IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI EX REL. SEMSA SELIMANOVIC, et al.,	)	
Relators,	)	
vs.	)	
	)	Appeal No.: SC88697
HON. ROBERT DIERKER, JR., CIRCUIT COURT JUDGE, DIVISION 18, MISSOURI CIRCUIT COURT, TWENTY-SECOND JUDICIAL CIRCUIT, CITY OF ST. LOUIS,	)	
Respondent.	)	

Original Proceeding in Prohibition

On Preliminary Rule in Prohibition From the Supreme Court of Missouri
to the Honorable Robert Dierker, Jr., Circuit Judge of the
Circuit Court of the City of St. Louis

RELATORS' REPLY BRIEF

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A. STANDARD OF REVIEW

As previously set forth, prohibition is an original proceeding brought to confine a lower court to the proper exercise of its jurisdiction and while it is discretionary, should be utilized to prevent an abuse of judicial discretion, to 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, 857 (Mo. banc 2001). Here, Respondent improperly granted Defendant's Motion to Transfer Venue. Therefore, prohibition is warranted.

B. THE STATUTE AND STANDARD

As discussed by Respondent, venue is proper in this case, as it is a tort action, at the location where Plaintiffs (Relators) were first injured by the wrongful acts alleged in the Petition and thus the issue before this Court is, when the injury is economic in nature, where does that injury occur first for purposes of venue. Section 508.010, R.S.Mo. Supp. 2005. Relators do not disagree with Respondent that under this statutory scheme this is an issue of first impression in Missouri. As previously set forth, when making such a determination this Court will apply the rules of statutory construction and give effect to legislative intent as reflected in the plain language of the statute. *State ex rel. Burns v. Whittington*, 219 S.W.3d 224, 224 (Mo. Banc 2007). Courts presume that the legislature was aware of the state of the law at the time of the statute's enactment. *Pollock v. Wetterau Food Distribution Group*, 11 S.W.3d 754, 769 (Mo. App. E.D. 1999). In

addition, courts presume that a change in a statute is ordinarily intended to have some effect, and courts will not presume the legislature engaged in a useless act. *Ristau v. DMAPZ, Inc.* 130 S.W.3d 602, 606 (Mo. App. W.D. 2004).

When analyzing the current statute and where the injury first occurs, Section 508.010.14, R.S.Mo. Supp. 2005, provides that: "[a] Plaintiff is considered first injured where the trauma or exposure occurred rather than where symptoms are first manifested." The common meaning of exposure includes both: "the condition of being subject to some effect or influence;" and "the condition of being at risk of financial loss." *Webster's Dictionary* 2007 Edition. Respondent contends that the term exposure as used here is referring to a Defendant. Yet, the new statute states injury to the Plaintiff and refers to exposure in that regard. Moreover, with financial loss cases, if exposure were referring to Defendant the exposure still occurs where the financial gain would have occurred for the Plaintiff in the absence of Defendant's negligence. Indeed, the exposure, if used as defined by Respondent, can only occur where the financial gain would have occurred. Here, that financial gain would and should have occurred in St. Louis City in the form a judgment.

Nonetheless, in this case, the nature of Relators' injury is the resulting financial loss from their lack of an enforceable judgment against the individuals and/or entities responsible for Serif Selimanovic's death. Relators were exposed to this financial loss, and were first injured in St. Louis City, which is where their wrongful death claim would and should have been filed prior to the expiration of the statute of limitations, and where Relators would and should have an enforceable judgment in the absence of Defendant's

negligence.

C. THE LOCATIONS OF THE NEGLIGENT PARTY AND PLAINTIFF ARE IRRELEVANT

Respondent's analysis of where the injury occurs for purposes of venue under the new statutory scheme erroneously focuses on the location of the tortfeasor and Plaintiff as opposed to focusing on where the Relators were first injured. Respondent suggests that Relators were first injured and thus venue is proper in St. Louis County because that is where Defendant was allegedly negligent and because that is where Relators resided.

Yet, the analysis for venue is not where the negligent conduct occurs or where Plaintiff lives, but rather where the negligent conduct first injures the Plaintiffs, as set forth by the plain language of the statute. Under Section 508.010, R.S.Mo. Supp. 2005, it is irrelevant where Defendant's office was located, where the attorney/client relationship was formed, or where the attorney/client communications occurred. The only relevant factor is where the injury occurred, which is clearly in St. Louis City where the Defendant allowed the statute of limitations to run without filing suit in the St. Louis City Circuit Court.

While Respondent contends that the statute intends that the location of the injury be connected to the wrongful act, this is clearly wrong. Instead, the statute is clear that it was designed to take the focus of venue off of the tortfeasor and the tortfeasor's location and indeed was enacted to place the focus on where the Plaintiff was injured. Specifically, prior to the reenactment of Section 508.010, R.S.Mo. Supp. 2005, that statute provided in part that venue in tort actions was proper where the cause of action

accrued. Section 508.010, R.S.Mo. 2000. As discussed, courts applying this standard held that a cause of action "accrues" at the place where the wrongful conduct causing injury or damage occurred. *State ex rel. Drake Publishers, Inc. v. Baker,* 859 S.W.2d 201, 204 (Mo. App. E.D. 1993). Thus, in determining venue, the prior statute focused on the location of Defendant's acts and omissions, while the newly enacted statute focuses on the location of Plaintiff's injury for which the action is filed. Following the rules of statutory construction, courts presume that when the legislature changed the statute, the legislature was aware of the statute and that the statutory change was intended to have some effect, with the understanding that the legislature would not engage in a useless act. *DMAPZ, Inc.* 130 S.W.3d at 606; *Pollock,* 11 S.W.3d at 769. The new venue statute is clear and unambiguous and was intended to change the prior statute from focusing on where the wrongful act occurred and instead now focuses on the location of Plaintiff's injury.

Giving effect to that change, when analyzing venue, the focus must be on where the injury first occurred to Relators. When the statute of limitations expired three years after Mr. Selimanovic's death, and suit was not filed in St. Louis City Circuit Court, Relators were injured in St. Louis City because the omission in filing deprived them of their day in court, and a verdict in St. Louis City Circuit Court.

Such a conclusion is consistent with this court's most recent discussion on the new venue provisions and the purpose behind such statutes. In *State ex rel. Lebanon School District. R-III v. Winfrey,* 183 S.W.3d 232, 237 (Mo. Banc. 2006), this Court stated that venue statutes are intended to provide a "convenient, logical and orderly forum for

litigation." There is no question that the underlying wrongful death case would and should have been tried in St. Louis City Circuit Court based on Mr. Finney's testimony that this was the preferred venue. Thus, the most convenient, logical and orderly forum for the pursuit of the malpractice action arising out of the failure to file a lawsuit prior to the expiration of the statute of limitations, that would and should have been filed in St. Louis City, and resulted in a judgment for damages in St. Louis City Circuit Court, is St. Louis City. This conclusion provides a plain reading to the new statute and gives the new statute the effect that was intended, a logical result, contrary to Respondent's arguments otherwise. Indeed, Respondent would find it very difficult to argue in good faith that when given the chance to file a wrongful death action, Respondent would have chosen to file it in St. Louis County over filing it in the City of St. Louis Circuit Court.

While Respondent makes the argument that Mr. Finney might not have filed suit in St. Louis City Circuit Court because he did not believe he had a cause of action, based on his testimony and the facts that we have before us, such an argument is clearly disingenuous. First, Mr. Finney testified he would have preferred to file suit in St. Louis City. Second, Respondent even notes in his brief that part of the purpose of tort reform was to reduce the number of cases filed in St. Louis City as this is such a desirable venue. Thus, were this venue an option, as Respondent has already decided it was, surely Mr. Finney would and should have filed the case there.

D. FOCUSING ON THE LOCATION OF THE NEGLIGENT PARTY OR PLAINTIFF WOULD DICTATE ABSURD RESULTS

Respondent contends that the theory that Relators were injured in St. Louis City

because this is where the case should and would have been filed, would lead to absurd results. Respondent then raises examples of other types of professional negligence such as by an accountant for failing to file a tax return, or a stock broker failing to purchase a stock. First, venue would be proper in these cases where the Plaintiff was first injured, just as in this case. Second, the only similarities between these examples and the instant case is that they involve professional negligence. This case is a specific allegation of negligence for failing to file a lawsuit before the expiration of the statute of limitations in a wrongful death claim. In other words, every professional negligence action does not involve an issue of where some underlying action would and should have been filed before the expiration of a statute. Thus, this is not carving out an exception to anything, but rather establishes where an economic injury first occurs for purposes of failing to file a petition at the expiration of the statute of limitations. Respondent is comparing apples to oranges here.

On the other hand, to analyze the issue of where Relators were first injured as Respondent has, not only deviates from the statute and its purpose, but actually will result in inconsistent and absurd results. For example, Respondent suggests that in analyzing where the injury first occurred we should look at where the Plaintiff resided. Yet, Plaintiff's place of residence has never had any bearing on venue, under this statute, and if it were considered, the results would be all over the board. Consider a wrongful death action where the members of a class of Plaintiffs all resided in different counties. In that case, does one venue prevail or is venue appropriate in every county where a Plaintiff resides? Such a situation, assuming venue would be proper where each Plaintiff lived,

following Respondent's argument, would encourage forum shopping and lead to inconsistent application of where the injury first occurred. This is not the intent of the statute. Moreover, if the residence of the Plaintiff were to have bearing, then if Plaintiff herein resided in St. Louis City or Cole County, venue would be proper in St. Louis City or Cole County. This too leads to inconsistent results. The place of Plaintiff's residence has absolutely no bearing or relevance on the issue of venue in this matter.

Respondent also considers location of Mr. Finney when he was negligent, when analyzing this issue. Considering the location of the tortfeasor in this analysis would also result in inconsistent and absurd results. For example, what would be the appropriate venue where the underlying Plaintiff contacted other lawyers whose offices were located in different counties. Again, would there be several proper venues, which would encourage forum shopping? The simple answer for venue purposes is where the underlying case would and should have been filed. That is where Relators were injured and that is where venue lies.

The analysis engaged in by the Respondent just does not make sense in this case. As discussed, to prevail in a legal malpractice action the Plaintiff has to prove that its underlying claim would have been successful. *McDowell v. Waldron,* 920 S.W.2d 555, 559 (Mo. App. E.D. 1996). Here, Relators will have to prove that their underlying wrongful death claim in front of a jury in St. Louis City would have been successful. Under this analysis, Relators are in the perplexing position of proving to a jury in St. Louis County what a jury in the City of St. Louis would and should have done had the wrongful death claim been timely filed. Such a result would be absurd and prejudicial to

Relators and is certainly not the intent of Section 508.010, R.S.Mo. Supp. 2005.

E. VENUE IS PROPER IN ST. LOUIS CITY

Respondent contends that Relators position makes it necessary to litigate venue in the underlying action to determine venue in a malpractice action. This is simply not the case. Unlike Respondent argues, Relators do not contend that venue for a legal malpractice action is proper in any circuit court where the underlying claim ***could*** have been filed, as the underlying action could have been filed in any circuit court in the State of Missouri, subject to a later transfer. Thus, this cannot be the rule as it would encourage forum shopping. Rather, under Section 508.010, R.S.Mo. Supp. 2005, venue is proper where a Plaintiff is first injured, which in this case, as established above, is the circuit court where the underlying claim ***would*** and ***should*** have been properly filed. Each case will have to be analyzed on its own facts in conducting this analysis but in this case the facts are that Mr. Finney admitted that the St. Louis City would have been the preferred venue and indeed Respondent held that the underlying action would have been proper in St. Louis City. (A. 138-139.) Because Defendant's negligence deprived Relators of the ability to obtain a judgment in St. Louis City Circuit Court, Relators were first injured in St. Louis City.

Moreover, as correctly noted by Respondent, Relators do not dispute that venue in the underlying wrongful death claim would have been permitted in St. Louis County, as St. Louis County is where Serif Selimanovic was killed. However, Relators allege that the underlying wrongful death claim ***would*** and ***should*** have been filed in St. Louis City, and by Defendant's own admission, he would have rather filed the action in St. Louis

City where, in his opinion, Plaintiffs' cases statistically do better. Thus, the facts of this case dictate the injury occurred in St. Louis City. As previously set forth, if there are two statutorily proper venues, Plaintiff has the choice as to which venue to select, and the court has no discretion to disturb that choice. *Jones v. Overstreet***,** 865 S.W.2d 717, 718 (Mo. App. E.D. 1993). Moreover, for Respondent to even argue that Mr. Finney would have filed this wrongful death action anywhere but St. Louis City Circuit Court stretches the realm of reality.

Indeed, Respondent has failed to point out any relevance to the fact that Plaintiffs in the underlying case may have a choice of where to file the case, it is the failure to file it and where and when the injury occurred under the facts of that case. The facts in this case dictate St. Louis City.

II. THE UNDERLYING ACTION WOULD AND SHOULD HAVE BEEN MAINTAINED IN ST. LOUIS CITY AS THE TRIAL COURT ALREADY FOUND THERE WAS ENOUGH EVIDENCE TO FILE THE CASE IN ST. LOUIS CITY UNDER THE "SOMETHING MORE" DOCTRINE.

Respondent's final argument is that even if this court agreed that Relators were first injured in any county where the petition could have been filed, the only proper venue for the underlying action would have been St. Louis County and not St. Louis City because there were insufficient facts to assert a claim against the supervisor in the case, which would be necessary to establish venue in St. Louis City. This issue was presented and determined by the Respondent as set forth in Respondent's order below, which stated "a colorable claim could have been asserted against the decedent's supervisor [Sam Longstreth], and that such a claim would have permitted defendant to file the wrongful

death action in the City of St. Louis." (A. 3.) Thus, this has been determined by Respondent already and moreover was not a part of the original writ of prohibition and has not been challenged in this matter.

Nonetheless, to address the issue, should the court consider this argument, under Missouri law, co-employees are immune from civil liability for a breach of the employer's non-delegable duty to provide a safe work place. *Quinn v. Clayton Constr. Co. Inc*., 111 S.W.3d 428, 433 (Mo. App. E.D. 2003). Actions against co-employees for breach of this duty are preempted by the Missouri Workers' Compensation Act. *Id.* A limited exception to this general rule exists. An employee may sue a fellow employee by alleging "something more" than breaching the duty to provide a safe work environment, i.e. affirmative negligent acts committed by the fellow employee outside the scope of the employer's responsibility to provide a safe work environment. *Id.* In analyzing this exception, a long line of cases have held that the "something more" requirement has been met where a supervisor has created a dangerous condition by personally directing the injured or deceased worker to engage in conduct that a reasonable person would recognize as inherently hazardous and outside the usual requirements of the employment. *State ex rel. Taylor v. Wallace*, 73 S.W.3d 620, 622 (Mo. banc 2002); *Arnwine v. John M. Trebel*, 195 S.W.3d 467, 477 (Mo. App. W.D. 2006); *Risher v. Golden*, 182 S.W.3d 583, 587 (Mo. App. E.D. 2005); *Graham v. Geisz*, 149 S.W.3d 459, 462-63 (Mo. App. E.D. 2004). Respondent ruled consistent with this law that the allegations against Sam Longstreth would have satisfied this standard and thus venue would have been proper in St. Louis City Circuit Court.

Respondent considered the following facts when determining there was sufficient evidence to state a claim for "something more" against Sam Longstreth and Rusty Caldwell. As set forth in the transfer pleadings, the underlying case arose out of a situation wherein it was alleged that Sam Longstreth, as well as Rusty Caldwell were informed by employees of Brentwood Plastics that the layon roller on the winder machine on which Mr. Selimanovich was killed was jamming. When the layon roller jammed, it prevented the indexing function from completing, and new rolls of film could not be started. Instead of fixing the winder machine, the supervisors instructed the employees to un-jam the layon roller by hand, which required the employees to reach into the running winder, to keep the line running. (A. 22, 100, 105-106.)

It was further alleged that when the employees realized that it was extremely dangerous to be reaching into the winder machine while it was running, and expressed their concerns to Mr. Longstreth and Mr. Caldwell that the machine should be fixed, or a different procedure should be developed to un-jam the layon roller, that Mr. Caldwell told the employees “I don’t care, do it anyway” and “go home or go work at McDonald’s”. (A. 106-107.) The result was that the employees were required to continue to un-jam the layon roller by hand. (A. 104-115.)

On July 19, 2002, when Mr. Selimanovich was attempting to start a new roll of film it was alleged that the layon roller became jammed and as Mr. Selimanovic had been instructed to do under the threat of being fired, he reached into the winder machine with his body, through the open side of the machine, and un-jammed the layon roller. When doing so, after the layon roller was un-jammed it retracted, triggering the micro-switch,

and because there was no stop or pause programmed into the PLC, the large turret began to turn and Mr. Selimanovic did not get out of the machine before the turret started to turn, and he was crushed by the turret, resulting in his death.

Based on these facts, the trial court found, there were sufficient facts in the underlying case to allege that Mr. Selimanovic's supervisor did "something more" than simply fail to discharge his employer's duty to provide a safe work environment and affirmatively took action placing Mr. Selimanovic in danger, such that he was not protected by workers' compensation law and a colorable claim could be made against him. (A. 2.) *See Golden,* 182 S.W.3d at 587. In fact, Mr. Finney must have thought a claim could be made against him because in the draft petition, Mr. Finney listed Mr. Longstreth as a defendant. (A. 62-66.) The claim against Mr. Longstreth would have made venue proper in St. Louis City Circuit Court. Again this issue has been decided by the Respondent and has not been challenged as part of this writ. As there was proper venue in St. Louis City and this is where Relators were first injured, venue in this case is in St. Louis City.

CONCLUSION

Respondent misapplied Section 508.010, R.S.Mo. Supp. 2005 in holding that Relators were first injured in St. Louis County. Respondent reached that result by holding that the first injury occurred where the act or omission constituting malpractice in fact occurred. In so ruling, Respondent improperly focused on Defendant's negligent acts, and not on Relators' injuries, as is required by Section 508.010, R.S.Mo. Supp. 2005. Unless the preliminary writ is made absolute, Relators will be deprived of their

right to a trial before a jury in the City of St. Louis, where they were first injured by Defendant's failure to file a wrongful death claim on their behalf, when engaged to do so. As a result, Relators request that the Court make the writ of prohibition absolute.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

The undersigned certifies that a copy of Relators' Brief and a disk containing same were deposited on this 31st day of December, 2007, in the United States Mail, postage prepaid, addressed to: The Honorable Robert Dierker, Jr., Respondent, Circuit Court of the City of St. Louis, Carnahan Courthouse, 1114 Market Street, St. Louis, Missouri 63101 (314-622-4331); and R.C. Wuestling, Wuestling & James, L.C., Attorneys for Defendant, 720 Olive Street, Suite 2020, St. Louis, Missouri 63101 (314-421-6500).

_____
Ted F. Frapolli, #26873

Subscribed and sworn to before me this 31st day of December, 2007.

_____
Notary Public

My Commission Expires:

CERTIFICATE OF COMPLIANCE

The undersigned certifies that Relators' Brief contains 3,622 words, and that the computer disk filed with Relators' Brief under Rule 84.06 has been scanned for viruses and is virus-free.

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Ted F. Frapolli, #26873