2017 IL App (1st) 161004-U

No. 1-16-1004

Order filed July 27, 2017

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

MELANIE J. BURTCH, as Administrator of the Estate of and as Personal Representative of MICHAEL L. BURTCH, Deceased,	)	Appeal from the Circuit Court of Cook County
Plaintiff-Appellee,	)	
v.	)	
	)	No. 15 L 5668
CHICAGO, CENTRAL & PACIFIC RAILROAD COMPANY, a Foreign Corporation, JAMES J. MASTNY and GERALD WILSON,	)	Honorable James N. O'Hara,
Defendants-Appellants.	)	Judge presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices McBride and Howse concurred in the judgment.

ORDER

¶ 1 *Held*: We reverse the circuit court's order denying defendants' motion to transfer venues based on *forum non conveniens* where the relevant private and public interest factors weigh strongly in favor of transfer from Cook County to Winnebago County.

¶ 2 In December 2014, as Michael L. Burtch (Michael) attempted to drive his truck over railroad tracks owned and operated by Chicago, Central & Pacific Railroad Company (CCP) in Winnebago, Winnebago County, Illinois, a train being operated by James J. Mastny (Mastny) and Gerald Wilson (Wilson), employees of CCP, collided with Michael's truck and killed him. Plaintiff Melanie J. Burtch, on behalf of Michael and his estate, sued CCP, Mastny and Wilson in the circuit court of Cook County under various theories of negligence.

¶ 3 All three defendants filed a motion to transfer the case to Winnebago County under the doctrine of *forum non conveniens*. The circuit court denied the motion, finding that Cook County would better serve the convenience of the parties and the ends of justice. However, the court overlooked several factors that strongly weigh in favor of Winnebago County as the more convenient forum. Consequently, we reverse the circuit court's order and remand with directions to transfer this case to Winnebago County.

¶ 4 I. BACKGROUND

¶ 5 On June 4, 2015, plaintiff filed an eight-count complaint in the circuit court of Cook County against CCP, Mastny and Wilson. According to the complaint, the DeLong Company (DeLong) operated a grain facility adjacent to Alworth Road in Winnebago, Winnebago County, Illinois. CCP owned and operated east-west railroad tracks that intersected Alworth Road (the Alworth crossing) and bisected DeLong's facility. DeLong's grain silos were located on the north side of the tracks while its weigh station was located on the south side. A truck driver would weigh his load and then unload the grain at the silos. In order to access the silos from the weigh station, a driver would have to travel northbound along Alworth Road, cross over the tracks and make a right-hand turn shortly thereafter.

¶ 6 In the morning of December 3, 2014, Michael had finished weighing his load at DeLong's weigh station and began driving his truck north on Alworth Road. As he attempted to cross the railroad tracks, a train being operated by Mastny and Wilson, employees of CCP, was traveling eastbound on those tracks and collided with Michael's truck, killing him. The complaint alleged that the area surrounding the railroad tracks and its crossing "created a special hazard for truck drivers." Specifically, the complaint claimed that "the trees, vegetation, curvature of the railroad tracks west of the railroad grade crossing, and visibility of the tracks, and noise of trucks and dryers and of fans of the silos" resulted in the warning lights on Alworth Road to "not [be] visible at all times." Plaintiff accordingly alleged that CCP knew that "this special hazard" could result in someone's serious personal injury or death.

¶ 7 Plaintiff alleged that defendants acted negligently in several manners specific to the Alworth crossing. For instance, she claimed that CCP failed to install "gate arms" at the crossing when it knew or should have known that the conditions made it difficult for vehicles to "visualize[e] and hear[] an approaching train because of vegetation and other obstructions near the grade crossing," including loud fans used by DeLong's grain facility. Plaintiff also asserted that CCP "failed to maintain and remove the trees, brush and shrubbery within 500 feet of the crossing" when it knew or should have known that the conditions would materially obstruct the view of the road. Concerning Mastny and Wilson, plaintiff alleged that they operated the train "at a speed too high for the unique hazards present" at the Alworth crossing.

¶ 8 Plaintiff also alleged that defendants acted negligently in several general manners. For instance, she alleged that Mastny and Wilson failed to stop or slow the train to avoid a collision, operated the train without keeping a safe and proper lookout for vehicles approaching the crossing, and failed to obey the applicable speed limit. Concerning CCP, plaintiff claimed that it

failed to install a railroad and highway signal recording device and failed to coordinate "an effective program of communication" between itself and the Illinois Department of Transportation.

¶ 9 In response, defendants filed a joint motion to transfer the case from Cook County to Winnebago County under the doctrine of *forum non conveniens.* The parties subsequently conducted discovery related to the motion, which revealed that plaintiff lives in Winnebago County and had lived there with Michael from 1990 until the time of his death. One of their daughters, Tasha Frame, lives in Winnebago County while their other daughter, Tonia Hesjedal, lives in Arizona. Michael's former employer, Karl Heeren, Inc., is located in Winnebago County.

¶ 10 CCP's home office is located in Homewood, Cook County, Illinois.[1] It has rail "yards" and owns approximately 27 miles of railroad tracks in Winnebago County, including the Alworth crossing, and approximately 18 miles of railroad tracks in Cook County. Although CCP's "employees are based in or report to work on a daily basis in Iowa and western Illinois," including Winnebago County, its "train crews may occasionally enter Cook County as part of their work duties."

¶ 11 Mastny and Wilson, believed to be the only surviving eyewitnesses to the collision, live in Oregon, Ogle County, Illinois and Freeport, Stephenson County, Illinois, respectively. Mastny, who still is employed by CCP as an engineer, lives approximately 25 miles away from the Winnebago County Courthouse and 100 miles from the Richard J. Daley Center in Cook County. Wilson, who is retired, lives approximately 35 miles away from the Winnebago County

[1] Although in its response to plaintiff's *forum non conveniens* interrogatories, CCP stated that its home office is located in "Homewood, Illinois," we may take judicial notice that Homewood is located in Cook County. See *City of Wood Dale v. Illinois State Labor Relations Board*, 166 Ill. App. 3d 881, 894 (1988) (taking notice of the fact that the city of Wood Dale was located in DuPage County).

Courthouse and 120 miles from the Richard J. Daley Center in Cook County. Both Mastny and Wilson signed affidavits averring that it would be inconvenient and burdensome for them to travel to Cook County to testify at trial. From January 2013 until December 2014, Mastny and Wilson's employment with CCP occasionally required them to travel into Cook County.

¶ 12 The parties identified several other potential witnesses, including the Winnebago County deputy and chief deputy coroner, police officers from the Illinois State Police and Winnebago County Sheriff's Department, and several firemen from the Win-Bur-Sew Fire Protection District. Although the parties did not list all of these witnesses' home addresses, instead in some cases listing their location of employment, they all either lived in or worked in Winnebago County. Several of these witnesses signed affidavits averring that it would be inconvenient and burdensome for them to travel to Cook County to testify at trial. Together, their affidavits indicated that the distance from either their place of residence or employment to the Winnebago County Courthouse was between 0 and 20 miles and to the Richard J. Daley Center in Cook County was between 90 and 120 miles.

¶ 13 The remaining identified witnesses were Michael Timm, Audra Snodgrass, Jeff Schroeder and Dr. Ronald Missun. Timm, an employee of DeLong, heard, but did not actually observe, the collision. He lives in Ogle County and signed an affidavit averring that it would be inconvenient and burdensome for him to travel to Cook County to testify at trial. Though it is unclear what Snodgrass' relevance is as a witness, she also lives in Ogle County. Schroeder works for Canadian National Railway, CCP's parent company, but his address was not known. Finally, Dr. Missun, an economist who plaintiff anticipates calling as an expert witness on damages, maintains his business address in Louisville, Kentucky.

¶ 14 In plaintiff's response to defendants' motion to transfer, she stated that she anticipates calling witnesses from the Illinois Commerce Commission's Transportation Bureau, which is located in Springfield, Illinois. Plaintiff further stated that she "believes that all parties will call expert witnesses to testify" and her research had "not uncovered any potential expert witnesses from the Winnebago County area, but rather the Chicago area and out of state." Plaintiff additionally believed that defendants "might call employees to testify from the Cook County, Illinois area, Indiana, possibly central and southern Illinois, and perhaps Canada."

¶ 15 The circuit court denied defendants' motion to transfer in a written order. The court first observed that the accident did not occur in, and plaintiff does not reside in, Cook County and thus her chosen forum was entitled to "less deference." It then generally noted the various private interest factors relevant to the resolution of a *forum non conveniens* motion. The court found that it is incongruous for a defendant to argue his own home county is inconvenient and the location of documentary evidence was less important today due to modern technology. The court next generally noted the various public interest factors relevant to the resolution of a *forum non conveniens* motion. It found that when a defendant is a resident of a particular forum, that forum has an interest in the litigation. Lastly, the court stated that, although court congestion is "relatively insignificant," it was an appropriate factor to consider and the time between filing and verdict in Cook County was four months less than in Winnebago County.

¶ 16 The circuit court concluded that:

> "The relevant factors, extensively discussed in the parties' briefs, when viewed in their totality, indicate that a trial in Cook County, Illinois, would better serve the convenience of the parties and the ends of justice. In this case, Defendants have failed to meet their burden of showing that the relevant parties would be

> inconvenienced by a trial in Cook County, Illinois, that trial would be impractical in Cook County, Illinois, and that it would be unfair to burden the citizens of Cook County, Illinois with trial in this case."

¶ 17 Defendants sought leave to appeal pursuant to Illinois Supreme Court Rule 306(a)(2) (eff. July 1, 2017). We initially denied their petition, but on September 28, 2016, our supreme court entered a supervisory order directing us to vacate our denial and grant their petition for leave to appeal. This appeal followed.

¶ 18 II. ANALYSIS

¶ 19 The only issue on appeal is whether the circuit court erred in denying defendants' motion to transfer based on the doctrine of *forum non conveniens.* The resolution of a *forum non conveniens* motion lies within the sound discretion of the circuit court and may only be reversed if the court abused its discretion in balancing the applicable factors. *Fennell v. Illinois Central R.R. Co.*, 2012 IL 113812, ¶ 21. The court abuses its discretion when no reasonable person would adopt the same view. *Id.*

¶ 20 The Illinois venue statute provides that an action must be commenced either "in the county of residence of any defendant who is joined in good faith" or "in the county in which the transaction or some part thereof occurred out of which the cause of action arose." 735 ILCS 5/2-101 (West 2014). In this case, venue is proper in Cook County due to CCP being a resident here (see 735 ILCS 5/2-102(a) (West 2014)) and Winnebago County due to the cause of action arising there. When two potential forums exist, "the equitable doctrine of *forum non conveniens* may be invoked to determine the most appropriate forum." *Dawdy v. Union Pacific R.R. Co.*, 207 Ill. 2d 167, 171 (2003). The doctrine grants the court the ability to decline jurisdiction of a case, even if it has proper jurisdiction over the subject matter and the parties, when "it appears that another

forum can better serve the convenience of the parties and the ends of justice." *Fennell*, 2012 IL 113812, ¶ 12. The doctrine is premised upon "considerations of fundamental fairness and sensible and effective judicial administration." *Gridley v. State Farm Mutual Automobile Insurance Co.*, 217 Ill. 2d 158, 169 (2005).

¶ 21 The general principles of the *forum non conveniens* doctrine are well recognized, but each case is unique and must be evaluated on its own facts. *Fennell*, 2012 IL 113812, ¶ 21. In determining whether to transfer a case under the doctrine, the circuit court must balance multiple private and public interest factors. *Id.* ¶¶ 15-17. The private interest factors include: (1) the convenience of the parties; (2) the relative ease of access to testimonial, documentary and real evidence; (3) the availability of compulsory process to secure the attendance of unwilling witnesses; (4) the costs to secure the attendance of willing witnesses; (5) the possibility of viewing the site where the accident occurred, if appropriate; and (6) "all other practical considerations that make a trial easy, expeditious, and inexpensive." *Id.* ¶ 15. The public interest factors include: (1) the interest in deciding controversies locally; (2) the unfairness of imposing the burden of jury duty on residents of a forum with little connection to the litigation; and (3) the administrative difficulties caused by adding litigation to already congested court dockets rather than resolving the case at its origin. *Id.* ¶ 16.

¶ 22 The circuit court must not place too much emphasis on any one factor, but rather must balance all private and public interest factors together and determine whether, under the totality of the circumstances, "the balance of factors strongly favors" transfer of the litigation. *Id.* ¶ 17. In conducting this analysis, the court should "include *all* of the relevant private and public interest factors." (Emphasis in original.) *Id.* ¶ 24. Defendants bear the burden to demonstrate

"that the plaintiff's chosen forum is inconvenient to [them] and another forum is more convenient to all parties." *Id.* ¶ 20.

¶ 23 Generally, the plaintiff's right to choose her desired forum of litigation is substantial and that choice should rarely be disturbed unless the factors strongly favor transfer. *Dawdy*, 207 Ill. 2d at 173. In other words, "the battle over forum begins with the plaintiff's choice already in the lead." *First American Bank v. Guerine*, 198 Ill. 2d 511, 521 (2002). However, if the plaintiff's injury did not occur in the chosen forum or she is not a resident of that forum, her choice is afforded far less deference. *Fennell*, 2012 IL 113812, ¶ 26. If these circumstances are present, " 'it is reasonable to conclude that the plaintiff engaged in forum shopping to suit [her] individual interests, a strategy contrary to the purposes behind the venue rules.' " *Dawdy*, 207 Ill. 2d at 174 (quoting *Certain Underwriters at Lloyds, London v. Illinois Central R.R. Co.*, 329 Ill. App. 3d 189, 196 (2002)). In the present case, the collision occurred in, and plaintiff resides in, Winnebago County. Consequently, while plaintiff's chosen forum of Cook County is still entitled to some deference, that deference is far less than if she selected Winnebago County. See *Fennell*, 2012 IL 113812, ¶ 26.

¶ 24 With these principles in mind, defendants contend that the circuit court abdicated its duty to analyze all of the factors affecting which county would better serve the convenience of the parties and the ends of justice and instead only focused on the residence of CCP, the existence of technology to aid in the access to documentary evidence and the congestion of the Winnebago County courts compared to Cook County. Defendants argue other factors that the court ignored make Winnebago County the more convenient forum for the litigation, including the location of the collision, Mastny, Wilson, plaintiff and the majority of the witnesses. Defendants further posit that a jury may need to visit the site of the collision during trial due to plaintiff's complaint

alleging the railroad crossing had unique qualities and presented a special hazard for truck drivers. Plaintiff responds that the circuit court expressly stated that it reviewed all of the arguments presented by the parties in their briefs and was plainly aware of the requisite balancing test. She concludes that defendants failed to meet their burden to show that a transfer to Winnebago County was warranted and the court accordingly did not abuse its discretion in denying their motion to transfer.

¶ 25 A. Private Interest Factors

¶ 26 We begin by discussing the private interest factors, specifically the convenience of the parties. In analyzing this factor, the circuit court only quoted our supreme court in *Kwasniewski v. Schaid*, 153 Ill. 2d 550, 555 (1992) and stated: "Illinois courts have held that 'it is all but incongruous for a defendant to argue that his own home county is inconvenient.' " While it is true that CCP has its home office in Cook County and thus is a resident here (735 ILCS 5/2-102(a) (West 2014)), the court's analysis overlooked that there are three other parties to this litigation: plaintiff, Mastny and Wilson. Plaintiff resides in Winnebago County while Mastny and Wilson reside in Ogle and Stephenson County, respectively, both counties adjacent to Winnebago County. See *Kwasniewski*, 153 Ill. 2d at 554 (finding that we may take judicial notice of the proximity of counties). Both Mastny and Wilson live within 35 miles of the Winnebago County Courthouse and 100 miles or more away from the Richard J. Daley Center in Cook County. Their sworn affidavits demonstrate the inconvenience and burden of traveling to Cook County for this litigation. Based on the location of all four parties, Winnebago County is the more convenient forum.

¶ 27 We next look at the relative ease of access to testimonial, documentary and real evidence. In analyzing this factor, the circuit court correctly found that, due to modern technology, the

location of documentary evidence is a less significant consideration than before. See *Taylor v. Lemans Corp.*, 2013 IL App (1st) 130033, ¶ 21. However, the court failed to mention the relative ease of access to testimonial evidence, where nearly every potential witness identified by the parties resides in, or works in, Winnebago County. The inconvenience to these witnesses in litigating the matter in Cook County is axiomatic due to their distance from Cook County, but is also borne out in several affidavits from these witnesses, averring that it would be inconvenient and burdensome to travel here for this litigation. Though plaintiff is likely correct that evidence depositions would be used in lieu of live testimony for some of these witnesses (see Ill. S. Ct. R. 212(b) (eff. Jan. 1, 2011)), some witnesses will still appear in court to testify. To these witnesses, Winnebago County is the more convenient forum.

¶ 28 Plaintiff has also identified Dr. Missun as a potential expert witness, whose business address is in Louisville, Kentucky. While Cook County, due to O'Hare airport being located here, may be more convenient for him, he is but one witness. More importantly, the location of an expert witness should be "given minimal weight" since the expert would be compensated for any inconvenience in travel. *Eads v. Consolidated Rail Corp.*, 365 Ill. App. 3d 19, 31-32 (2006). Furthermore, given that a plaintiff can choose an expert witness, according too much significance to his or her location would frustrate the principles underlying the *forum non conveniens* doctrine. *Griffith v. Mitsubishi Aircraft International, Inc.*, 136 Ill. 2d 101, 112 (1990).

¶ 29 In all, none of the witnesses identified by either party resides or works in Cook County. Although plaintiff clearly recognizes this, she believes "in good faith" that, due to CCP's home office in Cook County, defendants will call additional witnesses residing in Cook County, other areas of Illinois and possibly even Canada, but likely who do not live in Winnebago County. The

facts present to us at this time, however, do not reflect these potential unidentified witnesses, and we will not speculate as to their existence and their impact on this *forum non conveniens* analysis. See *Brant v. Rosen*, 373 Ill. App. 3d 720, 728 (2007). Lastly, the parties do not identify any physical evidence that will need to be accessed. Based on the relative ease of access to pertinent evidence, Winnebago County is the more convenient forum.

¶ 30 With regard to the availability of compulsory process over unwilling witnesses, both parties agree that this factor is irrelevant given that both forums are located in Illinois. As to the costs to secure the attendance of willing witnesses, the circuit court did not mention this factor. However, similar to our discussion concerning the ease of access to evidence, this factor, too, favors Winnebago County given the extra travel necessary for the identified witnesses if this case were to proceed in Cook County.

¶ 31 The penultimate private interest factor is the possibility of viewing the site where the accident occurred. Although the circuit court noted this factor as one generally relevant under the *forum non conveniens* doctrine, it did not specifically include the factor in its analysis. This "factor is not concerned with the *necessity* of viewing the site of the injury, but rather is concerned with the *possibility* of viewing the site, if appropriate." (Emphasis in original.) *Dawdy*, 207 Ill. 2d at 178. And it is within the discretion of the circuit court to determine whether such a viewing is appropriate. *Id.* at 179.

¶ 32 In this case, viewing the collision site is possible. Notably, in plaintiff's complaint, she alleged that the negligence of CCP, Mastny and Wilson, in part, arose due to their actions, or lack thereof, related to the Alworth crossing. For example, plaintiff claimed that the surroundings of the crossing, such as "the trees, vegetation, curvature of the railroad tracks west of the railroad grade crossing, and visibility of the tracks, and noise of trucks and dryers and of fans of the silo,"

created a "special hazard" for truck drivers. While plaintiff posits that it is not certain the circuit court, regardless of in what forum this litigation occurs, would allow a jury to visit the Alworth crossing when video and photographic evidence is available and the vegetation and layout of the crossing may have changed, she conflates the necessity of a view with the possibility of a view.

¶ 33 While ultimately the circuit court may deem it unnecessary to have a jury view the site of the collision for any number of reasons, at this point in the litigation, a view of the site remains possible. This case is unlike the case of *Langenhorst v. Norfolk Southern Ry. Co.*, 219 Ill. 2d 430, 448-49 (2006), where our supreme court found a site visit inappropriate because there was evidence in the record that, after an accident, the railroad crossing at issue had "substantially changed." Here, plaintiff points to no evidence in the record showing the environment of the Alworth crossing has changed, but instead merely speculates that it might have changed. Consequently, if the circuit court determines that viewing the site of the collision is appropriate, the visit would be accomplished more expeditiously if this case were held in Winnebago County.

¶ 34 The final private interest factor concerns all other practical considerations that make a trial easy, expeditious and inexpensive. The circuit court did not identify any additional considerations, but plaintiff asserts that the office of defendants' attorney is located in Cook County. Yet the office of plaintiff's attorney is located in Winnebago County. Consequently, the location of the parties' attorneys does not weigh in favor of either county. Regardless, "the location of the parties' attorneys is accorded little weight in determining a *forum non conveniens* motion." *Id.* at 450.

¶ 35 B. Public Interest Factors

¶ 36 We now turn to the relevant public interest factors, beginning with the interest in deciding controversies locally. In its analysis, the circuit court correctly noted that when a

defendant is a resident of a forum, that forum has an interest in the litigation. See *id.* at 451. But this abbreviated analysis overly simplifies the doctrine of *forum non conveniens*. Merely having an interest in the litigation does not mean the chosen forum is necessarily the most convenient. If this were the case, "any time there is a relevant connection between the forum and the litigation, defendant would be subject to suit in that forum regardless of the inconvenience. This result is contrary to the purpose of the doctrine, which is to avoid litigation in an unduly inconvenient forum." (Internal quotation marks omitted.) *Fennell*, 2012 IL 113812, ¶ 44 (quoting *Jones v. Searle Laboratories*, 93 Ill. 2d 366, 377 (1982)).

¶ 37 This litigation is, at its heart, a local controversy to Winnebago County. First, the location of the accident resulting in the litigation is the most substantial factor in giving any county a local interest. See *Dawdy*, 207 Ill. 2d at 183; *Peile v. Skelgas, Inc.*, 163 Ill. 2d 323, 343 (1994). And here, the collision occurred in Winnebago County. Second, this case involves a Winnebago County resident suing on behalf of her deceased husband, a former Winnebago County resident, based in part on claims of negligence concerning the specific surroundings of a railroad crossing in Winnebago County where the majority of the witnesses are residents of, or work in, Winnebago County and two of the three defendants live far closer to Winnebago County than Cook County. There is undoubtedly a significant interest in having this Winnebago County-centric controversy decided in Winnebago County.

¶ 38 Though Winnebago County has a substantial interest in this litigation, that is not to say that Cook County has no connection or interest to the litigation. As discussed, because CCP is a resident of Cook County, it has an interest in the litigation. Further, CCP owns and operates several miles of railroad tracks and crossings in Cook County. While these facts give Cook County a relevant connection to the litigation, it does not provide Cook County with the

significant factual connection necessary to avoid transfer to a more convenient forum. See *Fennell*, 2012 IL 113812, ¶ 44.

¶ 39 Given that Cook County does not have a significant factual connection to this litigation, it would be unfair to burden residents of Cook County with jury duty and the associated trial expenses associated with litigating the case here. Consequently, the first two public interest factors weigh in favor of transferring the case to Winnebago County.

¶ 40 The final public interest factor we must consider is the administrative difficulties caused by adding litigation to already congested court dockets rather than resolving the case at its origin. The circuit court observed correctly that this factor, by itself, is relatively insignificant, but nevertheless in the calculus. See *id.* ¶ 43. It subsequently correctly found that, based on a review of the 2014 Annual Report of the Illinois Courts, the average time between filing and verdict was approximately four months shorter in Cook County than in Winnebago County. See *Dawdy*, 207 Ill. 2d at 181 (Annual Report is a proper reference to assess court congestion). Four months is an insignificant difference, and therefore, this factor does not heavily favor either county.

¶ 41 In sum, although the circuit court's ruling is entitled to considerable deference, it failed to expressly consider all of the relevant private and public interest factors to a *forum non conveniens* analysis. In turn, those overlooked factors almost universally favor transfer to Winnebago County. And when all of the relevant private and public interest factors are viewed in their totality, they strongly favor transfer to Winnebago County, which can better serve the convenience of the parties and the ends of justice. We therefore find the circuit court abused its discretion in denying defendants' motion to transfer.

¶ 42 III. CONCLUSION

¶ 43 Accordingly, we reverse the judgment of the circuit court of Cook County and remand with directions to grant defendants' motion to transfer to Winnebago County in accordance with Illinois Supreme Court Rule 187 (eff. Jan. 4, 2013).

¶ 44 Reversed and remanded with directions.