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Case Number 669,2012

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARIA ELENA MARTINEZ, Individually and as Personal Representative of the Estate of SANTOS ROQUE ROCHA, deceased,	:	No. 669, 2012
Plaintiff Below/ Appellant,	:	
v.	:	
E.I. Du Pont de Nemours and Company, Inc.,	:	
Defendant Below/Appellee.	:	

APPELLANT'S OPENING BRIEF
ON APPEAL FROM THE SUPERIOR COURT IN AND FOR NEW CASTLE COUNTY

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NATURE OF THE PROCEEDINGS

This is an appeal of the Superior Court's December 5, 2012 Order Granting Defendant E. I. DuPont de Nemours & Company, Inc.'s ("DuPont") July 23, 2010 Motion to Dismiss. The Complaint was filed on April 23, 2010 by Maria Martinez, the widow of Santos Roque Rocha, who, according to the Complaint, died from mesothelioma as a result of working with and around asbestos from 1963 to 1980 while employed by a DuPont subsidiary at its Argentine plant. DuPont was sued not because of its ownership or relationship to the decedent's employer, but for its own separate and distinct tortious conduct. The heading of Count I, which states (in bold capital letters), "Defendant E. I. DuPont de Nemours & Co., Inc.'s direct liability to Plaintiff due to its own separate and distinct tortious conduct," makes this very clear. Moreover, the Complaint among other things alleges that DuPont wrongfully did the following:

- Provided raw asbestos to the Argentine plant.
- Directed and controlled the use of asbestos at the Argentine plant.
- Provided management, engineering and safety services in a negligent manner.
- The information from DuPont's Delaware Stine Haskell Laboratory was disseminated to the Argentine plant.

Finally, the Complaint notes at paragraph 72 that DuPont had known as early as the 1940's that asbestos could cause injuries such as those suffered by the Plaintiff's decedent and as late as 1968 DuPont "banned the use of asbestos insulation from its plants in the

United States, but did not update its safety requirements in Argentina".

Plaintiff responded in opposition to Defendant's Motion to Dismiss on October 1, 2010. (D.I. 7). In support of her opposition, Plaintiff attached the affidavit of Hugo Roberto Mansueti and declaration of Mariana Valls dealing with issues of whether Plaintiff has pled a valid cause of action under Argentine law.

On April 8, 2011, almost six months later, Counsel received a letter from the Court, which states that the experts for both sides had ignored what the Court considered was the "crucial issue" in this matter – "whether and under what circumstances Argentine law would recognize a parent company's non-derivative liability for direct participation in a subsidiary's alleged tortious conduct." (D.I. 9). The Court then requested that each party file supplemental expert affidavits and a three-page brief on that particular issue. The parties then did so on June 7, 2011 and September 7, 2011.

On October 27, 2011, Counsel received a letter from the Court stating that after receiving the supplemental briefing and documentation from the parties, the Court found that there was a "conflict in expert opinion" and stated that the Court had little choice "but to retain an independent Argentine law expert." (D.I. 16). The Court requested that the parties submit nominations by November 17, 2011, but if the parties could not agree on nominations, which they did so.

The parties heard nothing from the Court until May 14, 2012 when the Court announced that it had appointed its own two experts – Pablo

Andres Buey Fernandez and Dr. Daniel Funes de Rioja. Plaintiff promptly filed letters objecting to both experts because of bias. (D.I. 24, 25).

On June 28, 2012, the Court, having seemingly abandoned its decision to retain its own expert wrote a letter to Counsel stating that a hearing would be held on September 10, 2012 at which the parties' experts would testify. (D.I. 30).

Plaintiffs' two experts participated in the September 10, 2012 hearing via video conferencing from Buenos Aires Argentina, while Dupont had just one expert testify live.

On September 11, 2012, the day after the hearing, Plaintiffs' Counsel wrote a letter to the Court, requesting oral argument on Defendant's Motion to Dismiss, since the hearing the previous day had been limited to the issue of direct participant liability. (D.I. 36). The Court promptly denied Plaintiffs' request and stated it was converting the pending motion to one for summary judgment.

This conversion to summary judgment from a motion to dismiss was done despite the fact that no discovery had taken place, and the "only" facts in the record (other than legal opinions offered by various experts) were contained in three affidavits which had been submitted by Defendant in relation to its Motion to Dismiss.[1] The facts in those three affidavits, however, relate to the inapplicable corporate veil issue which Plaintiff repeatedly stressed it was not

[1] Affidavits of Miguel N. Armando, Alejandra M. Besora, and Monica B. Fernandez.

pursuing. Furthermore, the Superior Court never relied on any of these facts in making its decision to grant the "Motion to Dismiss."

In its letter of September 13, 2012, the Court then allowed the parties to file briefs "to address the issues raised by conversion to Summary Judgment." (D.I. 37). On September 21, 2012, Plaintiffs filed a Motion Opposing the Court's Conversation of Defendant's Motion to Dismiss to one for Summary Judgment. (D.I. 44). The Court denied the Motion on September 24, 2012. (D.I. 45). Plaintiffs filed for Reargument of the Motion under Rule 59(e) on September 27, 2012. The Motion for Reargument was denied on December 5, 2012. (D.I. 54).

On December 5, 2012, the Court seemingly reversed course and decided to abandon its decision to convert DuPont's Motion to Dismiss to summary judgment decision and instead granted DuPont's original Motion to Dismiss. This is Plaintiff's Opening Brief appealing this Motion to Dismiss.

SUMMARY OF ARGUMENT

1. The Trial Court erred in granting Dupont's Motion to Dismiss because it ignored the opinions of Plaintiff's and Defendant's experts that Plaintiff had stated a viable claim against Dupont under Argentine law.
2. The Trial Court erred in ignorning binding precedent and dismissing this action on forum non conveniens and indispensable parties.

STATEMENT OF FACTS

The only matters introduced into evidence in this case were the testimony of three legal experts as to what was the applicable Argentine law. All three legal experts both the Plaintiff and DuPont's experts all agree that the Plaintiff had alleged a valid cause of action under Argentine law. Because one of Plaintiff's experts, Professor Alterini, was dying of lung cancer and was too ill to testify,[2] Professor Alberto Bueres testified in his place. Bueres is a professor of law at the University of Buenos Aires and has taught Argentina tort law since 1971. (Sept. 10, 2012 Hearing Tr., A025). Bueres served as a trial judge in Argentina from 1974 to 1981 and as an appellate judge from 1981 to 2004. (A026). He served as president of the appellate court in 1987 and 2000. (A026). He directed the creation of a Commentary on Argentina civil law that is used by Argentina trial and appellate judges. (A025). Maria Campiani was Plaintiff's other expert to testify from Argentina. She is a professor of tort law in Argentina and engaged in private practice, representing one of the largest insurance carriers in Argentina. (A034). The only expert of DuPont to participate at the hearing was Professor Rosenn, a law professor at the University of Miami Law School.

Professor Alberto Bueres testified for the plaintiff that Dupont could be held liable:

[2] Prof. Alterini died on October 23, 2012.

Q: In his [Alterini] affidavit he says anyone sufficiently acquainted with the functions of the Argentina system, and the general criteria of Argentine judges would establish direct liability of a parent. Explain to the Judge here in Delaware, why you would believe that is so?
A: This is considered the golden rule as to civil law. Any person who causes injuries to another person should fix those injuries as a result.[3]
Q: Paragraph 12 talks about concurrent responsibilities meaning the obligations of parents based on its own negligent conduct. Is your opinion as you see in terms of professor Alterini, on veil piercing at all?
A: No, there is no possibility of putting the responsibility on one company, or on the other, or putting it on one company, and the other company not also being responsible for it. There are two completely different responsibilities, completely autonomous one from other other. One is the liability of the main office, and the other liability of the subsidiary, both of them are different.[4]

Professor Campiani testified at the Sept. 10, 2012 hearing that:

I have no doubt in my mind as professor Bueres said also in Professor Alterini's report, if you go to the two articles 1109 and 1113 that you can sue the main office of a company for damages occurred by an employee of a subsidiary when they are using, manipulating or near dangerous substances.[5]

Professor Campiani further testified:

Q: In your opinion, does the Martinez complaint state a valid cause of action under Argentine law?
A: That's correct, it does have one.
Q: Is there any Argentine law that restricts the right to sue a parent for direct action to limited cases, is there any case that restricts that right?
A: There is none.
Q: Is there any reason under Argentine jurisprudence to restrict the right of an Argentine worker to sue a foreign corporation for foreign corporation's negligent direct actions.?
A: There is none. There is no law in this case, or in the one just before it, it would be a direct violation of the Argentina Constitution to put the law since the Constitution says that you have to repair damages.
. . .

[3] A028.
[4] A029.
[5] A034.

Q: Is there any basis under Argentine law if DuPont US was responsible for damages to excuse - - not to have them sued?
A: No, there is not.[6]

Rosenn, DuPont's expert, agreed with Professors Bueres and Campiani that the Plaintiff had a viable cause of action under Sections 1109 and 1113 of the Argentina Code.

Rosenn admitted that Argentine Code 1109 states "Whoever commits an act by his fault or negligence, causes harm to others, he will be obligated to repair the damage."[7] He agreed that this is a basic negligence tort principle -- if a person causes damage through his or her fault or negligence, he or she is obligated to repair the damage.[8] He further acknowledged that if a person is injured in Argentina as a result of the negligence of another, he or she has a legal cause of action.[9] It makes no difference whether the person causing the injury is a person or a corporation; the cause of action exists.[10]

Rosenn further confirmed that Section 1113: 1) makes a corporation liable for its employees' acts; 2) imposes strict liability for defective activities; and 3) inverts the burden of proof if the damage is caused by an inanimate object that is not defective.[11] Section 1109 further authorizes an injured worker to sue both his

[6] A034-A035.
[7] A014.
[8] A015-A016.
[9] A016.
[10] A016.
[11] A016.

employer and a third party such as DuPont.[12] Additionally, Rosenn acknowledged that 1113 applied to asbestos cases.[13]

Indeed, he testified:

> Q: I would like you to assume that a safety company is contracted to provide safety services, and the safety company negligently provided services such that people at the plant were injured. So rather than the company's employee driving and hitting someone, the company's employees provided bad safety advice, and as a result of that, people were injured. Under Argentine tort law, would the Argentine worker, or individual who was injured as a result of that negligent safety service provided by the outside company have a right to sue the outside company?
> A: Yes, they would, if the services that were provided negligently were the cause of the injury, then under Article 1109, coupled with the vicarious liability provision of 1113, they would have an action against the company that the provided the services.
> Q: That is just general Argentine tort law, correct?
> A: Certainly. Correct.
> Q: You do not need a specific statute besides the 1109 in order to bring that lawsuit?
> A: Well, you do really need the 1113 if you going after a company. If you were after the individuals who negligently provided the services, then it is clearly 1109.[14]
> Q: If you turn to page three of the complaint, paragraph 12. You see it specifically says that "DuPont USA provided safety services in a negligent manner causing injury to the plaintiff decedent." You see that?
> A: Yes.
> Q: That is a specific allegation that you have just told this court would be a basis for action under Argentine law?
>
> . . .
>
> A: I see the allegation, and Article 12, but I don't read that as an allegation of direct participation liability. That would be the kind of direct liability we are talking about under 1109, with the vicarious liability coming out of 1113. In other words, that is liability for the parent's own actions.
> Q: Right. And you would agree that that sets forth a valid claim under Argentine law, correct?

[12] A017.
[13] A017-A018.
[14] A016.

A: Yes.
Q: And number 14 says DuPont directed or controlled the use of asbestos at the plant. That would also set forth valid claim under Argentine law, correct?
A: This could constitute a basis of a claim of direct liability under Argentine law.
Q: Number 15, DuPont trained the staff of DuPont Argentina in unsafe ways and failed to provide proper training. That could also provide a claim under Argentine law, correct?
A: Possibly, if this is a claim that the company, DuPont, the parent of assumed an obligation to provide the safety for the plant.
Q: And number 17, where it says because of DuPont USA, there were no warnings, or inadequate warnings as to the safe handling and use of asbestos. That would also provide a basis of a claim under Argentine law against DuPont USA, correct?
A: Again, assuming that DuPont assumed an obligation to, or duty to provide safety for the plant in Argentina.[15]

When questioned by counsel for DuPont, Mr. Rosenn testified:

A: You concede that an Argentine court might allow suit against DuPont under section 1109 of the Argentine Civil Code, correct?
Q: Correct, with the vicarious liability coming out of 1113.
. . .
Q: And to the extent that plaintiffs would have to rely on 1113, that is a theory of vicarious liability or veil piercing, correct?
A: No, it's not necessarily veil piercing, it is vicarious liability in the sense of holding a corporation liable for the acts of its employees.[16]

[15] A016.
[16] A018.

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING DEFENDANT DUPONT'S MOTION TO DISMISS BECAUSE IT IGNORED THE OPINIONS OF PLAINTIFF'S AND DEFENDANT'S EXPERTS THAT PLAINTIFF HAD STATED A VIABLE CLAIM AGAINST DU PONT UNDER ARGENTINE LAW.

A. Questions Presented. Did the court below err when it granted Dupont's motion to dismiss when it found that plaintiff had not pled a viable cause of action under Argentine law. This issue was preserved below in Plaintiff's October 1, 2010 and October 1, 2012 briefs.

B. Scope of Review. The court below made an error of law in granting Defendant's motion to dismiss. Therefore, the standard of review on appeal is de novo. *Stifel Financial Corp. v. Cochran*, 809 A.2d 555, 557 (Del. 2002); *Malone v. Brincatt*, 722 A.2d 5, 9 (Del. 1998).

C. Merits of Argument.

1. The Trial Court erred as a matter of law in finding that Plaintiff did not state a viable claim against Dupont under Argentine law. The Trial Court's entire opinion was based on one incorrect premise - the Plaintiff sued the wrong party. The Trial Court's decision reflected its preference that Martinez should have sued DuPont Argentina in an Argentina court rather than suing DuPont in Delaware. Regardless of the allegations of the complaint, the proof submitted or the authority cited, the Trial Court seemed determined to conclude that Ms. Martinez sued the wrong party and therefore dismiss DuPont. In reaching its conclusion, the Trial Court ignored the

allegations the Plaintiff actually made in her Complaint, imputed claims to her that she never made and ignored the sworn testimony of three experts all of whom agreed that Plaintiff stated a viable claim under Argentina law. This Court should reverse the Trial Court's decision, which had no basis in fact or law.

The first mischaracterization of the nature of Martinez's cause of action against DuPont which the Trial Court made was that "Counts III, IV, V and VII of the Complaint assert that DuPont is actually the owner and operator of the Berazategui plant and that DuPont was Rocha's employer."[17] Because the Trial Court determined that DuPont neither owned the property nor employed Rocha, it determined that DuPont was an improper defendant.

The Trial Court's inaccurate characterization of the Plaintiff's Complaint is puzzling. There is no fair reading of her allegations which should yield such a result. All factual allegations contained in the Complaint made it clear that Ms. Martinez was not alleging that DuPont was Rocha's employer. While Count III was labeled "Employment Exposure,"[18] it does not allege that DuPont was his employer. Indeed, it specifically, identified Du Pont Argentina SA as his employer. The reference to employment exposure was merely to put DuPont on notice as to where Rocha was exposed. Likewise, Counts IV, V and VII did not identify DuPont as Rocha's employer. Every allegation in those counts set forth DuPont's conduct which Plaintiff asserts gives rise to its

[17] Op. at p. 29.
[18] Standing Order No. 1, requires that every asbestos complaint contain where the exposure occurred, and the nature of the exposure – including the name of the employer. (A057-A058; A080-A081).

negligence. None of the allegations reference or rely upon any employment relationship between DuPont and Rocha.

Yet, the Trial Court concluded that Martinez alleged DuPont was Rocha's employer. It said, "The allegations against DuPont in this Count [Count III of the Complaint – Employment Exposure] are incorrectly asserted as though DuPont was Rocha's employer.[19] This critical misstatement permeated the court's entire opinion and served as a crucial impetus for the dismissal of Martinez's claims.

Another critical misstatement, upon which the Trial Court based its decision, is that Martinez's Complaint sought to pierce the corporate veil and hold DuPont liable for DASRL's negligence. Again, the Trial Court's characterization of the Plaintiff's Complaint is puzzling. There is not one allegation in the complaint seeking to hold DuPont liable for DASRL's conduct. Indeed, the Complaint is replete with claims against DuPont alleging specific conduct which has nothing to with DASRL's conduct.

All of these allegations are directed toward DuPont's conduct and are not dependent upon any acts of commission or omission by DASRL. Certainly, a parent corporation can be held liable for its own negligence even if it occurred on a subsidiary's property.[20] There simply was no attempt to pierce the corporate veil. Instead, Martinez sought to hold DuPont liable for its own negligence, which resulted in Rocha contracting mesothelioma. The Trial Court's holding unravels

[19] Op., 9.
[20] *Boggs v. Blue Diamond Coal Co.,* 590 F.2d 655, 658 (6th Cir. 1979).

when considering the actual allegations of the Complaint rather than its blatant mischaracterization of the nature of Martinez's claims.

In determining whether Martinez's complaint was proper, the Trial Court had one simple question to answer - - whether Martinez stated a viable claim against DuPont under Argentina law, which all experts agreed she did. It however, asked a different question - - whether Argentina recognized a cause of action for DuPont's "direct participation" in causing Rocha's exposure to asbestos at the Berazategui plant. Because there is no reported case that expressly uses the term "Direct Participation Liability", the Trial Court held that no such cause of action exists under Argentina law even though Martinez's experts, licensed Argentine attorneys, testified that it recognizes such a theory of liability. The Trial Court was determined to accept nothing less than a case using the term "direct participant." Amazingly, it criticized Plaintiff's experts for not knowing **American** law in expressing their opinions as to whether Argentina law supports Martinez's claims.

DuPont Can Be Held Liable Under Argentina Law For Its Own Negligence. The Trial Court simply ignored the wealth of authority demonstrating that Martinez filed a valid claim against DuPont under Argentina law. It was too focused on its own rigid view that Martinez should have sued DASRL instead of DuPont. Rather than following the law, it endeavored to justify its decision that DuPont was the "wrong" party to sue. Thus, it summarily rejected not only Martinez's experts, but also DuPont's expert, all of whom agreed that the

allegations contained in the Complaint constituted a valid cause of action under Argentina law.

In Argentina, a claim for negligence requires that the Plaintiff establish the following three elements: (1) the Defendant was negligent; (2) Plaintiff has been injured; and (3) the injury was caused by Defendant's neglect or omission.[21] Under the Argentina Civil Code, acts of omission can be negligence.[22] A Plaintiff is not required to prove guilt on the Defendant's part in pleading negligence.[23] Instead, when defending himself against a negligence suit, it is the Defendant's job to prove the absence of guilt.[24] A claim for strict liability under Argentina law requires that: (1) Defendant controlled or used dangerous products at the relevant time; (2) Plaintiff was exposed to those products; and (3) Plaintiff's exposure caused him injury.[25] Pleading strict liability only requires that the Plaintiff show the existence of his damage; Plaintiff does not have to show the tortfeasor's negligence when alleging strict liability.[26]

When simply looking at the plain language of the Complaint, Martinez clearly stated a valid cause of action for both negligence and strict liability under Argentine law. Indeed, the Plaintiff alleged that her decedent was exposed to asbestos distributed by DuPont, which she also alleged directed the use and installation of

[21] Article 1109, Argentine Civil Code.
[22] Article 512, Argentine Civil Code.
[23] Affidavit of Marian Valls, ¶19.
[24] Affidavit of Valls, ¶19.
[25] Article 1113, Argentine Civil Code; Affidavit of Valls, ¶15; Affidavit of Mansueti,¶¶9-11; Affidavit of Garo, ¶16.
[26] Affidavit of Valls, ¶15.

the product. This certainly constitutes a valid claim for strict liability under Argentine law. Martinez also alleged that DuPont assumed safety responsibility at the plant, but failed to properly undertake its responsibility. She further alleged that DuPont negligently trained DASRL employees with respect to the safe use and handling of asbestos products. These allegations support a negligence claim under Argentine law.

2. The Trial Court ignored the opinions of Plaintiff's and Defendant's experts. Because the Trial Court was understandably not an expert on Argentina law, the Plaintiff submitted a number of affidavits from Argentina lawyers and legal scholars, all of whom explained that her Complaint stated viable causes of action under Argentina law. All of these experts were practicing attorneys in Argentina and were well versed in the Country's liberal requirements for maintenance of a personal injury lawsuit. Dissatisfied with these affidavits, the Trial Court conducted a hearing to take testimony from experts for both parties concerning the viability of Plaintiff's claims. However, the Trial Court inexplicably was only interested in hearing whether Argentina supported a cause of action for the "direct participation" liability as recognized in several jurisdictions in the United States, including Delaware.

The testimony overwhelmingly demonstrated that Martinez's complaint stated valid claims under Argentina law. Plaintiff's main expert witness, Alberto Bueres, is a professor of law at the University of Buenos Aires, and has taught Argentina tort law since

1971.[27] Professor Bueres served as trial judge from 1974 to 1981 and an appellate judge from 1981 to 2004.[28] He served as president of the appellate court in 1987 and 2000.[29] He explained that the Commentary on Argentina's Civil Code is what Argentina lawyers refer when determining whether a lawsuit is viable under the code.[30] Indeed, Argentina trial judges and appellate judges also look to the Commentary for guidance.[31]

Dr. Bueres explained that Section 1109 of the Argentine Civil Code, as well as Section 1113, support the viability of Martinez's claims against DuPont. Section 1109 is the general negligence statute, which is broadly construed under Argentina law.[32] There is a presumption in favor of a valid claim brought by the worker in the absence of explicit authority to the contrary.[33]

Maria Campiani is a professor of tort law in Argentina and engaged in an active private practice.[34] She works for one of the largest insurance carriers in Argentina.[35] She testified that the

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[27] A025. Professor Bueres was substituted in place of Dr. Professor Alterini, who became ill and was unable to testify at the hearing. Professor Bueres testified concerning Professor Alterini's affidavit. The Trial Court limited Professor Bueres's testimony to the Alterini affidavit and limited his ability to further explain Argentine law.
[28] A026.
[29] A025.
[30] A025.
[31] A025.
[32] A030.
[33] A030.
[34] A034. Despite giving the Defendant's expert several hours to testify, Plaintiff was only afforded 10 minutes to elicit opinions from Dr. Compiani.
[35] A034.

Plaintiff had a valid cause of action that could be brought under sections 1109 and 1113.[36]

DuPont presented the testimony of Keith Rosenn, who is a professor at University of Miami School of Law.[37] Rosenn agreed with Professor Bueres and Professor Campiani that the Plaintiff had viable causes of action under Argentina Code sections 1109 and 1113. He testified that precedent has a different connotation in Argentina than American law. Argentine lawyers first look to statutes, then to scholarly documents and to finally case law to determine what the law is.[38]

Yet, the Trial Court completely ignored the fact that Rosenn expressly admitted that claim Martinez made was viable under Argentina law.

Despite the many admissions from Rosenn that Plaintiff had filed a viable claim, as well as Bueres' and Campiani's testimony, the Trial Court determined that Martinez failed to state a viable claim against DuPont because of its determination that Argentina does not recognize a claim for "direct participation" liability as recognized in Delaware.[39].

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[36] A034-A035.
[37] A003.
[38] A014.
[39] As evidenced by the testimony at the September 10, 2012 hearing, the Trial Court was confused about "direct participation liability," aka "direct liability." While DuPont tried to distinguish between "direct participation liability" and "direct liability" at the September 10, 2012 hearing, both terms clearly apply to the same theory of law, even here in the United States. For example, compare *U.S. v. Bestfoods*[39] with *Forsythe v. Clark USA, Inc.*[39] The U.S. Supreme Court case, *Best Foods*, only uses "direct liability" or "direct parental liability."[39] In contrast, the Illinois Supreme Court case, *Forsythe*, uses the term

First, clearly, Argentine law does recognize "direct participation liability." Second, the issue should have never been narrowed to whether Argentina recognized direct participation liability. The Trial Court became fixated on its narrow framing of the issue rather than the broader question it should have answered, which is whether the Complaint stated a viable cause of action against DuPont, which all experts agreed it did. Indeed, the presumption in Argentina is in favor of the worker and/or victim.[40] Therefore, the presumption is in favor of allowing a direct liability cause of action in order that the worker/victim can recover for the wrongs against him.

Furthermore, the Trial Court extensively criticized Martinez's experts because they did not look at the American case law.[41] The issue was whether a cause of action existed under Argentina law. American case law has very little relevance, if any, to this issue. Martinez made reference to United States case law on this issue because, like in U.S. tort law, the analysis in Argentina is also done under basic tort or strict liability principles. The fact that Plaintiffs' experts have not studied the American cases regarding direct participation liability has no bearing on the determination of what is Argentine law. Argentine judges do not look to American law to decide what Argentine law is. Rather than relying on the opinions

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"direct participant liability" repeatedly.[39] Dupont attempted to create a marked difference between the two terms to confuse the Trial, which obviously worked

[40] A032, testimony of Professor Bueres, wherein he states that this is the basis of all tort law in Argentina and is also included in Article of the Labor Law.

[41] Op. at p. 20.

of practicing Argentinian attorneys, the Trial Court gave more weight to an American lawyer who never practiced law in Argentina and could offer no basis for his opinion other than he simply did not believe Argentina would allow a claim for Direct Participation Liability.

4. Martinez's Complaint Put DuPont on Sufficient Notice Of The Allegations Against It. The Trial Court was critical of Martinez's 18-page Complaint wherein she made numerous allegations against DuPont and asserted several facts in support. Yet, the Trial Court declared there was no way for DuPont to be on adequate notice of the nature of Martinez's claims.[42] Although, it correctly stated that Rule 8 does not require detailed factual allegations, it then criticized the Plaintiff for providing detailed factual allegations. The inconsistency of the Trial Court's decision that the Complaint was not sufficiently plead with particularity is apparent when considering the tortured history of this case.

DuPont filed its motion to dismiss in July 2010. The Trial Court took more than two years to decide the motion. It received multiple affidavits in support of and in opposition to the motion. It also held an evidentiary hearing taking testimony from three expert witnesses. Had the Trial Court truly believed that the Plaintiff's case was not properly pled, it would have dismissed the action long ago rather than taking two years and holding an evidentiary hearing.

When filing a complaint in the Delaware Superior Court, under Superior Civil Court Rule 8, a plaintiff must make a "short and plain statement" requesting relief and "demand a judgment for the relief."

[42] Op. at p. 35.

Superior Court Civil Rule 9(b) requires that a claim for negligence must be pled with particularity. In *Robinson v. Meding*, the Delaware Supreme Court held that in a negligence claim, "[p]laintiff is not required to set forth in detail the evidence upon which plaintiff bases his claim. It is usually necessary to allege only sufficient facts out of which a duty is implied and a general averment of negligent failure to discharge that duty."[43] The Court went on to explain that, an example of the requirements of Rule 9(b) are set out in Form 9 in the Appendix of Forms to the Delaware Superior Court Civil Rules.[44] Form 9 is the same today as it was in 1960 when this Court ruled on *Robinson.*[45]

More recently in *Garcia v. Signetics Corp.*, the Superior Court discussed the issue of pleading with particularity in toxic tort cases.[46] The Court stated that the purpose behind Rules 8 is to give "fair notice" to defendants of the claims being brought against them.[47] The Court said that "[t]he particularity requirement embodied Rule 9(b) operates to: (1) provide defendants with enough notice to prepare a defense; (2) prevent plaintiffs from using complaints as fishing expeditions to unearth wrongs to which they had no prior knowledge; and (3) preserve a defendant's reputation and goodwill against baseless claims."[48] In addition, the Superior Court stated "This Court has consistently recognized that 'the sufficiency of a pleading under Rules

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[43] 163 A.2d 272 (Del. 1960).
[44] *Id.* at 584.
[45] *See* Form 9, Complaint for Negligence.
[46] 2010 WL 3101918 (Del. Super. Aug. 5, 2010).
[47] *Id.*, citing *In Re Benzene Litig.*, 2007 WL 625054, *5,*6 (Del. Super. Feb. 26, 2007).
[48] *Id.*

8(a) and 9(b) must be measured according to the particular circumstances of the case.'"[49]

There is no question that Martinez's complaint satisfied all of the requirements set forth in *Garcia.* The Trial Court's determination that the Complaint did not give proper notice of the Plaintiff's claims is based on a heightened duty to plead, which is not required by Delaware law. For example, the Trial Court asserted that stating that DuPont provided safety services without specifying a single example of what comprised those services does not satisfy Rule 8 requirements.[50] However, this is clearly the type of allegation which this Court has routinely confirmed and is acceptable.

The Trial Court did not base its decision on law. It based it on both an erroneous belief that Martinez was seeking to hold DuPont liable for DASRL's actions and its obvious disdain for such an attempt. Indeed, in determining that Martinez did not plead with particularity, the Trial Court stated,

> To hold a parent responsible solely on the basis of the minimal level of control that exists by virtue of the parent-subsidiary bond would destroy the long-established protection afforded shareholders through incorporation.[51]

This one statement demonstrated the Trial Court's fundamental mischaracterization of the nature of Plaintiff's claims against DuPont. No matter how many times, Martinez advised the Court that she was not seeking to pierce the corporate veil; the Trial Court insisted that is what she was trying to do.

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[49] *Id*
[50] Op. at p. 32.
[51] Op. at p. 33.

II. THE TRIAL COURT ERRED IN IGNORING BINDING PRECEDENT AND DISMISSING THIS ACTION ON FORUM NON CONVENIENS AND INDISPENSABLE PARTIES.

A. Questions Presented. Did the court below err when it granted Dupont's motion to dismiss when it found that bringing this action in Delaware against Dupont would cause the defendant to suffer overwhelming hardship and that there was failure to join an indispensable party? This issue was preserved below in Plaintiff's October 1, 2010 and October 1, 2012 briefs.

B. Scope of Review. The court below made an error of law in granting Defendant's motion to dismiss. Therefore, the standard of review on appeal is de novo. Stifel Financial Corp. v. Cochran, 809 A.2d 555, 557 (Del. 2002); Malone v. Brincatt, 722 A.2d 5, 9 (Del. 1998).

C. Merits of Argument.

1. **The Trial Court ignored binding precedent in Delaware *forum non conveniens* law.** The Trial Court seemingly went out of its way to decline jurisdiction even though this Court has expressly held that a Delaware court is a proper forum for cases under nearly identical circumstances as this case. This Court should not tolerate the Trial Court's complete disregard for controlling precedent.

The doctrine of *forum non conveniens* empowers the Court to decline jurisdiction whenever "considerations of convenience, expense and the interest of justice dictate that litigation in the forum selected by the Plaintiff would be unduly inconvenient, expensive or

otherwise inappropriate".[52] "A Plaintiff's choice of forum should not be defeated except in the rare case where the Defendant establishes through the *Cryo-maid* factors, overwhelming hardship and inconvenience".[53]

The Delaware Superior Court recently has made it clear that Delaware's lenient standard in accepting the cases of out-of-state plaintiffs and applying the laws of other jurisdictions controls. *Schultz v. American Medical Systems, Inc.*, C.A. No. N10C-05-218 (Del.Super. Aug. 23, 2010) (order denying Defendant's Motion to Dismiss based on forum *non conveniens*). In *Schultz*, a products liability case, the Court upheld the plaintiff's choice of the Delaware forum, even though it admitted,

> 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. *Id.* at 1.

The Court later stated that the fact that Delaware law would not apply in this case was not an issue warranting dismissal. "Delaware courts regularly interpret and apply the laws of other jurisdictions." *Id.* at 4. It found that the defendant had not presented an alternative, adequate forum and that it had also failed to show overwhelming hardship, despite the lack of connections to Delaware. This case was consolidated with 237 other mesh cases and is still

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[52] *Sequa Core v. Aetna Cas. Ser. Co.*, 1992 WL 179386 (Del.Super. July 16, 1992).

[53] *Ison v. E.I. DuPont Nemours & Co., Inc.*, 729 A.2d 832 (Del. 1999); *see also*, *In re Asbestos Litig. (Abou-Atoun)*, 929 A.2d 373, (Del. 2006).

ongoing, active litigation in the Delaware Superior Court. (A014-A126).

With respect to foreign nationals, the "Delaware Supreme Court consistently has held that the traditional showing a Defendant must make in order to prevail on a Motion to Dismiss on the grounds of *forum non conveniens* is not varied simply by virtue of the fact that Delaware's only connection to the litigation is the Defendant's incorporation or residency here".[54] In *Ison*, the Supreme Court reversed the Superior Court's dismissal for *non conveniens*, holding that the forum chose by the foreign nationals would not be disturbed since the Defendant there as here DuPont was incorporated here, its principal place of business was here and there was significant contacts here with the defective product. *Id.* at 843. Since *Ison* was decided, DuPont has not moved out of Delaware, or reincorporated somewhere else. Martinez alleged that asbestos was either was shipped by DuPont from Delaware and/or that DuPont purchased the asbestos that was used at the Argentina plant. These facts are nearly identical to *Ison*. Yet, the Trial Court barely referenced the decision in its opinion dismissing Martinez's claim. Instead, it adopted Dupont's arguments in their entirety and made factual determinations completely unsupported by the record.

Prior to the Superior Court's Order of December 5, 2012, the law on forum *non conveniens* was clear in Delaware. The Court threw everything into a tailspin with this decision. The Dec. 5, 2012 Order

[54] *Id.; Mar-Land Indus. Contractors, Inc. v. Caribbean Petroleum Ref.*, L.D., 777 A.2d 774, 780 (Del. 2001); *Warburg, Pinkus Ventures, L.P. v. Schrapper*, 774 A.2d 264, 288 (Del. 2001), emphasis added.

will threaten Delaware's reputation as a forum for international cases, because to date, Delaware has a good track record of dealing with a variety of international litigation. For example, see *Saudi Basic Industries Corp. v. Mobil Yanbu Petrochemical Co., Inc. v. Exxon Chemical Arabia, Inc.*, 866 A.2d 1 (Del. 2005), reargument denied Feb. 22, 2005. The Supreme Court stated in its opinion that the Islamic law system "differs in critically important respects from the system of legal thought employed by the common law countries;" however, it recognized that "[t]he trial judge was keenly mindful of this distinctive characteristic of Saudi law and of the problems that it created… ." *Id*. at 31-32).

Another case in which the Superior Court had to apply Saudi Arabian law was *In re Asbestos Litig. (Abou-Atoun)*, C.A. NO. 05C-05-246 ASB, J. Slights (Del.Super. Mar. 8, 2006) (order denying motions to dismiss based upon forum *non conveniens*. The *Abou-Atoun* litigation involved 40 complaints with plaintiffs in 23 states and one foreign country – Saudi Arabia. All the complaints dealt with Saudi Arabian exposures.

Other good examples of Delaware's ability to handle foreign law in international cases are *Ison v. E.I. Du Pont de Nemours*, 729 A.2d 832 (Del. 1999) (injuries occurred in England, Wales, Scotland, and New Zealand but the Court honored the foreign plaintiffs decision in choosing a Delaware forum); and *Lluerma v. Owens Illinois, Inc.*, 2009 WL 1638629 (Del. Super. June 11, 2009)(Spanish nationals exposed to asbestos while working aboard American warships in Spain). In *Pallano v. The AES Corp.*, C.A. No. N09C-11-021, the Superior Court has

repeatedly upheld the use of Dominican law in personal injury cases filed in Delaware but stemming from the dumping of toxic waste into the ocean which washed up onto the shores of the Dominican Republic and injured the Dominican plaintiffs.[55]

2. **Dismissal For Forum Non Conveniens Is Only Appropriate Where The Defendant Will Suffer Undue Hardship Litigating In Delaware.** *General Foods Corp, Inc.* set forth a six-factor test to determine whether a defendant will suffer "overwhelming hardship" in litigating the case in Delaware.[56] "Analysis of the Cyro-Maid factors is not quantitative".[57] Trial Courts are not supposed to tally the number of factors that favor the other party.[58] Indeed, the factors "do not, of themselves, establish anything".[59] They "merely provide the framework to conduct an analysis of hardship and inconvenience.[60] Instead, when deciding the Motion to Dismiss for *forum non conveniens*, a trial court must base its determination solely upon "whether any or all of the *Cyro-Maid* factors establish that a Defendant will suffer overwhelming hardship and inconvenience if forced to litigate in Delaware."[61] Without such a showing, a Plaintiff's choice of forum should not be disturbed.[62]

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[55] *See* 2012 WL 1664228 (Del.Super. May 11, 2012) and 2011 WL 2803365 (Del. Super. July 15, 2011).
[56] Footnote, 198 A.2d 684 (Del. 1964).
[57] *In re Asbestos (Abou-Antoun)* 929 A.2d 333, 381 (Del. 2006); *Taylor v. L.S.I. Logic Corp.*, 689 A.2d 1196, 1199 (Del. 1997).
[58] *Id.; Marlon Industry Contractors, Inc. v. Caribbean Petroleum*, Ref. L.P., 777 A.2d 774, 7749 (Del. 2001).
[59] *Taylor* at 1199.
[60] *Id.*
[61] *Id.*
[62] *Id.*

Argentine Courts Would Not Exercise Jurisdiction Over Dupont. Before a Court engages in the six factor analysis, the Trial Court must first determine whether there are at least "two forums in which a DuPont is amenable to process".[63] Because there is not another available forum for Martinez's claim against DuPont, the Trial Court should not have dismissed her claim.

In *Lluerma v. Owens Illinois, Inc.*, this Court addressed the issue of whether Spanish speaking foreign nationals could maintain a suit arising out of asbestos exposure in Delaware courts. [64] The Plaintiffs alleged exposure to asbestos at a United States Naval base located in Spain and on non-American warships.[65] Owens Illinois was a Delaware corporation that designed, developed and manufactured products, which contained asbestos and were used on that naval base and on the warships.[66]

Owens Illinois filed a Motion to Dismiss alleging forum non conveniens declaring that these suits should properly be brought in Spain because it was "an available and adequate alternate forum."[67] The Plaintiff contended that Spain was not an available and adequate forum since "the harm occurred in New Jersey where the product was manufactured and improperly packaged."[68] The Superior Court held that Spain did not have jurisdiction over the case. It further held that

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[63] *Lluerma v. Owens Illinois, Inc.*, 2009 WL 1638629, *7 (Del. Super. June 11, 2009); *Pena v. Cooper Tire Rubber Co., Inc.*, 2009 WL 847414 (Del. 2009).
[64] *Id.* at *1.
[65] *Id.*
[66] *Id.* at *2.
[67] *Id.* at *2.
[68] *Id.* at *8.

the mere fact that Owens Illinois said it would submit to the Spanish Court's jurisdiction did not create jurisdiction.[69] As a result, the court held there was no available alternative forum. Thus, the Plaintiffs had properly filed in Delaware.

Here, there is no evidence to support a finding that DuPont would be subject to jurisdiction and compulsory process in an Argentinian Court. DuPont is a Delaware Corporation. It did not concede, to the Court below, that it is subject to the Argentine court system, or that it would voluntarily submit to the Argentine jurisdiction. The Trial Court never made such a finding.

Indeed, the Trial Court inappropriately analyzed this important requirement by substituting DuPont for DASRL. The *Lluerma* court clearly intended for trial courts to determine whether the lawsuit against DuPont could maintained in another forum. Rather than engaging in that analysis, the Trial Court determined that Martinez's complaint against DuPont must be dismissed because she could file suit against *DASRL* in Argentina.[70] Whether Martinez could have sued DASRL in Argentina has no bearing on whether Delaware is an inconvenient forum in which DuPont to defend itself.

Clearly, the Trial Court's decision concerning available alternative forums was strongly influenced by its unfounded sentiment that Martinez sued the wrong party and its refusal to acknowledge that she could maintain a suit against DuPont. It was improper for the Trial Court to dismiss her claims against DuPont merely because she

[69] *Id.*
[70] Op. at p. 63.

could also sue DASRL in Argentina. Indeed, it was improper for the Trial Court to "compare Delaware, the Plaintiff's chosen forum, with an alternative forum, and decide which one was the more appropriate location for the dispute to proceed."[71]

3. The Trial Court Improperly Applied The *Cryo-Maid* Factors In Determining That DuPont Would Suffer Overwhelming Hardship In Having To Defend A Lawsuit In Its Home State. In *Ison*, this Court found that the Plaintiff's claims against DuPont should not be dismissed because it failed to prove overwhelming hardship under the *Cryo-Maid* factors. The Court distinguished between "simple hardships" and "overwhelming hardships" that invoked a Motion to Dismiss.[72] Unfortunately, the Trial Court failed to follow this Court's guidance and found "overwhelming hardships" when there were none, which precluded it from exercising jurisdiction over the matter. The Trial Court's holding is clearly erroneous. There is no way that DuPont, a multibillion dollar company, will suffer simple hardships from litigating a case in its own backyard.

DuPont Has Superior Access To Proof Than The Plaintiff. The *Ison* Court noted that Defendant would have difficulty accessing evidence from the Plaintiff's homelands in England, Wales and Scotland, and also accessing evidence in the United States which was not in their

[71] *Lluerma* at *9; *In Re Asbestos Litig. (Abou-Atoun)*, 929 A2d 373, 381 (Del. 2006); and *Mar-Land Indus. Contractors, Inc. v. Caribbean Petroleum Ref., LD,* 777 A.2d 774 (Del. 2001).
[72] Ison, 729 A.2d 843

possession or control.[73] Nevertheless, the Court held that "this factor does not present DuPont with overwhelming hardship."[74]

Likewise, in this case, DuPont does not face overwhelming hardship in accessing discovery from Argentina. There may be some hardship in that documents are in Spanish and some witnesses may not speak English. However, as the *Ison* Court, this is not an "overwhelming" hardship. Most of the factors, which apparently influenced the Trial Court, are applicable to both parties. Moreover, several of the hardships will exist regardless of where the lawsuit was filed. For example, the Trial Court declared that much of the evidence was in the possession of third parties.[75] The forum where the case is litigated does not change the fact that both Martinez and DuPont will have to obtain discovery from third parties.[76]

The Trial Court summarily dismissed Martinez's argument that several documents and witnesses will be located in Delaware. Indeed, on one hand, it acknowledged that the "burden is not on Plaintiff to identify any evidence in Delaware", but then criticized her for not identifying witnesses or documents.[77] The Trial Court's unwillingness to recognize the obvious demonstrates the uphill burden Martinez had to defeat DuPont's motion. The Trial Court refused to acknowledge that DuPont's corporate representatives and other witnesses are likely in Delaware. Documents concerning its relationship with DASRL are likely

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[73] *Id.* at 843.
[74] *Id.* at 843.
[75] Op. at pp. 65, 68.
[76] This Court can take judicial notice that Spanish is widely spoken here in Delaware. We are not dealing with an esoteric language such as Mongolian where there are few competent translators available.
[77] Op. at p. 65.

in Delaware. The Trial Court found it *impossible* to believe that there would be any witnesses in the United States.

The Trial Court also made troubling suppositions that DuPont would have a more difficult time obtaining documents from third parties or cooperation from co-workers and medical providers than Martinez.[78] First, there was no support for such a statement. How does the Trial Court or anyone know what level of cooperation either party will receive from third parties? Moreover, it is unclear as to what difference this perceived problem applies to DuPont's "hardship" for the purpose of *forum non conveniens*. If the case was filed in Argentina, it is difficult to imagine whether the level of cooperation DuPont receives from co-workers and medical providers would be enhanced or diminished.

The Trial Court further failed to recognize that each of the perceived hardships DuPont is expected to experience will also be experienced by Martinez. However, DuPont has far greater resources than the Plaintiff. Translating documents, interviewing and deposing Spanish speaking witnesses and seeking discovery from third parties is not the type of hardship contemplated by *Ison* or *Cryo-Maid* to preclude a Delaware court from exercising jurisdiction.

The Availability of Compulsory Process For Witnesses. Again, the Trial Court contends that DuPont will not likely receive the same cooperation from witnesses as Martinez.[79] However, it is entirely possible, if not probable, that DuPont will receive greater cooperation from witnesses than Martinez, particularly former DASRL

[78] Op. at p. 68.
[79] Op. at p. 68.

supervisors and foremen. It was simply inappropriate for the Trial Court to assume that DuPont will have a difficult time to obtain witness cooperation, without having any concrete proof to support such an allegation.

Moreover, the Trial Court failed to recognize that it has many tools available to prevent any unfair prejudice to DuPont. It could require Plaintiff to arrange for depositions of any witnesses it intended to use. It could threaten exclusion of witnesses if DuPont was not able to gain their cooperation prior to trial. The Trial Court has wide latitude to even the playing field if its assumptions turn out to be true. Nonetheless, a mere possibility that DuPont will not gain cooperation from witnesses fails to rise to the level of "overwhelming" hardship contemplated by *Ison* and *Cryo-Maid*.

The Trial Court Acknowledged That A Site Inspection Would Have Little Value To Both Parties. The Trial Court determined that the need for site inspections did not favor or hinder either party. It held that because the exposures occurred so many years ago, the Plant would not likely be in the same condition as it was when Rocha was exposed.[80] Nonetheless, DuPont is already intimately familiarity with the Berazategui Plant as it maintained personnel there for many years directing the use of asbestos. DuPont certainly has the resources to travel to the plant for an inspection, if necessary. It is difficult to imagine that it would suffer "overwhelming hardship" simply by having to travel to Argentina for a site inspection.

[80] Op. at pp. 72-73.

The Applicability of Delaware Law. Argentine law will apply to this case. While the Trial Court held this will impose some hardship on DuPont, it failed to explain how. The elements of proving negligence under Argentina law are straightforward and easy to apply. The Trial Court suggested that it was not equipped to interpret Argentine law, yet recognized that it is frequently called upon to interpret and apply Spanish laws.[81] It further recognized that DuPont is a global corporation that is accustomed to international litigation.[82] Yet, it still concluded that DuPont will suffer hardship from having to adjudicate this case under Argentine law. Importantly, the Trial Court did not conclude that it DuPont suffer "overwhelming" hardship.

Martinez Did Not File A Suit Against DASRL In Argentina. Once again, the Trial Court's decision was clouded by its personal preference that Martinez should have filed suit against DASRL in Argentina rather than against DuPont in Delaware. It is undisputed that Martinez did not file a claim in Argentina arising out of Rocha's asbestos exposure. Thus, this factor strongly favored not dismissing the claim.

However, the Trial Court engaged in a lengthy discussion as to Argentina law and the viability of claims against DASRL. Clearly, this discussion was misplaced. It is simply irrelevant as to whether Martinez could have maintained a suit against other defendants in Argentina. She did not file another lawsuit. There are no other

[81] Op. at p. 74.
[82] Op. at p. 74.

claims pending. She elected to pursue her right of recovery against DuPont in Delaware, where it is incorporated and headquartered. There certainly was no showing that DuPont suffered from "overwhelming hardship" because Martinez could have filed suit against a third party somewhere else.

4. Failure To Join DSLR Will Not Result in Overwhelming Hardship For Dupont, Nor is DASRL An Indispensable Party. The Trial Court concluded that DuPont would suffer "overwhelming hardship" in having to litigate this case in Delaware because DASRL is an indispensable party to this litigation. However, it made its determination solely on its erroneous belief that DuPont was the "wrong defendant" and DASRL was the correct defendant and indispensable party. This was an incorrect application of Superior Court Rule 19 (a). Delaware courts have defined indispensable parties as:

> [P]ersons who not only have an interest in the controversy but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.[83]

Critically, there is no Delaware case holding that an employer is an indispensable party under Rule 19 for the purposes of tort litigation. Indeed, Delaware does not require joint tortfeasors to be joined in a single unit. As the Superior Court reemphasized some six years ago in *Roberts v. Delmarva Power & Light Co.*, "[I]t is well settled law that joint tortfeasors are not necessary parties whose

[83] *Elster v. American Airlines*, 106 A.2d 202, 203-204 (Del.Ch. 1954), citing *Shields v. Barrow*, 58 U.S. 130, 139 (1954).

joinder is mandatory, but merely permissive parties."[84] The United States Supreme, in *Temple v. Synthes Corp* declared *per curium* that as the Advisory Committee on the Federal Rules of Civil Procedure noted, "a tortfeasor with the usual 'joint-and-several' liability is merely a permissive party an action against another with like liability."[85] It is well settled in other states that also have joint and several liability that joint tortfeasors are not considered indispensable.[86] The Trial Court ignored precedent from the U.S. Supreme Court, sister states, and Delaware settled tort case law, and said that DASRL was indispensable party. It simply is not, and its absence from this litigation does not constitute overwhelming hardship for Dupont.

Dupont essentially asserts that Rocha's death was the result the actions of DASRL and asserts a superseding cause and or sophisticated purchaser defense for cause of Mr. Rocha's death. The Trial Court agreed with this assertion, an assertion that was roundly rejected by earlier Delaware asbestos cases. In cases such as such as *Nutt v. A.C.&S*, C.A. No. 80C-FE-8; *Lee v. A.C.S.&S*, C.A. No. 79C-DE-125; and *Lowe v. Pittsburgh Corning Corp.*, C.A. NO. 86C-AU-70, such contentions were rejected.[87]

In Nutt v. GAF Corp., on the issue of superseding cause, "a defendant's liability depends on whether the subsequent negligence of

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[84] *Roberts v. Delmarva Power and Light Co.*, 2007 WL 2319761l, *10 (Del.Super. Aug. 6, 2007).
[85] *Temple v. Synthes Corp.*, 498 U.S. 5, 8, (1990).
[86] *See for example, Merritt v. Outdoor Advertising, Ltd*, 679 S.E.2d 97(Ga. 2009); *Matter of Johns-Mansville Corp*, 660 P.2d 271 (Wa. 1983).
[87] *Nutt v. A.C.&S*, C.A. No. 80C-FE-8, Order (Del.Super. Apr. 22, 1987); *Lee v. A.C.&S.*, C.A. No. 79C-DE-125 (Order) (Del.Super. March 6, 1987); and *Lowe v. Pittsburgh Corning Corp.*, C.A. NO. 86C-AU-70, Trial Transcript (Del.Super. June 25, 1990).

the third party should have been reasonably foreseen or reasonably anticipated by the initial tortfeasor. If the subsequent tortious conduct of the third party was reasonably foreseeable, the foreseeable conduct is not a superseding cause and the defendant is not relieved of liability."[88] Here, the actions of DASRL were clearly foreseeable on the part of the Dupont.[89] Similarly, in Neal v. Carey Canadian Mines, Ltd, the U.S. District Court found that Celetox could be found liable for damages the plaintiff suffered from exposure to asbestos, and that the failure of the plaintiff's employee, Philip Carey, to warn him of the dangers of asbestos were not a superseding cause of the plaintiff's injuries.[90]

Amazingly, the Trial Court recognized that the matter before it was no different than previous cases wherein this Court determined that the Plaintiff's chosen forum was appropriate:

> The Court is hard pressed to distinguish the circumstances here from those in cases like *Candlewood*, *In Re Asbestos* (*Abou-Antoun*), or others that have declined to find "overwhelming hardship." [The] manifest hardship to DuPont **because it should not have been named as a defendant in the first place.**[91]

CONCLUSION

Clearly, the Trial Court's decision was solely premised on its disdain that Martinez filed suit against DuPont in the first instance,

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[88] *Nutt v. GAF Corp,* 526 A.2d 564, 567 (1987).
[89] For cases involving allegations of Dupont's failure to warn its employees of the dangers of asbestos, see *Kofron v. Amoco Chemical Corp*, 441 A.2d 226 (Del. 1982); *Millison v. Dupont*, 501 A.2d 505 (N.J. 1989).
[90] *Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. 357 (E.D. Pa. 1982).
[91] Op., 81 (emphasis added).

which strongly influenced its penultimate conclusion that Martinez sued the wrong party. In order to justify that conclusion, it mischaracterized the substance and nature of the Plaintiff's claims against DuPont, which were entirely independent of any claims she could have asserted against DASRL. She did not sue DuPont as Rocha's employer and is not attempting to pierce the corporate veil. However, the Trial Court's whole opinion was based on these two incorrect assertions.

The Trial Court inexplicably refused to acknowledge that Martinez's Complaint stated a valid cause of action, pursuant to Argentina law, under the guise that no Argentine authority uses the exact terminology "Direct Participant" liability. It ignored the opinions of well-respected Argentine lawyers and legal scholars while accepting the opinion of a Miami law professor who has never practiced law in Argentina except for a brief period of time nearly thirty years ago. However, even DuPont's expert acknowledged that Martinez stated a valid claim under Argentine Civil Code 1109 and 1113.

The Trial Court's decision was clearly not based on Delaware or Argentine law, but rather was based on its obvious contempt for the Plaintiff's case:

> [T]he Court cannot ignore the fact that these cases have been filed in Delaware only through distortion and manipulation of the typical parent-subsidiary corporate relationship, and only because these Plaintiffs have made extraordinary efforts to attribute conduct and actions to the parent corporation that were strictly the acts of Argentine subsidiary.[92]

[92] Op. at p. 86.

This was a very bold statement especially given the stage of litigation. Martinez made numerous allegations in her complaint asserting claims for conduct directly attributable to DuPont, which, on their face, were viable claims according to DuPont's expert. Yet, the Trial Court made a broad sweeping conclusion that Martinez was distorting and manipulating DuPont's relationship with DASRL by seeking to attribute DASRL conduct to DuPont. It made factual findings even though no discovery had taken place and no evidence was in the record to support such a finding.

The Trial Court's opinion demonstrated a fundamental lack of recognition that multiple parties can be responsible for causing a single injury. Martinez was free to seek relief from whomever she wished, including DuPont. It is not the Trial Court's function to determine who would have been the best party to sue, or which jurisdiction would have been the wiser choice. Its sole responsibility is to determine whether the claim was viable and whether DuPont would suffer any hardship in having to defend itself in Delaware. It failed its responsibility by ignoring binding precedent from this Court.[93]

In view of the above, Plaintiff Martinez respectfully requests that this Honorable Court reverse the decision of the lower Court below to grant the Motion to Dismiss and remand the case so that full discovery can take place.

[93] *Ison, supra.*

Respectfully submitted,

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