2013 IL App (1st) 121986-U

FIRST DIVISION
FILED: MARCH 25, 2013

No. 1-12-1986

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DANA BAILEY, Plaintiff-Appellant, v. WASTE MANAGEMENT OF ILLINOIS, INC., a Foreign Corporation and MICHAEL WIERSEMA, Individually, Defendants-Appellees.	))))))))))	Appeal from the Circuit Court of Cook County No. 11 L 7390 Honorable Kathy M. Flanagan, Judge Presiding

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justice Cunningham concurred in the judgment.
Justice Rochford dissented.

ORDER

¶ 1 The plaintiff, Dana Bailey, filed a negligence action in the circuit court of Cook County against the defendants, Michael Wiersema and Waste Management of Illinois, Inc. (Waste Management), as well as several other Waste Management entities that have since been dismissed. The defendants filed a motion to transfer the case to Whiteside County pursuant to the doctrine of *forum non conveniens*. The circuit court granted the defendants' motion, and we granted the plaintiff's petition for leave to appeal pursuant to Illinois Supreme Court Rule 306(a)(2) (Ill. S. Ct. R. 306(a)(2) (eff. Sept. 1, 2006)). For the reasons that follow, we affirm the circuit court's ruling.

¶ 2 The plaintiff is a Winnebago County, Illinois resident who was employed as a professional truck driver by Mr. Bults, Inc. (MBI), a motor carrier located in Cook County. MBI contracted with Waste Management to haul refuse between two facilities, each owned and operated by Waste Management. Waste Management is a Delaware corporation, with corporate headquarters in Texas, and a registered agent in Cook County. Waste Management has six refuse facilities in Cook County, including two different facilities in Chicago, and employs 375 persons in Cook County.

¶ 3 On July 23, 2009, the plaintiff's truck was loaded with refuse and covered by Waste Management employees at Waste Management's Elburn facility (Elburn Transfer) located in Kane County. After the truck was loaded, the plaintiff transported the load to the Waste Management facility in Morrison, Illinois, (the Morrison refuse facility) which is located in Whiteside County. Mr. Wiersema is the district manager of the Morrison refuse facility. Later that day, while uncovering the load, the plaintiff fell and sustained serious injuries, requiring surgery at Loyola University Medical Center, located in Cook County, by Dr. Jonathon Citow, whose office is located in Lake County. The plaintiff also required treatment from several doctors in Rockford, Illinois, located in Winnebago County.

¶ 4 On July 18, 2011, the plaintiff filed a two-count complaint in the circuit court of Cook County alleging negligence. In count I, the plaintiff seeks recovery against Waste Management and Mr. Wiersema for personal injuries, alleging several acts of negligence relating to the loading of the truck at Elburn Transfer in Kane County, the unloading of the truck at the Morrison refuse facility in Whiteside County and inadequate company policies as to the loading and unloading of trucks. Specifically, the plaintiff alleges that the defendants: (1) improperly loaded the plaintiff's truck with a less than full load at Elburn Transfer; (2) failed to evenly distribute the load in the plaintiff's truck

between the front and back of the truck; (3) failed to warn the plaintiff that his truck was not fully loaded and/or that the load was unevenly distributed; (4) failed to have a system in place to avoid having trucks transport refuse with less than a full load and/or an unevenly distributed load; (5) failed to have an elevated tarping station or other unloading station at the Morrison refuse facility; (6) failed to have guardrails for unloading at the Morrison refuse facility; (7) failed to have in place proper fall protection for individuals unloading refuse at the Morrison refuse facility; (8) failed to have uniform unloading procedures at all facilities; (9) failed to provide assistance to the plaintiff in unloading his truck at the Morrison refuse facility; (10) failed to warn the plaintiff of the dangerous condition present at the Morrison refuse facility; and (11) otherwise improperly owned, operated, maintained, or controlled Elburn Transfer and the Morrison refuse facility such that they were unsafe locations for individuals such as the plaintiff.

¶ 5 Count II of the plaintiff's complaint is against JMM Management Group, LLC, which is not a party to this appeal.

¶ 6 After filing their answer and affirmative defenses, the defendants filed a motion to transfer venue from Cook County to Whiteside County for *forum non conveniens* pursuant to Illinois Supreme Court Rule 187 (Ill. S. Ct. R. 187 (eff. Aug. 1, 1986)). In support of their motion, the defendants argued that neither the plaintiff nor Mr. Wiersema are residents of Cook County. Additionally, neither Elburn Transfer, where the refuse was loaded onto the plaintiff's truck, nor the Morrison refuse facility, where the accident occurred, are located in Cook County, and none of the eyewitnesses to the occurrence are residents of Cook County. The defendants argued, therefore, that there is no nexus between the plaintiff's chosen forum of Cook County and the litigation, and that transfer to Whiteside County was proper because Mr. Wiersema is a resident thereof, the witnesses

are almost all Whiteside County residents, and Whiteside County is the location of the plaintiff's injury. In further support of the defendants' motion, Mr. Wiersema submitted an affidavit attesting to his home address in Morrison, which is located in Whiteside County, and to the fact that he will be greatly inconvenienced at having to testify in Cook County. Mr. Wiersema attested it would be "much more convenient" for him to testify if the matter was pending in Whiteside County.

¶ 7 In the defendants' answer to the plaintiff's *forum non conveniens* interrogatories, the defendants identified four Waste Management employees who were responsible for loading the plaintiff's truck at Elburn Transfer. Of those employees, two are residents of Kane County, Illinois, and two are residents of Kendall County, Illinois. The defendants also identified nine employees, in addition to Mr. Wiersema, who work at the Morrison refuse facility located in Whiteside County. Of those nine employees, seven reside in Whiteside County, and two reside in Iowa. Finally, the defendants disclosed that in 2011, Waste Management employed approximately 375 employees in Cook County and that Rich Grochowski, a Cook County resident, was the Waste Management employee responsible for quality control or safety for the Waste Management's Midwest Group Office located in DuPage County.

¶ 8 In his answer to the defendants' *forum non conveniens* interrogatories, the plaintiff indicated he intends to call, in addition to himself, two witnesses from Winnebago County, one witness from Arkansas, and an unspecified number of unknown Waste Management employees. Additionally, the plaintiff identified his treating physicians, four of whom reside in Winnebago County, one who resides in Lake County, and two who reside in Cook County. In summation, the parties have specifically identified the following 19 potential Illinois Supreme Court Rule 213(f)(1) (Ill. S. Ct. R. 213(f)(1) (eff. Jan. 1, 2007)) lay witnesses:

Whiteside County Residents
Mike Olson
Boone Brackemyer
Jerome White
Nick Crocker
Torn Kohl
Corey Sulouff
Ron Houzenga
Mike Wiersema (defendant)

Winnebago County Residents
Dana Bailey (the plaintiff)
Dana Bailey (the plaintiff's father)
Christopher Strauss

Kendall County Residents
Rick Johns
Juan Contreras

Kane County Residents
Rob Warford
Victor Carreon

State of Iowa Residents
Joe Adams
Teresa Gertson

State of Arkansas Resident
Gerald Lomas

Cook County Resident
Rich Grochowski

¶ 9 Additionally, the plaintiff has listed the following seven potential Illinois Supreme Court Rule 213(f)(2) (Ill. S. Ct. R. 213(f)(2) (eff. Jan. 1, 2007)) expert witnesses:

Winnebago County Residents
Dr. Ryan Phasouk
Dr. Michael Roh
Dr. Thomas Schiller
Dr. Faisal Raja

Lake County Resident
Dr. Jonathan Citow

Cook County Residents
Dr. John Shea
Dr. Guido Marra

¶ 10 Kane, Lake and DuPage Counties directly adjoin Cook County. Kendall County adjoins DuPage and Kendall Counties. Whiteside County does not adjoin any of the counties where the other Illinois witnesses reside, but is at the Illinois and Iowa borders. Two witnesses reside in Iowa.

¶ 11 The plaintiff filed a response to the defendants' motion to transfer venue arguing that the defendants failed to meet their burden of establishing that Cook County is an inconvenient forum and that Whiteside County is a more convenient forum for all of the parties. The plaintiff argued that Waste Management is a Cook County resident, that potential trial witnesses are scattered among six Illinois counties, including Cook County, as well as three states, and that a majority of the potential trial witnesses live closer to or equidistant from Cook County. The plaintiff further argued that the defendants were incorrectly characterizing this case as involving only tortious conduct in Whiteside County, and that in actuality the plaintiff's complaint also points to tortious conduct at: (1) Elburn Transfer in Kane County; (2) the managerial and corporate level at the Midwest Group Office located in DuPage County specifically, by Mr. Grochowski, a Cook County resident who was the Waste Management employee responsible for quality control and safety at the Midwest Group Office; and (3) Waste Management's corporate headquarters in Texas. The plaintiff argued further that his choice of forum is entitled to deference, and that the relevant private and public interest factors (discussed in more detail later in this order) used in determining a *forum non conveniens* motion do not strongly weigh in favor of transfer to Whiteside County. The plaintiff argued that the

relevant factors favor his choice of Cook County as the forum for the lawsuit.

¶ 12 On June 13, 2012, the circuit court of Cook County entered a written order granting the defendants' motion for transfer to Whiteside County. In so ruling, the circuit court stated it was giving limited deference to the plaintiff's choice of forum as he is not a resident thereof. As to the private interest factors used in the *forum non conveniens* analysis, the circuit court found that the ease of access to all proof, including witness testimony, favored transfer to Whiteside County as most of the potential fact witnesses reside in, or close to, Whiteside County and only one fact witness resides in Cook County. The circuit court noted that the plaintiff had named several medical treaters from different counties, but that the location of medical treaters is given little weight in the *forum non conveniens* analysis. The circuit court further found that the cost of obtaining witness testimony would be greater in Cook County than it would be in Whiteside County. Additionally, the circuit court determined that the possibility of a jury viewing the scene of the accident in Whiteside County exists, and that trial of the case would be easier, more expeditious and less expensive in Whiteside County as opposed to Cook County.

¶ 13 In considering the public interest factors used in the *forum non conveniens* analysis, the circuit court found that despite appearing more congested, Cook County disposes of cases about as quickly as Whiteside County. The circuit court stated that Whiteside County has a more significant local interest as the injury occurred in Whiteside County, and "none of the negligence at issue is alleged to have occurred in Cook County." The circuit court further stated that "even if there are elements of corporate negligence at issue, it is not alleged that, nor is there evidence of, those corporate decisions and policies being made in Cook County or having any connection to Cook County." Finding that Whiteside County has a "much more significant interest in this matter" than

Cook County, the circuit court determined it would be unfair to burden the citizens of Cook County with jury duty in this case. Accordingly, the circuit court granted the defendants' *forum non conveniens* motion, finding that the relevant private and public interest factors strongly favor transfer to Whiteside County.

¶ 14 The sole issue on appeal is whether the circuit court abused its discretion in granting the defendants' motion to transfer the plaintiff's negligence action from Cook County to Whiteside County pursuant to the doctrine of *forum non conveniens*. Section 2-101 of the Illinois Code of Civil Procedure (Code) requires that every action be commenced in either: (1) the county of residence of any defendant who is joined in good faith: or (2) the county in which the transaction or some part thereof occurred out of which the cause of action arose. 735 ILCS 5/2-101 (West 2012); *Langenhorst v. Norfolk Southern Ry. Co.*, 219 Ill. 2d 430, 441 (2006). *Forum non conveniens* is an equitable doctrine that permits a court to decline jurisdiction and transfer the case to another proper forum to "better serve the convenience of the parties and the ends of justice." *Dawdy v. Union Pacific R.R. Co.*, 207 Ill. 2d 167, 171-72 (2003). "The doctrine of *forum non conveniens* is founded in considerations of fundamental fairness and sensible and effective judicial administration." *Gridley v. State Farm Mutual Automobile Insurance Co.*, 217 Ill. 2d 158, 169 (2005).

¶ 15 To determine the appropriate forum in which the case should be tried, the circuit court is required to give the plaintiff's choice of forum deference and balance all of the relevant private and public interest factors. *Dawdy*, 207 Ill. 2d at 172-73. That is, " '[t]he plaintiff has a substantial interest in choosing the forum where his rights will be vindicated, and the plaintiff's forum choice should rarely be disturbed unless the other factors strongly favor transfer.' " *Langenhorst*, 219 Ill.

2d at 442 (quoting *First American Bank v. Guerine*, 198 Ill. 2d 511, 517 (2002)). That said, a plaintiff's choice of venue is afforded less deference where the plaintiff is not a resident of his chosen venue. *Gridley*, 217 Ill. 2d at 170.

¶ 16 "The private interest factors are not weighed against the public interest factors; rather, the trial court must evaluate the total circumstances of the case in determining whether the defendant has proven that the balance of factors strongly favors transfer." *Id*. at 444. "The defendant must show that the plaintiff's chosen forum is inconvenient to the defendant and another forum is more convenient to all parties." *Guerine*, 198 Ill. 2d at 518. That said, our supreme court has consistently held that a case should not be tried in a forum that has no significant factual connections to the cause of action. *Fennell v. Illinois Central Railroad Co.*, 2012 IL 113812, ¶ 46. We review the circuit court's decision under an abuse of discretion standard. *Langenhorst*, 219 Ill. 2d at 442. In this context, a circuit court abuses its discretion in balancing the relevant private and public interest factors "only where no reasonable person would take the view adopted by the circuit court." *Id*.

¶ 17 We begin by evaluating the private interest factors, which include (1) the convenience of the parties; (2) the relative ease of access to sources of testimonial, documentary, and real evidence; (3) the availability of compulsory process to secure attendance of unwilling witnesses and the cost of obtaining willing witness testimony; (4) the possibility of a jury view of the site; and (5) all other practical considerations that make trial of a case easy, expeditious, and inexpensive. *Fennell*, 2012 IL 113812, ¶ 15; *Guerine*, 198 Ill. 2d at 516.

¶ 18 On the first of these factors, the plaintiff lives equidistant from the circuit courts of Whiteside County and Cook County, and Waste Management maintains at least some corporate presence in Cook County. Mr. Wiersema, however, is employed and resides in Whiteside County,

approximately 133 miles away from the circuit court of Cook County. Thus, transfer to Whiteside County is far more convenient for at least one of the parties.

¶ 19 On the second factor, we agree with the circuit court that Whiteside County provides the better venue for access to testimonial evidence, because all but three of the 26 witnesses reside outside Cook County, while 8 reside in Whiteside County. In so noting, we reject the plaintiff's argument that the absence of affidavits from these witnesses precludes our consideration of their locations. As this court has recently held, where the parties have named witnesses who reside outside the chosen forum, the circuit court does not abuse its discretion in considering the distance of those witnesses from the chosen forum, even "without affidavits from each witness stating his or her unwillingness to travel." *Koss*, 2012 IL App (1st) 120379, ¶ 107.

¶ 20 The third factor–availability of compulsory process–does not meaningfully distinguish Cook from Whiteside County. The fourth factor, however, strongly favors transfer to Whiteside County. The accident that gave rise to this litigation occurred in Whiteside County, so it stands to reason that a Whiteside County jury would have better access to the accident site than would a Cook County jury. It is conceivable that the jury might also view another site, Elburn Transfer, in order to gauge the defendants' negligence there. However, although that secondary site is closer to Cook County than to Whiteside County, it nonetheless rests outside Cook County. Thus, venue in Whiteside County places the jury in the same county as the accident, but requires the jury to travel to view a second site at which the accident did not occur, while venue in Cook County would require the jury to travel to either site. In total, then, transfer to Whiteside County is far more likely to facilitate a jury's ability to view sites relevant to the litigation.

¶ 21 On the final factor, we see no significant difference on these facts between the practical

expense of trying this case in Cook or Whiteside County.

¶ 22 With that, we turn to the public interest factors for deciding whether to transfer a case based on the doctrine of *forum non conveniens*. Those factors include: (1) the interest in deciding localized controversies locally; (2) the unfairness of imposing the expense of a trial and the burden of jury duty on residents of a county with little connection to the litigation; and (3) the administrative difficulties presented by adding further litigation to already congested court dockets. *Fennell*, 2012 IL 113812, ¶ 16; *Guerine*, 198 Ill. 2d at 517.

¶ 23 On the first factor, we observe that the location of the incident giving rise to the litigation is the most significant factor in giving any county a local interest. *Dawdy*, 207 Ill. 2d at 183; *Peile*, 163 Ill. 2d at 343. Here, the incident occurred in Whiteside County, and so that county has an obvious, strong interest in this litigation. We note that it is possible that this case will affect Waste Management's corporate policies, as well as its practices in all of its facilities. However, the facts indicate that Waste Management has refuse facilities in Cook, Kane, and Whiteside Counties. Thus, to the extent any of these three counties has an interest in Waste Management corporate policies, or in practices at Waste Management facilities within its borders, the other counties share the interest. In short, Cook County has some interest in this litigation, but Whiteside County has a far greater interest.

¶ 24 Likewise, for the second factor, because Whiteside County has the far greater interest in this litigation, it is most fair to impose the expenses and burdens of a trial on the residents of that county.

¶ 25 As for the final public factor, we observe that, according to the 2010 Annual Report of the Illinois Courts, the average law jury case in Whiteside County proceeded to trial in 35 months, whereas the average law jury case in Cook County proceeded to trial in 31.2 months. Cook County

therefore disposed of its average law case quicker than Whiteside County. We note, however, as did the circuit court, that court congestion is generally a "relatively insignificant factor" in the *forum non conveniens* analysis. *Guerine*, 198 Ill. 2d at 517.

¶ 26 In all, we agree with the circuit court that the above factors support its decision to transfer this case to Whiteside County based on the doctrine of *forum non conveniens*. Because we agree with the circuit court's ruling, we obviously do not consider it to constitute an abuse of discretion.

¶ 27 Affirmed.

¶ 28 JUSTICE ROCHFORD, dissenting.

¶ 29 I respectfully dissent.

¶ 30 Before beginning my analysis, I make certain observations about some, but not all, of the subtleties and anomalies which are part of the process for deciding and reviewing *forum non conveniens* motions. As stated by the majority, the circuit court has broad discretion in deciding *forum non conveniens* issues (*Langenhorst v. Norfolk Southern Ry. Co.*, 219 Ill. 2d 430, 442 (2006)) and, obviously, we are to review those decisions for an abuse of discretion. However, the circuit court's discretion is defined by the holdings that warn the choice of forum should be declined only "in the *exceptional* case." (Emphasis added.) See, e.g., *First American Bank v. Guerine*, 198 Ill. 2d 511, 515 (2002). At the same time, the heavy burden on a defendant to support a *forum non conveniens* motion has been described as both "substantial" (*Koss Corporation v. Sachdeva*, 2012 IL App (1st) 120379, ¶ 100) and "difficult" (*Langenhorst*, 219 Ill. 2d at 443).

¶ 31 As to the determination itself, in "exercising its discretion" in these matters, a court *must* consider all relevant factors and, at the same time, *not* emphasize one factor or fact over another, and not weigh the private interest factors against the public interest factors. *Piele v. Skelgas*, 163

Ill. 323, 336-37 (1994). Further, a court must consider all relevant facts; however, the court must then remember certain facts, *e.g.*, locations of expert witnesses, and attorneys' offices may be considered, but must be given little weight. *Ammerman v. Raymond Corp.*, 379 Ill. App. 3d 878, 891 (2008); see also *Fennell v. Illinois Central R.R. Co.*, 2012 IL 113812, ¶ 24 (circuit courts should "include all of the relevant private and public interest factors in their analyses"). The overall examination has been described as the " 'battle over minutiae.' " *Guerine,* 198 Ill. 2d at 519 (quoting *Peile,* 163 Ill. 2d at 335).

¶ 32 Further, a court, in considering *forum non conveniens* motions, starts with the premises that venue is proper in the chosen forum and that a plaintiff has a substantial interest in the choice of a forum. *Dawdy v. Union Pacific R.R. Co.*, 207 Ill. 2d 167, 171-73 (2003). Despite the substantial interest a plaintiff has in choosing a forum, the choice is given differing levels of deference.

¶ 33 In the background is a concern that plaintiffs are practicing forum shopping when choosing their forums. *Id*. at 174 ("This court has acknowledged that a plaintiff, in choosing a forum, might shop for the most favorable forum."). Yet, it has been recognized that " '[t]he truth of the matter is that both plaintiffs' counsel and defendants' counsel are jockeying for position by seeking a judge, jury and forum that will enable them to achieve the best possible result for their clients.' " *Guerine*, 198 Ill. 2d at 521 (quoting G. Maag, *Forum Non Conveniens in Illinois: A Historical Review, Critical Analysis, and Proposal for Change*, 25 So. Ill. L.J. 461, 510 (2001)). In the end, fears as to forum shopping practices are to have no part in the analysis. *Dawdy*, 207 Ill. 2d at 175.

¶ 34 The *forum non conveniens* doctrine most certainly rests on the concept of convenience. We address convenience today differently than we did in the past and differently than we undoubtedly will tomorrow. See *Guerine*, 198 Ill. 2d at 525. (Recognizing that our present world is "smaller,"

as "we are connected by interstate highways, bustling airways, telecommunications, and the world wide web.")

¶ 35 In reaching a decision, a reviewing court must reconcile the various applicable principles, particularly those that place a heavy burden on a defendant while vesting the circuit court with the exercise of discretion and instructing the court to grant a transfer to another forum *only* in the exceptional case. Reviewing courts, generally, carefully examine all the relevant facts and factors as the circuit court is required to do, which poses a question as to whether appellate review is truly based on an abuse of discretion standard. A review of the ruling made by a respected circuit judge, as the one in this case, must be carefully based on the facts and the required analysis and not on the basis of what decision "we would have reached if we were reviewing the facts on a clean slate." *Koss Corporation v. Sachdeva*, 2012 IL App (1st) 120379, ¶ 91. When all of the relevant factors and facts are considered and *no* factor and *no* fact is given more emphasis than another, it is my belief that the defendants failed to meet their heavy burden of establishing this case as the "exceptional" one which must be transferred from the chosen forum.

I. Plaintiff's Choice of Forum

¶ 36 Prior to balancing the relevant factors, a court must first determine the amount of deference to give a plaintiff's choice of forum. *Dowd v. Berndtson*, 2012 IL App (1st) 122376, ¶ 27. In the case at bar, as plaintiff is foreign to his chosen forum of Cook County, and his injury occurred outside of Cook County in Whiteside County, the circuit court properly afforded plaintiff's choice of forum some, albeit limited, deference. "[W]hile the deference to be accorded to a plaintiff regarding his choice of forum is less when the plaintiff chooses a forum other than where he resides or where the injury occurred, nonetheless 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." (Emphases in original.) *Elling v. State Farm Mutual Automobile Insurance Co*., 291 Ill. App. 3d 311, 318 (1997).

¶ 37 II. Private Interest Factors

¶ 38 The relevant private interest factors include: (1) the convenience of the parties; (2) the relative ease of access to sources of testimonial, documentary, and real evidence; (3) the availability of compulsory process to secure attendance of unwilling witnesses and the cost of obtaining willing witness testimony; (4) the possibility of a jury view of the site; and (5) all other practical considerations that make trial of a case easy, expeditious, and inexpensive. *Fennell*, 2012 IL 113812, ¶ 15; *Guerine*, 198 Ill. 2d at 516.

¶ 39 A. The Convenience of the Parties

¶ 40 Defendants bear the burden of showing that plaintiff's chosen forum is inconvenient to defendants and another forum is more convenient to all parties. *Fennell*, 2012 IL 113812, ¶ 20. However, a defendant cannot assert that the chosen forum is inconvenient for the plaintiff. *Id*. at ¶ 27. The circuit court's order did not include a specific discussion as to this factor. The majority states that Whiteside County "is far more convenient for at least one of the parties."

¶ 41 In determining which forum is more convenient for the parties, a court may consider the distance the parties would have to travel to the respective forums. *Dawdy*, 207 Ill. 2d at 177-78; *Koss*, 2012 IL App (1st) 120379, ¶ 107. Plaintiff lives equidistant from the circuit courts of Whiteside County and Cook County. Whiteside County, therefore, is *not* more convenient for plaintiff.

¶ 42 However, Mr. Wiersema is employed and resides in Whiteside County, approximately 133

miles away from the circuit court of Cook County. Mr. Wiersema's affidavit is factually sufficient to show the inconvenience to him to have to travel to Cook County for trial in this case. See *Koss,* 2012 IL App (1st) 120379, ¶ 110 (finding that at the *forum non conveniens* stage of the litigation, some leeway in specificity of an affidavit must be given); *Walker v. Iowa Marine Repair Corp.*, 132 Ill. App. 3d 621, 630 (1985) (holding that defendant's affidavit specifying names and addresses of witnesses, showing they were located in counties outside the plaintiff's chosen forum of Cook County, was sufficient to show those counties were "far more convenient to this action than Cook.") There is a sufficient showing that Whiteside County is more convenient and Cook County is inconvenient for this defendant.

¶ 43 Plaintiff argues that even if Cook County is an inconvenient forum for Mr. Wiersema, it is not inconvenient for the corporate defendant, Waste Management. I would agree.

¶ 44 Waste Management has a registered agent in Cook County, employs 375 persons in multiple locations throughout Cook County and, as a part of conducting business in Cook County, maintains refuse facilities in Cook County. However, the mere fact that Waste Management conducts business in Cook County does not necessarily render this an important factor in the *forum non conveniens* analysis. See *Bland v. Norfolk & Western Ry. Co.,* 116 Ill. 2d 217, 226 (1987) (holding that conducting business within a forum is not an important factor in the *forum non conveniens* analysis as a *forum non conveniens* motion assumes both courts can obtain jurisdiction over defendant and requires "the court to look beyond the criterion of venue when it considers the relative convenience of a forum"); *Dawdy*, 207 Ill. 2d at 182 (same). Where, however, a defendant's corporate presence in a particular county is connected to the litigation such that it is the location of pertinent corporate records or potential corporate witnesses, the corporate presence is relevant to the *forum non*

conveniens analysis, though it is not dispositive. Compare *Koss,* 2012 IL App (1st) 120379, ¶¶ 123-24 (finding the location of the defendant's corporate headquarters relevant to the convenience of the parties analysis because the corporate headquarters was connected to the litigation as the source of firm-wide policies and employee training); with *Walsh v. Ramada Inns, Inc.*, 194 Ill. App. 3d 945, 948 (1989) (finding the defendants' corporate headquarters was not relevant to the convenience of the parties analysis where there was not a "sufficient nexus between the litigation and plaintiffs' chosen forum" as "[n]othing in the record suggests that any pertinent corporate records or potential corporate witnesses are located in Cook County"). In the present case, Mr. Grochowski, a Cook County resident, and the Waste Management employee responsible for quality control or safety for the Waste Management's Midwest Group Office, has been identified as a potential corporate witness and, as such, Waste Management has a corporate presence in Cook County which is relevant to the *forum non conveniens* analysis.

¶ 45 Defendants argue that Waste Management's ties to Cook County are not controlling, but have not stated with particularity why it would be inconvenient for Waste Management itself to try this case in Cook County. Corporate representatives of Waste Management, from either the DuPage office or from the headquarters in Texas, would have to travel to attend trial in either Cook County or Whiteside County. Cook County is closer to DuPage County. Representatives from Texas may find air travel to Cook County more convenient. See *Brown v. Cottrell Inc.*, 374 Ill. App. 3d 525, 531-32 (2007). The fact that defendants' attorneys have an office in Cook County is relevant, but is to be given little bearing. *Fennell*, 2012 IL 133812, ¶ 40.

¶ 46 In sum, the Cook County forum is convenient to plaintiff, but is not convenient to defendant Mr. Wiersama. There has been no showing the chosen forum is inconvenient to Waste

Management, the corporate entity. Waste Management's relationship to Cook County must be considered "along with other connections which exist between the litigation and the chosen forum." *Gridley v. State Farm Mutual Automobile Insurance Co.*, 217 Ill. 2d 158, 173 (2005). Defendants did not demonstrate that Whiteside County is more convenient for *all* parties.

¶ 47 B. Relative Ease of Access to Sources of Testimonial, Documentary, and Real Evidence

¶ 48 The second private interest factor requires a consideration of whether the relative ease of access to sources of testimonial, documentary, and real evidence weighs strongly in favor of transfer to Whiteside County. The circuit court, without specifically considering access to documentary and real evidence found this factor to weigh in favor of transfer to Whiteside County primarily because only one fact witness resides in Cook County, while eight fact witnesses reside in Whiteside County, and two witnesses reside in Iowa, which is closer to Whiteside County than Cook County. Nine other fact witnesses, however, are scattered in different Illinois counties and the state of Arkansas. See *Guerine*, 198 Ill. 2d at 522-23 (discussing *forum non conveniens* analysis when witnesses are scattered).

¶ 49 Defendants failed to provide affidavits from the fact witnesses (other than from Mr. Wiersema) indicating that traveling to Cook County for the trial would be inconvenient for them. However, as the majority noted, this court has recently held that where the parties have named witnesses who reside outside the chosen forum, the circuit court does not abuse its discretion in considering the distance of those witnesses from the chosen forum, even "without affidavits from each witness stating his or her unwillingness to travel." *Koss*, 2012 IL App (1st) 120379, ¶ 107.

¶ 50 Further, Illinois Supreme Court Rule 187 provides that the filing of affidavits in support of a *forum non conveniens* motion is optional and states in pertinent part: "Such motions *may* be

supported and opposed by affidavit." (Emphasis added.) Ill. S. Ct. R. 187 (eff. Jan. 4, 2013). However, defendants bear the burden of proving that the private and public interest factors strongly weigh in favor of transfer. *Langenhorst*, 219 Ill. 2d at 444. Additionally, " 'mileage is but one factor of convenience.' " *Dawdy*, 207 Ill. 2d at 180 (quoting *Bland*, 116 Ill. 2d at 227). Thus, "[w]hile the language of the [Illinois Supreme Court Rule 187] clearly states that the filing of affidavits is optional, the wisdom of filing affidavits in support of [a *forum non conveniens* motion] cannot be overemphasized." *Bird v. Luhr Brothers, Inc.*, 334 Ill. App. 3d 1088, 1096 (2002). See also *Langenhorst*, 219 Ill. 2d at 450 (where court noted that no affidavits had been filed as to "inconvenience" of chosen forum for witnesses).

¶ 51 As stated, the record here shows that fact witnesses are scattered across multiple counties in Illinois, as well as two other states. Thus, fact witnesses "will be required to travel regardless of the place of trial." *Id*. at 449. While eight witnesses, including defendant Mr. Wiersema, reside in Whiteside County, three witnesses, including plaintiff and his father, reside in Winnebago County, which is equidistant between Cook County and Whiteside County. Two witnesses reside in Kendall County and two reside in Kane County; all four of these witnesses are closer to the Daley Center in Cook County than to the Whiteside County courthouse. One fact witness, Mr. Grochowski, resides in Cook County. One fact witness resides in Arkansas. Thus, seven fact witnesses are closer to Cook County, or equal distance between the two courthouses, and one witness resides in Cook County. Even considering the distance the witnesses residing in Whiteside County and Iowa would have to travel for trial in Cook County, defendants have failed to show that the relative ease of access to sources of testimonial evidence of all fact witnesses weighs *strongly* in favor of transfer to Whiteside County.

¶ 52 As to access to the medical witnesses, two practice in Cook County, four practice in Winnebago County, which is equidistant from Cook County and Whiteside County, and one practices in Lake County, closer to Cook County than Whiteside County. The circuit court stated that the location of the treating physicians is to be given "little weight." Our supreme court in *Bland* cautioned courts not to place "undue weight to the fact that a plaintiff's treating physician or expert has an office in the plaintiff's chosen forum" as doing so permits a plaintiff to "easily frustrate the *forum non conveniens* principle by selecting as a witness a treating physician or expert in what would, in reality, be an inconvenient forum." *Bland*, 116 Ill. 2d at 227; accord, *Ammerman*, 379 Ill. App. 3d at 890. I believe there is much to distinguish a plaintiff's choice of a physician to treat and care for injuries, from the choice made as to other opinion witnesses in this analysis. Thus, an argument can be made that the residence of treating physicians should be given the same weight as fact witnesses. However, as the medical witnesses are not inconvenienced by the distance to the chosen forum, ease of access to these witnesses is not impeded by trial in Cook County. When both access to all fact witnesses and access to the medical witnesses (even without undue weight) is considered, the overall ease of access to all testimonial witnesses does not strongly favor Whiteside County.

¶ 53 Finally, as to the documentary and real evidence, the location of such evidence is less significant than the location of testimonial evidence in light of modern technology, which allows documents to be copied and transported easily and inexpensively. *Fennell*, 2012 IL 113812, ¶ 36 ("the location of documents, records and photographs has become a less significant factor in *forum non conveniens* analysis in the modern age of Internet, email, telefax, copying machines, and world-wide delivery services, since those items can now be easily copied and sent"). Defendants here have

established no issue regarding any difficulty in transporting documentary or other evidence. The circuit court and the majority did not specifically discuss the access to documentary and real evidence. Nonetheless, this factor (as to documentary and real evidence) has not been shown to weigh strongly in favor of transfer to Whiteside County.

¶ 54 Accordingly, when considering all aspects of this factor without emphasis placed on any one component, defendants have failed to show that the overall relative ease of access to sources of testimonial, documentary and real evidence strongly weighs in favor of transfer to Whiteside County.

¶ 55 The Compulsory Process and the Cost of Obtaining Willing Witnesses

¶ 56 The circuit court properly found that the availability of compulsory process for the attendance of unwilling witnesses does not weigh in favor of transfer to Whiteside County as this is an intrastate *forum non conveniens* motion and the compulsory process under Illinois Supreme Court Rule 237 (Ill. S. Ct. R. 237 (eff. July 1, 2005)) is equally available in Cook County and Whiteside County.

¶ 57 The circuit court also found that defendants had shown that the cost of obtaining willing witness testimony would be greater in Cook County and, therefore, this factor weighs in favor of transfer to Whiteside County. The circuit court gave no factual basis for this finding. The majority opinion is silent as to this issue.

¶ 58 In their memoranda in support of their motion, defendants argued only in conclusory terms that given the location of the witnesses, the cost of obtaining the witnesses would be greater if pursued in Cook County. On appeal, defendants argue that the higher cost of obtaining witness testimony in Cook County "can be observed in the form of parking, food, and lodging expenses for

depositions or trial." Defendants, however, provided no affidavits or other evidence of the difference in costs between parking, food, and lodging in Cook County and Whiteside County in the circuit court. Common sense may indicate that certain costs, such as food, lodging, and parking might may well be more expensive in Cook County than in Whiteside County. However, the required cost differential analysis between Whiteside County and Cook County is more complex when the witnesses are scattered as here, and there are significant costs related to the travel of medical and other opinion witnesses. As discussed above, although defendants are not generally *required* to provide affidavits in support of their *forum non conveniens* motion (see Illinois Supreme Court Rule 187 (Ill. S. Ct. R. 187 (eff. Jan. 4, 2013)), they are still required to carry their burden and show that the private and public interest factors strongly favor transfer. *Langenhorst*, 219 Ill. 2d at 444. In the absence of evidentiary support as to greater costs of obtaining witnesses for trial in Cook County, defendants have not made a sufficient showing that this factor weighs strongly in favor of transfer.

¶ 59 D. The Possibility of a Jury View of the Site

¶ 60 As recognized by the majority, the Illinois Supreme Court has found that this 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." (Emphasis in original.) *Dawdy*, 207 Ill. 2d at 178.

¶ 61 "[T]he necessity or propriety of viewing the scene is a decision left within the discretion of the trial court." *Id.* at 179. In the present case, the circuit court recognized that although unlikely, the possibility exists that the jury might view the scene of the accident, the Morrison refuse facility in Whiteside County. Based on plaintiff's allegations of negligence, this conclusion was reasonable. Accordingly, the circuit court found that this factor weighs in favor of transfer to Whiteside County.

¶ 62 Plaintiff also alleges negligence on the part of defendants not only at the scene of the injury at the Morrison refuse facility in Whiteside County, but also at Elburn Transfer in Kane County where his truck was allegedly improperly loaded and where allegedly the procedures for loading trucks was unsafe. As such, although more remote, the *possibility* also exists for the jury to view Elburn Transfer. As the possibility of a jury view exists for both the Morrison refuse facility in Whiteside County, which would be closer to jurors in Whiteside County, and the Elburn Transfer refuse facility in Kane County, which would be closer for jurors in Cook County, this factor does not weigh heavily in favor of transfer to Whiteside County.

¶ 63 E. All Other Practical Problems That Make Trial of a Case Easy, Expeditious, and Inexpensive

¶ 64 The circuit court, without elaboration, found that defendants had "identified the practical problems" of a trial in Cook County favoring transfer to Whiteside County. Defendants' filings in the circuit court however, do not clearly address this factor. On appeal, defendants ask us to take judicial note that the cost of parking in Chicago "is much higher," and argues that the "obvious traffic and population congestion of Chicago yields the lone conclusion that the ease of trial increases if a trial is held in Whiteside County." Defendants have failed to substantiate their contentions, and judicial notice, on this record, would not be appropriate as to what the actual parking costs in the two counties may be. Again, as discussed, although defendants are not *required* to support their *forum non conveniens* motion with affidavits (see Illinois Supreme Court Rule 187 (Ill. S. Ct. R. 187 (eff. Jan. 4, 2013)), defendants do bear the high burden of showing that the relevant factors strongly favor transfer. *Langenhors*t, 219 Ill. 2d at 444. Defendants have failed to meet their burden of showing that practical problems make trial of this case easier, more

expeditious, and less expensive in Whiteside County than in Cook County. This factor does not weigh strongly in favor of transfer to Whiteside County.

¶ 65 III. Public Interest Factors

¶ 66 A. Interest in Deciding Localized Controversies Locally

¶ 67 The circuit court found this factor weighed in favor of transfer to Whiteside County because plaintiff, a resident of Winnebago County, was injured in Whiteside County.

¶ 68 The location of the incident giving rise to the litigation is the most significant factor in giving any county a local interest. *Dawdy*, 207 Ill. 2d at 183; *Peile v. Skelgas, Inc.*, 163 Ill. 2d 323, 343 (1994)). The circuit court, therefore, properly considered the place of injury as providing Whiteside County with a great interest in the litigation. However, the circuit court erred in concluding that the interest in the controversy was localized solely there.

¶ 69 In the present case, plaintiff argues he was injured at the Morrison refuse center in Whiteside County, as a result of defendants' negligence in: failing to have guardrails or an elevated tarping station at the Morrison refuse center; failing to have in place proper fall protection for persons unloading refuse at the Morrison refuse center; failing to provide assistance to plaintiff in unloading his truck at the Morrison refuse center; and failing to warn plaintiff of the dangerous condition present at the Morrison refuse center. However, plaintiff also alleges his injury occurred as a result of negligence in loading the truck at Elburn Transfer in Kane County. In particular, plaintiff alleges defendants: improperly loaded his truck with a less than full load; failed to evenly distribute the load; failed to warn plaintiff of the uneven and less than full load; and failed to have a system to assure that the trucks are safely loaded.

¶ 70 Plaintiff further alleges his injury occurred as a result of corporate decisions and policies that

led to a failure to have uniform unloading procedures at *all* Waste Management refuse facilities and to a failure to have a system in place to avoid having trucks transport refuse with less than a full load and/or an unevenly distributed load. The complaint also charged that defendants negligently maintained the Morrison refuse facility and Elburn transfer facility in such a way that those facilities posed harm to individuals such as plaintiff. Thus, there were claims raising general safety concerns and negligent corporate decision making. Plaintiff maintains that this negligent policy-making was made in Waste Management's Texas headquarters and/or in DuPage County by Cook County resident Mr. Grochowski. The circuit court did not find significant the allegations of corporate negligence by a company doing business in Cook County because "it is not alleged that, nor is there evidence of, those corporate decisions and policies being made in Cook County."

¶ 71 The decision in *Langenhorst* guides the review of the circuit court's finding. In that case, plaintiff's decedent died from injuries he suffered when his pickup truck was struck by a train operated by Norfolk Southern Railway Company (Norfolk) in Clinton County. *Langenhorst*, 219 Ill. 2d at 433-34. The plaintiff, a resident of Clinton County, filed suit in St. Clair County. *Id*. at 433. Norfolk, a foreign corporation, had a registered agent in St. Clair County. *Id*. at 434. The collision took place at a railroad crossing. *Id*. In considering whether the interest in deciding the suit was localized to the county where the injury occurred, our supreme court said:

> "In considering the public interest factors, Clinton County has an interest in deciding a controversy involving an accident that occurred in Clinton County. The facts, however, demonstrate that St. Clair County has a legitimate interest in deciding a local controversy involving one of its residents, Norfolk, a foreign corporation that has its registered agent for service located in its county. Norfolk railroad tracks traverse all of St. Clair County,

> with approximately eight trains per day passing the Langenhorst property in Clinton County and entering St. Clair County on the same railroad line. See 735 ILCS 5/2-102(a) (West 2000) (in the case of a foreign corporation, residence is defined as any county where the corporation has an office or is doing business). Even though St. Clair County residents will bear the burden of jury duty and trial expense, St. Clair County has as much interest in deciding a controversy involving one of it residents [Norfolk] who operates trains in its county as does Clinton County. This is particularly true when, as here, the defendant railroad maintains similar rural crossings in St. Clair County and this same railway line bisects all of St. Clair County. Thus, defendants have failed to show that St. Clair County has no connection to this litigation." *Langenhorst*, 219 Ill. 2d at 450-51.

¶ 72 An analysis similar to *Langenhurst*–that counties other than the site of the accident have a legitimate interest in deciding the case when there are more generalized safety concerns–has been used in product liability cases. *See e.g. Brown v. Cottrell, Inc.*, 374 Ill. App. 3d 525, 534 (2007) (other fora may have interest in suit where defective design of a trailer, which travels across many states, is at issue); *Erwin v. Motorola Inc.*, 408 Ill. App. 3d 261, 282-83 (2011) (finding that the forum state had an interest in the controversy because there were several facilities in the forum state with identical company-wide policies and procedures to the out-of-state facility where the accident occurred); *Hinshaw v. Coachmen Industries, Inc.*, 319 Ill. App. 3d 269, 277-78 (2001) (in an automobile product liability case, while the county where the accident occurred has an interest, there is also a more general interest found in the chosen forum who had more dealerships which sold the automobile); *Vivas v. Boeing Co.*, 392 Ill. App. 3d 644, 661 (2009) ("product liability actions are

not 'localized' cases; they are cases 'with international implications'") (citing *Woodward v. Bridgestone/Firestone, Inc.*, 368 Ill. App. 3d 827, 836 (2006)).

¶ 73 The analysis in *Langenhorst* does not require that the allegedly corporate policy be made in the chosen forum for that forum to have an interest. Instead, the *Langenhorst* court found that because the safety concerns raised as to the place of injury existed in the chosen forum, that forum also had a localized interest in the litigation. As in *Langenhorst*, Cook County has a legitimate interest in deciding a controversy involving one of its residents, Waste Management. Waste Management maintains, supervises, and operates refuse facilities in Cook County, as it does in Whiteside and Kane Counties. Cook County has an interest in the safe operations of those facilities as St. Clair County similarly had in the safety of railroad crossings within its boundaries under the facts in *Langenhorst*. The Waste Management facilities in Cook County operate under the same company-wide policies that are allegedly unsafe and contributed to plaintiff's injuries. Cook County has a legitimate interest in considering whether these challenged policies posed safety hazards and, if inadequate, would make the facilities in Cook County unsafe for those who work there and use them. Defendants have failed to show that Cook County does not have a legitimate interest in the litigation when, in fact, it does.

¶ 74 Cook County has a further legitimate interest in this case, where plaintiff was acting in the course of his employment as a professional truck driver with his Cook County employer, MBI, at the time the accident occurred. Two Cook County residents–Waste Management and MBI–entered into a contract for the transport of refuse and plaintiff was injured while in fulfillment of that contract. This connection to the suit was not considered as part of the circuit court's analysis as to the question of localized interest.

¶ 75 The majority opinion shines a brighter light on the interests of Whiteside County. The problem with this approach is that the *forum non conveniens* analysis requires that no one fact or factor is to be emphasized over another. "'If central emphasis were placed on any one factor, the *forum non conveniens* doctrine would lose much of the very flexibility that makes it so valuable.'" *Dawdy*, 207 Ill. 2d at 176 (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249-50 (1981)). More importantly, the chosen forum should lose this factor only where there is *no* connection to the litigation. See *Guerine*, 198 Ill. 2d at 521 ("Though the plaintiff's choice is not absolute, intrastate transfer is appropriate only when the litigation has 'no practical connection' [citation], no nexus, with the plaintiff's chosen forum.") That is certainly not true here. Looking at all the relevant facts in the same manner, defendants have failed to show that the interest in having a localized controversy decided locally strongly favors transfer to Whiteside County.

¶ 76 B. Fairness of Imposing the Expense of a Trial and the Burden of Jury Duty on the Residents of a County with Little Connection

¶ 77 The circuit court found that because Whiteside County as the place of injury had the most significant interest in this case, this factor weighed in favor of Whiteside County. As discussed, Cook County has legitimate interests in this case, and therefore defendants have failed to show that the imposition of jury duty on residents of Cook County would be unfair. This factor does not weigh strongly in favor of transfer.

¶ 78 C. Congestion of Court Dockets

¶ 79 In considering the relative court congestion, we take into account the average length of time to trial. *Fennell*, 2012 IL 113812, ¶ 43; *Koss*, 2012 IL App (1st) 120379, ¶ 136. The 2010 Annual Report of the Illinois Courts reveals that in 2010, the average law jury case in Whiteside County

proceeded to trial in 35 months, whereas the average law jury case in Cook County proceeded to trial in 31.2 months. Cook County therefore disposed of its average law case quicker than Whiteside County. The circuit court correctly found this factor did not favor transfer to Whiteside County. I agree that court congestion is generally a "relatively insignificant factor" in the *forum non conveniens* analysis. *Guerine*, 198 Ill. 2d at 517. [1]

¶ 80 In summary, where Cook County is not inconvenient to all parties, the witnesses are scattered among multiple counties in Illinois as well as in two other states, where Cook County has legitimate interests in the ligation, defendants have failed to show that the private and public interest factors, when viewed in their totality, strongly favor transfer from plaintiff's choice of forum in Cook County to Whiteside County. See *Langenhorst*, 219 Ill. 2d at 453. See also *Hinshaw*, 319 Ill. App. 3d at 277 ("Given that these potential witnesses and other connections are scattered in eight Illinois counties and two additional states," it would be reasonable to conclude there was no predominance among the counties to justify transfer.).

[1]The 2011 Annual Report of the Illinois Courts has since become available. According to the 2011 Annual Report, Whiteside County disposed of 253 total law cases in 2011, whereas Cook County disposed of 227,482 total law cases. The Annual Report reveals that in 2011, the average law jury case in Whiteside County proceeded to trial in 48.1 months, whereas the average law jury case in Cook County proceeded to trial in 29.6 months.