

# APPELLATE CASE NOTES

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## MISSOURI SUPREME COURT RULES THAT RULE 51.03 (SMALL COUNTY VENUE CHANGE) SURVIVES TORT REFORM

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In *State ex rel. Audrain Healthcare, Inc., et al v. The Honorable Keith Sutherland, etc.*, the Missouri Supreme Court held that Rule 51.03, which gives an automatic right to a change of venue in counties with under 75,000 inhabitants, does not contradict any section of Chapter 508. Accordingly, § 508.010 (2005), which specifies that venue for tort cases is in the county where the plaintiff was "first injured" by the wrongful acts or negligent conduct alleged in the action, does not nullify plaintiff's right to file a timely application for change of venue under Rule 51.03.

### RELEVANT FACTS

This case stems from two medical negligence cases filed in Audrain County and transferred by the court to Warren County after a timely request under Missouri Rule of Civil Procedure 51.03.

Plaintiffs sued various health care organizations and physicians in Audrain County. The first suit alleged wrongful death from medical negligence while the second alleged personal injury due to medical negligence. There was no dispute that the first injury in both cases occurred in Audrain County.

Plaintiffs filed an Application for Change of Venue pursuant to Rule 51.03. Under that rule, a change of venue shall be granted from a county with a population under 75,000 upon the filing of a timely application. The court granted the applications and ordered both cases transferred to Warren County.

The defendants sought a Writ of Prohibition, arguing that new Section 508.011 prevents a transfer because Section 508.010.4 specifies that venue for a tort suit "shall be" where the plaintiff was first injured by the alleged wrongful acts or negligent conduct alleged in the lawsuit.

Rule 51.03 states that 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." The 2000 Census indicates that Audrain County has fewer than 25,900 inhabitants.

The statute at issue, RSMo., § 508.011, states:

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.

The health care providers interpreted this provision to mean that the new venue statutes prevail when Rule 51.03 is at issue in a tort action, and that Section 508.010.4 required the case to proceed in Audrain County, the county where the plaintiffs were first injured.<sup>1</sup> Plaintiffs argued in response that the new venue statute merely dictates where suit must be filed, and that the language did not bespeak an "immovable" venue. By this reading, there was no conflict between Rule 51.03 and § 508.010, and the court could transfer the case. Plaintiffs argued in the alternative that § 508.011 was unconstitutional under the "clear title" provision, Art III, § 23, and more importantly, under Art V, § 5 of the Missouri Constitution, which states in part: "Any (Supreme Court) rule may be annulled or amended in whole or in part by a law limited to the purpose."

Clearly, the tort reform bill was not "limited to the purpose" of modifying Rule 51.03.

### HOLDING

The Court held that new Section 508.011 only applies when Rule 51.03 contradicts a provision of Chapter 508 and that under the facts presented, Chapter 508 and Rule 51.03 do not contradict one another:

Although applying the different provisions might yield different results, that difference is not a contradiction. Section 508.010.4 does not prohibit a change of venue, nor does it purport to address how

a court should proceed where the selected trial venue becomes inappropriate due to the small number of persons in the county. Rule 51.03 addresses this problem by avoiding any potential unfairness in trying a case in a small county while protecting the parties by requiring the new venue to be convenient and by giving the parties input in the new location.

Accordingly, the Court held that the transfer from Audrain County was permissible. Because of this holding, the Court did not reach the constitutional challenge. Citing *Achtenberg*, *Venue in Missouri After Tort Reform*, 75 UMKC L. Rev. 595, 645-79, the Court went slightly further than most courts that do not have to reach the constitutional question presented. Interestingly, this article – which is over 100 pages long and has over 700 footnotes – concludes that the venue provisions in the Tort Reform Statute are unworkable and unconstitutional. The Supreme Court cited it only to point out that “a ‘law’ for purposes of Article V, Section 5 of the Missouri Constitution is a bill that has been duly enacted by both houses of the General Assembly and either signed by the Governor or passed over a veto; a section of a bill is not such a law.”

### LEGAL ANALYSIS

Missouri’s statutes have expressly permitted transfer of suits to counties where they could not have initially been brought. Referencing *State ex rel. Lebanon School District R-III v. Winfrey*, 183 S.W.3d 232, 235-36 (Mo. banc 2006), the Court reiterated that statutes providing a forum for litigation (i.e. venue statutes) do not purport to address how a court should proceed where the selected venue becomes inappropriate for trial due to the small number of persons in the county or for other reasons. That problem is addressed by Rule 51’s change of venue provisions.

The Supreme Court noted that, as was pointed out in the opinion in *Lebanon School District*, the legislature is well aware of how to prohibit, by statute, a change of venue in a filed lawsuit, “for it did so in the case of condemnation in certain instances in section 88.067.” *Lebanon School District*, 183 S.W.3d at 236.<sup>2</sup> Section 508.011 uses no mandatory or exclusive language, and no prohibition against a change of

venue appears with respect to venue in tort cases. If a section of Chapter 508 specifically barred an action from ever being transferred (like § 88.067), then Rule 51.03 could create a contradiction. The Supreme Court concluded that because there is no prohibition with respect to changes of venue in tort cases, there is no contradiction between Section 508.011 and Rule 51.03.

### CONCLUSION

Section 508.010.4 merely provides the forum where a tort case may be filed. Rule 51.03, allows for change of venue in cases that were properly filed in the first place. In keeping with Missouri precedent, the Missouri Supreme Court held that a court has continuing jurisdiction over transferred cases in counties where they could not have initially been filed. Because Rule 51.03 does not “contradict” any section of Chapter 508, the circuit court had jurisdiction to transfer the cases upon plaintiffs’ timely application. Although the Court had no reason to consider the alternative constitutional argument, it is noteworthy that it would describe as “excellent” a law review article that is highly critical of the new venue provisions.

#### ENDNOTES:

1. RSMo. §508.010.4 states:

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.

Rule 51.03, states in pertinent part:

(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

(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.

2. Section 88.067 RSMo., the condemnation statute cited by the Court in *Lebanon School District* is quite specific and clearly provides:

No change of venue shall be allowed in any of the proceedings under section 88.010 to 88.070 [in cases against cities of a certain size and having a special charter]... except where the judge of the court shall be disqualified for any of the reasons state in the statute of this state relating to change of venue in civil cases

(emphasis added).