2014 IL App (1st) 133588-U

FIRST DIVISION
September 29, 2014

No. 1-13-3588

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SHVETTE GRUBBS, Respondent-Appellee, v. CANADIAN NATIONAL RAILWAY COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY, CHICAGO, CENTRAL & PACIFIC RAILROAD COMPANY, ROBERT M. KEANE, and BOBBY A. WALKER, Petitioners-Appellants.	)	Appeal from the Circuit Court of Cook County. No. 2013 L 001890 Honorable Daniel T. Gillespie, Judge Presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 ***Held:*** The trial court did not err in denying petitioners' motion to dismiss on grounds of *forum non conveniens* as it properly balanced the private and public interest factors. We affirm the judgment of the circuit court.

¶ 2 Petitioners, Canadian National Railway Company (Canadian National), Illinois Central Railroad Company (ICR), Chicago, Central & Pacific Railroad Company (CC&P), Robert M. Keane, and Bobby A. Walker, petitioned this court for leave to appeal pursuant to Supreme

Court Rule 306(a)(2) (Ill. S. Ct. R. 306(a)(2) (eff. Feb. 16, 2011)) following the trial court's denial of their motion to dismiss on the grounds of *forum non conveniens*. Petitioners contend that the trial court erred in denying their motion by (i) "ignoring established principles of law," (ii) making factual findings based on unsupported assertions and not on any evidence of record, and (iii) giving inappropriate deference to respondent's choice of forum. Although we initially denied petitioners' petition, our supreme court issued a supervisory order directing us to vacate our denial and to consider the petition on the merits. *Grubbs v. Canadian National Ry. Co., et al.*, No. 117252 (March 26, 2014) (mem.). We have done so, and for the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 We initially note that, since this is an interlocutory appeal under Rule 306(a)(2), defendants were required to attach a "supporting record" to their petition for leave to appeal (Ill. S. Ct. R. 306(c) (eff. Sept.1, 2006)), authenticated either by a certificate of the circuit court clerk or, as here, the affidavit of "the attorney or party filing it" (Ill. S. Ct. R. 328 (eff. Feb. 1, 1994)). After the petition for leave to appeal was granted, this court granted defendants' agreed motion to allow their supporting record and respondent's supplemental record to stand as the record on appeal. As a result, this appeal proceeds based solely on those supporting records, which reveal the following pertinent facts and procedural history.

¶ 5 This case arises out of a personal injury action that took place in Waterloo, Iowa, on September 5, 2011. Respondent Shvette Grubbs was born and lived in Chicago until the age of 34, at which point she moved to Waterloo, where she lived for the next 14 years—until the date of the injury in question—and then returned to Chicago to live with family and where she could obtain a wider range of medical assistance. Petitioner Canadian National is a Montreal, Canada-

based corporation that operates railroads in Illinois; its wholly-owned subsidiaries are ICR and CC&P. ICR and CC&P operate railroad track in Illinois and both are headquartered in Cook County. Defendants Keane and Walker reside in Cook and Du Page county, respectively.

¶ 6 On the date of the accident, a CC&P train consisting of 172 railcars was stopped across an intersection in Waterloo. The train crew consisted of engineer Gary Angle, who lives in Oelwein, Iowa, and conductor Noah Diekhaus, who lives in Sheffield, Iowa. CC&P was in the process of "yarding" the train (*i.e.*, moving it to the nearby train yard). Because of the size of the train, several tracks in the yard had to be used, which thus required multiple back-and-forth movements in order to place groups of cars on various tracks.

¶ 7 Respondent Grubbs attempted to climb around one of the railroad cars, but the train suddenly moved and struck her. Grubbs's injuries resulted in her becoming a triple amputee, and only her nondominant left arm remains. The incident was investigated by local police in Waterloo. Shortly after the accident, a local attorney filed an "Application for Order Authorizing Release of Accident Investigation File" on Grubbs's behalf with the Black Hawk County district court. The application stated that local counsel needed to examine the Waterloo, Iowa, police department's investigation file so that counsel could "properly investigate the accident and advise [respondent] as to her legal options." Counsel asked the district court to enter an order "directing" the Waterloo police department to provide a duplicate of the investigation file to counsel. On February 9, 2012, the district court granted local counsel's application. The record does not disclose any subsequent filing with the Black Hawk County district court.

¶ 8 In November 2012, Grubbs returned to Chicago, where she receives medical treatment and assistance from, among others, the Illinois Department of Human Services (the Department),

the Community and Economic Development Association of Cook County, and the Chicago Transit Authority. Grubbs has around 30 family members in Chicago and 4 in Iowa.

¶ 9 On February 21, 2013, respondent filed a multicount complaint against petitioners. Respondent alleged that petitioners (i) failed to make the grade crossing reasonably safe; (ii) violated a local Waterloo city ordinance; (iii) failed to provide an adequate police force to prevent pedestrian-train accidents; and (iv) "created a culture and mind-set within their respective companies" that the pedestrian is solely at fault in these types of incidents.

¶ 10 CC&P filed a motion to dismiss on grounds of *forum non conveniens*, arguing in pertinent part that Iowa was a more convenient forum for this case because the accident occurred there and CC&P could locate no other witnesses (other than respondent) who lived in Cook County. Although CC&P stated that it would be more expensive for CC&P to produce its employees if a trial were held in Illinois than Iowa, there was no affidavit from any potential witness stating that trial in Illinois would be inconvenient compared to Iowa.

¶ 11 In response, respondent provided affidavits from 13 potential Iowa witnesses who stated that they were willing to testify in this case and traveling to Illinois to testify would not be an inconvenience to them. Respondent further noted that Canadian National's two wholly-owned subsidiaries, petitioners CC&P and ICR, were headquartered in Cook County. In addition, respondent noted that the possibility of a jury viewing the site of the accident was not significant as the railroad crossing "substantially changed because, most importantly, the train has moved." Respondent added that the case did not involve a railroad grade crossing collision "where sight obstructions, vehicle sight lines, *** are relevant." Respondent further noted that one of its theories of liability was that petitioners' corporate conduct caused the accident, and that Illinois has an interest in the negligence liability imposed upon its corporate residents, such as CC&P

and ICR. In reply, CC&P noted among other things that, based upon the affidavits submitted with respondent's response, she would "attempt to elicit testimony from other Waterloo residents that CC&P trains blocking crossings was a frequent occurrence in Waterloo."

¶ 12 On November 6, 2013, the trial court issued a written order denying CC&P's motion. On November 21, 2013, petitioners sought review of the trial court's denial by filing their petition for leave to appeal to this court under Supreme Court Rule 306(a)(2) (Ill. S. Ct. R. 306(a)(2) (eff. Feb. 16, 2011)). This court denied the petition on January 14, 2014, but the supreme court issued a supervisory order on April 13, 2014, directing this court to vacate its denial and to decide the petition on the merits. *Grubbs*, No. 117252 (March 26, 2014) (mem.). On May 9, 2014, we vacated our earlier denial and allowed the petition.

¶ 13 ANALYSIS

¶ 14 On appeal, petitioners contend that the trial court erred in denying their motion to dismiss on grounds of *forum non conveniens*. Petitioners argue that the trial court disregarded "established principles of law," made factual findings based on unsupported assertions rather than evidence, and deferred too much to respondent's choice of forum.

¶ 15 In Illinois, an action must 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 cause of action arose. 735 ILCS 5/2-101 (West 2012); *Dawdy v. Union Pacific R.R. Co.*, 207 Ill. 2d 167, 172 (2003). Where, as here, more than one appropriate forum exists, a defendant may invoke the doctrine of *forum non conveniens* to determine the most appropriate forum. *Dawdy*, 207 Ill. 2d at 172. This 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. *Id.* Where the focus is on an interstate *forum non conveniens*, the

issue is whether the case is being litigated in the most appropriate state. *Fennell v. Illinois Central R.R. Co.*, 2012 IL 113812, ¶ 13. If the trial court grants an interstate *forum non conveniens* motion, the action must be dismissed because an Illinois circuit court lacks the power to transfer the action to the court of another state, but the dismissal is conditioned on the plaintiff timely filing the action in the other forum and the defendant accepting service of process from that court and waiving any available statute of limitations defense. *Id.* (citing Ill. S. Ct. R. 187(c)(2) (eff. Aug. 1, 1986)).

¶ 16 In making its determination as to the appropriate forum in which the case should be tried, the court must balance certain private and public interest factors. *Dawdy*, 207 Ill. 2d at 172. Private interest factors include: (1) the convenience of the parties; (2) the relative ease of access to sources of evidence; (3) the availability of compulsory process to secure attendance of unwilling witnesses; (4) the cost to obtain attendance of willing witnesses; (5) the possibility of viewing the premises, if appropriate; and (6) any other practical considerations that make a trial easy, expeditious, and inexpensive. *Id.* Public interest factors include: (1) the administrative difficulties caused by litigating cases in congested forums; (2) the unfairness of imposing jury duty on residents of a county with no connection to the litigation; and (3) the interest in having local controversies decided locally. *Id.* at 173. The trial court, however, must also consider the plaintiff's choice of forum, which is substantial and entitled to deference. *Id.* The plaintiff's choice of forum may not be disturbed unless the factors weigh "strongly" in favor of transfer. *Id.* In other words, "the battle over forum begins with the plaintiff's choice already in the lead." *First American Bank v. Guerine*, 198 Ill. 2d 511, 521 (2002).

¶ 17 However, the plaintiff's choice of forum is not entitled to such deference in all cases. *Dawdy*, 207 Ill. 2d at 173. When a plaintiff chooses to litigate his cause of action in her home

forum or in the forum in which his accident or injury occurred, it is reasonable to assume that the forum was chosen for reasons of convenience. *Id.* However, when the plaintiff is foreign to her chosen forum or the events that gave rise to the litigation did not occur in that forum, that assumption is less reasonable and her choice is afforded less deference. *Id.* at 173-74. Under those circumstances, it is instead reasonable to conclude that the plaintiff engaged in forum shopping to suit her individual interests, which is disfavored. *Id.* at 174.

¶ 18 Thus, in ruling on a motion to transfer, the circuit court must take all of these factors into account and give each factor proper deference or weight under the circumstances. *Id.* at 176 (quoting *Griffith v. Mitsubishi Aircraft International, Inc.*, 136 Ill. 2d 101, 107-08 (1990)). The circuit court must evaluate the total circumstances of the case to determine whether the balance of factors strongly favors dismissal. *Fennell*, 2012 IL 113812, ¶ 17. In other words, " 'unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should *rarely* be disturbed.' " (Emphasis added.) *Jones v. Searle Laboratories*, 93 Ill. 2d 366, 372-73 (1982) (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947)).

¶ 19 The determination of a *forum non conveniens* motion lies within the sound discretion of the circuit court, and its decision will only be reversed if it can be shown that it "abused its discretion in balancing the relevant factors." *Fennell*, 2012 IL 113812, ¶ 21; *Dawdy*, 207 Ill. 2d at 176-77. The question is not whether this court would have weighed the factors differently or would have resolved the issue as did the trial court. *Jones*, 93 Ill. 2d at 378. Nor may we substitute our judgment for that of the trial court or even to determine whether the trial court exercised its discretion wisely. *Bird v. Luhr Bros.*, 334 Ill. App. 3d 1088, 1091 (2002). Rather, we will find an abuse of discretion only where no reasonable person would take the view adopted by the court. *Fennell*, 2012 IL 113812, ¶ 21. Put another way, where reasonable persons differ,

we will not find an abuse of discretion. *Peraica v. Riverside-Brookfield High School District No. 208*, 2013 IL App (1st) 122351, ¶ 34.

¶ 20 In this case, we cannot hold that the trial court abused its discretion in finding that petitioners failed to show that the private and public interest factors "strongly" favor dismissing this cause and refiling it in Iowa. We note preliminarily that respondent's choice of forum begins "already in the lead." *Guerine*, 198 Ill. 2d at 521. This lead, however, is somewhat thin, since only some deference is required: both the events giving rise to this cause of action and also respondent's residence at the time were in Iowa, not Illinois. See *id.* at 518.

¶ 21 Turning to the first private interest factor, the convenience of the parties, we hold that Illinois is slightly favored because four of the five petitioners are residents of Cook County (or nearby Du Page County). Canadian National is a Montreal-based corporation without appreciable operations in either Iowa or Illinois. Although the trial court found Canadian National had its United States headquarters in Illinois, we do not find anything in the record to support this finding. Nonetheless, all but one petitioner is an Illinois resident; thus, the trial court did not abuse its discretion in finding that this factor favors Illinois. See *Pendergast v. Meade Elec. Co.*, IL App (1st) 121317, ¶ 34 ("Additionally, three of the defendants are residents of Cook County and, thus, Cook County has an interest in deciding controversies involving its residents"), *appeal denied*, No. 116715 (Nov. 27, 2013).

¶ 22 With respect to the second factor, the relative ease of access to sources of evidence, this factor appears to slightly favor Iowa. Although documentary evidence would be easily available in Illinois and respondent's witnesses have all submitted affidavits indicating that they would not be inconvenienced by testifying in Illinois, the fact remains that they are all residents of Iowa

and the location of real evidence (to the extent it is relevant) is also in Iowa. We therefore find no abuse of discretion in the trial court's decision on this factor.

¶ 23 Next, regarding the availability of compulsory process to secure attendance of unwilling witnesses, the trial court found that this factor did not strongly favor transfer to Iowa because, although Iowa witnesses are not subject to compulsory process to testify in Illinois, Illinois witnesses equally could not be compelled to testify in Iowa. In addition, respondent could compel petitioners' Iowa employees to testify. See Ill. S. Ct. R. 237(b) (eff. July 1, 2005). We further note that one of respondent's theories of liability concerned the corporate actions of petitioners. On balance, the trial court did not abuse its discretion on this point.

¶ 24 The fourth private interest factor considers the cost to obtain attendance of willing witnesses. The trial court found this factor to be neutral, noting that although petitioners would incur costs to transport occurrence witnesses in Iowa to Illinois, the cost of obtaining the attendance of petitioners' employees who reside in Cook County would be minimal. We further note that, among the theories asserted against petitioners, respondent has alleged that petitioners' corporate culture played a significant role in the events leading to respondent's injuries. In any event, we cannot hold that the cost of procuring witnesses from a neighboring state are so exhorbitant that this factor alone would warrant transfer to Iowa. But see *Kourdoglanian v. Yannoulis*, 227 Ill. App. 3d 898, 901 (1992) (holding that the cost and inconvenience of bringing the plaintiff and the defendant to Illinois was "paramount" where both were residents of Greece and Switzerland, respectively). Under the facts of this case, the trial court's decision as to this factor was not an abuse of discretion.

¶ 25 With respect to the next factor, the possibility of viewing the premises, if appropriate, the trial court found that this was not appropriate in this case because this case does not turn on

whether respondent was able to view the train before the accident. Unquestionably, she did: she was in the process of climbing between railcars when the train suddenly moved and rolled over her, leaving her a triple amputee. Although it is clear that it is the *possibility* of viewing the premises that trial courts should examine (*Dawdy*, 207 Ill. 2d at 172), such possibility no longer exists in this case. Where "the preexisting conditions alleged to have caused the accident no longer exist and a jury view of the accident site as it existed on the occurrence date is not possible," this factor no longer weighs in favor of a transfer. See *Langenhorst v. Norfolk Southern Ry. Co.*, 219 Ill. 2d 430, 448-49 (2006). Here, the train itself caused the injury, and the train is no longer blocking the road where the accident took place. While the trial court may have placed too much emphasis on the appropriateness of a jury view rather than the possibility of it (*Fennell,* 2012 IL 113812, ¶ 37 (holding that the necessity of viewing the premises is a decision within the circuit court's discretion "at trial")), the trial court nevertheless did not abuse its discretion since the premises no longer exist in the same condition as on the date of the accident.

¶ 26 The final private interest factor, "any other practical considerations that make a trial easy, expeditious, and inexpensive," only slightly favors Illinois, as the parties' attorneys are located in Cook County. Although petitioners claim that respondent's out-of-state counsel did all of the "heavy lifting," we disagree with that observation. Local counsel signed the response to petitioners' motion to dismiss as well as the supplemental brief distinguishing an unpublished decision petitioners had relied upon in the trial court, and local counsel filed and argued a subsequent motion to strike a letter that petitioners submitted to the trial court. Finally, local

counsel also participated, albeit briefly, in the hearing on petitioners' motion.[1] Nonetheless, this factor is only to be accorded minimal weight (*Id.* ¶ 40), which is all the weight the trial court gave to this particular factor. Again, we find no abuse of discretion as to this point.

¶ 27 Turning to the first of the public interest factors, the administrative difficulties caused by litigating cases in congested forums, the trial court found that this factor only "arguably" favored Iowa because petitioners did not include any data as to the relative court congestion in Black Hawk County that could be compared with the data for Cook County, which the trial judge found has a 36-month average time from the filing of the initial complaint to the verdict. Petitioners do not address the trial court's finding in their briefs, and any argument as to this point is forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) ("Points not argued are waived ***"). Thus, there is no basis upon which we may hold that the trial court abused its discretion.

¶ 28 The second public interest factor concerns the unfairness of imposing jury duty on residents of a county with no connection to the litigation. The trial court found this factor to be "neutral," primarily because, although the location of the accident and respondent's residence at the time were in Iowa, four of the five petitioners reside or work in Cook County and respondent has alleged that the incident proximately resulted from petitioners' corporate conduct. We also observe that CC&P (the owner of the train that caused respondent's injuries) and ICR are both headquartered in Illinois, while defendant Keane resides in Cook County and defendant Walker resides in Du Page County, which is within Illinois and considerably closer to Cook County than Black Hawk County, Iowa. Illinois has an interest in the conduct of its corporate residents.

[1] Petitioners only provided selected excerpts of the transcript from a deposition, so we are unable to determine whether and to what extent local counsel participated therein.

Pendergast, IL App (1st) 121317, ¶ 34, *appeal denied*, No. 116715 (Nov. 27, 2013). On these facts, the trial court's finding did not constitute an abuse of discretion.

¶ 29 As to the last public interest factor, the interest in having local controversies decided locally, the trial court found that this factor favored Iowa since that was the location of the accident. Petitioners add that this case concerns the application of Iowa law, which further favors a transfer to Iowa. We disagree. We have little doubt that an Illinois court is capable of determining whether the law of a sister state is applicable and applying it to this personal injury action. See, *e.g.*, *Woodward v. Bridgestone/Firestone, Inc.*, 368 Ill. App. 3d 827, 837 (2006) (trial court competent to determine applicable law and to apply the law of Australia, if necessary), *appeal denied*, 222 Ill. 2d 603 (2006). Moreover, although respondent and four of the five petitioners are Illinois residents, and despite the fact noted above that Illinois has an interest in resolving matters between its residents (*Pendergast*, IL App (1st) 121317, ¶ 34*;* see also *Kwasniewski v. Schaid*, 153 Ill. 2d 550, 556 (1992)), we may not reweigh the factors nor substitute our judgment for that of the trial court (*Jones*, 93 Ill. 2d at 378). Accordingly, there was no abuse of discretion in finding this factor favored Iowa.

¶ 30 In sum, we find that the trial court conscientiously examined and weighed the various private and public interest factors. To hold as petitioners wish, we would have to reweigh the factors, giving disproportionate weight to the situs of the accident, and substitute our judgment for that of the trial court, something we may not do. See *id.*; *Bird*, 334 Ill. App. 3d at 1091. As a result, after examining the total circumstances of the case to determine whether the balance of factors strongly favors dismissal, we cannot hold that no reasonable person would have found that the factors "strongly" favored Iowa as a forum. *Fennell*, 2012 IL 113812, ¶¶ 17, 21. The

trial court therefore did not abuse its discretion in denying petitioners' motion to dismiss on grounds of *forum non conveniens*. *Id.* ¶ 21.

¶ 31 Finally, our decision is unaffected by petitioners' reliance upon *Fennell*. There, the plaintiff brought an action against the defendant in Mississippi under the Federal Employers' Liability Act for injuries allegedly sustained due to asbestos exposure during the plaintiff's employment with the defendant. *Fennell*, 2012 IL 113812, ¶ 3. The plaintiff later answered a set of defendant's interrogatories in part that he resided in Mississippi and that he did work in Jefferson County, Mississippi. *Id.* ¶ 4. A Mississippi circuit court eventually dismissed this consolidated action on the defendant's motion without prejudice. *Id.* Three years later, the plaintiff filed his complaint in the circuit court of St. Clair County, Illinois. *Id.* ¶ 5. The appellate court affirmed the trial court's denial of the defendant's motion to dismiss on grounds of *forum non conveniens*, but the supreme court reversed the appellate court and trial court, noting that: (1) Illinois was the plaintiff's second choice of forum, (2) the plaintiff never lived in Illinois, and (3) the action did not arise in Illinois. *Id.* ¶¶ 48-49. These facts, when considered with the relevant private and public interests, "strongly favor[ed]" dismissal in favor of a forum in Mississippi. *Id.*

¶ 32 Unlike in *Fennell*, where the plaintiff flatly admitted that he resided in Mississippi and had no connections whatsoever to Illinois, respondent in this case (*i.e.*, the plaintiff) was born in Cook County and lived there until the age of 34, at which point she moved to Waterloo, where she lived for the subsequent 14 years until the accident in question left her a triple amputee. She then returned to Cook County, where she has substantially more family than in Waterloo, and where she can receive greater assistance her with her considerable medical and financial needs. In addition, contrary to petitioners' claim, respondent did not file any "action" in Iowa first. The

record before us indicates that respondent filed an application asking for a court order directing the local Waterloo police to release its investigation files so that an attorney could advise respondent, which is required under local law. See Iowa Code Ann. § 22.7 (West 2012) (providing that "Peace officers' investigative reports" "shall be kept confidential, unless otherwise ordered by a court ***."). There is nothing in the record submitted to this court—indeed, petitioners point to nothing—that establishes that Illinois was respondent's second choice of forum. Since *Fennell* is factually distinguishable, petitioners' reliance upon it is unavailing.

¶ 33 We further find *Carona v. Illinois Central Gulf R.R. Co.*, 145 Ill. App. 3d 880 (1986), unhelpful to defendants' claim. There, the plaintiff was injured when he "threw a switch" at the Mays [Rail] Yard in New Orleans, Louisiana. *Id.* at 88. In other words, the instrumentality that caused the plaintiffs' injury was physically located in New Orleans. Here, by contrast, the instrumentality that caused plaintiff's injury was the rail car (or, the 172-car train), which is "rolling stock" and is not fixed to any particular physical location. Therefore, although we question the potential necessity of a jury view, even assuming, *arguendo*, that it were, the train car would just as likely be in proximity to Illinois (respondent's preferred forum) as Iowa (petitioners'), given the transient nature of the train car's location. For that reason, we reject defendants' claim that the ability of the jury to view the "premises" of the injury weighs strongly in favor of Iowa. See *Bird*, 334 Ill. App. 3d 1088, 1095 (2002) (rejecting the defendant's *forum non conveniens* claim, based in part upon the transient nature of the inland-waterway marine vessel where the injury occurred), *appeal denied*, 202 Ill. 2d 668 (2003).

¶ 34 CONCLUSION

¶ 35 The trial court did not err in denying petitioners' motion to dismiss on grounds of *forum non conveniens*. The trial court properly balanced the private and public interest factors, and its decision was not an abuse of discretion. Accordingly, we affirm the judgment of the trial court.

¶ 36 Affirmed.