

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI ex rel. WYETH a/k/a WYETH, INC.,
AHP SUBSIDIARY HOLDING CORPORATION, WYETH
PHARMACEUTICALS INC., PFIZER INC., PHARMACIA and UPJOHN
COMPANY, BARR LABORATORIES, BARR PHARMACEUTICALS, INC.,
DURAMED PHARMACEUTICALS, INC., QUALITEST
PHARMACEUTICALS, INC., GREENSTONE LTD., and SOLVAY
PHARMACEUTICALS, INC.,

Relators,

v.

HONORABLE THOMAS C. GRADY, Circuit Judge,
Division 2 of the Twenty-Second Judicial Circuit (St. Louis City),

Respondent.

On Petition For A Writ Of Prohibition To The Circuit Court of the City of St.
Louis, Missouri, Honorable Thomas C. Grady, Circuit Judge, Division 2

BRIEF IN RESPONSE TO RELATORS' OPENING BRIEF
ON PETITION FOR WRIT OF PROHIBITION

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State ex rel. Ford Motor Co. v. Westbrooke, 12 S.W.3d 386 (Mo. Ct. App. 2000)

ARGUMENT

Introduction

Relators have asked this Court to disturb a discretionary ruling of the trial court – the denial of a motion to dismiss on *forum non conveniens*. Rather than allow this case to proceed to trial and seek relief on direct appeal, which is a proper method for challenging the discretion of the trial court on such issues, Relators have decided to delay this case further by seeking a writ of prohibition. As Relators briefly note, their petition already

has been rejected by the Missouri Court of Appeals. That Court issued a preliminary writ on December 13, 2006, but quashed that preliminary writ on December 22, 2006, after Plaintiffs filed their Suggestions in Opposition.

As this Court is well aware, appellate courts are very reticent to disturb discretionary rulings, as such rulings are presumed correct. Such is the case here – even though reasonable minds may differ on the issue of *forum non conveniens*, there is nothing to suggest that the trial court abused its discretion in denying the motion to dismiss such that a trial of this action in Missouri will be oppressive or unjust. In similar situations, Missouri appellate courts have declined to direct a trial court to dismiss a pending action. Furthermore, any such dismissal would necessarily have to be predicated on the defense’s stipulation, or directive by the trial court, that any statute of limitations defense would be waived in another jurisdiction, otherwise no alternative forum is available and the inquiry ends.

RELATORS’ FIRST POINT RELIED ON:

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A. Writs of Prohibition Relating to the Denial of *Forum Non Conveniens* Motions Are Not Favored By Missouri's Appellate Courts and Relators Have an Adequate Remedy by Appeal.

Mo.Sup.Ct.R. 84.22 dictates when an original writ, such as the writ of prohibition being sought in this case, is appropriate. Specifically, a writ will not lie when there is an adequate remedy on appeal. *See, e.g., State ex rel. McCulloch v. Schiff*, 852 S.W.2d 392 (Mo. Ct. App. 1993). Missouri courts have recognized that while a writ of prohibition may be appropriate in some cases regarding a trial court's decision on *forum non conveniens* issues, they also recognize that failure to dismiss on these grounds may be raised on direct appeal. *See, State ex rel. The Kansas City Southern R.R. Co. v. Mauer*, 998 S.W.2d 185 (Mo. Ct. App. 1999). Relators in this case have not seriously argued that they will be unable to obtain an adequate remedy on appeal, asserting only that such relief would be unlikely following conclusion of a trial. That assertion is an exception that would swallow the rule, making all denials of dismissals on *forum non conveniens* grounds subject to review by extraordinary writ. Relators have failed to demonstrate that

they lack an adequate remedy by appeal, and the extraordinary relief of a writ of prohibition should be denied for this reason alone.

Assuming for argument's sake that pursuit of a writ is the appropriate method of seeking relief in this case, disturbing discretionary rulings of a trial court are not favored. As this Court is aware, the denial of a motion to dismiss on *forum non conveniens* grounds is purely within the discretion of the trial court, and the presumption at the appellate level is that the discretionary ruling was correct. *Id.*; *see also, Anglim v. Missouri Pac. R.R. Co.*, 832 S.W.2d 298 (Mo. banc 1992). As pointed out in the *Kansas City Southern* case, disturbing a discretionary decision of the trial court, even when reasonable minds could have come to the opposite conclusion, is not done often and is considered an "extraordinary measure." *Kansas City Southern*, 998 S.W.2d at 191 ("while we believe the trial judges could properly have dismissed the action on grounds of *forum non conveniens*, we decline at this point to take the extraordinary measure of directing the trial court to dismiss the action.").

In *Kansas City Southern*, nonresident plaintiffs brought suit against the defendant in Missouri for injuries sustained in an accident that occurred in Arkansas. The defendant therein filed a motion to dismiss based on *forum non conveniens*, arguing that the accident occurred in Arkansas, the plaintiffs resided in Arkansas, the witnesses were all located in states other than Missouri, and that the courts in Missouri had a greater case load than those in the same location as the accident, among other things. The plaintiffs opposed the dismissal, arguing that the Railway conducted significant business in

Missouri, which made jurisdiction and venue proper. The trial court denied the motion to dismiss. *Id.* at 186-187.

The defendant then petitioned for a writ of prohibition, directing the trial court to dismiss the action. In its review, the Court of Appeals began by recognizing the various factors applied to a *forum non conveniens* analysis, and noted that “if reasonable persons can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.” *Id.* at 188. The Court also stated that “Missouri courts are very reluctant to find an abuse of discretion in the denial of a dismissal for *forum non conveniens*.” *Id.* at 189.

In coming to its conclusion that the trial court’s denial of the motion to dismiss was not an abuse of discretion, the *Kansas City Southern* Court reviewed earlier cases wherein trial courts had denied a motion to dismiss on *forum non conveniens*, the trial courts’ decisions were not overturned, and no writs were issued. *Id.* (citing *Anglim*, 832 S.W.2d at 304-5, and *Besse v. Missouri Pacific R.R. Co.*, 721 S.W.2d 740 (Mo. Banc 1986)). In fact, the *Kansas City Southern* Court stated that “**no Missouri appellate court has ever issued a writ directing a trial court to dismiss a case on grounds of *forum non conveniens*.**” *Kansas City Southern*, 998 S.W.2d at 191.

B. Relators Have Failed To Meet The Burden Of Showing That The Trial Court’s Decision Should Be Disturbed In This Case.

Relators herein have failed to meet their burden of showing that the trial court abused its discretion in such a fashion as to make a trial in this state oppressive or unjust. *Id.* at 188. In order for an appellate court to disturb a trial court’s denial of a motion to

dismiss for *forum non conveniens*, it must be “firmly convinced” not only that the “relevant factors” weigh heavily in the defendant’s favor, but **also that permitting the trial to proceed in Missouri would cause an injustice due to oppression of the defendant or undue burden on the court.** *State ex rel. Ford Motor Co. v. Westbrooke*, 12 S.W.3d 386, 392 (Mo. Ct. App. 2000)(denying Ford’s petition for writ of prohibition following trial court’s denial of its motion to dismiss).

Relators herein have focused on only one side of the equation – the “relevant factors” that were considered by the trial court. However, in order for this Court to disturb the trial court’s findings, Relators also have the burden of showing a manifest injustice in allowing the case to proceed in Missouri. One way to prove this is by showing that it will cause an undue burden on the trial court; however, in its Order denying the motion to dismiss, the trial court specifically found that the case would *not* create an undue burden if prosecuted in St. Louis. (Relators’ Appendix, pp. A4-A5, A10, A16, A22, A28, A34, A40, A45-A46 A51 and A56).

Additionally, there is no oppression of the Relators, all of whom have a significant presence in Missouri based on their business activities. They are unable to demonstrate that proceeding to trial in Missouri would be oppressive. Both the record below and the exhibits to Relators’ petition are devoid of any evidence demonstrating that proceeding in Missouri would work an undue hardship on Relators. Similarly, there is no evidence that plaintiffs’ choice of forum was fraudulent, oppressive or manifestly unjust. All of the Relators do business in the state of Missouri, and all are subject to jurisdiction. The Relators employ detail representatives here to promote their drugs to local physicians for

use by local residents. In fact, discovery responses demonstrate ongoing and significant contacts with Missouri such that maintenance of the action here is neither inconvenient nor burdensome to Relators. For example, Wyeth employs nineteen Missouri resident sales representatives and managers, and another nine sales representatives and managers who reside outside Missouri, but work within the state. Wyeth's marketing activities in Missouri include "television commercials, print advertisements, speaker training for physicians, educational lunch and dinner programs, and dear doctor letters." Finally, Wyeth has conducted clinical trials or studies using Missouri physicians and patients. Other Relators also have extensive contacts with the State of Missouri.

Indeed, any alternative forum would be equally inconvenient for one or more of the Relators. For example, Wyeth is a Delaware corporation with a principal place of business in New Jersey, but Wyeth Pharmaceuticals, Inc. is a Delaware corporation with a principal place of business in Pennsylvania. Pharmacia & Upjohn Company is a Delaware corporation with a principal place of business in Michigan. Pfizer is a Delaware Corporation with a principal place of business in New York. AHP is incorporated and has its principal place of business in Delaware. In short, whatever forum may be chosen by Plaintiffs will be "inconvenient" to one or more Relators. Likewise, the remaining Relators are incorporated or headquartered in varying jurisdictions.

Relators, however, broadly assert without any evidentiary support that prescribing and treating physicians are important witnesses, who are not local and cannot be compelled to testify live at trial. Relators apparently are claiming that these "facts" somehow make the Plaintiffs' chosen forum oppressive or unfair to Relators. The

argument must be rejected, first because no such “facts” are established in the record below ¹ and second, because such testimony can be, and often is, presented in many ways – with live testimony being the most infrequently used. As this Court is well aware, prescribing and treating physicians, and other professionals, frequently (indeed, almost invariably) testify by video preservation deposition rather than appearing live at trial. There is no oppression or hardship in that fact, as demonstrated by routine practice and by what actually occurred in three recent trials in Philadelphia involving some of the same defendants and presenting the same issues involved in this action.

For instance, in *Nelson, et al. v. Wyeth et al.*, Court of Common Pleas, Philadelphia County, Civil Action No. 1670 (January Term 2004), Plaintiff was from Ohio, where her prescribing and treating physicians also lived and worked. Neither the prescribing nor treating physicians testified live at trial. Excerpts from the prescriber’s video deposition were played and parts of the deposition testimony of two treating physicians were read into the record. If that testimony were so critical or important, one would think defendants at least would have presented the treating physicians’ testimony by videotape.

In *Daniel, et al. v. Wyeth et al.*, Court of Common Pleas, Philadelphia County, Civil Action No. 2368 (June Term 2004), Plaintiff was from Arkansas, where her

¹ Relators presented no evidence, by affidavit or otherwise, that prescribing and treating physicians and other witnesses would not appear to testify live at trial, relying simply on the assertion that they would not.

prescribing and treating physicians also lived and worked. Again, neither the prescribing nor treating physicians testified live at trial, although portions of their discovery depositions were played or were read into the record.

Finally, in *Simon, et al. v. Wyeth et al.*, Court of Common Pleas, Philadelphia County, Civil Action No. 4229 (June Term 2004), Plaintiff was from New Jersey, where her prescribing and treating physicians also lived and worked. Neither the prescribing nor treating physicians testified live at trial. Excerpts from the three prescribers' video depositions were played, but no treating physicians testified.²

In short, there is no injustice or oppression to Relators, either in proceeding in a forum where each regularly does business, or in relying upon videotaped or deposition testimony at trial. Plaintiff's choice of forum is accorded great weight and a case should be dismissed on *forum non conveniens* grounds only if the balance is **strongly** in favor of the defendants. Absent proof that filing in Missouri was fraudulent, oppressive or manifestly unjust, the Court should not dismiss on the basis of *forum non conveniens*. Here the Respondent trial court considered all of the issues before it, both the "relevant factors" and the burden/oppression to the defendants and the forum, and properly exercised its discretion by denying the motion to dismiss. There simply is no evidence that could "firmly convince" anyone that the trial court abused that discretion. *Ford Motor Co.*, 12 S.W.3d at 392. Even if this Court believes that the Respondent could have

² Prescribers did testify live in the two federal cases tried in Arkansas, but they were called by the Plaintiffs, not the Defendants.

decided the matter differently, that is simply evidence that reasonable minds could differ, and does not justify the granting of a writ. *Kansas City Southern*, 998 S.W.2d at 188.

RELATORS' SECOND POINT RELIED ON:

II. RELATORS ARE ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY FURTHER ACTION IN THESE CASES, OTHER THAN SUSTAINING RELATORS' MOTIONS TO DISMISS BASED ON *FORUM NON CONVENIENS*, BECAUSE RESPONDENT ABUSED HIS DISCRETION IN DENYING THE MOTIONS IN THAT HE CONFUSED THE *FORUM NON CONVENIENS* ANALYSIS WITH THE STANDARD FOR PERSONAL JURISDICTION.

RESPONSE:

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Relators contend that Respondent confused jurisdictional concepts with the analysis of whether a case should be dismissed on forum non-conveniens grounds. As the case law clearly demonstrates, however, it is Relators who are confused. As noted above, the forum non conveniens analysis is two-pronged. Relators focus primarily on the first

prong, the non-exclusive listing of factors to be considered, while almost wholly ignoring the second prong – whether “*permitting the trial to proceed in Missouri would cause an injustice due to oppression of the defendant or undue burden on the court.*” *State ex rel. Ford Motor Co. v. Westbrooke*, 12 S.W.3d 386, 392 (Mo. Ct. App. 2000); *Anglim*, 832 S.W.2d at 303. In evaluating this second prong of the analysis, a trial court, like Respondent, should consider such “jurisdictional” matters as the defendants’ presence and activities in the forum. That is exactly what Respondent did, finding that Relators had significant and ongoing business activities in the state and that proceeding in this forum would not be oppressive to them.

Similarly, Respondent specifically determined that allowing the present actions would not create an undue burden on the Circuit Court. Respondent clearly did “take notice of the congestion of its own docket” and properly decided that maintenance of these actions would present no undue burden on the Court or the citizenry. *Anglim*, 832 S.W.2d at 304. Given Respondent’s position as a practicing judge in the Circuit, that factual determination is entitled to great weight and should not be disturbed, especially on the limited record Relators presented below and especially by way of extraordinary writ.

Recognizing that “the doctrine of forum non conveniens is to be applied with caution and only upon a clear showing of inconvenience and when the ends of justice require it,” (Relators’ Appendix, pp. A5, A10, A16, A22, A28, A34, A40, A46 A51 and A56), Respondent properly weighed the evidence before him and properly denied the motions to dismiss. That discretionary and carefully considered ruling is presumptively correct and should not be overturned by way of an extraordinary writ of prohibition.

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In seeking extraordinary relief, Relators focus on one phrase in the opinions below, arguing incorrectly that Respondent based denial of the motions to dismiss on an incorrect assumption regarding the extent of discovery. When read in context, however, it is clear that Respondent was focused on the entirety of the case, holding:

Here, the Court notes that this action has been pending for over two years and that **substantial discovery** has already been conducted. The lawsuit

was originally filed on July 7, 2004 and joined the claims of multiple plaintiffs, all of whom claimed they were injured as a result of taking hormone therapy drugs. The case was then removed [by Relators] to federal court and subsequently remanded back to this Court. On August 24, 2005, the Court ordered the cases severed. Pursuant to the Court's ruling a new Amended Complaint was filed on behalf of each of the individual plaintiffs.

(Relators' Appendix, pp. A4-A5, A10, A16, A22, A28, A34, A40, A45-A46 A51 and A56) (emphasis added).

Relators focus on the highlighted language, but that focus is misplaced. Following remand, Relators filed motions to sever and to dismiss on forum non conveniens grounds. Thereafter, the parties engaged in extensive discovery related to those issues. Each of the 186 plaintiffs responded to Interrogatories, Requests for Admission and Requests for Production of Documents. All or most of the 34 defendants also responded to written discovery propounded by plaintiffs. That discovery, while not directed to the merits, nevertheless fills several bankers' boxes, and is, by the definition of anyone other than Relators, substantial. In short, Respondent's observation regarding discovery is factually accurate and cannot form the basis for extraordinary relief. More important, that observation was hardly the sole basis for denying the motions to dismiss.

Respondent also focused on the substantial period of time that the actions had been pending and presumably on the prejudice to plaintiffs in dismissing actions that had

been pending for over two years (now nearly three), especially where the delay was largely attributable to the improvident removal and subsequent motion practice by Relators. Several plaintiffs originally joined in these actions have died while the cases were pending, and more will likely die before any final resolution.

In summary, Respondent's assertion that substantial discovery had been completed was factually accurate and is not an appropriate basis for issuance of an extraordinary writ. Moreover, the length of time the actions had been pending, as well as the extent of discovery and motion practice, were factors properly considered by Respondent in evaluating the prejudice to plaintiffs and whether the facts and equities weighed so heavily in favor of Relators that maintenance of the action in Missouri would be oppressive or cause undue hardship. *Ford Motor Co.*, 12 S.W.3d at 392 (Mo. Ct. App. 2000).

CONCLUSION

Missouri courts recognize that discretionary trial court decisions are presumed correct, and reviewing courts are especially hesitant to disturb a decision regarding *forum non conveniens*. Relators have done nothing more than argue that a different court could have come to a different conclusion. Without demonstrating that the relevant factors weigh in favor of them, and that a trial in Missouri would be unjust due to oppression on the defendants or undue burden on the Court, Relators have failed to meet their burden and the Preliminary Writ of Prohibition should be quashed.

Respectfully submitted,

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Counsel for Plaintiffs

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief contains the information required by Rule 55.03, complies with the limitations in Rule 84.06(b), and it contains 4296 words, excluding the parts of the brief exempted; has been prepared in proportionally spaced typeface using Microsoft Word 2003 in 13 point Times New Roman font; and includes a virus free 3.5" floppy disk in Microsoft Word 2003 format.

Counsel for Plaintiffs

IN THE SUPREME COURT OF MISSOURI

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AHP SUBSIDIARY HOLDING CORPORATION, WYETH PHARMACEUTICALS
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Relators,

v.

HONORABLE THOMAS C. GRADY, Circuit Judge,
Division 2 of the Twenty-Second Judicial Circuit (St. Louis City),

Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that on the 5th day of June, 2007, seven copies of the cover page and Brief in Response to Relators' Opening Brief on Petition For Writ of Prohibition and Certificate of Compliance was submitted to the Court by Federal Express overnight delivery, and was served by first-class mail, postage prepaid to the following parties of record:

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