



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: DIGITEK® LITIGATION

CIVIL ACTION NO. 08-C-5555

THIS DOCUMENT APPLIES TO:

1. *Diana L. Adkins, Administratrix of the Estate of Donald B. Adkins, deceased v. Mylan Pharmaceuticals, Inc., et al.*, Civil Action No. 09-C-40 KAN; and
2. *John Anthony "Jack" Conte, as Administrator of the Estate of Scottye Helton Conte, deceased v. Mylan Pharmaceuticals, Inc., et al.*, Civil Action No. 08-C-1995 KAN.

ORDER

Defendants have filed motions to dismiss based on the doctrine of forum non conveniens, in *Diana L. Adkins, Administratrix of the Estate of Donald B. Adkins, deceased v. Mylan Pharmaceuticals, Inc., et al.*, Civil Action No. 09-C-40 KAN ("Adkins"); and *John Anthony "Jack" Conte, as Administrator of the Estate of Scottye Helton Conte, deceased v. Mylan Pharmaceuticals, Inc., et al.*, Civil Action No. 08-C-1995 KAN ("Conte"). In support of their motions, Defendants argue Plaintiffs and Plaintiffs Decedents are citizens of Kentucky and none of the events giving rise to *Adkins* and *Conte* occurred in West Virginia, yet Plaintiffs have sued Defendants in this Court for strict liability, negligence, breach of express and implied warranties, fraudulent misrepresentation/fraudulent concealment and punitive damages as the result of ingestion and personal injury allegedly caused by Digitek®, a heart medication. Defendants' Motions, p. 1. Because Plaintiffs' claims accrued in Kentucky and the facts and witnesses relevant to Plaintiffs' claims are in Kentucky Defendants argue Kentucky is the forum in which Plaintiffs should bring their claims. *Id.*, p. 2.

Plaintiffs oppose Defendants' motions to dismiss on the ground the motions were not timely filed pursuant to W.Va. Code § 56-1-1a(b). *Adkins* and *Conte* Response Memoranda, p. 1. Plaintiffs' also argue the motions should be denied on the grounds that Plaintiffs' choice of West Virginia as their forum should be given great deference under the forum non conveniens statute; West Virginia has a stronger nexus to the relevant facts and circumstances surrounding these cases; and West Virginia can adjudicate these cases substantially more inexpensively and expeditiously. *Id.*, pp. 1-2, 5-7, 9-10.

Defendants have also filed motions to extend the time for filing their motions to dismiss because they believe good cause exists to extend the time frame for filing the motions. Because the motions and responses filed in *Adkins* and *Conte* are substantially similar, if not identical, the Panel will consider them together.

Procedural History

The *Adkins* Complaint was filed on January 8, 2009, and Defendants filed Answers on February 12, 2009. *Adkins* Response Memorandum, pp. 1-2. The *Conte* Complaint was filed on October 9, 2008. *Conte* Response Memorandum, p. 2. After receiving an extension of time from Plaintiff, Defendants filed a joint Answer on December 1, 2008. *Id.* Defendants admit no motions to dismiss on the basis of forum non conveniens were filed prior to or concurrently with their answers in either *Adkins* or *Conte*, although forum non conveniens was asserted as an affirmative defense in *Adkins*. Hearing Trans., pp. 9-10; Defendants' Reply Memoranda, p. 2.

Defendants propounded discovery in both *Adkins* and *Conte* on March 25, 2009, to which Plaintiffs responded on April 24, 2009. LexisNexis Case History Search; Defendants' Reply Memoranda, p. 2. Based upon Plaintiffs' discovery responses,

Defendants filed the instant motions to dismiss the *Adkins* and *Conte* Complaints on the basis of forum non conveniens on May 13, 2009, and attached a copy of Plaintiffs' discovery responses as an exhibit to their motions. *Id.* Plaintiffs filed responses to the motions to dismiss on July 28, 2009, in which they argued, among other things, that the motions to dismiss were untimely filed under W. Va. Code § 56-1-1a(b). On August 17, 2009, after Plaintiffs argued their motions were untimely, Defendants filed motions to extend the time for filing their motions to dismiss to May 13, 2009, along with their reply memoranda.

Timeliness of Filing Motions to Dismiss Pursuant to W. Va. Code § 56-1-1a(b)

The Panel first addresses the procedural issue of whether Defendants' motions to dismiss were timely. West Virginia's forum non conveniens statute provides that a motion to dismiss is timely:

if it is filed either concurrently or prior to the filing of either a motion pursuant to Rule twelve of the West Virginia Rules of Civil Procedure or a responsive pleading to the first complaint that gives rise to the grounds for such a motion: Provided, That a court may, for good cause shown, extend the period for the filing of such a motion.

West Virginia Code § 56-1-1a(b)(2008).

Plaintiffs argue Defendants' motions are untimely because, even though Plaintiffs alleged in the first paragraph of their Complaints that they are residents and citizens of Kentucky, Defendants waited three months after filing their Answer to file a motion to dismiss in *Adkins*, and five months after filing their Answer to file a motion to dismiss in *Conte*. *Adkins* and *Conte* Response Memoranda, pp. 1-2. Furthermore, Plaintiffs argue Defendants did not seek an extension of the filing period and have not demonstrated good cause for failing to timely file their motions. *Id.*

While Defendants admit their motions to dismiss were not timely filed and they “overlooked the necessity of obtaining leave of Court” to file the motions after their Answers were filed, they argue the *Adkins* and *Conte* Complaints did not provide sufficient allegations to determine whether an evidentiary basis existed for motions to dismiss based on the requirements of the West Virginia forum non conveniens statute. Hearing Trans., pp. 8-10; Defendants’ Reply Memoranda, pp. 1-2. Consequently, Defendants served discovery requests upon Plaintiffs that were focused exclusively on venue issues and based upon Plaintiffs’ responses to the discovery Defendants promptly filed their motions to dismiss. *Id.*

Having fully considered the motions, responsive memoranda and arguments of counsel, the Panel finds that good cause has been shown for an extension of the period of time for filing Defendants’ motions to dismiss the *Adkins* and *Conte* Complaints. Although Defendants did not file their forum non conveniens motions prior to or concurrent with their Answers, Defendants were diligent in conducting discovery regarding facts related to venue in these cases, and they timely filed motions to dismiss on the basis of forum non conveniens after receiving Plaintiffs’ responses to that discovery. In addition, the Panel finds that Plaintiffs have not been prejudiced by the delay in filing the motions. Accordingly, the Panel **GRANTS** Defendants’ Motions to Extend the time for filing the motions to dismiss the *Adkins* and *Conte* cases based on the doctrine of forum non conveniens, and finds the motions to dismiss are timely under W.Va. Code § 56-1-1a(b)(2008).

Dismissal of Actions Pursuant W. Va. Code § 56-1-1a(a)

Dismissal of actions under the West Virginia forum non conveniens statute is addressed in W. Va. Code § 56-1-1a(a)(2008), which provides that:

In any civil action if a court of this state, upon a timely written motion of a party, finds that in the interest of justice and for the convenience of the parties a claim or action would be more properly heard in a forum outside this State, the court shall decline to exercise jurisdiction under the doctrine of forum non conveniens and shall stay or dismiss the claim or action, or dismiss any plaintiff: Provided, That the plaintiff's choice of a forum is entitled to great deference, but this preference may be diminished when the plaintiff is a non resident and the cause of action did not arise in this State.

W. Va. Code § 56-1-1a(a)(2008). In determining whether to grant a motion to dismiss, the Panel is required by statute to consider:

- (1) Whether an alternate forum exists in which the claim or action may be tried;
- (2) Whether maintenance of the claim or action in the courts of this state would work a substantial injustice to the moving party;
- (3) Whether the alternate forum, as a result of the submission of the parties or otherwise, can exercise jurisdiction over all the defendants properly joined to the plaintiff's claim;
- (4) The state in which the plaintiff(s) reside;
- (5) The state in which the cause of action accrued;
- (6) Whether the balance of the private interests of the parties and the public interest of the State predominate in favor of the claim or action being brought in an alternate forum, which shall include consideration of the extent to which an injury or death resulted from acts or omissions that occurred in this State. . . .
- (7) Whether or not granting the stay or dismissal would result in unreasonable duplication or proliferation of litigation; and
- (8) Whether the alternate forum provides a remedy.

Id.

Is there an alternate forum where the claim or action may be tried?

Defendants argue Kentucky state and federal courts are suitable alternate forums because Plaintiffs are citizens of Kentucky who have alleged injury by a defective

product, and Kentucky law provides sufficient opportunity for recovery under the Kentucky Product Liability Act (Kentucky Revised Statutes, § 411.300 *et seq.*) Defendants' Motions, pp. 3-4. Plaintiffs do not dispute that an alternate forum exists, but argue that under the forum non conveniens statute their choice of venue, which has a much stronger nexus to the acts and omissions allegedly resulting in the deaths of Plaintiffs' Decedents, should be given great deference. Hearing Trans., p. 25; *Adkins* and *Conte* Response Memoranda, pp. 5-7 and 9-10. Having considered the parties' arguments, the Panel finds there is an alternate forum in which the claim or action could be tried.

Would maintenance of the claim or action in this Court work a substantial injustice to the moving party?

Defendants argue maintenance of Plaintiffs' actions in West Virginia would work a substantial injustice to them. If *Adkins* and *Conte* are left in West Virginia, Defendants argue that Plaintiffs' treating physicians and any fact witnesses who reside in Kentucky cannot be subpoenaed by the courts of this state or called to give testimony at trial. Defendants' Motions, pp. 5-6; Hearing Trans., pp. 18-20.

Additionally, if evidence is developed that poor medical care contributed to Plaintiff Decedents' injuries or their physicians erred in prescribing Digitek®, Defendants argue they will not be able to file cross-claims for indemnity against Kentucky parties in West Virginia because they will lack personal jurisdiction. Defendants' Motions, p. 6; Hearing Trans., pp. 20-21. However, if these actions are litigated in a Kentucky court all related claims could be heard together. *Id.*

Plaintiffs argue there has been no indication from any physician or fact witness that they will not appear for a deposition in these cases, and Plaintiffs' Counsel agrees to

either arrange for depositions or assist Defendants with arranging depositions of these witnesses. *Adkins* and *Conte* Response Memoranda, pp. 7 and 11-12; Hearing Trans., pp. 25-26. Further, Plaintiffs argue that Defendants have taken no action in a single Digitek® case to seek leave to amend any answer to assert a medical negligence claim against a treating physician. *Adkins* and *Conte* Response Memoranda, p. 12.

As a practical matter, although Defendants may not be able to subpoena witnesses or easily call physicians or fact witnesses who are Kentucky residents as live witnesses at trial, Defendants have the option of videotaping those depositions in the event Kentucky witnesses are not available to testify at trial.¹ Defendants have also admitted there are currently no Digitek® cases in which corporate defendants have filed third-party complaints against a plaintiff's treating physician.² Hearing Trans., pp. 20-22. Accordingly, the Panel finds that maintenance of *Adkins* and *Conte* in West Virginia would not work a substantial injustice on Defendants.

Can the alternate forum exercise jurisdiction over all the defendants properly joined to the plaintiff's claim?

Defendants argue that state and federal courts in Kentucky may exercise jurisdiction over properly joined defendants, under Kentucky's "long-arm" statute (Ky. Rev. Stat. § 454.210(2)(a)) and Federal Rule of Civil Procedure 4(k)(1)(A). Defendants' Motions, p. 4. Even when general jurisdiction is lacking, Defendants argue Kentucky district courts would have specific jurisdiction in actions involving products placed into the stream of commerce under *World-Wide Volkswagen Corp. v. Woodson*,

¹ Defendants agreed that, while treating physicians and witnesses in Kentucky are not readily available by state process, such witnesses are not completely unavailable. Hearing Trans., pp. 19-20.

² In response to this question, defense counsel replied, "There are some cases in Alabama, Oklahoma, Texas where there are physician or hospital co-defendants. But there is not a case to date where, based on the discovery, corporate defendants have filed a third-party complaint" Hearing Trans., p. 22.

444 U.S. 286, 297-98 (1980). Plaintiffs do not address this factor in their Response Memoranda, but agreed their cases could have “theoretically” been filed in Kentucky during the hearing on these motions. Hearing Trans., p. 25. The Panel finds that the alternate forum could exercise jurisdiction over all the defendants properly joined to Plaintiffs’ claims.

The state in which the plaintiff(s) reside.

Defendants argue Plaintiffs’ preference for West Virginia state court should be diminished because Plaintiffs are not residents of West Virginia, nor were Plaintiffs’ Decedents residents of West Virginia at the time of their deaths. Defendants’ Motions, pp. 1-2; Hearing Trans., pp. 8-9.

Plaintiffs have alleged they are citizens and residents of Kentucky. *Adkins* and *Conte* Complts. ¶ 1; *Adkins* and *Conte* Response Memoranda, pp. 1-2. However, they argue their choice of forum in West Virginia is entitled to great deference under the forum non conveniens statute. W.Va. Code § 56-1-1a(a). While the statute provides that a plaintiff’s forum preference “*may* be diminished if Plaintiffs are non-residents and the cause of action did not arise in this state” the statute does not require the Panel to diminish this preference. *Id.* (emphasis added). The Panel finds that Plaintiffs reside in the State of Kentucky.

The state in which the cause of action accrued.

Defendants argue Plaintiffs’ cause of action accrued in Kentucky and therefore Kentucky provides an adequate alternate forum: Plaintiffs’ Decedents’ prescriptions for Digitek® were written by doctors in Kentucky; their Digitek® prescriptions were purchased at pharmacies in Kentucky; they ingested Digitek® in Kentucky, and they later

died in Kentucky; Plaintiffs' Decedents never sought medical care in West Virginia; and the medical records and witnesses regarding medical treatment are in Kentucky, as are other fact witnesses. Defendants' Motions, pp. 1-2; Hearing Trans., pp. 8-9.

Although Plaintiffs are Kentucky residents and Plaintiffs' Decedents ingested Digitek® in Kentucky, Plaintiffs argue those facts are already established and not in controversy, and Plaintiffs have provided Plaintiffs' Fact Sheets, pharmacy records and medical records which provide "basically all evidence relevant to this case originating from Kentucky." *Adkins and Conte* Response Memoranda, pp. 6-7. Notwithstanding this, Plaintiffs argue West Virginia has a much stronger nexus to the acts and omissions which resulted in the deaths of Plaintiff Decedents.

To effectively prosecute their claims, Plaintiffs argue they must prove Digitek® was manufactured with high levels of active ingredient, was distributed to Plaintiff Decedents' pharmacies, and the drug labeling contained no warning of the "super-dosing." *Id.*, p. 9. While Defendant Actavis Totowa, LLC is a New Jersey corporation that allegedly manufactured Digitek®, Plaintiffs allege West Virginia Defendant Mylan Pharmaceuticals Inc., the venue giving defendant in these cases, purchased, labeled, distributed and sold Digitek®, and will control a vast amount of key evidence necessary for Plaintiffs to pursue their claims. *Id.*, pp. 5-6 and 9-10.

Having considered the parties arguments the Panel finds that there are three potential forums where the cause of action accrued: New Jersey, where the Digitek® was allegedly manufactured; West Virginia, where the Digitek® was allegedly purchased, labeled, distributed and sold; and Kentucky, where Plaintiffs' Decedents allegedly purchased and ingested the Digitek®.

Whether the balance of the private interests of the parties and the public interest of the State predominate in favor of the claim or action being brought in an alternate forum, which shall include consideration of the extent to which an injury or death resulted from acts or omissions that occurred in this State.³

Defendants argue the private interests of the parties weigh in favor of Kentucky: the alleged injuries did not result from acts or omissions that occurred in West Virginia; all events relevant to these claims occurred in Kentucky; sources of proof and witnesses are in Kentucky, where the alleged injury and death occurred; discovery will be focused in Kentucky, as there is no significant interest in engaging in the discovery process in West Virginia; and the private interests of the parties would be better served in Kentucky, where access to documents and witnesses will be less costly. Defendants' Motions, pp. 6-7.

Additionally, Defendants argue the public interest of the State weighs in favor of Kentucky: since Plaintiffs' Decedents used Digitek® in Kentucky their claims arose there and Kentucky law likely applies; and there is no reason why citizens of Kanawha County should be burdened with a lawsuit where the alleged injury occurred in Kentucky and the one West Virginia defendant conducts business in Monongalia County. *Id.*, p. 7.

Unlike Kentucky, Plaintiffs assert that West Virginia has a much stronger nexus to the acts and omissions that resulted in the deaths of Plaintiff Decedents. *Adkins* and

³ The West Virginia forum non conveniens statute describes types of factors relevant to private interests of the parties and the public interest of the State:

Factors relevant to the private interests of the parties include, but are not limited to, relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling witnesses; possibility of a view of the premises, if a view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. Factors relevant to the public interest of the State include, but are not limited to, the administrative difficulties flowing from court congestion; the interest in having localized controversies decided within the State; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty;

W. Va. Code § 56-1-1a(a)(6)(2008).

Conte Response Memoranda, pp. 6-7 and 9-11. Because all of the acts and omissions in purchasing, labeling, distributing and selling Digitek® occurred in or were controlled by Mylan Pharmaceuticals, Inc., the West Virginia corporate defendant, West Virginia provides ease of access to sources of proof, availability of compulsory process for attendance of unwilling witnesses, a less costly forum for attendance of willing witnesses, and a court system that has developed a mechanism and discovery plan for handling the Digitek® Litigation more expeditiously and inexpensively. *Id.*

Plaintiffs further argue that the public interest of the State weighs in favor of their choice of forum because West Virginia has a strong public interest in having the acts and omissions of a West Virginia corporation litigated in this State. *Id.* Nor are plaintiffs ready to concede that Kentucky law applies to these cases. Hearing Trans., pp. 26-27. Additionally, since Defendants will already be in West Virginia for the Digitek® MDL, there is no inconvenience or additional expense to them associated with litigating in West Virginia. *Id.*, p. 27. If Plaintiffs are forced to go to Kentucky, they will lose the expertise of the Mass Litigation Panel and the attorneys with experience handling mass litigation cases such as these, which will make the litigation time-consuming and expensive. *Id.*

Having considered all of the above, the Panel finds that the balance of private interests and the public interest of the State weighs in favor of Plaintiffs' choice of forum in West Virginia.

Will granting the stay or dismissal result in unreasonable duplication or proliferation of litigation?

The Panel has implemented several mechanisms for handling Digitek® cases filed in the state of West Virginia that do not appear to be available to the parties in Kentucky state court, including implementation of electronic filing and service, a comprehensive

Case Management Order, and an Order coordinating the West Virginia Digitek® Litigation with the Digitek® MDL pending in the Southern District of West Virginia. Each of these tools is designed to effectively manage this litigation. If Plaintiffs are dismissed and required to re-file their cases in Kentucky state court they will lose the benefit of these mechanisms and most likely they will experience a significant delay in adjudication of their cases.⁴ Accordingly, the Panel finds that granting the dismissal would result in unreasonable duplication or proliferation of litigation.

Does the alternate forum provide a remedy?

As Defendants have previously argued, Plaintiffs are citizens of Kentucky who have alleged injury by a defective product and Kentucky law provides opportunity for recovery under the Kentucky Product Liability Act (Kentucky Revised Statutes, § 411.300 *et seq.*) Defendants' Motions, pp. 3-4. While there is a remedy in Kentucky, Plaintiffs argue there are subtle differences between the law of Kentucky and the law of West Virginia, they do not concede Kentucky law should apply, nor do they believe Kentucky law is favorable because of strict liability and the learned intermediary doctrine. Hearing Trans., pp. 26-27. Having considered the parties' arguments on this point, the Panel is of the opinion the alternate forum of Kentucky does provide a remedy to Plaintiffs.

⁴ As of August 10, 2009, Defendants' chart of Active State Court Cases submitted to Judge Joseph R. Goodwin, the judge assigned to preside in the Digitek® MDL, showed no cases pending in Kentucky state court.

Having fully considered the Motions, Response Memoranda, Reply Memoranda and oral argument of counsel, and having considered each of the factors in W.Va. Code § 56-1-1a(a), the Panel finds that in the interest of justice and for the convenience of the parties the *Adkins* and *Conte* actions should remain in West Virginia, Plaintiffs' choice of forum. Accordingly, Defendants motions to dismiss are **DENIED**.

ENTER: April 2, 2010

/s/ Alan D. Moats
Lead Presiding Judge

/s/ Booker T. Stephens
Presiding Judge

/s/ Derek C. Swope
Presiding Judge