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Chicago Daily Law Bulletin®

VOLUME 165, NO. 155

LAW BULLETIN MEDIA

Plaintiff wins dispute over forum; Cook County deemed best for all

Recently, the 1st District Appellate Court affirmed a Cook County Circuit Court judgment entered in favor of the plaintiff in a wrongful-death suit after finding the trial court did not abuse its discretion in denying an intrastate forum non conveniens motion.

In *Alley v. BNSF Railway Co.,* 2019 IL App (1st) 182509-U, Randall Alley was a brakeman and locomotive engineer who worked for BNSF for more than 40 years and died of lung cancer in 2016.

Alley's work on trains as an engineer and was exposed to various toxic substances such as diesel fumes and exhaust, pipes wrapped with asbestos insulation, sand and toxic silica and brake dust containing asbestos.

Plaintiff Linda Alley, the decedent's widow and executor of his estate, sued BNSF alleging that the working conditions Alley experienced at BNSF were unsafe and exposed him to cancer-causing carcinogens from which he died.

Primarily, the trains Alley worked on traveled between Fort Madison, Iowa, and Kansas City, Mo. But for a portion of his employment with BNSF, Alley's trains departed from Knox County in western Illinois. As such, BNSF requested the trial court to transfer the case to Knox County in a forum non conveniens motion.

BNSF argued that the witnesses the plaintiff identified who had knowledge of Alley's toxic exposure are either deceased or living in Iowa. The railway company also identified three current or former employees that live in Knox County, Colorado and Iowa. All three supervised Alley at one time and stated that traveling to Galesburg in Knox County would be more convenient than traveling to Chicago.

In short, all of the potential trial witnesses were scattered among several states, including Texas, Illinois, Washington, Iowa, Missouri, Minnesota and Colorado. Alley worked in rail yards in Iowa, Illinois and Missouri, so it was necessary that BNSF meet its burden by showing Knox County was substantially more convenient to warrant a transfer of venue.

The trial court, however, found BNSF failed to sustain that burden based on both private- and public-interest factors.

On appeal, BNSF claimed that by denying its forum non conveniens motion to transfer the case to Knox County, the trial court abused its discretion. The trial court's view must have been one that no reasonable person could take for BNSF to prevail on the abuse of discretion claim.

TOXIC TORT TALK

CRAIG T. LILJESTRAND

CRAIG T. LILJESTRAND, *a partner at Hinshaw & Culbertson LLP, has experience in toxic tort litigation. He practices in the areas of asbestos, silica, welding fumes, lead paint, chemical and occupational disease claims. His client base includes Fortune 500 companies in which he has defended various industrial product and equipment manufacturers, contractors and premises owners in numerous toxic tort cases throughout the country. He is also the regional counsel for a major industrial manufacturer.*

Through consideration of the same private- and public-interest factors the trial court weighed, the appellate court concluded it could not find an abuse of discretion at the trial level and affirmed the denial of BNSF's motion.

Before addressing the rest of the relevant factors, the court first decided whether the trial court abused its discretion in attributing deference to the plaintiff's choice of forum — Cook County. While the deference given to a plaintiff's choice of forum is "somewhat less" when he or she does not reside in that forum, some deference is still appropriate. Thus, plaintiff's choice of Cook County was rightly awarded some deference at the trial level.

Addressing first the private-interest factors, the court considered "(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 v. Norfolk Southern Railway Co.,* 219 Ill.2d 430, 443 (2006).

Largely, the appellate court agreed with the trial court's view or, at least, concluded a reasonable person would be able to take the trial court's view.

First, BNSF needed to argue that it was inconvenient for itself — not the plaintiff — to litigate in Cook County. Because BNSF has a system of train yards and otherwise does substantial business in Cook County, arguing BNSF would be

inconvenienced by litigating there is difficult.

As for access to testimonial evidence, six potential witnesses were located wholly or partly in Cook County, but there were presumably more from Knox County. Still, the vast majority of witnesses were scattered among several counties and states and the Illinois Supreme Court has found abuse of discretion in a trial court granting an intrastate motion to transfer venue where potential trial witnesses are scattered among the chosen forum and other counties and no single county has a predominant connection to the litigation. To deprive the plaintiff of his chosen forum, the factors must strongly favor transfer of the case.

For access to documentary evidence, modern technology has made this factor less significant. Documents can easily be copied and transported no matter where litigation is located. The court also quickly dismissed the access to real evidence factor, concluding the trial court was correct in finding that "neither party represents that there is any 'real evidence' worth considering."

To the last private-interest factor, the court considered the practical problems of having the trial in Cook County with special attention to BNSF's argument that a jury may need to view the Knox County rail yards. But considering the rail yard has likely changed over the years, and Alley has worked at three different rail yards during his employment lasting longer than 40 years, the need to view the Knox County rail yards did not carry much weight. The court also acknowledged the fact that Knox County has no airport and that Cook County has two major airports slightly favors the plaintiff.

Turning to the public-interest factors, the court analyzed "(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 to already congested court dockets." *Langenhorst,* 219 Ill.2d at 443-44.

By virtue of BNSF's several rail yards in Cook County and its many trains that frequently travel through it, the court concluded giving Cook County citizens a substantial interest in resolving safety issues associated with the railroad company's operations was reasonable.

Moreover, court statistics established that cases were resolved almost two years faster in Cook County than in Knox County, which eliminated any congested docket claim.

Lastly, the court distinguished *Fennell v. Illinois Central Railroad Co.*, 2012 IL 113812, 987 N.E.2d 355, in which the defendant argued was analogous to the case at bar. There, a defendant railroad sought transfer of a case from Illinois to Mississippi, where the plaintiff worked his whole career.

But here, BNSF was not trying to transfer this case to the forum where decedent's trains departed his whole career. Most of the witnesses were located in Mississippi in the case BNSF cited and Illinois was not even the plaintiff's first choice in that case.

On balance, the court could not find that the trial court abused its discretion in finding that the public and private factors did not require a transfer to Knox County.