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IN THE FIFTH DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

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CITY OF TAVARES, ET AL.,

Appellants,

vs.

ROBERT GRAHAM AND TAMMY GRAHAM, ETC., ET AL.,

Appellees.
_____/

CONSOLIDATED CASE NOS:

5D07-75, 5D07-76

On Appeal from the Ninth Judicial Circuit,
in and for Orange County, Florida
Case No. 48-2006-CA-003989-0

ANSWER BRIEF OF APPELLEES

Theodore J. Leopold
Florida Bar No. 705608
Diana L. Martin
Florida Bar No. 624489
RICCI ~ LEOPOLD, P.A.
2925 PGA Blvd., Ste. 200
Palm Beach Gardens, FL 33410
(561) 684-6500

Gregory A. Page, Esq.
Page, Eichenblatt, Bernbaum & Bennett, P.A.
214 E. Lucerne Circle
Orlando, FL 32801
(407) 386-1900

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STATEMENT OF CASE AND FACTS

While coaching a high school basketball game, Plaintiff Robert Graham suffered a sudden cardiac arrest. (Medtronic Appendix 67). An officer from the Tavares Police Department was the first emergency-responder and attempted to revive Plaintiff Graham with a Lifepak 500 automated external defibrillator that was designed, manufactured, and sold by Defendants Medtronic, Inc. and Medtronic Emergency Response System, Inc (collectively referred to herein as "Medtronic"). (Medtronic Appendix 64-65, 67). The defibrillator failed to accurately detect and assess Plaintiff Graham's heart rhythm and failed to administer an electrical charge sufficient to restart his heart. (Medtronic Appendix 67; Appellees' Appendix 12). A second defibrillator had to be located and used to restart Plaintiff Graham's heart, by which time he had suffered catastrophic brain injury. (Medtronic Appendix 68).

Medtronic recalled the first defibrillator used on Plaintiff Graham weeks earlier because a defect prevented it from detecting the heart rhythms of certain patients and, therefore, it could not reasonably be expected to properly defibrillate someone suffering a life-threatening cardiac arrest. (Appellees' Appendix 15). Medtronic notified its customers of the defibrillator defect, but failed to inform them that the defibrillators had been recalled, instead advising its customers to continue using the defibrillators until Medtronic could update them. (Appellees' Appendix 10).

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The City of Tavares, who owned the defective defibrillator used on Plaintiff Graham, received this letter, but failed to remove the defibrillator from the use of its emergency personnel. (Medtronic Appendix 75-76).

Plaintiffs, Robert Graham and his wife Tammy, sued Medtronic for strict liability product defect as well as negligence for failing to properly design, manufacture, distribute, and recall the defective defibrillators. (Medtronic Appendix 68-69, 71-72). Plaintiffs also alleged Medtronic was negligent because it failed to exercise reasonable care in warning consumers of the defibrillator defect. (Medtronic Appendix 69, 72). Plaintiffs sued the City of Tavares for negligence as a result of its failure to remove the defective defibrillator from use by its emergency personnel although it had knowledge that the defibrillator could not be relied on to work properly in life-threatening situations as intended. (Medtronic Appendix 75). And, Plaintiffs sued John Ross, the Medtronic employee who sold, distributed, or recommended the defective device to the City, for negligence. (Medtronic Appendix 73-75).

The City moved to transfer venue from Orange County to Lake County, which is the location of the City of Tavares, on the ground that the trial court had discretion to transfer the case under the home venue privilege. (Medtronic Appendix 152-154, 155-157). Medtronic joined in the motion by filing a lengthy brief in which it argued that the convenience of the parties, the convenience of the

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witnesses, and the interests of justice warranted transfer of the action to Lake County. (Medtronic Appendix 160-166).

After a hearing at which both Defendants argued that the trial court should exercise its discretion by transferring the action to Lake County for the convenience of the witnesses, (Medtronic Appendix 180-181, 183), the trial court denied the motion to transfer venue. (Medtronic Appendix 175). Defendants then brought this appeal of the trial court's non-final order denying their motion to transfer venue.

SUMMARY OF ARGUMENT

The argument Defendants make on appeal—that the trial court erred as a matter of law in applying the joint tortfeasor exception to the home venue privilege—is not properly reviewable on appeal because Defendants failed to make this argument before the trial court. Furthermore, any error by the trial court in exercising its discretion in denying Defendants' motion to transfer venue was invited by Defendants who persistently argued in their motions and at the hearing that the decision to be made by the trial court was one of discretion.

In the event the Court decides to reach the merits of the appeal, it should affirm the trial court's denial of Defendants' motion to transfer venue because Plaintiffs' complaint demonstrates the City and Medtronic are joint tortfeasors whose actions combined to cause Plaintiff Robert Graham's injuries. And, Defendants failed to

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present any evidence below to demonstrate that there are significant witnesses in this case that will be inconvenienced by a trial in Plaintiffs' chosen forum.

ARGUMENT

I. An issue raised for the first time on appeal is not preserved for appellate review. Appellants argue that the trial court erred in applying the joint tortfeasor exception to the home venue privilege because Plaintiffs failed to allege that Defendants are joint tortfeasors, but Defendants never made this argument before the trial court. Can Appellants' argument be considered in this appeal, much less provide grounds for reversal of the trial court's order?

Defendant-appellants never argued at the trial level that Plaintiffs failed to allege that Defendant Medtronic and Defendant City of Tavares are joint tortfeasors. Nor did Defendants ever argue that the trial court was required as a matter of law to reject the joint tortfeasor exception to the home venue privilege. In fact, any alleged error in the trial court's improper application of that exception was invited by Defendants who argued below that the trial court had discretion to decide whether to grant the motion to transfer venue under the home venue privilege.

"[I]t is not appropriate for a party to raise an issue for the first time on appeal." *Sunset Harbour Condo. Ass'n v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005) (citing *Dade County Sch. Bd. v. WQBA*, 731 So. 2d 638 (Fla. 1999) (a claim not raised in the trial court will not be considered on appeal); *Dober v. Worrell*, 401 So. 2d 1322 (Fla. 1981) (appellate court will not consider issues not presented to the trial judge

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on appeal from final judgment on the merits)). "'In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved.'" *Id.* (quoting *Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985)).

The City of Tavares filed both a motion to transfer venue and an amended motion to transfer venue. (Medtronic Appendix 152-157). In each of these motions the City states, "A trial court has the discretion to dispense with the home venue privilege when a governmental body is sued as a joint tortfeasor." (Medtronic Appendix 153, 156). The City then asks the court to exercise its discretion by transferring venue "in consideration of convenience and efficiency." (Medtronic Appendix 153, 156). Not once in its motion to transfer venue does the City contend that it cannot be considered a joint tortfeasor with Medtronic, and that, consequently, the joint tortfeasor exception to the home venue privilege is inapplicable.

Nor does Medtronic make this argument in its ten-page motion to join the City's motion to transfer venue. Medtronic also pointed out to the trial court that "[o]ne exception to the home venue privilege arises where the governmental entity is sued as a joint tort-feasor in a non-home county," (Medtronic Appendix 159), without ever arguing that the joint tortfeasor exception is inapplicable. Instead,

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Medtronic advised the court that in cases with joint tortfeasors, the court's decision to transfer venue "should be guided by considerations of justice, fairness and convenience under the circumstances of the case." (Medtronic Appendix 159). Medtronic then devotes the remaining six pages of its motion to arguing that the circumstances of the case, the convenience of the parties and witnesses, and the interests of justice warrant transferring venue to Lake County. (Medtronic Appendix 160-166).

And, even though Plaintiffs specifically argued in their response to the motions to transfer venue that the trial court should apply the joint tortfeasor exception to the home venue privilege because "the Amended Complaint asserts that the actions and/or inaction of all of the Defendants, including the City of Tavares, combined to cause Mr. Graham's injuries [rendering] the City of Tavares . . . a joint tortfeasor with the other Defendants in this case," (Medtronic Appendix 172), **Defendants never argued otherwise at the hearing** before the trial court on this issue.

At that hearing, the City argued extensively in support of its contention that "the substantial connections, both from a witness perspective, a party perspective, and from the interests of not only time efficiency but the saving of resources is served by having this [case] tried in Lake County Circuit Court, not Orange County." (Medtronic Appendix 179). When arguing for application of the home venue privilege, the City stated, "although it is not an ironclad rule anymore, the

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home county venue privilege has to be given substantial deference. . . First of all, you have to look at the considerations of justice, fairness, and convenience to all of the witnesses." (Medtronic Appendix 180). It continued, "[t]he privilege of a Florida governmental entity . . . to be sued in [its] own county, has to be given substantial consideration, along with all of the other elements." (Medtronic Appendix 180-181). **Not once did the City raise the argument made here on appeal that the trial Court was required as a matter of law to apply the home venue privilege because the joint tortfeasor exception is inapplicable.**

Nor did Medtronic make this argument before the trial court. Medtronic began its argument at the hearing below by stating, "we have joined in the Tavares motion to transfer venue given the substantial consideration of the home venue privilege and all of the other arguments that counsel has made regarding the location of where this incident occurred. . . ." (Medtronic Appendix 183). Medtronic's brief argument, consisting of a mere twenty-nine lines in the record, did not include any claim that the joint tortfeasor exception to the home venue privilege is inapplicable in this case. (Medtronic Appendix 183, 188).

Although they never made the argument before the trial court, the City and Medtronic now argue that the trial court's denial of their motion to transfer venue should be reversed because the court improperly applied the joint tortfeasor exception to the home venue privilege. In fact, Medtronic states in its initial brief

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that the "principal question raised in this appeal . . . is whether the City of Tavares and Medtronic can be construed to be joint tortfeasors in this case." (Medtronic Initial Brief 8). The City argues in its brief that "the joint tort-feasor exception is not applicable to the facts involved in this case [because] Tavares . . . and Medtronic are not joint tort-feasors [and] Plaintiff has failed to establish that Tavares and Medtronic are joint tort-feasors." (City Initial Brief 15). Defendants cannot be heard to complain on appeal that the trial court erred in applying the joint tortfeasor exception when neither of them argued below that this exception is inapplicable.

Furthermore, "[u]nder the doctrine of invited error, a party cannot successfully complain of error for which he is himself responsible, or of rulings that he has invited the trial court to make." *Volusia County v. Niles*, 445 So. 2d 1043, 1048 (Fla. 5th DCA 1984) (citations omitted). "Invited error occurs when a rule of law is contended for by a party in the trial court who alleges on appeal that the rule was erroneous." *Growers Mktg. Serv. v. Conner*, 249 So. 2d 486, 487 (Fla. 2d DCA 1971). Both the City and Medtronic argued below that the trial court should exercise its discretion when deciding whether to grant their motion to transfer venue. They now argue on appeal that the trial court had no discretion to deny their motion, but should have transferred venue under the home venue privilege as

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a matter of law. If the trial court's exercise of discretion was indeed erroneous, the error was invited by the Defendants.

As the City and Medtronic failed to argue below that the joint tortfeasor exception to the home venue privilege is inapplicable in this case, that argument is waived and cannot be considered as grounds for reversal on appeal. Additionally, because the trial court's alleged error in exercising its discretion when ruling on the motion to transfer venue was invited by Defendants, they cannot now contend that the trial court's exercise of its discretion constitutes reversible error. Therefore, the Court should affirm the trial court's denial of the motion to transfer venue without even reaching the merits of the issue.

II. While a governmental body usually has the privilege to be sued in its home venue, an exception to this rule arises when the governmental body is sued as a joint tortfeasor. Plaintiffs sued the City of Tavares and Medtronic as joint tortfeasors by alleging that their negligent actions combined to cause Plaintiffs' injuries. Did the trial court err when applying the joint tortfeasor exception to the City's home venue privilege?

A. Standard of Review

The trial court's denial of a motion for change of venue is reviewed for an abuse of discretion. *Fla. State Lottery v. Woodfin*, 871 So. 2d 931, 932 (Fla. 5th DCA 2004). Although a governmental body generally has the privilege to be sued in its home venue, "a trial court has *discretion* to dispense with the home venue privilege when a governmental body is sued as a joint tortfeasor. The exercise of

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this discretion must be guided by considerations of justice, fairness, and convenience under the circumstances of the case." *Bd. of County Comm'rs of Madison County v. Grice*, 438 So. 2d 392, 395 (Fla. 1983) (emphasis added).

Furthermore, the question of "[w]hether defendants are joint tortfeasors is ordinarily a question of fact determined by the circumstances of the particular case." *Jackson v. York Hannover Nursing Ctrs.*, 876 So. 2d 8, 13 (Fla. 5th DCA 2004). Medtronic argues that this matter should be reviewed *de novo* because the trial court should not have exercised discretion when deciding whether to transfer venue under the home venue privilege. As demonstrated under Point I, however, Defendants extensively argued below that the trial court was required to exercise its discretion when ruling on their motion to transfer venue. Defendants should, therefore, be held to this standard on appeal, and this Court should review the trial court's decision for an abuse of discretion.

B. Plaintiffs sued the City of Tavares and Medtronic as joint tortfeasors by alleging that their negligent actions combined to cause Plaintiffs' injuries.

A review of the allegations in Plaintiffs' third amended complaint reveals that the City and Medtronic can be considered joint tortfeasors whose independent acts of negligence combined to cause Plaintiff Robert Graham's injuries. Thus, the trial court's application of the joint tortfeasor exception to the home venue rule was not erroneous.

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Joint tortfeasors are "'two or more negligent entities whose conduct combines to produce a single injury.'" *York Hannover*, 876 So. 2d at 12 (citing *D'Amario v. Ford Motor Co.*, 806 So. 2d 424, 435 n.12 (Fla. 2001)). "To be joint tortfeasors each actor must have committed some wrong that results in an injury or damage to another. 'Although there is but a single damage done, there are several wrongs.'" *Id.* at 13 (quoting *Phillips v. Hall*, 297 So. 2d 136, 139 (Fla. 1st DCA 1974) (Boyer, J., concurring specially)). The negligent actions of joint tortfeasors need not occur at the same time. As this Court has explained, "[e]ven if two seemingly independent tortious acts do not 'precisely coincide in time,' the actors can reasonably be considered to be joint tortfeasors if the sequence of their tortious acts produces a single injury." *Id.* (citing *Leesburg Hosp. Ass'n v. Carter*, 321 So. 2d 433, 434 (Fla. 2d DCA 1975)).

Plaintiffs made sufficient allegations in their complaint against the City of Tavares and Medtronic to support the trial court's finding that they are joint tortfeasors. In the third amended complaint, Plaintiffs alleged that Medtronic initiated a Class I recall of certain Lifepak 500 automated external defibrillators because they were defective in that they might fail to work on certain patients. (Medtronic Appendix 44 ¶18). Medtronic issued a letter to owners of the defective defibrillators advising that the defibrillators might "inhibit ECG analysis and therapy of certain patients," but not disclosing that the devices were being recalled.

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(Medtronic Appendix 44 ¶20; Appellees' Appendix 10). Nevertheless, Medtronic recommended the continued use of the defective defibrillators until it got around to updating them. (Medtronic Appendix 44 ¶20; Appellees' Appendix 10).

The City received this letter and continued to use the defective defibrillator with the knowledge that this device, which is meant for use in life-threatening situations to restore a person's normal heart rhythm, might not work properly. (Medtronic Appendix 44 ¶21, 45 ¶23, 53 ¶49-51). Defibrillation of Plaintiff Robert Graham's heart was attempted with the defective defibrillator, but the device failed to work properly, resulting in delayed defibrillation and catastrophic brain damage. (Medtronic Appendix 45 ¶¶23-24, 53 ¶51).

In their complaint, Plaintiffs allege that the negligent actions of Medtronic in failing to properly recall the defective defibrillator and properly warn of the defect, and the negligent actions of the City in failing to properly remove the defective defibrillator from use by its emergency personnel, joined to create Plaintiff Robert Graham's injuries. Specifically, Plaintiffs allege that Medtronic breached its duty of care by "[f]ailing to exercise reasonable care in warning consumers, including the owners and/or operators of the Defective Device, before [the date of Plaintiff Robert Graham's injuries], of the dangers caused by the documented problem with certain LIFEPAK 500 automated external defibrillators, including the Defective Device, which created a reasonable probability that the Defective Device would

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fail to administer an appropriate life-saving electrical charge." (Medtronic Appendix 47 ¶29(b), 49 ¶36(b)). Additionally, Plaintiffs allege that Medtronic breached its duty of care by "[f]ailing to exercise reasonable care in recalling the Defective Device, although it had knowledge of the defect for many years prior to Robert Graham's attempted defibrillation." (Medtronic Appendix 47 ¶29(d), 50 ¶36(d)).

In regard to the City's negligence, Plaintiffs allege that the City "through its agents and/or employees, had knowledge that there was a reasonable probability that the Defective Device would fail to render an appropriate electric charge necessary to successfully defibrillate and revive a person who has suffered a cardiac arrest." (Medtronic Appendix 53 ¶49). And, the City "had a duty to remove the Defective Device from use by emergency personnel because the Defective Device could not be reasonably used in response to life-threatening emergencies as required." (Medtronic Appendix 53 ¶50).

But for Medtronic's negligence in failing to proper recall the defibrillator and failing to properly warn its customers of the defect, Plaintiff Robert Graham would not have suffered catastrophic injuries as a result of the failed attempted defibrillation. And, but for the negligence of the City in failing to use reasonable care by removing the defective defibrillator from use by its emergency rescue personnel, Plaintiff Robert Graham would not have suffered catastrophic injuries

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as a result of the failed attempted defibrillation. The negligence of these two parties combined to create a *single* injury to Plaintiff Robert Graham. When a series of tortious acts combine to create a single injury, the negligent actors are considered joint tortfeasors. *See Jackson v. York Hannover Nursing Ctrs.*, 876 So. 2d 8, 12 (Fla. 5th DCA 2004).

Medtronic cites *Billman v. Nova Products, Inc.*, 328 So. 2d 244, 246 (Fla. 5th DCA 1976), for the proposition that a retailer and manufacturer cannot be joint tortfeasors. The plaintiff in *Billman* attempted to sue the manufacturer of a product after it had already sued the product retailer, arguing, *inter alia*, that because the retailer and manufacturer were joint tortfeasors, he could sue the manufacturer in an independent action if he had not yet satisfied judgment against the retailer. Citing *Phillips v. Hall*, 297 So. 2d 136 (Fla. 1st DCA 1974), the court held that the retailer and manufacturer were not joint tortfeasors. The *Phillips* court held that a master and servant are not joint tortfeasor when the master is not an active participant in the tort committed by the servant. 297 So. 2d at 137. That is not the situation here because Plaintiffs have alleged that both the City and Medtronic have committed independent acts of negligence, not that one is vicariously liable for the acts of other.

When viewed in comparison to the facts of *Letzter v. Cephas*, 792 So. 2d 481 (Fla. 4th DCA 2001), it is clear that Plaintiffs have made sufficient allegations to

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support a factual finding that Medtronic and the City are joint tortfeasors. In *Letzter*, the plaintiff sued two doctors. He alleged the first doctor was negligent for taking a wait-and-see approach with regard to the dry gangrene of plaintiff's toe, and failing to timely operate on his toe. *Id.* at 483-84. He alleged the second doctor was "negligent for performing the wrong operation." *Id.* at 483. As a result of the doctors' negligence, part of plaintiff's leg was amputated. *Id.* at 485. Although the alleged negligent actions of the doctors did not occur near in time to each other, but actually occurred months apart, the Fourth District Court of Appeal determined the question of whether the doctors were joint tortfeasors was for the jury to decide. *Id.* at 483-485, 487. It found the jury could determine either that the negligence of the first doctor made that doctor an initial tortfeasor, responsible for the subsequent medical treatment by the second doctor, or that the doctors were joint tortfeasors because their negligence combined to cause the amputation, which was the plaintiff's initial injury. *Id.* at 487.

Here, the alleged negligence of the City and Medtronic occured much closer in time. On February 3, 2005, Medtronic sent the notification letter dated January 2005 to its customers, including the City, but advised its customers keep using the defective defibrillators. (Appellees' Appendix 10, 13, 15). The City failed to remove the defective defibrillators from use by its emergency personnel, and just sixteen days later, on February 19, 2005, Plaintiff Robert Graham suffered a heart

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attack and the City's emergency responder attempted to defibrillate him with the defective device. Clearly, the negligent actions of the City and Medtronic combined to create the injuries Plaintiff Robert Graham suffered when the attempted defibrillation failed and he had to wait for a second defibrillator to be brought to the scene, rendering the City and Medtronic joint tortfeasors. Because there are sufficient facts, as alleged in Plaintiffs' complaint, to support the finding that the City and Medtronic are joint tortfeasors, the panel should affirm the trial court's denial of Defendants' motion to transfer venue.

III. A plaintiff's choice of venue is presumptively correct and the defendants bear the burden of proving that plaintiff's chosen forum is improper. Defendants did not present any evidence to the trial court in support of their motion to transfer venue. Did the trial court abuse its discretion in denying their motion to transfer venue?

A. Standard of Review

"The granting or refusal of a motion for change in venue is within the sound discretion of the trial court and will not be disturbed absent a demonstration of a 'palpable' abuse or grossly 'improvident' exercise of discretion." *Thornton v. DeBerry*, 548 So. 2d 1177, 1179 (Fla. 4th DCA 1989) (citing *Gaboury v. Flagler Hosp.*, 316 So. 2d 642 (Fla. 4th DCA 1975); *Adams v. Knabb Turpentine Co.*, 435 So. 2d 944 (Fla. 1st DCA 1983)). A trial court abuses its discretion "'only where no reasonable man would take the view adopted by the trial court.'" *Buzia v. State*,

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926 So. 2d 1203, 1216 (Fla. 2006) (quoting *Huff v. State*, 569 So. 2d 1247, 1249 (Fla. 1990)).

B. A plaintiff's choice of venue is presumptively correct and the defendants bear the burden of proving that plaintiff's chosen forum is improper.

"'A plaintiff's forum selection is presumptively correct. The burden is on the defendant to establish before the trial court that either substantial inconvenience or undue expense requires a change for the convenience of the parties or witnesses.'" *Wynn Drywall, Inc. v. Aequicap Program Adm'rs, Inc.*, 2007 WL 750337 (Fla. 4th DCA Mar. 14, 2007) (quoting *Safety Nat'l Cas. Corp. v. Fla. Mun. Ins. Trust*, 818 So. 2d 612, 613 (Fla. 5th DCA 2002)); *see also Hu v. Crockett*, 426 So. 2d 1275, 1278-79 (Fla. 1st DCA 1983) (stating that plaintiff's choice of venue is a "decision that is presumptively correct, and the burden is clearly upon the party challenging the plaintiff's venue selection to demonstrate the impropriety of that selection"). To meet this burden, the defendant must "'submit affidavits or other evidence that will shed necessary light on the issue of the convenience of the parties and witnesses and the interest of justice.'" *Wynn*, 2007 WL 750337 (quoting *Eggers v. Eggers*, 776 So. 2d 1096, 1098 (Fla. 5th DCA 2001)); *see also Botton v. Elbaz*, 722 So. 2d 974, 975 (Fla. 4th DCA 1999) (stating motion to transfer venue must be supported by sworn proof); *Graham v. Graham*, 648 So. 2d 814, 815-16 (Fla. 4th DCA 1995) (same).

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In *R.C. Storage One, Inc. v. Strand Realty*, 714 So. 2d 634, 635 (Fla. 4th DCA 1998), the district court affirmed the denial of a motion to transfer venue because the defendants supported the motion with only "a laundry list of witnesses, their places of residence and the conclusory statement that it would be inconvenient for them to travel to" the chosen venue without disclosing "any information as to the necessity, relevance or significance of the evidence to be presented by these witnesses." In the instant case, Defendants have done even less in support of their motion to transfer venue. As demonstrated below, Defendants' attempt to have the trial court transfer venue based on nothing more than their unsworn claims and speculations that most of the witnesses in this case are situated in Lake County was doomed to fail.

Although the district courts in the cases cited above were considering the propriety of a trial court's denial of a motion to transfer venue made under section 47.122, Florida Statutes, when rendering their rulings, the rulings are equally applicable here. Not only did Medtronic raise 47.122 in its joinder of the City's motion to transfer venue, (Medtronic Appendix 160 ¶5, 161-165), and the City raise 47.122 in its initial brief in this appeal, (City Initial Brief 16-17), but the same considerations are at play under a 47.122 analysis and a home venue analysis. Under 47.122, the trial court considers the convenience of the parties, witnesses and the interest of justice when deciding whether to transfer venue. §47.122, Fla.

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Stat. And, under the home venue privilege analysis, the trial court considers "justice, fairness, and convenience under the circumstances of the case." *Bd. of County Com'rs of Madison County v. Grice*, 438 So. 2d 392, 395 (Fla. 1983).

C. Defendants did not present any evidence to the trial court in support of their motion to transfer venue.

Because Defendants presented absolutely no evidence to the trial court to support their claims that the convenience of the parties, the convenience of the witnesses, or the interest of justice warrants transfer of this case to Lake County, the trial court acted within its discretion when denying Defendants' motion to transfer venue.

When seeking to change venue from plaintiff's chosen forum, a defendant must make "a detailed showing to the court specifying the key witnesses with general statements of the subject matter of their testimony." *Am. Can Co. v. Crown Cork & Seal Co.*, 433 F. Supp. 333, 338 (D.C. Wis. 1977).[1] The trial court's most important consideration when deciding whether to transfer venue is the convenience of the witnesses, *Morrill v. Lytle*, 893 So. 2d 671, 673 (Fla. 1st DCA 2005); *see also Stadler v. Ford Werke AG*, 581 So. 2d 632, 632 (Fla. 4th DCA 1991), because "material witnesses should be located near the courtroom to permit

[1] Federal case law has been deemed highly persuasive in informing the transfer of venue analysis. *See Hu v. Crockett*, 426 So. 2d 1275, 1278 (Fla. 1st DCA 1983).

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live testimony." *Hu v. Crockett*, 426 So. 2d 1275, 1279 (Fla. 1st DCA 1983) (citations omitted).

No Evidence to Demonstrate Significance of Witnesses

The *Hu* court explained that specific information about the witnesses and the significance of their testimony is crucial to the trial court's transfer of venue analysis:

> In order for a court to consider the convenience of the witnesses, **the court must know who the witnesses are and the significance of their testimony**. The court would need this information to ascertain whether a particular witness' testimony is material. Second, the court might desire to have this information in an effort to locate the trial in a forum most convenient to the greatest number of key witnesses, since the quality of testimony by a key witness may well outweigh the quantity of testimony by a number of witnesses testifying to relatively unimportant matters. **Therefore, it is apparent that the witnesses who will be called, especially the key witnesses, should be specified with a general statement as to the nature of their testimony.**

426 So. 2d at 1279 (emphasis added) (internal citations omitted). It is for this reason that a defendant must demonstrate the *quality* of witness testimony, not just the *quantity* of witness testimony in support of a motion to transfer venue. *Foster Marine Contractors v. S. Bell*, 541 So. 2d 114, 114 (Fla. 4th DCA 1989).

Here, Defendants provided no evidence to the trial court as to the quality of witness testimony. Defendants merely speculate repeatedly that because the incident occurred in Lake County that most of the witnesses must be situated in Lake County. (Medtronic Appendix 156; 160 ¶4; 179-180, 187). This was

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insufficient to support their motion to transfer venue. Plaintiffs' case is primarily one of products liability. Plaintiffs have alleged that Medtronic negligently designed, manufactured, and distributed the defective defibrillator, and have alleged strict products liability. (Medtronic Appendix 46-47, 49-50, 54-57, 57-60). Proving these allegations will require a multitude of witnesses that were not present at the time Plaintiff Robert Graham suffered a heart attack in the City of Tavares. Employees and corporate officers of Medtronic, as well as medical and engineering experts, will be necessary witnesses. While these witnesses will undoubtedly find Orange County a more convenient venue given its international airport and plethora of hotel accommodations, it is not necessary to even reach this inquiry because Defendants failed to present any evidence to demonstrate these significant witnesses will be inconvenienced by a trial in Orange County.

Of course, some of the people present in Lake County at the time of Plaintiff Robert Graham's heart attack will be significant witnesses, such as the officer who attempted to defibrillate Robert Graham with the defective defibrillator and some of the witnesses who came to the aid of Robert Graham and saw that the defibrillator did not operate properly. Defendants did not, however, present any evidence to the trial court to demonstrate how many people present at the time of the incident will actually be significant witnesses. Certainly, the trial court would not permit "hundreds of witnesses" (Medtronic Initial Brief 17-18) to present

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cumulative testimony. But Defendants' failure to present any evidence demonstrating what the significant testimony in this case will be and who the significant witnesses in this case are left the trial court with little option but to deny the motion to transfer venue.

No Evidence to Demonstrate Inconvenience of Witnesses

Defendants also failed to present any evidence to demonstrate what witnesses will actually be inconvenienced by a trial in Orange County. A defendant should "'show that the witnesses will be unwilling to testify [in the plaintiff's chosen forum] and that compulsory process would be necessary.'" *Conn. Indem. Co. v. Palivoda*, 2004 WL 3661069, *5 (M.D. Fla. 2004) (quoting *Mason v. Smithkline Beecham Clinical Labs.*, 146 F. Supp. 2d 1355, 1361-62 (S.D. Fla. 2001)).

Defendants did not present any evidence as to the location of the witnesses it claims will be inconvenienced by trial in Plaintiffs' chosen forum. In its motion, Medtronic states, "**presumably** all of the Plaintiff's friends and family,[2] the investigating authorities, and anyone else directly and indirectly involved with this suit live almost anywhere but Orange County, Florida and in Lake County,

[2] The location of Plaintiffs' family and friends is not relevant as a "[d]efendant cannot rely on the inconvenience to Plaintiffs' witnesses on a motion for transfer of venue." *Silong v. United States*, 2006 WL 948048, *2 (M.D. Fla. 2006) (footnote omitted).

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Florida." (Medtronic Appendix 162) (emphasis added). Defendants bore the burden to do more than *presume* the location of the witnesses; they were legally required to *prove* the location of the significant witnesses in this case.

Nor did Defendants present any evidence that significant witnesses will actually be *inconvenienced* by trial in Orange County. As Medtronic points out, the "City of Tavares is a small city that comprises a total area of only 7.1 miles, and has a population of 11, 621," (Medtronic Initial Brief 18), and is located 34 miles from Orange County. (Medtronic Initial Brief 18 n.10). And, Defendants admit that the basketball game at which the incident occurred was a district championship in which an Orange County team was playing. (Medtronic Appendix 180; Medtronic Initial Brief 3). Might there be significant witnesses in this case that were present at that game who are actually residents of Orange County or work in Orange County? The mere fact that this question is unanswered demonstrates Defendants failed to prove the significant witnesses in this case will be inconvenienced by trial in Orange County.

The record also demonstrates that there are significant witnesses that reside outside of Lake County. Plaintiff Robert Graham, who is severely disabled and requires constant medical care, is living about seven miles from the Orange County Courthouse. (Medtronic Appendix 172). And, many of Plaintiff Graham's treating physicians reside in Orange County. (Medtronic Appendix 172). In their

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Fourth Amended Complaint, Plaintiffs substituted the John Doe defendant for John Ross, the Medtronic employee who distributed, recommended, or sold the defective defibrillator to the City, whose last known address is in Orlando. (Medtronic Appendix 63, 64, 73-74, 192).

Also, in the record is an affidavit of Kevin Thoni, M.D., who was present at the basketball game, participated in the attempted resuscitation of Plaintiff Robert Graham, and observed that the defective defibrillator did not transmit an electrical current. (Appellees' Appendix 12). While the affidavit does not indicate where Dr. Thoni lives or works, it does specify that it was made in Seminole, not Lake, County. (Appellees' Appendix 12). The location of significant witnesses outside Lake County supports the trial court's denial of the motion to transfer venue. *See John Christen Corp. v. Maita*, 571 So. 2d 24, 25 (Fla. 2d DCA 1990) (reversing trial court's order transferring venue because defendant failed to demonstrate new venue would be substantially more convenient than plaintiff's chosen forum as witnesses were located in both venues).

As Defendants did not demonstrate to the trial court that *significant* witnesses in this case will be *inconvenienced* by trial in Plaintiffs' chosen forum, a forum which is presumptively correct, the trial court acted within its discretion when denying the motion to transfer venue.

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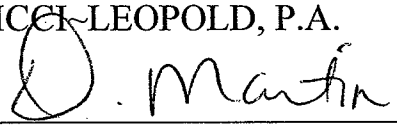
CONCLUSION

The Court should affirm the trial court's denial of Defendants' motion to transfer venue because:

1. Defendants waived the arguments they raise on appeal by failing to make these arguments before the trial court, and any error by the trial court was invited by Defendants who argued below that the court had discretion to decide whether to grant the motion to transfer venue under the home venue privilege;
2. The trial court properly applied the joint tortfeasor exception to the home venue privilege because the allegations in Plaintiffs' third amended complaint reveal that the City and Medtronic can be considered joint tortfeasors whose independent acts of negligence combined to cause Plaintiff Robert Graham's injuries; and
3. Defendants failed to present any evidence to the trial court that demonstrates any significant witness will be inconvenienced by a trial in Orange County.

Respectfully submitted this 20th day of March, 2007.

RICCI-LEOPOLD, P.A.



Theodore J. Leopold, Florida Bar No. 705608
Diana L. Martin, Florida Bar No. 624489, dmartin@riccilaw.com
2925 PGA Blvd., Suite 200
Palm Beach Gardens, Florida 33410
Telephone: 561-684-6500
Facsimile: 561-697-2383

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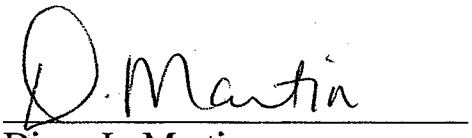
-and-

Gregory A. Page, Esq.
Page, Eichenblatt, Bernbaum & Bennett, P.A.
214 E. Lucerne Circle
Orlando, FL 32801
(407) 386-1900

Attorneys for Appellees

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the foregoing Initial Brief of Appellants were served by US Mail, postage prepaid, this 20th day of March, 2007, upon: **Michael J. Wiggins, Esq., Bianca G. Liston, Esq.**, Cabaniss, Smith, Toole & Wiggins, PL, Post Office Box 4924, Orlando, FL 32802-4924; **Gregory A. Page, Esq.**, Page, Eichenblatt, Bernbaum & Bennett, P.A., 214 E. Lucerne Circle, Orlando, FL 32801; **Don Roper, Esq.**, 116 N. Park Ave., Apopka, FL 32703.



Diana L. Martin
Florida Bar No. 624489

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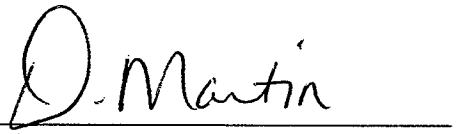
CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that Appellees' Answer Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) in that the Initial Brief being submitted is in Times New Roman 14-point font.



Diana L. Martin
Florida Bar No. 624489