IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JYMI RUDOLPH, a minor, by and through her parent and natural guardian, AMY RUDOLPH, and in her own right,	)	
Plaintiffs,	)	
v.	)	C.A. No. N13C-06-209 CEB
GENERAL MOTORS LLC, a Delaware corporation,	)	
Defendant.	)	

Date Submitted: January 7, 2014
Date Decided: February 7, 2014

MEMORANDUM OPINION

Upon Defendant's Motion to Dismiss
On Forum Non Conveniens.
DENIED.

Matthew R. Fogg, Esquire, DOROSHOW PASQUALE KRAWITZ & BHAYA, Wilmington, Delaware. Attorney for Plaintiff.

Kenneth M. Doss, Esquire, CASARINO CHRISTMAN SHALK RANSOM & DOSS, P.A., Wilmington, Delaware.

BUTLER, J.

INTRODUCTION

Before the Court is the Defendant General Motors LLC's ("GM") Motion to Dismiss on *Forum Non Conveniens*. For the reasons set forth below, GM's Motion is hereby **DENIED.**

FACTUAL BACKGROUND

Plaintiffs Jymi Rudolph, a minor, and her mother, Amy Rudolph, initiated this action in connection with a single-vehicle accident that occurred in Virginia. According to the complaint, the minor Plaintiff was seated in the center rear seat position of the vehicle wearing only a lap belt when the car crashed and she sustained severe injuries. It is alleged that her injuries were enhanced by GM's negligent design of the automobile. On November 7, 2013, GM filed a Motion to Dismiss without prejudice based on the doctrine of *forum non conveniens.* GM argues that the case ought to be brought in Virginia, where the accident occurred and the driver of the vehicle resides.

STANDARD OF REVIEW

Historically, the law of venue selection has deferred to the plaintiff's choice of forum on the principle that "plaintiffs should be masters of their own lawsuits."[1] When reviewing a motion to dismiss on grounds of *forum non conveniens,* a plaintiff is "afforded the presumption that its choice of forum is proper and a

[1] *Adams v. Bell*, 711 F.2d 161, 192 (D.C. Cir. 1983).

defendant who seeks to obtain dismissal based on grounds of *forum non conveniens* bears a heavy burden."[2] Only in the rare case where the defendant has demonstrated with particularity that it will be subject to "overwhelming hardship" and inconvenience if required to litigate in Delaware will the Court grant a motion to dismiss.[3]

LEGAL ANALYSIS

A. *Cryo-Maid* Factors

In *General Foods Corp. v. Cryo-Maid, Inc.*,[4] the Delaware Supreme Court highlighted six factors to guide the Court in determining overwhelming hardship and inconvenience if forced to litigate in Delaware. Under this framework and for the reasons set forth below, the Court has determined that GM has not met its burden of demonstrating overwhelming hardship.

1. Relative Ease of Access of Proof

The first factor is the relative ease of access to proof. Unless a defendant has difficulty retrieving evidence located out of state, the defendant is not subject to overwhelming hardship merely because the evidence related to the litigation is not located in Delaware.[5] In a crashworthiness case such as this, the primary focus

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[2] *Mar-Land Indus. Contractors, Inc. v. Caribbean Petroleum Ref., L.P.*, 777 A.2d 774, 778 (Del. 2001).
[3] *Id.*; *Taylor v. LSI Logic Corp.*, 689 A.2d 1196, 1199 (Del. 1997).
[4] 198 A.2d 681 (Del. 1964).
[5] *In re Asbestos Litig.*, 929 A.2d 373, 384 (Del. Super. Ct. 2006).

of the claim is the vehicle: its design, its safety features, and in this case, its seat belts. Nothing in the complaint or briefing suggests that this particular vehicle was outfitted in anything other than the standard GM seat belts. The "proof" with respect to these issues is not in Virginia but rather with GM wherever GM has its documents and witnesses. In this respect, Virginia arguably has no more access to proof than does Delaware. GM has not established that it would endure overwhelming hardship or have trouble accessing the evidence located outside of Delaware.

2. The Availability of Compulsory Process of Witnesses

The second factor is the availability of compulsory process for witnesses. Delaware courts have held that this factor deserves relatively little weight and lacks persuasive merit.[6] Many of the witnesses in this case have provided sworn affidavits confirming that they are willing to appear in Delaware. Even if the witnesses were not willing to appear, Delaware courts permit the introduction of videotaped depositions at trial. And given the heavy reliance on expert testimony in a crashworthiness case, the fact that the Philadelphia airport is 20 miles away while the nearest international airport to Shenandoah County, Virginia is 80 miles away is not insignificant.

[6] *Brandin v. Deason*, 941 A.2d 1020, 1025-26 (Del. Ch. 2007).

3. Possibility of a View of the Premises

The third factor is the need to view the accident scene or crashed vehicle. Because this case relates to the crashworthiness of the vehicle involved in the accident, there is almost no reason for a site visit. The Court was advised at oral argument that the vehicle has been destroyed in the interim. If pictures or other visual aids showing the crash are available, they are an entirely satisfactory substitute.[7]

4. Applicability of Delaware Law

The fourth factor relates to 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. Delaware courts "regularly interpret and apply the laws of other states and have consistently held that the 'need to apply another state's law will not be a substantial deterrent to conducting litigation in this state.'"[8] Accordingly, "the application of foreign law is not sufficient . . . to warrant dismissal under the doctrine of *forum non-conveniens*."[9]

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[7] *In re Asbestos*, 929 A.2d at 386.
[8] *Id.*
[9] *Id.*; *Berger v. Intelident Solutions, Inc.*, 906 A.2d 134, 137 (Del. 2006) (reversing trial court's dismissal on *forum non conveniens* grounds when the dispute involved unsettled issues of Florida law).

5. The Pendency of a Similar Action in Another Jurisdiction

The fifth factor considers the pendency or non-pendency of a similar action or actions in another jurisdiction. This is a controlling consideration in the *Cryo-Maid* analysis.[10] As there are no actions pending elsewhere, and the existence of additional claims is highly unlikely since no other passengers were seriously injured, this factor weighs heavily against dismissal.

6. Other Practical Considerations

The sixth and final factor relates to all other practical problems that would make the trial of the case easy, expeditious, and inexpensive. Here is where GM has made an argument with which the Court is at least intrigued, if not persuaded. GM has argued that it will have to file a separate, unnecessary, and costly action for contribution against the driver of the vehicle, Colby Cooper, in Virginia. Under the "crashworthiness" doctrine, the Court is unclear whether GM may even seek contribution from the driver. Assuming such an action may be maintained, GM seeks to dismiss the case in Delaware so it can defend in Virginia by adding the driver as a third party defendant over whom Virginia courts may assert jurisdiction but Delaware may not.

First, the Court notes that Plaintiffs have chosen not to sue the driver of the vehicle and are content to bring their "crashworthiness" products liability case only

[10] *In re Asbestos*, 929 A.2d at 387.

against GM on a theory of defective design of the automobile. An action against the driver is one strictly in negligence and is thus a different species of lawsuit from a crashworthiness case. In a crashworthiness case, the measure of damages is not the total compensable injuries suffered by the plaintiff.[11] Some of those injuries would have occurred regardless of the design of the vehicle.[12] Rather, the measure of damages is for the "enhanced injuries" suffered by the plaintiff as a result of the defective/negligent design of the vehicle.[13] Because of the nature of the suit, the plaintiff's recovery is limited to the difference between damages she would have suffered in a properly designed vehicle and those she did suffer in the poorly designed vehicle.[14]

The Court has carefully considered the opinion "*Wolf II,*"[15] where Judge Cooch surveyed the law regarding crashworthiness cases and a manufacturer/defendant's right to file a third party claim against the tortfeasor/driver. Separating the legal world into a "majority view" and a "minority view," the Court ruled that under Delaware law, a manufacturer/defendant *may* join a third party driver/tortfeasor to an underlying action brought by an injured passenger. While the Court's discussion is worth

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[11] *Meekins v. Ford Motor Co.*, 699 A.2d 339, 340-41 (Del. Super. Ct. 1997).
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Wolf v. Toyota Motor Corp.*, CV N11C-08-149-RRC, 2013 WL 6596833 (Del. Super. Ct. Dec. 9, 2013).

reading, it is sufficient for now to say applying *Wolf II* to this case, GM would be *permitted* to join the Virginia driver if it could get jurisdiction over him.[16]

But "permitted" is a long way from "must." GM is hardly required to file a third party complaint against the driver. Moreover, the grant of a motion for leave to file a third party complaint against a driver located in the forum state (and over whom jurisdiction may be asserted), as in *Wolf II*, is a different matter from granting a motion to dismiss on grounds of *forum non conveniens*, as requested here. While *Wolf II* is informative to resolution of this dispute, it is not itself dispositive.[17]

In addition, *Wolf II* examines the crashworthiness doctrine and third party actions through the lens of a motion to join a "joinable" third party. Here, the third party is not "joinable." On this precise point, there is but one Delaware precedent,

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[16] *Wolf* was a case in which the plaintiff brought a crashworthiness claim against Toyota Motor Corp., and Toyota sought leave to add the driver of the vehicle as a third party defendant. The driver was a Delaware resident over whom the Court had jurisdiction. Thus the problem of being able to add the driver as a third party defendant was not present in Wolf.

[17] The Court notes the somewhat odd docket entries in this case in which the parties removed this matter to the federal district court for Delaware. After resting there for a few weeks, it was remanded back to this Court by stipulation of the parties. While the record is silent as to why this happened, it should be noted that had the case been removed to federal court and remained there, GM's difficulty with obtaining jurisdiction over the Virginia driver would have been negated. With jurisdiction over the driver in federal court in Delaware, GM's *forum non conveniens* argument would lose most of its steam. So aside from the odd fact of removal and return, it is questionable why GM is complaining about this Court's lack of jurisdiction over a driver when jurisdiction could so easily have been obtained by removal of the case to federal court, which, in fact, actually happened, albeit only briefly.

States Marine Lines v. Domingo,[18] a case in which the defense sought dismissal under the *forum non conveniens* doctrine arguing that it could not join a Philippine third party because it could not get personal jurisdiction in Delaware. The Delaware Supreme Court said pointedly, "[t]he procedural inability of the defendant to bring into that litigation a joint torteasor for contribution is not sufficient to overcome the plaintiff's general right to choose the forum." This treatment was based on the defendant's claim against an alleged joint tortfeasor. As stated earlier, the Court has grave doubts that GM and the driver can be called "joint tortfeasors" in any sense of the term and even GM' claim of a right of contribution against the driver is at least suspect.

While the Court has no quarrel with the cases that permit a single lawsuit where one jury assesses all of the liability, it is important to note that the theory of relief as between the auto manufacturer and the driver of the vehicle is fundamentally different.[19] "The accident is essentially divided into two impacts and two separate causes of action: the accident itself and a second subsequent collision resulting from the vehicle's design."[20] Thus, the jury instruction is quite different in a crashworthiness case from an "ordinary" negligence case and so is the proof. While a defendant driver may focus his defense on road conditions,

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[18] 269 A.2d 223 (Del. 1970).
[19] *Meekins*, 699 A.2d at 342.
[20] *Wolf*, 2013 WL 6596833, at *6.

other traffic, or the conduct of parties inside the vehicle at the time of the crash, the crashworthiness defendant is really trying a case involving the design of the vehicle, its safety features, and the manufacturer's efforts to avoid injuries to its passengers. One case is heavy on the circumstances of the accident and perhaps the specific injuries to the plaintiff or the conduct of the driver, while the other is heavy on experts in design, building, and statistics. They are really two different lawsuits pressed into one courtroom.[21] Defenses may be available to the manufacturer/defendant that are unavailable to the driver, and vice versa.

This gives the Court confidence that any "prejudice" arguably suffered by GM's inability to join the driver of the vehicle in question is largely illusory. Having determined that GM will not suffer substantial prejudice by the inability to join the driver, GM has not overcome the strong presumption in favor of Plaintiffs' choice of forum.

GM also argues that because this is not a commercial dispute and Delaware's only connection to the litigation is that GM is incorporated in Delaware, this factor weighs in favor of dismissal. These arguments ignore the Court's holdings that plaintiffs in tort cases are accorded the same respect for their

[21] Charles E. Reynolds & Shane T. Costello, *The Enhanced Injury Doctrine: How the Theory of Liability is Addressed in a Comparative Fault World*, 79 DEF. COUNS. J. 181,183 (2012).

choice of forum as plaintiffs in commercial cases.[22] Likewise, the defendant's burden remains the same where the dispute's sole connection to Delaware is the fact the defendant is incorporated in Delaware.[23]

Based on this analysis, GM has not met its burden under the *Cryo-Maid* factors of establishing that it would be subject to overwhelming hardship if forced to litigate in Delaware.

B. Public Interest Factors

GM also urges the Court to expand its analysis past the *Cryo-Maid* factors to consider the "public interest" factors identified in *Gulf Oil Corp. v. Gilbert.*[24] These factors are typically considered only in cases involving the special characteristics of complex litigation.[25] Because this case stems from a single incident in a geographically-limited scope involving only two litigants and involves law from one foreign jurisdiction, this is not a proper case for application of the public interest factors.

Based on this analysis, GM has not presented special circumstances that would implicate the public interest factors. As such, its motion will be denied.

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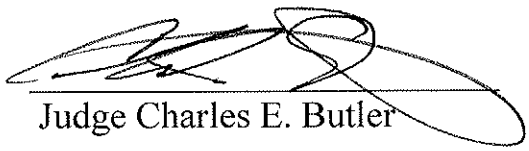
[22] *Dow Chem. Corp. v. Blanco*, 67 A.3d 392, 398 (Del. 2013).
[23] *Mar-Land Indus. Contractors*, 777 A.2d at 780.
[24] 330 U.S. 501 (1947).
[25] *Am. Home Prods. Corp. v. Adriatic Ins. Co.*, C.A. No. 91–C–04–119, 1991 WL 236915, at *6 (Del. Super. Ct. Nov. 5, 1991).

CONCLUSION

Based on the foregoing, the Court is satisfied that Delaware is the proper forum. Accordingly, GM's Motion to Dismiss Under *Forum Non Conveniens* is **DENIED.**

IT IS SO ORDERED.



Judge Charles E. Butler

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