

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**No. 2008-CA-02116**

**DON SAUVAGE and GENE J. SAUVAGE,  
Individually and as Personal Representatives of the  
Estate of ARANKA ABADIE SAUVAGE, Deceased**

**PLAINTIFFS/APPELLANTS**

**VS.**

**MEADOWCREST LIVING CENTER, LLC,  
STEVE YANCOVICH, Administrator of Meadowcrest  
Living Center, LLC, TRANSITION HEALTH  
SERVICES OF LOUISIANA, LLC, ROBERT R. BATES,  
Corporate President of Transition Health Services of  
Louisiana, LLC, NEW ORLEANS TOURS, INC.,  
JAMES E. SMITH, JR., Representative for New Orleans  
Tours, Inc., and JOHN DOES 1-25**

**DEFENDANTS/APPELLEES**

**ON APPEAL FROM THE CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI  
SECOND JUDICIAL DISTRICT  
CIVIL ACTION NO. 2007-30**

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**BRIEF OF APPELLEES  
MEADOWCREST LIVING CENTER, LLC,  
STEVE YANCOVICH, TRANSITION HEALTH  
SERVICES OF LOUISIANA, LLC and ROBERT R. BATES**

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**CERTIFICATE OF INTERESTED PERSONS**

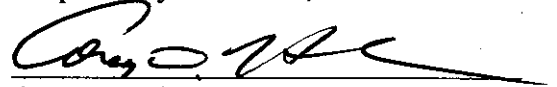
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The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Don Sauvage, Plaintiff/Appellant
2. Gene J. Sauvage, Plaintiff/Appellant
3. Stephen W. Mullins of the Law Firm of Luckey and Mullins, PLLC, counsel for Plaintiffs/Appellants
4. Meadowcrest Living Center, LLC, Defendant/Appellee
5. Steve Yancovich, Defendant/Appellee

6. Transition Health Services of Louisiana, LLC, Defendant/Appellee
7. Robert R. Bates, Defendant/Appellee
8. Clifford B. Ammons and Corey D. Hinshaw of Watkins & Eager, PLLC, counsel for Defendants/Appellees
9. Honorable William F. Coleman, Hinds County Circuit Court Judge

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Corey D. Hinshaw", written over a horizontal line.

Corey D. Hinshaw

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### **STATEMENT OF THE ISSUES**

1. WHETHER THE TRIAL COURT PROPERLY DISMISSED THIS ACTION FOR LACK OF PERSONAL JURISDICTION
2. WHETHER THE TRIAL COURT PROPERLY DISMISSED THIS ACTION BASED ON FORUM NON CONVENIENS

### **STATEMENT OF THE CASE**

The circuit court's order dismissing the Sauvages' claims for lack of personal jurisdiction and based on the doctrine of forum non conveniens should be affirmed. The circuit court below granted dismissal noting the court lacks jurisdiction "[u]nder Mississippi's long-arm statute and the constitutional limitations of the Due Process Clause." R. 148. Additionally, the circuit court concluded that "the doctrine of forum non conveniens is appropriate and the state of Louisiana is a more appropriate forum." R. 148.

#### **A. Course of Proceedings and Disposition Below**

Don Sauvage and Gene J. Sauvage, individually and as personal representatives of the estate of Aranka Abadie Sauvage, deceased (hereinafter collectively referred to as "the Sauvages"), filed suit in the Circuit Court of Hinds County, Mississippi, Second Judicial District, on October 3, 2007 alleging claims of wrongful death, negligence and breach of contract against Meadowcrest Living Center, LLC, Steve Yancovich, Administrator of Meadowcrest Living Center, LLC, Transition Health Services of Louisiana, LLC, and Robert R. Bates, Corporate President of Transition Health Services of Louisiana, LLC (hereinafter collectively referred to as "Meadowcrest" or "Nursing Home Defendants") as well as New Orleans Tours, Inc., James E. Smith, Jr., Representative for New

Orleans Tours, Inc., and John Does 1-25.<sup>1</sup> R. 4. Previously, a nearly-identical action had been filed against Meadowcrest Living Center, LLC and Transition Health Services, Inc. in the state of Louisiana on or about January 26, 2006, in the Twenty-Fourth Judicial District Court of Jefferson Parish, Louisiana. R. 92. The Louisiana action is still pending. Meadowcrest's Answer in the instant action was filed on December 14, 2007. R. 63. On January 3, 2008, Meadowcrest filed a Motion to Dismiss for Lack of Personal Jurisdiction or Based on Forum Non Conveniens. R. 74. The Sauvages filed a response on April 25, 2008. R. 104. Meadowcrest filed a rebuttal brief on June 19, 2008. R. 132. A hearing was held on this matter on June 20, 2008 before the Honorable William F. Coleman. Afterwards, the Sauvages filed another response on July 7, 2008. R. 141. The trial court filed its Memorandum Opinion and Order granting Defendants' Motion to Dismiss and finding that the court lacked personal jurisdiction and that dismissal was appropriate based on the doctrine of forum non conveniens on July 11, 2008. R. 147. On November 7, 2008, the Sauvages filed a Motion for Reconsideration with the trial court asserting they never received notification of the court's Memorandum Order and Opinion. R. 149. The trial court considered their Motion for Reconsideration even though it was filed well beyond the 10-day time limit for trial motions due to the Sauvages' counsel's assertion he did not receive notification of the court's order. On November 24, 2008, the court entered an order denying the Motion for Reconsideration and affirming the original order of dismissal. R. 153. The Sauvages filed a Notice of Appeal with the Mississippi Supreme Court on December 17, 2008. R. 154. Meadowcrest now respectfully prays that this Court will affirm the dismissal of the claims of the Sauvages by the trial court for lack of personal jurisdiction and based on forum non conveniens.

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<sup>1</sup> The Sauvages refer to "Appelle Tours [sic]" in their brief. However, counsel for Meadowcrest does not believe the other defendants in this lawsuit, i.e., New Orleans Tours, Inc. or James E. Smith, Jr., have ever entered an appearance in this action or know if they have ever even been served.



**B. Statement of Relevant Facts**

As this Court is very aware, on August 29, 2005, Hurricane Katrina made landfall and wreaked unparalleled havoc and destruction in Louisiana and Mississippi. The events giving rise to this lawsuit arose in the midst of this extraordinary setting. R. 7-8. Meadowcrest Living Center is a nursing home located in the metropolitan New Orleans area, specifically Gretna, Jefferson Parish, Louisiana. The residents of Meadowcrest, including the decedent, were among the thousands and thousands of people who evacuated to points northward in the wake of Hurricane Katrina. Meadowcrest residents were evacuated to Mississippi for the limited, urgent and necessitous purpose of fleeing from the brunt of the hurricane's damage. Within the first few days of the evacuation, the decedent passed away. R. 94. Subsequently, Don Sauvage and Gene J. Sauvage, the grandchildren of the decedent, commenced a civil action against Meadowcrest in Jefferson Parish, Louisiana and almost two years later the instant action was initiated against Meadowcrest as well. R. 92, 4. The only substantive difference between these two actions is that the Sauvages specifically pled in their Louisiana petition that the events giving rise to the lawsuit took place in Jefferson Parish, Louisiana, and the situs of the Defendants' conduct was in Jefferson Parish, Louisiana. R. 92. In the Mississippi action, however, the Sauvages assert the inconsistent allegation that all relevant actions took place in Hinds County, Mississippi. R. 4.

Any decisions regarding evacuation of the residents from the nursing home located in the state of Louisiana due to Hurricane Katrina were not made in the state of Mississippi by any Mississippi residents. Rather, all such decisions and plans of action were made and/or formulated in Louisiana by Louisiana residents. None of the alleged decision-making and planning, or lack thereof, regarding the nursing home's emergency evacuation plan took place in Mississippi.

Meadowcrest Living Center, LLC is a limited liability company pursuant to Louisiana law and doing business in Jefferson Parish, Louisiana. Meadowcrest is not licensed to do business in the state of Mississippi and does not have a registered agent for service of process in Mississippi. Steve Yancovich, Administrator of Meadowcrest Living Center, LLC, is a resident of the state of Louisiana. Transition Health Services of Louisiana, LLC is a Texas limited liability company, doing business in the state of Louisiana. Transition Health is not licensed to do business in Mississippi and does not have a registered agent for service of process in Mississippi. Robert R. Bates, President of Transition Health Services, Inc., is a resident of the state of Texas. The other named defendants, New Orleans Tours, Inc. and James E. Smith, Jr., are also upon information and belief not located in Mississippi or registered to do business in Mississippi.

All Nursing Home Defendants were served with process in this matter outside of the state of Mississippi. Not a single plaintiff or a single defendant in this matter is a Mississippi resident or a Mississippi corporation. R. 5-6. Rather, the Sauvages, the decedent, Meadowcrest Living Center, its residents, its administrator and its employees are all Louisiana residents or Louisiana businesses. None of the Nursing Home Defendants are Mississippi residents, and none are licensed to do business in Mississippi or operate a business in Mississippi. None of the Nursing Home Defendants have offices, employees or agents for service of process of any kind in the state of Mississippi. Meadowcrest Living Center never sought or subjected itself to the nursing home regulations of the state of Mississippi. Personal jurisdiction over the non-resident Nursing Home Defendants is not proper in Hinds County, Mississippi, and the most appropriate and convenient forum is in Jefferson Parish, Louisiana.

### **SUMMARY OF THE ARGUMENT**

The circuit court correctly concluded it lacked personal jurisdiction and that the more appropriate and convenient forum for the Sauvages' claim is in the state of Louisiana. The dismissal of this action by the trial court for lack of personal jurisdiction and based on the doctrine of forum non conveniens should be affirmed by this Court. The trial judge found that Mississippi's long-arm statute did not confer jurisdiction, that there were not minimum contacts to satisfy due process requirements, that the exercise of personal jurisdiction would offend traditional notations of fair play and substantial justice and, lastly, that the doctrine of forum non conveniens was applicable. If the circuit court was correct in its determination as to any one of these points, dismissal of this matter must be affirmed.

The only prong of the Mississippi long-arm statute applicable to out-of-state plaintiffs is the tort prong, thus neither the contract nor the doing business prong apply. The alleged acts or omissions giving rise to the Sauvages' claims of negligence against Meadowcrest and its administration would have taken place in Louisiana and did not take place in Mississippi. The sole event to occur in Mississippi was the death of the decedent, which happened within a few days of the emergency evacuation. Even if the Sauvages can properly bring a wrongful death claim in Mississippi and subject the non-resident Nursing Home Defendants to personal jurisdiction under the Mississippi long-arm statute, the due process requirements of the Fourteenth Amendment alone necessitate dismissal of this action.

The Nursing Home Defendants do not have sufficient minimum contacts with Mississippi to survive the due process analysis. The Nursing Home Defendants are not residents of the state of Mississippi, not licensed to do business in the state of Mississippi and have no registered agents for service of process in the state of Mississippi. The Nursing Home Defendants have no offices,

employees or agents anywhere in the state of Mississippi. The Nursing Home Defendants had no contact with Mississippi except for the extraordinary circumstance of the emergency evacuation of the nursing home's residents to Mississippi as a result of Hurricane Katrina. None of the alleged acts or omissions of the Nursing Home Defendants in issue in this litigation were directed toward Mississippi residents. Meadowcrest did not attempt to solicit business from Mississippi residents or in any way attempt to gain financially from any Mississippi residents. Finally, none of the employees or residents of Meadowcrest were Mississippi residents.

If minimum contacts exist, however, maintenance of this lawsuit in Mississippi would offend traditional notions of fair play and substantial justice. The burden is high on the non-resident defendants in that the nursing home, all administration, all employees and all residents are in Louisiana, which is where the majority of witnesses would most likely be as well. Also, the evacuation or contingency plans or failure to adequately implement such plans in a Louisiana nursing home are not matters of particular concern to Mississippi or Mississippians and should be adjudicated in Louisiana by a Louisiana jury. The interest of the Sauvages in obtaining relief is not hampered in any way by the dismissal of this action in light of their pending Louisiana action, and, likewise, the most efficient resolution of this controversy is to dismiss this action and have the Sauvages pursue their Louisiana action. Finally, policy concerns dictate that a lawsuit regarding the regulation of and care provided by a Louisiana nursing home subject to Louisiana laws and regulations be adjudicated in Louisiana.

Even if this Court disagrees with the trial court and deems personal jurisdiction to be proper over the Nursing Home Defendants, the trial court also ruled that the doctrine of forum non conveniens is applicable. The more convenient and appropriate forum is in the state of Louisiana. The Sauvages make scant mention of the forum non conveniens issue in their brief and fail to offer

any authority to support or even suggest that the lower court's ruling regarding forum non conveniens should be reversed, thus this Court need not even consider this assignment of error. However, even if considered, the trial court's ruling as to the issue of forum non conveniens should be affirmed as it was not an abuse of discretion or clearly erroneous. Therefore, Plaintiffs have no basis for personal jurisdiction over the Defendants in the state of Mississippi, and even if such personal jurisdiction existed, the most convenient and appropriate forum for this lawsuit is not in Hinds County, Mississippi but rather Jefferson Parish, Louisiana. Alternatively, the Sauvages' action must be dismissed because under Mississippi law the pendency of a prior suit between the same litigants and involving the same subject matter constitutes a bar to any subsequent action.

The circuit court's dismissal of this action must be affirmed.

#### **STANDARD OF REVIEW**

Meadowcrest agrees that the proper standard of review for jurisdictional questions is *de novo*. See *Hogrobrooks v. Progressive Direct*, 858 So.2d 913, 916 (Miss. Ct. App. 2003)(citing *de novo* standard of review and affirming trial court's grant of motion to dismiss for lack of personal jurisdiction). However, conspicuously absent from the brief of the Sauvages is the standard of review for a trial court's dismissal based on forum non conveniens. The standard of review for a trial court's dismissal based on forum non conveniens is an abuse of discretion or clearly erroneous standard. See *3M Co. v. Johnson*, 926 So.2d 860, 863 (Miss. 2006)("In reviewing the trial court's decision to grant or deny a motion for forum non conveniens this court will uphold the trial court unless it was clearly erroneous"); see also *Poole v. American Public Life Insurance Co.*, 878 So.2d 1102, 1003 (Miss. Ct. App. 2004)(holding dismissal on forum non conveniens "should only be reversed if the trial court abused its discretion or applied an erroneous legal standard, and the dismissal should be afforded great deference on appeal"). As the trial court's dismissal was based

on a lack of personal jurisdiction and forum non conveniens, both standards of review apply.

## **ARGUMENT**

### **I. THE TRIAL COURT'S DISMISSAL FOR LACK OF PERSONAL JURISDICTION SHOULD BE AFFIRMED BECAUSE PERSONAL JURISDICTION IS NOT PROPER UNDER EITHER PRONG OF THE ANALYSIS**

A two-tiered analysis is applied to determine if a Mississippi court can exercise personal jurisdiction over non-resident defendants. *Horne v. Mobile Area Water & Sewer System*, 897 So.2d 972, 976 (Miss. 2004); *Rockaway Commuter Line, Inc. v. Denham ex rel. Denham*, 897 So.2d 156, 158 (Miss. 2004). It must be determined if the non-resident defendants are amenable to suit in Mississippi pursuant to the Mississippi long-arm statute, codified at Miss. Code Ann. §13-3-57. *Id.* Even if the long-arm statute confers jurisdiction over the non-resident defendants, personal jurisdiction cannot be established if it does not comport with the due process requirements of the Fourteenth Amendment. *Denham*, 897 So.2d at 158. The Sauvages bear the burden of proving both jurisdictional requirements. *See Hogrobrooks*, 858 So.2d at 919. Due process requires that the non-resident defendants have “minimum contacts” with the forum state and that the exercise of personal jurisdiction over the non-resident defendants not “offend traditional notions of fair play and substantial justice.” *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945). After conducting this analysis, the trial court below correctly dismissed this action for lack of personal jurisdiction.

#### **A. Mississippi's Long-Arm Statute**

The trial court found it did not have personal jurisdiction under Mississippi's long-arm

statute<sup>2</sup> or the due process requirements of the Fourteenth Amendment. Although there are no Mississippi state appellate court opinions directly on point, Mississippi federal courts interpreting Mississippi law and citing the plain language of the statute have repeatedly stated that “*the law is perfectly clear*” the tort prong of Mississippi’s long-arm statute is the *only* prong available to *non-resident plaintiffs*. *Cowart v. Shelby County Health Care Corp.*, 911 F.Supp. 248, 249-50 (S.D. Miss. 1996) (citing *Herrley v. Volkswagen of America, Inc.*, 957 F.2d 216 (5<sup>th</sup> Cir. 1992))(emphasis added); *Moore Video Distributors, Inc. v. Quest Entertainment, Inc.*, 823 F.Supp. 1332, 1337 (S.D. Miss. 1993)). Thus, the trial court below properly concluded that the “contracts” prong and “doing business” prong of Mississippi’s long-arm statute were not applicable to the case at bar. Also, the “tort” prong of the Mississippi long-arm statute does not confer personal jurisdiction over the Nursing Home Defendants in this matter. The Sauvages assert in their Complaint that the Nursing Home Defendants “took no action to protect the residents of the nursing home” and that the nursing home management was “negligent in failing to evacuate the residents in an efficient and timely manner.” R. 8, 11. Also, the Sauvages assert the Nursing Home Defendants “breached their duty . . . in making the decision to bus nursing home residents to rural Mississippi” and “failed to fully make or implement any contingency plans for such emergencies.” R. 8, 10.

The Fifth Circuit has been careful to distinguish that an actual tort is different from its

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<sup>2</sup> Mississippi’s long-arm statute states jurisdiction may be had over a non-resident defendant who:

(1) made a contract with a resident of this state to be performed in whole or in part . . . in this state, (2) who shall commit a tort in whole or in part in this state against a resident or non-resident of this state, (3) or who shall do any business or perform any character of work or service in this state.

Miss. Code Ann. §13-3-57 (2002).

resultant consequences and has held “that consequences stemming from the actual tort injury do not confer personal jurisdiction at the site or sites where such consequences happened to occur.” *Jobe v. ATR Marketing, Inc.*, 87 F.3d 751, 753 (5<sup>th</sup> Cir. 1996); *Bufkin v. Thermage, Inc.*, 2009 U.S. Dist. LEXIS 3441 \*18-\*20 (S.D. Miss. Jan. 16, 2009) (dismissing medical malpractice claim for lack of personal jurisdiction and noting that actual injury and resultant consequences can be hard to identify). The Sauvages’ allegations of negligence involving the alleged acts or omissions of Meadowcrest in implement and/or effectively carrying out evacuation and contingency plans before Hurricane Katrina constitute the actual tort alleged, which occurred entirely in Louisiana. Any consequences of such alleged negligence are not enough to confer personal jurisdiction over the non-resident defendants in Mississippi. The only event to have occurred *in Mississippi* is the death of Aranka Abadie Sauvage, which would be the consequence of the actual tort alleged. Furthermore, and the Sauvages should be barred from pursuing a duplicative wrongful death action in Mississippi.<sup>3</sup>

#### **B. Due Process Requirements of the Fourteenth Amendment**

Even if Mississippi’s long-arm statute confers personal jurisdiction over Meadowcrest, the exercise of personal jurisdiction is not appropriate under the due process analysis. In dismissing this action, the trial court below stated that even if personal jurisdiction could be had via the Mississippi long-arm statute, the exercise of “such jurisdiction would be unconstitutional.” R. 147. The trial

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<sup>3</sup> Mississippi’s wrongful death statute, codified at Miss. Code Ann. §11-7-13, expressly states that “there shall be but one (1) suit for the same death which shall ensue for the benefit of all parties concerned . . . .” The Sauvages filed an initial action in the state court of Louisiana asserting the same claims regarding the wrongful death of Aranka Abadie Sauvage against the same Nursing Home Defendants as in this subsequent action. Plaintiffs should not be allowed to pursue two separate causes of action involving the death of the decedent. Moreover, it is not known whether Plaintiffs meet the other requirements of the wrongful death statute to even able to properly pursue this action in Mississippi.



court found that Meadowcrest did not have sufficient minimum contacts, and the exercise of personal jurisdiction would offend traditional notions of fair play and substantial justice. R. 148. The trial court's findings and dismissal of the Sauvages' action for lack of personal jurisdiction should be affirmed.<sup>4</sup>

It has been held that Mississippi's long-arm statute is "not coextensive with federal due process" requirements. *Allred v. Moore & Peterson*, 117 F.3d 278, 282 (5<sup>th</sup> Cir. 1997). Therefore, there must be an analysis as to whether due process rights are satisfied under the Fourteenth Amendment to the United States Constitution. *Id.* at 281. The United States Supreme Court has stated that the due process clause of the Fourteenth Amendment "operates to limit the power of a State to assert *in personam* jurisdiction over a non-resident defendant." *Seiferth v. Helicopteros Atuneros, Inc.*, 472 F.3d 266, 271 (5<sup>th</sup> Cir. 2006) (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413-14 (1984)). Personal jurisdiction over non-resident defendants may be had if either specific jurisdiction or general jurisdiction is established. *Thrash Aviation, Inc. v. KelnerTurbine, Inc.*, 72 F.Supp.2d 709, 715 (S.D. Miss. 1989). General jurisdiction is established where the non-resident defendant has "continuous and systematic contacts" or where "continuous corporate operations within the state [are] substantial and of such a nature as to justify suit against [a non-resident defendant]." *Id.* (citing *International Shoe*, 326 U.S. at 316). There is no question general jurisdiction can be had over the non-resident Nursing Home Defendants who are not licensed to do business in Mississippi, are not residents of the state of Mississippi, do not attempt to solicit

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<sup>4</sup> It should also be noted that personal jurisdiction can not be had over individual officers and employees, i.e., Steve Yancovich and Robert Bates in the instant action, of a corporation merely because personal jurisdiction can be had over the corporate entity. *See Cole v. Alton*, 567 F. Supp. 1081, 1084 (N.D. Miss. 1983) (holding that jurisdiction could not be asserted vicariously over employees and officers).

business in the state of Mississippi, do not operate a business in the state of Mississippi, have no registered agent for service of process in the state of Mississippi, and whose nursing home residents were only temporarily evacuated from Louisiana to Mississippi due to the urgent and necessitous circumstances created by Hurricane Katrina.

Specific jurisdiction may be had where “the suit in question arises out of or is related to the defendant’s contacts with the forum state.” *Id.* The *International Shoe* test requires courts to determine whether a non-resident defendant has sufficient “minimum contacts” and whether maintenance of the lawsuit would “offend traditional notions of fair play and substantial justice” before subjecting a non-resident defendant to litigation in a foreign jurisdiction. *Id.* (quoting *International Shoe*, 326 U.S. at 316). Non-resident defendants do not have “minimum contacts” unless they have “‘*purposefully directed’ [their] activities at residents of the forum and the litigation results from alleged injuries that arise out of and relate to those activities.*” *Horne v. Mobile Area Water & Sewer System*, 897 So.2d 972, 979 (Miss. 2004) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)). The *Horne* case is easily distinguishable from the case alleged by the Sauvages because Meadowcrest did not purposefully direct its activities to *Mississippi* residents. Thus, Meadowcrest does not have sufficient minimum contacts to survive the due process analysis for personal jurisdiction.

The Fifth Circuit has articulated a three-factor analysis for specific jurisdiction as follows:

- (1) whether the defendant has minimum contact with the forum state, i.e., whether it purposely directed its activities toward the forum state or purposely availed itself of the privileges of conducting activities there;
- (2) whether the plaintiff’s cause of action arises out of or results from the defendant’s forum-related contacts; *and*
- (3) whether the exercise of personal jurisdiction is fair and reasonable.

*Nuovo Pignone SpA v. Storman Asia M/V*, 310 F.3d 374, 378 (5<sup>th</sup> Cir. 2002) (emphasis added).

As to the first and second factors in the Fifth Circuit's analysis, the temporary evacuation of the nursing home residents to Mississippi was the result of extraordinary and necessitous circumstances and not purposefully directed toward Mississippi residents. Further, the urgent and necessitous purpose for which the nursing home residents were in Mississippi was in no way for the pecuniary or financial gain of Meadowcrest or in any way an attempt to solicit business from Mississippi residents by Meadowcrest. *See Lofton v. Turbine Design, Inc.*, 100 F. Supp. 2d 404, 411 (N. D. Miss. 2000)(finding personal jurisdiction improper over non-resident defendants who did not solicit business in Mississippi or derive any income from Mississippi customers). This distinguishes this case from other case law regarding personal jurisdiction and the case law cited in the brief of the Sauvages.

The Sauvages' brief attempts to point to the contract with the United Pentecostal Church for use of the emergency evacuation use of their facilities as constituting sufficient minimum contacts for the Nursing Home Defendants. However, the basis of the Sauvages' lawsuit in no way concerns this contract, and the United Pentecostal Church is not a party to the lawsuit. Also, the Sauvages insist that Meadowcrest was doing business in Mississippi while in the state. Meadowcrest at no time purposefully directed its activities to Mississippi residents because its sole purpose for temporarily being in Mississippi was due to the necessity to seek a temporary, safer shelter for the nursing home residents. Meadowcrest did not direct its activities toward Mississippi residents, and there are no Mississippi plaintiffs or defendants involved in this action. Furthermore, it is not believed any of the residents or employees of Meadowcrest were Mississippi residents, and no cause of action alleged against Meadowcrest by the the Sauvages involved or in any way was directed toward a

Mississippi resident.

The third and final factor regarding fairness and reasonableness has been broken down into five additional sub-factors to consider:

- (1) The burden on the non-resident defendant;
- (2) The interest of the forum state;
- (3) The plaintiff's interest in obtaining relief;
- (4) The interstate judicial system's interest in the most efficient resolution of the controversy; and
- (5) The shared interests of several states in furthering fundamental social policies.

*Nuovo Pignone*, 310 F.3d at 382; *see also Burger King*, 471 U.S. at 477 (discussing the last four factors to determine if maintenance of a lawsuit against a non-resident defendant "offends traditional notions of fair play and substantial justice"). The above-articulated factors weigh heavily in favor of the non-resident nursing home defendants herein and strongly support dismissal for lack of personal jurisdiction. First, the burden on the non-resident Nursing Home Defendants is high in that none of them are Mississippi residents or have any continuous contact with the state of Mississippi, nor do they do any business in Mississippi or have any contact with the state of Mississippi outside of the rare and exigent circumstance which resulted in the emergency evacuation created by the historic magnitude and unparalleled destruction wrought by Hurricane Katrina. The burden is compounded in that the Nursing Home Defendants are having to defend this action in addition to the identical Louisiana action.

Second, Mississippi has very little interest in this matter in that the crux of the Sauvages' claims involve allegedly negligent decisions and planning of nursing home management, owners and administrators, all in Louisiana, which involved the care of nursing home residents all of whom were residents of the state of Louisiana. Therefore, the interests of Mississippi courts in adjudicating this matter are far outweighed by the interests of the Louisiana court. Not a single tort is alleged to have

been committed against a resident of the state of Mississippi. Unlike in *Burger King and Horne*, Meadowcrest did not purposefully direct its activities at forum residents. Also, Mississippi's interest in adjudicating this dispute are not as great as in *Horne* because in that case Mississippi residents and property suffered injury. *Horne*, 897 So.2d at 981. The Sauvages nor the decedent were or are Mississippi residents and none of the alleged acts or omissions of Meadowcrest were directed to Mississippi residents. Further, it is irrefutable that any interest the state of Mississippi may have in this lawsuit is greatly outweighed by the interest the state of Louisiana has in this matter involving Louisiana plaintiffs and a Louisiana nursing home with Louisiana residents. To allow this matter to proceed in Mississippi would be fundamentally unfair and unreasonable.

Third, the Sauvages' interest in obtaining relief is not at all affected by a dismissal of this action because the very same action is pending before the more appropriate and convenient forum of the Twenty-Fourth Judicial District Court of Jefferson Parish, Louisiana, where the Sauvages have also sought a class certification for all of the nursing home residents. Fourth, the most efficient resolution of the controversy is to be had in the state court of Louisiana where the initial action is still currently pending. Judicial interests would be best served by dismissing this action for lack of personal jurisdiction and allowing the Sauvages to proceed with their pending Louisiana action.

The Court in *Seiferth* stated, "a plaintiff bringing multiple claims that arise out of different forum contacts of the defendant **must establish specific jurisdiction for each claim.**" *Seiferth*, 472 F.3d at 274 (emphasis added). If there are not sufficient, continuous and systematic contacts with the forum state to permit general jurisdiction, the due process clause would prohibit the reviewing court from exercising jurisdiction over any claim not arising out of or resulting from the defendant's contacts with the forum state. *Id.* at 274-75. Because specific jurisdiction must be established for each of the Sauvages' claims against each of the individual Nursing Home Defendants, a confusing

and burdensome quagmire could result from this Court potentially having personal jurisdiction over some Nursing Home Defendants and not others and over some of the Sauvages' claims and not others. This is especially true considering that none of these personal jurisdiction issues are present in the litigation pending in Jefferson Parish, Louisiana. It is simply not in the interests of justice or efficiency for the Mississippi trial court to have to consider all of the jurisdictional questions, venue questions and potential conflicts of law and choice of law questions inherent to this peculiar lawsuit brought in Mississippi where essentially the same action has already been pending in the appropriate jurisdiction for over three years.

Any interest the state of Mississippi may have in this civil action is far, far outweighed by the interest the state of Louisiana has in a lawsuit involving its own citizens and a nursing home which is licensed and regulated by its state's laws. The Sauvages' interest in obtaining relief would not be hindered at all by the dismissal of this Mississippi action because of the currently pending lawsuit they have against these very same Nursing Home Defendants arising out of the very same set of facts. Without question, the interstate judicial system's interest in the most efficient resolution of the controversy is to dismiss this Mississippi action and have the Plaintiffs continue to pursue the Louisiana action in the jurisdiction and venue which is most appropriate and most convenient.

Fifth and final, the vast majority of any policy issues related to this litigation concern the state of Louisiana and the residents of the state of Louisiana and **not** Mississippi. Furthermore, any policy concerns should weigh in favor of the Nursing Home Defendants and dictate that they not be subject to personal jurisdiction or duplicative litigation in Mississippi. This is especially true considering none of the parties are from Mississippi, and that the singular contact with Mississippi was the result of exigent circumstances necessitating an emergency, mandatory evacuation during Hurricane Katrina.

To subject Meadowcrest to jurisdiction in Mississippi would offend traditional notions of fair play and substantial justice. The exercise of personal jurisdiction in Hinds County, Mississippi as to Meadowcrest is not fair or reasonable as defined by applicable case law. Justice Brennan wrote in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 113 (1987), that “the ‘minimum requirements inherent in the concept of ‘fair play and substantial justice’ . . . [may] defeat the reasonableness of jurisdiction even [if] the defendant has engaged in forum activities.” To subject Meadowcrest to personal jurisdiction in Mississippi as a result of the single extraordinary circumstance of evacuating from Hurricane Katrina, which brought nursing home personnel and residents, including the decedent, to Mississippi to seek temporary shelter should serve to defeat the reasonableness of personal jurisdiction in Hinds County, Mississippi. This is especially true given that no activities or actions of Meadowcrest were in any way directed toward Mississippi residents. The trial court was correct in finding that it lacked personal jurisdiction over the non-resident Nursing Home Defendants. The trial court’s dismissal of this action should be affirmed.

**II. EVEN IF THE EXERCISE OF PERSONAL JURISDICTION IS PROPER, DISMISSAL BASED ON FORUM NON CONVENIENS MUST BE AFFIRMED**

Even if this Court finds the trial court erred in dismissing this action based on a lack of personal jurisdiction, the trial court’s dismissal should still be affirmed based on the doctrine of forum non conveniens. The trial judge did not abuse his discretion in finding forum non conveniens applicable. “[A] state court might still dismiss [a] suit on the basis that a much more convenient and appropriate forum exists in some other state.” *Hogrobrooks v. Progressive Direct*, 858 So.2d 913, 918 (Miss. Ct. App. 2003). The Mississippi Court of Appeals has further stated that if a more appropriate forum is available to a plaintiff and the Mississippi court is an inconvenient forum for trial, then the Mississippi court *should not* exercise jurisdiction. *Id.* (emphasis added) (citing

*Metropolitan Life Ins. Co. v. Aetna Casualty and Surety Co.*, 728 So.2d 573, 577 (Miss. 1989)).

Also, the Mississippi Supreme Court has held numerous times that courts in Mississippi “should not try cases that would be seriously inconvenient to one or more of the parties, provided that a more appropriate forum can be found.” *3M Co. v. Johnson*, 926 So.2d 860, 863 (Miss. 2006) (citing *McWhorter v. Cal-Maine Farms, Inc.* 913 So.2d 193, 196 (Miss. 2005)). In the case at bar, not only is there a more appropriate forum in which to proceed with this action, this identical action has already been filed in that forum, which is Jefferson Parish, Louisiana. There is no question that the Mississippi court is a more inconvenient forum than the Jefferson Parish, Louisiana court.

There are seven factors for courts to consider when presented with a motion to dismiss based on forum non conveniens. *Poole v. American Public Life Ins. Co.*, 878 So.2d 1102, 1103-04 (Miss. Ct. App. 2004) (citing *Missouri Pacific Railroad Co. v. Tircuit*, 554 So.2d 878, 881 (Miss. 1989)):

- (1) relative ease of access to sources of proof;
- (2) availability and cost of compulsory process for attendance of unwilling witnesses;
- (3) possibility of viewing the premises;
- (4) unnecessary expense or trouble to the defendant not necessary to the plaintiff's own right to pursue her remedy;
- (5) administrative difficulties for the forum courts;
- (6) whether there are local interests in deciding the case at home; and
- (7) the plaintiff's choice of forum should rarely be disturbed.

*Id.* at 1104-06.

The first factor regarding the “relative ease of access to sources of proof” most definitely favors dismissal. All documents and almost all witnesses are likely located in Louisiana. The only thing located in the state of Mississippi involving this lawsuit is the building where Aranka Abadie Sauvage was transported. All persons providing care to the decedent and all records documenting this care are located in Louisiana. Furthermore, the Nursing Home Defendants are not Mississippi residents, are not licensed to do business in Mississippi and do not have a registered agent for service



of process in Mississippi. Therefore, access to sources of proof will be much more burdensome in this forum than in the Louisiana court. Likewise, the second factor also favors dismissal because most, if not all, unwilling witnesses and non-party witnesses are located outside the state of Mississippi, thus being outside the general subpoena power of Mississippi courts. To compel documents or witnesses outside of Mississippi will be a complicated and time-consuming process not necessary for the adjudication of this matter.

Similarly, based on the same premise, the fourth and fifth factors, involving unnecessary expense or trouble to the defendant not necessary to the plaintiff's right to pursue her remedy and the administrative difficulties for the forum court, also favor dismissal. Much unnecessary expense and trouble has already been incurred by the Nursing Home Defendants in concurrently defending this matter in Hinds County, Mississippi as well as in Jefferson Parish, Louisiana, where virtually all parties, witnesses, records and other evidence is located. Likewise, it would be unnecessarily difficult for this Court to compel the production of documents and appearance of witnesses outside of the state of Mississippi as well as potentially having to review and apply Louisiana law where applicable in this case. Lastly, the sixth factor also favors dismissal of this action in Mississippi because it is in the best interest of the state of Louisiana and the citizens of Louisiana to have this matter decided in Louisiana. This case involves Louisiana plaintiffs, Louisiana defendants, and a Louisiana nursing home with Louisiana residents; thus, policy dictates that a trial of this matter should be decided by a Louisiana jury under Louisiana law. The interests in this matter by the state of Louisiana far outweigh any interest that may be had in the state of Mississippi.

The court in *Johnson* held, "The doctrine of forum of non conveniens protects litigants from unnecessary burdens and the courts and taxpayers from incurring the expense of litigating foreign disputes." *Johnson*, 926 So. 2d at 865 (citing *Illinois Central Railroad Co. v. Gregory*, 912 So.2d

829, 836 (Miss. 2005)). The court specifically noted that in *Gregory* the evidence, relevant witnesses, and appellees were all out-of-state, and, therefore, the case should be dismissed. *Id.* Also, the court pointed out the extreme difficulty upon both the courts and parties when witnesses and evidence for out-of-state plaintiffs are beyond the subpoena power of the trial court. *Id.* A heavy burden would be placed on the parties and the court to subpoena information and witnesses and otherwise serve process on out-of-state individuals. Finally, unlike in *Johnson*, in the case at bar not only is there a more appropriate judicial forum in another state, this action has already been brought in that forum. There is no question that the most appropriate forum for this action is in Louisiana where an identical action is currently pending.

The third factor involving the ability to view the premises<sup>5</sup> and the last factor involving the plaintiff's choice of forum are not enough to justify retaining this matter and certainly do not rise to the level of an abuse of discretion on the part of the trial court. The United States Supreme Court, in discussing the doctrine of forum non conveniens stated:

[W]e would not lay down a rigid rule to govern discretion and that each case turns on its facts. If central emphasis were placed on any one factor the forum non conveniens doctrine would lose much of the very flexibility that makes it so valuable.

*Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249-50 (1981). The Mississippi Supreme Court has also stated it is the intent of the United States Supreme Court that the first six factors of the forum non conveniens analysis be "balanced against the difference afforded to the plaintiff's choice of forum."

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<sup>5</sup> The only premises in Mississippi is the metal building owned and operated by the United Pentecostal Church. The condition of those premises are not in issue because the Sauvages did not name the United Pentecostal Church as a defendant in this lawsuit. Further, the site and condition of the campground building today would certainly not be the same as in 2005 during Hurricane Katrina or its immediate aftermath.

*Johnson*, 926 So.2d at 864. Also, in *Johnson*, the court cited the United States Supreme Court in holding that *less deference is afforded out-of-state plaintiffs who did not choose their home forum*. *Id.* at 866 (citing *Piper Aircraft*, 454 U.S. at 255-56)(emphasis added). Therefore, the trial court was correct in affording less deference to the Sauvages' choice of forum in Hinds County, Mississippi. Without a doubt, the analysis provided by our courts for determining the applicability of the forum non conveniens argument weighs heavily in favor of dismissal of this action when considering the location of the parties, witnesses and potential documents, the potential burden and increased expenses on the Mississippi trial court and the parties, the state of Louisiana's overwhelming interest in this case, and, the fact that an identical action was previously filed in Jefferson Parish, Louisiana which is still currently pending. This analysis weighs in favor of affirming the dismissal of this action by the trial court even when considering the seventh and final factor involving the plaintiff's choice of forum, especially in light of the law that affords less deference to out-of-state plaintiffs who did not choose their home forum. The trial court was correct in finding that the doctrine of forum non conveniens was applicable and did not abuse its discretion in any way. The dismissal of this action by the trial court on the basis of forum non conveniens should be affirmed even if this Court finds error as to the dismissal based on a lack of personal jurisdiction.

### **III. THE SAUVAGES' BRIEF CITES NO AUTHORITY TO SUPPORT REVERSAL OF THE TRIAL COURT'S DISMISSAL BASED ON FORUM NON CONVENIENS**

The Mississippi Supreme Court has "consistently held that an unsupported assignment of error will not be considered." *Shavers v. Shavers*, 982 So.2d 397, 401 (Miss. 2008); *Ellis v. Ellis*, 651 So.2d 1068, 1072 (Miss. 1995). Put another way, "[t]his Court does not have to consider alleged error when no authority is cited for the error in the brief." *Id.* (citing *Armstrong v. Armstrong*, 618

So.2d 1278, 1282 (Miss. 1993)). Moreover, this Court has held it is an appellant's duty "to provide authority in support of an assignment of error." *Entergy Mississippi, Inc. v. Bolden*, 854 So.2d 1051, 1057 (Miss. 2003) (quoting *Jones v. Howell*, 827 So.2d 691, 702)(Miss. 2002)). The court further held that "[w]here an assertion of error is not supported by authority, that assertion is deemed abandoned." *Id.* This Court ultimately concluded in *Bolden* that it was procedurally barred from considering unsupported assertions on appeal. *Id.* (citing *Webb v. Desoto County*, 843 So.2d 682, 685 (Miss. 2003)). "It is well known that the failure to cite case law in support of one's contentions acts as a procedural bar, preventing this court from considering it." *Ortman v. Cain*, 811 So.2d 457, 462 (Miss. Ct. App. 2002).

The Sauvages have abandoned their assignment of error as to the trial court's dismissal on the basis of forum non conveniens. The Sauvages make only scant mention of forum non conveniens in their brief and offer no discussion or supporting authority as to why the trial court's ruling on this issue should be reversed. Therefore, this Court is procedurally barred from considering this issue, and must affirm dismissal by the trial court at least on the issue of forum non conveniens.

**IV. ALTERNATIVELY, THIS ACTION IS BARRED BECAUSE THE SAUVAGES FIRST FILED AN ACTION STILL PENDING IN LOUISIANA INVOLVING THE SAME PARTIES AND SAME SUBJECT MATTER**

In addition to the trial court's proper dismissal of this action based on a lack of personal jurisdiction and forum non conveniens, the Sauvages' action is barred because they filed a nearly-identical action based on the same set of facts against the same Nursing Home Defendants before they ever filed this particular action in Mississippi. The first-filed action is currently pending in the most appropriate jurisdiction of Jefferson Parish, Louisiana. The Sauvages' Louisiana action is currently pending, and now they are seeking redress against the same Nursing Home Defendants based on the same set of facts and circumstances in two different courts in two different states.

Although the trial court did not address this issue in its Memorandum Opinion and Order, it was discussed in the Nursing Home Defendants' rebuttal brief and serves as a valid alternative basis for dismissal of this action.

Mississippi courts have long held that "[t]he pendency of a prior suit between the same litigants and involving the same subject matter constitutes a bar unless adequate relief is not attainable in a prior suit." *Abiaca Drainage District of Leflore, Holmes, & Carroll Counties, Miss. v. Albert Theis & Sons, Inc.*, 187 So. 200, 201 (Miss. 1939). Furthermore, the Mississippi Supreme Court has stated, "No one should be harassed and oppressed by two suits for the same cause of action and the same remedies." *General Acceptance Corp. v. Holbrook*, 189 So.2d 923, 925 (Miss. 1966). More recently, the Mississippi Supreme Court has cited the Fifth Circuit's adoption of the principal which prohibits relitigation and "requires that a plaintiff bring *in the first forum* every point which properly belongs to the subject of litigation, in which the parties, by exercising reasonable diligence, might have brought forward at the time." *Harrison v. Chandler-Sampson Insurance, Inc.*, 891 So. 2d 224, 234 (Miss. 2005)(emphasis added). And even more recently, the Mississippi Supreme Court recognized the "***long-standing principle of law in Mississippi*** prohibiting a party from splitting a cause of action into the subject of two different actions." *Wilner v. White*, 929 So. 2d 315, 320 (Miss. 2006)(emphasis added).

On January 27, 2006, almost two years before the filing of this Mississippi action, the very same Plaintiffs commenced an action in the Twenty-Fourth Judicial District Court of Jefferson Parish, Louisiana against Meadowcrest Living Center, LLC and Transition Health Services, Inc. based on the same set of operative facts and circumstances as this Mississippi action and alleging very similar causes of action under Louisiana law. Mississippi and Fifth Circuit law clearly suggest that the refiling of this cause of action should be abated and dismissed as a matter of fairness to the

Nursing Home Defendants and in the interests of judicial economy and efficiency. The policy reasons and practical reasons behind this long-held judicial principle in Mississippi are no less pertinent and proper just because this action was initially filed in a state court of Louisiana and then filed again in a state court of Mississippi. That the Sauvages have already brought this action in another court bars this action in Mississippi, and the Nursing Home Defendants should not have to defend both lawsuits.

### **CONCLUSION**

The trial court's judgment of dismissal must be affirmed.

Respectfully submitted,

MEADOWCREST LIVING CENTER, LLC,  
STEVE YANCOVICH, LLC, TRANSITION  
HEALTH SERVICES OF LOUISIANA, LLC, and  
ROBERT R. BATES

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ROBERT R. BATES, Corporate President of  
Transition Health Services of Louisiana, LLC

**CERTIFICATE OF SERVICE**

The undersigned attorney hereby certifies that a true and correct copy of the foregoing instrument has been this day mailed by United States mail, postage prepaid to the following:

Honorable William F. Coleman  
Hinds County Circuit Court  
Hinds County Courthouse  
407 E. Pascagoula St.  
2nd Floor East Wing  
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ATTORNEY FOR PLAINTIFFS

This the 22<sup>nd</sup> day of May, 2009.

  
COREY D. HINSHAW