

Missouri Appellate Court Hears Oral Argument in Johnson & Johnson \$4.7B Appeal

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Last Friday, the Eastern District of Missouri Appellate Court held oral arguments in an appeal by Johnson & Johnson (J&J) of a jury verdict for 22 plaintiffs who claimed that the company's talcum powder caused ovarian cancer, *Ingham v. Johnson & Johnson*, No. ED107476. Although J&J's appeal also asserted a lack of scientific evidence that talc causes ovarian cancer, the oral arguments centered around three issues.

J&J first argued that the trial court's authorization of a single mass trial of 22 different plaintiffs from 12 different states violated due process and the Missouri civil rules. According to J&J, the mass trial allowed the plaintiffs to hide weaknesses in individual cases and to use their sheer numbers—rather than scientific evidence—to convince the jury that talc powder causes ovarian cancer. J&J noted that after a six-week trial with evidence from 22 different plaintiffs under 12 different state laws, the jury deliberated for only eight hours and awarded each plaintiff family exactly \$25 million in compensatory damages (later supplemented by the court's division of the \$4.14 billion punitive damage award equally among each family, granting each \$188 million). J&J also argued that the mass trial resulted in the jury improperly hearing evidence about certain plaintiffs that would have been inadmissible in separate trials of others, given the plaintiffs' widely different circumstances, increasing the risk that the jury considered improper evidence in making its findings.

A Missouri appellate court focused its questions primarily on how the trial court could achieve the efficiencies of a mass trial and whether the jury was properly instructed through limiting instructions on the applicability of evidence to certain plaintiffs. J&J emphasized that a fair trial should not be sacrificed for the sake of efficiency and that limiting instructions could not effectively mitigate the problems inherent in the mass trial. J&J explained that the trial court's instruction to the jury to render separate verdicts for each plaintiff could not prevent the jury from struggling to segregate evidence applicable to different plaintiffs, and that it is unclear what specific further limiting instructions would have said. The plaintiffs responded that the jury was attentive and well-instructed, that each juror had received a copy of the instructions, and that it cannot be assumed from the amount of the verdict that the jury was overwhelmed.

J&J next argued that a Missouri state court did not have personal jurisdiction over the claims of 17 non-resident plaintiffs. Because J&J is not a Missouri corporation, these non-resident plaintiffs had to prove that J&J had

sufficient contacts with the state, which they did by referencing two contracts a J&J subsidiary had with a Missouri-based company, one of which was for the mixing and packaging of a talc-based powder in Missouri, which some non-resident plaintiffs claimed they had bought, and another for the manufacture of baby powder. On appeal, J&J argued it was never a party to those Missouri-based contracts, and that the plaintiffs had failed to show that its subsidiary was an alter ego or agent of J&J. J&J also noted that two non-resident plaintiffs never claimed to use the Missouri-made product, and that the others could not say when they used it or claimed they bought it at a time when it was not being sold. Moreover, the baby powder subject to the contract between the J&J subsidiary and the Missouri company was manufactured in Georgia, not Missouri. The plaintiffs responded that a contractual relationship can give rise to jurisdiction, and that J&J had exerted control over its subsidiary to impose J&J policies into the contractual relationship between the J&J subsidiary and the Missouri-based third party.

The appellate court noted that the mere fact of a parent subsidiary relationship does not establish agency, and it focused its questions mostly on the absence of trial evidence establishing J&J's influence on the alleged Missouri-based contacts and the alleged agency relationship. The plaintiffs responded by noting that the documents at issue in the case refer to the J&J family of companies.

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Finally, J&J argued that it was entitled to a new trial because the plaintiffs' attorney had improperly asserted during closing arguments that J&J's reference to the "but-for" causation requirement was "made up" and would not be found in the jury instructions. In its questioning, the appellate court noted that the jury had been given the correct jury instructions from the Missouri Approved Jury Instructions, which do not mention the but-for test, and that even though the plaintiffs' attorney's comments may have been tantamount to saying that but-for causation is not the law, he corrected himself after defense counsel objected. Moreover, the jury had the proper jury instructions—a fact which separates this case from precedent. J&J replied that the jury was told by plaintiffs' counsel that but-for causation was "made up," and began deliberations without clarification from the court on the correct standard. Plaintiffs' counsel countered that its statement at trial was in response to defense counsel's improper assertion that the but-for test would be found in the jury instructions.

Missouri has been a hot spot in recent years for litigation involving claims that J&J's talcum powder causes ovarian cancer, with many Missouri state court juries issuing large damage awards against the company. J&J, however, has seen multiple victories at the Missouri appellate level, as early plaintiff wins have been overturned by Missouri appellate courts based on jurisdictional issues.

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