
CASE NO. SC95377

**STATE OF MISSOURI *ex rel.*
HEARTLAND TITLE SERVICES, INC., *f/k/a*
HEARTLAND TITLE COMPANY, INC., AND JAMES C. DAY,**

RELATORS,

v.

THE HONORABLE KEVIN D. HARRELL,

RESPONDENT.

**WRIT OF PROHIBITION IN THE
CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
16TH JUDICIAL CIRCUIT**

The Honorable Kevin D. Harrell, Circuit Judge

Case No. 1516-CV048888

RELATORS' REPLY BRIEF

Paul Andrew Burnett, #54054
1010 Market St., Ste. 1340
St. Louis, Missouri 63101
(314) 621-8400
(314) 621-8843 (facsimile)
pbu@asyourattorney.com

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POINT RELIED ON

The trial court erred in dismissing Relators' second count for lack of venue because the trial court did not have jurisdiction to dismiss the claim for lack of venue in that venue was proper in the trial court and in that the trial court's dismissal and rationale for finding that venue was not proper effectively foreclosed Relators' ability to file suit for their injuries within the state of Missouri, thereby violating the Open Courts provision of the Missouri Constitution.

ARGUMENT

Venue Was Proper in Jackson County, and

Respondent's Argument to the Contrary Is Logically Inconsistent

Venue was proper in Jackson County because jurisdiction was present and because Section 508.010, RSMo, the Missouri venue statute, does not provide a mandatory, alternate venue. *See State ex rel. Neville v. Grate*, 443 S.W.3d 688 (Mo. App. 2014). In arguing to the contrary, Respondent essentially argues that venue was not proper 1) because venue is controlled by statute and because the venue statute does not provide a specific venue in which Relators' case must be pursued and 2) because the ruling in *State ex rel. Neville*, a similar case in all material respects, is not controlling because that case had a factual nexus to Missouri as some of the wrongful conduct in that case occurred in Missouri.

Respondent does not argue for reversal of the ruling in *State ex rel. Neville* or argue that it was wrongly decided, and Respondent does not argue in its brief that jurisdiction for this case was not present. Instead, Respondent merely argues that venue

is controlled by statute and that there is no venue for cases involving out-of-state plaintiffs injured outside of the state by out-of-state defendants with no registered agent in the state and no nexus to Missouri. That is, Respondent argues that statutes should prevail and control the issue, but it attempts to add a requirement that the case have some sort of factual nexus to Missouri, which is not found anywhere in the venue statute. The two parts of its argument contradict each other. On the one hand, Respondent wants to argue that statutes control; on the other, Respondent wants to require a nexus to Missouri, a requirement that has no statutory support and that is not found in any statute. Respondent's argument contradicts itself.

There is no meaningful difference between this case and *State ex rel. Neville*. Nowhere in *State ex rel. Neville* did that court state that its ruling was limited to cases that contained a nexus to Missouri, nor did it base its ruling on the existence of a factual nexus to Missouri. Respondent states that *State ex rel. Neville* was limited to the "set of circumstances" present in that case and that the "set of circumstances" to which it referred was limited to cases with a nexus to Missouri. Any reasonable reading of the case would show that the reference to "present set of circumstances" referred to cases that were not addressed by Section 508.010, RSMo, and not only to cases with a factual nexus to Missouri. The opinion's reference to the case's connection to Missouri was dicta used for effect and not a foundation upon which the opinion was based. It did not draw any distinction between cases in which negligent acts were performed in Missouri and otherwise similar cases in which no negligent acts were performed in Missouri.

The *State ex rel. Neville* Court made clear that it could not accept an interpretation

of Section 508.010, RSMo, that prohibited “some, but not all, plaintiffs from accessing Missouri courts despite the fact that Missouri courts possessed both subject matter and personal jurisdiction over the alleged cause of action.” *State ex rel. Neville*, 443 S.W.3d at 694. In so doing, it made clear that its ruling addressed cases in which subject matter and personal jurisdiction were present in Missouri, not simply cases in which negligent acts were performed in Missouri.

Respondent does not argue in Respondent’s Brief that Missouri courts do not have either subject matter or personal jurisdiction for this suit. Thus, the rationale of *State ex rel. Neville* should be applied to the case to determine that venue was proper in Jackson County, Missouri because the circumstances of the case do not fit into any of the mandatory venues provided by Section 508.010, RSMo, and Relators should be allowed to pursue their claim there.

Respondent’s Ruling Violates the Open Courts

Provision of the Missouri Constitution Because Defending

Against Relators’ Claim Would Not Cause Injustice to Defendants Below

Respondent’s finding that venue was not proper in Jackson County was based on the lack of a specific venue for the claim in Section 508.010, RSMo. The ruling effectively held that no Missouri venue was available to Relators for their claim because the facts of the case are not addressed by the venue statute. The ruling prohibits Relators from pursuing their claim in Missouri and violates the Open Courts provision of the Missouri Constitution. *See* Mo. Const. Art. 1 § 14.

Respondent claims that foreclosing the courts of Missouri from Relators does not

violate the Open Courts provision because the Constitution does not guarantee access to Missouri courts to nonresidents and cites *Loftus v. Lee*, 308 S.W.2d 654 (Mo. 1958), and *Elliot v. Johnson*, 292 S.W.2d 589 (Mo. 1956), as support. The cases have no relevance to this case. First, the issue in *Loftus and Elliot* was *forum non conveniens* and not venue. In fact, venue was proper in *Loftus*, and *Elliot* did not address the Open Courts provision directly. The ruling in *Loftus* was based on the “injustice” to which the defendant in the case would be subjected if forced to defend the case in the chosen venue. In ruling that the courts of Missouri should not be required to submit to an abuse of process by nonresidents, the court relied upon the section of the Open Courts provision holding that “right and justice shall be administered without sale, denial or delay.” *Loftus*, 308 S.W.2d at 660. Respondent has not set forth any allegation that defending against Relators’ claim in Missouri would be unjust. It would be an odd argument to make considering that the defendants below are defending against Relator James C. Day’s other claim in the same lawsuit in the trial court. Second, *State ex rel. Neville* rejected a similar argument because *Loftus* and *Elliot* “did not categorically exclude a class of plaintiffs from accessing Missouri courts.” *State ex rel. Neville*, 443 S.W.3d at 695 n.9.

Respondent also cites *Besse v. Missouri Pac. R.R. Co.*, 721 S.W.2d 740 (Mo. banc 1986), in support of Respondent’s argument. This Court held in *Besse* that “[t]he people of Missouri are not obliged to make their court available for *lawsuits* in which there is no significant Missouri nexus.” *Id.* at 742 (emphasis added). This Court did not state that the people of Missouri are not obliged to make their courts available for claims in which there is no significant Missouri nexus. This lawsuit involved two claims, one in which

one of the Relators¹ was injured by defendants in Missouri and one in which Relators were injured outside the state of Missouri. If it is a lawsuit and not a claim or count that requires a nexus, then the requirement is met because Relators' first claim involves a tort in which Relator James C. Day was injured in Missouri. It would not be unjust to defendants to defend against the claim at issue here because defendants have to defend against a different claim in the same lawsuit brought by Relator James C. Day. A greater injustice would occur if Relator James C. Day had to litigate his claims against defendant in piecemeal fashion.

Thus, if a nexus is required, which Relators do not concede, the case does have a nexus to Missouri, *i.e.*, the other claim in the lawsuit involving the same defendants and Relator James C. Day.²

¹ Relator James C. Day is a plaintiff in both counts. He hired defendants as attorneys on behalf of himself and both of the corporate plaintiffs.

² In asserting that the other claim provides a nexus to Missouri for the claim at issue here, Relators do not argue that venue for a claim can be established by joining a claim to another claim in which venue is proper but merely use it to demonstrate the case's nexus to the state. It would not violate *State ex rel. Turnbough v. Gaertner*, 589 S.W.2d 290 (Mo. banc 1979), which is easily distinguishable. In that case, the venue statute provided for venue for the claim at issue, and the claim for which venue was improper could be severed and transferred from the claim for which venue was proper. No such option is available here. As Respondent points out, this case cannot be transferred to another

Allowing Relators to Pursue Their Claim Would Not

Encourage Forum Shopping, But a Contrary Ruling Would

Discourage Corporate Entities From Registering Agents for Service of Process

Respondent claims that allowing Relators to litigate their claim in Missouri will encourage forum shopping. In so doing, it presents a sort-of straw man hypothetical of Relators³ filing suit in Jackson County against a California corporation with no registered agent in Missouri for a hypothetical car accident in Missouri and including an additional count unrelated to the claim and for which Section 508.010, RSMo, does not provide a specific venue. Respondent argues that recognizing that the ruling and rationale of *State ex rel. Neville* provides for venue in this case would result in the proverbial slippery slope of forum shopping, resulting in certain courts being inundated with filings.

Setting aside the unlikelihood of the existence of enough claims with similar circumstances as this one to constitute a burden on Missouri's courts, safeguards still exist to ensure that requiring litigants to defend against claims in Missouri does not violate due process concerns, namely jurisdiction. Thus, Respondent's slippery slope argument is meritless because the requirements of meeting personal and subject matter jurisdiction would prevent cases with no ties to Missouri from being heard in Missouri.

venue under Section 476.410, RSMo, because there is no specific venue provided under Section 508.010, RSMo.

³ Respondent asserts that Relators are Kansas residents in the hypothetical. Relators are Florida residents.

In addition, *forum non conveniens* exists to prevent defendants from litigation that is vexatious, oppressive, or harassing. See, e.g., *Anglim v. Missouri Pac. R.R. Co.*, 832 S.W.2d 298, 302 (Mo. banc 2002).

Respondent also asserts that allowing venue in this instance would violate the legislature's intent in amending Section 508.010, RSMo. However, courts "presume that the Legislature does not enact laws without a reason." *In the Interest of J.L.H.*, ____ S.W.3d ____ at 11, WD77850 (Mo. App. 2016). The legislature did not provide a specific, mandatory venue for cases like this one. Implicit in Respondent's argument in this regard is the proposition that the legislature intended no Missouri venue be available in cases like this one. The argument ignores the fact that changes to venue statutes would have no effect on whether Missouri courts are available to a specific set of plaintiffs; making Missouri courts unavailable would require changes to jurisdiction statutes. "Venue assumes the existence of jurisdiction and determines, among many courts with jurisdiction, the appropriate forum for the trial." *State ex rel. Kansas City S. Ry. Co. v. Nixon*, 282 S.W.3d 363, 365 (Mo. banc 2009). If the legislature wanted to eliminate jurisdiction for certain claimants, it would have made changes to Section 506.500, RSMo, the personal jurisdiction statute. If the legislature wanted to provide a specific venue for cases like this one, it would have done so.

Moreover, Respondent's position would discourage corporate entities from designating registered agents in order to avoid defending lawsuits in Missouri. Clearly, public policy favors Relators' position. If the legislature disagrees, it can make changes to the venue statute to designate its preferred venue for claims like this one or

(presumably) eliminate personal jurisdiction for defendants like the defendants in this case.

**If a Nexus to Missouri Is Necessary for Venue, Relators Should Have Been Given
The Ability to Perform Discovery to Determine Whether Such a Nexus Existed**

Respondent also argues that Relators should not have been given the ability to perform discovery to determine if a nexus to Missouri was present, if such a nexus is required, because no nexus exists. Respondent's conclusion that no nexus was present is based on a leap in logic that relies on an unsupported assumption. Respondent concludes that no nexus was present only because the parties are not Missouri residents with registered agents in Missouri and because the plaintiffs were injured outside of Missouri. However, those facts do not necessarily preclude the existence of a nexus to Missouri. The claim at issue involves professional malpractice in a bankruptcy court case that was dismissed because the defendants failed to serve an opposing party and because the defendants failed to respond to a motion. Any number of the acts leading to negligence could have occurred in Missouri (or the defendants below could have failed to perform acts that should have been performed in Missouri), *e.g.*, depositions could have been conducted in Missouri, the person who was not served could have been served in Missouri, *etc.* Relators were not given the opportunity to obtain and present such evidence to the Court.

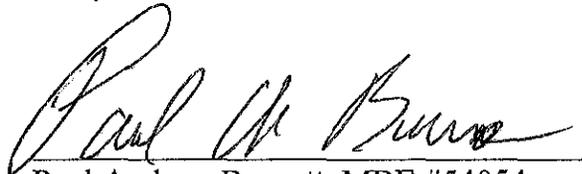
Respondent's argument regarding the necessity of a nexus to Missouri is based on its interpretation of *State ex rel. Neville v. Grate*. However, the nexus to Missouri was no more apparent in the circumstances of *State ex rel. Neville* than such a nexus may be in

this case. *State ex rel. Neville*, like the instant case, was a case involving out-of-state plaintiffs, out-of-state defendants with no registered agent in Missouri, and an injury that occurred outside the state. In spite of all of that, it still had a nexus to Missouri; so, too, could this case. Identifying a nexus to Missouri in cases like this could require discovery into the facts of the cases not necessarily included on the face of the pleadings. Consequently, dismissal without the ability to determine whether a nexus was present and demonstrate it to the trial court was not warranted, and Relators should have been allowed to conduct discovery on the issue and present it to the trial court.

CONCLUSION

WHEREFORE, Relators pray that this Court make its Preliminary Writ of Prohibition permanent and prohibit Respondent from dismissing Relators' claim that was filed properly in Jackson County for lack of venue. Alternately, if a nexus to the state of Missouri is required to establish venue, Relators pray that this Court make its Preliminary Writ of Prohibition permanent and prohibit Respondent from dismissing Relators' claim until Relators have the ability to conduct discovery on the issue and present it to Respondent.

Respectfully submitted,



Paul Andrew Burnett, MBE #54054
1010 Market St., Ste. 1340
St. Louis, Missouri 63101
(314) 621-8400
(314) 621-8843 (facsimile)
pbu@asyourattorney.com

CERTIFICATE REQUIRED BY RULE 84.06(c)

I certify that I signed the original version of this. This Brief complies with the limitations contained in Rule 84.06(b). According to the word count of Microsoft WORD for Mac, the word-processing system used to prepare this Brief, the Brief contains 2,860 words.



Paul Andrew Burnett, MBE #54054
1010 Market St., Ste. 1340
St. Louis, Missouri 63101
(314) 621-8400
(314) 621-8843 (facsimile)
pbu@asyourattorney.com

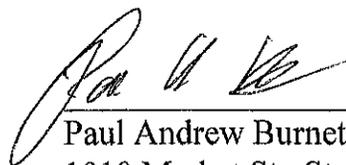
CERTIFICATE OF SERVICE

I certify that on May 13, 2016, I signed the original version of the foregoing document, and I electronically filed it with the Clerk of the Court using the Missouri E-Filing system, which sent notice of electronic filing to the following counsel who are or who should be registered with the Court:

Matthew G. Koehler
Derek H. MacKay
T. Michael Ward
BROWN & JAMES, P.C.
800 Market Street
St. Louis, Missouri 63101
Attorneys for Respondent and Defendants

I further certify that on May 13, 2016, I sent a copy of the foregoing document via U.S. Mail to:

The Honorable Kevin D. Harrell
Circuit Judge, Division 18
Circuit Court of Jackson County,
Missouri at Kansas City
415 East 12th Street, 8th Floor
Kansas City, Missouri 64106



Paul Andrew Burnett, MBE #54054
1010 Market St., Ste. 1340
St. Louis, Missouri 63101
(314) 621-8400
(314) 621-8843 (facsimile)
pbu@asyourattorney.com