

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 REPLY BRIEF

/s/ Ben Scrivner

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ARGUMENT

INTRODUCTION

1) From a case originally filed in the 22nd Judicial Circuit Court of Missouri, Relator (*qua* Defendant) filed a timely motion to transfer for improper venue. Plaintiff did not file a reply; Respondent Honorable Judge Moriarty did not deny the motion within 90 days of filing; thus, the motion is deemed to be granted by operation of law. Therefore, Respondent is in default of her ministerial duty to transfer the case and it is an abuse of judicial discretion to refuse transfer.

2) Relator sought transfer of the case to either St. Charles County or Warren County because of the location of Relator's registered agent and situs of residential rental property in the village of Innsbrook, respectively.

3) This Court issued a preliminary writ of mandamus directed to Respondent. Plaintiff moved to quash, Relator filed suggestions in opposition, and the motion to quash was overruled. Relator filed its opening brief; Plaintiff filed a brief on behalf of Respondent; and, Relator hereby files its reply brief.

4) This Court should make its preliminary ruling permanent and mandamus Respondent to transfer the case to either St. Charles County or Warren County because Respondent was mandated to order transfer upon Plaintiff's failure to file a timely reply under RULE 51.045 and no denial of the motion within 90 days of its filing. (Appx. 3).

5) The remaining issue: whether to transfer to St. Charles or Warren County?

MATERIAL FACTS

6) Plaintiff Kyle Klosterman is an individual citizen who alleges to reside in the City of St. Louis, Missouri.¹

7) 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 the county of St. Charles, Missouri.²

8) 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.³

9) 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.⁴

10) 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.⁵

11) Respondent did not deny the motion within 90 days of its filing.⁶

12) Plaintiff never filed a reply to the motion.⁷

¹ See Relator's Petition, ¶ 15; Plaintiff's Return, ¶ 15.

² See Relator's Petition, ¶ 16; Plaintiff's Return, ¶ 16.

³ See Relator's Petition, ¶ 17; Plaintiff's Return, ¶ 17.

⁴ See Relator's Petition, ¶ 18; Plaintiff's Return, ¶ 18.

⁵ See Relator's Petition, ¶ 23; Plaintiff's Return, ¶ 23.

⁶ See Relator's Petition, ¶ 27; Plaintiff's Return, ¶ 27.

⁷ See Relator's Petition, ¶¶ 24, 25; Plaintiff's Return, ¶¶ 24, 25.

QUESTIONS PRESENTED

- 13) This writ turns on the interpretation and application of RULE 51.045 and Section 508.010, R.S.MO. (Appx. 3, 6).
- 14) Two questions presented are:
- (1) Whether the plain language of Supreme Court RULE 51.045(c) requires that venue be transferred if a reply to a motion to transfer is not filed nor an extension granted within 30 days? (Appx. 3).
 - (2) Whether § 508.010.10 R.S.MO.'s requirement that motions to transfer for improper venue "shall be deemed granted if not denied within ninety days" of filing is applied literally? (Appx. 6).
- 15) Plaintiff failed to file a timely reply to the motion to transfer or to obtain an extension within the 30-day response period.
- 16) This left Respondent with no discretion under Rule 51.045 but to grant Relator's motion. *See* RULE 51.045(c) ("If no reply is filed, the court shall order transfer to one of the counties specified in the motion"). (Appx. 3).
- 17) Under the plain language of § 508.010.10 R.S.MO., the absence of a ruling on Relator's motion within 90 days of filing also left Respondent with no discretion but to grant the requested transfer. (Appx. 6).

I. LOCAL RULE 33.7.2 DOES NOT REQUIRE ORAL ARGUMENT

18) Local Rule 33.7.2 for the circuit court of St. Louis City directs *where* motions are heard but does not mandate that motions proceed by oral argument.

19) The only requirements for a proper motion to transfer for improper venue are the motion must be filed within 60 days of service, identify one or more counties in which venue is proper, and state a basis for venue in each county. RULE 51.045. (Appx. 3).

20) Oral argument not being a requirement, lack thereof is not grounds to refuse transfer.

21) Plaintiff has cited this Court to no authority which requires a trial court to set argument on a motion to transfer for improper venue before it *denies* the motion. Respondent could have denied the motion within the 90-day period but having not done so, the motion was deemed granted by operation of law.

22) This logic is similarly applied in the context of after-trial motions being automatically overruled in this manner upon the expiration of a ninety-day period. *See, e.g., Nichols v. Bossert*, 727 S.W.2d 211, 214[5] (Mo. App. E.D. 1987) (finding no error in denying the after-trial motion to amend the judgment without oral argument prior to the expiration of the ninety-day period).

23) Clearly, no oral argument is required before a motion to transfer for improper venue can be deemed granted in this manner.

24) Since the trial court was not required to take any actions with respect to the motion in order for it to be deemed granted under the 90-day rule, it cannot be said Respondent would err by transferring the case without having heard oral argument.

25) The St. Louis City case cited by Respondent is distinguishable from this case and is of doubtful precedential value in general. The court stated that Defendant “Osborn & Barr are Missouri corporations with their headquarters, principal places of business, and registered agents in the City of St. Louis.” *Peterson, et al. v. Monsanto Company, et al.*, City of St. Louis Case No. 1622-CC01071, *3 (Jun. 3, 2019). Discussion of Local Rules was merely dicta in that it was not essential to the court’s decision.

26) In the seventh paragraph of its first argument, Respondent (*qua* Plaintiff) quotes from *Lincoln Credit Co. v. Peach*, 636 S.W.2d 31 (Mo. banc 1982) to argue that Respondent (*qua* Respondent) had no opportunity to rule on the motion to transfer for improper venue. Respondent’s reliance is misplaced; the requirement to present a constitutional challenge at the first opportunity has no application to the instant matter because Relator (*qua* Defendant) moved to transfer for improper venue at the first opportunity and a motion to transfer for improper venue is not a constitutional challenge.

27) On an appeal from a failed challenge to a statute prohibiting the arrangement of credit in amount of \$1,000 or less when the proceeds are intended to be used by the borrower primarily for personal, family or household purposes, this Court held that: (1) the statute is not an *ex post facto* law; (2) it did not deprive plaintiff of equal protection; and (3) it is not vague nor unconstitutional as a special law. *Lincoln*, 636 S.W.2d at 35.

28) In so holding, this Court refused to entertain arguments regarding the unconstitutional vagueness of certain other phrases in the statute because those arguments were not presented to the lower court.

II. PLAINTIFF WAIVED ARGUMENT THAT VENUE IS PROPER IN ST. LOUIS CITY

29) With regard to the issue of proper venue, it is necessary to address the lack of a reply by Plaintiff to the motion to transfer for improper venue.

30) Respondent was mandated to grant transfer upon Plaintiff's failure to file a reply under RULE 51.045. (Appx. 3).

31) The rule requires that a reply be filed within thirty days, and "if no reply is filed, the court shall order transfer to one of the counties specified in the motion." See RULE 51.045(a) and (c). (Appx. 3).

32) When a party moves to transfer the case on the basis of venue, the plaintiff has the burden of showing that venue is proper. See, e.g., *Igoe v. Department of Labor & Industrial Relations of State of Missouri*, 152 S.W.3d 284, 288 (Mo. banc 2005) ("The procedure for challenging venue is now expressed in RULE 51.045, but the burden of showing that venue is proper always has been with the plaintiff when venue is challenged."). (Appx. 3).

33) Thus, the Plaintiff in a reply to the motion to transfer "shall state the basis for venue in the forum or state reasons why venue is not proper in one or more counties specified by the movant." RULE 51.045(b). "The court *shall not consider any basis not stated in the reply.*" RULE 51.045(b) (emphasis added). (Appx. 3).

34) Plaintiff claims *now* in this Court that St. Louis City is the proper venue.

35) But Plaintiff's failure to assert that as a reason why venue in St. Charles County or Warren County is improper *in a timely reply* means that it is not a reason that

can be considered. *See* RULE 51.045(b); *see State ex rel. Trans World Airlines, Inc. v. David*, 158 S.W.3d 232, 234 (Mo. *banc* 2005) (where motion for transfer asserted facts showing that chosen venue was improper and reply “did not dispute or even address” those facts, the court deemed the facts undisputed). (Appx. 3).

III. DEFENDANT DID NOT WAIVE THE 90-DAY DEADLINE

36) Plaintiff makes the ludicrous argument that, by signing a docket sheet, counsel for Defendant expressly waived the 90-day time period set forth in section 508.010.10 R.S.MO. There is no explicit reference to waiver on any docket sheet, thus no intentional relinquishment of a right. (Appx. 3, 6).

CONCLUSION

37) The Plaintiff does not contend that it was precluded from filing a reply to Defendant's motion nor otherwise claim that RULE 51.045 imposes an undue procedural burden upon a litigant engaged in a disputed motion for transfer of venue by requiring a timely reply. (Appx. 3).

38) Likewise, the record does not show any request by Plaintiff for an oral presentation against the motion to transfer for improper venue.

39) Plaintiff had ample opportunity to file a reply. Plaintiff had thirty days to file a reply or request an extension of time to reply.

40) On Plaintiff's failure to do so the court was authorized to rule on the motions. When the court did not deny the motion within 90 days of its filing, the court in effect granted the motion without specifying to which county the case would be transferred.

41) As far as Plaintiff's "threshold showing" argument, an earlier version of RULE 51.045 included language that a motion to transfer may be filed within 60 days after an action is brought "*in a court where venue is improper.*"⁸

42) Based on that language, this Court held that even when there was not a timely reply, a circuit court had to determine whether the moving party made a "threshold

⁸ Nowhere in Plaintiff's brief is there any mention of this Court's change to the language of RULE 51.045 in 2012. This is significant to the extent that Plaintiff relies heavily on *State ex rel. Jennings v. Riley*, 236 S.W.3d 630 (Mo. banc 2007) to support its arguments. This Court has the opportunity to expressly disavow the holding of *Jennings* to ensure future compliance with RULE 51.045 in its current form.

showing” that the action was brought in an improper venue. *State ex rel. Jennings v. Riley*, 226 S.W.3d 630, 632 (Mo. banc 2007).

43) Five years after the *Jennings* decision, this Court amended RULE 51.045 effective January 1, 2012. (Appx. 3).

44) The current Rule no longer contains the language relied on by *Jennings* to support its conclusion that a party must make a threshold showing of improper venue in a motion to transfer. The Rule now allows for the filing of “[a]ny motion to transfer venue alleging improper venue.” RULE 51.045(a). RULE 51.045(c) goes on to provide that if “no reply is filed” the court “shall order transfer” of venue. *Id.* (Appx. 3).

45) This Court should make clear that under the 2012 amendments, which appear to have been designed to further streamline the transfer process, the holding in *Jennings* no longer controls.

46) Under the current language of RULE 51.045, improper venue must simply be alleged, and circuit courts no longer have the discretion to *sua sponte* engage in a venue analysis when there is no timely reply. (Appx. 3).

47) Therefore, Respondent had no discretion to take any action other than to transfer the matter to either of the counties specified in Relator’s motion.

48) Consistent with RULE 51.045’s manifest purpose to resolve venue disputes early and efficiently, the Rule’s filing deadlines should be enforced as written. In the absence of a timely reply to a motion to transfer venue—by filing within 30 days or obtaining an extension during that period—the circuit court “*shall order transfer*” to a county specified in the motion. RULE 51.045(c) (emphasis added). Respondent’s failure to

enforce the time limitations of RULE 51.045(c), therefore, was an abuse of discretion. (Appx. 3).

49) Plaintiff's arguments to the contrary must be rejected. The trial court did not rule on Defendant's motion within 90 days of its filing, and the language of section 508.010.10 is clear that it must therefore be deemed granted, and this case transferred to either St. Charles County or Warren County. (Appx. 6).

50) The application for change of venue was properly before the court for its judicial consideration and disposition. The trial court should have ruled on the application before proceeding to schedule the case for trial.

51) Plaintiff effectually tied its own hands by not filing a timely reply to Relator's motion to transfer for improper venue; Plaintiff could not lift a finger in a proceeding to determine proper venue at this point.

WHEREFORE, Relator prays the Court make permanent its preliminary writ mandamus Respondent to transfer the matter to either 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 Reply 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 3,459 words and 308 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.

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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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