NOT DESIGNATED FOR PUBLICATION

LINDA PENROSE FAVRE	*	**NO. 2003-C-1410**
VERSUS	*	**COURT OF APPEAL**
GEORGE ENGINE COMPANY, INC., ET AL.	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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ON APPLICATION FOR WRITS DIRECTED TO
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2003-2697, DIVISION "F"
Honorable Yada Magee, Judge
* * * * * *
Judge David S. Gorbaty
* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge David S. Gorbaty, Judge Edwin A. Lombard)

Gerolyn P. Roussel
Perry J. Roussel
Albert J. Campani II
Brent V. Schillage
ROUSSEL & ROUSSEL
1710 Cannes Drive
LaPlace, LA 70068-2407
COUNSEL FOR LINDA PENROSE FAVRE

Alan D. Ezkovich
Melissa M. Savoie
Glenn S. Newbauer

EZKOVICH & COMPANY, LLC
650 Poydras Street, Suite 1220
New Orleans, LA 70130
COUNSEL FOR GEORGE ENGINE CO., INC., LOUIS FRIERSON, LOUIS BARTELS, AND CONTINENTAL INSURANCE COMPANY

WRIT GRANTED; JUDGMENT VACATED IN PART

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Relator maintains that venue is proper in Orleans Parish as to the insurers pursuant to La. R.S. 22:655(B)(1) on the basis that Orleans Parish is "the parish in which the accident or injury occurred." Relator also seeks to establish venue as to the remaining defendants pursuant to La. C.C.P. art 74 on the basis that the "damages were sustained" in Orleans Parish. Relator further suggests that because Louis Frierson is domiciled in Orleans Parish, then venue is proper as to the remaining defendants, including the insurers, on the basis of La. C.C.P. art. 73, because they are solidarily liable.

Relator's submissions on the question of where the accident or injury occurred have been somewhat vague in both the instant application and the pleadings below. We assume that she lived in her father's home for a period

of time while he was employed by the George Engine Company and that the majority of that time the family's residence was in Orleans Parish. However, relator does not actually state the foregoing. Relators's only submission in the instant application is simply that the accident of injury occurred in Orleans Parish at her residence. Although it is possible that relator may be able to establish that venue is proper in Orleans Parish, she fails to do so convincingly.

Louisiana Code of Civil Procedure article 74 establishes that in action on an offense or quasi offense, as is the case here, venue is proper in "the parish where the damages were sustained." Damages are sustained as the result of wrongful conduct in that parish where they first arose or, in the case of bodily injury, where the conditions have been set in motion within the body which will eventually evolve into the injury or damage complained of. *In re Medical Review Panel of Bechet*, 609 So.2d 982 (La. App. 4 Cir.1992); s*ee also Williams v. Ochsner Clinic*, 97-2275 (La. App. 4 Cir. 10/29/97), 701 So.2d 744. In this case, the conditions within the body which evolved into mesothelioma were set in motion when the asbestos was inhaled.

Accordingly, were it the case that relator lived in Orleans Parish while her father lived in Jefferson Parish or elsewhere, she could not establish venue on the basis that she became sick [i.e. sustained damages] while living

in Orleans Parish.

In *Boatwright v. Metropolitan Life Ins. Co.*, 95-2525 (La. App. 4 Cir. 3/27/96) 671 So.2d 553, this court addressed the issue of whether the 1989 amendments to the Louisiana Direct Action Statute, La. R.S. 22:655, restricted venue against insurers to the general rules governing venue as provided by La. C.C.P. art 42 and thereby overruled previous jurisprudence holding that the exceptions to the general venue rules found in La. C.C.P. arts. 71 through 85 also apply. La. R.S. 22:655(B)(1) was amended in 1989 to provide:

> The injured person or his or her survivors or heirs mentioned in Subsection A, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy; and, such action may be brought against the insurer alone, or against both the insured and insurer jointly and in solido, in the parish in which the accident or injury occurred or in the parish in which an action could be brought against either the insured or the insurer under the general rules of venue prescribed by Code of Civil Procedure Art. 42 **only**. (emphasis supplied)

The amendment simply added the designation "only" following the reference to La. C.C.P. art. 42.

This court determined that the 1989 amendment was intended to "'provide that the reference to C.C.P. Art. 42 does not include the exceptions under C.C.P. Articles 71 through 85.'" *Boatwright*, 95-2525 at p. 5, 671 So.2d at 556, (quoting the 1989 Comment to La. R.S. 22:655, parenthetical

omitted) and reversed the trial court's ruling that venue was proper by application of La. C.C.P. art. 73.

Relator cites *Dempster v. A.P. Green Industries, Inc*., 99-2198 (La. App. 4 Cir. 1/26/00) 753 So.2d 330 for the proposition that venue can be established against Continental Insurance Company pursuant to article 73. In *Dempster*, this court initially addressed the issue of whether venue was proper as to several insurers who had insured four executive officers of Avondale who were domiciled in Orleans Parish and found that even though the officers were deceased, venue was proper under the Direct Action Statute.

This court then considered whether venue was proper as to the executive officers and the insurers who were not domiciled in Orleans Parish and ruled that "based on the doctrine of solidary liability" venue was proper in Orleans Parish. *Id*., 99-2988, p. 5., 753 at 333. The decision relied on *Gaspard v. Louisiana Farm Bureau Ins. Co.*, 96-2148 (La. App. 4 Cir. 11/6/96) 684 So.2d 55, which had distinguished *Boatwright*. However, *Gaspard* did not concern the applicability of 22:655 to an insurer sued by an injured party, as was the case in *Dempster*. *Gaspard* concerned whether venue was proper as to the tortfeasor himself, who was alleged to be solidarily liable with the plaintiff's UM carrier. Incidentally, the opinion

addressed whether venue was proper as to the plaintiff's UM carrier as well.

In *Gaspard*, the plaintiff, an Orleans Parish domiciliary, was injured in an automobile accident that occurred in Jefferson Parish. Gaspard sued her UM carrier (State Farm), the driver of the other vehicle (Cousins), and his insurance carrier (Louisiana Farm Bureau Insurance Company). Cousins and Louisiana Farm Bureau filed an exception of improper venue. The trial court granted the exception and transferred the case to East Baton Rouge Parish. Gaspard dismissed the Louisiana Farm Bureau without prejudice and sought review of the judgment granting the exception in favor of Cousins and transferring the case.

Initially, this court considered the impact of the amendment to La. R.S. 22:655(B) on UM actions as a matter of first impression and determined that venue was proper in Orleans Parish as to the plaintiff's UM carrier, State Farm, under the provisions of 22:655(B) and La. C.C.P. 42, because the injured party was the insured. This court then determined that because Cousins was alleged to be solidarily liable with the UM carrier then venue was proper as to Cousins also. The decision expressed no opinion as to whether venue was appropriate in Orleans Parish for the Louisiana Farm Bureau, Cousins' liability carrier.

Although *Gaspard* specifically distinguished *Boatwright*, the two

cases concerned different issues. As such, it is apparent that this court erroneously applied *Gaspard* in *Dempster* to find that venue was proper as to the insurers of the non-resident executive officers. As such, we must follow *Boatwright*, not *Dempster*.

Accordingly, we find that the trial court correctly maintained the exception of venue in favor of Continental Insurance Company. Ms. Favre could establish venue in Orleans Parish as to George Engine Company and the officers and directors but not Continental Insurance Company. Because plaintiff cannot maintain her direct action against Continental as the insurer of George Engine Company, the case was properly transferred to Jefferson Parish, where venue is proper as to all defendants. As such, we affirm the trial court's ruling on the exception of improper venue.

Exceptions of No Cause of Action and Nonconformity and Vagueness:

Initially, there is a question as to the propriety of granting an exception of venue, and at the same time ruling on other exceptions. In *Favorite, et al. v. Alton Ochsner Medical Foundation,* 537 So.2d 722, 723 (La. App. 4 Cir.1988), this court ruled that "[o]nce a defendant properly raises an exception of improper venue he has placed venue at issue and it should always be resolved before the court rules on an exception of no cause of action." *See also Bennett v. Giarrusso,* 583 So.2d 607 (La. App. 4 Cir.

1991); *Livingston Downs Racing Ass'n v. Krantz*, 95-1217 (La. App. 1 Cir. 7/6/95), 664 So.2d 102; *Succession of Harvey*, 616 So.2d 1281.

Accordingly, the trial court's ruling on the exceptions of no cause of action, nonconformity and vagueness are vacated.

WRIT GRANTED; JUDGMENT VACATED IN PART