

No. 16-2524

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

ELAINE ROBINSON, ET AL.,

Plaintiffs-Appellees,

v.

PFIZER INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri (Jackson, J.)
Case No. 4:16-cv-00439-CEJ

**BRIEF OF AMICUS CURIAE
MISSOURI ORGANIZATION OF DEFENSE LAWYERS
IN SUPPORT OF APPELLANT**

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CORPORATE DISCLOSURE STATEMENT

The Missouri Organization of Defense Lawyers (“MODL”) is a 501(c)(6) non-profit corporation. MODL has 1,399 attorney members. MODL has no parent corporation, and no publicly held company has ten percent (10%) or greater ownership in MODL.

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INTEREST OF THE *AMICUS CURIAE*¹

The Missouri Organization of Defense Lawyers (“MODL”) is an association of Missouri Attorneys dedicated to promoting improvements in the administration of justice and optimizing the quality of the services that the legal profession renders to society. The attorneys who compose MODL’s membership devote a substantial amount of their professional time to representing defendants in civil litigation, including defendants in products liability and mass tort litigation. An organization composed entirely of Missouri attorneys, MODL is concerned and interested in the establishment of fair and predictable laws affecting tort litigation involving individual and corporate clients that will maintain the integrity and fairness of civil litigation for both plaintiff and defendants. The attorneys of MODL represent civil defendants that are often sued in forums outside of the forum where the alleged conduct or damage occurred. This frequently happens when multiple, unrelated plaintiffs from outside forums join together with unrelated diversity-destroying plaintiffs.

As discussed in this *Amicus* Brief, MODL supports Appellant’s positions that (1) personal jurisdiction in cases involving out-of-state plaintiffs should be

¹Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amicus curiae* states that no party’s counsel authored this brief in whole or in part, no party or party’s counsel contributed money that was intended to fund preparing or submitting the brief, and no person other than *amicus curiae*, its members, or its counsel contributed money intended to fund preparing or submitting this brief. All parties

addressed prior to remand, (2) personal jurisdiction is not appropriate over cases involving out-of-state plaintiffs when there is no connection between the defendant's contacts with the forum and the case, and (3) diversity-destroying plaintiffs cannot be fraudulently joined or procedurally misjoined to defeat diversity jurisdiction.

have consented to the filing of this brief.

ARGUMENT

I. BACKGROUND.

The underlying case involves sixty-four (64) plaintiffs from twenty-nine (29) states joining together to file a state court action in the Circuit Court for the City of St. Louis. (Compl. ¶¶ 4-66) Four (4) plaintiffs are from Missouri, including the one (1) “venue plaintiff.” *Id.* Six (6) plaintiffs are citizens of New York. *Id.* Defendant Pfizer (“Pfizer”) is a citizen of Delaware and New York. *Id.* There are no allegations that the cases of the out-of-state plaintiffs have any nexus to Pfizer’s Missouri contacts. This case was removed. The District Court issued an Order remanding and awarding sanctions. The District Court found no subject matter jurisdiction due to lack of complete diversity as to the New York plaintiffs. (Order at 8).

The underlying case illustrates a common practice used in the Circuit Court for the City of St. Louis to circumvent the complete-diversity requirement of 28 U.S.C. §1332. In the last ten (10) years, this practice has been used on behalf of more than 5,000 plaintiffs in that circuit alone. *See Exhibit A to Appellant’s Brief.* Cases are typically filed with a large number of unrelated, out-of-state plaintiffs. A Missouri plaintiff is joined to establish venue under §508.010 R.S.Mo. Finally, a diversity-destroying plaintiff is added to keep the case out of Federal Court. Typically, none of the cases except those of the Missouri plaintiffs have any

connection whatsoever to Missouri. As a result of this practice, defendants are denied a federal forum, then forced to defend cases in a forum with no connection to the vast majority of occurrences.

The issue before the Eighth Circuit is whether a defendant is rightfully subject to suit in Missouri by out-of-state plaintiffs when those plaintiffs' causes of action have no relation to any of the defendant's contacts with Missouri. Further, the issue then becomes whether that same defendant should be denied a federal forum by joinder of non-diverse, out-of-state plaintiffs, when there is no corresponding personal jurisdiction.

II. IN RULING ON A MOTION TO REMAND, A COURT SHOULD ADDRESS PERSONAL JURISDICTION ISSUES FIRST WHERE THERE IS NO ALLEGATION THAT CLAIMS OF NON-RESIDENT (AND DIVERSITY-DESTROYING) PLAINTIFFS HAVE ANY CONTACT WITH THE FORUM STATE.

The procedural matter of whether a District Court first considers personal or subject matter jurisdiction is paramount to the analysis of this issue. The District Court in this case addressed subject matter jurisdiction (i.e. whether there was complete diversity) prior to personal jurisdiction. This is the general practice in cases where creative joinder is used to thwart diversity jurisdiction and establish venue in a court with no direct connection to the cause of action of the diversity-destroying plaintiffs. *See eg. Fahnestock v. Boehringer Ingelheim Pharm. Inc.*, 2016 WL 4397971 (E.D. Mo. 2016); *Joseph v. Combe Inc.*, 2016 WL 3339387

(E.D. Mo. 2016); *Nickerson v. Jansen Pharm. Inc.*, 2016 WL 3030241 (E.D. Mo. 2016); *Shaver v. Combe, Inc.*, 2016 WL 3015184 (E.D. Mo. 2016).

Considering subject matter jurisdiction first makes a de facto determination that the cases of out-of-state (and non-diverse) plaintiffs are properly brought in Missouri and personal jurisdiction is proper in that forum. It is well established that District Courts have discretion to determine whether to consider subject matter jurisdiction or personal jurisdiction first. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 587-88 (1999); *Crawford v. F. Hoffman - LA Roche LTD*, 267 F.3d 760, 764 (8th Cir. 2001) (“[C]ertain threshold issues, such as ‘personal jurisdiction’ may be taken up without a finding of subject matter jurisdiction, provided the threshold issue is simple when compared to the issue of subject-matter jurisdiction”); *Fahnestock*, 2016 WL 4397971. In a case where there is no allegation that any of the out-of-state plaintiffs’ claims have any nexus to the forum state contacts, analysis of personal jurisdiction is straight forward. In contrast, when out-of-state plaintiffs are used to defeat diversity (and thus the option of a federal forum), review of subject matter jurisdiction without review of personal jurisdiction is no review at all. From a procedural standpoint, this is akin to “heads I win, tails you lose.” This is especially true as most remand orders are not subject to appellate review. *See* 28 U.S.C. §1447(d).

III. PERSONAL JURISDICTION IS IMPROPER IN CASES BROUGHT BY NON-RESIDENT PLAINTIFFS WHEN THERE IS NO NEXUS BETWEEN THE DEFENDANT’S CONTACTS WITH THE STATE AND THE PLAINTIFF’S ALLEGED CAUSE OF ACTION.

When an out-of-state plaintiff does not plead any nexus between a defendant’s contacts with a forum and their alleged cause of action, there is no personal jurisdiction, general nor specific. General jurisdiction² was recently limited by the U.S. Supreme Court, and that limitation shows the importance of personal jurisdiction as a concept of fairness to defendants. A court may only assert general jurisdiction over foreign corporations “to hear any and all claims against them when their affiliations with the State are so ‘continuous and systematic’ as to render them essentially at home in the forum State.” *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011); (quoting *International Shoe Co. v. State of Washington*, 326 U.S. 310, 317 (1945)); see also *Daimler AG v. Bauman*, 134 S.Ct. 746, 751 (2014). Under the standards set forth in *Goodyear* and then several years later in *Daimler*, a corporation is not “at home” in a forum unless that is its state of incorporation or center of operations. Outside of that, *Goodyear* and *Daimler* mandate that any exercise of personal jurisdiction must come from specific jurisdiction.

² The District Court did not address allegations that Pfizer was subject to

The present case illustrates the problems with the joinder of unrelated claims of out-of-state plaintiffs and how those cases circumvent specific jurisdiction. In the present case, the out-of-state plaintiffs do not allege that they ingested Lipitor in Missouri, were injured in Missouri, or that Pfizer took any action in Missouri which contributed to their alleged injuries. Thus, there is not even a bare allegation of a nexus between the out-of-state plaintiffs' claims and actions occurring in Missouri. Despite the absence of allegations establishing a connection between Missouri contacts and the alleged injuries to the out-of-state plaintiffs, the District Court found specific jurisdiction in a footnote, stating:

According to defendant, no federal or state court in Missouri can exercise personal jurisdiction over defendant and comport with due process with respect to the out-of-state plaintiffs' claims. The parties do not dispute, however, that Missouri courts have personal jurisdiction over defendant with respect to the in-state plaintiffs' claims. Missouri courts, thus, may properly exercise personal jurisdiction over defendant with respect to this cause of action as a whole arising out of or related to its contacts and conduct in Missouri. (citations omitted)

(Order at 8).

The District Court's ruling imputed the specific jurisdiction from the claims arising in Missouri to the claims arising in other states. Pfizer classifies this as "jurisdiction by joinder." *Appellant's Brief* p. 30. Their description is accurate. Under the District Court's finding, it is possible to manufacture specific

general jurisdiction in Missouri.

jurisdiction by permissive joinder under FRCP 20. Such a ruling not only extends personal jurisdiction outside the confines of *Goodyear* and *Daimler*, it misapplies the Missouri long arm statute, the due process clause and the very notion of specific jurisdiction.

In contrast to general jurisdiction, specific jurisdiction is permitted only where a “suit arises out of or relates to the defendant’s contacts with the forum.” *Goodyear*, 564 U.S. at 924. Specific jurisdiction usually involves “single or occasional acts” occurring or having their impact within the forum State. *Id.* As a rule in these cases, Courts have “inquired whether there was ‘some act by which the defendant purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.’” *Id.*; (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, (1958). *See, also., World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 287, 297 (1980); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-475 (1985); *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.*, 480 U.S. 102, 105 (1987)). This Circuit previously held that specific jurisdiction requires a showing that the injury alleged in the lawsuit occurred within or had some connection to the forum state. *See Downing v. Goldman Phipps, PLLC*, 764 F.3d 906, 911 (8th Cir. 2014); *Myers v. Casino Queen, Inc.*, 689 F.3d 904, 909 (8th Cir.2012); *Steinbuch v. Cutler*, 518 F.3d 580, 586 (8th Cir. 2008). When this is not the case, there is no specific jurisdiction.

“When assessing whether personal jurisdiction exists over a nonresident defendant, jurisdiction must be authorized by Missouri's long arm statute [506.500 R.S.Mo.] and the defendant must have sufficient minimum contacts with the forum state to satisfy due process.” *Downing*, 764 F.3d at 911; *see also Bryan v. Smith Interior Design Group, Inc*, 310 S.W.3d 277, 231 (Mo.banc 2010)³. The Missouri Long-arm Statute, § 506.500.3 R.S.Mo., provides that “[o]nly causes of action arising from acts enumerated in this section may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.” Specific jurisdiction exists over a defendant when the cause of action “arises out of or relates to the defendant's contacts with the forum.” *Daimler*, 134 S.Ct at 754. In a diversity case, specific jurisdiction exists only to the extent permitted by the forum state's “long-arm statute.” *Myers*, 689 F.3d at 909 The long-arm statute and Due Process Clause require separate inquires. *Id; citing Bryant*, 310 S.W.3d at 231. Thus, for personal jurisdiction in Missouri Courts the plaintiff’s claims must arise out of or relate to the defendant’s contacts with the forum. *Id.; see also Wallach v. Whetstone Partners, LLC*, 2016 WL 3997080 (E.D. Mo. 2016); *Mulvihill v. KC Ring Management*, 2015 WL 5316197 (Mo. W.D. 2015).

³“Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons” *Daimler*, 134 S.Ct at 753. “We note the reach of a state's long-arm statute is a matter of state law, and ‘federal courts are required to accept the interpretation given the statute by the state supreme court.’” *Myers*, 689 F.3d at 909; (quoting *Mountaire Feeds, Inc. v. Agro Impex, S.A.*, 677 F.2d 651, 653

The Missouri long arm statute does not authorize imputing the specific jurisdiction of one plaintiff's claims to those of another plaintiff by permissive joinder. Similarly, allowing the practice used here submits defendants to personal jurisdiction where it naturally does not exist, and at the same time deprives that defendant of a federal forum. It is well settled that personal jurisdiction "must arise out of contacts that the 'defendant himself' creates with the forum State." *Walden v. Fiore*, 134 S.Ct. 1115, 1118 (2014). There is no exception to this rule. When there is no alleged relationship between a defendant's connections to Missouri and the alleged torts to out-of-state plaintiffs, there simply is not specific jurisdiction with regard to those out-of-state plaintiffs' claims. Imputing specific jurisdiction for the claims of one in-state plaintiff to the claims of another out-of-state plaintiff goes beyond the general jurisdiction limitations of *Goodyear* and *Daimler*.

Defendants must assert personal jurisdiction objections at the first available opportunity or they are waived. FRCP 12(b)(8). The same is true of removal. 28 U.S.C. §1446. The practice of "jurisdiction by joinder" circumvents the holdings of *Goodyear* and *Daimler*. Seeking review of the specific jurisdiction of the out-of-state plaintiff's claims at the first available opportunity has subjected defendants to sanctions. This Court should reverse the District Court's ruling and allow a

(8th Cir.1982)).

federal forum for defendants where it is justified.

IV. THE JOINDER OF NON-RESIDENT PLAINTIFFS WHOSE CLAIMS HAVE NO CONNECTION TO A DEFENDANT'S CONTACTS WITH A FORUM STATE CONSTITUTES FRAUDULENT JOINDER AS WELL AS FRAUDULENT MISJOINDER AND, THEREFORE, DOES NOT DEFEAT DIVERSITY.

A. Lack of specific personal jurisdiction over the claims of a non-resident plaintiff constitutes fraudulent joinder.

The practice of joining in a single case one or more out-of-state, diversity-destroying plaintiffs, whose cases do not establish specific jurisdiction in the forum state, is fraudulent joinder. When, as here, there is no personal jurisdiction over the claims of the diversity-destroying plaintiffs, those plaintiffs and their claims are fraudulently joined and cannot prevent removal. A district court may retain jurisdiction where a nondiverse defendant has been fraudulently joined. Joinder is fraudulent when a plaintiff files a frivolous or illegitimate claim solely to prevent removal. *Hubbard v. Federated Mut. Ins. Co.*, 799 F.3d 1224, 1227 (8th Cir. 2015). “A party has been fraudulently joined when there exists no reasonable basis in fact and law to support a claim against it.” *Id.* While often used regarding fraudulently joined defendants, it is equally applicable to plaintiffs. *See Orrick v. Smithkline Beecham Corp.*, 2014 WL 3956547 (E.D. Mo. 2014).

Personal jurisdiction represents the “power of a court to enter ‘a valid judgment imposing a personal obligation or duty in favor of the plaintiff.’”

Viasystems, Inc. v. EBM-Papst St. Georgen GmbH & Co., 646 F.3d 589, 592-93 (8th Cir. 2011) (quoting *Kulko v. Superior Court of Cal.*, 436 U.S. 84, 91 (1978)).

It is axiomatic that a court may not proceed at all in a case unless it has jurisdiction. *Crawford*, 267 F.3d 760, 764 (8th Cir. 2001). Thus, without personal jurisdiction, there can be no reasonable basis in law or fact to join a claim brought by a diversity-destroying plaintiff. This is particularly true in a case such as this where the Complaint, on its face, shows a lack of specific personal jurisdiction for the claims of the out-of-state plaintiffs. The Complaint does not allege that the out-of-state plaintiffs ingested Lipitor in Missouri, were injured in Missouri, or that Pfizer took any action in Missouri which contributed to their alleged injuries. Given the allegations or absence thereof, logic dictates that the out-of-state plaintiffs were not brought into this action for any reason other than defeating diversity.

B. Lack of specific personal jurisdiction over the claims of a non-resident plaintiff constitutes fraudulent misjoinder.

In 2010, prior to *Goodyear* and *Daimler*, this Court decided *In re Prempro Products Liability Litigation*, 591, F.3d 613 (8th Cir 2010). *Prempro* addressed three (3) cases where out-of-state plaintiffs sued in state Court for alleged injuries from taking hormone replacement therapy (“HRT”) drugs. *Id. at 617*. In that Case, the Court discussed the concept of “fraudulent misjoinder,” which occurs when a plaintiff sues a diverse defendant in state court and joins a viable claim

involving a non-diverse party, or a resident defendant, even though the plaintiff has no reasonable procedural basis to join them in one action. *Id. at 620*. This Court declined to either accept this concept or reject it, instead finding that “even if we adopted the doctrine, the plaintiffs’ alleged misjoinder in this case is not so egregious as to constitute fraudulent misjoinder.” *Id. at 623*.

Subsequent to the holding of *Prempro*, the U.S. Supreme Court decided both *Goodyear* and *Daimler*. Those cases each limited the scope of general jurisdiction, continuing the trend started in *International Shoe* and extended through its progeny toward an emphasis on specific jurisdiction. *See Goodyear*, 564 U.S. at 925 (specific jurisdiction has become the centerpiece of modern jurisdiction theory while general jurisdiction plays a reduced role); see also *Daimler*, 134 S.Ct. at 755. *Amicus* submits that, considering *Goodyear* and *Daimler*, fraudulent misjoinder is a theory worthy of consideration in cases such as this. *Amicus* respectfully suggests that this Court reconsider adopting the doctrine of fraudulent misjoinder, which it neither adopted nor rejected when ruling in *Prempro*.

V. CONCLUSION.

For the reasons stated above, this Court should reverse the District Court’s Orders remanding the Complaint to state court and awarding sanctions.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d) because it contains 2,733 words, excluding the parts of the Brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This Brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

This Brief complies with Local Rule 28A(h)(2) because it has been scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of September, 2016, I caused the foregoing Brief of Amicus Curiae Missouri Organization of Defense Lawyers to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit through the Court's CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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