



## CAN CHANGES IN PERSONAL JURISDICTION, VENUE LAW FORCE MISSOURI TALC LITIGATION TO TAKE A POWDER?

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Over the past several years, Missouri has become the landing spot for a large number of lawsuits alleging a connection between the use of talcum powder and the development of ovarian cancer, including several shockingly large plaintiffs' verdicts. This LEGAL BACKGROUNDER details (1) how Missouri and particularly St. Louis City became the go-to venue for these types of cases; (2) reforms and developments that may stem the tide of such suits; and (3) what more can be done to improve the business climate and restore fairness to Missouri courts.

### Why Missouri?

Missouri's twenty-second judicial circuit became a hotbed for talcum-powder cases following massive multimillion dollar verdicts in lawsuits alleging that products containing the substance caused plaintiffs to develop ovarian cancer.

Even prior to those verdicts, Missouri courts were open for business to any out-of-state lawsuit that could bring together foreign and resident plaintiffs in order to satisfy venue and joinder under Missouri law. Missouri's venue law requires that if an injury occurs in the state, venue shall lie in the county where the plaintiff was first injured or where the negligent conduct occurred.<sup>1</sup> If the plaintiff first suffered an injury outside the state, venue lies where the defendant's registered agent is incorporated. If the plaintiff's principal residence was in Missouri, venue can be found in the county where the plaintiff resided at the time of the injury.<sup>2</sup>

*Estate of Jacqueline Fox v. Johnson & Johnson, et al.* exemplifies the problems caused by Missouri's venue and joinder standards. In that case, 65 individual plaintiffs brought suit against Johnson & Johnson, Johnson & Johnson Consumer Companies, Inc., and Imery's Talc America, Inc. in St. Louis City. Jacqueline Fox and 62 other plaintiffs alleged they bought and used the defendants' talcum-powder products outside of Missouri. However, their claims were combined with those brought by two plaintiffs who purchased the products in Missouri, one of whom bought and used the products in the City of St. Louis and the other in St. Louis County.<sup>3</sup> Missouri's joinder law allows permissive joinder of non-residents with claims of resident plaintiffs when all plaintiffs' claims arise out of the same transaction, occurrences, or series of occurrences.<sup>4</sup>

<sup>1</sup> 508.010.4, Revised Statutes of Missouri.

<sup>2</sup> 508.010.5(1), Revised Statutes of Missouri.

<sup>3</sup> It should be noted here that St. Louis County and St. Louis City are separate judicial circuits and venue must be established relative to each.

<sup>4</sup> Missouri Supreme Court Rule 52.05.

Aside from the plaintiff-friendly venue and joinder rules, Missouri courts historically applied personal-jurisdiction standards permissively to allow non-resident claims. As the Eastern District Court of Appeals for Missouri noted, “Missouri courts historically have exercised personal jurisdiction over defendants as to joined non-residents’ claims, so long as jurisdiction exists as to the residents’ claims.”<sup>5</sup>

Plaintiffs’ law firms find St. Louis City to be a favorable jurisdiction, with access to relatively quickly scheduled jury trials, accommodating judges who are willing to keep cases in their courts, and juries prone to handing out exorbitant verdicts. The first of several jury verdicts against Johnson & Johnson in the *Fox* case helped solidify this reputation. In *Fox*, a St. Louis City jury awarded Ms. Fox’s family \$10 million in compensatory damages and \$62 million in punitive damages. St. Louis City juries followed that award with verdicts in separate cases of \$55 million, \$70 million, and \$110 million. The talc-product makers won a single verdict out of the five cases tried before St. Louis juries.

In response to the jury verdicts in favor of plaintiffs for alleged talc-related ovarian cancer, legal advertising for similar cases ballooned in the greater St. Louis City market. According to marketing and data analysis performed by Rustin Silverstein on behalf of Johnson & Johnson, a disproportionate amount of talcum-powder-litigation advertising appeared in the St. Louis City media market between July 1, 2015 and June 30, 2016.<sup>6</sup> Silverstein noted that 875 talcum-powder-litigation advertisements were broadcast at an estimated cost of \$173,050 in market. This amount does not include 4,300 talcum-powder-litigation ads purchased on national cable and broadcast networks through syndicated programming. St. Louis City ranked first nationally in the number of talcum-powder-litigation advertisements aired during this time period, despite the fact that St. Louis City is the twenty-first ranked media market nationally.

Following the St. Louis City verdict, talcum-powder-litigation advertising jumped over 1,000% nationally between February and March of 2016, and spending increased nearly 5,000% nationally in March as compared to February as a result. In St. Louis City, the number of ads increased by nearly 11,000% and nearly 20,000% in the amount spent on the advertisements. The pool of jurors selected for the subsequent talcum-powder trials had been exposed to a disproportionate number of advertisements that highlighted the \$72 million dollar and reiterated the alleged link between talcum powder and ovarian cancer.

### **Personal Jurisdiction and Expert-Witness Reboot**

As the talcum-powder trials rolled on in the St. Louis City, a storm was brewing in Missouri and at the federal level on the law of personal jurisdiction. Perhaps foreshadowing the decision to come from the U.S. Supreme Court, in February 2017 the Missouri Supreme Court issued a permanent writ of prohibition finding that the circuit court of St. Louis County did not have personal jurisdiction over Norfolk Southern in a personal-injury case.<sup>7</sup> Plaintiffs had filed suit in St. Louis County for injuries sustained to an Indiana resident in the state of Indiana for his work on behalf of Norfolk Southern in Indiana. Plaintiffs had argued that because Norfolk owned and operated railway in Missouri and/or has registered to do business by complying with Missouri’s foreign corporation registration statute, personal jurisdiction was satisfied. The Missouri Supreme Court was unconvinced, saying that the business contacts of Norfolk Southern in Missouri were insufficient to establish general jurisdiction and the company could thus not be found “at home” in Missouri. Additionally, the court rejected the argument that the foreign-corporation-registration statute could broaden personal jurisdiction to include claims such as those the Indiana plaintiff brought.

<sup>5</sup> *Estate of Fox v. Johnson & Johnson*, No. ED104580, at 4, (Mo. App. E.D. Oct. 17, 2017).

<sup>6</sup> Affidavit of Rustin Silverstein, *Hogans, et al., v. Johnson & Johnson, et al.*, 1422-CC09012 (22nd. Cir. Mo.); “Defendants Motion to Change Venue for the Upcoming September Trial,” July 28, 2016.

<sup>7</sup> *State ex rel. Norfolk S. Ry. Co. v. Dolan*, 512 S.W.3d 41 (Mo. Banc. 2017).

Following the *Norfolk Southern* decision, the U.S. Supreme Court weighed in on personal jurisdiction in June 2017 in the *Bristol-Myers Squibb (BMS)* case.<sup>8</sup> *BMS* narrowed the requirements for personal jurisdiction, holding that the defendant's conduct must sufficiently arise out of its activities within the forum state. Prior to *BMS*, plaintiffs were alleging general activities and connections with the forum state as nothing more than a backdoor to general jurisdiction. Following the ruling, plaintiffs must demonstrate specific contacts within the forum that have a connection to the injury alleged. In *BMS*, nonresident claims were added with resident claims and filed in California to gain piggyback jurisdiction. This is the same mechanism plaintiffs utilized to file massive numbers of talcum-powder claims against Johnson & Johnson and others in St. Louis City.

*Norfolk Southern* and *BMS* have had an impact on the talc lawsuits in Missouri, albeit a slowly developing one. In August 2017, two months after *BMS*, St. Louis City Judge Rex Burlison finalized the \$110 million judgment in favor of Lois Slemp against Johnson & Johnson and Imery's Talc.<sup>9</sup> Judge Burlison further allowed plaintiffs to reargue and allege additional facts relating to personal jurisdiction that had not been established before the jury verdict in May. As a result, the plaintiffs were able to advance a new, alternative theory of personal jurisdiction. That theory involved a Missouri company that plaintiffs claimed had manufactured, processed, and bottled the talc products at Johnson & Johnson's direction. As Judge Burlison wrote, "This Court, however, believes this case is not in such advance[d] posture so as to prohibit a review of jurisdictional facts."<sup>10</sup> That review led Judge Burlison to find personal jurisdiction over the defendants and to uphold the \$110 million verdict. The *Slemp* defendants have appealed to the Missouri Eastern District Court of Appeals.

Perhaps in a sign of what is to come in *Slemp*, the appellate court reversed and vacated the jury verdict in favor of the Estate of Jacqueline Fox for lack of personal jurisdiction.<sup>11</sup> In *Fox*, Judge Burlison denied the defendants' motion to dismiss for lack of personal jurisdiction, writing that each non-resident need not independently establish a basis for jurisdiction so long as one defendant has sufficient minimum contacts with the state. The Missouri Eastern District Court of Appeals disagreed, and denied the plaintiff's request for the court to stay the jury verdict pending the re-litigation of personal jurisdiction.<sup>12</sup> Plaintiffs filed a motion for rehearing and/or transfer to the Supreme Court of Missouri. However, on December 19, 2017, the Court of Appeals denied plaintiffs request.<sup>13</sup>

The Missouri Supreme Court will have an opportunity to weigh in on the talcum-powder litigation next month. Both Johnson & Johnson and Imery's Talc filed for preliminary writs of prohibition to the Missouri Supreme Court to stop the commencement of trial in October for a St. Louis County man, Michael Blaes, on behalf of his deceased wife. Both Johnson & Johnson and Imery's appeal for the writ were based on Judge Burlison's refusal to sever and transfer venue to St. Louis County from the City of St. Louis. The Supreme Court issued preliminary writs and will hear oral arguments on February 27.

Missouri's legislature also enacted, and Governor Eric Greitens signed, important civil-justice reforms in the 2017 legislative session that will impact the litigation of talcum-powder and other personal-injury claims. Prior to these reforms, Missouri's expert-witness standard was one of the most lax in the country, allowing plaintiffs' lawyers to trot a bevy of expert witnesses to the witness stand. In 2017, the Missouri

<sup>8</sup> *Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco Cnty.*, 137 S. Ct. 1773 (2017).

<sup>9</sup> Judgment, *Lois Slemp, v. Johnson & Johnson, et al.*, 1422-CC09326-02, (22nd Cir. Mo. Aug. 3, 2017).

<sup>10</sup> Order, *Lois Slemp, v. Johnson & Johnson, et al.*, 1422-CC09326-02, (22nd Cir. Mo. Nov. 29, 2017).

<sup>11</sup> *Estate of Fox v. Johnson & Johnson*, No. ED104580, (Mo. App. E.D. Oct. 17, 2017).

<sup>12</sup> *Id.* at 6.

<sup>13</sup> Order, *Estate of Fox v. Johnson & Johnson*, No. ED104580, (Mo. App. E.D. Dec. 19, 2017).

legislature passed House Bill 153, closely modeled after the *Daubert* standard applied in federal court.<sup>14</sup> By aligning Missouri's expert-witness law with those in other states, businesses will no longer have to defend against claims that lack reliable scientific evidence and talc plaintiffs will have to show that their expert testimony is based on facts, data, and reliable principles and methods.

### Work Left to Do

Missouri courts were in the news frequently during 2016 and 2017 thanks in part to the large talc verdicts coming out of St. Louis City. That jurisdiction is also a magnet for other high-stakes litigation. As noted above, venue and joinder laws in Missouri have created a gaping hole that allows cases to funnel directly to plaintiff-friendly jurisdictions. In addition to the influx of talc cases, St. Louis City has long been known for its busy asbestos docket. In 2016, 292 asbestos cases were filed in the state of Missouri. An eye-popping 279 of those were filed in the St. Louis City—over 95%.

Missouri businesses have long sought an end to forum shopping through comprehensive venue reform. One version of venue reform died on the Senate floor during the final week of the 2017 legislative session after passing through the lower chamber. The legislature is expected to pursue reform in the 2018 session with a proposal that requires plaintiffs to show that venue can be established independently for each individual plaintiff against each individual defendant. If a plaintiff cannot make that showing, courts would be compelled to sever and transfer cases that are misjoined or brought in an improper venue.

### Conclusion

St. Louis City and the state of Missouri became the talcum-powder-litigation capital over the last several years thanks to lax venue, joinder, and expert-witness laws. Together with plaintiff-friendly judges and juries, outrageous verdicts became the norm. However, personal-jurisdiction and expert-witness fixes have helped rein the tide back in and Missouri's legislature can deliver a one-two punch by delivering much needed venue reform to restore a more balanced and equitable judicial climate for Missouri's businesses in 2018.

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<sup>14</sup> 490.065, Revised Statutes of Missouri, <http://www.house.mo.gov/billtracking/bills171/hlrbillspdf/0381H.01T.pdf>.