03-41115

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN RE NISSAN MOTOR CO., LTD.
Petitioner,

On Petition for Writ of Mandamus to the United States District Court for the Eastern District of Texas, Marshall Division

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OPPOSITION TO PETITION FOR WRIT OF MANDAMUS ON BEHALF OF THE DISTRICT COURT

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Local Rule 28.2.1, Respondent certifies that the following persons and entities have an interest in the outcome of this appeal:

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Respectfully submitted,

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STATEMENT OF JURISDICTION

Nissan asserts the jurisdiction of this Court based on its petition for writ of mandamus. Plaintiff Kenneth Hopper disputes that this Court has appellate jurisdiction to review the district judge's discretionary decision to deny a transfer of venue. The district court also urges that writ of mandamus is not appropriate and should be denied.

STATEMENT OF THE ISSUE

Whether this Court should take the extraordinary step of issuing mandamus to correct a district court's exercise of discretion in denying a product liability defendant's perfunctory motion to transfer venue when it was unsupported factually or legally and when the district court weighed only the factors specified by this Court?

ARGUMENT AND AUTHORITIES IN OPPOSITION TO MANDAMUS

This is a products liability case against a foreign defendant–the trial of which will be resolved by the testimony of expert witnesses who have yet to be identified, but who may come from anywhere in the world. The decision whether to transfer venue of a case filed in a proper forum lies within the discretion of the district court. *Peteet v. Dow Chemical Co.*, 868 F.2d 1428, 1436 (5th Cir.), *cert. denied*, 493 U.S. 935 (1989). Under 28 U.S.C. § 1404(a) and the case law interpreting it, the district court cannot transfer a case without adequate proof of substantial inconvenience to the parties or witnesses, and it would be subject to mandamus if it did so.

Petitioner Nissan seeks a writ of mandamus to *compel* the district court to transfer venue to the Dallas Division of the Northern District of Texas when, after properly weighing the facts and factors, the district court denied Nissan's request. The district courts in this Circuit receive many motions to transfer venue. Some are well-grounded and supported with affidavits and facts; others–like Nissan's–are perfunctory. Nissan's three page motion to transfer venue provided the district court with little evidence in support of its allegations, and it cited only three or four of the eleven relevant factors in arguing for the transfer of venue. The district court balanced the requisite factors and did not abuse its discretion in denying the request. Nissan's petition for a writ should be denied. Nissan failed to meet its burden in the district court or in this Court.

A. Mandamus Should Not Be Used To Review A District Court's Lawful Exercise of Discretion.

As this Court has "said on many occasions, the writ of mandamus is an extraordinary remedy reserved for extraordinary situations." *In re American Marine Holding Co.*, 14 F.3d 276, 277 (5th Cir. 1994) (*citing Gulf Stream Aerospace Corp. v. Mayacamus Corp.*, 485 U.S. 271 (1988)). It should not issue to reverse a federal district judge's legally grounded exercise of discretion. Indeed, this Court has long held that mandamus is a drastic remedy and may not be used as a substitute for an

appeal. *Garner v. Wolfinbarger,* 433 F.2d 117, 119 (5th Cir. 1970); *Apache Bohai Corp., LDC v. Texaco China, B.V.*, 330 F.3d 307, 310-11 (5th Cir. 2003).

"Traditionally, federal courts have exercised their mandamus power only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" *In re American Marine Holding*, 14 F.3d at 277 (*quoting Gulf Stream*, 485 U.S. at 289). In the transfer context, mandamus has only been used when the district court has "made an error of law, as by transferring a case to a forum not proper under the statute, or considering an impermissible factor in passing on the motion . . .." *In Re McDonnell-Douglas*, 647 F.2d 515, 517 (5th Cir. 1981). That has not occurred here. The party seeking mandamus has the burden of demonstrating a "clear and indisputable right to it." *Gulf Stream*, 485 U.S. at 289.

This Court is obliged to strictly construe the governing statutes and rules, which require denial of the mandamus request here. The grant or denial of a motion to transfer venue is not an order authorized for immediate interlocutory appeal by Congress in either 28 U.S.C. § 1292(b) or FED.R.CIV.P. 54. Issuance of a writ in this context runs the risk of setting precedent for a new category of appellate jurisdiction over these interlocutory orders–something not sanctioned by Congress when it enacted § 1292 or Rule 54. The Congressional policy against piecemeal appeals is eroded by

permitting immediate review of a judge's discretionary order by mandamus, and confuses the courts and parties, who then assume that immediate review in one case assures immediate review in another. *Garner*, 433 F.2d at 120.

When Congress has seen fit to authorize immediate appeals over interlocutory rulings, it has done so. It has not done so here, and absent certification of this order for immediate review by the district court, it is not appealable now. *Compare Garner,* 433 F.2d at 119-20 (even a § 1292(b) certification of an interlocutory transfer ruling is disfavored when it is not accompanied by a *bona fide* jurisdictional or other immediately appealable issue).

This Court should not issue mandamus in this case because the district court weighed the appropriate facts and factors and, in an exercise of discretion, denied Nissan's motion to transfer venue to the adjoining district of Nissan's choice. Where there is no showing that the court failed to construe the statute correctly or to consider the relevant factors, writ of mandamus is not appropriate. *Garner*, 433 F.2d at 120. In the "voluminous litigation over transfer orders," few litigants have "surmounted the formidable obstacles" to justify a writ. *Id.* Here, there is no showing that Nissan will not receive a fair trial in the forum chosen by the Plaintiff, and there is no extraordinary situation warranting a writ of mandamus.

B. Mandamus Should Not Issue To Reverse A District Court's Legally Grounded Discretionary Decision Not To Transfer Venue In This Products Liability Case To An Adjoining District Preferred by Petitioner.

The district court properly applied the relevant legal factors and exercised its discretion in accordance with the law. A transfer ruling is "peculiarly one for the exercise of judgment" by the judge, who is "in daily proximity to these delicate problems of trial litigation." *Time Inc. v. Manning*, 366 F.2d 690, 698 (5th Cir. 1966) (citation omitted). That the Petitioner or even this Court might have reached a different result or disagree with the district court's ultimate decision is not the test. This Court reviews Petitioner's request only to see whether the district court applied the correct factors to the facts, which the court did.

1. Section 1404(a) States That A District Court *May* Transfer Venue If Justice Weighs *Substantially* In Favor Of Granting The Motion–A Highly Factual And Statutorily Discretionary Decision.

The district court applied the appropriate legal factors to the relevant facts and determined that Nissan had not carried its burden of proving a substantial need to transfer this case from Marshall to nearby Dallas[1] (Nissan App. C, pp. 2-3). Nissan is a foreign corporation that does business throughout the world. It has corporate

[1] The district court applied the very same factors listed by Nissan in its motion to transfer venue. *Compare* (Nissan App. B p. 2 & C pp. 2-3).

locations in many states and countries, with assembly plants in Mexico and Japan. Just in North America, there is: Nissan Canada in Ontario; Nissan Design in San Diego, California; the assembly plant in Mexico; a logistics headquarters in Smyrna, Tennessee; and, a distribution center in Honolulu, Hawaii. Its nerve center for "Nissan North America" is in Gardena, California, from which the corporation "coordinates all operations in the United States, Canada and Mexico, including automotive styling, consumer and corporate financing, and engineering." Its only automotive production plant in the United States is in Smyrna, Tennessee, where it employs 5,800+ people.[2]

Nissan relied on the following facts in the district court to argue that justice would be substantially impacted if the case were not transferred:

1. Situs of the automobile accident;
2. Residence of the plaintiff; and
3. Convenience of unnamed witnesses.

(Nissan App. B). Nissan provided no affidavits, however, and no witness said he or she could not or would not come to Marshall. Further, Nissan does business in Marshall, as it does everywhere, the facts relating to product design, defect and manufacture will come from outside of Texas, and Nissan did not demonstrate that it

[2] This is public information published on Nissan's website at www.nissanusa.com.

would suffer any prejudice from proceeding to trial in the Eastern District. Nissan's request for transfer of venue and its petition for writ of mandamus demonstrate no facts that would require either the district court or this Court to rule in its favor.

Nissan points to 3 witnesses, 2 involved in the accident and the investigating policeman–none of whom are "key," and it has produced no factual basis from which the district court could make a finding for it. Its vague allegations were legally insufficient to support transfer. *See In re Chesson*, 897 F.2d 156, 158 (5th Cir. 1990) (out of state corporation would suffer no more inconvenience defending in one or the other venues).

Moreover, the facts of the accident itself are not critical to this products liability case. As in *Holmes v. Freightliner, LLC*, 237 F.Supp.2d 690 (M.D. Ala. 2002), and *Dwyer v. General Motors Corp.*, 853 F.Supp. 690 (S.D. N.Y. 1994), "the place where the business decisions relative to the product liability theories of the case were made was the site of the operative facts, not the site of the accident." *Dwyer* expressly discounts the significance of eyewitnesses when the facts surrounding the accident will not be the deciding factor in the case.

As the district court clearly explained in reviewing § 1404(a)'s guiding factors and finding that Nissan had not met its burden, certain factors cited by Nissan simply were not persuasive given the particular context of this case, and Nissan had not

adequately demonstrated why other factors weighed in favor of transfer. In the end, Nissan failed to prove that justice required disregard of the plaintiff's choice of a proper forum in favor of elevation of Nissan's choice of the district next door that was not significantly more convenient for anyone.

Because this is a products liability case against Nissan based on the faulty operation of seat belts, the situs of the underlying accident is not relevant to this claim. *See Dwyer*, 853 F.Supp. at 693. Much of the evidence and many witnesses will have no connection to the State of Texas. The Dallas Division has no greater interest than the Marshall Division in finding out whether Nissan has designed and manufactured faulty seat belts in a plant located in neither place. Unlike the cases on which Nissan relies, this case is not locally driven.

Nissan is everywhere. It can easily defend this manufacturing-based products liability suit as well in Marshall as it can anywhere else. *Chesson*, 897 F.2d at 158 (petitioner was equally inconvenienced in its chosen forum as the one that was 150 miles away). Nissan will not suffer any inconvenience by defending this suit in Marshall rather than Dallas, the evidence will be marshaled from elsewhere in either venue, and Nissan can as easily view and test plaintiff's vehicle in either place. The mere fact that the car is stored in Dallas does not mean that the plaintiff will not produce it or its relevant parts if necessary for the trial.

That the plaintiff has chosen to drive to Marshall when she lives in neighboring Dallas does not weigh in favor of transfer. The plaintiff has the right to file suit in any proper venue,[3] and absent substantial waste of time, energy, money, or inconvenience to parties or witnesses, transfer is neither appropriate nor compulsory. The plaintiff's choice of venue deserves deference, especially when it is so close to the venue the petitioner would elect, were it the petitioner's option to do so.

In *In Re McDonnell-Douglas Corp.*, 647 F.2d 515 (5th Cir. 1981), like here, the plaintiff resided in Texas–although not in the Eastern District where that suit was also filed. The defendant did business throughout the state, but sought transfer out of the Eastern District to its own choice of forum. Judge Gee, writing for this Court, held that where the plaintiff was a Texas resident, and the defendant did business throughout Texas, the balance of convenience to the parties and witnesses did not weigh so heavily in favor of the defendant's chosen forum to justify overriding the plaintiff's choice. *Id.* at 517. There, as here, "the imbalance [was] not so great as to say that the trial judge's denial of a transfer was a clear abuse of discretion." *Id.* at 517-18.

Finally, the district court in this case properly considered and rejected Nissan's only remaining argument for transfer–convenience of the witnesses. Nissan did not

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[3] Under 28 U.S.C. § 1391(d), a foreign corporation "be sued in any district." Nissan does not argue that the Eastern District is not a proper venue.

carry its burden of showing that the location of a few eyewitnesses to the accident in nearby Dallas would substantially affect this products liability trial. Nissan cites only three witnesses that "possibly" might object to a trial in Marshall, but produced no evidence that they would object. Nissan has no evidence that any other potential witnesses reside in Dallas, including even the plaintiff's treating physician. The key witnesses in this case will include the experts and those who testify about the product design, manufacture, functioning, and safety standards. The design and manufacturing records and documentary evidence are located in another state or country in Nissan's design and manufacturing facilities for this vehicle.

In addition, this case will turn on the testimony of experts that Nissan has not identified and whose convenience is of little significance on a motion to transfer venue. *Dwyer*, 853 F.Supp. at 693. On these facts, Nissan failed to show that Dallas is a substantially more convenient venue. The court appropriately held, in its discretion, that the plaintiff's choice of forum, where venue does lie, was not substantially outweighed by Nissan's desire to proceed next door.[4]

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[4] In its motion, Nissan also cited the location of counsel as a factor. This Court held in *In re Horseshoe Entertainment*, 337 F.3d 429 (5th Cir. 2003), that the location of counsel is not a factor in § 1404(a) transfer analysis.

2. In The Absence Of Relevant Facts Substantially Requiring Transfer Of Venue, The Plaintiff's Choice Of A Proper Venue Deserves Deference.

Nissan incorrectly argues that (1) the district court gave decisive weight to the plaintiff's choice of venue, and (2) the plaintiff's choice of venue is entitled to no deference and is not a worthy factor in this case. The district court's opinion demonstrates that it did not give undue weight to this appropriate §1404(a) factor. The court addressed each of the arguments raised by Nissan as to the relevant facts and factors. It found that they had little or no bearing in this products case and, in the exercise of its discretion, that Nissan had not carried its burden of showing that its facts, when weighed according to the requisite factors, *substantially* tilted in favor of transfer and disregard of the plaintiff's choice. To hold otherwise when the facts do not weigh substantially in favor of transferring venue is to allow the defendant to make the venue choice–something clearly contrary to § 1404(a) and congressional intent.

In this case, which is not locally grounded and which is likely to draw much of its testimony and evidence from outside of Texas, the court weighed the facts in the crucible of the required factors and did not commit an abuse of discretion. The petitioner is not entitled to second guess the court's decision or to ask this Court to do so by reweighing the facts through a writ of mandamus. It is undisputed that Marshall was a proper venue. It was not the plaintiff's burden to show why the trial should

proceed in Marshall. It was Nissan's burden to prove that convenience and justice substantially required transfer of the trial to Dallas. *See Time Inc.,* 366 F.2d at 698 (it is the plaintiff's privilege to choose venue, and it is the defendant's burden to demonstrate that change is required).

Contrary to this Court's precedent, Nissan incorrectly argues that the plaintiff's choice of venue deserves no deference and should not have been a factor in the court's analysis. This is wrong as a matter of law. *Garner*, 433 F.2d at 119-20; *Horseshoe,* 337 F.3d 429. This Court and the Supreme Court have repeatedly held that the plaintiff's choice of venue is a valid factor to be considered.[5] The district court followed this Court's precedents and weighed all the facts and factors at issue here–including location of the accident, convenience of the parties, witnesses and evidence, and plaintiff's choice of venue. It did not look at factors it should not have applied, nor did it fail to apply factors that it should have applied. *Cf. Horseshoe*, 337

[5] Nissan erroneously cites *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1982), for the proposition that the Court should discount plaintiff's choice of forum, but *Piper* was a forum non conveniens case, not a § 1404(a) transfer case. Moreover, both *Piper,* 454 U.S. at 258, and this Court in *Peteet*, 868 F.2d at 1436, held that a district judge has *greater* discretion in ruling on a § 1404(a) transfer, and that "forum non conveniens implicates different interests ... [and the two motions] are not 'directly comparable.'" *Piper* has no application to this case, and its statements regarding the role of plaintiff's choice of forum as a factor in relation to forum non conveniens are not binding. Additionally, *Piper* involved foreign plaintiffs, whereas here, as in *McDonnell-Douglas*, 647 F.2d 515, the plaintiff resides in Texas and nearby the chosen forum.

F.3d 429. The factors it considered are all appropriate, and there is no legal error in this case. *Cf. id.* The district court's discretionary decision to deny transfer should be respected and not second-guessed on application for writ of mandamus.

3. The District Court Followed *In Re Horseshoe Entertainment*, And It Does Not Require A Different Result In This Case.

Finally, Nissan relies heavily on a recent Fifth Circuit opinion that does not change the result here. In *In re Horseshoe Entertainment*, 337 F.3d 429 (5th Cir. 2003), this Court found an abuse of discretion in a district court's refusal to transfer venue because the district court had committed legal errors by considering irrelevant factors and disregarding relevant ones. The plaintiff had filed a Title VII discrimination and retaliatory discharge suit based on her employment separation from the Horseshoe Casino located in Shreveport, Louisiana. All pertinent records, books, parties, witnesses and evidentiary facts occurred and were located in the Western District of Louisiana.[6] The case was closely tied to situs, and the local witnesses' testimony was exclusively and highly relevant.

Additionally, in *Horseshoe*, a special venue statute refined which venue the plaintiff could choose in filing suit. While adopting § 1404(a) analysis as part of its

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[6] The Plaintiff resided there, was employed by Horseshoe there, was allegedly harassed and discriminated against there, and all witnesses and records were located there. *Id.* at 1-2, *4.

transfer test, 40 U.S.C. § 2000e-5(f)(3) specially required the court to additionally consider: (1) the place where the unlawful employment practice is alleged to have been committed; (2) the place where employment records relevant to such practice are maintained and administered; and (3) the place where the aggrieved person would have worked but for the alleged unlawful employment practice, or, if the employer is not located there, the place of the employer's principle office. These special factors, along with §1404(a), influenced this Court to hold that convenience and justice substantially weighed in favor of transfer to the Western District of Louisiana. The Court's decision to grant mandamus was based on its recognition of this special statute and the legal errors committed by the district court in its transfer analysis. The district court had disregarded the factors expressly required to be considered by the special venue statute, and it had also relied on irrelevant factors, such as the location of counsel–a factor Nissan cites to this Court now. *Id.* at *5-6. The district court in *Horseshoe* had also engaged in speculation about the transfer–something that Nissan also wrongly asks this Court to do. In *Horseshoe*, the court speculated about "possible prejudice and delay," whereas here, Nissan asks this court to assume –without basis–that most witnesses will be from Dallas, which is likely untrue, and that travel to nearby Marshall will be an undue inconvenience, when there is no such proof. *Id.* at *5. Nissan produced no evidence that a transfer will promote justice or convenience.

Finally, while the district court in *Horseshoe* gave undue weight to the plaintiff's choice of forum precisely because it failed to consider and give proper weight to other factors, that is *not* what has occurred in this case. *Id.* at *6. The district court considered all of Nissan's arguments and weighed all the appropriate facts and factors, without adding or disregarding anything.

The following standards for reviewing a straight §1404(a) ruling are found in *Horseshoe* and were met by the district court:[7]

(1) Did the district court correctly construe and apply the relevant statutes;

(2) Did the district court consider the relevant factors incident to ruling upon a motion to transfer; and

(3) Did the district court abuse its discretion in deciding the motion to transfer?

The district court correctly construed and applied § 1404(a) and considered *only* the relevant facts and factors. Nissan has shown nothing in this case that would warrant reweighing or rebalancing the facts and factors to conduct *de novo* review where abuse of discretion is the standard. This Court should not perform that kind of review of a perfunctory, unsupported motion to transfer. *See Id.* at *3, 7.

A writ of mandamus is an extraordinary remedy that must be charily used. *Chesson*, 897 F.2d at 159. This is not a case where the district court has "made an

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[7] *See Garner v. Wolfinbarger*, 433 F.2d 117 (5th Cir. 1970); *Ex Parte Chas. Pfizer & Co.*, 225 F.2d 720 (5th Cir. 1955).

error of law, as by transferring a case to a forum not proper under the statute, or considering an impermissible factor in passing on the motion . . ..” *McDonnell-Douglas*, 647 F.2d at 517. Although this happened in *Horseshoe*, it did not happen here.

Provided a district court balances legally appropriate factors in making its discretionary determination, its ruling on a transfer motion should not be reviewed by mandamus, especially when the transfer was denied. *Id.* Indeed, as Judge Gee wrote for this Court in *McDonnell-Douglas*, 647 F.2d at 517, the use of the writ is less appropriate in denial of transfer than it is in grant of transfer. *McDonnell-Douglas* and *Horseshoe* require denial of mandamus here. Nissan has not and cannot show that the district court so clearly abused its discretion as to require the extraordinary correction of mandamus.

CONCLUSION

Nissan’s petition for writ of mandamus to review the court’s appropriately considered and discretionary decision to deny Nissan’s transfer motion under § 1404(a) should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that two true and correct hard copies, and an electronic copy in Word Perfect version 10.0 PDF format, of this Opposition to Petition for Writ of Mandamus were served on the following attorneys of record for Petitioner via first class mail, postage prepaid, this ____ day of August, 2003:

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CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 21(d), undersigned counsel certifies that this opposition brief complies with the page limitations of this Court's rules.

1. EXCLUSIVE OF THE EXEMPTED PORTIONS OF FED.R.APP.P. 32(a)(7)(B)(iii), THE BRIEF IS 16 PAGES LONG.

2. THE BRIEF HAS BEEN PREPARED IN PROPORTIONALLY SPACED TYPEFACE USING WORD PERFECT 10.0 FOR WINDOWS IN TIMES NEW ROMAN TYPEFACE AND 14 POINT FONT SIZE.

3. UNDERSIGNED COUNSEL IS ALSO PROVIDING AN ELECTRONIC VERSION OF THE BRIEF IN PDF FORMAT TO THE COURT AND OPPOSING COUNSEL.

4. UNDERSIGNED COUNSEL UNDERSTANDS THAT A MATERIAL MISREPRESENTATION IN COMPLETING THIS CERTIFICATE, OR CIRCUMVENTION OF THE TYPE-VOLUME LIMITS IN FED.R.APP.P. 32(a)(7)(B)(iii), MAY RESULT IN THE COURT'S STRIKING THE BRIEF AND IMPOSING SANCTIONS AGAINST THE PERSON SIGNING THE BRIEF.

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