

IN THE SUPREME COURT FOR THE STATE OF MISSOURI

State of Missouri ex rel., Missouri Public Service Commission)
)
)
 Relator,)
)
 vs.) Docket No. SC 89015
)
 The Honorable Gary Oxenhandler,)
 Circuit Judge for Boone County, Missouri,)
)
 Responden)

**ON APPEAL FROM THE
CIRCUIT COURT OF BOONE COUNTY, THIRTEENTH CIRCUIT
THE HONORABLE GARY OXENHANDLER, CIRCUIT JUDGE**

**REPLY BRIEF OF RELATOR
MISSOURI PUBLIC SERVICE COMMISSION**

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JURISDICTIONAL STATEMENT

This action is before this Court on Relator's Petition for Writ in Prohibition. Relator seeks a writ in prohibition to prohibit the trial court from granting a motion for change of venue in a case brought pursuant to Section 386.600, RSMo (2000). The Western District Court of Appeals denied Relator's petition for writ in prohibition. This Court issued a preliminary writ in prohibition. Relator seeks to have the preliminary writ made peremptory. This Court has jurisdiction to issue and determine original remedial writs pursuant to Article V, Section 4 of the Missouri Constitution.

STATEMENT OF FACTS

Relator Missouri Public Service Commission (Relator or Commission) is a legislative agency created to oversee the regulation of investor-owned public utilities by the state. (Relator's Exhibit 1, page A1). Suburban Water and Sewer Co. (Suburban) is a Missouri corporation possessing a certificate of convenience and necessity granted by the Commission to provide water service to residents of the Bon-Gor Lakes subdivision in Boone County, Missouri. (Relator's Exhibit 1, page A2).

The Commission issued its Report and Order in Case No. WC-2007-0452 on August 28, 2007. (Relator's Exhibit 1, page A34). In that Report and Order, the Commission directed its Office of General Counsel to file a penalty petition in circuit court to seek monetary penalties for violations of a 2005 Commission Report and Order. (Relator's Exhibit 1, page A59). The Commission's Report and Order adopted a unanimous stipulation and agreement by the parties that fixed a rate increase for Suburban conditioned upon Suburban's compliance with the stipulation and agreement.

(Relator's Exhibit 1, page A12). Violation of the Report and Order began to occur as early as August 31, 2005, the date by which Suburban was ordered to have meters installed on all buildings within its service area. (Relator's Exhibit 1, page A55). Violations continued to occur throughout the period of the issuance of the Commission's June 30, 2005 Report and Order up to and including the time the Commission issued its Report and Order in Case No. WC-2007-0452. (Relator's Exhibit 1, pages A34-A60). The Commission's Office of General Counsel filed a penalty petition in Boone County Circuit Court on September 21, 2007. (Relator's Exhibit 1, page A1).

Suburban filed a Motion to Transfer Venue in Boone County Circuit Court on October 17, 2007. (Relator's Exhibit 3, page A63). Suburban asserted that venue was proper only in Cole County because Suburban's registered agent is located in Cole County. (Relator's Exhibit 3, pages A63-A64). Suburban changed its registered agent to an agent with an address in Jefferson City, Missouri, Cole County, on September 6, 2007. (Relator's Exhibit 3, page A77). Prior to the change made on September 6, 2007, Suburban's registered agent was Bonnie Burnam, with an address in Columbia, Boone County, Missouri. (Relator's Exhibit 3, page A77). Bonnie Burnam was the registered agent with a Columbia address at the time of the company's incorporation. (Relator's Exhibit 9). Bonnie Burnam remained the company's registered agent and maintained a registered address in Columbia until September 6, 2007. (Relator's Exhibit 3, Page A77). Bonnie Burnam was the company's registered agent and had an address in Columbia, Boone County, Missouri at the time the Commission issued the June 30, 2005 Report and Order and at the time the Commission issued its August 28, 2007 Report and Order.

(Relator's Exhibit 3, page A77). The Boone County Sheriff's office obtained service on the company on October 4, 2007 by serving Bonnie Burnam, an officer of the company. (Relator's Exhibit 2, page A62).

The trial court in the underlying penalty action, the Honorable Gary Oxenhandler, granted Suburban's Motion to Transfer Venue on November 28, 2007. (Relator's Exhibit 7, page A86). Relator's initial Petition for Writ of Prohibition seeking to prohibit the trial court in Boone County Circuit Court from transferring the case to Cole County Circuit Court was denied by the Western District Court of Appeals without opinion on December 18, 2007. (Relator's Exhibit 8, page A87). This Court issued its Preliminary Writ of Prohibition on January 22, 2008. (Relator's Exhibit 12).

STANDARD OF REVIEW

“Prohibition is an original proceeding brought to confine a lower court to the proper exercise of its jurisdiction.” *State ex rel. McDonald's Corp. v. Midkiff*, 226 S.W.3d 119, 122 (Mo.banc 2007) citing *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 856-57 (Mo.banc 2001). “When venue is improper, prohibition lies to bar the trial court from taking any action, except to transfer the case to a proper venue.” *Id.*, citing *State ex rel. Green v. Neill*, 127 S.W.3d 677, 678 (Mo.banc 2004). “A writ of prohibition is appropriate when a trial court improperly transfers venue.” *State ex rel. Private Nursing Service, Inc. v. Romines*, 130 S.W.3d 28, 28 (Mo. App. E.D. 2004), citing *State ex rel. East Carter County R-II School Dist. v. Heller*, 977 S.W.2d 958, 959 (Mo. App. S.D. 1998). “While it is true, as a general principle, that prohibition will not lie when an act

has already been done, this principle has its exceptions. *State ex rel. Palmer by Palmer v. Goeke*, 8 S.W.3d 193, 196-97 (Mo. App. E.D. 1999). Prohibition will lie to undo acts done in excess of a court's jurisdiction, and to restrain the further enforcement of orders that are beyond or in excess of the authority of the judge. *Id.*” *Id.*

POINTS RELIED ON

I. RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TRANSFERRING VENUE BECAUSE PURSUANT TO SECTION 508.010.9, RSMO, VENUE IS PROPER IN BOONE COUNTY, IN THAT THE PLAINTIFF WAS FIRST INJURED IN BOONE COUNTY.

Statutes

Section 351.375, RSMo (2000)

Section 386.600, RSMo (2000)

Section 508.010, RSMo (2000) (Supp. 2007)

Section 508.040, RSMo (2000) (repealed)

Cases

State ex rel. McDonald's Corp. v. Midkiff, 226 S.W.3d 119 (Mo.banc 2007).

ARGUMENT

I. RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TRANSFERRING VENUE BECAUSE PURSUANT TO SECTION 508.010.9, RSMO, VENUE IS PROPER IN BOONE COUNTY, IN THAT THE PLAINTIFF WAS FIRST INJURED IN BOONE COUNTY.

Section 508.040 formerly governed venue in cases where the sole defendants were corporations. *State ex rel. McDonald's Corp. v. Midkiff*, 226 S.W.3d 119, 123 (Mo.banc 2007). The legislature repealed Section 508.040, RSMo (2000) in 2005. *Id.*, fn.3. Because Missouri no longer has a specific statute setting venue for corporate defendants, the general provisions of Section 508.010 apply. Section 508.010.2(1) provides that venue shall lie “[w]hen the defendant is a resident of the state, either in the county within which the defendant resides, or in the county within which the plaintiff resides, and the defendant may be found.” Section 351.375.2, RSMo (2000) provides in relevant part that “[t]he location or residence of any corporation shall be deemed for all purposes to be in the county where its registered office is maintained.” Section 508.010.9, RSMo (2000) (Supp. 2007) provides in its entirety that “[i]n all actions, venue shall be determined as of the date the plaintiff was first injured.”

The underlying action is a penalty action based on violations arising out of a 2005 Commission Report and Order. The Commission’s Report and Order adopted a stipulation and agreement by the parties to dispose of a rate increase request by Suburban. In the stipulation and agreement, the Commission granted a rate increase to

Suburban and ordered Suburban to comply with the terms of the stipulation and agreement entered into by the parties. Violation of the stipulation and agreement by Suburban began to occur as early as August 31, 2005, the date by which Suburban was required to have installed meters on all buildings within its service area. Bonnie Burnam was the registered agent of Suburban at the time the violations began to occur. Bonnie Burnam's address as registered agent was located in Columbia, Boone County, Missouri. Because the Commission was first injured as early as August 31, 2005, even assuming *arguendo* that the venue provision in Section 386.600, RSMo does not apply, venue is properly in Boone County pursuant to Section 508.010.9, RSMo because Suburban's registered agent was located in Boone County when the Commission was first injured.

CONCLUSION

WHEREFORE, Relator respectfully requests that this Court make its preliminary Writ of Prohibition peremptory, that this Court make a finding that venue is proper in Boone County, that this Court enter an Order prohibiting the Honorable Gary Oxenhandler from transferring this case to Cole County for trial and grant such other relief as the Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that copies of the foregoing document has been served by US mail postage prepaid to the Honorable Gary Oxenhandler at the Boone County Circuit Court, 705 E. Walnut Street, Columbia, Missouri 65201, and to Tom Harrison and Matt Volkert, VanMatre, Harrison, Volkert & Hollis, 1103 E Broadway, P.O. Box 1017, Columbia, Missouri 65201 and hand delivered to Christina Baker, Office of Public Counsel, 200 Madison Street, Suite 650, Jefferson City, Missouri 65101, prior to or on the date of filing this 18th day of April, 2008.

Jennifer Heintz

CERTIFICATION

I hereby certify that the foregoing reply brief of Relator Missouri Public Service Commission complies with the limitations contained in Rule 84.06 and that:

- (1) The signature block above contains the information required by Rule 55.03;
- (2) The brief complies with the limitations contained in Rule 84.06(b);
- (3) The brief contains 1,591 words, as determined by the word count feature of Microsoft Word;
- (4) I am filing with this brief a computer disk which contains a copy of the above and foregoing brief in the Microsoft Word format; and
- (5) That the attached computer disk has been scanned for viruses and that it is virus free.

I further certify that copies of the foregoing have been mailed or hand-delivered to all counsel of record as shown on the service list the 18th day of April, 2008.

Jennifer Heintz
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