2018 IL App (4th) 160925-U

NO. 4-16-0925

FILED
November 7, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

MARLENE ROSS, as Special Administrator of the Estate of Don Ross, Deceased, Plaintiff-Appellee, v. R.J. REYNOLDS TOBACCO COMPANY, HOLLINGSWORTH & VOSE COMPANY, FORD MOTOR COMPANY, HOBART BROTHERS LLC, f/k/a Hobart Brothers Company, and the LINCOLN ELECTRIC COMPANY, Defendants	)	Appeal from the Circuit Court of McLean County No. 15L92
(Hobart Brothers LLC f/k/a Hobart Brothers Company and The Lincoln Electric Company Defendants-Appellants).	)	Honorable Paul G. Lawrence, Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Presiding Justice Harris and Justice DeArmond concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court concluded that the trial court did not abuse its discretion by denying defendants' motion to transfer pursuant to the doctrine of *forum non conveniens*.

¶ 2 In June 2015, Marlene Ross and Don Ross (Don later died and Marlene Ross, as special administrator of the estate of Don Ross, became the named plaintiff) filed a complaint in McLean County against defendants, Hobart Brothers LLC (Hobart) and the Lincoln Electric Company (Lincoln Electric) (defendants), as well as 28 codefendants, alleging all of the defendants had exposed Don to asbestos and caused him to contract lung cancer.

¶ 3 In September 2015, defendants filed a motion to transfer for *forum non*

conveniens, asserting either Vermilion County, Illinois, or the state of Indiana was a more convenient location for litigation because Don worked and was exposed to asbestos in Vermilion County, Illinois, and resided and was treated in Indiana. Following a November 2016 hearing, the trial court denied the motion.

¶ 4 Defendants appeal, arguing the trial court abused its discretion by denying their motion to transfer due to *forum non conveniens*. We disagree and affirm.

¶ 5 I. BACKGROUND

¶ 6 A. The Complaint

¶ 7 In June 2015, Don and Marlene Ross filed a complaint in McLean County against defendants, as well as 28 codefendants which are not parties to this appeal, alleging all of the defendants, at some point in time, exposed Don to asbestos. The counts pertaining to defendants alleged they and many other codefendants manufactured, distributed, or sold products which contained asbestos or asbestos fiber and that Don was exposed to asbestos by using these products. Don worked at Hyster (a manufacturing plant which produces lift trucks) in Danville, Illinois, where one of his job duties was welding. Don also performed personal automotive repairs and home improvement at his residence. The complaint did not state where Don lived, when the complaint was filed or when the work was performed, but the complaint asserted these actions exposed him to asbestos. The complaint alleged Don contracted lung cancer as a result of failure to warn consumers about the health risks of asbestos.

¶ 8 The complaint also alleged four codefendants—not including defendants Hobart and Lincoln Electric—engaged in a conspiracy to conceal information regarding the presence and health risks of asbestos while exposing employees and consumers to products that contained asbestos. Owens-Illinois, Inc., which maintained a production plant in McLean County until

1972, was one of the codefendants named in the conspiracy count.

¶ 9 B. The Motion To Transfer and Related Proceedings

¶ 10 In September 2015, defendants filed a motion to transfer based on the doctrine of *forum non conveniens*, arguing none of the allegations in the complaint demonstrated a connection to McLean County. Defendants contended that because the only location of alleged exposure was in Vermilion County, the case should be transferred there. Defendants also noted the complaint did not allege Don received any medical treatment in McLean County.

¶ 11 In March 2016, plaintiff filed an amended complaint to reflect that Don had died in October 2015 and she was proceeding as special administrator of his estate. Later in March, defendants filed a "supplemental motion and memorandum in support to transfer under the doctrine of *forum non conveniens*." Defendants argued that plaintiff's responses to discovery demonstrated that Don and plaintiff lived in Indiana, he received all of his medical treatment in Indiana, and Don was exposed to asbestos only in Vermilion County, Illinois, and Indiana. Defendants asserted that because the case had no connection to McLean County, it would be unfair for McLean County to bear the expense of trial and impose jury duty on its residents. Defendants claimed that Vermilion County was more convenient to all the witnesses disclosed by plaintiff and that Vermilion County had a stronger interest in deciding the case because it was the primary site of exposure.

¶ 12 In April 2016, the trial court entered an order permitting the parties to exchange discovery relating to *forum non conveniens*.

¶ 13 In November 2016, plaintiff filed a response to defendants' motion to transfer, arguing defendants had failed to demonstrate (1) McLean County was inconvenient to them and (2) another forum was more convenient for all parties. Plaintiff contended all of the defendants

had disclosed witnesses scattered across the country and that these defendants had failed to present any affidavits that McLean County was inconvenient to any witness. Plaintiff further claimed McLean County had an interest in the litigation because acts in furtherance of the alleged conspiracy occurred in McLean County. Defendants responded that Vermilion County, Illinois, or Vermillion County, Indiana, were appropriate forums because plaintiff lived in Vermillion County, Indiana, and the exposure occurred in Vermilion County, Illinois, giving either of those counties a strong connection to the litigation.

¶ 14 C. The Trial Court's Ruling

¶ 15 Later in November 2016, the trial court conducted a hearing and denied defendants' motion to transfer. In so ruling, the court acknowledged that (1) plaintiff's choice of forum was entitled to less deference because plaintiff was not a resident of Illinois and (2) the private interest factors generally weighed in favor of transfer because the site of exposure was in Danville, Illinois, and the witnesses were mostly located in Danville, Illinois, and the state of Indiana. Nonetheless, the court believed the public interest factors weighed in favor of McLean County because the conspiracy count was based in Bloomington. Accordingly, the trial court concluded there was a nexus between the cause of action and plaintiff's chosen forum.

¶ 16 D. Relevant Procedural History

¶ 17 In December 2016, defendants petitioned this court for leave to appeal pursuant to Illinois Supreme Court Rule 306(a)(2) (eff. Nov. 1, 2017), and in February 2017, we denied defendants' petition. In September 2017, the Illinois Supreme Court denied defendants' petition for leave to appeal but, in the exercise of its supervisory authority, directed this court to vacate our February 2017 order and allow defendants' Rule 306(a)(2) petition for leave to appeal. *Ross v. R.J. Reynolds Tobacco Co.*, No. 122359 (Ill. Sept. 27, 2017) (supervisory order). In

accordance with the supreme court's order, this court in November 2017 granted defendants' Rule 306(a)(2) petition for leave to appeal.

¶ 18 II. ANALYSIS

¶ 19 Defendants appeal, arguing the trial court abused its discretion by denying their motion to transfer due to *forum non conveniens*. We disagree and affirm.

¶ 20 A. The Doctrine of *Forum Non Conveniens*

¶ 21 "The doctrine of *forum non conveniens* assumes that there is more than one forum with the power to hear the case." *Fennell v. Illinois Central R.R. Co.*, 2012 IL 113812, ¶ 12, 987 N.E.2d 355. "The doctrine allows a court to decline jurisdiction of a case, even though it may have proper jurisdiction over the subject matter and the parties, if it appears that another forum can better serve the convenience of the parties and the ends of justice." *Id.*

¶ 22 "In determining whether the doctrine of *forum non conveniens* applies, the circuit court must balance the public and private interest factors." *Id.* ¶ 17.

> " '[P]rivate interest factors include (1) the convenience of the parties; (2) the relative ease of access to sources of testimonial, documentary, and real evidence; and (3) all other practical problems that make trial of a case easy, expeditious, and inexpensive * * *.' [Citation.] Public interest factors include (1) the interest in deciding controversies locally; (2) the unfairness of imposing trial expense and the burden of jury duty on residents of a forum that has little connection to the litigation; and (3) the administrative difficulties presented by adding litigation to already congested court dockets." *Langenhorst v. Norfolk Southern Ry. Co.*, 219 Ill. 2d 430, 443–44, 848 N.E.2d 927, 935 (2006) citing *First American Bank v. Guerine*, 198 Ill. 2d 511, 516-17, 764 N.E.2d 54, 59 (2002).

¶ 23 The factors are not weighed against each other; instead "the court must evaluate the total circumstances of the case in determining whether the balance of factors strongly favors dismissal." *Fennell*, 2012 IL 113812, ¶ 17. "If central emphasis were placed on any one factor, the *forum non conveniens* doctrine would lose much of the very flexibility that makes it so valuable." (Internal quotation marks omitted.) *Id.* "[E]ach *forum non conveniens* case is unique and must be considered on its own facts." *Id.* ¶ 21.

¶ 24 *Forum non conveniens* has been described as an "unequal balancing test." *Griffith v. Mitsubishi Aircraft International, Inc.*, 136 Ill. 2d 101, 107, 554 N.E.2d 209, 212 (1990). The plaintiff's choice of forum is entitled to deference and should rarely be disturbed unless the factors weigh strongly in favor of transfer or dismissal. *Fennell*, 2012 IL 113812, ¶ 18. However, a plaintiff's choice of forum is entitled to less deference if the plaintiff is foreign to the forum or if the action giving rise to the litigation did not occur in the chosen forum. *Id.*

¶ 25 A trial court's order granting or denying a motion on the doctrine of *forum non conveniens* is reviewed for an abuse of discretion. *Id.* ¶ 21. "An abuse of discretion will be found where no reasonable person would take the view adopted by the circuit court." *Id.*

¶ 26 B. The Private Interest Factors

¶ 27 1. *The Convenience of the Parties*

¶ 28 The trial court noted all of the named defendants in this case were scattered throughout the country. Defendants have not provided any evidence that litigating in McLean County would be inconvenient to them or their codefendants. Although plaintiff resides in Indiana, *defendants* cannot argue a given forum is inconvenient for *plaintiff*. *Fennell*, 2012 IL 113812, ¶ 27. The court properly concluded this factor does not weigh strongly in favor of transfer.

¶ 29 2. *Access to Sources of Testimonial, Documentary, and Real Evidence*

¶ 30 This factor considers the convenience to witnesses and the ability to review documents and any real evidence. Courts are careful not to give undue weight to the location of expert witnesses; "otherwise, parties to a lawsuit could easily frustrate the *forum non conveniens* doctrine through the selection of their expert witnesses." *Griffith*, 136 Ill. 2d at 112. Additionally, "the location of documents, records and photographs has become a less significant factor in *forum non conveniens* analysis in the modern age of Internet, email, telefax, copying machines, and world-wide delivery services, since those items can now be easily copied and sent." *Fennell*, 2012 IL 113812, ¶ 36.

¶ 31 Defendants argue that all of the fact witnesses, treating physicians, and damage witnesses reside in Vermilion County or Indiana. Specifically, Don's coworkers live in Vermilion County, and his family members and treating physicians are all located in Indiana. Plaintiff contends again that defendants cannot argue that McLean County may be inconvenient for her witnesses; however, in any event, defendants have not provided any evidence that Vermilion County, Illinois, or Indiana would be more convenient for any witness. Plaintiff also emphasizes that defense witnesses—both experts and corporate representatives—are scattered throughout the country.

¶ 32 The trial court concluded that "certainly [this] factor does favor the defendants." As noted by the trial court, the witnesses whom neither party controls (fact witnesses and treating physicians) are all located in either of defendants' suggested forums. However, the court noted with regard to the documentary evidence that a different forum "wouldn't make much difference." Accordingly, the trial court did not abuse its discretion in finding this factor weighed in favor of transfer.

¶ 33 3. *Possibility of Viewing the Premises*

¶ 34 The possibility of viewing the premises "is an important consideration in ruling on a *forum non conveniens* motion." *Fennell*, 2012 IL 113812, ¶ 37. "This convenience factor is not concerned with the *necessity* of viewing the premises, but rather is concerned with the *possibility* of a view, if appropriate." (Emphasis in original.) *Id.*

¶ 35 The trial court noted that this factor weighs in favor of transferring venue to Vermilion County but suggested "[i]t certainly wouldn't be too difficult to visit the si[te] if in fact that's what happened."

¶ 36 The parties dispute the importance of this factor. However, it is clear the trial court did not abuse its discretion in finding it weighed in favor of transfer. See *Dawdy v. Union Pacific R.R. Co.*, 207 Ill. 2d 167, 179, 797 N.E. 2d 687, 697 (2003) ("[I]t would be irrational for a jury composed of Madison County residents to travel to Macoupin County to view the accident scene.").

¶ 37 4. *Other Factors of Convenience*

¶ 38 The final private interest factor courts consider is "all other practical problems that make trial of a case easy, expeditious, and inexpensive ***." (Internal quotation marks omitted.) *Langenhorst*, 219 Ill. 2d at 443. One "practical problem" courts place particular emphasis on is "the availability of compulsory process to secure the attendance of unwilling witnesses." *Gridley v. State Farm Mutual Automobile Insurance Co.*, 217 Ill. 2d 158, 173, 840 N.E. 2d 269, 277 (2005). The supreme court has held that when "[t]he residence of plaintiff, the situs of the injury, and the location of *** witnesses," are in a different state, these facts weigh in favor of transfer." *Fennell*, 2012 IL 113812, ¶ 34; see also *Gridley*, 217 Ill. 2d at 173-74 (discussing expense and inconvenience where all relevant witnesses were located and events

occurred in Louisiana).

¶ 39 Defendants assert the trial court correctly noted that the Indiana witnesses are not subject to process in Illinois and securing the testimony of these witnesses is costlier and more time consuming as a result. We note that because this factor presents a double-edged sword for defendants, it is not clear how strongly it weighs in favor of transfer. Transfer to Vermilion County, Illinois, would not make the Indiana witnesses subject to process, and transfer to Indiana would mean that the fact witnesses in Vermilion County would no longer be subject to compulsory process. Nonetheless, the trial court had discretion to determine how much weight to give this factor, and we conclude the trial court did not abuse its discretion in finding that this factor weighed in favor of transfer.

¶ 40 We note both plaintiff's counsel and defendants' counsel maintain offices in McLean County. While this is a factor courts may consider, "little weight should be accorded this consideration." *Fennell*, 2012 IL 113812, ¶ 40.

¶ 41 C. The Public Interest Factors

¶ 42 1. *The Interest in Deciding Controversies Locally*

¶ 43 Defendants argue Vermilion County has a much greater interest in this controversy than McLean County because Don worked in Danville for years where the alleged exposure occurred. Alternatively, defendants contend Indiana has a greater interest because plaintiff and Don lived there for most of their lives and Don received treatment in Indiana. Plaintiff responds that products liability cases have a national instead of a local flavor and that McLean County has an interest in the litigation because the conspiracy count provides a nexus with the forum.

¶ 44 The trial court relied heavily on plaintiff's reasoning, explaining that the

conspiracy "allege[d] that Owens-Illinois Corning failed to warn their employees at the Bloomington plant [of the dangers of asbestos] from 1951 and 1972." The court stated that it was not "to determine whether or not [the conspiracy claim is] meritorious right now" but only whether the claim provided the proper nexus. The court concluded it did.

¶ 45 In *Fennell*, the supreme court, in evaluating the local interest involved in asbestos cases, stated "[t]he public interest requires that causes which are without significant factual connections to particular forums be dismissed in favor of, or transferred to, convenient forums." *Id.* ¶ 44; See also, *Id.* ¶ 46 (" 'This court has consistently held that a case should not be tried in a forum that has no significant factual connections to the cause of action.' " (quoting *Foster v. Chicago & North Western Transportation Co.*, 102 Ill. 2d 378, 383, 466 N.E.2d 198, 200 (1984))). The court acknowledged that counties "have an interest in traveling asbestos and other harmful substances." *Id.*

> " 'However, this does not necessarily mean that any time such a relationship exists, the chosen forum is appropriate. To so hold would certainly cast doubt upon the continued vitality of the *forum non conveniens* doctrine. This is not the test. If so, 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.' " *Id.* ¶ 44 (quoting *Jones v. Searle Laboratories*, 93 Ill. 2d 366, 377, 444 N.E.2d 157, 162 (1982)).

¶ 46 An argument exists that the trial court may have placed too much weight on this factor. Because the complaint does not allege that Don ever worked at the Bloomington plant or for any of the alleged conspirators, it is unclear how this allegation is related to plaintiff's injuries. Although Owens-Illinois did business in McLean County, *forum non conveniens* looks

beyond the elements of venue; merely doing business in a particular forum is enough to establish venue but does not necessarily mean the forum is convenient. *Fennell*, 2012 IL 113812, ¶ 47; see also *Dawdy*, 207 Ill. 2d at 182 ("If the fact that the defendant conducts business *** in the plaintiff's chosen forum were dispositive the *forum non conveniens* doctrine itself would be entirely vitiated, and no transfer would ever be obtained." (Internal quotation marks omitted.)). Moreover, the Illinois Supreme Court in its most recent *forum non conveniens* case dealt with asbestos and still placed significant emphasis on the need for local controversies to be decided locally. *Fennell*, 2012 IL 113812, ¶¶ 44-47.

¶ 47 Although plaintiff has not demonstrated a strong tie to McLean County, the burden is on defendants, not plaintiff, to demonstrate McLean County has no "relevant or practical connection with [the] litigation," (*Fennell*, 2012 IL 113812, ¶ 46), and that the factors *strongly* favor transfer to a more convenient forum. *Guerine*, 198 Ill. 2d at 518. We cannot say the trial court abused its discretion in concluding defendants failed to meet that burden here. The trial court assumed plaintiff's complaint stated a valid cause of action for conspiracy.

¶ 48 The trial court indicated that in ruling on defendants' *forum non conveniens* motion, it would not evaluate the merits of the conspiracy claim at that time, and the court was correct to so indicate. Accordingly, we conclude the trial court did not abuse its discretion when it found the conspiracy claim provided a sufficient connection to McLean County.

¶ 49 Defendants argue that subsequent to their appeal additional conspiracy defendants received summary judgment in their favor and that Owens-Illinois is now the only remaining conspiracy defendant. According to defendants, the conspiracy claim no longer provides the requisite nexus to McLean County.

¶ 50 We may take judicial notice of orders entered subsequent to an interlocutory

appeal under the doctrine of *forum non conveniens*. See *Wilder Chiropractic, Inc. v. State Farm Fire and Casualty Co.*, 2014 IL App (1st) 130781, ¶ 25 (taking judicial notice that after the appeal was filed the federal court to which defendant proposed the case be transferred had dismissed the action for lack of jurisdiction). However, these orders do not change our analysis. Owens-Illinois is the party the trial court was most concerned with and is the party in which McLean County residents have the greatest interest. Certainly, the conspiracy count is plaintiff's anchor claim; without it, the analysis could possibly be different. But the claim remains, and the trial court's finding was not unreasonable.

¶ 51 2. *The Unfairness of Imposing Trial Expense and the Burden of Jury Duty on Residents of a Forum That Has Little Connection to the Litigation*

¶ 52 The trial court considered this issue along with the local nature of the controversy. As demonstrated by the supreme court's decision in *Fennell*, the facts considered in determining whether a forum has an interest in deciding a local controversy apply with equal force to whether a sufficient connection exists to impose the costs of litigation and jury duty on residents. See *Fennell*, 2012 IL 113812, ¶¶ 44-47.

¶ 53 We earlier concluded that McLean County has at least some relevant interest in deciding this case. Given that conclusion, the trial court did not err by finding a sufficient connection with McLean County to impose the costs and burdens of trial on its residents.

¶ 54 We pause to note that defendants may be correct that other forums arguably have a stronger connection to this case. However, even assuming defendants are correct, it does not follow that transfer is required if the plaintiff's chosen forum has some connection and the remaining factors do not strongly favor transfer. See *Langenhorst*, 219 Ill. 2d at 450-51 (explaining that even though the accident occurred in a different county and plaintiff was foreign to the chosen forum, the chosen forum had sufficient interest in the litigation such that first two

public interest factors weighed against transfer); see also *Brown v. Cottrell, Inc.*, 374 Ill. App. 3d 525, 534, 871 N.E.2d 63, 71 (2007) (finding transfer was not appropriate where none of the three possible forums had a particularly strong interest in the litigation).

¶ 55 3. *The Administration Difficulties Presented by Adding Litigation to Already Congested Court Dockets*

¶ 56 The trial court indicated McLean County had a larger caseload than Vermilion County but also noted it likely had more judges and staff. The court believed it was "probably better prepared to deal with [asbestos cases] than most" because of the regularity with which it handled asbestos cases. The court also expressed concern that plaintiff would have to "start all over again" if the matter were transferred, thus wasting the approximately year and a half the case had been in McLean County.

¶ 57 Defendants argue the court erred when it considered factors which are not traditionally associated with judicial administration. Plaintiff responds that defendant did not show that a trial in a different venue would be quicker than in McLean County.

¶ 58 We are aware of only a single case which considered whether a court is familiar with or better physically equipped to handle a particular type of case as part of its *forum non conveniens* analysis. See *Hefner v. Owens-Corning Fiberglas Corp.*, 276 Ill. App. 3d 1099, 1105, 659 N.E.2d 448, 454 (1995) (considering whether transferee court had "the facilities and expertise" to handle complex litigation as a private interest factor). If such things were routinely considered, it would permit plaintiffs to file cases in distant, specialized courts so long as there was even a tentative connection to the litigation and despite the fact that its docket is crowded, thus promoting forum shopping in contravention of the policy behind *forum non conveniens*. *Fennell*, 2012 IL 113812, ¶ 19. Further, declining to transfer a case simply because it has been pending in one forum would create an incentive for plaintiffs to delay a ruling on a *forum non*

conveniens motion in order to secure venue in their chosen forum. See *Gridley*, 217 Ill. 2d at 167 (extensive investigation would defeat purpose of motion); *Schoon v. Hill*, 207 Ill. App. 3d 601, 606, 566 N.E.2d 718, 722 (1990) ("the period of time which a case has been pending is irrelevant if the *** motion is brought in a timely fashion."). Moreover, a case does not "start over" when it is transferred, particularly in the case of intrastate transfer where the new venue would simply pick up were the prior court left off. Ill. S. Ct. R. 187(c)(2) (eff. Jan. 1, 2018).

¶ 59 The court congestion factor should be given little weight (*Fennell*, 2012 IL 113812, ¶ 43), and a trial court is presumed to be in the best position to judge its own docket. *Langenhorst*, 219 Ill. 2d at 451. Defendants did not make any showing that Vermilion County's docket was substantially less crowded or that a trial could occur faster if the case were transferred to Vermilion County or Indiana. Accordingly, the trial court did not abuse its discretion by finding this factor did not weigh in favor of transfer.

¶ 60 D. Balancing the Public and Private Interests

¶ 61 Based on all of the factors, the trial court concluded that defendants did not meet their burden of showing the factors strongly favored transfer. The trial court's determination was not an abuse of discretion.

¶ 62 III. CONCLUSION

¶ 63 For the reasons stated, we affirm the trial court's judgment.

¶ 64 Affirmed.