2019 IL App (5th) 180279-U

NO. 5-18-0279

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NICHOLE HAMBY, *et al.*,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellees,	)	Madison County.
	)	
v.	)	No. 16-L-1617
	)	
BAYER CORPORATION; BAYER HEALTHCARE LLC; BAYER ESSURE, INC.; and BAYER HEALTHCARE PHARMACEUTICALS, INC.,	)	
	)	
Defendants-Appellants,	)	
	)	
and	)	
	)	
DOES 1-10,	)	Honorable
	)	William A. Mudge,
Defendants.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Presiding Justice Overstreet and Justice Moore concurred in the judgment.

ORDER

¶ 1 *Held*: The order of the circuit court of Madison County is affirmed where Bayer has purposefully availed themselves to Illinois, the plaintiffs have made a *prima facie* showing that exercising specific personal jurisdiction in this case is appropriate, the defendants have failed to rebut that showing, and litigating in Illinois would not be unreasonable.

¶ 2 This is an interlocutory appeal of the circuit court of Madison County's denial of the defendants' (Bayer)[1] motion to dismiss for lack of personal jurisdiction. The class-action claim was filed by 73 nonresident plaintiffs against Bayer for injuries caused by Essure, a permanent contraceptive device manufactured by Bayer.[2] For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On November 28, 2016, 86 women—73 of whom were nonresidents of Illinois—filed a complaint in Madison County alleging negligence, strict products liability, breach of express warranty, breach of implied warranty, and fraud against Bayer for injuries received from defective Essure contraceptive devices—which were developed and manufactured by Bayer.

¶ 5 On June 19, 2017, the United States Supreme Court issued its decision in *Bristol-Myers Squibb Co. v. Superior Court of California*, 582 U.S. __, 137 S. Ct. 1773 (2017). On September 5, 2017, Bayer filed a motion to dismiss the case. It argued that under *Bristol-Myers*, Illinois lacked both general and specific jurisdiction. Thereafter, the plaintiffs filed a response in opposition to Bayer's motion to dismiss, and a first amended complaint.

[1]There are multiple defendants in this case; however, all are Bayer corporations and LLCs. Therefore, for clarity and ease of reading, we will refer to all defendants simply as Bayer.

[2]The class-action claim included eight plaintiffs that alleged that they resided in or experienced injuries in Illinois and are not part of this appeal.

¶ 6 In the first amended complaint, the plaintiffs alleged that the trial court could exercise specific personal jurisdiction in this case against Bayer because of the numerous ways in which it purposefully availed itself to this forum, including:

> "at all relevant times [Bayer has] engaged in substantial business activities in the State of Illinois. At all relevant times [Bayer] transacted, solicited, and conducted business in Illinois through their employees, agents, and/or sales representatives. In addition, *** [Bayer] committed tortious acts within the state—specifically making fraudulent and negligent misrepresentations, failing to properly train physicians, failing to warn [the] Plaintiffs and their implanting physicians about the dangers of Essure, negligently conducting clinical trials, negligently developing a marketing strategy, and negligently developing the Essure Accreditation Program.
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> *** [Bayer] used Illinois to develop, label, or work on the regulatory approval, for Essure®. In addition, [Bayer] created the Essure Accreditation Program and the marketing strategy for Essure in Illinois. All of the Plaintiffs' claims arise out of or relate to [Bayer's] contacts with Illinois.
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> ***
>
> a. [Bayer] engaged in extensive contacts with Illinois during the development of Essure®, creating a marketing strategy for Essure®, creating the physician training program for Essure® that all Essure®-implanting physicians must take, creating the Essure® labeling, and in obtaining FDA approval of Essure®.
>
> b. Illinois was the site of one of the clinical studies that allowed Conceptus—[Bayer's] predecessor-in-interest—to clear Essure® for marketing with the FDA and thereafter continue marketing the product with inadequate labeling because of a failure to follow-up during post-marketing testing.
>
> c. Illinois was the site of a [Bayer] Essure® consumer marketing campaign, including radio, print, and direct mail advertisements. Based on the success of [Bayer's] Illinois-based marketing campaign, [Bayer] rolled out additional consumer campaigns across the country, modeled from the Illinois campaign.

> d. Illinois was also the site of [Bayer's] pilot program for the Essure® Accreditation Program, which every physician who implants Essure® must go through. [Bayer was] negligent in creating the Essure® Accreditation Program in Illinois, which was then implemented across the country thereby negligently training all [the] Plaintiffs' implanting physicians.
>
> e. Conceptus was required to conduct *four* pre-approval clinical studies for Essure's initial pre-market approval ('PMA') submission to the FDA. *** Conceptus conducted at least one of those four pre-market clinical studies for Essure in part, in Illinois, using Illinois hospitals and Illinois physicians to serve as clinical investigators ***. ***
>
> f. To conduct the Pivotal Phase III Study, [Bayer] contracted with Dr. Rafael [F]. Valle at Northwestern University ***, to serve as a principal investigator. The purpose of the Pivotal Trial was to demonstrate the safety and the effectiveness of the Essure® device in providing permanent contraception. Chicago, Illinois is one of only eight principal sites in the United States to perform the Pivotal Trial. That Pivotal Trial took place between May 2000 and February 2001 in Illinois, and was one of two pre-market clinical trials Conceptus was required to perform before Essure® could obtain FDA approval." (Emphasis in original.)

¶ 7 The plaintiffs alleged that Bayer breached its obligation to update warnings and report adverse events; that Essure had quality problems and manufacturing defects; and that Bayer engaged in false and misleading sales and marketing tactics. The causes of action raised by the plaintiffs in the first amended complaint were negligence, strict products liability, breach of express warranty, breach of implied warranty, and fraud.

¶ 8 On December 15, 2017, Bayer filed a motion to dismiss the first amended complaint, arguing that Illinois lacked specific personal jurisdiction over it because the plaintiffs were not citizens of Illinois, and they did not undergo the Essure procedure in

Illinois. In response to the motion to dismiss, the plaintiffs argued that it would be appropriate for the trial court to exercise specific personal jurisdiction over Bayer because it conducted the pivotal clinical trials for Essure in Illinois using Illinois physicians; the data collected during these trials was included in the pre-market approval materials and directly related to Essure's regulatory approval; it used Illinois as "a critical test bed" for its nationwide marketing strategy; and it launched its Essure Accreditation Program in Illinois. Bayer filed a reply, once again arguing that Illinois lacked specific personal jurisdiction under the United States Supreme Court's ruling in *Bristol-Myers*.

¶ 9 On April 18, 2018, the trial court issued a written order denying Bayer's motion to dismiss for lack of personal jurisdiction. The court found that the "nonresident Plaintiffs' claims 'directly arose from or [were] related to' Bayer's purposeful activities in Illinois. Thus, the nonresident Plaintiffs' factual allegations establish a *prima facie* showing that Illinois has specific jurisdiction over Bayer." The court also found that it would not be unreasonable to require Bayer to litigate in Illinois. This court granted leave to appeal and has jurisdiction under Illinois Supreme Court Rule 306(a)(3) (eff. Nov. 1, 2017).

¶ 10 II. ANALYSIS

¶ 11 A trial court's finding of jurisdiction based solely on documentary evidence is reviewed *de novo*. *Russell v. SNFA*, 2013 IL 113909, ¶ 28. Initially, it is plaintiffs' burden to make a *prima facie* showing that jurisdiction is appropriate. *Id*. "Any conflicts in the pleadings and affidavits must be resolved in the plaintiff's favor, but the defendant may overcome plaintiff's *prima facie* case for jurisdiction by offering uncontradicted evidence that defeats jurisdiction." *Id*.

¶ 12 A state's power to exercise personal jurisdiction over a nonresident defendant is limited by the due process clause of the fourteenth amendment. *Riemer v. KSL Recreation Corp.*, 348 Ill. App. 3d 26, 34 (2004) (citing *Maunder v. DeHavilland Aircraft of Canada, Ltd.*, 102 Ill. 2d 342, 348 (1984)). "The due process clause [thus] limits a state's exercise of personal jurisdiction over a nonresident defendant to those instances where the defendant had at least 'minimum contacts' with the state." *Commercial Coin Laundry Systems v. Loon Investments, LLC*, 375 Ill. App. 3d 26, 30, (2007). In making this determination, courts must evaluate whether jurisdiction is proper under the long-arm statute, as well as whether it comports with the constitutional requirements of due process. *Higgins v. Richards*, 401 Ill. App. 3d 1120, 1123-24 (2010).

¶ 13 In order for a state court to exercise specific personal jurisdiction over an out-of-state defendant, the suit must arise out of, or relate to, defendant's contact with the forum. *Bristol-Myers Squibb*, 582 U.S. at __, 137 S. Ct. at 1780. The primary focus of a specific jurisdiction inquiry is the conduct of defendants. *Id*. at __, 137 S. Ct. at 1779. With regard to a corporation, courts may exercise specific personal jurisdiction when the claim directly arises from, or is connected to, defendant's purportedly wrongful acts within the forum state such that it is reasonable to require defendant to litigate in the forum. *Sabados v. Planned Parenthood of Greater Indiana*, 378 Ill. App. 3d 243, 248 (2007). To exercise specific personal jurisdiction against an out-of-state corporation: (1) defendant must have certain minimum contacts with the forum that (a) it purposefully directed its activities toward the forum, and (b) the suit must directly arise from or be

connected to defendant's purported wrongful conduct within the forum state; and (2) it must be reasonable to require defendant to litigate within the forum state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985).

¶ 14 A. Cases Addressing Jurisdiction

¶ 15 In *Bristol-Myers Squibb*, 582 U.S. __, 137 S. Ct. 1773, over 600 plaintiffs, most of which did not reside in California, filed a civil action in state court against a pharmaceutical company, Bristol-Myers Squibb (BMS), for injuries they allegedly suffered from the drug Plavix. *Id*. at __, 137 S. Ct. at 1777. In the complaint, none of the nonresident plaintiffs ever alleged that they "obtained Plavix through California physicians or from any other California source; nor did they claim that they were injured by Plavix or were treated for their injuries in California." *Id*. at ___, 137 S. Ct. at 1778. Additionally, BMS was incorporated in Delaware, headquartered in New York, and maintained substantial business operations in New York and New Jersey. *Id*. at __, 137 S. Ct. at 1777-78. BMS engaged in business activities in California in that it maintained five research and laboratory facilities, employed roughly 310 employees (around 160 at the laboratory and research facilities and 250 as sale representatives), and maintained "a small state-government advocacy office in Sacramento." *Id*. at __, 137 S. Ct. at 1778. Though BMS sold Plavix within the state, "BMS did not develop Plavix in California, did not create a marketing strategy for Plavix in California, and did not manufacture, label, package, or work on the regulatory approval of the product in California." *Id*. Between 2006 and 2012, BMS generated $900 million in the sale of roughly 187 million pills in the state of California. *Id*. That amount represented just over 1% of the company's sales

revenue nationwide. *Id*. In that case, the Supreme Court found that there was no "connection between the forum and the specific claims at issue." *Id*. at __, 137 S. Ct. at 1781. In making its decision, the Court reasoned that "[t]he relevant plaintiffs are not California residents and do not claim to have suffered harm in that State. In addition, *** all the conduct giving rise to the nonresidents' claims occurred elsewhere. It follows that the California courts cannot claim specific jurisdiction." *Id*. at __, 137 S. Ct. at 1782.

¶ 16 In *M.M. v. GlaxoSmithKline LLC*, 2016 IL App (1st) 151909, eight minor plaintiffs, and their parents, sued GlaxoSmithKline (GSK) for catastrophic birth defects they suffered from *in utero* exposure to the drug Paxil. *Id*. ¶ 1. GSK filed a motion to dismiss the claims of the out-of-state defendants for lack of jurisdiction. *Id*. In finding that plaintiffs had made a *prima facie* showing that Illinois had specific jurisdiction over GSK, the First District found that GSK had purposefully directed its activities at Illinois by "contracting with 17 Illinois physicians in 10 Illinois cities—from Springfield to Chicago to Gurnee—to conduct between 18 and 21 clinical trials of Paxil in Illinois, on Illinois study subjects, every year from 1985 to 2003." *Id*. ¶ 49. The court further stated that:

> "Plaintiffs argue that their claims arose out of these collective failures during the Paxil trials. Plaintiffs claim that their children were born with serious congenital defects as a result of Paxil's warning labels, which inadequately warned the mothers of the association between the drug and birth defects. These labels were informed, in part, by the results of the Illinois clinical trials. Thus, plaintiffs' claims directly arose from defendant GSK's acts and omissions in Illinois." *Id*. ¶ 52.

The court concluded that defendant had failed to overcome plaintiffs' *prima facie* showing and therefore the lower court did not err in denying defendant's motion to dismiss for lack of specific personal jurisdiction. *Id.* ¶ 80.

¶ 17 B. Bayer's Contacts With the Forum

¶ 18 Here, Bayer mistakenly focuses its arguments on appeal on the actions of the plaintiffs, and whether the plaintiffs themselves were injured in Illinois, visited doctors in Illinois, or had the device implanted in Illinois. That is not the correct analysis under the case law. Instead, we must look to the conduct of Bayer that occurred in Illinois and whether the causes of action in the complaint arose from or were connected to its conduct in Illinois.

¶ 19 1. *Purposeful Availment*

¶ 20 Bayer conducted clinical trials in Illinois, targeted Chicago for developing a marketing campaign, and developed its physician training program in Illinois. Bayer contracted with Illinois doctors and facilities to conduct both pre- and post-approval trials for Essure, developed its nationwide marketing strategy in Illinois, and used Illinois as a test-base for its physician training program. Illinois was one of eight states in which phase III of the Pivotal Trial was conducted. The plaintiffs' claims in this case directly arose, at least in part, from these contacts with Illinois.

¶ 21 2. *Claims Arising From Bayer's Purposeful Availment*

¶ 22 Bayer relies on the Supreme Court's reasoning in *Bristol-Myers Squibb* in defense of its position that Illinois cannot exercise specific personal jurisdiction over them in these claims. However, in *Bristol-Myers Squibb*, the Court specifically stated that "BMS

did not develop Plavix in California, did not create a marketing strategy for Plavix in California, and did not manufacture, label, package, or work on the regulatory approval of the product in California." *Bristol-Myers Squibb*, 582 U.S. at __, 137 S. Ct. at 1778. The facts before us are easily distinguishable.

¶ 23 Here, Bayer directly targeted and marketed in Illinois, conducted clinical trials in Illinois, contracted with Illinois physicians and facilities, and established a physician accreditation program in Illinois. Unlike *Bristol-Myers Squibb*, the clinical trials conducted in Illinois were for the product at issue, *i.e.*, the Essure product. All of Bayer's conduct cited by the plaintiffs relates to the testing, development, and marketing of the Essure product. Therefore, the plaintiffs' claims for negligence, strict products liability, breach of express warranty, breach of implied warranty, and fraud for harm suffered as a result of having the Essure device implanted all arise, at least in part, from Bayer's conduct in Illinois.

¶ 24 C. Reasonableness

¶ 25 In order to comply with federal due process requirements, we must also determine whether it is reasonable to require a defendant to litigate in Illinois. In making this determination, courts must consider: (1) the burden on defendant; (2) the forum state's interest in resolving the dispute; (3) plaintiff's interest in obtaining convenient and effective relief; and (4) the interest of several states, including the forum state, in the efficient judicial resolution of the dispute and the advancement of substantive social policies. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

¶ 26 Here, Illinois has an undeniable interest in resolving a dispute arising, in part, from clinical trials held in Illinois, by Illinois doctors, in Illinois facilities. Also, regardless of whether the out-of-state plaintiffs' claims are dismissed, this case will move forward in Illinois as there are also in-state plaintiffs who joined this suit. Though we recognize that there are other forums in which the out-of-state plaintiffs could bring suit, piecemeal litigation would result in additional costs and use of judicial resources, and would run the risk of conflicting rulings. Therefore, considering these facts, we do not find that litigating in Illinois would be unreasonable.

¶ 27 III. CONCLUSION

¶ 28 Therefore, as Bayer has purposefully availed itself to Illinois, the plaintiffs have made a *prima facie* showing that exercising specific personal jurisdiction in this case is appropriate, Bayer has failed to rebut that showing, and litigating in Illinois would not be unreasonable, we find that the trial court did not commit reversible error in denying Bayer's motion to dismiss for lack of jurisdiction.

¶ 29 For the foregoing reasons, the order of the circuit court of Madison County is hereby affirmed.

¶ 30 Affirmed.