

MULTI-VENUE CONSOLIDATION IN OHIO MASS TORT ACTIONS:
A MISSING RULE OF CIVIL PROCEDURE

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INTRODUCTION

On December 15th, 2015, Judge Robert Ruehlman granted a motion filed by 172 Plaintiffs to consolidate their medical malpractice cases pending in Hamilton County.¹ The cases all included allegations that Defendant Abudakar Atiq Durrani, M.D. (“Dr. Durani Litigation”) performed unnecessary surgeries that resulted in complications and injuries. Plaintiffs also included claims against various Hospitals for negligent credentialing, supervision, retention and fraud. At the time of the order, an additional 258 related cases were pending in Butler County and 40 cases were pending in Warren County. Now, Plaintiffs have dismissed the Butler County cases and refilled them to consolidate them before Judge Ruehlman. The defendants have appealed the Order, filed a writ of Mandamus against Judge Ruehlman, and attempted to remove the cases under The Class Action Fairness Act.

The Durani litigation is an outlier in many respects: (1) the trial judge granted consolidation for hundreds of medical malpractice claims where individual facts typically predominate common questions of fact and law; (2) the lead trial counsel is no longer holding a law license in Ohio or Kentucky; and (3) the key defendant fled the country following indictment for Medicare Fraud². Notwithstanding the intrigue of a case fit for Netflix, there are a number of lessons that can be learned that may be useful in proposing a better system in Ohio with respect to the benefits of early consolidation of complex litigation.

I. AN ABSENCE OF AUTHORITY FOR CONSOLIDATION IN OHIO

An Ohio Court, pursuant to Rule 42 of Ohio Rule of Civil Procedure, may consolidate cases where pending actions involve “common questions of law and fact”. Upon filing a motion, the Court may issue orders “to reduce unnecessary costs or delay. Unfortunately, under current Ohio Rules, there is no mechanism to designate a category of cases as a “mass tort” whereby all related cases from all Ohio venues could be transferred before one Judge early in the litigation to efficiently manage complex litigation with common questions of law and fact.

Complete consolidation of related actions may therefore only be available where defendants would waive venue, or in the county where the defendant has its principal place of business, which may not be a favorable venue option for the Plaintiffs. Moreover, the lack multi-venue consolidation can lead to a situation where even if one court takes advantage of the

¹ In re Durani. A1506577, Order on Motion to Consolidate

² Following indictment for Medicare Fraud, Dr. Durani left the country and returned to his home country of Pakistan.

efficiencies of consolidating a category of cases, the cases filed in the county next door would not be eligible for transfer. As a result, despite the close proximity of the filings and common questions of fact and law, the same issues may be re-litigated resulting in inefficiencies and potentially inconsistent rulings. Finally, the lack of statewide consolidation can introduce significant delay in advancing the litigation as seen in the Durani litigation.

II. THE DURANI LITIGATION MISTEPS IN EARLY CONSOLIDATION EFFORTS HAVE PROVEN COSTLY.

The first Durani Litigation cases were filed in 2013 with the parties ultimately trying five trials to conclusion (four occurring in Butler County and one in Hamilton County). Despite the cost of trying five jury trials, the litigation is entangled in appeals related to a consolidation Order entered almost three years after the start of the case.

A. Rule 42 of Superintendence Lacks Sufficient Guidance.

While the judges and parties recognized early on that the Durani litigation was complex in nature, and the Supreme Court designated the case as “complex litigation” under the Rule 42 of Rules of Superintendence for the Courts of Ohio, the litigation was not aggregated to manage the discovery or the key legal questions. Rather, the 172 cases in Hamilton County were assigned to various Judges. Eventually, the Ohio Supreme Court, following the imprimatur from the Common Pleas judges, appointed Judge Guy Guckenberger to manage the Butler County litigation. The cases, however, were not all assigned or transferred to Judge Guckenberger from all venues.

As a result, there was never a format to enter case management orders to guide all cases; therefore, the Court did not establish basic methods to assist the efficient development of complex litigation. For example, plaintiff and defense fact sheets were not utilized, deposition protocols were not set, briefing schedules on common issues of law and evidentiary rulings were not established, and a bellwether process that would allow the parties to select representative cases was not ordered.

B. Delayed Centralization Created More Complexity, Cost & Delay.

Rather than centralize the case management, discovery moved forward on all individual cases, with motions being filed on general issues and case specific issues in no particular order or time frame, and trials moved forward based on the time of filing rather than what could be learned from the particular case. Ultimately, as would be expected, the litigation became unmanageable. Motions sat without decisions and evidentiary issues were re-argued with every trial.

Finally, after several years and great expense to the parties and judicial resources, Plaintiff’s counsel filed a motion to consolidate the pending cases in Hamilton County. In what appears to be an effort to gain control over litigation that was spiraling out of control, Judge Ruehlman took an aggressive approach setting several consolidated trials and then one “massive

group trial” of “ all remaining Dr. Durrani cases” which could “take six months to a year”. The Order offered no additional assistance on discovery methods but simply stated: “This trial schedule allows the parties to conduct discovery as they choose.”

The Order, however, also opened the Plaintiff up to removal under the Class Action Fairness Act. This issue is currently pending in the 6th Circuit. Second, the Order resulted in a Writ of Mandamus against Judge Ruehlman as the defense viewed the Order as judicial over-reaching. The collective current result was more delay in a piece of litigation that has already failed to advance the common issues forward at any admirable pace.

III. ALTERNATIVE METHODS OF CONSOLIDATION

New Jersey is the principal place of business for Johnson and Johnson and other pharmaceutical companies, and, therefore, many civil lawsuits are filed in New Jersey counties that are appropriate for consolidations. The New Jersey system, as opposed to Ohio, (1) provides for consistency in addressing consolidation questions, (2) allows for both parties to be heard on the initial question to consolidate; and (3) creates a process where cases can be centralized before one judge in the most appropriate county.³

Under the New Jersey complex litigation rule, a party may request the Supreme Court to classify a category of cases as a mass tort and to assign them to a designated judge for centralized management. Factors considered are: (1) the volume of cases; (2) common questions of fact or law associated with a single product, mass disaster, toxic tort; (3) geographical disbursement of the parties; (4) high degree of commonality of injury among Plaintiffs; (5) whether consolidation will prejudice a party; (6) whether it is fair and convenient to the parties and witnesses; (7) whether there is a risk of duplicative and inconsistent rulings; (8) whether coordinated discovery would be beneficial; (9) whether complexity requires expertise of a dedicated Judge; (9) whether centralization would result in efficient utilization of judicial resources; (10) whether issues of insurance, limits on assets and potential bankruptcy can be best addressed in coordinated proceedings; (11) whether there are related matters in federal court that require coordination with a single New Jersey judge.⁴

Once the Supreme Court has designated a category of cases a “mass tort”, the cases will be re-assigned to a designated judge in a particular venue for centralized management of the issues based on issues of fairness, geographical location of the parties, and the existing mass tort case load in that venue. Any related cases will then be transferred from the sitting venue to the consolidated venue, where motions can be filed to sever, and where a case management structure can be developed to advance the litigation efficiently.⁵

IV. APPLYING THE NEW JERSEY FACTORS

³ NJ Rule 4:38A

⁴ New Jersey Multicounty Litigation Guidelines , Directive #08-12

Given the volume of the cases in the Durani Litigation, multi-venue filings and risk for inconsistent rulings, yet the individual nature of medical malpractice cases, there is a legitimate question whether the Durani litigation is appropriate for consolidation. And second, there is a legitimate issue whether Hamilton County is the appropriate venue for consolidation.

In general, litigation of this size and with common questions of fact and law would benefit from an early centralized approach towards discovery and rulings; however, centralization should occur early in the process, and the appropriate factors should be weighed. Judge Ruehlman's Order does not make clear what factors were weighed in favor or against consolidation. Moreover, in the event that consolidation is appropriate, then proper venue should be selected: Factors such as the volume of filings, the knowledge of the Judge given earlier cases, the advancement of the litigation in a particular venue should be taken into account to select the best venue to consolidate the cases.⁶ Again, there is no analysis of the appropriate factors in the Order. Arguably, Butler County would be the most appropriate venue given it has been the venue for four of five trials, and the majority of the filings are in Butler County.

Yet, without a formal process to decide these important questions, the court and the parties are left without an appropriate avenue to address these issues early in the litigation, which in this case has unfortunately resulted in timely appeals and Writs of Mandamus due to one party left with the impression the consolidation decision was arbitrary.

V. CONCLUSION

Ohio courts are missing a link to consolidate mass actions throughout the state before one Judge. This could be due to a lack of volume of complex actions in the State or simply no effort to create a rule that would be beneficial to both parties and the judiciary. In crafting such a rule, Ohio could learn from the complex litigation program in New Jersey that has successfully developed a system to more justly and efficiently manage mass tort cases, and the inefficiencies in the consolidation of the Dr. Durani litigation would hopefully be avoided in the future.

⁶ See, Manual for Complex Litigation, generally on venue selection.