

# Missouri Adopts High Burden for Venue Challenges and Affirms a \$23 Million Punitive Damages Award Based, in Part, on a Manufacturer's Profit Motives

September 13, 2017

On September 12, 2017 the Missouri Supreme Court handed down its 4-3 opinion in *Barron v. Abbott Laboratories, Inc.*, SC96151, dealing a significant blow to businesses who seek to transfer cases from Missouri trial venues considered to be too plaintiff friendly. The opinion also is of significant interest to businesses since it identifies profit motive as a factor supporting an award of punitive damages.

The plaintiff in *Barron* brought a product liability lawsuit against the manufacturer of an anti-epileptic drug (Depakote), claiming her birth defects were caused by her mother's ingestion of the drug during pregnancy. The plaintiff claimed that the warning label used by the manufacturer did not sufficiently warn consumers about the risks of birth defects associated with the drug. The Supreme Court affirmed the jury's \$38 million damage award, which included \$23 million in punitive damages, and also rejected the defendant's challenge to venue in the City of St. Louis.

The lawsuit was brought by a Minnesota plaintiff against an Illinois-based defendant. The court noted a "lack of connection to Missouri" and highlighted the defendant's efforts to transfer venue from the City of St. Louis, including a petition for writ of prohibition and mandamus (which both the Court of Appeals and Supreme Court denied). The court held that even if the trial court failed to comply with a mandatory statute, there was no error unless the defendant proved that the improper venue resulted in an "unfair trial"—specifically, bias by the jury or trial court that materially affected the merits of the case. The concurring opinion, authored by Judge Paul Wilson and joined by two other judges, described this burden as "insurmountable" and opined that the prejudice requirement would "seldom (if ever)" be met. Thus, following the decision in *Barron*, a trial court that declines to follow the mandates of a venue statute has an exceedingly low chance of being reversed on appeal.

Moreover, the defendant in *Barron* argued that the City of St. Louis was a pro-plaintiff venue that had become a haven for out-of-state plaintiffs. For example, in its brief, the defendant stated that "[t]here are over 145 ... mass tort cases currently pending in St. Louis City with over 9,700 plaintiffs. These cases have on average sixty-two out-of-state plaintiffs and one plaintiff who resides in the City of St. Louis." However, in

rejecting the venue challenge, a four-member majority of the court held that the defendant's claims that the City of St. Louis "is a more favorable venue to plaintiffs" or "biased in general" were insufficient to establish the prejudice needed to reverse a trial court's denial of a change of venue.

The venue concerns raised by the defendant in *Barron* echo the criticism of others who perceive an unfair pro-plaintiff litigation environment in Missouri's courts. For example, the American Tort Reform Foundation has listed the City of St. Louis as the number one "Judicial Hellhole" in America.[1] Further, in September 26, 2016, *Bloomberg Businessweek* described St. Louis as the "New Hot Spot for Litigation Tourists" because of its "reputation for fast trials, favorable rulings, and big awards." [2] Likewise, the U.S. Chamber's Institute for Legal Reform has ranked Missouri as the 49th worst state in the country in terms of "how reasonable and balanced the states' tort liability systems are perceived to be by U.S. businesses." [3]

In addition to denying the defendant's venue challenge, the Supreme Court also affirmed the jury's \$23 million punitive damages award. In reaching this decision, the court noted that the defendant's product label warned of a one- to two-percent risk of birth defects. However, there were "studies" showing that the risk was as high as ten percent.

In affirming the punitive damages award, the court cited evidence that the defendant "conducted no independent research or studies of its own" to evaluate the risks for birth defects, and further noted that the defendant had spent "\$50 million to \$100 million per year marketing" its product. The court concluded that "[a] reasonable inference from this evidence is that, motivated by profits, [the defendant] deliberately disregarded the safety of [the drug's] users."

Thus, the court's opinion indicates that a corporate defendant's profit motive is a factor for the jury to consider in awarding punitive damages. Further, the court's opinion would support an argument that drug manufacturers may be liable for punitive damages if they spend money on marketing rather than on studying reports that identify risks presented by their products.

The opinion is available here: <http://www.courts.mo.gov/file.jsp?id=117596>

If you have questions about this alert, please contact your Lathrop Gage attorney or the attorney listed above.

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[1] <http://www.judicialhellholes.org/2016-2017/city-of-st-louis-missouri/>

[2] <https://www.bloomberg.com/news/articles/2016-09-29/plaintiffs-lawyers-st-louis>

[3] <http://www.instituteforlegalreform.com/states>