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Abbreviations:

A	“Appendix”
RR	“Respondent’s Response to Relators’ Petition for Writ of Mandamus
P	“Relators’ Petition for Writ of Mandamus”
PA	“Exhibits Attached to Relators’ Petitioner for Writ of Mandamus”

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JURISDICTIONAL STATEMENT

Relator Auto Owners Insurance Company brought this original proceeding in prohibition, or, in the alternative, mandamus, to obtain interlocutory review of an Order entered by Respondent, the Honorable Edith L. Messina, Circuit Judge in the Circuit Court of Jackson County, Missouri, on May 18, 2010, transferring venue of this case to the Circuit Court of Boone County, Missouri. (PA 51-52) The underlying action, *Auto Owners Insurance Company v. Columbia Mutual Insurance Company and Biegel Refrigeration and Electric Co., Inc.*, Cause No.: 0916-cv-39510 (Circuit Court of Jackson County, Missouri), is a lawsuit seeking to recover for Equitable Contribution and Subrogation. (PA 1-9)

This Court has jurisdiction because it issued a Preliminary Writ of Prohibition on August 31, 2010. Under Article V, Section 4 of the Missouri Constitution, this Court has authority to determine and issue remedial writs.

STATEMENT OF FACTS

This original proceeding for a writ of prohibition, or, in the alternative, mandamus, arises from *Auto Owners Insurance Company v. Columbia Mutual Insurance Company and Biegel Refrigeration and Electric Co., Inc.*, Cause No.: 0916-cv-39510 (Circuit Court of Jackson County, Missouri), which is a lawsuit seeking to recover for Equitable Contribution and Subrogation. (PA 1-9)

On or about December 24, 2009, Plaintiff filed its Petition against Defendants in the Circuit Court of Jackson County, Missouri. (PA 1-9) Count I seeks equitable contribution against Defendant Columbia Mutual, and Count II seeks equitable subrogation against Biegel, Inc. (PA 4-9)

On or about February 17, 2010, Defendants filed jointly a “Motion to Dismiss” claiming that venue was improper in Jackson County because “Columbia does not have an office or any agents in Jackson County, Missouri.” (PA 10-12, 13-20) In their Suggestions in Support of the “Motion to Dismiss,” Defendants stated that “[f]or venue purposes, the Missouri Supreme Court has held that domestic insurance corporations ‘reside’ in any county it keeps an office or agent to transact its usual and customary business.” (PA 14) Hence, Columbia’s basis for its “motion to dismiss” was that it did not have any offices or agents located in Jackson County. (PA 10, 13-20)

On or about March 19, 2010, Auto Owners filed its Memorandum of Law in Response to Defendants’ Joint Motion to Dismiss. (PA 21-33) In its Response, Auto Owners pointed to evidence making clear that Defendant Columbia Mutual had dozens of

agents located in Jackson County for the transaction of its usual and customary business. (PA 27-33)

In their Reply Memorandum, Defendants changed their argument from arguing that they did not have agents located in Jackson County to now arguing that the relevant standard for the residency of an insurance company is limited to where they have an office for the transaction of their usual and customary business. (PA 34-38) The sole basis for their argument was that the corporate venue statute, Section 508.040, was repealed as a part of 2005's tort reform. (PA 34-38)

On March 30, 2010, the trial court issued a one-page Order denying Defendants' Motion to Dismiss. (PA 39) The trial court then held a case management conference on April 12, 2010 and chose to re-visit the issue of whether venue was proper in Jackson County. (PA 41) In an April 12, 2010 "Order Following Case Management Conference," the trial court reversed its prior March 30, 2010 Order and dismissed the entire case based on improper venue, stating "Motion to Dismiss is granted. The original order denying the motion is set aside." (PA 41)

Auto Owners then filed a Motion for Reconsideration on April 14, 2010, asserting that the trial court erred in concluding that venue was improper in Jackson County and, in any event, erred when it dismissed the case entirely instead of transferring it to another venue. (PA 42-46) The trial court heard oral arguments on Plaintiff's Motion for Reconsideration on May 11, 2010. (PA 51)

On May 18, 2010, the trial court entered a one-page Order setting aside its prior Order dismissing this case and instead ordered that the case be transferred to the Circuit

Court of Boone County, Missouri. (PA 51-52) On June 1, 2010, Boone County accepted transfer of this case and assigned the case, Cause No.: 10BA-CV02436, to The Honorable Kevin M. J. Crane.

Auto Owners then filed a Petition for Writ with the Missouri Court of Appeals, Western District, which was denied by that court on June 14, 2010. (PA 53) This proceeding followed.

POINT RELIED ON

Relator is entitled to the issuance of a permanent Writ ordering The Honorable Kevin M.J. Crane to transfer this case back to the Circuit Court of Jackson County, Missouri, and prohibiting The Honorable Edith L. Messina from taking any actions inconsistent with such transfer back to Jackson County, because longstanding Missouri law makes clear that venue was proper in Jackson County as a matter of law in that:

- A. Missouri law makes clear that an insurance company resides where it has an office or agent for the usual and customary transaction of its business;
- B. There is no question that Defendant Columbia Mutual Insurance Company has agents for the usual and customary transaction of its business in Jackson County, Missouri; and
- C. Longstanding Missouri law setting forth the residency requirements of insurance companies, as set forth by this Court, was unaffected by 2005 “tort reform” and, specifically, by the repeal of Missouri’s corporate venue statute, Section 508.040.

State ex rel. Smith v. Gray, 979 S.W.2d 190 (Mo. banc 1998)

Revised Statutes of Missouri, Section 508.010 (2000)

State ex rel. Henning v. Williams, 131 S.W.2d 561 (Mo. banc 1939)

STANDARD OF REVIEW

A Writ of Prohibition is appropriate when a trial court improperly makes a venue determination. *State ex rel. Reed Craft Manufacturing, Inc. v. Keys*, 967 S.W.2d 703, 704 (Mo. Ct. App. 1998) (citing *State ex rel. Quest Com. Corp. v. Bald ridge*, 913 S.W.2d 366, 368 (Mo. Ct. App. 1996)). Hence, a Writ of Prohibition should be entertained for the purpose of judicial economy. *State ex rel. City of St. Louis v. Kinder*, 698 S.W.2d 4, 6 (Mo. banc 1985).

Alternatively, a Writ of Mandamus is appropriate where a trial court judge improperly determines that venue is improper. *Reed craft Manufacturing*, 967 S.W.2d at 704 (citing *State ex rel. Domino's Pizza, Inc. v. Dowd*, 941 S.W.2d 663, 664 (Mo. Ct. App. 1997)). Furthermore, a writ of mandamus is proper where there is (1) “an existing, clear, unconditional legal right in the relator,” (2) “a corresponding, present, imperative, unconditional duty upon respondent,” and (3) a “default” by respondent in satisfying that duty. *State ex rel. Belle Starr Saloon, Inc. v. Patterson*, 659 S.W.2d 789, 790 (Mo.App. 1983).

Hence, “[t]he standard of review for writs of mandamus and prohibition, including those pertaining to motions to transfer venue, is abuse of discretion, and an abuse of discretion occurs where the circuit court fails to follow applicable statutes.” *State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630, 631 (Mo. banc 2007).

ARGUMENT

A. Summary of the argument

There are few, if any, disputed facts relevant to this proceeding. Relator, Respondents, and Defendants all agree that Section 508.010.2.(2) is the venue provision applicable to this case, which states as follows:

2. In all actions in which there is no count alleging a tort, venue shall be determined as follows:

* * *

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

Under this statute, venue is proper where any defendant resides, and no party disputes this. The sole issue, then, is where Defendant Columbia Mutual is deemed to “reside” for venue purposes.

Auto Owners contends that venue is proper in Jackson County because it is undisputed, as is evidenced by the arguments set forth in Defendants’ Response to Auto Owners’ Writ Petition (RR 4-7), that Columbia Mutual has dozens of agents for the transaction of its usual and customary in Jackson County. This is significant because the standard in Missouri for determining the residency of insurance companies has been, for decades, where the insurer has offices or agents for the transaction of its usual and customary business. Despite the clarity of Missouri law on this issue, Defendants’ argument in this case has evolved to be that residency of an insurance company is

determined not by where an insurer has an office or agent for the usual and customary transaction of its business, but only where they have an office. As its sole support for such an argument, Defendants point to the 2005 repeal of Missouri's corporate venue statute, Section 508.040.

Defendants' argument is error. In fact, an insurance company's "residency" has never been determined based on Missouri's "corporate venue" statute such that an insurance company's residency was completely unaffected by the repeal of Section 508.040. Put simply, and as explained in more detail below, there simply is no question that Section 508.040 would have no application to this case even had it not been repealed, as the sole venue statute at issue in this case is Section 508.010.2(2).

B. The outcome of this issue is governed by this Court's decision in *State ex rel. Smith v. Gray*, 979 S.W.2d 190, 191 (Mo. banc 1998).

Despite the fact that the residency of an insurance company has never been determined by statute in Missouri, including the now-repealed corporate venue statute (previously codified at Section 508.040 RSMo (2000)), and despite the fact that there is no "tort" even present in this lawsuit (A1-9), Defendants convinced the trial court that the repeal of Section 508.040 somehow changed the standard for determining where an insurance company resides. While the standard has always been where an insurer has an *office or agent* for the transaction of its usual and customary business, the trial court in Jackson County concluded that the standard is now only where an insurer has an *office* for the transaction of its usual and customary business. Such a decision is directly contrary to this Court's decision in *Gray*. 979 S.W.2d at 191.

We note at the outset that this Court has specifically held that, under Section 508.010(2), both “foreign and domestic insurance companies ‘reside’ for venue purposes in any county where they have or usually keep an office or agent for the transaction of their usual and customary business.” *Id.* at 192. Despite this, Defendants argued, and the trial court ultimately agreed, that the repeal of Section 508.040 somehow altered this standard for determining an insurance company’s residency and that this Court’s decision in *Gray* is no longer valid. This is simply incorrect.

First of all, and as noted above, there is no question that the relevant venue statute in this case is Section 508.010(2). The trial court’s ruling, then, is puzzling to say the least in that this Court in *Gray* stated explicitly that its standard for determining the residency of an insurance company applied to *both* Section 508.010 (the very venue statute at issue in this case) *and* Section 508.040 (the now-repealed corporate venue statute). *Id.* at 193. Furthermore, the language interpreted in *Gray* is identical to the language of Section 508.010.2(2) that everyone agrees is the applicable venue statute in this case. Hence, there is no question that the standard set forth in *Gray* defining where an insurer resides is the proper standard for determining where Columbia Mutual resides. By ignoring the clear holding of *Gray*, the trial court misapplied and misinterpreted Missouri law.

A detailed analysis of *Gray* makes this clear, as this Court went to great lengths to demonstrate the history in Missouri of determining the residency of an insurance company. The issue in *Gray* was whether Shelter Mutual Insurance Company resided in Jackson County, where they maintained an office through which they sold insurance

policies. The undeniable holding in *Gray* was that, under either Section 508.010, which is the venue statute applicable to this case, *or* Section 508.040, which is the now-repealed corporate venue statute, a foreign or domestic insurance company resides in *any* county in which they have or usually keep an office or agent for the transaction of their usual and customary business.” *Id.* at 192-193 (emphasis added). While this ultimate conclusion is significant to the sole issue presented by this writ, the analysis of this Court leading to that conclusion is equally as significant and demonstrates the trial court’s error in concluding that the standard in Missouri has now somehow changed.

This Court first noted that “[p]rior to 1943, no Missouri statute defined the ‘residence’ of corporations for venue purposes.” *Id.* at 192. When they first interpreted Missouri’s “corporate venue” statute, this Court stated that “Section 508.040 permits corporations to be sued in ‘any county where such corporations shall have or usually keep an office or agent for the transaction of their usual and customary business.’” *Id.*, quoting *State ex rel. Henning v. Williams*, 131 S.W.2d 561, 563-64 (Mo. banc 1939).

In speaking of the *Henning* case, this Court in *Gray* stated that “[t]he *Henning* case follows the common law rule that a corporation’s ‘residence may be wherever its corporate business is done,’ that is, ‘where its offices and agencies are actually present in the exercise of its franchises and in carrying on its business; and that the legal residence of a corporation is not necessarily confined to the locality of its principal office or place of business.’” *Gray*, 979 S.W.2d at 192, quoting *ZL Slavens v. South Pacific Railroad Co.*, 51 Mo. 308, 310 (Mo. banc 1873); See also *City of St. Louis v. Wiggins Ferry Co.*, 40 Mo. 580, 586-87 (Mo. banc 1867); *Kalamazoo Loose Leaf Binder Co. v. Con P.*

Curran Printing, 242 S.W. 982 (Mo.App. 1922). Hence, this standard is well over a century old and, as this Court made clear in *Gray*, long pre-dates the creation of the “corporate venue” statute by the Missouri General Assembly.

This Court next noted that in 1943 “the General Assembly changed the law, legislating that the residence of a general and business corporation ‘shall be deemed for all purposes to be in the county where its registered office is maintained.’” 979 S.W.2d at 192, citing to Revised Statutes of Missouri Section 351.375(3). Hence, “[a]s for general and business corporations, the 1943 law determines their ‘residence’ under Section 508.010(2).” *Id.*

However, this Court immediately clarified, in the very next paragraph, that the statute making a corporation’s residence where it has its “registered office” has never applied to insurance companies. “Although the 1943 law changed the rule for general and business corporations, it expressly does not apply to insurance corporations.” *Id.*, citing *Sec. 351.690(2)* codifying *1943 Mo. Laws 415, sec. 3*. This remains the law today pursuant to Section 351.690(3) RSMo (2000). At any rate, this Court concluded that “[t]herefore, the provision fixing a corporation’s residence at its registered office does not apply to insurance corporations.” *Id.* at 192. Ironically, this is the very standard applied by the trial court in determining that venue was only proper as to Columbia Mutual in Boone County, where Columbia Mutual has its office.

Because a statute governing its residency was absent, this Court in *Gray* relied on the longstanding *common law* definition of residency and explicitly held that “an insurance corporation’s residence is any place it keeps an office or agent to transact its

usual and customary business.” *Id.* In making absolutely clear that no statute governs the residency of an insurance company, including both the statutes making a corporation’s residence where it has its registered office and the corporate venue statute, the Supreme Court further stated:

However, unlike general and business corporations, no statute makes this location the residence of an insurance corporation. To the contrary, the statute requiring that domestic insurance corporations list their “principal or home office” existed when this Court decided *Henning* in 1939, *and* when the legislature amended the general and business corporation law in 1943. *Sec. 379.210*, reenacting *sec. 5950 RSMo 1939*, reenacting *sec. 5839 RSMo 1929*, reenacting *sec. 6250 RSMo 1919*. The General Assembly’s amendment for general and business corporations did not alter the common law for corporations not covered by the amendment.

Id. at 192-193, citing *Wring v. City of Jefferson*, 413 S.W.2d 292, 300 (Mo. banc 1967).

Despite the clarity of its analysis in *Gray*, this Court went a step further to again make their holding clear:

By changing the law for general and business corporations but not for insurance companies, the legislature left intact this Court’s definition of “residence” for insurance corporations. Under Sections 508.010(2) *and* 508.040, foreign and

domestic insurance companies “reside” for venue purposes in any county in where they have or usually keep an office or agent for the transaction of their usual and customary business.

Id. at 193, citing *Rothermich v. Gallagher*, 816 S.W.2d 194, 196 (Mo. banc 1991); *Henning*, 131 S.W.2d at 565 (emphasis added).

The *Gray* case clearly governs the determination of venue in this case. There is no question that the corporate venue statute, whether it still existed today or not, has nothing to do with this case, as all parties agree that Section 508.010.2 applies to this case. Moreover, *Gray* set forth the standard for determining the residency of an insurance company under *either* Section 508.010 *or* 508.040. It is completely immaterial that Section 508.040 no longer exists, as any argument or conclusion that the repeal of one of the *two* statutes that the *Gray* case addressed has any effect on the statute that everyone agrees applies to this case, is simply illogical.

The true irony of the trial court’s decision is that it essentially subjects the insurance company to Section 351.375(2), which Defendants advocated for, in determining an insurance company’s residency. Section 351.375(2) states that “[t]he location or residence of any corporation shall be deemed for all purposes to be in the county where its registered office is maintained.” This is what Defendants advocated for and what the trial court held in transferring this case to Boone County, where Columbia Mutual’s registered office is located. The irony of such a holding is that Section 351.375 is the exact statute that this Court in *Gray* stated “explicitly does not apply to insurance

companies,” citing to Section 351.690. Indeed, it was the law at the time of the decision in *Gray* and remains the law today that Chapter 351 of the Missouri Statutes, which pertains to “General and Business Corporations,” has no application to insurance companies. 979 S.W.2d at 192; Section 351.690(3).

Hence, the standard applied by the trial court in determining that venue was only proper where Columbia Mutual maintained its registered office, which was the position advocated by Defendants in their Response to Plaintiff’s Motion to Reconsider, is the very standard that both this Court and the General Assembly has made absolutely clear does not, and cannot, apply to insurance companies. See *Id.* The trial court, then, clearly erred in concluding that an insurance company can only reside where it has an office, as opposed to applying the centuries-old standard that an insurer resides anywhere it has either an office or agent for the transaction of its usual and customary business.

Defendants’ own position in this case makes clear that they do not even believe that the standard applied by the trial court was the proper standard. Rather, they were forced to change their argument “mid-stream” once it became clear that Columbia Mutual had dozens of agents located in Jackson County. As noted above, Defendants stated in their initial motion to dismiss that, “[f]or venue purposes, the Missouri Supreme Court has held that domestic insurance corporations ‘reside’ in any county it keeps an office or agent to transact its usual and customary business.” (A13-20) In support of that statement, Defendants cite to the same decision of this Court, *Gray*, which they would later argue no longer applies due to the repeal of the corporate venue statute.

Hence, Defendants first argued that they had no offices or agents in Jackson County and then, when it was pointed out that Columbia Mutual in fact has dozens of agents in Jackson County, Defendants were forced to transform their argument to be that residency is now determined solely by where an insurance company has an *office* for the usual and customary transaction of its business.

Finally, the effect of the trial court's ruling must be considered. By limiting the residency of an insurance company to where it maintains its office, as opposed to where it has an office or agent, this allows insurance companies to sell their insurance product all throughout the state of Missouri, knowing that they can only be sued, where the governing venue statute is Section 508.010.2.(2), in the county where they choose to maintain their office. Not only is this directly contrary to longstanding Missouri law, as evidenced by the fact that Missouri statutes expressly prevent this result through Section 351.690, but such would encourage forum shopping by allowing insurance companies to pick the one venue they want to litigate in, despite selling insurance policies, and having agents, all throughout the State of Missouri. Such a result would be directly contrary to the prevailing law in Missouri for over a century, and there simply is no merit to any argument that this Court's decision in *Gray* is not still the prevailing law in Missouri on where an insurance company resides.

CONCLUSION

Based on all of the above, Respondent, The Honorable Edith L. Messina, erred in concluding that venue was improper in Jackson County based on her reasoning that venue was only proper where Columbia Mutual had an *office* for the usual and customary transaction of its business. Hence, the preliminary writ in prohibition of this Court should be made permanent, and Respondent The Honorable Kevin M.J. Crane, should be ordered to transfer this case back to where it was properly filed in the Circuit Court of Jackson County, Missouri.

Respectfully submitted,

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Subscribed and sworn to me, a Notary Public, this 12th day of November, 2010.

Notary Public

My Commission Expires:

CERTIFICATE OF COMPLIANCE

The undersigned certifies under Rule 84.06 of the Missouri Rules of Civil

Procedure that:

1. This Relators' Brief includes the information required by Rule 55.03.
2. This Relators' Brief, which has 3,632 words, exclusive of the cover, the certificate of service, the Rule 84.06 certification, the signature block, and the appendix, complies with the word limitations authorized by Rule 84.06 of the Missouri Rules of Civil Procedure; and
3. The computer disk accompanying Relator's Brief has been scanned for viruses and to the undersigned's best knowledge, information, and belief is virus free.

Kenneth R. Goleaner

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