IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DONALD R. WILD and DIANA H. WILD,
Individually and as representatives of the Estate
of Joseph Donald Wild,

OPINION AND ORDER

Plaintiff,

01-C-0461-C

v.

HEART OF TEXAS DODGE, INC.;
UNIVERSAL UNDERWRITERS INSURANCE
COMPANY; SUBSCRIPTIONS PLUS, INC.;
KARLEEN HILLERY; PROGRESSIVE
NORTHERN INSURANCE COMPANY;
SCOTTSDALE INSURANCE COMPANY;
ACCEPTANCE INSURANCE COMPANIES;
Y.E.S.! INC., a/k/a YOUTH EMPLOYMENT
SERVICES, INC. and/or YOUNG ENTREPRENEUR
SOCIETY; CHOAN A. LANE, JEREMY HOLMES;
and NATIONAL PUBLISHERS EXCHANGE,

Defendants.

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DONALD R. WILD and DIANA H. WILD,
Individually and as representatives of the Estate
of Joseph Donald Wild,

Plaintiff,

01-C-0463-C

v.

HEART OF TEXAS DODGE, INC.;
UNIVERSAL UNDERWRITERS INSURANCE
COMPANY; SUBSCRIPTIONS PLUS, INC.;
KARLEEN HILLERY; PROGRESSIVE
NORTHERN INSURANCE COMPANY;
SCOTTSDALE INSURANCE COMPANY;
ACCEPTANCE INSURANCE COMPANIES;
Y.E.S.! INC., a/k/a YOUTH EMPLOYMENT
SERVICES, INC. and/or YOUNG ENTREPRENEUR
SOCIETY; CHOAN A. LANE, JEREMY HOLMES;
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Defendants.

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These two identical civil actions were filed in two different parishes in Louisiana and removed from there to two different federal courts in the same state under the diversity jurisdiction. 28 U.S.C. § 1332. The United States District Court for the Middle District of Louisiana transferred the removed case to the Eastern District of Louisiana, where it was assigned to the same judge presiding over plaintiffs' other removed case. Both cases were consolidated and then transferred to this court on the judge's finding that the cases are identical to an earlier suit filed by plaintiffs in the Eastern District of Louisiana in 1999, which was transferred to this court in early 2000, over plaintiffs' objections, upon the court's finding that venue was lacking in Louisiana.

In the 1999 case, the Honorable Martin Feldman determined that venue was

improper in Louisiana because a substantial part of the events or omissions giving rise to the claim had not occurred there. 28 U.S.C. § 1391(a)(2). Under § 1391(a), a suit founded on diversity of citizenship may be brought only in a judicial district (1) in which any defendant resides, if all defendants reside in the same state; (2) in which a substantial part of the events or omissions giving rise to the claim occurred (or a substantial part of the property that is the subject of the action is situated); or (3) in which any defendant is subject to personal jurisdiction at the time the action is commenced if there is no district in which the action might otherwise be brought. Judge Feldman found that all significant events relating to the case occurred in Wisconsin: the accident; the death of plaintiffs' son; and the performance of the duties plaintiffs' son had contracted to do (sell magazine subscriptions). (He did not say so specifically, but I infer from his order that either he found or the parties conceded that not all of the defendants resided in Louisiana so that venue could not be premised on subsection (1) of § 1391(a).) He concluded that venue did not lie in Louisiana and that the case should be transferred to the Western District of Wisconsin pursuant to 28 U.S.C. § 1406(a), which allows a court either to dismiss a case "laying venue in the wrong district" or transfer it to "any district or division in which it could have been brought" "if it be in the interests of justice" to do so. The transferred case was assigned case no. 00-C-0067-C, was resolved completely in August of this year and is now on appeal.

All of plaintiffs' suits arise out of a van accident that occurred in the Western District

of Wisconsin, involving fifteen persons engaged in the door-to-door sale of magazine subscriptions. Jeremy Holmes was driving the van well in excess of the posted maximum speed. When a law enforcement officer began to pursue the car, Holmes made the mistake of trying to change seats with another passenger because he did not have a valid driver's license. Not surprisingly, Holmes lost control of the van, whereupon it rolled over, killing seven of the fourteen passengers, one of whom was the son of plaintiffs Donald R. Wild and Diana H. Wild. Other passengers sustained severe injuries.

These are not the only cases filed as a result of the accident. Plaintiffs and others filed suits in Dane County and in Rock County, Wisconsin and the state filed criminal suits against Holmes and Choan Lane. Both men are now serving state sentences.

Plaintiffs have filed a motion in both of the recently transferred cases, seeking to have them returned to the United States District Court for the Eastern District of Louisiana or remanded to the Louisiana state courts in which they originated. The motion will be denied. As a rule, it is not appropriate for a court to review the decisions of a coordinate court. This is particularly true in cases such as these where there is no prejudice to the parties resulting from the transfers, as I will discuss below. In fact, it is puzzling why plaintiffs want these cases returned to the Lousiana federal court, where the likely result would be a dismissal for lack of proper venue.

The apparent motivation for plaintiffs' strategy is their fear that the court of appeals

will overturn this court's decision not to return the 1999 case to the Eastern District of Louisiana and that the statute of limitations will run before this happens. The denial of the motion to return the case was entered almost one year after the case had been transferred here and after extensive discovery disclosed that defendant Karleen Hillery had been living in Oklahoma at the time of the accident and was currently living in Illinois, that she had never lived or worked in Wisconsin, that the two sales crews she managed had never made any sales in Wisconsin and that she had never entered into a contract in Wisconsin. Defendant Hillery's motion for summary judgment was granted on December 6, 2000, on the ground that this court lacked jurisdiction over her person.

On January 5, 2001, plaintiffs moved to remand or transfer case 00-C-0067-C back to the Eastern District of Louisiana, arguing that this court was not a court in which the case could have been brought, as required under § 1406(a), because the court lacked personal jurisdiction over Karleen Hillery. I denied the motion, finding that subject matter jurisdiction existed over the case and that even if plaintiffs succeeded on their claim that the Western District of Wisconsin was not a district in which the case could have been brought, they had not shown that a transfer of the case to Louisiana would enable them to sue all defendants in one district. I would analyze the issue differently today, although I would reach the same result.

In the January 2001 order, I did not give sufficient weight to the cases and

commentators' position that whether a court considers the merits of a motion to transfer under either § 1404(a), which allows transfers for the convenience of the parties, or § 1406(a), which allows transfers when venue does not lie in the transferor court, it must determine whether the court to which transfer is sought is one in which venue would lie *and* all of the defendants would be subject to the court's jurisdiction. See, e.g., 15 Charles Alan Wright et al., Federal Practice & Procedure §§ 3827, 3845 (2d ed. 1986); 17 Moore's Federal Practice § 111.33 (3d ed.); Hoffman v. Blaski, 363 U.S. 335 (1960) (§ 1404(a)). My sense is that this rule is honored in the breach. Rarely do courts or lawyers address the matter of personal jurisdiction unless it is apparent at the time of transfer that one or more defendants will not be amenable to service in the transferee district. Judge Feldman never addressed the issue in the 1999 case, and, as far as I can tell, none of the parties raised it, although it is the moving party's burden to show that personal jurisdiction could be exercised in the transferee district. Moore's, supra, at § 111.33. (As a practical matter, waiting until close questions of personal jurisdiction can be resolved could delay the transfer decision for months or years. In this case, for example, discovery on that question took eight months.)

Once Judge Feldman made the transfer decision, however flawed that decision might have been, that decision became the law of the case. It would have been improper for this court to reexamine the issue he had decided. Wright, supra, § 3827 at p. 276 ("The transferee court should not reexamine whether it is a court in which suit could have been

brought.") There is some question whether the court of appeals in the circuit in which the transferee court sits may review a transfer decision made by a court outside the circuit; the question is essentially academic because transfer decisions are interlocutory decisions and therefore not subject to review. In rare instances, a party may succeed in persuading the court of appeals in the circuit in which the transferor court sits to entertain a writ of mandamus to review a transfer decision. Plaintiffs did not make that effort when Judge Feldman reached his decision in the 1999 case.

It seems to be settled that a court of appeals may review a decision by a transferee court within its circuit to deny a motion to retransfer, see, e.g., Songbyrd, Inc. v. Estate of Grossman, 206 F.3d 172, 177 (2d Cir. 2000), when the court takes up the entire case on appeal. In that situation, the Court of Appeals for the Second Circuit has held that the test is whether the appealing party has shown a high likelihood that the transfer affected the outcome of the case. Id. at 179-80. I do not believe that plaintiffs could persuade the court of appeals that the outcome of their case had been affected by the transfer in 00-C-0067-C. The only forum in which plaintiffs could have brought that case is the Western District of Wisconsin. (Technically, there would be other forums if plaintiffs wanted to bring individual actions against the various defendants in the districts in which they reside.) Therefore, it is probably irrelevant whether the Eastern District of Louisiana's transfer order and this court's denial of plaintiffs' motion were technically correct.

This discussion about case no. 00-C-0067-C is preliminary to deciding how to proceed in the two cases that are presently before the court. One might argue that when Judge Feldman decided the motion to transfer in 00-C-0067-C, he had no reason to believe that this court would not be able to exercise personal jurisdiction over all of the defendants, given their probable connection to the accident, to Subscriptions Plus and to Subscriptions Plus's alleged agents. However, no such argument can be made with respect to his decision to transfer these two cases, now that a determination has been made that defendant Hillery is not subject to personal jurisdiction in this district. At the very least, he should have severed this defendant from the rest of the case and retained jurisdiction (assuming the Louisiana court would be able to exercise personal jurisdiction over her). However, he has made his decision. Even the fact that he made it sua sponte without giving the parties a chance to be heard does not mandate a review of his decision by this court, both because that decision is the law of the case and because I do not want to make these cases the shuttlecocks in a badminton game between transferee and transferor court. Hayman Cash Register Co. v. Sarokin, 669 F.2d 162, 169 (3d Cir. 1982) ("principles of comity among courts of the same level of the federal system provide a further reason why the transferee court should not independently re-examine an issue already decided by a court of equal authority"). Moreover, I can see no prejudice to any of the parties if the cases are retained here for further proceedings. Plaintiffs are not prejudiced because they could not proceed

in Louisiana against the defendants they have named; venue does not lie in Louisiana for damages caused by an automobile accident that occurred in Wisconsin unless all the defendants reside in Louisiana. Discovery in case 00-C-0067-C has shown that they do not. Defendant Hillery will have to be dismissed again unless plaintiffs have uncovered new evidence showing a connection to this state; she would have been dismissed in Louisiana along with all the other defendants had the cases stayed there.

Defendants are not prejudiced. Those that have been dismissed from case 00-C-0067-C or have settled with plaintiffs in that case can raise a defense of res judicata here, just as they could in Louisiana. There is an advantage to defendants in being here where the court is more familiar with the facts and the bases for their claims.

Plaintiffs have asked for a remand to state court, but have not cited any statute or case law to suggest that a federal court in another state can remand a case to state court after it has been removed to one federal court and transferred to a second or third one. Moreover, plaintiffs have not suggested that diversity is lacking so as to make remand by any district court proper.

ORDER

IT IS ORDERED that the motion of plaintiffs Donald R. Wild and Diana H. Wild

to return these cases to the Eastern District of Louisiana is DENIED.

Entered this 23rd day of November, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge