

IN THE SUPERIOR COURT OF PENNSYLVANIA

JOANNE BRANHAM, Individually and as
the Administratrix of the Estate of
FRANKLIN DELANO BRANHAM,

Plaintiff-Appellee,

v.

ROHM AND HAAS COMPANY, et al.,

Defendants

Appeal of:

THE DOW CHEMICAL COMPANY

Appeal Docket No. 1161 EDA 2010

**APPLICATION OF APPELLANT NON-PARTY THE DOW CHEMICAL COMPANY
FOR URGENT EMERGENCY RELIEF STAYING THE TRIAL COURT'S APRIL 26,
2010 ORDER COMPELLING TRIAL DEPOSITION TESTIMONY**

This application for urgent, expedited relief is filed in connection with an appeal taken by The Dow Chemical Company ("TDCC") from a collateral order dated April 26, 2010 in a case in which TDCC is not a party. (The trial court's April 26, 2010 Order is attached hereto as Exhibit A). TDCC is a Delaware Corporation with its principal place of business in Michigan. Pursuant to the April 26th Order, TDCC is required to produce in Pennsylvania a corporate representative for a trial deposition within fifteen days. The deposition is to provide what the Michigan Court of Appeals has already held would be improper compelled expert testimony. TDCC, as a foreign corporation doing business within the Commonwealth, is not subject to a Pennsylvania subpoena seeking its testimony for a trial in which it is not a party. In light of the immediacy of the trial court's Order, and the substantial impracticability of obtaining relief in the trial court before the time TDCC would be required to comply with that Order, TDCC seeks

urgent relief from the Superior Court staying the trial court's April 26th Order pursuant to Rules 123 and 1732(b) of the Rules of Appellate Procedure until such time as this appeal has been resolved.¹ In support of this application TDCC states:

PROCEDURAL HISTORY

1. On March 3, 2010, plaintiff served on TDCC's statutory agent in Pennsylvania a "trial deposition" subpoena purporting to compel TDCC to produce in Philadelphia a witness to give a videotaped deposition for use at the trial in this case on seven subjects concerning more than thirty years of scientific studies and data.

2. On March 26, TDCC moved to quash the subpoena and argued, *inter alia*, (1) that the Pennsylvania subpoena is procedurally defective on a number of grounds including that non-party TDCC, a Delaware corporation with its principal place of business in Michigan, is beyond the subpoena power of the trial court, (2) that the proper procedure to obtain deposition testimony of a TDCC corporate designee who is beyond the subpoena powers of the Pennsylvania trial court is to follow the out-of-state commission process set forth in 42 Pa. C.S.A. § 5325 for issuance of a subpoena in Michigan; (3) that the Pennsylvania subpoena disregards a prior ruling against plaintiff by a Michigan state court quashing a nearly identical subpoena on the basis that the subpoena called for improper and impermissible expert testimony – the subpoena in Michigan was issued pursuant to the 42 Pa. C.S.A. § 5325 commission process; (4) that the Pennsylvania subpoena imposes an unreasonable burden on TDCC; and (5)

¹ TDCC has simultaneously filed in the trial court a motion for reconsideration or in the alternative a motion to stay the proceedings while TDCC pursues its appellate rights, and has requested that motion be heard on an expedited basis. Because TDCC believes that it is likely that its motion may not be heard in the trial court before the time it is obligated to provide testimony pursuant to the Order at issue in this appeal, TDCC also seeks expedited relief from the Superior Court. TDCC will immediately inform the Superior Court should the trial court act before the Superior Court's ruling on this application.

that the Pennsylvania subpoena calls for the production of sensitive and confidential medical information related to patient participants in the studies at issue in the subpoena. (TDCC's Motion to Quash is attached hereto as Exhibit B).

3. Plaintiff filed a response on April 15, 2010 and argued, *inter alia*, that because TDCC maintains a "vast corporate presence" in Pennsylvania, it may be treated as a resident of Pennsylvania and therefore is subject to the trial court's subpoena powers. (Plaintiff's Response to Motion to Quash is attached hereto as Exhibit C).

4. TDCC filed a Reply Memorandum on April 22, 2010 pointing out various deficiencies in plaintiff's response, including, *inter alia*, substantial authority demonstrating that a foreign corporation such as TDCC is not a "resident" of Pennsylvania merely because it transacts business within the Commonwealth. TDCC explained that plaintiff improperly conflated two entirely distinct jurisdictional concepts – (a) the standard for personal jurisdiction over a foreign corporation sued in Pennsylvania and doing business here and (b) the statutory authority of a Pennsylvania court to issue a subpoena to a foreign corporation doing business here which is not a party in the action in Pennsylvania. (TDCC's Reply is attached hereto as Exhibit D).

5. Without hearing argument on TDCC's Motion to Quash, the trial court issued an Order denying the Motion on April 26, 2010.

6. TDCC filed its Notice of Appeal with the trial court on April 29, 2010, along with a motion for reconsideration and a request for stay pending the outcome of TDCC's appeal. (TDCC's Notice of Appeal is attached hereto as Exhibit E). That motion remains pending, however TDCC is pursuing this application because it believes that the trial court may not

address its request for a stay before TDCC's scheduled trial deposition. TDCC seeks a stay to maintain the status quo pending appeal.

BASIS FOR STAY

7. A stay pending appeal is warranted where: (a) "[t]he petitioner makes a strong showing that he is likely to prevail on the merits"; (b) "[t]he petitioner has shown that without the requested relief, he will suffer irreparable injury"; (c) "[t]he issuance of a stay will not substantially harm other interested parties in the proceedings"; and (d) "[t]he issuance of a stay will not adversely affect the public interest." Pa. Pub. Utility Comm'n v. Process Gas Consumers Group, 502 Pa. 545, 552-53, 467 A.2d 805, 808-09 (1983) (citing Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921 (D.C. Cir. 1958)). No one factor is dispositive. Id. at 553, 467 A.2d at 809 (citing Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977)); see also Darlington, et al. PENNSYLVANIA APPELLATE PRACTICE, § 1732.6 ("In essence, Process Gas requires that a court balance the equities without necessarily giving any one element more weight than another"). All of these factors weigh in favor of a stay here.

TDCC Is Likely To Prevail On The Merits

8. In issuing its Findings and Order on April 26, 2010, the trial court ruled that "[TDCC's] argument that it is not subject to the Subpoena power of the Court is misplaced as it clearly is a corporate resident of this County *as it succeeded to the prominent corporate presence of Rohm and Haas* which had been acquired by [TDCC]." Ex. A at p. 1 (emphasis added). The trial court's conclusion appears to be premised on (1) a disregard of the separate corporate structure of TDCC and Rohm and Haas, and (2) a misapplication of clear precedent which provides that a corporation is a resident of the state of its incorporation and no other. Each point is addressed below.

9. The trial court had no basis to disregard the separate corporate forms of TDCC and Rohm and Haas.

a. Plaintiff's opposition to TDCC's motion to quash below did not advocate, much less establish, that the trial court could disregard the separate legal status of TDCC as a parent corporation to Rohm and Haas, a separately organized subsidiary corporation. Nevertheless the trial court held that TDCC "succeeded" to the status of Rohm and Haas as a "corporate resident" of Pennsylvania. Given that no facts or legal arguments were presented related to piercing the corporate veil, or any other theory under which the trial court could have concluded that Rohm and Haas and TDCC are one and the same for purposes corporate residency, the trial court committed clear error in denying the Motion to Quash based on its finding that TDCC "succeeded" to the "corporate residence" of Rohm and Haas.

b. "[T]here is a strong presumption in Pennsylvania against piercing the corporate veil." Lumax Industries, Inc. v. Aultman, 543 Pa. 38, 41-42, 669 A.2d 893, 895 (1995). "Any court must start from the general rule that the corporate entity should be recognized and upheld, unless specific, unusual circumstances call for an exception... . Care should be taken on all occasions to avoid making the entire theory of the corporate entity ... useless." Id., quoting Zubik v. Zubik, 384 F.2d 267, 273 (3rd Cir. 1967) (ellipses in original). The corporate form "will be disregarded only when the entity is used to defeat public convenience, justify wrong, protect fraud or defend crime." First Realvest, Inc. v. Avery Builders, Inc., 410 Pa. Super. 572, 577, 600 A.2d 601, 604 (1991), quoting Sams v. Redevelopment Authority, 431 Pa. 240, 244, 244 A.2d 779, 781 (1968). In Lumax the Pennsylvania Supreme Court identified four factors that guide the analysis of when piercing the corporate veil is appropriate: (1) undercapitalization; (2) failure to adhere to corporate

formalities; (3) substantial intermingling of corporate and personal affairs; and (4) use of the corporate form to perpetrate a fraud. 543 Pa. at 42, 669 A.2d at 895. Where plaintiffs have sought to pierce the corporate veil between a parent and a wholly-owned subsidiary, courts have required that a plaintiff allege facts establishing that the parent “dominates a subsidiary corporation to the degree that it is a mere instrumentality of same corporation,” in addition to establishing the four Lumax factors. Saint Joseph Hosp. v. Berks Cty. Bd. of Assessment Appeals, 709 A.2d 928, 936-37 (Pa. Commw. 1998); In re Thorotrast Cases, 26 Phila. Co. Rptr. 479, 490 (C.C.P. Phila. Cty. 1994).

c. None of the factors identified above were argued, let alone established, by the plaintiff in her opposition to TDCC’s motion to quash. The trial court’s conclusion that Rohm and Haas’s corporate residence is transferable to TDCC solely because it is Rohm and Haas’s corporate parent, is not supported by any facts and is contrary to black letter principles of corporate law.

10. The trial court failed to recognize that corporate presence does not establish corporate residence:

a. Pa. R.C.P. 234.2 provides that a subpoena “may be served upon any person within the Commonwealth by an adult....” Similarly, 42 Pa. C.S.A. provides that all county courts in Pennsylvania shall have *statewide* subpoena power: “[e]very court of record shall have power in any civil or criminal matter to issue subpoenas to testify...into any county of this Commonwealth....” The plain language of these rules and provisions limit a Pennsylvania Court’s subpoena power to witnesses *within the Commonwealth*. A corporation is not “within the commonwealth” unless it has corporate residence or domicile in Pennsylvania.

b. In holding that TDCC is subject to plaintiff's subpoena, the trial court conflated two entirely distinct jurisdictional concepts: general personal jurisdiction, and the statutory authority of a court to issue subpoenas. The trial court was apparently swayed by TDCC's contacts with Pennsylvania and did not analyze, as it should have, whether TDCC is a Pennsylvania "corporate resident" for purposes of being subject to a subpoena served within the Commonwealth.

c. Pennsylvania law is well settled that a corporation is a resident *exclusively* of its state of incorporation, and no amount of business conducted within Pennsylvania can make it a resident. See Commw. v. Mundy Corp., 346 Pa. 482, 484, 30 A.2d 878, 880 (1943) ("A corporation's domicile is the state of its incorporation"). That has long been the rule in Pennsylvania. Wheedon v. The Camden and Amboy RR Co., 1856 WL 6998, at *2 (Pa. 1856) ("the defendant being a corporation created by the Legislature of New Jersey, and having no vitality or existence save such as is derived from that source, *cannot be, whatever their business transactions in this State, a citizen of Pennsylvania*, in any sense of either the Constitution or the Judiciary Act") (emphasis added); see also Pennsylvania Ins. Guaranty Ass'n v. Charter Abstract Corp., 790 F. Supp. 82, 85 (E.D. Pa. 1992) ("It is the settled rule that, insofar as a corporation can be considered a resident of a state, it is a resident of the state in which it is incorporated, and no other," citations omitted); Philadelphia Housing Authority v. Am. Radiator & Standard Sanitary Corp., 291 F. Supp. 252, 255 (E.D. Pa. 1968) ("A corporation is an inhabitant of the State in which it is incorporated"); Barrett v. Nat'l Malleable & Steel Castings, 68 F. Supp. 410, 414 (W.D. Pa. 1946) ("It is a well settled rule of law that a corporation is a resident and inhabitant of the state under which it was incorporated"); 17 Fletcher Cyclopedia of the Law of Corporations § 8300 (Apr. 2010 Update) ("insofar as a corporation can be regarded as a citizen,

resident or inhabitant of any state or country, it is exclusively a citizen, resident or inhabitant of the state or country under the laws of which it was created, even though it may be engaged in business and have an office in another country or state.”), *id.* at ch. 8 § 4025 (the “legal existence, the home, the domicile, the habitat, the residence, and the citizenship of the corporation is generally deemed to be the state it which it was created” or “the state of its principal place of business” . . . “notwithstanding that it may lawfully do business in other states”).

d. In light of the unequivocal authority establishing that a corporation is a resident *exclusively* of its state of incorporation, and where it is uncontested that TDCC is incorporated in Delaware with corporate headquarters in Michigan, the trial court erred in finding that TDCC, a non-party, is subject to plaintiff’s subpoena as a “corporate resident” of Pennsylvania.

11. The trial court’s finding that TDCC is subject to a Pennsylvania subpoena is by itself reversible error. However, the trial court failed to recognize additional infirmities, procedural and substantive, with the subpoena TDCC sought to quash, which provide additional independently sufficient grounds for a reversal by the Superior Court. The trial court erred by: (1) allowing plaintiff to end-run around the prior ruling by a Michigan state court expressly prohibiting plaintiff from obtaining the very testimony her subpoena compels; (2) disregarding the unreasonable burden imposed on TDCC, a non-party to the litigation, to comply with a subpoena that essentially seeks to compel expert testimony; and (3) disregarding that the subpoena raises substantial concerns regarding the privacy of study participants and may result in the disclosure of confidential employment and medical records.

12. Comity principles advise against the trial court undercutting the ruling of the Michigan Court of Appeals on the same issues.

a. A Michigan state court has *already held* that the scope of and the nature of the information Plaintiff here seeks to compel TDCC to produce as “trial testimony” is expert testimony, which may not be properly compelled pursuant to subpoena. Branham v. Rohm and Haas, 2010 WL 935650 at *4 (Mich. Ct. App. March 16, 2010). The trial court erred by failing to observe basic principles of comity and *res judicata* in its refusal to give preclusive effect to the prior holding of the Michigan Court of Appeals on the same issue. See Smith v. Firemens Ins. Co. of Newark, 404 Pa. Super. 93, 99, 590 A.2d 24, 27 (1991) (“[c]omity is the principle that courts of one state or jurisdiction will give effect to laws and judicial decisions of another state . . .”).

13. The trial court’s order compels TDCC to provide expert testimony and imposes an unreasonable burden.

a. The seven areas of inquiry in plaintiff’s subpoena relate to complex scientific research into carcinogenicity and are inherently expert in nature, as the Michigan Court of Appeals recently held. Branham v. Rohm and Haas, 2010 WL 935650 at *4. Pennsylvania law clearly provides that attempts to compel a witness to provide expert testimony are inappropriate, and impermissible. See Graham v. I.M.O. Industries, Inc., 16 Pa. D. & C.4th 492, 503 (C.C.P. Allegn. Cty. 1992) (Wettick, J.) (witness “should not be compelled to provide expert testimony under policy that protects persons from giving expert testimony in private litigation when they had no involvement in the matter”). That has long been the rule in Pennsylvania. See Pennsylvania Co. for Insurances on Lives Granting Annuities v. Philadelphia, 262 Pa. 439, 442, 105 A. 630 (1918) (“the private litigant has no more right to compel a citizen to give the product

of his brain than he has to compel the giving up of material things”); see also Dolan v. Fissell, 973 A.2d 1009, 1013 (Pa. Super. 2009) (“The idea that an expert cannot be compelled to give up the product of his or her brain has been sustained throughout the years, in a variety of circumstances”); Jastarri v. Nappi, 549 A.2d 210, 218 (Pa. Super. 1988) (same).

b. TDCC certified to the trial court in affidavits, which the trial court’s Order does not mention, that there currently exists no TDCC employees who have knowledge of all the epidemiology studies referenced in plaintiff’s subpoena. The studies referenced in the subpoena were conducted over a nearly 30-year period beginning in the 1970’s. In light of the enormity of the data involved, it is manifestly unreasonable to require TDCC to locate, educate and produce a witness competent to testify on the history of TDCC’s scientific contributions to vinyl chloride epidemiology and to respond to plaintiff’s unfounded assertions that TDCC “manipulated the data and lied to Dr. Mundt [one of the epidemiology researchers]” and otherwise engaged in “manipulation and scientific fraud” with respect to the Mundt study. (Ex. C at 10).

14. The subpoena seeks to compel the disclosure of potentially confidential employee records and health information.

a. The epidemiology studies at issue in the subpoena involve numerous study participants who were required to provide vital personal information to the researcher, which allowed the researcher to obtain health related information from various governmental sources. Those sources require researchers to keep and maintain the confidentiality of health-related information as a condition of accessing the information, and prohibit researchers from identifying particular workers or disclosing which workers developed particular health effects in reporting the results of their research. 42 U.S.C. 242m (d). The subpoena also calls for TDCC to seek and disclose health information about its present and former employees, potentially

running afoul of the Health Insurance Portability and Accountability Act of 1996, as amended, 42 U.S.C. § 1320d. The trial court erred by failing to protect the sensitive and confidential information plaintiff's subpoena compels TDCC to disclose.

Without A Stay TDCC Will Suffer Irreparable Injury

15. Plaintiff seeks to take expert testimony from TDCC, and will do so in short order unless the Superior Court issues a stay. If plaintiff is allowed to proceed, plaintiff will obtain access to information to which she is not entitled, and there will be no way to turn back the clock if the trial court's order is later reversed on appeal. Plaintiff has stated in her briefing below that she "intends on educating the jury that Dow and other chemical companies manipulated the data and lied to Dr. Mundt in order to undercut his conclusions and cover up the fact that vinyl chloride was causing cancer in the workers at their vinyl chloride plants." (Ex. C, Opposition Memorandum at 10). Without a stay TDCC will be forced to participate in litigation in which it is not a party, but where it nevertheless will have to defend itself against plaintiff's groundless accusations.

A Stay Will Not Prejudice Plaintiff Nor Will It Harm The Public Interest

16. A stay will not prejudice plaintiff. If the Superior Court finds that the trial court should have quashed plaintiff's subpoena, then her position in the underlying litigation will remain unchanged. If the Superior Court ultimately upholds the trial court's order, plaintiff could take TDCC's testimony at that time. TDCC is requesting expedited review of its appeal. Given that the trial in Branham is not scheduled to begin until June 7, 2010 and is expected to last at least 35-40 days according to the Pretrial Order, the issue could be resolved by the Superior Court before the conclusion of plaintiff's case. (Pretrial Order attached hereto as Exhibit F). If a trial deposition of TDCC was then needed, plaintiff could complete the

