

IN THE SUPREME COURT OF MISSOURI

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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.

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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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RELATORS' REPLY BRIEF

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## ARGUMENT

**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.**

Plaintiffs' Brief in Response does not come close to refuting Relators' showing that each of the six factors specified by this Court in *Anglim v. Missouri Pac. R.R. Co.*, 832 S.W.2d 298, 302 (Mo. banc), *cert. denied*, 506 U.S. 1041 (1992), for determining whether a case should be dismissed on the ground of *forum non conveniens* is satisfied here:

1. **Place of accrual of the cause of action** — The first factor is satisfied because it is *undisputed* that plaintiffs' causes of action accrued outside Missouri.
2. **Location of witnesses** — The second factor is satisfied because it is *undisputed* that all witnesses are located outside Missouri.
3. **The residence of the parties** — The third factor is satisfied because it is *undisputed* that no party is a Missouri resident.
4. **Any nexus with the place of suit** — The fourth factor is satisfied because it is *undisputed* that there is no nexus whatsoever between these cases and Missouri. Plaintiffs

allege that they purchased and took hormone replacement therapy products in other states and were allegedly injured in other states.

5. **Convenience to and burden upon the court** — The fifth factor is satisfied because it is *undisputed* that the trial court and its jurors are the most overburdened in the State, and that these are complex cases that would require weeks of trial. Respondent’s statement that he “does not believe an undue burden” 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)) is unsupported by any analysis, and fails to consider the evidence of court congestion presented by Relators and the burdens collectively imposed by all ten of these cases. Far greater burdens would be imposed if Missouri courts continue to fail to apply the *forum non conveniens* doctrine in cases such as these, because then there would effectively be no limitation on the importation of lawsuits involving facts and parties that are centered out-of-state.

6. **Availability of another court with jurisdiction affording a forum for plaintiffs’ remedy** — The sixth factor is satisfied because it is *undisputed* that these actions can be litigated in plaintiffs’ home forums. Plaintiffs implicitly concede that alternative forums are available if Relators stipulate that “any statute of limitations defense would be waived in another jurisdiction” (Brief in Response at 2). Relators agree that, if the Court chooses, it may condition an order on a stipulation that the statute of limitations is tolled during the time this litigation was pending in Missouri.

Unable to defend Respondent’s orders based on the *Anglim* factors, plaintiffs fall back on the argument that the rulings should not be disturbed because they are

“discretionary.” But a trial court’s discretion in deciding the motion is “controlled,” not unlimited, and “is not the equivalent of whim.” *State ex rel. K-Mart Corp. v. Holliger*, 986 S.W.2d 165, 169 (Mo. banc 1999). Here, Respondent never even applied the *Anglim* factors to the facts of this case. It cannot be “controlled discretion” when a court fails to apply the governing legal standard. It cannot be “controlled discretion” to deny a *forum non conveniens* motion where, as here, all six *Anglim* factors favor dismissal and no factor points the other way. And it cannot be “controlled discretion” to base a ruling on a misunderstanding of the controlling law (by conflating the standards for jurisdiction and *forum non conveniens*) and a mistake of fact (Respondent’s erroneous statement that “substantial discovery has already been conducted” (Exhibits 31-40 (A4, A10, A15, A21-A22, A27-A28, A33-A34, A40, A45, A50 and A55))). These are not circumstances where “reasonable persons can differ about the propriety of the action taken by the trial court,” as plaintiffs assert. Brief in Response at 12. To the contrary, this is plainly an abuse of discretion because the law was “overridden or misapplied.” *Fritzsche v. East Texas Motor Freight Lines*, 405 S.W.2d 541, 545 (Mo. App. 1966).

If such rulings are never reversed on appeal on the ground that they are “discretionary,” then the legal standard for *forum non conveniens* motions becomes meaningless and the doctrine is effectively nullified. That result would be squarely contrary to this Court’s directive that trial courts “are obliged to give attention” to the *forum non conveniens* doctrine and have “a duty to apply it in appropriate cases” that “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).

Plaintiffs' assertion that the record is "devoid of any evidence demonstrating that proceeding in Missouri would work an undue hardship on Relators" is wrong. Brief in Response at 6. The exhibits to the Petition establish, and it is undisputed, that none of plaintiffs' prescribing or treating physicians are located in Missouri, and accordingly the jury will be deprived of their live testimony. In Point I(B) of their Brief, Relators explained in detail why plaintiffs' physicians are the most important non-party witnesses in these cases, on issues of both liability (including causation and the adequacy of warnings) and damages. Plaintiffs do not dispute the importance of their physicians' testimony. As this Court recognized in *Anglim*, 832 S.W.2d at 303, in personal injury actions "the need to have ready access to the treating physicians and medical records" is "critical to the preparation and trial of the case."

Plaintiffs say that Relators presented no "evidence" that "prescribing and treating physicians and other witnesses would not appear to testify live at trial." Brief in Response at 15 n.1. Not surprisingly, plaintiffs cite no case that required a defendant, as a condition of a *forum non conveniens* dismissal, to show that treating physicians will not appear for a trial in another state. It defies belief that practicing doctors in Delaware, New York, New Jersey and Pennsylvania will voluntarily fly hundreds of miles to attend a trial in Missouri. These doctors are not within Relators' control, and even if they promised to appear the promise would be unenforceable. Plaintiffs, like Respondent, simply ignore the long line of cases (*see* Relators' Brief at 13-15) that have granted *forum non conveniens* motions or motions to transfer because medical witnesses were located elsewhere. In sum, the denial of these motions severely prejudices Relators and "would

lead to an injustice” (*Anglim*, 832 S.W.2d at 303) by requiring them to try all of these cases in a forum where there is no realistic possibility of obtaining live testimony from any of the critical non-party medical witnesses. Indeed, no witness at all, in any of these cases, is located here.

Plaintiffs assert that the physicians’ testimony could be presented through videotape depositions. Brief in Response at 15. But courts have long held that there is a strong interest in having key witnesses, in this case physicians, testify in person. Thus, in *Besse*, 721 S.W.2d at 742, this Court pointed out that presenting by deposition the testimony of “[e]yewitnesses and treating physicians who are unable or unwilling to travel to the trial” are a “much less satisfactory method” than live testimony.

Similarly, as the U.S. Supreme Court recognized in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 511 (1947):

Certainly to fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition, is to create a condition not satisfactory to court, jury or most litigants.

And in *Polaroid Corp. v. Casselman*, 213 F. Supp. 379, 382 (S.D.N.Y. 1962), the court aptly observed:

Depositions, deadening and one-sided, are a poor substitute for live testimony especially where, as here, vital issues of fact may hinge on credibility. In determining credibility, there is nothing like the impact of live *dramatis personae* on the trier of the facts.

(Footnote omitted.) Accordingly, dismissal “will not only serve the convenience of the witnesses but, more importantly, the ends of justice.” *Id. Accord, Manning v. Lockhart*, 623 F.2d 536, 539 (8th Cir. 1980) (“There is no question that oral testimony is the preferred form of testimonial evidence, and that testimony by deposition or affidavit should be used as a substitute only if a witness is not available to testify in person”).

The availability of videotape depositions does not change the analysis. As the court stated in *In re Eastern Dist. Repetitive Stress Injury Litig.*, 850 F. Supp. 188, 194 (E.D.N.Y. 1994): “Depositions, . . . even when videotaped, are no substitute for live testimony.” *Accord, Hoppe v. G.D. Searle & Co.*, 683 F. Supp. 1271, 1276 (D. Minn. 1988) (“Forcing the defendant to conduct its case by deposition, even videotape deposition, is simply unjustified” because “all . . . witnesses with knowledge of the facts surrounding [plaintiffs’ use of their devices], any attendant medical complications and injury” are located in other states). Surely, plaintiffs would not agree to have their own testimony presented by videotape.

Plaintiffs argue that in the trials of the *Nelson, Daniel* and *Simon* hormone therapy cases in Philadelphia the testimony of the plaintiffs’ physicians was presented by deposition. Brief in Response at 15-16. Unlike these cases, where no defendant is headquartered in Missouri, the *Nelson, Daniel* and *Simon* trials occurred in the home forum of Wyeth Pharmaceuticals, Inc., whose principal place of business is in Pennsylvania. The reason why the physicians were not called as live witnesses in those trials is simply because they were located in Ohio, Arkansas, and New Jersey, beyond the subpoena power of a state court in Pennsylvania. This does not mean that physicians

“almost invariably” testify by deposition in such cases, as plaintiffs assert. *Id.* at 15. To the contrary, plaintiffs admit that prescribing physicians testified live in two hormone therapy trials in federal court in Arkansas, where they were called by the plaintiffs. *Id.* at 16 n.2. This shows that (1) contrary to plaintiffs’ argument, doctors are not willing to appear voluntarily for such trials in other states; (2) when doctors are within the subpoena power of the court, they do testify live; and (3) both sides typically want treating physicians to appear as live witnesses if they are available.

Thus, plaintiffs’ assertion that “any alternative forum would be equally inconvenient for one or more of the Relators” is false. *Id.* at 14. The prejudice to Relators from a trial in Missouri is not that plaintiffs’ home states would be more convenient for Relators’ own witnesses, but that Relators will be deprived of live testimony from the most important witnesses — plaintiffs’ physicians — because they cannot be compelled to testify here.

Plaintiffs’ statement that Relators “have not seriously argued that they will be unable to obtain an adequate remedy on appeal” is wrong. *Id.* at 10. Relators specifically addressed that point on page 23 of their Brief, pointing out that there is no adequate remedy on appeal because it is not seriously disputable that — even if Relators are denied the opportunity for live testimony from plaintiffs’ physicians — no appellate court will reverse a final judgment on the ground of *forum non conveniens*, let alone final judgments in ten cases. If an adequate remedy on appeal were realistically available, one would think plaintiffs could cite even one case from Missouri or anywhere else reversing a judgment after trial on the ground of *forum non conveniens*, but they cannot do so. As a

practical matter, *forum non conveniens* is solely a pretrial, not a post-trial, remedy. The very case cited by plaintiffs on this point rejected a procedural challenge to a writ of prohibition because the court found that “[t]he State’s right to relief by way of appeal is, at best, doubtful.” *State v. McCulloch*, 852 S.W.2d 392, 395 (Mo. App. 1999). Here, the lack of an adequate remedy on appeal is a virtual certainty.

Plaintiffs rely upon *State ex rel. Kansas City Southern R.R. Co. v. Mauer*, 998 S.W.2d 185 (Mo. App. 1999), but ignore the fact that the defendant in that case had “agents, shops, maintenance facilities, a rail yard and its corporate headquarters” in Missouri and was “considered a resident of Kansas City, Missouri, for Missouri and federal venue purposes.” *Id.* at 187. “[I]t is seldom considered inconvenient to be sued in a defendant’s place of residence.” *Id.* at 190. That is not the case here. Plaintiffs also cite *State ex rel. Ford Motor Co. v. Westbrooke*, 12 S.W.3d 386, 389, 392 (Mo. App. 2000), which is distinguishable because the Ford vehicle at issue was manufactured in St. Louis and because the *forum non conveniens* motion was not supported by “any facts in the record concerning the location of pertinent witnesses; and nexus or lack thereof with the suit; the ‘public factor of the convenience to and burden upon the court’; or the matter of inconvenience to Ford.”

Respondent’s rulings simply encourage importation of litigation that has no connection with this State. To prevent the burdens that result from such litigation, to prevent severe prejudice to Relators, and to reinforce the need to apply the *forum non conveniens* doctrine when the *Anglim* factors warrant its application, the preliminary writ of prohibition should be made permanent.

**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.**

Plaintiffs assert that Respondent properly took into account 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)), because trial courts “should consider such ‘jurisdictional’ matters as the defendants’ presence and activities in the forum” as part of determining the “second prong” of the *forum non conveniens* analysis — whether “permitting the trial to proceed in Missouri would cause an injustice due to oppression of the defendant or undue burden on the court.” *Westbrooke*, 12 S.W.3d at 392; Brief in Response at 18. The problem is that Respondent never engaged in the first prong of the analysis — whether the six *Anglim* factors favor dismissal — and that none of the business done by any of the Relators in Missouri has anything to do with the facts or claims in these cases. The *forum non conveniens* doctrine “can never apply if there is absence of jurisdiction.” *Elliott v. Johnston*, 365 Mo. 881, 292 S.W.2d 589, 593 (1956) (quoting *Gilbert*, 330 U.S. at 506). Whenever there is jurisdiction based on a defendant’s transaction of business in Missouri, a court could always find, in the abstract, that it would not be “oppressive” to the defendant if the case were tried in Missouri even if it

has “but little, if any, ‘nexus’ with Missouri and its courts.” *Id.*, 292 S.W.2d at 594. That is not the legal standard. By denying the *forum non conveniens* motions without analyzing the six *Anglim* factors, on the ground that Relators do a substantial amount of business in Missouri, Respondent ruled, in effect, that the cases should remain in Missouri simply because there is a basis for jurisdiction here, and thereby improperly conflated the issues of personal jurisdiction and *forum non conveniens*.

Respondent correctly stated that the *forum non conveniens* doctrine “provides that notwithstanding proper jurisdiction,” a court may dismiss a case “if the forum is seriously inconvenient for the trial of the action involved and if a more appropriate forum is available to the plaintiff.” (Exhibits 31-40 (A3, A8, A14, A20, A26, A32, A38-39, A44, A49 and A54)). But Respondent never considered whether this forum is seriously inconvenient for trial or if a more appropriate forum is available. Where, as here, all six *Anglim* factors favor dismissal because the facts, claims, and parties have nothing — *nothing at all* — to do with Missouri, this forum cannot possibly be appropriate or convenient for trial. By focusing on considerations more properly related to jurisdiction than trial convenience, Respondent failed to apply the *forum non conveniens* standard as set forth by this Court, and accordingly abused his discretion.

Respondent’s interpretation of the *forum non conveniens* doctrine effectively eviscerates the doctrine in Missouri, inviting a flood of similar lawsuits that would further burden Missouri courts, jurors, taxpayers, and litigants. This Court adopted the *forum non conveniens* doctrine more than 50 years ago to prevent such burdens, and should now take this opportunity to align Missouri practice in this area of the law with the

mainstream of American jurisprudence by reinforcing the need for trial courts to apply the doctrine in cases, such as these cases, that are brought by nonresidents against nonresidents based on claims that arose out-of-state.

**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.**

Plaintiffs attempt to defend Respondent's statement that a *forum non conveniens* dismissal was unwarranted because "substantial discovery has already been conducted" (Exhibits 31-40 (A4, A10, A15, A21-A22, A27-A28, A33-A34, A40, A45, A50 and A55)) by asserting that this discovery filled "several bankers' boxes" and was therefore "substantial." Brief in Response at 20. But plaintiffs admit that this discovery was "not directed to the merits"; all of it pertained to Relators' *forum non conveniens* and severance motions. *Id.* Accordingly, that discovery has no bearing on the *forum non conveniens* analysis, because it did nothing substantive to advance these cases toward trial or to increase the trial judge's understanding of the merits so that it would be more efficient for him rather than judges in plaintiffs' home states to preside over the trials. Moreover, it is inherently unfair to deny *forum non conveniens* motions on the ground that time had elapsed while discovery on those motions was taken when another judge of

the same court previously denied the motions on the ground that discovery had *not* been taken.

### **CONCLUSION**

In short, Respondent either made a mistake of fact by assuming that this discovery related to the merits or mistakenly relied on a factor that is entirely irrelevant to the *forum non conveniens* analysis. In either event, Respondent abused his discretion.

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 3,455 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.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that two copies of Relators' Reply Brief and a virus-free diskette were mailed, first class postage prepaid this \_\_\_\_ day of June 2007 to:

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