2014 IL App (1st) 133529-U

SECOND DIVISION
September 30, 2014

No. 1-13-3529

CHRISTOPHER AGUILERA,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	No. 13 L 3550
	)	
STEPHEN JAY BLOCK, individually and d/b/a	)	
LIDOV & BLOCK,	)	Honorable
	)	Daniel T. Gillespie,
Defendants-Appellants.	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Simon and Justice Neville concurred in the judgment.

ORDER

¶ 1 *Held*: In a legal malpractice case, the circuit court did not abuse its discretion in denying defendant's motion to transfer the case on *forum non conveniens* grounds from Cook County to Kankakee County, having found that the relevant factors, considered in their totality, do not strongly favor transfer.

¶ 2 On October 16, 2013, the circuit court of Cook County entered an order that denied the defendants', Stephen Jay Block and Lidov & Block, motion to transfer based on the doctrine of *forum non conveniens*. Defendants filed a petition for leave to appeal that was granted on

December 19, 2013. For the following reasons, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 On January 20, 2011, plaintiff, Christopher Aguilera, a resident of Kankakee County, was seriously injured when hit by a speeding car while changing a flat tire on the side of the road. According to the Kankakee County Sheriff's investigation, the accident occurred at 4000 E. Road in Kankakee County and the offending vehicle was driven by Ryan C. Jacobsen, also a resident of Kankakee County. Immediately after the accident, plaintiff was taken by ambulance to Riverside Medical Center in Kankakee County for medical treatment.

¶ 5 Shortly thereafter, plaintiff retained defendants to represent him in pursuing personal injury claims arising from the accident. Defendants negotiated a settlement with Jacobsen's insurance carrier and obtained a pre-suit policy limit settlement of $250,000. In exchange for the settlement, plaintiff executed a release of all claims against Jacobsen and his insurance carrier. The release contained no admissions of fault by Jacobsen.

¶ 6 At the time of the accident, Jacobsen was employed by H. & R. Jacobsen, Inc. which is located in Kankakee County. On August 13, 2012, plaintiff filed a two count complaint against H. & R. Jacobsen, Inc. in the circuit court of Kankakee County. Plaintiff alleged in count I that Jacobsen was acting within the scope of his employment at the time of the accident and his employer was vicariously liable for plaintiff's injuries. Plaintiff alleged in count II that Jacobsen's employer was negligent in hiring, training, supervising and retaining Jacobsen. On September 28, 2012, H. & R. Jacobsen, Inc. filed a motion to dismiss the complaint on the grounds that plaintiff's settlement with Jacobsen barred any action against his employer based on a theory of vicarious liability. The circuit court of Kankakee County dismissed count I of

plaintiff's complaint with prejudice and allowed plaintiff to file an amended complaint with regards to count II. On May 22, 2013, plaintiff filed an amended complaint alleging a claim for negligent entrustment. That same day, plaintiff moved to voluntarily dismiss the amended complaint. On June 26, 2013, the circuit court of Kankakee County granted plaintiff's motion to voluntarily dismiss his lawsuit against H. & R. Jacobsen, Inc.

¶ 7 On April 8, 2013, plaintiff filed this legal malpractice case in Cook County, Illinois. Plaintiff alleged that defendants were negligent in representing plaintiff. Plaintiff alleged that the settlement was inadequate to compensate him for his long term medical care; defendants had a duty to reasonably investigate all theories of liability and responsible parties and to file all necessary claims before advising plaintiff to settle with Jacobsen. Plaintiff claims that defendants advised him to accept Jacobsen's offer and, but for defendants' negligent advice, plaintiff could have prevailed in a lawsuit against H. & R. Jacobsen, Inc. resulting in full compensation for damages he incurred.

¶ 8 On April 19, 2013, defendants filed a motion to transfer this legal malpractice action to Kankakee County on the basis of *forum non conveniens*. Defendants argued that this legal malpractice claim would involve the litigation of a "case-within-a-case" which would require the circuit court to consider plaintiff's claims against Jacobsen and his employer H. & R. Jacobsen, Inc. and determine the liability of Jacobsen and his employer for the auto accident. Defendants asserted that because the auto accident and defendants' legal representation occurred in Kankakee County, it is the more convenient forum to litigate the malpractice claim. Attached to the motion was a copy of the Kankakee County Sheriff's accident report and a corporation detail report from the Illinois Secretary of State listing the names of H. & R. Jacobsen, Inc.'s corporate president

and secretary and their addresses in Kankakee County.

¶ 9 In response to the motion to transfer, plaintiff argued that plaintiff's choice of forum is entitled to deference and the private and public interest factors do not strongly favor transfer to Kankakee County. Plaintiff argued that in this legal malpractice case the principal witnesses are the two attorneys who represented plaintiff, Stephen Jay Block and Margee Reyes, both work in the defendant law firm's Chicago office. If any Kankakee County witness testimony is required, the testimony can be presented to the court by evidence deposition. Lastly, Cook County has a legitimate interest in deciding this controversy involving a legal malpractice claim against a Cook County based law firm and attorneys.

¶ 10 Subsequently, plaintiff filed additional evidence in support of his opposition to the motion to transfer. On September 24, 2013, plaintiff filed a supplemental brief in opposition to the motion to transfer which included a “medical summary” that listed plaintiff’s subsequent medical treatment at Mercy Hospital in Cook County on August 13, 2013. Thereafter, defendants filed a supplemental reply arguing that plaintiff’s medical treatment received at Mercy Hospital in Cook County should not be considered when determining the appropriate forum because it occurred after defendant filed the motion to transfer.

¶ 11 The following facts are not disputed: (1) the auto accident occurred in Kankakee County; (2) the parties to the accident reside in Kankakee County; (3) after the accident, plaintiff was taken by ambulance to Riverside Medical Center in Kankakee County for medical treatment; (4) plaintiff's lawsuit against H. & R. Jacobsen, Inc. was filed in Kankakee County; (5) H. & R. Jacobsen, Inc.'s corporate president and secretary reside in Kankakee County; (6) the principal place of business of the defendant law firm is in Cook County and the attorneys who allegedly

negligently represented plaintiff work in defendant's Chicago office.

¶ 12 On October 16, 2012, the circuit court reviewed each of the factors to be considered in ruling on a *forum non conveniens* motion to transfer and entered a thorough written memorandum and order that denied defendants' motion. The circuit court found, *inter alia*, that "because there is no auto case to be proved it appears there would be no issue that would require the testimony of police or witnesses to the accident." The circuit court balanced the private and public interest factors under *forum non conveniens* analysis and found that defendants failed to meet their burden to show that the totality of the circumstances "strongly favor" disturbing plaintiff's choice of forum. Defendants timely filed a petition for leave to appeal. Pursuant to Illinois Supreme Court Rule 306(a)(2) (eff. Feb. 16, 2011), we granted defendants' petition for leave to appeal the circuit court's ruling.

¶ 13 ANALYSIS

¶ 14 The issue in this interlocutory appeal is whether the trial court abused its discretion when it denied defendants' motion to transfer to Kankakee County. Defendants contend that the circuit court's order denying their motion to transfer should be reversed because the private and public interest factors used in a *forum non conveniens* analysis strongly support the conclusion that the case should be tried in Kankakee County and not Cook County.

¶ 15 The *forum non conveniens* doctrine "permits the court in which the action was filed to decline jurisdiction and direct the lawsuit to an alternative forum that the court determines can better serve the convenience of the parties and the ends of justice." *Pendergast v. Meade Electric Co., Inc.*, 2013 IL App (1st) 121317, ¶ 18. *Forum non conveniens* analysis is not a question of personal or subject matter jurisdiction (see *Wieser v. Missouri Pacific R.R. Co.*, 98 Ill. 2d 359,

365 (1983) or which court can adjudicate the case more quickly, but whether "another forum can better serve the convenience of the parties and the ends of justice." *Fennell v. Illinois Central R.R. Co.*, 2012 IL 113812, ¶ 12. The doctrine should be exercised only in exceptional circumstances which require a trial in a more convenient forum. *Langenhorst v. Norfolk Southern Ry. Co.*, 219 Ill. 2d 430, 442 (2006).

¶ 16 A trial court has "broad discretion to determine a motion based on *forum non conveniens* and a reviewing court will not overturn the trial court's determination absent an abuse of discretion." *Taylor v. Lemans*, 2013 IL App (1st) 130033, ¶14. "A circuit court abuses its discretion in balancing the relevant factors only where no reasonable person would take the view adopted by the circuit court." *Langenhorst*, 219 Ill. 2d at 442. The test is whether the relevant factors when viewed in their totality strongly favor transfer to the forum requested by the defendant. *Id*. at 442.

¶ 17 To determine the appropriate trial forum, the trial court must balance private and public interest factors. *Pendergast*, 2013 IL App (1st) 121317, ¶18. The trial court must make its decision based on the total circumstances of the case to determine whether the balance of factors strongly favors dismissal. *Langenhorst*, 219 Ill. 2d at 445. Defendants have a "high burden" of showing that the factors strongly favor transfer to disturb plaintiff's choice of forum. *Id*. at 452-53. Unless the balance of factors strongly favors a defendant's choice of forum, the plaintiff's choice of forum should rarely be disturbed. *Peile v. Skelgas, Inc.*, 163 Ill. 2d 323, 337 (1994). The "private interest factors include: the convenience of the parties; the relative ease of access to sources of evidence; the availability of compulsory process to secure attendance of unwilling witnesses; the cost to obtain attendance of willing witnesses; the possibility of viewing the

premises, if appropriate; and all other practical considerations that make a trial easy, expeditious, and inexpensive." *Pendergast*, 2013 IL App (1st) 121317, ¶ 19. The "public interest factors include: the administrative difficulties caused by litigating cases in congested forums; the unfairness of imposing jury duty on residents of a county with no connection to the litigation; and the interest in having local controversies decided locally." *Id.*

¶ 18 Here, the circuit court denied defendants' motion to transfer this lawsuit from Cook County to Kankakee County. In pertinent part, the circuit court found that it had considered the totality of the circumstances and concluded: (1) defendants did not prove that the convenience of the parties, relative ease of sources of evidence, availability of potential witnesses and cost of obtaining the attendance of those witnesses strongly favors transfer to Kankakee County; (2) defendants' argument that there is a possibility the jury would have to view the site of the auto accident was "not appropriate" because the condition of the roadway is not relevant to the adjudication of this legal negligence case; (3) although the "interest in deciding local matters locally" favors transfer to Kankakee County, Cook County also has an interest in maintaining the cause because the defendants practice and office in Cook County; and (4) the litigation would proceed more expeditiously if kept in Cook County.

¶ 19 After considering the relevant private and public interest factors and the facts herein, we find the trial court did not abuse its discretion in denying defendants' motion to transfer the case from Cook County to Kankakee County. We cannot say that no reasonable person would take the view adopted by the trial court, and therefore, we find that the trial court did not abuse its discretion when it denied defendants' *forum non conveniens* motion. *Langenhorst*, 219 Ill. 2d at 442. Exceptional circumstances do not exist that warrant a transfer to Kankakee County. *Id.*

¶ 20 First, we agree with the circuit court that less deference should be afforded plaintiff's forum choice because he does not reside in Cook County. Defendants argue that plaintiff's choice of forum should not be afforded *any* deference because plaintiff took actions which indicate forum shopping by filing suit in a foreign venue against the underlying defendants and in seeking medical care in Cook County after the motion to transfer was filed in this lawsuit.

¶ 21 A trial court must give deference to the plaintiff's choice of forum. *Dawdy v. Union Pacific R.R. Co.*, 207 Ill. 2d 167, 173 (2003). When a plaintiff has chosen a forum that is neither his resident forum nor the site of the injury, the plaintiff's choice of forum is afforded less deference. *Hackl v. Advocate Health and Hospitals Corp.*, 382 Ill. App. 3d 442, 448 (2008). Our supreme court has cautioned, however, that only *less* deference is to be afforded "as opposed to none." *First National Bank v. Guerine*, 198 Ill. 2d 511, 518 (2008). "[W]hile courts acknowledge that plaintiffs forum shop, courts may not consider this practice in a *forum non conveniens* analysis." *Dawdy*, 207 Ill. 2d at 175. Courts already take into account whether a plaintiff is a resident or nonresident of the chosen forum and this consideration ensures that a plaintiff's forum choice is not accorded undue deference. *Id.* at 175-76. Therefore, the circuit court properly afforded plaintiff's forum choice less deference because it is a forum foreign to his residence as opposed to no deference as suggested by defendants. *First National Bank*, 198 Ill. 2d 518.

¶ 22 Regarding the first private interest factor, the convenience of the parties, the trial court found this factor weighed against transfer. Defendants have a high burden to show that plaintiff's forum choice is inconvenient to defendants and another forum is more convenient to all parties. *Pendergast*, 2013 IL App (1st) 121317, ¶ 30. Defendants have not met this burden. Defendants argue that Cook County is an inconvenient forum for plaintiff. However, plaintiff chose this

forum, therefore, it is presumptively convenient for him. *Blake v. Colfax Corp.*, 2013 IL App (1st) 122987, ¶ 19. In addition, convenience does not require transfer to Kankakee County where the defendants maintain their law offices in Cook County. See *Dawdy*, 219 Ill. 2d at 451. We also note that no affidavits have been filed by defendants in support of their contention that Cook County is an inconvenient forum for them. It may be optional to file an affidavit to support a *forum non conveniens* motion, however, the wisdom of filing an affidavit to establish inconvenience cannot be overemphasized. See *Bird v. Luhr Brothers, Inc.*, 334 Ill. App. 3d 1088, 1096 (2002). The defendant law firm maintains its primary office in Cook County, as do the defendant attorneys who represented plaintiff. Defendants have not demonstrated that Kankakee County is more convenient to all parties and the trial court did not abuse its discretion in finding the location of defendants' law office and practice heavily favored Cook County.

¶ 23 Next, we consider the second private interest factor, the relative ease of access to testimonial, documentary and other evidence. The trial court found this factor to be neutral. Medical records and other documentary evidence can be easily and inexpensively transported to either forum, therefore, this factor is afforded "less significant convenience consideration." *Spiegelman v. Victory Memorial Hospital*, 392 Ill. App. 3d 826, 843 (2009)*; Taylor*, 2013 IL App (1st) 130033, ¶ 21. Defendants assert that plaintiff, Jacobsen, his employer and the witness to the execution of the Jacobsen release all reside in Kankakee County and it would be inconvenient to obtain their testimony at a trial in Cook County. Defendants also argue that the purpose of transfer is so that "a party is not forced to incur the expense, inconvenience, and prejudice of being forced to use evidence depositions to present his/her case to a jury."

¶ 24 Here, because plaintiff chose this forum, he availed himself of appearing to testify in

Cook County. As for Jacobsen and the remaining witnesses, defendants have not filed affidavits stating that it is inconvenient for them to travel to Cook County to testify. It is not presumptively inconvenient for a witness to travel by car from one county to another to appear to give testimony as a witness. *Blake v. Colfax Corp.*, 2013 IL App (1st) 122987, ¶21; *Wilder Chiropractic, Inc. v. State Farm Fire and Casualty Co.*, 2014 IL App (2d) 130781, ¶ 59 (even a 45-mile travel distance between county courthouses is not "unreasonable or inconvenient" in itself). This record contains no persuasive basis to credit defendant's rationale relating to inconvenience to any of plaintiff's witnesses or for any specific witness whatsoever. We note that if the motion to transfer were allowed, defendants, which maintain their primary office in Cook County, would have to travel to Kankakee County for trial every day. *Pendergast*, 2013 IL App (1st) 121317, ¶ 33. If that commute is convenient for defendants we safely conclude the reverse commute would be equally convenient for others. Therefore, we find defendants have not established that it is inconvenient for any party or other witnesses to travel to Cook County to give testimony at trial. In addition, "[w]itness testimony could be obtained through deposition[s]" and defendants have not identified any practical problems with obtaining evidence depositions. *Taylor*, 2013 IL App (1st) 130033, ¶ 21; See *Kwasniewski v. Schaid*, 153 Ill. 2d 550, 554 (1992), citing 134 Ill. 2d Rules 202, 203, 204, 212(b) (the testimony of a reluctant nonresident witness "could be obtained through the taking of an evidence deposition."). Defendants have failed to submit affidavits or convincing argument that obtaining and furnishing evidence depositions is an unduly burdensome alternative to live testimony on a particular day of trial, therefore, we cannot say that the trial court erred in rating this factor as neutral.

¶ 25 In considering factors that make a trial easy, expeditious and inexpensive, defendants

argue that the circuit court erred in failing to recognize that the need to litigate a "case-within-a-case" to establish legal malpractice will require the jury to visit the location of the auto accident in Kankakee County and to produce witnesses from that county.

¶ 26 To prevail on a legal malpractice claim, the plaintiff/former client must prove that the "defendant attorneys owed the client a duty of due care arising from the attorney-client relationship, that the defendants breached that duty, and that as a proximate result, the client suffered injury." *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill.2d 294, 306 (2005). The theory underlying a cause of action for legal malpractice is that the client would have been compensated for an injury caused by a third party, absent negligence on the part of the client's attorney. *Id*. Where the alleged legal malpractice involves litigation, no actionable claim exists unless the attorney's negligence resulted in the loss of an underlying cause of action. If the underlying action never reached trial because of the attorney's negligence, the plaintiff is required to prove that, but for the attorney's negligence, the plaintiff would have been successful in that underlying action. See *Cedeno v. Gumbiner*, 347 Ill. App. 3d 169, 174 (2004). A legal malpractice plaintiff must therefore litigate a "case within a case" to establish proximate cause between the alleged negligence of the attorney and plaintiff's alleged damages. *Id*.; *Orzel v. Szewczyk*, 391 Ill. App. 3d 283, 290 (2009).

¶ 27 Defendants assert the circuit court abused its discretion when it found that "viewing the premises, is not appropriate in this case because the condition of the roadway is not relevant" because this is a "legal malpractice case where [p]laintiff alleges that [d]efendants were negligent in handling his personal injury claims arising from an accident that occurred in Kankakee County." A litigant "does not have an absolute right to have the jury view the scene of an

incident" (*Boner v. Peabody Coal Co.*, 142 Ill. 2d 523, 535 (1991)) and a site visit is not always required in cases involving auto accidents (*Blake*, 2013 IL App (1st) 122987, ¶ 22). For *forum non conveniens* analysis, the question is whether there is a possibility that the site will be viewed. *Dawdy*, 207 Ill.2d at 179. A circuit court's determination regarding "the necessity or propriety of viewing the scene is a decision left within the discretion of the trial court." *Dawdy*, 207 Ill. 2d 167, 179.

¶ 28 Here, plaintiff alleged that he was injured when hit by Jacobsen's car while changing a tire on the side of the road. Defendants have not offered any argument or evidence establishing why a site visit is appropriate in this case. Indeed, in their petition for leave to appeal defendants candidly admitted that "the likelihood of an accident site inspection is not particularly great." Defendants have not described any condition of the road, which upon a site inspection would provide Jacobsen and thus his employer a defense to the cause of the collision. *Blake*, 2013 IL App (1st) 122987, ¶ 22. Defendants do not have an absolute right to have a jury visit the accident site and have not put forth a sufficient basis to persuade us that there is a likelihood a jury would visit the accident site to determine the facts of the underlying auto accident. Therefore, we find the circuit court did not abuse its discretion on this basis in finding that this factor is neutral in this case.

¶ 29 Defendants also argue that the case of *Merritt v. Goldenberg*, 362 Ill. App. 3d 902 (2005) is "identical" to the case at hand and highlights the circuit court's error. In *Merritt*, we reversed the trial court's denial of a motion to transfer a legal malpractice case from Madison County to Alexander County. *Id*. at 913. In the underlying litigation, the defendant attorneys represented plaintiffs in prosecuting a wrongful death action arising from an auto accident. *Id*. at 904. In

concluding that Alexander County was the proper forum to litigate the malpractice action, we found significant that: the plaintiffs lived in Alexander County where the auto accident occurred, and the underlying wrongful death action was filed in the circuit court of Alexander County, which approved the settlement negotiated by the defendant attorneys, which was the basis of the legal malpractice action.

¶ 30 Although defendants argue that *Merritt* is "identical" to the case *sub judice* and requires that we reverse the judgment of the circuit court, we note that each "*forum non conveniens* case is unique and must be considered on its own facts." *Fennell*, 2012 IL 113812, ¶ 20-21. We observe that the facts of *Merritt* are not identical to this case and this court's conclusion was appropriate under those circumstances and facts. *Brant v. Rosen*, 373 Ill. App. 3d 720 (2007) (explaining that *Merritt* did not create a bright-line rule that a legal malpractice action must be transferred to the county where the underlying injury occurred and emphasized that a motion to transfer must be decided on a case by case basis). Here, the circuit court had broad discretion to consider and balance all factors and made the determination that defendants did not carry their burden to establish that plaintiff's forum choice should be disturbed and the factors on balance strongly favor transfer. *Taylor*, 2013 IL App (1st) 130033, ¶14. We will not reweigh the factors by comparing them with *Merritt*, but rather we will and must defer to the judgment of the circuit court. *Bishop v. Rockwell International Corp.*, 194 Ill. App. 3d 473, 477 (1990).

¶ 31 Next, we turn to the public interest factors. The circuit court found that the interest in deciding this matter in Kankakee County favors transfer; the fairness of imposing the trial in Cook County is neutral; and administrative difficulties by adding litigation to the court docket favors keeping this action in Cook County.

¶ 32 Defendants argue that Kankakee County has an "exponentially" greater interest in this litigation than Cook County because plaintiff, Jacobsen, Jacobsen's employer and certain witnesses are residents of Kankakee County and the alleged negligent legal services were performed in Kankakee County. We disagree. Although Kankakee County has an interest in adjudicating this legal malpractice case by a Kankakee County resident for his attorney's alleged failure to file a claim against a company located in Kankakee County, we cannot minimize the notion that Cook County also has an interest in this lawsuit because defendants maintain their principal office in Cook County and provide legal services to Cook County residents. *Prouty v. Advocate Health and Hospitals Corp.*, 348 Ill. App. 3d 490, 497 (2004) (for *forum non conveniens* purposes, a county in which a defendant provides services to county residents has an interest in the outcome of the case). We strongly disagree with defendants' contention that Kankakee residents have a greater interest in deciding a case that involves a non-Kankakee County attorney coming into their county and representing one of its residents. If this were true, defendants should be cautious in what they request. Simply put, residents of both counties have an interest in proceedings such of this.

¶ 33 Lastly, defendants argue that the circuit court failed to consider the congestion of Cook County's case docket as compared to the number of pending cases in Kankakee County. Court congestion may be an insignificant factor, but should be considered with all the other factors, especially when the data shows that Cook County resolves cases more quickly. *Langenhorst*, 219 Ill. 2d at 451-52. The circuit court found this factor to be neutral considering that, even with a higher volume of cases, cases tried by a jury are adjudicated more quickly in Cook County than in Kankakee County. The circuit court relied on statistical data that shows that in Cook County,

it took about 36.3 months from filing to verdict compared to approximately 48.9 months for Kankakee County. Therefore, we find the circuit court did not abuse its discretion in finding the public interest factors do not strongly favor transfer where defendants' law offices are in Cook County and the statistical data establishes that jury trials are adjudicated more quickly in Cook County.

¶ 34 Exceptional circumstances have not been established to warrant transfer from Cook County. The circuit court balanced the private and public interest factors and evaluated the totality of the circumstances, concluding that defendants did not meet their burden and show that Cook County is inconvenient and Kankakee County is more convenient to the parties. Our function as a reviewing court is to determine whether the circuit court abused its discretion in denying defendants' motion to transfer. *Taylor*, 2013 IL App (1st) 130033, ¶ 27. Defendants did not provide any affidavits from its witnesses stating that Cook County is an inconvenient forum. The record reveals that the principal place of business for the defendant law firm and the defendant attorney is in Cook County. The location of documents and evidence for trial can reasonably and efficiently be obtained in Cook County and defendants have not sustained their burden by arguing that the "case-within-a-case" analysis to establish proximate cause elicits the reasonable possibility that a visit by the jury to the site of the underlying accident. Therefore, we find the trial court did not abuse its discretion in denying defendants' motion to transfer on *forum non conveniens* grounds.

¶ 35 CONCLUSION

¶ 36 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 37 Affirmed.