IN THE SUPREME COURT OF MISSOURI

Appeal No. SC88697

STATE OF MISSOURI EX REL. SEMSA SELIMANOVIC, et al.,

Relators,

vs.

HON. ROBERT DIERKER, JR.
CIRCUIT COURT JUDGE, DIVISION 18
MISSOURI CIRCUIT COURT, TWENTY-SECOND
JUDICIAL CIRCUIT, CITY OF ST. LOUIS

Respondent.

Writ of Prohibition Directed to the Circuit Court of the City of St. Louis
Cause No. 0722-CC00369, Division 18
Honorable Robert Dierker, Jr.

BRIEF OF RESPONDENT
THE HONORABLE ROBERT DIERKER, JR.

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TABLE OF CONTENTS

Table of Authorities 3, 4

Jurisdictional Statement 5

Statement of Facts 6

Points Relied On 7

Argument 8

Conclusion 29

Certificate of Compliance with Rules 31

Certificate of Service 32

TABLE OF AUTHORITIES

Cases

Burns v. Employer Health Serv., Inc., 976 S.W.2d 639 (Mo.App. 1998) 25
Butler v. Mitchell-Hugeback, Inc., 895 S.W.2d 15 (Mo.banc 1995) 10, 11
Global Fin.Corp. v. Triarc Corp., 93 N.Y.2d 525 (N.Y. 1999) 16
Gunnett v. Girardier Bldg. & Realty Co., 70 S.W.3d 632 (Mo.App. 2002) 26
Hill v. Kendrick, 192 S.W.3d 719 (Mo.App. 2006) 8, 25
IBM v. Kemp, 536 S.E.2d 303 (Ga.App. 2000) 16
Lewis v. Gibbons, 80 S.W.3d 461 (Mo.banc 2002) 9
Murray v. Missouri Highway and Transp. Comm'n, 37 S.W.3d 228 (Mo.banc 2001) ... 13, 17
Sexton v. Jenkins & Assoc., Inc., 41 S.W.3d 1 (Mo.App. 2000) 27
Soto v. State of Missouri, 226 S.W.3d 164 (Mo.banc 2007) 9
Spradlin v. City of Fulton, 982 S.W.2d 255 (Mo.banc 1998) 9, 11
State ex rel. Casey's Gen. Stores, Inc. v. City of West Plains, 9 S.W.3d 712 (Mo.App. 1999) 14
State ex rel. DePaul Health Ctr. v. Mummert, 870 S.W.2d 820 (Mo.banc. 1994) 12
State ex rel. Doe Run Res. Corp. v. Neill, 128 S.W.3d 502 (Mo.banc 2004) 12
State ex rel. Lebanon Sch. Dist. R-III v. Winfrey, 183 S.W.3d 232 (Mo.banc 2006) 8
State ex rel. Linthicum v. Calvin, 57 S.W.3d 855 (Mo.banc 2001) 8, 12
Steward v. Goetz, 945 S.W.2d 520 (Mo.App. 1997) 17
Tucker v. Fianson, 484 S.2d 1370 (Fla. Dist. Ct. App. 1986) 21
United Pharmacal Co. of Missouri v. Missouri Bd. of Pharmacy, 208 S.W.3d 907 (Mo.banc 2006) 10

Statutes

MO.REV.STAT. §508.010 (2005) ..... passim
MO.REV.STAT. §508.010.11 ..... 11, 15
MO.REV.STAT. §508.010.14 ..... 9, 10, 21
MO.REV.STAT. §508.010.4 ..... 7, 9, 10
MO.REV.STAT. §508.010.8 15
MO.REV.STAT. §538.232 (2005) 11, 24

Other Authorities

Missouri Tort Reform, 62 J.MO.BAR 6, 378 (2006) 10

Rules

MO.S.CT.R. 51.045 14
MO.S.CT.R. 55.27(g)(3) 25

JURISDICTIONAL STATEMENT

Relators filed a Petition for Writ of Prohibition against the Honorable Robert Dierker, Jr. of the Circuit Court of St. Louis City. Respondent granted Defendant Daniel Finney's Motion to Transfer for Improper Venue, and ordered Relators' cause of action transferred to the Circuit Court of St. Louis County on July 17, 2007. On September 25, 2007, this Court issued its Preliminary Writ in Prohibition.

The Missouri Supreme Court has jurisdiction over this matter pursuant to Article V, Section 4 of the Missouri Constitution.

STATEMENT OF FACTS

On or about July 19, 2002, Serif Selimanovic was injured on the job at Brentwood Plastics and later died. (A 7.) His survivors, Relators Semsa, Alen, Dervis, and Jasmin Selimanovic, claim attorney Daniel Finney failed to file a wrongful death action on their behalf. (A 9-10.) Relators filed a legal malpractice action against Finney in St. Louis City. (A 6-10.) They claim venue for the malpractice action is proper in St. Louis City because the underlying wrongful death suit should have been filed in St. Louis City. (A 7.)

On or about April 18, 2007, Defendant Daniel Finney filed a motion asking the trial court to transfer the malpractice action to St. Louis County where venue is proper. (A 11-13.) After extensive briefing and oral argument, Respondent Judge Robert Dierker, Jr. granted the motion to transfer venue, and ordered the case transferred to St. Louis County. (A 1-5, Memorandum and Order, July 17, 2007.)

Relators filed a Petition for Writ of Prohibition in the Eastern District of the Missouri Court of Appeals on July 26, 2007. (Relators' Petition for Writ of Prohibition and Suggestions in Support, SC88697, p.7.) The Eastern District denied Relators' petition on July 13, 2007. (Relators' Petition for Writ of Prohibition and Suggestions in Support, SC88697, p. 7.)

Relators filed a Petition for Writ of Prohibition with this Court on August 8, 2007. On September 25, 2007, this Court issued its Preliminary Writ in Prohibition.

POINT RELIED ON

RELATORS ARE NOT ENTITLED TO AN ORDER PROHIBITING THE TRANSFER OF VENUE FROM ST. LOUIS CITY TO ST. LOUIS COUNTY BECAUSE, PURSUANT TO MO.REV.STAT. §508.010 (2005), VENUE IS PROPER IN ST. LOUIS COUNTY.

Butler v. Mitchell-Hugeback, Inc., 895 S.W.2d 15 (Mo.banc 1995).

Murray v. Missouri Highway and Transp. Comm'n, 37 S.W.3d 228 (Mo.banc 2001).

Spradlin v. City of Fulton, 982 S.W.2d 255 (Mo.banc 1998).

United Pharmacal Co. of Missouri v. Missouri Bd. of Pharmacy, 208 S.W.3d 907 (Mo.banc 2006).

MO.REV.STAT. §508.010 (2005).

ARGUMENT

RELATORS ARE NOT ENTITLED TO AN ORDER PROHIBITING THE TRANSFER OF VENUE FROM ST. LOUIS CITY TO ST. LOUIS COUNTY BECAUSE, PURSUANT TO MO.REV.STAT. §508.010 (2005), VENUE IS PROPER IN ST. LOUIS COUNTY.

As this Court is well aware, there is a new venue statute in town. In 2005, the Missouri legislature repealed and replaced numerous statutes, purportedly in order to accomplish "tort reform." One area subject to major overhaul was venue. With MO.REV.STAT. §508.010 (2005), the legislature lumped together all tort actions for the purpose of determining venue:

> 4. Notwithstanding any other provision of law, in all actions in which there is any count alleging a tort and in which the plaintiff was first injured in the State of Missouri, venue shall be in the county where the plaintiff was first injured by the wrongful acts or negligent conduct alleged in the action.

MO.REV.STAT. §508.010.4.

So venue is now determined by where the plaintiff was first injured. And the issue presented for determination by this Court is apparently one of first impression: where is a plaintiff "first injured" where there is no physical injury and no property damage?

In this legal malpractice case, the Plaintiffs (Relators) were first injured in St. Louis County because (1) as Respondent held, they were injured where the wrongful acts or negligent conduct occurred; or, in the alternative,
(2) they were injured where they reside which is where they sustained the impact of their financial injury.

Relators contend, however, that they were injured in St. Louis City, and seek a writ prohibiting the transfer of this case to St. Louis County.

A. STANDARD OF REVIEW

Prohibition is a discretionary writ that lies to prevent abuse of judicial discretion, avoid irreparable harm to a party, or to prevent exercise of extra-jurisdictional power. *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 856-57 (Mo.banc 2001). The burden is on the petitioning party to show that the trial court exceeded its jurisdiction, and that burden includes overcoming the presumption in favor of the trial court's ruling. *Hill v. Kendrick*, 192 S.W.3d 719, 720 (Mo.App. 2006).

B. STATUTORY CONSTRUCTION

Though the venue statute itself changed, and must be interpreted anew, the purpose of the statute did not. Venue statutes are intended to provide a convenient, logical, and orderly forum for litigation. *State ex rel. Lebanon Sch. Dist. R-III v. Winfrey*, 183 S.W.3d 232, 237 (Mo.banc 2006). In this way, they protect defendants from suits being filed against them in counties all over the state to which neither they nor the cause of action have any connection. *Id*.

The general rule of statutory construction requires a court to determine the intent of the legislature based on the plain language used and to give effect to this intent whenever possible. *Soto v. State of Missouri*, 226 S.W.3d 164, 166 (Mo.banc 2007). It is a basic rule of statutory construction that words should be given their plain and ordinary meaning whenever possible. *Spradlin v. City of Fulton*, 982 S.W.2d 255, 258 (Mo.banc 1998). Courts look elsewhere for interpretation only when the meaning is ambiguous or would lead to an illogical result defeating the purpose of the legislature. *Id*. A statute is ambiguous where it is capable of being read differently by reasonably well-informed individuals. *Id*. The ultimate guide in construing an ambiguous statute is the intent of the legislature. *Id*.

Relators and Respondent read §508.010 differently. The ambiguity is created, however, more by what is *not* proscribed in the statute rather than what is—ambiguity by omission. Section 508.010.4 provides that venue shall be in the county where the plaintiff is first injured. And a plaintiff is considered first injured where the trauma or exposure occurred. MO.REV.STAT. §508.010.14. The parties disagree as to what the statute requires where there is no physical injury or property damage, i.e. the injury is solely economic. Although all involved might "wish the legislature had drafted this statute with the clarity and precision of an English grammar teacher," it obviously did not do so. *Lewis v. Gibbons*, 80 S.W.3d 461, 465 (Mo.banc 2002). The fact that the statute is not clearly written, however, "is certainly not unprecedented." *Spradlin*, 982 S.W.2d at 267 (Wolff, J.,

dissenting). For this reason, the Court must ascertain the intent of the legislature from the language used, and give effect to that intent. *Id*.

To discern legislative intent, the Court may review the earlier versions of the law, or examine the whole act to discern its purpose, or consider the problem the statute was enacted to remedy. *United Pharmacal Co. of Missouri v. Missouri Bd. of Pharmacy*, 208 S.W.3d 907, 911-12 (Mo.banc 2006); *Soto*, 226 S.W.3d at 166. In addition, the Court presumes the legislature was aware of the Court's prior decisions establishing rules for construing statutes and their exceptions. *Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15, 19 (Mo.banc 1995).

1. Earlier Versions of the Law

Prior to 2005, the venue statutes provided various rules for venue based primarily on the defendant's status—as a motor carrier, a corporation, not-for-profit corporation, or railroad company—or on the defendant's residency. James L. Stockberger and Brian Kaveney, *Missouri Tort Reform*, 62 J.MO.BAR 6, 378 (2006). "Under those rules, venue was proper even if the court was located in a county that had little contact with the plaintiff or the plaintiff's injury." *Id*.

The revised venue statute now limits venue in a tort action to the county where the plaintiff was first injured. §508.010.4. The statute defines the place of first injury for certain torts. In latent injury actions, the plaintiff is first injured where the trauma or exposure occurred rather than where symptoms are first manifested. MO.REV.STAT. §508.010.14. In a wrongful death action, the plaintiff is first injured where the decedent was first injured by the wrongful acts or

negligent conduct alleged in the action rather than where the decedent died. MO.REV.STAT. §508.010.11. Similarly, in a loss of consortium claim, the plaintiff is first injured where the other spouse was first injured by the wrongful acts or negligent conduct alleged in the action. §508.010.11. For a defamation or invasion of privacy action—where there is no physical injury—the legislature kept the language from the previous version of §508.010, and defined the place of first injury as the county in which the defamation or invasion was first published. In addition, the legislature enacted a separate statute to define the place of first injury in a medical malpractice action: the plaintiff shall be considered injured by a health care provider only in the county where the plaintiff first received treatment for a medical condition at issue in the case. MO.REV.STAT. §538.232 (2005).

Earlier versions of the venue law allowed plaintiffs to strategically choose from among various venue options. The new law does not. To the contrary, §508.010 limits venue to one county only—the county where the plaintiff was first injured. Respondent's holding that Relators were injured where the wrongful acts or negligent conduct occurred is consistent with the language used in the statute. *Spradlin*, 982 S.W.2d at 267.

2. <u>Prior Decisions</u>

In addition to comparing the new law to its previous incarnation, the Court also presumes the legislature took into account prior court decisions on venue when it chose to change the law as it did. *Butler*, 895 S.W.2d at 19. For example:

(1) *State ex rel. DePaul Health Ctr. v. Mummert*, 870 S.W.2d 820, 821 (Mo.banc. 1994): "This original action in mandamus is another in a seemingly unending series of extraordinary writ actions in which civil tort plaintiffs and defendants enter protracted procedural plotting to embrace or avoid the generous juries of the City of St. Louis."

(2) *State ex rel. Linthicum*, 57 S.W.3d at 858: "For purposes of section 508.010, a suit instituted by summons is 'brought' whenever a plaintiff brings a defendant into a lawsuit, whether by original petition or by amended petition." This rule did not however apply when a defendant was dismissed from a lawsuit rather than added to it.

(3) *State ex rel. Doe Run Res. Corp. v. Neill*, 128 S.W.3d 502, 505-06 (Mo.banc 2004): Petition stated a cause of action against the corporation's chief financial officer in his individual capacity sufficient to withstand a motion to dismiss for pretensive joinder. Defendant must establish that the information available at the time the petition was filed would not support a reasonable legal opinion that a case could be made against the joined defendant.

The revised venue statutes obviate the need for "protracted procedural plotting" to gain or avoid plaintiff-friendly venues, and end future wrangling over pretensive joinder and nonjoinder.

By changing the law as it did, the legislature intended to limit venue choices in tort actions to one county—the county where the plaintiff was first injured by the conduct alleged in the petition. Respondent's holding is consistent with the intent of the legislature because it limits and connects venue to the conduct alleged in the petition.

In response, Relators contend they were injured in the City where their wrongful death claim should have been filed. The statute does not allow, and the legislature did not intend, this interpretation. As outlined below, Relators' interpretation would also allow for unreasonable or absurd results when applied in other such cases. "Construction of statutes should avoid unreasonable or absurd results." *Murray v. Missouri Highway and Transp. Comm'n*, 37 S.W.3d 228, 233 (Mo.banc 2001). The legislature is presumed, in enacting a statute, to intend a logical result. *Id*. at 234.

C. ST. LOUIS COUNTY IS THE PROPER VENUE BECAUSE, PURSUANT TO SECTION 508.010, RELATORS WERE FIRST INJURED IN ST. LOUIS COUNTY.

Relators claim their injury is a financial loss.[1] Pursuant to §508.010, venue for Relators' legal malpractice claim shall be where Relators were first injured by the wrongful acts or negligent conduct alleged in their petition.

[1] Pet. For Writ of Prohibition, p. 3; Relators' Brief, SC88697, p. 15.

1. **Relators were injured where the wrongful acts or negligent conduct occurred**.

Relators claim their injury is the financial loss they suffered because Defendant Daniel Finney (Finney) failed to file a wrongful death lawsuit within the statute of limitations. Because the lawsuit was not filed, Relators were not able to obtain and enforce a judgment. Relators contend they were injured in St. Louis City (the City) because that is where the underlying lawsuit should have been filed.[2]

Respondent rejected this argument, however, because it required a result inconsistent with the manifest purpose of the statute.[3] Instead, Respondent held Relators were injured where the wrongful act or negligent conduct constituting malpractice in fact occurred.[4] This holding is consistent both with the entire act, and with the intent of the legislature. *State ex rel. Casey's Gen. Stores, Inc. v. City of West Plains*, 9 S.W.3d 712, 716 (Mo.App. 1999).

As noted above, §508.010.11 provides that in a wrongful death action, the plaintiff is considered first injured where the decedent was first injured *by the wrongful acts or negligent conduct alleged in the action*. Likewise, in a claim for loss of consortium, the plaintiff is considered first injured where the other spouse

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[2] Pursuant to MO.S.CT.R. 51.045, the Court shall not consider any other basis for City venue.

[3] A 4-5, Memorandum and Order, pp. 4-5.

[4] A 4.

was first injured *by the wrongful acts or negligent conduct alleged in the action.* §508.010.11. Respondent held Relators were first injured where the wrongful acts or negligent conduct alleged in the action occurred. This ruling is consistent with the language of the statute which focuses on and connects the injury to the wrongful acts or negligent conduct alleged in the petition.

Respondent's holding is also consistent with the only provision in the statute which addresses a tort involving a non-physical injury. In any action for defamation or for invasion of privacy, the plaintiff shall be considered first injured in the county in which the defamation or invasion was first published. MO.REV.STAT. §508.010.8.[5] For the only tort addressed in the statute which involves a non-physical injury, the legislature set the place of injury where the wrongful acts or negligent conduct occurred. Respondent's holding is therefore consistent with the entire language of the statute.

The ruling is also consistent with the intent of the legislature to limit venue to the county which has contact with the plaintiff and the conduct alleged in the petition. Relators have no contact with the City outside their claim that the underlying suit should have been filed there. The negligent conduct alleged in the petition is the failure to file a lawsuit, *not* the failure to file a lawsuit in the City.

[5] The legislature did not change the venue provision for defamation and invasion of privacy in 2005.

2. Relators were injured where they reside which is where they sustained the economic impact of their loss.

Relators did not suffer a physical injury. They contend instead that their injury is the financial loss resulting from the lack of an enforceable judgment against the individuals they claim are responsible for the death of their husband and father.[6]

As noted above, the question of where a non-physical injury occurs, pursuant to the revised statute, appears to be one of first impression. Respondent discovers no Missouri authority which specifically defines where one is "first injured." The "place of injury" question, however, has been addressed by various jurisdictions when analyzing the issue in the context of statute of limitations and conflict of laws disputes. Those analyses have resulted in a consistent holding that the place of injury, where the damages are purely economic, is where the plaintiff resides and sustained the economic impact of the loss. *E.g. IBM v. Kemp*, 536 S.E.2d 303 (Ga.App. 2000); *Global Fin.Corp. v. Triarc Corp.*, 93 N.Y.2d 525, 529 (N.Y. 1999).

Relators reside in the County. They claim their injury is a financial loss. Logically, they could only sustain that injury where they *are*—St. Louis County—not some place they are not—St. Louis City. Again, this analysis is consistent with the intent of the legislature because it limits venue to a county which has

[6] Relators' Brief, SC88697, p.15.

contact with the plaintiff. "The legislature is presumed…to intend a logical result." *Murray*, 37 S.W.3d at 233.

D. ST. LOUIS CITY IS NOT THE PROPER VENUE BECAUSE, PURSUANT TO SECTION 508.010, RELATORS WERE NOT INJURED IN ST. LOUIS CITY.

This is a legal malpractice action. Relators claim Finney failed to file a wrongful death claim within the statute of limitations. A legal malpractice suit is unique in that it requires Relators to prove a "case-within-a-case." *Steward v. Goetz*, 945 S.W.2d 520, 532 (Mo.App. 1997). Relators must prove both the malpractice case against Finney, and the underlying wrongful death claim. Contrary to Relators' claim, proper venue for the underlying action is not necessarily the same for the malpractice action. The trial court was asked to determine proper venue for the malpractice action.

Relators argue the malpractice action belongs in the City because venue for the underlying wrongful death claim was the City—where they claim the underlying lawsuit should have been filed. Venue for a malpractice action is therefore wherever the underlying action should have been filed.

With this argument, Relators are asking the Court to carve out an interpretation of the statute that will allow them to pursue their legal malpractice claim in the City—a venue where their only connection is the claim that a lawsuit should have been but was not filed there. Relators do not cite, and Respondent does not discover, any language in the statute which supports this interpretation of

the act. In addition, the ruling desired by Relators contravenes the intent of the legislature in changing the venue statute as it did.

By Relators' analysis, venue in a legal malpractice action would depend on where the plaintiff thought the underlying lawsuit should have been filed. As a result, trial courts—and no doubt appellate courts as well—will be forced to litigate venue in the underlying action in order to determine venue in the malpractice action— a battle the parties in this case have already waged before Respondent. The legislature intended to reduce, not multiply, venue battles.

In addition, the logical extension of Relators' argument yields unreasonable and absurd results. For example, if the legal malpractice involved a claim that the attorney failed to adequately brief an appeal, where is the injury—where a "good" brief should have been filed? By that analysis, venue for every malpractice action involving an appeal will be St. Louis City (Eastern District), Kansas City (Western District), or Springfield (Southern District). A malpractice action involving a will contest presents a similar dilemma. Is venue where a "good" will should have been filed? But what about a malpractice action that does not have an underlying lawsuit, e.g. an action involving the creation of a trust? If there is no underlying venue or "should have been filed" location, where is venue proper under the Relators' analysis?

Relators' analysis is similarly inapplicable to other claims involving non-physical injuries. For example, if an accountant fails to file a client's income tax return or files an incorrect return, where is the client injured: at the post office

where the return should have been mailed, or the offices of the IRS where the return was filed? If a stockbroker fails to carry out a client's order to sell certain shares of stock, where is the client injured: in New York where the sale should have been effected? In addition to being unreasonable and absurd, these results are not consistent with the plain language of the statute or the intent of the legislature. The logical result in these cases is the same result reached by Respondent: the plaintiff was injured where the accountant or stockbroker or lawyer failed to act or acted negligently. An equally logical result is a determination that the plaintiff was injured where he resides which is where he suffered the economic impact of his financial loss.

But Relators argue venue is proper in the City because Finney testified he would have preferred to file their case in the City. First, this claim misrepresents the entirety of Finney's testimony. Finney testified that he never felt a lawsuit should have been filed. He admitted that generally speaking plaintiffs' cases statistically do better in the City.[7] Obviously, the legislature was aware of those statistics as well. Even assuming, however, Finney would have preferred to file in St. Louis City, this argument is irrelevant. The fact that Finney may have wanted to file in the City does not prove he could have prosecuted, and won, the case in the City. More importantly, it does not establish where the Relators were injured which is what determines venue in the malpractice action.

[7] A 52, Def. Finney's Dep. at p. 39.

Relators also contend that Respondent erroneously focused on Finney's conduct, and that they could not have been injured in the County because they did not suffer trauma or exposure at Finney's office. This argument mischaracterizes Respondent's holding. Respondent held that the injury occurred where the "act or omission constituting malpractice in fact occurred."[8]

As to the application of the "trauma or exposure" standard, Relators admit the definitions of these terms are more easily applied to a claim of physical injury to person or property. Relators argue, however, that the common meaning of exposure includes "the condition of being at risk of financial loss." Relators contend that this definition can only occur where the financial gain would have occurred—which in their case was the City. Relators misinterpret this definition. In this case, as in most civil actions, the defendant—not the plaintiff—and/or his insurer risk "exposure," i.e. the risk of suffering a financial loss. In the underlying action, the *defendants* were at risk of a financial loss if Relators obtained a judgment against them. Relators were never at risk of financial loss in the underlying suit, and are not at risk of financial loss in the malpractice action.

In addition, Relators' definition of exposure is not consistent with the language of the statute. A financial loss is not an "exposure" injury as is, for example, exposure to lead or other pollutants. Exposure to a pollutant usually results in certain symptoms, hence the provision, "A plaintiff is considered first

[8] A 4.

injured where the trauma or exposure occurred rather than where symptoms are first manifested." MO.REV.STAT. §508.010.14.

Relators next argue Respondent's holding will require that they prove to a County jury that they would have been successful with a City jury. Even assuming this is true, and it is not, the argument is irrelevant. The statute requires that the Court determine where Relators were injured by Finney's alleged failure to file a lawsuit. In the malpractice action, Relators will have to prove they could have won a judgment in their favor in the underlying action and could have collected said judgment. They are not required to prove they could have won a judgment from a jury in a particular locale. Respondent is not aware of any approved jury instructions which require the jury to find Relators would have prevailed against the underlying defendants before a City jury in order to obtain a verdict in the malpractice action in the County.

Relators also rely on an appellate decision from the state of Florida, *Tucker v. Fianson*, 484 S.2d 1370 (Fla. Dist. Ct. App. 1986). Relators contend this decision supports their claim that they were injured in the City because that is where their economic interests were impacted. Relators' reliance on *Tucker* is misplaced because there are important distinctions between *Tucker* and the case at hand.

First, and most importantly, the Florida venue statute at issue in *Tucker* more closely resembles the prior version of §508.010. As was the case in Missouri prior to 2005, in Florida, venue was proper where the defendant resided,

where the cause of action accrued, or where the property in litigation was located. *Id*. at 1371. The Missouri legislature obviously intended that this would no longer be the law when it chose to limit venue to the county where the plaintiff was first injured. The Florida court determined venue by deciding where the action accrued. This is no longer the standard in Missouri.

In addition, the two cases are factually distinct as well. In *Tucker*, the plaintiff sued his attorney for providing negligent advice and services in the condominium conversion of a building in Dade County. *Id*. at 1371. The court held the cause of action accrued/the plaintiff was injured where the economic damage had been done—which was where the property was located. *Id*. at 1372. The *Tucker* court utilized an interesting analogy:

> "…while lawyer Tucker negligently shot his arrow into the air of Broward County, it did no harm and had no effect until it fell to earth in Dade. It is therefore here that he must answer for his asserted error."

Id.

Unlike in *Tucker*, there is no property in this case that was "injured" or where a court can locate an economic impact that resulted from the attorney's negligence. Using the *Tucker* court's analogy, in this case Finney allegedly failed to shoot an arrow at all, i.e. he failed to file a lawsuit, so the court cannot look at where the arrow fell to earth and had an effect. For these reasons, the *Tucker* decision fails to support Relators' claim that they were injured in the City.

Finally, as noted above, Relators contend that venue in the malpractice action is where venue in the underlying action could have/should have been. By their analysis, they suffered a financial loss/economic impact in either of two venues since the underlying lawsuit could have been filed in either venue. They admit that venue in the underlying action—and therefore in the malpractice action as well—is proper in the County. They also admit that, by extension of their own logic, venue for the malpractice claim would be permissible in the County since the County is also a location of Relators' first injury.[9] But Relators argue that since there are two statutorily proper venues, they have the choice as to which venue to select, and the trial court has no discretion to disturb that choice.

By their own analysis then, the Relators were injured in either of two venues—the City or the County—and they get to choose. As discussed above, if the Court adopts the ruling desired by Relators, the parties in similar actions will be required to litigate venue in the underlying action in order to determine venue for the malpractice action. In addition, the holding desired by Relators leaves unresolved numerous other types of cases where there is no physical injury or an underlying lawsuit, e.g. an attorney is sued for negligently setting up a trust; an accountant is sued for filing an erroneous tax return; an attorney is sued for negligently drafting a contract.

Relators' analysis runs contrary to both the language of the statute and the evident intent of the legislature. As discussed above, §508.010.11 defines "first

[9] Relators' Brief, SC88697, p. 18.

injured" in a wrongful death action and for a loss of consortium claim as where the decedent, or injured spouse, was first injured by the wrongful acts or negligent conduct alleged in the action. Likewise, §538.232 provides that in a medical malpractice action, the plaintiff is first injured *only in the county* where the plaintiff first received treatment for the condition at issue in the case. The plain language of these statutes evidences the intent of the legislature to limit venue to where the injury occurred—with the logical understanding that an injury occurs in one location. Where the plaintiff could possibly claim an injury in more than one venue, as in a medical malpractice action, the legislature again sought to limit venue to one locale:

> In any action against a health care provider for damages for personal injury or death arising out of the rendering of or the failure to render health care services, for purposes of determining venue under Section 508.010, RSMo, the plaintiff shall be considered injured by the health care provider *only in the county* where the plaintiff first received treatment by a defendant for a medical condition at issue in the case.

MO.REV.STAT. §538.232 (Emphasis added.)

Relators' claim—that they were injured in two venues and get to choose which they prefer—is inconsistent with the legislature's intent to limit venue. Relators also fail to show how the plain language of the statute supports this claim.

For these reasons, Relators fail to meet their burden to show that the trial court exceeded its jurisdiction. As a result, they fail to overcome the presumption in favor of Respondent's ruling. *Hill v. Kendrick*, 192 S.W.3d at 720.

E. IN THE ALTERNATIVE, ST. LOUIS COUNTY IS THE PROPER VENUE BECAUSE THE UNDERLYING ACTION COULD NOT HAVE BEEN MAINTAINED IN ST. LOUIS CITY.

In the alternative, if the Court determines that Relators were first injured in any county where the underlying lawsuit could have been filed, Defendant Finney contends that the underlying action could not have been maintained in St. Louis City. St. Louis County is therefore the proper venue for the malpractice action.

Relators based their claim for City venue solely on the allegation that Samuel Longstreth, a City resident, would have been a defendant in the wrongful death action. They claim Longstreth, a supervisor, was liable under the something-more theory of negligence.

The claim against Longstreth raises the issue of subject matter jurisdiction. The claim would have been dismissed if it appeared the circuit court lacked jurisdiction. MO.S.CT.R. 55.27(g)(3). As the term "appears" suggests, the quantum of proof is not high and can be satisfied with a preponderance of evidence that the court is without jurisdiction. *Burns v. Employer Health Serv., Inc.*, 976 S.W.2d 639, 641 (Mo.App. 1998).

Relators contend they had a something-more claim against Longstreth based on the following evidence: (A) a draft petition prepared by Finney;

(B) alleged but undocumented statements by Longstreth and another supervisor Rusty Caldwell; (C) an OSHA report; and (D) an undocumented claim that the workers' compensation insurer paid a penalty relevant to the accident. As outlined in Defendant's Response to Plaintiffs' Reply to the Motion to Transfer Venue, this evidence fails to satisfy the "something-more" standard as follows.[10]

1. Draft Petition

Finney testified that he did not prepare the draft petition.[11] Even assuming, however, the draft could be attributed to Finney, it fails to substantiate Relators' claim. This is because first there are no allegations in the petition that go beyond a failure to provide a safe working environment. More importantly, there are no allegations directed specifically to Longstreth which show that he engaged in any affirmative act directed at Selimanovic. *Gunnett v. Girardier Bldg. & Realty Co.*, 70 S.W.3d 632, 639-41 (Mo.App. 2002). The draft petition fails to establish a something-more claim against the City resident, Longstreth.

2. Unsubstantiated Allegations

Relators claim unnamed employees warned Longstreth and Caldwell about problems with the machine on which the decedent was injured. They claim the unnamed employees were told to keep working with the machine or "go home."

Relators do not, however, allege that those employees had these discussions with Longstreth. The OSHA report submitted by Relators quote an employee as

[10] A 38-82.
[11] A 57.

telling the investigator that the problem was reported to Rusty Caldwell. Relators fail to submit any evidence that the problem was reported to Longstreth.

Furthermore, the affidavits submitted by Relators defeat the claim against Longstreth. None of the employees testify that Longstreth directed them to engage in dangerous activities. The only claim with regard to Longstreth is that he stated at a meeting, "We are going to do things differently now, and we are going to fix the problems with the machines.[12]

3. OSHA Report

Relators also rely on their claim that Longstreth admitted to willful violations of OSHA regulations and agreed to pay $50,000 in fines. Relators attached portions of an OSHA report which indicated that certain violations were labeled "Willful" by the reporting agency. Relators failed, however, to submit any evidence that Longstreth admitted to willful violations or that he paid the $50,000 in fines.[13] In addition, allegations of a failure to comply with OSHA regulations are not sufficient to state a cause of action against individual employees. *Sexton v. Jenkins & Assoc., Inc.*, 41 S.W.3d 1, 6 (Mo.App. 2000).

4. Insurance Penalty

Finally, Relators argued they had a something-more claim against Longstreth because the insurance provider for the employer paid a 15 percent penalty related to the accident. Relators did not submit any evidence to support

[12] A 73, 76.

[13] A 44-45.

this claim. Assuming it to be true, however, Relators failed to explain or cite any authority for how evidence of an insurance payment on behalf of the employer would support a claim that Longstreth, an employee, somehow committed an affirmative negligent act directed at the decedent.

Relators failed to produce evidence to support a something-more claim against the lone City resident. Without the City resident, the wrongful death action would not have continued in the City. Relators admit the underlying action could have been filed in St. Louis County. For these reasons, St. Louis County is the proper venue.

CONCLUSION

Pursuant to §508.010, venue for Relators' legal malpractice action is proper in St. Louis County, and the case should be transferred in accord with Respondent's Order of July 17, 2007.

WHEREFORE, Respondent, The Honorable Robert Dierker Jr., respectfully requests that this Court quash the preliminary writ in prohibition, and permit this case to proceed to the Circuit Court of St. Louis County where venue is proper.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This Brief complies with the limitations contained in Rule 84.06(b) because it contains 6,045 words and 698 lines. This word count includes the entire Brief and does not exclude the parts of the Brief subject to exemption under said rules.

2. This Brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 13-point Times New Roman.

3. Pursuant to Rule 84.06(g), a floppy disk containing this Brief is being filed; this disk was scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

The undersigned certifies that this Brief of the Respondent was sent by United States mail, postage prepaid, this 14th day of December, 2007, to the following persons, along with a floppy disk containing the Brief that was scanned for viruses and is virus-free:

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