

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MONA SHORES and RONALD SHORES,)	
Plaintiffs,)	
v.)	C.A. No. N10C-01-145 MMJ
)	
AMERICAN MEDICAL SYSTEMS, INC.,)	
Defendant.)	
JANICE DRUMMOND and JOEY)	
DRUMMOND, her husband,)	
Plaintiffs,)	C.A. No. N10C-04-076 MMJ
v.)	
)	
AMERICAN MEDICAL SYSTEMS, INC.,)	
Defendant.)	
KIMBERLY SMITH,)	
Plaintiff,)	
v.)	C.A. No. N10C-04-075 MMJ
)	
AMERICAN MEDICAL SYSTEMS, INC.,)	
Defendant.)	
JANICE HOLT and JIMMY HOLT,)	
Plaintiffs,)	
v.)	C.A. No. N10C-04-077 MMJ
)	
AMERICAN MEDICAL SYSTEMS, INC.,)	
Defendant.)	
MARYLYN CARTER,)	
Plaintiff,)	
v.)	C.A. No. N10C-05-209 MMJ
)	
AMERICAN MEDICAL SYSTEMS, INC.,)	
Defendant.)	
)	

FACTUAL AND PROCEDURAL CONTEXT

Seven plaintiffs filed actions seeking damages from defendant American Medical Systems, Inc. (“AMS”). Plaintiffs allege that they were injured as a result of the implantation of transvaginal mesh (“TVM”) medical products that were designed, marketed, manufactured and sold by AMS. Plaintiffs claim that AMS: (1) was negligent in designing, manufacturing, marketing, labeling, packaging and selling the TVM products; (2) breached various warranties by selling products not fit for use because of defects in design, manufacture, warnings and lack of proper instructions; and (3) failed to warn plaintiffs of the dangerous propensities of the TVM products. Four plaintiffs also have asserted loss of consortium claims.

For purposes of these consolidated motions to dismiss, the following facts are undisputed. No plaintiff is a Delaware resident. All alleged tortious acts occurred in other jurisdictions. All medical providers are located outside Delaware. AMS is a Delaware corporation, but does not have a physical facility in Delaware. None of the relevant evidence is physically located in Delaware.

AMS seeks dismissal of all actions on the basis of *forum non conveniens*. AMS argues that dismissal is justified because it is likely that no third party witnesses could testify in Delaware. Therefore, plaintiffs would be the only live witnesses at trial. Additionally, the liability of potential third parties cannot be

adjudicated in Delaware. According to AMS, these factors, among others, constitute overwhelming hardship.

ANALYSIS

_____The Court first must examine whether defendant has demonstrated that there is another adequate forum. Other than the undisputed fact that none of the relevant events occurred in Delaware, AMS has not proffered an alternative forum. The second part of the analysis is whether this lawsuit should be dismissed on *forum non conveniens* grounds on the basis of overwhelming hardship and inconvenience.¹

Forum Non Conveniens Standard

The Court may decline to hear a case, despite having jurisdiction over the subject matter and the parties,² if “considerations of convenience, expense, and the interests of justice dictate that litigation in the forum selected by the plaintiff would be unduly inconvenient, expensive or otherwise inappropriate.”³ In Delaware, a plaintiff’s choice of forum is presumed to be proper, even if the

¹*Pena v. Cooper Tire & Rubber Co., Inc.*, 2009 WL 847414, at *1, 4 (Del. Super.).

²*Chrysler First Bus. Credit Corp. v. 1500 Locust Ltd, P’tship*, 669 A.2d 104, 106 (Del. 1995).

³*Monsanto Co. v. Aetna Cas. and Surety Co.*, 559 A.2d 1301, 1304 (Del. Super. 1988).

plaintiff is not a resident of Delaware.⁴ In order to overcome such a presumption, defendants “must show with particularity that litigating in Delaware will cause them ‘overwhelming hardship and inconvenience.’”⁵ The determination of whether to dismiss a case based on *forum non conveniens* grounds is left to the discretion of the Court.⁶

Cryo-Maid Factors

To evaluate whether AMS has made a showing of overwhelming hardship, the Court must consider the following factors:

- (1) the applicability of Delaware law;
- (2) the relative ease of access to proof;
- (3) the availability of compulsory process for witnesses;
- (4) the pendency or nonpendency of a similar action in another jurisdiction;
- (5) the possibility of a need to view the premises; and
- (6) all other practical considerations that would make the trial easy, expeditious, and inexpensive.⁷

⁴*Pena v. Cooper Tire & Rubber Co., Inc.*, 2009 WL 847414, at *4 (Del. Super.).

⁵*Id.*

⁶*In re Asbestos*, 929 A.2d 373, 380 (Del. Super. 2006).

⁷*Gen. Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681, 684 (Del. 1964).

Defendant need not demonstrate all or a majority of the factors. Defendant must establish that one or more of these factors would actually cause significant hardship and inconvenience.⁸ When making such a determination, the Court may not “compare Delaware, the plaintiff’s chosen forum, with an alternate forum and decide which is the more appropriate location for the dispute to proceed.”⁹ Such comparisons are irrelevant to the ultimate issue. Rather, the Court must base its determination exclusively upon “whether any or all of the *Cryo-Maid* factors establish that defendant will suffer overwhelming hardship and inconvenience if forced to litigate in Delaware.”¹⁰ Absent such a showing, a plaintiff’s choice of forum will go undisturbed.

Applicability of Delaware Law

The parties agree that Delaware substantive law likely will not apply. Delaware courts regularly interpret and apply the laws of other jurisdictions. This factor, standing alone, is not sufficient to warrant dismissal.¹¹

⁸*Chrysler*, 669 A.2d at 107-108.

⁹*In re Asbestos Litigation*, 929 A.2d at 381.

¹⁰*Taylor v. LSI Logic Corp.*, 689 A.2d 1196, 1199 (Del. 1997).

¹¹*In re Asbestos Litigation*, 929 A.2d 373, 386 (Del. Super. 2006).

Relative Ease of Access to Proof

The physical evidence in these cases will consist primarily of medical records. There is no reason why these records cannot be made available to the parties through electronic means, or even by the time-honored United States Postal Service. Additionally, the evidence is not centrally located in another single jurisdiction.¹²

Plaintiffs are obligated to produce their medical records and other relevant evidence. Failure to cooperate in discovery in good faith may be grounds for sanctions - including dismissal. The speculative prospect that defendant will not have relatively convenient access to proof is not grounds for dismissal on the basis of *forum non conveniens*.

Availability of Compulsory Process for Witnesses

To justify dismissal under this factor, the moving party must specifically identify the witnesses not subject to compulsory process and the specific substance of their testimony.¹³

¹²Defendant has provided a chart indicating that witnesses and other relevant evidence are located in at least 10 other states - Oregon, California, Hawaii, Minnesota, Alabama, Florida, Texas, Georgia, Indiana and Michigan.

¹³*Lluerma v. Owens Illinois, Inc.*, 2009 WL 1638629, at *10 (Del. Super.).

AMS contends that the “learned intermediary doctrine” will apply in these cases. A manufacturer of a medical product has a duty to warn physicians of any risks or contraindications associated with the product. “If the prescribing physician has received adequate notice of possible complications, the manufacturer has no duty to warn the consumer.”¹⁴ The doctrine provides that “a manufacturer of a prescription drug satisfies its duty to provide an appropriate warning about the drug when it gives the patient’s physician the necessary information to be disseminated to the patient.”

AMS argues that the importance of live testimony of doctors and other medical staff is “significantly magnified.” The doctor making the treatment recommendation is the only link between the plaintiff and the product. The medical staff are necessary witnesses to the condition of the product at the time of the medical procedure. AMS asserts that “the most important aspects of the transaction underlying this lawsuit are the decisions of the physician and the relationship between doctor and patient.”¹⁵

In order to present their cases in the best possible light, plaintiffs have the same or greater interest in live testimony. At this juncture in the litigation, AMS

¹⁴*Brooks v. Medtronic, Inc.*, 750 F.2d 1227, 1231 (4th Cir.1984).

¹⁵*Lacy v. G.D. Searle & Co.*, 567 A.2d 398, 399 (Del. 1989).

has not identified any crucial witnesses who will neither appear voluntarily, nor be subject to compulsory process.

The Court notes that treating physician testimony commonly is presented through video deposition. Further, the learned intermediary doctrine is analogous to the law applied in toxic tort cases tried in Delaware. Depending upon the circumstances, a manufacturer need not warn the ultimate consumer of the product.

The Court finds that there are questions of fact (or mixed questions of fact and law at this stage of the proceedings): whether adequate warnings were given by AMS; whether plaintiffs' physicians had, or should have had, warnings and/or state-of-the-art information; and whether information was transmitted orally, thus potentially escalating the need for live testimony for credibility determinations. The state-of-the-art evidence should be documentary and easily accessible in the form of websites, written instructions, pamphlets, treatises and journals. AMS has failed to demonstrate that these issues cannot be resolved during trial in Delaware.

The issue of availability of compulsory process is AMS's strongest argument in favor of *forum non conveniens* dismissal. Nevertheless, the Court finds that this factor does not create an overwhelming hardship, under the circumstances presented.

Pendency or Nonpendency of a Similar Action in Another Jurisdiction

There is no related case pending in an alternative forum. AMS argues that “there will have to be other litigation in other jurisdictions because actions will have to be commenced in each of the relevant jurisdictions to obtain subpoenas for documents and third party witnesses.” This contention is wholly without merit. Subpoenas, and other means of obtaining witness testimony and evidence in other states, commonly are used, pursuant to standard, well-settled procedures.

Possibility of a Need to View the Premises

The necessity of a view of any site is not reasonably foreseeable.

Other Practical Considerations

No other practical considerations weigh in favor of dismissal. The Court regularly deals with the complex multi-jurisdictional issues presented in these cases.¹⁶

AMS has raised the possibility of joint and several liability with treating physicians. However, the parties did not identify any action filed in any other jurisdiction naming doctors where AMS might be a necessary third party defendant. Further, no party has moved to join any physician in these actions. Therefore, the Court need not resolve this issue.

¹⁶See generally *In re Asbestos Litigation*, 929 A.2d 373, 383-89 (Del. Super. 2006).

CONCLUSION

The Court finds that defendant has failed to present an alternative adequate forum. Defendant also has not established that it will suffer overwhelming hardship and inconvenience if these cases continue in Delaware. It is insufficient for defendant to allege some largely-speculative hardship. Plaintiffs' choice of forum will not be disturbed.

THEREFORE, Defendant's Consolidated Motions to Dismiss Based on *Forum non Conveniens* are hereby **DENIED**.

IT IS SO ORDERED.

/s/ *Mary M. Johnston* _____
The Honorable Mary M. Johnston