

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT OF MISSOURI

Case No. ED 88881

88464

STATE OF MISSOURI, EX REL.
CITY OF JENNINGS, MISSOURI

Relator,

v.

HONORABLE JOHN J. RILEY

Respondent.

DUPLICATE
OF FILING ON

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IN OFFICE OF
CLERK SUPREME COURT

Appeal from the Circuit Court of the County of St. Louis

Division No. 1

The Honorable John J. Riley

REPLY BRIEF OF RELATOR CITY OF JENNINGS, MISSOURI

W. Dudley McCarter, #24939

Edward V. Crites, #33985

Timothy J. Reichardt, #57684

7777 Bonhomme Avenue, Suite 1400

St. Louis, MO 63105

314.862.3800 – *telephone*

314.862.3953 – *facsimile*

ATTORNEYS FOR RELATOR CITY OF JENNINGS, MISSOURI

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POINTS RELIED ON

I.

RELATOR CITY OF JENNINGS IS ENTITLED TO AN ORDER MANDATING RESPONDENT TO GRANT RELATOR'S MOTION TO TRANSFER FOR IMPROPER VENUE ("VENUE MOTION") BECAUSE, PURSUANT TO MO. R. CIV. P. 51.045(c), RESPONDENT LACKED DISCRETION TO DENY RELATOR'S VENUE MOTION AND HAD A MINISTERIAL DUTY TO GRANT RELATOR'S VENUE MOTION, THUS EXCEEDING HIS JURISDICTION IN DENYING RELATOR'S VENUE MOTION, IN THAT THE UNDERLYING PLAINTIFF FAILED TO FILE A REPLY TO RELATOR'S VENUE MOTION AS REQUIRED BY MO. R. CIV. P. 51.045(c).

State ex rel. USAA Cas. Ins. Co. v. David, 114 S.W.3d 447 (Mo. App. E.D. 2003).

Vee-Jay Contracting Co. v. Neill, 89 S.W.3d 470 (Mo. banc 2002).

Missouri Rule of Civil Procedure 51.045 (2006).

II.

IN THE ALTERNATIVE, RELATOR CITY OF JENNINGS IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DENYING RELATOR'S MOTION TO TRANSFER FOR IMPROPER VENUE ("VENUE MOTION") BECAUSE UNDER MO. REV. STAT. §508.050, WHICH WAS NOT REPEALED

BY MISSOURI HOUSE BILL 393, THE CITY OF JENNINGS, A MUNICIPAL CORPORATION ORGANIZED AND EXISTING AS A CITY OF THE THIRD CLASS UNDER THE LAWS OF THE STATE OF MISSOURI WHOLLY LOCATED IN ST. LOUIS COUNTY MISSOURI, CAN BE SUED IN THIS TORT ACTION ONLY IN ST. LOUIS COUNTY; THEREFORE, RESPONDENT LACKS JURISDICTION TO DO ANYTHING EXCEPT GRANT THE MOTION OF JENNINGS TO TRANSFER VENUE TO ST. LOUIS COUNTY.

Sales v. Barber Asphalt Pav. Co., et al., 66 S.W. 979 (Mo. 1902).

State ex rel. City of Bella Villa v. Nicholls, 698 S.W.2d 44 (Mo. App. E.D. 1985).

State ex rel. Eggers v. Enright, 609 S.W.2d 381 (Mo. banc 1980).

State ex rel. Casey's General Stores, Inc. v. City of West Plains, 9 S.W. 3d 712 (Mo. App. S.D. 2000).

MO.REV.STAT. §508.010 (2005).

MO.REV.STAT. §508.050 (2003).

Missouri House Bill 393 (2005).

Sutherland on Statutory Construction, 5th Ed. (1992).

ARGUMENT

I. RELATOR CITY OF JENNINGS IS ENTITLED TO AN ORDER MANDATING RESPONDENT TO GRANT RELATOR'S MOTION TO TRANSFER FOR IMPROPER VENUE ("VENUE MOTION") BECAUSE, PURSUANT TO MO. R. CIV. P. 51.045(c), RESPONDENT LACKED DISCRETION TO DENY RELATOR'S VENUE MOTION AND HAD A MINISTERIAL DUTY TO GRANT RELATOR'S VENUE MOTION, THUS EXCEEDING HIS JURISDICTION IN DENYING RELATOR'S VENUE MOTION, IN THAT THE UNDERLYING PLAINTIFF FAILED TO FILE A REPLY TO RELATOR'S VENUE MOTION AS REQUIRED BY MO. R. CIV. P. 51.045(c).

A Writ of Mandamus must issue because Plaintiff did not file a reply to Jennings' Venue Motion. *See* Mo. R. Civ. P. 51.045 (2006). Respondent maintains that this "conclusion is incorrect because Rule 51.045's threshold requirement – that venue actually is improper – was not first met." Respondent's Brief, p. 8, *ln.* 7-9. Neither of the cases set forth by Respondent, however, establish that "venue actually being improper" is a threshold requirement under Rule 51.045. *See* Vee-Jay Contracting Co. v. Neill, 89 S.W.3d 470, 472 (Mo. banc. 2002); State ex rel. USAA Cas. Ins. Co. v. David, 114 S.W.3d 447 (Mo. App. E.D. 2003). Both Vee-Jay and USAA hold that Rule 51.045

mandates transfer when a proper motion to transfer is made and no timely reply is filed by the opposing party. Id.

Venue is proper in St. Louis County under §508.050 for reasons specified in Relator's Brief. *See Relator City of Jennings' Brief.* Because Relator's Venue Motion was proper and no timely reply was filed thereto, granting the motion to transfer was a "purely ministerial" duty of the trial judge. *See State ex rel. USAA Cas. Ins. Co. v. David*, 114 S.W.3d 447 (Mo. App. E.D. 2003). Therefore, a writ of mandamus should issue to compel Respondent to grant Jennings' Venue Motion.

II. IN THE ALTERNATIVE, RELATOR CITY OF JENNINGS IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DENYING RELATOR’S MOTION TO TRANSFER FOR IMPROPER VENUE (“VENUE MOTION”) BECAUSE UNDER MO. REV. STAT. §508.050, WHICH WAS NOT REPEALED BY MISSOURI HOUSE BILL 393, THE CITY OF JENNINGS, A MUNICIPAL CORPORATION ORGANIZED AND EXISTING AS A CITY OF THE THIRD CLASS UNDER THE LAWS OF THE STATE OF MISSOURI WHOLLY LOCATED IN ST. LOUIS COUNTY MISSOURI, CAN BE SUED IN THIS TORT ACTION ONLY IN ST. LOUIS COUNTY; THEREFORE, RESPONDENT LACKS JURISDICTION TO DO ANYTHING EXCEPT GRANT THE MOTION OF JENNINGS TO TRANSFER VENUE TO ST. LOUIS COUNTY.

Respondent’s argument is that §508.010.4 is unambiguous and contains plain language (i.e. the word “notwithstanding”) requiring that §508.010.4 be applied to the exclusion of all other laws. Respondent contends that, unless ambiguity is found, other means of interpretation may not be considered.

Relator City of Jennings has set forth exhaustive Missouri law confirming that the context of H.B. 393, §508.010.4, and §508.050 must be considered by Respondent in ruling on Jennings’ Venue Motion. First, §508.010.4 is ambiguous in light of the remainder of Chapter 508 and the legislature’s express repeal in H.B. 393 of several Chapter 508 special venue statutes but not §508.050. Second, Missouri courts confirm that the history and surrounding circumstances of the laws must be considered when

necessary to avoid “an illogical result.” Clearly, the threshold test that Respondent suggests in Respondent’s Brief is met in this situation and the underlying purpose behind H.B. 393 must be considered and applied here so as to effectuate the intent of the legislature.

Moreover, Respondent was required to apply §508.050 in this case regardless of whether §508.010.4 was found unambiguous. State ex rel. Eggers v. Enright, 609 S.W.2d 381 (Mo. banc 1980), left unaddressed in Respondent’s Brief, is controlling here because Respondent’s ruling, in effect, found that §508.050 was implicitly repealed by H.B. 393. Eggers requires that any repeal by implication must be done so only by necessity -- implicit repeal is disfavored. Here, these statutes can both be applied because the special venue statute (§508.050) exists as an exception to the terms of the general venue statute (§508.010). Eggers further holds that, to the extent of the repugnancy between §508.010.4 and §508.050, the special venue statute (§508.050) remains as an exception to the terms of the general venue statute (§508.010). Eggers, 609 S.W.2d at 384.

1. CHAPTER 508 IS AMBIGUOUS AND RESPONDENT’S ORDER CREATES AN ILLOGICAL RESULT

Respondent’s primary argument is that the “plain meaning of R.S.Mo. §508.010.4 unambiguously shows that it applies to all tort actions,” including tort actions against municipalities. See Respondent’s Brief, p. 11, *ln.* 9, 10. In support thereof, Respondent cites Spradlin, 982 S.W.2d at 258, as follows: “Courts look elsewhere for interpretation

only when the meaning is ambiguous or would lead to an illogical result defeating the purpose of the legislature.” See Respondent’s Brief, p. 11, *ln.* 15-17. Here, Spradlin supports Relator’s position that Respondent must consider more than just the term “notwithstanding.”

First, and as to whether ambiguity exists, Respondent’s argument misperceives the source of the ambiguity. Under the doctrine of *in pari materia*, all statutes relating to the same subject must be construed together as though they constitute one act and with reference to the system they form. See Sales v. Barber Asphalt Paving Co., 66 S.W. 979, 980 (Mo. 1902) (“All consistent statutes relating to the same subject, and briefly called statutes in pari materia, are treated prospectively and construed together as though they constituted one act. This is true whether the acts relating to the same subject were passed at different dates.... A statute must be construed with reference to the system of which it forms a part.”). In deciding whether ambiguity exists here, the question is not whether §508.010.4 is ambiguous; rather, the question is whether Chapter 508 is ambiguous. Chapter 508 (“Venue and Change of Venue”) is ambiguous in light of: 1) the apparent conflict between §508.010.4 and §508.050, 2) the fact that H.B. 393 clearly omitted §508.050 from its list of repealed statutes, and 3) Missouri courts consistently holding that special venue statutes prevail over general venue statutes to the extent of any repugnancy. See Eggers, 609 S.W.2d at 384; Bella Villa, 698 S.W.2d at 45.

Second, Respondent’s Order denying Jennings’ Venue Motion leads to an illogical result defeating the legislature’s purpose behind the enactment of H.B. 393. As further

discussed in Jennings' Brief and herein, Respondent's Order found, in effect, that §508.050 was implicitly repealed by H.B. 393 to the extent that it once governed tort cases against municipalities. The purpose of H.B. 393 was not to expand, but to limit, the scope of proper venue in tort cases. Respondent's Order construes H.B. 393 as expanding the proper venues for municipalities, thus making municipalities susceptible to lawsuits anywhere in Missouri as opposed to only in the County in which the municipality sits. In Bella Villa, it was noted that the purpose of §508.050 was to prevent local officials from defending lawsuits in courts across the state. Bella Villa, 698 S.W.2d at 45. In light of this policy, subjecting public officials to suits throughout Missouri is an illogical result.

Furthermore, Respondent's Order reaches an illogical result because the legislature repealed several special venue statutes in Chapter 508 while leaving §508.050 untouched. H.B. 393 basically states: "repealed... §508.040, 508.070" -- **§508.050 is literally skipped over**. Because the legislature repealed several special venue statutes in H.B. 393, but did not address §508.050, it is presumed that the legislature intended §508.050 to remain in effect. Sales, 66 S.W. at 980.

Respondent also claims the term "notwithstanding" in §508.010.4 is unambiguous, and therefore, Respondent has no authority to look beyond the plain meaning of the statute. As explained in State ex rel. Casey's General Stores, Inc. v. City of West Plains, 9 S.W. 3d 712, 717 (Mo. App. S.D. 2000), "the term "notwithstanding"... does not necessarily mean that it is to the complete exclusion of all other statutory provisions." Id.

at 717. “Courts look beyond the plain and ordinary meaning of a statute when its meaning is ambiguous” or “would lead to an illogical result defeating the purpose of the legislature.” *Id.* The ultimate guide is the intent of the legislature. *Id.* In ascertaining that, it is appropriate for us to consider the statute’s history, surrounding circumstances, and examine the problem in society to which the legislation was addressed.” *Id.* Missouri law required Respondent to look beyond the language of §508.010.4.

2. RESPONDENT’S ORDER, IN EFFECT, FOUND THAT §508.050 WAS IMPLICITLY REPEALED IN PART BY H.B. 393; MISSOURI COURTS DISFAVOR IMPLICIT REPEAL OF STATUTES AND MISSOURI COURTS HAVE HELD THAT IMPLICIT REPEAL WILL NOT BE FOUND UNLESS ABSOLUTELY NECESSARY

(A) RELEVANCE OF THE ISSUE OF REPEAL

Jennings’ Brief establishes that Respondent’s ruling, in effect, finds that §508.050 was implicitly repealed by H.B. 393. In attempting to avoid this argument, Respondent states that “this argument is irrelevant because the issue of repeal was not necessary, considered, nor addressed in Respondent’s Order denying the request for venue transfer.” *Respondent’s Brief*, p. 13, *ln.* 6-8. Respondent also states: “Respondent did not nor does not contend that §508.050 has been repealed nor rendered null; rather, it is simply inapplicable when a tort is alleged.” *Respondent’s Brief*, p. 15, *ln.* 3-5. Respondent’s mistaken suggestion seems to be that the Order must have magic language stating “§508.050 is repealed” for the issue of repeal to be relevant here. Respondent did not specifically address the “repeal” of §508.050 in his Order. The effect of Respondent’s

Order, however, is that §508.050 no longer controls venue for tort claims against municipalities, thus treating §508.050 as being repealed by H.B. 393 to the extent that it addresses tort claims. Respondent's Brief attempts to distinguish "rendering a statute inapplicable in part" from "repeal in part." This proffered distinction is a desperate attempt to avoid the issue of repeal because that issue, as addressed in Eggers and Sales, completely invalidates Respondent's position. Regardless of Respondent's characterization, the Order treats §508.050 as being repealed in part by H.B. 393. Furthermore, because H.B. 393 did not expressly repeal §508.050 to any extent, Respondent's Order treats §508.050 being impliedly repealed to the extent that it addresses tort claims.

Moreover, H.B. 393 contains no manifest intention to repeal or alter the special venue statute for municipalities. H.B. 393 expressly repealed various other special venue statutes (i.e. §508.040 – corporations, §508.070 – motor carriers) without repealing the special venue statute for municipalities. There is no reason why the legislature would specifically identify some special venue statutes being repealed and not identify other special venue statutes in the very same chapter unless it intended to repeal only those statutes listed.

(B) REGARDLESS OF WHETHER RESPONDENT BELIEVED THAT §508.010.4 IS UNAMBIGUOUS, EGGERS CONTROLS HERE AND REQUIRES APPLICATION OF §508.050

Repeal by implication is disfavored, and if two statutes can be reconciled (as they can be here) then both should be given effect. St. Charles County v. Director of

Revenue, 961 S.W.2d 44, 47 (Mo. banc. 1998) (emphasis and parenthetical added). State ex rel. Eggers v. Enright, 609 S.W.2d 381 (Mo. banc 1980), confirms that H.B. 393 did not repeal §508.050 in any capacity. Implicit repeal is rare and only found where necessary. *See Id.* at 384. An implicit repeal is only necessary when, after attempting to harmonize and apply both statutes, an irreconcilable repugnancy exists between the two statutes. *Id.* As regards special venue statutes, “where the general act (§508.010.4) is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication.” *Id.*

Respondent argues that §§508.010.4 and 508.050 were “discerned in a way which they were able to be harmonized” in the Order. Respondent did not harmonize these statutes – he simply nullified §508.050 as regards tort claims. These statutes must be harmonized and both must be applied to the extent possible. Eggers, 609 S.W.2d at 384. These statutes can be harmonized to co-exist under the law as provided in Eggers. Eggers holds that the special venue statute controls and remains in effect as an exception to the terms of the general statute enacted later in time “although the terms of the general act would, taken strictly but for the special law, include the case or cases provided for by it.” *Id.* Under this rule, both statutes can be fully applied without undercutting the other. More specifically, §508.050 can be fully applied despite §508.010’s “notwithstanding” language because of Eggers’ specific over general rule. At the same time, the “notwithstanding” language in §508.010.4 is not discredited or undercut by §508.050’s application here because, under Eggers, §508.050 merely exists as an exception to

§508.010. Because these statutes are reconcilable, there can be no repeal by implication; any such implication is not “necessary.” See Eggers, 609 S.W.2d at 384.

Furthermore, even if these statutes are deemed irreconcilable, Eggers holds that the special venue statute (§508.050) prevails over the general venue statute to the extent of any repugnancy. See Eggers, 609 S.W.2d at 384; Bella Villa, 698 S.W.2d at 45. From all of the above-stated arguments, it is clear that §508.050 must be applied in this case regardless of the term “notwithstanding” in §508.010.4 or any failure to harmonize these statutes.

CONCLUSION

For the above stated reasons, this Court should issue a writ of mandamus to compel Respondent to grant the Venue Motion, or, in the alternative, to issue a writ of prohibition to prevent Respondent from exercising any jurisdiction except to transfer venue of this case to the Circuit Court of St. Louis County.

BEHR, McCARTER & POTTER, P.C.

By: W. Dudley McCarter
W. Dudley McCarter, #24939
Edward V. Crites, #33985
Timothy J. Reichardt, #57684
7777 Bonhomme Avenue, Suite 1400
St. Louis, MO 63105
314.862.3800 – telephone
314.862.3953 – facsimile
Attorneys for Relator City of Jennings

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)	
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CERTIFICATION PURSUANT TO SUPREME COURT RULE 84.06(c) AND (g)

Comes now Counsel for Relator City of Jennings, Missouri and hereby certifies that:

(1) the brief includes the information required by Rule 55.03; (2) the brief complies with the limitations contained in Rule 84.06(b); (3) the brief contains 2,704 words and 262 lines of monospaced type after deducting sections omitted from the count in Rule 84.06(b); and, (4) based on these word and line counts, this reply brief is within the limits set forth in Local Rule 360 (a)(1). Furthermore, this Court should take notice that pursuant to Local Rule 363, and in lieu of filing a copy of this brief on floppy disk, Relator has sent this brief to the court as an electronic mail message attachment in accordance with the requirements of Local Rule 363 to the following address:

moapped@courts.mo.gov


W. Dudley McCarter

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)	
HONORABLE JOHN J. RILEY)	
)	
Respondent.)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was sent via First Class U.S. mail, postage pre-paid, and, pursuant to Local Rule 363, transmitted via electronic mail message as an attachment (and in lieu of filing a floppy disk) on this 4th day of February, 2007 to: Harold Whitfield, 701 Market St., Suite 1550, St. Louis, MO 63101, Attorney for Plaintiff. Furthermore, the same has been sent via First Class U.S. Mail and via disk (scanned and noted as virus-free) to: Hon. John J. Riley, City of St. Louis Circuit Court – Division 7, 10 N. Tucker, St. Louis, MO, 63101.



W. Dudley McCarter