2018 IL App (1st) 173184-U

SIXTH DIVISION
July 27, 2018

No. 1-17-3184

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DALTON L. BROWN, MICHAEL F. GROSS, MICHAEL K. WENDT, EDDIE C. CROWDER, JERRY DRUMGOOLE, and BENJAMIN MUNOZ, Plaintiffs, (Michael F. Gross, Plaintiff-Appellee,) v. BNSF RAILWAY COMPANY (Individually and as a Successor-in-interest to the Burlington Northern, Inc., Burlington Northern and Santa Fe Railway Company, and Atchison, Topeka and Santa Fe Railway Company), Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County. No. 16 L 9796 Honorable Clare McWilliams, Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's decision to deny defendant's motion to sever and transfer based on the doctrine of *forum non conveniens* was not an abuse of discretion where defendant failed to meet its burden to show that plaintiff's chosen forum was inconvenient to it, and where the private and public interest factors did not strongly weigh in favor of transfer; affirmed.

¶ 2 Defendant, BNSF Railway Company, appeals the trial court's decision that denied its motion to sever the claim of one of the plaintiffs, Michael F. Gross, and transfer it to Knox County pursuant to the doctrine of *forum non conveniens*. On appeal, defendant argues that the trial court abused its discretion in denying the motion because the plaintiffs' claims were improperly joined, and the claim of one of the plaintiffs should have been transferred to Knox County, the location where he resides and his alleged asbestos exposure occurred. We find that the trial court did not abuse its discretion and affirm its decision.

¶ 3 BACKGROUND

¶ 4 This case involves injuries that allegedly stem from railroad workplace exposure to asbestos and asbestos-containing products. Plaintiffs, Dalton L. Brown, Michael F. Gross, Michael K. Wendt, Eddie C. Crowder, Jerry Drumgoole, and Benjamin Munoz (collectively referred to as plaintiffs[1], individually referred to by each plaintiff's last name) filed their one-count complaint against defendant on October 4, 2016, alleging negligence pursuant to the Federal Employers' Liability Act (Act) (45 U.S.C. § 51 *et seq.* (2000)).

¶ 5 On June 2, 2017, plaintiffs filed their first amended complaint, adding a count for negligent infliction of emotional distress. The first amended complaint alleged that plaintiffs were former employees of defendant who, during the course of their employment, were exposed to "toxic substances and dusts including dust from asbestos-containing products and materials, silicates and silica-containing products, diesel exhaust, welding fumes, and cleaning solvents, which caused them to suffer severe and permanent personal injuries." Specifically, all plaintiffs

[1] In its appellate brief, defendant noted that on October 18, 2017, Munoz dismissed his claim against defendant pursuant to settlement. Additionally, defendant stated that the claims of Crowder and Drumgoole were severed and transferred to the Cook County Asbestos Deferred Registry, and dismissed without prejudice. As a result, defendant suggests the only remaining plaintiffs are Gross, Brown, and Wendt. However, plaintiffs have not made the same representation in their brief and the record before this court does not contain orders reflecting dismissal of Munoz, Crowder, or Drumgoole. Nonetheless, when we refer to plaintiffs as a collective, we are referring to those plaintiffs still remaining in the case.

alleged that they suffered from asbestosis, an occupational lung disease, and some plaintiffs also alleged they had a form of cancer. The first amended complaint further alleged that "[p]laintiffs were unaware of the dangerous propensities of the dust, fumes, vapors and toxins they were required to work with and around and were unaware of the cause of any latent abnormal medical condition."

¶ 6 With the exception of certain details of each plaintiff's background, the allegations of the first amended complaint were the same for all plaintiffs. Specifically, the following background information was alleged:

> "[]Plaintiff, Dalton L. Brown worked for the Defendant Railroad and/or its predecessors from 1964 to 2002 as a Yard Switchman, Trainman and Conductor. He worked a portion of his career in and around the Defendant Railroad's yards and shops in Cicero, Illinois. He has been diagnosed with an occupational lung disease, namely Asbestosis and Lung Cancer.
>
> []Plaintiff, Michael F. Gross worked for the Defendant Railroad and/or its predecessors from 1971 to 2012 as a Locomotive Painter and Carman. He worked a portion of his career in and around the Defendant Railroad's yards and shops in West Burlington, Iowa and in Galesburg, Illinois. He has been diagnosed with an occupational lung disease, namely Asbestosis. He has also been diagnosed with occupationally related Colon Cancer."

Count I of plaintiff's first amended complaint, alleging negligence under the Act, stated that defendant had violated the Act through one or more of the following acts or omissions:

> "(a) in failing to provide Plaintiffs with a reasonably safe place within which to work;

(b) in failing to furnish Plaintiffs with safe and suitable tools and equipment including adequate protective masks and/or protective inhalation devices;

(c) in failing to warn Plaintiffs of the true nature and hazardous effects of exposure to dusts, fumes, vapors, toxins, and other hazardous materials;

(d) in failing to exercise reasonable care in publishing and enforcing a safely [*sic*] plan and method of handling and installing products that contained or produced hazardous dusts and toxins;

(e) in failing to provide adequate, if any, instructions in the use or removal of products that contained or produced hazardous dusts, fumes, vapors and toxins;

(f) in failing to provide Plaintiffs with safe and proper ventilation systems in the workplace;

(g) in failing to inquire of the suppliers of products to its shops regarding the hazardous nature of exposure to the dusts, fumes, vapors and toxins contained in such products;

(h) in requiring Plaintiffs to work with and around ultra-hazardous products; and

(i) in failing to periodically test and examine Plaintiffs to determine if they were subject to any ill effects of their exposure to dusts, fumes, vapors, toxins and other hazardous substances."

The first amended complaint further stated that as a result of one or more of the aforementioned alleged negligent acts, plaintiffs "developed an occupational lung disease and as a result sustained injury to their body and respiratory systems, resulting in pain and suffering, mental anguish, and progressive impairment and disability."

¶ 7 As to count II, the negligent infliction of emotional distress count, plaintiffs' first amended complaint alleged that plaintiffs "were informed by a physician that as a result of his

[*sic*] exposure to asbestos while employed by the [defendant] his expected life span had been greatly diminished."

¶ 8 According to information contained in the record, defendant filed its answer to plaintiffs' first amended complaint on July 3, 2017. However, the record on appeal does not contain a copy of defendant's answer.

¶ 9 On August 15, 2017, defendant filed a motion to sever and transfer Gross's claim to Knox County based on the doctrine of *forum non conveniens*. Defendant's motion argued that Brown and Gross were improperly joined as plaintiffs and Gross's claim should be severed because "it is unlikely that [Brown and Gross] worked on the same machines and/or equipment, had the same supervisors, or [were] subject to [the] same working conditions." Defendant also asserted that Gross was not a necessary party to Brown's claim and their claims did not arise from the same transaction or events. Defendant also argued that Gross's claim should be transferred to Knox County pursuant to the doctrine of *forum non conveniens*. Defendant asserted that Knox County was the location where Gross worked and where all of the incidents giving rise to his claim occurred. Defendant further contended that the public and private interest factors weighed heavily in favor of transfer because Gross had no connection to Cook County and any presumed fact witnesses would be located in, or closer to, Knox County.

¶ 10 In support of its motion, defendant included the affidavit of Kevin W. Bell, a claims manager for defendant. Bell's affidavit included the following information:

> "[] Dalton Brown was employed by [defendant] as a trainman, switchman, and yard conductor and worked in Cicero, Illinois from 1964-2002.

> [] Michael Gross was employed by [defendant] as a trainman, switchman, and yard conductor and worked in Galesburg, Illinois and West Burlington, Iowa between 1971 through 2012."

Bell's affidavit further stated that defendant's rail yards located in Galesburg in Knox County are approximately 200 miles from Cook County. Additionally, Bell attested that "[a]ny witnesses on behalf of Gross are likely to be located in Knox County" and "[t]he majority of the records and physical evidence pertaining to Gross'[s] claim are likely to be located or maintained in Knox County." Bell's affidavit also mentioned the possibility of viewing the scene of the accident, which is 4 miles from the Knox County courthouse and 200 miles from the Richard J. Daley Center in Cook County. Bell's affidavit concluded with his opinion that "[g]iven the location of the scene, the witnesses, and the evidence that has been collected, it would be far more convenient to all parties involved if this case were tried in the Knox County Courthouse in Galesburg, Illinois, than it would be if the case were tried in Chicago, Illinois."

¶ 11 Defendant also attached the most recent annual report from the Administrative Office of the Illinois Courts regarding the number of annually-filed and pending cases in each Illinois county. According to the 2015 report, Cook County had 1,158,072 pending cases and a total of 1,082,598 cases filed that year. Specifically, in terms of cases where damages sought exceeded $50,000, such as the instant case, Cook County had 19,540 newly filed cases. Comparatively, Knox County had 25,379 pending cases and a total of 30,636 cases filed in 2015. As to cases where damages sought exceeded $50,000, Knox County had 128 newly filed cases. Overall, at the end of 2015, the report stated that Cook County had 20,555 pending cases in which $50,000 or more was sought and Knox County had 254 such cases.

¶ 12 On September 26, 2017, Gross filed his response to defendant's motion, asserting that there is nothing inconvenient about Cook County for any party. Specifically, Gross argued that the plaintiffs were properly joined because their injuries were caused by exposure to "a cocktail of [t]oxic [s]ubstances" and each plaintiff was exposed in a similar fashion to the same types of asbestos-containing products and machinery. Gross also contended that the plaintiffs' claims arise out of a common question of law under the Act, which allows a plaintiff to have causation of his injuries determined "by the simple test of whether the injuries resulted 'in whole or in part' from the Defendant Railroad's negligence, which is far less burdensome than the usual proximate cause test applied in common-law negligence cases." Further, Gross argued that allowing plaintiffs to remain joined in Cook County will promote judicial economy because there will be significant travel expenses irrespective of the location of the trial, and alleged that severing and transferring his case would inconvenience the litigation by requiring two separate trials in two separate counties. As to the *forum non conveniens* issue, Gross also argued that it was immaterial that his and Brown's exposure occurred in different locations, which is to be expected for employees working in train service, and asserted that the private and public interest factors did not strongly weigh in favor of transfer. Gross pointed out that defendant cannot argue that Gross's own choice of forum is inconvenient to him, and instead must show why Cook County is inconvenient to it, which it cannot do because defendant conducts business here, and thus resides here for purposes of venue. Gross also noted that his and Brown's expert witness, who diagnosed all of the plaintiffs with asbestosis and other occupation-related diseases, is located in Chicago. Gross also asserted that although some witnesses are located in Knox County, other witnesses are located throughout the country and would testify via videotaped evidence deposition, rendering their locale irrelevant.

¶ 13 Attached to Gross's response were physician's reports from his expert, Dr. Alvin J. Schonfeld, regarding Gross and Brown. In Gross's report, Dr. Schonfeld described Gross's occupational history as follows:

> "Between 1971 and 2012 he worked for the Burlington Northern/Burlington Northern & Santa Fe Railroad.
>
> He worked on the steam lines of passenger coaches. He changed the steam lines. He removed and replaced the asbestos on the steam lines and asbestos-wrapped pipe. He changed the gaskets on the steam lines that ran between the coaches.
>
> He worked on derailments working around the diesel crane. He worked in the car shop and roundhouse. He sanded engines. He also painted engines. He worked in the shop while diesel engines were being rebuilt. He worked in an office in the repair facility that contained asbestos-containing tile.
>
> He changed numerous composition and metallic brake shoes on freight cars, cabooses, refrigerator cars. He worked alongside the machinists changing brake shoes on diesel locomotives.
>
> Over the years, he stripped asbestos off pipes and boilers. He worked with asbestos gaskets, blankets, ropes and gloves. He knocked asbestos off pipes. He applied asbestos to pipes and boilers.
>
> He inhaled brake shoe dust from passing trains. He worked near the retarders. He sandblasted inside of hoppers without benefit of respiratory protection.
>
> He thinks the only respiratory protection that he got from the railroad was when he was painting."

Dr. Schonfeld concluded in his report that due to Gross's history of significant exposure to asbestos in the workplace, he felt that "with a reasonable degree of medical certainty that Mr. Gross is diagnosed as having bilateral asbestosis," and that "to a reasonable degree of medical certainty" Gross's asbestosis and history of colon cancer are causally related to workplace asbestos exposure.

¶ 14 As to Brown's occupational history with defendant, Dr. Schonfeld's report stated:

> "1964 to 2002 he worked for the Chicago Burlington & Quincy/Burlington Northern & Santa Fe Railroad. He rode on several types of diesel locomotives including covered wagon, EMD, GE, Alco and Baldwin engines.
>
> He also rode in cabooses, some of which had potbelly stoves. He stated there was insulation on the walls near the potbelly stove. He remembers inhalation of brake shoe dust in the caboose and he swept the caboose floor.
>
> He went in and out of the roundhouse and car shops to pick up equipment while other trades working on equipment in the roundhouse that was not yet ready.
>
> He also worked on derailments in the early years working around steam cranes and in later years, around diesel cranes.
>
> He worked around air hoses and asbestos-covered wire.
>
> On an as needed basis, he changed metallic and/or composition brake shoes on freight engines.
>
> He is not sure that the railroad provided any respiratory protection."

Dr. Schonfeld concluded in his report that due to Brown's history of significant exposure to asbestos in the workplace, he felt that "with a reasonable degree of medical certainty that Mr.

Gross is diagnosed as having bilateral asbestosis," and that Brown's asbestosis is causally related to his workplace asbestos exposure.

¶ 15 On October 10, 2017, defendant filed its reply in support of its motion to sever and transfer, asserting that Gross's claims arose from a separate transaction that was not closely related to any of the other plaintiffs. Defendant argued that Gross was a carman, whose duties included inspecting for defects and maintaining and repairing equipment, and that Brown was a brakeman and engine foreman, whose duties included switching railroad cars in a yard and being responsible for the movement of trains in transit. Defendant further contended that Gross failed to point out any of the same products to which he and Brown were exposed. Additionally, defendant argued that Gross's claim not only differed from Brown's, but also from the other plaintiffs. Specifically, defendant stated that Gross's job responsibility differed from that of Wendt, Drumgoole, and Crowder, and attached defendant's employee transcripts for Brown, Gross, Wendt, and Crowder. No employee transcript for Drumgoole was attached. Brown's transcript reflected that he was initially hired as a brakeman, and then worked as an engine foreman in Aurora. Gross's transcript stated that he worked as a carman "other" and carman "freight" in Galesburg. Wendt's transcript stated that he was hired a machinist, and worked as a mechanical foreman and a locomotive foreman in Cicero. Crowder's report stated that he worked as a carman "other" and carman "freight" in Cicero. Defendant's reply also reiterated its position that litigating the claim in Knox County would be more convenient to all parties.

¶ 16 On October 31, 2017, the circuit court entered an order denying defendant's motion to sever and transfer "for reasons stated on the record including the fact that [defendant] does business in Cook County and the court finds no reason to change or upset the venue chosen by plaintiff."

¶ 17 On November 9, 2017, defendant filed an emergency motion to reconsider its ruling denying defendant's motion to sever and transfer, or in the alternative, to clarify its ruling. Defendant argued that the court had erred in its prior ruling and did not provide a full analysis of the private and public interest factors.

¶ 18 On November 20, 2017, the circuit court entered an order sustaining defendant's motion to reconsider or clarify, and on November 28, 2017, the court issued a written order, finding that defendant's argument in favor of severing Gross's claim was not persuasive. The court explained its reasoning as follows:

> "Gross and Brown's injuries are the result of the same series of transactions, which occurred during their work at BNSF. Both properly joined Plaintiffs worked for the same train company, in a similar line of work, during overlapping time periods, and both allegedly incurred asbestos related injuries from asbestos containing products purportedly used in all BNSF trains during the relevant time periods. *** Both causes of action are based on the claimed negligence of BNSF in allowing the joined plaintiffs to be exposed to asbestos containing products during their respective jobs."

On the issue of *forum non conveniens*, the court conducted the requisite public and private interest factors analysis. As to the private interest factors, the court found that the first factor, convenience of the parties, did not weight in favor of dismissal because "Cook County's convenience is assumed as it relates to Plaintiffs because a portion of the alleged exposure to asbestos fibers allegedly occurred here." The court also found that defendant was a resident of Cook County, and there existed no specific evidence in the record of inconvenience to any party if litigation ensued here. The court noted that the second factor, ease of access to sources of evidence, did not strongly weigh in favor of transfer because evidence would likely be located in

both Cook and Knox Counties, and computer technology and internet access has lessened the significance of this factor. The court found the third factor, the availability of compulsory process to secure attendance of unwilling witnesses and the cost to obtain such witnesses, did not weigh in favor of transfer because defendant's notation regarding the minor cost discrepancy to subpoena witnesses was not compelling enough to strongly favor Knox County over Cook County. The court explained that the fourth "factor does not concern the necessity of viewing the premises, but rather is concerned with the possibility of a view, if appropriate." The court determined that the fourth factor did not strongly weigh in favor of transfer because "[t]he use of modern technology and written discovery makes any alleged need for visiting these jobsites weak at best. It is practical for both parties to procure the relevant site-specific evidence needed without physically visiting Mr. Gross'[s] jobsites." The court also noted that both plaintiffs' and defendant's attorneys were located in Chicago, and although the location of attorney carries little weight, it may be considered.

¶ 19 The court next analyzed the public interest factors, and found those, too, disfavored transfer. The court found the first public interest factor, unfairness of imposing jury duty upon residents of a county with no connection to the litigation, did not weigh in favor of transfer because the residents of Cook County had a connection to this litigation. Specifically, the court stated, "All parties allegedly worked in the same or similar condition during overlapping time periods in Cook County and throughout the State of Illinois." The court also found the second public interest factor, congestion in the court, did not strongly weigh in favor of transfer because "[defendant] [has] done nothing to show, that if this case were transferred to Knox County, it would be resolved more quickly than if it were heard in Cook County." Further, the court explained that it was "capable of assessing the congestion factor, or lack thereof, of its own

docket." Finally, as to the third public interest factor, the interest of having local controversies decided locally, the court found that "residents of Cook County have an interest in deciding a controversy involving allegations of asbestos fiber exposure in their county and throughout the State of Illinois on a national railroad company such as BNSF." The court ultimately determined that defendant failed to meet its burden of showing how it would be inconvenienced by a trial in Cook County, and that the relevant factors, when viewed in their totality, indicated that a trial in Cook County would better serve the convenience of the parties and the ends of justice.

¶ 20 On December 28, 2017, defendant filed a petition for leave to appeal pursuant to Illinois Supreme Court Rule 306(a)(2) (eff. Nov. 1, 2017), which was granted by this court on January 23, 2018.

¶ 21 ANALYSIS

¶ 22 On appeal, defendant contends that the circuit court incorrectly denied its motion to sever and transfer pursuant to the doctrine of *forum non conveniens* because an analysis of the relevant factors indicates that Knox County is the more convenient forum. We first address the motion to sever and then turn to the motion to transfer based on *forum non conveniens*.

¶ 23 Section 404 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-404 (West 2016)) in relevant part, states as follows:

> "All persons may join in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally or in the alternative, whenever if those persons had brought separate actions any common question of law or fact would arise. If upon the application of any party it shall appear that joinder may embarrass or delay the trial of the

> action, the court may order separate trials or enter any other order that may be expedient."

"The objective of joinder is the economy of actions and trial convenience. The determining factors are that the claims arise out of closely related transactions and that there is in the case a significant question of law or fact that is common to the parties." (Internal quotation marks omitted.) *Prime Leasing, Inc. v. Kendig*, 332 Ill. App. 3d 300, 308 (2002). Section 2-1006 of the Code states that an action may be severed as an aid to convenience, whenever it can be done without prejudice to a substantial right. 735 ILCS 5/2-1006 (West 2016).

¶ 24 "A motion to sever is addressed to the sound discretion of the trial judge, to be exercised in each case by an appraisal of administrative convenience and the possibility of prejudice to substantial rights of the litigants in the light of the particular problems which will arise in the course of the trial." *Pickering v. Owens-Corning Fiberglas Corp.*, 265 Ill. App. 3d 806, 811 (1994). The standard of review on the issue of severance is an abuse of discretion. *Walter v. Carriage House Hotels, Ltd.*, 239 Ill. App. 3d 710, 725 (1993). "The trial court has broad discretion in determining whether to grant a severance." *Id.*

¶ 25 Here, the trial court found that Gross's and Brown's injuries resulted from the same series of transactions during their work for defendant. Specifically, the trial court reasoned, "Both properly joined Plaintiffs worked for the same train company, in a similar line of work, during overlapping time periods, and both allegedly incurred asbestos related injuries from asbestos containing products purportedly used in all BNSF trains during the relevant time periods." Although we agree with defendant's assertion that there is no evidence in the record that supports the trial court's finding that the asbestos-containing products were "used in all BNSF trains during the relevant time periods," we nonetheless find that the trial court's decision

was proper. "[W]e may affirm the trial court's decision on any basis that appears in the record before us, whether or not the trial court in fact relied on that basis, and even if the trial court's reasoning was incorrect." *Father & Sons Home Improvement II, Inc. v. Stuart*, 2016 IL App (1st) 143666, ¶ 27.

¶ 26 We find it pertinent to initially point out that there appears to be some confusion amongst the parties regarding what type of work Gross did while employed for defendant. In the "Parties and Service" section of plaintiffs' first amended complaint, it states that Gross worked as "a Trainman, Switchman and Yard Conductor." Conversely, in the "Factual [Background]" section of plaintiffs' first amended complaint, it states that Gross worked as "a Locomotive Painter and Carman." Gross acknowledges these discrepancies in its brief by stating that although he "incorrectly identified Mr. Gross as a Trainman, Switchman and Yard Conductor in *** the Parties and Service section of his *** First Amended Complaint, Mr. Gross's craft was correctly identified in the Factual Background section of *** [his] First Amended Complaint." However, further complicating the issue are the contents of Bell's affidavit, which stated:

> "[] Dalton Brown was employed by [defendant] as a trainman, switchman, and yard conductor and worked in Cicero, Illinois from 1964-2002.
>
> [] Michael Gross was employed by [defendant] as a trainman, switchman, and yard conductor and worked in Galesburg, Illinois and West Burlington, Iowa between 1971 through 2012."

Thus, defendant's own claims manager attested that Gross worked as a "trainman, switchman, and yard conductor." Defendant does not acknowledge or explain why Bell's affidavit contains the same incorrect information as plaintiffs' first amended complaint. Thus, Gross's job title is somewhat unclear to this court. Further complicating the matter is the complete lack of any

evidence of the job duties of a carman versus a trainman, switchman, or yard conductor. These are not laymen's terms, and an affidavit or other evidence regarding the specifics of these job titles should have been provided to this court, especially when we are tasked with determining the similarities or differences between the work done by Gross and Brown in the context of a motion to sever. It is well-settled that "any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984). Here, defendant filed a petition for leave to appeal pursuant to Rule 306(a)(2), which provides, "A supporting record conforming to the requirements of Rule 328 shall be filed with the petition [for leave to appeal]." Ill. S. Ct. R. 306(a)(2) (eff. Nov. 1, 2017) Rule 328 states, "Any party seeking relief from the reviewing court before the record on appeal is filed shall file an application or petition with an appropriate supporting record containing enough of the trial court record to show an appealable order or judgment, a timely filed and served notice of appeal (if required for appellate jurisdiction), and any other matter necessary to the application made." Ill. S. Ct. R. 328 (eff. July 1, 2017). It is unclear whether the trial court was provided with information that would be helpful to resolve the severance issue. Because defendant prepared the supporting record that was presented with its petition for leave to appeal, we construe the lack of evidence against defendant.

¶ 27 Our review of the record indicates that the trial court's decision not to sever Gross's claim was within its broad discretion. The record before this court evidences that both Brown and Gross worked for defendant during the same timeframe, namely 1971 to 2002. Specifically, Brown worked for defendant from 1964 to 2002, and Gross worked for defendant from 1971 to 2012. Thus, although Brown began and ended his work for defendant before Gross, they nonetheless worked for defendant over the same 30-year time frame. Brown and Gross also

worked for defendant in similar ways. We recognize that Brown and Gross did not work in the same rail yard, and may not have had the same job title[2]. However, according to Dr. Schonfeld's reports, Brown and Gross both changed brake shoes. Specifically, Gross "changed numerous composition and metallic brake shoes on freight cars" and Brown, on an as-needed basis, "changed metallic and/or composition brake shoes on freight engines." Additionally, Brown and Gross both worked on derailments and around diesel cranes. Dr. Schonfeld's reports also reflect that Brown and Gross both worked in the "car shop" and "roundhouse." Although neither of these terms is defined, it is undisputed that Brown and Gross did not work in the same rail yard. Thus, it would be reasonable to infer that the rail yards where Brown and Gross worked, although in different cities, were somewhat similar in that both contained a car shop and roundhouse. All of the foregoing sufficiently shows Brown and Gross participated in the same series of transactions.

¶ 28 Further, plaintiffs' first amended complaint contains the same allegations of negligence for each plaintiff. The first amended complaint alleged that plaintiffs were injured due to same conduct by defendant, *i.e.*, failing to provide plaintiffs with a reasonably safe place within which to work and failing to furnish plaintiffs with safe tools and equipment, including protective inhalation devices. Brown and Gross worked in rail yards that, although not in the same location, were owned and/or operated by defendant. Additionally, all plaintiffs alleged that they suffered from asbestosis. The record contains reports from Dr. Schonfeld, plaintiffs' expert witness, who diagnosed both Brown and Gross with asbestosis. Dr. Schonfeld's reports specifically stated that in his opinion, Brown and Gross's asbestosis were causally related to their workplace asbestos exposure, or the exposure that occurred while working for defendant.

[2] According to Bell's affidavit, Gross and Brown had the same job title. However, in Gross's brief, he suggests he did not have the same job title as Brown.

Further, in Dr. Schonfeld's report regarding Brown, he stated that Brown was unsure whether defendant provided any respiratory protection. Similarly, in Dr. Schonfeld's report regarding Gross, he stated that Gross believed the only respiratory protection he received from defendant was when he was painting. Plaintiffs' complaint contains an allegation that defendant was negligent when it failed to provide respiratory protection to plaintiffs. Thus, significant common questions of law or fact exist between claims brought by Brown and Gross because the court and the ultimate trier of fact in both claims will need to determine whether defendant had a duty to provide respiratory protection, whether it complied with that duty, and if it did not, whether plaintiffs' injuries were a result of negligence.

¶ 29 Defendant has failed to show how the trial court's denial of its motion to sever was an abuse of its "broad discretion." See *Walter*, 239 Ill. App. 3d at 725. We reiterate that an action may be severed as an aid to convenience, whenever it can be done without prejudice to a substantial right. 735 ILCS 5/2-1006 (West 2016). Defendant has not shown how severing these claims would aid convenience. In fact, Gross has argued convincingly to the contrary that if the claims were severed, the ultimate result would be inconvenient and inefficient because the result would be two separate trials. Gross has also pointed out that this would mean two separate discovery and case management schedules, and twice the cost of presenting expert testimony because the same experts would need to be presented twice, perhaps at different times, which could require twice the travel expenses. It is also noteworthy that severing Gross's claim would prejudice his substantial right to select a forum. *Dawdy v. Union Pacific R.R. Co.*, 207 Ill. 2d 167, 173 (2003) ("[a] plaintiff's right to select the forum is substantial"). As a result, it was not an abuse of the trial court's discretion to deny severance.

¶ 30 We next turn to the portion of defendant's motion seeking intrastate transfer based on *forum non conveniens*. Our supreme court has recognized that "[t]he Illinois venue statute is designed to insure that the action will be brought either in a location convenient to the defendant, by providing for venue in the county of residence, or convenient to potential witnesses by allowing for venue where the cause of action arose." (Internal quotation marks omitted.) *Langenhorst v. Norfolk Southern Railway Co.*, 219 Ill. 2d 430, 441 (2006). Although defendant concedes that Cook County is a proper venue, it nonetheless asserts that the doctrine of *forum non conveniens* requires transfer because Cook County does not have a significant connection to the litigation.

¶ 31 "*Forum non conveniens* is an equitable doctrine 'founded in considerations of fundamental fairness and sensible and effective judicial administration' [citation], which allows a trial court to decline jurisdiction in the exceptional case where trial in another forum with proper jurisdiction and venue 'would better serve the ends of justice' [citation]." *First American Bank v. Guerine*, 198 Ill. 2d 511, 515 (2002). "A trial court is afforded considerable discretion in ruling on a *forum non conveniens* motion. [Citation.] We will reverse the circuit court's decision only if defendants have shown that the circuit court abused its discretion in balancing the relevant factors. [Citation.] A circuit court abuses its discretion in balancing the relevant factors only where no reasonable person would take the view adopted by the circuit court. [Citation.]" *Langenhorst*, 219 Ill. 2d at 441-42.

¶ 32 In determining whether the doctrine of *forum non conveniens* applies, the court must balance the public and private interest factors. *Fennell v. Illinois Central R.R. Company*, 2012 IL 113812, ¶ 17. "Private interest factors include: the convenience of the parties; the relative ease of access to sources of testimonial, documentary, and real evidence; the availability of

compulsory process to secure attendance of unwilling witnesses; the cost to obtain attendance of willing witnesses; the possibility of viewing the premises, if appropriate; and all other practical considerations that make a trial easy, expeditious, and inexpensive." *Id.* ¶ 15. "The relevant 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 community with no connection to the litigation; and the interest in having local controversies decided locally." *Id.* ¶ 16. It is important to note that the court does not weigh the private interest factors against the public interest factors, but instead the court must examine the total circumstances of the case when deciding whether the balance of factors strongly favors dismissal. *Id.* ¶ 17.

¶ 33 "Before weighing the relevant factors, a court must first decide how much deference to give a plaintiff's choice of forum." (Internal quotation marks omitted.) *Ruch v. Padgett*, 2015 IL App (1st) 142972, ¶ 42. The plaintiff's interest in choosing the forum where his rights will be vindicated is substantial, and should not be disturbed unless the other factors strongly favor transfer. *Guerine*, 198 Ill. 2d at 517. "[T]he plaintiff's interest in choosing the 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," (*Id.*) but this court has recognized that "the deference to be accorded is only *less*, as opposed to *none*, and the test is still whether the relevant factors viewed in their totality, strongly favor transfer to another forum." (Emphasis in original.) *Elling v. State Farm Mutual Automobile Insurance Co.*, 291 Ill. App. 3d 311, 318 (1997).

¶ 34 Here, Cook County is neither Gross's residence, nor the site of the asbestos exposure that allegedly resulted in Gross's injuries, and thus, we give Gross's choice some deference, but not as much as we would if he resided here or his injury occurred here. Nonetheless, this court has

held that "[i]n most instances, the plaintiff's initial choice of forum will prevail, provided venue is proper *and the inconvenience factors attached to such forum do not greatly outweigh the plaintiff's substantial right to try the case in the chosen forum*." (Emphasis in original.) (Internal quotation marks omitted.) *Schuster v. Richards*, 2018 IL App (1st) 171558, ¶ 21.

¶ 35 Turning back to the private and public interest factors, it is pertinent to note that when examining the factors, "the burden is on the defendant to show that the relevant private and public interest factors strongly favor his choice of forum and merit disturbing the plaintiff's initial choice." (Internal quotation marks omitted.) *Id.* ¶ 23. This means that defendant must show "that the plaintiff's chosen forum is inconvenient to defendant and that another forum is more convenient to all parties." *Id.* Significantly, "[t]he defendant cannot assert that the plaintiff's chosen forum is inconvenient to the plaintiff." *Ellis v. AAR Parts Trading, Inc.*, 357 Ill. App. 3d 723, 741-42 (2005). Additionally, we note that the record before us is unclear as to which witnesses the parties intend to call, whether any witnesses would need to be presented live at trial, where those witnesses are located, and whether those witnesses would be willing to testify at trial without compulsion. It does not seem that this information was inadvertently left out of the record, but instead, it appears the litigation may not be far enough along for the parties to know this pertinent witness information. Again, we reiterate that "any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984). Keeping the aforementioned applicable law in mind and based on what we have before us right now, we find that the factors do not strongly weigh in favor of transfer to Knox County, and thus, the trial court's decision to deny defendant's motion was not an abuse of discretion.

¶ 36 Examining the private interest factors, we first consider convenience to the parties. Gross resides in Knox County. His alleged asbestos exposure occurred in Galesburg, Illinois, which is in Knox County, and in West Burlington, Iowa. Defendant conducts business in, *inter alia*, Cook County, and thus resides here. Defendant argues that Cook County is not a convenient forum because Gross was not allegedly exposed to asbestos here. Also, defendant asserts that it would be inconvenient for it to produce witnesses and physical evidence in Cook County because Gross never worked in Cook County. We do not find this factor strongly weighs in favor of transfer. We reiterate that it is defendant's burden to show that the factors strongly favor transfer to defendant's chosen forum. *Schuster*, 2018 IL App (1st) 171588, ¶ 23. Here, defendant speculates about the location of witnesses and evidence. In Bell's affidavit, which was attached to defendant's motion to transfer, Bell stated that the majority of records and physical evidence related to Gross's claim is "likely to be located or maintained in Knox County." Defendant also asserts that employee witnesses who worked with Gross in Knox County may be called, but does not provide any names or addresses of these co-worker witnesses. Defendant's generalizations are insufficient to meet its burden. Defendant does not point to any specific witnesses who reside in Knox County, except Gross. However, this is irrelevant because defendant cannot assert that plaintiff's chosen forum is inconvenient for plaintiff. *Guerine*, 198 Ill. 2d at 518. Additionally, records pertaining to Gross's claim would be subject to discovery. Both defendant's and plaintiffs' attorneys are located in Cook County, and all parties will presumably conduct discovery through assistance of counsel. Therefore, we find that although relevant records may be located in Knox County, those records will need to be sent to defendant's attorney in Cook County during the discovery process. Thus, we find unconvincing defendant's argument that the convenience factor strongly weighs in favor of transfer.

¶ 37 We next consider the relative ease of access to testimonial, documentary, and other evidence. Defendant argues that the records and real evidence pertaining to Gross's claim are located in Knox County. However, we have already rejected this contention. Because any documentary records would be subject to discovery, they would be tendered to defendant's counsel in Cook County, and thus would be present in Cook County. Further, it is important to note that advances in technology and internet access have made the location of documentary evidence a less significant consideration. *Taylor v. Lemans Corp.*, 2013 IL App (1st) 130033, ¶ 21. Gross also emphasizes that any documentary evidence would be produced in an electronic format. As to "real" evidence, defendant merely suggests, "A scanner and internet connection will not make access to real evidence any easier," but does not point to any tangible, real evidence that is located in Knox County that will be used in this case and that could not be produced in Cook County. Thus, defendant again engages in speculation, which is insufficient to meet its burden. Further, defendant argues that the trial court erroneously found that the location of witnesses did not strongly weigh in favor of transfer. Defendant argues that Gross's family members and treating physicians, who will be called to testify, are located in Knox County. However, by pointing out that Gross's family members and his treating doctors, *i.e.* witnesses who would be called by Gross, are located in Knox County, defendant is again attempting to argue that Cook County is inconvenient for Gross, which he may not do. Additionally, Gross argues that although some of the witnesses are located in Knox County, Gross also worked in Iowa, and so some witnesses are also located there. There is no evidence before this court of who these co-worker witnesses are or where they live. Defendant is essentially asking this court to assume that everyone who Gross worked with in Knox County still lives there, which is insufficient to show that this factor strongly favors transfer.

¶ 38 Next, we examine the availability of compulsory process and cost to secure the attendance of willing and unwilling witnesses. Defendant argues that the trial court erroneously found that the difference in subpoena costs in Cook County versus Knox County was "minor." We disagree. Defendant argues that trying this case in Cook County would force witnesses to miss work and likely spend a night in Chicago. However, defendant again fails to support such a contention with evidence or facts. We are unaware of the details of occurrence witnesses that may be called, and thus we do not know whether they are employed and would need to miss work for this trial. Additionally, defendant estimated that it would cost $28 per day to subpoena a witness to the Knox County courthouse, and would cost approximately $100 per day to do the same in Cook County. It is this difference in cost that the trial court referred to as "minor." We do not find such a comment to be an abuse of discretion where defendant has failed to present evidence regarding who will actually testify live at trial, who will testify via videotaped evidence deposition, and who will refuse to testify without compulsory process. Compulsory process is available in both Knox County and Cook County, and the aggregate cost difference between the two counties is unknown, given that we do not know the number of witnesses or where they live.

¶ 39 Defendant also argues that the penultimate private interest factor, the possibility of viewing the scene of the alleged exposure, strongly weighs in favor of transfer. While this factor favors transfer, it does not favor it strongly. "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." *Laverty v. CSX Transportation, Inc.*, 404 Ill. App. 3d 534, 538 (2010). Because Gross worked in Knox County, it would be easier for jurors located in Knox County to view the premises. However, Gross also worked in Iowa, and thus we cannot say this factor strongly weighs in favor of transfer where jurors may be required to visit Knox County and West

Burlington, Iowa. Additionally, defendant has not provided any evidence regarding whether the condition of the premises is in the same condition as when Gross worked there, and thus we do not know whether it would even be possible to visit Gross's former employment locales.

¶ 40 The final private interest factor consists of all other practical considerations that make a trial easy, expeditious, and inexpensive. We find that this factor also does not strongly weigh in favor of transfer. Both plaintiffs' and defendant's attorneys are located in Cook County, and thus requiring both sides' attorneys to travel to a county that is 200 miles from Cook County on a regular basis to attend court hearings would not be inexpensive. Nor would it be inexpensive to instead hire local counsel each time this matter is before the court. Additionally, Gross's expert, Dr. Schonfeld, is located here. Further, we have already determined that the trial court did not abuse its discretion in denying the motion to sever, and as a result, the claims of the plaintiffs will remain in the same case. Defendant argues that we are only to examine the factors as to Gross and defendant, and not the other plaintiffs. However, we believe this final factor, which requires us to consider *all* other practical considerations, allows us to take into consideration the fact that Gross's co-plaintiff Brown resides in Cook County, worked in Cook County, and allegedly suffered injury here. Also, we find that because common questions of law and fact exist between Gross's and Brown's claims, it would be easier and more efficient to conduct one trial in Cook County, where this matter has been pending since 2016. Overall, we find that the trial court did not abuse its discretion in finding that the private interest factors do not strongly weigh in favor of transfer.

¶ 41 We next examine the public interest factors. First, we look to the administrative difficulties caused when litigation is handled in congested venues instead of being handled at its origin. It is undisputed that Cook County has a higher-volume docket of pending cases than

Knox County. However, it is also undisputed that Cook County has a significantly higher population than Knox County, and so such a discrepancy is not surprising. Additionally, Cook County has more judges than Knox County. Defendant has not shown any administrative difficulty in keeping this matter in the more-congested forum, which echoes the trial court's finding that defendant has "done nothing to show, that if the case were transferred to Knox County, it would be resolved more quickly than if it were heard in Cook County." The trial court further explained, "This [c]ourt is capable of assessing the congestion factor, or lack thereof, of its own docket, and determines that this factor does not weigh strongly in favor of transfer to Knox County." We find that this logic is reasonable.

¶ 42 The next two factors, the unfairness of imposing jury duty upon residents of a community with no connection to the litigation, and the interest in having local controversies decided locally do not strongly weigh in favor of transfer. Gross's asbestos exposure allegedly occurred in Knox County and he resides there. Thus, it seems that Knox County has an interest in deciding a controversy that stemmed from an occurrence that took place there. However, Cook County also has an interest in deciding the outcome of this litigation because defendant conducts business here and employs residents of Cook County, some of whom are co-plaintiffs in this case. Similarly, because defendant conducts business in Cook County and has employees here, it would not be unreasonable to require Cook County residents to sit for jury duty on this case, especially where Brown, a party who we have determined was properly joined, was injured and resides here. Thus, although this factor may somewhat weigh in favor of transfer, it does not weigh strongly in favor because Cook County has an interest in this matter, and thus its residents will not be burdened by jury duty.

¶ 43 Overall, defendant simply has not met its burden to show that the private and public interest factors strongly favor transfer to Knox County. Defendant repeatedly attempted to meet its burden by arguing inconvenience for Gross, which it cannot do. Further, defendant's argument in favor of transfer is almost entirely based on speculation, and the record contains no evidence as to who will testify live at trial or where witnesses reside. Merely suggesting that Gross's own witnesses and other relevant evidence are "likely" located in Knox County is insufficient to strongly favor transfer. We cannot conclude, in light of the record before us, that no reasonable person would have adopted the determination of the trial court, where the trial court properly balanced the private and public interest factors.

¶ 44 CONCLUSION

¶ 45 Based on the foregoing, we find the trial court did not abuse its discretion when it denied defendant's motion to sever and transfer based on the doctrine of *forum non conveniens*.

¶ 46 Affirmed.