SC 96151

IN THE MISSOURI SUPREME COURT

ABBOTT LABORATORIES, INC.,
Appellant,

v.

MADDISON SCHMIDT, et al.,
Respondents.

Appeal from the Circuit Court of the City of St. Louis
Case No. 1222-CC02479, Hon. Steven R. Ohmer

BRIEF OF THE ST. LOUIS REGIONAL CHAMBER, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Constitutional Provisions

Rules

JURISDICTIONAL STATEMENT

Amici adopt the jurisdictional statement set forth in Appellant's brief.

STATEMENT OF INTEREST OF THE *AMICI CURIAE*

The St. Louis Regional Chamber ("St. Louis Chamber") is one of the oldest chambers of commerce in the United States. It has been involved with projects as diverse as securing funding for Charles Lindbergh's historic 1927 transatlantic flight and rallying community support for the design, funding and construction of St. Louis' famed Gateway Arch. It represents the 15-county bi-state metropolitan area and its members account for nearly 30% of the region's employment base.

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation, representing 300,000 direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. One of the U.S. Chamber's most important responsibilities is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the U.S. Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs over 12 million men and women, contributes roughly $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for three-quarters of private-sector research and development. The NAM is the powerful voice of the manufacturing community and the leading advocate for a

policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

Amici represent a diverse array of companies that conduct business across the United States and around the world, including in Missouri. In reliance on decades of precedent, many such companies have conducted business in Missouri with the understanding that any claims brought against them in Missouri that arise out of events taking place outside Missouri would be litigated in a predictable venue—*i.e.*, where their registered agents are located and where they are subject to personal jurisdiction. The venue-by-joinder approach applied below threatens to disrupt that long-standing and settled expectation.

CONSENT OF PARTIES TO FILING OF THIS BRIEF

Appellant consents to the filing of this brief. Respondents denied consent. This brief has been conditionally filed with a motion for leave to file, pursuant to Rule 84.05(f)(3).

STATEMENT OF FACTS

Amici adopt the Statement of Facts as set forth in Appellant's brief.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO TRANSFER THE CLAIMS OF PLAINTIFFS ALLEGEDLY INJURED OUTSIDE MISSOURI TO ST. LOUIS COUNTY, BECAUSE PLAINTIFFS CANNOT USE THE JOINDER MECHANISM TO BRING SUIT IN JURISDICTIONS WHERE VENUE IS IMPROPER.

Mo. Sup. Ct. R. 51.01

State ex rel. Turnbough v. Gaertner, 589 S.W.2d 290 (Mo. banc 1979)

State ex rel. Jinkerson v. Koehr, 826 S.W.2d 346 (Mo. banc 1992)

State ex rel. BJC Health Sys. v. Neill, 121 S.W.3d 528 (Mo. banc 2003)

II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO TRANSFER THE CLAIMS OF PLAINTIFFS ALLEGEDLY INJURED OUTSIDE MISSOURI TO ST. LOUIS COUNTY, BECAUSE PERMITTING PLAINTIFFS TO ESTABLISH VENUE THROUGH JOINDER WOULD BE HARMFUL TO BUSINESSES AND COURTS ALIKE.

Hertz Corp. v. Friend, 559 U.S. 77 (2010)

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980)

ARGUMENT

Under the Court of Appeals' reasoning, nonresident plaintiffs may sue an out-of-State corporation based on conduct that occurred entirely outside this State, in *any* court in Missouri, as long as they join together with one plaintiff whose claim belongs in that forum. That result violates Missouri law, this Court's rules of civil procedure and decades of this Court's precedent precluding the use of joinder to expand venue.

The practical effects of venue-by-joinder would be significant and deleterious. If left to stand, the decision below will make it more difficult for out-of-State companies to control or predict where in Missouri they are subject to suit, discouraging them from investing in Missouri. This Court should reverse and hold that plaintiffs whose claims arose outside Missouri must sue in the venue prescribed by statute—which is the forum where the defendant's registered agent is located.

Appellant preserved this error for appellate review by moving to transfer the claims of plaintiffs allegedly injured outside Missouri to St. Louis County and raising the error on appeal to the Missouri Court of Appeals. The question whether venue is proper in St. Louis City as to the plaintiffs allegedly injured outside Missouri is a question of law that this Court reviews *de novo*. *See, e.g.*, *Smith v. Shaw*, 159 S.W.3d 830, 832 (Mo. banc 2005) ("[T]his Court gives de novo review to questions of law.").

I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO TRANSFER THE CLAIMS OF PLAINTIFFS ALLEGEDLY INJURED OUTSIDE MISSOURI TO ST. LOUIS COUNTY, BECAUSE PLAINTIFFS CANNOT USE THE JOINDER MECHANISM TO BRING SUIT IN JURISDICTIONS WHERE VENUE IS IMPROPER.

Under Missouri law, the proper venue for a tort claim against a corporation depends on where the plaintiff was injured. When the plaintiff "was first injured in the state of Missouri, venue shall be in the county where the plaintiff was first injured." Mo. Rev. Stat. § 508.010.4. But when the plaintiff was first injured "outside the state of Missouri," then "venue shall be in any county where a defendant corporation's ***registered agent*** is located." *Id.* § 508.010.5(1) (emphasis added). "Improper venue is a fundamental defect, and a court that acts when venue is improper acts in excess of its jurisdiction." *State ex rel. Harness v. Grady*, 201 S.W.3d 48, 50 (Mo. App. E.D. 2006).

The Court of Appeals did not dispute that, if the out-of-State plaintiffs here had filed their own individual suits, the proper venue for their claims would be in the Circuit Court for St. Louis County, where Appellant's registered agent is located. But it held that those out-of-State plaintiffs' claims could nonetheless be brought in the City of St. Louis because they had been joined to the claims of two plaintiffs whose alleged injuries occurred in the City. The court stated that "[v]enue and joinder are intertwined in the law," and that "[t]he issues of proper venue are contingent upon whether there is proper joinder of parties." *Barron v. Abbott Labs., Inc.*, 2016 WL 6596091, at *2 (Mo. App. Nov. 8, 2016). According to the lower court, as long as

the out-of-State plaintiffs "were properly joined with" the two plaintiffs injured in the City of St. Louis, "then venue is proper to all of them under Section 508.010.4." *Id.* at *3.

That notion of venue-by-joinder is incorrect. Under Missouri law, a plaintiff cannot avoid the venue rules simply by joining with *other* plaintiffs for whom venue may be proper. Even if the joinder itself is permissible, the joinder device cannot be used to expand the scope of the venue authorized by Missouri law.[1]

To begin, this Court's rules of civil procedure make clear that they do not alter the scope of permissible venue. Missouri Supreme Court Rule 51.01 expressly provides that procedural rules—including the joinder rule (Mo. Sup. Ct. R. 52.05(a))—"shall not be construed to extend or limit the jurisdiction of the courts of Missouri, *or the venue of civil actions therein*." *Id.* 51.01 (emphasis added). The import of that language is unmistakable: if the venue statute does not confer venue for a particular plaintiff's claims standing alone, those claims must be dismissed or transferred for improper venue, even if they have been joined to claims for which venue is proper.

The text of the rule is crystal clear. But even if it were not, this Court squarely held in *State ex rel. Turnbough v. Gaertner*, 589 S.W.2d 290 (Mo. banc 1979), that joinder does not affect the scope of permissible venue.

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[1] *Amici* agree with Appellant that joinder was improper, but focus here on the separate point that—assuming *arguendo* that all the claims were properly joined—venue is improper as to the plaintiffs who could not have themselves sued in the City of St. Louis.

The plaintiff in *Turnbough* (DeRousse) brought suit in the City of St. Louis, asserting separate causes of action against two separate defendants (Frisco and Turnbough). *Id.* at 291. Although venue was proper as to the claim against Frisco, the plaintiff "concede[d] that when the claim" against Turnbough was "considered separately there [was] no independent basis for venue thereof in the Circuit Court of the City of St. Louis." *Id.* Nevertheless, the plaintiff argued that "when [Turnbough] is joined in the same petition with [Frisco], there is venue in the City of St. Louis as to [Turnbough] because when there are multiple defendants residing in different counties, § 508.010(2) authorizes suit in the county wherein any one of the defendants resides." *Id.* This Court explained that the plaintiff's position was "that by joining two or more separate causes of action in a single petition pursuant to Rule 52.05(a), venue as to all is created in any county wherein any one of the several defendants resides even though there would not have been venue as to one (or more) of the counts if filed separately in that county." *Id.* at 291–92.

This Court squarely "reject[ed] this contention." *Id.* at 292. It explained that the plaintiff's venue-by-joinder "argument ignore[d] the language of Rule 51.01 which clearly and explicitly states that the Rules of Civil Procedure, of which Rule 52.05(a) is a part, '*shall not be construed to extend* or limit the jurisdiction of the Courts of Missouri or the *venue* of civil actions therein.'" *Id.* (emphasis added). Given that limitation, this Court held, even "assuming . . . that joinder of [the two counts] was authorized by Rule 52.05(a), that fact would not establish venue as to [Turnbough]," for to "hold otherwise would mean that, *contrary to the express provisions of Rule 51.01,* venue as to [Turnbough] would be established by means of Rule 52.05(a) *when it would not have existed without such joinder*." *Id.* (emphasis added).

The venue statute itself has been amended over the years since *Turnbough* was decided—most recently in 2005, when venue options were limited in order to reduce forum-shopping by plaintiffs.[2] What has remained consistent, however, is the repeated recognition by Missouri courts that whether venue is proper is controlled by the provisions of the venue statute (*see, e.g.*, *State ex rel. Smith v. Gray*, 979 S.W.2d 190, 191 (Mo. banc 1998) ("Venue is determined solely by statute.")), and that "[s]imply *joining* . . . two separate causes of action in a single petition *does not create venue* over both actions." *State ex rel. Jinkerson v. Koehr*, 826 S.W.2d 346, 348 (Mo. banc 1992) (emphasis added); *accord State ex rel. Kinsey v. Wilkins*, 394 S.W.3d 446, 450 (Mo. App. E.D. 2013) (stating that Rule 51.01 "explicitly prohibits Missouri Rules of Civil Procedure from a construction that extends or limits venue," and thus "simply joining two separate causes of action in a single petition does not create venue over both actions.") (citing *Turnbough*, 589 S.W.2d at 292, and *Jinkerson*, 826 S.W.2d at 348); *State ex rel. Sims v. Sanders*, 886 S.W.2d 718, 720 (Mo. App. E.D. 1994) (stating that Rule 51.01 and *Turnbough* preclude

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[2] *See McCoy v. Hershewe Law Firm, P.C.*, 366 S.W.3d 586, 592 (Mo. App. W.D. 2012) ("The passage of Missouri's 2005 Tort Reform Act significantly restricted venue options so as to reduce forum-shopping by plaintiffs. *See* H.R. 393, 93d Gen. Assm., 1st Reg. Sess. (Mo. 2005)."); *State ex rel. Kinsey v. Wilkins*, 394 S.W.3d 446, 448 n.1 (Mo. App. E.D. 2013) ("The amendments to Section 508.010 were a component to the larger piece of legislation, referred to as Missouri's 2005 Tort Reform Act . . . . This legislation has ostensibly had the effect of significantly restricting venue locales in order to reduce forum-shopping by plaintiffs.") (citing *McCoy*, 366 S.W.3d at 592).

invocation of permissive joinder to establish venue because "[o]therwise, contrary to the express provisions of Rule 51.01, venue would be extended by joinder pursuant to Rule 52.05(a) *when it would not have existed without resorting to the rule*") (emphasis added), *abrogated on other grounds by State ex rel. Nixon v. Dally*, 248 S.W.3d 615, 619 n.6 (Mo. banc 2008); *Polk Cnty. Bank v. Spitz*, 690 S.W.2d 192, 194 (Mo. App. S.D. 1985) ("[T]he joinder of two or more separate causes of action in a single petition does not create venue as to both causes.") (citing *Turnbough*).

To justify its departure from this overwhelming authority, the Court of Appeals in this case relied on *State ex rel. Allen v. Barker*, in which this Court stated that "[t]he issues of proper venue are contingent upon whether there is proper joinder of parties." 581 S.W.2d 818, 824 (Mo. banc 1979). But that reliance was wholly misplaced. Not only was *Barker* decided before *Turnbough*, but this Court subsequently has explained that although *Barker* "correctly allow[ed] four defendants to be sued together because they shared common liability for an indivisible injury," *Barker* was "incorrect[]" in "stating that 'the question of venue is contingent upon proper joinder.'" *State ex rel. BJC Health Sys. v. Neill*, 121 S.W.3d 528, 530 (Mo. banc 2003) ("joinder" is not "the touchstone" for determining venue). And nine years ago—well after *Turnbough* and *Barker*— this Court reaffirmed that, in cases involving multiple plaintiffs, "joinder [is] an issue subsidiary to venue." *State ex rel. Nixon v. Dally*, 248 S.W.3d 615, 619 n.6 (Mo. banc 2008).

In short, this Court's precedent conclusively establishes that permissive joinder cannot be used to create venue over claims that are not properly brought in the forum. As applied here, that

principle means that the claims of the 22 plaintiffs whose alleged injuries did not occur in the City of St. Louis must be transferred to the proper venue—St. Louis County.

II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO TRANSFER THE CLAIMS OF PLAINTIFFS ALLEGEDLY INJURED OUTSIDE MISSOURI TO ST. LOUIS COUNTY, BECAUSE PERMITTING PLAINTIFFS TO ESTABLISH VENUE THROUGH JOINDER WOULD BE HARMFUL TO BUSINESSES AND COURTS ALIKE.

Venue-by-joinder not only conflicts with Rule 51.01 and this Court's precedent: if adopted by this Court, it will also inflict severe burdens on the business community and the courts.

1. Venue-by-joinder would produce great uncertainty for businesses. The U.S. Supreme Court has long recognized that rules regarding venue and personal jurisdiction "give[] a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). This "[p]redictability is valuable to corporations making business and investment decisions." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). Companies like Appellant make decisions based on the knowledge that if they are sued in Missouri by plaintiffs who reside outside Missouri and whose claims arose outside the State, then—assuming *arguendo* the existence of personal jurisdiction—venue will be proper only in the forum where their registered agent is located. Indeed, they may well take the prospect of such litigation into account when deciding where to maintain their registered agent.

The decision below would dramatically reduce companies' ability to control or predict where in Missouri they are subject to suit. If out-of-State plaintiffs can bring suit anywhere in this State as long as they join their claims to those of one plaintiff whose claim invokes proper venue in the chosen forum, companies that sell products or do business nationwide will have no way of predicting where in the State they will be subjected to mass actions. That would be a severe and unexpected hardship on businesses—one that would discourage them from making investments in Missouri. *See J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 885 (2011) (explaining that "[j]urisdictional rules should avoid the[] costs [of unpredictability] whenever possible"). Similar unpredictability and hardship would result if Missouri plaintiffs are allowed to use joinder to pick a venue anywhere in the state, instead of filing "in the county where the plaintiff was first injured," as the venue statute requires. Mo. Rev. Stat. § 508.010.4.

2. Venue-by-joinder would expand plaintiffs' ability to engage in forum-shopping.

The venue-by-joinder approach also would impose new burdens on courts by enabling plaintiffs—and plaintiffs' lawyers—to shop aggressively for plaintiff-friendly forums and bring as many claims as possible in such venues. In pharmaceutical litigation in particular, plaintiffs' counsel often seek to aggregate claims from plaintiffs across the country in particular "magnet jurisdictions" that are viewed as especially plaintiff-friendly. Personal jurisdiction is one procedural check on forum-shopping.[3] But venue is another—and it serves a different and

[3] Indeed, the U.S. Supreme Court recently granted certiorari to review whether personal jurisdiction bars out-of-State plaintiffs from participating in such mass actions. *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, No. 16-466 (to be argued Apr. 25, 2017). In *Bristol-Myers*

equally important role. Personal jurisdiction rules ensure that defendants have sufficient minimum contacts with the State to give Missouri courts "the authority . . . to render judgment" over them as a matter of due process, while the venue statute ensures "a convenient, logical and orderly forum for the resolution of [a] dispute[]." *State ex rel. DePaul Health Ctr. v. Mummert*, 870 S.W.2d 820, 822 (Mo. banc 1994) (quoting *State ex rel. Elson v. Koehr*, 856 S.W.2d 57, 59 (Mo. banc 1993)); *see also, e.g.*, *Finnegan v. Squire Publishers, Inc.*, 765 S.W.2d 703, 705 (Mo. Ct. App. 1989) ("A purpose of statutorily specified venue is to protect the defendant against the risk that a plaintiff will select an unfair or inconvenient place of trial.").

The venue-by-joinder approach, however, would effectively eliminate the venue statute as a check on forum-shopping by plaintiffs. Under that approach, plaintiffs' lawyers can funnel claims into any forum, whether or not it is "convenient" or "logical" for the parties, by finding one plaintiff in that forum and then using joinder to bring in a limitless number of other plaintiffs whose claims otherwise would not qualify for venue there.

Squibb, 86 plaintiffs who resided in California joined together with *592* plaintiffs who resided outside the State and whose claims arose outside the State to file suit in California against a drug manufacturer. The California Supreme Court held that California courts had specific personal jurisdiction over the out-of-State claims because they were based on alleged conduct that paralleled the defendant's conduct within California. The U.S. Supreme Court will review whether due process permits this theory of specific jurisdiction, under which an out-of-State plaintiff's claim need not have any direct relationship to conduct by the defendant in the forum State.

Such blatant gamesmanship should not be permitted. The venue rules exist to *prevent* such forum shopping, not encourage it. *See, e.g.*, *Sledge v. Town & Country Tire Cents., Inc.*, 654 S.W.2d 176, 180 (Mo. Ct. App. 1983) (noting need to prevent venue rules from being "abuse[d]" to "allow forum shopping") (internal quotation marks omitted).

3. Venue-by-joinder would impose costs on Missouri's courts and citizens. Finally, the venue-by-joinder approach, if adopted here, would impose serious burdens on the Missouri judiciary and the communities it serves. Venue-by-joinder invites nonresident plaintiffs to flood Missouri courts with claims that have no ties to this State. The delay that inevitably will result from this influx of claims into already-congested courts will injure not only the business community, but also Missouri courts and citizens who rely on Missouri courts to resolve disputes that are there legitimately. It would lead to over-crowded dockets in the jurisdictions favored by plaintiffs' lawyers—forcing citizens in those jurisdictions to spend more time on jury duty and taking up time that could otherwise be devoted to cases filed by local residents.

That increase in litigation would, in turn, increase Missouri courts' operating costs, especially because out-of-State plaintiffs joined in cases like these do not even pay separate filing fees to offset the costs they impose. And cases brought by Missouri citizens would be crowded out by the influx of out-of-State plaintiffs. Rather than impose these unwarranted burdens on the State and its court system, this Court should reject the venue-by-joinder approach.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned hereby certifies:

1. The attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 3,838 words, excluding the cover, certificate of service, this certification, the signature block, and the appendix, as counted by Microsoft Word software; and

2. The attached brief includes all of the information required by Supreme Court Rule 55.03; and

3. The attached brief was served by means of the electronic filing system this February 28, 2017, upon Counsel of Record.

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