IN THE MISSOURI SUPREME COURT

Appeal No. 87856

STATE OF MISSOURI ex rel. McDONALD'S CORPORATION and C&S MARSHFIELD, INC.,

Relators,

v.

THE HONORABLE SANDRA C. MIDKIFF, DIVISION ONE, CIRCUIT COURT OF JACKSON COUNTY, MISSOURI,

Respondent.

Writ of Prohibition Directed to the Circuit Court of
Jackson County, Missouri, Division 1
The Honorable Sandra C. Midkiff
Case No. 0516-CV10440

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

The Petition for Damages in this underlying action was filed in the Circuit Court of Jackson County, Missouri on April 20th, 2005. (See Relators' Petition for Writ of Prohibition, Ex. A, p. 1) . In this personal injury case, plaintiffs allege that the defendant corporations (hereinafter relators) were negligent in failing to properly train, instruct and educate their employees, agents or servants in how to properly prepare food manufactured and served at a McDonald's restaurant located at 1323 Spur Drive, in Marshfield, Missouri. (*Id.* at para. 3-7). Plaintiffs further allege that such negligence caused plaintiff Meagan Bell to consume a hamburger contaminated with Escherichia coli 0157:H7 ("E. coli 0157:H7"), causing her severe, life-threatening and permanent injuries. (*Id.* at para. 10-20).

Plaintiffs allege in their petition that venue in Jackson County, Missouri is proper pursuant to *§ 508.010* and *508.040, R.S.Mo.* (2000) in that relator 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. (*Id.* at para. 8). Plaintiffs contend that relator 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. (*Id*. at para. 9).

Further, relator McDonald's Corporation owns the real property wherein all of those more than thirty (30) McDonald's restaurants sit in Jackson County, Missouri.

Relator McDonald's Corporation admits that it "did own the real property at the Marshfield McDonald's restaurant at all times referred to in Plaintiffs' Petition…" (*Id.*, Ex. B, p. 37 at para. 5). Relators admit in their petition that they own or lease the real property where McDonald's restaurants are located in Jackson County, Missouri. (Relators' Petition for Writ of Prohibition, para. 11). All McDonald's restaurants in Missouri are operated pursuant to a franchise agreement with relator McDonald's Corporation, including the Marshfield McDonald's restaurant at issue in this matter. (*Id.*, Ex. B, p. 37, para. 10).

Plaintiff Meagan Bell was hospitalized at Children's Mercy Hospital in Kansas City, Jackson County, Missouri, for approximately three (3) weeks, where she spent approximately two (2) weeks in the Intensive Care Unit and several days on kidney dialysis. (*Id.*, Ex. A, para. 16-19). Nearly all of her medical treatment, including receiving care and treatment from various medial specialists, all occurred in Jackson County, Missouri. *Id.*

On June 22nd, 2005, relators filed a Motion to Transfer for Improper Venue and to Dismiss McDonald's Corporation, with supporting suggestions. (*Id.*, Ex. B). On August 5th, 2005, plaintiffs filed their Suggestions in Opposition to Defendants' Motion. (*Id.*, Ex. D). On August 24th, 2005, respondent issued her order denying the motion to transfer and motion to dismiss. (*Id., Ex. E*).

On March 29th, 2006, relators filed a Petition for Writ of Prohibition with suggestions in support in the Missouri Court of Appeals, Western District. Respondent filed Suggestions in Opposition to the petition on April 11th, 2006. The court denied relators' petition for Writ of Prohibition on April 14th, 2006. (*Id.*, Ex. F).

On July 20th, 2006, relators filed a Petition for Writ of Prohibition with suggestions in support in this honorable Court. Respondent filed her Suggestions in Opposition on July 28th, 2006. This Court issued a Preliminary Writ on September 26th, 2006, with the Court ordering respondent, by written return, on or before October 26th, 2006, to show cause why a writ of prohibition should not issue, which was timely filed by respondent in this Court.

POINT RELIED ON

RELATOR IS NOT ENTITLED TO AN ORDER TRANSFERING VENUE TO WEBSTER COUNTY BECAUSE VENUE IS PROPER IN JACKSON COUNTY MISSOURI, PURSUANT TO *§ 508.040, R.S.Mo.* IN THAT RELATOR McDONALD'S CORPORATION HAS AN OFFICE FOR THE TRANSACTION OF ITS USUAL AND CUSTOMARY BUSINESS IN JACKSON COUNTY AND/OR HAS AGENTS FOR THE TRANSACTION OF ITS USUAL AND CUSTOMARY BUSINESS IN JACKSON COUNTY.

Section 508.040, R.S.Mo. (2000)

State ex rel. Elson v. Koehr, 856 S.W.2d 57 (Mo. banc 1993)

State ex rel. Rothermich v. Gallagher, 816 S.W.2 194 (Mo. banc 1991)

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ARGUMENT

RELATOR IS NOT ENTITLED TO AN ORDER TRANSFERING VENUE TO WEBSTER COUNTY BECAUSE VENUE IS PROPER IN JACKSON COUNTY MISSOURI, PURSUANT TO *§ 508.040, R.S.Mo.* IN THAT RELATOR McDONALD'S CORPORATION HAS AN OFFICE FOR THE TRANSACTION OF ITS USUAL AND CUSTOMARY BUSINESS IN JACKSON COUNTY AND/OR HAS AGENTS FOR THE TRANSACTION OF ITS USUAL AND CUSTOMARY BUSINESS IN JACKSON COUNTY.

Standard of Review

"A writ of prohibition is an extraordinary remedy and is to be used with great caution and forbearance and only in cases of extreme necessity." *State ex rel. Douglas Toyota III, Inc. v Keeter*, 804 S.W.2d 750, 752 (Mo. banc 1991). As such, this Court has limited its application to three fairly rare categories of cases, including: 1) to prevent the trial court from usurping judicial power when it lacks the requisite jurisdiction; 2) to remedy an excess of jurisdiction or abuse of discretion when the lower court lacks the power to act; and 3) and to prevent a party from suffering irreparable harm. *Id. See also, State ex rel. Kemper v. Vincent*, 191 S.W.3d 45, 49 (Mo. banc 2006).

"A writ of prohibition is not issued as a matter of right; rather, whether a writ should be issued in a particular case is a question left to the sound discretion of the court in which a petition has been filed." *State ex rel. Abdullah v. Roldan*, WD 66901

(Mo.App. W.D. 11-28-2006); *State ex rel. Garrett v. Dally*, 188 S.W.3d 111, 113 (Mo.App. S.D. 2006). Further, "the burden is on the petitioning party to show that the trial court exceeded its jurisdiction, and that burden includes overcoming the presumption in favor of the trial court's ruling." *Hill v. Kendrick*, 192 S.W.3d 719, 720 (Mo.App. E.D. 2006).

"The discretionary authority of a court to issue a writ of prohibition is exercised when the facts and circumstances of a particular case demonstrate unequivocally that an extreme necessity for preventative action exists." *Id.*

Venue is Proper in Jackson County since relator McDonald's Corporation has an office for the transaction of its usual and customary business in Jackson County.

Venue is determined solely by statute. *State ex rel. Smith v. Gray*, 979 S.W.2d 190, 191 (Mo. banc 1998). Pursuant to *§ 508.040, R.S.Mo.*, "[s]uits against a corporation shall be commenced either in the county where the cause of action accrued" or "***in any county where such corporations shall have or usually keep an office or agent for the transaction of their usual and customary business***." (emphasis added.) A corporation's "residence may be wherever its officers and agencies are actually present in the exercise of its franchises and in carrying on its business…" *Gray*, 979 S.W.2d at 192.

"The primary purpose of Missouri's venue statute is to provide a convenient, logical and orderly forum for the resolution of disputes." *State ex rel. Elson v. Koehr*, 856 S.W.2d 57, 58 (Mo. banc 1993). In this matter, the Circuit Court of Jackson County, Missouri is the most convenient and logical forum to resolve this personal injury case. Relator McDonald's Corporation admittedly owns the real property where more than thirty (30) McDonald's restaurants sit in Jackson County, Missouri. Relator McDonald's Corporation also admits

that it operates all McDonald's restaurants in Missouri, including those thirty (30) in Jackson County, pursuant to a franchise agreement either with an independent owner or through its subsidiary, McDonald's Restaurants of Missouri, Inc. And, most importantly, 3-year-old plaintiff Meagan Bell received nearly all of her medical treatment, which included a three-week stay at Children's Mercy Hospital, where she was treated for her life-threatening injuries by numerous physicians from a variety of specialties in Jackson County, Missouri. Hence, the many treating physicians who will testify in this matter provided plaintiff medical treatment and continue to work in Jackson County, Missouri.

Relator McDonald's Corporation has more than thirty (30) offices situated in Jackson County, Missouri. Relator McDonald's Corporation admits that it owns the real property where all of the McDonald's restaurants sit in Jackson County, Missouri. "Under the broad language of *§ 508.040*, a corporation may be subjected to suit in a wide variety of venues – in every county where the corporation maintains an "office or agent.'" *Koehr*, 856 S.W.2d at 62. *Section 508.040* "evinces a policy 'of broadly subjecting corporations to suit.'" *Ball v. American Greetings Corp*., 752 S.W.2d 814, 825 (Mo.App. W.D. 1988).

It is disingenuous for relators to argue that McDonald's Corporation does not "possess or control any restaurant business in Missouri." Indeed, it actually owns at least thirty (30) pieces of property in Jackson County, Missouri where McDonald's restaurants sit and conduct relator's corporate business. Relators acknowledge that relator McDonald's Corporation owns this real property and that it has entered into contracts with numerous individuals to operate these McDonald's restaurants through franchise

agreements. Indisputably, relator McDonald's Corporation has many offices in Jackson County, Missouri where its business is being conducted.

Relators argue that simply owning real estate in and of itself does not meet the definition of "office." Relators incredulously suggest to this Court that it simply buys and then leases this real property to an independent owner or to its subsidiary company and then steps away – that it does not conduct any business from these sites and does not possess any control over these restaurants. The undersigned verily believes that the franchise agreement shows otherwise. Indeed, if the franchise agreement supported relators' contention that it does not control these restaurants in any way surely they would have attached a copy of the same as an exhibit to their petition.

Relators' reliance on the 1983 Eastern District decision, *Wadlow v. Donald Lindner Homes, Inc.*, 654 S.W.2d 644 (Mo.App. 1983), is misplaced. In *Wadlow*, the court found that there was "no evidence that business was customarily, or even rarely, transacted at any St. Charles address" – the county where the suit was filed. *Id.* at 647. The only connection to St. Charles County was that the corporate president's personal residence was in that county. *Id*. The court found that "venue in St. Charles County was improper because St. Charles County was not where the cause of action accrued and Lindner Homes did not have an agent or office for the transaction of business there." *Id*.

To so narrowly interpret or define "office" as relators have done in their petition, with no legal support, voids the legislative intent or policy of *§ 508.040* of "broadly subjecting corporations to suit." *Ball*, 752 S.W.2d at 825. Although there is no Missouri case law defining "office" in the context of the venue statute, *Blacks Law Dictionary* defines

"office" as "a place where regular transaction of business or performance of a particular service."

Unlike *Wadlow* and contrary to the relators' narrow definition of "office," in this matter, relator McDonald's Corporation owns the real property where each and every McDonald's restaurant sits in Jackson County, Missouri. At each of those McDonald's restaurants, business is being transacted on behalf of relator McDonald's Corporation either pursuant to a franchise agreement or through a subsidiary of the corporation. Therefore, pursuant to *§ 508.040,* venue in Jackson County, Missouri is proper since relator McDonald's Corporation maintains an office (more than 30 such offices) in Jackson County, Missouri.

With a finding that relator McDonald's Corporation does maintain an office (or many offices) in Jackson County, Missouri, this Court may conclude on this basis alone that venue is proper in this Court.

Venue is Proper in Jackson County since relator McDonald's Corporation has an agent for the transaction of its usual and customary business in Jackson County.

As an entirely separate basis for venue, respondent believes relator McDonald's Corporation also has agents for the transaction of its usual and customary business in Jackson County, Missouri. *See Koehr*, 856 S.W.2d at 62; *§ 508.040, R.S.Mo.*

For venue purposes, "agent" means a "person authorized by another to act for him, one intrusted [sic] with another's business." *State ex rel. Rothermich v. Gallagher*, 816 S.W.2 194, 201 (Mo. banc 1991). In most cases where the appellate courts "have found agency for purposes of *§ 508.040*" have primarily involved "agents authorized to sell a

product and bind the corporation."[1] *State ex rel. Cameron Mut. Ins. v. Koehr*, 850 S.W.2d 374, 375 (Mo.App. E.D. 1993). The long-standing law in Missouri has been that the "requirements of venue are grounded in convenience to litigants…" *State ex rel. Pagliari v. Stussie*, 549 S.W.2d 900 (Mo.App. St. L. 1977).

> In light of the policy of broadly subjecting corporations to suit, we conclude that there is no reason to narrowly define 'agent' as used in *§508.040*. The standard definition of 'agent' as 'a person authorized by another to act for him, one intrusted [sic] with another's business… seems sufficient to serve the convenience objectives which venue statutes are directed.

Id.[2]

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[1] *State ex rel. Cameron Mut. Ins. Co. v. Reeves*, 727 S.W.2d 916 (Mo.App. 1987) (independent insurance agency which represented several companies and which had authority to bind relator insurance company for insurance coverage and solicit and submit applications for insurance to relator); *State ex rel. Wilson v. Sanders*, 745 S.W.2d 735 (Mo.App. 1987) (independent agents who placed insurance with several companies, who had authority to solicit and submit applications of insurance for insurer and bind insurer in limited circumstances); *Ball v. American Greetings Corp.*, 752 S.W.2d 814 (Mo.App. 1988) (sales representatives solicited orders for corporation products, had authority to bind corporation to employment contracts, and district manager who supervised sales representatives worked out of his home in county where venue was sought).

[2] In *Stussie*, the appellate court reversed the trial court's order dismissing the relator's

A more recent Missouri Supreme Court decision, which is consistent with the above definition, but more comprehensive, comes from *§ 1 of the Restatement (Second) of Agency*. That section states:

1) that an agent holds a power to alter legal relations between the principal and a third party;

2) that an agent is a fiduciary with respect to matters within the scope of the agency;

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

Koehr, 856 S.W.2d at 60.

Missouri courts have held that if an individual or entity has the power to bind a company or principal, then the individual or entity is an agent under *§ 508.040*. *See Reeves*, 727 S.W.2d at 918; *Koehr*, 856 S.W.2d at 60. In *Koehr*, this Court further held that it is not the "scope of the agency" but rather the "existence of the agency" that the court looks at in determining whether venue is proper. *Id*. at 61.

Relators rely on a 1997 Eastern District decision, in which the court held that there was no agency relationship for venue purposes between Domino's Pizza, Inc. and its franchisee. *State ex rel. Domino's Pizza, Inc. v. Dowd*, 941 S.W.2d 663 (Mo.App. E.D. 1997). In that case, there was only one Domino's franchise operating in the county where

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cause of action for improper venue. The court held that the alleged agent's "status at least rose to the level of a person authorized" by the company "to act for it on a regular basis in its St. Louis County sales efforts." *Id*.

plaintiff filed suit - not more than thirty (30) restaurants where the company actually owned the real property where the restaurants sit. *Id*. The only issue on appeal in the *Domino's* case was whether there was an agent of Domino's for the transaction of Domino's usual and customary business in St. Louis City at that one franchise. *Id* at 665. Whether Domino's maintained an office in that county was not an issue on appeal. *Id*. Unlike the *Domino's* case, here, relator McDonald's Corporation owns thirty (30) pieces of property in Jackson County, Missouri, where the company's business is conducted on a daily basis.

Nonetheless, relators argue that in the *Domino's* case the franchisee was found to have no authority to alter legal relations between the company and third parties and therefore, the franchisee was not a fiduciary. *Id*. Relator McDonald's Corporation argue that the *Domino's* case is similar to this matter since this case also involves a franchise arrangement. That may be where the similarities end. It is impossible to know what authority or apparent authority the franchisees in Jackson County, Missouri, have in relation to relator McDonald's Corporation and its dealing with third parties without reviewing the Franchise Agreement and the Operations Manual or cross-examining the individual owners or operators of the McDonald's restaurants in Jackson County, Missouri, which relators have not supplied to plaintiffs or attached as an exhibit to this petition.

Of course, this Court need not reach this issue if it finds that relator McDonald's Corporation maintains offices in Jackson County, Missouri. However, if the Court wishes to determine whether defendant also has agents in Jackson County, Missouri for the transaction of its usual and customary business, the plaintiffs cannot adequately or properly argue the issue without further discovery – more specifically without reviewing the

corporate operation's manual, the franchise agreements for the various restaurants and/or cross-examining the various franchisee owners.

The undersigned believes that further discovery will reveal that the agents of the franchisees are authorized to alter legal relations or contracts between relator McDonald's Corporation and third parties – whether it be rejecting meat from a manufacturer, refusing to conduct business with a particular individual or company or declining to pay a bill. Unlike the *Domino's* case, where the parent company did not own the real property and appeared not to be actively involved in the operation of the restaurant (considering the court found that the conduct of the franchise was primarily for its own benefit, not Domino's), in this matter, the Court will find to the contrary. The undersigned believes if allowed to conduct additional discovery that the Court will find that relator McDonald's Corporation dictates the day-to-day operation of all of the McDonald's restaurants in Missouri and that the agents of the franchise are allowed to alter legal relations and contract between the defendant and third parties.

Thus, the Court will find the individuals or companies operating the McDonald's restaurants in Jackson County, Missouri serve as a fiduciary of relator McDonald's Corporation. As further evidence of the agency and fiduciary relationship, the individuals and companies operating the restaurants pursuant to the franchise agreements collect money from patrons and pay monthly fees to relator McDonald's Corporation during the term of their franchise. More specifically, the undersigned believes that additional discovery will reveal that the individuals and/or companies operating the McDonald's restaurants in Missouri on behalf of relator McDonald's Corporation must pay a monthly service fee which is based upon the restaurant's sales performance

(currently, a service fee of 4% of the monthly sales) as well as rent (which is either a monthly base rent or percentage rent that is based on the percentage of monthly sales).

Finally, the principal, relator McDonald's Corporation, has the right to control the conduct of the agents, these individuals or agents of the companies running the McDonald's restaurants in Jackson County, Missouri. The undersigned believes the relevant Franchising Agreement and the Operations Manual will evidence that relator McDonald's Corporation determines the situs of the restaurant, the lay-out of the restaurant, the manner in which the restaurant is operated (including the day-to-day activities), the dress code of the employees, and, most importantly, where to purchase its inventory, how to prepare the food (down to the temperature of the coffee) and how to train its staff in preparing the food to be sold. If the agent violates any condition of the agreement, plaintiffs believe relator McDonald's Corporation can take action against the agent, including shutting it down.

The legislature has imposed no limitation on the term "agent" for purposes of *§508.040* except that the agent "must be engaged in the "usual and customary business" of the principal. *Koehr*, 856 S.W.2d at 62. The agents, employees and servants of all of the McDonald's restaurants in Missouri serve an integral part in the day-to-day operation of these restaurants which inures to the benefit of relator McDonald's Corporation – not only in maintaining the high reputation of the company but in profiting through obtaining a percentage of the restaurants' monthly sales.

The long-standing holding in Missouri in interpreting the "rules of venue, as contradistinct from the rules of service of process… relate to the place of adjudication and so subserve the convenience of the litigants." *Ball*, 752 S.W.2d at 825. *Section*

508.040 evinces a policy "of broadly subjecting corporations to suit… The term agent in venue *§ 508.040,* therefore, construed to comport with that desideratum of statute, means as usual, and without technical restriction: a person another authorizes to act for that other, or one entrusted with the business of the other." *Id*.

Therefore, not only does relator McDonald's Corporation maintain many offices in Jackson County, Missouri, wherein it is conducting business on behalf of the company, but it also has hundreds of agents transacting its usual and customary business in Jackson County, Missouri. For venue purposes, plaintiffs need only show that either relator McDonald's Corporation maintains an office or has an agent in Jackson County, Missouri. Plaintiffs have shown both to be the case, making venue proper in Jackson County, Missouri.

Plaintiffs seek additional time to conduct discovery on the issue of venue as allowed by Rule 51.045(b), M.R.Civ.P.

Pursuant to *Rule 51.045,* plaintiffs were required to file a reply prior to requesting additional time to conduct discovery on the issue of venue. In compliance with the rule, plaintiffs filed their reply prior to discovery beginning in this matter. Therefore, prior to filing their reply and to this day, plaintiffs do not possess copies of the Franchise Agreements and/or Operations Manuals from the relevant corporate restaurants and have not taken the depositions of the individuals who have filed supporting affidavits to relators' petition. Again, it is not surprising and quite telling that relators failed to attach the relevant Franchise Agreements or the Operations Manuals as exhibits in support of their petition.

As this Court knows, the trial court "may allow discovery on the issue of venue" and "allow the party to amend" the reply if good cause is shown pursuant to *Rule 51.045(b).*

Therefore, if this Court deems necessary, respondent requests this Court to allow plaintiffs to conduct discovery on this issue and to amend their reply and/or answer prior to this Court making a determination on whether venue is proper. The undersigned verily believes that discovery in this matter will reveal that relator McDonald's Corporation exerts incredible control and power over the various franchise owners who operate its restaurants in Jackson County, Missouri, who would then be considered agents of the corporation.

CONCLUSION

For all of the foregoing reasons, respondent requests that this Court deny defendant's Petition for Writ of Prohibition on the basis that venue is proper in Jackson County, Missouri, as relator McDonald's Corporation has numerous offices and/or agents in Jackson County, Missouri, or, in the alternative, plaintiffs be allowed to conduct discovery on this issue, specifically, that relator McDonald's Corporation has agents throughout Jackson County, Missouri, and for such further relief as the Court deems just and proper in the premises.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

STATE OF MISSOURI)
) ss.
COUNTY OF JACKSON)

Kathleen M. Hagen, of lawful age, first being duly sworn, states upon her oath that on December 8th, 2006, she served two (2) copies of the foregoing Respondent's Brief on relators' attorney by depositing the same in the United States mail, first-class postage prepaid, at Kansas City, Missouri, in an envelope addressed to Jeffrey J. Brinker, Brinker & Doyen, LLP, 120 South Central Avenue, Clayton, Missouri 63105.

She also certifies that this brief complies with *Rule 84.06(b)* and contains 3,731 words excluding the title page, table of authorities, certificate of service and compliance and signature page, that the brief contains words in 13-point Times New Roman and that

a virus-free disk, scanned by Norton anti-virus, has also been served on counsel and on the Court.

_____
Kathleen M. Hagen
Attorney for Respondent

SUBSCRIBED AND SWORN to before me, a notary public, this 8th day of December, 2006.

_____
Notary Public

My Commission Expires:

_____

APPENDIX

1) Missouri Rules of Civil Procedure, Rule 51.045(b).....A1