

In the Supreme Court of Missouri

No. SC87057

**STATE OF MISSOURI, ex. rel.
Memorial Park Cemetery
Association of Mo.,
and
Henry W. DeVry, III,
and
Mark H. Bailey,**

Relators

vs.

**HON. RANDALL R. JACKSON
Judge, Division 1
Circuit Court
Buchanan County, Missouri,**

Respondent.

REPLY BRIEF

THE BRUCE LAW FIRM
Jeffrey W. Bruce MO Bar # 32857
P.O. Box 797
Belton, MO 64012
Tel (816) 322-7400
Fax (816) 322-7402
bruce.law@att.net

ATTORNEY FOR RELATOR
MARK H. BAILEY

EDMUNDS LAW OFFICE, L.L.C.
Fritz Edmunds, Jr. MO Bar # 46503
10990 Quivira, Suite 200
Overland Park, KS 66210
(913) 661-0222 Telephone
(913) 661-0212 Facsimile
fritz@edmundslaw.com

ATTORNEY FOR RELATORS
MEMORIAL PARK & DEVRY

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ARGUMENT AND AUTHORITIES

I. MANDAMUS IS APPROPRIATE REMEDY

Respondent's brief argues mandamus should not lie because Relators do not seek to execute a clearly established and presently existing right. Plaintiffs then go on to offer purported public policy arguments in attempting to overturn precedent for determining how and when venue is determined. That precedent is established by this Court in *State ex rel. DePaul Health Ctr. v. Mummert*, 870 S.W.2d 820 (Mo. 1994), and *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855 (Mo. banc 2001). Plaintiffs attempt to avoid the rule that venue is determined when a Defendant is brought into a case, by arguing that the rule should be reevaluated, and expanded (Respondent's Brief 16).

Plaintiffs argue that there is no clearly established rule as to when venue is determined. But Plaintiffs cite no authority contradicting the rule in *DePaul* or *Linthicum*. Plaintiffs argue that there is an "unsettled question of law," apparently because *Linthicum* carved out a narrow exception to the rule in *DePaul*, for when a new defendant is brought into a case. Plaintiffs' argument for further expansion of the rule does not make the rule an "unsettled question of law."

Although Defendants do not believe the time for fixing venue is any time the claims against a defendant change, the position articulated by Judge Limbaugh's dissent in *DePaul* would actually support the writ in this case – requiring Respondent to transfer the cause to a proper venue. Judge Limbaugh writes:

[T]he better rule, in my view, is that the propriety of venue and the "ministerial duty to transfer the case" should be determined according to the presence and

status of the parties at the time the court rules on the merits of the challenge.

DePaul, at 823 (Limbaugh, J., dissenting).

Because Respondent in this case had no jurisdiction to grant a contested motion to amend by adding new claims, *Green v. Neill*, 127 S.W.3d 677, 678 (Mo. 2004), the undisputed status of the parties at the time Defendants challenged venue was that venue was improper. Plaintiffs admitted that venue was improper in Buchanan County as the case stood when brought (Exhibit G-184: 3-12; 191:13-18). Voluntarily dismissing parties, as discussed in Judge Limbaugh's dissent, does not require action from a court of proper jurisdiction. Rule 67.02(a). However, amendment of a petition, after defendants contest venue and file an answer, does require court action. Rule 55.33(a). The trial court had no power to act, other than to transfer venue. *Green*, at 678.

Respondent chose to overlook Defendants' motion for transfer to a proper venue, in order to first entertain Plaintiffs' later-filed motion to amend, to, in effect, grant himself jurisdiction (Exhibit G- pp. 4-5, 7). Respondent's actions, without jurisdiction, are absolutely void. *Worley v. Worley*, 19 S.W.3d 127, 130 (Mo. 2000); *Strozewski v. City of Springfield*, 875 S.W.2d 905, 906 (Mo. 1994); and see *Mauldin v. City of St. Louis*, 872 S.W.2d 139 (Mo. Ct. App. 1994) (amendment after court lost jurisdiction ineffective).

Plaintiffs do not deny that Defendants have a clearly established and presently existing right to proper venue. *Litzinger v. Pulitzer Publishing Co.*, 356 S.W.2d 81, 88 (Mo. 1962). Plaintiffs, instead, suggest that judges should be allowed to make discretionary rulings even though venue is improper and they have no jurisdiction (Respondent's Brief 14). Additionally, Plaintiffs propose a new rule for when venue should be determined

(Respondent’s Brief 16). A rule which would make the determination of venue a perpetual ‘moving target.’ Respondent’s brief rightly abandons Plaintiffs’ earlier argument that forum shopping is acceptable in Missouri (Exhibit L, p. 4). But Respondent’s brief continues to argue that plaintiffs’ right to choose venue is “significant.” That right, is not absolute. It does not extend to venues which are statutorily improper. *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194, 196 (Mo. banc 1991) (venue in Missouri is determined solely by statute).

Improper venue is a fundamental defect. *State ex rel. Green v. Neill*, 127 S.W.3d 677, 678 (Mo. 2004). Defendants would be severely prejudiced if this matter is not transferred to a proper venue. *Id.* Mandamus is the appropriate remedy for requiring the performance of the ministerial act, to prevent this irreparable harm. *DePaul*, at 823; *State ex rel. Bunker Res. v. Dierker*, 955 S.W.2d 931, 933 (Mo. 1997); *State ex rel. Turnbow v. Schroeder*, 124 S.W.3d 1, 3 (Mo. Ct. App. 2003).

II. RELATION BACK IS INAPPOSITE

Plaintiffs offer a strained interpretation of the relation back doctrine to suit their preference. Plaintiffs would have this Court ignore the language of Rule 55.33(c) stating: “An amendment changing the *party* against whom a claim is asserted relates back...” (emphasis added). Rule 55.33(c) does not state that an amendment relates back for amendments changing the *claims* asserted against an existing party. The cases and Rule 55.33 itself contain no mention of the word “venue” or relation back for purposes of determining venue. Moreover, Rule 55.33(c) states a requirement that “the *party to be brought in by amendment*...knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party” (emphasis added).

This requirements from Rule 55.33(c) is also not satisfied in the present case. There was no mistake as to identity of the parties, and none of the defendants were brought in by amendment. Also, defendant Bailey could not have known that actions for fraud or breach of duty of loyalty (offered to cure venue) would have been brought against him, but for some mistake (also a requirement of Rule 55.33(c)). Notwithstanding, there is no issue regarding a statute of limitations.

The Missouri relation back doctrine has its origin in *Daiprai v. Moberly Fuel & Transfer Co.*, 359 Mo. 789, 223 S.W.2d 474, 476 (Mo. 1949). *Bailey v. Innovative Management & Inv.*, 890 S.W.2d 648, 651 (Mo. 1994). *Daiprai* and its progeny formulate the rule that saves *claims set forth or attempted to be set forth in the original petition*, when defendants receive notice of those claims but were mistakenly misnamed. *Id.*; *Watson v. E. W. Bliss Co.*, 704 S.W.2d 667, 670 (Mo. 1986); *Byrnes v. Scaggs*, 247 S.W.2d 826, 830-31 (Mo. 1952); *Clark Estate Co. v. Gentry*, 362 Mo. 80, 91 (Mo. 1951); and see *Hummell v. Button*, 541 S.W.2d 737 (Mo. Ct. App. 1976). These cases hold that certain amendments, meeting several criteria, relate back to the original claims filed, for purposes of statute of limitations. *Id.* The cases do not address venue. *Id.*

Respondent's brief cites no Missouri or other authority holding (or suggesting) that the relation back doctrine affects the determination of venue (Respondent's Brief 11). Indeed, the only Missouri case located by Relators addressing relation back with any connection to venue holds, "there can be no 'relation back' with regard to objections to venue." *State ex rel. Uptergrove v. Russell*, 871 S.W.2d 27, 29 (Mo. Ct. App. 1993). Plaintiffs' stilted interpretation of Rule 55.33(c) has no legal foundation.

A. New Claim For Purposes of “Holding Venue” Not Subject to Relation Back

On one hand Plaintiffs argue that the new claims alleged in their proposed amended petition for the purpose of curing venue arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading (Respondent’s Brief 7). On the other hand, Plaintiffs argue that their allegations of fraudulent inducement arise from a separate and distinct promise or representation (Respondent’s Brief 19). Plaintiffs cannot have it both ways here. If the latter is correct, Plaintiffs’ Relation Back argument is further invalidated. If the latter is *incorrect* (which it is), Plaintiffs’ claim of fraudulent inducement must fail because, as addressed *aftra*, a claim for fraudulent inducement is permitted only if it arises from acts that are separate and distinct from the contract. *O’Neal v. Stifel, Nicolaus & Co.*, 996 S.W.2d 700, 703 (Mo. Ct. App. 1999). If Plaintiffs’s allegation of fraudulent inducement did not arise from a separate transaction, Plaintiffs’ argument for venue in Buchanan County under 508.010(6) RSMo. must also fail. *Id.*, *Sisco v. James*, 820 S.W.2d 348, 351 (Mo. Ct. App. 1991) (pleading which states no cause of action confers no subject matter jurisdiction on a court and is subject to dismissal).

B. Respondent Had No Authority to Amend

Plaintiffs also mistakenly argue that *State ex rel. Green v. Neill*, 127 S.W.3d 677 (Mo. 2004) does not prevent Respondent from ruling on Plaintiffs’ motion to amend when venue is improper (Respondent’s Brief 9). The language in *Green* is clear, “Because improper venue is a fundamental defect, a court that acts when venue is improper acts in excess of its jurisdiction. Prohibition lies to bar the trial court from taking any further action, except to transfer the case to a proper venue.” *Id.*, at 678 (emphasis added). *Green* does not say that

trial courts are prevented from taking any further action *except* ruling on a contested motion for leave to amend. *Id.*

It is well settled that if venue is improper in the court in which the action is brought, the trial court has a ministerial duty to transfer the case to a court of proper venue. § 476.410 RSMo.; *DePaul* at 822; *State ex rel. Missouri Property & Casualty Ins. Guar. Ass'n v. Brown*, 900 S.W.2d 268, 271 (Mo. Ct. App. 1995). Respondent's ability to act is clearly limited by Supreme Court precedent, Supreme Court Rule, and by Missouri statute. *Id.*; Rule 51.045; and 476.410 RSMo.

C. Venue Would Nevertheless Be Improper in Buchanan County

At page 9 of Respondent's brief, Plaintiffs Mischaracterize Relators' argument. Plaintiffs represent that Relators believe venue would be proper in Buchanan County under Plaintiffs' proposed amended petition (Respondent's Brief 9). Relators do not believe venue to be appropriate in Buchanan County, even under Plaintiffs' proposed amended petition. The proposed amended petition fails to state a claim for fraudulent inducement, and venue for such a claim, if plausible, would lie in Clinton County (See Relators' Brief 23-25). Nevertheless, venue in this case was supposed to be determined as the case stood when brought. *DePaul*. Plaintiffs' proposed amended petition does not seek to add additional parties, and therefore, would not alter the determination of venue under *Linthicum*.

**III. PLAINTIFFS' ALLEGED CLAIM OF FRAUDULENT INDUCEMENT
WOULD NOT ACCRUE IN BUCHANAN COUNTY**

Plaintiffs argue that the conduct of Mr. Bailey causing them injury was his allegedly making promises that he did not intend to keep in the future (Respondent's Brief 19). Under

Plaintiffs’ reasoning they could have maintained a suit for fraud the moment Mr. Bailey allegedly made a relied-on promise that he did not intend to keep in the future – before he had any opportunity to honor or breach the alleged promise. The only authority Plaintiffs cite for their erroneous proposition is “*See O’Neal v. Stifel, Nicolaus & Co.*, 996 S.W.2d 700, 702 (Mo. App. E.D.1999) (fraudulent inducement claim arose out of representations during negotiations)” (Respondent’s Brief 19). Plaintiffs misread *O’Neal*. The Eastern District does not hold that a cause of action accrues before it is capable of being brought. A thorough reading of *O’Neal* reveals that the plaintiff brought two separate claims against the defendant. Mr. O’Neal alleged a breach of contract and fraudulent inducement. *O’Neal*, at 701. The court held that statements of defendants’ intent to enter into an employment contract with plaintiff were sufficient to state a claim for fraudulent inducement when the defendant did not enter into the contract and plaintiff had prepared to leave his other employment. *Id.*

It is important to note that, unlike the case at bar, the promises in the *O’Neal* contract were separate and distinct from the promises in the inducement. *Id.* at 702. Indeed, the court cites the Eighth Circuit in holding that, “a fraud claim is permitted only if it arises from acts that are separate and distinct from the contract.” *Id.* (citing *Bernoudy v. Dura-Bond Concrete Restoration*, 828 F.2d 1316 (8th Cir. 1987) (emphasis added)). Plaintiffs do not claim that Mr. Bailey promised anything more, or different, than the covenants and promises that are encompassed in his contract. Accordingly, Plaintiffs state no acts separate and distinct from the contract, and cannot state a claim for fraudulent inducement. *Id.*; see also, *Dillard v. Earnhart*, 457 S.W.2d 666, 670 (Mo. 1970) (“If the recipient [of a representation] wishes to obtain legal assurance that the intention honestly entertained will be carried out, he must see

that it is expressed in the form of an enforceable contract”).

A. Accrual of Claims of Fraudulent Inducement

One of the questions before the Court is this: Under the venue statute, 508.010 RSMo., when and where does a fraudulent inducement cause of action accrue if the claim is based on allegations that defendant misrepresented his intent to perform future acts? This question has not been directly addressed by Missouri Appellate Courts. However, precedent from this Court holds that the time of accrual for other similar torts occurs when and where the tort culminates or is completed. *State ex rel. Willman v. Marsh*, 720 S.W.2d 939, 941 (Mo. 1986) (import of petition was defendants’ wrongful inducement of a breach of contract culminated in Jackson County and there that purported injury occurred and the cause of action accrued); *Kansas City, Mun. Corp. v. Keene Corp.*, 855 S.W.2d 360, 366 (Mo. 1993) (cause of action for strict liability and fraud accrues when the damage resulting therefrom is sustained and is capable of ascertainment); *State ex rel. Stifel, Nicolaus & Co. v. Clymer*, 522 S.W.2d 793, 797 (Mo. 1975) (cause of action accrues at the moment of a wrong if the injury of the plaintiff is complete at the time of the act). The time when a cause of action accrued is determined by ascertainment of the time when the plaintiff could first have maintained an action to enforce his cause of action. *State ex rel. State Life Ins. Co. v. Faucett*, 163 S.W.2d 592, 596 (Mo. 1942).

Plaintiffs argue that the wrong in the present case was Mr. Bailey allegedly making promises about future actions with a present intent not to perform (Respondent’s Brief 19). Plaintiffs’ position is like arguing in a medical malpractice case that the wrong occurs when the physician does not properly prepare himself or herself to meet the standard of care while

in medical school. It cannot be credibly argued that Mr. Bailey's alleged wrong was complete at the time of the alleged promises of future conduct. He must first act contrary to his promises for Plaintiffs to sustain any legal injury. If his promises/representations are not false, they cannot comprise a requisite element of fraud. *State ex rel. PaineWebber, Inc. v. Voorhees*, 891 S.W.2d 126, 128 (Mo. 1995) (stating nine elements for fraud, the first of which is a representation that is false). Promises of future action are not false until they are broken. This is so even if the promise is *believed* by the maker to be false when made, because a belief as to a statement's falsity is a separate element of the tort of fraud. *Id.*

A cause of action for fraud does not accrue until all the elements are present:

Generally, it may be said that a cause of action accrues at the moment of a wrong, default, or delict by the defendant and the injury of plaintiff, although the actual damage resulting therefrom may not be discovered until sometime afterwards, if the injury, however slight, is complete at the time of the act. But if the act is not legally injurious until certain consequences occur, it is not the mere doing of the act that gives rise to a cause of action, but the subsequent occurrence of damage or loss as the consequence of the act, and therefore, in such case, no cause of action accrues until the loss or damage occurs.

State ex rel. State Life Ins. Co. v. Faucett, 163 S.W.2d 592, 596 (Mo. 1942).

Plaintiffs could not have maintained an action to enforce their cause of action unless and until the alleged representations were false and caused damage. *Id.* The alleged injury was not complete until Mr. Bailey allegedly did not fulfill his promises. There would be no legal injury unless and until Mr. Bailey allegedly breached his agreement. Or as Plaintiffs put

it, “Plaintiffs’ cause of action would not have arisen but for Bailey’s conduct in violating his non-compete agreements” (Respondent’s Return p. 12).

In arguing that their claim for fraudulent inducement accrues where Mr. Bailey allegedly made promises he did not intend to keep, Plaintiffs do not refute that a cause of fraud cannot be maintained until all the elements of fraud are met, including damage (See Relators’ Brief 24-25). Plaintiffs’ own argument is that they were damaged when Mr. Bailey *breached* his non-compete agreement in Lathrop, *Clinton County*, Missouri (Exhibit A ¶¶ 16-26). In Respondent’s brief, however, Plaintiffs argue that they were damaged when they *entered* into contracts with Mr. Bailey for the sale of his business and employment with the new owners because Mr. Bailey allegedly did not intend to abide by the promises therein (Respondent’s Brief 25). But Plaintiffs do not plead such damage in their petition (Exhibit A ¶¶ 32, 38, 45, 51, 65) nor in their proposed amended petition (Exhibit F ¶¶ 37, 43, 49, 55, 62, 68, 81). Plaintiffs plead damage resulting from an alleged *breach* of contract, not from *entering* into a contract. Plaintiffs’ argument that damages arose when they entered into contracts is specious.

IV. PLAINTIFFS’ PUBLIC POLICY ARGUMENTS ARE UNSUPPORTABLE

Plaintiffs assert that they should be allowed to change venues whenever their various claims are amended. They argue that plaintiffs should be able to jump to different venues during the case because of alleged public policy reasons. Plaintiffs argue essentially that abiding by the rule in *DePaul* and *Linthicum* – determining venue when the case is brought (or a new defendant is brought into the case – is too harsh on plaintiffs in general, and will result in an administrative burden on the courts. Plaintiffs provide no substantive support for

either argument.

A. Present Rules Are Not Harsh

There is no harshness when venue is determined as a case stands when brought, by evaluating the parties and claims pursuant to the initiating document that plaintiffs file to frame their case. Respondent's brief does not address the fact that defendants are similarly required to know their case when filing their answer (or taking any other action), at the risk of waiving objection to improper venue (See Relators' Brief 19). Reduced to its core, Plaintiffs' argument is that the rule for when venue is determined is "harsh" unless they are allowed to change venue at any time. Plaintiffs cannot seriously argue the present rule is more harsh to plaintiffs, especially when defendants have only one opportunity to object to improper venue. *State ex rel. Uptergrove v. Russell*, 871 S.W.2d 27, 29 (Mo. Ct. App. 1993). Likewise, Plaintiffs cannot reasonably argue that a case tried in a *proper* venue, as determined by statute to provide a convenient, logical, and orderly forum for litigation – but not the venue they *prefer* – is in any way "harsh." *Linthicum*, at 857.

B. No Administrative Burden

Plaintiffs suggest an administrative burden will result if *DePaul* and *Linthicum* remain good law (Respondent's Brief 15). However, the administrative burden to the courts would be greater under Plaintiffs' suggested scenario because cases could be transferred to different venues without the filing fees to help offset the costs. There would be little incentive to prepare one's petition with due diligence. Filing fees are, and should be, required when a plaintiff voluntarily dismisses a case and then re-files. § 488.031 R.S.Mo. Consistent with the results in Rule 67.02(d), Re-filing is an appropriate, comparatively minor, consequence

if a plaintiff does not adequately prepare his case, changes his mind, and wants to try again (or attempt pretensive venue).¹ Plaintiffs' proposed rule would likely provide a *greater* drain of judicial resources because Missouri plaintiffs would have less incentive to prepare their cases carefully, so Plaintiffs' rule would promote additional motion practice.

Plaintiffs offer conflicting arguments with regard to the *Linthicum* case. Plaintiffs first argue that determining venue, not when defendants are brought into a case but when plaintiffs add new claims, is consistent with the rule set forth in *Linthicum* (Respondent's Brief 10). Plaintiffs then argue, "this Court should re-examine its construction of § 508.010 in *Linthicum*." (Respondent's Brief 16). In so arguing, Plaintiffs acknowledge without admitting that this Court has decided precisely when venue is to be determined. See *St. Louis County v. State Tax Com.*, 562 S.W.2d 334, 338 (Mo. 1978) (Supreme Court has the power to interpret Missouri statutes). Plaintiffs go on, however, to argue that § 508.010 should not be construed in a temporal sense, and that venue should remain an open question throughout litigation (Respondent's Brief 16-17). Plaintiffs' "public policy" argument runs counter to established Missouri precedent and policy. *State ex rel. Johnson v. Griffin*, 945 S.W.2d 445, 446-447 (Mo. 1997) ("it inures to the benefit of the parties and the judicial system, for the purpose of efficient administration of justice, to bring the issue [of improper venue] to the trial court's attention at the earliest possible time. This allows disposition of the issue to be made promptly so that the litigation can proceed elsewhere"); *State ex rel. Rothermich v. Gallagher*,

¹Ironically, Plaintiffs complain about filing fees when Defendants were required to pay filing fees in the appellate courts, and thousands of dollars in attorney fees in order to contest improper venue.

816 S.W.2d 194, 196 (Mo. 1991) (purpose of venue statutes is to provide “convenient, logical and orderly forum for litigation”). Determination of venue every time the claims change, is not consistent with *DePaul, Linthicum*, or Missouri public policy.

V. MANDAMUS IS APPROPRIATE TO CORRECT PRETENSIVE VENUE

Plaintiffs argue that mandamus is not appropriate to challenge the sufficiency of pleadings (Respondent’s Brief 21). Plaintiffs misunderstand the issue. Relators do not seek judgment on the pleadings or to reverse a denial of a motion to dismiss. Relators challenge improper venue and the Respondent’s authority to act when venue is improper (except for performing the ministerial task of transfer). *Green*, at 678.

In order to establish venue in Missouri, plaintiffs need to state a valid claim for which relief can be granted. *State ex rel. Ehrlich v. Hamilton*, 879 S.W.2d 491, 492 (Mo. 1994) (“venue is pretensive if the petition on its face fails to state a claim against the resident defendant”). Because Plaintiffs cannot state a valid claim for fraudulent inducement – the only claim they rely on for Buchanan County venue – Plaintiffs’ claim of venue is pretensive. *Id.*

It is undisputed that Plaintiffs’ petition fails to state a claim for which venue is proper in Buchanan County. Plaintiffs’ proposed First Amended Petition also fails to state a claim for which venue is proper in Buchanan County. Plaintiffs argue against this fact, but their proposed amended petition fails to state a claim for at least three reasons. Those reasons and Respondent’s rebuttal arguments are addressed below, in order of easiest to more complex.

A. No Reasonable Reliance

Plaintiffs’ proposed amended petition does not support their claim of reasonable

reliance, a requisite element of fraudulent inducement. *Paine Webber*, at 128. Plaintiffs first argue that they need not plead facts to support their conclusion that they reasonably relied on Mr. Bailey's representations (Respondent's Brief 26). Plaintiffs cite the rule that fact pleading does not require evidentiary facts but "ultimate" facts. Plaintiffs conspicuously omit the remainder of the rule: that pleadings cannot rely on mere conclusions. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 379-380 (Mo. 1993) (motions to dismiss for failure to state a claim have substantially more 'bite' under our 'fact pleading' rules than they have under the federal system of 'notice pleading'); See also, Plaintiffs' citations, *M & H Enterprises v. Tri-state Delta Chems., Inc.*, 984 S.W.2d 175, 181 (Mo. Ct. App. 1998) (pleading must allege ultimate facts and cannot rely on mere conclusions); *Charron v. Holden*, 111 S.W.3d 553, 555 (Mo. Ct. App. 2003) (conclusory allegation that actions were "in retaliation for, and to punish" are conclusory); and *Sofka v. Thal*, 662 S.W.2d 502, 509 (Mo. banc 1983) (where petition contains only conclusions and neither the ultimate facts nor any allegations from which to infer those facts, motion to dismiss is properly granted).

Plaintiffs' proposed amended petition states only, "The Plaintiffs had a right to rely upon Defendant Bailey's aforesaid representation and were reasonable in doing so." (Exhibit F ¶ 36). Plaintiffs' conclusory statement is not sufficient to state a claim for fraudulent inducement. *Hoag v. McBride & Son Inv. Co.*, 967 S.W.2d 157, 174 (Mo. Ct. App. 1998) (pleader cannot merely conclude that it had the right to rely on the alleged misrepresentation to survive a motion to dismiss). Plaintiffs simply do not allege facts that would support reasonable reliance on alleged oral representations, especially when the alleged

representations were merged into a written contract.

Plaintiffs argue that additional allegations from their proposed amended petition can be divined to *infer* justifiable reliance (Respondent’s Brief 15). However, a review of the proposed amended petition and its incorporated exhibits establishes clearly that Plaintiffs did not rely on Mr. Bailey’s representations – justifiably or otherwise. Plaintiffs required a writing which subsumed the alleged representations and prescribed damages and other relief. Plaintiffs’ Employment Agreement states, “*This Agreement constitutes and expresses the whole agreement and all representations between Employer and Employee with respect to the subject matter hereof, all promises, understandings or representations relative thereto being herein merged* except that this Agreement shall not supplant the terms of the Share Interest Option Agreement and of the Buy-Sell Agreement” (Exhibit F-150 ¶ 12(a) (emphasis added)). Likewise, Plaintiffs’ Asset Purchase Agreement contains a similar clause (Exhibit F-164, ¶ 10(a)). Plaintiffs’ proposed amended petition does not state a valid claim for fraudulent inducement because Plaintiffs do not and cannot state justifiable reliance. Accordingly, venue is pretensive. *Ehrlich*, at 492.

B. No Damage

Plaintiffs’ proposed amended petition does not include a valid claim of damage – another of nine elements required to state a claim for fraudulent inducement. *PaineWebber*, at 128. As this Court has previously held, damage for an alleged breach of contract cannot be the basis for damage for an alleged fraudulent inducement:

[T]he damage complained of was not caused by, nor resulted from, the fraud which induced the execution of the contract. On plaintiff’s own theory of

values the contract was highly beneficial. If the fraudulently induced contract was valid, beneficial and enforceable, the damage resulting to plaintiff from its non-performance was not caused by the fraud which induced its execution. Absent the contract plaintiff had no right to acquire the property, and no bargain to lose. The damages, if any, resulting from the failure of defendants to convey the described property to plaintiff in accordance with the contract, and any loss occasioned by the breach of the contract, did not and could not have been the direct result of the fraud complained of. Defendants are not liable to plaintiff in an action of fraud and deceit for the benefits which would have accrued to plaintiff from the performance of the contract which plaintiff alleges he was fraudulently induced to enter into.

Dolan v. Rabenberg, 360 Mo. 858, 868 (Mo. 1950).

Plaintiffs reach to claim that they were damaged by giving Mr. Bailey access to pre-need funeral lists as part of his employment (Respondent's Brief 18). But Plaintiffs admit these lists were part of Mr. Bailey's job, and the Plaintiffs do not claim damage from Bailey accessing the lists. Plaintiffs claim damage (in a separate count) resulting from Mr. Bailey's alleged *disclosing* or sharing the lists with defendant DeVry to compete with Plaintiffs (Exhibit F, ¶ 41). Again, Plaintiffs' proposed amended petition does not allege damage arising from entering into contracts with Mr. Bailey. Plaintiffs' argument does not save them from the fact that they can state no claim for damages resulting from an alleged fraudulent inducement. *Dolan*, at 868. As such, venue is pretensive. *Ehrlich*, at 492.

C. No Particularity

Ordinarily, intent may be averred generally. Rule 55.15. But intent for future actions presents different circumstances than are ordinarily the basis for claims of fraud. For decades the law in Missouri prevented claims of fraud based on representations of future acts. See *Riss & Co. v. Wallace*, 239 Mo. App. 979, 989 (Mo. Ct. App. 1946) (“It is not sufficient that the promisor, when making the promise, had no intention of fulfilling it, if the promise was as to an act to be performed in the future”); *Reed v. Cooke*, 331 Mo. 507, 515 (banc 1932) (fraud “cannot ordinarily be predicated on unfulfilled promises or statements as to future events”); see also, *Yerington v. Riss*, 374 S.W.2d 52, 58-59 (Mo. 1964); *Bayer v. American Mut. Casualty Co.*, 359 S.W.2d 748, 754 (Mo. 1962); *Bryan v. Louisville & N. R. Co.*, 292 Mo. 535, 544-545 (Mo. 1922) (a promise, though made without intention to fulfill, is not a misrepresentation of an existing fact); *Younger v. Hoge*, 211 Mo. 444 (Mo. 1908).

Yerington, *Bayer*, *Bryan*, and *Younger* have not been expressly overruled by this Court. See also *O'Neal v. Stifel, Nicolaus & Co.*, 996 S.W.2d 700, 703 (Mo. Ct. App. 1999) (“statements and representations as to expectations and predictions for the future are insufficient to authorize recovery for fraudulent misrepresentation”). In 1978 the Supreme Court of Missouri began down a road inviting baseless lawsuits by allowing Missouri plaintiffs to allege fraud, without supporting facts, based on speculation that defendants did not intend to perform contract terms in the future. The Court overruled *Reed* and *Riss*, by interpreting *Dillard v. Earnhart*, 457 S.W.2d 666 (Mo. 1970), *Wallach v. Joseph*, 420 S.W.2d 289, 295 (Mo. 1967), and *Musser v. General Realty Co.*, 313 S.W.2d 5, 10 (Mo. 1958) as holding that fraud may be predicated on statements of future events because “state of mind, or intent, is itself an ‘existing fact’, the misrepresentation of which can constitute fraud.”

White v. Mulvania, 575 S.W.2d 184, 188 (Mo. banc 1978) (dissent by Bardgett, J; Stockard, S.J; not participating: Finch, J. and Simeon, J.); See also *Schimmer v. H. W. Freeman Constr. Co.*, 607 S.W.2d 767, 770 (Mo. Ct. App. 1980) (Supreme Court recognized “trend” of expanding basis for fraud claims). One of the cases relied on by the *Mulvania* court is *Dillard v. Earnhart*. The *Dillard* court departs from decades of precedent, stating that “A false representation of intention is actionable if the statement is reasonably interpretable as expressing a firm intention and not merely as one of those ‘puffing’ statements which are so frequent in negotiations for a commercial transaction as to make it unjustifiable for the recipient to rely upon them.” *Dillard*, at 670. *Wallach*, and *Musser* are cases in which representations of intent are held to support *equitable* relief through the formation of constructive trusts (not fraud cases), and may be fairly characterized as inappropriately blurring the distinction between the separate fraud elements of a false statement and an intent to induce action or deceive. See *Anchor Centre Partners, Ltd. v. Mercantile Bank, N.A.*, 803 S.W.2d 23, 36 (Mo. 1991) (lack of proof of intent to deceive is fatal to fraud count).

Admittedly, many other jurisdictions seem to have adopted rules similar to the rule in *Mulvania*. Yet many others, including jurisdictions in the Eighth Circuit, hold fast to the rule that representations of intent to act in the future cannot form the basis for a claim of fraud. See *Golden Tee v. Venture Golf Sch.*, 333 Ark. 253, 267 (Ark. 1998); *Giotis v. Lampkin*, 145 A.2d 779, 781 (D.C. 1958); *Craft v. Drake*, 244 Ga. 406, 408 (Ga. 1979); *HPI Health Care Services, Inc. v. Mt. Vernon Hospital, Inc.*, 131 Ill. 2d 145, 168 (Ill. 1989); *Mariga v. Flint*, 822 N.E.2d 620, 629 (Ind. Ct. App. 2005); *McHargue v. Fayette Coal & Feed Co.*, 283 S.W.2d 170, 172 (Ky. 1955); *Stewart v. Winter*, 133 Me. 136, 140 (Me. 1934); *Berrendo*

Irrigated Farms Co. v. Jacobs, 23 N.M. 290, 302-303 (N.M. 1917); *Vallely v. Devaney*, 49 N.D. 1107 (N.D. 1923); *Shoemaker v. Commonwealth Bank*, 700 A.2d 1003, 1006 (Pa. Super. Ct. 1997).¹

Missouri courts still require that the intent element of fraud must be proven by facts, and not merely inferred.

While it is true that fraud may be established by circumstantial evidence, it may not be presumed, and a party's case will fail if he can show only facts and circumstances which are equally consistent with honesty and good faith. The difficulty of proving these elements does not dispense with the necessity of making the proof, and the failure to establish these elements is fatal to defendant's claim.

Bank of Kirksville v. Small, 742 S.W.2d 127, 132 (Mo. 1987) (citations omitted).

The intention which is necessary to make the rule stated in this Section applicable is the intention of the promisor when the agreement was entered into. The intention of the promisor not to perform an enforceable or unenforceable agreement cannot be established solely by proof of its nonperformance nor does his failure to perform the agreement throw upon him the burden of showing that his nonperformance was due to reasons which operated after the agreement was entered into. Such intention may be shown by any other evidence which sufficiently indicates its existence as, for example, the certainty that he would not be in funds to carry out his promise.

¹Non-exhaustive list.

Dillard, at 671.

Intent not to perform in the future cannot be presumed and must be proven by direct or circumstantial evidence (facts) that would support such an allegation. *Id.*, and see *Emerick v. Mutual Ben. Life Ins. Co.*, 756 S.W.2d 513, 519-520 (Mo. 1988). Accordingly, if this Court affirms the holding in *Mulvania*, abrogating the rule in *Reed* and *Riss*, and other cases not expressly overruled, the Court should amend its Rule 55.15 to consistently require fact-pleading for the “condition of mind of a person” so that a defendant’s “intent” as it relates to that defendant’s *future actions* cannot be based on mere speculation – that is, “averred generally.” Rule 55.15. Such an amendment would reduce frivolous claims, and would thwart the type of fanciful, after-the-fact pleading attempted by Plaintiffs in this case to establish venue in an improper circuit. Amending Rule 55.15 in this manner would prevent cloaking ordinary contract claims as tort claims. See *O’Neal v. Stifel, Nicolaus & Co.*, 996 S.W.2d 700, 703 (Mo. Ct. App. 1999) (citing *Paul v. Farmland Indus.*, 37 F.3d 1274, 1276 (8th Cir. 1994) (plaintiffs may not assert a fraud claim that is essentially a cloaked contract claim)). Plaintiffs have not pled any facts to support their conclusion that Mr. Bailey did not intend to comply with his alleged representations regarding future actions. Let alone, any particular facts.

Mulvania, *Reed*, *Riss*, and the issue of particularity notwithstanding, Plaintiffs’ proposed amended petition does not state a claim for fraudulent inducement (as discussed above) and cannot confer venue in St. Joseph because it fails to state justifiable reliance, fails to state damages, and fails to state facts to support alleged intent not to perform.

Nevertheless, venue for Plaintiffs’ fraudulent inducement claim would not accrue in Buchanan

County. And venue is determined as the case stands when parties are brought into a case. *DePaul, Linthicum*. Venue is not determined when claims against parties already in a case are amended – especially when a trial court has no jurisdiction to amend. *Id; Green*.

CONCLUSION

For the above-stated reasons, Respondent’s Brief does not rebut the arguments in Defendants’ petition for writ and subsequent brief. Accordingly, the Alternative Writ of Mandamus, issued by this Court, September 20, 2005, preventing Respondent from taking any further action, except to transfer the cause to a proper venue, should be made absolute and peremptory. Respondent should be ordered to transfer the cause below to a proper venue.

Respectfully Submitted,

EDMUNDS LAW OFFICE, L.L.C.

Fritz Edmunds, Jr. MO Bar # 46503
10990 Quivira, Suite 200
Overland Park, KS 66210
(913) 661-0222 Telephone
(913) 661-0212 Facsimile
fritz@edmundslaw.com

ATTORNEY FOR RELATORS
MEMORIAL PARK CEMETERY
ASSOCIATION OF MO. & DEVRY

THE BRUCE LAW FIRM

Jeffrey W. Bruce MO Bar # 32857
P.O. Box 797
Belton, MO 64012
Tel (816) 322-7400
bruce.law@att.net

ATTORNEY FOR RELATOR
MARK H. BAILEY

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of January, 2006, a true copy of Relators'

Brief in Support of Writ of Mandamus was sent by U.S. Mail, to:

R. Dan Boulware and Seth C. Wright
Shugart Thompson & Kilroy, P.C.
P. O. Box 6217
St. Joseph, MO 64506
(816) 364-2117 Phone
(816) 279-3977 Fax

Hon. Randall R. Jackson
Judge, Division 1
Circuit Court Buchanan County, Missouri
Buchanan County Courthouse
411 Jules St.
St. Joseph, MO 64501
(816) 271-1447 Phone
(816) 271-1538 Fax

Fritz Edmunds, Jr.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 84.06(c), I hereby certify that Relators' Brief complies with the limitations contained in Rule 84.06(b). The number of words in the brief is 6935, according to the word count of WordPerfect, Version 8, the word-processing system used to prepare the brief.

I also certify that the diskette submitted herewith to the Court, contains Relators' Brief in WordPerfect, Version 8 (and Acrobat PDF format), and has been scanned by an updated version of Norton Antivirus, and contains no viruses.

Respectfully Submitted,

EDMUNDS LAW OFFICE, L.L.C.

Fritz Edmunds, Jr. #16829
10990 Quivira Road - Suite 200
Overland Park, Kansas 66210
(913) 661-0222 Telephone
(913) 661-0212 Facsimile

ATTORNEY FOR RELATORS

APPENDIX

476.410 RSMo.	A2
508.010 RSMo	A3
Rule 51.045	A4
Rule 55.33	A6
Rule 67.02	A8

§ 476.410 RSMo. Transfer of case filed in wrong jurisdiction

The division of a circuit court in which a case is filed laying venue in the wrong division or wrong circuit shall transfer the case to any division or circuit in which it could have been brought.

§ 508.010. Suits by summons, where brought

Suits instituted by summons shall, except as otherwise provided by law, be brought:

(1) When the defendant is a resident of the state, either in the county within which the defendant resides, or in the county within which the plaintiff resides, and the defendant may be found;

(2) When there are several defendants, and they reside in different counties, the suit may be brought in any such county;

(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;

(4) When all the defendants are nonresidents of the state, suit may be brought in any county in this state;

(5) Any action, local or transitory, in which any county shall be plaintiff, may be commenced and prosecuted to final judgment in the county in which the defendant or defendants reside, or in the county suing and where the defendants, or one of them, may be found;

(6) In all tort actions the suit may be brought in the county where the cause of action accrued regardless of the residence of the parties, and process therein shall be issued by the court of such county and may be served in any county within the state; provided, however, that in any action for defamation or for invasion of privacy the cause of action shall be deemed to have accrued in the county in which the defamation or invasion was first published.

Rule 51.045. Transfer of Venue When Venue Improper

(a) An action brought in a 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 to 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. When a transfer of venue is ordered, the entire civil action shall be transferred unless a separate trial has been ordered. If a separate trial is ordered, only that part of the civil action in which the movant is involved shall be transferred.

(c) A request for transfer of venue under this Rule 51.045 shall not deprive a party of the right to a change of venue under Rule 51.03 if the civil action is transferred to a county having seventy-five thousand or fewer inhabitants. A party seeking a change of venue under Rule 51.03, after transfer of venue pursuant to this Rule 51.045, shall make application therefor within the later of:

- (1) The time allowed by Rule 51.03, or
- (2) Ten days of being served with notice of the docketing of the civil action in the transferee court as provided by Rule 51.10.

Rule 55.33. Amended and Supplemental Pleadings

(a) A pleading may be amended once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the pleading may be amended at any time within thirty days after it is served. Otherwise, the pleading may be amended only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within ten days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would cause prejudice in maintaining the action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set

forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and within the period provided by law for commencing the action against the party and serving notice of the action, the party to be brought in by amendment: (1) has received such notice of the institution of the action as will not prejudice the party in maintaining the party's defense on the merits and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit service of a supplemental pleading setting forth transactions or occurrences or events that have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

Rule 67.02. Voluntary Dismissal--Effect of

(a) Except as provided in Rule 52, a civil action may be dismissed by the plaintiff without order of the court anytime:

- (1) Prior to the swearing of the jury panel for the voir dire examination, or
- (2) In cases tried without a jury, prior to the introduction of evidence.

A party who once so dismisses a civil action and thereafter files another civil action upon the same claim shall be allowed to dismiss the same without prejudice only:

- (1) Upon filing a stipulation to that effect signed by the opposing party, or
- (2) On order of the court made on motion in which the ground for dismissal shall be set forth.

(b) Except as provided in Rule 67.02(a), an action shall not be dismissed at the plaintiff's instance except upon order of the court upon such terms and conditions as the court deems proper.

(c) A voluntary dismissal under Rule 67.02(a) shall be without prejudice unless otherwise specified by the plaintiff. Any other voluntary dismissal shall be without prejudice unless otherwise specified by the court or the parties to the dismissal.

(d) If a plaintiff who has once dismissed a civil action in any court commences a civil action based upon or including the same claim against the same defendant, the court may make an order for the payment of any unpaid costs of the civil action previously dismissed. In addition, if the plaintiff dismissed the previous civil action without prejudice within ten days of the date set for trial, the court may make an order for the payment of witness and other expenses, not including attorney fees, incurred by any other party that are caused to be incurred for the second trial because of the dismissal without prejudice of the previous civil action. The court

may stay the proceedings in the civil action until the plaintiff has complied with any such order.