IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

WENDOLYN TUMLINSON, JAKE ALBERT TUMLINSON, JILLVEH ONTIVEROS, AND PARIS ONTIVEROS, BY HER NATURAL MOTHER AND NEXT FRIEND JILLVEH ONTIVEROS, Plaintiffs,	)	C.A. No.: 08C-07-106 FSS
	)	**E-FILED**
v.	)	
ADVANCED MICRO DEVICES, INC., Defendant.	)	

Submitted: April 30, 2010
Decided: July 23, 2010

MEMORANDUM OPINION AND ORDER

Upon Defendant's Motion to Apply Texas Law to Issues of Liability and Damages – *GRANTED*

Upon Defendant's Motion to Sever Plaintiffs' Claims or For Separate Trials – *GRANTED*

SILVERMAN, J.

This is a toxic tort case. The adult plaintiffs, a woman and a man, are unrelated Texans who manufactured semiconductors for Defendant at different times, in different departments, and in different facilities in Texas. The minor plaintiffs are the adult plaintiffs' children, born in Texas with major, but significantly different, birth defects. Plaintiffs claim they were directly or indirectly injured by exposure to similar, harmful chemicals and radiation at Defendant's hands in Texas. Defendant is a Delaware corporation.

Discovery is ongoing. Meanwhile, Defendant has filed preliminary motions, asking the court to apply Texas law, and to sever Plaintiffs' claims or for separate trials. This decides those motions.

I.

Plaintiff, Wendolyn Tumlinson, worked at Defendant's San Antonio, Texas, semiconductor manufacturing facility from 1986 to 1989. She worked in a photolithography department, where "photoresist was applied to . . . [semiconductor] wafers." Plaintiff, Anthony Ontiveros, worked in Defendant's Austin, Texas, semiconductor manufacturing facility from 1992 to 1995. He worked in an etch department, "operating acid baths which removed the photoresist from wafers previously processed in photo."

On July 5, 1987, Wendolyn Tumlinson gave birth to Jake Tumlinson,

who was born with "a missing anus, a fistula connecting his intestines and bladder, an atrophied kidney, and vertebral malformations[.]" On August 12, 1994, Paris Ontiveros was born to Anthony and Jillveh Ontiveros, with "*situs inversus* (organs reversed and located on the wrong side of the body) and severe malformations of the heart."

On July 11, 2008, Plaintiffs sued Defendant for negligence, premises liability, strict liability, abnormally dangerous ultra hazardous activity, and willful and wanton misconduct, for the birth defects allegedly resulting from Wendolyn Tumlinson's and Anthony Ontiveros's exposure to chemicals and toxic compounds while working at Defendant's facilities. On March 16, 2010, Defendant filed the instant motions.

II.

Delaware courts use the "most significant relationship" test to decide which state's laws will govern a case. Accordingly, the state's law that "has the most significant relationship to the occurrence and the parties under the principles stated in § 6 [of the Second Restatement of Conflict of Laws]" will govern a tort case.[1] "However, regardless of which state's substantive law is used, procedural matters are

[1] *Travelers Indemnity Co. v. Lake*, 594 A.2d 38, 47 (Del. 1991) (citing Restatement (Second) of Conflict of Laws § 145(1) (1971)); *see also Clinton v. Enterprise Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009).

generally controlled by the law of the forum state."[2]

> Section 6 provides the following factors to consider:
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> (a) the needs of the interstate and international systems,
> (b) the relevant policies of the forum,
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
> (d) the protection of justified expectations,
> (e) the basic policies underlying the particular field of law,
> (f) certainty, predictability and uniformity of result, and
> (g) ease in the determination and application of the law to be applied.[3]

Section 145 further provides:

> Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
> (a) the place where the injury occurred,
> (b) the place where the conduct causing the injury occurred,
> (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
> (d) the place where the relationship, if any, between the parties is centered.[4]

"For personal injury actions, the law of the state where the injury occurred is

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[2] *Chubb Custom Ins. Co. v. Nutri/Sys., L.P.*, 1999 WL 743258, at *1 (Del. Super. May 19, 1999) (Vaughn, J.).

[3] Restatement (Second) of Conflict of Laws § 6(2) (1971).

[4] Restatement (Second) of Conflict of Laws § 145(2) (1971).

presumed to control unless another state has a more significant relationship."[5]

Plaintiffs contend that Defendant's "motion must fail because the parties have stipulated and the Court has ordered that Delaware law will govern the admissibility of expert proofs on causation." Plaintiffs also claim that Defendant's "misconduct was a course of willful and deliberate policies and decisions, perpetrated by high corporate management in California, with conscious disregard for the health and safety of [Defendant's] personnel and their offspring worldwide." Plaintiffs further contend that because Defendant "fails to identify issues of law where it claims that Texas law is in conflict with the law of Delaware, the law of [Delaware] must govern."

Defendant responds that "the state where the alleged injury occurred is undeniably Texas. Moreover, virtually every aspect of this case is tied exclusively to Texas[.]" Defendant further claims that "[t]he only connection to Delaware is that [Defendant] is incorporated in Delaware." Defendant concludes, therefore, that "Texas clearly has the most significant relationship to issues of both liability and

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[5] *Clinton*, 977 A.2d at 895; *see also Turner v. Lipschultz*, 619 A.2d 912, 914-15 (Del. 1992); Restatement (Second) of Conflict of Laws § 146 (1971); *cf. Lagrone v. Am. Mortell Corp.*, 2008 WL 4152677, at *5 (Del. Super. Sept. 4, 2008) (Slights, J.) ("[T]he end result [may be] the same regardless of which State's law the Court applies[.] In such instances of 'false conflicts' of laws, the Court may resolve the dispute without a choice between the laws of the competing jurisdictions."); *Berg Chilling Sys., Inc. v. Hull Corp.*, 435 F.3d 455, 462 (3d Cir. 2006); *Williams v. Stone*, 109 F.3d 890, 893 (3d Cir. 1997).

damages." Defendant's conclusion is correct.

A.

On December 22, 2009, the court issued a trial scheduling order. In Section Five, the "*Daubert* Motions and Hearing" paragraph, the order provided:

> The Court will conduct a *Daubert* hearing on the admissibility of expert testimony under the standard set forth in *Daubert v. Merrill-Dow Pharmaceuticals*, as adopted by the Delaware Supreme Court in *M. G. Bancorporation v. Le Beau*, 737 A.2d 513 (Del. Supr. 1999) and subsequent cases at a time convenient to the Court.

While the trial scheduling order refers to a Delaware case, the order did not decide the choice of law for this case. A scheduling order merely establishes or limits the time:

> (1) To join other parties and to amend the pleadings;
> (2) To file and hear motions;
> (3) To complete discovery.
> (4) To engage in compulsory alternative dispute resolution . . .
> (5) Any other deadlines or protocols appropriate in the circumstances of the case . . .
> (6) The date, or dates for conferences before trial, a final pretrial conference, and trial; and
> (7) Any other matters appropriate in the circumstances of the case.[6]

The scheduling order merely serves an administrative purpose, and Section Five

[6]Super. Ct. Civ. R. 16(b).

merely established deadlines. Accordingly, the order only established the law of the *Daubert* hearing.

B.

Plaintiffs alternatively claim that Defendant "failed to establish the existence of a true conflict between the laws of Delaware and Texas," and, thus, "the Court should avoid the choice of law question altogether and deny the motion in its entirety." If Plaintiffs truly believed that Texas and Delaware law were the same, it is difficult to see why Plaintiffs are fussing about choice of law. In any event, Defendant observes that "Delaware does not require a party to preliminarily identify all conflicts before choice-of-law decisions are made."

There are conflicts between Delaware and Texas law. For example, Texas has a statutory cap on punitive damages.[7] Delaware, on the other hand, "has a strong public policy against imposing any limitation on damages in order to ensure that its citizens receive the full recovery that the jury awards them."[8] Furthermore, it appears that Texas takes a more rigorous approach to the evidence required for

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[7]Tex. Civ. Prac. & Rem. Code § 41.008 (2009).

[8]*Marks v. Messick & Gray Constr., Inc.*, 2000 WL 703657, at *2 (Del. Super. Apr. 18, 2000) (Ridgely, P.J.). *See also* Tex. Civ. Prac. & Rem. Code § 41.003 (2007) (Texas standard for determining punitive damages is clear and convincing evidence); *cf. Simon v. Beebe Med. Ctr., Inc.*, 2004 WL 692647, at *1 (Del. Super. Mar. 15, 2004) (Del Pesco, J.) (Delaware standard for determining punitive damages is preponderance of the evidence).

demonstrating causation.[9]

Under Restatement principles, not only is Texas the place of injury, but no other state has a more significant relationship.[10] Plaintiffs lived in Texas while working for Defendant, and Jake Tumlinson and Paris Ontiveros were born and raised in Texas, where they still live. The parties' relationship is completely centered in Texas.

Although Defendant is incorporated here, it has no facilities or management offices in Delaware.[11] While it is assumed that Delaware has general concern that a Delaware corporation operates properly, Delaware typically does not tell its corporate citizens how to conduct their daily operations outside of Delaware.

Delaware's broad corporate oversight pales compared to the specific interest Texas has in the way foreign and domestic businesses operate within Texas,

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[9] *See Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 718-24 (Tex. 1997). *See generally Wells v. SmithKline Beecham Corp.*, 2009 WL 564303, at *8 (W.D. Tex. Feb. 18, 2009), *aff'd*, 601 F.3d 375 (5th Cir. 2010) ("*Havner* establishes substantive Texas law on a plaintiff's causation burden of proof."); *see also Burton v. Wyeth-Ayerst Labs. Div. of Am. Home Prods. Corp.*, 513 F. Supp. 2d 719, 730 n.20 (N.D. Tex. 2007) ("*Havner's* standards are substantive, not procedural, requirements."); *Cotroneo v. Shaw Envtl. & Infrastructure, Inc.*, 2007 WL 3145791, at *3 (S.D. Tex. Oct. 25, 2007) ("*Havner* sets forth substantive Texas law on toxic tort causation, not merely procedural law on admissibility of expert testimony[.]").

[10] *See Clinton*, 977 A.2d at 895.

[11] *See Lee v. Choice Hotels Int'l Inc.*, 2006 WL 1148737, at *2 (Del. Super. Mar. 21, 2006) (Toliver, J.) (holding that the presumption that the state of injury's law controls "should not be disturbed where the place of incorporation is the only factor favoring the forum[]"); *see also Michaud v. Fairchild Aircraft Inc.*, 2004 WL 1172897, at *2 (Del. Super. May 13, 2004) (Del Pesco, J.).

and the strong interest Texas has in Texas workers' safety and continuing care.

Accordingly, Texas's tort law will control here. As to evidentiary matters, including the admissibility of expert opinions, Delaware's Rules of Evidence and the authorities interpreting them will apply.[12] As to severance, discussed next, the issue is controlled by Delaware's Rules of Civil Procedure.

III.

Defendant's second motion is to sever Plaintiffs' claims or for separate trials. Defendant "asks the Court to sever the Tumlinson Plaintiffs' claims from the Ontiveros Plaintiffs' claims because they do not arise from the same occurrence, do not present common questions of law or fact, and, if tried together, will confuse the jury and prejudice [Defendant]."

Under Superior Court Civil Rule 20(a):

> All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to

[12] *See generally* Restatement (Second) of Conflict of Laws § 138 (1971) ("The local law of the forum determines the admissibility of evidence[.]"); *see also* Restatement (Second) of Conflict of Laws § 137 (1971) ("The local law of the forum determines what witnesses are competent to testify and the considerations that may affect their credibility."); *Chubb Custom Ins. Co.*, 1999 WL 743258, at *1; *Monsanto Co. v. Aetna Cas. & Sur. Co.*, 1993 WL 563245, at *9 (Del. Super. Dec. 21, 1993) (Ridgely, P.J.), *aff'd*, 1994 WL 632413 (Del. Supr. Nov. 7, 1994).

> all these persons will arise in the action.[13]

Thus, Plaintiffs were entitled to file their complaint jointly.

Rule 21 provides, however, that "[p]arties may be dropped or added by order of the Court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately." Furthermore, under Rule 42:

> (b) Separate trials. – The Court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim . . . or of any separate issue or of any number of claims . . . or issues.[14]

Although Plaintiffs contend that their claims "involve the same generic type of injury, birth defects," Jake Tumlinson and Paris Ontiveros were born with dramatically dissimilar birth defects, each requiring radically different medical treatment and follow-up care. Furthermore, the chemicals, gases, and other toxic compounds were allegedly transferred to the children differently through Jake's

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[13]*See Sequa Corp. v. Aetna Cas. & Sur. Co.*, 1990 WL 123006, at *7-8 (Del. Super. July 13, 1990) (Herlihy, J.) ("This rule, like the federal rule it is modeled after, is permissive in nature with the purpose of promoting trial convenience, expediting the final disposition of disputes and thereby preventing multiple lawsuits. . . . [T]here exists no generalized test, but rather, the decisions reflect a case-by-case approach.").

[14]*See Brandywine Transmission Servs., Inc. v. Justice*, 1991 WL 35695, at *3 (Del. Super. Mar. 7, 1991) (Babiarz, J.) (holding that, when considering whether to grant a motion for separate trials, the court will consider whether there will be a "duplication of witnesses, documents, and facts[]").

mother, Wendolyn, and through Paris's father, Anthony. Additionally, although Wendolyn Tumlinson and Anthony Ontiveros both worked for Defendant, they held different positions at different times, in different departments, at different facilities seventy-five miles apart.

At the macro level, there are broad similarities between: Jake's and Paris's injuries, as they generally are birth defects; Wendolyn's and Anthony's jobs; the long list of chemicals, gases, and toxic compounds to which the workers allegedly were exposed; and the safety practices at Defendant's facilities. It may also be somewhat more economical to hold one trial here. Those broad similarities and that economy, however, are substantially outweighed by the risk of jury confusion and unfair prejudice in a single trial.

As presented above, at the micro level, the sets of claims are dramatically dissimilar, and a joint trial will make it challenging for the jury to keep the evidence and arguments separate as to each Plaintiff. Substantially different evidence will be presented for Tumlinson's claims and Ontiveros's claims. The expert testimony regarding Jake Tumlinson's and Paris Ontiveros's injuries' causes, their treatments, and future medical care will be drastically different in important ways. If heard together, the evidence as to one parent will become innuendo to the other, and vice versa. The same is true for the children's injuries and care. This will likely confuse

the jury and cause unfair prejudice to Defendant. Cautionary instructions will not cure the problem. Accordingly, the two sets of claims will be severed. Until trial, however, the claims may stay together.

IV.

For the foregoing reasons, Defendant's Motions to Apply Texas Law to Issues of Liability and Damages and to Sever Plaintiffs' Claims are **GRANTED**. The latter, however, is without prejudice to Plaintiffs' renewing the application after dispositive motion practice is complete, and only if Plaintiffs' causation claim has narrowed to a specific chemical, or two, and a specific, common means of exposure.

IT IS SO ORDERED.

/s Fred S. Silverman
Judge

cc: Prothonotary (Civil)
Ian Connor Bifferato, Esquire
Frederick L. Cottrell, III, Esquire