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ARGUMENT

I. THE TRANSFER OF VENUE WAS PROPER, BECAUSE TO THE EXTENT SECTIONS 386.600 AND 508.010 CONFLICT, AS BETWEEN THOSE SECTIONS, SECTION 508.010 CONTROLS UNDER APPLICABLE STATUTORY CONSTRUCTION PRINCIPLES. THIS PORTION OF DEFENDANT'S ARGUMENT RESPONDS TO RELATOR'S FIRST POINT RELIED ON, WHICH READS:

RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TRANSFERRING VENUE BECAUSE SECTION 386.600 RSMO. CONTAINS A SPECIFIC VENUE PROVISION, IN THAT THE SPECIFIC VENUE PROVISION IN SECTION 386.600 SUPERSEDES THE GENERAL VENUE PROVISIONS OF SECTION 508.010.

In this case there are two statutes, Sections 386.600 and 508.010 RSMo., each of which, in isolation, arguably applies to determine venue in a different county. The interplay between these two statutes has been addressed by a Missouri court only once before, in *State ex rel. PSC v. Thompson*, 379 S.W.2d 824 (Mo.App. 1964), which is the subject of points II-IV below. Ignoring the *Thompson* case for purposes of this point, however, the question becomes one of statutory construction.

In construing statutes, the courts' primary goal is to ascertain the intent of the legislature. *Preston v. State of Mo.*, 33 S.W.3d 574, 578-579 (Mo.App. W.D. 2001). In this regard, "[s]tatutory provisions relating to the same subject matter are considered in

pari materia” *Id.* at 579 (Mo.App. W.D. 2001) (quoting *EBG Health Care III, Inc. v. Mo. Health Facilities Review Comm.*, 12 S.W.3d 354, 360 (Mo.App. W.D. 2000)).

One of the primary rules of construction is that courts should attempt to harmonize statutes on the same subject matter; however, “if they cannot be reconciled, the more specific will govern over the more general.” *Id.* (citing *Greenbriar Hills Country Club v. Dir. of Revenue*, 935 S.W.2d 36, 38 (Mo. banc 1996)). “A venue statute, although absolute in terms, when construed with other statutes is not always without exception. For example, such a statute is subject to the general rule that a specific statute prevails over a general statute, although the latter contains no exception in its terms.” *State ex rel. City of Springfield through the Bd. Of Public Utilities v. Barker*, 755 S.W.2d 731, 732-733 (Mo.App. S.D. 1988). Thus, in examining the interrelation of two or more applicable venue statutes, the more specific one will prevail over the general one. *Id.* Relying on this rule, but without any analysis at all, Relator’s argument on this point simply states, in conclusory fashion, that Section 386.600 RSMo. is the specific venue statute. Relator’s Brief at page 14.

However, even assuming that this is the issue, the relevant provision in Section 386.600 RSMo. is, on its face, extremely broad and general. It provides: “An action to recover a penalty or a forfeiture under this chapter or to enforce the powers of the commission under this or any other law *may be brought in any circuit court in this state* in the name of the state of Missouri and shall be commenced and prosecuted to final judgment by the general counsel to the commission.” Section 386.600 RSMo. (emphasis added).

Furthermore, Relator's position is that this provision applies regardless of the underlying statutory basis for the action. For example, the present case involves an action under both Section 386.570 RSMo., which authorizes civil penalties, and Section 386.600 RSMo., which permits actions to recover them. Reading these statutes together, Relator's choices and powers become greater still because the former statute provides, in relevant part: "*Any ... person ... which violates or fails to comply with any provision of the constitution of this state or of this or any other law, or which fails, omits or neglects to obey, observe or comply with any order ... of the commission in a case in which a penalty has not herein been provided ... is subject to a penalty*" Section 386.570.1 RSMo. (emphasis added).

In other words, if Relator's argument is accepted and Section 386.600 RSMo. is held to supersede Section 508.010 RSMo., it would generally permit Relator to seek penalties against any person who violates any provision of any law, with venue in any circuit court, in any county, within the State of Missouri, irrespective of the circumstances, including the defendant's residence or place of business, or the nature or location of the alleged violation. By the same token (albeit taken to its logical extreme), this argument could be extended to actions for criminal penalties such as Sections 386.560 and 386.580 RSMo., with Section 386.600 likewise superseding the general criminal venue statute in Section 541.033 RSMo..

Notwithstanding this, Relator claims that the Section 386.600 RSMo. provision is "specific" relative to the Section 508.010 RSMo. provisions. Relator's Brief at page 14.

On the contrary, it is difficult to imagine any provision less specific, or more general, in its terms or application.

By contrast, Section 508.010 RSMo., though sometimes referred to as the “general venue statute,” is reasonably specific as to where venue should lie in this case. The particular provision at issue provides: “In all actions in which there is no count alleging a tort” and the defendant is a Missouri resident, as here, venue lies where the defendant resides or where the plaintiff resides and the defendant may be found. Section 508.010.2(1) RSMo. For a corporation, its residence is the location of its registered office, which for Defendant is Cole County. Section 351.375 RSMo.; *State ex rel. Smith v. Gray*, 979 S.W.2d 190, 192 (Mo. banc 1998); *State Farm Mutual Automobile Ins. Co. v. Ryan*, 766 S.W.2d 727, 728 (Mo.App. E.D. 1989) (rev'd for other grounds). For Relator, a state agency, its residence is in Cole County. *United Pharmacal Co. of Mo. v. Mo. Bd. of Pharmacy*, 159 S.W.3d 361, 364 (Mo. banc 2005).

As noted above, the rule is often repeated that of two or more applicable venue statutes, the more specific one will control. *Barker*, 755 S.W.2d at 732-733. This rule is, however, seldom analyzed in great detail as to the basis for determining relative generality or specificity. In light of the discussion above, Section 386.600 RSMo. is much more general in scope and Section 508.010.2 RSMo. more specific. In fact, Defendant’s research did not uncover any case in the United States in which a statute such as Section 386.600 RSMo., permitting venue in any county and without regard to the defendant’s circumstances, was held to be a special or specific venue statute.

This conclusion is further reinforced by the application of several other maxims of statutory construction. First and foremost, a court is to effectuate legislative intent. *Preston*, 33 S.W.3d at 578-579. When the legislature amends a statute, it is deemed to have intended the amendment to have an effect. *State v. Sweeney*, 701 S.W.2d 420, 423 (Mo. banc 1985). In 2005, the legislature amended Section 508.010 RSMo. H.B. 393, 93rd General Assembly, 1st Regular Session (2005). As part of this amendment, the legislature deleted a general qualifier from the introductory language to Section 508.010 RSMo., which read “... except as otherwise provided by law” *Id.* This language had previously been cited for the proposition that Section 508.010 RSMo. was merely a residual venue statute that never took precedence over another venue statute. *State ex rel. Mo. Highway and Transportation Comm’n v. Patterson*, 731 S.W.2d 461, 462 (Mo.App. E.D. 1987) (*rev’d on other grounds*). Further, the addition or alteration of such a qualifier is meaningful. For example, in the same recent amendment of Section 508.010 RSMo., the legislature added a general qualifier to the introductory language of one of the subsections, and a court held that this addition required the application of Section 508.010 RSMo. in lieu of another, specific venue statute. *State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630, 631 (Mo. banc 2007). Section 386.600 RSMo., in its current form, predates this amendment of Section 508.010 RSMo. Significantly, in the *Thompson* case, which as noted above is the only Missouri case to address the interaction of Sections 386.600 and 508.010 RSMo. and is the subject of points II-IV below, Relator’s argument that Section 386.600 RSMo. trumped Section 508.010 RSMo. hinged upon the existence of the general qualifier “except as otherwise provided by law”

described above, which the recent amendment of Section 508.010 RSMo. has now deleted. *Thompson*, 379 S.W.2d at 825. Accordingly, it would comport with the general legislative intent behind the recent amendment to Section 508.010 RSMo. to hold that the provisions of Section 386.600 RSMo. were meant to be trumped by the more specific venue provisions of the amended Section 508.010 RSMo.

Also, in construing a statute, a court should consider its purpose and related statutes. *State v. Withrow*, 8 S.W.3d 75, 80 (Mo. banc 1999). In general, “[t]he purpose of the venue statutes is to provide a convenient, logical and orderly forum for litigation.” *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194, 196 (Mo. banc 1991). In particular, the courts have indicated that the legislature’s ultimate intent and goal is to protect defendants from uncertainty and inconvenience. *Natalini v. Little*, 185 S.W.3d 239, 246 (Mo.App. S.D. 2006); cf. *Igoe v. Department of Labor and Industrial Relations of the State of Mo.*, 152 S.W.3d 284, 288 (Mo. banc 2005) (noting that a special venue statute superseded the general venue statute because it subjected a defendant to a narrower range of the plaintiff’s venue options). Section 508.010 RSMo., as compared to Section 386.600 RSMo., is narrower and thus better serves as the applicable venue statute here.

Finally, Section 386.600 RSMo. is a penal statute and must be strictly construed. *State v. Davis*, 830 S.W.2d 27, 29 (Mo.App. S.D. 1992). To contend, as Relator does, that this statute confers such broad and sweeping powers to choose venue, on the one hand, and yet is still a specific venue statute so as to supersede a narrower statute, on the other hand, is not only self-contradictory but inconsistent with this rule of construction.

In this regard, there is an alternative construction of the provisions in Section 386.600 RSMo. that may harmonize it with Section 508.010 RSMo.. Because Relator is an administrative agency, it “is purely a creature of statute, its powers are limited to those conferred by statute...” *Utilicorp United Inc. v. Platte-Clay Elec. Co-op., Inc.*, 799 S.W.2d 108, 109 (Mo.App. W.D. 1990). For this reason, Chapter 386 contains many provisions which establish Relator’s authority, powers, and jurisdiction. The language in Section 386.600 RSMo., which does not use the term venue but simply recites Relator’s ability to bring an action for penalties, can be reasonably interpreted as such a provision. When viewed as such, it is not a venue statute at all, but rather is a statutory authorization to pursue penalties, within certain parameters, and otherwise subject to other applicable law, including venue statutes. In fact, the language could (and, given that it is both an administrative and penal statute) arguably should be interpreted as a limiting provision, i.e., Relator’s ability to recover penalties is limited to the State of Missouri, so it cannot pursue defendants or attempt to collect on any judgment in any foreign jurisdiction. Section 386.600 RSMo.

In sum, Defendant respectfully suggests that Sections 386.600 and 508.010 RSMo. would be best harmonized if Relator’s venue is subject the more specific limitations of Section 508.010 RSMo., but, if those two Sections cannot be reconciled in this manner, the more specific and certain venue provisions of Section 508.010 RSMo. should prevail over the otherwise open-ended and state-wide venue set by Section 386.600 RSMo.

II. THE *THOMPSON* CASE HAS NOT BEEN OVERRULED, BUT EVEN IF IT WERE, IT WOULD NOT JUSTIFY THE ISSUANCE OF A WRIT. THIS PORTION OF DEFENDANT'S ARGUMENT RESPONDS TO RELATOR'S SECOND POINT RELIED ON, WHICH READS:

RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TRANSFERRING VENUE BECAUSE THE TRIAL COURT RELIED ON THE *THOMPSON* CASE AND THAT CASE SHOULD NO LONGER BE FOLLOWED, IN THAT THE LINE OF CASES ON WHICH THE *THOMPSON* CASE RELIED HAVE BEEN EXPRESSLY OVERRULED

In *Thompson*, 379 S.W.2d at 824, the circuit court granted a defendant utility company's motion to dismiss, and the Court of Appeals affirmed, holding that Relator's state court penalty actions were governed by the then-applicable general venue statute rather than Section 386.600 RSMo. *Thompson*, 379 S.W.2d at 824-25. In the *Thompson* case, as in the present case, Relator attempted to sue the defendant in a county that was not its residence and argued that it could sue defendants in any county in the state under this Section. *Thompson*, 379 S.W.2d at 825. In this regard, the cases are quite similar.

In deciding the *Thompson* case, the Court of Appeals primarily relied on a line of cases in which requirements of venue and jurisdiction were combined. Relator is correct that, following recent amendments to venue statutes, this Court repudiated the concept of the two being combined in *State ex rel. DePaul Health Center v. Mummert*, 870 S.W.2d 820 (Mo. banc 1994). However, this Court's repudiation, and its holding in the *DePaul* case, were limited to this concept and applied only to the extent a court with proper venue

was required to issue the summons in order to acquire jurisdiction. *Id.* at 822 (this Court's limited holding was that "[a] summons can now issue from a court in which venue is not proper."). This Court stated "*to the extent they hold otherwise*, we overrule *Yates v. Casteel... Hankins v. Smarr... State ex rel. Minihan v. Aronson*," three cases cited in the *Thompson* case. *Id.* (emphasis added). The Court also overruled seven other cases on the same grounds (in other words it specifically listed a total of ten cases). *Id.* It did not, however, address or overrule the *Thompson* case's holding.

Further, this Court's reasoning in the *DePaul* case was based on statutory amendments that now permit courts with improper venue to issue summons in a case, and then transfer the case to the proper court. *DePaul*, 870 S.W.2d at 821-22. Both the limited holding and reasoning in the *DePaul* case are inapplicable here, in that Defendant did not move to dismiss based on lack of jurisdiction because a court of improper venue had issued the summons; rather, Defendant moved to transfer the case to the court of proper venue. Thus, the circumstances of the present case do not implicate any conflict between *DePaul* and *Thompson*.

Finally, even if this Court decides to overrule the *Thompson* case to the extent it otherwise conflicts with the *DePaul* case, such a decision would not result in an extraordinary writ being appropriate in this case. The court in *Thompson* recited Relator's contention that Section 386.600 RSMo. is a special venue statute, but the court did not itself confirm this or address how Section 386.600 RSMo. may relate to other venue statutes. *Thompson*, 379 S.W.2d at 825. That court disposed of the case before reaching these issues. *Id.*

On the other hand, as described in Defendant's argument on point I above, *Thompson* is noteworthy nonetheless because Relator's contention that Section 386.600 RSMo. is a special venue statute and trumps the general civil venue statute was premised and relied upon the language in the general statute that it only applied "...except as otherwise provided by law..." *Id.*, which has since been removed by amendment.

In sum, no court has expressly overruled *Thompson*. However, even if this Court decided to do so, in part or in whole, based on *DePaul*, such a decision would at most render that case inapplicable to this case and would not provide any authority or other basis to grant an extraordinary writ here.

III. THE FACTS OF THE THOMPSON CASE AND THIS CASE ARE SIMILAR AND DO NOT JUSTIFY DISTINGUISHING THE TWO IN THE FOR PURPOSES OF THE INSTANT SITUATION. THIS PORTION OF DEFENDANT'S ARGUMENT RESPONDS TO RELATOR'S THIRD POINT RELIED ON, WHICH READS:

RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TRANSFERRING VENUE BECAUSE THE THOMPSON CASE IS INAPPLICABLE, IN THAT THE FACTS OF THAT CASE ARE DISTINGUISHABLE FROM THE FACTS IN THIS CASE

As noted in Defendant's argument on point II above, both the *Thompson* case and this case are in fact very similar, in that both involve the Relator bringing a lawsuit in state court against a defendant in a county other than its county of residence and claiming

it has complete freedom to sue a defendant for civil penalties wherever it chooses. *Thompson*, 379 S.W.2d at 825.

Relator's arguments on this point are substantially similar to its arguments on the preceding point and elsewhere, and, for the reasons described in Defendant's responses to said arguments, these claims are without merit. Therefore, no further argument will be made here.

IV. THE *IGOE* CASE DOES NOT AFFECT *THOMPSON*, AND IT UNDERMINES RATHER THAN SUPPORTS RELATOR'S POSITION. THIS PORTION OF DEFENDANT'S ARGUMENT RESPONDS TO RELATOR'S FOURTH POINT RELIED ON, WHICH READS:

RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TRANSFERRING VENUE BECAUSE RECENT COURTS HAVE NOT FOLLOWED THE REASONING OF THE *THOMPSON* CASE, IN THAT SPECIFIC VENUE PROVISIONS HAVE BEEN UPHeld IN THE ABSENCE OF SERVICE OF PROCESS PROVISIONS IN STATUTES CONTAINING SPECIFIC VENUE PROVISIONS

In *Igoe*, 152 S.W.3d at 284, the plaintiff filed his petition in the wrong venue, and the defendants sought to transfer venue, not dismiss the case, which does not implicate *DePaul* or its effect on *Thompson*. *Id.* at 286. Further, in *Igoe*, unlike this case or *Thompson*, it was already established that the statute in question was a special venue statute. *Id.* at 288. In fact, the court in *Igoe* noted that it was special venue statute

because it provided a plaintiff with more limited options. *Id.* Therefore, the *Igoe* decision supports Defendant's, not Relator's, position in this case.

Otherwise, Relator's arguments on this point are substantially similar to its other arguments insofar as they relate to the *Thompson* case, and, for the reasons described in Defendant's other responses, these claims are without merit. Therefore, no further argument will be made here.

V. RELATOR CANNOT BRING AN ACTION UNDER SECTION 386.600 FOR PENALTIES WITHOUT A SEPARATE CAUSE OF ACTION OR OTHER FINDING OF LIABILITY GIVING RISE TO THOSE PENALTIES, THE PRESENT ACTION WAS BROUGHT UNDER SECTIONS 386.570 AND 386.600, AND ACTIONS UNDER SECTION 386.570 CANNOT ENJOY ANY SPECIAL BENEFITS UNDER SECTION 386.600 BECAUSE IT IS A PENAL STATUTE AND MUST BE STRICTLY CONSTRUED. THIS PORTION OF DEFENDANT'S ARGUMENT RESPONDS TO RELATOR'S FIFTH POINT RELIED ON, WHICH READS:

RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TRANSFERRING VENUE BECAUSE THIS CASE WAS NOT BROUGHT PURSUANT TO SECTION 386.570 RSMO., IN THAT SECTION 386.570 IS MERELY A STATUTE THAT SETS OUT THE APPLICABLE PENALTY RANGE

FOR VIOLATION OF COMMISSION ORDERS AND SECTION 386.570 DOES NOT
PROVIDE FOR AN INDEPENDENT CAUSE OF ACTION

In its argument on this point, Relator states that Section 386.600 RSMo. provides the actual cause of action and Section 386.570 RSMo. merely provides the applicable range of penalties. Relator's Brief at page 19. Relator states that it "bears the burden of establishing that the violations alleged occurred pursuant to Section 386.600." Relator's Brief at page 19. However, this argument is belied by the plain language of Section 386.600 RSMo. Nowhere does the word "violation" occur. Section 386.600 RSMo. Nowhere is any cause of action defined or established. There are no elements or other standards for awarding a penalty. This Section only authorizes actions to recover penalties that are due by virtue of other provisions.

Therefore, all actions instituted under Section 386.600 RSMo. must always either be paired with or follow a cause of action under another provision. This requirement is immediately and clearly evident even in present case, as Relator instituted the present action against Defendant by filing a petition under both Sections 386.570 and 386.600 RSMo. Relator's Appendix at page A-1. Thus, Relator's claim, in its Petition for Writ of Prohibition, that the present action is solely premised on Section 386.600 RSMo., is false or at least disingenuous. Appendix at page A-3.

Further, in its petition, Relator admitted that the alleged offenses and basis for its action, arise out of Section 386.570 RSMo. Relator's Appendix at page A-4 (stating that "Each day's failure to comply ... is a separate and distinct offense pursuant to Section 386.570, RSMo (2000)"). Relator's allegations all revolve around its claims that

Defendant “violated the provisions of [one of its orders].” Relator’s Appendix at page A-4. Such allegations are only actionable under Section 386.570 RSMo., which provides: “Any corporation ... which violates or fails to comply with any provision of ... law, or which fails, omits or neglects to obey, observe or comply with any order ... in a case in which a penalty has not herein been provided ... *is subject to a penalty*” 386.570.1 RSMo. (emphasis added). This Section also addresses other salient aspects of an alleged offense, i.e., whether an offense is continuing and by whom it is deemed to have been committed.

Accordingly, as noted above, any action under Section 386.600 RSMo. must involve at least two judicial actions, as in most civil cases (and other cases, for that matter): (1) the submission of evidence and the finding of facts establishing a cause of action or other legal claim or right, and (2) the assessment and then recovery of a monetary penalty or amount, i.e., a money judgment. These are separate and distinct judicial functions. Cf. *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976) (providing different standards of review, depending whether a challenged action is regarding the evidence or the law). Section 386.570 RSMo. as well as various other provisions in Chapters 386 and 393 create civil and criminal causes of action, and Relator, as an administrative agency, has the authority to pursue those causes of action only to the extent permitted by statute. *Utilicorp*, 799 S.W.2d at 109. Some provisions in Chapters 386 and 393 provide for both the cause of action and method for enforcement, so it is apparent that the legislature knows how to combine rights and remedies.

On the contrary, Section 386.600 RSMo. applies only to actions “to recover a penalty.” Section 386.600 RSMo. This phrase is not defined, and “[w]hen a word used in a statute is not defined therein, it is appropriate to derive its plain and ordinary meaning from a dictionary.” *Preston*, 33 S.W.3d at 578 (citing *Am. Healthcare Mgmt., Inc. v. Dir. of Revenue*, 984 S.W.2d 496, 498 (Mo. banc 1999)). According to Black’s Law Dictionary, “recover” means: “In a narrower sense, to be successful in a suit, to collect or obtain amount, to have judgment, to obtain a favorable or final judgment....” Black’s Law Dictionary 1275 (6th ed. 1990). Thus, the plain meaning of this phrase is properly the obtaining or collecting of a judgment for money.

Even if the statutory language might otherwise be deemed to be ambiguous and capable of reinterpretation in some manner to include other acts, this statute is penal in nature and so must be strictly construed. *Davis*, 830 S.W.2d at 29. In other words, to the extent Relator does have extraordinarily broad rights to choose any forum it wishes under Section 386.600 RSMo., then these rights only apply in actions under that Section, and specifically the obtaining or collecting of a monetary penalty, and not other actions, determinations, or matters.

Significantly, it is well-established that Relator is not a court and cannot make any findings or otherwise fulfill any adjudicative functions whatsoever, including for purposes of Section 386.570 RSMo. See, e.g., *Lusk v. Atkinson*, 186 S.W. 703, 705 (Mo. banc 1916). As a result, Relator does not have the power to enter findings of violations or liability and must ask a court to so.

State v. Davis, 830 S.W.2d 27, 29 (Mo.App. S.D. 1992), is illustrative on the potential to bifurcate nature of proceedings under Sections 386.570 and 386.600 RSMo. In that case, Relator’s cause of action was also founded upon Section 386.570 RSMo., in that it claimed “violations of law or ... refusing to follow orders,” and it instituted the action to establish violations and seek penalties pursuant to *both* Sections 386.570 and 386.600 RSMo. *Id.* at 29. Further, before trial, Relator “established that violations by defendants had occurred for which penalties were appropriate under Section 386.570.” *Id.* at 30. The circuit court entered summary judgment on the liability of the defendants, and the trial was on “the amount of statutory penalties alone.” *Id.* at 29. Therefore, it is appropriate to distinguish between the judicial functions of finding liability as opposed to assessing penalties. It is also important to note that this does not effect a repeal of Section 386.600 RSMo., because the special benefits under that Section, if any, still would be available for suits involving only the latter function, e.g., if liability is not in question in the context of cumulative penalties under Section 386.590 RSMo., the doctrine of *res judicata*, collections, or otherwise.

Even assuming *arguendo* that the relevant provisions in Section 386.600 RSMo. constitute a special venue statute that would otherwise trump the venue provisions in Section 508.010 RSMo., Relator must first ask a court to find one or more violations under Section 386.570 RSMo. (which falls under Section 508.010 RSMo.), before it can avail itself of any special rights under Section 386.600 RSMo. It would be improper to liberally construe actions for recovery of penalties to include actions to establish liability, because Section 386.600 RSMo. is a penal statute and must be strictly construed.

Therefore, since Relator proceeded under both Sections 386.570 and 386.600 RSMo. at the same time, it cannot claim any preferred venue under Section 386.600 RSMo., and it would be improper to grant an extraordinary writ in this case.

VI. THE DOCTRINE OF FORUM NON CONVENIENS HAS NO INTRASTATE APPLICABILITY AND THUS RELATOR’S ARGUMENTS BASED ON GENERAL CLAIMS OF CONVENIENCE AND LOGIC ARE IRRELEVANT TO THIS CASE. THIS PORTION OF DEFENDANT’S ARGUMENT RESPONDS TO RELATOR’S SIXTH POINT RELIED ON, WHICH READS:

RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TRANSFERRING VENUE BECAUSE BOONE COUNTY IS A CONVENIENT AND LOGICAL FORUM FOR ADJUDICATION AS REQUIRED BY CASE LAW, IN THAT SUBURBAN’S ONLY BUSINESS OPERATIONS AND ITS ENTIRE CUSTOMER BASE ARE LOCATED IN BOONE COUNTY AND SUBURBAN’S REGISTERED AGENT WAS LOCATED IN BOONE COUNTY UNTIL TWO WEEKS PRIOR TO THE FILING OF THE UNDERLYING PENALTY ACTION

This Court has held that Missouri does not recognize any intrastate doctrine of forum non conveniens. *Willman v. McMillen*, 779 S.W.2d 583, 586 (Mo. banc 1989). Thus, Relator’s argument that it is entitled to an order prohibiting the transfer of venue because “Boone County is a convenient and logical forum for adjudication as required by case law,” is misplaced. Relator’s Brief at 19-20.

Relator is correct that “the propriety of venue is prescribed by statute.” *DePaul*, 870 S.W.2d at 822. Questions of convenience or inconvenience, as well as arguments relating to which county may be most closely related to a cause of action, do not come into play absent specific language in an applicable venue statute. The facts of an individual case do not matter, except insofar as those facts result in the application of a particular statute, which then determines venue for the case. In other words, "venue in Missouri is solely a matter of statute," and courts are not to contravene the statutes, whether upon grounds of convenience or otherwise, as between Missouri parties with a Missouri cause of action. *Willman v. McMillan*, 779 S.W.2d at 585-586.

Defendant denies Relator’s claims that Boone County is better-suited than Cole County to be the venue for the underlying action. However, as a legal matter, this dispute is irrelevant to this case.

In sum, this Court should disregard all of Relator's arguments on this point, as they rely upon subjective, general notions of convenience and logic that are not relevant to any statute at issue here. In Missouri, venue is within the province of the legislature and should lie in the particular county provided by the most-specific applicable venue statute, which, in this instant situation, is Section 508.010.2(1) RSMo. for the reasons described in Defendant’s arguments on points I, II, and V above. Relator's arguments do not provide a cognizable basis to grant an extraordinary writ in this case.

VII. RELATOR’S ARGUMENTS THAT VAGUE PRINCIPLES SHOULD CONTROL LEGAL PRINCIPLES EMBODIED IN VENUE STATUTES

ARE IRRELEVANT TO THIS CASE. THIS PORTION OF DEFENDANT'S ARGUMENT RESPONDS TO RELATOR'S SEVENTH POINT RELIED ON, WHICH READS:

RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TRANSFERRING VENUE BECAUSE THE SPECIFIC VENUE PROVISIONS OF SECTION 386.600 SHOULD BE GIVEN EFFECT, IN THAT IF THE PROVISION IS NOT GIVEN EFFECT ANY CORPORATION SUBJECT TO THE JURISDICTION OF THE COMMISSION WOULD BE ABLE TO AVOID HAVING TO DEFEND A PENALTY ACTION IN THE SAME COUNTY AS ITS BUSINESS OPERATIONS SIMPLY BY CHANGING ITS REGISTERED AGENT AS HAPPENED IN THIS CASE

It is well-established in Missouri that statutes determine venue, and courts cannot ignore them based on general statements that one county is more closely-related to a cause of action than another or other allegations of logic and justice. See *DePaul Health Center*, 870 S.W.2d at 822; *Willman*, 779 S.W.2d at 586. Missouri venue statutes provide and establish which forum is most appropriate for a particular dispute. *DePaul*, 870 S.W.2d at 822. In its arguments on this point, Relator not only fails to cite any relevant authority to the contrary, but essentially repeats, in different words, its arguments from the preceding point relying on even broader and less legally relevant or supportable theories. Compare Relator's Brief at 19-20 with Relator's Brief at 21-22. Again, as noted above, these arguments are without merit.

In all actions not involving torts and with a Missouri defendant, venue is based on the parties' residence. Section 508.010.2(1) RSMo. Further, "[v]enue is determined as the case stands when *brought*." *DePaul*, 870 S.W.2d at 823 (emphasis in original). Because Relator's offices and Defendant's registered agent and registered office were all in Cole County when the suit was filed, both parties resided there and venue was proper there. Accordingly, for these types of actions (which undoubtedly constitute a substantial number of civil lawsuits filed), the legislature has determined that venue based on residence when the suit is filed is generally logical, just, and appropriate. Although it appears to question the legislature's wisdom in making such a determination, Relator does not outright deny that, if Section 508.010.2(1) RSMo. is indeed the applicable venue statute in this case, then venue is proper only in Cole County.

On the other hand, Relator's frequent platitudes, which appear throughout its brief, that it cares about principles, and that its cause is one of logic and justice, ring hollow in light of its fundamental position, which is that it should have unfettered discretion to file any suit in any county in the state. In other words, according to Relator, it is only right that Relator should be able to choose any venue anywhere, without restriction, but it makes no sense for the legislature to relate venue to the parties' residence. Thus, its position is contradictory as well as legally flawed.

Section 508.010 RSMo. is the applicable venue statute in this case for the reasons described in Defendant's arguments on points I, II, and V above. Because the legislature has decided that the parties' residence is the most appropriate and best way to determine

venue in this and many similar cases, Relator's arguments do not justify an extraordinary writ here.

CONCLUSION

For the reasons set forth above, the Boone County Circuit Court order in this case granting Defendant's motion to transfer venue was proper and should not be disturbed.

WHEREFORE, Defendant respectfully requests that this Court quash its preliminary writ issued in this case, deny and dismiss Relator's petition for writ of prohibition filed in this case, and grant such other relief as is just and proper in the circumstances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that, on April 11, 2008, a complete copy of the foregoing document was mailed to each party or to an attorney who represents any such party to the foregoing action, by U.S. Mail, postage prepaid in the proper amount, or hand delivery, as set forth below:

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The Honorable Judge Oxenhandler
Boone County Courthouse
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Columbia, MO 65201

Matthew S. Volkert

CERTIFICATE REQUIRED BY RULE 84.06(c) and (g)

The undersigned hereby certifies that the foregoing brief of Defendant Suburban Water and Sewer Company:

- (1) includes the information required by Rule 55.03;
- (2) complies with the limitations contained in Rule 84.06(b); and
- (3) contains 6,258 words, as computed by the word count of Microsoft Word.

The undersigned is filing an electronic copy of this brief on CD-ROM, in Microsoft Word format, which has been scanned for viruses and is virus-free.

The undersigned further certifies that copies of the foregoing have been mailed or hand-delivered to all counsel of record and/or parties as shown on the service list the 11th day of April, 2008.

Matthew S. Volkert
Attorney for Defendant

DEFENDANT'S APPENDIX

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Section 541.033A-13

H.B. 393, 93rd General Assembly, 1st Regular Session (2005) (EXCERPT).....A-14

THE FOLLOWING MATERIALS, ALTHOUGH CITED IN THIS BRIEF, HAVE
ALREADY BEEN INCLUDED IN RELATOR’S PREVIOUSLY-FILED APPENDIX:

Section 386.570 RSMo..... Relator’s Appendix A-103

Section 386.600 RSMo..... Relator’s Appendix A-104

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