# IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
# COUNTY DEPARTMENT, LAW DIVISION

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| James Gunther, | ) | |
| Plaintiff, | ) | |
| v. | ) | No. 20 L 8165 |
| Santos P. Martinez; Lorig Construction Company, an Illinois corporation; and Adam R. Cook, | ) | |
| Defendants. | ) | |

## MEMORANDUM OPINION AND ORDER

The doctrine of *forum non conveniens* permits a circuit court to transfer a case to another jurisdiction, but only after weighing a variety of public- and private-interest factors and determining that they strongly favor the transfer. In this case, the factors strongly favor transferring this case, particularly as none of the individual parties are Cook County residents, and the alleged incident occurred in Lake County. The defendant's motion to transfer is, therefore, granted.

### Facts

On August 15, 2018, James Gunther was involved in a multi-vehicle collision in Lake County. Gunther alleges that Santos Martinez, driving a vehicle owned by Lorig Construction, struck the rear of a vehicle driven by Adam Cook, pushing Cook vehicle into oncoming traffic where it collided with Gunther's. On August 3, 2020, Gunther filed a complaint naming Cook, Martinez, and Lorig as defendants. On November 18, 2020, Cook filed a motion to transfer this case to Lake County pursuant to Illinois Supreme Court Rule 187 and the *forum non conveniens* doctrine.

The parties' respective briefs supply information relevant to a *forum non conveniens* analysis. For example, Gunther lives in McHenry County, Martinez in Lake County, and Cook in Kenosha County, Wisconsin. Lorig Construction is a Delaware corporation headquartered in Cook County. Several of the non-party medical providers and facilities where Gunther received medical treatment are located in Cook County. The parties have also supplied information concerning the work and home locations of the parties, treating medical care providers, and various potential witnesses. Those individuals and entities include:

| Party or Witness | Residence (City, County) | Work Location (City, County) |
|---|---|---|
| James Gunther | Spring Grove, McHenry | Chicago, Cook |
| Santos P. Martinez | Zion, Lake | Des Plaines, Cook |
| Adam R. Cook | Salem, Kenosha (WI) | |
| Lorig Construction | Des Plaines, Cook / DE* | N/A |
| Antioch Police Officer, Star No. 17 | N/A | Antioch, Lake |
| Terri Foster | Spring Grove, McHenry | N/A |
| George Laut | Arlington Heights, Cook | N/A |
| Mike Gunther | Chicago, Cook | N/A |
| Bill Gunther | Chicago, Cook | N/A |
| Scott Gunther | Chicago, Cook | N/A |
| John Gunther | Highwood, Lake | N/A |
| Mike Ambrosino | | Chicago, Cook |
| Dr. Ronald Silver | | Lincolnwood, Cook |
| Dr. Peter Jurgen Kiefer | | Des Plains, Cook |
| Dr. Craig Williams | | Highland Park, Lake |
| Sarah Dayta/William Bayden | | McHenry, McHenry |

Analysis

There exists an extensive body of law governing a court's consideration of a motion to transfer litigation based on the doctrine of *forum non conveniens*. A main concern of *forum non conveniens* jurisprudence is curtailing forum shopping by plaintiffs. *See First National Bank v. Guerine*, 198 Ill. 2d 511, 521 (2002). At its essence, the doctrine "is founded in considerations of fundamental fairness and sensible and effective judicial administration." *Gridley v. State Farm Mut. Auto. Ins. Co.*, 217 Ill. 2d 158, 169 (2005). The modern application of the doctrine came with the United States Supreme Court's decision in *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501 (1947), a decision Illinois courts have consistently followed. *See Fennell v. Illinois. Cent. R.R.*, 2012 IL 113812, ¶ 14 (2012) (citing cases).

A motion to transfer based on *forum non conveniens* differs from one based on venue. In Illinois, venue is a product of statute. *See* 735 ILCS 5/2-101. In contrast, *forum non conveniens* arises from the common law and is based on equitable principles. *See Langenhorst v. Norfolk S. Ry.*, 219 Ill. 2d 430, 441 (2006), *citing Vinson v. Allstate Ins. Co.*, 144 Ill. 2d 306, 310 (1991). In short, a circuit court is instructed to "look beyond the criteria of venue when it considers the relative convenience of a forum." *Id., quoting Bland v. Norfolk & W. Ry.,* 116 Ill. 2d 217, 226 (1987).

Circuit courts are given "considerable discretion in ruling on a *forum non conveniens* motion." *Id.* at 441-42 (citing *Peile v. Skelgas, Inc.*, 163 Ill. 2d 323, 336 (1994)). A circuit court's decision will be reversed only if the court abused its discretion in balancing the relevant factors; in other words, if no reasonable person would adopt the view taken by the circuit court. *See Dawdy v. Union Pacific R.R.*, 207 Ill. 2d 167, 176-77 (2003). At the same time, courts are cautioned to exercise their discretion "*only in exceptional circumstances* when the interests of justice require a trial in a more convenient forum." *Langenhorst*, 116 Ill. 2d at 442 (citing cases, emphasis in original); *see also Dawdy*, 207 Ill. 2d at 176 ("the test . . . is whether the relevant factors, viewed in their totality, *strongly* favor transfer to the forum

suggested by defendant") (emphasis added)), *quoting Griffith v. Mitsubishi Aircraft Int'l, Inc.*, 136 Ill. 2d 101, 108 (1990).

The consideration given to a *forum non conveniens* motion rests on several relevant presumptions, two of which are relevant here. First, as to a plaintiff's choice of forum, "[w]hen the home forum is chosen, it is reasonable to assume that the choice is convenient." *Guerine*, 198 Ill. 2d at 517-18 (citing cases). A second presumption is especially pertinent if the disputed fora are two adjoining counties, as they often are in the Chicago metropolitan area and, indeed, as they are in this case. In such instances, "the battle over the forum results in a battle over the minutiae." *Langenhorst*, 219 Ill. 2d at 450 (quoting *Guerine*, 198 Ill. 2d at 519-20). As has been explained, "a trial court abuses its discretion in granting an intrastate *forum non conveniens* motion to transfer venue where . . . the potential trial witnesses are scattered among several counties, including the plaintiff's chosen forum, and no single county enjoys a predominant connection to the litigation." *Guerine*, 198 Ill. 2d at 526 (citing *Peile*, 163 Ill. 2d at 345).

As noted above, circuit courts are instructed to balance a variety of private- and public-interest factors to determine the appropriate forum in which a case should be tried. *See Dawdy*, 207 Ill. 2d at 172. The test is "whether the relevant factors, viewed in their totality, strongly favor transfer to the forum suggested by defendant." *Id.* at 176 (quoting *Griffith*, 136 Ill. 2d at 108). It is the defendant's burden to show that the relevant factors strongly favor the defendant's choice of forum to warrant disturbing the plaintiff's choice. *See Langenhorst*, 219 Ill. 2d at 444 (citing *Griffith*, 136 Ill. 2d at 107). A court is not to weigh the private- and public-interest factors against each other, but evaluate the totality of the circumstances before deciding whether the defendant has proven that the balance of factors strongly favors transfer. *Id.* (citing *Guerine*, 198 Ill. 2d at 518). "The defendant must show that the plaintiff's chosen forum is inconvenient to the defendant and that another forum is more convenient to all parties." *Id.* The defendant may not, however, assert that the plaintiff's chosen forum is inconvenient to the plaintiff. *Id.*

Before addressing the private and public factors, this court believes some commentary on the *forum non conveniens* analysis is highly warranted. First, the analysis by Illinois courts of motions to transfer litigation based on the *forum non conveniens* doctrine has always been weighted to trials and not discovery. The reality is, however, that very, very few cases go to trial. Further, the amount of time parties and their attorneys spend in discovery far exceeds the amount of time they spend at trial. The current *forum non conveniens* analysis stressing the trial is, quite frankly, out of sync with modern litigation practice. A more current analysis would give at least equal weight to the applicability of enumerated factors to pre-trial proceedings, particularly the discovery process, and not merely the trial.

Second, the *forum non conveniens* analysis as stated in *Langenhorst* has not been updated to reflect the changing face of litigation over the past 15 years. Several of the factors enumerated in the analysis do not reflect the reality of modern litigation, such as "viewing the premises," which rarely, if ever, occurs during a modern jury trial. Several of the elements have been rendered trivial because of improved technology and its entrenchment in court proceedings. In application, this reality renders the public factors weightier than the private factors.

Third, the Covid-19 pandemic has altered the convenience factors related to obtaining parties' and witnesses' deposition or trial testimony. It is now common for depositions and trial testimony to occur remotely, with attorneys, witnesses, and a court reporter in multiple separate locations. The cost savings to all parties has been enormous. It is difficult to think that clients, counsel, and witnesses will return to far more expensive discovery practices after the pandemic is over.

In *Guerine*, the Illinois Supreme Court listed the private- and public-interest factors a circuit court is to consider when addressing a motion to transfer based on *forum non conveniens*. The private factors are:

> (1) the convenience of the parties; (2) the relative ease of access to sources of testimonial, documentary, and real evidence; and (3) all other practical problems that make a trial of a case easy, expeditious, and inexpensive – for example, the availability of compulsory process to secure attendance of unwilling witnesses, the cost to obtain attendance of willing witnesses, and the ability to view the premises (if appropriate).

198 Ill. 2d at 516 (citing *Griffith*, 136 Ill. 2d at 105-06; *Bland*, 116 Ill. 2d at 224; and *Adkins v. Chicago, Rock Island & Pac. R.R.*, 54 Ill. 2d 511, 514 (1973)). Courts have generally broken down the third element to address each aspect separately and have often reorganized the order of the factors, as this court does below.

A. The Deference Given to a Plaintiff's Choice of Forum

The first step in a *forum non conveniens* analysis is to determine how much deference to give to the plaintiff's choice of forum. *Id.* at 448. Normally, the plaintiff's choice is a substantial factor. *Dawdy*, 207 Ill. 2d at 172. When a plaintiff's home forum is chosen, it is reasonable to assume that the choice is convenient. *Guerine*, 198 Ill. 2d at 517. When the plaintiff chooses a non-resident forum, that choice is accorded less deference. *See Langenhorst*, 219 Ill. 2d at 448. The deference granted to the plaintiff's choice of venue acknowledges the plaintiff's substantial interest in choosing the forum where their rights will be vindicated and is based on the assumption that the plaintiff's choices of forum are convenient. *Czarnecki v. Uno-Ven Co.*, 339 Ill. App. 3d 504, 509 (1st Dist. 2003) (citing *Guerine*, 198 Ill. 2d at 517).

Gunther is a resident of McHenry County. It is, however, reasonable to assume that his choice of Cook County is convenient. Though the collision occurred in Lake County, a plaintiff's right to select the forum is a substantial one, and unless other factors weigh strongly in favor of transfer, "'the plaintiff's choice of forum should rarely be disturbed.'" *Peile*, 163 Ill. 2d at 337 (quoting *Griffith*, 136 Ill. 2d at 106). This presumption favors Cook County.

B. Private Factors

1. Convenience of the Parties

Courts have recognized it is relatively easy for a party to declare its forum preference as convenient and the opposing party's as inconvenient. "If we follow this reasoning, the convenience of the parties means little. . . ." *Hale v. Odman*, 2018 IL App (1st) 180280, ¶ 34 (quoting *Fennell*, 2012 IL 113812, ¶ 20). "To avoid this inevitable conflict, we must look beyond the declarations of convenience and realistically evaluate convenience and the actual burden each party bears when traveling to the plaintiff's chosen forum." *Id.* at ¶ 35.

This court begins by stressing that this factor focuses on the parties, not other witnesses, and not the attorneys. Gunther resides in McHenry County, Martinez in Lake County, and Cook in Kenosha County, Wisconsin. Lorig is headquartered in Cook County. A motion to transfer based on *forum non conveniens* is, of course, a defendant's motion and, therefore, imposes pleading burdens on the movant. Although the defendants cite Gunther's location as a reason to relocate the case, "defendants cannot assert that the plaintiff's chosen forum is inconvenient to the plaintiff." *Langenhorst*, 219 Ill. 2d at 448; *see Guerine*, 198 Ill. 2d at 518.

In this instance the distance from Cook's home to the Waukegan courthouse is 25 miles, but 62 miles to the Daley Center. Martinez lives only nine miles from the Waukegan courthouse as opposed to 56 miles to the Daley Center. Although the defendants cannot argue that Cook County is inconvenient for Gunther, the reality is that he lives 31 miles from the Waukegan courthouse but 67 miles from the Daley Center. Given the parties' locations, travel times to the Waukegan courthouse would unquestionably be shorter than to the Daley Center.

The undisputed and highly relevant facts are that all of the individual parties reside substantially closer to the Waukegan

courthouse than the Daley Center. This factor favors transfer to Lake County.

### 2. The Relative Ease of Access to Evidence

This factor reveals a certain antique nature of the *forum non conveniens* analysis. As to documents, this factor is much less important than it used to be. The court in *Ruch v. Padgett*, wrote that: "the location of documents, records and photographs has become a less significant factor in *forum non conveniens* analysis in the modern age of email, internet, telefax, copying machines and world-wide delivery services, since they can now be easily copied and sent." 2015 IL App (1st) 142972, ¶ 61 (citing *Vivas v. Boeing Co.*, 392 Ill. App. 3d 644, 659 (1st Dist. 2009)). The use of real evidence is far less common, given the modern use of photography and video photography both in depositions and at trial. Technology has made document transfer possible at the press of a few buttons, while the portability of real and demonstrative evidence is rarely a substantial hurdle. The result is that this factor is now focused primarily on the availability of testimonial evidence.

It is highly likely that Gunther's treating physicians will be deposed where they work via Zoom or some other audio-visual linkage, as is the current common practice. Their trial testimony will be either read from a transcript or presented via a pre-recorded, visual evidence depositions taken at their place of employment, again, as is the current common practice. Ultimately, the location of discovery or trial in Cook or Lake County is unimportant to this group of witnesses. *See Meyers v. Bridgeport Machines Div. of Textron, Inc.*, 113 Ill. 2d 112, 120 (1986) (collar county treaters "would not be subjected to a significant inconvenience by a trial in Cook County").

Gunther's discovery responses identify various family members whom Gunther states will testify to his health and activities both before and after the accident. As with the treating physicians, the deposition or trial testimony of these witnesses can be easily secured through remote means. The list of testifying witnesses also presents

cumulative evidence that would not be permitted either in discovery or at trial. Besides, the depositions or trial testimony of these witnesses can be easily achieved through remote means.

In sum, this factor favors transferring this case to Lake County.

3. Other Practical Problems That Make Trial Easy, Expeditious, and Inexpensive

The First District has held that when the issue is moving a suit from Cook County to an adjacent county, the factor of practical problems is not usually a strong factor favoring transfer. *See Johnson v. Nash*, 2019 IL App (1st) 180840, ¶ 56 (quoting *Susman v. North Star Tr. Co.*, 2015 IL App (1st) 142789, ¶ 31. Nevertheless, this court discusses the topics enumerated in *Guerine* as the third private interest factor in the *forum non conveniens* analysis. *Guerine*, 198 Ill. 2d at 516.

<u>Compulsory Process of Unwilling Witnesses</u>

The parties have not identified any witness that would need to be compelled to be deposed or testify, and it does not appear to be a relevant factor in this case, as a judge in either county would have access to compulsory process over witnesses. As a result, this factor is neutral.

<u>Cost of Obtaining Attendance of Willing Witnesses</u>

A *forum non conveniens* analysis cannot ignore the impact that web-based video conferencing has had on litigation. The need for parties, witnesses, and lawyers to spend time and money traveling long distances to prepare for and give testimony in a court proceeding has significantly decreased. When weighing the cost of obtaining witness testimony, travel expenses are less likely to be a substantial component.

The Covid-19 pandemic has had a dramatic impact on how litigation is conducted. Most court hearings, depositions, and pre-

trial conferences are now being done remotely. The judiciary is even finding ways to conduct jury trials remotely. Covid-19 has accelerated the adoption of Zoom, Skype, Microsoft Teams, and other web-based video conferencing platforms by lawyers and the general public. The technology employed during this crisis is not likely to disappear once the pandemic ends. The idea of a trial consisting of lawyers, witnesses, jurors, and judges all in the same room may one day become an artifact of a bygone era.

In this case, Gunther's Rule 213(f) disclosures identify witnesses located in Cook, Lake, and McHenry counties. Under the new norm, the only travel required for these witnesses may be to testify at trial. Indeed, many of them need not even be present at trial because their testimony can be presented via recorded evidence depositions and, as noted, depositions will likely be taken remotely, obviating the need for travel.

As to factual issues, this court notes that the Chicago metropolitan area is well connected by a series of multi-lane highways and commuter train lines. It is also noted that these highways and train lines are generally convenient to both the Waukegan and Chicago courthouses, so perhaps a greater consideration for the purpose of convenience is time. While trains usually run on a schedule, travel by car across northern Illinois, particularly in peak hours, can be long and frustrating. To that extent, it is reasonable to presume that travel time by car or train is reduced the shorter the distance, regardless of the county.

In this instance, Cook's home is 25 miles from the Lake County courthouse, located in Waukegan, but 62 miles from the Daley Center. Martinez lives only 9 miles from the Waukegan courthouse, but 56 miles from the Daley Center. Although the defendants cannot argue that Cook County is inconvenient for Gunther, the reality is that he lives 31 miles from the Waukegan courthouse, but 67 miles from the Daley Center. Given the parties' locations, travel times to the Waukegan courthouse would unquestionably be shorter than to the Daley Center. The parties do not, however, indicate how they or other witnesses would travel to either courthouse.

Time is less of a factor for the parties during discovery than it is during trail, as discovery can—and likely will—be taken remotely. For the defendants who are likely to testify live at trial, particularly Cook and Martinez, travel time would be substantially reduced if the trial proceeded in Lake County.

Based on the record and these reasonable assumptions, this court concludes this factor favors Lake County.

Viewing the Premises

The Illinois Supreme Court has previously stated that "the possibility of having a jury view the scene of an accident is an important consideration in ruling upon a forum non conveniens motion to dismiss." *Moore v. Chicago & North Western Transp. Co.*, 99 Ill. 2d 73, 80 (1983). That decision is, however, nearly 40 years old. While Cook argues that viewing the accident scene would provide a jury with valuable context in determining liability, juries are rarely transferred to view an accident scene. Rather, photographs and video are generally sufficient and far more efficient alternatives to hauling a jury to an accident scene. This court concludes this factor is neutral.

C. Public Factors

The court in *Guerine* also identified public-interest factors a circuit court should consider in a *forum non conveniens* analysis. These factors are:

> (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 court dockets in already congested fora.

*Guerine*, 198 Ill. 2d at 516-17. This court's analysis of these factors follows seriatim.

1. Deciding Localized Controversies Locally

The fundamental fact in this case is that the collision occurred in Lake County. Lake County, therefore, has a significant interest in the dispute. *Smith v. Jewel Food Stores, Inc.*, 374 Ill. App. 3d 31, 34 (1st Dist. 2007) (quoting *Dawdy*, 207 Ill. 2d at 183 ("when an automobile accident occurs within a county's borders, that county has 'a significant interest in the dispute'")). Residents of Lake County have a higher degree of investment and interest in the safety of the roadways in their own county than residents of a foreign county. This factor favors Lake County.

2. Unfairness of Imposing Expense and Burden on a County with Little Connection to the Litigation

This public-interest factor generally follows from the first, as it does in this case. Typically, the residents of one county should not be burdened with jury duty where the accident at issue occurred in a different county. *See Smith*, 374 Ill. App. 3d at 35 (quoting *Dawdy*, 207 Ill. 2d at 183). Further, it is possible that a Cook County jury would be confused as to why it was being asked to consider an accident that occurred elsewhere, particularly if the parties are Cook County residents. Given these circumstances, it is reasonable to conclude that this factor favors Lake County.

3. Administrative Difficulties

This factor typically calls for a court to consider the length of time a case is on the docket from filing to resolution. The Illinois Supreme Court has relied upon the annual report of the Administrative Office of the Illinois Courts as a proper reference for assessing relative court congestion in conducting *forum non conveniens* analysis. *See Dawdy*, 207 Ill. 2d at 181; *see also Griffith*, 136 Ill. 2d at 114. The average length of time a case is on the docket in Cook County is 29.9 months, while in Lake County it is 21.9

months. *See* Annual Report of the Illinois Courts – 2019, at 72-73. The difference of approximately eight months between the duration of trials in Cook and Lake counties is not terribly significant, but also weighs in favor of transferring this case to Lake County.

Conclusion

For the reasons presented above, it is ordered that:

1. Cook's motion to transfer venue pursuant to Illinois Supreme Court Rule 187 is granted;
2. This case is to be transferred to the Lake County Circuit Court; and
3. Cook will pay all costs imposed for the transfer.

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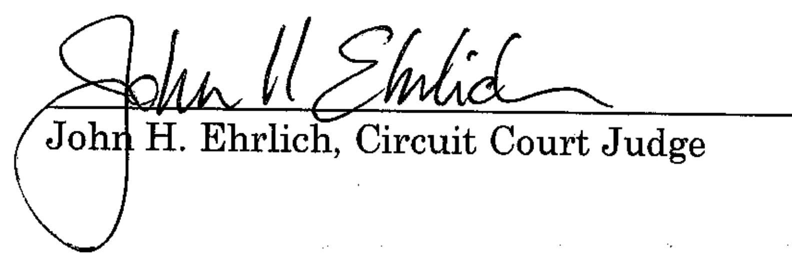

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich
FEB 03 2021
Circuit Court 2075