NO. 81764

IN THE SUPREME COURT OF NEVADA

JOHN BORGER and SHERRI BORGER
Appellants

v.

POLARIS INDUSTRIES, INC.
Respondent

v.

SANDBAR POWERSPORTS, LLC, DOES I through X;
and ROE CORPORATIONS XI through XX, inclusive
Defendants

On Appeal from the Eighth Judicial District
Clark County, Nevada, Dept. No. XXV
No. A-17-751896-C

APPELLANTS' REPLY BRIEF

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INTRODUCTION

The Borgers file this Reply to highlight the contradictions throughout Polaris' response. As Polaris noted in its brief, "[s]ometimes plaintiffs file suit in a forum that is not convenient for the other party and the court." (Br. 7). But that is not what happened here. The Borgers filed suit in a forum that was perfectly appropriate for their claims. Instead, Polaris convinced the District Court to upend the lawsuit shortly before trial due to the routine settlement of a forum co-defendant. This highly unorthodox situation is fraught with abuse and risks substantial danger to the settlement process in multiparty suits. Yet Polaris largely ignores the highly unorthodox nature of its motion. Though it can provide no factually similar cases, Polaris claims a nearly unfettered right to challenge the forum at any time. Yet as shown below, the arguments and authority on which Polaris relies only underscore the prejudicial, inefficient, and inconvenient nature of this dismissal.

ARGUMENT

I. Polaris Ignores the Effect of this Suit's Long Duration on the Private and Public Interest Factors.

There is no dispute that litigation in the Borger's case progressed significantly. "Once the litigation has progressed significantly…a different factor enters into the equation." *Lony v. E.I. Du Pont de Nemours & Co.,* 935 F.2d

604, 614 (3d Cir. 1991). Thus, "[i]f extensive discovery on the merits has taken place *or* if the court has expended significant resources on the case, considerations of judicial economy weigh in favor of retaining the action." *Baypack Fisheries, L.L.C. v. Nelbro Packing Co.,* 992 P.2d 1116, 1119 (Alaska 1999), *quoting* 17 James Wm. Moore et al., Moore's Federal Practice ¶ 111.90, at 111–245 to 111–246 (emphasis added). As the *Lony* court noted, "[t]his consideration goes to both private concerns, because of the parties' investment in time and money in discovery, and public ones, because the district court and court personnel already have expended resources in connection with this litigation." *Lony*, 935 F.2d at 614.

Here, it is undisputed that the district court and court personnel have expended significant resources. This case has involved a discovery extension and multiple disputes between the parties, including litigation over Polaris' objections before the Discovery Commissioner. (App. 12). Over those two years, Plaintiffs have likewise expended substantial resources. At the time the District Court heard Polaris' motion, the Borgers were 70 days away from their May 2019 trial date. (App. 183; App. 281). By that point, they had engaged in substantial preparation for that trial. As such, the *forum non conveniens* motion should have been treated with disfavor since the Borgers have "waste[d] resources on discovery and trial preparation in a forum that will later decline

to exercise its jurisdiction over the case." *Lony v. E.I. Du Pont de Nemours & Co.,* 935 F.2d 604, 614 (3d Cir. 1991).

II. Polaris Cannot Establish that its Motion was Timely under the Circumstances.

Polaris believes it may bring a *forum non conveniens* motion at any time because "[t]he statute does not set a time limit" and because timeliness "is not listed as a 'factor to be considered' under Nevada's cases." (Br. 23). Yet Polaris ignores that timeliness affects the private interest factors which the Court must consider. For this reason, "[w]hile reviewing these private interest factors, the court should also consider whether the defendant's motion to dismiss was filed in a timely manner." *Baumgart v. Fairchild Aircraft Corp.,* 981 F.2d 824, 836 (5th Cir. 1993). Courts agree that "delay in bringing a *forum non conveniens* motion is a factor to be considered in the Court's evaluation of whether the forum was convenient." *Genpharm Inc. v. Pliva-Lachema a.s.,* 361 F. Supp. 2d 49, 59 (E.D.N.Y. 2005); *see also Viscofan USA, Inc. v. Flint Group*, 08-CV-2066, 2009 WL 1285529, at *7 (C.D. Ill. May 7, 2009) ("Courts can consider a defendant's delay in filing a motion to dismiss on the basis of *forum non conveniens* as one of the relevant factors when considering the motion.").

Polaris relies on rare cases in which dismissals were granted years into the litigation, but Polaris obscures the reasons for these rulings. For instance, Polaris relies on *Aldana v. Del Monte Fresh Produce N.A., Inc.*, 578 F.3d 1283, 1296-97 (11th Cir. 2009), trumpeting it as a case in which dismissal was granted after six years of litigation. Yet in that case, the defendants brought a *forum non conveniens* motion in the preliminary stages of a federal lawsuit suit, but that lawsuit was instead dismissed for merits reasons. *Id.* at 1287. While that dismissal was on appeal, the plaintiffs brought an identical state court suit in which *forum non conveniens* was also challenged as a preliminary motion, and it was granted by the court. *Id.* at 1287. However, in the federal case, the Eleventh Circuit eventually reversed the earlier merits dismissal. *Id.* "After the case was remanded to the district court, the appellees again moved to dismiss on *forum non conveniens* grounds." *Id.* Under those circumstances, in which *forum non conveniens* had been raised since the start of the case, the motion was clearly timely.

One commonality to the cases cited by Polaris is a defendant who consistently objected to *forum non conveniens* at the earliest opportunity. For example, in *Empresa Lineas Maritimas Argentinas, S.A. v. Schichau–Unterweser, A.G.*, 955 F.2d 368 (5th Cir. 1992), the court granted a dismissal after years of litigation. Yet it did so because it was revisiting a *forum non conveniens* motion

filed in the first year of suit. *Id.* at 371. In nearly all of these cases, the defendant brought a *forum non conveniens* objection at a preliminary stage in the litigation, but for various procedural or substantive reasons, the forum issue did not become sufficiently developed until a late stage of the case.

There is no defined time limit for *forum non conveniens* motions because there are occasions in which the earliest possible opportunity for such a motion may arrive late in the case. But it remains imperative that "[s]election of a forum in which to resolve a legal dispute should be made at the earliest possible opportunity in order to economize on the resources, both public and private, consumed in dispute resolution." *Cabinetree of Wisconsin Inc. v. Kraftmaid Cabinetry, Inc.,* 50 F.3d 388, 391 (7th Cir. 1995). Here, Polaris' motion was not brought at the earliest possible opportunity.

Under this scenario, it is proper to deny the motion when "a defendant files a *forum non conveniens* objection for the first time after the defendant has answered, deposed witnesses, and caused the plaintiff to incur expense in preparing for trial." *Lugones v. Sandals Resorts, Inc.,* 875 F. Supp. 821, 823 (S.D. Fla. 1995). As the court in *Bryant* explained, "the purpose of the doctrine is to *limit* the burden of the forum, not multiply the burden of having to re-start litigation in a foreign forum" or to "divide claims." *Bryant v. Mattel, Inc.,* CV 04-9049 DOC RNBX, 2010 WL 3705668, at *19 (C.D. Cal. Aug. 2, 2010), quoting

Zelinski v. Columbia 300, Inc., 335 F.3d 633, 643 (7th Cir. 2003). Yet that is precisely what Polaris wants this Court to do. Affirming the District Court's order will cause lawsuits to be tried piecemeal in different forums upon settlements, and it will lead to a variety of pernicious effects. Defendants will be incentivized to withhold discovery and grind the litigation to a halt if they believe a settlement with a co-defendant could be in the works. Likewise, Plaintiffs will be incentivized to withhold settlements until the very eve of trial, burdening Nevada defendants who would otherwise be released from litigation.

Importantly, Polaris never accounts for the unorthodox situation presented by this case. Polaris has been unable to provide a case which looks anything like this lawsuit, in which a defendant waited until the routine settlement of a forum co-defendant to raise a *forum non conveniens* objection. None of the cases cited by Polaris are factually similar in any way. The only factually similar case presented to this court was the Borger's citation to *Fessler v. Watchtower Bible and Tract Society of New York, Inc*., 131 A.3d 44, 47 (Pa.Super. 2015), in which the court rejected a *forum non conveniens* motion after the settlement of a co-defendant when there was no reason to believe the Plaintiff had selected the forum in bad faith. While *Fessler* addresses a *forum non conveniens* motion within the state, there is nothing about the principles it

applied or the authority it cited which is unique to in-state *forum non conveniens* motions, and nothing that would exclude *forum non conveniens* motions involving forums in different states or countries. Its logic is sound in finding the tactic defective.

III. Polaris' Arguments Relating to Inconvenience and Access to Proof have been Mooted.

Polaris' brief shows the problems with its arguments relating to access to proof and witness inconvenience. First, as the Alaska Supreme Court noted, an extended period of litigation moots a defendant's *forum non conveniens* argument:

> Most importantly, by the time the superior court dismissed the case for *forum non conveniens*, the question as to whether Alaska was a "seriously inconvenient forum" was largely a moot issue. At that point, the parties had already invested significant time and resources litigating the case in the Alaska forum.

Baypack Fisheries, L.L.C., 992 P.2d at 1120. Citing the Seventh Circuit, a California federal court made the same point, noting "[t]he fact that a party has been subject to ongoing litigation is itself evidence that the forum was 'if not convenient[,] at least workable' for the foreign defendant." *Bryant,* 2010 WL 3705668 at *19, *quoting Zelinski v. Columbia 300, Inc.,* 335 F.3d 633, 643 (7th Cir. 2003). Polaris ignored these issues, instead claiming an unfettered right to challenge the forum at virtually any time.

In the *Baypack* case, the Alaska Supreme Court further explained why discovery of non-party witness testimony similar moots arguments relating to access to proof:

> The factor relating to ease of access to proof had been largely mooted, because most of the evidence that would be relied upon at trial had already been obtained by discovery. The same is true regarding the availability and cost of obtaining witnesses. If non-party witnesses residing outside the state refuse to attend the trial, their depositions may be used.

Baypack Fisheries, L.L.C., 992 P.2d at 1119–20. Polaris' brief leaves these issues unaddressed, but the discovery it conducted and the extended period of litigation in the forum undermines the basis for its motion.

IV. Polaris Suffers from a Lack of Required Evidence.

Polaris concedes there is no evidence supporting any inconvenience to any third-party witnesses, such as Sandbar's owners, Sandbar's employees, and first responders. The Nevada Supreme Court has made clear that "a motion for change of venue based on *forum non conveniens* must be supported by affidavits so that the district court can assess whether there are any factors present that would establish such exceptional circumstances." *Mountain View Rec. v. Imperial Commercial,* 129 Nev. 413, 419, 305 P.3d 881, 885 (2013).

Polaris acknowledges that it only provided an affidavit from its corporate representative, and it also acknowledges that "the convenience to a party is not

relevant." (Br. 27). Yet it claims no other evidence was required because "the District Court had all the facts it needed to decide the motion." (*Id.*). It is unclear what facts in the record Polaris relies on for that statement, since much like in *Mountain View,* "[t]he record is devoid of affidavits from either percipient or expert witnesses or other evidence to demonstrate how the witnesses would be inconvenienced." *Mountain View Rec.,* 129 Nev. at 419. Polaris appears to rely on general allegations of inconvenience, but "[g]eneral allegations regarding inconvenience or hardship are insufficient because '[a] specific factual showing must be made.'" *Id.,* quoting *Eaton v. Second Judicial Dist. Court*, 96 Nev. 773, 774–75, 616 P.2d 400, 401 (1980).

Lacking any evidence, Polaris instead argues that the absence of compulsory process over out-of-state witnesses establishes the necessary inconvenience, but if that were true, it would be impossible to prevail on any *forum non conveniens* motion involving out-of-state witnesses. Instead, the mere possibility of an unwilling witness is not enough. The factor is neutral when "neither Plaintiffs nor Defendants identify specific unwilling witnesses by name." *Leighty v. Stone Truck Line Inc.,* 3:19-CV-2615-L, 2020 WL 85152, at *2 (N.D. Tex. Jan. 6, 2020); *see also Pinnacle Label, Inc. v. Spinnaker Coating, LLC,* 2009 WL 3805798, at *10 (N.D. Tex. Nov. 12, 2009) (Fitzwater, C.J.) (concluding this factor is neutral when movant "does not identify in its motion,

however, any non-party witnesses who are unwilling to testify without being subpoenaed."); *Ternium Int'l U.S.A. Corp. v. Consol. Sys., Inc.,* 2009 WL 464953, at *3 (N.D. Tex. Mar. 25, 2009) (noting that "consideration must be given to the availability of compulsory process for unwilling witnesses" and finding the factor neutral when movant "has not identified any witnesses that are unwilling to testify."); *J2 Glob. Communications, Inc. v. Protus IP Sols., Inc.,* CIV.A. 6:08-CV-211, 2008 WL 5378010, at *3 (E.D. Tex. Dec. 23, 2008) ("Defendants have not demonstrated any need for compulsory process in California to secure witnesses, so the second factor weighs against transfer."); *Weimer v. Gen. Motors LLC,* 4:16-CV-02023-AGF, 2017 WL 3458370, at *5 (E.D. Mo. Aug. 11, 2017) ("Although GM LLC has argued in its motion that relevant non-party witnesses likely reside in the Northern District of Texas and would be inconvenienced if this action were maintained in the Eastern District of Missouri, GM LLC has not submitted any evidence to identify even a single one of these witnesses."); *Maritz Inc. v. C/Base, Inc.*, No. 4:06-CV-761 CAS, 2007 WL 6893019, at *12 (E.D. Mo. Feb. 7, 2007) (noting "[t]here is no indication who the potentially unwilling witnesses are, or whether they could be made available by deposition," and denying motion when movant "made no showing that any particular witness or essential witness will refuse to come to Missouri voluntarily, making compulsory process necessary"). Likewise, Nevada cases

distinguish between unwilling and willing witnesses, noting that "additional factors include the availability of compulsory process for *unwilling* witnesses, [and] the cost of obtaining testimony from *willing* witnesses." *Eaton,* 96 Nev. at 774 (emphasis added). Polaris has not made any showing with respect to unwilling witnesses nor any costs for obtaining willing witnesses.

Not only has Polaris failed to identify any witnesses who will suffer inconvenience or who are unwilling to testify, but the circumstances of these witnesses further weaken Polaris' position. With respect to witnesses employed by Sandbar, Polaris has already taken their depositions, and even if Polaris desired to call them at trial, there is no evidence in the record showing that Sandbar witnesses are unwilling to testify. Nor can this Court conclude, in the absence of any evidence, that a Nevada corporation will find it inconvenient to produce witnesses for a Nevada trial. With respect to the first responders, there is no evidence they are unwilling to testify or would suffer inconvenience. Nor does Polaris address the convenience of the medical witnesses residing in Nevada who will provide the most crucial testimony regarding Ms. Borger's treatment. As opposed to the Arizona first responders, who merely stabilized Ms. Borger's condition, the Nevada health care providers have far greater knowledge about Ms. Borger's injuries, treatment, and long-term prognosis.

Based on this lack of evidence, this Court cannot conclude there is any inconvenience supporting transfer.

CONCLUSION

The District Court erred because the record did not show "exceptional circumstances strongly supporting another forum." *Mountain View,* 129 Nev. At 413. Moreover, Polaris' untimely motion should have been treated with disfavor, as it aggravated the inefficiencies that a *forum non conveniens* motion is designed to prevent. Granting *forum non conveniens* motions in the late stages of a lawsuit is a rare exception dictated by the specific circumstances of the case. It should not be a routine option open to defendants in the wake of pre-trial settlements, especially when substantial resources have been expended in the case in the original forum. Such transfers result in piecemeal litigation and divided claims, which the doctrine expressly seeks to avoid. The Borgers therefore pray this Court reverses that dismissal.

DATED this 13th day of April, 2021

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ATTORNEY CERTIFICATE

Pursuant to NRAP 28.2, undersigned counsel certifies that:

1. This Reply Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Cambria in size 14-point font.

2. I further certify that this Reply Brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 2,692 words.

3. Finally, I certify that I have read this Reply Brief and, to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Reply Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion regarding matters in the record to be supported by a reference to the page of the record on appeal where the matter relied upon is to be found.

I understand that I may be subject to sanctions in the event that the accompanying Reply Brief is not in compliance.

DATED this 13th day of April, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2021, a copy of Appellants Reply Brief was served via electronic service by way of the Nevada Courts E-Filing Portal, as follows:

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