

IN THE MISSOURI SUPREME COURT

Appeal No. 87855

**STATE OF MISSOURI ex rel. MCDONALD'S CORPORATION AND KRIS
DAVISON, INC.,**

Relators,

vs.

**THE HONORABLE ANN MESLE,
JUDGE, DIVISION SEVEN, CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI,**

Respondent.

Writ of Prohibition Directed to the Circuit Court of Jackson County
Cause No. 0516-CV10447
Division Seven
Honorable Ann Mesle, Judge

**BRIEF OF RELATORS MCDONALD'S CORPORATION AND
KRIS DAVISON, INC.**

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JURISDICTIONAL STATEMENT

This is a Petition for Writ of Prohibition against the Honorable Ann Mesle, Division Seven, of the Circuit Court of Jackson County (“Respondent”) in a case now pending therein. In the Petition for Writ of Prohibition, Relators contend that venue of a lawsuit in Jackson County arising out of an alleged case of food poisoning is improper. On December 30, 2005, Respondent denied Relators’ Motion to Transfer for Improper Venue. On September 26, 2006, this Court issued its Preliminary Order in Prohibition. The Missouri Supreme Court has jurisdiction

over this Writ under the provisions of Rule 97.01 et seq., Missouri Rules of Civil Procedure and §530.020 R.S.Mo. (2000).

STATEMENT OF FACTS

On or about April 20, 2005, Samantha Marie Ryan, a minor, by and through her next friend and mother, Lisa Marie Ryan, and Jeff and Lisa Ryan individually (hereinafter collectively referred to as “Plaintiffs”) instituted an action for personal injuries in the Circuit Court of Jackson County. (Exhibit A). In their Petition, Plaintiffs alleged Samantha Ryan sustained injuries as a result of food served and consumed at a McDonald’s Restaurant in Branson, Missouri, which is located in Taney County. (See Exhibit A at ¶10). The McDonald’s restaurant in Taney County was owned by Kris Davison, Inc. (See Exhibit A at ¶6). There were no allegations that Kris Davison, Inc. had any offices or agents in Jackson County, Missouri.

Plaintiffs claimed that McDonald’s Corporation supervised and maintained the property of the McDonald’s restaurant through its agents, servants and employees or ostensible agents, servants and employees. (See Exhibit A at ¶4). Plaintiffs further alleged that McDonald’s Corporation was responsible for and did provide instruction, education, written materials and/or training regarding food preparation. (See Exhibit A at ¶5).

Plaintiffs’ Petition also alleged claims against Kris Davison, Inc., a Missouri Corporation that operated the McDonald’s restaurant where the allegedly tortious act was committed. (See Exhibit A at ¶6). There were no allegations made in the

Petition that McDonald's Corporation controlled the day-to-day operations of Kris Davison, Inc., nor were any specific facts alleged to support any such allegation.

Plaintiffs' sole basis for venue in Jackson County set forth in the Petition is that "defendant MCDONALD'S CORPORATION has had and usually keeps an office and/or agent for transaction of its usual and customary business in Jackson County, Missouri." (See Exhibit A at ¶8). Plaintiffs allege that "MCDONALD'S CORPORATION owned and/or operated more than thirty (30) McDonald's restaurants in Jackson County, Missouri, with agents, servants and employees at all of those locations." (See Exhibit A at ¶9).

On June 22, 2005, Relators timely filed their Motion to Transfer for Improper Venue and to Dismiss McDonald's Corporation. (See Exhibit B). In the motion, Relators first noted that Kris Davison, Inc. does not now nor did it on the date Plaintiffs' Petition was filed have or usually keep an office or agent for the transaction of its usual and customary business in Jackson County, and that Plaintiffs' Petition did not allege otherwise. An affidavit of Kris Davison was filed with the Court to support the allegation. (See Exhibit C). Relators further noted that Defendant McDonald's Corporation does not now nor did it on the date Plaintiffs' Petition was filed have or usually keep an office or agent for the transaction of its usual and customary business in Jackson County. (See Exhibit B at ¶6 and Affidavit of Robert Johnson attached thereto).

Relators' motion next indicated that McDonald's Corporation does not and did not on the date Plaintiffs' Petition was filed own or operate any restaurant business in Missouri, including Jackson County. (See Exhibit B and Robert Johnson Affidavit attached thereto). Instead, all McDonald's restaurants in Missouri are operated pursuant to franchise agreements with McDonald's Corporation. McDonald's restaurants in Missouri are operated by independent owners/operators like Kris Davison, Inc., or by McDonald's Restaurants of Missouri, Inc. (hereinafter "MRM"). Relators averred that McDonald's Corporation does not operate, manage, possess or control any restaurant business in Missouri. The premises where the restaurants are located, and the restaurant businesses at said premises are solely operated, managed, maintained, possessed and controlled by the independent owner/operators or by MRM. (*Id.*)

Relators noted that McDonald's Corporation owns or leases the real property where McDonald's restaurants are located in Jackson County. That real property is then leased or subleased to the independent owners/operators or MRM, which solely operate, manage, possess and control the leased premises. (*Id.*) Relators averred that McDonald's Corporation was not in possession or control of any Missouri McDonald's restaurant locations. (*Id.*)

Relators next stated that the workers at McDonald's restaurants in Missouri, including Jackson County are not, and were not at the time Plaintiffs' Petition was

filed, employees of McDonald's Corporation. (*Id.*) The workers at the McDonald's restaurants are and were employees of either independent owners/operators or MRM, and the independent owner/operators and MRM were solely responsible for the hiring, supervision, discipline and retention of all workers at their respective restaurants. (*Id.*)

Relators pointed out that McDonald's Corporation is a publicly traded company incorporated in the State of Delaware. (*Id.*) MRM is a Missouri corporation in good standing. MRM is an indirect wholly owned subsidiary of McDonald's Corporation, and is not publicly traded. (*Id.*) McDonald's Corporation and McDonald's Restaurants of Missouri, Inc. have separate directors. The two corporations have some, but not all, officers in common. (*Id.*)

Relators next indicated that McDonald's Corporation is not a party to contracts that are entered into by MRM or independent owners/operators with third parties. Similarly, neither MRM nor independent owners/operators are parties to contracts entered into by McDonald's Corporation with third parties. (*Id.*) Further, neither MRM nor any independent owner/operator has the power to alter contractual relations or legal relations between McDonald's Corporation and third parties. (*Id.*) Relators also asserted that McDonald's Corporation has not and does not control the day-to-day activities of any Missouri McDonald's restaurant. (*Id.*)

While McDonald's Corporation did own the real property at the Branson McDonald's restaurant at all times referred to in Plaintiffs' Petition, the property was leased to the franchisee. McDonald's Corporation was not in possession or control of the premises as the premises was operated, managed, controlled, and possessed solely by Kris Davison, Inc. (*Id.*)

Relators further asserted that at no time referred to in Plaintiffs' Petition did McDonald's Corporation employ any of the workers at the Branson McDonald's including those who prepared or served food. All workers at the Branson McDonald's restaurant were employees of Kris Davison, Inc. and Kris Davison, Inc. was solely responsible for said employees' hiring, supervision, discipline and retention. (*Id.*) McDonald's Corporation did not control the day-to-day activities of any McDonald's restaurant, including the Branson McDonald's or manufacture, process or prepare, and has not manufactured, processed or prepared any product for sale at the Branson McDonald's, or at any other McDonald's restaurant. (*Id.*)

In addition, Relators noted that McDonald's Corporation does not supply and has not supplied any product, nor does it own or operate nor has it owned or operated any business which supplies any product, to the Branson McDonald's, or to any other McDonald's restaurant. (*Id.*) Also, McDonald's Corporation has not and does not control the day-to-day activities of the Branson McDonald's, nor does it have a right to. (*Id.*) Both McDonald's Corporation and Kris Davison noted that

the Branson McDonald's sells product to its own customers and conducts business primarily for its own benefit, not McDonald's Corporation. (See Exhibit C and Exhibit B).

On August 5, 2005, Plaintiffs filed their Reply to Relators' Motion to Transfer or to Dismiss. (See Exhibit D). In the Reply, Plaintiffs noted that McDonald's owned the real property on which more than thirty McDonald's restaurants sit in Jackson County, Missouri and, further, that it owned the real property on which the Branson property sits. (See Exhibit D). They also noted that all McDonald's restaurants are run pursuant to a franchise agreement with McDonald's Corporation. (*Id.*) Plaintiffs also sought time to conduct discovery.

On December 30, 2005, Respondent issued her order denying the motion to transfer without providing reasons for the denial. (See Exhibit E). On March 29, 2006, Relators filed a petition in prohibition in the Missouri Court of Appeals, Western District. On April 14, 2006, this petition was denied. (See Exhibit F).

POINTS RELIED ON

THIS COURT SHOULD MAKE ITS ORDER GRANTING RELATORS' PETITION FOR ISSUANCE OF A WRIT OF PROHIBITION PERMANENT AND ORDER RESPONDENT TO ISSUE HER ORDER TRANSFERRING VENUE TO TANEY COUNTY AS RESPONDENT EXCEEDED HER JURISDICTION OR ABUSED HER DISCRETION IN DENYING RELATORS' MOTION TO TRANSFER FOR IMPROPER VENUE BECAUSE VENUE IS IMPROPER IN THE CIRCUIT COURT OF JACKSON COUNTY UNDER THE PROVISIONS OF §508.040 R.S.Mo. (2000) IN THAT THE CAUSE OF ACTION ACCRUED IN TANEY COUNTY, MISSOURI; RELATOR KRIS DAVISON, INC IS A RESIDENT OF TANEY COUNTY, MISSOURI; AND NEITHER KRIS DAVISON, INC., NOR MCDONALD'S CORPORATION HAS OFFICES OR AGENTS FOR THE TRANSACTION OF USUAL AND CUSTOMARY BUSINESS IN JACKSON COUNTY, MISSOURI.

§508.040 R.S.Mo. (2000)

Wadlow v. Donald Lindner Homes, Inc., 654 S.W.2d 644 (Mo.App. 1983)

Litzinger v. Pulitzer Publishing Company, 356 S.W.2d 81 (Mo. 1962)

State ex rel. Domino's Pizza, Inc. v. Dowd, 941 S.W.2d 663 (Mo. App. 1997)

State ex rel. Ford Motor Company v. Bacon, 63 S.W.3d 641 (Mo.banc 2002)

ARGUMENT

THIS COURT SHOULD MAKE ITS ORDER GRANTING RELATORS' PETITION FOR ISSUANCE OF A WRIT OF PROHIBITION PERMANENT AND ORDER RESPONDENT TO ISSUE HER ORDER TRANFERRING VENUE TO TANEY COUNTY AS RESPONDENT EXCEEDED HER JURISDICTION OR ABUSED HER DISCRETION IN DENYING RELATORS' MOTION TO TRANSFER FOR IMPROPER VENUE BECAUSE VENUE IS IMPROPER IN THE CIRCUIT COURT OF JACKSON COUNTY UNDER THE PROVISIONS OF §508.040 R.S.Mo. (2000) IN THAT THE CAUSE OF ACTION ACCRUED IN TANEY COUNTY, MISSOURI; RELATOR KRIS DAVISON, INC IS A RESIDENT OF TANEY COUNTY, MISSOURI; AND NEITHER KRIS DAVISON, INC., NOR MCDONALD'S CORPORATION HAS OFFICES OR AGENTS FOR THE TRANSACTION OF USUAL AND CUSTOMARY BUSINESS IN JACKSON COUNTY, MISSOURI.

Standard of Review

Prohibition is a discretionary writ, and such a writ will only be granted to prevent an abuse of judicial discretion, to avoid irreparable harm to a party or to prevent the exercise of extra-judicial power. *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 857 (Mo.banc 2001). Because improper venue is a fundamental

defect, a court that acts when venue is improper acts in excess of its jurisdiction. (*Id.*) Prohibition lies to bar the trial court from taking any further action, except for transferring the case to the proper venue. (*Id.*)

Lack of Proper Venue

Venue in Missouri is determined solely by statute. *State ex rel Gray v. Smith*, 979 S.W.2D 190, 191 (Mo.banc 1998). The present action was filed against two corporate entities and there are no individuals named as defendants. Venue is, therefore, controlled pursuant to the provisions of §508.040. *Coale v. Grady Bros. Siding and Remodeling, Inc.*, 865 S.W.2d 887 (Mo.App. 1993). Under this statute, venue is appropriate in the county where the cause of action accrued or in any county where the corporation has or usually keeps an office or agent for the transaction of its usual and customary business. §508.040 R.S.Mo. (2000).

There is no question in the present matter that the cause of action accrued in Taney County and that corporate defendant Kris Davison, Inc. had no offices or agents in Jackson County, Missouri. Venue was, thus, premised solely upon the issue of whether McDonalds Corporation had any offices or agents for the transaction of its business in Jackson County, Missouri.

Plaintiffs' allegations to support venue in Jackson County were simply that McDonald's Corporation owned thirty restaurants in Jackson County and had agents and employees at those locations. McDonald's Corporation filed affidavits

clearly indicating, inter alia, that McDonald's Corporation did not own those restaurants, that McDonald's Corporation had no control over those restaurants, that the restaurants in Jackson County could not bind McDonald's Corporation to contracts, and that McDonald's Corporation had no employees in those restaurants. In spite of this, Respondent determined that venue was proper, impliedly making the determination that McDonald's Corporation had offices and agents for the transaction of business in Jackson County, Missouri.

Respondent did not explain her ruling; however, there are only two possible bases for the ruling as set forth in Plaintiffs' response: 1) McDonald's Corporation owned the land on which the McDonald's Corporation franchises sat and the land somehow constituted offices or agents for the transaction of business under the terms of §508.040; and 2) the franchises in Jackson County were agents of McDonald's. Both of these arguments are seriously flawed and contrary to Missouri law.

First, with respect to the argument that the ownership of land in a county is sufficient to constitute an office or agent for the transaction of business, Relators note that the applicable venue statute nowhere indicates that the mere ownership of land is sufficient to serve as a basis for venue. Where the language of a statute is clear, it is not the place of the courts to surmise what the legislature intended to say or might have said. *Rohner v. Long*, 57 S.W.3d 920, 923 (Mo.App. 2001). The

legislature is presumed to know what it is doing and to have knowledge of the existing law. *Pfeifer v. Board of Police Commissioners*, 654 S.W.2d 124 (Mo.banc 1983).

Real estate in and of itself does not meet the dictionary definition of “office.” Office has been defined to mean: “The place where a particular kind of business or service for others is transacted; a house, room, or apartment in which public officers and others transact business; the building room or department in which the clerical work of an establishment is done; a countinghouse; the room, etc., in which the business or work of some particular department of a large concern or institution is carried on or from which it is directed; as, the register’s *office*; a lawyer’s *office*; the *office* of a school or hospital; freight *office*.” Webster’s New International Dictionary 1690-1691 (2d ed. 1961). The plain meaning of the language of §508.040, therefore, does not permit a determination that the ownership of land or renting land constitutes an office for the transaction of business.

Further, the Missouri legislature had already indicated that it knew how to draft a statute permitting venue to be premised, if it so chose, on the mere location of property. In enacting §508.020 R.S.Mo. (2000), the legislature utilized language permitting venue to be premised upon the ownership of property where the ownership of that property was at issue. This clearly demonstrates that the

legislature was fully capable of premising venue upon the mere location of land if that was its intent. In spite of this, the terms of §508.040 do not list the location of property as a basis for venue against a corporate entity. In issuing the ruling, Respondent, hence, implicitly made a determination not of what the language stated, but what the trial court thought it might have meant. As the language of the statute is clear, Respondent's ruling was unauthorized and beyond her jurisdiction.

Missouri case law also demonstrates that Respondent's ruling was incorrect. In *Wadlow v. Donald Lindner Homes, Inc.*, 654 S.W.2d 644 (Mo.App. 1983), the issue was whether Lindner Homes maintained an office for the transaction of its usual and customary business in St. Charles County. The personal residence of Lindner Homes' president was in St. Charles County. While testifying at the hearing on the motion to dismiss for improper venue, the corporate president said that Lindner Homes did twenty percent of its business in St. Charles County. The Appellate Court rejected the contention that the president's home was an "office" of Lindner Homes and, further, found irrelevant the fact that Lindner Homes did twenty percent of its business in St. Charles County:

The venue statute, however, does not consider the amount of business transacted by a domestic corporation in a specific county. It focuses, instead, on the office of the agent for the transaction of business. Lindner Homes simply had no agent in St. Charles County. Although

the corporate president's personal residence was in St. Charles County, this, in itself, does not make the residence an office for usual and customary business even though records were stored there, occasional mail was sent there and a few business cards listed the St. Charles address...Lindner Homes' business in St. Charles County consisted of dispatching tow vehicles from the St. Louis County office to pick up vehicles in St. Charles County. There was no evidence that business was customarily, or even rarely, transacted at any St. Charles address. 654 S.W.2d at 647.

In *Litzinger v. Pulitzer Publishing Company*, 356 S.W.2d 81 (Mo. 1962), Plaintiff instituted suit against Pulitzer in St. Louis County for libel. The sheriff served one Asa Bryan as "an Agent kept by the Pulitzer Publishing Company in St. Louis County for the transaction of its usual and customary business in St. Louis County." *Litzinger*, 356 S.W.2d at 83. Defendant moved to quash the service of process maintaining that venue was improper as it did not have an office or agent for the transaction of its usual and customary business in St. Louis County and, further, that Bryan was not an officer, partner, or managing or general agent, or in charge of any business office of the defendant.

The evidence presented at the hearing on the motion to quash was an affidavit of Pulitzer's official. The affidavit conceded that Bryan was a "reporter"

in the employment of Pulitzer. Bryan worked on a full time basis to cover the courthouse in collecting and transmitting information in regard to news events. Bryan had desk facilities in the “pressroom” of the courthouse and telephone service listed in the St. Louis telephone directory as “Post-Dispatch Correspondent, Clayton Court House, Parkview 7-3313-7-8173.” The Supreme Court held that service upon Bryan and venue in St. Louis County was improper as Pulitzer did not have an office or agent for the transaction of its usual and customary business in St. Louis County.

The McDonald’s restaurants in Jackson County do not constitute an office for the transaction of McDonald’s Corporation’s usual and customary business. All McDonald’s restaurants in Missouri are operated pursuant to franchise agreements with McDonald’s Corporation. McDonald’s restaurants in Missouri are operated by independent owners/operators like Kris Davison, Inc., or by MRM. McDonald’s Corporation does not operate, manage, possess or control any restaurant business in Missouri. The premises where the restaurants are located, and the restaurant businesses at said premises are solely operated, managed, maintained, possessed and controlled by the independent owner/operators or by MRM. (See Affidavit of Robert Johnson at ¶10).

McDonald’s Corporation owns or leases the real property where McDonald’s restaurants are located in Jackson County. McDonald’s Corporation

merely leases or subleases the real property to the independent owner/operators or MRM which solely operate, manage, possess and control the leased premises. Under Missouri law the restaurants in Jackson County were not offices or agents for the transaction of business.

The franchisee restaurants in Jackson County also were not agents of McDonald's Corporation. The Missouri Court of Appeals considered the issue of whether a franchisee is an agent for the transaction of the franchisor's usual and customary business for venue purposes in *State ex rel. Domino's Pizza, Inc. v. Dowd*, 941 S.W.2d 663 (Mo. App. 1997). The Court of Appeals noted that for purposes of venue the Missouri Supreme Court had adopted the definition of agency found in the *Restatement 2d of Agency*. *Id.* at 665. The Court noted that there are three essential characteristics of an agency relationship, the absence of any of which defeats a claim that agency exists. *Id.* The essential elements are:

- (1) that an agent holds a power to alter legal relations between the principal and a third party; *Restatement 2d of Agency* §12;
- (2) that an agent is a fiduciary with respect to matters within the scope of the agency; *Restatement 2d of Agency* §13;

(3) that a principal has the right to control the conduct of the agent with respect to matters entrusted to the agent;

Restatement 2d of Agency §14. Id.

The Court of Appeals found that the first two characteristics did not apply between Domino's and its franchisee, and therefore held that there was no agency relationship for venue purposes, without even having to consider the third element. *Id. at 667.* The Court of Appeals found no evidence that the franchisee had the ability to alter legal relationships between Domino's and third parties. *Id. at 665-666.* The Court also found that the franchisee was not acting as a fiduciary for Domino's in that the franchisees were selling their own product to their own customers, and the conduct of their business was primarily for their own benefit, not Domino's. *Id. at 666.*

Applying the Court of Appeals' rationale to the instant case, at least two of three essential characteristics of agency fail with respect to the relationship between McDonald's Corporation and its Jackson County franchisees for venue purposes. Relators' Motion and Supporting Affidavits reveal that neither independent owner/operators or MRM are empowered to alter legal relations between McDonald's Corporation and any third party, and Plaintiffs' Petition does not allege otherwise. Relators' Motion and Supporting Affidavits also reveal that

McDonald's Corporation does not control the day-to-day activities of McDonald's restaurants.

Relators submit that the third essential characteristic of agency, the right to control, is not present as either the independent owners/operators or McDonald's Restaurants of Missouri, Inc. have sole possession and control of their restaurant premises; solely own and operate their restaurant businesses; and solely employ the workers at the franchise restaurants.

Similarly, with respect to the approximately three Jackson County restaurants operated by McDonald's Corporation's wholly owned indirect subsidiary, the fact that McDonald's Restaurants of Missouri, Inc. is a subsidiary of McDonald's Corporation does not in and of itself make McDonald's Restaurants of Missouri, Inc. an agent of McDonald's Corporation for venue purposes. The same three elements of agency discussed in the *Restatement 2d of Agency* must be present. *State ex rel. Ford Motor Company v. Bacon*, 63 S.W.3d 641, 642 (Mo.banc 2002).

In *Bacon*, the Court's analysis got no further than the first element (whether the agent holds the power to alter legal relations between the principal and the third party) before finding that there was no agency for venue purposes between Ford Motor Company and its wholly owned indirect subsidiary, Ford Motor Credit Company. (*Id.*) The Missouri Supreme Court found that Ford Motor Company's

supporting affidavit was dispositive on the issue as the affidavit provided uncontroverted factual allegations that Ford Motor Company is not a party to Ford Credit's contracts, and that Ford Credit was not subject to any agreement with Ford Motor Company restricting or conditioning its ability to finance vehicles. *Id. at 644*. The Court concluded:

Absent allegations and evidence that would justify piercing the corporate veil, Ford Credit does in fact operate independently from Ford. Although Ford owns Ford Credit, and in that sense Ford engages in the business of financing purchases of Ford Products and floor plans for Ford dealers, it does not follow that Ford Credit has the power to alter legal relations between Ford and any third party. Neither plaintiff nor the dissent has identified any acts or representations – other than Ford's ownership of Ford Credit as a financial services company – that would lead a reasonable person to believe that Ford Credit has the power to do so. *Id.*

Applying the rationale of the *Bacon* opinion to the instant case, there is no evidence justifying piercing the corporate veil, and Plaintiffs' Petition does not suggest otherwise. McDonald's Corporation and McDonald's Restaurants of Missouri, Inc. are separate corporations, incorporated in separate states, with separate Boards of Directors. McDonald's Corporation is in the business of

franchising McDonald's restaurant businesses that are owned and operated by other entities. McDonald's Restaurants of Missouri, Inc. is in the business of operating certain McDonald's restaurant locations in Missouri. McDonald's Corporation is not in the usual and customary business of operating McDonald's restaurants. McDonald's Corporation is not a party to contracts that are entered into by either McDonald's Restaurants of Missouri, Inc. or by independent owner/operators with third parties; and neither McDonald's Restaurants of Missouri, Inc. nor independent owner/operators are parties to contracts between McDonald's Corporation and third parties. McDonald's Restaurants of Missouri, Inc. does not have the power to alter contractual relations or legal relations between McDonald's Corporation and third parties.

The control element is also missing to make McDonald's Restaurants of Missouri, Inc. an agent of McDonald's Corporation for venue purposes. McDonald's Corporation does not control and has not controlled the day-to-day activities of any Missouri McDonald's restaurant. Lacking control, there can be no agency relationship.

Plaintiffs argue in the Answer and Suggestions in Opposition to the Petition for Writ of Prohibition (hereinafter "Opposition") that venue is proper in Jackson County because the minor had medical treatment in Jackson County. (See Opposition at 9). This is irrelevant to the issue of proper venue. There is nothing in

the venue statute and the cases construing it that ever indicated that location of medical treatment has any bearing on venue.

Plaintiffs also attempt to distinguish *State ex rel. Domino's Pizza, Inc. v. Dowd*, 941 S.W.2d 663 (Mo. App. 1997) by arguing that there was only one franchise operating for Domino's in that case whereas there are thirty restaurants operating on land owned by McDonald's in the present matter. (See opposition at 14). This is a distinction without a difference. There is nothing in the venue statute that indicates it makes a difference whether one or ten or twenty locations are in a given venue. The issue is merely whether there are offices or agents in that venue. In the present matter as in the *Dowd* case, there are no offices of agents in Plaintiffs' venue of choice. That is the only relevant factor. Plaintiffs also argues that the property in question in the *Dowd* case was not owned by Domino's. (See opposition at 15). While irrelevant to the issue of venue, Relators note there is no such evidence set forth in the *Dowd* case.

Plaintiffs also argue they believe that the franchisees may pay franchise fees to McDonald's or monthly service fees based upon the restaurant's performance. (See opposition at 16). As the *Dowd* case noted, however, such payments are irrelevant. See *State ex rel. Domino's Pizza, Inc.*, 941 S.W.2d at 666-667. Any such monies would be due and owing from contractual obligations between the franchises and McDonald's and do not indicate a right of the franchisee to bind

McDonald's in contracts with third parties. *Id.* Nor do such payments create a fiduciary relationship. *Id.*

Plaintiffs next argue that McDonald's might have the right to ensure that the franchises are maintained in good order and to tell the franchisees how to dress their employees. Assuming for argument that this is true, this does not create make the franchisee an office or agent for the transaction of business. These matters would not place the franchisees in a position where they could alter the legal relations of McDonald's with a third party and, as noted in the *Dowd* case, quality assurance does not create a fiduciary relationship. See *Dowd* 941 S.W.2d at 666. Further, such restrictions and controls do not indicate the franchisee is operating primarily for the benefit of the franchisor. The franchisees are independent businesses and wish to make a profit from their sales. Their operations are primarily for their own benefit, not that of McDonald's. *Id.* (See also, exhibits B and C.)

Finally, Plaintiffs argue that they should be entitled to discovery on the venue issue. Plaintiffs have not identified anything to be gained from any such discovery that would impact on venue. Instead, the things they seek to discover relate to issues that have no relevance to agency and which the *Dowd* Court expressly rejected as any basis for venue. Further, Relators note that Respondent's order did not deny the motions to allow for discovery to take place with a final

determination of the venue issue to then be made. Instead, Respondent simply denied the motion to transfer outright. As Plaintiffs have not indicated what could be discovered that would make venue proper in Jackson County, and as Respondent denied the motion outright, this is not a matter where discovery is at issue.

CONCLUSION

Based upon the above, Relators hereby request this Court issue its order in prohibition to prevent Respondent from taking any further actions in this matter other than ordering the case transferred to the proper venue.

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STATE OF MISSOURI)
)
COUNTY OF ST. LOUIS)

AFFIDAVIT OF SERVICE

Comes now Gary P. Paul, and after being duly sworn upon his oath states that he did on the _____ day of November, 2006 place in the United States mail in Clayton, Missouri an envelope containing two copies of the Brief of Relators and that proper postage was affixed on said envelopes and that they were plainly addressed to:

The Honorable Ann Mesle
Division 7
Jackson County Courthouse—Kansas City
415 East 12th Street, 3rd Floor
Kansas City, MO 64106

Kathleen M. Hagen
Henri J. Watson
WATSON & DAMERON, LLP
2500 Holmes
Kansas City, MO 64108
Attorney for Respondent

Subscribed and sworn to before me, a Notary Public, this _____ day of
November, 2006.

NOTARY PUBLIC

My Commission Expires:

CERTIFICATE OF COMPLIANCE

I, one of the attorneys for Relators, certify that the number of words in the brief of Relators is 5,494, as directed by MRCP 84.06(c) which is based on a word count of the word processing system. The name and version of the word processing software used to prepare the brief is Microsoft Word 2000.

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Subscribed and sworn to before me, a Notary Public, this _____ day of
November, 2006.

NOTARY PUBLIC

My Commission Expires:

MEMORANDUM FILING DISK OF BRIEF

COME NOW Relators and hereby files its brief on disk with the Court. The brief was prepared in Microsoft Word 2003. The disk has been scanned for viruses using Norton Antivirus, Corporate Edition, and no viruses were found.

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APPENDIX

- 1) Order of Jackson County Circuit Court of December 30, 2005.....A1
- 2) Order of Supreme Court of September 26, 2006
granting Preliminary Writ of ProhibitionA2
- 3) §508.040 R.S.Mo. (2000)A3