

SC98323

IN THE MISSOURI SUPREME COURT

STATE EX REL. VACATION MANAGEMENT SOLUTIONS, LLC

Relator,

vs.

HON. JOAN L. MORIARTY

Respondent.

Writ of *Mandamus*

RELATOR'S OPENING BRIEF

/s/ Ben Scrivner

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**RELATOR IS ENTITLED TO A PERMANENT WRIT MANDAMUSING
RESPONDENT TO TRANSFER CASE NUMBER 1922-CC00925 FROM ST.
LOUIS CITY TO ST. CHARLES COUNTY OR WARREN COUNTY BECAUSE
VENUE IS IMPROPER IN ST. LOUIS CITY, AS SUCH RESPONDENT ABUSES
HER DISCRETION BECAUSE SHE EVADES A POSITIVE DUTY ENJOINED BY
LAW TO TRANSFER THE CASE, IN THAT PLAINTIFF DID NOT FILE A
REPLY TO RELATOR’S TIMELY MOTION TO TRANSFER FOR IMPROPER
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ITS FILING, AND THE MOTION IS DEEMED GRANTED BY OPERATION OF
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STATEMENT OF JURISDICTION

1) The action is one involving questions as to the powers and duties of the Respondent in the premises and as to the proper functions and office of *mandamus*; therefore, this Court has authority to issue and determine an original writ in this case. Article V, section 4, subsection 1 of the Missouri Constitution provides that “[t]he supreme court shall have general superintending control over all courts and tribunals. Each district of the court of appeals shall have general superintending control over all courts and tribunals in its jurisdiction. The supreme court and districts of the court of appeals may issue and determine original remedial writs.”¹

¹ See Appendix to Relator’s Opening Brief (hereinafter “Appx.”) at page 8.

POINT RELIED ON

2) Relator is entitled to a permanent writ mandamus using Respondent to transfer case number 1922-CC00925 from St. Louis City to St. Charles County or Warren County because venue is improper in St. Louis City, as such Respondent abuses her discretion because she evades a positive duty enjoined by law to transfer the case, in that Plaintiff did not file a reply to Relator's timely motion to transfer for improper venue, Respondent did not deny the motion within 90 days of it being filed, and the motion is deemed granted by operation of law.

Lemay Fire Protection Dist. v. St. Louis County, 340 S.W.3d 292 (Mo. App. E.D. 2011)

State ex rel. Kansas City S. Ry. Co. v. Nixon, 282 S.W.3d 363 (Mo. banc 2009)

State ex rel. Prater v. Brown, 572 S.W.3d 94 (Mo. 2019)

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Section 347.069 R.S.MO

Section 508.010 R.S.MO

RULE 51.045

RULE 55.09

STATEMENT OF FACTS

3) Plaintiff Kyle Klosterman is an individual citizen who alleges to reside in St. Louis City, Missouri.²

4) Relator Vacation Management Solutions, LLC, is a limited liability company organized and existing under the laws of the state of Missouri, with registered agent in St. Charles, Missouri.³

5) Respondent Joan L. Moriarty is a circuit judge sitting in Division 20 of the 22nd Judicial Circuit Court of the City of St. Louis, Missouri.⁴

6) On May 7, 2019, Plaintiff filed a one-count petition against Relator (*qua* Defendant) in the 22nd Judicial Circuit Court of the City of St. Louis, alleging violation of the Missouri Merchandising Practices Act.⁵

7) Relator (*qua* Defendant) filed a motion to transfer for improper venue on June 17, 2019, seeking transfer of the case to either St. Charles County or Warren County.⁶

8) Respondent did not enter an order denying Relator's motion.⁷

9) Plaintiff did not file a reply to Relator's motion.⁸

² See Relator's Petition, ¶ 15; Plaintiff's Return, ¶ 15.

³ See Relator's Petition, ¶ 16; Plaintiff's Return, ¶ 16.

⁴ See Relator's Petition, ¶ 17; Plaintiff's Return, ¶ 17.

⁵ See Relator's Petition, ¶ 18; Plaintiff's Return, ¶ 18.

⁶ See Relator's Petition, ¶ 23; Plaintiff's Return, ¶ 23.

⁷ See Relator's Petition, ¶ 27; Plaintiff's Return, ¶ 27.

⁸ See Relator's Petition, ¶¶ 24, 25; Plaintiff's Return, ¶¶ 24, 25.

ARGUMENT

INTRODUCTION

10) Relator seeks a permanent writ mandamus Respondent Honorable Joan L. Moriarty to transfer St. Louis City Circuit Court Case Number 1922-CC00925 to St. Charles County or Warren county.

11) From a case originally filed in the 22nd Judicial Circuit Court of Missouri, Relator (*qua* Defendant) filed a timely motion for transfer of venue. This provided Respondent and Plaintiff with an opportunity to address the issue of venue, and it preserved the error for appellate review. Plaintiff did not file a reply, nor did Respondent enter an order denying the motion within 90 days of it being filed. The motion is thus deemed granted by operation of law. Therefore, Respondent is in default of her ministerial duty to transfer venue and it is an abuse of discretion to evade the positive duty to act accordingly.

12) Relator sought extraordinary relief in the Missouri Court of Appeals, Eastern District, in Case Number ED108560. This preserved claim of error for further review. The Court of Appeals denied relief on January 16, 2020.

13) Upon application of Relator Vacation Management Solutions, LLC, this Court issued a Preliminary Writ of Mandamus on January 27, 2020.

14) At the Court's direction, Relator submits this brief and prays the Court make its Preliminary Writ permanent and absolute.

STANDARD OF REVIEW

15) The standard of review for writs of mandamus and prohibition, including those pertaining to motions to transfer venue, is abuse of discretion, and an abuse of discretion occurs where the circuit court fails to follow the applicable law. *State ex rel. Trans World Airlines, Inc. v. Dowd*, 158 S.W.3d 232, 233[1] (Mo. banc 2005).

POINT RELIED ON

16) Relator is entitled to a permanent writ mandamus using Respondent to transfer case number 1922-CC00925 from St. Louis City to St. Charles County or Warren County because venue is improper in St. Louis City, as such Respondent abuses her discretion because she evades a positive duty enjoined by law to transfer the case, in that Plaintiff did not file a reply to Relator's timely motion to transfer for improper venue, Respondent did not deny the motion within 90 days of it being filed, and the motion is deemed granted by operation of law.

RESPONDENT HAS A MINISTERIAL DUTY TO TRANSFER CASES

17) "A writ of mandamus is issued to compel the performance of a ministerial duty that one charged with the duty has refused to perform." *Lemay Fire Protection Dist. v. St. Louis County*, 340 S.W.3d 292, 294 (Mo. App. E.D. 2011) (internal citations omitted).

18) Though not a jurisdictional requirement, trial courts do have a ministerial duty to transfer cases to correct venues. *State ex rel. Kansas City S. Ry. Co. v. Nixon*, 282 S.W.3d 363, 365 (Mo. banc 2009).

RELATOR HAS AN UNEQUIVOCAL RIGHT TO PROPER VENUE

19) "The relator seeking mandamus must allege that he has a clear, unequivocal, specific right to a thing claims." *Lemay Fire Protection Dist.*, 340 S.W.3d at 294[5]. "Mandamus may not be used to establish a legal right; it may only be used to compel performance of a right that already exists." *Id.* "The writ's purpose is to execute, not adjudicate." *Lemay Fire Protection Dist.*, 340 S.W.3d at 294[6].

20) To determine whether Relator’s right to mandamus is clearly established and presently existing, the Court examines the statute under which Relator has claimed a right. *Lemay Fire Protection Dist.*, 340 S.W.3d at 294[7].

21) Relator claims a right to transfer of the underlying case for improper venue and “[v]enue is determined by rule or statute.” *State ex rel. Prater v. Brown*, 572 S.W.3d 94, 95 (Mo. 2019).

22) Section 347.069.2 R.S.MO. provides that “[p]roceedings against a limited liability company shall be commenced either in the county where the cause of action accrued or in any county where such limited liability company shall have or usually keep an office or agent for the transaction of its usual and customary business, or in the county in which the office of the registered agent of the limited liability company is maintained.”⁹

23) Venue is proper in this case in St. Charles County pursuant to section 347.069.2 R.S.MO.¹⁰ because Relator is a limited liability company with registered agent in St. Charles County.¹¹

24) Venue is also proper in Warren County pursuant to section 347.069.2 R.S.MO.,¹² in that the alleged cause of action would have accrued in Warren County.

⁹ See Appx. at page 4.

¹⁰ See Appx. at page 4.

¹¹ *Supra.* ¶ 4.

¹² See Appx. at page 4.

MANDAMUS ENFORCES THE RIGHT TO PROPER VENUE

25) “It is well established that this Court accepts the use of an extraordinary writ to correct improper venue decisions of the circuit court before trial and judgment.” *Prater*, 572 S.W.3d at 95. “Mandamus is appropriate if the circuit court fails to perform its ministerial duty to transfer a case from an improper venue to a proper venue.” *Id.*¹³

26) When an action is filed in the wrong venue, a defendant may file a motion to transfer venue within 60 days of being served. RULE 51.045(a).¹⁴

27) Any party opposing such motion may reply, or request an extension, within 30 days. RULE 51.045(b).¹⁵

28) If no reply is timely filed, it is the duty of the court to transfer the case to a county specified in the motion to transfer. RULE 51.045(c)¹⁶ (“*shall* order transfer”) (emphasis added).¹⁷

29) A motion to transfer based upon a claim of improper venue that is not denied within 90 days of filing, absent a written waiver, “*shall* be deemed granted.” § 508.010.10 R.S.MO. (emphasis added).¹⁸

¹³ See also, *State ex rel. Kelleher v. St. Louis Public Schools*, 35 S.W. 617, 619–620 (Mo. 1896) (*mandamus* can require a public officer to do an act for which there is duty to perform).

¹⁴ See Appx. at page 1.

¹⁵ See Appx. at page 1.

¹⁶ See Appx. at page 1.

¹⁷ See also, *State ex rel. The Grand River Health System Corp. v. Williamson*, 240 S.W.3d 172, 174-75 (Mo. App. W.D. 2007) (holding that plaintiff’s right to court access was not violated when the court transferred venue after plaintiff failed to timely reply to a motion to transfer).

¹⁸ See Appx. at page 7.

30) Courts interpret Supreme Court Rules by applying principles similar to those used for state statutes. *State ex rel. Vee-Jay Contracting Co. v. Neill*, 89 S.W.3d 470, 471–72 (Mo. banc 2002). This Court's intent is determined by considering the plain and ordinary meaning of the words in the Rule. *Id.*

31) With the language of RULE 51.045 so explicit and unambiguous and its meaning so clear and unmistakable, there is neither reason nor room for judicial construction; and, there is nothing in RULE 51.045 which would indicate a legislative intent that the non-technical and commonplace language hereinbefore quoted from the cited rule should be construed otherwise than in its natural, plain and ordinary sense and meaning, or which would afford any legislative basis for refusal to accept and apply that language honestly and faithfully.¹⁹

32) The plain and ordinary meaning of RULE 51.045 mandates that a judge transfers a case to an identified proper venue if the opposing party does not reply to a timely motion for transfer of venue. *State ex rel. Vee-Jay Contracting Co.*, 89 S.W.3d at 472. This is but an application of the general rule that failure to file a reply admits the allegations of the preceding pleading. *Id.* RULE 55.09.²⁰

RESPONDENT REFUSES TO PERFORM MINISTERIAL DUTY

33) Respondent abuses her discretion by failing to heed two procedural imperatives which require Respondent to grant Relator's motion to transfer.

¹⁹ See Appx. at page 1.

²⁰ See Appx. at pages 1 and 3.

34) First, RULE 51.045 mandates that a court transfer venue to the county specified in the transfer motion when an opposing party fails to file a reply or seek an extension of time within 30 days. RULE 51.045(c).²¹

35) Second, § 508.010.10 R.S.MO. states that a motion to transfer for improper venue “shall be deemed granted” if it is not denied by a court within 90 days.²²

36) Here, Plaintiff did not file a reply within 30 days, and Respondent did not deny the motion within 90 days.

FUNCTIONS AND OFFICE OF *MANDAMUS*

37) When the law enjoins the performance of a specific act, obedience to the law may be enforced by *mandamus*. The writ of *mandamus* does not create any new authority, or confer power which did not previously exist; its proper function being to set in motion and to compel action with reference to previous and clearly-defined duties; and, to warrant the Court in granting a writ, such a state of facts must be presented as to show that Relator has a clear right to the performance of the thing demanded, and that a corresponding duty is imposed on Respondent for which Respondent is derelict in default.

²¹ See Appx. at page 1.

²² See Appx. at page 7.

CONCLUSION

38) Relator proves through court records the requisite facts to justify issuance of a permanent writ of *mandamus*. Respondent had a positive duty to sustain Relator's timely-filed motion to transfer for improper venue because Plaintiff failed to file a reply and Respondent did not deny the motion. Tested by these rules and authorities, the Court must conclude that, under the facts of this case, it was the duty of Respondent, under the law, to transfer the case to a correct venue as identified in Relator's motion.

39) Having demonstrated Respondent abuses her discretion in failing to follow the applicable law, the preliminary writ should be made permanent.

WHEREFORE, Relator prays the Court enter its permanent writ mandamus Respondent to transfer the case to St. Charles County or Warren County; and, for such other and further relief as the Court deems just and proper in the premises.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned, pursuant to Rules 55.03 and 84.06(c) hereby represents and states to the court that Relator's Brief in this matter complies with the Rules to the best of counsel's information and belief in that:

1. Relator's brief conforms and does not exceed the court's word count, line count, and page count parameters in that it contains a total of 3,249 words and 311 lines in double spaced, word searchable PDF format and 13 pages, excluding cover, certificate of service, certificate of compliance, signature block, and appendix.
2. Relator's claim, defense, request, demand, objection, contention, or argument is not presented or maintained for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
3. Relator's claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
4. Relator's allegations and other factual contentions have evidentiary support or, if so specifically identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and,
5. Relator's denials of factual contentions are warranted on the evidence or, if so specifically identified, are reasonably based on a lack of information or belief
6. Relator's Brief is in compliance with Rule 84.06(b).
7. Relator's Brief and Appendix are served *via* Rule 103.08.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was served upon all parties of record through the electronic filing system as provided in Rule 103.08.

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