IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI *ex relatione* DKM ENTERPRISES, LLC, Relator, vs. HON. STACEY LETT, *in her official capacity as* Circuit Judge, Circuit Court of Cass County, Respondent.	Case No. WD_____ Circuit Court of Cass County Case No. 22CA-CC00112

PETITION FOR WRIT OF PROHIBITION
AND SUGGESTIONS IN SUPPORT

Relator DKM Enterprises, LLC, requests the Court under Mo. Const. art. V, § 4, Chapter 530, R.S.Mo., and Rules 84.22, *et seq*. and 97, to issue a writ prohibiting Respondent Judge Lett from enforcing her order of May 5, 2023, denying Relator's motion to dismiss the plaintiffs' claims against it for lack of personal jurisdiction, and from doing anything other than vacating that order and dismissing the plaintiffs' claims against it.

The Missouri trial court below lacks personal jurisdiction over Relator, a Texas resident, on the Georgia and Kansas plaintiffs' tort claims that Relator's alleged negligent acts in Kansas caused the wrongful death of the plaintiffs' Kansas-resident decedent in Kansas. The court erred in denying Relator's motion to dismiss. This Court's writ of prohibition now lies to remedy this error.

In support, Relator states:

Summary

Kansas and Georgia plaintiffs allege DKM Enterprises, a Texas resident, committed negligent acts in Kansas that caused the wrongful death of the plaintiffs' decedent, also a Kansas resident, when steel pipes DKM had loaded onto a truck in Kansas struck the decedent's car in Kansas. The only connection to Missouri the plaintiffs allege is that a third party was transporting the pipes to Missouri at the time and DKM previously had done unrelated business with Missouri and sold unrelated goods to Missouri.

The trial court summarily denied DKM's motion to dismiss for lack of personal jurisdiction. This was error. To exercise personal jurisdiction over a nonresident defendant, a plaintiff must plead and prove (1) its cause of action arises from an act of the defendant within Missouri's long-arm statute, § 506.500, R.S.Mo., one of which is transacting business here; and (2) if so, that the defendant has sufficient contacts in Missouri to reasonably expect to be haled into court in Missouri on the plaintiff's specific claims.

Neither requirement is met here. First, DKM did not transact business in Missouri here, as it sold the pipes to a Florida distributor who had them picked up from DKM in Kansas. And a tort claim against a nonresident for an injury in another state caused when goods are being shipped to Missouri does not arise out of transacting business here. *Babb v. Bartlett*, 638 S.W.3d 97, 110-11 (Mo. App. 2021). Second, DKM's alleged torts in Kansas have no direct connection to its activities in Missouri to satisfy Due Process. *State ex rel. Cedar Crest Apartments, LLC v. Grate*, 577 S.W.3d 490, 494-95 (Mo. banc 2019). Prohibition now lies to order dismissal of the claims against DKM. *Id.*

Statement of Facts

A. Plaintiffs' allegations

In September 2021, Thomas Rees and Steven and Dana Naylor filed a petition in the Circuit Court of Johnson County[1] against: (1) Ruth Anne & Dwight Parrott, LLC ("Parrott"); (2) Jesse Vannoy; (3) Gateway Pipe, Inc. ("Gateway"); and (4) DKM Enterprises, LLC ("DKM") (Ex. 20).[2] They filed a first amended petition in February 2023 (Ex. 510). The plaintiffs seek damages from the defendants for the wrongful death of Brooke Rees, Mr. Rees' wife and the Naylors' daughter (Ex. 510). Mr. Rees is a resident of Kansas, as Mrs. Rees had been, and the Naylors are residents of Georgia (Ex. 510-11). Respondent Honorable Stacey Lett is the judge assigned (Ex. 14).

The plaintiffs allege Parrott and Mr. Vannoy are Missouri residents and Gateway and DKM are non-residents, though the plaintiffs allege Gateway had a Missouri operation in St. Louis (Ex. 511-12). For DKM, the plaintiffs allege it "operated as a steel salvage company and wholesale distributor of used steel materials in the states of Missouri and Kansas" and "regularly transacted business in the state of Missouri and availed itself of the laws and privileges of Missouri by way of providing steel salvage and distribution services within the state of Missouri" (Ex. 511-12). They allege the Missouri court has jurisdiction over DKM under Missouri's long-arm statute, § 506.500, R.S.Mo., because DKM "committed tortious acts in

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[1] The court later granted a change of venue to Cass County (Ex. 6-7). Both courts' dockets are included in the record (Ex. 1, Ex. 6).

[2] Per Rule 97.03, the attached exhibits are consecutively paginated and are preceded by an index. "Ex. X" refers to page X of the collective exhibits.

Missouri and transact[s] business within this state such that [it has] purposely availed [itself] of Missouri law and could reasonably anticipate defending a lawsuit in Missouri" (Ex. 512).

The plaintiffs allege the defendants' negligence caused or contributed to cause Mrs. Rees' death (Ex. 514-26). They allege Gateway brokered a contract to purchase steel pipe from DKM in Abilene, Kansas, for delivery to Gateway's customers in Maryville, Missouri (Ex. 514). They allege Gateway hired Parrott to pick up the pipe from DKM in Kansas and deliver it to Maryville (Ex. 514). They allege Mr. Vannoy was Parrott's agent and drove Parrott's tractor-trailer with a flatbed semi-trailer to DKM's location in Kansas, where he and DKM loaded the pipes onto the trailer (Ex. 514). They allege that thereafter, Mr. Vannoy was driving the truck with the pipes eastbound on Interstate 70 near Topeka, Kansas, when the pipes became displaced and entered the westbound lanes, striking Mrs. Rees' car, as a result of which she died (Ex. 514-15).

The plaintiffs allege DKM's negligence caused or contributed to cause Mrs. Rees' death because DKM "failed to exercise an ordinary degree of care in loading, immobilizing, and securing the pipe on the trailer" at its location in Abilene, Kansas, in multiple respects (Ex. 519-21). They seek damages for Mrs. Rees' death and their loss of consortium (Ex. 521-22). In allowing the plaintiffs to amend their petition, Respondent allowed the plaintiffs to seek punitive damages against DKM, too (Ex. 525-26).

B. Proceedings below

Parrott and Mr. Vannoy timely answered the plaintiffs' petition and denied the claims of their liability or that the plaintiffs were entitled to any relief (Ex. 37, 61). Gateway later was dismissed as a party (Ex. 66). Dismissals for Parrot and Mr. Vannoy are pending Respondent's approval of their motion to approve a settlement, which was filed shortly after Respondent entered her order denying DKM's second motion to dismiss for lack of personal jurisdiction that is at issue in this petition (Ex. 19).

Within the time to file an answer, DKM moved the court to dismiss the plaintiffs' claims against it for lack of personal jurisdiction (Ex. 3-5). The trial court (at the time, Honorable William Collins) denied that motion in January 2022 (Ex. 5).

DKM then filed a petition in this Court seeking a writ prohibiting the trial court from enforcing its order denying the motion to dismiss and doing anything except granting the motion and dismissing the case, arguing that the facts showed a lack of personal jurisdiction. See *State ex rel. DKM Enters., LLC v. Collins*, No. WD85174. When this Court denied the petition (Ex. 552), DKM refiled its petition in the Supreme Court, No. SC99507.

In opposition to DKM's writ petition in the Supreme Court, the plaintiffs argued it was "premature because jurisdictional discovery has not been undertaken" (Opp. to Petition for Writ of Prohibition in SC99507 at p. 1). They argued that "[w]ithout discovery to flesh this out, plaintiffs would be denied due process," as the "facts require additional discovery" (*Id.* at 5-6). They argued, "The degree of knowledge of DKM principals about the sale of

the pipes, the shipment of the pipes, and the company's knowledge that its pipes were going into Missouri also require exploration in discovery" (*Id.* at 5-6 n.3). They then repeated this argument throughout their opposition (*Id.* at 12, 14), concluding, "Even if this Court believes that the evidence assembled by Plaintiffs at this point is insufficient to fully justify personal jurisdiction, the writ should not issue as Plaintiffs have not had the opportunity to conduct jurisdictional discovery, or test the accuracy of the representations in the affidavits through deposition" (*Id.* at 16-17). The Supreme Court denied DKM's petition (Ex. 553).

DKM then answered the plaintiffs' petition, denying all their claims and again asserting the court lacked personal jurisdiction over it (Ex. 74, 79).

Over the next 13 months, the parties conducted what the plaintiffs later called "a great deal of discovery" on personal jurisdiction (Ex. 529). This included depositions of Gary Lakowski, Gateway's principal (Ex. 119), Ruth Anne and Dwight Parrott, Parrott's principals (Ex. 154, 293), Mr. Vannoy (Ex. 206), David Trevino, DKM's employee who oversaw its pipe yard in Abilene (Ex. 351), and Steven McNew, DKM's principal (Ex. 408).

In February 2023, with jurisdictional discovery complete (Ex. 93), DKM again moved to dismiss the plaintiffs' claims against it for lack of personal jurisdiction (Ex. 88-91, 91).

DKM argued it does not fall under Missouri's long-arm statute, § 506.500, R.S.Mo., because the plaintiffs' claims do not arise from its transacting business in Missouri or making a contract in Missouri, and the

alleged tort did not occur in Missouri (Ex. 95-100). Pointing to discovery in the case, which it attached, DKM showed (Ex. 93-95):

- The accident with Ms. Rees occurred in Kansas (Ex. 115).
- Mr. Rees was a Kansas resident at the time of the accident and now lives in Texas, Mrs. Rees was a Kansas resident at the time, and Mr. and Mrs. Naylor were and are Georgia residents (Ex. 107, 109-10).
- DKM is a Texas company that operates a pipe yard in Abilene, Kansas (Ex. 417, 436-37).
- DKM sold the pipes at issue in this case "F.O.B. Abilene" to Gateway, a Florida company pipe broker (Ex. 121-22, 139).
- Independent of DKM, Gateway sold the pipe at issue to two companies located in Missouri (Ex. 132, 139).
- Gateway did not tell DKM the pipes at issue were destined for Missouri (Ex. 134).
- Gateway hired Parrott to pick up the pipe "FOB Abilene", and chose Parrott based on its interactions with an online trucking service coordinator, internettruckstop.com (Ex. 132, 139).
- Gateway did not consult with DKM in selecting the motor carrier that would haul the pipe at issue (Ex. 132).
- DKM had no input on which driver Parrott assigned to pick up the load of pipe at issue (Ex. 176).
- The pipes at issue were heading toward Missouri because an entity outside of DKM's control sold them into Missouri (Ex. 128, 134, 140).
- DKM had no contracts with Parrott (Ex. 176).

- DKM had no contracts with Mr. Vannoy (Ex. 256).
- DKM had no contracts with any Missouri company related to the transaction at issue in this case (Ex. 443).
- DKM and Parrott did not exchange any money relating to the pipes at issue (Ex. 176).

Based on these facts, DKM argued the plaintiffs had not met the initial burden of showing it engaged in any of the specific acts enumerated in the long-arm statute, § 506.500.1, and their cause of action "arose from" those acts (Ex. 95). It argued that as it "had no control over (a) where the load was heading, (b) which driver would be accepting responsibility for the load, or (c) which motor carrier would be accepting responsibility for the load," it was not "physically present in Missouri during any relevant part of the transaction at issue in this case," and "any action DKM took with regard to the load at issue was taken outside the State of Missouri," § 506.500.1 was not met (Ex. 95).

Citing *Babb v. Bartlett*, 638 S.W.3d 97 (Mo. App. 2021), DKM argued the fact Missouri was the ultimate destination for the pipes was irrelevant to a personal jurisdiction analysis, as DKM had no contact with Missouri with respect to the load at issue (Ex. 96). As only Gateway chose Parrott as the carrier that would accept responsibility for the load, which Parrott confirmed, and only Parrott chose to have Mr. Vannoy pick up the load from Kansas, which Parrott confirmed, DKM argued it had no control over which carrier or driver would take responsibility, and jurisdiction over DKM in Missouri could not be predicated on third-party Gateway's or Parrott's actions (Ex. 97-98).

As well, as Gateway sold the pipes to Missouri companies without DKM's knowledge in a "blind shipment," which Gateway and Parrott confirmed, and Mr. Vannoy confirmed DKM did not tell him where to take the load and loaded the pipes entirely in Kansas, DKM argued it had no control over where the load at issue was heading (Ex. 98-99). The "blind shipment" meant the broker, Gateway, shielded the ultimate destination from DKM, and Gateway's reason for doing this was because it wanted to reduce the risk of DKM or the ultimate customer finding each other and cutting out the middleman, which DKM respects, all of which Gateway's principal confirmed (Ex. 133-34, 137, 140). And DKM's loader, Mr. Trevino, testified he would have loaded the trailer the same way whether the load was destined for Missouri or anywhere else (Ex. 368-69).

Therefore, DKM argued the plaintiffs' claims against it did not connect directly to its Missouri activities, so jurisdiction over it in Missouri would violate its right to due process under U.S. Const. Amend. XIV (Ex. 100). It cited numerous authorities, including among others *Bristol-Myers Squibb Co. v. Superior Ct. of Cal., S.F. Cnty.*, 137 S. Ct. 1773 (2017), and *State ex rel. Cedar Crest Apartments, LLC v. Grate*, 577 S.W.3d 490 (Mo. banc 2019) (Ex. 100). It argued that under these authorities, even if the court were to proceed to a "minimum contacts" analysis, DKM still constitutionally could not be sued in Missouri in this case, as "DKM had no Missouri activities that gave rise to Plaintiffs' allegations" (Ex. 100, 102-04).

Finally, DKM argued it would be prejudiced by applying Missouri procedural law, because unlike in Kansas, where jurisdiction against it really

is vested, in Missouri settled parties and non-parties may not be included on the verdict form, whereas in Kansas they may be (Ex. 105). As well, in Kansas the trial judge decides the amount of punitive damages when allowed, whereas in Missouri they are decided by a jury (Ex. 105). It noted this meant it could "face the possibility of a Missouri jury (as opposed to a Kansas judge) awarding a sum of money against it to punish it for actions undertaken outside the State of Missouri" (Ex. 105).

The plaintiffs opposed DKM's motion to dismiss (Ex. 529). They argued the court's prior denial of DKM's first motion to dismiss, as well as this Court's and the Supreme Court's denial of writs, was dispositive (Ex. 529-30).

As additional facts, the plaintiffs argued DKM knew the truck and driver who arrived in Kansas to take the pipes were from Missouri, and Mr. Vannoy told Mr. Trevino the load was being taken to Missouri (Ex. 530-31). They argued Gateway had previously brokered the supply of pipe between DKM and Missouri customers before, and had previously done so to one of the same Missouri customers in this case five-to-ten times before (Ex. 531). They alleged Mr. Trevino believed the load was dangerously secured, knowing it was headed to Missouri (Tr. 531-32). They argued 6.4% of DKM's overall business and 11.4% of DKM's revenue was derived from Missouri customers in 2021, the year of the incident at issue, DKM advertises to and solicits business from Missouri customers in the same manner as 48 other states, DKM includes a testimonial from a Missouri customer on its website, and DKM regularly does business with Missouri customers, including its drivers logging at least 8,200 miles of travel on Missouri roads and highways since

2016 (Tr. 532-35). They argued DKM had obtained permits from the Missouri Department of Transportation to transport oversized loads through Missouri (Tr. 533). They argued DKM's employee-driver hauling a load was cited in Missouri for violations, the fines for which DKM paid (Tr. 533-34).

The plaintiffs argued that, given these facts, DKM transacted business in Missouri in this case through an agent, Gateway, to a Missouri resident, which did fit the long-arm statute (Ex. 535-36). They pointed to testimony by DKM's principal, Mr. McNew, that this was its common way of doing business, including through brokers in Missouri (Ex. 537-39). They also pointed to Mr. McNew's testimony that DKM itself hauled loads through Missouri and to Missouri customers (Ex. 541-42). It argued that consequently, under the facts of this case, all of DKM's case law was distinguishable (Ex. 542-45). It argued that instead, "the 'transaction of any business' is construed broadly and may consist of a single transaction when that transaction is the basis for the plaintiff's suit," though it only invoked authority predating *Bristol-Meyers* (Ex. 544-46). It argued DKM's actions in this case therefore constituted "doing business in Missouri" (Ex. 548-49).

DKM replied in support of its motion to dismiss (Ex. 748). It argued it was proper to revisit the issue of personal jurisdiction now that discovery had closed, citing *State ex rel. Pain, Anesthesia & Critical Care Servs., P.A. v. Ryan*, 728 S.W.2d 598, 601 (Mo. App. 1987) (Ex. 749). It argued Gateway was not DKM's agent under Missouri law, because "DKM had nothing to do, directly, with Gateway's sale of the pipe to the Missouri entities" (Ex. 750-51). It argued none of the elements of agency was met (Ex. 751-53).

DKM also pushed back on the plaintiffs' factual arguments (Ex. 751-56). It showed the "Missouri customers" the plaintiffs stated in their additional facts were DKM's in fact were Gateway's (Ex. 753). It showed DKM did not have any foreknowledge that the pipes would be sold to a Missouri customer (Ex. 753). It argued the plaintiffs were misconstruing testimony, and the Missouri customers at issue were Gateway's, not DKM's, including the one receiving pipe in this case to whom the plaintiffs alleged DKM had sold pipe to in the past – that customer was Gateway's (Ex. 754). It showed that in fact, of the 3,824,772 miles DKM drove in 2021, only 8,208, or 0.2%, were in Missouri (Ex. 755-76).

Finally, DKM argued that despite the plaintiffs' assertion it had "minimum contacts" with Missouri, all of those contacts were outside the circumstances alleged in this case (Ex. 756). It argued,

> While those arguments could be relevant if this case arose out of those contacts, they are irrelevant here because Plaintiffs cannot establish anything other than a third party's actions causing DKM's pipes to be sold into the State of Missouri. Even then, the accident happened in Kansas, involving a Kansas resident. The United States Supreme Court is clear that under these circumstances, DKM's due process rights would be violated if it were required to litigate this case in Missouri.

(Ex. 756).

On May 5, 2023, the trial court entered an order summarily denying DKM's motion to dismiss (Ex. 859). DKM then timely filed an answer to the plaintiffs' first amended petition, in which it continued to state the lack of personal jurisdiction over it as an affirmative defense, incorporating all its prior briefing (Ex. 861, 868). This petition follows.

Reasons Why the Writ Should Issue

I. The trial court lacks personal jurisdiction over Texas resident DKM for liability for a tort the Kansas and Georgia plaintiffs allege DKM committed against a Kansas resident entirely in Kansas, and erred in denying DKM's motion to dismiss.

Standard of Review

"When personal jurisdiction is contested, 'it is the plaintiff who must shoulder the burden of establishing that defendant's contacts with the forum state were sufficient.'" *Bryant v. Smith Interior Design Group, Inc.*, 310 S.W.3d 227, 231 (Mo. banc 2010) (citation omitted). "'The sufficiency of the evidence to make a prima facie showing that the trial court may exercise personal jurisdiction is a question of law,' which … this Court reviews de novo." *Id.* (citation omitted).

"A reviewing court evaluates personal jurisdiction by considering the allegations contained in the pleadings to determine whether, if taken as true, they establish facts adequate to invoke Missouri's long-arm statute and support a finding of minimum contacts with Missouri sufficient to satisfy due process." *Id.* "When the motion [to dismiss] is based on facts not appearing on the record, the trial court may hear it on affidavits presented by the parties …." *Conway v. Royalite Plastics*, 12 S.W.3d 314, 318 (Mo. banc 2000), *disagreed with on other grounds by Bryant*, 310 S.W.3d at 233. But this "does not serve to convert the motion to dismiss into a motion for summary judgment," and "the trial court's inquiry is limited to an examination of the petition on its face and the supporting affidavits to determine the limited question of personal jurisdiction." *Chromalloy Am. Corp. v. Elyria Foundry*

Co., 955 S.W.2d 1, 3 n.3 (Mo. banc 1997), *disagreed with on other grounds by State ex rel. Henderson v. Asel*, 566 S.W.3d 596, 599, n.6 (Mo. banc 2019).

* * *

To establish personal jurisdiction over a nonresident defendant in Missouri, a plaintiff first must plead and prove that its cause of action against the defendant "arises from" an act enumerated in Missouri's long-arm statute, § 506.500, R.S.Mo. If the plaintiff meets this requirement, the plaintiff then also must plead and prove that the defendant had minimum contacts with Missouri such that it reasonably could expect to be haled into court in Missouri on the plaintiff's specific claims.

Here, Kansas and Georgia plaintiffs sued DKM, a Texas resident, for torts they alleged DKM committed entirely in Kansas against their Kansas-resident decedent. The only conduct they argue satisfied the long-arm statute was DKM's transacting business in Missouri by loading pipes onto an independent motor carrier's truck in Kansas destined for Missouri. They argued DKM's customer, Gateway, was DKM's agent, who then selected Missouri customers and the Missouri motor carrier. For minimum contacts, they only pointed to DKM having transacted unrelated business in Missouri.

The law of Missouri is that these connections are insufficient for personal jurisdiction over DKM. First, the plaintiffs did not show their cause of action arose from DKM's transacting business in Missouri. DKM did not transact business in Missouri at all in this case, instead only selling pipes in Kansas to a Florida distributor, which as a matter of law was not DKM's agent. But even if that somehow could be considered transacting business in

Missouri, the plaintiffs' claims did not "arise from" that transaction's connection to Missouri, as the goods' destination did not affect the tortious conduct the plaintiffs alleged, all of which they alleged occurred in Kansas.

Second, the plaintiffs' allegation that DKM did other business in Missouri is insufficient for minimum contacts *on the plaintiffs' claims*. Their claims that DKM committed tortious acts in Kansas that injured their decedent there have no direct connection to those other, separate alleged economic activities in Missouri to satisfy Due Process. *State ex rel. Cedar Crest Apartments, LLC v. Grate*, 577 S.W.3d 490, 494-95 (Mo. banc 2019).

Therefore, Missouri lacks personal jurisdiction over DKM. The trial court erred in holding otherwise. This Court's writ of prohibition now lies to remedy that error.

A. To subject a nonresident to jurisdiction in Missouri, the plaintiff first must plead and prove that its cause of action against the nonresident arises from the nonresident's commission of an act enumerated in § 506.500, R.S.Mo., and only then does a court turn to a minimum contacts analysis.

"Missouri courts employ a two-step analysis to evaluate personal jurisdiction." *Bryant*, 310 S.W.3d at 231. That is,

> [t]o subject a non-resident defendant to the long arm jurisdiction of Missouri, the plaintiff must plead and prove two elements: first, that the suit arose from any of the activities enumerated in Section 506.500 RSMo ..., the Missouri long arm statute; and second, that the defendant has sufficient minimum contacts with Missouri to satisfy due process requirements.

Consolidated Elec. & Mechanicals, Inc. v. Schuerman, 185 S.W.3d 773, 776 (Mo. App. 2006).

First, Missouri's long-arm statute, § 506.500, provides in relevant part:

> Any person or firm, whether or not a citizen or resident of this state, or any corporation, who in person or through an agent does any of the acts enumerated in this section, thereby submits ... to the jurisdiction of the courts of this state as to any cause of action *arising from* the doing of any of such acts:
>
> (1) The transaction of any business within this state; …

§ 506.500.1 (emphasis added)

Besides the "arising from" language in § 506.500.1, § 506.500.3 provides "[o]nly causes of action *arising from* acts enumerated in this section may be asserted against a defendant in an action in which jurisdiction over him is based upon this section." (Emphasis added).

Second, as to minimum contacts, "[t]he due process clause of the Fourteenth Amendment further requires that a non-resident defendant have sufficient minimum contacts with the forum state so that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Schuerman*, 185 S.W.3d at 776 (citation omitted). In enacting § 506.500, the General Assembly "sought to extend the jurisdiction of Missouri courts to numerous classes of out-of-state defendants who could not have been sued in Missouri under the preexisting law," and "intended to provide for jurisdiction, within the specific categories enumerated in the statutes, to the full extent permitted by the due process clause of the Fourteenth Amendment." *State ex rel. Metal Serv. Cent. of Ga., Inc. v. Gaertner*, 677 S.W.2d 325, 327 (Mo. banc 1984).

So, only if a plaintiff meets the initial "burden of making a *prima facie* showing that [a nonresident defendant] engaged in any of the specific acts enumerated in § 506.500.1 and that the causes of action against [that

defendant] in the [plaintiff's] Petition 'arose from' those acts" does a court then engage in any analysis of "whether [the nonresident defendant] had sufficient 'minimum contacts' with Missouri to satisfy due process requirements." *Babb v. Bartlett*, 638 S.W.3d 97, 112-13 (Mo. App. 2021) (citing *Lindley v. Midwest Pulmonary Consultants, P.C.*, 55 S.W.3d 906, 909 (Mo. App. 2001)).

B. As a matter of law, the Kansas and Georgia plaintiffs' claims that Texas resident DKM committed a tort in Kansas do not arise out of DKM transacting business within Missouri, making minimum contacts irrelevant.

Here, the plaintiffs' only argument that DKM fell under the long-arm statute was "DKM transacted business within Missouri" per § 506.500.1(1) (Ex. 535-36). It argued that because the statute allows transacting business "in person or through an agent," Gateway was DKM's agent, and DKM selling pipes to Gateway and loading them onto a truck registered in Missouri with a Missouri signate, which Mr. Vannoy told Mr. Trevino was destined for Missouri, was sufficient to meet this (Ex. 535-48). It then argued DKM had sufficient "minimum contacts" with Missouri to expect to be haled into court here (Ex. 548-49).

The plaintiffs' argument is in error. The law of Missouri is that even under the facts the plaintiffs alleged, Gateway was not DKM's "agent," and their personal injury claim of negligence against DKM does not "arise from" DKM's transaction of business in Missouri. Therefore, any analysis of minimum contacts is irrelevant.

1. A tort claim against a nonresident for an injury in another state caused when a truck is shipping goods to Missouri does not arise out of transacting business in Missouri.

In *Babb*, the Court held a similar claim against a similar nonresident defendant did not arise from that defendant's transaction of business in Missouri. 638 S.W.3d at 110-11. The Court "note[d] that 'Missouri courts have consistently held that the requirement of 'transaction of any business within this state' must be construed broadly and may consist of a single transaction if that is the transaction sued upon.'" *Id.* at 110 (quoting *Lindley*, 55 S.W.3d at 910 (quoting *Metal Serv. Ctr.*, 677 S.W.2d at 327)). Despite this, the plaintiff's claim still must arise out of that transaction. *Id.*

There, Oklahoma-resident plaintiffs sued an Oklahoma-resident truck driver and her Missouri contracting shipper, alleging the driver's negligence caused personal injuries to the plaintiffs in a vehicular accident in California. *Id.* at 100-01. When the driver moved to dismiss for lack of personal jurisdiction over her, one of the plaintiffs' arguments for long-arm jurisdiction was that she had transacted business in Missouri by carrying loads for the Missouri contracting shipper's company, including at the time of the accident in California. *Id.* at 101.

This Court's Eastern District held that even if the driver transacted business with Missouri, the plaintiffs' tort claims did not "arise out of" that transaction of business, even if the load she was hauling at the time of the accident was picked up in or delivered to Missouri, because that was not the transaction on which the tort claims sued:

> However, even if we accept that [the driver] had previously "worked extensively in Missouri," including picking up and

> delivering loads for [the Missouri shipper's] customers, there are absolutely no allegations in the Second Amended Petition, and no supporting evidence in the record, establishing that the tort claims against [the driver] actually "arose from" this conduct.
>
> In particular, [the driver] notes that there are no allegations or evidence that the particular load she was hauling at the time of the 2018 Incident was either picked up in or delivered to Missouri. **However, even if this load had been picked up in or delivered to Missouri, that fact would not alter our conclusion. The origin or destination of the load, given the other facts and circumstances of this case, is purely incidental to the cause of the 2018 Incident**. The core claim against [the driver] in the Second Amended Petition alleges ordinary negligence in connection with her operation of her tractor-trailer, including that she failed to keep a careful lookout, failed to maintain control of the vehicle, was distracted, and failed to properly maintain the tractor and/or trailer. Therefore, the origin or destination of the load [the driver] happened to be carrying at the time of the 2018 Incident has absolutely nothing to do with these issues in the case, and this fact will not impact the outcome of the negligence claims against [the driver] in any way.

Id. at 110 (emphasis added).

The Court analogized this to *Lindley*, 55 S.W.3d at 913-14, in which a Kansas-resident medical doctor was not subject to personal jurisdiction in Missouri under § 506.500 for claims of medical malpractice that were committed exclusively in Kansas against a Kansas resident, because those claims did not arise out of his transaction of business in Missouri, even though he was licensed in Missouri and employed at the time by a Missouri entity. *Id.* at 110-11. The Court noted that like the doctor's conduct in *Lindley*, the driver's "conduct in connection with the [accident at issue] was intended to have, or actually did have, any effects or consequences in

Missouri because: (a) the [accident at issue] occurred in California; and (b) [the plaintiffs] were Oklahoma residents at all relevant times." *Id.* at 111.

None of the driver's connections to Missouri affected the conduct on which the plaintiffs sued, which was ordinary negligence from an alleged breach of "her general duties of care as a truck driver on public roads and elsewhere, which duties of care she owed to *everyone*." *Id.* (emphasis in the original). Therefore, the plaintiffs' claims did not arise from the driver's transaction of any business in Missouri, "regardless of the origin or destination of the load she was carrying at the time of the [California accident] and the other facts [the plaintiffs] rel[y] on." *Id.*

2. Gateway was not DKM's agent.

The same as in *Babb* is true here. First, DKM did not actually transact business in Missouri in this case at all.

Perhaps recognizing this is a problem for it, in opposition to the DKM's 2023 motion to dismiss for the first time the plaintiffs argued DKM had not *itself* transacted business in Missouri, but now say DKM instead did so through an agent, Gateway (Ex. 535-36). It pointed to testimony by DKM's principal, Mr. McNew, that this was its common way of doing business, including through brokers in Missouri, and that DKM had previously sold goods to Missouri customers through Gateway as broker before (Ex. 537-39).

The plaintiffs' argument that Gateway was DKM's "agent" is in error. The law of Missouri is that a company selling its product to another company, who then re-sells the product, is not the principal to its customer, and its customer is not its agent. *See Dotson v. Int'l Harvester Co.*, 285 S.W.3d 585, 591-92 (Mo. 1955).

In *Dotson*, a farmer sued an implement dealer and International Harvester ("IH") for misrepresentation, seeking to hold IH responsible for the dealer's statements during the sale by arguing the dealer was an agent of IH. *Id.* In holding the dealer was not IH's agent, the Court held the plaintiff presented no evidence transforming an ordinary dealer-manufacturer relationship into a principal-agent relationship. *Id.* Notably, IH had provided the dealer with literature, blank order forms, and signage bearing IH's logo, but even that was not enough. *Id.* The Court noted, "[N]either International Harvester nor any of its representatives had anything to do, directly, with the sale of the corn planter to the Dotsons and, of course, made no representations." *Id.* at 591.

Here, DKM had nothing to do, directly, with Gateway's sale of the pipe at issue to the Missouri entities (Ex. 98-99, 132, 139). This was a "blind shipment," in which DKM cannot have made any representations to Gateway's customers, let alone intentionally selected them as customers.

It makes sense that consequently, Gateway was not DKM's agent and DKM was not Gateway's principal. An agency relationship in Missouri requires three elements: (1) the agent must have the power to alter the legal relationships between the principal and third parties, and between the principal and himself; (2) the agent has a fiduciary duty within the scope of his agency, and (3) the principal has the right to control the conduct of the agent in matters entrusted to him. *Capitol Indem. Corp. v. Citizens Nat'l Bank of Fort Scott, N.A.*, 8 S.W.3d 893, 903 (Mo. App. 2000) (holding, for purposes of ruling on personal jurisdiction under Missouri's long-arm statute,

that defendant bank was not agent of a contractor who banked with them); *Stavrides v. Zerjav*, 848 S.W.2d 523, 529-30 (Mo. App. 1993) (same, holding bank serving as an escrowee was not borrower's agent, as the borrower did not have power to alter relations between the bank and third parties).

The plaintiffs offered no discussion of these elements, let alone any evidence to establish any of them, but instead merely asserted Gateway was DKM's agent (Ex. 535-36). This is because none of them remotely is met.

First, Gateway had no power to alter the legal relationships between DKM and third parties. There was no legal relationship between DKM and Gateway's customers at all. Gateway sent its own purchase order to DKM, with no reference to any other customer (Ex. 758). DKM invoiced Gateway directly (Ex. 759). DKM's pipes were sold in a transaction involving only two parties: Texas-based DKM and Florida-based Gateway. DKM did not even know who the third-party was, as Gateway was the pipes' purchaser and the shipment was blind (Ex. 140). Gateway then hired third-party transportation to come to DKM's location to pick up the purchased pipes and deliver them to Gateway's customer (Ex. 128, 132, 139-40, 176). DKM would not even know the town to which the pipes were being shipped, let alone the Gateway customer to which they were being shipped (Ex. 128, 134, 140). Simply put, DKM had no legal relationship with Gateway's Missouri customers that could be altered, and the plaintiffs presented no evidence to the contrary.

Second, Gateway did not owe DKM a fiduciary duty. Gateway is a separate business that sells pipe (Ex. 122). In Gateway's principal's own

words, DKM is one of Gateway's suppliers (Ex. 140). DKM and Gateway do not have a contract, and instead do business on purchase orders alone (Ex. 127). Neither has anything to do with the other's operation, and instead the relationship is that of a supplier selling pipe to a customer, who in turn resells the pipes to third parties, who are unknown to DKM (Ex. 132, 135). To be sure, Gateway sells pipe from several different pipe suppliers and is not DKM's exclusive pipe seller (Ex. 134).

Finally, DKM did not have any right to control Gateway's conduct. After Gateway purchased the pipe from DKM, Gateway was then responsible for picking up the purchased pipes and transporting them off DKM's property (Ex. 132). Gateway hired a third-party trucking company to pick up the pipes from DKM in Kansas (Ex. 132). Gateway hired the driver, and DKM did not have any input in qualifying the driver (Ex. 447).

Accordingly, none of the elements of agency is met. As a matter of law, Gateway was not DKM's agent. Because the plaintiffs' only basis for arguing personal jurisdiction over DKM under the long-arm statute in their opposition below hinges on Gateway acting as DKM's agent, the trial court erred in holding the plaintiffs had met their burden to establish personal jurisdiction over DKM.

3. DKM did not transact business in Missouri in this case at all.

To be sure, outside of the plaintiffs' unfounded new agency theory, and as the plaintiffs tacitly recognize, DKM did not by itself transact business in Missouri in this case at all.

DKM is a Texas company with its principal place of business in Texas and a location in Kansas, and it sold the pipes alleged to be involved in the

accident with Mrs. Rees to Gateway, a Florida corporation, and was paid by Gateway (Ex. 121-22, 139). All the actions the plaintiffs allege were DKM's negligence occurred in Kansas (Ex. 514-15). DKM never made any telephone calls or sent any correspondence or documentation to Missouri related to the pipes or entered into any contracts with anyone from Missouri associated with the pipes (Ex. 176, 256, 443). The trailer was located in Kansas when it was loaded with the pipes, and the accident the plaintiffs allege caused Mrs. Rees' death occurred in Kansas (Ex. 514-15).

To the extent the plaintiffs made any argument outside of their agency theory that their injury arises out of DKM's transaction of business in Missouri, it appears to be that DKM knew the pipes were being loaded for transport to Missouri, as confirmed by the signate on Mr. Vannoy's truck and Mr. Vannoy believing he had told DKM employees that he was headed to Missouri (Ex. 535-48).

But that was not DKM transacting business in Missouri at all. It was transacting business with a Florida entity, with the incidental fact that the Florida entity was sending the product to a customer in Missouri. No part of DKM's transaction with Gateway occurred in Missouri. The pipes' destination had nothing to do with the transaction between DKM and Gateway in Kansas. It is no different than a manufacturer anywhere in America selling a good to a distributor for delivery to the distributor's customer elsewhere. It was not the transaction of business in Missouri.

4. If DKM did transact business in Missouri by selling pipes to Gateway, the plaintiffs' tort claims for acts and injuries in Kansas do not arise from that transaction.

Even if this could be considered DKM transacting business in Missouri, rather than in Kansas, as in *Babb* the plaintiffs' claim does not arise from that transaction because it was not "the transaction sued upon." 638 S.W.3d at 110 (quoting *Lindley*, 55 S.W.3d at 910 (quoting *Metal Serv. Ctr.*, 677 S.W.2d at 327)). Neither the plaintiffs nor Mrs. Rees, none of whom was a Missouri resident, were party to that transaction. The fact the pipes were destined for Missouri did not affect the conduct on which the plaintiffs sued DKM, which was DKM's alleged ordinary negligence from its breach of various duties of care for securing FOB cargo at its facility in Kansas, which it allegedly owed to everyone. "Therefore, the origin or destination of the" pipes DKM loaded onto Mr. Vannoy's truck in Kansas "has absolutely nothing to do with these issues in the case, and" cannot "impact the outcome of the negligence claims against [DKM] in any way." *Id.* at 110.

Rather, as in *Babb*, the destination of the items DKM was loading when the plaintiffs allege it was negligent was "purely incidental to the cause of the" injury the plaintiffs alleged. *Id.* The pipes could have been destined for anywhere. They just happened to be destined for Missouri. The plaintiffs' claims of injury in Kansas to Kansas and Georgia residents for negligent acts allegedly committed entirely in Kansas has nothing to with the pipes' destination.

The only three decisions the plaintiffs cited to the trial court about transacting business within the meaning of the long-arm statute (Ex. 544-45)

are inapposite and do not change this analysis. None of them involved torts, but instead they were suits on the transactions at issue. *State ex rel. Nixon v. Beer Nuts, Ltd.*, 29 S.W.3d 828, 833-34 (Mo. App. 2000), was a suit by the Missouri Attorney General against a North Carolina company for both violating the Missouri Merchandising Practices Act in selling goods to Missouri residents and then breaching an agreement with Missouri. *Sloan Roberts v. Morse Chevrolet, Inc.*, 44 S.W.3d 402, 407-08 (Mo. App. 2001), was a suit by a Missouri resident against a Kansas car dealership for selling him a defective car that the dealership itself had purchased in Missouri, from which purchase the plaintiff's cause of action arose. And in *Capital Indem. Corp. v. Citizen's Nat'l Bank of Fort Scott, N.A.*, 8 S.W.3d 893, 903-04 (Mo. App. 2000), the Court held a Kansas bank seeking to collect from a Missouri entity payments a Kansas customer owed it *did not* qualify as transacting business in Missouri so as to subject it to long-arm jurisdiction here.

Conversely, decisions from throughout the United States that *are* similar to this case echo *Babb*. They hold long-arm personal jurisdiction of a claim against a nonresident for a tort occurring in a foreign state cannot be maintained on the basis of the nonresident transacting business in the forum state unless the cause of action arises out of that transaction. *See, e.g.*:

- *Johnson v. Ward*, 829 N.E.2d 1201, 519-20 (N.Y. 2005) (New York lacked long-arm jurisdiction over New Jersey resident for injuries allegedly caused in New Jersey on the basis of defendant's business transactions with New York, where "Plaintiffs' cause of action arose out

of defendant's allegedly negligent driving in New Jersey, not from" those business transactions);

- *Gaidar v. Tippecanoe Distrib. Serv.,* 702 N.E.2d 316, 323-24 (Ill. App. 1998) (Illinois lacked long-arm jurisdiction over Indiana resident for injuries allegedly caused in Indiana on the basis of defendant's business transactions with Illinois including having driven a truck from Illinois to Indiana earlier that day, where "Plaintiff's cause of action did not arise from the transaction of any business within Illinois as required by the long-arm statute but arose out of alleged negligent driving in Indiana;" **collecting cases from across the country**).

As in *Babb* and these decisions, the plaintiffs did not prove a *prima facie* case that their cause of action against Texas-resident DKM alleging negligence in injuring a Kansas resident in Kansas arose from DKM's transaction of business in Missouri. Therefore, the trial court erred in denying DKM's motion to dismiss for lack of personal jurisdiction. An analysis of whether DKM had minimum contacts with Missouri is unnecessary.

C. Texas resident DKM lacked minimum contacts with Missouri such that it reasonably could be expected to be haled into court in Missouri for the Kansas and Georgia plaintiffs' claims that DKM committed a tort in Kansas.

If the plaintiffs' cause of action against DKM somehow arises from DKM's transaction of business in Missouri, DKM still lacked sufficient "minimum contacts" with Missouri in the context of this case for a Missouri court to exercise specific personal jurisdiction over it.

1. DKM lacks even a minimum presence in Missouri.

The Due Process Clause of U.S. Const. Amend. XIV requires a defendant's contacts with a proposed forum be sufficiently extensive so that "maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945) (citation omitted). "When evaluating minimum contacts, the focus is on whether 'there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" *Bryant,* 310 S.W.3d at 232 (quoting *Hanson v. Denckla,* 357 U.S. 235, 253 (1958)).

"In determining whether a defendant has established sufficient minimum contacts, 'the foreseeability that is critical to due process analysis … is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.'" *Peoples Bank v. Frazee,* 318 S.W.3d 121, 129 (Mo. banc 2010) (citations omitted).

DKM has no connection to Missouri such that it reasonably would expect to be haled into court in Missouri, especially for a tort allegedly committed entirely in Kansas. DKM is a Texas limited liability company with its principal place of business in Texas and no Missouri operations (Ex. 417). Its contacts with Missouri are the same as any other state where it advertises its goods (Tr. 532-35). DKM did not sell the pipe at issue to a Missouri entity, but instead to Gateway, a Florida entity (Ex. 121-22, 139).

2. Shipping products to or from Missouri is insufficient for minimum contacts.

The plaintiffs' only response was that "DKM sold and loaded its steel pipes for transport to Missouri customers with full knowledge that said pipes would travel to Missouri" (Ex. 545). First, simply selling products in the general stream of commerce to or from Missouri residents and shipping them to or from Missouri is insufficient for minimum contacts, even over claims involving the goods at issue. *See, e.g.*:

- *Schuerman*, 185 S.W.3d at 777 (Missouri lacked personal jurisdiction over California resident over contract for Missouri resident's purchase of baseball tickets from California resident via mail in which no services were performed in Missouri other than receipt of the tickets);
- *Johnson Heater v. Deppe*, 86 S.W.3d 114, 120 (Mo. App. 2002) (same re: contract by Missouri corporation to sell HVAC system to Wisconsin resident in which no services were performed in Missouri other than shipping of HVAC system to Wisconsin, even where Wisconsin resident sent faxes and mail to Missouri corporation and mailed check to Missouri to pay for HVAC system); and
- *TSE Supply Co. v. Cumberland Natural Gas Co.*, 648 S.W.2d 169, 170 (Mo. App. 1983) (same re: contract for sale of steel pipe from Missouri supplier to Texas buyer in which no services were performed in Missouri other than shipment of pipe).

3. The nonresident plaintiffs' claims that nonresident DKM committed torts in Kansas against their nonresident decedent in Kansas have no direct connection to DKM's economic activities in Missouri.

Second, the plaintiffs' argument that DKM has minimum contacts in Missouri for their alleged injury just by DKM selling products to Missouri customers in other cases is based on an outmoded and overbroad notion of minimum contacts. All the decisions they cited for "minimum contacts" were more than ten years old, with all but one more than 20 years old (Ex. 544-46).

More recently, beginning with *Bristol-Myers Squibb Co. v. Superior Ct. of Cal., S.F. Cnty.*, 137 S. Ct. 1773, 1781 (2017), the U.S. Supreme Court and Missouri's courts have confirmed that for a nonresident plaintiff to sue a nonresident defendant in Missouri, the plaintiff's claim must connect directly to the defendant's Missouri activities, which is untrue of a tort the nonresident defendant is alleged to have committed against the nonresident plaintiff in another state unless that tort stems from the nonresident defendant's acts within Missouri. *See, e.g.*, *State ex rel. PPG Indus., Inc. v. McShane*, 560 S.W.3d 888, 890-93 (Mo. banc 2018); *State ex rel. Cedar Crest Apartments, LLC v. Grate*, 577 S.W.3d 490, 494-95 (Mo. banc 2019); *State ex rel. LG Chem, Ltd. v. McLaughlin*, 599 S.W.3d 899, 903-04 (Mo. banc 2020); *Est. of Fox v. Johnson & Johnson*, 539 S.W.3d 48, 50-52 (Mo. App. 2017); *Ristesund v. Johnson & Johnson*, 558 S.W.3d 77, 80-81 (Mo. App. 2018); and *Slemp v. Johnson & Johnson*, 589 S.W.3d 92, 97 (Mo. App. 2019).

In *Bristol-Myers*, the U.S. Supreme Court held a non-resident plaintiff must establish an independent basis for specific personal jurisdiction over a nonresident defendant in the forum state outside of general economic

activity. 137 S. Ct. at 1781. There, some 600 plaintiffs, mostly non-residents, sued Bristol-Myers in California for injuries allegedly caused by a drug Bristol-Myers manufactured, and "all the conduct giving rise to the nonresidents' claims occurred elsewhere." *Id.* at 1778, 1782.

The nonresident plaintiffs argued that because their claims were similar to the California residents' claims, California also had specific jurisdiction over their claims, as the same drug was marketed, prescribed, sold, and ingested in California. *Id.* at 1779. The U.S. Supreme Court disagreed, holding the "mere fact that *other* plaintiffs were prescribed, obtained, and ingested [the drug] in California – and allegedly sustained the same injuries as did the nonresidents – does not allow the State to assert specific jurisdiction over the nonresidents' claims," because "[w]hat is needed – and what is missing here – is a connection between the forum and the specific claims at issue." *Id.* at 1781 (emphasis in the original). "When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the state." *Id.*

At all times below, the plaintiffs have ignored this recent clarification of the law. For example, they invoked the supposed doctrine of "purposeful availment," arguing "DKM has purposely availed itself of the privilege of doing business in Missouri" (Ex. 546, 548). But the Missouri Supreme Court has noted that "there is considerable doubt as to what relevance – if any – this concept," which it referred to as the "hoary notion of 'purposeful availment,'" "retains in light of *Bristol-Myers Squibb*." *Cedar Crest*, 577 S.W.3d at 495 n.2. This is because "the majority of the [U.S.] Supreme Court

– over Justice Sotomayor's lone dissent – conspicuously omitted any discussion of 'purposeful availment' in its specific jurisdiction analysis. *Compare Bristol-Myers Squibb*, 137 S. Ct. at 1777-84, with *id.* at 1784-89 (Sotomayor, J., dissenting)." *Id.* Instead, per *Bristol-Myers*, "there can be no question that every assertion of specific jurisdiction must rest upon a showing that: (1) the defendant had at least one contact with the forum state, and (2) the claim being asserted against that defendant arose out of that contact." *Id.* (citing *Bristol-Myers*, 137 S. Ct. at 1780).

Since *Bristol Myers*, the Missouri Supreme Court and this Court uniformly have held Missouri courts lack specific personal jurisdiction over a nonresident defendant engaged in economic activities in Missouri for a nonresident plaintiff's claim for a tort, unless that tort claim directly stems from the defendant's acts within Missouri.

In *State ex rel. Bayer Corp. v. Moriarty*, the Missouri Supreme Court issued a writ directing dismissal of nonresident plaintiffs' product liability claims against a nonresident defendant for injuries occurring elsewhere, holding the mere fact the defendant was engaged in business in Missouri was insufficient, as the plaintiffs failed to show their claims arose out of or related the defendant's Missouri activities. 536 S.W.3d 227, 233-34 (Mo. banc 2017).

In *PPG*, the Missouri Supreme Court issued a writ directing the dismissal of a Missouri plaintiff's negligent misrepresentation claim against a nonresident defendant for a statement on its website, holding the defendant having a website accessible to Missourians was not a sufficient connection between Missouri and the specific claims at issue. 560 S.W.3d at 890-93.

In *Cedar Crest Apartments*, the Missouri Supreme Court issued a writ directing the dismissal of a Kansas resident's tort claims against Kansas entities alleging personal injuries from the Kansas entities' negligence in Kansas. 577 S.W.3d at 494-95. The plaintiff argued the defendants had sufficient minimum contacts with Missouri because (unlike even DKM here) they had registered to do business in Missouri, filed lawsuits in Missouri, and even owned rental property in Missouri. *Id.* The Court held "these contacts are insufficient to establish specific jurisdiction because [the plaintiff] fails to show any connection between these contacts and his claims, far less that his claims against [the defendants] arise out of those contacts." *Id.* at 495.

In *LG Chem.*, the Missouri Supreme Court issued a writ directing the dismissal of a Missouri resident's products liability tort claims against a Korean entity alleging personal injuries in Missouri when a battery the defendant manufactured exploded in his pocket. 599 S.W.3d at 903-04. The plaintiff argued the defendant selling the battery to an independent third-party distributor (like DKM did here) who then sold them in Missouri was a sufficient affiliation between Missouri, because it was foreseeable that the batteries would be sold in Missouri. *Id.* at 903. The Court disagreed, holding the plaintiff could not use a third party's actions to satisfy Due Process, and so the plaintiff's claim of injury did not arise out of any of the defendant's own independent Missouri activities. *Id.* at 903-04.

This Court has followed these decisions. *See, e.g.*, *Fox*, 539 S.W.3d at 50-52 (reversing judgment for nonresident plaintiff against nonresident drug manufacturer for injuries allegedly caused by manufacturer's drug outside

Missouri); *Ristesund*, 558 S.W.3d at 80-81 (reversing judgment for nonresident plaintiffs against nonresident talc powder manufacturer for injuries allegedly caused by manufacturer's product outside Missouri); *Slemp v. Johnson & Johnson*, 589 S.W.3d 92, 97 (Mo. App. 2019) (same).

This Court's Eastern District's decision in *Ingham v. Johnson & Johnson*, 608 S.W.3d 663 (Mo. App. 2020), illustrates well when a nonresident defendant's actions in Missouri *do* directly connect to a nonresident plaintiff's claims as compared to when they do not. There, a group of nonresident consumers brought claims against a nonresident talc powder manufacturer for product liability claims related to two different products, "Shimmer" and "Johnson's Baby Powder." *Id.* at 690. Fifteen plaintiffs alleged having used both products, but two alleged they only had used Johnson's Baby Powder and not Shimmer. *Id.*

Johnson's Baby Powder was solely manufactured in Georgia, but Shimmer was manufactured, packaged, and labeled in Missouri, and the 15 plaintiffs who stated they used Shimmer alleged in part that the defendant "negligently manufactured, produced, packaged, and labeled Shimmer." *Id.* at 691-93. The Court held these claims involving Shimmer "firmly connect [the defendant]'s activities in Missouri to the specific claims of the" 15 nonresident plaintiffs "and thus provide an adequate basis to exercise specific jurisdiction over" the defendant as to those claims. *Id.* at 693. But the Court reversed the judgment in favor of the two other plaintiffs concerning only Johnson's Baby Powder, holding there was no evidence the defendant

"engaged in any activities related to Johnson's Baby Powder" in Missouri besides marketing and selling it here, which was insufficient. *Id.* at 693-95.

The plaintiffs' claims against DKM here are like all these for which writs were granted or the judgments reversed, not the "Shimmer" plaintiffs in *Ingham*. They are suing DKM, a Texas resident, for an alleged tort against nonresidents in Kansas, in which all of DKM's alleged acts constituting the tort are alleged to have occurred in Kansas. The Missouri activities to which the plaintiffs point, that DKM sold goods to other Missouri consumers, obtained trucking permits in Missouri, and drove through Missouri, have no direct connection to their allegations in their personal injury claim. Rather, "these contacts are insufficient to establish specific jurisdiction because [the plaintiffs] fai[l] to show any connection between these contacts and [their] claims, far less that [their] claims against [DKM] arise out of those contacts." *Cedar Crest Apartments*, 577 S.W.3d at 495.

The plaintiffs' claim is that Texas-resident DKM committed negligent acts in Kansas that injured their Kansas-resident decedent in Kansas. There is no connection between those acts and any of DKM's alleged Missouri activities. In the terms of *Ingham*, their claims are Johnson's Baby Powder claims, not Shimmer claims. As in the above decisions, especially *Cedar Crest Apartments*, even if a minimum-contacts analysis is required, DKM lacks the required contacts in Missouri to reasonably expect to be haled into court in Missouri on the plaintiffs' tort claims.

The trial court erred in denying DKM's motion to dismiss for lack of personal jurisdiction.

II. Prohibition lies to remedy the foregoing.

The writ of prohibition is a fundamental part of our common law that allows this Court to prevent the usurpation of judicial power and prevent an irreparable harm to a party. § 530.010, R.S.Mo; *State ex rel. Dir. of Revenue v. Gaertner*, 32 S.W.3d 564, 566 (Mo. banc 2000). It

> is appropriate in one of three circumstances: (1) to prevent the usurpation of judicial power when the trial court lacks jurisdiction; (2) to remedy an excess of jurisdiction or an abuse of discretion where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not made available in response to the trial court's order.

State ex rel. Proctor v. Bryson, 100 S.W.3d 775, 776 (Mo. banc 2003).

"In particular, '[p]rohibition is the proper remedy to prevent further action of the trial court where personal jurisdiction of the defendant is lacking.'" *Cedar Crest Apartments*, 577 S.W.3d at 493 (quoting *State ex rel. Norfolk S. Ry. Co. v. Dolan*, 512 S.W.3d 41, 45 (Mo. banc 2017) (quoting *State ex rel. William Ranni Assoc., Inc. v. Hartenbach*, 742 S.W.2d 134, 137 (Mo. banc 1987))).

Accordingly, Missouri courts many times have issued writs of prohibition directing the dismissal of claims against defendants for lack of personal jurisdiction when a trial court erroneously has denied the defendants' motions to dismiss. *See, e.g.*, *Norfolk*, 512 S.W.3d at 45; *Bayer*, 536 S.W.3d at 233-34; *PPG*, 560 S.W.3d at 890-93; *Cedar Crest Apartments*, 577 S.W.3d at 494-95; *LG Chem*, 599 S.W.3d at 903-04. This makes sense, because a trial court improperly exercising jurisdiction over a party when it has none exceeds its jurisdiction, warranting prohibition.

Below, the plaintiffs argued this Court's and the Supreme Court's denial of writ petitions before discovery should be dispositive of the personal jurisdiction issue now, too (Ex. 529-30). This is untrue. *See State ex rel. Pain, Anesthesia & Critical Care Servs., P.A. v. Ryan*, 728 S.W.2d 598, 601 (Mo. App. 1987).

In *Ryan*, despite a writ petition being denied over a denial of a motion to dismiss pre-discovery, post-discovery the Court granted a new writ petition. There, Kansas defendants were sued in Missouri for alleged medical malpractice. *Id.* at 600. After the trial court denied the defendants' initial motions to dismiss, the defendants filed writ petitions in this Court and the Supreme Court, which were summarily denied. *Id.* 601.

The case then proceeded to discovery, in which evidence continued to show the Kansas defendants had insufficient contact with Missouri to satisfy due process requirements. *Id.* As DKM did here, the defendants then filed a new motion again arguing Missouri could not exercise jurisdiction over them, which the trial court denied. *Id.* The defendants then filed a new petition for a writ of prohibition in this Court. *Id.*

Despite the denial of the previous writ petition pre-discovery, this time the Court issued a preliminary writ and ultimately made it permanent, requiring the trial judge to dispose of the case for lack of personal jurisdiction. *Id.* at 601-02. It held, "The prior denials of the petitions for writs of prohibition by this court and by the Supreme Court were perhaps predicated upon an insufficient development of a record in opposition to the amended petition alleging activities which would tend to establish minimum

contacts with Missouri by the non-resident defendants. In any event these denials are not to be viewed as decisions on the merits and have no precedential value." *Id.* at 602; *see also Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 61 (Mo. banc 1999) (mere denial of a petition for writ of prohibition where the appellate court issues no opinion is not a conclusive decision on the merits of the issue presented).

At the same time, as these decisions recognize, DKM has no adequate remedy by appeal. "[T]his Court will not issue a remedial writ 'in any case wherein adequate relief can be afforded by an appeal.'" *State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798, 805 (Mo. banc 2015) (quoting Rule 84.22). But an appeal is not an "adequate remedy" when "this Court can readily avoid … duplicative and unnecessary additional litigation through a writ," as "[t]o do otherwise would be result in [*sic*] a failure of judicial efficiency." *Id.* at 806. Regardless of the possibility that the relator could wait for a final judgment and appeal, a writ is proper "to prevent a waste of judicial resources through unnecessary, inconvenient and expensive litigation." *Id.* at 807.

If a writ is denied, to have the question of its personal jurisdiction heard DKM would have to undergo additional discovery, expert workup, pretrial litigation, trial, and an appeal, likely lasting further years and costing hundreds of thousands of dollars, just to be in this same position. There is no reason to waste the Court's, the jury's, or the parties' time.

As in all the personal jurisdiction writ decisions cited above, the Court can and should remedy the trial court's error in denying DKM's motion to dismiss now. The writ of prohibition lies, and the Court should issue it.

Conclusion

The Court should issue a writ prohibiting Respondent Judge Lett from enforcing her order of May 5, 2023 denying Relator's motion to dismiss the plaintiffs' claims against it for lack of personal jurisdiction, and from doing anything other than vacating that order and dismissing the plaintiffs' claims against Relator.

Respectfully submitted,

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Certificate of Compliance

I certify that I prepared this petition, its accompanying writ summary, and the index of exhibits using Microsoft Word for Office 365 in Century Schoolbook size-13 font, which is not smaller than Times New Roman size-13 font. I further certify under this Court's Rule 20 that the exhibits to this petition include any legal memoranda filed in the lower court that advocated a position contrary to the relief requested in the petition.

/s/Jonathan Sternberg
Attorney

Certificate of Service

I certify that I signed the original of the foregoing, which is being maintained by Jonathan Sternberg, Attorney, P.C. per Rule 55.03(a), and that on July 3, 2023, I filed a true and accurate Adobe PDF copy of this petition, its accompanying writ summary, the index of exhibits, and all exhibits via the Court's electronic filing system, and e-mailed a true and accurate copy of all of the same to the following:

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