

**IN THE MISSOURI SUPREME COURT**

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**No. SC84218**

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**STATE OF MISSOURI ex rel.  
VEE-JAY CONTRACTING CO.,**

**Relator,**

**vs.**

**THE HONORABLE MARGARET M. NEILL,  
Presiding Judge of the Missouri Circuit Court,  
Twenty-Second Judicial Circuit (St. Louis City),**

**Respondent.**

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**Original Proceeding in Mandamus**

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**REPLY BRIEF OF RELATOR**

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**POINT RELIED ON**

**I. RELATORS ARE ENTITLED TO A WRIT OF MANDAMUS TO COMPEL RESPONDENT TO VACATE HER ORDER DENYING RELATOR'S MOTION TO TRANSFER BASED ON IMPROPER VENUE AND TO TRANSFER THE UNDERLYING ACTION TO ST. LOUIS COUNTY, BECAUSE RESPONDENT WAS REQUIRED PURSUANT TO MISSOURI SUPREME COURT RULE 51.045 TO TRANSFER THIS ACTION TO A COURT WHERE VENUE IS PROPER, IN THAT:**

- A. No Reply to Relator's Motion to Transfer for Improper Venue was Filed in the Underlying Action and Rule 51.045 Requires Relator to Order a Transfer to a Court Where Venue is Proper when No Reply is Filed; and**
- B. Relator Refuted Plaintiff's Allegations Regarding Venue Lying in the City of St. Louis and Relator Established that Venue in St. Louis County is Proper, Because the Cause of Action Accrued in St. Louis County and Defendants are All Residents of St. Louis County.**

*State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855 (Mo. banc 2001)

*State ex rel. American Family Mut. Ins. Co. v. Koehr*, 832 S.W.2d 7 (Mo. App. E.D. 1992)

Rule 51.045

## ARGUMENT

**I. RELATORS ARE ENTITLED TO A WRIT OF MANDAMUS TO COMPEL RESPONDENT TO VACATE HER ORDER DENYING RELATOR’S MOTION TO TRANSFER BASED ON IMPROPER VENUE AND TO TRANSFER THE UNDERLYING ACTION TO ST. LOUIS COUNTY, BECAUSE RESPONDENT WAS REQUIRED PURSUANT TO MISSOURI SUPREME COURT RULE 51.045 TO TRANSFER THIS ACTION TO A COURT WHERE VENUE IS PROPER, IN THAT:**

**A. No Reply to Relator’s Motion to Transfer for Improper Venue was Filed in the Underlying Action and Rule 51.045 Requires Relator to Order a Transfer to a Court Where Venue is Proper when No Reply is Filed.**

Respondent claims that under Rule 51.045(b), venue must first be established as improper before the mandatory language that, if no reply to the motion to transfer for improper venue is filed, the court “shall” order a transfer comes into play. In support of her argument, Respondent cites the language in 51.045(a) that “[a]n action filed in the court where venue is improper shall be transferred to a court where venue is proper,” claiming that this is a prerequisite to any analysis under the mandatory language in 51.045(b) when no reply is filed. Respondent’s argument is erroneous.

Rule 51.045, Transfer of Venue When Venue Improper, states in its entirety as follows:

(a) An action filed in the court where venue is improper shall be transferred to a court where venue is proper if a motion for such transfer is timely filed. Any motion to transfer venue shall be filed:

(1) Within the time allowed for responding to an adverse party's pleading, or

(2) If no responsive pleading is permitted, within thirty days after service of the last pleading.

If a motion to transfer venue is not timely filed, the issue of improper venue is waived.

(b) Within ten days after the filing of a motion to transfer for improper venue, an opposing party may file a reply denying the allegations in the motion to transfer. If a reply is filed, the court shall determine the issue.

If the issue is determined in favor of the movant or if no reply is filed, a transfer of venue shall be ordered to a court where venue is proper. When a transfer of venue is ordered, the entire civil action shall be transferred unless a separate trial has been ordered. If a separate trial is ordered, only that part of the civil action in which the movant is involved shall be transferred.

(c) A request for transfer of venue under this Rule 51.045 shall not deprive a party of the right to a change of venue under Rule 51.03 if the civil action is transferred to a county having seventy-five

thousand or fewer inhabitants. A party seeking a change of venue under Rule 51.03, after transfer of venue pursuant to this Rule 51.045, shall make application therefor within the later of:

- (1) The time allowed by Rule 51.03, or
- (2) Ten days of being served with notice of the docketing of the civil action in the transferee court as provided by Rule 51.10.

As one can see, there is no qualifying or introductory language to subsection (b) that venue be found to be improper before the mandatory language requiring transfer if no reply is filed is triggered. Rule 51.045(b) stands on its own. There is no referral back to subsection (a). According to the plain language of Rule 51.045(b), the court shall determine the issue of venue only if a reply is filed. If no reply is filed, the court is mandated under 51.045(b) to order a transfer of venue to a court where venue is proper, regardless of whether venue is shown to be improper.

Furthermore, Respondent's proposed construction of Rule 51.045(b) is contrary to well-established rules of construction. As this Court held in *Missouri Pacific Railroad Co. v. Kuehle*, 482 S.W.2d 505, 508 (Mo. 1972):

It is an elementary and cardinal rule of construction that effect must be given, if possible, to every word, clause, sentence, paragraph, and section of a statute, and a statute should be so construed that effect may be given to all of its provisions, so that no part, or section, will be inoperative, superfluous, contradictory, or conflicting, and so that

one section, or part will not destroy another. [Citation omitted.]  
Moreover, it is presumed that the legislature intended every part and section of a statute, or law, to have effect and to be operative, and did not intend any part or section of such statute to be without meaning or effect. [quoting *Graves v. Little Tarkio Drainage Dist. No. 1*, 345 Mo. 557, 134 S.W.2d 70 (Mo. 1939).]

Respondent argues that a movant under Rule 51.045(b) has the burden of establishing that venue is improper before a court may order transfer. However, Rule 51.045(b) states in part:

**If a reply is filed**, the court shall determine the issue.

If the issue is determined in favor of the movant **or if no reply is filed a transfer of venue shall be ordered** to a court where venue is proper. . . . [Emphasis added.]

The rule clearly states that the court shall only determine whether or not venue is improper “if a reply is filed.” The rule further states “if no reply is filed a transfer of venue shall be ordered.” Respondent’s contention that a court must always determine if venue is improper regardless of whether or not a reply is filed is contrary to the express language of the rule and affords no effect to the above provisions making them superfluous.

In this case, no reply to the Motion to Transfer for Improper Venue was filed. In addition, Relator showed that venue was proper in St. Louis County. Thus, under the plain language of Rule 51.045(b), the court was mandated to transfer this action to St.

Louis County. Rule 51.045(b) compels a transfer of venue to a court where venue is proper if there is no reply to the motion to transfer for improper venue. The words “shall be ordered” are mandatory in nature and divest the trial court of any discretion in ordering a transfer when no reply is filed. *See State ex rel. American Family Mut. Ins. Co. v. Koehr*, 832 S.W.2d 7, 8 (Mo. App. E.D. 1992).

**B. Relator Refuted Plaintiff’s Allegations Regarding Venue Lying in the City of St. Louis and Relator Established that Venue in St. Louis County is Proper, Because the Cause of Action Accrued in St. Louis County and Defendants are All Residents of St. Louis County.**

Respondent misconstrues Relator’s position in this matter. Although Relator originally argued in its original Motion to Transfer for Improper Venue that the City of St. Louis was pretensively joined as a defendant, Relator advanced this argument before this Court’s decision in *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855 (Mo. banc 2001). Since *Linthicum* clarified that a lawsuit is “brought” for venue purposes each time a defendant is added, it is no longer necessary to establish that St. Louis City was pretensively joined when the suit was first filed. *Linthicum* requires a court to consider only the defendants in the lawsuit at the time the movant-defendant was added to the suit. In this case, those defendants are McCarthy Brothers Construction Company, Vee-Jay Cement Contracting Company, and Interface Construction Company. Thus, the City of St. Louis, and any pretensive joinder thereof, is no longer a consideration under the current state of the law.

Respondent's argument that Relator has not presented any competent evidence that no defendant has an office or agent in the City of St. Louis defeats its Motion to Transfer for Improper Venue is also without merit. As stated in its opening brief, Relator does not have the burden of disproving all possible bases for venue. Interestingly, Respondent does not make mention of the case on which Relator relies in support of its argument, the Eastern District's decision of *State ex rel. Etter, Inc. v. Neill*, 70 S.W.3d 28 (Mo. App. E.D. 2002), which is directly on point. In *Etter*, the court specifically held that "[w]hile relator bore the burden of persuasion and proof, it does not need to disprove bases for venue that were never pleaded to meet those burdens." *Id.* at 29. Because Plaintiff never pleaded venue based on any defendants' having an office or agent in the City of St. Louis, Relator was not required to disprove this basis for venue. As noted in its original brief, Relator disproved the only basis for venue (that "the subject property is owned, operated and maintained by Defendant, City of St. Louis, and technically located within the City of St. Louis") by citing this Court's decision in *State v. Boyd*, 492 S.W.2d 787 (Mo. 1973), wherein this Court took judicial notice that Lambert St. Louis Airport, the "subject property," is located in St. Louis County. Relator also produced evidence to show that venue would be proper in St. Louis County. Thus, Relator sustained its burden of proof on this issue. The cases cited by Respondent in support of its position that the party asserting improper venue has the burden of persuasion and proof<sup>1</sup> are also

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<sup>1</sup> *Coale v. Grady Bros. Siding and Remodeling, Inc.*, 865 S.W.2d 887, 889 (Mo. App. S.D. 1993); *Cuba's United Ready Mix v. Bock Concrete Foundations, Inc.*, 785

inapposite in that they were decided before *Etter*; moreover, they did not hold that such burden extended to disproving unplead bases for venue.

Finally, Respondents misconstrues this Court's reasoning behind its holding in *Linthicum*. This Court specifically stated as follows:

For purposes of section 508.010, a suit instituted by summons is "brought" whenever a plaintiff brings a defendant into a lawsuit, whether by original petition or by amended petition. [Citation omitted.] **This interpretation protects all party defendants equally and gives effect to the intent of the legislature in enacting section 508.010(3).** *State ex rel. DePaul Health Ctr. v. Mummert* does not hold to the contrary and still applies whenever a defendant is dismissed from a lawsuit rather than added to it.

[Emphasis added.] *Linthicum*, 57 S.W.3d at 858. Thus, the Court's policy was to protect all defendants equally. The opinion says nothing of venue rights that are "different" from the original defendants, as Respondent maintains. Based on *Linthicum* and *Etter*, this Court should issue an absolute writ of mandamus.

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S.W.2d 649, 650 (Mo. App. S.D. 1990); *Pierce v. Pierce*, 621 S.W.2d 530, 531 (Mo. App. S.D. 1981).

## CONCLUSION

Because Plaintiff in the underlying action did not file a response to the Motion to Transfer for Improper Venue, Rule 51.045 mandates that Respondent “shall” transfer this action to a court where venue is proper. Relator has shown that St. Louis County is a court where venue is proper. Plaintiff never disputed that venue is proper in St. Louis County. Furthermore, Relator refuted Plaintiff’s grounds for asserting venue in the City of St. Louis. This Court should issue an absolute writ in mandamus and compel Respondent to grant Relator’s Motion to Transfer for improper venue and transfer this cause to St. Louis County.

Respectfully submitted,

**MOSER and MARSALEK, P.C.**

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**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that two copies of the foregoing reply brief and one copy of accompanying disks were mailed, postage prepaid, to the following this 23rd day of May, 2002: The Hon. Margaret M. Neill, Presiding Judge, Division 1, Missouri Circuit Court, Twenty-Second Judicial Circuit, Civil Courts Building, 10 N. Tucker, St. Louis, Missouri 63101; Mr. John Anderson and Mr. Herman Praszkie, Attorney for Plaintiff Florida Murray, 1007 Olive Street—Third Floor, St. Louis, Missouri 63101; and Ms. Zora Manjencich, Attorney for Defendant McCarthy Brothers Construction Co., 515 North Sixth Street, Suite 2400, St. Louis, Missouri 63101.

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