

PRODUCT LIABILITY

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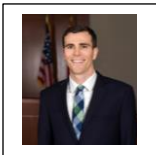
The Missouri Supreme Court's recent decision in Barron v. Abbott Laboratories, Inc. to affirm a \$38 million judgment was noteworthy, not only for the sizeable Missouri judgment sounded in Minnesota law, but also because the court's conclusion requires defendants to overcome a "nearly insurmountable hurdle of proving prejudice on appeal" if appealing verdicts based on improper venue. Although the separate concurrence and recent legislative actions (perhaps resulting from the ruling) give hope for changing trends in the future, defendants should take note of the multitude of lessons this ruling addresses in order to ensure their day in court.

Missouri Supreme Court Weighs in on Venue: Finds Prejudice is not Implicit to Litigation Hotspots

ABOUT THE AUTHORS



Mark A. Prost is a partner and trial attorney in Sandberg Phoenix's products liability practice group. He focuses his practice in pharmaceutical/mass torts, toxic torts, transportation, and general products litigation, and he actively defends cases in Missouri, Illinois, and Kansas. He can be reached at mprost@sandbergphoenix.com.



Tim Tevlin is an Associate at Sandberg Phoenix & von Gontard, and specializes in civil defense litigation. Tim has experience defending clients in various state and federal courts, and represents manufacturers, contractors, and suppliers in claims involving pharmaceutical and toxic torts, product liability, personal injury, and commercial litigation. He can be reached at ttevlin@sandbergphoenix.com.

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Whitney Frazier Watt
Vice Chair of Newsletter
Stites & Harbison PLLC
wwatt@stites.com

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The Missouri Supreme Court's recent order to uphold a \$38 million judgment against a pharmaceutical defendant sent a clear signal that defendants challenging non-resident plaintiffs' claims brought in purportedly improper venues must meet the "nearly insurmountable burden" of proving prejudice on appeal. The court in *Barron, et al. v. Abbot Laboratories, Inc.*, cautions defendants should be attentive to raise and preserve defenses and arguments throughout litigation, and also keep in mind opportunities to clarify their positions and objections to allow appellate courts to adequately review the arguments on the record.

The failure to seize any of these opportunities may result, like here, in an uphill battle to prove the defendant was prejudiced by an unfavorable or potentially plaintiff-friendly jury. As a result, defendants are cautioned to exercise vigilance in preserving jurisdictional defenses from the outset of litigation and to keep watch for opportunities to re-assert arguments after significant changes in ongoing litigation, for example, when new parties are added or severed for trial.

FACTUAL BACKGROUND

In *Barron*, Minnesota plaintiff, Maddison Schmidt, was born with birth defects and the condition spina bifida allegedly caused by

her mother's *in utero* ingestion of Depakote, a prescription manufactured by the Defendant Abbott Laboratories, Inc. ("Abbot").¹ Notably, Schmidt's mother ingested the Depakote while pregnant in Minnesota.² Abbot's company headquarters are in the State of Illinois.³ Abbot was registered to do business in St. Louis County, Missouri.⁴ Schmidt joined four Missouri plaintiffs and 19 other non-Missouri plaintiffs to file a single action against Abbot in Missouri state court. Each plaintiff sought compensatory and punitive damages related to birth defects allegedly caused by their *in utero* exposure to Depakote.

The plaintiffs filed suit directly in the city of St. Louis based on two of the plaintiff's alleged claims arising there.⁵ The city of St. Louis has long been viewed as a plaintiff's friendly venue, and recently gained notoriety as a litigation hotspot for its "fast trials, favorable rulings, and big awards".⁶

In response to the multi-plaintiff lawsuit, including 19 of 23 non-Missouri plaintiffs' claims, Abbot moved to sever the claims based on "improper joinder" under Missouri law. Abbot also moved to transfer venue of the non-Missouri plaintiffs' claims to St. Louis County, which is typically considered less plaintiff's oriented than nearby St. Louis City. After the trial court denied Abbot's initial motions to sever and transfer venue, Abbot brought the issue before Missouri's

¹ *Barron, et al. v. Abbot Laboratories, Inc.*, 529 S.W.3d 795, 797 (Mo. banc 2017).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 797, fn. 1.

⁶ Welcome to St. Louis, the New Hot Spot for Litigation Tourists, Margaret Cronin Fisk, BLOOMBERG BUSINESSWEEK (2016).

appellate courts by way of extraordinary writs. The appellate courts denied Abbot's pre-trial writ petitions, and Abbot was forced to litigate in the city of St. Louis.

Although the plaintiff's claims remained joined in one action, the trial court ordered separate, individual trials.⁷ Accordingly, a jury trial was held solely on Schmidt's claims without severing the other plaintiffs' claims.⁸ Schmidt advanced a failure-to-warn claim against Abbot, and alleged the Depakote label insufficiently warned of the risks of birth defects posed by the drug. After trial, the jury awarded Schmidt \$15 million in compensatory damages and \$23 million in punitive damages.⁹ Abbot appealed the trial court's entry of judgment, and the appeal was ultimately transferred to the Missouri Supreme Court.

FAILURE TO SHOW PREJUDICE ON APPEAL

At the outset, the *Barron* court noted Abbott waived any defenses related to Missouri's lack of personal jurisdiction over non-resident plaintiff's claims because Abbot purportedly failed to raise those defenses upon the filing of its responsive pleadings.¹⁰ As a result, the court ruled the "United States Supreme Court's recent decision in *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cnty.*, -- U.S. --, 137

S.Ct. 1773 (2017), therefore has no application to this appeal."¹¹

Without being able to challenge jurisdiction, Abbot argued the proper venue for Schmidt's claim and trial was St. Louis County, Missouri.¹² In particular, Abbott challenged the fact that Schmidt's claims were tied to the city of St. Louis simply because Schmidt joined her claims with two, St. Louis plaintiffs.¹³ Abbot claimed the trial court erred in denying its motion to sever Schmidt's claims for the purposes of trial which should have properly proceeded in St. Louis County.¹⁴

The Missouri Supreme Court rejected Abbot's procedural objections outright, but not necessarily for lack of merit.¹⁵ Even assuming the circuit court erred by failing to transfer venue or failing to sever claims, the court noted under Missouri law a trial court error does not warrant reversal on appeal unless the error results in prejudice.¹⁶ Missouri procedural rules state, "No appellate court shall reverse any judgment unless it finds that error was committed by the trial court against the appellant materially affecting the merits of the action."¹⁷ The court quickly distinguished an earlier Missouri Supreme Court addressing improper venue¹⁸, and particularly held "silence [on the issue of prejudice] should

⁷ *Barron*, 529 S.W.3d at 797.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 797, fn. 2; citing Missouri Rule 55.27(g).

¹¹ *Id.*

¹² Citing § 508.010.5, RSMo Supp. 2013.

¹³ *Id.* at 798.

¹⁴ *Id.*

¹⁵ *Baron*, 529 S.W.3d at 798-99.

¹⁶ *Id.* at 798; citing *Dieser v. St. Anthony's Med. Ctr.*, 498 S.W.3d 419, 435-36 (Mo. banc 2016).

¹⁷ *Id.*; citing Missouri Rule 84.13(b).

¹⁸ See *Igoe v. Department of Labor and Industrial Relations*, 152 S.W.3d 284 (Mo. banc 2005)(reversing

not be inferred as an implicit holding that no prejudice is required when error results in improper venue.”¹⁹

Moreover, the court rejected Abbot’s alternative claims it was, in fact, prejudiced by improper venue because the city of St. Louis “is a more favorable venue to plaintiffs than St. Louis County.”²⁰ In particular, the court criticized Abbot for failing to “identify any particular ruling by the circuit court suggesting bias or any particular juror who should have been disqualified for bias. This claim of prejudice will not suffice.”²¹ Abbot’s claim of prejudice was unacceptable “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.”²² Thus, having found Abbot failed to establish the trial in the city of St. Louis was unfair, “Abbot fails to satisfy the prejudice requirement” and the court “need not decide whether the circuit court erred in

either failing to transfer venue or failing to sever the claims.”²³

The court also addressed the merits of Abbot’s substantive appeal related to Schmidt’s failure-to-warn claim.^{24,25} The court found Minnesota law requires the content of product warnings to be complete and accurate so as not to mislead. After reviewing the content of Abbot’s Depakote warnings advising consumers Depakote may cause an increased risk of birth defects, the court examined Schmidt’s evidence Abbot was aware the risks from Depakote use were, in fact, considerably higher.²⁶ The court found that because the labels did not reflect “this relevant information”, the reasonable inference could be drawn that the warning was not complete and accurate and, therefore, the matter was properly submitted to the jury.²⁷ The court similarly upheld the award of punitive damages.²⁸ The

judgment based on the circuit court’s error in failing to transfer venue, but without discussing prejudice).

¹⁹ *Id.*; citing *State ex rel. DePaul Health Ctr. v.*

Mummert, 870 S.W.2d 820, 822 (Mo. banc 1994)(differentiating between venue and personal jurisdiction).

²⁰ *Id.* at 799.

²¹ *Id.*.

²² *Id.*.

²³ *Baron*, 529 S.W.3d at 799.

²⁴ *Id.*; noting the parties agree Minnesota law applies to Schmidt’s claims. *Id.*, Fn. 7

²⁵ To be legally adequate, the warnings required to (1) attract the attention of those the product could harm, (2) explain the mechanism and mode of injury; and (3) provide instructions on ways to safely use the product to avoid injury. Even so, the adequacy of a warning is a jury issue. *Gray v. Badger Mining Corp.*, 676 N.W.2d. 268, 274 (Minn. 2004).

²⁶ *Id.* at 800; Noting Schmidt presented evidence (1) Depakote posed a considerably higher risk of overall birth defects than other antiepileptic drugs; and should be avoided by women of childbearing potential unless all other alternatives have been tried and failed; (2) the overall risk of birth defects was 10 percent or even greater; (3) the risk of spina bifida was significantly higher than 1 or 2 percent; and (4) the risk of spina bifida amounted to a twentyfold increased risk compared with the background rate in the general population..

²⁷ *Id.*.

²⁸ As for punitive damages, the court found the plaintiff presented sufficient evidence to meet the standard for Minnesota’s punitive damages requirements. The court disregarded Abbot’s claim that it used a the most serious type of warning mandated by the FDA for Depakote. Rather, the court found in the light most favorable to the verdict that the plaintiff presented sufficient evidence

circuit court's entire judgment was therefore affirmed.

CONCURRING OPINION

Missouri Judge Paul C. Wilson filed a lengthy concurring opinion (joined by Chief Judge Fischer and Judge Stith) which identifies several criticisms of the *Barron* majority.²⁹ Judge Wilson agreed the judgment should be affirmed, but disagreed with the analysis used to reach that result.³⁰ As an initial matter, while Judge Wilson pointed joinder-based, multi-plaintiff actions "will likely be prevented in the future by *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*", Judge Wilson felt compelled to write separately to address joinder for cases involving multiple, Missouri-plaintiffs.³¹ In particular, Judge Wilson wrote to address the procedural distinctions between defendants filing motions to sever claims "at the *outset* of an action and [filing motions to sever] after pretrial proceedings are complete and the trial court has determined to try each plaintiff's claims separately."³²

Judge Wilson proposed an alternative to the majority's findings that "protects the rights of all parties, furthers the policies of

efficiency and expeditiousness that animate [Missouri's joinder rules] and avoid creating the analytical dead-end of a prejudice requirement that seldom (if ever) can be met."³³ Missouri law expressly permits multiple plaintiffs to join their claims in a single petition if they assert any right of relief arising out of the same "transaction, occurrence, or series of transactions and occurrences *and* if any question of law or fact common to all of them will arise in the action."³⁴ Judge Wilson found the plaintiff's claims clearly meet this standard, even though there are obvious differences between each claim. Judge Wilson also found the city of St. Louis was the proper venue because it was the county "in which any one of the plaintiffs in the many tort counts alleges he or she was first injured".³⁵

Even so, Judge Wilson found there may "come a time in the course of litigation when severance is required".³⁶ Judge Wilson finds joinder is proper to allow trial courts to engage in early dispositive motions, coordinated discovery, adjudicating summary judgments, and joint trials of common questions to determine these issues. Once the trial court has determined that each plaintiff's claims are to be tried separately, however, the "trial court

Abbot was aware there were studies indicating Depakote was more dangerous than warned, and that Abbot refused to conduct studies on its own despite spending \$50-\$100 million on marketing, and that Abbot tried to make Depakote the first choice antiepileptic drug for women despite internally referring to it as a "dirty drug". For these reasons, the court found there was a reasonable inference that Abbot was motivated by profits and

deliberately disregarded the safety of Depakote users.

²⁹ *Barron*, 529 S.W.3d at 801.

³⁰ *Id.*

³¹ *See id.* at 801.

³² *Id.*

³³ *Id.*; citing Rule 52.05(a).

³⁴ *Id.*; citing Rule 52.05(a).

³⁵ *Id.*; citing RSMo. § 508.010.

³⁶ *Id.*

necessarily has decided there are no further gains in efficiency or expeditiousness to be had from the joinder.”³⁷ Once that decision has been made, the trial court “has discretion to deny a subsequent or renewed motion to sever **only in the rarest of circumstances.**”³⁸ An abuse of discretion in denying such a motion “will be patently prejudicial” under Missouri law that is triggered when a party is added or removed.³⁹ A decision to sever each plaintiff’s claims in a multi-plaintiff case “removes” a plaintiff for purposes of Missouri statute, 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.⁴⁰

That being said, Judge Wilson noted Abbot failed to show it **renewed** its motion to sever after the trial court announced its intention to try each plaintiff’s claim separately. Had Abbot done so, the proper result on appeal 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.⁴¹

CONCLUSION

The *Barron* decision confirmed defendants subject to multi-plaintiff cases throughout Missouri have little control over the venues in which they are forced to litigate. Nevertheless, the court’s and Judge Wilson’s opinions identified key concerns with Abbot’s appeal and the appellate record – namely that certain arguments were waived or improperly preserved for appeal.

Therefore, there are a number of lessons defendants should take away from the *Barron* case. In light of Abbot’s purported “waiver” of various defenses and objections, defendants should remain vigilant in preserving jurisdictional objections and arguments from the pleading stage through litigation and the trial itself.⁴² Defendants should also look for opportunities to raise or re-assert arguments after significant changes in litigation. Through careful consideration of trial court limitations differing between the outset of litigation and the trial-setting, defendants may ultimately avoid the “nearly insurmountable hurdle of proving prejudice on appeal.”

Lastly, defendant should keep on top of changing case law and statutes tailored at preventing forum shopping. Indeed, Judge Wilson supposed the number of joinder-based claims used by non-resident plaintiffs to establish jurisdiction (and now,

³⁷ *Barron*, 529 S.W.3d at 801.

³⁸ *Id.*

³⁹ *Id.*; citing section 508.012.

⁴⁰ *Id.* at 802.

⁴¹ *Id.*

⁴² The *Barron* court also held Abbot waived its arguments punitive damages violate due process because the arguments were not preserved in the trial record. *Barron*, 529 S.W.3d. at 801, fn. 9.

potentially venue) in Missouri will most likely be significantly reduced by *Bristol-Myers Squibb*.⁴³ This certainly appears to be a reasonable conclusion, and early indications from state and federal courts appear to agree.⁴⁴ Additionally, the *Barron* ruling has appeared to have encouraged the Missouri legislature to address Missouri's murky venue statutes and potentially resolve the issue further.⁴⁵ To date, legislation addressing proper venue has passed initial muster of the Missouri House of Representatives and remains open for a vote in the Missouri Senate. Defendants would be smart to take advantage of new, persuasive case law and statutes to more fully protect their rights. Despite these changes, defendants can take note of decisions like *Barron* to ensure high-stakes claims are litigated in proper, amenable venues and defenses are preserved (if necessary) for appellate court review.

⁴³ *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cnty.*, -- U.S. --, 137 S.Ct. 1773 (2017).

⁴⁴ See *State ex rel. Bayer Corp. et al. v. Moriarty*, 536 S.W.3d 227 (Mo. banc, Dec. 19, 2017)(Adopting *Bristol-Myers Squibb* and dismissing claims of non-Missouri resident plaintiffs after holding "only if the instant suit arises out of defendant's contacts with Missouri does Missouri have specific jurisdiction"); See also *DYSON, ET AL. V. BAYER CORPORATION, ET*

AL., Case No. 4:17-CV-2584-SNLJ, 2018 WL 534375 (E.D. Mo. Jan. 24, 2018)(Limbaugh, J.)(Finding *Bristol-Myers Squibb* makes personal jurisdiction "the more straightforward issue" for the district court's consideration on remand, and dismissal of non-Missouri resident plaintiff's claims is proper).

⁴⁵ See Editorial: Legislature moves to Limit City's Big-Verdict Industry, ST. LOUIS POST-DISPATCH (2018); *Citing* MO. HOUSE BILL NO. 1578.

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