

IN THE STATE COURT OF DEKALB COUNTY

STATE OF GEORGIA

KATHRYN YARBROUGH et al., :
 :
 Plaintiffs, :
 :
vs. :
 :
 :
NORTHSIDE HOSPITAL, INC. :
et al., :
 :
 :
 Defendants. :
 :

O R D E R

Upon consideration of **Defendants' Joint Motion to Transfer Venue from the State Court of DeKalb County to the State Court of Cherokee County** filed on December 28, 2005; after reviewing the motion, supporting briefs,¹ response and other documents in the file and hearing, on July 7, 2006, the arguments of counsel, the Court finds as follows:

1. Insofar as the motion is based on OCGA § 9-10-31(c), it must be denied;²
2. OCGA § 9-10-31.1(a) provides that

If a court . . . finds that in the interest of justice and for the convenience of the parties and witnesses a[n] . . . action would be more properly heard . . . in a different county of proper

¹Filed on December 28, 2005, April 28, 2006, and May 5, 2006.

²EHCA Cartersville, LLC v. Turner, 280 Ga. 333 (1) (626 SE2d 482) (2006).

venue within this state,³ . . . the venue shall be transferred to the appropriate county. In determining whether . . . to transfer venue . . . , the court shall give consideration to the following factors:

(1) Relative ease of access to sources of proof;

(2) Availability and cost of compulsory process for attendance of unwilling witnesses;

(3) Possibility of viewing of the premises, if viewing would be appropriate to the action;

(4) Unnecessary expense or trouble to the defendant not necessary to the plaintiff's own right to pursue his or her remedy;

(5) Administrative difficulties for the forum courts;

(6) Existence of local interests in deciding the case locally; and

(7) The traditional deference given to a plaintiff's choice of forum.

3. "[The] movant . . . ha[s] the burden to show that the factors . . . support the transfer";⁴

4. The **first factor** weighs in favor of transfer, as

a) only one of the original eleven defendants resided in this County at the time this case was filed,⁵ none of them practiced here at that time and none of the current twelve defendants resides or practices here now,⁶

³It is undisputed that Cherokee is a county of proper venue.

⁴R.J. Taylor Mem. Hosp., Inc. v. Beck, No. S06A0402, 2006 Ga. LEXIS 451, at *6 (3) (June 26, 2006) (cits. om.).

⁵Franek v. Ray, 239 Ga. 282, 285-86 (236 SE2d 629) (1977).

⁶Contrast Taylor, *supra*, where "several of the defendants . . . reside [in the county of filing]" (*7 (3)) and "some of the defendants . . . reside and practice in [the county of filing]" (*id.*).

b) six of the current defendants reside in Cherokee County, four of them⁷ reside in Fulton County, which borders both this county and Cherokee, two of them reside in Forsyth County, which borders Cherokee County but not this county and one of them resides in Paulding County, which borders neither this county nor Cherokee but is closer to the latter,

c) six witnesses (excluding Plaintiffs) reside in Cherokee County,⁸ two reside in Forsyth County,⁹ one resides in Pickens County,¹⁰ which borders Cherokee County on the north, one resides in Dawson County,¹¹ which borders Cherokee County on the northeast, one resides in Union County,¹² which is northeast of Cherokee County and two reside out of state,¹³ and

d) all relevant events occurred in Cherokee County;¹⁴

5. While the availability aspect of the **second fac-**

⁷Including one, Northside Hospital, Inc., that also resides in Cherokee County.

⁸Non-parties Holierhoek, Schwaner and James Howard Yarbrough and Defendants Dr. Al-Kharrat, Dr. Allen and Oden.

⁹Defendants Hal Gentry and Stephanie Gentry.

¹⁰Non-party James Harold Yarbrough.

¹¹Non-party McFarland.

¹²Non-party LaBelle.

¹³Dr. Terndrup (Ala.) and Nurse Redmon (Fla.).

¹⁴The Court views Plaintiffs' interesting point - that a number of expert witnesses will arrive from other states at the Atlanta airport and thus the parties' access to these sources of proof will be easier if the case remains here - as having insufficient weight to overcome the foregoing facts.

tor has no weight either way,¹⁵ the cost aspect¹⁶ weighs in favor of transfer, as it is undisputed that Defendants will need to subpoena some witnesses,¹⁷ and in view of the findings in paragraph 4c hereof, the costs will be lower if the case is transferred;

6. Notwithstanding Defendants' claim that viewing the premises would be appropriate to the action, the Court is unable to understand how, in this action for medical malpractice, that could be so, and thus the **third factor** has no weight either way;¹⁸
7. The **fourth factor** weighs in favor of transfer as indicated in paragraphs 4 and 5 hereof;¹⁹
8. The **fifth factor** has no weight either way;²⁰
9. The **sixth factor** weighs in favor of transfer as indicated in paragraph 4 hereof;²¹

¹⁵OCGA § 24-10-21.

¹⁶OCGA § 24-10-24.

¹⁷Contrast Taylor, *supra*, where "there is no demonstration by the record that resort to compulsory process was necessary" (*7 (3)).

¹⁸As in Taylor, *supra* (*7 (3)).

¹⁹Alternatively, it may have no weight either way, as it appears ¶ (4) of OCGA § 9-10-31.1(a), at least in most cases, will already have been accounted for in ¶¶ (1)-(3). Cf. Taylor, *supra* (*7-*8 (3)).

²⁰As in Taylor, *supra* (*8 (3)).

²¹Contrast Taylor, *supra* (*8 (3)):

[I]nasmuch as the hospital has acknowledged that *some of the defendants in this case do reside and practice in [the county of filing, Bibb]* and that [Bibb and the proposed transferee county, Pulaski] are not at great dis-

10. The **seventh factor**, of course, weighs against transfer, as it always will;²²
11. Having given the required consideration to the seven factors, the Court finds that "in the interest of justice and for the convenience of the parties and witnesses . . . [this] action would be more properly heard . . . in [Cherokee County]";²³
12. This conclusion makes it necessary to consider the constitutional arguments at pp. 2-11 of Plaintiffs' response;²⁴
13. No violation of Ga. Const. Art. III, Sec. V, Para. III²⁵ occurred in the enactment of Act 1 of the 2005 session of the Georgia General Assembly ("Act

tance from one another, it is difficult to accept the assertions that what is at issue affects the receipt of medical care solely in Pulaski County or that there is no local interest in deciding the case in Bibb County.

Emphasis added. With respect to distance, county seats Decatur and Canton are only slightly closer to one another than are Macon and Hawkinsville.

²²It seems pertinent to point out, however, that Plaintiffs also reside in Cherokee County.

²³OCGA § 9-10-31.1(a). Taylor, *supra*, is not to the contrary, as it merely holds that the movant/appellant there "failed to . . . show[] an abuse of . . . discretion [in refusing to transfer]" (*6-*7 (3)). Moreover, see the points of distinction between Taylor and this case in nn. 6, 17 & 21, *supra*.

²⁴"A constitutional question will not be decided unless it is essential to the resolution of the case." Bell v. Austin, 278 Ga. 844 (1) (607 SE2d 569) (2005) (citation omitted). Here, of course, Plaintiffs' constitutional claims, in conjunction with the conclusion in ¶ 11 hereof, make it essential to the resolution of the motion to decide these constitutional questions.

²⁵"No bill shall pass which refers to more than one subject matter"

1");²⁶ and

²⁶Ga. L. 2005, p. 1. This question was not addressed in Turner, supra (n.2). The preamble to Act 1 stated that it was

[An Act] [t]o amend Titles 9, 24, 33, 43, and 51 of the Official Code of Georgia Annotated, relating respectively to civil practice; evidence; insurance; professions and businesses; and torts, so as to provide for substantive and comprehensive revision of provisions regarding civil practice, evidentiary matters, and liability in tort actions in general and actions related to health care in particular

Moreover, uncodified Sec. 1 of Act 1 states that

. . . The General Assembly further finds that certain civil justice and health care regulatory reforms as provided in this Act will promote predictability and improvement in the provision of quality health care services and the resolution of health care liability claims and will thereby assist in promoting the provision of health care liability insurance by insurance providers. The General Assembly further finds that certain needed reforms affect not only health care liability claims but also other civil actions and accordingly provides such general reforms in this Act.

The standard applicable to what is now Art. III, Sec. V, Para. III was set out in Crews v. Cook, 220 Ga. 479, 481-82 (139 SE2d 490) (1964), as follows:

In determining whether this Act refers to more than one subject matter . . . we must determine the meaning of the word "subject matter" as used in the Constitution. . . . As used in the Constitution, it is to be given a broad and extended meaning so as to allow the legislature authority to include in one Act all matters having a logical or natural connection. To constitute plurality of subject matter, an Act must embrace two or more dissimilar and discordant subjects that by no fair intendment can be considered as having any logical connection with or relation to each other. All that our Constitution requires is that the Act embrace only one general subject; and by this is meant, merely, that all

14. No violation of Ga. Const. Art. I, Sec. II, Para. III²⁷ occurred in the enactment of Act 1.²⁸

matters treated by the Act should be so connected with or related to each other, either logically or in popular understanding, as to be parts of, or germane to, one subject. This provision of our Constitution was intended to stop the vicious practice of joining in one Act incongruous and unrelated matters; but any construction of it which would interfere with the very commendable policy or practice of incorporating the entire body of statutory law upon one general subject in a single Act, instead of dividing it into a number of separate Acts, would not only be contrary to its spirit, but also seriously embarrassing to honest legislation. The attacked Act . . . amends several Code sections, all of which deal with and relate directly to the subject of wills and the administration of estates; and since this is true, it does not offend [what is now Art. III, Sec. V, Para. III]

Under this standard, Act 1 did not violate the constitutional provision in question. See also Perdue v. O'Kelley, No. S06A1574, 2006 Ga. LEXIS 465, at *6-*9 (July 6, 2006), reaching the same conclusion with respect to Ga. Const. Art. X, Sec. I, Para. II (single-subject rule for constitutional amendments) and relying on Crews, *supra*.

²⁷"The legislative, judicial, and executive powers shall forever remain separate and distinct; and no person discharging the duties of one shall at the same time exercise the functions of either of the others except as herein provided."

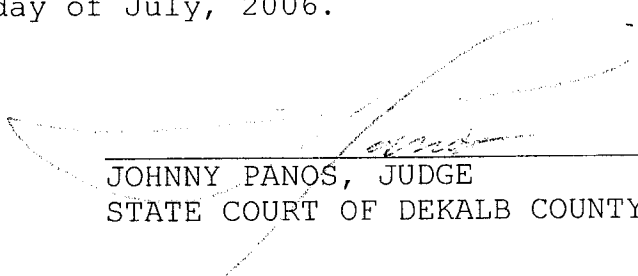
²⁸In Turner, *supra* (n.2), the Court held that "OCGA § 9-10-31.1(a) is a proper exercise of authority under Art. VI, Sec. II, Par. VIII of the Constitution" (280 Ga. at 337 (2)). The referenced paragraph provides that

The power to change . . . venue . . . shall be vested in the superior [and state] courts to be exercised *in such manner as . . . shall be . . . provided by law [i.e., by enactment of a statute by the General Assembly and Governor]*.


Emphasis added. (The inserted reference to state courts is based upon the Court's holding earlier in its opinion that "the term

ACCORDINGLY, the motion is hereby GRANTED.²⁹

SO ORDERED, this 11th day of July, 2006.


JOHNNY PANOS, JUDGE
STATE COURT OF DEKALB COUNTY

c: Linda A. Klein, Esquire
Andrew B. Koplan, Esquire
Steven G. Hall, Esquire
Susan V. Sommers, Esquire
Jane C. Taylor, Esquire
Alan F. Herman, Esquire
Assunta F. Deevey, Esquire
Richard A. Mitchell, Esquire
Brynda Rodriguez Insley, Esquire
H. Andrew Owen, Jr., Esquire
T. Case Maner, Esquire

FILED IN THIS OFFICE
THIS 12 DAY OF July 20 06

Clerk, State Court, DeKalb County

'superior courts' in Art. VI, Sec. II, Par. VIII must be construed to include 'state courts.'" (280 Ga. at 335 (1)).) Since the enactment of OCGA § 9-10-31.1(a) is "a proper exercise of authority" under a constitutional provision that vests in superior and state courts the power to change venue "in such manner as . . . shall be . . . provided by law," it follows that Act 1 did not violate the constitutional provision now in question either.

²⁹The Uniform Transfer Rules and UStCR 19.1 (and in particular, their provisions for fees and costs) appear not to apply here, as those rules are applicable "only when the court . . . is alleged to lack . . . venue" (UTR T-2) and to a "motion . . . that . . . venue is improper" (UStCR 19.1(A)) and it is undisputed that venue was properly laid in DeKalb County (see n. 5, *supra*, and accompanying text).