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IN THE
COURT OF APPEALS OF INDIANA

BFD Enterprises, LLC,
Appellant-Plaintiff,

v.

Jeff Koepnick and Shamarie Schauer,
Appellees-Defendants

June 23, 2022

Court of Appeals Case No. 21A-CT-1931

Appeal from the Huntington Circuit Court

The Honorable Davin G. Smith, Judge

Trial Court Cause No. 35C01-2012-CT-000764

May, Judge.

[1] BFD Enterprises, LLC ("BFD") appeals following the trial court's order dismissing its lawsuit against Jeff Koepnick and Shamarie Schauer stemming from an automobile accident that occurred in Indiana. BFD raises two issues on appeal, which we revise and restate as:

1. Whether the trial court abused its discretion when, in deference to a Kentucky lawsuit filed by Schauer against BFD, the trial court dismissed BFD's lawsuit pursuant to comity principles; and

2. Whether the trial court abused its discretion in dismissing BFD's lawsuit pursuant to Trial Rule 4.4(C) on the ground that Kentucky was a more convenient forum.

We affirm.

Facts and Procedural History[1]

[2] BFD is a limited liability company incorporated in the Commonwealth of Kentucky and has its principal place of business in Lewisport, Kentucky. In August 2020, Koepnick was employed as a truck driver by BFD, and the company assigned him to drive a semi-tractor trailer with a load of aluminum ingots[2] from Lewisport, Kentucky, to Kalamazoo, Michigan. Koepnick's wife, Schauer, accompanied Koepnick on this journey. To ride with Koepnick, Schauer had to sign a release of liability. The release provided the signee

[1] We held oral argument on this matter remotely via Zoom on May 16, 2022. We appreciate counsel's flexibility in participating in an oral argument in this manner and commend counsel on their thorough presentation of the issues.

[2] An "ingot" is "a mass of metal cast into a convenient shape for storage or transportation to be later processed." Merriam-Webster Online Dictionary. [Perma | Ingot Definition & Meaning - Merriam-Webster]

agreed "any loss and this Release shall be governed by the laws of Kentucky." (App. Vol. III at 67.)

[3] Koepnick and Schauer departed from Lewisport, Kentucky, on August 19, 2020, at 11:00 p.m. BFD alleges Koepnick and Schauer either brought alcohol with them on the journey or purchased alcohol during two brief stops they made along the way. At approximately 7:00 a.m. on August 20, 2020, Koepnick drove the semi-truck into an overpass support pillar in Huntington County, Indiana. This caused the semi-truck to catch fire and explode. Koepnick died, and Schauer was thrown from the vehicle but survived. Debris from the explosion struck another vehicle traveling on the highway, but no one else was injured. It was later determined Koepnick had a blood alcohol content of .168 at the time of the crash. Officers also recovered one empty whiskey bottle, a half-empty whiskey bottle, and prescription medication bottles from the scene.

[4] On December 11, 2020, BFD filed a complaint in state court in Huntington County, Indiana, against Koepnick and Schauer. The complaint sought to recover for damage done to the truck ("Indiana Lawsuit"). BFD alleged Schauer was liable pursuant to Indiana's Dram Shop Act[3] for furnishing alcohol to Koepnick after he was visibly intoxicated. BFD also alleged both that Koepnick negligently operated the semi-truck resulting in the crash and that

[3] Ind. Code § 7.1-5-10-15.5.

Schauer and Koepnick should be held jointly and severally liable because they were engaged in a joint venture at the time of the accident. On December 16, 2020, Schauer filed suit against BFD in a Hancock County, Kentucky, state court ("Kentucky Lawsuit"). Schauer alleged both that BFD was liable through the doctrine of respondeat superior for Koepnick's negligence and that BFD negligently hired, retained, and supervised Koepnick.

[5] Schauer was able to effectuate service on BFD shortly after filing the Kentucky Lawsuit. However, BFD struggled to effect service of the Indiana Lawsuit on Schauer. The crash report listed Schauer's address as a house located on Locust Hill Road in Harned, Kentucky (hereinafter "Kentucky Address"), while the coroner's report for Koepnick listed a Tell City apartment as the address for both Koepnick and Schauer. The Tell City apartment was the residence of Koepnick's adult son, but both Koepnick and Schauer had signed the lease on the son's behalf.

[6] BFD attempted to serve Schauer by certified mail at both the Tell City apartment and the Kentucky Address. However, the copy sent to the Tell City apartment was returned by the post office and marked "unable to forward," (App. Vol. III at 14), and the copy mailed to the Kentucky Address was also returned by the post office and marked "no mail receptacle." (*Id*. at 16.) BFD then hired a process server, who in turn utilized a skip trace service to learn where Schauer lived, and the skip trace service reported Schauer's address was the Tell City apartment. The process server left a copy of the complaint and summons near the door to the Tell City apartment on December 31, 2020. The

process server noticed a gentleman in his mid-twenties retrieve the documents, but the process server was not able to make further contact with the man.

[7] On January 5, 2021, BFD filed a motion to dismiss the Kentucky Lawsuit on the basis of forum non conveniens. During a hearing in the Kentucky Lawsuit on February 5, 2021, Schauer's counsel reported Schauer lived at the Kentucky Address and thus Kentucky was an appropriate venue for the suit. The Kentucky state court subsequently denied BFD's motion to dismiss. BFD's appeal of that order was later dismissed by the Kentucky Court of Appeals, and litigation of the Kentucky Lawsuit continues.

[8] On February 17, 2021, BFD filed its first amended complaint in the Indiana Lawsuit. The amended complaint advanced the same allegations as the original complaint, but it also added a count seeking indemnification from Schauer and Koepnick for any claims Schauer may have against BFD because of the accident. BFD hired another process server and successfully served Schauer at the Kentucky Address on February 24, 2021. On March 1, 2021, BFD filed its answer and affirmative defenses to Schauer's complaint in the Kentucky Lawsuit. Among the affirmative defenses listed by BFD was the assertion that the negligence of other parties, including Schauer, caused the accident.

[9] On March 19, 2021, Schauer filed a motion to dismiss BFD's complaint in the Indiana Lawsuit. Schauer argued the trial court should dismiss BFD's suit for two reasons:

> (1) there is a danger of inconsistent judgments on the same factual questions regarding the Accident due to parallel litigation in the Kentucky Lawsuit, and the Court should therefore exercise its authority to dismiss the Indiana Lawsuit out of comity; and (2) all parties in both lawsuits are Kentucky residents, and litigation regarding the Accident is proceeding in Kentucky, making Indiana an inconvenient forum.

(App. Vol. II at 40.) In support of her motion to dismiss, Schauer submitted an affidavit in which she attested she lived and worked in Kentucky. She also attested she was a Kentucky Medicaid beneficiary and she possessed a Kentucky driver's license, even though she physically lost her licensure card during the accident. Schauer explained she received the majority of her medical treatment in Kentucky and most of her family and support system also lived in Kentucky. BFD filed a response to Schauer's motion to dismiss arguing the suit should remain in Indiana because the Indiana Lawsuit was the first filed suit and Indiana provides a more convenient forum. The trial court held a hearing on the motion to dismiss on May 25, 2021.

[10] On August 23, 2021, the trial court dismissed the Indiana Lawsuit. The trial court concluded:

> 4. In both actions, the respective parties seek monetary recovery for their damages resulting from the same Accident. Schauer seeks recovery from BFD for her personal injuries resulting from the Accident in the Kentucky Action, and in this action BFD seeks recovery for the damage to its semi as a result of the accident, as well as indemnity from Schauer for any damages the Kentucky court may award Schauer in the Kentucky Action.

5. For purposes of comity, therefore, the subject matter and remedy sought in both actions are the same. The claims in both actions each involve a factual determination of who is liable for the Accident, and all parties seek monetary recovery. *See*, *e.g.*, *Pivarnik v. Northern Indiana Public Service Co.*, 636 N.E.2d 131, 135 (Ind. 1994) (finding the subject matter and remedy the same in two actions where "every claim involves a factual determination of who is liable for the rupture of NIPSCO's pipeline," and "[a]ll parties are seeking [money] damages for their various injuries that resulted from the pipeline rupture"); *Brightpoint, Inc. v. Pedersen*, 930 N.E.2d 34 (Ind. Ct. App. 2010); and *Crawfordsville Apartment Co. v. Key Trust Co. of Florida*, 692 N.E.2d 478 (Ind. Ct. App. 1998).

6. As a result, there is a risk of inconsistent findings on factual issues common to both this action and the Kentucky Action if they proceed in separate forums. Therefore, the goals of uniformity of results and prudent use of judicial resources would be served by both actions being litigated in the same forum.

7. The Kentucky Court obtained jurisdiction over BFD in the Kentucky Action before this Court obtained jurisdiction over Schauer in this Action, since BFD was served with the Kentucky Action on December 18, 2020, while Schauer was not served with this action until February 24, 2021. *See* Ind. Tr. R. 4(a) ("The court acquires jurisdiction over a party or person who under these rules . . . is served with summons or enters an appearance . . .").

8. The logic and effect of the circumstances before the Court compel the conclusion that BFD's claims must be brought as counterclaims in the ongoing Kentucky Action. In addition to the fact that the Kentucky Court acquired jurisdiction over all parties to the action first, the Kentucky Court has already denied BFD's motion to dismiss that action. The Kentucky Action has

therefore proceeded further along, and opportunities to dismiss that action on forum grounds have been denied, or have passed. Thus, if the Court were to not dismiss this action, the parties would necessarily be litigating their claims involving the same Accident in different forums, with the attendant risk of inconsistent results. The Court therefore determines, in its discretion, that this action should be dismissed based on comity principles.

* * * * *

10. No parties to this action are residents of Indiana. Both BFD and Schauer are residents of Kentucky, and therefore are amendable to personal jurisdiction there. BFD is a Kentucky corporation with its principal place of business in Hancock County, Kentucky.

11. Because BFD is a Kentucky resident, its choice of forum in Indiana does not enjoy the presumption of convenience typically afforded the plaintiff's choice of forum. As the United States Supreme Court has explained:

> When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any forum non conveniens inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.

Piper Aircraft Co. v. Reyno, 454 U.S. 235, [255-56, 102 S. Ct. 252, 266 (1981), *reh'g denied*]. The Indiana Court of Appeals has similarly stated that "when a foreign citizen chooses a forum other than his own nation, a substantially diminished

presumption of convenience is present." *McCracken v. Eli Lilly & Co.*, 494 N.E.2d 1289, 1293 (Ind. Ct. App. 1986).

12. Indeed, BFD seems to have chosen Indiana on grounds other than convenience, as evidenced by the fact that it required Schauer to execute a "Passenger Authorization & Release of Liability" agreement in order to ride as a passenger in Koepnick's truck that included a provision stating that "whether allowed by law any loss and this Release shall be governed by the laws of Kentucky." This Agreement, while not *binding* on BFD, is telling as to where BFD finds it convenient to litigate in many cases involving authorized passengers in its trucks. If it did not find Kentucky a convenient forum for such cases, it would not require authorized passengers to bring their claims in Kentucky.

13. Moreover, given that the parties will be litigating Schauer's claims against BFD arising from the Accident in Kentucky, it would be inconvenient and an imprudent use of judicial resources for the parties to litigate BFD's claims against Schauer arising from the same Accident in Indiana.

14. Therefore, as an additional and independent ground for dismissal, the Court exercises its discretion under Trial Rule 4.4(C) and determines that BFD's action should be litigated in Kentucky.

(*Id*. at 13-15.)

Discussion and Decision

1. Comity

[11] "Comity" refers to the principle that "an Indiana court has the discretion to dismiss a case as a matter of courtesy and convenience when there are pending proceedings in an out-of-state court[.]" *Herren v. Dishman*, 1 N.E.3d 697, 707 (Ind. Ct. App. 2013). Our recognition of comity is separate from our obligations under the full faith and credit clause of the United States Constitution.[4] *Angelopoulos v. Angelopoulos*, 2 N.E.3d 688, 695 (Ind. Ct. App. 2013), *trans. denied*. Nonetheless, it is a practice rooted in "deference and good will" toward our sister states, intended "to promote uniformity of decision by discouraging repeated litigation of the same question." *Id*.

[12] "Generally, where an action concerning the same parties and the same subject matter has been commenced in another jurisdiction capable of granting prompt and complete justice, comity should require staying or dismissing of a subsequent action filed in a different jurisdiction." *Id*. In deciding whether to dismiss a lawsuit based on comity, the trial court may consider: "(1) whether the first filed suit has been proceeding normally, without delay, and (2) whether there is a danger the parties may be subjected to multiple or inconsistent judgments." *Id*. We review a trial court's decision to dismiss a suit based on

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[4] Article IV, Section 1 states:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

comity for an abuse of discretion.[5] *Brightpoint, Inc. v. Pedersen*, 930 N.E.2d 34, 39 (Ind. Ct. App. 2010), *trans. denied*. An abuse of discretion occurs when the trial court's decision is against the logic and effect of the facts and circumstances before it. *Id*.

1.1. First Filed

[13] BFD argues the trial court abused its discretion in dismissing the Indiana Lawsuit because it was the first-filed case. In support, BFD relies on *George S. May Int'l Co. v. King*, 629 N.E.2d 257 (Ind. Ct. App. 1994), *reh'g denied*, *trans. denied*. In that case, an international consulting firm, George S. May International Company ("May"), brought a breach of contract action in an Indiana state court against two former employees, Gary King and Preston Hacker. *Id*. at 259. King and Hacker moved to dismiss the Indiana lawsuit on the basis of improper venue because of a forum selection clause in the contract

[5] This standard of review is unique. The trial court did not conduct an evidentiary hearing before ruling on Schauer's motion to dismiss, and usually when a trial court makes its decision on the basis of a paper record, we review the decision de novo. *See GKN CO. v. Magness*, 744 N.E.2d 397, 401 (Ind. 2001) (applying de novo standard of review when evaluating a trial court's ruling on a motion to dismiss based on a paper record). However, an exception to this general rule applies with respect to motions to dismiss based on comity. In *In re Arb. Between Am. Gen. Fin. Servs., Inc. & Miller*, we declined the appellant's invitation to apply a de novo standard of review when evaluating a trial court's order dismissing a lawsuit because of comity. 820 N.E.2d 722, 724 (Ind. Ct. App. 2005). We noted "comity is a 'rule of convenience and courtesy'" and because a trial court may or may not apply the principle to a particular case, we will review the trial court's decision for an abuse of discretion. *Id*. (quoting *Am. Econ. Ins. Co. v. Felts*, 759 N.E.2d 649, 660-61 (Ind. Ct. App. 2001) (applying abuse of discretion standard when reviewing dismissal of a declaratory judgment action based on the principles of comity)).

they had with May, and the trial court granted their motion to dismiss. *Id*. King and Hacker then filed a lawsuit against May in Illinois state court. *Id*.

[14] May appealed the Indiana trial court's dismissal of its lawsuit, and one of the arguments advanced by King and Hacker was that the appeal pending in the Indiana Court of Appeals should be dismissed on comity grounds because of the subsequently filed Illinois lawsuit. *Id*. at 260. However, we declined to dismiss May's appeal. *Id*. We reasoned:

> [B]ecause King and Hacker instituted their action in Illinois after May initiated its actions against them in Indiana, we will not allow King and Hacker to assert the principles of comity as a possible defense. If we were to allow this, every litigant could seek to stymie proceedings in Indiana by filing subsequent actions in other states.

Id. BFD asserts *May* stands for the principle that a first-filed suit cannot be dismissed based on comity.

[15] We do not agree *May* created such a bright-line rule. Even though the Indiana Lawsuit was filed five days before the Kentucky Lawsuit, the Kentucky Lawsuit is further along than the Indiana Lawsuit because of BFD's delay in serving Schauer. As the trial court noted in its order granting Schauer's motion to dismiss, the Kentucky state court obtained jurisdiction over Schauer and BFD months before the Indiana state court did. (App. Vol. II at 13 (citing Ind. T.R. 4(A) ("The court acquires jurisdiction over a party or person who under these rules . . . is served with summons or enters an appearance . . .")). The Indiana Lawsuit has not advanced past the pleadings stage, but the parties have already

started discovery in the Kentucky Lawsuit. Moreover, BFD did not successfully serve Schauer with the Indiana Lawsuit until after the Kentucky state court denied BFD's motion to dismiss the Kentucky Lawsuit. Even though the Indiana Lawsuit was the first-filed suit, the additional progress in the Kentucky Lawsuit as compared to the Indiana Lawsuit supports the trial court's decision to dismiss the Indiana Lawsuit. *See Bowlers Country Club, Inc. v. Royal Links USA, Inc.*, 846 N.E.2d 732, 737 (Ind. Ct. App. 2006) (dismissing a case based on comity principles, and noting, among other factors, that "Bowlers had already filed a motion to dismiss the Iowa action," and the Iowa court had denied that motion), *trans. denied*.

1.2. Parties, Subject Matter, and Remedy

[16] In addition to arguing the Indiana Lawsuit should not be dismissed because it was the first-filed action, BFD contends the factors we use to consider whether to dismiss a lawsuit based on the principal of comity weigh against dismissing the Indiana Lawsuit. We look to caselaw interpreting Trial Rule 12(B)(8), which allows for dismissal of a suit if a similar suit is pending in another Indiana state court, for guidance in deciding issues of comity. *Angelopoulos*, 2 N.E.3d at 695. In *Vannatta v. Chandler*, we explained that "when faced with a challenge to a trial court's dismissal on the basis of T.R. 12(B)(8), the critical question before us is 'whether the parties, subject matter, and remedies are either precisely or substantially the same." 810 N.E.2d 1108, 1111 (Ind. Ct. App. 2004) (quoting *Davidson v. Perron*, 716 N.E.2d 29, 35 (Ind. Ct. App. 1999), *trans. denied*). BFD argues dismissing the Indiana Lawsuit was error "because

the actions do not involve the same parties, the same subject matter, or the same remedy." (Appellant's Br. at 15.) In contrast, Schauer maintains the trial court correctly dismissed the Indiana Lawsuit. She argues the two lawsuits involve the same parties – Schauer and BFD – and both lawsuits concern injuries stemming from the August 20, 2020, truck accident. Schauer also contends both lawsuits involve substantially similar remedies because both Schauer and BFD seek monetary relief.

1.2.1. Parties

[17] BFD argues the parties in the Indiana Lawsuit and the Kentucky Lawsuit are not the same because while Koepnick is named in the Indiana Lawsuit, he is not a party in the Kentucky Lawsuit. BFD asserts it "has multiple claims against Koepnick and those claims are at risk of never seeing the light of day if the trial court's order of dismissal is not reversed." (Appellant's Br. at 24.) BFD likens the instant case to *Vannatta*, where we held one suit filed in Marion County by prospective buyers in a failed real estate transaction against their realtor involved different parties from a Hamilton County lawsuit between the seller and the prospective buyer's realtor. 810 N.E.2d 1108, 1111 (Ind. Ct. App. 2004). However, the instant case is distinguishable from *Vannatta* because both the Indiana Lawsuit and the Kentucky Lawsuit involve Schauer and BFD asserting claims against each other. Likewise, "the presence of . . . other parties [is] irrelevant to the Trial Rule 12(B)(8) requirement that each action contain the same parties." *Beatty v. Liberty Mut. Ins. Group*, 893 N.E.2d 1079, 1086 (Ind. Ct. App. 2008) (holding parties were the same when two suits involved the

plaintiffs suing Liberty Mutual even though the plaintiffs named additional and differing insurance companies in each suit). Like in *Beatty*, the presence of both BFD and Schauer in the Kentucky Lawsuit and the Indiana Lawsuit supports dismissing the Indiana Lawsuit pursuant to the principal of comity.

[18] Moreover, even though Koepnick is not named in the Kentucky Lawsuit, BFD could have brought suit against him in Kentucky. BFD maintains Koepnick was an Indiana resident, (*see*, *e.g*, Appellant's Br. at 15 (Koepnick "was an Indiana resident at the time of his death") & 23 ("Koepnick, an Indiana resident,")), and therefore "it is unclear whether Kentucky can acquire personal jurisdiction over Koepnick (or his estate)." (*Id*. at 23.) However, this assertion of Indiana residency conflicts with the trial court's finding that: "No parties to this action are residents of Indiana." (App. Vol. II at 14.) In addition, Koepnick's employment relationship with BFD likely subjected him to personal jurisdiction in Kentucky.[6] *See* Ky. Rev. Statutes § 454.210(2)(a) ("A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a claim arising from the person's: (1) Transacting any business in this Commonwealth; (2) Contracting to supply services or goods in this Commonwealth").

[6] Kentucky Revised Statute 413.125 provides: "An action for the taking, detaining or injuring of personal property, including an action for specific recovery shall be commenced within two (2) years from the time the cause of action accrued." Thus, it appears the period to bring suit against Koepnick in Kentucky has yet to expire.

1.2.2. Subject Matter

[19] BFD additionally contends "BFD's claims in the Indiana action are wholly distinct and unrelated to Schauer's theory of liability in the Kentucky case." (Appellant's Br. at 25.) It argues the factual determinations necessary in the Indiana Lawsuit concern what occurred during the journey and accident. In contrast, BFD maintains, the factual determinations of the Kentucky Lawsuit concern questions regarding Koepnick's employment relationship with BFD, including the scope of Koepnick's employment, BFD's training practices, and BFD's knowledge of Koepnick engaging in any unsafe driving practices.

[20] However, we disagree that the subject matter of the claims can be separated from each other. Litigation may concern the same subject matter for comity purposes even though the theories advanced by the parties do not completely overlap. *Brightpoint*, 930 N.E.2d at 40-41 (noting that while the allegations in the Indiana court and the Danish court are not identical, they all concern the same alleged dealings). In *Pivarnik v. N. Ind. Pub. Serv. Co.*, property owners hired a construction company to dig a pond on their land. 636 N.E.2d 131, 133 (Ind. 1994). In digging, a bulldozer hit a natural gas pipeline and an explosion occurred. *Id*. at 132-33. A flurry of litigation involving the utility company, the construction company, the property owners, and the bulldozer driver followed, with some suits filed in Porter County and an additional suit filed in Starke County. *Id*. at 133. The Starke Circuit Court asserted it had jurisdiction over all the parties, and the property owners appealed to our Indiana Supreme Court. *Id*. In assessing whether the Porter County suits and the Starke County

suit were the same within the meaning of Trial Rule 12(B)(8), the Court opined: "the subject matter of the Porter and Starke County actions are the same since every claim involves a factual determination of who is liable for the rupture of NIPSCO's pipeline." *Id*. at 135. Likewise, in the instant case, both the Kentucky Lawsuit and the Indiana Lawsuit concern who was responsible, and to what degree, for the August 20, 2020, semi-truck accident.

1.2.3. Remedies

[21] BFD also contends remedies available to it in the Indiana Lawsuit are not available to it in the Kentucky Lawsuit. BFD notes that, in *May*, the potential remedy available through the Indiana appeal was different from the potential remedy available through the Illinois lawsuit. We explained, "whether May can seek injunctive relief in Indiana is unlikely to be an issue in the pending action in Illinois; thus, the parties do not risk facing conflicting decisions." *May*, 629 N.E.2d at 260. BFD likens the instant case to *May* and claims "the uncertainty regarding the recognition of Indiana's statutory and common law claims under Kentucky law (e.g., BFD's dram shop claim against Schauer), demand that comity not be applied[.]" (Appellant's Br. at 27-28.)

[22] However, both BFD and Schauer are seeking money damages. Moreover, BFD's dram shop claim and its assertion Schauer is responsible for the accident are inextricably linked. As Schauer explains:

> If BFD can somehow prove Ms. Schauer furnished an already intoxicated Koepnick with alcohol, that likely would reduce the amount of damages recoverable for her personal injuries, and

> would at the same time impact BFD's property damage claim based on its Dram Shop liability allegation. On the other hand, if BFD cannot make that showing, its Dram Shop liability claim would fail and Ms. Schauer's damages would not thereby be reduced.

(Appellee's Br. at 23-24.) Thus, the remedies sought in both the Indiana Lawsuit and the Kentucky Lawsuit are substantially similar. *See Brightpoint, Inc.*, 930 N.E.2d at 41 (holding dismissal based on comity was appropriate and remedies were substantially similar when plaintiff intended to seek compensatory damages in both Indiana and Danish suits).

1.2.4. Risk of Inconsistent Rulings

[23] Comity's "primary value is to promote uniformity of decision by discouraging repeated litigation of the same question." *Cnty. of Ventura v. Neice*, 434 N.E.2d 907, 910 (Ind. Ct. App. 1982). Likewise, in *Beatty*, we stated "Trial Rule 12(B)(8) is meant to avoid the risk of conflicting judgments or other confusion that can result from two courts exercising simultaneous jurisdiction over the same or substantially same action." 893 N.E.2d at 1087. In *Kindred v. Ind. Dep't of Child Services*, we similarly held the risk of conflicting findings from two lawsuits centering around alleged improprieties by the State in its investigation of abuse allegations made against the plaintiff supported the trial court's dismissal of one of the lawsuits pursuant to Trial Rule 12(B)(8). 136 N.E.3d 284, 291 (Ind. Ct. App. 2019), *reh'g denied*, *trans. denied*.

[24] BFD contends "[t]he material facts, evidence, and relevant law will be entirely different in the two actions and, thus, the risk of inconsistent rulings is negligible[.]" (Appellant's Br. at 28.) However, we cannot agree. As we have explained above, both BFD and Schauer blame the other for actions that resulted in the August 20, 2020, semi-truck accident. Therefore, the risk of inconsistent findings in allowing both the Kentucky Lawsuit and the Indiana Lawsuit to move forward is real, and dismissal of the Indiana Lawsuit on the basis of comity serves to alleviate that risk. *See Am. Econ. Ins. Co. v. Felts*, 759 N.E.2d 649, 661 (Ind. Ct. App. 2001) ("Because a court of our sister state is adjudicating this very issue and the same parties are litigating this very issue, there was no abuse of discretion in dismissing American Economy's declaratory judgment action.").

1.2.5 Weighing of Comity Factors

[25] In the two lawsuits, both BFD and Schauer seek monetary relief, and each one seeks the relief from the other. Thus, the parties and the remedies are the same in both the Indiana Lawsuit and the Kentucky Lawsuit. The August 20, 2020, truck accident plays a central role in both lawsuits as each case concerns who contributed to the accident and in what ways that party contributed. These facts also create a risk of inconsistent results if both lawsuits are allowed to move forward. Thus, the comity factors weigh in favor of dismissing the Indiana Lawsuit. *See Bowlers Country Club, Inc.*, 846 N.E.2d at 737 (holding trial court did not abuse its discretion when it dismissed Indiana action based on the principles of comity).

II. Trial Rule 4.4

[26] Finally, BFD asserts the trial court also erred in ruling the case should be dismissed on forum non conveniens grounds pursuant to Trial Rule 4.4. Indiana Trial Rule 4.4 provides:

> **(C) More Convenient Forum.** Jurisdiction under this rule is subject to the power of the court to order the litigation to be held elsewhere under such reasonable conditions as the court in its discretion may determine to be just.
>
> In the exercise of that discretion the court may appropriately consider such factors as:
>
> > (1) Amenability to personal jurisdiction in this state and in any alternative forum of the parties to the action;
> >
> > (2) Convenience to the parties and witnesses of the trial in this state and in any alternative forum;
> >
> > (3) Differences in conflict of law rules applicable in this state and in the alternative forum; or
> >
> > (4) Any other factors having substantial bearing upon the selection of a convenient, reasonable and fair place of trial.

Like with motions to dismiss based on comity, we review a trial court's order dismissing a suit pursuant to Trial Rule 4.4(C) for an abuse of discretion. *Anyango v. Rolls-Royce Corp.*, 971 N.E.2d 654, 656 (Ind. 2012). As our Indiana Supreme Court explained: "The language of the rule itself entrusts this

determination to the trial court and so our review of a trial court's dismissal under this rule is limited to abuse of discretion." *Id*.

[27] In *Anyango*, our Indiana Supreme Court clarified previous case law interpreting Trial Rule 4.4(C):

> We note language in most decisions of the Court of Appeals applying Trial Rule 4.4(C) to the effect that "[t]he purpose of [the rule] is to permit a case to be litigated in another [forum] upon a showing that litigation in Indiana is so inconvenient that substantial injustice is likely to result." *Emp'rs Ins. of Wausau v. Recticel Foam Corp.*[,] 716 N.E.2d 1015, 1021 (Ind. Ct. App. 1999) (citing *Freemond* [*v. Somma*], 611 N.E.2d [684, 691 (Ind. Ct. App. 1993), *reh'g denied*, *trans. denied*]), *trans. denied*. This language appears to date to *Killearn Properties*, when it appeared with a citation to "1 Harvey, *Indiana Practice*. Author's Comments 4.4(C) p. 313." 176 Ind. App. [684,] 687, 377 N.E.2d [417,] 419 [Ind. Ct. App. 1978]. **It would conflict with the explicit discretionary authority granted to the trial court in Trial Rule 4.4(C) if a motion to dismiss could not be granted unless it was clear that litigation in Indiana would be so inconvenient that "substantial injustice" would likely result.**

Id. at 656 n.2 (emphasis added); *see also DePuy Orthopaedics, Inc. v. Brown*, 29 N.E.3d 729, 731 n.2 (Ind. 2015) (noting *Anyango* expressly rejected the notion that forum non conveniens permitted a cause to be litigated in another state only if litigation in Indiana was so inconvenient that substantial injustice would likely result), *reh'g denied*.

[28] The record supports the trial court's conclusion Kentucky is a more convenient forum than Indiana. The trial court found both Schauer and BFD are residents

of Kentucky. Kentucky is also a convenient forum for BFD as evidenced by its specification of Kentucky as the preferred forum in the release of liability it requires all passengers to execute before accompanying the company's drivers on their trips. While the parties may wish to call Indiana residents as witnesses in the Kentucky Lawsuit, both Indiana and Kentucky have adopted the Uniform Interstate Depositions and Discovery Act,[7] and therefore, the courts of one state may secure the attendance of witnesses in the other state. Consequently, we hold the trial court did not abuse its discretion when it dismissed the Indiana Lawsuit pursuant to Trial Rule 4.4(C).[8] *See Anyango*, 971 N.E.2d at 663-64 (holding Canada was more convenient forum for suit stemming from helicopter accident that killed pedestrian and dismissing lawsuit filed in Indiana).

Conclusion

[29] The principal of comity supports dismissing the Indiana Lawsuit. Even though the Indiana Lawsuit was filed days before the Kentucky Lawsuit, the Kentucky court acquired jurisdiction over the parties before the Indiana court and the Kentucky Lawsuit is further along in the litigation process. Moreover, both the

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[7] Ind. Code § 34-44.5-1-6(b); Ky. Rev. Statutes § 421.360(3)(b).

[8] BFD asserts for the first time in its reply brief that Trial Rule 4.4(D) requires all defendants to submit to the personal jurisdiction of the other forum and "Koepnick has not (and cannot) stipulate to the personal jurisdiction of the Kentucky Court." (Appellant's Reply Br. at 4.) However, such argument is waived because it was not raised in BFD's initial brief and a party may not use its reply brief to advance a new argument. *See Taylor v. St. Vincent Salem Hosp., Inc.*, 180 N.E.3d 278, 290 (Ind. Ct. App. 2021) (holding argument raised for first time in a reply brief is waived).

Kentucky Lawsuit and the Indiana Lawsuit involve Schauer and BFD asserting claims for damages against each other stemming from the August 20, 2020, truck accident. Allowing both suits to proceed creates a risk of inconsistent results.

[30] In addition, Trial Rule 4.4(C) supports dismissing the Indiana Lawsuit on the basis Kentucky is a more convenient forum. Schauer is a Kentucky resident and initiated suit in Kentucky. BFD is likewise a Kentucky corporation, and BFD designates Kentucky as the preferred forum in the release of liability it requires of passengers. Consequently, BFD cannot sincerely assert it is uncomfortable litigating in Kentucky. Therefore, we affirm.

[31] Affirmed.

Brown, J., and Pyle, J., concur.