

# TIPS *from the Trenches*

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## OPPOSING A FORUM NON CONVENIENS MOTION INVOKING SECTION 6-5-430

For several decades, Alabama courts have applied *forum non conveniens* in determining whether to dismiss an action without prejudice in favor of a “a more appropriate forum outside this state ....”<sup>1</sup> The pertinent statute, Section 6-5-430, provides as follows:

Whenever, either by common law or the statutes of another state or of the United States, a claim, either upon contract or in tort has arisen outside this state against any person or corporation, such claim may be enforceable in the courts of this state in any county in which jurisdiction of the defendant can be legally obtained in the same manner in which jurisdiction could have been obtained if the claim had arisen in this state; provided, however, the courts of this state shall apply the doctrine of *forum non conveniens* in determining whether

to accept or decline to take jurisdiction of an action based upon such claim originating outside this state; and provided further that, if upon motion of any defendant it is shown that there exists a more appropriate forum outside this state, taking into account the location where the acts giving rise to the action occurred, the convenience of the parties and witnesses, and the interests of justice, the court must dismiss the action without prejudice. Such dismissal may be conditioned upon the defendant or defendants filing with the court a consent (i) to submit to jurisdiction in the identified forum, or (ii) to waive any defense based upon a statute of limitation if an action on the same cause of action is commenced in the identified forum within 60 days of the dismissal.

Ala. Code § 6-5-430.

In applying Section 6-5-430, the court defers to the plaintiff’s choice of forum unless **all** of the *forum non conveniens* factors weigh “strongly in favor of the defendant.”<sup>2</sup> Deference to the plaintiff’s choice of forum is appropriate in view of Article I, Section 13 of the Alabama Constitution.<sup>3</sup> Notwithstanding the “must dismiss” language in the statute, a trial court’s ruling on a motion invoking Section 6-5-430 is reviewed for abuse of discretion.<sup>4</sup>

### Factors Applied

Several factors are applied in determining whether to dismiss under Section 6-5-430:

“Under § 6-5-430 a trial court must dismiss an action without prejudice if, upon motion of a defendant, it is shown that there exists a more appro-

priate forum outside the state, taking into account the location where the acts giving rise to the action occurred, the convenience of the parties and witnesses, and the interest of justice. ...”<sup>5</sup>

Consistent with the deference due the plaintiff’s choice of forum, the defendant bears the burden of proving all of the pertinent factors, and all must be “positively found” before dismissal would be warranted.<sup>6</sup>

### Location Where Acts Giving Rise to the Cause of Action Occurred

The fact that the acts giving rise to the cause of action at issue arose out of state is not dispositive.<sup>7</sup> Indeed, a showing that the cause of action arose outside the state is a threshold requirement on any defendant seeking dismissal without prejudice pursuant to Section 6-5-430. The statute begins with “[w]henever, either by common law or the statutes of another state or of the United States, a claim, either upon contract or in tort has arisen outside this state against any person or corporation ....”<sup>8</sup>

### Convenience of Non-Party Witnesses

In opposing a motion to dismiss for *forum non conveniens*, counsel must be mindful not only of the factors applied under the statute but the required evidentiary showing to establish the existence or non-existence of the various factors. For example, the Supreme Court “require[s] that parties requesting a dismissal on the basis of *forum non conveniens* produce evidence describing their potential witnesses’ testimony and the inconvenience those witnesses would suffer if they were required to testify in the initial forum.”<sup>9</sup> Though this requirement speaks in terms of a defendant’s burden, in meeting any evidentiary showing by the defendant, the plaintiff should likewise identify the witnesses, the inconvenience each would suffer, and the importance (materiality) of the testimony of each witness. A concise summary of the testimony of each witness



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is essential. Of course, this is best done by an affidavit from each of the witnesses. Submission of comprehensive evidentiary materials in the trial court is critical. In mandamus proceedings, the Supreme Court's review will be "limited to those facts that were before the trial court." *Ex parte Transp. Leasing Corp.*<sup>10</sup>

We recently opposed a motion to dismiss asserting *forum non conveniens* in which numerous physicians who practice in the forum county had important testimony to offer on plaintiff's proof of damages. We secured affidavits from these physicians setting out the substantial inconvenience each physician would suffer if the case were dismissed in favor of the distant forum preferred by the defendant. The affidavits of the physicians also set out that testifying at trial in the distant forum would adversely affect care for their (in many instances seriously ill) patients.

### Interests of Justice

A plaintiff's receipt of medical treatment in the forum county not only impacts the convenience of witnesses factor, it also ties to the interests of justice factor. This factor looks to the interest of the forum county in litigating the case. Where a resident of the forum county receives extensive medical treatment from physicians practicing in that county, such is a particularly strong showing on the interests of justice factor. A county has an interest in avoiding inconvenience to local physicians and other health care professionals who provide care for residents of the county. Of course, the obverse is also true.

The Supreme Court granted mandamus relief in *Ex parte Wayne Farms, LLC*<sup>11</sup> and transferred venue under Section 6-3-21.1, Ala. Code 1975. The Court cited the fact that the plaintiff who resided in the forum county (Bullock) had received "medical treatment from several medical providers in Pike County."<sup>12</sup> The Court concluded the interests of justice required transfer because the connection between the plaintiff's action and the initial forum did not "warrant burdening the plaintiff's forum with the action."<sup>13</sup>

### Convenience of the Parties

On the convenience of the parties factor, counsel should be aware of authority that the medical condition of a party and the impact of that condition on a party's ability to travel and attend trial or

other proceedings in a distant forum is a significant consideration. For example, in *Ex parte Ford Motor Credit Co.*,<sup>14</sup> in remanding the Supreme Court directed the trial court to consider the plaintiff's medical condition (cancer) and its impact on her participation in the case if litigated in Volusia County, Florida as opposed to her home county – Barbour County, Alabama.

Also, cases applying the transfer for convenience analysis under 28 U.S.C. § 1404(a)<sup>15</sup> also acknowledge the relevance of a party's medical condition in determining where a case should be litigated and tried.<sup>16</sup> Particularly persuasive on this point is the Southern District of New York's decision in *Vassallo v. Niedermeyer*.<sup>17</sup> There, the court noted that the plaintiff "claims to be suffering from serious difficulties" allegedly caused by the motor vehicle accident at issue.<sup>18</sup> The court also noted that "plaintiff currently is receiving medical treatment in New York for injuries allegedly sustained in the accident and proposes to call New York physicians to testify at trial."<sup>19</sup> Consequently, the court found the "[p]laintiff's serious medical problems weighed heavily against transfer of the motor vehicle accident litigation to Georgia where the accident occurred."<sup>20</sup>

In the recent case in which we opposed a *forum non conveniens* dismissal, the medical condition of the plaintiff was shown to weigh heavily against transfer. As a result of the conduct made the basis of the lawsuit, the plaintiff was forced to have his left leg amputated at the knee, half of his right foot amputated, and all of his fingers amputated. The evidence showed that plaintiff had not traveled outside the forum county since having the multiple amputations and that he had to have assistance with ambulation as well as certain basic life activities. All of these facts were established by affidavits from plaintiff and his physicians. Several of the physicians testified that traveling for litigation in the distant forum of defendant's choice would adversely affect the plaintiff.

The trial court denied the motion to dismiss based on *forum non conveniens*. If the motion had been granted, the disabled plaintiff would have been forced to litigate over 800 miles from his home.

### Other Considerations

Location of documents outside of Alabama is sometimes cited as a factor in the *forum non conveniens* analysis. However, a showing must be made regard-

ing "volume, necessity, and inconvenience" supporting the relevance of this factor.<sup>21</sup> The Supreme Court recognized in 1990 that given ample modern discovery devices, the location of documents outside of Alabama does not create significant inconvenience.<sup>22</sup> With advances in electronic document storage and distribution, the significance of the location of documents factor has diminished greatly in recent years.

In applying Section 6-5-430, a pertinent factor is the substantive law to be applied. While there is some preference for trying the case in the forum whose substantive law will be applied, the importance of this factor varies commensurate with the magnitude of the difference between the applicable substantive law and the substantive law of the forum. In some cases, for example Jones Act cases, the same substantive law will apply regardless of where the case is litigated. In those situations, the law to be applied is not a factor bearing on *forum non conveniens*.

### Conclusion

The above is not intended as an exhaustive discussion of the numerous cases applying *forum non conveniens* in the context of a motion to dismiss pursuant to Section 6-5-430. The purpose here is to remind the reader of the factors applied, and that in any given case relevant factors are limited only by the imagination of the lawyer advancing or opposing a motion to dismiss based upon *forum non conveniens*.

The impact on a seriously injured plaintiff forced to travel to a distant forum should never be overlooked, nor should any special medical difficulties of the defendant. Likewise, where extensive medical treatment is received in the forum county, the necessity of testimony from medical providers and the inconvenience faced by those providers in the event the litigation is moved from the forum county is also a compelling factor supporting litigation in the initial forum.

- 1 . § 6-5-430, Ala. Code 1975. The reader is also alerted to Section 6-3-21.1 of the Alabama Code providing for transfer of venue from the county of original filing to another county within the state. The same principles apply under both *forum non conveniens* statutes so that authorities applying Section 6-3-21.1 are persuasive in the application of Section 6-5-430 and vice versa. *Ex parte Transp. Leasing Corp.*, 128 So. 3d 722, 730 (Ala. 2013).
- 2 . *Ex parte General Nutrition Corp.*, 855 So. 2d 475, 479 (Ala. 2003); *Ex parte Preston Hood Chevrolet*,

- Inc.*, 638 So. 2d 842, 845 (Ala. 1994); *Ex parte Allied-Signal, Inc.*, 561 So. 2d 1062, 1064 (Ala. 1990).
- 3 . Art. I, § 13 **Courts To Be Open; Remedies for All Injuries, Impartiality of Justice**  
That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay.  
Art. I, § 13, Ala. Const. 1901.
  - 4 . *Ex parte Transp. Leasing*, 128 So. 3d at 726, quoting *Ex parte Brookwood Health Servs., Inc.*, 781 So. 2d 954, 956-57 (Ala. 2000) (“We apply the abuse-of-discretion standard when considering a mandamus petition challenging a venue ruling, and we will not issue the writ unless the trial court exercised its discretion in an arbitrary and capricious manner.”) *See also Ex parte United Brotherhood of Carpenters*, 688 So. 2d 246, 249 (Ala. 1997) (“Whether to dismiss an action based on the doctrine of forum non conveniens is within the sound discretion of the trial court, and its ruling on that issue will not be reversed absent an abuse of that discretion.”).
  - 5 . *Ex parte Daimler Chrysler Corp.*, 952 So. 2d 1082, 1087 (Ala. 2006) (quoting *Ex parte Prudential Ins. Co. of America*, 721 So. 2d 1135, 1138 (Ala. 1998)).
  - 6 . *Ex parte United Brotherhood of Carpenters, supra*, 688 So. 2d at 249. *See also Ex parte General Nutrition Corp., supra*, 855 So. 2d at 485 (“[a]ll of the factors must be positively found in order to justify dismissal on the grounds of *forum non conveniens*”) (quoting *Ex parte Preston Hood Chevrolet, Inc., supra*, 638 So. 2d at 845 (emphasis in *Ex parte General Nutrition Corp.*)).
  - 7 . *See Ex parte United Brotherhood of Carpenters, supra*, 688 So. 2d at 249 (“Although it is undisputed, as the UPIU points out, that many of the acts giving rise to BE&K’s claims occurred at the International Falls plant in Minnesota, that fact alone does not warrant a dismissal based on § 6-5-430.”); *Ex parte Integon Corp.*, 672 So. 2d 497, 499 (Ala. 1995) (“Although it is undisputed that many of the acts giving rise to the plaintiff’s claims occurred in North Carolina, that fact alone does not warrant a dismissal based on § 6-5-430.”).
  - 8 . § 6-5-430, Ala. Code 1975.
  - 9 . *Ex parte Daimler Chrysler Corp., supra*, 952 So. 2d at 1098, n. 7. *See also Ex parte Preston Hood Chevrolet, Inc., supra*, 638 So. 2d at 845 (“a defendant cannot assert the inconvenience of its witnesses without making a detailed statement specifying the key witnesses and providing general statements of the subject matter of their testimony.”).
  - 10 . 128 So. 3d at 726, citing *Ex parte Jim Burke Auto., Inc.*, 776 So. 2d 118, 120 (Ala. 2000).
  - 11 . No. 1150404, 2016 WL 3031369 (Ala. May 27, 2016).
  - 12 . *Id.* at \*6.
  - 13 . *Ibid.*
  - 14 . 772 So. 2d 437, 444-45 (Ala. 2000).
  - 15 . Cases applying Section 6-5-430 cite with approval federal authorities on transfer of venue based upon convenience. *See, e.g., Ex parte Transp. Leasing, supra*, 128 So. 3d at 730, quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09, 67 S.Ct. 839, 91 L.Ed. 1055 (1947).
  - 16 . *See, e.g., Dekle v. Global Digital Solutions, Inc.*, No. CIV A 15-0069-WS-C, 2015 WL 3562412, at \*6 (S.D. Ala. June 5, 2015) (declining to transfer action from Southern District of Alabama to Middle District of Florida based in part on plaintiff’s terminal cancer); *Tyrill v. Alcoa Steamship Co.*, 158 F.Supp. 853, 854 (S.D.N.Y. 1958) (plaintiff’s paraplegia weighed heavily against transfer).
  - 17 . 495 F.Supp. 757 (S.D.N.Y. 1980).
  - 18 . *Id.* at 760.
  - 19 . *Ibid.*
  - 20 . *Ibid.*
  - 21 . *Ex parte General Nutrition Corp., supra*, 855 So. 2d at 480.
  - 22 . *Ex parte Allied-Signal, Inc.*, 561 So. 2d 1062, 1065 (Ala. 1990).