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IN THE SUPREME COURT OF THE STATE OF DELAWAR

EDUARDO ALVARADO CHAVERRI, et al. Plaintiffs Below, Appellants, v. DOLE FOOD COMPANY, INC., et al. Defendants Below, Appellees.	No. 642, 2013 Court Below: Superior Court of the State of Delaware in and for New Castle County C.A. No. N12C-06-017 ALR

APPELLANT'S REPLY BRIEF

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Plaintiffs-Appellants ("Plaintiffs") have shown that the Superior Court's Dismissal Order should be reversed because it erroneously applied the doctrine of *McWane v. McDowell*, 263 A.2d 281 (Del. 1970). When the Superior Court issued the Dismissal Order in November 2013, there were no other simultaneously pending actions involving the same parties, and in fact there had not been any such concurrent action since the Louisiana Action was dismissed by the U.S. District Court for the Eastern District of Louisiana on September 17, 2012 based on the application of Louisiana Prescription rules.

Moreover, *McWane* involved an order staying a Delaware action, not dismissing it. Here, the Superior Court used the *McWane* doctrine to permanently extinguish Plaintiffs' claims altogether and terminate their ability to seek any redress in Delaware. Such a harsh result is not favored under Delaware law, especially where the Louisiana Action was dismissed under the one-year Louisiana prescription statute and that decision has no application under Delaware law.

Appellees' Answering Brief ("Appellees' Br.") cannot cite any case applying *McWane* in a similar situation. *Lisa, S.A. v. Mayorga*, 993 A.2d 1042 (Del. 2010), is entirely inapposite because it involved the context where a dismissed out-of-state case formed the predicate for the Delaware action. That is not the situation here.

McWane has never been applied in circumstances like these, and doing so would turn the purposes of the doctrine upside-down. The Superior Court's Order dismissing Plaintiffs' action should be reversed.

ARGUMENT

A. The Superior Court Erred By Invoking The *McWane* Doctrine.

1. The Abuse of Discretion Standard Does Not Protect The Superior Court's Decision.

Defendants argue that the Superior Court's decision should not be disturbed under the abuse of discretion standard. Appellees' Br. 18. However, this Court has instructed that "[t]he essence of judicial discretion is the exercise of judgment directed by conscience and reason, as opposed to capricious or arbitrary action." *Pitts v. White*, 109 A 2d 786, 788 (Del. 1956). "Where, however, the court in reaching its conclusion overrides or misapplies the law, or the judgment exercised is manifestly unreasonable, an appellate court will not hesitate to reverse." *Id.*

The Superior Court's decision should be reversed under this standard, because it fundamentally misconstrued and misapplied the *McWane* doctrine in an arbitrary and capricious fashion. Defendants themselves state that the *McWane* doctrine applies where "there *is* a prior action." Appellees' Br. 18 (emphasis added). Defendants cite this Court's decision in *Ison v. E.I. DuPont de Nemours & Co*., 729 A.2d 832 (Del. 1999), referring to *McWane* in the context where "if other jurisdictions *are hearing* a similar case." *Id*. at 845 (emphasis added) (cited at Appellees' Br. 19). The use of present tense language means simultaneously pending, concurrent litigation at the time the court issues its decision on a defendant's motion invoking the *McWane* doctrine.

This case is different. Here, at the time the Superior Court ruled on Defendants' Motion to Dismiss, no other parallel action was pending before the same parties. When the Superior Court decided Defendants' Motion to Dismiss, the Louisiana Action had already been dismissed under the Louisiana prescription statute and the appeal was over so that the Delaware Action was the only pending action.

Defendants state that a second precondition of *McWane* is that the cases "involv[e] the same parties and issues." Appellees' Br. 18. Here, the Louisiana Action involved the issue of whether Plaintiffs' claims were timely under the one-year Louisiana prescription statute, while the Delaware Action involved the issue of whether the claims were timely under the two-year Delaware statute of limitations. In dismissing the Louisiana Action under the Louisiana prescription statute, the Eastern District of Louisiana did not decide anything about the Delaware statute of limitations. In fact, Louisiana law and Delaware law are diametrically opposed on this point. For example, this Court held in a companion DBCP case that the Delaware limitations statute recognizes "cross-jurisdictional" tolling in the class action context. *See Dow Chemical Corp. v. Blanco*, 67 A.3d 392, 393 (Del. 2013) (holding that class members' individual claims are tolled until class certification is denied, "whether the class action is brought in Delaware or in a foreign court"). In contrast, the Louisiana Supreme Court held that the

Louisiana prescription statute is not suspended or interrupted by a putative class action filed in any jurisdiction except Louisiana state court. *See Quinn v. Louisiana Citizens Prop. Ins. Corp*., 118 So.3d 1011 (La. 2012). In short, the Louisiana prescription statute and Delaware statute of limitations are not the "same issue," as required by the *McWane* doctrine.

Next, Defendants state that a third precondition of the *McWane* doctrine is that "the court in [the prior] action is capable of doing prompt and complete justice." Appellees' Br. 18. Here, the Louisiana court had already dismissed the Louisiana Action under Louisiana law and was not capable of "doing prompt and complete justice." Indeed, *McWane* involved an order staying a Delaware action, not dismissing it. Here, the Superior Court used the *McWane* doctrine to extinguish Plaintiffs' claims altogether and terminate their ability to seek any redress in Delaware. Delaware law does not favor such a harsh result.

Defendants contend that it is "irrelevant" whether Delaware is an appropriate forum for this litigation. Appellees Br. 21-22. That contention flies in the face of *McWane*, where this Court did not grant even a *stay* of the Delaware action before examining several *forum non conveniens* factors favoring Alabama. *See* 263 A.2d at 283. The appropriateness of a Delaware form is an important consideration under *McWane*. In this case, the Superior Court did not properly apply *McWane* and did not identify an alternative forum in which Plaintiffs could

bring their claims. Nor did it examine any of the *forum non conveniens* factors argued by Plaintiffs (and never denied by Defendants) establishing that this litigation is appropriate in Delaware.

This case presents none of the traditional concerns of the *McWane* doctrine. Defendants cite the risk of "wasteful duplication of time, effort, and expense" and the possibility of "inconsistent and conflicting rulings" (Appellees' Br. 19) (internal quotation marks and citation omitted), but no such risk exists—its an illusion. There has been no discovery in the Delaware Action, nor has any Defendant even filed an answer. Hence, there was never any danger of duplicative proceedings or inconsistent judgments. Further, there is no danger of inconsistent rulings, because there is no conflict between a Louisiana decision that Plaintiffs' claims were untimely under the one-year Louisiana prescription statute and a Delaware decision that the claims were timely under the two-year Delaware statute of limitations.

In fact, the Superior Court's decision turned the purposes of the *McWane* doctrine on their head. In *McWane*, a defendant sought to defeat a plaintiff's choice of forum (Alabama) by filing subsequent actions in Delaware. The decision in *McWan*e sought to *protect plaintiffs* against a defendant's attempt to defeat the plaintiff's choice of forum. Here, Defendants used the *McWane* doctrine to defeat Plaintiffs' choice of forum—turning the purpose of the doctrine upside-down.

2. Defendants' Reliance On *Lisa* Is Misplaced.

Lisa, S.A. v. Mayorga, 993 A.2d 1042 (Del. 2010), is the only Delaware authority Defendants cite for the proposition that the *McWane* doctrine is applicable even in the absence of simultaneously pending concurrent actions. Appellees' Br. 21. Defendants misread *Lisa.*

As shown in the Opening Brief, *Lisa* involved the unusual situation where an out-of-state action formed the foundation for a subsequent Delaware suit, which is not the posture of the instant case. In *Lisa*, this Court explained that the Florida action was a "predicate" to the Delaware case, and "[t]he 1998 Florida Action was what propped up this Delaware action. Its dismissal caused that prop to collapse and warranted the dismissal of the Delaware action under *McWane*." 993 A.2d at 1048.

This case is different. Here, the question of whether Plaintiffs' action was timely under the one-year Louisiana prescription statute is not the predicate for Plaintiffs' Delaware Action—in fact, its irrelevant.

Defendants also cite this Court's statement in *Lisa* that the Florida and Delaware actions were "functionally identical." Appellees Br. 25 (quoting 993 A.2d at 1048). This Court opined that there was "the possibility of inconsistent and conflicting rulings." 993 A.2d at 1048.

Again, this case is different. The Louisiana prescription statute and

Delaware statute of limitations are different issues, and the question of whether Plaintiffs' claims were timely under the Louisiana prescription statute says nothing about whether they were timely under the different Delaware statute of limitations. There is no possibility of inconsistency or conflict between holding that a claim (i) is barred by a Louisiana limitations period but (ii) is not barred by a different Delaware statute of limitations.

Further, Defendants have no answer to the point in the Opening Brief that this Court's reasoning in *Lisa* supports Plaintiffs. In *Lisa*, this Court opined that the *McWane* doctrine "promote[s] the orderly administration of justice by recognizing the value of confining litigation to one jurisdiction, whenever that is both possible and practical." *Id.* at 1047 (internal quotation marks and citations omitted). In the instant case, those principles counsel in favor of allowing the Delaware action to proceed, because Delaware is the only jurisdiction in which claims are pending.

3. Defendants' Claims Of "Forum Shopping" Are Misplaced.

Defendants' accuse Plaintiffs of "forum shopping." Appellees' Br. 22. But it is Plaintiffs who have been hampered by Defendants' forum-shopping and repeated removals and delays of a prior putative class action to federal court on multiple occasions, requiring multiple appeals, which succeeded in delaying Plaintiffs' claims for some 17 years. Plaintiffs' injuries have never been redressed,

and they have suffered severe prejudice from Defendants' tactics. This Court has already opined, in a companion DBCP case, that "defendants have caused a lot of the delay—upon which they now seek to rely—through their own procedural maneuvering and they may not take refuge behind it. Plaintiff here has tried to act continuously since the filing of the original [ ] action, and has been procedurally thwarted at every turn by defendants . . . ." *Dow Chemical Corp. v. Blanco*, 67 A.3d 392, 394 (Del. 2013) (internal quotation marks and citation omitted). The Superior Court found that Defendants had made the "decision to wage the extended procedural war delaying the prior action." *Blanco v. AMVAC Chemical Corp*., 2012 WL 3194412, *12 (Del. Super. Aug. 8, 2012), *aff'd*, 67 A.3d 392 (Del. 2013). The court explained that "[a] fairer reading of the procedural history here is that defendants have attempted to tranquilize these claims through repeated forum shopping removals and technical dismissals, playing for time and delay and striving to prevent, or arguably frustrate, the claims from ever being heard on the merits in any court." *Id.*

Nor can Defendants argue that this forum is inconvenient or lacks appropriate contacts to this dispute. Nine of the Defendants are Delaware corporations or Delaware limited liability companies. In addition, certain Defendants maintain major facilities in Delaware and conduct business in the State. Suing Defendants on their home turf is not "forum shopping."

4. Defendants' Reliance on Federal Decisions Is Misplaced.

Defendants rely on a federal district court decision (which is on appeal) applying the federal first-filed rule, *Chavez v. Dole Food Co.*, 2013 WL 5288165 (D. Del. Sept. 19, 2013), appeal pending, No. 13-4144 (3d Cir.) (cited by Appellees' Br. 20, 31). But Delaware is a separate sovereign, and its law is distinct from federal law. *E.g. Jones v. State*, 745 A.2d 856, 863, 865 (Del.1999). The Superior Court applied *McWane*, not the federal first-filed rule, and Defendants' reliance on the federal district court decision misses the point.

B. The Superior Court's Dismissal Order Is Inconsistent With This Court's Decision In *Blanco* Affirming The Superior Court's Predecessor.

Defendants (Appellees' Br. 26-27) contend that the Superior Court's Dismissal Order is consistent with this Court's decision in *Dow Chemical Corp. v. Blanco*, 67 A.3d 392 (Del. 2013), but their argument ignores the fact Plaintiff Blanco had participated in several lawsuits before filing in Delaware. Defendants argue that "Plaintiffs fail to cite a single case that permitted the plaintiff to file duplicative suits in multiple jurisdictions." Appellees' Br. 23. Blanco was forced to do just that because of the defendants' repeated forum shopping removals and technical dismissals that played for time and delay in an effort to prevent the claims from ever being heard on the merits in any court. Nevertheless, this Court stressed that state policy favors resolution of claims on the merits and that a defendant cannot defeat plaintiffs' right to a day in court by cries of "forum shopping," which is what Defendants argue here. In *Blanco*, this Court rejected such reasoning and held that state policy favors granting a plaintiff his or her day in court. The Court followed the Delaware policy of affording a judicial remedy, even to foreign plaintiffs. The Superior Court's decision is inconsistent with that reasoning.

C. Plaintiffs' Claims Are Not Barred By Res Judicata.

Defendants urge this Court to affirm the dismissal on the alternative ground of res judicata. Appellees' Br. 28-32. The Superior Court did not reach this argument, which in any event has no merit. *See* Opening Brief at 20-21.

Defendants insist, "this Court must look to Louisiana's rules of preclusion" to define the effect of the Louisiana Dismissal. Appellees' Br. 29. Defendants acknowledge (in a footnote) "the traditional rule that judgments based on statute of limitations are not ordinarily afforded res judicata effect." Appellees' Br. 32 n.8.

Defendants have failed to meet their burden of establishing that Louisiana would depart from the traditional rule. Louisiana's version of res judicata follows "the common law" and "the Restatement of Judgments," as well as federal law. *Lafreniere Park Foundation v. Broussard*, 221 F.3d 804, 808 (5th Cir. 2000). Both sources of law indicate that Louisiana would follow the traditional rule. As shown in the Opening Brief (at 20-21), decisions by the U.S. Supreme Court and numerous other federal courts, as well as the Restatement of Judgments, the Restatement of Conflicts, and leading treatises, all confirm the traditional rule that "dismissal on [limitations] ground[s] does not have claim-preclusive effect in other jurisdictions with longer, unexpired limitations periods." *Semtek International Inc. v. Lockheed Martin Corp*., 531 U.S. 497, 504 (2001). "The decisions of the Supreme Court and the English cases all indicate that the judgment of the court of

a foreign state which dismisses a cause of action because of the statute of limitations of the forum is not a decision on the merits and is not a bar to a new action upon the identical claim in the courts of another state." *Warner v. Buffalo Drydock* Co., 67 F.2d 540, 541 (2d Cir.1933)), *cert. denied*, 291 U.S. 678 (1934). These are the sources of law that a reviewing court should consider in ascertaining Louisiana principles of res judicata. *Lafreniere Park*, 221 F.3d at 808

Defendants cannot cite a single case holding that a dismissal under the Louisiana prescription statute bars a suit in another state with a different statute of limitations. The cases cited by Defendants (Appellees' Br. 30) involve a very different situation, where a plaintiff tries to repeatedly sue under the *very same law* and *same statute of limitations*. *See, e.g.*, *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211, 238 (1995) (both cases involved federal securities fraud claims); *Elkadrawy v. Vanguard Group, Inc*., 584 F.3d 169 (3d Cir. 2009) (federal discrimination claims under 42 U.S.C. § 1981); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 322 F.3d 1064 (9th Cir. 2003) (takings claims under Fifth Amendment); *Wakefield v. Cordis Corp.*, 304 F. App'x. 804 (11th Cir. 2008) (Title VII claims); *Smalls v. United States*, 471 F.3d 186 (D.C. Cir. 2006) (federal disability benefits).

This case is different. Plaintiffs' suit in Louisiana involved the Louisiana prescription statute, and Plaintiffs' claims in Delaware do not. Plaintiffs recognize

they cannot go back to Louisiana and attempt to sue again under the Louisiana prescription statute. But that has nothing to do with whether Plaintiffs' claims are timely under the Delaware limitations statute. Because the Louisiana dismissal was based on Louisiana prescription law, Plaintiffs' actions in Delaware are not barred by res judicata.

The Louisiana cases cited by Defendants (Appellees' Br. 32) are similarly inapposite. They involve the situation where a plaintiff tries to sue under the same law and same statute of limitation twice. None of them involves the situation where the first suit was in Louisiana and the second suit was in another jurisdiction, such as Delaware, under another statute of limitations. *See Bernard v. Parish*, 2008 WL 2859243 (E.D. La. July 22, 2008) (in actions for just compensation under the Fifth Amendment, first case was in Louisiana state court and second in Louisiana federal court); *Dantzler v. Pope,* 2009 WL 959505 (E.D. La. Apr. 3, 2009) (in legal malpractice actions under Louisiana law, first case was in Louisiana state court and second was in Louisiana federal court); *Sours v. Kneipp*, 923 So.2d 981 (La. Ct. App. 2006) (two legal malpractice claims, both in Louisiana state court).

The only case cited by Defendants involving a plaintiff with suits in more than one jurisdiction is *Steve D. Thompson Trucking v. Dorsey Trailers*, 870 F.2d 1044 (5th Cir. 1989) (Appellees' Br. 30-31), but that case applied federal law

rather than Louisiana law, 870 F.2d at 1045, and Defendants have cited no Louisiana decision following *Thompson Trucking* and that case is inapposite.

In *Thompson Trucking*, a plaintiff brought suit in Louisiana federal court and suffered an adverse judgment that its Louisiana law claim was time-barred under Louisiana prescription. The plaintiff then argued to the Louisiana federal court that its claim was governed by Mississippi law, an argument that the Louisiana federal court rejected. 870 F.2d at 1044-45. Thus, the plaintiff in *Thompson Trucking* – unlike Plaintiffs here – expressly submitted a choice-of-law decision to the Louisiana federal court and suffered a ruling that the claims were *not* governed by the law of the second forum but instead governed by Louisiana law. In this case, Plaintiffs' Delaware claims are not governed by the Louisiana prescription statute.[1]

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[1] *See* 870 F.2d at 1047 (Brown, J., concurring) ("Strictly speaking what, and all, the Louisiana Federal Court determined was the plaintiff's redhibitory action was prescribed since that was the only Louisiana claim which was asserted. At that stage, no rights under Mississippi law were presented. The Louisiana Federal Court did not, nor could it then, determine that any Mississippi claim (cause of action) did or could exist. Also at that stage, the Mississippi Federal Court would had to have given res judicata effect only to the Louisiana Federal Court decision that the Louisiana claim for redhibition was time barred. Hence, the Mississippi Federal Court was correct in saying that the Louisiana Federal Court's decision that the Louisiana redhibitory action was prescribed did not compel a finding of res judicata by the Mississippi Federal Court. But this was all changed by the plaintiff's misguided decision to try to persuade the Louisiana Federal Court that Mississippi, not Louisiana, law applied. The Louisiana Federal Court held that Louisiana, not Mississippi, law applied. This Court of Appeals affirmed that (continued…)

There is another reason for this Court not to follow *Thompson Trucking*. The Maryland Court of Appeals in *Semtek* also cited and relied on the Fifth Circuit decision in *Thompson Trucking*. *Semtek Intern. Inc. v. Lockheed Martin Corp*., 736 A.2d 1104, 1110 (Md. App. 1999). But the U.S. Supreme Court reversed the Maryland Court of Appeals in *Semtek*. Rather than relying on a decision that was effectively reversed in *Semtek*, this Court should look to the U.S. Supreme Court's *Semtek* decision itself, which opined that a "dismissal on [limitations] ground does not have claim-preclusive effect in other jurisdictions with longer, unexpired limitations periods." 531 U.S. at 504.

Further calling Defendants' argument into doubt is that Louisiana law is clear that it must be resolved against preclusion. Under Louisiana law, "[t]he doctrine of res judicata is stricti juris and any doubt concerning the doctrine's application is to be resolved against its application. Res judicata's preclusive effect will not obtain, however, unless all its necessary elements are established beyond all question." *Pot of Gold, Inc. v. Sampak, L.L.C*., 441 Fed.Appx. 278, 281-82 (5th Cir. 2011) (citing cases); see *also Lafreniere*, 221 F.3d at 809 ("Louisiana's doctrine of res judicata can only be invoked if all essential elements are present

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decision. This was the classic case of the first Court determining an issue that was squarely and necessarily presented, namely that the Louisiana law of redhibition applied and not the law of Mississippi. . . . That became binding on the Mississippi Federal Court which could no longer determine that it really was a Mississippi cause of action with a 6-year statute of limitations.").

and established beyond all question."); *Kelty v. Brumfield*, 633 So.2d 1210, 1215 (La.1994) ("The doctrine of res judicata is stricti juris; any doubt concerning application of the principle of res judicata must be resolved against its application. The doctrine of res judicata cannot be invoked unless all its essential elements are present, and each necessary element must be established beyond all question.") (citations omitted).

Further, "[u]nder Louisiana jurisprudence, prescriptive statutes are strictly construed, and of two permissible constructions that is adopted which favors maintaining rather than barring the action." *Foster v. Breaux,* 270 So.2d 526, 529 (La. 1972); *see also Oil Ins. Ltd. v. Dow Chemical Co.*, 977 So.2d 18, 21-22 (La. App. 2007) ("Prescriptive statutes are strictly construed against prescription and in favor of the obligation sought to be extinguished; thus, of two possible constructions, the one which favors maintaining an action, as opposed to barring, should be adopted."). Any doubts should be resolved in favor of maintaining an action and against prescription. *Louisiana Health Serv. & Indem. Co. v. Tarver*, 635 So.2d 1090, 1098 (La. 1994). So even if this Court were to look to Louisiana law, that law will not result in the application of res judicata principles to bar the actions under the Delaware statute of limitations.

There is an independent reason that the Louisiana Dismissal on prescription grounds does not bar Plaintiffs' Delaware actions as a matter of res judicata. In

upholding the Louisiana Dismissal in *Chaverri v. Dole Food Co*., No. 12-30126, 2013 WL 5274446 (5th Cir. Sept. 19, 2013) (per curiam) (unpublished), the Fifth Circuit relied on the Louisiana Supreme Court's decision in *Quinn v. Louisiana Citizens Prop. Ins. Corp*., 118 So.3d 1011 (La. Nov. 2, 2012), which held that Louisiana does not recognize cross-jurisdictional tolling for class actions – i.e., that the Louisiana prescription statute is not suspended or interrupted by a putative class action in any jurisdiction except Louisiana state court. The Fifth Circuit explained that *Quinn* provided an independent reason to affirm the judgment of the E.D. La. *See Chaverri*, 2013 WL 5274446, *2. Because there were two separate grounds for the Fifth Circuit's decision, neither aspect of that decision should be given preclusive effect. "If a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone." Restatement (Second) of Judgments § 27 cmt. i (1982). Because the Louisiana Dismissal rested on two independent alternative grounds, neither one operates as res judicata.

For all these reasons, res judicata does not provide an alternative ground for this Court to affirm the Superior Court's Dismissal Order.

CONCLUSION

The Superior Court's Dismissal Order should be reversed.

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