

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

.....
ANNE ANDERSON, ET AL.,
Plaintiffs,
v.
W.R. GRACE & CO., INC., ET AL.,
Defendants.
.....

REGISTERED

Civil Action
No. 82-1672-S

MOTION FOR CHANGE OF VENUE

Pursuant to 28 U.S.C. §1404(a),¹ defendant W.R. Grace & Co. hereby moves this court for a transfer of the trial, in the interest of justice, to a district where suit might have been brought and outside the present locality which has been, and will continue to be, permeated with inflammatory publicity concerning matters at issue in this litigation. Grace's fair trial rights have been jeopardized, and Grace will shortly present the court with evidence of bias in the potential venire.

A corporation may be sued in any judicial district where it is incorporated or licensed to do business or is conducting business. Under 28 U.S.C. §1404(a), alternate venues are else-

¹ The transfer of pending civil cases is governed by 28 U.S.C. §1404(a), which provides:

For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Denied 2/28/88 WPA v. W.R. Grace

(88)

where where Grace is licensed to do business or incorporated.² Grace is incorporated in Connecticut and is licensed to do business in virtually every state.

As grounds for its motion, Grace states as follows:

1. Section 1404(a) authorizes the transfer of an action "for the convenience of parties and witnesses, in the interest of justice". The interest of justice is an independent statutory criterion entitled to greater weight than the convenience of the parties or witnesses. American Standard, Inc. v. The Bendix Corp., 487 F.Supp. 254, 263 (W.D. Mo. 1980); Lank v. Federal Ins. Co., 309 F. Supp. 349, 352 (D. Del. 1970); Cinema Amusements v. Loew's, Inc., 85 F. Supp. 319, 326 (D. Del. 1949). Courts have accorded considerable weight in the venue determination to the possibility of prejudice in the local community for or against a party. Northern Indiana Public Service Co. v. Envirotech Corp., 566 F. Supp. 362, 365 (N.D. Indiana 1983); Haase v. Gilboy, 246 F. Supp. 594, 596 (E.D. Wisc. 1965); Wilson v. Great Atlantic & Pacific Tea Co., 156 F. Supp. 767, 769-70 (W.D. Mo. 1957).

2. The interest of justice is in jeopardy in this case because defendant's right to a fair trial in the current location has been severely impaired by inflammatory publicity concerning matters at issue in the litigation. The nature of that publicity is described at length in Grace's various filings in support of a protective order. Moreover, defendant anticipates there will be further publicity, e.g., the NOVA program on toxic wastes

² Grace has not yet determined whether certain other potential locations have also been infected with bias and will make recommendations to the Court at a later date.

scheduled by WGBH for the broadcast at the time of trial and publicity about a new book, "Cluster Mystery Epidemic and the Children of Woburn, Mass.". The inflammatory and pejorative statements instigated by the plaintiffs have created prejudice saturating the community from which veniremen will be drawn. The emotionalism engendered by the pretrial publicity in this case is not unlike the racial prejudice which motivated the court in Wilson to forego trial in the more convenient location. Wilson, 156 F. Supp. at 770. The nature and extent of the publicity that has occurred, and that is likely to occur in the future, compels the conclusion that impanelling an impartial jury in the current location will be next to impossible.

3. Controversies, whether criminal or civil, must be decided on the basis of evidence received in open court, not from outside sources. See Sheppard v. Maxwell, 384 U.S. 333, 350 (1966). Courts, including this court, when faced with similar pretrial publicity have granted a motion for transfer before voir dire.

When this court faced similar pretrial publicity in a criminal action, it wisely opted for the extraordinary remedy of a change of venue prior to a voir dire of the prospective veniremen. In United States v. Abrahams, 453 F. Supp. 749 (D. Mass. 1978), the defendant in a criminal action for fraud, Abrahams, had been the focus of pretrial publicity that described, as if the facts were indisputable, defendant as a "con man, swindler, and imposter". Id. at 751, 752. This court concluded that this incident and others created an incriminating nexus between the publicity

and the issues for trial, rendering it impossible for the defendant to receive a fair trial anywhere in the northeast United States. Id. at 753. In a related case, Judge Freedman of this court concluded that Abrahams' co-defendants, although not the direct focus of the pretrial publicity, had also been placed at risk from local prejudice. The court granted them a change of venue to Springfield, Massachusetts. United States v. Abrahams, 466 F. Supp. 552, 558 (D. Mass. 1978). Abrahams was tried in Phoenix, Arizona. Id. at 557.

The emotionalism stirred by the publicity in this case runs up as the passions attending a criminal case, and warrants safeguards. In Northern Indiana Public Service Co. v. Tech Corp., 566 F. Supp. 362 (N.D. Indiana 1983), the court realized that prospective veniremen bias is measured by what prospective jurors subjectively believe, not what they should believe. Id. at 365. Emotional and argumentative statements that focus on the defendant, have a close nexus to the issues at trial, are widely disseminated, and are proximate to the time of trial are extremely likely to influence the subjective beliefs of the prospective jurors. See Riddeau v. Louisiana, 373 U.S. 723, 726-27 (1963); U.S. v. Kelly, 722 F.2d 873, 879 (1st Cir. 1983).

Moreover, any alternative to change of venue is unlikely to succeed. As the court in Northern Indiana Public Service realized, when the probability of prejudice is substantial, the efficacy of examining the jurors on prejudice during voir dire is

Criminal case - denial of transfer upheld by 1st Cir. (investigation into prejudice of jurors) in a complex case requiring extensive discovery and performing a determination of prospective juror bias

until voir dire is utterly unworkable based on time, energy, and cost considerations." Northern Indiana Public Service, 566 F. Supp. at 365-66 n.2. See also Groppi v. Wisconsin, 400 U.S. 505, 510 (1971).

4. Defendant W.R. Grace & Co. makes no claim that transfer in this case increases the convenience for the parties or the witnesses. Nevertheless, defendant contends that in this case inconvenience is not a compelling counterweight to transfer in the interest of justice.

One consequence of the preeminence of the interest of justice in the venue determination is that a case may be transferred in the interest of justice although no considerations of convenience to the parties or witnesses justify the transfer. See Lank v. Federal Insurance Co., 309 F. Supp. 349, 353 (D. Del. 1970). The equities in this case compel transfer despite inconvenience.

First, the prejudicial pretrial publicity inflaming the prospective veniremen was instigated by the plaintiffs. Plaintiffs can hardly seek to hide behind the inconvenience their conduct has wrought.


Second, the transfer, although it creates some inconvenience for the parties, does not shift inconvenience from one party to another. Both sides will encounter some additional expense and minor inconvenience. Nevertheless, that expense and inconvenience is overshadowed by defendant's right to a trial in court, not the media, and by the exceptional expense and delay of a long, arduous voir dire if this motion is denied.

In support of this motion, defendant relies on this motion and its various filings in support of a protective order. Grace hopes to file a supporting affidavit by Monday, October 21, 1985. Defendant further requests permission to submit any other supporting affidavits and documents, as well as a full memorandum, within two weeks.

CONCLUSION

For the reasons set forth above, Grace respectfully requests that the Court consider its motion for a change of venue and grant its request to submit supporting affidavits and documents, as well as a full memorandum, by November 1, 1985.

By its attorneys,



William J. Cheeseman
James K. Brown
Sandra L. Lynch
Foley, Hoag & Eliot
One Post Office Square
Boston, MA 02109
(617) 482-1390

Dated: October 18, 1985

167