

No. SC 83559

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI, ex rel. FORD MOTOR COMPANY

Relator,

vs.

THE HONORABLE MAX E. BACON, JUDGE
OF THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI,
ASSOCIATE DIVISION

Respondent.

RELATOR'S BRIEF

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JURISDICTIONAL STATEMENT

This action involves a question of whether Respondent, Honorable Max Bacon, can take any action except to transfer this cause, Case No. 397AC3980, entitled John Duffey v. Ford Motor Company, as well as the consolidated cases, from Greene County to St. Louis County, Clay County, or any county in which the causes of action accrued. The cases were initiated against Ford Motor Company, a foreign corporation, with no office or agent for its usual and customary business in Greene County. Furthermore, the causes of action did not accrue in Greene County. Venue in Greene County is, therefore, improper pursuant to R.S.Mo. 508.040. This Court has jurisdiction of this writ proceeding under Article V, Section 4 of the Missouri Constitution.

STATEMENT OF FACTS

This case, as well as the consolidated cases, involve breach of warranty and tort claims against Ford Motor Company, Inc. (“Ford”) for damages sustained to plaintiffs’ Ford vehicles. (See Plaintiffs’ Petitions, attached to Ford’s Petition for Writ of Prohibition, at Exhibit A.) Plaintiffs allege the vehicles caught fire and were damaged due to unreasonably dangerous and defective conditions existing in the automobiles. The claims against Ford are for property damage only.

Plaintiffs filed their Petitions against Ford in Greene County, Missouri in 1997 and 1998.¹ Plaintiffs have brought suit only against Ford, a foreign corporation with a registered agent in St. Louis County, Missouri, but with no office or agent for the transaction of the usual and customary business in Greene County, Missouri. (See Affidavit of Ron Ehlert, attached to Ford’s Petition for Writ of Prohibition at Exhibit L, ¶ 5.) Ford’s usual and customary business in the design, manufacture, final assembly, and distribution of motor vehicles. (Affidavit of Ehlert, ¶ 3.)

1. Duffey v. Ford (397AC3980), James v. Ford (397AC4203), Brown v. Ford (398AC0284), Conrad v. Ford (398AC2020), and Spicer v. Ford (398AC1488), were consolidated for purposes of resolving the venue issue only, by Court Order on October 18, 2000.

Because the underlying cases did not accrue in Greene County and because Ford has no office or agent for the transaction of its usual and customary business in Greene County, Ford moved to Dismiss or Transfer for Improper Venue on October 3, 1997.² (See Ford’s Motion to Dismiss or Transfer, attached to Ford’s Petition for Writ of Prohibition at Exhibit L.)

Plaintiff Duffey filed a Response to Ford’s Motion to Dismiss or Transfer for Improper Venue, and Plaintiffs James, Brown, Conrad, and Spicer filed Suggestions in Opposition to Ford’s Motion to Dismiss or Transfer for Improper Venue asserting that venue is proper because Ford Motor Credit Company (“Ford Credit”), a wholly-owned subsidiary of Ford, has an office for the conduct of its business in Springfield, Greene County, Missouri. (See Plaintiffs’ Suggestions in Support, attached to Ford’s Petition for Writ of Prohibition at Exhibit E.) Ford’s Reply established that under Missouri law an office of Ford Credit is insufficient to support venue. (See Ford’s Reply Brief, attached to Ford’s Petition for Writ of Prohibition at Exhibit F.) On December 7, 2000, Respondent, the Honorable Max E. Bacon, filed entries in the docket sheets of these

2. Ford Motor Company filed similar Motions to Dismiss or Transfer for Improper Venue in the individual cases, prior to consolidation, as follows: James, October 22, 1997; Brown, February 23, 1998; Conrad, May 29, 1998; and Spicer, April 22, 1998.

actions overruling Relator's motion to dismiss or transfer. (See copies of docket sheet, attached to Ford's Petition for Writ of Prohibition at Exhibit G.)

Relator Ford then filed a Petition for Writ of Prohibition with the Southern District Court of Appeals. (See copy of Petition, attached to Ford's Petition for Writ of Prohibition at Exhibit H.) That court summarily denied the writ without a written opinion. (See copy of letter from Clerk, attached to Ford's Petition for Writ of Prohibition at Exhibit K.) Ford then filed this Writ.

POINT RELIED ON

RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY ACTION EXCEPT TO TRANSFER VENUE FROM GREENE COUNTY, BECAUSE VENUE IS IMPROPER IN GREENE COUNTY PURSUANT TO R.S.MO. § 508.040, IN THAT FORD MOTOR COMPANY DOES NOT HAVE AN OFFICE OR AGENT FOR ITS USUAL AND CUSTOMARY BUSINESS IN GREENE COUNTY, MISSOURI, AND THE CAUSE OF ACTION DID NOT ACCRUE IN GREENE COUNTY.

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

State ex rel. Bunting v. Koehr, 865 S.W.2d 351 (Mo. banc 1993)

Hefner v. Dausmann, 966 S.W.2d 660 (Mo. Ct. App. 1999)

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

Mo. Rev. Stat. § 508.040

therefore, it is undisputed that Missouri Revised Statute § 508.040 applies to determine whether venue is appropriate in these lawsuits.

The trial court’s ruling that venue is proper over Ford in Greene County exposes corporations to lawsuits in forums with no connection to the cause of action merely on the basis of an office of a separate legal entity. It ignores well-established law regarding corporate structure and formation. The ruling would essentially make all subsidiaries “offices or agents” of the parent corporation for venue purposes, a result that is inapposite to the plain-language and purpose of the corporate venue statute, and contrary to Missouri law. See Hefner v. Dausmann, 996 S.W.2d 660, 664 (Mo. Ct. App. 1999)(“two different corporations are treated as two different persons, even if one corporation is the sole shareholder of the other”)(citing Grease Monkey Int’l, Inc. v. Godat, 916 S.W.2d 257, 262 (Mo. Ct. App. 1995)(emphasis added)).

II. STANDARD OF REVIEW Relator seeks this writ on the ground respondent has misconstrued or misapplied the law with respect to venue pursuant to Section 508.040. Where the claim is that the trial court misconstrued or misapplied the law, the appellate court reviews the trial court’s decision on a de novo basis. See, e.g., McGhee v. Dickson, 973 S.W.2d 847, 848 (Mo. banc 1998); Fishman v. Joseph, 14 S.W.3d 709, 715 (Mo. Ct. App. 2000).

III. VENUE IS NOT PROPER IN GREENE COUNTY If venue is improper in the county where an action is brought, prohibition lies to bar the

trial court from taking any further action, except to transfer the case to a county of proper venue. State ex rel. Reedcraft Mfg., Inc. v. Kays, 967 S.W.2d 703, 704 (Mo. Ct. App. 1998); State ex rel. Quest Commun. v. Baldrige, 913 S.W.2d 366 (Mo. Ct. App. 1996).

Section 508.040 of the Missouri Revised Statute sets forth the proper venue for suits against corporations. State ex rel. Malone v. Mummert, 889 S.W.2d 822, 824 (Mo. banc 1994). Section 508.040 provides:

Suits against corporations shall be commenced either in the county where the cause of action accrued, . . . or in any county where such corporation shall have or usually keep an office or agent for the transaction of their usual and customary business.

The purpose of the corporate venue statute “is to provide convenient, logical and orderly forum for resolution of disputes.” State ex rel. Domino’s Pizza, Inc. v. Dowd, 941 S.W.2d 663, 665 (Mo. Ct. App. 1997) (citing State ex rel. Elson v. Koehr, 856 S.W.2d 57 (Mo. banc 1993)).

Under Section 508.040, venue is not proper in Greene County because the cause of action did not accrue in Greene County, and an office of Ford Credit is not an office or agent of Ford Motor Company for the transaction of Ford Motor Company’s usual and customary business. Therefore, Respondent exceeded his jurisdiction by denying Ford’s Motion to Dismiss or Transfer for Improper Venue.

**A. An Office of Ford Credit is Not an Office or Agent of Ford for
Transaction of Its Usual and Customary Business**

**1. Ford’s Usual and Customary Business is the
Design, Manufacture, and Wholesale Distribution of Motor Vehicles**

To establish venue over Ford in this lawsuit, Ford Credit must be an office or agent of Ford for the transaction of Ford’s usual and customary business. Mo. Rev. Stat. § 508.040. Ford’s usual and customary business is the design, manufacture, final assembly, and distribution of motor vehicles. (Affidavit of Ehlert, ¶ 3.) Ford sells its vehicles to independent authorized dealers. (Id. at ¶ 4.) These dealers then sell the vehicles to the consumer. Id.; see State ex rel. Ford Motor Co. v. Dierker, 766 S.W.2d 691, 694 (Mo. Ct. App. 1989) (concluding the record supported Ford’s argument “that its usual and customary business is the sale of motor vehicles only to dealers,” and finding “the sale to the dealer is distinct from the second sale from the dealer to the ultimate consumer”, and “no part of the payment made by the ultimate purchaser is transmitted to Ford.”) overruled on other grounds by State ex rel. Bunting v. Koehr, 865 S.W.2d 351 (Mo. banc 1993).⁴

4. In State ex rel. Ford Motor Co. v. Dierker, the court held that a dealer entrusted with the performance of warranty and policy service on Ford products was an agent for

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Ford's usual and customary business, manufacturing and selling the vehicles to dealers, is not performed by Ford Credit. Venue over Ford in Greene County is, therefore, improper under Section 508.040. Relator also argues an office of Ford Credit and an office of Ford Motor Company are one and the same and should be treated as such. Relator's argument is not supported by the evidence and is simply wrong.

2. Ford Credit's Office is Not an Office of Ford Motor Company

3.

The office of Ford Credit in Greene County is not an office of Ford Motor Company under well-established Missouri law. "Generally, two different corporations

the purposes of determining venue under § 508.040. However, this holding was expressly overruled in Bunting v. Koehr, 865 S.W.2d 351, 355 (Mo. banc 1993). The Ford v. Dierker court's analysis that the usual and customary business of Ford is the sale of motor vehicles only to dealers was not discussed in Bunting.

are treated as two different persons, even if one corporation is the sole shareholder of the other.” Hefner v. Dausmann, 996 S.W.2d 660, 664 (Mo. Ct. App. 1999) (citing Grease Monkey, Int’l, Inc. v. Godat, 916 S.W.2d 257, 262 (Mo. Ct. App. 1995) (emphasis added)). “Two separate corporations may be treated as one only where there is such dominion and control that the controlled corporation has no separate mind, will or existence of its own and is but an alter ego for its principal. Such dominion and control must be established by evidence, and is not presumed.” Id.

Ford Credit is a separately incorporated entity under the laws of Delaware. (See Affidavit of Ann Oh-Yee Lee, ¶ 4.), attached to Ford’s Petition for Writ of Prohibition at Exhibit M.) It is a wholly-owned indirect subsidiary of Ford. (Id. at ¶ 3.) It maintains its own officers and directors. (Id. at ¶ 4.) Therefore, any office of Ford Credit is only an office of Ford Credit, it cannot be considered an office of Ford Motor Company simply because Ford Motor Company is the sole shareholder. See Hefner, 996 S.W.2d 660 (affirming original trial court’s granting of defendant’s pretensive joinder motion, as the medical clinic, an affiliated corporation of the defendant incorporated hospital, was not an agent of the hospital).

**4. Ford Credit is Not an Agent of Ford Motor Company for
the Transaction of Its Usual and Customary Business**

5.

Respondent also contends Ford Credit is an agent of Ford for venue purposes. This argument by Respondents is also flawed. In State ex rel. Bunting v. Koehr, 865 S.W.2d 351 (Mo. banc 1993), the Supreme Court of Missouri set forth three requirements for determining the existence of agency for venue purposes under Section 508.040:

- (1) An agent must hold the power to alter legal relations between the principal and third persons and between the principal and himself;
- (2) An agent must be a fiduciary with respect to matters within the scope of his agency; and
- (3) The principal must have the right to control the conduct of the agent with respect to matters entrusted to him.

Bunting, 865 S.W.2d at 353. “The absence of any one of the three elements of agency defeats the claim that agency exists.” Id.; State ex rel. Domino’s Pizza, Inc. v. Dowd, 941 S.W.2d 663, 665 (Mo. Ct. App. 1997) (emphasis added). Respondents have failed to show the existence of a single element, much less all the elements, required to establish an agency relationship has been met. Therefore, venue is improper in Greene County.

a. Ford Credit Has No Power to Alter the Legal Relationship Between Ford Motor Company and Dealers or Consumers

b.

Ford Credit has no power to alter legal relations between Ford Motor Company and purchasers of Ford vehicles. Respondent contends Ford Credit has the power to alter the legal relationship between Ford and Ford Credit by altering financing terms on the purchase of Ford vehicles. Financing arranged by Ford Credit in no way alters the legal relationship between Ford and its consumers or dealers. Ford Motor Company manufactures vehicles and sells them to independent dealers. (Affidavit of Ehlert, ¶ 4.) A consumer who purchases a Ford vehicle makes that purchase from a dealer, not Ford. (Id.; Affidavit of Lee, ¶ 7.) A consumer may choose to finance this purchase or lease the vehicle, and may enter into a retail contract or lease with the dealer. (Id. at ¶¶ 5, 7.) A consumer is not required to finance a purchase of a Ford Motor Company vehicle using Ford Credit. (Id. at ¶ 8.) Ford Credit purchases, from the dealer, retail contracts and leases entered into by the dealer and the consumer. (Id. at ¶ 5.) The decision to sell retail contracts to Ford Credit is left to the dealer's discretion. (Id. at ¶ 7.) Ford Credit is assigned the creditor's rights and holds a security interest in the vehicle (Id. at ¶ 7.) Ford Credit does not act as an agent of the manufacturer for these purchases. (Id.) Regarding leases, the lease does not affect the relationship between the consumer or

dealer and the manufacturer. (Id. at ¶ 10.) The manufacturer is not a party to the lease agreement. (Id.)

Ford Credit also provides inventory financing for some dealer purchases from Ford Motor Company and other manufacturers. (Id. at ¶ 6.) Ford Credit advances funds to the manufacturer for the purchase of vehicles by the dealer, taking a security interest in the inventory and assets of the dealership as security for the financing. (Id.) Upon sale of the vehicle by the dealer to a consumer, the security interest is discharged upon payment to Ford Credit by the dealer. (Id.) Ford Credit does not act as an agent of the manufacturer for these purchases. (Id.)

Ford Motor Company is not a party to any of the purchase or lease agreements entered into by Ford Credit. (Id. at ¶ 10.) Ford Credit and Ford Motor Company are not parties to any agreement restricting or conditioning Ford Credit's ability to finance a customer's purchase of a vehicle or a dealer's inventory purchases. (Id. at ¶ 13.) Therefore, Ford Credit, as a purchaser of commercial paper and a creditor in certain transactions, has no power to alter any legal relation between Ford Motor Company and the dealer or a consumer. See Bunting, 865 S.W.2d at 354 (“[T]he dealer's contractual obligation to inform the purchaser of the manufacturer's warranty and notify the manufacturer of the identity of the new holder of the warranty is not the same as a power to alter a legal relationship . . .”). Cf. Elson v. Koehr, 856 S.W.2d 57, 61 (Mo. banc 1993) (finding travel agent had power to alter legal relations because the airline was

“bound to provide air travel to customers who buy airline tickets from the travel agencies.”). Unlike Elson, Ford Credit’s purchase of a consumer’s lease or retail sales contract with the dealer does not alter the relationship between the consumer and Ford Motor Company. (Lee Affidavit at ¶¶ 9, 10.)

Respondent’s argument regarding Ford Credit’s ability to change the terms of financing has no bearing on Ford’s legal relationship between Ford and its dealers the consumers. Ford is not a party to any purchase or lease agreement entered into between the dealer and the consumer. Respondent has failed to show the existence of the first element required for an agency relationship--the power of the agent to alter the principle’s legal relationship with dealers or consumers. Ford Credit cannot alter the legal relationship between Ford and its dealers or customers and cannot, therefore, be considered an agent of Ford Motor Company.

**c. Ford Credit is Not a Fiduciary of Ford Motor
Company**

d.

Second, Ford Credit is not a fiduciary of Ford. Respondent has set forth vague allegations claiming a “symbiotic relationship” between Ford and Ford Credit.

The Missouri Court of Appeals in Domino's Pizza defined a fiduciary in the context of the corporate venue statute as “one who acts primarily for the benefit of the principal.” Domino's Pizza, 941 S.W.2d at 666 (citing Bunting, 865 S.W.2d at 2, 3; Restatement (Second) of Agency). In Domino's Pizza, the Court found a non-party franchisee was not an agent of Domino's Pizza for venue purposes. The Court focused on the activities of the franchise and concluded, although Domino's received some benefit from the maintenance of reputation and quality, “it is not the primary reason for the activities of the franchises.” Domino's Pizza, 941 S.W.2d at 666. The franchise was not a fiduciary because it sold its own product to the consumer and money was collected for that product, not Domino's Pizza's product. Further, the Court relied on the fact that the franchisee was not required to segregate any of the money and treat it as Domino's Pizza. Id.

In the present case, Ford Credit purchases retail contracts and leases entered into by dealers and customers and provides inventory financing to some Ford and non-Ford Dealers. (Lee Affidavit at ¶ 5.) The interest and principle payments from consumers and dealers are received by Ford Credit. (Id. at ¶ 11.) These moneys are not segregated and treated as receivables or held in trust for Ford Motor Company. (Id. at ¶ 12.) Ford Credit does not segregate money from each installment contract with the purchaser of a Ford vehicle and forward a percentage to Ford. (Id. at ¶¶ 11, 12.)

Respondent’s vague allegations regarding a fiduciary relationship fails to show Ford Credit acts primarily for the benefit of Ford Motor Company. Ford Credit, therefore, is not a fiduciary of Ford.

e. Ford Motor Company Lacks the Requisite Control Over Ford Credit

Finally, Ford lacks the requisite control over Ford Credit to establish agency for venue purposes. In Elson, the Court found this element satisfied because the agreement between the airline and the travel agent was “replete with conditions and restrictions on the authority of the agencies to act on behalf of the airline.” Elson, 856 S.W.2d at 61; see also Hefner v. Dausmann, 966 S.W.2d 660, 666 (Mo. Ct. App. 1999) (“the control a parent corporation must have over its subsidiary to be held liable for the subsidiary’s actions must include control over finances and over the policy and business practice with respect to the particular transaction at issue.”).

In the present case, Ford has no agreement with Ford Credit restricting or conditioning Ford Credit’s ability to finance a customer’s purchase of a vehicle. (Lee Affidavit at ¶ 13) Plaintiffs in the underlying lawsuits cited no such agreement, control, or condition with respect to the financing transaction between Ford Credit and the purchaser. Rather, Respondent apparently relied solely on the existence of a parent-

subsidiary relationship. However, Ford Credit's existence as a wholly-owned subsidiary of Ford Motor Company does not rise to the level of "conditions and restrictions" on an agent's authority. See Hefner, 966 S.W.2d at 666. Respondent has failed to show the requisite control necessary for an agency relationship to exist between Ford Motor Company and Ford Credit.

As Ford has established, none of the three required elements of agency are present between Ford and Ford Credit. The existence of a parent-subsidiary relationship by itself is insufficient to establish these elements under Missouri law. See Hefner, 996 S.W.2d at 666.

IV. CONCLUSION

Greene County has no connection with the lawsuit: the plaintiffs are residents of counties other than Greene County; the accidents occurred in counties other than Greene County; and Ford has no office or agent in Greene County. Further, Ford Credit does not meet the requirements necessary to make it an agent of Ford Motor Company. A finding that an office of Ford Credit is sufficient to establish venue over Ford Motor Company will subject corporations to lawsuits in forums with no connection to the cause of action merely on the basis of an office of a separate legal entity. This is an undesirable result and contrary to well established Missouri law regarding agency relationships and corporate structure and function.

Greene County is an illogical and inconvenient forum. See Domino's Pizza, S.W.2d 663, 665 (purpose of corporate venue statute "is to provide a convenient,

logical and orderly forum for resolution of disputes”). Because venue is improper in Greene County under § 508.040, Ford respectfully requests this Court to issue a writ of prohibition preventing Respondent from taking further action on these matters other than transferring them to counties where venue is proper.

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CERTIFICATE PURSUANT TO SPECIAL RULE NO. 1

Pursuant to Special Rule No. 1, the undersigned does hereby certify that this brief contains the information required by Rule 55.03, that it complies with the limitations of Special Rule No. 1(b) and contains 4325 words. The undersigned further certifies the enclosed disk has been scanned for viruses and is virus-free.

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Signature of this filing is a certificate that true and correct copies of the foregoing were mailed by U.S. Mail, postage prepaid, this _____ day of July, 2001, to:

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