

IN THE SUPREME COURT OF THE STATE OF MISSOURI

STATE OF MISSOURI ex rel. AUTO)	
OWNERS INSURANCE COMPANY,)	
)	
Relators,)	
v.)	Appeal No. SC 91013
)	
THE HONORABLE EDITH L. MESSINA,)	
CIRCUIT JUDGE, DIVISION 12)	Boone Co. No. 10BA-CV02436
16 th Judicial Circuit, Jackson County, Missouri,)	
and THE HONORABLE KEVIN M.J. CRANE)	Jackson Co. No. 0916-CV39510
CIRCUIT JUDGE, DIVISION 3)	
13 th Judicial Circuit, Boone County, Missouri,)	
)	
Respondents.)	

**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**

**BRIEF OF DEFENDANTS COLUMBIA MUTUAL INSURANCE COMPANY
AND BIEGEL REFRIGERATION AND ELECTRIC CO. INC. AND ON BEHALF
OF RESPONDENT THE HONORABLE KEVIN M.J. CRANE**

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Table of Contents

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES..... 2

STATEMENT OF FACTS..... 3

POINT RELIED ON 4

ARGUMENT..... 5

CONCLUSION 9

AFFIDAVIT OF SERVICE 10

CERTIFICATE OF COMPLIANCE 11

APPENDIX 12

INDEX TO APPENDIX..... 13

TABLE OF AUTHORITIES

Cases

<i>State ex rel. Smith v. Gray</i> , 979 S.W.2d 190 (Mo. banc 1998)	5
<i>Rothermich v. Gallagher</i> , 816 S.W.2d 194 (Mo. banc 1991).....	4, 6, 7

Statutes

§508.010(2) R.S.Mo (2005)	4, 5, 7
§508.010 R.S.Mo. (2000)	6, 7, 9
§508.040 R.S.Mo. (2000)	4-7, 9
§351.375(2) R.S.Mo	7

STATEMENT OF FACTS

Defendants are compelled to set forth their Statement of Facts in order to emphasize the limited number of facts that are actually relevant to the disposition of Auto Owners' original proceeding in prohibition and/or mandamus. Auto Owners filed its Petition against Columbia Mutual Insurance Company ("Columbia Mutual") and Biegel Refrigeration and Electric Company, Inc. ("Biegel") (collectively "Defendants") in Jackson County, Missouri. Columbia Mutual's registered office and agent is located in Boone County. Biegel is located in Linn County. The lawsuit filed by Auto Owners, seeking equitable contribution from Columbia Mutual and equitable subrogation from Biegel, has absolutely no connection with Jackson County. Various motions were filed in Jackson County but ultimately, on May 18, 2010, the Honorable Edith L. Messina of Jackson County transferred venue of this case to Boone County. Boone County accepted transfer of the case and the Honorable Kevin M.J. Crane has been assigned the case. Auto Owners sought interlocutory review of Judge Messina's May 18 Order in the Western District Court of Appeals but was denied relief. Auto Owners then brought this original proceeding in prohibition or alternatively mandamus to obtain interlocutory review of Judge Messina's Order transferring venue of this action to Boone County. This Court issued its Preliminary Writ of Prohibition on August 31, 2010.

POINT RELIED ON

The trial court did not err in transferring venue from Jackson County to Boone County because under the current venue statute, §508.010(2) R.S.Mo. (2005) venue should lie in Boone County where Columbia maintains its registered agent, in that this Court's prior rulings which held that venue for an insurance company is proper where it has an office or agent for the transaction of its usual and customary business, were based in part on the language of the corporate venue statute §508.040 R.S.Mo. (2000) which has since been repealed.

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

Rothermich v. Gallagher, 816 S.W.2d 194 (Mo. banc 1991)

§508.010(2) R.S.Mo. 2005

ARGUMENT

Relator, Auto Owners Insurance Company, (“Auto Owners”) has heretofore filed a Petition for Writ of Prohibition or in the alternative Petition for Writ of Mandamus in this Court. Auto Owners seeks to prevent this case from being litigated in Boone County and seeks to have the case transferred back to Jackson County, a county with absolutely no connection to this lawsuit, but where it asserts venue is proper.

Jackson County Circuit Court Judge Edith L. Messina did not err in her Order of May 18, 2010 transferring this case from Jackson County to Boone County and Boone County Circuit Court Judge Kevin M.J. Crane should not be compelled to transfer the case back to Jackson County. Auto Owners claims that the determination of venue in this matter is “unaffected by 2005 tort reform and the repeal of the corporate venue statute.” Defendants adamantly disagree.

The sole issue presented to this Court is the residency of a domestic insurance company for venue purposes under the new venue framework, that is, under §508.010(2) R.S.Mo (2005). Predictably, Auto Owners relies on this Court’s decision in *State ex rel. Smith v. Gray*, 979 S.W.2d 190 (Mo. banc 1998) for the proposition that an insurance company resides where it has an office or an agent for the transaction of its usual and customary business. However, Auto Owners fails to recognize that this Court decided *Gray* prior to the amendment of the venue statute in 2005 and the elimination of §508.040 R.S.Mo. While Auto Owners argues that the decision in *Gray* applies unequivocally to the instant case, and that the repeal of §508.040 R.S.Mo. has no effect on the venue analysis, it is undisputed that when considering venue issues in the past, this

Court has viewed the individual venue statute *in conjunction with* the corporate venue statute in its decisions.

This Court's decision in *Gray* was clearly premised on the fact that the office where a corporation conducts its usual and customary business is the appropriate venue under the now repealed corporate venue statute, §508.040. Moreover, in reaching its opinion in the *Gray* case, that an insurance company "resides" where they have or usually keep an office or agent for the transaction of their usual and customary business, this Court clearly relied on its earlier opinion in *Rothermich v. Gallagher*, 816 S.W.2d 194 (Mo. banc 1991) which was also based expressly on *both* the prior versions of §508.010 R.S.Mo. (2000) and §508.040. The language in the *Rothermich* opinion is even more explicit, going so far as to recognize that the two venue statutes were "*interrelated* to the issue of venue and how it is obtained in Missouri." *Rothermich, supra* at 200. The *Rothermich* Court held as follows:

Accordingly, this Court holds the language of §508.040, finding that venue established for a foreign insurance corporation lies 'in any county where such corporations shall have or usually keep an office or agent for the transaction of their usual and customary business,' to be *persuasive* in determining the definition of 'residence' of a foreign insurance corporation, pursuant to §508.010.

Id. (emphasis added) It could not be any more clear that these earlier venue decisions were based on the relationship between §508.010 R.S.Mo. (2000) and §508.040. The Court in *Rothermich* acknowledged that it had "utilize[d] the language of §508.040" in determining the definition of residence for venue under §508.010 R.S.Mo. (2000) This

Court's venue analysis in both *Gray* and *Rothermich* was expressly and undeniably based on the interplay between the individual and the corporate venue statutes. Because this interplay between the two statutes no longer exists, Defendants submit that this Court should undertake a venue analysis based solely on the application of the new version of §508.010 R.S.Mo. (2005). The *Rothermich* court in fact noted that "the term 'residence' is not used in Section 508.040 and is not the basis for fixing venue of a corporation in said statute." *Rothermich, supra* at 197. (emphasis added) Since it was §508.040 that permitted 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," with the repeal of the corporate venue statute, Defendants submit that the issue of the determination of residence of an insurance company for venue purposes should be re-examined.

The elimination of the corporate venue statute had a tangible effect: a plaintiff can no longer choose among the various counties where a corporate defendant has offices or agents for the transaction of their usual and customary business, but instead is limited to the single county where the corporate defendant has its registered office. Because under the new version of §508.010(2) R.S.Mo. (2005), venue for a domestic corporation is proper only where the corporation "resides," venue is proper solely where a corporation's registered office and agent is located. In contrast, the only authority for allowing venue to be proper "where a corporation has an office or agent for the transaction of their usual and customary business" was §508.040 which has been repealed. While the statute governing residence of a corporation, §351.375(2) R.S.Mo., may not squarely apply to an

insurance company, there is simply no logical reason to apply a different test for “residence” of a domestic insurance company for venue purposes.

For the foregoing reasons, under a rational interpretation of the new venue statute, §508.010(2), *without reading it in conjunction with the repealed corporate venue statute*, venue for this an action should be held to be proper in the county where Columbia Mutual’s registered agent is maintained.

CONCLUSION

It is specious for Auto Owners to argue that the repeal of §508.040 has no bearing on the analysis of venue in this case. The relevant case law decided prior to the repeal of §508.040 was based expressly upon the interrelation between the prior version of §508.010 and §508.040. Those decisions permitting an insurance company to be sued in the county where it has an office or agent for the transaction of its usual and customary business were rooted firmly on the existence of a statute that has been repealed. Any venue determination based upon that provision is no longer valid. Venue in this action is proper either in Linn County where Biegel has its registered agent, and where the underlying personal injury action originated, or in Boone County where Columbia Mutual has its registered agent. This case has no connection to Jackson County and Auto Owners' attempt to proceed in that wholly unrelated venue should fail.

For the foregoing reasons, Defendants urge this Court to quash its Preliminary Writ in Prohibition and dismiss this proceeding.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was furnished,
via U.S. Mail, this 3rd day of December, 2010, to:

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Subscribed and sworn to me, a Notary Public, this 3rd day of December, 2010.

My Commission Expires:

CERTIFICATE OF COMPLIANCE WITH RULE 84.06

Pursuant to Rule 84.06, the undersigned hereby certifies that:

1. The foregoing Brief of Defendants is in compliance with Rule 55.03;
2. The foregoing Brief of Defendants complies with the limitations set forth in Rule 84.06(b);
3. The foregoing Brief of Defendants contains 2,038 words, pursuant to the word count of the word processing system used to prepare the Brief;
4. A CD Rom is also filed together with this Brief of Defendants, which has been served upon all other counsel of record by U.S. Mail on December 3, 2010; and
5. The contents of the CD Rom are in Word format identical to the paper document, which has been scanned for viruses and is virus-free.

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APPENDIX

INDEX

Revised Statutes of Missouri Section 508.010 (2000). 1
Revised Statutes of Missouri Section 508.040 (2000) 2