Dickie McCamey
ATTORNEYS AT LAW

5/23/2023 | Articles

# *Mallory v. Norfolk Southern Railway Co.'s* Impact on Tort Litigation

**Overview**

On December 22, 2021, the Supreme Court of Pennsylvania issued a decision in *Mallory v. Norfolk Southern Railway Co*., 263 A.3d 542 (Pa. 2021), which will have a significant impact on toxic tort litigation in Pennsylvania. Until now, Pennsylvania's long-arm statute, 42 Pa.C.S. § 5301(a)(2), has enabled plaintiffs to haul foreign corporations into court under principles of general jurisdiction based solely upon that corporation's registration to do business in Pennsylvania. In an unanimous opinion, the *Mallory* court held said statutory scheme unconstitutional, leaving plaintiff's attorneys scrambling to keep cases in Pennsylvania, particularly pro-plaintiff Philadelphia County, which otherwise have no connection to the state. The plaintiff in *Mallory* appealed the court's decision and, on April 25, 2022, the Supreme Court of the United States agreed to hear the case. Oral argument for the same occurred on November 8, 2022.

**Background**

In *Mallory v. Norfolk Southern Railway Co*., 263 A.3d 542 (Pa. 2021), a Virginia plaintiff filed a Federal Employers' Liability Act ("FELA") action in the Philadelphia County Court of Common Pleas against the defendant, a foreign railway company, which, at the time, was incorporated in Virginia and had its principal place of business there, alleging injuries due to exposure to toxic chemicals in Virginia and Ohio. The Pennsylvania Supreme Court held that the plaintiff could not establish the general jurisdiction over the defendant based upon the defendant's principal place of business and state of incorporation. Further, because there was no allegation that the plaintiff was exposed to toxic chemicals in Pennsylvania, the court also held that it lacked specific jurisdiction over the defendant. The plaintiff argued the court had general personal jurisdiction over defendant based exclusively on the defendant's compliance with 15 Pa.C.S. § 411, a Pennsylvania statute that mandates a foreign corporation to register with the Pennsylvania Department of State in order to do business in the Commonwealth. Prior to *Mallory*, Pennsylvania's long-arm statute provided in § 5301(a)(2)(i) that "qualification as a foreign corporation under the laws of this Commonwealth" constituted a sufficient basis to enable Pennsylvania courts to exercise general personal jurisdiction over a foreign corporation. Thus, the plaintiff argued that that the defendant consented to general personal jurisdiction when it registered to do business as required by 15 Pa.C.S. § 411.

However, the *Mallory* court, with the guidance of controlling United States Supreme Court precedent[1], held that "a foreign corporation's registration to do business in the Commonwealth does not constitute voluntary consent to general jurisdiction but, rather, compelled submission to general jurisdiction by legislative command." 2021 Pa. LEXIS 4318 at *57, *59. As such, the *Mallory* court further held that §§ 5301 and 411's combined scheme of "conditioning the privilege of doing business in the Commonwealth on the submission of the foreign corporation to general jurisdiction in Pennsylvania courts" is "unconstitutional to the extent that it confers upon Pennsylvania courts general jurisdiction over foreign corporations that are not 'at home' in Pennsylvania pursuant to *Goodyear* and *Daimler*." *Id*. at *54-55, *63. The plaintiff in *Mallory* appealed the Pennsylvania Supreme Court's decision, and the United States Supreme Court granted certiorari on April 25, 2022. Argument was held on November 8, 2022, in the United States Supreme Court, and a decision likely will not come until 2023.

***Mallory's* Impact**

The Pennsylvania Supreme Court's decision in *Mallory* significantly impacts where toxic tort litigation cases may now be filed. Long awaited by foreign corporate defendants, the *Mallory* decision brings Pennsylvania's jurisprudence in line with the United States Supreme Court's decisions on general jurisdiction, including *Goodyear* and *Daimler*.[2] Now, the message is clear to plaintiffs seeking to file tort actions in Pennsylvania: if you were not exposed to a product in Pennsylvania or injured in Pennsylvania, do not file suit in Pennsylvania.

Nevertheless, plaintiffs will continue to search for creative loopholes in their fight to keep their cases in plaintiff-friendly Pennsylvania trial courts, including Philadelphia. For example, plaintiffs have already attempted to limit *Mallory* to defendants engaging in intrastate commerce in Pennsylvania. More specifically, plaintiffs have since argued that the *Mallory* opinion suggests that 42 Pa.C.S. § 5301(a)(2) only requires a corporation conducting intrastate business to register with the Pennsylvania Department of State. Therefore, plaintiffs argue that defendants who engage in interstate commerce and have registered to do business in Pennsylvania have done so voluntarily and not by coercion and thus consented to general jurisdiction because 42 Pa.C.S. § 5301(a)(2) does not require registration for interstate commerce. However, such argument is a Hail Mary for plaintiffs. To the extent the foreign corporation had only intrastate activities, it fits squarely within the *Mallory* holding, and there would be no jurisdiction over the foreign corporation in Pennsylvania. (Note, it is unlikely that a defendant would not conduct intrastate business. Even primarily interstate businesses, *i.e*. airlines, would likely have some intrastate operations that would require registration in Pennsylvania.) However, to the extent discovery revealed the corporation had only interstate activities, Pennsylvania would not be permitted to regulate that commerce due to the interstate commerce clause. Regardless, this convoluted argument was previously raised in *amicus curiae* briefs filed with the Pennsylvania Supreme Court and dismissed out of hand, as the *Mallory* holding invalidated the registration by consent system in its entirety.

It is worth noting that *Mallory* did not impact the ability of Pennsylvania courts to exercise specific jurisdiction over foreign corporations. Thus, where *Mallory* applies and prevents a court from exercising general personal jurisdiction over foreign corporations, courts may still allow plaintiffs to conduct specific jurisdiction discovery. In *Bean Sprouts LLC v. Lifecycle Constr. Servs. LLC*, 270 A.3d 1237 (Pa. Super. Ct. 2022), the Pennsylvania Superior Court held that in order to exercise specific jurisdiction over an out-of-state defendant, three requirements must be met: (1) the plaintiff's cause of action must have arisen out of or relate to the out-of-state defendants' forum-related contacts; (2) the defendant must have purposely directed its activities, particularly as they relate to the plaintiff's cause of action, toward the forum state or purposely availed itself of the privilege of conducting activities therein; and (3) the exercise of personal jurisdiction over the nonresident defendant must be reasonable and fair. In *Bean Sprouts LLC*, the court ruled that for specific jurisdiction to lie, the plaintiff could not be the only link between the defendant and Pennsylvania. Rather, the defendant's actions must have been "sufficient to establish that it intentionally relied on the machinery of Pennsylvania justice in some fashion." *Id*. at 1241. The *Bean Sprouts LLC* court's analysis and holding will bolster foreign corporate defendants' arguments that any alleged tangential connections to Pennsylvania asserted by plaintiffs to overcome *Mallory* are simply not enough for specific personal jurisdiction.

**Recommendations**

Post-*Mallory*, foreign corporate defendants should always consider moving for dismissal where the plaintiff's alleged exposures and injuries did not occur in Pennsylvania. However, situations may arise where the alleged exposures and injuries may have occurred in a less favorable jurisdiction or venue, and the jurisdictional challenge may not be worth pursuing. To the extent the court permits plaintiffs to conduct specific jurisdiction discovery where *Mallory* applies, defendants should always push back on discovery and force plaintiff's counsel to focus on suit-related activities within the State of Pennsylvania. Defendants should also assert the holding of *Bean Sprouts LLC* and argue that any alleged connections to Pennsylvania by plaintiffs are too tangential to establish specific jurisdiction.

Acknowledgements: A special thanks goes to Vaughn K. Schultz, Esq.; Theresa A. Folino, Esq.; and Maria V. Carr, Esq. for their expertise and assistance in writing this article.

---

[1] *See e.g.*, *Goodyear Dunlop Tires Operations*, *S.A. v. Brown*, 564 U.S. 915 (2011), and *Daimler v. Bauman*, 571 U.S. 117, 137 (2014).

[2] To see how other states address the issue of personal jurisdiction, check out William R. Adams' article titled *Personal Jurisdiction Issues in Select Other States*.

Katlyn A. Stone
412-392-5304
kstone@dmclaw.com

© 2024 Dickie, McCamey & Chilcote, P.C. All rights reserved.