

No. SC87962

IN THE SUPREME COURT OF MISSOURI

STATE ex rel. ROWE BURNS,
Relator,

v.

THE HONORABLE CAROLYN C. WHITTINGTON,
Respondent.

BRIEF OF RESPONDENT
THE HONORABLE CAROLYN C. WHITTINGTON

SANDBERG, PHOENIX & von GONTARD, P.C.

Reed W. Sugg, #29314
Timothy C. Sansone, #47876
Jason D. McKnight, #52336
One City Centre, 15th Floor
St. Louis, Missouri 63101-1880
314-231-3332

Attorneys for Respondent
The Honorable Carolyn C. Whittington

TABLE OF CONTENTS

Table of Authorities.....4

Jurisdictional Statement.....5

Statement of Facts6

Point Relied On9

Argument.....10

BURNS IS NOT ENTITLED TO AN ORDER COMMANDING JUDGE WHITTINGTON TO TRANSFER THIS CASE TO THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, AND THE SUPREME COURT SHOULD QUASH THE PRELIMINARY WRIT IN MANDAMUS, BECAUSE BURNS NEVER REQUESTED SUCH RELIEF, OR ANY OTHER RELIEF, FROM JUDGE WHITTINGTON, AND VENUE PROPERLY LIES IN THE CIRCUIT COURT OF ST. LOUIS COUNTY, IN THAT THE NEW CAUSE OF ACTION BURNS IS NOW PURSUING DID NOT ACCRUE UNTIL JANUARY 2006, WELL AFTER THE EFFECTIVE DATE OF THE NEW VENUE STATUTE10

A. Burns Is Not Entitled to an Order Commanding Judge Whittington to Do Something She Was Never Asked to Do..... 11

B.	<u>Even If Burns Had Filed a Motion to Transfer Venue That Was Later Denied, She Would Not Have a Clear and Unequivocal Right to a Writ of Mandamus Because Venue in Fact Properly Lies in the Circuit Court of St. Louis County</u>	12
1.	<u>Burns’ New Cause of Action for Wrongful Death Was Created and Vested in Her Only upon the Death of Her Husband, Which Occurred after the Effective Date of the New Venue Statute; Therefore, the New Venue Statute Applies in This Case</u>	13
2.	<u>Pursuant to the New Venue Statute, Venue Is Proper in the Circuit Court of St. Louis County Because Mr. Burns Was Allegedly First Injured There by the Defendants’ Products</u>	15
3.	<u>Burns Is Not Entitled to an Order Commanding Judge Whittington to Transfer This Case to the Circuit Court of the City of St. Louis, Because Burns Has No Clear and Unequivocal Right to Such Relief</u>	16
	Conclusion	18
	Certificate of Compliance	19
	Certificate of Service	20

TABLE OF AUTHORITIES

Cases

Chesterfield Village, Inc. v. City of Chesterfield, 64 S.W.3d 315
(Mo. banc 2002) 14

Furlong Companies, Inc. v. City of Kansas City, 189 S.W.3d 157
(Mo. banc 2006) 10-11, 13, 17

Meyer v. Ravenhill, 20 S.W.3d 543 (Mo.App. W.D. 2000) 11-12, 16-17

Reese v. U.S. Fire Ins. Co., 173 S.W.3d 287 (Mo.App. W.D. 2005) 14, 17

State ex rel. LeNave v. Moore, 408 S.W.2d 47 (Mo. banc 1966)..... 14

State ex rel. Linthicum v. Calvin, 57 S.W.3d 855 (Mo. banc 2001)..... 17

Constitutional Provisions and Statutes

Mo. Const., Art. V, Sec. 4 5

Section 508.010 6, 13, 15-17

Section 537.080 7

Section 537.090 7

Section 538.305 13, 17

H.B. 393 (2005)..... 13, 16

Rules

Rule 51.045..... 12-13

Rule 84.06..... 19

Rule 84.24..... 5, 8

JURISDICTIONAL STATEMENT

The Supreme Court has jurisdiction over this matter pursuant to Article V, Section 4 of the Missouri Constitution. The relator, Rowe Burns (“Burns”), seeks a peremptory writ of mandamus that would require the respondent, The Honorable Carolyn C. Whittington, Presiding Judge of the Circuit Court of St. Louis County (“Judge Whittington”), to transfer this case from the Circuit Court of St. Louis County to the Circuit Court of the City of St. Louis (Writ Summary, p. 2). (Throughout this brief, citations to the record as defined in Rule 84.24(g) shall be to the particular pleading or order referenced.)

This case was originally filed in the Circuit Court of the City of St. Louis, but was subsequently transferred to the Circuit Court of St. Louis County by order of The Honorable Thomas C. Grady, Circuit Judge of the Circuit Court of the City of St. Louis (“Judge Grady”) (Order of Judge Grady, pp. 1, 17 (Exhibit 2 to Petition for Writ of Mandamus)).

Counsel for Judge Whittington represent NCH Corporation (“NCH”), one of two defendants named in Burns’ First Amended Petition (Exhibit 1 to Petition for Writ of Mandamus). The other defendant, Chemisphere Corporation (“Chemisphere”), is separately represented and will not be filing a brief in this Court.

STATEMENT OF FACTS

Burns and her husband, Alfred L. Burns, now deceased, initiated this action on August 19, 2005, approximately 10 days before the effective date of Missouri's new venue statute, Section 508.010 RSMo (Petition, p. 1 (Exhibit A to Suggestions in Opposition to Petition for Writ of Mandamus); Order of Judge Grady, pp. 1, 3). The Petition named a dozen defendants, including NCH and Chemisphere (Petition, pp. 1-3), and alleged that Mr. Burns was exposed to various products containing benzene while he was employed by Van Hoffman Press, Inc. between 1981 and 2001 (Petition, p. 6). The facility where Mr. Burns worked was located in Crestwood, a municipality in St. Louis County, Missouri (Plaintiff's Answers to Defendants' First Joint Set of Interrogatories, pp. 9-11 (Exhibit D to Suggestions in Opposition to Petition for Writ of Mandamus)).

The petition alleged that NCH was strictly liable and negligent for manufacturing and/or selling to Mr. Burns' employer a purportedly defective product known as Yield (Petition, pp. 6-12). Mr. Burns sought to recover for personal injuries he allegedly sustained in connection with his on-the-job use of Yield, while his wife sought to recover for an alleged loss of consortium (Petition, pp. 6-12). They made similar allegations concerning various products made by the other defendants (Petition, pp. 6-12).

On December 21, 2005, Burns and her husband voluntarily dismissed 10 of the named defendants without prejudice, leaving NCH and Chemisphere as the sole remaining defendants (Dismissals Without Prejudice, p. 1 (Exhibit B to

Suggestions in Opposition to Petition for Writ of Mandamus)). The following month, Mr. Burns died (Order of Judge Grady, p. 2). Shortly thereafter, Burns filed a Suggestion of Death (Joint Motion to Transfer, p. 1 (Exhibit C to Suggestions in Opposition to Petition for Writ of Mandamus)).

With leave of court, on March 6, 2006, Burns filed her First Amended Petition against NCH and Chemisphere (Order of Judge Grady, p. 2). The First Amended Petition named Burns as the sole plaintiff and identified her as the surviving spouse of Mr. Burns (First Amended Petition, p. 1). Burns alleged that her husband's exposure to benzene contained in the defendants' products caused his death in January 2006 (First Amended Petition, p. 2). Rather than continuing to pursue the original cause of action for her husband's alleged personal injuries and her derivative claim for loss of consortium, Burns sought damages available under Missouri's wrongful death statute, Section 537.080 RSMo, including damages for funeral expenses, pain experienced by Mr. Burns until the time of his death, and the companionship of which she was deprived due to his death (First Amended Petition, pp. 2-6; see also Section 537.090 RSMo).

On May 1, 2006, defendants filed their Joint Motion to Transfer, noting that Burns' original cause of action was only a derivative claim for loss of consortium in connection with her husband's alleged personal injuries, but that her new cause of action was for the allegedly wrongful death of her husband (Joint Motion to Transfer, pp. 1-2). Defendants argued that Burns' new cause of action was subject to the new venue statute because she filed it after August 28, 2005, and that the

new venue statute required the case to be venued where Mr. Burns sustained his first injury: St. Louis County (Joint Motion to Transfer, p. 2). Judge Grady granted the defendants' motion on July 31, 2006, and entered an order transferring the case to the Circuit Court of St. Louis County (Order of Judge Grady, p. 17).

The Circuit Court of St. Louis County acknowledged receipt of the change of venue on August 14, 2006 (Exhibit F to Suggestions in Opposition to Petition for Writ of Mandamus). One day later, without seeking any relief from the Circuit Court of St. Louis County, Burns filed a Petition for Writ of Mandamus in the Missouri Court of Appeals, Eastern District (Exhibit G to Suggestions in Opposition to Petition for Writ of Mandamus). The Honorable Kathianne Knaup Crane, Presiding Judge of Writ Division Seven, denied the petition on August 18, 2006 (Exhibit 5 to Petition for Writ of Mandamus).

On August 24, 2006, Burns filed her Petition for Writ of Mandamus in this Court. Judge Whittington filed her Suggestions in Opposition, after which the Court issued a preliminary writ on September 26, 2006. Judge Whittington then filed her Answer to the Petition on October 26, 2006. Pursuant to Rule 84.24(i), Burns filed her Relator's Brief herein on November 27, 2006.

POINT RELIED ON

BURNS IS NOT ENTITLED TO AN ORDER COMMANDING JUDGE WHITTINGTON TO TRANSFER THIS CASE TO THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, AND THE SUPREME COURT SHOULD QUASH THE PRELIMINARY WRIT IN MANDAMUS, BECAUSE BURNS NEVER REQUESTED SUCH RELIEF, OR ANY OTHER RELIEF, FROM JUDGE WHITTINGTON, AND VENUE PROPERLY LIES IN THE CIRCUIT COURT OF ST. LOUIS COUNTY, IN THAT THE NEW CAUSE OF ACTION BURNS IS NOW PURSUING DID NOT ACCRUE UNTIL JANUARY 2006, WELL AFTER THE EFFECTIVE DATE OF THE NEW VENUE STATUTE.

Furlong Companies, Inc. v. City of Kansas City, 189 S.W.3d 157

(Mo. banc 2006)

Meyer v. Ravenhill, 20 S.W.3d 543 (Mo.App. W.D. 2000)

Reese v. U.S. Fire Ins. Co., 173 S.W.3d 287 (Mo.App. W.D. 2005)

ARGUMENT

BURNS IS NOT ENTITLED TO AN ORDER COMMANDING JUDGE WHITTINGTON TO TRANSFER THIS CASE TO THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, AND THE SUPREME COURT SHOULD QUASH THE PRELIMINARY WRIT IN MANDAMUS, BECAUSE BURNS NEVER REQUESTED SUCH RELIEF, OR ANY OTHER RELIEF, FROM JUDGE WHITTINGTON, AND VENUE PROPERLY LIES IN THE CIRCUIT COURT OF ST. LOUIS COUNTY, IN THAT THE NEW CAUSE OF ACTION BURNS IS NOW PURSUING DID NOT ACCRUE UNTIL JANUARY 2006, WELL AFTER THE EFFECTIVE DATE OF THE NEW VENUE STATUTE.

Standard of Review

The purpose of the extraordinary writ of mandamus is to compel the performance of a ministerial duty that one charged with the duty has refused to perform. Furlong Companies, Inc. v. City of Kansas City, 189 S.W.3d 157, 165 (Mo. banc 2006). The general rule is that a court will issue a writ of mandamus only when it is shown that the one requesting the writ has a clear and unequivocal right to the relief requested, and that there is a corresponding present, imperative, unconditional duty imposed on the respondent, which the respondent has

breached. Meyer v. Ravenhill, 20 S.W.3d 543, 545 (Mo.App. W.D. 2000); see also Furlong, 189 S.W.3d at 166. Even if the trial court misinterprets its jurisdiction and duty in a case, it does not necessarily follow that a relator is therefore entitled to a peremptory writ of mandamus. Meyer, 20 S.W.3d at 545. A writ of mandamus is a hard and vast unreasoning writ, and is reserved for extraordinary emergencies. Id. It is not a writ of right, and its issuance is largely discretionary with the court in each particular case. Id. (citations omitted).

Argument

A. Burns Is Not Entitled to an Order Commanding Judge Whittington to Do Something She Was Never Asked to Do.

Significantly, this is not a case in which the respondent has refused to do anything. Indeed, Judge Whittington has never been asked to take any action in connection with this case (see Exhibit F to Suggestions in Opposition to Petition for Writ of Mandamus). The record indicates that this case had been pending in the Circuit Court of St. Louis County for only one day at the time Burns filed her Petition for Writ of Mandamus in the Missouri Court of Appeals, Eastern District (see Exhibits F and G to Suggestions in Opposition to Petition for Writ of Mandamus). Therefore, it would be fundamentally unfair to Judge Whittington, and counter to the purpose of a writ of mandamus, to compel her to do something she was never asked to perform. See Furlong, 189 S.W.3d at 165 (emphasizing

that the purpose of the writ is to compel the performance of a duty one has refused to perform).

Moreover, pursuant to Rule 51.045, Judge Whittington could not have transferred this case without first receiving a request to do so. As provided in Rule 51.045(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” (emphasis added). The record is clear that no such motion was filed in this case after it was transferred to the Circuit Court of St. Louis County (see Exhibit F to Suggestions in Opposition to Petition for Writ of Mandamus). In the absence of a motion to transfer venue, Judge Whittington was not required to do anything related to the issue of venue after this case was transferred to the Circuit Court of St. Louis County. Therefore, there was no duty she could have “breached” that would trigger a “right to the relief requested” (quoting Meyer, 20 S.W.3d at 545). For this reason alone, the Supreme Court should quash the preliminary writ in mandamus.

B. Even If Burns Had Filed a Motion to Transfer Venue That Was Later Denied, She Would Not Have a Clear and Unequivocal Right to a Writ of Mandamus Because Venue in Fact Properly Lies in the Circuit Court of St. Louis County.

Because Burns is unable to show that any duty on the part of Judge Whittington ever arose, that Judge Whittington breached any duty, or that Burns

ever requested any relief from Judge Whittington, there is no basis to issue a peremptory writ in mandamus in this case. Nonetheless, even if Burns had filed a motion to transfer venue pursuant to Rule 51.045, which was later hypothetically denied, Burns cannot show that she would have a “clear, unequivocal, specific right” to a transfer of venue to the Circuit Court of the City of St. Louis (quoting Furlong, 189 S.W.3d at 166).

1. Burns’ New Cause of Action for Wrongful Death Was Created and Vested in Her Only upon the Death of Her Husband, Which Occurred after the Effective Date of the New Venue Statute; Therefore, the New Venue Statute Applies in This Case.

Pursuant to Section 538.305 RSMo, the provisions of H.B. 393 (2005), including the new venue statute, Section 508.010 RSMo, “shall apply to all causes of action filed after August 28, 2005.” Here, Burns filed her new cause of action for wrongful death on March 6, 2006, when she filed her First Amended Petition against NCH and Chemisphere (Order of Judge Grady, p. 2). The First Amended Petition named Burns as the sole plaintiff and identified her as the surviving spouse of Mr. Burns (First Amended Petition, p. 1).

Notably, following her husband’s death, Burns did not continue to pursue the original cause of action for his alleged personal injuries and her derivative claim for loss of consortium. Rather, she asserted a new and different cause of

action that did not accrue until January 2006, when Mr. Burns died. See Reese v. U.S. Fire Ins. Co., 173 S.W.3d 287, 298 (Mo.App. W.D. 2005) (noting that a cause of action for wrongful death “is neither a transmitted right nor a survival right, but is created and vests in the survivors at the moment of death”). Her First Amended Petition presented new a cause of action that simply did not exist, and could not have existed, when the original cause of action was filed on August 19, 2006 (Petition, p. 1).

For this reason, Burns’ reliance on State ex rel. LeNave v. Moore, 408 S.W.2d 47 (Mo. banc 1966) is misplaced. That case concerned the question of whether a new venue statute may be applied to a cause of action “existing at the time it was enacted.” Id. at 48. Here, Burns’ cause of action for the allegedly wrongful death of her husband did not exist either when the new venue statute was enacted or when it became effective. Rather, her cause of action was created and vested in her at the moment of Mr. Burns’ death in January 2006, several months after the effective date of the new venue statute. Reese, 173 S.W.3d at 298.

Furthermore, the “facts giving rise” to her new cause of action for the allegedly wrongful death of Mr. Burns (i.e., his death and the defendants’ alleged liability for his death) did not and certainly could not exist until his death. Therefore, Burns’ reliance on Chesterfield Village, Inc. v. City of Chesterfield, 64 S.W.3d 315 (Mo. banc 2002) is equally misplaced. In that case, this Court examined whether there were new ultimate facts, as opposed to evidentiary details, that formed a new claim for relief. Id. at 320. Here, Mr. Burns’ death is no mere

“evidentiary detail”; rather, it is the *sine qua non* of the new wrongful death action brought by his wife against the defendants. Because it was a new cause of action filed after the effective date of the new venue statute, the new venue statute applies.

2. Pursuant to the New Venue Statute, Venue Is Proper in the Circuit Court of St. Louis County Because Mr. Burns Was Allegedly First Injured There by the Defendants’ Products.

In her First Amended Petition, Burns alleged that her husband’s exposure to benzene contained in the defendants’ products caused his death in January 2006 (First Amended Petition, p. 2). The facility where Mr. Burns worked when he was allegedly exposed to and injured by those products was located in Crestwood, a municipality in St. Louis County, Missouri (Plaintiff’s Answers to Defendants’ First Joint Set of Interrogatories, pp. 9-11).

Section 508.010.4 RSMo provides that in all actions in which there is any count alleging a tort, and in which one was first injured in Missouri, venue shall be in the county where he or she was first injured by the wrongful acts or negligent conduct alleged in the action. Here, all four counts of the First Amended Petition sound in tort; moreover, the pleadings and discovery answers confirm that Mr. Burns was allegedly injured by defendants’ products while working at his employer’s location in St. Louis County, Missouri. Thus, under the new venue

statute, which applies to Burns' new cause of action for the reasons noted previously, venue is proper only in the Circuit Court of St. Louis County. Section 508.010.4 RSMo.

3. Burns Is Not Entitled to an Order Commanding Judge Whittington to Transfer This Case to the Circuit Court of the City of St. Louis, Because Burns Has No Clear and Unequivocal Right to Such Relief.

As explained above, a writ of mandamus is a hard and vast unreasoning writ, and is reserved for extraordinary emergencies. Meyer, 20 S.W.3d at 545. Indeed, even if a trial court misinterprets its jurisdiction and duty in a case, it does not necessarily follow that a relator is therefore entitled to a peremptory writ of mandamus. Id. Here, Burns has hardly shown that an extraordinary emergency exists, especially considering that Judge Whittington never received the opportunity to interpret (much less misinterpret) anything.

Burns now claims that she and her husband preempted any further consideration of venue by filing the original cause of action a few days before the effective date of the new venue statute. Her static view of venue would require this Court to equate a cause of action with a lawsuit. The legislature, however, did not write that the new venue statute applies to all "lawsuits" filed after August 28, 2005, such that lawsuits filed before that date could never be subject to the new statute. Rather, the legislature wrote that the provisions of H.B. 393 (2005),

including the new venue statute, Section 508.010 RSMo, “shall apply to all causes of action filed after August 28, 2005.” See Section 538.305 RSMo (emphasis added). Here, Burns’ cause of action for wrongful death clearly arose at the moment of her husband’s death in January 2006, and no earlier. Reese, 173 S.W.3d at 298 (noting that a cause of action for wrongful death “is created and vests in the survivors at the moment of death”). Therefore, her First Amended Petition filed in March 2006 necessarily asserted a “cause of action” filed after August 28, 2005, such that the new venue statute must apply.

Burns mistakenly relies on State ex rel. Linthicum v. Calvin, 57 S.W.3d 855 (Mo. banc 2001), for the proposition that venue cannot be transferred unless new defendants are added to a lawsuit. Notably, Linthicum specifically examined the question of when a suit is brought. Id. at 858. The case did not equate the term “suit” or “lawsuit” with “cause of action”; in fact, it did not even discuss the term “cause of action” and dealt with a previous version of Section 508.010 RSMo. Id. at 857. Moreover, the Linthicum Court did not examine language concerning the effective date of a venue statute, such as that provided in Section 538.305 RSMo. Thus, Linthicum is inapplicable here.

Because Burns has failed to show that she has a clear and unequivocal right to a writ of mandamus, as required under the applicable standard of review, the Supreme Court should quash the preliminary writ in mandamus, and permit this case to proceed in the Circuit Court of St. Louis County, where venue properly lies. Furlong, 189 S.W.3d at 166; Meyer, 20 S.W.3d at 545.

CONCLUSION

For all of the reasons stated herein, the respondent, The Honorable Carolyn C. Whittington, Presiding Judge of the Circuit Court of St. Louis County, respectfully requests that the Supreme Court quash the preliminary writ in mandamus, and permit this case to proceed in the Circuit Court of St. Louis County, where venue properly lies.

SANDBERG, PHOENIX & von GONTARD, P.C.

By: _____

Reed W. Sugg, #29314
Timothy C. Sansone, #47876
Jason D. McKnight, #52336
One City Centre, 15th Floor
St. Louis, MO 63101-1880
314-231-3332
314-241-7604 (Fax)

*Attorneys for Respondent
The Honorable Carolyn C. Whittington*

CERTIFICATE OF COMPLIANCE

1. This brief complies with the limitations contained in Rule 84.06(b) because it contains 3,886 words. This word count includes the entire brief, and does not exclude the parts of the brief subject to exemption under said rules.
2. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 13-point Times New Roman.
3. Pursuant to Rule 84.06(g), a floppy disk containing this brief is being filed; this disk was scanned for viruses and is virus-free.

SANDBERG, PHOENIX & von GONTARD, P.C.

By: _____

Reed W. Sugg, #29314
Timothy C. Sansone, #47876
Jason D. McKnight, #52336
One City Centre, 15th Floor
St. Louis, MO 63101-1880
314-231-3332
314-241-7604 (Fax)

*Attorneys for Respondent
The Honorable Carolyn C. Whittington*

CERTIFICATE OF SERVICE

The undersigned certifies that this brief of the respondent was sent by United States mail, postage prepaid, this 15th day of December, 2006, to the following persons, along with a floppy disk containing the brief that was scanned for viruses and is virus-free:

The Honorable Carolyn C. Whittington
Circuit Court of St. Louis County
7900 Carondelet Ave.
Clayton, Missouri 63105
Respondent

Thomas E. Schwartz
Holloran & Schwartz
1010 Market St., Ste. 1650
St. Louis, Missouri 63101
Attorneys for Relator

Matthew Shorey
Armstrong Teasdale LLP
One Metropolitan Square, Ste. 2600
St. Louis, Missouri 63102
Attorneys for Defendant Chemisphere Corporation
