

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MONROE COUNTY

TRIAD HUNTER, LLC,

Plaintiff- Appellant,

v.

EAGLE NATRIUM, LLC et al.,

Defendants- Appellees.

OPINION AND JUDGMENT ENTRY
Case No. 18 MO 0012

Civil Appeal from the
Court of Common Pleas of Monroe County, Ohio
Case No. 2018-149.

BEFORE:

Carol Ann Robb, Gene Donofrio, Cheryl L. Waite, Judges.

JUDGMENT:

Reversed and Remanded.

Atty. Robert M. Stonestreet, Atty. Matthew S. Casto Atty. Timothy M. Miller, Babst, Calland, Clements & Zomnir, P.C., BB&T Square, 300 Summers Street, Suite 1000, Charleston West Virginia 25301, for Plaintiff- Appellant and

Atty. Melanie Morgan Norris, Steptoe & Johnson, PLLC, 1233 Main Street, Suite 3000, Wheeling, West Virginia 26003 and Atty Russell J. Ober, Jr, Atty. Antoinette C. Oliver,

Meyer, Unkovic & Scott, LLP, 535 Smithfield Street, Suite 1300, Pittsburgh, Pennsylvania 15222-2315 for Defendants- Appellees.

Dated: March 11, 2019

Robb, J.

{¶1} Plaintiff-Appellant Triad Hunter, LLC appeals the judgment of the Monroe County Common Pleas Court granting the motion to dismiss filed by Defendant-Appellee Eagle Natrium, LLC et al. Appellant contends the court erred in dismissing the complaint based on a lack of personal jurisdiction, urging the court misapplied the purposeful availment prong of the constitutional test for ascertaining whether there is personal jurisdiction in Ohio. We agree and find the trial court had personal jurisdiction. Appellant next contests the trial court's alternative ruling that the action should be dismissed under the doctrine of forum non conveniens. We find this decision unreasonable under the totality of the circumstances. In accordance, the trial court's decision is reversed, and the case is remanded.

STATEMENT OF THE CASE

{¶2} On April 16, 2018, Triad Hunter filed a complaint in Monroe County, Ohio against Eagle Natrium, Axiall Corporation, and Westlake Chemical Corporation asserting causes of action for: negligence in solution mining; trespass by causing fluids and high pressure to enter Triad Hunter's property which impaired Triad Hunter's minerals and damaged the subsurface; conversion of Triad Hunter's minerals such as salt; nuisance which interferes with Triad Hunter's use of its property; violation of a statute which prohibits solution mining in Ohio without a permit; and injunctive relief.

{¶3} Triad Hunter is a Delaware company engaged in the exploration for and production of oil and gas with an office in Marietta, Ohio. In 2014, Triad Hunter purchased or leased all of the mineral rights on certain property along the Ohio River in Monroe County. Triad Hunter states it drilled three wells on its upper well pad in 2014, with future plans to engage in hydraulic fracturing at the Utica Shale layer (11,000 feet). Upon reentry into the wells in 2017, damage was discovered to the well bore casing at the Salina formation (5,900-6,800 feet). (Later testing in 2018 showed additional subsidence and brine fluid containing water from the Ohio River.)

{¶4} As a result, these wells were idled and a new well was drilled at a different location on the well pad. While drilling with air, Triad Hunter unexpectedly encountered salt water, hydrogen sulfide (a toxic gas), and abnormal pressure at the Salina formation where it seemed caverns had formed therein, all allegedly a result of the solution mining activities of the Natrium facility on the other side of the river. As a result of these conditions, Triad Hunter had to use a costlier drilling and casing method to complete the well, but risks to the well remain.

{¶5} Eagle Natrium (a Delaware limited liability company with a principal place of business in Texas) operates a chlor-alkali chemical manufacturing plant along the Ohio River in Natrium, West Virginia (Marshall County). Most of the plant's assets and liabilities were owned by Axiall (a Delaware corporation, with a principal place of business in Texas, registered to do business in Ohio, and said to conduct business operations in Ohio). Axiall was merged into Westlake Chemical Corporation, a Delaware corporation with a principal place of business in Texas with business conducted in Ohio through a wholly-owned subsidiary (which subsidiary is registered to do business in Ohio). It was said employees of Axiall and Westlake operate the Natrium facility.

{¶6} The Natrium facility engages in solution mining in the Salina formation to obtain salt to use in its manufacture of chemicals. The Natrium facility has subsurface brine fields where salt and other minerals are dissolved using water obtained in part from the Ohio River and injected into underground mineral formations. The resulting brine solution is pumped to the surface where minerals are extracted from the solution. This can create caverns in the Salina formation and result in subsidence there and in the Marcellus shale formation (which lies above the Salina formation).

{¶7} The complaint filed by Triad Hunter alleged the salt caverns from the Natrium facility extend under the Ohio River and into Triad Hunter's property in Ohio as the defendants have solution-mined salt and other minerals from property they do not own in the Salina formation. The complaint alleged various caverns were known to have been created years earlier as the Natrium facility complained about "communication" in 2013 between Marcellus shale wells on the lower well pad of Triad Hunter's property and the defendants' southern solution mining wells. It was noted the stimulation of a Marcellus

shale well is only expected to result in pressure and fluid traveling less than 500 feet (rather than a half mile away to the southern fields of the Natrium facility).

{¶8} In response to the complaint, the defendants filed a motion to dismiss on May 17, 2018. The defendants attached affidavits to the dismissal motion. The affidavit of the site manager of the Natrium facility stated the facility cannot store large amounts of brine and cannot operate with a lengthy interruption in the brine supply. It was noted that Triad Hunter’s wells at issue in the current suit are almost two miles from the Natrium facility (without discussing the distance from the brine fields). An affidavit confirmed the 2013 pressure experienced in the brine wells when Triad Hunter stimulated wells in the Marcellus shale formation. It also disclosed that Eagle Natrium sued Triad Hunter in West Virginia as a result of the 2013 communication between wells and that suit was settled in 2017.

{¶9} As a result of the more recent communication, Triad Hunter filed a West Virginia action (mostly mirroring the within suit) against the current defendants on November 27, 2017. The defendants attached that complaint to their motion to dismiss and complained of forum shopping. The affidavit of an attorney for Eagle Natrium acknowledged Triad Hunter had a pending motion to voluntarily dismiss the West Virginia action, which Eagle Natrium would oppose during an oral argument scheduled in West Virginia for June 4, 2018.

{¶10} Initially, the motion to dismiss raised a lack of personal jurisdiction under Civ.R. 12(B)(2). The defendants requested an evidentiary hearing where Triad Hunter would have the burden of demonstrating personal jurisdiction by a preponderance of the evidence. The defendants noted Triad Hunter’s reliance on the long-arm statute and argued the next step was not satisfied as the exercise of personal jurisdiction would deprive them of their constitutional right to due process. They claimed they did not “purposely avail” themselves of the privilege of acting in or causing a consequence in the forum state and the exercise of personal jurisdiction would not comport with the principles of fair play and substantial justice due to the switching of venues midstream and the West Virginia interests at stake. The motion to dismiss alternatively argued that even if personal jurisdiction was proper, the court should dismiss the case under the doctrine of

forum non conveniens. The defendants argued the public and private interests called for the suit to proceed in West Virginia rather than Ohio.¹

{¶11} Triad Hunter responded on June 4, 2018, asserting the Natrium facility begins its activities in West Virginia but extends into Ohio where minerals are being stolen while infrastructure and subsurface are being damaged. It was noted the defendants contradict themselves by alleging a lack of personal jurisdiction in Ohio while alleging a lack of “subject matter jurisdiction” in West Virginia; attached was the defendants’ answer filed in the 2017 West Virginia action containing a defense that the West Virginia court “lacks subject matter jurisdiction over activity that is alleged to have occurred and caused damage outside the State of West Virginia.” As for personal jurisdiction in Ohio, Triad Hunter’s response cited four provisions in the long-arm statute, R.C. 2307.382(A)(1),(3),(6), and (8), and argued the constitutional step was satisfied as: the defendants purposefully availed themselves of the privilege of acting or causing a consequence in Ohio; the cause of action arose from the activities in Ohio; and the acts or consequences have a substantial connection with Ohio to make the exercise of jurisdiction reasonable.

{¶12} Regarding forum non conveniens, Triad Hunter’s response provided an analysis of the private and public interests to be weighed and concluded the scale tipped in favor of allowing the case to proceed in the forum chosen by the plaintiff. Triad Hunter emphasized its substantial connection to Ohio where it owns realty that was trespassed upon and damaged. It was urged the defendants disingenuously argue against forum shopping where the Ohio suit was filed after the defendants claimed there was no “subject matter jurisdiction” in West Virginia due to the activity at issue occurring in Ohio. Triad

¹ The motion also alleged grounds for dismissing a claim, stating the statute governing Ohio wells did not apply to operations outside of Ohio or Triad Hunter had no standing to enforce it; Triad Hunter responded the statute prohibited drilling or injecting (including for solution mining) and created a private cause of action. And, the motion alleged grounds for dismissing a party, claiming the complaint failed to allege Axiall or Westlake engaged in wrongful conduct by a mere ownership interest and failed to allege sufficient elements to pierce the corporate veil; Triad Hunter responded that Eagle Natrium is effectively controlled by Axiall/Westlake and all three defendants operate the Natrium facility in any event. (Triad Hunter filed a supplement providing evidence Westlake holds itself out as the operator of the Natrium facility, such as photographs of the Westlake logo on public display outside of the Natrium facility.)

Hunter also claimed the defendants failed to agree to submit to jurisdiction in West Virginia in order to allow the Ohio court to dismiss under Civ.R. 3(D).

{¶13} On June 8, 2018, the defendants filed a reply. They disclosed their request for leave from the West Virginia court in order to remove from the answer the affirmative defense of lack of “subject matter jurisdiction” due to the allegations affecting Ohio land. A supplemental affidavit of the site manager was provided where he explained the 2013 communication involved hydrocarbons (produced by Triad Hunter’s Marcellus shale activity) traveling up the outside of the casing of the brine wells at the Natrium Facility, with no impacts to the brine at the Salina formation. It was concluded there was no reason to believe the brine caverns were in communication with Triad Hunter’s wells from these past events.

{¶14} The site manager also referred to a seismic study commissioned by Triad Hunter in 2016 to evaluate salt under Ohio Route 7 (where Triad Hunter’s expert testified at deposition that he did not have a firm conclusion as to the quality of the salt deposit). The site manager attested that Eagle Natrium commissioned an analysis of this data which “confirmed” that fluid had not been replaced by salt. He also stated the Natrium facility used a mixture of groundwater and water from the Ohio River and noted Triad Hunter did not provide scientific analysis demonstrating a link between the brine at the Natrium facility and the brine discovered in the Triad Hunter wells (except to say it contained water from the Ohio River).

{¶15} The court held an oral hearing on the motion to dismiss on June 20, 2018. The court was informed: the West Virginia court granted Triad Hunter’s motion for voluntary dismissal without prejudice; prior to this, the defense filed a motion for leave to amend the answer in West Virginia to eliminate the defense of lack of “subject matter jurisdiction” in that action; and this motion was not addressed by the West Virginia court before the dismissal. Defense counsel noted any Ohio order enjoining activity would have to be enforced in West Virginia where that court would first have to determine whether Ohio had jurisdiction in issuing the order; this was characterized as inefficient and potentially resulting in inconsistent determinations. The defendants stated the salt wells were purely vertical bores, emphasizing that the plaintiff’s allegation is merely that cracks

in the formation have caused the injection solution to migrate horizontally to Ohio. The defense urged this was not a deliberate or meaningful connection.

{¶16} Triad Hunter noted the defense made no effort to contest the satisfaction of the long-arm statute and said the defense arguments essentially involved the merits of the case. It was suggested that the test is not whether the defendant intended to cross into Ohio but whether they intended to perform the act of solution mining that traveled into Ohio (where both an action and a consequence took place), using the example of a West Virginia resident purposely firing a gun which goes across the border (without meaning for the bullet to travel that far) and the shooter then arguing a lack of personal jurisdiction when the shooting victim sues him. It was emphasized that forum shopping involves a plaintiff with no connection to the state, but here, the plaintiff's property being damaged lies in Ohio. Triad Hunter noted the reason for filing in Ohio was because the defense asserted in West Virginia essentially admitted the case should be filed in Ohio.

{¶17} On July 25, 2018, the trial court found a lack of personal jurisdiction after applying the purposeful availment prong of the constitutional test for ascertaining whether there is personal jurisdiction in Ohio. Specifically, the court found: "the Defendants herein have not deliberately engaged in significant activities that have occurred within the State of Ohio tied to Plaintiff's claims"; any injuries resulted from operations in West Virginia; "any possible incidental consequences that may have occurred in Ohio do not equate to evidence of purposeful minimum contacts within the State of Ohio"; and "Plaintiff cannot demonstrate that Defendant Eagle Natrium has purposefully conducted solution mining operations in the State of Ohio. Accordingly, Plaintiff has established no purposeful availment, or deliberate engagement in significant activities within Ohio to support the exercise of jurisdiction over this litigation."

{¶18} The court alternatively concluded that even if the court had personal jurisdiction, the complaint would be dismissed under the doctrine of forum non conveniens. In balancing the public and private interests, the court made various findings on the factors it found relevant. Triad Hunter filed a timely notice of appeal.

ASSIGNMENT OF ERROR ONE: LONG-ARM STATUTE

{¶19} Triad Hunter sets forth three assignments of error, the first of which provides:

“The trial court erred by failing to address whether Defendants’ subsurface injection of fluids originating in West Virginia that trespass upon and cause injury to property in Ohio subjects them to personal jurisdiction in Ohio under Civ.R. 4.3 and Ohio’s ‘long-arm’ statute – Ohio Revised Code § 2307.382.”

{¶20} Personal jurisdiction is a question of law subject to de novo review. *Kauffman Racing Equip., L.L.C. v. Roberts*, 126 Ohio St.3d 81, 2010-Ohio-2551, 930 N.E.2d 784, ¶ 27. Upon a defendant’s Civ.R. 12(B)(2) motion to dismiss for lack of personal jurisdiction, it becomes the plaintiff’s burden to show the trial court had personal jurisdiction over the defendant. *Id.* Where the trial court decides the motion on written submissions and without an evidentiary hearing, the plaintiff is only required to make a prima facie showing of jurisdiction; the court is to view allegations in the pleadings and the documentary evidence in a light most favorable to the plaintiff and resolve reasonable inferences in favor of the plaintiff. *Id.*²

{¶21} To ascertain an Ohio trial court’s personal jurisdiction over a nonresident defendant, a two-step analysis is required. *Id.* at ¶ 28. The court is to first review the long-arm statute and the applicable rule of civil procedure; if jurisdiction is conferred by these laws, then the court is to consider whether the exercise of jurisdiction would deprive the nonresident defendant of constitutional due process. *Id.* Appellant addresses the first step in the first assignment of error and the second step in the second assignment of error. In discussing the first step, Appellant cites the following four divisions in the long-arm statute:

(A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person’s:

(1) Transacting any business in this state; * * *

(3) Causing tortious injury by an act or omission in this state; * * *

² The defendants note where a court denies a motion to dismiss on the written filings, the plaintiff may be required to show personal jurisdiction by a preponderance of the evidence at a pretrial evidentiary hearing or at trial. See *State ex rel. DeWine v. 9150 Group, L.P.*, 9th Dist. No. 25939, 2012-Ohio-3339, 977 N.E.2d 112, ¶ 15. Here, the motion to dismiss requested an oral hearing on its face and an evidentiary hearing in the memorandum in support. The court scheduled an oral hearing. Triad Hunter’s response to the dismissal motion noted how an evidentiary had not been scheduled and asked the court to advise whether an evidentiary hearing was desired.

(6) Causing tortious injury in this state to any person by an act outside this state committed with the purpose of injuring persons, when he might reasonably have expected that some person would be injured thereby in this state; * * *

(8) Having an interest in, using, or possessing real property in this state[.]

R.C. 2307.382(A),(1),(3),(6),(8). See also Civ.R. 4.3(A)(1),(3),(6),(9) (providing for out-of-state service of process on a nonresident with a list of qualifiers corresponding to the statute but numbered slightly differently).

{¶22} The defendants initially state the grounds in R.C. 2307.382(A)(1) and (A)(3) were not alleged in the complaint. Although not specifically paraphrased in the section of the complaint discussing jurisdiction where (A)(6) and (A)(8) were paraphrased, the complaint as a whole can be read to ascertain any relevant sections of the long-arm statute. If operative facts are set forth that encompass a ground under the long-arm statute, then the complaint raises a basis for jurisdiction. For instance, regarding (A)(3) (which entails causing any injury by an act in this state), the complaint specifically alleged trespass into Ohio and conversion of minerals from within Ohio resulting in damages in Ohio from the entry and the removal.

{¶23} In addition, all four cited subdivisions were specified in the response in opposition to the motion to dismiss. Where certain facts are alleged in the complaint, legal arguments can thereafter be made as to why additional subdivisions may apply besides those cited or paraphrased in the complaint. As the defendants seem to recognize, the court was not confined to the complaint in ruling on the personal jurisdiction, and arguments as to why personal jurisdiction existed can be made in the response to the dismissal request. See, e.g., *Goldstein v. Christiansen*, 70 Ohio St.3d 232, 1994-Ohio-229, 638 N.E.2d 541 (1994) (in ruling on the motion to dismiss for lack of personal jurisdiction, the court must “view allegations in the pleadings and the documentary evidence in a light most favorable to the plaintiffs, resolving all reasonable competing inferences in their favor”); *State ex rel. Atty. Gen. v. Grand Tobacco*, 171 Ohio App.3d 551, 2007-Ohio-418, 871 N.E.2d 1255, ¶ 13 (10th Dist.) (the plaintiff has a burden in response to the dismissal motion, and the court is not confined to the complaint).

{¶24} In any event, the defendants did not move to dismiss under the first step of the analysis. In fact, the defendants state an analysis of the long-arm statute would be irrelevant to this appeal as they did not specifically contest it below. They point out they only argued a lack of personal jurisdiction due to a lack of due process under the constitutional (second) step of the analysis. Likewise, the trial court did not find a lack of personal jurisdiction under the long-arm statute or the corresponding civil rule under the first step of the analysis. Rather, the trial court moved to the second step and concluded the exercise of personal jurisdiction would not satisfy due process. We therefore move to the second step as well.³

ASSIGNMENT OF ERROR TWO: PURPOSEFUL AVAILMENT

{¶25} Appellant’s second assignment of error provides:

“The trial court erred by concluding that Defendants’ subsurface injection of fluids originating in West Virginia that trespass upon and cause injury to property in Ohio does not subject them to personal jurisdiction in Ohio under principles of constitutional due process.”

{¶26} In general, the Fourteenth Amendment’s due process clause prohibits a state from entering judgment against a nonresident defendant unless the defendant has such minimum contacts with the state that the exercise of jurisdiction comports with principles of fair play and substantial justice. *Walden v. Fiore*, 571 U.S. 277, 283, 134 S.Ct. 1115, 1121, 188 L.Ed.2d 12 (2014). Personal jurisdiction is characterized as general or specific, depending upon the nature of the defendant’s contacts with the forum state. *Kauffman Racing*, 126 Ohio St.3d 81 at ¶ 46. General personal jurisdiction involves continuous and systematic contacts which allow a state to exercise personal jurisdiction over the defendant even if the action is unrelated to the contacts, whereas specific personal jurisdiction requires the suit to arise out of or be related to the defendant’s contacts with the forum state. *Id.* at ¶ 47. Here, the parties and the trial court discussed only the test for specific jurisdiction, which is therefore our focus.

³*Accord James v. Hoffman*, 2d Dist. No. 27735, 2018-Ohio-2422, 112 N.E.3d 447, ¶ 10, fn. 2 (where the defendant did not concede long-arm jurisdiction but did not challenge the trial court’s implicit application of the statute).

{¶27} In determining whether the exercise of specific personal jurisdiction comports with due process, the court determines whether: (1) the defendant purposefully availed himself of the privilege of acting in the forum state or causing a consequence in the forum state; (2) the cause of action arose from the defendant's activities in the forum state; and (3) the acts of the defendant or consequences caused by the defendant have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable. *Id.* at ¶ 49-50.

{¶28} Triad Hunter addresses all three elements. For instance, as to the second element, it is said the cause of action arose from the alleged activities in the forum state. *See id.* at ¶ 49, 70 (noting the “lenient standard” asking whether “a defendant's contacts with the forum state are related to the operative facts of the controversy”). It is also noted that after the first two elements are satisfied, the reasonableness requirement of the third element is typically inferred and “only the unusual case” will not meet this element. *See id.* at ¶ 71-72 (noting Ohio has a significant interest in redressing injuries that actually occur in the state and in protecting the business interests of its citizens).

{¶29} The defendants focus on the first part of the test as the threshold element, stating the other two parts essentially rely on the existence of the first part in this case. For example, the defendants state it would not be reasonable to exercise jurisdiction (under the third step) if Triad Hunter failed to establish the defendants “deliberately engaged in significant activities within or aimed at Ohio” (the definition of purposeful availment). We proceed to the first element for determining if whether the exercise of specific personal jurisdiction comports with due process: “whether the defendant purposefully availed himself of the privilege of acting in the forum state or causing a consequence in the forum state.” *Kauffman Racing*, 126 Ohio St.3d 81 at ¶ 51.

{¶30} The requirement of “purposeful availment” ensures a defendant will not be forcibly drawn into a jurisdiction solely as a result of contacts that are random, fortuitous, or attenuated; rather, it ensures a defendant would reasonably anticipate being haled into court due to his conduct and connection with the forum. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-475, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528 (1985); *Kauffman Racing*, 126 Ohio St.3d 81 at ¶ 51. Jurisdiction “may not be avoided merely because the defendant did not physically enter the forum” state; however, the contact that proximately

resulted from the defendant’s actions must create a “substantial connection” with the forum state. *Burger King*, 471 U.S. at 475-476.

{¶31} The purposeful availment test is met if the defendant has *deliberately engaged in significant activities within a forum state* or has deliberately created continuing obligations between himself and residents of the forum. *Id.* Where a defendant has “purposefully directed” its efforts toward another state or its residents, the foreseeable results of these efforts can constitute minimum contacts sufficient for personal jurisdiction. *Id.* at 472, 473, 476. See also *Kauffman Racing*, 126 Ohio St.3d 81 at ¶ 52-69, applying *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984) (effects in forum state caused by expressly aimed or intentional conduct).

{¶32} Triad Hunter urges that the described physical invasion into and removal from Ohio’s sovereign territory which is initiated in West Virginia satisfies the purposeful availment test. Triad Hunter notes purposeful availment can involve *either* acting in Ohio or causing a consequence in Ohio. Triad Hunter cites evidence of past communication (pressure) between Triad Hunter’s Marcellus well and a brine well at the Natrium Facility, while the defendants point out their supplemental affidavit explained that this communication occurred through a layer above the Salina formation. Triad Hunter replies by concluding the ability to communicate between states was caused by the subsidence of Marcellus due to caverns *in the Salina formation*. Emphasis is also placed on the “immense financial incentive” of the defendants to continue the solution mining regardless of its trespass. Triad Hunter notes intent is nearly always established by circumstantial evidence and the facts must be construed in the plaintiff’s favor. Triad Hunter alternatively suggests even if the defendants lacked specific intent to enter Ohio, they purposely engaged in activity that ended up directly affecting Ohio.

{¶33} Although Triad Hunter experienced brine in Ohio well bores consistent with Ohio River water being used as a component (which is a component of the defendants’ solution), the defendants point to allegations of a 2016 study from which their expert opined the Salinas formation near the property in Ohio had not been replaced by liquid. An excerpt they submit from a deposition appears inconclusive. The defendants suggest the unsupported allegations in the complaint are insufficient and contend there is a lack

of evidence showing the issues experienced in Ohio were related to their solution mining activities.

{¶34} Yet, the plaintiff is not required to prove the merits of its cause of action at this stage, and Triad Hunter presented a prima facie case that the defendants caused a consequence in Ohio. However, this is only part of the constitutional test. The defendants conclude that even if we take as true the allegation that the issues experienced by Triad Hunter were related to the defendants' activities at the Natrium facility, the consequences were incidental. Yet, taking the allegations in the complaint at face value, the consequences do not appear incidental. Rather, they appear significant, and the connection created with Ohio is substantial.

{¶35} The defendants next assert there is no indication they deliberately caused the solution to enter Ohio. They note that the mere foreseeability of causing an injury is not sufficient to establish minimum contacts. *Burger King*, 471 U.S. at 474; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295, 100 S.Ct. 559, 566, 62 L.Ed.2d 490 (1980). The relevant foreseeability inquiry involves whether “the defendant’s conduct and connection are such that he should reasonably anticipate being haled into court” in the forum state. *Id.* To determine whether the exercise of personal jurisdiction over a defendant by a forum state can be reasonably anticipated, even where there is no physical presence in the forum state, courts are to consider whether the defendant purposefully availed himself of the privilege of acting in the forum state, purposefully availed himself of the privilege of causing a consequence in the forum state, or purposefully directed his action at the forum state or its residents. *Burger King*, 471 U.S. at 475-476. In asking whether the defendant has “deliberately” engaged in “significant activities within a state” (or has deliberately created continuing obligations between himself and residents of the forum), “territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there * * *.” *Id.* at 475-476.

{¶36} Regarding purposeful availment or direction, the complaint alleges: “Defendants have known, or reasonably should have known, that they have been performing solution mining outside of their property line toward and onto Triad’s property”; “Defendants’ trespass was intentional, willful and in reckless disregard for Triad’s property

rights”; “Defendants’ interference with Triad’s use and enjoyment of its property was intentional, willful, and in reckless disregard for Triad’s property rights”; “Defendant’s through their solution mining operations, intentionally mined and removed salt and minerals legally belonging to Triad, and exercised dominion and control over it without permission, authorization, or justification”; (Complaint at ¶ 104, 112, 117, 121). The complaint also noted how the Natrium facility alleged its solution mining wells experienced abnormal pressures when Triad Hunter stimulated its Marcellus wells in 2013. Triad Hunter stated this was evidence the Natrium facility knew its brine caverns caused the overburden up to the Marcellus formation to collapse and allow communication over a half mile away when pressure was only expected to travel 500 feet. Notwithstanding this event, it is alleged the Natrium facility continued to solution mine through caverns it created leading to Triad Hunter’s property in Ohio.

{¶37} We are to take the allegations in the complaint as true and construe the reasonable inferences in the plaintiff’s favor in determining whether Triad Hunter made a prima facie case that the Natrium facility: (1) purposefully availed itself of acting or of causing a consequence in Ohio by its solution mining activities, or (2) purposefully directed its injected solution toward Ohio land and minerals. This essentially asks whether the Natrium facility deliberately engaged in the Ohio activities which appear significant.

{¶38} On the one hand, “the mere likelihood that a product will find its way into the forum State” is insufficient to give rise to personal jurisdiction. *World–Wide Volkswagen*, 444 U.S. at 297. Where the contact with the state is a commercial item being sold, the rule is: “The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State.” *Asahi Metal Indus. Co. v. Superior Court of California, Solano Cty.*, 480 U.S. 102, 112, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987). On this topic, it noted that although foreseeability alone is not sufficient, it is still relevant. *Asahi Metal*, at 480 U.S. at 109 (“The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.”).

{¶39} The case before us does not involve a sale of an item or distribution into the stream of commerce. Nor does it deal with others (such as a consumer or distributor) moving the item into the forum, thus resulting in contact. Rather, the defendants are alleged to have physically injected their solution into Ohio.

{¶40} Continuing to release a substance while knowing it travels to a jurisdiction is considered purposeful direction of efforts toward that jurisdiction. See, e.g., *Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565, 577-78 (9th Cir.2018) (“We have no difficulty concluding that Teck expressly aimed its waste at the State of Washington. The district court found ample evidence that Teck’s leadership knew the Columbia River carried waste away from the smelter, and that much of this waste travelled downstream into Washington, yet Teck continued to discharge hundreds of tons of waste into the river every day.”); *Horne v. Mobile Area Water & Sewer Sys.*, 897 So.2d 972, 979 (Miss.2004) (where the Supreme Court found the City of Mobile, Alabama and its local board of water commissioners “purposefully directed” their activities toward Mississippi property owners by opening the spillway to its maximum capacity). The aim can involve a forum resident or the forum state in general. See *Walden*, 571 U.S. at 285.

{¶41} Furthermore, we are not only dealing with entry of the defendants’ instrumentality into the state but also with allegations of retrieval of the item which made contact with Ohio and retrieval of minerals which were dissolved into the item (which was injected with the purpose of dissolving minerals in order to profit). The item making the contact with Ohio still essentially belonged to the defendants, at least for purposes of personal jurisdiction, and it was purposefully retrieved by them in order to extract the dissolved minerals. This is more than a case of leaching and more than a case of releasing a substance into a flow.

{¶42} We conclude that purposefully solution mining the Salina formation near a state line, where prior mining communication has occurred between the parties, constitutes the purposeful availment of acting or causing a consequence in the other state when the solution enters the other state. The defendants previously sued Triad Hunter in West Virginia due to allegations that pressure injected in Ohio negatively affected a West Virginia brine well. For purposes of the Civ.R. 12(B)(2) motion to dismiss for lack of personal jurisdiction, which the trial court decided without an evidentiary hearing, this

court concludes Triad Hunter presented a prima facie case of personal jurisdiction due to the defendants' purposeful availment of the privilege of acting or causing a consequence in Ohio or the purposeful direction of injected solution into caverns leading to Ohio land. The defendants contact with Ohio was of such a nature that they could reasonably expect to be summoned into court here.

{¶43} As to the other two constitutional elements, the cause of action arose from the above activities in the forum state (under the second prong of the constitutional test), and the acts or consequences caused by the defendant have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable (under the lenient third prong). On the latter topic: Ohio has a substantial interest in the real estate of Ohio landowners and in minerals underlying its soil; and any burden to the defendant whose property borders the Ohio property at the heart of the dispute is not significant enough to affect due process rights. See *U.S. Sprint Communications Co. Partnership v. Mr. K's Foods, Inc.*, 68 Ohio St.3d 181, 187, 624 N.E.2d 1048 (1994). See also *Burger King*, 471 U.S. at 477 (also considering “the plaintiff's interest in obtaining convenient and effective relief,” “the interstate judicial system's interest in obtaining the most efficient resolution of controversies,” and the “shared interest of the several States”).

{¶44} In any event, the two final elements are not addressed by appellees other than to the extent they require the first element of purposeful availment in order to find the cause of action arose from the activities defined in the first element or in order to have an adequate connection and render jurisdiction reasonable. Regarding the third prong of the constitutional test, we also note the United States Supreme Court's observation that many contests to reasonableness on the basis of inconvenience can be addressed in a ruling on the choice of forum. *Burger King*, 471 U.S. at 477, fn. 20. That issue is discussed in the next assignment of error. Although there is personal jurisdiction in Ohio, the trial court alternatively ruled that dismissal was warranted under the doctrine of forum non conveniens.

ASSIGNMENT OF ERROR THREE: VENUE

{¶45} The third and final assignment of error set forth by Triad Hunter contends:

“The trial court erred by concluding that Plaintiff’s Complaint would be dismissed under the doctrine of *forum non conveniens* even if Defendants were subject to personal jurisdiction in Ohio.”

{¶46} Civ.R. 3(C) provides a list of Ohio counties where venue is proper, including the county in which the defendant conducted activity that gave rise to the claim for relief and the county in which all or part of the claim for relief arose. See Civ.R. 3(C)(3),(6). If there is no available forum in divisions (C)(1) to (10), then venue lies in the county in which plaintiff resides, has his or her principal place of business, or regularly and systematically conducts business activity. Civ.R. 3(C)(12). Triad Hunter cites Civ.R. 3(E), which provides:

Venue: No Proper Forum in Ohio. When a court, upon motion of any party or upon its own motion, determines: (1) that the county in which the action is brought is not a proper forum; (2) that there is no other proper forum for trial within this state; and (3) that there exists a proper forum for trial in another jurisdiction outside this state, the court shall stay the action upon condition that all defendants consent to the jurisdiction, waive venue, and agree that the date of commencement of the action in Ohio shall be the date of commencement for the application of the statute of limitations to the action in that forum in another jurisdiction which the court deems to be the proper forum. If all defendants agree to the conditions, the court shall not dismiss the action, but the action shall be stayed until the court receives notice by affidavit that plaintiff has recommenced the action in the out-of-state forum within sixty days after the effective date of the order staying the original action. If the plaintiff fails to recommence the action in the out-of-state forum within the sixty day period, the court shall dismiss the action without prejudice. If all defendants do not agree to or comply with the conditions, the court shall hear the action.

If the court determines that a proper forum does not exist in another jurisdiction, it shall hear the action.

Civ.R. 3(E).

{¶47} This provision “governs that unusual situation in which defendant objects to venue on the ground of improper venue and the court finds that there is not an appropriate venue within this state to which to transfer the action.” 1971 Staff Note to Civ.R. 3(D), now (E). In other words: “this subsection only applies when venue in Ohio is not proper under any of the options of [the pertinent preceding subsections].” *Chambers v. Merrell-Dow Pharmaceuticals, Inc.*, 35 Ohio St.3d 123, 132, 519 N.E.2d 370 (1988).

{¶48} As such, Civ.R. 3(E) is inapplicable because the defendants did not argue improper venue under Civ.R. 3(C). Rather, they filed a motion to dismiss under the doctrine of forum non conveniens. Notwithstanding its lack of codification in a statute or promulgation in a rule, this common law doctrine can be utilized in Ohio, “pursuant to the inherent powers of such court to achieve the ends of justice and convenience of the parties and witnesses.” *Chambers*, 35 Ohio St.3d 123 at paragraph one of the syllabus. “The doctrine of forum non conveniens is consistent, and does not conflict, with the intent or purpose of Civ.R. 3, relating to venue.” *Id.* at paragraph two of the syllabus. “Civ.R. 3 does not expressly preclude the application of the common-law doctrine of forum non conveniens in interstate or international situations not covered by subsection [E], whether or not venue is “proper” in Ohio.” *Id.* at 132.⁴

{¶49} Under the doctrine of forum non conveniens, a court with jurisdiction may refuse to exercise its jurisdiction even if there is venue under the state’s law if this would further the ends of justice and promote the convenience of the parties. *Chambers*, 35 Ohio St.3d at 125-126, applying *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507, 67 S.Ct. 839, 91 L.Ed. 1055 (1947). The doctrine presupposes there is jurisdiction, venue, and another available forum. *Chambers*, 35 Ohio St.3d at 126. In choosing between the forums, a trial court being asked to dismiss under this doctrine is to consider the public and private interests. *Id.*

{¶50} Regarding the private interests of the litigants, the following factors can be pertinent: the relative ease of access to evidence; the availability of compulsory process;

⁴ As for choice of county within the state, we note “Ohio does not recognize the applicability of forum non conveniens as a basis for intrastate transfers of venue.” *State ex rel. Yeaples v. Gall*, 141 Ohio St.3d 234, 2014-Ohio-4724, 23 N.E.3d 1077, ¶ 30. See also Civ.R. 3(D)(1),(4) (transfer to county which is proper or to adjoining county if fair and impartial trial cannot be held).

the cost of obtaining the attendance of witnesses; the convenience and travel expenses for parties; the ease of viewing relevant premises; any legal benefits; the enforceability of a judgment; the policy of respecting the plaintiff’s choice of forum (especially if it is a home forum); and any other practicalities that would make the trial easy, expeditious, and inexpensive. *Id.* at 127, 133. Concerning the public interests, pertinent factors involving the courts and the citizens of the forum state can include: administrative difficulties and delay to other litigants due to docket congestion or case complexity; the imposition of jury duty upon the citizens of a community with very little relation to the case; the interest in having local controversies decided locally; the forum familiar with the applicable law; the difficulty of the case; the anticipated flood of similar cases; and any dispositive changes in the law. *Id.*

{¶51} The trial court’s decision on whether to dismiss under the doctrine of forum non conveniens determination can be reversed “only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference.” *Chambers*, 35 Ohio St.3d at 127. The reviewing “will not independently assess and reweigh each factor, as our review is limited to the narrow determination of whether the trial court abused its discretion” in dismissing on forum non conveniens grounds. *Id.* at 132-133 (where there was a viable alternative forum and the dismissal was on conditional grounds).

{¶52} A court abuses its discretion if it issues a decision that is unreasonable, arbitrary, or unconscionable. *AAAA Ents., Inc. v. River Place Community Urban Redev. Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). An unreasonable decision is one that cannot be supported by any sound reasoning process. *Id.* An arbitrary decision is one made without consideration of or regard for facts or circumstances. *State v. Beasley*, 152 Ohio St.3d 470, 2018-Ohio-16, 97 N.E.3d 474, ¶ 12. An unconscionable decision is often defined as “affronting the sense of justice, decency, or reasonableness.” *Hise v. Laiviera*, 7th Dist. No. 18 MO 0010, 2018-Ohio-5399, ¶ 29, quoting *State v. Waugh*, 10th Dist. No. 07AP-619, 2008-Ohio-2289, ¶ 13, quoting *Black’s Law Dictionary* 1561 (8th Ed.2004). In reviewing for an abuse of discretion, the appellate court is not free to merely

substitute its judgment for that of the trial court. *Berk v. Matthews*, 53 Ohio St.3d 161, 169, 559 N.E.2d 1301 (1990).

{¶53} The trial court weighed some private and public interests. As for private interests, the court found: Triad Hunter first chose to file a virtually identical suit in West Virginia before filing this action and voluntarily dismissing the West Virginia action; Triad Hunter was a foreign plaintiff whose choice deserves less deference; evidence located in West Virginia includes the facilities, equipment, and personnel used in committing the act at issue and the records kept on those matters; sample retrievals and premises viewing will take place in West Virginia; and Triad Hunter seeks relief that would need to be enforced in West Virginia where the court would review the Ohio court’s jurisdiction anew (which could result in inconsistent determinations of jurisdiction). Regarding public interests, the trial court stated: the case is complex, time-consuming, and requires extensive discovery; many experts will be utilized; the residents of West Virginia are interested in the operations of a long-standing West Virginia plant; the complaint was nearly identical with that filed in West Virginia; and Triad Hunter engaged in forum shopping, which is not favored in the judicial system.

{¶54} Triad Hunter counters this analysis by pointing to: the existence of evidence and witnesses in Ohio; the property subject to the alleged trespass and damage is Ohio realty; citizens of Monroe County, Ohio have a strong interest in adjudicating claims for damage to the local realty and conversion of local minerals; samples and viewing will occur in Ohio as well West Virginia; it is not disfavored forum shopping where the plaintiff has a connection to Ohio and the injury occurred in Ohio; an Ohio judgment would be enforceable in West Virginia; although West Virginia was the original venue chosen, the defendants inserted a defense into their answer claiming a lack of “subject matter jurisdiction” in West Virginia because the claim involved damage to Ohio land; the defendants therefore instigated the plaintiff’s change of forum; although the defendants notified the Ohio court at the oral hearing that they would submit to the West Virginia court, that case had been dismissed already; a party cannot waive subject matter jurisdiction if the West Virginia court adopted a theory similar to that claimed in the

defendants' West Virginia answer⁵; and although the plaintiff is not incorporated in Ohio and does not operate a principal place of business in Ohio, it has an office in Ohio, conducts business in Ohio, and owns Ohio realty.

{¶55} On the latter topic, Triad Hunter argues it should not be labeled a “foreign plaintiff” for purposes of whether deference should be given to its choice of forum. See *Chambers*, 35 Ohio St.3d at 127, comparing *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524, 67 S.Ct. 828, 91 L.Ed. 1067 (1947) (choice of forum should rarely be disturbed, especially if the plaintiff chooses his home forum) with *Piper Aircraft Co. v. Reyno* (1981), 454 U.S. 235, 256, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981) (“Because the central purpose of any forum non conveniens inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.”). See also *Chambers*, 35 Ohio St.3d at 129, quoting *Douglas v. New York, New Haven & H. RR. Co.*, 279 U.S. 377, 387, 49 S.Ct. 355, 73 L.Ed. 747 (1929) (there are “manifest reasons for preferring residents in access to often overcrowded Courts, both in convenience and in the fact that broadly speaking it is they who pay for maintaining the Courts concerned.”).

{¶56} This court finds the dismissal on grounds of forum non conveniens was unreasonable. The above list of factors set forth by Triad Hunter is compelling in addition to matters such as: the plaintiff owned land rights in Ohio, had an office in Ohio, and transacted business in Ohio (business that was allegedly affected by the conduct of the defendants in Ohio); this was not some nefarious form of forum shopping; the trespass into Ohio land and damage to the plaintiff's Ohio land, minerals, and drilling equipment was the very subject of the suit; there is a high interest of Ohio jurors, citizens, and courts in the protection of Ohio minerals and Ohio's territorial sovereignty; the parties are located across the Ohio River from each other, and the distance of the defendant to the Monroe County courthouse is closer than the courthouse is to many other Ohio counties (for instance), both of which diminish the arguments on increased costs of the action being venued in Ohio; the voluntary dismissal of the suit in West Virginia was prompted by the defendants' own answer (which suggested the suit should be brought in Ohio because

⁵ The defendants did not set forth law contradicting their prior position that West Virginia could not proceed in a case concerning Ohio real estate. See *Piper Aircraft*, 454 U.S. 235 at fn. 22 (“At the outset of any forum non conveniens inquiry, the court must determine whether there exists an alternative forum.”).

the real estate allegedly damaged was located in Ohio); there was no sign of court congestion; and there was no indication of an anticipated floodgate being opened to an influx of related suits.

{¶57} The trial court's weighing of the private and public interests was incomplete and was an abuse of discretion under the particular facts of this case. The forum non conveniens dismissal is reversed.

{¶58} For the foregoing reasons, the trial court's two alternative reasons for dismissal are both reversed, and this case is remanded for further proceedings in the Ohio trial court which has personal jurisdiction and is a convenient forum.

Donofrio, J., concurs.

Waite, P.J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are sustained and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Monroe County, Ohio, regarding the two alternative reasons for dismissal are reversed. We hereby remand this matter to the Ohio trial court which has personal jurisdiction and is a convenient forum for further proceedings according to law and consistent with this Court's Opinion. Costs to be taxed against the Appellee.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.