2015 IL App (5th) 130578-U

NO. 5-13-0578

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

JEREMY DICKERSON, as Father and Next Friend of Skyler Dickerson, a Minor, Plaintiff-Appellee, v. JANE BARKER, Defendant-Appellant.	)	Appeal from the Circuit Court of St. Clair County. No. 11-L-605 Honorable Andrew J. Gleeson, Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Schwarm and Moore concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court did not abuse its discretion in denying motion to dismiss on grounds of *forum non conveniens* where the plaintiff filed the suit in the home county of the individual defendant and the convenience factors did not strongly favor dismissal.

¶ 2 The defendant, Jane Barker, D.O., appeals an order of the trial court denying her motion to dismiss this medical malpractice case on the basis of interstate *forum non conveniens*. The plaintiff, Jeremy Dickerson, filed his complaint in St. Clair County, Illinois, where the defendant lives; however, the medical care at issue was provided in Ste. Genevieve County, Missouri, where the plaintiff lives, and nearly all of the necessary

follow-up care took place in St. Louis, Missouri. The defendant argues that the trial court abused its discretion in denying her motion because the connections to Missouri predominate. We affirm.

¶ 3 The plaintiff brings this action on behalf of his young son, Skyler Dickerson. He alleges that on August 27, 2010, the defendant treated Skyler in the emergency room at Ste. Genevieve Memorial Hospital in Ste. Genevieve, Missouri. The defendant diagnosed Skyler with constipation and released him. Two days later, the Dickersons brought Skyler to the emergency room at Jefferson Regional Medical Center in Festus, Missouri. This time, Skyler was admitted and transferred to the pediatric intensive care unit at Cardinal Glennon in St. Louis. The plaintiff alleges that the defendant failed to take an adequate history, negligently failed to recommend urinalysis, improperly diagnosed Skyler, and negligently failed to recommend follow-up care within 24 hours. The plaintiff further alleges that, as a result of these failures, Skyler suffers from chronic renal damage.

¶ 4 The plaintiff filed his complaint in St. Clair County, Illinois, on October 26, 2011. On February 28, 2012, the defendant filed a motion to dismiss on the basis of *forum non conveniens*. She argued that the connections to Missouri predominated. In a supporting affidavit, the defendant stated that to the best of her knowledge, all witnesses other than herself resided in Missouri, and all records relating to her care of Skyler were located in Ste. Genevieve, Missouri. She further averred that Skyler's primary care doctor at the time of the events at issue resided and maintained an office in Ste. Genevieve County, Missouri. The defendant also stated that although she was licensed to practice medicine

in Illinois, she had practiced exclusively in Missouri since 2010. The defendant also attached to her motion the affidavit of Kathy Hammond, an emergency room nurse who provided nursing care to Skyler at the Ste. Genevieve Memorial Hospital emergency room. Hammond stated that she worked at Ste. Genevieve Memorial Hospital and lived in Farmington, Missouri. She further stated that it would be a hardship for her to travel to St. Clair County to testify.

¶ 5 On November 12, 2013, the court entered an order denying the defendant's motion. The order stated, in its entirety, "Motion argued and denied based upon all public and private factors." The defendant then filed the instant appeal pursuant to Illinois Supreme Court Rule 306(a)(2) (eff. Feb. 16, 2011).

¶ 6 Under the doctrine of *forum non conveniens*, a court may decline jurisdiction over a case in favor of another forum if it appears that litigating the matter in the other forum will be more convenient for the parties and better serve the ends of justice. *Fennell v. Illinois Central R.R. Co.*, 2012 IL 113812, ¶ 12. *Forum non conveniens* is an equitable doctrine based on principles "of fundamental fairness and sensible and effective judicial administration." *Gridley v. State Farm Mutual Automobile Insurance Co.*, 217 Ill. 2d 158, 169 (2005).

¶ 7 Although courts have the discretion to decline jurisdiction, they should do so only in exceptional circumstances. *First American Bank v. Guerine*, 198 Ill. 2d 511, 515 (2002). This is because a plaintiff has a substantial interest in choosing the forum in which to vindicate his rights. *Fennell*, 2012 IL 113812, ¶ 18 (citing *Dawdy v. Union Pacific R.R. Co.*, 207 Ill. 2d 167, 173 (2003)). As such, a key consideration is the

plaintiff's choice of forum. The plaintiff's choice is always entitled to deference. *Dawdy*, 207 Ill. 2d at 173; *Guerine*, 198 Ill. 2d at 518. However, it is not always entitled to the same level of deference. When a plaintiff chooses his home forum or a forum where the incident giving rise to his claim occurred, we may presume he chose this forum because it was convenient. When the plaintiff chooses a forum other than his home county or the site of the events at issue, this presumption is not as strong. *Dawdy*, 207 Ill. 2d at 173. As such, the plaintiff's choice is entitled to somewhat less deference than it otherwise would be in those circumstances. *Guerine*, 198 Ill. 2d at 517. Less deference, however, does not mean no deference. *Guerine*, 198 Ill. 2d at 518 (quoting *Elling v. State Farm Mutual Automobile Insurance Co.*, 291 Ill. App. 3d 311, 318 (1997)).

¶ 8 One concern underlying *forum non conveniens* jurisprudence is the need to discourage forum-shopping by plaintiffs. *Guerine*, 198 Ill. 2d at 521. Courts have always viewed the practice with disfavor, in part because it may burden communities with litigation over disputes that arose elsewhere. *Fennell*, 2012 IL 113812, ¶ 19. We recognize, however, "that both plaintiffs and defendants engage in the practice with equal fervor." *Schwalbach v. Millikin Kappa Sigma Corp*., 363 Ill. App. 3d 926, 930 (2005) (citing *Dawdy*, 207 Ill. 2d at 174, and *Guerine*, 198 Ill. 2d at 521).

¶ 9 In determining whether to grant a *forum non conveniens* motion, trial courts must balance all the relevant private and public interest factors. *Fennell*, 2012 IL 113812, ¶ 17 (citing *Gridley*, 217 Ill. 2d at 169-70). Private interest factors include: (1) the convenience of the parties; (2) the relative ease of access to testimony and other evidence; (3) the availability of compulsory service to secure the attendance of unwilling

witnesses; (4) the cost to secure the attendance of willing witnesses; (5) the possibility of a jury view of the premises, if appropriate; and (6) "all other practical considerations that make a trial easy, expeditious, and inexpensive." *Fennell*, 2012 IL 113812, ¶ 15. The public interest factors include: (1) the administrative difficulties of trying cases in courts with congested dockets; (2) the unfairness of imposing jury duty on residents of a county with little or no connection to the lawsuit; and (3) the interest in resolving local disputes locally. *Fennell*, 2012 IL 113812, ¶ 16. In ruling on a forum motion, courts must consider all of these factors and determine whether, on balance, they *strongly* outweigh the plaintiff's interest in choosing a forum. *Dawdy*, 207 Ill. 2d at 173; *Guerine*, 198 Ill. 2d at 517.

¶ 10 The decision to grant or deny a forum motion rests within the sound discretion of the trial court. *Fennell*, 2012 IL 113812, ¶ 21. On appeal, we will not overturn the court's decision absent an abuse of discretion. We will find an abuse of discretion where no reasonable person could take the position of the trial court. *Langenhorst v. Norfolk Southern Ry. Co.*, 219 Ill. 2d 430, 442 (2006).

¶ 11 The doctrine of *forum non conveniens* applies in both interstate and intrastate contexts, and the same analytical framework applies to each. *Fennell*, 2012 IL 113812, ¶ 13. In intrastate forum cases, the question is which county is the most convenient forum, whereas in interstate forum cases, such as this case, the issue is which state is the more appropriate forum. *Fennell*, 2012 IL 113812, ¶ 13. Nevertheless, in determining which state can provide a more convenient forum, we cannot overlook the fact that the defendant is not a Missouri resident and Ste. Genevieve County is the only Missouri

county in which venue is proper. See Mo. Ann. Stat. § 508.010(4) (West 2014). Thus, as a practical matter, a realistic assessment of many of the convenience factors requires us to consider the relative convenience of Ste. Genevieve County. See *Fennell*, 2012 IL 113812, ¶¶ 31, 43 (comparing the convenience of specific counties in Illinois and Mississippi for potential witnesses and the relative court congestion in both counties); *Kwasniewski v. Schaid*, 153 Ill. 2d 550, 554-55 (1992) (comparing the relative convenience of counties in Illinois and Wisconsin).

¶ 12 We also note that, as we will discuss, all likely witnesses and documentary evidence in this case are within an 85-mile radius of both possible forums. Although the doctrine of *forum non conveniens* has vitality even in a battle between adjacent counties (see *Dawdy*, 207 Ill. 2d at 180), the geographic proximity means that for most witnesses, the differences in mileage and travel time will be fairly minimal (see *Langenhorst*, 219 Ill. 2d at 450; *Kwasniewski*, 153 Ill. 2d at 554). With this in mind, we turn to a consideration of the relevant public and private interest factors in this case.

¶ 13 First and foremost, we consider the deference due the plaintiff's choice of forum. As stated, this choice is always accorded deference. *Dawdy*, 207 Ill. 2d at 173; *Guerine*, 198 Ill. 2d at 518. Here, because the plaintiff has not chosen his home county or the place where the cause of action arose, we accord his choice *somewhat* less deference than we would if he brought the action in his home county.

¶ 14 We turn now to the private interest factors. The first factor we will consider is the convenience of the parties. As discussed previously, the defendant makes her home in St. Clair County, Illinois. To prevail on a forum motion, she must show that the plaintiff's

choice of St. Clair County is inconvenient for her and that another forum is more convenient to all parties. She cannot prevail by asserting inconvenience to the plaintiff. See *Fennell*, 2012 IL 113812, ¶ 20; *Langenhorst*, 219 Ill. 2d at 444. As our supreme court has observed, this burden is virtually insurmountable when the plaintiff's chosen forum is the defendant's home county. See *Kwasniewski*, 153 Ill. 2d at 555 (explaining that "[i]t is all but incongruous for defendants to argue that their own home county is inconvenient").

¶ 15 The defendant's argument that her home county is somehow inconvenient for her is two-fold. First, as she correctly points out, numerous Illinois cases have held that the fact that a defendant does business or maintains a presence in the plaintiff's chosen forum is not dispositive. See, *e.g.*, *Gridley*, 217 Ill. 2d at 172; *Dawdy*, 207 Ill. 2d at 182; *Vinson v. Allstate*, 144 Ill. 2d 306, 311 (1991). This is because the doctrine of *forum non conveniens* assumes that there is more than one forum where venue is proper. A forum motion asks the court to look beyond factors that make venue proper–*i.e.*, the presence of a defendant in the chosen forum. *Fennell*, 2012 IL 113812, ¶ 47.

¶ 16 Although the defendant's argument correctly states the law, she overlooks the difference between a corporate defendant, which may have a presence in many different places, and an individual defendant who has one home. A corporate defendant may have offices in numerous counties, including the county where the plaintiff has chosen to file his complaint; however, the officers and employees whose presence is necessary at trial may live and work hundreds of miles away. The same cannot be said of an individual defendant such as the defendant here.

¶ 17 Second, the defendant argues that in deciding whether she has met her burden of demonstrating that the plaintiff's chosen forum is inconvenient for her, we should look beyond an assessment of how convenient it would be for her to attend trial in St. Clair County. She argues that the efforts required to defend herself in Illinois will be "monumental" because she asserts that all occurrence witnesses (other than herself) live in Missouri and all relevant medical records are kept in Missouri. We are not persuaded. It is important to note that the ability to secure the attendance of witnesses and the relative ease of access to other evidence are matters we consider when evaluating the remaining private interest factors. The defendant explicitly acknowledges that she "can attend the courthouse in St. Clair County with relative ease." We agree that this is not necessarily dispositive in every case–*forum non conveniens* is a flexible doctrine, and no one factor should be dispositive. See *Gridley*, 217 Ill. 2d at 169; *Dawdy*, 207 Ill. 2d at 176. Nevertheless, the convenience of the parties is an important factor, and in this case, it weighs heavily in favor of the plaintiff's chosen forum.

¶ 18 We will next consider the ease of access to testimonial, documentary, and other evidence. We focus first on the convenience of the witnesses. Both parties have identified few specific witnesses. The defendant has indicated that she will likely call Kathy Hammond, an emergency room nurse who treated Skyler. Hammond works in Ste. Genevieve and lives in Farmington, Missouri. Ste. Genevieve is a 28-mile drive from Farmington, which takes 33 minutes. Belleville, where the St. Clair County court is located, is 86 miles from Farmington, a drive of one hour and 24 minutes. See *Dawdy*, 207 Ill. 2d at 177 (explaining that courts may take judicial notice of the distances, typical

routes, and travel times between cities because these are matters subject to easy verification). Obviously, for Hammond, testifying at a trial in Ste. Genevieve would be more convenient. However, we are not persuaded by the defendant's bald assertion that this is the case for the remaining witnesses because, to the best of her knowledge, they are all Missouri residents.

¶ 19 The only specific witnesses the plaintiff has identified are himself, Skyler's mother, and Skyler. However, he has also indicated that he might call any of Skyler's health care providers. Those providers include staff at Ste. Genevieve Memorial Hospital (located in Ste. Genevieve, Missouri), Jefferson Regional Medical Center (located in Festus, Missouri), and Cardinal Glennon Children's Medical Center and South County Health Center (both located in St. Louis, Missouri). Although neither party has specifically indicated an intent to call Skyler's pediatrician, Dr. Kanani, the defendant notes that Dr. Kanani resides and maintains a medical practice in Ste. Genevieve County. Assuming he testifies live, Ste. Genevieve County would be the more convenient forum for Dr. Kanani. However, physicians rarely testify live; they nearly always testify by deposition. See *Roberts v. Illinois Power Co.*, 311 Ill. App. 3d 458, 463 (2000).

¶ 20 Other than Kathy Hammond and Dr. Kanani, the record does not indicate where any possible nonparty witnesses reside. We note, however, that Skyler undergoes dialysis three times a week at Cardinal Glennon. Presumably, most of the doctors, nurses, and medical technicians who regularly provide this care to him reside in or near St. Louis. St. Louis is significantly closer to Belleville (17 miles) than it is to Ste. Genevieve (63 miles). Skyler also received care at the Jefferson Regional Medical

Center emergency room in Festus, Missouri, which is slightly closer to Ste. Genevieve (30 miles) than it is to Belleville (49 miles). In addition, as the defendant emphasizes, Skyler received care in Ste. Genevieve, which is 77 miles from Belleville by interstate. We reiterate that many–if not most–of the healthcare providers who testify will do so by evidence deposition. Given this fact, the comparative distances witnesses must travel is not a significant factor in this case. Moreover, while we do not know which witnesses will testify in person or where any such witnesses live (other than the parties and emergency room nurse Kathy Hammond), it appears that Ste. Genevieve County will be more convenient for some witnesses, while St. Clair County will be more convenient for others. On the record before us, we find that this factor does not favor either forum. We reiterate that it is the defendant's burden to demonstrate that the factors strongly favor transfer. *Langenhorst*, 219 Ill. 2d at 444.

¶ 21 The documentary evidence at issue here consists of Skyler's medical records. The defendant argues that this factor favors a Missouri forum because all of those records are in Missouri. As noted earlier, however, most of the follow-up care Skyler has required has been provided in St. Louis, which is closer to St. Clair County. More importantly, Illinois courts recognize that the location of records and other documents has become a less significant factor than it once was due to the advent of email, fax machines, copy machines, and worldwide delivery services, all of which make documents easy to copy and send or transport. See *Fennell*, 2012 IL 113812, ¶ 36 (citing *Erwin v. Motorola, Inc.*, 408 Ill. App. 3d 261, 281 (2011)). In addition, in the case before us, neither possible forum is more than a 90-minute drive from any of the facilities in which care was

provided to Skyler. We do not believe bringing documents to court will add to the inconvenience any witness or party incurs by attending the trial in the first place. On the whole, we do not believe this factor favors either forum.

¶ 22 We will next address the possibility of a jury view of the premises if appropriate. This factor is concerned with the *possibility* of a jury view, not the *necessity* of such a view. *Dawdy*, 207 Ill. 2d at 178. Our supreme court has stated that whether a jury view is appropriate is a determination to be made by the trial court. *Fennell*, 2012 IL 113812, ¶ 37. In this case, the condition of the emergency room where Skyler was treated is not relevant to any issue in the case. Thus, it is virtually inconceivable that the trial court would find a jury view to be appropriate. Although this factor does favor Ste. Genevieve County, we do not find it appropriate to accord this factor much weight. To do so would be at odds with the practical and flexible nature of *forum non conveniens* jurisprudence, and would place undue emphasis on a single factor. See *Schwalbach*, 363 Ill. App. 3d at 938-39.

¶ 23 We next consider the remaining private interest factors–the availability of compulsory service to secure the attendance of unwilling witnesses, the cost to secure the attendance of willing witnesses, and other practical considerations that make trial of a case easy, expeditious, and inexpensive. As discussed previously, only two specific potential witnesses have been identified by either party–emergency room nurse Kathy Hammond and Skyler's pediatrician, Dr. Kanani. Both are Missouri residents. As also discussed previously, most of the remaining health care providers work in Missouri. It is

reasonable to presume that most of them are Missouri residents. Thus, the availability of compulsory service favors a Missouri forum.

¶ 24 The cost of securing the attendance of willing witnesses does not favor either forum. As we have already discussed, all of the health care providers work within 85 miles of both St. Clair County, Illinois, and Ste. Genevieve County, Missouri. In addition, as a practical matter, most are likely to testify by evidence deposition. Thus, the cost of securing the presence of willing witnesses at trial will not be significant in either forum.

¶ 25 Although neither party has identified expert witnesses, it is likely that both will retain experts to testify on their behalf. We give little weight to the convenience of retained experts for two reasons. First, expert witnesses are compensated for their time and inconvenience. *Fennell*, 2012 IL 113812, ¶ 34. Second, because plaintiffs are able to choose the expert witnesses they wish to retain, according significance to the location of these witnesses would allow plaintiffs to "frustrate the *forum non conveniens* principle" by choosing experts who live in counties that are not otherwise convenient. *Fennell*, 2012 IL 113812, ¶ 33. We acknowledge, however, that retaining expert witnesses requires parties to arrange for those experts to travel to the area to testify. The proximity of Lambert-St. Louis International Airport to Belleville makes it easier for both parties to arrange for their retained experts to travel to attend the trial if it is held in St. Clair County. Although this is not a significant factor, we have recognized that it is a proper consideration when assessing the practical considerations that make trial of a case easy, expeditious, and inexpensive. See *Schwalbach*, 363 Ill. App. 3d at 936.

¶ 26 We turn now to the public interest factors–the difficulty of trying cases in courts with congested dockets, the unfairness of imposing jury duty on residents of a county with little connection to the litigation, and the interest in resolving local disputes locally. *Fennell,* 2012 IL 113812, ¶ 16. We will first consider the comparative congestion of the courts in St. Clair County and Ste. Genevieve County. This is not a factor to be accorded a great deal of weight; however, it is appropriate to consider evidence that one forum will resolve the case more quickly than the other. *Fennell*, 2012 IL 113812, ¶ 43. Here, the defendant provided the court with statistics from both counties. The Illinois court statistics she provided indicated that the average time it takes to resolve a case involving a jury verdict of over $50,000 in St. Clair County is 53 months. The Missouri court statistical report indicates that the average time it takes to resolve a civil case in Ste. Genevieve County is 374 days, or 12½ months. The plaintiff argues that the St. Clair County court is better equipped to handle complex civil litigation such as a medical malpractice case because such cases are regularly tried there but are rare in Ste. Genevieve County. While this contention seems plausible, the only evidence in the record concerning court congestion and the speed of resolution of cases is the court reports we just discussed. Based on this evidence, we find that this factor weighs in favor of Ste. Genevieve County.

¶ 27 We may consider the final two factors–the unfairness of imposing jury duty on residents of a county with little connection to the litigation and the interest in resolving local disputes locally–together. See *Dawdy,* 207 Ill. 2d at 183 (explaining that it is unfair to impose the burden of jury duty on residents of a county with little or no connection to a

dispute). Here, the State of Missouri and Ste. Genevieve County clearly have a very strong interest in resolving this dispute. The plaintiffs are residents, the alleged negligence occurred there, and the defendant continues to practice medicine there. The State of Illinois and St. Clair County also have an interest in the litigation. The defendant lives in St. Clair County and is licensed to practice medicine in Illinois. On balance, however, Ste. Genevieve County and the State of Missouri have a stronger connection to this dispute. As such, these two factors favor Ste. Genevieve County as a forum.

¶ 28 In summary, the convenience of the parties favors St. Clair County; the remaining private interest factors, on balance, do not favor either forum; and all three of the public interest factors weigh in favor of a Missouri forum. As we explained earlier, the issue before the trial court was whether the defendant met her burden of demonstrating that these factors strongly outweigh the plaintiff's interest in choosing a forum. *Dawdy*, 207 Ill. 2d at 173. The issue before this court is whether the trial court abused its discretion in concluding that they do not. *Fennell*, 2012 IL 113812, ¶ 17; *Langenhorst*, 219 Ill. 2d at 442. Taken as a whole, the convenience factors weigh slightly in favor of Ste. Genevieve County. However, we do not believe the trial court abused its discretion in concluding that the factors do not *strongly* favor dismissal for a Missouri forum.

¶ 29 For the foregoing reasons, we affirm the order of the trial court denying the defendant's motion to dismiss.

¶ 30 Affirmed.