SIDEBAR

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FORUM NON CONVENIENS ISSUES IN DELAWARE STATE COURTS

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By: Bryan Smith, Esq.

Many clients, especially those involved in toxic torts, consistently question why a plaintiff brings an action in a jurisdiction, such as Delaware, which lacks any identifiable connection to the allegations and harms underlying the action. This factual situation frequently rears its head in cases alleging injury as a result of asbestos exposure, where the plaintiff lives and was allegedly exposed to asbestos in one jurisdiction (State A), but brings the lawsuit in an entirely separate jurisdiction (State B). In electing the state of filing, the plaintiff's counsel may consider various factors, such as the perceived leanings of State B's jury pool, historical settlement values in State B, and the ability to obtain personal jurisdiction over several defendants in State B. These considerations, however, ignore the reality that State B (even if it happens to be the state of incorporation of a defendant, thereby subjecting the defendant to personal jurisdiction) has no relationship to the alleged tort.

When faced with this situation, especially in toxic tort cases filed in Delaware, many clients inquire as to the ability to have the action either dismissed or transferred (when federal jurisdiction is in play) based on the doctrine of forum non conveniens. Historically, Delaware courts have been extremely loath to dismiss actions based on forum non conveniens, in large part due to the fact that many corporate defendants have expressly consented to jurisdiction in Delaware by virtue of making Delaware their respective states of incorporation. Recently, however, the Delaware Supreme Court has added some teeth to the applicable forum non conveniens analysis, especially when the plaintiffs are not citizens or entities located in the United States.

In Aranda v. Philip Morris USA Inc., 2018 Del. LEXIS 129 (Del. Mar. 22, 2018), the Delaware Supreme Court affirmed the Superior Court's dismissal of the plaintiffs action on the basis of forum non conveniens. The Aranda plaintiffs, all Argentinean tobacco farmers, filed suit in Delaware alleging that Philip Morris and its subsidiaries mandated the use of carcinogenic herbicides manufactured by a third party, Monsanto. Id. at 4-5. Specifically, the plaintiffs alleged that, although Philip Morris required the use of these herbicides, Philip Morris never recommended the use of protective measures, despite Philip Morris knowledge that the plaintiffs lacked the requisite protective equipment and knowledge required for safe use of the herbicides. Id. at 5. Consequently, the plaintiffs were injured by their exposure to the herbicides.

Philip Morris moved to dismiss the plaintiffs complaint on the basis of forum non conveniens, arguing, amongst other factors, that: (1) litigating the case in Delaware would subject Philip Morris to overwhelming hardship because the witnesses and documents were located in Argentina; (2) the lack of availability of a compulsory process for Argentinean witnesses; and (3) the controversy was not dependent upon Delaware law. Id. at 6.

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The Delaware Superior Court applied the following factors in performing its forum non conveniens analysis:
(1) the relative ease of access to the proof; (2) the availability of a compulsory process for witnesses; (3) the possibility to view the premises, if appropriate; (4) all other practical problems that would make the trial easy, expeditious, and inexpensive; (5) whether the controversy is dependent upon Delaware law, which the Courts of this state should decide rather than those of another jurisdiction; and (6) the pendency or non-pendency of a similar action in another jurisdiction.

Id. at 11-12. After applying these factors, the Superior Court granted the motion to dismiss on the basis that Philip Morris would endure overwhelming hardship if the case were to proceed in Delaware.

Following the Superior Court's dismissal, the plaintiffs sought clarification and reargument, arguing that, "'as a matter of logic and precedent, a threshold requirement is that the moving defendant be amenable to suit in the suggested foreign forum [of Argentina].'" Id. at 6. The Superior Court denied the reargument motion, holding that an available alternative forum is not a requirement under Delaware's forum non conveniens analysis, as "the analysis focuses on the hardship a defendant faces in this jurisdiction—not whether the defendant is amenable to suit somewhere else). Id. at 7. The plaintiffs appealed to the Delaware Supreme Court, arguing that the lack of an available alternative forum was fatal to Philip Morris's motion to dismiss for forum non conveniens.

The Delaware Supreme Court affirmed the Superior Court and held that, while the availability of an "alternative forum should be considered as part of the forum non conveniens analysis," that criteria is not a threshold requirement. Id. at 4. In reaching this conclusion, the Supreme Court surveyed state and federal law across the country and noticed that, while most other courts require that another forum be available before dismissing on forum non conveniens grounds, such a threshold requirement has never been necessary in Delaware. Id. at 12-13. Instead, as Delaware's application of forum non conveniens focuses solely on whether the defendant would face an overwhelming hardship by litigating in Delaware, as opposed to some other forum. Id. at 13-14 (citing Mar-Land Industrial Contractors, Inc. v. Caribbean Petroleum Refining, L.P., 777 A.2d 774, 779 (Del. 2001). In the matter sub judice, the plaintiffs attempted to interject a criteria that focused not on the defendant's hardship, but instead on any hardship incurred by the plaintiffs—a point of analysis that was not probative on Philip Morris's forum non conveniens motion.

It is not yet clear how Aranda will influence toxic tort practice in Delaware. However, the clear statement of Aranda—that an available alternative forum is not a threshold requirement in a motion to dismiss based on forum non conveniens, the general slant of the ruling indicates that Delaware courts are increasing their willingness to entertain—and grant—motions to dismiss based upon forum non conveniens.

Bryan Smith is an associate in the firm's Wilmington office.

DELAWARE APPELLATE COURT ISSUES RULING CLARIFYING PREMISES OWNER LIABILITY

By: Bryan Smith, Esq.

Frequently, an individual alleges an asbestos-related injury as a result of asbestos exposure he experienced while he was employed by an independent contractor working at a premises owner's facility. The Delaware Superior Court recently held that a premises owner is not liable to an independent contractor's employee for asbestos-related injuries suffered by that employee when the premises owner did not control the manner in which the independent contractor performed the work. Kivell v. Union Carbide, 2018 Del. Super. LEXIS 189, *9-10 (Del. Super. Ct. May 1, 2018) (Kivell II).

In Kivell, this exact factual scenario was alleged where the plaintiff's decedent, Milton Kivell, allegedly contracted mesothelioma from asbestos exposure he allegedly experienced while working for an independent contractor pipefitter in connection with construction of new units at Union Carbide's Taft, Louisiana facility. Union Carbide contracted the independent contractors—who employed Mr. Kivell—to construct several process units. As part of that contract, Union Carbide monitored the independent contractor employees to ensure Union Carbide's safety standards were met, but the independent contractor retained the right to control the manner in which the work was performed and the contractor provided all consumable supplies under the contract. There was not any evidence in the contract that Union Carbide mandated the use of any asbestos-containing materials in the construction.

Union Carbide moved for summary judgment arguing, inter alia, that it could not be liable for Mr. Kivell's injuries because Mr. Kivell's employer—the independent contractor—controlled the manner in which the work was to be performed. The Delaware Superior Court adopted this argument and granted summary judgment in Union Carbide's favor. In re Asbestos Litig. (Kivell), 2017 Del. Super. LEXIS 431, *1 (Del. Super. Ct. Aug. 30, 2017) (Kivell I). After the August 2017 grant of Union Carbide's summary judgment motion, the plaintiff sought reargument, claiming that "newly discovered evidence"—which was actually in her possession for several weeks before the close of summary judgment briefing—demonstrated that Union Carbide controlled the manner in which Mr. Kivell's employer performed the work.

On May 1, 2018, the Delaware Superior Court denied the plaintiff's motion for reargument and reentered summary judgment in Union Carbide's favor. In Kivell II, the Court summarily dismantled the plaintiff's arguments and held that: (1) Union Carbide did not have sufficient control over the independent contractor such that Union Carbide could be held vicariously liable; (2) the Taft facility did not contain enough asbestos to hold Union Carbide directly liable; and (3) Union Carbide could not be held strictly liable based on the custody of asbestos that Mr. Kivell encountered at the Taft facility. First, the Court held that Union Carbide's admitted safety monitoring of the independent contractor "does not constitute sufficient right to control so as to impose liability on" Union Carbide. Kivell II, 2018 Del. Super. LEXIS 189, *3-4. In fact, as the Court noted, to hold otherwise would have the undesirable effect of encouraging principals, such as Union

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OHIO SUPREME COURT REJECTS PLAINTIFFS' THEORY OF CUMULATIVE EXPOSURE IN ASBESTOS CASES

By: Michele L. Larissey

On January 24, 2018, the Ohio Supreme Court entered a landmark decision rejecting Plaintiffs' cumulative exposure theory of causation in asbestos cases. See Schwartz v. Honeywell International, Inc. (Slip Opinion No. 2018-Ohio-474). The cumulative exposure theory of causation is a broad-brushed theory that is premised in the notion that exposure to asbestos from various products collectively is the cause of a plaintiff's claimed asbestos-related injury. Essentially, the cumulative exposure theory is nothing more than an adaptation of the previous "each and every exposure" theory of causation.

In order to recover from any given defendant in an asbestos case, the longstanding law in Ohio requires a plaintiff to prove (1) exposure to an asbestos-containing product manufactured or supplied by the defendant; and, (2) that the exposure to said product was a substantial factor contributing to the plaintiff's claimed asbestos-related injury. Horton v. Harwick Chem. Corporation, 73 Ohio St. 3d 679, 686-87, 653 N.E.2d 1196, 1202 (1995).

In 2004, the Ohio General Assembly further clarified the substantial factor component of this two-pronged legal doctrine by codifying factors that a court must consider when assessing whether or not a particular defendant's product was a substantial factor contributing to a plaintiff's claimed injury. Ohio R.C. § 2307.96. Specifically, the legislature provided that a court must consider:

(1) The manner in which the plaintiff was exposed to the defendant's product(s);

(2) The proximity of the plaintiff to the defendant's product(s) when the exposure occurred;

(3) The frequency and length of the plaintiff's exposure to the defendant's product(s); and,

(4) Any factors that mitigated or enhanced the plaintiff's exposure to asbestos.

OHIO R.C. § 2307-96(B)(1) – (4).

In Schwartz, the Ohio Supreme Court rejected the plaintiff's efforts to circumvent the plain language of R.C. § 2307.96(B) with the "cumulative exposure" theory. In doing so, the Court provided clarity regarding the application of Ohio R.C. § 2307.96 to an individual defendant in an asbestos case. In the process, the Court reversed a jury verdict as well as the Court of Appeals for the 8th District of Ohio, and entered judgment in favor of a friction product manufacturer, finding that the plaintiff could not establish that exposure to the defendant's product was a substantial contributing factor in the development of Plaintiff's Decedent's mesothelioma. In its analysis, the Court dismissed Plaintiff's attempts to broaden the requirements for substantial factor causation with expert theories of "cumulative exposure". Instead, the court clarified that Ohio R.C. § 2307.96 requires a plaintiff to establish substantial factor causation as to each individual defendant, considering the factors enumerated in the statute.

Specifically, the Court in Schwartz stated "the legislature made it clear that in asbestos cases, there must be a determination whether the conduct of each 'particular defendant' was a substantial factor in causing the plaintiff's injury and that this determination must be based on specific evidence of the manner, proximity, frequency, and length of exposure." Schwartz at (¶14). The Court went on to state that Ohio R.C. § 2307.96 "requires an individualized determination for each defendant: there must be a finding that the conduct of a 'particular defendant was a substantial factor' in causing the Plaintiff's disease." Id. at (¶18).

Thus, the Schwartz Court found that the cumulative exposure theory conflicts with the statutory requirement that substantial factor causation be measured as against each individual defendant—while considering the manner, proximity, length, and duration of exposure to any given defendant's product—because the cumulative exposure theory considers Plaintiff's exposures en masse. Consequently, the Court found that the cumulative exposure theory is insufficient to demonstrate that exposure to asbestos from a particular defendant's product is a "substantial factor" contributing to a plaintiff's claimed asbestos injury under R.C. § 2307.96.

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NEWS & FIRM NOTES

Swartz Campbell LLC is proud to announce the opening of its first office in Maryland. The office, located in Baltimore MD, opened on May 1st, 2018.
The contact information for the office is:

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Joshua Byrne, a partner in Swartz Campbell's professional liability department, had an article published in the The Legal Intelligencer on Friday September 22, 2017. The article, titled, It's Not Your File! Actually, It's Your Client's File discusses the ownership of file materials when representing a client. Mr. Byrne is a vice chair of the Pennsylvania Bar Association's professional liability committee and continues to be a regular contributor to the Swartz Campbell LLC Professional Liability blog. For more information on the topic of this article, please contact Jbyrne@swartzcampbell.com.

Shae Chasanov recently had a Motion For Summary Judgment granted in GEICO Insurance Company's favor in the Court of Common Pleas of the State of Delaware in the case of Khaliq Anderson, a minor by their natural mother and next of friend, Amira Dickerson v. GEICO Secure Insurance Co., C.A. No. CPU4-17-000021. The decision came out on September 26, 2017 following a hearing on September 1, 2017, and the Judge presiding was Chief Judge Alex J. Smalls.

The issue was whether GEICO breached its contract by failing to preserve the plaintiff's Personal Injury Protection benefits(AKA as PIP benefits) for home care services. The minor plaintiff was involved in an automobile accident on September 27, 2016, sustaining very serious injuries as a result. His counsel made a verbal request to GEICO seeking that PIP coverage be reserved for the minor's future home care. A letter was thereafter sent seeking the same preservation. GEICO responded requesting the plaintiff's authority for this request, in light of the statute requiring prompt processing and payments of PIP benefits. No response was provided to GEICO's request for additional information, and therefore, GEICO paid medical bills submitted by the hospital. The payment of these bills exhausted the PIP coverage available to the minor.

The court reviewed the specific facts, finding that there was no clear indication in the plaintiff's PIP application for the requested preservation of PIP benefits, and the plaintiff ignored GEICO's request for supporting authority for this request. Furthermore, the court looked at other jurisdictions that have considered this issue. The court ultimately decided that GEICO's request for additional documentation was reasonable, and the plaintiff's failure to respond to this request left the insurer in a difficult position of either following the PIP statute or the request.

Jeffrey McCarron, the chair of the firm's Professional Liability Department, made a presentation to the Philadelphia Association of Defense Counsel titled "Enhanced Advocacy: Strategies for Development of a Comprehensive Case Theory and Theme" on May 15, 2018

Several employees from Swartz Campbell LLC took part in the **39th Annual Philadelphia Bar Association 5k Run on May 20, 2018 at Memorial Hall.** Those who participated included Lauren Burke, Mike Cognetti, Andrea Graf, and Donna Evans. Proceeds from the event benefitted the Support Center for Child Advocates, which provides legal assistance and social service advocacy for abused and neglected children in Philadelphia County.

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Carbide, to either ignore or condone unsafe activities. Id. at 4-5. Moreover, the Court found to be critical the fact that, while Union Carbide monitored the activities, the independent contractor retained ultimate
responsibility for performing the actual work. Id. at 5.

Second, the Court rejected Plaintiff's contention regarding the "sufficiency of the asbestos content at the Taft facility" necessary to hold Union Carbide directly liable. Id. at 6. In reaching this holding, the Court analogized to a case involving silica sandblasting, where the United States District Court for the Western District of Louisiana held that the airborne silica was "temporary in nature and transported to the facility by the plaintiff's employer and/or supplier. The hazard was inherent in the performance of the sandblasting." Id. (citing Roach v. Air Liquide Am. LP, 2016 U.S. Dist LEXIS 84493, *4 (W.D. La. June 28, 2016). Just as the hazards of silica was inherent in sandblasting, the hazards of asbestos were inherent in Mr. Kivell's duties as a pipefitter, and were not a result of some shortcoming on behalf of Union Carbide which would otherwise the Taft facility an unsafe worksite. Id. at *6-7.

Third, the Court rejected the plaintiff's contention that Union Carbide should be strictly liable for Mr. Kivell's injury based on the fact that it retained the right to benefit from the Taft facility. Id. at 8-9. In holding that Union Carbide was not strictly liable for Mr. Kivell's injuries, the Court noted that, not only was the plaintiff's position unsupported by Louisiana law, the plaintiff's contention was directly opposite Louisiana law. Id. at *9.

Specifically, the Court directed the plaintiff to Rando v. Anco Insulations Inc., 16 So. 3d 165 (La. 2009) for the proposition that, even when a premises owner specifies that an independent contractor use asbestos, the premises owner is not liable to the independent contractor's employees for asbestos-related injuries because it is the contractor who controls who the work is performed. Kivell II, 2018 Del. Super. LEXIS 189, *9.

Although Kivell (both I and II) deal solely with the application of Louisiana law, these decisions represent a general unwillingness of the Delaware courts to hold a premises owner liable for the injuries suffered by an employee of an independent contractor where the premises owner merely ensured minimal safety standards were met, the hazard was not inherent to the facility, and the actual performance of the work was dictated by the independent contractor.

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