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JURISDICTIONAL STATEMENT

This is an original action in mandamus. The relators are defendants in a negligence action in the Circuit Court of the City of St. Louis. The respondent is a judge of that court. The relators sought a writ of mandamus to compel the respondent to transfer the circuit court proceeding to another venue. This Court issued its alternative writ of mandamus on January 23, 2001. Mo. Const. Art. V, § 4.1, invests this Court with jurisdiction to entertain applications for and issue extraordinary writs.

STATEMENT OF FACTS

Scott Hammer commenced an action against Gary Cooke in the St. Louis Circuit Court on March 3, 2000. (L.F. 1-3) Mr. Hammer alleged that he had gone to a park in Kirkwood to observe a fireworks display on July 4, 1998, that he had been struck in the face and eye by fireworks debris and had lost the vision in his eye, and that Mr. Cooke had been exploding fireworks as part of the holiday program. (L.F. 1-2) Mr. Hammer sought to recover damages based upon Mr. Cooke's negligence. (L.F. 2) Counsel for Mr. Hammer sent notice of the commencement of the action to Mr. Cooke on March 20, 2000, in accordance with Mo.R.Civ.P. 54.16.

On March 22, 2000, Mr. Hammer obtained leave to file an amended petition. (L.F. 10-11) In his amended petition Mr. Hammer asserted a claim against Mr. Cooke's employer, Fireworks Spectacular, Inc. (L.F. 6-9) He also asserted claims against David White and Curtis Carron, who were employees of the City of Kirkwood, and against an unknown city employee. (L.F. 6-9)

Mr. Cooke, who is a relator in this Court, then filed a petition to remove Mr. Hammer's action to the United States District Court in St. Louis. (L.F. 13-17) The basis for removal was the diversity of citizenship between Mr. Hammer, who resides in Missouri, and Mr. Cooke, who resides in Illinois. (L.F. 15-16) Mr. Cooke apparently was unaware that Mr. Hammer had filed his amended petition or that

the additional defendants named in the amended petition were Missouri residents. (L.F. 15-16)

Mr. Hammer moved for an order remanding the case to the state court. (L.F. 18-21) After having been formally apprised that Missouri residents had been added to the state court proceeding as defendants prior to the filing of their notice of removal, the defendants resisted remand to the state court. (L.F.40-44) They argued that the additional defendants "were not properly added in state court" and that the sole defendant in the case was Mr. Cooke. (L.F. 41) The district court granted Mr. Hammer's motion and returned the case to the state court. (L.F. 82-83)

All of the defendants then claimed that venue in the City of St. Louis was improper and sought an order from the Circuit Court transferring the case to St. Louis County. (L.F. 84-86, 121-23, 129-34) The Circuit Court concluded that venue had been proper in St. Louis at the time that the action was brought. (L.F. 144) The defendants, now relators, seek relief by extraordinary writ from this Court.

POINT RELIED ON

I.

The relators are not entitled to a writ of mandamus to compel the respondent to transfer the plaintiff's case to a venue other than the City of St. Louis because venue in the City of St. Louis was proper under § 508.010, Mo.Rev.Stat., the general venue statute, at the time that suit was brought, in that the only defendant named in the plaintiff's original petition did not reside in Missouri and §508.010(4) provides that a suit in which no defendant is a Missouri resident "may be brought in any county in this state."

State ex rel. Rothermich v. Gallagher, 816 S.W.2d 194 (Mo. 1991)

Willman v. McMillen, 779 S.W.2d 583 (Mo. 1989)

State ex rel. DePaul Health Center v. Mummert, 870 S.W.2d 820 (Mo. 1994)

§ 508.010, Mo.Rev.Stat.

ARGUMENT

I.

The relators are not entitled to a writ of mandamus to compel the respondent to transfer the plaintiff's case to a venue other than the City of St. Louis because venue in the City of St. Louis was proper under § 508.010, Mo.Rev.Stat., the general venue statute, at the time that suit was brought, in that the only defendant named in the plaintiff's original petition did not reside in Missouri and §508.010(4) provides that a suit in which no defendant is a Missouri resident "may be brought in any county in this state."

A. Introduction

In Missouri it is axiomatic that "venue is determined solely by statute." *State ex rel. Bunker Resource, Recycling and Reclamation, Inc.* v. Dierker, 955 S.W.2d 931, 933 (Mo. 1997); *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194, 196 (Mo. 1991). This Court has explained what that principle means:

> Venue is within the province of the legislature, and a court must be guided by what the legislature says. The court may not engraft upon a statute provisions that do not appear explicitly or by implication from other words in the statute.

Willman v. McMillen, 779 S.W.2d 583, 585-86 (Mo. 1989). The relators have asked this Court to stand that longstanding and unequivocal acknowledgment of legislative prerogative on its head.

The general venue statute provides that a suit in which no defendant is a Missouri resident "may be brought in any county in this state." § 508.010(4). That statute constitutes "the legislature's limitation on a party in deciding where to initiate an action." *Willman v. McMillen, supra,* 779 S.W.2d at 585. This Court has held that "[b]y the terms of the statute" venue must be determined as the case stands when brought. *State ex rel. DePaul Health Center v. Mummert,* 870 S.W.2d 820, 823 (Mo. 1994); *see also State ex rel. Breckenridge v. Sweeney,* 920 S.W.2d 901, 903 (Mo. 1996) (noting that § 508.010 "requires . . . that challenges to venue based upon a party's residence must be determined as of the time suit was filed"); *State ex rel. Santoya v. Edwards,* 879 S.W.2d 775, 777 (Mo.App.E.D. 1994) (holding "the rule is clear" that "[v]enue is determined as a case stands when brought").

The relators want this Court to put a new spin on the statute: "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." Brief for Relators at 10. But § 508.010 does not make venue a moving target, fair game for attack whenever a defendant is added to a case. A cardinal purpose of the venue statutes is to provide "definiteness and certainty" in the analysis of venue issues. *State ex rel. Bowden v. Jensen,* 359 S.W.2d 343, 350 (Mo. 1962). The relators have duly noted that purpose. Brief for Relators at 13-14. There could be no certainty about venue in a jurisdiction which provided for reconsidering the situs of an action every time a new defendant was named. *See Willman v. McMillen, supra,* 779 S.W.2d at 586 (recognizing that § 508.010(6) "gives certainty and guards against

successive shifting of the location of an action by defendants who assert that they are inconvenienced by the plaintiff's statutorily-provided venue").

The bright-line test for venue challenges based upon residence that was recognized by this Court in its *DePaul Health Center* and *Breckenridge* opinions has a remarkably sound foundation: it is prescribed by unambiguous statutory language and it offers certainty and orderliness in its application. The new rule construction of § 508.010 sought by the relators would read language into the statute that the legislature never wrote, eliminate certainty from venue selection, and ensure a multiplicity of venue challenges. Because the relators' position has no foundation in the language of the venue statutes or in this Court's venue jurisprudence, and because its adoption would invite recurrent venue challenges throughout the course of litigation, the relief demanded by the relators ought to be denied.

B. This Court's Interpretation of § 508.010 is Correct

In *DePaul Health Center* this Court found that the applicable subsection of § 508.010 provided for venue to be determined once and for all "as the case stands when *brought*." *Id.*, 870 S.W.2d at 823 (Court's emphasis). The subsection of the general venue statute here at issue provides with equal clarity that a suit in which no defendant resides in Missouri "may be brought in any county in this state." § 508.010(4), Mo.Rev.Stat. The plaintiff in this case chose to bring his action against an Illinois resident in the City of St. Louis. By the unambiguous language of § 508.010(4), that election was proper.

"The primary rule of statutory construction is to ascertain the intent of the lawmakers 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 ex rel. Dresser Industries, Inc. v. Ruddy,* 592 S.W.2d 789, 794 (Mo. 1980). The intent of § 508.010 generally was to provide for certainty and order in the determination of proper venue. *State ex rel. Bowden v. Jensen, supra,* 359 S.W.2d at 350. The undeniable intent of § 508.010(4) in particular was to allow suits in which no defendant is a Missouri resident to be filed in any county. When a statute is not ambiguous and its words have "a plain and definite meaning," there is no occasion for applying any other rule of construction. *State ex rel. Whaley v. Gaertner,* 605 S.W.2d 506, 507 (Mo. 1980). The rationale of *DePaul Health Center* was correct and applicable to this case.

The relators seem to contend that there is ambiguity in the term "brought," arguing that a single suit may be "brought" again and again as additional defendants are added to the case. Brief for Relators at 10. The "plain and ordinary meaning" of "brought" in the context of § 508.010 is "commenced." It could hardly be clearer that in Missouri "the filing of a petition in a court of record . . . and suing out of process therein [is] deemed the commencement of a suit." § 506.110.2, Mo.Rev.Stat.; *see South Missouri Lumber Company v. Wright,* 21 S.W. 811, 812 (Mo. 1893). If there was ambiguity in the term "brought," which there is not, § 508.010 should be given a reading which keeps it in harmony with § 506.110. *See State ex rel. Rothermich v. Gallagher, supra,* 816 S.W.2d at 200 (recognizing that "statutes are *in pari*

materia when they relate to the same matter or subject" and holding that such statutes "are intended to be read consistently and harmoniously").

In order to avoid the obvious application of the venue analysis articulated in *DePaul Health Center v. Mummert,* the relators also contend that the distinction between adding a defendant and dismissing a defendant is critical. Although the distinction between adding and subtracting parties is undeniable--they are, after all, opposite actions--that difference is not germane to the evaluation of venue under § 508.010. In *DePaul Health Center* this Court looked to the language of the statute and concluded that the legislature had intended for venue to be "determined as the case stands when brought." *Id.*, 870 S.W.2d at 823. The relators' proposed revision of that interpretation would require the imputation of words that are nowhere in the statute or in its ambit, a singularly inappropriate device in statutory construction. *See Willman v. McMillen, supra,* 779 S.W.2d at 586.

Recognizing that the correctness or incorrectness of venue is established once and for all at the commencement of an action is consistent with the legislative purpose of providing "definiteness and certainty" in the analysis of venue issues. *State ex rel. Bowden v. Jensen, supra,* 359 S.W.2d at 350. The construction of § 508.010 promoted by the relators would put venue in flux throughout the course of every action and invite serial challenges to the correctness of a plaintiff's venue choice. That construction inevitably would result in the transfer of cases from one venue to another, and perhaps to another, early and late in the litigation process. *See*

Mo.R.Civ.P. 52.06 (providing that "[p]arties may be dropped or added by order of the court . . . at any stage of the action").

This Court has noted the importance of avoiding an application of the venue statutes that "contribut[es] to and encourag[es] litigation relating to venue problems." *State ex rel. Rothermich v. Gallagher, supra,* 816 S.W.2d at 200. The interpretation of § 508.010 in *State ex rel. DePaul Health Center v. Mummert,* and the respondent's application of that ruling in this case, are consistent with the legislative desire for definiteness and certainty.

C. The Relators' Argument is Unsound

The relators insist that "[i]t is appropriate and necessary to determine venue as the case stands when brought against . . . new defendants." Brief for Relators at 22. Their argument is based largely on five propositions: (1) revisiting the issue of venue each time a new defendant is named in an action "eliminates the issue of 'pretensive non-joinder'"; (2) the opportunity for reconsideration of venue whenever a new defendant is identified by the plaintiff "provides a simple, salutary rule for resolving venue disputes when suit is brought against a new defendant"; (3) the rule proposed by the relators "treats all defendants alike" because it "permits all defendants the right to challenge venue, not just the original defendant, and deprives no defendant of the right to proper venue"; (4) that rule "is easy to apply"; and (5) the rule "requires no subjective analysis of the motives of plaintiff's counsel in not bringing suit against a particular defendant at an earlier time." Brief for

Relator at 11. None of those contentions provides a rational basis for adopting the relators' novel and self-serving proposal.

(1) *Elimination of "pretensive non-joinder."* The relators contend that their new venue test would put an end to the issue of "pretensive non-joinder." Their argument begs the question by positing that "pretensive non-joinder" actually exists as an "issue." The term does not appear in any published opinion in this or any other American jurisdiction. Nor is "pretensive non-joinder" a close relative to "pretensive joinder," which can be an issue. *See, e.g., State ex rel. Ehrlich v. Hamilton,* 879 S.W.2d 491 (Mo. 1994).

Pretensive joinder exists when a plaintiff's venue election is premised upon the naming of a defendant against whom the plaintiff fails to state a claim or with respect to whom the petition and the record "establish that there is, in fact, no cause of action." *Id.* at 492. Pretensive joinder violates the letter of the venue statute and the test for identifying pretensive joinder is an objective one. *Id.* No objective test for identifying "pretensive non-joinder" could be imagined: there are a plethora of reasons for omitting possible defendants at the outset of litigation and for adding them during the course of litigation, and the existence or non-existence of "pretensive non-joinder" necessarily would depend in large measure upon divining which of those reasons had been on a plaintiff's mind each time he added a

party.[1] Bearing in mind that "[t]he primary purpose of Missouri's venue statutes is to provide a convenient, logical and orderly forum for the resolution of disputes," *State ex rel. DePaul Health Center v. Mummert, supra,* 870 S.W.2d at 822, the notion of "pretensive non-joinder" ought not to be recognized as doctrinally useless and dispatched.

(2) *Simple and salutary test.* The test already articulated by this Court is simple and functional. As this Court noted in the *DePaul Health Center* case, the present test derives from the "terms of the statute." *Id.* at 823. It is a bright line test with a focus fixed once and for all when suit is commenced. *Id.* The analysis enables a trial court and every party, no matter when he joins or is joined to an action, to determine straight away whether venue is proper.

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[1] A plaintiff might omit a defendant from his initial petition because his investigation has not yet identified that defendant or fully developed that defendant's culpability. He might omit an individual defendant in favor of an action maintained solely against an impersonal corporation. He might not choose to sue a relative or a friend. He might not want to dilute juror reaction to a particularly offensive defendant with the presence of defendants who might evoke sympathy. The very purpose of discovery is to shed light on events and conditions germane to a suit, and the bounty of discovery may be the identity of new defendants or new wisdom about the wisdom of excluding certain defendants.

There is nothing simple in the venue protocol which the relators have urged upon this Court: the focus of venue analysis would be converted from static to dynamic, subject to change each time the plaintiff found occasion to add a new defendant and presumably each time that a defendant impleaded a third-party defendant.[2] To the extent that the relators use the term "salutary" to mean "remedial," the only thing that their singularly cumbersome new test would remedy is their own displeasure with the venue options afforded plaintiffs "[b]y the terms of the statute." *Id.*

(3) *Equality of defendants.* The present test for determining the propriety of a plaintiff's venue selection treats defendants equally: late-arriving defendants are entitled to challenge the designation of venue even if the issue has been waived by original defendants, and the criteria for evaluating venue remain the same for all. *See Washington University v. ASD Communications, Inc.*, 821 S.W.2d 895, 896 (Mo.App.E.D. 1992). Although the new test proposed by the relators also might afford equal treatment to all defendants, it is not rooted in the language or

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[2] The relators premise their new venue paradigm upon a substantive right afforded all defendants by the Missouri venue statutes. Brief for Relators at 13-14, 16-19. If every defendant added to a case after its commencement really did have a right to demand reconsideration of venue based upon his or her own residence, logic and fairness surely would require its extension to defendants added by other defendants as well as those added by the plaintiff.

consistent with the purpose of § 508.010: the legislature could have specified that a plaintiff's choice of venue is subject to ongoing review whenever a defendant is added to a case, or more specifically that venue which was proper for an action against a non-resident when suit was commenced may become improper when a resident defendant is added to the case, but it did not. And the state would have had a far less certain and orderly system if it had.

(4) *Ease of application.* Missouri courts do not appear to have had difficulty applying the present standard. The respondent's research has identified 29 cases in which this Court's opinion in *DePaul Health Center* was cited. No court appears to have been flummoxed by, or even to have struggled with, the venue test articulated in that opinion. In fact the approach to venue analysis proposed by the relators would be precisely the same except that courts would be compelled to consider the issue more frequently and under shifting patterns of fact.

(5) *Avoiding subjective analysis of plaintiff's motive.* This herring is crimson. The venue statute does not contemplate analysis of the plaintiff's motive in choosing a location for his action. § 508.010, Mo.Rev.Stat. And venue after all "is determined solely by statute." *State ex rel. Bunker Resource, Recycling and Reclamation, Inc. v. Dierker, supra,* 955 S.W.2d at 933; *State ex rel. Rothermich v. Gallagher, supra,* 816 S.W.2d at 196. Missouri courts are not called upon to analyze a plaintiff's motive even when the issue of pretensive joinder has been raised: the resolution of that issue depends upon the objective determination of whether the plaintiff's petition states a claim against the suspect defendant or whether the petition and the record establish

that no cause of action existed. *State ex rel. Ehrlich v. Hamilton, supra,* 879 S.W.2d at 492.

In fact the relators' position in this proceeding is founded on the proposition that the motives of plaintiffs are germane to the evaluation of their venue choices and likely to be inappropriate. That the relators can articulate an analytical method which presumes an improper motive rather than searches for it hardly changes the rationale of their argument. And this much should be clear: *there is nothing improper in a plaintiff's selection of that venue which he finds most attractive provided that his choice is correct under the governing statute.* This Court has made it clear that "[t]he advocate has a duty to use legal procedure for the fullest benefit of the client's cause." Mo.R.Prof.Resp. 4-3.1, comment; *see also McDowell v. Waldron,* 920 S.W.2d 555, 561 (Mo.App. 1996). Surely tort defendants, including the relators in this case, regularly do nothing less when they remove cases from disfavored state court venues to federal court.

The relators' have assured this Court that mandamus must issue in this case or "[v]enue as a means to provide a convenient, logical, and orderly forum for litigation [will] be eliminated altogether." Brief for Relators at 10-11. That warning is plum silly.

• *Convenience.* The legislature has not endeavored to provide perfect convenience for defendants in civil actions. The courthouses in Henry County and St. Louis County--the two venues suggested as appropriate for this case by the relators themselves--are across the state from one another, separated by almost 250

miles. The venue statutes permit the maintenance of actions at great distances from the residences of defendants some of the time. As this Court has recognized in a different context, the clear statutory allowance of distant venue "presupposes legislative determination that it cannot be overly inconvenient for a defendant to appear in [such a] location." *Willman v. McMillen, supra,* 779 S.W.2d at 586.

• *Logic.* The logic of the plaintiffs' venue election in this case derives from the general venue statute. The legislature found no need to restrict a plaintiff's venue options for the commencement of an action against an individual who does not reside in Missouri. § 508.010(4). This Court has recognized the legislative prerogative with respect to venue on numerous occasions. See, e.g., *State ex rel. Bunker Resource, Recycling and Reclamation, Inc. v. Dierker, supra,* 955 S.W.2d at 933; *State ex rel. Rothermich v. Gallagher, supra,* 816 S.W.2d at 196; *Willman v. McMillen, supra,* 779 S.W.2d at 585-86.[3] Particularly in view of this Court's admonition against

[3] Surely venue in St. Louis pursuant to § 508.010(4) is no less logical than venue in Henry County pursuant to §

engrafting provisions onto a statute that have no basis in the language chosen by the legislature, *Willman v. McMillen, supra*, 779 S.W.2d at 585-86, logic would be disserved by the construction sought by the relators.

• *Order.* The relators' interpretation of § 558.010 would convert venue analysis from a static to a dynamic process and promote litigation of a multiplicity of venue challenges. Adding a defendant at any stage of any action could well result in transfer to another venue. So might adding a third-party defendant. This Court's interpretation of § 508.010 in *DePaul Health Center* established a clear and efficient focus for adjudicating venue challenges in service of an orderly system of litigation. The construction of § 508.010 sought by the relators would diminish orderliness in the system. *See State ex rel. Rothermich v. Gallagher, supra,* 816 S.W.2d at 200.

D. Conclusion

The venue statutes by their terms afford plaintiffs a limited opportunity to choose the forums in which their suits are brought. *See Willman v. McMillen, supra,* 779 S.W.2d at 585 (recognizing that the general venue statute "is the legislature's limitation on a party in deciding where to initiate an action"). This Court has acknowledged that entitlement and held that even in the context of *forum non conveniens* analysis "a plaintiff's choice among forums permitted by the statute is not to be disturbed except for 'weighty reasons.'" *Anglin v. Missouri Pacific Railroad Company,* 832 S.W.2d 298, 302 (Mo. 1992).

What the relators seek from this Court is nothing more or less than a judicial solution to a venue option created by the legislature that the relators do not like. This Court needs no admonition regarding the impropriety of usurping the authority of the legislature to designate venue for litigation. It is in fact the relators who have picked the wrong forum for their complaint. Their application should be denied and they should be pointed across the road, toward the capitol.

CONCLUSION

For the reasons set forth in this brief, the alternative writ of mandamus entered by this Court on January 23, 2001, should be quashed and the application for a writ of mandamus should be denied.

Respectfully submitted by:

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CERTIFICATE OF COMPLIANCE WITH SPECIAL RULE NO. 1

The respondent's brief complies with the limitations contained in Special Rule No. 1(b), that the brief contains 4,618 words, and that the diskette filed with the brief pursuant to Special Rule No. 1(f) has been scanned for viruses and found to be virus-free.

_____

Michael A. Gross [23600]

CERTIFICATE OF SERVICE

One printed copy of the respondent's brief and one diskette prepared in accordance with Special Rule No. 1(f) were sent by first class mail on April 23, 2001, to each of the following:

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