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

Jaron Srain, as independent administrator of the estate of Charles A. Schauer, deceased, Plaintiff, v. Eric Zilka, MK Deliveries, Inc., Felix Ocampo, Jr., Maria Kadushkina, Tipsy's Tap, Inc., d/b/a Tipsy's Tap, Walter E. Smithe Furniture, Inc., and Rodrigo Marin, Defendants.	)	No. 20 L 8609

MEMORANDUM OPINION AND ORDER

The *forum non conveniens* doctrine contained in Illinois Supreme Court Rule 187 authorizes a court to transfer a case to another jurisdiction if various private and public factors strongly suggest the other venue is more convenient. Here, both parties fail to provide a sufficient record for this court to determine what venue would be most convenient for all parties. For that reason, the defendants' motion to transfer must be denied.

Facts

On January 19, 2020, a vehicle collision occurred on southbound Interstate 55, approximately one-quarter mile north of state route 30 in Plainfield, Will County. Rodrigo Marin struck a box truck driven by Felix Ocampo. After the collision, Ocampo left the immobilized box truck in the right-hand travel lane. Approximately five minutes later, Erin Zilka struck the box truck. Before the accident, Zilka had been drinking at Tipsy's Tap,

located in Berwyn, Cook County. Charles Schauer was a passenger in Zilka's vehicle and died from the injuries inflicted in the accident.

Srain's first amended complaint brings 14 counts of negligence—one count under the Wrongful Death Act and one count under the Survival Act against each defendant. Srain also brings one additional count under the Dram Shop Act against Tipsy's Tap. The complaint alleges, at the time of the collisions, MK Deliveries, Inc., a company owned by Maria Kadushkina, employed Ocampo. The complaint pleads alternatively that Walter E. Smithe Furniture, Inc. employed Ocampo.

The record is inconsistent as to where MK Deliveries and Kadushkina are located. Srain points out that MK Deliveries lists its and Kadushkina's address as 6116 South St. Lawrence Avenue, Chicago. A copy of a deed shows Kadushkina owns the South St. Lawrence Avenue property. Yet Kadushkina avers that she and her company are located in Burr Ridge, Du Page County. Kadushkina and Ocampo both aver MK Deliveries employed Ocampo at the time of the collision.

Ocampo's affidavit further indicates his home address is in Will County. He explains that he had previously worked for Walter E. Smithe Furniture, but not at the time of the collisions. Ocampo avers that he generally makes deliveries in Will and Du Page Counties, not Cook County. He further avers that a trial in Cook County would be inconvenient since he lives approximately 50 miles from the Daley Center, but only approximately eight miles from the Joliet courthouse. The record further indicates the MK Deliveries truck involved in the collisions is currently stored in Rockdale, Will County.

The uncontested record indicates Marin and Zilka both live in Will County, but neither provided an affidavit indicating it would be inconvenient for them if this case were to proceed in Cook County. The record does not indicate where Schauer lived at the time of his death or where Srain currently lives. The record

also does not indicate where the first responders to the scene live or work; MK Deliveries infers they likely are from Will County.

On January 13, 2021 Kadushkina, MK Deliveries, and Ocampo filed a motion to transfer this case to Will County pursuant to the *forum non conveniens* doctrine. None of the other defendants joined the three defendants' motion. Srain filed a response, and MK filed a reply.

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*. 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, ¶ 12 (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. *Langenhorst*, 219 Ill. 2d 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*, 219 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. 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). Second, "[w]hen the plaintiff is foreign to the forum chosen . . . this assumption is much less reasonable and the plaintiff's choice deserves less deference." *Id.* Third, in a wrongful death case, if the decedent's residence and the state of the accident are not the same as the plaintiff's chosen forum, the plaintiff's choice is given less deference, but not no deference. *See Ellis v. AAR Parts Trading, Inc.*, 357 Ill. App. 3d 723, 742-43 (1st Dist. 2005) (citing *Dawdy*, 207 Ill. 2d at 173-74; *Guerine* 198 Ill. 2d at 517). Fourth, "[w]hen the plaintiff is foreign to the chosen forum and the action that gives rise to the litigation did not occur in the chosen forum, 'it is reasonable to conclude that the plaintiff engaged in forum shopping to suit his individual interests, a strategy contrary to the purposes behind the venue rules.'" *Bruce v. Atadero*, 405 Ill. App. 3d 318, 328 (1st Dist. 2010) (citing *Dawdy*, 207 Ill. 2d at 174, quoting, in turn, *Certain Underwriters at Lloyd's London v. Illinois Cent. R.R.*, 329 Ill. App. 3d 189, 196 (1st Dist. 2002)). The Supreme Court has plainly stated its position against forum shopping. "Decent judicial administration cannot tolerate forum shopping as a persuasive or even legitimate reason for burdening communities with litigation that arose elsewhere and should, in all justice, be tried there." *Fennell*, 2012 IL 113812, ¶ 19.

As an initial matter, this court notes it is impossible to consider any of the presumptions because of the incomplete record supplied by the parties. It is unknown where Schauer lived at the time of his death, a critical fact in determining whether Srain has a legitimate basis for bringing the lawsuit in Cook County, or whether he is forum shopping. Further, it is unknown where Srain lives, a separate critical factor necessary to determine if the filing in Cook County is legitimate or merely forum shopping.

Apart from considering any presumptions, 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 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 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 if not greater 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* and its progeny has not been updated over the past 15 years to reflect the changing face of litigation. 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 far weightier than the private factors.

Third, the Covid-19 pandemic of 2020-21 has altered the private 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 and trial practices after the pandemic is over.

Regardless of apparent shortcomings of the now dated *forum non conveniens* analysis, the Illinois Supreme Court has listed the private- and public-interest factors a circuit court must still 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).

Guerine, 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.

I. Private Factors

A. Convenience Of The Parties

Courts have recognized that 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.

The difficulty in weighing this factor is the lack of evidence presented by both sides. Srain has not indicated where he lives or where any of Schauer's relatives live. Srain also failed to indicate where Schauer lived at the time of his death. Thus, this court cannot judge whether a Cook County trial would be more convenient or whether Srain is forum shopping. At the same time, affidavits from Kadushkina and Ocampo aver that a trial in Cook County would be inconvenient. While those affidavits are useful, they have limited value given that the three defendants did not obtain affidavits of inconvenience from any other defendants. Further, it is an open question where Kadushkina lives and where MK Deliveries is headquartered. It is also notable that no other defendant joined the motion to transfer. The lack of a record means this factor must be judged as neutral.

B. The Relative Ease Of Access To Evidence

This factor reveals the 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 than it used to be, given the modern use of photography and video photography both in depositions and at trial. Specifically, "[i]t would be a rare instance for the vehicle to be viewed by the trier of fact when photographs are normally used for this purpose." *Id.* at ¶ 65. Further, the location of a defendant's vehicle is a consideration for a court's review, "but does not constitute a significant factor." *Id.* (citing *Guerine*, 198 Ill. 2d at 524-25).

This factor is, however, still important as to testimonial evidence of persons other than parties. The three defendants assume the first responders to the accident are Will County residents, but there is no evidence in the record either way. Regardless, the record fails to indicate why first responder testimony is necessary. Further, the record is does not indicate what treating physicians, if any, would have to be deposed or called as witnesses. In short, this factor must be judged as neutral.

C. Compulsory Process Of Unwilling Witnesses

Compulsory process is not a concern for either a Cook or Will County judge. This factor is neutral.

D. Cost Of Obtaining Attendance Of Willing Witnesses

The parties have not argued this factor or supplied evidence as to the relative costs between this litigation going forward in either county. This factor is neutral.

E. Viewing The Premises

It is unimaginable that a Cook or Will Count trial judge would ever excuse a jury to visit a busy stretch of an interstate highway, particularly at night. Besides, there is nothing in the record to suggest such a visit is necessary. The parties do not appear to dispute the facts leading up to the two collisions; therefore, photographs or videos of the area would be more than sufficient to set the scene in the jurors' eyes. This factor is neutral.

F. Other Practical Considerations That Make A 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 Trust Co.*, 2015 IL App (1st) 142789, ¶ 31). A more timely consideration is that the Covid-19 pandemic has dramatically altered oral discovery. 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 it ends. The idea of depositions or even a trial consisting of lawyers, witnesses, jurors, and judges all being in the same room may one day become an artifact of a bygone era.

The case law discussing this factor acknowledges the Chicago metropolitan area is well connected by a series of multi-lane highways and commuter train systems. This court takes judicial notice that these highways and various train stations in both counties are generally convenient to both the Joliet and Chicago courthouses, so perhaps a greater consideration is time. While trains usually run on a schedule, travel by car across

northern Illinois, particularly in peak hours is often long and frustrating. To that extent, it is reasonable to presume that travel time by car or train is reduced the shorter the distance. Ultimately, it is difficult to weigh this factor given the vagaries of who the witnesses will be in this case. For that reason, this factor is considered neutral.

II. Public Factors

The court in *Guerine* also identified the public-interest factors a circuit court should weigh in considering a motion to transfer venue based on the *forum non conveniens* doctrine. 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.

A. Deciding Localized Controversies Locally

The overriding public factor in this case is that the collision occurred in Will County. Will County has, therefore, 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 Will 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 Will County.

B. Unfairness Of Imposing Expense And Burden On A County With Little Connection To The Litigation

This public-interest factor generally follows from the first, and it does in this case. Indeed, one court has concluded the obvious by writing that, "we cannot say that it would be unfair to burden [a] county['s] jurors with the trial of one of their fellow residents." *Lint v. Missouri P. R. Co.*, 200 Ill. App. 3d 1047, 1051 (5th Dist. 1990). Here, Srain concedes that multiple defendants are Will County residents. This factor favors Will County.

C. Administrative Difficulties

The Administrative Office of Illinois Courts tracks cases in which juries reach a verdict in excess of $50,000. For those cases, the time from the date of filing until the date of disposition is 29.9 months in Cook County and 39.1 months in Will County. It should be noted that the closure of the courts during the Covid-19 pandemic will, undoubtedly, alter these statistics. Until new statistics are available, however, this court may rely only on what is available. This factor favors Cook County.

Conclusion

For the reasons presented above, it is ordered that:

1. The motion to transfer this case to Will County is denied; and
2. The parties are to submit an agreed case management order by June 4, 2021.

Judge John H. Ehrlich John H. Ehrlich, Circuit Court Judge

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