

No. SC97787

**In the
Supreme Court of Missouri**

**State of Missouri ex rel. KENNETH ZELLERS, Acting Director,
MISSOURI DEPARTMENT OF REVENUE,**

Relator,

v.

**The Honorable BRENDA STACEY, Judge, Division IV, Circuit Court
of Jefferson County, Missouri,**

Respondent.

**Missouri Court of Appeals Eastern District No. ED107654
Circuit Court of Jefferson County No. 18JE-CC00805**

RELATOR'S BRIEF

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STATEMENT OF GROUNDS FOR JURISDICTION

This is an original writ of prohibition action arising from a suit in the Circuit Court of Jefferson County. After Jefferson County 9-1-1 Dispatch, a political subdivision, sued the Director of the Missouri Department of Revenue, the Director moved to change venue to Cole County pursuant to Mo. R. Civ. P. 51.045, as venue was improper in Jefferson County under section 508.010.2, RSMo. The Honorable Brenda Stacey denied the Director's motion to transfer venue. Relator applied to the Missouri Court of Appeals, Eastern District, but that court denied the writ. This Court has jurisdiction over this case under MO. CONST. art. V, § 4 and Missouri Supreme Court Rules 84.22, 84.24, and 97.

STATEMENT OF FACTS

Jefferson County 9-1-1 Dispatch (“Jeff. Co. 911”), a political subdivision, sued Joel Walters, former Director of the Missouri Department of Revenue (the “Director”), seeking to enjoin the Director from applying section 190.460, RSMo., as to Jeff. Co. 911 and seeking a declaration as to the meaning of sections 190.460.5 and 190.460.6.¹ *Relator’s Index, Exhibit B, Petition, Case No. 18JE-CC00805, p. 7-11*. The petition did not seek a declaration as to the validity of a rule promulgated by the Department of Revenue. *Id.*

The Director timely moved to change venue to Cole County, pursuant to Mo. R. Civ. P. 51.045 and section 508.010.2, RSMo. *Relator’s Index, Exhibit C, Motion for Change of Venue, Case No. 18JE-CC00805*. Section 508.010.2(1) provides that venue shall be determined as follows: “When the defendant is a resident of the state, either in the county within which the defendant resides, or in the county within which the plaintiff resides, and the defendant may be found.”

Jeff. Co. 911 opposed the Director’s motion, arguing venue was proper in Jefferson County because section 536.050 was a more specific venue statute. *Relator’s Index, Exhibit D, Plaintiff’s Response to Defendant’s Motion for Change of Venue, Case No. 18JE-CC00805*. Section 536.050 establishes venue

¹ The current acting Director is Kenneth Zellers. Relator has filed a notice with this Court to allow for proper substitution of the parties.

for declaratory judgments “respecting the validity of rules, or of threatened applications thereof” and provides that “[v]enue of such suits against agencies shall, at the option of the plaintiff, be in the circuit court of Cole County, or in the county of the plaintiff’s residence, or if the plaintiff is a corporation, domestic or foreign, having a registered office or business office in this state, in the county of such registered office or business office.”

The Honorable Brenda Stacey, Judge, Division IV, denied the Director’s motion to transfer venue, holding that section 536.050.1, RSMo., the more specific statute, provides that “venue is proper in both Cole County and Jefferson County,” and Jeff. Co. 911 “chose Jefferson County.” *Relator’s Index, Exhibit A, Order, Case No. 18JE-CC00805, p. 2*. In its Answer/Return, Jeff. Co. 911 states the Trial Court “ruled that venue was proper in Jefferson County essentially determining that” an email sent by a Department of Revenue employee to a Department of Public Safety employee interpreting certain statutes “constituted a rule, which was regulatory in nature.” *Answer/Return at 2*. Jeff. Co. 911 believes that venue attaches because of this email.

A petition for writ of prohibition was filed in the Missouri Court of Appeals, Eastern District, but that court denied the writ on March 20, 2019. *Relator’s Index, Exhibit E, Order, Case No. ED107654, p. 20*. This writ action follows.

POINT RELIED ON

- I. Relator is entitled to an order prohibiting Respondent from doing anything other than vacating the order denying Relator's motion for change of venue and issuing an order sustaining said motion, because venue is improper in Jefferson County, in that venue is controlled by section 508.010.2, RSMo., and lies in Cole County where there is no averment in the petition that challenges any promulgated rule.

Section 508.010.2, RSMo.

Edwards v. Gerstein, 237 S.W.3d 580 (Mo. banc 2007).

Missouri Assn. of Nurse Anesthetists, Inc. v. St. Bd. of Registration for Healing Arts, 343 S.W.3d 348 (Mo. banc 2011).

United Pharmacal Co. of Mo. Inc. v. Mo. Bd. of Pharm., 159 S.W.3d 361 (Mo. banc 2005).

ARGUMENT

- I. Relator is entitled to an order prohibiting Respondent from doing anything other than vacating the order denying Relator’s motion for change of venue and issuing an order sustaining said motion, because venue is improper in Jefferson County, in that venue is controlled by section 508.010.2, RSMo., and lies in Cole County where there is no averment in the petition that challenges any promulgated rule.**

A writ should issue in this case because the law is clear—“venue in ‘actions against state executive department heads [lies] only . . . in the county where their offices are located and their principal official duties are performed.’” *Edwards v. Gerstein*, 237 S.W.3d 580, 583-84 (Mo. banc 2007), quoting *State ex rel. Spradling v. Bondurant*, 501 S.W.2d 527, 529 (Mo. App. K.C. 1973). The offices and principal official duties of the Director of the Department of Revenue—the only defendant in the case—are in Cole County and, as such, the Director was improperly denied a change of venue to Cole County.

Despite Missouri statute and controlling case law from this Court, the Circuit Court of Jefferson County erroneously concluded that venue was proper under a statute giving venue for certain declaratory judgements “respecting

the validity of rules, or of threatened applications thereof.” *Exhibit A*, p. 2 (holding venue proper in either Jefferson County or Cole County under section 536.050.1, RSMo.). The Circuit Court did this despite the fact that the petition has no averment challenging the validity of any promulgated rule, a clear and well-established requirement of section 536.050.

This cannot be permitted to stand, otherwise state department heads could be sued in all 114 counties in Missouri and the City of St. Louis. A writ of prohibition is the appropriate remedy to correct a court’s failure to transfer to the proper venue. *See, e.g., State ex rel. Hawley v. Midkiff*, 543 S.W.3d 604, 607-08 (Mo. banc 2018).

A. Standard of Review

“A writ of prohibition is appropriate where there is an important question of law decided erroneously that would otherwise escape review by this Court and the aggrieved party may suffer considerable hardship and expense as a consequence of the decision.” *State ex rel. Wolfrum v. Wiseman*, 225 S.W.3d 409, 411 (Mo. banc 2007). “The essential function of prohibition is to confine an inferior court within its proper jurisdiction and prevent it from acting without or in excess of its rightful jurisdiction.” *State ex rel. Allen v. Yeaman*, 440 S.W.2d 138, 145 (Mo. App. K.C. 1969) (citations omitted).

Missouri’s appellate courts “will issue a writ to: (1) prevent a usurpation of judicial power when the court lacks authority or jurisdiction; (2) remedy an

excess of authority or jurisdiction where the court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not granted.” *State ex rel. Waack v. Thornhill*, 515 S.W.3d 839, 841 (Mo. App. E.D. 2017).

“Lack of venue is a defect of a jurisdictional nature which authorizes issuance of prohibition.” *Bondurant*, 501 S.W.2d at 529 (citations omitted). Indeed, a writ of prohibition is the appropriate remedy to correct a court’s failure to transfer to the proper venue. *Midkiff*, 543 S.W.3d at 607-08.

**B. Venue for suits against state executive department heads
in their official capacity is only in Cole County under
section 508.010.2, RSMo.**

“Venue is determined solely by statute.” *Edwards*, 237 S.W.3d at 583-84, citing *State ex rel. BJC Health System v. Neill*, 121 S.W.3d 528, 529 (Mo. banc 2003). Section 508.010.2, which is Missouri’s general venue statute, states in relevant part:

In all actions in which there is no count alleging a tort, venue shall be determined as follows:

(1) When the defendant is a resident of the state, either in the county within which the defendant resides, or in the county within which the plaintiff resides, and the defendant may be found[.]

Jeff. Co. 911 has not alleged a tort. As Jeff. Co. 911’s action relates to declarations regarding a statute and injunctive relief, and because the sole

defendant in the suit is the Director of the Department of Revenue, venue is appropriate only in Cole County under the general venue statute. Despite the Circuit Court's ruling, there is no special venue statute that applies.

Applicable case law supports this view. This Court has held that “when a state agency is the sole defendant and there is no otherwise applicable special venue statute,” section 508.010.2(1) “applies and renders Cole County as the only proper venue.” *Edwards*, 237 S.W.3d at 583, citing *State ex rel. Mo. Dept. of Nat. Resources v. Roper*, 824 S.W.2d 901, 903 (Mo. banc 1992). This rationale applies to actions against not only departments but also state executive department heads. *Id.* at 583-84.

“Venue of actions against executive heads of departments of state government lies in the county in which their offices are located and their principal official duties are performed absent statutes authorizing other suit to be brought in other locales.” *Robinson v. Dir. of Revenue*, 32 S.W.3d 148, 153 (Mo. App. S.D. 2000). Both the Director and the Department of Revenue's principal offices are located in Jefferson City, which is located in Cole County. MO. CONST. art. IV, §§ 12 & 20; §32.040, RSMo. Venue for an action against the Director of the Department of Revenue is thus proper only in Cole County. *Robinson*, 32 S.W.3d at 153; *Payless Pharmacy, Inc. v. Hoffert*, 589 S.W.2d 623, 625 (Mo. App. E.D. 1979); *Bondurant*, 501 S.W.2d at 529.

C. Section 536.050 is not applicable in this matter as there is no averment within the petition that challenges the legitimacy or application of a promulgated rule.

Plaintiff brought its action in the Jefferson County Circuit Court seeking an injunction and declaratory judgment as to a statute. However, the special venue provision within section 536.050.1 is only applicable when a circuit court is addressing a promulgated rule. It provides:

The power of the courts of this state to render declaratory judgments shall extend to declaratory judgments respecting the validity of rules, or of threatened applications thereof, and such suits may be maintained against agencies whether or not the plaintiff has first requested the agency to pass upon the question presented. ***The venue of such suits against agencies shall, at the option of the plaintiff, be in the circuit court of Cole County, or in the county of the plaintiff's residence, or if the plaintiff is a corporation, domestic or foreign, having a registered office or business office in this state, in the county of such registered office or business office.*** Nothing herein contained shall be construed as a limitation on the declaratory or other relief which the courts might grant in the absence of this section.

Section 536.050.1 (emphasis added).

This Court has held that “[w]ithout promulgation of an administrative rule, section 536.050.1 cannot support venue to dispute the validity of a rule. There simply cannot be a suit regarding an administrative rule’s statutory authority, conflict with state law, or arbitrary and capriciousness when there was never a rule promulgated or an attempt to promulgate a rule.” *United*

Pharmacal Co. v. Mo. Bd. of Pharm., 159 S.W.3d 361, 366 (Mo. banc 2005). Put simply, as there was no promulgated rule, section 536.050 cannot be the basis for the venue determination.

This Court has held that “the provisions of section 536.050 only apply if a plaintiff can plead and establish specific facts that a promulgated rule was the basis of the agency’s action.” *Mo. Assn. of Nurse Anesthetists, Inc. v. St. Bd. of Registration for Healing Arts*, 343 S.W.3d 348, 353 (Mo. banc 2011). Plaintiff has not pled and cannot show that the agency’s alleged actions were based upon a promulgated rule. Because Jeff. Co. 911’s petition does not seek a declaration as to, or even reference anything related to, a promulgated rule, the circuit court incorrectly applied the special venue provision within section 536.050.

In its Answer/Return, Jeff. Co. 911 states that “the Trial Court ruled that venue was proper in Jefferson County essentially determining that the e-mail produced by the Department on or about October 4, 2018 constituted a rule, which was regulatory in nature.” *Answer/Return at 2*. This is a reference to an e-mail sent from a DOR employee to an employee of the Department of Public Safety. *Exhibit B, p. 12*. Jeff. Co. 911 is arguing that, because of this email, the Department “took an additional step, which was regulatory in nature,” thus making section 536.050 “the controlling venue statute.” *Answer/Return at 3*.

However, such a conclusion makes little sense. Emails are obviously not promulgated administrative rules. Jeff. Co. 911 points to no authority showing how Missouri's venue statutes shift based on the mere sending of an email. More importantly, such an argument is contrary to the well-established case law of this court. Where "it is undisputed that . . . there is no promulgated rule at issue . . . or at least a rule that purports to have been promulgated, section 536.050 is not applicable." *Missouri Assn. of Nurse Anesthetists*, 343 S.W.3d at 353.

This case bears striking similarity to *United Pharmacal Co. v. Mo. Bd. of Pharm.*, 159 S.W.3d 361, 366 (Mo. banc 2005). There, an animal-drug seller brought a declaratory judgment action after the Board of Pharmacy issued a cease-and-desist order and posted answers to frequently asked questions ("FAQ") on its website interpreting certain statutes. *Id.* at 363-64. Holding that the FAQ was not a rule, this Court explained that "[n]ot everything that is written or published by an agency constitutes an administrative rule." *Id.* at 365. Noting that there was no attempt by the Board to go through the formal process of promulgating a rule, this Court said that "[w]ithout ***promulgation of an administrative rule***, section 536.050.1 cannot support venue to dispute the validity of a rule." *Id.* at 366 (emphasis added).

This Court in *United Pharmacal* further clarified that even the threatened application language of 536.050 presupposes the existence of a rule.

This Court said:

Pharmacal cannot generate venue under section 536.050.1 “by mere allegation” that the board’s [cease-and-desist] letter was sent pursuant to an administrative rule. It must plead and establish specific facts that a promulgated rule was the basis of the board’s action. The specific authority relied upon by the board for its action here, however, was not a rule, but a state statute. Pharmacal has pleaded no facts that show that the threatened action against it was pursuant to any promulgated rule. Section 536.050.1 cannot provide venue in the absence of an application of a rule or on the mere allegation of such an application.

Id. at 367. Just as a cease-and-desist letter and FAQ cannot support venue, neither can an email. Without a rule or purported rule, section 536.050 cannot be the basis for the venue determination.

Where the circuit court has determined venue based upon section 536.050 and there is no allegation of a promulgated rule, that court has exceeded its authority, and this Court should issue a permanent writ. “Lack of venue is a defect . . . which authorizes issuance of prohibition.” *Bondurant*, 501 S.W.2d at 529. “[The Court] will issue a writ to: (1) prevent a usurpation of judicial power when the court lacks authority or jurisdiction; (2) remedy an excess of authority or jurisdiction where the court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not granted.” *Thornhill*, 515 S.W.3d at 841.

CONCLUSION

For the foregoing reasons, the Director of the Department of Revenue requests this Court make permanent its preliminary writ prohibiting the Jefferson County circuit court from further proceeding or attempting to exercise jurisdiction over this matter and to order the matter be transferred to Cole County circuit court, where venue is proper.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that, on June 5, 2019, a copy of the foregoing brief was filed through the Missouri CaseNet e-filing system, which will send notice to all counsel of record. I further certify that the attached brief complies with the limitations contained in Supreme Court Rule 84.06 and contains 2,660 words as calculated pursuant to the requirements of Supreme Court Rule 84.06 as determined by Microsoft Word 2010 software.

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