IN THE SUPREME COURT OF MISSOURI

THE STATE OF MISSOURI ex rel. JOHNSON & JOHNSON and JOHNSON & JOHNSON CONSUMER INC.,	)	
Relators,	)	
vs.	)	No. SC96704
THE HONORABLE REX M. BURLISON,	)	
Respondent.	)	

BRIEF OF RELATORS JOHNSON & JOHNSON AND JOHNSON & JOHNSON CONSUMER INC.

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JURISDICTIONAL STATEMENT

Plaintiff Michael Blaes was one of dozens of plaintiffs who joined in a single petition against Relators Johnson & Johnson and Johnson & Johnson Consumer Inc., formerly known as Johnson & Johnson Consumer Companies, Inc., in the Circuit Court of the City of St. Louis. *See Swann v. Johnson and Johnson,* No. 1422-CC09326-01/02.

Respondent, The Honorable Rex M. Burlison, is the Circuit Judge assigned to preside over that action. Respondent denied Relators' renewed motion to sever and transfer the Blaes claims to the appropriate venue, St. Louis County, after Respondent set those claims for a separate trial.

On September 29, 2017, Relators filed in the Missouri Court of Appeals, Eastern District, a writ petition seeking the relief requested in this proceeding. That court possesses the power to issue and determine original remedial writs pursuant to Article V, Section 4.1, of the Missouri Constitution and Rules 84 and 97. The Circuit Court of the City of St. Louis is within the territorial jurisdiction of the Eastern District. § 477.050, RSMo. On October 2, 2017, the Court of Appeals denied the petition. *See* No. ED105958; Exhibits at 401.

On October 3, 2017, Relators filed the petition in this proceeding. On October 13, 2017, this Court issued a preliminary writ. This Court possesses the power to issue and determine original remedial writs pursuant to Article V, Section 4.1, of the Missouri Constitution and Rules 84 and 97.

INTRODUCTION

This writ proceeding arises from a years-long effort by plaintiff Michael Blaes to maneuver his way into the Circuit Court of the City of St. Louis, even though his claims have no connection to that venue. This forum-shopping is motivated by the belief that St. Louis City is particularly friendly to plaintiffs and a hope that Mr. Blaes, like other plaintiffs before him, can secure a large verdict.

Mr. Blaes is one of hundreds of plaintiffs with no business in St. Louis City who have nevertheless brought their claims there against Relators for the same reasons. They have done so through manipulation of joinder rules, linking dozens of cases to the claims of a few plaintiffs with connections to the forum. These plaintiffs have effectively transformed St. Louis City into a boundless venue, contrary to Rule 51.01's express provision that civil rules "shall not be construed to extend or limit the jurisdiction of the courts of Missouri, or the venue of civil actions therein."

This Court should end that practice by issuing a writ directing Relator to sever the Blaes claims from those of the other plaintiffs with which they are improperly joined and to transfer the Blaes claims to St. Louis County, where Mr. Blaes alleges the decedent first used the products at issue, making it the only proper venue for these tort claims under Missouri law. In doing so, the Court should also make clear that these disparate claims never should have been joined together in the first place and that such joinder cannot alter the straightforward operation of the venue statutes.

STATEMENT OF FACTS

Plaintiff Michael Blaes is one of dozens of plaintiffs whose claims have been joined in a single petition in the Circuit Court of the City of St. Louis against Relators Johnson & Johnson ("J&J") and Johnson & Johnson Consumer Inc., formerly known as Johnson & Johnson Consumer Companies, Inc. ("JJCI). *See Swann v. Johnson and Johnson,* No. 1422-CC09326-02. The 61 individual plaintiffs named in the First Amended Petition that included Plaintiff Blaes claimed to reside in over two dozen different states. Of those 61 plaintiffs, only three claimed that that they resided in Missouri, purchased and used the products in Missouri, or "developed" ovarian cancer in Missouri.

None of the named defendants (including Relators) are citizens of Missouri or maintain principal places of business here. *See Estate of Fox v. Johnson & Johnson,* 2017 WL 4629383 (Mo. App. Oct. 17, 2017).

Respondent, The Honorable Rex M. Burlison, is the Circuit Judge assigned to preside over that action.

Mr. Blaes alleges that he is a citizen of St. Louis County. Exhibits at 10, 74, 138, 201; Return at ¶ 1. Mr. Blaes alleges that, at all pertinent times, his decedent Shawn Blaes purchased and applied talcum powder in St. Louis County. Exhibits at 10, 74, 138, 201; Return at ¶ 2. Based on these allegations, for venue purposes decedent's alleged injury would have occurred in St. Louis County. *See* § 508.010(4), (11), (14), RSMo.

Proceedings in St. Louis County and federal court

On January 10, 2014, Mr. Blaes commenced his individual action in St. Louis County against Relators, as well as Imerys Talc America, Inc., Personal Care Products Council, and the owners of Schnucks and Walgreens stores where Shawn Blaes was alleged to have purchased talcum-powder products. Exhibits at 273; *see Blaes v. Johnson & Johnson,* 858 F.3d 508, 511 (8th Cir. 2017). In his original petition, Mr. Blaes alleged that venue was proper in St. Louis County pursuant to section 508.010, RSMo, because the decedent "was first exposed to the substance at issue in the County of St. Louis, State of Missouri." Exhibits at 278.

The defendants timely removed the case to federal district court. *See Blaes,* 858 F.3d at 511. Mr. Blaes later voluntarily dismissed the Schnucks and Walgreens defendants and the Personal Care Products Council. *Id.; see Blaes v. Johnson & Johnson,* 71 F. Supp. 3d 944, 945 (E.D. Mo. 2014). "After initially moving to remand based on a lack of complete diversity, Blaes conceded that his claims against the diversity-destroying defendants were barred by the Innocent Seller Statute, dismissed these claims, and withdrew his request to return to state court." 858 F.3d at 517 (Gruender, J., dissenting in part).

In federal court, the parties completed twenty-four depositions, fully briefed various Daubert and summary judgment motions, and resolved several other issues through motion practice. *Id.* The district court granted motions to strike two of the plaintiff's expert witnesses. *Id.; see, e.g., Blaes v. Johnson & Johnson,* 2016 WL 543163 (E.D. Mo. Feb. 9, 2016) (barring expert witness).

On October 24, 2014, the district court scheduled the case for a two-week jury trial to start on March 7, 2016. 858 F.3d at 511. On February 12, 2016, the district court held a status conference during which counsel for Mr. Blaes orally requested a continuance of the March trial date, advising the court that a case with similar claims (the *Fox* trial) was in progress in the City of St. Louis and would take longer than two weeks to complete. *Id.* at 511-512. Mr. Blaes sought a new date to accommodate a longer trial. *Id.* at 512. On February 18, 2016, the district court entered an order resetting the trial for July 6, 2016. *Id.*

On February 22, 2016, the jury in the *Fox* trial awarded that plaintiff $10 million in compensatory damages and $62 million in punitive damages. *Id.*; *Fox,* 2017 WL 4629383 at *1.

On March 9, 2016, the defendants in the Blaes case in federal court moved to reset the July 6, 2016, trial date because it conflicted with another talcum powder case scheduled for trial in New Jersey. *Blaes*, 858 F.3d at 512. Counsel were scheduled for six talcum powder trials starting in April 2016 and running through February 2017. *Id.* One of the trials listed was to be of a claim of one of the plaintiffs in the underlying action (the *Swann* case), which was scheduled for trial in January of 2017 in the City of St. Louis. *Id.*

On March 11, 2016, Mr. Blaes filed a motion for voluntary dismissal in the federal case. *Id.* "The motion failed to include any justification as to why dismissal was appropriate, but it is telling that the Fox jury found against J&J only two weeks earlier

and awarded Fox $10 million in compensatory damages and $62 million in punitive damages." 858 F.3d at 517 (Gruender, J., dissenting in part).

The defendants opposed the motion, asserting that Mr. Blaes was improperly forum shopping. 858 F.3d at 512. The defendants argued that Mr. Blaes was seeking to refile in St. Louis City (rather than St. Louis County, where venue had been proper before removal) because a St. Louis jury had just awarded a large plaintiff's verdict and the district court had made several unfavorable evidentiary rulings against Mr. Blaes. *Id.*

On March 29, 2016, the district court granted the motion to dismiss, finding that dismissal was proper "because this case will likely be refiled and consolidated with [the underlying *Swann* action]." *Id.*

On May 26, 2017, a divided panel of the Eighth Circuit affirmed this dismissal, holding that "the district court reasonably concluded that the case would likely be tried at an earlier date in state court, and the dismissal would not prejudice defendants because the Blaes case would be consolidated with a previously scheduled trial. We find that the district court's reasoning fell within its range of choices and was not an abuse of discretion." *Id.* at 514.

Judge Gruender dissented from the affirmance of the dismissal because "the district court abused its discretion by failing to address the issue of forum shopping in its grant of voluntary dismissal." 858 F.3d at 516 (Gruender, J., dissenting in part). Judge Gruender stated that he shared the appellants' concerns that the real motive of Mr. Blaes was to defeat removal to federal court "in light of the $72 million judgment in *Fox* and Missouri's relatively lax expert-witness standard." *Id.* at 518.

Proceedings after refiling in St. Louis City

After the dismissal in federal court, the Blaes claims became part of the underlying *Swann* case, as a result of a First Amended Petition in *Swann* adding Mr. Blaes as one of the dozens of plaintiffs named in that petition. Exhibits at 129.

Relators have consistently argued that venue in St. Louis City is improper as to the claims of Mr. Blaes (and other non-St. Louis City plaintiffs) and that the Blaes claims should be transferred to St. Louis County. Exhibits at 255-56, 262, 263, 267-70.

Respondent has denied Relators' motions to sever and transfer the claims of Mr. Blaes and all other non-St. Louis City plaintiffs. Exhibits at 271, 272. Respondent has held that the claims of non-St. Louis City plaintiffs should not be severed and that venue for the claims of non-St. Louis City plaintiffs is proper in his court as a result of their joinder with the claims of a single plaintiff alleging injury in the City of St. Louis.

On June 5, 2017, Respondent commenced a jury trial on the Blaes claims, along with the claims of out-of-state plaintiffs Savanna Crews and Darlene Evans.

On June 19, 2017, the Supreme Court of the United States handed down its decision in *Bristol-Myers Squibb Co. v. Superior Court,* 137 S. Ct. 1773 (2017).

The defendants immediately moved for a mistrial, noting that *Bristol-Myers* confirmed that the trial court lacked personal jurisdiction over J&J and JJCI with respect to the claims of Crews and Evans, because they arose from alleged conduct and activity entirely outside the state of Missouri, a defect that was not remedied by the joinder of their claims with those of a Missouri plaintiff.

On June 20, 2017, Respondent granted a mistrial.

Also on June 20, 2017, Respondent entered an order resetting the trial for October 16, 2017. At that time, Respondent did not specify what claims would be tried in October. Exhibits at 300. In the meantime, the plaintiffs' counsel informally indicated that they would pursue trial of the Blaes claims in October 2017. Return at ¶ 5.

On September 12, 2017, this Court issued its decision in *Barron v. Abbott Laboratories, Inc.,* 529 S.W.3d 795 (Mo. banc 2017). The majority opinion did not address whether Rule 51.01 precluded the use of joinder to extend venue, instead holding that Rule 84.13(b) required prejudice for reversal of a judgment for improper venue after a trial and that the defendants in *Barron* had failed to show prejudice.

In a concurring opinion joined by Chief Justice Fischer and Judge Stith, Judge Wilson stated that where, as here, the trial court decides to have a particular plaintiff's claims tried separately, "the trial court has discretion to deny a subsequent or renewed motion to sever only in the rarest of circumstances." 2017 WL 4001487 at *6 (Wilson, J., concurring). Citing section 508.012, RSMo, the concurrence recognized that, upon severance and a motion to transfer venue, the trial court must reassess venue based on the facts relevant to those severed claims. *Id.*

On September 13, 2017, the day after the opinion in *Barron* was issued, Relators filed a renewed motion to sever and transfer venue as to the claims of Mr. Blaes. Exhibits at 303-07; Return at ¶ 8.

On September 18, 2017, Respondent heard oral argument on several motions, including the renewed motion to sever and transfer the Blaes claims. Exhibits at 308-42;

Return at ¶ 9. On the same date, Respondent entered a scheduling order indicating that the Blaes claims would be tried on October 16, 2017. Exhibits at 301-02; Return at ¶ 6.

On September 26, 2017, Respondent denied the renewed motion. Exhibits at 343. The order denying the renewed motion set the Blaes claims "separately for trial before a jury beginning October 16, 2017." Return at ¶ 10.

Relators and co-defendant Imerys Talc America, Inc. moved to stay the October 16, 2017, trial. Exhibits at 344-91, 392-99. Respondent refused to grant a stay. Exhibits at 400; Return at ¶ 11.

This writ proceeding

On September 29, 2017, Relators filed in the Missouri Court of Appeals, Eastern District, a writ petition seeking the relief requested in this proceeding. On October 2, 2017, the Court of Appeals denied the petition. *See* No. ED105958; Exhibits at 401.

On October 3, 2017, Relators filed the petition in this proceeding.

On October 13, 2017, this Court issued a preliminary writ directing Respondent to "show cause, if any you have, why a writ of prohibition should not issue prohibiting you from doing anything other than vacating your order of September 25, 2017, overruling Relators' renewed motion to sever plaintiff Michael Blaes' claims and transfer venue . . . and entering an order sustaining said motion."

POINT RELIED ON

THE COURT SHOULD ISSUE A WRIT DIRECTING RESPONDENT TO TAKE NO FURTHER ACTION WITH REGARD TO THE CLAIMS OF PLAINTIFF MICHAEL BLAES EXCEPT TO SEVER THE BLAES CLAIMS AND TRANSFER THEM TO ST. LOUIS COUNTY CIRCUIT COURT BECAUSE RESPONDENT'S RULING IN DENYING SEVERANCE AND TRANSFER WAS IN EXCESS OF HIS JURISDICTION, AN ABUSE OF DISCRETION, AND IN VIOLATION OF SECTIONS 508.010 AND 508.012, RSMO, IN THAT THE DECEDENT WAS ALLEGED TO HAVE BEEN FIRST INJURED IN ST. LOUIS COUNTY, VENUE IN A TORT ACTION IS PROPER IN THE COUNTY WHERE THE FIRST INJURY OCCURRED, RESPONDENT SET THE BLAES CLAIMS FOR A SEPARATE TRIAL, VENUE OF THE BLAES CLAIM IS PROPERLY IN ST. LOUIS COUNTY, AND RESPONDENTS LACK AN ADEQUATE REMEDY BY APPEAL AND WILL SUFFER IRREPARABLE HARM IF RELIEF IS NOT GRANTED.

Barron v. Abbott Laboratories, Inc., 529 S.W.3d 795 (Mo. banc 2017).

State ex rel. Green v. Neill, 127 S.W.3d 677 (Mo. banc 2004).

State ex rel. Kansas City. S. Ry. Co. v. Nixon, 282 S.W.3d 363 (Mo. banc 2009).

§ 508.010, RSMo.

§ 508.012, RSMo.

ARGUMENT

THE COURT SHOULD ISSUE A WRIT DIRECTING RESPONDENT TO TAKE NO FURTHER ACTION WITH REGARD TO THE CLAIMS OF PLAINTIFF MICHAEL BLAES EXCEPT TO SEVER THE BLAES CLAIMS AND TRANSFER THEM TO ST. LOUIS COUNTY CIRCUIT COURT BECAUSE RESPONDENT'S RULING IN DENYING SEVERANCE AND TRANSFER WAS IN EXCESS OF HIS JURISDICTION, AN ABUSE OF DISCRETION, AND IN VIOLATION OF SECTIONS 508.010 AND 508.012, RSMO, IN THAT THE DECEDENT WAS ALLEGED TO HAVE BEEN FIRST INJURED IN ST. LOUIS COUNTY, VENUE IN A TORT ACTION IS PROPER IN THE COUNTY WHERE THE FIRST INJURY OCCURRED, RESPONDENT SET THE BLAES CLAIMS FOR A SEPARATE TRIAL, VENUE OF THE BLAES CLAIM IS PROPERLY IN ST. LOUIS COUNTY, AND RESPONDENTS LACK AN ADEQUATE REMEDY BY APPEAL AND WILL SUFFER IRREPARABLE HARM IF RELIEF IS NOT GRANTED.

The underlying action represents transparent forum shopping that is contrary to Missouri statutes and this Court's rules. Plaintiff Michael Blaes alleges that his wife developed ovarian cancer and died as a result of cosmetic application of talcum powder products in St. Louis County. Accordingly, the proper venue for this action is St. Louis County. Indeed, that is where Mr. Blaes filed his first action against Relators (along with a number of sham defendants in the unsuccessful hope of destroying diversity and avoiding removal to federal court). After a jury in St. Louis City awarded $72 million to a plaintiff with claims similar to his, Mr. Blaes voluntarily dismissed the federal action

and joined his claims to the claims of dozens of unrelated claims in the underlying action in St. Louis City.

However, as Mr. Blaes recognized at the outset of this litigation, St. Louis County remains the correct venue. St, Louis City is an improper venue, and Respondent's rulings to the contrary were in excess of his jurisdiction, an abuse of discretion, and in violation of Missouri venue statutes. The Court should issue a permanent writ to prevent the trial in the underlying action from going forward in an improper venue.

"Venue is determined solely by statute." *State ex rel. Harness v. Grady,* 201 S.W.3d 48, 50 (Mo. App. 2006). "Improper venue is a fundamental defect." *State ex rel. Green v. Neill,* 127 S.W.3d 677, 678 (Mo. banc 2004). When venue is improper the trial court may not take any further action, "except to transfer the case to a proper venue." *State ex rel. McDonald's Corp. v. Midkiff,* 226 S.W.3d 119, 122 (Mo. banc 2007). Plaintiffs bear the burden of showing that venue is proper and "must make allegations that bring the claim within an appropriate statutory venue provision." *Harness,* 201 S.W.3d at 50.

Consistent with these standards, venue for the Blaes claims was never appropriate in St. Louis City. Mr. Blaes has consistently alleged that his decedent was first injured in St. Louis County, where his wife allegedly developed ovarian cancer and died as a result of cosmetic application of talcum powder products in St. Louis County. Mr. Blaes could not create venue in the City of St. Louis by joining his claims with those of a city resident because Rule 51.01 prohibits the use of joinder to extend venue. Nonetheless, the Blaes

claims are pending in St. Louis City because they were joined in a petition with other plaintiffs, only one of whom alleges venue there.

Even if venue had ever been proper in the City of St. Louis, these claims should no longer be there. Once the Blaes claims were selected to be tried individually, Respondent was obligated to sever those claims, "determine the proper venue for the various actions resulting from that severance," and "transfer those actions for which venue in St. Louis City is not proper." *See Barron v. Abbott Laboratories, Inc.,* 529 S.W.3d 795, 803 (Mo. banc 2017) (Wilson, J., concurring, joined by Fischer, C.J, and Stith, J.).

Because the undisputed facts show that venue is lacking in St. Louis City, and because, as this Court also made clear in *Barron*, review on appeal does not offer an adequate remedy, a writ is proper and necessary.

A. Prohibition is the appropriate remedy for improper venue.

A writ of prohibition is proper here because Respondent's order denying the motion to sever and transfer the claims of Mr. Blaes was in excess of his authority and an abuse of discretion, and because ordinary appeal will not provide Relators with an adequate remedy.

First, a writ of prohibition is available "(1) to prevent a usurpation of judicial power when the trial court lacks authority or jurisdiction; (2) to remedy an excess of authority, jurisdiction or abuse of discretion where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not granted." *State ex rel. KCP&L Greater Mo. Ops. Co. v. Cook,* 353 S.W.3d 14, 17 n.3 (Mo. App. 2011); *see State ex rel. Kinder v. McShane,* 87 S.W.3d 256, 260 (Mo. banc 2002).

Second, a writ is appropriate where "there is no adequate remedy by appeal for the party seeking the writ, and 'the aggrieved party may suffer considerable hardship and expense as a consequence of the erroneous decision [of the lower court].'" *State Bd. of Registration for the Healing Arts v. Brown,* 121 S.W.3d 234, 236 (Mo. banc 2003) (quoting *State ex rel. Chassaing v. Mummert,* 887 S.W.2d 573, 577 (Mo. banc 1994)); *see KCP&L,* 353 S.W.3d at 17 (prohibition "may be appropriate to prevent unnecessary, inconvenient, and expensive litigation").

Third, a writ of prohibition is an appropriate remedy to correct a trial court that acts when venue is improper. *State ex rel. Green v. Neill,* 127 S.W.3d 677, 678 (Mo. banc 2004); *State ex rel. SSM Health Care St. Louis v. Neill,* 78 S.W.3d 140, 142 (Mo. banc 2002). In such circumstances, prohibition lies "to bar the trial court from taking any further action, except to transfer the case to a proper venue." *State ex rel. Green v. Neill,* 127 S.W.3d at 678 (internal quotation marks and citation omitted).

Indeed, the Court recently explained that claims of improper venue are properly raised in the pretrial writ context, "which requires no showing of prejudice." *Barron,* 529 S.W.3d at 799 n.6 (citing *State ex rel. Kansas City S. Ry. Co. v. Nixon,* 282 S.W.3d 363, 367 n.1 (Mo. banc 2009) (Fischer, J., dissenting) ("Direct appeal after completion of a jury trial historically has not been considered an adequate remedy to address improper venue.")).

B. The proper venue of the Blaes claims was always St. Louis County.

As the plaintiff effectively conceded when he filed his original petition, the proper venue for his claims was always St. Louis County.

"In Missouri, venue is determined solely by statute." *State ex rel. Kinsey v. Wilkins,* 394 S.W.3d 446, 449 (Mo. App. 2013). Where, as here, a venue decision is based on interpretation of a statute, this Court applies *de novo* review. *Scherder v. Sonntag,* 450 S.W.3d 856, 861-62 (Mo. App. 2014). When suit is brought in an improper venue, the trial court has a ministerial duty to transfer the case to a correct venue. *State ex rel. Kansas City. S. Ry. Co. v. Nixon,* 282 S.W.3d 363, 365 (Mo. banc 2009).

Venue is clearly lacking as to the Blaes claims in St. Louis City. Mr. Blaes has consistently alleged that at all pertinent times his decedent purchased and applied talcum powder in St. Louis County. Exhibits at 201.

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), RSMo.

"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), RSMo.

"A plaintiff is considered first injured where the trauma or exposure occurred rather than where symptoms are first manifested." § 508.010 (14), RSMo.

These provisions were adopted by the General Assembly in the 2005 tort reform act in order to prevent forum shopping. *McCoy v. The Hershewe Law Firm, P.C.,* 366 S.W.3d 586, 592 (Mo. App. 2012).

Mrs. Blaes was "first injured" in St. Louis County and, pursuant to sections 508.010(4), (11), and (14), venue is proper in St. Louis County, not St. Louis City.

C. The claims in the underlying action were never properly joined.

From the outset, the joinder in the underlying action was improper under Rule 52.05, which governs the permissive joinder of parties. It provides:

> All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action.

The interpretation of a procedural rule is a question of law and is therefore reviewed *de novo*. *See, e.g., Muhm v. Myers,* 400 S.W.3d 846, 849 (Mo. App. 2013). Where joinder is improper, "the trial court must sever upon motion, having no discretion to do otherwise." *Guess v. Escobar,* 26 S.W.3d 235, 239 n.3 (Mo. App. 2000).

Rule 52.05 is derived from Federal Rule of Civil Procedure 20, and Missouri courts endeavor to interpret it "in accord with the interpretation of the federal rule from which it came." *State ex rel. Nixon v. Dally,* 248 S.W.3d 615, 617 (Mo. banc 2008) (quotations omitted). This Court has favorably cited federal authorities in construing Rule 52.05. *See State ex rel. Allen v. Barker,* 581 S.W.2d 818, 826-27 (Mo. banc 1979).

Under Federal Rule 20's substantively identical "transaction or occurrence" requirement, the question is "whether there are enough ultimate factual concurrences that it would be fair to the parties to require them to defend jointly [the several claims] against them." 7 C. Wright et al., Federal Practice and Procedure § 1653 (3d ed.) (quotations omitted). The joinder rule exists "to promote trial convenience and expedite the final determination of disputes, thereby preventing multiple lawsuits." *Mosley v. Gen. Motors Corp.,* 497 F.2d 1330, 1332 (8th Cir. 1974).

Complex, individualized medical claims of plaintiffs from different states, with different medical histories, and who used a product at different times and under different circumstances, do not satisfy the transaction or occurrence requirement simply because they used the same product. *See, e.g., Alday v. Organon USA, Inc.,* 2009 WL 3531802 (E.D. Mo. Oct. 27, 2009); *Boschert v. Pfizer, Inc.,* 2009 WL 1383183 (E.D. Mo. May 14, 2009).

The 61 plaintiffs named in the First Amended Petition, which included Blaes, claimed to reside in over two dozen different states. Some plaintiffs were diagnosed with ovarian cancer recently, while others were diagnosed decades ago, implicating various applicable statutes of limitations. Each plaintiff had a unique family and medical history with different risk factors for ovarian cancer, necessitating individualized causation analyses, and each plaintiff may have developed a different type of ovarian cancer. Each plaintiff claimed to have used talc products for different periods of time, in different amounts, for different durations, and with different frequency.

Due to the significant number of differences among the plaintiffs, the law that governs their claims, and the circumstances under which injury allegedly occurred, the plaintiffs' claims could not manageably be tried together without causing significant confusion and prejudice. Indeed, the trial court entered a scheduling order pursuant to which claims were to be separately tried. Exhibits at 343.

Joinder in this case did not serve the purpose of Rule 52.05 to promote convenience and prevent multiple lawsuits. Trying the claims of multiple plaintiffs separately is the same as multiple lawsuits. The only purpose for the joinder has been the attempted avoidance of jurisdictional and venue limitations.

Improper joinder (which serves as the only purported basis for haling these defendants into an improper venue to defend against numerous separate claims) is contrary to Rules 52.05 and 51.01, and it provides no justification for Respondent's venue ruling.

D. Joinder did not create venue in St. Louis City.

Even if it had been appropriate, joinder with other plaintiffs' claims would not change the proper venue for the Blaes claims.

This Court's rules expressly bar the use of joinder to expand venue. 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." Consistent with Rule 51.01, the Court has held that joinder of claims does not create venue. *See State ex rel. Turnbough v. Gaertner,* 589 S.W.2d 290, 291-92 (Mo. banc 1979). As a result, "simply joining two separate causes of action in a single petition does not create venue over both actions."

State ex rel. Kinsey v. Wilkins, 394 S.W.3d 446, 450 (Mo. App. 2013). The Court recently reaffirmed that venue must be analyzed on a claim-by-claim basis. *See State ex rel. Heartland Title Servs., Inc. v. Harrell,* 500 S.W.3d 239, 242 n.4 (Mo. banc 2016).

Because it decided the appeal based on Abbott's failure to show prejudice, the majority in *Barron* did not address Abbott's argument that Rule 51.01(b) precluded use of joinder to extend venue. Relators are not required to prove prejudice in this writ proceeding. Because joinder cannot extend venue, Respondent exceeded his authority in denying Relators' motion to sever and transfer in the first instance.

E. *Barron* requires reconsideration of joinder and venue.

Even if joinder was ever appropriate for limited purposes (and temporarily justified venue in the City of St. Louis), it is no longer appropriate after Respondent decided to try the Blaes claims separately.

Respondent's established practice of ordering separate trials of individual claims is explicit recognition that joint trials are not appropriate. When individual claims are set for separate trials, joinder no longer provides whatever benefits it may have provided previously, and it is no longer justified.

This is clearly explained in the separate opinion in *Barron,* in which multiple plaintiffs sued a drug manufacturer in St. Louis City. The plaintiff, Maddison Schmidt, "was born and resides in Minnesota. Her mother ingested Depakote, an antiepileptic drug manufactured and marketed by Abbott, while Schmidt was in utero. Her mother ingested the Depakote in Minnesota. Abbott's company headquarters are in Illinois. Despite this lack of connection to Missouri, Schmidt joined with four Missouri plaintiffs

and 19 other non-Missouri plaintiffs to file a single action against Abbott in the circuit court of the city of St. Louis." *Barron,* 529 S.W.3d at 796.

Abbott sought relief from the improper joinder and improper venue, but its efforts were in vain: "Abbott moved to sever the plaintiffs' individual claims, arguing they should not have been joined together in a single action. Abbott also moved to transfer the non-Missouri plaintiffs' claims to the circuit court of St. Louis County, which Abbott argued was the proper venue for these plaintiffs. After the circuit court overruled Abbott's motions, Abbott raised its venue and joinder arguments in a petition for a writ of mandamus or, alternatively, a writ of prohibition. Both the court of appeals and this Court denied Abbott's writ petition without opinion." *Id.*

The circuit court then ordered each side to nominate plaintiffs for separate, individual trials, even though all the plaintiffs' claims remained joined in one action. *Id.* A jury trial was held solely on the claims of Maddison Schmidt without severing the other plaintiffs' claims. *Id.* The jury found in favor of the plaintiff and awarded her $15 million in compensatory damages and $23 million in punitive damages. *Id.*

Abbott appealed, and its first two points relied on raised the venue and joinder issues that had been preserved by its motions to sever and transfer venue and raised in writ petitions to this Court and the Court of Appeals. *Id.* at 2. The Court rejected both points solely on the basis of prejudice: "This Court declines to hold Abbott was prejudiced simply because a fair judge and jury in the city of St. Louis rendered the judgment and verdict rather than a fair judge and jury in St. Louis County. Because Abbott fails to satisfy the prejudice requirement, this Court need not decide whether the

circuit court erred in either failing to transfer venue or failing to sever the claims. Points I and II are denied." *Id.*

In affirming the judgment, the Court noted that claims of improper venue are properly raised in the pretrial writ context, "which requires no showing of prejudice." *Barron,* 529 S.W.3d at 799 n.6 (citing *State ex rel. Kansas City S. Ry. Co. v. Nixon,* 282 S.W.3d 363, 367 n.1 (Mo. banc 2009) (Fischer, J., dissenting) ("Direct appeal after completion of a jury trial historically has not been considered an adequate remedy to address improper venue.")).

In a separate opinion joined by Chief Justice Fischer and Judge Stith, Judge Wilson explained that, even if joinder of so many plaintiffs in a single action may not have been an abuse of discretion at the outset of the case, joinder became improper when an individual plaintiff's claims were set for a separate trial: "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 no 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 discretion to deny a subsequent or renewed motion to sever only in the rarest of circumstances." *Id.* at 803 (Wilson, J., concurring).

An abuse of discretion in denying a motion to sever and reconsider venue "will be patently prejudicial under section 508.012," which requires venue to be reconsidered when a plaintiff is either added or removed from a petition. *Id.*

As the separate opinion in *Barron* explains, severing 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.* Once the trial court in *Barron* determined that each plaintiff's claims should be tried separately, "it was error not to sever them and transfer those for which venue was no longer proper under sections 508.012 and 508.010." *Id.* at 804.[1]

The separate opinion explained the proper method for a defendant to obtain relief in this context: "In the present case, if Abbott had renewed its motion to sever after the trial court announced its intention to try each Plaintiff's claims separately—and if Abbott had challenged that failure in this appeal—the proper result would be to vacate the judgment entered below and remand with instructions for the trial court: (1) to sever each Plaintiff's claims into separate actions; (2) to reassess venue for each of the newly severed actions under section 508.012; and (3) to transfer those actions for which venue in St. Louis City is not proper under section 508.010 to their proper venue." *Id.* at 803-804.

[1] Although the separate opinion suggests that judicial convenience might warrant joinder for discovery, this was addressed in the context of a case where the claims of separate plaintiffs were designated for separate trials. The separate opinion did not address the impossibility and impracticality of trying cases controlled by different substantive law, different time frames relative to scientific knowledge and product use, and different medical conditions and claimed injuries. Joinder for discovery does not implicate venue rights as significantly as would joinder for trial. Even if the Court should determine to adopt a de facto MDL procedure for Missouri lawsuits, trial of each case should be held in the proper venue, consistent with the federal MDL procedures.

F. Relators were entitled to severance and reassessment of venue.

In the underlying action, Relators did exactly as suggested by the separate opinion in *Barron.* Relators' initial motion to sever and to transfer was denied. Exhibits at 271, 272. In light of *Barron*, on September 13, 2017, Relators filed a renewed motion to sever and transfer venue as to the Blaes claims after Respondent set those claims for a separate trial. Exhibits at 303-07; Return at ¶ 8. On September 26, 2017, Respondent denied the renewed motion and set the Blaes claims "separately for trial before a jury beginning October 16, 2017." Exhibits at 343; Return at ¶ 10. Relators moved to stay the October 16, 2017, trial, and Respondent refused. Exhibits at 344-91, 392-400; Return at ¶ 11.

Although the separate opinion in *Barron* allowed that refusing to sever claims selected for separate trial might be warranted in "rare circumstances," no such circumstances are even arguably present in the underlying action. Indeed, the circumstances in the underlying case are identical to those in *Barron*.

In the underlying action, once Respondent ordered that the October 2017 trial would involve the Blaes claims alone, Exhibits at 301-02, Relators were entitled to severance of those claims and reassessment of venue after severance. Respondent acted in excess of his authority and abused his discretion in refusing to sever the Blaes claims and reconsider venue. *See Barron,* 529 S.W.3d at 803-804 (Wilson, J., concurring) ("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.") (citing § 508.012, RSMo).

As the concurrence in *Barron* explained, upon severance section 508.012 requires the trial court, upon motion of a party, to determine the proper venue for the various actions resulting from that severance and transfer to that venue. 529 S.W.3d at 803-804 (Wilson, J., concurring). Section 508.012 expressly provides that, at "any time prior to commencement of a trial, if a plaintiff . . . is either added or removed from a petition . . . which would have, if originally added or removed in 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 508.012, Respondent was required to consider venue as to the Blaes claims alone, after Respondent set the Blaes claims for a separate trial and Relators filed a renewed motion to sever and transfer venue as to the claims of Mr. Blaes. Exhibits at 301-343; Return at ¶¶ 6, 8-10.

G. Upon severance, transfer to St. Louis County was required.

Reassessment of venue after severance requires that the Blaes claims be transferred to St. Louis County.

As discussed above, Mr. Blaes has always pleaded that his decedent first used talc products in St. Louis County, and thus was first injured for venue purposes in St. Louis County. Exhibits at 10, 74, 138, 201, 278; Return at ¶ 2. Under section 508.010(4), the proper venue for the Blaes claims is and has always been St. Louis County. Based on these undisputed facts, once Respondent set the Blaes claims for a separate trial, he had a ministerial duty to transfer those claims to St. Louis County for trial. *See Kansas City S. Ry. Co.,* 282 S.W.3d at 365.

Respondent also has violated the clear legislative intent of the venue statutes, in contravention of the interpretive maxim that statutes be construed in a way that advances legislative intent. *See, e.g., Am. Eagle Waste Indus., LLC v. St. Louis Cty.,* 379 S.W.3d 813, 832 (Mo. banc 2012). The legislature enacted the venue statute as part of the 2005 tort reform act, which was intended to restrict venue options "so as to reduce forum-shopping by plaintiffs." *McCoy,* 366 S.W.3d at 592. Contrary to Respondent's orders, this legislative intent cannot be thwarted through manipulation of joinder.

By denying Relators' renewed motion to sever and transfer the Blaes claims, Respondent impermissibly continues to exercise venue over Relators, thereby abusing his discretion and exceeding his authority.

H . Relators have no adequate remedy on appeal.

Writ relief is appropriate because review by appeal does not afford an adequate remedy. This Court expressly recognized in *Barron* that proof of prejudice from improper venue is difficult on direct appeal, which is precisely "why these types of claims are better raised in the pretrial writ context," in which there is no prejudice requirement. 529 S.W.3d at 799 n.6; *see also id*. at 801 (Wilson, J., concurring) (explaining that litigants forced to raise the issue in an end-of-case appeal will be "left without a remedy unless [they] can scale the nearly insurmountable hurdle of providing prejudice on appeal").

Relief on appeal also could not undo the fact that Relators would have already incurred the burden, expense, and inconvenience of litigating the Blaes claims in an

improper venue. Accordingly, this is precisely the sort of issue for which a writ is appropriate. *See Green,* 127 S.W.3d at 678.

CONCLUSION

For the foregoing reasons, the Court should issue a writ directing Respondent to take no further actions with regard to the claims of plaintiff Michael Blaes except to sever the claims of Mr. Blaes and transfer those claims to St. Louis County Circuit Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

A copy of this document, along with the accompanying Appendix, was served on counsel of record through the Court's electronic notice system on January 3, 2018.

This brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 6,749, excluding the cover, table of contents, table of authorities, signature block, appendix, and this certificate.

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