2016 IL App (4th) 150663-U

NO. 4-15-0663

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
June 15, 2016
Carla Bender
4th District Appellate
Court, IL

BILL BAUGHER and SHARON BAUGHER, Plaintiffs-Appellees, v. R.J. REYNOLDS TOBACCO COMPANY, as Successor-by-Merger to Lorillard Tobacco Company, Defendant-Appellant.	))))))))	Appeal from Circuit Court of McLean County No. 14L99 Honorable Rebecca Simmons Foley, Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Presiding Justice Knecht and Justice Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding the trial court did not abuse its discretion by denying defendant's motion to transfer the suit from McLean County to either Mercer or Rock Island County under the doctrine of *forum non conveniens*.

¶ 2 In June 2014, plaintiffs, Bill Baugher and Sharon Baugher, filed a complaint in McLean County against defendant, Lorillard Tobacco Company, which later merged into R.J. Reynolds Tobacco Company, as well as 44 codefendants, alleging all of the defendants exposed Bill to asbestos and therefore caused him to contract asbestosis.

¶ 3 In May 2015, defendant filed a motion to transfer for *forum non conveniens*, asserting either Mercer or Rock Island County was a more convenient location for litigation, as Bill resided, worked, and was exposed to asbestos in those counties. Following a July 2015 hearing, the trial court denied the motion.

¶ 4 Defendant appeals, asserting the trial court abused its discretion by denying its motion for transfer. For the following reasons, we affirm.

¶ 5 I. BACKGROUND

¶ 6 In June 2014, plaintiffs filed a complaint in the McLean County circuit court against defendant and 44 codefendants, alleging all of the defendants, at some point in time, exposed Bill to asbestos. The counts pertaining to defendant alleged defendant and several codefendants were in the business of manufacturing, distributing, and/or selling asbestos-containing products or asbestos fiber, and that Bill was exposed to asbestos by using these products. Plaintiffs alleged those defendants were negligent in failing to tell consumers about the health risks of asbestos and, as a result, Bill contracted asbestosis. Plaintiff also alleged several codefendants—but not this defendant—engaged in a conspiracy to conceal information regarding the presence and health risks of asbestos while exposing employees and consumers to asbestos-containing products. Owens-Illinois, Inc., which operated in McLean County, was one of the codefendants named in the conspiracy count.

¶ 7 In May 2015, defendant filed a motion to transfer based on *forum non conveniens*. At the time, approximately 39 codefendants remained in the case. Defendant argued plaintiffs' interrogatories and relevant discovery deposition testimony failed to establish any connection with McLean County. Rather, defendant asserted, most of the relevant contacts, including plaintiffs' residences, Bill's various places of employment, Bill's personal physicians, and the sites where Bill was exposed to asbestos were located either in Mercer or Rock Island County. In a supplemental motion, defendant added McLean County was at least 122 miles from any relevant witness or site of alleged asbestos exposure, which would be inconvenient for plaintiffs' witnesses and for any jury visits to the sites of exposure. Defendant also asserted the McLean

County dockets were more congested than the dockets in Mercer or Rock Island County, thus presenting administrative difficulties for McLean County.

¶ 8 In July 2015, plaintiffs filed a response to defendant's motion for transfer. Plaintiffs asserted defendant failed to demonstrate another forum was more convenient for all parties. Defendant responded that plaintiffs were engaging in improper forum shopping by filing their action in McLean County.

¶ 9 Later that month, following a hearing, the trial court denied defendant's motion for transfer. In reaching its decision, the court indicated it considered all the private- and public-interest factors without emphasizing one particular factor. The court noted plaintiffs' choice of forum was to be given less deference because it was not plaintiffs' home county. The court determined plaintiffs' conspiracy count involved at least one entity from McLean County, and therefore demonstrated a nexus between McLean County and the litigation. Additionally, the court found the location of the witnesses had little impact on the analysis because their presence could be procured through subpoena and travel expenses reimbursed. The court also highlighted the documentary nature of the evidence, which meant the evidence could be easily reviewed in any jurisdiction. Because of the nature of the multiparty case, the court determined it would be very difficult for the court to find any forum convenient to all the parties.

¶ 10 This appeal followed. During the pendency of the appeal, defendant filed a motion to strike portions of plaintiffs' appellee's brief. We ordered that motion taken with the case.

¶ 11 II. ANALYSIS

¶ 12 On appeal, defendant asserts the trial court erred in denying its motion to transfer due to *forum non conveniens*. However, before we reach the merits of the appeal, we must resolve defendant's motion to strike portions of plaintiffs' appellee's brief.

¶ 13 A. Motion To Strike

¶ 14 In its motion to strike portions of plaintiffs' appellee's brief, defendant argues that part of plaintiffs' statement of facts and exhibits should be stricken because those portions failed to comply with Illinois Supreme Court Rule 341(h) (eff. Feb. 6, 2013). Rule 341(h)(6) requires the parties to properly cite the record on appeal, and defendant claims plaintiffs failed to properly cite the record in several instances. Ill. S. Ct. R. 341(h)(6) (eff. Feb. 6, 2013). Defendant also asserted plaintiffs cited evidence not contained within the record.

¶ 15 "[T]he striking of an appellate brief, in whole or in part, is a harsh sanction and is appropriate only when the alleged violations of procedural rules interfere with or preclude review. [Citations.]" (Internal quotation marks omitted.) *In re Detention of Powell*, 217 Ill. 2d 123, 132, 839 N.E.2d 1008, 1013 (2005). In the present case, plaintiffs' brief substantially complies with Rule 341(h) and it neither hinders nor precludes our review. Accordingly, defendant's motion to strike is denied. However, we will disregard any inappropriate statements or arguments made by plaintiffs in their appellee's brief. See *Walk v. Illinois Department of Children & Family Services*, 399 Ill. App. 3d 1174, 1180, 926 N.E.2d 773, 779 (2010).

¶ 16 We now turn to the merits of defendant's appeal.

¶ 17 B. *Forum Non Conveniens*

¶ 18 Generally, when a party files a civil action, that action must commence in either (1) any defendant's county of residence, or (2) the county in which the cause of action arose. See 735 ILCS 5/2-101 (West 2014). Even where a defendant concedes the venue is proper, that

defendant may seek to transfer the case to another, more convenient, venue under the doctrine of *forum non conveniens*. *Langenhorst v. Norfolk Southern Ry. Co.*, 219 Ill. 2d 430, 441, 848 N.E.2d 927, 934 (2006).

¶ 19 When a defendant files a *forum non conveniens* motion, the courts look beyond the general criteria of venue and focus instead on the convenience of the chosen forum. *Id*. In that situation, the trial court considers whether another forum " 'would better serve the ends of justice.' " *Id.* (quoting *Vinson v. Allstate*, 144 Ill. 2d 306, 311, 579 N.E.2d 857, 859 (1991)).

¶ 20 The discretionary powers afforded the trial court in determining the appropriate venue under the doctrine of *forum non conveniens* should be exercised only in exceptional circumstances, where the interests of justice support a trial in a more convenient forum. *Id.* at 442, 848 N.E.2d at 934. The plaintiff's choice of forum should not be disturbed unless the factors strongly support a transfer of venue. *Id.* However, where the plaintiff chooses a forum that is neither the site of the injury or his residence, his choice of venue is given *slightly less* deference. *Id.* at 442-43, 848 N.E.2d at 934.

¶ 21 The trial court's decision regarding a motion to transfer for *forum non conveniens* will not be overturned absent an abuse of discretion. *Fennell v. Illinois Central R.R. Co.*, 2012 IL 113812, ¶ 21, 987 N.E.2d 355. "An abuse of discretion will be found where no reasonable person would take the view adopted by the circuit court." *Id.*

¶ 22 In determining whether to grant a defendant's motion to transfer under the doctrine of *forum non conveniens*, the trial court must consider both private- and public-interest factors. 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 considerations that make trial of a case easy, expeditious, and inexpensive. ' "

Langenhorst, 219 Ill. 2d at 443-44, 848 N.E.2d at 935 (quoting *First American Bank v. Guerine*, 198 Ill. 2d 511, 516, 764 N.E.2d 54, 58 (2002)). The public-interest factors the court must consider 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." *Id.* The court should consider all of the relevant factors and not emphasize any one factor. *Id*. at 443, 848 N.E.2d at 935. "The burden is on the defendant to show that relevant private and public interest factors 'strongly favor' the defendant's choice of forum to warrant disturbing plaintiff's choice." *Id.* at 444, 848 N.E.2d at 935.

¶ 23 We now turn to the analysis of the private- and public-interest factors.

¶ 24 1. *Private-Interest Factors*

¶ 25 Defendant first asserts the trial court incorrectly weighed the private-interest factors in plaintiffs' favor. As stated above, the private-interest factors the court must consider 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 considerations that make trial of a case easy, expeditious, and inexpensive.' " *Id.* at 443-44, 848 N.E.2d at 935 (quoting *Guerine*, 198 Ill. 2d at 516, 764 N.E.2d at 58).

¶ 26 a. The Convenience of the Parties

¶ 27 As to this factor, defendant argues the convenience of the parties would be better served in Mercer or Rock Island County, where plaintiffs lived and the alleged asbestos exposure occurred. Defendant noted plaintiffs' witnesses were located within 30 miles of either of those county's courthouses, thus making those locations more convenient than McLean County.

¶ 28 However, defendant's argument fails to explain how the McLean County forum is inconvenient to *defendant*. See *Guerine*, 198 Ill. 2d at 518, 764 N.E.2d at 59 ("The defendant must show that the plaintiff's chosen forum is inconvenient to the defendant and that another forum is more convenient to all parties."). Defendant failed to provide any allegations, affidavits, or evidence demonstrating McLean County was inconvenient or that Mercer or Rock Island County were more convenient to defendant. Moreover, defendant makes no mention of the convenience of Mercer or Rock Island County for any of the remaining 39 codefendants, who are also parties to the action. We note, that a majority of those defendants have not moved for a transfer due to *forum non conveniens*. Defendant's assertion that McLean County is inconvenient for plaintiffs and their witnesses is also problematic because "the defendant cannot assert that the plaintiff's chosen forum is inconvenient to the plaintiff." *Langenhorst*, 219 Ill. 2d at 444, 848 N.E.2d at 935. As the appellate court noted in *Dykstra v. A.P. Green Industries, Inc.*, 326 Ill. App. 3d 489, 496, 760 N.E.2d 1034, 1040 (2001), the fact that the plaintiff's chosen venue "has little to no connection to this controversy does not relieve defendants of the burden of showing that this forum is inconvenient and that another forum is convenient to all the parties."

¶ 29 We therefore conclude defendant has failed to demonstrate the private-interest factor of convenience to the parties weighs strongly in favor of transfer.

¶ 30 b. Access to Testimonial, Documentary, and Real Evidence

¶ 31 Defendant next asserts the evidence is more easily accessible in Mercer and Rock Island Counties because plaintiffs' doctors and witnesses, as well as the alleged exposure to asbestos, occurred in or adjacent to those counties.

¶ 32 As to the witnesses, several of plaintiffs' witnesses are inarguably located closer to Mercer or Rock Island County than McLean County. Defendant argues the convenience of

the parties is served by the close proximity of the witnesses, making their availability more ready. See *Botello v. Illinois Central R.R. Co.*, 348 Ill. App. 3d 445, 456, 809 N.E.2d 197, 208 (2004). That being said, plaintiff also disclosed dozens of witnesses employed by codefendants who appear to reside outside of Mercer and Rock Island counties. Additionally, numerous codefendants have disclosed lay witnesses that are located throughout the United States.

¶ 33 The trial court determined the location of plaintiffs' Mercer and Rock Island County witnesses was not an important factor in its analysis, as they could be compelled to attend court in any county through subpoena. See Ill. S. Ct. R. 237(a) (eff. July 1, 2005). While the location of the witnesses is an important aspect of a *forum non conveniens* motion, defendant has not brought forth any evidence indicating its access to witnesses is in any way diminished, or that those witnesses would be inconvenienced by traveling to McLean County for trial.

¶ 34 As to the access to evidence, other than a sweeping, general statement regarding the accessibility of evidence, we note defendant has not pointed to a single document or piece of evidence that is more accessible in Mercer or Rock Island County than in McLean County. In reaching its decision, the trial court noted the evidence was largely documentary, which was easily transferred between locations. We agree. In the digital age, the transfer of documents has become far easier, making this factor less significant. See *Fennell*, 2012 IL 113812, ¶ 36, 987 N.E.2d 355.

¶ 35 Defendant also argues the jury's access to potential viewing sites is hampered by keeping the case in McLean County, rather than transferring the case to Mercer or Rock Island County, where plaintiff's alleged exposure occurred. "This convenience factor is not concerned with the *necessity* of viewing the site of the injury, but rather is concerned with the *possibility* of viewing the site, if appropriate." (Emphases in original.) *Dawdy v. Union Pacific R.R. Co.*, 207

Ill. 2d 167, 178, 797 N.E.2d 687, 697 (2003). "[T]he necessity or propriety of viewing the scene is a decision left within the discretion of the trial court." *Id.* at 179, 797 N.E.2d at 697. Defendant argues, not only was Bill exposed to asbestos in Mercer and Rock Island counties, but one of the sites where Bill was allegedly exposed to asbestos—the Cordova plant—remains operational in Rock Island County. Thus, a site visit would be a possibility, and it would be unfair to ask McLean County jurors to travel to another county for such a viewing.

¶ 36 Cleary the possibility of viewing the Cordova plant weighs in favor of transfer. We note the possibility of a site viewing seems to be the only obstacle under this factor and it is not insurmountable. As has been discussed above, the possibility of a viewing is only a portion of what we are to consider under the access to testimonial, documentary, and real evidence factor. When we look to the varying considerations under this factor, the possibility of the site visit fails to be persuasive enough to make the necessary showing.

¶ 37 We therefore conclude defendant has failed to demonstrate this factor weighs strongly in favor of transfer.

¶ 38 c. Other Practical Considerations

¶ 39 Under this factor, we consider "all other practical considerations that make a trial easy, expeditious, and inexpensive." *Id.* Plaintiffs note, the case has been pending in McLean County since June 2014, where the trial court has ruled on several substantive motions and, at one point, had scheduled a trial date of February 2016. Accordingly, plaintiffs assert it would be impractical to transfer the case to another venue at this stage of the proceedings, where another court would essentially be required to start from the beginning. Defendant asserts it was not served with a copy of the complaint until January 2015. It then filed a motion to transfer in May

2015, a mere four months after being served. Thus, defendant argues, it sought transfer in a timely manner, before the McLean County court became too invested in the litigation.

¶ 40 We agree that a transfer at this juncture would increase the costs of litigation and delay a resolution of the case. We therefore conclude defendant has failed to demonstrate a transfer of venue would make the trial easier, more expeditious, and less expensive.

¶ 41 Having considered the private-interest factors, we now turn to the public-interest factors.

¶ 42 2. *Public-Interest Factors*

¶ 43 Defendant next asserts the public-interest factors weigh in its favor. These 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, 848 N.E.2d at 935.

¶ 44 a. Interest in Deciding Controversies Locally

¶ 45 Defendant asserts McLean County has no interest in deciding plaintiffs' case locally, as no portion of the case arose from McLean County. Defendant argues venue is favored where the underlying cause of action accrued, relying on *Ruch v. Padgett*, 2015 IL App (1st) 142972, ¶ 75, 40 N.E.3d 448. Because Bill's alleged exposure was in Mercer and Rock Island counties, defendant asserts venue is more appropriate in one of those locations rather than McLean County.

¶ 46 Plaintiffs, in turn, argue the asbestos cases are not locally based controversies but, rather, have an impact across the nation. Because defendant sold, and continues to sell, its cigarettes throughout Illinois, plaintiffs assert McLean County has an interest in the litigation as

much as Mercer and Rock Island Counties. See *Laverty*, 404 Ill. App. 3d at 539, 956 N.E.2d at 7. However, the fact that defendant sold its products in McLean County is largely irrelevant to the analysis, as this case presents not an issue of venue, but of convenience to the parties. See *Dawdy*, 207 Ill. 2d at 182, 797 N.E.2d at 699.

¶ 47 Plaintiffs also assert their conspiracy claim had a nexus with McLean County because it alleged several codefendants, including Owens-Illinois, Inc., engaged in a conspiracy in McLean County to downplay the impact of asbestos. Defendant contends such a nexus is tenuous, as the plant owned by Owens-Illinois, Inc., which manufactured asbestos products, has long since burned down. Defendant also argues the conspiracy counts are not meritorious. However, we are not here to determine whether the pending conspiracy count, in which defendant is not named, is meritorious. The fact that the conspiracy count creates a nexus between McLean County and the cause of action is sufficient at this time to demonstrate some local interest in the outcome.

¶ 48 b. Unfairnesss of Burden to McLean County Taxpayers and Jurors

¶ 49 Defendant argues it would be unfair to impose the burden of a trial and jury duty on McLean County taxpayers and jurors. See *id.* at 183, 797 N.E.2d at 700. (county's residents should not be burdened with jury duty on a case that had no relation to the county). Though Mercer and Rock Island Counties jurors certainly have more connection and interest in this action than McLean County, we must not overlook the pending conspiracy count involving other codefendants that alleges wrongdoing in McLean County. That provides McLean County jurors and taxpayers with an interest in the outcome and, thus, the burden to taxpayers and jurors is not unfair.

¶ 50 c. Administrative Difficulties

¶ 51 Defendant contends McLean County's docket is more crowded than Mercer or Rock Island County's dockets, thus imposing administrative difficulties for the trial court's already congested docket. Court congestion is considered a relatively insignificant factor, particularly where the record does not demonstrate another proposed forum would resolve the case more quickly. *Langenhorst*, 219 Ill. 2d at 451-52, 848 N.E.2d at 939-40. Defendant references the 2013 Annual Report of the Illinois Courts, which demonstrates the McLean County caseload is more congested than either Mercer or Rock Island County. Other than providing a chart indicating the number of cases filed in each county per judge, defendant has provided no information regarding the amount of time for a case to proceed to trial in each county to demonstrate transfer would be more convenient.

¶ 52 Our review of the 2012, 2013, and 2014 annual reports of Illinois courts shows Mercer County had no civil cases with a request of more than $50,000; thus, we have no way of comparing how quickly this small county would resolve such extensive litigation. In 2014, McLean County resolved such cases in an average of 53.4 months, whereas Rock Island County resolved their cases in 43.7 months. In 2013, McLean County averaged 52.6 months in getting such a case to a jury whereas, in 2012, it averaged only 31.1 months. In 2013, Rock Island County averaged 40.2 months in getting such a case to jury whereas, in 2012, it took an average of 38.2 months. While these statistics suggest Rock Island County would be able to resolve the case more quickly, those numbers do not take into account the fact that McLean County has already been overseeing this case since June 2014. That being said, the statistics support Rock Island County as a more favorable venue.

¶ 53 Nonetheless, we note the trial court is in the best position to determine the congestion of its own docket. *Id.* at 451, 848 N.E.2d at 939. The court here clearly did not find

its docket to be an impediment to resolving the case, which already had a projected trial date of February 2016 at the time of this action.

¶ 54 Accordingly, though Rock Island County may, on average, resolve cases more quickly than McLean County, we conclude the difference between the counties does not *strongly* support transfer.

¶ 55 After weighing all of the private- and public-interest factors, we conclude defendant has failed to demonstrate said factors weigh strongly in favor of transfer.

¶ 56 3. *Supreme Court Precedent*

¶ 57 Nevertheless, defendant contends the trial court's decision in this case contradicts supreme court precedent.

¶ 58 a. The *Bland* Case

¶ 59 Defendant first points to *Bland v. Norfolk & Western Ry. Co.*, 116 Ill. 2d 217, 506 N.E.2d 1291 (1987). In *Bland*, the plaintiff brought an action for a railyard accident in Madison County, despite his injuries accruing in Macon County. *Id.* at 221, 506 N.E.2d at 1293. The defendant filed a motion to transfer the case to Macon County based on *forum non conveniens*. *Id.* The plaintiff argued venue was convenient in Madison County, where (1) the defendant had switching operations, (2) the plaintiff was treated by two physicians, and (3) the plaintiff occasionally performed switching operations. *Id.* at 222, 506 N.E.2d at 1293. The defendant, in turn, asserted Macon County, where the accident occurred, witnesses lived, and the plaintiff resided, was more convenient, particularly in light of Madison County's congested docket. *Id.* at 221-22, 506 N.E.2d at 1293.

¶ 60 The supreme court agreed with the defendant, concluding the factors favored transferring the case to Macon County because the connection to Madison County was

insignificant. *Id.* at 225-26, 506 N.E.2d at 1295. Plaintiffs in this case distinguish *Bland* by noting the trial court's primary reason for denying the transfer in *Bland* was the close proximity of the counties, an emphasis the supreme court rejected. *Id.* at 227, 506 N.E.2d at 1295. That was not a consideration by the trial court in the present case. We disagree with plaintiffs' characterization limiting *Bland*. Though the *Bland* court noted the trial court's emphasis on the close proximity of the counties, it also examined all of the public- and private-interest factors and determined the connection of the litigation to Macon County far outweighed its connection to Madison County, a forum in which the plaintiff did not reside, nor where the accident occurred. *Id.* at 229, 506 N.E.2d at 1296.

¶ 61 b. The *Dawdy* Case

¶ 62 Defendant next relies on *Dawdy*, 207 Ill. 2d 167, 797 N.E.2d 687. In *Dawdy*, the supreme court directed the cause transferred from Madison County to Macoupin County on the grounds of *forum non conveniens* where the accident occurred and treating physicians resided in or near Macoupin County, and the plaintiff had no connections with Madison County other than a post office box. *Id.* at 184, 797 N.E.2d at 700. Accordingly, the court found Madison County had little or no interest in trying a case that arose out of Macoupin County. *Id.*

¶ 63 Plaintiffs distinguish *Dawdy* by noting, in the present case, one potential expert witness disclosed by numerous other defendants resides in McLean County, whereas no witnesses had connections with Madison County in *Dawdy*. Also, unlike in *Dawdy*, which involved an accident on the highway, plaintiffs assert on-site jury visits are unlikely in the present case. Additionally, the defendant in *Dawdy* sought transfer to its county of residence, whereas the defendant here seeks transfer to plaintiffs' county of residence.

¶ 64 c. The *Fennell* Case

¶ 65 Third, defendant relies on *Fennell*, 2012 IL 113812, 987 N.E.2d 355. In *Fennell*, the supreme court held venue was more convenient in Mississippi rather than in Illinois, as the alleged exposure to asbestos, the majority of the witnesses, and plaintiff's residence were all in Mississippi. *Id*. ¶ 48. Moreover, the Mississippi witnesses could not be compelled to attend court by an Illinois subpoena, nor would it be practical for on-site visits by the jury. *Id*. ¶ 34.

¶ 66 Plaintiffs distinguish *Fennell* by noting it was a case of interstate transfer, where compulsory process would be unavailable, rather than an issue of intrastate transfer as presented here. We agree. Although the principles of *forum non conveniens* are the same between interstate and intrastate transfers, one of the factors the *Fennell* court emphasized was the unavailability of compulsory service out of state, which is not an issue for intrastate transfers. See Ill. S. Ct. R. 237(a) (eff. July 1, 2005).

¶ 67 After considering the cases relied upon by defendant, we find the distinguishing factor between those cases and the case at bar is that the present case has 39 codefendants still pending in McLean County, most of which have not requested a transfer of venue. In a close analysis, and after considering all of the relevant factors, we find that particular consideration tips the balance in favor of venue in McLean County.

¶ 68 Accordingly, we conclude the trial court did not abuse its discretion in denying defendant's motion to transfer due to *forum non conveniens*.

¶ 69 III. CONCLUSION

¶ 70 For the foregoing reasons, we affirm the trial court's judgment.

¶ 71 Affirmed.