**SC96710**

**IN THE MISSOURI SUPREME COURT**

**State ex rel. Imerys Talc America, Inc., Relator**

**v.**

**The Honorable Rex M. Burlison, Respondent**

**An Original Writ Proceeding arising from**
**the Circuit Court of the City of St. Louis, Missouri**
**Case Number 1422-CC09326-01/02**
**The Honorable Rex M. Burlison**

# Relator Imerys Talc America, Inc.'s Reply Brief

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## Argument

Respondent's brief is not persuasive in supporting his actions in denying Relator's renewed motion to sever Michael Blaes' wrongful death claim and transfer it to the proper venue of St. Louis County. Following *Barron, et al., v. Abbott Labortories, Inc.*, 529 S.W.3d 795 (Mo. banc 2017), Relator properly and timely renewed its motion to sever and transfer venue of Blaes' wrongful death claim after Respondent set Blaes' claim for trial, separately from the remaining plaintiffs. This Court's reasoning in *Barron* is sound, in concluding that once this occurs, the trial court "necessarily has decided there are no further gains in efficiency or expeditiousness to be had" from joinder of multiple plaintiffs' claims, and that the trial court has discretion to deny a renewed motion to sever "only in the rarest of circumstances" and that an abuse of discretion in denying such a motion "will be patently prejudicial under section 508.012." *Id.*, at 803. Respondent offers no argument, based on fact or law, as to why *Barron* and its determination of the applicability of §508.012 R.S.Mo. is not dispositive, and why this Court's preliminary writ issued in this case should not be made permanent.

### A. This Court's writ should be made permanent because Relator timely and properly renewed its motions to sever and transfer the venue of Blaes' wrongful death claim to St. Louis County after Respondent ordered it to be tried separately from the claims of the remaining plaintiffs.

Respondent's argument that Relator's motion to sever and transfer venue is deficient is wrong.

**1. Relator's motion to sever and transfer venue was timely filed.**

On September 18, 2017, Respondent ordered Blaes' wrongful death claim to be tried separately from the remaining plaintiffs' claims. Though Relator has consistently objected to joinder and sought severance and venue transfer, it specifically renewed these motions after Respondent entered the order for a separate trial for the Blaes wrongful death claim. It is clear from reading the primary and concurring opinions in *Barron*, this Court distinguishes relief requested and denied *before or after* the trial court orders an individual plaintiff's claims to be separately tried from the remaining plaintiffs' claims. *Barron*, 529 S.W.3d at 801-803. Unlike the defendant in *Barron*, who did not renew the request for a severance and venue transfer after the individual plaintiff's claim was set for trial separate from the remaining plaintiffs, Relator did do so. Relator's motion was not deficient in its timing.

**2. The *requirement* to sever and reassess venue arose when Respondent ordered *Blaes'* wrongful death claim to be separately tried.**

The motion to sever and transfer venue of the Blaes claim was not deficient in its substance. Respondent contorts this Court's use of the word "each" in *Barron* to attempt to exact a requirement that Relator demonstrate Respondent has made a determination to try each *and every* plaintiff's claims individually, or the motion to sever Blaes' claims (which was in fact ordered to be tried separately) should be denied. In fact, there is no such requirement in *Barron*. Instead, the accurate reading of *Barron* makes clear a defendant must renew the motion to sever and transfer the claim of the individual

plaintiff's claims when *that plaintiff's claim* is ordered to be separately tried. The focus of this writ proceeding is whether *Blaes'* claim should be severed and transferred, and there is no requirement Relator provide proof that Respondent has also determined (and that really would mean ordered) separate trials for all of the remaining plaintiffs, even if discovery has not occurred or been completed as to these claims and they are not even ready to be set for any trial.

**3. By ordering Blaes' wrongful death claim separately tried, Respondent necessarily determined any gains of efficiency and expeditiousness through joinder of multiple plaintiffs' claims were no longer gained as to Blaes' claim.**

In addition, Respondent argues, *without any evidentiary support cited in his brief or attached to his appendix*, that the writ should not be made permanent because he designed a "bellwether system" whereby a few cases would be tried, and his denial of Relator's renewed motion to sever "was a decision in keeping with the hope that as the parties and the court learned more, the possibility of trying common issues in a single trial across the remaining cases would increase." (Respondent's brief at 11, 12.) Not only is that statement unsupported by any citation to the record, it is contrary to what really happened. [1]

[1] Respondent also argues severing would be inefficient and would add "significant additional delay" for Blaes' wrongful death claim to be transferred to St. Louis County, because it would be "placed at the end of the line in that circuit and await trial on a crowded docket." (Respondent's brief at 12.) However, this argument is not persuasive. *Blaes originally filed his wrongful death claim in St. Louis County over four years ago,*

First, Imerys would never agree to any "bellwether system" because it has consistently maintained Respondent lacks general and specific jurisdiction over it *for all claims brought by all plaintiffs, whether they reside in or outside Missouri.*[2]

Second, there is no pleading, order or transcript that evidences any discussion or agreement to use a "bellwether system" for trial on some claims as "test claims." *Respondent's brief does not contain a single reference to the underlying court record to support this point—because there is none.* Five single-plaintiff cases have proceeded to separate verdict and final judgment without any request by a party or order from Respondent that they or any other claims are to be tried as "bellwether" or test cases. In fact, Blaes was specifically set for an *individual* trial following the United States Supreme Court's issuance of *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017), which precluded Respondent from trying the claims of any non-resident plaintiffs along

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but after his case was set for trial he moved to continue the trial setting, and then in March 2016, *Blaes* sought leave of court to dismiss his claim. *See Blaes v. Johnson & Johnson*, 858 F.3d 508, 511, 517 (8th Cir. 2017). He later sought and obtained leave to be added to the underlying case in December 2016. (Exhibit D.)

[2] As Relator's writ petition and supporting suggestions make clear, Relator continues to maintain Respondent lacks personal jurisdiction over it for *all claims brought by Missouri and non-Missouri plaintiffs* and it should not be forced to go to trial on liability until its jurisdiction motions are ruled on. After Respondent ordered Blaes set separately for trial, Relator renewed its motion to dismiss and also moved to stay or continue the October 16, 2017 trial because Blaes had requested, and was still undertaking jurisdiction discovery, which would not be completed before trial commenced. Respondent refused to continue the trial and ordered Relator's motion to dismiss held "in abeyance." As part of this writ proceeding, Relator requested this Court prohibit Respondent from proceeding to trial before jurisdiction discovery was complete and a ruling made on Relator's jurisdiction motion. This Court issued the preliminary writ only as to the severance/change of venue issues however, it had the effect of stopping the October trial. Relator continues to

with Blaes. *See Barron*, 529 S.W.3d at 810 wherein the concurring opinion recognizes the use of a Rule 52.05(a) joinder to combine multiple in-state and out-of-state plaintiffs in a single action largely will be prevented in the future by *Bristol-Myers*.

Third, in *Barron*, this Court reasoned, though the gains of efficiency and expeditiousness may be met in permitting joinder of claims while discovery is proceeding, when a trial court orders an individual plaintiff's claim to be tried separately from the remaining plaintiffs, the trial court "necessarily has decided" there are no further gains to be had on these issues. *Id.*, at 803. This Court recognized, if a party were to timely renew the request to sever after the individual plaintiff's claim is ordered to be separately tried, the trial court has discretion to deny a renewed motion to sever "only in the rarest of circumstances" and that an abuse of discretion in denying such a motion "will be patently prejudicial under section 508.012." *Id.*, at 803.

Respondent exceeded his authority in denying Relator's renewed motion to sever the Blaes wrongful death claim after it ordered it to be tried separately from the remaining plaintiffs' claims.

**B. Once Respondent ordered a separate trial for the Blaes wrongful death claim, §508.012 R.S.Mo. and §508.010 *required* transfer to St. Louis County.**

Section 508.012 *requires* transfer of a claim if at any time prior to the commencement of a trial, if a party, *whether a plaintiff or a defendant*, is either added or

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preserve its claim that Respondent lacks personal jurisdiction as to the claims of plaintiff

removed from a petition, which would have, if originally added or removed to the initial petition, altered the determination of venue under §508.010, then the judge, upon proper application, shall transfer venue to the case to a proper venue under §476.410. Respondent argues the word "or" as found in the statute means it is not applicable in this case.

This argument is wrong. First, this Court has already determined the statute applies in this situation. *Barron*, 529 S.W.3d at 803. Respondent's brief reads as if *Barron* does not exist. In fact, he only mentions the case twice in passing and makes no reference to *Barron* anywhere in the entire section of his brief on this point. (Respondent's brief at 8, 11, 13-29.)

*Barron* is important because it distinguishes between motions to sever and transfer venue requested by defendants at the beginning of a case involving multiple joined plaintiffs versus when individual plaintiffs are later set separately for trial. *Id.*, at 802, 803. The concurring opinion discussed the interplay between the rules permitting joinder (Rule 52.05), separate trials (Rule 66.02), and managing multi-party civil ligation in pursuit of just, speedy and inexpensive resolution of claims (Rule 41.03) at the beginning of a case, but the concurring opinion specifically determines §508.012 is triggered when the trial court orders a separate trial for an individual plaintiff:

> Once the trial court has determined that each plaintiff's claims are to be tried separately, however, the trial court necessarily has decided there are not further gains in efficiency or expeditiousness to be had from the joinder authorized by Rule 52.05(a). Once that decision has been made, therefore the trial court has

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Blaes and all other plaintiffs, whether they reside in or outside Missouri.

> discretion to deny a subsequent or renewed motion to sever only in the rarest of circumstances. Moreover, an abuse of discretion in denying such a motion will be patently prejudicial under section 508.012 RSMo 2005, which provides:
>
> > At any time prior to the commencement of a trial, **if a plaintiff** or defendant, including a third-party plaintiff or defendant, **is either added or removed** from a petition filed in any court in the state of Missouri which would have, if originally added or removed to the initial petition, altered the determination of venue under section 508.010, then the judge shall upon application of any party transfer the case to a proper forum under section 476.410.

*Barron*, 529 S.W.3d at 802 (original emphasis as contained in the opinion).

Based on the reasoning of the majority and concurring opinions in *Barron*, Relator renewed its previously filed motions to sever and transfer the venue of Blaes' claims to St. Louis County as soon as Respondent ordered Blaes' claim to be set for trial separate from the remaining plaintiffs. As in *Barron*, though Respondent may have denied motions to sever and transfer venue while discovery was ongoing, "once the trial court determined that each Plaintiff's claims should be tried separately in this case, … it was error not to sever them and transfer those for which venue was no longer proper under sections 508.012 and 508.010." "Once that decision has been made [to try a plaintiff's claims separately] . . . the trial court has discretion to deny a subsequent or renewed motion to sever only in the rarest of circumstances." *Id.*, at 803.

The concurring opinion reasoned: "A decision to sever each plaintiff's claims in a multi-plaintiff case 'removes' a plaintiff for purposes of section 508.012 and, therefore, doing so will require the trial court (on application of a party) to determine the proper venue for the various actions resulting from that severance. Where those venues are

different from the original venue, section 508.012 *requires* the trial court to transfer those actions to their proper venues for trial." *Id*. (emphasis added). Respondent offers no supportable reason to not follow this Court's clear interpretation of §508.012.[3]

Respondent argues there is no basis in the rules to sever claims properly joined, however, Rule 52.06[4] on its face does, and *Barron* is directly on point in recognizing, upon a proper and timely request, §508.012 *requires* it.[5] See *Gardner v. Mercantile Bank of Memphis*, 764 S.W.2d 166, 168 (Mo.App. 1989) (where the legislature has enacted a statute pertaining to a procedural matter not addressed nor inconsistent with any supreme court rule, the statute must be enforced).

**C. Respondent ignores the only proper venue for Blaes' claim was St. Louis County.**

Respondent's brief is silent on the undisputed fact *the only proper venue for Blaes' claims is St. Louis County*. As alleged in the Fourth Amended Petition, "[a]t all pertinent times" the decedent "purchased and applied talcum powder in St. Louis County, Missouri" and her ovarian cancer "developed in the State of Missouri." (Exhibit B10, ¶ 6.) Mrs. Blaes was "first injured" in St. Louis County and, pursuant to sections

[3] Respondent also argues that the supreme court rules do not permit later reassessment of venue. The rules were in place when this Court recognized application of §508.012 and Respondent provides no supported argument as to why this Court's application of the statute was improper.

[4] Rule 52.06 states in part: "Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately."

508.010(4), (11), and (14), venue is proper in St. Louis County, not St. Louis City.[6] These facts have remained unchanged throughout all prior petitions and are undisputed. (Exhibit C71, ¶ 8; Exhibit D135 ¶ 8; Exhibit E199 ¶ 6.)[7]

The determination of proper venue is determined solely by statute. *State ex rel. Harness v. Grady*, 201 S.W.3d 48, 50 (Mo. App. 2006); *State ex rel. Kinsey v. Wilkins*, 394 S.W.3d 446, 449 (Mo. App. 2013). Improper venue of a plaintiff's claims requires transfer to the appropriate venue and joinder with other plaintiffs' claims does not alter the venue analysis and outcome. Joinder here does not and cannot expand venue, which is created by statute. Rule 51.01 provides: "These Rules shall not be construed to extend or limit the jurisdiction of the courts of Missouri, or the venue of civil actions therein." (A11.) *See State ex rel. Turnbough v. Gaertner*, 589 S.W.2d 290, 291, 292 (Mo. banc 1979); *State ex rel. Kinsey v. Wilkins*, 394 S.W.3d 446, 450 (Mo. App. 2013) (simply

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[5] Respondent relies upon *State ex rel. Blond v. Stubb*, 485 S.W.2d 152, 157 (Mo.App. 1972), however this case is factually distinguishable and was issued before §508.012 was enacted.

[6] In tort actions "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." §508.010 (4) R.S.Mo. "In a wrongful death action, the plaintiff shall be considered first injured where the decedent was first injured by the wrongful acts or negligent conduct alleged in the action." §508.010 (11) R.S.Mo. "A plaintiff is considered first injured where the trauma or exposure occurred rather than where symptoms are first manifested." §508.010 (14), RSMo.

[7] *Blaes* originally filed his wrongful death claim in St. Louis County over four years ago wherein he alleged venue was proper in St. Louis County, but after his case was set for trial he moved to continue the trial setting, and then in March 2016, *Blaes* sought leave of court to dismiss his claim, and thereafter he obtained leave to be added to the underlying case in December 2016. *See Blaes v. Johnson & Johnson*, 858 F.3d 508, 511, 517 (8th Cir. 2017); Exhibit D. He has never changed his allegation that his wife's purchase and

joining separate causes of action in a single petition does not create venue over both actions). Respondent provides no fact or law to the contrary.

**D. Respondent ignores this Court made clear the propriety and necessity of writ relief.**

Respondent's brief is silent on this Court's recognition that venue improprieties should be handled by writ relief rather than on appeal following judgment, as review on appeal does not offer an adequate remedy. *Barron*, 529 S.W.3d at 799, n. 6. "Perhaps the difficulty in showing prejudice on appeal is why these types of claims [improper venue] are better raised in the pretrial writ context, which requires no showing of prejudice." *Id*. Forcing Relator to trial in an improper venue with the idea that relief will be afforded on an appeal following final judgment is no longer an appropriate reason to deny severance and venue motions.

Absent writ relief by this Court, Imerys will have no remedy at all for trial in an improper venue in Missouri, making Respondent's improper venue rulings essentially unreviewable and essentially abrogates the venue statutes. *Barron*, 529 S.W.3d at 801, 802 (when a defendant's initial efforts to sever and transfer venue of the resulting separate actions to a proper venue fail, a defendant is "left without a remedy unless it can scale the nearly insurmountable hurdle of proving prejudice on appeal" and therefore, writ relief for an improperly denied renewed request to sever and transfer venue when a plaintiff's claims are set separately for trial is proper and necessary as it "avoids creating

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use of talcum powder was in St. Louis County. (Exhibit B10 Exhibit C71, ¶ 8; Exhibit

the analytical dead-end of a prejudice requirement that seldom (if ever) can be met.") Once Respondent set Blaes' claim separately for trial, Respondent was *obligated* to sever the Blaes claim, reassess venue, and transfer the Blaes claims to the proper venue of St Louis County.

**Conclusion**

Wherefore, for the above set-forth reasons, Relator Imerys Talc America, Inc. moves this Court make its preliminary writ of prohibition permanent directing Respondent to take no further actions with regard to the claims of plaintiff Michael Blaes except to sever and transfer his claim to St. Louis County Circuit Court and for whatever further relief this court deems fair and just.

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D135 ¶ 8; Exhibit E199 ¶ 6.)

## Certificate of Service and Compliance

Susan Ford Robertson, of lawful age, first being duly sworn, states upon her oath that on February 20, 2018, a copy of Relator's Reply Brief was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system on all counsel of record. I also certify that the attached brief complies with the Supreme Rule 84.06(b) and contains 3,386 words, excluding the cover and the certification as determined by Microsoft Word software.

/s/ Susan Ford Robertson
SUSAN FORD ROBERTSON, Attorney