NOT DESIGNATED FOR PUBLICATION

DORIS WALLER, Individually and On Behalf of Her Deceased Husband, PRESTON WALLER, ET AL.	**COURT OF APPEAL**
	FIFTH CIRCUIT
VERSUS	**STATE OF LOUISIANA**
ANCO INSULATIONS, ET AL.	**NUMBER 01-CA-1097**

APPEAL FROM
THE TWENTY-THIRD JUDICIAL DISTRICT COURT,
PARISH OF ST. JAMES, STATE OF LOUISIANA,
NUMBER 27624, DIVISION "D,"
HONORABLE PEGRAM MIRE, JR., PRESIDING.

January 29, 2002

SUSAN M. CHEHARDY
JUDGE

Panel composed of Judges James L. Cannella,
Marion F. Edwards and Susan M. Chehardy.

CANNELLA, J., J. DISSENTS

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AFFIRMED.

This appeal arises in an action by or on behalf of Preston E. Waller, Earl M. Barnwell, James F. Blackwell, and George L. Bean against Anco Insulations, Inc., the McCarty Corporation, Dow Chemical Company, and Kaiser Aluminum & Chemical Corporation for damages resulting from occupationally-induced asbestos-related disease.[1] Dow Chemical Company appeals the overruling of its declinatory exception of improper venue and its dilatory exception of improper cumulation.[2] We affirm, for the reasons that follow.

Venue

On appeal Dow contends the district court erred in overruling Dow's declinatory exception of venue because the only nominal defendant domiciled in

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[1]All the plaintiffs developed mesothelioma. The suit is prosecuted by George Bean, the sole living plaintiff, together with his wife, and by the legal successors of Waller, Barnwell and Blackwell, who are deceased. After the appeal was lodged in this court but prior to its submission for decision, we received a notice of settlement by Bean and his wife of their claims against Dow. The settlement does not affect the claims of the other plaintiffs.

[2]An interlocutory judgment erroneously overruling an exception of venue cannot as a practical matter be corrected on appeal; therefore, it is appealable under La.C.C.P. art. 2083 because irreparable injury may result. See Chambers v. LeBlanc, 598 So.2d 337 (La. 1992). In addition, proper cumulation requires that all the cumulated actions be filed in a court of proper venue. La.C.C.P. art. 463.

St. James Parish was joined solely for the purpose of creating venue in St. James Parish.

An action against joint or solidary obligors may be brought in a parish of proper venue, under Article 42 only, as to any obligor who is made a defendant. La.C.C.P. art 73.

An action against a domestic corporation shall be brought in the parish where its registered office is located and against a foreign corporation in the parish where its primary business office is located as designated in its application to do business in the state or, if no such designation is made, then in the parish where its primary place of business in the state is located. La.C.C.P. art. 42(2), (4).

Before any proceedings can be taken against a defendant or defendants, it is essential either that they be brought into court by service of process or that a lawful appearance be made in their behalf. Hatfield v. King, 184 U.S. 162, 166, 22 S.Ct. 477, 46 L.Ed. 481 (1902); Schultz v. Doyle, 00-926 (La. 1/18/01), 776 So.2d 1158, 1162.

Defendants Anco and McCarty are domestic corporations, but their principal places of businesses are in other parishes. Defendant-appellant Dow is a foreign corporation licensed to do business in Louisiana that has its principal place of business in this state at Plaquemine in Iberville Parish. Plaintiffs filed suit in St. James Parish because defendant Kaiser, a foreign corporation licensed to do business in Louisiana, has its principal place of business in this state at Gramercy in St. James Parish and plaintiffs allege the other defendants are solidarily liable with Kaiser.

Dow asserts that because it neither maintains its primary place of business in St. James Parish nor has a registered agent for service of process there, St. James is not a proper venue for Dow. Dow argues that when its exception of improper venue was made and argued, Kaiser had not yet been served with the lawsuit because plaintiffs had requested that service be withheld on Kaiser. Therefore, Dow contends, Kaiser was not a "defendant" for purposes of assessing whether Dow had a solidary obligor for whom venue was proper.

Dow maintains that plaintiffs named Kaiser as a defendant solely for the purpose of obtaining the venue they desired and that plaintiffs' withholding service on Kaiser up to and including the date when Dow's venue exception was tried indicates that plaintiffs had bad faith in joining Kaiser.

This suit was filed on June 11, 2001. At the time of filing plaintiffs requested service on defendants Anco, Dow and McCarty, but specified that service be withheld on Kaiser. In conjunction with filing of the petition plaintiffs requested a preferential assignment of trial date due to plaintiff Bean's deteriorating condition and terminal prognosis.

Defendant Dow filed its exceptions of improper venue and improper cumulation on June 20, 2001 and the exceptions were assigned a hearing date of August 13, 2001. On August 2, 2001 Dow filed its memorandum in support of its exceptions, in which it asserted that venue was improper in St. James Parish because none of the "properly joined and served" solidary obligors had its principal place of business in St. James Parish.

On August 8, 2001 plaintiff sent a letter to the clerk of court requesting that Kaiser be served. The record on appeal has been supplemented with copies of the

letter requesting service and the sheriff's return on service, showing that Kaiser was served on August 15, 2001.

At the time the exception was argued on August 13, 2001, however, Kaiser had not yet been served. In overruling the exception of improper venue, the trial court stated,

> [S]ince service has been made on Kaiser or attempted on Kaiser, the Court at this time finds that St. James Parish is proper venue for this particular suit. Of course, they have to be served, and if they want to contest the progress of the suit, that's up to them to do that . . . .

We find no error in the court's conclusion. Once Kaiser was served the exception of improper venue became moot. Further, it is immaterial that service of Kaiser was not accomplished until after the filing of the exception to venue. When the grounds of the objections pleaded in the declinatory exception may be removed by amendment of the petition or other action of the plaintiff, the judgment sustaining the exception shall order the plaintiff to remove them within the delay allowed by the court. La.C.C.P. art. 932. Alternatively, if the action has been brought in a court of improper venue, the court may transfer the action to a proper court in the interest of justice. Id. Here, however, the grounds for the exception were removed within two days of the hearing on the exception, by "other action of plaintiff"–e.g., service on Kaiser. Accordingly, the exception to venue is moot.

Cumulation of Parties

Two or more parties may be joined in the same suit, either as plaintiffs or as defendants, if there is a community of interest between the parties joined, each of the actions cumulated is within the jurisdiction of the court and is brought in the

proper venue, and all of the actions cumulated are mutually consistent and employ the same form of procedure. La.C.C.P. art. 463.

In overruling the exception of improper cumulation, the trial court stated:

> You've got a conspiracy going on over here by the asbestos industry on hiding what's going on. . . . That's where your community of interest comes in. . . . The interest is that we've all been exposed to asbestos, and nobody told us about it, and they knew about it and didn't tell us about it. . . . That's the commonality. . . . There's a big community of interest here.
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> But there surely is a community of interest whenever you talk about everybody being exposed to the same material manufactured by the same people.
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> * * *
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> At this particular time . . . the Court finds that they are properly cumulated because there is a community of interest and rules that way.

Dow contends the district court erred in overruling its dilatory exception of improper cumulation because the cumulated actions do not possess the necessary community of interest required by La. Code Civ. Proc. Art. 463.

First, Dow contends that cumulation of the claims of multiple and distinct plaintiffs is improper because it undermines the requirement of random allotment. We find no merit to that argument because it ignores the fact that the claims are joined in one proceeding that was in fact randomly allotted when initially filed. See Lane Memorial Hosp. v. Watson, 98-0273 (La.App. 1 Cir. 3/3/99), 734 So.2d 28, 32. Such claims, if properly cumulated, are appropriately handled as one case.

Second, Dow asserts the district court erroneously applied the requirement for cumulation, in that the court referred in open court to "conspiracy . . . by the asbestos industry," although the petition makes no allegation of a conspiracy. Regardless of whether the court applied the appropriate test, we review the record

to determine whether there is sufficient commonality of interests among the plaintiffs to justify the cumulation.

Third, Dow contends the plaintiffs lack the necessary community of interest to support cumulation. Dow asserts, "Plaintiffs' alleged exposures took place at different times, under different conditions, at different places, and all produced separate, distinct and individual alleged injuries."

The petition alleges that each plaintiff contracted malignant mesothelioma as a result of being exposed to asbestos on the premises of Kaiser and Dow and being exposed to asbestos-containing products manufactured, distributed and/or installed by Anco and McCarthy. Plaintiffs argue that at trial they will offer common testimony on how asbestos fibers affect the body and cause mesothelioma. They state there will be common foundation medical issues, including etiology, diagnosis, prognosis, causation, as well as general medical effects resulting from asbestos exposure. Plaintiffs assert the only distinction between each plaintiff's claim will be the testimony of each expert on issues of individual causation and issues of individual causation will represent only a small fraction of the testimony presented at trial.

Under La.C.C.P. art. 463(1), for two or more parties to be joined as plaintiffs or as defendants, there must be a community of interest between the parties joined. "The term 'community of interest' retains the same meaning assigned to it and to 'common interest' in Gill v. City of Lake Charles, 119 La. 17, 43 So. 897 (1907), and subsequent cases based thereon, namely, actions arising out of the same facts, or presenting the same factual and legal issues." La.C.C.P. Art. 463, Official Revision Comment (c).

Whether several parties may be joined as defendants depends on whether they have a common interest or liability respecting the subject matter of the suit; if so, parties may be joined although there is some distinction in the plaintiff's claim against each defendant. Keel v. Rodessa Oil & Land Co., 189 La. 732, 180 So. 502, 503 (La. 1938).

On the face of the documents filed in the record we find there is sufficient information to establish a community of interest or common interest among the plaintiffs. Therefore, there is no merit to this assignment.

Regarding the claims concerning Preston Waller, we note Dow's argument that Waller's survival action falls within the exclusive remedy provision of the Louisiana Workers' Compensation Act. However, Dow did not raise that argument in the trial court. As a general rule, courts of appeal will not consider issues raised for the first time on appeal. Segura v. Frank, 93-1271 (La.1/14/94), 630 So.2d 714, 725. Accordingly, we do not address this argument.

Decree

For the foregoing reasons, the judgment overruling the exceptions of improper venue and improper cumulation of parties is affirmed. Costs of this appeal are assessed against the appellant, Dow Chemical Company.

AFFIRMED.

DORIS WALLER, Individually and on Behalf of her Deceased Husband PRESTON WALLER, ET AL	FIFTH CIRCUIT
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CANNELLA, J., DISSENTS IN PART WITH REASONS.

I agree that the trial judge did not err in denying the dilatory exception of improper venue. However, I would reverse the denial of the exception of improper cumulation of actions because the facts alleged in the petition show that there is no community of interest as required by La.C.C.P. art. 463. Although the Plaintiffs will allegedly introduce evidence proving that exposure to asbestos can cause malignant mesothelioma, and each Plaintiff has contracted the illness, the alleged exposures were at different times, under different conditions, at different places, and caused separate, distinct and individual injuries. Thus, these cases should not be cumulated, but filed individually. In addition, Plaintiffs can move to consolidate, part or all, for trial. That would be the proper procedure to follow in this case.