IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

Docket No. 7 EAP 2019

PATRICIA HAMMONS,
Plaintiff-Appellee,

v.

ETHICON, INC., and JOHNSON & JOHNSON,
Defendants-Appellants,

and

GYNECARE, SECANT MEDICAL, SECANT MEDICAL INC., PRODESCO, INC. and SECANT MEDICAL LLC,
Defendants.

BRIEF OF *AMICI* CURIAE PENNSYLVANIA MANUFACTURERS' ASSOCIATION, PENNSYLVANIA COALITION FOR CIVIL JUSTICE REFORM, NATIONAL ASSOCIATION OF MANUFACTURERS, PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA, AMERICAN TORT REFORM ASSOCIATION, AND COALITION FOR LITIGATION JUSTICE, INC. IN SUPPORT OF DEFENDANTS

Appeal from the Decision of the Superior Court in the Appeal at 1526 EDA 2016 and Cross-appeal at 1522 EDA 2016 (2018 Pa. Super. 172), dated June 19, 2018, En Banc *Reargument Denied, Aug. 29, 2018; affirming the Order of the Court of Common Pleas of Philadelphia County, May Term 2013, No. 3913 (Hon. M. Bernstein, J.), dated Apr. 14, 2016, Entering Judgment Following a Jury Verdict and Denial of Post-Trial Motions*

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QUESTION ADDRESSED BY *AMICI CURIAE*

Whether the Superior Court committed legal error when it found that a trial court could exercise personal jurisdiction over out-of-state corporations when the Plaintiff's injuries did not occur in Pennsylvania and her claims do not relate to any of Defendant's contacts in this state.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are the Pennsylvania Manufacturers' Association ("PMA"), Pennsylvania Coalition for Civil Justice Reform ("PCCJR"), National Association of Manufacturers ("NAM"), Pharmaceutical Research and Manufacturers of America ("PhRMA"), American Tort Reform Association ("ATRA"), and Coalition for Litigation Justice, Inc. ("Coalition"). *Amici* are concerned that the Superior Court's ruling, if not reversed, will harm their members in Pennsylvania and subject their out-of-state members to jurisdiction in Pennsylvania based on attenuated relationships to Pennsylvania businesses that are unrelated to a plaintiff's claim.

The PMA, founded in 1909 by Bucks County industrialist Joseph Grundy, is the nonprofit, statewide trade organization representing the manufacturing sector in Pennsylvania's public policy process. Headquartered just steps from the state capitol in Harrisburg, PMA works to improve Pennsylvania's ability to compete with other states for investment, jobs, and economic growth. It advances pro-growth public

policies that reduce the baseline costs of creating and keeping jobs in the commonwealth, including limits on lawsuit abuse.

The PCCJR is a statewide, bipartisan organization representing business, health care and other perspectives. The coalition is dedicated to improving Pennsylvania's civil justice system by elevating awareness of problems and advocating for legal reform in the legislature and fairness in the courts

The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all fifty states. Manufacturing employs more than twelve million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than two-thirds of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

PhRMA is a voluntary nonprofit association representing the country's leading research-based pharmaceutical and biotechnology companies, which are devoted to inventing medicines that allow patients to live longer, healthier, and more productive lives. PhRMA advocates in support of public policies that encourage the discovery of life-saving and life-enhancing new medicines. PhRMA members

produce innovative medicines, treatments, and vaccines that save and improve the lives of countless individuals every day. PhRMA members have invested more than $600 billion dollars in the search for new treatments and cures since 2000, including an estimated $71.1 billion in 2017 alone.

Founded in 1986, ATRA is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than three decades, ATRA has filed *amicus curiae* briefs in cases before state and federal courts that have addressed important liability issues.

The Coalition is a nonprofit association formed by insurers in 2000 to address and improve the litigation environment for toxic tort claims.[1] The Coalition has filed over 150 *amicus curiae* briefs in cases that may have a significant impact on the mass tort litigation environment, including more than a dozen briefs in the Pennsylvania appellate courts.

Pursuant to Pennsylvania Rule of Appellate Procedure 531(b)(2), *amici* state that no counsel for any party authored this brief in whole or in part and no entity or

[1] The Coalition includes Century Indemnity Company; Great American Insurance Company; Nationwide Indemnity Company; Allianz Reinsurance America, Inc., Resolute Management, Inc., a third-party administrator for numerous insurers; and TIG Insurance Company.

person, aside from *amici curiae*, their members, and counsel, made any monetary contribution to fund the preparation or submission of this brief.

ARGUMENT

A Pennsylvania court's exercise of specific personal jurisdiction over New Jersey defendants in a claim brought by an Indiana plaintiff for an injury that occurred in Indiana runs directly contrary to recent U.S. Supreme Court rulings that redefined the constitutional boundaries of personal jurisdiction. In a series of unanimous or nearly unanimous decisions, the Court established new standards for personal jurisdiction that significantly limit the states where civil litigation can be filed against businesses with operations and sales in multiple states. Proper application of these principles here is critical to avoiding unconstitutional burdens on litigants, and improperly encumbering Pennsylvania businesses and courts.

Here, two defendants, Ethicon and Johnson & Johnson, are New Jersey companies. The Plaintiff, an Indiana resident, claims she experienced complications resulting from the use of a medical device, Prolift, made by Defendants and that Prolift is defective in its design and warnings. The physicians who treated the Plaintiff were in Indiana. The injuries she alleges occurred in Indiana. The Plaintiff's claim arose entirely in Indiana, and the parties agree that Indiana law governs her product liability claims. Yet, the Superior Court exercised specific jurisdiction over the Defendants based solely on their contacts with a Pennsylvania supplier, Secant

Medical, Inc. and Secant Medical LLC (collectively "Secant"), as part of the manufacturing process, and a Pennsylvania consultant, gynecologist Dr. Lucente, who provided advice in the product's development.[2] This broad theory of jurisdiction would cover not only Ms. Hammons's personal injury claim, but presumably extend to all Prolift product liability cases wherever they arise.

The U.S. Supreme Court has instructed states that they may not use the veneer of specific jurisdiction to create any such "loose and spurious form of general jurisdiction" over a company or product-line. *Bristol-Myers Squibb Co. v. Super. Ct.*, 137 S. Ct. 1773, 1782 (2017). General jurisdiction for a claim may be asserted regardless of where the actions occurred, but requires that a defendant is "at home" in the forum state. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011). On the other hand, specific jurisdiction requires "an affiliation between the forum and the underlying controversy." *Bristol-Myers Squibb*, 137 S. Ct. at 1780 (quoting *Goodyear*, 564 U.S. at 919). Without this tie, "specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State." *Id.* at 1781. Using vendors in the chain of commerce are such unconnected activities; they do not create any tie to a plaintiff's claim. Otherwise, any state with any entity

[2] Neither Secant nor Dr. Lucente have any connection to Ms. Hammons's product liability claims upon which jurisdiction, even if allowed, could be based.

involved in a product's development could assert jurisdiction over claims involving that product, which is the exact situation the U.S. Supreme Court is seeking to avoid.

If the Court adopts this theory for personal jurisdiction it will harm Pennsylvanians. In today's interconnected economy, businesses regularly operate, use suppliers, and sell products in multiple states. National manufacturers will have a disincentive to use Pennsylvania businesses if they do not want to be subject to liability here for entire product lines. Further, Pennsylvania courts, juries, and taxpayers will continually be burdened with cases having nothing to do with anyone or anything in their communities. Instead, plaintiffs should pursue their claims in the courts empowered and properly suited to hear them—Indiana or New Jersey in this case. *Amici* respectfully urge the Court to adhere to the U.S. Supreme Court's jurisdiction jurisprudence and dismiss these claims.

I. Recent U.S. Supreme Court Rulings Do Not Permit State Courts to Exercise Personal Jurisdiction Over Corporations Based on Activities in a State that are Unrelated to a Tort Claim

Under the U.S. Constitution, a lawsuit can be heard only in states with a legal interest in that dispute. The Due Process Clause of the Fourteenth Amendment prescribes the circumstances when it is proper for a state to assert specific or general personal jurisdiction over a defendant. *See Kulko v. Super. Ct.*, 436 U.S. 84, 91 (1978) (stating the Due Process Clause "operates as a limitation on the jurisdiction of state courts" against defendants). Either type of jurisdiction is appropriate only

when the defendant establishes a meaningful relationship with that state. *See Walden v. Fiore*, 571 U.S. 277, 285 (2014) ("[I]t is the defendant's conduct that must form the necessary connection with the forum State."). A state cannot force itself into a dispute when neither the plaintiff's claim nor the defendant has such a connection.

Over the past few years, the U.S. Supreme Court reformulated the due process tests for establishing personal jurisdiction in order to protect these constitutional limits and rights. Collectively, three decisions, *Goodyear*, *Daimler AG v. Bauman*, 571 U.S. 117 (2014), and *Bristol-Myers Squibb* represented a major shift in the Court's due process approach to personal jurisdiction.[3] *Goodyear* and *Daimler* provided a new test for general personal jurisdiction. The U.S. Supreme Court explained that the world had grown more interconnected, with "tremendous growth of interstate business activity." *Daimler*, 571 U.S. at 126. The previous method of subjecting a business to general personal jurisdiction in all states where it has "minimum contacts" led to a "sprawling" view of jurisdiction offending constitutional due process and federalism concerns. *Goodyear*, 654 U.S. at 929. The U.S. Supreme Court specifically rejected theories of personal jurisdiction based on the "stream of commerce." *Id.* at 920. This approach would subject a company to litigation in many states, allowing plaintiffs to shop for the most plaintiff-friendly

[3] *See also BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549 (2017) (applying these principles in case arising under Federal Employers' Liability Act).

forum. In *Goodyear* and *Daimler*, the U.S. Supreme Court held that general personal jurisdiction should be limited to the one or two states where a company is "at home": where it is incorporated or has its principal place of business. *Id.* at 924. These affiliations, the U.S. Supreme Court continued, "afford plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims." *Daimler,* 571 U.S. at 137.

In *Bristol-Myers Squibb,* the U.S. Supreme Court revisited specific jurisdiction to align this jurisprudence with its new approach to general jurisdiction. *See* 137 S. Ct. at 1777. The Court expressed concern that state courts, as here, may try to broaden interpretations of specific jurisdiction to circumvent these new general jurisdiction boundaries. During oral argument, Justice Ginsburg, who authored *Goodyear* and *Daimler*, cautioned against trying "to reintroduce general jurisdiction, which was lost in *Daimler,* by the backdoor" of specific jurisdiction. Oral Argument, *Bristol-Myers Squibb Co. v. Super. Ct.*, No. 16-466, Apr. 25, 2017, at 54 (statement of Justice Ginsburg). Justice Alito, writing for the Court in *Bristol-Myers Squibb,* echoed this theme, urging states not to turn specific jurisdiction into "a loose and spurious form of general jurisdiction." 137 S. Ct. at 1781.

In *Bristol-Myers Squibb,* the U.S. Supreme Court directly linked specific and general jurisdiction limits. A defendant has a due process right not to be subject to a state's judicial system for claims that have no sufficient nexus to that state. *See id.*

at 1780. In addition, the U.S. Supreme Court explained, jurisdiction invokes the "territorial limitations on the power of the respective States." *Id.* (quoting *Hanson v. Denckla*, 357 U.S. 235, 251 (1958)). Federalism bars one state from over-reaching and hearing claims that should be heard elsewhere. *Id.* (finding claims must be protected from "the coercive power of a State that may have little legitimate interest in the claims in question"). The U.S. Supreme Court concluded that the proper test for specific personal jurisdiction is that the plaintiff's claim must "arise out of or relate to the defendant's contacts with the forum." *Id.* at 1780 (quoting *Daimler*, 571 U.S. at 127). The direct "affiliation between the forum and the underlying controversy" gives the state its legal interest in the case. *Id.* (quoting *Goodyear*, 564 U.S. at 919). By focusing on where the claim arose, these doctrines unified the defendant and state interests over each claim.

The case at bar presents mass tort dynamics comparable to those the U.S. Supreme Court addressed, and rejected, in *Bristol-Myers Squibb*. Pennsylvania, as with California, has become a popular destination for aggregating mass tort claims from around the country. Here, Plaintiff's lawsuit is one of many Prolift cases filed by out-of-state plaintiffs against out-of-state defendants in Pennsylvania. In California, as here, state courts attempted to allow out-of-state claimants to file their claims even though the state did not have general jurisdiction over the defendant or any connection to the plaintiffs' claims. In fact, the Superior Court, as the California

courts tried in *Bristol-Myers Squibb*, hooked its specific jurisdiction assertion to the manufacturer's use of in-state third party vendors. In *Bristol-Myers Squibb*, the defendant drug manufacturer used a California distributor. The Superior Court's attempt to distinguish suppliers and consultants from distributors rings hollow. In neither case did the vendor engage in any activity giving rise to the claim. Secant and Dr. Lucente were unrelated parts of Ethicon's production process.

The Superior Court's conclusion that it can assert jurisdiction over the entire Prolift product line raises the exact type of hybrid between general and specific jurisdiction the U.S. Supreme Court cautioned against in *Bristol-Myers Squibb*. In rejecting this mass tort concept for personal jurisdiction, the Court explained that general and specific jurisdiction are "very different," even for a product line. *See id.* at 1780. To assert specific jurisdiction over a claim, the facts occurring in the state must relate to the factual predicate upon which the claim is based—not merely that events related to the product's design, manufacture, marketing, or distribution took place in a state. Thus, the instant case represents the same constitutional "danger" the U.S. Supreme Court identified in *Bristol-Myers Squibb*. *Id*. at 1781.[4]

[4] In other cases, plaintiffs have asserted that 42 Pa.C.S. § 411 and 42 Pa.C.S. § 5301 can be read together to suggest the state will permit a foreign corporation to do business in Pennsylvania only if it subjects itself to general personal jurisdiction in Pennsylvania. The Second Circuit has explained that if "mere" registration and appointment of an agent in a state were enough to grant general jurisdiction, "every corporation would be subject to general jurisdiction in every state in which it registered, and *Daimler*'s ruling would be robbed of meaning by a back-door thief." *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 640 (2d Cir. 2016).

Justice Sotomayor, the lone dissenter in *Bristol-Myers Squibb*, underscored the impact of this ruling on the situation at bar: it will be "impossible to bring a nationwide mass action in state court"—such as is being attempted here. *Id*. at 1784. Justice Sotomayor concluded that the majority's holding in *Bristol-Myers Squibb* forbids mass actions "in any State other than those in which a defendant is essentially at home." *Id*. at 1789 (internal citation omitted). Because Defendants are not "at home" in Pennsylvania, it cannot be a destination for this case or any other out-of-state claim that, collectively, create a mass tort action over Prolift. Plaintiff can bring her claim in Indiana or seek to "join[] together in a consolidated action" in New Jersey, which has general jurisdiction over Defendants. *Id*. at 1783.

As the Court reiterated in another recent jurisdiction case, "the Fourteenth Amendment's Due Process Clause does not permit a State to hale an out-of-state corporation before its courts when the corporation is not 'at home' in the State and the episode-in-suit occurred elsewhere." *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1554 (2017). There are now generally three states in which a corporation is subject to liability: (1) where it is incorporated; (2) where it has its principal place of business; and (3) where the plaintiff sustained his or her injury. Here, as in *Bristol-Myers Squibb*, none of these places includes the state where the claim was filed. Plaintiff did not obtain Prolift from physicians, receive treatment, or sustain injury in Pennsylvania. This Court should join with other courts and recognize that the

U.S. Supreme Court intended its jurisdiction rulings to be transformative.[5] It should dismiss her claims for lack of general and specific personal jurisdiction.

II. The Interests of Pennsylvanians Weigh Heavily Against the Lower Courts' Expansive View of Personal Jurisdiction

Apart from due process safeguards that prevent the exercise of jurisdiction by Pennsylvania courts in this case, it would be unsound policy for Pennsylvania to try cases with little or no connection to Pennsylvania. The sprawling view of personal jurisdiction applied by the Superior Court would harm Pennsylvania's economy and force Pennsylvania taxpayers and juries to spend valuable resources and time on cases having nothing to do with their communities.

A. Tying Personal Jurisdiction Over Out-of-State Claims to the Mere Involvement of Pennsylvania Businesses in the Production Process Will Lead National Manufacturers to Eschew Local Businesses

The Superior Court's ruling, if not reversed, will harm Pennsylvania's strong manufacturing and manufacturing support base. There is concern that Pennsylvania trial courts could assert personal jurisdiction over a manufacturer whenever it uses a Pennsylvania company—a supplier, local manufacturer, or consultant—to develop a product. Out-of-state companies not wanting to face liability in Pennsylvania may simply avoid working with Pennsylvania businesses. As the U.S. Supreme Court has

[5] *See, e.g., Lawson v. Simmons Sporting Goods, Inc.*, 569 S.W.3d 865, 870-72 (Ark. 2019) (establishing new state standard for determining specific personal jurisdiction to comport with *Bristol-Myers Squibb*); *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 127 (Del. 2016) (cautioning against its sister states from exacting "unreasonable tolls simply for the right to do business").

acknowledged, companies operating in multiple states use jurisdiction laws as guides for structuring their operations so that they can determine where to be subject to liability and for which types of claims. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (explaining such limits provide "some minimum assurance as to where that conduct will and will not render them liable to suit").

Particularly in the mass tort context, the uncertainty of legal exposure and risks have become significant factors for manufacturers and other businesses in considering where to do business, including where to use third-party vendors. Today's economic marketplace is global in nature, allowing manufacturers of all sizes to purchase materials and make products in a multitude of states. The trend is for large manufacturers to contract with smaller companies that specialize in aspects of the manufacturing process. *See* Dmitry Slepov, *Micromanufacturing the Future*, Tech Crunch, Apr. 3, 2016.[6] Three-quarters of manufacturing firms in the country have fewer than twenty employees. *See* Anthony Caruso, Statistics of U.S. Businesses Employment and Payroll Summary: 2012, at 7 (2015).[7] These dynamics create significant opportunities for local businesses, but they also make it easier for large manufacturers to move these discrete operations to vendors in other states and for the vendors themselves to move to friendlier legal environments.

[6] https://techcrunch.com/2016/04/03/micromanufacturing-the-future/.

[7] https://www.census.gov/content/dam/Census/library/publications/2015/econ/g12-susb.pdf.

In Pennsylvania, many businesses and their employees have worked diligently to become integral to such national production processes; manufacturing has become critical to Pennsylvania's economy. Manufacturing now accounts for 11.65% of the total economic output in Pennsylvania and employs 9.47% of the state's workforce. *See* Nat'l Ass'n of Mfrs., 2019 Pennsylvania Manufacturing Facts (2019).[8] These jobs pay well. The roughly 560,000 manufacturing employees in Pennsylvania earn an average annual compensation of more than $73,000, which is well above the state's median household income of less than $60,000 per year. *See id.*; U.S. Census Bureau, QuickFacts: Pennsylvania.[9] The Court should prioritize protecting these jobs and Pennsylvania's overall economy, not risk them for out-of-state claims.

B. Pennsylvania Courts and Jurors Should Spend Their Limited Resources on Cases Connected to Their Communities

The Superior Court's expansive view of personal jurisdiction will also cause Pennsylvania to waste the jury service of its citizens and spend taxpayer resources on cases that are unconnected to legitimate interests of the state.

As this Court has long appreciated, a jury represents "the understanding, experience, and conscience of the community" in which it sits. *Bream v. Berger*, 130 A.2d 708, 711 (Pa. 1957). Because jury duty imposes a burden, Pennsylvania

[8] https://www.nam.org/state-manufacturing-data/2019-pennsylvania-manufacturing-facts/.

[9] https://www.census.gov/quickfacts/fact/table/PA/INC110217.

has invested significant time and money into improving its jury system to foster broad citizen participation. *See, e.g.*, Pa. Interbranch Comm'n for Gender, Racial, and Ethnic Fairness, Best Practices for Jury Selection and Service in Pennsylvania (2016);[10] Philadelphia Bar Ass'n, For the Public: About Jury Service.[11]

A citizen's sacrifice in serving on a jury should be counterbalanced by the ability of jurors to address alleged wrongs in their communities. *See* Restatement (Second) of Conflict of Laws § 36, comment (c) (1971). When a case has no connection to the community, these resources are wasted, jurors may resent showing up for service, and the rationale for the jury pool to be a cross-section of the community is undermined. As this Court has found, when "litigation is piled up in congested centers instead of being handled at its origin," jury service becomes "a burden that ought not to be imposed upon the people of a community [because they have] no relation to the litigation." *Rini v. New York Cent. R. Co*., 240 A.2d 372, 374 (Pa. 1968) (discussing *forum non conveniens* in an action that arose outside Pennsylvania and plaintiffs and witnesses did not have any connection to county).

Further, many courts are experiencing the effects of a prolonged reduction in resources. *See generally* Michael D. Greenberg & Samantha Cherney, Discount

[10] http://www.pa-interbranchcommission.com/_pdfs/SuggestedStandardizedProcedures-Oct-2016.pdf.

[11] https://www.philadelphiabar.org/page/AboutJuryService (last visited June 19, 2019).

Justice: State Court Belt-Tightening in an Era of Fiscal Austerity (RAND Corp. 2017).[12] As this Court expressed in 2019 testimony to the General Assembly, the judiciary's budget in Pennsylvania has remained flat over the past two years, and some $15 million has been diverted from the state's Judicial Computer System, which allows agencies to share critical data. *See* Supreme Court of Pennsylvania, Senate Appropriations Committee Hearing Statement, Feb. 26, 2019.[13] The judicial resources spent on out-of-state claims would be better served elsewhere. Pennsylvania courts and juries should perform their responsibilities and expend their resources only when the community has a valid connection to the litigation.

To be clear, becoming a destination for out-of-state claims does not serve the interests of Pennsylvanians. Out-of-state individuals who allege harm from a pharmaceutical, medical device, or other product should pursue claims where the community has an interest in resolving their dispute with the manufacturer. As the U.S. Supreme Court concluded, these jurisdictions are where the injury occurred or the defendant is "at home," neither of which is Pennsylvania in this case.

[12] https://www.rand.org/content/dam/rand/pubs/conf_proceedings/CF300/CF343/RAND_CF343.pdf.

[13] http://www.pacourts.us/assets/files/setting-5470/file-7575.pdf?cb=f2cfe6.

III. Philadelphia Should Not Serve as America's Courtroom for Medical Device and Pharmaceutical Mass Tort Litigation

The U.S. Supreme Court's attention to personal jurisdiction—a subject the Court left largely unchanged for almost seventy years—appears directed at curbing "forum shopping" or "litigation tourism," which is the practice of filing a lawsuit in a location believed to provide a litigation advantage to the plaintiff regardless of the forum's affiliation with the parties or claims. *See generally* Philip S. Goldberg, *et al*., *The U.S. Supreme Court's Personal Jurisdiction Paradigm Shift to End Litigation Tourism*, 14 Duke J. Const. L. & Pub. Pol'y 51 (2019). As discussed below, Pennsylvania and other states have found that forum shopping distorts the ability of courts to administer justice and that diversifying the litigation environment allows mass tort litigation to be resolved more fairly and on each claim's own merits.

A. The Court Should Demagnetize Philadelphia's Mass Tort Program

Over the past decade, Philadelphia has become a prime location for plaintiffs' attorneys to file product liability litigation claims from around the country, particularly against pharmaceutical and medical device manufacturers as in the case at bar. This upsurge was intentional. In 2009, the Court of Common Pleas President Judge undertook a "public campaign to lay out the welcome mat for increased mass torts filings." Amaris Elliott-Engel, *Common Pleas Court Seeing More Diabetes Drug Cases*, Legal Intelligencer, Mar. 19, 2009. The reported goal of this effort was

to make the Complex Litigation Center (CLC) more attractive to attorneys to "tak[e] business away from other courts." Amaris Elliott-Engel, *For Mass Torts, a New Judge and a Very Public Campaign*, Legal Intelligencer, Mar. 16, 2009 (quoting Common Pleas President Judge Pamela Pryor Dembe).

That is precisely what occurred. The percentage of out-of-state claims in the CLC, which stood at about one-third of filings from 2001 to 2008, "soared to 41%" in 2009 and "reached an astonishing 47%" in 2011. *See* General Court Regulation No. 2012-01, *In re Mass Tort and Asbestos Programs* (Ct. of Common Pleas of Philadelphia County, Feb. 15, 2012). In pharmaceutical litigation, the percentage of out-of-state filings reached as high as 88%. *See* General Court Regulation No. 2012-03, Notice to the Mass Tort Bar, Amended Protocols and 5 Month Interim Report, at 1 (Ct. of Common Pleas of Philadelphia County, June 18, 2012). Because of these claims, the CLC's inventory of cases rose from 3,632 cases to 6,174 cases, a 143% increase over five years. *Id*. The court, however, realized that stockpiling out-of-state claims here was a mistake; it expressed concern that the "explosive growth" burdened the court and jeopardized its ability to properly administer cases. *Id*.

In 2012, the CLC implemented procedural changes intended to reduce out-of-state filings. But, it was difficult to roll up the welcome mat, as out-of-state plaintiffs continued to account for 81% of new pharmaceutical cases in 2015. *See* Max Mitchell, *Out-of-State Pharma Filings Dip as Phila. Mass Torts Remain Steady*,

Legal Intelligencer, July 25, 2016. That percentage dipped to 65% in 2016, which local lawyers attributed to the initial impact of *Daimler*. *See id.* The influence of that decision on the plaintiffs' bar, however, appears to have waned, and local courts have not enforced the U.S. Supreme Court's constitutional limits. Now, the proportion of pharmaceutical lawsuits filed by out-of-state plaintiffs in the CLC is back in the high 80% to 90% range. Max Mitchell, *Phila. Mass Tort Inventory Saw Record Decline in 2018, Court Reports*, Legal Intelligencer, Feb. 13, 2019. In addition, the percentage of asbestos plaintiffs from other states filing in the CLC is at its highest level since 2010—60%. *Id.*

Commentators have observed that "[w]hen large numbers of plaintiffs are willing to give up home field advantage and file in a jurisdiction that has little or no logical connection to their claims, one should ask why this is occurring." *See* Mark A. Behrens & Cary Silverman, *Litigation Tourism in Pennsylvania: Is Venue Reform Needed*, 22 Widener L.J. 29, 37 (2012). It "suggests that those who represent plaintiffs view the forum as advantageous." *Id*. By reinforcing the jurisdictional principles the U.S. Supreme Court set forth in *Goodyear*, *Daimler*, and *Bristol-Myers Squibb*, this Court can send a clear message in this case that such improper forum shopping is unconstitutional and no longer welcome in Pennsylvania.

B. Mass Filings of Out-of-State Claims Undermines Justice

Permitting or inviting mass tort litigation from around the country also damages a court's ability to resolve each claim fairly and judiciously on its own merits. A troubling consequence of stockpiling such claims, especially when most of them are unconnected to the locale, is the pressure to shift the court's focus from dispensing justice to disposing of cases. Well-intentioned judges may feel pressured to take improper legal shortcuts in an attempt to fix a clogged docket; such efforts often backfire. *See* Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 Ariz. L. Rev. 595, 606 (1997) ("Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings.").

One tactic already exposed in surgical mesh litigation is to overwhelm a court's docket with cases, mixing a few cases that may have merit among hundreds or thousands of speculative or frivolous claims. Judge Clay Land, who oversees a federal multidistrict litigation over a surgical mesh product, found that plaintiffs' attorneys generated many of their claims through an "onslaught of lawyer television solicitations," but did "little pre-filing preparation" and most of the cases were meritless and "should never have been brought in the first place." *In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, No. 4:08-MD-2004, 2016 WL 4705807, at *1 n.2 (M.D. Ga. Sept. 7, 2016). Judge Land observed that the plaintiffs'

lawyers were seeking to leverage the mass filings to create a presumption among judges, juries, and the media that there must be merit to the cases. *See id*. at *1. They then hoped to pressure the defendant into entering a global settlement without scrutinizing the merits of individual cases. *See id*. Judge Land concluded that establishing efficiencies to process these cases had the "perverse result" of the court becoming even more flooded with non-meritorious claims. *Id*.

A similar phenomenon occurred in silica litigation more than a decade ago. The federal judge overseeing that litigation found that "truth and justice had very little to do with" the surge of approximately 10,000 cases of silicosis. *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 635 (S.D. Tex. 2005). Rather, plaintiffs had used flawed medical screenings "as an 'entrepreneurial' means of claim generation" to "inflate the number of Plaintiffs and claims in order to overwhelm the Defendants and the judicial system." *Id*. This was done, the court found, "in the hopes of extracting mass nuisance value settlements because [they] are financially incapable of examining the merits of each individual claim in the usual manner." *Id*. at 676.

This Court should not allow its judiciary to be used as a tool for stockpiling claims to pressure defendants to enter global settlements. Proper application of the U.S. Supreme Court's personal jurisdiction jurisprudence significantly reduces the potential for these abuses to arise in Pennsylvania courts. Diversifying the litigation

environment among multiple states can promote fairness, and facilitate each claim being resolved on its own merits.

C. As Other Courts Adhere to Personal Jurisdiction Limitations, Pennsylvania Will Attract More Out-of-State Claims

As courts in other states with large mass tort dockets follow the U.S. Supreme Court's personal jurisdiction restrictions, more mass tort litigation is likely to flow into Philadelphia unless this Court reverses the Superior Court's decision.

As discussed earlier, the U.S. Supreme Court has already intervened in California to stop that state's courts from exercising jurisdiction over pharmaceutical product liability actions that lack a specific nexus to the state. *See Bristol-Myers Squibb v. Super. Ct.*, 137 S. Ct. at 1781. Other courts are adhering to that ruling. For example, in Missouri, plaintiffs have attempted to keep out-of-state claims in another favored mass tort destination, St. Louis. Similar to the case before this Court, the plaintiffs there alleged that if a company's marketing strategy for a product, its labeling and regulatory approval, or early clinical trials have any connection to Missouri then courts in Missouri can exercise specific jurisdiction over out-of-state claims related to those products. *See Hinton v. Bayer Corp.*, No. 4:16-cv-1679, 2018 WL 3725776, at *2 (E.D. Mo. July 27, 2018) (citing cases); *Dyson v. Bayer Corp.*, 4:17-cv-2584, 2018 WL 534375, at *2 (E.D. Mo. Jan. 24, 2018). Federal district courts in Missouri have rejected such efforts, finding these connections "too

attenuated" to provide specific, "case-linked" personal jurisdiction. *Hinton*, 2018 WL 3725776, at *4 (dismissing removed claims of non-Missouri plaintiffs for lack of jurisdiction); *see also Dyson*, 2018 WL 534375, at *5 (same). "Based on a 'straightforward application' of the 'settled principles of personal jurisdiction,' it is not enough for a defendant to have general connections with the forum—there must be a connection between the forum and the specific claims at issue." *Hinton*, 2018 WL 3725776, at *4 (quoting *Bristol-Myers Squibb*, 137 S. Ct. at 1781-83)). In addition, earlier this year, the Missouri Supreme Court clamped down on attempts to bootstrap the product liability claims of out-of-state plaintiffs with those of state residents as a means of trying the cases in St. Louis. *See State ex rel. Johnson & Johnson v. Burlison*, 567 S.W.3d 168 (Mo. banc 2019).

Although plaintiffs often have options as to where to file their claims, they must file in a court that can constitutionally exercise personal jurisdiction over the defendants. Product liability claims against out-of-state businesses that have no specific Pennsylvania connection to the plaintiff's alleged harm cannot be heard in Pennsylvania. Reversing the lower courts will require cases in the CLC and other Pennsylvania courts to have a true connection to Pennsylvania, prevent the unfairness that can result from unchecked mass tort litigation, and avoid Pennsylvania courts and juries from being inundated with out-of-state lawsuits.

CONCLUSION

For these reasons, *amici* respectfully request that this Court reverse the Superior Court's ruling and find that Pennsylvania lacks general and specific personal jurisdiction against Defendants in this case.

Sincerely,

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CERTIFICATION OF COMPLIANCE

Pursuant to Pennsylvania Rule of Appellate Procedure 2135(d), I hereby certify that this Brief of *Amici Curiae* complies with the word count limits of Pennsylvania Rule of Appellate Procedure 531(b)(3).

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