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Recent Decisions

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Fighting the *Forum* Fight

Forum non conveniens is important to defendants. After all, plaintiffs get to pick the forum and will certainly choose the one believed to be most favorable to their claims. There is little a defendant can do if venue is proper unless the defendant can establish, through the *forum non conveniens* doctrine, that there is another proper and more convenient forum to hear the matter. *Forum non conveniens* is not especially difficult to understand or apply. Nevertheless, recent decisions regarding the doctrine's application are noteworthy because of the doctrine's importance and the frequency that it arises. To that end, the Illinois Appellate Court, First District recently issued two opinions applying *forum non conveniens*, *Hale v. Odman, et al,* 2018 IL App (1st) 180280 and *Benedict v. Abbott Laboratories, Inc.*, 2018 IL App (1st) 180377, each of which is discussed below.

Forum Non *Conveniens* Standard and Factors

The *Hale* and *Benedict* decisions turn on the application and evaluation of *forum non conveniens* principles and factors. To avoid unnecessary repetition, recall that *forum non conveniens* is an equitable doctrine driven by notions of fairness. *Hale v. Odman, et al.,* 2018 IL App (1st) 180280, ¶ 27. It is the movant's burden to show that transfer to another proper venue better "serves the end of justice. "*Id.* Importantly, the plaintiff's choice is given deference unless the chosen forum is neither the plaintiff's home county nor the county where the claim arose. *Id.* ¶ 28. In such cases the plaintiff's chosen forum is given less deference, not no deference. *Id.*

Courts deciding *forum* issues must evaluate six private interest factors and three public interest factors to decide if transfer is warranted. The private interest factors are: (1) "the convenience of the parties," (2) "the relative ease of access to sources of testimonial, documentary, and real evidence," (3) "availability of compulsory process," (4) cost of obtaining testimony of willing witnesses, (5) possibility of viewing the premises, and (6) other practical considerations that make trial expeditious and inexpensive. See *Id.* ¶¶ 13-18; see also *Dawdy v. Union Pac. R.R. Co.*, 207 Ill. 2d 167, 172 (2003). The relevant public interest factors to be considered are: (1) the administrative difficulties caused when litigation is handled in congested venues instead of being handled at its origin; (2) the unfairness of imposing jury duty upon residents of a county with no connection to the litigation; and (3) the interest of having local controversies decided locally. *Dawdy*, 207 Ill. 2d at 173.

Hale v. Odman: Weight of *Forum Non Conveniens* Factors Favored Intrastate Transfer

The facts of *Hale v. Odman* are straightforward. The plaintiff filed a wrongful death claim in Cook County against a driver of a commercial truck and the driver's employer alleging that the driver's negligence caused a motor vehicle accident that lead to the death of the plaintiff's son (decedent). *Hale*, 2018 IL App (1st) 180280, ¶ 27. The accident

occurred in Kane County, and almost all pertinent events and witnesses were in Kane County. In comparison, Cook County, the plaintiff's chosen forum, had little connection to the case. The defendant driver filed a motion to transfer to Kane County based on *forum non conveniens.* The plaintiff's argument against transfer was that the defendant driver did not establish that the public and private interest factors *strongly* favored transfer. *Id.* ¶¶ 6, 22 (emphasis added). The trial court agreed, and the defendant driver appealed.

The evidence before the trial court was that the accident occurred in Kane County. *Id.* ¶ 4. The decedent and defendant driver were both residents of Kane County. *Id.* The defendant employer's location straddled Kane and Cook Counties. *Id.* ¶ 10. Prior to his death, the plaintiff's son was treated by paramedics who were from Kane County. *Id.* ¶ 4. The plaintiff's son was also transferred to, and pronounced dead, at a hospital in Kane County. *Id.* Four of the five witnesses were also Kane County residents, the other resided in DuPage County. *Id.* ¶ 5. The Kane County sheriff investigated the accident with assistance of the Illinois State Police Forensic Science Department out of Sangamon County. The decedent's motorcycle was stored in Cook County. *Id.*

The parties also presented exhibits that identified 30 potential witnesses. *Id.* ¶ 7. Interestingly, the plaintiff presented affidavits of two eyewitnesses who were Kane County residents, both who attested that Cook County was not an inconvenient forum. *Id.* These witnesses later submitted affidavits attesting that they were unaware that the matter was pending in Kane County, and that Kane County was certainly more convenient. *Id.* The plaintiff also had family member and other damages witnesses, one who resided in Kane County and two in DuPage County. *Id.* ¶ 8. Three of the decedent's family members signed affidavits that Cook County was not inconvenient to them. *Id.* The plaintiff also identified seven damages witnesses who were located in Cook County. *Id.* These witnesses were family members who lived in two residences. *Id.* Counsel for both parties were in Chicago and the defendant driver's attorney also had a Kane County office.

Against this backdrop, the trial court concluded that the convenience of the parties, the first private interest factor, was neutral. *Id.* ¶ 13. Cook County was presumed to be more convenient for the plaintiff because it was his chosen venue. *Id.* The trial court found that the ease of access to sources of testimony and evidence slightly favored Kane County. *Id.* ¶ 14. Availability for compulsory process was neutral. *Id.* ¶ 15. Because of lower parking costs in Kane County, the court found the cost of "obtaining the testimony of willing witnesses, favored Kane County." *Id.* ¶ 16. Finally, the trial court acknowledged the possibility that the jurors might need to visit the premises favored Kane County but discounted the weight because the road condition was not at issue. *Id.* ¶ 17. Regarding the public interest factors, the trial court found that the interest in deciding local controversies locally favored Kane County, though it also found that Cook County had an interest in the case because the driver's employer did "most" of its business in Cook County. *Id.* ¶ 19. The trial court also concluded that the "unfairness of imposing the expense of trial and burden of jury duty on residents of a county with little connection" to the case favored Kane County. *Id.* ¶ 20. Last, the court acknowledged the concern of adding litigation to an already congested court docket and found that Kane County was less congested than Cook County, and that this slightly favored Kane County. Ultimately, the trial court concluded that the defendant had not met "the high standard for a defendant moving for transfer based on the *forum non conveniens* doctrine." *Id.* ¶ 22.

On review, the appellate court disagreed with the trial and found that the trial court abused its discretion when denying the defendant driver's motion to transfer for *forum non conveniens. Id.* ¶¶ 63-64. The court found that the trial court failed to give the plaintiff's choice less deference because Cook County was not his home county and it was not where the accident occurred. *Id.* ¶ 36. Indeed, the appellate court noted that Kane County was the home county for the plaintiff and the defendant driver, and travelling to Cook County was equally inconvenient for both. The appellate court

also concluded that Kane County provided greater access to all forms of evidence as nearly all of the witnesses resided in Kane County. *Id.* ¶ 37. As for those in Cook County, the appellate court noted that they were largely family whose testimony was likely duplicative. *Id.* ¶ 38.

While the trial court seemingly discounted any difficulties accessing evidence between two contiguous counties, the appellate court took a markedly different approach. The appellate court concluded that the 40-mile distance between the Kane and Cook County courthouses was significant. Relying on *Washington v. Illinois Power,* 144 Ill. 2d 395 (1991), the appellate court noted the Illinois Supreme Court's holding that a "30-mile drive between adjacent counties should be factored into the *forum non convenience* analysis." *Hale*, 2018 IL App (1st) 180280, ¶ 39. As such, the appellate court noted that the witnesses would be inconvenienced by the increased time and expense of travelling to Cook County.

The appellate court also rejected the trial court's discounting of the potential for a site visit. The appellate court clarified it is the possibility of such a visit and not the necessity of the visit that matters. *Id.* ¶ 42. Indeed, the defendant driver suggested that his view was blocked by a blind hill, thus it was possible the jury may need to view the premises. *Id.* The appellate court endorsed the Illinois Supreme Court's statement tin *Dawdy v. v. Union Pac. R.R. Co.*, 797 N.E.2d 687, that is it "irrational for a jury composed of one county's residents to travel to an adjacent county to view the accident scene." *Hale*, 2018 IL App (1st) 180280, ¶ 42. For these reasons, the appellate court rebuked the trial court for giving this factor such little weight. *Id.* ¶ 44.

As for the public interest factors, the appellate court clarified that Cook County did not have a local interest in the case simply because the employer did business in Cook County. Indeed, the appellate court viewed the evidence of the defendant employer's sales and location and concluded that the defendant business did not do "most" of its business in Cook County. *Id.* ¶ 51. The appellate court acknowledged that the defendant employer's presence in Cook County did give it a connection to the case, but that the impact of that interest was to render that factor neutral. *Id.* Ultimately, after reviewing all of the factors at issue, the appellate court held that the trial court abused its discretion denying the defendants' motion to transfer for *forum non conveniens* to Kane County.

Benedict v. Abbott Laboratories, Inc.: Weight of *Forum Non Conveniens* Factors Did Not Favor Interstate or Intrastate Transfer

In *Benedict v. Abbott Laboratories, Inc.,* the Illinois Appellate Court, First District affirmed the trial court's denial of the defendant's motion to dismiss/transfer for *forum non conveniens.* The facts of *Benedict* differ from those in *Hale*. *Benedict* is a product liability case. The plaintiffs, one from Missouri and one from Colorado, brought a nine-count complaint against the defendant in Cook County related to their allegations that the defendant "failed to provide adequate warnings regarding the risk of birth defects." *Benedict v. Abbott Laboratories, Inc.*, 2018 IL App (1st) 180377, ¶ 4. The plaintiffs were born with spina bifida and neural tube defects after their mothers allegedly ingested the defendant's drug while pregnant. *Benedict,* 2018 IL App (1st) 180377, ¶ 4. Not only were the plaintiffs from out of state, but their mothers were also prescribed the medication out of state, and the plaintiffs received medical treatment outside Illinois. *Id.* ¶ 5. In contrast, the defendant was headquartered in Illinois and allegedly made decisions regarding product labeling and marketing in Illinois. *Id.* ¶¶ 5-6. The medication at issue was sold and marketed nationwide and in Cook County. *Id.* ¶ 6. The defendant's headquarters and principal place of business were in Lake County and its registered agent was in Cook County. *Id.*

The defendant ultimately filed a motion to dismiss or transfer under *forum non conveniens.* The defendant sought an order requiring the plaintiffs to refile in their home state, or to transfer the matter to Lake County. The trial court denied these motions.

The trial court addressed the preliminary issue of plaintiffs' choice of forum at the outset. The appellate court clarified that the plaintiffs' choice, which was not their home county and was not where the injury occurred, was entitled to less deference, not no deference. *Id.* ¶ 17. The trial court also framed its analysis in the context of the type of case. Indeed, when considering convenience, the trial court relied on authority that "in a product liability case, the place where a plaintiff was injured mattered less." *Id.* ¶ 18. In such cases, the location of injury is less important because large product liability cases may have expansive impact to the extent the allegedly offending products could be used. *Id.* The trial court found that "Illinois had an interest in resolving the controversy over where a corporation, headquartered in Illinois, may be sending forth products that caused harm." *Id.* ¶ 19. Indeed, the court relied on the defendant's gross sales in Cook County, that it is headquartered in Illinois, that its marketing efforts were also directed to Cook County, and that its agent is in Cook County. *Id.* The trial court also recognized the potential difficulties with compulsory process in the plaintiffs' home states. *Id.* ¶ 21. Ultimately, the trial court denied the motion to dismiss and also denied the motion to dismiss and/or transfer. *Id.* ¶ 15.

On review, the appellate court found that the trial did not abuse its discretion denying the defendant's motion. First, the appellate court recognized that the trial court gave the plaintiffs' choice of forum the appropriate deference. Second, the appellate court found that the private interest factors did not favor transfer. Indeed, the appellate court repeated that the defendant cannot argue that the chosen forum is inconvenient to the plaintiff, but is to rely on the inconvenience to the defendant. *Id.* ¶ 39. In rejecting the defendant's argument, the appellate court noted that "where a defendant has its headquarters in plaintiffs' chosen form, the convenience factor does not weigh in favor of transfer." *Id.* That is, a party cannot complain that its home forum is inconvenient unless there are other issues. *Id.* Regarding the defendant's desire to transfer the matter to Lake County, the appellate court relied on the defendant's interrogatory responses that its headquarters is 34-36 miles from the Cook County courthouse in downtown Chicago. *Id.* ¶ 41. The appellate court found that Lake and Cook are contiguous, that it was only one and a half hours from the defendant's headquarters to the Cook County courthouse in downtown Chicago, and only a half hour away from the Cook County courthouse in Skokie. *Id.* ¶ 42. As such, the appellate court concluded this factor did not weigh in favor of transfer.

The appellate court also concluded that the trial court did not abuse its discretion when it concluded that the ease of access to evidence did not favor transfer. *Id.* ¶ 44. First, the defendant failed to identify any of plaintiffs' treaters or other individuals who would be unwilling to testify in Illinois. *Id.* ¶ 45. Further, the appellate court rejected the defendant's argument that ease of access to evidence favored the plaintiffs' home states based on the plaintiffs' disclosures of potential witnesses who lived in their respective home states. The appellate court was not persuaded because the defendant did not "argue that it intends to call" these witnesses and the defendant has the burden of proof on the motion. *Id.* ¶ 46.

The defendant also identified that plaintiffs' treating physicians and facilities were out of state. This too was rejected. The appellate court also found that the "in a non-medical malpractice case, the location of the plaintiffs' treatment facility or treating physician is not completely irrelevant" but should not be given undue weight. *Id.* ¶ 48. Instead the court noted that in a products lability case it is "important to consider the location of the witnesses and evidence relating to the design and manufacture of the product at issue." *Id.* ¶ 49. To that end, the defendant identified that some employees with personal knowledge of the medication resided in Cook County, and listed other employees who were Cook County residents that it believed had personal knowledge of the marketing, promoting, selling and labelling of the medication at issue in the

case. *Id.* Moreover, the defendant listed 57 employees who were responsible for "sale or servicing" the medication in Cook County. *Id.* ¶ 50. The defendant, however, argued that it never represented that its employees had personal knowledge relevant to the plaintiffs' claims. *Id.* ¶ 51. The court further noted that electronic records and technology tend to make the location of records and documentation less of a concern. *Id.* ¶ 52. Ultimately, the court found that where "potential witnesses and evidence [are] scattered among different states, we cannot find that the trial court abused its discretion in finding that this factor 'did not tilt in favor' or transfer." *Id.*

The appellate court also rejected that there were any practical problems sufficient to transfer the matter from Cook to Lake County. It noted that commuters easily travel between these counties each day and the transportation system reduces any practical concerns. *Id.* ¶ 56. As for interstate transfer, it did not find that any practical problems weighed in favor of transfer.

As for the public interest factors, the appellate court emphasized that Illinois citizens have an interest in the activities of a home corporation whose products may have injured people nationwide. *Id.* ¶ 62. Nor was the court convinced by the defendant's arguments regarding the choice of law issues that may arise. The court acknowledged the congestion of the Cook County courts but repeated that factor is relatively insignificant. *Id.* ¶ 65.

Ultimately, the appellate court weighed all of the private and public interest factors and did not believe that the trial court abused its discretion denying the defendant's motion. *Id.* ¶ 68.

Conclusion

These cases demonstrate what practitioners know, a transfer on *forum non conveniens* is never a "sure thing." The application of this doctrine is heavily fact dependent and may depend on the nature of the case. Even the same rules are not always applied or considered in the same way. Indeed, in these cases the same court viewed the same facts very differently. On the one hand the 40 miles between Kane and Cook County favored transfer because witnesses would have to travel further. On the other hand, 34-36 miles that may take one and a half hours or a half hour did not raise the same concern. While neither *Hale* nor *Benedict* articulate new rules of law or new applications of existing law, these decisions are important reminders to defendants to marshall and develop the best evidence to support any *forum non conveniens* motion. The necessary evidence will likely depend on the type of case and the parties involved. Indeed, in *Benedict* the court drew clear distinctions based on the types of cases. Affidavits are routinely used to support claims for inconvenience by demonstrating the distance, time, and inconvenience of the chosen forum. It is always best to track down and speak to the witnesses if possible. But, rather than set forth basic affidavits with general commentary regarding inconvenience and distances the witness may be required to travel, determine if there are other reasons why a forum is inconvenient and if they exist, include it in those affidavits. Additionally, consider how plaintiff's *forum non conveniens* discovery, which must be verified, can be used offensively to support transfer or to oppose any expected arguments from the plaintiff. Finally, the appellate court in *Benedict* seemingly punished the defendant for not securing affidavits from treating physicians suggesting that they would be unwilling to travel. The difficulty of course, is that *Petrillo* prevents defendants from simply reaching out to treating physicians. While little can be done to remedy that issue, defendants should consider specifically identifying that limitation to frame that issue.

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