2017 IL App (1st) 162398-U

SECOND DIVISION
June 13, 2017

No. 1-16-2398

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

IRVIN ROHL and MARLENE ROHL, Plaintiffs-Appellants, v. BORG WARNER CORPORATION, CATERPILLAR, INC., CBS CORPORATION, DANA COMPANIES LLC, FEDERAL-MOGUL ASBESTOS PERSONAL INJURY TRUST, FORD MOTOR COMPANY, GENERAL ELECTRIC CORPORATION, GENUINE PARTS COMPANY, GEORGIA-PACIFIC LLC, GOULDS PUMPS, INC., THE GOODYEAR TIRE & RUBBER COMPANY, HENNESSY INDUSTRIES, INC., HONEYWELL INTERNATIONAL, INC., JOHN CRANE, INC., KAISER GYPSUM COMPANY, INC., KELSEY HAYES COMPANY, MACK TRUCKS, INC., MARMONT CORPORATION, MCCORD CORPORATION, METROPOLITAN LIFE INSURANCE COMPANY, NAVISTAR INTERNATIONAL TRANSPORTATION CORPORATION, PNEUMO ABEX LLC, and UNION CARBIDE CORPORATION, Defendants (Caterpillar, Inc., and Navistar International Transportation Corporation, Defendants-Appellees).	)	Appeal from the Circuit Court of Cook County No. 2016 L 676 Honorable Claire E. McWilliams Judge Presiding.

JUSTICE MASON delivered the judgment of the court.
Justices Neville and Pierce concurred in the judgment.

ORDER

¶ 1 *Held*: Circuit court's order denying defendant's *forum non conveniens* motion reversed where plaintiff denied or was, at best, equivocal about exposure to asbestos in Cook County and all of the relevant factors favored transfer to Winnebago County.

¶ 2 Plaintiffs Irvin and Marlene Rohl sued several defendants in the circuit court of Cook County for alleged asbestos exposure that caused lung cancer, which ultimately led to Irvin's death. Certain defendants, including Caterpillar and Navistar, filed motions to transfer this matter to Winnebago County under the doctrine of *forum non conveniens*. The circuit court denied the motions, citing Irvin's attendance at a trade school in Cook County in the late 1940's where, according to the court's ruling, Irvin was exposed to asbestos.

¶ 3 Caterpillar sought leave to appeal pursuant to Illinois Supreme Court Rule 306 (eff. Feb. 16, 2011). We initially denied Caterpillar's petition, but on December 21, 2016, the supreme court entered a supervisory order directing us to grant the petition (in which it allowed Navistar to join) and resolve it on its merits.

¶ 4 The record does not support the circuit court's factual finding relating to the connection between this litigation and Cook County given Irvin's deposition testimony that, at most, he was "not sure" whether he was exposed to asbestos in Cook County. And because (i) there are no other connections to Cook County and (ii) the relevant factors overwhelmingly favor Winnebago County, we reverse the order denying Caterpillar's motion and remand with directions to transfer this matter to Winnebago County.

¶ 5 According to the complaint filed on January 21, 2016, in the circuit court of Cook

County, prior to his retirement in 1999, Irvin was employed as a laborer, heavy equipment operator and mechanic. During the period from 1950 until 1999, Irvin was exposed to asbestos-containing products and equipment manufactured by a variety of companies named as defendants, including Caterpillar and Navistar, and as a result, he developed lung cancer. In particular, Irvin alleged that he worked with asbestos-containing brakes, gaskets, clutches, engines, heavy duty equipment and vehicles manufactured by Caterpillar and Navistar.

¶ 6 During discovery related to defendants' *forum non conveniens* motions, Irvin provided a summary of his various places of employment where he claimed exposure to asbestos. The only exposure relating to Cook County was identified as "Automotive and Diesel Trade School" during the period from 1946-47. Other workplace exposures were listed as occurring in (i) Evansville, Indiana, (ii) Freeport, Illinois in Stephenson County, and (iii) from 1953 to 1999, in Rockford, Illinois in Winnebago County.

¶ 7 Irvin's deposition was taken. With respect to his attendance at the trade school in Cook County, Irvin testified that the parts he worked with at the school, including brakes, clutches and gaskets, were new and clean. Therefore, Irvin never used compressed air to clean those parts.[1] When asked whether he believed he was exposed to asbestos during his attendance at the trade school, Irvin responded, "No. Not sure." Although Irvin spent a total of eight months in Cook County between 1946 and 1947, he was ill for two

[1] Since 2006, the Occupational Safety and Health Administration has recommended that when handling asbestos-containing parts such as brakes, gaskets and clutches, workers either use (i) a negative pressure enclosure/HEPA-controlled vacuum system to isolate the part and any fibers that may escape when handled or cleaned or (ii) the low pressure "wet cleaning method" that saturates the fibers with water containing an organic cleaning solvent or wetting agent prior to handling to prevent the fibers from becoming airborne. See www.osha.gov/dts/shib/shib072606.html (last visited June 6, 2017).

months and, therefore, his only possible exposure was during the six-months he attended the trade school.

¶ 8 Irvin and Marlene, who was appointed administrator of Irvin's estate after his death in 2016, lived their entire adult life in Winnebago County. From 1957 until 1999, Irvin worked at Rockford Blacktop in Rockford. Irvin's co-workers at Rockford Blacktop, with whom he continued to meet regularly following his retirement, live in Winnebago County. The majority of Irvin's medical treatment took place in Winnebago County, with the exception of treatment he received at the Mayo Clinic in Scottsdale, Arizona. None of Irvin's treating physicians or medical care providers is based in Cook County. Marlene and Irvin's surviving adult children all live in Winnebago County.

¶ 9 The sole issue on appeal is whether the circuit court erred in denying defendants' motion to dismiss based on the doctrine of *forum non conveniens.* The circuit court is vested with considerable discretion when ruling on a *forum non conveniens* motion, but is subject to reversal if the court abused its discretion in balancing the relevant factors. *Decker v. Union Pacific R.R. Co.*, 2016 IL App (5th) 150116, ¶ 16. A circuit court abuses its discretion if no reasonable person would take the view it adopted. *Id.*

¶ 10 Resolution of a defendants' *forum non conveniens* motion begins with the well established principle that the doctrine is premised on "considerations of fundamental fairness and sensible and effective judicial administration." *Gridley v. State Farm Mutual Automobile Insurance Co.*, 217 Ill. 2d 158,169 (2005). It assumes that more than one forum possesses the power to hear the case, but permits a court to decline jurisdiction where another forum can "better serve the convenience of the parties and the ends of justice." *Id.*

¶ 11 In determining whether the doctrine applies, the court must balance private interest factors affecting the convenience of the litigants and public interest factors affecting the administration of the courts. *Erwin v. Motorola, Inc.*, 408 Ill. App. 3d 261, 274 (2011). The private interest factors include (1) the convenience of the parties; (2) the relative ease of access to testimonial and documentary evidence; and (3) all other practical problems that make trial of a case "easy, expeditious, and inexpensive," while the public interest factors include (1) the interest in deciding controversies locally; (2) the unfairness of imposing trial expense and the burden of jury duty on residents of a forum with little connection to the litigation; and (3) the administrative difficulties presented by adding litigation to already congested court dockets. *Langenhorst v. Norfolk Southern Ry. Co.*, 219 Ill. 2d 430, 443-44 (2006) (citing *First American Bank v. Guerine*, 198 Ill. 2d 511, 516-17 (2002)). The court must balance these factors applying a totality of the circumstances approach, while remaining mindful that a defendant bears the burden of showing that those circumstances favor transfer. *In re Marriage of Mather*, 408 Ill. App. 3d 853, 859 (2011).

¶ 12 Ordinarily, a plaintiff has a substantial interest in choosing the forum where his rights will be litigated, and as such, a plaintiff's choice of forum should rarely be disturbed unless the relevant factors strongly favor transfer. *Dawdy v. Union Pacific R.R. Co.*, 207 Ill. 2d 167, 173 (2003). But where the plaintiff's injury did not occur in the chosen forum or where the plaintiff is not a resident of that forum, the plaintiff's choice is entitled to far less deference. *Fennell v. Illinois Central R.R. Co.*, 2012 IL 113812, ¶ 26. When these circumstances are present, "'it is reasonable to conclude that the plaintiff engaged in forum shopping to suit his individual interests, a strategy contrary to the

purposes behind the venue rules.'" *Dawdy*, 207 Ill. 2d at 174 (quoting *Certain Underwriters at Lloyds, London v. Illinois Central R.R. Co.*, 329 Ill. App. 3d 189, 196 (2002)).

¶ 13 This is the situation we confront here. It is undisputed that Marlene and Irvin, until the time of his death, resided in Winnebago County during their entire adult lives. While plaintiffs maintain that part of Irvin's injury occurred in Chicago, this is not borne out by the evidence. Instead, the evidence reveals that during Irvin's six months in trade school in Chicago, he denied any exposure to asbestos, or was at best unsure whether exposure occurred. These equivocal statements are insufficient to establish that Irvin's injury occurred in Cook County.

¶ 14 In arguing to the contrary, plaintiffs cite expert testimony that any exposure to asbestos above background levels substantially contributed to Irvin's lung cancer. But this argument overlooks Irvin's own testimony that the parts he worked with at the trade school in Cook County were new and clean: *i.e.*, free from asbestos dust. Irvin did not need to scrape or clean gaskets, nor did he need to use compressed air. This testimony suggests that to the extent Irvin was exposed to asbestos in Cook County, it was not above background levels. Accordingly, given that plaintiffs do not reside in Cook County and Irvin's injury did not occur there, plaintiffs' choice of forum is entitled to far less deference. See *Fennell*, 2012 IL 113812, ¶ 26.

¶ 15 With this mind, we turn to a consideration of the relevant factors, beginning with the private interest factors and the convenience of the parties. Defendants do not explain how a trial in Cook County would inconvenience them, but instead argue that because Marlene lives in Winnebago County, she cannot possibly find it convenient to litigate this

case in Cook County. But defendants cannot be heard to argue that a plaintiff's forum choice is inconvenient to plaintiff. See *Erwin*, 408 Ill. App. 3d at 275. Marlene, on the other hand, while averring that she finds Cook County a convenient forum, also does not explain how she would be inconvenienced by a trial in her home county. Thus, the convenience of the parties does not strongly favor either forum. See *Ruch v. Padgett*, 2015 IL App (1st) 142972, ¶ 51 (finding that where neither party argues its own inconvenience, this factor does not favor either forum).

¶ 16 Turning next to the ease of access to testimonial and other sources of evidence, it is clear that this factor strongly favors Winnebago County. All identified potential witnesses, including Irvin's family members, co-workers, and most treating physicians (with the exception of physicians who treated Irvin at the Mayo Clinic in Arizona), reside or work in Winnebago County. Plaintiffs have not identified a single witness who works or resides in Cook County. While it is true, as the circuit court noted, that defendants did not produce affidavits from the possible Winnebago County witnesses explicitly stating the inconvenience of attending a trial in Cook County, not only are such affidavits not required, but it is obvious that it would be easier to access these witnesses' testimony in Winnebago rather than Cook County.

¶ 17 In addition, Irvin's medical and employment records are maintained in Winnebago County, which is also the location of the primary site of Irvin's asbestos exposure between 1953 and 1999. We recognize that the ease of access to documentary evidence is a less significant factor given the rise of computer technology and Internet access (*Taylor v. Lemans Corp.* 2013 IL App (1st) 130033, ¶ 21), but many of Irvin's employment records predate computer technology and so we may not assume they are as

readily available as records of more recent vintage. Also, the possibility of viewing the site of injury continues to be an important consideration in a *forum non conveniens* analysis. *Fennell*, 2016 IL 113812, ¶ 37. Overall, then, the private interest factors weigh strongly in favor of transfer to Winnebago County.

¶ 18 The public interest factors likewise weigh strongly in favor of transfer. First, this controversy is local to Winnebago County, where Irvin was exposed to asbestos for over 45 years. We have already determined that based on Irvin's own testimony, it is at best uncertain whether any exposure to asbestos occurred in Cook County. While plaintiffs argue that "hundreds, perhaps thousands" of Cook County residents have come into contact with defendants' asbestos-containing products, this speculation is insufficient to establish a "significant factual connection" to Cook County so as to render this case a local controversy. See *Fennell*, 2012 IL 113812, ¶ 44 (merely because residents of county "'have an interest in traveling asbestos and other harmful substances,'" it does not follow that that county necessarily has a "significant factual connection" to the litigation) (citing *Jones v. Searle Laboratories*, 93 Ill. 2d 366, 377 (1982)).

¶ 19 And given the lack of connection to Cook County, it would also be manifestly unfair to burden Cook County residents with jury duty and trial expenses associated with litigating this matter here.

¶ 20 Finally, court congestion is a relatively insignificant factor in a *forum non conveniens* analysis. See *Berbig v. Sears Roebuck & Co., Inc.*, 378 Ill. App. 3d 185, 189 (2007). On this point, based on a review of the 2014 annual report of the Administrative Office of the Illinois Courts (Annual Report), Cook County is plainly more congested than Winnebago County, with 1,108,254 civil cases pending at year end, compared with

Winnebago County's 93,950. See *Dawdy*, 207 Ill. 2d at 181 (Annual Report is proper reference to assess court congestion). Yet, the time between filing and verdict for a law jury verdict above $50,000 was 4 months longer in Winnebago County than in Cook County. But even assuming this relatively minor delay favors Cook County, this does not change our conclusion that considered as a whole, the public interest factors strongly favor transfer to Winnebago County.

¶ 21 For these reasons, we find the circuit court abused its discretion in denying defendants' motion to dismiss based on *forum non conveniens*. We reverse the judgment of the circuit court and remand with directions to grant defendants' motion to dismiss the action in accordance with Illinois Supreme Court Rule 187(c)(2) (eff. Jan. 4, 2013).

¶ 22 Reversed and remanded with directions.