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

Brigitte Waska and Joseph Waska,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 21 L 12212
	)	
Sanket Shah, M.D., Radiology Subspecialists of Northern Illinois, LLC, and Northwestern Medicine Physicians Network, LLC,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

The *forum non conveniens* doctrine permits the transfer of a case to another venue if the weighing of various private and public factors strongly favors a transfer. Here, the balance of factors demonstrates that DuPage County would be a substantially more convenient forum for the parties. The defendants' motion is, therefore, granted and this case is transferred to the Eighteenth Judicial Circuit in DuPage County.

Facts

On February 8, 2020, Northwestern Medicine Central DuPage Hospital ("CDH") admitted Brigitte Waska based on various health complaints. The same day, technicians took a computerized tomography ("CT") scan of Brigitte's abdomen and pelvis. Dr. Sanket Shah, acting as an agent of Northwestern Medicine Physician Network, LLC ("NMPN") and Radiology Subspecialists of Northern Illinois LLC, ("RSNI"), interpreted the CT scan.

On March 29, 2022, Brigitte and Joseph Waska filed a six-count, first-amended complaint against the defendants. Brigitte brings three causes of action in negligence against each of the three defendants. In turn, Joseph has three causes of action for loss of consortium against the same defendants. The causes of action against RSNI (count three) and NMPN (count five) are based on *respondeat superior* for Shah's alleged negligence. The Waskas claim that Shah was negligent in interpreting the CT scan by failing to identify: (1) the nearly complete occlusion of Brigitte's superior mesenteric artery; and (2) the substantial stenosis of her celiac artery. Shah's acts or

omissions allegedly resulted in Brigitte losing most of her large bowel, making her lifelong dependent on total parenteral nutrition.

On March 24, 2022, NMPN filed a motion to transfer venue based on the *forum non conveniens* doctrine. *See* Ill. S. Ct. R. 187. Shah and RSNI filed a motion to join the motion to transfer venue. The parties briefed the motion. From these submissions, the following facts are noted:

- Brigitte and Joseph Waska are residents of Carol Stream, DuPage County.
- Shah is a resident of Elmhurst, DuPage County.
- CDH is located in Winfield, DuPage County.
- RSNI is located in Geneva, Kane County.
- NMPN has its principal office in Cook County, but its physicians practice in DuPage, Cook, and other counties.
- CDH is located 1.4 miles from the DuPage County courthouse in Wheaton and 35.9 miles from the Daley Center in Chicago.
- Shah's principal professional office—RSNI—is located in Geneva, Kane County.
- Shah worked exclusively at CDH at the time of the alleged medical negligence.
- Shah averred that it would be inconvenient and burdensome both personally and professionally for the trial to proceed in Cook County, and that it would be far more convenient for him to travel to and within DuPage County based on his work schedule, distance, travel time, and expense.
- Tracy Wolford, the claims manager at Northwestern Medicine, has her office at CDH. Wolford averred that it would be significantly more inconvenient and difficult for her to attend a trial in Cook County as a corporate representative given her professional responsibilities.
- In her affidavit, Wolford identified 11 physicians who provided Brigitte with care and treatment at CDH after Shah's allegedly negligent conduct. One of the physicians lives in Will County, two live in Cook County, and eight live in DuPage County.

Analysis

A motion filed pursuant to *forum non conveniens* seeks to transfer the action from one forum with proper venue to another, more convenient forum with proper venue. *Tabirta v. Cummings*, 2020 IL 124798, ¶ 1. Thus, "this doctrine assumes the existence of at least two forums in which the defendant is amenable to jurisdiction." *Foster v. Chicago & N. W. Transp. Co.*, 102 Ill. 2d 378, 381 (1984). Here, both Cook and DuPage Counties are proper venues for this action. The equitable doctrine of *forum non conveniens* is well

established in Illinois courts and is "founded in considerations of fundamental fairness and sensible and effective judicial administration." *First Nat'l Bank v. Guerine*, 198 Ill. 2d 511, 515 (2002) (quoting *Adkins v. Chicago, Rock Island & Pac. R.R. Co.*, 54 Ill. 2d 511, 514 (1973)). Illinois courts adopted the modern line of precedent from the United States Supreme Court case *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). *See Fennell v. Illinois Cent. R.R. Co.*, 2012 IL 113812, ¶ 14 (2012) (listing cases).

A *forum non conveniens* motion requires the movant to show the overall weight of several convenience factors strongly favors transfer to a more convenient forum. *Guerine*, 198 Ill. 2d at 517 (citing *Griffith v. Mitsubishi Aircraft Int'l, Inc.*, 136 Ill. 2d 101, 106 (1990)); *see also Langenhorst v. Norfolk S. Ry. Co.*, 219 Ill. 2d 430, 442 (2006) (courts have discretionary power to be exercised "*only in exceptional circumstances* when the interests of justice require a trial in a more convenient forum") (emphasis in original). The convenience factors adopted from *Gulf* are divided into "private interest factors affecting the litigants and public interest factors affecting court administration." *Fennell*, 2012 IL 113812, ¶ 14. Illinois courts have defined the private factors to include:

> (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 cases). Courts have generally broken down the practicality factor to address each aspect separately. The public interest factors are:

> (1) 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.

Id. at 516-17 (citing *Griffith*, 136 Ill. 2d at 106). The public and private factors are not weighed against each other but are weighed together to test whether they strongly favor transfer away from the plaintiff's chosen forum. *Fennell*, 2012 IL 113812, ¶ 18. "The plaintiff's right to select the forum is substantial" and "should rarely be disturbed." *Id.*

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. [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." *Guerine*, 198 Ill. 2d 511, 517-18 (2002) (citing cases). Third, "[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.

Before this court applies the private and public factors to this case, some commentary on the *forum non conveniens* analysis is 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 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. Analysis focused on the trial is, quite frankly, out of sync with modern litigation practice. A more current analysis would give equal or greater weight to the applicability of enumerated factors to pre-trial proceedings.

Second, the *forum non conveniens* analysis, as stated in *Langenhorst* and its progeny, has not been updated over the past 16 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 occurs during a jury trial. Other factors 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 altered the private convenience factors related to obtaining parties' and witnesses' depositions or trial testimonies. 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 have been enormous. It is difficult to think that clients, counsel, and witnesses will return to far more expensive discovery and trial practices.

Notwithstanding the current test's shortcomings, this analysis will proceed with the required factor analysis described above.

I. Private Factors

A. Convenience of the Parties

As to the first private factor, "[t]he defendant must show that the plaintiff's chosen forum is inconvenient to the defendant and that another forum is more convenient to all parties." *Langenhorst,* 219 Ill. 2d at 444. Although a defendant is not required to claim a plaintiff's chosen venue is inconvenient for the plaintiff, *Guerine*, 198 Ill. 2d at 518, courts have also recognized it is quite 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.

At the outset, this court must presume the Waskas are forum shopping. That presumption is based on the facts that the Waskas are DuPage County residents and the alleged medical negligence giving rise to their complaint occurred in DuPage County. *See Bruce*, 405 Ill. App. 3d at 328; *Fennell*, 2012 IL 113812, ¶ 19. The Waskas' selection of Cook County must, therefore, be given "significantly diminished deference." *Czarnecki v. Uno-Ven Co.*, 339 Ill. App. 3d 504, 511 (1st Dist. 2003).

The forum shopping presumption is bolstered by the fact that the Waskas did not supply affidavits supporting their choice of Cook County as the more convenient forum. While affidavits are not required in defense of a Rule 187 motion, *see Koss Corp. v. Sachdeva*, 2012 IL App (1st) 120379, ¶ 100, the lack of a record supporting the convenience of the Waskas's choice of forum makes unrealistic the conclusion that they, as DuPage County residents, would find a trial in Cook County more convenient that one in DuPage County. *See Hale*, 2018 IL App (1st) 180280, ¶ 35. In contrast, Shah and Wolford each supplied an affidavit attesting to the inconvenience of a trial in Cook County and the convenience of a trial in DuPage County. It is also important to note that the Waskas's causes of action against NMPN and RSNI are brought solely under *respondeat superior* for Shah's alleged

negligent acts and omissions. It is, therefore, doubtful that an NMPN or RSNI corporate representative would be deposed or called to testify absent any institutional negligence claims.

The Waskas argue that because Northwestern Medicine does business in Cook County, NMPN cannot claim it would be inconvenient to litigate in Cook County. Other courts have rejected similar arguments. "Although these defendants have business ties to St. Clair County that are sufficient to establish venue there, any business transactions that are unrelated to the instant case are insignificant for purposes of *forum non conveniens*." *Kuhn v. Nicol,* 2020 IL App (5th) 190225, ¶17 (citing *Shaw v. Haas*, 2019 IL App (5th) 180588, ¶ 32) (transfer to another county granted because failure to diagnose and treat stroke occurred there); *Brandt v. Shekar*, 2020 IL App (5th) 190137, ¶ 34 (Rule 187 motion granted because negligent mammogram reading occurred in county other than plaintiff's choice of forum). As articulated in *Dawdy*, if the fact that the defendant conducts business in the plaintiff's chosen forum were dispositive, the *forum non conveniens* doctrine "would be entirely vitiated, and no transfer would ever be obtained. Rather, plaintiff's choice would be elevated to the stature of a dispositive consideration, which is patently not to be allowed." *Dawdy*, 207 Ill. 2d 167, 182 (2003) (quoting *Franklin v. FMC Corp.*, 150 Ill. App. 3d 343, 347 (1st Dist. 1986)).

The record in this case establishes that Cook County is an inconvenient forum for Shah and Wolford. Further, there is nothing in the record suggesting that DuPage County is inconvenient to the Waskas. Without the identification of corporate representatives that might suggest a conclusion to the contrary, this factor favors a transfer to DuPage County.

B. The Relative Ease of Access to Evidence

This factor looks to evidence provided by persons and entities other than the parties. As to documentary evidence, the majority of relevant documents constitute Brigitte's medical records, which were created at CDH. Ultimately, however, the location of the medical records is of little concern since documents may be physically or electronically transferred between venues. *See Ruch v. Padget*, 2015 IL App (1st) 142972, ¶¶ 61, 65.

As to other potential testimonial evidence, the only non-party witnesses identified by any of the parties are the 11 doctors other than Shah who treated Brigitte at CDH. Of those physicians, one lives in Will County, two in Cook County, and eight in DuPage County. Yet a witness's personal residence informs very little in a *forum non conveniens* analysis. *Brandt*, 2020 IL App (5th) 190137, ¶ 33 ("We find it significant, however, that Dr. Shekar's personal residence, while sufficient to make venue proper in St.

Clair County, was in no way connected to the medical negligence alleged in plaintiffs' complaint."). There are three reasons for this conclusion. First, depositions and trials do not occur before of after business hours; in other words, the location of a witness's regular business is far more informative as to convenience than residence. Second, out of professional courtesy, physicians are almost always deposed where they work. Third, non-party physicians typically do not appear live at trial, but through an evidence deposition presented to the jury either through the reading of a transcript or through a video recording. On a related note, the Waskas acknowledge that Brigitte's treaters' depositions will occur at a time and place agreed to by the parties and will probably occur remotely. The acknowledgement does not, however, tip the scale in favor of Cook County, but is, rather, equally true if the case proceeds in DuPage County. The reasonable conclusion is that 11 identified non-party physicians witnesses would find discovery and trial in DuPage County far more convenient since each works at CDH.

This factor favors DuPage County.

C. Compulsory Process of Unwilling Witnesses

A judge in either Cook or DuPage County would have equal authority to subpoena unwilling witnesses; consequently, this factor is considered neutral.

D. Cost of Obtaining Attendance of Willing Witnesses

The parties did not address this factor; therefore, it is considered neutral.

E. Viewing the Premises

It is undisputed that the alleged negligence occurred in DuPage County. Although viewing the premises is rarely, if ever, necessary in a medical malpractice case, *Hackl v. Advocate Health and Hosp. Corp.*, 382 Ill. App. 3d 442, 452 (1st Dist. 2008), the convenience factor of viewing the site is not concerned with the necessity of viewing the site, but rather the possibility of viewing the site if appropriate. *Dawdy*, 207 Ill. 2d. at 178. Here, none of the parties indicated that a jury would need to see where Shah committed his alleged malpractice; consequently, this factor is considered neutral.

F. Other Practical Considerations That Make a Trial Easy, Expeditious, and Inexpensive

The Waskas argue that the location of the parties' attorneys in Chicago should weigh favorably for Cook County. It is, however, well-established that the location of the parties' attorneys is given little weight in a *forum non conveniens* analysis. *See Langenhorst*, 219 Ill. 2d at 433, 450. Further, the Waskas point out that a considerable amount of oral discovery is today conducted remotely through media platforms. That fact is plainly correct, but it is equally plain that taking depositions remotely does not make either county more or less convenient.

Both Shah and Wolford aver that a trial of this case in Cook County would be substantially more inconvenient to them based on their professional duties. Wolford noted, in particular, that a trial in Cook County would be substantially disruptive for her work given that her office is located at CDH. Shah's and Wolford's averments must be taken as true since no counter-affidavits contest their statements. *See Rehfield v. Diocese of Joliet*, 2021 IL 125656, ¶ 65.

This factor favors DuPage County.

II. Public Factors

A. Settling Local Controversies Locally

This case arises out of alleged medical negligence and loss of consortium brought by the Waskas, both of whom are DuPage County residents, based on acts or omissions by Shah, a DuPage County resident, that occurred exclusively at CDH, a DuPage County hospital. Eight of 11 physicians who provided subsequent care to Brigitte live in DuPage County, while each of the 11 physicians works at CDH in DuPage County.

The Waskas argue that venue is proper in Cook County because Northwestern Medicine is located here. A party's principal place of business is not necessarily dispositive in a *forum non conveniens* analysis, but "it certainly is an acceptable factor to be weighed." *Erwin v. Motorola, Inc.*, 408 Ill. App. 3d 261, 276 (1st Dist. 2011); *Gridley v. State Farm Mut. Auto. Ins. Co.*, 217 Ill. 2d 158, 173 (2005) (principal place of business is a "factor to be considered"). The fact that Northwestern Medicine and its related entities such as NMPN are based in Cook County would have far greater resonance in this case if the alleged medical negligence at issue had also occurred here. As it is, the mere fact that a large medical provider has offices throughout northern Illinois and has staff physicians at those locations does not shift the focus the alleged negligent conduct away from where it occurred.

On a wider focus, Cook County's interest in this case is tenuous compared to DuPage County. Although NMPN conducts business in Cook County, only two of 11 non-party physicians live in Cook County, a fact that, once again, does not alter the locus of the controversy. Indeed, it is unquestionable that DuPage County residents would have a far greater interest in a case involving the practice of medicine on a DuPage County resident in a DuPage County hospital by a physician who lives and works in DuPage County. This case is localized in DuPage County; consequently, this factor weighs in favor of DuPage County.

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

This public factor typically follows from the first, and it does in this instance. A court should avoid imposing administrative costs and the burden of jury duty on a forum with little interest in the dispute. *Dawdy*, 207 Ill. 2d at 183. Here, DuPage County residents have a substantially greater interest in this dispute because it involves a resident being treated at a DuPage County hospital by a physician who lives and practices in DuPage County. This court does not subscribe to the notion that Cook County has a greater interest in this litigation because one corporate defendant is based in Cook County and two subsequent treaters live here. In sum, it is no imposition on DuPage County to assume the costs associated with discovery in and trial in this case; indeed, it would be unfair to Cook County residents to bear the costs of this case. This public factor favors DuPage County.

C. Administrative Concerns

This factor considers court congestion by comparing the caseload and resolution times of the fora in question. *Fennell*, 2012 IL 113812 at ¶ 43. "Court congestion is a relatively insignificant factor, especially where the record does not show the other forum would resolve the case more quickly." *Guerine*, 198 Ill. 2d at 517. In this case, the facts show that the case would likely be resolved more quickly in Cook County.

Under *Dawdy*, a review of the most recent Annual Report of the Illinois Courts is the appropriate reference. 207 Ill. 2d at 181. In the 2020 report for law division cases valued at more than $50,000 and resolved by jury verdict, Cook County had 20,147 pending actions while DuPage County had only 1,852 pending cases. While this shows that Cook County's docket is far more congested, it must also be noted that, for the same category of cases, Cook county disposed of those cases, on average, in 28.6 months versus 45.5 months in DuPage County. Administrative Office of the Illinois Courts, *Annual Report of the Illinois Courts, Statistical Summary*, at 81. It must be

noted that these statistics cover a year in which DuPage and Cook counties closed their courts for most of the year. Given the backlog of cases in both counties, it is questionable whether these statistics reflect current dockets and disposal times. It is, however, plain that Cook County has the ability to dispose of cases nearly one and one-half years faster than DuPage County. This factor favors Cook County.

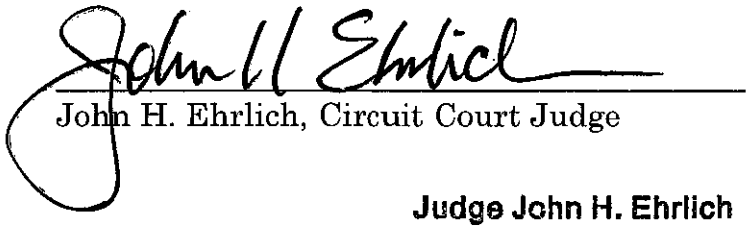
III. Balance of Factors

The Waskas's choice of forum is given very little deference, but not no deference, because the law compels the presumption that they are forum shopping. Further, a review of the relevant factors shows that five favor DuPage County, three are neutral, and only one favors Cook County. Importantly, each of the most significant factors—party and non-party convenience, locus of controversy, and burden shifting—favors transfer to DuPage County. This one-sided tilt plainly meets the exceptional circumstances necessary to justify the transfer of a case pursuant to the *forum non conveniens* doctrine.

Conclusion

Based on the foregoing, it is ordered that:

1. The defendants' motion for transfer of venue based on the *forum non conveniens* doctrine contained in Illinois Supreme Court Rule 187 is granted;
2. This matter is transferred to the Eighteenth Judicial Circuit in DuPage County; and
3. The defendants shall pay all costs for the transfer.



John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

AUG 25 2022

Circuit Court 2075