

IN THE CIRCUIT COURT OF CLINTON COUNTY, MISSOURI

MICHAEL O'LOUGHLIN,)
)
 Plaintiff,)
)
 v.)
)
 ETEROUTREMER S.A., et al.,)
)
 Defendants.)

Case No. 08CN-CV00705

FILED

NOV 5 - 2009

MOLLY LIVINGSTON
Clerk of Clinton Co. Circuit Court

NATIONAL BEEF LEATHERS' REPLY TO
PLAINTIFF'S SUGGESTIONS IN RESPONSE TO ITS
APPLICATION FOR CHANGE OF VENUE

National Beef Leathers, LLC ("NBL") replies to Plaintiff's response to NBL's Application for Change of Venue as follows:

I. INTRODUCTION

Defendant NBL is entitled to a change of venue as matter of right under M.R.C.P. 51.03 (the "Rule"). Plaintiff argues Livingston County, located within the same judicial circuit as this Court, is neither equipped nor more convenient than Jackson County (or, alternatively, St. Louis City) to handle this and similar litigation. Plaintiff bases this argument on pure speculation that more than 100 similar claims may be filed against NBL and other Defendants. In contrast, the purpose of the Rule and its prior use in this circuit support a transfer of this case to Livingston County.

II. DISCUSSION

A. The Purpose Of The Rule Supports Transfer Within The 43rd Judicial Circuit To Livingston County.

The Supreme Court of Missouri recently explained the purpose of the Rule. In State ex rel. Lebanon School Dist. R-III v. Winfrey, 183 S.W.3d 232 (Mo. banc)(2006), the court noted the Rule addresses the problem when the selected venue becomes inappropriate due to the small number of persons in a county or other reasons. Id. at 237. The court then explained The Rule's purpose:

Allowing an automatic change of venue upon timely application thus saves judicial resources that would otherwise be spent in determining whether a party could get a fair trial in the county in light of the prejudice that may have arisen in a particular case due to publicity or familiarity with the parties or the issues involved. This avoids any potential unfairness yet protects the convenience of the remaining parties by expressly providing that the new venue must be convenient and by giving the parties input into the new location for trial.

Id. (citations omitted). Moreover, the court clarified that the Rule "does *not* permit the transfer of a case to counties 'all over the state.'" Id. at 236. The Rule limits the locations to another county convenient to the parties. Id. at 236-37. "Further, Rule 51.03 in no manner suggests that the transferee county must have more than 75,000 inhabitants, and indeed that is not the case." Id. at 237 (emphasis added). Contrary to the Missouri Supreme Court's explanation of the Rule, Plaintiff is attempting to thwart the Rule's purpose by arguing this case must go to Jackson County or St. Louis City, venues of more than 75,000. This is not the case.

B. Plaintiff Is Forum Shopping.

Plaintiff is attempting to circumvent Missouri's recent tort reform in Mo. Rev. Stat. § 508.010 (2009) that mandates that venue is only proper in the county of a plaintiff's first injury. Plaintiff seeks to "forum shop" and transfer this case to his desired location of Jackson County or St. Louis City. Citing State ex rel. Audrain Healthcare, Inc. v. Sutherland, 233 S.W.3d 217, Plaintiff argues a case venued in a county with less than 75,000 residents can be transferred to

another county under the Rule even though the first injury or exposure did not occur in that transferee county. This is correct. However, even the court in Audrain Healthcare, Inc. transferred that case under the Rule from Audrain County to Warren County, a county within the same judicial circuit and a county of less than 75,000 residents. See Id. at 218. Thus, there is no support to transfer this case from a county with less than 75,000 residents to a large, metropolitan county. Plaintiff's attempt to forum shop is in direct contrast to Missouri's recently revised venue statute, Mo. Rev. Stat. § 508.010 (2009).

Additionally, in considering the criminal counterpart to the Rule (Missouri Rule of Criminal Procedure 32.03 ("Rule 32.03")) in Moss v. State, 10 S.W.3d 508, 513 (Mo. 2000), the Supreme Court of Missouri noted these change of venue rules recognize that "a [party's] ability to secure a fair trial in small counties is often contested and affords the defendant the right to change venue as a matter of convenience." This case principally involves counties in Northwest Missouri and alleged conduct that occurred in Northwest Missouri. As such, the merits of this case should be decided by the residents of Northwest Missouri. Clinton, DeKalb, Andrew, and Buchanan Counties do not provide an appropriate and convenient alternative venue due to Plaintiff's allegations that harmful sludge was distributed in those counties. Moreover, Jackson, Clay, Cass, and Platte Counties are all metropolitan counties from which there has been significant adverse publicity that has originated out of Jackson County and other metropolitan area counties. Thus, those counties do not provide an appropriate and convenient alternative venue. A transfer of this case to Livingston County provides the most convenient alternative venue for this case.

C. The 43rd Judicial Circuit Has A Precedent Of Transferring Venue Under The Rule To Another County Within The Same Circuit.

The 43rd Judicial Circuit has a precedent of transferring cases under the Rule and its criminal counterpart to another county within the same judicial circuit. For example, in Thiel v. Miller, 164 S.W.3d 76, 79 (Mo. Ct. App. 2005), the plaintiffs filed a legal malpractice claim in the Circuit Court of DeKalb County. The court sustained an application under the Rule, and transferred the case to the Circuit Court of Daviess County. Id. at 80. Another example is seen in the criminal context in State ex rel. Davis v. Lewis, 893 S.W.2d 817 (Mo. 1995). In Davis, the defendant was arraigned in the Circuit Court of Daviess County and filed for a change of venue under Rule 32.03. Id. at 818. The court granted the motion and transferred the case to Livingston County. Id. Similarly here, transferring this case to Livingston County is the most appropriate and convenient decision.

D. The Key Factor In Considering A 51.03 Transfer Is Convenience Of The Parties.

The only consideration for the Court in its decision whether to transfer venue to Livingston County is the convenience of the parties. M.R.C.P. 51.03. Plaintiff's contention that Jackson County is better equipped than Livingston County to handle this case is irrelevant to the issue of convenience, and Plaintiff offers no support for his argument that the judges and staff of the Livingston County court are not fully capable of handling this case. Moreover, Plaintiff's cite to the Hyatt skywalk disaster as proof of Jackson County's ability to handle mass tort claims is also irrelevant to the issue of convenience, as that case involved a mass tort which occurred in Jackson County, not a rural community. Despite Plaintiff's speculation that more than 100 similar claims may be filed against NBL and other defendants, only twelve other cases with similar allegations have been filed in three Northwest Missouri counties since August 2008, and four of those cases were removed to federal court. Plaintiff's attorneys have been involved in a majority of these cases since their inception; and now, nearly 15 months later, only eight of those

twelve cases remain in state court, and two of the removed cases have already been dismissed. Thus, there is no merit to Plaintiff's claim that Livingston County is not capable of handling this and related litigation.

Also contrary to Plaintiff's argument, Livingston County will not be inconvenient to fact or expert witnesses, who likely would only be called to testify in Livingston County once, at the time of trial. Typically, depositions of witnesses occur where the witnesses are located or at some other agreed-upon location, and not necessarily near the trial venue. And convenience to attorneys is irrelevant to the Court's consideration. Livingston County, therefore, remains the most convenient alternative venue for this case.

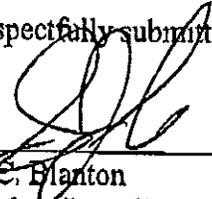
Furthermore, as noted above, other plaintiffs have filed 12 cases with similar allegations involving four of the six counties that comprise the Forty-Third Judicial Circuit, namely Andrew, Buchanan, Clinton and DeKalb Counties. There is no merit to these cases. Regardless, Livingston County is the closest venue in the Forty-Third Judicial Circuit for those with an interest in this and other related litigation and is therefore more convenient than Jackson County or St. Louis City.

III. CONCLUSION

For the reasons set forth above, in NBL's Application for Change of Venue, and in its Suggestions in Support of its Application for Change of Venue, NBL respectfully requests the Court to transfer this lawsuit to Livingston County and to grant NBL such further relief as this Court deems appropriate.

Date: November 5, 2009

Respectfully submitted,



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**ATTORNEYS FOR DEFENDANT NATIONAL
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **NATIONAL BEEF LEATHERS' REPLY TO PLAINTIFF'S SUGGESTIONS IN RESPONSE TO ITS APPLICATION FOR CHANGE OF VENUE** has been deposited in the U.S. Mail, first class postage prepaid, this 5th day of November, 2009, to the following:

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