IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 85501

GLAXOSMITHKLINE LLC,
Petitioner,

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for the County of Clark, and **THE HONORABLE JOSEPH HARDY JR.**
Respondents

SARA ELABBASSY, as Special Administrator of the **ESTATE OF DECEDENT HUSROM**, deceased; **JAMIL HUSROM**, individually and as a legal guardian for **KHULOD HUSROM**, a minor, **SALIH HUSROM**, a minor, **FATIMA HUSROM**, a minor, and **MOHAMMED HUSROM**, a minor
Real Parties in Interest

District Court Case No. A-21-835385-C

REPLY IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION

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I. INTRODUCTION

Plaintiffs' answering brief does not contest the critical point made in GSK's petition: that the conduct Plaintiffs claim subjects GSK to specific jurisdiction in Nevada—GSK's marketing of its own Zantac—is *irrelevant* to Plaintiffs' theory of liability. The only reason Plaintiff could arguably pursue a claim against GSK, for injuries allegedly caused by Zantac and generic ranitidine sold by *other companies*, is that GSK created the drug's original label. The fact that GSK marketed its own Zantac in Nevada is beside the point. Under the plaintiff's theory of liability, even if GSK had *never* marketed Zantac in Nevada, it would still be liable for the extra-jurisdictional decisions that affected the label on products the decedent used.

Unable to contest the fact that GSK's sale of its own Zantac is irrelevant to an innovator-liability claim, Plaintiffs argue that jurisdiction is nonetheless present because GSK "created a market for its products in the forum through advertising," like the defendant in the United States Supreme Court's *Ford* decision. Answering Brief ("AB") at 14. But Plaintiffs ignore a glaring difference between *Ford* and this case: Ford was being held responsible for alleged defects *in the products it was*

advertising, while GSK is being held liable for *other companies'* products. If Ford had never sold, advertised, or serviced its cars in Montana or Minnesota, it never would have faced product-liability claims in the states. But GSK would face innovator-liability claims for other companies' ranitidine even if it never sold its own products in Nevada, because those claims are based entirely on GSK's out-of-state labeling decisions.

Plaintiffs simply cannot explain how activities that are irrelevant to a theory of liability can "relate to" that claim for purposes of personal jurisdiction. If irrelevant conduct like GSK's marketing of its own Zantac could support specific jurisdiction, then "the phrase 'relate to' would have no real limits." *In re Zantac (Ranitidine) Prod. Liab. Litig.*, 546 F. Supp. 3d 1192, 1213 (S.D. Fla. 2021). Indeed, if "creating a market" for a drug through advertising were sufficient grounds for jurisdiction, then a company could be subject to jurisdiction for claims based on other companies' sales of the drug *forever*, even if the company had long ago stopped doing any business in the state, just because it advertised the drug for a short period of time decades earlier. That cannot be, and is not, the law of personal jurisdiction. The only result consistent with this

Court's precedent, and that of the United States Supreme Court, is to issue a writ of prohibition and direct the district court to enter an order dismissing the plaintiff's claim against GSK for lack of personal jurisdiction.

II. ARGUMENT

A. *FORD* DOES NOT SUPPORT PLAINTIFFS' OVERBROAD VIEW OF SPECIFIC JURISDICTION.

The answering brief relies on a so-called "market-creation" theory of personal jurisdiction derived from *Ford Motor Co. v. Montana Eighth Judicial Dist. Ct.*, 141 S. Ct. 1017 (2021). Because GSK, like Ford, "engage[d] in such heavy marketing that it could turn 'anyone' in the forum state into a customer," Plaintiffs argue GSK should be "'subject to jurisdiction in the State's courts when the product causes injury there.'" AB at 11 (quoting *Ford*, 141 S. Ct. at 1025, 1030). The problem for Plaintiffs is that GSK did not advertise the ranitidine products that allegedly caused the decedent's injuries. GSK ceased advertising or selling OTC Zantac in 1998, eighteen years before the decedent used the product, and it never advertised or sold generic ranitidine. PA-014. The decedent used products made, sold, and advertised by GSK's *competitors*, not by GSK. The only reason Plaintiffs could arguably hold GSK liable

for injuries caused by its competitors' products is that GSK created the original label for OTC Zantac, which other companies then relied on. But under that "innovator liability" theory, GSK would have potential liability even if it never advertised its own Zantac (or any other product) in Nevada. An innovator-liability claims could rest on GSK's labeling decisions alone, regardless of any past sales or advertising in Nevada.

Plaintiffs never contest the fact that GSK's sale of its own Zantac in Nevada is irrelevant to their innovator-liability claims. That is unsurprising, because the fact is beyond dispute. Instead, Plaintiffs rebut a claim GSK never made: that GSK would be subject to *jurisdiction* even if it had never sold any products in Nevada. *See* AB at 25. Of course, given that the district court based specific jurisdiction on GSK's Zantac sales, there would be no jurisdiction if those sales had not occurred. GSK's point is that the plaintiff's *theory of liability* has nothing to do with its Zantac sales in Nevada, and thus it is improper to base jurisdiction on those sales. The most vivid illustration of that point is the (unrebutted) fact that the plaintiffs could still state innovator-liability claims under their interpretation of Nevada law even if GSK had never sold a single Zantac pill in Nevada.

That fact also crystallizes why this case is the exact opposite of *Ford*. In that case, Ford's advertising in the forum states was significant because it could give rise to product-liability claims like the plaintiffs'. When Ford "turned [a] resident of Montana or Minnesota into a Ford owner," it was exposing itself to product-liability suits in the state. *Ford*, 141 S. Ct. at 1029. But when GSK advertised its own Zantac in Nevada, it was *not* exposing itself to innovator liability. According to Plaintiffs' (and the trial court's) view of Nevada tort law, GSK would have faced innovator-liability claims from Nevada plaintiffs even if no one in Nevada had ever purchased its products.

Plaintiffs also argue that, under *Ford*, a company is subject to specific jurisdiction in a state where it sells *any* products, even if it no longer sells the product at issue in the forum. As support for this remarkably broad theory of "related-to" jurisdiction, Plaintiffs cite the fact that Ford had stopped making the Crown Victoria in 2011, prior to the plaintiff's 2013 purchase. *See* AB at 15. Jurisdiction was nonetheless proper, Plaintiffs say, because "Ford continued to promote its other cars and its brand in the forum." *Id.* at 16.

This argument ignores the fact that Ford was still selling *used* Crown Victorias in Minnesota and Montana, even if it was no longer making new ones. The Supreme Court specifically observed that "Ford urge[d] Montanans and Minnesotans to buy its vehicles, including (at all relevant times) Explorers and Crown Victorias" and that "Ford cars—again including those two models—are available for sale, whether new *or used*, throughout the States, at 36 dealerships in Montana and 84 in Minnesota." 141 S. Ct. at 1028 (emphasis added). Jurisdiction was appropriate because Ford was selling, promoting, and servicing the allegedly defective product in the forum states. Because that conduct could give rise to product-liability claims exactly like the plaintiffs' claims, it clearly "related to" those claims for purposes of specific jurisdiction. Here, by contrast, nothing GSK did in Nevada could give rise to innovator liability.

Plaintiffs object that focusing the jurisdictional analysis on conduct that is legally relevant to Plaintiffs' theory of liability "misuses the phrase 'legally relevant facts' as a stand-in for [the] but-for causation" standard that *Ford* rejected. *See* AB at 16. This is false. In *Ford*, the defendant conceded that it was engaged in conduct in the forum states

that could give rise to product-liability claims targeting the Explorer and Crown Victoria, but it wanted to escape jurisdiction because the specific plaintiffs there did not allege that Ford's in-state activities caused their injuries. That is the sort of strictly causation-focused analysis that the Supreme Court rejected. After *Ford*, a court still must ask whether the defendant's contacts with the forum state "relate to" the plaintiff's claims. The only principled, limited way to conduct that analysis, as the MDL court recognized, is to ask whether the defendant's contacts with the forum could give rise to claims like the plaintiffs' claims. If the answer is no, and the only relevant conduct occurred out of state, then there is no specific jurisdiction.

B. PLAINTIFFS' RELIANCE ON THIS COURT'S PRECEDENTS IS MISPLACED.

Plaintiffs misrepresent GSK as arguing that "the *only* relevant jurisdictional fact is the specific spot its officers and employees were standing when they played their part in committing the 'breach' element" of a tort, and Plaintiffs then discuss four decisions from this Court that supposedly take a broader view. AB at 17. But GSK does not argue that jurisdiction is only appropriate in the state where a defendant is located when it commits an alleged tort. Nevada and federal law have long been

clear that specific jurisdiction can be exercised when the defendant's allegedly tortious act in another state was "expressly aimed at Nevada and caused harm [it] knew was likely to be suffered in Nevada." *Tricarichi v. Cooperative Rabobank, N.A.*, 135 Nev. 87, 93, 440 P.3d 645, 651 (2019). All of the decisions Plaintiffs cite involved defendants who—unlike GSK—aimed their tortious conduct at Nevada or were directly engaged in tortious activity in the state.

In *Arbella Mutual Insurance Company v. Eighth Judicial District Court*, the defendant contracted to provide nationwide insurance coverage and then refused to defend the plaintiff in a lawsuit in Nevada. 122 Nev. 509, 515, 134 P.3d 710, 714 (2006). This Court easily concluded that the plaintiffs' breach-of-contract and bad-faith claims were "related" to the defendant's contacts with Nevada because they "arise directly from Arbella's refusal to pay their underinsured motorist claim pursuant to their policy." *Id.* at 516, 134 P.3d at 714. Contrary to Plaintiffs' argument, this Court correctly focused its analysis on the actions from which the claims "ar[o]se." *Id.* Because the refusal to finance the defense of a lawsuit in Nevada was obviously an action "expressly aimed at Nevada" that "cause[d] harm [the defendant] knew was likely to be

suffered in Nevada," jurisdiction was appropriate. *Tricarichi*, 135 Nev. at 93, 440 P.3d at 651.

In *Trump v. Eighth Judicial District Court*, the plaintiffs alleged that the defendant tortiously induced a Nevada employee to breach his employment contract and join the defendant's company. 109 Nev. 687, 691, 857 P.2d 740, 743 (1993). This Court expressly found that the defendant had "purposefully directed his conduct toward the forum of Nevada" by making many telephone calls to the employee in Nevada, sending him many documents, and "[m]ost significantly," "creating the irrevocable trust which was part of [the] employment agreement." *Id.* at 702, 857 P.2d at 750. Again, the actions by the defendant that gave rise to the plaintiff's claims were expressly aimed at Nevada and calculated to cause harm there.

In *Baker v. Eighth Judicial District Court*, a California resident threatened to sue a Nevada hotel for false advertising after he stayed there, and the hotel sought a declaratory judgment. 116 Nev. 527, 530, 999 P.2d 1020, 1022 (2000). This Court rejected the California resident's argument that "his cause of action did not arise out of his contact with Nevada" concluding instead that his "injuries arose directly from his

hotel stay" in Las Vegas. *Id.* at 533, 999 P.2d at 1024. Once again, this Court focused on the conduct that gave rise to the claim at issue, and in this case, the conduct occurred within Nevada's borders.

Finally, in *Judas Priest v. Second Judicial District Court*, the defendants were selling in Nevada, through a distributor, the exact album that allegedly caused the suicide of the plaintiffs' son. 104 Nev. 424, 425, 760 P.2d 137, 138 (1988). And they had "targeted Nevada as a market" by playing two concerts in the state. *Id.* at 426, 760 P.2d at 139. The concerts themselves were not the basis for jurisdiction, as Plaintiffs suggest. The sales of the allegedly dangerous album—from which the plaintiffs' claims arose—were the basis for jurisdiction, and the concerts established that the defendants had targeted Nevada as a market for those albums.

All of these decisions confirm that the court should focus its jurisdictional analysis on "the acts or conduct underlying [the] tort claims" and ask whether they occurred "in Nevada or … were expressly aimed at Nevada and caused harm that [the defendant] knew was likely to be suffered in Nevada." *Tricarichi*, 135 Nev. at 93, 440 P.3d at 651. In each of these decisions, the answer was yes. Here, by contrast, GSK did

not make its allegedly tortious labeling decisions in Nevada and did not aim them at Nevada or any other specific state.

C. THE TRIAL COURT DECISIONS ASSERTING SPECIFIC JURISDICTION OVER INNOVATOR-LIABILITY CLAIMS ARE NOT PERSUASIVE.

The answering brief cites two trial court decisions from outside Nevada that found specific jurisdiction over innovator-liability claims. Neither of those decisions grapples with the fact that the defendant's labeling decisions are the only actions relevant to an innovator-liability claim, and thus that the defendant would face the exact same claims if it had never sold or advertised its own products in the forum state.

First, Plaintiffs note that a federal district court assumed personal jurisdiction over innovator-liability claims in *Quinn-White v. Novartis Pharmaceuticals Corporation*, 2018 WL 6133637 (C.D. Cal. March 7, 2018), but the analysis of that decision was manifestly inadequate. The *Quinn-White* court began by finding *general* jurisdiction over the out-of-state defendant (which Plaintiffs have conceded does not exist here) based merely on the facts that the company was registered in California, had a California office and research center, and had often litigated in California courts. *See id.* at *2. That conclusion contravened the

Supreme Court's holding that even a "substantial, continuous, and systematic course of business" in the forum state does *not* make an out-of-state defendant subject to general jurisdiction. *Daimler AG v. Bauman*, 571 U.S. 117, 138 (2014). The court also made a one-sentence specific jurisdiction finding based on the brand-name company's marketing and sale of its own products in California, but the court did not analyze the nature of an innovator-liability claim under California law, much less consider the fact that the brand-name company's sale of its own products is irrelevant to the theory of innovator liability. *See Quinn-White*, 2016 WL 11519285 at *2.

Second, Plaintiffs cite the federal district court decision in *Whaley v. Merck & Company*, 2022 WL 1153151 (S.D. Cal. April 12, 2022), but that decision rested on a fundamental misunderstanding of the innovator-liability theory. In *Whaley*, Merck argued that its marketing and sale of Singulair in California could not support specific jurisdiction in an innovator-liability case concerning injuries allegedly caused by the generic equivalent, montelukast. The court held that the innovator-liability claims "related to" Merck's marketing activities because "Plaintiffs' theory targets Singulair, not generic montelukast." *Id*. at *7.

That is simply wrong under California law, which the trial court here followed. An innovator-liability claim, by definition, alleges deficiencies in the generic product's label, because that is the product the plaintiff consumed. As the *Whaley* court itself explained elsewhere in its opinion, "California law attributes liability to Merck *for the contents of the generic montelukast label*." *Id.* at *6 (emphasis added). Merck's sale of its own product had nothing to do with the innovator-liability theory.

D. Plaintiffs' Theory Would Subject GSK to Jurisdiction In Perpetuity.

Plaintiffs' "market-creation" theory of jurisdiction exceeds any reasonable limits on the scope of "related-to" jurisdiction, as explained above. It also has the perverse consequence that, with respect to innovator-liability claims, a defendant can be subject to specific jurisdiction *forever*, no matter what steps the defendant takes to limit its connections to the forum. The defendant cannot go back in time and undo the initial advertising that created the market for the drug, which is what Plaintiffs argue subjects the defendant to specific jurisdiction. And innovator-liability claims will continue to arise as long as other companies' keep selling the drug in the forum. Even if the defendant completely severed ties with the forum state, it would be subject to

jurisdiction for innovator-liability claims arising decades later because it created the initial market for the drug.

Indeed, Plaintiffs are suing GSK for injuries allegedly caused by OTC Zantac that other companies sold *eighteen years* after GSK stopped selling the product. True, GSK continued selling prescription Zantac, but that is not the product the decedent used. And although Plaintiffs mention GSK's continuing sales of prescription ranitidine, they do not actually base their jurisdictional theory on those sales. For Plaintiffs, what matters is that GSK "develop[ed] the demand" for Zantac years before the decedent ever took it. AB at 2. If GSK had stopped selling all Zantac products in Nevada in 1998, Plaintiffs would still claim Nevada courts had jurisdiction over an innovator-liability claim that arose in 2016. That, if nothing else, should be a sign that Plaintiffs' jurisdictional argument is fatally overbroad.

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CONCLUSION

For these reasons, the district court cannot properly exercise personal jurisdiction over GSK in the underlying lawsuit, and this Court should issue the writ of prohibition.

Dated: December 20, 2022.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Chad R. Fears, hereby certify:

1. I have read the foregoing reply and to the best of my knowledge, information, and belief, the foregoing document is not frivolous or interposed for any improper purpose, and it complies with all applicable rules of appellate procedure, including NRAP 28(e)(1).

2. The foregoing brief complies with type-volume limitations of NRAP 21(d) because it contains 2,809 words.

3. This brief complies with the typeface, formatting, and type style requirements of NRAP 32(a)(4)-(6) because it was prepared in a double-spaced typeface in Century Schoolbook, 14-point, type style with one-inch margins on all sides.

Dated: December 20, 2022.

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CERTIFICATE OF SERVICE

I certify that on December 20, 2022, I submitted the foregoing Reply in Support of Petition for Writ of Prohibition for filing via the Court's eFlex electronic filing system. Electronic notifications will be sent to the following:

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