IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 3058 EDA 2012

CSX Transportation, Inc.,

Defendant-Appellant,

v.

Paul R. Black,

Plaintiff-Appellee.

BRIEF OF APPELLANT CSX TRANSPORTATION, INC.

Appeal from the Order of the Court of Common Pleas of Philadelphia County
January Term 2012, No. 1897, Entered on July 17, 2012 (Moss, J.)

John E. Young
Flynn Wirkus Young, P.C.
1617 JFK Blvd., Suite 1575
Philadelphia, PA 19103
(215) 568-1440

Evan M. Tager (admitted *pro hac vice*)
Phillip R. Dupré (admitted *pro hac vice*)
Mayer Brown LLP
1999 K Street, N.W.
Washington, DC 20006
(202) 263-3000

Counsel for Appellant CSX Transportation, Inc.

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INTRODUCTION

This case presents a question that was resolved by the U.S. Supreme Court over 60 years ago—whether state courts may give heightened deference to a plaintiff's choice of forum in applying the doctrine of *forum non conveniens* in actions brought under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60. In *Missouri ex rel. Southern Railway v. Mayfield*, 340 U.S. 1 (1950), the Supreme Court held that state courts may not treat FELA actions differently from other actions for purposes of the *forum non conveniens* doctrine. Despite this authority, and decades of authority from Pennsylvania and other states applying it to cases materially identical to this one, the Court of Common Pleas gave plaintiff's choice of forum heightened—indeed, effectively unlimited—deference because "this is an FELA case." If permitted to stand, the Court of Common Pleas' decision will have the effect of permitting another asbestos case with no connection to Philadelphia to clog the court's docket and to impose on Pennsylvania residents the burden of paying for the court's oversight of this litigation and serving as jurors in a trial to determine whether a ***Kentucky*** resident who never set foot in Philadelphia and allegedly was injured while working ***in Kentucky*** is entitled to recover from an out-of-state corporation under FELA. The Court of Common Pleas abused its discretion in failing to dismiss this case under the *forum non conveniens* doctrine, and its decision accordingly should be reversed.

STATEMENT OF JURISDICTION

Defendant CSX Transportation, Inc. ("CSXT") moved to dismiss plaintiff's case under 42 Pa.C.S. § 5322(e). The Court of Common Pleas entered an order denying CSXT's motion on July 17, 2012. CSXT then moved the Court of Common Pleas to certify that order for interlocutory appeal pursuant to 42 Pa.C.S. § 702(b). The Court of Common Pleas denied that request by Order dated September 4, 2012. CSXT petitioned this Court to review the Court of

Common Pleas' order refusing to amend its prior order to include the language prescribed by 42 Pa.C.S. § 702(b). This Court granted CSXT's petition for review on November 13, 2012 and stated that the matter shall proceed as an appeal from the order dated July 17, 2012.

ORDER IN QUESTION

The order from which CSXT appeals states:

> AND NOW, this 17th day of July 2012, upon consideration of the Motion to Dismiss Based on *Forum Non Conveniens* filed by Defendant, CSX Corporation, and upon further consideration of Plaintiff's answer thereto, it is hereby ORDERED and DECREED that said Motion is Denied, as this is an FELA case.

(Add. 6.)

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

Orders on motions to dismiss under the doctrine of *forum non conveniens* are reviewed for an abuse of discretion. *Rini v. N.Y. Cent. R.R.*, 429 Pa. 235, 238, 240 A.2d 372, 373 (1968). "An abuse of discretion occurs if there was an error of law or the judgment was manifestly unreasonable." *Silver v. Thompson*, 26 A.3d 514, 516 (Pa. Super. 2011) (citing *Kring v. Univ. of Pittsburgh*, 829 A.2d 673, 675 (Pa. Super. 2003)). When reviewing for errors of law, "the appellate standard of review is *de novo* and the scope of review is plenary." *Hutchison ex rel. Hutchison v. Luddy*, 946 A.2d 744, 750 (Pa. Super. 2008).

STATEMENT OF THE QUESTIONS INVOLVED

Whether Pennsylvania courts may give heightened deference to a plaintiff's choice of forum in applying the doctrine of *forum non conveniens* in a FELA case.

Answer below: Yes; *Suggested answer: No.*

Whether the requisite "weighty" reasons for dismissal under the doctrine of *forum non conveniens* exist when an out-of-state plaintiff who had no connection to Pennsylvania sues an

out-of-state defendant to recover for injuries allegedly suffered outside of Pennsylvania and all known witnesses reside outside of Pennsylvania.

Answer below: No; *Suggested answer: Yes.*

STATEMENT OF THE CASE

A. Procedural History

Plaintiff Paul R. Black initiated this FELA action in the Court of Common Pleas of Philadelphia County on January 17, 2012. (R. 3a.)[1] Mr. Black filed his First Amended Complaint on February 24, 2012. (R. 14a.)

CSXT filed a Motion to Dismiss for *Forum Non Conveniens* pursuant to 42 Pa.C.S. § 5322(e) in its Preliminary Objections on March 5, 2012. (R. 7a.) On July 17, 2012, the Court of Common Pleas (Sandra Mazer Moss, J.) denied CSXT's motion. (Add. 6.) The Order stated simply that "said Motion is Denied, as this is an FELA case." (*Id.*) On August 15, 2012, CSXT filed a motion for reconsideration, or, in the alternative, to amend the July 17 Order to include the language prescribed by Section 702(b) of the Judicial Code, 42 Pa.C.S. § 702(b) (Interlocutory Appeals by Permission), so as to enable CSXT to file a Petition for Permission to Appeal the July 17 Order to this Court. (R. 80a.) By order entered September 4, 2012, the Court of Common Pleas denied that motion. (R. 126a.)

On October 3, 2012, CSXT petitioned this Court to review the Court of Common Pleas' order refusing to amend its prior order to include the language prescribed by 42 Pa.C.S. § 702(b). (Petition for Review, *CSX Transp., Inc. v. Black*, No. 109 EDM 2012 (Pa. Super. Oct. 3, 2012).) By order dated November 13, 2012, this Court granted CSXT's petition and permitted CSXT to appeal from the July 17, 2012 order denying its motion to dismiss. (Order, *CSX Transp., Inc. v.*

[1] Although Mr. Black died subsequent to filing this suit, his estate has yet to be substituted as the plaintiff in this case. Accordingly, we will continue to refer to the plaintiff as Mr. Black.

Black, No. 109 EDM 2012 (Pa. Super. Nov. 13, 2012).) On April 24, 2013, the Court of Common Pleas issued an opinion in support of the July 17, 2012 order. (Add. 1.)

B. Statement of Facts

Mr. Black was a resident of Verona, Kentucky, who worked 30 years for the Louisville & Nashville Railroad ("L&N"), a CSXT predecessor. (R. 16a.) During his tenure with L&N, Mr. Black worked exclusively in and around Latonia, Kentucky, and Cincinnati, Ohio. (R. 46a.) Mr. Black alleges that he contracted lung cancer as a result of exposure to asbestos in Kentucky during the 1950s. (R. 16a-17a.) Mr. Black never worked for L&N in Pennsylvania.[2] (R. 46a.)

Mr. Black identified two Kentucky residents—both former co-workers of his—as potentially having information regarding his exposure to asbestos. (R. 42a-43a.) Mr. Black was not aware of any individual residing in Pennsylvania who may have information or knowledge about his working conditions at L&N or alleged asbestos exposure. (R. 45a-46a.) All of the doctors who treated Mr. Black are located in Kentucky, except for one doctor who practices in both Kentucky and Ohio. (R. 47a.) None of Mr. Black's doctors are located in Pennsylvania. (*Id*.)

CSXT is a Virginia corporation with its principal place of business in Jacksonville, Florida. CSXT operates in 23 states, including Pennsylvania, and the District of Columbia. Plaintiff's claims against CSXT are not related to CSXT's operations in Pennsylvania. (R. 16a-17a.)

C. The Court of Common Pleas' Opinion

In its July 17, 2012 order, the Court of Common Pleas denied CSXT's *forum non conveniens* motion on the ground that "this is an FELA case." (Add. 6.) On April 23, 2013, the

[2] In fact, L&N never even operated in Pennsylvania. *See* Charles B. Castner, Ronald Flanary, & Patrick Dorin, *Louisville & Nashville Railroad: The Old Reliable* 41 (1996).

Court of Common Pleas (Moss, J.) issued an opinion in support of the July 17, 2012 order. The court explained that it had given Mr. Black's choice of forum greater deference than it would have in deciding a similar motion in a non-FELA case. (Add. 4 ("A plaintiff's choice of forum receives particular deference in an FELA case.").) The court further stated that "***FELA defendants*** cannot establish dismissal by merely showing their preferred forum is the 'likely' location of relevant witnesses and documents." (*Id*. (emphasis added).) The court added that, in evaluating a motion to dismiss for *forum non conveniens* in a FELA case, it must "begin with a ***strong*** presumption against dismissing Plaintiffs' case." (*Id*. (emphasis added).) Having placed that heavy thumb on the scale, the court conducted only the most superficial evaluation of the private- and public-interest factors that govern the *forum non conveniens* inquiry, stating ***only***:

> Defendant's "private factors" analysis focuses on Mr. Black's relationship with Philadelphia County, the fact his alleged exposures occurred in Kentucky and Mr. Black's coworkers' and doctors' locations in Kentucky. As set forth above, Plaintiffs' residence and exposure sites are not dispositive, and Defendant must do more than merely show some witnesses and documents may be located in Kentucky. Defendant conducts business in Philadelphia and has failed to demonstrate any prejudice it will face litigating here. Defendant has also failed to show public interest factors outweigh the presumption favoring Plaintiffs' forum choice.

(*Id*. (citation omitted).) The Court of Common Pleas concluded that, "[e]specially given this is an FELA action, [w]e denied Defendant's Motion based on *forum non conveniens*." (*Id*.)

SUMMARY OF ARGUMENT

A. The U.S. Supreme Court held in *Mayfield* that state courts must apply their doctrine of *forum non conveniens* in the same manner in FELA cases as in other cases. Since then, Pennsylvania courts, along with courts around the country, have consistently done so. The Court of Common Pleas therefore erred ***as a matter of law*** by giving Mr. Black's choice of forum heightened deference on the ground that this is a FELA case. The two federal district court cases cited by the Court of Common Pleas in support of its position rest on a misreading of

the U.S. Supreme Court's decision in *Boyd v. Grand Trunk Western Railroad*, 338 U.S. 263 (1949) (per curiam). *Boyd* not only *pre*-dates *Mayfield*, but also does not address the doctrine of *forum non conveniens*; instead, it holds simply that contracts attempting to limit the venues where railroad employees could initially bring suit are void under FELA.

B. It could not be more obvious that the center of gravity of this case is Kentucky, not Pennsylvania. Mr. Black, a Kentucky resident who never set foot in Philadelphia, brought suit against CSXT, an out-of-state corporation, for injuries he allegedly sustained working in Kentucky. All known witnesses in this case, including Mr. Black's medical providers, are based in Kentucky. Not only do these private-interest factors militate in favor of dismissal, but so too do the public-interest factors, as Philadelphia's courts are already overcrowded with out-of-state asbestos cases like this one. Moreover, on facts materially identical to these, Pennsylvania courts, including this Court and the Supreme Court, have held that the weighty reasons needed to dismiss a case for *forum non conveniens* are present. Accordingly, the Court of Common Pleas abused its discretion in denying CSXT's *forum non conveniens* motion.

ARGUMENT

A. The Court Of Common Pleas Erred By Giving Greater Deference To Mr. Black's Choice Of Forum On The Ground That This Is A FELA Case.

FELA establishes a cause of action for railroad employees who are injured as a result of the negligence of their employers. 45 U.S.C. § 51. As part of this statutory regime, Congress gave state courts concurrent jurisdiction over FELA actions. 45 U.S.C. § 56. Because of this specific grant of jurisdiction, there was confusion in the early part of the twentieth century as to whether state courts were "compelled by federal law to reject" the doctrine of *forum non conveniens* in suits arising under FELA. *Mayfield*, 340 U.S. at 4. The Supreme Court resolved that confusion in 1950, holding in *Mayfield* that states must apply their doctrine of *forum non*

conveniens in the same manner in FELA cases as in other cases. *Id*. Consistent with *Mayfield*, Pennsylvania courts, including the Supreme Court, have never given special deference to a FELA plaintiff's choice of forum. Accordingly, the Court of Common Pleas erred as a matter of law by giving Mr. Black's choice of forum heightened deference on the ground that this is a FELA case.

1. Pennsylvania courts may not apply the *forum non conveniens* doctrine differently in FELA cases.

Mayfield squarely addressed the issue here—whether states may apply a different standard for resolving *forum non conveniens* motions in FELA actions than in other actions—and held that they may not. *Mayfield* involved two FELA cases filed in Missouri. In each case, "the plaintiff was not a resident of Missouri, the carrier was a foreign corporation, and the accident which gave rise to the claim of liability for negligence took place outside Missouri." 340 U.S. at 2-3. "[T]he trial court denied the motion[s] to dismiss the suit[s] [under the *forum non conveniens* doctrine] as beyond the jurisdiction of the court to grant." *Id*. at 3. The Missouri Supreme Court affirmed, holding that "the doctrine of *forum non conveniens* cannot bar an action based on [FELA]." *Id*. The U.S. Supreme Court granted review and reversed. *Id*.

The Court held that there is "[n]o [] restriction [on dismissing cases under the *forum non conveniens* doctrine] imposed upon the States merely because [FELA] empowers their courts to entertain suits arising under it." *Id*. at 4. The Court made clear that for purposes of *forum non conveniens* states not only may, but must, treat FELA cases the same as other cases brought in their courts, explaining that federal law does not "limit[] the power of a State to deny access to its courts to persons seeking recovery under the Federal Employers' Liability Act if in similar cases the State for reasons of local policy denies resort to its courts and enforces its policy impartially so as not to involve a discrimination against Employers' Liability Act suits . . . ." *Id*.

(citations omitted). Accordingly, the Court concluded, "if the Supreme Court of Missouri held as it did because it felt under compulsion of federal law . . . so to hold, it should be relieved of that compulsion. It should be freed to decide the availability of the principle of *forum non conveniens* in these suits according to its own local law." *Id*. at 5.

Courts throughout the country have long recognized that *Mayfield* prohibits state courts from giving "particular deference" to "[a] plaintiff's choice of forum . . . in a FELA case" (Add. 4.) Indeed, the Court of Common Pleas noted as far back as 1958 that "[a] State has the power to reject or accept the doctrine of *forum non conveniens* in all actions begun in its courts so long as it does not discriminate against . . . actions under the Federal Employers' Liability Act." *Tamburrino v. Pa. R.R.*, 17 Pa. D. & C. 2d 156, 159 (C.P. Phila. 1958) (citing *Mayfield*). Similarly, the Missouri Supreme Court has held that "the basic factors to be weighed in any case and from which a determination is made whether a case should be dismissed on the basis of *forum non conveniens* apply equally to F.E.L.A. as to [non-F.E.L.A.] cases." *State ex rel. Chi., Rock Island & Pac. R.R. Co. v. Riederer*, 454 S.W.2d 36, 39 (Mo. 1970) (stating that "[t]his complies with the requirements laid down by the Supreme Court of the United States in [*Mayfield*]"). And the Appellate Court of Illinois has likewise held that "Federal Employers' Liability Act cases are to be considered as any other case in the application of the doctrine of *forum non conveniens*." *Saunders v. Norfolk & W. Ry.*, 369 N.E.2d 518, 521 (Ill. App. Ct. 1997). Quite simply, *Mayfield*'s neutrality principle has long been recognized and is not in dispute.

In accord with *Mayfield*, Pennsylvania courts have (until now) consistently paid no more deference to a FELA plaintiff's choice of forum than to that of a plaintiff with any other kind of

claim.[3] *See, e.g.*, *Rini*, 429 Pa. at 239-41, 240 A.2d at 373-74 (setting forth and applying the general standard for *forum non conveniens* in a FELA case); *Norman v. Norfolk & W. Ry.*, 228 Pa. Super. 319, 324, 323 A.2d 850, 852-53 (1974) (same); *see also Palumbo v. N.J. Transit Rail Operations, Inc.*, 2003 WL 256939, at *1-2 (C.P. Phila. Feb. 3, 2003) (same). The decision below appears to be the sole exception to this heretofore uniform practice of affording the plaintiff's choice of forum no greater weight in FELA cases than in other cases.

Indeed, almost 40 years ago this Court recognized that it is particularly important to apply the *forum non conveniens* doctrine with full force in FELA cases. As the Court explained, the purpose of the *forum non conveniens* doctrine is to address the problem of forum shopping—*i.e.*,"plaintiffs … bring[ing] … suit in an inconvenient forum in the hope that they will secure easier or larger recoveries or so add to the costs of the defense that the defendant will take a default judgment or compromise for a larger sum." *Norman*, 228 Pa. Super. at 328, 323 A.2d at 854. "This problem is especially acute in F.E.L.A. cases, in large part because railroads are amenable to service in many jurisdictions simply because of the nature of their business." *Id.* Accordingly, this Court instructed, "'[t]he doctrine of *forum non conveniens* can be most useful in suits against railroads under the Federal Employers' Liability Act where the most flagrant examples of abuse of the venue privilege are found.'" *Id.* (quoting Edward L. Barrett, Jr., *The Doctrine of Forum Non Conveniens*, 35 Cal. L. Rev. 380, 399 (1947)). The Court of Common Pleas' decision—granting the forum choice of FELA plaintiffs ***heightened*** deference—cannot be squared with this Court's observation (exemplified by this case) that FELA cases are particularly

[3] As Pennsylvania has codified the doctrine of *forum non conveniens* (*see* 42 Pa.C.S. § 5322(e)), it assuredly has not, "[a]ccording to its own notions of procedural policy, . . . reject[ed] . . . the doctrine for all causes of action begun in its courts" (*Mayfield*, 340 U.S. at 3).

susceptible to abusive forum shopping and that the doctrine of *forum non conveniens* should be employed to combat that problem.

2. The Court of Common Pleas' reliance on two federal district court cases was misplaced.

In the face of the extensive authority holding that state courts may not apply the *forum non conveniens* doctrine more sparingly in FELA cases, the Court of Common Pleas cited two Eastern District of Pennsylvania cases for the proposition that "[a] plaintiff's choice of forum receives particular deference in an FELA case." (Add. 4 (citing *Askew v. CSX Transp., Inc*., 2008 U.S. Dist. LEXIS 72566 (E.D. Pa. Sept. 22, 2008); and *Szabo v. CSX Transp., Inc*., 2006 U.S. Dist. LEXIS 3862 (E.D. Pa. Feb. 1, 2006)).) These decisions, however, do not justify departing from the consistent understanding of Pennsylvania courts that *Mayfield* prohibits giving greater deference to a plaintiff's choice of forum in FELA cases than in other cases.

To begin with, CSXT brought its motion under 42 Pa.C.S. § 5322(e), Pennsylvania's *forum non conveniens* statute, not 28 U.S.C. § 1404(a), the federal transfer statute applied in *Askew* and *Szabo*. Thus, even if *Askew* and *Szabo* were deemed to be correct interpretations of the federal transfer statute, they have no bearing on the proper application of Pennsylvania's *forum non conveniens* statute. Moreover, the Court of Common Pleas' decision to give these two decisions decisive weight is puzzling given that the "[c]ourts in [the Eastern District of Pennsylvania] are ***divided*** as to whether, in cases involving FELA, the plaintiff's choice of forum requires a heightened level of deference." *Monington v. CSX Transp., Inc.*, 2010 WL 4751716, at *2 (E.D. Pa. Nov. 22, 2010) (emphasis added).[4]

[4] Numerous district courts outside of the Eastern District of Pennsylvania also have rejected the notion that a FELA plaintiff's choice of venue should receive heightened deference under Section 1404(a). *See, e.g., Teter v. BNSF Ry.*, 2006 WL 3060125, at *2 (E.D. Mo. Oct. 26, 2006); *Nasser v. Soo Line R.R.*, 1997 WL 223063, at *1 n.2 (N.D. Ill. Apr. 25, 1997); *De Jesus v.*

Most importantly, for the proposition that a FELA plaintiff's choice of forum is entitled to "notable deference," *Askew* and *Szabo* rely on the Supreme Court's decision in *Boyd*. *See Askew*, 2008 U.S. Dist. LEXIS at *4; *Szabo*, 2006 U.S. Dist. LEXIS at *4. But *Boyd* did not address the doctrine of *forum non conveniens* (or even transfer under Section 1404(a)) at all. In *Boyd*, an injured employee entered into an agreement with his railroad employer that, if his claim could not be resolved, he would bring suit in Michigan. 338 U.S. at 263-64. After he nonetheless filed suit in Illinois, the railroad brought an action in Michigan to enjoin prosecution of the employee's suit in Illinois. *Id*. at 264. The Michigan Supreme Court upheld the forum-selection clause, and the Supreme Court granted review to determine "the validity of a contract restricting the choice of venue for an action based upon the Federal Employers' Liability Act." *Id*. at 263.

The Supreme Court held that FELA prohibits enforcement of agreements restricting a plaintiff's "initial" choice of venue. *Id*. at 266. The Court explained that FELA authorizes plaintiffs to bring suit "'in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action.'" *Id*. at 265 (quoting 45 U.S.C. § 56). The Court then held that a "[plaintiff's] right to bring [a FELA] suit in any eligible forum is a right of sufficient substantiality to be included within the Congressional mandate of § 5 of [FELA]," which provides that "'[a]ny contract [with] the purpose or intent . . . to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void.'" *Id*. (quoting 45 U.S.C. § 55). In so holding, the Court expressly distinguished its decision six months earlier in *Ex parte Collett*, 337 U.S. 55 (1949), in which it had held that the federal transfer statute applies with full force to FELA actions. The

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Nat'l R.R. Passenger Corp., 725 F. Supp. 207, 208 (S.D.N.Y. 1989); *Conley v. Pa. R.R.*, 87 F. Supp. 980, 981 (S.D.N.Y. 1950).

Boyd Court explained that "nothing in [*Collett*] affects the ***initial*** choice of venue afforded [FELA] plaintiffs" because *Collett* held that Section 1404(a) "does not limit or otherwise modify any right granted in § 6 of [FELA] . . . to bring suit in a particular district." *Boyd*, 338 U.S. at 266 (emphasis added; internal quotation marks omitted). As the Court noted, under Section 1404(a), "[a]n action may still be brought in any court, state or federal, in which it might have been brought previously." *Id.* In short, *Boyd* held only that "contracts limiting the choice of venue are void as conflicting with [FELA]" because FELA gives plaintiffs the "right to bring the suit in any eligible forum." *Id*. at 265. *Boyd* does not purport to limit *Collett*'s holding that Section 1404(a) "applies generally, *i.e.*, to any civil action"—including FELA cases (337 U.S. at 59 (internal quotation marks omitted)),[5] much less alter the application of state *forum non conveniens* principles in FELA cases.

The Supreme Court ***did*** address *forum non conveniens* in the FELA context a year later in *Mayfield*, holding unequivocally that states ***must*** apply that doctrine the same way in FELA cases that they do in all other cases. And Justice Jackson added in a concurring opinion that under "28 U.S.C. § 1404(a), as interpreted in *Ex parte Collett*, 337 U.S. 55 [(1949)], [a] federal court . . . would now be free to decline to hear this case and could transfer it to its proper forum." 340 U.S. at 5-6 (Jackson, J., concurring).

Thus, notwithstanding *Boyd*'s characterization of a FELA plaintiff's choice of "initial" forum as a "substantial right," *Mayfield* and *Collett* make clear that this characterization means only that an agreement to limit the available forum is unenforceable and that ordinary *forum non*

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[5] Several courts have so recognized. *See, e.g.*, *Potrykus v. CSX Transp., Inc.*, 2009 WL 466573, at *2 n.1 (E.D. Pa. Feb. 25, 2009) ("[N]othing in [*Boyd*] addresses the distinct question of whether, once a FELA suit is brought properly in a selected forum, a transfer is warranted under Section 1404(a)."); *Teter*, 2006 WL 3060125, at *2; *Nasser*, 1997 WL 223063, at *1 n.2; *Conley*, 87 F. Supp. at 981.

conveniens and transfer principles continue to apply. Accordingly, state courts around the country have uniformly rejected the notion that *Boyd* authorizes state courts to give greater weight to a FELA plaintiff's choice of forum in applying the doctrine of *forum non conveniens*. For example, the Virginia Supreme Court has explained:

> Citing *Boyd v. Grand Trunk W. R. Co.*, 338 U.S. 263, 265, 70 S. Ct. 26, 27, 94 L.Ed. 55 (1949), [Plaintiff] asserts that the choice of venue in a FELA action is a "substantial right" and proposes that the presumption in favor of the plaintiff's choice of forums in a FELA action is stronger than in other actions. While the presumption of correctness attaches to a plaintiff's choice of forum, it is not absolute. Indeed, the presumption cannot be enhanced simply because the action arises under the FELA. We are bound to apply the same principles to venue issues in a FELA case as we apply to venue issues in any other tort case. *Southern R. Co. v. Mayfield*, 340 U.S. 1 (1950).

Norfolk & W. Ry. v. Williams, 389 S.E.2d 714, 716-17 (Va. 1990) (some citations omitted). Similarly, after citing to *Boyd* and noting that "[FELA] does express a policy that the injured employee has a substantial power to choose as a forum," the Illinois Appellate Court explained that "[the] precise question of the power of state courts to apply the doctrine of *forum non conveniens* [was] put to rest by . . . *Mayfield*." *Saunders*, 369 N.E.2d at 521; *see also Mo. Pac. R.R. v. Little*, 319 S.W.2d 785, 791 (Tex. Civ. App. 1958) ("[*Boyd*] merely holds that the railroad employee's agreement to bring suit only where the employee resided or where his injuries were sustained was void . . . [and] has no relevancy to the question of venue in the present case.").

The Court of Common Pleas thus erred as a matter of law in relying on *Askew* and *Szabo* to justify giving near-dispositive weight to Mr. Black's choice of forum.

B. CSXT More Than Satisfied Its Burden Of Demonstrating That Weighty Reasons Exist For Dismissing Mr. Black's Case Under The Doctrine Of *Forum Non Conveniens.*

The test for deciding whether to dismiss a case under 42 Pa.C.S. § 5322(e) is well established:

> In deciding whether to dismiss a suit based on *forum non conveniens*, the court must consider two important factors (1) a plaintiff's choice of the place of suit will not be disturbed except for weighty reasons, and (2) no action will be dismissed unless an alternative forum is available to the plaintiff.

Jessop v. ACF Indus., LLC, 859 A.2d 801, 803 (Pa. Super. 2004). Further, "[i]n determining whether 'weighty reasons' exist so as to overcome the plaintiff's choice of forum, the trial court must examine both the private and public interest factors involved." *Id.* (quoting *Engstrom v. Bayer Corp.*, 855 A.2d 52, 56 (Pa. Super. 2004).

Applying these factors, Pennsylvania courts have consistently held that when, as here, "the cause of action arose outside of the Commonwealth of Pennsylvania; ***neither the plaintiffs nor any of the witnesses reside in or have any connection with [Pennsylvania],*** nor are the witnesses within subpoena range of [Pennsylvania's courts]," weighty reasons exist for dismissal under the *forum non conveniens* doctrine. *Rini*, 429 Pa. at 240, 240 A.2d at 374 (affirming *forum non conveniens* dismissal of claims of FELA plaintiffs who resided and were injured outside of Pennsylvania); *see also Jessop*, 859 A.2d at 804 (affirming *forum non conveniens* dismissal of claim of railroad employee who resided and was injured in Kansas); *Norman*, 228 Pa. Super. at 322-23, 323 A.2d at 851-52 (finding abuse of discretion by trial court in declining to dismiss FELA case where the plaintiff, a Kentucky resident, was injured in Kentucky).[6]

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[6] Courts around the country have likewise held that dismissal is warranted when, as here, "[t]he only connections with [a plaintiff's chosen forum] are that defendant's railroad tracks run through it and it is the site of plaintiff's lawyer's office." *See Foster v. Chi. & N. W. Transp. Co*., 466 N.E.2d 198, 199 (Ill. 1984) (reversing trial court and remanding with directions to dismiss FELA action brought by Iowa resident for injuries incurred in Iowa); *see also Mobley v. S. Ry.*, 418 A.2d 1044, 1045 (D.C. 1980) (affirming dismissal of FELA action brought by North Carolina resident for injuries incurred in Virginia); *S. Ry. v. McCubbins*, 196 So.2d 512, 514-15 (Fla. Dist. Ct. App. 1967) (reversing trial court and remanding with directions to dismiss FELA action brought by Tennessee resident for injuries incurred in Tennessee); *Mayhew v. Seaboard Sys. R.R.*, 484 N.E.2d 388, 389 (Ill. App. Ct. 1985) (affirming dismissal of FELA action brought by Tennessee resident for injuries incurred in Tennessee); *Mo. Pac. R.R. v. Tircuit*, 554 So.2d 878, 879-80 (Miss. 1989) (reversing trial court and dismissing FELA actions brought by Louisiana and Texas residents for injuries incurred in Louisiana and Texas); *Riederer*, 454

The Court of Common Pleas' refusal to follow these on-point cases here was an abuse of discretion. Indeed, as in those cases, application of the private- and public-interest factors demonstrates that CSXT has more than satisfied its burden of demonstrating the requisite weighty reasons for dismissing Mr. Black's case so that it can be re-filed in Kentucky.[7]

1. The private-interest factors weigh decisively in favor of dismissal.

The private-interest factors are:

> the relative ease of access to sources of proof; availability of compulsory process for attendance for unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of a view of the premises, if a view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.

Jessop, 859 A.2d at 803 (quoting *D'Alterio v. N.J. Transit Rail Operations*, 845 A.2d 850, 852 (Pa. Super. 2004)). Every one of these private-interest factors weighs in favor of dismissing this case so that it can be re-filed in Kentucky.

S.W.2d at 36-37 (granting writ of mandamus directing trial court to dismiss FELA action brought by Kansas resident for injuries incurred in Kansas); *Atchison, Topeka & Santa Fe Ry. v. Dist. Ct. of Creek Cnty.*, 298 P.2d 427, 428 (Okla. 1956) (granting writ of mandamus directing trial court to dismiss FELA action brought by estate of deceased New Mexico railroad worker who was killed in New Mexico).

[7] There can be no doubt that Kentucky is an available alternative forum. CSXT has "stipulate[d] . . . that [it] will submit to service of process [in Kentucky] and not raise the statute of limitations as a defense," which "eliminate[s] the concern regarding the availability of an alternative forum." *See Jones v. Borden, Inc., Ind*., 455 Pa. Super. 110, 116, 687 A.2d 392, 395 (1996); (R. 24a.). Although this should put to rest the question whether Kentucky is an alternative forum, Mr. Black nevertheless contended below that he would have difficulty finding a Kentucky lawyer with sufficient expertise. Unsurprisingly, we have found no instance—either in Pennsylvania or elsewhere—in which a plaintiff's purported difficulty finding a lawyer has caused a court to rule that an alternative forum does not exist. In any event, as CSXT pointed out below, Mr. Black's contention that no Kentucky lawyers have adequate expertise to represent an asbestos plaintiff is misguided. Not only are there multiple Kentucky lawyers who advertise that expertise, but Kentucky courts liberally allow lawyers from other states to appear *pro hac vice*. (R. 63a.)

a. CSXT made the requisite weighty showing with respect to the private-interest factors.

In the Court of Common Pleas, CSXT demonstrated that, as in the numerous prior cases in which courts have dismissed claims by out-of-state plaintiffs to recover for injuries allegedly caused by out-of-state defendants in other states, all of the private-interest factors decisively support dismissal.

i. ***Access to sources of proof***. Mr. Black worked his entire career for L&N in Kentucky and across the river in Cincinnati, Ohio. Consistent with that work history, he alleges that his exposure to asbestos occurred in Kentucky. Accordingly, whatever evidence exists in support of his claim is likely to be in Kentucky. Indeed, Mr. Black has not identified a single piece of evidence that is located in Pennsylvania. This factor thus weighs heavily in favor of dismissal. *See Jessop*, 859 A.2d at 804 (finding the private factors to weigh in favor of dismissal where "[a]ll pertinent events occurred outside of Pennsylvania"); *Cinousis v. Hechinger Dep't Store*, 406 Pa. Super. 500, 504, 594 A.2d 731, 733 (1991) (finding the private factors to weigh in favor of dismissal where "'[t]he pertinent events giving rise to the cause of action occurred outside of Pennsylvania [and] [t]he relevant medical records of plaintiff's physician after the alleged accident are located outside of Pennsylvania'") (quoting trial court).

ii. ***Access to witnesses.*** Every potential witness in this case resides in Kentucky. (R. 45a-46a.) The co-workers whom Mr. Black identified as potential witnesses live in Kentucky. All of Mr. Blacks' medical providers are located in Kentucky. (R. 47a.) Moreover, because the basis of Mr. Black's claim is that he was exposed to asbestos while working at various L&N sites ***in Kentucky***, any as-yet unidentified witnesses are far more likely to reside there than in Pennsylvania. Moreover, given that the injuries supposedly were caused by Mr. Black's exposure to asbestos many years ago, any percipient witnesses are likely to be older and less

willing (and perhaps less able) than otherwise to travel to Philadelphia for trial. If, as is almost surely the case, these potential witness have retired from the railroad, CSXT could not require their presence. Nor, of course, could the Court of Common Pleas compel their presence, because they are far beyond the range of its subpoena power. Similarly, CSXT would have no ability to compel attendance at trial of non-railroad witnesses who might have information about alternative sources of asbestos exposure and/or alternative causes of Mr. Black's lung cancer. Accordingly, this factor weighs heavily in favor of dismissal. *See Rini*, 429 Pa. at 237, 240 A.2d at 374 (finding dismissal appropriate because "***the witnesses [do not] reside in or have any connection with Allegheny County***, nor are the witnesses within subpoena range of the Court of Common Pleas of Allegheny County"); *Jessop*, 859 A.2d at 804(finding the private factors to weigh in favor of dismissal where "all known and additional witnesses likely reside outside of Pennsylvania"); *Norman*, 228 Pa. Super. at 323, 323 A.2d at 852 (dismissing case where "[a]ll these witnesses reside near plaintiff's home in the vicinity of Stone, Kentucky").

iii. ***Ease of conducting a view of the premises.*** It is unlikely that resolution of this case would require a view of the premises where Mr. Black worked for L&N. But to the extent that it might, this private-interest factor would likewise weigh in favor of dismissal, as Mr. Black solely worked for L&N in Kentucky and near-by Cincinnati, never setting foot in Philadelphia in his life. (R. at 44a-45a.)

iv. ***All other practical problems that make trial of a case easy, expeditious, and inexpensive.*** As the entirety of Mr. Black's claim is centered around his work in Kentucky, conducting discovery and any subsequent trial in Kentucky would be manifestly easier and less burdensome than doing so in Pennsylvania. *See, e.g., Jessop*, 859 A.2d at 804 (finding the private factors to weigh in favor of dismissal where a party would be required to travel at his

expense to conduct discovery). In addition, CSXT moved to dismiss this case on *forum non conveniens* grounds in its preliminary objections ***before*** "a considerable amount of discovery had been completed" (*Beatrice Foods Co. v. Proctor & Schwartz, Inc.*, 309 Pa. Super. 351, 360, 455 A.2d 646, 650 (1982)). Because there has been no discovery (and no merits-based dispositive motions), dismissing this case so that it can be re-filed in Kentucky would result in no duplication of efforts.[8] Accordingly, this private-interest factor also weighs decisively in favor of dismissal.

b. The Court of Common Pleas' reasons for refusing to find that the private-interest factors support dismissal are erroneous as a matter of law.

Laboring under the misapprehension that a FELA plaintiff's choice of forum is entitled to heightened deference, the Court of Common Pleas gave short shrift to CSXT's showings on the private-interest factors. The entirety of the lower court's analysis was as follows:

> Defendant's 'private factors' analysis focuses on Mr. Black's relationships with Philadelphia County, the fact that his alleged exposures [to asbestos] occurred in Kentucky and Mr. Black's coworkers' and doctors' locations in Kentucky. . . . Plaintiff's residence and exposure sites are not dispositive, and Defendant must do more than merely show some witnesses and documents may be located in Kentucky. Defendant conducts business in Philadelphia and has failed to demonstrate any prejudice it will face litigating here.

(Add. 4.) These rationales for refusing to consider the private-interest factors are erroneous as a matter of law.

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[8] The fact that discovery has not commenced distinguishes this case from *D'Alterio*, *supra*. In *D'Alterio*, the defendant never objected to the plaintiff's choice of venue and the parties had already engaged in discovery for over a year and completed pre-trial preparation when the Court of Common Pleas *sua sponte* dismissed the case under the *forum non conveniens* doctrine. 845 A.2d at 854-55. In cases decided roughly contemporaneously with *D'Alterio*, this Court made clear that *D'Alterio* turned on these anomalous facts and does not support refusing to dismiss when an out-of-state plaintiff sues for events that occurred out of state and little or no discovery has taken place. *See Jessop*, 859 A.2d at 805 ; *Engstrom,* 855 A.2d at 57.

As an initial matter, while the Court of Common Pleas may have been right that the out-of-state location of the plaintiff, witnesses, and exposure is not necessarily "dispositive," that is so only when ***other*** factors support the plaintiff's choice of a Pennsylvania forum.[9] When, as here, none do, dismissal is required. *See, e.g.*, *Rini*, 429 Pa. at 240, 240 A.2d at 374 (affirming *forum non conveniens* dismissal in these circumstances); *Jessop*, 859 A.2d at 804 (affirming dismissal where trial court found it "significant that the decedent's entire [] work history was solely in the state of Kansas and he was diagnosed with the alleged asbestos-related disease by a Kansas doctor").

The lower court was equally mistaken in invoking the fact that CSXT conducts business in Pennsylvania. That fact goes only to jurisdiction and is not a private-interest factor that weighs against dismissal. *Cf. Jessop*, 859 A.2d at 803 (listing private-interest factors). Indeed, if it were otherwise, the doctrine of *forum non conveniens* would be a virtual dead letter because the only cases in which this fact would support dismissal under the *forum non conveniens* doctrine would be ones that should be dismissed for lack of personal jurisdiction.

Finally, the Court of Common Pleas erred as a matter of law in suggesting that CSXT was obligated to make an independent showing that it would be prejudiced if the case is not dismissed. Prejudice is subsumed within the private-interest factors. By showing that those factors favor dismissal, CSXT necessarily established that it would be prejudiced if the case is not dismissed.

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[9] The court's suggestion that only "some" witnesses and documents are located in Kentucky is unsupported by the record. CSXT established that virtually all witnesses and documents are in Kentucky, while Mr. Black made no showing that ***any*** witnesses or documents are in Pennsylvania. (*See* R. 45a (Mr. Black's deposition testimony in which he failed to identify any witnesses in Pennsylvania); R. 54a-55a (Mr. Black's opposition to CSXT's motion to dismiss in which he failed to identify any witnesses or documents located in Pennsylvania).)

In short, the Court of Common Pleas had no valid legal reason for disregarding the private-interest factors. As we have discussed, those factors weigh decisively in favor of dismissing this case.

2. The public-interest factors also weigh decisively in favor of dismissal.

This Court has explained the public-interest factors as follows:

> [A]dministrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community that has no relation to the litigation. There is an appropriateness, too, in having the trial in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

Jessop, 859 A.2d at 803-04 (quoting *D'Alterio*, 845 A.2d at 852). Like the private-interest factors, these public-interest factors uniformly support dismissal.

a. CSXT made the requisite weighty showing with respect to the public-interest factors.

As with the private-interest factors, CSXT demonstrated in the lower court that the public-interest factors weigh heavily in favor of dismissal.

i. ***Administrative difficulties for Philadelphia courts.*** As this case well illustrates, Philadelphia courts have become magnets for out-of-state mass tort cases (such as asbestos cases) that have no connection to Pennsylvania. In fact, "[s]ince 2008, the backlog of asbestos and pharmaceutical cases has shot up from about 2,600 to more than 6,100." Ashby Jones, *Philadelphia Rues Case Flood*, Wall St. J., Sept. 24, 2012, at B8 As Court of Common Pleas Judge John Herron has noted, this backlog is the result of an "overflow of asbestos lawsuits by out-of-state lawyers." Chris Mondics, *Philadelphia Court Changes Address a Backlog of Cases*, Philadelphia Inquirer, Mar. 9, 2012 (paraphrasing Judge Herron's comments),

http://articles.philly.com/2012-03-09/news/31140050_1_defense-lawyers-court-system-case-backlog.

This case involves a Kentucky plaintiff who allegedly was injured by the actions of L&N in Kentucky, with no apparent connection to Philadelphia, except that L&N's successor CSXT does business there (as it does in 22 other states and the District of Columbia) and Mr. Black's attorney is located there. In situations like this, Pennsylvania courts have consistently held that this public-interest factor favors dismissal. *See Jessop*, 859 A.2d at 804 (approving trial court's conclusion that "the most compelling public interest factor favoring dismissal is the enormous burden the court already faces in mass tort litigation, largely the result, it explained, of out-of-state plaintiffs who chose to file in Philadelphia for no reason other than their attorneys have offices there"). There is no reason to find otherwise here.

ii. ***Burden on Philadelphia citizens.*** "Jury duty is a burden that ought not to be imposed upon the people of a community that has no relation to the litigation." *Id.* at 803 (quoting *D'Alterio*, 845 A.2d at 852). Accordingly, "as [this] case ha[s] no connection with Philadelphia, … '[t]here is simply no valid reason that the people of Philadelphia County should bear the burdens of adjudicating this case, including jury duty and the expense conducting a trial.'" *See id.* at 804 (quoting trial court).

iii. ***Conflict of laws.*** The same substantive law—FELA—will apply whether Mr. Black's suit is adjudicated in Kentucky or in Pennsylvania. Accordingly, "[no state] is at home with the . . . law that must govern the case." *Id.* at 803 (quoting *D'Alterio*, 845 A.2d at 852). Consequently, this public-interest factor is neutral.

b. The Court of Common Pleas offered no reason for concluding that CSXT had failed to show that the public-interest factors support dismissal.

The Court of Common Pleas' discussion of the public-interest factors was perfunctory to say the least. The court said only that "Defendant has also failed to show public interest factors outweigh the presumption favoring Plaintiffs' choice of forum." (Add. 4.) That conclusion is manifestly wrong. Indeed, this Court's discussion of the public-interest factors in *Jessop*—which, like this case, involved an out-of-state railroad worker who claimed to be injured by exposure to asbestos out of state—applies equally here:

> [T]he public interest in efficient judicial administration strongly favors dismissing this action currently filed in the Philadelphia County Court of Common Pleas and permitting Plaintiff, if so desired, to re-file the action in Kansas. Philadelphia has no connections with the allegations Plaintiff has put forth in this action. Simply put, there is no relationship between the facts of this case in [sic] Philadelphia County. Plaintiff has no connection to Philadelphia County whatsoever. Accordingly, neither Pennsylvania nor Philadelphia citizens should not [sic] be forced to expend time and tax dollars on a controversy that does not even have tangential contacts with Pennsylvania, let alone Philadelphia County.

See Jessop, 859 A.2d at 804-05 (quoting trial court). Here, as in *Jessop*, the public-interest factors overwhelmingly support dismissal, and the Court of Common Pleas' contrary conclusion is insupportable.

CONCLUSION

The Court should reverse the Court of Common Pleas' order denying CSXT's motion to dismiss and remand with instructions to enter an order dismissing this case.

Respectfully submitted,

Evan M. Tager (admitted *pro hac vice*)
Phillip R. Dupré (admitted *pro hac vice*)
Mayer Brown LLP
1999 K Street, N.W.
Washington, DC 20006
Phone: (202) 263-3000

John E. Young, PA No. 209837
Flynn Wirkus Young, P.C.
1617 JFK Blvd., Suite 1575
Philadelphia, PA 19103
Phone: (215) 568-1440

Counsel for CSX Transportation, Inc.

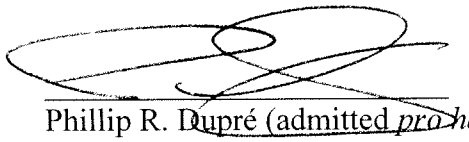
Dated: June 6, 2013.

CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2013, I caused two copies of the foregoing Brief of Appellant CSX Transportation, Inc., together with the attached addendum and Reproduced Record, to be served on the following by first-class mail, which satisfies the requirements of Pa.R.A.P. 121:

Edward M. Nass, Esq.
Phone: (215) 546-8200
Howard, Brenner & Nass, P.C.
1608 Walnut Street, Suite 700
Philadelphia, PA 19103

Attorney for Plaintiff-Appellee Paul R. Black



Phillip R. Dupré (admitted *pro hac vice*)
Mayer Brown LLP
1999 K Street, N.W.
Washington, DC 20006
(202) 263-3000

Attorney for CSX Transportation, Inc.

ADDENDUM

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IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

PAUL R. BLACK and CHARLOTTE J. BLACK, Husband and Wife, Plaintiffs v. CSX TRANSPORTATION INC., as successor to Louisville & Nashville Railroad (a/k/a L&N Railroad), Defendant	January Term, 2012 No. 1897 Superior Court No. 3058 EDA 2012

OPINION

Sandra Mazer Moss, J. April 24, 2013

Defendant CSX Transportation's ("CSX") appeals this Court's Order, dated July 17, 2012, denying Defendant's Motion to Dismiss based on *forum non conveniens* pursuant to 42 Pa. C.S. § 5322. For the following reasons, Our Order should be affirmed.

I. BACKGROUND

On January 17, 2012, Plaintiffs Paul R. Black and Charlotte J. Black (husband and wife) commenced this personal injury action under the Federal Employers' Liability Act (FELA), 45 U.S.C.A. §§ 51 *et seq.*, against CSX. Plaintiffs allege Mr. Black contracted lung cancer from asbestos exposure working as a laborer with Defendant's predecessor, Louisville & Nashville Railroad ("L & N"), between 1950 and 1982. Plaintiffs allege, and Defendant does not apparently dispute, it is a railroad corporation conducting business as an interstate common carrier in Philadelphia, among other places.

On March 5, 2012, Defendant filed a Motion to Dismiss for *forum non conveniens* pursuant to 42 Pa. C.S. § 5322. On May 8, 2012, Plaintiffs filed their Response.[1] On May 11, 2012, Defendant replied. On May 16, 2012, Plaintiffs filed a Sur-Reply. On July 17, 2012, We denied Defendant's Motion to Dismiss. *See* Order dated 7/17/12.

On August 15, 2012, Defendant filed a Motion for Reconsideration or, in the Alternative, Certification of Interlocutory Appeal pursuant to 42 Pa. C.S. § 702(b). On August 27, 2012, Plaintiffs responded. On September 1, 2012, Defendant replied. On September 4, 2012, We denied Defendant's Motion. *See* Order dated 9/4/12.

Defendant filed a Petition for Review and Answer in the Superior Court of Pennsylvania which was granted November 13, 2012. *See* Order dated 11/13/12.

Defendant argues Plaintiffs' case should be dismissed under Pennsylvania's *forum non conveniens* statute, 42 Pa. C.S. § 5322. Defendant argues Plaintiffs' case "has absolutely no connection to either Philadelphia County or the Commonwealth of Pennsylvania." (Def.'s Mot. to Dis., p. 2) Defendant emphasizes Mr. Black's testimony he has never been to Philadelphia and does not know anyone in Pennsylvania with information about his asbestos exposure or medical conditions. (Def.'s Mot. to Dis., p. 4) Defendant argues private and public interest considerations favor Defendant's preferred forum of Boone County, Kentucky, near where Mr. Black's alleged exposure occurred and where his medical providers and living coworkers live. (Def.'s Mot. to Dis., p. 2, 4-5) Defendant argues Pennsylvania courts have dismissed other FELA cases on similar grounds. (Def.'s Mot. for Recons.)

In response, Plaintiffs argue under FELA they have a substantial right to litigate in their chosen forum. (Pl.'s Resp. to Mot. for Recons.) Plaintiffs argue dismissal would be improper

[1] On March 20, 2012, We granted Defendant's Motion as unopposed, as Plaintiffs failed to file a timely Response. On April 27, 2012, upon consideration of Plaintiffs' Motion to Vacate dated March 28, 2012, We vacated Our March 20, 2012 Order and gave Plaintiffs leave to answer Defendants' Motion to Dismiss.

because Defendant has not put forth "weighty reasons" for dismissal and has not established its preferred forum is an appropriate alternative to Philadelphia, as required by our *forum non conveniens* law. (Pl.'s Resp. to Mot. to Dis.) Specifically, Plaintiffs stress Defendant does business in Philadelphia and would not be prejudiced by litigating here. (Pl.'s Resp. to Mot. to Dis.)

II. DISCUSSION

The decision to dismiss on *forum non conveniens* is within the trial court's discretion and will not be reversed absent an abuse of discretion. *Tyro Industries, Inc. v. James A. Wood, Inc.*, 418 Pa. Super. 296, 300 (1992). "If there is any basis for the trial court's decision, the ruling will not be disturbed." *Id.* at 300-01.

Section 5322 authorizes a trial court to dismiss "on any conditions that may be just" where "in the interest of substantial justice the matter should be heard in another forum." 42 Pa. C.S. §5322(e). "In deciding whether to dismiss a suit based on *forum non conveniens*, the court must consider two important factors (1) a plaintiff's choice of the place of suit will not be disturbed except for weighty reasons, and (2) no action will be dismissed unless an alternative forum is available to the plaintiff." *Jessop v. ACF Indus., LLC*, 2004 Pa. Super. 367, 4 (2004).

In determining whether there are "weighty reasons" to overcome a forum choice, trial courts must examine the private and public interests involved. *Id.*; *Poley v. Delmarva Power & Light Co.*, 2001 Pa. Super. 182, 4 (2001). Private interest factors include all practical considerations of expediency and trial expense (i.e., access to sources of proof; availability of compulsory attendance procedures; and cost of obtaining witnesses' attendance). *Jessop,* 2004 Pa. Super. 367 at 5. As to public interests, a court should consider whether dismissal would

create or avoid problems associated with: litigating in a congested forum outside the home state; imposing jury duty upon a community with no relation to the litigation; and/or requiring a court to apply another state's law. *Id.* When applying the foregoing factors, a court should not dismiss "unless justice strongly militates in favor of relegating the plaintiff to another forum." *Poley*, 2001 Pa. Super. 182 at 4.

A plaintiff's choice of forum receives particular deference in an FELA case. *Askew v. CSX Transp., Inc.*, 2008 U.S. Dist. LEXIS 72566 (E.D. Pa. Sept. 22, 2008); *Szabo v. CSX Transportation, Inc.*, 2006 U.S. Dist. LEXIS 3862 (E.D. Pa. Feb. 1, 2006) (citing *Boyd v. Grand Trunk Western R.R. Co.*, 338 U.S. 263, 266 (1959) (per curiam)). An FELA plaintiff's forum choice receives some deference regardless of residence or the underlying incident site. *Id.* at *4. FELA defendants cannot establish dismissal by merely showing their preferred forum is the "likely" location of relevant witnesses and documents. *Id.* at *6.

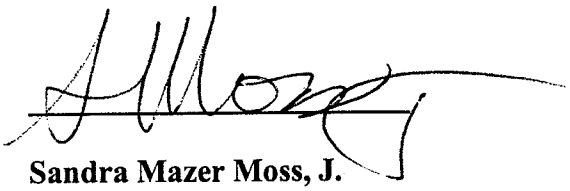
Accordingly, We begin with a strong presumption against dismissing Plaintiffs' case and conclude Defendant has not met its burden of overcoming this presumption.

Defendant's "private factors" analysis focuses on Mr. Black's relationship with Philadelphia County, the fact his alleged exposures occurred in Kentucky and Mr. Black's coworkers' and doctors' locations in Kentucky. (Def.'s Mot. to Dis. p. 4-5) As set forth above, Plaintiffs' residence and exposure sites are not dispositive, and Defendant must do more than merely show some witnesses and documents may be located in Kentucky. Defendant conducts business in Philadelphia and has failed to demonstrate any prejudice it will face litigating here. Defendant has also failed to show public interest factors outweigh the presumption favoring Plaintiffs' forum choice. Especially given this is an FELA action, in the exercise of discretion We denied Defendant's Motion based on *forum non conveniens*.

III. CONCLUSION

For the foregoing reasons, this Court respectfully requests Our Order denying Defendant's Motion to Dismiss be affirmed.

BY THE COURT:



Sandra Mazer Moss, J.

PAUL R. BLACK and CHARLOTTE BLACK, h/w vs. CSX TRANSPORTATION, et al.	COURT OF COMMON PLEAS PHILADELPHIA COUNTY JANUARY TERM, 2012 NO. 1897

ORDER

AND NOW, this 17th day of July, 2012, upon consideration of the Motion to Dismiss Based on *Forum Non Conveniens* filed by Defendant, CSX Corporation, and upon further consideration of Plaintiff's answer thereto, it is hereby ORDERED and DECREED that said Motion is Denied, as this is an FELA case.

BY THE COURT:

J.

Black Etal Vs Csx Transportation Inc.-ORDER

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