

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
Harrisonburg Division

KEITH S. SLAYDON	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 5:14-cv-00024
	)	
WATER COUNTRY USA,	)	
SEAWORLD ENTERTAINMENT,	)	By: Joel C. Hoppe
BLACKSTONE GROUP LP	)	United States Magistrate Judge
Defendants.	)	

**REPORT & RECOMMENDATION**

This matter is before the Court on Defendant SeaWorld Parks & Entertainment, LLC’s (“SeaWorld”) Motion to Transfer. ECF No. 20. Plaintiff Keith S. Slaydon seeks recovery for personal injuries allegedly caused by SeaWorld’s negligent operation of a ride at its theme park, Water Country USA. SeaWorld moves to transfer the action to the Eastern District of Virginia pursuant to 28 U.S.C. § 1404(a). For the reasons set forth below, I recommend that this Court GRANT the motion and TRANSFER this case to the Eastern District of Virginia, Newport News Division.

**I. Factual and Procedural Background**

Plaintiff alleges injuries sustained while aboard the Aquazoid water ride at the Water Country USA theme park in Williamsburg, Virginia in early September 2011. Compl., ECF No. 1-1. He asserts that SeaWorld negligently failed to establish good safety policies or properly train its employees. *Id.* On August 30, 2013, Slaydon, filing *pro se*, sued “Water Country USA,” “SeaWorld Entertainment,” and “Blackstone Group LP”<sup>1</sup> in the Circuit Court of Rockingham

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<sup>1</sup> SeaWorld asserts that it was improperly sued as Water Country USA, SeaWorld Entertainment, and Blackstone Group LP. Answer, ECF No. 2; Resp. to Order Show Cause, ECF. No. 12.

County, seeking \$3 million in damages for injuries suffered in the accident. (*Id.*) Slaydon is a resident of Harrisonburg, Virginia. *Id.*

SeaWorld removed the case to this Court, ECF No. 1, filed its Answer, ECF No. 2, and moved to dismiss for improper venue, ECF No. 5. Because of insufficient jurisdictional allegations in the notice of removal, this Court ordered the parties to show cause why the case should not be remanded to state court. ECF No. 11. SeaWorld adequately responded to the order, demonstrating that subject matter jurisdiction exists. ECF No. 12. On July 18, 2014, the presiding district judge adopted a Report and Recommendation and denied Defendant's Motion to Dismiss. ECF Nos. 13, 19.

On July 25, 2014, SeaWorld filed the present motion, requesting transfer under 28 U.S.C. § 1404 to the Eastern District of Virginia, Newport News Division. ECF No. 20. In support of its motion, SeaWorld asserts that all witnesses it would call at trial live in or near York County, Virginia, where the alleged incident giving rise to the cause of action occurred. Def.'s Br. in Supp. 3, ECF No. 21. York County is within the Newport News Division. SeaWorld's witnesses include current and former employees, "managers . . . , investigators, ride attendees . . . , maintenance personnel, trainers, in-park supervisors, and health service professionals." *Id.* at 3–4. Furthermore, SeaWorld asserts that a site visit could be appropriate and the park and ride itself are in York County, along with "many of the plans and materials related to the premises." *Id.* at 4.

On July 28, 2014, I held a telephone status conference with the parties. Slaydon said he was considering hiring an attorney. To date, no attorney has appeared on Slaydon's behalf.

On August 15, 2014, Slaydon filed *pro se* a brief in opposition to Defendant's motion to transfer. ECF No. 26. He points out that SeaWorld failed to provide names and addresses to

support its contention that its potential witnesses reside near York County and further posits that many of Seaworld's witnesses are "college aged and could reside anywhere." Pl. Br. in Opp. 2. He also argues that many of his own "[d]octors and rehabilitation specialists will have a hardship traveling so far away from their office," though he also does not provide names or addresses for those witnesses. *Id.* Finally, he contends that remote viewing would allow inspection of the ride or any other necessary facilities. *Id.*

## **II. Legal Standard**

Pursuant to 28 U.S.C. § 1404, "[f]or the convenience of parties and witnesses, in the interests of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). The statute rests "discretion in the district court to adjudicate motions for transfer according to an individualized, case-by-case consideration of convenience and fairness." *Steward Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (internal quotation marks omitted). The court "may consider evidence outside the pleadings, but must view all facts in the light most favorable to the party opposing transfer." *Nuvotronics, LLC v. Luxtera, Inc.*, No. 7:13cv478, 2014 WL 1329445, at \*1 n.1 (W.D. Va. Apr. 1, 2014) (internal quotation marks omitted). In deciding whether to exercise this discretion, courts typically consider a number of factors, including: "(1) plaintiff's choice of forum, (2) convenience of the parties, (3) witness convenience and access, and (4) the interest of justice." *Id.* at \*3. "The movant bears the burden of showing that transfer is proper." *JTH Tax, Inc. v. Lee*, 482 F. Supp. 2d 731, 736 (E.D. Va. 2007).

## **III. Analysis**

For the following reasons, I respectfully recommend that this case be transferred to the Eastern District of Virginia, Newport News Division.

**A. Transferee Forum’s Initial Eligibility**

Under 1404(a), a court may only transfer venue to a district where the plaintiff could have initially filed the action. 28 U.S.C. § 1404(a). Venue is always proper in a district where “a substantial part of the events or omissions giving rise to the claim occurred.” 28 U.S.C. § 1391(b)(2). The injury underlying this suit and the alleged negligence that caused the injury occurred in Williamsburg, Virginia, within the Eastern District of Virginia’s Newport News Division. Compl. Plaintiff could have initially brought this suit in that forum.

**B. Plaintiff’s Choice of Venue**

Generally, a plaintiff’s choice of venue is entitled to substantial weight in determining whether to transfer, “especially where the chosen forum is the plaintiff’s home forum or bears a substantial relation to the cause of action.” *Nuvotronics*, 2014 WL 1329445, at \*3 (quoting *Heinz Kettler GMBH & Co. v. Razor USA, LLC*, 750 F. Supp. 2d 660, 667 (E.D. Va. 2010)) (internal quotation marks omitted). The weight given varies, however, “depending on the significance of the contacts between the venue chosen by Plaintiff and the underlying cause of action.” *Bd. of Trustees v. Sullivant Ave. Props., LLC*, 508 F. Supp. 2d 473, 477 (E.D. Va. 2007); *see also GTE Wireless, Inc. v. Qualcomm, Inc.*, 71 F. Supp. 2d 517, 519 (E.D. Va. 1999) (“When a plaintiff chooses a foreign forum and the cause of action bears little or no relation to that forum, the plaintiff’s chosen venue is not entitled to such substantial weight.”).

Slaydon has filed suit in his home forum, but the weight of his choice is diminished by the fact that his injury and the alleged negligence behind it occurred in the Eastern District of Virginia. The only connection this district has to the suit is that Slaydon resides here and has received local medical care. Pl. Br. in Opp. 2. Because the nucleus of operative facts in this case lies in another district, Plaintiff’s choice of home forum receives less weight than it would

otherwise and this factor weighs in favor of transfer. *See Koh v. Microtek Int'l, Inc.*, 250 F. Supp. 2d 627, 635 (E.D. Va. 2003) (“[I]f there is little connection between the claims and this judicial district, that would militate against a plaintiff’s chosen forum and weigh in favor of transfer to a venue with more substantial contacts.”).

It is worth noting that had Slaydon originally filed in federal court, venue in this district would have been improper. *See* 28 U.S.C. § 1391(b). Ordinarily, venue lies where the defendant resides or where “a substantial part of the events or omissions giving rise to the claim occurred.” *Id.* SeaWorld is a Delaware limited liability company with its principal place of business in Orlando, Florida Def. Resp. to Order to Show Cause, ECF No. 12, and the events giving rise to this claim occurred in the Eastern District of Virginia *See* Compl. Venue is proper in this district only because Slaydon filed the action in a state court located within the boundaries of this district and SeaWorld removed the action. *See* 28 U.S.C. § 1441(a); Report and Recommendation 2, ECF No. 13.

### **C. Convenience of the Parties**

To assess the convenience of the parties, courts generally consider “the ease of access to sources of proof, the cost of obtaining the attendance of witnesses, and the availability of compulsory process.” *Heinz Kettler*, 750 F. Supp. 2d at 668. This factor alone rarely justifies transfer, especially if it would only shift inconvenience from the defendant to the plaintiff. *Id.* “However, it is the balance of convenience which is in question, and courts must determine whether the total convenience of the parties favors transfer.” *Perry v. LTD, Inc.*, No. 3:14cv148, 2014 WL 3544988, at \*3 (E.D. Va. July 17, 2014) (internal quotation marks omitted).

“Ease of access” weighs in favor of SeaWorld, as the nucleus of operative facts is in Williamsburg, Virginia. *See id.* at \*4. This factor is “tempered by the reality that transportation

of documents and electronic discovery have minimized its importance.” *Id.* Nevertheless, all plans, designs, and policies regarding the Aquazoid ride are located in Williamsburg, as is the ride itself. Def. Br. in Supp. 4.

The impact of transfer on the “cost of obtaining attendance” has not been established with specificity by either party. Slaydon asserts his “doctors and rehabilitation specialist will have a hardship traveling so far away from their office.” Pl. Br. in Opp. 2. SeaWorld states that “all of Defendant’s known witnesses, perhaps as many as a dozen individuals, reside in the York County area.” Def. Br. in Supp. 3. It appears that SeaWorld may call more witnesses than Slaydon and therefore have greater costs litigating in a farther forum, but without additional facts it is difficult to conclusively resolve this factor.

The “availability of compulsory process” slightly favors the Eastern District. At trial, compulsory process would be equally available in both the Eastern and Western Districts. Federal courts can subpoena witnesses to appear at trial if they reside, work, or regularly transact business either within 100 miles of the court or within the state in which the court sits, so long as they would not incur substantial expense by attending. Fed. R. Civ. P. 45(c). Harrisonburg and Newport News are in Virginia and are three hours apart, a distance unlikely to cause witnesses to incur substantial expense. Therefore, both courts could compel witnesses who reside or work within Virginia to attend the trial.

During discovery, courts are limited to the 100 mile provision of Rule 45(c) and cannot issue subpoenas throughout the state. *Id.* The incident underlying this suit occurred in the Newport News division, and it is more likely that relevant witnesses and evidence will be within 100 miles of that court than Harrisonburg, which is more than 100 miles away from where the

incident occurred. To the extent that compulsory process is necessary during discovery, the Eastern District offers greater availability.

**D. Witness Convenience and Access**

Witness convenience and access is “of considerable importance in the transfer analysis.” *Nuvotronics*, 2014 WL 1329445, at \*5. Courts distinguish between party and non-party witnesses, giving more weight to non-party witness inconvenience under the presumption that party witnesses are more willing to testify. *Id.* (citing *Samsung Elecs. Co., Ltd. v. Rambus, Inc.*, 386 F. Supp. 2d 708, 718 (E.D. Va. 2005)).

“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.” *Perry*, 2014 WL 3544988, at \*3. Courts recognize, however, that “there is a tension in transfer motions between the duty to file such motions early in the action and the need to support that motion with affidavits identifying witnesses and the materiality of their testimony, information which may not be known until later in the case.” *Koh*, 250 F. Supp. 2d at 636; *see also Corry v. CFM Majestic, Inc.*, 16 F. Supp. 2d 660, 667 n. 16 (E.D. Va. 1998) (finding sufficient proof of witness inconvenience where particularity was lacking, but the record as a whole indicated that the majority of witnesses were located where the allegedly infringing activities chiefly occurred).

Neither party provided much information about its witnesses. Slaydon asserts that his “doctors and rehabilitation specialist will have a hardship traveling so far away from their office.” Pl. Br. in Opp. 2. He also posits that many of SeaWorld’s witnesses are “college aged and could reside anywhere,” though he provides no evidence in support. *Id.* It is reasonable to

assume that Slaydon's local doctors would be inconvenienced by traveling three hours to attend trial in Newport News.

SeaWorld states that "all of Defendant's known witnesses, perhaps as many as a dozen individuals, reside in the York County area." Def. Br. in Supp. 3. These witnesses include current and former employees, "managers . . . , investigators, ride attendees . . . , maintenance personnel, trainers, in-park supervisors, and health service professionals." *Id.* at 3–4. Employees of SeaWorld are closely aligned with a party, and their inconvenience receives less weight. *See Beacon Wireless Solutions, Inc. v. Garmin Int'l, Inc.*, No. 5:11cv25, 2011 WL 4737404, at \*5 (W.D. Va. Oct. 5, 2011) (finding the convenience of five employee witnesses less important than the convenience of one non-party witnesses). SeaWorld also lists non-party witnesses, such as former employees, ride attendees, and health service professionals. It is reasonable to assume these witnesses would be inconvenienced by trial in Harrisonburg.

"Neither party provides the requisite particularity about the expected witnesses and their potential testimony to accord this factor much weight." *Affinity Memory & Micro, Inc. v. K & Q Enters., Inc.*, 20 F. Supp. 2d 948, 955 (E.D. Va. 1998) (internal quotation marks omitted). Both parties describe classes of non-party witnesses then make conclusory statements that trial in the opposing forum would inconvenience them. Further, the potential inconvenience of a three hour drive is relatively minor. Ultimately, this factor is neutral between the parties and has little weight to lend to the dispute.

#### **E. The Interest of Justice**

The final factor, the interest of justice, is "intended to encompass all those factors bearing on transfer that are unrelated to convenience of witnesses and parties." *Baylor Heating*, 702 F. Supp. at 1260. Courts look to "public interest factors aimed at systematic integrity and fairness."

*Nuvotronics*, 2014 WL 1329445, at \*6. “Relevant considerations include the court's familiarity with the applicable law, docket conditions, access to premises that might have to be viewed, the possibility of an unfair trial, the ability to join other parties, the possibility of harassment, the pendency of a related action, and the interest in having local controversies decided at home.” *Id.*

Many of these factors are non-issues. Both districts are proficient at applying Virginia law; both districts have an interest in providing a forum for their residents and the businesses operating within their boundaries to litigate their disputes. There is no evidence of docket congestion, bias that could lead to an unfair trial, a need to join other parties, harassment, or a pending related action.

On the other hand, as the Defendant asserts, the trier of fact could conceivably benefit from viewing the Aquazoid ride in person. The interests of justice weigh slightly in favor of SeaWorld.

#### **IV. Conclusion**

SeaWorld bears the burden of proving that transfer is proper. The evidence on record is minimal, but what exists warrants transfer. The injury and alleged negligence occurred in the Eastern District. Most relevant witnesses either work at Water Country USA or live near there. Though Plaintiff resides in Harrisonburg and has received local medical care, on the whole, transfer of this case is warranted under 28 U.S.C. § 1404. I therefore recommend that this Court GRANT Defendant's motion and TRANSFER this case to the Eastern District of Virginia, Newport News Division.

#### **Notice to Parties**

Notice is hereby given to the parties of the provisions of 28 U.S.C. § 636(b)(1)(C):

Within fourteen days after being served with a copy [of this Report and Recommendation], any party may serve and file written objections to such

proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

Failure to file timely written objections to these proposed findings and recommendations within 14 days could waive appellate review. At the conclusion of the 14 day period, the Clerk is directed to transmit the record in this matter to the Honorable Michael F. Urbanski, United States District Judge.

The Clerk shall send certified copies of this Report and Recommendation to all counsel of record.

ENTER: August 27, 2014

A handwritten signature in black ink that reads "Joel C. Hoppe". The signature is written in a cursive, slightly slanted style.

Joel C. Hoppe  
United States Magistrate Judge