

[Cite as *Cincinnati Ins. Co. v. Allstate Property & Cas. Ins. Co.*, 2009-Ohio-3540.]

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

CINCINNATI INSURANCE CO.,	:	
Plaintiff-Appellant,	:	CASE NO. CA2009-01-017
- vs -	:	<u>OPINION</u>
	:	7/20/2009
ALLSTATE PROPERTY & CASUALTY INSURANCE CO.,	:	
Defendant-Appellee.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2008-09-3970

David S. Wirth, 6200 South Gilmore Road, Fairfield, OH 45014, for plaintiff-appellant

Lane, Alton & Horst, LLC, Rick E. Marsh, Jennifer A. French, Two Miranova Place, Suite 500, Columbus, OH 43215, for defendant-appellee

YOUNG, J.

{¶1} Plaintiff-appellant, Cincinnati Insurance Company (CIC), appeals the Butler County Court of Common Pleas' decision to dismiss its complaint against defendant-appellee, Allstate Property & Casualty Insurance Company (Allstate), pursuant to the

doctrine of *forum non conveniens*.¹ We affirm the trial court's decision.

{¶2} This action arose out of September 4, 2006 vehicular accident that took place in Adams County, Indiana. Butler County resident, Dustin Owens, who was insured by CIC, was permissibly operating an Allstate insured vehicle owned by Butler County residents James and Lisa Boehm, when Owens struck and injured a motorcyclist, Trevor Kuntz. Owens and the Boehms entered into settlement agreement with Kuntz for \$127,000, which CIC paid. Allstate denied coverage and did not contribute to the settlement.

{¶3} CIC, whose principal place of business is in Butler County, filed suit against Allstate, in Butler County, where both policies were issued and executed. CIC's suit alleged damages via subrogation, contribution and/or assignment for Allstate's pro rata share of the settlement CIC paid, and damages for bad faith. Although Allstate admitted insuring Owens in its answer; Allstate also claimed venue was improper as the accident occurred in Indiana. Allstate subsequently moved to dismiss based on *forum non conveniens*. The trial court granted Allstate's motion, but conditioned the dismissal on Allstate agreeing to jurisdiction in Indiana.² CIC filed an appeal raising two assignments of error.

{¶4} In its appellate brief, Allstate also raised the issue of this court's jurisdiction to review CIC's appeal. Because Allstate's argument relates to appellate jurisdiction, we have elected to address it first.

{¶5} Allstate argues that the trial court's order granting Allstate's motion to dismiss was not a final appealable order, and as such, we lack jurisdiction to render an

1. Pursuant to Loc.R. 6(A), we have sua sponte removed this appeal from the accelerated calendar.
2. The parties filed a stipulation to consent of jurisdiction in Adams County, Indiana on March 11,

opinion on the merits of CIC's appeal. We do not agree.

{¶16} Where a case is dismissed for a reason other than on the merits, and the trial court declines to retain jurisdiction, the order of dismissal is a final appealable order. *Natl. City Commercial Capital Corp. v. AAAA At Your Serv., Inc.*, 114 Ohio St.3d 82, 2007-Ohio-2942, ¶11-12. This includes a dismissal based upon the doctrine of *forum non conveniens*. See *Id.* at ¶11.

{¶17} The trial court's dismissal was based on *forum non conveniens* and did not contain any language retaining jurisdiction, thus it is a final appealable order. Therefore, this court does have jurisdiction to review CIC's appeal.

{¶18} Assignment of Error No. 1:

{¶19} "THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S COMPLAINT UNDER THE DOCTRINE OF FORUM NON CONVENIENS."

{¶110} In its first assignment of error, CIC argues the trial court should not have dismissed the instant case because there was no "reasonable argument that Adams County, Indiana is a more convenient forum for this action than Butler County, Ohio." We disagree.

{¶111} "The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." *Chambers v. Merrell-Dow Pharmaceuticals, Inc.* (1988), 35 Ohio St.3d 123, 125-26, quoting *Gulf Oil Corp. v. Gilbert* (1947), 330 U.S. 501, 507, 67 S.Ct. 839. "The doctrine assumes that proper jurisdiction and proper venue lie in the court which plaintiff has chosen, * * * and additionally presupposes the availability of

another forum in which the defendant may be sued." (Internal citations omitted.) *Chambers* at 126, citing *Gilbert* at 504; Civ.R. 3(D). Additionally, "[t]he doctrine furnishes criteria for choice between them." *Chambers* at 126, quoting *Gilbert* at 507. However, "the ultimate inquiry is where [a] trial will best serve the convenience of the parties and the ends of justice." *Chambers* at 127, quoting *Koster v. Lumbermens Mut. Cas. Co.* (1947), 330 U.S. 518, 527, 67 S.Ct. 828. "Once a court has determined that the alternate forum is the more convenient, the common-law doctrine requires the court to dismiss the action." *Chambers* at 127, citing *Gilbert* at 512.

{¶12} "The criteria * * * are to be applied flexibly, with each case turning on its own facts." *Chambers* at 126, citing *Williams v. Green Bay & Western Ry. Co.* (1946), 326 U.S. 549, 557, 66 S.Ct. 284. "These factors may be divided into the private interests of the litigants and factors of public interest involving the courts and citizens of the forum." *Id.*

{¶13} "Important private interests include: 'the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained.'" *Chambers* at 126-27, quoting *Gilbert* at 508. In addition, "'the plaintiffs' choice of forum should rarely be disturbed,' particularly when the plaintiff has chosen his home forum." (Internal citation omitted.) *Chambers* at 127, quoting *Gilbert* at 508, and citing *Koster* at 524.

{¶14} "Public interest factors to be considered include the administrative

difficulties and delay to other litigants caused by congested court calendars, the imposition of jury duty upon the citizens of a community which has very little relation to the litigation, a local interest in having localized controversies decided at home, and the appropriateness of litigating a case in a forum familiar with the applicable law." *Chambers* at 127, citing *Gilbert* at 508-509. "Additionally * * * the possibility of an unfavorable change in law upon dismissal should not, standing alone, bar such dismissal, provided the remedy in the alternate forum is not so clearly inadequate as to amount to no remedy at all." *Chambers* at 127, citing *Piper Aircraft Co. v. Reyno* (1981), 454 U.S. 235, 249-55, 102 S.Ct. 252.

{¶15} "The *forum non conveniens* determination is committed to the sound discretion of the trial court." *Chambers* at 127, quoting *Reyno* at 257. "It may be reversed only when there has been a clear abuse of discretion." *Chambers* at 127, quoting *Reyno* at 257. "An abuse of discretion implies 'not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency.'" *Chambers* at 133, quoting *State ex rel. Commercial Lovelace Motor Freight, Inc. v. Lancaster* (1986), 22 Ohio St.3d 191, 193. "[W]here the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference." *Chambers* at 127, quoting *Reyno* at 257.

{¶16} Because "[o]ur * * * task is to determine whether the trial court below properly employed the doctrine of *forum non conveniens*, considering all the relevant private and public interest factors and the weight given to each[;] we will not independently assess and reweigh each factor." *Chambers* at 133. Instead, where a court indicates that it considered all of the private and public interest factors, even in the

absence of any reasoning or analysis, we presume that the court properly weighed and balanced the criteria in ordering a dismissal based on the doctrine of *forum non conveniens*. See *Travelers Cas. & Sur. Co. v. Cincinnati Gas & Elec. Co.*, 169 Ohio App.3d 207, 2006-Ohio-5350, ¶11; *Mitrovich v. Hammer*, Cuyahoga App. Nos. 86211 and 86236, 2005-Ohio-5451, ¶9-10.

{¶17} In its argument for dismissal, Allstate focused on the private interest factors related to witnesses to the accident, including the victim, and evidence of accident, including the settlement agreement, being located in Indiana. CIC, in turn, argued these factors are not implicated, and no Indiana evidence/witness is necessary, because its case does not turn on the accident. Instead, CIC asserts its suit is a dispute about the underlying Ohio insurance coverage owned by Butler County residents and amounts owed by Allstate as subrogation, contribution and/or assignment.

{¶18} The public interest factors implicated, according to Allstate, are the fact that there would be less delay in the litigation, as Adams County is less populated than Butler County; and the interest of the people of Indiana, with regard to how insurance policies are applied to their citizens who are injured. CIC argues that although more populated, Adams County only has two judges while Butler County has 16; jury duty is not at issue because neither party made a jury demand; the only Indiana person who arguably has an interest in the matter has already been compensated, while the people of Ohio have an important interest in how carriers and polices share responsibility; and Ohio courts are in a better position, than are the Indiana courts, to apply Ohio law.

{¶19} Although the trial court did not explain its rationale for finding Adams County, Indiana was the more convenient and proper venue for this litigation, we must

presume that the court properly balanced and weighed the *Chambers* factors when making its decision as the court indicated that it had done so in its decision. *Travelers*, 169 Ohio App.3d at ¶111; *Mitrovich*, 2005-Ohio-5451, at ¶9-10. We may not substitute our judgment for that of the trial court, and we cannot find the trial court's decision is characterized by a "perversity of will, passion, prejudice, partiality, or moral delinquency." CIC's first assignment of error is overruled.

{¶20} Assignment of Error No. 2:

{¶21} "THE TRIAL COURT ERRED IN FAILING TO PLACE NECESSARY CONDITIONS ON ITS DISMISSAL OF APPELLANT'S COMPLAINT UNDER THE DOCTRINE OF FORUM NON CONVENIENS."

{¶22} In its second assignment of error, CIC asserts the trial court should have placed further conditions upon its decision to dismiss the case for *forum non conveniens*. In particular, CIC argues the trial court should have ordered Allstate to agree to make any necessary documents/witnesses available in Indiana, waive any statute of limitations defenses and satisfy any judgment rendered against Allstate in Indiana. We do not agree.

{¶23} "The dismissal [for *forum non conveniens*] may be conditioned upon the refiling of the action in the alternate forum with defendant consenting to its jurisdiction." *Chambers* at 127. "Other conditions may include, *inter alia*, defendant's consent to waive any statute of limitations defense, consent to comply with the discovery rules of the original forum, and consent to satisfy any judgment rendered against it in the alternate forum." (Emphasis sic.) *Id.*, citing *Dowling v. Richardson-Merrell, Inc.* (C.A.6, 1984), 727 F.2d 608; *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India*

(S.D.N.Y.1986), 634 F.Supp. 842, modified on appeal (C.A.2, 1987), 809 F.2d 195. Although the *Chambers* court made the above conditions permissible rather than mandatory; we are aware that at least one court has required their inclusion in a *forum non conveniens* dismissal, to ensure the plaintiff had a forum in which to bring his action. *Stidham v. Butsch*, 163 Ohio App.3d 227, 2005-Ohio-4591, ¶11.

{¶24} We decline to follow the position espoused in *Stidham*, and instead follow the permissive language found in *Chambers* with regard to placing conditions on the dismissal. In this case, the trial court, in its discretion, only chose to condition the dismissal on Allstate consenting to jurisdiction. We cannot find there was an abuse of discretion in not requiring any further conditions. CIC's second assignment of error is overruled.

{¶25} Judgment affirmed.

BRESSLER, P.J., and RINGLAND, J., concur.