TABLE OF CONTENTS

Table of Contents 1

Table of Cases and Other Authorities 2

Interest of The Amici 3

Argument 4

Conclusion. 9

Certificate of Compliance 10

Certificate of Service 11, 12

Table of Cases and Other Authorities

Cases:

Fusz v. Spaunhorst, 67 Mo. 256 (Mo. banc 1878) 7

State ex rel. Elson v. Koehr, 856 S.W.2d 57 (Mo. banc 1993).....4

State ex rel. Malone v. Mummert, 889 S.W.2d 822 (Mo. banc 1994).....5

Rules:

Mo. Sup. Ct. R. 55.03(b).....4

INTEREST OF THE AMICI

The Missouri Chamber of Commerce & Industry, hereafter "MCCI" is the largest statewide general business organization in the state of Missouri. It represents nearly 3,000 Missouri business, almost 200 local chambers of commerce and a number of other business organizations. MCCI seeks to advance Missouri's business interests by addressing public-policy issues which affect those interests. MCCI promotes Missouri's economy by advancing policies which will attract and retain business and industry and foster job growth.

The Court will decide if venue in the City of St. Louis is proper or improper by applying the law on pretensive joinder and corporate officer liability. The issues of pretensive joinder and the degree of personal participation required of a corporate officer to sustain a cause of action personally against such officer are topics of great interest to MCCI and its members. How the Court resolves these issues has a direct impact on (1) Missouri's ability to attract and retain business and industry; (2) on business and industry's ability to attract and retain employees; and (3) the decision of business and industry to hire employees who are residents of plaintiff-favored venues. MCCI and its members have a strong interest in assuring that business and its employees are not the subject of frivolous and pretensive suits.

ARGUMENT

Plaintiffs seek to establish venue in the City of St. Louis through the residency of Mr. Kaiser. Mr. Kaiser is joined in this case for the sole purpose of obtaining venue. It is suits of this sort which cause corporate employees to avoid residency in certain of the state's urban counties. It is suits such as this which deter business from hiring employees who are residents of Missouri's urban counties. This Court's ruling that venue in the City of St. Louis is improper will eliminate these concerns. The economy of the state and of the state's urban communities will be benefitted.

While it is true that venue in Missouri is statutory, "the primary purpose of Missouri's venue statutes is to provide a convenient, logical, and orderly forum for the resolution of disputes." State ex rel. Elson v. Koehr, 856 S.W.2d 57, 59 (Mo. banc 1993). Creating venue in the City of St. Louis based on the residency of Mr. Kaiser is not logical.

There must be a logical connection between the person sued and the cause of action stated in the lawsuit. Without such a logical connection a suit is frivolous. The filing of frivolous pleadings is not allowed. (Mo. Sup. Ct. R. 55.03(b)). The rule represents sound public policy. The emotional and financial toll of defending a suit is much too high to allow frivolous or pretensive causes of action to be prosecuted.

This case should be decided on the basis of the Court's en banc decision in State ex rel. Malone v. Mummert, 889 S.W.2d 822 (Mo. banc 1994). This Court held "courts will not permit Plaintiffs to engage in the pretense of joining Defendants for

the sole purpose of obtaining venue." State ex rel. Malone v. Mummert, 889 S.W.2d at 824. In Malone the Court held that a mere honest belief that the Plaintiff has a justiciable claim against a party such as Mr. Kaiser is not enough. State ex rel. Malone v. Mummert, 889 S.W.2d at 824. As announced in Malone the test for pretensive joinder is "a realistic belief that under the law and the evidence a valid claim exists." State ex rel. Malone v. Mummert, 889 S.W.2d at 824.

When the underling case was filed, Plaintiffs already knew a great deal about the facts of their case. In 1995 essentially the same suit was filed in the Circuit Court of Jefferson County seeking the same damages as Plaintiffs seek here. Three of the named Plaintiffs in that action are also named Plaintiffs in the underling suit. As the procedural history of the Jefferson County case, shows Plaintiffs conducted extensive discovery and participated in a hearing in the Jefferson County case. By reason of the knowledge of the facts Plaintiffs acquired in the Jefferson County case it is clear they have no realistic belief that they have a cause of action against Mr. Kaiser personally. Mr. Kaiser, it should be noted, was not named as a Defendant in the Jefferson County case.

When Plaintiffs filed their Second Amended Petition in this case naming Mr. Kaiser as a Defendant, Plaintiffs knew Mr. Kaiser did not have management supervision or control over the smelting operation in Herculaneum, Missouri. They also knew that he was not in charge of Doe Run's environmental compliance. Plaintiffs knew that Mr. Kaiser's duties were limited to budgetary matters.

Plaintiffs knew that Mr. Kaiser was not personally involved in the activity which Plaintiffs allege caused their harm. The Eastern District Court of Appeals, at page six of its opinion, succinctly characterized the corporate nature of Mr. Kaiser's activities when it stated "the very nature of the actions Mr. Kaiser is alleged to have taken is such that they could only be undertaken in Mr. Kaiser's official capacity as the Chief Financial Officer of Doe Run and not in his individual capacity."

Based on the knowledge which Plaintiffs possessed on the date Mr. Kaiser was added as a party, it is clear Plaintiffs do not satisfy the Malone test for pretensive joinder. It is certain Plaintiffs did not have a realistic belief that they had a valid claim against Mr. Kaiser personally.

It is the extent of Plaintiffs' knowledge of the facts acquired through discovery and hearing which compels a finding that Mr. Kaiser's joinder is pretensive. A ruling that venue is proper in the City of St. Louis would greatly weaken existing case law on the pretensive joinder issue. Plaintiffs clearly knew that Mr. Kaiser had no personal participation in the actions which they allege caused their harm.

A ruling that venue is proper in the City of St. Louis would also greatly weaken existing case law in the area of corporate officer liability. Missouri law on this issue was established early in the state's history and has remained unchanged since. "Nothing short of active participancy in a positively wrongful act intendedly and directly operating injuriously to the prejudice of the party complaining will

give origin to individual liability." Fusz v. Spaunhorst, 67 Mo. 256, 264 (Mo. banc 1878).

While this case is old, it remains the law and it sets good policy. In order for a corporate officer to be liable in an individual capacity, the officer must participate in the wrongful act. It is clear from Plaintiffs' pleading that Mr. Kaiser did not actively participate in the events described in Plaintiffs' Second and Third Amended Petitions. Without such active participation no cause of action can be stated against him and his joinder in this suit is pretensive.

In addition to legal precedent there are sound policy reasons which compel a finding that venue in the City of St. Louis is improper. If venue remains in the city, this case will become legal precedent. It will deter businesses from locating in the state of Missouri. It will deter businesses from hiring employees who are residents of urban communities such as the City of St. Louis for fear that such employees may be joined in lawsuits to create venue. It discourages residents of the City of St. Louis from accepting employment with business for fear that they, like Mr. Kaiser, may by reason of their residency in the city, be targeted for personal suit.

The Court should continue to prohibit pretensive joinder as attempted in this case and continue to require active participation by a corporate officer before the officer is subjected to personal liability. A corporate officer, not actively and personally engaged in tortious conduct, should not be subject to suit merely because he or she lives in a desired venue.

The state of Missouri, and its cities and counties work hard each day to attract business and industry. Business and Industry bring jobs, jobs bring people, people earn and spend money and tax revenue is generated at all levels of government. There is great competition between Missouri and other states and great competition between the cities and counties of this state for corporate business and corporate jobs.

The laws and judicial decisions of this state are considered by business and business employees when location and hiring decisions are made. The Court's ruling in this case will become part of Missouri law and will be reviewed by prospective businesses and employees during this due diligence process.

The decision of the Court in this case will have a direct impact on the economic development of the City of St. Louis and other urban centers. The state of Missouri in the recent past has lost many manufacturing jobs and the City of St. Louis has lost enormous population over the years. The economic base of the state and the City of St. Louis is enhanced by greater population and more jobs. The Court should hold that joinder of Mr. Kaiser in the City of St. Louis improper.

CONCLUSION

WHEREFORE, for all the reasons stated above, Missouri Chamber of Commerce & Industry prays that this Court should direct that a permanent order in

prohibition issue. Respondent should be ordered to take no action in <u>Doyle v. Fluor Corporation</u> et al., No. 012-8641 other than dismissal of the claims against Defendant Kaiser and to transfer the case to a proper venue.

Respectfully submitted

CARSON & COIL, P.C.

_____

James W. Gallaher MBE #22085
515 East High Street, P.O. Box 28
Jefferson City, MO 65102
Tel:(573) 636-2177; Fax:(573) 636-7119

CERTIFICATE OF COMPLIANCE

PURSUANT TO RULE 84.06(c) and (g)

The undersigned counsel hereby certifies pursuant to Supreme Court Rule 84.06(c) and (g), that:

1. The **Brief of Amicus Curiae** submitted in the above-styled cause includes the information required by Rule 55.03;

2. The amicus brief submitted complies with the limitations contained in Rule 84.06(b).

3. As reported by the undersigned's copy of Word Perfect 10, the word count is 1,652, excluding therefrom the cover page, signature block, certificate of service and certificate of compliance.

4. The diskettes submitted to the Court and to counsel of record have been scanned for viruses using Norton Anti-Virus, Corporate Edition, with virus definitions as of October 15, 2003, and they are virus free.

_____

James W. Gallaher MBE #22085
ATTORNEY FOR AMICUS CURIAE

CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing brief in paper form (and, where indicated, one copy of the foregoing brief on disk) have been mailed, United States postage prepaid, on October 20, 2003.

<u>Respondent:</u>
The Honorable Margaret M. Neill (Hard Copy and Disk)
Circuit Court of the City of St. Louis
Civil Courts Building
10 N. Tucker
St. Louis, Missorui 63101
Telephone: (314) 622-4311

<u>Attorneys for Plaintiffs:</u>
Robert F. Ritter
Gray, Ritter & Graham, PC
701 Market Street, Suite 800
St. Louis, Missouri 63101
Telephone: (314) 241-5620

Jeffrey J. Lowe (Hard Copy and Disk)
Simon, Lowe & Passanante, LLC
701 Market Street, Suite 390
St. Louis, Missouri 63101
Telephone: (314)241-2929

Kevin S. Hannon
The Hannon Law Firm, LLC
1641 Downing Street
Denver, Colorado 80218
Telephone: (303) 861-8800

Robert B. Reeser
The Law Offices of Robert Reeser
306 West Third Street
Sedalia, Missouri 65302-0388

<u>Attorneys for Defendants:</u>

Jeffrey L. Cramer
T. Michael Ward
Brown & James, PC
1010 Market Street, 20th Floor
St. Louis, Missouri 63101
Telephone: (314) 421-3400

John H. Quinn, III
Armstrong Teasdale, LLP
One Metropolitan Square, Suite 2600
St. Louis, Missouri 63102
Telephone: (314) 621-5070

Andrew Rothschild
Richard A. Ahrens (Hard Copy and Disk)
Lewis, Rice & Fingersh, LC
500 North Broadway, Suite 2000
St. Louis, Missouri 63102
Telephone: (314) 444-7600

John R. Musgrave
James M. Cox
Thompson Coburn, LLP
One U.S. Bank Plaza
St. Louis, Missouri 63101
Telephone: (314) 552-6000

_____
James W. Gallaher