

**IS “GOOD CAUSE” FOR VENUE DECISIONS
LIMITED TO CONVENIENCE ISSUES**

**Gary A. Bryant
Willcox & Savage P.C.**

Introduction

Depending on your perspective, “forum shopping” is either an abuse or an art. It is no accident that more cases are filed in “plaintiff-friendly” venues than in other jurisdictions. Similarly, it is no accident that defense counsel often move to transfer when their clients are sued in these jurisdictions. As an example, few courts in the Commonwealth feel the effect of forum shopping more than the Circuit Court of the City of Portsmouth. Rightly or wrongly, a large portion of the plaintiffs’ bar sees Portsmouth as a jurisdiction in which multi-million dollar verdicts are the norm and defense verdicts the exception. If a case can be filed in Portsmouth, it will be, regardless of whether the case relates in any significant way to the forum. While the defense bar argues “forum shopping,” the plaintiffs’ bar responds that, as long as the venue rules designate Portsmouth as a permissible forum, it would be a disservice to the client to file anywhere else. If the defense hopes to secure transfer, it should argue that venue is inconvenient, and avoid the accusations of “forum shopping.”

Venue Rules

The venue provisions for actions brought in Virginia are contained in Virginia Code Sections 8.01-257 through 8.01-267. Section 8.01-261 provides for “preferred” venue in certain actions, while Section 8.01-262 sets forth “permissible” venues for all other cases. As a practical matter, the Code provides only “permissible” venue for most tort claims. Specifically, Section 8.01-262 sets forth a “permissible” venue where a defendant “regularly conducts substantial

business activity.” For many corporate defendants operating in the Commonwealth, numerous circuit courts, and in some cases *all* circuit courts, will be a permissible venue.

Regardless of whether a venue is preferred or permissible, transfer may be appropriate pursuant to Virginia Code Section 8.01-265 if the moving party can show “good cause” for the transfer. Section 8.01-265 states:

In addition to the provisions of Section 8.01-264 and notwithstanding the provisions of § 8.01-195.4, 8.01-260, 8.01-261 and 8.01-262, the court wherein an action is commenced may, upon motion by any defendant for good cause shown ... (ii) transfer the action to any fair and convenient forum having jurisdiction within the Commonwealth... good cause shall be deemed to include, but not limited to, the agreement of the parties or the avoidance of substantial inconvenience to the parties or the witnesses.

Section 8.01-265 empowers courts with discretion to nullify venue selections by transferring a case where a defendant shows “good cause.” Such discretion is necessary because the venue provisions of Virginia Code “may admit those who seek not simply justice but perhaps justice blended with some harassment.” *Norfolk & Western Railway Co. v. Williams*, 239 Va. 390, 392 (1990). Harassment, of course, comes in all forms, a fact not lost on the General Assembly when it drafted Section 8.01-265, leaving the definition of “good cause” intentionally expansive. Under the statute, “[G]ood cause shall be deemed to include, *but not limited to*, the agreement of the parties of the avoidance of substantial inconvenience to the parties or the witness.” (Emphasis added).

Curiously, the venue transfer statute imposes the same requirements for retaining an action for trial as for transferring a case. Specifically, Section 8.01-265 provides that “the court, on motion of any party and for good cause shown, may retain the action for trial.” At first glance, we might wonder why a party would ever move a court to retain an action. The Supreme Court’s decision in *Booth v. Brady*, 235 Va. 457 (1988) explains. In *Booth v. Brady*, the plaintiff, a resident of Virginia Beach, was injured in an accident occurring in Suffolk that

involved a defendant who resided in Suffolk. The plaintiff chose to file suit in Norfolk and the defendant objected as Norfolk was neither a preferred nor a permissible venue. The trial court overruled the defendant's objection noting that it would be "more convenient" to the plaintiff's medical witness and his patients if the case were tried in Norfolk. The Supreme Court reversed, holding that the trial court abused its discretion:

There was no showing that trial in Suffolk would result in "substantial inconvenience to the parties or the witnesses," only that trial in Norfolk would be "more convenient" to the plaintiff's medical witness and his patients. Hence, this Court holds that the ground assigned by the trial judge for retaining the action for trial in Norfolk did not constitute good cause under Code Section 8.01-265. And, because the absence of good cause appears as a matter of law, there was no basis for the exercise of discretion by the trial court.

235 Va. at 459. The decision makes clear that a trial court cannot retain jurisdiction of a case filed in a venue listed in neither 8.01-261 nor 262 without articulating "good cause" for doing so - translated as "substantial inconvenience" resulting from trying the case in a permissible venue.

Virginia Code Section 8.01-267 sets forth the standard of reviewing any venue decision, and reads in pertinent part as follows:

Both the decision of the court transferring or refusing to transfer an action under 8.01-265... shall be within the sound discretion of the trial judge. However, nothing herein shall affect the right to assign as error a court's decision concerning venue.

Va. Code § 8.01-267.

Taken together, the venue rules and the Supreme Court decisions interpreting them provide that (1) when a defendant objects to improper venue, the court must articulate "good cause" for retaining the case and (2) when a defendant objects to proper venue and moves to transfer, the court must articulate "good cause" for granting the motion. Absent "good cause," the venue transfer decision is subject to reversal for an abuse of discretion.

Good Cause

Most cases addressing venue decisions (whether transferring or retaining) focus on the convenience to the parties, usually defined as how far the parties or their witness must travel to participate in the trial. But the plain language of the statute makes clear that convenience to the parties is not the only consideration in determining “good cause” for transfer. The Code does not define “good cause” justifying either retention or a transfer except to note that good cause includes agreement of or avoiding inconvenience to the parties. The “but not limited to” language makes clear that other facts and circumstances may justify retention or transfer as well. So what is “good cause”?

Nexus

One often cited ground for transfer is that the underlying cause of action “has no practical nexus” to the chosen forum. However, the Supreme Court has made clear that lack of a practical nexus alone will not justify transfer. In *Norfolk & West Railway Co. v. Williams*, 239 Va. 390 (1990), the Supreme Court held that the City of Portsmouth will not be the litigation capital of Virginia simply because it is perceived as a plaintiff-friendly forum, and the Virginia venue statutes allow flexibility and a choice of forum. Recognizing that the venue provisions often are misused and that venue choices frequently are “blended with some harassment,” the court held that a case should be transferred where the underlying cause of action has no “practical nexus” to the chosen forum *and* the moving party has otherwise shown “good cause” for transfer. *Id.* at. 392. Eliminating any doubt about whether the lack of a practical nexus standing alone justifies transfer, the Supreme Court reiterated in *Virginia Electric & Power Company v. Dungee*, 258 Va. 235 (1999), that the lack of a practical nexus *by itself* is not sufficient to establish the good cause necessary for transfer. *Id.* at. 246.

Convenience

The Supreme Court has provided some guidance on what amounts to “good cause”.

[T]o guard against abuse of the latitude afforded by the venue statutes, judges were vested with the discretion to change the location of the trial in favor of a location more convenient to the parties and witnesses, one free of any taint of prejudice, or on which would better serve the ends of justice.

Williams, 239 Va. at 392. In essence, courts have the discretion to transfer venue to one “which would better serve the ends of justice.” While this standard language provides considerable latitude, most courts still look to convenience to find “good cause.”

In *Taylor v. Commonwealth*, 34 Va. Cir. 73 (1994), the Circuit Court for the City of Norfolk explored the venue statute in detail, noting confusion over the venue provisions. The plaintiff filed a tort claim against the Commonwealth in the city of Norfolk, where she resided. Under the Virginia Tort Claims Act, the city wherein the claimant resides is a preferred venue. The Commonwealth moved to transfer to Greensville County where the tort occurred, another preferred venue, citing convenience as “good cause” justifying the transfer.

Before ruling, the court addressed “apparent inconsistencies in the statute and their accompanying reviser’s notes” rejecting the reviser’s conclusion that “if the venue is preferred and is properly laid under Section 8.01-261, the court may transfer the case only upon agreement of all the parties.” The Circuit Court of the City of Norfolk interpreted the statute as prohibiting transfers from a preferred to a permissive venue only upon the agreement of parties, but leaving to the sound discretion of the court whether to transfer from one preferred venue to another upon a showing of good cause. The court ultimately concluded that the Commonwealth showed “that substantial inconvenience to the parties and witnesses [would] result if the action remain[ed] in the Circuit Court for the City of Norfolk.”

The majority of other circuit courts considering the issue focuses on convenience to the parties when considering a motion to transfer as well. There are, however, a few exceptions.

For example, in *Shaw v. Cook*, 13 Cir. LA31321 (1996), the Circuit Court for the City of Richmond concluded that delay in a trial is “good cause” for denying a motion to transfer. Other courts have reached the same conclusion relying on 8.01-264, governing objections to venue. *See Rector v. Approved Financial Corp.*, 48 Va. Cir. 329 (1999) (court concluding that the motion to transfer venue was untimely because the defendant waited seven months to notice a hearing on the motion).

Perhaps feeling the effects of a “plaintiff-friendly” venue, the Circuit Court for the City of Portsmouth broadened the notion of “convenience” in granting a motion to transfer venue. In *Jackson v. Hartig*, 274 Va. 219 (2007), a plaintiff filed a defamation suit against the *Virginian Pilot* in Portsmouth notwithstanding that the suit had no connection to Portsmouth other than that the Newspaper was published there. In support of its motion to transfer the case to Virginia Beach (or anywhere else but Portsmouth), the Newspaper cited a lack of practical nexus. But in addition, the Newspaper needed to allege “good cause” to support the transfer. In light of the proximity of the various jurisdictions in Hampton Roads, any argument that the chosen forum was “inconvenient” was less than persuasive. Borrowing from the Supreme Court’s language in *Norfolk & Western Railway Co. v. Williams*, the Newspaper argued that the ends of justice would best be served if the Circuit Court in Virginia Beach resolved the claims of this former Virginia Beach public official that he was defamed by the Newspaper’s characterization his performance in office.

We will never know whether the Newspaper’s “good cause” argument is sufficient. The Portsmouth Circuit Court held that the “inconvenience” referenced in the Code was not limited to the parties, but that “good cause” included inconvenience to the court:

And we also throw in two other factors under the inconvenience aspect of it is are our jurors going to be inconvenienced in dealing with a matter that in reality is somebody else’s problem. And its going to take up a lot of valuable time that we

have, because for whatever difference it makes, this is the busiest circuit court in the state. And we have plenty of work.

In essence, the trial court found good cause to transfer because it was inconvenient that Portsmouth jurors had to deal with someone else's problem. The case was transferred to Norfolk and ultimately dismissed on a motion for summary judgment. As discussed below, while the plaintiff appealed the venue decision, the Supreme Court upheld the summary judgment ruling and, as a result, concluded that the venue issue was irrelevant.

Only one circuit court decision has addressed a venue transfer motion grounded in "good cause" that amounts to neither delay nor inconvenience. In *Kollman v. Jordan*, 60 Va. Cir. 293 (2002), the Circuit Court for the City of Chesterfield was faced with a defendant's argument that venue should be transferred because of "the lack of practical nexus between [the] action and plaintiff's chosen forum" and that "the plaintiff's position suggests a taint or abuse of the venue provisions." The trial court properly noted that a lack of practical nexus, standing alone, is insufficient to justify transfer. Exploring the defendant's contention that the plaintiff's choice of venue amounted to harassment, the court again chose "convenience" as the yardstick:

In the case at bar, Chesterfield County is adjacent to Colonial Heights. The Colonial Heights Circuit Court building and the Chesterfield County Circuit Court are only 12 miles apart. This distance imposes no "substantial inconvenience to the parties or the witnesses." Nor does it suggest a desire on the plaintiff's part to harass or inconvenience defendant.

(citations omitted).

Even the Portsmouth Circuit Court in *Jackson v. Hartig* that ignored the convenience of the parties based its ruling on convenience to the court. In short, while the venue statute clearly provides that "good cause" supporting a transfer includes something other than inconvenience to the parties, no court in Virginia has found "good cause" to mean anything other than inconvenience or delay.

Venue Is Not Jurisdictional

Anyone who has taken Virginia civil procedure knows that venue is not jurisdictional. Venue issues only come up when a party objects. Unlike jurisdiction in which the court has no authority to render a decision, a case filed in the wrong venue can be heard and decided as long as there is no objection.

The distinction between venue and jurisdiction is particularly important when challenging a court's decision to transfer a case. The decision is subject to challenge *only* if the case is tried. If the circuit court improperly transfers a case which ultimately is dismissed either on demurrer or motion for summary judgment, any error in transferring the case is harmless. In *Jackson v. Hartig*, the Norfolk Circuit Court dismissed the plaintiff's claim on a motion for summary judgment after it was transferred from Portsmouth. On appeal, the plaintiff challenged both the dismissal, and the original transfer of venue on the grounds that anything that occurred after the improper transfer, including the ultimate summary judgment dismissal, was void. After affirming the summary judgment decision, the Supreme Court rejected the venue argument, noting that venue is concerned only with the "appropriate place of trial," not the viability of a cause of action. 274 Va. at 232.

The Supreme Court's decision makes clear that, when factual issues are irrelevant, so is venue. If a plaintiff fails to state a cause of action as a matter of law, then it does not matter which court decides the case. Since a circuit court summary judgment decision is reviewed *de novo*, any resolution of the issue on appeal will not depend on the perspective of the trial judge.

Conclusion

While the Code may suggest that "good cause" is not limited to issues of convenience, any party hoping to persuade a judge either to transfer or retain a case would be well served by

raising convenience as an important issue. Parties may argue that a particular venue is or is not convenient for the parties or the witnesses. They can argue that a venue is not convenient because it will result in a delay of the trial. They may even argue that a venue is not convenient to the court, but the better argument is that the venue is not convenient because the court is overloaded, and delay is likely. If venue is permissible in a particular jurisdiction, there is no case law suggesting that a defendant can secure transfer by arguing simply that the choice of a plaintiff-friendly venue amounts to “harassment.”

As appeared in VSB Litigation News, Fall 2008

Gary A. Bryant is head of the litigation group at Willcox & Savage P.C. in Norfolk, Virginia. He can be reached at gbryant@wilsav.com or 757-628-5520.