# SUPREME COURT OF MISSOURI
## en banc

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| MIASIA BARRON, et al., | ) | |
| | ) | |
| Plaintiffs, | ) | FILED |
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| and | ) | SEP 12 2017 |
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| MADDISON SCHMIDT, by next friends, GARRY SCHMIDT and TAMMY SCHMIDT, | ) | CLERK, SUPREME COURT |
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| Respondents, | ) | |
| | ) | |
| v. | ) | No. SC96151 |
| | ) | |
| ABBOTT LABORATORIES, INC., | ) | |
| | ) | |
| Appellant. | ) | |

**CONCURRING OPINION**

The principal opinion affirms the judgment below on the ground that, even assuming the trial court erred in failing to grant the motions to transfer and to sever by Abbott Laboratories, Inc. ("Abbott"), reversal is not required because Abbott failed to show prejudice. Respectfully, though I agree the judgment should be affirmed, I disagree with the analysis used to reach that result.

Even though the use of a Rule 52.05(a) joinder to combine multiple in-state and out-of-state plaintiffs in a single action largely will be prevented in the future by *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, 137 S. Ct. 1773 (2017), I am compelled to write separately because – in cases like the present one – the use of Rule 52.05(a) to join the claims of multiple Missouri plaintiffs in a single petition will (and should) still occur. In my view, the analysis in the principal opinion falls short because it fails to highlight critical distinctions between non-discretionary rulings on motions to transfer and discretionary rulings on motions to sever and, more importantly, between a motion to sever made at the outset of an action and one made after pretrial proceedings are complete and the trial court has determined to try each plaintiff's claims separately.

Under the analysis in the principal opinion, when a defendant's initial efforts to sever each plaintiff's claims and transfer the resulting separate actions to proper venues fail (both in the trial court and, by way of petitions for extraordinary writs, in the appellate courts), the defendant is left without a remedy unless it can scale the nearly insurmountable hurdle of proving prejudice on appeal. The analysis set forth below, on the other hand, focuses on the fact that (unlike a motion to transfer) the trial court has discretion in ruling on motions to sever and the fact that this discretion will vary depending upon the circumstances of the litigation at the time the motion to sever is made. This analysis protects the rights of all parties, furthers the policies of efficiency and expeditiousness that animate Rule 52.05(a), and avoids creating the analytical dead-end of a prejudice requirement that seldom (if ever) can be met.

First, it bears emphasizing that Rule 52.05(a) expressly 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." [Emphasis added.] Though there are obvious differences among Plaintiffs' claims in this case, it is clear those claims arose out of a series of occurrences (i.e., the taking of Depakote) and at least one common question of law or fact will arise in resolving those claims (e.g., whether Abbott's design was defective, whether its testing was deficient, or whether its warnings were inadequate). As a result, joinder of Plaintiffs' claims in a single petition was proper in this case and the trial court's decision not to grant Abbott's original motion to sever – made at the outset of this case – was not an abuse of discretion.

Second, because joinder of Plaintiffs' claims in a single petition was proper under Rule 52.05(a), venue for this action in St. Louis City also was proper. Section 508.010, RSMo 2005, in relevant part, provides:

> 4. 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.

§ 508.010.4 (emphasis added). The first requirement in this subsection is that the petition must contain at least one count alleging a tort. Plainly, that requirement is met in this case because the petition contained numerous tort counts. The second requirement in this section is that "the plaintiff" in one of these tort counts must allege they were first injured

in this state. Here, four Plaintiffs alleged in their separate tort counts that they were first injured in the City of St. Louis, Missouri. As a result, both of the requirements of section 508.010.4 were met in this case and venue for the entire "action" (and not merely for the qualifying tort counts) was proper in St. Louis City.[1]

At this point, the analysis is clear that the question of venue in a multi-plaintiff, single-defendant case such as the present one is determined by section 508.010.4 and, therefore, venue is proper in any Missouri county in which any one of the plaintiffs in the many tort counts alleges he or she was first injured. The application of section 508.010.4, in turn, requires a determination as to whether the various counts of the various plaintiffs were properly joined in a single petition under Rule 52.05(a), which requires the trial court to determine whether the plaintiffs' claims arose out of the same transaction or occurrence, or series of transactions or occurrences, and whether common questions of law or fact will arise during the resolution of those claims. If so, joinder is proper under Rule 52.05(a) and any one of the joined counts may create venue for the

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[1] Arguably, section 508.010.5 compels a different result because there is at least one count in Plaintiffs' petition that both alleges a tort and alleges the plaintiff for that count was first injured outside the state. If so, subsections 4 and 5 would compel contrary and conflicting results – in cases such as the present one – where there are multiple plaintiffs seeking relief against a single, common defendant and where some of the plaintiffs were first injured in-state while other plaintiffs were first injured out of state. This quandary is enhanced by the fact that the introductory phrase in each subsection instructs this Court to ignore the other subsection. Perhaps this conflict suggests that, read as whole, section 508.010 simply does not define a proper venue for this action and, therefore, venue was proper in any county. *See State ex rel. Heartland Title Servs., Inc. v. Harrell*, 500 S.W.3d 239, 243 (Mo. banc 2016) (where section 508.010 fails to identify proper venue in a given case, venue is proper in any county). In my view, however, that approach is unnecessary. Here, Plaintiffs contend that, as filed, venue in this action was controlled by section 508.010.4, and the plain wording of that provision instructs this Court to ignore all contrary provisions of law, including section 508.010.5.

entire action under section 508.010.4. Finally, if joinder is proper under Rule 52.05(a), a trial court's decision to overrule a motion to sever the properly joined counts at the outset of the litigation – by operation of Rule 52.05(a) alone – cannot be an abuse of discretion.

But to say a trial court does not abuse its discretion by refusing to sever properly joined claims at the ***outset*** of an action, however, does not mean there will not come a time in the course of the litigation when severance is required. The efficient resolution of claims with common questions of law and fact is the driving force behind permissive joinder under Rule 52.05(a), and the trial court's discretion to pursue that end is bounded only by its ingenuity and the circumstances of the action. *See, e.g.,* Rule 66.02 (when "conducive to expedition and economy," the trial court may order a separate trial of any claims or issues). Resolution of early dispositive motions, coordinated discovery, adjudication of motions for full or partial summary judgment, and joint trials of common questions under Rule 66.02 are just a few of the tools trial courts have to manage multi-party civil litigation in pursuit of the just, speedy and inexpensive resolution of claims that Rule 41.03 requires. Accordingly, the trial court has broad discretion in deciding whether and when to sever properly joined claims, and its decisions in that regard should be affirmed as long as they are rationally related to the goals of efficiency and expeditiousness underlying Rule 52.05(a).

Once the trial court has determined that each plaintiff's claims are to be tried separately, however, the trial court necessarily has decided there are no further gains in efficiency or expeditiousness to be had from the joinder authorized by Rule 52.05(a). Once that decision has been made, therefore, the trial court has discretion to deny a

subsequent or renewed motion to sever only in the rarest of circumstances. Moreover, an abuse of discretion in denying such a motion will be patently prejudicial under section 508.012, RSMo 2005, which provides:

> At any time prior to the commencement of a trial, ***if a plaintiff*** or defendant, including a third-party plaintiff or defendant, ***is either added or removed*** from a petition filed in any court in the state of Missouri which would have, if originally added or removed to the initial petition, altered the determination of venue under section 508.010, then the judge shall upon application of any party transfer the case to a proper forum under section 476.410.

§ 508.012 (emphasis added).

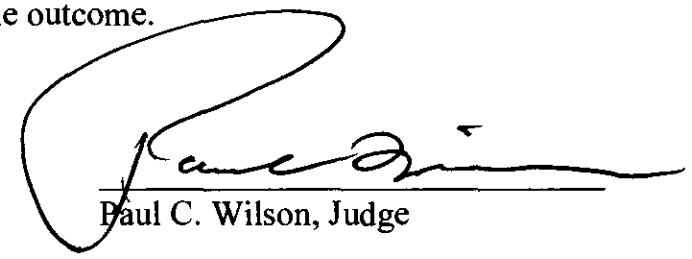
A decision to sever each plaintiff's claims in a multi-plaintiff case "removes" a plaintiff for purposes of section 508.012 and, therefore, doing so will require the trial court (on application of a party) to determine the proper venue for the various actions resulting from that severance. Where those venues are different from the original venue, section 508.012 requires the trial court to transfer those actions to their proper venues for trial.

In the present case, if Abbott had renewed its motion to sever after the trial court announced its intention to try each Plaintiff's claims separately – and if Abbott had challenged that failure in this appeal – the proper result would be to vacate the judgment entered below and remand with instructions for the trial court: (1) to sever each Plaintiff's claims into separate actions; (2) to reassess venue for each of the newly severed actions under section 508.012; and (3) to transfer those actions for which venue in St. Louis City is not proper under section 508.010 to their proper venue. That said, I am not convinced this is the proper result.

Even assuming Abbott renewed its motion to sever after pretrial proceedings were complete and the trial court had announced its intention to try each Plaintiff's claims separately, Abbott failed to identify clearly the trial court's denial of that ***renewed*** motion to sever – rather than the denial of Abbott's original motion – as the action being challenged in its point relied on. *See* Rule 84.04(d)(1) (each point relied on "shall … [i]dentify the trial court ruling or action that the appellant challenges"). Instead, Abbott's point relied on regarding severance is ambiguous as to whether it is the denial of Abbott's original or renewed motion to sever that is being challenged, while Abbott's appendix and the other sections in its brief refer only to the trial court's denial of Abbott's original motion. Because the trial court did not abuse its discretion in denying Abbott's original motion, I agree with the principal opinion that the proper result of this appeal is to affirm the judgment of the trial court.

Though I agree with the result in the principal opinion, my disagreement with the analysis in that opinion is not an academic one, and the effects of the path chosen by the Court in this case will be immediate and significant. As explained above, once the trial court determined that each Plaintiff's claims should be tried separately in this case, I believe it was error not to sever them and transfer those for which venue was no longer proper under sections 508.012 and 508.010. The principal opinion is at least willing to assume this is true. Nevertheless, under the principal opinion, the trial court may continue to try each of the remaining 23 Plaintiff's claims separately in the City of St. Louis even though venue would not be proper for 19 of those Plaintiffs' claims under section 508.012 if severance had occurred. Abbott may claim this is error, but it will

never obtain relief without showing the elusive, undefined, and likely unprovable prejudice that the principal opinion demands. I am unwilling to countenance such an immediate, improper, and easily avoidable outcome.



Paul C. Wilson, Judge