

Pennsylvania's Long-Arm Statute Gets Even Longer!

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In *Hammons v. Ethicon*, 2020 Pa. LEXIS 5511 (Pa., Oct. 21, 2020), a landmark case involving the issue of personal jurisdiction under Pennsylvania's long arm statute, 42 Pa.C.S. § 5322, the Pennsylvania Supreme Court, in a 6-1 decision, upheld jurisdiction over a New Jersey based pelvic mesh manufacturer and affirmed a \$12.85 million dollar jury verdict in favor of the plaintiff. In so doing, the majority rejected the defendant's argument that jurisdiction was unconstitutional per the United States Supreme Court's decision in *Bristol-Myers Squibb Company v. Superior Court of California*, 137 S. Ct. 1773 (2017), and concluded that the Supreme Court's holding in *Bristol-Myers Squibb* did not represent a major shift in the way a state court should analyze specific jurisdiction over a defendant, contrary to the opinion of many legal experts.

Patricia Hammons was an Indiana resident who suffered significant injuries following the 2009 implantation in Indiana of Ethicon's Prolift Kit, a medical device used to treat conditions in the female pelvis. The Prolift Kit included mesh that was designed and intended to be permanently implanted through surgery. The **only** aspect of the Prolift Kit produced in Pennsylvania was the mesh. In that regard, Ethicon contracted with Secant Medical Inc., a Pennsylvania manufacturer, to weave the mesh according to Ethicon's specifications from Ethicon's proprietary polypropylene filament. Ethicon supplied Secant with spools of Prolene polypropylene filament, which Secant knitted to produce large rolls of mesh in accordance with specifications provided by and required by Ethicon as to various characteristics thereof including elasticity, density, mass and areal density. Once the polypropylene filament was knitted into mesh, the mesh was tested to confirm that it met Ethicon's specifications, following which the mesh was shipped in large rolls to various facilities of Ethicon, outside of Pennsylvania, where it was incorporated into the Prolift Kit device.

In May 2013, Hammons filed suit in the Philadelphia Court of Common Pleas against Ethicon, Johnson & Johnson, Gynecare (a division of Ethicon), and Secant.¹ The case was eventually transferred to the court's Complex Litigation Center Pelvic Mesh Mass Tort Program. Ethicon is a wholly owned subsidiary of Johnson & Johnson; both are incorporated and headquartered in New Jersey. Plaintiff asserted jurisdiction over defendants under Pennsylvania's Long Arm Statute, 42 Pa.C.S. § 5322.² As to Ethicon, Hammons asserted strict liability failure to warn and design defect claims, alleging that Ethicon "designed, manufactured, packaged, labeled, marketed, sold and distributed" the Profit Kit, and that the Prolift Kit was defective because of

¹ Secant filed Preliminary Objections to the Complaint asserting its immunity under the Biomaterials Access Assurance Act of 1998, 21 U.S.C. §§ 1601-06, which were granted by the trial court.

² Plaintiff had also asserted that Pennsylvania had general jurisdiction over Ethicon but subsequently withdrew that assertion after the U.S. Supreme Court's decision in *Daimler AG v. Bauman*, 571 U.S. 117 (2014), which held that "a substantial, continuous, and systematic course of business" by a defendant corporation in the forum state is not sufficient to establish general jurisdiction and that general jurisdiction over a defendant corporation is limited by federal due process to those states where a corporation is incorporated or maintains its principal place of business.

the design defects associated with the mesh. Ethicon filed a motion to dismiss Hammons' action for lack of specific personal jurisdiction because Hammons was not a Pennsylvania resident and had not received the implant surgery nor suffered any related injury in Pennsylvania.

The trial court denied Ethicon's motion to dismiss for lack of personal jurisdiction. Following a three-week trial, a jury found that Ethicon was liable for violating Indiana's design defect and failure to warn product liability law and awarded Hammons compensatory damages of \$12,850,945.18. Ethicon appealed the verdict to the Pennsylvania Superior Court raising, *inter alia*, the issue that the trial court lacked personal jurisdiction over Ethicon because Hammons's claims "did not arise from or relate to" any of Ethicon's contacts with Pennsylvania. The Superior Court rejected Ethicon's personal jurisdiction argument finding that Ethicon's involvement in Pennsylvania with Secant's manufacture of the mesh used in the Prolift Kit, which was allegedly the cause of Hammons' injuries, along with Ethicon's employment of Dr. Lucente (an Allentown gynecologist) to assist with the marketing and development of the Prolift Kit, was sufficient to meet the requirements of Pennsylvania's Long Arm Statute, 42 Pa.C.S. § 5322, as well as the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Ethicon filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court to address the issue of whether the trial court had jurisdiction over Ethicon for the claims asserted by Hammons. The Supreme Court granted the Petition on the following issue:

Whether the Due Process Clause of the Fourteenth Amendment to the United States Constitution and 42 Pa.C.S. § 5322(c) precludes Pennsylvania from asserting personal jurisdiction over two New Jersey companies in a case brought by an Indiana resident asserting claims under the Indiana Product Liability Act.

On appeal, Ethicon argued that Pennsylvania's Long Arm Statute, 42 Pa.C.S. § 5322, limits the reach of Pennsylvania's jurisdiction to "**causes of action**" arising from acts enumerated in subsection (a) of the statute. As to Ethicon, one of the acts enumerated in subsection (a) subjecting a defendant to jurisdiction in Pennsylvania is "causing harm or tortious injury by an act or omission in this Commonwealth." 42 Pa.C.S. § 5322(a)(3). However, Ethicon argued that the term "**cause of action**" in subsection (c), rather than the term "lawsuit," mandates a claim-by-claim analysis of jurisdiction, and that by applying a claim-by-claim analysis to this case, the crucial question is whether the conduct giving rise to Hammons' claims, namely the allegedly defective design of the Prolift Kit and the allegedly inadequate warnings, took place in Pennsylvania. Ethicon asserted that the evidence established that all of Ethicon's alleged conduct with regard to these two claims occurred in New Jersey and France. Ethicon noted that Hammons' design defect claim challenged the properties of the mesh that Ethicon chose to have Secant manufacture and that the decisions regarding the properties of the mesh were made in New Jersey. Likewise, Ethicon noted that there were no significant acts asserted by Hammons that would tie Ethicon to Pennsylvania for purposes of her failure to warn claim given that neither Dr. Lucente nor Secant were involved with the drafting of the warnings. Ethicon also cited the strain that it would put on the entire Pennsylvania judicial system if the Supreme Court adopted Hammons' broad formulation of special personal jurisdiction permitting suit with

minimal, if any, connection to Pennsylvania by a non-resident plaintiff against a non-resident defendant applying the law of another state.

Hammons argued that jurisdiction was proper in Pennsylvania because there was a direct relationship between Ethicon's mesh-related activities in Pennsylvania and plaintiff's claims, citing Ethicon's involvement with Secant and Dr. Lucente. With regard to Secant, Hammons argued that Ethicon worked with Secant to develop all the mesh used in its Prolift Kit, including the mesh implanted into Hammons, and referenced numerous affidavits detailing interactions between Ethicon and Secant with regard to the production of the mesh: Ethicon supplied the mesh, provided the specifications for the mesh, and required certification that the specifications were followed by Secant. Hammons distinguished this production process, and Ethicon's involvement, from Ethicon simply purchasing the mesh from a vendor in Pennsylvania. Likewise, Hammons claimed jurisdiction was proper based on Ethicon's ties to Dr. Lucente's clinical testing of the mesh and his involvement with the subsequent promotion of the Prolift Kit, citing testimony from Ethicon's medical director that Dr. Lucente was "the most important advocate in promoting other surgeons using the Prolift procedure across the country and across the world." Hammons argued that this involvement of Ethicon with Secant and Dr. Lucente in Pennsylvania satisfied the requirements for jurisdiction under subsection (a)(3) of Pennsylvania's Long Arm Statute which requires that Ethicon caused "harm or tortious injury by an act or omission in this Commonwealth." 42 Pa.C.S. § 5322(a)(3)

To the surprise of no one familiar with the current liberal composition of the Pennsylvania Supreme Court, the Court rejected Ethicon's argument that specific personal jurisdiction requires a "claim-by-claim" analysis, as opposed to a "case or controversy" analysis, to determine if Pennsylvania has jurisdiction over a corporate defendant under Pennsylvania's long arm statute and the Due Process Clause of the U.S. Constitution. In short, the Court determined that "the focus of the jurisdictional question should be the actions of the defendant in relation to the forum, not the fortuity of which claims a plaintiff's counsel includes in a complaint."

Justice Baer wrote the opinion for the majority and initially noted that the parties agreed that post-*Daimler*, Ethicon is not "at home" in Pennsylvania and not subject to general personal jurisdiction in the Commonwealth. With regard to whether Pennsylvania had specific personal jurisdiction over Ethicon for Hammons' claims, Justice Baer referenced a legal treatise cited by Justice Sotomayor in support of her dissenting opinion in *Bristol-Myers Squibb* as setting forth the appropriate three-part test for determining whether a defendant has sufficient "minimum" contacts with a state to satisfy federal due process requirements:

1. Did the plaintiff's cause of action arise out of or relate to the out-of-state defendant's forum-related contacts?
2. Did the defendant purposely direct its activities, particularly as they relate to the plaintiff's cause of action, toward the forum state or did the defendant purposely avail itself of the privilege of conducting activities therein?

3. [W]ould the exercise of personal jurisdiction over the nonresident defendant in the forum state satisfy the requirement that it be reasonable and fair?³

Justice Baer observed that Ethicon's and Hammons' arguments focused on the first prong of Wright's test for determining jurisdiction, and that the second and third factors were not issues in determining jurisdiction over Ethicon because Ethicon had engaged in business in Pennsylvania and would be litigating the related Prolift Kit pelvic mesh cases of the Pennsylvania plaintiffs in Pennsylvania in any event. As to the first factor, although Justice Baer noted that Supreme Court Justice Sotomayor expressed concern in her dissent that the majority had narrowed specific personal jurisdiction in *Bristol-Myers Squibb* to require a "claim-by-claim" analysis of a defendant's contacts with a jurisdiction, he disagreed with her conclusion on that issue. Rather, Justice Baer noted that specific personal jurisdiction failed in *Bristol-Myers Squibb* due to the absence of "a connection between the forum and the specific claims at issue." *Bristol-Myers Squibb*, 137 S.Ct. at 1781. Further, Justice Baer concluded that the majority in *Bristol-Myers Squibb* would not have "dramatically narrowed the construct of specific personal jurisdiction to require a claim-by-claim analysis *sub silentio*," and also pointed out that in prior phrasing of specific jurisdiction the Supreme Court had only required a link between the defendant and the "suit" or "controversy." Likewise, Justice Baer noted that even in *Daimler*, the Supreme Court had only required that the "suit" relate to the defendant's actions in the forum state in order to establish specific jurisdiction.

Further, the majority rejected Ethicon's argument that jurisdiction under 42 Pa.C.S. § 5322(c) of Pennsylvania's long arm statute be read restrictively to require a claim-by-claim jurisdictional analysis based on the term "cause of action" used in subsection (c). While conceding that the phrase "cause of action" could be viewed narrowly to mean the specific claims pleaded in the complaint, the majority concluded that the term also "has a broader connotation encompassing the same concepts used in the U.S. Supreme Court's jurisprudence relating to suit, controversy, and litigation." The majority noted that its conclusion regarding the requirements of jurisdiction under § 5322(c) was also guided by the clear legislative intent expressed in § 5322(b) to apply Pennsylvania's jurisdiction "to the fullest extent allowed under the Constitution of the United States." By applying an analysis of specific personal jurisdiction based on "suit" or "controversy" to the facts of the Hammons lawsuit, the majority found that jurisdiction was proper for Hammons' claims against Ethicon in Pennsylvania: Hammons claimed she was injured as a result of the implantation of the Prolift Kit, specifically averring her injuries resulted from the characteristics of the mesh; and Ethicon contracted with Secant to produce the mesh, shipped the proprietary filament for the mesh to Secant in Pennsylvania, and required Secant to knit the filament in accordance with Ethicon's specifications. The majority contrasted this conduct of Ethicon from a scenario in which Ethicon had simply ordered a generic component of the Prolift Kit from a Pennsylvania supplier in which case there would be no basis to assert personal jurisdiction over Ethicon in Pennsylvania.

Lastly, Justice Baer noted that the United States Supreme Court recently granted certiorari in two cases involving specific personal jurisdiction and the "arise out of or relate to" requirement. These two cases involve plaintiffs who suffered injury in the forum states while driving Ford

³ 4 Charles Alan Wright, *Federal Practice & Procedure Civil*, § 1069.

vehicles manufactured and sold by Ford in another state. Plaintiffs asserted jurisdiction over Ford in the forum states based on Ford's activities in the forum states including advertising, sales, and service of other Ford vehicles. Ford opposed jurisdiction in the forum states on the ground that plaintiffs' claims for design defect, failure to warn, and negligence did not "arise out of or relate to" any conduct of Ford in the forum states. However, Justice Baer opined that he did not think that the question in the Ford cases would be controlling in Hammons' case because it was undisputed the mesh that was alleged to have caused Hammons' injuries was produced in Pennsylvania, ignoring the fact that Ethicon simply did not manufacture or produce the mesh. Hopefully, Justice Baer's prediction on the impact of these two pending Supreme Court cases on the issue in *Hammons* will be wrong, and the Supreme Court's decision in these cases will further clarify that a "claim-by-claim" analysis is required to determine if a forum state has jurisdiction over a party, eliminating much of the forum shopping by plaintiffs' counsel seeking favorable forums in mass tort cases, such as Pennsylvania in the *Hammons* case.

In a concurring opinion, Justice Donohue, joined by Justice Wecht, was critical of the Superior Court's reference to and reliance on the evidence presented at trial regarding Ethicon's interactions with Dr. Lucente, the Allentown gynecologist who assisted with the marketing and development of the Prolift Kit. Justice Donohue correctly noted that Ethicon's challenge to jurisdiction was raised and decided on by preliminary objections before trial and that subsequent evidence regarding Ethicon's contacts with Pennsylvania presented at trial should not have been considered in deciding the issue of jurisdiction on appeal:

Either the forum court has jurisdiction when the preliminary objections are decided, or it does not.

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Consideration of evidence adduced for the first time at trial to support the trial court's judicial determination on preliminary objections was in contravention of the design of Pennsylvania's procedural rules and was error.

Chief Justice Saylor was the lone dissenter. According to Chief Justice Saylor, the majority's opinion ignored the U.S. Supreme Court's decision on personal jurisdiction in *Bristol-Myers Squibb* preferring instead to rely on Justice Sotomayor's conclusion in her dissent that the majority's rationale in *Bristol-Myers Squibb* was "flawed." Chief Justice Saylor also cited the specific holding of the majority in *Bristol-Myers Squibb* that a state's personal jurisdiction over a party is dependent on "a connection between the forum and the specific claims at issue."

Although Ethicon can seek review of the Pennsylvania Supreme Court's decision in *Hammons* by the U.S. Supreme Court because the case involves federal constitutional issues, the granting of such review is discretionary and, in this author's opinion, unlikely to be granted, particularly because the High Court already has two pending appeals involving the issue of specific personal jurisdiction. Unfortunately, until those appeals are decided, the Pennsylvania Supreme Court's decision in *Hammons* will allow plaintiffs' attorneys to cast a wide net over parties with little or

no connection with Pennsylvania and haul them into plaintiff-friendly jurisdictions in Pennsylvania such as Allegheny and Philadelphia counties.

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