IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

RONALD W. OLSON AND CAROL OLSON, his wife,	)	
Plaintiffs,	)	
v.	)	C.A. No. 02C-04-263 JRS
	)	(Consolidated for discovery with:
	)	C.A. No. 02C-05-168 JRS
MOTIVA ENTERPRISES, L.L.C.; BATTAGLIA MECHANICAL, INC.; FISHER CONTROLS INTERNATIONAL, INC.; HYDROCHEM INDUSTRIAL SERVICES, INC.; JJ WHITE, INC.; NORTHEAST CONTROLS, INC.; PARSONS ENERGY AND CHEMICALS GROUP, INC.; PRAXAIR, INC.; TEXACO AVIATION PRODUCTS, L.L.C.; DAIKIN INDUSTRIES, LTD.; SAINT-GOBAIN PERFORMANCE PLASTICS; RIX INDUSTRIES, INC.; TEXACO GLOBAL GAS AND POWER; TEXACO DEVELOPMENT CORPORATION,	)	C.A. No. 02C-05-169 JRS
	)	C.A. No. 02C-05-190 JRS)
Defendants.	)	

Upon Consideration of Plaintiffs' Motion to Consolidate.
DENIED.

Date Submitted: April 18, 2003
Date Decided: July 22, 2003

MEMORANDUM OPINION

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SLIGHTS, J.

I. INTRODUCTION

A violent explosion and fire at the refinery owned by Motiva Enterprises, L.L.C. in Delaware City ("the Refinery") has given rise to four separate lawsuits in this Court: one involves claims for personal injuries; two involve claims for property damage and related damages; and one involves a claim for subrogation following the payment of insurance proceeds for commercial losses incurred as a result of the fire. The Court already has consolidated the four cases for purposes of discovery and pre-trial motion practice. At a scheduling conference, the Court raised the question of whether the cases also should be consolidated for trial. Because the parties did not share the same position with respect to this issue, the Court invited a motion to consolidate and opposition.

The plaintiff in the personal injury case, Ronald W. Olson ("Mr. Olson"), was the only party to move for consolidation; all other parties oppose consolidation. The Court has reviewed the initial written submissions, heard oral argument, and received supplemental legal memoranda. Because the Court has concluded that undue prejudice and confusion will result if the Court consolidates the personal injury action with the property damage and subrogation actions, Mr. Olson's motion to consolidate must be **DENIED.** The Court will, however, consolidate the property damage and subrogation actions for a single trial which will commence soon after the completion of the personal injury trial.

II. FACTS

A. The Parties

Tracking the alignment of the parties in the four lawsuits is no easy task. Each direct action is accompanied by a series of cross-claims and third-party claims, some of which have been answered, some of which have not. In a few instances, the parties have styled the cases with different corporate entities while not attempting to distinguish them from the affiliates named in the companion lawsuits (e.g., Parsons Corporation and Parsons Energy & Chemicals Group, Inc.; Daikin Industries and Daikin America).[1] Rather than attempt to narrate the alignment of the parties, the Court has elected to prepare a chart (appended to this opinion) which sets forth the parties to each action as best as the Court can discern from the pleadings.

B. The Re-Powering Project

The Refinery is owned by Motiva Enterprises, L.L.C. ("Motiva"), and maintained and managed by Conectiv Operating Services Company, Inc. ("Conectiv"). For some period prior to May 20, 2000, Praxair, Inc. ("Praxair"), Parsons Energy and Chemicals Group, Inc. ("Parsons Energy"), and Motiva were involved in a "re-powering project" ("the Project") at the Refinery. The Project

[1]The Court urges the parties to clean up the pleadings with appropriate amendments to reflect the proper parties and to file answers in the event of unanswered cross or third-party claims.

involved the calibration of an oxygen-flow transmitter which is used to transfer 99.99% pure oxygen gas from a base load oxygen compressor ("BLOC") into an air separation unit ("ASU") through a series of control valves and pipes to a gassifier. This collective process and its interrelated components have been referred to by the parties as the "Oxygen System."

Several parties were involved in the design, construction, and maintenance of the Oxygen System. Praxair, a supplier of industrial gases, participated in the design of the ASU. Texaco, Inc., doing business as Texaco Global Gas & Power, (referred to hereinafter as "Texaco, Inc.") and Texaco Aviation Products L.L.C. ("Texaco Aviation") also participated in the development of operating procedures and design of the Oxygen System. In addition, Texaco Aviation, Battaglia Mechanical, Inc. ("Battaglia"), Hydrochem Industrial Services, Inc. ("Hydrochem"), and JJ White, Inc. ("JJ White") were retained to perform services on the Oxygen System, such as cleaning and maintenance.

In designing the ASU, Praxair entered into an agreement with Parsons Energy to supply, construct, and test the ASU for the Project. Praxair purchased the BLOC control valve ("the Valve") from Fisher Controls International, Inc. ("Fisher"), a manufacturer of control valves for industrial applications, and Northeast Controls ("Northeast"), a distributor of the valves. Rix Industries, Inc. ("Rix") also allegedly

distributed the Valve.[2] Daikin America, Inc. ("Daikin America") and/or its parent company, Daikin Industries, Ltd. ("Daikin Industries"), manufactured a polymer which it supplied to Saint-Gobain Performance Plastics Corporation ("Saint-Gobain"). Saint-Gobain, in turn, molded the polymer into materials which were incorporated into the Valve manufactured by Fisher.

C. The Explosion and Fire

On May 20, 2000, Conectiv and Texaco Development Corporation ("Texaco Development") oversaw the process of opening the Valve for the maiden run of the Oxygen System. A control room operator first attempted to open the Valve from the control room but the Valve did not respond. An explosion occurred as Mr. Olson, an employee of Conectiv, was manually checking the Valve. The parties appear to dispute at whose direction or on whose behalf Mr. Olson was acting when the explosion occurred. It is undisputed that Mr. Olson sustained serious personal injuries from the explosion and resulting fire. The Refinery was damaged extensively as well.

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[2]Fisher later dismissed Rix from its third party complaints in the property damage and subrogation actions "on the basis of [Rix's] representation that it had no involvement with the manufacture, assembly, preparation, or cleaning of the piping or with the procedure(s) being conducted at the time of the incident that occurred on May 20, 2000, and that is the subject of this lawsuit ('the Incident')." (C.A. No. 02C-05-190, D.I. 117; C.A. No. 02C-05-168, D.I. 101; C.A. No. 02C-05-169, D.I. 81) Therefore, it appears that Rix may not have any connection to the explosion at the Refinery. Rix has not been dismissed from, and has not filed an answer in C.A. Nos. 02C-04-263 and 02C-05-190.

D. The Litigation

As stated, four separate suits arose out of this incident. Mr. Olson has filed a claim for the personal injuries he sustained as a result of the explosion and fire, and his wife has brought a claim for loss of consortium ("the Olson action"). Praxair has brought claims sounding in negligence, breach of contract and breach of warranties for its commercial damages (the "Praxair action"). Motiva has brought claims for property damage and business loss ("the Motiva action"). Finally, in the fourth case ("the Great American action"), it is alleged that Great American Assurance Company ("Great American") issued a builder's risk policy to Parsons Corporation and related companies. The policy provided coverage to Parsons Corporation and other designated insureds for specified losses during the Project. After the explosion and fire, Great American made certain loss payments to Praxair, Parsons Corporation, and Motiva. It is alleged that additional payments may be made in the future. The policy contained a provision for subrogation rights which Great American now seeks to enforce without objection from the insureds.

As mentioned, in each of the four cases, most of the defendants have brought cross-claims, some have brought counter-claims, and some have brought third-party claims for contribution and/or indemnification.

III. DISCUSSION

A. The Parties' Contentions

The Olsons' motion features four grounds for consolidation. First, they argue that the outcome of each of the cases will turn on the resolution of a central issue: what (and, in turn, who) caused the May 20th fire? The determination of this issue will involve the same facts, witnesses, and documents in each case. Second, the Olsons contend that consolidation will prevent inconsistent verdicts which is particularly important here because the jury will be asked to allocate fault among the defendants and third-party defendants in each of the four cases. Third, they argue that none of the parties will suffer prejudice by consolidation because: (a) personal injury and property damage claims are commonly consolidated; (b) judicial economy would be served by consolidation; (c) the jury will not be confused by the absence of some parties from various suits or contributory negligence; and (d) any prejudice or confusion which may result from the varied alignment of the parties in the different cases or the potentially unique issues presented in one or more of them (e.g., comparative negligence and workers' compensation immunity in the Olson action, subrogation and insurance issues in the Great American action) can be cured by

carefully-crafted jury instructions.[3]

As stated, only the Olsons seek consolidation.[4] The remaining parties have spoken in opposition to consolidation ("the opposition") with varied degrees of intensity. They first argue that the ultimate issue in the personal injury case is markedly different than the ultimate issue in the property damage and subrogation cases. The Olson action will determine what, if any, negligence proximately caused Mr. Olson's injuries. The remaining actions will focus solely on the cause of the explosion and fire. Moreover, even if the Court finds that there is a common factual question, the collective message from the opponents to consolidation, fairly paraphrased, is that any minimal benefit to judicial economy which may be achieved by consolidation will be far outweighed by the substantial likelihood of prejudice and confusion which would flow from the awkward joinder of issues and parties.[5] The opposition suggests that as the Court is considering the balance between judicial economy and prejudice, it should not lose sight of the fact that the Olsons are parties

[3]The Olsons provided suggested jury instructions and interrogatories in supplemental briefing. (C.A. No. 02C-04-263, D.I. 293).

[4]Battaglia initially filed a letter stating they were unopposed to the Olsons' motion to consolidate, but has since joined the other parties' supplemental briefing in opposition to the motion.

[5](C.A. No. 02C-04-263: D.I. 220, D.I. 246, D.I. 247, D.I. 250, D.I. 253, D.I. 254, D.I. 264, D.I. 265, D.I. 272).

to only one of the four cases. Implicit in this observation is the rhetorical question: what purpose is served or proper benefit achieved for the Olsons by consolidation?

With respect to confusion and prejudice, the opposition notes that the jury in a consolidated trial would be forced to perform multiple and facially inconsistent allocations of fault among the parties since, in the Olson action, Conectiv (Mr. Olson's employer) will be immune from fault under the workers' compensation statute[6] and Olson will be held accountable for his own fault (if any) under the comparative negligence statute.[7] These considerations will not be present in the property damage and subrogation actions where Mr. Olson's fault will not be an issue, but Conectiv may be held accountable. Additionally, the opposition expresses concern that the admission of evidence pertaining to the substantial damages sought in the property damage and subrogation cases will unfairly inflate Mr. Olson's personal injury damages award.

B. The Standard of Review

Motions to consolidate are governed by Superior Court Civil Rule 42(a) ("Rule 42(a)"), which states:

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[6]DEL. CODE ANN. tit. 19, §2304 (1995).

[7]DEL. CODE ANN. tit. 10, §8132 (1999).

> When actions involving a common question of law or fact are pending before the Court, it may order a joint hearing or trial of any or all the matters in issues in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.[8]

The purpose of this rule is to "give the court broad discretion to decide how cases on its docket are to be tried so that the business of the court may be dispatched with expedition and economy while providing justice to the parties."[9] "Although the [] courts generally take a favorable view of consolidation, the mere fact that a common question is present, and that consolidation is therefore permissible under Rule 42(a), does not mean that the trial court judge must order consolidation."[10] Consolidation is really nothing more than a case management tool. It is not surprising, then, that the trial judge is afforded broad discretion when determining whether or not to consolidate cases for trial.[11]

C. Should The Cases Be Consolidated?

Under Rule 42(a), the Court must first decide if the cases share a common

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[8] SUPER. CT. CIV. R. 42(a).

[9] 9 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D §2381 (2d ed. 1995)(discussing federal rule of procedure, which is identical to Superior Court Civil Rule 42(a)).

[10] *Id.*

[11] *See Earl D. Smith, Inc. v. Carter*, 2000 Del. Super. LEXIS 225, at *2 ("The decision to consolidate two civil actions is within the discretion of the trial court.").

question of law or fact. At first glance, the four cases would meet this threshold requirement because in each case the fact-finder will be required to determine what (and who) caused the explosion and fire at the Refinery. A closer look, however, reveals that the central issue in the personal injury case and the property damage cases are fundamentally different. The primary issue in the property damage cases is what (and who) caused the explosion? Whatever (and whomever) caused the explosion and fire also caused the property damage. In the Olson action, the primary question is what (and who) caused Mr. Olson's injuries? Clearly, a component part of this question is what (and who) caused the explosion? But, the considerations of Mr. Olson's alleged contributory negligence, the negligence of his supervisors and other potential causes of Mr. Olson's injuries will require the jury to look beyond the cause of the explosion to reach a proper verdict.

Consolidation may not be proper when the actions to be consolidated do not share "central" issues in common.[12] Nevertheless, in this case, where the separate actions all relate to the same single event, the Court is satisfied that further study of the consolidation issue is appropriate even though the "central" issues of the cases may not be the same.

After the "common question" issue, the question remaining for the Court is

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[12] *Id.*

"whether justice can be administered between the parties without a multiplicity of suits."[13] In this regard, the Court "must exercise certain discretion and weigh the possible saving of time and effort that consolidation would advance against any inconvenience, delay, or expense that it would occasion."[14] Several well-settled factors guide the Court's analysis. Specifically, the Court must consider:

> whether testimony will overlap by having some of the same witnesses and documents; whether continued separation will impose duplication, double expense, and not be conducive to expedition of the trial; whether consolidation will cause an undue surprise or hardship to a party; whether separate judgments may be given to separate parties to prevent any prejudice; and whether confusion will result from the combination of the cases.[15]

As to the first two factors, all of the parties agree that some of the same witnesses, documents, and other evidence will overlap and that separate trials will require the parties to incur some duplication of expenses.[16] The proper application of the remaining factors, however, is hotly contested.

1. Undue Surprise or Hardship

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[13] *Mirachi v. Picard*, 2002 Del. Ch. LEXIS 41, at *2.

[14] *Id.*

[15] *Hoyle v. Mueller*, 1990 Del. Super. LEXIS 48, at *10-11.

[16] It is ironic in this case that the parties who oppose consolidation will be the only parties to bear duplicative expenses if separate trials go forward. The opposition proposes a plan that would allow the Olson action to be tried first. Mr. Olson is not a party to any of the other cases and presumably would not be involved in those trials.

The parties have not suggested that "undue surprise" would result from consolidation and the Court likewise sees no basis for concern.

With respect to hardship, the parties have concentrated their arguments on whether a joinder of issues and parties in one trial will confuse the jury and thereby cause prejudice. Because confusion is a separate factor in the consolidation analysis, the Court will address these arguments when it reaches that step of the inquiry. The hardship analysis does not end here, however. In light of the unique circumstances of this motion - - where the benefits of consolidation to the moving party have not been articulated and are not readily apparent - - the Court feels compelled to invert the hardship analysis to reiterate an important point. As the Court has already observed, in this case the expense of separate trials will be borne only by the parties who are asking for separate trials. Since the cases have been consolidated for purposes of discovery and motion practice, the Olsons will not miss any information developed in the other cases. Thus, the Court can discern no undue hardship to any of the parties, and no hardship at all to the Olsons, if the Olson action is tried separately prior to the trial of the other actions.[17]

[17]Of course, separate trials will create a hardship for the Court and its staff. This is by no means an insignificant consideration in the analysis. But, as explained in more detail below, the strong potential for jury confusion in a consolidated trial and the attendant increased risk of mistrial, retrial, or post-trial proceedings, outweighs the hardship to the Court created by separate trials.

2. Separate Judgments to Prevent Prejudice

The Court's focus with respect to this factor must be on the ease with which the jury may reach separate judgments on each separate claim without causing prejudice to any of the parties.[18] The opposition contends that the presence of comparative negligence and employer immunity in the Olson action make a proper allocation of fault in the consolidated cases nearly impossible. They contend that Mr. Olson's presence near the valve at the time of the explosion suggests negligence, either on his part or Conectiv's part (or both), and that some percentage of fault will be allocated to one or both of them. But Conectiv will be immune from allocation in the Olson action. Mr. Olson is not a party to the other actions and, therefore, not subject to fault allocation in those cases.

The Olsons have proffered a set of jury instructions and special interrogatories which they contend would guide the jury through the maze of claims, cross claims and fault allocation. The instructions propose two steps. In the first step, the jury would allocate fault among all of the parties including Conectiv. The jury would then be instructed to award damages in the property damage and subrogation cases. The Court would adjust the lump sum award to each of the property damage and

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[18] *Bryson v. Delaware Sand & Gravel Co.,* 1987 Del. Super. LEXIS 1112, at *3 ("[T]he Court's provision of [a] separate judgment in each instance [must] prevent prejudice to any parties").

subrogation plaintiffs by reducing the damages in accordance with the percentage of fault allocated to that party. In the second step, the jury would be instructed to allocate a percentage of fault for Mr. Olson's comparative negligence, if any, and award an unadjusted amount of damages to Mr. Olson. The Court would adjust the fault allocation to account for Conectiv's immunity and then make any necessary adjustments to the damages award.[19]

The Olsons' proposed instructions allow for separate judgments, but do not address all of the possible scenarios which may confront the jury in their deliberations. As a fundamental matter, the instructions assume that the legal issues in the two cases are the same. As already noted, they are not. Yet the instructions do not direct the jury to distinguish whether they have found fault for causing the fire or for causing Mr. Olson's injuries or both. The proposed jury interrogatories do not address the distinction either. Specifically, they do not direct the jury to assign fault to any of the parties (other than Mr. Olson) for causing Mr. Olson to be near the ASU

[19]It should be noted that the Olsons have provided the Court with no authority to justify the post-verdict adjustment of the jury's allocation of fault. As best as the Court can tell, this process is not authorized (or even contemplated) by Delaware's Uniform Contribution Among Tort-Feasors Law, DEL. CODE ANN. tit. 10, § 6301 *et. seq.*, (1999), or any of the cases interpreting the statute. Indeed, at least one decision of our Supreme Court would suggest that the process of reallocating Conectiv's fault in the Olson action after the jury has performed its allocation in the other cases would be contrary to the statute. *See Ikeda v. Mulock*, 603 A.2d 785, 787 (Del. 1991)(requiring a cross-claim to be filed against a party before the jury may consider allocating a percentage of fault to that party). Because the Court has determined that the reallocation process would not be manageable in any event, it need not pass definitively on its legality.

at the time of the explosion, even though this claim will likely be a showcase defense in the Olson action. Consequently, the Olsons' instructions and verdict form would allow the jury to find a party liable for damages in the property or subrogation cases even though the jury did not find that party to be responsible, even in part, for the explosion.[20] If anything, the instructions demonstrate the difficulties in managing the competing issues and explaining them to the jury.

3. **Confusion from the Combination of Cases**

The issues already discussed relating to the allocation of fault in the various cases create all the confusion that is needed to justify separate trials.[21] But there is more. The defendants in the Olson action have raised the affirmative defense of superseding cause.[22] Thus, in a consolidated trial, the jury would have to grapple with the Court's instruction that Conectiv's negligence may not be considered when addressing comparative negligence or fault allocation in the Olson action, but it may

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[20]For example, if Praxair is found 50% responsible for Mr. Olson's injuries but 0% responsible for the explosion, then, under Olsons' instructions, Praxair, in the Praxair action, would receive an award reduced by 50%. Praxair's share of fault from the Olson action would carry over to the property damage and subrogation cases even though the jury had determined that Praxair had no role in causing the explosion.

[21]*See Earl D. Smith, Inc. v. Carter*, 2000 Del. Super. LEXIS 225, at *2 ("Prejudice to party can be found when each case presents factual differences which could tend to confuse the jury.").

[22]*See USH Ventures v. Global Telesystems Group*, 796 A.2d 7, 22 (Del. Super. 2000) (Judge Quillen treats defense of superseding cause as an affirmative defense).

be considered as a superseding cause in the Olson action to the extent the jury concludes that Conectiv's negligence was the "sole proximate cause of the plaintiff's injuries."[23] At the same time, the jury would be told that they must assign a percentage of fault to Conectiv in the other actions for causing the fire, assuming they find some liability, so that a proper allocation of fault can occur in those cases. The assimilation of these complex and competing legal principles is too much to ask of a jury that is already wrestling with complex factual and expert evidence.[24] The complexities will breed confusion and, ultimately, prejudice.[25]

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[23] *Duphily v. Delaware Electric Cooperative, Inc.*, 662 A.2d 821, 829 (Del. 1995)("If ... the intervening negligence was not reasonably foreseeable, the intervening act supersedes and becomes the *sole* proximate cause of the plaintiff's injuries, thus relieving the original tortfeasor of liability").

[24] *See Mays v. Liberty Mut. Ins. Co.*, 35 F.R.D. 234, 235 (E.D. Pa. 1964)(finding that consolidation of four personal injury trials would be unreasonably complicated because the plaintiff advanced numerous legal theories between multiple defendants and third party defendants and the trial would commingle a large of amount of technical expert testimony), cited in *Minor v. Toulson,* 1982 Del. Super. LEXIS 968, at *5.

[25] Confronting similar facts, the court in *Carcaise v. Cemex, Inc.*, 217 F. Supp. 2d 603, 608 (W.D. Pa. 2002) found that the confusion created by competing legal principles implicated by a personal injury case and a property damage case arising from the same incident weighed against consolidation:

> Presuming [the defendants] will be permitted to introduce evidence of [the employer's] alleged negligence in attempting to show it was the sole legal cause of [the employee's] injuries, the potential for undue complication and jury confusion multiplies exponentially. On the one hand, the jury would be instructed it may consider evidence of the Employer's negligence to determine whether it was the sole, proximate cause of [the employee's] injuries. On the other hand, the jury would have to understand that it may *not* consider such evidence within the context of comparative fault, nor would it be able to apportion liability based on the same. Superimposed upon these considerations would be an instruction that the jury can and should determine whether [the employer] was comparatively negligent within the context of [property damage plaintiff's] property damage and related claims, and that

Finally, the Court finds persuasive the opposition's concern that the jury may be influenced improperly in the Olson action by the substantial amounts of compensatory damages that will be requested in the property damage and subrogation actions. In those cases, the parties will be entitled to present hard numbers representing the value of the property damaged in the fire, the value of profits lost and the amount of proceeds paid out under the Great American policy. The numbers are substantial. On the other hand, in the Olson action, plaintiffs' counsel would not be permitted to suggest a value to the jury for Mr. Olson's pain and suffering and disability. Yet, with the property damage and subrogation claims as a backdrop, there is a substantial risk that the jury would conclude that the value of a seriously injured human body must exceed the value of damaged commercial property. While this may be a valid comparison conceptually, it would be improper to use the comparison as a basis to return a compensatory damages award for personal injuries.[26] The Court acknowledges that this factor, standing alone, probably would not justify separate

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apportionment of liability *is* appropriate within this context.
Id.(citations omitted)(emphasis in original). The court denied the motion to consolidate, stating that the "aforementioned scenario presents far too great a potential for jury confusion and trial complication for this [court] to endorse." *Id.*

[26] *See McNally v. Eckman*, 466 A.2d 363, 374 (Del. 1983)(finding it improper to suggest to the jury that they consider the salaries of highly paid athletes when fixing an amount for compensatory damages); *Burris v. McKiver*, 1992 Del. Super. LEXIS 172, at *5 (comparing personal injuries to damage to priceless artwork while not so prejudicial as to warrant a new trial also not deemed proper argument).

trials.[27] But in the total mix, it is one more factor weighing against consolidation.

4. Additional Considerations

a. Aligning Adverse Parties

The opposition has argued that consolidation would align adverse parties. Admittedly, several parties will be plaintiff and defendant in the same action. This phenomenon, however, would occur whether the Court consolidated all of the actions or any two of the actions. Indeed, the alignment of plaintiffs and defendants in a consolidated trial would be no more confusing or prejudicial than any other trial involving counterclaims in which the jury is required to evaluate the negligence of the plaintiff and defendant separately when considering each of their claims. This is a non-factor.

b. Collateral Estoppel

At oral argument, the Court expressed concern that the collateral estoppel effect of the jury's factual findings in the Olson action could make any subsequent trial of the remaining cases more complicated than a trial of all of the cases together. The Court

[27] Indeed, to conclude otherwise would be tantamount to holding that personal injury and property damage cases can never be tried together. The Court intends no such result by this decision.

has recent experience in this regard.[28] The process in *Miller* was, at first, confusing but ultimately manageable. While it appears likely to the Court that collateral estoppel would apply in any action tried after the Olson action,[29] the Court's concern appears to be mooted by the agreement of the opposition that none of the parties will raise collateral estoppel in the subsequent trial of the property damage and subrogation cases. This agreement is appropriate and enforceable.[30]

c. Inconsistent Verdicts

The Court acknowledges that the approach it has adopted with respect to consolidation in these cases creates a risk of inconsistent verdicts. In some instances, however, the parties may be permitted to take the risk of inconsistent verdicts by trying

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[28] *See Miller v. F & C Structures, Inc.*, C.A. No. 00C-11-048 JRS, Slights, J. (Del. Super. Aug. 5, 2002)(collateral estoppel required the court to instruct the jury that certain of the court's factual findings in a prior insurance coverage trial were binding on them in a subsequent personal injury action).

[29] *See M.G. Bancorporation, Inc. v. LeBeau*, 737 A.2d 513, 520 (Del. 1999)(collateral estoppel requires "that (1) a question of fact essential to the judgment (2) be litigated and (3) determined (4) by a valid and final judgment."); *Columbia Casualty Co. v. Playtex FP, Inc.*, 584 A.2d 1214, 1217 (Del. 1991)("Delaware, like many jurisdictions, has abandoned the requirement of mutuality as a prerequisite to the assertion of collateral estoppel. . . . It is sufficient that the party against whom collateral estoppel is asserted was a previous party.").

[30] *See Coronet Ins. Co. Travers*, 668 N.E.2d 1046, 1051-52 (Ill. App. Ct. 1996)("In addition to the fact that Travers' right to raise collateral estoppel would be subject to the sound discretion of the trial judge, we point out that Travers has expressly stated that it would not raise the claim. That concession by Travers is enforceable."). *See also State v. Wright*, 2003 Del. Super. LEXIS 28, at *9 ("[i]t is well-settled that the Court may exercise its inherent power 'to manage its affairs and to achieve the orderly disposition of its business.'")(citation omitted).

a common factual issue to two different juries.[31] Courts generally will not raise *res judicata* issues *sua sponte.*[32] The opposition here has accepted the risk of inconsistency by waiving collateral estoppel in the second consolidated trial. They alone will bear the consequences, if any, of a verdict that is inconsistent with the Olson verdict. The Olsons will not be affected by the outcome of the subsequent trial.

IV. CONCLUSION

Based on the foregoing, the Olsons' motion to consolidate is **DENIED.** Justice cannot be administered fairly between the parties without a multiplicity of suits. And although there will be an overlap of evidence and duplication of the related expenses, the Court finds that these factors are outweighed by the risk of undue prejudice and confusion that would result from the joinder of all four actions. The Olson action will be tried first. The Court will then try the Motiva action, the Praxair action, and the Great American action in a consolidated trial. A scheduling conference will be convened in due course to fix the trial schedules and trial-related deadlines.

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[31]The risk of inconsistent judgments is not determinative in the analysis of a motion to consolidate; this risk may be outweighed by other considerations. *See, e.g., Earl D. Smith, Inc. v. Carter*, 2000 Del. Super. LEXIS 225, at *5 ("While the Court acknowledges that there may be some possibility of some inconsistency of verdicts on this point, the Court is not persuaded that this justifies consolidating these mostly unrelated cases."); *Freeman v. Lester Coggins Trucking, Inc.*, 771 F.2d 860, 866 (5th Cir. 1985)(refusing to apply collateral estoppel and stating that due process concerns prevail over the risk of inconsistent verdicts).

[32]Ruth B. Ginsburg, *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments*, 82 HARV. L. REV. 798, 798 (1969)("Res judicata is not interjected by a court sua sponte; it is up to the parties to raise or not to raise the prior adjudication as they see fit.").

IT IS SO ORDERED.

Judge Joseph R. Slights, III

Original to the Prothonotary.

APPENDIX

PLAINTIFFS	Olson	Great American (subrogee of Motiva, Parsons Corp., & Praxair)	Motiva	Praxair
DEFENDANTS	Battaglia Daikin Ind. Fisher Hydrochem JJ White Motiva Northeast Parsons En. Praxair Rix Saint-Gobain Texaco Aviat. Texaco Dev. Texaco, Inc.	Fisher Northeast Texaco Dev.	Conectiv Fisher Northeast Praxair	Conectiv Fisher Northeast Texaco Dev.
THIRD PARTY PLAINTIFF		Fisher	Fisher	Fisher
THIRD PARTY DEFENDANTS		Battaglia Conectiv Daikin Am. Daikin Ind. Hydrochem JJ White Motiva Parsons Corp. Parsons En. Praxair Saint-Gobain Texaco Aviat. Texaco, Inc.	Battaglia Daikin Am. Daikin Ind. Hydrochem JJ White Parsons Corp. Parsons En. Saint-Gobain Texaco Aviat. Texaco Dev. Texaco, Inc.	Battaglia Daikin Am. Daikin Ind. Hydrochem JJ White Motiva Parsons Corp. Parsons En. Saint-Gobain Texaco Aviat. Texaco, Inc.

THIRD PARTY PLAINTIFF		Northeast	Northeast	Northeast
THIRD PARTY DEFENDANTS		Battaglia Conectiv Daikin Am. Daikin Ind. Hydrochem JJ White Motiva Parsons En. Praxair Saint-Gobain Texaco Aviat. Texaco, Inc.	Battaglia Daikin Am. Daikin Ind. Hydrochem JJ White Parsons En. Saint-Gobain Texaco Aviat. Texaco Dev. Texaco, Inc.	Battaglia Daikin Ind. Hydrochem JJ White Motiva Parsons En. Rix Saint-Gobain Texaco Aviat. Texaco, Inc.