IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

MARY ANN SCHAFER and RICHARD SCHAFER, her husband,	:	
	:	C.A. No. 01C-02-012
Plaintiffs,	:	
v.	:	
WAL-MART STORES, INC., a Delaware corporation,	:	
Defendant.	:	

Submitted: June 1, 2001
Decided: August 13, 2001

ORDER

Upon Defendant's Motion to Dismiss. Denied.

Jeffrey J. Clark, Esquire, Schmittinger & Rodriguez, P.A., Dover, Delaware, attorneys for the Plaintiffs.

Walter W. Speakman, Jr., Esquire, Brown, Shiels, Beauregard & Chasanov, Dover, Delaware, attorneys for the Defendant.

WITHAM, J.

On this 13th day of August, 2001, upon consideration of the Defendant's Motion to Dismiss pursuant to Superior Court Civil Rule 12(b) for lack of subject matter jurisdiction or in the alternative to dismiss Plaintiffs' Complaint pursuant to the Doctrine of Forum Non Conveniens, it appears that:

(1) On February 22, 2000, Mary Ann Schafer slipped on ice that was in the parking lot of a Wal-Mart store located in North Conway, New Hampshire. Mary Ann Schafer and her husband ("Plaintiffs") filed suit on February 8, 2001, alleging that Mrs. Schafer fell in the Wal-Mart parking lot causing significant personal injury and that Mrs. Schafer's fall was caused by Wal-Mart's negligence. The key facts at this stage in the litigation include the following: the accident occurred out-of-state at Wal-Mart Store No. 2140 in North Conway, New Hampshire, Plaintiff received her medical treatment in Delaware–where she resides, and this law suit is the first filed in any forum regarding Plaintiff's injuries.

(2) Defendant Wal-Mart brings this Motion to Dismiss pursuant to Superior Court Civil Rule 12(b) for lack of subject matter jurisdiction and in the alternative pursuant to the doctrine of forum non conveniens. Defendant claims that because the alleged tortious conduct occurred in New Hampshire, this Court lacks subject matter jurisdiction. In the alternative, Defendant argues that even if the Court has subject matter jurisdiction the case should be dismissed under the doctrine of forum non conveniens because the tortious conduct occurred in New Hampshire, all of Defendant's trial witnesses are located in New Hampshire or Maine, the witnesses are not residents of Delaware therefore compulsory process in Delaware subpoenaing

these witnesses would be unavailable, the Defendant could not bring a third-party claim against the corporation responsible for snow and ice removal at the Wal-Mart in question, and because the law of New Hampshire should be applied since the alleged tortious conduct occurred there. Plaintiffs argue that the Court has subject matter jurisdiction because this suit is a civil action. With respect to the doctrine of forum non conveniens, Plaintiffs claim that the Defendant does not meet the burden of showing with particularity that the Plaintiffs' choice of forum results in an "overwhelming hardship and inconvenience" for the Defendant to continue this litigation in Delaware. The Court will first address the issue of subject matter jurisdiction and then discuss the doctrine of forum non conveniens.

(3) Defendant claims that the Court does not have subject matter jurisdiction over this matter because the alleged negligence and injuries all occurred in New Hampshire. Plaintiffs rebut this argument by noting that this is a civil suit and this Court's subject matter jurisdiction generally includes civil, personal injury suits. Because of the general jurisdiction of this Court over civil actions, Plaintiffs point out that the more important question in a civil suit is whether the court has personal jurisdiction over the parties. The Court agrees that its subject matter jurisdiction includes civil suits such as the immediate action and that personal jurisdiction is also satisfied because the Plaintiffs are Delaware residents and Wal-Mart is a Delaware corporation. Defendant's Motion to Dismiss for lack of subject matter jurisdiction is therefore DENIED.

(4) Defendant's second attack is that the action should be dismissed pursuant

to the doctrine of forum non conveniens. The Doctrine of Forum Non Conveniens is well-defined under Delaware law. In *Chrysler First Business Credit Corp. v. Locust Ltd. Partnership*,[1] the Delaware Supreme Court expressed four basic principles courts should use when evaluating a motion to dismiss for forum non conveniens:

(i) only in a rare case should a plaintiff's choice of forum be defeated in favor of a later-filed action in another jurisdiction;
(ii) in order to prevail on a forum non conveniens motion, a defendant must establish, with particularity, that it will be subjected to undue hardship and inconvenience if required to litigate in Delaware;
(iii) the factors to be considered in evaluating a forum non conveniens motion are those identified in *Cryo-Maid*:
[(1) the relative ease of access to proof,
(2) the availability of compulsory process for witnesses,
(3) the possibility of the view of the premises,
(4) whether the controversy is dependent upon the application of Delaware law which the courts of this State more properly should decide than those of another jurisdiction,
(5) the pendency or nonpendency of a similar action in another jurisdiction, and

[1] ***Chrysler First Business Credit Corp. v. Locust Limited Partnership*, Del. Supr., 669 A.2d 104 (1995).**

(6) all other practical problems that would make the trial of the case easy, expeditious and inexpensive.[2]]

(iv) a defendant must establish that one or more of the *Cryo-Maid* factors actually causes such significant hardship and inconvenience.[3]

(5) More concisely, under Delaware law "[a]n action may not be dismissed upon bare allegations of inconvenience without a particularized showing of the hardships relied upon. 'To do otherwise would put . . . a powerful weapon into the hands of corporations alleged to have improperly conducted their affairs.'"[4] Therefore, the issue is whether "any or all of the *Cryo-Maid* factors establish [with particularity] that defendant will suffer overwhelming hardship and inconvenience if

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[2] ***General Foods Corp. v. Cryo-Maid, Inc.*, Del. Supr., 198 A.2d 681, 684 (1964).**

[3] ***Chrysler First* at 107.**

[4] ***Taylor v. LSI Logic Corp.*, Del. Supr., 689 A.2d 1196, 1199 (1997).**

forced to litigate in Delaware."[5] The Court will use its discretion and view the immediate facts and circumstances under the four principles from *Chrysler First* and the six more specific factors of *Cryo-Maid.*

[5] ***Chrysler First* at 108.**

(6) The first *Cryo-Maid* factor is the "relative ease of access to proof."[6] Defendant contends that this factor weighs in their favor because the store where the slip-and-fall occurred is located in New Hampshire; therefore, the liability evidence in this case is located in New Hampshire. Plaintiffs argue that Mrs. Schafer received her medical treatment in Delaware; therefore, the damages portion of the case is located in Delaware. Because the liability and damage portion of the case is split between two states, one party will be inconvenienced if either forum hosts the litigation. The first *Cryo-Maid* factor does not favor either party.

(7) The second *Cryo-Maid* factor is "the availability of compulsory process for witnesses."[7] Defendant argues that compulsory process will not be available for at least three specific witnesses, one of which is actually Plaintiffs' eye-witness. The Court agrees that some of the witnesses will not be subject to compulsory process; therefore, this element weighs in favor of the Defendant. However, as the litigation proceeds the parties may be able to stipulate to certain facts and take measures to deal with any such difficulties. Again, Defendant has shown inconvenience which would

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[6] ***Cryo-Maid* at 684.**

[7] ***Id.***

be equally matched for the Plaintiffs should the action be brought in New Hampshire.

(8) The third *Cryo-Maid* factor is "the possibility of the view of the premises."[8] Again, Defendant points out that the premises are located in New Hampshire and a trial in Delaware would preclude a view of the premises. Plaintiffs respond that in cases of this nature pictures and/or video are often sufficient. This factor weighs in favor of the Defendant; however, like the previous factors the parties could easily take steps to negate any inconvenience or expense.

(9) The fourth *Cryo-Maid* factor is "whether the controversy is dependent upon the application of Delaware law which the courts of this State more properly should decide than those of another jurisdiction."[9] Because the alleged negligence occurred in New Hampshire, Defendant argues that New Hampshire law should apply thereby making New Hampshire the proper forum. Defendant bases this argument on *McBride v. General Motors Corp.*[10] in which this Court referenced a Supreme Court

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[8] ***Id.***

[9] ***Id.***

[10] ***See McBride v. General Motors Corp. & Whiting-Turner Contracting Co.*, Del. Super., C.A. No. 91C-01-179, Bifferato, J. (March 27, 1992), Letter. Op. at 3-4 (recalling the**

decision that applied the Restatement (Second) of Conflicts § 146, which states in part:

> In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.[11]

Plaintiffs argue that it is not clear whether New Hampshire or Delaware law will apply and that a Delaware court can apply New Hampshire law should it be necessary. To support their argument, Plaintiffs cite to *Taylor v. LSI Logic Corp.* which states that:

Delaware Supreme Court's citation to the Restatement (Second) of Conflicts § 146 in *Travelers Indemnity Co. v. Lake*, Del. Supr., 594 A.2d 38, 47 (1991)).

[11] **Restatement (Second) of Conflicts § 146 (1971).**

> Delaware Courts are accustomed to deciding controversies in which the parties are non-residents of Delaware and where none of the events occurred in Delaware . . . The application of foreign law is not a sufficient reason to warrant dismissal under the doctrine of forum non conveniens.[12]

In the immediate case, the Court agrees with *Taylor* that applying the law of another jurisdiction does not give rise to an overwhelming hardship.[13] Even if New Hampshire tort law were to apply, this case will likely encompass issues already settled by existing New Hampshire law. This Court is well-equipped to apply another jurisdiction's law.

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[12] ***Taylor* at 1200.**

[13] **The Court is not making any determination at this time whether Delaware or New Hampshire law will apply.**

(10) The fifth *Cryo-Maid* factor is "the pendency or nonpendency of a similar action in another jurisdiction."[14] At oral argument, Defendant brought *Texas Instruments, Inc. v. Cyrix Corp.*[15] and *Williams Gas Supply Co. v. Apache Corp.*[16] to the Court's attention as supportive of their forum non conveniens motion. Both *Texas Instruments* and *Williams Gas Supply* were cases in which actions were filed in other jurisdictions. In *Texas Instruments* the Chancery Court noted that "Delaware law gives special weight to the fourth [this opinion's fifth] factor–the pendency of a similar action in another jurisdiction."[17] No other actions are pending in other jurisdictions; therefore, this factor weighs in favor of the Plaintiffs.

(11) The sixth *Cryo-Maid* factor includes "all other practical problems that would make the trial of the case easy, expeditious and inexpensive." The only other problem brought to the Court's attention is that Wal-Mart will not be able to bring a third-party claim against the company in charge of snow and ice removal at the Wal-Mart in New Hampshire. The Defendant is correct that no third-party claim could be

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[14] ***Cryo-Maid* at 684.**

[15] ***Texas Instruments, Inc. v. Cyrix*, Del. Ch.,**

[16] ***Williams Gas Supply Co. v. Apache Corp.*, Del. Supr., 594 A.2d 34 (1991).**

[17] ***Texas Instruments* at 5.**

brought against the New Hampshire company responsible for snow and ice removal in this Court because this Court lacks personal jurisdiction over a New Hampshire company. The possibility that Wal-Mart may have a cause of action against such company causes this factor to weigh in favor of the Defendant; however, nothing precludes Wal-Mart from bringing a separate claim against any potential third-party defendant in New Hampshire.

(12) After evaluating the *Cryo-Maid* factors and the principles from *Chrysler First*, the Court finds that the Plaintiffs' choice of forum will be honored in this case.[18] Defendant has not met the demanding burden of showing with particularity that it will be subjected to undue hardship and inconvenience if required to litigate this matter in Delaware. The Court's conclusion comes after a thorough balancing and analysis of the factors which revealed that either jurisdiction will inconvenience each party to some extent. In light of the overriding principle that a Plaintiff's choice of forum should be honored in all but the rarest of cases, the Defendant's Motion to Dismiss based on the Doctrine of Forum Non Conveniens is DENIED.

IT IS SO ORDERED.

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J.

[18] **More recently, the Supreme Court has reaffirmed the *Cryo-Maid* analysis in *Mar-Land Industrial Contractors, Inc. v. Caribbean Petroleum Refining, L.P.*, Del. Supr., _ A.2d __, No. 526, 2000, Walsh, J. (July 25, 2001).**

dmh
oc: Prothonotary
xc: Order Distribution