

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
EVANSVILLE DIVISION

AZRIEL C. FELLNER, in his capacity as the )  
Personal Representative of the Estate of )  
Tamar Etana Fellner, Deceased )

Plaintiff, )

v. )

Cause No. 3:05-cv-218-SEB-WGH

PHILADELPHIA TOBOGGAN COASTERS, INC., )  
a Pennsylvania Corporation, and )  
KOCH DEVELOPMENT CORPORATION, )  
an Indiana Corporation, )

Defendants. )

**ENTRY ON DEFENDANT PHILADELPHIA TOBOGGAN  
COASTER’S MOTION TO DISMISS**

**Introduction**

This matter is before the Court on the Motion to Dismiss filed by defendant, Philadelphia Toboggan Coaster, Inc. (“PTC”), on March 23, 2006. (Dkt. 41). Plaintiff filed a Response on July 10, 2006, (Dkt. 55), and defendant filed a Reply on August 9, 2006, (Dkt. 65). The matter is therefore ripe for our decision.<sup>1</sup>

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<sup>1</sup>Plaintiff’s claims for strict liability, implied warranty, attorneys fees and punitive damages against Defendant Koch were dismissed by stipulation of the parties at Dkt. 58 on July 14, 1006. Dkt. Entries 62 and 63 reflect the dismissal of Plaintiff’s claims in Counts VII and VIII premised on Pennsylvania law for wrongful death and survival.

## **Background**

On May 31, 2003, Tamara Etana Fellner, a citizen of New York, was killed when she fell from a roller coaster, dubbed “The Raven,” at Holiday World, an amusement park located in Santa Claus, Indiana. (Compl. ¶¶ 3, 6-7, 11-12, 14). Koch Development Corporation (“Koch”) owns and operates both Holiday World and The Raven roller coaster. (*Id.* ¶¶ 11-12). Defendant PTC developed, designed, manufactured and sold to Koch the roller coaster cars and track that comprise The Raven. (*Id.* ¶ 13).

Plaintiff, the personal representative of Fellner’s estate, has brought this suit against PTC alleging negligence, strict liability, and breach of implied warranties in the design and manufacture of the roller coaster. (Compl. ¶¶ 15-56). Plaintiff also seeks damages for Ms. Fellner’s wrongful death under the Pennsylvania Wrongful Death Act and for survivorship damages under the Pennsylvania Survival Act. (*Id.* ¶¶ 49-56).

PTC filed its Motion to Dismiss directed towards Counts I, III, V, VII, and VIII contending that Indiana (not Pennsylvania) law applies to PTC’s causes of action. After careful consideration, we concur in PTC’s analysis and hold that Counts I, III, V, VII and VIII against PTC must be DISMISSED.

## **Legal Standard**

In ruling on a Rule 12(b)(6) motion to dismiss for failure to state a claim, the Court accepts as true all well-pleaded factual allegations contained in the complaint as well as the inferences reasonably drawn therefrom. *See Baxter by Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728, 730 (7th Cir. 1994). A dismissal is appropriate only if the plaintiff can establish no set of facts, even if hypothesized, consistent with the allegations of its complaint that would

entitle it to relief. *See Sanjuan v. Am. Bd. Of Psychiatry and Neurology, Inc.*, 40 F.3d 247, 251 (7th Cir. 1994), *cert. denied*, 516 U.S. 1159 (1996). Moreover, the Court is to examine the allegations of the complaint and not the merits of the lawsuit. *See Autry v. Northwest Premium Servs., Inc.*, 144 F.3d 1037, 1039 (7th Cir. 1998).

### Analysis

#### A. Choice of Law

Because this case was transferred from the Eastern District of Pennsylvania, as we have previously noted,<sup>2</sup> Pennsylvania's choice of law rules apply here in determining which state's laws govern the causes of action against PTC.

Under Pennsylvania law, the old rule of *lex loci delict* has been abandoned. *Griffith v. United Air Lines, Inc.*, 203 A.2d 796 (Pa. 1964). Pennsylvania currently applies a more flexible approach which combines a "government interest analysis" with the "significant relationship" analysis consistent with Section 145 of the Restatement (Second) of Conflicts. *Normann v. Johns-Manville Corp.*, 593 A.2d 890, 893 (Pa. Super. Ct. 1991). If there is a conflict between the laws of the relevant states, (*Cipolla v. Shaposka*, 267 A.2d 854, 855 (Pa. 1970)), the Court must determine which state has the greater interest in the application of its substantive laws. As explained by the Pennsylvania Superior Court:

In determining which state has the greater interest in the application of its law, one method is to see what contacts each state has with the accident, the contacts being relevant only if they relate to the policies and interests underlying the particular issue before the court. When doing this it must be remembered that a mere counting of the contacts is not what is involved. The weight of a particular state's contacts must be measured on a qualitative

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<sup>2</sup>In the Court's prior opinion regarding Defendant Koch's Motion to Dismiss, at Docket # 62.

rather than quantitative scale.

*Troxel v. A.I. duPont Inst.*, 636 A.2d 1179, 1181 (Pa. Super. Ct. 1994)(internal citations and quotations omitted). In a products liability context, Pennsylvania courts have clearly indicated that the fact that a product was designed and manufactured in a particular state does not automatically yield a finding that that state's laws apply. *See Apple v. Ford Motor Co.*, 2004 WL 3218425 (Pa. Ct. Comm. Pleas 2004); *Giovanetti v. Johns-Manville Corp.*, 539 A.2d 871, 873-74 (Pa. Super. Ct. 1988).

In the case at bar, the parties agree and the Court concurs that there is a clear conflict between the laws of Indiana and Pennsylvania in that Indiana products liability actions must be pled under the Indiana Products Liability Act, which includes defenses of misuse of a product and knowledge of a product's dangerousness, and recognizes the theory of comparative fault (IND. CODE § 34-20-6 & 8), whereas, Pennsylvania products liability actions are pled as separate causes of action sounding in negligence, strict liability, and breach of implied warranties. Additionally, Pennsylvania does not recognize comparative fault in strict products liability actions. Given this conflict between the laws of Pennsylvania and Indiana, we must determine which state has the greater interest in having its laws applied.<sup>3</sup>

Pennsylvania's only contact with this case is that PTC was located in and manufactured the cars for "The Raven" there. Clearly, Pennsylvania has an interest in ensuring that products manufactured within its borders are safe for their intended use.

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<sup>3</sup>We note that there is one additional contact with a third state, New York, which was the residence of Ms. Fellner. However, no one has argued in favor applying New York law.

Significantly, Pennsylvania's consumer protection statutes (which, for example, foreclose comparative fault in strict products liability actions) are designed to protect Pennsylvania consumers. However, the injured consumer here was neither a Pennsylvania resident nor did her use of the product (ie, a patron on the roller coaster) occur in Pennsylvania.

Pennsylvania's interests are minimal compared to Indiana's far greater interests. The roller coaster cars manufactured by PTC were merely a component of The Raven roller coaster system which was constructed and operated in Indiana and, of course, the tragic accident which caused Ms. Fellner's death occurred in Indiana. The nexus of the relationships between and among all the parties centered in Indiana. If it is established that there was some misuse of the roller coaster by Ms. Fellner, it would have occurred in Indiana. Whatever warnings may have been given to Ms. Fellner concerning the dangerousness of The Raven would have been provided at the site of the ride in Indiana. Further, if other factors contributed to the accident, such as operational errors by Koch or its employees, they also would have occurred in Indiana.

Based on these contacts, Indiana has a substantial interest in having its products liability laws govern the resolution of this case. The availability of misuse and knowledge of dangerous conditions as defenses also impacts the standard of care applicable to patrons of amusement parks under Indiana law. Certainty and predictability in the results of tort litigation based on accidents at amusement parks in Indiana advance the goal of safe behavior by everyone involved. It can be assumed as well that Ms. Fellner purposefully availed herself of the laws of Indiana, including products liability statutes, when she came to Indiana to visit Holiday World and to ride The Raven. Neither her contact with Indiana nor PTC's

contact with Indiana was fortuitous. Based on Indiana's strong interest in applying its products liability laws to the accident at issue in this case, especially in comparison to Pennsylvania's minimal interest, the resolution of this litigation against PTC shall be in accordance with Indiana law.

The Complaint alleges three separate causes of action: tort, strict liability, and breach of implied warranties. None of these causes of action comports with the Indiana Products Liability statutes. Further, because Plaintiff's wrongful death and survival actions were pled under Pennsylvania law, our previous ruling that Indiana law applies to this accident requires the dismissal as to PTC of Counts I, III, V, VII, and VIII.

### **Conclusion**

For the reasons outlined above, PTC's Motion to Dismiss is **GRANTED**. Counts I, III, and V of Plaintiff's Complaint are accordingly **DISMISSED**. Counts VII and VIII as against PTC are also **DISMISSED**.

IT IS SO ORDERED.

Date: \_\_\_\_\_

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