2019 IL App (1st) 182509-U
No. 1-18-2509
Opinion filed June 28, 2019

FOURTH DIVISION

**NOTICE**: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

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| LINDA A. ALLEY, as Executor of the Estate of Randall Alley, Deceased,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>BNSF RAILWAY COMPANY f/k/a Burlington Northern Santa Fe Railway Company,<br><br>Defendant-Appellant. | ) | Appeal from the Circuit Court of Cook County.<br><br><br><br>No. 17 L 012991<br><br>The Honorable Daniel T. Gillespie, Judge, presiding. |

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice McBride and Justice Reyes concurred in the judgment.

**ORDER**

¶ 1 *Held*: Where the witnesses are scattered among different states; where a number of the identified potential witnesses live or work in cities or villages located wholly or partly in Cook County; where plaintiff chose this forum; where defendant conducts substantial business here; where court statistics establish that a resolution would be speedier here than in Knox County; where viewing the railyard in Knox County is not significant since the decedent worked out of three different railyards, the injuries are claimed to have occurred primarily in transit and conditions have presumably changed over 40 years; where Cook County has a significant interest in the safe operation of defendant's many trains that travel through it on a daily and frequent basis; where the attorneys' offices are here; and where major airports make travel easy and efficient for out-of-state witnesses, we cannot find an abuse of discretion.

¶ 2 On this interlocutory appeal, defendant BNSF Railway Company appeals the trial court's denial of its *forum non conveniens* motion, which had sought the transfer of this case from Cook County to Knox County.

¶ 3 In the case at bar, the decedent, Randall Alley, worked for defendant for 40 years, primarily as a brakeman and locomotive engineer on trains traveling back and forth between Fort Madison, Iowa, and Kansas City, Missouri. Plaintiff Linda A. Alley, his wife and executor of his estate, alleges that the decedent's working conditions were unsafe, exposing him to carcinogenic particles that caused the lung cancer from which he died. In its *forum non conveniens* motion, defendant asked the trial court to transfer the case to Knox County, where decedent's trains departed from, during a portion of his employment. Neither party seeks to have the case heard in either Fort Madison, Iowa, or Kansas City, Missouri, from which decedent's trains departed for 28

years. For the following reasons, we cannot find that the trial court abused its discretion and, thus, must affirm.

¶ 4 BACKGROUND

¶ 5 Plaintiff Linda Alley is the executor of the estate of the deceased engineer, Randal Alley, and she resides in Woodford County, Illinois. She was his wife at the time of his death.

¶ 6 Starting in 1974, the decedent worked for the Santa Fe Railroad. This company was later acquired by the Burlington Northern Santa Fe Railway Company, and is now known as the BNSF Railway Company, the defendant in this action. The decedent worked for defendant, in one form or another, until 2014, starting as a brakeman and ultimately advancing to locomotive engineer. Thus, he worked for the railroad for 40 years.

¶ 7 Plaintiff's first amended[1] complaint (complaint), which is the operative complaint on this appeal, alleges that the decedent, at all relevant times, resided in Woodford and Hancock Counties, and did so when he was diagnosed with lung cancer on December 30, 2014, until he died on April 22, 2016. The decedent worked for defendant on trains departing from train yards in: (1) Fort Madison, Iowa, and Kansas City, Missouri, from 1974 through 2002, or 28

[1] Plaintiff's initial complaint was filed on December 20, 2017. Her first amended complaint was filed on February 16, 2018.

years; and (2) Knox County, Illinois, from 2002 through 2014, or 12 years.[2] The trains traveled throughout northern Illinois, Iowa and Missouri. Plaintiff alleges that, while working for defendant, the decedent sustained toxic exposures to known cancer-causing substances, and that he received medical treatment for his cancer primarily in Peoria County, Illinois, and at the Mayo Clinic in Rochester, Minnesota.[3]

¶ 8 Plaintiff's complaint alleges that defendant, at all times relevant to this complaint, conducted substantial business within Cook County, including the operation of regularly scheduled trains, arriving into and departing from its facilities in Cook County, at various rail yards including Willow Springs, Corwith, and Cicero. In its answer, defendant admitted that, "from 1975 to July, 2016[,] it or its predecessor companies conducted business in Cook County that included ownership, maintenance, and operations of facilities and offices and train operations at Willow Springs, Corwith, Cicero and 14th Street."

[2] Plaintiff's complaint does not allege the precise year that the decedent started working for defendant. However, defendant's answer stated that the decedent worked for it or its predecessor companies, starting in 1974, until December 2014, for a total of 40 years; and plaintiff's interrogatory response agrees with these dates.

[3] Plaintiff provided a list of the decedent's treating physicians that states their addresses as: Rochester, Minnesota; Peoria, Illinois; and "Pedria, IL." "Pedria" appears to be a typo, substituting a "d" for the "o" in Peoria.

¶ 9 With respect to the decedent's exposure injuries, plaintiff alleges that his daily work as an engineer required him to work both inside and alongside idling locomotives, sometimes indoors, for long periods of time, exposing him to diesel fumes and exhaust on a daily and routine basis. Plaintiff alleges that, as a brakeman, he was required to ride on a caboose with pipes wrapped with asbestos insulation and that, as an engineer, he was required to ride in a locomotive engine compartment with pipes that were also wrapped with asbestos insulation, thereby exposing him to asbestos. Plaintiff alleges that the decedent was frequently required to ride in trailing engines, while the front engine was dumping sand on the track for traction, exposing him to sand and toxic silica. As an engineer and brakeman, he was required to apply and release brakes, exposing him to brake dust also containing asbestos.

¶ 10 Plaintiff alleges two counts: (1) a negligence survival claim; and (2) a negligence wrongful death claim. These counts also allege that defendant violated the Federal Locomotive Inspection Act (49 U.S.C. § 20701 (eff. July 5, 1994)) and the Federal Employers Liability Act (45 U.S.C. § 51, *et seq*. (eff. Aug. 11, 1939)).

¶ 11 On April 18, 2018, defendant filed a motion to transfer the case from Cook County to Knox County, based on the doctrine of *forum non conveniens*. Defendant argued that, for the last 12 years of the decedent's 40-year

employment with defendant, the decedent had worked on trains originating from a railyard in Galesburg, which is in Knox County.

¶ 12 Defendant argued that plaintiff has identified five people who had knowledge of the decedent's exposure to toxic substances while employed by defendant. Two of the people identified are deceased. Of the remaining three, John Fowler and Ronne Longwell live in Iowa, and no address was provided by plaintiff for Don Dredge.[4]

¶ 13 Defendant identified three current or former employees who it claimed have knowledge relevant to plaintiff's claims: (1) Michael McKelvy; (2) Mark Scheffert; and (3) Jack E. Williams. McKelvy supervised the decedent from 2007 to 2014, as the decedent's "Road Foreman of Engines," and lives in Galesburg, in Knox County. Scheffert, who is currently employed with defendant and currently living in Pueblo, Colorado, also supervised the decedent. From 2011 to August 2014, Scheffert was the "Division

[4] In its brief to this court, defendant asserts that Don Dredge lives in Knox County, but cites in support *its own* brief to the trial court, in which it had argued that it had located a Don Dredge on the internet. However, defendant does not claim to have direct knowledge whether this is the same Don Dredge, or possibly a father or a son, or whether this is a current address. When a defendant argues that a co-worker "must" reside in its proposed forum and that the plaintiff's incomplete interrogatory answer should be held against the plaintiff, this court has responded that it is always the defendant who bears the burden to establish that its proposed forum is more convenient and that " '[a]ny doubts arising from the inadequacy of the record will be resolved against the defendant.' " *Hefner v. Owens-Corning Fiberglas Corp.*, 276 Ill. App. 3d 1099, 1104 (1995) (quoting *Weaver v. Midwest Towing, Inc.*, 116 Ill. 2d 279, 285 (1987)).

Trainmaster," with supervisory authority over both McKelvy and the decedent. Williams, a retired BNSF employee, who was also a "Road Foreman of Engines" and also a former supervisor of the decedent, resides in Iowa. Williams supervised the decedent during part of the time that the decedent worked out of Fort Madison, Iowa. All three aver that traveling to Chicago would be inconvenient, while Galesburg would be more convenient.

¶ 14 Defendant observed that the decedent's two children and two of his former spouses may be called to testify regarding the decedent's health and activities: (1) Randall Alley, Jr., the decedent's son, who lives in the State of Washington; (2) Adrienne Hirsch, the decedent's daughter, who lives in Cook County; (3) Nancy Sue Clemson, an ex-wife, who also lives in Cook County; and (4) Debra Kay Alley, another ex-wife, who lives in Missouri.

¶ 15 Defendant argued in its motion that the "counsel for BNSF has been able to identify some additional employees who worked in the Galesburg/Ft. Madison[, Iowa] area who may be knowledgeable about [the decedent's] job activities or workplace conditions." Of the nine employees listed, only one was listed as living in Knox County. The other eight were listed as living in California, Colorado, South Carolina, Missouri, Minnesota, Iowa or Plainfield, Illinois.

¶ 16 Defendant's motion conceded that "[v]enue is proper in Cook County because BNSF does business in, and is a resident of Cook County." Defendant's motion included plaintiff's answers to defendant's interrogatories.

¶ 17 In plaintiff's answers to defendant's interrogatories, plaintiff stated that the decedent worked out of Fort Madison, Iowa, on trains traveling to Kansas City, Missouri, from 1974 to 2002; and that, starting in 2002, he worked out of Galesburg, Illinois, as an engineer on trains traveling from Galesburg, Illinois, to Kansas City, Missouri. Plaintiff acknowledged that the decedent "smoked approximately 1 pack per day" during his military service "in Vietnam and approximately a few years after."

¶ 18 In plaintiff's response to defendant's *forum non conveniens* motion, plaintiff identified the type of the decedent's lung cancer as chronic lymphatic leukemia. She argued that this disease was caused over the course of the decedent's 40-year career, when he was exposed daily to multiple carcinogens while in transit on defendant's trains. Plaintiff argued that the prior and current industrial hygienists employed by defendant are particularly important to a case such as this one which alleges exposure to a multitude of toxic substances.

¶ 19 To her response to defendant's motion, plaintiff attached defendant's responses, dated May 29, 2018, to her interrogatories. Plaintiff asked defendant to identify "each and every industrial hygienist employed by you that inspected

any of Decedent's workplaces." In response, defendant listed 15 hygienists with names and addresses, four of whom live or work in cities or villages located wholly or partly in Cook County.[5] None were in Knox County. In the May set, plaintiff asked defendant to "[i]dentify the person most knowledgeable regarding your efforts *** prior to the termination of Decedent's employment, to identify, detect, analyze, assess, and/or consider the available scientific evidence concerning the health hazards of exposure" to toxic substances. Defendant responded that Don Cleveland "would have knowledge about the general scope of the subject matter of the interrogatory as to BNSF Railway and Dave Malter *** would be the person most knowledgeable regarding" the predecessor railway. Defendant listed Dave Malter with an address in Woodridge, Illinois, a village partly in Cook County, and listed Don Cleveland with an address in Texas.

¶ 20 When asked to identify each person it intended to call as a witness, the only person whom defendant identified by name was Larry Liukomen, of Burleson, Texas. Plaintiff also attached a set of interrogatory answers in another

[5] For Karen B. Lingren, defendant provided addresses in both Naperville and Chicago; the latter is in Cook County. For Dave Malter, defendant provided addresses in Woodridge, Downers Grove and Texas; Woodridge is a village located partly in Cook County. For Tammy Dillard-Barnes, the sole address provided by defendant was in Chicago, which is in Cook County. For Terry Krug, the sole address provided by defendant was in Bartlett, which is a village located partly in Cook County.

case that plaintiff claimed involved similar litigation, and was dated April 5, 2018. In the set from a different case, defendant listed Larry Liukomen as an industrial hygienist employed by defendant from 1978 to 1986. In another set of undated interrogatory responses in this case, defendant stated that Liukomen did a "study on [the] presence of airborne asbestos in locomotive cabs."

¶ 21 On September 25, 2018, the trial court heard oral arguments on the motion. Defendant argued, among other things, that "nothing happened in Cook County." Plaintiff argued, among other things, that this "is a case that's focused on corporate level negligence; that is, what did BNSF do from a corporate level to research these enumerated substances to implement safety protocols and procedures from a corporate level. And those shots, those decisions, all of those things are made down in Texas," where defendant is headquartered.

¶ 22 On November 2, 2018, the trial court issued a detailed 11-page memorandum order denying defendant's motion. First, the trial court considered the convenience of the parties. It found that, although plaintiff's choice of forum was entitled to less deference because she did not reside there, her choice was still entitled to some deference as the plaintiff. The trial court rejected defendant's argument that Cook County was less convenient for plaintiff, because a party may not argue another party's convenience.

¶ 23 Although defendant denied managing trains from a facility on West Washington Avenue in Chicago as plaintiff had claimed, the trial court observed that defendant's denial "falls just short of representing that it does not manage trains from anywhere in Cook County." The trial court found that defendant "maintain[ed] a system of train yards and support networks in this forum." As a result, the trial court found that the convenience of the parties was a factor that "weighs slightly in [p]laintiff's favor."

¶ 24 Second, the trial court considered the relative ease of access to proof, and found that "neither party represents that there is any 'real' evidence worth considering in this case."

¶ 25 The trial court found that testimonial evidence "undoubtedly arises from Knox County, where Decedent worked for 12 years," as well as from Cook County, where the decedent's daughter resides. The court observed: "It's evident in the briefs that the County which has the strongest connection to this litigation is located in Ft. Madison, Iowa, where he worked" the most years. Other out-of-county sources of testimonial proof included the decedent's medical providers in Peoria, Illinois, and in Minnesota.

¶ 26 After observing that documentary evidence is a less significant factor in this modern age, the trial court found that the ease of access to proof was a factor that "remains neutral."

¶ 27 Third, the trial court considered the availability of compulsory process to compel the attendance of witnesses and concluded that it favored neither party, since defendant was requesting a transfer to a county "still located in Illinois." Thus, the parties will "be able to avail themselves of the same compulsory process whether this case remains in Cook County or is transferred to Knox County."

¶ 28 Fourth, the trial court found that "the cost of obtaining the attendance of willing witnesses weighs in Defendant's favor." Although the trial court observed that witnesses were scattered among several states and that the nearest airport to Knox County was 50 miles away in Peoria while Cook County had two international airports, the trial court found that defendant "capture[d]" this factor with its diligent provision of affidavits from witnesses Michael McKelvy, Mark Scheffert and Jack Williams, the decedent's supervisors, who all averred that they will be inconvenienced if the case remains in Cook County.

¶ 29 Fifth, the trial court found the ability to view the premises did not weigh in favor of transfer, where decedent worked for almost 30 years out of a different train yard; where he spent most of his work life traveling on trains; and where "it's hard to accept that the rail yards and the conditions [the] Decedent worked in have remained substantially the same" over the last 40 years.

¶ 30 Sixth, the trial court found that the other practical problems that make a trial easy and expeditious weighed in plaintiff's favor, since the attorneys are located in Cook County.

¶ 31 Next, the trial court considered the public interest factors, and found that the interest in deciding local matters locally weighed slightly in defendant's favor since the decedent worked out of Knox County for a portion of his employment. The trial court observed: "On that note, the forum with the most predominant connection to this case is the railyard in Ft. Madison, Iowa, where the [decedent] worked" for the vast majority of his career. However, the trial court found that Cook County did have "a slight interest" since defendant "employs thousands of railroad workers in multiple railyards here."

¶ 32 Second, the trial court found that "it would not be unfair to shoulder Cook County's taxpayers with the expense and burden" of this case, since a forum has an interest in "a case involving a defendant which transacts similar activities in the forum like those complained of."

¶ 33 Lastly, the trial court found that the last factor, docket congestion, favored Cook County over Knox County. The trial court observed: "the most recent statistics from the Illinois Supreme Court shows that while it took 42.5 months to dispose of one law jury verdict in Knox County, Cook County disposed of 378 cases in 35 months, 7 ½ months faster than Knox County."

¶ 34 After considering all these factors, the trial court observed that the burden was on defendant to show that the balance of factors strongly favored transfer, and it found that defendant failed to sustain its burden. The trial court observed that, when the potential trial witnesses are scattered among several counties, and no single county enjoys a predominant connection to the lawsuit, then transfer is not warranted. The trial court found that, since the witnesses were scattered among several states, including Texas, Illinois, Washington, Iowa, Missouri, Minnesota and Colorado, and since the decedent worked in railyards in Iowa, Illinois and Missouri, defendant failed to sustain its burden of showing that Knox County was substantially more convenient.

¶ 35 On December 3, 2018, defendant filed a petition in this court for leave to appeal the trial court's interlocutory order,[6] which this court granted on February 20, 2019. This appeal followed.

¶ 36 ANALYSIS

¶ 37 On this appeal, defendant claims that the trial court abused its discretion by denying its *forum non conveniens* motion seeking to transfer this case from Cook County to Knox County.

[6] Supreme Court Rule 306 provides, in relevant part: "A party may petition for leave to appeal to the Appellate Court *** (2) from an order of the circuit court allowing or denying a motion to dismiss on the grounds of *forum non conveniens*, or from an order of the circuit court allowing or denying a motion to transfer a case to another county within this State on such grounds." Ill. S. Ct. R. 306(a)(2) (eff. Nov. 1, 2017).

¶ 38 This is a case where, in the first instance, reasonable minds could differ. However, the issue for an appellate court is not what we would have done in the first instance—that is irrelevant. *Vivas v. Boeing Co.*, 392 Ill. App. 3d 644, 657 (2009). The sole issue for us is whether the trial court abused its discretion. See *Langenhorst v. Norfolk Southern Ry. Co.*, 219 Ill. 2d 430, 441 (2006). An abuse of discretion occurs when no reasonable person could take the view that the trial court took, and we cannot find that here. *Langenhorst*, 219 Ill. 2d at 442

¶ 39 As we explain in more detail below, in a case where the witnesses are scattered among different states; where a number of the identified potential witnesses live or work in cities or villages located wholly or partly in Cook County; where plaintiff chose this forum; where defendant conducts substantial business here; where court statistics establish that a resolution would be speedier here than in Knox County; where viewing the railyard in Knox County is not significant since the decedent worked out of three different railyards, the injuries are claimed to have occurred primarily in transit and conditions have presumably changed over 40 years; where Cook County has a significant interest in the safe operation of defendant's many trains that travel through it on a daily and frequent basis; where the attorneys' offices are here; and where major airports make travel easy and efficient for out-of-state witnesses, we

cannot find an abuse of discretion. We observe that, while the presence of attorney offices and airports are small considerations, they still may be noted. Thus, for the reasons explained in more detail below, we can find no abuse of discretion.

¶ 40 I. Standard of Review

¶ 41 "*Forum non conveniens* is an equitable doctrine founded in considerations of fundamental fairness and the sensible and effective administration of justice." *Langenhorst*, 219 Ill. 2d at 441 (citing *Vinson v. Allstate*, 144 Ill. 2d 306, 310 (1991)). "This doctrine allows a trial court to decline jurisdiction when trial in another forum 'would better serve the ends of justice.' " *Langenhorst*, 219 Ill. 2d at 441 (quoting *Vinson*, 144 Ill. 2d at 310). "*Forum non conveniens* is applicable when the choice is between interstate forums as well as when the choice is between intrastate forums," such as in the case at bar. *Glass v. DOT Transportation, Inc.*, 393 Ill. App. 3d 829, 832 (2009).

¶ 42 The parties agree, and they are correct, that the standard of review for a *forum non conveniens* decision is abuse of discretion. See *Langenhorst*, 219 Ill. 2d at 441.

¶ 43 The discretion afforded a trial court in ruling on a *forum non conveniens* motion is "considerable." *Langenhorst*, 219 Ill. 2d at 441. As a result, "[w]e

will reverse the circuit court's decision only if defendants have shown that the circuit court abused its discretion in balancing the relevant factors." *Langenhorst*, 219 Ill. 2d at 442 (citing *Dawdy v. Union Pacific R.R. Co.*, 207 Ill. 2d 167, 176-77 (2003)). "A circuit court abuses its discretion in balancing the relevant factors only where no reasonable person would take the view adopted by the circuit court." *Langenhorst*, 219 Ill. 2d at 442 (citing *Dawdy*, 207 Ill. 2d at 177); *Glass*, 393 Ill. App. 3d at 832.

¶ 44 "The issue, then, is not what decision we would have reached if we were reviewing the facts on a clean slate, but whether the trial court acted in a way that no reasonable person would." *Vivas*, 392 Ill. App. 3d at 657. See also *Hefner*, 276 Ill. App. 3d at 1103 ("the question on review is not whether the appellate court agrees with the circuit court's denial of a *forum non conveniens* motion but whether the circuit court 'acted arbitrarily, without employing conscientious judgment ***[and] exceeded the bounds of reason' " (quoting *Mowen v. Illinois Valley Supply Co.*, 257 Ill. App. 3d 712, 714 (1994))). In addition, "we may affirm a trial court's *forum non conveniens* order on any basis found in the record." *Ruch v. Padgett*, 2015 IL App (1st) 142972, ¶ 40.

¶ 45 When reviewing the trial court's decision, we must also keep in mind that the burden is always on the movant to show that the relevant factors strongly favor a transfer. *Koss Corp. v. Sachdeva*, 2012 IL App (1st) 120379, ¶ 106 (the

burden is on the movant to show a transfer is strongly favored); *Erwin v. Motorola, Inc.*, 408 Ill. App. 3d 261, 275 (2011) (the burden is on the movant to show a transfer is strongly favored); *Woodward v. Bridgestone/Firestone, Inc.*, 368 Ill. App. 3d 827, 833 (2006) ("[t]he burden is on a defendant to show that the relevant factors strongly favor the defendant's choice of forum").

¶ 46 II. Plaintiff's Choice of Forum

¶ 47 "Before weighing the relevant factors, a court must first decide how much deference to give to a plaintiff's choice of forum." *Vivas*, 392 Ill. App. 3d at 657 (citing *Langenhorst*, 219 Ill. 2d at 448 (the supreme court determined the appropriate amount of deference before weighing the relevant factors)).

¶ 48 It is " 'assumed on a *forum non conveniens* motion that the plaintiff's chosen forum is a proper venue for the action.' " *Lagenhorst*, 219 Ill. 2d at 448 (quoting *Dawdy*, 207 Ill. 2d at 182). "Plaintiff's choice of forum is entitled to substantial deference." *Lagenhorst*, 219 Ill. 2d at 448; *First American Bank v. Guerine*, 198 Ill. 2d 511, 521 (2002) ("the battle over forum begins with the plaintiff's choice already in the lead"). However, when neither the plaintiff's residence nor the site of the injury are located in the chosen forum, the plaintiff's choice is "entitled to *somewhat* less deference." (Emphasis in original.) *Lagenhorst*, 219 Ill. 2d at 448; *Guerine*, 198 Ill. 2d at 517. While " 'the deference to be accorded to a plaintiff regarding his choice of forum is less

when the plaintiff chooses a forum other than where he resides *** nonetheless the deference to be accorded is only *less*, as opposed to *none*.' " (Emphases in original.) *Lagenhorst*, 219 Ill. 2d at 448 (quoting *Guerine*, 198 Ill. 2d at 518). Thus, the trial court did not abuse its discretion by finding that plaintiffs' choice of Cook County was entitled to some deference.

¶ 49 III. Private Interest Factors

¶ 50 When a court considers a *forum non conveniens* motion, the Illinois Supreme Court found that it must consider both "the private and public interest factors." *Langenhorst*, 219 Ill. 2d at 443; *Dawdy*, 207 Ill. 2d at 172-73; see also *Vivas*, 392 Ill. App. 3d at 658. "[N]o single factor is controlling." *Erwin*, 408 Ill. App. 3d at 274 (citing *Langenhorst*, 219 Ill. 2d at 443).

¶ 51 First, we consider the private interest factors, which 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 trial of a case easy, expeditious, and inexpensive.' " *Langenhorst*, 219 Ill. 2d at 443 (quoting *Guerine*, 198 Ill. 2d at 516-17); *Dawdy*, 207 Ill. 2d at 172; see also *Vivas*, 392 Ill. App. 3d at 658.

¶ 52 A. Convenience to the Parties

¶ 53 The trial court was correct in finding that the convenience of the parties does not weigh in favor of transfer.

¶ 54 With respect to this factor, "the defendant must show that the plaintiff's chosen forum is inconvenient to the *defendant*." (Emphasis added.) *Langenhorst*, 219 Ill. 2d at 450; *Vivas*, 392 Ill. App. 3d at 658. In other words, "one party cannot argue another party's convenience." *Ruch v. Padgett*, 2015 IL App (1st) 142972, ¶ 51; *Susman v. North Star Trust Co.*, 2015 IL App (1st) 142789, ¶ 27. Thus, the trial court was correct in finding that defendant could not argue plaintiff's convenience.

¶ 55 As for defendant, it is headquartered in Texas, and it conducts substantial business in both Knox and Cook Counties. The trial court found that defendant "maintain[ed] a system of train yards and support networks in this forum." We cannot find that the trial court abused its discretion in finding that defendant would be "hard-pressed to argue that it is inconvenient for it to litigate in a forum" where it does substantial business.

¶ 56 B. Ease of Access to Evidence

¶ 57 The next factor is the relative ease of access to sources of testimonial, documentary, and real evidence. *Langenhorst*, 219 Ill. 2d at 443 (quoting *Guerine*, 198 Ill. 2d at 516-17); *Dawdy*, 207 Ill. 2d at 172; see also *Vivas*, 392 Ill. App. 3d at 658.

¶ 58 First, we consider the testimonial evidence. The potential witnesses from cities or villages located wholly or partly in Cook County include: (1) Adrienne

Hirsch, the decedent's daughter; (2) Nancy Sue Clemson, an ex-wife; and (3) 4 of the 15 industrial hygienists employed by defendant, including Dave Malter whom defendant identified as "the person most knowledgeable"[7] on this topic with respect to defendant's predecessor railway. None of the 15 hygienists listed by defendant were from Knox County. Thus, six potential witnesses are from cities or villages located wholly or partly in Cook County.

¶ 59 The potential witnesses from Knox County are presumably more extensive, since defendant worked on trains departing from there for 12 of his 40 years with defendant. In addition, defendant submitted affidavits from three of plaintiff's supervisors averring that Knox County was more convenient for them than Cook County.

¶ 60 However, as the trial court observed, the vast majority of witnesses are scattered among several counties and states. Our supreme court has found: "a trial court abuses its discretion in granting an intrastate *forum non conveniens* motion to transfer venue where, as here, 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. The balance of factors must strongly favor transfer of the case before the plaintiff can be

[7] In addition, defendant stated in its reply brief to this court: "BNSF, moreover, has told Plaintiff outright that the most knowledgeable industrial hygienists are Don Cleveland *** and Dave Malter, who worked for [a predecessor railway] from 1981 to 1987."

deprived of his chosen forum." *Guerine*, 198 Ill. 2d at 526. This language has been quoted and applied in numerous appellate cases. *Erwin*, 408 Ill. App. 3d at 282 (affirming the trial court's denial of a defendant's *forum non conveniens* motion, where "the witnesses in this case are scattered throughout the United States"); *Vivas*, 392 Ill. App. 3d at 659 (finding no abuse of discretion for the trial court to conclude that, where "witnesses *** [are] scattered among different states and countries," this factor did not tilt in favor of any one forum); *Woodward*, 368 Ill. App. 3d at 834 (no one forum can be said to be more convenient when potential witnesses are "scattered among different forums"); *Ellis v. AAR Parts Trading, Inc.*, 357 Ill. App. 3d 723, 747 (2005) ("where the potential witnesses are scattered among different forums, neither forum enjoys a predominant connection to the litigation"); *Berbig v. Sears Roebuck & Co.*, 378 Ill. App. 3d 185, 188 (2007) ("When potential witnesses are scattered among several counties, including the chosen forum, *** the plaintiff should not be deprived of his chosen forum.").

¶ 61 In the case at bar, the "scattered" witnesses include, and are not limited to: (1) defendant's medical providers from both Peoria, Illinois, and the Mayo Clinic in Rochester, Minnesota; (2) current and former employees listed by defendant as individuals who may be knowledgeable about the decedent's work conditions and who live in California, Colorado, South Carolina, Missouri,

Minnesota, Iowa, Knox County, and Plainfield, Illinois; (3) Larry Liukomen, an industrial hygienist employed by defendant from 1978 to 1986 who authored a study on the "presence of airborne asbestos in locomotive cabs," and who lives in Texas; (4) Don Cleveland, who defendant identified as the industrial hygienist with knowledge of "the general scope of the subject matter *** as to BNSF Railway," and who lives in Texas; and (5) Randall Alley, Jr., the decedent's son, who lives in the State of Washington. Thus, we cannot find that the trial court abused its discretion in finding that the testimonial evidence was scattered among several states and that Knox County did not predominate.

¶ 62 With respect to documentary evidence, the trial court found that modern technology has rendered it a less significant factor. In fact, this court has previously found 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." *Vivas*, 392 Ill. App. 3d at 658. See also *Erwin*, 408 Ill. App. 3d at 281 ("it has become well-recognized by our courts that given our current state of technology *** documentary evidence can be copied and transported easily and inexpensively"); *Woodward*, 368 Ill. App. 3d at 834 ("the location of documents is not significant because documents can be transported with ease and at little expense"); *Glass*, 393 Ill.

App. 3d at 836-37 ("there should be little difficulty encountered in securing documentary evidence, given that current technology allows documents to be copied and transported easily and inexpensively"); *Ammerman v. Raymond Corp.*, 379 Ill. App. 3d 878, 890 (2008) ("the location of documentary evidence has become less significant because today's technology allows documents to be copied and transported easily and inexpensively").

¶ 63 With respect to real evidence, the trial court found that "neither party represents that there is any 'real evidence' worth considering," and this finding appears correct.

¶ 64 Thus, we cannot find that the trial court abused its discretion in finding that the relative ease of access to proof was a "neutral" factor.

¶ 65 C. Practical Problems

¶ 66 The last private interest factor is a consideration of " 'all other practical problems that make trial of a case easy, expeditious, and inexpensive.' " *Langenhorst*, 219 Ill. 2d at 443 (quoting *Guerine*, 198 Ill. 2d at 516-17); *Dawdy*, 207 Ill. 2d at 172; see also *Vivas*, 392 Ill. App. 3d at 658.

¶ 67 The trial court found that, "although defendant argues that a jury may need to view the rail yards in Knox County and Missouri, it's difficult to imagine that such would be the case." The trial court explained that, during the decedent's 40-year career, he worked out of three different rail yards and spent

most of his work life traveling on trains. In addition, the trial court found it "hard to accept that the rail yards and the conditions [the] Decedent worked in have remained substantially the same."

¶ 68 In *Vivas*, when this court considered the possibility of viewing an accident site, we found that "this factor is not as significant where the accident site has 'substantially changed' since the accident." *Vivas*, 392 Ill. App. 3d at 659-60. The *Vivas* court observed that, "years later, the construction has likely been completed or has at least proceeded to an extent that the appearance *** has changed significantly since the date of the crash. *** Thus, we cannot find that the trial court abused its discretion in giving little weight to this factor." *Vivas*, 392 Ill. App. 3d at 660. Similarly, in the case at bar, the possibility of viewing the Knox County railyard carries little weight when it has likely changed in the intervening years, when defendant worked out of three different railyards, and where his employment stretched over a 40-year time span. See also *Hefner*, 276 Ill. App. 3d at 1105 (where the decedent's asbestos exposure occurred over a 10-year period, 20 years ago, the ability to view the scene was not a factor supporting transfer, since the "site has undoubtedly been altered in the last 20 years").

¶ 69 While little weight should be accorded to the location of attorneys[8] on a *forum non conveniens* motion, "a court may still consider it in the *forum non conveniens* analysis." *Vivas*, 392 Ill. App. 3d at 660. See also *Dawdy*, 207 Ill. 2d at 179 ("a court may consider this factor"); *Erwin*, 408 Ill. App. 3d at 281 (this court "note[d]" that both plaintiff and defendant's counsel "maintain offices in Cook County"); *Woodward*, 368 Ill. App. 3d at 835 ("We also note that the defendants' counsel of record have offices in Illinois. Although not a significant factor, we may consider it in our analysis.").

¶ 70 Again, while not a significant factor, Knox County has no airport, while Cook County has two major airports, and the majority of identified potential witnesses live out of state. Thus, to the extent that this factor tips in any direction, it slightly favors plaintiff.

¶ 71 III. Public Interest Factors

¶ 72 When deciding a *forum non conveniens* motion, a court must also consider the public interest factors. These factors include: "(1) the interest in deciding controversies locally; (2) the unfairness of imposing trial expense and the burden of jury duty on residents of a forum that has little connection to the litigation; and (3) the administrative difficulties presented by adding litigation

[8] In its appellate brief, defendant observed that: "Defense counsel of record, Richard T. Sikes, Jr., Stephen P. Heine and Knight Nicastro, L.L.C. have offices in both Peoria and Chicago."

to already congested court dockets." *Langenhorst*, 219 Ill. 2d at 443-44 (citing *Guerine*, 198 Ill. 2d at 516-17); *Gridley v. State Farm Mutual Automobile Insurance Co.*, 217 Ill. 2d 158, 170 (2005); *Dawdy*, 207 Ill. 2d at 173. See also *Vivas*, 392 Ill. App. 3d at 660.

¶ 73 First, we consider the respective forums' interests in deciding these controversies and the fairness of imposing jury duty on the forums' residents. In *Langenhorst*, our supreme court affirmed a trial court's decision not to transfer a case from St. Clair County to Clinton County, which was the scene of the railway accident at issue. *Langenhorst*, 219 Ill. 2d at 451, 454. In considering the respective forums' interest, the court observed that St. Clair County had as much interest in the controversy as Clinton County, because "this same railway line" involved in the accident "bisects all of St. Clair County." *Langenhorst*, 219 Ill. 2d at 451. The same is equally true here, where defendant maintains several rail yards in Cook County and defendant's trains run regularly throughout Cook County, giving Cook County a substantial interest in ensuring the safety of defendant's train operations. See *Hefner*, 276 Ill. App. 3d at 1106 (an asbestos exposure case, by its very "nature," is "not truly connected to any one county").

¶ 74 Lastly, we must consider "the administrative difficulties presented by adding litigation to already congested court dockets." *Langenhorst*, 219 Ill. 2d

at 443-44 (citing *Guerine*, 198 Ill. 2d at 516-17). However,"[c]ourt 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. Following this directive, we must consider how fast each forum resolves its cases on average. As the trial court observed in our case, court statistics establish that cases actually resolved faster in Cook County than in Knox County.

¶ 75 The "Annual Report of the Illinois Courts: Statistical Summary—2017," which is compiled and published annually by the Administrative Office of the Illinois Courts, contains a chart that shows the "time lapse," or the months between the "case filing" and the "date of verdict," by county, for "law jury verdicts over $50,000." Although Knox County had only 4 "law jury verdicts over $50,000," the average time lapse for these cases from the date of filing to the date of verdict was 55.3 months. By contrast, Cook County had 400 such cases, but the time lapse was only 32.2 months, or 23 months faster than Knox County. That is almost a full two years faster, which is not a small difference. See Admin. Office of the Ill. Courts, Annual Report of the Illinois Courts: Statistical Summary—2017, 60 (2018), *available at* http://www.illinoiscourts.gov/SupremeCourt/AnnualReport/2018/2017_Statistical_Summary_Final.pdf.

See also *Johnson v. Nash*, 2019 IL App (1st) 180840, ¶¶ 64-65 (we may take judicial notice of the annual reports of the Illinois courts).

¶ 76 Defendant argues that *Fennell v. Illinois Central Railroad*, 2012 IL 113812, is analogous to our case and dictates the outcome here. In *Fennell*, the defendant railroad sought to transfer the case from Illinois to Mississippi, out of which the plaintiff employee had worked for his entire career. *Fennell*, 2012 IL 113812, ¶¶ 6-7. *Fennell* would have been more analogous if defendant was seeking to transfer this case to Fort Madison, Iowa, out of which defendant worked for most of his 40-year career with defendant. Although the same principles apply whether a defendant seeks an interstate or an intrastate transfer (*Fennell*, 2012 IL 113812, ¶ 13), one clear difference between our case and *Fennell* is that, unlike the defendant in *Fennell*, defendant is not seeking to transfer the case to the forum from which the decedent's trains departed during most of his career. In *Fennell*, the supreme court found that the defendant's motion should have been granted, observing that, except for one expert witness, "*all* other workplace and medical witnesses are in Mississippi." (Emphasis added.) *Fennell*, 2012 IL 113812, ¶ 34. The same cannot be said of defendant's chosen forum in the case at bar. In addition, the *Fennell* plaintiff originally filed his suit in Mississippi; but after four years of discovery in Mississippi, a Mississippi court granted the defendant's motion to dismiss, although without

prejudice. *Fennell*, 2012 IL 113812, ¶¶ 3-4. Instead of attempting to amend his Mississippi complaint, the *Fennell* plaintiff waited three years and decided to try his luck in another forum, refiling his suit in a completely different state, namely, Illinois. *Fennell*, 2012 IL 113812, ¶ 5. Our supreme court found that the *Fennell* plaintiff's choice of forum was entitled to almost no deference, since it was not even *his* "first choice." *Fennell*, 2012 IL 113812, ¶ 25 (Illinois was "plaintiff's *second* choice" (emphasis in original)). In light of the differences and the unique circumstances of the *Fennell* case, we do not find *Fennell* dispositive of the case at bar.

¶ 77 For all the reasons that the trial court discussed in its own order and for all the additional reasons that we discussed above, we cannot find that the trial court abused its discretion in finding that the public and private factors did not require a transfer to Knox County.

¶ 78 CONCLUSION

¶ 79 After carefully considering and weighing every factor in the *forum non conveniens* doctrine, we cannot find that the trial court abused its discretion by denying defendant's *forum non conveniens* motion. Thus, we must affirm the trial court's order and remand for further proceedings consistent with this opinion.

¶ 80 Affirmed.