STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
(Cavanagh, P.J., and Jansen and Fort Hood, JJ.)

JOSIP RADELJAK, Personal Representative,
Estate of ENA BEGOVIC, Deceased;
JOSIP RADELJAK, Individually 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 Circuit No. 02-228401-NP

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APPELLEES' BRIEF ON APPEAL

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INTRODUCTION

A Jeep Grand Cherokee was designed and manufactured in Michigan, specifically for export to Europe. Like virtually all vehicles on the market today, the final product incorporated component parts from various international suppliers, including Japan. The Cherokee was purchased in Italy by a Croatian.

These Jeeps had a transmission problem: they would slip from "Park" to "Reverse" without driver involvement. This Jeep Grand Cherokee did exactly that, killing a famous Croatian actress in her native land.

DaimlerChrysler Corporation knew that many American customers had complained to the federal government about the transmissions on these Jeeps. The National Highway Traffic Safety Administration investigated the matter, and found a sufficient factual basis to raise the level of their involvement, to what would have eventually been a federally mandated recall. DaimlerChrysler opted instead for a voluntary recall of Jeep Cherokees, but only in the United States. European editions were apparently not recalled, although they shared the same faulty transmission. Plaintiffs never received notice of the U.S.-based recall and only discovered it after the subject fatal accident. Thus, there was no warning from the American manufacturer to its European customers that a defect had prompted a recall.

An estate was opened on behalf of the deceased actress in Oakland County, Michigan. This products liability action was filed in the circuit court in Wayne County, Michigan, the county in which the vehicle had been designed and assembled. DaimlerChrysler Corporation moved for dismissal of the action on grounds of forum non conveniens. It argued, *inter alia*, that the transmission was manufactured in Japan, and that it would be inconvenient to try the case in Michigan because certain fact witnesses were in Croatia. Plaintiffs responded that the decision to include a 1960s-era Japanese transmission was made here in Michigan, and the principle

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witnesses involved in the decision-making process were located in this state. The circuit court agreed with Defendant, and granted the motion [APX 5a]. The Michigan Court of Appeals, however, reversed in an unpublished opinion. *Radeljak v DaimlerChrysler Corp*, unpublished opinion per curiam of the Court of Appeals, decided December 14, 2004 (Docket No. 247781) [APX, 11a].

DaimlerChrysler applied for leave to appeal to the Michigan Supreme Court. Plaintiffs opposed that application. In an order dated June 10, 2005, the Supreme Court granted leave to appeal, and instructed the parties to brief two additional issues:

> (1) Whether the public interest factors of the forum non conveniens doctrine set forth in *Cray v General Motors Corp*, 389 Mich 382, 396 (1973), should be revised or modified; and (2) whether, even if another more appropriate forum exists, a Michigan court may not resist jurisdiction unless its own forum is "seriously inconvenient." See *Roby v Ford Motor Co* [*sic – Robey*], 155 Mich App 643, 645 (1986).

The Court also invited briefs from amicus curiae.

STATEMENT OF FACTS

This is a product liability case, arising from Defendant's negligent design of a motor vehicle, in Michigan, and a resulting motor vehicle accident which occurred on August 15, 2000, on the Island of Brac, Croatia (Complaint, ¶ 5, p 2, APX 19a). Plaintiffs and Plaintiff's decedent, Ena Begovic, were occupants of a 1993 Jeep Grand Cherokee. *Id.*, p 2, ¶ 7 (APX 19a). The vehicle was designed, manufactured and distributed for Defendant DaimlerChrysler and/or its predecessor at its facilities in the State of Michigan, Plaintiff alleges. *Id.*, ¶ 8 (APX 19a). Ena Begovic died and the other Plaintiffs were injured when the now-recalled 1993 Jeep Grand Cherokee went from PARK to REVERSE and rolled backward off a roadway. *Id.*, pp 2-3, ¶¶ 11-13 (APX 19a-20a). The transmission gearshift lever "unexpectedly and without occupant input,

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moved into REVERSE, causing the vehicle to travel rearward, after seeming to have been stable." *Id.*, p 3, ¶ 13 (APX 20a).

Plaintiff further alleges that Defendant, DaimlerChrysler, had experienced similar problems on other vehicles with similar transmissions; had received more than 74,000 warranty claims; had received hundreds of complaints and was and should have been aware of hundreds of crashes with injuries and fatalities resulting from the same problem; and knew that similar experiences were more than five times more likely to occur with this sort of vehicle (the Jeep Grand Cherokee) than Defendant's competitors' sport utility vehicles (SUV's). *Id.*, ¶ 15 (APX 20a).

As amplified on the record by Plaintiffs' attorney, Plaintiffs challenge Defendant's decision to place this particular transmission in this type of vehicle:

> This case is not so much about the design of the transmission that was in this vehicle as it is about the decisions made by Chrysler with respect to whether that transmission should go in this vehicle as opposed to a more appropriate transmission.
>
> This transmission was designed for a 1960's vehicle. Chrysler, not some company in Japan, made a decision that they were going to put this 1960's transmission into the Jeep Grand Cherokee, the top of the line Jeep Cherokee.
>
> Those decisions were made here. And [the] vehicle was designed here. The vehicle was made here and it was sold from here to a dealership in Rome, Italy where my client's [*sic*] purchased it. [Tr 12/20/02, pp 10-11].

The Jeep Grand Cherokee was the subject of a recall by DaimlerChrysler after the initiation of an investigation by the National Highway Traffic Safety Administration (NHTSA) (Exhibit 1, APX 53b).[1] There are numerous U.S. personnel involved in the matter. *Id.* In fact,

[1] The exhibits to this Brief are identical to those attached to Plaintiff's Response to Defendant's Motion for Dismissal (filed: 10/25/02, APX 26b) and to the Court of Appeals brief.

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part of the basis of NHTSA's decision to upgrade the investigation, which resulted in the recall, were the over 74,000 customer complaints and warranty claims – all by U.S. residents. *Id.*

Defendant has acknowledged the vehicle was designed and manufactured in Michigan (Exhibit 2, APX 66b). Based upon independent research, it was both designed and built in the City of Detroit – as noted hereinafter. In answering the Complaint (Answer, p 2, ¶ 8, APX 4b), Defendant agreed "that the 1993 Jeep Grand Cherokee was designed, in part, and assembled in Michigan."

As can be seen from a December 14, 1990 letter from Chrysler Jeep and Engineer's Mr. F. J. Castaing, the "ZJ" (i.e., Jeep Grand Cherokee) was a major product program (Exhibit 3, APX 73b). Chrysler Jeep & Truck Engineering is based in Michigan, on Plymouth Road. Mr. Castaing, presently a Birmingham, Michigan resident, has testified in such cases previously. Defendant has 45 engineering personnel listed with Mr. Castaing, probably Michigan-based (Exhibit 4, APX 76b).

Defendant's Product Planning Committee consists of numerous U.S. – mostly if not all Michigan-based – individuals (Exhibit 5, APX 80b). This Committee activity was instrumental in the decision to utilize a 1960's-style three-speed transmission for this vehicle, while representing it as a four-speed transmission based upon the inclusion of an overdrive compounder – the very source of the "PARK" to "REVERSE" problem.

Defendant's basic Chrysler customer relations owner contract report record, known as "CAIR" ("customer assistance inquiry request") is a system which is U.S.-based and hooked into Defendant's Michigan, general counsel's office (Exhibits 6 and 7, APX 82b, 84b). Defendant has indicated that one purpose of the CAIR Mirror Server is to provide a server which contains a mirror of the CAIR data base "that can be manipulated by General Counsel's Office personnel

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and by selected outside law firms, to allow the data to be frozen as of the inception of a lawsuit, and written to non-volatile memory (CD-ROM), and then provided to counsel and opposing counsel as part of the legal discovery process" (Exhibit 7. APX 84b). Such "manipulat[ors]" would include Defendant's Michigan-based general counsel and outside Michigan law firms, such as Miller Canfield, which was listed as a defense attorney at the circuit court level in the present case (Exhibit 8, APX 87b).

In addition, several former Chrysler employees still spend their time with automotive companies in the metro-Detroit area (Exhibits 9-12, APX 89b-97b).

When Defendant's vehicles are the subject of a recall and/or Technical Service Bulletins, Defendant handles the resulting communications and coordinates them through its Customer Services Field Operations (see Exhibit 13, APX 98b, which depicts a letter sent to customers to inform them of the shift problems and warns that it could "cause an accident"; this American notice did not go to European customers). This "CSFO" function is also Michigan-based.

The only thing having anything to do with this case which occurred in Croatia is the accident itself. But this is not an automobile negligence case; it is a product liability case (Complaint ¶ 17, pp 3-4; APX 20a-21a).

Although these are some Croatian witnesses, they have agreed or will agree to come to this country to testify: Professor Josip Paldino, M.D., Ph.D. (family doctor of Plaintiff's decedent and of two of the surviving Plaintiffs [Exhibit 14, APX 100b]); Vinko Ugrini (authorized "legal Tribunal surveyor" assigned to investigate this case in Croatia for the police; [Exhibit 15, APX 102b]); and Vlatko Andrie (who repaired and/or provided maintenance for the vehicle at issue [Exhibit 16, APX 104b]).

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Ms. Ena Begovic was a well-known Croatian actress (Exhibit 17, APX 106f); it is quite reasonable to suppose that the Croatian witnesses whose testimony will be required at trial will willingly come to this country to testify. In addition, there are American witnesses to the history and potential of decedent's career. For example, Ms. Begovic was scheduled to perform in a movie with American actor Martin Sheen.

Compare the very limited quality of the evidence and witnesses available solely through travel to Croatia. While Plaintiffs attached various documentary evidence to their brief opposing the motion in the trial court, Defendant attached no documentary proofs whatsoever to its motion for dismissal on the basis of forum non conveniens (Motion filed: 10/3/02, APX 9b).[2]

Plaintiffs have already translated the police report, and obtained the police photographs, along with the police log, medical reports and miscellaneous information. All of these items have been or will be provided to the Defendant, along with any remaining and continuing medical information, translated and provided to the Defendant.

This small amount of translated "Croatian information" stands in stark contrast to the thousands of pages of technical and management documents of Defendant and the U.S. National Highway Traffic & Safety Administration (NHTSA). All of these materials would have to be translated into Croatian, if the Court accepts Defendants' argument that suit must be filed overseas. The NHTSA file itself consists of, or references, more than 100,000 pages of documents, and the DaimlerChrysler design and manufacturing files are equally as voluminous.

PROCEDURAL HISTORY

Defendant moved for dismissal on grounds of forum non conveniens (Motion filed: 10/3/02, APX 9b). Plaintiff responded, with exhibits (copies attached hereto), on October 25,

[2] As a result, this case is not factually poised for review by the state's highest court.

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2002 (APX 26b). On October 28, 2002, Defendant supplemented its brief in support of the dismissal motion (APX 126b), attaching an unsworn letter, purportedly from a Croatian attorney, indicating:

> Pursuant to Croatian law, which recognizes a product liability cause of action under its Statute of Obligations Relations, Croatian Courts will have jurisdiction over the matter and over DaimlerChrysler Corporation. Also the limitations period for bringing an action pursuant to the Statute of Obligations Relations is three years from the date the person became aware [of] the damage. There is no statute of repose under Croatian law. [APX 129b.]

The letter identifies no interest that Croatia would have in application of its product liability law to a Michigan motor vehicle manufacturing company. *Id.*

Defendant also supplemented its Response to Plaintiffs' Request to Admit, now indicating that the transmission in the accident vehicle "was designed and assembled by Aisen Warner," in Japan (Defendant's supplement to its Brief in Support of Motion for Dismissal on forum non conveniens grounds; filed: 10/28/02, Exhibit B, APX 131b).

In responding to Defendant's motion, Plaintiffs made the following points:

1. That Michigan "is where the documents are", which relate to the design of this vehicle, and "this is where all the design decisions were made giving rise to this case";

2. All of the documents relating to the occurrence of the accident which were generated in Croatia were already in the hands of Plaintiffs' attorney and would be provided voluntarily to the defense;

3. There were no eyewitnesses to this accident besides the occupants of the vehicle, who would appear and testify voluntarily;

4. The police had never finished their investigation of this accident, but had put their investigation on hold, because they did not wish to involve themselves in a technical dispute, but were "awaiting the outcome of <u>this litigation</u>" (emphasis in original);

5. Medical personnel would appear voluntarily for depositions;

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6. Damages witnesses are scattered throughout the globe, so that there is no particular reason therein to litigate this matter in Croatia;

7. Many of the witnesses speak English, in addition to their native languages.

[Response to Motion for Dismissal; filed: 10/25/02, pp 1-2, ¶¶ 1-5, APX 26b].

The motion was heard by the circuit court on December 20, 2002, with the court taking the matter under advisement (Tr 12/20/02, p 21).

The circuit court granted the motion by Opinion and Order entered on March 14, 2003 (Exhibit 18, APX 5a).

In an unpublished decision dated December 14, 2004, the Michigan Court of Appeals reversed the circuit court's decision, applying the factors of *Cray v General Motors Corp*, 389 Mich 382; 207 NW2d 393 (1973). *Radeljak v DaimlerChrysler Corp*, unpublished opinion per curiam of the Court of Appeals, decided December 14, 2004 (Docket No. 247781) (APX, 11a).

I. THE COURT OF APPEALS DID NOT ERR IN APPLYING THE *CRAY* FACTORS TO REJECT DEFENDANT'S ARGUMENT OF FORUM NON CONVENIENS

A. Introduction/Standard of Review

Application of the doctrine of forum non conveniens lies within the discretion of the trial judge. *Russell v Chrysler Corp*, 443 Mich 617, 621; 505 NW2d 263 (1993); *Cray v General Motors Corp*, 389 Mich 382, 395 (1973); *Miller v Allied Signal, Inc*, 235 Mich App 710, 713; 599 NW2d 110 (1999), app dismissed, 624 NW2d 190 (2001). "Nevertheless, in exercising this discretion, the trial judge is not without constraint." *Poet v Traverse City Osteopathic Hosp*, 433 Mich 228, 236; 445 NW2d 115 (1989). "When [discretion is] invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law, and

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directed by reason and conscience of the judge to a just result." *Id.*, 236-237; quoting, *Langnes v Green*, 282 US 531, 541; 51 S Ct 243; 75 L Ed 520 (1931).

Where the "*Cray* " factors do not demonstrate that the case is among those exceptional ones in which the convenience of the *parties* (plural) and the ends of justice would be better served by filing the action overseas, the circuit court abuses it discretion by granting dismissal based on forum non conveniens. *Manfredi v Johnson Controls*, 194 Mich App 519, 521-526; 487 NW2d 475 (1992).

B. Discussion

This Court in *Cray* identified the following factors to be considered:

> A balancing out and weighing of factors to be considered in rejecting or accepting jurisdiction in such cases 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;

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c. People who are concerned by the proceeding.

3. Reasonable promptness in raising the plea of *forum non conveniens*. [389 Mich at 395-396.]

In moving for dismissal based on forum non conveniens, Defendant is obliged to demonstrate that this is one of those "exceptional cases where a weighing of all the many relevant factors, of which residence is but a part, decisively establishes that there is available another forum where trial will best serve the convenience of the parties and the ends of justice." *Cray, supra*, at 392, quoting with approval *Gore v United States Steel Corp*, 15 NJ 301; 104 A2d 670 (1954). Defendant submitted to the circuit court exactly two documents to support its contention that trial would be inconvenient in Michigan: an unsworn statement from a purported Croatian attorney (APX 129b), and Defendant's response to a request to admit in which it stated that the transmission was designed by a company called "Aisen Warner" (APX 131b). Defendant has utterly failed to carry its factual burden of showing that forum non conveniens should apply in this case, and instead has painted with a broad brush to promote a "no foreigners" strategy. If this Court agrees that the forum is inconvenient, that decision clearly will not be on the "strength" of any record Defendant has made.[3]

As the Court of Appeals stated in *Robey v Ford Motor Co*, in the course of reversing such a dismissal order:

> When a party requests that a court decline jurisdiction based on the doctrine of forum non conveniens, there are two inquiries for the court to make: whether the forum is inconvenient and whether there is a more appropriate forum available. If there is not a more appropriate forum elsewhere, the inquiry ends and the court may not resist imposition of jurisdiction. If there is a more appropriate forum, the court still may not decline jurisdiction unless its own forum is seriously inconvenient. [155 Mich App at 645.]

[3] Thus, even if this Court modifies the *Cray* and *Robey* cases, the factual record in this case does not support granting relief to Defendant.

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It is not the function of the forum non conveniens doctrine, therefore, merely to shift the inconvenience from one side to the other. Rather, the Court must first determine whether there is a "more appropriate forum elsewhere," and even if so, whether the Plaintiff's chosen forum is "seriously inconvenient." *Id.*[4]

Michigan is *less* "seriously inconvenient" than Croatia as a site for litigation of this case. This is a controversy between a Michigan-based corporation, a Michigan probate estate (that of Ena Begovic, pending in Oakland Probate Court), and Croatian residents. Plaintiffs and the witnesses to the accident and its aftermath have agreed to make themselves available here. There are no eyewitnesses to the occurrence other than the vehicle's occupants (all Plaintiffs). Plaintiffs have also demonstrated that pertinent accident-specific documents are already in the hands of Plaintiffs' attorneys. Witnesses will be forthcoming in their availability to testify in this case, including medical personnel, in Michigan. Documents and witnesses regarding the 40-year history of the design and management decisions regarding the placement of this transmission in this particular vehicle (the Jeep Grand Cherokee) are all found within this country, mostly in this State.

It is surely not enough to justify application of the forum non conveniens doctrine that the accident occurred elsewhere than Michigan. In *Robey*, the accident giving rise to the litigation occurred in Virginia, yet the Court of Appeals reversed dismissal based on forum non conveniens. 155 Mich App at 645; see also, *Manfredi*, *supra* (product liability case arising from injury which occurred in Georgia). Even in the leading case, *Cray*, each of the accidents in the

[4] In this issue, Plaintiff assumes the statement in *Robey* constitutes the applicable law. This Court has instructed the parties to brief whether the *Robey* standard should survive, a matter addressed in Issue III of this brief. As discussed there, the "seriously inconvenient" language may not be an actual holding, but a shorthand form of guidance.

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four cases occurred beyond this State's borders (in Maine, Georgia, Montana and Kentucky, respectively), yet the Supreme Court held that the trial judges had properly denied the motions to dismiss on the basis of forum non conveniens. 389 Mich at 385-387, 396-397.

Michigan decisions addressing the forum non conveniens doctrine draw upon federal authorities, including *Gulf Oil Corp v Gilbert*, 330 US 501; 67 S Ct 839; 91 L Ed 1055 (1947). Such authorities sustain Plaintiffs' position. In *Anderson v Great Lakes Dredge & Dock Co*, 411 Mich 619; 309 NW2d 539 (1981), this Court quoted from *Gulf Oil*, stating, "unless the balance is *strongly* in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." 411 Mich at 628; *Gulf Oil*, 330 US at 508 (emphasis added).

This is not a "forum shopping" case. Plaintiffs have sued DCX in its own backyard. Defendant designed the vehicle here. Its decisions, giving rise to its potential liability, were made here. Plaintiff has not "chosen a forum where none of the parties or witnesses reside . . . ," *Anderson*, 411 Mich at 629. The location of the parties is "inescapably an element of the analysis as a court applies the considerations listed in *Cray*." *Russell v Chrysler Corp*, 443 Mich at 624. The Court "can and must consider the residence of the parties in deciding whether to decline jurisdiction." *Id.*

Whatever problems are associated with the processing of this case in Michigan would be magnified many times over by placement of the same case in Croatia, with the necessity of obtaining witnesses from this country, and documents – with much greater weight than the documents which are written in Croatian – to be obtained from the defense. There would be much greater difficulties in terms of translation of those documents, and procuring necessary testimony, from Defendant's personnel and *former* personnel.

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Defendant submitted only two documents in support of its generalized contention that trial would be inconvenient in Michigan. The first, attached as Exhibit A to its "Supplemental" brief (APX 129b), a letter/memorandum (in English) from a purported Croatian lawyer, assuring us that a product liability cause of action exists in the Croatian courts, and of the Croatian courts' jurisdiction. The letter fails to meet any known standard for admissibility. Nevertheless, it remains true that compulsory process would be a very complicated matter involving the Hague Convention. As pointed out by Plaintiffs' attorney at the hearing, furthermore, it would be very difficult, and require a satellite proceeding in Michigan, anyway, to obtain the testimony of Defendant's former personnel, including the key individual with respect to the design of this product, Mr. Castaing (Tr 12/20/02, pp 13-14). Mr. Castaing is presently a Birmingham, Michigan resident, and has previously testified in such cases. American (most probably Michigan)-based personnel, 45 engineering employees in all, are listed along with him in relation to the subject matter of this case (Exhibit 4, APX 76b).

Defendant has also mentioned in the second and last document filed in support of its contention that trial would be inconvenient in Michigan its own response to a request to admit stating that the transmission was designed by "Aisen Warner" (Supplement filed 10/28/02; Exhibit B, APX 131b), which is apparently a Japanese company, but that is not the point of this case. As noted above, this case is about the *choice* of this transmission for placement in this vehicle.

The Croatian information is rather less voluminous than the *thousands of pages* of documents in Defendant's possession and in the hands of NHTSA that would have to be translated into Croatian and transported to Croatia, if the case proceeds there. The NHTSA file itself consists of, or references, more than 100,000 pages of complaints and investigative

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information. Defendant's own design and manufacturing files would likely approach – and might exceed – that size. In contrast, Croatian documents include only medical records and miscellaneous information. Plaintiffs' witnesses will come to this country to testify.

But let us proceed with consideration of the factors listed by this Court in *Cray*.

1(a) "Availability of compulsory process for attendance of unwilling and the cost of obtaining attendance of willing witnesses": First, compulsory process would be no more available to obtain Defendant's witnesses for trial in Croatia than it is here for obtaining Croatian witnesses to testify in Michigan. Indeed, this factor heavily favors Plaintiffs' position, given the willingness of Plaintiffs' witnesses to appear and testify here and the sheer number of American engineers and executives involved in the product's design, selection, and manufacturing. Defendant has made no assurances that its current and former employees will be willing to travel to Croatia for a trial. Defendant gives misplaced reliance to the Canadian bar cases like *Holme v Jason's Lounge*, 168 Mich App 132; 423 NW2d 585 (1988). Although the Court of Appeals in *Holme* had concerns about whether Michigan subpoena power could reach Canadian "res gestae" witnesses to a beating of Americans in a Canadian bar, this case is the opposite. The res gestae witnesses in this case consist of two groups: the plaintiffs themselves, who willingly submit to Michigan's jurisdiction, and the American witnesses to the design and selection process. Defendants continue to misconstrue this as an auto negligence action when it is a products liability case.

1(b) "Ease of access to sources of proof" certainly favors Plaintiffs' argument as well. The proofs originating in Croatia could readily be made available here. Translations have already been accomplished. In contrast, with trial overseas, much of the work would have to be done with regard to the Michigan documents and federal investigative materials, which are

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mammoth in comparison to the Croatian documents. Again, this factor favors Plaintiffs' position.

1(c) "Distance from the situs of the accident or incident which gave rise to the litigation." Admittedly, there is quite a distance from the site the of accident or incident giving rise to this litigation to Plaintiffs' choice of forum. *Cray*, at 396. On the other hand, the design and manufacturing decisions forming the basis for the products liability claim were made within a few miles of the Wayne County Circuit Court.

1(d) "Enforceability of any judgment obtained." One may presume, given the respective Courts' jurisdiction, that "any judgment obtained" would be enforceable, whether rendered by a Michigan or a Croatian court. *Cray*, at 396. We note, however, that a Croatian judgment may have to be domesticated in the U.S. to be enforced against Defendant or its insurers. Thus, instead of one all-encompassing action in Michigan, Defendant urges piecemeal litigation with a trial in Croatia and separate proceedings for discovery and enforcement in the U.S.

1(e) "Possible harassment of either party." There is no cause for accusation of "harassment of either party" herein. Plaintiffs sued Defendant in its home jurisdiction (Michigan). *Id.*, p 396. Indeed, this is where the documents are and where the decisions were made, as already noted in detail.

1(f) "Other practical problems which contribute to the ease, expense and expedition of the trial." The location of such immense governmental and corporate documentary evidence – in English – is a practical consideration militating in favor of Michigan. The small number of Croatian-language documents have already been translated into English.

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1(g) "Possibility of viewing the premises." It is highly unlikely that the court will allow a "viewing [of] the premises" where this accident occurred. *Id.* This is a product liability case based upon Defendant's decision-making processes and design decisions, not an automobile negligence case. The scene of decedent's fatal injuries will not necessarily shed light on Defendant's corporate decision to select the transmission it designated for Grand Cherokees.

2(a) "Administrative difficulties which may arise in an area which may not be present in the area of origin." *Cray*, at 396, also suggests consideration of "administrative difficulties which may arise in an area which may not be present in the area of origin." Wayne County used to have a docket problem, but it is not the problem that it used to be. Compare, *Anderson*, 411 Mich 619, 631. In recent years, the Wayne County docket has improved to the point where litigation of a civil nature is more expedited in this county than in other counties even within the State of Michigan. Defendant has offered no proof that the Croatian courts' consideration of this case would be more expeditious. Although Defendant criticizes the way the Court of Appeals handled this matter, its criticism lacks any factual support.

2(b) "Consideration of the state law which must govern the case" & 2(c) "People who are concerned by the proceeding." Next considered is the state law which governs the case. *Cray*, at 396. This dovetails with other public interests in the proceedings. In circuit court, the defense cited only cases involving choices among statutes of limitation – a procedural matter entirely, as to which Michigan, as demonstrated by its "borrowing statute," MCL 600.5861, discourages efforts of forum shopping. Where the cause of action arises elsewhere than Michigan, the court is required to apply the shorter statute of limitations. *Id.* In this case, the statute of limitations is three years in either place (Defendant's Supplement, Exhibit A, APX 129b); MCL 600.5805. The statute of limitations is basically a neutral consideration here.

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This case does not raise merely a limitations dispute, but rather, a choice of substantive law, as one of several factors under *Cray*, *supra*. This factor itself requires application of a two-step test:

> First, we must determine if any foreign state has an interest in having its law applied. If no state has such an interest, the presumption that Michigan law will apply cannot be overcome. If a foreign state does have an interest in having its law applied, we must then determine if Michigan's interests mandate that Michigan law be applied, despite the foreign interests. [*Sutherland v Kennington Truck Service, Ltd*, 454 Mich 274, 286; 562 NW2d 466 (1997)].

In this case, Michigan public policy is heavily weighted in favor of protection of its own product manufacturers from product liability litigation. The Michigan Legislature has enacted a product liability statute, and amended it, in an effort to weed out non-meritorious claims and limit damages awards in such cases. MCL 600.2945-2948. The current Michigan statute also imposes caps on non-economic damages in such cases. MCL 600.2946(a)(1). Further, it provides for non-party fault, which eliminates Defendant's concerns regarding other potentially liable parties. MCL 600.2957.[5]

The circuit court cited *Hampshire v Ford Motor Co*, 155 Mich App 143, 147; 399 NW2d 36 (1986), lv den 428 Mich 852 (1987), to support the notion that Croatian law would apply to this case, if it remains here. In *Hampshire*, however, "the connections to Michigan [were] limited to the fact that Ford's headquarters are located in Michigan and the action was filed in this state." *Id.*, 147. The connections to this State are far more extensive in the present case, as noted above.

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[5] Defendant's references in this context to *Hall v General Motors Corp*, 229 Mich App 580; 582 NW2d 866 (1998), lv den 459 Mich 986 (1999); *Farrell v Ford Motor Co*, 199 Mich App 81; 501 NW2d 567 (1993), lv den 445 Mich 863 (1994) are inapposite, as those cases addressed choice of law, not forum non conveniens questions.

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Of course, Croatia has an interest in the tort recovery of its citizens, but it is far from clear that this policy outweighs Michigan's own policy, as reflected in our product liability laws. Furthermore, as the Court of Appeals noted in *Manfredi*, *supra*, 194 Mich App at 526, a product liability case arising from an injury occurring in Georgia, "the citizenry of Michigan has as much interest in the safe design and manufacture of [products] in this state as does the citizenry of Georgia." While the focus has been on the state's interest in seeing its citizens protected and in manufacturing safe products, there is also an interest in an even-handed application of the laws *against* its own citizens. *Michigan has an interest in the way liability is imposed against a Michigan manufacturer.*

At any rate, Defendant's vague and general references to differences in Croatian law, as applicable to this product liability case, are no substitute for a true analysis of this factor. Both sides have already retained Croatian legal experts. Whatever difficulties are posed by such jurisprudence, Plaintiffs' attorneys, and certainly those employed by the defense, are up to the task. Michigan is not a "seriously inconvenient" place to litigate this case. *Robey*, 155 Mich App at 645.

3 "Reasonable promptness in raising the plea of forum non conveniens." Plaintiff agrees that Defendant raised the forum non conveniens issue early in the litigation. *Cray*, 389 Mich at 396.

The defense has spoken of complicated, technical issues raised by the product liability complaint. If that be the case, it would be especially convenient to litigate this case in Defendant's home state, where the documents and witnesses bearing upon Defendant's design decisions are most readily available to all parties, including Defendant itself.

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Defendant is not really concerned about the possibility (actually speculation) that there might be additional witnesses to this accident, or additional documents somewhere floating around Croatia that might bear on this controversy. It is absolutely clear that the greater number of witnesses will be more readily available in Michigan, along with the far greater weight of documentary proofs, than would be the case if the matter is tried in Croatia. Defendant's concern about decisions by a Wayne County jury is not a basis for dismissal under the forum non conveniens doctrine. Rather, Defendant can be granted dismissal "only when the balance of inconvenience strongly supports that change." *Raymond E Danto Assoc v Arthur D Little, Inc*, 316 F Supp 1350, 1357 (ED Mich, 1970). "A plaintiff's selection of a forum is ordinarily accorded deference." *Anderson v Great Lakes Dredge & Dock Co, supra*, 411 Mich at 628.

Defendant (1) fails to suggest what the anticipated testimony of the "foreign witnesses" (whoever they are) will be; (2) refers to no major, specific differences in the laws of the two forums, or even if there are such differences, sets forth no particularly complex legal questions likely to arise, but makes a bare reference to what it feels is the applicable law; and (3) has utterly failed to make a clear showing, that, as a matter of *fact*, as opposed to Defendant's unsupported conjectures, the proposed alternative forum "is a *more* convenient one, and that the interests of justice would be better served by a trial there." *Schneider v Sears Roebuck & Co*, 265 F Supp 257, 263 (SD NY, 1967); *Simmons Ford, Inc v Consumers Union*, 490 F Supp 106, 107 (WD Mich, 1980).

Finally, even if one were to suppose that Croatia would be a "more appropriate forum," Defendant must demonstrate that Wayne Circuit Court "is seriously inconvenient." *Robey*, 155 Mich App at 645. Defendant simply fails to demonstrate this, but offers the most wildly speculative ideas about witnesses and documents. Instead of offering factual proof to support its

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arguments, Defendant has relied on such phrases as an "incident occurring on foreign soil" (see Appellant's Brief on Appeal, pp 13, 16, 17, 18, 21) to convey its conclusory impression that the case cannot be heard in Michigan. As with many shorthand catch-phrases, though, Defendant's reliance on this phrase ignores the fact that, while the fatal accident occurred in Croatia, the foundation for a products liability action rests where the product is designed and manufactured, not where the product ultimately failed. That location – the location where the design decisions and manufacturing process occurred – is right here in Michigan.

Plaintiffs' response, exhibits, and a thorough analysis of the case, all dictate the conclusion that Wayne Circuit is a reasonably convenient place, under the circumstances, and certainly in comparison to Croatia, to litigate this case. The Defendant has offered argument, but no exhibits or proofs, to support its contention that it is inconvenient for DaimlerChrysler to have to defend its design and manufacturing decisions in its home state. It may come as no surprise, then, that Defendant wants this Court to impose a new rule of forum non conveniens on the basis of merely two facts (where the accident occurred, and where the Plaintiffs reside) rather than a fact-intensive inquiry that addresses the basis for the cause of action (products liability law) and the multiple considerations suggested by *Cray* and its progeny.

II. IF THE COURT DECIDES TO RETAIN THE CONCEPT OF FORUM NON CONVENIENS, CLARIFICATION OF THE "PUBLIC INTEREST" FACTORS MAY BE WARRANTED, BUT A BROAD RULE BARRING FOREIGN LITIGANTS IS NOT THE PROPER REMEDY

This Court instructed the parties to brief two issues. The first is "whether the public interest factors of the forum non conveniens doctrine set forth in *Cray v General Motors Corp*, 389 Mich 382, 396 (1973), should be revised or modified." The statement of this issue assumes that the essence of the *Cray* decision should remain intact. That assumption may be incorrect.

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A. The *Cray* Decision

In *Cray*, the Michigan Supreme Court – for the first time[6] – recognized the doctrine of forum non conveniens. Prior to that 1973 decision, the doctrine had never been recognized in Michigan. The only cases hinting of its existence rejected it as a basis for dismissal. In *Cofrode v Circuit Judge*, 79 Mich 332; 44 NW 623 (1890), a case involving a contract to build a railroad in the Upper Peninsula, neither party resided in Michigan. Subject matter jurisdiction was appropriate in Michigan, and both parties submitted to jurisdiction in Michigan. Suit was filed in Wayne County. The circuit court declined to exercise jurisdiction, citing a crowded docket, the possible length of the trial, the expense to the county, and general concerns about the administration of public justice and consideration of the public welfare.

This Court issued mandamus, commanding the circuit judge to take jurisdiction over the matter:

> No court or judge has a lawful right to deny to suitors the privilege of bringing and prosecuting their suits, upon the ground that to entertain them will entail expense upon the county. The parties were rightfully before the circuit court for the county of Wayne. The court had full jurisdiction of the parties and the subject-matter, and the circuit judge was in error in holding that the court had no jurisdiction, *or that it had a discretion whether to entertain the suit or not*. [79 Mich at 343 (emphasis added).]

Thus, this Court's first pronouncement on the issue clarified that the circuit court has no discretion to reject jurisdiction.

This Court next mentioned forum non conveniens in the second-to-last paragraph of its decision in *Herpolsheimer v AB Herpolsheimer Realty Co*, 344 Mich 657, 669-670; 75 NW2d 333 (1956). There, the Court agreed that forum non conveniens was a matter for a motion to

[6] 2 Honigman & Hawkins, *Michigan Court Rules Annotated*, p 93 (1984 supp).

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change venue, but repeated that it is not a jurisdictional matter to be decided on a motion to dismiss:

> We have not overlooked the persuasive arguments of convenience that are set forth in appellants' respective briefs. It may well be that the net sum of pro and con debate addressed to the doctrine *forum non conveniens* (*cf Silverstone v London Assur Corp*, 176 Mich 525 [142 NW 776 (1913)], would, if submitted, lead to venue-transfer of this case from Ottawa to Kent. Such considerations are nevertheless inconsequential at present sitting. If judicial digestion thereof is desired, they should be served to the chancellor on the platter of motion for change of venue–not motion to dismiss.[7]

By the time 1973 arrived, forum non conveniens had become a more popular legal principle. The U.S. Supreme Court ruled in 1947 that a federal district court had inherent power to dismiss a case by forum non conveniens. *Gulf Oil Corp v Gilbert*, 330 US 501; 67 S Ct 839; 91 L Ed 1055 (1947). In 1948, Congress enacted 28 USC § 1404(a), which specifically authorized federal judges to *transfer* civil actions to "any other district or division where it might have been brought" for the convenience of the parties and witnesses. As recognized by the *Cray* Court, this doctrine addressed concerns that a defendant might be forced to defend a matter far from its home:

> In their book on *Federal Practice and Procedure*, Barron and Holtzoff said *forum non conveniens* "was designed as an instrument of justice to avoid the unfairness, vexatiousness and oppressiveness of a trial away from the domicile of a defendant." (p 443.) The basic standards are said to be "convenience, efficiency and justice." Moore and Fink in *Moore's Federal Practice* indicate *forum non conveniens* is applied when trial would be "unduly burdensome upon the defendant." [389 Mich at 391-392.]

[7] The case cited by the Court, *Silverstone*, involved a motion for change of venue on the basis of the convenience of the witnesses. It was not a motion asking the circuit court to reject jurisdiction.

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When *Cray* was decided in 1973, twenty-one out of fifty states had adopted the concept of forum non conveniens to one extent or another. 389 Mich at 392. This Court decided to add Michigan to that list, with the proviso that application of the concept rested in the trial court's discretion.

B. Forum Non Conveniens is Contrary to the Common Law as Adopted by the Voters to the 1963 Constitution

Cray was improperly decided because it changed the common law of Michigan. Prior to *Cray*, the common law did not recognize the concept of forum non conveniens. In fact, only twenty-one states out of fifty recognized it, and those twenty-one came to that recognition well after the U.S. Supreme Court's decision in *Gulf Oil* in 1947. Soon after the 1947 decision, Congress followed up with a legislative enactment formally recognizing forum non conveniens as a ground *for changing venue.*

The Michigan Constitution, Const 1963, art 3, § 7, preserves the common law as it existed in Michigan before adoption of the Constitution:

> The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed.

The common law, as it existed pursuant to the 1890 decision in *Cofrode* and the 1956 *Herpolsheimer* opinion, denied a circuit judge the authority to reject jurisdiction. In stark contrast to the federal government's response through enactment of 28 USC § 1404(a), none of the Michigan statutes incorporate the concept of forum non conveniens. Those statutes reaffirm that jurisdiction is present in this case, and the voters who adopted the 1963 Constitution have approved no other changes to the *Cofrode* ruling. In other words, Michigan never "changed, amended or repealed"[8] the common law's rejection of forum non conveniens as a jurisdictional

[8] Const 1963, art 3, § 7.

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challenge. Thus, a circuit court's decision to reject jurisdiction was unimaginable before 1973, and therefore is untenable under the 1963 Constitution.

C. Forum Non Conveniens Contravenes the Legislature's Authority and Exceeds the Judiciary's Authority

Moreover, forum non conveniens is a judicial device that contravenes a fabric of constitutional provisions and legislation controlling the issues of jurisdiction and venue. The general jurisdiction of the circuit courts is controlled by Const 1963, art 6, § 13:

> *The circuit court shall have original jurisdiction in all matters not prohibited by law*; appellate jurisdiction from all inferior courts and tribunals except as otherwise provided by law; power to issue, hear and determine prerogative and remedial writs; supervisory and general control over inferior courts and tribunals within their respective jurisdictions in accordance with rules of the supreme court; and jurisdiction of other cases and matters as provided by rules of the supreme court. [Emphasis added.]

The plain language of this provision grants the circuit court, as a court of general jurisdiction, broad powers except where prohibited by law. Although the Supreme Court is given certain powers to *add* to the circuit court's jurisdiction through court rules ("jurisdiction of other cases and matters as provided by rules of the supreme court"),[9] the Constitution does not give the Supreme Court any power to *take away* jurisdiction already conferred. See also Const 1963, art 6, § 1 (Legislature has the power to create courts of limited jurisdiction). Employing the doctrine of forum non conveniens to decline jurisdiction by judicial discretion is inconsistent with the statutes and constitutional protections granting the Legislature the power to decide when a circuit court's jurisdiction should be limited. Cf *Garg v Macomb County Community Mental Health Services*, 472 Mich 263; 696 NW2d 646 (2005) (judicially imposed doctrine of "continuing violations" doctrine *held* inconsistent with the Legislature's statutory scheme found in the

[9] An example of added jurisdiction might be the authority to swear in new members of the State Bar.

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statutes of limitations). Just as the continuing violations doctrine was a judicial creation to overcome the statute of limitations, 472 Mich at 279, forum non conveniens as a jurisdictional tool is a judicial creation designed to overcome the Legislature's power to designate jurisdiction, as well as a judicial creation to overcome prior common law and its preservation via the 1963 Constitution, and "it bears little relationship to the actual language of the relevant statute" and constitutional provisions, 472 Mich at 281.[10]

Through its statutory scheme, the Legislature has contemplated cases such as this where a party may not be a resident of Michigan. This precise scenario is encompassed within MCL 600.1621(a), which states: "The county in which a defendant resides, has a place of business, or conducts business, or in which the registered office of a defendant corporation is located, is a proper county in which to commence and try an action." Our Legislature has contemplated that non-residents might file suit in Michigan, and has accommodated such suits within the Michigan judicial system by establishing that venue to file *and try* a case is proper in the county in which Defendant has its registered office, a place of business, or does business.

D. <u>There are Risks in Using Jurisdictional Principles to Address Venue Concerns</u>

The Legislature's web of venue statutes is well-though-out and avoids sticky jurisdictional issues. The first venue statute states clearly that "The provisions of this chapter relate to venue and are not jurisdictional." MCL 600.1601. This provision is not a mere statement of generalized policy. Rather, it was enacted in 1961 as a specific response to a distressing decision from this Court in *Peplinski v Employment Security Commission*, 359 Mich

[10] As in *Garg*, the underlying legal principle here (forum non convenience as a jurisdictional tool) was flawed by its heavy reliance on federal precedent (*Gulf Oil*). "While federal precedent may often be useful as guidance in this Court's interpretation of laws with federal analogies, such precedent cannot be allowed to rewrite Michigan law." 472 Mich at 282.

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665; 103 NW2d 454 (1960). As discussed in 2 Honigman & Hawkins, *Michigan Court Rules Annotated* (2d ed, 1963), pp 262-264:

> A difficult question arises as to the extent to which these special venue provisions may be considered "jurisdictional." At least two significant consequences may follow from characterizing a venue provision as "jurisdictional." First, a defect in bringing the action in the wrong place may not be waived, and even though the parties may have acquiesced in a trial on the merits the judgment may be void and vulnerable to attack. Second, if the action is commenced in the wrong place, it may be said that the original court does not have jurisdiction and, therefore, has no power to remedy the defect by transfer or change of venue to a proper place. The action in the original court must simply be dismissed.
>
> These are harsh consequences and quite clearly inconsistent with the spirit of modern procedural systems as expressed in RJA Chapter 16. While clearly recognizing this, the Supreme Court recently felt compelled to hold a special venue statute jurisdictional, where the language fixing place of trial was expressed in terms of a grant of power to the court to hear and determine the case. *Peplinski*, [*supra*]. The statute provided that the circuit court of the county in which the claimant resides or in which the employer's principal place of business is located ". . . shall have power to review questions of fact and law" on appeal from determinations by the appeal board of the Michigan employment security commission. CL 1956 supp, § 421.38[.] The court felt compelled to treat this as a jurisdictional provision, with the consequence that the action commenced in the wrong court could not be transferred but had to be dismissed, in the absence of some curative statute permitting change of venue where the original court lacks jurisdiction. 359 Mich at pp 668-669.
>
> In enacting RJA Chapter 16, it was clearly the intent to eliminate the problem presented in the *Peplinski* case. RJA § 1601 provides: "The provisions of this chapter relate to venue and are not jurisdictional." RJA § 1645 provides that "no order, judgment, or decree shall be void or voidable solely on the ground that there was improper venue." RJA § 1651 provides that "an action brought in a county not designated as a proper county may nevertheless be tried therein, unless a defendant moves for a change of venue within the time and in the manner provided by court rule," in which case the action shall be transferred to a proper county, and the court to which the transfer is made "shall thereupon have full jurisdiction of the action as though the action had been originally commenced therein."
>
> Specifically, this last provision is the kind of curative statute which the Court in the *Peplinski* case felt would be necessary to empower a transfer of the case by the court in which the action was improperly brought. It is clear from the opinion, that if RJA § 1651 had been available when the *Peplinski*

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> case was decided, a different result would have been reached. 359 Mich at 669.
>
> To maintain that the problem of the *Peplinski* case survives the enactment of RJA § 1651, it would be necessary to argue that this remedial provision was intended to apply only to those actions whose venue is fixed by RJA Chapter 16 and, consequently, does not apply to actions where venue is fixed by special statutes. But there is nothing in the language of RJA § 1651 to suggest such a restrictive interpretation, and its legislative history expressly indicates the contrary.
>
> The basic concept of RJA Chapter 16 is stated in the Committee Comment, following RJA § 1601, in these terms: "This section is included to make certain that the provisions prescribing the place of trial within the state *for all actions* shall in no way be construed as limitations on the jurisdiction of the courts of the state. All circuit courts of the state have jurisdiction, and in the absence of raising the venue matter in the proper manner, all courts may render valid judgments. If the venue matter is raised in a proper manner, then this may create an error, but not a jurisdictional error."

The Legislature crafted this carefully worded statute to negate the decision in *Peplinski*. In so doing, though, the Legislature avoided a multitude of other problems. For example, it left in place a set of court rules that addressed forum non conveniens *solely as a venue issue*, rules that permit circuit judges to *transfer* cases to other counties where appropriate for the convenience of the parties and witnesses. By elevating forum non conveniens to a jurisdictional question, this Court contravenes the system of common law, statutes, and court rules in place in 1963, and negates the force of MCL 600.1601, at least in this setting. For more than a century since *Cofrode* was decided, the Legislature has opted to leave in place a series of statutes that decline to excuse jurisdiction on the basis of inconvenience. As stated in 2 Honigman & Hawkins, *Michigan Court Rules Annotated* (2d ed, 1963), while discussing GCR 1963, 403,[11]

> Prior decisions have at least intimated that a change of venue may be granted for convenience of parties or witnesses. *Eston v Argus, Inc*, 328 Mich 554; 44 NW2d 154 [1950]; *Silverstone v London Assur Corp*, 176 Mich 525;

[11] Rule 403 was a predecessor of MCR 2.222(A). See 1985 Staff Comment to MCR 2.222.

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> 142 NW 776 [1913]. The express incorporation of this ground into Rule 403 should lead to increasing consideration of the convenience of parties and witnesses with reference to place of trial. Venue statutes must be drafted in terms of broad policies and sweeping generalizations. *Hardship in individual cases may be avoided by a proper application of the flexible provisions of Rule 403*. [Emphasis added.]

Accordingly, the combination of MCL 600.1601 and current MCR 2.222 treat the convenience of the parties and witnesses as venue matters, not jurisdictional matters. This is wise, because treating the convenience of parties and witnesses as a jurisdictional issue carries unique risks. First, the court's consideration of such factors is necessarily subjective, as confirmed by the appellate courts' treatment of venue decisions as discretionary matters. See *Michigan Dep't of Transportation v Randolph*, 461 Mich 757, 767-768; 610 NW2d 893 (2000) (addressing the award of attorney fees in condemnation proceedings, this Court stated "trial courts can and will reach different decisions concerning reimbursement of attorney fees. However, that is the nature of discretionary decisions. The key in each case is that the trial court provide a reasoned basis for its decision."). Second, as will be seen in the next section, even when the *Cray* Court decided to adopt forum non conveniens as a jurisdictional concept, it wisely chose to identify a non-exhaustive list of *considerations* rather than impose a list of *qualifications* necessary to establish jurisdiction. Of course, such a list of qualifications would be in addition to Legislative enactments like the long-arm statutes and constitutional considerations of due process.[12]

Finally, and more importantly, treating such matters as jurisdictional inquiries could give rise to a problem not fully contemplated in the *Cray* decision but made apparent by more recent

[12] *Green v Wilson*, 455 Mich 342; 565 NW2d 813 (1997) (the Due Process Clause of the U.S. Constitution establishes the outer limits of permissible jurisdictional power).

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decisions of the appellate courts: trial courts are powerless to require jurisdictional issues to be raised within any court-imposed deadlines. In *Lehman v Lehman*, 312 Mich 102, 105; 19 NW2d 502 (1945), this Court held that jurisdictional issues can be raised at any time, even on appeal. See also *Bass v Combs*, 238 Mich App 16; 604 NW2d 727 (1999), lv den 463 Mich 855 (2000). The Court of Appeals extended this rationale in *Gerling Konzern Allgemeine Versicherungs AG v Lawson*, 254 Mich App 241, 248; 657 NW2d 143 (2002), rev'd on other gnds, 472 Mich 44; 693 NW2d 149 (2005), where it applied the concept to summary disposition motions in general:

> In light of the dispositive nature of defendants' proposed motion for summary disposition, we find that the trial court abused its discretion in denying them leave to file the motion for summary disposition. Because plaintiff may not seek contribution from defendants, defendants are entitled to judgment as a matter of law; on remand, the trial court should dismiss plaintiff's claim with prejudice.
>
> Although the time set forth in the scheduling order for dispositive motions had expired, the court rules expressly provide that defendants may "at any time" assert that plaintiff has failed to state a cause of action. MCR 2.116(D)(3). MCR 2.116(D)(3) "serves to remove any time limit for asserting [MCR 2.116(C)(8)] as a basis for summary disposition." *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 392, n 16; 651 NW2d 756 (2002) [lv den 468 Mich 852 (2003)]. This is clearly logical, because no party should have to defend a claim that is not recognized in the state. Moreover, a scheduling order cannot give rise to a cause of action that does not exist. We find the denial of defendants' motion, on the basis of its relative untimeliness, was an abuse of discretion and, therefore, in error. [*Gerling Konzern Allgemeine Versicherungs AG v Lawson*, 254 Mich App 241, 248 (2002).]

See also *Berryman Properties v O'Dea*, unpublished opinion per curiam of the Court of Appeals, decided September 23, 2004 (Docket No. 248718) (APX 134b), which applies *Gerling* to hold that a (C)(10) motion can be filed at any time, and a trial court cannot deny the motion solely because it was filed after the motion cutoff contained in the court's scheduling order. In *Berryman*, the court was addressing a legal malpractice claim where counsel had not filed a

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summary disposition motion, but successor counsel could have filed under the Court of Appeals' theory that the deadline did not apply.[13]

The thought that a defendant could lay in wait and file a motion to dismiss on *subjective non-statutory jurisdictional grounds* at any time creates a serious danger that the motion might be filed after the appropriate limitations period in another jurisdiction has expired. Considering the international nature of this matter, it is also possible that a defendant could argue that a pending trial has *become* inconvenient due to governmental changes in a foreign nation, civil unrest or warfare, or a plethora of other headline events. The inability to use live testimony – or even fresh testimony – is already contemplated by various fundamental principles such as the burden of proof and the rules of evidence. There is no need to graft additional requirements – requirements the Legislature has seen fit to avoid – to treat these concerns as jurisdictional matters.

There is an additional oddity in allowing a court to reject jurisdiction under the doctrine of forum non conveniens. The establishment of jurisdiction is a legal matter, reviewed de novo. *Travelers Insurance Co v Detroit Edison Co*, 465 Mich 185; 631 NW2d 733 (2001); *Jodway v Kennametal, Inc*, 207 Mich App 622; 525 NW2d 883 (1994). The rejection of jurisdiction is currently considered a discretionary matter, reviewed for an abuse of discretion. *Russell v Chrysler Corp, supra*. In an oft-quoted definition, an abuse of discretion has been described as a result that is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise

[13] This Court had an opportunity to review the *Gerling* panel's view that a trial court cannot rely on its scheduling orders to decline to address summary disposition motions. When this Court accepted leave and decided *Gerling*, however, it did not address this issue. 442 Mich 44; 693 NW2d 149 (2005).

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of reason but rather of passion or bias."[14] It would create an inconsistent system of justice to allow the firm legal principle of jurisdiction to be defeated by a trial judge's discretionary act, an act that – under the most severe definition – is clearly insulated from effective review. It is also ironic that, under long-arm statutes, a foreign corporation could be sued by a Michigan resident without running afoul of jurisdictional principles, see *Oberlies v Searchmont Resort, Inc*, 246 Mich App 424; 633 NW2d 408 (2001); *Aaronson v Lindsay & Hauer International Ltd*, 235 Mich App 259; 597 NW2d 227 (1999), yet a foreign plaintiff would be barred from suing a Michigan-based corporation in that corporation's own backyard. One of the constitutional requirements of a long-arm statute is that the defendant must have sufficient contacts with the forum state. *International Shoe Co v Washington*, 326 US 310; 66 S Ct 154; 90 L Ed 95 (1945). The concept of forum non conveniens turns this principle entirely on its head, protecting those corporations who have the *strongest* contacts[15] with Michigan from the authority of their home state's courts.

E. If the Concept of Forum Non Conveniens Remains, What Standards Should Apply?

Therefore, any question that presupposes that *Cray* was good law to begin may be flawed. If this Court decides to adopt or retain forum non conveniens as a matter of public policy, however, there remains a question as to the standards to be applied. At this point, this brief's analysis focuses more on the specific question posed in this Court's order granting leave to appeal. The Court singled out the "public interest" factor in its order.

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[14] *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959). Although criticized, see *People v Talley*, 410 Mich 378, 396; 301 NW2d 809 (1981) (Levin, J, concurring), this definition has remained in vogue. See, e.g., *Kurtz v Faygo Beverages, Inc*, 466 Mich 186, 193; 644 NW2d 710 (2002).

[15] A corporation that establishes its headquarters in Michigan "purposefully avails" itself of the state's laws and justice system. See *World-Wide Volkswagen Corp v Woodson*, 444 US 286, 297; 100 S Ct 559; 62 L Ed 2d 490 (1980).

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The *Cray* decision identified the following factors for *suggested* consideration, although the Court also noted with approval the U.S. Supreme Court's determination that "[w]isely it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy." Those considerations identified fall within three general categories, with subcategories:

> A balancing out and weighing of factors to be considered in rejecting or accepting jurisdiction in such cases 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*. [389 Mich at 395-396.]

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The ultimate task for the trial court is to "consider the plaintiff's choice of forum and to weigh carefully the relative advantages and disadvantages of jurisdiction and the ease of and obstacles to a fair trial in this state." 389 Mich at 396. For reasons stated earlier in this brief, the concerns raised by Defendant do not implicate concepts of "fair trial," which is not only a broadly-stated doctrine but is also a constitutional principle. There is nothing to indicate, for example, that the exercise of jurisdiction will deprive Defendant of its constitutional rights to a fair trial. Defendant would bear the burden of demonstrating a constitutional violation, see *Johnson v Harnischfeger Corp*, 414 Mich 102, 113; 323 NW2d 912 (1982) ("objectors" have the burden of showing that a statute is unconstitutional), but Defendant has not argued or even identified a constitutional right at stake. This is consistent with the lack of proofs submitted to the circuit court to support Defendant's contention that it is inconvenient to try this case in Michigan.

Nonetheless, the specific question in this case is whether this Court should modify the second category of suggested considerations, "Matters of public interest." This Court has not suggested any possible alternatives, and – despite this Court's request that the issue be briefed – Defendant's brief has not offered any alternatives addressing these specific considerations.[16] Plaintiff suggest that if the doctrine of forum non conveniens retains any legality in Michigan, the "suggested" list of factors is not an exclusive list, and trial judges possess sufficient discretion to consider additional factors not contemplated by the *Cray* Court. In other words,

[16] The *Cray* decision has been cited in several other jurisdictions, but its delineation of factors has not been criticized. See *Manu Int'l, SA v Avon Products*, 641 F2d 62, 67 (CA 2, 1981); *Douglas Machine & Engineering Co, Inc v Hyflow Blanking Press Corp*, 229 NW2d 784, 791 (Iowa 1975); *MacLeod v MacLeod*, 383 A2d 39, 42 (Maine 1978); *Oregon ex rel Academy Press v Beckett*, 282 Ore 701, 723, n 3; 581 P2d 496 (1978) (Holman, J., concurring); *Myers v The Boeing Co*, 115 Wash 2d 123, 145; 794 P2d 1272 (1990) (Utter, J., concurring).

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like the U.S. Supreme Court's list in *Gulf Oil*, the list in *Cray* is fluid, and formal amendment of it is not required.

If the Court still wishes to address the factors, however, Plaintiffs suggest that the list may be ambiguous and difficult to understand because it does not suggest how application of the factors would lead to a decision to grant or deny jurisdiction. The first factor in the "public interest" category is "Administrative difficulties which may arise in an area which may not be present in the area of origin," yet the *Cray* Court nowhere defines "area" or "origin." The *Cray* Court compiled its list from cases in other jurisdictions, but no other jurisdiction has used this precise phrase. However, the *Cray* decision was based in large part on the *Gulf Oil* decision. There, the U.S. Supreme Court provided a more cogent explanation of the "public interest" factors:

> Factors of public interest also have place in applying the doctrine. 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 509.]

The second factor in the "public interest" category is "Consideration of the state law which must govern the case." Here, perhaps the factor is not as ambiguous. It is reasonable to conclude that the Court intended to facilitate a knowledgeable and familiar application of state law by the courts most familiar with it. Thus, if Michigan law will apply, this factor would favor acceptance of jurisdiction in Michigan courts. If, say, California law applied, this factor would favor rejection of jurisdiction in Michigan.

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The third factor is "People who are concerned by the proceeding." Again, this precise phrase has never appeared outside Michigan jurisprudence, and here Plaintiffs concede there is broad ambiguity. "People" apparently means more than the litigants themselves, since their concerns are addressed in the "private interest of the litigant" list. Plaintiff suggests that the "people" who are "concerned" would include the employees and owners of a defendant company, suppliers, and even neighbors who would be affected by a plant closure or other adverse economic impact of a court judgment. While Plaintiff is not suggesting that these concerns have a place in the proofs at trial, or that it is a potential outcome of the case, it is reasonable to suggest that Michigan residents – as a whole – reel when they hear of multi-million dollar judgments in other states against local businesses (notably the automobile industry). Those judgments often include components of punitive damages and other elements of damages the people of this state have determined not to recognize, and such large awards often lead to confusion and misunderstanding among state residents and employees of the affected companies. This Court could go a long way toward reaffirming the basic principle that forum non conveniens was intended to protect defendants from having to defend in far-away lands, *Cray*, 389 Mich at 391-392, by clarifying that the law should encourage suits against defendants where they reside or are headquartered. While it is true in a global economy that decisions in other states or countries have impact elsewhere, decisions for or against Michigan companies have their strongest impact right here.

This clarification would also reaffirm that Michigan companies need to conform their conduct to Michigan standards, rather than a mish-mash of international laws, policies, codes, practices, or local customs.

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F. This Court Should Reject Defendant's Call to Single Out Foreigners

The only solution Defendant offers does not address the specific question raised by this Court – whether the "public interest" factors should be clarified or modified. Instead, Defendant suggests as the only remedy that this Court declare Michigan courts off-limits to foreigners involved in foreign accidents. This suggestion has numerous flaws.

First, it ignores the Legislature's decision to formulate a series of jurisdiction and venue statutes that already address the residence of plaintiffs and the origin of the cause of action. Defendant asks this Court to judicially legislate a broad bright-line exception to the statutory scheme.

Second, there is a multitude of potential unintended consequences should this Court adopt Defendant's suggestion. A decision to bar Michigan courts to "foreigners" would create a whole new discriminatory scheme based on national origin. Americans injured overseas would be allowed to sue in Michigan under Defendant's proposal, but foreigners would be treated in an entirely different fashion. *Myers v The Boeing Co*, 115 Wash 2d 123, 138; 794 P2d 1272 (1990). As stated by the U.S. Supreme Court:

> [T]he Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.
>
> The general rule gives way, however, when a statute classifies by race, alienage, or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy – a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest. [*City of Cleburne v Cleburne Living Center, Inc*, 473 US 432, 440; 105 S Ct 3249; 87 L Ed 2d 313 (1985).]

The damage is even more severe when the classification is imposed by a court acting outside the democratic process.

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Third, the proposal is vastly overbroad. If Michigan defendants wish to avoid state courtrooms and provincial limitations on the state court system's authority, they have an option that does not require the Draconian remedy of dismissal: they can remove the action to federal court under 28 USC § 1446. That statute provides:

> 28 USC § 1446 states, in part:
>
> (a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.
>
> (b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter. If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

The federal diversity statute specifically contemplates lawsuits between Americans and residents of foreign countries. 28 USC § 1332 states:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between–
>
> (1) citizens of different States;
>
> (2) *citizens of a State and citizens or subjects of a foreign state*;
>
> (3) *citizens of different States and in which citizens or subjects of a foreign state are additional parties*; and

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> (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.
>
> For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled. [Emphasis added.]

Thus, three out of four subsections specifically address the involvement of foreign states or citizens, and two out of four specifically address matters involving citizens of a foreign state. The removal procedure grants our Defendant[17] an adequate remedy to transfer an action to a federal court, where the court's authority is more far-reaching.

If this Court is looking to re-invent the law of forum non conveniens, Plaintiffs would urge that the Court reconsider its rejection of then-Judge Corrigan's position in *Witt v CJ Barrymore's*, 195 Mich App 517, 520; 491 NW2d 871 (1992),[18] where the Court of Appeals held that forum non conveniens could not be applied when one of the parties was from Michigan:

> The doctrine of forum non conveniens applies only where the parties are residents of different states, *neither are residents of the forum state*, and the injury or event giving rise to the cause of action occurred other than in the forum state. As observed in dicta in *Duyck v Int'l Playtex, Inc*, 144 Mich App 595, 602-603; 375 NW2d 769 (1985):
>
>> Forum non conveniens is applicable only where the parties are residents of different states, *neither are residents of the forum state*, and the injury or event giving rise to the suit occurred other than in the forum where suit was brought. Under this doctrine, jurisdiction is refused by the court and the suit is dismissed. *This doctrine, should it be applied in a suit involving a party who resides in Michigan, would be contrary to this state's concept of one court of justice.* Const 1963, art 6, § 1. See also *Anderson v Great Lakes Dredge & Dock Co*, 411 Mich 619; 309 NW2d 539 (1981).
>
> [Emphasis added.]

---

[17] "A corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business," 28 USC § 1332(c)(1).

[18] *Witt* and *Duyck* were overruled in *Russell v Chrysler Corp*, 443 Mich 617 (1993).

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G. Conclusion

There is no need for this Court to adopt Defendant's off-topic proposal and risk unintended consequences where numerous remedies already exist. Clarification of the "public interest" factors may be warranted, but only in the proper case. This is not the right case for a sweeping realignment of the law of forum non conveniens because, despite any present ambiguity in the "public interest" factors, the Court of Appeals' decision properly applied the *Cray* factors in an unpublished opinion.

III. THE *ROBEY* CASE NEED NOT BE OVERRULED BECAUSE ITS STANDARDS ARE CONSISTENT WITH U.S. SUPREME COURT PRECEDENT, EVEN IF IT EMPLOYS DIFFERENT LANGUAGE

In *Robey*, the Court of Appeals stated that "[i]f there is a more appropriate forum, the court still may not decline jurisdiction unless its own forum is seriously inconvenient." 155 Mich App at 645. In its order granting leave (APX 2b), this Court inquired whether this statement should stand.

First, it is questionable whether the "seriously inconvenient" statement is part of the *Robey* Court's holding. Later in the decision the Court also referred to "exceptional case[s]," 155 Mich App at 646, and "exceptional factors," *id.* The phrase "seriously inconvenient" appears to have been made in passing. Nonetheless, Plaintiffs concede that some panels at the Court of Appeals have treated the phrase as something more authoritative. The phrase is found in only two published decisions, however – *Manfredi*, *supra*, and *Allied Signal*, *supra*. As a result, it is debatable whether that phrase – even if this Court finds fault with it – has resulted in a significant number of appellate errors.

Second, even if the *Robey* Court's choice of words was not the best choice, it is still consistent with federal authority underlying the entire concept of forum non conveniens. The U.S. Supreme Court has used such phrases as "prohibitively inconvenient," *Burnham v Superior*

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Court of California, 495 US 604; 110 S Ct 2105; 109 L Ed 2d 631 (1990); "manifestly inconvenient" and "really inconvenient," *Ferens v John Deere Co*, 494 US 516, 536, 539; 110 S Ct 1274; 108 L Ed 2d 443 (1990) (Scalia, J, dissenting in, at times, a tongue-in-cheek tone); "so gravely difficult and inconvenient" that a party unfairly is at a "severe disadvantage" in comparison to his opponent, *Burger King Corp v Rudzewicz*, 471 US 462, 478; 105 S Ct 2174; 85 L Ed 2d 528 (1985), quoting *The Bremen v Zapata Off-Shore Co*, 407 US 1, 18; 92 S Ct 1907, 32 L Ed 2d 513 (1972) (re: minimum contacts requirements); "so completely inappropriate and inconvenient," *Norwood v Kirkpatrick*, 349 US 29, 31; 75 S Ct 544; 99 L Ed 789 (1955); and "vexatiously inconvenient," *Koster v American Lumbermens Mutual Casualty Co*, 330 US 518, 533; 67 S Ct 828; 91 L Ed 1067 (1947) (Reed, J, dissenting). Even this Court in *Anderson, supra*, quoted from *Gulf Oil*, stating, "unless the balance is *strongly* in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." 411 Mich at 628; *Gulf Oil*, 330 US at 508 (emphasis added). Every trial is inconvenient to a defendant, no matter where it is held (even if it's just thirty miles down Interstate 75 from the defendant's American headquarters). Abolishing the "seriously inconvenient" test or something akin to it would allow courts to reject jurisdiction upon minimal, flimsy reasoning any time a defendant requests that the matter be dismissed prior to – or even after – the burden of discovery, ADR efforts, motion practice, trial and the "really inconvenient" possibility of an adverse judgment.

Again, Defendant offers no real guidance, except to repeat that a foreigner's choice of forum (even a forum matching the principal place of a defendant's business) "deserves less deference" under *Piper Aircraft v Reyno*, 454 US 235; 102 S Ct 252; 70 L Ed 2d 419 (1981). Defendant's proposal, however, would give no deference – not just less deference.

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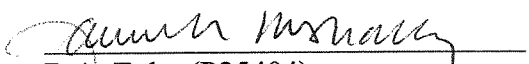
PRAYER FOR RELIEF

Plaintiffs pray that this Honorable Court affirm the judgment of the Court of Appeals.

Respectfully submitted,

SOMMERS SCHWARTZ, P.C.



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Dated: September 9, 2005

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STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
(Cavanagh, P.J., and Jansen and Fort Hood, JJ.)

JOSIP RADELJAK, Personal Representative,
Estate of ENA BEGOVIC, Deceased;
JOSIP RADELJAK, Individually 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 Circuit No. 02-228401-NP

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PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF OAKLAND)

SHARON THRASHER, being first duly sworn, deposes and says that on the 9th day of September, 2005, she served two copies of APPELLEES' BRIEF ON APPEAL and APPELLEES' APPENDIX upon the following:

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Cheryl A. Bush, Esq.
Raymond M. Kethledge, Esq.
Bush Seyferth Kethledge &Paide PLLC
3001 W. Big Beaver Rd., Ste. 600
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by placing said copies in an envelope properly addressed and depositing said envelope in the U.S. mail located at Southfield, Michigan.

Further, Deponent sayeth not.

Sharon Thrasher
SHARON THRASHER

Subscribed and sworn to before me,
this 9th day of September, 2005.

NOTARY PUBLIC

PATRICIA L. CHAPMAN
Notary Public, Oakland County, Michigan
My Commission Expires September 18, 2006

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