No. 20-

IN THE
Supreme Court of the United States

JOHNSON & JOHNSON and
JOHNSON & JOHNSON CONSUMER INC.,
Petitioners,
v.
GAIL L. INGHAM, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Missouri Court of Appeals for the Eastern District

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a court must assess if consolidating multiple plaintiffs for a single trial violates due process, or whether it can presume that jury instructions always cure both jury confusion and prejudice to the defendant.

2. Whether a punitive-damages award violates due process when it far exceeds a substantial compensatory-damages award, and whether the ratio of punitive to compensatory damages for jointly and severally liable defendants is calculated by assuming that each defendant will pay the entire compensatory award.

3. Whether the "arise out of or relate to" requirement for specific personal jurisdiction can be met by merely showing a "link" in the chain of causation, as the court below held, or whether a heightened showing of relatedness is required, as petitioner in *Ford Motor Co.* v. *Montana Eighth Judicial District Court*, No. 19-368, has argued.

PARTIES TO THE PROCEEDING

Johnson & Johnson and Johnson & Johnson Consumer Inc., petitioners on review, were defendants-appellants below.

Gail L. Ingham, Robert Ingham, Laine Goldman, Carole Williams, Monica Sweat, Gregory Sweat, Robert Packard, Andrea Schwartz-Thomas, Janus Oxford, William Oxford, Stephanie Martin, Ken Martin, Shelia Brooks, Martin Maillard, Krystal Kim, Annette Koman, Allan Koman, Toni Roberts, Marcia Owens, Mitzai Zschiesche, Tracee Baxter, Cecilia Martinez, Olga Salazar, Karen Hawk, Mark Hawk, Pamela Scarpino, Jackie Herbert North, Marvin Walker, and Talmadge Williams, respondents on review, were plaintiffs-appellees below.

RULE 29.6 DISCLOSURE STATEMENT

1. Johnson & Johnson has no parent corporation, and no publicly held company owns 10% or more of Johnson & Johnson's stock.

2. Johnson & Johnson Consumer Inc. is wholly owned by Janssen Pharmaceuticals, Inc. Janssen Pharmaceuticals, Inc. is wholly owned by DePuy Synthes, Inc. DePuy Synthes, Inc. is wholly owned by Johnson & Johnson International. Johnson & Johnson International is wholly owned by Johnson & Johnson, which is a publicly held company.

RELATED PROCEEDINGS

Missouri Court of Appeals for the Eastern District:

Ingham v. *Johnson & Johnson*, No. ED 107476 (Mo. Ct. App. June 23, 2020) (reported at 608 S.W.3d 663), *reh'g and/or transfer to Missouri Supreme Court denied* (July 28, 2020), *application for transfer to Missouri Supreme Court denied* (Nov. 3, 2020).

Circuit Court of the City of St. Louis:

Ingham v. *Johnson & Johnson*, No. 1522-CC10417 (Mo. Cir. Ct., 22d Judicial Cir.)

Ingham v. *Johnson & Johnson*, No. 1522-CC10417-01 (Mo. Cir. Ct., 22d Judicial Cir.)

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PETITION FOR A WRIT OF CERTIORARI

Johnson & Johnson and Johnson & Johnson Consumer Inc. respectfully petition for a writ of certiorari to review the judgment of the Missouri Court of Appeals for the Eastern District in this case.

OPINIONS BELOW

The Missouri Court of Appeals' opinion is reported at 608 S.W.3d 663. Pet. App. 1a-106a. The City of St. Louis Circuit Court's orders are unreported. *Id.* at 107a-145a. The Missouri Supreme Court's order denying further review is unreported. *Id.* at 146a-147a.

JURISDICTION

The Missouri Court of Appeals entered judgment on June 23, 2020. Pet. App. 1a-106a. On November 3,

2020, the Missouri Supreme Court denied Petitioners' timely application to transfer. *Id.* at 146a-147a. On March 19, 2020, this Court extended the deadline to petition for a writ of certiorari to 150 days. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

INTRODUCTION

This case arises from an over $2 billion judgment against Petitioners Johnson & Johnson (J&J) and Johnson & Johnson Consumer Inc. (JJCI). Petitioners have sold their iconic baby powder to millions of Americans for decades. Over the last several years, however, plaintiffs' lawyers have filed thousands of lawsuits in select jurisdictions alleging—against the vast weight of scientific evidence—that Petitioners' cosmetic talc products are contaminated with asbestos and cause ovarian cancer. Contrary to those claims, federal regulators and respected health organizations have rejected calls for warnings on talc, and comprehensive epidemiological studies tracking tens of thousands of talc users have found no meaningful association between cosmetic talc use and ovarian cancer.

Yet some plaintiffs' lawyers have struck on a winning formula: They first canvass the country for women who were both diagnosed with ovarian cancer and among the millions who used Petitioners' talc products. They then select a jurisdiction where out-of-state plaintiffs can be consolidated with in-state plaintiffs for a single mass trial. They put dozens of

plaintiffs on the stand to discuss their experiences with cancer, and the jury awards billions of dollars in punitive damages supposedly to punish Petitioners. Lawyers can then follow this script and file the same claims with new plaintiffs and seek new outsized awards, over and over again.

This case illustrates the problem. The Missouri court consolidated for trial 22 plaintiffs' disparate claims under 12 States' laws before a single jury—notwithstanding plaintiffs' widely divergent circumstances and injuries, ranging from full remission to lengthy illness and death. Evidencing the prejudicial joinder, the jury found liability as to all 22 plaintiffs and awarded $25 million in compensatory damages to each of the 22 plaintiff families. On top of that, the Missouri Court of Appeals upheld a $1.6 billion punitive award, a figure that for J&J was more than *eleven times* the already staggering compensatories. And the court gave no heed to the fact that 17 plaintiffs brought into this mass trial did not reside in Missouri, did not purchase or use Petitioners' products in Missouri, did not rely on any Missouri advertising in making their purchasing decisions, and were not injured in Missouri. Those rulings infringe Petitioners' fundamental due-process rights.

This Court has insisted that class-action defendants are entitled to "individualized determinations" of injury for each plaintiff. *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 366 (2011). And it has reined in class-action damages abuses. *See, e.g.*, *Comcast Corp.* v. *Behrend*, 569 U.S. 27, 34-36 (2013); *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 514-515 & n.28 (2008). Today, confusion reigns in the lower courts over the due-process boundaries of mass trials—and whether jury

instructions by themselves are a sufficient antidote to the jury confusion and prejudice mass trials cause. The Court should intervene here to curb due-process abuses in mass-tort suits and ensure that state courts give mass-tort defendants the same rights as everyone else.

First, the Missouri appellate court did not even *evaluate* whether consolidating 22 plaintiffs' disparate claims violated Petitioners' due-process rights; it instead said that it "must" presume that jury instructions cured any problems. Pet. App. 14a-16a, 18a-19a. Multiple state and federal courts disagree, holding that courts must evaluate whether consolidation violates due process *despite* the jury instructions.

Second, the Missouri court held that the $1.6 billion punitive award—which far exceeds a 1:1 ratio of punitive to compensatory damages—did not violate Petitioners' due-process rights. *See id.* at 101a-103a. But other state and federal courts would have reduced the award by over a *billion* dollars. In fact, had the case been in Missouri federal court, both the ratio and its compatibility with due process would have been analyzed differently, reducing the punitive award by at least hundreds of millions.

Third, the Missouri court found specific personal jurisdiction over JJCI because of its contract with a third party to bottle one of its talc products in Missouri, concluding that this activity was a "direct link in the production chain of [the product]'s eventual sale to the public." *Id.* at 35a. But the "arise out of or relate to" prong of specific personal jurisdiction requires more than a mere but-for "link" in the chain of causation—as many courts have held. *See* Petition for Writ of Certiorari at 12-16, *Ford Motor Co.* v. *Montana*

Eighth Judicial Dist. Ct., No. 19-368 (U.S. Sept. 18, 2019), *cert. granted*, 140 S. Ct. 917 (2020).

Each issue warrants the Court's attention. That they are presented in a single petition challenging one of the largest verdicts ever in a product-liability case gives the Court an extraordinary opportunity to resolve the most common and troubling due-process questions posed by mass-tort litigation, a gap left open by this Court's precedents. At a minimum, the Court should consider granting, vacating, and remanding this case in light of *Ford*.

STATEMENT

A. Talc Research

Hundreds of millions of Americans have used Petitioners' cosmetic talc products, including Johnson's Baby Powder.[1] Plaintiffs' claim that cosmetic talc products contain asbestos first received attention in the 1970s, when Dr. Arthur Langer claimed to find asbestos in talc samples—a claim he later withdrew as to Johnson's Baby Powder.

Since then, scientists have studied for decades whether there is any link between talc use and ovarian cancer, and the three largest epidemiological studies—tracking the health of tens of thousands of women—have found no meaningful relationship. *See* C.A. Appellants' Appx. A294, A298, A307; Tr. 4689:13-4700:21.[2] The Food and Drug Administration (FDA), National Cancer Institute, and American Cancer

[1] J&J sold cosmetic talc products until 1979, when it transferred those products to subsidiaries, which ultimately became JJCI. *See* Pet. App. 3a, 103a.

[2] "Tr." citations are to the trial transcript.

Society have reached the same conclusion. *See* Pet. App. 91a-92a. And the FDA has repeatedly found that warning labels on cosmetic talc products are scientifically unwarranted. *See id*.

Petitioners have used leading independent laboratories to ensure that their cosmetic talc products were not contaminated with asbestos, and they deny that their products contain asbestos or cause cancer. *See* Tr. 4167:1-10, 5128:17-5144:1, 5157:6-5164:21, 5170:11-5228:10. Petitioners have also conducted thousands of their own tests to ensure there was no asbestos contamination in these products. *See id.* at 5135:23-5138:8. Plaintiffs' lawyers have nevertheless filed thousands of lawsuits across the country alleging that Johnson's Baby Powder causes ovarian cancer.

B. Trial Court Proceedings

This is one such case. Plaintiffs are 22 women who filed suit against Petitioners in the St. Louis City, Missouri Circuit Court alongside eight plaintiffs' spouses. *See* Pet. App. 2a n.1, 3a. All 22 plaintiffs initially alleged that they had used Johnson's Baby Powder and later developed ovarian cancer. *See id.* at 3a-4a. Plaintiffs and their spouses sought relief under 12 different States' laws, asserting product-liability and loss-of-consortium claims. *See id.* They also sought punitive damages. *Id.* at 3a.

Johnson's Baby Powder was always manufactured outside Missouri, and only five plaintiffs even alleged they purchased that product in Missouri. *See id*. at 3a-5a, 30a. Petitioners moved to dismiss for lack of personal jurisdiction the claims of 17 plaintiffs who did not reside in Missouri, did not purchase or use Petitioners' products in Missouri, did not rely on Missouri advertising in making their purchasing

decisions, and were not injured in Missouri (the "non-Missouri plaintiffs"). *See id.* at 4a. The trial court initially denied the motion. *Id.* at 122a-132a.

After *Bristol-Myers Squibb Co.* v. *Superior Court*, 137 S. Ct. 1773 (2017), 15 of the 17 non-Missouri plaintiffs asserted for the first time that they had used Shower-to-Shower Shimmer Effects (Shimmer), a glittery body powder JJCI sold in nominal amounts between 2005 and 2010. *See* Pet. App. 4a-6a & nn.5-6. During part of that period, JJCI contracted with Pharma Tech, a Missouri manufacturing-for-hire company, to mix and package Shimmer and to affix a label JJCI designed in New Jersey. *See id.* at 4a-6a, 33a.

The 15 non-Missouri plaintiffs offered little proof that they had purchased Shimmer. One testified that she had a dream of using Shimmer after her lawyer—post-*Bristol-Myers Squibb*—asked about the product. *Id.* at 157a-158a. The trial court nonetheless accepted the non-Missouri plaintiffs' assertions and found personal jurisdiction over JJCI and J&J, including with respect to the plaintiffs who did not use Shimmer. *Id.* at 6a-7a, 128a-130a.

All 22 plaintiffs asked to have their claims heard together before the same jury. Petitioners objected, explaining that plaintiffs had used different talc products at different levels of intensity for different periods of time in different States. *See id.* at 7a, 11a-12a. Plaintiffs also had dramatically different risk factors for and experiences with cancer. *See id*. Some plaintiffs had a genetic or family predisposition for cancer, while others did not. *See id.* And some plaintiffs experienced remission after treatment, whereas others died after a years-long battle. *See id.* at 11a-12a.

Petitioners explained that consolidation would confuse the jury and prejudice their defense by "blurr[ing] distinctions in the law and defenses applicable to each [p]laintiff's claim," violating their due-process rights. *Id.* at 17a-18a; *see* Appellants' C.A. Br. 82-83. The trial court denied the severance motions. Pet. App. 7a, 142a-144a.

At trial, there was little (if any) evidence that plaintiffs ever used products from Petitioners that contained asbestos. Even though ovarian cancer has numerous established risk factors, *see* Tr. 4720:14-4723:9, plaintiffs' expert opined that each of the 22 plaintiffs' talc use "directly contributed" to her ovarian cancer—using the same language for each. Pet. App. 74a-75a. The expert provided as little as a few words of analysis for each plaintiff. *See id.* at 163a-164a (15 words for Ms. Webb); *id.* at 164a-165a (21 words for Ms. Hillman). And plaintiffs' counsel urged the jury to infer causation from the two things that "all of these women have * * * in common": "[a]ll of them used * * * Johnson & Johnson Baby Powder" and all of them "got cancer." *Id.* at 152a.

It took the trial court more than five hours to instruct the jury on 12 different States' laws. *See id.* at 14a; *see also* Tr. 5872:11-15 (court informing the jury that it would "plow through" hundreds of pages of jury instructions because there were no "other alternatives"). Yet the jury deliberated less than 20 minutes on average for each plaintiff family, rendering *identical* $25 million compensatory awards for each—irrespective of whether the plaintiff was alive or dead, how long she had suffered from cancer, which talc product she used, and whether the plaintiff brought suit individually or with her spouse. *See* Pet. App. 8a.

In total, the jury awarded $550 million in compensatory damages. *See id*.

The jury then awarded $3.15 billion in punitive damages against J&J and $990 million in punitive damages against JJCI—over $4 billion altogether. *Id.* One juror later explained that the award was intended to disgorge Petitioners' nationwide profits from talc sales over the last four decades. *See* C.A. Appellants' Appx. A317-318.

C. Appellate Proceedings

The Missouri Court of Appeals largely affirmed. Pet. App. 105a-106a. The court rejected Petitioners' argument that consolidation violated their due-process rights. It acknowledged the "obvious differences among Plaintiffs' claims," but held that "[a]ny dangers of prejudice arising from joinder were adequately addressed by the trial court's instructions to the jury to consider each Plaintiff's claim separately." *Id.* at 18a-19a.

The court agreed with Petitioners that the trial court lacked jurisdiction over J&J with respect to the non-Missouri plaintiffs. *See id.* at 48a-49a. And it found no jurisdiction at all over the two non-Missouri plaintiffs who did not allege using Shimmer. *See id.* at 40a, 48a-49a. But the court found personal jurisdiction over the claims of the 15 non-Missouri plaintiffs who alleged using Shimmer because "JJCI contracted with Missouri-based Pharma Tech Industries to manufacture, package, and label Shimmer," and "JJCI's activities with Pharma Tech" "represent a direct link in the production chain of Shimmer's eventual sale to the public." *Id.* at 32a-33a, 35a.

The court reduced the damages award based on its personal-jurisdiction rulings, entering judgment

against JJCI for $375 million in compensatory damages, and against J&J and JJCI jointly and severally for $125 million more in compensatory damages. *Id.* at 100a. The court also purported to reduce the punitive damages proportionally, retaining the same punitive-to-compensatory ratios awarded by the jury. *See id.* The court accordingly affirmed a $900 million punitive-damages award against JJCI and a $715.9 million punitive-damages award against J&J. *Id.* at 100a-101a.

The court believed that these awards were "within the limits of punitive damages consistently upheld." *Id.* at 101a-103a. But the court incorrectly assumed that J&J and JJCI would *each* pay the *entire* joint-and-several portion of the compensatory award, and therefore calculated ratios of 5.7:1 for J&J and 1.8:1 for JJCI. *See id.* at 99a-100a & n.27. Had the court instead assumed that Petitioners would each pay half the joint-and-several award, it would have calculated the ratios as 11.5:1 for J&J and 2.1:1 for JJCI.

All told, the court entered judgment against Petitioners for over $2.1 *billion*. But the Missouri Supreme Court denied review. *Id.* at 146a-149a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW IS IRRECONCILEABLE WITH HOW NUMEROUS STATE AND FEDERAL COURTS ANALYZE DUE-PROCESS RISKS FROM MASS TRIALS.

If the Due Process Clause means anything, it means that a defendant cannot be deprived of billions of dollars without a fair trial. The mass trial of 22 plaintiffs' claims here obscured plaintiffs' individual

circumstances—and Petitioners' individual defenses—through the sheer breadth of testimony and instructions thrown at the jury. Consolidation obviously had that effect because the jury returned 22 identical verdicts for 22 dissimilar plaintiff families and because each plaintiff received awards that far outstripped the compensatory verdicts against Petitioners in single-plaintiff Missouri cases.

At least two courts—the Second and Fifth Circuits—would have vacated this consolidation on due-process grounds. And eight other courts would have rejected the Missouri court's reliance on jury instructions as a panacea for prejudice from mass consolidation, citing due-process concerns of fairness, prejudice, and jury confusion. Only the outlier Alabama Supreme Court embraces the Missouri position, abandoning all constitutional limits and common sense.

A. The Decision Below Is At Odds With Other Courts' Consolidation Standards.

1. Petitioners below explained that a mass trial of 22 plaintiffs' disparate claims under 12 States' laws violated their due-process rights. Pointing to the identical astronomical compensatory awards, Petitioners argued that the *five hours* of jury instructions—instructions so voluminous that the trial court at one point admitted that it was "frankly concerned about losing the jury," Pet. App. 169a—confused rather than clarified the law. *Id.* at 8a-9a. Petitioners explained that the welter of claims and witnesses occasioned by the mass trial deprived them of a fair determination of the individual allegations against them. *See id.* And they directed the court to numerous "scientific studies of jury decisionmaking" showing that in a multi-plaintiff trial of this size, "there is

a substantially greater likelihood that the jury will find defendants liable and will award greater damages to the plaintiffs" and that "jury instructions will not mitigate this unfair prejudice." *Id.* at 172a; *see id.* at 172a-175a.

The Missouri Court of Appeals did not address these serious due-process concerns. The court instead insisted that it "must presume the jury followed the trial court's instruction in reaching its verdict." *Id.* at 14a (citing *Dieser* v. *St. Anthony's Med. Ctr.*, 498 S.W.3d 419, 435 (Mo. 2016)). The court held that because "the trial court instructed the jury to consider each Plaintiff's claim on its own merits" and "in over 140 pages of trial transcript, read the jury instructions for each individual Plaintiff to the jury," Petitioners could not prove prejudice. *Id.*; *see id.* at 18a ("Because we presume the jury followed the trial court's instruction in reaching its verdict, we are not persuaded differences in the law applicable to each Plaintiff's claims rendered the trial court's decision not to sever Plaintiffs' claims an abuse of discretion."); *id.* at 18a-19a ("Any dangers of prejudice arising from joinder were adequately addressed by the trial court's instructions to the jury * * * .").

2. The Second and Fifth Circuits have rejected mass trials under similar circumstances as a due-process violation.

The Second Circuit's foundational case on mass trials held that "[c]onsiderations of convenience and economy must yield to a paramount concern for a fair and impartial trial." *Johnson* v. *Celotex Corp.*, 899 F.2d 1281, 1285 (2d Cir. 1990). It tied those concerns to "due process rights." *Id.* at 1289. The Second Circuit applied *Johnson*'s due-process standard in a case

strikingly similar to this one, holding that a mass trial of 48 asbestos cases prejudiced the defendants. *Malcolm* v. *Nat'l Gypsum Co.*, 995 F.2d 346, 349-352 (2d Cir. 1993). Even though the "jury was instructed on several occasions to consider each case separately and each juror was given a notebook for this purpose," that was not enough to prevent prejudice given the "maelstrom of facts, figures, and witnesses." *Id.* The court concluded that because the plaintiffs had been exposed to asbestos at different times under different circumstances, and experienced different disease trajectories, "the sheer breadth of the evidence made [the trial court's] precautions feckless in preventing jury confusion." *Id.* at 351-352. The Second Circuit ordered new trials, explaining that the "systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice," *id.* at 350 (citation omitted), and that the consolidation had "sacrifice[d] basic fairness." *Id.* at 354; *see also In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 373 (2d Cir. 1993) (ordering deconsolidation for similar reasons).[3]

The Fifth Circuit takes a similar approach. It reversed consolidation in a case involving just *two* plaintiffs, explaining that "the *primary* consideration" in evaluating consolidation was "the individual [plaintiff's] Constitutional right to due process." *Gwathmey* v. *United States*, 215 F.2d 148, 156 (5th Cir. 1954). "As between a method of procedure which seriously restricts or prevents" a party "from establishing his claim in order to save time and costs and one which

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[3] District courts continue to follow *Malcolm*. *E.g.*, *Weiss* v. *Nat'l Westminster Bank PLC*, 2017 WL 10058916, at *2 (E.D.N.Y. Mar. 31, 2017); *KGK Jewelry LLC* v. *ESDNetwork*, 2014 WL 7333291, at *2 (S.D.N.Y. Dec. 24, 2014).

preserves those fundamental rights," the court held, "the choice is obvious and all reasonable doubt should be resolved in favor of justice." *Id.*

If the Missouri court had applied the Second or Fifth Circuit's standard, it would have severed these cases for trial. *See Dupont* v. *S. Pac. Co.*, 366 F.2d 193, 196 (5th Cir. 1966) (a "trial judge should * * * make sure that the rights of the parties are not prejudiced by the order of consolidation"); *Trevizo* v. *Cloonan*, 2000 WL 33348794, at *2 (W.D. Tex. Nov. 29, 2000) (similar); *cf. In re Fibreboard Corp.*, 893 F.2d 706, 710-711 (5th Cir. 1990) (explaining in the class-action context that aggregation is inappropriate where plaintiffs are "persons claiming different diseases, different exposure periods, and different occupations," given fairness "concerns" that "find expression in defendants' right to due process").

3. At least eight other state and federal courts reject the Missouri Court of Appeals' categorical holding—that it "must" affirm consolidation whenever the jury is instructed to consider each claim separately. These courts instead measure the dangers of consolidation in terms of fundamental fairness, the very thing the Due Process Clause guarantees. *See Lassiter* v. *Dep't of Soc. Servs. of Durham Cty.*, 452 U.S. 18, 24-25 (1981).

The Texas Supreme Court is a paradigmatic example. It has reviewed a 22-plaintiff mass asbestos trial and held that jury instructions, standing alone, could not cure prejudice from consolidation, explaining that a "risk of juror confusion is present in this case even if the trial court were to utilize techniques that have seemed to lessen confusion in other asbestos cases, such as * * * submitting jury issues and instructions

tailored to each plaintiff." *In re Ethyl Corp.*, 975 S.W.2d 606, 615 (Tex. 1998). The court examined "whether the trial will be fair and impartial to all parties," analyzing the date and length of exposure for each plaintiff to determine whether consolidation could be achieved without prejudice. *Id.* at 614-617. The court continues to apply that approach. *See In re Van Waters & Rogers, Inc.*, 145 S.W.3d 203, 210 (Tex. 2004) (per curiam) (ordering deconsolidation because "significant juror confusion and undue prejudice would result from" a mass trial of 20 toxic-tort plaintiffs).

The Supreme Court of Appeals of West Virginia has likewise disagreed that jury instructions alone can cure unfairness from consolidation. It has acknowledged that "the risks of prejudice and confusion may be reduced by the use of cautionary instructions to the jury." *State ex rel. Appalachian Power Co.* v. *Ranson*, 438 S.E.2d 609, 613 (W. Va. 1993). But it also considered whether "the risk of prejudice in consolidating" three tort actions "outweigh[ed] the considerations of judicial dispatch and economy" because "the tragic nature of [one plaintiff's] death could affect the jury's determination of the [other] cases * * *, especially if the jury believes that recovery in each of the cases is interdependent because of the consolidation." *Id*.

The Iowa Supreme Court concurs. It reversed a lower court that had consolidated cases because it thought that "any dissimilar issues could be remedied by proper jury instructions," explaining that it was error to "conclud[e] these actions could be consolidated without prejudice to" the defendants. *Johnson* v. *Des Moines Metro. Wastewater Reclamation Auth.*, 814

N.W.2d 240, 244, 248-249 (Iowa 2012) (internal quotation marks omitted).

The en banc Fourth Circuit likewise disagreed with a panel's conclusion that "appropriate cautionary instructions" were sufficient to "safeguard" against unfairness from consolidation. *Arnold* v. *E. Air Lines, Inc.*, 681 F.2d 186, 193 (4th Cir. 1982). The full court held that "convenience may not prevail where the inevitable consequence to another party is harmful and serious prejudice." *Arnold* v. *E. Air Lines, Inc.*, 712 F.2d 899, 906 (4th Cir. 1983) (en banc). "In the actual proof of the pudding, * * * the fairness required was not possible to attain" from a mass trial. *Id.* at 907.

The Mississippi Supreme Court has reversed a trial court's consolidation of five suits alleging injury from air pollution. *See Vicksburg Chem. Co.* v. *Thornell*, 355 So. 2d 299 (Miss. 1978). As here, the jury had returned identical awards for each household—regardless of the number of plaintiffs in the household, the "different family situations," and the particular injuries suffered. *Id.* at 301-302. The court held that it could not rely on jury instructions to cure prejudice, because "the identical verdicts indicate that the jury did not follow the instructions on damages." *Id.* at 302. And the court continues to evaluate prejudice from consolidation by examining whether a "jury can be expected to reach a fair result under the[] circumstances." *Janssen Pharmaceutica, Inc.* v. *Armond*, 866 So. 2d 1092, 1101 (Miss. 2004).

Finally, at least three other courts apply a multi-factor test to evaluate whether consolidation will prejudice the defendant. *See Cantrell* v. *GAF Corp.*, 999 F.2d 1007, 1011 (6th Cir. 1993) ("[T]he decision to consolidate is one that must be made thoughtfully, with

specific reference to the [discrete] factors identified * * * ."); *ACandS, Inc.* v. *Godwin*, 667 A.2d 116, 147-149 (Md. 1995); *Minnesota Pers. Injury Asbestos Cases* v. *Keene Corp.*, 481 N.W.2d 24, 26-27 (Minn. 1992). These multi-factor tests are also inconsistent with the Missouri approach, which presumes that jury instructions alone guarantee a fair trial.

The only court to agree with Missouri is the Alabama Supreme Court. In a mass trial of asbestos claims, the defendant argued that "consolidation confused the jury and resulted in a flawed verdict." *Owens-Corning Fiberglass Corp.* v. *Gant*, 662 So. 2d 255, 256 (Ala. 1995). The Alabama Supreme Court disagreed, emphasizing that "the trial judge gave specific instructions in order to eliminate juror confusion." *Id.* But the court never evaluated whether the defendant's right to a fair trial was violated *despite* those instructions. *Id.*

Given this stark divergence, the Court should step in.

B. The Missouri-Alabama Rule Denies Due Process.

"It is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process." *Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (alterations and internal quotation marks omitted). By cavalierly treating the jury instructions as a cure-all, the Missouri court ignored how a mass trial of dissimilar claims can confuse a jury and deprive defendants of their constitutional fair-trial right.

"[D]ue process requires that" aggregation "not be used to diminish the substantive rights of any party to the litigation." *Stonebridge Life Ins. Co.* v. *Pitts*, 236 S.W.3d 201, 205 (Tex. 2007) (per curiam).

"Aggregating claims can dramatically alter substantive tort jurisprudence" by "removing individual considerations from the adversarial process." *Sw. Refin. Co.* v. *Bernal*, 22 S.W.3d 425, 438 (Tex. 2000); *see also Hall* v. *Hall*, 138 S. Ct. 1118, 1128 (2018) ("[C]onsolidation could not prejudice rights to which the parties would have been due had consolidation never occurred.").

Mass trials obscure difficult causation questions because jurors are asked to "assimilate vast amounts of information" and individual cases are "lost in the shadow of a towering mass litigation." *Malcolm*, 995 F.2d at 350 (citation omitted). Mass trials also risk creating a "perfect plaintiff" who is "pieced together for litigation" from "the most dramatic" features of individual cases. *Broussard* v. *Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 344 (4th Cir. 1998).

Those fears were realized here. The jury was confronted with 22 different plaintiffs with dramatically different cancer-risk profiles, prognoses, and talc use. The mass trial papered over these differences, allowing the jury to overlook significant weaknesses in individual plaintiffs' claims—and to infer causation from the number of plaintiffs before it. For example, if Ms. Ingham's case had proceeded individually, the jury would have heard about her year with cancer, how she went into full remission, and how she spent the next 32 years cancer-free. *See* Tr. 4741:16-25. That would not have been a $25-million-plus-punitives case. Or if Ms. Walker's case had proceeded individually, the jury would have heard about her BRCA gene mutation, which increases the risk of ovarian cancer 20 to 60 times. *See id.* at 4709:3-8, 4744:4-21. That would not have been a $25 million-plus-

punitives case, either. Consolidating these cases with Ms. Packard's, however, allowed plaintiffs' lawyers to present Ms. Packard's videotaped deathbed testimony as she succumbed to her 10-year battle with cancer and conflate Ms. Ingham and Ms. Walker's experiences with Ms. Packard's. *See id.* at 2207:10-16.

There is good reason to think that consolidation made the difference here: Other single-plaintiff trials against Petitioners have resulted in defense jury verdicts, mistrials, and, in Missouri, several far-smaller compensatory-damages awards. *See, e.g.*, *Forrest* v. *Johnson & Johnson*, No. 1522-CC00419-02 (Mo. Cir. Ct. Dec. 20, 2019) (defense verdict in single-plaintiff Missouri trial); *Swann* v. *Johnson & Johnson*, No. 1422-CC09326-01 (Mo. Cir. Ct. Mar. 3, 2017) (same). It is implausible that separate trials would have resulted in liability as to each of 22 plaintiffs, with the same $25 million verdict for each. In these circumstances, consolidation deprived Petitioners of their due-process rights.

Worse still, there is no logical stopping point to the Missouri-Alabama approach. If this case did not warrant severance, no case will. The Court of Appeals' logic would permit consolidation of dozens or hundreds of plaintiffs with radically different medical conditions and claims arising under dozens of States' laws, so long as the jury was instructed to consider each case individually. That is no way to assure a fair trial. And the problem is not limited to these cases: Mass consolidation generally has been a "spectacular" due-process "failure." Mark H. Reeves, *Makes Sense to Me: How Moderate, Targeted Federal Tort Reform Legislation Could Solve the Nation's Asbestos Litigation Crisis*, 56 Vand. L. Rev. 1949, 1968 (2003); *id.*

(consolidation "substantially abridges the due process rights of defendants by prejudicing and confusing juries and by frequently forcing settlements that preclude jury trials altogether"); *see also* Carter G. Phillips et al., *Rescuing Multidistrict Litigation from the Altar of Expediency*, 1997 B.Y.U. L. Rev. 821, 836 (1997) (similar).

This Court has already recognized the dangers of aggregate litigation in the class-action context, warning that an "elephantine mass of asbestos cases * * * defies customary judicial administration." *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 821 (1999); *see Amchem Prod., Inc.* v. *Windsor*, 521 U.S. 591, 625 (1997) ("caution" is called for in aggregation "when individual stakes are high and disparities among class members great"). The Court has accordingly set standards to assure that a defendant receives "individualized determinations of each" plaintiff's claims and an opportunity to "litigate its * * * defenses to individual claims." *Wal-Mart*, 564 U.S. at 366-367.

This case offers the Court the chance to do the same for mass torts. The many jurisdictions that disagree with the Missouri-Alabama approach appropriately protect defendants' constitutional rights. They recognize a truth articulated by this Court long ago that "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton* v. *United States*, 391 U.S. 123, 135 (1968). Due process requires careful analysis of whether a jury can realistically be expected to fairly adjudicate consolidated claims, not

Panglossian reliance on jury instructions. This Court should step in.

II. THIS CASE EXACERBATES TWO CLEAR SPLITS OVER PUNITIVE DAMAGES.

The state and federal courts are also deeply divided over whether due process permits a punitive-damages award that far exceeds substantial compensatory damages. This Court stated in *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003), that "[w]hen compensatory damages are substantial," "a lesser ratio" of punitive damages, "perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.* at 425; *see also Exxon*, 554 U.S. at 514-515. Yet many lower courts treat that statement about the "outermost limit" of due process as meaningless dicta, holding instead that *any* single-digit ratio is permissible. And some courts do not hold even that line.

That is not all. The state and federal courts are further split over *how* to calculate the ratio of punitive to compensatory damages in cases like this one where the defendants are jointly and severally liable—leading to different conclusions about whether a punitive award is constitutional. As this petition starkly illustrates, whether a defendant is subject to millions or even billions of dollars in punitive damages greatly depends on the courthouse in which a case is brought. Over a decade after *State Farm*, this Court should make clear the case means what it says.

A. The State And Federal Courts Are Divided Over The Due-Process Limits On Punitive Damages.

The state and federal courts are intractably split over whether due process permits a punitive-damages award that far exceeds substantial compensatory damages.

1. Five state and federal courts have invoked *State Farm* to limit punitives at or near a 1:1 ratio in cases where compensatory damages are substantial, including Missouri's own federal authority, the Eighth Circuit.

In *Lompe* v. *Sunridge Partners, LLC*, 818 F.3d 1041 (10th Cir. 2016), the Tenth Circuit held that due process concerns required it to reduce an 11.5:1 ratio to 1:1. *See id.* at 1073-75. The court explained that "[b]ecause we have concluded that the amount of the compensatory damages * * * is substantial, an award of punitive damages equal to the compensatory award * * * may represent the outermost limit of the due process guarantee." *Id.* at 1073.

The Sixth Circuit has done the same. It ordered a punitive damages award remitted to an amount "not to exceed the amount of compensatory damages" of $6 million. *Morgan* v. *New York Life Ins. Co.*, 559 F.3d 425, 443 (6th Cir. 2009). And it has remitted punitive damages to match compensatories based on the "scenario described in *State Farm*, where the plaintiff has received a substantial compensatory-damages award, and a ratio of 1:1 or something near to it is an appropriate result." *Bach* v. *First Union Nat'l Bank*, 486 F.3d 150, 156 (6th Cir. 2007). The Third Circuit and South Dakota Supreme Court take a similar approach. *See Jurinko* v. *Med. Protective Co.*, 305 F.

App'x 13, 30 (3d Cir. 2008) ("[T]he Supreme Court's statement"—capping the ratio at 1:1 when compensatory damages are substantial—"instructs the outcome here."); *Roth* v. *Farner-Bocken Co.*, 667 N.W.2d 651, 671 (S.D. 2003) (finding "a punitive damages award at or near the amount of compensatory damages" appropriate "where there [i]s a substantial compensatory damage award" (citation omitted)).

The Eighth Circuit—which includes the Missouri federal courts—has largely followed suit. *See Boerner* v. *Brown & Williamson Tobacco Co.*, 394 F.3d 594, 603 (8th Cir. 2005) (setting 1:1 ratio as the limit in case involving $4 million in compensatory damages for cancer claims against cigarette manufacturer, even after finding the manufacturer "exhibited a callous disregard for the adverse health consequences of smoking"); *Williams* v. *ConAgra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004) (remitting punitive-damages award to an amount equal to the $600,000 compensatory-damages award). The court has approved of ratios above 1:1 in intentional-tort cases. *See Ondrisek* v. *Hoffman*, 698 F.3d 1020, 1029-31 (8th Cir. 2012) (repeated battery of children by a religious cult leader); *see also Lee ex rel. Lee* v. *Borders*, 764 F.3d 966, 975-976 (8th Cir. 2014) (sexual assault at facility for developmentally disabled individuals). But even then, the court has rejected ratios above 4:1, citing *State Farm*. *See Ondrisek*, 698 F.3d at 1031 (remitting 10:1 ratio to 4:1); *Lee*, 764 F.3d at 976 (permitting 3:1 ratio).

2. Other state and federal courts treat a 10:1 ratio as the limit, paying lip service to *State Farm*'s warning that "few awards exceeding a single-digit ratio * * * will satisfy due process," while ignoring *State*

Farm's separate statement that when a jury awards substantial compensatory damages, a 1:1 ratio "can reach the outermost limit of the due process guarantee." 538 U.S. at 425.

The Ninth Circuit maintains that a 4:1 ratio is "a good proxy for the limits of constitutionality" where "there are significant economic damages" but the misconduct "is not particularly egregious." *Planned Parenthood of Columbia / Willamette Inc.* v. *Am. Coal. of Life Activists*, 422 F.3d 949, 962 (9th Cir. 2005); *see also Ramirez* v. *TransUnion LLC*, 951 F.3d 1008, 1037 (9th Cir. 2020) (permitting 4:1 ratio). It has held that "a single-digit ratio greater than 4 to 1 might be constitutional," however, where the economic damages are significant and the misconduct is "more egregious." *Planned Parenthood*, 422 F.3d at 962-963 (ultimately approving 9:1 ratio).

The Eleventh Circuit dismissed this Court's statement in *State Farm* that a 1:1 ratio "can reach the outermost limit of the due process guarantee" as "dicta." *Cote* v. *Philip Morris USA, Inc.*, 985 F.3d 840, 849 (11th Cir. 2021) (upholding 3.3:1 ratio). And other state high courts rubber-stamp punitive damages below the 10:1 threshold. *See, e.g.*, *Seltzer* v. *Morton*, 154 P.3d 561, 612-613, 615 (Mont. 2007) (reducing ratio from 18.2:1 to 9:1 because "a single-digit ratio, although not compulsory, is more likely to comport with due process"); *Manor Care, Inc.* v. *Douglas*, 763 S.E.2d 73, 103, 105 (W. Va. 2014) (approving $32-million punitive-damages award seven times the compensatory award because "ratio statements by the United States Supreme Court[ ] do not represent strict standards" but rather "merely provide a guide"); *Union Pac. R.R. Co.* v. *Barber*, 149 S.W.3d 325, 348 (Ark. 2004)

(holding that $25-million punitive-damages award five times the compensatory award satisfied due process because it was not "breathtaking").

3. Some state courts eschew even the single-digit limit. The Oregon Supreme Court has affirmed a $79.5 million punitive award that was 97 times the compensatory award, reasoning that "two guideposts—reprehensibility and comparable sanctions—can provide a basis for overriding the concern that may arise from a double-digit ratio." *Williams* v. *Philip Morris Inc.*, 127 P.3d 1165, 1181-82 (Or. 2006), *adhered to on reconsideration*, 176 P.3d 1255 (2008). And below, the Missouri Court of Appeals affirmed an 11.5:1 ratio against J&J.

The Court should resolve this disagreement. If this case had been tried under Eighth or Tenth Circuit precedent, J&J's punitive damages would have been limited to $62.5 million and JJCI's punitive damages would have been limited to $437.5 million (a 1:1 ratio). If this case had been tried in the Ninth Circuit, J&J's punitive damages would have been limited to $562.5 million (a 9:1 ratio), while JJCI's damages would have remained $900 million (a 2.1:1 ratio). But because this case was tried in the plaintiff-friendly Missouri courts, J&J's punitive damages were $715.9 million (an 11.5:1 ratio), and JJCI's punitive damages were $900 million (a 2.1:1 ratio). The lower-court split means that Petitioners were subject to *over $1 billion* in additional liability. Permitting this kind of disparity—and subjecting defendants to this kind of ten-figure unpredictability—violates due process.

B. The State And Federal Courts Are Divided Over How To Calculate The Ratio Of Punitive To Compensatory Damages.

This case also presents a straightforward split with the Missouri Supreme Court on one side and the Eighth Circuit and Texas Supreme Court on the other over how to calculate the ratio of punitive to compensatory damages in cases involving joint-and-several liability. This issue, while seemingly technical, has a dramatic impact: The Missouri Supreme Court's approach halves the ratio where two defendants are jointly and severally liable, permitting awards exceeding a 10:1 ratio and increasing the damages here by at least $350 million.

Joint and several liability measures the harm that defendants *collectively* cause. *See Honeycutt* v. *United States*, 137 S. Ct. 1626, 1631 (2017). Punitive damages, however, are assessed individually. To determine the ratio of punitive to compensatory damages for each defendant, the Missouri Supreme Court assumes the legal impossibility that each defendant will pay the *entire* joint-and-several compensatory award. *Contra id.* ("[T]he plaintiff" can "recover only once for the full amount.").

In *Lewellen* v. *Franklin*, 441 S.W.3d 136 (Mo. 2014), for example, two defendants were jointly and severally liable for $25,000 in compensatory damages. The Missouri Supreme Court assumed that each defendant would pay the full $25,000 and calculated the ratios as 40:1 and 22:1, respectively. *See id.* at 147. If the court had assumed that each defendant would pay half the compensatory award, it would have calculated the ratios as 80:1 and 44:1. The Missouri Supreme Court's approach meant it did not have to

justify the true 80:1 and 44:1 ratios—or reduce the punitive damages to a ratio that comports with due process. The Missouri Court of Appeals applied the same method here, citing *Lewellen*. *See* Pet. App. 99a-100a n.27.

The Eighth Circuit has rejected that approach. It holds that "divid[ing] each individual punitive damages award by the entire actual damages award * * * assumes an impossibility"—that "each defendant will ultimately pay the full compensatory damages award." *Grabinski* v. *Blue Springs Ford Sales, Inc.*, 203 F.3d 1024, 1026 (8th Cir. 2000). The Eighth Circuit accordingly determines each defendant's share of the compensatory damages before calculating the punitive-to-compensatory ratio. *See id.*

The Texas Supreme Court agrees. It holds that the total "joint-and-several compensatory award" is not "the proper denominator for calculating the ratio of compensatory to exemplary damages." *Horizon Health Corp.* v. *Acadia Healthcare Co.*, 520 S.W.3d 848, 878-879 (Tex. 2017); *see also Olson* v. *Brenntag N. Am., Inc.*, 132 N.Y.S.3d 741 (N.Y. Sup. Ct. 2020) (Table) (restating *Grabinski*'s concern that dividing individual punitive awards by the total joint-and-several compensatory award "is logically impossible" and remitting a punitive-damages award from a 12:1 ratio to a 7:1 ratio in a talc case against Petitioners).

Applying the Eighth Circuit and Texas Supreme Court's approach here results in very different ratios. J&J would be liable for $715 million in punitive damages and $62.5 million in compensatory damages—half of the joint-and-several compensatory award—for a ratio of 11.5:1. JJCI would be liable for $900 million in punitive damages and $437.5 million in compensatory damages—$375 million in individual damages

plus $62.5 million of the joint-and-several portion of the compensatory award—for a ratio of 2.1:1.

Those revised ratios would lead to a revised result. The Missouri Court of Appeals emphasized—quoting *State Farm*—that "[f]ew awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process" in *any* case, let alone one with such substantial damages. Pet. App. 99a. If the court had properly calculated the ratios, and had reduced the ratio for J&J to 5.7:1—half of the 11.5:1 ratio as properly calculated—it would have cut J&J's punitive-damages award by $350 million. This Court's intervention is needed to address this recurring issue, which is important to defendants generally and to J&J in this case.

C. The Decision Below Is Divorced From This Court's Precedent And Long-Standing Due-Process Principles.

The decision below is wrong, for three reasons.

First, "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 574 (1996). That is why *State Farm* held that "a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee" "[w]hen compensatory damages are substantial." 538 U.S. at 425.

But *State Farm* did not "reduce[ ] the inconsistency or unpredictability of punitive damages awards." Laura J. Hines & N. William Hines, *Constitutional*

Constraints on Punitive Damages: Clarity, Consistency, and the Outlier Dilemma, 66 Hastings L.J. 1257, 1257, 1284 (2015) (surveying 507 punitive-damages awards handed down since *State Farm*). And so this Court drew a firmer line in *Exxon*, mandating a 1:1 ratio in a maritime case involving a $500 million compensatory award. *See* 554 U.S. at 514-515. That line should apply equally here.

To be sure, *Exxon* was a maritime case. But *Exxon*'s concerns about predictability and fairness are not unique to maritime law. *See* Jill Wieber Lens, *Procedural Due Process and Predictable Punitive Damage Awards*, 2012 B.Y.U. L. Rev. 1, 25 (2012). *Exxon* identified "[t]he real problem" as "the stark unpredictability of punitive damage awards" in general. *Id.* at 7 (quoting *Exxon*, 554 U.S. at 499). And the Court's solution—a 1:1 ratio—was based on the median ratio of *state* court awards, not federal maritime cases. *See id.* at 25-26. The due-process problem with inconsistent punitive awards is the same within and without maritime law; so should be the solution.

This unpredictability is magnified in the mass-tort context, where plaintiffs may file thousands of cases and juries may return verdicts ranging from a complete defense victory, only modest compensatory damages, or—as here—billions in punitives. *See, e.g.*, *Swann*, No. 1422-CC09326-01 (defense verdict); *Giannecchini* v. *Johnson & Johnson*, No. 1422-CC9012-02 (Mo. Cir. Ct. Nov. 16, 2016) ($2.6 million compensatory award to a single plaintiff), *vacated on appeal for lack of personal jurisdiction*, No. ED105443 (Mo. Ct. App. June 18, 2019); Pet. App. 100a ($500 million compensatory award to 20 plaintiffs). Permitting unlimited punitive damages in every one of these

cases makes it impossible for defendants to predict their potential liability. And it incentivizes plaintiffs' lawyers to file thousands of lawsuits in the hopes of hitting the punitives jackpot. The mass-tort context calls out for the Court to enforce the 1:1 ratio *State Farm* identified and *Exxon* adopted.

Second, large punitive awards create a significant risk that the jury is punishing hypothetical harm to non-parties—as was almost certainly the case here. *See supra* p. 9 (juror's explanation that award was meant to divest Petitioners of all profits from talc sales nationwide for past 40 years). The "increasingly common phenomenon" illustrated by this case, where individual punitive awards "are in essence assessed on a putative 'classwide' basis for harms actually or potentially inflicted upon numerous individuals," Catherine M. Sharkey, *Punitive Damages As Societal Damages*, 113 Yale L.J. 347, 352 (2003), poses significant due-process concerns requiring this Court's attention.

This problem is particularly acute in mass torts that produce multiple punitive awards. Judge Friendly recognized that punitive damages—as first conceived—were typically awarded where "the number of plaintiffs will be few" and "they will join, or can be forced to join, in a single trial." *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d 832, 838-839 (2d Cir. 1967). A single jury would thus consider the reprehensibility of the defendant's conduct and assess whether (and how much) punitive damages were necessary to meet the State's punishment and deterrence goals. *See Pac. Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 19 (1991). Here, by contrast, Petitioners face thousands of lawsuits and potentially thousands of juries, creating a

real risk each jury will "double count" damages and punish Petitioners for all of their allegedly wrongful conduct in each one of thousands of cases. *State Farm*, 538 U.S. at 423 (quoting *Gore*, 517 U.S. at 593 (Breyer, J., concurring)). Yet the "Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties" because a defendant "has no opportunity to defend against" such a charge. *Philip Morris USA* v. *Williams*, 549 U.S. 346, 353 (2007).

That principle has a long historical pedigree. As the South Carolina Supreme Court explained in 1901, "punitive damages go to the plaintiff, not as a fine or penalty for a public wrong, but in vindication of a private right which has been willfully invaded." *Watts* v. *S. Bound R.R. Co.*, 38 S.E. 240, 242 (S.C. 1901). Other early American cases similarly conceptualized punitive awards "as punishment only for the legal wrong that is actually before the court." Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages As Punishment for Individual, Private Wrongs*, 87 Minn. L. Rev. 583, 622-629 (2003). Enforcing a 1:1 ratio of punitive to compensatory damages lessens the risk that a jury will punish the defendant for harm to non-parties and will tether punitive damages to their traditional aims.

Third, punitive awards that are many multiples of compensatory damages can harm plaintiffs, too. Large awards divert resources that might otherwise be available for future plaintiffs seeking compensatory damages. That risk is hardly theoretical; asbestos litigation has bankrupted over 100 companies, leaving them unable to compensate plaintiffs whose injuries come later in time. *See* U.S. Gov't

Accountability Off., GAO-11-819, Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts 2 (2011). And the risk is greater when plaintiffs allege injuries, like those here, that may not manifest until decades after an alleged exposure. Imposing a 1:1 ratio hedges against these harmful-to-plaintiffs possibilities.

Just like *State Farm*, "this case is neither close nor difficult." 538 U.S. at 418. But it *is* immensely important—requiring Petitioners to pay over a billion dollars in punitive damages to just 20 plaintiffs, and setting a dangerous standard for mass-tort litigation across the country. The Court should grant certiorari.

III. MISSOURI'S EXPANSIVE PERSONAL-JURISDICTION THEORY RAISES THE SAME QUESTION PRESENTED IN *FORD*.

Finally, the Missouri Court of Appeals held that Pharma Tech affixing a label JJCI designed in New Jersey to bottles filled in Missouri was sufficient for Plaintiffs' claims to arise out of or relate to JJCI's supposed Missouri contacts. According to the court below, JJCI's contract with Pharma Tech was "a direct link in the production chain of Shimmer's eventual sale to the public." Pet. App. 35a. That holding broke from the federal courts of appeals that require the defendant's in-state conduct be a proximate cause, not just a but-for cause, of a plaintiff's claims. *See, e.g.*, *Harlow* v. *Children's Hosp.*, 432 F.3d 50, 61 (1st Cir. 2005); *Beydoun* v. *Wataniya Rests. Holding, Q.S.C.*, 768 F.3d 499, 507-508 (6th Cir. 2004). And it presents the same question this Court is considering in *Ford*—but on facts that more compellingly demonstrate the error in the bare-causation approach.

Under a proximate-cause standard—or indeed, any notion of relatedness beyond a bare but-for test—the "operative facts" of the non-Missouri plaintiffs' claims did not arise out of or relate to Pharma Tech's bottling conduct. *Beydoun*, 768 F.3d at 507 (citation omitted). Plaintiffs assert that talc contains asbestos and asbestos causes cancer. To the extent plaintiffs claim that the talc in Shimmer should have been mined differently, the mining did not occur in Missouri. To the extent plaintiffs claim that the talc in Shimmer should have been tested differently, the testing did not occur in Missouri. And to the extent plaintiffs claim that JJCI should have warned of talc's supposed dangers, Shimmer's label was designed in New Jersey, not Missouri. *See* Pet. App. 3a, 33a. Pharma Tech is a third party that had nothing to do with these activities and was not even named in this lawsuit. Plaintiffs' suit did not challenge any decision or substantive action Pharma Tech took in Missouri—much less a decision or action meeting the "arise out of or relate to" requirement.

This Court granted review in *Ford* to determine whether a proximate-cause standard, or some other test, applies to the arise-out-of-or-relate-to prong of specific personal jurisdiction. *See* Petition for Writ of Certiorari at i, *Ford*, No. 19-368 (petition granted Jan. 17, 2020). This petition presents the same question, *on even starker facts*. The Missouri court found personal jurisdiction over the claims of plaintiffs who did not reside in Missouri, did not purchase or use Petitioners' products in Missouri, did not rely on any Missouri advertising in making their purchasing decisions, and were not injured in Missouri. The only connection to Missouri is a *third party* that bottled Shimmer in Missouri—and the operative facts of the non-

Missouri plaintiffs' claims do not arise from that activity. It violated JJCI's due-process rights to subject it "to the coercive power of a State" with no "legitimate interest in the claims in question." *Bristol-Myers Squibb*, 137 S. Ct. at 1780. The Court should therefore at the very least hold the petition and then consider granting, vacating, and remanding in light of *Ford*.

IV. THIS PETITION IS AN IDEAL VEHICLE TO CONSIDER THESE IMPORTANT, INTERLOCKING DUE-PROCESS QUESTIONS.

This case is a stark illustration of the problems posed by mass litigation—and the reasons why the Court should grant review.

The jury's award was one of the largest ever in a product-liability case[4]—and the largest jury verdict in the country in 2018.[5] The enormous "economic interests at stake," both for Petitioners and for other manufacturers facing mass-tort claims, is a significant reason to grant certiorari. *Mobil Oil Expl. & Producing Se., Inc.* v. *United Distrib. Cos.*, 498 U.S. 211, 214-215 (1991); *see* Stephen M. Shapiro et al., *Supreme Court Practice* § 4.13, at 269-270 (10th ed. 2013).

Moreover, this case is merely one of *thousands* filed across the country. The questions presented here will continue to recur in nearly identical suits both inside and outside Missouri. Each will pose similar

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[4] *See* Margaret Cronin Fisk, *Why Johnson & Johnson May Not Have to Pay Its $4.7 Billion Court Verdict*, Bloomberg (Jan. 9, 2019), https://bloom.bg/3iQmPEl.

[5] *See Top 100 Verdicts of 2018*, Nat'l L.J., June 2019, at 32, *available at* https://bit.ly/2YfEThA.

questions about personal jurisdiction, consolidation, and punitive damages; indeed, plaintiffs' lawyers' success here has emboldened them to try the same tactics again. *See, e.g.*, *Forrest*, No. 1522-CC00419-02 (Mo. Cir. Ct.) (multi-plaintiff trial). The "enormous potential liability" facing Petitioners "is a strong factor in deciding whether to grant certiorari." *Fidelity Fed. Bank & Tr.* v. *Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., concurring in denial of certiorari).

The questions posed here are also broadly applicable. Whether dozens of tort plaintiffs may proceed to trial before the same jury—and under what circumstances—is a crucial question for both state and federal courts, which must ensure that multi-plaintiff trials comply with due process. Whether a punitive award may far exceed a substantial compensatory award is a significant constitutional question that courts will continue to face. And whether personal jurisdiction exists when a defendant's in-state actions have no substantive connection to a plaintiff's claims is an issue this Court has already granted certiorari to consider.

This petition is an ideal vehicle to address these important issues. All three questions were raised and passed on below by two courts, and this Court routinely grants review of cases arising from intermediate state courts. *E.g.*, *Cyan, Inc.* v. *Beaver Cty. Emps. Ret. Fund*, 137 S. Ct. 2325 (2017); *Murr* v. *Wisconsin*, 136 S. Ct. 890 (2017). And all three questions are outcome determinative, requiring dismissal, retrial, or remittitur.

In short, if any case merits review, this is it. The Court has repeatedly sought to curb abuses in class-

action litigation; it should do the same for mass-tort litigation. It should grant certiorari.

CONCLUSION

The petition should be granted. Alternatively, the petition should be held for *Ford* and disposed of as appropriate in light of the Court's decision.

Respectfully submitted,

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MARCH 2021

APPENDIX

APPENDIX A

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
DIVISION TWO

ROBERT INGHAM, ET AL.,
Respondent,
vs.
JOHNSON & JOHNSON, ET AL.,
Appellant.

No. ED107476

Appeal from the Circuit Court of
the City of St. Louis

Honorable Rex M. Burlison

Filed: June 23, 2020

Introduction

Johnson & Johnson ("J&J") and Johnson & Johnson Consumer Companies Inc. ("JJCI") (collectively, "Defendants") appeal the trial court's judgment after a jury verdict for Gail L. Ingham and twenty-one other

plaintiffs (collectively, "Plaintiffs")[1] on their product liability claims. Defendants bring ten points on appeal. In their first point, Defendants argue the trial court erred in denying their motion for severance. In their second point, Defendants argue the trial court erred in overruling their objection to a statement made by Plaintiffs' counsel during closing argument. In their third point, Defendants argue the trial court erred in finding they were subject to personal jurisdiction in Missouri on the claims of those Plaintiffs not residing in Missouri. In their fourth through seventh points, Defendants challenge the admissibility of various expert testimony. In their eighth point, Defendants argue the trial court erred in denying their motion for directed verdict because Plaintiffs failed to make a submissible case for causation. In their ninth point, Defendants argue the trial court erred in denying their motion for directed verdict because Plaintiffs failed to make a submissible case for punitive damages. Last, Defendants argue the trial court erred in denying their motion to vacate or remit the jury's punitive damages award. We reverse the trial court's judgment in part, and affirm the trial court's judgment as modified under Rule 84.14.[2]

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[1] Plaintiffs' Petition initially named eighty-two plaintiffs, including spouses of the other named Plaintiffs. Only twenty-two plaintiffs and their spouses proceeded to trial.

[2] All rule references are to the Missouri Supreme Court Rules (2018).

Factual and Procedural Background

JJCI manufactures and sells products containing talcum powder ("talc"), a mineral used in cosmetics, across the United States. J&J is JJCI's parent company. Defendants are both incorporated and headquartered in New Jersey. Plaintiffs filed a petition ("Petition")[3] against Defendants in St. Louis City Circuit Court, alleging claims for strict liability, negligence, and other torts. Plaintiffs' Petition alleged they developed ovarian cancer after continued use of two of Defendants' talc products: Johnson's Baby Powder ("Johnson's Baby Powder") and Shower to Shower, including any variation, modification, or extension such as Shower to Shower Shimmer Effects ("Shimmer") and Shower to Shower Sport (collectively, "Products"). Plaintiffs allege Defendants knew for decades their Products contained asbestos fibers and other dangerous carcinogens but persisted in producing and marketing the Products despite the dangerous health hazards they posed. Plaintiffs allege Defendants mounted a concerted effort to avoid warning government regulators and public health officials, the scientific and medical community, and the public of the contents of the Products. Plaintiffs sought compensatory and punitive damages. Seventeen Plaintiffs lived, purchased Defendants' Products, used Defendants' Products, and developed ovarian cancer outside Missouri (collectively, the "Non-Resident Plaintiffs"). Five Plaintiffs lived, purchased Defendants' Products, used Defendants'

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[3] All references to the Petition are to Plaintiffs' Third Amended Petition.

Products, and developed ovarian cancer in Missouri (collectively, the "Missouri Plaintiffs").

Before trial, Defendants moved to dismiss Plaintiffs' Petition for lack of personal jurisdiction over the Non-Resident Plaintiffs' claims.[4] Defendants asserted there is no general jurisdiction over Defendants in Missouri because they are incorporated and headquartered in New Jersey. Defendants asserted there is no specific jurisdiction over them in Missouri on the Non-Resident Plaintiffs' claims because the Non-Resident Plaintiffs "reside[d] outside of Missouri, purchased and used [Defendants'] products outside of Missouri, and 'developed' ovarian cancer outside of Missouri."

In their Petition, Plaintiffs alleged Defendants were subject to specific jurisdiction on their claims because JJCI had two long-term contractual relationships with Pharma Tech Industries, which is headquartered in Missouri. Plaintiffs alleged one contractual relationship involved the manufacturing, packaging, and supply of Shimmer and the other involved the manufacturing, packaging, and supply of Johnson's Baby Powder.[5] Plaintiffs argued Pharma Tech

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[4] Defendants did not challenge personal jurisdiction as to the Missouri Plaintiffs in the trial court and do not challenge personal jurisdiction as to the Missouri Plaintiffs on appeal.

[5] The Non-Resident Plaintiffs initially argued Missouri had specific jurisdiction over Defendants regarding their claims because they joined an action with the Missouri Plaintiffs. However, while this case was pending, that theory was rejected by the United States Supreme Court in *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1781 (2017), which held each individual out-of-state plaintiff in an action must demonstrate "a connection between the forum and the specific claims at issue."

Industries engaged in manufacturing, packaging, and supply activities relating to the Products in Missouri "at . . . Defendants' direction and under [their] control." Specifically, fifteen Non-Resident Plaintiffs argued specific jurisdiction over Defendants on their claims was proper because they used Shimmer, which was manufactured, labeled, and packaged by Pharma Tech Industries' sister company, known as Pharma Tech Union, in Union, Missouri, under Defendants' direction and control. The remaining two Non-Resident Plaintiffs argued specific jurisdiction over Defendants on their claims was proper because they used Johnson's Baby Powder, which was manufactured, labeled, and packaged by Pharma Tech Industries' sister company, known as Pharma Tech Royston, in Royston, Georgia, under Pharma Tech Industries' direction and control. In addition, all Non-Resident Plaintiffs [6] argued Defendants were subject to specific jurisdiction because Defendants' marketing strategy for the Products was created, in part, in St. Louis City, and marketing, advertising,

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This Court has confirmed that, after *Bristol-Myers*, out-of-state plaintiffs in talc cases cannot sue defendants in Missouri solely by joining their causes of action with in-state plaintiffs. *See Estate of Fox v. Johnson & Johnson*, 539 S.W.3d 48 (Mo. App. E.D. 2017) and *Ristesund v. Johnson & Johnson*, 558 S.W.3d 77 (Mo. App. E.D. 2018).

[6] The two Non-Resident Plaintiffs who testified they did not use Shimmer and only used Johnson's Baby Powder are Annette Koman and Marcia Owens. A Suggestion of Death and Motion for Substitution was filed on Annette Koman's behalf during the pendency of this appeal. Allan Koman, her surviving husband and the administrator of her estate, was substituted in her place.

distribution, and sale of the Products took place in Missouri.[7]

The trial court denied Defendants' motion to dismiss and held that specific jurisdiction existed over Defendants on the Non-Resident Plaintiffs' claims. The trial court found Defendants' alleged conduct satisfied Missouri's long-arm statute because Defendants transacted business in Missouri, allegedly committed tortious conduct in Missouri, owned real estate in Missouri, and contracted with Missouri-based Pharma Tech Industries to manufacture packaging materials. The trial court further found Defendants contracted with Missouri-based Pharma Tech Industries to manufacture, label, and package the Products and Pharma Tech Industries' relevant actions were under the direction and control of Defendants.

Although Defendants relied on *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017) to argue they were not subject to specific

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[7] The Non-Resident Plaintiffs also argued the following acts served as bases for personal jurisdiction: Defendants interviewed adult women who used Johnson's Baby Powder in St. Louis, Missouri; Defendants tested the sale of their Products on an endcap at a K-Mart store in St. Louis, Missouri; Defendants entered agreements with an organization based in St. Louis, Missouri to sell Johnson's Baby Powder to hospitals and health agencies across the nation; Defendants contributed to Missouri political candidates; and Defendants coordinated with the U.S. Chamber Institute for Legal Reform to engage in lobbying efforts in Missouri. Plaintiffs do not assert their claims arise out of or relate to any of these alleged activities. Thus, these alleged activities cannot serve as a basis for exercising personal jurisdiction over Defendants. *See Bristol-Myers*, 137 S. Ct. at 1781.

jurisdiction in Missouri, the trial court found *Bristol-Myers* distinguishable. In *Bristol-Myers*, the United States Supreme Court found the sale of a drug that injured plaintiffs in California did not confer jurisdiction over plaintiffs injured in other states where the defendant "did not develop [the drug] in California, did not create a marketing strategy for [the drug] in California, and did not manufacture, label, package, or work on the regulatory approval of the product in California." The trial court found "Plaintiffs allege[d] that Defendants engaged in all of these activities in Missouri except working on regulatory approval." The trial court found these activities constituted sufficient minimum contacts to subject Defendants to specific jurisdiction in Missouri on the Non-Resident Plaintiffs' claims.

Defendants also argued the trial court should sever Plaintiffs' claims because they had numerous differences: e.g., all Plaintiffs were different ages when they developed ovarian cancer, had different medical histories, were from different states, and used the Products at different ages and during different time periods. Defendants argued these differences precluded Plaintiffs' claims from arising from the same transaction or occurrence. The trial court denied Defendants' motion to sever, holding Plaintiffs' claims against Defendants "ar[o]se out of the same basic injuries, same defect, same alleged duty, and same causes of action." The trial court also found "[t]he alleged events for which Plaintiffs s[ought] damages ar[o]se out of the same common scheme or design[;] . . . [we]re connected with a common core, common purpose, or common event[;]" and had common questions of law and fact.

Plaintiffs proceeded to trial on May 31, 2018. After hearing testimony from over thirty witnesses over six weeks, the jury returned a verdict finding Defendants liable on all claims. The jury awarded each individual Plaintiff $25 million in compensatory damages, totaling $550 million, with judgment entered jointly and severally against Defendants. The jury awarded $4.14 billion in punitive damages, with J&J responsible for $3.15 billion and JJCI responsible for $990 million. Defendants filed several post-judgment motions, which were denied by the trial court.

Defendants now appeal. Additional facts will be included below as we address Defendants' ten points of error.

Discussion

Point I: Denial of Defendants' Motion to Sever

Defendants' first point argues the trial court's denial of their motion to sever Plaintiffs' claims was erroneous because each Plaintiff "had her own set of risk factors, diagnoses and health outcomes; . . . her own distinct history of exposure to Powders sourced from different mines around the globe; and . . . faced different defenses, in many cases under the laws of different states (12 in all)." They argue the trial court's denial of their motion to sever Plaintiffs' claims into separate and distinct trials prejudiced them because the ruling allowed Plaintiffs to:

> (1) evade their burden of providing that the Powders caused each one's cancer;
>
> (2) obscure the weaknesses in each Plaintiff's individual case by presenting the jury with a

> confusing jumble of facts regarding the separate claims of nearly two dozen Plaintiffs; and
>
> (3) blur important differences in the varying laws and defenses applicable to each Plaintiff's claims.

Defendants argue the trial court was required, under Rule 52.05(b),[8] to order separate trials and prevent this alleged prejudice.

Standard of Review

"Appellate courts review the circuit court's ruling on a motion to sever for an abuse of discretion." *State ex*

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[8] We note Defendants' brief on appeal conflates the terms "separate" and "sever." Defendants' motion below requested the trial court "*sever* Plaintiffs' claims into distinct and separate actions." (emphasis added). However, Defendants' brief on appeal relies on Rule 52.05(b), which allows the trial court to "order *separate* trials or make other orders to prevent delay or prejudice," and requests that our Court "remand for new, *separate* trials." (emphasis added). "[D]esignating a claim for separate trial is distinguishable from severance, despite these terms being used interchangeably." *See State ex rel. Johnson & Johnson v. Burlison*, 567 S.W.3d 168, 178 (Mo. banc 2019) (Draper, J., dissenting). "Rule 52.06 severance creates totally separate claims to be pursued in independent actions and resulting in completely separate judgments," while "[s]eparate trials . . . remain part of a single legal action with a single judgment to be entered thereon." *Distefano v. Quigley*, 230 S.W.3d 647, 648 (Mo. App. S.D. 2007) (citing STEVEN KATZ, 16 MISSOURI PRACTICE, CIVIL RULES PRACTICE § 66.02-2 (2d ed. 1998)). Because Defendants' motions before the trial court were motions for *severance*, we will treat their claim on appeal as one that the trial court erred in denying their requests to sever Plaintiffs' claims, not to order separate trials on Plaintiffs' claims.

rel. Johnson & Johnson v. Burlison, 567 S.W.3d 168, 178 (Mo. banc 2019) (Draper, J., dissenting) (citing *Bhagvandoss v. Beiersdorf, Inc.*, 723 S.W.2d 392, 395 (Mo. banc 1987)). An abuse of discretion only occurs when the trial court's ruling is "'clearly against the logic of the circumstances' and 'so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.'" *Stephenson v. Countryside Townhomes, LLC*, 437 S.W.3d 380, 389 (Mo. App. E.D. 2014) (quoting *Mitchell v. Kardesch*, 313 S.W.3d 667, 675 (Mo. banc 2010)). However, Rule 84.13(b) provides: "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." Therefore, "[e]ven assuming the circuit court erred by . . . failing to sever . . . claims, an error does not warrant reversal on appeal unless the error results in prejudice." *Barron v. Abbott Labs., Inc.*, 529 S.W.3d 795, 798 (Mo. banc 2017) (citations omitted).

Analysis

"Appellate review of claims of improper joinder and failure to sever involves a two-step analysis." *State v. Hood*, 451 S.W.3d 758, 762 (Mo. App. E.D. 2014) (citing *State v. Chambers*, 234 S.W.3d 501, 508 (Mo. App. E.D. 2007)). "First, we must determine whether joinder was proper as a matter of law." *Id.* "If joinder was proper, we must next determine whether the court abused its discretion in denying the defendant's motion to sever." *Id.* A challenge to *only* the trial court's decision not to sever claims "presupposes proper joinder." *Id.*

Defendants' first point does not challenge Plaintiffs' claims were improperly joined. But joinder of Plaintiffs' claims was proper. "[T]he policy of the law is to try all issues arising out of the same occurrence or series of occurrences together." *Bryan v. Peppers*, 175 S.W.3d 714, 719 (Mo. App. S.D. 2005) (internal quotations and citations omitted). Missouri courts have adopted a "broad policy favoring permissive joinder." *State ex rel. Allen v. Barker*, 581 S.W.2d 818, 827 (Mo. banc 1979). Missouri Supreme Court Rule 52.05(a) [9] permits multiple plaintiffs to join their claims in a single petition "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." All that is necessary to be properly joined under Missouri law is the claims be "factually and legally interrelated"; "the plaintiffs' claims need not be *identical* to one another." *McGuire v. Kenoma, LLC*, 375 S.W.3d 157, 189 (Mo. App. W.D. 2012) (alteration in original) (footnote omitted).

Certainly, Plaintiffs' claims are not identical. As Defendants' brief describes, they have a host of differentiating characteristics. These differences include their genetic dispositions, family histories, previous diagnoses, ages when they developed ovarian cancer, types of ovarian cancer, and durations and

[9] "Missouri's Rule 52.05(a) is substantially the same as Federal Rule 20(a), and, when 'the Missouri and federal rules are essentially the same, federal precedents constitute persuasive, although not binding, authority.'" *Burlison*, 567 S.W.3d at 189 n.4 (quoting *Hemme v. Bharti*, 183 S.W.3d 593, 597 (Mo. banc 2006)) (Wilson, J., dissenting).

frequencies of talc use. However, the existence of facts unique to each plaintiff does not preclude joinder. *See Simmons v. Skechers USA, Inc.*, No. 4:15-CV-340-CEJ, 2015 WL 1604859, at *4 (E.D. Mo. Apr. 9, 2015) ("The presence of some unique factual circumstances in each of plaintiffs' claims . . . does not undercut the propriety of joinder."). If it did, joinder "would be precluded in almost any circumstance." *McClellan v. I-Flow Corp.*, Nos. 07-1309-AA, 07-1318-AA, 08-478-AA, 2010 WL 11595942, at *3 (D. Or. July 23, 2010).

Despite Plaintiffs' differentiating characteristics, Plaintiffs' claims against Defendants arose out of the same occurrence: each Plaintiff used Defendants' Products. Their Petition alleged they each developed ovarian cancer because of Defendants' wrongful conduct in manufacturing, marketing, testing, promoting, selling, and distributing the Products. Plaintiffs also asserted the same causes of action against Defendants with the same relevant evidence at issue in all claims. The evidence adduced at trial involved common issues regarding whether talc or asbestos cause cancer, whether the Products contained asbestos, Defendants' testing methodology, whether Defendants knew the Products contained asbestos, and whether Defendants disseminated misleading information regarding the risks of the Products.

Disposal of Plaintiffs' claims in a single trial would save both the parties and the court money, time, and resources. *See State ex rel. Blond v. Stubbs*, 485 S.W.2d 152, 157-58 (Mo. App. 1972); *see also McClellan*, 2010 WL 11595942, at *3 (quoting *In re Montor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, 2010 WL 797273, at *4 (M.D. Ga. Mar. 3,

2010)) (holding joinder is appropriate where it would allow parties "to obtain results from multiple claims without burdening the [trial c]ourt or parties with the substantial cost of multiple separate trials."). Under the circumstances, the trial court could, in its discretion, order joinder of Plaintiffs' claims under Rule 52.05(a).

Having found joinder was proper under Rule 52.05(a), we must next evaluate whether the trial court abused its discretion when it denied Defendants' request that Plaintiffs' claims be severed. Rule 52.06 states, "Any claim against a party may be severed and proceeded with separately." In deciding whether to sever claims under Rule 52.06, the trial court should consider the "practical difficulties" involved in proceeding with one trial when there are multiple issues, plaintiffs, or defendants. *See Stubbs*, 485 S.W.2d at 157 (footnote omitted). The trial court should also consider convenience, the avoidance of prejudice, judicial economy, and the conflicting interests of the parties. *See Bryan*, 175 S.W.3d at 720-21 (citing *Shady Valley Park & Pool, Inc. v. Fred Weber, Inc.*, 913 S.W.2d 28, 36 (Mo. App. E.D. 1995)). "Th[e]se considerations can and should be taken into account under the authority conferred upon the trial court under Rule 66.02, which authorizes the granting of separate trials of any claim or of any separate issue 'in the furtherance of convenience or to avoid prejudice.'" *Stubbs*, 485 S.W.2d at 157.

Defendants make no arguments regarding convenience or judicial economy and undertake no effort to weigh their interests against those of Plaintiffs. Instead, they advance several arguments they were prejudiced by the trial court's denial of their

motion for severance. None of their arguments persuade us the trial court's decision not to sever Plaintiffs' claims was an abuse of discretion.

First, Defendants speculate the jurors were "lost in a jumble of evidence." Defendants argue Plaintiffs' similar awards of $25 million in compensatory damages prove the jury's confusion and failure to "consider any individual plaintiff's claim[ ] on its own merits." Defendants' claim of prejudice in this regard suffers a fatal flaw: it "amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict." *Opper v. United States*, 348 U.S. 84, 95 (1954). We must presume the jury followed the trial court's instruction in reaching its verdict. *Dieser v. St. Anthony's Med. Ctr.*, 498 S.W.3d 419, 435 (Mo. banc 2016). Here, the trial court instructed the jury to consider each Plaintiff's claim on its own merits. The trial court also, in over 140 pages of trial transcript, read the jury instructions for each individual Plaintiff to the jury.

Further, "[I]dentical damages awards, without more, simply are not sufficient evidence of juror confusion." *Eghnayem v. Boston Sci. Corp.*, 873 F.3d 1304, 1315 (11th Cir. 2017). The reasoning behind a jury's verdict is not "open to inquiry or impeachment for faulty logic, misconceived evidence or mistaken calculations. These remain matters which 'rest alone in the juror's breast.'" *See Elam v. Alcolac, Inc.*, 765 S.W.2d 42, 221 (Mo. App. W.D. 1988) (internal quotations omitted). Defendants identify no direct source of the jury's alleged confusion and instead effectively "worked backwards, speculating as to the reason for the compensatory awards based on the end

result." *See Eghnayem*, 873 F.3d at 1315 (alteration omitted). Where plaintiffs suffer similar injuries caused by the same product, a jury may reasonably find they are entitled to similar relief. *Id.* Because speculation does not support a finding that any error committed "materially affect[ed] the merits of the action" as required to support reversal under Rule 84.13(b), Defendants' argument they were prejudiced because the jury allegedly failed to consider any individual plaintiff's claims on its own merits is insufficient. *See Nachtweih v. Maravilla*, 861 S.W.2d 164, 169 (Mo. App. E.D. 1993) (holding reversal on the basis that an error "materially affect[ed] the merits of the action" under Rule 84.13 cannot be based on speculation).

Second, Defendants argue joinder "permitted [P]laintiffs to evade their causation burden." Defendants argue Plaintiffs' risk factors were "significantly different" and joinder "confused and obscured" those differences, leading the jury to "assum[e] that the Powders must have been the common factor that caused all of [P]laintiffs' diseases." Defendants essentially argue severance was required because each Plaintiff's proof of specific causation was different. However, differences in causation are generally not enough, standing alone, to bar joinder of products liability claims. *See Eghnayem*, 873 F.3d at 1314. Any danger of prejudice arising from joinder despite differences in Plaintiffs' proof of causation was reduced in this case because the trial court instructed the jury, in separate verdict directors, they must find Defendants' Products directly caused or directly contributed to cause each individual Plaintiff's injury. And Plaintiffs presented

evidence of specific causation for each individual Plaintiff through their expert, Dr. Felsher. In his differential diagnosis, Dr. Felsher considered and compared the unique risk factors of each individual Plaintiff in detail. He meticulously told the jury about each individual Plaintiff's personal history, opined about which aspects of her history made her more or less at risk for developing ovarian cancer, and concluded talc exposure directly caused or directly contributed to cause her ovarian cancer. The trial court's instructions, and Plaintiffs' presentation of Dr. Felsher's expert testimony, prove joinder did not permit Plaintiffs to "evade [their] causation burden," as Defendants argue.

Third, Defendants argue joinder allowed evidence into trial individually inadmissible for some plaintiffs. For example, Defendants complain Plaintiffs were exposed to the Products in different time periods, but joinder allowed the jury to consider the alleged presence of asbestos in talc over several decades dating "as far back as 1960" where different mines were used to supply talc for the Products. Defendants argue evidence of alleged asbestos in talc from years other than those years an individual Plaintiff used the Products would have been inadmissible if Plaintiffs' cases were tried separately. Defendants also complain the jury heard evidence of "the emotional impact of 22 different [P]laintiffs' stories." They argue evidence of other women's experience with cancer would have been inadmissible if Plaintiffs' cases were tried separately.

We note initially Defendants failed to advance this argument in their motion for severance at the trial

court level or in their motion for new trial.[10] "An issue is not properly preserved for appeal when the appellant fails to argue at trial the grounds asserted upon appeal." *State v. Lewis*, 243 S.W.3d 523, 524 (Mo. App. W.D. 2008) (citing *State v. Tisius*, 92 S.W.3d 751, 767 (Mo. banc 2002)). Because "[a]n appellant cannot broaden or change allegations of error on appeal," Defendants' argument that severance was warranted because, without it, some evidence was admitted into trial that would have been inadmissible for some Plaintiffs was not properly preserved. *Id.* Even if their argument could be considered, it would fail. Plaintiffs could have submitted evidence of other women with similar injuries to show the dangerous nature of Defendants' Products in individual trials. The Missouri Supreme Court has held sufficiently similar misconduct, regardless of when it occurred, is relevant in assessing reprehensibility. *See Lewellen v. Franklin*, 441 S.W.3d 136, 147 (Mo. banc 2014). Therefore, evidence that other women were injured by Defendants alleged negligence in manufacturing, packaging, and labeling the Products, despite knowing the Products contained asbestos, may have been admissible to prove Plaintiffs' claims even if their claims were tried individually.

Last, Defendants argue joinder "blurred distinctions in the law and defenses applicable to each [P]laintiff's

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[10] We also note Defendants failed to request limiting instructions for any evidence they believed would be relevant to one Plaintiffs' claim and not the others. "[W]hen evidence is relevant for some purposes and not others, limiting instructions—not exclusion—are generally the best way to handle the issue." *Eghnayem v. Boston Sci. Corp.*, 873 F.3d 1304, 1316-17 (11th Cir. 2017).

claim." However, the trial court told the jury the verdict directors for the Non-Resident Plaintiffs' claims would instruct on the laws from their respective states, while the verdict directors for the Missouri Plaintiffs' claims would instruct on Missouri law. And the trial court read the instructions for each individual Plaintiff, which included these differences in the law, to the jury in over 140 pages of trial transcript. Because we presume the jury followed the trial court's instruction in reaching its verdict, we are not persuaded differences in the law applicable to each Plaintiff's claims rendered the trial court's decision not to sever Plaintiffs' claims an abuse of discretion. *Dieser*, 498 S.W.3d at 435.

Each of Defendants' arguments ask our Court to make assumptions about how the jury reached their verdict in determining whether the trial court abused its discretion by dismissing their motion to sever Plaintiffs' claims. However, our standard of review does not permit such assumptions to be made. We are compelled to consider only whether the trial court's "ruling is 'clearly against the logic of the circumstances' and 'so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.'" *Stephenson*, 437 S.W.3d at 389 (quoting *Mitchell*, 313 S.W.3d at 675).

Although there are obvious differences among Plaintiffs' claims, those claims arose out of a series of occurrences (i.e., using the Products) and at least one common question of law or fact will arise in resolving those claims (e.g., whether Defendants negligently manufactured and produced the Products, whether their testing was deficient, or whether their warnings were inadequate). Any dangers of prejudice arising

from joinder were adequately addressed by the trial court's instructions to the jury to consider each Plaintiff's claim separately. The trial court's ruling was neither against the logic of the circumstances nor so arbitrary and unreasonable as to indicate a lack of careful consideration. Accordingly, joinder of Plaintiffs' claims was proper and the trial court's decision to deny Defendants' motion to sever was not an abuse of discretion.

Point I is denied.

Point II: Plaintiffs' Counsel's Statement on Causation During Closing Argument

Defendants' second point argues the trial court erred by overruling their objection to Plaintiffs' counsel's statement that "but for" causation was "made up" during closing argument. Defendants argue Missouri law requires proof the Products were the "but for" cause of each Plaintiff's injuries. They argue Plaintiffs' counsel's statement that "but for" causation was "made up" was a misstatement of the law, which the trial court had a duty to correct. In Defendants' view, the trial court's failure to do so requires reversal.

Standard of Review

We review the trial court's decision to overrule an objection to a portion of a closing argument for abuse of discretion. *Minze v. Mo. Dep't of Public Safety*, 541 S.W.3d 575, 581 (Mo. App. W.D. 2017). "An abuse of discretion occurs when a defendant is prejudiced such that 'there is a reasonable probability that the outcome at trial would have been different if the error had not been committed.'" *State v. Holmsley*, 554

S.W.3d 406, 410 (Mo. banc 2018) (quoting *State v. Deck*, 303 S.W.3d 527, 540 (Mo. banc 2010)).

Analysis

"Trial courts have wide discretion in controlling closing arguments." *State v. Banks*, 215 S.W.3d 118, 121 (Mo. banc 2007) (quoting *State v. Hahn*, 37 S.W.3d 344, 356 (Mo. App. W.D. 2000)). "Courts accord counsel wide latitude in arguing the facts and in drawing inferences from the evidence, and the law indulges a liberal attitude toward argument, particularly where the comment complained of is fair retort or responds to prior argument of opposing counsel." *Kelly by Kelly v. Jackson*, 798 S.W.2d 699, 704 (Mo. banc 1990) (citing *Lewis v. Bucyrus-Erie*, 622 S.W.2d 920, 925 (Mo. banc 1981)).

However, "misstatements of the law are impermissible during closing argument, and a positive and absolute duty . . . rests upon the trial judge to restrain such arguments." *Estate of Overbey by Overbey v. Franklin*, 558 S.W.3d 564, 573 n.10 (Mo. App. W.D. 2018) (alterations omitted). A trial court abuses its discretion in controlling closing argument "when [it] allow[s] plainly unwarranted and injurious arguments." *Banks*, 215 S.W.3d at 121 (quoting *Hahn*, 37 S.W.3d at 356). In ruling on the propriety of argument, the challenged comment "must be interpreted in light of the entire record rather than in isolation." *Dieser*, 498 S.W.3d at 439 (quoting *State ex rel. Kelly v. Jackson*, 798 S.W.2d 699, 704 (Mo. banc 1990)).

As Plaintiffs concede in their brief, "the but for causation test is applicable to nearly all tort cases in

Missouri." *Thomas v. McKeever's Enters. Inc.*, 388 S.W.3d 206, 212 (Mo. App. W.D. 2012), *overruled on other grounds by* S.B. No. 43, 99th Gen. Assemb., Reg. Sess. (Mo. 2017). "The 'but for' causation test provides that 'the defendant's conduct is *a* cause' of the event if the event would not have occurred 'but for' that conduct. Put simply, 'but for' causation tests for causation in fact." *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 860-61 (Mo. banc 1993) (emphasis added) (internal quotation and citation omitted). "'But for' is an absolute minimum for causation . . . . [It] dictates that there be some causal relationship between the defendant's conduct and the injury or event for which damages are sought." *Id.* at 862. Importantly, the "but for" standard does not require the defendant's conduct to be the sole or exclusive cause of the injury. *Wagner v. Bondex Int'l, Inc.*, 368 S.W.3d 340, 350-51 (Mo. App. W.D. 2012).

However, "Missouri courts have stated that terms such as 'but for causation' are not to be used when instructing the jury." *Thomas*, 388 S.W.3d at 216. This is "because but for is a test of submissibility, a way of viewing the sufficiency of the evidence, rather than an ultimate finding to be made by the trier of fact." *Id.* at 212. Therefore, "instructing the jury by use of such terms creates the potential for juror confusion." *Id.* at 216. Missouri Approved Instructions ("MAI") instead instructs the jury using the terms "directly cause" or "directly contribute to cause" without mentioning the phrase "but for causation." *Callahan*, 863 S.W.2d at 863 (citing *MAI 19.01 [1986 Revision] Verdict Directing Modification—Multiple Causes of Damage*).

During closing argument, Defendants' counsel argued that, to find for Plaintiffs, the jury "must rule out alternative causes" and be able to "say to [themselves] if [Plaintiffs] never used Johnson & Johnson's Baby powder would things be different? . . . . That's the question. That's what this but for thing means." During rebuttal closing argument, Plaintiffs' counsel argued to the jury the phrase "but for" would not appear in the trial court's jury instructions and "but for causation" was "made up." Although Plaintiffs' counsel's use of the phrase "made up" to describe "but for causation" lacked eloquence, it was made in response to Defendants' counsel's prior argument suggesting Plaintiffs needed to prove the Products were the sole cause of their injuries. It was within the trial court's wide discretion to allow Plaintiffs' counsel to make such a comment. *See Jackson*, 798 S.W.2d at 704.

Further, according to the MAI, the jury did not have to find that "but for" Defendants' Products, Plaintiffs would not have been injured. Under the MAI, the jury must find Defendants "directly cause[d]" or "directly contribute[d] to cause" Plaintiffs' injuries. Therefore, Plaintiffs' counsel's comment during closing argument tracked the trial court's causation instruction. *Peterson v. Progressive Contractors, Inc.*, 399 S.W.3d 850, 857 (Mo. App. W.D. 2013) (citing *Heshion Motors, Inc. v. W. Int'l Hotels*, 600 S.W.2d 526, 534 (Mo. App. W.D. 1980)) ("If a complained of argument during closing is within the purview of a matter to be determined by the jury as it has been instructed, the argument is not a misstatement of the law.").

Even if Plaintiffs' counsel misstated the law, "as long as the trial court properly instructs the jury, we will

rarely find reversible error." *Minze*, 541 S.W.3d at 583 (citing *Peterson*, 399 S.W.3d at 861). Defendants do not argue the jury was not provided with the proper law regarding causation. The jury was instructed it must find Defendants' Products "directly caused or directly contributed to cause" Plaintiffs' injuries to return a verdict for Plaintiffs. The trial court read the instructions to the jury, and the written instructions were available to the jury during deliberations. "The jury is bound to follow the trial court's instructions[,] and we presume that it will even to the extent that doing so might require the jury to ignore specific argument of counsel in conflict." *Id.* (alteration in original) (citing *Peterson*, 399 S.W.3d at 861).

Given the entire record, Plaintiffs' counsel's comments were not plainly unwarranted and did not prejudice Defendants. Accordingly, we find the trial court did not abuse its discretion in overruling Defendants' objection to Plaintiffs' counsel's closing argument.

Point II is denied.

Point III: Personal Jurisdiction

In their third point, Defendants argue the trial court erroneously determined they were subject to personal jurisdiction in Missouri on the Non-Resident Plaintiffs' claims.

<u>Standard of Review</u>

"[W]hen the issue is whether Missouri courts have personal jurisdiction over a defendant, a reviewing court defers to the fact-finding court with regard to any facts that are essential to that determination."

Pearson v. Koster, 367 S.W.3d 36, 44 (Mo. banc 2012). "[H]owever, the ultimate question of whether the exercise of jurisdiction meets the standards of the Missouri long-arm statute and the constitution remains a legal question, which is reviewed independently on appeal." *Id.* "When personal jurisdiction is contested, it is the plaintiff who must shoulder the burden of establishing the defendant's contacts with the forum state were sufficient." *Bryant v. Smith Interior Design Grp., Inc.*, 310 S.W.3d 227, 231 (Mo. banc 2010) (internal quotations omitted).

When presented with a motion to dismiss for lack of personal jurisdiction, "[a] court must consider whether the allegations in the petition, if taken as true, establish facts adequate to invoke personal jurisdiction." *Fulton v. The Bunker Extreme, Inc.*, 343 S.W.3d 9, 12 (Mo. App. S.D. 2011) (citing *Bryant*, 310 S.W.3d at 230-31). "The allegations of the petition are given an intendment most favorable to the existence of the jurisdictional fact." *Good World Deals, LLC. v. Gallagher*, 554 S.W.3d 905, 910 (Mo. App. W.D. 2018) (quoting *Moore v. Christian Fid. Life Ins. Co.*, 687 S.W.2d 210, 211 (Mo. App. W.D. 1984)). In addition to the allegations in the petition, a trial court may also consider "affidavits, oral testimony, and deposition testimony." *Longshore v. Norville*, 93 S.W.3d 746, 751 (Mo. App. E.D. 2002). "The trial court has discretion to believe or disbelieve evidence submitted when deciding the question of personal jurisdiction. However, when determining the issue of personal jurisdiction, the court cannot consider the merits of the underlying action." *Id.*

Analysis

Our evaluation of personal jurisdiction involves a "two-step analysis." *Getz v. TM Salinas, Inc.*, 412 S.W.3d 441, 447 (Mo. App. W.D. 2013) (citing *Bryant*, 310 S.W.3d at 231). First, we must "determine whether the defendant's conduct satisfies Missouri's long-arm statute, Section 506.500, RSMo 2000." *Id.* "If it does, then we next determine whether the defendant has sufficient minimum contacts with Missouri such that asserting personal jurisdiction over the defendant comports with due process." *Id.* (internal quotations omitted). Due process prohibits courts from exercising personal jurisdiction over a defendant where doing so would offend "traditional notions of fair play and substantial justice." *Bryant*, 310 S.W.3d at 232 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)). Here, the trial court found the long-arm statute extends to Defendants, and Defendants do not challenge this finding. Therefore, the sole issue in this appeal is whether the Plaintiffs' Petition sets forth sufficient minimum contacts between Defendants and Missouri to allow the court to exercise personal jurisdiction over them on the Non-Resident Plaintiffs' claims.

"Courts recognize two categories of personal jurisdiction: general and specific." *Ristesund v. Johnson & Johnson*, 558 S.W.3d 77, 80 (Mo. App. E.D. 2018) (citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 654 U.S. 915, 923-24, 131 S. Ct. 2846, 180 L.Ed.2d 796 (2011)). No Plaintiff asserts the trial court has general personal jurisdiction over

Defendants;[11] they argue only that Missouri has specific jurisdiction over Defendants on all their claims. A court may assert specific personal jurisdiction over a defendant "if certain minimum contacts between Missouri and the defendant are established." *Getz*, 412 S.W.3d at 448 (footnote omitted) (quoting *Bryant*, 310 S.W.3d at 232). These factors are "of primary importance" when determining whether a non-resident defendant has sufficient minimum contacts for a Missouri court to have personal jurisdiction: "(1) the nature and the quality of the contact; (2) the quantity of the contacts; [and] (3) the relationship of the cause of action to the contacts." *Weicht v. Suburban Newspapers of Greater St. Louis, Inc.*, 32 S.W.3d 592, 601 (Mo. App. E.D. 2000) (citing *Schilling v. Human Support Servs.*, 978 S.W.2d 368, 371 (Mo. App. E.D. 1998)). It is "of secondary importance" for the court to consider Missouri's interest in providing a forum for its residents and the convenience or inconvenience to the parties. *Id.*

"When evaluating minimum contacts, the focus is on whether 'there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Getz*, 412 S.W.3d

[11] "A court normally can exercise general jurisdiction over a corporation only when the corporation's place of incorporation or its principal place of business is in the forum state." *State ex rel. Key Ins. Co. v. Roldan*, 587 S.W.3d 638, 641 (Mo. banc 2019) (footnote omitted) (quoting *State ex rel. Norfolk S. Ry. Co. v. Dolan*, 512 S.W.3d 41, 45 (Mo. banc 2017)). Here, it is undisputed Defendants are both incorporated and headquartered in New Jersey.

at 448 (quoting *Bryant*, 310 S.W.3d at 232). "It is essential that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Id.* (quoting *Bryant*, 310 S.W.3d at 236). If sufficient minimum contacts are established, we must also determine "whether jurisdiction over the defendant would comply with traditional notions of fair play and substantial justice" by considering: "(1) the burden on the defendant; (2) the interest of the forum state; (3) the plaintiff's interest in obtaining relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several states in furthering the fundamental substantive social policies." *Weicht*, 32 S.W.3d at 601 (citing *Schilling*, 978 S.W.2d at 371).

The defendant's minimum contacts with the forum state must also be "adequate[ly] link[ed]" to the plaintiffs' claims. *See Bristol-Myers*, 137 S. Ct. at 1781. Thus, "the specific personal jurisdiction inquiry must be conducted separately for the claims of each individual plaintiff." [12] *Jinright v. Johnson &*

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[12] Specific jurisdiction need not be established for each individual product at issue within a claim in a litigation. *See Carson Optical, Inc. v. RQ Innovasion Inc.*, No. 16-CV-1157, 2020 WL 1516394, at *4 (E.D.N.Y. Mar. 30, 2020). Instead, specific jurisdiction must be established for each *claim* asserted. *See Seiferth v. Helicopteros Atuneros, Inc.*, 472 F.3d 266, 275 n.6 (5th Cir. 2006); *see also* 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL 3d § 1351, at 299 n.30 (2004) ("[I]f separate claims are pled, specific personal jurisdiction must independently exist for each claim and the existence of personal jurisdiction for one claim will not provide the basis for another claim."). The Petition does not contain an individual claim for each purportedly dangerous

Johnson, Inc., No. 4:17CV01849, 2017 WL 3731317, at *3 (Mo. E.D. Aug. 30, 2017). Here, there are two defendants: JJCI and J&J. There are twenty-two plaintiffs in this litigation.

Defendants do not challenge their minimum contacts with Missouri are insufficient as to the claims of the five Missouri Plaintiffs. However, personal jurisdiction over Defendants on the claims of the Missouri Plaintiffs is proper because each of the Missouri Plaintiffs bought the Products, used the Products, developed ovarian cancer, and received treatment for ovarian cancer in Missouri. We do not disturb the trial court's finding of personal jurisdiction over Defendants as to the five Missouri Plaintiffs who purchased and applied the Products in Missouri and developed ovarian cancer in Missouri. *See Weicht*, 32 S.W.3d at 602 (holding that where appellants do not "specifically address the issue of sufficient minimum contacts in their argument . . . [,] appellate review . . . is precluded.").

Product but, rather, asserts eight causes of action alleging Defendants negligently manufactured a litany of Products, failed to warn consumers of the dangers of those Products, and other torts relating to the manufacture and sale of those Products. It is enough that the Non-Resident Plaintiffs establish their claim arises out of or relates to *at least one* the specific activities alleged in in the Petition. *See Marten v. Godwin*, 499 F.3d 290, 296 (3d Cir. 2007) (internal citations omitted) (holding specific jurisdiction is proper where "'the defendant . . . purposefully directed his activities' at the forum . . . and the plaintiff's claim . . . 'arise[s] out of or relates to' at least one of those specific activities."). Therefore, specific jurisdiction is proper so long as any part of the Non-Resident Plaintiffs' claims arises from out of or relates to Defendants' activities in Missouri.

Defendants only challenge they are subject to personal jurisdiction in Missouri on the claims of the seventeen Non-Resident Plaintiffs. In their Petition, each of the seventeen Non-Resident Plaintiffs claim they purchased and applied the Products in their home states and developed ovarian cancer in their home states because of Defendants' negligent conduct. Specifically, fifteen Non-Resident Plaintiffs testified they used Shimmer and Johnson's Baby Powder. The remaining two Non-Resident Plaintiffs denied they used Shimmer and testified they only used Johnson's Baby Powder. Because there must be an "adequate link" between Defendants' activities in Missouri and the Non-Resident Plaintiffs' claims before imposing specific jurisdiction over Defendants, our analysis is guided by the specific claims asserted by the Non-Resident Plaintiffs against both Defendants. *See Bristol-Myers*, 137 S. Ct. at 1781.

Our specific jurisdiction analysis proceeds in two parts. In the first part, we analyze whether JJCI is subject to specific jurisdiction in Missouri on the Non-Resident Plaintiffs' claims. We discuss whether an adequate link exists between: (1) the fifteen Non-Resident Plaintiffs who testified they used Shimmer *and* Johnson's Baby Powder and JJCI's activities in Missouri and (2) the two Non-Resident Plaintiffs who testified they did not use Shimmer and only used Johnson's Baby Powder and JJCI's activities in Missouri. We then analyze whether JJCI's contacts should be imputed to J&J on the Non-Resident Plaintiffs' claims by alter ego or agency principles in the second part.

Specific Jurisdiction Over JJCI on the Non-Resident Plaintiffs' Claims

JJCI argues the trial court erroneously exercised specific jurisdiction over it in Missouri on the Non-Resident Plaintiffs' claims and improperly based its ruling on Pharma Tech Industries' conduct in Missouri. JJCI argues the "bare fact" it contracted with Pharma Tech Industries to manufacture, label, and package Shimmer and Johnson's Baby Powder is not enough to establish specific jurisdiction over it in Missouri. JJCI argues that, although it contracted with Missouri-based Pharma Tech Industries and Pharma Tech Union manufactured Shimmer in Missouri, no "minimum contacts" exist that justify the trial court's exercise of specific jurisdiction over it in Missouri on fifteen of the Non-Resident Plaintiffs' claims. JJCI argues no minimum contacts exist that justify the trial court's exercise of specific jurisdiction over it in Missouri on the remaining two Non-Resident Plaintiffs' claims because Johnson's Baby Powder was never manufactured in Missouri; Johnson's Baby Powder was solely manufactured, labeled, and packaged by Pharma Tech Royston in Georgia.[13]

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[13] In addition to these arguments, Defendants also argue the trial court erroneously exercised specific jurisdiction over it because Defendants marketing strategy for the Products was partially created in St. Louis, Missouri, and marketing, advertising, distribution, and sales activities took place in Missouri. Although Plaintiffs argued in their Response in Opposition to Defendants' Renewed Motion to Dismiss 17 Non-Missouri Plaintiffs' Claims for Lack of Personal Jurisdiction specific jurisdiction over Defendants may be exercised because of their engagement in marketing research and operations

Our decision of whether the trial court properly exercised personal jurisdiction over JJCI in Missouri is informed by the United States Supreme Court's decision in *Bristol-Myers*, 137 S. Ct. 1773. In *Bristol-Myers*, over 600 plaintiffs, most of whom were not California residents, sued Bristol-Myers Squibb Co. ("BMS") in California, alleging a drug manufactured by BMS damaged their health. *Id.* at 1777-78. BMS was incorporated in Delaware and headquartered in New York. *Id.* The nonresident plaintiffs did not allege they obtained the drug through California physicians or from any other California source; nor did they claim they were injured by the drug or treated for their injuries in California. *Id.* at 1778. BMS' activities in California included: making approximately one percent of its nationwide sales in California; maintaining five research and laboratory facilities in California; employing around 250 sales representatives in California; and maintaining a small state-government advocacy office in California. *Id.* BMS also contracted with McKesson, a California

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meetings for the Products in Missouri, Plaintiffs do not argue this as a basis for specific jurisdiction on appeal. Regardless, Defendants' sales and marketing activities in Missouri do not provide a sufficient basis to exercise personal jurisdiction over Defendants in Missouri on the Non-Resident Plaintiffs' claims. None of the Non-Resident Plaintiffs alleged they were exposed to or influenced by Defendants marketing in Missouri. Similarly, none of the Non-Resident Plaintiffs alleged they saw or were influenced by any marketing created in Missouri. Defendants' sales and marketing of products in Missouri to resident Plaintiffs is not forum-related conduct that is related to the claims being asserted by the Non-Resident Plaintiffs. *See In re Talc Prod. Liab. Litig.*, No. N17C-03-054, 2018 WL 4340012, at *6 (Del. Super. Ct. Sept. 10, 2018).

company, to distribute the drug nationally. *Id.* at 1783.

The United States Supreme Court held there was no specific jurisdiction over BMS in California on the nonresident plaintiffs' claims because their petition alleged no "adequate link between the State and the nonresidents' claims." *Id.* at 1781. The Court emphasized: "the nonresidents were not prescribed [the drug] in California, did not purchase [the drug] in California, did not ingest [the drug] in California, and were not injured by [the drug] in California." *Id.* The Court held "[t]he mere fact that *other* plaintiffs were prescribed, obtained, and ingested [the drug] in California—and allegedly sustained the same injuries as did the nonresidents—does not allow [California] to assert specific jurisdiction over the nonresidents' claims." *Id.* (alteration in original). In reaching its conclusion, the Court found it significant that BMS did not develop the drug in California; create a marketing strategy for the drug in California; *or manufacture, label, package*, or work on the regulatory approval of the drug in California. *Id.* at 1778 (emphasis added). The Court also found "[t]he bare fact that [BMS] contracted with a California distributor" did not establish personal jurisdiction over BMS in California because the nonresident plaintiffs did not allege BMS "engaged in relevant acts together with McKesson in California" or BMS was "derivatively liable for McKesson's conduct in California." *Id.* at 1783.

Fifteen Non-Resident Plaintiffs Claims

Using *Bristol-Myers* as our guide, we find the trial court properly exercised specific jurisdiction over JJCI

on the claims of the fifteen Non-Resident Plaintiffs who testified they used Shimmer. While it is true that, like the nonresident plaintiffs in *Bristol-Myers*, the Non-Resident Plaintiffs here do not assert they purchased, obtained, or used Shimmer in Missouri, the Petition alleged, and the record reveals, JJCI engaged in a host of significant activities in Missouri related to the Non-Resident Plaintiffs' use of Shimmer. JJCI contracted with Missouri-based Pharma Tech Industries to manufacture, package, and label Shimmer. Pharma Tech Industries then manufactured, packaged, and labeled Shimmer at its Pharma Tech Union facility in Missouri according to JJCI's specifications. "[W]here the defendant 'deliberately' has engaged in significant activities within a State, or has created 'continuing obligations' between [it]self and residents of the forum, [the defendant] manifestly has availed [it]self of the privilege of conducting business there." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-76 (1985). Accordingly, JJCI's activities relating to the manufacture, packaging, and labeling of Shimmer in Missouri make it reasonable to require it "to submit to the burdens of litigation" in Missouri. *See id.*

JJCI argues that, like the defendant in *Bristol-Myers*, the "bare fact" JJCI contracted with Missouri-based Pharma Tech Industries and Pharma Tech Union then manufactured Shimmer in Missouri does not establish personal jurisdiction over JJCI in Missouri. It argues Pharma Tech Union "merely execute[d] JJCI's specifications, which were all created and issued in New Jersey." JJCI's reliance on *Bristol-Myers* is misplaced. The Court in *Bristol-Myers* concluded "[t]he bare fact that [BMS]

contracted with a California distributor" did not establish personal jurisdiction in California because the nonresident plaintiffs did not allege BMS "engaged in relevant acts together with McKesson in California" or was "derivatively liable for McKesson's conduct in California" *and* there was no evidence the drug was manufactured, labeled, or packaged in California. *Id.* Here, the parties concede Shimmer was manufactured, labeled, and packaged according to JJCI's specifications in Missouri. Unlike in *Bristol-Myers*, specific jurisdiction over JJCI is proper because it is based on something more than a mere contractual relationship with a third party.

JJCI also relies on *In re Talc Products Liability Litigation*, No. N17C-03-054, 2018 WL 4340012 (Del. Super. Ct. Sept. 10, 2018) to argue its manufacturing contract with Pharma Tech Industries is insufficient to confer personal jurisdiction over it on the Non-Resident Plaintiffs' claims of Shimmer use in Missouri. However, its reliance on *In re Talc Products Liability Litigation* is also misplaced. In *In re Talc Product Liability Litigation*, the Delaware Superior Court held the fact J&J sent its talc to a company in Delaware for testing was not enough to establish personal jurisdiction over J&J in Delaware over nonresident plaintiffs' claims that J&J engaged in the "continued production, packaging, marketing, and sale of talc knowing that it was harmful to women." *Id.* at *8. The court found no adequate link existed between J&J's activity of sending its talc to be tested in Delaware and the nonresident plaintiffs' claims, as the nonresident plaintiffs did not allege J&J's testing of talc in Delaware was "a link in the production chain of talc's eventual sale to the public." *Id.* The court

found "the fact . . . the situs of the analysis was a lab in Delaware is at best happenstance; it could have been a lab anywhere, and it was not the sort of purposeful availment of the privilege of conducting business in a state that would lead [J&J] to 'reasonably anticipate being hauled into court there.'" *Id.* (footnote omitted).

Here, in contrast, JJCI's contract with Pharma Tech Industries was to manufacture, package, and label Shimmer—and Pharma Tech Union *did* manufacture, package, and label Shimmer in Missouri. The Non-Resident Plaintiffs' claims alleged JJCI negligently manufactured, produced, packaged, and labeled Shimmer. JJCI's activities with Pharma Tech Industries and Pharma Tech Union represent a direct link in the production chain of Shimmer's eventual sale to the public. JJCI's activities with Pharma Tech Industries firmly connect JJCI's activities in Missouri to the specific claims of the Non-Resident Plaintiffs and thus provide an adequate basis to exercise specific jurisdiction over JJCI.

To the extent JJCI challenges specific jurisdiction over it was erroneous because some of the fifteen Non-Resident Plaintiffs had "questionable recollections" of using Shimmer, its argument also fails. Under our standard of review, we must "defer[ ] to the fact-finding court with regard to any facts that are essential" to determining whether personal jurisdiction exists. *Pearson*, 367 S.W.3d at 44. In ruling on Defendants' motion to dismiss for lack of personal jurisdiction, the trial court examined the pleadings and considered the sworn affidavits of all Non-Resident Plaintiffs. It was within the trial court's discretion to believe the affidavits and

testimony of the fifteen Non-Resident Plaintiffs they used Shimmer. *See Longshore*, 93 S.W.3d at 754. We must defer to the trial court's fact-finding.

Because sufficient evidence in the record supports that JJCI contracted with Missouri-based Pharma Tech Industries to manufacture, package, and label Shimmer *and* Shimmer was manufactured, packaged, and labeled by Pharma Tech Union in Missouri, and JJCI purposefully availed itself of the privilege of conducting activities within Missouri to establish minimum contacts with the State to satisfy due process, the trial court did not err in overruling Defendants' motion to dismiss for lack of personal jurisdiction over JJCI on these fifteen Non-Resident Plaintiffs' claims.

Two Non-Resident Plaintiffs' Claims

We cannot, however, find the trial court properly exercised specific jurisdiction over JJCI on the claims of the two Non-Resident Plaintiffs who testified only that they used Johnson's Baby Powder. The Petition did not sufficiently allege JJCI engaged in significant activities in Missouri related to their use Johnson's Baby Powder.

Two of the Non-Resident Plaintiffs argue the trial court had specific jurisdiction over JJCI on their claims although they denied using Shimmer because they testified they used Johnson's Baby Powder. They maintain JJCI is subject to specific jurisdiction in Missouri because JJCI executed a Manufacturing and Supply Agreement ("MSA") with Missouri-based Pharma Tech Industries to manufacture, package, and label Johnson's Baby Powder. Although Pharma

Tech Industries assigned its manufacturing duties on the closing date to Pharma Tech Royston, which is headquartered in Delaware and has its principal place of business in Georgia, the Non-Resident Plaintiffs maintain JJCI is subject to specific jurisdiction in Missouri because Pharma Tech Industries executed two Continuing Unlimited Guaranty Agreements ("Guaranties") guaranteeing Pharma Tech Royston's performance of the production of Johnson's Baby Powder according to the MSA's specifications at JJCI's request and for JJCI's benefit. Beyond the contractual relationships between JJCI and Pharma Tech Industries, the Non-Resident Plaintiffs argue specific jurisdiction over JJCI exists because their Petition alleged Pharma Tech Industries "controlled and directed the manufacturing, processing, bottling, mislabeling, mispackaging, and distributing, without any warnings, of the PRODUCTS at other manufacturing facilities outside of Missouri, including but not limited to its Royston, Georgia manufacturing facility, from its Union, Missouri headquarters."

We find the two Non-Resident Plaintiffs have failed to meet their burden to show specific jurisdiction over JJCI exists on their claims. The record is devoid of evidence that JJCI engaged in any activities related to Johnson's Baby Powder, beyond the executing of the MSA and the Guaranties with a Missouri-based corporation, in Missouri. United States Supreme Court precedent is clear that contracting with an out-of-state party *alone* cannot automatically establish sufficient minimum contacts in the out-of-state party's home forum. *See Burger King Corp.*, 471 U.S. at 478 (alteration in original) ("If the question is

whether an individual's contract with an out-of-state party *alone* can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot."); *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1783.

Plaintiffs' Petition alleged that Pharma Tech Industries controlled and oversaw Pharma Tech Royston's manufacture of Johnson's Baby Powder from Missouri. However, this allegation lacks support in the record. When determining whether there is personal jurisdiction over a defendant, the trial court "must consider whether the allegations in the petition, if taken as true, establish facts adequate to invoke personal jurisdiction." *Fulton*, 343 S.W.3d at 12. But "[t]he plaintiff's prima facie showing [of personal jurisdiction] must be tested, not by the pleadings alone, but by the affidavits and exhibits presented with the motions and oppositions thereto." *Jinright*, 2017 WL 3731317, at *1 (internal quotations omitted). "Bare assertions of jurisdiction are insufficient." *Yaeger v. Wyndham Vacation Resorts, Inc.*, No. 4:14-cv-795-JCH, 2014 WL 3543426, at *3 (E.D. Mo. July 17, 2014).

After JJCI challenged the trial court's personal jurisdiction, the Plaintiffs had an obligation to provide some factual support for the jurisdictional claims made in their Petition and in their briefing on Defendants' motion to dismiss. They have not done so regarding their assertion that Missouri-based Pharma Tech Industries "oversaw, directed and controlled the manufacturing facility in Royston, Georgia." Accordingly, we cannot conclude the trial court properly exercised specific jurisdiction over JJCI on claims of the two Non-Resident Plaintiffs' who

testified they did not use Shimmer and only used Johnson's Baby Powder.

Plaintiffs' brief in opposition to Defendants' motion to dismiss asserted "it is clear that [JJCI] directed Pharma Tech in Missouri to oversee and control the [Johnson's Baby Powder] operations" with no exhibit or affidavit to support their argument. Plaintiffs cite only the allegations in their own Petition to support their contention that Pharma Tech Industries oversaw and controlled Pharma Tech Royston from Missouri. Plaintiffs also maintain Pharma Tech Industries' website and promotional videos generally refer to Pharma Tech Royston solely as "Pharma Tech" without distinction from Pharma Tech Union or Pharma Tech Industries, so Pharma Tech Industries must have directed and controlled Pharma Tech Royston. But "[a] corporation is . . . generally not liable for the acts of its sister corporation absent a showing that the sister corporation was an alter ego or acted as an agent." *Douglas v. Imerys Talc Am., Inc.*, No. 4:18CV1141, 2019 WL 626427, at *7 (quoting *Weston v. Progressive Comm. Holdings, Inc.*, No. 10-980, 2011 WL 231709, at *2-3 (D. Del. Jan. 24, 2011)). Showing two "companies are somehow affiliated with one another is not sufficient" to demonstrate one company should be liable for the other's acts. *Id.*

In addition, Plaintiffs argue Pharma Tech Industries must have overseen and controlled Pharma Tech Royston's manufacture of Johnson's Baby Powder because, "[o]n at least two occasions, Pharma Tech in Missouri shipped samples of talc and tricalcium phosphate intended for use in the Products to labs 'to be tested per [J&J] micro protocol" and "[t]he testing documents identify two Union, Missouri

addresses for Pharma Tech." However, Plaintiffs do not provide support in the record for how the act of Pharma Tech Industries shipping samples of talc for testing to "labs" establishes Pharma Tech Industries specifically oversaw and controlled Pharma Tech Royston's manufacture of Johnson's Baby Powder from Missouri.

Plaintiffs concede neither Pharma Tech Industries nor Pharma Tech Union manufactured, packaged, or labeled Johnson's Baby Powder and Pharma Tech Royston was the sole manufacturer, packager, and labeler of Johnson's Baby Powder.[14] And the record is devoid of evidence Pharma Tech Industries or Pharma Tech Union directed and controlled Pharma Tech Royston's manufacture of Johnson's Baby Powder in Georgia. Plaintiffs did not allege JJCI engaged in acts with Pharma Tech Industries or Pharma Tech Union in Missouri, beyond JJCI's execution of the MSA with a Missouri-based corporation, that were related to Johnson's Baby Powder. Thus, there is insufficient evidence in the record to support JJCI purposefully availed itself of the privilege of conducting activities in Missouri to establish minimum contacts with the State to satisfy due process. The trial court erred in overruling Defendants' motion to dismiss for lack of personal jurisdiction over JJCI on the two Non-Resident Plaintiffs' claims.

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[14] The only Johnson's Baby Powder produced at Pharma Tech Union in Missouri was a pilot batch of Johnson's Baby Powder Cooling Cucumber Melon in 2006, which was never sold and which no Non-Resident Plaintiff alleges they used.

Specific Jurisdiction Over J&J on the Non-Resident Plaintiffs' Claims[15]

The parties do not dispute Defendants are separate corporate and legal entities. The parties also agree personal jurisdiction regarding the Non-Resident Plaintiffs' claims over J&J exists only if JJCI's contacts may be properly imputed to J&J via agency or alter ego principles.

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[15] Plaintiffs maintain Defendants "did not adequately present" their argument that specific jurisdiction over J&J was improper to the trial court. Plaintiffs argue Defendants never challenged personal jurisdiction over J&J specifically below and only attempted to distinguish between JJCI and J&J in "eight footnotes in four separate memoranda filed between 2015 and 2018" with no accompanying evidentiary citations and minimal evidence. As such, Plaintiffs argue we should treat Defendants' argument as waived. Based on our review of the record, we find Defendants argued this issue below and the trial court considered the issue of personal jurisdiction over J&J on the Non-Resident Plaintiffs' claims based on the evidence presented. Defendants' memoranda in support of their motion to dismiss for lack of personal jurisdiction emphasized any relevant contractual relationships were solely between JJCI and Pharma Tech Industries. And Defendants specifically raised the issue of personal jurisdiction over J&J on the Non-Resident Plaintiffs' claims at the pre-trial hearing, where they argued:

> [T]here are no allegations of any contracts between the[Pharma Tech] entities and Johnson & Johnson. The only contracts are contracts between the[Pharma Tech] entities and JJCI. So the arguments that are made based on the relationship between JJCI and Pharma Tech or PTI Union, or PTI Royston, do not support exercise of jurisdiction with regard to Johnson & Johnson.

Fifteen Non-Resident Plaintiffs' Claims

We must first confront whether JJCI's minimum contacts with Missouri, as they relate to the manufacturing, packaging, and labeling of Shimmer, should be imputed to J&J so that specific jurisdiction over J&J exists on the fifteen Non-Resident Plaintiffs' claims.

The requirements of personal jurisdiction "must be met as to each defendant." *Bristol- Myers*, 137 S. Ct. at 1783. "It is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation . . . is not liable for the acts of its subsidiaries." *United States v. Bestfoods*, 118 S. Ct. 1876, 1884 (1998). "[T]wo separate corporations are to be regarded as distinct legal entities, even if the stock of one is owned partly or wholly by the other." *Mitchell v. K.C. Stadium Concessions, Inc.*, 865 S.W.2d 779, 784 (Mo. App. W.D. 1993). Even a "close, synergistic relationship" between a parent and subsidiary corporation does not transfer the subsidiary's contacts to the parent for purposes of assessing personal jurisdiction. *Goodbye Vanilla, LLC v. Aimia Proprietary Loyalty U.S. Inc.*, 196 F. Supp. 3d 985, 991 (D. Minn. 2016) (citing *Viasystems, Inc. v. EMB-Pabst St. Georgen GmbH & Co., KG*, 646 F.3d 589, 596 (8th Cir. 2011)). The "parent/subsidiary separation should be 'ignored with caution, and only when the circumstances clearly justify it.'" *Doe 1631 v. Quest Diagnostics, Inc.*, 395 S.W.3d 8, 18 (Mo. banc 2013) (quoting *Cent. Cooling & Supply Co. v. Dir. of Revenue, State of Mo.*, 648 S.W.2d 546, 548 (Mo. banc 1982)).

"Courts, both nationwide and in Missouri, recognize two doctrines by which to hold a parent corporation liable for the acts of a subsidiary." *Blanks v. Fluor Corp.*, 450 S.W.3d 308, 374 (Mo. App. E.D. 2014). The first is where an alter ego relationship is established between a parent corporation and its subsidiary. *Mid-Mo. Tel. Co. v. Alma Tel. Co.*, 18 S.W.3d 578, 582 (Mo. App. W.D. 2000). The second is where an agency relationship is established between a parent corporation and its subsidiary. *See State ex rel. Ford Motor Co. v. Bacon*, 63 S.W.3d 641, 642 (Mo. banc 2002).

Plaintiffs' brief on appeal primarily argues specific jurisdiction over J&J is proper because the MSA between JJCI and Pharma Tech Industries referenced and "included" J&J. Plaintiffs argue the MSA between JJCI and Pharma Tech Industries renders J&J subject to specific jurisdiction in Missouri because the MSA: imposed "J&J's Responsibility Standards for Suppliers and its Wood Pallet Policy"; indemnified J&J for certain losses; provided "protections for J&J's intellectual property"; and provided J&J would be copied on certain contractual notices. This argument is nothing more than a request to hold J&J liable based on a contract it did not sign simply because J&J was mentioned within the contract's fine print with no reference to agency or alter ego principles. We cannot hold the trial court properly exercised personal jurisdiction over J&J on this theory. *See Mid-Mo. Tel. Co.*, 18 S.W.3d at 582.

Although not discussed in detail in their brief, Plaintiffs' Petition alleges both that JJCI acted as an agent on behalf of J&J and J&J and JJCI were alter

egos.[16] To determine whether Plaintiffs sufficiently pled facts to support either or both of these theories, we must consider Missouri's requirements for establishing an alter ego relationship and an agency relationship.[17]

Courts will find an alter ego relationship exists between a parent corporation and its subsidiary if the "parent corporation completely dominates its subsidiary, and has created or is using the subsidiary for some improper purpose." *Blanks*, 450 S.W.3d at 377 (citing *Camelot Carpets, Ltd. v. Metro Distrib. Co.*, 607 S.W.2d 746, 750 (Mo. App. E.D. 1980)). This "alter ego" concept is commonly called "piercing the corporate veil." *Id.* at 377. To pierce the corporate veil, a plaintiff must prove these three elements:

(1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and

(2) Such control must have been used by the defendant to commit fraud or wrong, to

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[16] Plaintiffs dedicated a little over one page of their 165-page brief to the argument that specific jurisdiction over J&J is proper because "J&J and JJCI held themselves out as one and the same." They argued personal jurisdiction was proper on this ground because J&J was mentioned in several documents between JJCI and Pharma Tech Industries.

[17] For a thorough explanation of the distinctions between the "alter ego" theory and the "agency" theory, see *Blanks v. Fluor Corp.*, 450 S.W.3d 308, 375-83 (Mo. App. E.D. 2014).

perpetrate the violation of a statutory or other positive legal duty, or dishonest and unjust act in contravention of plaintiff's legal rights; and

(3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

Id. at 375-76. When piercing the corporate veil, "courts set aside and ignore the subsidiary's corporate entity to hold the parent liable." *Id.* at 380. "All activities—and liabilities—of the subsidiary become those of the parent." *Id.*

"The agency theory differs from piercing the corporate veil in theory and operation." *Id.* at 379. "Under an agency theory, the court attributes specific acts to the parent corporation, as principal, because of the parent's authorization of those acts." *Id.* "When legal liability is predicated on principles of agency, courts do not ignore or set aside the existence and entity of the subsidiary. Rather the separate corporate identity of the subsidiary is affirmed, and the two corporations remain distinct entities." *Id.* (internal citations omitted). "To establish agency, evidence must support a finding that the principal has consented to the agents acting on the principal's behalf, and the agent must be subject to the principal's control." *Hefner v. Dausmann*, 996 S.W.2d 660, 664 (Mo. App. S.D. 1999) (citing *Wray v. Samuel U. Rodgers' Cmt'y Health Ctr., Inc.*, 901 S.W.2d 167, 170 (Mo. App. W.D. 1995)). However, domination and control alone does not establish agency. *See Blanks*, 450 S.W.3d at 380-81. The "essential elements" of an agency relationship are:

1) that an agent holds a power to alter legal relations between the principal and a third party;

2) that an agent is a fiduciary with respect to matters within the scope of the agency; [and]

3) that a principal has the right to control the conduct of the agent with respect to matters entrusted to the agent . . . .

Id. at 382-83 (alteration in original) (quoting *Bacon*, 63 S.W.3d at 642).

During oral argument, Plaintiffs conceded personal jurisdiction over J&J could only be justified on an agency theory, waiving their reliance on an alter ego theory. Even if Plaintiffs had not conceded this issue, Plaintiffs' allegation that Defendants were alter egos would fail. Plaintiffs failed to plead facts alleging J&J should be held liable for the acts of JJCI as an alter ego. Plaintiffs' allegations focus entirely on JJCI's relationship with J&J and J&J's level of control over JJCI. However, "Even [if] corporations are related and one has complete control over the other, there can be no piercing of the corporate veil without a showing of impropriety in the establishment or use of the corporate form sought to be disregarded." *Blanks*, 450 S.W.3d at 376. Plaintiffs pled no impropriety in J&J's establishment of or use of JJCI and no such evidence was adduced at trial. Therefore, we cannot impute the activities of JJCI to J&J for jurisdictional purposes on an alter ego theory.

Plaintiffs' argument that an agency relationship existed between Defendants fairs no better. The

Petition includes these allegations regarding the relationship between Defendants:

- J&J "formulates and coordinates the global strategy for the 'Johnson & Johnson Family of Companies,' including [JJCI], and maintains central corporate policies requiring [JJCI] to act under the general guidance of [J&J]."
- J&J exercised an "unusually high degree of control" over JJCI's manufacturing, marketing, testing, promoting, selling, and/or distributing of the Products.
- J&J "maintains a reporting relationship with [JJCI] that is not defined by a legal, corporate relationship, but in fact crosses that corporate line."
- J&J "directed [JJCI] how it was to handle product safety communication between [JJCI] and the scientific community and consumers at large as to the hazard the PRODUCTS pose to women with respect to development of ovarian cancer."
- J&J "maintains a central global finance function that governs the entire Johnson & Johnson Family of Companies, to include [JJCI], such that [JJCI] does not function independently but under [J&J]'s umbrella."

These allegations suggest J&J exerted a high level of control over JJCI's activities. However, they are nothing more than bare assertions unsupported by the record. Plaintiffs submitted no exhibits, affidavits, or other evidence regarding J&J's alleged

domination and control over JJCI with their briefs opposing Defendants' motion to dismiss for lack of personal jurisdiction. Such "[b]are assertions of jurisdiction are insufficient" to establish personal jurisdiction. *Yaeger*, 2014 WL 3543426, at *3. In addition, even if Plaintiffs sufficiently established J&J exerted a high level of control over JJCI's activities in the record, their Petition wholly failed to allege the first and second elements of agency: that JJCI holds a power to alter legal relations between J&J and third parties and that JJCI is a fiduciary for J&J on any matters. This failure is fatal to their claim.

Plaintiffs failed to plead and prove all elements of agency. Therefore, we cannot impute the activities of JJCI to J&J for jurisdictional purposes on an agency theory. The circumstances in this case do not clearly justify ignoring the distinction between parent/subsidiary and holding J&J liable for JJCI's acts. We find the trial court erred in overruling Defendants' motion to dismiss for lack of personal jurisdiction as to J&J on the fifteen Non-Resident Plaintiffs' claims.

Two Non-Resident Plaintiffs' Claims

Because we find JJCI lacked minimum contacts with Missouri relating to the claims of the two Non-Resident Plaintiffs' who denied using Shimmer and testified they only used Johnson's Baby Powder, we find J&J also could not have had minimum contacts with Missouri relating to their claims. Therefore, we find the trial court also erred in overruling Defendants' motion to dismiss for lack of personal

jurisdiction as to J&J on the two Non-Resident Plaintiffs' claims.

Point III is granted in part and denied in part. Because "any judgment entered without personal jurisdiction over a party is void," the trial court's judgment entered against JJCI on the two Non-Resident Plaintiffs' claims and against J&J on all seventeen Non-Resident Plaintiffs' claims is reversed. *See Focus Bank v. Scott*, 504 S.W.3d 904, 907 (Mo. App. S.D. 2016) (internal quotations omitted).

Point IV: Dr. Longo's Testimony

In their fourth point relied on, Defendants argue the trial court abused its discretion in admitting Dr. Longo's testimony because they contend it "rested on insufficient facts and data, was not the product of reliable principles and methods, and did not reliably apply principles and methods to the facts, in violation of section 490.065."[18]

Standard of Review

"The trial court has considerable discretion when admitting evidence." *Jones v. City of Kan. City*, 569 S.W.3d 42, 53 (Mo. App. W.D. 2019), *overruled on other grounds by Wilson v. City of Kan. City*, — S.W.3d—, No. SC 97712, 2020 WL 2392483 (Mo. banc May 12, 2020) (citing *Mansil v. Midwest Emergency Med. Servs., P.C.*, 554 S.W.3d 471, 475 (Mo. App. W.D. 2018)). We review a trial court's decision to admit expert testimony for abuse of discretion. *State v. Rogers*, 529 S.W.3d 906, 910, 917 (Mo. App. E.D.

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[18] All statutory references are to RSMo 2017, unless otherwise indicated.

2017). "An abuse of discretion occurs when the court's ruling is 'clearly against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration.'" *Jones*, 569 S.W.3d at 53 (quoting *Mansil*, 554 S.W.3d at 475). The burden is on the appellant to prove the trial court abused its discretion and prejudice resulted. *Matter of Care & Treatment of Lester Bradley v. State*, 554 S.W.3d 440, 452 (Mo. App. W.D. 2018).

Analysis

The admissibility of expert testimony is governed by section 490.065 as amended by the Missouri Legislature effective August 28, 2017. *State v. Boss*, 577 S.W.3d 509, 517 (Mo. App. W.D. 2019); *State v. Suttles*, 581 S.W.3d 137, 146-47 (Mo. App. E.D. 2019). Since the 2017 amendment, sections 490.065.2(1)-(2) contain language identical to Federal Rule of Evidence ("FRE") 702 and 703 and provide:

> (1) A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> > (a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> >
> > (b) The testimony is based on sufficient facts or data;

> (c) The testimony is the product of reliable principles and methods; and
>
> (d) The expert has reliably applied the principles and methods to the facts of the case[.]

> (2) An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Suttles, 581 S.W.3d at 146-47 (quoting § 490.065.2(1)-(2)).

Under section 490.065.2, "trial courts must act as gatekeepers to ensure that the testimony sought to be admitted . . . is 'not only relevant, but reliable.'" *State ex rel. Gardner v. Wright*, 562 S.W.3d 311, 317 (Mo. App. E.D. 2018) (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589, 113 S. Ct. 2786, (1993)). "This Court since has held that because the language of Section 490.065 now mirrors FRE 702 and 703, and because FRE 702 and 703 are interpreted under *Daubert* and its progeny, the cases interpreting those federal rules remain relevant and useful in guiding our interpretation of Section 490.065." *Suttles*, 581 S.W.3d at 147 (citing *Jones*, 569 S.W.3d

at 54). "Several federal circuits boil the gatekeeping function of trial courts under [FRE] 702 down to its essence in a useful three-part test: (1) whether the expert is qualified, (2) whether the testimony is relevant, and (3) whether the testimony is reliable." *Wright*, 562 S.W.3d at 319 (collecting cases). Missouri courts have borrowed this three-part test to determine the admissibility of expert testimony. *See id.*; *Jones*, 569 S.W.3d at 54.

Defendants' point on appeal challenges only the reliability of Dr. Longo's testimony. "[R]eliability, under section 490.065.2, is determined by many factors," including those set out in *Daubert*. *Boss*, 577 S.W.3d at 517. The *Daubert* factors allow courts to consider the following when determining if an expert's testimony is reliable:

> (1) whether the expert's technique or theory can be or has been tested; (2) whether the technique or theory has been subject to peer review and publication; (3) the known potential error rate of the technique or theory when applied and the existence and maintenance of standards and controls; and (4) whether the technique or theory has been generally accepted in the scientific community.

Id. (citing *Daubert*, 509 U.S. at 593-94, 113 S. Ct. 2786). "Although [section] 490.065.2 is patterned after [FRE] 702, and the Supreme Court of the United States interpreted [FRE] 702 in *Daubert*, this Court has held that 'the *Daubert* factors themselves are not controlling' in applying [section] 490.065." *State v. Marshall*, 596 S.W.3d 156, 160 (Mo. App. W.D. 2020) (quoting *Suttles*, 581 S.W.3d at 147). The

admissibility inquiry is flexible and "other factors may also be relevant." *Wright*, 562 S.W.3d at 318. "[N]o single factor is necessarily dispositive of the reliability of a particular expert's testimony." *Id.*

Defendants contend Dr. Longo's testimony was unreliable because: (1) his conclusion that Johnson's Baby Powder contained asbestos was based on his testing of previously opened, "secondhand" samples dating back to the 1930s and 1940s and (2) his conclusion that Plaintiffs were exposed to high levels of asbestos was based on improper extrapolations from a videotaped simulation in which an "extreme outlier" sample of Johnson's Baby Powder was used. We address each of Defendants' arguments.

Johnson's Baby Powder Bottle Samples

At trial, Plaintiffs' expert Dr. Longo testified he sampled thirty-six bottles of Defendants' Products with a transmission electron microscope. Dr. Longo testified about the methods he used to obtain the samples: he purchased one bottle off-the-shelf at a store; one bottle came from the J&J museum; one bottle came from a Plaintiff's home; and the rest were bought by Plaintiffs' lawyers, both from eBay and off-the-shelf at a store, and sent to him. Dr. Longo testified twenty of the thirty-six bottles tested positive for asbestos. In an earlier deposition, Dr. Longo testified none of the bottles sent to him by Plaintiffs' lawyers were sealed and each had been previously opened. He testified he did not know the chain of custody of those bottles before Plaintiffs' lawyers sent them to him.

Defendants challenge the reliability of Dr. Longo's testimony that twenty of the thirty-six bottles of Johnson's Baby Powder tested contained asbestos under section 490.065.2. Defendants complain Dr. Longo's testimony was unreliable because Dr. Longo "had no idea whether the samples he tested consisted of [D]efendants' Powders in their original condition." Defendants argue that, because Dr. Longo's testimony was based on facts and data derived from "secondhand" bottles of Johnson's Baby Powder previously opened, the data underpinning his testimony lacked "reasonable assurance" that the bottles of Johnson's Baby Powder tested were not contaminated or altered after leaving Defendants' control. Defendants argue there were "strong indications" the talc in the bottles tested by Dr. Longo was contaminated or altered, as several of the testing samples contained impurities not associated with manufacturing Johnson's Baby Powder, such as the minerals "richterite" and "diatomaceous earth."

Dr. Longo's testimony is not rendered unreliable under section 490.065.2 because several samples he tested for asbestos were previously opened before they were sent to him. The sufficiency of the facts and data and reliability of the principles and methods Dr. Longo used in concluding the samples of Johnson's Baby Powder he tested contained asbestos were sufficiently established.

In an earlier deposition, Dr. Longo testified he took steps to verify the samples he tested were in fact samples of Johnson's Baby Powder. He testified he performed a "particle size analysis" on a scanning electron microscope "to compare the size distributions of the talc particles as well as any fibrous particles in

there as compared to . . . a current version of Johnson's Baby Powder that was bought at a local store." He testified he conducted this analysis to "see how the size particles compared from sample to sample to sample." Dr. Longo found "the particle size distribution was consistent among and between them . . . and consistent with [Defendants'] own particle size specifications." Citing an article by J&J executives, Dr. Longo noted this finding was significant because "particle size of the talc raw material used in . . . products varies widely by product type and by manufacturer." Also in an earlier deposition, Dr. Longo testified he considered whether the thirty-six samples of Johnson's Baby Powder he tested had been contaminated. Dr. Longo stated the caps and lids of the Johnson's Baby Powder he tested could not be removed by hand and there would be observable evidence if the cap or lid had been removed. Dr. Longo concluded none of the samples he analyzed showed any signs of tampering.

"The trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." *Eichacker v. Eichacker*, 596 S.W.3d 177, 185 (Mo. App. E.D. 2020) (citing *Wright*, 562 S.W.3d at 317). "In deciding whether to admit an expert's testimony, the circuit court is required to ensure that all of the statutory factors are met; however the court is not required to consider the degree to which they are met." *Kivland v. Columbia Orthopaedic Grp., LLC*, 331 S.W.3d 299, 311 (Mo. banc 2011). "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Wright*, 562 S.W.3d at 318

(quoting *Daubert*, 509 U.S. at 596, 113 S. Ct. 2786). "So long as the expert is qualified, any weakness in the expert's knowledge is for the jury to consider in determining what weight to give the expert." *Kivland*, 331 S.W.3d at 311.

Here, the parties presented the jury with competing theories of whether the Johnson's Baby Powder contained asbestos. Rather than deeming any theory contrary to Defendants' theory unreliable, it was appropriate for the trial court to submit Dr. Longo's expert opinion to the jury. Defendants had plenty of opportunities to highlight possible sources of contamination in the samples of Johnson's Baby Powder Dr. Longo tested during cross-examination. Defendants' challenge to Dr. Longo's use of previously opened samples of Johnson's Baby Powder goes to the weight of his testimony, not its admissibility.

Defendants also urge us to find the trial court abused its discretion in allowing Dr. Longo to testify Johnson's Baby Powder contained asbestos after testing previously opened samples because several other courts have done so when faced with Dr. Longo's or a similar expert's opinion.[19] However, Defendants'

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[19] *See e.g.*, *Fishbain v. Colgate-Palmolive Co.*, No. A-1786-15T2, 2019 WL 4072135, at *9-11 (N.J. App. Aug. 29, 2019) (excluding expert testimony regarding samples of talc obtained from eBay without a reliable chain of custody); *Weirick v. Brenntag N. Am. Inc.*, No. JCCP 4674 (Cal. Super. Ct. July 23, 2018) (order excluding Dr. Longo's testimony regarding samples of talc because the Products he tested "came from multiple sources (clients, collectors, and off-the-shelf purchases by the plaintiff firms) and multiple eras (unknown, 1950s, 1960s, 1970s, 1990s, 2000s, and 2010s)" and plaintiffs "fail[ed] to explain how the samples were stored, repackaged, delivered, etc."); *Nosse v.*

assertion that Dr. Longo's testimony must be excluded because other courts have deemed it inadmissible does not persuade us the trial court abused its discretion. Plaintiffs note several other courts have admitted Dr. Longo's testimony about whether Johnson's Baby Powder contains asbestos.[20] "An abuse of discretion will not be found if reasonable minds could differ as to the propriety of the trial court's action." *Bell v. Redjal*, 569 S.W.3d 70, 81 (Mo. App. E.D. 2019) (citing *Koon v. Walden,* 539 S.W.3d 752, 761 (Mo. App. E.D. 2017)). The fact courts across the country do not agree on whether this testimony is

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Arvinmeritor, Inc., No. BC603354 (Cal. Super. Ct. June 29, 2016) (in a pre-trial hearing, the trial court stated "it's unreasonable for an expert to rely on the test that was done in a product that cannot be traced back to the product at issue and draw conclusions from the testing on those products that what he tested was indeed the product at issue."); *Barlow v. Colgate-Palmolive Co.*, No. 24X11000783, slip op. at 16-17 (Bal. Cir. Ct. Nov. 13, 2015) ("Given the numerous hands through which these containers pass within the secondary Internet market, the Court finds that it is indeed possible that the eBay samples have been subjected to tampering or altered in some fashion, thereby leaving them in a significantly different condition from the time they were manufactured.").

[20] *See e.g.*, *Lanzo v. Cyprus Amax Minerals Co.*, No. L-7385-16AS, at *10 (N.J. Sup. Ct. Dec. 22, 2017) (in a pre-trial hearing, the trial court admitted Dr. Longo's testimony based on sampling of previously opened bottles, finding his testimony "compelling" because he established the "consistency of the product" throughout the samples. The trial court held other issues with his testimony would "go to the weight of the evidence," not admissibility); *Bostic v. 3M Co.*, No. 2017-CP-16-0400, 122, 125 (S.C. Com. Pl. May 11, 2018) (in a pre-trial hearing, the trial court held Dr. Longo's testimony based on previously opened samples of Johnson's Baby Powder was admissible).

admissible is proof that reasonable minds can, and do, differ on this subject.

Videotaped Simulation and Testimony Regarding Exposure Levels

To demonstrate the level of "dust" in the air that can be generated by using Johnson's Baby Powder, Dr. Longo conducted a videotaped simulation of a man wearing a respirator applying Johnson's Baby Powder to his legs and/or underwear. In the simulation, which lasted five minutes, the man applied Johnson's Baby Powder for a few seconds. The man sat in one place for the remainder of the five minutes, allowing air samples to be gathered. Air filters were then analyzed using standard protocols for determining occupational exposure to airborne asbestos fibers.

The simulation showed the man applying Johnson's Baby Powder under regular lighting and under "Tyndall" lighting, which Dr. Longo described as "high intensity lighting" that shows "invisible[,] small microscopic particles . . . in the air [that] normally you can't see." Dr. Longo testified that, when the simulation was viewed under Tyndall lighting, the jury could see how much "dust" was actually generated from the man's application of Johnson's Baby Powder. Dr. Longo explained to the jury that the simulation showed "how the particles of talc get up into the breathing zone, get up into – into your surrounding" even when Johnson's Baby Powder is applied solely below the waist. He testified that, under normal lighting, "[y]ou wouldn't realize you were in this cloud of dust using . . . Johnson['s] Baby Powder."

After the simulation was shown to the jury, Dr. Longo testified the sample of Johnson's Baby Powder used in the simulation was a post-1953 bottle with the highest concentration of asbestos of all the bottles he tested; the bottle had "fifteen million asbestos fibers in bundles per gram," or 630 million total asbestos fibers. Based on the number of asbestos fibers in the high-concentration sample from the simulation, Dr. Longo then testified that a person buying a fourteen-ounce bottle of Johnson's Baby Powder would be exposed to 5.9 billion asbestos fibers. He testified a person buying a twenty-two-ounce bottle of Johnson's Baby Powder would be exposed to nine billion asbestos fibers.

Defendants advance several reasons why Dr. Longo's simulation and related testimony should have been excluded. However, none have merit. First, Defendants complain the bottle of Johnson's Baby Powder Dr. Longo used in the simulation was an "extreme outlier" that "purportedly had amphibole levels more than 30 times higher than the average Dr. Longo claimed to have found in all the secondhand samples combined." (alterations omitted). But Dr. Longo testified "there was a specific reason [he] used" the post-1953, high-concentration bottle in the simulation. He explained another scientist published a similar, peer-reviewed study of the asbestos levels in cosmetic talc manufactured by Cashmere Bouquet. He testified the Cashmere Bouquet study used a cosmetic talc sample with eighteen million asbestos fibers in bundles per gram. Because Dr. Longo wanted to see if Johnson's Baby Powder "performed the same" as Cashmere Bouquet, he testified used a bottle of Johnson's Baby Powder with "fifteen million

asbestos fibers in bundles per gram," or 630 million asbestos fibers, in the simulation. Dr. Longo's reliance on a similar, published, peer-reviewed study when selecting the sample used in the simulation provides the data underlying his testimony with a sufficient indicia of reliability.

Defendants also claim Dr. Longo's testimony that Plaintiffs exposure levels to asbestos were just as high as the man in the simulation were unreliable because Dr. Longo failed to establish a similarity of circumstances and conditions between the simulation and Plaintiffs' real-life use of the Products. "A court may properly admit experimental evidence if the tests were conducted under conditions substantially similar to the actual conditions." *Champeau v. Fruehauf*, 814 F.2d 1271, 1278 (8th Cir. 1987) (quoting *Randall v. Warnaco, Inc.*, 677 F.2d 1226, 1233-34 (8th Cir. 1982)). "Admissibility, however, does not depend on perfect identity between actual and experimental conditions. Ordinarily, dissimilarities affect the weight of the evidence, not its admissibility." *Id.*

The conditions in the simulation were not identical to Plaintiffs' real-life exposures. However, the simulation did not purport to be a recreation of Plaintiffs' exact uses of Johnson's Baby Powder. Instead, it was offered solely to show the level of dust involved in applying Johnson's Baby Powder is "beyond what [a juror] would normally perceive." The trial court instructed the jury accordingly. The trial court instructed the jury to consider the simulation evidence "only with respect to the demonstration of the ability of dust particles to remain arborne" and not

"on the issues of how much of the dust depicted is or is not asbestos."

Last, Defendants argue Dr. Longo's video demonstration should have been excluded from evidence because allowing the jury to view it was prejudicial in that "the only effect of presenting the jury with a vivid image of a shirtless man in an oversized gas mask dousing himself in Johnson's Baby Powder was to convey to the jury the very point that was so hotly contested—that the Powders can kill." However, "[d]emonstrating that a piece of evidence is prejudicial is not enough to warrant exclusion . . . by itself since virtually all evidence presented against a [party] can be considered prejudicial." *United States v. Kapordelis*, 569 F.3d 1291, 1313 (11th Cir. 2009). Rather, exclusion is warranted only when the evidence creates a danger of unfair prejudice, confusion of the issues, or misleading the jury that substantially outweighs the probative value of the evidence. *Still v. Ahnemann*, 984 S.W.2d 568, 575 (Mo. App. W.D. 1999) (citing FED. R. EVID. 403). Defendants concede the video demonstration was relevant. The video was not shocking, confusing, or misleading. "Defendants' arguments regarding the exaggeration of the appearance of dust would be appropriate arguments in challenging the weight of the video." *See Lipson v. On Marine Servs. Co.*, No. C13-1747, 2013 WL 6536923, at *3 (W.D. Wash. Dec. 13, 2013).

Again, Defendants urge us to find the trial court abused its discretion in allowing Dr. Longo to testify Plaintiffs were exposed to high levels of asbestos based on his extrapolations from the simulation because several other courts have excluded the exact

video Dr. Longo showed the jury in this case, or a similar one.[21] And, again, Plaintiffs point out other courts have admitted similar experiments conducted by Dr. Longo and the testimony accompanying them.[22] Becasue "[a]n abuse of discretion will not be found if reasonable minds could differ as to the propriety of the trial court's action," we cannot find the trial court abused its discretion in admitting Dr. Longo's simulation and related testimony. *Bell*, 569 S.W.3d at 81 (citing *Koon*, 539 S.W.3d at 761).

Dr. Longo's testimony met the standards of reliability under section 490.065.2. We find no error in the trial court's decision to admit his testimony.

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[21] *See, e.g.*, *Herford v. AT&T Corp.*, No. BC646315, at *81 (Cal. Super. Ct. Sept. 27, 2017) (in a pre-trial hearing, the trial court excluded Dr. Longo's video simulation); *In re Garlock Sealing Techs., LLC*, 504 B.R. 71, 80-81 (Bankr. W.D.N.C. 2014) (describing Dr. Longo's simulation video study as "pseudo-science at best" because they "were carried out in such a way as to produce the highest results possible and to overdramatize the process."); *Krik v. Crane Co.*, 71 F. Supp. 3d 784, 791 (N.D. Ill. 2014) (excluding Dr. Longo's video simulation because the study "had not been conducted in 'substantially the same conditions' as the alleged exposure."); *Dugas v. 3M Co.*, No. 3:14-cv-1096-J-39JBT, 2016 WL 3946802, at *6 (M.D. Fla. June 21, 2016) (excluding one of Dr. Longo's studies because they were not conducted in "substantially similar" conditions to those the plaintiff encountered and its admission would "invite[ ] a plethora of unfair inferences.").

[22] *See e.g.*, *Lipson v. On Marine Servs. Co.*, No. C13-1747, 2013 WL 6536923, at *2-3 (W.D. Wash. Dec. 13, 2013) (admitting Dr. Longo's video demonstrations using Tyndall lighting and accompanying testimony into evidence because the trial court found doing so would "assist the jury in understanding the evidence and . . . Dr. Longo's opinions [were] relevant and reliable").

Point IV is denied.

Point V: Dr. Madigan's Testimony

In their fifth point relied on, Defendants argue the trial court abused its discretion in admitting Dr. Madigan's testimony because they contend it "rested on insufficient fa[c]ts and data, was not the product of reliable principles and methods, and did not reliably apply principles and methods to the facts, in violation of section 490.065."

Standard of Review

"The trial court has considerable discretion when admitting evidence." *Jones*, 569 S.W.3d at 53 (citing *Mansil*, 554 S.W.3d at 475). We review a trial court's decision to admit expert testimony for abuse of discretion. *Rogers*, 529 S.W.3d at 910, 917.

Analysis

At trial, Plaintiffs' expert Dr. Madigan testified on direct-examination that Plaintiffs' counsel asked him to review the samples of Johnson's Baby Powder that Dr. Longo found contained asbestos. Based on Dr. Longo's findings, Dr. Madigan was asked to calculate the statistical probability that a Plaintiff was exposed to asbestos if she was exposed to a certain number of containers in her life (i.e., 20, 50, 100). He testified he "rel[ied] heavily on Dr. Longo's work" in reaching his opinions. When Dr. Madigan prepared his report, Dr. Longo had tested thirty-three bottles of Johnson's Baby Powder. Of those thirty-three bottles tested, Dr. Longo detected asbestos in nineteen bottles and did not detect asbestos in fourteen bottles.

Based on Dr. Longo's test results, Dr. Madigan testified the statistical probability that a Plaintiff was exposed to asbestos in Johnson's Baby Powder "depends on how many containers [she] w[as] exposed to"; "the more containers [she] w[as] exposed to, the more likely [she] w[as] exposed to asbestos." He testified, "[I]f a [P]laintiff were exposed to 50 containers [of Johnson's Baby Powder], [his] calculations suggest[ ] the probability they were *not* exposed to asbestos is very, very small"; "It's the chance of winning [the] Powerball [lottery] with 10 tickets."[23] (emphasis added). He testified, "If a woman used 50 bottles of [Johnson's Baby Powder], based on [his] assumptions, there's a 99.999999997 percent chance she's exposed to asbestos in that bottle" and the chance she's exposed to asbestos is "basically guaranteed." Dr. Madigan also testified if a Plaintiff were exposed to 100 containers of Johnson's Baby Powder, the odds she was not exposed to asbestos is equivalent to winning the Powerball lottery with just one ticket.

Defendants contend Dr. Madigan's testimony was unreliable because he based his statistical analysis entirely on Dr. Longo's "unreliable" test results. Defendants argue that, even if Dr. Longo's testimony regarding whether there was any asbestos in Johnson's Baby Powder was admissible, Dr. Madigan's expert testimony should have been

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[23] Powerball is a popular American lottery game. The published odds of winning the Powerball jackpot are about one in 292 million. *See* Alicia Adamczyk, CNBC, *These Are the Odds You'll Win Tonight's $350 Million Powerball Jackpot*, June 1, 2019, https://www.cnbc.com/2019/05/31/these-are-the-odds-youll-win-the-350-million- powerball-jackpot.html.

excluded because he failed to demonstrate Dr. Longo's samples were representative of the Johnson's Baby Powder produced by Defendants over any relevant time period. Defendants suggest neither Dr. Longo nor Dr. Madigan established Dr. Longo's test samples were representative of Johnson's Baby Powder produced by Defendants and instead merely relied on each other to "assume" the samples were representative.

Because we find Dr. Longo's testimony regarding his findings of asbestos in samples of Johnson's Baby Powder was reliable, as further discussed in point four of this opinion, we are not persuaded by Defendants' argument that Dr. Madigan's testimony was unreliable solely because he based his statistical analysis on Dr. Longo's test results. We are similarly not persuaded by Defendants' argument that Dr. Madigan's testimony was unreliable because he failed to demonstrate Dr. Longo's samples were representative samples from which generalizations could be drawn.

"Courts have recognized the need for non-biased, representative sampling in various contexts where experts have attempted to draw generalizable conclusions from limited data." *In re: Pella Corp. Architect & Designer Series Windows Mktg., Sales Practices & Prod. Liab. Litig.*, 214 F. Supp. 3d 478, 492 (D.S.C. 2016). Here, the representativeness of Dr. Longo's samples was established. At trial, Dr. Madigan testified about the representativeness of Dr. Longo's samples. He testified that, although he had "no personal knowledge of whether Dr. Longo had any objective or neutral protocols" in deciding which bottles were sent to Dr. Longo for testing, Dr. Longo's

samples "couldn't possibly be biased because there's no way of knowing which one has asbestos and which one doesn't." Dr. Madigan testified he "discussed [representativeness] at length with Dr. Longo," and "the process by which the 33 [bottles] were chosen seemed reasonable."

Dr. Longo's testimony corroborates Madigan's testimony. Dr. Longo testified he tested bottles from the 1930s, '40s, '50s, '60s, and '70s through the early-to-mid 2000s because those were the time frames in which Plaintiffs used Johnson's Baby Powder before developing cancer. He testified, when selecting samples, he found it most significant that the samples being tested came from the mines used by Defendants during the relevant time periods. Dr. Longo testified he knew the bottles selected for testing were manufactured during those time periods because their containers matched Defendants' manufacturing specifications as they changed over the years.

Dr. Longo also reliably established the samples sent to him were authentic Johnson's Baby Powder. In an earlier deposition, Dr. Longo testified he performed a "particle size analysis" on a scanning electron microscope "to compare the size distributions of the talc particles as well as any fibrous particles in there as compared to . . . a current version of Johnson's Baby Powder that was bought at a local store." He testified he conducted this analysis to "see how the size particles compared from sample to sample to sample." Dr. Longo found "the particle size distribution was consistent among and between them . . . and consistent with [Defendants'] own particle size specifications," verifying the samples he tested were representative of Johnson's Baby Powder. Dr. Longo

also testified he considered whether the thirty-six samples of Johnson's Baby Powder he tested had been contaminated. Dr. Longo stated the caps and lids of the Johnson's Baby Powder he tested could not be removed by hand and there would be observable evidence if the cap or lid had been removed. Based on his observations of the samples, Dr. Longo concluded none showed signs of tampering.

The record is devoid of evidence that Dr. Longo selected bottles for testing that he thought would yield a certain result. Any weaknesses in Dr. Longo's testing samples could have been highlighted on cross-examination of him in the same manner Defendants cross-examined Dr. Madigan about the representativeness of Dr. Longo's samples. Notably, Defendants chose not to cross-examine Dr. Longo about the representativeness of his samples or sources of possible contamination. While the burden is on Plaintiffs to show a sampling methodology is reliable, Defendants presented no evidence suggesting the samples selected by Dr. Longo and relied upon by Dr. Madigan lack trustworthiness and are not representative. We conclude Dr. Longo's samples were representative of Johnson's Baby Powder produced in the years Plaintiffs claimed to have used it. Therefore, Dr. Madigan's testimony does not violate section 490.065.

Point V is denied.

Point VI: Dr. Egilman's Testimony

In their sixth point, Defendants argue the trial court abused its discretion in admitting Dr. Egilman's testimony because they contend it "rested on

insufficient facts and data, was not the product of reliable principles and methods, and did not reliably apply principles and methods to the facts, in violation of section 490.065."

Standard of Review

"The trial court has considerable discretion when admitting evidence." *Jones*, 569 S.W.3d at 53 (citing *Mansil*, 554 S.W.3d at 475). We review a trial court's decision to admit expert testimony for abuse of discretion. *Rogers*, 529 S.W.3d at 910, 917.

Analysis

At trial, Plaintiffs' expert Dr. Egilman testified he examined the amount of asbestos Plaintiffs were exposed to after using Johnson's Baby Powder. Dr. Egilman testified he interviewed each living Plaintiff, or a relative of the deceased Plaintiffs, and gathered histories of their Johnson's Baby Powder use. Based on the results of Dr. Longo's simulation study, and the published, peer-reviewed study of Cashmere Bouquet Dr. Longo also relied upon, Dr. Egilman testified the amount of asbestos dust released during personal use of Johnson's Baby Powder is 1.9 fibers per cubic centimeter of space ("f/cc"). Dr. Egilman testified he relied on the Cashmere Bouquet study in calculating Plaintiffs' personal use exposures to asbestos because, although the Cashmere Bouquet study involved a competitor's product, "some of the talc in that product came from the same mine as Johnson's Baby Powder mine." Based on a 1972 National Institute for Occupational Safety and Health ("NIOSH") study, which tested Johnson's Baby Powder to estimate asbestos exposures during diapering, and J&J studies

that estimated asbestos exposure during diapering, Dr. Egilman testified the amount of asbestos dust released during diapering was 2.2 f/cc for adults and 1.8 f/cc for babies. Using these figures and Plaintiffs' histories, Dr. Egilman calculated the asbestos exposure estimates for Plaintiffs, specifically highlighting the exposure estimates of three Plaintiffs in his trial testimony. Dr. Egilman concluded Plaintiffs' exposures to Johnson's Baby Powder more than doubled their baseline risk of developing ovarian cancer.

Defendants maintain Dr. Egilman's measurements "lacked a reasonable factual basis" for several reasons. However, their arguments are insufficient to render Dr. Egilman's testimony inadmissible. "[Q]uestions relating to the bases and sources of an expert's opinion affect the *weight* to be assigned that opinion rather than its *admissbility* and should be left for the jury's consideration." *Primrose Operating Co. v. Nat'l Am. Ins. Co.*, 382 F.3d 546, 562 (5th Cir. 2004) (alterations in original) (internal quotations omitted). The problems Defendants cite with Dr. Egilman's testimony go to the weight of his testimony, not its admissibility.

First, Defendants complain Dr. Egilman's finding that the amount of asbestos dust released during personal use of Johnson's Baby Powder is 1.9 f/cc lacks reliability. Defendants argue the Cashmere Bouquet study provided no reliable basis for Dr. Egilman's measurements because, although that product contained some talc from an Italian mine Defendants used to produce Johnson's Baby Powder, Cashmere Bouquet contained some talc from mines in Montana and North Dakota never used by Defendants to

produce Johnson's Baby Powder. However, the fact the Cashmere Bouquet study examined a different product does not render Dr. Egilman's opinion testimony factually baseless. Dr. Egilman testified he consulted the same Cashmere Bouquet study Dr. Longo also consulted when Dr. Longo chose which sample of Johnson's Baby Powder to use during his simulation experiment. Dr. Longo acknowledged Cashmere Bouquet contained a "different type of asbestos" than Johnson's Baby Powder. But Dr. Longo testified the differences in Cashmere Bouquet and Johnson's Baby Powder did not impact the results reached in his simulation study; Dr. Longo testified his simulation study reached "very similar results" to the Cashmere Bouquet study.

Next, Defendants complain Dr. Egilman's finding that the amount of asbestos dust released during use of Johnson's Baby Powder while diapering is 2.2 f/cc for adults and 1.8 f/cc for babies lacks reliability. They complain the 1972 NIOSH study from which he drew those figures was flawed because it did not measure solely the concentration of asbestos in the air; rather, it measured the concentration of all fiber types without distinguishing which fibers were asbestos fibers. This fact alone, however, does not render Dr. Egilman's testimony unreliable and inadmissible. Dr. Egilman explained that, after consulting several studies, his expert opinion was that Johnson's Baby Powder contained asbestos. He further explained that, in his view, whether the 1972 NIOSH study identified fibers specifically as "asbestos" was inconsequential, as the only other possible fiber that could be present in a talc sample is a "talc fiber, which

is chemically identical to anthophyllite asbestos and structurally the same."

Last, Defendants complain Dr. Egilman's testimony "contradicted—without any explanation or support—the scientific consensus that perineal talc use has not been shown to cause ovarian cancer." "However, an expert's testimony is not rendered unreliable by opposing expert testimony that contradicts it, because contradictory fact or opinion evidence merely establishes a fact dispute." *Sanford v. Russell*, 387 F. Supp. 3d 774, 785 (E.D. Mich. May 16, 2019). Indeed, *Daubert* instructs us that "shaky but admissible evidence" should be attacked through "[v]igorous cross-examination" and "presentation of contrary evidence" to the jury. *See id.*; *see also Daubert*, 509 U.S. at 595, 113 S. Ct. at 2786.

Dr. Egilman's testimony on Plaintiffs' asbestos exposure was based on reasonable methodology and was admissible under section 490.065.2. Dr. Egilman considered the scientific literature, discussed the scientific literature, and explained why he believed the studies he relied on were important. The weaknesses Defendants note in Dr. Egilman's testimony are weaknesses Defendants could, and did, attack and highlight to the jury at trial through the cross-examination of Dr. Egilman and the presentation of their own expert witness.

Point VI is denied.

Point VII: Dr. Felsher's Testimony

In their seventh point, Defendants argue the trial court abused its discretion in admitting Dr. Felsher's testimony because they contend it "rested on

insufficient facts and data, was not the product of reliable principles and methods, and did not reliably apply principles and methods to the facts, in violation of section 490.065."

Standard of Review

"The trial court has considerable discretion when admitting evidence." *Jones*, 569 S.W.3d at 53 (citing *Mansil*, 554 S.W.3d at 475). We review a trial court's decision to admit expert testimony for abuse of discretion. *Rogers*, 529 S.W.3d at 910, 917.

Analysis

Dr. Felsher conducted a "differential diagnosis" and concluded Plaintiffs' exposure to talc caused their ovarian cancer. "In performing a differential diagnosis, a[n expert] begins by 'ruling in' all scientifically plausible causes of the plaintiff's injury. The [expert] then 'rules out' the least plausible causes of injury until the most likely cause remains." *Glastetter v. Novartis Pharm. Corp.*, 252 F.3d 986, 989 (8th Cir. 2001). "The final result of a differential diagnosis is the expert's conclusion that a defendant's product caused (or did not cause) the plaintiff's injury." *Id.* "[A] medical opinion about causation, based upon a proper differential diagnosis, is sufficiently reliable to satisfy *Daubert.*" *Turner v. Iowa Fire Equip. Co.*, 229 F.3d 1202, 1208 (8th Cir. 2000). "Because a differential diagnosis is presumptively admissible, . . . a . . . court may exercise its gatekeeping function to exclude only those diagnoses that are scientifically invalid." *Glastetter*, 252 F.3d at 989. Defendants maintain Dr. Felsher's testimony "did not qualify as a differential diagnosis"

because he had no scientifically valid bases for "ruling in" talc as a potential cause of Plaintiffs' ovarian cancer or "ruling out" the other risk factors associated with each Plaintiff. We disagree.

Defendants argue Dr. Felsher improperly "ruled in" talc as a potential cause of Plaintiffs' ovarian cancer based solely on the assumptions that Dr. Longo and Dr. Madigan correctly identified asbestos in Johnson's Baby Powder and Dr. Egilman correctly calculated Plaintiffs' exposures to asbestos from Johnson's Baby Powder. Defendants argue Dr. Felsher's basis for "ruling in" talc as a potential cause of Plaintiffs' ovarian cancer was unreliable because Dr. Longo's, Dr. Madigan's, and Dr. Egilman's testimony was unreliable. However, section 490.65.2(2) authorizes the acceptance of an expert's opinion even though that opinion may be based on facts or data supplied by a third party, including another expert. *Schreibman v. Zanetti*, 909 S.W.2d 692, 698 (Mo. App. W.D. 1995). The statute provides:

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.

§ 490.065.2(2). The fact Dr. Felsher assumed the accuracy of their opinions without checking them is inconsequential because Dr. Longo, Dr. Madigan, and Dr. Egilman each vouched for the reasonableness and accuracy of their tests and opinions, as explained in points four through six above. Dr. Felsher

appropriately "ruled in" talc as a potential cause of Plaintiffs' ovarian cancer.

Defendants argue Dr. Felsher failed to "rule out" other potential causes of Plaintiffs' ovarian cancer. They argue Dr. Felsher acknowledged all Plaintiffs had several risk factors for developing ovarian cancer but failed to assess them "in terms of weight" or explain why talc exposure, as opposed to other risk factors, was the most likely cause of their ovarian cancer. "A differential diagnosis that fails to take serious account of other potential causes may be so lacking that it cannot provide a reliable basis for an opinion on causation." *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 265 (4th Cir. 1999). "However, '[a] medical expert's causation conclusion should not be excluded because he or she has failed to rule out every possible alternative cause of a plaintiff's illness.'" *Id.* (quoting *Heller v. Shaw Indus. Inc.*, 167 F.3d 146, 156 (3d Cir. 1999)). "The alternative causes suggested by a defendant affect the weight that the jury should give the expert's testimony and not the admissibility of the testimony, unless the expert can offer no explanation for why she has concluded an alternative caused offered by the defendant was not the sole cause." *Id.* at 265 (internal citations, quotations, and alterations omitted).

Here, Dr. Felsher considered other potential causes for Plaintiffs' ovarian cancer. Dr. Felsher testified at length regarding the personal histories of each Plaintiff and their various risk factors for developing ovarian cancer. He admitted certain risk factors, such as genetic mutations, family history of cancer, an endometriosis or polycystic ovarian syndrome diagnosis, being overweight, and using certain

medications, increase the risk of developing ovarian cancer. Dr. Felsher acknowledged cancer "can start in a lot of ways." But Dr. Felsher opined exposure to asbestos "can act as gasoline" and cause cancer to "become metastatic[and] become[] resist[a]nt to therapy." He testified exposure to asbestos aggravates cancer by promoting its spread and halting the body's defense mechanisms. He testified this aggravation occurs because asbestos is a carcinogen that activates mesothelial cells, which cause ovarian cancer to spread from the ovaries to other parts of the body. Dr. Felsher concluded, based on each of the twenty-two Plaintiffs' personal histories, asbestos directly contributed to cause their ovarian cancer.

Perceived faults in an expert's differential diagnosis are matters for cross-examination that do not affect admissibility. *See McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1044 (2d Cir. 1995). On cross-examination, Defendants questioned Dr. Felsher about why genetic mutations were not the sole cause of Plaintiffs' ovarian cancer. Dr. Felsher explained severe errors in cell division were unlikely to be the sole cause of a Plaintiff's ovarian cancer because such genetic mutation is "not something that generally happens unless you've done something that makes it much more likely to happen. Like a carcinogen." On cross-examination, Defendants chose not to question Dr. Felsher about why the other negative risk factors, such as family history of cancer, an endometriosis or polycystic ovarian syndrome diagnosis, being overweight, and using certain medications, were not the sole cause of each Plaintiff's ovarian cancer.

Dr. Felsher's testimony made clear that he considered and excluded other potential causes for Plaintiffs' ovarian cancer. Furthermore, on cross-examination, Dr. Felsher explained why he did not believe genetic mutations, alone, accounted for their ovarian cancer. Accordingly, Dr. Felsher's alleged failure to account for all possible alternative causes for Plaintiffs' ovarian cancer did not prohibit the admissibility of his opinion as to causation.

Point VII is denied.

Point VIII: Substantial Evidence of Causation

In their eighth point, Defendants argue the trial court erred in overruling their motions for directed verdict and judgment notwithstanding the verdict because Plaintiffs failed to present substantial evidence that Defendants' Products were the cause in fact of their ovarian cancer. Defendants maintain Plaintiffs failed to present substantial evidence that Defendants' Products were the cause in fact of Plaintiffs ovarian cancer because their "general causation theory was contrary to the overwhelming scientific consensus."[24]

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[24] Defendants also argue Plaintiffs failed to make a submissible case for causation because, "with the exclusion of Drs. Felsher, Egilman, Longo, and/or Madigan, a jury could not find in [P]laintiffs' favor on the issues of specific and general causation." For the reasons explained in points four through seven of this opinion, the testimony of Drs. Felsher, Egilman, Longo, and Madigan was admissible. Therefore, Defendants' argument, to the extent it hinges on the inadmissibility of those experts' testimony, is moot and will not be further addressed.

Standard of Review

"The standard of review of a trial court's denial of motions for directed verdict and judgment notwithstanding the verdict are treated the same." *Twin Chimneys Homeowners Ass'n v. J.E. Jones Const. Co.*, 168 S.W.3d 488, 495 (Mo. App. E.D. 2005) (citing *Erdman v. Condaire, Inc.*, 97 S.W.3d 85, 88 (Mo. App. E.D. 2002)). We must determine "whether the plaintiff made a submissible case." *Hodges v. City of St. Louis*, 217 S.W.3d 278, 279-80 (Mo. banc 2007) (footnote omitted). "A case can be submitted only if 'each and every fact essential to liability is predicated upon legal and substantial evidence.'" *Guidry v. Charter Comm'ns, Inc.*, 269 S.W.3d 520, 527 (Mo. App. E.D. 2008) (quoting *Dhyne v. State Farm Fire & Cas. Co.*, 188 S.W.3d 454, 456 (Mo. banc 2006)). "In determining whether the plaintiff has made a submissible case, we will view the evidence in the light most favorable to the verdict, giving the plaintiff the benefits of all reasonable inferences from the verdict, and disregarding unfavorable evidence." *Id.* (citing *Hodges*, 217 S.W.3d at 280). We will only find the plaintiff has failed to make a submissible case where there is "a complete absence of probative fact to support the jury's conclusion." *Dhyne*, 188 S.W.3d at 457. "A directed verdict is inappropriate 'unless reasonable minds could only find in favor of the defendants.'" *Guidry*, 269 S.W.3d at 527 (quoting *Holtmeier v. Dayani*, 862 S.W.2d 391, 395 (Mo. App. E.D. 1993)).

Analysis

To make a submissible case for negligence, "a plaintiff must show that 'the defendant had a duty to

protect him [or her] from injury, the defendant failed to perform that duty, and the defendant's failure proximately caused his [or her] injury." *Poage v. Crane Co.*, 523 S.W.3d 496, 508 (Mo. App. E.D. 2017) (quoting *Strong v. Am. Cyanamid Co.*, 261 S.W.3d 493, 506 (Mo. App. E.D. 2007)). To make a submissible case for strict liability, a plaintiff must show:

> (1) the defendant sold a product in the course of its business; (2) the product was then in a defective condition, unreasonably dangerous when put to a reasonably anticipated use; (3) the product was used in a manner reasonably anticipated; and (4) the plaintiff was damaged as a direct result of such defective condition as existed when the product was sold.

Id. "Under both strict liability and negligence theories, the plaintiff is required to show a causal connection between the defendant's conduct and the plaintiff's injury." *Id.* A prima facie showing of causation requires the plaintiff to show the defendant's conduct was "more probably than not" a cause of injury. *Wagner*, 368 S.W.3d at 350 (quoting *Sill v. Burlington N. R.R.*, 87 S.W.3d 386, 394 (Mo. App. S.D. 2002)). Missouri requires showing two types of causation: causation in fact (or "but for" causation) and "proximate" causation. *Poage*, 523 S.W.3d at 508; *see also Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 863, 865 (Mo. banc 1993).

Defendants' eighth point argues Plaintiffs failed to establish Defendants' Products were the cause in fact of their ovarian cancer. Whether Defendants' Products were the "cause in fact" of Plaintiffs' ovarian

cancer is a factual question left for the jury. *Poage*, 523 S.W.3d at 508. Under Missouri law, the plaintiff must show the negligence of the defendant "directly cause[d]" or "directly contribute[d] to cause" his or her injury to establish causation in fact. *Poage*, 523 S.W.3d at 508. The plaintiff need not prove the defendant's negligence was "the exclusive cause" of his or her injury. *Wagner*, 368 S.W.3d at 350-51.

Defendants argue there is an absence of probative fact from which a jury could find for Plaintiffs on the issue of causation because there is an "overwhelming body of . . . epidemiological evidence" concluding there is no causal relationship between cosmetic talc and ovarian cancer. Defendants highlight evidence favorable to them and ask us to conclude Plaintiffs failed to make a submissible case of causation because Plaintiffs presented no evidence "refut[ing] or explain[ing]" Defendants' evidence. However, Defendants' argument is fundamentally flawed. First, it ignores our standard of review, which requires us to "view the evidence in the light most favorable to the verdict, giving the plaintiff the benefits of all reasonable inferences from the verdict, and disregarding unfavorable evidence." *Guidry*, 269 S.W.3d at 527. Second, it suggests, without legal support, that the only way Plaintiffs could make a submissible case of causation in fact was by "refut[ing] or explain[ing]" Defendants' evidence.

The evidence, when viewed in the light most favorable to the verdict, reveals Plaintiffs met their burden to establish causation. Plaintiffs presented testimony from several experts that asbestos causes ovarian cancer and asbestos-containing talc causes ovarian cancer. Plaintiffs' expert Dr. Moline testified

asbestos causes or significantly contributes to cause ovarian cancer. She testified asbestos causes ovarian cancer because it is microscopic in size, can travel throughout the bloodstream and the body, and can be found in every organ in the body, including the ovaries. She testified her opinion is consistent with the findings of the International Agency for Research on Cancer ("IARC"), the American Cancer Society, the U.S. Department of Health and Human Services, the Environmental Protection Agency, and the National Cancer Institute. Dr. Moline testified that, if a person uses powder containing asbestos in their perineal region, "it can travel into the peritoneal cavity" and cause ovarian cancer. She testified if talc is "laced . . . with asbestos," the asbestos would be carried along with the talc into the ovaries. Dr. Felsher also testified at length about the role asbestos plays in causing ovarian cancer. He testified asbestos causes cancer cells to become invasive and spread through the inflammation and irritation of the mesothelial cells. He also testified about how asbestos makes cancer more aggressive and therapy-resistant. In addition, Plaintiffs' expert Dr. Rosner testified several scientific studies have reported a "link" between asbestos and ovarian cancer and have associated asbestos and talc-based products.

Plaintiffs also presented testimony from several experts that the talc in Johnson's Baby Powder contained asbestos. In her deposition, Plaintiffs' expert Dr. Blount testified she tested one bottle of Johnson's Baby Powder she purchased off-the-shelf from a store and found it contained asbestos. Dr. Longo similarly testified he tested thirty-six bottles of Johnson's Baby Powder and found twenty bottles

contained asbestos. And Dr. Egilman testified there is asbestos in Johnson's Baby Powder after reading nearly 1,400 studies conducted by the FDA, J&J, and several other competitor companies.

Plaintiffs also presented testimony from Dr. Felsher that exposure to asbestos-containing talc from Defendants' Products specifically caused Plaintiffs' ovarian cancer. Dr. Felsher testified at length regarding the personal histories of each Plaintiff and their various risk factors for developing ovarian cancer. He admitted certain risk factors, such as genetic mutations, family history of cancer, an endometriosis or polycystic ovarian syndrome diagnosis, being overweight, and using certain medications, increase the risk of developing ovarian cancer. Dr. Felsher acknowledged cancer "can start in a lot of ways." But Dr. Felsher opined exposure to asbestos "can act as gasoline" and cause cancer to "become metastatic[and] become[] resist[a]nt to therapy." He testified that, based on each of the twenty-two Plaintiffs' personal histories, asbestos directly contributed to cause their ovarian cancer.

Defendants' attacks on Plaintiffs' expert's testimony regarding causation are simply that their conclusions are "not yet established as fact in the scientific community." *See Bonner v. ISP Techs., Inc.*, 259 F.3d 924, 932 (8th Cir. 2001) (rejecting a defendant's argument that an expert's testimony regarding causation should be excluded because it was "not yet established as fact in the scientific community."). However, Defendants have not shown that any scientific theories or studies indicate talc powders are incapable of causing ovarian cancer. Indeed, they admit in their brief the FDA has opined "a possible

association" between cosmetic talc and ovarian cancer "is difficult to dismiss" and the IARC has opined "[p]erineal use of talc-based body powder is possibly carcinogenic."

Defendants could, and did, present their own expert witnesses to counter Plaintiffs' causation theory. "[I]t is common that medical experts often disagree on . . . causation," and "questions of conflicting evidence must be left for the jury's determination." *See Hose v. Chi. Nw. Transp. Co.*, 70 F.3d 968, 976 (8th Cir. 1995). We cannot find there is a complete absence of probative fact regarding the element of causation. Based on the evidence Plaintiffs adduced at trial, a jury could have reasonably found Defendants' Products caused Plaintiffs' injuries. Plaintiffs made a submissible case for the jury, and the trial court properly denied Defendants' motions for directed verdict and judgment notwithstanding the verdict.

Point VIII is denied.

IX: Clear and Convincing Evidence Justifying Punitive Damages

In their ninth point, Defendants argue the trial court erred in overruling their motions for directed verdict and judgment notwithstanding the verdict on Plaintiffs' demand for punitive damages. Defendants argue Plaintiffs failed to present clear and convincing evidence that Defendants "knew or had reason to know there was a high degree of probability that their talc causes ovarian cancer" and "improperly influenced" regulators, scientists, and the talc industry. Thus, according to Defendants, punitive damages were unwarranted.

Standard of Review

"Whether sufficient evidence exists to support an award of punitive damages is a question of law, which we review *de novo*." *Poage*, 523 S.W.3d at 515 (internal quotations omitted). "In reviewing a circuit court's overruling of a motion for directed verdict or judgment notwithstanding the verdict, this Court views the evidence in the light most favorable to the verdict, gives the plaintiff all reasonable inferences, and disregards all contrary evidence and inferences." *Barron*, 529 S.W.3d at 800 (citing *Fleshner v. Pepose Vision Institute, P.C.*, 304 S.W.3d 81, 95 (Mo. banc 2010)). "Only evidence that tends to support the submission should be considered." *Blanks*, 450 S.W.3d at 401.

Analysis

Under Missouri law, punitive damages may be submitted to the jury if (1) some element of outrageous conduct is demonstrated that (2) shows the defendant acted with a "willful, wanton or malicious culpable state." *Poage*, 523 S.W.3d at 515. To recover punitive damages, "[u]nder both negligence and strict liability theories, the plaintiff must demonstrate that the defendant showed a complete indifference to or conscious disregard for the safety of others."[25] *Id.*

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[25] In a negligence action, punitive damages may be awarded only if the plaintiff shows the defendant "*knew or had reason to know* a high degree of probability existed that the action would result in injury. *Poage v. Crane Co.*, 523 S.W.3d 496, 515 (Mo. App. E.D. 2017) (emphasis added) (citing *Letz v. Turbomeca Engine Corp.*, 975 S.W.2d 155, 164-65 (Mo. App. W.D. 1997)). In a strict liability action, the plaintiff must show "the defendant

This claim must be proven by clear and convincing evidence. *Blanks*, 450 S.W.3d at 400. "[C]lear and convincing evidence is that which tilts the scales in the affirmative when weighed against the evidence in opposition; evidence which clearly convinces the fact finder of the truth of the proposition to be proved." *Cook v. Polineni*, 967 S.W.2d 687, 690-91 (Mo. App. E.D. 1998) (internal quotations omitted). In determining whether a plaintiff has met his or her burden, a court must consider

> whether the evidence—giving full play to the jury's right to determine credibility, weigh the evidence and draw justifiable inferences of fact—is sufficient to permit a reasonable juror to conclude that the plaintiff established with convincing clarity—that is, that it was highly probable—that the defendant's conduct was outrageous because of evil motive or reckless indifference.

Peters v. Gen. Motors Corp., 200 S.W.3d 1, 25 (Mo. App. W.D. 2006) (quoting *Lopez-Vizcaino v. Action Bail Bonds, Inc.*, 3 S.W.3d 891, 893 (Mo. App. W.D. 1999)). Where there are multiple defendants, "[p]unitive damages are to be assessed against each tortfeasor depending, among other facts, upon his degree of culpability." *Heckadon v. CFS Enters., Inc.*, 400 S.W.3d 372, 381 n.9 (Mo. App. W.D. 2013) (citing *Taylor v. Compere*, 230 S.W.3d 606, 611 (Mo. App. S.D. 2007)); *Moore v. Shelton*, 694 S.W.2d 500, 501 (Mo. App. S.D. 1985).

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placed in commerce an unreasonably dangerous product with *actual knowledge* of the product's defect." *Id.* (emphasis added).

Viewing the evidence in the light most favorable to the verdict, we find Plaintiffs proved with convincing clarity that Defendants engaged in outrageous conduct because of an evil motive or reckless indifference. According to Plaintiffs' evidence, Defendants knew the Products, which they referred to internally as their "company trust-mark," "golden egg," and "sacred cow," contained asbestos. In a 1969 memorandum, Defendants acknowledged their Products contained tremolite asbestos and asbestos could be dangerous. Defendants' scientist T.M. Thompson warned that, "until [there is] at least substantial evidence . . . to the effect that the presence of Tremolite in our talc does not produce adverse effects, we should not extend its usage beyond an absolute minimum." Memoranda from the 1970s also reveal Defendants knew the Products contained tremolite asbestos. After Dr. Seymour Lewin, "Consultant to the FDA," reported asbestos in samples of Defendants' Products in 1972, Defendants hired Walter C. McCrone Associates, Inc. ("McCrone") to examine the samples. McCrone confirmed the samples contained tremolite. In 1975, McCrone tested more samples of Defendant's Products for asbestiform minerals and found some contained "rather high" levels of amphibole asbestiform fibers.

In an undated internal letter, Defendants' scientist Bill Ashton noted "[t]here are trace quantities [of tremolite] present . . . . Levels are extremely low but occasionally can be detected optically. *This is not new*." (emphasis added). A 1974 internal report found "extremely low" levels of chrysotile were detected in three samples of Johnson's Baby Powder. A 1973

internal memorandum, discussing one of Defendants' mines, stated:

> We should not rely on the 'Clean Mine' approach as a protective device for Baby Powder in the current Asbestos or Asbestos-Form controversy. We believe this mine to be very clean; however, we are also confident that fiber forming or fiber type minerals could be found. The usefulness of the 'Clean Mine' approach for asbestos only is over.

According to Plaintiffs' evidence, Defendants' knowledge of asbestos in the Products continued into the 1980s, 1990s, and well into the 2000s. In 1984, air filters at one of Defendants' mines were tested by the Mine Safety and Health Administration ("MSHA"). MSHA found the air filters contained "5.8% anthophyllite, an asbestiform amphibole." In 1998, an internal letter showed Defendants consulted with Dr. Blount, a PhD mineralogist, who tested a talc sample from Defendants' Vermont mine and alerted Defendants she "believe[d] that Johnson & Johnson's Vermont talc contains trace amounts of asbestos which are well below those specified by OSHA." At trial, Dr. Blount testified Defendants' Products have contained asbestos since the 1970s or earlier. In 2003, Defendants' talc supplier Luzenac America Technical Center reported it detected tremolite in a sample of Defendants' talc. In 2004, Hayward Laboratory also reported a sample of Johnson's Baby Powder contained asbestos. Plaintiffs even produced evidence that Defendants' website initially touted their "talc-based consumer products have always been asbestos free" but was later edited to read their "talc-based

products *are* asbestos free" because they admitted they could not "say 'always.'" (emphasis added).

According to Plaintiffs' evidence, Defendants also knew of the potential safety hazards caused by the presence of asbestos in cosmetic talc products. In 1972, FDA representatives, the Cosmetic Talc and Fragrance Association ("CTFA"), J&J, and others attended a meeting to discuss the preliminary results of an analysis of over 100 talc-containing cosmetic products for asbestos contamination. A memorandum summarizing that meeting noted, "There was no disagreement between FDA and industry scientists present at this meeting about the potential safety hazard that the presence of asbestos in talc containing cosmetic product poses to the consumer." And Defendants' talc supplier Rio Tinto Minerals warned Defendants in the 2000s that, "[b]ecause there is no recognized 'safe' level of exposure to asbestos, the presence of any amount in talc would be a serious problem."

In the 1970s, Defendants addressed several alternative methods that could remove fibers from talc "to better protect [their] powder franchise," including the substitution of cornstarch for talc in the Products. Defendants acknowledged cornstarch, "by its very nature does not contain fibers. Furthermore, it is assimilated by the body." Defendants noted investigating replacing talc with cornstarch should "receive top priority." However, Defendants also noted such a replacement would require them to develop explosion proof facilities and undergo merchandising changes. The other alternative methods discussed by Defendants included improving the flotation technique used to separate talc from

asbestos and using a process to remove a large portion of the fine particles found in talc. However, Defendants noted that, under these latter approaches, "no final product will ever be made which will be totally free from respirable particles. We are talking about a significant reduction in fine particle count but not 100% clean-up." In 2008, an internal email revealed Defendants discussed replacing talc with cornstarch in the Products but were reluctant to do so because it would be costly. In an email, one Defendant employee urging the use of cornstarch instead of talc stated:

> Basically, I'm thinking it would be in the brand's best interest to develop a strategy to move out of the baby aisle for our talc product and either create a direct Adult proposition or *simply replace the talc ingredient with cornstarch*. This would align with our Best for Baby charter.
>
> *I understand this is a $70M business in the US alone, unsupported. So any changes are risky*. However, given a number of other ingredient issues we are facing, this seems like an easy fix and win. *I know this will be controversial and we'll need to work hard to justify the cost implications* – I also see great positives associated with it in our challenge to maintain Mom's trust and deliver on our baby expertise.

(emphasis added).

Plaintiffs' evidence further showed Defendants worked tirelessly to ensure the industry adopted testing protocols not sensitive enough to detect

asbestos in every talc sample. In the 1970s, Defendants recommended the FDA adopt their "J-41" method of testing for asbestos in cosmetic talc products. The J-41 method uses an x-ray diffraction instrument to detect asbestos in a talc sample. Only if the x-ray diffraction instrument detects an amphibole mineral is the talc sample is further analyzed under polarized light microscopy to determine whether asbestos is present.

Over several years, Defendants consistently found the Products contained no asbestos using the J4-1 method. However, another method for testing cosmetic talc for asbestos existed and Defendants knew it: the "pre-concentration method." The pre-concentration method separates talc particles from asbestos particles so imaging equipment can accurately display the amount of asbestos present in a talc sample. The process involves placing a talc sample in a heavy liquid and using a centrifuge to separate the talc particles from the asbestos particles. The talc particles float, while the asbestos particles sink. This technique prevents asbestos from "hiding" behind talc particles and enhances imaging equipment's ability to detect asbestos.

Defendants admitted in an internal company document that using "concentrating techniques w[ould] permit a good laboratory to identify asbestos or tremolite in a talc sample." And, in the early 1970s, Defendants used the pre-concentration method to test samples of their Products for asbestos and detected tremolite. But Defendants deliberately chose not to use the pre-concentration method when testing the Products for asbestos because they feared doing so would cause *too much* asbestos to be detected.

Internal documents revealed Defendants decided not to adopt the pre-concentration method because the pre-concentration method made it "possible to arrive at levels of detectability of asbestos in talc in the [parts per million] range" and would likely "be too sensitive."

Defendants then aggressively recommended the FDA adopt the J-41 method and not the pre-concentration method as the industry standard for asbestos testing in talc. Internal documents revealed Defendants did so to protect their own interests:

- "[I]t looks like the FDA is getting into separation and isolation methodology which will mean concentration procedures . . . . [T]here are many talcs on all markets which will be hard pressed in supporting purity claims, when ultra sophisticated assay separation and isolation techniques are applied. Chances are that this FDA proposal will open up new problem areas with asbestos and talc minerals."
- "We believe it is critical for the C.T.F.A. to now recommend [the J-41 method] to the F.D.A. before the art advances to more sophisticated techniques with higher levels of sensitization. We deliberately have not included a concentration technique as we felt it would not be in worldwide company interests to do this."

Plaintiffs adduced additional evidence that Defendants published articles downplaying the safety hazards associated with talc through deception without revealing their funding. For example, Defendants hid the fact they funded a 2008 article by

Joshua Muscat and Michael Huncharek that concluded there is no indication cosmetic talc causes cancer. Plaintiffs also adduced evidence that Defendants attempted to discredit scientists who published or sought to publish unfavorable studies regarding their Products. For example, after Defendants learned the Dutch Consumer Organization reported asbestos in the Products in 1973, Defendants asked the Dutch Consumer Organization "not to make any publications about asbestos in baby powder[ ] before [Defendants] agreed with their findings." And, after the Mount Sinai School of Medicine published findings Defendants deemed "hostile" regarding asbestos in Johnson's Baby Powder in 1975, Defendants demanded those findings be "immediate[ly] removed" from materials being disseminated at an occupational health conference. The following year, Defendants pressured Mount Sinai to retract the results of its study and issue a press release to that effect. Defendants noted Mount Sinai did so "reluctantly."

A reasonable inference from all this evidence is that, motivated by profits, Defendants disregarded the safety of consumers despite their knowledge the talc in their Products caused ovarian cancer. The jury, exercising its "right to determine credibility, weigh the evidence and draw justifiable inferences of fact," could have reasonably concluded it was highly probable Defendants' conduct "was outrageous because of evil motive or reckless indifference" based on this evidence. *See Peters*, 200 S.W.3d at 25.

Defendants' arguments to the contrary are unavailing. First, Defendants argue punitive damages were unwarranted because several studies

and reports concluded their Products contained no asbestos. To support their argument, Defendants cite to a host of evidence presented in their case-in-chief that many public health agencies have found there is insufficient evidence to conclude cosmetic talc causes ovarian cancer; the FDA has found no warning labels should be required on cosmetic talc products; several epidemiological studies found no association between cosmetic talc and ovarian cancer; many any regulatory agencies and laboratories have found no asbestos in the Products; and Defendants' routine testing measures detected no asbestos in the Products. These arguments ask us to entertain evidence and inferences from the evidence contrary to the jury's verdict, defying our standard of review. *See Barron*, 529 S.W.3d at 800.

Second, Defendants contend their adherence to the J4-1 method for asbestos testing fully complied with and exceeded industry standards and, thus, could not rise to the level of "evil motive or reckless indifference to the rights of others." They argue "Plaintiffs' proposed concentration method has been known since the 1970s and no public-health agency has ever adopted it, including EPA, NIOSH, OSHA, and U.S. Pharmacopeia"; thus, punitive damages are unwarranted. However, our Court has held "mere compliance with industry standards" is not enough to prevent a trial court from finding a plaintiff made a submissible case for punitive damages. *See Ellis v. Kerr-McGee Chemical, L.L.C.*, No. ED 74835, 1999 WL 969278, at *3-4 (Mo. App. E.D. Oct. 26, 1999) (holding a plaintiff made a submissible case for punitive damages in a negligence case despite a defendant's argument it complied with industry

standards). Further, Plaintiffs adduced compelling evidence suggesting they improperly influenced the industry, causing it to adopt a deficient testing standard. A reasonable jury could find such actions outrageous. *See Blanks*, 450 S.W.3d at 403 (holding plaintiffs made a submissible case for punitive damages in a mass tort case where plaintiffs adduced evidence "the defendants hid information from regulators[and] resisted regulatory changes).

Last, Defendants urge we must find no clear and convincing evidence exists that Defendants engaged in conduct that was outrageous because of evil motive or reckless indifference because other courts have so held in other cases where they were named defendants. They cite *Johnson & Johnson Talcum Powder Cases*, wherein the California Court of Appeals held the plaintiffs did not make a submissible case for punitive damages where no regulatory agency or scientific experts had drawn a causal connection between perineal talc use and ovarian cancer. 37 Cal. App. 5th 292, 333 (Cal. Ct. App. 2019). They also cite *In re Johnson & Johnson Talcum Powder Cases*, No. BC628228, 2017 WL 4780572, at *16 (Cal. Super. Oct. 20, 2017), wherein the Superior Court of California held the plaintiffs did not make a submissible case for punitive damages where the evidence they presented suggested no more than "an on-going debate in the scientific and medical community about whether talc more probably than not causes ovarian cancer."

These decisions are persuasive authority at best. "Out of state appellate decisions do not constitute controlling precedent in Missouri courts." *Grillo v. Glob. Patent Grp. LLC*, 471 S.W.3d 351, 356 (Mo. App. E.D. 2015) (alterations omitted) (quoting *Craft v.*

Philip Morris Cos., Inc., 190 S.W.3d 368, 380 (Mo. App. E.D. 2005)). "While cases from other jurisdictions 'can provide useful and insightful guidance,' they 'are not conclusive or binding precedent.'" *State v. McIntosh*, 540 S.W.3d 418, 425 n.5 (Mo. App. W.D. 2018) (quoting *State ex rel. Safety Roofing Sys., Inc. v. Crawford*, 86 S.W.3d 488, 493 n.4 (Mo. App. S.D. 2002)). Even so, the California cases are factually distinguishable. In both cases, no evidence was adduced that samples of Defendants' Products contained asbestos or Defendants sought to conceal this fact by persuading the industry to adopt the J-41 method rather than a pre-concentration testing method. Here, new evidence was adduced that samples of Defendants' Products contained asbestos and Defendants sought to persuade the industry to adopt the less sensitive J-41 method rather than a pre-concentration testing method. As outlined above, the evidence adduced in this trial showed clear and convincing evidence Defendants engaged in conduct that was outrageous because of evil motive or reckless indifference.

We hold Plaintiffs made a submissible case for punitive damages against Defendants. Therefore, the trial court did not err in overruling Defendants' motions for directed verdict and judgment notwithstanding the verdict.

Point IX is denied.

X: Punitive Damages

In their final point, Defendants argue the trial court erred in denying their motion to vacate or remit the jury's punitive damages award because the award

violates due process under both the United States and Missouri Constitutions. Defendants argue the jury's $4.14 billion punitive damages award is grossly excessive and arbitrary, furthering no legitimate purpose. Defendants also argue the jury's $4.14 billion punitive damages award impermissibly punished J&J for injuries to "nonparties."

Standard of Review

Appellate courts review constitutional challenges to a punitive damages award *de novo*. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003). "[A]lthough the determination on punitive damages is 'a function primarily left for the jury,' we must ensure that the award does not infringe upon a defendant's constitutional rights.'" *Poage*, 523 S.W.3d at 522 (citing *Kelly v. Bass Pro Outdoor World, LLC*, 245 S.W.3d 841, 850 (Mo. App. E.D. 2007)). "Exacting appellate review ensures that an award of punitive damages is based upon 'an application of law, rather than a decisionmaker's caprice.'" *Campbell*, 538 U.S. at 418 (internal quotations omitted) (quoting *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 436 (2001)).

Analysis

"Although compensatory damages and punitive damages are typically awarded at the same time by the same decisionmaker, they serve distinct purposes." *See Cooper Indus., Inc.*, 532 U.S. at 432; *Campbell*, 538 U.S. at 416. Where compensatory damages are imposed to "redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct," punitive damages are

imposed for purposes of "deterrence and retribution." *Campbell*, 538 U.S. at 416 (internal quotations and citations omitted). "Essentially, punitive damages are meant to 'serve the same purposes as criminal penalties.'" *Poage*, 523 S.W.3d at 520 (quoting *Campbell*, 538 U.S. at 417). Punitive damages awards, however, cannot be imposed without adherence to constitutional limitations. *Campbell*, 538 U.S. at 416. The Due Process Clause of the Fourteenth Amendment prohibits grossly excessive damage awards. *Id.* "To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." *Id.* at 417.

No "simple mathematical formula" exists to help us determine whether a punitive award is grossly excessive; "the relevant constitutional line is 'inherently imprecise.'" *Krysa v. Payne*, 176 S.W.3d 150, 156 (Mo. App. W.D. 2005) (quoting *Cooper Indus., Inc.*, 532 U.S. at 434-35). "To satisfy due process, the amount of punitive damages should reflect the extent of the defendant's offense and be related to the resulting actual or potential harm." *Blanks*, 450 S.W.3d at 410. To ensure a punitive damages award comports with due process, the United States Supreme Court has instructed appellate courts to consider three guideposts: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."

Campbell, 538 U.S. at 418 (citing *BMW of North Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)).

In weighing these guideposts, "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Campbell*, 538 U.S. at 419 (alterations omitted) (citing *Gore*, 517 U.S. at 575). Reprehensibility of the defendant's conduct is determined by considering several factors, including whether:

> the harm caused was physical or economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the targets of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, deceit, or mere accident.

Id. (citing *Gore*, 517 U.S. at 576-77). In evaluating the reprehensibility of JJCI's actions, "we view the evidence and all reasonable inferences in the light most favorable to the verdict and disregard all contrary evidence and inferences." *Krysa*, 176 S.W.3d at 157.

We find there was significant reprehensibility in Defendants' conduct. The harm suffered by Plaintiffs was physical, not just economic. Plaintiffs each developed and suffered from ovarian cancer. Plaintiffs underwent chemotherapy, hysterectomies, and countless other surgeries. These medical procedures caused them to experience symptoms such as hair loss, sleeplessness, mouth sores, loss of

appetite, seizures, nausea, neuropathy, and other infections. Several Plaintiffs died,[26] and surviving Plaintiffs experience recurrences of cancer and fear of relapse. All Plaintiffs suffered mentally and emotionally. Their ovarian cancer diagnoses caused them constant worry and fear.

After considering the substantial evidence presented by Plaintiffs that Defendants discussed the presence of asbestos in their talc in internal memoranda for several decades; avoided adopting more accurate measures for detecting asbestos and influenced the industry to do the same; attempted to discredit those scientists publishing studies unfavorable to their Products; and did not eliminate talc from the Products and use cornstarch instead because it would be more costly to do so, the jury found Defendants knew of the asbestos danger in their Products when they were sold to the public. This finding supports that Defendants' exposure of consumers to asbestos over several decades was done with reckless disregard of the health and safety of others.

"The second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff." *Gore*, 517 U.S. at 580. The United States Supreme Court has advised "a comparison between the compensatory award and the punitive

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[26] During the pendency of this appeal alone, Plaintiffs Gail Ingham, Annette Koman, Toni Roberts, Andrea Lynn Schwartz-Thomas, and Olga Salazar have died. Suggestions of Death and Motions for Substitution were filed on their behalf, all of which were granted by this Court.

award is significant." *Id.* However, there is no "mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." *Id.* Instead, "[w]hether the disparity between punitive damages and the harm caused violates due process is determined on a case-by-case basis" and should be guided by "a general concern of reasonableness." *Poage*, 523 S.W.3d at 523 (first quotation); *Gore*, 517 U.S. at 583 (second quotation) (alterations omitted) (quoting *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 458 (1993)). "[T]he precise award in any case 'must be based on the peculiar facts and circumstances of the defendant's conduct and the harm to the plaintiff.'" *Blanks*, 450 S.W.3d at 411 (quoting *Campbell*, 538 U.S. at 425). "[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Campbell*, 538 U.S. at 425. "Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in the range of 500 to 1." *Id.* (citing *Gore*, 517 U.S. at 582).

Here, the jury awarded $550 million in actual damages ($25 million multiplied by twenty-two Plaintiffs) jointly and severally against Defendants. The jury recommended, and the trial court awarded, $990 million in punitive damages against JJCI and $3.15 billion against J&J, yielding ratios of 1.8:1 for JJCI and 5.72:1 for J&J.[27]

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[27] We have calculated these ratios in accordance with the Missouri Supreme Court's approach in *Lewellen v. Franklin*, 441

However, in Point III we held the trial court erred in exercising personal jurisdiction over JJCI on two Non-Resident Plaintiffs' claims and over J&J on all seventeen Non-Resident Plaintiffs' claims. "[A]ny judgment entered without personal jurisdiction over a party is void." *Focus Bank*, 504 S.W.3d at 907. Therefore, JJCI is liable for $500 million in actual damages ($25 million multiplied by twenty Plaintiffs) and J&J is jointly and severally liable for $125 million in actual damages with JJCI ($25 million multiplied by five Plaintiffs).

Given our reduction of actual damages, we must reduce the punitive damages awards against Defendants proportionally to "reflect the ratio of punitive to actual damages assessed originally by the trial court." *See Ogilvie v. Fotomat Corp.*, 641 F.2d 581, 586-87 (8th Cir. 1981) (reducing punitive damages awards proportionally to reflect the reduction of actual damages awarded to plaintiffs); *see also Senn v. Manchester Bank of St. Louis*, 583 S.W.2d 119, 138-39 (Mo. banc 1979) (same). This approach ensures the original judgment of the jury is given effect, while excessive damage awards are avoided. *Ogilvie*, 641 F.2d at 587.

Because we determined there is personal jurisdiction over JJCI on twenty of the twenty-two Plaintiffs' claims, we reduce the punitive damages award against JJCI to $900 million. Because we determined there is personal jurisdiction over J&J on

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S.W.3d 136 (Mo. banc 2014). In *Lewellen*, the court divided each individual punitive damages award by the entire actual damages award where defendants were jointly and severally liable for all actual damages.

five of the twenty-two Plaintiffs' claims, we reduce the punitive damages award against J&J to $715,909,091.[28] The adjusted actual damages amounts and punitive damages amounts yield ratios of 1.8:1 for JJCI and 5.72:1 for J&J. These ratios, as adjusted, are well within the limits of punitive damages consistently upheld. *See e.g.*, *Barnett v. La Societe Anonyme Turbomeca France*, 963 S.W.2d 639, 661 (Mo. App. W.D. 1997), overruled on other grounds by *Badahman v. Catering St. Louis*, 395 S.W.3d 29 (Mo. banc 2013) (upholding a 3:1 ratio); *Poage*, 523 S.W.3d at 523-24 (upholding a 6:1 ratio); *Mansfield v. Horner*, 443 S.W.3d 627, 645-46 (Mo. App. W.D. 2014) (upholding a 11:1 ratio); *Bogle v. McClure*, 332 F.3d 1347, 1362 (11th Cir. 2003) (upholding a 4:1 ratio); *Gibson v. Moskowitz*, 523 F.3d 657, 665 (6th Cir. 2008) (upholding a 2:1 ratio); *Brand Mktg. Grp. LLC v. Intertek Testing Servs., N.A., Inc.*, 801 F.3d 347, 366 (3d Cir. 2015) (upholding a 5:1 ratio).

Defendants claim a punitive damages ratio of 1:1 is the "outermost" constitutional limit in cases where the jury has awarded "substantial damages." Defendants cite several federal appellate decisions that have remitted punitive damages awards from higher ratios to a 1:1 ratio when "substantial" compensatory damages were awarded. *See e.g.*, *Lompe v. Sunridge Partners, LLC*, 818 F.3d 1041 (10th Cir. 2016); *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594 (8th Cir. 2005); and *Morgan v. New York Life Ins. Co.*, 559 F.3d 425 (6th Cir. 2009). However, "[w]hile an appellate court can look to other decided cases for guidance, they are often not

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[28] This figure has been rounded to the nearest dollar amount.

determinative, for each case presents its own peculiar facts and circumstances which must be evaluated." *Barnett*, 963 S.W.2d at 661.

The United States Supreme Court has stated, "When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 501 (2008) (internal alterations and quotations omitted). However, the Court has also emphasized "there are no rigid benchmarks that a punitive damages award may not surpass." *Campbell*, 538 U.S. at 425; *see also TXO Prod. Corp.*, 509 U.S. at 462 (upholding a ratio as high as 526:1). We find the ratios of 1.8:1 for JJCI and 5.72:1 for J&J appropriate, given the facts and circumstances before us.

"High-ratio punitive damage awards are sometimes necessary in order to have a sufficient deterrent effect." *See Blanks*, 450 S.W.3d at 411. Indeed, "[a] much larger amount of punitive damages is required to have a deterrent effect on a multi-billion dollar corporation than a smaller business." *Poage*, 523 S.W.3d at 524. "[A] larger punitive damages award is justified to promote Missouri's legitimate interest of deterring companies from putting unreasonably dangerous products into our State's stream of commerce." *Id.*

Because Defendants are large, multi-billion dollar corporations, we believe a large amount of punitive damages is necessary to have a deterrent effect in this case. However, based on the evidence, we believe a larger amount of punitive damages is needed to deter

J&J's conduct than JJCI's conduct. While both corporations are multi-billion dollar corporations, J&J's net worth is considerably larger than JJCI's net worth. At trial, Defendants stipulated JJCI's net worth is $13.3 billion and J&J's net worth is $63.2 billion. Furthermore, Defendants' decision to chart their course of reprehensible conduct began with J&J long before JJCI was spun off as a separate entity in 1979 and engaged in reprehensible conduct of its own. Given this evidence, the higher ratio of 5.72:1 for J&J is justified.

"Regardless of culpability, however, heavier punitive awards have been thought to be justifiable when wrongdoing is hard to detect." *Id.*; *see also Gore*, 517 U.S. at 582 ("A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine."). It is impossible to place monetary value on the physical, mental, and emotional anguish Plaintiffs suffered because of their injury caused by Defendants. In addition, Plaintiffs adduced evidence ovarian cancer can take many years to develop after exposure to an asbestos-containing product. The time between the use of Defendants' asbestos-containing Products and the manifestation of symptoms of ovarian cancer makes it difficult to detect the harm they suffered. *See Poage*, 523 S.W.3d at 524. Given these facts and circumstances, the ratios of 1.8:1 for JJCI and 5.72:1 for J&J are reasonable and comply with due process.

Under the third guidepost, we must evaluate "the disparity between the punitive damages award and the 'civil penalties authorized or imposed in comparable cases.'" *Campbell*, 538 U.S. at 428

(quoting *Gore*, 517 U.S. at 575). However, as the parties agree, "violations of common law tort duties often do not lend themselves to a comparison with statutory penalties." *See Lompe*, 818 F.3d at 1070; *see also Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 419 (Utah 2004) ("[T]he quest to reliably position any misconduct within the ranks of criminal or civil wrongdoing based on penalties affixed by the legislature can be quixotic."). Accordingly, "This factor 'is accorded less weight in the reasonableness analysis than the first two guideposts.'" *Krysa*, 176 S.W.3d at 163 n.7 (quoting *Kemp v. Am. Tel. & Tel., Co.*, 393 F.3d 1354, 1364 (11th Cir. 2004)).

"[T]he Missouri legislature has authorized . . . civil and criminal sanctions for cases of fraud and concealment." *Grabinski v. Blue Springs Ford Sales, Inc.*, 203 F.3d 1024, 1026 (8th Cir. 2000). For example, section 407.100.6 authorizes a civil penalty of up to $1,000 for each violation, and section 407.020.3 provides that a person who "with the intent to defraud," willfully and knowingly engages" in any violation of the MMPA is guilty of a class E felony, which is punishable by up to four years in prison and a fine of up to $10,000. *Id.* (citing §§ 407.100.6, 407.020.3); *see also* § 558.002.1(1) (providing "a person who has been convicted of an offense may be sentenced to pay a fine which does not exceed . . . ten thousand dollars[.]"); § 558.011.1(5) (providing the term of imprisonment for a class E felony cannot exceed four years). The punitive damages awards here, as adjusted, are significantly larger than the penalties authorized under the MMPA. However, this is not dispositive in our analysis of whether the punitive damage awards against Defendants are

grossly excessive. *See Lewellen v. Franklin*, 441 S.W.3d 136, 148 (Mo. banc 2014) (finding a $2 million punitive damages award was not grossly excessive despite the fact the punitive damages award exceeded the penalties authorized under the MMPA).

Considering all three guideposts, we find the punitive damages awards assessed against Defendants, as adjusted, are not grossly excessive considering Defendants' actions of knowingly selling Products that contained asbestos to consumers. "Under Rule 84.14, this Court may enter the judgment the trial court should have entered." *City of De Soto v. Nixon*, 476 S.W.3d 282, 291 (Mo. banc 2016); *see also* Rule 84.14. Accordingly, we enter judgment for $500 million in actual damages against JJCI and $125 million in actual damages against J&J jointly and severally with JJCI. We further enter judgment for $900 million in punitive damages against JJCI and $715,909,091 in punitive damages against J&J.

Point X is denied as modified.

Conclusion

The judgment against JJCI is reversed in part on the claims of the two Non-Resident Plaintiffs, Allan Koman on behalf of Annette Koman and Marcia Owens, who only used Johnson's Baby Powder and denied using Shimmer for lack of personal jurisdiction. The judgment against J&J is reversed in part as to all seventeen Non-Resident Plaintiffs for lack of personal jurisdiction.

Because no further adjudication is necessary, this Court may give such judgment as ought to be given under Rule 84.14. *See Nixon*, 476 S.W.3d at 291.

Accordingly, this Court enters judgment under Rule 84.14 against JJCI for $500 million in actual damages and J&J for $125 million jointly and severally with JJCI to reflect the proportional loss of the two Non-Resident Plaintiffs from JJCI's actual damages award and the proportional loss of the seventeen Non-Resident Plaintiffs from J&J's actual damages award, as discussed in Point III. We further enter judgment under Rule 84.14 against JJCI for $900 million in punitive damages and against J&J for $715,909,091 in punitive damages to reflect the proportional loss of the two Non-Resident Plaintiffs from JJCI's punitive damages award and the proportional loss of the seventeen Non-Resident Plaintiffs from J&J's punitive damages award. In all other respects, the judgment is affirmed as modified.

/s/ Philip M. Hess

Philip M. Hess, Presiding Judge

Kurt S. Odenwald, J. and
Lisa P. Page, J. concur.

APPENDIX B

STATE OF MISSOURI

CITY OF ST. LOUIS

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT

GAIL LUCILLE INGHAM, *et al.*,

Plaintiffs,

vs.

JOHNSON & JOHNSON, *et al.*,

Defendants.

Cause No. 1522-CC10417-01

Division No. 10

Filed: December 19, 2018

ORDER

The Court has before it Defendants' Johnson & Johnson and Johnson & Johnson Consumer Inc.'s motion for judgment notwithstanding the verdict, motion for new trials, and motion for new trials on damages or request for remittitur. The Court now rules as follows.

All parties were given a full and fair opportunity to adduce evidence and present argument over the course of a six week jury trial. Following the trial, a verdict was entered in favor of Plaintiffs and against Defendants.

Motion for Judgment Notwithstanding the Verdict

Defendants move for a judgment notwithstanding the verdict on all of Plaintiffs' claims. Defendants contend that the Court lacks jurisdiction over them, that venue is improper, that Plaintiffs did not prove causation, that Plaintiffs failed to prove their failure to warn claims, that Plaintiffs' claims are barred by the applicable statutes of limitation, that Plaintiffs' claims fail for other claim-specific reasons, and that Plaintiffs failed to proffer sufficient evidence to support the verdict on punitive damages claims. In addition, Defendant Johnson & Johnson separately argues that it is entitled to judgment notwithstanding the verdict as to the claims of Plaintiffs Andrea Schwartz Thomas, Marcia Owens and Sheila Brooks, because they failed to present evidence that they used the products at issue before 1979.

Rule 72.01(b) states:

> Motion for Judgment Notwithstanding the Verdict. A party may move for a directed verdict at the close of all the evidence. Whenever such motion is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than thirty days after

> entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the motion for a directed verdict; or if a verdict was not returned, such party, within thirty days after the jury has been discharged, may move for judgment in accordance with the motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

A motion for judgment notwithstanding the verdict presents the question of "whether a submissible case was made." Smith v. Brown & Williamson Tobacco Corp., 275 S.W.3d 748, 759 (Mo. App. W.D. 2008)(citing Payne v. Cornhusker Motor Lines, Inc., 177 S.W.3d 820, 832 (Mo. App. E.D. 2005)). "To determine whether the evidence was sufficient to support the jury's verdict, an appellate court views the evidence in the light most favorable to the verdict and the plaintiff is given the benefit of all reasonable inferences. Conflicting evidence and inferences are disregarded." Keveney v. Mo. Military Acad., 304 S.W.3d 98, 104 (Mo. banc 2010). "The jury's verdict will be reversed only if there is a complete absence of probative facts to support the jury's conclusion." Id. "A

judgment notwithstanding the verdict is a drastic action that can only be granted if reasonable persons cannot differ on the disposition of the case." Delacroix v. Doncasters, Inc., 407 S.W.3d 13, 39 (Mo. App. E.D. 2013).

The Court finds that it should deny Defendants' motion for judgment notwithstanding the verdict. Many of Defendants' arguments have been addressed in prior orders of this Court and will be addressed briefly herein.

This Court has addressed Defendants' arguments related to jurisdiction in its prior orders. The Court finds that it has specific personal jurisdiction over Defendants under controlling precedent. See Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1779 (U.S. June 19, 2017); Bryant v. Smith Interior Design Grp., Inc., 310 S.W.3d 227, 231 (Mo. banc 2010). Plaintiffs have established facts adequate to invoke Missouri's long-arm statute and that support a finding of minimum contacts with Missouri sufficient to satisfy due process. The lawsuit arises out of and relates to Defendants' contacts with Missouri.

This Court has addressed Defendants' arguments related to venue in its prior orders. Venue is proper in this case under Section 508.010 RSMo.

Defendants contend that Plaintiffs failed to proffer reliable expert evidence of causation. The Court finds that the evidence presented on this issue was sufficient to support the jury's verdict. This Court found that Plaintiffs' expert witnesses were qualified to offer their opinions and their testimony was relevant and admissible under Section 490.065 RSMo.

The evidence presented at trial includes the testimony of Plaintiffs' expert witnesses, evidence of the testing of the products at issue, including Defendants' own testing, Defendants' correspondence and the testimony of Defendant's corporate representative and chief medical officer. This evidence satisfies the standards for causation under all applicable state law. See e.g. Scapa Dryer Fabrics, Inc. v. Knight, 788 S.E.2d 421 (Ga. 2016); In re New York City Asbestos Litig., 48 Misc. 3d 460, 473 (N.Y. Sup. Ct. 2015); Bostic v. Georgia-Pacific Corp., 439 S.W.3d 332, 336-37 (Tex. 2014); Ford Motor Co. v. Boomer, 736 S.E.2d 724, 732 (Va. 2013); Gregg v. V-J Auto Parts, Co., 943 A.2d 216, 225 (Pa. 2007); Langness v. Fencil Urethane Sys., Inc., 667 N.W.2d 596, 606 (N.D. 2003); Benshoof v. Nat'l Gypsum Co., 761 F. Supp. 677, 679 (D. Ariz. 1991), *aff'd,* 978 F.2d 475 (9th Cir. 1992); Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156 (4th Cir. 1986).

Defendants contend that Plaintiffs failed to prove their failure to warn claims. The Court finds that the evidence presented on this issue was sufficient to support the jury's verdict. This evidence includes the testimony of Plaintiffs' expert witnesses and the testimony of Defendant Johnson & Johnson's chief medical officer. This Court has previously considered Defendants' preemption argument on this issue and found that Plaintiffs' claims were not preempted.

Defendants argue that Plaintiffs' claims are barred by the applicable statutes of limitation. This was a fact issue for the jury to decide. See Powel v. Chaminade College Preparatory Inc., 197 S.W.3d 576, 582 (Mo. banc 2006). The Court submitted verdict directors to the jury on timeliness for each of the

Plaintiffs to which this argument applies. The Court finds that sufficient evidence was presented to the jury on this issue such that their determinations on the timeliness of Plaintiffs' claims should not be set aside.

Defendants argue that that Plaintiffs' Ms. Kim and Ms. Groover-Mallard's claims fail because they are subsumed by the NJPLA. The Court finds that the claims submitted to the jury by Plaintiffs' Ms. Kim and Ms. Groover-Mallard were solely strict liability claims allowed under the NJLPA. See Dean v. Barrett Homes, Inc., 204 N.J. 286, 294, 8 A.3d 766, 771 (N.J. 2010).

Defendants argue that that Plaintiffs Ms. Owens, Ms. Packard, and Ms. Schwartz-Thomas's strict liability claims fail because they are not cognizable under the applicable state laws. The Court finds that this argument is moot because Plaintiffs Ms. Owens, Ms. Packard, and Ms. Schwartz-Thomas did not submit strict liability claims to the jury.

Defendants contend that Plaintiffs failed to proffer sufficient evidence to support the verdict on their punitive damages claims. First, Defendants contend that other state laws should apply herein regarding punitive damages. Missouri courts apply the "most significant relationship" test set forth in the Restatement (Second) of Conflict of Laws Section 145 (1971) in deciding choice of law issues for tort claims. Kennedy v. Dixon, 439 S.W.2d 173, 184 (Mo. banc 1969); See also Harter v. Ozark-Kenworth, Inc., 904 S.W.2d 317, 320 (Mo. App. W.D. 1995).

Section 145 of the Restatement (Second) of Conflict of Laws provides:

> (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in §6.
>
> (2) Contacts to be taken into account in applying the principles of §6 to determine the law applicable to an issue include:
> (a) the place where the injury occurred,
> (b) the place where the conduct causing the injury occurred,
> (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
> (d) the place where the relationship, if any, between the parties is centered.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Kennedy v. Dixon, 439 S.W. at 184.

Considering the direct connection between Defendants' activities in Missouri and the injuries Plaintiffs received, as well as the fact that numerous Plaintiffs were first injured in Missouri, the Court finds that Missouri law should apply regarding Plaintiffs' claims for punitive damages.

Second, Defendants contend that even under Missouri law, Plaintiffs have failed to present

sufficient evidence to support their claims for punitive damages. "The test for punitive damages in a products liability case is a strict one." Angotti v. Celotex Corp., 812 S.W.2d 742, 746 (Mo. App. W.D. 1991). Punitive damages are allowed when "defendant knew of the defect and danger and secondly, that by selling the product with said knowledge, the defendant thereby showed complete indifference to or conscious disregard for the safety of others." Id. Punitive damages may also be recoverable "when there is evidence to show that a defendant had been put on notice of the fact that relevant information in regard to the dangerousness of a product was available to show that the product was actually known to constitute a health hazard to a given class of individuals and the defendant consciously chose to ignore the available information." Id. The Court finds that sufficient evidence was presented to the jury from which it could make such a finding.

Defendant Johnson & Johnson argues that it is entitled to judgment notwithstanding the verdict as to the claims of Plaintiffs Andrea Schwartz-Thomas, Marcia Owens and Sheila Brooks, because they failed to present evidence that they used the products at issue before 1979. The Court finds that Plaintiffs presented sufficient evidence of a participatory connection with the products at issue such that holding Johnson & Johnson liable is warranted under applicable law. Plaintiffs presented particular evidence regarding decisions, specifications and testing of the products at issue that were done by Defendant Johnson & Johnson rather than by its subsidiary. In addition, Plaintiffs presented sufficient evidence from which the jury could find that

Defendant Johnson & Johnson owed a legal duty of care to Plaintiffs Andrea Schwartz-Thomas, Marcia Owens and Sheila Brooks.

Accordingly, this Court must deny Defendants' motion for judgment notwithstanding the verdict.

Motion for New Trials

Defendants contend that they are entitled to new separate trials of each Plaintiffs' families' claims.

Rule 78.01 states as follows:

> The court may grant a new trial of any issue upon good cause shown. A new trial may be granted to all or any of the parties and on all or part of the issues after trial by jury, court or master. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact or make new findings, and direct the entry of a new judgment.

"On a motion for new trial, the trial court may reconsider its rulings on discretionary matters, such as the admissibility of evidence, and may order a new trial if it believes that its discretion was not wisely exercised and that the losing party was thereby prejudiced." Anderson v. Kohler Co., 170 S.W.3d 19, 23 (Mo. App. E.D. 2005).

The Court has examined Defendants' claims in their Motion for New Trial and finds that Defendants have not shown good cause required for a new trial under Rule 78.01.

In particular, the Court notes that it did not err in admitting documents from Imerys Talc America, Inc. f/k/a Luzenac America, Inc. Missouri courts allow the admission of non-party co-conspirator statements against a Defendant conspirator. See State v. Ferguson, 20 S.W.3d 485, 496 (Mo. banc 2000)("Statements of one conspirator are admissible against another under the co-conspirator exception to the hearsay rule"); See also Sparkman v. Columbia Mut. Ins. Co., 271 S.W.3d 619, 622 (Mo. App. S.D. 2008)(recognizing the co-conspirator exception in civil cases).

Motion for New Trials on Damages or Request for Remittitur

Defendants seek an order of this Court vacating the damages award and ordering new separate trials on damages. In the alternative, Defendants ask the Court to reduce the damages or give Plaintiffs the option of accepting remittitur.

Section 537.068 RSMo states in pertinent part:

> A court may enter a remittitur order if, after reviewing the evidence in support of the jury's verdict, the court finds that the jury's verdict is excessive because the amount of the verdict exceeds fair and reasonable compensation for plaintiff's injuries and damages.

"The circuit court should not sustain a motion for additur or remittitur under § 537.068 without having determined that the verdict is against the weight of the evidence and that the party moving for additur or remittitur is entitled to a new trial. Badahman, 395 S.W.3d at 38. Courts "generally defer to the jury's

decision as to the amount of damages." Mackey v. Smith, 438 S.W.3d 465, 480 (Mo. App. W.D. 2014).

Substantial evidence was presented at trial that supports the compensatory damage awards entered herein, including evidence of the injuries, pain, suffering and impairment of Plaintiffs, their spouses and decedents. The jury's compensatory damage awards are fair and reasonable compensation for the injuries and damages proven by Plaintiffs at trial. This Court will defer to the jury's decision as to these damage amounts.

"Punitive damages may properly be imposed on a tortfeasor to further a state's legitimate interests in punishing unlawful conduct and deterring its repetition." Blanks v. Fluor Corp., 450 S.W.3d 308, 409 (Mo. App. E.D. 2014). "Punishing a tortfeasor through an award of punitive damages is an exercise of state power that must comply with the Due Process Clause of the Fourteenth Amendment." Id. "And the Due Process Clause prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." Id. "A grossly excessive punitive damage award violates a tortfeasor's substantive right of due process in that it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." Id.

"No precise constitutional line or simple mathematical formula exists with regard to determining whether a punitive damage award is grossly excessive." Id. "The United States Supreme Court has set out three guideposts, commonly referred to as the Gore guideposts, when reviewing whether a punitive-damage award comports with due process: (1) the reprehensibility of the defendant's misconduct;

(2) the disparity between the harm or potential harm suffered by the plaintiff and the punitive-damage award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." Id.

In this case, the Court finds that the punitive damage awards comport with due process. First, substantial evidence was adduced at trial of particularly reprehensible conduct on the part of Defendants, including that Defendants knew of the presence of asbestos in products that they knowingly targeted for sale to mothers and babies, knew of the damage their products caused, and misrepresented the safety of these products for decades. Second, Defendants' actions caused significant physical harm and potential physical harm, including causing ovarian cancer in Plaintiffs or Plaintiffs' decedents. Third, Missouri state law imposes significant potential penalties in comparable cases under the Missouri Merchandising Practices Act.

The Court finds that Defendants have not shown good cause for a new trial on the damage awards entered herein. The Court cannot determine that the verdict was against the weight of the evidence and accordingly cannot sustain Defendants' request for remittitur.

The Court now **ORDERS** and **DECREES** as follows.

Defendants' Johnson & Johnson and Johnson & Johnson Consumer Inc.'s motion for judgment notwithstanding the verdict, motion for new trials,

and motion for new trials on damages or request for remittitur are hereby **DENIED.**

SO ORDERED:

/s/ Rex M. Burlison
Rex M. Burlison
Circuit Judge
Division 10

Dated: December 19, 2018

APPENDIX C

STATE OF MISSOURI

CITY OF ST. LOUIS

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT

GAIL LUCILLE INGHAM, *et al.*,

Plaintiffs,

vs.

JOHNSON & JOHNSON, *et al.*,

Defendants.

Cause No. 1522-CC10417-01

Division No. 10

Filed: May 15, 2018

ORDER

The Court has before it Defendants' joint motion to sever Plaintiffs' claims for improper joinder.

The Court now **ORDERS** and **DECREES** as follows.

Defendants' joint motion to sever Plaintiffs' claims for improper joinder is hereby **DENIED**.

SO ORDERED:

/s/ Rex M. Burlison
Rex M. Burlison
Circuit Judge
Division 10

Dated: May 15, 2018

APPENDIX D

STATE OF MISSOURI

CITY OF ST. LOUIS

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT

GAIL LUCILLE INGHAM, *et al.*,

Plaintiffs,

vs.

JOHNSON & JOHNSON, *et al.*,

Defendants.

Cause No. 1522-CC10417-01

Division No. 10

Filed: May 15, 2018

ORDER

The Court has before it Johnson & Johnson and Johnson & Johnson Consumer Companies, Inc., (the Johnson & Johnson Defendants') joint motion to dismiss for lack of personal jurisdiction and joint motion to sever and transfer venue, and Defendant Imerys Talc America, Inc.'s motion to dismiss for lack of personal jurisdiction, supplemental motion to

dismiss for lack of personal jurisdiction and motion to transfer venue. The Court now rules as follows.

Plaintiffs bring product liability claims alleging that they or their spouses developed ovarian cancer as a result of the use of Johnson & Johnson Baby Powder and Shower to Shower products that contained both talc and asbestos. The Johnson and Johnson Defendants are alleged to have engaged in the business of manufacturing, testing, labelling, packaging, bottling, shipping, distributing and selling the products at issue in Missouri both directly and through their agent, Pharma Tech Industries. Defendant Imerys Talc America, Inc., is alleged to have exclusively mined and supplied the asbestos-containing talc used in the products.

On May 9, 2018, this Court granted Plaintiffs leave to file their Fourth Amended Petition. The amended allegations in this petition are unrelated to the issues raised in Defendants' motions. In this Court's Order granting Plaintiffs' leave to amend, Defendants' pending motions were deemed to apply to the Fourth Amended Petition.

Personal Jurisdiction

The Johnson and Johnson Defendants argue that claims asserted against them by seventeen nonresident Plaintiffs should be dismissed for lack of personal jurisdiction. Defendant Imerys Talc America, Inc., contends that this Court cannot exercise personal jurisdiction over it as to any claims in this case.

When deciding on a motion to dismiss for lack of personal jurisdiction, the allegations of the petition

must be given an intendment most favorable to the existence of the jurisdictional fact. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). "The sufficiency of the evidence to make a prima facie showing that the trial court may exercise personal jurisdiction is a question of law." Bryant v. Smith Interior Design Grp., Inc., 310 S.W.3d 227, 231 (Mo. banc 2010). When personal jurisdiction is contested, it is the plaintiff's burden to show "that defendant's contacts with the forum state were sufficient." Id. "A reviewing court evaluates personal jurisdiction by considering the allegations contained in the pleadings to determine whether, if taken as true, they establish facts adequate to invoke Missouri's long-arm statute and support a finding of minimum contacts with Missouri sufficient to satisfy due process." Id.

Section 506.500.1 RSMo, Missouri's long-arm statute, reads as follows:

> Any person or firm, whether or not a citizen or resident of this state, or any corporation, who in person or through an agent does any of the acts enumerated in this section, thereby submits such person, firm, or corporation, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of such acts:
>
> (1) The transaction of any business within this state;
>
> (2) The making of any contract within this state;

(3) The commission of a tortious act within this state;

(4) The ownership, use, or possession of any real estate situated in this state;

(5) The contracting to insure any person, property or risk located within this state at the time of contracting;

(6) Engaging in an act of sexual intercourse within this state with the mother of a child on or near the probable period of conception of that child.

"Section 506.500 is construed to extend the jurisdiction of the courts of this state over nonresident defendants to that extent permissible under the Due Process clause." Bryant, 310 S.W.3d at 232 (citing State ex rel. Deere v. Pinnell, 454 S.W.2d 889, 892 (Mo. banc 1970)). "[E]xtraterritorial acts that produce consequences in the state, such as fraud, are subsumed under the tortious act section of the long-arm statute." Bryant, 310 S.W.3d at 232 (citing Longshore v. Norville, 93 S.W.3d 746, 752 (Mo. App. E.D. 2002)).

"The Due Process Clause of the Fourteenth Amendment requires that the defendant have minimum contacts with the forum state so that maintenance of the suit does not offend traditional notions of fair play and substantial justice." Peoples Bank v. Frazee, 318 S.W.3d 121, 128 (Mo. banc 2010). "In addition to proving that the defendant purposefully availed himself of the privilege of conducting activities within the forum, exercise of personal jurisdiction over a defendant with minimum

contacts must be reasonable in light of the surrounding circumstances of the case." Id. "This reasonableness depends on an evaluation of several factors." Id. "A court must consider the burden on the defendant, the forum's interest in adjudicating the dispute, and the plaintiffs interest in obtaining convenient and effective relief." Id. "Consideration must also go to the interstate judicial system's interest in obtaining the most efficient resolution of controversies and the shared interest of the several States in furthering fundamental substantive social policies." Id.

"Personal jurisdiction can be general or specific." Peoples Bank, 318 S.W.3d at 128 (citing Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n.8-9, (1984)). In this case, Plaintiffs contend that this Court has specific jurisdiction over the Defendants herein. "Specific jurisdiction requires consideration of the relationship among the defendant, the forum, and the litigation." State ex rel. Norfolk S. Ry. v. Dolan, 512 S.W.3d 41, 48 (Mo. banc 2017) (citing Andra v. Left Gate Prop. Holding, Inc., 453 S.W.3d 216, 226 (Mo. banc 2015)). "[S]pecific jurisdiction encompasses cases in which the suit arises out of or relates to the defendant's contacts with the forum." Id.

"The primary focus of our personal jurisdiction inquiry is the defendant's relationship to the forum State." Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1779 (U.S. June 19, 2017). "In order for a state court to exercise specific jurisdiction, the suit must aris[e] out of or relat[e] to the defendant's contacts with the forum." Id. at 1780. "[S]pecific jurisdiction is confined to adjudication of issues

deriving from, or connected with, the very controversy that establishes jurisdiction." Id. "When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State." Id. at 1781.

In this case, Plaintiffs have met their burden of showing that Defendants' contacts with Missouri are sufficient. The allegations in the pleadings, supported by numerous exhibits in the record, establish facts adequate to invoke Missouri's long-arm statute and support a finding of minimum contacts with Missouri sufficient to satisfy due process. In addition, this Court has specific jurisdiction over Defendants because Plaintiffs' suit arises out of and relates to Defendants' contacts with the forum.

The minimum contacts alleged and supported by the record are reasonable in light of the circumstances because Defendants suffer little or no burden by litigating here, this forum is interested in adjudicating the dispute because it involves the injury of a City of St. Louis resident that occurred in the City of St. Louis, and Plaintiffs are interested in obtaining convenient and effective relief in a forum where one Plaintiff resides and was first injured, and in a State where several Plaintiffs reside. This Court is most able to efficiently resolve the controversies raised in Plaintiffs' petition.

Regarding the Johnson & Johnson Defendants, Plaintiffs have shown that the long arm is met through the transaction of business in Missouri, the alleged commission of the tortious conduct described in the petition, the ownership of real estate and the entry of contracts, including contracts with a company

located in the City of St. Louis for the manufacture of packaging materials. Plaintiffs have shown that the Johnson & Johnson Defendants purposefully availed themselves of the privilege of conducting activities in Missouri, such that exercising personal jurisdiction over them is reasonable in light of the surrounding circumstances of this case.

Plaintiffs' allege that this Court has specific jurisdiction over the Johnson & Johnson Defendants because they contracted with their agent, Pharma Tech Industries, in Missouri to manufacture, package and label the products at issue and to transport the talc used in the products. Plaintiffs contend Pharma Tech's relevant actions were under the direction and control of the Johnson & Johnson Defendants. Plaintiffs allege that the products at issue were manufactured, bottled, packaged, labeled, marketed, advertised, distributed and sold in Missouri. In addition, Plaintiffs contend that Defendants' marketing strategy was created in part in in the City of St. Louis, Missouri, and in Kansas City, Missouri. The record supports Plaintiffs' jurisdictional allegations regarding all of the claims alleged, including those of the non-residents.

Regarding Imerys, Plaintiffs have shown that the long arm is met through the transaction of business in Missouri, and the alleged commission of the tortious conduct described in the petition. Plaintiffs have shown that Imerys purposefully availed itself of the privilege of conducting activities in Missouri, such that exercising personal jurisdiction over it is reasonable in light of the surrounding circumstances of this case. Plaintiffs allege injury as a result of their purchase and use of Shimmer, a product

manufactured in Missouri that included asbestos-containing talc supplied by Imerys. Imerys sold this talc to Pharma Tech, worked with Pharma Tech to test the talc, and traveled to Missouri for meetings related to the products at issue. The talc Imerys sold to Pharma Tech was delivered to it in Missouri.

Plaintiffs' allege that this Court has specific jurisdiction over Imerys because it sold the asbestos-containing talc to Pharma Tech Industries in Missouri to be used in the products at issue and that it knew that the talc contained asbestos at the time and of the dangers associated with it. In particular, Plaintiffs point to the talc mined and sold by Imerys used in the Shimmer product manufactured in Union, Missouri. Plaintiffs contend that Imerys sent hundreds of pounds of talc into Missouri for use in this product. Plaintiffs assert claims directly related to their use of the Shimmer product. Finally, Plaintiffs contend that Imerys engaged in strategy meetings in Missouri regarding the products at issue. The record supports Plaintiffs' jurisdictional allegations related to Imerys.

Defendants cite Bristol-Myers Squibb in support of their jurisdictional arguments. In Bristol-Myers Squibb, the United States Supreme Court found that the sale of Plavix that injured plaintiffs in California did not confer jurisdiction over plaintiffs that were injured by Plavix in other states. 137 S. Ct. at 1781. This holding is distinguishable from Plaintiffs' case herein, because the Supreme Court specifically pointed out that the defendants in Bristol-Myers "did not develop Plavix in California, did not create a marketing strategy for Plavix in California, and did not manufacture, label, package, or work on the regulatory approval of the product in California." Id.

at 1778. In this case, Plaintiffs allege that Defendants engaged in all of these activities in Missouri except working on regulatory approval. The reasoning in Bristol-Myers supports this Court's ruling that when the suit arises out of and relates to Defendants' contacts with Missouri, as Plaintiffs have shown here, the Court has specific personal jurisdiction over the lawsuit.

Venue

Defendants move to transfer venue under Section 508.010.4 RSMo. Defendants contend that venue for Plaintiffs claims can only be obtained through Gail Ingham and that discovery has shown that she was not first exposed to Defendants' products in the City of St. Louis.

Venue in Missouri is determined solely by statute. State ex rel. Ford Motor Co. v. Manners, 161 S.W.2d 373, 375 (Mo. banc 2005); State ex rel. Linthicum v. Calvin, 57 S.W.3d 855, 857 (Mo. banc 2001).

Section 508.010.4 RSMo states:

> Notwithstanding any other provision of law, in all actions in which there is any count alleging a tort and 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.

The Missouri legislature has mandated that singular terms in its statutes should be construed as including their plural forms "unless there be something in the subject or context repugnant to such

construction." State ex rel. BJC Health Sys. v. Neill, 121 S.W.3d 528, 530 (Mo. banc 2003). Section 508.010.4 should therefore be read as "venue shall be in the county where the plaintiff was [or plaintiffs were] first injured... ."

The Court must deny Defendants' motion because venue is proper herein. Plaintiffs' claims are properly joined under Rule 52.05. These claims include those of Gail Ingham who allegedly was first exposed to and injured by the talcum powder products at issue in the City of St. Louis. Accordingly, venue is proper in this case under Section 508.010.4 RSMo.

Plaintiffs allege that Gail Ingham was first exposed to Defendants' products in the City of St. Louis where she purchased and applied the products and developed ovarian cancer. Defendants point to Gail Ingham's deposition testimony regarding smelling the fragrance of baby powder on her grandmother as refuting these allegations. The Court finds this argument to lack merit. First, the Court cannot determine from the record that smelling a fragrance is equivalent to exposure. Second, it appears from the record that Gail Ingham first smelled the fragrance of baby powder at her grandmother's home in the City of St. Louis.

Defendants argue that Plaintiff Gail Ingham's claims should be severed and the remaining Plaintiffs' claims transferred to Cole County because under Rule 51.01 the joinder rules may not be used to extend venue. This Court agrees that the joinder rules may not be used to extend venue, however the basis for venue in this case is section 508.010.4 RSMo and not

the joinder rules. See State ex rel. Kinsey v. Wilkins, 394 S.W.3d 446, 454 (Mo. App. E.D. 2013).

Defendants' motions to sever and to transfer venue must be denied.

The Court now **ORDERS** and **DECREES** as follows.

Defendants Johnson & Johnson and Johnson & Johnson Consumer Companies, Inc.'s joint motion to dismiss for lack of personal jurisdiction and joint motion to sever and transfer venue are hereby **DENIED**.

Defendant Imerys Talc America, Inc.'s motion to dismiss for lack of personal jurisdiction, supplemental motion to dismiss for lack of personal jurisdiction and motion to transfer venue are hereby **DENIED**.

SO ORDERED:

/s/ Rex M. Burlison
Rex M. Burlison
Circuit Judge
Division 10

Dated: May 15, 2018

APPENDIX E

STATE OF MISSOURI

CITY OF ST. LOUIS

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT

GAIL LUCILLE INGHAM, *et al.*,
Plaintiffs,

vs.

JOHNSON & JOHNSON, *et al.*,
Defendants.

Cause No. 1522-CC10417

Division No. 10

Filed: May 17, 2016

ORDER

The Court has before it Defendants Johnson & Johnson, Johnson & Johnson Consumer Companies, Inc., and Imerys Talc America, Inc.'s motions to transfer venue, to dismiss the non-Missouri Plaintiffs' claims for improper venue, to dismiss under the doctrine of *forum non conveniens,* to dismiss for lack

of personal jurisdiction, and to sever. The Court now rules as follows.

Plaintiffs bring product liability claims alleging that they or their spouses have developed ovarian cancer as a result of the use of talcum powder products. The Johnson and Johnson Defendants are alleged to have engaged in the business of manufacturing, marketing, testing, promoting, selling and/or distributing the talcum powder products. Defendant Imerys Talc America, Inc., is alleged to have mined and distributed raw talcum powder, introducing it into interstate commerce with knowledge of its harmful properties and with intent of its use in manufacturing the talcum powder products at issue, ultimately sold in the State of Missouri.

Venue

Defendants move to transfer venue under Section 508.010.4 RSMo.

Venue in Missouri is determined solely by statute. State ex rel. Ford Motor Co. v. Manners, 161 S.W.2d 373, 375 (Mo. banc 2005); State ex rel. Linthicum v. Calvin, 57 S.W.3d 855, 857 (Mo. banc 2001).

Section 508.010.4 RSMo states:

> Notwithstanding any other provision of law, in all actions in which there is any count alleging a tort and 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.

The Missouri legislature has mandated that singular terms in its statutes should be construed as including their plural forms "unless there be something in the subject or context repugnant to such construction." State ex rel. BJC Health Sys. v. Neill, 121 S.W.3d 528, 530 (Mo. banc 2003). Section 508.010.4 should therefore be read as "venue shall be in the county where the plaintiff was [or plaintiffs were] first injured... ."

The Court must deny Defendants' motion because venue is proper herein. Plaintiffs' claims are properly joined under Rule 52.05. These claims include those of Gail Ingham who allegedly was first exposed to and injured by the talcum powder products at issue in the City of St. Louis. Accordingly, venue is proper in this case under Section 508.010.4 RSMo.

Defendants argue that under Rule 51.01 the joinder rules may not be used to extend venue. This Court agrees that the joinder rules may not be used to extend venue, however the basis for venue in this case is section 508.010.4 RSMo and not the joinder rules. See State ex rel. Kinsey v. Wilkins, 394 S.W.3d 446, 454 (Mo. App. E.D. 2013).

Defendants' motion to dismiss as to venue must be denied.

Forum Non Conveniens

Defendants argue that the claims of all Plaintiffs that are not Missouri residents should be dismissed on *forum non conveniens* grounds.

Under the doctrine of *forum non conveniens*, a trial court has broad discretion to refuse to exercise

jurisdiction, even if there is proper jurisdiction and venue, if the forum is seriously inconvenient for the trial of the action, and if a more appropriate forum is available to the petitioner. Anglim v. Mo. P. R. Co., 832 S.W.2d 298, 302 (Mo. banc 1992); Moyers v. Moyers, 284 S.W.3d 182, 187 (Mo. App. E.D. 2009).

"The trial court should weigh six important, but non-exclusive, factors in making its decision: 1) the place where the cause of action accrued; 2) the location of witnesses; 3) the parties' residence; 4) any nexus with the place of suit; 5) the public factor of the convenience to and burden on the court; and 6) the availability of another court with jurisdiction that affords a forum for the plaintiff." Moyers, 284 S.W.3d at 187. "Any additional factors considered and the weight assigned to each depend upon the circumstances of the particular case." Id. "In addition to the foregoing factors, the trial court shall consider whether proceeding in Missouri would cause injustice by oppressing the defendant or place an undue burden on the court." Id.

In considering a defendant's argument the Court must keep in mind that plaintiff's choice of a forum should not be disturbed except for "weighty reasons" and only if the balance is strongly in favor of the defendant. Anglim, 832 S.W.2d at 302. The mere fact a plaintiff might choose a forum based on a perception that a particular venue has a more favorable jury pool does not constitute a basis for dismissal. Euton v. Norfolk & Western Railway Company, 936 S.W.2d 146 (Mo. App. E.D 1996). The Court should honor a plaintiff's choice of forum if reasonable persons could differ with the decision to dismiss. Barrett v. Missouri

Pacific R.R. Co., 688 S.W.2d 397, 399 (Mo. App. E.D. 1985).

This forum is not seriously inconvenient for the trial of the action, and there is no forum more appropriate. None of the six factors weigh heavily in favor of dismissal. The cause of action accrued in part in the City of St. Louis. Many witnesses will be located in the City of St. Louis. Several treating doctors are located in the City of St. Louis. Many of the parties in this case reside in the City of St. Louis and other Missouri counties. At least one Plaintiff was first injured in the City of St. Louis and other Plaintiffs were also first injured in Missouri. The Court finds no significant burden on this Court to try the matter here. Finally, Defendants have not shown the availability of another forum that would be more convenient to hear all of Plaintiffs' claims.

The Court will not exercise its discretion to refuse to exercise jurisdiction under a *forum non conveniens* theory.

Personal Jurisdiction

The Johnson and Johnson Defendants argue that claims asserted against them by non-Missouri Plaintiffs should be dismissed for lack of personal jurisdiction. Defendant Imerys Talc America, Inc., contends that this Court cannot exercise personal jurisdiction over it as to any claims in this case.

When deciding on a motion to dismiss for lack of personal jurisdiction, the allegations of the petition are given an intendment most favorable to the existence of the jurisdictional fact. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297

(1980). Absent one of the traditional territorial bases of personal jurisdiction—presence, domicile or consent—a court may assert personal jurisdiction over a defendant only if certain minimum contacts between Missouri and the defendant are established. Bryant v. Smith Interior Design Grp., Inc., 310 S.W.3d 227, 232 (Mo. banc 2010).

"The sufficiency of the evidence to make a prima facie showing that the trial court may exercise personal jurisdiction is a question of law." Bryant, 310 S.W.3d at 231. When personal jurisdiction is contested, it is the plaintiff's burden to show "that defendant's contacts with the forum state were sufficient." Id. (citing Angoff v. Marion A. Allen, Inc., 39 S.W.3d 483, 486 (Mo. banc 2001)). "A reviewing court evaluates personal jurisdiction by considering the allegations contained in the pleadings to determine whether, if taken as true, they establish facts adequate to invoke Missouri's long-arm statute and support a finding of minimum contacts with Missouri sufficient to satisfy due process." Id.

"Missouri courts employ a two-step analysis to evaluate personal jurisdiction." Bryant, 310 S.W.3d at 231 (citing Conway v. Royalite Plastics, Ltd., 12 S.W.3d 314, 318 (Mo. banc 2000). "First, the court inquires whether the defendant's conduct satisfies Missouri's long-arm statute, section 506.500." Id. "If so, the court next evaluates whether the defendant has sufficient minimum contacts with Missouri such that asserting personal jurisdiction over the defendant comports with due process." Id.

Section 506.500.1 RSMo, Missouri's long-arm statute, reads as follows:

> Any person or firm, whether or not a citizen or resident of this state, or any corporation, who in person or through an agent does any of the acts enumerated in this section, thereby submits such person, firm, or corporation, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of such acts:
>
> (1) The transaction of any business within this state;
>
> (2) The making of any contract within this state;
>
> (3) The commission of a tortious act within this state;
>
> (4) The ownership, use, or possession of any real estate situated in this state;
>
> (5) The contracting to insure any person, property or risk located within this state at the time of contracting;
>
> (6) Engaging in an act of sexual intercourse within this state with the mother of a child on or near the probable period of conception of that child.

"Section 506.500 is construed to extend the jurisdiction of the courts of this state over nonresident defendants to that extent permissible under the Due Process clause." Bryant, 310 S.W.3d at 232 (citing State ex rel. Deere v. Pinnell, 454 S.W.2d 889, 892 (Mo. banc 1970)). "[E]xtraterritorial acts that produce consequences in the state, such as fraud, are subsumed under the tortious act section of the long-arm statute." Bryant, 310 S.W.3d at 232 (citing

Longshore v. Norville, 93 S.W.3d 746, 752 (Mo. App. E.D. 2002)).

"The Due Process Clause of the Fourteenth Amendment requires that the defendant have minimum contacts with the forum state so that maintenance of the suit does not offend traditional notions of fair play and substantial justice." Peoples Bank v. Frazee, 318 S.W.3d 121, 128 (Mo. banc 2010). "In addition to proving that the defendant purposefully availed himself of the privilege of conducting activities within the forum, exercise of personal jurisdiction over a defendant with minimum contacts must be reasonable in light of the surrounding circumstances of the case." Id. "This reasonableness depends on an evaluation of several factors." Id. "A court must consider the burden on the defendant, the forum's interest in adjudicating the dispute, and the plaintiff's interest in obtaining convenient and effective relief." Id. "Consideration must also go to the interstate judicial system's interest in obtaining the most efficient resolution of controversies and the shared interest of the several States in furthering fundamental substantive social policies." Id.

"Personal jurisdiction can be general or specific." Peoples Bank, 318 S.W.3d at 128 (citing Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n.8-9, (1984)). "A court has general jurisdiction over a nonresident defendant if the defendant has continuous and systematic contacts with the forum not necessarily related to the cause of action." Id.; See also Daimler AG v. Bauman, 134 S. Ct. 746, 751 (2014). "A court has specific jurisdiction over a non-resident defendant when the suit arises out of or is

related to the defendant's contacts with the forum." Id.

In this case, this Court has specific personal jurisdiction over the Defendants. Defendants' alleged conduct satisfies Missouri's long-arm statute because their alleged tortious acts produced injury in the City of St. Louis and other parts of Missouri. The Johnson & Johnson Defendants have sufficient minimum contacts with Missouri which include both the distribution and sale of the talcum powder products at issue in Missouri to Missouri residents. Defendant Imerys has sufficient minimum contacts with Missouri, including: having a distributor located in the City of St. Louis and with an additional office in Kansas City, Missouri, and knowledge of the harmful properties of its products that were sold and used in Missouri. These contacts are reasonable in light of the circumstances because Defendants suffer little or no burden, this forum is interested in adjudicating the dispute because it involves the injury of a City of St. Louis resident and injury in the City of St. Louis, and Plaintiffs are interested in obtaining convenient and effective relief from a Court in a forum where one Plaintiff resides and was first injured and in a State where several Plaintiffs reside and were injured by Defendants' alleged tortious activities.

The Johnson & Johnson Defendants cite no controlling precedent in support of their contention that jurisdiction should be considered as to the claims of each individual plaintiff. Jurisdiction over a defendant is based on the minimum contacts that the defendant has with the state, and not the contacts that plaintiffs have with the state. See Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 779 (1984).

Defendants' reliance on Daimler is misplaced because this Court has specific personal jurisdiction over Defendants based on Plaintiffs' claims and not general personal jurisdiction. 134 S. Ct. at 759.

In addition, the Court finds that Defendant Imerys has consented to the jurisdiction of this Court by maintaining a registered agent to accept the service of process in Missouri. See Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93 (1917); Railroad Co. v. Harris, 79 U.S. 65, 81 (1871); Knowlton v. Allied Van Lines, Inc., 900 F.2d 1196, 1197 (8th Cir. 1990); See also State ex rel. K-Mart v. Holliger, 986 S.W.2d 165, 166 (Mo. banc 1999).

Severance

Defendants contend that Plaintiffs have improperly joined claims that did not arise out of the same transaction or occurrence and ask that Plaintiffs' claims be severed into distinct and separate actions.

The permissive joinder of parties is governed by Rule 52.05(a). State ex rel. Nixon v. Dally, 248 S.W.3d 615, 616 (Mo. banc 2008). Rule 52.05(a) states as follows:

> **Permissive Joinder**. 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. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any

> right to relief in respect of or arising out of the same transaction, occurrences or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

The policy of the law is to try all issues arising from the same occurrence or series of occurrences together. Bhagvandoss v. Beiersdorf, Inc., 723 S.W.2d 392, 395 (Mo. banc 1987); Bryan v. Pepper, 175 S.W.3d 714, 719 (Mo. App. S.D. 2005). Events arise out of the same series of transactions or occurrences when they have either a common scheme or design, or if all acts or conduct are connected with a common core, common purpose, or common event. Levey v. Roosevelt Federal Savings Association of St. Louis, 504 S.W.2d 241, 246 (Mo. App. 1973).

Plaintiffs claim that they were each damaged by the same wrongful conduct of the Defendants in the mining, manufacturing, marketing, testing, promoting, selling and distributing the talcum powder products at issue with knowledge of their harmful properties. Plaintiffs' claims against Defendants arise out of the same basic injuries, same defect, same alleged duty, and same causes of action. Plaintiffs all allege that they or their spouses developed ovarian cancer as a result of the use of the talcum powder products at issue. The alleged events for which Plaintiffs seek damages arise out of the same common

scheme or design, and are connected with a common core, common purpose, or common event. In addition, numerous questions of law and fact are common to Plaintiffs' claims herein, including what knowledge Defendants had as to the harmful nature of the talcum powder products at issue and whether they engaged in a common scheme to withhold or suppress information related to the dangerous nature of these products.

The Court finds that Plaintiffs are properly joined under Rule 52.05(a) and their claims should not be severed.

The Court now **ORDERS** and **DECREES** as follows.

Defendants Johnson & Johnson and Johnson & Johnson Consumer Companies, Inc.'s motions to transfer venue, to dismiss the non-Missouri Plaintiffs' claims for improper venue, to dismiss under the doctrine of forum non conveniens, to dismiss for lack of personal jurisdiction, and to sever are hereby **DENIED**.

Defendant Imerys Talc America, Inc.'s motions to transfer venue, to dismiss the non-Missouri Plaintiffs' claims for improper venue, to dismiss under the doctrine of *forum non conveniens,* to dismiss for lack of personal jurisdiction, and to sever are hereby **DENIED**.

SO ORDERED:

/s/ Rex M. Burlison
Rex M. Burlison
Circuit Judge
Division 10

Dated: 5-17-2016

APPENDIX F

SUPREME COURT OF MISSOURI
EN BANC

SC98674
ED107476

September Session, 2020

ROBERT INGHAM, ET AL.,

Respondents,

vs. (TRANSFER)

JOHNSON & JOHNSON, ET AL.,

Appellants.

November 3, 2020

Now at this day, on consideration of the Appellants' application to transfer the above-entitled cause from the Missouri Court of Appeals, Eastern District, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, Betsy AuBuchon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court entered of record at the September Session, 2020, and on the 3rd day of November, 2020, in the above-entitled cause.

IN TESTIMONY WHEREOF, I have hereunto set my hand and the seal of said Court, at my office in the City of Jefferson, this 3rd day of November, 2020.

/s/ Betsy AuBuchon ___, Clerk
/s/____________________, Deputy Clerk

APPENDIX G

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

No. ED107476

ROBERT INGHAM, individually and on behalf of Gail Ingham, et al.,

Respondents,

vs.

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

Appellants

IMERYS TALC AMERICA INC.,

Defendant.

July 28, 2020

ORDER

Appellant's Application for Transfer to Missouri Supreme Court is denied.

SO ORDERED.

DATED:

JUL 28 2020 /s/____________________

Chief Judge
Missouri Court of
Appeals Eastern District

APPENDIX H

IN THE CIRCUIT COURT
OF THE CITY OF ST. LOUIS
STATE OF MISSOURI
The Honorable Rex M. Burlison, Judge

GAIL LUCILLE INGHAM, et al.,
Plaintiffs,
vs.

JOHNSON & JOHNSON, et al.,
Defendants.

Cause No. 1522-CC10417-01

TRIAL TRANSCRIPT
Volume 5

June 6, 2018

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P R O C E E D I N G S

* * *

[Plaintiffs' Opening Statement,
pp. 766:21-767:13]

* * *

All of these women, they have different names. They come from different parts of the country. They come from different educational backgrounds. They have got different social lives. Different skin colors. Different ethnic heritage.

But all of these women have something in common. All of them used regularly and extensively Johnson & Johnson Baby Powder and had to listen when a doctor said to them: You've got cancer.

And not just any cancer. You've got ovarian cancer. A cancer that has a mortality rate of almost 50 percent. And even if you go into remission, you always have an increased risk of a reoccurrence.

Now, all of these women have had that, it's what has taken the lives of a number of them, and what you've got to do in your position in this case is figure out why.

You're the detectives in this trial. You've got to do some detective work.

* * *

APPENDIX I

IN THE CIRCUIT COURT
OF THE CITY OF ST. LOUIS
STATE OF MISSOURI
The Honorable Rex M. Burlison, Judge

GAIL LUCILLE INGHAM, et al.,
Plaintiffs,
vs.

JOHNSON & JOHNSON, et al.,
Defendants.

Cause No. 1522-CC10417-01

TRIAL TRANSCRIPT
Volume 11

June 14, 2018

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P R O C E E D I N G S

* * *

[Videotaped Deposition of Donna Packard, pp. 2283:23-2288:5]

* * *

Q Now, your counsel asked you earlier today whether you had ever used the Johnson & Johnson Shower to Shower Shimmer Effects product. Do you recall that question?

A Um-hmm, I do.

Q And before I ask you a little bit more about that, let me just take you back to yesterday. You had an opportunity to meet with your counsel yesterday; is that right?

A Um-hmm, yes.

Q Okay. You met here in your home?

A Um-hmm.

Q Is that right?

A Yes.

Q Okay. And of course I will not ask you what you discussed with your counsel because that is attorney-client privilege between you and your lawyer.

A Okay.

Q But you did have an opportunity to speak with your counsel yesterday; is that right?

A Okay.

Q Is that right?

A Yes.

Q In preparation for your testimony today; is that right?

A Yes.

Q And it was after your meeting with your attorney yesterday that you did some more thinking last night; is that right?

A I thought about it more last night and here's what I thought: I think like most -- I don't mean to make this sexist, but I think girls go into a cosmetic counter and they see pretty colors and pretty-colored bottles. And now we have blue nail polish and turquoise and green and pink and orange and white and yellow and whatever. But back then we only had the typical pink and blue and turquoise green and whatever.

And so I was thinking that I probably saw this new product that was cream and had a gold top, and I thought, hmm. And I bought it. Not just because it was Shower to Shower, but because it was pretty and

colorful, and so I'm sure there was at some point some in this house.

Q And that's a memory that you had after your meeting with counsel last, yesterday?

A I dreamed it last night. I dreamed -- I woke up, I wasn't sleeping well last night thinking about all of today. And I was thinking, and the blue bottles were in here, and I think there may have been a blue bottle in here. I know there were times you would go to the store and you could only get pink or you could only get green or you can only get, you know, or white, or you could only get the sport, which was white -- the blue on white. And so I felt like knowing my whimsical ways, I would have seen, oh, gold, and I would have bought it.

Q And that's based on what you think you might have done, not what you recall doing; is that correct?

A Probably a little of both.

Q Okay. And this thought that you had and the dream that you had that you just described to us, those all came after you had your meeting with counsel to prepare for your deposition today; is that right?

A I've been thinking about this because this has been ongoing for quite a while. This has been coming up for several months, so I have -- I probably have given it more than just cursory, you know, thought.

Q That's fair enough, ma'am. Earlier today when you were asked about the Shower to Shower Shimmer Effects product by your counsel, I believe your testimony was that in thinking about it last night,

that you remembered or you believe that you would have bought that product. Did I get that testimony correct?

A I think so.

Q Okay. First, could you describe for us the outside of the Shimmer Effects product that you testified recalling you may have purchased or used?

A As I recall, because I don't have it in the house any more, it's a cream-colored bottle, it's the same shape, and it had a gold top on it.

Q And you would agree, ma'am, that in your Plaintiff Fact Sheet on page 11 that we just talked about for a few minutes, that when you were asked to describe the Shower to Shower products that you used, you described having used one that was blue and one that was pink and one that was green, but you don't describe having used one that had a cream-colored bottle or a gold top; is that correct?

A I also don't mention the purple, which I used.

Q But we are correct, you don't mention the Shower to Shower Shimmer Effects product in your Plaintiff Fact Sheet; is that right?

A Correct.

Q And I just wanted to make sure that we're clear. You did not describe the Shimmer to Shimmer, excuse me, Shimmer Effects product on your Plaintiff Fact Sheet where you're describing the -- the appearance of the Shower to Shower product that you used, correct?

A Yes.

Q When did you purchase -- first purchase Shower to Shower Shimmer Effects powder?

A I have not got a clue.

Q How old were you when you purchased Shower to Shower Shimmer Effects product?

A I have not got a clue. I mean, you've got to remember that I am -- I could have been 50, which would have been 40 years ago. I could have been 40, which could have been 35 years, 40 years ago. I don't recall.

Q Did you purchase Shower to Shower -- strike that. Did you purchase Shower to Shower Shimmer Effects powder more than once?

A I honestly don't know.

* * *

APPENDIX J

IN THE CIRCUIT COURT
OF THE CITY OF ST. LOUIS
STATE OF MISSOURI
The Honorable Rex M. Burlison, Judge

GAIL LUCILLE INGHAM, et al.,
Plaintiffs,
vs.

JOHNSON & JOHNSON, et al.,
Defendants.

Cause No. 1522-CC10417-01

TRIAL TRANSCRIPT
Volume 18A

June 26, 2018

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P R O C E E D I N G S

* * *

[Direct Examination of Dean Felsher, M.D., Ph.D., by Mr. Lanier, pp. 3590:19-3591:14, 3593:2-3594:10]

* * *

Q Clora Webb. Also not with us. You didn't have a chance to visit with her, did you?

A No.

Q Papillary serous adenocarcinoma IIC. What is that?

A The most common type of ovarian cancer.

Q BRCA not known. No family history. We don't know about that, but no family history's a good thing?

A Right.

Q Two children?

A Benefit.

Q Positive tobacco. Does it matter with that?

A No.

Q Negative for alcohol.

A Doesn't matter.

Q Talcum powder usage as an adult for 43 years. My question is: Did asbestos directly contribute to cause the ovarian cancer of Clora Webb?

A Yes.

Q Same reasons?

A Same reasons.

* * *

Q And our last plaintiff to look at is Marcia Hillman. Obviously, did not get to meet with her, but did you get to visit with her daughters?

A I didn't get to visit, I was able to talk by phone.

Q Oh, okay, that's good. Serous adenocarcinoma IV. And I think we've got it by now, but for the record we have to put it down because we got to make a record for each of these. Sorry for having to go through the same thing each time.

Serous adenocarcinoma IV, what is it?

A Most common type of ovarian cancer.

Q And IV, advanced stage?

A Advanced stage.

Q BRCA negative. That's a good thing?

A Good thing.

Q Tubal ligation?

A May be helpful.

Q May be. Children times three breastfed?

A Both good.

Q Family history, breast cancer. Her maternal grandmother?

A Bad thing.

Q Tobacco and social alcohol. Does that matter with her cancer type?

A No.

Q You've got her history. Pediatric talc as a child, as an adult around 40 years.

My question for Marcia Hillman as has been for the rest of these ladies. Did asbestos directly to cause her ovarian cancer?

A Yes.

Q Same reasons?

A Same reasons.

* * *

APPENDIX K

IN THE CIRCUIT COURT
OF THE CITY OF ST. LOUIS
STATE OF MISSOURI
The Honorable Rex M. Burlison, Judge

GAIL LUCILLE INGHAM, et al.,
Plaintiffs,
vs.

JOHNSON & JOHNSON, et al.,
Defendants.

Cause No. 1522-CC10417-01

TRIAL TRANSCRIPT
Volume 24A

July 5, 2018

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P R O C E E D I N G S

* * *

[Proceedings outside the presence of the jury
Re: Scheduling,
pp. 5039:6-5040:13]

* * *

THE COURT: But we've got 400 jury instructions that have to be read.

MR. BICKS: Right.

THE COURT: So that has to be the day before Wednesday.

MR. BICKS: Right. Or possibly, you know, end of the day Tuesday and then continuing into Wednesday with the closings, for example, Wednesday afternoon, but I hear what you're saying.

THE COURT: Yeah, I think for both sides -- it's most beneficial for both sides that the jury goes up to the deliberation room and not home after closings.

MR. LANIER: Yeah.

THE COURT: So, maybe I'm wrong, but that's typically how attorneys like to close and then deliberations start, not close and go home. So, that's where we are.

There may be some other options of through the weekend with Dr. Holcomb. Or as Dr. Moline was handled through some kind of video, live video, but I really am firm that we need to read these instructions and have enough time to read them and give the jury breaks, because we went through last Tuesday afternoon, we had this discussion, and I'm frankly concerned about losing the jury on about Instruction Number 150, so that's why I feel we need to do it at a pace that gives them breaks. I think we discussed about putting the instructions on the overhead while I'm reading those. I really think that that's to properly present 400 instructions to the jury and we have to take a day to do that.

Anything else? That's kind of the state of the case where we are right now. Court will be in temporary recess.

(Court was held in recess for the noon hour.)

APPENDIX L

IN THE CIRCUIT COURT
OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

GAIL LUCILLE INGHAM, et al.,

Plaintiffs,

v.

JOHNSON & JOHNSON, et al.,

Defendants.

April 18, 2018

Case No. 1522-CC10417-01

Division 10

AFFIDAVIT OF STEVEN D. PENROD

BEFORE ME, the undersigned authority, personally appeared the affiant named below, who being by me duly sworn, deposed as follows:

1. My name is Steven D. Penrod. I am over 18 years of age. I submit this Affidavit in support of Defendants' Memorandum of Law in Support of Motion to Sever Plaintiffs' Claims for Improper Joinder in the above-referenced matter. I am of sound mind, and if called as a witness, I could

and would competently testify to the statements herein.

2. I am a Distinguished Professor of Psychology at the John Jay College of Criminal Justice of the City University of New York. I hold a J.D. degree from the Harvard Law School, and a Ph.D. degree in social psychology, also from Harvard University. I have testified as an expert on a variety of social science and law issues in over 150 cases in federal and state venues, including Wisconsin, Minnesota, Illinois, Ohio, Indiana, California, Texas, Oklahoma, New York, New Jersey, Maine, Connecticut, Massachusetts, New Hampshire, Maryland, the District of Columbia, Virginia, Delaware, and Pennsylvania. I am an author or co-author of approximately 150 publications. I have specialized in the study of the legal and psychological aspects of decision-making by juries for more than 35 years, am conversant with the literature on consolidation of claims and parties and have published research on the specific topics discussed in this affidavit. My professional qualifications, including publications, grants, awards, and memberships are set forth more fully in my *curriculum vitae*, attached to this affidavit as Exhibit A.

3. I have been asked to render an opinion on: (1) the likely effect that consolidation of the claims of multiple plaintiffs against Johnson & Johnson, Johnson & Johnson Consumer Inc. and Imerys Talc America for trial will have on the jury; and (2) the efficacy of limiting instructions designed to overcome the prejudice stemming from such consolidation.

4. In my opinion, if the claims of multiple plaintiffs are presented to the same jury, the result will be unfairly prejudicial to defendants because there is a substantially greater likelihood that the jury will find defendants liable and will award greater damages to the plaintiffs. It is also my opinion that jury instructions will not mitigate this unfair prejudice.

5. In forming these opinions, I have reviewed the relevant psychological research literature summarized below and listed in Exhibit B hereto.

6. I base my opinions on scientific studies of jury decisionmaking in which jurors are confronted with multiple charges or claims, as well as studies in which jurors are confronted with evidence that is intended for use in either a limited manner or that jurors are instructed not to consider at all. In my opinion these studies clearly show that unfair prejudice results when jurors are exposed to information about other claims or charges against a defendant.

STUDIES ADDRESSING THE EFFECTS OF CONSOLIDATION

7. A number of researchers have studied the effect that consolidation of charges/claims against a defendant has on jury decision making. The studies in this area clearly and fairly uniformly demonstrate that when evidence of consolidated claims is presented to a jury, the jury is substantially more likely to find against a defendant on a given claim than if it had not

heard evidence of the other claims. Although some of this research has been conducted within the context of criminal cases, it is directly relevant to the issues raised in the present civil cases because the research underscores the difficulties jurors have in keeping trial evidence neatly compartmentalized. The research further demonstrates the ways in which inappropriate use of evidence can produce prejudicial effects. The research also underscores my opinions that jurors are likely to misuse evidence presented about multiple plaintiffs/claims, that the result will be prejudice against defendants, and that efforts to constrain the jury's use of the evidence in order to avoid consolidation prejudice are extremely unlikely to succeed.

8. Among the studies supporting the conclusions above are: Bordens & Horowitz (1983); Goodman-Delahunty, Cossins & Martschuk (2016); Greene & Loftus (1985); Horowitz & Bordens (1988); Horowitz & Bordens (1990); Horowitz & Bordens (2000); Horowitz, Bordens, & Feldman (1981); Leipold & Abbasi (2006); Tanford & Penrod (1982); Tanford & Penrod (1984); Tanford & Penrod (1986); Tanford, Penrod, & Collins (1985); Thomas (2010); White, (2006) and Wilford, Van Hom, Penrod & Greathouse (in press). Nearly all of these and other consolidation studies cited below have been published in peer-reviewed scientific journals. Most of my research and many other studies have been supported by grants from such as the National Science Foundation and the National Institute of Justice and these studies were

subjected to peer review even before they were funded and conducted. Complete references to the studies cited in this affidavit are provided in Exhibit B hereto.

9. These studies reveal the difficulties jurors confront when trying to sort out evidence that is relevant to particular issues or parties and not relevant to other issues or parties. The research shows that consolidated trials result in: (1) **inferences** by the jurors that a defendant has a bad character; (2) **cumulation** or spilling over of evidence against the defendant; (3) **confusion** of evidence; and (4) **changes in weight of evidence** (i.e. the tendency of jurors in such cases to give greater weight to plaintiff/prosecution evidence, relative to defense evidence). All of these factors have been shown to result in prejudice against defendants. A consolidated trial of these cases will therefore likely lead jurors to draw negative inferences against defendants and increase the likelihood of a pro-plaintiff verdict. It is also likely that jurors will cumulate "evidence" across claims, confuse the evidence presented by various plaintiffs and give greater weight to individual items of plaintiff evidence than would be the case if the claims were tried separately.

* * *

51. Based upon the foregoing, I conclude that it would be highly prejudicial to defendants if multiple claims against them were consolidated for trial. I anticipate that consolidation would cause jurors to draw negative inferences about

the defendants, enhance the apparent probative value of evidence against the defendants, prompt confusion and accumulation of evidence against the defendants and prejudicially increase the risk of liability findings, damages and punitive damages awards against the defendants. I further conclude that limiting instructions and deliberation by jurors are extremely unlikely to overcome these multiple sources of prejudice. By far the most effective method of avoiding the problems detailed above is to try each claim separately before separate juries.

Further Affiant sayeth not.

/s/ Steven D. Penrod
Steven D. Penrod

SUBSCRIBED AND SWORN TO before me on this 18th day of April, 2018.

/s/ Edward Canora
Notary Public In and For The State of New York

My Commission Expires: 9/07/18