

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

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JEROME NISBY and MACARTHUR	)	
NISBY, next friends of ESSIE	)	
Q. NISBY, deceased,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 06-2799 Ma
	)	
BARDEN MISSISSIPPI GAMING, LLC	)	
d/b/a FITZGERALD'S GAMING	)	
CASINO,	)	
	)	
Defendant.	)	

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ORDER GRANTING DEFENDANT'S MOTION TO STRIKE, GRANTING  
PLAINTIFFS' MOTION FOR LEAVE TO AMEND, AND DENYING DEFENDANT'S  
MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO TRANSFER VENUE

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The plaintiffs, Jerome and MacArthur Nisby, filed a complaint in this court alleging that on November 30, 2003, decedent Essie Q. Nisby was fatally injured in a car accident in Robbinsville, Mississippi, due to the carelessness and negligence of Defendant Barden Mississippi Gaming, LLC d/b/a Fitzgerald's Gaming Casino ("Fitzgerald"). On July 21, 2007, Fitzgerald moved to dismiss the complaint for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2) or, in the alternative, to transfer venue to the United States District Court for the Northern District of Mississippi. On August 24, 2007, plaintiffs filed an amended complaint, and a

week later, on August 31, they filed a response in opposition to the motion to dismiss. Fitzgerald responded by moving to strike the amended complaint on September 3, 2007. On September 17, 2007, plaintiffs filed a response in opposition to the motion to strike, as well as an alternative motion to amend the complaint. For the following reasons, defendant Fitzgerald's motion to strike the amended complaint is GRANTED, plaintiffs' motion for leave to amend the complaint is GRANTED, and Fitzgerald's motion to dismiss the complaint or, in the alternative, to transfer venue is DENIED.

**I. Background**

On the evening of November 30, 2003, the decedent, Essie Q. Nisby, a resident of Memphis, Tennessee, was driving westbound on Fitzgerald's Boulevard in Robbinville, Mississippi, en route to Fitzgerald's Casino. (Compl. ¶ 9.) Meanwhile, Robert B. Stephens had departed the casino in his truck, traveling eastbound on Fitzgerald's Boulevard in a lane designated for westbound traffic only. (Id. ¶ 8-9.) While driving in the wrong lane, Stephens' truck collided head on with the car driven by Ms. Nisby, who later died as she was being transported by ambulance to the hospital. (Id. ¶ 10.)

At the time of the accident, Stephens was legally intoxicated. (Id. ¶ 12.) Plaintiffs allege that before the accident, Stephens drank excessively while gaming at

Fitzgerald's. (Id. ¶ 7, 13-15.) They contend that casino employees provided alcohol, free of charge, to an obviously intoxicated Stephens. (Id. ¶ 16.) The complaint avers that the accident and all related damages were directly and proximately caused by this negligence. (Id. ¶ 17-19.)

## **II. Jurisdiction and Venue**

For reasons set out below, this court has jurisdiction under 28 U.S.C. § 1332, and venue is proper under 28 U.S.C. § 1404.

## **III. Standard of Review**

Under Federal Rule of Civil Procedure 15(a), the trial court is vested with discretion in granting or denying an amendment. See Foman v. Davis, 371 U.S. 178 (1962). Trial courts may consider a number of factors in making this determination, including undue delay, bad faith, undue prejudice, futility of amendment, or repeated failure to cure deficiencies by previous amendments. Id. Delay alone is insufficient to deny the proposed amendment. Robinson v. Michigan Consol. Gas Co. Inc., 918 F.2d 579, 581 (6th Cir. 1990) (citations omitted). Where a party seeks leave to amend under Rule 15(a), "a party must act with due diligence if it intends to take advantage of the Rule's liberality." United States v. Midwest Suspension and Brake, 49 F.3d 1197, 1202 (6th Cir. 1995)

(citing Troxel Mfg. Co. v. Schwinn Bicycle Co., 489 F.2d 968 (6th Cir. 1973)).

Motions to dismiss for lack of personal jurisdiction are considered under a "procedural scheme" that is "well-settled." Theunissen v. Matthews, 935 F.2d 1454, 1458 (6th Cir. 1991). The plaintiff at all times bears the burden of establishing that personal jurisdiction over the defendant exists. Id. When a court bases its decision on supporting and opposing affidavits without an evidentiary hearing, "the plaintiff must make only a *prima facie* showing that personal jurisdiction exists in order to defeat dismissal." Id. Furthermore, "the court must...view affidavits, pleadings, and documentary evidence in the light most favorable to the plaintiff." Kerry Steel v. Paragon Indus., Inc., 106 F.3d 147, 153 (6th Cir. 1997). This does not, however, require the court "to ignore undisputed factual representations of the defendant which are consistent with the representations of the plaintiff." Id.

When a federal court has jurisdiction over a case based on diversity of citizenship under 28 U.S.C. § 1332, it must apply the forum state's rules for exercising personal jurisdiction to determine whether it has such jurisdiction over an out-of-state defendant. Aristech Chem. Int'l Ltd. V. Acrylic Fabricators, Ltd., 138 F.3d 624, 627 (6th Cir. 1998). The Tennessee long-arm statute, Tenn. Code Ann. § 20-2-225(2), confers personal

jurisdiction over nonresident defendants to the maximum extent permitted under the Due Process Clause of the United States Constitution. Payne v. Motorists' Mutual Ins. Co., 4 F.3d 452, 455 (6th Cir. 1993); Masada Inv. Corp. v. Allen, 697 S.W.2d 332, 334 (Tenn. 1985). The requirements of the Tennessee long-arm statute track the Due Process Clause of the Constitution, and this court's inquiry focuses on whether the exercise of personal jurisdiction over Fitzgerald meets constitutional due process requirements. See, e.g., Aristech, 138 F.3d at 627.

"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." 28 U.S.C. § 1404(a). This Court has broad discretion in considering motions under § 1404(a). Ellipsis, Inc. v. Colorworks, Inc., 329 F. Supp .2d 962, 970 (W.D. Tenn. 2004). The burden is on the moving party to establish the need for a change of forum. Paragon Fin.Group, Inc. v. Bradley Factor, Inc., 2003 WL 23471548, at \*11 (E.D. Tenn. 2003). The plaintiff's choice of forum will be given deference unless the defendant makes an appropriate showing. Id. at \*12. The threshold consideration is whether the action is one which could have originally been brought in the proposed transferee district. Returns Distribution Spec., LLC v. Playtex Prods., Inc., 2003 WL 21244142, at \*6 (W.D. Tenn.2003). Where the

threshold requirement is met, a court then examines factors including location of witnesses, location of documents and records, and location of counsel. Platt v. Minnesota Mining and Mfg. Co., 376 U.S. 240 (1964); see also United States v. Jamal, 2007 WL 2478636, at \*14 (6th Cir. 2007).

#### **IV. Analysis**

##### **A. Motion to Strike Amended Complaint and Motion to Amend**

Fitzgerald moves to strike the August 24 amended complaint for failure to comply with the requirements of Rule 15(a). Under the Rule, amendments to pleadings made after the opposing party has responded may only be made with leave of court or consent of the opposing party. Plaintiffs filed a complaint on November 30, 2006, which Fitzgerald answered on April 20, 2007. Plaintiffs must have the consent of the court or Fitzgerald to amend the complaint.

Plaintiffs argue that Fitzgerald consented to the amended complaint in the course of scheduling discussions between the parties in June 2007. As proof plaintiffs point to the Report they submitted after the Rule 26(f) planning meeting on June 8, 2007. The Report suggests that the parties had agreed that August 24, 2007, would be the final date plaintiffs could file an amended complaint. Although Fitzgerald has not objected to the veracity of the Report, it does not expressly assent to its terms. The Rule 16(b) Scheduling Order entered on July 10,

2007, includes no reference to an agreed deadline for filing an amended complaint. Therefore, the court is unable to find that Fitzgerald consented to the amended complaint. Fitzgerald's motion to strike the August 24 amended complaint is GRANTED.

Plaintiffs have filed an alternative motion for leave to amend. Rule 15 permits courts to grant such motions liberally if doing so would not result in undue delay or prejudice, and if the motion is not made in bad faith. Davis, 371 U.S. at 182. Because plaintiffs have already drafted an amended complaint, granting leave to amend will not result in undue delay. Because the amendments appear only to specify facts underlying jurisdictional requirements, granting plaintiffs' motion will not prejudice the defendant. Finally, although the Report of Rule 26(f) discussions between the parties is insufficient to prove consent, it suggests that the plaintiffs acted in good faith in filing the August 24 amended complaint. For these reasons, plaintiffs' motion for leave to amend the complaint is GRANTED.

**B. Motion to Dismiss for Lack of Personal Jurisdiction<sup>1</sup>**

Consistent with the Due Process Clause, courts may exercise personal jurisdiction over a nonresident defendant so long as that defendant has "certain minimum contacts" with the forum

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<sup>1</sup> In ruling on the motion to dismiss, the court considers only the original complaint and not the amended complaint filed on August 24, 2007.

state such that the exercise of that jurisdiction "does not offend traditional notions of fair play and substantial justice." Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). There are two forms of personal jurisdiction: general and specific. Aristech, 138 F.3d at 627.

General jurisdiction exists when a defendant has "continuous and systematic contacts with the forum state sufficient to justify the state's exercise of judicial power with respect to any and all claims," including those unrelated the defendant's contacts with the forum. Kerry Steel v. Paragon Indus., Inc., 106 F.3d 147, 149 (6th Cir. 1997); see also Perkins v. Benguet, 342 U.S. 437 (1952). In contrast, specific jurisdiction may only be exercised for claims "arising out of or related to the defendant's contacts with the forum." Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n.8 (1984).

Specific jurisdiction exists where: (1) the defendant purposefully avails itself of the privilege of acting in the forum state or intentionally causes a consequence there, (2) the plaintiff's cause of action arises from the defendant's action in the forum state, and (3) the exercise of personal jurisdiction is reasonable in light of the defendant's acts or the consequences of its acts in the forum state. Aristech, 138 F.3d at 628; see also Payne, 4 F.3d at 455.

In making a determination about specific jurisdiction, the court is persuaded by a similar case, Ford v. RDI/Caesar's Riverboat Casino, LLC, 2007 WL 2407249 (W.D. Ky. 2007). The decedent in Ford was killed on an Indiana road while on her way to Caesar's Riverboat Casino by an intoxicated driver who had just left the casino. Id. at \*1. Both the decedent and the intoxicated driver were Kentucky residents. Id. The casino was located 20 miles from Louisville, Kentucky, in Elizabeth, Indiana, and advertised extensively in Kentucky, drawing over fifty percent of its customers from the state. Id. On the basis of these facts, the court found that Caesar's was subject to specific personal jurisdiction in Kentucky. First, the court found that Caesar's purposefully availed itself of the privilege of acting in Kentucky because of its "concerted, sophisticated effort to woo Kentucky residents to visit Ceasars [sic] in Indiana." Id. at 3. Second, the court held that the accident was made possible by the casino's contact with Kentucky as it emerged from "a series of ongoing contacts designed to encourage [the intoxicated driver] and [the decedent] to frequent the casino more often." Id. at 4.<sup>2</sup> Finally, the court held that

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<sup>2</sup> In arriving at this conclusion, the court distinguished its case from the Sixth Circuit's holding in Brunner v. Hampson, 441 F.3d 457 (6th Cir. 2006). Brunner held that although a "'but for' relationship between the solicitation and injuries clearly exists...one cannot reasonably say that the solicitations in Ohio were the proximate cause of the [accident] in Canada." The case was distinguished on the grounds that Ohio's long-arm statute (unlike the statutes of Kentucky and Tennessee) did not extend to the full

jurisdiction was constitutionally reasonable given that the casino's contacts with Kentucky were "frequent, significant, and systematic" and because of the casino's "close geographic proximity" and "heavy reliance on Kentucky patrons." Id. For similar reasons this court finds that Fitzgerald is subject to specific personal jurisdiction in Tennessee.

The first requirement, purposeful availment, "allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." World-Wide Volkswagen, Corp. v. Woodson, 444 U.S. 286, 297 (1980), and "ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1986). In this case, it is clear that Fitzgerald has purposefully availed itself of the privilege of acting within Tennessee. According to its 2007 Annual 10-K Report to the SEC, the casino advertises extensively in Tennessee, using television, radio, newspapers, and billboards. (Pl. Resp. at 3.) This is for good reason. According to the Report, "Fitzgerald's Tunica is located 30 miles from downtown Memphis, Tennessee and primarily draws its gaming patrons from the Memphis area." (Id.) Just as Caesar's

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limits of Due Process and because the contacts at issue were of a less "continuous and concentrated" nature than those of the Caesar's Riverboat Casino. For the same reasons, the present case may be distinguished from Brunner.

in Ford, Fitzgerald's advertising represents a "concerted, sophisticated effort to woo" out-of-state residents to the casino. Ford, 2007 WL 2407249, at \*3.

The second requirement is that the cause of action must arise from the defendant's contacts within a forum. Aristech, 138 F.3d at 628; see also Payne, 4 F.3d at 455. In this case, the accident arose from a combination of the casino's proximity to Memphis, its reliance on Memphis patrons, and its extensive advertising through Memphis media outlets. These factors are identical to those which weighed heavily with the Ford court. Ford, 2007 WL 2407249, at \*3. One might distinguish Ford because both the decedent and the intoxicated driver were members of a Caesar's Rewards Club and holders of Caesar's Players Cards, which awarded points for frequent visits to the casino and were used in a direct mail marketing campaign. Id. at \*1. Although these factors strengthen the tie between the cause of action and the contacts, the present case remains far more analogous to Ford than to Brunner v. Hampson, 441 F.3d 457 (6th Cir. 2006). Unlike Brunner, and like Ford, this case involves "a series of ongoing contacts" (namely, a coordinated and extensive local marketing campaign) and a Tennessee long-arm statute which extends to the constitutional maximum.

The final requirement is that "the acts of the defendant or consequences caused by the defendant must have a substantial

enough connection with the forum state to make the exercise of jurisdiction reasonable." Southern Mach. Co. v. Mohasco Indus., Inc., 401 F.2d 374, 381 (6th Cir. 1968). As in Ford, Fitzgerald's contacts with Tennessee are "frequent, significant, and systematic." Ford, 2007 WL 2407249, at \*4. These contacts, combined with the casino's "close geographic proximity" and "heavy reliance" on Tennessee patrons, suggest that it is not "unreasonable" to bring the defendant into court in Tennessee. Id.

The three requirements have been met, and Fitzgerald is subject to specific personal jurisdiction in Tennessee. Therefore it is unnecessary to consider the question of general personal jurisdiction. Defendant Fitzgerald's motion to dismiss for lack of personal jurisdiction is DENIED.

### **C. Motion to Transfer Venue**

The Supreme Court has instructed district courts to exercise their discretion under § 1404(a) according to an "individualized, case-by-case consideration of convenience and fairness." Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29 (1988). In deciding whether to transfer a case the Court is to consider: (1) the location of willing and unwilling witnesses; (2) the residence of the parties; (3) the location of sources of proof; and (4) the location of the events that gave rise to the dispute. Paragon Fin. Group, 2003 WL 23471548, at \*11. Put

another way, the Court may consider any factor that may make any eventual trial easy, expeditious, and inexpensive. Cherokee Export Co. v. Chrysler Int'l Corp., 1998 WL 57279, at \*2 (6 Cir. 1998). To that end the court may examine facts outside the complaint, but must draw all reasonable inferences and resolve factual conflicts in favor of the plaintiff. Gone to the Beach, LLC v. Choicepoint Servs., Inc., 434 F.Supp. 2d 534, 537 (W.D. Tenn. 2006). Transfer is inappropriate where the result would simply shift the inconvenience from one party to another. Paragon Fin. Group, 2003 WL 23471548, at \*12. The heavy burden of establishing that another venue is more appropriate falls entirely on defendant Fitzgerald. Id. at \*11; see also Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947) ("Unless the balance is strongly in favor of the defendants, the plaintiff's choice of forum should rarely be disturbed.").

In its original memorandum of law to this court, Fitzgerald offered no factual argument to support its motion to transfer venue. (Def.'s Mem. of Law in Supp. of Mot. to Dismiss at 8-9.) Plaintiffs argued that they are residents of Memphis, that defendant's Mississippi location is only 30 miles from downtown Memphis (the location of the federal court), and that numerous potential witnesses are non-Mississippi residents. (Pls.' Reply at 13.) This argument prompted Fitzgerald to respond that a trial would involve testimony by several Mississippi residents,

including casino employees and members of the Tunica County Sheriff's Department who investigated the car accident. (Def.'s Reply to Pls.' Reply at 2.)

Based on the parties' memoranda, it appears a trial would be likely to require testimony from witnesses residing in Memphis, Northern Mississippi, and Eastern Arkansas. Attorneys for both plaintiffs and defendant work from offices in Memphis. It is, therefore, difficult to conclude that a trial held in Oxford, Mississippi, as opposed to Memphis, Tennessee, would advance the interests of justice to a degree that would warrant subverting the plaintiffs' original choice of forum. The defendant has failed to meet its burden, and the motion to transfer venue is DENIED.

**V. Conclusion**

For the foregoing reasons, defendant Fitzgerald's motion to strike the amended complaint is GRANTED, plaintiffs' motion for leave to amend the complaint is GRANTED, and Fitzgerald's motion to dismiss or, in the alternative, to transfer venue is DENIED.

So ordered this 24th day of September 2007.

s/ Samuel H. Mays, Jr.  
SAMUEL H. MAYS, JR.  
UNITED STATES DISTRICT JUDGE