IN THE SUPREME COURT OF THE
STATE OF GEORGIA

R. J. TAYLOR MEMORIAL HOSPITAL, INC.,	)	
Appellant,	)	Case No.
v.	)	S06A0402
DONALD RAY BECK,	)	
Appellee.	)	

BRIEF FOR AMICUS CURIAE
GEORGIA TRIAL LAWYERS ASSOCIATION

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Statement of Interest

GTLA is a voluntary membership organization composed of Georgia trial lawyers which is committed to preserving the jury system and representing those injured by the wrongdoing of others. GTLA submits the following brief in order to preserve plaintiffs' constitutional rights to jury trial in constitutionally permissible venues.

SUMMARY OF THE ARGUMENT

In construing O.C.G.A. § 9-10-31.1, GTLA urges the Court to adopt the interpretations that other courts have reached in construing similar laws on the following three points. First, a motion to transfer venue must be based on a detailed factual record that documents the inconvenience that is alleged to warrant the transfer. A perfunctory listing of potential witnesses who live outside the plaintiff's chosen forum is insufficient to meet the purpose of the statute. Venue transfer is not a "battle of numbers." Second, because our constitution and statutes grant the plaintiff the initial right to choose the forum in these cases, the balance of factors must *strongly* favor transfer before that right is negated and a transfer is authorized. Third, the focus of the inquiry into the alleged inconvenience of the forum should rest upon "key witnesses," those witnesses who are *not parties and not employees of parties*, but who provide critical testimony on the issue of liability.

ARGUMENT AND CITATION OF AUTHORITY

GTLA agrees with a number of positions asserted by appellee[1] and will not add additional argument on those subjects. GTLA will add some observations from the persuasive authority of the federal courts deciding forum non conveniens questions under 28 U.S.C. § 1404(a) and the authority of other state courts construing similar provisions of state law.

1. The Burden of Proof Requires a Detailed Evidentiary Showing on Both the "Convenience" and "Justice" Components of O.C.G.A. § 9-10-31.1.

O.C.G.A. § 9-10-31.1, by its terms, expressly requires that, before transferring venue, the trial court "finds that in the interest of justice *and* for the convenience of the parties and witnesses a claim or action would be more properly heard . . . in a different county of proper venue." (Emphasis added.) Federal and state courts uniformly impose a significant burden of proof on the parties seeking to transfer venue under similar rules and regularly require such parties to make a detailed evidentiary showing in support of such motions. The effect of this burden is to enable the trial court to get at the truth about the most convenient forum for trial rather than decide a "battle of

[1] In particular, GTLA agrees that (1) an abuse of discretion standard will *generally* apply to the review of decisions on change of venue motions based on forum non conveniens; (2) the "location of the tort" is not expressly or implicitly a statutory factor in making the decision; (3) the General Assembly's decision not to include the "location of the tort" as a factor in O.C.G.A. § 9-10-31.1, though it was included in O.C.G.A. § 50-2-21, is a significant indication of legislative intent.

witnesses" who may or may not appear for trial at all, who may or may not offer material testimony that cannot be stipulated, who may address central concerns or peripheral matters, and who may or may not find the initial venue inconvenient.

In the federal courts,

> [I]f the party moving for transfer under § 1404(a) merely makes a general allegation that witnesses will be necessary, without identifying those necessary witnesses and indicating what their testimony at trial will be, the motion for transfer based on convenience of witnesses will be denied. 15 Wright, Miller & Cooper, Federal Practice And Procedure § 3851, l.c. 271 (1976).

American Standard, Inc. v. Bendix Corp., 487 F. Supp. 254, 262 (W.D. Mo. 1980). Further, a defendant has the burden to identify the witnesses who will be key witnesses and who will be inconvenienced. "[A] party seeking a transfer of venue must demonstrate that the witnesses identified are key witnesses." Holmes v. Freightliner, 237 F. Supp. 2d 690, 694 (M.D. Ala. 2002). Vague notions that there may be some witnesses out there who may be inconvenienced are insufficient to sustain the defendants' burden of proof. Where a defendant makes nothing more than "general allegations" about the inconvenience to potential witnesses, "[c]ourts have been uniform in holding such a bald showing as insufficient." J.I. Kislak Mortg. Corp. v. Connecticut Bank & Trust Co., N.A., 604 F. Supp. 346, 348 (S.D. Fla. 1985).

A mere quantitative counting of yet-to-be-identified individuals rather than the qualitative "individualized, case-by-case consideration of convenience and fairness" (Stewart Organization,

Inc. v. Ricoh Corp., 487 U.S. 22, 29 (1988)) is insufficient to sustain the burden to transfer venue.

> The analysis of the convenience of the witnesses *does not boil down to which party produces the longer list of witnesses* that will be inconvenienced by a particular forum. Rather, *in addition to the weight accorded non-party witnesses, the Court's focus is on those witnesses which will be key to conducting the trial.* When considering a transfer of venue, the *key witnesses are those which have information regarding the liability of Defendant.* Damage witnesses are accorded less weight due to the fact that without liability, there are no damages to recover.

Ramsey v. Fox News Network, LLC, 323 F. Supp. 2d 1352, 1356-57 (N.D.Ga. 2004) (internal citations omitted, emphasis added). Therefore,

> The party asserting witness inconvenience has the burden to proffer, by affidavit or otherwise, sufficient details respecting the witnesses and their potential testimony to enable the court to assess the materiality of evidence and the degree of inconvenience. Naturally, in contrast to witness testimony that is merely cumulative, greater weight should be accorded inconvenience to witnesses whose testimony is central to a claim and whose credibility is also likely to be an important issue. *Witness convenience is not merely a battle of numbers favoring the party that can provide the longest list of witnesses it plans to call.*

Samsung Elecs. Co. v. Rambus Inc., 386 F. Supp. 2d 708, 718-719 (E.D. Va. 2005) (internal citations and quotations omitted, emphasis added).

State courts analyzing similar provisions have imposed similar requirements. The North Dakota Supreme Court has recently outlined the showing to be made:

> The party moving for a change of venue has the burden of stating facts, not merely conclusions, that affirmatively establish a change of venue is warranted. This

> burden requires a showing that both the convenience of witnesses and the ends of justice would be promoted by a change of venue. To support a motion for change of venue based upon the convenience of the witnesses and furtherance of the ends of justice, the moving party must demonstrate with specificity the identity of the witnesses, their place of residence, and the nature, necessity, and relevance of their testimony: . . . The requirements are well settled that the affidavit in support of such a motion may not only state conclusions, but must state facts upon which the trial court can make its determination. It must also contain specifics, rather than mere generalities. It should contain the names of proposed witnesses and their places of residence, that they are necessary and material witnesses, that the moving party cannot safely proceed to trial without their testimony, and what is expected to be proved by them.

Flattum-Riemers v. Flattum-Riemers, 660 N.W.2d 558, 565-566 (N.D. 2003) (internal citations omitted). Such burdens are well-settled. American State Bank v. Hoffelt, 246 N.W.2d 484, 486 (N.D. 1976) (citing early cases).

New York's Appellate Division recently summarized numerous prior decisions as requiring four showings of any party that seeks to transfer venue:

> A review of the case law decided with reference to CPLR 510 (3) and its antecedents establishes that there is a general consensus among appellate courts as to the existence, if not as to the absolute rigidity and inexorability, of four criteria which should be established by the movant in order to demonstrate his or her entitlement to relief pursuant to CPLR 510 (3). The elements to be shown are as follows:
>
> First, [t]he affidavit in support of a motion under this section must contain ... the names, addresses and occupations of the prospective witnesses.
>
> Second, a party seeking a change of venue for the convenience of witnesses is also required to disclose the facts to which the proposed witnesses will testify at the trial, so that the court may judge whether the

> proposed evidence of the witnesses is necessary and material.
>
> Third, the moving party must show that the witnesses for whose convenience a change of venue is sought are in fact willing to testify.
>
> Fourth, there must be a showing as to how the witnesses in question would in fact be inconvenienced in the event a change of venue were not granted.

O'Brien v. Vassar Bros. Hosp., 622 N.Y.S.2d 284, 286-287 (N.Y. App. Div. 1995) (internal citations and quotations omitted).

Alabama's Supreme Court has recently noted "the *necessity* for 'a showing on the general nature of the witnesses's testimony'," Ex parte Perfection Siding, Inc., 882 So. 2d 307, 312 n.2 (Ala. 2003) (emphasis added), citing Ex parte Wiginton, 743 So. 2d 1071, 1076 (Ala. 1999), where the Court quoted a leading federal treatise (Wright, Miller & Cooper, Federal Practice and Procedure, § 3851, at 424-28 (2d ed. 1986)) as follows:

> The most important limitation on transfers to suit the convenience of witnesses is the showing that is required to justify such a transfer. The courts with one accord, have refused to let applications for transfer become 'a battle of numbers.' The rule is that these applications are not determined solely upon the outcome of a contest between the parties as to which of them can present a longer list of possible witnesses located in the respective districts in which each party would like to try the case. The party seeking the transfer must clearly specify the key witnesses to be called and must make a general statement of what their testimony will cover. The emphasis must be on this showing rather than on numbers. One key witness may outweigh a great number of less important witnesses. If a party has merely made a general allegation that witnesses will be necessary, without identifying them and indicating what their testimony will be the application for transfer will be denied.

Colorado has long ago imposed similar requirements.

> When a motion for a change of venue is made under C.R.C.P. 98(f)(2), the movant must show, through affidavit or evidence, the identity of the witnesses, the nature, materiality and admissibility of their testimony, and how the witnesses would be better accommodated by the requested change in venue.

Sampson v. District Court of Seventh Judicial Dist., 590 P.2d 958, 959 (Colo. 1979) (citing early cases, finding that a transfer of venue based on nothing more than an affidavit that the initial venue was remote and the witness would be inconvenienced was an abuse of discretion).

See further Patrick v. Hurdle, 169 S.E.2d 239, 241 (N.C. App. 1969) (if "a motion to remove when the convenience of witnesses and ends of justice would be promoted . . . is made, facts must be stated particularly and in detail in the affidavit, or judicially admitted, showing the grounds for such removal"); Garrett v. Packet Motor Express Co., 263 S.C. 463, 467 (S.C. 1975) (criticizing affidavits submitted in support of a motion to transfer as "stereotyped, the only material change being the names of the affiant," some dealing with medical witnesses who would not testify at all, and none providing the potential testimony of the witness; "the movant cannot rely merely on the beliefs, opinions, and conclusions of the witnesses"; the "distance of travel, without further explanation, is of no probative significance in determining the issue of convenience"; "It is not only necessary that the convenience of witnesses be promoted but equally essential that the 'ends of justice' be promoted before the court is justified in granting the motion.");

Guardian Fidelity Corp. v. United States Fidelity & Guaranty Co., 225 S.E.2d 655, 656 (S.C. 1976) ("The trial court nor this Court can consider the convenience of witnesses when the materiality of their testimony is not shown. . . . A disclosure of their testimony must be shown.")

Imposing similar burdens in Georgia, as in these other states, will serve the purposes of O.C.G.A. § 9-10-31.1 in avoiding inconvenient forums for the *trial* of cases. Otherwise, nominal witnesses, or immaterial witnesses, or peripheral witnesses, or witnesses who live elsewhere but would not be inconvenienced, would improperly affect the selection of the forum for trial.

2. The Burden of Proof is Enhanced: The Movant's Proof Must *Strongly* Weigh in Favor of Transfer.

The federal decisions show that the burden concerning transfer of venue rests on the party moving for transfer, and that it is a significant burden which is not met by casual or general arguments. "[I]n the usual motion for transfer under section 1404(a), the burden is on the movant to establish that the suggested forum is more convenient." In re Ricoh Corp., 870 F.2d 570, 573 (11th Cir. 1989). "The plaintiff's choice of forum should not be disturbed unless it is *clearly outweighed* by other considerations." Robinson v. Giarmarco & Bill, P.C., 74 F.3d 253, 260 (11th Cir. 1996) (emphasis added). "Unless the balance is *strongly* in favor of the moving party, the plaintiff's choice of forum should not be disturbed." Paul, Hastings, Janofsky &

Walker, LLP v. City of Tulsa, 245 F. Supp. 2d 1248, 1260 (N.D. Ga. 2002) (emphasis added), citing Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947).

State courts are in accord. "A plaintiffs [sic] right to select the forum is a substantial one, and unless the factors weigh *strongly* in favor of transfer, 'the plaintiffs [sic] choice of forum should rarely be disturbed.'" Peile v. Skelgas, Inc., 645 N.E.2d 184, 191 (Ill. 1994) (emphasis added). "A plaintiff's choice of forum should not be disturbed except for '*weighty reasons*,' and the case should be dismissed only where the balance *strongly* favors the defendant. Omans v. Norfolk S. Ry., 2006 Ohio App. LEXIS 295 (Ohio Ct. App. 2006) (emphasis added). "[A] motion to transfer should be granted only when the balance weighs *strongly* in favor of the moving party." Bittner v. Huth, 876 A.2d 157, 165 (Md. Ct. Spec. App. 2005) (emphasis added). "Unless the balance is *strongly* in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." Ameritas Inv. Corp. v. McKinney, 694 N.W.2d 191, 202 (Neb. 2005) (emphasis added). "[U]nless the balance is *strongly* in favor of the defendant, the plaintiffs choice of forum should rarely be disturbed." Weingarten v. Bd. of Educ., 776 N.Y.S.2d 701, 704 (N.Y. Misc. 2004) (emphasis added). "Plaintiff's choice of forum is entitled to great weight and will not be disturbed unless there are factors *strongly* militating against it." Goldberg v. Hersman, 2000 Del. C.P. LEXIS 10 (Del. C.P. 2000). "[U]nless the

balance is *strongly* in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." Ex parte First Family Fin. Servs., 718 So. 2d 658, 661 (Ala. 1998) (emphasis added). "[U]nless the balance is *strongly* in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed. . . . [T]he party seeking a change of venue bears a *heavy burden* in justifying the request, and it has been consistently held that this burden includes the demonstration on the record of the claimed hardships." Okkerse v. Howe, 556 A.2d 827, 832 (Pa. 1989) (emphasis added). "Unless the balance is *strongly* in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." Kohn v. Ford Motor Co., 390 N.W.2d 709, 718 (Mich. Ct. App. 1986) (emphasis added).

In this connection, a significant difference between O.C.G.A. § 9-10-31.1 and 28 U.S.C. § 1404(a) should be noted. When a motion to transfer under § 1404(a) is filed, the issue will commonly involve inconveniences on the order of whether one must litigate in such venues as distant as from Georgia to California. Such motions involve a degree of potential inconvenience that is an order of magnitude greater than most motions under O.C.G.A. § 9-10-31.1 are likely to be. Most issues under O.C.G.A. § 9-10-31.1 will likely involve distances one or two counties away, and where the plaintiff initially files suit in a more populous county, it will frequently occur that all or many of the defendants live in the county, or regularly visit places

within a few miles of the initial courthouse for shopping, entertainment, or otherwise. The comparatively *low* level of inconvenience of litigating here should be remembered in assessing whether "[t]he plaintiff's choice of forum . . . is *clearly outweighed* by other considerations." Robinson v. Giarmarco & Bill, P.C., 74 F.3d 253, 260 (11th Cir. 1996) (emphasis added).

3. In determining the most convenient forum, non-party witnesses addressing issues of liability should be given the greatest consideration, and parties and their employees should be given little consideration.

Although both 28 U.S.C. § 1404(a) and O.C.G.A. § 9-10-31.1 expressly concern "the convenience of the parties and witnesses," the federal case law is clear that the *paramount* concern is the convenience of the non-party witnesses who will address the question of liability. Parties and employees of parties are excluded because it is assumed that they will be more willing to testify, or can be assigned by employers to testify, in the plaintiff's chosen forum. Therefore, only the non-party witnesses who address the most material issues should be the focus of an analysis of convenience.

> The convenience of the witnesses is of great importance to the decision to transfer venue from one forum to another, and the focus of the Court should be on the convenience of "key witnesses." McNair v. Monsanto Co., 279 F. Supp. 2d 1290, 1311 (M.D. Ga. 2003). Additionally, there is a distinction between party witnesses and non-party witnesses. Party witnesses are the parties themselves and those closely aligned with a party, and they are *presumed to be more willing to testify in a different forum*, while there is no such presumption as to non-party witnesses. Gundle Lining Const. Corp. v. Fireman's Fund Ins. Co., 844 F. Supp. 1163, 1166 (S.D. Tex. 1994). Given the fact that, when

> possible, live testimony is preferred over other means of presenting evidence, *the convenience of the non-party witnesses weighs most heavily on the Court in deciding on a motion to transfer venue*. State Street Capital Corp. v. Dente, 855 F. Supp. 192, 197 (S.D. Tex. 1997).

Ramsey v. Fox News Network, LLC, 323 F. Supp. 2d 1352, 1356 (N.D. Ga. 2004) (emphasis added).

> [I]t is the convenience of non-party witnesses, rather than that of party witnesses, that is the more important factor and is accorded greater weight in a transfer of venue analysis. So, while the location of party witnesses may factor into transfer analysis, *it's the location of key, non-party witnesses that dominates*. Regardless whether transfer is sought for key party or non-party witnesses, the moving litigant must make more than a general allegation that the key witnesses are inconveniently located. The moving party must specifically identify key witnesses and outline the substance of their testimony.

Mohamed v. Mazda Motor Corp., 90 F. Supp. 2d 757, 775 (E.D. Tex. 2000) (internal citations and quotations omitted). "[T]he convenience of key witnesses who are employees of a defendant is 'entitled to less weight because that party will be able to compel their testimony at trial.'" Chretien v. Home Depot U.S.A., Inc., 169 F. Supp. 2d 670, 674 n.1 (S.D. Tex. 2001).

The state courts are in agreement. "[T]he convenience of the parties themselves or that of their employees will not be considered." Stavredes v. United Skates of America, Inc., 447 N.Y.S.2d 478, 479 (N.Y. App. Div. 1982). "The convenience of witnesses who are members of the immediate family of a party, or witnesses who are employees of one of the parties normally are not given the same consideration as given to witnesses not

occupying such relationship." Stephan v. Hoffman, 386 P.2d 56, 59 (Idaho 1963). "It is generally held that the convenience of nonresident witnesses, and the convenience of officers and employees of a party, will not be considered on a motion based on the ground of the convenience of witnesses." Kroehnke v. Gold Creek Mining Co., 51 P.2d 640, 642-643 (Mont. 1935). "[E]xcept under limited circumstances, the court may not consider the convenience of the parties or of their employees in passing upon the motion." Lieberman v. Superior Court, 194 Cal. App. 3d 396, 401 (Cal. Ct. App. 1987). Therefore, "[o]n a motion [to change venue] such as this, little, if any, consideration is to be given to the convenience of employees of defendant hospital." Joseph v. Agnant, 693 N.Y.S.2d 21, 22 (N.Y. App. Div. 1999) (rejecting the significance of the convenience of three physician employees identified as witnesses).

CONCLUSION

GTLA respectfully submits that the Court should consider the foregoing authority as persuasive in applying O.C.G.A. § 9-10-31.1 in this and future cases.

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CERTIFICATE OF SERVICE

I certify that I have this day served a copy of the foregoing BRIEF OF AMICUS CURIAE GEORGIA TRIAL LAWYERS ASSOCIATION upon all counsel of record by mailing the same with sufficient postage in a properly addressed envelope.

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Dated this 10th day of May, 2006.

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