Rel: September 2, 2022

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2022

SC-2022-0470

Ex parte Premier Plastic Surgery, P.C.

PETITION FOR A WRIT OF MANDAMUS

(In re: Deborah D. Bush

v.

Premier Plastic Surgery, P.C.)

(Jefferson Circuit Court, CV-19-902843)

SHAW, Justice.

Premier Plastic Surgery, P.C. ("Premier"), the defendant below,

petitions this Court for a writ of mandamus directing the Jefferson Circuit Court to vacate its order denying Premier's motion for a change of venue in this medical-malpractice action commenced by the plaintiff, Deborah D. Bush, and to enter an order transferring the action to the Shelby Circuit Court. We deny the petition.

Facts and Procedural History

Premier offered cosmetic and reconstructive surgery at its medical facility located in Shelby County. Bush went to Premier's medical facility to receive a consultation from Dr. Peter W. Van Hoy. After evaluating Bush, Dr. Van Hoy recommended that she undergo a surgical procedure, which subsequently took place in June 2015. Bush went to follow-up appointments at Premier's medical facility and was seen by Dr. Van Hoy each time. At her last appointment, Bush alleges, Dr. Van Hoy told her that everything had healed well. It is undisputed that all of Bush's treatment by Dr. Van Hoy occurred at Premier's medical facility.

In December 2017, Dr. Van Hoy died. Because he was Premier's sole shareholder, director, and owner, Premier was dissolved in September 2018.

In June 2019, Bush commenced in the Jefferson Circuit Court a

medical-liability action against Premier and numerous fictitiously named defendants under the Alabama Medical Liability Act, §§ 6-5-480 to -488, Ala. Code 1975, as supplemented by the Alabama Medical Liability Act of 1987, §§ 6-5-540 to -552, Ala. Code 1975 (referred to collectively as the "AMLA"), relating to her surgical procedure and treatment by Dr. Van Hoy. Bush alleged in her complaint that she underwent the surgical procedure "at Premier" and was seen by Dr. Van Hoy on subsequent occasions "in the clinic." She further alleged that, as a result of purported breaches of the standard of care by the defendants, she had suffered damage and injuries, including, but not limited to, pain, suffering, medical bills, and the need for future medical treatment. Bush's complaint also alleged that she was a resident of Jefferson County.

Premier answered the complaint and denied all of Bush's allegations. It also alleged that venue was improper in the Jefferson Circuit Court.

In a January 2021 deposition, Bush provided the address of her residence at the time of her surgical procedure and treatment by Dr. Van Hoy. It is undisputed that that residence is located in Shelby County. On March 28, 2022, three weeks before the trial was scheduled to begin,

Premier moved the trial court to transfer Bush's action to the Shelby Circuit Court pursuant to § 6-5-546, Ala. Code 1975. Under that Code section, Premier argued, an AMLA action is required to be brought in the county where the act or omission constituting the alleged breach of the standard of care actually occurred. According to Premier, because the surgical procedure and treatment at issue in Bush's action occurred at Premier's medical facility in Shelby County, her action was due to be transferred to the Shelby Circuit Court.

In her response to Premier's motion, Bush did not dispute that Shelby County was the proper venue for the action. Instead, she argued that Premier's motion had been filed "too late" and, thus, that Premier had waived any challenge it may have had to venue. She further argued that a challenge to venue under § 6-5-546 can be waived if it is not presented in a timely manner. According to Bush, because Premier's motion was filed almost three years after the litigation began and only three weeks before the scheduled trial, the motion cannot be deemed timely.

The trial court denied Premier's motion for a change of venue, and Premier filed its mandamus petition. This Court subsequently ordered

answers and briefs and stayed the trial-court proceedings.

Standard of Review

This Court has stated:

> "'"A writ of mandamus is an extraordinary remedy, and it will be 'issued only when there is: 1) a clear legal right in the petitioner to the order sought; 2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; 3) the lack of another adequate remedy; and 4) properly invoked jurisdiction of the court.'"'

"Ex parte Flexible Prods. Co., 915 So. 2d 34, 39 (Ala. 2005) (quoting Ex parte Empire Fire & Marine Ins. Co., 720 So. 2d 893, 894 (Ala. 1998), quoting in turn Ex parte United Serv. Stations, Inc., 628 So. 2d 501, 503 (Ala. 1993)). '"'The proper method for obtaining review of a denial of a motion for a change of venue in a civil action is to petition for the writ of mandamus.'"' Ex parte WMS, LLC, 170 So. 3d 645, 649 (Ala. 2014) (quoting Ex parte Pike Fabrication, Inc., 859 So. 2d 1089, 1091 (Ala. 2002), quoting in turn Ex parte Alabama Great Southern R.R., 788 So. 2d 886, 888 (Ala. 2000)). This Court has explained that, '[w]hen we consider a mandamus petition relating to a venue ruling, our scope of review is to determine if the trial court [exceeded] its discretion, i.e., whether it exercised its discretion in an arbitrary and capricious manner.' Ex parte Integon Corp., 672 So. 2d 497, 499 (Ala. 1995). A trial court that refuses to transfer a case when such a transfer is proper has routinely been held to be exceeding its discretion. See Ex parte WMS, LLC, supra."

Ex parte Blue Cross & Blue Shield of Alabama, 321 So. 3d 682, 683-84 (Ala. 2020).

Discussion

In its petition, Premier contends that the trial court erred in denying its motion to transfer the action to Shelby County. According to Premier, by enacting § 6-5-546, "[t]he Alabama Legislature enacted a specific venue provision for medical malpractice actions like this one that supersedes Alabama's general venue rules" and, under that Code section, transfer to the county in which the alleged act or omission allegedly occurred -- in this case, Shelby County -- is mandatory. Although Bush does not dispute that Shelby County is the proper venue for the action, she argues, as she did below, that Premier's motion was untimely and that it thus waived its challenge to venue.

Section 6-5-546, in pertinent part, provides:

> "In any action for injury or damages or wrongful death whether in contract or in tort against a health care provider based on a breach of the standard of care, the action must be brought in the county wherein the act or omission constituting the alleged breach of the standard of care by the defendant actually occurred. If plaintiff alleges that plaintiff's injuries or plaintiff's decedent's death resulted from acts or omissions which took place in more than one county within the State of Alabama, the action must be brought in the county wherein the plaintiff resided at the time of the act or omission, if the action is one for personal injuries, or wherein the plaintiff's decedent resided at the time of the act or omission if the action is one for wrongful death. If at any time prior to the commencement of the trial of the action it is shown that the plaintiff's injuries or plaintiff's decedent's death did not result

> from acts or omissions which took place in more than one county, on motion of any defendant the court shall transfer the action to such county wherein the alleged acts or omissions actually occurred."

The first sentence of that Code section provides that, generally, the proper venue for an AMLA action is the county where the acts or omissions underlying the action "actually occurred." Under that sentence, as Premier notes, because all of Bush's treatment by Dr. Van Hoy occurred in Shelby County, the proper venue of this action is in that county.

The second sentence of that Code section addresses venue of an AMLA action when the acts or omissions complained of took place in more than one county. In such a case, venue is proper where the plaintiff or the plaintiff's decedent resided at the time the acts or omissions giving rise to the action occurred:

> "If plaintiff alleges that plaintiff's injuries or plaintiff's decedent's death resulted from acts or omissions which took place in more than one county within the State of Alabama, the action must be brought in the county wherein the plaintiff resided at the time of the act or omission, if the action is one for personal injuries, or wherein the plaintiff's decedent resided at the time of the act or omission if the action is one for wrongful death."

That sentence is inapplicable in this case; the acts or omissions underlying Bush's claims were not alleged to have occurred in more than one county.

The third sentence of that Code section states:

> "If at any time prior to the commencement of the trial of the action it is shown that the plaintiff's injuries or plaintiff's decedent's death did not result from acts or omissions which took place in more than one county, on motion of any defendant the court shall transfer the action to such county wherein the alleged acts or omissions actually occurred."

That sentence presumes that the action is pending in a particular venue -- specifically, the county where the plaintiff or the plaintiff's decedent resided -- because the acts or omissions giving rise to the action were alleged to have taken place in more than one county; in other words, the third sentence presumes that venue was initially controlled by the second sentence of the Code section. If it is subsequently shown that the relevant acts or omissions did not actually take place in more than one county, then, on the motion of a defendant, the case is due to be transferred to the county where "the alleged acts or omissions actually occurred," that is, the venue provided by the first sentence of the Code section. The third sentence applies only when an action is pending in a

venue because the relevant acts or omissions were alleged to have taken place in more than one county but, before the commencement of trial, it is shown that they occurred in only one county.

Bush contends that, although venue is proper in Shelby County, Premier waived any challenge to venue by failing to timely seek a transfer of the action. Specifically, Bush relies on the facts that Premier's motion for a change of venue was filed years after the complaint and answer were filed, over a year after her deposition, and a mere three weeks before the trial was scheduled to begin.

Because Premier "pleaded improper venue in [its answer] to the complaint, [it] preserved [its] right to file a timely motion for a change of venue under Rule 82, Ala. R. Civ. P." Ex parte Lugo de Vega, 65 So. 3d 886, 894 (Ala. 2010). Rule 82(d)(1), Ala. R. Civ. P., provides: "When an action is commenced laying venue in the wrong county, the court, on timely motion of any defendant, shall transfer the action to the court in which the action might have been properly filed and the case shall proceed as though originally filed therein."

> "Rule 82 does not define what constitutes a 'timely motion' for a change of venue, but Rule 1(c), Ala. R. Civ. P., provides us with the general instruction that the Alabama Rules of Civil

> Procedure 'shall be construed and administered to secure the just, speedy and inexpensive determination of every action.'"

Lugo de Vega, 65 So. 3d at 894. See also Ex parte Culbreth, 966 So. 2d 910, 912 (Ala. 2006) ("Venue can be waived, and any objection to improper venue is waived if not timely raised.").

Premier argues that, under the third sentence of § 6-5-546, it could file its motion for a change of venue "any time prior to the commencement of the trial." In support of its argument, Premier cites this Court's decision in Ex parte Children's Hospital of Alabama, 721 So. 2d 184, 189 (Ala. 1998), which states, in reference to that sentence:

> "The plain meaning of these words is that if 'at any time prior to the commencement of the trial,' any party 'show[s]' that venue is improper under § 6-5-546, a single defendant may then make a 'motion' to transfer the malpractice claims, and the trial court 'shall' grant that motion."

However, that language in Children's Hospital, in accord with the discussion of the language of § 6-5-546 above, refers to the timing of a motion for a change of venue when the action is pending in a venue under the second sentence of § 6-5-546, that is, in the county where the plaintiff or the plaintiff's decedent resided at the time of the relevant acts or omissions because the acts or omissions were alleged to have taken place in more than one county.

In Children's Hospital, the plaintiff, Curt Howell, was treated both at a hospital in Walker County and at a hospital in Jefferson County. Subsequently, Howell commenced a medical-liability action in the Walker Circuit Court, alleging that his injuries had been caused by the acts or omissions of named defendants occurring in Jefferson County and the acts or omissions of fictionally named defendants occurring in Walker County. 721 So. 2d at 186. Howell amended the complaint several times, but he never specifically named any defendants whose acts or omissions occurring in Walker County had contributed to his injuries. After the final amendment of Howell's complaint, the named defendants filed motions to transfer the action to Jefferson County pursuant to § 6-5-546. Howell conceded that no Walker County defendants would be named. The motions were denied as "untimely," and the named defendants petitioned this Court for a writ of mandamus. 721 So. 2d at 186.

Howell argued that the motions were untimely under Rule 12(h)(1) and Rule 82(d)(2)(C)(i), Ala. R. Civ. P. [1] In addressing his arguments,

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[1]Rule 12(h)(1) states:

> "A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the

this Court noted that, by adopting the AMLA, the legislature had opted to remove medical-liability actions from the general rules addressing venue of actions and, instead, to provide that venue of such actions would be controlled by § 6-5-546. 721 So. 2d at 188. The Court held that the same was true regarding the rules governing the timing of a challenge to venue:

> "With respect to the timing of challenges to venue in medical liability actions prior to 1987, Ala. Code 1975, § 6-3-21 provided the general rule that '[a] defendant in a civil action may move for a transfer of venue as provided in the Alabama Rules of Civil Procedure.' Rule 12(h)(1) provides the general timing rule applicable to a defendant's challenge of venue by a motion or responsive pleading. Rule 82(d)(2)(C)(i) provides the general timing rule for multiple-party actions, requiring a defendant to challenge venue within 30 days of

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> circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a)[, Ala. R. Civ. P.,] to be made as a matter of course."
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> Rule 82(d)(2)(C)(i) provides:
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> "A motion to transfer after voluntary dismissal of a party shall be served as soon as practicable if the action has been set for trial within less than thirty (30) days of the dismissal or if the trial of the action has commenced; and, in all other instances, within thirty (30) days after the plaintiff serves a notice of the voluntary dismissal on all other parties and files a copy of the notice with the clerk."

the dismissal of the party that had made venue proper in the forum. If the defendant did not strictly adhere to the timing requirements, his challenge to venue was waived. Rules 12(h)(1), 82(d)(2)(C)(iii), Ala. R. Civ. P.

"….

"… Evidently unsatisfied with the application of the general timing provisions of the rules to medical liability actions, the Legislature chose not to default to Rule 12(h)(1) or Rule 82(d)(2)(C)(i) by remaining silent. Instead, it expressly provided a special timing sentence in § 6-5-546. … The special timing sentence in § 6-5-546 reads:

> "'If at any time prior to the commencement of the trial of the action it is shown that the plaintiff's injuries or plaintiff's decedent's death did not result from acts or omissions which took place in more than one county, on motion of any defendant the court shall transfer the action to such county wherein the alleged acts or omissions actually occurred.'

"(Emphasis added.) The plain meaning of these words is that if 'at any time prior to the commencement of the trial,' any party 'show[s]' that venue is improper under § 6-5-546, a single defendant may then make a 'motion' to transfer the malpractice claims, and the trial court 'shall' grant that motion. … By providing that both the showing of improper venue and the motion to transfer could be made 'at any time prior to the commencement of the trial,' the Legislature showed a clear intent to assure that the new venue benefit conferred on health care defendants would not be vitiated by the strict timing provisions of Rule 12(h)(1) and Rule 82(d)(2)(C)(i)."

Children's Hospital, 721 So. 3d at 187-89 (footnotes omitted).

This Court, in Children's Hospital, noted that, had Howell, in addition to naming the defendants who had treated him in Jefferson County, named the defendants who had treated him in Walker County, then, because the acts or omissions underlying his claims would have been alleged to have occurred in more than one county, venue would have been appropriate in Walker County, where he resided. However, the Court reasoned, when Howell conceded that he could name no defendants in Walker County, and thus it was revealed that the alleged acts or omissions had occurred only in Jefferson County, § 6-5-546 required that his action be transferred to that county because its "special timing sentence," that is, the third sentence, superseded the timing provisions of Rule 12(h)(1) and Rule 82(d)(2)(C)(i). 721 So. 2d at 189.

The discussion in Children's Hospital of the third sentence of § 6-5-546 and its effect on the general rules regarding the timing of motions for a change of venue was solely in the context of an action that had been commenced pursuant to the second sentence of that Code section; in other words, it had been commenced in the county of the plaintiff's residence because the alleged acts or omissions giving rise to the action had

allegedly occurred in more than one county. The complaint in that case referred to alleged negligence of different defendants, purportedly occurring in different counties, but when, in the course of litigation, it was revealed that the plaintiff's injuries had not resulted from alleged acts or omissions that took place in more than one county, the Court determined that the third sentence of § 6-5-546 -- the special timing sentence -- came into play. The Court held that, under those circumstances, the timing requirement of Rule 82(d)(2)(C)(i), governing the timing of motions to transfer in multiparty actions when defendants, whose presence initially made venue proper, are dismissed from the case, was preempted by that sentence. However, neither Children's Hospital nor the plain language of § 6-5-546 address the timing of a motion for a change of venue when the plaintiff does not allege that the plaintiff's injuries resulted from acts or omissions that took place in more than one county. In such cases, venue is controlled by the first sentence of § 6-5-546, to which the third sentence is unrelated and has no application, and the general timing provisions of Rules 12(h)(1) and Rule 82(d)(1) remain applicable. Thus, contrary to Premier's argument, it could not move to transfer the action at "any time prior to the commencement of the trial";

instead, under Rule 82(d)(1), Premier was required to file a "timely motion" for a change of venue.

Premier does not allege that, absent the application of the third sentence of § 6-5-546, its motion for a change of venue can still be deemed timely. Here, its March 28, 2022, motion was filed years after it filed its answer on September 19, 2019. Neither the answer nor the complaint were amended in this case. Bush was deposed in January 2021, and discovery in the case was completed before Premier filed its motion. Premier moved to transfer the action a mere three weeks before trial. Under these circumstances, the trial court did not exceed its discretion in determining that the motion was untimely under Rule 82(d)(1) and that Premier's challenge to venue had been waived. See generally Lugo de Vega, supra; Culbreth, supra; Ex parte Starr, 419 So. 2d 222, 223 (Ala. 1982) ("The first time the defendant raised the venue issue came some nine months after the complaint was filed. This is not a timely objection under Alabama Rules of Civil Procedure, Rule 82."); and Ex parte Maness, 386 So. 2d 429, 431 (Ala. 1980) (plurality opinion) (holding that the defendants' motion for a change of venue that "was not made until ten months after their pleadings" was untimely). Therefore, we deny

Premier's mandamus petition.

PETITION DENIED.

Parker, C.J., and Bolin, Wise, Bryan, Sellers, Mendheim, Stewart, and Mitchell, JJ., concur.