

Nos. 1-11-1729 and 1-11-1731 (cons.)

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(e)(1).

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

RITA WHITNEY, as Independent Administrator of the)	Appeal from the
Estate of DIANE L. WHITNEY, deceased,)	Circuit Court of
)	Cook County
Plaintiff-Appellee,)	
)	
v.)	
)	No. 10 L 13159
ARNOLD J. HERBSTMAN, M.D., Individually,)	
ASSOCIATES IN ORTHOPAEDIC SURGERY, a)	Honorable
corporation, and SHERMAN HOSPITAL, a)	Ronald Davis,
corporation,)	Judge Presiding.
)	
Defendants-Appellants.)	

JUSTICE KARNEZIS delivered the judgment of the court.
Presiding Justice Hoffman and Justice Hall concurred in the judgment.

ORDER

¶ 1 *HELD:* Trial court did not abuse its discretion in denying defendants' motions to transfer venue based on the doctrine of forum *non conveniens* in medical malpractice case when, although the alleged malpractice occurred in Kane County, decedent was treated in Cook County for several months before her death.

¶ 2 Decedent, Diane L. Whitney, died as a result of complications from knee replacement surgery. Decedent's mother, plaintiff Rita Whitney, as independent administrator of decedent's estate, filed a wrongful death and survivorship action in the circuit court of Cook County against defendants Sherman Hospital (Sherman Hospital), Associates in Orthopaedic Surgery, and Dr. Arnold J. Herbstman (collectively Surgery defendants). Sherman Hospital and the Surgery defendants filed separate motions to transfer the case to Kane County based on the doctrine of *forum non conveniens* pursuant to Illinois Supreme Court Rule 187 (eff. August 1, 1986). The trial court denied both motions and all defendants jointly filed a petition for interlocutory appeal pursuant to Illinois Supreme Court Rule 306(a)(2) (eff. February 16, 2011), which we granted. On appeal, defendants maintain that the trial court erred in denying their motions to transfer because the public and private interest factors strongly favor transfer of the case to Kane County. Based on the following reasons, we affirm.

¶ 3 **Background**

¶ 4 Decedent, who was a resident of McHenry County at the time of her death, underwent knee replacement surgery in June 2008 at Sherman Hospital. Sherman Hospital is located in Kane County. The surgery was performed by Dr. Herbstrom, who was affiliated with defendant Associates in Orthopaedic Surgery, which is located in Kane County. Dr. Herbstrom, who has since retired from practice, maintains residences in both Kane County and Lake County; although, he averred he spends a majority of his time at his Kane County residence.

1-11-1729

¶ 5 Subsequently, decedent went to the emergency room at Sherman Hospital on January 10, 2009, and was diagnosed with an infection in her right knee. She was transferred 10 days later, on January 20, 2009, to Sherman West Court Nursing Home, which is located in Kane County. Dr. Herbstrom treated decedent while she was at Sherman Hospital and Sherman West Coast Nursing Home. She was subsequently discharged from the nursing home on January 29, 2009.

¶ 6 Decedent consulted with Dr. Shawn Palmer, who immediately admitted her to Provena St. Joseph Hospital to remove her right knee prosthesis. Dr. Shawn Palmer maintains offices in Kane County and McHenry County and is a resident of Cook County. Provena St. Joseph Hospital is located in Kane County. Decedent remained at Provena St. Joseph Hospital until February 2, 2009, and was then transferred to Weiss Memorial Hospital. Weiss Memorial Hospital is located in Cook County. Decedent was then transferred to Lexington of Streamwood Nursing Home, which is in Cook County. On June 19, 2009, decedent was readmitted to Weiss Memorial Hospital, where she remained until July 31, 2009. On that date, she was transferred to Crossroads Care Center, which is located in McHenry County. Subsequently, on August 6, 2009, decedent was readmitted to Weiss Memorial Hospital where she remained until her death, on August 11, 2009.

¶ 7 Plaintiff's complaint focuses on the specific time period between January 12, 2009, and January 29, 2009. The complaint alleges that during that time period defendants were negligent in their treatment of decedent.

¶ 8 Defendants argued in their motions to transfer the case to Kane County for forum *non conveniens* that Kane County was the more appropriate venue because neither plaintiff nor decedent resided in Cook County, the alleged malpractice occurred in Kane County and the additional relevant factors weighed in favor of Kane County. At the hearing on the motions, the court asked the parties to address the case of *Smith v. Silver Cross Hospital*, 312 Ill. App. 3d 210 (2000), where this court found venue proper in Cook County based on the decedent's hospital stay of one day in a hospital located in Cook County. After the hearing, the trial court took the matter under advisement and later denied defendants' motions. The court's one-page written order did not give specific reasons for the denial.

¶ 9 On appeal, defendants contend that the trial court abused its discretion in denying their motions to transfer venue based on forum *non conveniens*. Defendants additionally argue that the court improperly focused on a single factor, the subsequent treatment of decedent at Weiss Memorial Hospital in Cook County, as the main basis for denying their motions to transfer. We note that although defendant Sherman Hospital and the Surgery defendants have filed separate briefs on appeal, most of their arguments are similar. Therefore, we will address their arguments collectively, unless otherwise noted.

¶ 10 Analysis

¶ 11 The sole question on appeal is whether the trial court erred in denying defendants' motions to transfer the case from Cook County to Kane County pursuant to

1-11-1729

the doctrine of *forum non conveniens*. The resolution of a *forum non conveniens* motion requires the court to apply an "uneven" balancing test to various private interest factors affecting the convenience of the litigants and public interest factors affecting the administration of the courts. *Dawdy v. Union Pacific Railroad Co.*, 207 Ill. 2d 167, 172 (2003). The private interest factors include the convenience of the parties; the relative ease of access to sources of testimonial, documentary, and real evidence; the availability of compulsory process to secure attendance of unwilling witnesses; the cost to obtain attendance of willing witnesses; the possibility of viewing the premises, if appropriate; and all other practical considerations that make a trial easy, expeditious, and inexpensive. *Dawdy*, 207 Ill. 2d at 172. The public interest factors include the administrative difficulties caused when litigation is handled in congested venues instead of being handled at its origin; the unfairness of imposing jury duty upon residents of a county with no connection to the litigation; and the interest in having local controversies decided locally. *Dawdy*, 207 Ill. 2d at 173. The defendant bears the burden of establishing that the relevant factors, viewed in their totality, strongly favor the suggested forum. *Boner v. Peabody Coal Co.*, 142 Ill. 2d 523, 542 (1991).

¶ 12 This balancing test however, has been referred to as "uneven" because of the deference afforded to the plaintiff's chosen forum. The plaintiff's right to select a forum is substantial, and unless the above factors weigh strongly in favor of transfer, the plaintiff's choice of forum should rarely be disturbed. *Dawdy*, 207 Ill. 2d at 173.

Nevertheless, the degree of deference to be given is determined by whether the plaintiff

is a resident of the selected forum. When the plaintiff chooses her home forum, that choice is accorded substantial deference. When the plaintiff is foreign to the selected forum, her choice is given less deference. In a wrongful death action, it is the decedent's residence at the time of death that is of significance. *Bradbury v. St. Mary's Hospital of Kankakee*, 273 Ill. App. 3d 555, 560 (1995). Where, as here, decedent was not a resident of the chosen forum and the injury did not occur therein, plaintiff's choice is given less deference. *Dawdy*, 207 Ill. 2d at 173-174.

¶ 13 In balancing the above considerations, no single factor controls. The trial court must consider all relevant factors, including the plaintiff's choice of forum and the proper deference accorded to that choice, according to the circumstances of the case. We will not reverse the trial court's denial of a *forum non conveniens* motion unless the court abused its discretion in balancing the relevant factors, *i.e.*, where no reasonable person would take the view adopted by the court. *Dawdy*, 207 Ill. 2d at 177.

¶ 14 Private Interest Factors

¶ 15 We first examine the private interest factors in this case. As noted above, the private interest factors include the convenience of the parties; the relative ease of access to sources of testimonial, documentary, and real evidence; the availability of compulsory process to secure attendance of unwilling witnesses; the cost to obtain attendance of willing witnesses; the possibility of viewing the premises, if appropriate; and all other practical considerations that make a trial easy, expeditious, and inexpensive. *Dawdy*, 207 Ill. 2d at 172.

¶ 16 The first factor, the convenience of the parties, weighs in favor of Kane County. Decedent resided in McHenry County at the time of her death and, plaintiff currently resides in McHenry County. McHenry County is closer to Kane County than Cook County. Sherman Hospital is located in Kane County. Associates in Orthopaedic Surgery is located in Kane County. Dr. Herbstrom, who is retired, maintains residences in both Kane and Lake County, although he averred he spends a majority of his time at his Kane County residence. The Kane County courthouse is located closer to the parties than the Daley Center in Cook County.

¶ 17 The second factor, the relative ease of access to sources of testimonial, documentary, and real evidence, does not weigh in favor of Kane County or Cook County. The alleged negligence occurred in Kane County, however, decedent was also treated for several months at Weiss Memorial Hospital in Cook County. Decedent's medical records and testifying physicians and medical treatment providers are located in both Kane County and Cook County.

¶ 18 Sherman Hospital further argues here that the trial court improperly focused on the single factor of decedent's subsequent treatment at Weiss Memorial Hospital in Cook County as the main basis for denying their motions to transfer. The Surgery defendants also make the same argument, albeit in a separate part of their brief. We now address defendants' contentions with respect to this issue. The transcript from the hearing on the motions to transfer venue does indicate the trial court's interest in and application of the case of *Smith v. Silver Cross Hospital*, 312 Ill. App. 3d 210 (2000), to

the case at bar. However, the transcript also indicates that the court permitted defendants to argue all of the relevant factors and reasons in support of their motions. There is no indication that the court gave the decedent's subsequent treatment in Cook County more weight than the other relevant factors. And, since there is no written order giving specific reasons for the court's denial of the motions, we cannot conclude as defendants maintain that the court improperly elevated this factor above all others.

¶ 19 The third factor, the availability of compulsory process to secure attendance of unwilling witnesses, does not weigh in favor of Kane County or Cook County. As stated above, decedent was treated in both Kane County and Cook County, therefore, the physicians and medical treatment providers who could be called to testify at trial are located in both Kane County and Cook County. Compulsory process is available in either county to secure the attendance of any unwilling witnesses.

¶ 20 The fourth factor, the cost to obtain attendance of willing witnesses, does not weigh in favor of Kane County or Cook County. Those witnesses who reside or work in Kane County will incur less costs (traveling time, cost of gas, time away from home or work) if traveling to Kane County for trial rather than to Cook County. However, those witnesses who reside or work in Cook County will incur less costs if the trial were held in Cook County rather than Kane County. Defendants emphasize the cost of parking at the Daley Center, which can total \$30 each day, as compared to the free parking at the Kane County courthouse. However, the witnesses have the option of taking public transportation to the Daley Center, which would eliminate the parking expense.

¶ 21 The fifth factor, the possibility of viewing the premises, is not relevant in this medical malpractice action, so we need not discuss it.

¶ 22 The last factor, all other practical considerations that make a trial easy, expeditious, and inexpensive, does not weigh in favor of Kane County or Cook County. As stated above, the alleged negligence occurred in Kane County and decedent was treated in both Kane County and Cook County. Decedents' medical records and treatment providers are located in both Kane County and Cook County. Although the parties are located in or near Kane County rather than Cook County, this does not necessarily establish that a trial in Kane County would be easier, more expeditious or less expensive than a trial in Cook County. Defendants focus their argument on the short time period of the alleged negligence, January 12, 2009, to January 29, 2009, in which the decedent was treated in Kane County. However, the trial will not likely be limited to witnesses who only treated decedent during that time period. It will likely include decedent's treatment in Kane County as well as her treatment in Cook County until her death in August 2009. We further note that there is no evidence in the record that decedent's treatment in Cook County was for the purpose of establishing venue. Decedent received treatment in Cook County from February 2009 to August 2009, either at Weiss Hospital or at a nursing home in Cook County, except for several days she received care at a nursing home in McHenry County.

¶ 23 Public Interest Factors

¶ 24 We next examine the public interest factors in this case. As noted above, the

1-11-1729

public interest factors include the administrative difficulties caused when litigation is handled in congested venues instead of being handled at its origin; the unfairness of imposing jury duty upon residents of a county with no connection to the litigation; and the interest in having local controversies decided locally. *Dawdy*, 207 Ill. 2d at 173.

¶ 25 The first factor, the administrative difficulties caused when litigation is handled in congested venues instead of being handled at its origin, weighs only slightly in favor of Kane County. Plaintiff admits that Cook County is a more congested venue than Kane County. However, a crowded court docket has been held to be a relatively insignificant factor, and is insufficient to justify removal to a different venue. *Czarnecki v. Uno-Ven Co.*, 339 Ill. App. 3d 504, 509 (2003).

¶ 26 The second factor, the unfairness of imposing jury duty upon residents of a county with no connection to the litigation, does not weigh in favor of Kane County or Cook County. As stated above, the decedent was treated in both counties. Therefore, both counties have a connection to the litigation.

¶ 27 The third factor, the interest in having local controversies decided locally, also does not weigh in favor of Kane County or Cook County. The Kane County courthouse is located about 36 miles from the Daley Center in Chicago. This is a relatively short distance such that hospitals and physicians in Kane County and Cook County often treat individuals from any one of the neighboring counties. Cook County has an interest in a medical malpractice case that occurred in Kane County, which then resulted in the decedent's transfer to treatment facilities in Cook County.

1-11-1729

¶ 28 Overall, balancing the private and public interest factors, defendants have not met their burden of establishing that the relevant factors, viewed in their totality, strongly favor transfer of the case to Kane County. Most of the factors did not weigh in favor of either county, and those two factors that did (convenience to the parties and court congestion) are insufficient to justify transfer. Additionally, we give plaintiff's chosen forum of Cook County some deference. The trial court's determination that plaintiff's choice of forum should not be disturbed was not an abuse of discretion.

¶ 29 Accordingly, we affirm the judgment of the trial court.

¶ 30 Affirmed.