NO. 81764

IN THE SUPREME COURT OF NEVADA

JOHN BORGER and SHERRI BORGER
Appellants

v.

POLARIS INDUSTRIES, INC.
Respondent

SANDBAR POWERSPORTS, LLC, DOES I through X;
and ROE CORPORATIONS XI through XX, inclusive
Defendants

On Appeal from the Eighth Judicial District
Clark County, Nevada, Dept. No. XXV
No. A-17-751896-C

APPELLANTS' OPENING BRIEF

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DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the Appellants are individuals, therefore there are no parent corporations or publicly held companies that own 10% or more of the party's stock.

The following counsel appeared for Appellants in proceedings in the District Court and now appears for Appellants before this Court:

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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to NRAP 3A(b)(1) because the District Court's August 9, 2020 order is a final order dismissing all claims in the court. The order was electronically served on August 9, 2020. The notice of appeal was timely filed on September 4, 2020. (App. 349).

ROUTING STATEMENT

This case is presumptively retained for the Supreme Court to "hear and decide" because the case raises "as a principal issue a question of statewide public importance." NRAP 17(a)(13)-(14). Nevada's case law on *forum non conveniens* is quite limited, and this case raises an issue which will recur in similar lawsuits and affect the settlement process. While the issue presented in this case has been tackled by numerous decisions in other jurisdictions, this appeal provides an opportunity for the Supreme Court to address the problem in an authoritative matter, as a matter of first impression in the state.

ISSUE ON APPEAL

Did the Trial Court err by granting a *forum non conveniens* dismissal upon the routine settlement of a Nevada defendant when the case had been pending for two years and the parties had engaged in substantial merits discovery?

STATEMENT OF THE CASE

Nature of the Case:

Plaintiffs, injured while operating an off-road vehicle on vacation, brought a negligence suit against Nevada-based Sandbar Powersports, LLC, the renters of the vehicle, and a product liability suit against Polaris, Inc., the manufacturer of the vehicle.

Trial Court:

Eighth Judicial District Court
Clark County, Nevada, Dept. No. XXV
Judge Kathleen E. Delaney

Nature of the Appeal:

For nearly two years, Plaintiffs had been pursuing their claims and conducting merits discovery. Yet when they settled with the Nevada-based defendant near the completion of discovery, the Trial Court granted a *forum non conveniens* dismissal in favor of the out-of-state defendant, even though the court and parties had already devoted extensive resources to the case.

STATEMENT OF FACTS

In October of 2016, Minnesota residents[1] John and Sherri Borger were on vacation with their family in Lake Havasu, Arizona, where they rented a Polaris RZR[2] from Defendant Sandbar Powersports, LLC, a Nevada corporation. (App. 23-24). While the family was operating the vehicle "on areas designated by Sandbar, the vehicle unexpectedly rolled onto its right side." (App. 24). Sherri Borger "was the properly belted right front passenger at the time." (*Id.*). Mrs. Borger was seriously injured when her arm was trapped under the vehicle. (*Id.*). Mrs. Borger was evacuated to Nevada for medical treatment, where doctors spent eleven days in failed attempts to save her arm, ultimately being forced to amputate. (App. 317).

On March 15, 2017, the Borgers sued Sandbar. (App. 23). After learning more facts about the vehicle and its configuration when sold to Sandbar, the Borgers sued Polaris, Inc. on November 14, 2017. (App. 82). By the new year, the parties were conducting discovery, with both defendants making a series of supplemental disclosures through that summer, after which depositions occurred. On June 25, 2018, the District Court extended the close of discovery

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[1] After filing the lawsuit, the Borgers moved to California, and are thus sometimes referred to as California residents in the record.

[2] The Polaris RZR is a type of recreational off-highway vehicle (ROV).

to February 1, 2019. (App. 182). On July 11th, 2018, Polaris' counsel summarized the Court the progress of the case in an affidavit:

> Since Polaris became a Defendant, this case has been proceeding with discovery. The depositions of the two owners of Defendant Sandbar Powersports, LLC, Mr. and Mrs. Melton, and the two employees were involved with renting the RZR to Plaintiffs have been deposed. In addition, an inspection of the RZR involved in the subject accident took place at the home of its new owner, and that new owner was deposed. A site inspection was also undertaken. Written discovery has been exchanged. The parties are negotiating a protective order. (App. 188).

The following week, on July 16, 2018, the District Court issued an order setting a jury trial in May 2019. (App. 183). Discovery continued that fall, including a dispute about the Borgers' depositions. By October 2018, both John and Sherri Borger had been deposed. Following those depositions, both Polaris and Sandbar continued to supplement their discovery. (App. 221; 248).

On January 16, 2019, after the parties appeared for mediation, the Borgers reached a settlement with Sandbar. The following week, the Discovery Commissioner issued a Report & Recommendations on January 22, 2019 resolving after a dispute between the Borgers and Polaris over a protective order for the confidentiality of certain documents. (App. 12).[3]

[3] Where this brief references the mere fact of the filing of a pleading rather than discussing or relying on its content, citation is made to the docket sheet rather than include the pleading, cognizant of 30(b)'s command not to "unnecessarily

On February 1, 2019, the date discovery had been scheduled to close, Polaris brought a *forum non conveniens* motion based on the settlement with Sandbar. (App. 13). The same day, it also sought leave to file a third-party complaint against the Borgers' son. (*Id*). Three days later, on February 4, 2019, Polaris served its Fifth Supplemental disclosures. (App. 248). On February 7, 2019, Sandbar brought a Motion to Determine Good Faith Settlement, which Polaris opposed. (App. 14). On February 13, 2019, Polaris served a subpoena on the Borgers' son, requiring him to appear for deposition at the end of the month. (App. 276). On February 19, 2019, the parties appeared for oral hearing on the pending matters. (App. 281).

During the hearing, Polaris downplayed the progress of the case, claiming that it had produced few documents and had not appeared for deposition. Yet the Borgers' counsel pointed out Polaris had continually delayed this process for over a year and was continuing to delay production:

> I sent Polaris requests for production February 26, 2018. I still don't have documents. I have been diligent. I have 3 sets of lawyers promising me I'm going to get the documents over, and over, and over. I had Mr. Ross, who I believe is still counsel of record, tell me I've got the documents sitting on my desk. I'm going to send them to you. I have the current counsel saying I will produce them. I was supposed to get them last week, and I still

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enlarge the appendix" and only include materials "essential to the decision of issues."

> don't have them. Got an e-mail on Valentine's day saying, maybe, next week you'll get them … I have tried, short of coming to this court and begging, because I keep getting emails saying you'll get it next week. I know if I come to the court you're are going to look at me, "They said they'd get it to you next week. What's the big deal?" So Polaris has drug the discovery out for a year to have them stand in front of this court and say Plaintiffs haven't done discovery as to Polaris. (App. 313-14).

At the hearing, the District Court initially appeared cognizant of the unorthodox nature of the motion, noting "we are now sitting here with *forum non conveniens* being asserted, post a significant amount of discovery." (App. 301). The District Court also noted "that discovery was geared towards what would understandably be, you know, a Nevada courtroom." (*Id.*). The Trial Court also explained that:

> Like I said, we have great deference. I believe Plaintiff is entitled to a determination on what forum should be. And we have to, when we make those exceptions, there are certain findings that should be made. We have to find that the Plaintiff was blatantly forum shopping, I believe. I don't know that we have those facts. (App. 293).

Yet when the District Court later summed up its reasons for ruling, it ignored these factors, and ultimately resolved the motion contrary to established case law regarding *forum non conveniens* in cases where significant activity has already occurred. (App. 324-28).

On March 13, 2019, the District Court granted Sandbar's Motion to Determine Good Faith Settlement. (App. 341). On August 9, 2020, the District Court granted Polaris' Motion to Dismiss. (App. 344). The Order recites three reasons to dismiss the case. First, it found "the Plaintiffs' choice of forum is entitled to lesser deference because it is not the Plaintiffs' residence." (*Id.*). Second, it found "Arizona is an adequate forum." (App. 345). Third, it found "the public and private interest factors weigh in favor of dismissing this case." (*Id.*).

SUMMARY OF THE ARGUMENT

1) The routine settlement of a forum co-defendant does not create good cause for a *forum non conveniens* motion. The dismissal of a co-defendant can only support a *forum non conveniens* motion if it is shown that the co-defendant was a sham and sued in bad faith as a forum shopping device. The Trial Court owed substantial deference to Plaintiff's legitimate forum choice.

2) *Forum non conveniens* motions are heavily disfavored when brought after the case has been on file for years or when the parties have engaged in merits discovery. Once the court and the parties have expended substantial time and resources towards the case, the granting of such a motion only aggravates the inefficiencies and inconvenience it was designed to cure.

3) Polaris failed to meet its evidentiary burden. In Nevada, a party must support a *forum non conveniens* motion with affidavits demonstrating

unjust inconvenience. The Nevada Supreme Court has held that an affidavit from a party claiming the inconvenience of its own employees cannot support a *forum non conveniens* motion. Yet such an affidavit is all Polaris provided.

ARGUMENT

The Trial Court's order does not provide much specificity into the reasons for its decision, but it could not reach the ruling it did without failing to properly consider the circumstances of the case which weighed strongly against dismissal. If upheld in this appeal, the Trial Court's ruling would prove uniquely disruptive to the settlement process in similar lawsuits. Future plaintiffs in these lawsuits would be incentivized to keep defendants in the case longer than necessary and refrain from settling when doing so could trigger a *forum non conveniens* dismissal years into litigation, requiring a new lawsuit in a different forum with a restart of discovery. For the reasons discussed below, the Trial Court's dismissal of the Borgers' claims exceeded its discretion.

I. The Routine Settlement of a Forum Co-Defendant does not Justify a *Forum Non Conveniens* Motion.

"A plaintiff's selected forum choice may only be denied under exceptional circumstances strongly supporting another forum." *Mountain View Rec. v. Imperial Commercial,* 129 Nev. 413, 419, 305 P.3d 881, 884–85 (2013). A routine settlement with a forum defendant is not an "exceptional circumstance" justifying a *forum non conveniens* motion. Otherwise, multiparty litigation would be regularly upended in the wake of settlements. Dismissing multiparty injury cases after a settlement with a forum defendant would disrupt the

orderly and efficient resolution of these claims. Polaris did not present the District Court with any authority in which a *forum non conveniens* motion was granted based on a routine settlement with a co-defendant. To the contrary, a *forum non conveniens* motion based on a dismissed defendant is inappropriate unless it can be shown that the plaintiff sued the dismissed defendant as a sham to insert the lawsuit into the wrong forum in bad faith.

In *Fessler,* the Pennsylvania Superior Court reversed a trial court on this issue. In that case, Scott sued for an auto accident at WaWa gas station, and filed his suit in Philadelphia, the headquarters of WaWa, though neither Scott nor co-defendant Menna were residents of the forum. Eighteen months into the case, Scott "entered into a monetary settlement with WaWa and discontinued his action against WaWa." *Fessler v. Watchtower Bible and Tract Society of New York, Inc*., 131 A.3d 44, 47 (Pa.Super. 2015). Immediately thereafter, Menna, the lone remaining defendant, filed a *forum non conveniens* motion. Menna argued the forum was inappropriate because Menna, Scott, and the accident scene were located outside the forum, "and Wawa, the only Philadelphia defendant, has been dismissed from the case." *Id.* The trial court granted the motion, but that ruling was reversed on appeal.

The *Fessler* court held that the dismissal of a co-defendant cannot form the basis of a *forum non conveniens* motion unless it can be shown that the

plaintiff engaged in improper forum shopping. "When the plaintiff engages in improper forum shopping, the trial court may interfere with the plaintiff's choice of forum on *forum non conveniens* grounds." *Id.* at 53. If "the defendants that provided the basis for plaintiff's choice of forum are subsequently dismissed from the case, the remaining defendants…have the burden of proving that the plaintiff's inclusion of the dismissed defendants in the case was designed to harass the remaining defendants." *Id.*

The *Fessler* court noted the plaintiff did not bring a frivolous suit against WaWa. "To the contrary, the fact that WaWa paid Scott a monetary settlement indicates that Scott had a good faith basis for suing WaWa and thus had a legitimate reason for selecting Philadelphia as the forum for litigation." *Id., citing Zappala v. James Lewis Group*, 982 A.2d 512, 521, 2009 PA Super 179, ¶ 14 (Pa.Super. 2009) (Even the dismissal of co-defendant on summary judgment does not provide a basis for *forum non conveniens* motion absent improper forum shopping).

Here, the Court is faced with the same facts. Plaintiffs' settlement with Sandbar shows they had a legitimate reason for selecting Clark County for their suit. Furthermore, the District Court entered an order determining that the settlement between Plaintiffs and Sandbar was made in good faith. (App. 341).

Under these facts, Polaris is not entitled to disrupt the case far into the merits upon the routine settlement of a co-defendant.

II. *Forum Non Conveniens* Motions are Strongly Disfavored when Brought After Substantial Litigation or After the Parties Engaged in Merits Discovery.

Courts around the country agree *forum non conveniens* should be addressed in preliminary motions. The Seventh Circuit court has emphasized the need to settle on an appropriate forum with haste, noting that "[s]election of a forum in which to resolve a legal dispute should be made at the earliest possible opportunity in order to economize on the resources, both public and private, consumed in dispute resolution." *Cabinetree of Wisconsin Inc. v. Kraftmaid Cabinetry, Inc.,* 50 F.3d 388, 391 (7th Cir.1995). As the Third Circuit noted, "[m]otions to dismiss based on *forum non conveniens* usually should be decided at an early stage in the litigation, so that the parties will not waste resources on discovery and trial preparation in a forum that will later decline to exercise its jurisdiction over the case." *Lony v. E.I. Du Pont de Nemours & Co.,* 935 F.2d 604, 614 (3d Cir. 1991). "Once the litigation has progressed significantly…a different factor enters into the equation." *Id.* Thus, "[i]f extensive discovery on the merits has taken place <u>or</u> if the court has expended significant resources on the case, considerations of judicial economy weigh in favor of retaining the action." *Baypack Fisheries, L.L.C. v. Nelbro Packing Co.,* 992

P.2d 1116, 1119 (Alaska 1999), *quoting* 17 James Wm. Moore et al., Moore's Federal Practice ¶ 111.90, at 111–245 to 111–246 (emphasis added). Here, both circumstances are present. First, the Trial Court devoted extensive resources over two years to the litigation, during which Polaris was never unduly prejudiced. Second, the parties have conducted substantial merits discovery. Both circumstances are examined below.

A. The duration of litigation in Nevada weighed strongly against dismissal.

Courts agree that "delay in bringing a *forum non conveniens* motion is a factor to be considered in the Court's evaluation of whether the forum was convenient." *Genpharm Inc. v. Pliva-Lachema a.s.,* 361 F. Supp. 2d 49, 59 (E.D.N.Y. 2005). In *Genpharm,* dismissal was improper when the court expended resources on the case for a year, even where the parties had not engaged in extensive discovery:

> The private interest factors favor the Plaintiffs. This case has been pending since June 6, 2003. Although the parties have not engaged in extensive discovery, the Defendants have sought to stay and delay discovery at every step of the case. In addition, as noted above, the Court can consider the fact that the Defendants have moved for dismissal based on *forum non conveniens* more than a year after the case was filed.

Id. at 60. Similarly, the Third Circuit cautioned that courts "cannot overlook as a highly significant factor the district court's familiarity with the litigation."

Lony, 935 F.2d at 614. "Thus, courts can consider a defendant's delay in filing a motion to dismiss on the basis of *forum non conveniens* as one of the relevant factors when considering the motion." *Viscofan USA, Inc. v. Flint Group*, 08-CV-2066, 2009 WL 1285529, at *7 (C.D. Ill. May 7, 2009); *see also In re Hellas Telecommunications (Luxembourg) II SCA*, 555 B.R. 323, 345 (Bankr. S.D.N.Y. 2016) (same). As the Alaska Supreme Court noted, an extended period of litigation moots a defendant's *forum non conveniens* argument:

> Most importantly, by the time the superior court dismissed the case for *forum non conveniens*, the question as to whether Alaska was a "seriously inconvenient forum" was largely a moot issue. At that point, the parties had already invested significant time and resources litigating the case in the Alaska forum.

Baypack Fisheries, L.L.C., 992 P.2d at 1120. Citing the Seventh Circuit, a California federal court made the same point, noting "[t]he fact that a party has been subject to ongoing litigation is itself evidence that the forum was 'if not convenient[,] at least workable' for the foreign defendant." *Bryant v. Mattel, Inc.,* CV 04-9049 DOC RNBX, 2010 WL 3705668, at *19 (C.D. Cal. Aug. 2, 2010), *quoting Zelinski v. Columbia 300, Inc.,* 335 F.3d 633, 643 (7th Cir. 2003). As the court in *Bryant* explained, "the purpose of the doctrine is to *limit* the burden of the forum, not multiply the burden of having to re-start litigation in a foreign forum" or to "divide claims." *Id.*

Here, the Trial Court should have considered the inconvenience resulting from the transfer after two years of litigation in a Nevada court. Over those two years, the plaintiffs have been developing their case for a Nevada trial. The Trial Court and its staff have expended substantial resources. And Polaris has litigated without undue inconvenience. All of these factors weighed heavily against dismissal.

B. Substantial merits discovery weighed strongly against dismissal.

Courts across the country likewise agree that dismissal is inappropriate where the parties have been conducting discovery on the merits. For instance, in reversing one such dismissal, the Third Circuit noted, "we would be unlikely to disturb the district court's order given the discretionary nature of its decision were it not for one overriding factor: the court's failure to consider the extent of merits activity already completed and underway in Delaware." *Lony*, 935 F.2d at 613; *see also Jones v. Eon Labs, Inc.*, 43 A.D.3d 711, 841 N.Y.S.2d 558 (1st Dep't 2007) (Finding *forum non conveniens* motion inappropriate when "made some two years after commencement of the action, and after significant progress in discovery."); *Anagnostou v. Stifel,* 204 A.D.2d 61, 62, 611 N.Y.S.2d 525, 525–26 (1994) (Dismissal improper when "three years had elapsed from commencement of the action and only after a significant degree of activity had

already taken place, including…the commencement of discovery."); *Corines v. Dobson,* 135 A.D.2d 390, 392, 521 N.Y.S.2d 686, 688 (1987) (Dismissal improper when case "had been pending in New York for eighteen months" and saw "significant activity, including discovery").

During the two years the Borgers' case had been pending, the parties conducted written discovery and repeatedly supplemented that discovery.[4] They conducted inspections of the vehicle and the accident site. They took numerous depositions on the merits, including both John and Sherri Borger, as well as depositions of the owners and employees of Defendant Sandbar. Indeed, the Borgers anticipated being able to prove much of their defect case against Polaris through the testimony of these Sandbar witnesses. The parties also deposed a subsequent owner of the vehicle as well as the Borgers' son. The Borgers developed all of this evidence for use in a Nevada courtroom. Likewise, experts were retained to formulate opinions with the expectation of a Nevada trial. (App. 301).

As the parties told the District Court, depositions for the first responders were set to be taken at the time the motion was pending. Thus, not only had the parties conducted substantial merits discovery, but that discovery also

[4] In fact, Polaris supplemented its discovery five times, while Sandbar supplemented twelve times.

eliminated any concerns about access to proof. As the Alaska Supreme Court explained in *Bayback* under similar facts:

> The factor relating to ease of access to proof had been largely mooted, because most of the evidence that would be relied upon at trial had already been obtained by discovery. The same is true regarding the availability and cost of obtaining witnesses. If non-party witnesses residing outside the state refuse to attend the trial, their depositions may be used.

Baypack Fisheries, L.L.C., 992 P.2d at 1119–20. As Polaris conceded, the only remaining deposition was its own corporate representative, so any issue with regard to access to proof had likewise been mooted by the substantial merits discovery here.

The parties also litigated discovery motions which required the intervention of the Discovery Commissioner, including an extended dispute over a protective order of confidentiality. Polaris argues discovery is not complete because it has not yet produced its corporate representative for deposition or produced confidential internal documents, but it cannot dispute that the parties have engaged in substantial merits discovery for quite some time and repeatedly brought matters before the District Court. When this occurs, "considerations of judicial efficiency and expediency counsel that the extent of discovery on the merits already completed must be weighed in favor of retention of jurisdiction in the forum. Otherwise, we may be faced with the

situation presented here, where allegedly new facts…are used to initiate reconsideration of what should be a preliminary motion." *Lony*, 935 F.2d at 614.

In *Lony,* the Third Circuit reversed a district court where "two years [had] elapsed since the case was filed," including "merits discovery for nearly six months." *Id.* at 613. In this case, Polaris brought its motion two years after the Borgers filed their claims, and the parties had been engaging in merits discovery for nearly a year. As the *Lony* court noted, "[t]his consideration goes to both private concerns, because of the parties' investment in time and money in discovery, and public ones, because the district court and court personnel already have expended resources in connection with this litigation." *Id.* This "reflect[s] both the preliminary nature of the question and counterproductivity of substantial discovery before dismissing an action so that it can be reinstituted elsewhere." *Id.* at 614. Therefore, even if Polaris had been able to produce evidence showing substantial prejudice from inconvenience, it would not be "sufficient to overcome the strong ground for retention of jurisdiction in [Nevada] in light of the substantial merits discovery already underway." *Id.*

III. The District Court Owed Deference to Plaintiffs' Initial Forum Choice.

At the District Court, Polaris cited an unpublished federal district court opinion which it claimed supports the idea that less deference is afforded to U.S.

plaintiffs who do not sue in their home states. However, there is no support for this proposition in Nevada law, and the Nevada Supreme Court has cited contrary Second Circuit authority. In *Provincial Gov't,* the Supreme Court noted that "a plaintiff's choice of forum is entitled to great deference, but a foreign plaintiff's choice of a United States forum is entitled to less deference." *Provincial Gov't of Marinduque v. Placer Dome, Inc.,* 131 Nev. Adv. Op. 35, 350 P.3d 392, 396 (2015). The Supreme Court cited *Pollux Holding Ltd.*, which noted that "when a foreign plaintiff sues in a United States forum such choice is entitled to less deference." *Pollux Holding Ltd. v. Chase Manhattan Bank,* 329 F.3d 64, 71 (2nd Cir. 2003). However, *Pollux* only ruled that foreign nationals could "be treated on terms no less favorable than those applicable to U.S. nationals." *Id.* at 72. The deference is lowered because a non-citizen is not "entitled to access American courts on the same terms as American citizens." *Id.* at 73. American citizens are always entitled to enhanced deference. As the First Circuit explained, "[t]he deference accorded the plaintiff's choice of forum is enhanced…when the plaintiff is an American citizen who has selected an available American forum." *Mercier v. Sheraton Intern., Inc.,* 981 F.2d 1345, 1355 (1st Cir. 1992). Yet the Trial Court did not give the Borgers any "enhanced deference." Instead, its order afforded them less deference.

The Second Circuit also discussed the issue in *Iragorri,* in which it examined "a fact pattern not directly addressed by the Supreme Court: a United States resident plaintiff's suit in a U.S. district other than that in which the plaintiff resides." *Iragorri v. United Techs. Corp.,* 274 F.3d 65, 71 (2d Cir. 2001). The court held that a U.S. resident is entitled to enhanced deference over a foreign litigant, and that "[t]he more it appears that a domestic or foreign plaintiff's choice of forum has been dictated by reasons that the law recognizes as valid, the greater the deference that will be given to the plaintiff's forum choice." *Id.* at 71-72. Here, Plaintiffs' forum was valid and sensible, and as American litigants, their forum choice is entitled to enhanced deference.

In sum, Plaintiffs were fully justified in filing suit in Nevada, and there is no compelling reason to disturb the case. Polaris did not claim there was a docket congestion problem unique to Clark County, nor was there any comparison to docket congestion in the alternate forums. Nor do any potential choice of law issues pose significant challenge. Assuming Arizona law would apply, Nevada courts are frequently called upon to apply neighboring law, and there is nothing unique or complex about Arizona law that makes its local application inconvenient or oppressive. "The fact that the Court might have to apply the law of another jurisdiction is not particularly significant. This Court is frequently called upon to apply the law of other jurisdictions and should be

presumed capable of carrying out such a function" *Cropper v. Peninsula Bank,* NO. 1989-05-125, 1990 WL 964522, at *1 (Del. Com. Pl. Apr. 27, 1990). In short, none of the private or public interests weigh so strongly in favor of dismissal to overcome the strong deference to these American citizens' forum choice, especially given the long duration of the case, the substantial merits discovery, and the legitimate reasons for suing and settling with Defendant Sandbar.

IV. Polaris Failed to Meet its Evidentiary Burden.

In Nevada, "a motion for change of venue based on *forum non conveniens* must be supported by affidavits so that the district court can assess whether there are any factors present that would establish such exceptional circumstances." *Mountain View Rec.,* 129 Nev. at 419. "General allegations regarding inconvenience or hardship are insufficient because a specific factual showing must be made." *Id.* Here, Polaris submitted a single affidavit from its employee Blake Anderson. (App. 246). His affidavit states three facts:

- Polaris headquarters are in Medina, Minnesota.
- Polaris manufactured the vehicle at issue in Minnesota.
- Polaris employees and documents are in Minnesota.

Mr. Anderson's affidavit does not contain any statements regarding inconvenience or how Arizona would be more convenient. This Court cannot presume that Polaris -- a manufacturer with multi-national operations and multi-billion-dollar revenues -- will be inconvenienced by emailing its

documents into Nevada, having its employees deposed in Minnesota, or bringing whatever Polaris witnesses it desires to appear at the time of trial.

In any case, Mr. Anderson's affidavit is irrelevant under a *forum non conveniens* analysis. In *Mountain View,* the Nevada Supreme Court warned that "neither the convenience of a party nor an employee of a party is to be considered in determining a [*forum non conveniens*] motion." *Mountain View,* 129 Nev. at 419. Likewise, "convenience of counsel is not an appropriate consideration." *Id.* Yet Polaris offered no other evidence.

Most importantly, there is no evidence from Polaris supporting any inconvenience to any Arizona witnesses, which consist of Sandbar's owners, Sandbar's employees, and first responders. With respect to Sandbar personnel, Polaris has already secured testimony from these witnesses, and even if Polaris desired to call them at trial, there is no evidence in the record showing that Sandbar witnesses would refuse to appear at trial. Nor can it be presumed to be inconvenient for Sandbar witnesses to appear in the state of Sandbar's incorporation. In fact, their depositions occurred in Nevada. With no evidence in the record, a dismissal cannot be granted due to their inconvenience.

With respect to first responders, their testimony is readily available and set to be taken at the time of dismissal. Video depositions of first responders are routinely used at trial, and even assuming Polaris could show it was

unreasonably oppressive to lack live testimony, Polaris has not provided any evidence showing that any witness will not appear at trial voluntarily.

Here, "[t]he record is devoid of affidavits from either percipient or expert witnesses or other evidence to demonstrate how the witnesses would be inconvenienced." *Id.* at 420. In fact, Polaris never disputed these witnesses may agree to travel to Nevada for trial. Indeed, Sandbar witnesses appeared in Nevada for deposition. In any event, an argument focused on travel "provides little, if any, support for [defendant's] position even if such evidence were provided in the record." *Id.* at 419, *citing Gates Learjet Corp. v. Jensen,* 743 F.2d 1325, 1336 (9th Cir.1984) (noting that "a district court should keep in mind that the increased speed and ease of travel and communication ... makes, especially when a key issue is the location of witnesses, no forum as inconvenient [today] as it was [in years past].").

Polaris failed to meet its burden seeking "a change of venue based on *forum non conveniens*" because Polaris did not "submit affidavits to demonstrate exceptional circumstances supporting a venue change on this basis." *Flannery v. Shaw,* 71440, 2016 WL 7635453, at *1 (Nev. App. Dec. 28, 2016). By failing to meet its evidentiary burden, Polaris has prevented this Court from engaging in "the fact-intensive inquiry the doctrine of *forum non conveniens* requires." *Pound for Pound Promotions, Inc. v. Golden*

Boy Promotions, Inc., 432 P.3d 201 (Nev. 2018). "In the absence of such evidence as to why a venue change is warranted, the supreme court has concluded that a venue change under NRS 13.050(2)(c) is improper." *Flannery,* 2016 WL 7635453 at *1.

CONCLUSION

Granting the motion was error when the court and parties expended substantial resources on the case, including substantial merits discovery. Polaris' motion was also improper because it was based solely on the routine settlement of a co-defendant, which does not create the "exceptional circumstances" required by the Nevada Supreme Court in *Mountain View.* When ruling on that motion, the District Court also failed to afford enhanced deference to Plaintiffs' valid forum choice as U.S. citizens. On top of these defects, Polaris' motion failed to meet the evidentiary burden because it included only a single affidavit from its employee which merely states the location of the company and its employees. For these reasons, the Trial Court abused its discretion in dismissing the case. The Borgers therefore pray this Court reverses that dismissal.

DATED this 12th day of January, 2021

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ATTORNEY CERTIFICATE

Pursuant to NRAP 28.2, undersigned counsel certifies that:

1. This Opening Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Cambria in size 14-point font.

2. I further certify that this Opening Brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 5,089 words.

3. Finally, I certify that I have read this Opening Brief and, to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Opening Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion regarding matters in the record to be supported by a reference to the page of the record on appeal where the matter relied upon is to be found.

I understand that I may be subject to sanctions in the event that the accompanying Opening Brief is not in compliance.

DATED this 12th day of January, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2021, a copy of Appellants Opening Brief was served via electronic service by way of the Nevada Courts E-Filing Portal, as follows:

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I hereby certify that on January 12, 2021, a copy of Appellants Opening Brief was served via U.S. Mail, as follows:

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