

IN THE SUPREME COURT OF MISSOURI

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STATE OF MISSOURI ex rel. AUTO )  
OWNERS INSURANCE COMPANY, )  
 )  
Relators, )  
v. )  
 )  
THE HONORABLE EDITH L. MESSINA, )  
CIRCUIT JUDGE, DIVISION 12 )  
16<sup>th</sup> Judicial Circuit, Jackson County, Missouri, )  
 )  
and )  
 )  
THE HONORABLE KEVIN M. J. CRANE )  
CIRCUIT JUDGE, DIVISION 3 )  
13<sup>th</sup> Judicial Circuit, Boone County, Missouri, )  
 )  
Respondents. )  
 )

Appeal No.: SC91013

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ORIGINAL PROCEEDING IN PROHIBITION AND/OR MANDAMUS ON PRELIMINARY RULE IN  
PROHIBITION FROM THE SUPREME COURT OF MISSOURI TO THE HONORABLE EDITH L.  
MESSINA, CIRCUIT JUDGE OF JACKSON COUNTY, MISSOURI, AND THE HONORABLE KEVIN  
M.J. CRANE, CIRCUIT JUDGE OF BOONE COUNTY, MISSOURI

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REPLY BRIEF OF RELATOR AUTO OWNERS INSURANCE COMPANY

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## ARGUMENT

In their Response, Defendants Columbia Mutual Insurance Company (“Columbia Mutual”) and Biegel Refrigeration & Electric Co., Inc. (“Biegel, Inc.”) assert the same argument they have asserted throughout these proceedings, which is that the 2005 repeal of the “corporate venue statute” by the Missouri General Assembly somehow erased the common law definition of where an insurance company resides, which has existed for over a century. This is incorrect. As this issue has been briefed at length by the parties, Relator will only highlight below a couple of reasons why the specific arguments set forth in Respondents’ Brief are without merit.

The premise of Respondents’ argument is that, when Section 508.040 was repealed as a result of 2005 tort reform, the effect was to also repeal the longstanding common law standard that an insurance company resides, for venue purposes, where it has either an office or agent for the usual and customary transaction of its business. Such an argument, however, is flawed based upon both the history of this common law standard and a close look at the changes made to the venue statutes upon which Respondents base their entire argument.

First, Respondents’ argument is flawed in that it assumes that the standard for determining where an insurance company “resides” was created by the corporate venue statute such that its repeal means that this common law standard is somehow eliminated. However, the undeniable holding of this Court in *State ex rel. Smith v. 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.” 979 S.W.2d 190, 192-193 (Mo. banc 1998) (emphasis added). The fact that one of these two statutes no longer exists, Section 508.040, has no bearing whatsoever on where Defendants are deemed to reside for purposes of the other statute addressed in *Gray*, which is Section 508.010.

More importantly, Defendants’ argument ignores the history of the common law determination of where an insurance company resides and, in fact, implies that this common law determination was actually *created* by statute. To the contrary, this Court in *Gray*, in speaking of this Court’s prior decision in *State ex rel. Henning v. Williams*, 131 S.W.2d 561, 563-64 (Mo. banc 1939), 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). The Court in *Gray* made unambiguously clear that no statute has ever governed the determination of where an insurance company resides for venue purposes, which is what makes Respondents’ argument in this case both problematic and ironic. See *Gray*, 979 S.W.2d at 192-193.

Hence, the determination of where an insurance company resides is undoubtedly a common law one that spans back well over a century and pre-dates the creation of Section 508.040. This alone renders meaningless Respondents' argument that the repeal of Section 508.040 somehow changed the common law standard for determining where an insurance company resides for venue purposes.

In addition, absent from Respondents' argument is any analysis as to *why* Section 508.040 was repealed. It was not in order to change where an insurance company is deemed to reside for venue purposes. Rather, it was because of the changes that were being made as to how all venue determinations are to be made in Missouri. Section 508.010, which is the venue statute applicable to this case, was changed so as to distinguish between venue in tort and non-tort actions. See Section 508.010 RSMo (2000 and cum.supp. 2006). (A1, A3)

Based on this change in how venue determinations were to be made, the Missouri General Assembly concluded that the separate corporate venue statute was no longer necessary. Specifically, as to non-torts, venue would now be determined by where a defendant resides. For non-insurers this determination is statutory and is governed by Section 351.375.2. Because Section 351.375 does not apply to insurance companies, where an insurance company resides would continue to be determined, as it always has been, by common law.

As to torts, the change in Section 508.010 mandated that venue was to be determined based on where the plaintiff was first injured, so long as the injury took place within the State of Missouri. Hence, the residency of a corporation was now irrelevant to

a venue determination in such a case. Finally, as to tort actions where the plaintiff was not first injured in the State of Missouri, Section 508.010 added a provision as to where venue of a corporation is to be determined in such a situation:

If the defendant is a corporation, then venue shall be in any county where a defendant corporation's registered agent is located or, if the plaintiff's principal place of residence was in the State of Missouri on the date the plaintiff was first injured, then venue may be in the county of the plaintiff's principal place of residence on the date the plaintiff was first injured.

Section 508.010.5(1).

The above analysis makes two things clear. First, the changes to the statutory scheme in general, and Section 508.010 in particular, make clear *why* Section 508.040 was no longer necessary and was repealed. It had nothing to do with changing the longstanding common law standard for determining where an insurance company resides, as Respondents suggest. Rather, it had to do with Section 508.040 no longer being necessary based on the sweeping changes that were being made by the Missouri General Assembly as to how venue was to be determined in all cases.

In addition, the specific changes that were made to Section 508.010 make clear that the Missouri General Assembly did not intend to interfere with the common law standard for determining an insurance company's residency. Specifically, Section 508.010 adds a definition of "principal place of residence" for individuals. Had the legislature wanted to specifically define where a corporation or an insurance company

resides for venue purposes, they certainly could have done so by adding a similar definition. They did not.

Similarly, Section 508.010 specifically spells out how a corporation's venue is to be determined in cases where a tort is alleged and where the injury first occurs outside the State of Missouri. Again, had the Missouri General Assembly intended to alter the common law determination as to where an insurance company resides for purposes of Section 508.010 in light of the other changes that were being made to this statute, they certainly could have. Again, however, they did not. The changes the Missouri General Assembly did make, along with changes they could have but did not make, make clear that Respondents' argument is without merit and that the Missouri General Assembly had no intention of disturbing the centuries-old common law determination that an insurance company resides where it has an office or agent for the transaction of its usual and customary business.

In fact, this Court in *Gray* specifically held that prior statutory changes made by the Missouri General Assembly had no effect on the common law determination of where an insurance company resides. 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 .... The General Assembly’s amendment for general and business corporations did not alter the common law for corporations not covered by the amendment .... 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.

*Gray*, 979 S.W.2d at 192-193, citing *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194, 196 (Mo. banc 1991); *Henning*, 131 S.W.2d at 565 (emphasis added). Thus, changes made to statutes that have never governed as to the specific inquiry of where an insurance company resides simply have no effect on the common law standard for determining the residency of an insurance company.

Finally, it bears noting that the effect of the specific argument made by Respondents would be to subject insurance companies to the precise venue standard that the Missouri General Assembly has rejected, which is where their registered office is located. Section 351.375.2 mandates 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.” However, Section 351.690 makes clear that this statute does not apply to insurance companies. Section 351.690 RSMo (2000); *Gray*, 979 S.W.2d at 192. Hence, not only is Respondents’ argument without merit that Section 508.040’s repeal somehow

changed the common law determination of where an insurance company resides, but the effect of Respondents' argument would be to apply a standard for the residency of an insurance company that the Missouri General Assembly has made clear *does not* apply to insurance companies.

## CONCLUSION

Based on all of the above, longstanding Missouri law makes clear that venue was proper where this case was initially filed in Jackson County. Hence, this Court's preliminary Writ should be made permanent.

Respectfully submitted,

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**AFFIDAVIT OF SERVICE**

The undersigned certifies that a copy of the foregoing brief, along with a CD-ROM containing the same, were deposited on this 16<sup>th</sup> day of December, 2010, in the United States Mail, postage prepaid, addressed to:

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Kenneth R. Goleaner

Subscribed and sworn to me, a Notary Public, this 16th day of December, 2010.

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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' Reply Brief includes the information required by Rule 55.03.
2. This Relators' Reply Brief, which has 1,710 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 Reply Brief has been scanned for viruses and to the undersigned's best knowledge, information, and belief is virus free.

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Kenneth R. Goleaner

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