

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

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JURISDICTIONAL STATEMENT

This is an original writ proceeding in which Relators seek a permanent writ of prohibition directing Respondent, the Honorable Thomas C. Grady, Circuit Judge, Division 2 of the Twenty-Second Judicial Circuit (St. Louis City) (“Respondent”) to cease any action with respect to the ten product liability cases at issue other than dismissing them based upon the doctrine of *forum non conveniens*.

On November 2, 2006, Respondent denied Relators’ motions to dismiss. Relators file a Petition for Writ of Prohibition in the Missouri Court of Appeals, Eastern District. On December 13, 2006, the Court of Appeals issued a Preliminary Order in Prohibition, but by an Order of December 22, 2006, it quashed that Preliminary Order, without opinion. On March 20, 2007, this Court issued its Preliminary Writ of Prohibition. The Supreme Court of Missouri has jurisdiction over this writ proceeding pursuant to Article V, Sections 3 & 4, of the Missouri Constitution, Supreme Court Rule 84.23 and § 530.020 RSMo.

STATEMENT OF FACTS

A. Factual Background

All of the plaintiffs allege injuries as a result of taking prescription hormone therapy (“HT”) medications manufactured by Relators — ovarian cancer (the *Gozzi* case); a pulmonary embolism (the *Rogers* case); or breast cancer (all other cases). Relator Wyeth is a defendant in all ten cases. Relators Pfizer Inc. and Pharmacia & Upjohn Company are defendants in eight cases. Other defendants in the *Branson* and/or *Miesenzahl* cases are Relators Barr Laboratories, Inc., Barr Pharmaceuticals, Inc.,

Duramed Pharmaceuticals, Inc., Qualitest Pharmaceuticals, Greenstone Ltd., and Solvay Pharmaceuticals. The relevant facts regarding each case — all of which are undisputed — are described below. A chart showing the states where plaintiffs reside, where the alleged injuries occurred, where plaintiffs’ physicians are located, and where Relators are incorporated and have their principal places of business was submitted to Respondent. *See* Exhibit 11 (“Chart Summarizing Parties’ Residence and Situs of Plaintiffs’ Claims”).¹

There is no allegation or evidence of any event or witness in Missouri in connection with any of plaintiffs’ claims:

Ballard. Plaintiff Paula Ballard has been a resident of New Jersey and Pennsylvania. Exhibit 1, ¶ 8 (Ballard Second Am. Complaint); Exhibit 12, No. 1 (“Ballard’s Response to First Set of Interrogatories”). She allegedly took Prempro, Premphase, and Premarin Vaginal Cream, manufactured by Wyeth. Her ingestion of HT medications, alleged injury, and medical treatment occurred in New Jersey. Exhibit 12,

¹ Because this is an original writ proceeding, “[t]he petition for the writ, together with the suggestions in support thereof, any exhibits accompanying the petition, the writ and return of service thereon, the answer made to the petition for the writ, and all other papers, documents, orders, and records filed in the appellate court constitute the record.” *See* Supreme Court Rule 84.24. Accordingly, all citations to the “record” will be citations to the documents and exhibits previously filed in this Court with Relators’ Petition for Writ of Prohibition. The Separate Appendix is cited as “A__.”

Nos. 2, 4-6. The potential witnesses identified by Ms. Ballard reside in New Jersey or Pennsylvania. *Id.*, No. 7.

Branson. Plaintiff Deborah Branson is a New Jersey resident who allegedly took unspecified HT medications. Exhibit 2, ¶ 11 (Branson Second Am. Complaint). She did not provide complete discovery responses, but her HT prescriptions were filled in New Jersey and she admitted that her ingestion of HT medications, alleged injury, and medical treatment occurred out-of-state (presumably in New Jersey). *See* Exhibit 11.

DiPietro. Plaintiff Angela DiPietro is a New Jersey resident who allegedly took Prempro and Premarin, manufactured by Wyeth, and Provera, manufactured by Upjohn. Exhibit 3, ¶ 11 (DiPietro Second Am. Complaint). Her ingestion of HT medications, alleged injury, and medical treatment occurred in New Jersey. Exhibit 14, Nos. 2, 4, 6 (DiPietro's Response to First Set of Interrogatories). The potential witnesses identified by Ms. DiPietro reside in New Jersey. *Id.*, No. 7.

Gozzi. Plaintiff Arnold J. Gozzi (as representative for Antoniette E. Gozzi) is a New York resident, as was Ms. Gozzi. Exhibit 4, ¶ 11 (Gozzi Second Am. Complaint). Ms. Gozzi allegedly took Prempro and Premarin, manufactured by Wyeth, and Provera, manufactured by Upjohn. *Id.* Her ingestion of HT medications, alleged injury, and medical treatment occurred in New York. Exhibit 16, Nos. 2, 4-7 (Gozzi's Response to First Set of Interrogatories). The potential witnesses identified by plaintiff reside in New York. *Id.*, No. 7.

Jurewicz. Plaintiff Grace Jurewicz is a New Jersey resident. Exhibit 5, ¶ 11 (Jurewicz Second Am. Complaint). She allegedly took Premarin and Cycrin,

manufactured by Wyeth; Provera, manufactured by Upjohn; and a generic HT medication. *Id.* Her ingestion of HT medications, alleged injury, and medical treatment occurred in New Jersey. Exhibit 18, Nos. 2, 4-6 (Jurewicz's Response to First Set of Interrogatories). The potential witnesses identified by Ms. Jurewicz reside in New Jersey. *Id.*, No. 7.

MacDuff. Plaintiff Ruth MacDuff is a Pennsylvania resident who allegedly took Prempro and Premarin, manufactured by Wyeth, and Provera, manufactured by Upjohn. Exhibit 6, ¶ 11 (MacDuff Second Am. Complaint). Her ingestion of HT medications, alleged injury, and medical treatment occurred in Pennsylvania. Exhibit 20, Nos. 2,4-6 (MacDuff's Response to First Set of Interrogatories). The potential witnesses identified by Ms. MacDuff reside in Pennsylvania. *Id.*, No. 7.

Miesenzahl. Plaintiff Janet Miesenzahl is a New York resident. Exhibit 7, ¶ 18 (Miesenzahl Second Am. Complaint). She allegedly took Prempro, Premarin, Cycrin and Premphase, manufactured by Wyeth; Estratest, manufactured by Solvay; and a generic HT medication. *Id.* Her ingestion of HT medications, alleged injury, and medical treatment occurred in New York. Exhibit 22, Nos. 2, 4, 6 (Miesenzahl's Response to First Set of Interrogatories). The potential witnesses identified by Ms. Miesenzahl reside in New York. *Id.*, No. 7.

Necowitz. Plaintiff Francine Necowitz is a New Jersey resident. Exhibit 8, ¶ 8 (Necowitz Second Am. Complaint). She allegedly took Prempro, manufactured by Wyeth. *Id.* Her ingestion of HT medications, alleged injury, and medical treatment occurred in New Jersey. Exhibit 24, Nos. 2, 4-6 (Necowitz's Response to First Set of

Interrogatories). The potential witnesses identified by Ms. Necowitz reside in New Jersey. *Id.*, No. 7.

Rogers. Plaintiff Elby F. Rogers, Sr. (as representative of Charlotte Rogers) is a Delaware resident, as was Ms. Rogers. Exhibit 9, ¶ 11 (Rogers Second Am. Complaint). Ms. Rogers allegedly took generic Estradiol, manufactured by Wyeth, and Provera, manufactured by Upjohn. *Id.* Her ingestion of HT medications, alleged injury, and medical treatment occurred in Delaware (or locations not identified by plaintiff). Exhibit 26, Nos. 2, 4-6 (Rogers's Response to First Set of Interrogatories). The potential witnesses identified by Ms. Rogers reside in Pennsylvania. *Id.*, No. 7.

Watt. Plaintiff Gail M. Watt is a New Jersey resident who allegedly took Prempro and Premarin, manufactured by Wyeth, and Provera, manufactured by Upjohn. Exhibit 10, ¶ 11 (Watt Second Am. Complaint). Her ingestion of HT medications, alleged injury, and medical treatment occurred in New Jersey or New York. Exhibit 28, Nos. 2, 4-6 (Watt's Response to First Set of Interrogatories). The potential witnesses identified by Ms. Watt reside in Pennsylvania. *Id.*, No. 7.

B. Procedural Background

The original petition in these HT cases, *Ballard, et al. v. Wyeth, et al.*, No. 042-07388, filed on July 7, 2004, named 186 plaintiffs and 34 defendants. Relators removed the *Ballard* case to federal court on August 20, 2004, but it was remanded on November 8, 2004. On February 14, 2005, Relators filed a motion to sever plaintiffs' claims and to dismiss on the ground of *forum non conveniens*.

The only discovery that has been taken in these cases related to the severance and *forum non conveniens* motions; there has been no discovery on the merits. In early 2005, some of the Relators served discovery on plaintiffs relating to severance and *forum non conveniens* issues. Instead of responding, on February 3, 2005, plaintiffs filed a motion to stay all discovery pending a ruling on the motions to dismiss. On February 22, 2005, Respondent denied the motion for a stay, agreeing with Relators that the discovery was necessary to evaluate the severance and *forum non conveniens* motions.

On August 24, 2005, Respondent severed the claims of the individual plaintiffs under Rule 56.02 and directed plaintiffs to file new complaints against only those defendants whose medications they claimed to have taken. Respondent declined to grant Relators' *forum non conveniens* motion on the ground that the only fact provided in support of that motion was the plaintiffs' state of residence. After plaintiffs filed individual petitions on or about January 26, 2006, Relators removed the majority of the cases to federal court. Those cases were transferred to the multi-district litigation proceeding that has been established for federal HT cases in the Eastern District of Arkansas before the Hon. William Wilson, *In re Prempro Litigation*, MDL No. 1507.

On June 27, 2006, Relators moved to dismiss 10 of the remaining 11 non-removable cases on the ground of *forum non conveniens*.² Relators pointed out, and

² Relators did not file a *forum non conveniens* motion in the remaining *Deewall* case because the plaintiffs live in Madison County, Illinois, near St. Louis, and Ms. Deewall alleges that she was treated by several doctors in Missouri.

plaintiffs did not dispute, that none of the events underlying plaintiffs' claims occurred in Missouri; that no witnesses were located in Missouri; and that all of plaintiffs' prescribing and treating physicians are located out-of-state.

On November 2, 2006, Respondent denied Relators' motions. Respondent:

- Did not cite a single case denying a *forum non conveniens* motion where, as here, all six relevant *forum non conveniens* factors weigh in favor of dismissal.
- Confused the *forum non conveniens* analysis with factors relevant to personal jurisdiction, by relying on the fact that "Defendants do a substantial amount of business within the State of Missouri," when that in-state business had no relationship with any plaintiff. *See* Exhibits 31-40 (A4, A10, A16, A22, A28, A34, A40, A45, A51 and A55).
- Relied upon the assumption — for which there was no record support — that "substantial discovery has already been conducted" in these cases. *Id.* (A4, A10, A15, A21-A22, A27-A28, A33-A34, A40, A45, A50 and A55). In fact, *no* discovery on the merits has occurred.

Relators then filed a Petition for Writ of Prohibition in the Missouri Court of Appeals, Eastern District. On December 13, 2006, the Court of Appeals issued a Preliminary Order in Prohibition, but by an Order of December 22, 2006, it quashed that Preliminary Order, without opinion. This Court issued a Preliminary Writ of Prohibition on March 20, 2007.

POINTS RELIED ON

I. 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 THOSE MOTIONS IN THAT ALL SIX RELEVANT FACTORS IN THE LEGAL STANDARD ESTABLISHED BY THIS COURT FAVOR DISMISSAL.

Anglim v. Missouri Pac. R.R. Co., 832 S.W.2d 298, 303 (Mo. banc), *cert. denied*, 506 U.S. 1041 (1992)

Besse v. Missouri Pac. R.R. Co., 721 S.W.2d 740 (Mo. banc 1986), *cert. denied*, 481 U.S. 1016 (1987)

Elliott v. Johnston, 365 Mo. 881, 292 S.W.2d 589 (1956)

Rozansky Feed Co. v. Monsanto Co., 579 S.W.2d 810 (Mo. App. 1979)

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.

Besse v. Missouri Pac. R.R. Co., 721 S.W.2d 740 (Mo. banc 1986), *cert. denied*, 481 U.S. 1016 (1987)

Elliott v. Johnston, 365 Mo. 881, 292 S.W.2d 589 (1956)

Stidham v. Stidham, 136 S.W.3d 74 (Mo. App. 2004)

Rozansky Feed Co. v. Monsanto Co., 579 S.W.2d 810 (Mo. App. 1979)

III. 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 RELIED UPON AN ASSUMPTION THAT IS CONTRARY TO THE UNDISPUTED RECORD.

Anglim v. Missouri Pac. R.R. Co., 832 S.W.2d 298, 303 (Mo. banc), *cert. denied*, 506 U.S. 1041 (1992)

ARGUMENT

Standard of Review

The standard of review applicable to each claim of error is abuse of discretion. A trial court has “controlled discretion” in deciding a *forum non conveniens* motion, which “is not the equivalent of whim,” and a writ is warranted where it has abused that discretion by denying the motion. *State ex rel. K-Mart Corp. v. Holliger*, 986 S.W.2d 165, 169 (Mo. banc 1999); *Anglim v. Missouri Pac. R.R. Co.*, 832 S.W.2d 298, 303 (Mo. banc), *cert. denied*, 506 U.S. 1041 (1992). A writ shall issue where “the relevant factors

weigh heavily in favor of applying the doctrine of *forum non conveniens*” and “permitting the case to be tried in Missouri would lead to an injustice because such trial would be oppressive to the defendant or impose an undue burden on Missouri courts.” *Anglim*, 832 S.W.2d at 303.

I. 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 THOSE MOTIONS IN THAT ALL SIX RELEVANT FACTORS IN THE LEGAL STANDARD ESTABLISHED BY THIS COURT FAVOR DISMISSAL.

This Court has held that: “Trial courts are obliged to give attention to the [*forum non conveniens*] doctrine and to dismiss cases which have no tangible relationship to Missouri.” *Besse v. Missouri Pac. R.R. Co.*, 721 S.W.2d 740, 743 (Mo. banc 1986), *cert. denied*, 481 U.S. 1016 (1987). The doctrine applies in Missouri “as a matter of judicial policy,” and “trial courts have a *duty* to apply it in appropriate cases.” *Id.* (emphasis added).

This Court has articulated six factors for trial courts to consider when ruling on a *forum non conveniens* motion: “(1) place of accrual of the cause of action, (2) location of witnesses, (3) the residence of the parties, (4) any nexus with the place of suit, (5) the public factor of the convenience to and burden upon the court, and (6) the availability to plaintiff of another court with jurisdiction of the cause of action affording a forum for

plaintiff's remedy." *Anglim*, 832 S.W.2d at 302. Respondent recited these six factors, but then made no attempt to apply them to the facts of these cases. If Respondent had followed this Court's directive and applied the legal standard, he would have been compelled to find — based on the undisputed facts — that *all six factors* are satisfied and overwhelmingly favor dismissal.

An abuse of discretion occurs "where the law is overridden or misapplied." *Fritzsche v. East Texas Motor Freight Lines*, 405 S.W.2d 541, 545 (Mo. App. 1966). It follows that a complete failure to apply the legal standard is necessarily an abuse of discretion. Where all six factors favor dismissal for *forum non conveniens* and no factor points the other way, a trial court should not have discretion to deny the motion because doing so would effectively override the legal standard. To allow a trial court the discretion to deny a *forum non conveniens* motion under those circumstances would eviscerate the doctrine.

A. It Is Undisputed That Factors 1 and 4 Are Satisfied — Plaintiffs' Claims Did Not Accrue in Missouri and Have No Nexus With Missouri.

The complaints do not allege that any of the events giving rise to these lawsuits took place in Missouri. There are no allegations that plaintiffs were prescribed, purchased, or took HT medications in Missouri or were injured in Missouri. Rather, plaintiffs' discovery responses confirm that all of these events took place out-of-state.

Where, as here, there is no nexus between the lawsuit and this State, dismissal is warranted. In *Elliott v. Johnston*, 292 S.W.2d 589, 594 (Mo. 1956), where this Court first adopted the *forum non conveniens* doctrine and affirmed dismissal, the Court pointed out

that “these cases have but little, if any, ‘nexus’ with Missouri and its courts” and were apparently filed in Missouri simply because the plaintiffs’ counsel hoped to obtain “some real or fanciful tactical advantage.” That is exactly the case here.

Similarly, in *Rozansky Feed Co. v. Monsanto Co.*, 579 S.W.2d 810, 814 (Mo. App. 1979), the Court of Appeals affirmed dismissal where, “except for the fact that [one defendant] had its principal office in Missouri” — which is not even the case here — and another defendant “was licensed to and did practice business in Missouri and thus both were subject to suit in Missouri,” the case “had little, if any, ‘nexus’ with Missouri and its courts.” *Accord, Acapolon v. Ralston Purina Co.*, 827 S.W.2d 189, 193 (Mo. banc 1992) (affirming dismissal where claim accrued outside of Missouri, even though defendant was a Missouri corporation); *Vercimak v. Vercimak*, 762 S.W.2d 529, 532 (Mo. App. 1988) (affirming dismissal where lawsuit was between non-residents, so that Missouri had “no significant interest to protect on behalf of the citizens of the State of Missouri”).

In sum, the first and fourth factors exclusively favor dismissal because it is undisputed that plaintiffs’ claims did not accrue in Missouri and have no nexus with Missouri. Respondent ignored these factors.

B. It Is Undisputed That Factor 2 Is Satisfied — All Witnesses, Including All Prescribing and Treating Physicians, Are Located Out-of-State.

The convenience and availability of witnesses, particularly non-party witnesses, is a key factor in the *forum non conveniens* analysis. As this Court has recognized, in personal injury cases “the need to have ready access to the treating physicians and medical records” is “critical to the preparation and trial of the case.” *Anglim*, 832 S.W.2d

at 303. *See also Acapolon*, 827 S.W.2d at 193 (affirming dismissal where “plaintiff does not demonstrate that any material witness, expert or otherwise, now lives in Missouri.”); *Besse v. Missouri Pac. R.R. Co.*, 721 S.W.2d 740 (Mo. banc 1986), *cert. denied*, 481 U.S. 1016 (1987) (“Trial judges should consider dismissal when any suit for personal injuries is brought at a great distance from the place of the accident, unless there is some nexus with the place of trial.”).

Plaintiffs’ claims of failure to warn and misrepresentation will depend upon testimony by prescribing physicians. Only plaintiffs’ doctors can testify about what they knew (from all sources) about the risks and benefits of HT medications when they prescribed each medication for each plaintiff; why they made those prescribing decisions; and what they were told about HT medications by Relators. The issue of specific causation — what caused each plaintiff’s alleged injury — also will depend heavily upon an evaluation of each plaintiff’s medical history and pre-existing risk factors for that condition. Plaintiffs’ own physicians are uniquely qualified to testify about those issues. Thus, as in *In re Parlodel Consol. Lit.*, 22 F. Supp. 2d 320, 324 (D.N.J. 1998), where the court transferred a product liability action against a local pharmaceutical company to plaintiffs’ home district, “the two most critical issues in these cases, specific causation and [defendant’s] marketing representations, will rest upon testimony and other evidence from each Plaintiff’s treating physician.” In addition, plaintiffs’ damage claims will require testimony by their treating physicians. Local sales representatives of the Relators who met with plaintiffs’ physicians also could be relevant fact witnesses.

There is no realistic possibility that any prescribing or treating physician would travel to St. Louis for trial. Thus, if Respondent's rulings stand, Relators would have to try all of these cases without the benefit of live testimony from the most crucial fact witnesses. And even if some physicians are willing to appear, a trial in their home states would be far more convenient for them. *See Bridgeman v. Bradshaw*, 405 F. Supp. 1004, 1007 (D.S.C. 1975) (transferring case to district where doctors were located stating that the convenience of physicians is "important to the community and their attention at a hospital where their services are of great value and moment"); *Blake v. Delta Steamship Lines, Inc.*, 1985 WL 322, *3 (S.D.N.Y. 1985) (doctors "are well known for their busy schedules" and have a duty to be available to patients).

It is undisputed that *no* witnesses are located in Missouri. Plaintiffs' doctors and any other witnesses who may testify about plaintiffs' use of HT medications and their alleged injuries reside in Eastern states, far from Missouri and well beyond the trial court's subpoena power. As this Court has recognized, when there is a long distance between the place of the alleged injury and the place of trial, "[e]yewitnesses and treating physicians who are unable or unwilling to travel to the trial must be presented through the much less satisfactory method of deposition." *Besse*, 721 S.W.2d at 742.

Other state courts that have granted *forum non conveniens* motions, as well as federal courts that have transferred medical product liability actions to the district where medical treatment was provided, have recognized that in personal injury cases the location of treating physicians is a key factor in determining the appropriate forum for the trial. *See, e.g., Pearson v. Bayer Corp.*, 2003 WL 22299786, *1 (Pa. Com. Pl. Sept. 24,

2003) (“all of the health care providers who may testify or otherwise have information relevant on the issues of causation and damages” in this product liability case are located in Arizona); *Cuzzopoli v. Metro-North Commuter R.R.*, 2003 WL 21496879, *6 (S.D.N.Y. June 30, 2003) (“Plaintiff’s treating physicians will be important witnesses at the trial. . . . Treating physicians are characteristically reluctant to interrupt their practices to appear at trials”); *Nicholson v. Pfizer, Inc.*, 717 N.Y.S.2d 593, 594 (1st Dep’t 2000) (“It is uncontroverted that plaintiff’s treating physicians . . . are located in New Jersey, and beyond the reach of New York’s subpoena power. In view of this, defendant established its entitlement to dismissal of this action on the ground of *forum non conveniens.*”); *In re Eastern Dist. Repetitive Stress Injury Lit.*, 850 F. Supp. 188, 194 (E.D.N.Y. 1994) (“trials will require testimony from treating physicians, coworkers, and persons familiar with individual plaintiffs’ lifestyles” who reside in other districts); *Watson v. Dow Corning Corp.*, 1993 WL 165337, *2 (N.D. Cal. 1993) (transferring breast implant case to forum where medical treatment occurred); *Hoppe v. G.D. Searle & Co.*, 683 F. Supp. 1271, 1276 (D. Minn. 1988) (all witnesses “with knowledge of the facts surrounding [the] use and removal of her [IUD], [and] any attendant medical complications and injury or damages” are located in plaintiff’s home forum).

In sum, the second factor exclusively favors dismissal because it is undisputed that not a single witness is located in Missouri. Respondent ignored this factor.

C. It Is Undisputed That Factor 3 Is Satisfied — The Parties Do Not Reside in Missouri.

It is further undisputed that none of the plaintiffs live in Missouri and no defendant is incorporated in Missouri or has its headquarters in Missouri. Accordingly, it is apparent that a trial in St. Louis would be inconvenient for all parties, and that these cases were filed here for reasons having nothing to do with the non-resident plaintiffs' convenience. *See Morales v. Navieras de Puerto Rico*, 713 F. Supp. 711, 713 (S.D.N.Y. 1989) (“Because plaintiff is a resident of Puerto Rico, he does not, nor can he, seriously argue that New York is a more convenient forum [for him] than Puerto Rico.”).

The case law makes clear that courts routinely dismiss or transfer non-resident plaintiff cases involving out-of-state injuries, even when the lawsuit was filed in the defendant's home forum — which is not even the case here. *See, e.g., Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 238-39 (1981) (affirming dismissal of action arising out of the crash of an airplane in Scotland that was designed and built in the U.S.); *Gridley v. State Farm Mut. Auto Ins. Co.*, 840 N.E.2d 269, 278 (Ill. 2005) (directing dismissal even though defendant is headquartered in Illinois); *Russell v. Chrysler Corp.*, 505 N.W.2d 263 (Mich. 1993) (vacating denial of *forum non conveniens* dismissal in suit by non-resident plaintiffs; lower court erroneously ruled that the doctrine did not apply because the manufacturer was a Michigan resident); *Stangvik v. Shiley, Inc.*, 819 P.2d 14 (Cal. 1991) (granting *forum non conveniens* stay of product liability actions by Swedish and Norwegian residents against California heart valve manufacturer); *Bergquist v. Medtronic, Inc.*, 379 N.W.2d 508 (Minn. 1986) (affirming dismissal of suit by Swedish

plaintiffs against Minnesota heart valve manufacturer); *Baker v. Bell Helicopter Textron Inc.*, 985 S.W.2d 272 (Tex. App. 1999) (affirming dismissal of suit by foreign plaintiffs involving crash in Australia of helicopter manufactured in Texas); *Bewers v. American Home Products Corp.*, 472 N.Y.S.2d 637 (1st Dept), *aff'd*, 485 N.Y.S.2d 39 (N.Y. 1984) (dismissing suit by English plaintiffs against New York manufacturer); *In re Silicone Gel Breast Implants Prod. Liab. Lit.*, 887 F. Supp. 1469 (N.D. Ala. 1995) (granting *forum non conveniens* motions in six foreign-plaintiff breast implant cases, including actions originally filed in the home forum of some of the defendants); *Watson v. Dow Corning Corp.*, 1993 WL 165337 (N.D. Cal. 1993) (transferring action by out-of-state plaintiff involving breast implant made in California). Thus, the result reached by Respondent is completely out-of-step with the mainstream of American jurisprudence.

Respondent stated that “a plaintiff’s freedom to select a forum is significant,” quoting *Barrett v. Missouri Pac. R.R. Co.*, 688 S.W.2d 397, 399 (Mo. App. 1985). But “[b]ecause the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a [non-resident] plaintiff’s choice [of forum] deserves less deference,” and accordingly courts are “fully justified” in distinguishing between resident and non-resident plaintiffs. *Piper*, 454 U.S. at 255-56. *Accord, Biometrics, LLC v. New Womyn, Inc.*, 112 F. Supp. 2d 869, 877 (E.D. Mo. 2000) (“plaintiff’s choice of forum is accorded less weight . . . where it is not the plaintiff’s residence”). Moreover, any residual deference that might be due to plaintiffs’ forum choice is further reduced where, as here, the forum “lacks any significant connection with the underlying claim.” *Bell v. K Mart Corp.*, 848 F. Supp. 996, 1000 (N.D. Ga. 1994). As this Court has explained:

The plaintiff, initially, may select the forum by filing suit in any venue allowed by law. The right of choice of forum, however, is not absolute. A suit is subject to dismissal if it is filed in a forum which is manifestly inconvenient. The court, in ruling upon the issue, may consider the convenience of the parties, as well as its own convenience. The people of Missouri are not obliged to make their courts available for lawsuits in which there is no significant Missouri nexus.

Besse, 721 S.W.2d at 742.

Plaintiffs have relied upon *State ex rel. Kansas City Southern R.R. Co v. Mauer*, 998 S.W.2d 185 (Mo. App. 1999), which is readily distinguishable. There, the defendant had “agents, shops, maintenance facilities, a rail yard and its corporate headquarters” in Jackson County, Missouri, and was “considered a resident of Kansas City, Missouri, for Missouri and federal venue purposes.” *Id.* at 187. As the court pointed out, “it is seldom considered inconvenient to be sued in a defendant’s place of residence.” *Id.* at 190. No such facts are present here.

In sum, the third factor exclusively favors dismissal because it is undisputed that the parties are not located in Missouri. Respondent also ignored this factor.

D. Factor 5 Is Satisfied — Trying Plaintiffs’ Claims Would Unnecessarily Burden the Trial Court and the Citizens of St. Louis.

The United States Supreme Court adopted the *forum non conveniens* doctrine in the context of a lawsuit in New York by a Virginia resident, pointing out that “[a]dministrative difficulties follow for courts when litigation is piled up in congested

centers instead of being handled at its origin.” *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). More recently, the United States Supreme Court reaffirmed that principle in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 252 (1981), a product liability case, recognizing that, unless the doctrine is utilized, imported litigation will “further congest already crowded courts.” The original Missouri *forum non conveniens* case likewise stated that “the basic consideration is the public factor of convenience to the court and for that reason emphasis is fairly placed upon residence and the place where the causes of action accrued.” *Elliott v. Johnston*, 292 S.W.2d 589, 594 (1956). As explained in a seminal law review article, cited in *Elliott*, 292 S.W.2d at 591, *Gilbert*, 330 U.S. at 508 n.8, and *Piper*, 454 U.S. at 248 n.13:

The most practical reason [for the doctrine] is founded upon the necessity that some means shall exist of protecting the citizens of the state from the burdens unjustifiably imposed upon them when imported controversies are allowed to proceed to trial. The burden is felt in two ways, in increased expenses of administration and in delays of justice.

Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 *Colum. L. Rev.* 1, 25 (1929). In advocating use of the doctrine, the Blair article discussed cases filed by U.S. residents outside their home states. *Id.* at 13-15.

The considerations relevant to the public interest factor regarding judicial burdens include “[s]uch matters as taxpayer cost, jury time, the necessity to interpret and apply the law of a foreign jurisdiction, and similar facts.” *Anglim*, 832 S.W.2d at 304. “In

addition, the trial court may take notice of the congestion of its own docket.” *Id.* All of those considerations weigh heavily in favor of dismissal.

The 22nd Judicial Circuit ranks first and second of the 45 Missouri Judicial Circuits for average filings per judge for complex civil cases and circuit level civil cases, respectively. Exhibit 30, p. 45 (*Report of the Joint Interim Committee on Judicial Resources in Missouri*, Jan. 2004). Likewise, for fiscal years 1998-2003, the 22nd Circuit ranked first for total number of jury trials in Missouri and posted the highest number of jury trial days. *Id.* at 47, 49. As Judge Wolff pointed out in *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 860 (Mo. banc 2001) (Wolff, J., separate opinion), 10.7% of all people eligible for jury duty in the City of St. Louis (26,160 residents) appeared for jury service in one year during 1999-2000. To get this number, the City Circuit Court had to summon 72,228 people — almost 30% of all of those eligible. *Id.* at 860-61.

Simply put, the Circuit in which Respondent sits, and its jury pool, are the busiest and most overburdened in the State. To further task the judges and staff with administering cases that have absolutely nothing to do with St. Louis or Missouri is as patently unfair as it is to ask Missouri residents to serve on juries for such cases and to bear the cost of adjudicating them. This Court recognized long ago that this State’s taxpayers and courts should not be burdened with non-resident lawsuits that are more conveniently adjudicated elsewhere, because “[o]ur Missouri dockets and that of Vernon County are already overloaded with cases ready for trial.” *Elliott v. Johnston*, 292 S.W.2d 589, 594 (Mo. 1956). *Accord, Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09

(1947) (“Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation.”); *Engstrom v. Bayer Corp.*, 855 A.2d 52, 56-57 (Pa. Super. 2004) (when “there is no connection between Pennsylvania and the specific facts of these cases,” there is “simply no valid reason that the people of Philadelphia County should bear the burdens of adjudicating” them). Today, those public burdens are significantly greater than they were when *Elliott* was decided.

Adjudicating these complex cases, involving extensive medical and scientific issues, would place a particularly heavy burden on the trial court and its jurors. Trials of pharmaceutical product liability cases such as these commonly last at least three or four weeks. Missouri courts have no duty to undertake the burden of handling cases from around the country that have no nexus to Missouri. This Court can and should take steps to avoid the substantial public burdens that will be caused by this imported litigation.

Allowing these lawsuits to proceed in St. Louis will not produce any efficiencies. There are already coordinated proceedings for HT litigation in plaintiffs’ home states of New Jersey, New York, and Pennsylvania, where such cases can be efficiently handled. *See* Exhibits 41-43 (Sept. 21, 2004 Case Management Order No. 1 (New Jersey); August 9, 2006 Case Management Order No. 1 (New York); December 12, 2003 Case Management Order No. 1 (Pennsylvania)). There is no need to create a *de facto* consolidated proceeding in the St. Louis City Circuit Court. The trial court’s resources are far better spent resolving claims that have some nexus to Missouri.

Moreover, plaintiffs' home states have a substantial "local interest" in having these cases "handled at [their] origin," so that these "localized controversies" can be "decided at home," *i.e.*, in the states where the alleged injuries occurred. *Gilbert*, 330 U.S. at 508-09. Those states have the overriding interest in determining whether the benefits of these HT medications, which were prescribed by local physicians for local residents, outweigh their risks under the facts of each case. Respondent did not even consider that factor.

Finally, if these cases remain in Missouri the trial court would be burdened by having to apply foreign law to each plaintiff's claim. *See, e.g., Goede v. Aerojet General Corp.*, 143 S.W.3d 14, 24 (Mo. App. 2004) ("When determining choice-of-law issues in a tort action, Missouri courts apply the 'most significant relationship' test."). The case law recognizes that "there is an appropriateness . . . in having the trial . . . in a forum that is at home with the state law that must govern the case." *Bell*, 848 F. Supp. at 1000 (quoting *Gilbert*, 330 U.S. at 509).

In sum, the fifth factor of judicial convenience and burden on the court exclusively favors dismissal. On this issue, Respondent merely stated that he "does not believe an undue burden on this Circuit will be created by the prosecution of this case in the City of St. Louis." Exhibits 31-40 (A4-A5, A10, A16, A22, A28, A34, A40, A45-A46, A51 and A56). Respondent offered no analysis on this point, and failed to consider the burdens collectively imposed by *all* of these cases — not merely one case — and the far greater public burdens that would be imposed if Missouri trial courts continue to fail to apply the *forum non conveniens* doctrine in such cases.

E. It Is Undisputed That Factor 6 Is Satisfied — Plaintiffs Could Have Filed Their Lawsuits in Their Home States.

Plaintiffs obviously did not file their claims in Missouri because of any impediment to suit in the states that have a nexus to their claims. On the contrary, plaintiffs could have brought their claims in states that — unlike Missouri — have a connection to those claims. Such courts would have jurisdiction over plaintiffs' claims, and would provide a far more convenient forum. Accordingly, no prejudice to plaintiffs would result from a *forum non conveniens* dismissal. Conversely, if the cases are not dismissed Relators would have no adequate remedy on appeal, because it is extremely unlikely that an appellate court will reverse on the ground of an inconvenient forum after a trial has been completed.

Accordingly, all six *forum non conveniens* factors overwhelmingly favor dismissal. Respondent did not cite any case denying a *forum non conveniens* motion where all six factors favor dismissal, and Relators are not aware of any such case. If *forum non conveniens* motions are denied under these facts — where not a single party or witness is from this State, and no relevant conduct occurred in this State — then the doctrine is effectively dead in Missouri. Respondent's decisions are an open invitation to any non-resident to file a lawsuit in Missouri based on out-of-state events against any defendant who does business here, secure in the knowledge that the *forum non conveniens* doctrine will not be enforced. In that event, Missouri will become a magnet for such imported litigation, further burdening its already overburdened courts and residents.

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.

The *forum non conveniens* doctrine “can never apply if there is absence of jurisdiction.” *Elliott*, 292 S.W.2d at 593 (quoting *Gilbert*, 330 U.S. at 506). On any *forum non conveniens* motion, the defendant is presumed to have sufficient contacts with the forum so that the court may constitutionally exercise jurisdiction. Otherwise, the proper motion would be to dismiss for lack of jurisdiction, not *forum non conveniens*. The inquiry on a *forum non conveniens* motion is not whether the court can exercise jurisdiction, but whether “the forum is inappropriate” under the six relevant factors and the court should therefore decline jurisdiction in favor of a more convenient forum. *Id.*; *see, e.g., Rozansky*, 579 S.W.2d at 814 (affirming dismissal where defendants “did practice business in Missouri and thus both were subject to suit in Missouri” but the case “had little, if any, ‘nexus’ with Missouri and its courts”).

Respondent disregarded that fundamental distinction and abused his discretion by relying upon the fact that “Defendants do a substantial amount of business within the State of Missouri.” Exhibits 31-40 (A4, A10, A16, A22, A28, A34, A40, A45, A51 and A55). That consideration relates to jurisdiction, not *forum non conveniens*, because it is

undisputed that none of the business done by defendants in this State has anything to do with plaintiffs' claims or with the six relevant *forum non conveniens* factors. "A trial court abuses its discretion if its decision rests on a misunderstanding of law." *Stidham v. Stidham*, 136 S.W.3d 74, 78 (Mo. App. 2004).

Under Respondent's reasoning, there could never be a dismissal for *forum non conveniens* because **any** non-resident who alleges injury from any product could maintain an action in Missouri simply because the defendant does business here. In the pharmaceutical context alone, any plaintiff could pursue a lawsuit in Missouri merely by naming a manufacturer who sells the product at issue — or, indeed, any other product — in Missouri. That result would flood Missouri courts with non-resident plaintiff claims, and would violate this Court's directive that "trial courts have a duty to apply" the *forum non conveniens* doctrine in appropriate cases. *Besse*, 721 S.W.2d at 743. Moreover, as the court pointed out in *Mauer*, 998 S.W.2d at 191, "the more expansive the rules of personal jurisdiction are, the more important it becomes for courts to carefully evaluate motions based on *forum non conveniens*."

Other states have wisely decided to avoid such a result by ensuring that the doctrine remains viable. Courts have pointed out that imported litigation creates multiple burdens — that "there is more involved here than three or four weeks spent on the bench in trial" in each case, because "the time that the judge would have to devote to motions and matters other than the trial" must be considered; "these cases would assuredly reach [appellate courts] in some numbers"; and "to dragoon [local] residents into coming and sitting [for jury duty] for two or three or four weeks" to hear an out-of-state dispute is an

“improper imposition.” *Eric T. v. National Medical Enterprises, Inc.*, 700 A.2d 749, 757 (D.C. App. 1997). *Accord, Gridley v. State Farm Mut. Auto Ins. Co.*, 840 N.E.2d 269, 280 (Ill. 2005) (“residents of Illinois should not be burdened with jury duty given the fact that the action did not arise in, and has no relation to, Illinois”). Courts also have recognized that there is no deterrence interest to be served by retaining such cases, because any similar lawsuits filed by local residents “would provide sufficient deterrence to prevent wrongful conduct in the future even if the suits filed by nonresident plaintiffs were tried elsewhere.” *Stangvik v. Shiley, Inc.*, 819 P.2d 14, 23 (Cal. 1991).

Moreover, courts in other states have not hesitated to reverse the denial of a *forum non conveniens* motion where the lawsuit has little or no connection with the forum. *See, e.g., Gridley v. State Farm Mut. Auto Ins. Co.*, 840 N.E.2d 269, 277-80 (Ill. 2005); *Illinois Cent. R.R. Co. v. Gregory*, 912 So. 2d 829, 836-37 (Miss. 2005); *Nicholson v. Pfizer, Inc.*, 717 N.Y.S.2d 593, 594 (N.Y. App. Div. 2000); *Wyeth Labs., Inc. v. Jefferson*, 725 A.2d 487, 491-95 (D.C. App. 1999); *Value Rent-A-Car, Inc. v. Harbert*, 720 So. 2d 552, 554-55 (Fla. Ct. App. 1998).

As the Supreme Court of Mississippi aptly stated in a recent decision reversing the denial of a *forum non conveniens* motion:

The courts of Mississippi will not become the default forum for plaintiffs seeking to consolidate mass-tort actions. To allow otherwise would waste finite judicial resources on claims that have nothing to do with the state.

Each trial requires the empanelling of Mississippians as jurors and the use

of Mississippi tax dollars. These resources should be used for cases in which Mississippi has an interest.

3M Co. v. Johnson, 926 So. 2d 860, 866 (Miss. 2006). This Court should follow that reasoning.

III. 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 RELIED UPON AN ASSUMPTION THAT IS CONTRARY TO THE UNDISPUTED RECORD.

A principal reason cited by Respondent for his decision was that “this action has been pending for over two years” and “substantial discovery has already been conducted.” Exhibits 31-40 (A4, A10, A15, A21-A22, A27-A28, A33-A34, A40, A45, A50 and A55). Respondent did not describe the discovery to which he referred. In fact, there is no support for Respondent’s statement, because there has been no discovery at all on the merits. As discussed above, the only discovery that was taken in these cases was written discovery relating to the procedural issues of severance and *forum non conveniens*. To date, there have been no depositions, either of parties or non-parties. This is hardly “substantial discovery.” By relying heavily upon an assumption that is contrary to the undisputed record, Respondent abused his discretion.

Moreover, to deny the motion on this ground is fundamentally unfair because the trial court denied Relators' first *forum non conveniens* motion based on the *lack* of discovery. In *Anglim*, 832 S.W.2d at 303, this Court explained that "application of the doctrine of *forum non conveniens* is fact intensive," and "evidentiary permutations justifying application of the doctrine are unpredictable." The trial court's August 24, 2005, Order cited the lack of discovery as the basis for denying Relators' original *forum non conveniens* motion without prejudice. Yet, in his November 2, 2006, Order, Respondent cited the discovery taken to obtain that factual support as the primary basis for denying the motion. Thus, Respondent created a "Catch-22" — a defendant must take discovery to obtain facts to support a *forum non conveniens* motion, but if it takes such discovery that will preclude a *forum non conveniens* dismissal. That is yet another reason why Respondent's reasoning would make it impossible to dismiss a Missouri case under the *forum non conveniens* doctrine.

Although these actions were filed in 2004, the only activity to date has involved purely procedural issues. Thus, the trial court has not become familiar with the merits of these cases, and accordingly no efficiencies would be realized by keeping them in St. Louis. Relators should not be penalized because it took time to resolve procedural matters such as severance, *forum non conveniens* motions, discovery related to those motions, and removal.

CONCLUSION

For all of the reasons set forth above, this Court should make its Preliminary Writ of Prohibition permanent and order Respondent to cease any action in these cases other than dismissing them on the ground of *forum non conveniens*.

Respectfully submitted,

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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 7,352 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.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of Relators' Opening Brief, Relators' Separate Appendix and a virus-free diskette were mailed, first class postage prepaid this 18th day of May 2007 to:

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APPENDIX