

No. WD 61268

IN THE

MISSOURI COURT OF APPEALS, WESTERN DISTRICT

STATE EX REL. FORD MOTOR COMPANY, THE BUDD COMPANY, AND
COOPER TIRE & RUBBER COMPANY,

Relators,

-vs-

THE HONORABLE JOHN R. O'MALLEY, JUDGE
CIRCUIT COURT OF JACKSON COUNTY, MISSOURI,

Respondent.

RELATORS= REPLY BRIEF

Robert T. Adams, Esq., # 34612
Esq.

Paul A. Williams, Esq., #43716
LABORDE,

Julie A. Shull, Esq., #49848
SHOOK, HARDY & BACON L.L.P.
200

1200 Main Street
Kansas City, Missouri 64105
T: 816/474-6550
F: 816/421-4066

Keith W. McDaniel,

PULASKI, GIEGER,

L.L.C.
434 N. Columbia Street, Suite

Covington, Louisiana 70433
T: 504/561-0400

ATTORNEYS FOR RELATOR
FORD MOTOR COMPANY

Thomas P. Schult, Esq., #29986
Nicholas Divita, Esq., #37514
Julie Westcott, Esq., #49749
BERKOWITZ, FELDMILLER, STANTON,
BRANDT, WILLIAMS & SHAW, LLP
Two Emanuel Cleaver II Boulevard, Suite 500
Kansas City, Missouri 64112
T: 816/561-7007
F: 816/561-1888

ATTORNEYS FOR RELATOR
THE BUDD COMPANY

Robert A. Horn, Esq., #38176
HORN, AYLWARD & BANDY, L.L.C.
2600 Grand Boulevard, Suite 500
Street
Kansas City, Missouri 64108
T: 816/421-0700
F: 815/421-0899

W. Wray Eckl, Esq.
DREW, ECKL & FARNHAM, LLP
880 West Peachtree

P.O. Box 7600
Atlanta, Georgia 30357

ATTORNEYS FOR RELATOR
COOPER TIRE & RUBBER CO.

TABLE OF AUTHORITIES

CASES

<i>Bass v. Nat'l Super Markets, Inc.</i> , 911 S.W.2d 617 (Mo. banc 1995)	6
<i>Deister v. Kansas City Northwestern Railway Co.</i> , 195 S.W. 499 (Mo. 1917)	14
<i>Holmes v. Interiors by Canova</i> , 58 S.W.3d 915 (Mo. Ct. App. 2001)	6
<i>Leis v. Massachusetts Bonding and Insurance Co.</i> , 125 S.W.2d 906 (Mo. Ct. App. 1939)	13
<i>New First National Bank v. C.L. Rhoses Produce Co.</i> , 58 S.W.2d 742 (Mo. 1932)	14
<i>Prayson v. Kansas City Power and Light Co.</i> , 847 S.W.2d 852 (Mo. Ct. App. 1992).....	5
<i>State ex rel. Crowden v. Dandurand</i> , 970 S.W.2d 340 (Mo. banc 1998)	14
<i>State ex rel. DePaul Health Ctr. v. Mummert</i> , 870 S.W.2d 820 (Mo. banc 1991)	5, 7, 8, 9
<i>State ex rel. Fechtling v. Rose</i> , 189 S.W.2d 425 (Mo. 1945)	13
<i>State ex rel. Landstar Ranger, Inc. v. Dean</i> , 62 S.W.3d 405 (Mo. banc 2001)	6
<i>State ex rel. Linthicum v. Calvin</i> , 57 S.W.3d 855 (Mo. banc 2001)	4, 5, 6, 7, 9, 10, 11, 12, 14
<i>State ex rel. Miracle Recreation Equipment Co. v. O'Malley</i> , 62 S.W.3d 407 (Mo. banc 2001)	6, 7

Sumners v. Sumners, 701 S.W.2d 720 (Mo. 1985)..... 7, 10

Weir v. Brune, 256 S.W.2d 810 (Mo. 1953) 13

Welch v. Continental Placement, Inc., 627 S.W.2d 319 (Mo. Ct. App. 1982) 12, 13, 14

STATUTES AND RULES

Mo. Rev. Stat. ' 508.010..... 4, 5, 7, 8, 9, 11, 12, 15

Mo. Rev. Stat. ' 508.040..... 4, 8

Mo. Rev. Stat. ' 287.040.16

Mo. R. Civ. P. 55.33 13

REPLY

I. INTRODUCTION

Following a long procedural history, this case comes to this Court on Relators' Petition for Writ of Prohibition. Relators are requesting that this Court prohibit Respondent from taking any further action in this case other than transferring it to a county where venue is proper.

Plaintiffs in the underlying case filed suit against defendants Ford, Budd & Cooper (Relators here) in Jackson County, Missouri. Less than twenty-four hours later, plaintiffs amended their petition to include Max E. House d/b/a Southside Motors, as a defendant. Because both an individual and corporations were named as defendants, section 508.010 controls venue. Defendants filed a Motion for Improper Venue, alleging that venue was improper in Jackson County under section 508.010 because none of the defendants were residents of, and the cause of action did not accrue in Jackson County. Respondent denied defendants' motion. After the Missouri Supreme Court handed down its decision in *Linthicum*, defendants asked Respondent to reconsider their motion. Respondent again refused to transfer the case out of Jackson County and Relators filed this Writ of

Prohibition arguing *Linthicum* applies to the underlying case and, therefore, venue should be determined from plaintiffs= Amended Petition rather than the Abandoned Petition.

In Respondent's Brief, he argues that *Linthicum* does not apply retroactively to the present case and that he acted properly in reviving plaintiffs= Abandoned Petition. For the reasons set forth herein and in Relators= Brief, Respondent is incorrect.

II. ARGUMENT

A. *Linthicum* Is Properly Applied Retroactively To Determine Venue In The Underlying Case

In his First Point Relied On, Respondent argues that the *Linthicum* decision should not be applied retroactively to govern venue in the underlying case. In support of his argument, Respondent argues that judicial decisions changing procedural as opposed to substantive law apply prospectively-only and cites *Prayson v. Kansas City Power and Light Co.*, 847 S.W.2d 852, 855 (Mo. Ct. App. 1992) in support of this argument.

(Respondent's Brief, First Point Relied On.) *Prayson* is not applicable here. While the court in *Prayson* did state that judicial decisions that change procedural law are to be given

prospective effect only,@ the Missouri Supreme Court's decision in *Linthicum* not result in a change in procedural law. Rather, the court merely rendered an interpretation of a venue statute in a manner consistent with prior court decisions.

Respondent may argue that *State ex rel. DePaul v. Mummert*, 870 S.W.2d 820 (Mo. banc 1991) was overruled by *Linthicum*. However, the Missouri Supreme Court in *Linthicum* found otherwise. After professing its holding in *Linthicum* the court stated, *State ex rel. DePaul Health Center v. Mummert* does not hold to the contrary and still applies whenever a defendant is dismissed from a lawsuit rather than added to it.@ *Linthicum*, 57 S.W.3d at 358. *Linthicum*, therefore, did not effect a change in procedural law but, rather, simply interpreted a provision of section 508.010, the general venue statute. And despite Respondent's argument to the contrary, judicial decisions interpreting Missouri statutes can be retroactively applied. See *Holmes v. Interiors by Canova*, 58 S.W.3d 915 (Mo. Ct. App. 2001) (the court held that the Missouri Supreme Court's prior decision in *Bass*, in which it interpreted the term *usual business*@ as set forth in section 287.040.1, a workers= compensation statute, applied retrospectively to injuries

received prior to the decision.) See *Bass v. National Super Markets, Inc.*, 911 S.W.2d 617 (Mo. banc 1995). Obviously, there is no bar to applying judicial decisions involving statutory interpretations retroactively.

Furthermore, any argument by Respondent that *Linthicum* does not apply retroactively must fail in light of the Missouri Supreme Court's decisions in *Landstar* and *Miracle Recreation*. The Missouri Supreme Court remanded those cases to the trial courts to determine venue in accord with *Linthicum*. See *State ex rel. Miracle Recreation Equipment Co. v. O'Malley*, 62 S.W.3d 407 (Mo. banc 2001); *State ex rel. Landstar Ranger, Inc. v. Dean*, 62 S.W.3d 405 (Mo. banc 2001). Respondent, however, continues to argue that *State ex rel. Landstar* and *Miracle Recreation* do not mandate retroactive application of *Linthicum*. (Respondent's Brief, First Point Relied On, ' A.) Relators do not see how those cases can be interpreted otherwise. Both cases were pending at the time *Linthicum* was decided and, as set forth above, were remanded to be decided in accord with that decision.

Respondent appears to argue that because the Motion to Transfer in *Miracle Recreation* was unopposed on remand, the case is distinguishable from the underlying case. Relators can only

assume that venue was not challenged on remand because the plaintiffs in that case realized any attempt to prevent transfer of the case in light of the *Linthicum* decision would be useless.

This alleged distinction enunciated by plaintiffs between *Miracle Recreation* and the underlying case is nothing more than a feeble attempt to divert this Court's attention from the real issue: that both *Landstar* and *Miracle Recreation* mandate retroactive application of the *Linthicum* decision.

Respondent has exceeded his jurisdiction by refusing to apply *Linthicum* to the underlying case. Pursuant to *Linthicum*, venue must be determined from plaintiffs' Amended Petition, which names both corporations and an individual as defendants. Accordingly, venue is governed by section 508.010 and, under 508.010, venue is improper in Jackson County. The Preliminary Writ should be made permanent and Respondent should be ordered to take no further action regarding this case other than to transfer it to a county in which venue is proper.

**B. *Sumners* Fundamental Fairness Test, If
Applicable, Also Favors Retroactive
Application Of *Linthicum* To The Underlying
Case**

Plaintiffs argue that the Court's decision in *Linthicum* substantially affected their substantive rights and, therefore, the *Sumners* fundamental fairness test applies. (Respondent's Brief, p. 15.) While Relators maintain their position that the *Sumners* test is not applicable to the court's decision in *Linthicum*, application of that test weighs in favor of retroactive application.

First, *Linthicum* did not overrule clear past precedent. Plaintiffs argue that they relied upon *State ex rel. DePaul Health Ctr. v. Mummert*, 870 S.W.2d 820 (Mo. banc 1991), when filing their Abandoned Petition and then filing their Amended Petition less than twenty-four hours later. (Respondent's Brief, p. 19, fn 3.) Plaintiffs' reliance on *DePaul* is misplaced. *DePaul* did not determine the issue of when a case is brought for purposes of venue when a defendant is subsequently added by an amended petition, as was done in the underlying case. Rather, *DePaul* determined when a case is brought for purposes of venue when a defendant is subsequently dismissed from a lawsuit.

In *DePaul*, the plaintiffs filed their lawsuit in the City of St. Louis. Because they named both an individual and

corporation as defendants section 508.010, the general venue statute, applied. *Id.* at 821. One of the corporate defendants filed a motion to quash because all of the defendants resided in, and the cause of action accrued in, St. Louis County. *Id.* Through discovery, it was determined that the individual defendant was a resident of St. Louis County. *Id.* Plaintiffs then dismissed the individual defendant and urged the court to determine venue under section 508.040, the corporate venue statute. *Id.* The court stated that venue is determined as the case stands when brought, not when a motion challenging venue is decided and, therefore, section 508.010, not 508.040, applied to determine venue. *Id.* at 823. The court held that under section 508.010, venue was improper in St. Louis City because the case was originally brought against the individual defendant as well as the corporations. *Id.*

The facts in *DePaul* are inapposite to those presented in the underlying case. In the underlying case, plaintiffs did not dismiss any defendants from their lawsuit after filing their Abandoned Petition. Rather, they filed an Amended Petition and added defendant House less than twenty-four hours later. Therefore, if plaintiffs relied on *DePaul* as they argue, their

reliance was misplaced because *DePaul* did not decide when a case was brought for purposes of section 508.010 when a defendant is added rather than dismissed from a lawsuit. The Missouri Supreme Court's decision in *Linthicum* supports Relators' position that plaintiffs' reliance on *DePaul* is misplaced. The court, after setting forth its holding regarding when a case is brought for purposes of section 508.010, stated *State ex rel. DePaul Health Ctr. v. Mummert* does not hold to the contrary and still applies whenever a defendant is dismissed from a lawsuit rather than added to it. *Linthicum*, 57 S.W.3d at 858. Any argument by plaintiffs that they are prejudiced because they relied on the *DePaul* decision must fail because the *DePaul* court decided an entirely different issue than the one presented in the underlying case.

Further, if plaintiffs did rely on *DePaul*, the goal of such reliance was improper. Plaintiffs' reliance was simply to validate their efforts to fix venue in a county plaintiffs believe is more favorable to their cause. Plaintiffs were fully aware of their claims against House at the time the Abandoned Petition was filed, having asserted the claims in the prior lawsuit when plaintiff thought to do so would help them defeat

diversity jurisdiction and would allow them to maneuver their way to the state court venue of their choice. Reliance on *DePaul* for in this manner is improper and should not be permitted.

Plaintiffs, therefore, will not be prejudiced in any way if the *Linthicum* decision is applied to the underlying case.

Relators, however, will be prejudiced if the decision does not apply to determine venue. As set forth in Relators' Brief, Relators were served with the Abandoned Petition at the same time they were served with the Amended Petition. Therefore, Relators should not be precluded from objecting to venue when they did so at their first opportunity. To hold otherwise would be to work a hardship on Relators. Therefore, the *Sumners* test favors retroactive application of *Linthicum*.

C. Plaintiffs In the Underlying Case, Not Relators, Are Attempting To Forum Shop For A More Favorable Venue

It is disingenuous for plaintiffs to claim that they are not forum shopping. Both plaintiffs are residents of Phelps County. Moreover, all of the events giving rise to their cause of action accrued in Phelps County. When Relators were

finally successful in their endeavor to transfer the prior lawsuit out of Jackson County to Phelps County, where venue is proper, plaintiffs dismissed their lawsuit, only to re-file it back in Jackson County. While plaintiffs are correct that a plaintiff may choose his forum, the plaintiff must abide by the venue statutes. ~~A~~The purpose of the venue statutes is to provide a convenient, logical, and orderly forum for litigation. ~~@~~*Linthicum*, 57 S.W.3d at 855. Relators are not forum shopping but are merely seeking compliance with the venue statutes and are requesting this Court to make permanent the Writ of Prohibition preventing Respondent from taking any further action in this case other than to transfer it to a county where venue is proper.

**D. Relators Are Proper Parties To Challenge
Venue In The Underlying Case**

Respondent also asserts that the Missouri Supreme Court, with its decision in *Linthicum*, intended only to protect ~~A~~subsequently added Missouri resident defendants. ~~@~~ (See Respondent's Brief, Second Point Relied On.) This argument by Respondent is simply without merit and, if adopted, would lead to absurd results.

While Respondent is correct in his assertion that the individual defendant Max House d/b/a Southside Motors has never challenged venue in Jackson County, he is incorrect in his assertion that Athe protections afforded by *Linthicum* are inapplicable to the underlying case. (Respondent's Brief, Second Point Relied On, p. 22.) The Missouri Supreme Court's decision in *Linthicum* does not support such a proposition. The court in *Linthicum* held that a case is Abrought, for purposes of section 508.010, Awhenever a plaintiff brings a defendant into a lawsuit, whether by original petition or by amended petition.

Id. at 858. The court went on to state: AThis interpretation protects all party defendants equally and gives effect to the intent of the legislature in enacting section 508.010(3). *Id.* (emphasis added) The Missouri Supreme Court, therefore, did not limit the protections of *Linthicum* to only the defendant added by the amended petition, but extended it to Aall party defendants equally. *See id.*

Adopting the approach set forth by Respondent would lead to absurd results. When a lawsuit is brought, any defendant may challenge venue regardless of which defendant destroys proper venue. The same must hold true when defendants

are subsequently added by an amended petition. If venue is improper as to the added defendant, it is improper as to all defendants and any of them can properly object to venue. When a defendant is later added by an Amended Petition, not only should the added defendant be given an opportunity to challenge venue, but so should all defendants who would be subjected to an improper venue. This is particularly true under the facts of the underlying case where plaintiffs amended their petition without first serving Relators with the Abandoned Petition. Relators, therefore, had no opportunity to object to venue prior to House being added to the lawsuit. This fact, however, does not preclude them from objecting to venue at their first opportunity to do so, which was when they were served with the Amended Petition.

Despite Respondent's argument, Relators are proper parties to object to venue in Jackson County, a venue that is improper under plaintiffs' Amended Petition. *Linthicum* should not be interpreted to discriminate between subsequently added parties and the defendants originally named. Both are entitled to proceed in a county where venue is proper under Missouri venue statutes, here, section 508.010.

**E. Respondent Erred In Allowing Plaintiffs In
The Underlying Case To Revive Their
Abandoned Petition**

In support of his argument that plaintiffs' Abandoned Petition was properly revived, Respondent cites a Western District Court of Appeals case, *Welch v. Continental Placement, Inc.*, 627 S.W.2d 319 (Mo. Ct. App. 1982). It is impossible, after reading this case, to understand how it can be cited in favor of reviving an original petition. In *Welch*, the plaintiff filed her first petition in 1972 which included claims for fraud and deceit against the defendant. *Id.* at 320. In 1975, plaintiff amended the petition and filed a First Amended Petition. *Id.* at 320-21. In the First Amended Petition, the plaintiff omitted the fraud and deceit claims and sought only reformation of the contract formed between her and the defendant. *Id.* at 321. The case went to trial in 1977. *Id.*

Before submission of the case to the jury, the plaintiff was granted leave to file a Second Amended Petition. *Id.* In the Second Amended Petition, the plaintiff reasserted the fraud and deceit claims as well as the claim for reformation of the contract. *Id.*

Defendant moved for summary judgment on the deceit and fraud claims, arguing that the statute of limitations for those claims had expired because the Acts complained of occurred in 1971.® *Id.* The plaintiff argued that the 1977 Second Amended Petition related back, under Rule 55.33(c), to the 1975 First Amended Petition, which in turn, related back to the 1972 Petition, therefore, preserving her claims under the five year statute of limitations. *Id.* The Court of Appeals disagreed with the plaintiff, stating:

This argument overlooks the consequence of a pleading amendment which abandons an earlier theory or claim for recovery. When an amended pleading is filed, the former pleading is abandoned and is no longer before the court. *Weir v. Brune*, 256 S.W.2d 810 (Mo. 1953). An abandoned petition becomes a mere »scrap of paper« insofar as the case is concerned. *Leis v. Massachusetts Bonding and Insurance Co.*, 125 S.W.2d 906 (Mo. Ct. App. 1939). Where a petition has been replaced by an amended petition, the

original petition has been abandoned and it may not be considered for any purpose.

State ex rel. Fechtling v. Rose, 189 S.W.2d 425 (Mo. 1945).

Id. at 321-22.

The court then found the plaintiff's deceit and fraud claims barred by the statute of limitations. *Welch*, therefore, supports Relators' not Respondent's position regarding abandoned pleadings.

In support of reviving the Abandoned Petition, Respondent also cites *Deister v. Kansas City Northwestern Railway Co., et al.*, 195 S.W. 499 (Mo. 1917). Respondent's reliance on this case is also misplaced. *Deister* dealt with the revival of actions against representatives or successors of corporations pursuant to Kansas statutes. *Deister* had absolutely nothing to do with revival of a petition that had been abandoned by filing of an amended petition.

In summary, Respondent has absolutely no support for his action of reviving plaintiff's Abandoned Petition. There is simply no Missouri rule or decision that allows such a procedure. As stated above, and previously in Relators' Brief,

A[w]here a petition has been replaced by an amended petition, the original petition has been abandoned and it may not be considered for any purpose.® See *Welch*, 627 S.W.2d at 321. See also *State ex rel. Crowden v. Dandurand*, 970 S.W.2d 340, 342 (Mo. banc 1998) (once plaintiffs file an Amended Petition, they abandon their original petition); *New First National Bank v. C.L. Rhoses Produce Co.*, 58 S.W.2d 742, 744 (Mo. 1932). Because plaintiffs= Abandoned Petition is a legal nullity, Respondent erred when he allowed plaintiffs to revive that petition.

III. CONCLUSION

Relators respectfully state that Respondent erred in not applying the Missouri Supreme Court=s decision in *Linthicum* to the underlying case. Plaintiffs Abrought® this suit, for venue purposes, at the time their Amended Petition was filed against both corporations and an individual and, therefore, section 508.010 applies to determine venue. Because none of the defendants are residents of Jackson County and because the cause of action did not accrue there, venue under section 508.010 is improper in Jackson County. For these reasons and those set forth in the Relators= Brief, Relators request this Court to make its Preliminary Writ permanent and prohibit Respondent from

taking any further action on this case other than to transfer it to a county where venue is proper.

Respectfully submitted,

SHOOK, HARDY & BACON L.L.P.

By _____

Robert T. Adams, #34612
Paul A. Williams, #43716
Julie A. Shull, #49848

One Kansas City Place
1200 Main Street
Kansas City, Missouri 64105
816/474-6550
FAX: 816/421-4066

and

Keith W. McDaniel, Esq.
PULASKI, GIEGER, LABORDE, L.L.C.
434 N. Columbia Street, Suite 200
Covington, Louisiana 70433
T: 504/561-0400

ATTORNEYS FOR RELATOR
FORD MOTOR COMPANY

BERKOWITZ, FELDMILLER, STANTON,
BRANDT, WILLIAMS & SHAW, LLP

By

—

Thomas P. Schult, #29986
Nicholas DiVita, #37514

Julie Westcott, #49749

Two Emanuel Cleaver II Boulevard,
Suite 500
Kansas City, Missouri 64112
816/561-7007
FAX: 816/561-1888

ATTORNEYS FOR RELATOR
THE BUDD COMPANY

HORN, AYLWARD & BANDY, L.L.C.

By

Robert A. Horn, #38176

2600 Grand Boulevard, Suite 500
Kansas City, Missouri 64108

W. Wray Eckl
DREW, ECKL & FARNHAM, LLP
880 West Peachtree Street
P.O. Box 7600
Atlanta, Georgia 30357

ATTORNEYS FOR RELATOR
COOPER TIRE & RUBBER CO.

CERTIFICATE REQUIRED BY RULE NO. 84.06(c)

The undersigned does hereby certify that this brief complies with Rule 84.06(c), and contains 2,974 words. The undersigned further certifies that a floppy disk containing Relators' Reply Brief was filed with this brief in compliance with Rule 84.06(g), and that the disk is virus free.

SHOOK, HARDY & BACON L.L.P.

By

Robert T. Adams, #34612
Paul A. Williams, #43716
Julie A. Shull, #49848

One Kansas City Place
1200 Main Street
Kansas City, Missouri 64105
T: 816/474-6550
F: 816/421-4066

and

Keith W. McDaniel, Esq.
PULASKI, GIEGER, LABORDE, L.L.C.
434 N. Columbia Street, Suite 200
Covington, Louisiana 70433
T: 504/561-0400

ATTORNEYS FOR RELATOR
FORD MOTOR COMPANY

CERTIFICATE OF SERVICE

The undersigned does hereby certify, pursuant to Rule 84.06(g) that (1) a hard copy of the foregoing document in the form specified by Rule 84.06(a) and (2) and a copy of the disk required by Rule 86.06(g), was sent via U.S. Mail, this 10th day of July, 2002, to the individuals below. The undersigned does also hereby certify that the disk required by Rule 84.06(g) is virus-free.

The Honorable John R. O'Malley
Sixteenth Judicial Circuit Court
Jackson County, Missouri
415 East 12th Street
Kansas City, Missouri 64106
T: 816/881-3612
F: 816/881-3233

RESPONDENT

Randy W. James, Esq.
Lauren E. Perkins, Esq.
RISJORD & JAMES, P.C.
218 N.E. Tudor Road
Lee's Summit, Missouri 64086
T: 816/554-1500
F: 816/554-1616

ATTORNEYS FOR RESPONDENT

SHOOK, HARDY & BACON L.L.P.

By _____

Robert T. Adams, #34612
Paul A. Williams, #43716
Julie A. Shull, #49848

One Kansas City Place
1200 Main Street

Kansas City, Missouri 64105

T: 816/474-6550

F: 816/421-4066