

IN THE  
SUPREME COURT OF MISSOURI

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No. SC87962

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STATE OF MISSOURI ex rel. ROWE BURNS,  
Relator,

v.

HONORABLE CAROLYN C. WHITTINGTON,  
Respondent.

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RELATOR'S BRIEF IN SUPPORT OF ITS  
PETITION FOR WRIT OF MANDAMUS

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HOLLORAN & SCHWARTZ

Thomas E. Schwartz, #44504  
1010 Market St., Ste. 1650  
St. Louis, Missouri 63101  
(314) 621-2121 Phone  
(314) 621-8512 Facsimile  
[tschwartz@holloranlaw.com](mailto:tschwartz@holloranlaw.com)

Attorneys for Rowe Burns

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## **Jurisdictional Statement**

This Petition for Writ of Mandamus arises from a case filed in the Twenty-Second Judicial Circuit Court of the City of St. Louis, Missouri. The case was transferred to the Twenty-First Judicial Circuit Court of the County of St. Louis, Missouri. Relator contests The Honorable Thomas C. Grady's Order transferring venue. Both Circuit Courts lie within the Eastern District of the State of Missouri and, as a result, Relator first filed a Petition with the Missouri Court of Appeals, Eastern District, as provided by §477.050 RSMo (2000), which was denied. Pursuant to Rule 83.20 and Article V, §4 of the Missouri Constitution, jurisdiction for this Petition now lies in the Supreme Court of Missouri.

## Statement of Facts

Alfred and Rowe Burns filed this case on August 22, 2005. Alfred Burns alleged that his exposure to Defendants' benzene-containing products caused him to develop acute myelogenous leukemia; Rowe Burns alleged a loss of consortium.

On January 12, 2006, Alfred Burns died as a result of his leukemia. On February 2, 2006, Plaintiffs filed a Suggestion of Death and Motion For Leave To File First Amended Petition. As set forth in the Motion For Leave, the First Amended Petition included no new Defendants and included identical negligence and strict liability theories. The trial court granted the Motion, and the First Amended Petition was deemed filed on March 3, 2006.

On August 2, 2006, the Honorable Thomas C. Grady granted Defendant's Motion to Transfer. The Court found that Plaintiff's Amended Petition constituted a new cause of action, and that the "new cause of action" was filed on or about March 3, 2006, thus implicating the new tort venue rules. Plaintiff filed a Petition for Writ of Mandamus with the Missouri Court of Appeals, Eastern District. The issue presented in said writ was the alleged error in the trial judge's act of granting a venue transfer from the City of St. Louis to St. Louis County contrary to the meaning of §538.305 RSMo and the provisions of §508.010 RSMo.

On August 18, 2006, Presiding Judge Kathianne Knaup Crane issued an

Order denying Relator's Petition for Writ of Mandamus. Relator then filed a Petition for Writ of Mandamus with the Supreme Court of Missouri. On September 26, 2006, Relator's Petition for Writ of Mandamus was sustained and an Alternative Writ was ordered to issue returnable to the Supreme Court en Banc in thirty (30) days. Relator now writes this Brief in Support of its Petition for Writ of Mandamus.

**Point Relied On**

**RELATOR IS ENTITLED TO AN ORDER RE-TRANSFERRING THIS CASE TO THE CITY OF ST. LOUIS AFTER THE TRIAL COURT ERRED IN GRANTING A VENUE TRANSFER TO ST. LOUIS COUNTY BECAUSE VENUE IS PROPER IN THE CITY OF ST. LOUIS UNDER MISSOURI LAW IN THAT VENUE WAS PROPER AND UNCONTESTED AT THE TIME PLAINTIFF FILED HIS PETITION ALLEGING INJURY (LEUKEMIA) AND VENUE WAS NOT REQUIRED TO BE RE-ANALYZED WHEN PLAINTIFF AMENDED THE PETITION ALLEGING THAT PLAINTIFF DIED AS A RESULT OF THAT INJURY, DID NOT INCLUDE ANY NEW DEFENDANTS AND DID NOT CONSTITUTE A NEW “CAUSE OF ACTION.”**

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

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Wolff Shoe Co. v. Dir. of Revenue, 762 S.W.2d 29 (Mo. banc 1988).

Mo. Rev. Stat. §508.010 (2000).

Mo. Rev. Stat. §538.305 (2005).

## Argument

**RELATOR IS ENTITLED TO AN ORDER RE-TRANSFERRING THIS CASE TO THE CITY OF ST. LOUIS AFTER THE TRIAL COURT ERRED IN GRANTING A VENUE TRANSFER TO ST. LOUIS COUNTY BECAUSE VENUE IS PROPER IN THE CITY OF ST. LOUIS UNDER MISSOURI LAW IN THAT VENUE WAS PROPER AND UNCONTESTED AT THE TIME PLAINTIFF FILED HIS PETITION ALLEGING INJURY (LEUKEMIA) AND VENUE WAS NOT REQUIRED TO BE RE-ANALYZED WHEN PLAINTIFF AMENDED THE PETITION ALLEGING THAT PLAINTIFF DIED AS A RESULT OF THAT INJURY, DID NOT INCLUDE ANY NEW DEFENDANTS AND DID NOT CONSTITUTE A NEW “CAUSE OF ACTION.”**

Because the issue raised in this writ requires the Court’s interpretation of a statute, *de novo* review is necessary as the Court seeks to give effect to the legislative intent. Carmack v. Mo. Dep’t of Agric., 31 S.W.3d 40, 46 (Mo.App. W.D. 2000).

**I. VENUE IS PROPER IN THE CITY OF ST. LOUIS BECAUSE WHEN PLAINTIFF FILED HIS PETITION, VENUE WAS PROPER PURSUANT TO §508.010 RSMo AND VENUE WAS UNCONTESTED.**

Venue in Missouri is determined solely by statute. State ex rel. Rothermich v. Gallagher, 816 S.W.2d 194, 196 (Mo. banc 1991). This case was brought against these Defendants on August 22, 2005, pursuant to Missouri's general venue statute, §508.010 RSMo. When this case was filed, the pertinent part of the statute read, "Suits instituted by summons shall . . . be brought: 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. . . ." §508.010(3), RSMo (2000). When the Petition was filed on August 22, 2005, venue was proper and uncontested.

**II. VENUE IS PROPER IN THE CITY OF ST. LOUIS BECAUSE PLAINTIFF'S AMENDED PETITION DID NOT ADD NEW DEFENDANTS, AND VENUE THEREFORE SHOULD NOT HAVE BEEN RE-ANALYZED.**

Under Missouri law, venue is only re-analyzed when new defendants are

added to the case. State ex rel. Linthicum v. Calvin, 57 S.W.3d 855, 858 (Mo. banc 2001). The Court in Linthicum explained, “For purposes of section 508.010, a suit instituted by summons is “brought” whenever a plaintiff brings a defendant into a lawsuit, whether by original petition or by amended petition.” 57 S.W.3d at 858.

Here, no new defendants were added in the First Amended Petition. The Amended Petition alleged the *same* negligence and strict liability theories, relating to the *same* products, against the *same* defendants. Pursuant to Linthicum, there is no reason to re-analyze venue as it relates to the Amended Petition. 57 S.W.3d at 858.

**III. VENUE IS PROPER IN THE CITY OF ST. LOUIS BECAUSE §538.305 RSMo AND THE RECENTLY REVISED §508.010 RSMo WERE NOT IN EFFECT AT THE TIME PLAINTIFF’S PETITION WAS FILED, AND THEREFORE SHOULD NOT BE APPLIED.**

Venue is proper in the City of St. Louis because venue was proper and uncontested when this case was brought against the Defendants on August 22, 2005, before the new venue rules came into effect. Pursuant to legislative intent and judicial interpretation, Plaintiff’s Amended Petition does not constitute a “new cause of action,” and thus, the new tort venue rules are not implicated. See H.B.

393, 93<sup>rd</sup> Gen. Assem., 1<sup>st</sup> Reg. Session. (Mo. 2005), codified at section 538.305 RSMo 2005 (“The provisions of this act, except for section 512.099, RSMo, shall apply to all causes of action filed after August 28, 2005”). The trial court’s misinterpretation of the meaning of “cause of action” in the context of venue has caused this case to be erroneously transferred to St. Louis County contrary to the meaning of §538.305 RSMo and the provisions of §508.010 RSMo.

It is well established in Missouri that a procedural statute, such as a statute conferring venue rights, does not apply to a cause of action existing at the time the statute was enacted when the Missouri legislature has expressed a contrary intention. State ex re. LeNave v. Moore, 408 S.W.2d 47 (Mo. banc 1966). The Missouri legislature has expressed a clear intention that the current version of §508.010 RSMo applies only to “causes of action filed after August 28, 2005.” §508.010 RSMo (2005). Because this cause of action was brought against these Defendants on August 22, 2005, §508.010 RSMo (2005), does not apply to this case.

**IV. VENUE IS PROPER IN THE CITY OF ST. LOUIS BECAUSE  
EVEN IF §538.305 RSMo AND THE RECENTLY REVISED**

**§508.010 RSMo WERE APPLIED, SAID APPLICATION  
WOULD NOT RESULT IN A CHANGE OF VENUE  
BECAUSE PLAINTIFF’S AMENDED PETITION DID NOT  
CONSTITUTE A NEW “CAUSE OF ACTION.”**

While §538.305 RSMo states that the new tort laws “shall apply to all ‘causes of action’ filed after August 28, 2005,” it does not define the term “cause of action.” See §538.305 RSMo (2005). “The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning.” Wolff Shoe Co. v. Dir. of Revenue, 762 S.W.2d 29, 31 (Mo. banc 1988). Historically, the term “cause of action” has been used interchangeably with other terms in the venue context. In the new version of §508.010 RSMo for instance, the legislature used the terms “suit”, “action”, “claim”, “civil action”, and “cause of action”, without distinction or definition. See §508.010 RSMo (2005).

This Court defined the term “cause of action” as “a group of operative facts giving rise to one or more bases for suing.” Chesterfield Village, Inc. v. City of Chesterfield, 64 S.W.3d 315, 318 (Mo. banc 2002) (citing Black’s Law Dictionary 214 (7<sup>th</sup> ed. 1999)). This definition centers on the factual bases for the claims, not the legal theories. Id. at 319. A cause of action does not change even though

additional or different evidence or legal theories might be advanced to support it. Id. at 319-20; citing Fleming James Jr., Geoffrey C. Hazard, Jr. & John Leubsdorf, Civil Procedure § 11.8 (5<sup>th</sup> ed., 2001). Because the legislature chose not to define the term in §538.305 RSMo, it must be assumed that this is the meaning that was intended.

In the context of venue, pursuant to legislative intent and judicial interpretation, Relator's "cause of action" (or whatever other term is used as a substitute) was filed against these Defendants on August 22, 2005. See Chesterfield Village, Inc., 64 S.W.3d at 318 ("A claim is '[t]he aggregate of operative facts giving rise to a right enforceable by a court.' The definition of a cause of action is nearly the same: 'a group of operative facts giving rise to one or more bases for suing.'"). Whether Mr. Burns is living or dead, the "factual bases for the claims" is the same.

Because this cause of action accrued and was filed prior to the effective date of the new tort laws, these laws may not be applied to this case. Application of House Bill 393, or any of its provisions such as §508.010 RSMo (2005), would violate Article I, section 13 of the Missouri Constitution, which prohibits laws from operating retrospectively. Therefore, venue should never have been disturbed.

### **Conclusion**

Relator is entitled to an Order re-transferring this case to the City of St.

Louis because the trial court erred in granting venue transfer to St. Louis County. Under the relevant Missouri statute, §508.010(3), RSMo (2000), venue was uncontested and proper when this case was filed on August 22, 2005. Because no new defendants were added to the case, venue should not have been re-analyzed. Moreover, even if the issue of venue is reconsidered, the wrongful death claim does not constitute a new “cause of action” under §508.010 RSMo and §538.305 RSMo. For any and all the bases set forth in the above sections, Plaintiffs pray this Honorable Court enter an Order re-transferring this case to the City of St. Louis where venue is proper.

**HOLLORAN & SCHWARTZ**

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**Thomas E. Schwartz, #44504**  
**1010 Market St., Ste. 1650**  
**St. Louis, Missouri 63101**  
**(314) 621-2121 Phone**  
**(314) 621-8512 Facsimile**  
**[tschwartz@holloranlaw.com](mailto:tschwartz@holloranlaw.com)**

**Attorneys for Rowe Burns**

**Certificate of Rule 84.06 (c) Compliance**

I hereby certify that this brief complies with the type-volume limitation of Rule 84.06(b) of the Missouri Rules of Civil Procedure. This brief was prepared in Microsoft WordPerfect 9 and contains 2,344 words, excluding those portions of the brief listed in Rule 84.06(b) of the Missouri Rules of Civil Procedure. The font is Times New Roman, proportional spacing, 14-point type. A 3 ½ inch computer diskette (which has been scanned for viruses and is virus free) containing the full text of this brief has been served on each party separately represented by counsel and is filed herewith with the clerk.

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**Certificate of Service**

I hereby certify that one copy of this brief and a 3 ½ inch computer diskette (which has been scanned for viruses and is virus free) containing the full text of

this brief were mailed, postage prepaid, this 22<sup>nd</sup> day of November, 2006 to:

The Honorable Carolyn C. Whittington  
Presiding Judge of the Circuit Court of the County of St. Louis  
7900 Carondelet  
Clayton, Missouri 63105  
Telephone: (314) 615-1507

Matthew Shorey  
Armstrong Teasdale LLP  
One Metropolitan Square, Ste. 2600  
St. Louis, Missouri 63102  
Telephone: (314) 621-5070  
Attorney for Defendant Chemisphere Corporation

Reed Sugg & Jason McKnight  
Sandberg, Phoenix & von Gontard, P.C.  
One City Center, 15<sup>th</sup> Floor  
St. Louis, Missouri 63101-1880  
Telephone: (314) 231-3332  
Attorneys for Defendant NCH Corporation