Forum Non Conveniens: It's Not About Convenience Anymore, Or Is It?

by George A. Kiser

Forum non conveniens continues to be a much litigated issue and cases filed from out of state continue to garner much publicity. Within the last 18 months, the Court of Appeals for the Fifth District handed down two forum decisions. These two decisions do not provide clarity of the issues as much as they each provide litigants ammunition to use in future disputes. Both cases are factually very similar, yet different panels of the Court of Appeals for the Fifth District came to different conclusions in each case, reversing the trial court's denial of the forum motion in one and upholding the denial in the other.

On September 15, 2010, the Fifth District's opinion in *Laverty v. CSX Transportation, Inc.*, 404 Ill. App. 3d 534, 956 N.E.2d 1 (5th Dist. 2010) was filed. The plaintiff, Thomas Laverty, was living in Texas when he died. He had lived and worked in Michigan and Ohio before that, but never lived or worked in Illinois. His surviving family members resided in Texas. He treated for his asbestos disease in Texas and was never treated by a doctor in Illinois. While the defendant railroad had "trackage rights" in the Chicago area, it did not operate any tracks in Illinois. Defendant argued that it would be more convenient for them to defend the lawsuit in Michigan because that was the primary site of the plaintiff's alleged exposure, because all of the medical witnesses and fact witnesses plaintiff had identified were not in Illinois and because the investigation into the plaintiff's claims would occur in Michigan. The Madison County Circuit Court denied the defendant's forum motion. The Fifth District Court of Appeals reversed the court's denial and dismissed the case based on forum non conveniens.

On January 12, 2012, the Fifth District handed down its opinion in the case of *Walter Fennell v. Illinois Central Railroad Company*, 2012 WL 19455 (Ill. App. 5th Dist.) [1]. Walter Fennell was living in Hazelhurst, Mississippi when he filed his lawsuit. He worked for the defendant railroad for 37 years based out of its facility in Jackson, Mississippi. He had worked primarily on the trains that ran through Jackson, Mississippi, Gulfport, Louisiana and McComb, Mississippi. In 2009, he filed his asbestos suit in St. Clair County, Illinois. Like Mr. Laverty, Mr. Fennell had not lived in Illinois, did not allege any exposure in Illinois and identified thirteen potential treating physicians and co-worker witnesses in Mississippi. None of the plaintiff's treating physicians were located in Illinois. The St. Clair County Circuit Court denied the defendant's forum motion. The Fifth District Court of Appeals upheld the denial.

In *Laverty*, the Fifth District cited the case of *Botello v. Illinois Central Railroad Co.*, 348 Ill. App. 3d 445, 809 N.E.2d 197 (2004), in support of the proposition that where a case has no connection to the state of Illinois, a forum motion should be granted. The court went on to specifically hold that since the case had no connection to Illinois, it should be dismissed. *Laverty*, 956 N.E.2d at 8-9. The court specifically addressed the private and public interest factors that are found in forum non conveniens precedent. The court noted that since Mr. Laverty died in Texas, where he had resided, and had lived in the states of Ohio and Michigan during his life as well, his choice of Illinois forum deserved less deference. *Id.* at 6. It also noted that if the circuit court determined that viewing the exposure site was appropriate, it would be irrational for a Madison County jury to travel outside of the state to view it. *Id.* There were no fact witnesses who were identified as living in Illinois, but plaintiff argued that he might call an expert witness who lived in Illinois to testify. The court noted that a plan to employ a local expert should be given little, if any, consideration in a forum analysis, since the plaintiff would be able to use the expert to circumvent the forum non conveniens doctrine and select an inconvenient forum. *Id.* at 7.

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[1] On February 3, 2012, Defendant filed a Petition for Leave to Appeal to the Illinois Supreme Court.

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Regarding the public interest factors, the *Laverty* court pointed to statistics from the Annual Report of the Administrative Office of the Illinois Courts, 2007, showing that there were 15,709 civil cases pending in Madison County, 2,194 of which sought damages in excess of $50,000. *Id.* at 7. Statistics for Saginaw County Michigan indicated that there were only 780 civil cases pending in 2007. *Id.* The *Laverty* court also pointed out that asbestos product liability was not a localized controversy and residents of Illinois should not be burdened with jury duty in a case that did not arise in and had no relation to their state. *Id.* Since Illinois had no connection to the case, the court directed that the case be dismissed in favor of Michigan. *Id.* at 9.

In the *Fennell* case, the Fifth District began its analysis by stating the appellate court will reverse an order denying a forum motion only if the trial court abused its considerable discretion in balancing the private and public interest factors. 2012 WL 19455 at 4. The court also noted that while the plaintiff's choice of forum was accorded less deference since he did not reside in Illinois, his choice should not be disturbed unless the factors strongly favored transfer (dismissal) to the defendant's proposed forum. *Id.* at 3. The *Fennell* court noted that the defendant had not identified any of its own witnesses or representatives who resided in Mississippi and would need to attend trial. *Id.* at 4. Defendant had, however, presented the affidavit of one representative who lived in Memphis, Tennessee and averred that trial in Copiah County, Mississippi would be more convenient for him. The appellate court referred to MapQuest to determine that Memphis was only 23 miles closer to the Mississippi court than to the court in Belleville, Illinois. *Id.* This factor, the convenience of the defendant, did not favor either side. *Id.* The plaintiff had disclosed the identity of 13 family members, treating physicians and co-workers who lived in Mississippi. While the court stated that Mississippi would be more convenient for them, the fact that the defendant had not indicated an intention to call any of these individuals as witnesses accorded this factor less weight. *Id.* at 4-5. The court also noted that the only other witness who was identified was plaintiff's expert, Dr. Schonfield, who was a Chicago resident; trial in St. Clair County would be more convenient for him. *Id.* at 5. The defendant also identified a representative who lived in Joliet, Illinois. *Id.*

The court held that the defendant did not meet its burden of proving that the plaintiff's chosen forum (Illinois) was inconvenient to the defendant and that the defendant's proposed alternative forum (Mississippi) was substantially more convenient for all parties and affirmed the trial court's denial of defendant's forum motion.

In *Fennell*, the plaintiff emphasized that the defendant routinely hired counsel from Belleville, Illinois, to defend these types of cases and that they had possession of old documents relevant to the case. The court noted that these documents had been used in other jurisdictions and found that it would be more convenient to bring them to trial in St. Clair County. *Id.* at 5-6. All in all, the court found that the ease of access to witnesses and documentary evidence did not strongly favor either forum. *Id.* In addressing the availability of compulsory process, the court noted that the defendant's representatives would be subject to compulsory process in Illinois, but not in Mississippi. *Id.* at 6. While the medical personnel and other fact witnesses disclosed by plaintiff would not be subject to compulsory process in Illinois, the court noted that the defendant had not specifically alleged it intended to call any of these witnesses. *Id.* The court also pointed out that both parties' attorneys were based

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in St. Clair County and that the injury was not site-specific (plaintiff's work occurred on moving trains), so a jury view of the premises was not a consideration. *Id.*

Regarding the public interest factors, the court noted that exposure to asbestos and other toxins by railroad workers is a national, not local, problem. *Id.* at 7. In *Fennell*, the court found that Mississippi's interest in resolving the claim of one of its residents for exposure that took place primarily in Mississippi and Louisiana weighed somewhat in favor of holding the trial in Mississippi. *Id.* Lastly, the court specifically noted that the St. Clair County trial court had expressly found that its dockets were not overburdened. *Id.* The defendant did not present any evidence of how long it would take to resolve cases in Copiah County, Mississippi. *Id.* The court held that the defendant did not meet its burden of proving that the plaintiff's chosen forum (Illinois) was inconvenient to the defendant and that the defendant's proposed alternative forum (Mississippi) was substantially more convenient for all parties and affirmed the trial court's denial of defendant's forum motion. *Id.* at 9.

Both cases cite the same general forum non conveniens case law that has developed over many years. In *Laverty*, the court seemed to view forum non conveniens as a question of connections to the forum state. *See Botello v. Illinois Central Railroad Co.*, 348 Ill. App.3d 445, 809 N.E.2d 197 (2004) which relied on *Espinosa v. Norfolk & Western Railway Co.*, 86 Ill.2d 111, 427 N.E.2d 111 (Ill. 1981); *McGinty v. Norfolk Southern Railway Co.*, 362 Ill.App.3d 934, 841 N.E.2d 987 (2005); and *Dawdy v. Union Pacific Railroad Co.*, 207 Ill.2d 167, 797 N.E.2d 687 (Ill. 2003) (there is support in *Dawdy*, too, for looking at the private and public interest factors in a more detailed, "convenient" manner). With modern air travel so accessible, what purpose is served by counting the miles between one County Seat in Illinois and one in Texas or Mississippi? Laverty looks at the issue as one of practicality; it is more appropriate to try a case where it happened. Illinois jurors do not have an interest in another state's case. Illinois courts needn't be burdened with another state's dispute.

Fennell seemed to favor adding up every possible private/public interest factor, calculating every mile separating jurisdictions and counting the number of cases each alternative jurisdiction has in order to determine if another state is significantly more convenient than the chosen forum. *See Langenhorst v. Norfolk Southern Railway Co.*, 219 Ill.2d 430, 848 N.E.2d 927 (2006); *First American Bank v. Guerine*, 198 Ill.2d 511, 764 N.E.2d 54 (Ill. 2002); *Boner v. Peabody Coal Co.*, 142 Ill.2d 523, 568 N.E.2d 883 (1991); *Dawdy v. Union Pacific Railroad Co.*, 207 Ill.2d 167, 797 N.E.2d 687 (Ill. 2003). In *Fennell*, the court noted that most of the factors the plaintiff claimed supported Illinois as the proper forum were to be accorded very little weight; plaintiff's choice when he did not live in Illinois, residences of experts, locations of attorneys. Yet, when the *Fennell* court tallied these factors, they added up to the defendant not meeting its steep burden of proving that another location was more convenient. For the *Fennell* court, even the location of the defendant's attorneys was a factor to consider.

The two cases are instructive because they point out the vast ambiguity that the forum non conveniens case law can and has created. They also arm both sides in a Fifth District forum fight with plenty of ammunition to use against the other. ■