STATE OF MICHIGAN

IN THE SUPREME COURT

JOSIP RADELJAK, Individually and as Personal Representative of the Estate of ENA BEGOVIC, Deceased and as Next Friend of LANA RADELJAK, LEO RADELJAK and TEREZA BEGOVIC,

Plaintiffs-Appellees,

-vs-

DAIMLERCHRYSLER CORPORATION,

Defendant-Appellant,

_____/

Supreme Court No. 127679

Court of Appeals No. 247781

Wayne County Circuit Court
No. 02-228401-NP

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## STATEMENT OF THE QUESTIONS PRESENTED

I.

SHOULD THE PUBLIC INTEREST FACTORS OF THE FORUM NON CONVENIENS DOCTRINE SET FORTH IN *CRAY v GENERAL MOTORS*, 389 MICH 382, 396 (1973) BE MODIFIED TO MAKE CLEAR THAT WHEN ANOTHER MORE APPROPRIATE FORUM EXISTS, MICHIGAN COURTS MAY CONSIDER THE EXTENT TO WHICH ACCOMMODATING A REQUEST FROM A FOREIGN LITIGANT TO HEAR A LAWSUIT ARISING OUT OF A CLAIMED TORT THAT OCCURRED IN A FOREIGN JURISDICTION WILL HAVE CONSEQUENCES FOR THE NUMBER AND TYPES OF FUTURE LAWSUITS HEARD BY MICHIGAN COURTS?

Plaintiffs-Appellees Josip Radeljak, Individually and as Personal Representative of the Estate of Ena Begovic, Deceased and as Next Friend of Lana Radeljak, Leo Radeljak & Tereza Begovic answer "No."

Defendant-Appellant DaimlerChrysler Corporation answers "Yes."

The Wayne County Circuit Court would presumably answer "Yes."

The Michigan Court of Appeals would presumably answer "No."

Amicus Curiae Michigan Defense Trial Counsel answers "Yes."

II

IF ANOTHER MORE APPROPRIATE FORUM EXISTS, MAY A MICHIGAN COURT RESIST JURISDICTION EVEN WHEN ITS OWN FORUM IS NOT SERIOUSLY INCONVENIENT?

Plaintiffs-Appellees Josip Radeljak, Individually and as Personal Representative of the Estate of Ena Begovic, Deceased and as Next Friend of Lana Radeljak, Leo Radeljak & Tereza Begovic answer "No."

Defendant-Appellant DaimlerChrysler Corporation answers "Yes."

The Wayne County Circuit Court would presumably answer "Yes."

The Michigan Court of Appeals would presumably answer "No."

Amicus Curiae Michigan Defense Trial Counsel answers "Yes."

## STATEMENT OF FACTS

The Michigan Defense Trial Counsel (MDTC) relies upon the statement of facts set forth in Defendant-Appellant DaimlerChrysler Corporation's brief.

## ARGUMENT I

**THE PUBLIC INTEREST FACTORS OF THE FORUM NON CONVENIENS DOCTRINE SET FORTH IN *CRAY v GENERAL MOTORS*, 389 MICH 382, 396 (1973) SHOULD BE MODIFIED TO MAKE CLEAR THAT WHEN ANOTHER MORE APPROPRIATE FORUM EXISTS, MICHIGAN COURTS MAY CONSIDER THE EXTENT TO WHICH ACCOMMODATING A REQUEST FROM A FOREIGN LITIGANT TO HEAR A LAWSUIT ARISING OUT OF A CLAIMED TORT THAT OCCURRED IN A FOREIGN JURISDICTION WILL HAVE CONSEQUENCES FOR THE NUMBER AND TYPES OF FUTURE LAWSUITS HEARD BY MICHIGAN COURTS.**

### A. STANDARD OF REVIEW.

A trial court's determination concerning whether to resist imposition upon its jurisdiction is reviewed for abuse of discretion. *Cray v General Motors Corp*, 389 Mich 382, 395; 207 NW2d 393 (1973). An abuse of discretion is generally found only in extreme cases where the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227-228; 600 NW2d 638 (1999). To the extent that the rules governing the doctrine of forum non conveniens itself are questions of law, questions of law in general are reviewed de novo. See *National Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 612; 684 NW2d 800 (2004). A key aspect of review under an abuse of discretion standard is that the reviewing court must accept the outcome even if it might have exercised its discretion differently. In other words, a discretionary decision necessarily means that the trial court is empowered to choose between more than one option at its discretion. A reversal is not permitted unless that choice amounted to an abuse of discretion; deferral to the trial court's exercise of discretion is required.

## B. THE HISTORY AND RATIONALE FOR THE DOCTRINE OF FORUM NON CONVENIENS SUPPORTS THE CONSIDERATION OF ADDITIONAL FACTORS SUCH AS THE EXTENT TO WHICH ACCOMMODATING A REQUEST FROM A FOREIGN LITIGANT TO HEAR A LAWSUIT ARISING OUT OF A CLAIMED TORT THAT OCCURRED IN A FOREIGN JURISDICTION WILL HAVE CONSEQUENCES FOR THE NUMBER AND TYPES OF FUTURE LAWSUITS HEARD BY MICHIGAN COURTS.

The term forum non conveniens can be traced back to Scottish decisions in the late 1800s. Barrett, *The Doctrine of Forum Non Conveniens*, 35 Calif L R 380, 386-388 (1947). It referred to the rule that allowed Scottish trial courts to decline to hear cases when the ends of justice would be better served in another forum. *Id.* American courts, especially in admiralty, also began to recognize discretion in the trial court to refuse to hear certain types of cases. *Id.* See also, Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Colum L R 1 (1929); Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 Cornell L Q 12 (1949). In 1947, in *Gulf Oil Corp v Gilbert*, 330 US 501; 67 S Ct 839; 91 L Ed 1055 (1947), the Supreme Court first adopted the doctrine. According to *Gilbert*, "the principle of forum non conveniens is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." 330 US at 507. The Court explained that venue statutes are broadly drawn to allow the plaintiff a choice of courts "so that he may be quite sure of some place in which to pursue his remedy." *Id.*

But this "open door" may also be used for illegitimate purposes. One scholar writing at that time explained that the "plaintiff's right to choose jurisdictions in which to sue, … has often imposed an unnecessary and harsh burden on the defendant who is making no effort to avoid his obligations." Barrett, *supra* at 381. To deal with this problem, the Court embraced the common law techniques and criteria that had been developed in state courts and in England. *Id.* The

Court articulated a balancing test to determine whether to decline jurisdiction based on public and private interests at stake. In discussing the private interests, the Court explained:

> Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.

330 US at 508. The Court also identified some of the factors pertaining to the public interest:

> Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

330 US at 508.

Over thirty years later, the Supreme Court expanded the application of the doctrine of forum non conveniens to encompass litigation involving domestic defendants, a foreign plaintiff, and a foreign alternative forum. *Piper Aircraft Co v Reyno*, 454 US 235; 102 S Ct 252; 70 L Ed 2d 419 (1982). In *Piper*, the plaintiff sued for the wrongful deaths of several Scottish citizens that had occurred as a result of an airplane crash that occurred in Scotland. 454 US at 238. The suit was filed in California by a legal secretary to the attorney who filed the suit after a California probate court appointed her as administratrix of the estates of the passengers killed in the crash. *Id.* at 239. The suit was removed to federal court in California and then transferred to a Pennsylvania district court. *Id.* at 240. The defendant then moved for dismissal on the basis of forum non conveniens. 454 US at 241. The defendant was the aircraft manufacturer of the plane, which had been manufactured in Pennsylvania, but included propellers manufactured by a

different entity located in Ohio. *Id.*. at 239. The plane was owned and operated by companies organized in the United Kingdom and the wreckage was located in England.

The *Piper* court emphasized that the doctrine of forum non conveniens inquiry is essentially based on convenience, not whether there is a possibility of an unfavorable change in the law. 454 US at 249. The *Piper* court explained that "under *Gilbert*, dismissal will ordinarily be appropriate where trial in the plaintiff's chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice." *Id.* The Court elaborated on the considerations that arise when a foreign plaintiff sues an American manufacturer as defendant, emphasizing the problems that would stem from the Court of Appeals decision to deny motions to dismiss on the basis that the law in the alternative forum would be less favorable:

> [W]here the foreign plaintiff named an American manufacturer as defendant, a court could not dismiss the case on grounds of forum non conveniens where dismissal might lead to an unfavorable change in the law. The American courts, which are already extremely attractive to foreign plaintiffs, would become even more attractive. The flow of litigation into the United States would increase and further congest already crowded courts.

454 US at 252. In rejecting consideration of the favorability of the law for the plaintiff, the Court also explicitly held that "the possibility of a change in the law favorable to the defendant should not be considered." *Id.* at 252 n 19. According to the Court, "[i]f the defendant is able to overcome the presumption in favor of plaintiff by showing that trial in the chosen forum would be unnecessarily burdensome, dismissal is appropriate—regardless of the fact that defendant may also be motivated by a desire to obtain a more favorable forum." *Id.* at 252 n 19. The Court also clarified that the presumption in favor of the plaintiff's choice of forum "applies with less force when the plaintiff or real parties in interest are foreign." *Id.* at 255.

The forum non conveniens doctrine serves to ensure that litigation takes place in an appropriate forum based upon a multi-factor balancing test. The courts apply the test to choose

an appropriate forum; one that will minimize the parties' outlay of time and money. Courts properly consider the practical difficulties of litigation including access to evidence and the cost of obtaining witnesses. They also consider public interests such as convenience to the courts. The public interests also include the use of judicial resources. The courts consider whether the efficient use of resources suggests that one forum is more appropriate than another. For example, selecting a forum that is familiar with the governing law conserves scarce judicial resources and enhances the decisionmaking process. Selecting the most appropriate jurisdiction may mean that a forum need not untangle complex problems involving conflict of laws or make decisions based on unfamiliar law. The public interests at stake also include consideration of whether jurisdictions that are attractive to litigants will be burdened with trials that relate to far-off events having little or no connection with the jurisdiction.

The Supreme Court has never held its list of factors to be exclusive. To the contrary, the *Gilbert* court explained that "[w]isely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy." 330 US at 508. Likewise, in *Piper*, the Court reiterated the "need to retain flexibility" and approved of its refusal to place "central emphasis on any one factor." 454 US at 249-250. Thus, considering whether accepting jurisdiction will burden the courts of the forum is appropriate under federal law. Federal and state courts have increasingly granted motions to dismiss on the basis of forum non conveniens to avoid forum-shopping foreign plaintiffs' efforts to bring their tort claims in American courts. See generally, Boyce, *Foreign Plaintiffs and Forum Non Conveniens: Going Beyond Reyno*, 64 Tex L R 193, 195-196 (1985). Giving increased weight to public interest factors would ensure that principles of judicial comity are given proper consideration.

At the same time, giving increased weight to public factors is consistent with precedent addressing the presumption in favor of a foreign litigant. When a plaintiff sues in his or her

home jurisdiction, that choice has traditionally been afforded great deference because it is presumed to be convenient. See e.g., *Koster v Lumbermens Mutual Casualty Co*, 330 US 518, 524; 67 S Ct 828; 91 L Ed 1067 (1947). But a litigant who selects a far-off forum is not necessarily entitled to a presumption that the choice was based on convenience. *Piper* held that "when a foreign plaintiff sues in a United States forum such choice is entitled to less deference because one may not easily presume that choice is convenient." 454 US at 256.

The Second Circuit dealt with this question in *Pollux Holding Ltd v The Chase Manhattan Bank*, 329 F3d 64, 71 (CA 2, 2003). Rejecting the notion that a foreign litigant was entitled to deference, the court explained:

> In such circumstances, it is more likely that forum-shopping for a higher damage award or for some other litigation advantage was the motivation for plaintiff's selection.

329 F3d at 71. The court refused to defer to a plaintiff's litigation forum selection when it was not based on convenience but rather was predicated on reasons of trial strategy:

> The plaintiff's choice of the defendant's home forum provides a much less reliable proxy for convenience. Bearing in mind that litigants rarely are concerned with promoting their adversary's convenience at their own expense, a plaintiff's choice of the defendant's home forum over other fora where defendant is amenable to suit and to which the plaintiff and circumstances of the case are much more closely connected suggests the possibility that the plaintiff's choice was made for reasons of trial strategy.

329 F3d at 74. The court concluded that a foreign plaintiff's choice to initiate suit in the defendant's home forum should be given deference only "to the extent that the plaintiff and the case possess bona fide connections to, and convenience factors favor, that forum." *Id.* See also, *Capital Currency Exchange NV v National Westminster Bank PLC*, 155 F3d 603, 609 (CA 2, 1998).

When a foreign plaintiff's connection to a forum is tenuous, any presumption of deference to the plaintiff's choice is substantially weakened. The local forum is not obligated to

open its doors to forum-shopping plaintiffs who have many choices of fora against the local defendant, choices that would be more convenient to the plaintiff, more closely connected to the incident giving rise to the suit, and more appropriate. At the same time, the weight to be afforded public interests is increased in that circumstance because a forum ought not facilitate the filing of litigation in one place over another on the basis of illegitimate concerns. Accepting jurisdiction breeds the kind of behavior that occurred after the Bhopal disaster, which was followed in less than ten days by the arrival of American plaintiffs' lawyers seeking to persuade those injured to bring suit in American courts. Boyce, *supra* at 193 n 4 citing Calcutta Statesman, Dec. 12, 1984, at 1, col 1. Suits were filed in five jurisdictions. Boyce, *supra*, at 193 n 5 (noting that "Kenneth Ditkowski filed in federal court in Chicago, seeking $50 billion. *Id.*, Dec. 13, 1984, at 2, col 4. Santa Monica attorney Jay Gould brought suit in New York for $20 billion. NY Times, Dec. 14, 1984, at 6, col 4. Melvin Belli brought suit in federal court in West Virginia seeking $15 billion. Wall St J, Dec. 10, 1984, at 2, col 3. Finally, Houston attorney Benton Musslewhite filed a $50 billion lawsuit in state court in Beaumont, Texas. Dallas Morning News, Jan. 4, 1985, at 14A, col 1.") The race to bring litigation to a favorable United States jurisdiction (state and federal) reflects the extent to which lawyers' efforts to bring suit in a more favorable jurisdiction may overcome convenience factors.

The doctrine of foreign non conveniens permits the host forum to decline to accept such litigation when the forum choice was not based on legitimate convenience factors, but rather reflects forum-shopping for illegitimate reasons. In addressing forum non conveniens in the context of a decision between two different state courts, the New Jersey Supreme Court declined to exercise jurisdiction and its reasoning is equally applicable to a foreign plaintiff who fails to bring suit in an alternative forum in which the plaintiff resides, where the accident occurred, and in which the defendant is amenable to suit. *Gore v United States Steel Corp*, 15 NJ 301; 104

A2d 670 (1954). After acknowledging that the Alabama judicial system was equipped to handle the controversy, the *Gore* court observed that the plaintiffs' "motivating reason for selecting New Jersey rather than Alabama for the institution of their action was the expectation of receiving a substantially higher verdict." *Id.* at 313. The court recognized that "[i]t may well be that plaintiffs' verdicts in metropolitan areas where average income and living costs exceed those elsewhere will generally be greater." *Id.* But, in the court's view, "decent judicial administration could not tolerate that as a persuasive or even legitimate reason for burdening metropolitan communities with litigious controversies which arose elsewhere and should in all justice be tried there." *Id.* The court rejected opposing views because they would "open our courts to extensive litigation which would deal exclusively with foreign issues and would necessarily retard the expeditious determination of local issues." *Id.* In reaching this conclusion, the court noted the news reports of a Chicago attorney who had filed "100 actions against railroads for non-resident plaintiffs on foreign claims for injuries which occurred in Arizona, California, New Mexico and elsewhere." *Id.*

Numerous jurisdictions have applied the doctrine of forum non conveniens in these circumstances to refuse jurisdiction. See e.g., *S De Ravel v Italia Societe Per Azioni Di Navigazione*, 22 Misc 2d 371; 198 NYS2d 797 (1960) (trial court properly declined to entertain jurisdiction of action brought by citizens and domiciliaries of Argentina against Italian corporation for tort that occurred on high seas between South America and Europe aboard corporation's vessel which was taking plaintiffs to Italy); *Krieger v American-Israeli Shipping Co*, 24 Misc 2d 116, 202 NYS2d 940 (1960) (court properly declined to exercise jurisdiction of suit by foreign plaintiff temporarily living in state when suit arose out of injuries suffered aboard a vessel owned by a foreign corporation, plaintiff bought ticket for trip on vessel outside state, and ticket provided rights to be determined solely in accord with law of jurisdiction in which

ticket bought). The court's decision in *Sannazzari v Pan American World Airlines, Inc,* 41 AD2d 816; 342 NYS2d 630 (1973) is illustrative of the proper approach to these kinds of cases. In *Sannazzari*, the court held that the action properly dismissed on grounds of forum non conveniens where the plaintiff was an Argentinian resident and national who sought to bring tort action arising out of automobile accident that occurred in Zambia in New York although her medical treatment was provided in Zambia and Argentina, the defendant, which owned the automobile and employed the driver did business in Zambia, and the only connection with New York was that the defendant automobile owner was a lessee of the corporation's subsidiary. The court observed that it was "the general policy of the courts of this state in the absence of special circumstances, to reject actions between non-residents founded on tort, where the cause of action arises outside the state." 342 NYS2d at 632 quoting *Aetna Ins Co v Creole Petroleum Corp*, 275 NYS2d 274, aff'd 296 NYS2d 363; 244 NE2d 56 (1966). The court's rationale for declining jurisdiction was that it "would constitute an unnecessary burden on the New York courts as well as an improper hardship on the foreign defendants." *Id.*; *Agyenkwa v American Motors Corp*, 622 F Supp 242, 247-248 (ED NY, 1985) (where non-resident of New York sought to sue for injuries arising out of an automobile accident that occurred in Ghana, the vehicle was not manufactured in New York, and the only connection with the state was that the vehicle passed through a New York distributor on its way from Ohio to Ghana, the state's courts should not be burdened with litigation having "such a tangential relation to this forum").

The Third Circuit employed the doctrine of forum non conveniens in a product liability suit to dismiss litigation involving a Norwegian incident in *Dahl v Drangeld*, 632 F2d 1027 (CA 3, 1980). Four wrongful death actions were filed in a Delaware federal district court seeking recovery for their deaths, which occurred in a crash of a helicopter that was designed and manufactured by the defendant, United Technologies Corporation. 632 F2d at 1028. The

helicopter had been sold by UTC to a Japanese corporation, All Nippon Airways, pursuant to a lease agreement with an option to purchase. *Id.* The helicopter was delivered to the airline in 1971, and in 1976, was sold to a helicopter service doing business only in Norway. *Id.* The defendant had no contact with the plane for approximately seven years before the crash. *Id.* at 1031.

As in this case, the plaintiff argued that the proofs regarding the design and manufacture of the helicopter were located in the United States since its testing occurred here and records dealing with governmental approval were located here. *Id.* at 1030-1031. But the Second Circuit noted that evidence regarding the crash was all in Norway, the recovered parts of the wreckage were in Norway. *Id.* The court also reasoned that, since the helicopter was based in and maintained in Norway, evidence regarding its condition and maintenance were located there. *Id.* The investigation into the accident had taken place and was underway in Norway, not the United States. *Id.* Moreover, the court pointed out that evidence regarding damages would come from witnesses who knew the decedents, who would be from Norway. The court was also concerned about the difficulty in impleading the corporation that owned the helicopter at the time of the crash since it operated only in Norway. *Id.* Based on these considerations, the court concluded that the private interest factors militated in favor of declining jurisdiction.

The court also evaluated the public interests to determine whether they supported the decision to decline jurisdiction. According to the court, the local public interest in the forum "clearly militates in favor of trial in Norway." *Id.* at 1032. The court based this conclusion on the fact that the plaintiffs were Norwegian citizens and that Delaware was only connected to the suit because the defendant had incorporated there. The court could not justify the commitment of Delaware judicial time and resources because Delaware lacked "any nexus ... with what is essentially a Norwegian case." *Id.* See also, *Jennings v Boeing Co*, 660 F Supp 796 (ED Pa,

1987) (dismissal on the basis of forum non conveniens is appropriate where Irish plaintiff's decision to file suit in Pennsylvania was not based on convenience to her but rather to "take advantage of what she perceives to be a more favorable law"); *Grodinsky v Fairchild Industries, Inc*, 507 F Supp 1245 (D Md, 1981) (forum non conveniens properly applied to dismiss suit brought by Canadian citizens for injuries arising out of airplane crash that occurred over Canadian territory when aircraft was designed and manufactured in United States by American corporation, was equipped with engines manufactured by a Canadian corporation operating in Quebec, and later sold to Canadian corporation); *Cheng v Boeing Co*, 708 F2d 1406 (CA 9, 1983) (not an abuse of discretion to dismiss claims arising out of airplane crash in Taiwan on ground of forum non conveniens).

The Sixth Circuit similarly upheld the dismissal of a wrongful death action brought by the plaintiff against an airline and airplane manufacturer where the accident took place in Spain, the records connected with the plane were in the hands of Spanish authorities, and most of the witnesses resided in Spain. *Kryvicky v Scandinavian Airlines System*, 807 F2d 514 (CA 6, 1986). The plaintiff and her decedent husband had moved from Brazil to Spain, where they lived until the decedent was killed in an airplane crash that took place near the Madrid airport. *Id.* at 515. After the accident, the plaintiff moved to Michigan, the state in which she had resided many years before moving to Brazil. *Id.* She filed suit in Wayne Circuit Court against Boeing Company, the manufacturer of the aircraft, and Scandinavian Airlines System, the company that had leased the plane to the airline that was operating it at the time of the crash. *Id.* The private factors favored trial in Spain since that was the situs of the accident, where the wreckage was located, where records connected with the plane were located, and where the authorities had conducted an investigation of the accident. *Id.* In addition, most witnesses lived in Spain. Moreover, the defendants could not implead the Spanish aviation authorities or the airline in

United States courts. And, of strong importance was the fact that Spain had a greater interest in the outcome of the case. The court's ruling underscores the importance of the foreign country's greater interest in the ensuing products liability litigation. *Id.* at 517 citing *Dowling v Richardson-Merrell, Inc*, 727 F2d 608, 616 (CA 6, 1984). See also *Duha v Agrium, Inc*, 340 F Supp 2d 787 (ED Mich, 2004) (dismissal on the basis of forum non conveniens was proper even though the plaintiff was a United States citizen, where the plaintiff sued an Argentine company, its parent company which was a Canadian corporation, and its United States affiliate, raising contract and tort theories, because employment performance and termination took place in Argentina where witnesses were located and district court would have difficulty summoning foreign witnesses for trial or deposition testimony).

Courts have recognized that court congestion and burdens on the proposed forum are entirely appropriate considerations when analyzing forum non conveniens. In *Wolf v Boeing Co*, 61 Wash App 316; 810 P2d 943 (1991), the court upheld a trial court's dismissal of a suit brought by the estates and survivors of passengers killed in an airplane crash in Mexico on the basis of forum non conveniens. Although the plaintiff raised product liability claims against the defendant corporation, which was located in Washington, the court concluded that the public and private interests favored trial in Mexico. The accident had been investigated there, the plaintiffs were residents of Mexico, the crash occurred in Mexico, substantially all witnesses to the crash were in Mexico, the aircraft belonged to a Mexican corporation, maintenance of the aircraft took place in Mexico, and evidence regarding damages was in Mexico. The court rejected the plaintiff's contention that crash evidence was less important than evidence regarding aircraft crashworthiness and design, which was located in or has facilities operating in Washington, because it was important to Boeing. 810 P2d at 950. The court also noted that it was "entirely appropriate" to consider the "court congestion of King County as a factor in" the forum non

conveniens decision. *Id.* at 951. See also, *Fustok v Banque Populaire Suisse*, 546 F Supp 506, 513 (SD NY, 1982) ("litigation presents legal and factual issues of substantial complexity, and the sheer volume of papers already submitted on this motion with its projection of numerous issues portends an extensive and time-consuming process which necessarily would delay the normal and orderly progress of other cases involving litigants who are here as a matter of right"); *Pratt v United Arab Shipping Co*, 585 F Supp 1573 (ED La, 1984) ("public has little interest in seeing Pratt's case tried in this forum ... [when] [n]o statistics need to be cited to show that the Eastern District of Louisiana has one of the busiest trial dockets in this country" and the case lacks "a local connection that justifies the imposition of jury duty upon members of this community").

Persuasive authority supports DaimlerChrysler's position that this Court should clarify the *Cray* factors to make clear that the public interests to be considered include the burden on Michigan courts from accepting jurisdiction of litigation that has little connection to the state. It is entirely appropriate to decline jurisdiction in cases without a local connection that is sufficiently strong to justify the imposition of the costs of handling the litigation and the burden of jury duty on Michigan citizens. Accepting litigation involving remote incidents and foreign plaintiffs without any local connection other than that a corporate defendant is located in Michigan is likely to encourage additional efforts to litigate such claims here. In addition to allowing the state's court's to be used for illegitimate reasons, any such policy threatens to engulf Michigan courts with litigation from foreign plaintiffs seeking to shop for a forum that they perceive to be more favorable. It is entirely appropriate to allow a trial court to consider this problem in determining whether to decline jurisdiction.

### C. MICHIGAN'S FORUM NON CONVENIENS DOCTRINE SUPPORTS THE CONSIDERATION OF ADDITIONAL FACTORS SUCH AS THE EXTENT TO WHICH ACCOMMODATING A REQUEST FROM A FOREIGN LITIGANT TO HEAR A LAWSUIT ARISING OUT OF A CLAIMED TORT THAT OCCURRED IN A FOREIGN JURISDICTION WILL HAVE CONSEQUENCES FOR THE NUMBER AND TYPES OF FUTURE LAWSUITS HEARD BY MICHIGAN COURTS.

Michigan courts first dealt with the question of declining jurisdiction in *Cofrode v Gartner*, 79 Mich 332; 44 NW 623 (1890). In *Cofrode*, a trial court declined to hear a case within its jurisdiction. The litigation arose out of a dispute regarding a contract for building a railroad in the upper peninsula; it was filed in Wayne County Circuit Court. 79 Mich at 336. The plaintiffs were both from Pennsylvania and the defendants were from New York and Illinois. *Id.* The circuit court struck the case from its docket after noting that the suit would require several weeks of trial, would cost the county thousands of dollars in expense to handle, and was one in which "the county has no interest, either in the parties or the subject-matter." *Id.* The circuit court emphasized that the "docket of this circuit is crowded, and we have more than we can do in determining matters wherein the jurisdiction of the court is undoubted." *Id.* Distinguishing a case in which the cause of action arose in a foreign country from the circumstances of this case, where the cause of action arose in Michigan, the Court concluded that the circuit court had jurisdiction and was obligated to exercise it to hear the case. *Id.* at 343. The Court's analysis focused on the privileges and immunities clause of the United States Constitution as a basis for holding that the trial court erred in refusing to exercise its jurisdiction.

But *Cofrode* carefully distinguished the situation that is presented by DaimlerChrysler in this case:

> Whether courts ought to take jurisdiction in suits between aliens, when the cause of action arose in a foreign country, is not the question in dispute. If it were, I should be willing to follow the views expressed by Chief Justice Marshall in *Mason v. The Blaireau*, 2 Cranch, 240....

79 Mich at 340. The Court explained that "in suits between foreigners, brought in our courts, the courts are not obligated to entertain jurisdiction." *Id.* The Court recognized that jurisdiction might be declined upon principles of comity.

In 1973, the Michigan Supreme Court considered the issue that it had reserved in *Cofrode*, the question of whether a court could decline to hear a suit when the incident precipitating the litigation had occurred outside the state and adopted the doctrine of forum non conveniens. *Cray v General Motors Corp*, 389 Mich 382; 207 NW2d 393 (1973). In four consolidated matters, each involving automobile accidents that took place outside of Michigan and claims brought against the manufacturer, General Motors Corporation, the Supreme Court considered whether to adopt the doctrine of forum non conveniens. *Cray* distinguished *Cofrode* by explaining that the concern about a possible violation of the privilege and immunities clause of art IV, § 2 of the United States Constitution had been "eliminated by other decisions." 389 Mich at 389. The Court relied on *Gulf Oil Corp v Gilbert*, 330 US 501; 67 S Ct 839; 91 L Ed 2d 1055 (1947), which held that a court may resist imposition upon its jurisdiction even though jurisdiction is authorized by the general venue statute. Noting the growth of the "forum non conveniens philosophy," the Court emphasized that it was intended to ensure convenience, efficiency, and justice. *Id.* at 392. The Court counted twenty-one states, which had adopted the doctrine, and reviewed state court decisions explaining its purpose and use. *Id.* at 392-395.

The Court held that the doctrine of forum non conveniens should apply in Michigan and "that its application should lie with the discretion of the trial judge." *Id.* at 395. The Court then set forth criteria to guide the trial court's discretion that it drew from *Gilbert* and the other cases it had cited. *Id.* According to *Cray*, the trial court's balancing and weighing of factors should include:

1. The private interest of the litigant.

a. Availability of compulsory process for attendance of unwilling and the cost of obtaining attendance of willing witnesses;

b. Ease of access to sources of proof;

c. Distance from the situs of the accident or incident which gave rise to the litigation;

d. Enforceability of any judgment obtained;

e. Possible harassment of either party;

f. Other practical problems which contribute to the ease, expense and expedition of the trial;

g. Possibility of viewing the premises.

2. Matters of public interest.

a. Administrative difficulties which may arise in an area which may not be present in the area of origin;

b. Consideration of the state law which must govern the case;

c. People who are concerned by the proceeding.

3. Reasonable promptness in raising the plea of Forum non conveniens.

*Id.*

Among the other decisions cited with approval by *Cray* were several specifically mentioning the extent to which accommodating a request from a foreign litigant to hear a lawsuit arising out of a claimed tort that occurred in a foreign jurisdiction would have consequences for the number and types of future lawsuits heard by the courts of that jurisdiction. For example, the *Cray* court discussed *Price v Atchison, T&SFR Co*, 42 Cal 2d 577; 268 P2d 457 (1954) with favor. *Price* arose out of a suit brought in Los Angeles by a New Mexico resident. The defendant was a Kansas corporation doing business in both places. All witnesses resided in New Mexico. The court relied upon *Gilbert* and, saying the doctrine was an equitable one, held at 583-584; 268 P2d at 461:

> (W)e are of the view that the injustices and the burdens on local courts and taxpayers, as well as on those leaving their work and businesses to serve as jurors which can follow from an unchecked and unregulated importation of transitory causes of action for trial in this state . . . require that our courts . . . exercise their discretionary power to decline to proceed in those causes of action which they conclude, on satisfactory evidence, may be more appropriately and justly tried elsewhere . . ..

This reliance on *Price* and its consideration of the burdens on local courts suggests that the *Cray* court deemed this an appropriate consideration.

Michigan courts have already recognized these factors on occasion. In *Hamann v American Motors Corp*, 131 Mich App 605, 609; 345 NW2d 699 (1984), the court approved the trial court's consideration of administrative difficulties that might arise, the question of what law would apply, and the concern "that, if it were to accept jurisdiction, it might open the floodgates and encourage forum shopping." 131 Mich App at 609. In doing so, the *Hamann* court relied on this Court's recognition that "The Wayne Circuit Court, where this action was filed, has the most crowded civil docket of any court in the state." *Id.* quoting *Anderson v Great Lakes Dredge & Dock Co*, 411 Mich 619, 631; 309 NW2d 539 (1981). The *Hamann* court further noted that this Court concluded in *Anderson* that the "burden on our courts and upon the defendant's ability to prepare a defense greatly outweighs the remote interest the plaintiff has shown in behalf of conducting this trial in Michigan." 411 Mich at 631. Similarly, in *Holme v Jason's Lounge*, 168 Mich App 132, 135-136; 423 NW2d 585 (1988), the Court of Appeals noted that both the Court of Appeals and Supreme Court "have taken judicial notice of the fact that the Wayne Circuit Court, where this action was filed, has the most crowded civil docket of any court in the state." *Id.*

This Court should specifically add these considerations to the *Cray* factors to ensure that trial courts properly consider them in exercising their discretion over whether to accept or decline jurisdiction. Globalization of the world economies suggests that plaintiffs may

increasingly try to bring litigation in the courts of a country perceived as more favorable to the plaintiff. Just as the courts within the United States guard against forum shopping, which undercuts the credibility of the judiciary as a whole, so should the state's courts refuse to accept litigation involving only tangential connection to Michigan when another more appropriate foreign forum is available. Doing so is consistent with long-standing principles that provide the foundation for the doctrine of forum non conveniens. And it will have the salutary effect of preserving scarce Michigan judicial resources for litigation that has an appropriate connection to Michigan.

### D. THE DOCTRINE OF FORUM NON CONVENIENS IS PROPERLY APPLIED TO DISMISS A LAWSUIT BROUGHT BY A FOREIGN PLAINTIFF RAISING TORT CLAIMS AGAINST A LOCAL DEFENDANT WHEN THE INCIDENT GIVING RISE TO THE SUIT OCCURRED ON FOREIGN SOIL, AN ALTERNATIVE FORUM IS AVAILABLE, AND BOTH PRIVATE AND PUBLIC INTERESTS SUGGEST THAT THE ALTERNATIVE FORUM IS MORE CONVENIENT.

The trial court applied the doctrine of forum non conveniens in accord with this long-standing tradition of balancing public and private interests to determine that private and public interests favored trial in Croatia. (Opinion and Order Granting Defendant's Motion for Dismissal, 3/14/03, pp 2-5; Apx 6a-9a). The trial court noted that the accident took place on a roadway on the Island of Brac, Croatia, the witnesses are in Croatia (although it is disputed whether there are any eye witnesses), the vehicle was designed and manufactured in the United States, although the transmission was designed and manufactured in Japan. (*Id.*, p 2; Apx 6a). The trial court reasoned that the law to be applied was unlikely to be Michigan law, the accident occurred in Croatia, the transmission was not of Michigan origin, and the plaintiffs did not dispute the availability of an alternative forum in Croatia. (*Id.*)

Michigan courts lack the power of compulsory process over witnesses in Croatia. MCR 2.506(G)(1). This creates huge problems for a defendant, both at the discovery stage and during trial. See generally, Dunn, *The Thing About Non-U.S. Discovery for U.S. Litigation: It's*

*Expensive and Complex*, 67 Def Counsel J 342 (2000). It is particularly problematic in this case because the accident took place in Croatia, the investigation of the accident took place in Croatia, the witnesses concerning the vehicle's maintenance are in Croatia, and the witnesses concerning damages are in Croatia. Litigation here will also handicap DaimlerChrysler because it will be unable to implead any Croatian persons or entities that may be responsible for causing the accident or increasing the damages. DaimlerChrysler has asserted that these could include the persons and dealerships responsible for maintenance of the vehicle, and the persons and entities involved in medical treatment. Since the transmission, which is the part that allegedly malfunctioned, was not designed in Michigan, but rather in Japan, additional complexity will be introduced.

At the same time, accepting jurisdiction means that Michigan courts will face grave and complex practical and legal difficulties including issues surrounding choice of law, and evaluation of Croatian law. See *Farrell v Ford Motor Co*, 199 Mich App 81; 501 NW2d 567 (1993) lv den 445 Mich 863; 519 NW2d 158 (1994); *Hall v General Motors Corp*, 229 Mich App 580, 585; 582 NW2d 866 (1998) lv den 459 Mich 986; 593 NW2d 556 (1999). Efforts to apply Croatian law will prove difficult and time-consuming. Accepting jurisdiction will require extensive use of the Hague Convention for discovery, a protracted and unfamiliar process to most Michigan judges. Any trial is also likely to be lengthy and complex. These difficulties would be tolerable if the connection to Michigan was strong; but the connection here is remote and tangential, despite DaimlerChrysler's location here. If this litigation proceeds here, it will burden Wayne County citizens with jury duty on a lawsuit with little connection to this location, and it will encourage additional foreign litigation against Michigan manufacturers for injuries or accidents that take place in remote places of the world.

Given these factors, the trial court's decision constituted a proper exercise of discretion under *Gilbert* and *Piper*. Thus, it should have been upheld by the Court of Appeals and a reversal of that Court's opinion is required.

## ISSUE II

**IF ANOTHER MORE APPROPRIATE FORUM EXISTS, A MICHIGAN COURT MAY RESIST JURISDICTION EVEN WHEN ITS OWN FORUM IS NOT SERIOUSLY INCONVENIENT.**

The "seriously inconvenient" requirement can be traced to *Robey v Ford Motor Co*, 155 Mich App 643; 400 NW2d 610 (1987), where it was adopted in a conclusory statement without citation to authority. *Robey* dealt with a case in which the "facts are on all fours with those in *Cray*." 155 Mich App at 644. Judge Burns, emphasizing the discretionary standard of review, concluded that the trial court did not abuse its discretion when it refused to exercise its jurisdiction because the accident occurred in Virginia, the plaintiff lived in Virginia, and the defendant was doing business in Virginia. 155 Mich App at 647-649.

This "seriously convenient" language is inconsistent with *Cray*, contrary to the rationale for the doctrine of forum non conveniens, and unfairly saddles a defendant in a local jurisdiction with a higher standard than is applied to the plaintiff even when the plaintiff's reason for choosing the forum is likely to be based on forum shopping rather than convenience. As a result, this Court should make clear that Michigan law does not require such a showing.

This Court should make clear that the standard for determining whether a Michigan court may resist jurisdiction does not require a defendant to show that its own forum is seriously inconvenient. Instead, the balancing should take into account all the factors including the extent to which accommodating a request from a foreign litigant to hear a lawsuit arising out of a claimed tort that occurred in a foreign jurisdiction will have consequences for the number and types of future lawsuits heard by Michigan courts. When the litigation has been filed by a foreign plaintiff and raises claims arising out of incidents that occurred outside of the United States, the plaintiff's forum choice is no longer entitled to the traditional presumption that it is the most convenient place for the litigation to proceed. And in that circumstance, it should be

unnecessary for the defendant to show that the forum is "seriously inconvenient." It should be enough to show that it is inconvenient and that the balancing favors litigation in the alternate forum.

The Supreme Court considered the doctrine of forum non conveniens in *Anderson v Great Lakes Dredge & Dock Co*, 411 Mich 619; 309 NW2d 539 (1981) and its analysis sheds light on this question. *Anderson* refined the *Cray* court's discussion of balancing by explaining that when the plaintiff's interest in the forum is slight "as when the plaintiff has chosen a forum where none of the parties or witnesses reside, where Michigan law does not apply and where none of the operative facts have occurred the choice is entitled to less weight than where there exists a significant nexus between litigation and the chosen forum." 411 Mich at 628. *Anderson* held that the "balance will generally swing strongly in favor of the defendant when plaintiff's 'choice of forum (is) supported only by the fact that it was chosen.'" *Id.* quoting *Pacific Car & Foundry Co v Pence*, 403 F2d 949, 955 (CA 9, 1968). Applying this altered balancing, the *Anderson* court concluded that when the "only apparent connections of any kind are that plaintiff's counsel is located here and that there may be testimony at trial from some experts who reside here," the inconvenience to the defendant and to the public outweighed the plaintiff's interest. *Id.* at 629-630.

Superimposing a "seriously inconvenient" requirement on top of the balancing embraced by *Cray* and *Anderson* improperly alters the court's analysis of the public and private interests at stake. It will require Michigan courts to adjudicate many disputes involving foreign litigants and arising out of incidents that took place outside of the United States merely because the forum selected by the plaintiff is not "seriously" inconvenient. It requires Michigan courts to engage in a weighted analysis that offers more protection for plaintiffs than is available for defendants. And it suggests that, even when the public interests at stake favor declining jurisdiction, the court

may be forced to hear the case because although inconvenient, the forum is seriously inconvenient.

The doctrine of forum non conveniens is intended to weigh and balance the private interests of the litigants on both sides. It is also intended to take into account the public interests that are at stake. Although the plaintiff's choice of forum is traditionally afforded some deference, this deference is based upon the notion that the plaintiff will select a forum that is convenient for the plaintiff. This deference was never intended to safeguard decisions made on the basis of international forum shopping. Nor should it be permitted to do so in Michigan courts. To the contrary, this Court should squarely hold that a foreign litigant seeking to litigate an incident which occurred outside the United States even though the defendants are amenable to suit in the country of the incident is not entitled to a presumption that the plaintiff's selection was based on convenience. If anything, a choice to litigate in a far-off jurisdiction suggests that the choice may be based on impermissible and illegitimate factors. In these circumstances, the Court should either adopt a categorical rule that bars such litigation in Michigan, see Scalia, *The Rule Of Law As A Law Of Rules*, 56 U Chi L R 1175 (1989), or it should require a balancing without any "seriously inconvenient" showing.

## RELIEF

Wherefore Amicus Curiae Michigan Defense Trial Counsel respectfully requests this Court to reverse the Court of Appeals and reinstate the judgment of the trial court and to adopt a rule making clear that the *Cray* factors require the trial court to consider the extent to which accommodating a request from a foreign litigant to hear a lawsuit arising out of a claimed tort that occurred in a foreign jurisdiction will have consequences for the number and types of future lawsuits heard by Michigan courts, that defendants need not show serious inconvenience to succeed with a forum non conveniens motion, and that Michigan courts should routinely decline to exercise jurisdiction when circumstances suggest international forum shopping and when the factors including the public interests at stake suggest a foreign jurisdiction is appropriate.

Respectfully submitted,

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