SUPREME COURT OF MISSOURI
en banc

STATE ex rel. JANSSEN PHARMACEUTICALS, INC., JOHNSON & JOHNSON, AND JANSSEN RESEARCH & DEVELOPMENT, LLC,	)	*Opinion issued December 22, 2020*
Relators,	)	
v.	)	No. SC98222
THE HONORABLE MICHAEL NOBLE,	)	
Respondent.	)	

ORIGINAL PROCEEDING IN PROHIBITION

Various plaintiffs, some claiming injury in the City of St. Louis and others asserting injury elsewhere, brought this action against Janssen Pharmaceuticals, Johnson & Johnson, and Janssen Research & Development (the "pharmaceutical companies") in the Circuit Court of the City of St. Louis. The pharmaceutical companies seek a writ of prohibition preventing the circuit court from allowing the claims of those injured outside of the City of St. Louis to be tried there. The pharmaceutical companies further ask this Court to require transfer of those claims. As reaffirmed in this Court's recent decision of *State ex. rel Johnson & Johnson v. Burlison*, 567 S.W.3d 168 (Mo. banc 2019),

permissive joinder under Rule 52.05(a) cannot create venue in an otherwise improper forum. Further, under the facts of this case, recently enacted section 508.013.1[1] is inapplicable because a trial date, as contemplated by the statute, was not set prior to February 13, 2019, to begin on or before August 28, 2019. For these reasons, the circuit court abused its discretion by refusing to transfer the claims of those injured outside of the City of St. Louis. This Court makes permanent its preliminary writ of prohibition.

Background

On May 8, 2015, 68 plaintiffs filed an action in the Circuit Court of the City of St. Louis against the pharmaceutical companies, stating various causes of action arising from the sale and use of Risperdal, a prescription drug. The petition contained the following theories: 1) negligence; 2) fraud; 3) strict product liability for failure to warn; 4) strict product liability for design defect; 5) breach of express warranty; 6) breach of implied warranty; and 7) unfair and deceptive trade practices. Five days later, a jury trial was initially set for April 18, 2016. The pharmaceutical companies filed a motion to dismiss, based on improper venue and *forum non conveniens*, for all plaintiffs not injured in the City of St. Louis. Alternatively, the pharmaceutical companies asked the circuit court to transfer those claims to proper venues.

Subsequently, 10 individuals voluntarily dismissed their claims. Of the remaining plaintiffs, only one, Treyvon Johnson, was purportedly injured in the City of St. Louis. Two other plaintiffs, Ryan Shelton and Jacob Simms, alleged injury in other Missouri

[1] All statutory references are to RSMo Supp. 2019, unless otherwise provided.

counties.[2] The circuit court considered and overruled the pharmaceutical companies' motion. After the motion was overruled, this Court handed down *Johnson & Johnson*. In light of that opinion, the pharmaceutical companies sought reconsideration of the motion to dismiss or, alternatively, transfer. The circuit court overruled the motion, finding this case was factually distinguishable from *Johnson & Johnson*.

All out-of-state plaintiffs ultimately consented to transfer of their claims to St. Louis County, where one of the pharmaceutical companies' registered agents is located. The circuit court ordered transfer of all claims other than those of the plaintiffs who were injured in Missouri—Johnson, Shelton, and Simms. Because the injuries of Shelton and Simms allegedly occurred in Missouri counties other than the City of St. Louis, the pharmaceutical companies filed a petition for a writ of prohibition or mandamus, asking that those claims be prevented from continuing in the City of St. Louis and be transferred. The court of appeals denied the petition. This Court subsequently issued a preliminary writ of prohibition. The pharmaceutical companies now seek a permanent writ.

Jurisdiction and Standard of Review

This Court has the power to issue and determine original remedial writs. Mo. Const. art. V, sec. 4.1. "Prohibition is a discretionary writ that only issues to prevent an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extrajurisdictional power." *State ex rel. Schwarz Pharma, Inc. v. Dowd*, 432 S.W.3d 764,

[2] Shelton and Simms were supposedly harmed in St. Louis County and Dunklin County, respectively. All other plaintiffs claimed injury in a different state.

768 (Mo. banc 2014). Extraordinary writs can be used to remedy improper venue decisions before a case is resolved. *State ex rel. Zellers v. Stacey*, 583 S.W.3d 436, 438 (Mo. banc 2019).

Analysis

The pharmaceutical companies argue transfer of Shelton's and Simms's claims is required, as venue is improper in the City of St. Louis. Specifically, the pharmaceutical companies argue the only basis for venue regarding Shelton's and Simms's claims is joinder with Johnson's claim, which was properly brought in the City of St. Louis. Rule 51.01 and this Court's precedent foreclose that method of venue creation.[3]

Rule 51.01 provides, "These Rules shall not be construed to extend or limit the jurisdiction of the courts of Missouri, or the venue of civil actions therein." This Court reaffirmed Rule 51.01 in *Johnson & Johnson*. The plaintiff there joined an action in the City of St. Louis, alleging various claims arising out of his wife's death. *Johnson & Johnson*, 567 S.W.3d at 169-70. While the plaintiff's wife was allegedly injured in St. Louis County and the applicable statute provided that venue lies in the place of injury, the plaintiff contended venue was proper in the City of St. Louis based on joinder with other claims that had proper venue in the City of St. Louis. *Id.* at 171-73. This Court, however, plainly stated:

[3] The pharmaceutical companies further contend transfer must occur based on section 508.010.10, RSMo Supp. 2014, because the circuit court denied the motion to transfer more than 90 days after filing. Although more than 90 days elapsed between filing of the motion and its adjudication, this argument need not be addressed because the pharmaceutical companies' other claim is dispositive.

> Whether joinder is justified by Rule 52.05 (parties), Rule 55.06 (claims), or any other court rule, Rule 51.01 prohibits extending venue, beyond statutory venue constraints, pursuant to any of the Missouri Rules of Civil Procedure, and it does not matter if the separate claims were brought by multiple plaintiffs against a single defendant, a single plaintiff against multiple defendants, or even a single plaintiff against a single defendant.

Id. at 174-75. The plaintiff's claim was ultimately transferred because permissive joinder under Rule 52.05(a) could not create venue where it otherwise would be improper. *Id.* at 175.

Section 508.010.4, RSMo Supp. 2014, which dictated the proper venue in *Johnson & Johnson*, also applies here. That subsection provides that "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." In this case, much like the plaintiff's claim in *Johnson & Johnson*, both Shelton and Simms allege injuries occurring outside of the City of St. Louis, and venue for their claims is based on joinder with a claim properly brought in that forum. As this Court previously held, venue cannot be created through permissive joinder.

The circuit court attempted to distinguish *Johnson & Johnson* by noting an immaterial factual difference, namely that the plaintiff's claim in *Johnson & Johnson* was designated for a separate trial, but no claims have been divided here. Because such a distinction was not necessary for the holding in that case, this Court finds no need to create one now. *Johnson & Johnson* is directly on point.

The plaintiffs, on behalf of the circuit court, cite a recently enacted statute, however, to argue *Johnson & Johnson* is inapplicable. Section 508.013.1,[4] which has been in force for just more than a year, states:

> The provisions of sections 507.040, 507.050, 508.010, 508.012, and 537.762 shall apply to any action filed after February 13, 2019. A plaintiff who is a resident of Missouri and who has a case that:
>
> (1) Is pending in a court in this state as of February 13, 2019;
>
> (2) Has proper jurisdiction in this state; and
>
> (3) Has or had been set at any time prior to February 13, 2019, for a trial date beginning on or before August 28, 2019, may continue to trial in the venue as filed.

The plaintiffs argue all requirements of section 508.013.1 are met. Specifically, they contend: 1) all remaining plaintiffs are Missouri residents; 2) the case was pending in the City of St. Louis as of February 13, 2019; 3) the parties do not dispute that the Circuit Court of the City of St. Louis has jurisdiction; and 4) the action, prior to February 13, 2019, was set for a trial date beginning before August 28, 2019. As a result, the plaintiffs posit, *Johnson & Johnson* does not apply,[5] and the claims can proceed in the City of St. Louis.

---

[4] At oral argument, the parties briefly addressed, for the first time, the constitutional validity of this statute. An appellate court will not consider arguments not raised in a party's brief. Rule 84.13(a); *see also Franklin Farms, LLC v. N. Am. Auction Co.*, 554 S.W.3d 497, 499 n.2 (Mo. App. 2018). The constitutional validity of this statute was not briefed, so this Court will not address the issue.

[5] Section 508.013.1 arguably prevents the application of *Johnson & Johnson* for two reasons. First, the statute states section 507.040.2, which expressly adopts this Court's holding in *Johnson & Johnson* as it relates to joinder and venue, is inapplicable. Second, the new law provides the statute underlying the venue analysis in *Johnson & Johnson*, section 508.010.4, RSMo Supp. 2014, no longer governs.

Assuming section 508.013.1 governs,[6] the requirements are not satisfied because a trial date, as contemplated by the statute, has not been set. Local Rule 6.2.1 of the Twenty-Second Judicial Circuit, the circuit embracing the City of St. Louis, provides, "After filing, the clerk shall assign each case triable by a jury to Division 1. Thereafter, the presiding judge shall place each such case on the Division 1 trial calendar and assign such cases to general divisions for trial when appropriate." The Twenty-Second Judicial Circuit's Docket Procedures further state, "Within 30 days of filing, a circuit civil case is assigned to Division 1, designated as a track 1 or track 2 case and scheduled on an *initial* trial docket according to the trial readiness time periods prescribed by Local Rule 31." (Emphasis added).[7]

Together, these local practices indicate civil cases are set on an ambitious, *initial* trial docket in Division 1 within 30 days of the case's filing. Division 1 typically does not hear or try the case. Rather, when a case is deemed ready for an *actual* trial, the presiding judge assigns it to a general trial division within the circuit. Here, April 18, 2016, was the date indicated on the *initial* trial docket, without input from the parties.

---

[6] The pharmaceutical companies argue section 508.013.1 does not govern because it applies prospectively. Although statutes generally apply prospectively, when "legislative intent that [the statute] be given retroactive operation clearly appears from the express language of the act or by necessary or unavoidable implication[,]" this rule is overcome. *Lincoln Credit Co. v. Peach*, 636 S.W.2d 31, 34 (Mo. banc 1982). Here, retroactive operation is shown by necessary or unavoidable implication because of the dates set out in the section. Only cases pending before February 13, 2019, and set for trial before August 28, 2019, are eligible for statutory protection. Because these dates fall on or before the effective date of the statute, the law must apply retroactively.

[7] All cases filed in the City of St. Louis are designated as a track one, two, or three case. Local Rule 31.1. Most cases are assigned to track one, but certain actions, including products liability cases, are designated as track two cases. Local Rule 31.2. Track two cases are to be "ready for trial 370 days from the date of filing." Local Rule 31.5.

This date came less than one year after the action was commenced. Further, the setting was made automatically, likely by someone other than the judge anticipated to preside over the trial, five days after the petition was filed, one day after the summonses had been issued, and before the defendants were served.[8] Automatic placement on the *initial* trial docket indicated this date was to serve as a preliminary placeholder, rather than an *actual* trial date as contemplated by the statute.[9]

The legislature passed section 508.013.1 in May 2019, a few months after this Court decided *Johnson & Johnson*.[10] The new law went into effect August 28, 2019. The legislature clearly intended the statute to allow cases pending as of February 2019, with trial set to begin on or before the statute's effective date, to continue in the original venue, even though venue was improper pursuant to *Johnson & Johnson*. The change in law was meant to permit cases on the eve of trial to go forward in an improper forum without being forced to transfer to a proper county, which would likely cause further case delays.

Although the facts of this case fit into the timeline set out in section 508.013.1, the aspirational setting on the *initial* trial docket was not an *actual* trial setting. At the time this date was set, the litigation was at an early stage, with defendants unserved and

---

[8] At this early stage in the litigation, it is highly unlikely a mass tort case, such as this one with 68 plaintiffs, would be ready for trial on the placeholder date set. It is highly unlikely the parties could effectuate service, retain experts, conduct discovery, and complete other pretrial matters—in short, completely prepare the case for trial—in less than one year. In fact, that did not occur here.

[9] The mass calendaring system used by the Twenty-Second Judicial Circuit helps track and keep cases moving.

[10] *Johnson & Johnson* was handed down February 13, 2019.

discovery not initiated. To date, the case remains at a preliminary phase, with no discovery completed and the case nowhere near ready for trial. Requiring a transfer of venue in this case does not risk a last-minute trial delay, which would jeopardize judicial efficiency and lead to countless hours of additional litigation. The requirement of a trial setting as found in section 508.013.1 is not met under these facts. *Johnson & Johnson* controls and requires transfer of Shelton's and Simms's claims.

Conclusion

Based on this Court's recent holding in *Johnson & Johnson*, Rule 52.05(a) cannot be used to confer venue in a forum that is otherwise improper. Additionally, newly enacted section 508.013.1 does not alter the result on these facts, as a trial date within the meaning of the statute was not set prior to February 13, 2019, to begin on or before August 28, 2019. The circuit court's failure to transfer the claims of those injured outside of the City of St. Louis was an abuse of discretion. This Court makes permanent its preliminary writ of prohibition.

____
Mary R. Russell, Judge

Powell, Breckenridge, Stith, and Fischer, JJ., concur;
Wilson, J., dissents in separate opinion filed;
Draper, C.J., dissents without opinion.

SUPREME COURT OF MISSOURI
en banc

STATE ex rel. JANSSEN PHARMACEUTICALS, INC., JOHNSON & JOHNSON, AND JANSSEN RESEARCH & DEVELOPMENT, LLC,	)	
Relators,	)	
v.	)	No. SC98222
THE HONORABLE MICHAEL NOBLE,	)	
Respondent.	)	

DISSENTING OPINION

The principal opinion determines this case does not qualify for the safe harbor provision of section 508.013.1, RSMo Supp. 2019, because the original trial date in this case of April 18, 2016, was "aspirational," "highly unlikely," and does not ***now*** appear to have been reasonably achievable when set. But the plain language of the statute requires only that the action have had a trial date beginning on or before August 28, 2019. This case did.[1] Section 508.013.1(3) does not say the trial date had to have been "practical,"

---

[1] The principal opinion suggests that the April 18, 2016, trial date may have been generated automatically or set by someone other than the judge. *Slip op*. at 8. Of course, a trial date can be

"reasonable," or "likely." When construing a statute, "courts cannot 'add statutory language where it does not exist'; rather, courts must interpret 'the statutory language as written by the legislature.'" *Peters v. Wady Indus., Inc.*, 489 S.W.3d 784, 792 (Mo. banc 2016) (quoting *Frye v. Levy,* 440 S.W.3d 405, 424 (Mo. banc 2014)). Accordingly, the preliminary writ in this case should be quashed.

____
Paul C. Wilson, Judge

---

set only by a judge to whom the case was assigned at the time the date was set. Had it been set by a clerk or automatically by the case management system, there would have been no trial date set and the safe harbor in section 508.013.1 would not be met. But, as the principal opinion points out, Local Rule 6.2.1 in the Twenty-Second Circuit plainly provides that all cases triable to a jury are to be assigned to the presiding judge and that this judge is to set the original trial date. Relators fail to demonstrate this local rule was not followed and, therefore, have failed to establish grounds for a permanent writ of prohibition.