2013 IL App (1st) 122056-U

FIFTH DIVISION
September 27, 2013

No. 1-12-2056

JOHN RUPP and KARLA RUPP, as Special Administrators of the Estate of JOHN DONALD RUPP, III, deceased,	)	Appeal from the Circuit Court of Cook County
Plaintiffs-Appellees,	)	No. 11 L 2726
v.	)	Honorable John Kirby,
PHUSION PROJECTS, LLC, JAISEN FREEMAN, CHRIS HUNTER, JEFF WRIGHT, and SYNERGY FLAVORS, INC.,	)	Judge Presiding.
Defendants-Appellants.	)	

JUSTICE PALMER delivered the judgment of the court.
Justices McBride and Taylor concurred in the judgment.

ORDER

¶ 1 Held: We reverse and remand with instructions that the trial court reweigh the private and public interest factors, taking into consideration the newly filed lawsuits in Virginia, Wisconsin, and Illinois, in addition to the fact that Synergy had joined the *forum non conveniens* motion to dismiss, and to consider the choice of law issue as part of the public interest factor analysis.

¶ 2 Defendants Phusion Projects, LLC, Jaisen Freeman, Chris Hunter, Jeff Wright, and Synergy Flavors, Inc., appeal the trial court's denial of their motion to dismiss based on *forum*

non conveniens. Defendants argue that the trial court abused its discretion in denying their motion because Virginia provided a more appropriate venue and the private and public interest factors strongly favored dismissal and transfer of the case to Virginia.

¶ 3 BACKGROUND

¶ 4 Following the death of their 15-year-old son in 2010, John Donald Rupp, III, plaintiffs John and Karla Rupp brought an action in Cook County Circuit Court against Phusion Projects, Freeman, Hunter, Wright, City Brewing Company, LLC, J. F. Fick, Inc., RaceTrac Petroleum, Inc. (individually and d/b/a RaceWay 6788), Emile El Haddad, and Synergy Flavors, Inc. (Synergy).[1] Plaintiffs' complaint consisted of strict liability and negligent product design claims regarding Four Loko, a caffeinated alcoholic beverage. Count I alleged strict liability under the Survival Act (755 ILCS 5/27-6 et seq (West 2010)); count II alleged strict liability under the Wrongful Death Act (740 ILCS 180/1 et seq (West 2010)); count III alleged negligent design under the Wrongful Death Act; count IV alleged negligent design under the Survival Act; and counts V and VI sought recovery for medical and burial expenses under the Family Expense Act (750 ILCS 65/15 (West 2010)).

¶ 5 In their complaint, plaintiffs alleged that on September 24, 2010, their minor son and his

[1]Synergy was subsequently added as a defendant by plaintiffs in January 2012 in their third amended complaint. We note that El Haddad, J. F. Fick, RaceTrac Petroleum, and City Brewing are not party to this appeal, and references in this order to "defendants" refers to the remaining defendants Phusion Projects, Freeman, Hunter, Wright, and Synergy, unless specifically indicated otherwise. Upon motion by plaintiffs, El Haddad, J. F. Fick, and RaceTrac Petroleum were voluntarily dismissed without prejudice in February 2012. Further, the trial court granted City Brewing's motion to dismiss for lack of jurisdiction on June 26, 2012.

friends purchased Four Loko at a RaceWay gas station in Manassas, Virginia. Plaintiffs alleged that one can of the beverage contained the equivalent alcohol content of five to six 12-ounce cans of beer, and as much caffeine as two cups of coffee, along with the stimulants guarana, taurine, and wormwood. According to plaintiffs, the decedent consumed two cans of the beverage before attending a concert with his friends in Barstow, Virginia, on September 25, 2010. He then began exhibiting unusual behavior, and Karla Rupp was called to the venue to pick him up. The decedent became increasingly paranoid and disoriented on the drive home and attempted to jump out of the car. Upon arriving home, the decedent ran away and hid; he later sent nonsensical text messages to Karla Rupp. The decedent then ran onto a busy highway and appeared disoriented. Plaintiffs alleged that at some point, he collapsed, fell, or sat down in the road, where he was accidentally struck by a vehicle. He died the next day in a Virginia hospital.

¶ 6 Plaintiffs alleged that Four Loko was unreasonably dangerous and defective and that defendants were negligent in developing and selling the product because it masked intoxication and desensitized users to the symptoms of intoxication, increased the risk of alcohol-related harm or engaging in high-risk behavior, was specifically marketed to college-aged and underage consumers, and was sold in convenience stores where clerks were less likely to verify a customer's age. Plaintiffs alleged that Phusion Projects, a Delaware limited liability corporation with its principal office at 1658 Milwaukee Avenue, Chicago, Illinois, invented and owned the Four Loko beverage line; Hunter, Wright, and Freeman were inventors and developers of Four Loko and corporate officers of Phusion Projects; Synergy was a corporation organized under Illinois law and licensed to conduct business in Illinois; City Brewing, a Wisconsin limited

liability company with its principal office in Wisconsin, brewed, bottled, and labeled Four Loko for Phusion Projects; RaceTrac Petroleum, a Georgia-based chain of gasoline and convenience stores, sold the decedent the Four Loko at a RaceWay 6788 in Manassas, Virginia; El Haddad was the owner and operator of the RaceWay store; and J. F. Fick, a Virginia corporation with its principal offices in Virginia, distributed Four Loko to the RaceWay convenience store.

¶ 7 In 2011, J. F. Fick, RaceTrac Petroleum, City Brewing, and El Haddad all filed separate motions to dismiss. J. F. Fick moved to dismiss for lack of personal jurisdiction and based on the doctrine of *forum non conveniens*. RaceTrac Petroleum moved to dismiss based on lack of personal jurisdiction and adopted J. F. Fick's motion to dismiss based on *forum non conveniens*. El Haddad moved to dismiss based on lack of subject matter jurisdiction. City Brewing moved to dismiss based on lack of personal jurisdiction. As previously noted, plaintiffs subsequently moved to voluntarily dismiss J. F. Fick, RaceTrac Petroleum, and El Haddad without prejudice. The trial court granted the motion and entered an order on February 10, 2012.[2]

¶ 8 On July 13, 2011, defendants Phusion Projects, Freeman, Hunter, and Wright (Phusion defendants) moved to dismiss based on the doctrine of *forum non conveniens.* In the alternative, they moved to dismiss the strict liability claims as they were not cognizable under Virginia law, and to dismiss counts V and VI for failing to state a claim under the Family Expense Act. Regarding the *forum non conveniens* motion, Phusion defendants argued that the private and public interest factors strongly favored dismissal because the events underlying the claims

[2]This order was contained in the supporting record, but was not found in the common law record. However, the parties do not contest this order.

occurred in Virginia, including the sale and consumption of Four Loko, the accident, the medical treatment, and the decedent's death, and all relevant witnesses to those events were located in Virginia. Any witnesses not in Virginia were either defendants or employees of defendants who could be compelled by a Virginia court to appear in Virginia, whereas Illinois courts could not compel the Virginia occurrence witnesses to appear for trial in Illinois. Phusion defendants argued that viewing the accident site was important. They also asserted that Phusion Projects' registered address with the State of Illinois was a post office box and it did not maintain a physical office in Chicago or elsewhere, and that Freeman and Hunter worked from home in Illinois and Wright worked from home in Arizona, or while traveling throughout the country, and Phusion Projects employees frequently worked in the field while traveling around the country. Phusion defendants indicated that they would consent to service of process from a Virginia court as a condition of dismissal.

¶ 9 Regarding the public interest factors in the *forum non conveniens* analysis, Phusion defendants argued that Illinois did not have significant factual connections to the dispute, but Virginia had a strong local interest in the case. The safety of the product was no longer of concern to Illinois because Phusion Projects had voluntarily reformulated Four Loko. Phusion defendants also asserted that a conflict existed between Illinois and Virginia law because Illinois recognized strict liability for product liability claims, but Virginia law did not; Illinois followed a comparative negligence approach, while Virginia followed a contributory negligence approach; and, unlike Virginia, Illinois law did not permit punitive damages in wrongful death cases. These defendants asserted that Virginia law would apply and this favored transfer to Virginia.

¶ 10 In support of their motion, Phusion defendants provided a October 6, 2010, newspaper article from a Virginia newspaper regarding the decedent's death; a "declaration" from Freeman, and a November 16, 2010, press release from Phusion Projects regarding its removal of caffeine, taurine, and guarana from its products. In Freeman's declaration, he stated that he was a resident of Illinois and a co-founder and managing partner of Phusion Projects; that Phusion Projects was a Delaware limited liability corporation with its principal place of business at a post office box at 1658 Milwaukee Avenue, in Chicago, Illinois; that Phusion Projects did not have a physical office or headquarters in Illinois or elsewhere; and that the founders worked from their respective residences or while traveling throughout the country.

¶ 11 Plaintiffs opposed the motion and responded that Phusion defendants failed to meet their burden of showing that Illinois was an inconvenient forum. Plaintiffs pointed out that, in contrast to the above statements in Freeman's declaration, in a 2009 lawsuit Phusion Projects filed against one of its competitors in the United States District Court for the Northern District of Illinois, Phusion Projects opposed the defendant's motion to dismiss for *forum non conveniens*, and Freeman asserted in a sworn declaration that Phusion Projects' headquarters were in Chicago.[3] Plaintiffs provided an email from Phusion Projects's vice president of national

[3]Freeman's deposition testimony indicated that Phusion Projects sold Four Loko in Illinois, Freeman and Hunter resided in Chicago, a Chicago address was listed with the state of Illinois as Phusion Projects' principal place of business, Phusion Projects had a permit in Illinois allowing it to sell Phusion Projects' products to distributors, it received some of its mail at the Chicago address, and Phusion Projects began selling Four Loko in Illinois in 2009. Freeman also testified that the meetings leading up to the formation of the company that would eventually create Four Loko occurred in Arizona and Chicago, along with discussions over the telephone with Hunter and Wright, and Freeman indicated he could have been in Illinois or traveling for

accounts to an employee of RaceTrac Petroleum, in which he referred to Chicago as Phusion Projects' "home court."

¶ 12 Plaintiffs also identified 15 witnesses they intended to call at trial. The Illinois-based witnesses were Freeman, Hunter, Chris Short (a Phusion Projects employee), and Phil Ross (a Synergy employee). The Virginia-based witnesses included Christian Daniels (to testify about the events on the night the decedent died) and John and Karla Rupp, all of whom signed affidavits indicating that it was not inconvenient to travel to Illinois to testify. Plaintiffs noted that Wright was based in Arizona. Plaintiffs also named four witnesses based in Wisconsin and connected to City Brewing. In addition, plaintiffs listed Nick Middlesworth (located in California and an employee of Atlas, a company that worked with Phusion Projects on marketing); Stephan Jannuzzo (former employee of Phusion Projects in Georgia); Stuart Bakay (former Phusion Projects employee in Louisiana).

¶ 13 In addition, plaintiffs argued that Phusion Projects stored its documents on a cloud server, which could easily be accessed from anywhere, and some hard copies of documents were stored at Freeman and Hunter's homes in Chicago, Wright's home in Arizona, or at employees' homes across the country. Further, Phusion Projects received mail in Chicago, including correspondence from the Food and Drug Administration, the State of Illinois, and bills. Phusion Projects also received mail in Wisconsin and Ohio, but there was no evidence that it received or maintained any records in Virginia, and police reports and medical records from Virginia were

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work at the time of the telephone conversations.

easily brought to Illinois. Plaintiffs asserted that, based on deposition testimony and Freeman's declaration, decisions about Four Loko's formulation and marketing were made in Illinois and Arizona, and it was sold and marked to Illinois residents.

¶ 14 Plaintiffs argued that Phusion defendants failed to name any witness in Virginia, viewing the site of the accident was unnecessary, and most of the testimonial and documentary evidence was located in Illinois. Plaintiffs argued that Phusion defendants could not assert that their home county would be inconvenient, and City Brewing and Synergy were closer to Cook County, Illinois, than to Fairfax County, Virginia. Plaintiffs argued that Cook County had a substantial interest in preventing and redressing the misconduct of its corporate residents because corporate officers resided in Illinois and the corporation was based in Chicago. Plaintiffs pointed out that the Illinois legislature passed a law in 2011 that prohibited selling beverages like Four Loko. Plaintiffs contended that it was premature to determine the choice of law issue, and even if Virginia law applied, this factor alone would not support granting defendants' motion.

¶ 15 In their reply, Phusion defendants countered that the trial court would be unable to compel the Virginia witnesses to attend trial in Illinois and judicial resources would be wasted in forcing Phusion Projects or plaintiffs to pursue separate actions in Virginia against the dismissed defendants. Phusion defendants noted that the police report from the incident indicated that the cause of the decedent's death was suicide and that the decedent was advised on the night of his death not to drink alcohol because he was taking other medication that could interact adversely. These defendants also provided a list of 24 witnesses, including the names, addresses, and areas of testimony for each witness. Every witness was located in Virginia. Their anticipated

testimony included: seven individuals who allegedly observed the decedent on the highway, four friends of the decedent who went to the concert and could testify regarding the decedent's illegal purchase and consumption of alcohol or other substances, four police officers who investigated the accident, the decedent's physician who had prescribed him antidepressants, the decedent's social worker who could testify regarding a prior suicide attempt by the decedent and his state of mind, concert staff at the venue who could testify regarding the decedent's behavior, medical staff who treated the decedent after the accident, the post-mortem medical examiner, and El Haddad and the store clerk who sold Four Loko to the decedent. Defendants provided four "affidavits" that were signed, but not notarized or sworn, by four of the prospective witnesses, which indicated that it would be inconvenient to travel to Illinois to testify.

¶ 16 Plaintiffs subsequently filed a sur-reply to Phusion defendants' motion, reiterating their previous arguments and noting that much of defendants' witnesses' testimony would be cumulative.

¶ 17 On April 24, 2012, Synergy moved to dismiss plaintiffs' complaint, adopting Phusion defendants' motion to dismiss based on *forum non conveniens* and arguments in support. On May 23, 2012, the court entered and continued Synergy's motion to June 11, 2012. In addition, on April 26, 2012, City Brewing also moved to join Phusion defendants' motion to dismiss based on *forum non conveniens,* as an alternative to its pending motion to dismiss for lack of personal jurisdiction.

¶ 18 Following combined oral arguments on defendants' motion and City Brewing's motion on May 10, 2012, the court entered a written opinion and order on June 18, 2012, denying

defendants' *forum non conveniens* motion. It granted without prejudice defendants' motion to dismiss counts V and VI under the Family Expense Act, and granted plaintiffs leave to amend their complaint.[4]

¶ 19 Regarding the private interest factors, the court noted that the convenience of the parties strongly favored maintaining the case in Cook County. Phusion Projects, Freeman, and Hunter resided in and were doing business in Cook County; and Synergy and City Brewing resided closer to Cook County than to Fairfax County, Virginia; and all parties had retained local counsel. Noting that plaintiffs sought testimonial evidence from witnesses predominantly located in Illinois and Wisconsin, while defendants relied on testimonial evidence of occurrence witnesses located exclusively in Virginia, the court determined that the relative ease of access to testimonial, documentary, and real evidence was a "mixed bag," slightly favoring Virginia or being neutral. The documentary and real evidence was "highly portable" and the court found this factor of little significance. The availability of compulsory process to secure witnesses, however, "strongly favored" trial in Virginia because all of the occurrence and treating physician witnesses were located there, while the potential Illinois witnesses were either parties to the ligation or employees of parties. The court also held that the cost of obtaining attendance of witnesses was neutral given that witnesses were located in each location. The court assigned little weight to viewing the premises because the dispute revolved around what caused the decedent's unusual behavior, not the condition of the Virginia highway.

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[4]Plaintiffs subsequently filed a fourth amended complaint alleging in counts V and VI that the decedent was an unemancipated minor under 18 years of age at the time of death.

¶ 20 The court held that defendants' choice of law argument was premature because they had not presented the court with a proper motion to apply Virginia law and the issue was not fully briefed.[5] Assuming for argument purposes that Virginia law would apply, the court observed that Illinois courts routinely apply laws of other states, and held that this factor would only slightly favor transfer to Virginia. Regarding defendants' argument that it would be impractical to have simultaneous litigation in two states, the court noted that there was no pending litigation in Virginia. The court indicated that Synergy and City Brewing had not joined the motion to transfer and thus would not be subject to jurisdiction in Virginia.

¶ 21 With respect to the public interest factors, the court held that the interest in deciding local controversies locally ultimately favored transfer to Virginia. Regarding the fairness of imposing jury duty and trial, the court held that Cook County's connection to the litigation was significant and found that this factor weighed against transfer. The court indicated that there was no evidence regarding congestion of dockets in Fairfax County or Cook County, so the third public interest factor was neutral.

¶ 22 The court indicated that plaintiffs' choice of forum was not accorded the highest degree of deference given that they were not residents of Cook County, but their choice was entitled to "some deference." The trial court ultimately found that defendants had not met their burden of showing that it was substantially more convenient to try the case in a different forum.

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[5]The court denied defendants' motion to dismiss the first count in plaintiffs' complaint, finding that defendants had not yet presented a motion to apply Virginia law, but indicated that they could renew the motion when the choice of law issue was properly before the court.

¶ 23 On June 26, 2012, the court also entered a written opinion and order in which it granted City Brewing's motion to dismiss for lack of personal jurisdiction. The court also entered on July 16, 2012, an order denying Synergy's motion to dismiss for the same reasons as set forth in its June 18, 2012, opinion regarding Phusion defendants' motion.[6]

¶ 24 Pursuant to Illinois Supreme Court Rule 306(a)(2) (eff. Sept. 1, 2006), defendants (Phusion Projects, Freeman, Hunter, Wright, and Synergy) timely petitioned for leave to appeal the trial court's June 18, 2012, order denying their motion to dismiss based on *forum non conveniens,* and this court granted the petition.

¶ 25 Subsequently, this court granted defendants' motion to take judicial notice of publicly filed documents in other litigation. During the pendency of this appeal, J. F. Fick filed a third-party complaint for indemnification in Fairfax County, Virginia, against Phusion Projects. The third-party complaint is related to plaintiffs' breach of warranty lawsuit pending in Virginia against J. F. Fick, El Haddad, and RaceTrac Petroleum, which plaintiffs commenced after the trial court in the instant case denied defendants' *forum non conveniens* motion. This court also granted plaintiffs' motion to take judicial notice of the filing of a declaratory judgment action, Phusion Projects, Inc. & Phusion Projects, LLC v. Frank A. Crissie, et al., in the Circuit Court of Cook County. Plaintiffs maintain that the action "seeks damages as a result of the filing of products liability actions that have arisen against" Phusion related to Four Loko, and that the insurance coverage of Four Loko will be one of the subjects of discovery and will be litigated in

[6]The order regarding Synergy was contained in the supporting record but not in the common law record. However, the parties do not dispute this order on appeal.

Cook County.

¶ 26 ANALYSIS

¶ 27 1. *Forum Non Conveniens* Doctrine

¶ 28 "The *forum non conveniens* doctrine is an equitable doctrine grounded on considerations of fundamental fairness and sensible and effective judicial administration which permits the circuit court to decline jurisdiction in the exceptional case where a trial in another forum with proper jurisdiction and venue would better serve the ends of justice. [Citation.]" (Internal quotation marks omitted.) *Erwin v. Motorola, Inc*., 408 Ill. App. 3d 261, 273 (2011). In analyzing a motion to dismiss based on the doctrine of *forum non conveniens*, "the trial court must balance private interest factors affecting the convenience of the litigants and public interest factors affecting the administration of the courts." *Id.* at 274. The private interest factors are as follows:

> "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 v. Union Pacific R.R. Co.*, 207 Ill. 2d 167, 172 (2003).

¶ 29 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.

¶ 30 "The private interest factors are not weighed against the public interest factors; rather, the trial court must evaluate the total circumstances of the case in determining whether the defendant has proven that the balance of factors strongly favors transfer." *Langenhorst v. Norfolk Southern Ry. Co.*, 219 Ill. 2d 430, 444 (2006). The defendant bears the burden of establishing that the private and public interest factors "strongly favor" transferring the case. *Id*. at 444. "The defendant must show that the plaintiff's chosen forum is inconvenient to the defendant and another forum is more convenient to all parties. [Citation.] However, the defendant cannot assert that the plaintiff's chosen forum is inconvenient to the plaintiff." *Id.* at 444.

¶ 31 "A trial court is afforded considerable discretion in ruling on a *forum non conveniens* motion." *Langenhorst*, 219 Ill. 2d at 441. However, this "discretionary power *** should be exercised *only in exceptional circumstances* when the interests of justice require a trial in a more convenient forum." (Emphasis in original.) *Id.* at 442. Its discretionary decision will be upheld on appeal unless "no reasonable person would take the view adopted by the circuit court." *Id.* "[I]t is not the role of a reviewing court to substitute its judgment for that of the trial court, or to decide whether the reviewing court would have weighed the factors differently, or even to determine whether the trial court exercised its discretion wisely." *Haight v. Aldridge Electric Co., Inc.*, 215 Ill. App. 3d 353, 359 (1991) (citing *Griffith v. Mitsubishi Aircraft International, Inc*., 136 Ill. 2d 101, 115 (1990)). "It is not our duty to reweigh the various factors ***, but merely to determine whether or not the trial court abused its discretion in granting the motions."

Bishop v. Rockwell International Corp., 194 Ill. App. 3d 473, 477 (1990). In the instant case, we review the trial court's decision with regard to the above relevant factors to the extent it informs our decision.

¶ 32 2. Plaintiffs' Chosen Forum

¶ 33 As part of its *forum non conveniens* analysis, the court "must also consider its deference to the plaintiff's choice of forum." *Erwin*, 408 Ill. App. 3d at 274 (citing *Dawdy*, 207 Ill. 2d at 173). " 'The plaintiff has a substantial interest in choosing the forum where his rights will be vindicated, and the plaintiff's forum choice should rarely be disturbed unless the other factors strongly favor transfer.' " *Langenhorst*, 219 Ill. 2d at 442 (quoting *First American Bank v. Guerine*, 198 Ill. 2d 511, 517 (2002)). However, a plaintiff's chosen forum "receives 'somewhat less deference when neither the plaintiff's residence nor the site of the accident or injury is located in the chosen forum.' " *Langenhorst*, 219 Ill. 2d at 442-43 (quoting *Guerine*, 198 Ill. 2d at 517). "Nevertheless, this does not equal no deference." *Ellis v. AAR Parts Trading, Inc.*, 357 Ill. App. 3d 723, 741 (2005) (citing *Dawdy*, 207 Ill.2d at 174).

¶ 34 Turning to the case at bar, we find that the trial court accorded the proper amount of deference to plaintiffs' choice of forum. The trial court indicated that plaintiffs' selection of forum was "not accorded the highest degree of deference because they are not citizens of Cook County," but it recognized that their choice was nonetheless entitled to some deference. *Ellis*, 357 Ill. App. 3d at 741.

¶ 35 3. Private Interest Factors

¶ 36 On appeal, defendants assert that the private interest factors weighed strongly in favor of

transferring the case to Virginia, and the trial court abused its discretion in focusing primarily on geographic convenience and failed to adequately consider the prejudice to defendants if the case remained in Illinois.

¶ 37 With respect to the first factor, the convenience of the parties, the trial court concluded that it "strongly favor[ed] maintaining this case in Cook County." The trial court noted that plaintiffs were presumably not inconvenienced by litigating the case in Cook County given that they chose the venue; it was not inconvenient for Phusion, Freeman, and Hunter to litigate this case where they resided; and Synergy and City Brewing were located closer to Cook County than to Fairfax County, Virginia. The court also observed that all parties had retained local Chicago counsel.

¶ 38 Although "a party's principal place of business may not be dispositive in the *forum non conveniens* analysis, it certainly is an acceptable factor to be weighed in determining whether Illinois is an inconvenient forum." *Erwin*, 408 Ill. App. 3d at 276. For example, the trial court did not abuse its discretion in *Erwin* in concluding that a defendant cannot "genuinely contend that litigating the case in Illinois, where it maintained its corporate headquarters, would prove inconvenient to it." *Erwin*, 408 Ill. App. 3d at 276 (the defendant's headquarters and source of safety policies were in Illinois while plaintiffs resided in and the exposure to allegedly harmful chemicals occurred in Arizona and Texas). See *Vivas v. Boeing Co.*, 392 Ill. App. 3d 644, 658 (2009) (finding that the defendant could not argue that Illinois was inconvenient where its corporate headquarters were in Chicago, even though the injury occurred in and all the plaintiffs were located in Peru).

¶ 39 In the instant case, the record evidence demonstrated that Phusion Projects registered its principal place of business with the Illinois Secretary of State at a Chicago address, two of its three corporate officers and founders were also Chicago residents, and Synergy was based in Illinois. Although Freeman asserted in his "declaration" attached to defendants' motion that Phusion Projects' registered address in Chicago was merely a post office box and that Phusion Projects maintained no physical headquarters in Chicago or elsewhere, he made a contradictory assertion in Phusion Projects' federal case that its headquarters have been located in Chicago since its inception.[7] As noted above, Phusion Projects fought the attempt to move its federal case from the Northern District of Illinois based on *forum non conveniens*. Additional evidence indicated that a Phusion Projects employee referred to Chicago as Phusion Projects' "home court" in an email to an employee of RaceTrac Petroleum. Phusion Projects also received mail at the Chicago address. Based on the foregoing, it was reasonable for the trial court to conclude that this factor strongly favored Cook County.

¶ 40 Defendants contend that the evidence merely showed that Illinois was not an *inconvenient* forum for plaintiffs, but plaintiffs did not demonstrate that it would be a *convenient* forum for them. This Court has held that, "[e]ven where, as here, all of the plaintiffs reside outside their chosen forum," a defendant cannot claim that the plaintiff's chosen forum is inconvenient for the

[7]Although it is improper to consider the fact that a defendant has previously filed lawsuits in other cases in Illinois in determining whether a forum is convenient (*Ammerman v. Raymond Corp*., 379 Ill. App. 3d 878, 888-89 (2008)), we note that we are considering only the fact that Freeman apparently made contradictory statements regarding Phusion Projects, and not the fact that a prior lawsuit was filed in Cook County.

plaintiff. *Erwin*, 408 Ill. App. 3d at 275 (citing *Langenhorst*, 219 Ill. 2d at 448). Defendants' argument essentially amounts to a contention that Illinois was not a convenient forum for plaintiffs, an argument which they are not permitted to advance. *Id.* Moreover, defendants, not plaintiffs, bore the burden of showing that the various factors strongly favored transfer. *Langenhorst,* 219 Ill. 2d at 444.

¶ 41 Further, as the trial court noted, the parties have retained local counsel. While not dispositive, this nonetheless may appropriately be considered by the court in analyzing a *forum non conveniens* motion. *Koss Corp. v. Sachdeva*, 2012 IL App (1st) 120379, ¶ 129 (citing *Dawdy*, 207 Ill. 2d at 179).

¶ 42 We next turn to the second factor, the relative ease of access to sources of testimonial, documentary, and real evidence. The trial court determined that this factor was a "mixed bag" and was ultimately neutral or slightly favored Virginia. Specifically regarding the access to documentary and real evidence, the trial court held that this was of little significance because much of the this evidence existed electronically in Phusion Projects' cloud-based system of storing documents, in emails, or at the homes of the individual defendants or employees of Phusion Projects. As such, this evidence could be made available in either forum. Although defendant argues that documentary evidence such as medical records and police reports were located in Virginia, "it has become well-recognized by our courts that given our current state of technology *** documentary evidence can be copied and transported easily and inexpensively." *Erwin*, 408 Ill. App. 3d at 281. Accordingly, the ease of access to documentary and real evidence did not weigh heavily in favor of transfer to Virginia and the trial court did not abuse its

discretion in finding that this aspect of the analysis was of little significance.

¶ 43 With respect to the ease of access to testimonial evidence, the court recognized that plaintiffs sought testimonial evidence from officers or employees of corporate defendants based predominantly in Illinois and Wisconsin, while defendants focused on occurrence witnesses located in Virginia and provided statements from four of those witnesses regarding inconvenience. The court found that this factor was neutral or slightly favored trial in Virginia.

¶ 44 It is an established principle of *forum non conveniens* jurisprudence that "[w]hen potential witnesses are scattered among several counties, including the chosen forum, and no single county enjoys a predominant connection to the litigation, the plaintiff should not be deprived of his chosen forum." *Berbig v. Sears, Roebuck & Co.*, 378 Ill. App. 3d 185, 188 (2007). Moreover, each case "must be considered as unique on its facts." *Langenhorst*, 219 Ill. 2d at 443. As previously stated, the court must not give any one factor conclusive effect, but must consider the totality of the circumstances of each case. *Id.* at 443-44.

¶ 45 Defendants argue that *Ellis*, a case relied on by plaintiffs, is distinguishable from the present circumstances. In *Ellis*, the plaintiff, a Cook County resident and daughter of a Philippine decedent who died in a plane crash in the Philippines brought suit in Cook County against a parts company and a financing company which leased and then sold the plane involved in the crash to a Philippine airline. *Ellis*, 357 Ill. App. 3d at 725-26. The court affirmed the denial of the defendants' motion to dismiss for *forum non conveniens*, even though the defendants raised "valid points" concerning the fact that 31 witnesses who possessed critical information regarding the cause of the crash resided in the Philippines, in addition to the crash

investigators and the plaintiffs' attorneys. *Id.* at 743. The court indicated that the other public and private interest factors did not strongly favor dismissal; the defendants' principal places of business were in Illinois, there was no need to view the accident site, compulsory process issues existed regardless of where the case was tried, and the two forums had an equal interest in deciding the controversy. *Id.* at 743-44, 747-48.

¶ 46 The trial court's opinion in the case at bar demonstrates that it gave careful consideration to the various locations of the parties' proposed witnesses. Although defendants focus mainly on occurrence witnesses located in Virginia, the court must consider the totality of the circumstances, which in this case included plaintiffs' product liability claims and their connection to Illinois. It is of particular significance that in the present case, plaintiffs generally do not dispute the events surrounding the accident and the decedent's death. At its core, this is a products liability case, and disputes regarding the accident in Virginia are secondary to the issues surrounding the product liability claims. Thus, the primary focus at an eventual trial will be what caused the decedent's erratic behavior, and not the events surrounding the accident. The cause of his erratic behavior has implications in both Virginia and Illinois.

¶ 47 We further observe that, of defendants' named witnesses, only four provided statements indicating that it would be inconvenient for them to travel to Illinois. There was no evidence regarding the remaining witnesses' willingness to travel to Illinois.[8] Moreover, one of plaintiffs'

[8]The parties dispute whether defendants provided sufficient evidence regarding their potential witnesses. Although courts have held that "a court cannot speculate as to witnesses' unwillingness to testify at trial where the witnesses have not yet been identified," (*Koss Corp. v. Sachdeva*, 2012 IL App (1st) 120379, ¶¶ 106-07), a defendant need not "submit affidavits

occurrence witnesses indicated his willingness to travel to Illinois. It also appears from defendants' list that much of the witnesses' testimony regarding the accident would potentially overlap and would amount to cumulative evidence; therefore, it likely would not be necessary to present the testimony of all Virginia-based witnesses. We find no abuse of discretion in the trial court's conclusion that this factor was neutral or slightly favored trial in Virginia. *Langenhorst*, 219 Ill. 2d at 441.

¶ 48 We next examine the somewhat related factor, the availability of compulsory process to secure the attendance of unwilling witnesses. Defendants contend that dozens of critical witnesses and the dismissed former defendants are located in Virginia and are not subject to compulsory process by Illinois courts, while plaintiffs could just as easily try the case in Virginia because their potential witnesses are mainly parties or employed by parties. Defendants argue that there are no witnesses who could be compelled to testify in Illinois and not Virginia, but 25 witnesses who could be compelled to testify in Virginia and not Illinois. Defendants note that presenting deposition testimony of witnesses at trial would not be an adequate substitute for live, in-court testimony. *Jones v. Searle Laboratories*, 93 Ill. 2d 366, 374 (1982).

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identifying the witnesses they would call and the testimony these witnesses would provide if the trial were held in the alternative forum" (*Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 258 (1981)). See *Koss*, 2012 IL App (1st) 120379, ¶¶ 107 (it is within a court's discretion "to consider the inconvenience to witnesses residing in [other forums] without affidavits from each witness stating his or her unwillingness to travel.") Here, defendants provided sufficient information about their potential witnesses; they provided a list of names of occurrence witness, their potential testimony, and their residences. Defendants only provided, however, four statements from four of the witnesses, which were unsworn and not notarized, indicating that trial in Illinois would be inconvenient.

¶ 49 Apparently the trial court held that this factor strongly favored trial in Virginia because all of the occurrence witnesses and treating physicians were located there, while witnesses in Illinois were either parties or employees of parties.[9] Although the trial court decided this factor in defendants' favor, defendants maintain that the court gave it insufficient weight. As the ruling we reach will necessarily cause the trial court to reweigh the relevant factors, we decline to address this argument.

¶ 50 Turning to the next factor, the cost of obtaining the attendance of willing witnesses, the trial court determined that this factor was neutral. The trial court observed that this factor was similar to the second factor, the ease of access to testimonial evidence, because it would be more economical for Illinois- and Wisconsin-based witnesses to attend trial in Cook County, while it would be more economical for Virginia-based witnesses to attend trial in Virginia. Considering the various locations of the witnesses, we cannot conclude that no reasonable person would adopt the view taken by the trial court. *Langenhorst*, 219 Ill. 2d at 442.

¶ 51 As to the possibility of viewing the premises, the trial court reasoned that although this factor favored Virginia, it deserved "little weight" under the circumstances. Defendants contend that the trial court underestimated the importance of the possibility of viewing the site of the accident. Because the central dispute in this case concerns the cause of the decedent's unusual behavior, the condition of the Virginia highway is likely of little relevance. When a case

[9] When proposed witnesses are employees of parties, our supreme court has found that a party would not likely encounter difficulty in securing the attendance of the other party's employees at trial. *Gridley v. State Farm Mutual Auto Ins. Co.*, 217 Ill. 2d 158, 174 (2005).

"primarily concerns a products liability claim," then "the importance of [the possibility of viewing the premises] diminishes *** because jury views of the accident site are not generally necessary in such cases." *Ammerman v. Raymond Corp*., 379 Ill. App. 3d 878, 891 (2008). As stated, the facts relating to the accident in this case are generally not disputed by plaintiffs. There is no indication that viewing the site where the decedent was struck by a vehicle would aid a jury in resolving the case. The trial court did not abuse its discretion. *Langenhorst*, 219 Ill. 2d at 442.

¶ 52 On this point, defendants rely on *Berbig*, 378 Ill. App. 3d at 190, in arguing that the possibility of viewing the accident site was an important consideration. However, in contrast to the present case, the private and public interest factors as a whole weighed heavily in favor of transferring the case to Minnesota in *Berbig*. The product at issue was purchased in Minnesota, the accident occurred in Minnesota, the plaintiff received medical treatment primarily in Minnesota, and occurrence witnesses were located in Minnesota. *Id.* The only connection to Illinois was that one of the defendant's principal place of business was in Illinois, but the lawn mower was not designed, tested, or manufactured in Illinois, and there were no witnesses or evidence in Illinois. *Id.*

¶ 53 Lastly, we address all other practical considerations which make a trial easy, expeditious, and inexpensive. It is this private interest factor that we feel, for the reasons set forth below, must be revisited by the trial court.

¶ 54 First, in its ruling, the trial court addressed the choice of law issue, and found it premature to rule on this issue but assumed for sake of defendants' motion that the law of Virginia would apply, and that this slightly favored transfer to Virginia. We agree with the appellant that this

issue is more appropriately considered under the public interest factor analysis. See *Gridley v. State Farm Mutual Auto Ins. Co.*, 217 Ill. 2d 158, 175 (2005).

¶ 55 Second, the record shows that the trial court was in error when it considered that City Brewing and Synergy had not joined the Phusion defendants' *forum non conveniens* motion. The record supports that Synergy and City Brewing had in fact joined the motion.[10] As a result, contrary to the court's finding, Synergy, who had remained in the case, would be subject to jurisdiction in Virginia had the motion been granted.

¶ 56 Lastly, due to the parties' motions to take judicial notice which were filed during the pendency of this appeal, we now know that plaintiffs have filed suit in Virginia against the Virginia-based defendants, that J. F. Fick has filed a third-party complaint against Phusion in Virginia, and that Phusion has filed a declaratory judgment action in Cook County, Illinois seeking damages related to product liability actions involving Four Loko and involving the insurance coverage of Four Loko. We further know, based on oral arguments in the present case, that there is a Wisconsin case pending against City Brewing.

¶ 57 We note that other than the trial court's statement regarding Virginia law, the trial court made no finding regarding the other practical conditions which make a trial easy, expeditious, and inexpensive. The fact that Synergy would be subject to jurisdiction in Virginia was not considered by the trial court, and the trial court considered the choice of law issue as part of the private interest factor analysis, instead of part of its public interest analysis. Moreover, the

[10] The trial court subsequently granted City Brewing's motion to dismiss based on lack of jurisdiction.

information regarding the newly filed cases in Virginia, Illinois, and Wisconsin, were not before the trial court at the time it exercised its discretion. As noted above, it is not the reviewing court's role to reweigh the factors on appeal. *Haight*, 215 Ill. Appl. 3d at 359; *Bishop*, 194 Ill. App. 3d at 477. We also find that it is not our role to weigh these factors on review based on new information. For these reasons, we find it necessary to remand to the trial court with instructions to consider the three considerations we have just listed.

¶ 58 4. Public Interest Factors

¶ 59 Considering our ruling set forth above, it is unnecessary to engage in an in-depth analysis of the trial court's findings with respect to the public interest factors. The trial court will necessarily reweigh the public interest factors upon remand when it considers the choice of law issue as part of the public interest analysis.

¶ 60 However, we briefly address defendants' contention that the trial court abused its discretion in finding that the public interest factor, the fairness of imposing jury duty on residents of a county, favored Illinois. In its ruling, the trial court found "that this case is not entirely a matter of local concern" to Virginia residents, but held the interest in deciding localized controversies locally nevertheless favored transfer. The trial court then concluded that the fairness of imposing jury duty and trial on residents of a county favored maintaining the case in Cook County. Defendants contend that the trial court placed too much emphasis on the fact that Phusion does business in Illinois and two of its officers and Phusion are located in Illinois.

¶ 61 "[W]hile the forum where the injury occurred 'generally has a strong interest in the outcome of litigation, this general rule does not necessarily apply to cases involving complex

products liability issues.' " *Woodward v. Bridgestone/Firestone, Inc.*, 368 Ill. App. 3d 827, 836 (2006) (quoting *Hefner v. Owens-Corning Fiberglas Corp.*, 276 Ill. App. 3d 1099, 1106 (1995)). Where "the plaintiffs' action is based on allegedly defective products," and the products were sold in Illinois and/or manufactured in Illinois, our courts have concluded that it is "reasonable to burden the residents" of an Illinois county with jury duty because "Illinois has a significant interest in the dispute." *Id.* at 837.

¶ 62 On the other hand, we previously noted that choice of law issues are appropriately considered under the public interest factors. " 'The need to apply the law of a foreign jurisdiction has been considered a significant factor favoring dismissal of a suit on grounds of *forum non conveniens*.' " *Gridley*, 217 Ill. 2d at 175 (quoting *Moore v. Chicago & North Western Transportation Co.,* 99 Ill. 2d 73, 80 (1983)). We leave it to the trial court to determine how much weight to accord the choice of law issue; however, it should be considered in the context of the public interest factors analysis.

¶ 63 We find no abuse of discretion in the trial court's determination that it was fair to impose the burden of trial on the residents of Cook County, Illinois. We disagree with defendants' attempt to minimize this case's connection to Illinois considering not only the fact that Phusion Projects, Freeman, Hunter, and Synergy were based in Illinois, but also the fact that plaintiffs alleged that events relating to their product liability claims occurred here. Moreover, as plaintiffs point out, our state's concern with products like Four Loko has been demonstrated by the fact that our legislature has passed a law regarding such beverages in Illinois. See 235 ILCS 5/6-35 (West 2010). That being said, however, these public interest factors will be revisted by the trial court

when it further considers the choice of law issue under its totality of the circumstances analysis here.

¶ 64 5. Summary

¶ 65 In summary, this matter is reversed and remanded to the trial court with instructions to perform a *forum non conveniens* analysis, taking into account the plaintiff's choice of forum and the private and public interest factors. Specifically, the trial court is to further consider that Synergy had joined the *forum non conveniens* motion and thus would be subject to jurisdiction in Virginia upon transfer; the existence of the newly filed litigation in Virginia, Wisconsin, and Illinois; and any choice of law considerations as a public interest factor.

¶ 66 CONCLUSION

¶ 67 For the reasons set forth above, we reverse the trial court's order denying defendants' motion and remand with instructions.

¶ 68 Reversed and remanded, with instructions.