No. 1-10-2133

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(3)(1).

Third Division
March 31, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

GARY HOLMAN and AMY HOLMAN, Plaintiff-Appellees, v. GEORGE E. DEPHILLIPS, M.D., S.C., by and through its Authorized Agents and Employees, including but not limited to GEORGE E. DEPHILLIPS, M.D., and E. DEPHILLIPS, M.D, individually, Defendants-Appellants (Michel H. Malek, M.D., P.C., and Michel H. Malek, M.D., individually, Defendants).	)	Appeal from the Circuit Court of Cook County. 08 L 010536 Honorable Randye Kogan, Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Quinn and Justice Steele concurred in the judgment.

ORDER

HELD: The trial court's order that denied the motion to transfer was affirmed because the private and public interest factors, considered in their totality, do not *strongly favor* transfer of the case from Cook County to Will County.

On July 1, 2010, the trial court entered an order that denied the defendants', George E.

DePhillips, M.D. and George E. DePhillips, M.D., S.C. ("DePhillips corporation") (collectively "Dr. DePhillips"), motion to transfer based on the docrine of *forum non conveniens*. Dr. DePhillips filed a petition for leave to appeal, and the appellate court granted the petition on September 16, 2010.

BACKGROUND

On September 23, 2008, the plaintiffs, Gary and Amy Holman, filed a medical negligence case in Cook County, Illinois. In count one of the complaint, Gary Holman alleged that Dr. DePhillips and the DePhillips corporation were negligent when they performed a posterolateral intertransverse arthrodesis and pedicle screw fixation on L5-S1 of his spine. In count two of the complaint, Amy Holman, Gary's wife, complained about a loss of consortium. Michel H. Malek, M.D. and Michel H. Malek, M.D., P.C. ("Malek corporation") were named as respondents in discovery in the original complaint.

On May 19, 2009, plaintiffs filed a first amended complaint and named Dr. Malek and the Malek corporation as defendants. The plaintiffs asserted the same allegations of negligence and loss of consortium against Dr. Malek as they asserted against Dr. DePhillips.

On September 14, 2009, Dr. DePhillips filed an amended motion to transfer the case from Cook County to Will County. The following facts are relevant to this appeal: (1) the plaintiffs reside in Will County; (2) the location of the alleged malpractice was at Provena St. Joseph's Hospital ("Provena") in Will County; (3) Dr. DePhillips resides in DuPage County; (4) Dr. DePhillips' corporation has offices in Will County; (5) Dr. Malek resides in Cook County; (6) Dr. Malek practices in Will County, Cook County and Kankakee County; (7) Dr. Malek's corporation was incorporated in Kankakee County and has offices in Will County and Kankakee County; and (8) Dr.

Ghanayam, a subsequent treater, practices at Loyola Medical Center in Cook County and at Loyola's medical offices in Grundy County and DuPage County, and Holman also received subsequent treatment in medical offices that are located in Will County, Kane County, Grundy County, Cook County and Kankakee County.

On July 1, 2010, the trial court entered an order that denied Dr. DePhillips' motion to transfer. The appellate court granted the rule 306 petition on September 16, 2010.

ANALYSIS

Forum non Conveniens

The only issue in this interlocutory appeal is whether the trial court abused its discretion when it denied Dr. DePhillips' motion to transfer. A trial court is afforded considerable discretion in ruling on a motion to transfer based on the doctrine of *forum non conveniens*. *Langenhorst v. Norfolk Southern Railway Co.,* 219 Ill. 2d 430, 442 (2006), citing *First American Bank v. Guerino*, 198 Ill. 2d 511, 520 (2002), *Peile v. Skelgas, Inc.*, 163 Ill. 2d 323, 336 (1994). The trial court's decision is subject to reversal only if it abused its discretion in balancing the relevant factors. *Langenhorst,* 219 Ill. 2d at 442, citing *Dawdy v. Union Pacific Railroad Co.,* 207 Ill. 2d 167, 177 (2003). Our supreme court has repeatedly noted that the *forum non conveniens* doctrine gives courts discretionary power that should be exercised *only in exceptional circumstances* when the interests of justice require a trial in a more convenient forum. *Langenhorst,* 219 Ill. 2d at 442; *First American Bank v. Guerine,* 198 Ill. 2d 511, 5120 (2002). The test is whether the relevant factors, viewed in their totality, *strongly favor* transfer to the forum suggested by the defendant. *Dawdy,* 207 Ill. 2d at 176.

"A circuit court abuses its discretion in balancing the relevant factors only where no reasonable person would take the view adopted by the circuit court." *Langenhorst,* 219 Ill. 2d at 442; *Dawdy,* 207 Ill. 2d at 177. Section 2-101 of the Code of Civil Procedure, the venue statute, provides that an action must be commenced (1) in the county of residence of any defendant who is joined in good faith, or (2) in the county in which the cause of action arose. *Langenhorst,* 219 Ill. 2d at 441, citing 735 ILCS 5/2-101 (West 2008); *Dawdy,* 207 Ill. 2d at 171. If more than one potential forum exists, the equitable doctrine of *forum non conveniens* may be invoked to determine the most appropriate forum. *Dawdy,* 207 Ill. 2d at 172.

The Illinois Supreme Court has held that a court must consider both "the private and public interest factors" in deciding a *forum non conveniens* motion. *Langenhorst,* 219 Ill. 2d at 443; *Dawdy,* 207 Ill. 2d at 172. The private 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, for example, the availability of compulsory process to secure attendance of unwilling witnesses. *Langenhorst,* 219 Ill. 2d at 443 (quoting *Guerine,* 198 Ill. 2d at 516); *Dawdy,* 207 Ill. 2d at 172. The 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,* 219 Ill. 2d at 443-44, citing *Guerine,* 198 Ill. 2d at 516-17; *Dawdy,* 207 Ill. 2d at 173.

Another factor to consider is the plaintiff's choice of forum, which is normally a "substantial" factor in deciding a *forum non conveniens* motion. *Guerine,* 198 Ill. 2d at 517; *Dawdy,* 207 Ill. 2d at 173; *Griffith v. Mitsubishi Aircraft International, Inc.,* 136 Ill. 2d 101, 106 (1990). However, the Illinois Supreme Court has stated that where the plaintiff chooses a forum that was neither the site of the accident nor the county in which he resides, the plaintiff's choice is entitled to somewhat less deference. *Dawdy,* 207 Ill. 2d at 173-76; *Guerine,* 198 Ill. 2d at 517.

The defendant has the burden to show that the relevant private and public interest factors strongly favor the defendant's choice of forum to warrant granting the motion to transfer and disturbing the plaintiff's choice. *Langenhorst*, 219 Ill. 2d at 444; *Guerine,* 198 Ill. 2d at 518. A defendant cannot assert that the plaintiff's chosen forum is inconvenient for the plaintiff. *Guerine,* 198 Ill. 2d at 518. The defendant must show that the plaintiff's chosen forum is inconvenient to the defendant and another forum is more convenient to all parties. *Guerine,* 198 Ill. 2d at 518.

1. Private Interest Factors

Applying the *forum non conveniens* factors to the facts in this case, we find that the trial court did not abuse its discretion in denying Dr. DePhillips' motion to transfer the case from Cook County, the plaintiffs' chosen forum, to Will County. Dr. DePhillips has not sustained his burden of proving that the private and public interest factors, viewed in their totality, *strongly favors* transfer to Will County. *Dawdy,* 207 Ill. 2d at 176. Finally, we cannot say that no reasonable person would take the view adopted by the trial court. *Langenhorst,* 219 Ill. 2d at 442; *Dawdy,* 207 Ill. 2d at 177.

Turning to the private interest factors, we first consider the convenience of the parties. The

trial court determined that the private interest factors did not "present a compelling favor to transfer." In this case, the trial court acknowledged, and we agree, that plaintiffs' choice of forum receives somewhat less deference because the plaintiffs reside in Will County and the alleged medical malpractice occurred in Will County, not in Cook County. However, plaintiffs' choice of forum is still entitled to some deference (*Guerine,* 198 Ill. 2d at 517; *Dawdy,* 207 Ill. 2d at 173-76), but less deference does not equal no deference. *Langenhorst,* 219 Ill. 2d at 448, citing *Guerine,* 198 Ill. 2d at 518.

With regard to the defendants, we note that Dr. DePhillips resides in DuPage County and practices primarily in Will County. In an affidavit, Dr. DePhillips indicates that litigating the case in Will County would be more convenient for him. The other defendant, Dr. Malek, resides in Cook County and practices in Cook, Will and Kankakee County. We note, however, that Dr. Malek does not join in Dr. DePhillips' motion to transfer, and he did not testify during his deposition that Cook County is an inconvenient forum.

Next, we consider the potential witnesses. The trial court noted that Dr. DePhillips failed to proffer affidavits from other witnesses stating that Cook County is an inconvenient forum. Dr. DePhillips maintains that the trial court abused its discretion in making this determination and in disregarding his own affidavit. Dr. DePhillips argues that he did not obtain the affidavits of subsequent treators because that would have created a potentially serious *Petrillo* violation. *Petrillo v. Syntex Laboratories, Inc.,* 148 Ill. App. 3d 581 (1986) (defendant may only communicate with plaintiff's treating physicians through formal discovery methods). We disagree with Dr. DePhillips'

contentions. We note that the trial court allowed forum discovery. Therefore, Dr. DePhillips would not have violated *Petrillo* had he noticed the depositions of the treating physicians or served them with written deposition questions. 210 Ill. 2d R. 202 (Any party may take the testimony of any party or person by deposition upon oral examination or written questions for the purpose of discovery or for use as evidence in the action).

Dr. DePhillips also could have obtained affidavits from nurses or other potential witnesses from Provena in Will County. In its order denying the motion to transfer, the trial court stated that: "[e]ven after forum discovery was completed, Dr. Phillips failed to offer any affidavits or other evidence in support of these arguments, other than Defendant Dr. DePhillips' affidavit of personal preference." While it is true that Supreme Court Rule 187 does not mandate that a movant file affidavits in support of a motion to transfer, Dr. DePhillips is still required to carry his burden and show that the private and public interest factors strongly favor transfer. *See Langenhorst*, 219 Ill. 2d at 450 (movant failed to provide any affidavits from any of the identified witnesses stating that Cook County was an inconvenient forum). Cases have indicated that the wisdom of filing additional affidavits "cannot be overemphasized." See *Bird v. Luhr Brothers*, 334 Ill. App. 3d 1088, 1096 (2002) (While the language of the rule permitting the filing of affidavits to support or oppose *forum non conveniens* motions clearly states that it is optional, the wisdom of filing affidavits cannot be overemphasized); Ill. S. Ct. R. 187(c) (eff. Aug. 1, 1986). Dr. Dephillips has failed to carry his burden by showing that the plaintiffs' chosen forum of Cook County is inconvenient, not only for him, but for *all parties*. *Guerine,* 198 Ill. 2d at 518. Therefore, the first private interest factor does

not weigh in favor of transfer.

The second private interest factor, the relative ease of access to sources of testimonial, documentary and real evidence, also does not weigh in favor of transfer. First, based upon Gary Holman's answers to interrogatories and his affidavit, it is reasonable to assume that there may be potential witnesses that reside in Will County. It is also reasonable to assume that Dr. Ghanayam, the physician who performed plaintiff's second surgical procedure, may be a potential witness. Dr. Ghanayam practices at Loyola Medical Center in Cook County and at Loyola's medical offices in Grundy County and DuPage County. Plaintiff also identified medical offices (but not the medical providers) where he received medical treatment in Will County, Kane County, Grundy County, Cook County and Kankakee County. Therefore, the potential trial witnesses will likely reside and be scattered among several counties, including the plaintiffs' chosen forum, and no single county will enjoy a predominant connection to the litigation. *Guerine,* 198 Ill.2d at 526 (Trial court abuses its discretion in granting an intrastate *forum non conveniens* motion where the potential trial witnesses are scattered among several counties, including the plaintiff's chosen forum, and no single county enjoys a predominant connection to the litigation).

In addition, the plaintiff's medical records can be easily obtained in either Cook County or Will County. Although plaintiff's medical records involving the alleged malpractice are in Will County, all of his subsequent medical records, which are relevant to the allegations in plaintiff's case, are in Will County, Kane County, Grundy County, Cook County and Kankakee County. See *Shirley v. Kumar*, 404 Ill. App. 3d 106, 111 (2010) (appellate court affirmed the trial court's order which denied motion to transfer where documentary evidence, including medical records, were in

both DuPage County and Cook County); *Spiegelman v. Victory Memorial Hosp.*, 392 Ill. App. 3d 826, 843 (2009) (in affirming the denial of the defendants' motion to transfer the case, the appellate court held that medical records could easily be transported to either forum). We note that the weight of documentary evidence has become less significant because today's technology allows documents to be copied and transported quite easily. *Guerine*, 198 Ill. 2d at 517. Finally, although the site of the alleged malpractice, Provena Hospital, is in Will County, a viewing of the site is rarely called for in a medical negligence case. *Hackl,* 382 Ill. App. 3d at 452.

Third, we must weigh all other practical considerations that make trial of a case easy, expeditious, and inexpensive, for example, the availability of compulsory process to secure attendance of unwilling witnesses. *Langenhorst,* 219 Ill. 2d at 443 (quoting *Guerine,* 198 Ill. 2d at 516); *Dawdy,* 207 Ill. 2d at 172. Dr. DePhillips has not presented any evidence that the trial would be more or less expensive if it occurs in Cook County as opposed to Will County. Compulsory process is equally available in Will County and Cook County, and residents of Will County would be subject to subpoena if the trial takes place in Cook County. *Hackl,* 382 Ill. App. 3d at 451; *Bird*, 334 Ill. App. 3d at 1094. Therefore, this factor does not weigh in favor of transfer.

2. Public Interest Factors

Next, we consider the public interest factors. The first factor is the interest in deciding controversies locally. Dr. DePhillips argues that it would be unfair to impose jury duty on the residents of Cook County because it has no meaningful connection to the litigation. He asserts that this is a Will County controversy because plaintiffs reside in Will County and the alleged negligence

took place in Will County, therefore, Will County is the most convenient forum. We find that this factor is equally balanced. Although Will County residents do have an interest in this case because the alleged malpractice took place in Will County and the plaintiffs live in Will County, Cook County residents also have an interest in the outcome of this litigation because Dr. Malek, the other defendant in this case, practices in Cook County and is a resident of Cook County. *See Langenhorst*, 219 Ill. 2d at 451 (a county has an interest in deciding a controversy involving one of its residents); *Hackl,* 382 Ill. App. 3d at 452 (defendant doctors were residents of Cook County), citing *Prouty v. Advocate Health & Hospitals Corp.*, 348 Ill. App. 3d 490, 497 (2004) (any county in which a healthcare provider provides service has an interest in the outcome of the case). Therefore, this factor does not weigh in favor of transfer.

The second public interest factor, the unfairness of imposing trial expense and the burden of jury duty on residents of a forum that has little connection to the litigation, also does not weigh in favor of transfer. Because a Cook County resident is also named as a defendant in this case its residents also have an interest in deciding this controversy. Therefore, it is not unfair to impose the expense of the trial and the burden of jury duty on Cook County's residents. *Langenhorst*, 219 Ill. 2d at 451.

The third public interest factor is consideration of judicial administration and congestion of the court's docket. In the trial court, Dr. DePhillips argued that Cook County has far more pending cases than Will County. He pointed out that in 2007, Cook County had more than 17,000 Law Division jury cases and Will County had 1,263 jury cases. However, when considering this factor,

not only are the number of cases pending relevant, but the court's ability to dispose of those cases. *See Dawdy,* 207 Ill. 2d at 181 (considering court congestion, the court noted the average time lapse, in months, between filing and verdict in Madison County - 29.3 months - and Macoupin County - 17.3 months). The Caseload and Statistical Records for the Circuit Court of Illinois indicates that 23,988 cases were disposed of in Cook County in 2007, while only 1,003 cases were disposed of in Will County. More importantly, as plaintiffs pointed out in the trial court, the average lapse of time, in months, between the date a case is filed and the date the case goes to trial is 37.2 months in Cook County compared to 46.1 months in Will County.

Although there are more cases filed in Cook County than in Will County, the statistical data shows that Cook County has the ability to dispose of its cases in an expeditious manner. We recognize that court congestion is a relatively insignificant factor, but it is a factor to be considered with all of the other factors, especially when the record shows that Cook County would resolve the case more quickly. *Langenhorst*, 219 Ill. 2d at 451-52, citing *Guerine*, 198 Ill. 2d at 517. Therefore, this factor does not weigh in favor of transfer.

When the private and public interest factors are considered in their totality, they do not *strongly favor* transfer to Will County. *Dawdy,* 207 Ill. 2d at 177. Dr. DePhillips failed to show that Will County was a convenient forum not only for himself but for all parties. Plaintiff's medical records can be obtained from medical facilities in Will County, Cook County and other counties. Dr. DePhillips has not presented any evidence that having the trial in Will County rather than Cook County would make the trial easier, more expeditious or less expensive. The record indicates that

Cook County has an interest in the controversy because one of its residents, Dr. Malek, practices in Cook County on a regular basis. In addition, because Dr. Malek resides and practices in Cook County, it would not be unfair to impose jury duty on the residents of Cook County. Finally, the record shows that Cook County would resolve the case more quickly than Will County.

CONCLUSION

In this case, after carefully considering the trial court's decision and the fact that transfers pursuant to the doctrine of *forum non conveniens* "should be exercised *only in exceptional circumstances* when the interests of justice require a trial in a more convenient forum," we hold that the trial court did not abuse its discretion when it denied Dr. DePhillips' *forum non conveniens* motion. *Langenhorst*, 219 Ill. 2d at 442, citing *Guerine*, 198 Ill. 2d at 520; *Peile*, 163 Ill. 2d at 335-36; *Torres v. Walsh*, 98 Ill. 2d 338, 346 (1983). Accordingly, we affirm the trial court's order that denied the defendants' (Dr. DePhillips and George E. DePhillips M.D., S.C.) motion to transfer. *Langenhorst,* 219 Ill. 2d at 442; *Dawdy,* 207 Ill. 2d at 177.