' quotation of Tweedledee's concept of logic from Lewis Carroll's *Alice's Adventures in Wonderland* to illustrate the difficulty Missouri courts have historically encountered in their attempts to simplify venue. Relators admit to being somewhat surprised by that criticism, given that BNSF has adopted the Humpty Dumpty method of statutory interpretation:

"When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean -- neither more nor less." "The question is," said Alice, "whether you can make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master -- that's all."

LEWIS CARROLL, *ALICE'S ADVENTURES IN WONDERLAND*, Chapter 6 (1865).

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH RULE 84.06(c)

The undersigned hereby certifies, pursuant to Rule 84.06(c), that:

1. This brief includes the information required by Rule 55.03, including the undersigned's address, Missouri Bar number, telephone number, and fax number;
2. This brief complies with the limitations contained in Rule 84.06(b);
3. This brief, including the certificate of service, this certificate, and the signature block, contains 6,660 words according to the word-processing system used to prepare the brief; and
4. This brief uses characters which are 13 font, Times New Roman, and does not use a monospaced face.
5. Microsoft Word was used to prepare Relators' brief.
6. The diskette provided with this brief has been scanned for viruses and is virus free.

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing brief and one copy of accompanying disks were mailed via U.S. Mail, first-class, postage prepaid, on this 30th day of August, 2002, to:

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