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Counselor, Stop Everything - Missouri's Venue Statutes Receive an Expansive Interpretation

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NOTE

Counselor, Stop Everything! Missouri's Venue Statutes Receive an Expansive Interpretation

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

DARIN P. SHREVES*

I. INTRODUCTION

In 2005, the Missouri plaintiffs' bar inadvertently revealed just how much it benefitted from the state's pre-reform venue statute.¹ During that year, the Missouri General Assembly enacted House Bill 393, commonly referred to as the Tort Reform Act (Act).² This Act was to become effective in late August 2005, and it threatened plaintiffs' attorneys by instituting rigid venue provisions that restricted their ability to steer suits into favorable venues.³ Seeking to avoid the new Act's restrictions, these attorneys responded by filing 602 tort lawsuits in St. Louis City⁴ in May 2005; in contrast, they

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1. The pre-reform venue statute is located in section 508.010 of the Missouri Revised Statutes.

2. H.B. 393, 93d Gen. Assem., 1st Reg. Sess. (Mo. 2005). In this Note, this legislation will be referred to as the "Tort Reform Act" or "Act."

3. James L. Stockberger & Brian Kaveney, *Missouri Tort Reform*, 62 J. MO. B. 378, 378-82 (2006) (discussing the numerous statutes amended or enacted by the Act and their effect on Missouri litigation).

4. The St. Louis, Missouri metro-area is composed of a number of counties, two of which are St. Louis City and St. Louis County. See generally *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 858-67 (Mo. 2001) (en banc) (per curiam) (Wolff, J., concurring in part and dissenting in part) (discussing legal consequences of St. Louis encompassing various counties). Because these two counties are politically distinct, each selects juries from its own population, and conventional wisdom holds that City juries are far more favorable to personal injury claims. *Id.* at 859; *State ex rel. DePaul Health Ctr. v. Mummert*, 870 S.W.2d 820, 821 (Mo. 1994) (en banc).

filed only 255 tort lawsuits in that venue in May 2006, nine months after the Tort Reform Act became effective.⁵

As illustrated above, Missouri's pre-reform venue law held substantial advantages for plaintiffs' attorneys. These attorneys regularly used creative statutory readings and questionable procedural techniques to exploit the state's venue statute and maneuver their lawsuits into favorable forums.⁶ Just as frequently, defense attorneys challenged these practices in the state's appellate courts.⁷ In the resulting decisions, Missouri courts developed an elaborate venue doctrine that consistently limited the ability of litigants to circumvent the state's venue laws by curtailing common forum shopping strategies.⁸

The Missouri General Assembly responded to the state's venue difficulties by enacting the Tort Reform Act in 2005. This Act dramatically revised the state's venue statute, section 508.010, to impose rigid limitations on where a suit could be filed.⁹ The Act also included a new statute, section 508.012, that substantially codified the venue doctrine created by the state's courts.¹⁰ In *State ex rel. Kansas City Southern Railway Co. v. Nixon*, the Supreme Court of Missouri interpreted this new statute as a matter of first impression.¹¹ In doing so, however, the court diverged significantly from the Tort Reform Act's statutory language and legislative goals.¹² As a result, *Nixon* has potentially dramatic consequences for all litigation filed in Missouri.

This Note seeks to place *Nixon* in the context of Missouri law in order to analyze the court's holding and its attendant consequences. First, this Note will review Missouri's venue law leading up to *Nixon*.¹³ Next, this Note will examine the court's reasoning, consider its interpretation of the newly-enacted venue provision of section 508.012, and explore the issues and implications arising from the decision.¹⁴ Finally, this Note will conclude that in order to mitigate *Nixon*'s departure from the legislative goals of the Tort

5. Stockberger & Kavaney, *supra* note 3, at 381; see also Michael E. Crowley, *Burning Bridges: Does Joining a Party Sacrifice Venue Selected Before Missouri Tort Reform?*, 64 J. MO. B. 74, 74-75 (2008) ("Plaintiffs' attorneys scrambled to file their cases before the rules went into effect on August 28, 2005.")

6. See generally Craig A. Adoor & Joseph J. Simeone, *The Law of Venue in Missouri*, 32 ST. LOUIS U. L.J. 639 (1988) (discussing strategic venue tactics prior to the Act's enactment and compiling illustrative cases); see also *infra* Part III.A-B.

7. See Ador & Simeone, *supra* note 6; see also *infra* Part III.A-B.

8. See cases discussed *supra* Part III.A-B.

9. MO. REV. STAT. § 508.010 (Supp. 2009).

10. § 508.012.

11. 282 S.W.3d 363 (Mo. 2009) (en banc).

12. *Id.* at 366 (interpreting § 508.010 so as to expand where venue is proper, rather than limiting it).

13. See *infra* Part III.

14. See *infra* Part V.

Reform Act, future courts will limit the decision's reach by failing to apply its reasoning beyond the narrow procedural issue presented in *Nixon*.¹⁵

II. FACTS AND HOLDING

On June 25, 2007, a Kansas City Southern Railway Company (the Railway) train collided with a car at a railroad crossing in Ruston, Louisiana.¹⁶ At the time of the collision, Louisiana residents Lauren Cockerell, Clifford and Kimberly McFarland, and the McFarlands' daughter, Hannah, were in the car.¹⁷ The collision killed Hannah.¹⁸

The McFarlands sued the Railway for wrongful death in the Circuit Court of Jackson County, Missouri; in the same suit, Lauren sued the Railway for her own personal injuries.¹⁹ The Railway's principal place of business was situated in Jackson County, but its registered agent was located across the state in St. Louis County.²⁰ After the plaintiffs filed and served the petition,²¹ the Railway moved to transfer the venue of the lawsuit based on Missouri Supreme Court Rule 51.045.²² In its motion, the Railway argued that, under section 508.010.5 of the Act,²³ the only proper venue for the lawsuit was in St. Louis County because the plaintiffs alleged a tort but did not reside

15. *See infra* Part V.C.

16. *State ex rel. Kan. City S. Ry. Co. v. Nixon*, 282 S.W.3d 363, 364 (Mo. 2009) (en banc); Relator's Brief at *2, *Nixon*, 282 S.W.3d 363 (No. SC89704), 2009 WL 319007.

17. *Nixon*, 282 S.W.3d at 364.

18. *Id.*

19. *Id.* The original action filed was entitled *Rachel Cockerell, et al. v. The Kansas City Southern Railway Co.*, Case No. 0816-CV18142. Respondent's Brief at *5, *Nixon*, 282 S.W.3d 363 (No. SC89704), 2009 WL 601928.

20. Respondent's Brief, *supra* note 19, at *5.

21. The plaintiffs filed the suit on June 24, 2008. Respondent's Brief, *supra* note 19, at *5.

22. *Nixon*, 282 S.W.3d at 364; *see* MO. SUP. CT. R. 51.045. Rule 51.045(a) reads in pertinent part: "An action brought in a court where venue is improper shall be transferred to a court where venue is proper if a motion for such transfer is timely filed. Any motion to transfer venue shall be filed within sixty days of service on the party seeking transfer." MO. SUP. CT. R. 51.045(a). The motion was timely because the Railway filed the transfer motion on August 5, 2008. Relator's Brief, *supra* note 16, at *3.

23. *See* MO. REV. STAT. § 508.010 (Supp. 2009). This section is the general venue statute for Missouri, prescribing where proper venue lies for a given action. *Id.* The statute was dramatically revised by the passage of the Tort Reform Act. *See* H.B. 393, 93d Gen. Assem., 1st Reg. Sess. (Mo. 2005). For a thorough discussion of the ramifications of the amended venue statute, *see* David Jacks Achtenberg, *Venue in Missouri After Tort Reform*, 75 UMKC L. REV. 593, 679-80 (2007).

or suffer injury in Missouri and the Railway was a corporation with its registered agent in St. Louis County.²⁴

Rather than dispute the Railway's argument, the plaintiffs attempted to cure the defect in venue by seeking leave to add Kevin McIntosh as an additional defendant in the suit.²⁵ McIntosh was a Railway employee, but, more importantly, he was a Jackson County resident.²⁶ Because adding McIntosh as a defendant would have rendered venue proper in Jackson County under section 508.010.5,²⁷ the trial court granted the plaintiffs' motion for leave to amend.²⁸ On the same day, the trial court also denied the Railway's motion to transfer venue.²⁹

Following the trial court's ruling, the Railway sought a writ of prohibition³⁰ that would bar "the trial court from enforcing its order granting plaintiffs' motion to add McIntosh as a defendant."³¹ The Railway maintained its

24. *Nixon*, 282 S.W.3d at 364. The defendant relied upon section 508.010.5, which states that in actions in which any count alleges a tort and in which the plaintiff was first injured outside of Missouri, venue is proper against a defendant corporation in the county where the corporation's registered agent is located. See § 508.010.5.

25. Relator's Brief, *supra* note 16, at *3. The plaintiffs filed their motion on September 8, 2008, before the trial court ruled on the Railway's motion to transfer. *Id.*

26. *Nixon*, 282 S.W.3d at 364.

27. Section 508.010.5(2) states that in suits in which any count alleges a tort and in which the plaintiff was first injured outside of Missouri, venue is proper against an individual defendant in the county of the individual's principal place of residence. § 508.010.5(2).

28. *Nixon*, 282 S.W.3d at 364. The trial court entered this ruling on October 1, 2008. Relator's Brief, *supra* note 16, at *3. In granting leave to the plaintiffs, the trial court permitted the plaintiffs ten days to file the amended petition. *Nixon*, 282 S.W.3d at 364. The plaintiffs did so, with McIntosh as a named defendant, on October 8, 2008. Respondent's Brief, *supra* note 19, at *6.

29. Relator's Brief, *supra* note 16, at *3. As a result, on the date the trial court denied the Railway's transfer motion, venue remained improper in Jackson County because, while the plaintiffs were granted leave to amend their complaint, McIntosh had not yet actually been added as a defendant. *Id.*

30. In *State ex rel. Selimanovic v. Dierker*, the Supreme Court of Missouri explained how a writ of prohibition relates to rulings on venue. 246 S.W.3d 931 (Mo. 2008) (en banc). The court wrote that "[p]rohibition is a discretionary writ that only issues to 'prohibit an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent the exercise of extra-jurisdictional power.'" *Id.* at 932 (quoting *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 857 (Mo. 2001) (en banc) (per curiam)). The court continued, writing that "[i]mproper venue is a fundamental defect, and a court that acts when venue is improper acts in excess of its jurisdiction" and that if "venue is improper, prohibition lies to bar the trial court from taking any further action, except to transfer the case to a proper venue." *Id.* (citing *State ex rel. Green v. Neill*, 127 S.W.3d 677, 678 (Mo. 2004) (en banc); *State ex rel. McDonald's Corp. v. Midkiff*, 226 S.W.3d 119, 122 (Mo. 2007) (en banc)).

31. *Nixon*, 282 S.W.3d at 364-65.

position that St. Louis County was the proper venue for suit and that “the trial court, therefore, exceeded its ‘jurisdiction’” in denying the Railway’s transfer motion.³² After the Missouri Court of Appeals, Western District denied the Railway’s request,³³ the Railway appealed again.³⁴ The Supreme Court of Missouri held that the “trial court did not exceed its jurisdiction or its authority by allowing plaintiffs to cure the defect in venue by adding McIntosh as a defendant.”³⁵

III. LEGAL BACKGROUND

This Note argues that in *Nixon*, the Supreme Court of Missouri expanded venue within the state by interpreting section 508.012, the statute addressing the transfer of a case based on the addition of a party, in a way that is inconsistent with the legislative goals of the Tort Reform Act. In order to understand and analyze the significance of *Nixon*, it is first necessary to briefly survey Missouri’s pre-reform venue statutes and rules. Next, important decisions interpreting those rules and statutes must be reviewed in order to understand the evolution of the court’s venue doctrine prior to reform. Finally, this Note examines the venue statutes enacted in the Tort Reform Act that led the court to its ruling in *Nixon*.

A. Venue Prior to the Tort Reform Act and Related Missouri Law

Consistent with current law, venue in Missouri was governed by statute prior to the Tort Reform Act,³⁶ and the general venue statute of section 508.010 determined where suits were to be “brought.”³⁷ Prior to its amend-

32. *Id.* at 365. It seems clear from examining the briefs that the Railway used the word “jurisdiction” in an attempt to invoke the language of the court in *Dierker*. Relator’s Brief, *supra* note 16, at *7 (citing *Dierker*, 246 S.W.3d at 932) (stating “a court that acts when venue is improper acts in excess of its jurisdiction”).

33. Relator’s Brief, *supra* note 16, at *4.

34. *Nixon*, 282 S.W.3d at 364-65. The Supreme Court of Missouri granted a preliminary writ of prohibition in favor of the Railway. *Id.* at 365.

35. *Id.* at 367. To enforce its ruling, the court quashed the preliminary writ it issued in favor of the Railway. *Id.*

36. State *ex rel.* Rothermich v. Gallager, 816 S.W.2d 194, 196 (Mo. 1991) (en banc) (stating “[v]enue in Missouri is determined solely by statute” and “[t]he purpose of the venue statutes is to provide a convenient, logical and orderly forum for litigation”).

37. MO. REV. STAT. § 508.010 (2000) (amended 2005). Section 508.010 was entitled “Suits by summons, where brought” and the statute’s text began, “Suits instituted by summons shall . . . be brought . . .” The section’s use of the word “brought” played a critical role in the Supreme Court of Missouri’s rulings in *Mummert* and *Linthicum*. See *infra* Part III.B.

For a thorough discussion of the pre-reform section 508.010, see Adoor & Simeone, *supra* note 6, at 642 (discussing a preceding and nearly identical venue

ment, section 508.010 determined venue primarily based on the residence of the defendant, and attorneys could circumvent the statute's provisions by joining parties pretensively or at strategic times.³⁸ Such procedural maneuvering is commonly known as "forum shopping,"³⁹ and under Missouri's pre-reform venue statute plaintiffs effectively used the technique to navigate lawsuits into favorable venues.⁴⁰

While section 508.010 established venue, other laws and procedural rules governed transferring venue. Missouri Supreme Court Rule 51.045 instructed that if a suit was filed in an improper venue, then, upon a timely motion to transfer, the suit "shall be transferred to a court where venue is proper."⁴¹ Similarly, section 476.410 required that if a suit was filed in an improper venue, then the trial court "shall transfer the case" to any venue where the suit "could have been brought."⁴²

Other laws affected venue in more subtle ways. Rule 55.33 allowed a party to amend and to supplement the pleadings,⁴³ and Rule 67.02 permitted

statute to that in place in 2000); *see also* Achtenberg, *supra* note 23, at 598-601. Pre-reform § 508.010 governed if a defendant was an individual. Other chapter 508 sections governed if the defendant was a non-individual. *See, e.g.*, § 508.040 (corporations); § 508.050 (municipal corporations); § 508.060 (counties); and § 508.070 (motor carrier). Still, other special venue statutes governed suits concerning subject matters of law. *See, e.g.*, § 144.400 (taxes).

38. Achtenberg, *supra* note 23, at 598-601, 679-80; Adoor, *supra* note 6, at 651-52.

39. BLACK'S LAW DICTIONARY (8th ed. 2004) defines "forum shopping" as "[t]he practice of choosing the most favorable jurisdiction or court in which a claim might be heard."

40. Adoor & Simeone, *supra* note 6, at 667 (concluding venue had become a forum shopping tool); Crowley, *supra* note 5, at 75 (venue was "relatively simple to establish" and could be established by "extremely tenuous links"). For illustrative cases, *see generally* Adoor & Simeone, *supra* note 6 (examining case law).

41. MO. SUP. CT. R. 51.045. The moving party was required to file the transfer motion within sixty days of being served, though the court could expand that time limit "[f]or good cause shown." *Id.*

42. MO. REV. STAT. § 476.410 (2000). Rule 51.045 and section 476.410 require transfer of a suit when venue is improper, which should be distinguished from rules permitting changes of venue. *Cf.* MO. SUP. CT. R. 51.02 (change of venue by party agreement); MO. SUP. CT. R. 51.03(a) (change of venue as of right if county of low population); MO. SUP. CT. R. 51.04(a) (change of venue for cause).

43. MO. SUP. CT. R. 55.33. This rule states: "A pleading may be amended once as a matter of course at any time before a responsive pleading is served Otherwise, the pleading may be amended only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." *Id.* Missouri courts have long recognized that leave to amend pleading should be liberally granted at the discretion of the trial courts. *Dallam v. Bowman*, 16 Mo. 225, 226; 1852 WL 4091, *2 (1852). For examples of parties attempting to use amendment of a petition to alter venue determination, *see infra* Part III.B; Adoor & Simeone, *supra* note 6.

the voluntary dismissal of a suit.⁴⁴ Both of these rules could affect venue by altering the pleadings before the court. Finally, article V, section 4 of the Missouri Constitution provided the Supreme Court of Missouri with “general superintending control over all courts” in the state, as well as the authority to “issue and determine original remedial writs.”⁴⁵ Missouri law recognizes the writs of mandamus and prohibition,⁴⁶ and litigants may protest a trial court’s venue ruling by petitioning for either.⁴⁷

While the Tort Reform Act dramatically revised the general venue statute of section 508.010, the other statutes, rules, and constitutional provisions mentioned above were not altered by that Act. As a result, that body of law remains crucial to understanding venue in Missouri.

B. Interpreting the Rules of Venue: Mummert, Linthicum, and Ohmer

The Supreme Court of Missouri examined the interaction of these venue laws in the case of *State ex rel. DePaul Health Center v. Mummert*.⁴⁸ In *Mummert*, the plaintiffs filed a medical malpractice suit for injuries occurring in St. Louis County against a doctor and two medical businesses, both located in St. Louis County for venue purposes.⁴⁹ Because the plaintiffs filed suit in St. Louis City,⁵⁰ the defendants argued that venue was improper and, thus, the

44. MO. SUP. CT. R. 67.02. This Rule states that “a civil action may be dismissed by the plaintiff without order of the court anytime: (1) Prior to the swearing of the jury panel for the voir dire examination, or (2) In cases tried without a jury, prior to the introduction of evidence at the trial.” *Id.*

45. MO. CONST. art. V, § 4, cl.1.

46. § 1.010 (adopting English common law); *State ex rel. T.J.H. v. Bills*, 504 S.W.2d 76, 79 (Mo. 1974) (approving of use of writs). Mandamus is used to command the performance of an act, while prohibition is used to prevent the performance of an act. JAMES W. ERWIN, MO. APPELLATE COURT PRACTICE § 13.1 (5th ed. 2007). However, the distinction between the writs is not always honored. *St. Louis Little Rock Hosp., Inc. v. Gaertner*, 682 S.W.2d 146, 148 (Mo. App. E.D. 1984) (distinction “is at best blurred, at worst nonexistent, and the subject matter to which the two writs apply overlap to a great extent”). Compare *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855 (Mo. 2001) (en banc) (per curiam) (prohibition for venue) with *State ex rel. Landstar Ranger, Inc. v. Dean*, 62 S.W.3d 405 (Mo. 2001) (per curiam) (mandamus for venue). See also MO. SUP. CT. R. 94 (mandamus); MO. SUP. CT. R. 97 (prohibition).

47. Litigants commonly petition for a writ to seek review of court orders that would otherwise be un-appealable, such as venue rulings. See ERWIN, *supra* note 46, at §§ 13.2, 13.10.

48. 870 S.W.2d 820 (Mo. 1994). For an in-depth review of *Mummert*, see Joseph H. Knittig, Note, *Severing Venue and Personal Jurisdiction in Missouri*, 60 MO. L. REV. 505 (1995).

49. *Mummert*, 870 S.W.2d at 821.

50. Judge Edward D. Robertson opened the majority opinion by noting that *Mummert* was “another in a seemingly unending series of extraordinary writ actions

circuit court lacked personal jurisdiction over the defendants.⁵¹ Thereafter, the plaintiffs voluntarily dismissed the defendant doctor in an attempt to cure the defect in venue.⁵² Accordingly, the trial court denied the defendants' motion to transfer.⁵³

In reaching its ruling, the Supreme Court of Missouri first noted the Missouri General Assembly's recent amendment of the statute governing the commencement of suits and service of process,⁵⁴ as well as the distinct purposes served by personal jurisdiction and venue.⁵⁵ As a result, the court concluded that the legislature "severed" the concepts through the statute's amendment and held that "proper venue was no longer a prerequisite to personal jurisdiction," thereby permitting trial courts to continue to hear suits over which they lacked proper venue.⁵⁶

in which civil tort plaintiffs and defendants enter protracted procedural plotting to embrace or avoid the generous juries of the City of St. Louis." *Id.*

51. *Id.* The defendants' argument in *Mummert* was possible because of a then-existing "quirk" in the Missouri venue statutes that fused the disparate concepts of venue and personal jurisdiction. *Id.*; see also *infra* note 54 and accompanying text.

52. *Mummert*, 870 S.W.2d at 821. The plaintiffs argued that, upon dismissing the doctor, venue was proper in St. Louis City under MO. REV. STAT. § 508.040 (1986) (repealed 2005) (suits against a corporation permitted in the venues in which the corporation transacts business) because the medical businesses had commercial dealings in the City. *Id.*

53. *Mummert*, 870 S.W.2d at 821. In response to the denial of their motion, the defendants sought a writ of mandamus. *Id.*

54. MO. REV. STAT. § 506.110 (1989); S.B. 127, 72, 161, 171, 275 & 120, 85th Gen. Assem., 1st Reg. Sess. (Mo. 1989). As written in 1986, MO. REV. STAT. § 506.110(1) stated that "[s]uits may be instituted in courts of record . . . [b]y filing in the office of the clerk of the proper court a petition setting forth the plaintiff's cause or causes of action." MO. REV. STAT. § 506.110 (1986). In interpreting this statute, Missouri courts concluded that a court sitting in improper venue was not a "proper" court and thus unable to issue service of process, preventing that court from obtaining personal jurisdiction over the defendant. *Mummert*, 870 S.W.2d at 821; see, e.g., *Oney v. Pattison*, 747 S.W.2d 137 (Mo. 1988), *overruled by Mummert*, 870 S.W.2d 820. In this way, the word "proper" in the statute led to the "coupling" of the concepts of personal jurisdiction and venue, enabling the *Mummert* defendants to challenge the trial court's venue. *Mummert*, 870 S.W.2d at 822. As mentioned above, the Missouri General Assembly subsequently amended MO. REV. STAT. § 506.110 so that the word "proper" was omitted. *Id.* at 821. For a more thorough treatment, see Knitig, *supra* note 48.

55. *Mummert*, 870 S.W.2d at 822. Venue, the court wrote, sought "to provide a convenient, logical and orderly forum for the resolution of disputes." *Id.* (quoting *State ex rel. Elson v. Koehr*, 856 S.W.2d 57, 59 (Mo. 1993) (en banc)). In contrast, personal jurisdiction concerned "the authority of a court to render judgment over a particular defendant." *Id.*

56. *Id.* at 821. In so ruling, the court expressly overruled numerous cases to the contrary, including *Oney v. Pattison*, 747 S.W.2d 137 (Mo. 1988) (en banc). *Id.* at 822. The ruling's effect was that a summons could be issued by a court in which

The court next addressed the defendants' transfer motion and concluded that section 508.010 required venue to be "determined as the case stands when *brought*, not when a motion challenging venue is decided."⁵⁷ Because the presence of the defendant doctor in the suit rendered venue improper at the time the suit was brought, his subsequent dismissal from the suit had no ability to cure that initial defect in venue.⁵⁸ As a result, the court held that the trial judge had a "ministerial duty" to transfer the suit to a proper venue.⁵⁹

In *State ex rel. Linthicum v. Calvin*, the court revisited its holding in *Mummert* and expanded what it meant for a suit to be "brought."⁶⁰ In *Linthicum*, a fairgoer sued for injuries received in a fall from a Ferris wheel in St. Francois County, Missouri.⁶¹ The fairgoer filed suit in St. Louis City against a single defendant, Harold Linthicum, the fair amusement ride operator and a citizen of Arkansas.⁶² When the suit was filed, venue was proper in St. Louis City because the venue statute at that time provided that nonresidents of Missouri could be sued in any county of the state.⁶³ However, one day after filing the initial petition, the plaintiff was granted leave to amend the petition to add additional defendants.⁶⁴ In response, the defendants filed a timely motion

venue was improper, permitting that court to make rulings in a suit, despite sitting in improper venue. *Id.*

57. *Id.* at 823.

58. *Id.* at 822-23.

59. *Id.* at 823. The ruling's effect was to order the trial court to transfer the suit to St. Louis County. *Id.*

In dissent, Judge Limbaugh wrote that section 508.010 contained no express or implied provision concerning the timing of the determination of venue challenges, but spoke only to the venues in which suits were to be brought. *Id.* at 823 (Limbaugh, J., dissenting). In light of the statute's silence, he believed that the "better rule" would be to allow the trial judge the authority to determine venue "according to the presence and status of the parties at the time the court rules on the merits of the challenge." *Id.* In this way, he sought to avoid barring plaintiffs from curing defects in venue by adding or dismissing parties to the suit, as the majority had. *Id.* Judge Price joined the dissent. *Id.*

60. 57 S.W.3d 855 (Mo. 2001) (en banc) (per curiam).

61. *Id.* at 856. The suit at issue in *Linthicum* is actually the second lawsuit arising from the fairgoer's injuries. *Id.* Originally, the fairgoer filed suit in St. Francois County against the Ferris wheel operator. *Id.* After substantial discovery, the fairgoer was granted leave to name previous owners of the Ferris wheel as additional defendants. *Id.* Finally, the fairgoer voluntarily dismissed the St. Francois County suit without prejudice on June 13, 2000. *Id.* However, on June 20, 2000, a mere seven days later, the plaintiff filed the suit at issue in *Linthicum* as described above. *Id.*

62. *Id.* at 856.

63. *Id.* at 857. The venue statute then in place stated, "When all the defendants are nonresidents of the state, suit may be brought in any county in this state." MO. REV. STAT. § 508.010(4) (2000). Therefore, because the only defendant in the suit was Linthicum, all defendants were nonresidents. *Linthicum*, 57 S.W.3d at 856.

64. *Linthicum*, 57 S.W.3d at 856. The plaintiff sought to add the individual who employed Linthicum and currently owned the Ferris wheel, two previous owners of

to transfer venue, which the trial court denied.⁶⁵ After the Missouri Court of Appeals, Eastern District denied the defendants' request for a writ of prohibition, the defendants appealed to the Supreme Court of Missouri.⁶⁶

The Supreme Court of Missouri first examined the trial court's ruling, which was based on *Mummert's* holding that venue was to be determined when a suit was "brought."⁶⁷ The trial court reasoned that because no venue defect existed when the suit was first "brought" against Linthicum in St. Louis City, the subsequent addition of the other defendants was irrelevant and did nothing to alter that determination.⁶⁸ The Supreme Court of Missouri found two errors in this reasoning.⁶⁹ First, the court ruled that just as suit is "brought" against defendants when a petition is originally filed, it is also "brought" against defendants subsequently added via amendment to the suit.⁷⁰ Second, the trial court's ruling had the effect of conferring different venue rules on defendants initially named in the suit and those defendants subsequently added to the suit; such a result, the court ruled, was contrary to both the plain language and the legislative intent of the venue statute.⁷¹ The court therefore held that for the purposes of venue, a suit was "'brought' whenever a plaintiff brings a defendant into a lawsuit, whether by original petition or by amended petition."⁷²

the Ferris wheel, and two other parties not identified in the court's opinion. *Id.* The places of residency or incorporation of these additional defendants are not indicated in the court's opinion. However, in light of the defendants' motion to transfer, the defendants' appeal, and the court's ruling, it seems reasonable that at least one was a resident of Missouri and that none of the defendants resided in St. Louis City. *See infra* note 65 and accompanying text.

65. *Linthicum*, 57 S.W.3d at 856. In their motion, the defendants relied on section 508.010(3), which states that "[w]hen there are several defendants, some residents and others nonresidents of the state, suit may be brought in any county of this state in which any defendant resides." MO. REV. STAT. § 508.010(3) (2000).

66. *Linthicum*, 57 S.W.3d at 856. The Supreme Court of Missouri issued a preliminary writ for the defendants. *Id.*

67. *Id.* at 857 (citing *State ex rel DePaul Health Ctr. v. Mummert*, 870 S.W.2d 820, 823 (Mo. 1994) (en banc); *see also supra* notes 48-59 and accompanying text).

68. *Linthicum*, 57 S.W.3d at 858.

69. *Id.*

70. *Id.*

71. *Id.* The court further explained that no basis existed for such a "temporal distinction" in the venue statute when its language governed all six specified scenarios that could arise based on the residency of the suit's defendants. *Id.* In contrast, the court said that its own ruling both protected all defendants and gave effect to the legislative intent of section 508.010. *Id.*

72. *Id.* The court then issued an absolute writ requiring the trial court to reconsider venue in light of the ruling. *Id.*

The court took care to expressly limit the situations its ruling would reach. *Id.* First, the court stated that *Mummert's* ruling – that improper venue could not be cured by dismissing a defendant – was undisturbed. *Id.* Second, the court stated that the venue statute contained no provisions concerning third-party plaintiffs and third-

In *State ex rel. Dillard's, Inc. v. Ohmer*, the Missouri Court of Appeals, Eastern District applied the reasoning of *Mummert* and *Linthicum* to determine the appropriate venue when amending a suit's causes of action, rather than its parties.⁷³ In *Ohmer*, the plaintiffs brought suit in St. Louis City for events occurring in St. Louis County.⁷⁴ In the original petition, the plaintiffs alleged Missouri Human Rights Act (MHRA) violations and tort claims.⁷⁵ The plaintiffs claimed venue in St. Louis City under the general venue statute,⁷⁶ but the defendants claimed that venue was improper under the MHRA⁷⁷ and filed a timely motion to transfer.⁷⁸ In response, the plaintiffs

party defendants and, thus, that the rule that these parties did not affect venue still applied. *Id.* at n.3.

The majority's opinion generated three other opinions. Judge Michael A. Wolff wrote separately to express his opinion that no sound reason existed for the continued separation of the St. Louis City and St. Louis County jury pools and that they should instead be merged to eliminate the incentive for venue maneuvering. *Id.* at 859 (Wolff, J., concurring in part and dissenting in part). Judge Laura Denvir Stith wrote to express her view that the majority's ruling "equated adding a party with filing a new suit," and that such an interpretation was not only contrary to both statutory language and court precedent, but also that such a construction raised numerous new issues. *Id.* at 863 (Stith, J., concurring in part and dissenting in part). While Judge Stith did not disagree with the court's goal of curtailing the ability of parties to evade venue rules, she felt that fashioning rules in this complex area was a job best left for the legislature: "Should the legislature at some point decide that addition of any new defendant, or even any new party, should allow a redetermination of venue, then it can adopt a new statute so stating." *Id.* at 864. Judge Ronnie L. White dissented because he felt that *Mummert* and substantial other authority mandated the conclusion that a suit is only "brought" when an action is first initiated. *Id.* at 867 (White, J., dissenting).

For a review of the *Linthicum* decision and an analysis of the cases in which it was applied before the venue statutes were amended in 2005, see Stephen M. Schoenbeck, *The Ongoing Venue Saga: Linthicum After Three Years*, 61 J. MO. B. 78, 81 (2005) (arguing that *Linthicum* had been consistently applied in the four years since it was decided and that the court had struck a proper balance by hindering the manipulation of the venue rules without infringing upon the right of access to the courts).

73. 190 S.W.3d 570, 572-73 (Mo. App. E.D. 2006).

74. *Id.* at 571-72.

75. *Id.* at 572. The Missouri Human Rights Act is located in MO. REV. STAT. §§ 213.010-.137 (2000).

76. The general Missouri venue statute is located in section 508.010.

77. The MHRA contains its own venue statute, mandating venue for all MHRA allegations to be in the "county in which the unlawful discriminatory practice is alleged to have occurred." § 213.111.1. Existing court precedent determined that this specific provision trumped the general venue statute. *Ohmer*, 190 S.W.3d at 572 (citing *Igoe v. Dep't of Labor & Indus. Relations*, 152 S.W.3d 284, 288 (Mo. 2005) (en banc)).

78. *Ohmer*, 190 S.W.3d at 572. The substance of the transfer motion stated that the only proper venue for the MHRA allegations was in St. Louis County because

attempted to cure the defect in venue by dropping the MHRA allegations from the petition.⁷⁹ Upon permitting the plaintiffs to amend, the trial court found no defect in venue and thus denied the defendants' transfer motion, leading the defendants to seek a writ of prohibition.⁸⁰

The Missouri Court of Appeals, Eastern District noted that a writ of prohibition was the correct means to prevent a court from proceeding in any way other than transferring a suit to proper venue.⁸¹ After recognizing that under the MHRA, venue could only have been in St. Louis County,⁸² the court found that venue was improper when the action was brought.⁸³ Therefore, the court "lacked [the] jurisdiction and authority to properly grant Plaintiffs' Motion to Amend," and prohibition was proper because the "only action" the trial court could have taken was to grant the transfer motion.⁸⁴

As the cases above demonstrate, prior to the Tort Reform Act, the Supreme Court of Missouri consistently interpreted section 508.010 in a manner intended to frustrate plaintiffs who attempted to evade the state's venue law for procedural advantages. *Mummert* and *Linthicum* instructed trial courts to analyze venue as the suit was "brought," so that the addition of new parties, but not the dismissal of existing parties, prompted a redetermination of venue.⁸⁵ *Ohmer* extended this concept to amending a suit's causes of action, instructing that dismissal of a claim could not cure an existing defect in ve-

alleged discriminatory actions took place in that county. *Id.*; see *supra* note 77 for the text of the MHRA venue provision.

79. *Ohmer*, 190 S.W.3d at 572. By dropping the MHRA allegations, venue would continue to be proper for the tort claims in St. Louis City under the general venue statute, section 508.010. *Id.*

80. *Id.* The defendants sought the writ to prevent the trial court from taking any action other than transferring the suit to St. Louis County. *Id.* The trial court granted a preliminary writ of prohibition. *Id.*

81. *Id.* (citing *State ex rel. SSM Health Care St. Louis v. Neill*, 78 S.W.3d 140, 142 (Mo. 2002) (en banc)).

82. See *supra* note 77 and accompanying text.

83. *Ohmer*, 190 S.W.3d at 572-73. In support of this determination, the court relied upon MO. REV. STAT. § 476.410 as well as the defendants' transfer motion pursuant to MO. SUP. CT. R. 51.045(a). *Id.* at 572. Additionally, the court stated that it was "well settled that a court that acts when venue is improper acts in excess of its jurisdiction." *Id.* (citing *Neill*, 78 S.W.3d at 142).

Though the *Ohmer* court used the word "brought" several times, it gives no indication whether it intended to evoke the doctrines of *Mummert* and *Linthicum*. See generally *Ohmer*, 190 S.W.3d 570. However, *Ohmer*'s ruling that venue determinations are to be made on the basis of the petition as it is "brought" – in this context, meaning originally filed – is consistent with the rulings of those two earlier decisions. Compare *id.* with *State ex rel. DePaul Health Ctr. v. Mummert*, 870 S.W.2d 820 (Mo. 1994) and *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855 (Mo. 2001) (en banc).

84. *Ohmer*, 190 S.W.3d at 573. The court thus made its preliminary prohibition order absolute, restraining the trial court from "all action except transfer of the underlying cause to St. Louis County Circuit Court." *Id.*

85. See discussion of *Mummert* and *Linthicum* *supra* notes 48-72.

nue.⁸⁶ In this way, the court developed a judicial doctrine that slowed the most blatant attempts to forum shop in the state. However, the judiciary lacked the power to address the heart of the problem – the venue statute itself – and so the focal point for addressing venue in Missouri soon moved from the courts to the legislature.

C. Venue under the Tort Reform Act

The potential for venue manipulation and forum shopping that existed under Missouri's venue law – illustrated well by *Mummert*, *Linthicum*, and *Ohmer* – spurred the General Assembly to action in 2005.⁸⁷ In that year, the legislature enacted the Tort Reform Act⁸⁸ and in doing so caused major changes for litigation filed in Missouri.⁸⁹

As part of its reforms, the new Act extensively revised Missouri's existing venue statute.⁹⁰ Goals of the reforms consisted of limiting forum shopping⁹¹ and creating consistency in venue determination.⁹² To this end, determining venue under section 508.010 now turns on whether the plaintiff alleges tort claims rather than the defendant's residence.⁹³ If any tort is alleged, venue is determined by where the plaintiff was first injured.⁹⁴ If the injury occurs within Missouri, venue is proper only in the county where the plaintiff

86. See discussion of *Ohmer* *supra* notes 73-84.

87. Crowley, *supra* note 5, at 74 (Tort Reform Act passed in response to perceived "rampant venue shopping"). For the goals of this legislative action, see *infra* notes 91-92 and accompanying text.

88. H.B. 393, 93d Gen. Assem., 1st Reg. Sess. (Mo. 2005). Governor Matt Blunt signed the bill into law on March 29, 2005. Paul J. Passanante & Dawn Mefford, *The Effect of Tort Reform on Medical Malpractice*, 61 J. MO. B. 236, 236 (2005).

89. For a discussion of the Act's substance, see Stockberger & Kaveney, *supra* note 3. For a discussion of the Act's impact in the context of medical malpractice litigation, see Passanante & Mefford, *supra* note 88.

90. MO. REV. STAT. § 508.010 (Supp. 2009). For a thorough exploration of the language and implications of the revised statute, see Achtenberg, *supra* note 23.

91. Achtenberg, *supra* note 23, at 602 (the Act sharply reduces plaintiff's venue options); Crowley, *supra* note 5, at 74 (the Act places "stringent" limitations on a plaintiff's choice of venue); Stockberger & Kaveney, *supra* note 3, at 381 (the Act limits forum shopping).

92. Achtenberg, *supra* note 23, at 595 (reforms "substantially increase defendants' control over the counties in which they can be sued"); Stockberger & Kaveney, *supra* note 3, at 381 (reforms should provide more certainty regarding venue).

93. § 508.010.2-.3; see Achtenberg, *supra* note 23, at 602. The statute heightens the restrictions upon venue for suits alleging a tort than for those that do not. § 508.010.2-.4; see Achtenberg, *supra* note 23, at 602.

94. § 508.010.4.

was first injured,⁹⁵ if the injury occurs outside the state, proper venue turns upon whether the defendant is a corporation⁹⁶ or an individual.⁹⁷

The Tort Reform Act affects venue in ways beyond dictating where venue is proper. One such example appears in section 508.010.10, which states that transfer and dismissal motions are deemed granted if they are not denied within ninety days.⁹⁸ Another example is section 508.010.13, which gives parties the ability to agree to a change of venue but also allows parties subsequently added to that suit to protest the transfer.⁹⁹ But perhaps the most important provision is section 508.012,¹⁰⁰ which creates another device to limit the ability of plaintiffs to forum shop.¹⁰¹ To effect this constraint, the legislature partially codified *Linthicum*'s holding by permitting the addition of parties to a suit to alter venue.¹⁰² However, the statute reaches further than *Lin-*

95. *Id.* Under the statute, a plaintiff is "first injured where the trauma or exposure occurred rather than where symptoms are first manifested." § 508.010.14.

96. § 508.010.5(1). The defendant corporation may be sued in either the county of its registered agent or the county of the plaintiff's residence. *Id.*

97. § 508.010.5(2). The defendant individual may be sued in either the defendant's county of residence or the plaintiff's county of residence at time of injury. *Id.*

98. § 508.010.10. This section could be a rude surprise for the unwary practitioner. It states that if a motion to dismiss or a motion to transfer is based on improper venue and is not denied within ninety days of filing, then the motion is to be deemed granted. *Id.* This result is avoided only if the parties waive the time period in writing. *Id.* This section places the burden of obtaining rulings on such motions on the non-movant plaintiffs, and so the section seems to be designed to benefit defendants. See Stockberger & Kaveney, *supra* note 3, at 380.

One commentator suggested this section could be subject to attack under the Missouri Constitution in that it conflicts with MO. SUP. CT. R. 51.045 (transfer when venue improper). See *id.*

99. That section states that "if all parties agree in writing to a change of venue, the court shall transfer venue to the county within the state unanimously chosen by the parties." § 508.010.13. However, that section goes on to state that if subsequently added parties do not consent to the transfer, then the suit "shall be transferred to such county in which venue is appropriate under this section, based upon the amended pleadings." *Id.*; cf. MO. SUP. CT. R. 51.02 (transfer of venue by party stipulation).

100. That section, entitled "Transfer of case based on addition or removal of a plaintiff or defendant prior to commencement of trial," reads:

At any time prior to the commencement of a trial, if a plaintiff or defendant . . . is either added or removed from a petition filed in any court in the State of Missouri which would have, if originally added or removed to the initial petition, altered the determination of venue under section 508.010, then the judge shall upon application of any party transfer the case to a proper forum under section 476.410

§ 508.012.

101. Achtenberg, *supra* note 23, at 683 (policy of section 508.012 is to "reduce plaintiffs' ability to finesse venue restrictions.").

102. *Id.* at 681-87 (section 508.012 codifies *Linthicum*); Stockberger & Kaveney, *supra* note 3, at 381 (same).

thicum in that dismissal of defendants and third-party defendants, as well as the addition of third-party plaintiffs, can also bring about redetermination of venue.¹⁰³

The Tort Reform Act's venue laws underscore the legislature's interest in directly confronting venue manipulation in Missouri. Even so, it remained unclear at the Act's enactment whether the new venue statutes could withstand the pressures of litigation. Were the reforms substantial enough to end forum shopping or would litigants continue to frustrate the purpose of the statutes? And when disputes and subsequent appeals inevitably arose, what judicial doctrines would guide the courts' interpretations of the new statutes? The Supreme Court of Missouri's holding in *Nixon* provided the first answers to these questions.

IV. INSTANT DECISION

A. Majority Opinion

In writing for the majority in *State ex rel. Kansas City Southern Railway Co. v. Nixon*, Judge Michael A. Wolff opened his opinion by framing the question before the Supreme Court of Missouri: "When a defendant challenges venue, may the circuit court grant leave for the plaintiff to add a party whose presence makes venue proper?"¹⁰⁴ Relying on *Ohmer*, the Railway argued that a trial court without proper venue exceeded its "jurisdiction" by denying a timely transfer motion.¹⁰⁵ The plaintiffs responded by arguing that the trial court had the authority to grant a motion to amend that would cure a defect in venue.¹⁰⁶ In ruling for the plaintiffs, the Supreme Court of Missouri drew upon *Mummert*, *Linthicum*, and the newly enacted section 508.012 to adopt a new approach to determinations of venue in Missouri.¹⁰⁷

After briefly recognizing the issue of prohibition,¹⁰⁸ the court quickly identified a major error in the Railway's argument: by contending that the trial court's actions justified the writ of prohibition, the Railway mischaracterized improper venue as a "jurisdictional" defect.¹⁰⁹ In support, the

103. Achtenberg, *supra* note 23, at 687 (noting third-party defendant expansion of pre-reform court doctrine).

104. 282 S.W.3d 363, 364 (Mo. 2008) (en banc). Chief Judge Stith and Judges Price, Teitelman, and Breckenridge concurred in the majority opinion. *Id.* at 367.

105. Relator's Brief, *supra* note 16, at *9-*10.

106. Respondent's Brief, *supra* note 19, at *18-*21.

107. *See Nixon*, 282 S.W.3d 363.

108. Without elaborating further, the court stated that it was "well-established" that the "use of an extraordinary writ" was accepted "to correct improper venue decisions of the circuit court before trial and judgment." *Id.* at 364-65 (citing *State ex rel. DePaul Health Ctr. v. Mummert*, 870 S.W.2d 820 (Mo. 1994) (en banc)).

109. *Id.* at 365. The court explained the distinction between the concepts, writing that "[j]urisdiction describes the power of a court to try a case" and rests on "constitu-

court cited *Mummert*'s severance of jurisdiction and venue, reaffirming the decision's ruling that "proper venue is no longer a prerequisite to personal jurisdiction."¹¹⁰ Therefore, the Supreme Court of Missouri concluded that the trial court was not without the power to grant the plaintiffs' motion to amend.¹¹¹

However, the issue remained of how the trial court should have handled the parties' competing motions. The Supreme Court of Missouri began by recognizing *Mummert*'s other ruling that trial courts have a ministerial duty to transfer cases to correct venues even if venue is distinct from jurisdiction.¹¹² Therefore, the court rephrased the question presented as "whether the ministerial duty to transfer venue must be exercised immediately, requiring that the circuit court take no other action."¹¹³

To resolve this issue, the court began an "exploration" of the statutes and rules, measuring the language of each against the Railway's argument that the mandatory "shall" language of the venue rules¹¹⁴ gave the trial court no choice but to transfer the suit to the proper venue.¹¹⁵ Without commenting upon the propriety of the Railway's improper venue claim, the court stated that the Railway's argument was "not consistent" with section 508.012.¹¹⁶ Given that this statute permitted venue to be redetermined if a party is either added to or removed from a suit,¹¹⁷ the court reasoned that "where, as in this

tional principles," while "venue relates to the locale where the trial is to be held" and "is determined by the applicable rule or statute." *Id.* Furthermore, venue "assumes the existence of jurisdiction and determines, among many courts with jurisdiction, the appropriate forum for the trial." *Id.*

110. *Id.* at 364-65 (quoting *Mummert*, 870 S.W.2d at 820) (internal quotations omitted).

111. *Id.* at 367. Phrased differently, the Supreme Court of Missouri concluded that the trial court did possess the power to rule on the motion to amend if it chose to do so.

112. *Id.* at 365 (citing *Mummert*, 870 S.W.2d at 821).

113. *Id.* This "ministerial duty" is especially pronounced when the writ is "necessary to prevent unnecessary, inconvenient and expensive litigation." *Id.* (quoting *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 856 (Mo. 2001) (en banc)). The trial court's "duty" also gives rise to the ability of appellate courts to issue writs ordering a trial court to transfer a case to a proper venue. *Id.*

114. MO. SUP. CT. R. 51.045(a) states that an action brought in the wrong venue "shall be transferred to a court where venue is proper" if a timely motion is filed. Similarly, MO. REV. STAT. § 476.410 states that if a case is filed in a court without venue, that court "shall transfer the case to any division or circuit in which it could have been brought." See *supra* Part III.A for a discussion of these court rules.

115. *Nixon*, 282 S.W.3d at 366. The Railway claimed that Jackson County was an improper venue for the suit under section 508.010.5(1). *Id.* For the substance of the Railway's argument, see *supra* Part II.

116. *Nixon*, 282 S.W.3d at 366. For the language and substance of section 508.012, see *supra* Part III.C.

117. The court wrote that section 508.012 "mandates re-determination of venue in cases where the addition or removal of a party renders venue improper and provides

case, the addition of a party *cures* a defect in venue, the case should remain in the court where venue is proper considering the newly added party.”¹¹⁸ The court then looked to Rule 55.33¹¹⁹ and concluded that the trial court’s grant of leave to the plaintiffs reflected this rule’s directive that leave to amend a pleading “shall be freely given when justice so requires.”¹²⁰ Therefore, the court ruled that the legislative codification of *Linthicum* in section 508.012 permitted the trial court to grant a plaintiff leave to amend, and thereby cure a defect in venue, before ruling on a defendant’s motion to transfer.¹²¹

The court offered two justifications for this ruling.¹²² First, the court stated that neither section 476.410 nor Rule 51.045¹²³ required the trial court to “stop everything” and immediately transfer the case, because nothing in the language of either law precluded opposing parties from filing motions to amend.¹²⁴ Second, the court pointed out that under Rule 67.02¹²⁵ the plaintiffs could dismiss their suit without prejudice and re-file it to render venue proper in Jackson County,¹²⁶ but doing so would only waste time and money.¹²⁷ Therefore, the Supreme Court of Missouri held that the trial court did not exceed its jurisdiction or authority by permitting the plaintiffs to cure the defect in venue by adding McIntosh as a defendant.¹²⁸

for transfer to a proper venue.” *Nixon*, 282 S.W.3d at 366; see MO. REV. STAT. § 508.012 (Supp. 2009).

118. *Nixon*, 282 S.W.3d at 366.

119. For the language of MO. SUP. CT. R. 55.33, see *supra* note 43. The court also recognized the long-standing tradition in Missouri of allowing amendments to pleadings. *Nixon*, 282 S.W.3d at 366 n.3 (citing *Dallam v. Bowman*, 16 Mo. 225, 1852 WL 4091 (1852) (“holding that the discretion of courts in permitting amendments of pleadings in furtherance of justice should be liberally exercised”)).

120. *Nixon*, 282 S.W.3d at 366 (quoting MO. SUP. CT. R. 55.33) (internal quotations omitted).

121. *Id.*

122. *Id.*

123. For the language of section 476.410 and Rule 51.045, see *supra* notes 41-42 and accompanying text.

124. *Nixon*, 282 S.W.3d at 366. In support of this reason, the court pointed to the fact that an opposing party is permitted thirty days to file a motion in opposition to a motion to transfer, and that amount of time may even be extended for “good cause shown.” *Id.* at 367 n.4 (quoting MO. SUP. CT. R. 51.045(b)). Judge Wolff closed the examination of this reason by remarking without elaboration that “a motion to amend may well be the most appropriate response to a motion to transfer.” *Id.* at 366-67.

125. For the text of MO. SUP. CT. R. 67.02, see *supra* note 44.

126. Although the court states that naming both the Railway and McIntosh as defendants in a single suit would render venue proper in both Jackson County and St. Louis County, one commentator believes the result was not so clearly prescribed by section 508.010. See Achtenberg, *supra* note 23, at 619-20.

127. *Nixon*, 282 S.W.3d at 367.

128. *Id.* To enforce this ruling, the court quashed the preliminary writ in favor of the Railway. *Id.* The court noted its ruling, when taken together with section

B. Dissenting Opinion

In his dissenting opinion, Judge Zel M. Fischer stressed the one consideration causing him to reject the majority's reasoning: Rule 51.045(a) clearly states that if venue is improper and a timely transfer motion is filed, then the suit "shall" be transferred.¹²⁹

In stark contrast to the majority, Judge Fischer reasoned that regardless of *Mummert's* severance of venue and jurisdiction, improper venue remained a "fundamental defect" and prohibition was the "proper remedy" if a trial court erred in exercising its ministerial duty to transfer cases.¹³⁰ Against this background, the mandatory "shall" language of the venue rules was all the more clear for him.¹³¹ Furthermore, in his view, section 508.012 did nothing to change that result because that statute "presupposes that venue is proper and then contemplates that the addition or removal of a party could alter that analysis based on [section] 508.010."¹³² As a result, Judge Fischer wrote that *Ohmer* should control, requiring the court to rule that the trial court was without authority to do anything but grant the transfer motion.¹³³

In closing, Judge Fischer admitted that the majority opinion may have offered the more "practical approach" to venue, given section 508.012's "wait and see" approach to the determination of venue.¹³⁴ Even so, Judge Fischer reiterated his belief that, if the court's rule says "'shall,' it should mean 'shall.'"¹³⁵

508.012, amounted to an adoption of the "better rule" advocated by Judge Limbaugh in his dissent in *Mummert*. *Id.* at 367 n.5; see also *supra* note 59.

129. *Nixon*, 282 S.W.3d at 367-68 (Fischer, J., dissenting). Judge Russell joined this dissent. *Id.* at 367.

130. *Id.* (quoting *State ex rel. SSM Health Care St. Louis v. Neill*, 78 S.W.3d 140, 142 (Mo. 2002)). Judge Fischer explained that this occurred because "[d]irect appeal after completion of a jury trial historically [had] not been considered an adequate remedy to address improper venue." *Id.* at 367 n.1.

131. *Id.* at 368 (citing MO. SUP. CT. R. 51.045(a)).

132. *Id.* Here, Judge Fischer noted that the "clear intent" of the statute was to "combat pretensive joinder." *Id.*

133. *Id.*

134. *Id.*

135. *Id.* Judge Fischer wrote that the need for "an orderly system of justice" necessitated that result, assuring all that the court would "follow its own rules." *Id.* He continued on, writing that under the majority's ruling, "[t]he strategy to the game called 'forum shopping' will reach a new high." *Id.* at 368 n.2. Finally, he stated that if the majority believed it to be "good policy to give trial courts discretion to make venue a moving target to the date of trial . . . [then] the matter should be referred to the Civil Rules Committee for consideration." *Id.*

V. COMMENT

This Note argues that the Supreme Court of Missouri's departure in *Nixon* from the Tort Reform Act's statutory language and legislative goals holds potentially dramatic consequences for civil litigation in Missouri. To explore *Nixon*'s impact, the court's reasoning as a whole will first be examined, followed by the court's interpretation of section 508.012. Next, this Note will consider the incentives created by *Nixon* and the implications the decision could create for determining venue in Missouri. However, this Note ultimately concludes that future courts will limit *Nixon*'s reach by failing to apply its reasoning beyond the narrow procedural issue presented in *Nixon*.

A. Analyzing the Court's Reasoning in *Nixon*

In order to analyze the Supreme Court of Missouri's reasoning in *Nixon*, it is instructive to recognize that the court's ruling decided three separate issues: (1) the matter of jurisdiction, (2) the denial of the Railway's motion to transfer, and (3) the granting of the plaintiffs' motion to amend.

First, the court addressed the issue of whether the trial court acted beyond its "jurisdiction" in granting the plaintiffs' motion to amend.¹³⁶ The court clearly invoked *Mummert* in its ruling, but relying upon that case as precedent for *Nixon* is somewhat odd because the Railway plainly used "jurisdiction" to refer to a trial court's ability to hear an issue, not formal definitions of personal or subject matter jurisdiction.¹³⁷ Furthermore, recent precedent supported the Railway.¹³⁸ Though reaffirming *Mummert* was not itself improper, the appearance of that case in *Nixon* does nothing more than lay a foundation for the court's other rulings, since the merits of *Nixon* did not require its mention.¹³⁹

Second, the court addressed what grounds permitted a trial court sitting in improper venue to deny a timely motion to transfer.¹⁴⁰ The ruling – that the trial court did not err in denying the motion – is difficult to read as anything but a departure from precedent holding that a court take "[no] further action except to transfer the case"¹⁴¹ based on its "ministerial duty."¹⁴² It

136. *Id.* at 365 (majority opinion).

137. Relator's Brief, *supra* note 16, at *7. Note also that the court used the term "authority" in its holding sentence, thus using language that echoes the Railway's argument. *Nixon*, 282 S.W.3d at 367.

138. See *State ex rel. Selimanovic v. Dierker*, 246 S.W.3d 931, 932 (Mo. 2008) (en banc) ("Improper venue is a fundamental defect, and a court that acts when venue is improper acts in excess of its jurisdiction."). The Railway specifically cited this case in its brief. Relator's Brief, *supra* note 16, at *7.

139. See generally Relator's Brief, *supra* note 16 (containing no challenge to *Mummert* as precedent).

140. *Nixon*, 282 S.W.3d at 366-67.

141. *Dierker*, 246 S.W.3d at 932.

seemed clear, prior to *Nixon*, that the mandatory “shall” language of the rules required the trial court to grant such a motion, but the *Nixon* court seems to have flatly rejected this result.¹⁴³

Third, the court addressed what authority empowered a trial court sitting in improper venue to grant a motion to amend when a timely motion to transfer was before the court.¹⁴⁴ The Supreme Court of Missouri found that authority within section 508.012, as well as Rule 55.33(a).¹⁴⁵ The court’s reading of Rule 55.33(a) is difficult to follow:¹⁴⁶ the preclusion justification seems to assign Rule 51.045 a new purpose,¹⁴⁷ and the conservation of court resources justification seems to elevate the unidentified savings realized by the

142. *State ex rel. DePaul Health Ctr. v. Mummert*, 870 S.W.2d 820, 821 (Mo. 1994) (en banc).

143. For the language of the transfer statute of section 476.410 and the transfer rule of Rule 51.045, see *supra* notes 41-42 and accompanying text. Of course, the “shall” language was determinative for *Nixon*’s minority opinion. See *supra* note 129 and accompanying text.

In support of the court’s conclusion that the transfer statute and rule do not mandate that the judge act immediately, the court points out that Rule 51.045(b) permits a party opposing the motion to reply. *Nixon*, 282 S.W.3d at 366-67. However, this author finds such reasoning unconvincing. The time period granted by the rule is designed to give an opposing party the opportunity to contest the transfer motion on its merits, rather than to set a schedule for the trial court to act. See MO. SUP. CT. R. 51.045(b); see, e.g., *State ex rel. Grand River Health Sys. Corp. v. Williamson*, 240 S.W.3d 172, 174-75 (Mo. App. W.D. 2007) (response to transfer motion untimely when not filed within thirty days).

In addition, the court’s argument that the absence of “shall only” or other language precluding the trial court from considering other motions when presented with a transfer motion seems to put what is not in the rule ahead of what affirmatively appears, conflicting with basic tenets of statutory construction. See, e.g., *State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630, 631 (Mo. 2007) (en banc) (“[T]he goal of statutory analysis . . . is ‘to ascertain the intent of the legislature, as expressed in the words of the statute,’ and that goal is achieved ‘by giving the language used its plain and ordinary meaning.’” (quoting *United Pharmacal Co. of Mo., Inc. v. Mo. Bd. of Pharm.*, 208 S.W.3d 907, 909-10 (Mo. 2006) (en banc))).

144. *Nixon*, 282 S.W.3d at 367.

145. *Id.* at 366. For the language of Rule 55.33(a), see *supra* note 43.

146. The court concluded that “justice” required granting the motion to amend under Rule 55.33(a) because nothing precluded the trial court from considering the motion and because denying it would waste time and money. *Nixon*, 282 S.W.3d at 367. Instead, this author suggests that “justice” should require recognizing that the Railway had validly invoked the venue transfer rules and statutes. Cf. *Dueker v. Gill*, 175 S.W.3d 662, 672 (Mo. App. S.D. 2005) (“Liberal amendment rules are not meant to be employed as a stratagem of litigation; rather, the purpose of the grant of an amendment is to allow a party to assert a matter unknown or neglected from inadvertence at the time of the original pleading.” (quoting *Merten v. Day*, 921 S.W.2d 35, 39 (Mo. App. W.D. 1996) (internal quotations omitted))).

147. See *supra* notes 123-24 and accompanying text.

plaintiff curing venue above adherence to and enforcement of the venue statutes enacted by the legislature.¹⁴⁸

While the court's decision relied heavily upon the economy of time and money resulting from ruling for the plaintiff, the heart of *Nixon* was its interpretation of section 508.012 to permit the plaintiffs to cure a defect in venue.¹⁴⁹ Because the statute was part of the Missouri General Assembly's answer to forum shopping and its meaning was a matter of first impression, the court's interpretation of section 508.012 deserves further scrutiny.

B. Analyzing the Court's Construction of Section 508.012 in Nixon

In *Nixon*, the court interpreted section 508.012 for the first time and ruled that it enabled a plaintiff to cure a defect in venue by subsequently adding a defendant to the petition.¹⁵⁰ On its face, this ruling seems consistent with *Linthicum*: in both cases, trial courts were instructed to consider the added parties when determining venue. However, the key distinction is that venue was improper when the suit was brought in *Nixon*.¹⁵¹

Assuming the *Nixon* plaintiffs properly added McIntosh, it is difficult to bring the resulting configuration within section 508.012.¹⁵² First, the addition

148. This author suggests that because resources will be expended if either the plaintiff amends the petition to cure venue or if the court grants the defendant's motion to transfer, only to have the plaintiff dismiss and re-file in the original court, any savings of "time and money" realized would be negligible. In addition, rather than merely being able to re-file, the plaintiffs would lose the ability to dismiss their petition without prejudice under Rule 67.02. See MO. SUP. CT. R. 67.02. Thus, the interaction of the rules would create an incentive for the plaintiff to abide by the venue statute, a goal that fits well with the legislative intent of the Tort Reform Act. Furthermore, some may question whether such a ruling by the court is akin to a legislative determination that the conservation of time and money are more important than giving effect to the rules. Finally, the ruling also creates a new, and potentially far-reaching, policy that time and money are legitimate grounds for reaching results contrary to statutory language.

149. See discussion of *Nixon supra* Part IV.A.

150. See discussion of *Nixon supra* Part IV.A.

151. Compare *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855 (Mo. 2001) (en banc) (per curiam) (when suit was filed in proper venue, trial court erred in failing to consider subsequently added defendant in determining venue when added defendant rendered venue improper) with *Nixon*, 282 S.W.3d 363 (when suit was filed in improper venue, trial court properly considered subsequently added defendant in determining venue even though original defendant made timely motion to transfer venue).

152. For the language of section 508.012, see *supra* note 100. This author believes section 508.012 contains minor drafting errors, in that prepositions are either missing or inappropriate when the words "add" and "remove" appear in the section. As a result, this author believes that section 508.012 should read "At any time prior to the commencement of a trial, if a plaintiff or defendant, is either added *to* or removed from a petition filed in any court in the State of Missouri which would have, if originally added *to* or removed *from* the initial petition, altered the determination of venue

of McIntosh would indeed have “altered the determination of venue under section 508.010,” as section 508.012 requires.¹⁵³ However, it is unclear that “altered” should be interpreted so broadly as to encompass the creation of proper venue. Next, the statute requires the judge to transfer the suit to a proper venue.¹⁵⁴ However, in *Nixon* the trial court retained the suit instead.¹⁵⁵ Finally, the statute instructs the judge to transfer the suit “to a proper forum under section 476.410,” thus expressly referencing that section’s command that judges “shall” transfer cases from improper to proper venues.¹⁵⁶ In *Nixon*, however, the trial court was permitted to retain the suit and create proper venue for itself.¹⁵⁷ By approving of this result, the Supreme Court of Missouri interprets the statute to *expand* where venue is proper, a result directly contrary to the legislature’s goal in reforming the venue statute.¹⁵⁸

C. Evaluating the Implications Arising from Nixon

The incentives created by *Nixon* align poorly with the legislative goals of the Tort Reform Act. Under *Nixon*, plaintiffs are encouraged to add defendants to a lawsuit in order to cure venue defects they created. In this way, plaintiffs can manipulate venue, a result contrary to the purpose of the venue reforms.¹⁵⁹ In contrast, defendants are deterred from filing motions to enforce the venue statutes because *Nixon* instructs trial courts to deny motions to transfer as long as time and money may be conserved through another ave-

under section 508.010, then the judge shall upon application of any party transfer the case to a proper forum under section 476.410.” (italics added to highlight author’s changes). While this language had no effect in *Nixon*, this author believes that correcting these potential errors could benefit future litigants and courts by clarifying the section’s language and purpose.

153. MO. REV. STAT. § 508.012 (Supp. 2009); for this section’s language, see *supra* note 100.

154. § 508.012.

155. *Nixon*, 282 S.W.3d at 364.

156. § 508.012. For the language of section 476.410, see *supra* note 42 and accompanying text.

157. *Nixon*, 282 S.W.3d at 364.

158. See *supra* notes 91-92 for a discussion of the legislative goals of the Tort Reform Act.

159. Consider again the facts of, and issue presented in, *Nixon*. The suit was originally filed on June 24, 2008, more than two full years after the venue statutes went into effect, and Missouri attorneys represented the Louisiana plaintiffs. Respondent’s Brief, *supra* note 19 at *5. Nonetheless, the suit was filed in plain violation of the venue statute. Because it is undisputed that McIntosh was not pretentively joined, he could have been added as an original defendant. *Nixon*, 282 S.W.3d at 368 (Fischer, J., dissenting). Thus, it is difficult to conclude anything other than that the plaintiffs’ attorneys flatly ignored the venue statute. Despite this, the court still permitted the plaintiffs to cure their defect by amending and adding McIntosh, all over a timely motion to transfer. *Id.* at 367 (majority opinion).

nue. As a result, *Nixon* is a considerable departure from the Missouri General Assembly's goals of fairness and consistency in determining venue.¹⁶⁰

Applying *Nixon* faithfully to future cases will cause further deviations from the legislative intent underlying Missouri venue law. For instance, would section 508.012 permit a plaintiff to satisfy venue via the pretensive addition of a defendant?¹⁶¹ Language in *Nixon* suggests not, but such a move might well result in saving time and money, thus satisfying the court's justification.¹⁶² Similarly, what if the dismissal of a party destroyed venue?¹⁶³ What if third-party plaintiffs or third-party defendants are dismissed or added, parties whom section 508.012 specifically reaches?¹⁶⁴ Finally, consider what effect the addition or dismissal of causes of action containing specific venue provisions – such as the MHRA venue provision at issue in *Ohmer* – could have on venue determination for a suit.¹⁶⁵ Just as they did prior to Missouri venue reform, plaintiffs' attorneys will scrutinize these situations to seek out any advantages they contain.¹⁶⁶ Based on *Nixon*'s holding, it is unclear how future courts will respond to these cases.

However, this Note predicts that future courts will not expand the holding of *Nixon* to enable future evasion of the venue statutes. First, *Nixon* is direct precedent for a relatively narrow procedural issue that may not translate well to the other scenarios suggested above.¹⁶⁷ In addition, courts have

160. Achtenberg, *supra* note 23, at 681 (concluding that section 508.012 should make only minor changes to the pre-reform court doctrines for venue); *id.* at 692 (concluding that, through the Tort Reform Act, the General Assembly intended to make it harder – not easier – for plaintiffs to manipulate venue).

161. This could occur, for example, if a janitorial office employee of the Railway who lived in Kansas City was added; such an individual would almost certainly bear no liability and so would be added for the purpose of venue rather than recovery.

162. *Nixon*, 282 S.W.3d at 368 (Fischer, J., dissenting) (noting that whether McIntosh's addition as a defendant was pretensive was not in dispute in the present case); *see also* Achtenberg, *supra* note 23, at 690-96 (arguing that even after the venue reform, the pretensive joinder doctrine will still play an important role).

163. This could arise in the converse of *Nixon* – that is, the plaintiffs sued both McIntosh and the Railway in Jackson County, but then McIntosh is removed from the petition. This could happen if the plaintiffs voluntarily dismiss McIntosh or if the court dismisses him on the grounds that his inclusion was pretensive.

164. A court could well conclude that transferring venue based on one of these non-original parties would be even more wasteful of time and money.

165. An example of this situation is provided by the MHRA claims in *Ohmer*. *See supra* notes 73-84; *see also* Achtenberg, *supra* note 23, at 695-705 (analyzing reformed venue statutes and concluding pretensive joinder of claims and strategically delayed joinder of claims are “the new frontier” in venue manipulation).

166. *See State ex rel. Lintthicum v. Calvin*, 57 S.W.3d 855, 865 n.2 (Mo. 2001) (en banc) (per curiam) (Stith, J., concurring in part and dissenting in part) (recognizing point of view contending that an attorney acts reasonably as an advocate when seeking procedural advantages for client).

167. As previously explained, McIntosh's addition as a defendant was not pretensive. *See supra* note 162. As a result, this Note concludes that the fact that the plain-

no interest in encouraging the pre-reform procedural jockeying that gave rise to so many appeals.¹⁶⁸ Instead, courts will likely use their authority to restrict such behavior, as they did in *Linthicum* and *Ohmer*.¹⁶⁹ The Tort Reform Act's legislative goals and statutory language should both underpin and foster such a limited judicial stance. For these reasons, this Note concludes that future courts will not expand *Nixon*'s holding, but instead will recede from it by allowing the Act's statutory language to control where proper venue lies in Missouri.

VI. CONCLUSION

The mass of tort lawsuits filed in St. Louis City in anticipation of the Tort Reform Act highlighted the extent to which Missouri plaintiffs' attorneys sought the procedural advantages of the state's pre-reform venue law.¹⁷⁰ However, it also revealed how attorneys desire the comforts of established law: the Tort Reform Act was threatening not only because of its restrictive venue provisions but also because these attorneys were unfamiliar with the law's mechanics and wary of its unknown ramifications.

In *Nixon*, the court's unfortunate departure from the Act's language and purpose has only created more uncertainty within the Missouri judicial system.¹⁷¹ This uncertainty most directly affects defense attorneys, who will wonder if their motions to transfer venue will be granted. Even so, plaintiffs' attorneys will also question what implications the decision holds for them. Furthermore, trial court judges will be the first to confront *Nixon*'s repercussions, and the Supreme Court of Missouri has so far provided them with little guidance on how to proceed. While this Note argues that *Nixon*'s reach will

tiffs in *Nixon* could have added McIntosh as a defendant in the original petition, but declined to do so, was persuasive to the court. That is, this author believes that because the court considered the plaintiffs' failure to originally name McIntosh as defendant to be harmless neglect, the conservation of time and money warranted the subsequent addition of McIntosh to render venue proper. *Nixon*, 282 S.W.3d at 367. This author concludes that occasions when a court will find such an omission harmless will be rare.

168. *State ex rel. DePaul Health Ctr. v. Mummert*, 870 S.W.2d 820, 821 (Mo. 1994) (en banc) (bemoaning the endless appeals that arose under the pre-reform venue statute).

169. *See, e.g., Achtenberg*, *supra* note 23, at 679-80 (outlining doctrines created by Missouri courts to resolve issues of venue manipulation arising under pre-reform venue law); *id.* at 696 (suggesting that courts develop a doctrine to address pretensive joinder of claims, as they did for pretensive joinder of parties in the pre-reform era).

170. For statistics, *see supra* note 5 and accompanying text.

171. *Nixon*, 282 S.W.3d at 368 (Fischer, J., dissenting) (warning that under the majority's decision, "[t]he strategy to the game called 'forum shopping' will reach a new high" and writing that "an orderly system of justice requires the litigants, attorneys, and trial courts of this state to be able to rely on this Court to follow its own rules . . .").

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not be expanded by future decisions, its present effect is to inject uncertainty into all civil litigation filed in the Missouri courts. For that reason, trial attorneys throughout the state would do well to stop everything and take a good look at the venue statutes before proceeding further in their respective cases.

