Case No. SC 95514

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI ex rel. NORFOLK SOUTHERN RAILWAY COMPANY, Relator,

v.

HONORABLE COLLEEN DOLAN, JUDGE OF THE TWENTY-FIRST JUDICIAL CIRCUIT IN THE COUNTY OF ST. LOUIS, DIVISION 20, Respondent.

BRIEF OF AMICUS CURIAE, MISSOURI ASSOCIATION OF TRIAL ATTORNEYS

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Missouri Courts recognize two kinds of jurisdiction: subject matter and personal, *J. C. W. ex rel. Webb v. Wyciskalla,* 275 S.W. 3d 249, 252 (Mo. *en banc.* 2009). Subject matter jurisdiction refers to a court's authority to render judgment in a particular category of case, *Id.* at 253. The subject matter jurisdiction of most Missouri courts is derived from the Missouri Constitution, *Id.*[1] Personal jurisdiction, on the other hand, refers to the power of a court to require a person to respond to a legal proceeding affecting the person's rights or interests, *Id.* at 252-253. The requirement that a court has personal jurisdiction flows mostly from the Due Process Clause, either in the Fifth or the 14th Amendments to the United States Constitution, *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S, 694, 702 (1982). Although subject matter jurisdiction can never be waived, "[b]ecause the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived." *Id.* at 703.

In more recent years, the Supreme Court of the United States has recognized two kinds of personal jurisdiction: specific and general. Specific

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[1] The one exception is the jurisdiction of Associate Circuit Judges which is determined by law, i.e. the Missouri General Assembly, *Id.* at 254 n. 7, citing Missouri Constitution Art V, § 17.

jurisdiction refers to jurisdiction over causes of action occurring as a result of a defendant's actions within a forum state, *Mitchell v. Eli Lilly and Co.*, -- F.Supp.3d--, 2016 WL 362441 (E.D.Mo. 2016) *4. It arises out of a state's long-arm statute, *Id.* General jurisdiction is based on the presence of the defendant in the state, *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1199 (8th Cir. 1990). In the case of corporations, courts in the past looked at whether they conducted business within a state on a sustained and systematic basis to determine if there was general jurisdiction, *Id.* As Relator notes in its Brief, in the last few years, the Supreme Court has limited general jurisdiction insofar as corporations are concerned (Relator's Brief at 20-25).

While much energy is expended in some cases in distinguishing between the two kinds of personal jurisdiction and whether they empower a state to issue valid process, are there other ways in which a court can validly exercise personal jurisdiction over defendants regardless of specific and general jurisdiction? If there are, then whether the defendant in a particular case is subject to specific or general jurisdiction is irrelevant.

Transient Jurisdiction

The answer is obvious that there are. For example, in *Burnham v. Superior Court of California, County of Marin,* 495 U.S. 604 (1990), the petitioner was a husband separated from his wife. Dennis Burnham lived in New Jersey; his estranged wife lived in California. Mr. Burnham was in Marin

County, California for a weekend and visited his children. While there his wife had him served with a summons in a divorce action. He sought to quash the summons on the ground that he lacked sufficient minimum contacts with California to support personal jurisdiction consistent with the Due Process Clause of the 14th Amendment. The trial court denied his motion to quash, and ultimately the case ended up before the United States Supreme Court.

Justice Scalia, speaking for four members of the Court in affirming the lower court, wrote that among the "most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State." 495 U.S. at 610. He concluded that the Court did not need to consider matters of fairness since "jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system. . . ." *Id.* at 619. This is commonly called "transient jurisdiction."

Justice Brennan, also speaking for four justices, disagreed that concerns of fair play and substantial justice were irrelevant just because of the historical pedigree of transient jurisdiction, *Id*. at 629-630. Nonetheless, he concurred in affirming the lower court, noting a number of factors that served to uphold transient jurisdiction against a due process challenge. They included the wide-spread knowledge of the tradition that a defendant voluntarily present in a state is subject to suit, citing the RESTATEMENT (SECOND) OF CONFLICT OF

LAWS § 28, *Id.* at 636-637. He also noted that by visiting the forum state, a transient defendant avails himself of significant benefits:

> His health and safety are guaranteed by the State's police, fire, and emergency medical services; he is free to travel on the State's roads and waterways; he likely enjoys the fruits of the State's economy as well. Moreover, the Privileges and Immunities Clause of Article IV prevents a state government from discriminating against a transient defendant by denying him the protections of its law or the right of access to its courts. [Citations omitted.] Subject only to the doctrine of *forum non conveniens,* an out-of-state plaintiff may use state courts in all circumstances in which those courts would be available to state citizens. Without transient jurisdiction, an asymmetry would arise: A transient would have the full benefit of the power of the forum State's courts as a plaintiff while retaining immunity from their authority as a defendant.

495 U.S. at 637-638. Justice Brennan also noted that the potential burdens on the transient defendant were slight since modern "transportation and communications have made it much less burdensome for a party sued to defend himself in a State outside his place of residence." *Id.* at 638 (Citations and quotation marks omitted.) In the case of Dennis Burnham, a resident of New

Jersey who was going to have to defend his divorce action in California based on his weekend in Marin County, the Court reasoned that the fact he had "already journeyed at least once before to the forum—as evidenced by the fact that he was served with process there—is an indication that suit in the forum likely would not be prohibitively inconvenient." *Id.* at 638-639. Finally, the Court concluded that "any burdens that do arise can be ameliorated by a variety of procedural devices." *Id.* at 639.

Whether transient jurisdiction is viewed as ignoring due process altogether—the Scalia approach—or "due process lite"—the Brennan approach—in neither event does one find anything approximating specific or general jurisdiction.

Consent to Jurisdiction

But there are far more common exceptions to specific or general jurisdiction than transient jurisdiction. The reality is that, "regardless of the power of the State to serve process, an individual may submit to the jurisdiction of the court by appearance. A variety of legal arrangements have been taken to represent *express or implied consent* to the personal jurisdiction of the Court." *Insurance Corp. of Ireland, Ltd., supra,* 456 U.S. at 703 (emphasis added). *Ireland* noted some of those arrangements as including forum-selection clauses in contracts, arbitration agreements, and failure to

raise a defense of a lack of personal jurisdiction at the earliest opportunity as required by Rule 12 (h), F. R. Civ. P., *Id.* at 703-704.

This list was hardly comprehensive as Judge Richard Arnold noted in *Knowlton, supra,* 900 F.2d at 1199: "One of the most solidly established ways of giving such consent is to designate an agent for service of process within the State." Although Judge Arnold did not cite authority for the latter proposition, the seminal case that established the rule he invoked involved a case originating out of Audrain County, Missouri that squarely controls the instant cause. Curiously, it is a case that warrants not even a footnote in Relator's Brief, earning it, apparently, the sobriquet of . . .

The Case That Dare Not Speak Its Name

In *Gold Issue Mining and Milling Co. v. Pennsylvania Fire Insurance Company of Philadelphia*, 267 Mo. 524, 184 S.W. 999 (*en banc.* 1916), the plaintiff was an Arizona corporation that suffered a fire loss in a gold mine in Colorado that was insured under a policy insured by defendant, a foreign insurance company organized under Pennsylvania law. The defendant's insurance policy was issued by its agent in Cripple Creek, Colorado, and plaintiff filed suit in Audrain County, Missouri. Service was effected on the Superintendent of Insurance in Cole County, Missouri pursuant to a statute that provided that any insurance company doing business in this state, not

incorporated by or organized under Missouri law, was required to file an instrument with the Superintendent of Insurance authorizing the Superintendent to receive service of process on behalf of the company in any court of the state. The defendant had filed such a consent with the Superintendent. This Court held that the statute permitted suits in Missouri against foreign insurance companies even though the contract of insurance did not involve property insured in Missouri, 184 S.W. at 1005.

The Court then addressed defendant's claim—which is the same as relator's at bar—that allowing personal jurisdiction to be based on consent that took the form of appointment of an agent for process deprived it of due process of law where the cause of action did not originate in Missouri. In a lengthy discussion of existing precedent, Chief Justice Woodson noted that the Open Courts provision of the Bill of Rights, Article 2, § 10 of the Missouri Constitution of 1875, guaranteed that:

> The courts of justice shall be opened to *every person*. Not a part of them. Not to the citizens or residents of Missouri only, nor to the citizens of the United States only, but to all persons of the world who demand justice at the hands of our courts against anyone who may be found

> within the jurisdiction of this state, whether resident or nonresident, individual or corporation.[2]

184 S.W. at 1015. The Court then noted that the laws allowing foreign insurance companies to do business in Missouri allowed them to do business "upon the same footing and equality with domestic companies of like character," *Id.* at 1016. There was no question that transitory actions could be pursued against *resident* defendants, *Id.* at 1013 – 1016. No legitimate reason existed for treating resident and nonresident defendants differently, *Id.* at 1017. In a 4–3 opinion, this Court concluded that the Due Process clause to the 14th Amendment did not prohibit the exercise of personal jurisdiction over defendant.

The United States Supreme Court granted a Writ of Error on a petition by the insurance company in *Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining & Milling Co.,* 243 U.S. 93 (1917). In a much shorter, unanimous opinion by Justice Oliver Wendell Holmes, Jr., the Court held that a statute requiring the defendant to appoint an agent to receive process did not deprive it of due process, citing then Judge Cardozo's opinion in *Bagdon v.*

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[2] Of course, Justice Brennan said the same thing in his concurrence to *Burnham, supra*, when he talked about the impermissibility of denying an out-of-state plaintiff use of a state's courts, 495 U.S. at 638.

Philadelphia and Reading Coal and Iron Co., 217 N.Y. 432, 436 – 437, 111 N.E. 1075 (1916), where the New York Court of Appeals said:

> The state of New York has said that a foreign stock corporation, other than a moneyed corporation, shall not do business here until it has obtained a certificate from the secretary of state. The penalty is that it may not maintain any action in our courts "upon any contract made by it in this state, unless before the making of the contract it has procured such certificate." General Corporation Law (Cons.Laws, c. 23) § 15. The business, though unlicensed, is not illegal; the contract is not void; it may be enforced in other jurisdictions; all that is lost is the right to sue in the courts of the state. [Citation omitted.] To obtain such a certificate, however, there are conditions that must be fulfilled. One of them is a stipulation, to be filed in the office of the secretary of state, "designating a person upon whom process may be served within this state." General Corporation Law § 16. There is no alternative provision for service on a public officer if the stipulation is not filed. The only result of the omission to file it is that the certificate does not issue. The stipulation is therefore a true contract. The person designated is a true agent. The consent that he shall represent the corporation is a real consent. He is made the person "upon whom process against the corporation may be served." *The actions in which he is to represent the corporation are not limited. The*

> *meaning must therefore be that the appointment is for any action which under the laws of this state may be brought against a foreign corporation.* Code Civ. Proc. §§ 432, 1780. The contract deals with jurisdiction of the person. It does not enlarge or diminish jurisdiction of the subject-matter. It means that, whenever jurisdiction of the subject-matter is present, service on the agent shall give jurisdiction of the person.

(Emphasis added.) Justice Holmes also cited to Judge Learned Hand's opinion in *Smolik v. Philadelphia and Reading Coal and Iron Co.,* 222 F. 148, 151 (S.D.N.Y. 1915), where the court held:

> When it is said that a foreign corporation will be taken to have consented to the appointment of an agent to accept service, the court does not mean that as a fact it has consented at all, because the corporation does not in fact consent; but the court, for purposes of justice, treats it as if it had. It is true that the consequences so imputed to it lie within its own control, since it need not do business within the state, but that is not equivalent to a consent; actually it might have refused to appoint, and yet its refusal would make no difference. The court, in the interests of justice, imputes

> results to the voluntary act of doing business within the foreign state, quite independently of any intent.[3]

Thus, three of the giants of American jurisprudence established the foundation for the interpretation of the 14th Amendment that registration by a foreign corporation and appointment of an agent for acceptance of process can constitute a form of consent to jurisdiction by such corporations.

In 1939 Justice Felix Frankfurter—not exactly a slouch—reiterated in *Neirbo Co. v. Bethlehem Shipbuilding Corporation*, 308 U.S. 165, 175, that when a corporate defendant appointed an agent upon whom summons could be served in New York, it thereby secured the right to enjoy business freedom in New York as part of the bargain, and it also gave "actual consent" to receive process in New York so that "service on the agent shall give jurisdiction of the person."

Consent as a basis for personal jurisdiction continued to be recognized even after the development of long-arm statutes, *Knowlton, supra,* 900 F.2d at 1199. In *Knowlton* the Court noted that personal jurisdiction based on long-arm statutes is related to in-state activity by the defendant in regard to the plaintiff's claim, *Id.* Apart from specific and general jurisdiction, consent "is

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[3] The foregoing language from *Smolik* was cited favorably by this Court in the *Gold Issue Mining* case, *supra*, 184 S.W. at 1012.

the other traditional basis of jurisdiction, existing independently of long-arm statutes." *Id.* That is, a defendant may "voluntarily consent or submit to the jurisdiction of the court which otherwise would not have jurisdiction over it." *Id.*

In *Knowlton* the plaintiff sued defendant in the United States District Court for Minnesota for injuries she received in a collision with a truck in Iowa. The truck was operated by an agent for Allied Van Lines, a Delaware corporation with its principal place of business in Illinois. There was no basis for long-arm jurisdiction in Minnesota since the wreck occurred in Iowa. Allied was registered to do business in Minnesota and had a registered agent there, but the District Court held that fact was insufficient to confer personal jurisdiction over Allied because (the court believed) the designation of a registered agent "was not the equivalent of consent to jurisdiction." *Id.* The Eighth Circuit disagreed.

The Court noted that the statute requiring appointment of a registered agent simply said that "a foreign corporation shall be subject to service of process . . . by service on its registered agent. . . ." *Id.* "There are no words of

limitation to indicate that this type of service is limited to claims arising out of activities within the state." *Id.*[4]

MATA would submit that *Knowlton* is persuasive in connection with Missouri law. The Missouri statute regarding service on registered agents of foreign corporations is R.S. Mo. § 351.594.1 (2016 Cum. Supp.), which states that, "The registered agent of a foreign corporation authorized to transact business in this state is the corporation's agent for service of process . . . required or permitted by law to be served on the foreign corporation." As in *Knowlton*, "[b]y its plain text, the statute does not limit service of process to those suits arising from or related to a registered corporation's activities in Missouri." *Mitchell v. Eli Lilly and Co.*, *supra*, 2016 WL 362 441 * 8. *Accord: State ex rel K-Mart Corp. v. Holliger,* 986 S.W.2d 165, 167 (Mo. *en banc.* 1999) ("where a corporation's registered agent is served in Missouri, assertion of jurisdiction [is] no more than adherence to the traditional understanding that a state may condition a corporation's doing business upon the appointment of an agent in the state for service of process").

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[4] Although plaintiff claimed that Allied's business activities were so pervasive that general jurisdiction existed in Minnesota, the Court did not reach that issue since it held that Allied consented to the jurisdiction of Minnesota courts, 900 F.2d at 1199.

The Effect of *Daimler AG v. Bauman* and *Goodyear Dunlop Tires Operations, S.A. v. Brown:* Some Courts "Embrace the Exhilarating Opportunity of Anticipating the Overruling of a Supreme Court Decision"

Relator relies primarily on *Daimler AG v. Bauman,* -- U.S. --, 134 S. Ct. 746, 187 L. Ed.2d 624 (2014), and *Goodyear Dunlop Tires Operations, S.A. v. Brown,* 564 U.S. 915 (2011), two cases that profoundly restricted the reach of general jurisdiction as a ground for personal jurisdiction, at least insofar as corporations were concerned.

The problem with relying on those cases is that they do not purport to overrule cases like *Pennsylvania Fire Insurance* or *Neirbo Co.*; indeed, they are not mentioned in either *Daimler* or *Goodyear*. Nor do either *Daimler* or *Goodyear* discuss the concept of consent as an independent basis for personal jurisdiction.

Certainly, neither case purports to hold that a party cannot waive objections to personal jurisdiction by consenting to the court's jurisdiction. That is hardly surprising since neither case addresses whether personal jurisdiction is an individual right, whether it may therefore be waived, whether waiver may occur by consent, or whether consent is assessed as a matter of state law, *Acorda Therapeutics, Inc. v. Mylan Pharmaceuticals, Inc.*, 78 F.Supp.3d 572, 590 (D.Del. 2015).

That has not prevented some lower courts from thumbing their noses at the Supreme Court's decisions in *Pennsylvania Fire* and *Neirbo*. Relator cites, *inter alia*, *Brown v. Lockheed Martin Corp.,* 814 F.3d 619 (2d Cir. 2016), where the Court declined to follow *Pennsylvania Fire* because it was part of a "19th Century approach" to jurisdiction since the opinion, although a product of the 20th Century, was written by Justice Holmes who was born in 1840, fought in the Civil War, and was decidedly 19th Century in his origins. Thus, the Court found *Pennsylvania Fire* could not "be divorced from the outdated jurisprudential assumptions of its era." 817 F.3d at 639. The Court also took some shots at Justice Holmes for relying on this Court's analysis, *Id.* at 638. (Apparently the Second Circuit did not think much of Justice Cardozo or Judge Hand either.)

What the courts that want to ignore apposite precedents that have never been repudiated by the United States Supreme Court are really saying is this: We can *imply* the overruling of, say, *Pennsylvania Fire,* by what we believe to be the abandonment of some of the principles underlying it.

Not surprisingly, this approach has not met with universal approbation, and it runs afoul of fundamental principles of *stare decisis*. Last year in *Boland v. Saint Luke's Health System, Inc*., 471 S.W.3d 703, 709 (Mo. *en banc*. 2015), this Court held that, "Absent a contrary showing, an opinion of this Court is presumed not to be overruled *sub silentio*. *State v. Wade*, 421 S.W.3d 429, 433

(Mo. *en banc*. 2013)." In *Wade* this Court explained that *sub silentio* means "without notice being taken or without making a particular point of the matter in question." 421 S.W.3d at 433. And the Court discussed the presumption against overruling precedent *sub silentio* as reflecting the proposition that, "If the majority chooses to overrule [a case] it is far preferable to do so by the front door of reason rather than the amorphous back door of *sub silentio*." *Id.* Finally, in *Wade* this Court explained that *sub silentio* holdings have no *stare decisis* effect and are not binding on future decisions of this Court since they do not expressly address whether long-held precedents are being overruled, *Id*.

Of course, these are *Missouri* cases. Does the United States Supreme Court display a more insouciant attitude toward overruling its long-held precedents by implication? Not according to Justice Breyer, delivering the opinion of the Court in *Shalala v. Illinois Council on Long Term Care, Inc*., 529 U.S. 1, 18 (2000), in which he said, "This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*." What happens if—as Relator claims at bar—later opinions appear to reject some of the conceptual underpinnings of existing precedents? Should we assume those precedents have been impliedly overruled? Consider *Agostini v. Felton*, 521 U.S. 203, 237 (1997), where the Court said:

> We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an

> earlier precedent. We reaffirm that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."[5]

Citing, Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989). The Supreme Court has held that even where its precedent contains "infirmities," and appears to rest upon "increasingly wobbly, moth-eaten foundations . . . *it is this Court's prerogative alone* to overrule one of its precedents." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (emphasis added). The Eleventh Circuit refers to this as the Supreme Court's "supreme prerogative rule," and notes, in deference to that rule, "We must not, to borrow Judge Hand's felicitous words, 'embrace the exhilarating opportunity of anticipating' the overruling of a Supreme Court decision. [*Spector Motor Service v.*] *Walsh*, 139 F.2d [809,] 823 [(2d Cir. 1943)] (Hand, J., dissenting)."

It is respectfully submitted that the prerogative to overrule *Pennsylvania Fire* and *Neirbo* rests not with this Court, but exclusively with

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[5] Although the language in *Agostini* was directed to federal courts of appeals, it is equally applicable to state courts, *Marshall v. Crosby*, 911 So.2d 1129, 1135 (Fla. 2005).

the United States Supreme Court. It is up to that Court to decide whether their holdings "cannot be divorced from the outdated jurisprudential assumptions of [their] era." *Brown, supra*, 814 F.3d at 639. Relator is obviously certain it will prevail in the United States Supreme Court, so quashing this Court's Preliminary Writ of Prohibition will be a momentary setback in its journey to Washington, D.C. where it can ultimately prevail. Until that time, this Court is bound to follow *Pennslyvania Fire*.

There Are Two Sides to Every Story

At pages 32-33 of its Brief, Relator cites some cases, including federal courts in Missouri, all of which hold that, contrary to *Pennsylvania Fire* (although Relator never mentions *Pennsylvania Fire* by name), appointment of a registered agent is not sufficient to constitute consent to personal jurisdiction. One would conclude from Relator's Brief that there are no contrary views on the subject. One would be mistaken.

In *Acorda Therapeutics, Inc. v. Mylan Pharmaceuticals, Inc.*, 817 F.3d 755, 764-773 (Fed.Cir. 2016), Judge Kathleen O'Malley writes a truly magisterial opinion in which she discusses, *inter alia*, the ongoing efficacy of *Pennsylvania Fire* and its progeny, stating that, "The Supreme Court's subsequent decisions in *International Shoe [Co. v. State of Washington*, 326 U.S. 310 (1945)] and *Daimler* did not overrule this historic and oft-affirmed

line of binding precedent. Indeed, both cases are expressly limited to scenarios that do not involve *consent* to jurisdiction." 817 F.3d at 768 (emphasis in original). She also noted that in *Knowlton, supra*; *Bane v. Netlink, Inc.*, 925 F.2d 637, 641 ((3d Cir. 1991); and *Holloway v. Wright & Morrissey, Inc.*, 739 F.2d 695, 697 (1st Cir. 1984), three federal circuits—the Eighth, Third, and First—had all recognized that appointment of a registered agent by a foreign corporation constituted consent to the exercise of personal jurisdiction, 817 F.3d at 768-769. After a similar review the Court in *Otsuka Pharmaceutical Co., Ltd. v. Mylan, Inc.*, 106 F.Supp.3d 456, 469 (D.N.J. 2015), concluded:

> Taken together, these precedents provide clear confirmation that designation of an in-state agent for service of process in accordance with a state registration statute may constitute consent to personal jurisdiction, if supported by the breadth of the statute's text or interpretation.

While Relator cites Judge Dierker's Order in *Smith v. Union Carbide Corp.*, at page 32 of its Brief, it fails to note that the Court did not discuss *Pennsylvania Fire* or its effect on the Court's ruling in that case, probably because it was not briefed. Judge Dierker should not be criticized for the inadequacy of the briefing provided to him.

Relator also cites three cases from the United States District Court for the Eastern District of Missouri in which three Judges of that Court have held

that registration by a foreign corporation will not constitute consent to personal jurisdiction (Relator's Brief at 32). *Keeley v. Pfizer, Inc.*, 2015 WL 3999488 (E.D.Mo. 2015), and *Neeley v. Wyeth LLC*, 2015 WL 1456984 (E.D. Mo. 2015) were decided in 2015, while the other, *Beard v. Smithkline Beecham Corp.*, 2016 WL 1746113, was decided in May of this year.

Relator does not acknowledge that there is a substantial body of contrary case law emanating *from the very same Court*. Just since the beginning of 2016, Judge Jackson entered her scholarly Memorandum and Order in *Mitchell v. Eli Lilly and Co., supra*, denying defendant's motion to dismiss for lack of subject matter jurisdiction, applying the logic of *Knowlton* to the Missouri statute requiring appointment of a registered agent for acceptance of service of process, 2016 WL 362441 *8. Unfortunately, *Mitchell* was not available for consideration by the Eastern District of Missouri when *Neeley* and *Keeley* were being decided (or the *Smith* case by Judge Dierker for that matter). After *Mitchell* was decided, similar results followed in *Trout v. SmithKline Beecham Corp.*, 2016 WL 427960 (E.D.Mo.), on February 4, 2016, *Jackson v. SmithKline Beecham Corp.*, 2016 WL 454735 (E.D.Mo.), on February 5, 2016 (both orders by Judge Perry); *Chalkey v. Smithkline Beecham Corp.*, 2016 WL 705134 (E.D.Mo.) on February 23, 2016 (an order by Judge Noce); and *Regal Beloit America, Inc. v. Broad Ocean Motor LLC*, 2016 WL 3549624 (E.D.Mo.),

on June 30, 2016 (Memorandum and Order by Judge Hamilton). In the latter case, Judge Hamilton stated:

> [T]his Court agrees with the holding in *Mitchell*: "Missouri's registration statutes confirm that by registering to do business in Missouri and maintaining an agent for service of process here, [defendant] has 'consented to the jurisdiction of Missouri's courts for any cause of action, whether or not arising out of activities within the state.'"

2016 WL 3549624 *5. It is clear that a strong body of case law supports the traditional view that jurisdiction will follow a corporation's choice to do business in a particular state.

Considerations of Fairness

Relator argues that it is inherently unfair to require it to give up its right to object to personal jurisdiction by being forced to appoint a registered agent to accept process in Missouri as part of the process of registering to do business here. It is hard to figure out why.

Missouri law has regulated foreign corporations since 1891 when the first statute was enacted that required corporations for pecuniary profit organized in any other state, territory, or profit to "maintain a public office where legal service may be obtained upon it. . . ." R.S.Mo. § 1024 (1899). Such corporations were subjected to "all the liabilities, restrictions and duties which

are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers." *Id*. A corporation that violated this section was subject to a fine of not less than $1,000.[6] More importantly, a corporation which failed to comply with the law could not maintain any action in Missouri courts, legal or equitable, whether arising out of contract or tort, § 1026.

In that regard the Missouri law was similar to the New York act described by Judge Cardozo in *Bagdon, supra*. Recall, under that law, if a corporation failed to comply with the requirements of the law that it designate a person upon whom process could be served, then it could not maintain an action in the courts of New York. There was no limit on the kinds of actions for which the person so designated was to represent the foreign corporation, 217 N.Y. at 437.

Subsequent versions of the foreign corporation law in Missouri imposed more requirements on companies organized in other states. They now must obtain a certificate of authority from the Secretary of State before transacting business in this state, R.S.Mo. § 351.572.1 (2000). The law also provides that:

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[6] $1,000 in 1891 would be roughly $26,315.79 today. Stated another way, a fine of $1,000 today is the equivalent of a $38 fine in 1891.

> A foreign corporation with a valid certificate of authority has the same but no greater rights and has the same but no greater privileges as, and except as otherwise provided by this chapter, is subject to the same duties, restrictions, penalties, and liabilities now or later imposed on, a domestic corporation of like character.

R.S.Mo. § 351.582.2 (2000). The foreign corporation is required to continuously maintain a registered agent in this state, R.S.Mo. § 351.586 (2000).[7] That registered agent "is the corporation's agent for service of process . . . required or permitted by law to be served on the foreign corporation." R.S.Mo. § 351.594.1 (2016 Cum. Supp.) A foreign corporation that does business without a certificate of authority is still subject to a fine of not less than $1,000 as in 1891, and it still is disqualified from from maintaining any action in the courts of this state, R.S.Mo. § 351.574.4 (2000). The net effect of this statutory scheme was to "subject the foreign corporation to such liabilities for actions against it as a citizen would have against a domestic corporation . . . for its acts . . . whereby an injury be done to another person or corporation." *K-Mart Corp., supra*, 986 S.W.2d at 168, citing *Sidway v. Missouri Land & Live-Stock Co.* 101 F. 481, 488 (Cir.Ct.W.D.Mo.Dist.Ct.W.D. 1900).

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[7] That same requirement is imposed on domestic corporations, R.S.Mo. § 351.370 (2000).

Missouri has made a conscious decision that foreign corporations should be subject to the same liabilities that domestic corporations bear. Are corporations organized in Missouri subject to the personal jurisdiction of the courts of this state for torts occurring outside this state? Of course they are under Missouri courts' general jurisdiction, *Daimler AG, supra*, 134 S.Ct. at 760 (for a corporation, "the place of incorporation and principal place of business are paradigm bases for general jurisdiction").[8] See also, *Gold Issue Mining, supra,* 184 S.W. at 1015. If foreign corporations willingly subject themselves to the same liabilities as domestic corporations by obtaining certificates of authority to do business in Missouri, then why is Relator not subject to personal jurisdiction when it has consented to service on its agent in any action required to be served by law on the foreign corporation?

Relator may argue that it is "unfair" to require it to give up its right to contest jurisdiction on cases unconnected to Missouri (and thereby be treated like domestic corporations) because it gets nothing in return out of the bargain then Judge Cardozo described in *Bagdon*. Relator gets the benefit of access to Missouri courts to enforce obligations owed to it, whether arising out of contract or tort. Is that insignificant?

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[8] MATA wanted to have at least one reference to a "paradigm base" in this Brief since it is so un-Nineteenth Century.

Recall Justice Brennan's discussion of why it was not unfair to require Dennis Burnham to defend his divorce in California instead of New Jersey, based on his weekend in Marin County. His health and safety were guaranteed by California's police, fire, and emergency medical services, and he was free to travel on the State's roads and waterways as well.[9] But more importantly, he could not be denied access to California's court system, 495 U.S. at 638. Even though the last thing on Earth Dennis Burnham wanted to do was go to court in California—remember, he went all the way to the United States Supreme Court to stay *out of court* in California—the Court noted that California could not deny him access to its courts, something of great value, even if Mr. Burnham did not fully appreciate it. Moreover, the potential burden of defending the case was slight to Mr. Burnham. That he had already journeyed to California from New Jersey for a weekend was an indication that suit in California "likely would not be prohibitively inconvenient." 495 U.S. at 638-639. On top of that there were plenty of "procedural devices" that would ameliorate any of the burdens of going back and forth between the east and west coasts, *Id*.

[9] Anyone who has ever driven on California turnpikes can certainly appreciate that benefit.

We can compare the benefits that Relator gains by doing business in Missouri against the benefits Mr. Burnham experienced from his weekend in Marin County. There is no question that the health and safety of Relator's employees are guaranteed by Missouri's police, fire, and emergency medical services. Those employees are free to travel on Missouri roads in repairing Relator's tracks that cross this state. And even though Relator is trying to stay out of Missouri courts in this case, it has access to Missouri courts.

Unlike Dennis Burnham, Relator's utilization of Missouri courts is not theoretical. One small part of its use of our court system came before this Court in the case of *State ex rel. Crown Power and Equipment Co. v. Ravens*, 309 S.W.3d 798 (Mo. *en banc*. 2009), which arose out of a railroad grade crossing accident involving a Norfolk Southern Railway Company ("NSRC") train in March of 2006 in Keytesville, Missouri. (Of course, NSRC is the Relator in the instant cause.) NSRC sued Crown Power claiming that its negligence caused the accident, and it wanted to be paid for its property damage. NSRC was very happy to be able to use Missouri courts on that occasion. It did not complain about being subject to the personal jurisdiction of Missouri courts. The case proceeded in Chariton County Circuit Court according to the Casenet entry in Case No. 06CH-CC00011 on May 20, 2008 when a venirepanel of 86 Missouri citizens was seated and sworn. That was a pretty good sized panel for a county with a population of less than 7,600 people,

but NSRC was not reticent in asserting its right to have its claim against a Missouri corporation[10] heard by a jury of the citizens of Chariton County, inconvenience be damned! Apparently, voir dire did not go so well for the railroad, and plaintiff (i.e. NSRC) demanded, and received, a mistrial before a jury was picked. 309 S.W.3d at 799. Whereupon, NSRC moved for a change of venue which was eventually granted. It also sought discovery regarding the motion for change of venue, insisting that it get said discovery, even after its motion for change of venue was granted. That led to a trip to this Court where NSRC got to avail itself of another aspect of our judicial system (although the result was probably not to its liking), 309 S.W.3d at 802.

The case then went forward in Sullivan County, and (again, according to Casenet in Case No. 06CH-CC00011-01) 105 venirepersons in a county of fewer than 6,500 souls were summoned for what they were told would be a two-week jury trial on October 18, 2010. Fortunately for the citizens of Sullivan County, a verdict was returned on October 26, and judgment was entered the same day. Unfortunately for NSRC, the verdict failed to meet its expectations. It wanted

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[10] As will be seen below, this case eventually landed in the lap of the Western District of the Court of Appeals, WD73586, and the Legal File in that case filed on September 2, 2011, shows that according to NSRC's Petition, Crown Power & Equipment Company is a Missouri corporation, L.F. 000019.

$7,248,467.83; the jury only awarded $1,709,114.55, and to add insult to injury, it found NSRC to be 75.6% at fault so that its net damages entered on the judgment of the trial court were $417,023.95. *Norfolk Southern Railway Co. v. Crown Power & Equipment Co.*, 385 S.W.3d 445, 451 (Mo.App. W.D. 2012).

Both parties appealed, and once again NSRC got the benefit of Missouri's court system. Eventually, the Western District of the Missouri Court of Appeals ruled in favor of NSRC and remanded the case for a new trial on the issue of damages only. From Casenet, it appears the case settled after remand without the need for a retrial.

The lesson from what happened with NSRC is this: A foreign corporation enjoyed the ability to enforce its rights by using the court system of this state because it satisfied the conditions imposed by the General Assembly over 135 years ago, among them that it appoint an agent for the receipt of process without limitation. It is the same obligation imposed on domestic corporations, and it does not violate due process to expect of foreign corporations what is required of those organized in Missouri. It could hardly have taken NSRC by surprise since the idea that it consented to jurisdiction by appointing an agent for service of process has been around for a very long time, cf. *Burnham, supra*,

495 U.S. at 609; *Pennsylvania Fire, supra*,; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 44.[11]

There is nothing unfair about holding Relator to the same obligations as domestic corporations.

Conclusion

MATA would respectfully submit that there is no unfairness that inheres in holding that Relator has consented to the jurisdiction of Missouri courts. This Court should quash its Preliminary Writ.

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[11] Recall Justice Brennan cited § 28 of the RESTATEMENT, *supra*, as notice that transients could be subject to the exercise of jurisdiction. Section 44 of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS provides similar notice:

> A state has power to exercise judicial jurisdiction over a foreign corporation which has authorized an agent or a public official to accept service of process in actions brought against the corporation in the state as to all causes of action to which the authority of the agent or official to accept service extends.

CERTIFICATE OF SERVICE AND COMPLIANCE

A copy of this document was served on counsel of record through the Court's electronic notice System on July 15, 2016.

This brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 7,487, including the cover, table of contents, table of authorities, signature block, and this certificate. The brief was prepared using "Century Schoolbook" font in 13 point size on Microsoft Word.

The electronic copies of this brief were scanned for viruses and found virus-free through Endpoint Security by Bitdefender.

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Attorney for Amicus Curiae