No. SC98674

IN THE SUPREME COURT OF MISSOURI

ROBERT INGHAM, LAINE GOLDMAN, CAROL E. WILLIAMS, MONICA SWEAT, GREGORY SWEAT, ROBERT PACKARD, BRYAN THOMAS, JANIS GAIL OXFORD, WILLIAM OXFORD, STEPHANIE MARTIN, KEN MARTIN, SHEILA D. BROOKS, MARTIN MAILLARD, KRYSTAL J. KIM, ALLAN KOMAN, ZACHARY D. ROBERTS, MARCIA ELIZABETH OWENS, MITZI DENISE ZSCHIESCHE, TRACEE BAXTER, CECILIA A. MARTINEZ, APRIL TELLEZ, KAREN DENISE HAWK, MARK E. HAWK, PAMELA DIANNE SCARPINO, JACKIE HERBERT NORTH, MARVIN WALKER, TALMADGE WILLIAMS,

Plaintiffs - Respondents,

v.

JOHNSON & JOHNSON, JOHNSON & JOHNSON CONSUMER INC. F/K/A JOHNSON & JOHNSON CONSUMER COMPANIES, INC.

Defendants -Appellants.

On Appeal from the Circuit Court of the City of St. Louis,
The Honorable Rex M. Burlison

SUGGESTIONS OF *AMICUS CURIAE* FEDERATION OF DEFENSE & CORPORATE COUNSEL IN SUPPORT OF TRANSFER TO THE SUPREME COURT OF MISSOURI

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IDENTITY OF *AMICUS CURIAE* AND STATEMENT OF INTEREST

The Federation of Defense & Corporate Counsel (FDCC) is a not-for-profit corporation with a national and international membership of 1,400 defense and corporate counsel working in private practice, as in-house counsel, and as insurance claims representatives. A significant number of FDCC members practice in Missouri's trial and appellate courts. The FDCC constantly strives to protect the American system of justice. Its members have established a strong legacy of representing the interests of civil defendants, including publicly and privately-owned businesses, public entities, and individual defendants. The FDCC seeks to assist courts in addressing issues of importance to its membership that concern the fair and predictable administration of justice.

This case presents issues of vital interest concerning: (1) the conduct of mass trials in which the product liability claims of a multitude of personal injury plaintiffs, from a variety of states, are tried jointly in a single state court action; and (2) notwithstanding the U.S. Supreme Court ruling in *Bristol-Myers Squibb Co. v. Superior Court,* a state court's exercise of personal jurisdiction over claims asserted against an out-of-state defendant, by non-resident plaintiffs whose claims did not arise out of or relate to in-state marketing, sales, or related activities of defendants. The FDCC's membership is able to provide scholarly and practical insight into the issues of due process and the right to a fair trial associated with the conduct of mass trials, and the application of appropriate limits of personal jurisdiction in a post-*Bristol Myers Squibb* environment. Through its broad membership and nationwide perspective, FDCC is well positioned to address the important legal, constitutional, and public policy questions posed in this case.

STATEMENT OF THE CASE

Amicus FDCC adopts the Statement of the Case set forth in the brief of Appellants Johnson & Johnson (J&J) and Johnson & Johnson Consumer Inc. (JJCI).

ARGUMENT

I. <u>This Court Should Decide Whether The Circuit Court Deprived Defendants of Their Right To A Fair Trial by Consolidating Twenty-Two Different Lawsuits Into One Trial</u>

"Of all the discretionary rulings that a judge can make concerning the course of a trial, few are as pervasively prejudicial to a product liability defendant as deciding to consolidate cases if they bear little similarity other than that the same product resulted in an alleged injury in each case." James M. Beck, *Little in Common,* 53 No. 9 DRI For the Defense 28, 29 (Sept. 2011). The Circuit Court consolidated into a single trial the claims of 22 plaintiffs (and 7 spouses), from 12 different states. This Court should determine whether ushering this platoon of plaintiffs before the jury deprived J&J and JJCI of a fair opportunity to defend themselves as to each claim, under both the Missouri and United States Constitutions.

Empirical research shows that consolidated trials of multiple plaintiffs results in jury confusion and prejudice. Here, FDCC briefly addresses some of the important data that would precede a more complete discussion should this Court allow transfer. For example, one study found that consolidations of four or more plaintiffs resulted in juror confusion; made it more likely that the jury would find the defendant liable; and resulted in higher per-plaintiff compensatory-damages awards than in individual trials. See Irwin A. Horowitz & Kenneth S. Bordens, *The Consolidation of Plaintiffs: The Effects of Number of Plaintiffs on Jurors' Liability Decisions, Damage Awards, and Cognitive Processing of Evidence*, 85 J.Applied Psy. 909 (2000). In this study, "135 jury eligible adults were randomly assigned to 1 of 5 aggregations of plaintiffs involving 1, 2, 4, 6, and 10 claimants. Jurors were shown a 5- to 6-hr trial involving claims of differential repetitive stress injuries by each plaintiff." *Id.* at 909.

The study results proved that "[j]urors' ability to understand the evidence was significantly affected by the number of plaintiffs in the trial" in a number of ways. *Id*. at 915. For instance, the "jurors found it easier to understand the evidence in the 1- and 2-

plaintiff trials as compared to the 4-, 6-, and 10-plaintiff trials." *Id.* Additionally, "[i]t was easier to understand the expert testimony in the 1-and 2-plaintiff trials than in the 4-, 6-, and 10-plaintiff trials." *Id.* Furthermore, the jurors in the one and two plaintiff trials had higher evidence recognition than the jurors in the four, six and ten plaintiff trials. *Id.*

Horowitz and Bordens concluded that "an increase in information load had a significant impact on verdicts and information processing" which made it more likely that the plaintiffs in the four, six and ten plaintiff trials would prevail. *Id.* at 916. The study also found that the damages awarded were higher in the consolidated trials than they were in the individual trials. The authors explained that "[r]esearch from a number of venues suggests that 4 plaintiffs (alternatives, products, etc.) are perceived as a group, and even when jurors say they can distinguish among the members of the group, this "chunking" of individuals results in similar awards for all members of the group." *Id.* at 916, citing Molly Selvin & Larry Picus, *The Debate Over Jury Performance, Rand, Institute for Civil Justice* (1987). Here, there were not 4, 6, or 10, but <u>22</u> plaintiffs in a single trial. And as foreshadowed by the Horowitz & Bordens study, the result was identical verdicts of $25 million for each of the 22 plaintiffs.

Other research has similarly demonstrated that consolidated trials of multiple plaintiffs substantially increase the likelihood of verdicts in favor of the plaintiffs. "[D]ata suggests that consolidated trial settings create administrative and jury biases that result in artificially inflated frequency of plaintiff verdicts at abnormally large amounts." Peggy Ableman *et al.*, *The Consolidation Effect: New York City Asbestos Verdicts, Due Process, and Judicial Efficiency*, 14 Mealey's Asbestos Bankr. Rep. 1, 1 (Apr. 2015).

Courtroom experience with cosmetic talc cases filed against J&J and JJCI is entirely consistent with these research findings. Appellants' application to the Court of Appeals in support of transfer related (at p.4) that out of 32 cosmetic talc cases tried against J&J and JJCI since 2013, alleging that defendants' powders caused ovarian cancer or mesothelioma, over half resulted in either a defense verdict or a mistrial. This underscores the virtual impossibility that if the 22 cases tried together here had proceeded separately, all would have resulted in plaintiff verdicts.

Worse, the Circuit Court here purported to apply the laws of 12 different states. The jury instructions took over five hours to read—a torrent of complex information nearly unendurable for most people. The jury proceeded to award identical amounts to every plaintiff. Consistent with the research cited above, the conclusion seems inescapable that the equal damages awards across-the-board "amounted to the jury throwing up its hands" at the prospect of sorting out the individual plaintiffs' claims. *Malcolm v. Natl. Gypsum Co.*, 995 F.2d. 346, 352 (2d Cir. 1993).

Of course, a jury's central *job* is to assess the truth of individual plaintiffs' claims. The Missouri and U.S. Constitutions guarantee parties' right to a fair trial and due process of law, and in applying Rule 52.05, Missouri trial courts must utilize these fundamental principles. If this Court does not step in here to insist that Missouri trial courts safeguard these rights by avoiding unfair consolidations, judgments like the one here will continue to herald their erosion and ultimate extinction for civil defendants.

II. This Court Should Decide Whether *Bristol-Myers Squibb* Permitted Personal Jurisdiction over the Claims of 15 Non-Resident Plaintiffs, Based On JJCI's Use of a Missouri Subcontractor

Missouri courts' personal jurisdiction has limits set by the U.S. Supreme Court, but the Court of Appeals failed to enforce them. This Court's involvement is essential to preserve the constitutional rule of law.

A key holding of the U.S. Supreme Court in *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773, 1783 (2017), was that the "bare fact that [a defendant] contracted with [an in-state] distributor is not enough to establish personal jurisdiction in the State." But here, the Circuit Court—upheld in large measure by the Court of Appeals—permitted personal jurisdiction over Defendants for the claims of non-resident plaintiffs on the basis of JJCI's contract with a Missouri corporation to mix, bottle, and label a talc product called "Shimmer." All relevant corporate decisions relating to the claimed torts were made outside of Missouri, and there was no other nexus between these plaintiffs and Missouri. This Court should accept transfer to correct the dangerous precedent set by the appellate decision.

The Court recently underscored the importance of correctly applying *Bristol-Myers Squibb* in deciding whether to exercise personal jurisdiction over a non-resident party. In *State ex re. LG Chem Ltd. v. Laughlin,* case no. SC97991 (Mo. banc June 2, 2020), the Court made permanent a Writ of Prohibition, ruling unanimously that the Circuit Court of St. Louis County had improperly exercised jurisdiction over a South Korean defendant. In *LG Chem Ltd.* – as in this case – the trial court had relied heavily on the role of a third-party distributor to support its exercise of jurisdiction. The question of improper jurisdiction over American defendants in Missouri courtrooms is no less critical, and unresolved by *LG Chem Ltd*. This case centers on whether future litigants with minimal connection to Missouri, suing defendants whose relevant actions had no relevant connection to Missouri, will be invited to pursue their claims in Missouri state courts. The Court should allow transfer of this case to further examine the limits of due process in product liability cases.

Dated: August 13, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies:

1. The foregoing Suggestions of *Amicus Curiae* Federation of Defense & Corporate Counsel in Support of Transfer to the Supreme Court contain the information required by Rule 55.03.

2. The Suggestions are in Times New Roman 13 font, with 1.5 line-spacing, and they comply with the 5-page limit set forth in Rule 84.05(f)(1). Excluding the cover page, signature block, certificate of service, and this certificate, it contains 1,578 words, as determined by the Word Count feature of Microsoft Word.

3. The Suggestions have been served by electronic mail and filed using the Court's e-filing system, resulting in service on all counsel of record.

4. The Suggestions comply with all other applicable requirements of Rules 81.18, 84.04, 84.05, and 84.06.

/s/ *Paul S. Penticuff*
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CERTIFICATE OF SERVICE

A copy of the foregoing was filed using the Court's electronic filing system and served via electronic mail on all plaintiffs-respondents and all defendants-appellants through their attorneys below on August 13, 2020:

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