IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

Appeal No. ED104580

ESTATE OF JACQUELINE FOX
Plaintiff/Respondent

v.

JOHNSON & JOHNSON, et al.
Defendants/Appellants

Appeal from the Circuit Court of the City of St. Louis
The Honorable Rex M. Burlison, Circuit Judge

SUPPLEMENTAL BRIEF OF APPELLANTS

Thomas B. Weaver, #29176
William Ray Price, Jr., #29142
Jeffery T. McPherson #42825
ARMSTRONG TEASDALE LLP
7700 Forsyth Boulevard, Suite 1800
St. Louis, Missouri 63105
314.621.5070
314.621.5065 (facsimile)
tweaver@armstrongteasdale.com
wprice@armstrongteasdale.com

Gene M. Williams
Scott A. James
SHOOK, HARDY & BACON, L.L.P.
600 Travis Street, Suite 3400
Houston, Texas 77002-2926
713.227.8008
713.227.9508 (facsimile)
gmwilliams@shb.com
sjames@shb.com

Gerard T. Noce, #27636
Beth A. Bauer, #49981
HEPLERBROOM LLC
211 North Broadway, Suite 2700
St. Louis, Missouri 63102
314.241.6160
314.241.6116 (facsimile)
gtn@heplerbroom.com
bab@heplerbroom.com

Mark C. Hegarty, #40995
SHOOK, HARDY & BACON, L.L.P.
2555 Grand Boulevard
Kansas City, Missouri 64108-2613
816.474.6550
816.421.5547 (facsimile)
mhegarty@shb.com

Attorneys for Appellants

Appellants-Defendants Johnson & Johnson ("J&J") and Johnson & Johnson Consumer Inc., formerly known as Johnson & Johnson Consumer Companies, Inc. ("JJCI"), submit this memorandum to address the United States Supreme Court's recent ruling in *Bristol-Meyers Squibb Co. v. Superior Court of California*, No. 16-466, 2017 WL 2621322 (U.S. June 19, 2017) ("*BMS*"). In *BMS*, the Supreme Court held that nonresident plaintiffs like Ms. Fox cannot manufacture personal jurisdiction by joining their claims with those of other plaintiffs for whom jurisdiction may be proper. The decision confirms that the trial court lacked personal jurisdiction over J&J and JJCI with respect to Ms. Fox's claims and that the judgment in this case must be reversed.

Attempting to preserve the judgment notwithstanding *BMS*, apparently Plaintiff now seeks to supplement the record to advance a new jurisdictional argument based on the purported involvement of a Missouri company, Pharma Tech, in manufacturing talc-based products. *See* 6/22/17 Letter from E. Robinson to Hon. L. Roy (attached as Ex. 1). Specifically, Plaintiff asks that the case be remanded to the circuit court to permit the "development of evidence" to support this new theory. *Id*.

As set forth below, however, Plaintiff is limited to the record on appeal and cannot present to this Court "evidence" never presented to the trial court, much less do so in an attempt to support a new theory presented for the first time on appeal. That is especially true where, as here, such a theory has no basis in the pleadings. In any event, Plaintiff's new theory is contrary to both *BMS* and the record actually before this Court.

For all of these reasons, and those set forth in prior briefing and at oral argument,

personal jurisdiction was lacking, and the Court should reverse and remand to the trial court with directions to dismiss without prejudice for lack of personal jurisdiction.

ARGUMENT

1. *BMS* CONFIRMS THAT THE COURT LACKS PERSONAL JURISDICTION OVER DEFENDANTS AS TO THE FOX CLAIMS.

The Court should vacate the judgment and remand with directions to dismiss for lack of personal jurisdiction because Plaintiff's claims have no nexus to Missouri and J&J and JJCI are not based in this State. As Plaintiff's counsel conceded at oral argument, whether there is personal jurisdiction in this case "depend[s] on what the Supreme Court says" in *BMS*. *See* Tr. of Proceedings ("Fox Tr.") 54:10-55:5, *Fox v. Johnson & Johnson*, et al., No. ED104580 (May 10, 2017) (attached as Ex. 2). *BMS* has now been decided, and the U.S. Supreme Court's decision makes clear that Ms. Fox's claims cannot proceed in Missouri.

In *BMS*, more than 600 plaintiffs, most of whom were not California residents, sued Bristol-Myers in California state court, alleging that they were injured by ingesting Plavix, a drug manufactured by Bristol-Myers Squibb ("BMS") and sold nationwide. The defendant moved to dismiss the nonresidents' claims on the ground that the court lacked personal jurisdiction. On appeal, the California Supreme Court concluded that the trial court had specific personal jurisdiction over the claims, finding that "BMS's extensive contacts with California," combined with the fact that the "claims of the nonresidents were similar in several ways to the claims of the California residents," were sufficient to "permi[t] the exercise of specific jurisdiction." 2017 WL 2621322, at *5

(citation omitted).

The U.S. Supreme Court reversed, rejecting the California Supreme Court's approach as "resembl[ing] a loose and spurious form of general jurisdiction." *Id.* at *8. It further criticized the holding for failing to "identify[] any adequate link between the State and the nonresidents' claims." *Id.* As the Court explained:

> [T]he nonresidents were not prescribed Plavix in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California. The mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California – and allegedly sustained the same injuries as did the nonresidents – does not allow the State to assert specific jurisdiction over the nonresidents' claims. . . . This remains true even when third parties (here, the plaintiffs who reside in California) can bring claims similar to those brought by the nonresidents. . . . What is needed – and what is missing here – is a connection between the forum and the specific claims at issue.

Id.

Only Justice Sotomayor dissented. In so doing, she expressly emphasized the issue of joinder, contending that "[n]othing in the Due Process Clause prohibits a California court from hearing respondents' claims – at least not in a case where they are joined to identical claims brought by California residents." *Id.* at *15 (Sotomayor, J.,

dissenting). And she expressed concern that the ruling would "have consequences far beyond this case" because "the upshot of today's opinion is that plaintiffs cannot join their claims together and sue a defendant in a State in which only some of them have been injured." *Id.* at *17.

The majority rejected these concerns. As it explained, its decision did not erect an insuperable barrier to joint actions by residents from different states "in the States that have general jurisdiction over BMS" – i.e., New York or Delaware. *Id.* at *3. But what the plaintiffs could not do is join together to sue in some other state based solely on the fact that one or more of the plaintiffs resided or was allegedly injured there. *See id.* at *8.

Consistent with the Missouri Supreme Court's holding in *State ex rel. Norfolk Southern Railway v. Dolan*, 2017 WL 770977 (Mo. banc Feb. 28, 2017), *BMS* definitively forecloses specific personal jurisdiction for plaintiffs such as Ms. Fox, who allege no connection between their claims and the forum state, and instead rely on the fact that their claims involved products also sold in Missouri or they have joined their claims with other plaintiffs who allegedly were injured in the forum state. Indeed, Ms. Fox – who was not a Missouri citizen and did not allege that she purchased, used, or was injured from using talc in Missouri – is indistinguishable from the non-California plaintiffs who could not maintain specific personal jurisdiction over the non-California defendant in *BMS*.

Norfolk Southern and *BMS* have now rejected the only two bases for specific personal jurisdiction ever advanced by Plaintiff. Accordingly, Missouri courts do not have personal jurisdiction over J&J and JJCI with respect to Ms. Fox's claims, and the

trial court's judgment should be reversed and Plaintiff's claim remanded for dismissal.

2. MS. FOX'S NEW THEORY OF PERSONAL JURISDICTION CANNOT SAVE HER CLAIMS BECAUSE IT IS UNTIMELY AND GROUNDLESS.

Confronted with the plain fact that *BMS* and *Norfolk Southern* have rejected the jurisdictional arguments she has pursued throughout the case, Plaintiff now requests that the Court remand this case to the circuit court to "permit development of evidence relating to and consideration of Missouri's specific jurisdiction over Johnson & Johnson," apparently based on the alleged involvement of a third-party Missouri company, Pharma Tech, in the manufacturing process of talc products. *See* Exhibit 1 (6/22/17 Letter from E. Robinson to Hon. L. Roy). This effort should be rejected.

A. Plaintiff improperly seeks to supplement the record on appeal with documents never presented to the trial court.

First, Plaintiff seeks to support her extraordinary remand request by attaching the transcript of a hearing in a different case discussing documents Plaintiff never presented in the trial court in this case. Missouri courts have consistently held that the record on appeal is closed and may not be supplemented with documents or purported "evidence" that was not presented in the trial court and included in the record on appeal. *See 8182 Maryland Associates, Ltd. Partnership v. Sheehan*, 14 S.W.3d 576, 587 (Mo. banc 2000) ("[g]enerally appellate courts will not consider evidence outside the record on appeal"); *McQuary v. State,* 241 S.W.3d 446, 453 (Mo. App. 2007) (appellate courts review "the record created at trial and can neither receive nor consider new evidence"); *In re Adoption of C.M.B.R.*, 332 S.W.3d 793, 814 (Mo. banc 2011) ("there can be no review of

a matter which has not been presented to or expressly decided by the trial court"). Indeed, Missouri courts have refused to consider documents not included in the record on appeal even when those documents were part of the trial court record. *See Washington v. Zinn*, 286 S.W.2d 828, 831 (Mo. App. 2009); *Lester E. Cox Medical Centers v. Richards*, 252 S.W.3d 236, 238 n. 2 (Mo. App. 2008).

Neither the transcript from the hearing in *Blaes, et al. v. Johnson & Johnson, et al.*, No. 1422-CC9326-01 (attached to Plaintiff's June 22, 2017 letter) nor the documents referred to in that transcript – which were not in the trial court record in this case – are part of this record on appeal. The Court should reject Plaintiff's improper attempt to expand the record in a last-ditch attempt to overcome the deficiencies in her personal jurisdiction theory.

B. Plaintiff's new jurisdictional argument is not timely because it was raised for the first time on appeal and has no basis in the pleadings.

Second, Plaintiff's new theory of personal jurisdiction fails because she did not raise it before the trial court, or include any allegations in her pleadings or present any evidence to support it.

Under Missouri law, a party may not assert on appeal a theory or argument that was not presented in the trial court. *See In re Marriage of Hunter*, 614 S.W.2d 277, 278 (Mo. App. 1981); *State v. Davis*, 345 S.W.3d 768, 770 (Mo. banc 2011); *Blanks v. Fluor Corp.*, 450 S.W.3d 308, 384 (Mo. App. 2014).

Consistent with Missouri law, appellate courts in other jurisdictions have specifically held that, where the existence of jurisdiction is challenged on appeal, the

appellate court will not consider jurisdictional arguments or theories not raised before the trial court. *See, e.g.*, *Simmons v. Budde*, 38 N.E.3d 960, 963-64 (Ohio Ct. App. 2015) (rejecting plaintiff's personal jurisdiction argument offered for the first time on appeal, because "[a] party may not change its theory of the case and present new arguments for the first time on appeal"); *Ackourey v. Sonellas Custom Tailors*, 573 F. App'x 208, 211 n.2 (3d Cir. 2014) (declining to address new jurisdictional arguments that the plaintiff failed to raise before the district court); *Ritchie Capital Mgmt., L.L.C. v. Costco Wholesale Corp*., 667 F. App'x 328, 329 (2d Cir. 2016) ("[Plaintiff]'s sole argument on appeal is that [the defendant] is subject to general personal jurisdiction because it registered to do business in New York. It is undisputed that [the plaintiff] did not raise this argument below; it is forfeited."); *Greer v. Safeway,* 317 F. App'x 838, 841 (10th Cir. 2009) (refusing to consider arguments in favor of jurisdiction raised for the first time on appeal).[1]

As the Court is aware, both before the circuit court and on appeal to this Court, Plaintiff insisted that the Missouri courts have specific personal jurisdiction over J&J and

[1] The Missouri Court of Appeals has held that it will consider arguments raised by a party ***challenging*** jurisdiction for the first time on appeal because, if jurisdiction is lacking for any reason, the Court "lacks the power to adjudicate the matter" at all. *See Maul v. Maul*, 103 S.W.3d 819, 820 (Mo. App. 2003). The same concerns do not apply here because Plaintiff, not J&J or JJCI, had the burden to establish that jurisdiction exists and failed to make such a showing before the circuit court or on appeal.

JJCI for only two reasons: (1) her claim "related to" J&J's and JJCI's conduct in Missouri because the products she bought and used in Alabama were also sold in Missouri, and (2) Plaintiff had joined her claims to those of certain Missouri residents who also claim to have been injured as a result of using talc products. *See* LF312-13, 320-25; Respondent's Br. 39-50. In denying Defendants' motions to dismiss for lack of personal jurisdiction, the trial court limited its ruling to and adopted those grounds. LF622-24. Plaintiff never alleged or argued in the trial court or in this Court that specific personal jurisdiction existed because of any alleged relationship between the defendants and Pharma Tech or the latter company's alleged involvement in manufacturing talc-based body powder products. In fact, Plaintiff never mentioned Pharma Tech until *after* Plaintiff's theory of specific personal jurisdiction was rejected by the Supreme Court in *BMS*. For this reason alone, this Court should reject Plaintiff's extraordinary request that, based on documents she never presented to the trial court, she be allowed to pursue a new jurisdictional theory first raised on appeal.

Further, Plaintiff's suggestion that she is entitled to discovery to flesh out a new jurisdictional theory that is not mentioned in or supported by the allegations in her petition is contrary to Missouri law. Missouri courts have noted that a court's inquiry regarding the existence of personal jurisdiction is "limited to deciding whether the pleadings are sufficient to survive the motion to dismiss." *Hollinger v. Sifers*, 122 S.W.3d 112, 115 (Mo. App. 2003). Consistent with this rule, Missouri courts have held that, to be entitled to discovery related to jurisdictional issues, a "plaintiff is required to have alleged facts in the petition which, if true, establish jurisdiction." *Mello v.*

Giliberto, 73 S.W.3d 669, 674, (Mo. App. 2002) (affirming order dismissing claims for lack of jurisdiction and rejecting argument that plaintiff should have been allowed discovery to uncover facts capable of supporting personal jurisdiction); *see also State ex rel. Scott v. Marsh*, 661 S.W.2d 601, 603 (Mo. App. 1983) ("Relator's amended petition does not allege jurisdictional facts, and relator is not entitled to discovery in the absence of such alleged facts").

Even though Plaintiff filed an amended petition in January of 2016 shortly before trial, she did not allege that any of the products at issue were manufactured in Missouri or mention Pharma Tech in her petition. LF103-68, 1814-68. Plaintiff therefore could not have pled facts which, if true, would establish personal jurisdiction based on Pharma Tech's purported role in manufacturing the talc products that she used. For this reason, too, Plaintiff's new jurisdictional argument – and her belated bid for discovery to support it – should be rejected.

It is axiomatic that the appropriate relief in this appeal is reversal and remand for dismissal based on lack of jurisdiction. *See Thompson v. Thompson*, 657 S.W.2d 629, 632 (Mo. banc 1983) (reversed and remanded for dismissal based on lack of personal jurisdiction); *Nocito v. Nocito*, 670 S.W.2d 181, 182 (Mo. App. 1984) (same).

C. Plaintiff's new jurisdictional argument is legally and factually insufficient.

Based on the hearing transcript from another case, Plaintiff's new jurisdictional theory appears to be predicated on the assertion that "Pharma Tech" made a cosmetic talc product referred to as "Shower to Shower® Shimmer Effects ™" in Missouri for some

unspecified period of time in the 2000's. Plaintiff's new assertions fail to fix the fatal jurisdictional defects in Plaintiff's claim.

Evidence that Plaintiff used a talc product manufactured by Pharma Tech in Missouri, which neither these documents nor anything else in the record provides, would not be sufficient to establish personal jurisdiction with respect to J&J or JJCI. As the Supreme Court made clear in *BMS*, a defendant's "decision to contract with a[n in-state] company" in connection with a product "is not enough to establish personal jurisdiction in the State." 2017 WL 2621322, at *10 (rejecting respondents' "last ditch contention" that jurisdiction was proper with respect to BMS based on "[t]he bare fact that BMS contracted with a California distributor").

Finally, Plaintiff's new theory is contrary to the record in this case. Even if specific personal jurisdiction could be established by evidence that Shimmer Effects was manufactured in Missouri and that Ms. Fox used it– which it cannot – Ms. Fox never alleged or testified that she ever used the Shimmer Effects product that is the lynch-pin of Plaintiff's new end-run jurisdictional theory. Indeed, the time when Ms. Fox said she used a single bottle of Shower to Shower (not Shimmer Effects) was 20 years before the time frame of the documents on which Plaintiff now wants to rely. Tr.1985-87.

CONCLUSION

As explained in appellants' briefs, and recently confirmed by the United States Supreme Court in *BMS* and the Missouri Supreme Court in *Norfolk Southern*, the trial court never had personal jurisdiction in this case. The judgment should be reversed and the case remanded with directions to dismiss for lack of personal jurisdiction.

ARMSTRONG TEASDALE LLP

By: /s/ *Thomas B. Weaver*

Thomas B. Weaver #29176
William Ray Price, Jr., #29142
Jeffery T. McPherson #42825
7700 Forsyth Blvd., Suite 1800
St. Louis, Missouri 63105
314.621.5070
314.621.5065 (facsimile)
tweaver@armstrongteasdale.com
wprice@armstrongteasdale.com
jmcpherson@armstrongteasdale.com

Gerard T. Noce #27636
HeplerBroom LLC
211 North Broadway, Suite 2700
St. Louis, Missouri 63102
314.241.6160
314.241.6116 (facsimile)
gtn@heplerbroom.com

Beth A. Bauer #49981
HeplerBroom LLC
130 N. Main Street
P.O. Box 510
Edwardsville, Illinois 62025
618.307.1200
bab@heplerbroom.com

Gene M. Williams
Kathleen A. Frazier
Scott A. James
Shook, Hardy & Bacon, L.L.P.
600 Travis Street, Suite 3400
Houston, Texas 77002-2926
713.227.8008
gmwilliams@shb.com
kfrazier@shb.com
sjames@shb.com

Mark C. Hegarty
Shook, Hardy & Bacon, L.L.P.
2555 Grand Boulevard
Kansas City, Missouri 64108-2613
816.474.6550
mhegarty@shb.com

ATTORNEYS FOR JOHNSON & JOHNSON AND JOHNSON & JOHNSON CONSUMER COMPANIES

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of July, 2017, the foregoing was filed electronically with the Clerk of the Missouri Court of Appeals, Eastern District, to be served by operation of the Court's electronic filing system pursuant to Missouri Supreme Court Rule 103.08.

/s/ *Thomas B. Weaver*