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Ashley Brittain

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NOTES

When Precedent Wears Thin: The Missouri Supreme Court Clarifies an Issue of Ambiguity Affecting the Arbitrability of Wrongful Death Claims

*Lawrence v. Beverly Manor*¹

I. INTRODUCTION

For over sixty years, Missouri courts have followed the precedent that a wrongful death cause of action is a “new and independent claim.”² However, in 2007, the Missouri Supreme Court in *State ex rel. Burns v. Whittington* decided that a wrongful death cause of action is a “derivative claim” and seemingly called into question this long-established precedent.³ In the case of *Lawrence v. Beverly Manor*, the Missouri Supreme Court and the Missouri Court of Appeals for the Western District interpreted the *Burns* decision in two different ways. The Missouri Court of Appeals (in *Lawrence I*) found that *Burns* held that a wrongful death cause of action is a derivative claim, thus changing the current legal landscape surrounding arbitrability of wrongful death claims in Missouri.⁴ On the contrary, the Missouri Supreme Court (in *Lawrence II*), sitting en banc, interpreted *Burns* as having no such effect on current law, but it admitted that the language within *Burns* may be ambiguous.⁵ Although the application of the *Burns* decision by the Missouri Supreme Court seems to be the most beneficial for arbitration and wrongful death law in Missouri, the response of the appellate court was both logical and significant because it presented the Missouri Supreme Court with the opportunity to resolve the ambiguity and preserve the long-established legal precedent of Missouri affecting the arbitrability of wrongful death claims.

1. 273 S.W.3d 525 (Mo. 2009) (en banc).

2. See *Blessing v. Chicago, B. & Q.R. Co.*, 171 S.W.2d 602, 603 (Mo. 1943); *O’Grady v. Brown*, 654 S.W.2d 904, 910-11 (Mo. 1983) (en banc); *American Family Mut. Ins. Co. v. Ward*, 774 S.W.2d 135, 136-37 (Mo. 1989) (en banc); *Sullivan v. Carlisle*, 851 S.W.2d 510, 515 (Mo. 1993) (en banc). A “new and independent” wrongful death claim is defined under Missouri law as a new cause of action not belonging to the decedent. See *Finney v. Nat’l Healthcare Corp.*, 193 S.W.3d 393, 395 (Mo. Ct. App. 2006). Wrongful death is a cause of action derived from state statutes. See MO. REV. STAT. §§ 537.080-537.100 (2008).

3. *State ex rel. Burns v. Whittington*, 219 S.W.3d 224, 225 (Mo. 2007) (en banc). A “derivative” wrongful death claim is defined under Missouri law as a cause of action derived from the underlying tortious acts that caused the decedent’s fatal injury. *Id.*

4. See *Lawrence v. Manor*, No. WD 67920, 2008 WL 731561, at *5 (Mo. Ct. App. Mar. 18, 2008).

5. *Lawrence v. Beverly Manor*, 273 S.W.3d 525, 528-29 (Mo. 2009) (en banc).

II. FACTS AND HOLDING

In March 2003, the Beverly Manor nursing facility executed an agreement with Phyllis Skoglund, the daughter of Dorothy Lawrence, in order to secure residency for Lawrence at Beverly Manor.⁶ The agreement contained a provision compelling arbitration for any claims against Beverly Manor, including claims related to the services or health care provided.⁷ The agreement also specified that it was binding on “all persons whose claim is derived through or on behalf of [Dorothy Lawrence].”⁸ Skoglund signed the arbitration agreement on behalf of her mother pursuant to a power of attorney.⁹ Beverly Manor admitted Lawrence, but she died shortly thereafter.¹⁰ Her son, Dale Lawrence, who did not sign the arbitration agreement, filed a wrongful death action against Beverly Manor in a Missouri circuit court alleging that his mother suffered fatal head injuries when employees negligently dropped her.¹¹ In response to the lawsuit, Beverly Manor filed a motion to compel arbitration.¹²

The circuit court denied the motion on the ground that wrongful death claims are new and independent claims rather than derivative claims.¹³ The circuit court reasoned that “nothing in the arbitration agreement can be construed to extend to new and independent causes of action others would have such as this action for wrongful death.”¹⁴ On appeal, Beverly Manor argued that the circuit court erred in denying its motion to compel arbitration.¹⁵ In particular, Beverly Manor asserted that, although Lawrence’s son was not a party to the arbitration agreement, the agreement was binding upon him nonetheless.¹⁶

After the circuit court issued its initial order on January 5, 2007, denying the motion to compel arbitration, the Missouri Supreme Court decided *State ex rel. Burns v. Whittington*, ruling that a wrongful death claim was *not* a new and independent cause of action.¹⁷ The court concluded that “although death is the neces-

6. *Lawrence*, 2008 WL 731561, at *1.

7. *Id.* The agreement stated as follows:

It is understood and agreed by [Beverly Manor] and [Dorothy Lawrence] that any and all claims, disputes and controversies . . . arising out of, or in connection with, or relating in any way to the Admission Agreement or any service or health care provided by [Beverly Manor] to [Dorothy Lawrence] shall be resolved exclusively by binding arbitration . . .

It is the intention of the parties to this Arbitration Agreement that it shall inure to the benefit of and bind the parties, their successors, and assigns, including without limitation the agents, employees and servants of [Beverly Manor], and all persons whose claim is derived through or on behalf of [Dorothy Lawrence], including any parent, spouse, sibling, child, guardian, executor, legal representative, administrator or heirs of [Dorothy Lawrence]. The parties further intend that this agreement is to survive the lives or existence of the parties hereto.

Id.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at *2. The circuit court relied heavily on *Finney v. National Healthcare Corp.*, which announced the legal position that a wrongful death claim is a new and independent cause of action. *Id.* at *3; see *Finney v. Nat'l Healthcare Corp.*, 193 S.W.3d 393, 395 (Mo. Ct. App. 2006).

14. *Lawrence*, 2008 WL 731561, at *2.

15. *Id.* at *1.

16. *Id.*

17. *State ex rel. Burns v. Whittington*, 219 S.W.3d 224, 225 (Mo. 2007) (en banc).

sary final event in a wrongful death claim, the cause of action is derivative of the underlying tortious acts that caused the fatal injury.”¹⁸ Because Dale Lawrence initiated his wrongful death action against Beverly Manor prior to the opinion of the Missouri Supreme Court in *Burns*, the appellate court had to determine whether the *Burns* decision should apply retroactively to the present case.¹⁹ On appeal, the Court of Appeals of Missouri for the Western District, in *Lawrence I*, affirmed the circuit court’s decision not to compel arbitration, holding that the change in law enunciated in *Burns* should not apply retroactively to Dale Lawrence’s cause of action.²⁰ The court of appeals applied an exception for parties who had relied on the state of the law as it existed when the parties entered into the agreement.²¹

After the court of appeals arrived at this decision on March 18, 2008, the parties entered an application for transfer to the Missouri Supreme Court.²² However, the transfer was denied on April 29, 2008.²³ A transfer was again requested; on June 24, 2008, the court ordered the cause transferred to the Missouri Supreme Court.²⁴

The issue before the Missouri Supreme Court in *Lawrence II* was whether an arbitration agreement signed on behalf of a nursing home resident is binding on plaintiffs in a wrongful death action against the nursing home.²⁵ Beverly Manor argued that the court’s decision in *Burns* “undercut” the cases holding that a wrongful death claim is a new and independent cause of action.²⁶ However, the court disagreed that the *Burns* decision overturned such precedent.²⁷ The court admitted that the language of *Burns* may seem to create ambiguity about whether wrongful death is a derivative claim but clarified that the *Burns* holding is limited to the issue of venue.²⁸ On January 13, 2009, the Missouri Supreme Court affirmed the judgment of the circuit court, holding that a wrongful death cause of action is a new and independent claim rather than a derivative claim, though, in accordance with *Burns*, a wrongful death claim is treated differently for venue purposes.²⁹

III. LEGAL BACKGROUND

The long-established legal principle set forth by the Missouri Supreme Court is that a wrongful death cause of action is a new and independent claim, rather than a derivative claim.³⁰ In the *Lawrence* cases, the decision of *State ex rel. Burns v. Whittington* regarding wrongful death law in Missouri was interpreted

18. *Id.*

19. *Lawrence*, 2008 WL 731561, at *4.

20. *Id.* at *5-6.

21. *Id.* at *4.

22. *Id.* at *1.

23. *Lawrence v. Manor*, No. WD 67920, 2008 WL 731561 (Mo. Ct. App. Apr. 29, 2008).

24. *Lawrence v. Manor*, No. WD 67920, 2008 WL 731561 (Mo. Ct. App. June 24, 2008).

25. *Lawrence v. Beverly Manor*, 273 S.W.3d 525, 526 (Mo. 2009) (en banc).

26. *Id.* at 528.

27. *Id.*

28. *Id.*

29. *Id.* at 525, 529-30.

30. See *Blessing v. Chicago, B. & Q. R. Co.*, 171 S.W.2d 602, 603 (Mo. 1943); *O’Grady v. Brown*, 654 S.W.2d 904, 910-11 (Mo. 1983) (en banc); *Am. Family Mut. Ins. Co. v. Ward*, 774 S.W.2d 135, 136-37 (Mo. 1989) (en banc); *Sullivan v. Carlisle*, 851 S.W.2d 510, 515 (Mo. 1993) (en banc).

one way by the Missouri Court of Appeals and another way by the Missouri Supreme Court. The court of appeals interpreted the *Burns* decision as requiring courts to treat wrongful death claims as derivative, departing from long-established precedent and changing the rights of non-signatories to certain arbitration agreements.³¹ To avoid messy consequences, the court of appeals emphasized that exceptions are available for courts to consider when deciding whether a newly established rule of law should be applied retroactively to a particular case.³² However, finding a distinction in the ambiguous language of the *Burns* decision that the appellate court did not recognize, the Missouri Supreme Court concluded that the *Burns* decision does not greatly change wrongful death or arbitration law.³³

A. Missouri Supreme Court Precedent Characterizing Wrongful Death Claims

Beginning in 1943 with *Blessing v. Chicago, B. & Q. R. Co.*,³⁴ the Missouri Supreme Court set forth the legal principle that a wrongful death cause of action is a new and independent claim, rather than a derivative claim.³⁵ The Court provided that “the [wrongful death] statute created a new cause of action . . . [and] did not revive a cause of action belonging to a deceased.”³⁶ In 1983, the Missouri Supreme Court, in *O’Grady v. Brown*,³⁷ reiterated this legal principle, declaring that a wrongful death claim creates a new cause of action where none existed at common law.³⁸ The court further concluded that the right of action thus created is neither a transmitted nor a survival right, reasoning that because the wrongful death claim is so unrelated to any cause of action the deceased would have had, the wrongful death claim must be a new cause of action.³⁹

The Missouri Supreme Court continued to uphold this principle in both *American Family Mutual Insurance Co. v. Ward* and *Sullivan v. Carlisle*.⁴⁰ In *Ward*, the court decided that the cause of action for wrongful death “was not transmitted to plaintiffs by way of any right of action which the deceased . . . may have exercised if [he or she] had lived, but instead was a new and distinct cause of action created purely by statute”⁴¹ In *Sullivan*, the Court not only declared that a wrongful death claim does not belong to the deceased, but it further provided that

31. *Lawrence*, 2008 WL 731561, at *5; See *State ex rel. Burns v. Whittington*, 219 S.W.3d 224 (Mo. 2007) (en banc).

32. *Lawrence*, 2008 WL 731561, at *4 (citing *Sumners v. Sumners*, 701 S.W.2d 720 (Mo. 1985) (en banc) (for the proposition that when parties rely on the state of decisional law prior to a change courts may apply a law prospectively to avoid injustice and unfairness)).

33. *Lawrence*, 273 S.W.3d at 528.

34. *Blessing v. Chicago, B. & Q. R. Co.*, 171 S.W.2d 602 (Mo. 1943).

35. *Id.* at 603.

36. *Id.*

37. 654 S.W.2d 904 (Mo. 1983) (en banc) (quoting *State ex rel. Jewish Hosp. v. Bulder*, 540 S.W.2d 100, 104 (Mo. Ct. App. 1976)).

38. *Id.* at 910.

39. *Id.*; see *Lawrence*, 2008 WL 731561, at *4.

40. *Am. Family Mut. Ins. Co. v. Ward*, 774 S.W.2d 135 (Mo. 1989) (en banc); *Sullivan v. Carlisle*, 851 S.W.2d 510 (Mo. 1993) (en banc).

41. *Ward*, 774 S.W.2d at 136 (citing *Nanney v. I.H. Shell & Son*, 138 S.W.2d 717, 719 (Mo. Ct. App. 1940)).

the wrongful death right of action “is created and vests in the survivors at the moment of death.”⁴²

The Missouri Court of Appeals for the Southern District added to this line of cases in *Finney v. National Healthcare Corp.*⁴³ In *Finney*, the decedent was admitted into a nursing home after her granddaughter executed a contract with Joplin Healthcare Center (Joplin) that included an arbitration provision.⁴⁴ The decedent’s daughter, who was neither a party nor signatory to the contract, brought a wrongful death claim against Joplin after her mother’s death.⁴⁵ Although Joplin argued that the decedent’s daughter was bound by the arbitration agreement, the court of appeals found the arbitration clause inapplicable because wrongful death is an independent claim inherent in the survivor—not the deceased—and also because the plaintiff was a non-signatory to the contract.⁴⁶

This legal principle that a wrongful death cause of action is a new and independent claim has guided Missouri courts for over sixty years.⁴⁷ However, the decision of the Missouri Supreme Court in *Burns* almost changed the course of wrongful death actions in Missouri, thereby changing the arbitrability of wrongful death claims, as well.⁴⁸

B. An In-Depth Look at State ex rel. Burns v. Whittington

Before discussing the differing interpretations of *State ex rel. Burns v. Whittington*, it is important to understand the case in relation to the comprehensive tort reform initiative undertaken by the Missouri General Assembly in 2005.⁴⁹ Missouri’s tort reform has been called one of the Nation’s toughest and was passed in order to combat the venue shopping that was occurring throughout the state.⁵⁰ Before the Tort Reform Act, venue was quite simple to establish.⁵¹ However, the new venue provisions went into effect on August 28, 2005, severely limiting ve-

42. *Sullivan*, 851 S.W.2d at 515 (citing O’Grady, 654 S.W.2d at 910; *Ward*, 774 S.W.2d at 136-37).

43. 193 S.W.2d 393 (Mo. Ct. App. 2006). The circuit court in *Lawrence v. Manor* heavily relied on *Finney* because of its important factual similarities. *Lawrence*, 2008 WL 731561, at *2-3.

44. *Finney*, 193 S.W.3d at 394.

45. *Id.*

46. *Id.* at 395-97.

47. See *Blessing v. Chicago, B. & Q. R. Co.*, 171 S.W.2d 602, 603 (Mo. 1943); *O’Grady v. Brown*, 654 S.W.2d 904, 910 (Mo. 1983) (en banc); *Am. Family Mut. Ins. Co. v. Ward*, 774 S.W.2d 135, 136 (Mo. 1989) (en banc); *Sullivan v. Carlisle*, 851 S.W.2d 510, 515 (Mo. 1993) (en banc).

48. See *State ex rel. Burns v. Whittington*, 219 S.W.3d 224 (Mo. 2007) (en banc).

49. See Michael E. Crowley, *Burning Bridges: Does Joining a Party Sacrifice Venue Selected Before Missouri Tort Reform?*, 64 J. MO. B. 74, 75 (2008).

50. *Id.* at 74.

51. The former general venue statute stated that venue was proper in any county in which a defendant resided or “in the county where the [plaintiff’s] cause of action accrued” and “if all defendants resided outside [Missouri], venue would be proper “in any Missouri county” of the plaintiff’s choosing.” MO. REV. STAT. § 508.070 (2004), *repealed by* H.R. 393, 93d Gen. Assem., Reg. Sess. (Mo. 2005), *codified at* MO. REV. STAT. § 508.010 (2005 Supp.); see David Jacks Achtenberg, *Venue in Missouri After Tort Reform*, 75 UMKC L. REV. 593, 598 (2007).

nue determination.⁵² In particular, the new venue statutes limited venue for plaintiffs injured in the state of Missouri to the county in which they were injured.⁵³

Alfred Burns filed a petition on August 22, 2005, in the circuit court of the City of St. Louis alleging that he developed leukemia due to exposure to the defendants' products containing benzene.⁵⁴ Burns died in January 2006, and an amended petition was filed in March 2006 alleging wrongful death due to benzene exposure.⁵⁵ Defendants filed a motion to transfer the case to St. Louis County, where the plaintiff was first injured, arguing that the amended petition constituted a new "cause of action" and was therefore subject to the new venue statutes now in effect.⁵⁶ The circuit court granted the motion after finding that the amended petition constituted a new cause of action and transferred the case to St. Louis County as required by the amended venue provisions.⁵⁷ After the circuit court granted the motion, the plaintiff filed for a writ of mandamus.⁵⁸

On appeal, the Missouri Supreme Court questioned whether the amended petition asserting a wrongful death claim did, in fact, constitute a new cause of action requiring transfer to St. Louis County.⁵⁹ The Court analyzed the new venue statutes, which provided that the new provisions applied to *every* cause of action filed after August 28, 2005.⁶⁰ Because the statutes failed to define "cause of action," the Court relied on the definition the Missouri Supreme Court used in *Chesterfield Village, Inc. v. City of Chesterfield*.⁶¹ There, the court defined the term as "a group of operative facts giving rise to one or more bases for suing."⁶² The Court adopted this "operative facts test," declaring that the wrongful death claim was based on the same operative facts as the original claim and did not constitute a new and independent cause of action subject to the new venue statutes.⁶³ Therefore, the Missouri Supreme Court concluded that venue was proper in the City of St. Louis, rather than St. Louis County.⁶⁴

It is not only important to understand the *Burns* decision in relation to Missouri's tort reform, but also to understand the decision within the context of the rights of non-signatories to an arbitration agreement. As a general rule, and as applied by the court of appeals in *Finney*, only parties to an arbitration agreement

52. Crowley, *supra* note 49, at 74. The new venue provisions were codified as §§ 538.205-538.230 of the Missouri statutes. MO. REV. STAT. §§ 538.205-.230 (2005). MO. REV. STAT. § 538.230 was later repealed. Mo. H.R. 393.

53. Crowley, *supra* note 49, at 75-76.

54. State *ex rel.* Burns v. Whittington, 219 S.W.3d 224, 224-25 (Mo. 2007) (en banc). The petition was filed before the new venue statutes went into effect, thus venue was proper because a defendant resided in the City of St. Louis. *Id.*

55. *Id.* at 225.

56. *Id.*

57. *Id.*

58. Lawrence v. Manor, No. WD 67920, 2008 WL 731561, at *3 (Mo. Ct. App. Mar. 18, 2008) (discussing the procedural history of Burns); see Burns, 219 S.W.3d at 225-26.

59. Burns, 219 S.W.3d at 225; see Lawrence, 2008 WL 731561, at *4.

60. Burns, 219 S.W.3d at 225.

61. 64 S.W.3d at 318 (Mo. 2002).

62. Chesterfield Village, Inc. v. City of Chesterfield, 64 S.W.3d 315, 318 (Mo. 2002) (citing BLACK'S LAW DICTIONARY 214 (7th ed., 1999)).

63. Burns, 219 S.W.3d at 225; see Crowley, *supra* note 49, at 76.

64. Burns, 219 S.W.3d at 225-26.

are bound to arbitrate.⁶⁵ Therefore, a non-signatory, which is a party who has not signed or otherwise assented to the arbitration agreement, is not bound by the arbitration clause.⁶⁶ The general rule that non-signatories are not bound by the arbitration agreement exists because arbitration is consensual, and parties must agree by contract to arbitrate existing or prospective disputes.⁶⁷ Therefore, the general rule reflects the principle that only parties who manifest intent to be bound to the arbitration agreement should be bound.⁶⁸ However, under certain circumstances, persons who are non-signatories may have some rights or duties under an arbitration agreement.⁶⁹ Specifically, a non-signatory may be bound by an arbitration agreement under an accepted theory of agency or contract law.⁷⁰

As a result of the *Burns* court's decision, the rights of non-signatories to an arbitration agreement were severely limited. The Missouri Court of Appeals for the Southern District established in *Finney v. National Healthcare Corp.* that an arbitration clause is not binding on non-signatories to an arbitration agreement.⁷¹ However, this general rule established by *Finney* is significantly changed as a result of the *Burns* decision.⁷² After *Burns*, a non-signatory to an arbitration agreement would be forced to arbitrate on behalf of the deceased when bringing a wrongful death claim because the non-signatory would be asserting a claim through a derivative right of the deceased.⁷³ Non-signatories would thus be required to follow the specifications of arbitration agreements to which they were not a party and were never given the opportunity to bargain for the particular specifications set forth within the arbitration clause.⁷⁴ Therefore, the *Burns* decision would have a significant impact on the rights of non-signatories to arbitration agreements.

C. Exceptions Concerning the Application of a Newly Established Rule of Law

The Missouri Court of Appeals in *Lawrence I* interpreted the *Burns* decision as unquestionably changing Missouri's wrongful death law.⁷⁵ However, the court recognized that applying the new rule of law from *Burns* to all cases might be unfair.⁷⁶ The court of appeals turned to the prior decision of the Missouri Supreme Court in *Sumners v. Sumners*,⁷⁷ which adopted a three-factor test for deter-

65. *The Use of Equitable Estoppel to Compel Arbitration*, 11 WORLD ARB. & MEDIATION REP. 214, 215 (2000); see *Finney v. Nat'l Healthcare Corp.*, 193 S.W.3d 393, 395 (Mo. Ct. App. 2006).

66. See EDWARD BRUNET ET AL., ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT 245 (2006); see also 1 DOMKE ON COMMERCIAL ARBITRATION § 10:00 (Larry E. Edmonson ed., Thompson West 3d ed. 2009).

67. THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION I (2d ed. 2007).

68. DOMKE, *supra* note 66, at 1.

69. BRUNET ET AL., *supra* note 66, at 245.

70. DOMKE, *supra* note 66, at 1-2.

71. *Finney v. Nat'l Healthcare Corp.*, 193 S.W.3d 393, 397 (Mo. Ct. App. 2006).

72. See *State ex rel. Burns v. Whittington*, 219 S.W.3d 224 (Mo. 2007) (en banc).

73. *Lawrence v. Manor*, No. WD 67920, 2008 WL 731561, at *3-4 (Mo. Ct. App. Mar. 18, 2008).

74. See CARBONNEAU, *supra* note 67, at 1.

75. *Lawrence*, 2008 WL 731561, at *4.

76. See *id.* at *4-5.

77. 701 S.W.2d 720, 723 (Mo. 1985) (en banc).

mining whether or not a new rule of law should be applied retroactively.⁷⁸ Although the general rule is that substantive changes in law should be applied retroactively,⁷⁹ the Missouri Supreme Court has recognized its authority to declare whether a new rule of law should be applied retroactively or prospectively “based on the merits of each individual case.”⁸⁰

In order to clarify the operation of judicial decisions, the Missouri Supreme Court in *Sumners* adopted a three-factor test for determining whether an overruling decision should be given prospective-only effect.⁸¹

First, the decision in question must establish a new principle of law by overruling clear past precedent. Second, the Court must determine whether the purpose of the new rule will be enhanced or retarded by retrospective operation. Third, the Court must balance the interests of those who may be affected by the change in law, thus weighing the degree to which parties may have relied upon the old rule and the hardship that might result to those parties from the retrospective operation of the new rule against the possible hardship to those parties who would be denied the benefit of the new rule.⁸²

The three-factor test adopted by the Missouri Supreme Court in *Sumners* gave the court of appeals in *Lawrence I* the opportunity to assess whether or not the new rule of law established in *Burns* should be applied retroactively.⁸³ However, since the Missouri Court of Appeals and Missouri Supreme Court in the *Lawrence* cases interpreted the *Burns* decision differently, the necessity of the three-factor test within the context of wrongful death claims is uncertain.

IV. INSTANT DECISION

The different interpretations of *Burns* by the Missouri Court of Appeals in *Lawrence I* and the Missouri Supreme Court in *Lawrence II* necessitates that the reasoning of both courts be closely examined in order to identify the source of the contrasting views.

The Court of Appeals of Missouri for the Western District in *Lawrence I* held that, although *Burns* establishes that wrongful death claims are now arbitrable under a decedent’s arbitration agreement, the new rule of law should not apply retroactively to the present case brought by Lawrence’s son, Dale Lawrence.⁸⁴ To decide this issue, the court of appeals relied on *Sumners*.⁸⁵

78. *Id.* at 724; *Lawrence*, 2008 WL 731561, at *4.

79. *Sumners*, 701 S.W.2d at 724; *Lawrence*, 2008 WL 731561, at *4.

80. *Keltner v. Keltner*, 589 S.W.2d 235, 239 (Mo. 1979) (en banc). In addition, the U.S. Supreme Court found the practice of prospective-only application to be constitutional “whenever injustice or hardship will thereby be averted.” *Great Northern Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364 (1932).

81. *Sumners*, 701 S.W.2d at 724.

82. *Id.* (internal citations omitted).

83. *Id.* at 723.

84. *Lawrence v. Manor*, No. WD 67920, 2008 WL 731561, at *5 (Mo. Ct. App. Mar. 18, 2008).

85. *Id.* at *4-5.

Applying the three-factor test adopted by the Missouri Supreme Court in *Summers*,⁸⁶ the court of appeals concluded that the first factor, regarding a “new principle of law,”⁸⁷ weighed against applying the rule retroactively.⁸⁸ The court reasoned that because *Burns* declared a wrongful death cause of action to be a derivative claim rather than a new and independent claim, a new rule of law was established that is a clear departure from Missouri Supreme Court precedent.⁸⁹

Concerning the second factor, whether the purpose of the new rule will be enhanced by retroactive application, the court stated that the supreme court left them in a quandary by not explaining the actual purpose of the changed rule.⁹⁰ However, the court of appeals concluded that the second factor weighed in favor of applying the rule retroactively because the supreme court obviously had a reason for changing the rule; thus applying the new rule to the present case would enhance the purpose of the Supreme Court’s decision.⁹¹

Finally, the court concluded that the third factor, the balancing of interests, weighed against applying the new rule retroactively.⁹² The court presumed the parties were aware that the arbitration agreement did not cover wrongful death claims at the time the agreement was signed; as a result, Beverly Manor should not gain the benefit of this “unexpected and surprising change in Missouri law.”⁹³ Therefore, the court decided that the law should be construed as it existed at the time the parties executed the agreement.⁹⁴ The court of appeals in *Lawrence I* concluded that application of the three-factor test dictated that the new rule of law from *Burns* should not be applied retroactively to Dale Lawrence’s wrongful death cause of action.⁹⁵

In contrast, the Missouri Supreme Court in *Lawrence II* subsequently held that a wrongful death cause of action is, in fact, a new and independent claim, negating the necessity of deciding retroactive application.⁹⁶ In arriving at this decision, the court closely examined its prior decision in *Burns*, particularly its interpretation of the new venue statute.⁹⁷ *Burns* was interpreted to have held that “for purposes of establishing venue, the [wrongful death] cause of action is derivative of the underlying tortious acts that caused the fatal injury”;⁹⁸ as a result, the wrongful death claim did not constitute a new and independent cause of action.⁹⁹ The court emphasized that its decision in *Burns* was consistent with the purpose of the venue statutes, which is to prevent parties from manipulating venue.¹⁰⁰ The court admitted that although the language of *Burns* seems to create

86. *Lawrence*, 2008 WL 731561, at *4; see *Summers*, 701 S.W.2d at 724.

87. *Lawrence*, 2008 WL 731561, at *4 (citing *Summers*, 701 S.W.2d at 724).

88. *Id.* at *5.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Lawrence*, 273 S.W.3d 525, 528 (Mo. 2009).

97. *Id.*

98. *Id.* (emphasis in original) (quoting *State ex rel. Burns v. Whittington*, 219 S.W.3d 224, 225 (2007) (en banc)).

99. *Id.*

100. *Id.*

ambiguity concerning whether a wrongful death cause of action is derivative, the *Burns* holding was actually limited to the issue of venue.¹⁰¹ In addition, the court provided that there is nothing in the venue statute purporting to amend the wrongful death statute or overturn the long-established precedent.¹⁰²

Instead, the court explained that there was a distinction in the ambiguous language of *Burns* that the appellate court did not recognize.¹⁰³ In *Burns*, because the defendant's treatment of the deceased party was the basis for the negligence and wrongful death suit, and because both had the same connection to the original venue, there was no difference between the two suits for purposes of venue.¹⁰⁴ Thus, the question in *Burns* was whether the subsequent wrongful death suit has a sufficient tie to the original venue, while the question in *Lawrence v. Beverly Manor* was whether one is bound by another's agreement to which one was not a party.¹⁰⁵

The Missouri Supreme Court held that because the wrongful death plaintiffs were not parties to the arbitration agreement they were not bound by Dorothy Lawrence's agreement to arbitrate.¹⁰⁶ The court noted that the agreement between Lawrence and Beverly Manor applied to "all persons whose claim is derived through or on behalf of [Dorothy Lawrence]."¹⁰⁷ However, because Dorothy Lawrence could not be a party to the wrongful death suit resulting from her death, the court reasoned that a wrongful death claim is a separate cause of action brought by the wrongful death plaintiffs; thus, the damages are not awarded to the wrongful death plaintiffs on Dorothy Lawrence's behalf.¹⁰⁸ As a result, the arbitration agreement was not binding on Dale Lawrence in his wrongful death claim.¹⁰⁹

The Missouri Supreme Court in *Lawrence II* declared that *Burns* had no effect on the long-established precedent that a wrongful death cause of action is a new and independent claim, rather than a derivative claim.¹¹⁰ Therefore, the Court concluded that Dale Lawrence was not bound by the arbitration agreement signed on behalf of his mother, Dorothy Lawrence,¹¹¹ and that the current state of the law regarding the rights of non-signatories to such agreements remains intact.¹¹²

V. COMMENT

The Missouri Court of Appeals in *Lawrence I* and the Missouri Supreme Court in *Lawrence II* have produced contrary interpretations of the *Burns* decision, resulting in different conclusions about the nature of wrongful death claims and the rights of non-signatories to an arbitration agreement. Although the Mis-

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 529.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 530.

112. *See id.* at 527-529.

souri Supreme Court's interpretation of *Burns* has the final word on Missouri wrongful death law, the interpretation of the Missouri Court of Appeals is significant because it addresses an issue of ambiguity in the *Burns* decision that could have caused major shifts in Missouri law.

A. The Contrasting Interpretations of State ex rel. Burns v. Whittington

The Missouri Court of Appeals for the Western District in *Lawrence I* interpreted *Burns* as overturning long-established legal precedent by concluding that wrongful death is a derivative claim, rather than a new and independent claim.¹¹³ Perhaps the appellate court realized the *Burns* decision had the potential to negatively impact all subsequent arbitrations of wrongful death claims. Therefore, the court of appeals acted as a safety valve, taking action to protect against the possible negative effects of future courts' application of *Burns*.

The court of appeals used the three-factor test previously adopted by the Missouri Supreme Court in *Sumners* to dampen the effect of *Burns* and set forth guidelines for future Missouri courts to follow when deciding whether to retroactively apply the newly established rule of law.¹¹⁴ The actions of the court of appeals in *Lawrence I* not only provided future Missouri courts the opportunity to shield innocent parties from the harsh effects of retroactive application of a new rule of law, but also demonstrated the important obligation of all courts to be cautious in rendering a decision that could possibly, although unintentionally, alter long-established precedent.

Contrary to the interpretation of the Missouri Court of Appeals, the Missouri Supreme Court in *Lawrence II* construed the *Burns* decision as not significantly changing wrongful death or arbitration law in Missouri.¹¹⁵ In particular, the court concluded that the *Burns* decision did not overturn the long-established precedent that wrongful death is a new and independent claim, rather than a derivative claim.¹¹⁶

The Missouri Supreme Court explained that the *Burns* decision applies only to the issue of establishing venue.¹¹⁷ The driving force behind the decision was to facilitate the new venue statutes, which were established as part of Missouri tort reform.¹¹⁸ The goal of enacting the new venue statutes was to thwart venue shopping and prevent a defendant with remote connections to a particular forum from establishing venue.¹¹⁹ To further this goal, the court in *Burns* decided that a wrongful death claim belongs in the venue out of which the original negligence suit arose.¹²⁰

113. *Lawrence v. Manor*, No. WD 67920, 2008 WL 731561, at *4-5 (Mo. Ct. App. March 18, 2008).

114. *Id.*; see *supra* notes 86-95 and accompanying text.

115. *Lawrence*, 273 S.W.3d at 528.

116. *Id.*

117. *Id.*

118. Crowley, *supra* note 49, at 74-75; *Lawrence*, 273 S.W. 3d at 528.

119. Crowley, *supra* note 49, at 75; see James L. Stockberger & Brian Kaveney, *Missouri Tort Reform*, 62 J. MO. B. 378, 381 (2006).

120. *Lawrence*, 273 S.W.3d at 528.

B. The Impact on the Rights of Non-Signatories

The Missouri Court of Appeals in *Lawrence I* interpreted the *Burns* decision as having a substantial impact on the rights of non-signatories to arbitration agreements in particular cases.¹²¹ *Finney v. National Healthcare Corp.*, the most recent Missouri case involving the rights of non-signatories, established that an arbitration clause is not binding on non-signatories to an arbitration agreement under Missouri law.¹²² However, as a result of the *Burns* decision that a wrongful death cause of action is a derivative claim, the appellate court concluded that the general rule established in *Finney* was significantly changed and the rights of non-signatories to an arbitration agreement were severely limited.¹²³ After *Burns*, a non-signatory to an arbitration agreement would be forced to arbitrate any and all claims on behalf of the deceased when bringing a wrongful death claim because the non-signatory would essentially be asserting a claim through a derivative right of the deceased.¹²⁴ Non-signatories would thus be required to follow the specifications set forth within the arbitration agreement even though they were not a party to the agreement and were never given the opportunity to bargain for the particular specifications.¹²⁵

In particular, the court of appeals in *Lawrence I* emphasized that if Dale Lawrence's wrongful death claim had been characterized as derivative, that being derived from his mother's claim, he would have no greater rights than his mother and could not bring any claims she would be prohibited from bringing.¹²⁶ Although the court of appeals found that applying the *Sumners* three-factor test led to the conclusion that the new rule of law should not be retroactively applied to the wrongful death claim of Dale Lawrence, the same decision should not apply in future cases involving non-signatories to arbitration agreements.¹²⁷ Rather, under the appellate court's interpretation of *Burns*, other non-signatories would be bound by an arbitration agreement in a similar wrongful death case if their case was not affected by any of the three factors. Therefore, in the eyes of the Missouri Court of Appeals in *Lawrence I*, the *Burns* decision would have dramatically changed the rights of non-signatories to arbitration agreements.

On the contrary, under *Lawrence II*, the rights of non-signatories to arbitration agreements are unaffected by the *Burns* decision. The Missouri Supreme Court explained that because the *Burns* decision was limited to the issue of venue, the decision did not overturn the precedent that wrongful death remained a new and independent claim.¹²⁸ Therefore, non-signatories would not be bound by arbitration agreements precluding wrongful death claims.

The supreme court emphasized that, despite the language of the arbitration agreement, none of the plaintiffs in the wrongful death action was bound by the

121. *Lawrence v. Manor*, No. WD 67920, 2008 WL 731561, at *3-4 (Mo. Ct. App. March 18, 2008).

122. *Finney v. Nat'l Healthcare Corp.*, 193 S.W.3d 393, 397 (Mo. Ct. App. 2006).

123. *Lawrence*, 2008 WL 731561, at *3-4.

124. *Id.* at *2.

125. *Lawrence*, 2008 WL 731561 at *1, *2, *4. *But see* CARBONNEAU, *supra* note 67, at 1.

126. *Lawrence*, 2008 WL 731561, at *2.

127. *Id.* at *5.

128. *Lawrence*, 273 S.W.3d at 528.

arbitration agreement.¹²⁹ Because Dorothy Lawrence could not be a party to the wrongful death suit resulting from her death, a claim for wrongful death is not derivative from any claims she may have had.¹³⁰ As a result, Dale Lawrence, as the plaintiff in the wrongful death action, was not bound by the arbitration agreement.¹³¹ Therefore, the Missouri Supreme Court protected the rights of non-signatories by concluding that wrongful death is a claim independent of any that may have been available to the deceased.¹³²

Signatory issues are the most common issues litigated throughout the country, especially within the nursing home context.¹³³ Because many residents are elderly and have other persons acting on their behalf during the admission process, disputes often arise concerning the enforceability of arbitration agreements executed under these circumstances.¹³⁴ However, after *Lawrence II*, it is clear that under Missouri law arbitration agreements are not binding on non-signatories to an arbitration agreement. Therefore, the decision of the supreme court in *Lawrence II* not only secured the rights of non-signatories, but may also alleviate the frequency of Missouri cases involving signatory disputes between a nursing home and a non-signatory to an arbitration agreement.

C. *The Significance of Both Interpretations of State ex rel. Burns v. Whittington*

The Missouri Supreme Court's interpretation of *Burns* in *Lawrence II* is quite different than that of the court of appeals in *Lawrence I*, and each has different implications for the arbitrability of wrongful death claims.¹³⁵ Because the long-established precedent that a wrongful death cause of action is a new and independent claim remains intact with the Missouri Supreme Court's decision in *Lawrence II*, this decision seems to be the most beneficial for the legal landscape of arbitration and wrongful death law in Missouri. However, the Missouri Supreme Court may not have had a chance to acknowledge and settle the *Burns* ambiguity if the court of appeals had not revealed its possible, although unintended, consequences.

The interpretation of the *Burns* decision by the court of appeals in *Lawrence I* is significant simply because it recognized and drew attention to the potentially dramatic effects of *Burns*. The court of appeals read the *Burns* decision as changing the current legal landscape surrounding arbitrability of wrongful death claims in Missouri.¹³⁶ The appellate court thus construed *Burns* as affecting all subsequent cases regardless of whether the decision was made strictly for purposes of

129. *Id.* at 529. The language of the arbitration agreement is applicable to "all persons whose claim is derived through or on behalf of [Dorothy Lawrence]." *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. Reed R. Bates & Stephen W. Still, Jr., *Arbitration in Nursing Home Cases: Trends, Issues, and a Glance into the Future*, 76 DEF. COUNS. J. 282 (2009).

134. *Id.*

135. *Compare Lawrence*, 273 S.W.3d at 528-29 (interpreting *Burns* does not alter precedent declaring wrongful death an independent claim from the underlying intentional torts) with *Lawrence*, 2008 WL 731561, at *3-4 ("*Burns* unquestionably changed Missouri's wrongful death law.").

136. *Lawrence*, 2008 WL 731561, at *4.

establishing venue,¹³⁷ as the Missouri Supreme Court later revealed to be its true intention.¹³⁸

Yet, the significance of the court of appeals' opinion in *Lawrence I* has been overlooked and seemingly lost within the case history. If the Missouri Court of Appeals for the Western District would not have recognized the potential problems arising from *Burns*, future courts may have caused a dramatic shift in wrongful death and arbitration law in Missouri by incorrectly interpreting the *Burns* decision to mean that all wrongful death claims are derivative rather than new and independent. However, the actions of the court of appeals in *Lawrence I* avoided the possibility of such a problematic result. Therefore, credence should be given to the court of appeals for bringing this important issue to the legal forefront and prompting the Missouri Supreme Court in *Lawrence II* to eliminate any confusion stemming from the *Burns* decision in order to secure the current state of Missouri law regarding wrongful death and arbitration.

In conclusion, the appellate court's interpretation in *Lawrence I* was logical; even the Missouri Supreme Court admitted that the language of *Burns* may have created ambiguity as to whether wrongful death is a derivative cause of action.¹³⁹ Thus, the true significance of the court of appeals opinion in *Lawrence I* was in identifying the ambiguity of the *Burns* decision, while the significance of the Missouri Supreme Court's opinion in *Lawrence II* was in providing the necessary clarification to resolve such ambiguity in order to preserve the long-established legal principle in Missouri concerning the arbitrability of wrongful death claims.

VI. CONCLUSION

The different interpretations of the *Burns* decision by the Missouri Court of Appeals in *Lawrence I* and the Missouri Supreme Court in *Lawrence II* are each significant in their own right. Although the application of the *Burns* decision by the Missouri Supreme Court seems to be the most beneficial for arbitration and wrongful death law in Missouri, the logical response of the court of appeals should not go unmentioned. The actions of the court of appeals in recognizing the issue of ambiguity present within the language of *Burns* was significant, especially considering that the Missouri Supreme Court admitted that its language may have created such an ambiguity.¹⁴⁰ As a result of the actions of the appellate court, the Missouri Supreme Court was given the opportunity to provide necessary clarification in order to resolve the ambiguity and preserve the current legal landscape of Missouri surrounding arbitrability of wrongful death claims. The actions of the Missouri Court of Appeals for the Western District and the Missouri Supreme Court demonstrate the important obligation placed upon courts not only to bring issues of ambiguity to the forefront, but also to clarify such ambiguity for the benefit of the parties involved, future claims, and the current state of the law.

ASHLEY BRITAIN

137. *Id.*

138. *Lawrence*, 273 S.W.3d at 528.

139. *Id.*

140. *Id.*