NO. SC 085403

IN THE MISSOURI SUPREME COURT

STATE EX REL. L. DAVID ORMEROD, M.D.
Plaintiff/Relator,

vs.

THE HONORABLE GENE HAMILTON, PRESIDING JUDGE,
CIRCUIT COURT OF BOONE COUNTY,
Respondent.

Petition for Writ of Prohibition or
In The Alternative for Writ of Mandamus

RESPONDENT'S BRIEF

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ATTORNEYS FOR RESPONDENT

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JURISDICTIONAL STATEMENT

Respondent agrees that this Court has jurisdiction to entertain this action for an original writ.

STATEMENT OF FACTS

Relator resides in Boone County (para. 1, page 1, Ex. M to petition for writ). Relator's employment was at the University of Missouri-Columbia, on the Columbia campus (para. 6, page 2, Ex. M to petition for writ). The "agents, servants and employees" of the Curators alleged to be involved are officials at the Columbia campus (para. 7, page 2, Ex. M to petition for writ).

University Hall, located in Boone County, Missouri, houses the offices of the Board of Curators, the President of the University, the Office of the General Counsel (who is the "Custodian of Records" of the Board), and others, and the Secretary of the Board maintains the records, seal, books, papers and reports of the Board at University Hall (Ex. A to Ex. O to petition for writ).

The so-called "contract" upon which Relator bases his lawsuit shows his appointment ended August 31, 1996, four years before his employment ended (Ex. B to Ex. Q to petition for writ).

Respondent objects to Relator's inclusion of numerous irrelevant facts, such as information about prior motions and rulings in the trial court, which were interlocutory in nature. Only the June 18, 2003 Order transferring the case to the Circuit Court of Boone County is at issue.

POINT RELIED ON

THE CURATORS OF THE UNIVERSITY OF MISSOURI IS A PUBLIC COPORATION, AND, AS SUCH, IT IS NOT SUBJECT TO THE CORPORATE VENUE STATUTE, §508.040, WHICH APPLIES ONLY TO CORPORATIONS THAT ARE NOT PUBLIC CORPORATIONS. THEREFORE, VENUE FOR RELATOR'S LAWSUIT IS PROPERLY IN BOONE COUNTY, THE COUNTY WHERE THE CURATORS RESIDE, PURSUANT TO §508.010, AND NO WRIT OF MANDAMUS SHOULD ISSUE TO TRANSFER THE CASE TO JACKSON COUNTY, AS RELATOR IS REQUESTING.

Head v. The Curators of the University of the State of Missouri, 47 Mo. 220 (1871)

Todd v. Curators of the University of Missouri, 147 S.W.2d 1063, 1064 (Mo. 1941)

State ex rel. State Highway Commission of Missouri v. Bates, 296 S.W. 418 (Mo. banc 1927)

State ex rel. Milham v. Rickhoff, 63 S.W.2d 733, 735-736 (Mo. banc 1982)

ARGUMENT

THE CURATORS OF THE UNIVERSITY OF MISSOURI IS A PUBLIC COPORATION, AND, AS SUCH, IT IS NOT SUBJECT TO THE CORPORATE VENUE STATUTE, §508.040, WHICH APPLIES ONLY TO CORPORATIONS THAT ARE NOT PUBLIC CORPORATIONS. THEREFORE, VENUE FOR RELATOR'S LAWSUIT IS PROPERLY IN BOONE COUNTY, THE COUNTY WHERE THE CURATORS RESIDE, PURSUANT TO §508.010, AND NO WRIT OF MANDAMUS SHOULD ISSUE TO TRANSFER THE CASE TO JACKSON COUNTY, AS RELATOR IS REQUESTING.

"Is the Curators of the University of Missouri a 'corporation' within the meaning of corporation venue statute §508.040?" (This is how Relator states the issue, at page 20 of his brief.) For the Curators, the answer to the question is "No". The learned trial judge agreed, and the court of appeals declined to issue a writ to the contrary. Not satisfied (he is nothing if not persistent), Dr. Ormerod is looking to this Court to make new law and issue an extraordinary writ to give him what he wants, which is to hale the Curators into court in Kansas City in a case that otherwise belongs in Boone County.

Relator's argument rests on two propositions. Reduced to its essential components, Relator's argument goes something like this:

- The Curators of the University is a corporation.
- §508.040 applies to corporations.
- Therefore, §508.040 applies to the Curators.

Students of "Logic 101" will recognize this as two categorical propositions followed by a conclusion, supposedly the result of deductive reasoning. The basic unit of content in such an exercise is the categorical term used in the two propositions. In this particular application, the category is "corporations".

For categorical logic to work, the categorical term has to have precisely the same meaning in both propositions. If the word describing the category has different meanings in the different propositions, the conclusion can be a fallacy rather than a truth, and the result is an "equivocation". Following is an example of an equivocation:

- Really exciting novels are rare.
- Rare books are expensive.
- Therefore, really exciting novels are expensive.[1]

Obviously, because the word "rare" is used in different ways in the two premises of the argument, application of deductive logic leads to a spurious conclusion.

Applying the same principles, does the word "corporation" have the same meaning in the two premises of Relator's argument? When the Board of Curators is said to be a "corporation" for other purposes, does the word have precisely the same meaning the legislature intended when it used the word "corporations" in §508.040?

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[1] This example comes from Garth Kemerling, Philosophy Pages (2002), www.philosophypages.com. Another example of an equivocation presented by Kemerling in his definitions section: Odd things arouse suspicion. Seventeen is an odd number. Therefore, seventeen arouses suspicion.

If the word "corporation" has only one, precise meaning, then the inquiry is over, and the writ should issue. But as is shown in the following exposition, the word has different meanings, and when one considers them, the conclusion is inescapable that when precise language is used in the two premises of the deductive exercise, the conclusion is diametrically different than the conclusion urged upon the Court by the Relator.

A. "Corporation" has different meanings.

The inquiry begins with the landmark decision in *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819). There, in order to decide whether the state of New Hampshire could effectively take over control of Dartmouth College, whose charter predated the Revolution, the Supreme Court had to consider the different kinds of corporations and what those differences mean. In delivering the opinion of the Court, Chief Justice Marshall first defined corporations generally:

> "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. . . . Among the most important (qualities) are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property, without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. . . . By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal

being. But this being does not share in the civil government of the country, unless that be the purpose for which it was created." Id. at 636.

After describing what all corporations have in common, the Chief Justice then proceeded to draw distinctions between different types of corporations. In his concurring opinion, Justice Story provided even more enlightenment on the subject:

> "A great variety of these corporations exist. . . . Some of these corporations are, from the particular purposes to which they are devoted, denominated spiritual, and some lay; and the latter are again divided into civil and eleemosynary corporations. It is unnecessary, in this place, to enter into any examination of civil corporations. Eleemosynary corporations are such as are constituted for the perpetual distribution of the free-alms and bounty of the founder, in such manner as he has directed; and in this class, are ranked hospitals for the relief of poor and impotent persons, and colleges for the promotion of learning and piety, and the support of persons engaged in literary pursuits. (citations omitted)
>
> Another division of corporations is into public and private. Public corporations are generally esteemed such as exist for public political purposes only, such as towns, cities, parishes and counties; and in many respects, they are so, although they involve some private interests; but strictly speaking, public corporations are such only as are founded by the government, for public purposes, where the whole interests belong also to the government." *Id*. at 667-668.

The Supreme Court found that Dartmouth College was not a public corporation. Even though it had a public purpose, it was created and maintained by private donations. The result was that the state statute, which purported to take over control of Dartmouth, was struck down as unconstitutional, being an unlawful impairment of the obligation of contracts (the original corporate charter being the contract).

B. The Curators of the University of Missouri is a public corporation.

Fifty-two years after the United Supreme Court decided the *Dartmouth College* case, this Court was asked to apply the decision to the University of Missouri. *Head v. The Curators of the University of the State of Missouri*, 47 Mo. 220 (1871), was a suit by a professor against the Curators for breach of contract. Although he had been hired for a term of six years, four years into his appointment the General Assembly passed a law vacating all teaching positions at the University. Professor Head argued that the University of Missouri was a corporation just like Dartmouth College, based upon evidence the original assets were the result of gifts ($108,000 by private citizens of Boone County and $10,000 in buildings and equipment from Columbia College), and that the statute terminating his appointment was an unconstitutional impairment of the University's contract obligations to him. This Court disagreed. The reasoning is instructive in the instant case. "Between this and the Dartmouth College case and the cases following that decision there is a broad distinction – namely, the difference that exists between a public institution of the State and a private corporation." Id. at 225.

The Curators of the University of Missouri is a public corporation, "subject to the discretionary control of the lawmaking department of the State government." 47 Mo. at

224. "By establishing the university the State created an agency of its own, through which it proposed to accomplish certain educational objects. In fine, it created a public corporation for educational purposes – a State university." Id. at 225. Because the Curators of the University of Missouri is a public corporation, the state has the power to make any changes at any time, including shortening terms of employment or even abolishing positions altogether. Id. at 226.

Over the many years since the *Head* case, this Court has been consistent in its approach to the Curators' status. *Todd v. Curators of the University of Missouri*, 147 S.W.2d 1063, 1064 (Mo. 1941), reiterated that the Curators is a public corporation and that higher education, as administered by the Curators, is a governmental function that remains under the control of the state.

State ex rel. Milham v. Rickhoff, 633 S.W.2d 733, 735-736 (Mo. banc 1982), while holding that the Curators is not a "municipal corporation" for purposes of the special venue statute for municipalities, §508.050, reaffirmed the Curators' status as a public corporation. This Court also recognized that other jurisdictions with state universities have similarly described the corporate nature of their public institutions of higher learning. In addition to the cases cited in *Rickhoff*, other cases holding state universities to be public corporations include: *Phillips v. Rector and Visitors of the University of Virginia*, 34 S.E. 66 (Va. 1899); *Spalding v. People*, 49 N.E. 993 (Ill. 1898); *Regents of the University of Nebraska v. McConnell*, 5 Neb. 423 (1877); and *The Regents of the*

University of Michigan v. The Board of Education of the City of Detroit, 4 Mich. 213 (1856).[2]

After considering all the authorities, it is clear that "corporation" can have more than one meaning. Because the word, by itself, is equivocal, its use in a logical proposition can result in fallacious reasoning. The categorical term for the Curators of the University of Missouri in this particular context is that it a public corporation, and Relator's failure to acknowledge that distinction resulted in a fallacious argument and an erroneous conclusion on his part.

C. Section 508.040 does not apply to public corporations.

In scouring the many cases annotated under §508.040, none can be found that applied the statute to a public corporation. Has Relator found a way to expand possible venues for suits against public corporations? Is this something that all the lawyers and judges previously overlooked? Or is the road he claims to have found to the riches of big city venue like the Northwest Passage, nothing but a gleam in his eye?

As a matter of statutory interpretation, when the word "corporation" is used in a particular statute, the courts have looked to other constitutional and statutory provisions that use the word "corporation" to find what the word generally means, and what they

[2] The original authorization for a state university in Michigan described the institution as a "catholepistemiad" at which "didaxia" (the plural for "didactor") would teach the students. These terms have been gathering dust for a long time in the closet for words that did not catch on.

have found is that "corporation", standing alone, usually means private or business corporations. *City of Webster Groves v. Smith*, 102 S.W.2d 618, 619 (Mo. 1937).

The subject of Article XI of the Missouri Constitution is "corporations". Section 1 of Art. XI contains a definition of "corporation" and that definition is as follows: "The term 'corporation,' as used in this Article, shall be construed to include all joint stock companies or associations having any powers or privileges not possessed by individuals or partnerships." Other sections of Art. XI deal with cumulative voting by shareholders (§6), stock issues (§7), and limitation of liability of stockholders (§8). There is nothing in Article XI to indicate that "corporations" means public corporations like the Curators of the University of Missouri. In fact, the language of various sections of the article makes it clear that public corporations are not "corporations". In the case of *In re East Part Dist. of Kansas City*, 237 S.W.2d 118, 120 (Mo. banc 1951), this Court looked at the provisions of Missouri Constitution Art. XI in interpreting the word "corporation" and found that the word refers to private or business corporations.

The holdings of this Court are consistent with the general law of corporations. 18 Am.Jur2d. *Corporations* §3 states: "While the term 'corporation' may be sufficiently broad to include public entities, such as municipalities, counties, or the like, yet as used in constitutions and statutes, it has frequently been held to refer only to private corporations as distinguished from those which are purely public."

In the case of *State ex rel. State Highway Commission of Missouri v. Bates*, 296 S.W. 418 (Mo. banc 1927), this Court considered whether or not the State Highway

Commission, while sometimes referred to as a public corporation, was a "corporation" within the definition of Rules of Civil Procedure. This Court found that it was not.

> "That relator (Highway Commission) is not a private corporation we think there is no doubt. Relator is a legal entity possessing many of the attributes of a corporation, but is not necessarily a private business corporation. The cases sometimes call such entity a quasi corporation, and in speaking of such an entity, having the powers and the obligations of a corporation, it is in the sense that, having been given the power to contract and transact business, it must assume the obligations of these contracts and business relations.
>
> . . . .
>
> When we said, supra, that relator was not a private business corporation, we had in mind the fact that by section 2 of article 12 of the Constitution the Legislature could create no such corporation by special law, as relator was created." *Id.* at 422.

It is worth highlighting the last sentence in the above quote. The Curators of the University of Missouri was created by a special law. The Missouri Constitution prohibits the creation of "corporations" by special law. Therefore, the Curators has to be something different from a "corporation", as that term is commonly used in the constitution and statutes, or else its very existence and the existence of many other Missouri public corporations could be said to be unconstitutional. The idea is so radical that it proves Respondent's point.

Another indication that the legislature did not intend for public corporations to fall under §508.040 is the language of the statute itself. [1] Section 508.040 reads, in pertinent part: "Suits against corporations shall be commenced either in the county where the cause of action accrued . . . or in any county where such corporations shall have or usually keep an office or agent for the transaction of their usual and customary business." No case has ever held that the education of students by a publicly owned and operated school is a "business". All the annotated cases that have considered the word "business" in §508.040 involved commercial or mercantile activity. See, for example, *Ray v. Lake Chevrolet-Oldsmobile, Inc.*, 714 S.W.2d 928 (Mo.App. S.D. 1986) (automobile sales business); *Coale v. Grady Bros. Siding and Remodeling, Inc.*, 865 S.W.2d 887 (Mo.App. S.D. 1993) (home improvement business).

Another telltale sign is the distinction Missouri's statutes draw between corporations and other organizations engaged in business versus public corporations engaged in education. Statutes dealing with the University of Missouri (Chapter 172), other state colleges and universities (Chapter 174) and public schools (Chapter 160) are all part of Title XI, "Education and Libraries." Business corporations and other organizations engaged in either business or charitable activities are governed by the statutes collected under Title XXIII, "Corporations, Associations and Partnerships," Chapters 347 through 360.

Also, outside of the statutes and constitution, the word "business" is generally understood as referring to a commercial or mercantile activity. See *Suburbia Gardens Nursery, Inc. v. St. Louis County*, 377 S.W.2d 266 (Mo. 1964); *Atlas Mobilfone, Inc. v.*

Labor and Industrial Relations Comm'n, 939 S.W.2d 928, 933-934 (Mo.App. W.D. 1997); *Freese v. St. Paul Mercury Indem. Co.*, 252 S.W.2d 653, 655 (Mo.App. 1952).

Further confirmation that public corporations are not "corporations" as that term is used in §508.040 is found in previous decisions of this Court.

In *State ex rel. State Highway Commission of Missouri v. Bates*, 296 S.W. 418 (Mo. banc 1927), plaintiffs filed suit against the State Highway Commission in Jasper County. The Commission objected to venue and argued that what is now §508.010 controlled, and under that statute it could only be sued in Cole County, the location of its headquarters (i.e., its residence). The plaintiff argued that the corporate venue statute controlled (now §508.040), and that because the Highway Commission had an office or agent for the conduct of its usual business in the locality, venue was in Jasper County. The trial court agreed with the plaintiffs, but this Court did not. Although the Commission was found to be "a legal entity in the nature of a corporation," this Court found that the entity was not a "corporation" as that term was used in the corporate venue statute, §1180, RSMo 1919 (now §508.040). Id. at 421-422. Because the entity was created for a public purpose, it was held to be "in a class different from pure corporations." Id. at 423. The general venue statute applied, and because the books and records and the secretary of the Commission were in Jefferson City, and the entity's residence was in Jefferson City, the only place the Commission could be sued was Cole County, and this Court issued a writ of prohibition to prevent further proceedings in Jasper County.

Following the *Bates* decision, this Court decided *State ex rel. State Highway Commission v. Billings*, 123 S.W.2d 170 (Mo. 1938). Again, a local circuit court (Stoddard County) had allowed a suit to proceed against the Commission under the corporate venue statute. Again, this Court stopped the action with a writ of prohibition. Citing the *Bates* case and others, this Court again held that the word "corporation" as used in the corporate venue statute does not include a public corporation like the Commission.

As a general rule, the venue of actions against state agencies lies in the county where their principal office is located. *State ex rel. Dalton v. Oldham*, 396 S.W.2d 519, 523 (Mo. banc 1960). The only way to sue a public corporation in another county is if there are other defendants, one of whom is a resident of the forum, or if the cause of action accrued in the forum county. See *State ex rel. Missouri Department of Natural Resources v. Roper*, 824 S.W.2d 901 (Mo. banc 1992).

Respondent disagrees with Relator's suggestion that his strained construction of §508.040 should be followed because that section "trumps" §508.010. (Relator's brief, pp. 28-29). Because these two venue statutes relate to the same subject, they are *in pari materia* and should be construed together and harmonized. *State ex rel. Columbia National Bank of Kansas City*, 284 S.W. 464, 470 (Mo. banc 1926). Applying §508.040 to all corporations, except those that are public, serves the purpose of letting Aunt Minnie sue Wal-Mart anywhere Wal-Mart operates a store. Making several dozen administrators, professors, physicians and staff persons travel from Columbia to Kansas City to try a case that belongs in Boone County will do nothing more for the Aunt

Minnies or place any greater burden on the Wal-Marts. "The primary purpose of Missouri's venue statutes is to provide a convenient, logical, and orderly forum for the resolution of disputes." *State ex rel. Elson v. Koehr,* 856 S.W.2d 57, 59 (Mo. banc 1993). There is nothing illogical about drawing a distinction between public and private corporations. Nothing in §508.040 commands the interpretation urged by Relator, and the Legislature's inaction over all the years the courts have not applied §508.040 to public corporations is confirmation that the courts are reading it the way the Legislature intended.

Finally, the fact that the Curators of the University is authorized to "sue and be sued, complain and defend in all courts," (§172.020), does not mean that venue for actions against the Curators can be in any and all courts. Such "sue and be sued" language is commonly used in statutes to show the entity is empowered as a jural person. It carries no other meaning. See *Jones v. State Highway Commission,* 557 S.W.2d 225, 230 (Mo. banc 1977). If the "sue and be sued, complain and defend in courts" language is recognized as a statute that authorizes venue in any Missouri court, then a number of other public corporations, whose legislation contains the same or substantially similar language, will be exposed to suits everywhere as well: third class cities (§77.010); fourth class cities (§79.010); towns and villages (§80.020); social welfare boards (§96.230); boards of regents of other state colleges (§174.040); the Missouri State Horticultural Society (§262.010); the Missouri Property and Casualty Insurance Guaranty Association (§375.772); and rural electric cooperatives from adjacent states (§394.200).

All things considered, it must be said that §508.040 does not apply to public corporations. Properly stated, using language that is precise enough to prevent a fallacy, the controlling argument should be stated as follows:

- The Curators of the University of Missouri is a public corporation.
- §508.040 does not apply to public corporations.
- Therefore, §508.040 does not apply to the Curators.

Because this was a suit initiated by summons, against a lone defendant, and because Relator admits he is a resident of Boone County and does not contest that the residence of the Curators is in Boone County, §508.010(1) controls, and venue is properly in Boone County.

CONCLUSION

The preliminary order should be dissolved and the petition for a permanent writ denied.

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CERTIFICATE OF SERVICE

I hereby certify that two true and accurate copies of the above document, and floppy disk, were mailed, postage prepaid, to G. Spencer Miller, 207 N.E. 72nd St., Suite A, Gladstone, MO 64118 on this 1st day of December, 2003.

Dale C. Doerhoff