



SUPREME COURT OF MISSOURI

en banc

STATE ex rel. BAYER CORPORATION,)
BAYER HEALTHCARE LLC,)
BAYER ESSURE INC., and)
BAYER HEALTHCARE)
PHARMACEUTICALS, INC.,)
Relators,)
v.)
HONORABLE JOAN L. MORIARTY,)
Respondent.)

Opinion issued December 19, 2017

No. SC96189

ORIGINAL PROCEEDING IN PROHIBITION

Bayer Corporation, Bayer Healthcare LLC, Bayer Essure Inc., and Bayer Healthcare Pharmaceuticals Inc., (collectively, “Bayer”), seek a writ of prohibition directing the circuit court to dismiss nonresident Plaintiffs’ claims in a petition alleging personal injuries from Essure, a female contraceptive device Bayer manufactures and distributes. Bayer alleges Missouri has no specific personal jurisdiction over 85 out of 92 Plaintiffs who are nonresidents of Missouri and who have not alleged their injury occurred in Missouri. Bayer further alleges Missouri does not have general jurisdiction as Bayer is neither incorporated in nor has its principal place of business here, and Bayer is not “at home” in Missouri. This

Court agrees the petition did not assert any recognized basis for personal jurisdiction over Bayer with respect to nonresident Plaintiffs and vacates the circuit court's order overruling Bayer's motion to dismiss.

Plaintiffs assert the claims of nonresident Plaintiffs should not be dismissed because nonresident Plaintiffs will seek leave to file an amended petition asserting an additional basis of specific jurisdiction over Bayer based on its conduct of clinical trials and marketing of Essure in Missouri. Plaintiffs allege they also will seek jurisdictional discovery on these issues. Bayer counters these allegations are equally without merit to those in the initial petition as the proposed amended allegations simply will seek to exercise general jurisdiction under another name and, therefore, ask the circuit court be directed to grant the motion to dismiss. Bayer further asserts the proposed discovery is abusive.

This Court's preliminary writ extended solely to the circuit court's overruling of Bayer's motion to dismiss. The circuit court did not have the proposed amended petition before it when it made that ruling. The circuit court's order overruling the motion to dismiss, therefore, could not have been based on claims made in a petition not yet filed or on grounds for jurisdiction not yet proposed. It is for the circuit court in the first instance to consider whether the amended petition provides a basis for specific jurisdiction and to evaluate whether the requested discovery is necessary, as well as whether and what sort of a protective order is appropriate as to the nature and extent of the discovery.

Accordingly, without addressing the merits of Plaintiffs' proposed amended petition or proposed discovery or Bayer's assertions as to the merits of these matters, this Court makes its preliminary writ permanent and directs the circuit court to vacate its order

overruling the motion to dismiss.

I. FACTUAL AND PROCEDURAL BACKGROUND

On August 13, 2016, Plaintiffs initiated an action against Bayer in the St. Louis circuit court to recover damages for personal injuries they allegedly experienced from their use of Essure, a medical device Bayer manufactures and distributes. Of the 92 Plaintiffs, only seven are Missouri residents. The remaining 85 Plaintiffs are not Missouri residents and do not allege they used Essure in this state or were injured in Missouri. Moreover, none of the Bayer defendants is incorporated in or has its principal place of business in Missouri. Bayer is also not “at home” in Missouri.

Bayer moved to dismiss nonresident Plaintiffs’ claims or, alternatively, to sever and transfer those claims to appropriate venues, contending Bayer is not subject to personal jurisdiction in Missouri with respect to nonresident Plaintiffs. Bayer also argued Plaintiffs’ claims are preempted under the Medical Device Amendments of 1976, 21 U.S.C. sections 360k(a) and 337(a), to the Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. section 301 et seq.

In opposition to Bayer’s motion to dismiss, nonresident Plaintiffs argued they had specific and general jurisdiction over Bayer on the grounds stated in their original petition, including that Bayer is subject to “both general and specific personal jurisdiction” in Missouri because Bayer “consented to jurisdiction in the State by way of registering to do business therein,” “engaged in substantial business activities in the State,” “conducted business in Missouri,” “derived substantial revenue in Missouri by marketing Essure to women” in Missouri, and allegedly “committed torts in whole or in part against Plaintiffs

in Missouri.” They further argued in their response to the motion to dismiss that Bayer is subject to “piggyback” specific jurisdiction with respect to nonresident Plaintiffs’ claims because “Bayer does not challenge personal jurisdiction as to the Missouri Plaintiffs’ claims” and “the non-Missouri Plaintiffs alleged[] [they] were implanted with the same product the Defendants marketed and sold in Missouri and were injured by the same conduct allegedly injuring the Missouri Plaintiffs.”

The circuit court overruled Bayer’s motion to dismiss in December 2016 on the ground Bayer “is present or has consented to jurisdiction” in Missouri because “[a] corporation has long been considered ‘present’ within the state when its agent is served with process in the state.” In response to the circuit court’s order, Bayer sought a writ of prohibition in the court of appeals, which was denied. Bayer then sought a writ of prohibition from this Court. This Court issued its preliminary writ in July 2017, ordering the circuit court to show cause “why a writ of prohibition should not issue prohibiting [it] from doing anything other than vacat[ing] the December 20, 2016, order” that had overruled Bayer’s motion to dismiss.

II. STANDARD OF REVIEW

This Court has discretion to issue and determine original remedial writs. *Mo. Const. art. V, § 4.1*. “Prohibition is an original proceeding brought to confine a lower court to the proper exercise of its jurisdiction.” *State ex rel. Lebanon Sch. Dist. R-III v. Winfrey*, 183 S.W.3d 232, 234 (*Mo. banc* 2006). “The extraordinary remedy of a writ of prohibition is available: (1) to prevent the usurpation of judicial power when the trial court lacks authority or jurisdiction; (2) to remedy an excess of authority, jurisdiction or abuse of discretion

where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not granted.” *State ex rel. Norfolk S. Ry. Co. v. Dolan*, 512 S.W.3d 41, 45 (Mo. banc 2017), quoting, *State ex rel. Mo. Pub. Def. Comm’n v. Waters*, 370 S.W.3d 592, 603 (Mo. banc 2012). Therefore, “[p]rohibition is the proper remedy to prevent further action of the trial court where personal jurisdiction of the defendant is lacking.” *Id.*, quoting, *State ex rel. William Ranni Assocs., Inc. v. Hartenbach*, 742 S.W.2d 134, 137 (Mo. banc 1987). “However, prohibition is only proper ‘when usurpation of jurisdiction ... is clearly evident.’” *Id.*, quoting, *State ex rel. Tarrasch v. Crow*, 622 S.W.2d 928, 937 (Mo. banc 1981).

III. THE ORIGINAL PETITION DOES NOT STATE A BASIS FOR PERSONAL JURISDICTION OVER BAYER WITH RESPECT TO NONRESIDENT PLAINTIFFS’ CLAIMS

“[P]ersonal jurisdiction refers quite simply to the power of a court to require a person to respond to a legal proceeding that may affect the person’s rights or interests.” *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 253 (Mo. banc 2009). It is a due process requirement limiting the power of courts over litigants. *Id.* “The basis of a court’s personal jurisdiction over a corporation can be general – that is, all-purpose jurisdiction – or it can be specific – that is, conduct-linked jurisdiction.” *Norfolk*, 512 S.W.3d at 46. A “defendant [can also] waive jurisdictional objections by consenting to personal jurisdiction.” *Id.* But “[w]hen personal jurisdiction is contested, it is the plaintiff who must shoulder the burden of establishing that defendant’s contacts with the forum state were sufficient.” *Bryant v. Smith Interior Design Grp., Inc.*, 310 S.W.3d 227, 231 (Mo. banc 2010) (citation and quotation marks omitted).

This Court issued a preliminary writ based on the circuit court’s overruling of Bayer’s motion to dismiss. In the original petition, Plaintiffs alleged Bayer was subject to general jurisdiction in Missouri based on Bayer’s substantial business in the state and consent jurisdiction due to the fact some Bayer defendants had authorized registered agents within the state. They also asserted Missouri had specific jurisdiction over the claims of nonresident Plaintiffs because Bayer allegedly “committed torts in whole or in part against Plaintiffs in Missouri,” and because nonresident Plaintiffs’ claims were similar to the claims of in-state Plaintiffs as to which jurisdiction was uncontested. Therefore, Plaintiffs argued nonresident Plaintiffs could “piggyback” on the jurisdiction of in-state Plaintiffs. Bayer argues none of these three theories provides a basis for personal jurisdiction over Bayer.

A. *Missouri Does Not Have General Jurisdiction Over Bayer*

“When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant’s contacts with the forum, the State has been said to be exercising ‘general jurisdiction’ over the defendant.” *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.9 (1984). *Daimler AG v. Bauman*, 134 S.Ct. 746, 761 n.19 (2014), held a defendant cannot be subject to general jurisdiction in a state where it is neither incorporated nor has its principal place of business, unless it is an “exceptional case” rendering the corporation “essentially at home in the forum.” *Id.* at 754.

A state may have general jurisdiction over a corporation not incorporated there and that has not located its principal place of business there if the state is a “surrogate for place

of incorporation or home office’ such that the corporation is ‘essentially at home’ in that state.” *Norfolk*, 512 S.W.3d at 48, quoting, *Daimler*, 134 S.Ct. at 756 n.8, 761 n.19. But to find a corporation is “essentially at home” in the state requires “an appraisal of a corporation’s activities in their entirety, nationwide and worldwide,” because a “corporation that operates in many places can scarcely be deemed at home in all of them.” *Daimler*, 134 S.Ct. at 762 n.20. “Otherwise, ‘at home’ would be synonymous with ‘doing business’ tests framed before specific jurisdiction evolved in the United States,” *id.*, which would “destroy the distinction between general and specific jurisdiction,” *Norfolk*, 512 S.W.3d at 48. Accordingly, “when a corporation is neither incorporated nor maintains its principal place of business in a state, mere contacts, no matter how ‘systematic and continuous,’ are extraordinarily unlikely to add up to an ‘exceptional case.’” *Id.* (citation and quotations omitted).

Norfolk concluded that for these reasons:

Norfolk’s contacts are not sufficient to establish general jurisdiction. Only if the instant suit arises out of Norfolk’s contacts with Missouri does Missouri have specific jurisdiction. Parker pleaded no facts alleging that the injury arose from Norfolk’s Missouri activities. Therefore, the fact that he could sue in Missouri in a case in which the injury arose out of his contacts with Missouri does not support finding general personal jurisdiction here.

Id. at 49.

In May 2017, the Supreme Court held in *BNSF Railway Co. v. Tyrrell*, 137 S.Ct. 1549, 1559 (2017), as had this Court in *Norfolk*, that having “in-state business, [as] clarified in *Daimler* and *Goodyear*, does not suffice to permit the assertion of general jurisdiction over claims like [the nonresident plaintiffs’] that are unrelated to any activity occurring in

[the forum state].” In that case, a BNSF employee from North Dakota sued BNSF in Montana, alleging injuries sustained outside of the state. *Id.* BNSF was neither incorporated in nor had its principal place of business in Montana, and although BNSF had more than 2,000 miles of railroad tracks and more than 2,000 employees in Montana, the Supreme Court held its activities in Montana were not “so substantial and of such a nature as to render the corporation at home in that State.” *Id. at 1558* (citation omitted). Any decision to the contrary would render BNSF at home in each of the 28 states in which it did business. *Id.*

Similarly, Bayer’s contacts with Missouri do not give rise to general personal jurisdiction. Bayer is not incorporated in nor does it have its principal place of business in Missouri. And although Plaintiffs allege Bayer does substantial business in the state, *Daimler*, *BNSF*, and *Norfolk* held this insufficient to provide general jurisdiction in Missouri; it is simply not enough to render Bayer “at home” here. In light of the principles set out in these cases, Plaintiffs have failed to show Missouri has general jurisdiction over Bayer.

B. Consent Jurisdiction Does Not Exist Over Bayer

Norfolk was decided after the circuit court overruled the motion to dismiss on the basis that Bayer had consented to personal jurisdiction by registering to do business in this state. In addition to circumscribing the basis for asserting general jurisdiction to those grounds for jurisdiction set out in *Daimler*, *Norfolk* explicitly rejected the notion that, by registering to do business in Missouri and appointing registered agents here, a company consents to personal jurisdiction in this state even over unrelated claims. *512 S.W.3d at*

52-53. “The plain language of Missouri’s registration statutes does not mention consent to personal jurisdiction for unrelated claims, nor does it purport to provide an independent basis for jurisdiction over foreign corporations that register in Missouri.” *Id.* at 52. Instead, “section 351.594.1 provides only that registration is consent to service of process that Missouri requires or permits to be served on foreign corporations.” *Id.* “[T]he registration statute does not provide an independent basis for broadening Missouri’s personal jurisdiction to include suits unrelated to the corporation’s forum activities when the usual bases for general jurisdiction are not present.” *Id.*

For the reasons stated in *Norfolk*, Bayer did not consent to personal jurisdiction merely because it registered to do business and appointed registered agents in Missouri. To otherwise hold would result in universal personal jurisdiction for corporations complying with registration statutes in many states and would be inconsistent with the holdings of *Daimler* and *Norfolk*.

C. Specific Jurisdiction Does Not Exist Over Bayer as to Nonresident Plaintiffs’ Claims in the Original Petition

“Specific jurisdiction requires consideration of the ‘relationship among the defendant, the forum, and the litigation.’” *Norfolk*, 512 S.W.3d at 48, quoting, *Andra v. Left Gate Prop. Holding, Inc.*, 453 S.W.3d 216, 226 (Mo. banc 2015). It encompasses only those “cases in which the suit arise[s] out of or relate[s] to the defendant’s contacts with the forum.” *Daimler*, 134 S.Ct. at 749 (alterations in original). “In other words, there must be ‘an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State.’” *Bristol-Myers Squibb Co.*

v. Superior Court of Cal., San Francisco Cnty., 137 S.Ct. 1773, 1780 (2017), quoting, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). “For this reason, ‘specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction.’” *Id.*, quoting *Goodyear*, 564 U.S. at 919.

This Court has, therefore, held, “Only if the instant suit arises out of [defendant’s] contacts with Missouri does Missouri have specific jurisdiction.” *Norfolk*, 512 S.W.3d at 49. To say that “if a company is a national company that does the same ‘type’ of business in the forum state as in the rest of the country, it can be sued anywhere” “would be to turn specific jurisdiction on its head.” *Id.* For this reason, *Norfolk* held merely doing business in a state or being subject to specific jurisdiction in a state with respect to different but similar suits arising out of activities in that state is not sufficient to give a court specific jurisdiction over similar causes of action not arising out of or related to activities in the state. *Id.*

In *Bristol-Myers Squibb*, the Supreme Court utilized the same analysis this Court applied in *Norfolk* in rejecting an argument, identical to the one here asserted by Plaintiffs, that nonresident plaintiffs can gain “piggyback” jurisdiction by joining their claims with the claims of plaintiffs with a connection to the forum state. 137 S.Ct. at 1781. In *Bristol-Myers Squibb*, a group of plaintiffs brought a class action alleging personal injuries arising out of their use of a prescription drug Bristol-Myers Squibb manufactures. *Id.* at 1778. The lawsuit was filed in California even though most of the plaintiffs were nonresidents and “all the conduct giving rise to the nonresidents’ claims occurred elsewhere.” *Id.* at

1782. Nonetheless, the nonresident plaintiffs argued that, because their claims were similar in several ways to the claims of the California residents as to which specific jurisdiction was uncontested, California also had specific jurisdiction over the nonresident plaintiffs' similar claims. *Id. at 1779.*

The Supreme Court disagreed, holding the “mere fact that *other* plaintiffs were prescribed, obtained, and ingested [the drug] in California – and allegedly sustained the same injuries as did the nonresidents – does not allow the State to assert specific jurisdiction over the nonresidents' claims,” because “[w]hat is needed – and what is missing here – is a connection between the forum and the specific claims at issue.” *Id. at 1781* (emphasis in original). Any holding to the contrary, the Supreme Court indicated, would result in a “loose and spurious form of general jurisdiction.” *Id.*

Utilizing “settled principles regarding specific jurisdiction,” *Bristol-Myers Squibb* reaffirms *Norfolk*'s holding that Plaintiffs' theory here, which relies on *other* plaintiffs' experiences in Missouri as a predicate for all claims by anyone suffering the same injury, must be rejected. *Id.* Due process requires there be an affiliation between the forum and the underlying controversy. In the original petition, nonresident Plaintiffs failed to plead facts showing their claims arose out of or relate to Missouri activities of Bayer or their injuries occurred here.

In light of *Norfolk*, *BNSF*, and *Bristol-Myers Squibb*, Plaintiffs now concede they do not have general or consent jurisdiction over Bayer, and their specific jurisdiction theory also fails to give Missouri personal jurisdiction over nonresident Plaintiffs' claims. But Plaintiffs assert, although they have yet to do so, they will seek leave to file an amended

petition alleging a fourth jurisdictional theory asserting Missouri has specific jurisdiction over nonresident Plaintiffs on a different ground – that Bayer’s predecessor, Conceptus, conducted marketing and clinical trials for Essure in Missouri and nonresident Plaintiffs’ injuries allegedly arose out of and related to those trials and marketing. Nonresident Plaintiffs assert this is sufficient to establish specific personal jurisdiction over their claims, although they concede they have cited no published decision finding such trials or marketing sufficient when it is not alleged the injuries arose out of those trials or marketing.

Bayer notes the clinical trials in Missouri were just four of 27 clinical trials conducted across the country and its marketing of the drug in Missouri was part of a national marketing of the drug. It says if these activities were sufficient to provide specific jurisdiction in Missouri over plaintiffs who did not use the product in Missouri and do not reside here, then these same activities would be sufficient to provide specific jurisdiction over it in the dozens of states in which Bayer conducted similar studies and marketing. This would simply be another way of gaining general jurisdiction over Bayer in the many states in which it does business, in contravention of *Daimler’s* and *Bristol-Myers Squibb’s* rejections of such a basis for general or specific jurisdiction. Plaintiffs counter they need time for discovery on their new jurisdictional theory.

The question of whether the new jurisdictional grounds set out in Plaintiffs’ proposed amended petition provide a basis for personal jurisdiction over Bayer was not before the circuit court at the time it overruled Bayer’s motion to dismiss – and indeed is not before the circuit court now, as the amended petition has not yet been filed nor has leave to file it been sought in the circuit court. *See Rule 67.06* (“On sustaining a motion to

dismiss a claim ... the court shall freely grant leave to amend and shall specify the time within which the amendment shall be made or amended pleading filed.”). The claims of jurisdiction in a proposed amended petition, therefore, were not and could not have been the subject of the overruling of the motion to dismiss. And the petition for writ of prohibition sought relief only as to the overruling of the motion to dismiss, and that is the only order subject to this Court’s preliminary writ of prohibition.

Prohibition is an extraordinary remedy that issues to “confine a lower court to the proper exercise of jurisdiction.” *Winfrey*, 183 S.W.3d at 234. The circuit court could not have acted in excess of its jurisdiction in regard to the amended petition when it has not yet been filed and the court has yet to address its allegations of personal jurisdiction. The same is true as to the discovery Plaintiffs say they need to conduct regarding jurisdictional issues to support their new jurisdictional claims. The circuit court has not yet had an opportunity to consider this as-yet-unfiled discovery or to consider any motions for protective order Bayer may seek to file to limit its scope.

For these reasons, this Court finds the proposed amended petition and the discovery Plaintiffs say they will seek on jurisdictional allegations contained in it are outside the scope of the issues before this Court at this time. It is up to the circuit court in the first instance to consider whether the proposed amended petition should be filed, whether jurisdictional discovery requested by Plaintiffs is appropriate, and whether a protective order is necessary to limit its nature and extent. Further, it is premature to address Bayer’s contention that nonresident Plaintiffs’ claims should be severed and transferred to appropriate venues or its allegation that all Plaintiffs’ claims are preempted by the FDCA

in light of the discovery that still may be undertaken on jurisdictional issues and until it is determined whether these claims will be dismissed outright.

IV. CONCLUSION

For the reasons noted above, the circuit court erred in overruling the motion to dismiss the original petition. In light of the fact an amended petition is proposed that is not before this Court, this Court directs the trial court to vacate its order overruling the motion to dismiss, without prejudice, and to consider whether to permit Plaintiffs to file the proposed amended petition and whether a protective order is appropriate as to some or all of the proposed discovery.

LAURA DENVIR STITH, JUDGE

All concur.