



TRIAL BRIEFS

The newsletter of the Illinois State Bar Association's Section on Civil Practice & Procedure

Forum non Conveniens clarified: *Glass v. DOT Transportation, Inc.*

By Hon. Daniel T. Gillespie and Matthew Friedlander¹

For many judges and lawyers in Illinois, the doctrine of *forum non conveniens* appears to be a convoluted discretionary tool. Unlike a motion to transfer venue, which is a purely procedural matter, the doctrine of *forum non conveniens* allows the judge to transfer a case if he or she decides that hearing a case in the plaintiff's choice of forum is unfair to the defendant or the public. The doctrine itself applies on an interstate and intrastate basis so long as venue is proper in both forums.

In a recent ruling, *Glass v. Dot Transportation*, 393 Ill. App. 3d 829, 912 N. E. 2d 762 (1st Dist. 2009), the Illinois Appellate Court has provided welcome clarity in the proper application of an often misunderstood doctrine.

On October 15, 2007, Robert Wiand was driving eastbound on U.S. 136 near Havana in Mason County. He was killed instantly in a head-on collision with a tractor-trailer driven by Randy Crawford. Crawford crossed the center line into eastbound traffic after the truck ahead of him began to make a right-hand turn into a roadside rest area. Renee Glass, Wiand's daughter, initiated a probate proceeding in Champaign County, where she was appointed the special representative and special administrator of her father's estate.

Glass then filed a wrongful death action in Cook County against Crawford, a resident of Ad-

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Nonlawyer advocates in administrative proceedings

By Professor Emeritus Jeffrey A. Parness, Northern Illinois University College of Law

In *Grafner v. Department of Employment Security*, 914 N.E.2d 520 (1st Dist. 2009), the court considered whether a nonlawyer hired from an employer services company could represent a former employer in an administrative proceeding before the Department of Employment Security (DES) in a case involving disputed employment compensation benefits allegedly owed a former employee.

The majority found the nonlawyer could serve "as an adjunct," especially as nothing was "intended to be intensely litigated;" minimal dollar amounts were at stake; "informal, speedy and low cost" proceedings were desired; there was a "long history of participation" by nonlawyer

representatives; the proceedings were "largely routine" as there were no "complex and intricate legal problems;" and a relevant statute allowed representation by a union or a duly authorized agent. A concurring noted "the appropriate remedy" lies with the General Assembly or Supreme Court.

The *Grafner* court deemed its decision similar to the ruling in *Sudzus v. Department of Employment Security*, 914 N.E.2d 208 (1st Dist. 2009). Not unlike *Grafner*, on nonlawyer advocates in DES proceedings the *Sudzus* court emphasized the informality of the proceedings, including "the

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ams County, and Dot Transportation, Inc., which maintains its principal place of business in Brown County. Potential witnesses were scattered across Illinois and other states. At trial, defendants filed a pre-trial motion to transfer venue under Supreme Court Rule 187 pursuant to the doctrine of *forum non conveniens*.

As a matter of procedure, venue would be proper in both Mason and Cook Counties because the accident occurred in Mason County, and DOT Transportation does business in Cook County. The trial court weighed various public and private interest factors and determined that the plaintiff's choice of forum should not be disturbed. Defendants filed an interlocutory appeal pursuant to Supreme Court Rule 306(a)(2) which allows a party to petition for leave to appeal the granting or denying of a trial court's ruling on the issue of *forum non conveniens*. The Illinois Appellate Court granted leave to appeal.

The Appellate Court analyzed the *forum non conveniens* issue by weighing both public and private interest factors. In Illinois, the relevant private interest factors include "convenience of the parties; the relative ease of access to sources of testimonial, documentary, and real evidence; the availability of compulsory process to secure attendance of unwilling witnesses; the cost to obtain attendance of willing witnesses; the possibility of viewing the premises, if appropriate; and all other practical considerations that make a trial easy, expeditious, and inexpensive." *Dawdy v. Union Pacific R.R. Co.*, 207 Ill. 2d 167, 172 (2003).

The relevant public interest factors include "the administrative difficulties caused when litigation is handled in a congested venue instead of being handled at its origin, the unfairness of imposing jury duty upon residents of a county with no connection of litigation, and the interest in having local controversies decided locally." *Id.* at 173.

Furthermore, since the determination of a *forum non conveniens* motion lies within the sound discretion of the trial court, the Illinois Appellate Court could only reverse if it found that the trial court had abused its discretion in balancing the relevant factors.

When applying the relevant criteria, the appellate court noted that the burden of

proving why plaintiff's choice forum is inconvenient lies squarely upon the defendant. In fact, when evaluating the totality of circumstances, the trial court must determine that the defendant has proven that the balance of factors "strongly favors transfer." *Langenhorst v. Norfolk Southern Ry. Co.*, 219 Ill. 2d 430, 444 (2006). To do so, the defendant must show that the plaintiff's choice of forum is inconvenient to all parties and that all parties would be better served by litigating in defendant's choice of forum.

The appellate court concluded that concerning *forum non conveniens* jurisprudence, "the plaintiff has a substantial interest in choosing the forum where his rights will be vindicated, and the plaintiff's choice of forum should rarely be disturbed..." *First American Bank v. Guerine*, 198 Ill. 2d 511, 517 (2002).

Although deference to the plaintiff's choice of forum is substantial, it is not dispositive. The defendants in *Glass* cited two cases in support of their motion: *Moore v. Chicago & North Western Transportation Co.*, 99 Ill. 2d 73 (1983), and *Smith v. Jewel Food Stores, Inc.*, 374 Ill. App. 3d 31 (2007).

In *Moore*, a fatal accident car accident occurred in Wisconsin and the probate proceedings were to commence in Wisconsin. The probate administrator, a resident of Illinois, filed a wrongful death suit in Illinois and the defendants moved to transfer based on *forum non conveniens*. The trial court granted the motion, reasoning that the probate administrator's residence bore no relation to the litigation since he was a nominal party. In *Glass*, the appellate court held that the facts were distinguishable since Renee Glass was not just the probate administrator but a beneficiary of the decedent's estate, meaning her residence bore a significant relation to the litigation since it is the place where her "rights will be vindicated." *Glass*, 393 Ill. App. 3d 829, 835.

In *Smith*, a car accident occurred in Kendall County, where both the decedent and defendant truck driver resided. The plaintiff administrator of the decedent's estate resided in Kendall County but choose to file suit in Cook County since that was the defendant corporation's headquarters. The Illinois Appellate Court granted a *forum non conveniens* motion, acknowledging that the plaintiff's

choice of forum was granted less deference since it was "foreign to both her residence and the accident site." *Smith*, 374 Ill. App. at 34. In *Glass*, the appellate court held the facts to be distinguishable since Renee Glass' actual place of residence was in Cook County.

Having found the facts of *Glass* distinguishable from both *Moore* and *Smith*, the appellate court considered the relevant public and private interest factors bearing upon their *forum non conveniens* determination. As to the private interest factors, the court found no abuse of discretion since at least some witnesses resided in Cook County. Although many witnesses did not reside in Cook County, the court held that general physical proximity is not a factor bearing upon transfer in intrastate cases. Furthermore, the defendants failed to provide any affidavits from potential witnesses stating that Cook County was an inconvenient forum.

The appellate court also noted that compulsory process is available in both forums and that current technology allows relevant documents to be transferred easily. Concerning the private interest factors, the Court concluded that the "defendants [had] not shown any impediment to accessing sources of testimonial, documentary, or real evidence." *Glass*, at 837.

Concerning the public interest factors, the appellate court agreed that the defendants had failed to meet their burden of showing that plaintiff's choice of venue should be strongly disfavored. The court recognized that both Cook and Mason Counties had an interest in the underlying litigation. Mason County had an interest in resolving litigation that arose out of an accident that occurred within its borders. Likewise, Cook County had an interest in vindicating the rights of the many beneficiaries, including the plaintiff, who resided within its borders.

Furthermore, the appellate court opinion acknowledged that while Cook County may have a more congested docket, that factor, when considered with other relevant factors, does not necessarily require that the case be transferred. The appellate court ultimately affirmed the trial court's ruling, holding that a balancing of the public and private factors did not suggest an abuse of discretion.

Before one can fully appreciate the rel-

evance of *Glass*, it is important to distinguish between a motion to transfer venue and the doctrine of *forum non conveniens*. A motion to transfer venue is a procedural argument governed by 735 ILCS 5/2-101 which provides that an action must be brought either a) in a county in which one of the defendants resides or b) in a county where the cause of action arose. An attorney may file for a motion to transfer venue if neither of these criteria are met, in which case venue is improper as a matter of *procedure*.

Forum non conveniens, on the other hand, is a common law equitable doctrine that assumes there are multiple locations where venue is procedurally proper but should nevertheless be transferred as a matter of *fairness*. A motion to transfer venue, then, is a procedural issue while *forum non conveniens* is a discretionary fairness issue. This mirrors the Federal Rules of Civil Procedure which has a general venue provision, 28 U.S.C. §1391, and a separate common law notion of *forum non conveniens*.

Because *forum non conveniens* involves issues of fairness, its application is inherently ambiguous. In *Glass*, however, the Illinois Appellate Court resolves much of this ambiguity by establishing two bright line rules for the application of the *forum non conveniens* public/private balancing test. First, *Glass* firmly reinforces the notion that plaintiff's choice of forum will almost never be disturbed if he or she chooses to bring suit in the county where the cause of action arose. Though not explicit, the reason for such precedent is likely that the location of the cause of action is always relevant to the litigation,

which automatically gives the plaintiff a sufficient reason for filing suit there.

Second, the appellate court established that filing suit in the county of plaintiff's residence should rarely be disturbed so long as that place of residence bears a substantial relation to the litigation. In *Glass*, the fact that Renee Glass and other beneficiaries resided in Cook County was deemed substantial. In *Moore*, the relation was non-substantial because the plaintiff was a nominal party that only had a fiduciary interest in the litigation. *Smith* exists as a simple reminder that while plaintiff's choice of forum should rarely be disturbed, it will be when such a choice is arbitrary and extremely inconvenient.

With *Glass*, the Illinois Appellate Court has helped clarify an often misunderstood area of Illinois civil procedure. *Glass* reasserts that *forum non conveniens* is an equitable doctrine to be used *after* procedural requirements for venue have been met. *Glass* further establishes a firm baseline for how to apply the doctrine of *forum non conveniens*. The Court uses a public/private factor balancing test and primarily focus on 1) location of the cause of action and 2) plaintiff's residence and the relation to the litigation. This approach makes sense, for it simply reexamines the procedural rules to establish venue through a lens of fairness. This approach makes the doctrine of *forum non conveniens* much more practical and, most importantly, understandable. ■

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Nonlawyer advocates in administrative proceedings

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absence of any necessity for formal presentation of legal arguments; the statutory authorization for nonlawyer representations; the absence of any advice on, or negotiations or other actions related to, possible settlement; and the benefits to the former employing corporation of a nonlawyer asking questions of witnesses. Yet unlike *Grafner*, in *Sudzus* the nonlawyer was actually the owner of the former employer. The *Sudzus* court did not undertake a pro se analysis though the employer was a defendant.

As well, unlike *Grafner* the nonlawyer, as owner of the employer, was a witness as well as an advocate since he was the person who told the employee not to return to work. The *Sudzus* court observed that the nonlawyer advocate/owner provided key information on the work done by the former employee that prompted job termination, as well as on the damage caused to a third party by that work and on the reimbursement for the damage to be paid by the employing company.

Important questions remain after *Grafner* and *Sudzus*. First, who should write any new laws on nonlawyer representation in agency adjudications: the legislature, the high court, or the agency? In many states, including Illinois, exclusive or primary regulatory authority over the practice of law is vested in the high court.

As well, should any nonlawyer representation standards vary between administrative agencies? For example, only some agencies have a "long history" of nonlawyer representation, while other agencies, like the Human Rights Commission, routinely hear "complex and intricate legal problems."

Further, to what extent should opportunities for nonlawyer representation differ before adjudications commence? If nonlawyer insurance adjusters regularly settle prelawsuit claims, should other nonlawyers be allowed to settle? If so, should they be held to lawyer conduct standards as were certain insurance adjusters in *Jones v. Allstate Insurance*, 45 P.3d 1068 (Wash. 2002)?

Finally, should rationales allowing nonlawyer representatives in agency proceedings ever apply to nonlawyer advocates in Article VI court or court-related (i.e., mediation or compulsory arbitration) proceedings?

Put differently, do court cases inevitably involve "complex and intricate legal problems," or are some per se rules needed in order to avoid much satellite litigation over what distinguishes legal advocacy from fact presentation?

As these questions are not unique, recent developments elsewhere can facilitate resolutions in Illinois. On all questions, Arizona Supreme Court Rule 31 nicely elaborates on law practice regulation. It includes express implementations of statutes on lay representation that preclude many concerns about separation of powers. And it includes express recognitions of lay representatives in varying agency proceedings (including the Department of Economic Security, the Industrial Commission, and the Department of Envi-

ronmental Quality), as well as of nonlawyer mediators.

While the Illinois Supreme Court denied appeals in both *Grafner* and *Sudzus*, other state high courts have recently explored issues involving nonlawyer advocacy through judicial decisions. See, e.g., *Cincinnati Bar Assoc. v. Foreclosure Solutions, LLC*, 914 N.E.2d 386 (Ohio 2009) (unauthorized practice by nonlawyers who assisted financially distressed homeowners facing foreclosures) and *Carlson v. Workforce Safety & Insurance*, 765 N.W.2d 691 (N.D. 2009) (unauthorized practice in workers' compensation proceedings involving requests for reconsideration that included application of legal skill and knowledge to facts of case). ■

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Friday, 2/26/10 – Chicago, ISBA Regional Office—Countering Litigation Gamesmanship. Presented by the ISBA General Practice Solo & Small Firm Section, Co – Sponsored by the Federal Civil Practice Section. 9-5.

Friday, 2/26/10 – Webcast—Countering Litigation Gamesmanship. Presented by the ISBA General Practice Solo & Small Firm Section, Co – Sponsored by the Federal Civil Practice Section. 9-5

Friday, 2/26/10 – Bloomington, Holiday Inn & Suites—Second Amendment and Department of Corrections’ Issues for Criminal Practitioners. Presented by the ISBA Criminal Justice Section. Cap 70. 9-3:45.

March

Tuesday, 3/2/10- Chicago, ISBA Regional Office—Partnership Law Update- 2010. Presented by the ISBA Corporation, Securities and Business Law Section. 11:45-2.

Wednesday, 3/03/10 – Webcast—Illinois’ New Rules of Professional Conduct. Presented by the Illinois State Bar Association. 12-1.

Thursday, 3/04/10- Chicago, ISBA Regional Office—Family Law Skills—Practice Makes Perfect. Presented by the ISBA Family Law Section. 8:30-5.

Thursday, 3/04/10 – Webinar—Conducting Legal Research on Fastcase. Presented by the Illinois State Bar Association. *An exclusive member benefit provided by ISBA and ISBA Mutual. Register at: <<https://www1.gotomeeting.com/register/812110961>>. 12-1.

Friday, 3/05/10 – Chicago, ISBA Regional Office—Administrative Adjudication in the City of Chicago and other Municipalities. Presented by the ISBA Administrative Law Section; co-sponsored by the ISBA General Practice Section, Small Firm & Solo Section Council. 8:30-5:15.

Thursday, 3/11/10- Webcast—Bankruptcy: Tips from the Bench. Presented by the ISBA Commercial Banking and Bankruptcy Section. <<https://isba.fastcle.com/store/seminar/seminar.php?seminar=3562>>. 12-1.

Friday, 3/12/10- Springfield, Illinois Army National Guard—Legal Issues for the Military Law Attorney. Presented by the ISBA Military Law Section. 8-12:30.

Thursday, 3/18/10- Webcast—Collaboration Tools: Paperless Communication with Clients. Presented by the ISBA Legal Technology Section. <<https://isba.fastcle.com/store/seminar/seminar.php?seminar=3563>>. 12-1.

Friday, 3/19/10 – Chicago, ISBA Regional Office—Preparing for Trial and Preparing for Appeal. Presented by the ISBA Bench and Bar Section. 8:30 – 6:30.

Friday, 3/19/10- Chicago, ISBA Regional Office—Preparing for Appeal. Presented by the ISBA Bench and Bar Section. 1:00-5:30.

Friday, 3/26/10 – Chicago, ISBA Regional Office—Divorce, Deportation and Disciplinary Complaints: Avoiding Immigration Pitfalls in Family Law. Presented by the ISBA International and Immigration Law Section; Co-Sponsored by ISBA Family Law and the ISBA Human Rights Section. 9-1.

Friday, 3/26/10 – Rock Island, Holiday Inn—Illinois’ New Rules of Professional Conduct. Presented by the Illinois State Bar Association. 8-12:30. Cap 125.

April

Thursday, 4/1/10 – Webinar—Advanced Research on FastCase. Presented by the Illinois State Bar Association. *An exclusive member benefit provided by ISBA and ISBA Mutual. Register at: <<https://www1.gotomeeting.com/register/458393744>>. 12-1.

Thursday, 4/8/10- Webcast—Durable Powers of Attorney. Presented by the ISBA. <<https://isba.fastcle.com/store/seminar/seminar.php?seminar=3564>>. 12-1.

Thursday, 4/8/10- Springfield, INB Building 307 E. Jackson—Key Issues in Local Government Law: A Look at FOIA, OMA, Elections and Attorney Conflicts. Presented by the ISBA Government Section. 12:30-4:45.

Thursday, 4/8/10- Chicago, ISBA Regional Office—Resolving Financial Issues in Family Law Cases. Presented by the ISBA Family Law Section. 8:30-4:30.

Friday, 4/9/10- Chicago, ISBA Regional Office—Civil Practice Update- 2010. Presented by the ISBA Civil Practice Section. 9-4.

Monday - Friday, 4/12/10 - 4/16/10 – Chicago, ISBA Regional Office—40 hour Mediation/Arbitration Training. Master Series Presented by the Illinois State Bar Association and the ISBA Alternative Dispute Resolution Section. 8:30-5:45 each day.

Friday, 4/16/10- Chicago, ISBA Regional Office—Legal Trends for Non-Techies: Topics, Trends, and Tips to Help Your Practice. Presented by the ISBA Committee on Legal Technology ; co-sponsored by the ISBA Elder Law Section Council. 1-4:30 p.m.

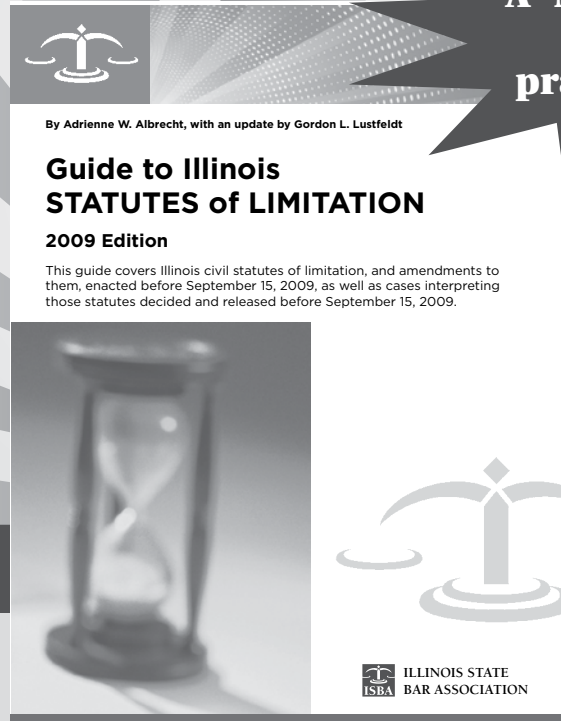
Saturday, 4/17/10 – Lombard, Lindner Learning Center—DUI, Traffic, and Secretary of State Related Issues- 2010. Presented by the ISBA Traffic Law Section. 9-4. Cap 250.

Tuesday, 4/20/10- Bloomington, Double Tree Hotel—Intellectual Property Counsel from Start-up to IPO. Presented by the ISBA Intellectual Property Section. 8:30-3:30. Cap 80.

Wednesday, 4/21/10- Bloomington, Double Tree Hotel—Construction Law—What’s New in 2010? Presented by the ISBA Special Committee on Construction. 9-4. Cap 80.

Friday, 4/23/10- Champaign, I- Hotel and Conference Center—Practice Tips & Pointers on Child-Related Issues. Presented by the ISBA Child Law Section. 8:25-4. Cap 70. ■

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