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Fifth District Appellate Court of Illinois Reverses Rail Carrier Asbestos Ruling on Motion to Dismiss for *Forum Non Conveniens*

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The Fifth District of the Appellate Court of Illinois recently reversed a Madison County trial court ruling denying a motion to dismiss an asbestos case for *forum non conveniens*. The Fifth District's decision constitutes a significant defense victory for parties involved in the Madison County asbestos litigation.

In *Laverty v. CSX Transp., Inc.*, Civ. No. 5-09-0043, 2010 WL 3623583 (Ill. Ct. App. 5th Dist., August 20, 2010), the plaintiff, Claudious Laverty, individually and as special administrator of the estate of her deceased husband, Thomas Laverty, filed a complaint in Madison County Circuit Court against CSX Transportation and other defendants for willful and wanton misconduct and negligence under the Federal Employers' Liability Act (FELA). CSX and 35 of the 38 co-defendants filed motions to dismiss based on interstate *forum non conveniens*.

The plaintiff and decedent were residents of Texas, and previously lived in Michigan and Ohio, but never resided in Illinois. The decedent was employed as a railway fireman and engineer from the early 1940s until 1979. CSX is a successor-in-interest to the decedent's previous employers.

In its motion, CSX argued Madison County was an inappropriate forum because the decedent worked for its predecessors in Saginaw, Michigan, and not from any location in Illinois. CSX further argued its predecessors did not operate tracks in Illinois, but had only limited trackage rights running to Chicago from Michigan to Indiana. Finally, CSX argued that no witnesses or treating physicians were located in Illinois. To further illustrate Illinois' lack of relation to the case, CSX argued the decedent's alleged exposure as a railroad employee would have occurred primarily in Michigan, and that he would have received medical care in Michigan. The manager of field investigations was also located in Michigan. CSX argued that it would be inconvenient for it to defend a lawsuit in Madison County, Illinois, because the investigation of the plaintiff's claims would occur in Michigan, the primary location where the decedent worked, and because all identified medical provider and coworker witnesses were located outside of Illinois.

At the hearing on CSX's motion, the plaintiff conceded that no witnesses were located in Illinois and that the decedent had not been exposed to asbestos in Illinois. The court denied CSX's motion. The Fifth District of the Appellate Court of Illinois granted CSX's petition for leave to appeal.

On appeal, CSX argued the trial court had improperly denied its motion to dismiss based on *forum non conveniens*. CSX argued Illinois had no connection to the litigation and the facts warranted the case's dismissal for refiling in Michigan. The Fifth District agreed.

The Illinois venue statute provides that an action must be filed in the county of residence of any defendant who is joined in good faith and with probable cause for the purpose of obtaining a judgment against the defendant and not solely for the purpose of fixing venue in a particular county, or in the county wherein the transaction or some part of the transaction occurred which gave rise to the cause of action. 735 ILCS 5/2-101 (West 2009). Where more than one potential forum exists, the court may invoke the doctrine of *forum non conveniens* to determine the most appropriate forum. *See Dawdy v. Union Pacific R.R. Co.*, 207 Ill.2d 167, 171 (2003).

In resolving *forum non conveniens* questions, the trial court must balance private interest factors affecting the parties' convenience and public interest factors affecting the court's administration. *Bland v. Norfolk & Western Ry. Co.*, 116 Ill.2d 217, 223-24 (1987). Private interest factors include the parties' convenience, relative ease of access to sources of testimonial, documentary, and real evidence and other considerations that will make the trial easy, expeditious, and inexpensive. Public interest factors include having controversies decided in the forum where they occurred and administrative concerns, such as docket congestion and the imposition of jury duty upon the citizens of a forum with little or no connection to the litigation.

There is no one factor greater than the other when evaluating a case under *forum non conveniens*. Due deference is given to the plaintiff's choice of forum because a "plaintiff's right to select the forum is substantial." *Dawdy*, 207 Ill.2d at 173. However, a non-resident plaintiff's choice of forum deserves less deference, especially when the cause of action has little or no connection to the forum chosen.

In concluding the circuit court erred in denying CSX's motion to dismiss based upon *forum non conveniens*, the Fifth District pointed out that the decedent was never exposed to asbestos in Illinois, as conceded by the plaintiff's counsel, and the decedent's co-workers and medical provider witnesses were not located in Illinois. These out-of-state witnesses would not be subject to the subpoena power of the Illinois courts. The Fifth District also pointed out that an important consideration when ruling on a *forum* motion is the possibility of the jury viewing the accident site. *Dawdy*, 207 Ill.2d at 179. When evaluating this aspect, the Fifth District stated that it is not the *necessity* of viewing the site by the injury, but rather the *possibility* of viewing the site, if necessary. With the plaintiff's attorney's concession that none of the exposure occurred in Illinois, the court explained it would be wholly irrational to believe that a Madison County jury should be required to travel outside Illinois to view the injury site.

In reviewing the public interest factors, the Fifth District focused on the administrative difficulties caused when a case is litigated in congested venues instead of being handled where the cause of action originated; the unfairness of imposing jury duty on residents of a county, or as in this case, a state, with no connection to the litigation; and the interest in having controversies decided where they occurred. *See Dawdy*, 207 Ill.2d at 173.

The Annual Report of the Administrative Office of the Illinois Courts revealed that in 2007 the total number of civil cases pending in Madison County was 15,709 – including 2,194 jury actions seeking in excess of $50 million. The circuit court in Saginaw County, Michigan, had a total of 780 civil cases pending in 2007. The Fifth District also pointed out that Illinois had little or no interest in trying the action of a nonresident whose claim arose outside of Illinois. "The courts have a responsibility to protect finite judicial resources and the efficient functioning of their judicial systems so that they are not impeded by nonresident litigation to the extent that their availability to local citizens is diminished." *Laverty v. CSX Transp., Inc.*, Civ. No. 5-09-0043, 2010 Westlaw 3623583, *5 (Ill. 5th Dist., Aug. 20, 2010), *citing Botello v. Illinois Central R.R. Co.*, 348 Ill.App.3d 445, 459 (1st Dist. 2004), *relying on Espinosa v. Norfolk & Western Ry. Co.*, 86 Ill.2d 111, 121 (1981). The Fifth District, thus, concluded that the public interest factors strongly favored dismissal.

Madison County has long been the plaintiff's forum of choice for filing asbestos cases. So much so that the court has a standing order that addresses anticipated disputes related to discovery, objections during depositions, and even scheduling trials. This writer has personally been involved in cases in which the plaintiffs were residents of Alaska and had never set foot in Illinois, not to mention Madison County; yet motions to dismiss based on *forum non conveniens* were denied. The Fifth District's recent decision was well-written and well-reasoned. It seems clear that this case never belonged in Madison County. However, the opinion did not have the support of all three members of the appellate panel chosen to hear the case. Presiding Justice Goldenhersh filed a dissenting opinion. Justice Goldenhersh did not believe that CSX had met its burden of proving that the alternative forum was substantially more convenient than the one chosen by the plaintiff.

Few defendants are willing to invest the time and money involved in taking a case to the appellate court on the issue of forum. This case was filed in December 2007. In February 2008, CSX filed a motion to dismiss based upon *forum non conveniens*. The hearing on CSX's motion was not held until January 2009, almost a year later. The issue was not finally resolved until August 2010, with the issuance of the Fifth District's opinion. In litigating this issue, CSX expended money on attorney fees and costs associated with the filing of the case, defending depositions, responding to discovery, and incurring the fees and costs associated with filing before the appellate court. All will agree that this was the best result possible for CSX, but how much did it really cost CSX?