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Venue in Missouri After Tort Reform

David J. Achtenberg
University of Missouri - Kansas City, School of Law

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David Jacks Achtenberg*

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*Professor and Law Foundation Scholar, University of Missouri–Kansas City School of Law, B.A. 1970 Harvard University; J.D. 1973, University of Chicago School of Law. I thank Miriam Jacks Achtenberg, Jeffrey Berman, H. Alice Jacks, Robert Klonoff, Nancy Levit, and Ellen Suni for their intellectual and moral support and for their willingness to listen critically but charitably as I worked through the convoluted venue problems posed by the Tort Reform Act. I am particularly grateful to the many lawyers throughout this state who commented on various presentations in which I presented the ideas that led to this article. Librarians and staff at the Leon E. Bloch Law Library, the Missouri Supreme Court Library, and the Missouri State Archives provided assistance and access to sources without which this article could not have been written. Research for this Article was supported by a grant from the UMKC Law Foundation. This article is dedicated to the memory of my father, Irving Achtenberg, and my grandfather, Benjamin M. Achtenberg, two members of the Missouri Bar who saw the practice of law in Missouri as a noble calling.

I. INTRODUCTION

Venue matters. Anyone who doubts it need only look to the venue wars waged in the Missouri Supreme Court during the last decades. Understandably, plaintiffs prefer unrestrictive venue rules so that they can file and try their cases in counties with plaintiff-friendly jury pools. Just as understandably, defendants prefer rules that restrict plaintiffs' ability to choose between multiple venues and, to the extent possible, rules that permit the defendant to select the counties in which they can be forced to defend their actions.

The passage of Missouri's 2005 Tort Reform Act[1] represented an important legislative victory for defendants in this struggle. The Act's provisions significantly restrict plaintiffs' venue options and substantially increase defendants' control over the counties in which they can be sued. The wisdom of these changes will be debated vigorously, but this article will not engage in that debate. It has less ambitious goals: to explain the post-tort reform venue provisions, to identify important issues that will face Missouri courts due to ambiguities or gaps in those provisions, and to suggest the most appropriate resolution of those issues based on neutral interpretive principles. The Tort Reform Act has not ended the venue wars, but it has significantly reshaped the territory on which those wars will be fought. This article is a map to the new battlefield.

Part II of the article briefly outlines Missouri venue law as it existed prior to the Tort Reform Act, focusing on those aspects of pre-tort reform doctrine that will help the reader understand the post-tort reform changes.[2] While Part II may be a useful review for all readers, those with substantial background on the issue may wish to begin with Part III.

Part III starts by presenting an overall description of the post-tort reform venue regime. Subpart A explains the new venue rules for non-tort cases, those in which no count alleges a tort.[3] It shows that, as expected, the non-tort rules reduce the venue options for suits against most corporations;[4] but it also reveals the surprising fact that those rules will actually increase the number of counties in which nonprofit corporations can be sued.[5] Subpart B discusses the new venue rules for tort cases. After describing those rules,[6] it discusses and resolves three

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[1] H.R. 393, 93d Gen. Assem., 1st Reg. Sess. (Mo. 2005). An Act to repeal Sections 355.176, 408.040, 490.715, 508.010, 508.040, 508.070, 508.120, 510.263, 510.340, 516.105, 537.035, 537.067, 537.090, 538.205, 538.210, 538.220, 538.225, 538.230, and 538.300, RSMo, and to enact in lieu thereof twenty-three new sections relating to claims for damages and the payment thereof, 2005 Mo. Laws 641, 641-57 (Mar. 29, 2005) [hereinafter "H.B. 393"]. In the text, this article will refer to the act by its popular name, the "Tort Reform Act," or as "H.B. 393."

[2] *See infra* text accompanying notes 24-60.

[3] *See infra* text accompanying notes 63-73.

[4] *See infra* text accompanying notes 64-70.

[5] *See infra* text accompanying notes 71-86.

[6] *See infra* text accompanying notes 87-94.

important interpretive questions: What it does it mean to say that a plaintiff was "first injured" in a particular location?[7] What does the statutory term "principal place of residence" mean when the party in question is not an individual, or is an individual whose main residence is outside Missouri?[8] What is the scope of the Act's requirement that venue must be determined as of the date of first injury?[9]

Part III continues by identifying and attempting to resolve three latent inconsistencies within the post-tort reform venue scheme. Subpart C discusses the multiple-party venue problem.[10] It explains how to determine venue when the otherwise applicable rules, if applied to the various parties separately, prescribe conflicting venues. Subpart D identifies the existence of "venue gaps," situations in which the Tort Reform Act appears to dictate that certain cases may not be brought in *any* Missouri county.[11] It concludes that the Court cannot interpret the Act in a manner that fills these gaps and will need to decide whether the existence of these gaps violates the Missouri Constitution. Finally, subpart E explains how to resolve the conflict between the venue provisions of the Tort Reform Act and the apparently incompatible provisions of special venue statutes that apply to particular parties and specific types of civil actions.[12]

Part IV deals with additional issues that stem from provisions of the Act that do not determine venue itself, but instead regulate the way venue can be changed, manipulated, and contested. Subpart A discusses new section 508.011's apparent partial repeal of Supreme Court Rule 51.03, the small county change of venue rule.[13] As a matter of statutory interpretation, Subpart A concludes that the act has not repealed Rule 51.03 because—contrary to the apparent assumption of the legislature—that rule is not inconsistent with the provisions of Chapter 508.[14] Subpart A then analyzes Article V, section 5 of the Missouri Constitution, discussing its text, its enactment history, and case law interpreting it.[15] That analysis demonstrates that, if section 508.011 were interpreted to modify or partially annul Rule 51.03, it would violate Article V, Section 5 because the Tort Reform Act was not a "law limited to the purpose" of making such a change. Finally, Subpart A concludes that, even if section 508.011 were interpreted to repeal Rule 51.03 and to comply with Article V, section 5, it would necessarily violate the "original purpose" requirement of Article III, section 21.[16]

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[7] *See infra* text accompanying notes 95-110.
[8] *See infra* text accompanying notes 111-24.
[9] *See infra* text accompanying notes 125-45.
[10] *See infra* text accompanying notes 146-97.
[11] *See infra* text accompanying notes 198-225.
[12] *See infra* text accompanying notes 226-316.
[13] *See infra* text accompanying notes 317-522.
[14] *See infra* text accompanying notes 325-98.
[15] *See infra* text accompanying notes 399-14.
[16] *See infra* text accompanying notes 515-22.

Subpart B of Part IV discusses new section 508.012's requirement that venue be redetermined whenever "a plaintiff or defendant, including a third-party plaintiff or defendant, is either added to or removed from a petition."[17] It concludes that, contrary to the expectations of many lawyers, section 508.012 will have only a modest effect, requiring venue redetermination only when plaintiffs amend their petitions to add or drop a party.[18] In light of the limited reach of section 508.012, Subpart B argues that the doctrine of pretensive joinder will still be necessary and may need to be expanded.[19] Finally, Subpart B points out that, while section 508.012 deals with a venue tactic—manipulation of *parties*—that the Tort Reform Act has made *less* important, it has completely ignored a similar tactic—manipulation of *claims*—that the act has made much more important. The subpart concludes that the Court should deal with this new tactic by creating a doctrine that requires trial courts to disregard pretensively joined claims on much the same basis that they currently disregard pretensively joined parties.[20]

Finally, Subpart C of Part IV analyzes section 508.010.10's unusual rule requiring that "[a]ll motions to dismiss or to transfer based upon a claim of improper venue shall be deemed granted if not denied within ninety days of filing."[21] That analysis leads to the surprising conclusion that section 508.010.10's ninety-day rule applies to all motions to dismiss, regardless of the basis of the motion, rather than merely to venue challenges.[22] Subpart C then suggests some practical steps for a plaintiff to take if a trial court's inaction leads to the unintentional "deemed dismissal" of a petition.[23]

II. MISSOURI VENUE PRIOR TO TORT REFORM—A BRIEF REVIEW

To understand the changes wrought by Missouri's 2005 Tort Reform Act, it is useful to have a brief review of the rules that governed venue prior to that act. Before tort reform, there were three major sets of venue rules, the application of which depended on the nature of the defendants in the case: the general venue statute (applicable if at least one defendant was an individual and no defendant was a not-for-profit corporation), the corporate defendant venue statute (applicable if all defendants were for-profit corporations), and the not-for-profit venue statute (applicable if at least one defendant was a not-for-profit corporation). In addition, there were a large number of special venue provisions—some contained in Chapter 508 and some contained elsewhere—that

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[17] *See infra* text accompanying notes 523-674.
[18] *See infra* text accompanying notes 535-87.
[19] *See infra* text accompanying notes 588-618.
[20] *See infra* text accompanying notes 620-74.
[21] *See infra* text accompanying notes 675-708.
[22] *See infra* text accompanying notes 675-700.
[23] *See infra* text accompanying notes 701-08.

provided different rules for particular types of causes of action or for actions involving particular types of parties.

A. The General Venue Statute (Former Section 508.010)

Under the general venue statute, section 508.010, the basic rule was that an action could be brought in any Missouri county in which any defendant resided.[24] If a defendant resided in the state, the action could also be brought in the county where the *plaintiff* resided, but only if the defendant could be served in that county.[25] In addition, in any tort case, the action could also be brought in the county where the cause of action accrued,[26] which had been interpreted as the county where the wrongful conduct was committed.[27] Finally, if all defendants resided outside the state, the action could be brought in any Missouri county.[28]

Since section 508.010 based venue primarily on the residence of parties, the meaning of "residence" was crucial. An individual's "residence" was defined as a place in which he or she was physically present with some "degree of permanency," but not necessarily the same level of "intent to remain indefinitely" required for domicile.[29] As a result, an individual could have more than one residence for venue purposes (e.g., a winter and a summer home).[30] On the other hand, most for-profit corporations were deemed to have only one residence, the county in which its registered office was located.[31] Finally, there were special

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[24] MO. REV. STAT. § 508.010(2) (2000) (where defendants are residents of different Missouri counties); § 508.010(3) (where some defendants are residents and some are non-residents).

The general venue statute applied when the defendants were individuals or a mix of individuals and for-profit corporations. State *ex rel.* Coca Cola Bottling Co. of Mid-America v. Gaertner, 681 S.W.2d 445 (Mo. 1984) (*overruled on other grounds by* State *ex rel.* DePaul Health Ctr. v. Mummert, 870 S.W.2d 820, 822 (Mo. 1994)).

[25] MO. REV. STAT. § 508.010(1) (2000). *See, e.g.,* State *ex rel.* Ford Motor Co. v. Manners, 161 S.W.3d 373, 375 (Mo. 2005) (statutory language that requires that defendant be "found" within the county satisfied only if the defendant is served in the county). The court may have left open the question of whether this provision applies only to cases in which there is a single defendant. *Id.* at 375 n.3 (assuming but not deciding that the rule applies to multiple defendant cases). *But see*, State *ex rel.* Bartlett v. McQueen, 361 Mo. 1029, 238 S.W. 2d 393, 395 (1951) (stating that the rule applies in multiple defendant cases) (*overruled on other grounds by* State *ex rel.* DePaul Health Ctr. v. Mummert, 870 S.W.2d 820,821 (Mo. 1994)).

[26] MO. REV. STAT. § 508.010(6) (2000).

[27] State *ex rel.* Mo. Prop. & Cas. Ins. Guar. Ass'n v. Brown, 900 S.W.2d 268 (Mo. Ct. App. 1995).

[28] MO. REV. STAT. § 508.010(4) (2000).

[29] State *ex rel.* Quest Commc'ns Corp. v. Baldridge, 913 S.W.2d 366, 369-70 (Mo. Ct. App. 1996).

[30] *Id.* at 370.

[31] MO. REV. STAT. § 351.375.2(2005); State *ex rel.* Rothermich v. Gallagher, 816 S.W.2d 194, 198 (Mo. 1991).

The same rule appears to apply to limited partnerships. MO. REV. STAT. § 359.041.4 (2005) (providing that a limited partnership's residence "shall be deemed for all purposes to be in the county where its registered office is maintained").

rules defining residence for other entities, such as insurance companies[32] and limited liability partnerships.[33]

The general venue statute applied when all defendants were individuals or when the defendants were a mix of individuals and for-profit corporations.[34] It did not apply when *all* defendants were for-profit corporations[35] or when *any* defendant was a not-for-profit corporation.[36]

B. The Corporations-Only Venue Statute (Former Section 508.040)

The general venue statute was subject to various special venue statutes, the most important of which was section 508.040,[37] the "corporations-only" statute governing cases in which *every* defendant was a for-profit corporation.[38] Under that statute, if all the defendants were for-profit corporations, venue did not depend on the *residence* (i.e., the location of the registered office) of the corporations.[39] Instead, venue was proper "in any county where such corporations shall have or usually keep an office or agent *for the transaction of their usual and customary business*."[40] As a result, plaintiffs were not required to file in the single county that the defendant had selected for its registered office, but instead could file in any county in which the defendant conducted its business operations.[41]

An unregistered foreign corporation is deemed to have no Missouri residence. State *ex rel.* England v. Koehr, 849 S.W.2d 168, 169-70 (Mo. Ct. App. 1993).

[32] State *ex rel.* Smith v. Gray, 979 S.W.2d 190 (Mo. 1998) (Insurance companies are deemed to reside, and thus can be sued, in any county in which they have an office or agent for doing their ordinary business.).

[33] MO. REV. STAT. § 358.150.6 (2005) (defining a limited liability partnership's residence for venue purposes as "the county in which it has any office or agent for the transaction of its usual and customary business activities or in which its registered office or registered agent is located").

[34] State *ex rel.* Dick Proctor Imp., Inc. v. Gaertner, 671 S.W.2d 273, 274 (Mo. 1984).

[35] *See infra* text accompanying notes 37-44.

[36] *See infra* text accompanying notes 45-47.

[37] MO. REV. STAT. § 508.040 (2000).

[38] State *ex rel.* Ford Motor Co. v. Bacon, 63 S.W.3d 641, 642 (Mo. 2002) (section 508.040 applies if sole defendant is a corporation); *Dick Proctor Imp*., 671 S.W.2d at 274 (section 508.040 applies where all defendants are corporations); State *ex rel.* Baker v. Goodman, 364 Mo. 1202, 1212-13, 274 S.W.2d 293, 297 (Mo. 1954) (same); State *ex rel.* Harper Indus. v. Sweeney, 190 S.W.3d 541, 544 (Mo. Ct. App. 2006) (section 508.040 applies rather than section 508.010(4) even if sole defendant was an unregistered foreign corporation that had no Missouri residence).

[39] Thus, if all defendants were corporations, the fact that a county was the location of the defendants' registered offices was not, by itself, enough to make venue proper in that county. State *ex rel.* Coca Cola Bottling Co. of Mid-America v. Gaertner, 681 S.W.2d 445, 447 (Mo. 1984), *overruled on other grounds by* State *ex rel.* DePaul Health Ctr. v. Mummert, 870 S.W.2d 820, 822 (Mo. 1994).

[40] MO. REV. STAT. § 508.040 (2000) (emphasis added). As discussed below, the action could also be filed in the county in which the cause of action accrued.

[41] The section also permitted suits against railroads to be filed in any county through which the railroad ran. *Id.*

In addition, plaintiffs could file suit in the county in which "the cause of action accrued," and, unlike plaintiffs suing under the general venue statute, could do so in both tort and non-tort cases.[42] In tort cases, the cause of action was deemed to accrue where the wrongful act was committed.[43] In contract cases, it was deemed to accrue where the breach occurred, rather than where the contract was made.[44]

C. The Not-For-Profit Venue Statute (Former Section 355.176.4)

Suits involving not-for-profit corporations were governed by a third set of rules that trumped both the general venue statute and the corporations-only venue statute.[45] Under section 355.176.4, suit could be brought *only* in the county in which the cause of action accrued, in the county in which the not-for-profit corporation maintained its principal place of business, or the county in which its registered office was located.[46] This not-for-profit corporation venue statute governed all cases in which a not-for-profit was a defendant, even if individuals or for-profit corporations were named as additional defendants.[47]

D. Special Venue Statutes

Finally, there were a considerable number of narrower special venue statutes that governed actions involving particular types of parties or suits asserting particular causes of action. For example, there were special rules that applied if a plaintiff was a county,[48] and others that applied if a defendant was a county,[49] a municipality,[50] or a limited liability company.[51] Similarly, there were

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[42] *Id.*

[43] State *ex rel.* Mo. Prop. & Cas. Ins. Guar. Ass'n v. Brown, 900 S.W.2d 268, 271-72 (Mo. Ct. App. 1995).

[44] *Id.* at 272.

[45] State *ex rel.* SSM Health Care St. Louis v. Neill, 78 S.W.3d 140 (Mo. 2002). The relevant provisions are contained in section 355.176.4 which can be found in MO. REV. STAT. (1994) or at 1994 Mo. Laws 868. As discussed in SSM Health Care, section 355.176.4 was repealed in 1996, but was reinstated when the repealing statute was held to be unconstitutional. As a result, it does not appear in the revised statutes after 1994, but continues to be in effect except to the extent it has been modified or superseded by the Tort Reform Act. For purposes of this article, we will refer to the section as section 355.176.4 simpliciter.

[46] *SSM Health Care*, 78 S.W.3d at 141.

[47] State *ex rel.* St. John's Mercy Healthcare v. Neill, 95 S.W.3d 103 (Mo. 2003); *SSM Health Care*, 78 S.W.3d at 141.

[48] MO. REV. STAT. § 508.010(6) (2000) (suit by counties can be brought where any defendant resides or in the plaintiff county if any defendant may be found in the county).

[49] MO. REV. STAT. § 508.060 (2005) (suits against counties must be filed in the circuit court of the defendant county).

[50] § 508.050 (suits against cities to be brought in the county in which the city is situated with special provisions for cities that are situated in more than one county); § 70.320 (suits affecting

special venue rules that applied if the suit asserted a cause of action for replevin,[52] for partition[53] or possession of real estate,[54] for violation of state anti-trust law,[55] or for illegal discrimination.[56] There were special venue statutes for defendants served and sued under particular statutes,[57] for actions to review various administrative proceedings,[58] and for a variety of obscure causes of action.[59] These special venue statutes were usually held to supersede the otherwise applicable general venue statute or the corporations-only venue statute.[60]

III. MISSOURI VENUE AFTER TORT REFORM—THE BASIC STRUCTURE

Missouri's 2005 Tort Reform Act drastically altered the previous rules for determining venue sharply reducing the number of options available to plaintiffs. In tort cases, it changed the venue decision from one that focused primarily on

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contracts with cities may be brought in the county in which the city is located or in the county in which any party to the contract resides); Control Tech. & Solutions v. Malden R-1 Sch. Dist., 181 S.W.3d 80, 84 (Mo. Ct. App. 2005) (holding that section 508.050 is not exclusive and that section 70.320 provides additional venue options when a suit against a city is based on contract).

The venue rules regarding municipalities may also apply to school districts. *See* State *ex rel.* Lebanon Sch. Dist. R-III v. Winfrey, 183 S.W.3d 232, 234 n.2 (Mo. 2006) (not deciding issue, but noting that lower courts had held that school districts should be treated as municipalities for venue purposes).

[51] MO. REV. STAT. § 347.069.2 (2005) (suits against limited liability companies (LLCs) to be brought in the county in which the cause of action accrued or in any county where the LLC has an office or agent for the transaction of its usual and customary business, or in the county in which its registered office is located).

[52] § 508.020 (replevin actions to be filed where the property is located).

[53] § 528.040 (partition actions to be filed in county where property is located with special provisions if property is located in more than one county).

[54] § 508.030 (suits for possession of real estate to be brought in county where real estate is located).

[55] § 416.121.1 (civil anti-trust actions for damages or injunctions may be brought where any defendant resides; has an officer, agent or representative; or where a defendant, agent, officer or representative may be found); § 416.131 (civil and criminal anti-trust actions generally may be brought in county in which any defendant resides, engages in business or has an agent).

[56] § 213.111(1) (civil actions under Missouri Human Rights Act may be brought in county in which the unlawful discriminatory practice allegedly occurred); Igoe v. Dep't of Labor & Indus. Relations, 152 S.W.3d 284, 288 (Mo. 2005) (section 213.111(1) trumps the broader provisions of section 508.010(2); State *ex rel.* Diehl v. O'Malley, 95 S.W.3d 82, 91, n.18 (Mo. 2003) (same).

[57] *See, e.g.,* MO. REV. STAT. § 506.290.1 (2005) (venue in cases brought under non-resident motorist statute); § 506.330 (2005) (venue in cases brought under non-resident watercraft statute).

[58] *See* statutes cited *infra* note 345.

[59] *See, e.g.,* § 60.355 (venue for actions alleging damage to surveyors' markers); § 560.290.2 (venue for actions alleging identity theft); § 84.015 (venue for actions involving the St. Louis Board of Police Commissioners).

[60] Igoe v. Dep't of Labor & Indus. Relations, 152 S.W.3d 284, 288 (Mo. 2005); State *ex rel.* Wasson v. Schroeder, 646 S.W.2d 105, 107 (Mo. 1983) (*overruled on other grounds* in State *ex rel.* DePaul Health Ctr. v. Mummert, 870 S.W.2d 820, 822 (Mo. 1994)).

the location of the defendants to one that focuses primarily on the location of the first injury. This section will outline the basic structure of the venue rules created by tort reform. The following sections will analyze a number of issues raised by the Act.

Under the Tort Reform Act, there will now be two quite different sets of venue rules: one applicable to tort cases (actions in which *any* count alleges a tort)[61] and a second set of rules applicable to non-tort cases (actions in which *no* count alleges a tort).[62] Both restrict the options available to plaintiffs, but the non-tort restrictions are substantially less drastic.

A. Venue for Non-Tort Cases

For non-tort cases, the Tort Reform Act retained the basic provisions of the pre-tort reform general venue statute.[63] Thus, non-tort cases may still be brought (a) in any Missouri county in which any defendant resides,[64] (b) in the county in which the plaintiff resides and the defendant can be served,[65] or (c) in any Missouri county if all defendants are non-residents.[66] Thus, with the exception of the possibility that a defendant's residence will now be determined as of the date of first injury rather than the date suit is brought,[67] the general venue statute's rules for non-tort cases remain the same.

However, the class of non-tort cases covered by those rules has been substantially expanded, and, as a result, plaintiffs will sometimes have fewer alternative venues. Since the Tort Reform Act repealed the corporations-only venue statute (prior section 508.040),[68] the general venue statute's rules now apply to non-tort cases even if all defendants are for-profit corporations. As a result, a plaintiff in such a case will no longer be able to pick among the various counties where the defendant has offices or agents "for the transaction of their

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[61] MO. REV. STAT. § 508.010.4 (2005) (tort cases in which the first injury was suffered within Missouri); § 508.010.5 (tort cases in which the first injury was suffered outside Missouri).

[62] § 508.010.2 .

[63] *Compare* MO. REV. STAT. § 508.010(1)-(4) (2000) *with* MO. REV. STAT. § 508.010.2(1)-(4) (2005).

[64] *See* § 508.010.2(1) (single resident defendant); § 508.010.2(2) (multiple resident defendants in residing in different counties); § 508.010.2(3) (mix of resident and non-resident defendants).

[65] § 508.010.2(1). *See also* authorities cited *supra* note 25.

[66] § 508.010.2(4).

[67] *Compare* § 508.010.9 (providing that "[i]n all actions, venue shall be determined as of the date the plaintiff was first injured") *with* State *ex rel.* Linthicum v. Calvin, 57 S.W.3d 855, 857 (Mo. 2001) (venue determined as it stands when brought); State *ex rel.* Breckenridge v. Sweeney, 920 S.W.2d 901, 903 (Mo. 1996) (residence of parties determined as of the date case is brought); State *ex rel.* DePaul Health Ctr. v. Mummert, 870 S.W.2d 820, 823 (Mo. 1994) (venue determined as it stands when brought); State *ex rel.* Palmer by Palmer v. Goeke, 8 S.W.3d 193, 195 (Mo. Ct. App. 1999) (venue not affected by post-filing change of party's residence).

[68] MO. REV. STAT. § 508.040 (2000).

usual and customary business,"[69] but will instead be limited to the single county in which the corporate defendant has chosen to place its registered office.[70]

In addition, since the Tort Reform Act also repealed the special venue provisions for not-for-profit corporations,[71] the general venue rules will apply to non-tort cases against those corporations as well. Plaintiffs will no longer have the tripartite option of suing a not-for-profit in the county where the cause of action accrued, the county in which the corporation's registered office is located, or the county where it has its principal place of business.[72] Instead, a plaintiff in a non-tort case will be able to sue only in the county or counties in which the not-for-profit corporation resides.[73]

Ironically, this change may have unintentionally *expanded* the number of available venues for suing not-for-profit corporations since such corporations will be deemed to reside in every county in which they have offices for conducting their normal operations. To understand why this is true, it is necessary to trace an obscure aspect of the convoluted history of Missouri not-for-profit corporation law.

Under the common law, unless a statute decrees otherwise, a corporation is deemed to reside in all counties where its ordinary business is done.[74] However, in 1953, Missouri adopted a new General Not For Profit Corporation Act,[75] under section 10 of which a not-for-profit corporation's residence and location were defined "for all purposes to be in the county where its registered office is maintained."[76] (An essentially identical definition had been adopted for general business corporations in 1943.)[77] Thus, from 1953 until 1994, a not-for-profit

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[69] *Id.*

[70] § 351.375.2 (for-profit corporations reside where their registered office is located); State *ex rel.* Rothermich v. Gallagher, 816 S.W.2d 194, 198 (Mo. 1991) (same).

It would also be possible to sue in the county where the plaintiff resides, but only if the corporate defendant could be served in that county. *See* MO. REV. STAT. § 508.010.2(1). In addition, if all defendants are non-residents (e.g., unregistered foreign corporations) plaintiff could sue in any Missouri county. § 508.010.2(4); State *ex rel.* England v. Koehr, 849 S.W.2d 168, 169-70 (Mo. Ct. App. 1993) (unregistered foreign corporation has no Missouri residence). In multiple defendant cases, venue will be proper in any Missouri county in which any defendant resides.

[71] H.B. 393 repealed the previously existing MO. REV. STAT. § 355.176 (1994), which contained four subsections, and replaced it with a new section 355.176, which omits former subsection 355.176.4, the subsection that contained the not-for-profit venue statute. *See also*, MO. REV. STAT. § 508.010.12 (2005) (providing that "[t]he provisions of this section [508.010] shall apply irrespective of whether the defendant is a for-profit or a not-for-profit entity").

[72] *Compare* MO. REV. STAT. § 355.176.4 (1994) *with* MO. REV. STAT. § 355.176 (2005) (containing no subsection 4) and *with* § 508.010.2 (setting forth venue alternatives for non-tort cases).

[73] For additional available venues, *see supra* note 70.

[74] State *ex rel.* Smith v. Gray, 979 S.W.2d 190, 192 (Mo. 1998).

[75] *See* General Not For Profit Corporation Act, 1953 Mo. Laws 322, 322-66.

[76] *Id.* § 10, 1953 Mo. Laws at 330 (subsequently codified as MO. REV. STAT. § 355.170.2 (1959)).

[77] The General and Business Corporation Act of Missouri, § 10, 1943 Mo. Laws 410, 419-20. The current version of this provision is MO. REV. STAT. § 351.375.2 (2005).

corporation was, like a general business corporation, deemed to have a single county of residence, the one it chose by selecting its registered office. However, since not-for-profit corporations were often covered by section 508.040 (the corporations-only venue statute) under which residence was immaterial, they could often be sued wherever they (or co-defendant corporations) had offices or agents for doing their ordinary business.[78]

In 1994, the General Assembly gave not-for-profit corporations additional venue protection when it enacted a general revision of the laws governing nonprofit corporations.[79] Section 351.176.4 of that revision explicitly limited venue in suits against a not-for-profit corporation to the county in which the corporation had its principal place of business, the county in which the cause of action accrued, or the county in which the corporation's registered agent was located.[80] At the same time, the revision repealed the previous definition of a not-for-profit corporation's residence.[81] Thus, since 1994, there has been no statutory definition of the residence of a not-for-profit corporation;[82] but, until the 2005 Tort Reform Act became effective, the absence of such a definition was irrelevant since venue for such corporations was governed solely by section 351.176.4.[83]

However, since the Tort Reform Act repealed section 351.176.4, venue in non-tort suits against not-for-profits is now governed by the general non-tort venue rules; and, under those rules, residence is often determinative.[84] In *State* ex rel. *Smith v. Gray*, the Missouri Supreme Court held that, in the absence of a statute to the contrary, the common law definition of corporate residence controls and dictates that a corporation resides wherever it has offices or agents for the conduct of its ordinary business.[85] While *Gray* dealt with insurance corporations rather than not-for-profits, the two situations appear to be legally indistinguishable.[86] As a result, it seems likely that, in non-tort cases, section

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[78] State *ex rel.* Vaughn v. Koehr, 835 S.W.2d 543, 544 (Mo. Ct. App. 1992). Moreover, if joined as defendants with individuals, they could be sued wherever any defendant resided. MO. REV. STAT. § 508.010(2) (1986).

[79] Missouri Nonprofit Corporation Act, 1994 Mo. Laws 854.

[80] *Id.* § 355.176.4, 1994 Mo. Laws at 869.

[81] *Id.* § A, 1994 Mo. Laws at 856 (repealing § 355.170). *See also*, *id.* at 908, 915 (same).

[82] Not-for-profit corporations are not governed by the definition of residence for general business corporations, per MO. REV. STAT. § 351.375.2 (2005), because the General Business Corporation Act explicitly excludes them from its coverage. § 351.690(3).

[83] State *ex rel.* SSM Health Care St. Louis v. Neill, 78 S.W.3d 140, 140-41 (Mo. 2002) (discussing previous, unconstitutional attempt to repeal section 351.176.4); State *ex rel.* St. John's Mercy Healthcare v. Neill, 95 S.W.3d 103, 105-06 (Mo. 2003).

[84] *See* MO. REV. STAT. § 508.010(2) (2005).

[85] State *ex rel.* Smith v. Gray, 979 S.W.2d 190, 192 (Mo. 1998) (insurance corporations governed by common law rule since no applicable statutory definition exists).

[86] One could argue that *Gray* is undermined by the repeal of section 508.040 since *Gray* relied on previous cases that relied, in part, on reading section 508.010 *in pari materia* with section 508.040. *Id.* However, the Court appears to have principally relied on the common law definition of

508.010 will be interpreted as permitting not-for-profit corporations to be sued wherever they maintain an office or agent for conducting their ordinary affairs.

B. Venue for Tort Cases

The Tort Reform Act radically changed the venue rules for all actions in which any count alleges a tort.[87] For such cases, the act has shifted the focus away from the traditional concepts of a party's residence and a cause of action's place of accrual. Instead, under the new regime, venue determinations depend primarily on the location of the plaintiff's first injury. In some cases, it will also depend on the "principal place of residence" of individual parties or the location of the registered agent of corporate defendants.[88] These three new determinative factors—place of first injury, principal place of residence, and location of registered agent—are statutorily defined terms of art and their meanings are not always what one might expect. Section 1 below will discuss the basic venue rules for tort cases. Section 2 will discuss the meanings of various terms used in those basic rules.

1. The Basic Tort-Case Venue Rules

The Tort Reform Act's tort case venue rules apply to all actions in which *any* count alleges a tort.[89] If the plaintiff was first injured within Missouri, there is only one prescribed venue, "the county where the plaintiff was first injured by the wrongful acts or negligent conduct alleged in the action."[90]

If the plaintiff was first injured outside the state of Missouri, a plaintiff's choices are more complicated.[91] First, "[i]f the defendant is a corporation, then

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residence and the legislature's decision to change that definition for general business corporations but not for insurance companies. If anything, the argument for using the common law definition is stronger for not-for-profit corporations since the legislature affirmatively repealed a pre-existing statutory definition of their residence, while it merely failed to enact such a definition for insurance corporations.

[87] MO. REV. STAT. § 508.010.4 (2005) (tort cases in which the first injury was suffered within Missouri); § 508.010.5 (tort cases in which the first injury was suffered outside Missouri).

[88] § 508.010.4; § 508.010.5.

[89] § 508.010.4; § 508.010.5. The distinction is not necessarily as clear as it seems. Whether the "tort-case" rules apply to cases in which tort claims are added by post filing amendments is discussed *infra* Part III, text accompanying notes 635-61.

[90] § 508.010.4 ("Notwithstanding any other provision of law, in all actions in which there is any count alleging a tort and in which the plaintiff was first injured in the state of Missouri, venue shall be in the county where the plaintiff was first injured by the wrongful acts or negligent conduct alleged in the action.").

[91] § 508.010.5 ("Notwithstanding any other provision of law, in all actions in which there is any count alleging a tort and in which the plaintiff was first injured outside the state of Missouri, venue shall be determined as follows: (1) If the defendant is a corporation, then venue shall be in any county where a defendant corporation's registered agent is located or, if the plaintiff's principal place of residence was in the state of Missouri on the date the plaintiff was first injured, then venue

venue shall be in any county where a defendant corporation's registered agent is located. . . ."[92] Second, "[i]f the defendant is an individual, then venue shall be in any county of the individual defendant's principal place of residence in the state of Missouri. . . ."[93] Third, regardless of whether the defendant is an individual or a corporation, "if the plaintiff's principal place of residence was in the state of Missouri on the date the plaintiff was first injured, then venue may be in the county of the plaintiff's principal place of residence on the date the plaintiff was first injured."[94]

2. Interpretive Problems Under the Basic Tort-Case Venue Rules

a. The Location of "First Injury"

Under the tort case venue rules, it is crucial to determine "where the plaintiff was first injured by the wrongful acts or negligent conduct alleged in the action."[95] In the typical bodily injury case, the meaning of this phrase appears

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may be in the county of the plaintiff's principal place of residence on the date the plaintiff was first injured; (2) If the defendant is an individual, then venue shall be in any county of the individual defendant's principal place of residence in the state of Missouri or, if the plaintiff's principal place of residence was in the state of Missouri on the date the plaintiff was first injured, then venue may be in the county containing the plaintiff's principal place of residence on the date the plaintiff was first injured.").

There will be cases that fall into gaps, for example, cases in which there appear to be no proper venue in Missouri. *See infra*, text accompanying notes 168-74, 198-220. In addition, there may also be cases in which the plaintiff has more than two options because of the existence of multiple parties. *See infra*, text accompanying notes 161-66.

[92] § 508.010.5(1).

[93] § 508.010.5(2).

[94] § 508.010.5(1) (as to corporation defendants); § 508.010.5(2) (identical language as to individual defendants).

The rather awkward language of the out-of-state injury provisions has led some to suggest that this third option is only available if neither of the first two options can be used, for example, that a corporate defendant could be sued in the county of the plaintiff's principal place of residence only if the corporate defendant did not have a registered agent in Missouri. However, this suggestion does not seem to follow from the language or logic of these provisions. The sentence is the grammatical equivalent of telling a shopper, "If you go to the store on Tuesday, buy pot roast or, if sirloin is on sale, you may buy sirloin." No one would suggest that this sentence permitted the shopper to buy sirloin only if it was on sale *and* the store was out of pot roast. The initial dependent clause ("If the defendant is a corporation,") conditions the entire sentence, i.e. it says that neither option is available unless the defendant is a corporation. The second dependent clause ("if the plaintiff's principal place of residence was in the state of Missouri . . .") conditions the second independent clause ("then venue may be . . ."), i.e. it says that the plaintiff's principal place of residence is not an available option unless it is located in Missouri.

[95] § 508.010.4. In a number of places, the statute refers to the place where (or the time when) "the plaintiff was first injured" simpliciter. *See, e.g.,* § 508.010.4 ("in which the plaintiff was first injured in the state of Missouri"); § 508.010.5 ("in which the plaintiff was first injured outside the state of Missouri"); § 508.010.5(1) ("on the date the plaintiff was first injured"); § 508.010.5(2) (same); § 508.010.8 ("the plaintiff shall be considered first injured"); § 508.010.11 (same); §

self-evident. The victim of an automobile collision is first injured at the location and at the time of the collision. The victim of a typical battery is first injured when and where he or she was first struck.

However, as used in the Tort Reform Act, "first injury" is, at least in part, a statutorily defined term of art. In some situations, the statutory definition recognizes and resolves ambiguity in the ordinary usage of the term. In some, it redefines "first injury" in a way that does not conform to ordinary usage at all but apparently serves an unidentified policy objective. Finally, there are a range of situations in which the phrase will need to be defined by subsequent case law.

For example, absent a statutory definition, one could have debated whether a victim of defamation or invasion of privacy was "first injured" where the defamation itself was first published, where the victim was physically located at the time of first publication, where the publication first had an effect on the victim's reputation, or where the victim first learned of the defamation. The Tort Reform Act preemptively resolves this debate in favor of the location of first publication.[96] Similarly, the act treats wrongful death plaintiffs as first injured in

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508.010.14 ("A plaintiff is considered first injured"). *See also*, § 538.232 ("the plaintiff shall be considered injured by the health care provider"). In context, it appears that the more truncated phrase is simply a shorthand version of the more explicit, longer phrase. It would make no sense for the shorter version to be treated as referring to some previous or subsequent injury.

[96] § 508.010.8 ("In any action for defamation or for invasion of privacy, the plaintiff shall be considered first injured in the county in which the defamation or invasion was first published."). In doing so, the act conforms to the pre-tort reform rule that treated the location of first publication as the place of accrual for venue purposes. MO. REV. STAT. § 508.010(6) (2000).

Under section 508.010.8, a difficult question is raised if a claim for defamation or invasion of privacy is joined with an additional claim alleging an injury that predated the publication of the defamation. The section's use of the phrase "any *action* for defamation" could be interpreted as meaning any civil action *containing* a count asserting a claim of defamation, in which case the county of first publication would be treated as the place of first injury for the entire civil action. Alternatively, the phrase could be interpreted as meaning any *count* containing a claim of defamation, in which case the county of first publication would be the place of first injury *for that count* but not necessarily for the case as a whole.

While this issue is not free from doubt, it appears most likely that the Tort Reform Act uses the word "action" as shorthand for "civil action," i.e., uses it to refer to the entire lawsuit. In sections 508.010.4 and 508.010.5, the Act refers to "all *actions* in which there is any *count* alleging a tort" thus necessarily using "actions" to refer to the civil action as a whole as opposed to the separate counts that make up that action. *See also* 508.010.2 ("all *actions* in which there is no *count* alleging a tort). This conclusion is reinforced by the language of the second sentence of section 508.010.11 which states that "In any spouse's *claim* for loss of consortium, the plaintiff claiming loss of consortium shall be considered first injured where the other spouse was first injured by the wrongful acts or negligent conduct alleged in *the action*"—thus treating a "claim" as a part of an "action." Similarly, section 508.010.7 ("In all actions, process shall be issued by the court in which the action is filed and process may be served in any county within the state") and 508.010.9 ("In all actions, venue shall be determined as of the date the plaintiff was first injured.") appear to use the word "action" to refer to the civil action as a whole since process is issued for for an entire civil action rather than for individual count and venue is the location for trial of the case as a whole.

the county where the decedent was first injured[97] rather than where the death occurred,[98] where the wrongful conduct was committed,[99] or where the plaintiff-survivors suffered injury from the death.[100] It treats a spouse who makes a derivative claim for loss of consortium as first injured where the other (directly injured) spouse was first injured[101] rather than where the consortium claimant suffered his or her actual loss.[102] The tort reform act treats victims of torts that inflict latent injuries as "first injured where the trauma or exposure occurred rather than where symptoms are first manifested."[103] In each of these situations, the act has made a reasonable choice—albeit one with which others might disagree—among plausible ordinary understandings of "first injury."[104]

As a result, it seems most likely section 508.010.8's definition of first injury requires that, in any civil action containing a claim of defamation or invasion of privacy, the county of first publication will be treated as the place of first injury for the entire civil action.

[97] MO. REV. STAT. § 508.010.11 (2005).

[98] The time of death might be suggested by the fact that wrongful death actions are deemed to accrue, for statute of limitations purposes, at the time of death. *See, e.g.,* Dzur v. Gaertner, 657 S.W.2d 35, 36 (Mo. Ct. App. 1983).

[99] The location of the wrongful conduct might be suggested by pre-tort reform case law that held that wrongful death actions accrued, for venue purposes, in that location. *See id.*

[100] Survivor-plaintiffs are entitled to recover for their own losses "having regard to the pecuniary losses suffered by reason of the death, funeral expenses, and the reasonable value of the services, consortium, companionship, comfort, instruction, guidance, counsel, training, and support of which those on whose behalf suit may be brought have been deprived by reason of such death . . . ." MO. REV. STAT. § 537.090 (2005). These injuries may be suffered far from the place that the *decedent* was first injured. While the survivor-plaintiffs may sometimes also recover, "such damages as the deceased may have suffered between the time of injury and the time of death," those damages are not always available since the deceased may have been killed instantly. *Id.*

[101] § 508.010.11.

[102] For example, a husband may be injured in a car wreck in Iowa, depriving his wife of companionship and services the husband would have provided to her solely in their home state of Missouri.

[103] § 508.010.14 (2005) ("A plaintiff is considered first injured where the trauma or exposure occurred rather than where symptoms are first manifested."). The same section could also be read as producing a rather counterintuitive result in situations in which the plaintiff purchases a product with a latent *defect* (e.g., a defective drill bit). In such a situation, it can be argued that the statutorily defined place of first injury is the location where the product is first *used* by the plaintiff rather than where it malfunctions, causing physical injury. The statute provides that a "plaintiff is considered first injured where the trauma *or* exposure occurred" which suggests that, where there is both exposure and trauma, the earlier should govern. *Id.* (emphasis added). The plaintiff, by using the product, is "expos[ed]" to the risk even if the malfunction and injury occur later and at a different location. Alternatively, one could argue that such a plaintiff is first "injured" (in the sense of "damaged") as soon as he or she purchases the defective product since the plaintiff is injured by receiving a product that is less valuable than impliedly warranted.

[104] This does not mean that the definitions were selected for neutral lexicographical reasons—one might suspect that the defamation rule is intended to force suits against the media to be brought in their home counties or that the loss of consortium rule was intended to reduce the venue options available to married plaintiffs—but the definitions are not ones that are outside the range of ordinary usage; and, there is nothing inherently improper about the majoritarian branches using statutory definitions as a way of effectuating policy choices.

There is, however, one statutory definition that does not seem to conform to any ordinary usage of "first injury." The Tort Reform Act provides that, for purposes of determining venue in medical malpractice actions, "the plaintiff shall be considered injured by the health care provider only in the county where the plaintiff first received treatment by a defendant for a medical condition at issue in the case."[105] As a result, in medical malpractice cases, plaintiffs may be "first injured" in counties in which they were not, in any ordinary meaning of the word, "injured" at all. For example, a doctor might first treat a patient for a shoulder injury in an office in Johnson County, Kansas, and later perform surgery on the shoulder for the same condition[106] at a hospital in Jackson County, Missouri. In a subsequent suit against that doctor, the patient will be treated as injured solely in Kansas, even if the petition alleges that the only negligence and the only injury occurred during the surgery at the Jackson County, Missouri hospital. Where several health care providers are named as defendants, the definition treats all of them as having injured the plaintiff in the same county, even if some of the defendants never examined or treated the plaintiff in that county.[107]

While the Tort Reform Act defines "first injury" in some situations and ordinary usage provides a reasonably clear answer in others, there are a range of torts for which there is no self-evident location of first injury.[108] For example,

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[105] § 538.232.

[106] As the example may suggest, courts will face difficult questions about whether to treat the "medical condition at issue in the case" narrowly or broadly. *See id.*

[107] *Id.* ("only in the county where the plaintiff first received treatment by *a defendant* for a medical condition at issue in the case") (emphasis added).

Unlike an earlier version of the bill, the definition directs the court to consider only treatment by health care providers who are named as defendants. Thus, if the plaintiff does not name a referring physician as a defendant, the location where that physician examined or treated the plaintiff will be disregarded for venue purposes. *Id.* Under the earlier definition, a plaintiff could have been considered first injured in a county where he or she was never seen or treated by *any* of the named defendants. H.B. 393 (Introduced and Read First Time, Journal of the House, 1st Reg. Sess., 93d Gen. Assem.185-86 (Jan. 31, 2005)) (emphasis added), *available at* www.house.mo.gov/bills051/biltxt/intro/HB0393I.htm (last visited Jan. 12, 2006) (medical malpractice "plaintiff[s] shall be considered injured by the health care provider in the county where the plaintiff was *first examined for the medical condition at issue in the case*") (emphasis added).

For reasons discussed infra note 96, section 538.232's introductory phrase ("In any action against a health care provider for damages for personal injury or death arising out of the rendering of or failure to render health care services,") should be interpreted as covering any civil action containing a count alleging such a claim.

[108] It does not seem tenable to argue that the word "injury" is limited to physical (or physical and psychological) injury. *See, e.g.,* State *ex rel.* BP Prods. N. Am. Inc. v. Ross, 163 S.W.3d 922, 925, 927-28 (Mo. 2005) (holding that the tort of "injurious falsehood," which protects only against pecuniary loss, is governed by section 516.120(4), the five year statute of limitation for an "injury to the person or rights of another").

In addition, such an argument would lead to the conclusion that the Tort Reform Act does not provide *any* venue for torts that result in only economic harm since there would be a class of cases that would be covered neither by section 508.010.2 (because they contain "a count alleging a tort")

the courts will face difficult interpretive issues in cases asserting causes of action such as tortious interference, unfair competition, injurious falsehood,[109] or securities fraud that involve primarily economic injuries.[110] But the need for this type of case-by-case delineation of boundaries is the necessary result of change—of the legislative decision to replace a fully fleshed out regime with one that considers new factors that are seen as better serving the General Assembly's goals.

b. The Meaning of "Principal Place of Residence"

Under the tort venue rules, if the plaintiff was first injured outside the state, it will often be necessary to determine the location of a party's principal place of residence.[111] "Principal place of residence" is a newly created term of art, statutorily defined as follows:

> As used in this section [508.010], "principal place of residence" shall mean the county which is the main place where an individual resides in the state of Missouri. There shall be a rebuttable presumption that the county of voter registration at the time of injury is the principal place of residence. There shall be only one principal place of residence.[112]

This new term of art appears to have been created to avoid the effect of previous Missouri case law that held that individuals resided wherever they were physically present with some "degree of permanency" and therefore that they could have multiple residences.[113] Under the Tort Reform Act, an individual may still have more than one residence, but he or she is limited to a single *principal place* of residence, and venue will depend on principal place of residence rather than residence simpliciter.

Under this definition, only an individual can have a principal place of residence for venue purposes.[114] Thus, a corporation, a limited liability company,

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nor by either section 508.010.4 or section 508.010.5 (because the plaintiff would not be considered to have been "injured" anywhere). While venue gaps do exist under tort reform, *see supra*, text accompanying notes 206-09, there is no reason to distort the statutory language to create them unnecessarily.

[109] Injurious falsehood is not governed by section 508.010.8's "first published" rule since it is not a form of defamation. *See Ross*, 163 S.W.3d at 929.

[110] For example, there are arguments that the first injury to a securities fraud victim occurs at four different points in time—when deceived, when the stock is purchased, when the market learns of the fraud, and when the stock is sold—and it is entirely possible that the stock certificates or the victims could be in different locations at each of those times.

[111] MO. REV. STAT. § 508.010.5(1) (2005). *See supra*, text accompanying notes 91-94.

[112] § 508.010.1.

[113] *See, e.g.,* State *ex rel.* Quest Commc's Corp. v. Baldridge, 913 S.W.2d 366, 369-70 (Mo. Ct. App. 1996).

[114] If the General Assembly had intended for corporations or other entities to be treated as having a "principal place of residence," there would have been no reason for it to use the narrowing word

or other entity may have a residence, but does not have a *principal place* of residence for purposes of section 508.010.[115] This fact will have important venue implications for corporate plaintiffs who are first injured outside the state.[116]

There is at least one set of situations in which the meaning of "principal place of residence" is ambiguous. Suppose that an individual plaintiff has multiple residences and that one of the out-of-state locations is the "main place" that he resides. Section 508.010.1 nonetheless seems to require a finding that the individual's main *in-state* residence be treated as his "principal place of residence" since it "is the main place where [he] resides *in the state of Missouri.*"[117] The italicized final words of the sentence appear to require the court to identify the individual's dominant *Missouri* residence, so long as he has at least one residence within the state. This interpretation has practical consequences since it will mean that any individual plaintiff who has any residence in Missouri, even a secondary residence, may have an additional

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"individual" in the definitional phrase "the main place where an individual resides in the state of Missouri," rather than using either the more generic word "party" or the word "person" which is statutorily defined to include corporations and other entities. *Compare*, Mo. Rev. Stat. § 1.020(11) (2005) ("The word 'person' may extend and be applied to bodies politic and corporate, and to partnerships and other unincorporated associations") *with* § 1.030(2) (distinguishing between "bodies corporate" and "individuals").

Well known Missouri cases dealing with venue have, of course, regularly used the word "individual" to refer to human parties as distinguished from corporate ones. *See, e.g.,* State *ex rel.* Rothermich v. Gallagher, 816 S.W.2d 194, 197 (Mo. 1991) ("The general venue statute, § 508.010, is applicable when one or more corporations are sued together with one or more individuals"); State *ex rel.* SSM Health Care St. Louis v. Neill, 78 S.W.3d 145,145-46 (Mo. 2002) (repeatedly distinguishing between "individuals," "nonprofit corporations," and "for-profit corporations"); State *ex rel.* Doe Run Res. Corp. v. Neill, 128 S.W.3d 502, 504 (Mo. 2004) ("The plaintiffs sued both resident and nonresident corporations and individuals "); *id.* at 506 (Benton, J., dissenting) ("corporations must act through individuals").

[115] While the language of the statute is unambiguous, there are at least two structural arguments that support the same conclusion. First, if corporations were deemed to have a principal place of residence, there would have been no need to subdivide section 508.010.5 into separate subsections for corporate and individual defendants. Second, section 508.010.1's "rebuttable presumption that the county of voter registration at the time of injury is the principal place of residence" would make no sense if applied to a corporation.

It may seem odd that the General Assembly adopted a definition under which a general business corporation, which by statute resides exclusively at its registered office, has no "principal place of residence" for venue purposes. However, the legislature appears to have been well aware of this anomaly. The defined term "principal place of residence" is used only in section 508.010.5, the venue provision for out-of-state first injury tort cases. That section clearly distinguishes between individuals and corporations. *Compare* MO. REV. STAT. § 508.010.5(1) (2005) (applicable if "the defendant is a corporation") *with* § 508.010.5(2) (applicable if "the defendant is an individual"). The only reason for the existence of a separate subsection 508.010.5(1) is to deal with the fact that corporate defendants have no "principal place of residence" and to provide an alternative venue for suits against them, the location of their registered agent.

[116] *See infra* text accompanying notes 203-14.

[117] § 508.010.1 (emphasis added).

available venue in tort cases involving out-of-state injuries.[118] Similarly, it will mean that individual defendants who have any Missouri residence will be subject to suit in one additional venue in such cases.[119]

While this interpretation is the most literal reading of the language of the Act, there is some indication that the drafters may have believed that an individual could have a principal place of residence outside Missouri. The Act explicitly creates "a rebuttable presumption that the county of voter registration at the time of injury is the principal place of residence."[120] Such a presumption may not be logically inconsistent with the literal reading,[121] but it does seem to cast doubt on that reading since it will sometimes dictate that the court should presume, albeit rebuttably, that a party's principal place of residence is in a county outside the state. In addition, section 508.010.5 twice uses the phrase, "*if* the plaintiff's principal place of residence was *in the state of Missouri* on the date the plaintiff was first injured."[122] Similarly, section 508.010.5(2) uses the phrase "any county of the individual defendant's principal place of residence *in the state of Missouri.*"[123] In both phrases, the words "in the state of Missouri" might seem redundant unless a principal place of residence could sometimes be outside the state. However, those words appear redundant regardless of whether one adopts the literal interpretation, since Missouri state court venue could never be proper in a county outside the state.[124] Thus, while the question is not free from doubt, these arguments against the literal interpretation seem insufficient to justify departing from the plain meaning of the statutory text.

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[118] § 508.010.5(1)-(2) .

[119] § 508.010.5(2).

[120] § 508.010.1.

[121] One could simply decide that the presumption is automatically rebutted whenever the county of voter registration is outside Missouri.

[122] § 508.010.5(1) (emphasis added) (as to cases against corporate defendants); § 508.010.5(2) (emphasis added) (as to cases against individual defendants).

[123] § 508.010.5(2) (emphasis added). This phrase's omission of the words "on the date the plaintiff was first injured" may also suggest that venue is proper in any Missouri county where defendant has ever had his or her principal place of residence. *Compare* § 508.010.5(2) ("venue shall be in *any* county of the individual defendant's principal place of residence in the state of Missouri") (emphasis added) *with* § 508.010.5(1) ("venue may be in *the* county of the plaintiff's principal place of residence *on the date the plaintiff was first injured*") (emphasis added). *But see* § 508.010.9 ("In all actions, venue shall be determined as of the date the plaintiff was first injured").

[124] In addition to the textual argument, there may also be another reason to reject the literal interpretation. It fails to reverse the outcome of cases like *State ex rel. Quest Commc'ns Corp. v. Baldridge,* 913 S.W.2d 366, 369-70 (Mo. Ct. App. 1996)—a reversal that may have been much of the drafters' motivation for adopting the new "principal place of residence" concept. *Quest Commc'ns* held that the individual defendant, who was domiciled in Texas but had a second residence in Missouri, resided in Missouri for venue purposes. *Id.* at 370. Under the literal interpretation of the new Act, the result would not change since that second residence would be treated as the defendant's principal place of residence.

c. Determining Venue as of the Date of First Injury

Under long-standing pre-tort reform case law, venue was determined as of the time the case was "brought."[125] A case was deemed to have been "brought" when filed or on the date of any subsequent amendment adding an additional defendant.[126] However, various provisions of the Tort Reform Act change this rule. In three subsections, the Act specifically states that a particular predicate for venue shall be determined as of the date of plaintiff's first injury.[127] More generally, new section 508.010.9 provides, "[i]n all actions, venue shall be determined as of the date the plaintiff was first injured."[128]

The purpose, meaning, and application of this more general provision is not entirely clear. Some crucial predicates for venue simply cannot be determined as of the date of plaintiff's first injury. For example, the question of whether there is a "count alleging a tort"[129] and the identities of the parties to the action cannot be determined until suit is filed.[130] The question of where a defendant "may be found"[131] cannot be determined until service has been effectuated since a defendant is only "found" in a county if served in that county.[132]

On the other hand, when the predicate for venue is a time-variable fact about a party, it is entirely possible to determine that fact "as of the date the

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[125] State *ex rel.* Linthicum v. Calvin, 57 S.W.3d 855, 857-58 (Mo. 2001).

[126] *Id.* at 858.

[127] MO. REV. STAT. § 508.010.4 (2005) (venue placed "in the county where the plaintiff was first injured by the wrongful acts or negligent conduct alleged in the action"); § 508.010.5(1) ("plaintiff's principal place of residence on the date the plaintiff was first injured"); § 508.010.5(2) (same).

[128] § 508.010.9.

[129] *See, e.g.,* § 508.010.2; § 508.010.4; § 508.010.5.

[130] The fact that a party could have asserted a particular claim does not make that claim a "count" in the action since, in civil cases, a "count" is a subdivision of a petition (or similar pleading) that asserts a separate and distinct claim. *See, e.g.,* BLACK'S LAW DICTIONARY 375 (8th ed. 2004) (defining "count" as "[i]n a complaint or similar pleading, the statement of a distinct claim"); MO. R. CIV. P. 55.11 (distinguishing between underlying claims and the counts through which they are asserted). A potential defendant never becomes a defendant until named in a pleading, and a potential plaintiff does not become a plaintiff until he or she brings suit. BLACK'S LAW DICTIONARY 450 (8th ed. 2004) (defining a "defendant" as "a person sued in a civil proceeding"); *id.* at 1188 (defining a "plaintiff" as "[t]he party who brings a civil suit in a court of law"). As a result, subsection 508.010.9 cannot be used to resolve issues of strategically deferred joinder of claims. *See infra* text accompanying notes 635-74.

[131] *See, e.g.,* MO. REV. STAT. § 508.010.2(1) (2005) (non-tort actions); § 508.010.6 (actions brought by counties).

[132] State *ex rel.* Ford Motor Co. v. Manners, 161 S.W.3d 373, 375 (Mo. 2005) (statutory language that requires that defendant be "found" within the county satisfied only if the defendant is served in the county). *See also* § 508.020 (suits by attachment or replevin to be brought where property in question may be found); § 416.121.1 (civil anti-trust actions for damages or injunctions may be brought where, *inter alia*, a defendant, agent, officer, or representative may be found).

plaintiff was first injured." For example, the residence of the plaintiffs[133] or defendants,[134] the location of a corporate defendant's registered agent,[135] the principal place of residence of the plaintiff,[136] the size of a municipal corporation,[137] or the location of various offices of a limited liability company[138] are all facts that may change between the date of first injury and the date the action is brought. Section 508.010.9 seems to dictate that all of them should be determined as of the date of first injury rather than when a suit is filed.[139]

This result does lead to some grammatical awkwardness. Virtually all of the provisions apparently affected by section 508.010.9 are worded in the present tense;[140] and it is odd, for example, to read a phrase like "[w]hen all defendants *are* nonresidents of the state, suit may be brought in any county" [141] as meaning "[w]hen all defendant's *were* nonresidents of the state *at an earlier time*, suit may be brought in any county." This awkwardness is aggravated in the new out-of-state-injury tort case provisions[142] because they *mix* present and past tense. Section 508.010.5(1), for example, states:

> If the defendant *is* a corporation, then venue shall be in any county where a defendant corporation's registered agent *is* located or, if the plaintiff's principal place of residence *was* in the state of Missouri *on the date the plaintiff was first injured*, then venue may be in the county of the plaintiff's principal place of residence *on the date the plaintiff was first injured*.[143]

Considered alone, it is difficult not to read this section as requiring the location of the defendant's registered agent to be determined as of the present time while requiring the principal place of residence of the plaintiff to be determined as of the date of first injury.

Nonetheless, such a reading should be rejected. It would make section 508.010.9 a nullity, and would violate Missouri courts' longstanding rule against

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[133] § 508.010.2(1).

[134] § 508.010.2(1)-(3); § 508.010.6; § 508.072 (suits against issuers of bad checks to the department of revenue).

[135] § 508.010.5(1).

[136] § 508.010.5(2).

[137] § 508.050 (providing special rule for cities containing more than four hundred thousand inhabitants).

[138] § 347.069.2. *See also*, § 416.121.1 (civil anti-trust actions for damages or injunctions may be brought, *inter alia*, where any defendant, officer, agent or representative may be found).

[139] Section 508.010.9 specifically states that it is to apply "[i]n all actions . . . ." Unlike other provisions of the Tort Reform Act, there is nothing in 508.010.9's language or structure that limits its application to actions governed by section 508.010 or to actions governed by Chapter 508. *Compare* § 508.010.9 ("in all actions") to § 508.010.1 ("As used in this section") and to § 508.010.12 ("The provisions of this section") and to § 508.011 ("the provisions of this chapter").

[140] See authorities cited at notes 133-39.

[141] § 508.010.2(4) (emphasis added).

[142] § 508.010.5(1)-(2).

[143] § 508.010.5(1) (emphasis added).

interpretations that assume that the legislature inserted "superfluous or meaningless words in a statute."[144] It would also refuse to give the words of the section their ordinary comprehensive meaning. Section 508.010.9 begins with the phrase, "In all actions."[145] Those words are general, but they are not vague or ambiguous, and they should—to the extent possible—be given the all-encompassing meaning they naturally convey.

C. Multiple Party Problems After Tort Reform

1. Pre-Tort Reform Principles for Multiple Defendant Cases

Prior to tort reform, Missouri courts had adopted a set of principles to cover the venue issues that arose when multiple defendants had been joined in the same case. The defendants in such cases frequently argued that the venue rules should be applied separately to each defendant, and that venue would be proper only where the separately determined venues overlapped.[146]

As a general rule, the Court rejected those arguments. For example, when multiple not-for-profit corporations were sued, venue was proper under former section 355.176.4[147] in the county where any one of them had its principal place of business, even if the cause of action accrued elsewhere and the other defendants had neither their principal places of business nor their registered

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[144] Dodd v. Independence Stove & Furnace Co., 330 Mo. 662, 671, 51 S.W.2d 114, 118 (Mo.1932) ("Legislature will not be presumed to have intended using superfluous or meaningless words in a statute."). *See also,* Civil Serv. Comm'n of City of St. Louis v. Members of Bd. of Aldermen of City of St. Louis, 92 S.W.3d 785, 788 (Mo. 2003) (court should not assume that legislature inserted "idle verbiage or superfluous language in a statute." (quoting Hyde Park Hous. P'ship v. Dir. of Revenue, 850 S.W.2d 82, 84 (Mo. 1993)). Knob Noster Educ. Ass'n. v. Knob Noster R-VIII Sch. Dist., 101 S.W.3d 356 (Mo. Ct. App. 2003) ("We should not interpret statutes in a way which will render some of their phrases to be mere surplusage.") (quoting State *ex rel.* Mo. Local Gov't. Ret. Sys. v. Bill, 935 S.W.2d 659, 666 (Mo. Ct. App. 1996)).

Admittedly, there is some rule against surplusage problem even if one interprets section 508.010.9 broadly since such an interpretation makes section 508.010.5's explicit "on the date the plaintiff was first injured" language redundant. (If section 508.010.9 means that *all* questions of parties' status are determined as of the date of first injury, there was no need for the out-state-injury provision to specify that plaintiff's principal place of residence was to be determined as of that date.) However, it seems more likely that the specific language of section 508.010.9 represented a "belt and suspenders" form of cautious redundancy than that the general language of section 508.010.9 was inserted for no purpose at all.

[145] MO. REV. STAT. § 508.010.9.

[146] State *ex rel.* BJC Health Sys. Christian Hosp. v. Neill, 121 S.W.3d 528, 530 (Mo. 2003) (multiple not-for-profit defendants; venue asserted under former 355.176.4); State *ex rel.* Jinkerson v. Koehr, 826 S.W.2d 346, 348 (Mo. 1992) (multiple individual defendants and multiple for-profit corporation defendants; venue asserted under former section 508.010(2); Webb v. Satz, 561 S.W.2d 113, 115 (Mo. 1978) (multiple for-profit corporation defendants; venue asserted under former section 508.040)).

[147] MO. REV. STAT. § 355.176.4 (2000).

offices in that county.[148] Similarly, when multiple for-profit corporations were sued, venue was proper under former section 508.040[149] in the county where any one of them had an office or agent even though the other defendants had no office or agent in that county.[150] As a general rule, venue was considered proper over all defendants if venue was proper as to any defendant.[151]

This general rule was, however, subject to a significant restriction; it applied only if the defendants were jointly or commonly liable.[152] If the injuries to the plaintiff were "inseparable and indistinguishable," venue was proper for one defendant if it was proper for any defendant.[153] On the other hand, if the injuries were separate and distinct, venue over the multiple defendant suit would be proper only if it would have been proper as to each defendant if they had been sued separately.[154] As a result, a plaintiff who was injured in an automobile accident and further damaged by the malpractice of a hospital that treated her for those injuries could sue both defendants in any county where either resided since the defendants were jointly liable for any damage resulting from the malpractice.[155] On the other hand, a plaintiff who was injured by two defendants in separate automobile accidents could only sue in a county where venue would have been proper as to both defendants, since neither would have be liable for any of the damage caused by the other.[156]

2. Post-Tort Reform Rules for Multiple Defendant Cases

These pre-tort reform principles clearly continue to apply to non-tort cases governed by 508.010.2 since the language of that section is functionally identical to the language of former 508.010(1)-(4).[157] Equally clearly, new section 538.232 renders pre-tort reform principles irrelevant in most multiple defendant

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[148] *BJC Health Sys.*, 121 S.W.3d at 530.

[149] MO. REV. STAT. § 508.040 (2000).

[150] Webb v. Satz, 561 S.W.2d 113, 115 (Mo. 1978).

[151] For those inclined to think in Venn diagrams, venue was not limited to the intersection of the sets of separately determined proper venues. Instead it was proper anywhere in the union of those sets.

[152] *BJC Health Sys.*, 121 S.W.3d at 530. It was enough that the defendants were jointly or commonly liable for a part of the plaintiff's damages. *See* State *ex rel.* Bitting v. Adolf, 704 S.W.2d 671, 673 (Mo. 1986) (venue proper where defendants "share liability for all or part of the plaintiff's claim against them").

[153] *BJC Health Sys*., 121 S.W.3d at 530; *Jinkerson*, 826 S.W.2d at 348.

[154] *BJC Health Sys.*, 121 S.W.3d at 530; *Jinkerson*, 826 S.W.2d at 348.

[155] *See* State *ex rel.* Bitting v. Adolf, 704 S.W.2d 671, 673 (Mo. 1986).

[156] *See Jinkerson*, 826 S.W.2d at 348. *See also*, State *ex rel.* Turnbough v. Gaertner, 589 S.W.2d 290, 291-92 (Mo. 1979) (same result where accidents were six days apart). The fact that it may be proper to join the two defendants in the same lawsuit under Rule 52.05's permissive joinder rule does not itself make venue proper. MO. R. CIV. P. 51.01; *Turnbough*, 589 S.W.2d at 291-92; *Jinkerson*, 826 S.W.2d at 348; *BJC Health Sys.*, 121 S.W.3d at 530.

[157] *Compare* MO. REV. STAT. § 508.010.2 (2005) *with* MO. REV. STAT. § 508.010(1)-(4)(2000).

medical malpractice cases since it dictates that all injuries shall be deemed to have taken place "where the plaintiff first received treatment by a defendant for a medical condition at issue in the case."[158] Similarly, 508.010.4 provides a chronological priority rule that trumps pre-tort reform principles when the plaintiff is first injured within the state. For example, a plaintiff who is injured in a Jackson County automobile accident and then taken to a Clay County hospital where she is further damaged by malpractice will have no choice of venues. Since the first injury was in Missouri, 508.010.4 dictates that "venue shall be in the county where the plaintiff was *first* injured by the wrongful acts or negligent conduct alleged in the action,"[159] i.e., in Jackson County. Even though the liability is joint or common, the plaintiff cannot sue in Clay County, a venue that would have been available under pre-tort reform principles.[160]

Slightly more difficult issues are raised by multiple-defendant cases covered by the out-of-state first injury provisions. If all defendants are corporations, the text of 508.010.5(1) indicates that venue is proper in any county where any defendant's registered agent is located. That subsection begins by referring to "*the* defendant," but it then goes on to say that venue will be proper "in *any* county where *a* defendant corporation's registered agent is located."[161] The use of the indefinite article "a" denotes membership in the class and is considered a synonym for "one" or "any."[162] Its use in this provision, particularly in conjunction with the earlier use of "any county," recognizes that there may be more than one corporate defendant and that venue would be proper where any such defendant's registered agent is located.

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[158] MO. REV. STAT. § 538.232 (2005). Since each defendant will be deemed to have first injured the plaintiff in the same county, the tort venue rules will prescribe the same venue for each defendant so long as the first treatment by a defendant took place in Missouri. If the first treatment was outside the state, the rules for multiple defendant out-of-state first injury cases will apply. *See infra*, text accompanying notes 161-68.

One article has suggested that 538.232 should be read to provide that malpractice plaintiffs should be considered inured"only in the county where the defendant first received treatment by [that] defendant for a medical condition at issue in the case." Paul Passante & Dawn Mefford, The Effect of Tort Reform on Medical Malpractice, 61 J. Mo. Bar. 236, ___ (2005)(bracketed change in the article). However, the article cites no authority or reason for the this reading and it appears to be entirely inconsistent with the language of the section.

[159] § 508.010.4 (emphasis added). Section 538.232 does not dictate a contrary result since it only specifies the county where "the plaintiff shall be considered injured *by the health care provider*"—not the county where the plaintiff will be considered first injured in the action as a whole. *See supra* note 96.

[160] For a caveat regarding cases in which joinder is improper under Rule 52.05 (because the cases against the two defendants do not arise out of the same transaction or share no common questions) or in which joinder is proper under Rule 52.05 but there would be no joint or common liablity, *see infra* section 4.

[161] § 508.010.5(1) (emphasis added).

[162] *See* BLACK'S LAW DICTIONARY 3 (8th ed. 2004).

If all defendants are individuals, the out-of-state injury provision's text is somewhat less clear, but nonetheless indicates that venue will be proper where any defendant's principal place of residence is located. Section 508.010.5(2) provides that, "[i]f *the* defendant is an individual, then venue shall be in *any* county of *the* individual defendant's principal place of residence."[163] If read literally and in isolation, that language suggests that a single individual defendant could have more than one "principal place of residence," a conclusion that is belied by 508.010.1 which explicitly provides that there can be only one.[164] Instead, the language should be read in light of Missouri's statutory dictate that language describing a party in the singular should be interpreted as including the plural unless the context makes such an interpretation unreasonable.[165] Read in this way, 508.010.5(2) is entirely consistent: If the defendants are individuals, venue is proper in any county that is the principal place of residence of a defendant.[166]

Finally, the out-of-state injury venue provisions contain an apparent lacuna: they appear to provide no venue at all if plaintiff was first injured outside Missouri and the defendants are a mix of individuals and corporations. Even if one reads 508.010.5(1) as covering situations in which "the defendant[s are *one or more*] corporation[s]" and 508.010.5(2) as covering situations in which "the defendant[s are *one or more*] individual[s]," there is no 508.010.5(3) covering situations in which the defendants are a mix of corporations and individuals.[167]

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[163] MO. REV. STAT. § 508.010.5(2) (2005) (emphasis added).

[164] § 508.010.1 (2005) ("There shall be only one principal place of residence.")

[165] § 1.030(2) (2005) ("When any subject matter, party or person is described or referred to by words importing the singular number or the masculine gender, several matters and persons, and females as well as males, and bodies corporate as well as individuals, are included."); State *ex rel.* BJC Health Sys. & Christian Hosp. v. Neill, 121 S.W.3d 528, 530 (Mo. 2003) (singular terms to be interpreted as including the plural unless that interpretation would be "repugnant to" the context); State *ex inf.* Gentry v. Long-Bell Lumber Co., 321 Mo. 461, 12 S.W.2d 64, 80 (Mo. 1928) (same).

[166] This reading is consistent with interpretive principles set forth in pre-tort-reform case law. *See, e.g., BJC Health Sys.*, 121 S.W.3d at 530 (reading the sentence "[s]uits against *a* nonprofit *corporation* shall be commenced only in . . . the county in which *the* nonprofit corporation maintains *its* principal place of business" as meaning "[s]uits against [*one or more*] nonprofit *corporations* shall be commenced in . . . the county in which *any* of the nonprofit *corporations* maintains its principal place of business") (emphasis added); Webb v. Satz, 561 S.W.2d 113, 114-15 (Mo. 1978) (reading the phrase "any county where such *corporations* shall have or usually keep an office or agent for the transaction of their usual and customary business" MO. REV. STAT. § 508.040 (2000) (emphasis added) as meaning "where *one or more of the corporations* has an office or agent of the specified type") (emphasis added).

For the special problems posed if some of the defendants are not properly joined or if they are properly joined but do not have joint or common liability to the plaintiff, *see infra*, section 4.

[167] § 508.010.5 (emphasis added).

Moreover, there is no other statute that would apply to such a situation if 508.010.5 does not cover it.[168]

Pre-tort-reform case law does not fill this gap. In *State* ex rel. *Dick Proctor Imports, Inc. v. Gaertner*,[169] the Court interpreted former section 508.040 as applying only if all defendants were for-profit corporations, and stated that the more general provisions of former 508.010(2) would apply where such corporations and individuals were sued together.[170] However, *Dick Proctor Imports* provides no solution to the present problem, since there is no longer a catch-all statute comparable to former 508.010(2).[171] Reliance on *State* ex rel. *SSM Health Care St. Louis v. Neill*,[172] would be similarly unavailing. In that case, the Court held that the former not-for-profit venue statute[173] was the exclusive statute applicable to cases in which any not-for-profit corporation was a party even if individuals or for-profit corporations were also named defendants.[174] However, even if 508.010.5 were given equally exclusive effect, there is nothing in it that prescribes venue in cases against a mix of individual and corporate defendants.

Faced with this gap, the Court should choose to fill it by interpolation.[175] The General Assembly, through its "[n]otwithstanding any other provision of law" language, has expressed its intention that 508.010.5 should be the sole source for venue rules in all cases in which a plaintiff is first injured outside Missouri, and the Court should honor that intention to the extent that it is

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[168] Section 508.010.2 only applies to cases in which "there is no count alleging a tort," and section 508.010.5 declares itself to be the exclusive by stating "*Notwithstanding any other provisions of law*, in *all* actions in which there is any count alleging a tort and in which the plaintiff was injured outside the state of Missouri, venue shall be determined as follows." § 508.010.5 (emphasis added).

[169] 671 S.W.2d 273 (Mo. 1984).

[170] *Id.* at 274-75.

[171] *See supra* note 168.

[172] 78 S.W.3d 140 (Mo. 2002).

[173] MO. REV. STAT. § 355.176.4 (2005).

[174] State *ex rel.* SSM Health Care St. Louis v. Neill, 78 S.W.3d 140 (Mo. 2002). It based its refusal to apply any other venue statute on the statutory language stating that "suits against a nonprofit corporation ***shall* be commenced *only*** in specified counties." *Id.* at 141 (italics and bold face in the original).

[175] Construing statutes through interpolation has long been recognized as a legitimate role for the courts. *See, e.g.,* Burnet v. Guggenheim, 288 U.S. 280, 285 (1933) (proper for court to decide "which choice it is more likely that Congress would have made" if it had directly dealt with the issue); Vermilya-Brown Co. v. Connell, 335 U.S. 377, 388 (1948) (proper for court to decide issue as legislators would have if they had "acted at the time of the legislation with the present situation in mind"). *See also*, OLIVER W. HOLMES, THE COMMON LAW 303 (1881) (court must "work out, from what is expressly said and done, what would have been said with regard to events not definitely before the minds of the parties [to a contract], if those events had been considered"). For a Missouri example dealing with venue, *see* State *ex rel.* Baker v. Goodman, 364 Mo. 1202, 274 S.W.2d 293, 296-97 (Mo. 1954) (interpreting former sections 508.040 and 508.010(2) and applying the former even though the court claimed that neither expressly covered the situation).

possible to do so. The text of 508.010.5 does not itself identify the rule for proper venue in cases filed against a mix of corporate and individual defendants, but it strongly points toward the contours of such a rule.[176] The most reasonable inference is that the General Assembly intended to authorize venue in any county which was either the principal place of residence of at least one individual defendant or the location of the registered agent of at least one corporate defendant.[177] While one cannot be sure that this rule precisely reflects the legislative will, it seems more likely to do so than the alternatives. "Here as so often there is a choice between uncertainties. We must be content to choose the lesser."[178]

3. Post-Tort Reform Principles for Multiple Plaintiff Cases

The Tort Reform Act's tort-case venue rules raise at least three troublesome questions regarding cases in which there are multiple plaintiffs. First, which subsection applies, 508.010.4 or 508.010.5, if some plaintiffs were first injured within the state and some were first injured outside the state?[179] Second, what is meant by "the county where the plaintiff was first injured" if some plaintiffs were first injured in one Missouri county and others were first injured in another?[180] Third, what is meant by the "county of the plaintiff's principal place of residence" in cases in which plaintiffs injured outside the state have different Missouri principal places of residence?[181] The first two questions can be

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[176] In addition, unlike some of the situations to be discussed elsewhere in this article, there is no reason to believe that the legislature would have wanted there to be no venue available in Missouri. It would be odd indeed to provide that suits can be brought in Missouri against corporations that have registered agents in the state, and that suits can be brought in Missouri against individuals with principal places of residence in the state, but that suits cannot be brought in Missouri if plaintiff joins the two types of defendants in a single action. It would be equally odd to think that the legislature intended to force plaintiffs to divide such suits and file them in separate counties.

[177] If the Court believed that the General Assembly intended to be more restrictive it could adopt a two stage rule under which (1) venue was proper only in any county which was *both* the principal place of residence of at least one individual defendant *and* the location of the registered agent of at least one corporate defendant, and (2) if no such county existed, venue was proper in any county which was *either* the principal place of residence of at least one individual defendant *or* the location of the registered agent of at least one corporate defendant.

[178] Burnet, 288 U.S. at 288 (Cardozo, J.).

[179] While situations in which a tort inflicts injuries on different plaintiffs in different states or counties are infrequent, they do occur. Of course, typical automobile accident cases or assaults rarely do so except in the imaginative hypotheticals sometimes invented by law professors to bedevil students on final exams. However, business or environmental torts frequently cause injuries to multiple victims in multiple locales. It is not unusual, for example, for consumer fraud to injure victims in many states. *See, e.g.,* In re Bridgestone/Firestone, Inc., 288 F.3d 1012 (7th Cir. 2002)(nationwide consumer fraud and breach of warranty plaintiffs.

[180] MO. REV. STAT. § 508.010.4 (2005).

[181] § 508.010.5.

answered with some degree of confidence using essentially the same analysis. The third is more puzzling.

The Tort Reform Act provides two sets of venue rules for tort cases, one applicable "in all actions . . . in which the plaintiff was first injured in the state of Missouri"[182] and the other applicable "in all actions . . . in which the plaintiff was first injured outside the state of Missouri."[183] On its face, the act does not seem to indicate how these rules apply in actions in which some plaintiffs are first injured within the state and some outside it. However, the Missouri legislature has mandated[184] that singular terms in its statutes should be construed as including their plural forms "unless there be something in the subject or context repugnant to such construction."[185] Under this canon, the two sections must be construed as if they read respectively "in all actions . . . in which the plaintiff [or plaintiffs were] first injured in the state of Missouri" and "in all actions . . . in which the plaintiff [or plaintiffs were] first injured outside the state of Missouri." Construed in this way, the criterion for selecting between the two sections is reasonably clear.[186] Plaintiffs collectively were first injured where the first

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[182] § 508.010.4.

[183] § 508.010.5.

[184] § 1.030(2) ("When any subject matter, party or person is described or referred to by words importing the singular number or the masculine gender, several matters and persons, and females as well as males, and bodies corporate as well as individuals, are included").

[185] State *ex rel.* BJC Health Sys. & Christian Hosp. v. Neill, 121 S.W.3d 528, 530 (Mo. 2003) (quoting State *ex inf.* Gentry v. Long-Bell Lumber Co., 321 Mo. 461, 12 S.W.2d 64, 80 (Mo. 1928)).

[186] Even reading the sections in this way, it would still be *possible* to construe "plaintiffs" in each section distributively, i.e., to construe the sections as applying only if all the individual injuries to the plaintiffs were suffered either in the state or outside it. However, if the legislature intended the sections to be interpreted distributively, one would have expected it to convey that intent explicitly, for example by providing that 508.010.4 applied "in all actions . . . in which [*every* rather than] *the* plaintiff was injured outside the state." This is particularly true for two reasons: First, the distributive reading is inconsistent with pre-tort reform case law. *See, e.g.,* State *ex rel.* Bartlett v. McQueen, 361 Mo. 1029, 238 S.W. 2d 393, 395 (Mo. 1951) (stating that the word "defendant" in former section 508.010(1) should be interpreted in the collective sense) (*overruled on other grounds by* State *ex rel.* DePaul Health Ctr. v. Mummert, 870 S.W.2d 820,821 (Mo. 1994)). Second, the distributive interpretation would lead to a venue gap since neither section would apply to cases in which there were both in-state and out-of-state first injuries.

Even more paradoxically, the distributive interpretation would create a venue gap even where the two sections, applied to the two types of plaintiffs separately, would dictate the same Missouri venue. For example, if the in-state first injuries and the defendant's registered agent were both in Jackson County, Missouri, 508.010.4 would seem to authorize venue in Jackson County for the in-state plaintiffs (because it was the place of their first injury) and 508.010.5 would seem to authorize the same venue for the out-of-state plaintiffs (because it was the location of defendant's registered agent). But under the distributive interpretation, neither section would apply (since the action is neither one in which every plaintiff was first injured in the state nor one in which every plaintiff was first injured outside the state) and there would therefore be no proper venue in Missouri.

plaintiff was injured.[187] The court should identify the first injury suffered by any of the plaintiffs and utilize 508.010.4 if that injury occurred in Missouri and 508.010.5 if it occurred outside the state.

A similar analysis leads to the parallel result in cases in which all plaintiffs were first injured within the state but they suffered their first injuries in different Missouri counties. In that situation, section 508.010.4 provides that "venue shall be in the county where *the plaintiff was* first injured by the wrongful acts or negligent conduct alleged in the action,"[188] but the singular words "the plaintiff" must be read as including the plural.[189] The plaintiffs collectively were first injured in the Missouri county where the first plaintiff was injured and venue should be limited to that county. This conclusion is reinforced by the final words of the section which suggest that venue should be limited to the location of the first injury caused by "the wrongful acts or negligent conduct alleged in the action," i.e., the first injury suffered by any of the plaintiffs due to that conduct.

The two previous multiple plaintiff venue problems could be resolved textually because the statute, by focusing on the chronologically first injury, provides a criterion for choosing among alternative interpretations. The third problem—proper venue when multiple victims of an out-of-state tort have different Missouri principal places of residence—is more difficult because it does not have an obvious, text-based prioritizing principle. Section 508.010.5 provides that venue in such cases "may be in the county containing the plaintiff's principal place of residence on the date the plaintiff was first injured."[190] As the previous discussion suggests, Missouri law requires the Court to construe the phrase "plaintiff's principal place of residence" as if it read "plaintiff's [or plaintiffs'] principal place[s] of residence," but that does not resolve the matter. Unlike the previous situations, in which the plaintiffs—treated collectively—were *first* injured in a single location, the plaintiffs in this situation—treated collectively—have no single principal place of residence. The plaintiffs must necessarily be treated distributively, i.e., as having separate principal places of residence. As a result, the Court will face a choice:[191] It can interpret 508.010.5 as permitting venue in *every* county in which *any* plaintiff's principal place of residence is located—thus giving the plaintiff a variety of optional venues. Alternatively, it can interpret the section as permitting venue only in a county in which *every* plaintiff has his or her principal place of residence—thus forcing the plaintiffs (who, by hypothesis, do not share a single county of principal place of residence) to file their suits separately. There is something to be said in favor of

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[187] *See, e.g., Bartlett*, 238 S.W.2d at 395 (stating that the word "defendant" in former section 508.010(1) should be interpreted in the collective sense) (*overruled on other grounds by* DePaul Health Ctr., 870 S.W.2d at 821.

[188] MO. REV. STAT. § 508.010.4 (2005)

[189] *See supra* authorities cited at notes 165-66.

[190] MO. REV. STAT. § 508.010.5 (2005).

[191] Under either interpretation, if the defendant's principal place of residence or registered agent is located in a Missouri county, the plaintiffs could assert venue in that county.

each of these interpretations. Consider, for example, the Missouri passengers of a van struck in Kansas by a Kansas resident drunk driver. On the one hand, it seems unlikely that the legislature intended to require the passengers to file separate suits just because they reside in different Missouri counties. At the same time, since one goal of the Tort Reform Act was to restrict plaintiffs' ability to shop for venues, the legislature may not have wanted to permit them all to file suit in the most plaintiff-friendly county in which any of them reside.

4. A Caveat Regarding Multiple Party Cases After Tort Reform

This discussion of venue in multiple party cases is subject to an important caveat: it assumes that the parties have been properly joined. In cases in which joinder is improper under Rule 52.05 (because the cases by or against multiple parties do not arise out of the same transaction or share no common questions), *State* ex rel. *Jinkerson v. Koehr*[192] would continue to suggest that the proper remedy is to sever the claims under Rule 52.06 and to transfer any claims for which venue would not be proper.[193]

More difficult questions are raised in the relatively rare cases in which joinder of defendants is proper under Rule 52.05 even though there is no joint or common liability. *State* ex rel. *Turnbough v. Gaertner*[194] suggests that an overlapping venue would have to be found since Rule 51.01 forbids interpreting a civil rule to expand venue.[195] However, after tort reform, it is the enactment of statutory provisions (508.010.4 and 5)—rather than the interpretation of a civil rule (Rule 52.05)—that extends venue in such cases; and there is, of course, nothing that forbids the *legislature* from extending or restricting venue. It is unclear whether the courts' repeated statements that the "common or joint liability, not joinder, is the touchstone for the determination of whether venue may be predicated on the residence of a co-defendant"[196] continue to apply after the enactment of the Tort Reform Act's venue provisions. Similarly, the Court will face the problem of whether there is *any* constraining principle other than the joinder rules when venue of one *plaintiff's* claim is predicated on the principal place of residence of a *co-plaintiff*.[197]

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[192] 826 S.W.2d 346 (Mo. 1992).

[193] *Id.* at 348.

[194] 589 S.W.2d 290 (Mo. 1979).

[195] *Id.* at 291-92.

[196] State *ex rel.* BJC Health Sys. & Christian Hosp. v. Neill, 121 S.W.3d 528, 530 (Mo. 2003); State *ex rel.* Farrell v. Sanders, 897 S.W.2d 125, 126 (Mo. Ct. App. 1995); State *ex rel.* Sims v. Sanders, 886 S.W.2d 718, 721 (Mo. Ct. App. 1994).

[197] The concept of common or joint liability cannot provide such a constraint since it describes the liability of multiple defendants to a single plaintiff rather than the rights of multiple plaintiffs against one or more defendant.

D. Gaps in the Post-Tort Reform Venue Structure

The pre-tort reform version of section 508.010 contained a comprehensive residual venue scheme. Since each defendant must necessarily be a resident or a non-resident, and since 508.010(1)-(4) covered every combination of resident and non-resident defendants,[198] those sections were always available to supply a venue if more specific venue statutes failed to do so.[199] Venue gaps were impossible since 508.010 was always available to fill them.

However, since the Tort Reform Act repealed the residual venue provision, this is no longer the case. As indicated in the previous section,[200] there are a number of situations in which an apparent venue gap exists but can be filled either by a plausible interpretation of the relevant post-tort reform statutes[201] or by interpolation.[202] Unfortunately, there are also some venue gaps that are so clearly commanded by the statutory that no such simple solution exists.

The difficulty centers on the new venue provisions for tort cases in which the plaintiff is first injured outside the state of Missouri.[203] Section 508.010.5 states:

> 5. Notwithstanding any other provision of law, in all actions in which there is any count alleging a tort and in which the plaintiff was first injured outside the state of Missouri, venue shall be determined as follows:
>
> (1) If the defendant is a corporation, then venue shall be in any county where a defendant corporation's registered agent is located or, if the plaintiff's principal place of residence was in the state of Missouri on the date the plaintiff was first injured, then venue may be in the county of the plaintiff's principal place of residence on the date the plaintiff was first injured;

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[198] The only possible literal exception to the comprehensive coverage of former section 508.010 (1)-(4) was the situation in which there were several defendants, all of whom were residents of the same Missouri county. However, this situation has long been held to be covered by section 508.010(1). State *ex rel.* Bartlett v. McQueen, 361 Mo. 1029, 238 S.W.2d 393, 395 (1951) (stating that the section applies in multiple defendant cases) (*overruled on other grounds by* State *ex rel.* DePaul Health Ctr. v. Mummert, 870 S.W.2d 820, 821 (Mo. 1994). *But see*, State *ex rel.* Ford Motor Co. v. Manners, 161 S.W.3d 373, 375 n.3 (Mo. 2005) (assuming but not deciding that the second option provided by former section 508.010(1) is available in multiple defendant cases).

[199] By its own terms, former section 508.010 applied to all suits begun by summons unless venue was "otherwise provided by law." MO. REV. STAT. § 508.010 (2000). *See, e.g.,* State *ex rel.* Dick Proctor Imp., Inc. v. Gaertner, 671 S.W.2d 273, 274 (Mo. 1984) (former section 508.010 applicable when former section 508.040 inapplicable).

[200] *See supra* Part III.C.

[201] *See supra* text accompanying notes 182-89.

[202] *See supra* text accompanying notes 190-91.

[203] MO. REV. STAT. § 508.010.5(1)-(2) (2005).

The other provisions present no significant gap problems. The non-tort provisions of § 508.010.2 are modeled after former sections MO. REV. STAT. § 508.010(1)-(4) (2000), and are equally comprehensive. Current MO. REV. STAT. § 508.010.4 (2005) prescribes the county of first injury as the proper venue for every tort cases in which the first injury was within Missouri and—with the avoidable exceptions noted *supra* Part III.C—leaves no apparent venue gaps.

> (2) If the defendant is an individual, then venue shall be in any county of the individual defendant's principal place of residence in the state of Missouri or, if the plaintiff's principal place of residence was in the state of Missouri on the date the plaintiff was first injured, then venue may be in the county containing the plaintiff's principal place of residence on the date the plaintiff was first injured.[204]

This section is unequivocally exclusive. It begins by stating that its rules apply "[n]otwithstanding any other provision of law" and that (at least if the defendants are individuals or corporations)[205] those rules cover "*all* actions in which there is *any* count alleging a tort and in which the plaintiff was first injured outside the state of Missouri."[206] It continues by stating that "venue *shall* be determined" according to the rules it prescribes.[207] The General Assembly has emphatically stated its intention that, for tort cases where the plaintiff was first injured outside Missouri and the defendants are either corporations or individuals, the exclusive available venues are those prescribed by 508.010.5(1) and (2).

However, while 508.010.5 is exclusive, it is not comprehensive. If the plaintiff has no principal place of residence in Missouri and the defendant is either a corporation with no Missouri registered agent or an individual with no Missouri principal place of residence, the statute provides no venue at all. If the defendant is a corporation, section 508.010.5(1) authorizes venue in the county in which the corporate defendant's registered agent is located; but an unregistered foreign corporation will have no registered agent located in any Missouri county.[208] If the defendant is an individual, section 508.010.5(2) authorizes venue in the county in which the defendant's principal place of residence is located; but non-resident individuals have no principal place of residence in Missouri.[209] If the defendant is either a corporation or an individual, the two subsections also permit venue in the county in which the plaintiff's principal place of residence is located. However, many plaintiffs will have no principal place of residence, either because they are not individuals—and only individuals can have principal places of residence[210]—or because they did not, at the time of first injury, have any residence within the state.[211] As a result, there is a class of cases for which section 508.010 provides no available venue at all.

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[204] MO. REV. STAT. § 508.010.5 (2005).

[205] The applicability of section 508.010.5 to non-corporate entities is discussed *infra* Part III.E.

[206] § 508.010.5 (emphasis added).

[207] *Id.* (emphasis added).

[208] § 508.010.5(1). The possibility that wrongs might be committed by unregistered foreign corporations or nonresident individuals was recognized by former MO. REV. STAT. § 508.010(4) (2000) (providing venue in any county if all defendants were nonresidents).

[209] MO. REV. STAT. § 508.010.1 (2005); § 508.010.5(2).

[210] As discussed in Part III.B.2.b, "principal place of residence" is a specifically defined term that only applies to individuals.

[211] § 508.010.5(1)-(2).

A few examples may illustrate the problem. Suppose that a Missouri corporation is defamed by a national newspaper published by a Florida corporation not registered in Missouri. The newspaper is widely distributed in Missouri; but, since the paper is first published in its home state, the plaintiff corporation is statutorily deemed to have been first injured in Florida.[212] Even if all of its operations are in Missouri, the plaintiff corporation has no principal place of residence[213] and cannot base venue on its own location. Since the newspaper has no registered agent in Missouri, the plaintiff cannot base venue on the location of the defendant's registered agent. Under the Tort Reform Act, there is simply no Missouri county in which venue is proper.[214]

Similarly, suppose a cabinetmaker who resides in Kansas orders a power saw from an unregistered foreign corporation[215] and asks it to ship the saw to his shop in Kansas City, Missouri. If the saw malfunctions and injures the cabinetmaker while he is working at his home or on a job in Kansas, there will be no Missouri county in which venue will be proper under section 508.010.5.[216]

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[212] § 508.010.8.

[213] § 508.010.1. *See infra*, note 114-16, and accompanying text.

[214] While the example involves a plaintiff corporation, the same result would be reached if the plaintiff was, *e.g.*, a limited company or an individual who did not reside in the state on the date of first publication. The result would also be the same if the plaintiff added the reporters and editors involved in the story unless at least one of them had a Missouri principal place of residence.

[215] The fact that a corporation ships product into Missouri would not require it to register as a foreign corporation in the state. § 351.572.2(8).

[216] Neither alternative provided by section 508.010.5(1) will be available since the cabinetmaker has no Missouri principal place of residence and the defendant has no Missouri registered agent. The situation of the cabinetmaker is aggravated by the fact that he will probably not be able to sue in Kansas either. Since the defendant corporation did not "purposefully avail[] itself of the privilege of conducting activities within the forum state" and since it was the "unilateral activity" of the plaintiff cabinetmaker that brought the saw into Kansas, the defendant will likely be held not to have had sufficient minimum contacts with the state to justify long arm jurisdiction. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

There are rare situations in which the lack of a permissible Missouri venue may mean that there will be *no* state or federal court in which the case could be brought. Suppose that a plaintiff purchases a product from a defendant in Missouri and the product subsequently malfunctions and injures plaintiff in Kansas. Suppose further that, at the time of the injury both parties were Kansas residents, but before suit is filed both have become citizens of Missouri. Since the first injury was suffered outside Missouri and since neither party had a Missouri principal place of residence *at the time of first injury*, there is no proper venue in Missouri. Since both parties are citizens of the same state *at the time of filing*, there will be no federal diversity jurisdiction. 28 U.S.C. § 1332 (2006). And since the product was taken to Kansas by the unilateral act of the plaintiff, Kansas will not have long arm jurisdiction over the defendant. *World-Wide Volkswagen*, 444 U.S. at 297. Unless plaintiff is able to assert transient jurisdiction over defendant in Kansas by serving him there after suit is filed, there appears to be no court—state or federal, Missouri or Kansas—in which suit could be filed. Admittedly, this is a law professor's hypothetical, but it illustrates the difficulties created by the fact that the Tort Reform Act's venue provisions often turn on the status of parties on the date of first injury, while many related doctrines turn on their status as of the date of filing.

Despite the unequivocally exclusive language of that section,[217] the Court might try to fill this gap by looking to other provisions, but there appear to be none that can serve that purpose. There is no longer a comprehensive residual statute such as former section 508.010(1)-(4).[218] Current section 508.010.2 cannot serve the function since it is explicitly limited to "actions in which there is no count alleging a tort."[219] There appears to be no other venue statute that one could plausibly argue covers this class of cases.

Nor does there appear to be any plausible interpretation of section 508.010.5 under which the gap is closed. It simply is not possible to designate a Missouri "principal place of residence" for an individual who has no Missouri residence at all, or to locate the Missouri county "where a defendant corporation's registered agent is located" if it has no registered agent in Missouri. One could shrink the gap slightly by treating plaintiff corporations as having a "principal place of residence," but doing so would require ignoring the statutory text while only marginally reducing the problem.

Finally, interpretive interpolation does not seem appropriate in this situation since it is entirely possible that the gap was intentional. The legislature explicitly directed that, for plaintiffs who were first injured outside Missouri, the only available venues are those prescribed by sections 508.010.5(1) and (2).[220] Both the text of H.B. 393 and its history suggest that the 93rd General Assembly intended the bill to significantly reduce plaintiffs' ability to choose favorable fora in which to bring their cases. The members of the General Assembly may have believed that it was appropriate to deny any Missouri state court forum to persons they may have seen as out-of-state plaintiffs suing out-of-state defendants for out-of-state injuries. As a matter of statutory interpretation, it is not appropriate to fill a gap that the legislative intended to create. Interpretive interpolation should be used to effectuate an imperfectly expressed legislative purpose, not to frustrate the legislature's intentions.

That does not, however, mean that the Court should leave the gap unfilled. While courts must "give deference to legislative enactments, those enactments must yield to constitutional mandates."[221] Regardless of the General Assembly's intention, there are serious questions about whether the Missouri Constitution permits the legislature to close all state court doors to plaintiffs asserting recognized causes of action over which Missouri courts have subject matter jurisdiction and personal jurisdiction. Plaintiffs may argue that the existence of such legislation violates the Missouri Bill of Rights' open courts provision[222] on the ground that it "arbitrarily or unreasonably bars individuals or classes of

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[217] *See supra* text accompanying notes 212-13.

[218] Former MO. REV. STAT. § 508.010 (2000) was explicitly repealed by the Tort Reform Act. 2005 Mo. Laws 655, 655.

[219] MO. REV. STAT. § 508.010.2 (2005).

[220] *See supra* text accompanying notes 205-08.

[221] Kilmer v. Mun, 17 S.W.3d 545, 554 (Mo. 2000).

[222] MO. CONST. art. I § 14 ("That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay.").

individuals from accessing our courts in order to enforce recognized causes of action for personal injury."[223] They may also argue that it is inconsistent with Article III, section 14(a)'s grant of "original jurisdiction over all cases and matters, civil and criminal" to the circuit courts.[224]

A full explication or evaluation of the constitutional arguments is outside the scope of this article. However, if those arguments are accepted, the Court will face the puzzling task of defining what venue is appropriate in cases for which the legislature has—albeit unconstitutionally—denied the propriety of *any* venue. Given the lack of legislative guidance and the absence of any residual venue statute, the Court will have little choice but to declare that venue over such cases will be proper in any Missouri county,[225] leaving it to subsequent legislatures to restrict venue further if they deem it appropriate to do so.

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[223] Wheeler v. Briggs, 941 S.W.2d 512, 515 (Mo. 1997) (Holstein, C.J., dissenting); *see also*, Kilmer v. Mun, 17 S.W.3d 545, 549 (Mo. 2000) (quoting *Wheeler* dissent with approval).

At least intuitively, the open courts argument against venue gaps seems persuasive. Section 508.010 does not merely "'[re]design the framework of substantive law' by abolishing or modifying common law or statutorily based claims." *Id.* at 550 (quoting Harrell v. Total Health Care, Inc., 781 S.W.2d 58, 62 (Mo. 1989)). Nor does it merely impose troublesome but surmountable barriers to be overcome before filing suit. *See* Mahoney v. Doerhoff Surgical Servs., Inc., 807 S.W.2d 503 (Mo. 1991) (rejecting open courts challenge to requirement of affidavit before filing medical malpractice case). Instead, the gap creates an insurmountable barrier, absolutely preventing plaintiffs from bringing recognized causes of action in any Missouri state court, regardless of how diligently they act. *See* Strahler v. St. Luke's Hosp., 706 S.W.2d 7 (Mo. 1986) (striking down under open courts provision, a statute of limitations as applied to a minor who was legally incapable of filing suit on his own behalf before the statute expired); Randolph v. City of Springfield, 302 Mo. 33, 257 S.W. 449, 450-51 (Mo. 1923) (striking down, under open courts provision, municipal notice of claim statute as applied to plaintiff who was physically incapable of giving the notice and holding that "[n]o act of the Legislature would be valid which clogged or incumbered [plaintiff's] right to enforce such common-law right with impossible conditions"). *See also* Schumer v. City of Perryville, 667 S.W.2d 414 (Mo. 1984) (striking down similar municipal notice claim statute as applied to minors who did not reach majority until after the statutory time for notice had run).

On the other hand, while there are exceptions, the creation of a venue gap will not ordinarily prevent plaintiffs from suing in another state or in federal court; and the Court might conclude that the existence of alternative fora is a factor to be considered in analyzing open courts challenges.

[224] MO. CONST. art. III §14(a) ("The circuit courts shall have original jurisdiction over all cases and matters, civil and criminal").

Plaintiffs may also argue that Article I, section 2's guarantee of equal protection of the laws is similarly implicated by the legislature's creation of venue gaps. However, those arguments are likely to be subsumed by ones under the open courts provision. *See* Kilmer v. Mun, 17 S.W.3d 545, 552 n.21 (Mo. 2000).

[225] This outcome is somewhat consistent with pre-tort reform venue law under which suits could be brought in any county if all defendants were nonresidents of Missouri. *See* MO. REV. STAT. § 508.010(4) (2000). *See also* § 508.010.2(4) (providing that, in non-tort actions, venue is proper in any county if all defendants are non-residents).

E. Special Venue Statutes After Tort Reform

Even after the Tort Reform Act, there continue to be a number of special venue statutes.[226] Prior to tort reform, the relationship between the general venue provisions of former 508.010 and the various special venue statutes was relatively straightforward: if the special statute covered the situation,[227] it took priority over the general statute. By its own terms, former section 508.010 was a residual statute which defined venue only if no other statute applied.[228] In addition, longstanding canons of statutory interpretation dictated that, if two statutes conflicted, the more specific should ordinarily be applied,[229] and that, if the specific statute was enacted later, it should be treated as creating an exception to the earlier general statute.[230] As a result, the Court consistently found that former section 508.010 was effectively trumped by various special venue statutes.[231]

The post-Tort Reform Act regime is not so simple. Section 508.010 no longer begins with the modest disclaimer, "except as otherwise provided by law."[232] Instead, section 508.010.2 begins "In *all actions* in which there is no count alleging a tort,"[233] and section 508.010.4 and section 508.010.5 each begin

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[226] The act specifically repealed some special venue statutes. *See, e.g.,* 2005 Mo. Laws 655 (repealing former section 508.070, the special venue statute for suits against motor carriers); *id.* (repealing former section 508.040, the special venue statute for suits in which all defendants were corporations); *id.* (repealing former section 508.040, containing special venue provisions for suits against railroads); *id.* (repealing former section 355.176 and reenacting it without former Subsection 355.176.4, the special venue statute for not-for-profit corporations).

[227] Of course, if the specific venue statute was held not to cover the particular situation, the general statute would govern. *See, e.g.,* State *ex rel.* Turnbough v. Gaertner, 589 S.W.2d 290, 291 (Mo. 1979) (since section 508.040 did not apply to cases in which corporate defendants were joined with individual defendants, the general venue statute should be applied).

[228] MO. REV. STAT. § 508.010 (2000) ("Suits instituted by summons shall, *except as otherwise provided by law*, be brought . . . .") (emphasis added).

[229] *See, e.g.,* Greenbriar Hills Country Club v. Dir. of Revenue, 935 S.W.2d 36, 38 (Mo. 1996) ("When the same subject matter is addressed in general terms in one statute and in specific terms in another, the more specific controls over the more general."); Terminal R.R. Ass'n of St. Louis v. City of Brentwood, 360 Mo. 777, 230 S.W.2d 768, 769 (1950) (specific terms in a statute prevail over more general terms unless the statute as a whole clearly demonstrates the opposite intent).

[230] *See, e.g.,* Laughlin v. Forgrave, 432 S.W.2d 308, 313 (Mo. 1968); State *ex rel.* McKittrick v. Carolene Prods. Co., 346 Mo. 1049, 1059, 144 S.W.2d 153, 156 (Mo. 1940); State *ex rel.* Buchanan County v. Fulks, 296 Mo. 614, 247 S.W. 129, 131-32 (Mo. 1922).

[231] *See, e.g.,* State *ex rel.* City of St. Louis v. Kinder, 698 S.W.2d 4, 6 (Mo. 1985) (holding that section 508.060 trumped former 508.010 and stating that "[g]eneral rules establishing venue are subject to specific statutes which place venue elsewhere"); Igoe v. Dep't of Labor and Indus. Relations of State of Mo., 152 S.W.3d 284, 288 (Mo. 2005) (holding that discrimination venue statute trumped general venue statute).

[232] *Compare* MO. REV. STAT. § 508.010 (2000) ("Suits instituted by summons shall, *except as otherwise provided by law*, be brought . . .") (emphasis added) *with* MO. REV. STAT. § 508.010 (2005) (containing no similar language).

[233] MO. REV. STAT. § 508.010.2 (2005) (emphasis added).

even more aggressively with "*Notwithstanding any other provision of law*, in all actions in which there is any count alleging a tort."[234] As a result, analysis of the interrelationship between the Tort Reform Act's basic provisions rules and various special venue statutes must begin with an analysis of the effect of these phrases.

The Missouri Supreme Court has long held that, whenever possible, even apparently conflicting statutes should be harmonized in a way that makes it possible to apply both.[235] "Repeals by implication are not favored."[236] As a result, the courts sometimes hold that two apparently conflicting venue statutes act as alternatives, permitting cases covered by both statutes to be brought in any county authorized by either.[237] At other times, they hold that a more specific venue statute, particularly if subsequently enacted, operates as an exception to a more general one.[238]

However, if the text of a subsequent statute unambiguously conflicts with an earlier one, it acts to repeal the earlier statute to the extent of that conflict.[239] If the more recent statute is inconsistent with every aspect of the earlier statute, the earlier one is repealed entirely.[240]

Finally, in resolving apparent conflicts between venue statutes, it is important to determine whether one of them contains language demonstrating that the legislature intended the statute to supply the exclusive available venues

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[234] § 508.010.4-5 (emphasis added).

[235] State *ex rel.* Riordan v. Dierker, 956 S.W.2d 258, 260 (Mo. 1997) ("Statutes which seemingly are in conflict should be harmonized so as to give meaning to both statutes"); County of Jefferson v. Quiktrip Corp., 912 S.W.2d 487, 490 (Mo. 1995) ("On their face, the statutes appear to be inconsistent. Nevertheless, the Court's duty is to attempt to reconcile the statutes and apply them both"); Poling v. Moitra, 717 S.W.2d 520, 522 (Mo. 1986) ("Unless two statutes are irreconcilably inconsistent, both must stand.").

[236] *Quiktrip Corp.*, 912 S.W.2d at 490; *Poling*, 717 S.W.2d at 522.

[237] *Riordan*, 956 S.W.2d at 260 (holding that §84.015 and §536.050—prescribing, respectively, venue for cases involving the Board of Police Commissioners and for declaratory judgments challenging the validity of administrative rules—should be interpreted as providing alternative venues); Control Tech. & Solutions v. Malden R-1 Sch. Distr., 181 S.W.3d 80, 82-83 (Mo. Ct. App. 2005) (holding that § 508.050 and § 70.320—prescribing, respectively, venue for suits against municipal corporations and venue for suits involving municipal contracts—should be interpreted as providing alternative venues).

[238] State *ex rel.* City of St. Louis v. Kinder, 698 S.W.2d 4, 6 (Mo. 1985) (by adopting special venue statute, legislature created an exception to general venue statute).

[239] *Quiktrip Corp.*, 912 S.W.2d at 490 ("When two statutes are repugnant in any of their provisions, the later act, even without a specific repealing clause, operates to the extent of the repugnancy to repeal the first."); Corvera Abatement Tech., Inc. v. Air Conservation Comm'n, 973 S.W.2d 851, 859 (Mo. 1998) ("When two statutes conflict, the later enacted statute, even when there is no specific repealing clause, repeals the first statute to the extent of any conflict with the second.").

[240] *Corvera Abatement Tech.*, 973 S.W.2d at 859 ("If the two laws are irreconcilable, the latter repeals the former."); Bartley v. Special Sch. Dist. of St. Louis County, 649 S.W.2d 864, 867 (Mo. 1983) (complete repeal by implication only if the two statutes are "so inimical to each other that both cannot stand" and only if the legislature intended to repeal the earlier statute even though it did not do so explicitly).

for a particular class of cases. If neither statute contains such language, the Court will often harmonize the two statutes by finding that they provide alternative permissible venues.[241] But if one of the statutes contains language expressing exclusivity, that statute will be deemed to prevail over any other venue provisions to the extent of the conflict.[242]

Sections 508.010.4 and 508.010.5 each begin with the words "Notwithstanding any other provision of law, in all actions in which there is any count alleging a tort . . . venue shall be" in particular counties.[243] In ordinary usage, these words unequivocally express the General Assembly's intent that the tort-case provisions of the act provide the "sole, exclusive venue"[244] for all tort cases to which they apply. Interpreting identical words in the context of a different statute, the Supreme Court recently stated:

> "The initial phrase ['Notwithstanding any other provisions of law'], if it is to be given any effect whatsoever, must be read to mean that [the section containing it] controls and takes precedence over any other provisions that might otherwise appear to [govern the situation]."[245]

As a result, if the act's tort-case venue provisions cover a particular case,[246] those provisions prevail over any inconsistent special venue statute.

Section 508.010.2, on the other hand, begins with the less emphatic words, "[i]n all actions in which there is no count alleging a tort, venue shall be determined as follows."[247] While the Supreme Court has held that a venue statute containing the phrase "all actions *whatsoever*"[248] expressed an intent to create an exclusive venue,[249] it has never stated that the phrase "all actions" *simpliciter*

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[241] *Riordan*, 956 S.W.2d at 260 (since neither of the two statutes contains language prescribing an exclusive venue, they should be treated as providing alternative venues); Control Tech. & Solutions v. Malden R-1 Sch. Dist., 181 S.W.3d 80, 82-83 (Mo. Ct. App. 2005) (same).

[242] State *ex rel.* SSM Health Care St. Louis v. Neill, 78 S.W.3d 140, 143-46 (Mo. 2002) (venue provision that stated that suits against nonprofit corporations "shall be commenced only in" particular counties held to be exclusive and to prevail over other arguably applicable venue statutes); *Kinder*, 698 S.W.2d at 6 (Mo. 1985) (venue provision that stated that '[a]ll actions whatsoever against any county shall be commenced in the Circuit Court of such county," held to be exclusive and to prevail over other arguably applicable venue statutes); *See also* State *ex rel.* Burlington N. R.R. Co. v. Forder, 787 S.W.2d 725, 726 (Mo. 1990) (venue provision that stated that suits against municipal corporations "shall be commenced only in" certain counties held to recognize special needs of municipal defendants to be sued only in the counties in which they are situated).

[243] MO. REV. STAT. §§ 508.010.4-5 (2005).

[244] *Riordan*, 956 S.W.2d at 260 (Mo. 1997).

[245] Corvera Abatement Tech., Inc. v. Air Conservation Comm'n, 973 S.W.2d 851, 859 (Mo. 1998).

[246] As discussed *supra*, the out-of-state first injury tort provisions may not, under their own terms, govern cases against certain types of defendants.

[247] MO. REV. STAT. § 508.010.2 (2005).

[248] § 508.060 (2005) (emphasis added).

[249] State *ex rel.* SSM Health Care St. Louis v. Neill, 78 S.W.3d 140, 143-46 (Mo. 2002) ("The use of the word "whatsoever" [in the phrase 'all actions whatsoever'] has also been interpreted as

would have that effect. Similarly, while it has held that two venue statutes stating that certain suits "shall be commenced *only*"[250] in particular counties created exclusive venues,[251] it specifically rejected the argument that a venue statute containing the phrase "shall be commenced" *simpliciter* should be treated as doing so.[252] While there are various ways the legislature could express its intent that a venue provision should be treated as exclusive,[253] the language of section 508.010.2 is not one of them.

This is particularly clear when that section is viewed in context of the other subsections of 508.010 that were enacted by the same General Assembly as part of the same act. If the phrase, "In all actions . . . venue shall be determined" was enough to make a venue provision exclusive in section 508.010.2, then there would have been no need for the legislature to have added the phrase, "Notwithstanding any other provision of law" before that language at the beginning of sections 508.010.4 and 508.010.5. In addition, if section 508.010.2 provided the exclusive venue for non-tort cases, then section 508.010.6 (the special venue provisions for plaintiff counties) would be a complete nullity: for non-tort cases, it would be trumped by section 508.010.2; and for tort cases, it would be trumped by section 508.010.4 or section 508.010.5. To hold that the members of the 93rd General Assembly intended section 508.010.2 to be an exclusive venue provision, one would also have to assume that they inserted entirely superfluous phrases at the beginning of sections 508.010.4 and 508.010.5 and also that they inserted an entirely meaningless section 508.010.6 in the same act. Such an assumption would fly in the face of the Supreme Court's longstanding rule that the court should not assume that legislature inserted "idle verbiage or superfluous language in a statute."[254] As a result, the post-tort reform version of section 508.010 should be viewed as a general venue statute,[255] but

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mandatory and to provide the exclusive venue for suits against counties"); State *ex rel.* City of St. Louis v. Kinder, 698 S.W.2d 4, 6 (Mo. 1985) (phrase "[a]ll actions whatsoever" in section 508.060 provides exclusive venue).

[250] MO. REV. STAT. § 508.050 (2005) (emphasis added); MO. REV. STAT. § 355.176.4 (2000) (emphasis added).

[251] *SSM Health Care*, 78 S.W.3d at 143-44 (holding that former section 355.176.4 was exclusive and noting that section 508.050 had been held to have the same effect); State *ex rel.* Burlington N. R.R. Co. v. Forder, 787 S.W.2d 725, 726 (Mo. 1990) (holding that section 508.050 was exclusive).

[252] *SSM Health Care*, 78 S.W.3d at 143-44 (discussing former section 508.040); State *ex rel.* Dick Proctor Imp., Inc. v. Gaertner, 671 S.W.2d 273, 275 (Mo. 1984) (holding that former section 508.040 was not exclusive).

[253] SSM Health Care, 78 S.W.3d at 143-44.

[254] Civil Serv. Comm'n of City of St. Louis v. Members of the Bd. of Aldermen of City of St. Louis, 92 S.W.3d 785, 788 (Mo. 2003) (quoting Hyde Park Housing P'ship v. Dir. of Revenue, 850 S.W.2d 82, 84 (Mo. 1993). *See also*, *e.g.*, *SSM Health Care*, 78 S.W.3d at 144 (rejecting interpretation that would make the word "only" surplusage); Dodd v. Independence Stove & Furnace Co., 330 Mo. 662, 671, 51 S.W.2d 114, 118 (Mo. 1932) ("Legislature will not be presumed to have intended using superfluous or meaningless words in a statute.").

[255] One could argue that, viewed piecemeal, the various subsections of 508.010 are specific venue provisions, one covering non-tort cases only, one covering tort cases with instate first injuries, and one covering tort cases with out-of-state first injuries. However, that argument is inconsistent with

one that prescribes exclusive venues for tort cases and non-exclusive ones for non-tort cases.

The following subsections analyze the effect of the Tort Reform Act's venue provisions on various special venue provisions in light of the particular language of those provisions.

1. Suits Brought by Counties (Section 508.010.6)

Section 508.010.6, the special venue provision for suits brought by counties, provides:

> Any action, in which any county shall be a plaintiff, may be commenced and prosecuted to final judgment in the county in which the defendant or defendants reside, or in the county suing and where the defendants, or one of them, may be found.[256]

The section is unique in that it is the only special venue provision that was enacted as a part of the Tort Reform Act itself, making it meaningless to ask whether section 508.010.6 was repealed by that act's general venue rules. Instead, the question is how to reconcile the conflicting language of the various subsections in light of the fact that they were all enacted simultaneously.

In tort cases, applying section 508.010.6 would permit suit to be brought in circuit courts of the plaintiff county (if any of the defendants may be found there), or in the county of any defendant's residence even if the first injury was not suffered in that county.[257] However, in light of the exclusive, "notwithstanding any other provision of law," language of the tort-case provisions, those provisions should be deemed to trump section 508.010.6.[258] The plaintiff-county subsection contains no comparable exclusive language nor does it contain any language suggesting that it was intended to be an exception to the unequivocal exclusivity of sections 508.010.4 and 508.010.5.[259] Particularly in light of the manifest intention of the General Assembly to restrict plaintiffs' choice of venue in tort cases, the tort-case venue provisions should govern.

On the other hand, the plaintiff-county provision should be interpreted as prevailing over (and as a supplement or exception to) the non-tort venue rules of section 508.010.2. Section 508.010.6 is more specific than section 508.010.2, and specific provisions are ordinarily interpreted as creating exceptions to more

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pre-tort reform case law that treated section 508.010 as a general venue statute even though it too, if viewed subsection by subsection, could be treated as a series of specific venue provisions.

[256] MO. REV. STAT. § 508.010.6 (2005).

[257] There will be situations in which the first injury will not occur in the plaintiff county. For example, a county owned vehicle or other property could be damaged while outside the county. In addition, the county might be one of several plaintiffs and the other plaintiffs could have suffered earlier injuries in other locations.

[258] *See supra*, notes 254-56 and accompanying text.

[259] For example, section 508.010.6 does not contain phrases such as "Notwithstanding the other provisions of this section" or "In addition to any venues specified in this section," and does not even state that actions by plaintiff counties "may *also* be commenced" in the specified counties.

general ones.[260] In addition, as discussed earlier, to interpret section 508.010.6 as being trumped in both tort and non-tort cases would make the section a nullity and violate the rule against surplusage.[261]

Finally, interpreting current section 508.010.6 as trumped by the tort-case rules but not by the non-tort-case rules is most consistent with the historical function of plaintiff-county venue rules. Prior to tort reform, former section 508.010(5)[262] was essentially identical to current section 508.010.6.[263] In the pre-tort reform venue scheme, it served a single, equalizing function: Former section 508.010(1) permitted to suit to be brought, inter alia, "in the county within which the plaintiff resides, and the defendant may be found,"[264] but a county is not ordinarily seen as "residing" within itself. Former section 508.010(5), gave plaintiff counties the venue option that former section 508.010(1) gave to individuals or corporations, the option of suing in their local circuit court if the defendant could be served there. Interpreting its post-tort reform equivalent as being supplemental to the current non-tort venue rules (which include former section 508.010(1)'s language verbatim) but as being trumped by the current tort-case venue rules (which contain no comparable language) lets the current plaintiff-county rule serve the same historical function.

2. Suits Brought Against Counties (Section 508.060) or Municipal Corporations (Section 508.050)

Section 508.060, the special venue provision for suits brought against counties, provides:

> All actions whatsoever against any county shall be commenced in the circuit court of such county, and prosecuted to final judgment and execution therein, unless removed by change of venue to some other county, in which case the

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[260] *See supra*, authorities cited at notes 229-30.

[261] *See supra*, text accompanying note 254.

[262] MO. REV. STAT. § 508.010(5) (2000) ("Any action, local or transitory, in which any county shall be plaintiff, may be commenced and prosecuted to final judgment in the county in which the defendant or defendants reside, or in the county suing and where the defendants, or one of them, may be found").

[263] The only difference was the former section's inclusion of the phrase "local or transitory." The elimination of the phrase was consistent with modern Missouri case law that recognizes that the common law differentiation between local and transitory actions has been replaced by statutory designation of appropriate venues. *See, e.g.,* Mission Med. Group, P.A. v. Filley, 879 S.W.2d 743, 745 (Mo. Ct. App. 1994) (citing cases). It is also consistent with current section 508.010's elimination of former section 508.010's introductory phrase limiting the former section's applicability to "[s]uits instituted by summons." *Compare* MO. REV. STAT. § 508.010 (2000) (containing phrase) *with* MO. REV. STAT. § 508.010 (2005) (omitting phrase).

[264] MO. REV. STAT. § 508.010(1) (2000) ("When the defendant is a resident of the state, either in the county within which the defendant resides, or in the county within which the plaintiff resides, and the defendant may be found.").

> action or actions so removed shall be prosecuted to final judgment and execution in the circuit court of such other county.[265]

Similarly, section 508.050, the special venue provision for suits brought against municipal corporations, provides:

> Suits against municipal corporations as defendant or codefendant shall be commenced only in the county in which the municipal corporation is situated, or if the municipal corporation is situated in more than one county, then suits against the municipal corporation shall be commenced only in that county wherein the seat of government of the municipal corporation is situated; except that suits may be brought against a city containing more than four hundred thousand inhabitants in any county in which any part of the city is situated.[266]

The Supreme Court has held that the inclusion of the phrase "All actions whatsoever," demonstrates the legislature's intent that section 508.060 should supply the exclusive venue for suits against counties[267] and that section 508.050's statement that cases against municipalities "shall be commenced only in" particularly counties provides the sole venue rules for suits against cities.[268] Given the absence of any similarly exclusive language in the Tort Reform Act's non-tort case venue provisions, it seems clear that the defendant-county rules and the defendant-city rules should be applied in cases in which no count alleges a tort.

However, the application of sections 508.060 and 508.050 in tort cases presents a much more difficult problem. The Tort Reform Act's tort-case venue sections *do* contain language indicating that they should provide the exclusive source for determining venue,[269] and there is no obvious textual basis to prioritize one set of expressions of exclusivity over the other. The canon that later statutes repeal earlier ones suggests that the tort-case provisions should govern,[270] but the equally valid canon that more specific statutes should prevail over more general ones suggests the opposite result—that the county-defendant and city-defendant rules should be applied. [271]

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[265] MO. REV. STAT. § 508.060 (2005).

[266] § 508.050.

[267] State *ex rel.* SSM Health Care St. Louis v. Neill, 78 S.W.3d 140, 143-46 (Mo. 2002) ("The use of the word "whatsoever" [in the phrase 'all actions whatsoever'] has also been interpreted as mandatory and to provide the exclusive venue for suits against counties"); State *ex rel.* City of St. Louis v. Kinder, 698 S.W.2d 4, 6 (Mo. 1985) (phrase "[a]ll actions whatsoever" in section 508.060 prescribes exclusive venue).

[268] MO. REV. STAT. § 508.050 (2005). *See supra* authorities cited in note 251.

[269] *See supra* text accompanying notes 243-46.

[270] *See supra* authorities cited in note 238-40.

[271] *See supra* authorities cited in note 229.

As this article was going to print, the Court of Appeals for the Eastern District used somewhat similar reasoning to conclude that section 508.050 prevailed over the contrary provisions of 508.010.4 and held that, even in tort cases, a city could be sued only in the county in which it is

There is, however, at least one reason why the Court should resolve this dilemma in favor of applying the county-defendant and city-defendant rules even in tort cases. By enacting the special venue rules for cities and counties, the legislature recognized that local governmental bodies have an interest in defending cases in their local courts and expressed its belief that they should not be forced to defend in courts spread out throughout the state.[272] And, while the

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located. *State* ex rel. *City of Jennings v. Riley*, --- S.W.3d ---, 2007 W.L. 656545 (Mo. Ct. App., March 6, 2007).

In the author's view, the *Riley* court reached the correct result as to section 508.050 but did so based on arguments that could lead to the incorrect result in cases involving other special venue statutes which—unlike 508.050 and 508.060—contain no exclusive venue language of their own.

For example, the *Riley* court argued that the Tort Reform Act's repeal of former section 508.040 (the old corporations-only venue statute) and former section 508.070 (the old motor carrier venue statute) suggested that the Act's failure to repeal the municipal venue statute implied that the legislature intended that it should not be affected by the tort-case venue provisions. This argument would be equally applicable to all special venue statutes, even those that—unlike 508.050 and 508.060—contain no language of exclusivity. But the argument is fundamentally flawed. First, if it was correct, it would render 508.010.4's "[n]otwithstanding any other provisions of law" language a complete nullity since that language would *always* be trumped by *any* specific venue statutes. Second, the corporations-only venue statute and the motor carrier venue statutes were repealed because they were intended to have *no* effect after tort reform (i.e., to be abolished in both tort and non-tort cases) and therefore should not remain in the revised statutes. However, as discussed in the subsequent sections, most special venue statutes will continue to apply in non-tort cases and are only trumped in tort cases. *See infra,* text accompanying notes 275-316. They were not repealed because, while their scope is diminished, they continue to apply in contract cases.

Similarly, the *Riley* court misread *State* ex rel. *Casey's General Stores, Inc. v. City of West Plains*, 9 S.W.3d 712, (Mo. Ct. App. 1999) for the proposition that "notwithstanding any other provision of law" language could be trumped by provisions in separate, pre-existing statutes. In fact, *Casey's General Stores* interpreted a sentence that stated that "Notwithstanding any other provision of this chapter to the contrary, any person who [met certain requirements should receive a license]" and held that the "notwithstanding" language at the beginning of the *sentence* did not negate the requirements contained at the end of the same sentence. *Id*. at 717-18.

Even more surprisingly, the *Riley* court suggested that *State* ex rel. *City of Bella Vista v. Nicholls*, 698 S.W.2d 44 (Mo. Ct. App. 1985), a case interpreting section former 508.010 when the section stated that it governed "except as otherwise provided by law" should control the interpretation of current 508.010.4 which now explicitly governs "*notwithstanding* any other provision of law." It did not discuss (and the parties' briefs did not cite) *Corvera Abatement Tech., Inc. v. Air Conservation Comm'n*, 973 S.W.2d 851, 859 (Mo. 1998) which held that such "notwithstanding any other provision" language means exactly what it says, "that [the section containing such language] controls and takes precedence over any other provisions that might otherwise appear to [govern the situation]."

Riley's broad arguments would, if applied generally, eviscerate the tort-case venue provisions' "[n]otwithstanding any other provision of law" language. As suggested in the text, the municipal-defendant and county-defendant special venue statutes may trump the tort-case provisions of the Tort Reform Act. But if they do so, it is because they, unlike other special venue statutes, contain their own exclusive venue language, and because there are policy reasons peculiar to suits against governmental bodies that militate in their favor.

[272] *See* State *ex rel.* Burlington N. R.R. Co. v. Forder, 787 S.W.2d 725, 726 (Mo. 1990) (dealing with municipal corporations); State *ex rel.* Milham v. Rickhoff, 633 S.W.2d 733, 735(Mo. 1982)

Tort Reform Act's venue rules certainly express the intent that tort cases be tried in the location of first injury, the underlying purpose for that rule seems to have been to limit plaintiffs' ability to force defendants to defend in disadvantageous fora. Section 508.060's requirement that cases against a county be filed in the circuit courts of that county seems to accomplish that purpose at least as effectively as the tort-case place-of-first-injury rule.

There is an additional reason why the *county*-defendant rules should be applied in preference to the tort-case rules: it is not at all clear that it is *possible* to apply section 508.010.5's out-of-state first injury rules to cases against counties.[273] That section prescribes the proper venue only for suits against individuals or corporations. Counties are not individuals, and it is difficult to see how they can be treated as municipal corporations under the venue statutes since those statutes clearly distinguish between the two types of entities.[274] If counties are neither individuals nor corporations, then section 508.060 is the *only* statute prescribing venue for out-of-state first injury cases against counties. As a result, treating the tort-case rules as prevailing would lead to a peculiar patchwork: Suits against counties would be governed by the county-defendant rules; but if they contained a count alleging a tort, they would be governed by the tort-case rules; but if the tort count alleged an out-of-state first injury, they would be governed by the defendant-county rules. While it is conceivable that the legislature intended this odd result, it does not seem likely.

3. Suits Brought Against Limited Liability Companies (Section 347.069.2)

Section 347.069.2, the special venue provision for suits brought against limited liability companies, provides:

> Proceedings against a limited liability company shall be commenced either in the county where the cause of action accrued or in any county where such limited liability company shall have or usually keep an office or agent for the transaction of its usual and customary business, or in the county in which the

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(discussing municipal corporations in the context of rejecting the argument that the Board of Curators should be considered a municipality for venue purposes).

[273] Of course, in many tort cases against counties, the place of first injury will be within the county itself and therefore within the state. However, suits arising out of the operation of county motor vehicles or suits in which the county's sovereign immunity has been waived by the purchase of insurance may involve injuries occurring outside the state.

[274] *Compare* MO. REV. STAT. § 508.050 (2005) (prescribing venue for suits against municipal corporations) *with* § 508.060 (prescribing venue for suits against counties).

There is one case stating in dictum that counties can sometimes be treated as municipal corporations for some unidentified purposes. State *ex rel.* Caldwell v. Little River Drainage Dist., 291 Mo. 72, 236 S.W. 15, 16 (Mo. 1921) (holding that a drainage district is a municipal corporation for purposes of immunity from state taxation). A more recent decision—one similarly not dealing with counties—quotes *Caldwell*, while holding that the Board of Curators is not a municipal corporation for venue purposes even though it is statutorily defined as a "public corporation for educational purposes." *Milham*, 633 S.W.2d at 735.

St. Louis is, of course, *sui generis* since it is constitutionally defined as both a city and a county. MO. CONST. art. VI, §31.

> office of the registered agent of the limited liability company is maintained.[275]

The practical significance of the Tort Reform Act's failure to repeal this section should not be underestimated. In recent years, the number of LLCs created in Missouri has vastly exceeded the number of general business corporations.[276] To the extent that section 347.069.2 continues to apply, it significantly reduces the effect of the Tort Reform Act's venue provisions, particularly on newly created small businesses.

For non-tort cases, given the absence of exclusive venue language in either statute, the more specific provisions of section 347.069.2 should govern and be treated as an exception to the more general provisions of section 508.010.2.[277] This will have a relatively minor effect on the options available to plaintiffs since, even under section 508.010.2, they could have sued in the county containing the LLC's residence and LLCs would be deemed to reside in all counties in which they had an agent or office for transacting their ordinary business.[278] The only additional venue that would be available under the special LLC venue statute would be the county containing the LLCs registered office.

For tort cases, the question is more complicated. Since the tort-case venue provisions of the Tort Reform Act contain unequivocally exclusive language, they certainly should prevail over the non-exclusive provisions of the special LLC venue—but only to the extent of any conflict. Since "[r]epeals by implication are not favored,"[279] the Court has the duty to harmonize apparently conflicting statutes whenever possible so that both can be applied.[280] "Unless two statutes are irreconcilably inconsistent, both must stand."[281]

For tort cases in which plaintiff's first injury occurred in Missouri, such an irreconcilable conflict exists. Section 508.010.4 explicitly covers "all actions" and contains no language limiting its effect to cases against particular types of

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[275] MO. REV. STAT. § 347.069.2 (2005).

[276] E-mail from Carol Fischer, Missouri Secretary of State's Office, to Robert Downs, Professor of Law, UMKC School of Law (Sept. 18, 2006, 04:39 P.M. CDT) (copy on file with author) (including table showing total of 80,971 LLCs formed compared to 29,010 general business corporations formed from Jan. 1, 2004 through Aug. 31, 2006). The disparity seems to be growing. In 2004, LLCs represented approximately 70% of the combined total. In the first 8 months of 2006, they represented more than 77%. *Id.*

[277] *See supra* authorities cited note 229-30.

[278] Since there is no statutory definition of an LLCs residence, the common law rule that entities are deemed to reside wherever they conduct their ordinary operations would apply. *See, e.g.,* State *ex rel.* Smith v. Gray, 979 S.W.2d 190, 192 (Mo. 1998) (stating common law rule for corporations).

[279] County of Jefferson v. Quiktrip Corp., 912 S.W.2d 487, 490 (Mo. 1995); Poling v. Moitra, 717 S.W.2d 520, 522 (Mo. 1986).

[280] State *ex rel.* Riordan v. Dierker, 956 S.W.2d 258, 260 (Mo. 1997) ("Statutes which seemingly are in conflict should be harmonized so as to give meaning to both statutes"); *Quiktrip Corp.*, 912 S.W.2d at 490 ("On their face, the statutes appear to be inconsistent. Nevertheless, the Court's duty is to attempt to reconcile the statutes and apply them both.").

[281] *Poling*, 717 S.W.2d at 522.

defendant.[282] There is no way to harmonize section 508.010.4 with the special LLC venue rules and the former must prevail.[283]

However, there is no such conflict between the special LLC venue rules and section 508.010.5, the out-of-state first injury venue rules of the Tort Reform Act. Section 508.010.5(1) covers cases in which the defendant is a corporation,[284] and section 508.010.5(2) covers cases in which the defendant is an individual,[285] but nothing in section 508.010.5 covers cases in which the defendant is a limited liability company. For tort cases in which the first injury is suffered outside Missouri, the Tort Reform Act says *nothing* about the proper venue for LLC defendants; and, to that extent, it does not conflict with the special LLC venue rules of section 347.069.2. As a result, the Court must harmonize the two statutes "so as to give meaning to both."[286] It should apply the Tort Reform Act's venue provisions to those situations in which there is a conflict—all non-tort cases and in-state first injury tort cases—and apply the special LLC venue rules in situations to which they alone apply—all out-of-state first injury tort cases.

To avoid this result, one might argue that limited liability companies should be treated as corporations.[287] In *State* ex rel. *Automobile Club Inter-Insurance Exchange v. Gaertner*,[288] the Court held that an inter-insurance exchange created under sections 379.650-379.800[289] should be treated as if it were a corporation suable as an entity with venue determined under former section 508.040 based on the location of its offices or agents, rather than as an unincorporated association suable only as a class with venue determined under former section 508.010(2) based on the residence of the particular members of the exchange named as defendant class representatives.[290] However, the reasoning of *Auto Club* does not apply to limited liability companies. The Court based its decision to treat reciprocal insurance exchanges as corporations on the fact that "[n]o purpose [would be] served in proceeding against the individual members as a class" and the fact that class action treatment would have the effect of "permit[ting] suit by

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[282] MO. REV. STAT. § 508.010.4 (2005).

[283] *Quiktrip Corp.*, 912 S.W.2dat 490 ("When two statutes are repugnant in any of their provisions, the later act, even without a specific repealing clause, operates to the extent of the repugnancy to repeal the first."); Corvera Abatement Tech., Inc. v. Air Conservation Comm'n, 973 S.W.2d 851, 859 (Mo. 1998) ("When two statutes conflict, the later enacted statute, even when there is no specific repealing clause, repeals the first statute to the extent of any conflict with the second.").

[284] MO. REV. STAT. § 508.010.5(1) (2005) ("If the defendant is a corporation, then venue shall be . . .").

[285] § 508.010.5(2) ("If the defendant is an individual, then venue shall be . . .").

[286] State *ex rel.* Riordan v. Dierker, 956 S.W.2d 258, 260 (Mo. 1997).

[287] For a case in which the defendant LLC initially took the position that it was a corporation covered by former section 508.040, but argued on appeal that it was an LLC governed by section 347.069.2, *see* Duncan v. Am. Commercial Barge Line, LLC, 166 S.W.3d 78, 87-88 (Mo. Ct. App. 2004).

[288] 636 S.W.2d 68 (Mo. 1982).

[289] MO. REV. STAT. §§ 379.650-800 (2005).

[290] State *ex rel.* Auto. Club Inter-Ins. Exch. v. Gaertner, 636 S.W.2d 68, 74 (Mo. 1982).

or against a reciprocal insurance exchange to be brought in any county simply because a member-subscriber resides there . . . ."[291] But unlike an insurance exchange, an LLC would not have to be treated as a class if it is not treated as a corporation. Since the legislature has explicitly provided a special venue statute for LLCs, the alternative to treating them as corporations is to treat them as the legislature mandated—as LLCs governed by section 347.069.2. After all, if LLCs were necessarily treated as corporations for venue purposes, it would have made no sense for the legislature to have enacted section 347.069.2 in the first place.[292]

A similar argument might be made based on the language of section 508.010.12. That section provides, "The provisions of this section [508.010] shall apply irrespective of whether the defendant is a for-profit or a not-for-profit entity."[293] This language appears to be intended to insure that, whenever a subsection of section 508.010 covers a particular type of entity, it covers that type of entity "irrespective of whether [it is] for-profit or not-for-profit."[294] Thus, if a subsection such as section 508.010.4 covers all types of defendants, it applies to both for-profit and not-for-profit defendants of any sort; and if a subsection such as section 508.010.5(1) applies to corporations, it applies to all types of

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[291] *Id.* at 73.

[292] There is language in *Auto Club* suggesting that Article XI, Section 1 of the Missouri Constitution compels the Court to treat all jural entities as corporations. *Id.* at 74. Of course, it does nothing of the sort, a fact that the Court recognizes in the following sentence by saying "This does not mean that in other contexts a reciprocal [or interinsurance exchange] must or should be treated as a corporation." *Id.* at 74. Article XI, Section 1 provides a definition that applies only to Article XI itself and does not purport to define the term when used by the General Assembly. Mo. Const. Art. XI §1 ("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.") (emphasis added). It would be impossible to treat the wide variety of Missouri business entities—almost all of which have "powers or privileges not possessed by individuals or partnerships" and each of which is governed by its own carefully tailored statutory provisions—as being subject to every Missouri statute that uses the word "corporation." Applying a constitutional definition where it does not apply is no more permissible than refusing to apply it where it does.

[293] Mo. Rev. Stat. § 508.010.12 (2005).

[294] The fact that section 508.010.12 uses the phrase "irrespective of whether the defendant is a for-profit or a not-for-profit *entity*," instead of the phrase "irrespective of whether the defendant is a for-profit or not-for-profit *corporation*," is not inconsistent with the conclusion that section 508.010.5(1) only applies to corporations. The phrase "not-for-profit corporation" is most properly applied to corporations organized under the former General Not For Profit Corporation Act, 1953 Mo. Laws 322, subsequently codified as MO. REV. STAT. § 355.170.2 (1959). The phrase "nonprofit corporations" could be construed to refer only to those not-for-profit corporate entities organized under the more recently enacted Missouri Nonprofit Corporation Act, 1994 Mo. Laws 854, currently codified, as amended MO. REV. STAT. §§ 355.001-.881 (2005). Either phrase could be construed to exclude other types of incorporated not-for-profit entities such as Health Services Corporations incorporated under Chapter 354, MO. REV. STAT. §§ 354.010-354.380 (2005), or Religious and Charitable Associations incorporated under Chapter 352. §§ 352.010-520. The choice of the phrase "not-for-profit entity" was a reasonable way of assuring that all forms of not-for-profit corporations (in the generic sense) were included.

corporations whether for-profit or not-for-profit corporations.[295] On the other hand, it is difficult to read section 508.010.12's language as an effort to apply section 508.010.5(1), which by its terms applies only to corporations, to non-corporate entities.[296] If that had been the legislature's intent, it could have conveyed it far more clearly, by adding the sentence, "The word 'corporation,' as used in this section, shall be construed to include all jural entities," or by replacing the word "corporation" in section 508.010.5(1) with the phrase "for-profit on not-for-profit entity,"[297] Even more simply, it could have explicitly repealed the special LLC venue statute just as it explicitly repealed the special nonprofit corporation statute.

In any event, the question is not whether it is *possible* to construe section 508.010.5(1) in a way that creates a conflict with section 347.069.2 thus rendering the entire special LLC venue statute a nullity, but instead whether it is *impossible to avoid* such a construction.[298] Repeals by implication are disfavored, and it is the duty of the court to harmonize apparently conflicting statutes whenever possible so that neither is rendered superfluous and both can be applied.[299] Fortunately, the language of the Tort Reform Act and the special LLC venue statute make this task simple since the interpretation that is most consistent with the text of the two statutes is also the one that harmonizes them and permits the court to apply both. Under that interpretation, each statute continues to have a function: the special LLC venue statute governs tort cases in which the first injury is suffered out of the state, and section 508.010 governs all other cases against LLCs.

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[295] § 508.010.5(1). This section's application to not-for-profit corporations is confirmed by the acts repeal of the not-for-profit venue statute. *See supra* text accompanying notes 71-86.

[296] It would be even more difficult, but no less logical, to read 508.010.12 as requiring that the word "*individual*" in section 508.010.5(2) be understood to include all forms of for-profit and not-for-profit entities. If section 508.010.12 requires that every provision of section 508.010 be interpreted as covering every form of entity, there is no logical reason to expand the meaning of word "corporation" to cover LLCs than it is to expand the meaning of the word "individual" to do so.

[297] With that change, section 508.010.5(1) would have begun, "If the defendant is a for-profit or not-for profit entity, then venue shall be in any county where a defendant entity's registered agent is located . . . ." Of course, some non-corporate entities, such as counties do not have registered agents; but that fact is a reason *not* to infer that section 508.010.5(1) was intended to apply to all entities.

[298] Poling v. Moitra, 717 S.W.2d 520, 522 (Mo. 1986) ("Unless two statutes are irreconcilably inconsistent, both must stand").

[299] State *ex rel.* Riordan v. Dierker, 956 S.W.2d 258, 260 (Mo. 1997) ("Statutes which seemingly are in conflict should be harmonized so as to give meaning to both statutes."); County of Jefferson v. Quiktrip Corp., 912 S.W.2d 487, 490 (Mo. 1995) ("On their face, the statutes appear to be inconsistent. Nevertheless, the Court's duty is to attempt to reconcile the statutes and apply them both.").

4. Suits Brought Under Miscellaneous Venue Statutes

The previous sections have focused on special venue statutes that prescribed venue based on the nature of the plaintiff or defendant. However, there are a number of special venue statutes—some contained in Chapter 508, but many scattered throughout the Revised Statutes—that base venue on the type of cause of action rather than the identity of the parties. The analysis for each of these statutes would appear to be the same: In cases in which no count alleges a tort, the special venue statute's more specific provisions should prevail over the more general non-tort case rules of section 508.010.2 However, in cases in which any count alleges a tort, the mandatory "[n]otwithstanding any other provision of law" language of sections 508.010.4 and 508.010.5 require that the tort-case venue rules of those sections prevail over the various special venue statutes.[300] This result harmonizes the conflicting statutes, giving each some function and recognizing that more specific provisions should prevail over more general ones.[301] At the same time, it complies with the legislative mandate that the tort-case venue rules should provide the exclusive method for determining venue in the cases to which those rules apply.[302]

Under this analysis, some types of causes of action will continue, with rare exceptions,[303] to be governed by their own special venue statutes. For example, since "suits for the possession of real estate, or whereby the title thereto may be affected, or for the enforcement of the lien of any special tax bill thereon"[304] or suits for partition of real estate[305] will rarely allege a tort,[306] such suits will ordinarily still need to be brought in one of the counties in which the real estate is located.[307] Similarly, there should be no change in the venue rules for suits

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[300] This would be true even for causes of actions that the common law might have described as local rather than transitory. In Missouri, the common law differentiation between local and transitory actions has been replaced by the statutory venue scheme. *See, e.g.,* Mission Med. Group, P.A. v. Filley, 879 S.W.2d 743, 745 (Mo. Ct. App. 1994) (citing cases).

[301] *See supra* text accompanying notes 229-30, 235-36.

[302] *See supra* text accompanying notes 243-46.

[303] The exceptions involve the unusual situations in which the plaintiff is able to join a non-frivolous——tort count alleging a first injury that occurred in a different county. (Rule 55.06 permits plaintiffs to join all their claims against a defendant in a single action—even completely unrelated claims.) For a discussion of pretensive joinder of claims, *see infra*, Parts IV.B.2.e and IV.B.2.f.

[304] MO. REV. STAT. § 508.030 (2005).

[305] §§ 528.010-.640.

[306] If a related tort is alleged in such a case, the first injury is likely to be suffered where the real estate is located.

[307] *See* § 508.030 (suit to be brought "where such real estate, or some part thereof, is situated"); § 528.040 ("Such petition shall be filed in the circuit court of the county in which such lands, tenements or hereditaments lie; but if the same shall lie in two or more counties, whether in detached parcels or otherwise, said petition shall be filed in the circuit court of the county in which any portion of such premises is situate, and a majority of the parties entitled thereto reside; and in case a majority of said parties do not reside in any such county, or all of them are nonresidents of

brought against defendants served and sued under Missouri's nonresident watercraft statute,[308] since that statute's designated venue ("the county in which the damage occurred"[309]) is essentially identical to the venue prescribed by section 508.010.4.[310]

For other types of litigation, tort reform may eliminate formerly available venues more frequently. For example, in replevin actions, venue will be proper in the Missouri county in which plaintiffs were first deprived of their property rather than the county where the property is found at the time of suit.[311] Similarly, tort suits begun by attachment will need to be brought in the place of first injury rather than the location of the attached property.[312]

However, the most drastic effect will be the implied repeal of the current special venue provisions for many statutorily created causes of action. Missouri courts have long recognized that civil actions for statutorily defined wrongs are torts.[313] As a result, the various special venue statutes formerly covering, for

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the state, the proceedings for partition shall be had in the circuit court of that county in which an equal or greater part of such premises may be.").

[308] § 506.330.

[309] *Id.*

[310] On the other hand, the Tort Reform Act will substantially restrict venue in actions brought against defendants served and sued under Missouri's nonresident *motorist* statute. §§ 506.200-.310. Since such actions necessarily allege an in-state tort, they will be governed by section 508.010.4 rather than by the more liberal nonresident motorist special venue provisions. *See* § 506.290.1 ("Any suit under the provisions of sections 506.200 to 506.320 shall be filed in the county in which the cause of action accrues or in the county where the plaintiff resides, and if there be other defendants in such action who are residents of the state of Missouri, then such action shall be brought in any county in which any one of said defendants resides, or in the county within which the plaintiff resides and the defendant may be found.").

[311] *Compare* § 508.010.4 (placing venue in the county where plaintiff is first injured) *with* § 508.020 (placing venue "in the county in which such property may be found"). The tort-case rules of sections 508.010.4 or 508.010.5 will apply since replevin is necessarily based on the tortious deprivation or detention of the plaintiff's personal property.

If plaintiffs were initially deprived of their property outside the state, the provisions of section 508.010.5 would apply.

[312] *Compare* § 508.010.4 (placing venue in the county where plaintiff is first injured) *with* § 508.020 (placing venue "in the county in which such property may be found').

This will sometimes create an unfortunate venue gap in situations in which an absconding out-of-state tortfeasor has property in Missouri and the victim has no Missouri principal place of residence. To make it possible for such a victim to recover to the extent of any of the defendant's Missouri property, the Court may want to fill this gap by treating section 508.020 as providing a residual venue.

[313] *See, e.g.*, Lowery v. Kansas City, 85 S.W.2d 104, 110 (Mo. 1935) (stating that "a tort is a breach of a duty which the law in distinction from a mere contract has imposed" and recognizing that such a duty "may be imposed by statute or ordinance."); Yellow Freight Sys., Inc. v. Mayor's Comm'n on Human Rights of City of Springfield, 791 S.W.2d 382, 383 (Mo. 1990) (recognizing the existence of both "common law [and] statutory tort action[s]"); Forsthove v. Hardware Dealers Mut. Fire Ins. Co., 416 S.W.2d 208, 218 (Mo. Ct. App. 1967) ("cause of action for wrongful death conferred by the statute sounds in tort"); Bloss v. Dr. C.R. Woodson Sanitarium Co., 5 S.W.2d 367, 368 (Mo. 1928) (recognizing the longstanding rule that "the wrongful death statutes confer a cause of action ex delicto, not one ex contractu."); Krasney v. Curators of Univ. of Mo., 765 S.W.2d 646,

example, civil actions for employment discrimination,[314] for identity fraud,[315] or for violations of state anti-trust laws[316] have all been silently superseded by new sections 508.010.4 and 508.010.5.

IV. MISSOURI VENUE AFTER TORT REFORM—SPECIAL PROBLEMS OUTSIDE THE BASIC STRUCTURE

A. Small County Change of Venue After Tort Reform (508.011)

Missouri Rule 51.03 authorizes a change of venue as of right in civil jury cases pending in a small county, i.e., a county with 75,000 or fewer inhabitants.[317] The small county venue rule provides, in relevant part:

> 51.03. Change of Venue from Inhabitants as Matter of Right in Counties of Seventy-five Thousand or Less Inhabitants - Procedure

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651 (Mo. Ct. App. 1989) (statutorily created worker compensation retaliation action sounds in tort and therefore is covered by sovereign immunity); Felts v. Ford Motor Co., 916 S.W.2d 798, 802 (Mo. Ct. App. 1995) (statutorily created worker compensation retaliation action is a form of "civil tort liability"); *Krasney*, 765 S.W.3d at 651-52 (violation of service letter statute "gives rise to a statutory action in tort" and therefore is covered by sovereign immunity); State *ex rel.* Diehl v. O'Malley, 95 S.W.3d 82, 87 (Mo. 2003) (statutory employment discrimination action and suit for retaliation sound in tort); Curtis v. Loether, 415 U.S. 189, 195 (1974) (statutory housing discrimination suit "sounds basically in tort") (quoted in *Diehl*, 95 S.W.3d at 91 n.17).

[314] MO. REV. STAT. § 213.111(1) (2005) (civil actions under Missouri Human Rights Act "may be brought in any circuit court in any county in which the unlawful discriminatory practice is alleged to have occurred"). In cases in which there were multiple unlawful discriminatory practices in various counties and in cases in which the discriminatory practice occurred in a different county than the one in which the first injury is suffered, the Tort Reform Act will trump the Human Rights Act venue statute and will legislatively overrule Igoe v. Dep't of Labor & Indus. Relations, 152 S.W.3d 284, 288 (Mo. 2005) (section 213.111(1) trumps the provisions of the general venue statute) and *Diehl*, 95 S.W.3d at 91, n.18 (same).

[315] MO. REV. STAT. § 506.290.2 (2005) ("Any civil suit under the provisions of section 570.223, RSMo, for [sic] a person charged with identity theft may be filed: (1) In the county in which the offense is committed; (2) If the offense is committed partly in one county and partly in another, or if the elements of the offense occur in more than one county, then in any of the counties where any element of the offense occurred; (3) In the county in which the defendant resides; (4) In the county in which the victim resides; or (5) In the county in which the property obtained or attempted to be obtained was located.").

[316] § 416.121.1 (civil anti-trust actions for damages or injunctions may be brought where any defendant resides; has an officer, agent or representative; or where a defendant, agent, officer or representative may be found); § 416.131 (civil and criminal anti-trust actions generally may be brought in county "in which any defendant resides, engages in business or has an agent").

[317] Missouri has 115 counties ranging in population from Worth County (2,382) to St. Louis County (1,016,315). Only twelve counties (including the city of St. Louis) have populations in excess of 75,000 inhabitants. Almost 40% of Missouri's population lives in the remaining 103 counties. (All population figures are based on the 2000 Census and are taken from the Missouri Census Data Center's website at http://mcdc2.missouri.edu/websas/dp3_2kmenus/mo/Counties.html.).

> (a) A change of venue shall be ordered in a civil action triable by jury that is pending in a county having seventy-five thousand or less inhabitants upon the filing of a written application therefor not later than ten days after answer is due to be filed; . . . The applicant need not allege or prove any cause for such change. The application need not be verified and may be signed by any party. . . .
>
> (c) If a timely application is filed, the court immediately shall order the case transferred to some other county convenient to the parties, first giving all parties the opportunity to make suggestions as to where the case should be sent.

Under Rule 51.03, parties who sue or are sued in a small county do not need to allege or establish any grounds for the change of venue. The right to change of venue from small counties is absolute, so long as a timely application for change is filed. The rule recognizes that parties often challenge their ability to obtain a fair trial in small counties in a particular case, and that "[a]llowing an automatic change of venue upon timely application thus saves judicial resources that would otherwise be spent in determining whether a party could get a fair trial in the county in light of the prejudice that may have arisen in a particular case due to publicity or familiarity with the parties or the issues involved."[318] At the same time, abuse of the procedure is avoided by limiting each class of parties to only one change of venue,[319] by providing that the new venue must be convenient, and by explicitly giving all parties a chance to provide their views on the most appropriate county for trial.[320]

The Tort Reform Act, H.B. 393 appears to abrogate Rule 51.03 for all tort cases by adding a new section 508.011 to the existing venue statutes. That section provides:

> Change of venue, state statute prevails if in conflict with supreme court rules.
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> 508.011. To the extent that rule 51.03 of the Missouri rules of civil procedure contradicts any provision of this chapter, the provisions of this chapter shall prevail regarding any tort claim.

Section 508.011 does not purport to create a conflict itself. Unlike a number of other provisions of Missouri venue law,[321] it does not provide that "no change of venue under Rule 51.03 shall be allowed" in any tort case. Instead, it merely provides a trumping rule to be applied if such a contradiction exists *elsewhere* in Chapter 508's tort venue statutes. As a result, it becomes crucial to determine

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[318] State *ex rel.* Lebanon Sch. Dist. R-III v. Winfrey, 183 S.W.3d 232, 237 (Mo. 2006).

[319] MO. SUP. CT. R. 51.04(f). Under the rule, parties are divided into no more than five classes: "(1) plaintiffs, (2) defendants, (3) third-party plaintiffs (where a separate trial has been ordered); (4) third-party defendants, and (5) intervenors." If any one member of a class applies for any form of change of venue, that application exhausts the right of all class members to a change.

[320] MO. SUP. CT. R. 51.03(c); *Winfrey*, 183 S.W.3d 232, 237 (Mo. 2006).

[321] *See* statutes cited *infra*, note 334.

whether Rule 51.03 contradicts either the provisions of the newly enacted Tort Reform Act such as sections 508.010.4 and 508.010.5,[322] or any remaining remnants of pre-tort-reform Chapter 508.[323] If such a contradiction does exist, it will then be necessary to determine whether section 508.011 is constitutional.[324] Parts 1 and 2 below argue that there is no such contradiction. Parts 3 and 4 demonstrate that, if such a contradiction did exist, section 508.011 would be unconstitutional under Article V, section 5 (the "Limited to the Purpose" clause) and under Article III, section 21 (the "Original Purpose" clause).

1. Rule 51.03, Section 508.011, and the Post-Tort Reform Additions to Chapter 508

The existence of a contradiction between Rule 51.03 and the post-tort reform venue provisions is not self-evident. The new tort-case provisions each state that "venue *shall be* in [designated counties]"[325] but say nothing about whether that venue can be *changed*. In a quite similar situation,[326] the Supreme Court recently concluded that there was not a conflict between Rule 51.03 and the special venue statute for suits against municipalities.[327] While the special venue statute provided that such suits could be commenced only in the county in which the municipal corporation was located, the Court held that this did not prevent change of venue under Rule 51.03.[328]

The Court based this conclusion on a number of arguments that are as applicable to the new tort venue statutes as they were to the special municipality venue statute. The Court pointed out that section 508.250[329] specifically provides that a court to which a case is transferred will have jurisdiction to hear the case even if the case "would not otherwise [have been] cognizable in that court."[330]

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[322] *See infra* Part IV.A.1.

[323] *See infra* Part IV.A.2.

[324] *See infra* Parts IV.A.3 and IV.A.4.

[325] MO. REV. STAT. § 508.010.4 (2005) (emphasis added); § 508.010.5(1) (emphasis added); § 508.010.5(2) (2005) (emphasis added).

[326] State *ex rel.* Lebanon Sch. Dist. R-III v. Winfrey, 183 S.W.3d 232 (Mo. 2006).

[327] MO. REV. STAT. § 508.050 (2005) provides, "Suits against municipal corporations as defendant or codefendant shall be commenced only in the county in which the municipal corporation is situated, or if the municipal corporation is situated in more than one county, then suits against the municipal corporation shall be commenced only in that county wherein the seat of government of the municipal corporation is situated; except that suits may be brought against a city containing more than four hundred thousand inhabitants in any county in which any part of the city is situated."

[328] *Winfrey*, 183 S.W.3d 232, 234-37 (Mo. 2006).

[329] MO. REV. STAT. § 508.250 (2005) provides, "The court to which any cause shall be transferred by change of venue shall have jurisdiction to hear and determine the same, and shall proceed to final judgment and execution therein; although such cause would not otherwise be cognizable in such court."

[330] *Winfrey*, 183 S.W.3d at 235 (quoting MO. REV. STAT. § 508.250 (2005)). *See also* MO. SUP. CT. R. 51.14(b) ("The court to which any civil actions shall be transferred by change of venue shall

As a result, a transferee court has authority "to hear and determine the [case], and [to] proceed to final judgment and execution therein"[331] despite the fact that venue would not otherwise have been proper under the special municipality venue statute; and it would have equal authority to do so despite the new tort venue statutes.

The Court also emphasized that the statutes establishing venue as an initial matter and the rules and statutes permitting change of venue serve interrelated but distinct functions. The former are intended "'to provide a convenient, logical and orderly forum for litigation.'"[332] The latter, on the other hand, are intended to deal with a separate problem: how to handle situations in which "the selected venue becomes inappropriate for trial due to the small number of persons in the county, due to prejudice of the inhabitants against one of the parties as a result of, for example, undue publicity, or for other reasons."[333] This difference in function is as pertinent to the new tort venue provisions as it is to the municipality venue statute.

Finally, the court pointed out that, in situations in which the legislature intended to eliminate the right to change venue, it had done so through explicit and unequivocal language. In three different sections Missouri statutes forbid changes of venue in language that could not be clearer: "No change of venue shall be allowed in any of the proceedings under [certain statutory provisions]."[334] The legislature's failure to use such language in the municipality venue statute—like its similar failure in the tort venue statutes—suggests that it did not intend the grant of initial venue to be treated as inconsistent with the longstanding right to change venue under Rule 51.03. If the legislature had wanted to forbid transfers of venue in tort cases, it could have provided simply, "No change of venue under Rule 51.03 shall be allowed in any tort case."

However, the *Lebanon School District* court also relied on one textual aspect of the municipality venue statute that is not shared by the tort venue provisions. The municipality venue statute, like most pre-tort reform venue provisions, limits venue options by defining the county where suits against municipalities "shall be commenced."[335] The new tort venue provisions, on the other hand, limit venue options by defining the counties where "venue shall

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have jurisdiction to hear and determine the same, and shall proceed to final judgment and execution therein, although such civil action would not otherwise be cognizable in such court.").

[331] MO. REV. STAT. § 508.250 (2005).

[332] *Winfrey*, 183 S.W.3d at 237 (quoting State *ex rel.* Rothermich v. Gallagher, 816 S.W.2d 194, 196 (Mo. 1991)).

[333] *Winfrey*, 183 S.W.3d at 237.

[334] MO. REV. STAT. § 88.067 (2005) (applicable to certain condemnation proceedings involving certain counties), § 242.650 (applicable to certain drainage district proceedings), § 245.255 (applicable to certain levee district proceedings). Each of the sections permits changes of judge (but not venue) for cause. There is at least one additional section with the same language. § 257.030 (applicable to certain river basin conservancy districts). For the applicability of the civil rules to condemnation proceedings, *see* State *ex rel.* Wash. Univ. Med. Ctr. Redevelopment Corp. v. Gaertner, 626 S.W.2d 373 (Mo. 1982).

[335] Mo. Rev. Stat. § 508.050 (2005).

be."[336] The *Lebanon School District* court rejected the district's argument that "Missouri statutes contemplate (indeed require) that all lawsuits must be tried in a county in which suit initially could be commenced,"[337] a rejection that depends in part on the "shall be commenced" language.

After tort reform, the argument will focus on different language. Defendants will argue that the new tort venue statutes, by specifying where venue "shall be," explicitly identify the location for trial and implicitly forbid changing that location. Venue is ordinarily defined as "the place where a case is to be tried."[338] It will be argued that, by providing that "venue shall be" in a particular county, the General Assembly intentionally abandoned the practice of specifying where a suit should be brought[339]—a location that would be only the presumptive place of trial, subject to subsequent developments including applications to change venue—and decided instead to specify venue itself, thus fixing an immutable trial location. And that is an argument that the *Lebanon School District* court did not face.

While this is a plausible interpretation of the new language, it is not a necessary one and it faces substantial obstacles. As a matter of ordinary language, it is not unusual to direct that something "shall" occur or shall be done in a particular manner, yet also to direct that, in certain events, it shall not occur or shall not be done in that manner.[340] For example, a will may provide that the testator's parents "shall be" the trustees of a testamentary trust, yet also provide that, in certain circumstances, someone else shall serve as trustee.[341] Similarly, a

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[336] § 508.010.4; § 508.010.5(1)-(2).

[337] *Winfrey*, 183 S.W.3d at 235.

[338] Sullenger v. Cooke Sales & Serv. Co., 646 S.W.2d 85, 88 (Mo. 1983) ("Venue means the place where a case is to be tried.") *overruled on other grounds* State *ex rel.* DePaul Health Ctr. v. Mummert, 870 S.W.2d 820 (Mo. 1994); 92A C.J.S. *Venue* § 2 (database updated May 2006) ("The prevailing meaning of 'venue' is the place of trial of action, the geographical location in which an action or proceeding should be brought to trial.). *See also* State *ex rel.* Elson v. Koehr, 856 S.W.2d 57, 59 (Mo. 1993) ("Venue refers to the situs in which a court of competent jurisdiction may adjudicate an action."); State *ex rel.* Rothermich v. Gallagher, 816 S.W.2d 194, 196 (Mo. 1991) ("Venue is a designation of the location or geographical situs where the court has jurisdiction to act in a particular lawsuit. The origin of venue dates back to the development of the English judicial system when venue was the locality from which the court summoned jurors.").

[339] Oddly, this interpretation would necessarily lead to the conclusion that the legislature has said nothing at all about where the suit should be filed, permitting plaintiff to file suit in any county and leaving it to the defendant to move to transfer if dissatisfied with plaintiff's choice.

[340] To take an example from the venue statutes themselves, section 508.140.1 provides that, if an affidavit for change of venue is filed and is sufficient on its face, the change of venue "shall be awarded" as a matter of course and without a hearing; but section 508.140.2 qualifies that by providing that, if the county has more than 65,000 inhabitants and the opposing party files a counter-affidavit, "the court shall hear evidence on the issue and determine the same on the merits of the evidence."

[341] 6A Eric Ziegenhorn, Missouri Practice: Legal Forms §20:24 Article V.B. at 442 (3d Ed. 2003). *See also id.* §20.28 Article IX.B at 491; *id.* §20.30 Article IX.B. at 501. It is, of course, also common for a trust to provide that a trustee "shall distribute" funds to specified beneficiaries, but

will may provide that a particular person "shall serve" as trustee and at the same time permit the removal and replacement of that trustee.[342] Rule 55.25 provides that a "defendant shall file an answer within thirty days after the service of the summons and petition," yet that time is not immutable and can be changed by the filing of a Rule 55.27 pre-answer motion or by the granting of a motion to enlarge time.[343] In the same way, there is nothing contradictory about providing that venue "shall be" in a particular county, yet also providing that venue can be changed as the result of the filing of an application under Rule 51.03 or the granting of an application under 51.04.

In addition, it is not clear that the legislature intended to use the phrase "venue shall be determined" to have any different meaning than the more common phrase "suit may be brought." The 93rd General Assembly itself used the two phrases as synonyms. In section 508.010.2, the legislature stated that, in non-tort cases, "venue *shall be determined* as follows: . . . (2) When there are several defendants, and they reside in different counties, the *suit may be brought* in any such county."[344] Thus, the legislature answered the question of how venue should be determined by specifying where such suit could be brought. In doing so, the 93rd General Assembly was not alone. There are at least three other situations in which Missouri statutes appear to treat direct specifications of venue as equivalent to specifications of where a judicial proceeding should be initiated.[345]

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also to provide that, upon the happening of certain contingencies, the trustee "shall distribute" the funds to other beneficiaries. *See, e.g., id.* §20.197.

[342] *Compare id.* §20.25, Part 1.04 (Option 2) at 450 *with id.* §20.25, Part 5.03 (alternative) at p. 469; and *compare id.* §20.30 Article IX.B. at 501 ("trustee (the "Trustee") of the Trust shall be [a particular person]" *with id.* §20.30 Article IX.B.(4) (providing for removal and replacement of the trustee).

[343] *Compare* MO. SUP. CT. R. 55.25(a) *with* MO. SUP. CT. R. 44.01(b) *and with* MO. SUP. CT. R. 55.25(c).

[344] *See also* MO. REV. STAT. § 508.010.2(3) (2005) (identical "suit may be brought" language as to cases where some defendants are non-residents); § 508.010.2(4) (identical "suit may be brought" language as to cases in which all defendants are non-residents).

[345] *See, e.g.,* § 536.328 ("Judicial review *shall be commenced* in the circuit court of the county in which the small business has its primary place of business, or in Cole County. If the small business does not have a primary place of business in the state, proper *venue shall be* in Cole County.") (emphasis added); § 210.152.5 (aggrieved alleged child abuse perpetrator "may *seek* de novo judicial review" in certain circuits, but, if he or she is a non-resident "*venue shall be* in Cole County") (emphasis added). *Compare* § 84.015 (in actions involving St. Louis Board of Police Commissioners, "*venue . . . shall be appropriate* in" the circuit court of the city of St. Louis)(emphasis added) *with* § 84.095 (actions against the "commissioners in their official capacity *shall be commenced*" in the same circuit.) (emphasis added) *and compare* § 536.110.1 ("Proceedings for review *may be instituted by filing* a petition in the circuit court of the *county of proper venue*") (emphasis added) *with* § 536.110.3 ("venue of such cases shall, at the option of the plaintiff, be in" certain counties) *and compare* § 213.085.2 (persons aggrieved "may obtain judicial review by *filing* a petition in the circuit court of the *county of proper venue*")(emphasis added) *with* § 213.085.3 ("venue of such cases shall, at the option of the appealing party, be in" certain counties).

Similarly, it seems unlikely that the legislature intended sections 508.010.4 and 508.010.5 to dictate an immutable location for trial. If the sections did so, they would necessarily bar not only small county changes of venue under Rule 51.03 but also changes of venue *for cause* under Rule 51.04.[346] It is highly unlikely that the legislature would make such a drastic revision of existing law without doing so explicitly,[347] particularly in light of the serious constitutional issues that would be raised by requiring trial in a county where prejudice has been established. Yet the text of the sections makes no distinction between the two types of applications for change of venue, and if that text contradicts one rule, it necessarily contradicts the other.[348]

In addition, if the place of trial is immutable whenever a statute states that "venue shall be" in a particular county, venue changes are forbidden in a number of surprising situations. The new tort venue provisions are not the only Missouri statutes that define venue by using that language. While many of those statutes appear to deal only with judge-tried cases in which changes of venue (as opposed to a change of judge)[349] would not be available in any event,[350] there are others

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[346] This is true as a matter of logic—nothing in the legislature's use of "venue shall be" would explain why one sort of change would be permitted and the other forbidden—but also because both forms of change of venue serve the same function. Both are intended to avoid the risk of prejudice resulting from factors such as publicity or the parties' likely relationships with members of the jury pool. State *ex rel.* Lebanon Sch. Dist. R-III v. Winfrey, 183 S.W.3d at 237. Rule 51.03, makes small county changes of venue automatic, not because they serve a different function, but because experience demonstrated that the likelihood of such factors was sufficiently great and the number of applications for such changes was so large that the costs of individualized determinations of prejudice were not justified. *Id.* at 237.

One could argue that the interpretation would also forbid changes of venue by written agreement of all parties under section 508.010.14. However, consent-based changes of venue might be justified on the basis of waiver.

[347] *See, e.g.,* Tenney v. Brandhove, 341 U.S. 367, 376 (1951) (Court will not lightly assume that Congress abrogated longstanding legal doctrine that is "well grounded in history and reason.").

[348] Rule 51.03 cannot itself provide the distinction, since it merely provides a trumping rule.

[349] *See, e.g.,* Wolff v. Ward, 16 S.W. 161 (Mo. 1891) (no change of venue from inhabitants in equitable cases).

[350] Some of these statutes specify the venue for suits seeking review of administrative decisions. *See, e.g.,* MO. REV. STAT. § 252.315.2 (2005) ("venue shall be in Cole County" in suits brought under section 536.150 to challenge certain administrative decisions under the Missouri Economic Diversification Act); § 252.318.2 (same); § 536.110 ("venue shall, at the option of plaintiff, be" in certain counties for petitions for review in contested cases); § 536.328 ("venue shall be in Cole County" for petitions by non-resident small businesses seeking review of certain regulations); § 213.085.3 (in cases seeking review of MCHR findings, "venue of such cases shall, at the option of the appealing party, be" in particular counties). Others define venue for enforcement of certain orders, subpoenas, or statutorily mandated agreements. *See, e.g.,* § 276.646 ("venue shall be" in particular counties for certain petitions to enforce subpoenas); § 393.016 ("venue shall be" in specific court for suits to enforce certain agreements between water and sewer districts); § 392.470.2 (in suits to enforce certain orders relating to telecommunications, "[t]he venue of such an action shall lie in [particular counties]"); § 407.822.2 (in cases seeking enforcement of orders under Motor Vehicle Franchise Practices Act, "[v]enue for such proceedings shall be" in certain

that apply to jury tried cases where such changes could be sought; and it is hard to imagine that the legislature silently selected to abolish the right to change venue for this odd collection of statutes. For example, it seems unlikely that the legislature intended to forbid changes of venue in actions whenever service was effectuated through the nonresident *watercraft* statute, but not in actions when service was effectuated through the nonresident *motorist* statute.[351] It seems similarly unlikely that the legislature decided to pick actions for damage to survey markers from among all the various forms of damage to real property, and make it the sole such cause of action in which changes of venue are not permitted.[352] It is hard to imagine that the legislature decided to forbid changes of venue in suits "involving the [St. Louis] board of police commissioners" while permitting such changes in suits "against the members of the St. Louis board of police commissioners in their official capacity."[353] And it would certainly come as a surprise to lawyers practicing in Jackson County to learn that the legislature, when it divided Jackson County into eastern and western portions, also eliminated the previously existing right to file a motion to change venue from that county for cause.[354]

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counties). Still others specify the venue for a miscellaneous collection of apparently judge tried matters. *See., e.g.,* § 452.403 ("venue shall be" in particular county when grandparent seeks mediation of visitation issue); § 393.145 (in suits to appoint receivers of certain sewer or water districts, "venue of such cases shall, at the option of the commission, be" in particular counties); § 536.050 (in certain suits for declaratory judgment regarding the validity of rules, "venue of such suits against agencies shall, at the option of the plaintiff, be" in certain counties).

[351] *Compare* § 506.330 (in actions against non-residents for injuries caused by watercraft, "[t]he venue of such an action *shall be* the county in which the damage occurred.") (emphasis added) *with* § 506.290 (actions under the non-resident motorist statute "*shall be filed in*" certain counties) (emphasis added).

[352] *Compare*, § 60.355 ("Venue for such cause of action shall be in the county in which the violation occurs") *with*, *e.g.*, Flowers v. Roberts, 979 S.W.2d 465, 469 (Mo. Ct. App. 1998) (change of venue granted in common law trespass to land action) *and* § 537.340 (providing statutory treble damage for various forms of trespass on realty including destruction or taking of trees, crops, or minerals; governed by the general tort venue statute).

[353] *Compare,* § 84.015 ("Venue for any civil action involving the board of police commissioners, established pursuant to section 84.020, *shall be appropriate in* the twenty-second judicial circuit.") (emphasis added) *with* § 84.095. ("All causes of action against the members of the St. Louis board of police commissioners in their official capacity *shall be commenced in* the circuit court of the city of St. Louis.") (emphasis added).

[354] *See*, § 478.461 ("venue *shall be in* either the western portion or the eastern portion of the [sixteenth judicial] circuit"; "venue *shall be in* that portion of the circuit" in which the facts giving rise to venue occurred) (emphasis added).

Since Jackson County has more than 75,000 inhabitants, Rule 51.03 changes are not available. Changes for cause under Rule 51.04, although rare, have been sought. *See, e.g.,* McManemin v. McMillin, 157 S.W.3d 304, 305 n.3 (Mo. Ct. App. 2005) (noting that case was now in Greene County after a "change of venue from Jackson County, Missouri"); State *ex rel.* Amoco Oil Co. v. Ely, 992 S.W.2d 915 (Mo. Ct. App. 1999) (upholding trial court's Rule 51.04 denial of motion to change venue for cause based solely on movants failure to provide proper notice and not suggesting that section 478.461 was a ground for that denial). It does not appear that the section 478.461 issue was raised in either case.

Thus, it is difficult to argue that the language of the new tort venue provisions dictates that venue should be immutable and equally difficult to argue that Rule 51.03 "contradicts" those provisions. If the General Assembly had intended to forbid small county changes of venue, the language of those provisions seems an extremely oblique method to accomplish that goal, particularly given the availability of an established, more direct method: explicitly providing that "no change of venue under Rule 51.03 shall be allowed in any tort case."[355]

2. Rule 51.03, Section 508.011, and the Remnants of Pre-Tort Reform Chapter 508

There is an alternative, more obscure, argument that Rule 51.03 conflicts with provisions of Chapter 508. That argument focuses not on the newly enacted provisions of the chapter, but instead on two much older provisions that have lain dormant for years, sections 508.130[356] and 508.140.[357] To understand the argument, some history will be helpful.

The state of Missouri has always permitted parties to apply for a change of venue due to prejudice of the inhabitants of the county in which a civil case was set for trial.[358] By 1879, although such a change continued to require a nominal

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[355] *See* authorities cited *supra* note 334.

[356] For the text of section 508.130, *see infra*, note 372.

[357] For the text of section 508.140, *see infra*, note 373. One might also argue that Rule 51.03 contradicts section 508.090.2, which provides in relevant part, "A change of venue may be awarded in any civil suit to any court of record for any of the following causes: (1) That the inhabitants of the county are prejudiced against the applicant; (2) That the opposite party has an undue influence over inhabitants of the county." However, by its own terms section 508.090.2 does not purport to set forth the exclusive situations in which changes of venue can be granted; and there are a number of provisions providing other bases for change of venue. *See, e.g.,* MO. REV. STAT. § 508.010.13 (2005) (providing for change of venue based on consent); § 508.080 (same); § 508.310 (providing for changes of venue in Cape Girardeau County); §§ 508.320-.330 (providing for changes of venue in Marion County); § 478.347 (providing for changes of venue in Lewis County); § 478.461.2(4) (providing for changes of venue in Jackson County). *See also*, Bray v. Marshall, 66 Mo. 122 (1877) (even if based on consent, change of venue requires an order of the court). In addition, even if section 508.090.2 were seen as listing the only situations in which venue could be changed *for cause*, it would not contradict Rule 51.03 which provides a change of venue as of right for which the applicant "need not allege or prove any cause." *See infra* text accompanying notes 393-98.

[358] An Act to Amend Certain Acts Respecting the Proceedings in Chancery and Suits at Law §4, 1804-24 Mo. Laws 769, 770 (June 27, 1821). Even before statehood, the Territory of Missouri had enacted a statute giving a party a right to a jury selected from an adjoining county if the applicant stated under oath that he believed that he could not receive a fair trial by a jury selected from the forum county. An Act Establishing Courts of Common Pleas, and for Other Purposes §18, 1804-24 Mo. Laws 276-78 (August 20, 1813).

By 1835, the grounds for change of venue were expressed in terms strikingly similar to those set forth in the current statutes. *See* An Act for the Change of Venue in Civil Cases § 1, MO. REV. STAT. §§ 1834-35 (March 14, 1835) (change of venue authorized if "the inhabitants of the county

finding of prejudice, that finding had become automatic if a proper application and affidavit were filed.[359] Under the then existing procedure, the applicant filed a petition and affidavit stating that the affiant had "just cause to believe that he cannot have a fair trial on account of the cause alleged."[360] Once an application was filed, there was no provision for the opposing party to file a counter-affidavit or for the court to hear evidence on the question.[361] If the application and

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[were] prejudiced against the applicant" or if the "opposite party [had] undue influence over the inhabitants of the county.").

[359] At least by 1879, the applicant's allegations of prejudice were deemed conclusive. *See infra*, authorities cited at notes 361-64.

Prior to that date, the status of such allegations fluctuated over time. Until 1835, with two short exceptions (1821-22 and 1831-33), the statutes appeared to require the court to grant the change based on the applicant's sworn statement or affidavit alone. *See* An Act Establishing Courts of Common Pleas, and for Other Purposes §18, 1804-24 Mo. Laws 272, 276-78 (August 20, 1813)(if applicant swears that he cannot obtain a fair trial "the court shall order a special jury to be summoned from an adjoining county"); An Act to Amend Certain Acts Respecting the Proceedings in Chancery and Suits at Law §4, 1804-24 Mo. Laws 769, 770 (June 27, 1871)(upon application and affidavit "it shall and may be lawful for the said court . . . to award a change of venue"); An Act to Regulate Proceedings at Law §33, 1804-24 Mo. Laws 841, 848-49 (January 11, 1822) (upon petition and affidavit "the court shall award a change of venue"); An Act to Provide for Changing the Venue in Civil and Criminal Cases §1, 1825 Mo. Laws 786, 786-87 (February 16, 1825) ("such court or judge, reasonable notice of the application having been given to the other party, or his attorney, shall award a change of venue"); An Act to Provide for changing the Venue in Causes Cognizable in the Circuit Courts §1, 2 1824-36 Mo. Laws 246, 246-47 (January 15, 1831) (upon application and five days notice to the other side, "such court *being first satisfied of the truth of the statements made in the petition*, shall award a change of venue") (emphasis added); An Act Providing for Change of Venue in Criminal Cases §10, 2 1824-36 Mo. Laws 388, 391 (February 12, 1833)(repealing the 1831 provision and reviving Act of February 16, 1825 as to civil cases, thus reinstating the "shall award" standard).

From 1835 until 1879, the statutes provided that, upon application and affidavit, "the court shall hear the case, and award a change of venue." An Act for the Change of Venue in Civil Cases §3, 1835 R.S. Mo. 614, 615 (March 14, 1835); An Act Providing for the Change of Venue in Civil Cases § 3, 1845 Mo. Laws 1072, 1072 (March 8, 1845) (same); An Act Providing for the Change of Venue in Civil Cases § 4, 1855 Mo. Laws 1558, 1559 (November 19, 1855) (same); 1866 G.S. Ch. 158, §4 (same). In light of the fact that the statutes in effect from 1835 to 1879 did not provide any mechanism for the adverse party to file counter-affidavits, it is unclear whether the "shall hear the case, and award a change of venue" language required the court to decide the merits of the application or simply determine its facial sufficiency. *See, e.g.,* Byrne v. St. Louis Public Sch., 12 Mo. 402, 403 (1849); Corpenny v. City of Sedalia, 57 Mo. 88, (Mo. 1874) (dealing with a change of judge under the same statute).

[360] MO. REV. STAT. § 3732 (1879). Applicants were also required to state when they obtained the "information and knowledge" on which he based his belief.

[361] § 3733 ("If reasonable notice shall have been given to the adverse party or his attorney of record, the court or judge, as the case may be, shall *consider the application*, and if it be sufficient, a change of venue *shall be awarded*.") (emphasis added). The lack of provision for a hearing is particularly significant since it replaced language that at least seemed to contemplate some form of hearing. *See, e.g.,* 1866 G.S. Ch. 158, §4 (upon the filing of an application and affidavit "the court shall hear the case, and award a change of venue"). It is also significant that the 1879 statute did not contain language similar to the short-lived 1831 version that permitted a change of venue only if the court was "satisfied of the truth of the statements made in the petition." An Act to Provide

affidavit were in proper form and proper notice had been given, the trial court had no authority to deny the requested change.[362]

> The only question to be determined by the court under that section, is the sufficiency of the application. The section does not require that the judge shall be satisfied of the truth of the allegations. If the petition is sufficient in form and substance, then the statute is peremptory, and the change of venue shall be awarded.[363]

The trial judge could not consider his own opinions and could not take evidence on the issue since "[t]he application, duly verified, furnishes evidence which is *conclusive* upon the court as to the existence of the causes in that county."[364]

Thus, by 1879, parties who filed a timely, sworn application were entitled to the change and the adverse party had no right to challenge the allegations in

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for Changing the Venue in Causes Cognizable in the Circuit Courts §1, 2 1824-36 Mo. Laws 246, 246-47 (January 15, 1831) *repealed by* An Act Providing for Change of Venue in Criminal Cases §10, 2 1824-36 Mo. Laws 388, 391 (February 12, 1833).

[362] Douglas v. White, 34 S.W. 867, 867-68 (Mo. 1896) (granting the motion is imperative and a matter of right rather than favor or discretion); Dowling v. Gerard B. Allen & Co., 88 Mo. 293 (1885) (statute is peremptory and the change must be granted); Gee v. St. Louis Ry. Co., 41 S.W. 796, 797 (Mo. 1897) (decided under pre-1895 law) (same).

There were two later Court of Appeals decisions that stated in dictum that the court could inquire as to whether the application was made in bad faith. St. Louis & S.F.R. Co. v. Big Three Mining Co., 123 S.W. 70, 71 (Mo. Ct. App. 1909); Padberg v. Padberg, 78 S.W.2d 555 (Mo. Ct. App. 1935) (designated as "Not to be Published in State Reports"). Even those opinions did not permit taking evidence on the issue or deciding it based on the trial court's view of the truth or falsity of the application's allegations. They stated that the determination of good or bad faith had to be made based on the files and records of the case. Both decisions dealt with applications based on allegations that the judge (rather than the inhabitants) was prejudiced and both held that the change should have been granted. In addition, they were decided under statutes under which counter-affidavits and hearings were permitted in all applications based on prejudice of the inhabitants. (Big Three Mining was decided before 1921. Padberg was filed after 1921 but in a county of more than 75,000 inhabitants.) *See infra*, text accompanying notes 365-67.

As the *Dowling* court noted, the requirement of notice was superfluous. "If the application is sufficient, it being the duty of the court at once to award the change, it is difficult to perceive a reason for requiring any notice whatever of the application. It is only necessary because the statute requires it." *Dowling*, 88 Mo. 293.

[363] *Dowling*, 88 Mo. 293 (The sufficiency of the application was judged on a purely formal basis. It was enough if the application simply parroted the words of the statute. State v. Yager, 157 S.W. 557, 558, 560 (Mo. 1913) (approving the following as a sufficient statement of prejudice of inhabitants: "Because the inhabitants of Pike county, Mo., are prejudiced against this applicant, the defendant in this cause.")). The court explicitly denied the adverse party's claim that he should have been permitted to offer testimony on the issue.

[364] *Gee*, 41 S.W. at 797 (emphasis added). *See also Douglas*, 34 S.W. at 868 ("Nor are the rights of the applicant made to depend upon the finding of the court upon the questions of facts stated in the application, or upon the private knowledge or information of the court of the existence or nonexistence of the facts therein stated, but must be determined by what is judicially presented in due course of law, and this the office of the application can alone perform.").

the application or to present evidence. However, in 1895, the legislature amended the code of civil procedure to give the adverse party the right to file a counter-affidavit denying the allegations of prejudice, and to require the court (on the filing of such a counter-affidavit) to hear evidence on the application and decide it on the merits.[365] As originally enacted, this right to an evidence-based decision on the merits applied to all cases regardless of the size of the county in which the case was filed,[366] but the legislature eliminated that right in 1921 for cases in all counties except those having more than 75,000 inhabitants.[367] In 1967, the population cut-off was changed to 65,000 inhabitants,[368] but the pertinent statutory provisions have otherwise remained essentially the same since 1921.[369] As a result, since 1921, the statutes have effectively provided a two-track system for inhabitant-based changes of venue: In small counties, since no counter-affidavit or hearing is permitted and since the application is treated as conclusive, applications for change of venue are granted as a matter of right.[370] In large counties, the adverse party is entitled to an evidentiary hearing, and changes of venue are granted only if the trial court finds that the alleged prejudice exists and justifies the change.[371] This statutory framework is now codified in sections 508.130[372] and 508.140[373] which are set forth in the margin.

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[365] Act of Apr. 1, 1895, § 2, 1895 Mo. Laws 92-93. The 1895 amendment added the following proviso:

> Provided, that if the removal is asked on the ground of objections to the inhabitants of the county, and the adverse party shall have filed a counter-affidavit controverting the objections to the inhabitants of the county, the court shall hear evidence on the issue and determine the same on the merits of such evidence.

This was the first time that Missouri change of venue statutes gave adverse parties the right to file a counter-affidavit in civil cases. *See* authorities cited *supra* note 362.

[366] 1 HALE HOUTS, MISSOURI PLEADING AND PRACTICE ANNOTATED § 256 at 456 (1936).

[367] Act of Apr. 11, 1921 § 1, 1921 Mo. Laws 203, 204. Based on the 1920 census, this eliminated all but five Missouri counties, Buchanan County, Jackson County, Jasper County, St. Louis County, and the city of St. Louis.

[368] Act of July 25, 1967 §1, 1967 Mo. Laws 652, 653. It would be interesting, but beyond the scope of this article, to try to determine the motivation for this change. In the 1960 census, only Jefferson County had between 65,000 and 75,000 inhabitants but it had grown to 105,248 by 1970. Boone County grew from 55,202 to 80,911 and St. Charles County grew from 52,970 to 92,954 in the same time period.

[369] In 1957, the crucial section, 508.140, was divided into the three current subparts and slightly reworded in ways that are not pertinent to this article. Act of June 13, 1957 §1, 1957 Mo. Laws 294, 297.

[370] *See* authorities cited *supra* note 359; 1 HALE HOUTS, MISSOURI PLEADING AND PRACTICE ANNOTATED §256 at 457 (1936).

[371] State *ex rel.* Kansas City Pub. Serv. Co. v. Waltner, 169 S.W.2d 697 (Mo. 1943).

[372] Section 508.130 is entitled "Application for disqualification of judge or change of venue—contents" and provides:

> Any party, his agent or attorney, may present to the court, or judge thereof in vacation, a petition setting forth the cause of his application for disqualification of the judge or for a change of venue, and when he obtained his information and knowledge of the existence thereof; and he shall annex thereto an affidavit, made by himself, his

However, under Missouri law, the statutory framework is not the only set of rules defining the right to change venue in Missouri. In 1959, the Supreme Court enacted the Missouri Rules of Civil Procedure;[374] and, pursuant to Article V, section 5 of the Missouri Constitution, those rules "have the force and effect of law."[375] In the initially enacted version of those rules, effective April 1, 1960, Rules 51.06 and 51.07 effectively mirrored the then existing statutory

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agent or attorney, to the truth of the petition, and that affiant has just cause to believe that he cannot have a fair trial on account of the cause alleged. If the removal is asked because of objections to the inhabitants of the county, the application shall not include therein any other county than the one from which the change of venue is asked.

[373] Section 508.140 is entitled "After notice given, duty of court." and provides:

1. If reasonable notice has been given to the adverse party or his attorney of record, the court or judge, as the case may be, shall consider the application, and if it is sufficient, the judge shall be disqualified or a change of venue shall be awarded to some county in the same, adjoining or next adjoining circuit, convenient to the parties for the trial of the case and where the causes complained of do not exist. One or more of several parties plaintiff or defendant may ask for the change of venue, and if the change is awarded the entire cause shall be removed, and there shall be no further change of venue awarded on the same side of the suit.

2. In all cases in counties in this state which have a population of more than sixty-five thousand inhabitants and wherein the removal is asked on the ground of objections to or prejudice of the inhabitants of the county and the adverse party has filed counter-affidavit controverting the objection to or the prejudice of the inhabitants of the county, the court shall hear evidence on the issue and determine the same on the merits of the evidence, and if the issue is determined in favor of the applicant for the change of venue, the change shall be awarded as herein provided.

3. This section does not apply to causes wherein a special venire has been issued, and in such case the party not applying for the special venire shall be granted a change of venue as of course, upon proper affidavit.

[374] For the orders of the Supreme Court adopting the rules, *see* MO. SUP. CT. R. 41-82 xv-xvii (West 1960) (superseded). For a history of the enactment of the rules, *see id.* at iii-v (Introduction by Chief Justice Hollingsworth).

[375] Mo. Const. art. V, § 5 provides, "The supreme court may establish rules relating to practice, procedure and pleading for all courts and administrative tribunals, which shall have the force and effect of law. The rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal. The court shall publish the rules and fix the day on which they take effect, but no rule shall take effect before six months after its publication. Any rule may be annulled or amended in whole or in part by a law limited to the purpose."

requirements,[376] and those two rules remained essentially unchanged until 1973.[377] As a result, the statutory two-track system remained in effect.[378]

However, in 1975, the Supreme Court repealed the existing Rule 51, and enacted a new Rule 51 in its place.[379] Former Rules 51.06 and 51.07 were eliminated and functionally replaced by current Rules 51.03 and 51.04.[380] The new rules created a new form of two-track system. In any size county, parties could apply for a "Change of Venue from Inhabitants for Cause," claiming prejudice or undue influence; and, if the opposing party opposed the motion, the court would hear evidence and decide the issue.[381] The procedure was somewhat simplified,[382] but otherwise quite similar to the procedure for large counties under the statute and previous rules. In small counties, the Rule 51.03 replaced the previous, nominally cause-based procedure with one that explicitly authorized "Change[s] of Venue from Inhabitants as a Matter of Right in Counties of Seventy-Five Thousand or Less Inhabitants."[383] The previous requirement of an application and an affidavit alleging prejudice[384] was replaced by a simple, unsworn application that could be as terse as "Plaintiff requests a change of venue."[385] The previous case law treating the application's allegations as

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[376] MO. SUP. CT. R. 51.06-51.07 (1960) (superseded). According to the Committee Notes, Rule 51.06 was identical to section 508.130 except for its title, while Rule 51.07 was identical to section 508.140 except for the deletion of some obsolete references. MO. SUP. CT. R. 51.06 at 77 (1960) (superseded) (Committee Note to Rule 51.06); MO. SUP. CT. R. 51.07 at 78 (1960) (superseded) (Committee Note to Rule 51.07). However, the Committee Notes compared the two rules to the version of the statutes contained in MO. REV. STAT. (1949), i.e., prior to the 1957 amendments. As previously discussed, those amendments divided section 508.140 into three subsections, but made no pertinent substantive changes. *See* Act of June 13, 1957 §1, 1957 Mo. Laws 294, 297.

[377] Rule 51.06 was amended in 1963 to make some stylistic changes, to require that applications be filed within 5 days of learning of the grounds justifying change of venue, and to require that the application include a statement that the application "is made in good faith and not to delay the trial or to vex or harass the adverse party." Order (Rules of Civil Procedure), 367-68 S.W.2d (Missouri Cases) xviii, xix-xx (July 9, 1963). At the same time, Rule 51.07 was amended to conform to the changes in Rule 51.06. Order (Rules of Civil Procedure), 367-68 S.W.2d (Missouri Cases) xviii, xx-xxi (July 9, 1963). In 1966, there were minor, primarily stylistic or clarifying changes to the two rules. Order (Supreme Court of Missouri Rules of Civil Procedure), 399-400 S.W.2d (Missouri Cases) xx, xx-xxii (Mar. 21, 1966). Neither set of changes is significant for purposes of this article.

[378] Oddly, despite the 1967 statutory redefinition of small counties, Act of July 25, 1967 §1, 1967 Mo. Laws 652, 653, the rules never reduced the population cutoff to 65,000.

[379] Order (Supreme Court of Missouri Rules of Civil Procedure), 514-15 S.W.2d (Missouri Cases) xxii, xlii-xlv (Sept. 1, 1975).

[380] While there have been subsequent minor amendments to the two rules, those amendments are not significant for purposes of this article; and Rules 51.03 and 51.04, as adopted in 1973, are essentially identical to the current version of the two rules.

[381] MO. SUP. CT. R. 51.04.

[382] For example, the requirement of affidavits was eliminated. *Id.*

[383] MO. SUP. CT. R. 51.03.

[384] *See supra* text accompanying notes 358-61.

[385] MO. SUP. CT. R. 51.03 (Committee Note—1973).

conclusive[386] was replaced by the explicit statement that "[t]he applicant need not allege or prove any cause for such change."[387]

Despite the similarities between the statutory and rule-base frameworks, it might be argued Rule 51.03 contradicts sections 508.130 and 508.140 in some respects, and therefore that the statutory framework should govern to the extent of that contradiction. First, section 508.140 gives small county treatment only to counties with less than 65,000 inhabitants while Rule 51.03 applies to counties with less than 75,000. Second and more significantly, section 508.130 requires that applicants allege, under penalties of perjury, that they have "just cause to believe that [they] cannot have a fair trial for the cause alleged,"[388] i.e., that "the inhabitants of the county are prejudiced against the applicant [or t]hat the opposite party has an undue influence over the inhabitants of the county."[389] While there will be many cases in which a party could honestly make such an allegation (and there may be others in which a party might make one dishonestly), the requirement of such a sworn statement will be a real constraint for many.[390] (Even this constraint would be eliminated if the required allegations come to be seen as a recognized and permissible legal fiction like English law's traditional fictional allegation that the island of Minorca is actually located in London.)[391] The practical result of interpreting 51.03 as contradicting the statutory small county rules would be modest: It would eliminate two or three counties from Rule 51.03's coverage[392] and would return to a more formalistic, cumbersome and less straightforward, nominally cause-based procedure. Nonetheless, this argument does suggest that some contradiction exists between Rule 51.03 and sections 508.130 and 508.140.

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[386] *See supra* text accompanying notes 364.

[387] MO. SUP. CT. R. 51.03.

[388] MO. REV. STAT. § 508.140 (2005).

[389] § 508.090.

[390] There are two cases suggesting that the application must allege prejudice was against the applicant as an individual rather than against the applicant's "side of the issue." Charlotte v. Chouteau, 33 Mo. 194 (1862); Bent v. Lewis, 15 Mo. App. 40, 44 (Mo. Ct. App. 1884). The authority of these cases is somewhat unclear. The first was a suit for emancipation of a slave during the Civil War and was decided over a powerful dissent. *Charlotte*, 33 Mo. At 194 (Dryden, J., dissenting) ("What matters it to the defendant whether it be against him or his cause? The result to him is the same in the one case as in the other; in either case he fails to get what every litigant is entitled to—a fair and impartial trial."). The second involved a claim that a judge should be disqualified because he had heard similar cases in the past. *Bent*, 15 Mo. App. at 44. If these cases are not treated as good law, the constraint would be significantly reduced (if not eliminated) since most change of venue applicants believe that the inhabitants of the forum county are unfavorably disposed toward (i.e., prejudiced against) their side of the case.

[391] *See* LON FULLER, LEGAL FICTIONS 18, 21 (1967); Eben Moglen & Richard J. Pierce, Jr., *Sunstein's New Canons: Choosing the Fictions of Statutory Interpretation*, 57 U. CHI. L. REV. 1202, 1209-10 (1990). For the classic discussion of the uses and evolution of legal fictions, *see* FULLER, *supra*.

[392] According to the 2000 census, only three counties have populations between 65,000 and 75,000; and one of these (Platte County with a 2000 census population of 73, 781) had almost surely passed the 75,000 threshold before section 508.011 was enacted.

However, it is not at all clear that this argument is correct or that there really is a contradiction between that rule and those statutes. For both large and small counties, the statutory sections prescribe a procedure for obtaining a change of venue that is, at least formally, a change of venue for cause. Section 508.130 explicitly requires that the petition and affidavit set forth a basis for the change of venue and a sworn statement that the affiant "has just cause to believe that he cannot have a fair trial on account of the cause alleged."[393] Section 508.140 does not dispense with the requirement of good cause for any size county. Instead, it provides two different procedures for *proving* cause: For small counties, an affidavit in proper form is considered sufficient and conclusive proof that cause for the change of venue exists.[394] In counties with more than 65,000 inhabitants, the judge must hold an evidentiary hearing and must independently decide whether cause exists.[395] But regardless of which procedure is required, any change under either section is a change of venue *for cause*.

Viewed in this way, Rule 51.03 cannot *contradict* the two statutory sections, because Rule 51.03—unlike Rule 51.04—does not even *deal with* "Changes of Venue from Inhabitants for Cause."[396] Instead of contradicting the statutorily created right to a cause-based change, Rule 51.03 supplements that right by providing an additional and different type of change of venue, "Changes of Venue from Inhabitants as a Matter of Right."[397] The Missouri Rules of Civil Procedure clearly differentiate between the two types of change, regulating cause-based changes through Rule 51.04 while regulating matter-of-right changes through Rule 51.03. In the former, the applicant must "set forth the causes for the change of venue" and, if the adverse party files a denial, must prove the causes alleged. In the latter, the applicant "need not allege or prove any cause."[398] Under this interpretation, *Rule 51.04* may contradict the two statutory sections; but *Rule 51.03* does not.

3. Section 508.011 and Article V Section 5 (the "Law Limited to the Purpose" Rule)

The previous two sections demonstrate that there are persuasive arguments that there is no contradiction between Rule 51.03 and Chapter 508 and thus that newly enacted section 508.011 has no effect.[399] However, if those arguments are

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[393] MO. REV. STAT. § 508.130 (2005).

[394] § 508.140.1. *See* authorities cited *supra* note 364.

[395] § 508.140.2. If no counter-affidavit is filed, the petitioner's application is sufficient.

[396] *Compare* MO. SUP. CT. R. 51.03 *with* MO. SUP. CT. R. 51.04.

[397] MO. SUP. CT. R. 51.03.

[398] *Id.*

[399] Such a conclusion may seem troublesome both because of the rule against surplusage, *see supra* text accompanying note 254, and because of the natural suspicion that the section would not have been adopted unless at least some members of the General Assembly believed there was a contradiction. These concerns may be somewhat alleviated by section 508.011's introductory phrase, "*To the extent that* rule 51.03 of the Missouri rules of civil procedure contradicts any provision of this chapter." MO. REV. STAT. § 508.011 (2005) (emphasis added). That phrase may

rejected, the Court should invalidate section 508.011 since it violates the "Limited to the Purpose" clause of Article V, section 5 of the Missouri Constitution. This conclusion is supported by the text of the Constitution itself, by existing case law interpreting Article V, section 5, and by the history of the enactment of that constitutional provision.

a. The Textual Argument

Article V, section 5 of the Missouri Constitution of 1945, as amended, provides:

> The supreme court may establish rules relating to practice, procedure and pleading for all courts and administrative tribunals, which shall have the force and effect of law. The rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal. The court shall publish the rules and fix the day on which they take effect, but no rule shall take effect before six months after its publication. *Any rule may be annulled or amended in whole or in part by a law limited to the purpose*.[400]

It would seem self-evident that H.B. 393, the 2005 Tort Reform Act,[401] was not "limited to the purpose" of annulling or amending Rule 51.03. The Tort Reform Act accomplishes—and presumably was intended to accomplish—a wide variety of changes in Missouri law.[402] To mention just a few, it set new caps on punitive damages[403] and medical malpractice awards,[404] repealed the

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suggest that legislators were uncertain as to whether there was a contradiction or that there was a disagreement among various legislators on the issue. However, uncertainty about the existence of a contradiction could have been more clearly expressed by replacing "To the extent that" with "To the extent, if any, that" or simply with "If."

It is possible that the phrase was intended to permit Rule 51.03 transfers to any county that would have been a proper venue under the new tort venue rules, for example, a transfer from the plaintiff's principal place of residence to the individual defendant's principal place of residence. *See* § 508.010.5(2). Ironically, this interpretation raises quite similar concerns. First, just as there was a simpler way to have expressed uncertainty, there was a simpler way to have expressed this intent. For example the legislature could have simply said, "In any tort case, Rule 51.03 shall not be deemed to permit change of venue to any county in which venue would not otherwise be proper under this Chapter." Second, the interpretation would itself lead to perverse incentives: A plaintiff wanting to try a case in his own principal place of residence would need to file in the *defendant's* principal place of residence and immediately move to transfer as of right.

[400] Mo. Const. 1945 art. V, § 5 (as amended 1976) (emphasis added). The current amended version is somewhat stronger than the version adopted in 1945. The amendment expanded the rule making power to cover administrative tribunals and added the phrase "which shall have the force and effect of law." There has been no change in the crucial last sentence.

[401] 2005 Mo. Laws 641, 641-57.

[402] For a summary of some of the changes, *see* the official Bill Summary for H.B. 393 (Truly Agreed) at http://www.house.mo.gov/bills051/bilsum/truly/sHB393T.htm.

[403] 2005 Mo. Laws 641, 647.

[404] *Id.* at 651-52.

joint and several liability doctrine,[405] created new presumptions regarding the pecuniary value of the lives of minors and full-time homemakers,[406] changed the interest rate charged on judgments,[407] and made changes to discovery procedure.[408] While this disparate set of objectives may satisfy the single subject requirement of Article III, section 23[409]—a question on which this article expresses no opinion—the Tort Reform Act is clearly not, in any ordinary sense, a "law limited to the purpose" of annulling or modifying Rule 51.03. Given the Supreme Court's repeated admonition that words in the constitution should be given their ordinary meaning,[410] this properly ends the matter.

It could be argued that section 508.011, viewed in isolation, *is* "limited to the purpose" of modifying Rule 51.03. However, section 508.011 is not itself a law; it is a section of a law. The Constitution states that a "law" is a bill that has been duly enacted by both houses of the General Assembly and either signed by the Governor or passed over his or her veto.[411] H.B. 393 was a single bill that was enacted as a whole by each house,[412] signed as a whole by the presiding

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[405] *Id.* at 649-50.

[406] *Id.* at 650-51.

[407] *Id.* at 643-44.

[408] *Id.* at 646.

This change itself raises Article V, Section 5 concerns since it is arguably inconsistent with Rule 56.01(d). *Compare* MO. REV. STAT. § 510.263.8 (2005) ("Discovery as to a defendant's assets shall be allowed only after a finding by the trial court that it is more likely than not that the plaintiff will be able to present a submissible case to the trier of fact on the plaintiff's claim of punitive damages.") *with* MO. SUP. CT. R. 56.01(d) ("Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence"). *See also* Burlington N. R.R. Co. v. Woods, 480 U.S. 1 (1987) (state statute restricting court's discretion inconsistent with federal rule granting court discretion).

[409] Mo. Const. art. III, § 23 ("No bill shall contain more than one subject which shall be clearly expressed in its title.").

[410] *See, e.g.,* Farmer v. Kinder, 89 S.W.3d 447, 452 (Mo. 2002); State Auditor v. Joint Comm. on Legislative Research, 956 S.W.2d 228, 232 (Mo. 1997) (citing numerous cases).

[411] *See, e.g.,* Mo. Const. art. III, §31 ("Every bill which shall have passed the house of representatives and the senate shall be presented to and considered by the governor, and, within fifteen days after presentment, he shall return such bill to the house in which it originated endorsed with his approval or accompanied by his objections. *If the bill be approved by the governor it shall become a law.*") (emphasis added); Mo. Const. art. III, § 32 (If the veto of a bill is overridden, the presiding officer of each house shall certify that fact and "[t]he bill thus certified shall be deposited in the office of the secretary of state as an authentic act and *shall become a law.*") (emphasis added). Mo. Const. art. III, § 30 ("*No bill shall become a law* until it is signed by the presiding officer of each house in open session, who first shall suspend all other business, declare that the bill shall now be read and that if no objection be made he will sign the same.") (emphasis added); Mo. Const. Art. III, § 21 ("The style of the laws of this state shall be: 'Be it enacted by the General Assembly of the State of Missouri, as follows.' *No law shall be passed except by bill,* and no bill shall be so amended in its passage through either house as to change its original purpose. Bills may originate in either house and may be amended or rejected by the other. Every bill shall be read by title on three different days in each house.") (emphasis added).

[412] Journal of the House, First Regular Session, 93rd General Assembly 674 (Mar. 16, 2005); Journal of the Senate, First Regular Session, 93rd General Assembly 477-79 (Mar. 16, 2005).

officer of each house,[413] and then approved as a whole by the Governor.[414] When so approved, it became "a law"[415]—not a group of laws.

b. Case Law Interpreting Article V, Section 5

The Supreme Court has gone out of its way to warn the legislature that multiple section laws like H.B. 393 that are not "limited to the *singular objective* of annulling [or modifying] one of [the Court's] rules" are constitutionally dubious.[416] In *State v. Pizzella*,[417] the Court was faced with a provision that referred to a specific Supreme Court Rule and was clearly intended to annul or modify that rule.[418] That provision, like section 508.011, was codified as a separate section in the Revised Statutes.[419] However, also like section 508.011, the provision was only one of many subparts of the law as enacted.[420] Because the defendant in *Pizella* lacked standing to challenge the provision, the Court did not need to discuss the issue of whether the provision violated Article V, section 5.[421] Nonetheless, the Court took the extraordinary step of warning the legislature to review its practice of purporting to amend Supreme Court rules in this fashion, unanimously stating:

> Section 545.880.1 was a subpart of one of nine discrete provisions in section 1 of Senate Bill 602. A *multi-faceted law* such as Senate Bill 602 which is not limited to the *singular objective* of annulling one of our rules may very well, under a logical extension of our decision in *State ex rel. K.C. v. Gant*, 661 S.W.2d 483 (Mo. banc 1983), run afoul of the "limited to the purpose" mandate of Article V, section 5.[422]

The Supreme Court then cited *Miller v. Russell*[423] with approval, as a case holding that a "statute which provided for revisions in court structure [The Court Reform and Revision Act of 1978] as well as annulling a Rule [was] violative of

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[413] Journal of the House, First Regular Session, 93rd General Assembly 690 (Mar. 17, 2005); Journal of the Senate, First Regular Session, 93rd General Assembly 493-94 (Mar. 17, 2005).

[414] Journal of the House, First Regular Session, 93rd General Assembly 736-37 (Mar. 29, 2005).

[415] Mo. Const. art. III, §31 ("If the bill be approved by the governor it shall become *a law.*") (emphasis added).

[416] State v. Pizzella, 723 S.W.2d 384, 387 n.3 (Mo. 1987).

[417] 723 S.W.2d 384 (Mo. 1987).

[418] *Pizzella*, 723 S.W.2d at 385-86.

[419] The provision was codified as MO. REV. STAT. § 545.880.1 (Cum. Supp. 1984).

[420] *Pizella*, 723 S.W.2d at 386, 387 n.3. Eventually codified as MO. REV. STAT. § 545.880.1 (Cum. Supp. 1984), the provision was originally one of several parts of House Committee Substitute for Senate Committee Substitute for Senate Bill No. 602 which was enacted as Act of June 7, 1984. 1984 Mo. Laws 746, 747-48.

[421] *Pizella*, 723 S.W.2d at 387 n.3.

[422] *Id.*

[423] 593 S.W.2d 598 (Mo. Ct. App. 1979).

art. V, section 5."[424] Under that holding, a statute which provides for wide ranging revisions in Missouri tort law (such as the Tort Reform Act of 2005) as well as annulling Rule 51.03 would be equally violative of that constitutional provision.

More recently, in *State v. Reese*,[425] the Court rejected another "multi-faceted" law that contained a section that would have modified a Supreme Court Rule. Since 1972, substitution of parties has been comprehensively governed by Rule 52.13.[426] That rule—which defines the procedures to be used, *inter alia,* when an individual party died or became incompetent—differed from and superseded former section 507.100 of 1969,[427] the previously enacted statutory provision covering the same subjects.[428] However, in 1983, the legislature enacted a bill significantly revising the previous statutes relating to trusts, estates, and persons under disability;[429] and one section of that law essentially reenacted the previously existing statutory provision, section 507.100.[430] That *section* of the bill was limited to a single topic, substitution of parties, and had no effect other than to change the then existing procedures prescribed by Rule 52.13.[431] Although all parties argued that the subsequently enacted 1983 law should be deemed controlling, the Court rejected that argument.[432] Despite the fact that the relevant *section* of that law was limited to the same topic as Rule 52.13, the Court unanimously held that the rule should govern stating that "[t]he General Assembly [had] not passed a *law* limited to the purpose of annulling or amending Rule 52.13. See 1983 Mo. Laws 895-896."[433]

Pizella and *Reese* are not aberrations. The Supreme Court has invariably held that previously enacted Supreme Court Rules prevailed over subsequently enacted, multi-faceted laws in which a single section conflicted with those rules.[434] The courts of appeals have reached the same result in numerous

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[424] *Pizella*, 723 S.W.2d at 387 n.3 (describing the holding of *Miller)*. In *Miller*, a father had argued that a Supreme Court Rule had been abrogated by the re-enactment of section 211.241 of the Missouri statutes. Miller v. Russell, 593 S.W.2d 598, 604 (Mo. Ct. App. 1979).

[425] 920 S.W.2d 94 (Mo. 1996).

[426] From 1960 to Dec. of 1972, substitution had been covered in Rule 52.12 which had been substantially tracked MO. REV. STAT. § 507.100 (1959). State v. Reese, 920 S.W.2d, 94, 95 (Mo. 1996).

[427] MO. REV. STAT. § 507.100 (1969).

[428] Mo. Const. art. V, § 5.

[429] Act of July 14, 1983, 1983 Mo. Laws 804.

[430] *Id.* at 895-96. It differed from the previous version in one respect; it substituted the phrase "mentally incapacitated" for the word "incompetent."

[431] *Compare id. with* MO. REV. STAT. § 507.100 (1959) *and with* MO. SUP. CT. R. 52.13.

[432] State v. Reese, 920 S.W.2d 94, 95-96 (Mo. 1996).

[433] *Id.* at 95 (emphasis added).

[434] *See, e.g.,* State *ex rel.* K.C. v. Gant, 661 S.W.2d 483 (Mo. 1983) (Rule 127.05 prevails over section 211.029 which was one eight sections of Senate Bill 512, Act of June 17, 1980, 1980 Mo. Laws 331, 332); State *ex rel.* Pressner v. Scott, 387 S.W.2d 539 (Mo. 1965) (Then existing Rule 54.06(c)(2) prevails over section 351.630.2 which was one of five subsections of one of two sections of Act of July 18, 1961, 1961 Laws 257, 257-58). *See also* Schleeper v. State, 982 S.W.2d 252 (Mo. 1998) (finding no conflict between Rule 29.15 and section 547.360 but suggesting that

cases.[435] For example, in *State* ex rel. *Kaufman v. Hodge,*[436] the Eastern District dealt with an act that had a section limited to the purpose of modifying an explicitly identified Supreme Court rule,[437] and nonetheless found that the statutory *section* could not modify the rule since the *entire law* was not limited to that purpose.[438]

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rule would prevail over the statute which was enacted as sections 12 and 14 of Act of July 7, 1997, 1997 Mo. Laws 1270, 1278-82); Breeden v. State, 987 S.W.2d 15, 17 (Mo. Ct. App. 1999) (holding that Rule 24.035 prevailed over the same act because the act was not "limited to the purpose of amending or annulling" the Supreme Court Rule).

[435] In addition to the case discussed in the text, cases from the Eastern District Court of Appeals reaching a similar result include State *ex rel.* McCulloch v. Lasky, 867 S.W.2d 697 (Mo. Ct. App. 1993) (then existing Rule 29.14(h) prevails over subsequently enacted section 491.230(2) which was one section of the forty-two-page Act of July 10, 1990, 1990 Mo. Laws 749, 771); Redifer v. Redifer, 650 S.W.2d 26 (Mo. Ct. App. 1983) (then existing Rule 51.05 prevails over subsequently enacted section 478.255 which was one of two sections of the Act of July 30, 1979, Mo. Laws 1979 625, 625-26); State v. Tate, 658 S.W.2d 940 (Mo. Ct. App. 1983) (then existing Rule 24.06(b) prevails over subsequently enacted section 545.885.2 which was a sub-sub-section the six-page Act of May 20, 1980, Section A, §545.885.2, 1980 Mo. Laws 494, 495).

The Southern District does not seem to have decided any cases in which a rule was challenged based on a subsequently enacted, multi-section law. *But see* State *ex rel.* Helms v. Moore, 694 S.W.2d 502 (Mo. Ct. App. 1985) (then existing Rule 32.08(c)(3) prevails over subsequently enacted section 478.255.3 which was part of the Act of June 10, 1982, 1982 Mo. Laws 670, 671, which would have modified multiple Supreme Court Rules; basis for ruling unclear).

Cases from the Western District upholding rules against challenges based on subsequently enacted multi-faceted statutes include Breeden v. State, 987 S.W.2d 15, 17 (Mo. Ct. App. 1999) (Rule24.035 prevails over subsequently enacted section 547.360 which was originally sections 12 and 14 of the Act of July 7, 1997 §§ 12, 14, 1997 Mo. Laws 1270, 1278-82); Knight v. State, 985 S.W.2d 432 (Mo. Ct. App. 1999) (same); Miller v. Russell, 593 S.W.2d 598, 603-04 (Mo. Ct. App. 1979) (Rule 110.05a(15) prevails over subsequently enacted section 211.021, which was one section of H.B. 1634, the Court Reform and Revision Act of 1978, 1978 Mo. Laws 696). *But see* State v. Kenney, 973 S.W.2d 536 (Mo. Ct. App. 1998) (discussed *infra* at text accompanying notes 443-54).

[436] 908 S.W.2d 137 (Mo. Ct. App. 1995).

[437] The sole effect of section 452.311 was to effectively modify Rule 53.01 (which provided that an action was commenced on filing regardless of when summons was issued, *see* Ostermueller v. Potter, 868 S.W.2d 110, 110-11 (Mo. 1993)) so that, in certain domestic cases, the action would not be deemed commenced until a summons was issued. In those cases, it would have had the effect of substantially repealing the 1972 amendments to Rule 53.01 and returning to the previous version that provided that an action was ordinarily deemed instituted only by both filing the petition "and suing out theron a writ of summons." *Compare* MO. SUP. CT. R. 53.01 (1960) *with* MO. SUP. CT. R. 53.01 (1972). *See Ostermueller*, 868 S.W.2d at 110-11.

Section 452.311, as then existing, specifically referred to Rule 53.01, providing that "[a] petition is not filed within the meaning of supreme court rule 53.01 in any cause of action authorized by the provisions of chapter 452, unless a summons is issued forthwith as required by supreme court rule 54.01."

[438] State *ex rel.* Kaufman v. Hodge, 908 S.W.2d 137 (Mo. Ct. App. 1995).

> When enacted, what became § 452.311 is the *seventh* section of a bill relating to the Department of Social Services.[439]
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> If it is argued that this provision amended Rule 53.01 or 54.01, such an argument would be suspect. To amend a supreme court rule, the constitution requires the General Assembly to do so "by a law limited to the purpose." Mo. Const. 1945, art. V, § 5. The 1989 amendment was not in a bill limited to the purpose of amending or annulling a rule.[440]

The court went on to recognize that the legislature had amended and reenacted section 452.311 in 1991.[441] Unlike the 1989 version, the 1991 version contains only one section and that section seems limited to the purpose of modifying Rule 53.01.[442]

There is a single apparent exception to this uniform line of decisions. In *State v. Kenney*,[443] the Western District held that the special Cole County criminal change of venue statute[444] preempted previously enacted Supreme Court Rule 32.03 regarding change of venue.[445] The court stated that the Cole County statute complied Article V, section 5 since "[t]he 'Notwithstanding Missouri supreme court rule 32.03' language of section 545.473 [the special Cole County statute] reveals the General Assembly's intent to pass a law limited to the purpose of annulling or amending Rule 32.03."[446] However, section 545.473 was not itself a law but simply one small section of a comprehensive bill dealing with various aspects of criminal law and procedure[447]—exactly the sort of "multi-faceted law" that the Supreme Court warned against in *Pizella*.[448]

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[439] Section 452.311 was originally enacted as section 7 of Act of July 27, 1989 §7, 1989 Mo. Laws 1164, 1171.

[440] *Kaufman*, 908 S.W.2d at 139 n.2.

[441] *Id.*

[442] *See* Act of June 27, 1991, 1991 Mo. Laws 1030. *But see Kaufman*, 908 S.W.2d at 139 n.2 (declining to express opinion on whether the new version complies with Article V, Section 5).

[443] 973 S.W.2d 536 (Mo. Ct. App. 1998).

[444] MO. REV. STAT. § 545.473 (2005).

[445] State v. Kenney, 973 S.W.2d, 536, 540-41 (Mo. Ct. App. 1998). The court also held that the Cole County statute prevailed over the general criminal "for cause" change of venue statute, MO. REV. STAT. § 545.490 (2005).

[446] *Kenney*, 973 S.W.2d at 541. The Supreme Court has stated that a law cannot be "limited to the purpose" of amending or annulling a rule unless it specifically mentions the rule. *See, e.g.,* State *ex rel.* K.C. v. Gant, 661 S.W.2d 483, 485 (Mo. 1983) ("A law, to qualify as one 'limited to the purpose' of amending or annuling a rule, must refer expressly to the rule.") (quoting State *ex rel.* Pressner & Co. v. Scott, 387 S.W.2d 539 (Mo. 1965)). However, the Court has never suggested that the fact that a law refers to a rule is enough, by itself, to establish that the law is limited to that purpose. The fact that something may be a necessary condition does not mean that it is a sufficient condition. The fact that *only* members of the student body can be on a school's basketball team does not mean that *every* member of the student body is on the team.

[447] Section 545.473 (first codified as section 508.355) was originally enacted as section 2 of senate bill 450. Act of Mar. 17, 1986, 1986 Mo. Laws 1091, 1105. It constituted one of twenty-two sections and occupied roughly half a page of the twenty-four page bill. In 1995, it was re-enacted (and given its current designation) as a part of an even more multi-faceted bill, as house bill 424,

Kenney is more of an apparent exception than a real one. Neither the parties in their briefs[449] nor the court in its opinion[450] recognized that section 545.473 was merely a part of a larger, multi-faceted law. Similarly, neither the parties nor the court cited *Pizella.*[451] Instead, the appellant affirmatively argued that section 545.473 *was* limited to the purpose of amending Rule 32.03 and therefore could not have any effect on a *different* rule, Rule *32.04*.[452] Respondent, in turn, agreed that section 545.473 validly amended Rule 32.03[453] and that Rule 32.04 was the applicable rule. As a result, the court was faced with a situation in which both parties took the position that Rule 32.03 had been validly amended by section 545.473, both parties treated that section as if it were a stand-alone law, neither party pointed out that it was just a part of a multi-faceted law, and both parties treated the meaning of Rule 32.04 as the relevant question to be decided. Given that situation, the court had no reason to independently research the enactment history of section 545.473 and was apparently unaware that it was just one part of part of a larger, multi-section law.[454]

In any event, *Kenney* is the only case providing even apparent support for the validity of 508.011. It stands alone against the otherwise uniform body of case law to the contrary and—more significantly—against the plain language of Article V, section 5 itself.

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which comprehensively revised the laws relating to penal institutions. Act of July 5, 1995, 1995 Mo. Laws 570, 598.

[448] State v. Pizzella, 723 S.W.2d 384, 387 n.3 (Mo. 1987).

[449] Brief for Appellant at 28-31, State v. Kenney, 973 S.W.2d 536 (Mo. Ct. App. 1998) (No. 5587); Respondent's Statement, Brief and Argument at 23-34, State v. Kenney, 973 S.W.2d 536 (Mo. Ct. App. 1998) (No. 55587) (copies on file with the author; originals available at the Missouri Public Archives).

[450] *Kenney*, 973 S.W.2d at 540-41.

[451] *See id.*

[452] Brief for Appellant, *supra* note 450 at 28-29 ("The purpose and valid effect given to section 545.473 RSMo is constitutionally limited to amending or annulling Rule 32.03."). *See also* Appellant's first Point Relied On, *id.* at 21 (Article V, Section 5 "limits the valid purpose and effect of section 545.473 RSMo to annulling or amending Rule 32.03"). Appellant then argued that Rule 32.04 implicitly incorporated a procedure provided by a different statutory section, section 545.490. *Id.* at 29-31.

[453] Brief for Respondent, *supra* note 540 at 31. Respondent then agreed with Appellant that Rule *32.04* was the applicable rule, but argued that the rule abrogated (rather than—as Appellant argued—incorporated) the procedures of section 545.490. Respondent also argued that the Appellant had not properly preserved the issue. *Id.* at 27-29.

[454] Such independent research for authorities not cited by the parties, particularly on an issue not presented by them, could be considered improper since the appellate court would run the risk of being seen as an advocate for one of the parties. *See, e.g.,* Henson v. Henson, 195 S.W.3d 479, 482 (Mo. Ct. App. 2006); Shaw v. Raymond, 196 S.W.3d 655, 660 (Mo. Ct. App. 2006); City of Plattsburg v. Davison, 176 S.W.3d 164, 170 (Mo. Ct. App. 2005).

c. The Enactment History of Article V, Section 5

The meaning of the "law limited to the purpose" language of Article V, section 5 is sufficiently clear that there is little reason to look to the history of its enactment to determine its meaning. Nonetheless, since it is likely that enactment history arguments will be made—and since the primary source materials for such arguments are not easily available—a review of that history may be useful.

Such a review reinforces the understanding of section 5 suggested by the case law and by the ordinary meaning of the section's language. The prevailing majority in the Constitutional Convention intended to shift control over procedural rules away from the General Assembly—which had been vested with such control under the then recently enacted statutory Civil Code—and transfer it to the Supreme Court.[455] Reading the "law limited to the purpose" language of section 5 as creating only a narrowly defined legislative override is consistent with that intent. This is particularly true in light of the Convention's choice of that language instead of the language of either of two provisions of the Civil Code, each of which would have given the legislature broader override power.[456] Finally, the debates on the Convention floor, while not independently conclusive, are entirely consistent with the view that section 5 was intended to permit the legislature to override Supreme Court rules only after separately considering the issue and only by passing a law that was limited to that purpose.[457]

Article V, section 5 was originally adopted as part of the 1945 Missouri Constitution,[458] but it was not enacted in a vacuum. Less than two months before the opening of the 1943-44 Constitutional Convention, the Missouri legislature passed and the governor signed a comprehensive new General Code of Civil Procedure.[459] Under the Civil Code, principal authority over procedural rules was vested, not in the courts, but in the General Assembly. The Supreme Court was forbidden to enact rules changing any existing practice or procedure in criminal cases,[460] and such changes were to be made only "by a legislative act

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[455] *See infra* text accompanying notes 466-04

[456] *See infra* text accompanying notes 458-65.

[457] *See infra* text accompanying notes 505-12.

[458] For the full current text of Article V, Section 5, *see supra* text accompanying note 401. It was amended in 1976, by a vote of the people, but there was no change in the crucial "law limited to the purpose" language.

[459] General Code for Civil Procedure, 1943 Mo. Laws 353 (Aug. 6, 1943) [hereinafter Civil Code]. The Convention convened on Sept. 21, 1943. 1 JOURNAL OF THE CONSTITUTIONAL CONVENTION OF MISSOURI 1943-1944, at 1 (1st Day, Sept. 21, 1943) [hereinafter JOURNAL OF THE CONVENTION]. While the Code of Civil Procedure was not to take effect until Jan. 1, 1945, Civil Code § 3 at 357, the delegates to the convention were well aware of its provisions.

[460] As was noted on the floor of the Convention, a bill to grant such power was rejected by the same General Assembly that enacted the Civil Code. 13 DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION 1945 at 7341 (statement of Mr. Tee); *id.* at 3862 (statement of Mr. Williams). All references to the constitutional convention debates refer to the debates as contained in the transcript

passed for that specific purpose."[461] Moreover, while the Civil Code gave the Supreme Court power to promulgate civil rules,[462] that power was tightly circumscribed since the Court could not promulgate any rules that conflicted with existing law including the Civil Code itself.[463] While the Court was authorized to promulgate rules to harmonize any conflicts between various procedural statutory provisions,[464] even such harmonizing rules were subject to an unrestricted legislative override since they were only to "be effective until superseded by legislative enactment."[465] There was no requirement that the superseding statute be a law "limited to the purpose" of amending or repealing the rule.

Almost as soon as the Convention convened, it became apparent that a significant group of delegates wanted to drastically shift the power to regulate procedure from the legislature to the judiciary. On the tenth day of the Convention, five delegates[466] submitted Proposal 21, a comprehensive revision of the previously existing judicial article that had been prepared by a committee of the Missouri Bar Association working in conjunction with a committee appointed by the Missouri Judicial Conference.[467] Proposal 21 created an "administrative council" consisting of fifteen judges[468] and gave the council the power to propose

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stored in the Missouri Supreme Court Library. The author is informed that the Missouri State Archives' copy of the transcript of the debates has different pagination.

[461] Civil Code, *supra* note 460, at § 145 at 397. There was one exception that proved the rule. If any provision of the Civil Code was found to have inadvertently changed criminal practice in any respect, the Supreme Court was *directed* to immediately promulgate a rule restoring the pre-existing practice. *Id.*

[462] *Id.* §10 at 359.

[463] *Id.* § 10(a) at 359 ("No such forms or rules shall . . . be contrary to or inconsistent with the laws in force for the time being.").

[464] *Id.* § 10(b) at 359-60 (authorizing promulgation of rules to harmonize conflicts between provisions of the Civil Code or between the Civil Code and other statutes).

[465] *Id.* § 10(b) at 360.

[466] The delegates who introduced Proposal 21 included Richard Righter (Chair of the Convention's Committee on the Judicial Department) and former Missouri Governor Guy Park. *See* 1 JOURNAL OF THE CONVENTION, *supra* note 460.

[467] *Id.* at 2 (10th Day, Oct. 12, 1943); PROPOSALS, THE 1943-44 CONSTITUTIONAL CONVENTION OF MISSOURI, No. 21 [hereinafter PROPOSALS]. For a discussion of the genesis of Proposal 21 and the work of the Missouri Bar Association Committee, *see* Samuel H. Lieberman, *A Preliminary Report of the Special Committee to Consider Articles of the New Constitution Relating to the Judiciary*, 14 MO. BAR J. 156, 156, 193 (1943); *Report of Committee to Cooperate with Judiciary Committee of the Supreme Court in Doing Research and Making Recommendations to Coming Constitution [sic] Convention Concerning Organization, Jurisdiction and Powers of the Judiciary*, 14 MO. BAR. J. 217, 217-20 (1943); *Proposal No. 21 in the 1943 Constitutional Convention of Missouri*, 14 MO. BAR. J. 284, 284-88 (1943); Laurance Hyde et al., *Suggestions of Joint Committee in Support of Proposal* 12, 14 MO. BAR. J. 289, 289-90 (1943); *Symposium on the New Constitution*, 15 MO. BAR. J. 190, 196-99 (1944) (statement of Mr. Righter); JACK PELTASON, THE MISSOURI PLAN FOR THE SELECTION OF JUDGES 91 (1945). Proposal 21 contained numerous provisions unrelated to this article and was seen as one of the principal proposals backed by those who wanted to retain the Missouri non-partisan plan for selection of judges.

[468] PROPOSALS, *supra* note 468, at No. 21 § 23 at 8. The council was to be composed of three judges from the Supreme Court, three from the Courts of Appeals, six from the Circuit Courts, and three from the Probate Courts. *Id.*

"rules of practice, procedure and evidence for all the courts, to be effective when approved by the Supreme Court."[469] Unlike the Civil Code, section 25 of Proposal 21 explicitly contemplated that these judge-made rules would trump pre-existing statutorily created procedures including the Civil Code itself. "All laws in force at the time of the adoption of this constitution which pertain to practice, procedure or evidence shall have the force and effect of general rules *until rescinded or changed by the council with the approval of the Supreme Court.*"[470] Section 25 did provide for legislative override of judge-made rules, but that provision was much more restrictive than the one contained in the Civil Code. Instead of permitting override by any subsequent "legislative enactment,"[471] it provided that rules could only "be repealed, or amended, by the general assembly *by a special law limited to that purpose*."[472] Proposal 21 was referred to the Convention's Committee on the Judicial Department[473] as were three subsequent proposals containing essentially identical restrictive legislative override provisions.[474]

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[469] *Id.* No. 21 § 25 at 9.

[470] *Id.* (emphasis added).

[471] Civil Code, *supra* note 460, at § 10(b) at 360.

[472] PROPOSALS, *supra* note 468, at No. 21 § 25 at 9 (emphasis added).

[473] 1 JOURNAL OF THE CONVENTION, *supra* note 460, at 2 (10th Day, Oct. 12, 1943); PROPOSALS, *supra* note 468, at No. 21 at 1.

The Convention had previously delegated initial drafting of the judicial article to that committee whose members were appointed on Sept. 28, 1943. 1 JOURNAL OF THE CONVENTION, *supra* note 460, at 3-4 (3rd Day, Sept. 28, 1943).

The Committee held weekly public hearings until Dec. 16, 1943 at which various proposals were presented by their proponents and discussed. *Id.* at 8 (12th Day, Oct. 14, 1943) (scheduling the Committee's meetings for Thursdays at 2:00); *Id.* at 2 (45th Day, Dec. 7, 1943) (reporting that the Committee would hold its last public hearing on Dec. 16, 1943); Richard S. Righter, *The Judicial Section of the Proposed Missouri Constitution*, 13 U.K.C. L. REV. 1, 2 (1944). All proposals were referred to sub-committees which evaluated them and reported back to the Committee as a whole. *Id.* at 1 (referring to 35 proposals); *but see* FILES, THE 1943-1944 CONSTITUTIONAL CONVENTION OF MISSOURI, FILE 15: REPORT OF THE COMMITTEE ON THE JUDICIARY No. 5 at 1 (listing 36 proposals) [hereinafter FILES, FILE 15]. After the public hearings concluded, the Committee held meetings (also open to the public) at which it considered and voted on the reports of the various sub-committees. Righter, *supra* note 474, at 1-2. It eventually prepared and voted on three drafts of the proposed judicial article. *Id.*

[474] Two proposals contained exactly the same legislative override language as Proposal 21. *See* PROPOSALS, *supra* note 468, at No. 274 § 13 at 6-7 (identical language) (introduced and referred to the committee on Nov. 17, 1943. 1 JOURNAL OF THE CONVENTION, *supra* note 460, at 12-13 (33rd Day, Nov. 17, 1943)); PROPOSALS, *supra* note 468, at No. 351 § 20 at 6-7 (identical language) (introduced and referred to the committee on Dec. 2, 1943. 1 JOURNAL OF THE CONVENTION, *supra* note 460, at 10 (42nd Day, Dec. 2, 1943)).

One additional proposal contained almost identical language. PROPOSALS, *supra* note 468, at No. 219 § 21 at 10 (rules proposed by the council and adopted by the court "may be repealed or amended, and any new rule may be enacted, by the general assembly by a special law limited to that purpose") (introduced and referred to the committee on Nov. 17, 1943. 1 JOURNAL OF THE CONVENTION, *supra* note 460, at 5 (33rd Day, Nov. 17, 1943)).

The Committee voted three times on provisions that were based on section 25 of Proposal 21 granting rule-making authority to the Supreme Court.[475] The version on which the Committee cast its final vote gave the rule-making authority directly to the Supreme Court and did not provide for an "administrative council."[476] It contained a restrictive legislative override provision essentially identical to the one contained in Proposal 21, providing that the rules could only be "be repealed or amended by a special law limited to that purpose."[477] However, the debate in the Committee focused not on the override provision, but instead on the fact that the proposal might be interpreted to permit the Court to enact rules relating to evidence, the right to jury trial, or the right to appeal.[478]

There were only two other proposals that explicitly authorized the Supreme Court (or the administrative counsel with the Court's approval) to promulgate rules. *See* PROPOSALS, *supra* note 468, at No. 142 Article 5, § 9 at 10-11 (introduced and referred to the committee on Nov. 3, 1943, 1 JOURNAL OF THE CONVENTION, *supra* note 460, at 9 (26th Day, Nov. 3, 1943)); PROPOSALS, *supra* note 468, at No. 175 § 3 at 2 (introduced and referred to the committee on Nov. 9, 1943. 1 JOURNAL OF THE CONVENTION, *supra* note 460, at 3 (28th Day, Nov. 5, 1943)). Neither proposal contained *any* provision for legislative override of such rules and neither forbade enactment of rules that were inconsistent with existing statutes.

None of the remaining twenty-nine proposal considered by the committee contained any provision authorizing the promulgation of rules.

[475] 13 DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION 1945 at 7354-55 (statement of Mr. Tee) (describing initial Committee rejection of, subsequent Committee reconsideration and approval of, and final Committee rejection of the provision); *Id.* at 3853-54 (statement of Mr. Marr) (describing his idiosyncratic recollection of earlier versions of provision before Committee).

It is unclear whether the language of the provision was revised between the Committee's first vote on the issue and its final rejection of the proposal. *Compare id.* at 7354-55 (statement of Mr. Tee) (suggesting that the language remained the same) *with id.* at 3853-54 (statement of Mr. Marr) (suggesting that earlier versions had not authorized the Supreme Court to make rules for the trial courts). However, there is no evidence that there was any change in the language authorizing a narrow legislative override.

[476] The final version before the Committee provided, "The Supreme Court shall exercise superintending control over all courts with power to establish rules of practice and procedure for all courts which shall not abridge any substantive right or remedy given by law. Any such rule may be repealed or amended by a special law limited to that purpose. Rules shall be published." *Id.* at 3836 (statement of Mr. Tee) (quoting from a draft in his notes). *See also id.* at 3877 (statement of Mr. Park) (identical language but with several apparent typographical or transcription errors). It is unclear whether the concept of the administrative council was rejected in a subcommittee or by the Committee itself.

[477] *Id.* at 3836 (statement of Mr. Tee). The only difference between the two override provision in Proposal 21 and the one on which the Committee voted is that the latter omitted the redundant phrase "by the general assembly." *Compare* text accompanying this note *with* PROPOSALS, *supra* note 468, at No. 21 § 25 at 9 (stating that rules may only "be repealed, or amended, by the general assembly by a special law limited to that purpose.").

[478] 13 DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION 1945 at 3841-42 (statement of Mr. Philips) (committee members objected because the phrase "practice and procedure" might be deemed to give the Court the right to change the rules of evidence); *id.* at 3877 (statement of Governor Park) (agreeing with Mr. Phillips that the principal objection of opponents in the committee was that it might authorize rules relating to evidence); *id.* at 3835 (statement of Mr. Righter) (committee members objected to the lack of the safeguards that were subsequently added

Because of these objections, on February 24, 1944, the Committee rejected the proposal by a vote of 11-10.[479]

As a result, on March 10, 1944, when the Committee submitted its final report to the Convention, that report contained no provision authorizing the Supreme Court to promulgate rules.[480] If the Constitution had been adopted without such a provision, the Supreme Court would have had only the limited rule-making authority provided by the Civil Code, and the General Assembly would have had the unrestricted power to repeal or amend such rules by any "legislative enactment,"[481]—even one not "limited to the purpose."

However, the struggle for judicial control over procedural rule making was not over; it had simply shifted to the floor of the Convention itself. Debate on the Committee's report and the proposed judicial article began on May 24, 1944.[482] The Convention initially dealt with a large number of minor amendments and then, on June 5 and June 6, debated and resolved the most contentious issue, retention of the Missouri Plan for judicial selection.[483] Just before adjournment on June 6, almost immediately after the vote on the Missouri Plan, former Governor Guy Park[484] submitted an amendment inserting a section giving the Court broad rule-making authority.[485] Governor's Park's proposed

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by Governor Park, (i.e., safeguards forbidding rules relating to evidence, right to jury etc.)); *id.* at 3835 (statement of Governor Park) (same). There is one colloquy in the convention debates that suggests that the legislative override provision was inserted to ameliorate some members' concerns that giving the rule making authority to the Court would be exclusive and would eliminate the legislature's power to make rules. *Id.* at 3850 (statement of Mr. Righter). However, the narrow override provision, in essentially its final form, was included in the proposal at all stages of the debate, i.e., in Proposal 21, in the version debated by the Committee, and in the version subsequently submitted to and approved by the Convention itself. Therefore, if the draftspersons added the provisions to deal with those concerns, they must have done so at the beginning rather than in the Committee.

[479] *Id.* at 3834 (statement of Mr. Righter); *id.* at 3877 (statement of Mr. Park). Governor Park stated that three members of the Committee had left before the vote. *Id.* at 3877.

[480] 1 JOURNAL OF THE CONVENTION, *supra* note 460 at 20-34 (99th Day, Mar. 10, 1944). *See also* FILES, FILE, *supra* note 474, at 15 at 1. The Committee's report was unusual in that it contained two alternative proposals for judicial selection, one proposing to continue the recently enacted Missouri Plan and the other proposing a return to elected judges. *Compare id.* at 8-13 *with id.* at 13-18. The Committee had split precisely equally on these two proposals. *Id.* at 8.

[481] Civil Code, *supra* note 460, at § 10(b) at 360.

[482] 2 JOURNAL OF THE CONVENTION, *supra* note 460, at 6 (148th Day, May 24, 1944).

[483] *Id.* at 2-6 (154th Day, June 5, 1944); *Id.* at 1-6 (155th Day, June 6, 1944); MARTIN L. FAUST, CONSTITUTION MAKING IN MISSOURI: THE CONVENTION OF 1943-1944 105-06 (1971).

[484] Park had served as Governor of Missouri from 1933 to 1937 and before that had been a circuit judge. *See* OFFICIAL MANUAL STATE OF MISSOURI 61 (Kristen S. Meyer Ed.) (2005-2006).

[485] 2 JOURNAL OF THE CONVENTION, *supra* note 460, at 6 (155th Day, June 6, 1944). 12 DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION 1945 at 3800 (statement of Mr. Park). The full text of the proposed amendment was as follows:

> The Supreme Court shall have the power to establish rules of practice and procedure for all Courts. Such rules shall neither abridge, enlarge nor modify the substantive rights of any party. Said rules shall not affect the rules of evidence, or the law relating to jurymen or juries or the right of trial by jury as now existing or the mode of giving

amendment was designed to alleviate the concerns that had led to defeat in the Committee.[486] For example, it forbade the Court from enacting rules of evidence, rules that would affect the right to trial by jury, or rules that would restrict the right to appeal.[487] At the same time, Governor Park's amendment accomplished the principal goals of those who favored judicial authority over procedural rules: It gave the Supreme Court explicit authority "to establish rules of practice and procedure for all Courts"; and—most significantly for purposes of this article—it restricted the General Assembly's authority by providing that such rules could be overridden only "by a special law limited to that purpose."[488]

The following day, before any motion to adopt the amendment was made, this override proviso was modified in one minor respect. At the suggestion of Mr. Mayer, Governor Park agreed to delete the word "special" so that the final phrase would read "annulled or amended by a law [rather than a "special law"] limited to that purpose."[489] However, this deletion was intended solely to avoid possible linguistic inconsistency between the proviso and the proposed legislative article which was said to contain a definition of "special laws" and restrictions on the circumstances in which such laws could be passed.[490] (As used in the legislative article, the phrase "local or special laws" referred to laws that applied only to particular persons or localities,[491] not to a law—like one repealing a Supreme Court Rule—that is generally applicable but is limited to a particular purpose.) Both Park and Mayer agreed that the change was not intended to have

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> evidence by the oral examination of witnesses. The right of appeal shall continue in all cases in which appeals are now or may hereafter be authorized by law. The Supreme Court shall cause such rules to be made public and may fix the dates when any rule or rules shall take effect, provided that no rule shall become effective prior to six months after its public promulgation, and provided further that any rule may be annulled or amended by a special law limited to that purpose.

[486] 13 DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION 1945 at 3841-42 (statement of Mr. Philips) (Park's proposal contains provisions intended to deal with concerns of the opponents); *id.* at 3835 (statement of Governor Park) (stating that he had "rearranged" the previous proposal to deal with those concerns); *id.* at 3835 (statement of Mr. Righter) (Park's proposal contains new provisions intended to alleviate concerns of former opponents).

[487] *See supra* note 486. A number of delegates indicated that they had voted against the rule-making proposal in committee but now supported it because of these new limitations. *See, e.g., Id.* at 3845 (statement of Mr. Ford); *id.* at 3875 (statement of Mr. Garten); *id.* at 7353 (statement of Mr. Marr) (stating that he made the motion to strike the provision in committee but now favors it).

[488] 2 JOURNAL OF THE CONVENTION, *supra* note 460 at 6 (155th Day, June 6, 1944); 12 DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION 1945 at 3800 (statement of Mr. Park).

[489] 13 DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION 1945 at 3825-26.

[490] *Id.* (colloquy between Mr. Mayer and Mr. Park). For the current version of this restriction, *see* Mo. Const. art. III, §§ 40-42. For the version then being considered by the Convention, *see* FILES, FILE, *supra* note 474, at 17 §§ 51-52 at 18-20. The Constitution itself does not, in fact, define "local or special laws," but case law has done so. *See, e.g.,* authorities cited *infra* note 491.

[491] *See, e.g.,* Blaske v. Smith & Entzeroth Inc., 821 S.W.2d 822 (Mo. 1991) (defining "special laws" as ones that apply to some but not all similarly situated persons); Doe v. Phillips, 194 S.W.3d 833 (Mo. 2006) (same).

any effect on the meaning of the proviso, the word "special" having been inserted simply for emphasis.[492]

The Park amendment presented the Convention with a choice between two starkly different rule-making regimes: If the Park amendment was adopted, broad rule-making authority would be vested in the Supreme Court; and the General Assembly would have only a narrowly controlled legislative override. If it was defeated, the Civil Code would continue to control, the Court would have quite limited rule-making power, and even that power could be easily overridden by any "legislative enactment."

Park amendment opponents recognized that the amendment would drastically curtail legislative authority[493] and quickly tried to restore the General Assembly's broad power over civil rules. Omar Brown, one of the principal opponents, moved to amend the Park amendment so that it would have read simply "The Supreme Court shall have the power to establish rules of practice and procedure within all courts. Such rules shall neither abridge, enlarge nor modify the general code of civil procedure provided by law."[494] If adopted, Mr. Brown's language would have reinstated the rule-making regime created by the Civil Code effectively forbidding promulgation of any rules inconsistent with existing statutory law and again permitting the General Assembly to override Supreme Court rules by any "legislative enactment" including ones not limited to the purpose of modifying or annulling those rules. However, the Convention overwhelmingly rejected Mr. Brown's proposal, defeating it by a vote of fifty-one to fourteen.[495] After additional debate, the Convention approved the Park amendment itself by a vote of thirty-six to twenty-six.[496]

On September 19, 1944, when the Judicial Article as a whole came to the floor for final consideration, the proponents of legislative control over rule-making made one last effort to defeat the Park Amendment.[497] At their request, it was considered separately and again debated.[498] After this final debate, the

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[492] 13 DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION 1945 at 3826 (statement of Mr. Park) (acknowledging that he would be just "as well off" if the word were deleted since it had been simply inserted for emphasis). Even after the change, at least one member continued to describe the Park amendment as permitting legislative override only by a "special law." *Id.* at 7345 (statement of Mr. Storckman).

[493] *See, e.g., Id.* at 3840 (statement of Mr. Brown of Christian County); *id.* at 3854-55 (statement of Mr. Phillips of Jackson County); *id.* at 3859-62 (statement of Mr. Williams); *id.* at 3870-75 (statement of Mr. Tee).

[494] *Id.* at 3839.

[495] *Id.* at 3868; 2 JOURNAL OF THE CONVENTION, *supra* note 460, at 4 (156th Day, June 7, 1944) (reporting vote as 14 yeas, 51 nays, 10 absent, and 8 absent with leave).

[496] 13 DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION 1945 at 3878.

[497] *Id.* at 7339-56.

[498] Mr. Tee (with the concurrence of eleven other members) requested separate consideration of section 5. *Id.* at 7339. Mr. Righter then moved that section 5 be adopted and that brought the matter to the floor for separate debate. *Id.*

Prior to the Sept. 19 debates, the Committee on Phraseology, Arrangement, and Engrossment had redesignated the Park amendment as section 5 of the judicial article and had rephrased it. The

Convention again approved the Park amendment, this time by a vote of fifty-four to thirteen.[499] Thus, in three separate votes (one rejecting the Brown proposal, one adopting the Park Amendment, and one reaffirming that adoption), the Convention rejected the Civil Code regime in favor of language that permitted the General Assembly to override Supreme Court rules only "by a law limited to that purpose."

The choice of this language is particularly significant when compared to the language that it replaced. Delegates repeatedly discussed the Civil Code and acknowledged that the Park amendment would supersede its provisions.[500] As the Convention was aware, the Civil Code contained its own override provision—one that permitted the General Assembly to repeal judge-made rules by any "legislative enactment."[501] In light of the Convention's decision to adopt the more restrictive, "law limited to the purpose," language, it is reasonable to infer that the Convention intended to enact exactly what that language seems to convey: that rules may *not* be modified or repealed by a "legislative enactment" unless that enactment is "a law limited to the purpose" of annulling or amending the rule. If the Convention had intended to permit rules to be repealed by "multi-faceted" multi-purpose laws, it would have retained the Civil Code's language permitting such repeal by any "legislative enactment."[502]

Similarly, the Convention was aware that, in section 145 of the Civil Code,[503] the General Assembly had provided that existing criminal practices and

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final proviso was made a separate sentence and rephrased to read "Any rule may be annulled or amended by a law limited to *the* purpose" (rather than "*that purpose*"). As rephrased, the entire Park amendment read as follows:

> The supreme court may establish rules of practice and procedure for all courts. The rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right to trial by jury, or the right of appeal. The court shall publish the rules and fix the day on which they take effect, but no rule shall take effect before six months after its publication. Any rule may be annulled or amended by a law limited to the purpose.

Report No. 1 of Committee on Phraseology, Arrangement and Engrossment. Article VI: Judicial Department at 2 JOURNAL OF THE CONVENTION, *supra* note 460 at 14, 17-18 (168th Day, June 28, 1944)(report submitted); *Id.* at 4 (197th Day, Aug. 23, 1944) (report adopted and rephrased file engrossed).

[499] 13 DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION 1945 at 7356; 2 JOURNAL OF THE CONVENTION, *supra* note 460, at 25-26 (210th Day, Sept. 19, 1944) (reporting the vote on the Park amendment, designated section 5, as 54 yeas, 13 nays, 8 absent, and 8 absent with leave).

[500] *See, e.g., Id*. at 3836-38 (statement of Mr. Julian); *id* at 3840-41 (statement of Mr. Phillips of St. Louis); *id.* at 3861-62 (statement of Mr. Williams); *id.* at 3867-68 (statement of Mr. Brown of Christian County); *id.* at 7346-47 (statement of Mr. Park)

[501] *See, e.g., id*. at 7345 (statement of Mr. Storckman) (referring to Civil Code Section 10's override provision). It is reasonable to infer that the distinguished lawyers and judges who made up the Missouri Bar-Missouri Judicial Conference Joint Committee that drafted and approved Proposal 21 as well as the members of the Convention's Committee on the Judicial Department were also familiar with the Civil Code's override provision and consciously decided to use different language.

[502] Civil Code, *supra* note 460, at § 10(b) at 360.

[503] *Id*. at § 145; 1943 Mo. Laws 353, 397.

procedures could "not be changed except by a legislative act passed for that specific purpose."[504] That language—particularly the phrase "*specific* purpose"—could be *construed* as permitting procedural changes to be made only by laws having such a change as their sole purpose; but the Convention chose even stronger language that made that restriction explicit—permitting rule changes only "by a law *limited* to the purpose." Once again, the decision to use new, clearer language strengthens the conclusion that Article V, section 5's override provision means what it says.

The statements of various delegates on the floor during the Park amendment debates suggest the same conclusion. While the debates focused primarily on the wisdom of the Park amendment as a whole, they did contain a limited amount of discussion of the legislative override provision in particular. Some opponents of the Park amendment argued that the existence of any legislative override somehow demonstrated the Court should have no rule-making authority at all[505] or that it might lead to embarrassing conflicts between the Court and the General Assembly.[506] On the other hand, some Park amendment supporters described the override provisions as a sensible allocation of authority that recognized the greater expertise of the Court while giving ultimate veto power to the majoritarian branch.[507] Others, including some of the strongest supporters of judicial rule-making, argued for complete elimination of the legislative override proviso[508] and unsuccessfully moved to eliminate it.[509]

However, the debates contain little that illuminates—and nothing that conclusively establishes—the meaning of the Park amendment's "law limited to that purpose" proviso. The proviso was quoted sufficiently frequently that the Convention members were certainly aware of its language.[510] Mr. Storckman

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[504] Civil Code, *supra* note 460, at § 145; 13 DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION 1945 at 3862 (statement of Mr. Williams) (quoting § 145 on the floor of the Convention).

[505] *See, e.g.,* 13 DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION 1945 at 3839 (Statement of Mr. Brown); *id.* at 7342-43 (Statement of Mr. Williams); *id.* at 7350-53 (Statement of Mr. Parker); *id.* at 7353-54 (Statement of Mr. Tee).

[506] *See, e.g., id.* at 3840 (Statement of Mr. Brown); *id.* at 7343-44 (Statement of Mr. Williams); *id.* at 7354 (Statement of Mr. Tee).

[507] *See, e.g., id.* at 3825 (Statement of Mr. Park); *id.* at 3830 (Statement of Mr. Storckman); *id.* at 3842 (Statement of Mr. Phillips of St. Louis City); *id.* at 7348 (Statement of Mr. Arnold).

[508] *Id.* at 3836-37 (Statement of Julian) (opposing proviso); *id.* at 3842 (Statement of Mr. Phillips of St. Louis City) (opposing proviso but willing to compromise); *id.* at 3845 (Statement of Mr. Ford) (same); *id.* at 3868-69 (statement of Mr. Julian and motion); *id.* at 3869 (second by Mr. Potter); *id.* at 3869-70 (expressing support for Mr. Julian's substitute but willingness to vote for the Park amendment if the substitute fails).

[509] *Id.* at 3868-69 (Motion by Mr. Julian to substitute the following for the Park amendment: "The Supreme Court shall have the power to establish rules of practice and procedure for all Courts."); *id.* at 3876 (Mr. Julian's substitute defeated by a voice vote). The Julian substitute would also have eliminated the Park amendment's other restrictions on rule making, for example, the ban on rules affecting the right to a jury and the requirement that rules be published.

[510] *See, e.g., id.* at 3825 (statement of Mr. Park) (first speech regarding the amendment); id at 3860 (statement of Mr. Williams); *id.* at 7343 (statement of Mr. Williams); *id.* at 7346 (statement of Mr.

explained a rationale for the "limited to the purpose" requirement, indicating that it would force the legislature to focus on the wisdom of changing the rule by requiring that it give the question separate consideration. If the Court adopted an unwise rule, Storckman stated, "the Legislature still has the reigns [sic] in its hand. It can pass a *special law giving special consideration to that situation* and bring back the old system or any system that we want."[511] Governor Park indicated that, to revoke a Supreme Court Rule, the General Assembly would need to pass a free-standing act having that purpose. When asked whether he thought it was a good idea to give the Court the power to change provisions of the Civil Code, he responded, "Yes, sir, with the right of the Legislature, if they think the court is wrong, to veto it [the court's rule] by repassing [the previous provision], by simply passing *an act* to do away with it [the rule]."[512] Nonetheless, while these statements are suggestive, they cannot be seen as definitive.

However, the question is not whether the debates definitively confirm the ordinary meaning of the Constitutional text, but rather whether those debates definitively contradict that meaning;[513] and no member of the Convention even suggested that the language meant anything other than what it appears to say. No member argued that the Park amendment's proviso could be satisfied by anything other than a law that had modification or annulment of Supreme Court rules as its exclusive purpose.[514] No member suggested that it could be satisfied by a multiple section bill in which one *section* was limited to that purpose.

Park). At the very beginning of the discussion, the Convention's attention was particularly directed to the language of the proviso by Mr. Mayer's suggestion that the word "special" be deleted and by Governor Park's acceptance of that suggestion. *Id.* at 3825-26 (colloquy between Mr. Mayer and Mr. Park). On the other hand, as one would expect in extended oral debate, the language was sometimes *mis*quoted. *See, e.g., id.* at 3838 (statement of Mr. Julian) (omitting "limited to the purpose" language).

[511] *Id.* at 7345 (Statement of Mr. Storckman) (emphasis added). The requirement that override legislation be considered seperately on its own merits may have been part of a general reformist trend to avoid logrolling by forbidding legislation that combined unrelated proposals into a single bill which would have to be voted up or down as a whole. The same convention adopted of Article III, Section 21's single subject requirement as well as Article III, Section 21's "original purpose" requirement—both of are intended to reduce logrolling. Missouri Ass'n of Club Executives v. State, 208 S.W.3d 885, 8__(Mo. 2006)quoting Stroh Brewery Co. v. State, 954 S.W.2d 323, 325-26 (Mo.1997).

[512] *Id.* at 3827 (Statement of Mr. Park) (emphasis added).

[513] *See* authorities cited *supra* note 410.

[514] The only statement that could be stretched to support the view that the Park amendment contained an unqualified legislative override is an exchange between Mr. Julian (who opposed *any* override) and Mr. Righter:

> MR. JULIAN: In [sic] that new constitutional law, giving the Legislature a veto of the Supreme Court, did you ever hear of that before?
>
> MR. RIGHTER: No, I say it's, here's the point. The Legislature has heretofore exercised this power of making codes and passing rules of procedure. Now, some of the members thought that if we give it to the court, we're taking it away from the Legislature. Now, to make clear that we're not taking away any power that the Legislature now has, we put that in there.

Viewed as a whole, the enactment history reinforces the interpretation of section 5 supported by the case law and the ordinary meaning of section 5's text. That interpretation is the one that best serves the goal of the prevailing faction in the convention—drastically shifting rule-making authority from the legislature to the Court. That interpretation is the only one that explains the Convention's decision to use new language rather than the language of the Civil Code's override provision. That interpretation is the one most consistent with the floor debates.

4. Section 508.011 and Article III Section 21 (the "Original Purpose" Rule)

As discussed in the previous section, the text, case law, and enactment history of Article V, section 5 of the Missouri Constitution all suggest that section 508.011 violates that constitutional provision since the Tort Reform Act is not "a law limited to the purpose" of annulling or amending Rule 51.03. However, if one were to reach the opposite conclusion—if one were to conclude that, as ultimately enacted, the Act had that limited purpose—it would face another constitutional obstacle: it would violate Article III, section 21's "original purpose" requirement.

Article III, section 21 provides that "No law shall be passed except by bill, and *no bill shall be so amended in its passage through either house as to change its original purpose*."[515] The Supreme Court has recognized that this original purpose requirement ordinarily presents the sponsor of a bill with a choice:

> [A] bill's sponsor is faced with a double-edged strategic choice. A title that is broadly worded as to purpose will accommodate many amendments that may garner sufficient support for the bill's passage. Alternatively, a title that is more limited as to purpose may protect the bill from undesired amendments, but may lessen the ability of the bill to garner sufficient support for passage.[516]

However, that choice is illusory if the bill is one that must (under Article V, section 5) be "limited to the purpose" of amending or annulling a Supreme Court rule. By definition, such a "limited purpose" bill cannot have a broad purpose "that will accommodate many amendments." As a result, if the Tort Reform Act *as passed* was a "law limited to the purpose" of amending Rule 51.03, it violates

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13 DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION 1945 at 3850.

It is possible to argue that, since the legislature had an unrestricted override right under previous law, Mr. Righter's statement suggests that they would still have one under the Park amendment. However, in context it seems more likely that Mr. Righter was referring only to the fact that the Park amendment preserved the General Assembly's power to enact or veto rules rather than stating that the procedure for exercising that power would not be changed.

In any event, Mr. Righter's ambiguous remark is hardly enough to justify ignoring the clear language passed by the Convention and ratified by the people of Missouri.

[515] Mo. Const. art. III, §21 (emphasis added).

[516] Stroh Brewery Co. v. State, 954 S.W.2d 323, 326 (Mo. 1997).

Article III, section 21 unless the original purpose of H.B. 393 (the bill that became the Tort Reform Act) *as introduced* was similarly limited.[517]

Yet the "original purpose" of H.B. 393 could not possibly have been to annul or modify Rule 51.03 since the bill, as originally introduced on January 31, 2005, said nothing at all about that rule and did nothing to modify it.[518] The first version of the bill that mentioned or modified Rule 51.03 was the House Committee Substitute which was reported out of the Judiciary Committee on February 10, 2005.[519] If the original purpose of the bill was not limited to annulling or modifying Rule 51.03, and if the bill's purpose cannot constitutionally be changed, then the final purpose of the bill could not be so limited.[520]

The bill as originally introduced may have had the much broader purpose stated in its original title (revising the laws "relating to claims for damages and the payment thereof") which might be construed as *including* the subsequent amendment modifying Rule 51.03.[521] Under that interpretation, the broad original purpose would not have been changed by the amendment, and thus the bill as a whole would not violate the "original purpose" requirement.[522] However, since that broad original purpose could not have been one that was

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[517] For purposes of Article III, Section 21, the original purpose of a bill is determined as of the time it was introduced. Stroh Brewery, 954 S.W.2d 323, 326 (Mo. 1997); McEuen *ex rel.* McEuen v. Mo. State Bd. of Educ., 120 S.W.3d 207, 210 (Mo. 2003).

[518] Compare H.R. 393, 93d Gen. Assem., Reg. Sess. 185-86 (Mo. 2005) (Introduced and Read First Time, Journal of the House, First Regular Session, 93rd General Assembly 185-86 (Jan. 1, 2005)), *available at* http://www.house.mo.gov/bills051/biltxt/intro/HB0393I.htm (containing no mention of Rule 51.03 and no section 508.011) with Conference Committee Substitute For Senate Substitute For Senate Committee Substitute For House Committee Substitute For House Bill No. 393 (Truly Agreed and Finally Passed, Journal of the House, First Regular Session, 93rd General Assembly 674 (Mar. 16, 2005); Journal of the Senate, First Regular Session, 93rd General Assembly 477-79 (Mar. 16, 2005)) available at http://www.house.mo.gov/bills051/biltxt/truly/ HB0393T.HTM (containing current section 508.011).

[519] House Committee Substitute for H.R. 393 (Reported, Journal of the House, First Regular Session, 93d Gen. Assem. 285 (Mo. 2005)).

[520] Moreover, any argument that the original purpose was limited to modifying or amending Rule 51.03 would run the risk of invalidating the entire Tort Reform Act since, if that were the original purpose, it would be impossible to argue that the bill had a sufficiently broad single purpose to comply with Article III, section 21.

[521] This article expresses no opinion on whether this is the correct interpretation of the original purpose of the bill. *See, e.g.,* Mo. State Med. Ass'n v. Mo. Dep't of Health, 39 S.W.3d 837, 839 (Mo. 2001) (the original purpose does not need to be stated in the bills title or anywhere in the bill); *McEuen*, 120 S.W.3d at 210 (same). Similarly, this article takes no position on whether the act as a whole violates either the original purpose, single subject, or clear title provisions of the Constitution.

[522] *See, e.g.,* Lincoln Credit Co. v. Peach, 636 S.W.2d 31, 38 (Mo. 1982) (the purpose of a bill with a general purpose is not impermissibly amended if the amendment is germane to that general purpose); *Stroh Brewery*, 954 S.W.2d at 326 (Mo. 1997) (amendments do not change the original purpose of a bill if they are germane to the original purpose).

limited to the purpose of amending Rule 51.03 (particularly since the original bill did nothing to accomplish that purpose), it would violate Article V, section 5.

B. Deletion and Addition of Parties or Claims After Tort Reform

1. The Pre-Tort Reform Rules

Prior to the enactment of H.B. 393, venue in most cases—tort or contract—was party-dependent. Under former section 508.010, venue usually depended on the residence of the defendants and sometimes on the residence of the plaintiff.[523] Under section 508.040, venue depended on the location of defendants' offices or agents for transacting their usual and customary business.[524] Under section 355.176.4, venue often depended on the location of the non-profit corporation defendants' principal places of business or registered offices.[525] As a result, the courts needed to determine what nominal parties should be treated as real parties for venue purposes and what nominal parties should be disregarded. They also needed to determine how venue determinations would be affected by post-filing addition or removal of parties.

In a series of cases, the Missouri Supreme Court adopted a set of principles to resolve those issues. First, venue was tentatively determined based on the parties named in the original petition.[526] Second, a party named in the original petition would be disregarded for venue purposes if the court concluded that the party had been pretensively joined.[527] Third, unless a party had been pretensively joined, the fact that a party was subsequently removed from the case (either by plaintiff's voluntary decision to dismiss the party or by the court's action on a party's motion) did not affect venue.[528] Fourth, if a plaintiff amended his petition to add a party, the court was required to redetermine venue as if the case had just been filed.[529] Fifth, defendant's decision to file a third party petition had no effect on venue and venue of the third party petition was proper so long as venue over the plaintiff's petition was proper.[530]

While these principles were not universally praised, they were reasonably clearly understood.

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[523] *See supra* Part II.A.

[524] *See supra* Part II.B.

[525] *See supra* Part II.C.

[526] State *ex rel.* Doe Run Res. Corp. v. Neill, 128 S.W.3d 502, 505 (Mo. 2004).

[527] *See, e.g., id.* at 502 (Mo. 2004).

[528] *Id.*

[529] *Id.*

[530] State *ex rel.* Garrison Wagner Co. v. Schaaf, 528 S.W.2d 438, 442 (Mo. banc 1975) ("[I]n third-party practice it need not be shown that venue requirements have been independently complied with but that such may rest on venue properly shown in the original case."); State *ex rel.* Linthicum v. Calvin, 57 S.W.3d 855 (Mo. 2001) (same).

2. The Post-Tort Reform Rules

a. The Continued Importance of Parties for Venue Determination After Tort Reform

Enactment of H.B. 393 has, of course, diminished the extent to which venue is party-dependent since, in many cases, venue will depend on the place of first injury. Nonetheless, even under the post-tort reform regime, it will often still be crucial to determine who should be considered parties for venue purposes. For example, in non-tort actions, plaintiffs will still be able to bring actions in the county in which any defendant resides.[531] In tort actions in which the first injury occurs *outside* the state of Missouri, plaintiffs will now be able to bring suit in the county where any defendant's registered agent is located or where any individual defendant's principal place of residence is located.[532] In such actions, it will also be proper to bring the action in the county where any individual plaintiff's principal place of residence is located.[533] In all of these cases, since venue explicitly depends on facts about the parties, the decision to consider or disregard a nominal party can be decisive.

Even in tort cases in which the first injury occurs in Missouri, it will sometimes be important to determine who will be treated as parties for purposes of venue. For example, in medical malpractice suits, plaintiffs are considered to be injured only "in the county where the plaintiff first received treatment *by a defendant* for a medical condition at issue in the case."[534] If a plaintiff has been treated in several counties by several health care providers, the county of first injury will depend on which of those providers are treated as defendants and which will be disregarded.

b. The Text and Modest Effect of 508.012

Section 3 of H.B. 393[535] (now codified as Mo. Rev. Stat. § 508.012) cast serious doubt on a number of the pre-tort reform principles. It provides:

> Transfer of case based on addition or removal of a plaintiff or defendant prior to commencement of trial.
> 508.012. At any time prior to the commencement of a trial, if a plaintiff or defendant, including a third-party 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

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[531] MO. REV. STAT. § 508.010.2 (2005). Similarly, section 508.010.2(1) sometimes makes the residence of the plaintiff crucial, i.e., when the plaintiff seeks to bring the action in the county of residence on the basis that the defendants can be found (i.e., served) there.
[532] § 508.010.5. For a discussion of multiple-defendant cases, see *supra* Parts III.C.1-2.
[533] For a discussion of multiple-plaintiff cases, see *supra* Part III.C.3.
[534] § 538.232 (2005) (emphasis added).
[535] 2005 Mo. Laws 641, 649-55.

> application of any party transfer the case to a proper forum under section 476.410, RSMo.[536]

Contrary to the belief of many lawyers, section 508.012 makes relatively minor changes in the pre-tort reform principles and will not have the drastic effect some have feared. It will not mean that every dismissal of a defendant will require redetermination of venue. It will not mean that defendants can manipulate venue by filing a third party petition. It will not eliminate the need for the doctrine of pretensive joinder. Instead, section 508.012 leaves the pre-tort reform venue rules for considering or disregarding parties substantially intact and represents a modest reform rather than a radical one. The limited effect of section 3 is best understood in the context of a series of concrete situations in which parties are added to or removed from a case or in which claims against parties are ruled upon.

c. Removal of Defendants from the Petition

i. Removal of a Defendants Versus Judgment Dismissing All Claims Against a Defendant

To illustrate the first situation, suppose a plaintiff files a malpractice suit in Jackson County against two doctors alleging that the first doctor treated him in Jackson County and that the second doctor later treated him in Clay County. Under section 538.232,[537] venue would be proper only in Jackson County since that is the county in which plaintiff "first received treatment by a defendant for a medical condition at issue in the case." However, if the plaintiff elects to amend his petition to drop all claims against the first (Jackson County) doctor, it is clear that the court must redetermine venue. In the words of the statute, the Jackson County doctor has been "removed from [the] petition"; and, if he had not been named in "the initial petition," venue would not have been proper in Jackson County.[538]

On the other hand, suppose that the plaintiff pursues his claims against both doctors; however, after further discovery, the Jackson County doctor successfully moves for summary judgment on all the claims against him. Must the court transfer venue on the basis that the Jackson County doctor has been removed from the case and that, if he had not been included in the original petition, venue

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[536] MO. REV. STAT. § 508.012 (2005).

[537] § 538.232, which was added by 2005 Mo. Laws 641, 655, provides: "In any action against a health care provider for damages for personal injury or death arising out of the rendering of or the failure to render health care services, for purposes of determining venue under section 508.010, RSMo, the plaintiff shall be considered injured by the health care provider only in the county where the plaintiff first received treatment by a defendant for a medical condition at issue in the case."

[538] § 508.012. If plaintiff had only sued the Clay County doctor, the first treatment "*by a defendant* for a medical condition at issue in the case"—and thus the first injury—would have occurred in Clay County. § 538.232 (emphasis added).

would only have been proper in Clay County?[539] The text of the statute strongly indicates that such a transfer should not be granted.

Section 508.012 does not require that venue be redetermined unless a party has been "added [to] or removed from *a petition* filed in any court in the state of Missouri."[540] A "petition" is, of course, a written document filed by the plaintiff to commence the action.[541] Parties are only added to or removed from that document by filing an amended petition. The summary judgment dismissing all claims against the Jackson County doctor does not remove that doctor from the petition. He remains a named defendant unless the plaintiff elects to amend.[542] And this is not a new distinction nor is it a merely technical one.[543] Absent a certification under Rule 74.01(b), the summary judgment ruling is an interlocutory one that the trial court may revise, reconsider or set aside at any time until entry of a final judgment disposing of all issues and all remaining parties.[544] Moreover, the plaintiff can challenge the dismissal of that defendant by appealing once the entire case is resolved and a final judgment is entered.[545] The Jackson County doctor has not been removed from the case; he has—subject to reversal on appeal—won. He has not stopped being a defendant; he has simply become a prevailing defendant. The legislature could have provided that venue must be redetermined whenever all claims against a defendant were resolved in that defendant's favor. It did not do so, instead choosing to require such redetermination only if a defendant is removed "from the petition."

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[539] The determination of venue would change because, if the Jackson County doctor is not considered a defendant, plaintiff would have "first received treatment *by a defendant*" in Clay County. § 538.232 (emphasis added).

[540] § 508.012 (emphasis added).

[541] MO. SUP. CT. R. 55.01.

[542] An amendment dropping a named defendant can be a dangerous decision for a plaintiff since such an amendment may be deemed to have abandoned plaintiff's claims against the defendant. State *ex rel.* Bugg v. Roper, 179 S.W.3d 893 (Mo. 2005). *But see* Beckmann v. Miceli Homes, Inc., 45 S.W.3d 533 (Mo. Ct. App. 2001) (identifying a narrow exception to abandonment where an amended pleading follows a decision dismissing a particular defendant on a ground that is not correctible by amendment).

[543] In fact, the distinction has been recognized in Missouri law since at least 1886. In Chouteau v. Rowse, 2 S.W. 209, 210 (1886), the court explicitly distinguished between a voluntary non-suit by which a plaintiff "abandons his suit, and it is ended," and an involuntary non-suit which manifests plaintiff's intention "not to abandon the prosecution of the suit, but to further prosecute it by appeal."

[544] MO. SUP. CT. R. 74.01(b); Bolin v. Farmers Alliance Mut. Ins. Co., 549 S.W.2d 886, 889-90 (Mo. 1977) (summary judgment on all claims against one of two defendants was not final and could be set aside at any time prior to final judgment on all claims as to the other defendant) overruled on other grounds Magee v. Blue Ridge Prof'l Bldg., 821 S.W.2d 839, 842 (Mo. 1991); Horne v. Ebert, 108 S.W.3d 142, 145 (Mo. Ct. App. 2003).

[545] MO. SUP. CT. R. 74.01(b). Of course, if the trial court certifies the summary judgment decision as an appealable interlocutory judgment by making an "express determination that there is no just reason for delay," the plaintiff could appeal immediately. *Id.*

This textual argument is sufficient standing alone, but it is reinforced by the policy behind section 508.012.[546] That section appears to have been inspired by a desire to reduce plaintiffs' ability to finesse venue restrictions by the temporary addition of essentially nominal parties. As to frivolous claims, that ability was already limited by the doctrine of pretensive joinder (a doctrine which, as discussed below, has continued viability and increased scope in the post-tort reform era).[547] Section 508.012 tightened those limitations by requiring trial courts to disregard even non-frivolous claims against defendants if the plaintiff does not pursue those claims at trial.[548] This anti-manipulation policy is not implicated when plaintiffs unflaggingly pursue non-frivolous claims against a defendant—even if those claims are ultimately rejected by the trial court.

A line of federal cases creates a similar distinction between the voluntary decision to amend the petition to remove a defendant and the involuntary dismissal of plaintiff's claims against that defendant. Suits filed in state court cannot be removed to federal court based on diversity if even one defendant is not diverse, i.e., is a citizen of the same state as any plaintiff.[549] But does such a case become removable if the non-diverse defendants are subsequently dismissed from the case? In answering that question, the federal courts have made the same voluntary-involuntary distinction dictated by section 508.012.[550] If the plaintiff voluntarily discontinues his claims against the non-diverse defendant, the suit becomes removable since the non-diverse defendant has been taken wholly out of the case.[551] On the other hand, if the claims against the non-diverse defendant are dismissed by the court without the acquiescence of the plaintiff, the suit does not become removable since the dismissed defendant is still a party to the case for purposes of appeal.[552]

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[546] As discussed *infra*, notes 549-52, it is also supported by a striking analogy to cases under federal law.

[547] *See supra* IV.B.2.e-f.

[548] For example, it eliminates the incentive for a plaintiff to join uncollectible employees of an employer-defendant, fully intending from the beginning to drop them before trial in order avoid the risk that the jury might award a smaller verdict out of sympathy for the employees or, even worse from the plaintiff's standpoint, might award a verdict only against the uncollectible employees.

[549] 28 U.S.C. § 1441(a) provides that removal is only proper if the federal courts would have had jurisdiction if the case had originally been filed in federal court. Under the rule of Strawbridge v. Curtiss, 7 U.S. 267 (1806), complete diversity is required. There are, of course, additional requirements; for example, there must be a sufficient amount in controversy and no defendant can be a citizen of the forum state.

[550] *See generally*, Weems v. Louis Dreyfus Corp., 380 F.2d 545 (5th Cir. 1967); Johnson v. Snapper Division of Fuqua Industries, Inc., 825 F. Supp. 127 (E.D. Tex. 1993).

[551] Am. Car & Foundry Co. v. Kettelhake, 236 U.S. 311, 316 (1915) (case removable due to dismissal of non-diverse defendants only if "the discontinuance as to such defendants was voluntary on the part of the plaintiff, and that such action has taken the [non-diverse] defendants out of the case, so as to leave a controversy wholly between the plaintiff and the [diverse] defendant").

[552] *Am. Car & Foundry*, 236 U.S. at 317 (grant of demurrers to the evidence as to all claims against non-diverse defendants does not make case removable by remaining diverse defendants); Whitcomb v. Smithson, 175 U.S. 635, 638 (1901) (directed verdict in favor of non-diverse

ii. Removal of a Defendant Versus Voluntary Non-Suits Under Rule 67.02

A plaintiff who does not wish to pursue a particular defendant at trial can, under Rule 67.02(a)(1), file a voluntary non-suit against that defendant prior to the swearing of the jury for voir dire.[553] Doing so is the effective equivalent of an amendment deleting all claims against the defendant: it fully removes the defendant from the *case* since the court has no authority to reconsider or set aside such a dismissal[554] and the plaintiff cannot appeal since he or she is not aggrieved by any action of the trial court.[555] However, unless the plaintiff elects to amend the petition, one could argue that the voluntary non-suit would not, in a literal sense, remove the defendant *from the petition,* and thus should not lead to redetermination of venue.

However, this argument should be rejected. The cardinal rule of statutory interpretation is *not* to read the statute literally but rather "to ascertain the *intent* of the legislature from the language used, to give effect to that *intent* if possible, and to consider the words in their plain and ordinary meaning."[556] Reading the statute to ignore voluntary non-suits would permit precisely the sort of manipulation that section 508.012 was intended to forbid. It would frustrate, rather than effectuate, the manifest intent of the General Assembly, and would represent the sort of "hyper-technical" interpretation that the Supreme Court has cautioned courts to avoid.[557] It is neither logical nor reasonable[558] to infer that the General Assembly intended to permit plaintiffs to accomplish through voluntary non-suits exactly what it forbade them to accomplish through amendments.

Instead, the court should construe the phrase "removed from the petition" to include any voluntary action by the plaintiff that effectively and fully removes the defendant from the case. Such an interpretation effectuates the purpose of section 508.012 (to reduce venue manipulation) and avoids turning a significant

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defendants does not make case removable by remaining diverse defendants); S. Ry. Co. v. Lloyd, 239 U.S. 496, 501 (order granting involuntary non-suit at the close of plaintiffs' case as to non-diverse defendant does not make case removable) (alternative holding).

[553] MO. SUP. CT. R. 67.02(a)(1).

[554] In re Klaas, 8 S.W.3d 906, 909 (Mo. Ct. App. 2000) (Once a voluntary non-suit is filed, the "trial court may take no further action as to the dismissed action and any step attempted is a nullity").

[555] State *ex rel.* Moore v. Sharp, 151 S.W.3d 104, 107 (Mo. Ct. App. 2004); P.R. v. R.S., 950 S.W.2d 255 (Mo. Ct. App. 1997). Chouteau v. Rowse, 2 S.W. 209 (Mo. 1886).

[556] *In re* Boland, 155 S.W.3d 65 (Mo. 2005) (emphasis added); Landman v. Ice Cream Specialties, Inc., 107 S.W.3d 240 (Mo. 2003), overruled on other grounds, Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo. 2003). *See also* Chouteau, 2 S.W. 209 (pointing out that the maxim ita lex scripta est is subordinate to the maxim qui haeret in litera, haeret in cortice).

[557] *Landman*, 107 S.W.3d at 251 ("construction of statutes is not to be hyper-technical").

[558] *Id.* (statutes should be interpreted in a manner that is "reasonable and logical"); Laclede Gas Co. v. City of St. Louis, 253 S.W.2d 832 (Mo. 1953) ("The law favors constructions which harmonize with reason, and which tend to avoid unjust, absurd, unreasonable or confiscatory results."); Md. Cas. Co. v. Gen. Elec. Co., 418 S.W.2d 115 (Mo. 1967) ("The law favors a construction of a statute which avoids unjust or unreasonable results").

part of the section into an effective nullity.[559] It is also supported by the equitable maxim that "equity regards that as done which should have been done."[560] By voluntarily dismissing all claims against a particular defendant, plaintiffs transform the litigation's structure to one that is identical to what would exist if they had amended to delete those claims. They should, in good conscience, amend their pleadings to conform to their actual claims.[561] If they fail to do so, courts may use their equitable powers to treat amendments that "should have been [filed]" as if they had been filed.[562]

If the court declines to interpret section 3 itself as automatically requiring venue redetermination as the result of voluntary non-suits, trial courts have ample authority to take steps that carry out the intent of section 508.012. Under Rule 55.27(e), the trial court has authority, at any time on its own motion, "to order stricken from any pleading any . . . redundant, immaterial, impertinent, or scandalous matter."[563] Once plaintiff has voluntarily dismissed all claims against a person, portions of the petition that designate that person as a defendant and pray for relief against him are both immaterial and impertinent as those terms are used in the rule: they "do not pertain, and are not necessary, to the issues in question."[564] To accomplish the General Assembly's intended result, trial courts should exercise their Rule 55.27(e) authority to strike the claims against such voluntarily dismissed former defendants.[565]

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[559] *See* cases cited *supra* note 144.

This interpretation is also suggested by section 3's requirement that venue be redetermined only if the removal of the defendant is "before the commencement of trial." While the cutoff point is not stated with precision, it roughly corresponds to the deadline for filing a voluntary non-suit as a matter of right under Rule 67.02(a). (Voluntary non-suits may be filed as of right "(1) Prior to the swearing of the jury panel for voir dire examination, or (2) In cases tried without a jury, prior to the introduction of evidence." MO. SUP. CT. R. 67.02(a)).

[560] St. Louis Union Trust Co. v. Fitch, 190 S.W.2d 215, 218 (Mo. 1945); Capitol Life Ins. Co. v. Porter, 719 S.W.2d 908, 910 (Mo. Ct. App. 1986).

[561] Compare MO. SUP. CT. R. 55.03(b) (forbidding "maintaining a claim . . . in a pleading" if that claim is no longer warranted) (emphasis added).

[562] *See* Eisler v. Stritzler, 535 F.2d 148 (1st Cir. 1976) (treating complaint as amended without requiring actual amendment since such a requirement would be merely a formality).

[563] MO. SUP. CT. R. 55.27(e).

[564] 5C CHARLES WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE & PROCEDURE § 1382 (3d ed. 2004) (interpreting Fed. R. Civ. P. 12(f), the federal analog to Rule 55.27(e)) [next to note 52].

This does not mean that all allegations regarding the dismissed defendant's conduct must be stricken. Those allegations (e.g., allegations that an employee—even if now dropped as a defendant—committed certain negligent acts) may remain material. However, the reference to that individual as a defendant and the assertion of claims against him become immaterial and impertinent as soon as the claims against him have been voluntarily dismissed.

[565] The same result could be reached under Rule 62.01, which gives trial courts the authority to hold pre-trial conferences to consider, among other things, the "necessity or desirability of amendments to the pleadings." However, it is not entirely clear that Rule 62.01, standing alone, gives the trial court the authority to order a plaintiff to amend the petition to delete claims against voluntarily dismissed defendants.

Alternatively, the Supreme Court could exercise its rule making authority to explicitly resolve the voluntary non-suit anomaly.[566] This could be accomplished by adding something similar to the following subsection to Rule 67.02:

> (e) If, under Rule 67.02(a) or (b), a plaintiff voluntarily dismisses all claims against one or more (but not all) defendants, the plaintiff shall amend the petition to remove the dismissed defendants from the petition. If the plaintiff fails to do so within __ days, the court shall strike from the petition all claims against the dismissed defendants. If, under Rule 67.02(a) or (b), a plaintiff voluntarily dismisses all claims against all defendants, any remaining plaintiffs shall amend the petition to remove the dismissed plaintiff from the petition. If the remaining plaintiffs fail to do so within __ days, the court shall strike from the petition all claims by the dismissed plaintiff.

d. Adding Parties, Strategically Delayed Joinder, and the Problem of Third Party Defendants

i. Addition of Defendants Under Rules 52.04 or 52.05

Section 508.012 requires redetermination of venue not only when a party is removed from the petition but also when one is added to it. In doing so, it simply codifies existing case law on strategically delayed joinder. Under *State* ex rel. *Linthicum v. Calvin*,[567] the Missouri Supreme Court had already held that, whenever plaintiff amended to add an additional defendant, the case would be deemed to be "brought" anew against that defendant and venue would need to be reevaluated.[568] Section 508.012's new "added [to] a petition" language explicitly codifies the requirement that venue be redetermined in the typical situation in which a plaintiff voluntarily amends to join an additional defendant under Rule 52.05. Similarly, it should apply when a plaintiff or defendant is joined after a compulsory joinder motion under Rule 52.04. When an absent party is found to be indispensable and joinder is feasible, the petition is amended to add the indispensable party.[569] Thus, such a party is, in the language of section 508.012, "added [to the] petition" and that addition triggers the need for venue redetermination.

This conclusion is fully consistent with the purpose of the statute since it destroys the incentive for strategically delayed joinder. If joinder under Rule 52.05 did not trigger redetermination, a plaintiff could obtain a preferred venue

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[566] MO. CONST. art. V § 5

[567] 57 S.W.3d 855 (Mo. 2001).

[568] State *ex rel.* Linthicum v. Calvin, 57 S.W.3d 855, 857-58 (Mo. 2001).

[569] Crumbaker v. Zadow, 151 S.W.3d 94 (Mo. Ct. App. 2004) (abuse of discretion to refuse plaintiff leave to amend to add a party after court determines that the party is indispensable under Rule 52.04); Schmitz v. Taylor-Morley-Simon, Inc., 708 S.W.2d 786 (Mo. Ct. App. 1986) ("If [an outsider] is indispensable, then leave should be granted to amend the petition and add [the outsider] as a party.").

by simply filing suit without naming a particular defendant and then joining that defendant by filing an amendment as a matter of right under Rule 55.33(a). If subsequent joinder of indispensable parties did not trigger redetermination, plaintiffs would have an incentive to fail to join such parties, expecting that the named defendants (or the court on its own motion) would require their subsequent joinder.[570]

ii. Addition of Third Party Defendants Under Rule 52.11

The effect of a defendant's impleading of a third-party defendant is more complicated. While pre-tort reform case law disregarded third-party defendants when determining venue,[571] Section 508.012 explicitly mentions third-party defendants and clearly contemplates that, in some situations, the existence of a third-party defendant will have an effect on venue. However, both the text of the rule and its purpose show that *defendant's* decision to implead a third-party defendant does not, by itself, require such a re-evaluation. Instead, it is only if a plaintiff subsequently amends the petition to assert a claim *by the plaintiff* against the third-party defendant that a venue redetermination is required.

To see why this is the case, it is first necessary to review the language of section 508.012 carefully. That section requires redetermination if, prior to trial, "a plaintiff or defendant, including a third-party plaintiff or defendant, is either added [to] or removed from a petition . . . which would have, if originally added [to] or removed [from] the initial petition altered the determination of venue."[572]

But defendant's decision to file a third-party petition against a third-party defendant does not add anyone *to the petition*. In Missouri, a petition and a third-party petition are distinct and different pleadings.[573] A petition is the pleading

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[570] This alternative would not be without risk since failure to join an indispensable party is a jurisdictional issue that can be raised even on appeal and thus could lead an appellate court to vacate a favorable verdict. However, that risk is minimal since, plaintiffs could always amend to add the indispensable party if no defendant moved to require them to do so.

[571] Linthicum, 57 S.W.3d 855 (Mo. 2001) ("[I]n third-party practice it need not be shown that venue requirements have been independently complied with but that such may rest on venue properly shown in the original case.") (quoting State *ex rel.* Garrison Wagner Co. v. Schaaf, 528 S.W.2d 438, 442 (Mo. 1975)); Schaaf, 528 S.W.2d at 442 (Mo. 1975) (same).

[572] Section 3's discussion of addition or removal of third-party *plaintiffs* is baffling. Since third-party plaintiffs are necessarily already defending parties in the case, the author is unaware of any situation in which third-party plaintiffs could be added to the petition: they are already in it. Similarly, since a third-party plaintiff is already a defendant, removing a third-party plaintiff necessarily removes a defendant which would, by itself, require redetermination of venue. It appears that the mention of third-party plaintiffs must have been inserted in error or in an abundance of caution. Despite the rule against surplusage, not every legislative word can be given meaning.

[573] MO. SUP. CT. R. 55.01. The rules and official forms ordinarily use the phrase "third-party petition."—*See, e.g.*, MO. SUP. CT. R. 55.01, 52.11(a) (second paragraph), 85, Official Form. — There is, however, a single reference to a third-party petition as a petition simpliciter (MO. SUP. CT. R. 52.11(a) (first paragraph).

filed by the plaintiff to commence a civil action,[574] while a third-party petition is a pleading filed by a defending party in an existing case to assert a derivative claim[575] against someone not already a party in that case.[576] The filing of a third-party petition does not add the third-party defendant to the petition; it asserts a related but independent claim by the defendant/third-party plaintiff against the third party defendant. It does so in a separate document. The petition remains unchanged and no amendment of the petition is required.

In addition, section 508.012 requires redetermination of venue only if the new party is one who "would have, if originally added . . . to the initial petition altered determination of venue." This language makes it clear that redetermination is not required if the new party is one who *could* not have been joined as a defendant in the initial petition. However, the plaintiff could not have added the third-party defendant as a defendant in the initial petition unless plaintiff asserts "a claim upon which relief [could] be granted" against the third-party defendant.[577] If plaintiff asserts *no* claim at all against a particular party, plaintiff necessarily is not asserting a claim upon which relief could be granted. Moreover, even if the plaintiff had named the third-party defendant as a defendant in the initial petition, doing so would not have "altered the determination of venue." Under the doctrine of pretensive joinder, the trial court must disregard the naming of a defendant unless the plaintiff makes a non-frivolous argument that the allegations against that defendant state a cause of action.[578] If plaintiff is making no claim against the third-party defendant, joinder of him or her in the petition would be pretensive and would not "alter[] the determination of venue."

Thus, the mere filing of a third-party petition does not, by itself, add a defendant to the petition. This interpretation would be troublesome if it rendered the phrase "including a third-party . . . defendant" meaningless, but it does not do so. There is an important situation in which a third-party defendant *is* added to the petition and in which that addition would have altered the determination of venue: whenever the original plaintiff amends the initial petition to assert plaintiff's *own* claims against the third-party defendant.[579]

This interpretation of section 3 is dictated by the text of the section: when a plaintiff amends to add a claim against a third-party defendant, that party is literally "added [to the] petition." It also implements the section's goal of reducing plaintiffs' ability to manipulate venue rules. A plaintiff is not manipulating venue when he sues the only defendant against whom he has a claim. However, the anti-manipulation purpose would be defeated if a plaintiff

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[574] MO. SUP. CT. R. 53.01.

[575] A derivative claim is a claim that the third-party defendant "is or may be liable to the defending party for all or part of the plaintiff's claim against the defending party."

[576] MO. SUP. CT. R. 52.11(a).

[577] MO. SUP. CT. R. 55.27(a)(6).

[578] State *ex rel.* Malone v. Mummert, 889 S.W.2d 822, 824 (Mo. 1994).

[579] Such claims are authorized by Rule 52.11(a) which provides "[t]he plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff [i.e., the original defendant]."

could circumvent venue restrictions simply by suing selected defendants, waiting for those defendants to implead parties whose initial joinder would have defeated venue, and then amending to assert claim against the impleaded parties.[580]

The United States Supreme Court has reached a strikingly parallel set of conclusions in dealing with diversity jurisdiction.[581] Federal courts have diversity jurisdiction only if no defendant is a citizen of the same state as any plaintiff.[582] At the same time, a defendant's decision to implead a non-diverse third-party defendant is not deemed to destroy diversity.[583] However, in *Owen Equipment & Erection Co. v. Kroger*,[584] the Supreme Court rejected a tactic for manipulation of diversity jurisdiction that bears a striking resemblance to the type of party manipulation against which 508.012 is directed. Ms. Kroger sued a diverse defendant and that defendant impleaded Owen Equipment, a corporation that— like Ms. Kroger—was a citizen of Iowa.[585] Ms. Kroger then amended her complaint to assert a claim against the non-diverse third-party defendant, Owen Equipment.[586] The Court held that there was no jurisdiction over the original plaintiff's claim against the non-diverse third-party defendant stating that a plaintiff should not be permitted to "defeat the statutory requirement of complete diversity by the simple expedient of suing only those defendants who were of diverse citizenship and waiting for them to implead nondiverse defendants."[587] Thus, in determining the existence of diversity, the federal courts have adopted the exact position that the language of 508.012 dictates for determining the existence of venue: they ignore defendant's mere impleading of a third-party defendant but give full weight to a plaintiff's subsequent amendment asserting a claim against that third-party defendant.

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[580] Compare Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978) (holding that plaintiffs could not circumvent the complete diversity rule by initially suing only diverse defendants and then amending to assert claims against non-diverse third-party defendants).

[581] These conclusions have now been codified in the supplemental jurisdiction statute. 28 U.S.C. § 1367 (2004).

[582] 28 U.S.C. § 1332 (2004); Strawbridge v. Curtis, 7 U.S. 267 (1806). There are, of course, several narrow statutory exceptions to this complete diversity rule. *See, e.g.,* Class Action Fairness Act, H.R. 525, 109th Cong. (2005).

[583] *See, e.g.,* H. L. Peterson Co. v. Applewhite, 383 F.2d 430, 433 (5th Cir., 1967); Dery v. Wyer, 265 F.2d 804 (2d Cir. 1959). This result is now codified in 28 U.S.C. § 1367 (2004).

[584] 437 U.S. 365 (1978).

[585] Owen Equipment, 437 U.S. at 367-69. Owen Equipment's Iowa citizenship did not become apparent until trial.

[586] *Id.* at 368.

[587] *Id.* at 374. This result has been codified in 28 U.S.C. § 1367(b) which forbids exercising supplemental jurisdiction over claims by a plaintiff against a non-diverse third party defendant.

e. Pretensive Joinder and Strategically Delayed Joinder of Parties After Tort Reform.

i. Pretensive Joinder of Parties After Tort Reform

In the pre-tort reform regime, there was a well developed body of law dealing with pretensive joinder and strategically delayed joinder of parties. Under the pretensive joinder doctrine, a trial court determined venue without considering any defendants who it found to have been "pretensively joined." A defendant was treated as pretensively joined in two situations: First, joinder of a defendant was considered pretensive if the allegations of the petition failed to "state a claim under existing law or under a non-frivolous argument for the extension, modification or reversal of existing law, or under a non-frivolous argument for the establishment of new law" against that defendant.[588] Second, even if the allegations stated a cause of action, joinder was considered pretensive if the record demonstrated that, based on information available to the plaintiff at the time the petition was filed, plaintiff could not have reasonably believed that the allegations could be proved.[589] "Both tests are objective, requiring that the plaintiff have a realistic belief under the law and evidence that a valid claim exists."[590]

The adoption of 508.012 has reduced, but not eliminated, the usefulness of the pretensive joinder doctrine. Whenever a plaintiff amends a petition to remove a party, the court no longer needs to ask whether joinder of that party was pretensive. However, as previously discussed,[591] section 508.012 does not require venue redetermination, even if all claims against a defendant are dismissed, unless the plaintiff amends to remove that defendant from the petition. As a result, pretensive joinder doctrine could continue to perform an important function: distinguishing between claims that were merely unsuccessful and those that were so frivolous that they should be disregarded for venue purposes.[592] When a defendant prevails on a motion to dismiss or a motion for summary judgment, the court on motion to transfer by the remaining defendants, would

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[588] State *ex rel.* Doe Run Res. Corp. v. Neill, 128 S.W.3d 502, 505 (Mo. 2004). As the court emphasized in State *ex rel.* Malone v. Mummert, 889 S.W.2d 822, 826 (Mo. 1994), the court does not need to "determine whether the duty the plaintiffs seek to impose against the joined defendants actually exists as a matter of substantive law. It is enough for purposes of venue discussion that they have a reasonable belief that under existing law, non-frivolous arguments for the extension, modification or reversal of existing law, or non-frivolous arguments for the establishment of new law, that such a duty exists or should exist."

[589] *Doe Run*, 128 S.W.3d at 505-06.

[590] *Id.* at 504.

[591] *See supra* Part IV.B.2.c.

[592] As the court in *Doe Run* explicitly recognized, the standard for determining whether a petition states a claim for venue purposes "is less stringent than [the standard] for granting a motion for summary judgment or sustaining a motion to dismiss on the merits." 128 S.W.3d at 505. *See* also *id.* at 505-06 (the fact that a defendant may prevail on summary judgment does not mean that the joinder of that defendant was pretensive).

need to determine whether the claims against the dismissed defendants were, at the time of filing, so lacking in merit that the plaintiff could not have had a "realistic belief under the law and evidence that a valid claim exist[ed]."[593]

There is, however, a plausible argument that the doctrine of pretensive joinder has not survived the enactment of the 2005 Tort Reform Act. That act was a comprehensive revision of the Missouri venue statutes. As part of that revision, section 508.012 specifically identified the situations in which the trial court should redetermine venue[594] yet omitted any provision authorizing them to do so based upon a finding of pretensive joinder. Under the long recognized doctrine of *expressio unius est exclusio alterius*,[595] ("the expression of one thing is the exclusion of another"[596]) this omission strongly suggests that 508.012 was intended to supersede and replace the pretensive joinder doctrine.[597]

Although this argument is plausible, it should not be accepted, *expressio unius* is merely one of many maxims used to accomplish the overriding goal of determining the legislature's intent.[598] It must be applied with caution[599] and "'is sometimes followed and sometimes held inapplicable, depending on the facts.'"[600] It is an argument from silence and such arguments only begin the inquiry into the legislature's intent rather than ending it.[601]

Viewing the Tort Reform Act as a whole in light of its history, it is apparent that the General Assembly intended to make it harder—not easier—for plaintiffs to manipulate venue. The new venue provisions repeatedly and consistently restrict the options available to plaintiffs.[602] Not only does the Act make it easier

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[593] *Id.* at 504.

[594] *See supra* Part IV.B.2.c.i.

[595] The Missouri Supreme Court recognized *expressiou unius* as far back as 1841. Wimer v. Brotherton, 7 Mo. 264 (1841).

[596] State v. Campbell, 26 S.W.3d 249 (Mo. Ct. App. 2000).

[597] The failure to codify the pretensive joinder doctrine may seem particularly persuasive in light of the General Assembly's evident (and presumed) awareness of that doctrine. Greenbriar Hills Country Club v. Dir. of Revenue, 47 S.W.3d 346, 352 (Mo. 2001) (expressio unius canon is particularly strong where the legislature is aware of the pre-existing law).

[598] Reorganized Sch. Dist. No. R-8 of Lafayette County v. Robertson, 262 S.W.2d 847, 850-51 (Mo. 1953).

[599] *Id.*; State *ex rel.* Birk v. City of Jackson, 907 S.W.2d 181, 185 (Mo. Ct. App. 1995); Pippins v. City of St. Louis, 823 S.W.2d 131, 133 (Mo. Ct. App. 1992).

[600] Robertson, 262 S.W.2d at 850 (quoting State *ex rel.* Fawkes v. Bland, 210 S.W.2d 31, 33-34 (Mo. 1948).

[601] State *ex rel.* Rowland Group v. Koehr, 831 S.W.2d 930, 931 (Mo. 1992).

[602] *See, e.g.,* MO. REV. STAT. § 508.010.1 (2005) (defining new term "principle place of residence" as limited to single location to replace the multiple residences existing under pre-existing law); § 508.010(4) (restricting tort plaintiffs suffering in-state injuries to a single venue rather than the multiple venues often available under pre-existing law); § 508.010(5) (restricting tort plaintiffs suffering out-state injuries to two venues rather than the multiple venues often available under pre-existing law); § 508.010(4)-(5) (providing that restrictive tort venue rules would prevail over often more liberal provisions of other laws); § 508.010(10) providing that motions to transfer would be deemed granted if not denied within 90 days).. *See* also 2005 Mo. Laws 641, 642, 656 (repealing former section 508.040 that provided multiple venue options for suits in which at least one

for defendants to challenge plaintiffs' venue choices, it also makes it more likely that they will prevail on those challenges.[603] In light of these provisions and the well-known history of the Tort Reform Act's enactment, it is simply inconceivable that the General Assembly intended to eliminate the well established doctrine that precluded the most egregious form of venue manipulation—the filing of objectively frivolous claims against defendants who are not even arguably liable.[604] To conclude that the *expressio unius* compels such a result would be to ignore the Missouri Supreme Court's almost one-hundred-year old warning that the maxim must be used solely as a tool to determine the legislature's intent and never as "a Procrustean standard to which all statutory language must be made to conform."[605]

A more difficult question is whether the Supreme Court should modify the pretensive joinder doctrine to permit trial courts to consider post-filing developments. To illustrate the question, consider two situations in which the initial joinder of a party is not pretensive under current doctrine. In the first, plaintiff joins a defendant based on a legal theory that is a non-frivolous argument for extension of existing law. However, before the case goes to trial, the Missouri Supreme Court issues an opinion in a separate case that conclusively rejects plaintiff's legal argument.[606] In the second situation, plaintiff joins a defendant based on factual allegations that the plaintiff reasonably expects, in light of the information then available, will be supported by the testimony of a particular witness. However, before the case goes to trial, it becomes quite clear that neither the witness nor any other evidence will support the crucial allegations.

In both situations, the joined defendant could successfully move for summary judgment. Moreover, given the presumed clarity of the changed situation, plaintiffs' lawyers could not, without violating Rule 55.03(b), sign a brief in opposition to such a motion.[607] However, under the current pretensive joinder doctrine, venue would not be reevaluated in either case since pretensive

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defendant was a corporation); 2005 Mo. Laws 641, 642, 656 (repealing former section 508.070 that provided multiple venues for suits against regulated motor carriers).

[603] MO. REV. STAT. § 508.010(10) (2005) (providing that motions to transfer would be deemed granted if not denied within 90 days).

[604] *See, e.g.*, Tenney v. Brandhove, 341 U.S. 367, 376 (Court will not lightly assume that Congress abrogated longstanding legal doctrine that is "well grounded in history and reason.").

[605] State *ex rel.* O'Bannon v. Cole, 119 S.W. 424, 429 (Mo. 1909) (quoting HENRY CAMPBELL BLACK,. HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS 146 (1896)). *See also* Six Flags Theme Parks, Inc. v. Dir. of Revenue, 179 S.W.3d 266, 273 n.4 (Mo. 2005) (maxim to be used solely as guide to legislative intent); Springfield City Water Co. v. City of Springfield, 182 S.W.2d 613, 618 (Mo. 1944) (maxim merely an aid to determining lawmakers' intent and should not be permitted to thwart that intent). Procrustes was a mythical Greek giant who would adjust travelers' height to fit his guest bed by stretching them on the rack or by cutting off their legs.

[606] A parallel, less common but more striking situation is one in which plaintiff's claim is fully supported by an existing Missouri Supreme Court case; but, before trial, the Missouri Supreme Court overrules that case.

[607] As discussed below, on service of a proper motion under Rule 55.03, plaintiffs' lawyers could be sanctioned for failing to withdraw or otherwise correct the allegations.

joinder would be determined based on the legal and factual information reasonably available to the plaintiff at the time of filing.[608] Even though neither plaintiff could *continue* to have a "realistic belief under the law and evidence that a valid claim exists,"[609] each did have such a belief at the time of filing. As a result, the existing pretensive joinder doctrine would not require venue redetermination; and, unless plaintiff amended to remove the defendant, neither would section 508.012.

This result made logical sense so long as the applicable law dictated that venue was to be determined based on the parties at the time the suit was "commenced." But section 508.012 now suggests that determination of venue should not be so limited. The same policy reasons that caused the courts to refuse to permit plaintiffs "to engage in the pretense of joining defendants for the sole purpose of obtaining venue,"[610] should also prevent them from engaging in the pretense of *continuing to maintain* an action against defendants for that purpose.

This is particularly true in light of the 1993 amendments to Rule 55.03.[611] Under Rule 55.03, attorneys are deemed to make representations to the court that closely parallel the two parts of the pretensive joinder test: that factual allegations "have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery"[612] and that claims and other legal contentions "are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law."[613] Under the 1993 amendments to Rule 55.03, attorneys are no longer deemed to make these representations only when they sign a pleading; they are also deemed to make them when they "present or *maintain*" the pleading.[614] The addition of the word

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[608]The first plaintiff has performed "a reasonable legal inquiry under the circumstances" which led to the conclusion that his theory was supported by "existing law or a non-frivolous argument for extension . . . of existing law." State *ex rel.* Doe Run Res. Corp. v. Neill, 128 S.W.3d 502, 506 (Mo. 2004) (emphasis added). The second plaintiff had a reasonable belief that the allegations would be proved based on "the information available at the time the petition was filed." *Id.* at 506 (emphasis added).

[609] *Id.*

[610] State *ex rel.* Malone v. Mummert, 889 S.W.2d 822, 824 (Mo. 1994).

[611] The two tests for pretensive joinder closely parallel the requirements of that rule. *See id.* at 825 (Mo. 1994) (citing MO. SUP. CT. R. 55.03(b) as parallel to the first branch of the pretensive joinder test).

[612] MO. SUP. CT. R. 55.03(b)(3). Compare *Doe Run*, 128 S.W.3d at 506 (pleading pretensive if "the information available at the time the petition was filed would not support a reasonable legal opinion that a case could be made against the [joined] defendant").

[613] MO. SUP. CT. R. 55.03(b)(2). *See* Malone, 889 S.W.2d at 825 (explicitly recognizing the parallel between Rule 55.03(b) and the pretensive joinder test).

The attorneys are also deemed to have certified that they have conducted "a reasonable inquiry under the circumstances," Rule 55.03(b)—a requirement that closely parallels the pretensive joinder's requirement of "reasonable legal inquiry under the circumstances." *Doe Run*, 128 S.W.3d at 504.

"maintain" was intended to make it clear that parties have an ongoing responsibility to re-evaluate the viability of their pleadings based on post-filing developments and "an obligation to withdraw from positions when they are no longer tenable."[615] This obligation is given teeth by the 1993 amendments to Rule 55.03(c)(1)(A) which provide that, within thirty days after service of a motion identifying the lack of legal or factual support for the claims against a particular defendant, the plaintiff must "withdraw[] or otherwise appropriately correct[]" those claims or else be liable for sanctions.[616]

Thus, Rule 55.03 requires "withdrawal or correction of claims" against a defendant if those claims, although not pretensive when filed, no longer have sufficient legal or factual basis to create a "realistic belief under the law and evidence that a valid claim exists."[617] If the plaintiff complies with the rule by amending the petition to remove the defendant, section 508.012 will require venue redetermination without reference to the pretensive joinder doctrine. However, if the plaintiff fails to do so,[618] the courts should not reward that failure by giving plaintiff access to an otherwise unavailable venue. This could be done through an expansion of the pretensive joinder doctrine to require consideration of post-filing developments, or through construing Rule 55.03(c)(2) as authorizing the trial court either to strike the claims against the defendant or to order the plaintiff to amend the petition to remove those claims from the petition.

ii. Tactically Delayed Joinder of Parties

As previously discussed, the Missouri Supreme Court had essentially resolved the treatment of tactically delayed joinder of parties even prior to tort reform. Whenever a plaintiff amended his petition to add a new defendant, the case was deemed to have been "brought" anew and venue was redetermined.[619] Section 3 has codified that ruling and there appears to be no need for any judicially crafted additional doctrine.

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[615] 15 MICHAEL MURRAY, MISSOURI PRACTICE: CIVIL RULES PRACTICE 334 (3d ed. 2005).

[616] MO. SUP. CT. R. 55.03(c)(1)(A).

[617] *Doe Run*, 128 S.W.3d at 504.

[618] Failure to amend the petition may not always be a sign of bad faith or intransigence. While amending the petition to remove the defendant is the most obvious method of "withdrawing or correcting" a claim, it may not be the only method. For example, an attorney who believes (contrary to the trial court's view) that claims against a particular defendant are warranted by a non-frivolous argument for change of existing law, might pledge not to assert the claim further at the trial level yet decline to amend the petition in order to preserve his client's right to appeal.

[619] State *ex rel.* Linthicum v. Calvin, 57 S.W.3d 855, 858 (Mo. 2001).

f. The New Frontier: Pretensive Joinder of Claims and Strategically Delayed Joinder of Claims after Tort Reform

i. Pretensive Joinder of Claims

Prior to tort reform, venue was almost entirely party dependent. While there were rare situations in which venue could be affected by the nature of the claims asserted by plaintiff, the broad range of options available to plaintiffs prevented those situations from posing significant problems.[620] As a result, Missouri courts have not had any need to determine whether to adopt principles to deal with pretensive joinder of claims or with the related problem of strategically delayed joinder of claims.

All this will change under the post-tort reform venue rules. For example, venue over a pure contract case against a corporation is now proper only in the county containing the corporation's registered agent[621]—presumably a location selected at least in part because the corporation's legal department considered it to be friendly venue. A plaintiff who suffered injury from the breach of contract in what he perceives to be a more plaintiff-friendly county will have an incentive to develop and plead a legitimate tort count to obtain the advantage of the more favorable venue.[622] A few plaintiffs may be tempted to plead frivolous tort counts; and, even if they do not do so, a few defendants may be tempted to argue that legitimate tort counts are frivolous. Similarly, a plaintiff injured by a tort in what he perceives as an unfavorable venue will have an incentive to add allegations of earlier wrongful acts that injured him in a more favorable county.[623] The questions raised by this type of pleading—which might be called questions of pretensive joinder of claims[624]—are simply not resolved by section

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[620] Under pre-tort reform law, if venue was proper for one count against a defendant, it would be treated as equally proper for any other properly joined claim against that defendant. *See* State *ex rel.* Riordan v. Dierker, 956 S.W.2d 258 (Mo. 1997); State *ex rel.* McClain v. Heckemeyer, 741 S.W.2d 734, 737 (Mo. Ct. App. 1987). This will no longer be a tenable position in tort cases, since the new tort venue provisions apply if "any count" alleges a tort. As a result, the fact that a venue would be proper for a contract count will be irrelevant if a tort count is also alleged.

[621] Under section 508.010.2, non-tort actions can only be brought in the county where a defendant resides. Corporations are deemed to reside in the county where their registered office is located. MO. REV. STAT. § 351.375.2 (2005).

[622] Under sections 508.010.4 and 508.010.5, if even a single count alleges a tort, the tort venue rules apply. In the case of an in-state first injury, this would permit plaintiff to file suit in the county of first injury.

[623] Under section 508.010.4, venue is proper in the county in which plaintiff "was first injured by the wrongful acts or negligent conduct alleged in the action."

[624] Denominating the issue "pretensive joinder of claims" has the advantage of reminding the reader of the issue's close relationship to—while still distinguishing it from— the existing case on pretensive joinder of parties. However, like any short hand expression, it is imprecise and can be misleading. A separate tort count alleging the same injury as a contract count would not ordinarily be considered a separate "claim" for purposes of, for example, claim preclusion or appealability under Rule 74.01(b).

508.012 which provides for redetermination of venue when *parties* are removed from a petition, but says nothing about what the court should do when *claims* are dropped or dismissed. Section 508.012 is designed to protect against a type of pretensive pleading—pretensive joinder of parties—that has become less important in an era when the nature of the claims, rather than the residence of the parties, has become crucial. Like the Maginot Line, it is a defense against the last war's strategy, great for trench warfare but useless in an era of tanks and dive bombers.

However, while section 508.012 does not itself deal with pretensive joinder of claims, it does not forbid the courts from doing so themselves as a matter of procedural common law. While there is a plausible *expressio unius est exclusio alterius* argument, that argument is even weaker here than the case of pretensive joinder of parties and should be rejected.[625] Section 508.012 explicitly identifies situations in which the naming of a party in the initial petition should be subsequently disregarded for venue purposes and might arguably be seen as an effort to fully catalog all such situations.[626] It is much harder to argue that section 508.012 should be seen as an effort to catalog all situations in which *any* aspect of the pleadings should be disregarded for purposes of venue. Moreover, since there was no existing body of Missouri case law dealing with pretensive joinder of claims, it seems more reasonable to conclude that the legislators never thought about the problem rather than to conclude that they intended to forbid the courts from dealing with it.

The courts should adopt a pretensive joinder of claims doctrine to deal with the situation. One of the great merits of common law decision making is its ability to apply unchanging fundamental principles to an ever changing legal landscape.[627] The fundamental principles underlying current pretensive joinder doctrine are equally applicable when it is a claim, rather than a party, that is pretensively joined. There is no more reason to "permit plaintiffs to engage in the pretense of joining [a claim] for the sole purpose of obtaining venue"[628] than there is to permit them to engage in the pretense of joining a defendant for that purpose. More than sixty years ago, in one of the seminal pretensive joinder cases, the St. Louis Court of Appeals stated:

> It would be a very dangerous doctrine, indeed, and one utterly destructive of the valuable rights conferred upon [defendants by the venue statutes] if this court should countenance a practice whereby a plaintiff could [obtain a preferred venue] by stating a paper case against [a particular] defendant . . .

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[625] *See supra* text accompanying notes 594-605.

[626] As previously discussed, this article rejects that interpretation of section 3.

[627] Norway Plains Co. v. Boston & Me. R. R., 67 Mass. 263, 267-68 (1854).

[628] State *ex rel.* Malone v. Mummert, 889 S.W.2d 822, 824 (Mo. 1994). *See also* State *ex rel.* Doe Run Res. Corp. v. Neill, 128 S.W.3d 502, 504 (Mo. 2004).

> when in truth and in fact the plaintiff had no cause of action against [that] defendant.[629]

It is just as dangerous and just as destructive to permit plaintiffs to obtain the same result by stating a paper case asserting a particular *claim* "when in truth and fact" no such *claim* exists. A plaintiff's attorney who files a pleading asserting objectively frivolous claims violates Rule 55.03(b) whether those claims are asserted against existing parties or against additional parties.[630] In both situations, the reason for disregarding the frivolous claim is the same: a plaintiff should not be permitted to undermine statutorily created venue restrictions by asserting a claim without a "realistic belief under the law and evidence that a valid claim exists."[631]

The existing two-part pretensive joinder test set forth in *Malone* and *Doe Run Resources* could easily be adapted to cover pretensive joinder of claims. For purposes of venue, the court would disregard allegations if they failed to "state a claim under existing law or under a non-frivolous argument for the extension, modification or reversal of existing law, or under a non-frivolous argument for the establishment of new law."[632] Even if the allegations of the claim stated a cause of action, the court would disregard them if, based on information available to the plaintiff at the time the petition was filed, plaintiff could not have reasonably believed that the allegations could be proved.[633] These standards would be applied in any situation in which the allegations would affect venue. Thus, for example, the court would utilize the two-part test to determine whether to disregard allegations of earlier wrongdoing arguably added to change the county of first injury, as well as to decide whether to ignore a tort count arguably added to take advantage of section 508.010.4. The standard would apply regardless of whether the challenged allegations added a defendant to the case.[634]

ii. Strategically Delayed Joinder of Claims

Just as the post-tort reform venue provisions have created temptations for pretensive joinder of frivolous claims, they have also created incentives for strategic delay in the joinder of perfectly legitimate claims. For example, a plaintiff who has a legitimate basis for asserting both contract and tort counts

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[629] Diehr v. Carey, 191 S.W.2d 296, 300-01 (Mo. Ct. App. 1945). This passage was quoted with approval by the Missouri Supreme Court in Lichterman v. Crockett, 331 S.W.2d 607, 608 (Mo. 1960), and cited with approval in Glick v. Ballentine Produce Inc., 396 S.W.2d 609, 612 (Mo. 1965). *See also* Sledge v. Town & Country Tire Ctrs., Inc., 654 S.W.2d 176, 181 (Mo. Ct. App. 1983).

[630] *See supra* note 607-16 and accompanying text.

[631] *Doe Run*, 128 S.W.3d at 504.

[632] *Id.* at 505.

[633] *Id.* at 506.

[634] Alternatively, the Missouri Supreme Court could substantially simplify the pretensive joinder doctrine and coordinate it with an increasingly important body of case law by even more explicitly linking the doctrine to Rule 55.03(b)(2)-(3).

against an unregistered foreign corporation may elect to initially allege only the contract count since, by doing so, plaintiff has the choice of suing in any county rather than being restricted to the county of first injury.[635] Similarly, a different plaintiff injured by a series of tortious acts (e.g., conduct intended to interfere with different aspects of plaintiff's business) may elect to initially allege only those acts causing injury in a particular county in order to avoid being forced to sue in a county in which plaintiff suffered earlier injuries.[636] Emulating the plaintiff's lawyers in *State* ex rel. *Linthicum v. Calvin*,[637] the first plaintiff may then amend to add his tort counts or the second plaintiff may amend to allege the additional tortious acts, each hoping that this strategically delayed joinder of claims will provide the benefit of their preferred venue without forcing them to surrender any of their potential claims.[638]

Neither section 508.012 nor pretensive joinder doctrine are suited to deal with strategically delayed joinder of claims. Similarly, the text of post-tort reform section 508.010 provides little if any support for a requirement that courts redetermine venue after strategically delayed claims are added. If that requirement is to be imposed, the most promising basis for doing so will be found in Rule 51.045.

Section 508.012 is strictly limited to situations in which a party has been added to, or removed from, the petition and says nothing about situations in which counts or other allegations are added without any change in parties. The judicially created pretensive joinder doctrine rests on a foundation that is simply absent in the delayed joinder situation: misconduct by the plaintiff or plaintiff's attorney. The underlying principle that justifies disregarding pretensive joinder is that plaintiffs should not be permitted to benefit from filing frivolous claims—claims that they knew (or should have known) were groundless—claims that they are forbidden to file by current Rule 55.03. In the simplest terms, a plaintiff who files a petition containing a pretensively joined claim is lying to the court: he or she is falsely representing that a valid, provable claim exists despite knowledge (or at least presumptive knowledge) that one does not. The pretensive joinder doctrine rests on the principle that plaintiff should not receive any advantage from misconduct that violates the attorney's duty of competence and candor to the court and the requirements of Rule 55.03.[639]

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[635] Under section 508.010.2(4), if no count alleges a tort and all defendants are nonresidents, plaintiff can sue in any county. In the situation described in the text, the sole defendant is a non-resident since an unregistered foreign corporation is deemed to have no Missouri residence. State *ex rel.* England v. Koehr, 849 S.W.2d 168 (Mo. Ct. App. 1993). On the other hand, under section 508.010.4, a plaintiff who asserts even one tort count is limited to the county of first injury.

[636] Under section 508.010.4, venue would be limited to "the county where the plaintiff was first injured by the wrongful acts or negligence alleged in the action." MO. REV. STAT. § 508.010.4 (2005).

[637] 57 S.W.3d 855 (Mo. 2001).

[638] These amendments could be made as a matter of right if filed before plaintiff serves an answer. MO. SUP. CT. R. 55.33(a).

[639] This is why the joining of claims against an insolvent defendant with no intention of attempting to collect from such a defendant is not considered pretensive. State *ex rel.* Malone v. Mummert,

But a plaintiff who decides to delay filing some of his or her legitimate claims against a defendant violates neither the duty of candor nor Rule 55.03. Such a plaintiff has not engaged in the "pretense of joining [a claim]"[640] by stating a mere "paper case."[641] The lack of principled congruence between pretensive joinder doctrine and strategically delayed joinder may well be among the reasons that the majority in *State* ex rel. *Linthicum v. Calvin*,[642] declined to rest its conclusion on any theory of "pretensive non-joinder, "[643] instead basing its decision on its reading of the text of the venue statutes.[644] As a result, if the courts are to redetermine venue when a strategically delayed count is added, their decision to do so must rest on something other than 508.012 or the pretensive joinder doctrine.

One source for such a decision would be the statutory text, and there are two plausible arguments that focus on H.B. 393's use of new language to frame the venue determination. Pre-tort reform venue statutes often defined venue by language that specified where a suit could be "brought"[645] or where it could be "commenced."[646] Since the civil actions are "brought" or "commenced" by filing a petition,[647] this suggests that allegations of the petition presumptively determine venue. However, several sections of H.B. 393 use quite different language to describe the venue determination, stating that, "[i]n all *actions in which there is* any [or no] count alleging a tort, *venue shall be determined* as follows: [setting forth the venue rule]."[648]

It might be argued that the choice of the phrase "venue shall be determined"—rather than the phrase "the suit may be brought"—suggests that venue should be determined at the time of trial or perhaps redetermined whenever venue facts change before trial. Since "venue" is often defined as the

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889 S.W.2d 822, 825-26 (Mo. 1994). Since the plaintiff, in such a situation, is making a claim that is neither legally nor factually groundless, the fact that the defendant's insolvency "may cool the plaintiff's ardor as a practical matter" does not make the claim pretensive.

[640] *Id.* at 824. *See also* State *ex rel.* Doe Run Res. Corp. v. Neill, 128 S.W.3d 502, 504 (Mo. 2004).

[641] Diehr v. Carey, 191 S.W.2d 296, 300-01 (Mo. Ct. App. 1945).

[642] 57 S.W.3d 855 (Mo. 2001).

[643] State *ex rel.* Linthicum v. Calvin, 57 S.W.3d at 855, 865 (Stith, dissenting) (noting the court's avoidance of the phrase "pretensive non-joinder").

[644] *Id.*

[645] *See, e.g.,* former MO. REV. STAT. § 508.010 ("suits instituted by summons shall . . . be brought . . ."); former § 508.010(6) ("In all tort actions, suit may be brought . . ."); § 508.020 (suits by attachment and suits in replevin "shall be brought . . .").

[646] *See, e.g.,* former § 508.010(5) (suits "in which any county shall be a plaintiff, may be commenced and prosecuted to final judgment"; § 508.050 (suits against cities "shall be commenced . . .").

[647] If a new defendant is added in an amended petition, the action is deemed to have been commenced by filing the amended petition. Calvin, 57 S.W.3d 855 (Mo. 2001). Amendments that do not add new parties (e.g., amendments that drop a party) do not have the effect of changing the date that the action was commenced. *Id.*

[648] MO. REV. STAT. § 508.010.2 (2005) (emphasis added) (any count alleging a tort); § 508.010.5 (emphasis added) (no count alleging a tort). *See also* § 508.010.4 ("[I]n all actions in which there is any count alleging a tort . . . venue shall be in the county where the plaintiff was first injured by the wrongful acts or negligent conduct alleged in the action." (emphasis added)).

location where a suit should be tried[649] (rather than where it should be filed), it might seem logical that the place of trial should be determined based on the best information available up to the time of trial.

Alternatively, one could argue that the General Assembly's choice of the phrase "In all *actions in which there is* any [or no] count alleging a tort"[650]—instead of the phrase "all actions in which *the petition contains* any count alleging a tort"—provides a basis for redetermining venue whenever a petition is amended to add or remove a count. It could be argued that, by this choice of language, the legislature redirected attention away from whether the a tort count *was* included in the *petition at time of filing* and toward whether such a count *"is"* included in the "*action*" as a whole, presumably including counts added in amended petitions.[651]

However, these arguments are seriously flawed. First, while it is true that the legislature did not say that the tort rules apply to "all actions in which *the petition contains* any count alleging a tort," it is equally true that the legislature did not say that they applied to "all actions in which *the petition or any subsequent amended petition contains* any count alleging a tort." If the legislators had chosen the first phraseology, it would be clear that venue should not be redetermined. If they had chosen the second, it would be clear that venue should be redetermined. Since they chose neither, their intent is simply unclear. Given that lack of clarity, the ordinary presumptions about legislative intent suggest that the General Assembly should not be deemed to have changed the pre-existing legal doctrine on the issue.[652]

This is particularly true since, when the General Assembly wanted to change pre-existing doctrine to require venue redetermination, it did so explicitly and unequivocally; and it did so in the Tort Reform Act itself. In section 508.012, the legislature provided that venue should be re-evaluated whenever "a

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[649] Sullenger v. Cooke Sales & Serv. Co., 646 S.W.2d 85, 88 (Mo. 1983) ("Venue means the place where a case is to be tried.") overruled on other grounds State *ex rel.* DePaul Health Ctr. v. Mummert, 870 S.W.2d 820 (Mo. 1994); 92A C.J.S. Venue § 2 (database updated May 2006) ("The prevailing meaning of "venue" is the place of trial of action, the geographical location in which an action or proceeding should be brought to trial.). *See also* State *ex rel.* Elson v. Koehr, 856 S.W.2d 57, 59 (Mo. 1993) ("Venue refers to the situs in which a court of competent jurisdiction may adjudicate an action."); State *ex rel.* Rothermich v. Gallagher, 816 S.W.2d 194, 196 (Mo. 1991) ("Venue is a designation of the location or geographical situs where the court has jurisdiction to act in a particular lawsuit. The origin of venue dates back to the development of the English judicial system when venue was the locality from which the court summoned jurors.").

[650] MO. REV. STAT. § 508.010.2 (2005).

[651] Both of these text-based arguments would go beyond dealing with strategically delayed joinder of counts and would require redetermination whenever a new count was added. Thus, they would apply even if the facts justifying the addition of the new count were not known at the time of the initial filing. In addition, they arguably would require redetermination if a counterclaim or cross-claim contained a tort count even if plaintiff never asserted such a count.

[652] *See, e.g.,* Tenney v. Brandhove, 341 U.S. 367, 376 (Court will not lightly assume that Congress abrogated longstanding legal doctrine); Briscoe v. Lahue, 460 U.S. 325, 330 (1983); United States v. Tex., 507 U.S. 529, 534 (1993).

plaintiff or defendant, including a third-party plaintiff or defendant, is added [to] or removed from the petition." If the General Assembly had intended to require venue re-evaluation whenever a new count was added, it would have used similar explicit language,[653] for example, by providing that venue should be re-evaluated whenever "a *count* is added to or removed from the petition."

Second, the fact that venue rules decide the proper county for trial (rather than the proper county for filing) does not determine when, or on the basis of what facts, that decision should be made. After all, each of the Missouri cases that defined "venue" as the determination of the place of trial[654] was decided in an era when that determination was made shortly after filing[655] and was based on the facts alleged in the pleading that commenced the case.[656]

Third, H.B. 393 actually treats the phrases "venue shall be determined" and "the suit may be brought" as synonymous. For example, section 508.010.2 provides:

> In all actions in which there is no count alleging a tort, venue *shall be determined* as follows: . . .
> (2) When there are several defendants, and they reside in different counties, the *suit may be brought* in any such county
> (3) When there are several defendants, some residents and others nonresidents of the state, *suit may be brought* in any county in this state in which any defendant resides;
> (4) When all the defendants are nonresidents of the state, *suit may be brought* in any county in this state.[657]

Thus, H.B. 393 itself answers the question of how "venue shall be determined" by explaining where "suit may be brought."

Fourth, the suggested interpretations would violate the rule against surplusage, i.e., the rule that one should avoid interpretations that make statutory provisions superfluous.[658] If the language of section 508.010 already required constant redetermination of venue based on all post-filing developments, there would be no need to have added a section 508.012 requiring such a redetermination when parties are added to or dropped from the petition.

Fifth, section 508.010.9 explicitly provides "In all actions, venue shall be determined *as of the date the plaintiff was first injured*."[659] As previously

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[653] State *ex rel.* Golden v. Crawford, 165 S.W.3d 147, 149 (Mo. 2005) (recognizing the express language of a statute that demonstrated the intent of the legislature).

[654] *See supra* note 649.

[655] Until January 1, 2001, challenges to venue were waived unless asserted in a pre-answer motion or the answer. *See infra* notes 688-90 and accompanying text. Since that time, the deadline for filing such a challenge has been extended to 60 days.

[656] State *ex rel.* Linthicum v. Calvin, 57 S.W.3d 855 (Mo. 2001).

[657] MO. REV. STAT. § 508.010.2 (2005) (emphasis added).

[658] *See supra* note 254 and accompanying text.

[659] MO. REV. STAT. § 508.010.9 (2005) (emphasis added).

discussed,[660] the application of section 508.010.9 is not entirely clear. However, it would certainly be difficult to argue that the General Assembly believed that the phrase "venue shall be determined" implicitly required that venue be determined as of the date of trial given the fact that it adopted a provision that explicitly required it to be determined at a different and much earlier date.

As a result of these flaws, it appears that the revised text of section 508.010—section like 508.012 and like the pretensive joinder case law—does not provide a basis for dealing with strategically delayed joinder of claims; and it can be argued that, without clear directives from the General Assembly, the courts should not interfere with litigants' efforts to take full advantage of the legislation as written.[661] Nonetheless, the tactic remains troublesome. It seems unlikely that the legislature intended to permit a plaintiff to take advantage of an otherwise unavailable venue by consciously filing a petition that states a fragment of the case and immediately filing an amended petition that adds the remainder. While the absence of clear direction from the legislature permits the Supreme Court to leave existing doctrine unchanged, it does not compel it to do so.

If the Court does wish to deal with the problem of strategically delayed joinder of claims, Rule 51.045 may provide an appropriate technique for doing so. This technique is possible because of the interplay between the deadline for a motion to transfer and the deadline for filing amendments as of right. In its most recent iteration, the rule permits a party to move to transfer venue within sixty days after service on that defendant.[662] Such a motion does not extend the time

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[660] *See supra* text accompanying notes 125-45.

[661] Jepson v. Stubbs, 555 S.W.2d, 307, 313 (Mo. 1977).

[662] MO. SUP. CT. R. 51.045 provides:

> Transfer of Venue When Venue Improper
>
> (a) 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. For good cause shown, the court may extend the time to file a motion to transfer venue or allow the party to amend it.
>
> If a motion to transfer venue is not timely filed, the issue of improper venue is waived. If a timely motion to transfer venue is filed, the venue issue is not waived by any other action in the case.
>
> (b) Within thirty days after the filing of a motion to transfer for improper venue, an opposing party may file a reply. For good cause shown, the court may extend the time to file the reply or allow the party to amend it.
>
> The reply shall set forth the basis for venue in the forum. The court shall not consider any basis not set forth in the reply, nor shall the court consider allegations relating to fictitious defendants. If a reply is filed, the court may allow discovery on the issue of venue and shall determine the issue.
>
> (c) If the issue is determined in favor of the movant or if no reply is filed, the court shall order a transfer of venue to a court where venue is proper. When a transfer of venue is ordered, the entire civil action shall be transferred unless a separate trial has been ordered. If a separate trial is ordered, only that part of the civil action in which the movant is involved shall be transferred.

for filing an answer,[663] nor does filing an answer waive the right to move for transfer.[664] A plaintiff who wishes to amend as of right, must do so before the defendant files an answer[665]—something that the defendant can do immediately upon service and is ordinarily required to do within thirty days of service.[666] As a result, defendants will be able to file an answer (and thus cut off a plaintiff's right to strategically join additional counts) well before the sixty day deadline for filing a motion to transfer; and plaintiffs who want to be sure to have the right to add the additional counts will need to do so very promptly after filing the initial petition.[667] Thus, in virtually every case of strategically delayed joinder of claims, the trial judge will face a petition that has *already* been amended to add the additional, venue-changing allegations. For such cases, the Supreme Court could adopt a standard similar to ones proposed by Judge Stith in *State* ex rel. *Linthicum v. Calvin*[668] and by Judge Limbaugh in *State* ex rel. *DePaul Health Center v. Mummert*[669] and hold that "the amended pleading, rather than the original pleading, [should be] the basis for determining venue."[670] This standard would eliminate the incentive for strategically delayed joinder while assuring that venue determinations would be made early in the case, thus minimizing the disruptions inherent in late changes of forum.[671]

There is some risk that plaintiffs might try to circumvent this standard by attempting to defer amending until after the expiration of the sixty day period for filing a motion to transfer. However, once an answer has been filed, an

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> (d) A request for transfer of venue under this Rule 51.045 shall not deprive a party of the right to a change of venue under Rule 51.03 if the civil action is transferred to a county having seventy-five thousand or fewer inhabitants. A party seeking a change of venue under Rule 51.03, after transfer of venue pursuant to this Rule 51.045, shall make application therefor within the later of:
>
> (1) The time allowed by Rule 51.03, or
>
> (2) Ten days of being served with notice of the docketing of the civil action in the transferee court as provided by Rule 51.10.

[663] Motions to transfer are no longer pre-answer motions under Rule 55.27; and, under Rule 55.25(c), only motions filed under Rule 55.27 extend the time for filing an answer.

[664] Rule 51.045(a) expressly provides that "If a timely motion to transfer venue is filed, the venue issue is not waived by any other action in the case." MO. SUP. CT. R. 51.045(a).

[665] MO. SUP. CT. R. 55.33(a).

[666] MO. SUP. CT. R. 55.25(a).

[667] To be safe, the plaintiff would probably file the amended petition before service. A plaintiff could gamble that a defendant would file a pre-answer motion rather than an answer but that would be a risky strategy, particularly since a defendant always has the option to forgo such motions and instead assert any of the Rule 55.27(a) defenses in the answer.

[668] 57 S.W.3d 855, 865 (Mo. 2001) (Stith, J., dissenting).

[669] 870 S.W.2d 820, 823 (Mo. 1994) (Limbaugh, J., dissenting) (venue should be determined on the basis of the status of the case at the time the court rules on the motion).

[670] State *ex rel.* Linthicum v. Calvin, 57 S.W.3d 855, 865 (Mo. 2001).

[671] There may be cases in which a plaintiff's amends as of right for non-venue related reasons (e.g., because of newly discovered information) and it is merely coincidental that the new allegations change the venue determination. One would expect these cases to be rare. However, even if they occur, transferring venue so early in the proceeding is unlikely to impose substantial costs on the system and does not seem inherently unfair.

amendment can be filed only with leave of court.[672] While Rule 55.33 requires that leave be "freely granted when justice so requires," justice does not require granting leave when the amendment is not the result of newly discovered information and will prejudice the other party.[673] As a result, when leave is sought for an amendment that adds allegations that would have changed the venue determination, the Supreme Court should urge the trial courts to deny leave if a careful inquiry demonstrates that the failure to include the allegations in the initial petition was a stratagem used to obtain a favorable venue. Alternatively, the trial courts could condition leave on a written agreement to change venue.[674] If leave is denied, the plaintiff would have the option of proceeding without the additional allegations or filing a voluntary non-suit and refiling a new petition—in which case, venue would be determined based on the allegations in the new petition.

C. Failure to Rule on Motions Within 90 Days—The Effect of 508.010.10 on Motions to Dismiss Under Rule 55.27(a)

Newly enacted section 508.010.10[675] sets a ninety-day deadline for trial court rulings on motions to transfer for improper venue and provides that, if the trial court fails to comply with the deadline, the motion for transfer shall be deemed granted. While some may doubt the wisdom or constitutionality[676] of this apparently unique provision,[677] it is unlikely to create significant problems so long as plaintiffs' attorneys monitor the deadline and bring it to the trial court's attention. However, it also appears that the language of the provision will have an unintended consequence that could have a surprising and troubling impact.

Section 508.010.10 now provides, "All motions to dismiss or to transfer based upon a claim of improper venue shall be deemed granted if not denied within ninety days of filing of the motion unless such time period is waived in

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[672] MO. SUP. CT. R. 55.33(a). Such an amendment could also be filed in the unlikely event that the defendant consented to the amendment.

[673] Zenith Radio Corp. v. Hazeltine Research, 401 U.S. 321, 331 (1971) (motion to amend should be denied where other party will be prejudiced); Albee Homes, Inc. v. Lutman, 406 F.2d 11 (3d Cir. 1969) (motion to amend should be denied where the knowledge was available from the beginning); David v. Crompton & Knowles Corp. 58 F.R.D. 444, 447 (E.D. Pa. 1973).

[674] MO. REV. STAT. § 508.010.13 (2005).

[675] § 508.010.10.

[676] It might be argued that section 508.010.10 "amend[s]" MO. SUP. CT. R. 51.045 by effectively restricting the trial court's right to "extend the time to file the reply," its right to "allow discovery on the issue of venue," or its implicit right to decide the issue after as much consideration as it deems necessary. If the section does amend the rule, it would be subject to constitutional challenge under Article V, Section 5 similar to that discussed in Part IV.A.3 above. However, it is not clear that, for purposes of the constitutional restriction, a statutory deadline should be treated as an "amend[ment]" to a rule that imposes certain obligations but does not discuss a deadline for their completion.

[677] While the author has not performed a comprehensive search, he has not been able to find a comparable provision in the laws of any other state.

writing by all parties."[678] While it is clear that the ninety-day "deemed granted if not denied" provision applies to motions "to *transfer* based upon a claim of improper venue" under Rule 51.045, the text strongly suggests that it also applies to *all* motions to *dismiss—regardless* of the basis for the motion to dismiss. While it is possible that this result may have been unintended, established maxims of statutory interpretation virtually compel the conclusion that the limiting phrase "based upon a claim of improper venue" modifies and restricts only the immediately preceding antecedent ("to transfer") and not the earlier phrase ("to dismiss").

Missouri has long recognized the "last antecedent rule" under which "qualifying words, phrases or clauses are to be applied to the words or phrase immediately preceding and are not to be construed as extending to or including others more remote."[679] The United States Supreme Court recently illustrated this maxim with the following example:

> Consider, for example, the case of parents who, before leaving their teenage son alone in the house for the weekend, warn him, "You will be punished if you throw a party or engage in any other activity that damages the house." If the son nevertheless throws a party and is caught, he should hardly be able to avoid punishment by arguing that the house was not damaged. The parents proscribed (1) a party, and (2) any other activity that damages the house.[680]

In the same way, the maxim dictates interpreting the statute to require trial judges to rule with ninety days on (1) motions to dismiss *simpliciter* and (2) motions to transfer based upon a claim of improper venue.[681]

The rule of the last antecedent is not, of course, an inflexible command and should not be followed if, after considering the act as a whole, the alternative interpretation is "clearly required by consideration of the entire act."[682] But the alternative interpretation—reading the deadline as not applying to motions to dismiss unless those motions are based upon a claim of improper venue—faces a

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[678] MO. REV. STAT. § 508.010.10 (2005).

[679] Citizens Bank & Trust Co. v. Dir. of Revenue, 639 S.W.2d 833, 835 (Mo. 1982) quoting Elliot v. James Patrick Hauling, Inc., 490 S.W.2d 284, 287 (Mo. Ct. App. 1973). *See also* Thompson v. Comm. on Legislative Research, 932 S.W.2d 392, 395 n.3 (Mo. 1996) ("The 'last antecedent rule' requires that qualifying phrases are applied to the phrase immediately preceding"). Missouri's recognition of this rule dates back to the nineteenth century. *See, e.g.,* State *ex rel.* Harris v. Laughlin, 75 Mo. 147 (Mo. 1881).

[680] Barnhart v. Thomas, 540 U.S. 20, 27 (2003). The example given in Barnhart is actually a more troubling application of the maxim because of the word "other."

[681] The language of section 508.010.10 poses a second level of ambiguity because the modifying phrase could also be interpreted as modifying the noun "motion." However, the maxim requires that the modifying phrase be applied only to the last possible antecedent even if there are more than one earlier possibilities. Moreover, there is no reason that the phrase "based upon a claim of improper venue" must be treated as adjectival rather than adverbial. The sentence "The case was transferred based upon a claim of improper venue" is just as grammatically correct as the sentence "Your motion based upon a claim of improper venue is hereby denied."

[682] Norberg v. Montgomery, 351 Mo. 180, 173 S.W.2d 387, 390 (1943).

second difficulty: It would make the reference to "motions to dismiss" meaningless since, under Missouri law, there is no such thing as a motion to *dismiss* "based upon a claim of improper venue."

For more than fifteen years, Missouri statutes have provided that transfer, rather than dismissal, is the proper remedy for improper venue. Until 1990, defendants who were sued in the wrong county were entitled to have the suit dismissed.[683] However, in 1989, in direct response to a Supreme Court decision that invited legislative correction of what was seen as the overly harsh rule requiring dismissal, the General Assembly enacted section 476.410.[684] That statute provided that dismissal would no longer be proper[685] and that the circuit courts should instead "transfer the [improperly venued] case to any division or circuit in which it could have been brought."[686] As a result, for more than fifteen years, it has not been proper to file a motion to *dismiss* for improper venue since *dismissal* was not a remedy that the trial court was authorized to grant.[687]

If there was any doubt about the abolition of motions to dismiss for improper venue, that doubt was eliminated by the May 26, 2000 amendments to the Missouri Rules.[688] Those amendments explicitly created a separate motion to transfer for improper venue[689] and removed "improper venue" from the list of defenses or objections that could be raised by a Rule 55.27(a) pre-answer motion.[690] By 2005—fifteen years after the enactment of section 476.410 and five years after the adoption of Rule 51.045—the legislature certainly must be

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[683] State *ex rel.* Rothermich v. Gallagher, 816 S.W.2d 194, 197 (Mo. 1991).

[684] Section 476.410 was enacted in 1989 in direct response to Oney v. Pattison, 747 S.W.2d 137 (Mo. 1988), which had noted the harshness of the previous rule requiring dismissal and had invited the General Assembly to correct the problem legislatively. State *ex rel.* DePaul Health Ctr. v. Mummert, 870 S.W.2d 820 (Mo. 1994); State *ex rel.* Mo. Highway & Transp. Comm'n v. Hedspeth, 788 S.W.2d 342, 344 (Mo. Ct. App. 1990) overruled on other grounds, State *ex rel.* Govero v. Kehm, 850 S.W.2d 100 (Mo. 1993). In response to the same decision, the legislature also enacted section 478.062 which provided that filing in the wrong portion of the 16th Judicial Circuit (Jackson County) would also not be grounds for dismissal but only grounds for transfer. State *ex rel.* Edu-Dyne Sys., Inc. v. Trout, 781 S.W.2d 84, 86 (Mo. 1989).

[685] Rothermich, 816 S.W.2d at 197; Hedspeth, 788 S.W.2d at 344 (Mo. Ct. App.1990).

[686] MO. REV. STAT. § 476.410 (2005).

[687] MO. SUP. CT. R. 55.26(a) requires motions to "set forth the relief or order sought." Even before the enactment of Rule 51.045, which became effective on Jan. 1, 2001, a motion to transfer could be filed under the then existing Rule 55.27(a) that permitted "objections" (as well as "defenses") to be raised by pre-answer motion.

[688] Order dated May 26, 2000 re: Supreme Court Rule 51 Venue etc., 55.27(a) Pleadings and Motions, How Presented, 61.01(h) Enforcement of Discovery: Sanctions, Objections to Approved Discovery, 74.01(a) Judgments, Orders and Proceedings Thereon, Included Matters, 81.04(c) and (d) Appeals, Docket Fees and Duty to Notify, and 84 Procedure in All Appellate Courts. The amendments enacted by this order became effective Jan. 1, 2001.

[689] See current Rule 51.045

[690] Compare Rule 55.27(a) (2000) (containing a Subsection (a)(3) "improper venue") with Rule 55.27(a)(2001)(containing no such subsection).

presumed to have known that there was no such thing as a "motion to dismiss . . . based upon a claim of improper venue" under Missouri law.[691]

Since *no* motions to dismiss can properly be "based upon a claim of improper venue," the interpretation that applies the ninety-day rule *only* to motions to dismiss that *are* made on that basis is an interpretation under which the rule would apply to *no* motions to dismiss at all. Such an interpretation would violate the rule against surplusage since it would drain all meaning from section 508.010.10's use of "motion to dismiss." Missouri case law has long rejected such interpretations, holding that every phrase in a statute should be given some effect and that courts should not presumed that the legislature inserted "idle verbiage or superfluous language in a statute."[692] Under an interpretation under which the only motions to dismiss that are covered by the ninety-day rule are ones that do not exist, the phrase "motion to dismiss" would be a quintessential example of "idle verbiage or superfluous language": language that applies to nothing.[693]

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[691] There is one limited sense in which "motions to dismiss for improper venue" continue to exist in Missouri. Sometimes lawyers still use that name—improperly—to refer to motions that are properly called "motions to transfer," *see, e.g*., State *ex rel.* Bugg v. Roper, 179 S.W.3d 893 (Mo. 2005) (motion improperly designated "Motion to Dismiss for Improper Venue") or to refer to motions that are actually motions to dismiss for lack of personal jurisdiction, *see, e.g*., State *ex rel.* J.C. Penney Corp. v. Schroeder, 108 S.W.3d 112 (Mo. Ct. App. 2003) (motion to dismissed based on forum selection clause that restricted the parties to Texas state or federal courts described as "Motion to Dismiss for Improper Venue"). It is difficult to imagine that the legislature added the phrase "motion to dismiss" for the sole purpose of directing trial judges to grant motions that are not authorized (under MO. SUP. CT. R. 51.045) and which seek relief that trial judges are specifically forbidden to grant under section 476.410.

[692] Civil Serv. Comm'n of City of St. Louis v. Members of Bd. of Aldermen of City of St. Louis, 92 S.W.3d 785, 788 (Mo. 2003) (quoting Hyde Park Hous. P'ship v. Dir. of Revenue, 850 S.W.2d 82, 84 (Mo. 1993)). *See also* Dodd v. Independence Stove & Furnace Co., 51 S.W.2d 114, 118 (Mo.1932) ("Legislature will not be presumed to have intended using superfluous or meaningless words in a statute."); Knob Noster Educ. Ass'n v. Knob Noster R-VIII Sch. Dist., 101 S.W.3d 356 (Mo. Ct. App. 2003) ("We should not interpret statutes in a way which will render some of their phrases to be mere surplusage.") (quoting State *ex rel.* Mo. Local Gov't Ret. Sys. v. Bill, 935 S.W.2d 659, 666 (Mo. Ct. App. 1996)).

[693] While there is also a plausible argument that the phrase "based upon a claim of improper venue" would be superfluous unless it applied to motions to dismiss, that argument is flawed. It rests on the fact that, under the Missouri rules, all motions to transfer are necessarily based on a claim of improper venue. (Other motions to move cases from one county to another are denominated "Applications for Change of Venue" rather than as "Motions to Transfer." MO. SUP. CT. R. 51.03, 51.04, 51.06.). Given this fact, the inclusion of the phrase "based upon a claim of improper venue" would add no additional meaning to the statute unless it applied to something other than motions to transfer. Under the rule against surplusage, the phrase should have some function, and the only available function is to serve as a limitation of the types of motion to dismiss covered by the ninety day rule.

This argument is inconsistent with the common usage. Attorneys and courts regularly use the technically redundant phrase "motion to transfer for improper venue" despite the fact that all motions to transfer are based upon claims of improper venue. *See, e.g.,* State *ex rel.* Trans World Airlines, Inc. v. David, 158 S.W.3d 232, 233 (Mo. 2005) ("motion to transfer for improper venue");

Finally, such an interpretation would lead to an anomalous result that can only be described as a *reductio ad absurdum.* Suppose that the ninety-day "deemed granted if not denied" rule were actually interpreted to apply only to one form of motion to dismiss, ones that are filed on the basis of improper venue. Under that interpretation, the effect of the phrase "motion to dismiss" would be to sometimes cause such motions to be granted, i.e., to *dismiss* cases that are filed in the wrong venue. In other words, if that interpretation were correct, one would have to conclude that the legislature inserted the phrase "motion to dismiss" for the sole purpose of requiring trial courts to grant a form of relief (dismissal) which the legislature has forbidden them to grant, and to do so based on a type of motion (motions to dismiss for improper venue) which the Supreme Court Rules have forbidden lawyers to file.

Thus, the text of the statute, read in light of the ordinary canons of construction, appears to dictate that the ninety day "deemed granted if not denied" rule should apply to all motions to dismiss, not just ones based upon a claim of improper venue. Faced with this situation, one might argue that the Missouri Supreme Court should reject such a reading based on the rule against absurdity.[694] Missouri Courts have long recognized that literal, text-based

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State *ex rel.* McDonald's Corp. v. Bryant, 151 S.W.3d 101, 103 (Mo. Ct. App. 2004) ("motion to dismiss that alleges improper venue"); State *ex rel.* USAA Cas. Ins. Co. v. David, 114 S.W.3d 447, 447-48 (Mo. Ct. App. 2003) ("motion to transfer for improper venue")). MO. SUP. CT. R. 51.045 itself is titled "Transfer of Venue When Venue Improper," and MO. SUP. CT. R. 51.045(b) describes the appropriate motion as a "motion to transfer for improper venue." This particular type of linguistic redundancy (the use of a logically unnecessary modifying phrase to remind the reader of a fact that is already necessarily implied even without the phrase) is common both for lawyers and lay persons. Lawyers commonly refer to a "Rule 55.27(a)(6) motion to dismiss for failure to state a claim"—even though every Rule 55.27(a)(6) motion to dismiss is necessarily based on failure to state a claim—or to a "Rule 55.27(d) motion for more definite statement"—even though every Rule 55.27(d) motion is necessarily a motion for more definite statement. *See, e.g.,* J.H. Cosgrove Contractors, Inc. v. Kaster, 851 S.W.2d 794, 799 (Mo. Ct. App. 1993). Similarly, a lay person might say, "I love fattening ice cream"—even though all ice cream is fattening—as a way of emphasizing the characteristic that is salient to the conversation. *See* MARIE GILLETTE & ERNST-JAN C. WIT, WHAT IS LINGUISTIC REDUNDANCY?, at § 2.3 Category 2 (1998), at http://galton.uchicago.edu/~wit/redundan.html (on file with the author) (discussing the use of redundancy to isolate and stress a particular aspect). Since this type of usage explains the inclusion of the phrase and gives it a function, the rule against surplusage does not apply.

[694] Parties may also be tempted to argue that title of section 508.010 ("Venue for nontort and tort suits -- principal place of residence, defined.") is a basis for limiting the ninety day rule to motions relating to venue. However, while "[T]he title of an act as enacted by the General Assembly is necessarily a part thereof and is to be considered in construing the act," Harry H. Houf & Sons Contractors, Inc. v. City of Wellsville, 796 S.W.2d 435, 437 (Mo. Ct. App. 1990) (emphasis added), the title of section 508.010 was not part of the act as enacted by the General Assembly. Headings or titles that do not appear in the act as passed by the legislature and signed by the Governor are not "titles," provide no evidence of the legislature's intent, and cannot be used to aid in statutory interpretation. *See, e.g.,* Bullington v. State, 459 S.W.2d 334, 341 (Mo. 1970) (headings inserted by the compiler of statutes are not "titles" and are not to be considered); Sisney v. Clay, 829 S.W.2d 9, 12 (Mo. Ct. App. 1992). The actual title of H. B. 393 is "To repeal sections [listing section numbers] and to enact in lieu thereof twenty-three new sections relating to claims

interpretation of a statute must not be permitted to lead to an absurd result clearly at odds with the probable intent of the legislature.[695] In extreme cases, the Supreme Court has gone so far as to explicitly delete words from a statute to avoid absurd results.[696]

However, it is not at all clear that a plain language reading of section 508.010.10 would necessarily be absurd and inconsistent with the intent of the legislature that enacted the Tort Reform Act. Reading the act as a whole, particularly in light of its well known history, it is clear that the legislature intended to shift the balance of litigation advantages in a way that was significantly more favorable to defendants. A requirement that all motions to dismiss be deemed granted unless denied within ninety days is certainly unusual[697] and some (including the author) may believe it to be unwise, but that does not mean that it is absurd to think that defense-oriented legislators could have intended to enact such a requirement. Such legislators may have believed that it was important that all dispositive motions be ruled on promptly and that ninety days was presumptively adequate time for such a ruling.[698] They may have believed that defendants already had adequate incentives to expedite

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for damages and the payment thereof." That title is entirely consistent with the broader application of the ninety day rule.

[695] Care & Treatment of Schottel v. State, 159 S.W.3d 836, 842 (Mo. 2005) (presumption that the legislature did not intend an absurd result justifies favoring constructions that avoid such results); State *ex rel.* McNary v. Hais, 670 S.W.2d 494 (Mo.1984) (same); Citizens' Nat'l Bank of Kansas Kan. City v. Graham, 48 S.W. 910, 911 (Mo. 1898) (explicitly rejecting literal interpretation of statute because it would lead to an absurd result); Bell v. Mid-Century Ins. Co., 750 S.W.2d 708 (Mo. Ct. App. 1988) (same); State *ex rel.* Liggett & Myers Tobacco Co. v. Gehner, 292 S.W. 1028 (Mo. 1927) (while statute should generally be read according to the natural meaning of its language, there is an exception when such a reading leads to an absurd result). Missouri's recognition of the rule against absurdity dates back at least to State to Use of Gentry v. Fry, 4 Mo. 120, 146 (1835).

[696] Lincoln Univ. v. Hackmann, 243 S.W. 320, 320-21 (Mo. 1922) (explicitly deleting word from a statute because doing so necessary to avoid an absurd result); Bingham v. Birmingham, 15 S.W. 533, 535 (Mo. 1891) (explicitly striking phrase from statute to avoid absurd result); Leibson v. Henry, 204 S.W.2d 310 (Mo. 1947) (explicitly deleting words from a statute because their inclusion appeared inadvertent and was not in harmony with the remainder of the statute); City of Kirkwood v. Mo. State Bd. of Mediation, 478 S.W.2d 690 (Mo. Ct. App. 1972) (deleting requirement that state mediation board use the services of the "state hearing officer" from the statute since no such officer exists); State *ex rel.* Harvey v. Sheehan, 190 S.W. 864, 865 (1916) ("We have frequently said that doubtful words of a statute will be enlarged, restricted, supplied, or even stricken out in order to make them conform to the true intent of the lawmakers, when such intent is manifested by the aid of sound principles of interpretation.").

[697] While a "deemed granted if not denied" rule is unusual and may be unique, the converse type of rule is well-known. For example, authorized post trial motions are deemed denied if not rule on within ninety days after the last such motion is filed. MO. SUP. CT. R. 78.06.

[698] The legislators could believe that, in the unusual situations in which the trial court believed more time was needed, the trial judge could (either through persuasion or by implicitly or explicitly threatening to deny the motion) induce the parties to agree to an extension.

consideration of such motions[699] and that the threat of automatic grant of such motions would serve as an appropriate equivalent incentive for plaintiffs to avoid delay. They may have believed that the burden of the trial judge's failure to rule promptly should fall on the plaintiffs—since they are the parties seeking to invoke the court's aid to change the pre-suit status quo—rather than on the defendants. They may have believed that these perceived advantages of such a rule outweighed any disruption or other procedural problems that the rule would create.[700] These beliefs may not be correct and they may not be shared by the Court, but it does not seem absurd to think that defense-oriented legislators could have held those beliefs and enacted legislation based on them.

While the Court may ultimately find a way of limiting section 508.010.10 to motions to transfer,[701] plaintiffs' lawyers and trial judges will need to deal with the risk that all motions to dismiss will be "deemed granted if not denied within ninety days of filing." The first and most important response should be to do everything possible to assure that trial courts rule on such motions before the statutory deadline. If there is a legitimate reason why that is not feasible, every effort should be made to obtain a written waiver of the deadline from all parties.[702]

Even if the deadline is inadvertently missed, the situation should still be salvageable. Section 508.010.10 did not purport to repeal or modify Rule 74.01; and under that rule, even an order granting a motion to dismiss—much less a "deemed" dismissal—is not a judgment unless it is reduced to writing, signed by the judge, filed, and denominated either a "judgment" or "decree."[703] Until those requirements are met, such an order (and, a fortiori, a "deemed" dismissal) is merely interlocutory.[704] Until the entry of such a judgment, "the court retains jurisdiction over the matter so that the court may be allowed to reconsider its

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[699] The legislators could believe, for example that defendants would receive little benefit from delay in the resolution of dispositive motions since discovery and trial preparation would proceed while the motion was pending.

[700] It is also possible that they simply wanted to give an additional advantage to defendants, either because they believed that it was necessary to redress what they perceived to be an excessively pro-plaintiff system or from less praiseworthy motives.

[701] One possibility would be to find that section 508.010.10, to the extent that it applies to Rule 55.27(a) motions, violates Article V, Section 5 by annulling a portion of Rule 55.27(c). That rule implicitly authorizes the trial court to "order[] that the hearing and determination [of Rule 55.27(a)(1)-(12) motions] be deferred until trial." Section 508.010.10, if applied to Rule 55.27(a) motions, would make such deferral impossible in almost any case. For a discussion of Article V, section 5, see *supra* Part IV.A.3.

[702] MO. REV. STAT. § 508.010.10 (2005).

[703] MO. SUP. CT. R. 74.01(a). Briggs v. Orf, 148 S.W. 3d 853, 854 (Mo. Ct. App. 2004). Even prior to the enactment of Rule 74.01(a), it was well recognized that an order granting a motion to dismiss was not a judgment. *See, e.g.,* Kipper v. Vokolek, 546 S.W.2d 521, 523 (Mo. Ct. App. 1977).

[704] Peet v. Randolph, 103 S.W.3d 872, 875 (Mo. Ct. App. 2003).

action, correct any errors, and modify or set aside its order."[705] Thus, even though the motion to dismiss may be "deemed granted," the dismissal can be set aside by the trial judge until a judgment is properly entered. In addition, in the unlikely event that the "deemed" dismissal was held to be the equivalent of the proper entry of a judgment, the trial court would retain control over that judgment for thirty days and could, "after giving the parties an opportunity to be heard and for good cause, vacate, reopen, correct, amend, or modify its judgment."[706] Thus, the plaintiff should promptly seek to have any "deemed" dismissal vacated and, if possible, should do so in time for the trial judge to act on the issue within thirty days of the deemed dismissal.

Finally, the ninety day rule creates a particular problem for a trial judge who concludes that the decision on a motion to dismiss should be postponed to trial on the merits.[707] Under section 508.010.10, a motion is deemed granted unless it is "denied within ninety days of filing," and a postponement to trial on the merits is not a denial. As a result, a trial judge's express decision to postpone will lead to a "deemed" dismissal. To avoid this result, trial judges who believes a particular motion to dismiss should be deferred to trial will be able to achieve that result only by denying the motion without prejudice, explicitly granting the movant leave to raise the issue again at trial.[708]

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[705] *Id.* at 876 (court had authority to modify involuntary dismissal without prejudice to one with prejudice despite entry of order and despite passage of thirty days). *See also* MO. SUP. CT. R. 74.01(b) (Without a Rule 74.01 certification, any order is "subject to revision at any time before the entry of judgment).

A dismissal resulting from the failure of the court to act within 90 days is not the equivalent of a voluntary dismissal without prejudice filed by the plaintiff since it is the court's inaction, rather than the voluntary choice by the plaintiff, that leads to the dismissal.

[706] MO. SUP. CT. R. 75.01. To be effective under Rule 75.01, the court must give the parties an opportunity to be heard and the order must actually be entered within thirty days. *Id*. Alternatively, the plaintiff could file a motion for a new trial or a motion to alter or amend the judgment within thirty days, and the court would then have ninety days to act.

[707] Such postponement is expressly contemplated by the rules and statutes. *See* MO. SUP. CT. R. 55.25(c), 55.27(c); MO. REV. STAT. § 509.260 (2005).

[708] *See In re* Care & Treatment of Johnson, 161 S.W.3d 873, 881 (Mo. Ct. App. 2005) (denial of motion for summary judgment merely postpones the issues for decision at trial).