

**IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT OF MISSOURI**

Case No. ED 88881

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

Relator,

v.

HONORABLE JOHN J. RILEY

Respondent.

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

Division No. 1

The Honorable John J. Riley

BRIEF OF RESPONDENT THE HONORABLE JOHN. J. RILEY

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POINTS RELIED ON

I.

**MISSOURI RULE OF CIVIL PROCEDURE 51.045, WHICH GOVERNS
MOTIONS TO TRANSFER FROM AN IMPROPER TO A PROPER VENUE, IS
INAPPLICABLE WHEN, AS IN THIS CASE, A PARTY MOVES TO TRANSFER
FROM A PROPER VENUE TO AN IMPROPER ONE, AND THEREFORE
RELATOR’S REQUEST FOR MANDAMUS MUST BE DENIED.**

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)

R.S.Mo. § 476.410 (2006)

R.S.Mo. § 508.010.4 (2006)

Missouri Rule of Civil Procedure 51.045 (2006)

II.

**RELATOR’S REQUEST FOR PROHIBITION MUST BE DENIED
BECAUSE THE PLAIN MEANING OF MISSOURI REVISED STATUTE
SECTION 508.010.4, ENACTED BY THE LEGISLATURE IN 2005
“NOTWITHSTANDING ANY OTHER PROVISION OF LAW,” SERVES AS
THE FINAL AND DETERMINATIVE STATUTE REGARDING VENUE FOR
ALL TORT CLAIMS IN MISSOURI IN WHICH THE PLAINTIFF WAS FIRST
INJURED IN THE STATE OF MISSOURI.**

State v. Rowe, 63 S.W.3d 647, 650 (Mo. banc 2002)

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

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

Parkville Benefit Assessment Spec. Road Dist. V. Platte County, 906 S.W.2d 766, 769 (Mo. App. W.D. 1995)

ARGUMENT

Standard of Review

The appropriate standard of review concerning the denial of a motion to transfer venue is abuse of judicial discretion. State ex rel. Trans World Airlines, Inc. v. David, 158 S.W.3d 232 (Mo. Banc 2005).

I.

MISSOURI RULE OF CIVIL PROCEDURE 51.045, WHICH GOVERNS MOTIONS TO TRANSFER FROM AN IMPROPER TO A PROPER VENUE, IS INAPPLICABLE WHEN, AS IN THIS CASE, A PARTY MOVES TO TRANSFER FROM A PROPER VENUE TO AN IMPROPER ONE, AND THEREFORE RELATOR’S REQUEST FOR MANDAMUS MUST BE DENIED.

The overriding duty of a Circuit Court Judge is to ensure that a case is heard in the proper court. R.S.Mo. § 476.410. Missouri Rule of Civil Procedure 51.045 (2006) states that “[a]n action brought in a court where venue is **improper** shall be transferred to a court where venue is proper if a motion for such transfer is timely filed.” (emphasis added). Since this rule is only applicable when venue is determined to be improper, a court must take the facts before it as true and make the determination of whether venue is proper as a threshold matter before the rule can be applied. See Vee-Jay Contracting Co. v. Neill, 89 S.W.3d 470, 472 (Mo. banc 2002).

Here, as discussed at greater length infra, venue in the City of St. Louis is the proper venue for this case pursuant to R.S.Mo. § 508.010.4 (2006) because (1) it is an action alleging a tort (2) in which the plaintiff was first injured in the State of Missouri,

and (3) the plaintiff was first injured in the City of St. Louis. After analyzing the facts, Respondent, the Honorable Judge Riley, reasoned in his Order that “[v]enue is only proper in the City of St. Louis, there is no other venue to which this case may be transferred, and defendants’ motion must be denied.” Order of Respondent, A4.

Relator argues that the language of Rule 51.045 mandates that Respondent transfer this case because the nonmovant (Plaintiff) did not file a reply to the Motion to Transfer Venue. Relator’s Brief, pp. 11-13. As stated above, however, this conclusion is incorrect because Rule 51.045’s threshold requirement—that venue actually is improper—was not first met.

In support of its position, Relator cites two cases that it claims are in support of its position: Vee-Jay, 89 S.W.3d 470, and State ex rel. USAA Cas. Ins. Co. v. David, 114 S.W.3d 447 (Mo. App. E.D. 2003). Relator’s Brief, pp. 12-13. In Vee-Jay, one party, a corporation, properly moved to transfer on the basis that venue was improper in the City because it did not have any offices or agents in the City, thereby not satisfying the corporate venue statutes in existence at that time. 89 S.W.3d at 471. The nonmoving party filed no reply, and no evidence was presented that any of the corporations had an office or agent in the City. Id. The Respondent judge, however, did not grant the motion to transfer venue. Id. On appeal, the Missouri Supreme Court held that the Respondent judge had a duty to issue the transfer, reflecting the “general rule that failure to file a required answer admits the allegations of the preceding pleading.” Id. at 472 (citing Rule 55.09).

The venue-relevant facts in USAA are similar to those in Vee-Jay. In USAA, the corporate party moved to transfer venue because it denied having offices or agents in the City of St. Louis. 114 S.W.3d at 447-8. The nonmoving party filed a late response, but the Respondent judge did not issue the transfer. Id. at 448. On review, this Court held that “the trial court was without any discretion to deny the motion, **if there was another court where venue was proper.**” Id. (emphasis added).

Here, unlike the cases discussed supra, there was not another court where venue was proper. The Respondent in his Order recognized that “[i]f defendant files a proper motion to transfer and no response is filed, the factual assertions in the motion must be taken as admitted.” Order, A3 (citing see Vee-Jay, 89 S.W.3d 470). Thus, Respondent took the facts in Relator’s motion as true, as did the Courts hearing Vee-Jay and USAA, and accurately determined that venue was in fact not improper in the City, and to transfer the case elsewhere would be to do so in violation of the plain language of R.S.Mo. § 508.010.4. That rule clearly states that “[n]otwithstanding any other provision of law, in all actions . . . alleging a tort and in which the plaintiff was first injured in the State of Missouri, venue **shall** be in the county where the plaintiff was first injured...” (emphasis added). Because Respondent’s analysis revealed that the City of St. Louis is the **only** proper venue for this case, the threshold requirement of improper venue was never achieved. Therefore, Rule 51.045 and the rest of its requirements never became applicable.

Because venue in this case is not improper in the City of St. Louis, even when taking all of Relator’s factual assertions as true as required by law, Rule 51.045 does not

apply, and Respondent did not err by denying Relator's Motion to Dismiss. Therefore, Respondent respectfully requests that Relator's request for mandamus be denied.

II.

**RELATOR’S REQUEST FOR PROHIBITION MUST BE DENIED
BECAUSE THE PLAIN MEANING OF MISSOURI REVISED STATUTE
SECTION 508.010.4, ENACTED BY THE LEGISLATURE IN 2005
“NOTWITHSTANDING ANY OTHER PROVISION OF LAW,” SERVES AS
THE FINAL AND DETERMINATIVE STATUTE REGARDING VENUE FOR
ALL TORT CLAIMS IN MISSOURI IN WHICH THE PLAINTIFF WAS FIRST
INJURED IN THE STATE OF MISSOURI.**

A. The plain meaning of R.S.Mo. § 508.010.4 unambiguously shows that it applies to all tort actions.

“The primary rule of statutory construction is that we are to determine the intent of the legislature from the language used, to give effect to that intent if possible, and to consider words used in the statute in their plain and ordinary meaning.” State v. Reproductive Health Services, 97 S.W.3d 54, 60 (Mo. App. E.D. 2002) (citing Lonergan v. May, 53 S.W.3d 122, 126 (Mo.App. 2001). “Courts look elsewhere for interpretation only when the meaning is ambiguous or would lead to an illogical result defeating the purpose of the legislature.” Spradlin v. City of Fulton, 982 S.W.2d 255, 258 (Mo. banc 1998). Moreover, courts do not have authority, under the “guise of discerning legislative intent,” to construe a statute in a manner contrary to its plain meaning. State v. Rowe, 63 S.W.3d 647, 650 (Mo. banc 2002).

Here, the Respondent looked to the plain language used in R.S.Mo. § 508.010.4 (2006) and determined its effect. That statute plainly provides that in **all** cases, alleging

torts, in which the plaintiff was first injured in the State of Missouri, venue shall be in the county where the plaintiff was first injured, notwithstanding **any** other provision of law. R.S.Mo. §508.010.4. As such, Respondent correctly stated that he could “not speculate a legislative intent that is contrary to the statute’s plain meaning.” Order, A4 (citing Rowe, 63 S.W.3d at 650; Reproductive Health Services, 97 S.W.3d at 60).

B. After August 28, 2005, R.S.Mo. § 508.050 no longer applies to actions alleging tort that accrue in the State of Missouri.

Relator’s first argument is that R.S.Mo. § 508.050 mandates that this suit be brought in St. Louis County. Relator’s Brief, p. 15. In support of this argument, Relator offers the case State ex rel. City of Bella Villa v. Nicholls, 698 S.W.2d 44 (Mo.App.E.D. 1985). Id. As Relator aptly describes, the facts of Bella Villa seem similar to the ones here. However, the two cases diverge on matters of law. The primary difference stems from the fact that Bella Villa addressed the law as it stood in 1985. 698 S.W.2d 44. Since that time (in 2005), R.S.Mo. § 508.010 has been altered to specially and specifically state that **all** tort actions should be filed in the venue in which they accrued. This recent, critical change in the law makes the holding in Bella Villa inapplicable here. Specifically, the phrase, “Notwithstanding any other provision of law,” instructs that the legislature intended this new tort venue provision to preclude all previous tort venue provisions.

C. Respondent does not allege that R.S.Mo. § 508.010.4 repealed § 508.050, expressly or impliedly, nor was this alleged “presumption” a consideration in issuing his Order.

Respondent clearly stated in his Order that “§ 508.050 no longer governs venue in cases involving **tort** claims.” Order, A4 (emphasis added). Respondent did not address § 508.050’s pertinence in non-tort actions, as this consideration was not relevant to Relator’s Motion to Transfer. Relator spends a great portion of its Brief arguing that R.S.Mo. §508.050 has not been repealed. Relator’s Brief, pp. 16-23. While thoroughly presented, however, 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.

D. The plain meaning of the language of R.S.Mo. § 508.010.4 shows that it is the pertinent statute regarding venue for all tort claims accruing in the State of Missouri.

In its final point, Relator argues that R.S.Mo. §508.010.4 (2006) does not preclude application of § 508.050 in tort cases accruing in the State of Missouri. Relator’s Brief, p. 23. Like the arguments presented by Relator supra, however, this argument founds itself on erroneous presumptions, and so inevitably leads to an erroneous conclusion.

The first presumption that Relator implicitly makes on this point is that the meaning of the language of R.S.Mo. § 508.010.4 is somehow ambiguous. This presumption is clouded by a presentation of how the Southern District Court of Appeals addressed a statutory provision containing the term “notwithstanding” in State ex rel. Casey’s General Stores, Inc. v. City of West Plains, 9 S.W.3d 712 (Mo. App. S.D. 2000). In that case, the court recognized that “[c]ourts look beyond the plain and ordinary meaning of a statute **when its meaning is ambiguous.**” Id. at 717 (emphasis added). The court held that the statute at issue was ambiguous because in one part it read,

“notwithstanding any other provisions in this chapter,” and in another part provided that all the other provisions of the chapter had to be complied with. Id. This is not the case here. Here, R.S.Mo. § 508.010.4 does not fold in on itself. It states simply, plainly, and clearly, that notwithstanding any other provisions of law, venue for tort actions in Missouri lies where the injury accrued. Therefore, because the critical threshold requirement of ambiguity is not satisfied here, the rest of the analysis in Casey’s is inapplicable.

Citing another Southern District case, Modern Day Veterans Chapter No. 251 v. City of Miller, 128 S.W.3d 176 (Mo. App. S.D. 2004), Relator next incorrectly presumes that Respondent seeks to “nullify” R.S.Mo. § 508.050. Relator’s Brief, p. 26. However, just as Respondent never alleged that § 508.050 has been repealed, neither did his refusal to grant Relator’s Motion to Transfer render that statute a nullity. Again, Respondent merely recognized that “§ 508.050 no longer governs venue in cases involving **tort** claims.” Order, A4 (emphasis added).

Finally, Relator cited Parkville Benefit Assessment Spec. Road Dist. V. Platte County, 906 S.W.2d 766, 769 (Mo. App. W.D. 1995). In that case, the court noted that in “determining the legislature’s intention, the provisions of the entire legislative act must be construed together, and if reasonably possible, all the provisions must be harmonized.” By looking to the plain meaning of the language contained in both § 508.010.4 and § 508.050, Respondent intelligently discerned a way in which they were able to be harmonized; viz. § 508.010.4 applies in all action alleging tort, and § 508.050 is still applicable in actions alleging something other than tort (such as breach of contract).

The language of the new venue statute, R.S.Mo. 508.010.4, stating that it is to be applied to all tort actions notwithstanding any other provision of law clearly demonstrates that § 508.050 is no longer applicable in tort actions. To reiterate, 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. For these reasons, R.S.Mo. § 508.010.4 is the final and determinative statute for all tort claims accruing in Missouri. Therefore, Respondent respectfully requests that Relator's request for prohibition be denied.

CONCLUSION

“Mandamus lies only when there is an unequivocal showing that a public official failed to perform a ministerial duty imposed by law. To be entitled to relief, there must be a showing that the applicant has a clear, unequivocal, specific and positive right to have performed the act demanded.” Casey's, 9 S.W.3d at 717 (internal citations omitted). “[P]rohibition will lie only where necessary to prevent a usurpation of judicial power, to remedy an excess of jurisdiction, or to prevent an absolute irreparable harm to a party.” State ex rel. York v. Daugherty, 969 S.W.2d 223, 224 (Mo. banc 1998).

Here, there has been no “clear, unequivocal, specific and positive right” proven by Relator to a “right” to have this case transferred to an improper venue. The Honorable Judge Riley did not usurp his judicial power, but rather recognized its limits when he stated that he did “not have the authority to read into a statute a legislative intent that is contrary to the statute’s plain meaning.” Order, A4. Respondent looked at the law as it stands today in the form of R.S.Mo. § 508.010.4 and Rule 51.045 and made an informed,

legally-based decision to ensure that this case was not transferred to an improper venue.

For these reasons, Relator's requests for mandamus and prohibition must be denied.

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HONORABLE JOHN J. RILEY)	
)	
Respondent.)	

CERTIFICATE OF COMPLIANCE

Comes now Counsel for Respondent Honorable John J. Riley, and hereby certifies that: (1) this Brief includes the information required by Rule 55.03; (2) this Brief complies with the limitations contained in Rule 84.06(b); (3) this Brief contains 2,489 words; and (4) this Brief contains 217 lines of monospaced type.

Furthermore, as this Brief was prepared as required by Rule 84.06(a), a floppy disk accompanies this Brief, and pursuant to Rule 84.06(g) has been scanned for viruses and is virus-free.

Harold L. Whitfield #21748

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CERTIFICATE OF SERVICE

A true copy of the foregoing was served upon Relator by mailing same to W. Dudley McCarter, Esquire, Attorney for said Relator, at 7777 Bonhomme Avenue, Suite 1400, St. Louis, Missouri 63105, this 24th day of January, 2007.

Harold L. Whitfield #21748