

IN THE SUPREME COURT OF MISSOURI

No. SC83282

STATE ex rel. FIREWORKS SPECTACULAR, INC., 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 MANDAMUS

RELATORS' BRIEF

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JURISDICTIONAL STATEMENT

This original action in mandamus is one involving the question of whether the Respondent failed to enforce a clear, unequivocal, preexisting, and specific right of the Relators when Respondent denied Relators' motions for transfer of venue, and whether the Alternative Writ of Mandamus entered by this Court on January 23, 2001 shall be made peremptory. This Court has jurisdiction pursuant to Article V, Section 4.1 of the Missouri Constitution to determine and issue remedial writs.

STATEMENT OF FACTS

On March 3, 2000 the plaintiff Scott Hammer filed a Petition in the Circuit Court of the City of St. Louis naming one defendant, Gary Cooke. (L.F. 1-3).¹ Plaintiff's Petition alleged that on July 4, 1998 Mr. Cooke negligently shot off fireworks during the annual fireworks show in Kirkwood Park, located in St. Louis County, Missouri, causing the plaintiff to be injured when fireworks debris struck him in the face and eye. (L.F. 1-3). Mr. Cooke is a resident of the State of Illinois and plaintiff's original Petition was filed in the City of St. Louis pursuant to Missouri Revised Statutes § 508.010(4) which provides that "[w]hen all the defendants are nonresidents of the state, suit may be brought in any county in this state." Mo. Rev. Stat. § 508.010(4). (L.F. 1).

On March 22, 2000, before Mr. Cooke had been served with or filed an Answer to plaintiff's original Petition, plaintiff filed a First Amended Petition which brought suit against four new defendants to the case. (L.F. 6-11; Petition for Writ of Mandamus, ¶ 4). Among the new defendants against whom suit was brought by plaintiff's First Amended Petition were David White and Curtis Carron, employees of the City of Kirkwood who allegedly had various ministerial and contractual duties related to supervisory control over the fireworks show. (L.F. 7,

¹ "L.F. #" refers to the relevant pages from the Stipulated Joint Legal File filed contemporaneously with this Brief.

¶ 9). Mr. White and Mr. Carron are both residents of St. Louis County, Missouri. (Petition for Writ of Mandamus, ¶ 15). Plaintiff also brought suit against John Doe alleging that an unknown employee of the City of Kirkwood witnessed the accident and did not prevent it. (L.F. 7-8, ¶¶ 9, 11).

The fourth new defendant against whom suit was brought by plaintiff's First Amended Petition was Fireworks Spectacular, Inc., a Kansas corporation with a registered agent in Henry County, Missouri. (L.F. 6, 7). Plaintiff alleged that Mr. Cooke was in the course and scope of his employment with Fireworks Spectacular, Inc. at the time of the accident. (L.F. 7, ¶ 8).

Each of the defendants (the Relators herein) timely filed motions in the trial court pointing out that venue in the City of St. Louis was improper under Missouri's general venue statute (§ 508.010) due to the presence of Missouri residents as defendants, none of whom resided in the City of St. Louis, and because plaintiff's cause of action did not accrue in the City of St. Louis. (L.F. 84-90, 121-141). Defendants' motions for transfer of venue were heard and denied by Judge Michael Calvin, the Respondent herein, on October 13, 2000. (L.F. 144). The Respondent denied defendants' motions for transfer of venue without giving a written opinion as to the reason for the denial.

Relators filed a Petition for Writ of Mandamus in the Missouri Court Appeals, Eastern District (L.F. 145-159), which that Court denied on November

16, 2000. (L.F. 160). On or about January 2, 2001 the Relators filed a Petition for Writ of Mandamus in this Court. On January 23, 2001 this Court entered its Alternative Writ of Mandamus commanding the Respondent Judge Michael Calvin to vacate his order of October 13, 2000 denying the motions for transfer of venue, or show cause, if any, why he should not do so. On February 22, 2001 a Response to Order to Show Cause was filed on behalf of the Respondent by counsel for the plaintiff.²

² Note that effective January, 2001 the Honorable Margaret M. Neill became the Presiding Judge in the Circuit Court of the City of St. Louis, Division 1, and may be substituted as the proper Respondent. See State ex rel. Breckenridge v. Sweeney, 920 S.W.2d 901, 904 (Mo. 1996); Mo. R. Civ. Proc. 52.13(d).

POINT RELIED ON

- I. Relators are entitled to a writ of mandamus to compel Respondent to vacate his order denying Relators' motions for transfer of venue and to transfer plaintiff's case to a proper venue because venue in the Circuit Court of St. Louis City is improper under the general venue statute, Section 508.010, Rev. Stat. Mo., in that:
 - A. No defendant resides in St. Louis City, Relators White and Carron are residents of St. Louis County, Relator Fireworks Spectacular, a Kansas corporation, resided in Henry County when suit was brought against it, and the plaintiff's cause of action accrued in St. Louis County; and
 - B. By fixing venue at the time plaintiff filed his original Petition against defendant Cooke, a non-Missouri resident, respondent deprived Relators, who were later added as party defendants in plaintiff's First Amended Petition, of their rights to have plaintiff's action brought in a proper venue and to challenge venue in an improper forum.

§ 508.010 RSMo (1994)

State ex rel. Bowden v. Jensen, 359 S.W.2d 343 (Mo. 1962)

ARGUMENT

- I. Relators are entitled to a writ of mandamus to compel Respondent to vacate his order denying Relators' motions for transfer of venue and to transfer plaintiff's case to a proper venue because venue in the Circuit Court of St. Louis City is improper under the general venue statute, Section 508.010, Rev. Stat. Mo., in that:**
 - A. No defendant resides in St. Louis City, Relators White and Carron are residents of St. Louis County, Relator Fireworks Spectacular, a Kansas corporation, resided in Henry County when suit was brought against it, and the plaintiff's cause of action accrued in St. Louis County; and**
 - B. By fixing venue at the time plaintiff filed his original Petition against defendant Cooke, a non-Missouri resident, respondent deprived Relators, who were later added as party defendants in plaintiff's First Amended Petition, of their rights to have plaintiff's action brought in a proper venue and to challenge venue in an improper forum.**

Plaintiff cannot dispute that if he had named all Relators as defendants in his original Petition, venue of this case under §508.010 would not be proper in the City of St. Louis because none of the Relators reside there and the plaintiff's cause

of action did not accrue there. The issue before this Court is whether the plaintiff can deprive Missouri citizens of their venue rights by adding them as defendants less than three weeks after the filing of an original Petition against only one defendant, a nonresident of Missouri. The Respondent in this case allowed the plaintiff to do just that.

Since plaintiff's cause of action accrued in St. Louis County, and since Relators Mr. White and Mr. Carron reside in St. Louis County, venue there would have been proper when this suit was brought against them. In addition, since Fireworks Spectacular, Inc. maintained its registered agent in Henry County at the time suit was brought against it, venue there would have also been proper.

In this case there were only two proper venues from which the plaintiff could choose when he brought suit against the Relators by filing his First Amended Petition: St. Louis County and Henry County. However, Respondent's order denying Relators' motion for transfer of venue, in effect, affords plaintiff **one hundred fifteen** proper venues from which to choose by simply suing a nonresident as the sole defendant in his original Petition.

It is the Relators' position that they are entitled to challenge venue as of the time the Amended Petition was filed, because that was the time that suit was brought against them. See State ex rel. DePaul Health Center v. Mummert, 870 S.W.2d 820 (Mo. 1994). To hold otherwise would effectively abolish venue as a

concept in any case involving a nonresident of Missouri as a defendant. Indeed, venue as a means to provide a convenient, logical and orderly forum for litigation would be eliminated altogether.

Relators' position preserves the venue rights of Missouri citizens that have been clearly and unequivocally expressed by the Missouri legislature and this Court regardless of when those defendants are joined. Enforcement of these rights eliminates the issue of "pretensive non-joinder" and provides a simple, salutary rule for resolving venue disputes when suit is brought against a new defendant. This rule treats all defendants alike, permits all defendants the right to challenge venue, not just the original named defendant, and deprives no defendant of the right to proper venue. Moreover, the rule is easy to apply. It requires no subjective analysis of the motives of plaintiff's counsel in not bringing suit against a particular defendant at an earlier time.

Relators respectfully request that this Court make peremptory its Alternative Writ of Mandamus entered on January 23, 2001 in order to protect the venue rights of Missouri citizens.

A. Venue Rights in Missouri

"The origin of venue dates back to the development of the English judicial system when venue was the locality from which the court summoned jurors." State ex rel. Rothermich v. Gallagher, 816 S.W.2d 194, 196 (Mo. 1991) (citing

Adoor and Simeone, The Law of Venue in Missouri, 32 St. Louis U.L.J. 639, 641 (1988)). Originally, jurors questioned the witnesses in a case and were therefore more effective if the jurors were drawn from the area where the dispute arose or where the land involved was located. Id. “As the judicial system developed and jurors no longer conducted inquiries of witnesses, the rules governing venue incorporated a transitory, local distinction for determining the proper court in which to file a lawsuit.” Id. A local action involves a dispute over a fixed object such as real property, while a transitory action involves a situation “where venue follows the parties.” Id.

Venue in Missouri is determined solely by statute; the purpose of Missouri venue statutes is to provide a convenient, logical and orderly forum for litigation. Rothermich, 816 S.W.2d at 196. Missouri venue statutes incorporate the concepts of local versus transitory actions; suits involving individuals are transitory actions and may be filed in the county of defendant’s residence. Id. at 196-197. When suit is brought against an individual defendant (including when one or more corporations are sued together with one or more individuals), Missouri’s general venue statute, §508.010, applies. Id. at 197.

Section 508.010 protects the venue rights of Missouri citizens by providing that suit against a resident of this state must be brought in the county where the defendant resides; the county where the plaintiff resides and the defendant may be

found; or, in a tort action, in the county where the cause of action accrued. Mo. Rev. Stat. §508.010(1), (6). When there are several defendants, some residents and others nonresidents of the state, suit may be brought in any county in which any defendant resides; or, in a tort action, in the county where the cause of action accrued. Mo. Rev. Stat. §508.010(2), (3), (6).

This Court recognized the legislature's intention to protect the venue rights of Missouri citizens in State ex rel. Bowden v. Jensen, 359 S.W.2d 343 (Mo. 1962). In Bowden this Court held that the residence of a foreign business corporation is the location of its registered agent, under Missouri Revised Statutes §351.620, for the purposes of determining proper venue under §508.010 (where the foreign business corporation was sued together with a Missouri resident). Id. This Court stated:

The theory that Sec. 351.620 was intended to give foreign business corporations a specific, definite and certain residence in this state, and that Sec. 508.010, subd. (2) should be construed with it, conforms to good business practice **and the proper protection of the rights of individual defendants** who may be joined with corporate defendants.

Bowden, 359 S.W.2d at 350 (emphasis added).

The Court further explained that this construction “makes for definiteness and certainty,” noting:

[A]n individual defendant when so joined may immediately and definitely determine whether the venue of the action is proper or improper as to him. It may not make any difference to such a foreign business corporation in what county the plaintiff may file his action, but, on the other hand, it may be vitally important to the particular individual defendant the plaintiff seeks to join as an additional defendant in the action.

Id.

In State ex rel. England v. Koehr, 849 S.W.2d 168 (Mo. App. 1993), the Missouri Court of Appeals, Eastern District, reiterated this Court's rationale from the Bowden decision. In the England case, the Court of Appeals held that when a Missouri resident is sued along with a foreign corporation that failed to properly register in compliance with Missouri statute, the foreign corporation is deemed to have no "residence" in Missouri even though it has offices in this state. The Court of Appeals, referring to this Court's decision in Bowden, stated "[the Supreme Court] premised [its] conclusion upon protecting the resident individual defendant from the indefiniteness of knowing whether venue as to him was proper. . . . The rationale did not have to do with the effect on the foreign corporation but upon the impact on the individual defendant." Id. at 169.

Consistent with the holding in Bowden, this Court has repeatedly upheld the venue rights of Missouri residents by applying the general venue statute to any suit

involving both corporate and individual defendants. If a corporation were the sole defendant in a case, plaintiff could file the action in any county in which the corporation maintained an office or agent for the transaction of its usual and customary business. Mo. Rev. Stat. §508.040. However, when suit is brought against even one Missouri resident along with one or more corporate defendants, the plaintiff's venue options are limited to only those counties where one of the defendants "resides," or where the cause of action accrued. Rothermich, 816 S.W.2d at 197; Mo. Rev. Stat. §508.010(2), (3), (6).

Moreover, under the general venue statute, the residence of a business corporation is limited to the location of its registered agent. Rothermich, 816 S.W.2d at 198; Bowden, 359 S.W.2d at 350-351. This is in contrast to a corporation's residence under the corporate venue statute, namely, any county in which the corporation maintains an office or agent for the transaction of its usual and customary business. Mo. Rev. Stat. §508.040.

Furthermore, venue is a personal privilege that cannot be waived on behalf of one defendant by the conduct of other defendants. Washington University v. ASD Communications, Inc., 821 S.W.2d 895, 896 (Mo. App. 1992). One defendant may waive venue but another defendant, even one that is subsequently added to the case, may still challenge improper venue. Id.

The purpose of Missouri venue statutes is to provide a convenient, logical and orderly forum for litigation. The venue statutes have been interpreted by this Court to grant certain specific venue rights to Missouri citizens. An individual resident of Missouri is entitled to the protections afforded by the general venue statute, so that suit may only be brought against him or her in a **limited** number of venues: (1) a county in which he or she resides (or in the county where plaintiff resides and all defendants may be found), (2) a county in which a co-defendant resides, or (3) in a tort action, in the county where the cause of action accrued. In addition to limiting the number of venues in which a suit against an individual Missouri resident may be brought, §508.010 allows Missouri citizens to know with definitiveness and certainty whether venue is proper when suit is brought against him or her. See Bowden, supra.

B. Respondent's Denial of Relators' Motions for Transfer of Venue Violated Relators' Venue Rights

In denying Relators' motions for transfer of venue, Respondent concluded that venue of this case was proper because the original Petition was filed against only one defendant, Mr. Cooke, and since Mr. Cooke is a nonresident of Missouri plaintiff could bring such an action in any county in this state pursuant to Missouri Revised Statutes § 508.010(4). See Response to Order to Show Cause. By so ruling, Respondent concluded that Relators had no venue rights when plaintiff

brought suit against two Missouri residents less than three weeks after the filing of the original Petition.

Respondent's denial of Relators' motions for transfer of venue means that this case could have been brought in any county in this state. There are one hundred fifteen counties in the State of Missouri: Adair, Andrew, Atchison, Audrain, Barry, Barton, Bates, Benton, Bollinger, Boone, Buchanan, Butler, Caldwell, Callaway, Camden, Cape Girardeau, Carroll, Carter, Cass, Cedar, Chariton, Christian, Clark, Clay, Clinton, Cole, Cooper, Crawford, Dade, Dallas, Daviess, DeKalb, Dent, Douglas, Dunklin, Franklin, Gasconade, Gentry, Green, Grundy, Harrison, Henry, Hickory, Holt, Howard, Howell, Iron, Jackson, Jasper, Jefferson, Johnson, Knox, Laclede, Lafayette, Lawrence, Lewis, Lincoln, Linn, Livingston, Macon, Madison, Maries, Marion, McDonald, Mercer, Miller, Mississippi, Moniteau, Monroe, Montgomery, Morgan, New Madrid, Newton, Nodaway, Oregon, Osage, Ozark, Pemiscot, Perry, Pettis, Phelps, Pike, Platte, Polk, Pulaski, Putnam, Ralls, Randolph, Ray, Reynolds, Ripley, Saline, Schuyler, Scotland, Scott, Shannon, Shelby, St. Charles, St. Clair, St. Francois, St. Louis City, St. Louis County, Ste. Genevieve, Stoddard, Stone, Sullivan, Taney, Texas, Vernon, Warren, Washington, Wayne, Webster, Worth, and Wright. See "Counties Constituting the Judicial Circuits," 2001 Missouri Court Rules, Volume I.

If Respondent is correct, any time a plaintiff has a claim in which at least one nonresident of Missouri is a potential defendant then venue is abolished as a right altogether. The plaintiff need only sue that nonresident first, pick **any** county out of one hundred fifteen in this state as plaintiff's desired venue, and moments later add Missouri residents as defendants without any inquiry being allowed into whether venue is proper against the Missouri residents. Relators' position renders Missouri's general venue statute meaningless and ignores the venue rights of Missouri citizens that the legislature and this Court have consistently protected.

"The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to the intent if possible, and to consider the words in their plain and ordinary meaning." Wolff Shoe Co. v. Director of Revenue, 762 S.W.2d 29, 31 (Mo. 1988). Construction of statutes should avoid unreasonable or absurd results. Taylor v. McNeal, 523 S.W.2d 148, 152 (Mo. App. 1975). "Appellate courts presume the legislature does not enact meaningless provisions." Allen v. Public Water Supply District No. 5 of Jefferson County, 7 S.W.3d 537 (Mo. App. 1999).

Respondent's ruling, however, renders the general venue statute meaningless whenever a nonresident of Missouri is a defendant in a case. Respondent assumes that the legislature intended that venue be finally and conclusively determined when the case is first brought against any one defendant (in this case, a nonresident

of Missouri), leaving those defendants subsequently brought into the case with no venue rights. Under Respondent's rule, it does not matter if the plaintiff files an Amended Petition within seconds after filing an original Petition. Plaintiff may amend his Petition once as a matter of course before a responsive pleading is served, without court approval. Mo. R. Civ. Proc. 55.33(a). The plaintiff could simply arrive at the courthouse with two Petitions, file the "original" Petition against a nonresident of Missouri and then file-stamp the "amended" Petition while at the courthouse.

The rule that plaintiff may freely amend his Petition must be construed consistently with the venue rights established by the legislature. It should not be construed in a manner that destroys venue rights and renders the general venue statute meaningless. There is no basis for the conclusion that the right to amend is paramount and supplants all other rights, including the right to proper venue.

Moreover, a rule requiring an inquiry into whether venue is appropriate when a claim is brought against a new defendant is compelled by consideration of the nature of the petitions filed by the plaintiff. Here, when the plaintiff filed his First Amended Petition, his original Petition was "abandoned." This court has held that when a party files an Amended Petition, the original Petition is abandoned and may not be used except for very limited purposes. State ex rel. Crowden v. Dandurand, 970 S.W.2d 340, 342 (Mo. 1998); Bledsoe v. Northside Supply &

Dev. Co., 429 S.W.2d 727, 730 (Mo. 1968) (abandoned allegations are admissible as admissions against interest).

A defendant cannot remove a case to federal court based upon the diversity of citizenship of parties in the original Petition when an Amended Petition is filed naming new parties which defeat diversity. Why should plaintiff be allowed to finally and conclusively establish venue by the use of one pleading, only to abandon that pleading in favor of one that defeats removal?

Relators' position is that there were **two** proper venues for the plaintiff to choose from when he brought suit against the Relators by filing a First Amended Petition: St. Louis County and Henry County. Respondent's position is that there were **one hundred fifteen** proper venues for the plaintiff to choose from.

Respondent's holding is at war with the individual venue rights of Missouri citizens to know with certainty that a lawsuit could be brought against them in only a **limited** number of venues. Indeed, Respondent neglects the venue rights of Missouri citizens by placing **no limit** on the number of venues in which this case could be brought.

The personal, statutory right of a Missouri resident to be sued only in certain limited venues is at risk of being lost because of the timing of when he or she is joined in the lawsuit. The issue here is not limited to the question of whether personal injury suits will be filed in the City of St. Louis with greater ease. The

issue is whether to preserve personal venue rights for all Missouri citizens wherever situated in the state, and whenever added to a lawsuit. Respondent's rule would permit the filing of a lawsuit in Atchison County in the northwest corner of the state against a resident of Pemiscot County in the southeast corner of the state, so long as a nonresident of Missouri was also a defendant. Is it convenient, logical, and orderly to allow a Missouri citizen to be haled into any of one hundred fifteen venues to be sued without geographic limitation? Is it logical that the legislature would establish a personal venue right that could be taken away without any notice to a prospective defendant? Relators take the position that the answer to each of these questions is "no." Relators submit that it is convenient, logical, and orderly to test venue when a suit is brought against a new defendant, in order to protect the rights of a Missouri citizen to be sued only in certain, limited venues.

The Respondent's denial of Relators' motions for transfer of venue eliminates the rules for providing a convenient, logical and orderly forum for litigation, because of the presence of a nonresident as a defendant. Under Respondent's rule, the personal, statutory venue rights of Missouri citizens are made meaningless by the mere timing of when suit is brought against them.

**C. Relators' Position That Venue is Improper in the City of St. Louis
is in Harmony with the General Venue Statute and Missouri Case
Law**

When plaintiff brought suit against Relators via the First Amended Petition, venue was improper in the City of St. Louis because none of the defendants resided in the City of St. Louis and the cause of action did not accrue in the City of St. Louis. It is appropriate and necessary to determine venue as the case stands when brought against the new defendants. Mo. Rev. Stat. §508.010. This case was not “brought” against Relators David White, Curtis Carron, John Doe and Fireworks Spectacular, Inc. until the filing of the First Amended Petition. Therefore, consistent with the language of the general venue statute that suit shall be “brought” against particular defendants in only a limited number of particular counties, venue as to Relators should be determined when suit was first “brought” against them.

This conclusion does not conflict with this Court’s decision in State ex rel. DePaul Health Center v. Mummert, 870 S.W.2d 820 (Mo. 1994). This Court in DePaul was faced with a situation where a defendant had been **dismissed**. This Court held that venue was determined as the case stood when it was brought. Id. at 822-823. Since the claims against all of the defendants were brought at the same time, there was only one reference point for the Court to consider.

The DePaul case stands for the proposition that a plaintiff cannot establish proper venue by **dismissing** a party against whom suit has already been brought. As observed by Judge Limbaugh in his dissenting opinion, a plaintiff would have to dismiss his entire lawsuit and bring a new lawsuit against the defendants of plaintiff's choice in order to obtain the desired venue. Id. at 823; see also State ex rel. Kyger v. Koehr, 831 S.W.2d 953, 955 (Mo. App. 1992) ("If venue was properly vested in the first instance, the subsequent **dismissal** of the resident defendant does not divest the court in which the action was filed of venue and jurisdiction over the person of the remaining non-resident defendant," unless the resident defendant was pretensively joined.) (emphasis added).

Moreover, a rule requiring an inquiry into whether venue is proper when a claim is brought against a new defendant would not create the "procedural headache" which plaintiff suggests. Response to Order to Show Cause, p. 8. If a case is filed in the venue where the cause of action accrued, defendants may be added without any change of venue being possible under the general venue statute. In addition, if a case is filed in any venue where any defendant resides, as many defendants may be added as one wishes without any change of venue being possible under the general venue statute.

Nor would such a rule "portend radical change in Missouri civil procedure" as the plaintiff suggests. Response to Order to Show Cause, p. 5. There are

already situations under Missouri law which allow or require the parties to examine whether venue is appropriate when a plaintiff brings suit against a new defendant in a case.

Under Rule 51.03 of the Missouri Rules of Civil Procedure, a change of venue shall be ordered in a civil action triable by jury “that is pending in a county having seventy-five thousand or less inhabitants upon the filing of a written application therefor not later than ten days after answer is due to be filed.” Mo. R. Civ. Proc. 51.03(a). There is no limitation in Rule 51.03 that only those defendants named in the original Petition are entitled to challenge venue. Therefore, if plaintiff brings suit against a new defendant by filing an amended Petition, venue could be challenged by that new defendant under the circumstances prescribed by Rule 51.03.

Similarly, under Rule 51.04 of the Missouri Rules of Civil Procedure, a change of venue may be ordered in any civil action triable by jury for cause under specific circumstances (if the inhabitants of the county are prejudiced against a party, or the opposite party has an undue influence over the inhabitants of the county). Under Rule 51.04, the application for change of venue “must be filed at least thirty days before the trial date or within ten days after a trial date is fixed, whichever date is later.” Mo. R. Civ. Proc. 51.04(b). There is no limitation in Rule 51.04 that only those defendants named in the original Petition are entitled to

challenge venue. Moreover, Rule 51.04 specifically provides that venue may be challenged a mere thirty days prior to trial, or within ten days after a trial date is fixed, which could be long after the plaintiff's original Petition was filed.

Under Missouri Revised Statutes §508.050, suits against municipal corporations must be commenced in the county in which the municipal corporation is situated. Mo. Rev. Stat. §508.050. This Court has held that if a party in a pending case wishes to bring a claim against a municipal corporation (even a defendant seeking to bring a third-party claim), such a party is precluded from bringing the claim unless it is brought in the county in which the municipal corporation is situated. State ex rel. Burlington Northern Railroad Company v. Forder, 787 S.W.2d 725 (Mo. 1990). This Court's decision in Forder points out that just because venue is proper as the case stands when the original Petition is filed does not preclude an inquiry into whether venue is proper when certain parties are sought to be added to the case.

In conclusion, a rule permitting newly added defendants to assert their personal venue rights is consistent with the plain language of the general venue statute. While §508.010 does not expressly state that defendants may challenge venue whenever suit is brought against a new defendant in a case, it also does not expressly state that venue is conclusively established upon the filing of the first Petition in a lawsuit. The plain language of §508.010, as this Court pointed out in

the Bowden decision, clearly provides certain venue rights to Missouri residents which Relators seek to protect.

CONCLUSION

Relators request the Court to preserve and protect their venue rights by holding that venue must be determined as the case stands **when brought** against new defendants. This rule is objective and straightforward, and merely enforces a right that already exists. It does not involve any inquiry into the subjective intent of plaintiff's counsel, and does not impugn the integrity or motives of opposing counsel. It vindicates the venue rights of all defendants, whenever joined. It eliminates possible equal protection problems because it treats all defendants alike.

For these reasons, Relators respectfully request the Court to make peremptory the Alternative Writ of Mandamus entered on January 23, 2001 and to direct Respondent to transfer this case from St. Louis City to a proper venue.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH
SPECIAL RULE NO. 1

The undersigned certifies that this Respondents' Brief complies with the limitations contained Special Rule No. 1(b), contains 6,109 words, and that the floppy disk filed with this Respondents' Brief in accordance Special Rule No. 1(f) has been scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 24th day of March, 2001 one copy of Relators' Brief and one copy of the disk required by Special Rule No. 1(f) were served upon each of the following via United States mail, correct postage prepaid:

The Honorable Michael B. Calvin, Judge
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