2012 IL App (1st) 112717-U

THIRD DIVISION
August 15, 2012

Nos. 1-11-2717, 1-11-2718 (Cons.)

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

JAMES DOLPH, Plaintiff-Appellee, v. BURLINGTON NORTHERN SANTA FE RAILWAY COMPANY; MITTAL STEEL USA-RAILWAYS INC., formerly known as the Lake Michigan and Indiana Railroad, LLC, a Corporation; and INDIANA HARBOR BNSF RAILROAD COMPANY, Defendants-Appellants.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY No. 10 L 7501 HONORABLE MICHAEL R. PANTER, JUDGE PRESIDING.

PRESIDING JUSTICE STEELE delivered the judgment of the court.
Justices Neville and Murphy concurred in the judgment.

O R D E R

¶ 1 *HELD*: The circuit court did not abuse its discretion in denying the defendants' motions to dismiss the plaintiff's complaint and transfer the cause to Indiana on grounds of interstate *forum non conveniens*.

¶ 2 Plaintiff, James Dolph, filed suit against defendants Burlington Northern Santa Fe Railway Company (BNSF), Mittal Steel USA-Railways Inc. (Mittal), and the Indiana Harbor

BNSF Railroad Company (IHB), in the circuit court of Cook County, Illinois. Defendants filed motions based on *forum non conveniens* to transfer the action to Porter County, Indiana, or Lake County, Indiana. The circuit court denied the motion and defendants now appeal. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 On June 28, 2010, Dolph filed a personal injury suit against BNSF, Mittal and IHB in the circuit court of Cook County. Dolph alleged that on July 30, 2008, he was injured while moving railcars at an Accelormittal Burns Harbor, LLC, facility in Burns Harbor, Indiana, resulting in injuries and the subsequent amputation of his legs. Dolph also alleged BNSF, which owns the railcars at issue and inspected them in Illinois, negligently failed to provide safe railcars and to repair malfunctioning brakes on its railcars. He further alleged that Mittal failed to properly inspect and repair the brakes on the railcars involved in the incident. Moreover, Dolph alleged that IHB, which transported the railcars from Illinois to Indiana, negligently failed to properly inspect the railcars at issue in Illinois.

¶ 5 On October 6, 2010, BNSF, Mittal and IHB filed motions to dismiss the complaint on grounds of *forum non conveniens*. BNSF requested the case be transferred to Porter County, Indiana. Mittal and IHB requested the case be transferred to Lake County, Indiana. The documents supporting and opposing these motions contained in the record disclose the following facts.

¶ 6 Dolph was and is a resident of La Porte County, Indiana.

¶ 7 BNSF is a Delaware corporation with its principal place of business in Texas. BNSF has extensive railroad tracks, personnel and facilities in Illinois. BNSF has no facilities in Indiana, but admits it does business in Indiana.

¶ 8 Mittal is a Delaware corporation with its principal place of business in East Chicago, Indiana. Mittal and Dolph's employer, Accelormittal Burns Harbor, LLC (a Delaware corporation), are subsidiaries of an entity currently known as Accelormittal USA, Inc. BNSF named the Accelormittal entities as third-party defendants and alleged these companies are the same entity and perform the same business function using common employees. Accelormittal USA, Inc. has its corporate headquarters in Chicago, Illinois.

¶ 9 IHB is an Indiana corporation with its principal place of business in Hammond, Indiana. IHB's registered agent is located in Springfield, Illinois. The IHB interchanges daily with 16 other railcarriers in Chicago. IHB's main line circles Chicago from near O'Hare International Airport to northwest Indiana, roughly paralleling Interstate 294 and Interstate 80/94. IHB's primary rail yard is located in Riverdale, Illinois, but the company also maintains yards in Hammond and East Chicago, Indiana.

¶ 10 At the time of the incident, Dolph was working with David Puckett, a resident of La Porte County, Indiana. Dolph states, by affidavit, that Dolph was the only witness to the occurrence. Mittal answered upon information and belief that Dolph was the only individual at the scene at the time of the incident and Puckett was at the scene prior and subsequent to the incident.

¶ 11 After the incident, at least 10 of Dolph's coworkers were on the scene, conducting an investigation of the incident. All 10 of these coworkers reside in various counties in Indiana. Of

these 10 coworkers, the record contains an affidavit from only Delbert Smallwood, a senior operating technician and union safety representative, stating that it is not inconvenient for him to travel to Chicago for a trial in this case. Dolph was examined at the scene by Dr. Howard Fineman, whose current residence is unknown. Other individuals at the scene were employed by a security company and an ambulance service, both of which are located in Indiana.

¶ 12 Sarah Leidy, Dolph's daughter and coworker, states in her affidavit that she was among the first to arrive in the area of the rail yard where her father was after the incident. Leidy noticed the railcars had left. Leidy also stated that Dolph had crawled away from the tracks to his truck to call for help. According to Leidy, paramedics transported Dolph from the area within 10 minutes of her arrival. She and others on the scene followed the ambulance to a local firehouse, from which Dolph was transported by helicopter to Christ Hospital in Oak Lawn, Illinois. Leidy further stated that it would not be inconvenient for her to come to Cook County, Illinois, for a trial in this case.

¶ 13 The incident was investigated by the United States Department of Labor, via the Occupational Health and Safety Agency (OSHA). The OSHA investigation, opened on August 11, 2008, and closed on September 12, 2008, found no violations and contains "coverage information" describing problems with radio communications between Dolph and Puckett at the time of the incident. An investigation by the Indiana Department of Labor conducted within the identical time frame contained similar information. According to Mittal, there was no post-incident testing of the railcars' hand brakes in Indiana.

¶ 14 BNSF owned the railcars involved in the incident. The railcars were interchanged from a BNSF track to an IHB route in McCook, Illinois, and to the Norfolk Southern Railroad in Indiana before delivery to the Accelormittal Burns Harbor, LLC, facility. In February 2011, BNSF's Chicago regional record-keeper, Richard Mohorn, gave deposition testimony that BNSF records showed the railcars at issue returned to Willow Springs, Illinois, on August 1, 2008. BNSF records also indicate the railcars returned to the BSNF rail yard in Blue Island, Illinois, on August 6, 2008. Mohorn testified he had worked at BNSF rail yards, including in Willow Springs and Eola, Illinois. According to Mohorn, BNSF personnel inspected railcars at these locations.

¶ 15 Kevin Bell, claims manager for the Chicago office of BSFN, provided a verified statement indicating he was responsible for any investigation of Dolph's claim and any information BNSF had regarding the incident before discovery commenced would have been referred to him.

¶ 16 In addition to Mohorn and Bell, Dolph listed various categories of BNSF witnesses in Chicago, Willow Springs, Eola, Somanauk, and Galesburg, Illinois, he would seek to call on his behalf at trial, including: (1) railcar inspectors; (2) crewmen who would remove cars with inadequate brakes from service; (3) brake repairmen; and (4) record-keepers to authenticate records on the movement of the railcars at issue and to produce and authenticate mechanical, maintenance and repair records of the railcars at issue. Dolph noted that BNSF's counsel objected to Mohorn testifying about the following subjects: (1) BNSF's inbound and outbound inspection of railcars; (2) the existence of records regarding the inspection of braking systems on

BNSF railcars; and (3) how to obtain the names of BNSF employees who inspected the railcars before and after the incident.

¶ 17 Dolph also listed, but did not name, IHB witnesses who could testify to the inbound and outbound inspection of the railcars before the incident. In a supplemental answer to interrogatories, Michael Kapitan, IHB claims agent, verified that no IHB personnel inspected or tested the railcars while inbound to Norfolk Southern Railway's yard in Burns Harbor, Indiana. However, IHB personnel performed an air brake test on the train prior to its departure. Air brake tests would also have been performed in Hammond, Indiana, and at the Blue Island yard in Riverdale, Illinois.

¶ 18 Dolph indicated that hospital records for his post-incident medical treatment were generated at Christ Hospital in Oak Lawn, Illinois, and identified Dr. George Bravovacki, Dr. Anton Fakhouri, Dr. James Doherty and Molly Langdon, R.N., among the witnesses. Dolph added that there would be records generated by the branch of the Rehabilitation Institute of Chicago located in Mishiwaka, Indiana. Dolph further stated that he continues to receive physical and rehabilitative care from Dr. Daniel Troy, an orthopedic surgeon located in Palos Hills, Illinois. In addition, Dolph stated he is seeing Richard Carroll, Ph.D., for treatment of post-incident psychological issues.

¶ 19 Dolph also submitted maps to show Indiana's Porter and Lake Counties are adjacent to Cook County, Illinois. Dolph also submitted information from the internet site MapQuest.com stating the distance from the site of the incident and the Daley Center court in Chicago is 43.43 miles.

¶ 20 The record also contains evidence regarding court congestion in Cook County, Illinois and Porter and La Porte Counties in Indiana. Dolph submitted a letter from the presiding judge of the law division of the circuit court of Cook County, stating that the average time from filing to disposition of a lawsuit was 18.9 months in 2009 and 19 months in 2010. Defendants submitted material showing that in 2008, the law division conducted 425 civil jury trials, while Porter County had 11 civil jury trials and La Porte County had 7 jury trials. Moreover, there were 17,548 civil jury actions pending in the law division at the end of 2008, while the comparable numbers were 2,542 in Porter County and 3,391 in La Porte County.

¶ 21 On August 22, 2011, following extensive briefing by the parties, the circuit court entered a memorandum opinion and order denying the motions to dismiss the complaint on the ground of *forum non conveniens*. On September 21, 2011, the defendants filed petitions for leave to appeal to this court, pursuant to Illinois Supreme Court Rule 306(a)(2) (eff. Feb. 16, 2011). On September 23, 2011, this court granted Mittal's motion to consolidate the appeals. On October 26, 2011, this court entered an order denying the petitions for leave to appeal.

¶ 22 On November 28, 2011, defendants filed a joint motion for a supervisory order from the Illinois Supreme Court, pursuant to Illinois Supreme Court Rule 383 (eff. Dec. 29, 2009). On January 11, 2012, the Illinois Supreme Court allowed defendants' joint motion and directed this court to vacate its October 26, 2011, order and allow defendants leave to appeal. On January 17, 2012, this court vacated its prior order and allowed the defendants leave to appeal.

¶ 23 DISCUSSION

¶ 24 I. Standards of Review

¶ 25 Defendants argue the circuit court erred in denying their motions to dismiss the complaint on ground of *forum non conveniens*. An equitable doctrine, *forum non conveniens* derives from "considerations of fundamental fairness and the sensible and effective administration of justice." *Langenhorst v. Norfolk Southern Ry. Co.*, 219 Ill. 2d 430, 441 (2006). Under the doctrine, a circuit court is permitted to decline exercising jurisdiction when transfer to another jurisdiction " 'would better serve the ends of justice.' " *Id.* (quoting *Vinson v. Allstate*, 144 Ill. 2d 306, 310 (1991)). The doctrine is applicable to intrastate and interstate transfers. *Langenhorst*, 219 Ill. 2d at 444. In both interstate and intrastate cases, the same principles govern the doctrine. *Dawdy v. Union Pacific R.R. Co.*, 207 Ill. 2d 167, 176 (2003); *First American Bank v. Guerine*, 198 Ill. 2d 511, 517 (2002).

¶ 26 The burden of proving transfer or dismissal in favor of a different forum is on the defendant (*Langenhorst*, 219 Ill. 2d at 444); it is a difficult burden to meet (*id*. at 443). In determining whether a defendant has met this burden, a circuit court must consider various factors identified by our supreme court. See *Guerine*, 198 Ill. 2d at 516-17. These include both private interest factors related to the convenience of the parties and public interest factors related to the efficient 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 comparative ease of access to witnesses, documents, and other evidence; and (3) "all other practical problems that make trial of a case easy, expeditious and inexpensive." *Guerine*, 198 Ill.

2d at 516. The public interest factors considered are: (1) the interest in deciding local controversies locally; (2) the unfairness of imposing the expense of a trial and the burden of jury duty on a county with little or no connection to the litigation; and (3) the relative court congestion. *Id*. at 516-17.

¶ 27 One additional consideration in determining whether to transfer a case is the plaintiff's choice of forum. *Gridley v. State Farm Mutual Automobile Insurance Co.*, 217 Ill. 2d 158, 170 (2005). A plaintiff's right to select the forum is substantial; unless the factors weigh strongly in favor of transfer, the plaintiff's choice of forum should rarely be disturbed. *Id*. Thus, when a plaintiff chooses his or her home forum or the site of the accident or injury, it is reasonable to assume that the choice of forum is convenient. *Id*. Conversely, when the plaintiff is foreign to the chosen forum and the action giving rise to the litigation did not occur in the chosen forum, the plaintiff's choice of forum is accorded less deference. *Id.* However, less deference does not mean no deference. *Langenhorst*, 219 Ill. 2d at 448.

¶ 28 The evaluation of *forum non conveniens* for any case is unique on the facts of each case. *Langenhorst*, 219 Ill. 2d at 443. The circuit court is to consider all of the relevant factors and not emphasize any single factor. *Langenhorst*, 219 Ill. 2d at 443; see *Koss Corp. v. Sachdeva*, 2012 IL App (1st) 120379, ¶ 95. Both private and public interest factors are to be considered, with the circuit court analyzing the totality of the circumstances in the case. *Langenhorst*, 219 Ill. 2d at 444.

¶ 29 Our only concern on review is whether the trial court's decision on the grant or denial of transfer on the ground of *forum non conveniens* constituted an abuse of discretion and not

whether the reviewing court would have resolved the issue as did the trial court. *Moore v. Chicago & North Western Transportation Co.*, 99 Ill. 2d 73, 83 (1983). Circuit courts are vested with considerable discretion in evaluating motions to dismiss based on *forum non conveniens*. *Langenhorst*, 219 Ill. 2d at 441. The Illinois Supreme Court has "repeatedly noted that the *forum non conveniens* doctrine gives courts discretionary power that should be exercised *only in exceptional circumstances* when the interests of justice require a trial in a more convenient forum." (Emphasis in original.) *Langenhorst*, 219 Ill. 2d at 442. A defendant must show that the forum chosen by the plaintiff is inconvenient to the defendant and that another forum is more convenient to all the parties. *Id*. at 444. The test is " 'whether the relevant factors, viewed in their totality, *strongly* favor transfer to the forum suggested by defendant.' " (Emphasis in original). *Id*. at 442 (quoting *Dawdy*, 207 Ill. 2d at 176). The decision of the circuit court will be reversed only if a defendant has shown that the court abused its discretion in balancing relevant factors. *Dawdy*, 207 Ill. 2d at 177. This discretion is abused only when no reasonable person would agree with the ruling. *Langenhorst*, 219 Ill. 2d at 442.

¶ 30 II. Plaintiff's Choice of Forum

¶ 31 Initially, we address defendants' contention that the circuit court improperly deferred to Dolph's choice of forum. Defendants, citing *Dawdy*, assert the court should presume Dolph is engaged in forum shopping. See *Dawdy*, 207 Ill. 2d at 74 (citing *Certain Underwriters at Lloyds, London v. Illinois Central R.R. Co.*, 329 Ill. App. 3d 189, 196 (2002)). As noted earlier, when the plaintiff is foreign to the chosen forum and the action giving rise to the litigation did not occur in the chosen forum, the plaintiff's choice of forum is accorded less deference. *Gridley*,

217 Ill. 2d at 170. Dolph is foreign to Illinois. Whether the action giving rise to the litigation did not occur in Illinois is debatable. Dolph claims his injuries, which were sustained in Indiana, were caused by negligence that occurred in Illinois. Here, the circuit court's order gives the defendants the benefit of the doubt on this point, expressly stating twice that Dolph's choice of forum requires less deference than if he were an Illinois resident. However, as previously noted, less deference does not equate to no deference. *Langenhorst*, 219 Ill. 2d at 448.

¶ 32 Additionally, defendants point to alleged errors the circuit court made because it afforded undue deference to Dolph's choice. However, defendants point to nothing in the order or the record linking these alleged errors to a disregard of the rule the circuit court acknowledged twice. The alleged errors will be addressed in our review of the private and public interest factors to which they relate. Accordingly, we now turn to address the private and public interest factors, based on the case before us.

¶ 33 III. Private Interest Factors

¶ 34 Regarding the factors related to convenience of the parties, defendants contend the circuit court erred in giving excessive consideration to the proximity of Cook County, Illinois, and Porter County, Indiana. However, as our supreme court has repeatedly noted, " 'We live in a smaller world ***. Today, we are connected by interstate highways, bustling airways, telecommunications, and the world wide web. Today, convenience – the touchstone of the *forum non conveniens* doctrine – has a different meaning.' " *Langenhorst*, 219 Ill. 2d at 450 (quoting *Guerine*, 198 Ill. 2d at 525). BNSF and IHB claim that *Langenhorst* is inapposite because it addresses intrastate *forum non conveniens* and this is an interstate case. As stated herein, the

same principles govern the doctrine in both interstate and intrastate cases. *Dawdy*, 207 Ill. 2d at 176; *Guerine*, 198 Ill. 2d at 517. Moreover, Illinois courts have included proximity in their analyses well before *Langenhorst*. See, *e.g.*, *Foster v. Chicago and North Western Transportation Co.*, 102 Ill. 2d 378, 383-84 (1984); *Eads v. Consolidated Rail Corp.*, 365 Ill. App. 3d 19, 31 (2006).

¶ 35 A review of the circuit court order shows proximity is a minor subject of the circuit court's extensive analysis. The circuit court found the travel time from the site of injury in Burns Harbor, Indiana to the courthouse in Cook County, Illinois to be 61 minutes. Defendants do not challenge this finding. The circuit court noted that this court has previously ruled that an hour's difference in travel time between two courthouses was insufficient to grant a motion to transfer the cause. *Spiegelman v. Victory Memorial Hospital*, 392 Ill. App. 3d 826, 844 (2009). The circuit court also noted that because of this proximity, it is not surprising that witnesses and other evidence might cross state lines. Evidence related to the maintenance and inspection of the railcars may be located in Illinois, while evidence related to the injury site may be found in Indiana. In short, although we agree with defendants that the presence of Lake Michigan ensures that Cook County, Illinois and Porter County, Indiana are not in fact adjacent, we nevertheless conclude defendants have not shown the circuit court erred in giving excessive consideration to the question of proximity.

¶ 36 Next, we turn to consider the related question of the comparative ease of access to witnesses, documents, and other evidence. Mittal argues that because the injury occurred in Indiana, all of the key liability witnesses and sources of proof on liability identified to date are

located in Indiana. Mittal refers to the witnesses who were either involved in the incident or who appeared on the scene in its immediate aftermath. However, as Dolph notes, defendants failed to provide affidavits from any of the identified witnesses stating that Cook County is an inconvenient forum. See, *e.g.*, *Langenhorst*, 219 Ill. 2d at 450; *Glass v. DOT Transportation, Inc.*, 393 Ill. App. 3d 829, 836 (2009); *Ammerman v. Raymond Corp.*, 379 Ill. App. 3d 878, 890 (2008). In contrast, Dolph, apparently the only direct witness to the incident, maintains Cook County is a convenient forum. Dolph submitted an affidavit from Smallwood, one of the witnesses listed by defendants, stating it is not inconvenient for him to come to Chicago for a trial in this case. Dolph also submitted an affidavit from Leidy, one of the first persons to arrive at the scene, who stated that it is not inconvenient for her to come to Chicago for a trial in this case.

¶ 37 Mittal notes that the incident was investigated in Indiana, claiming those investigations show the incident was likely caused by human error in Indiana. Dolph points out that the state and OSHA investigations began after the railcars were returned to Illinois. However, this appeal concerns the issue of *forum non conveniens*, not the merits of the litigation. Mittal names the safety officers involved in the internal investigation, one of whom is Smallwood, for whom appearing for trial in Cook County is not inconvenient.

¶ 38 Mittal suggests the circuit court abused its discretion because, after acknowledging the case has important connections to Indiana, wrote that, "Most significant, plaintiff's case stands on conduct that happened in Illinois." Mittal overlooks the next sentence of the order, which states: "While the place of occurrence is an important factor, defendants have not shown it is more

important than the negligence alleged to have occurred in Illinois and the substantial medical treatment, again, almost entirely in Illinois." Reading the order as a whole, we conclude defendants cannot show the circuit court ignored the connections this case has to Indiana. Additionally, we note precedent exists for favoring the forum that forms the basis of plaintiff's negligence claim against the defendants. See *Allee v. Myers*, 349 Ill. App. 3d 596, 606 (2004).

¶ 39 Mittal next argues the circuit court erred because Dolph has not identified any liability witnesses outside of Indiana. It would be significant if Dolph failed to identify any potential witnesses in Illinois. See, *e.g.*, *Botello v. Illinois Cent. R. Co.*, 348 Ill. App. 3d 445, 456-57 (2004). However, the record shows Dolph identified and gathered evidence from Mohorn and Bell. Bell, claims manager for BSFN's Chicago office, verified he would be responsible for any investigation of Dolph's claim and any information BNSF had on the incident before discovery commenced would have been referred to him. Moreover, in this case, Dolph was precluded from obtaining further names and information due to the objections of BNSF's counsel during Mohorn's deposition. That BNSF's counsel now complains for the first time in its reply brief that Dolph lacks evidence to support his claims is not only ironic, but also another attempt to litigate the merits in a *forum non conveniens* motion, not to mention a violation of Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008) (points not argued in the opening brief are forfeited).

¶ 40 In addition, Dolph has identified a number of witnesses in Illinois who may testify regarding Dolph's post-incident medical treatment. The defendants contend the circuit court gave undue weight to the location of this testimony and evidence, relying heavily upon *Kahn v. Enterprise Rent-A-Car Co.*, 355 Ill. App. 3d 13 (2004). The *Kahn* court reasoned that while

evidence of the medical expenses incurred were relevant to the plaintiff's action, the major issue to be determined in the case was the alleged negligence, which occurred in a different county. *Id.* at 25. This is a double-edged sword for defendants where, as here, Dolph alleges the negligence also occurred in Illinois.

¶ 41 As Mittal notes in its brief, Illinois courts are cautious not to give undue weight to the location of plaintiff's treating physician or expert because doing so would allow a plaintiff to easily frustrate the *forum non conveniens* principle by selecting as a witness a treating physician or expert in an otherwise inconvenient forum. *Bland v. Norfolk and Western Ry. Co.*, 116 Ill. 2d 217, 227 (1987). As Mittal also concedes, no one in this case contends Dolph was forum-shopping when he was helicoptered for immediate trauma treatment in Cook County. Mittal's argument that the concern about frustrating the *forum non conveniens* principle "remains the same" in this case simply does not follow. Defendants correctly indicate that the circuit court incorrectly (albeit understandably) misidentified the branch of the Rehabilitation Institute of Chicago, which in this case is located in Mishiwaka, Indiana, as being located in Chicago. However, given the record submitted in this case, including documentation that the treatment Dolph received at Christ Hospital in Oak Lawn, Illinois, along with the continuing care Dolph receives from Dr. Daniel Troy and Richard Carroll, Ph.D., is located in Illinois, we cannot say that no reasonable person would conclude that the bulk of Dolph's treatment was and is located in Illinois. Moreover, access to the hospital records and numerous medical expert witnesses will be in Illinois, even if such testimony is ultimately presented by videotaped deposition. Given the record, defendants have failed to show an abuse of discretion on this point.

¶ 42 Mittal also claims the circuit court failed to properly consider the relative access to sources of testimony and evidence in Porter County, Indiana. However, as noted previously and admitted by Mittal, the circuit court's order acknowledges the case has important connections to Indiana. The order also states that Dolph lives in Indiana, as do his supervisors and coworkers. The order further notes the injury occurred in Indiana. Moreover, the order notes that the state and OSHA investigations, as well as Dolph's worker's compensation claim, occurred in Indiana. That the circuit court concluded these factors did not strongly outweigh Dolph's choice of forum after evaluating the total circumstances of the case is not *ipso facto* an abuse of discretion. Mittal asserts it was improper for the circuit court to rely on its status as a "joint employer," but fails to cite any authority supporting its claim, thereby forfeiting the argument. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008).

¶ 43 Mittal further claims the relative ease of access to proof is shown by the fact that Dolph sought the Indiana courts' involvement in the case. However, neither the fact that Dolph attempted to have the circuit court of Cook County quash a subpoena for records in Indiana nor the fact that the circuit court denied Dolph's motion shows that Indiana courts are involved in this case. In contrast, the fact that BNSF has filed a contribution action against Mittal because Dolph and Mittal reached a potential settlement while the *forum non conveniens* motions were pending suggests the willingness of BNSF and Mittal to avail themselves of the Illinois courts when it suits their interests. This remains true even if BNSF is willing to voluntarily dismiss its Illinois action in the event the case is transferred to Indiana.

¶ 44 Regarding other practical considerations, Mittal argues the circuit court incorrectly found there is "no special reason for a jury view" of the scene of the injury. Mittal argues that the relevant consideration is the possibility of viewing the premises. See *Dawdy*, 207 Ill. 2d at 172. However, the *Dawdy* court actually considered "the possibility of viewing the premises, if appropriate." *Id.* Thus, in *Langenhorst*, our supreme court found that a view of the accident site was not appropriate because the record showed the scene had substantially changed in the interim. *Langenhorst*, 219 Ill. 2d at 448-49. In this case, Leidy states in her affidavit that the railcars at issue had left the scene within minutes. Moreover, a reading of the circuit court order shows the judge was making a relative assessment: "No special reason for a jury view of the scene, always unlikely in this modern world of technology, has been proposed, but, as suggested by plaintiff, is equally likely in Illinois of the subject railroad car or even plaintiff's medical facilities." Given this record, we conclude that the circuit court did not abuse its discretion on this point.

¶ 45 IV. Public Interest Factors

¶ 46 Turning to the public interest factors, we first address the interest in deciding controversies locally. Defendants contend the circuit court improperly considered their business activities in Illinois in deciding their motions. The fact that a defendant conducts business in the plaintiff's chosen forum is not dispositive of the *forum non conveniens* issue. *Gridley*, 217 Ill. 2d at 173. However, the fact that a defendant has its principal place of business is in Illinois or does business in Illinois is one factor to be considered in determining whether Illinois or Indiana is the more appropriate forum. See *id.*

¶ 47 The circuit court's order discusses Mittal's corporate presence in Illinois as part of its analysis. However, the order also relies on the fact that Mittal provided no evidence about employees who would be inconvenienced by attending a trial in Cook County, Illinois. The order further relies upon Smallwood's affidavit stating Cook County is not inconvenient for him to appear in. The order could have relied on Leidy's similar affidavit and the fact that Dolph is apparently the sole eyewitness to his injury, but it did not.

¶ 48 BNSF and IHB only refer to the circuit court's analysis on this point in passing. These defendants argue their significant presence in Illinois is simply a function of their business, generally ignoring that Dolph claims their negligence occurred in Illinois. In their joint reply brief, BNSF and IHB for the first time delve into great detail about the scope of their duty to inspect, the supposed inadequacy of Dolph's interrogatories on these issues, and the contents of records already produced in discovery. Again, these defendants not only are improperly attempting to litigate the merits of the suit, but they have also forfeited their argument. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008).

¶ 49 Mittal next claims that the circuit court improperly considered that BNSF previously filed lawsuits in Illinois in determining the forum was convenient. We agree that consideration of this factor was improper. *Ammerman v. Raymond Corp.*, 379 Ill. App. 3d 878, 889 (2008). However, the circuit court order devoted two sentences to this topic, in discussing BNSF's many connections to Illinois. It was not a significant part of the circuit court's consideration of the *forum non conveniens* motion and thus does not warrant reversal of the circuit court's decision. *Boner v. Peabody Coal Co.*, 142 Ill. 2d 523, 540 (1991). Mittal further claims the circuit court

erred in considering that BNSF has a registered agent in Illinois. This contention is incorrect. See, *e.g.*, *Langenhorst*, 219 Ill. 2d at 451; *Ammerman*, 379 Ill. App. 3d at 892.

¶ 50 Lastly on the point deciding controversies locally, defendants argue that Indiana law will govern this case. " 'The need to apply the law of a foreign jurisdiction has been considered a significant factor favoring dismissal of a suit on grounds of *forum non conveniens*.' " *Gridley*, 217 Ill. 2d at 175 (quoting *Moore*, 99 Ill. 2d at 80). However, this factor is not always sufficient to justify dismissal of the cause on the basis of *forum non conveniens*. *Moore*, 99 Ill. 2d at 83.

¶ 51 A choice-of-law determination is required only when a difference in the law will make a difference in the outcome. *Townsend v. Sears, Roebuck & Co.*, 227 Ill. 2d 147, 155 (2007). BNSF and IHB identify a number of differences between Illinois and Indiana tort law, but for our purposes, however, it suffices to note that Indiana follows a modified comparative fault system and has abolished joint and several liability. See Ind. Code § 34-51-2-1 *et seq*. (2011). Illinois, on the other hand, has adopted a pure form of comparative fault with the Illinois Joint Tortfeasors' Act. 735 ILCS 5/2-1117 (West 2010). This court has previously ruled a similar difference between California and Illinois law warranted a choice-of-law determination. *Quaid v. Baxter Healthcare Corp.*, 392 Ill. App. 3d 757, 773 (2009). However, Illinois cases analyzing this aspect of the *forum non conveniens* doctrine generally have not performed a full-scale choice-of-law analysis. See *id.* (and cases cited therein).

¶ 52 The *Townsend* court stated that "a *strong* presumption exists that the law of the place of injury *** governs the substantive issues herein," unless plaintiffs can demonstrate that "Illinois has a more significant relationship to the occurrence and the parties with respect to a particular

issue." (Emphasis in original.) *Townsend*, 227 Ill. 2d at 166. This presumption must be tested against the factors established by section 145(2) of the Second Restatement of Conflict of Laws (Restatement (Second) of Conflict of Laws § 145(2), at 414 (1971)) as follows: (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation and place of business of the parties; and (4) the place where the relationship between the parties is centered. *Townsend*, 227 Ill. 2d at 160.

¶ 53 First, Dolph's injury occurred in Indiana. The circuit court's order relies on the rule that "situations exist where the place of the injury will not be an important contact, for example, where the place of the injury was fortuitous." *Townsend*, 227 Ill. 2d at 168. The order cites cases involving injuries sustained during interstate travel. See *Murphy v. Mancari's Chrysler Plymouth, Inc.*, 408 Ill. App. 3d 722, 727-28 (2011) (Illinois driver of automobile bought, serviced, licensed, garaged, and primarily driven in Illinois was injured in a rollover occurring 39 miles inside the Michigan border; court held same type of accident and injuries could have just as easily happened in Illinois); *Miller v. Hayes*, 233 Ill. App. 3d 847, 852 (1992) (Illinois-domiciled college student attending university in Colorado died as a result of car accident in Colorado on drive back to school from Illinois after spring break; court held place of injury was fortuitous because it could just as easily have occurred in any of the states through which the decedent and the driver, also an Illinois-domiciled college student studying in Colorado, traveled); *Schulze v. Illinois Highway Transportation Co.*, 97 Ill. App. 3d 508, 510-11 (1981) (Illinois bus passengers were injured when bus owned by Illinois company overturned in Michigan on round trip between Illinois and Michigan; court held place of injury was fortuitous because same type of accident

injuries could just as easily have occurred on an Illinois or Indiana highway). In this case, the railcars traveled interstate, but Dolph did not. The incident could not just as easily have occurred in Illinois and Dolph could not have suffered the same injuries, as Dolph never worked with the railcars in Illinois. Thus, this factor favors Indiana law.

¶ 54 Second, the place where the conduct causing the injury occurred here is a subject of dispute. Dolph alleges negligence by BNSF and IHB in Illinois, as well as negligence by Mittal in Indiana. Defendants claim negligence by Dolph (and perhaps a coworker) in Indiana. A court's consideration of injury-causing conduct in a section 145(2) analysis includes all conduct from any source contributing to the injury. *Townsend*, 227 Ill. 2d at 169. Thus, this factor is a wash.

¶ 55 Third, the domicile, residence, nationality, place of incorporation and place of business of the parties are varied. Dolph was and is a resident of Indiana. BNSF is a Delaware corporation with its principal place of business in Texas. Mittal is a Delaware corporation with its principal place of business in East Chicago, Indiana. Mittal and Dolph's employer, Accelormittal Burns Harbor, LLC (a Delaware corporation), are subsidiaries of Accelormittal USA, Inc., which has its corporate headquarters in Chicago, Illinois. IHB is an Indiana corporation with its principal place of business in Hammond, Indiana. Thus, this factor is a wash.

¶ 56 Fourth, the only relationship between the parties is Dolph's employment with Mittal, which is centered in Indiana. This factor favors Indiana law. Accordingly, a consideration of the relevant factors fails to overcome the presumption that Indiana law will probably apply in this case. The circuit court erred in concluding otherwise.

¶ 57 Mittal next devotes a paragraph of its brief to argue the unfairness of imposing the expense of a trial and the burden of jury duty on a county with little or no connection to the litigation. See, *e.g.*, *Washington v. Illinois Power Co.*, 144 Ill. 2d 395, 404 (1991). Mittal's argument is premised on the assertions that the incident did not occur in Cook County and does not affect Cook County matters. While the incident did not occur in Cook County, Dolph alleges the negligent cause of the incident occurred in Cook County. Moreover, BNSF has extensive track, personnel and facilities in Illinois, while IHB's main line circles Chicago from near O'Hare International Airport to northwest Indiana, with its primary rail yard in Riverdale, Illinois. Mittal's corporate parent is headquartered in Chicago. Illinois certainly has a legitimate interest in the liability to be imposed on Illinois-based defendants under negligence principles. *Townsend*, 227 Ill. 2d at 174. Thus, the circuit court did not abuse its discretion in finding for Illinois in this regard.

¶ 58 Lastly, we consider the issue of court congestion. Court congestion is not a significant factor, especially when a defendant cannot show that one forum can resolve the case more quickly than the other. *Guerine*, 198 Ill. 2d at 517. Here, defendants submitted evidence showing that the law division of the circuit court of Cook County not only had many more cases pending, but also conducted many more trials than courts in Porter and La Porte Counties. Dolph submitted data on the time it takes to dispose of a case in the law division of the circuit court here; defendants submitted no comparable data for Porter and La Porte Counties. Contrary to what BNSF and IHB claim in their brief, the circuit court order expressly notes congestion is a minor factor and difficult to determine without knowing the time from filing to verdict in the

Indiana courts. We cannot say the circuit court abused its discretion in rejecting ths factor as a reason for transfer.

¶ 59 V. The Balance of Factors

¶ 60 The ultimate question is whether the circuit court abused its considerable discretion in evaluating defendants' claims of *forum non conveniens* (*Langenhorst*, 219 Ill. 2d at 441), not whether this court would have resolved the issue the same way. *Moore*, 99 Ill. 2d at 83. The issue here is whether this case presents exceptional circumstances requiring this case be tried in Indiana. See *Langenhorst*, 219 Ill. 2d at 442. As noted earlier, the test is " 'whether the relevant factors, viewed in their totality, *strongly* favor transfer to the forum suggested by defendant.' " (Emphasis in original). *Id*. at 442 (quoting *Dawdy*, 207 Ill. 2d at 176).

¶ 61 In this case, Dolph's choice of Illinois as a forum is entitled to some deference, albeit not full deference, given that Dolph is an Indiana resident and was injured in Indiana.

¶ 62 Regarding the private interest factors, the Cook County courthouse is relatively proximate to the site of the injury. Dolph submitted affidavits of convenience, including two from people at the scene shortly after the incident (one of whom was involved in investigating the incident). In contrast, defendants submitted no affidavits from any witnesses stating attending a trial in Cook County would be inconvenient. Dolph identified witnesses and evidence in Illinois. Most of the currently identified witnesses relate to Dolph's post-incident medical treatment, but those witnesses were not the result of forum shopping in this case. The circuit court order acknowledges that the case has important connections to Indiana, including evidence of the investigations conducted in Indiana. The circuit court did not abuse its discretion in giving little

weight to a need for a jury view of the accident scene, as the railcars left the scene within minutes of the incident.

¶ 63 Regarding the public interest factors, the circuit court made two errors with respect to the interest in local controversies being decided locally. The circuit court improperly considered that BNSF previously filed lawsuits in Illinois, which was not a significant factor in the court's decision. The circuit court also erred in rejecting defendants' claim that Indiana law would likely apply, which is a significant, but not a dispositive factor in the interstate *forum non conveniens* analysis. The circuit court did not abuse its discretion with respect to the burden placed on the circuit court or the relative congestion of the fora at issue.

¶ 64 Considering the totality of the circumstances of the case and without emphasizing any single factor (*Langenhorst*, 219 Ill. 2d at 443-44), the factors do not favor transferring the cause to Indiana so strongly to require the conclusion that the circuit court abused its discretion, even if this court might have decided the motion differently *de novo*. A defendant must show that the forum chosen by the plaintiff is inconvenient to the defendant and that another forum is more convenient to all the parties. *Id*. at 444. The circuit court concluded that defendants failed to do so here. The trial court abuses its discretion only when no reasonable person would agree with the ruling. *Langenhorst*, 219 Ill. 2d at 442. Thus, we cannot conclude that the trial court abused its discretion in denying the motions to dismiss here.

¶ 65 CONCLUSION

¶ 66 For all of the aforementioned reasons, we conclude that the circuit court did not abuse its discretion in denying defendants' motions to dismiss the complaint on the ground of *forum non conveniens*. Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 67 Affirmed.