

IN THE SUPREME COURT OF MISSOURI

No. SC 83558

STATE OF MISSOURI ex rel. HAROLD D. LINTHICUM,
DELMAR GILES d/b/a BLUFF CITY SHOWS, et al.,

Relators,

vs.

THE HONORABLE MICHAEL B. CALVIN,
CIRCUIT JUDGE, DIVISION ONE,
CIRCUIT COURT OF THE CITY OF ST. LOUIS,

Respondent.

ORIGINAL PROCEEDING IN PROHIBITION

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

This original action in prohibition involves whether Respondent improperly denied Relators' Motion For Transfer of Venue, and whether the Preliminary Writ of Prohibition entered by this Court on April 19, 2001, shall be made permanent. This Court has jurisdiction pursuant to Article 5, Section 4.1 of the Missouri Constitution to issue and determine remedial writs.

STATEMENT OF FACTS

On August 6, 1997, Plaintiff Kathy Penny was a passenger on a Ferris wheel carnival ride at the St. Francois County Fair in Farmington, Missouri. (First Amended Pet. at ¶14 Appendix p. A4). After Plaintiff had seated herself in the Ferris wheel's car, she was waiting for a friend to join her when the Ferris wheel abruptly began moving. (Deposition of Kathy Heberlie,¹ Appendix p. A 27-A28). Defendant Harold D. Linthicum, the operator of the Ferris wheel at the time of the incident, failed to secure the safety bar before the ride began moving. (Appendix p.A30-A31). As the ride moved, the car in which Kathy Penny was seated failed to keep her in a horizontally seated position, and “dumped” her out of the seat from a great height. (Id.). As a result of her fall from the Ferris wheel, Kathy Penny sustained serious and permanent injuries for which she seeks damages herein. (Appendix p. A4 at ¶15).

¹Kathy Penny was recently married, and thus her deposition was taken under her new married name Kathy Heberlie.

At the time of the incident, the Ferris wheel was owned by Defendant Delmar Giles (hereinafter “Giles”).² (Purchase Agreement dated June 12, 1996, Appendix p. A61). Plaintiff later learned that Defendant Forsythe & Dowis Rides, Inc. (hereinafter “Forsythe”) had sold the subject Ferris wheel ride to Defendant Giles.³ (Id). Defendant Forsythe had purchased the Ferris wheel from Defendant Reithoffer Shows (hereinafter “Shows”). (Invoice No. 12920, Appendix p. A62; see also Invoice No. 12945, Appendix p. A63). Defendants Shows and Reithoffer Equipment Co., Inc. (hereinafter “Equipment”) assert that the Ferris wheel was sold to Defendant Forsythe by Defendant Equipment, not Defendant Shows.

In the first proceeding, Plaintiff filed her Petition in the Circuit Court for St. Francois County, Cause No. CV598-738CC, naming Defendant Giles as the sole Defendant. (Petition, Appendix p. A64-A67). Plaintiff later amended her petition to include Defendant Shows and Defendant Forsythe as additional Defendants. (Second Amended Petition, Appendix p. A68-

²Defendant Delmar Giles does business as Bluff City Shows.

³Defendant Forsythe and Dowis Rides do business as WMI Industries, as indicated in the purchase order.

A77). After conducting limited discovery into the issue of personal jurisdiction, Plaintiff voluntarily dismissed her cause of action without prejudice on June 13, 2000.

On June 20, 2000, Plaintiff filed an original Petition in the Circuit Court of the City of St. Louis naming Defendant Harold D. Linthicum, a resident and citizen of Arkansas as the sole defendant. Venue was proper in the Circuit Court of the City of St. Louis pursuant to §508.010.4 RSMo 1998,⁴ in that Defendant Linthicum was not a resident of the State of Missouri. On June 21, 2000, Plaintiff sought and was granted leave to file her first amended petition. (Motion to Amend, Appendix p. A78). Plaintiff subsequently filed her first amended petition adding Defendant Giles, Defendant Forsythe, Defendant Shows, Defendant Equipment and Defendant Nittany Rides, Inc. (hereinafter “Nittany”). (First Amended Petition, Appendix p. A1-A17). Defendants Giles and Linthicum then filed a motion challenging venue in the City of St. Louis. (Motion to Transfer Venue, Appendix p. A79-A83). Respondent subsequently denied Defendants’ motion since venue was proper in the Circuit Court of the City of St. Louis when the cause was originally brought. (Order dated February 1, 2001, Appendix p. A84-A85).

⁴All references hereinafter are to RSMo 1998.

POINT RELIED ON

1. The relators are not entitled to a writ of prohibition to compel respondent to vacate his order denying relators' Motion to Transfer Venue. Venue is proper in the Circuit Court of the City of St. Louis under §508.010.4 RSMo 1998 because venue was proper as to the sole resident defendant when the case was brought in the Circuit Court of the City of St. Louis.

Cases

Jones v. Overstreet, 865 S.W.2d 717 (Mo.App. E.D. 1993)

State ex rel. Bunker Resource, Recycling & Reclamation, Inc. v. Dierker,
955 S.W.2d 931 (Mo.banc 1997)

State ex rel. DePaul Health Ctr. v. Mummert, 870 S.W.2d 820 (Mo.banc 1994)

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ARGUMENT

1. The relators are not entitled to a writ of prohibition to compel respondent to vacate his order denying relators' Motion to Transfer Venue. Venue is proper in the Circuit Court of the City of St. Louis under §508.010.4 RSMo 1998 because venue was proper as to the sole resident defendant when the case was brought in the Circuit Court of the City of St. Louis.

A. Standard of Review

The Missouri Supreme Court and the Courts of Appeals derive their power to issue writs of prohibition from the Constitution of the State of Missouri. Scott County Reorganized School Dist., v. Missouri Comm'n on Human Rights, 872 S.W.2d 892, 894 (Mo.App. S.D. 1994). "The power to issue a writ of prohibition is limited to correction or limitation of an inferior court or agency that is acting without, or in excess of, their jurisdiction." State ex rel. J.E. Dunn Construction Co. v. Fairness in Construction Board, 960 S.W.2d 507, 511 (Mo. App. W.D. 1997) (citations omitted). A writ of prohibition does not issue as a matter of right. Id. Further, the discretionary authority of the Court to issue a writ of prohibition should only be exercised when "the facts and circumstances of a particular case demonstrate unequivocally that there exists an *extreme necessity* for preventative action." Id. (emphasis added). Finally, "[a] writ of prohibition is an extraordinary remedy and it should be used with 'great caution, forbearance, and *only in cases of extreme necessity.*'" Id. quoting Missouri Dep't. of Social Serv. v. Admin. Hearing Comm'n, 826 S.W.2d 871, 873 (Mo.App. W.D. 1992) (emphasis added).

B. Venue is Proper in the Circuit Court of the City of St. Louis

In Missouri, venue is determined when the case is filed. State ex rel. DePaul Health Ctr. v. Mummert, 870 S.W.2d 820, 823 (Mo.banc 1994); State ex rel. Bunker Resource, Recycling & Reclamation, Inc. v. Dierker, 955 S.W.2d 931, 934 (Mo.banc 1997) (if venue is proper when a suit is filed, subsequent events do not make venue improper). Under the terms of the statute this Court explicitly held that “venue is determined as the case stands when brought, not when a motion challenging venue is decided,” and venue in Missouri is determined exclusively by statute. DePaul 870 S.W.2d at 822 & 823. Once the legislature has determined that venue is proper in the circuit court of a particular county, “it is not the court’s role to frustrate it.” Willman v. McMillen, 779 S.W.2d 583, 586 (Mo.banc 1989). Moreover, a trial judge is actually “*without discretion* to disturb a plaintiff’s choice of proper venue within the state.” Jones v. Overstreet, 865 S.W.2d 717, 718 (Mo. App. E.D. 1993) (emphasis added).

Contrary to relators’ assertion, neither §508.010.3 nor §508.010.6 determines venue in this case. Under DePaul, venue must be determined when a case is filed; and when suit is brought only against individual, non-resident defendants, §508.010.4 applies. Section 508.010.4 states that “[w]hen all the defendants are non-residents of the state, suit may be brought in any county in this state.” Id. At the time Plaintiff filed her original petition in the Circuit Court of the City of St. Louis, Defendant Linthicum, a non-resident of the state of Missouri, was the sole defendant. Therefore, at the time Plaintiff filed her petition, venue was proper in the Circuit Court of the City of St. Louis pursuant to §508.010.4. Since venue is determined when the case is filed, and not when additional defendants are added to a suit or

when a motion challenging venue is heard, venue is still proper in the Circuit Court of the City of St. Louis, despite the addition of subsequent defendants to Plaintiff's action. See DePaul, 870 S.W.2d at 823.

The appropriate time for determining venue is when a suit is brought, and “[t]he legislature’s language is specific, definite, and certain in its provision of a plaintiff’s determination of proper venue for his suit.” Willman, 779 S.W.2d at 585. Thus, if venue is proper in a particular county, the trial court acts in excess of its jurisdiction by transferring the case to another county. State ex rel. Watts v. Hanna, 868 S.W.2d 549, 550-551 (Mo.App. S.D. 1994). Had Respondent granted defendants’ motion and transferred this cause to St. Francois County or Butler County in derogation of §508.010 and DePaul, respondent clearly would have improperly acted in excess of his jurisdiction, thereby disregarding the venue rules established by the legislature.

Relators have utterly failed to show that Respondent acted without or in excess of his jurisdiction by denying relators’ motion to transfer venue. See J.E. Dunn Construction Co., 960 S.W.2d at 511. Further, relators have failed to demonstrate the requisite extreme necessity essential to justify the imposition of a writ of prohibition. Id.

C. Venue is Determined When Suit is Brought Not When a Party is Added

Relators propose a rule in which a trial court should re-examine venue upon joinder of an additional party after the filing of the original petition. This proposition is contrary to the clear language of DePaul and the customary meaning of “brought” when referring to the bringing of suit. For example, Black's Law Dictionary defines “bring suit” as:

“To ‘bring’ an action or suit has a settled customary meaning at law, and refers to the initiation of legal proceedings in a suit A suit is “brought” at the time it is commenced Under the Federal Rules of Civil Procedure, and also most state courts, a civil action is commenced by filing a complaint with the court.”

Black's Law Dictionary (West Publishing Co. 1990).

Such a reading of “brought” coincides with this Court’s interpretation of the statute under DePaul. Id. 870 S.W.2d at 823. In State ex rel. Bunker Resource, Recycling & Reclamation Inc., v. Dierker, Judge White of this Court noted in his dissent that DePaul stood for “the unremarkable proposition that, if venue properly lies when suit is filed, subsequent events do not make venue improper.” Bunker Resource, Recycling & Reclamation Inc., 955 S.W.2d at 934 (White, J., dissenting).

When a statute is not ambiguous and its words have “a plain and definite meaning,” there is no reason for applying a contrary rule of construction. State ex rel. Whaley v. Gaertner, 605 S.W.2d 506, 507 (Mo.App. E.D. 1980). The rationale of DePaul was correct and applicable to this case.

The relators contend the term “brought” is ambiguous, arguing that a single suit is “brought” anew any time an additional defendant is joined. The “plain and ordinary meaning” of “brought” in the context of §508.010 is “commenced.” Missouri law clearly states “the filing of a petition in a court of record . . . and suing out of process therein [is] deemed the commencement of a suit.” §506.110.2, see South Missouri Lumber Company v. Wright, 21 S.W. 811, 812 (Mo. 1893). If this Court finds ambiguity in the term “brought,” §508.010 should be read in harmony with §506.110. See State ex rel. Rothermich v. Gallagher, 816

S.W.2d 194, 200 (Mo.banc 1991) (recognizing that “statutes are *in pari materia* when they relate to the same matter or subject” and holding that such statutes “are intended to be read consistently and harmoniously”). A suit, therefore, is brought when it is filed.

The language of Rules 52.04 (Joinder of Persons Needed for Just Adjudication) and 52.06 (Misjoinder and Nonjoinder of Parties) further support the position that a suit is brought when filed and not when a defendant is added. Rule 52.04 states that “A person shall be joined *in the action* if” *Id.* Similarly, 52.06 states, “Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the *action* and on such terms as are just.” The use of “action” in the singular demonstrates that an action is only “brought” one time for purposes of venue and not every time a defendant is added.

The underpinnings of relators’ argument rest on drawing a distinction between dropping and adding a party. While DePaul involved a situation wherein a party was dropped, the rule it announce is equally applicable to circumstances involving the addition of a party. DePaul, 870 S.W.2d at 822 & 823; *See Bunker Resource, Recycling & Reclamation, Inc.*, 955 S.W.2d at 934 (White, J., dissenting). If every defendant who joined after a case was filed had a right to require reconsideration of venue based upon her residence, logic would require defendants added by other defendants to demand reconsideration of venue. *See Normandy Osteopathic Hospital v. Gaertner*, 663 S.W.2d 783 (Mo.App. E.D. 1984). The dichotomy which relators believe results in a different time for establishing venue is a distinction without a difference, and venue is determined when a suit is commenced.

D. Plaintiff’s Actions Did Not Constitute a Manipulation of Missouri Law

Relators contend that Plaintiff's actions in this case constituted a "blatant manipulation" of Missouri law in order to secure venue in the Circuit Court of the City of St. Louis. Nothing could be further from the truth. Plaintiff followed the letter of the venue statutes and Missouri Rules of Civil Procedure in obtaining venue in the Circuit Court of the City of St. Louis. Plaintiff's original petition filed in the Circuit Court of the City of St. Louis named Defendant Linthicum, a non-resident of the state of the Missouri, as the sole defendant. Pursuant to §508.010.4, when only non-residents of the state of Missouri are named as defendants, suit may be maintained in any county in the state. Id. Plaintiff is then entitled to amend her petition once as a matter of course pursuant to Rule 55.23(a) of the Missouri Rules of Civil Procedure. Moreover, Plaintiff sought and obtained leave from the court to file her first amended petition naming the additional defendants in her case. (Appendix p. A78). In short, Plaintiff did not manipulate the rules and laws of the state of Missouri in obtaining venue in the Circuit Court of the City of St. Louis, but in fact followed the law to the letter. Because Plaintiff followed Missouri's venue statute and the case law interpreting it, relators' contentions are a matter for the legislature, not this Court to change.

E. The Concept of "Pretensive Non-Joinder" is Not Recognized by Missouri Courts

Relators have characterized Plaintiff's conduct in filing successive petitions as a scheme of "pretensive non-joinder." Unlike the concept of pretensive joinder, which is accepted by Missouri courts, no court in Missouri has embraced or adopted the concept of "pretensive non-joinder." In fact, respondent was unable to find any state court in the United

States that has adopted the concept of “pretensive non-joinder.” There exists no provision of Missouri law that requires a plaintiff to join as defendants in her original petition all persons known to plaintiff who are or may be liable to plaintiff for her injuries.

Pretensive joinder is present when a plaintiff's choice of venue depends upon the joinder of a defendant against whom the plaintiff fails to state a claim or with respect to whom the petition and the record “establish that there is, in fact, no cause of action.” State ex rel. Ehrlich v. Hamilton, 879 S.W.2d 491, 492 (Mo.banc 1994). Pretensive joinder violates the letter of the venue statute, and the test for identifying pretensive joinder is an objective one. Id. While an examination for pretensive joinder involves an objective test, any attempt at making a determination of pretensive non-joinder rests upon subjective conjecture. No Missouri court rule, case or statute requires a plaintiff to name as defendants any and all persons who could possibly be liable at the time a case is filed; nor does any precedent grant a court discretion to determine which parties should be counted for venue purposes.

Numerous practical and strategic reasons exist for a plaintiff to not name all possible defendants when a suit is commenced. For example, a plaintiff may be unaware of the existence of a defendant or facts which could result in that party's liability. A plaintiff may believe an action solely against an impersonal corporation proves a better strategy than also joining individual defendants who appear sympathetic. Further, a plaintiff may not wish to sue a friend or relative. Any test for pretensive non-joinder would entail a subjective analysis of these reasons. “The primary purpose of Missouri's venue statutes is to provide a convenient, logical and orderly forum for the resolution of disputes.” DePaul, 870 S.W.2d at 822.

Adoption of relators' rule would frustrate these goals by converting venue into a complex issue involving a myriad of defendants and possible defendants which would be relitigated every time a defendant was added.

By requiring all the residency of all possible defendants to be considered when determining venue, courts will certainly entertain more venue challenges based on pretensive joinder. Trial judges will be forced to evaluate claims against any possible defendant, with some defendants arguing a claim can be stated against a certain defendant while others contend the joinder is pretensive. In addition, subsequent discovery may demonstrate a claim can be stated, and the parties will be forced to relitigate the venue issue. How can a trial judge determine all legitimate possible parties at the outset of litigation? Such an inquiry is impossible. Pretensive non-joinder and the multiplicity of conundrums it will create serve no purpose, and the concept is anathema to Missouri venue law and the policies it embodies.

F. DePaul Provides a Simple Test Derived From the Terms of the Statute

The current test as enunciated in DePaul is simple, functional, and derives from the “terms of the statute.” Id. 870 S.W.2d at 823. It is a bright line test with its aim fixed once and for all on the status of the parties when suit is commenced. Id. This analysis enables a trial court and every party, no matter when added, to easily determine whether venue is proper.

The simplicity of the current test serves in stark contrast to the complicated and subjective rule proposed by relators where venue would repeatedly become a battleground throughout the entire course of litigation. While relators couch their arguments in terms of

protecting defendants' venue rights, their position only seeks to frustrate the venue options afforded plaintiffs "[b]y the terms of the statute." Id.

DePaul serves as a well reasoned decision which established a rule that is simple and easy to apply. Having venue issues decided at the outset of a case not only provides certainty and predictability, but also promotes judicial economy. As indicated in State ex rel. Johnson v. Griffin, venue should be raised at the earliest possible time. State ex rel. Johnson v. Griffin, 945 S. W.2d 445, 446-447 (Mo.banc 1997). Relators' proposed rule, which would permit reevaluation of venue upon the addition of any defendant, creates the possibility that a case could be transferred several times throughout litigation. Undoubtedly, a motion for change of venue could be granted late in litigation after the judge has ruled on matters of discovery, scheduling, and dispositive motions. The possibility of change in venue at such a stage only serves to hamper judicial economy and arguably renders earlier rulings null and void. Cases would not proceed "expeditiously" as suggested by Judge Limbaugh in his dissent in DePaul. See DePaul, 870 S.W.2d at 823 (Limbaugh, J., dissenting).

G. DePaul Avoids Subjective Analysis of Plaintiff's Motive

No language of §508.010 countenances an analysis of the plaintiff's motive in selecting a location for his action, and venue after all "is *determined* solely by statute." Bunker Resource, Recycling & Reclamation, 955 S.W.2d at 933 (emphasis added); Rothermich, 816 S.W.2d at 196. Missouri courts do not seek to analyze or divine a plaintiff's motive even when examining the issue of pretensive joinder. Instead, that issue depends upon the objective determination of whether the plaintiff's petition states a claim against the particular defendant

or whether the petition and the record establish that no cause of action exists. Ehrlich, 879 S.W.2d at 492.

Relators' position is premised on the proposition that the motives of plaintiffs are relevant to the evaluation of their venue choices. Plaintiffs are guilty of no impropriety for selecting the venue believed to be most attractive provided that their choice is correct under the governing statute. This Court's rules make it exceedingly clear that "[t]he advocate has a duty to use legal procedure for the fullest benefit of the client's cause." Missouri Supreme Court Rule 4-3.1, comment; see also McDowell v. Waldron, 920 S.W.2d 555, 561 (Mo.App. E.D. 1996).

Conclusion

The bright-line test for venue challenges recognized by this Court in its DePaul opinion is prescribed by the unambiguous language of §508.010. Determining venue based on the residence of the parties at the time a suit is filed provides certainty and efficiency in its application. The relators' proposed rule only seeks to render a judicial solution to a legislatively created venue option which they do not like. It is not this Court's role to frustrate the clear mandate of the legislature concerning a plaintiff's choice of venue. Therefore, Relators' writ should be denied.

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CERTIFICATE OF COMPLIANCE WITH SPECIAL RULE NO. 1

The undersigned hereby certifies that this Respondent's Brief complies with the limitations contained in special Rule No. 1(b), contains 3,890 words, and that the floppy disk filed with this Respondent's Brief in accordance with Special Rule No. 1(f) has been scanned for viruses and is virus-free.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the parties hereto by mailing a copy thereof via U.S. Mail, postage prepaid, on this _____ day of July 2001, to:

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APPENDIX