Not intended for print publication.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

HUNTINGTON DIVISION

JAMES ADKINS and
VIRGINIA ADKINS,

Plaintiff,

v. CIVIL ACTION NO. 3:02-0982

SERVICE WIRE COMPANY,

Defendant.

MEMORANDUM OPINION AND ORDER

Pending is defendant Service Wire Company's motion to transfer venue [Docket 7]. For the following reasons, the court **DENIES** the defendant's motion.

1. Background

James Adkins, an Ohio resident, filed a state law tort action in this court, based on diversity jurisdiction, for injuries resulting from an accident in Houston, Texas. The defendant, Service Wire Company (Service Wire), is a West Virginia corporation with its principal place of business in Huntington, West Virginia.

In December of 2001, Service Wire contracted with Mr. Adkins's employer, Dallas and Mavis Specialized Carrier Company, to transport wire reels from Service Wire's Culloden, West Virginia location to its Houston location and to transport empty reels from Houston back to West Virginia. (Pl. Exh. A.) Mr. Adkins, accompanied by his wife Virginia, drove the load to Service Wire's facility in Houston, where Service Wire employees allegedly unloaded the reels and then

reloaded the trailer with empty reels. (Pl. Exh. A.) During the course of reloading, one of the reels allegedly fell off the truck and seriously injured Mr. Adkins. Mr. Adkins was hospitalized in Houston for a number of months, then transferred to Atlanta, and was scheduled to return to his home in Ohio on October 29, 2002. (Pl. Exh. K.) The accident has left Mr. Adkins a quadriplegic, and he will require 24-hour nursing care at home and significant ongoing medical care from physicians in the Huntington area. (Pl. Exh. A, K.) The Adkins's Ohio home is located just across the river, about six miles, from downtown Huntington. (Pl. Exh. A.)

Service Wire filed a motion to transfer venue to the United States District Court for the Southern District of Texas, arguing that almost all of the traditional factors regarding proper venue indicate that Texas is the proper venue for this action. In response, Mr. Adkins claims that it will be impossible, as a practical matter, for him to attend or participate in his trial if it occurs in Texas. (Pl. Exh. E.) He states that his last transport from Houston to his home near Huntington was by air ambulance at a cost of over $30,000. (Pl. Exh. E.) The parties have briefed the issue thoroughly, and the matter is now ripe for decision.

2. Standard of Review

The standard for a motion to transfer venue, as set out in *AFA Enterprises, Inc. v. American States Ins. Co.*, 842 F. Supp. 902 (S.D. W. Va. 1994), is as follows:

> The movant, most often the defendant, bears the burden of showing the propriety of transfer. The plaintiff's choice of forum is accorded considerable weight. Further, a transfer motion will be denied if it would merely shift the inconvenience from the defendant to the plaintiff . . . .
>
> Factors commonly considered in ruling on a transfer motion include: (1) ease of access to sources of proof; (2) the convenience of parties and witnesses; (3) the cost of obtaining the attendance of witnesses; (4) the availability of compulsory process; (5) the possibility of a

view; (6) the interest in having local controversies decided at home; and (7) the interests of justice.

Id. at 909 (citations omitted). Courts have also considered other factors, including the state law that will be applied and the relative congestion of the respective court dockets, in considering motions to transfer venue. *See Chesler v. Trinity Indus., Inc.*, No. 99 C 3234, 1999 WL 498592, at *3 (N.D. Ill. July 6, 1999).

3. Discussion

This case presents a difficult question regarding the proper venue for this action. On the one hand, many of the traditional factors related to venue, such as the location of the accident, the applicable law, and the location of most of the witnesses, favor venue in Texas. On the other hand, the plaintiffs in this case are a quadriplegic and his wife, both eyewitnesses to the accident, who claim that for all practical purposes they will be able to attend their own trial only if it is held in West Virginia. While this situation is somewhat unusual, it is not unprecedented. A review of the caselaw reveals that courts presented with similar situations have reached differing results and that their decisions depend heavily on the particular facts and circumstances of each case. Thus, the caselaw does not point unequivocally toward one outcome. Nonetheless, these decisions do provide guidance to the court in making its venue determination based on the particular circumstances of this case.

In *Chesler*, the court denied the defendant's motion to transfer venue from Illinois, the plaintiff's home state, to Nebraska, the site of the accident. The plaintiff had been injured in a multi-vehicle accident in Nebraska involving a semi truck owned and driven by an employee of the defendant, Trinity Industries, a Texas corporation. At the time of filing suit, the plaintiff was

confined to a hospital bed at home in Illinois and had to use a wheelchair to travel. The court noted that:

> a number of the liability witnesses will be located in and around Nebraska, as will some of the evidence. However, an equally important part of this litigation will involve Chesler's damages. Many of the damages witnesses and evidence remain in Illinois with the plaintiff. Neither party argue that jurors will need access to the scene of the accident. Therefore, given the mobility of all other witnesses, except Chesler, the court sees no reason to transfer venue to Nebraska simply because the accident took place there . . . .
>
> The driver of the Trinity vehicle resides in Texas and as a Trinity employee, defendant will bear the cost of transporting him to this forum. Plaintiff rightly points out that no witness to the collision itself is subject to compulsory service in Nebraska. Other persons involved in the accident now live in Utah, New Jersey, and Illinois. The investigating police officer and medical staff who first attended to Chesler's injuries reside in Nebraska. However, Chesler maintains that at least five of his treating physicians from Illinois will be called to testify about the extent of his injuries and chances for recovery. In addition, Chesler claims he will call lay witnesses to detail plaintiff's condition before and after the collision and that each of those witnesses live in Illinois. . . .
>
> While Nebraska maintains an interest in adjudicating matters occurring within its boundaries, Illinois also has an interest in protecting its citizen from the inconvenience and expense of having to litigate claims elsewhere. Although Nebraska law will govern the liability phase of this litigation, Illinois law would dictate any damages phase.

Id. at *2-3. In these circumstances, the court concluded that "on balance, the interests of justice do not require that the court transfer this case to Nebraska." *Id.* at *3. The court therefore denied the defendant's motion to transfer venue.

In contrast to *Chelser*, the court in *Passero v. Killington, Ltd.*, Civ. A. No. 92-5304, 1993 WL 8722 (E.D. Pa. Jan. 12, 1993), granted the defendant's motion for transfer of venue despite the inconvenience to a quadriplegic plaintiff. In *Passero*, the plaintiff had been injured in a skiing accident at the defendant's ski area in Vermont. The defendant corporation was a Vermont corporation, but advertised in Pennsylvania and was thus subject to personal jurisdiction in the

Eastern District of Pennsylvania. The defendant was a New Jersey resident but lived within 100 miles of the Eastern District of Pennsylvania courthouse. The court explained:

> [T]he following factors weigh heavily in favor of transferring this action to the District of Vermont: Killington is a Vermont corporation with its principal place of business in Vermont; plaintiff's injuries occurred in Vermont; a number of defendant's potential witnesses are located in Vermont; the bulk of any documents regarding the condition of ski trails . . . are in Vermont; and . . . the district which ultimately hears this case will most likely have to apply Vermont law.
>
> The following factors weigh in factor of retaining this action in the Eastern District of Pennsylvania: plaintiff and plaintiff's fact witnesses reside in New Jersey, within 100 miles of this courthouse; some of plaintiff's medical records are located in this district; and, most of all, plaintiff is a quadriplegic and traveling from New Jersey to Vermont for trial would create a physical hardship.
>
> After careful consideration of each of the above factors, the court concludes that venue is more properly laid in the District of Vermont.

Id. at *2-3. Both *Chesler* and *Passero* bear some similarity to this case, but of course the two differ from each other and from this case in various factual details. For example, in this case, unlike either *Chesler* or *Passero*, Service Wire is headquartered in this district. Other cases also reach different conclusions regarding venue given the particular facts presented. *See, e.g., Karrels v. Adolph Coors Co.*, 699 F.Supp. 172 (N.D. Ill. 1988) (motion to transfer venue to Indiana granted when plaintiff's accident occurred in Indiana, defendant corporation was an Indiana corporation, individual defendant was an 80-year old Indiana resident, most fact and medical witnesses were in Indiana, Indiana law would apply, and Indiana courts were less congested, despite fact that plaintiff was an Illinois resident and was a quadriplegic requiring 24-hour care); *Nikac v. Pozzi*, 172 F. Supp. 2d 414 (S.D.N.Y. 2001) (motion to transfer venue from Manhattan, New York to White Plains, New York denied when plaintiff was a quadriplegic living near the Manhattan courthouse and the inconvenience to the defendants, who lived in Westchester, was minimal). In sum, the caselaw

demonstrates that the proper venue in situations such as that presented here is a very close question that is dependant on the particular facts of each case.

Turning now to those particular facts, the court notes that the following factors favor venue in Texas:

(1) The accident happened in Texas.

(2) The witnesses to the accident are all or mostly in Texas, with the notable exception of the plaintiffs, James and Virginia Adkins, who are both parties and eyewitnesses to the injury.

(3) The medical personnel who treated Adkins at the scene and for several months thereafter are in Texas. However, Adkins states that he does not intend to call his treating doctors in Texas, Kentucky, or Georgia at trial, but rather will rely solely on their medical records. Additionally, Service Wire has not indicated that it intends to call the Texas medical personnel, who ordinarily would be plaintiff's witnesses, in support of its own case at trial. Accordingly, in this particular case this factor does not carry as much weight as it often might.

(4) The Service Wire employees who were involved in the accident are located at Service Wire's Texas operations center.

(5) The parties agree that Texas law will apply to this action.

(6) If the jury needs to view the accident site, that site is in Texas. Neither party has made any argument as to whether, in this particular case, it seems likely that the jury will or will not need to see the accident site.

(7) Witnesses in Texas are beyond the subpoena power of this court.

(8) From its perspective, Service Wire claims that Texas is the more convenient location. This claim is plausible, because the Service Wire employees who were involved in or who witnessed

the accident are all located in Texas. Nonetheless, the inconvenience to Service Wire of litigating in West Virginia is less in this case than the inconvenience to the defendants in *Chesler*, *Passero*, or *Karrels*, because in those cases the defendant was not located in the district where the plaintiff filed suit. In this case, while the accident most directly involves Service Wire's Houston facility, Service Wire is headquartered in Huntington, West Virginia. Accordingly, it will not be difficult for Service Wire to retain and communicate with local counsel. Thus, while the court accepts Service Wire's assertion that Texas would be the more convenient location from its perspective, the inconvenience in this case is lessened by the fact that Service Wire is headquartered in this district.

In addition to these factors, Service Wire submits several additional factors that it argues favor venue in Texas. First, Service Wire points out that Adkins elected to receive, and is receiving, worker's compensation under the Texas worker's compensation scheme. But Service Wire has not explained how, if at all, Adkins's participation in the Texas worker's compensation scheme will play any role in this lawsuit. Additionally, Service Wire argues that a State's interest in having local controversies decided at home favors Texas. In contrast, Adkins argues that this same factor favors West Virginia. It is not obvious to the court which party has the better argument. If the court focuses on the site of the accident, Texas is clearly the locale of the controversy. On the other hand, the controversy is between two parties, one an Ohio resident who lives six miles from Huntington and the other a West Virginia corporation based in Huntington. This suggests that West Virginia is the locale of the controversy. On balance, the court concludes that these factors do not clearly favor either Texas or West Virginia.

The following factors favor venue in West Virginia:

(1) West Virginia is more convenient for the plaintiffs, James and Virginia Adkins. In this case, this factor is particularly significant because the venue decision will dictate whether or not James Adkins can, practically speaking, attend his own trial.

(2) According to Mr. Adkins, he will soon be transferred back home to the Huntington area where he will be treated by doctors in Huntington. Thus, medical witnesses who would testify regarding his current and future medical condition would be from the Huntington area.

(3) James and Virginia Adkins are eyewitnesses to the accident.

(4) The caseload is lighter in this district than in the Southern District of Texas. In 2001, the Southern District of Texas has 21.5 vacant judgeship months and a weighted caseload of 598 filings per judgeship; in that same time, the Southern District of West Virginia had no vacant judgeship months and a weighted caseload of 281 filings per judgeship. (Pl. Exh. F.)

On balance, the court concludes that the defendant has not overcome the presumption in favor of the plaintiffs' choice of venue. Service Wire is a West Virginia corporation, which significantly lessens the burden on it to litigate in West Virginia. It appears that most if not all of the live testimony regarding medical matters will be done by West Virginia medical personnel. Many of defendant's potential witnesses are its own employees. While those employees are beyond this court's subpoena power, the defendant is in a position to ensure, if it so desires, that those witnesses will be available for trial. *See Sterling Novelty, Inc. v. Smith*, 700 F. Supp. 408, 410 (N.D. Ill. 1988). In addition, two of the eyewitnesses to the accident, the plaintiffs James and Virginia Adkins, reside very near this district.

Perhaps most significantly, in this case it will be practically impossible for James Adkins to attend a trial in Texas, as opposed to merely inconvenient (albeit significantly inconvenient) for

Texas witnesses to attend a trial in West Virginia. A plaintiff has a legitimate and significant interest in attending his own trial. As such, the interests of justice, another importance factor in determining proper venue, are better served by retaining venue in this district. While a civil litigant does not possess an absolute right to attend his own trial, courts have frequently held that "a court may not exclude arbitrarily a party who desires to be present merely because he is represented by counsel; such exclusion would violate the due process clause of the Fifth Amendment." *Helminski v. Ayerst Labs.*, 766 F.2d 208, 213 (6th Cir. 1985). *See also Gonzalez-Marin v. Equitable Life Assur. Soc. of U.S.*, 845 F.2d 1140, 1146 (1st Cir. 1988) (approving of *Helminski*); *Cary ex rel. Cary v. Oneok, Inc.*, 940 P.2d 201 (Okla. 1997) (affirming limited right of litigant to attend own trial and holding that plaintiff cannot be excluded from attendance on the basis of his physical appearance); *Carlisle v. County of Nassau*, 64 App.Div.2d 15, 18, 408 N.Y.S.2d 114, 116 (1978) (citation omitted) ("[T]he fundamental constitutional right of a person to have a jury trial in certain civil cases includes therein the ancillary right to be present at all stages of such a trial, except deliberations of the jury. Such right is basic to due process of law."). Simply put, "[o]ne who institutes an action is entitled to be present when it is tried." *Helminski*, 766 F.2d at 214.[1]

These cases illustrate the importance of a litigant's right to attend his own trial. Of course, this case does not involve the attempted exclusion of Mr. Adkins from the proceedings, so these cases are not directly on point. The court does not mean to suggest that transferring this action to Texas would violate Mr. Adkins's due process rights to be present at his trial. Nor does the court suggest that a litigant's right to attend his own trial should *always* trump the inconvenience to the

[1] Of course, a litigant may be excluded from attendance at trial for some good reason, such as if the litigant is disruptive to the trial proceeding. *See, e.g.*, *Helminski*, 766 F.2d at 216-17.

defendant and other factors favoring venue elsewhere. *See, e.g.*, *Passero*, 1993 WL 8722. Nonetheless, if the denial of litigant's right to attend his own trial rises to the level of a constitutional due process deprivation in some circumstances, the court should certainly give serious weight to a litigant's interest in attending his own trial when conducting a balancing test to determine the interests of justice. Given Mr. Adkins's ability to attend his own trial if it is held in West Virginia and his inability to attend a trial held in Texas, the interests of justice favor venue in West Virginia. Considering this factor in combination with the other factors discussed above, the court concludes that, on balance, the defendant has not overcome the plaintiff's choice of forum by demonstrating the propriety of transfer of venue in this case to Texas.

4. Conclusion

In sum, the court concludes that the interests of justice will be best served by honoring the plaintiff's choice of this forum in this particular case. Either venue poses some inconvenience to one of the parties. While many of the venue factors favor venue in Texas, in this case the inconvenience to the plaintiff of litigating in Texas is significantly greater than that to the defendant of litigating in West Virginia. Accordingly, the defendant's motion to transfer venue is **DENIED**.

The court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

ENTER: October 31, 2002

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JOSEPH R. GOODWIN
UNITED STATES DISTRICT JUDGE