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SUPREME COURT OF ALABAMA

SPECIAL TERM, 2011

1100479

Ex parte Jerry Elliott

PETITION FOR WRIT OF MANDAMUS

(In re: Ex parte International Paper Company, Inc.

(In re: Jerry Elliott v. International Paper Company, Inc., et al.))

**(Conecuh Circuit Court, CV-09-900053;
Court of Civil Appeals, 2090352)**

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(In re: Ex parte Chapman Forest Products, Inc.

(In re: Jerry Elliott v. International Paper Company, Inc., et al.))

(Conecuh Circuit Court, CV-09-900053; Court of Civil Appeals, 2090368)

MAIN, Justice.

Jerry Elliott, the plaintiff in an action pending in the Conecuh Circuit Court seeking worker's compensation benefits, petitions this Court for writs of mandamus directing the Court of Civil Appeals to quash the writs of mandamus that court issued to the Conecuh Circuit Court in Ex parte International Paper Co., [Ms. 2090352, December 30, 2010] ___ So. 3d ___ (Ala. Civ. App. 2010). Those writs directed the Conecuh Circuit Court to transfer the underlying action to the Butler Circuit Court. We grant Elliott's petitions and issue the writs.

I. Factual Background and Procedural History

International Paper Company, Inc. ("IP"), or Chapman Forest Products, Inc. ("Chapman"), owned and operated a plywood-manufacturing plant in Butler County at all times material to this action. On November 3, 2006, IP executed an exclusive 20-year pulpwood-support agreement and an exclusive

10-year log-supply agreement with two timber companies pursuant to which those companies were to supply IP's plywood plant with timber harvested in Conecuh County, which is adjacent to Butler County. On March 31, 2007, IP executed an exclusive log-supply agreement with four timber companies to supply its plant with timber harvested in Conecuh County. The agreements were recorded in the Conecuh Probate Court. On December 31, 2007, IP assigned all three of its agreements for the supply of timber to Chapman. Chapman began operating the Butler County plant in January 2008. On December 28, 2009, Chapman closed the plywood-manufacturing plant and recorded documents in the Conecuh Probate Court terminating the pulpwood-support agreement and the log-supply agreements IP had assigned to it.

Elliott has lived in Conecuh County for over 15 years and for 21 years worked as a machine operator at the plywood-manufacturing plant owned by IP and then Chapman. In December 2007, he allegedly sustained an injury to his left shoulder while pushing wood through a machine during the course of his employment with IP. In May 2008, he allegedly sustained a similar injury to his right shoulder during the course of his

employment with Chapman. On August 24, 2009, Elliott filed an action in the Conecuh Circuit Court seeking worker's compensation benefits for his shoulder injuries, both of which occurred at the plywood-manufacturing plant located in Butler County.

IP and Chapman filed motions to dismiss Elliott's action or, in the alternative, to transfer the case to Butler County. Both IP and Chapman contended that venue was improper in Conecuh County but proper in Butler County. Elliott opposed those motions. After a hearing, the trial court denied the motions to dismiss or to transfer. IP and Chapman each filed a petition for a writ of mandamus in the Court of Civil Appeals, seeking review of the trial court's order denying their motions to dismiss or to transfer.[1] The Court of Civil Appeals granted the petitions and directed the trial court to transfer this action to Butler County.

[1]Chapman also contended in the trial court that even if venue was proper in Conecuh County, the case should be transferred to Butler County pursuant to the doctrine of forum non conveniens, § 6-3-21.1, Ala. Code 1975. However, Chapman did not rely upon the doctrine of forum non conveniens in seeking mandamus relief in the Court of Civil Appeals, and it does not do so in this Court.

II. Standard of Review

> "This Court reviews de novo the issuance of a writ of mandamus by the Court of Civil Appeals. Rule 21(e), Ala. R. App. P. Review of a writ of mandamus issued by the Court of Civil Appeals is properly sought through a petition for the writ of mandamus to this Court. Rule 21(e), Ala. R. App. P. '"'Mandamus is a drastic and extraordinary writ to be issued only where 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 Sears, Roebuck & Co., 895 So. 2d 265[, 268](Ala. 2004) (quoting Ex parte Mardis, 628 So. 2d 605, 606 (Ala. 1993) (quoting in turn Ex parte Ben-Acadia, Ltd., 566 So. 2d 486, 488 (Ala. 1990))). 'The petitioner bears the burden of proving each of these elements before the writ will issue.' Ex parte Glover, 801 So. 2d 1, 6 (Ala. 2001) (citing Ex parte Consolidated Publ'g Co., 601 So. 2d 423 (Ala. 1992))."

Ex parte Vance, 900 So. 2d 394, 397 (Ala. 2004).

"The proper method for obtaining review of a denial of a motion for a change of venue is to petition for the writ of mandamus." Ex parte Alabama Great Southern R.R., 788 So. 2d 886, 888 (Ala. 2000). Moreover, the petitioner has the burden of proving that venue is improper, and "on review of an order transferring or refusing to transfer, a writ of mandamus will not be granted unless there is a clear showing of error on the

part of the trial judge." Ex parte Finance America Corp., 507 So. 2d 458, 460 (Ala. 1987).

III. Analysis

IP and Chapman argue that this case should be transferred to Butler County because, they say, § 6-3-7, Ala. Code 1975, states that, as to a foreign or domestic corporation, venue is proper:

> "(1) In the county in which a substantial part of the events or omissions giving rise to the claim occurred ...; or
>
> "(2) In the county of the corporation's principal office in this state; or
>
> "(3) In the county in which the plaintiff resided ... at the time of the accrual of the cause of action, if such corporation does business by agent in the county of the plaintiff's residence; or
>
> "(4) If subdivisions (1), (2), or (3) do not apply, in any county in which the corporation was doing business by agent at the time of the accrual of the cause of action."

The parties do not contest that the principal place of business of both IP and Chapman was, at the time material to this case, in Butler County and that Elliott's injuries occurred in Butler County. Elliott lives in Conecuh County, and he argues that venue in Conecuh County is proper under

subdivision (3) because, he argues, IP and Chambers did business by agent in Conecuh County at the time he filed his action in that they had exclusive supply agreements pursuant to which they purchased timber from landowners in Conecuh County. Ex parte Charter Retreat Hosp., 538 So. 2d 787, 789 (Ala. 1989) (the pertinent inquiry for determining whether venue is proper under § 6-3-7(a)(3) is whether a corporation did business in the county at the time the action was instituted). IP and Chapman argue that neither of them did business by agent in Conecuh County at the pertinent time and that, therefore, the only proper venue for this action is Butler County. Rule 82(c), Ala. R. Civ. P., provides that when more than one claim or party has been joined in an action, "the suit may be brought in any county in which any one of the claims could properly have been brought." If either IP or Chapman did business by agent in Conecuh County, then venue is proper there. See Ex parte Smith Wrecker Serv., Inc., 987 So. 2d 534, 536 (Ala. 2007) (argument in case involving two defendants that venue is improper in a certain county is not well taken unless venue in that county is improper as to both defendants).

As the parties requesting a transfer of the case, IP and Chapman bear the burden of proving that venue in Conecuh County is improper. If the activity in Conecuh County by either of them is sufficient to qualify as "doing business by agent" in that county under § 6-3-7(a)(3), then venue is proper in Conecuh County, and the Court of Civil Appeals should not have issued the writs of mandamus directing a transfer of the case to Butler County. If that activity is not sufficient, however, the Court of Civil Appeals properly issued the writs of mandamus directing the trial court to transfer the case to Butler County. Elliott maintains that he submitted proof that both IP and Chapman were doing business in Conecuh County at all pertinent times and therefore were subject to venue there, even though proof as to one defendant alone is sufficient to establish that venue is proper in Conecuh County.

To establish that a corporation does business in a particular county for purposes of venue, past isolated transactions are inconclusive. Ex parte Harrington Mfg. Co., 414 So. 2d 74 (Ala. 1982). A corporation does business in a county for purposes of § 6-3-7 if it performs with some

regularity in that county some of the business functions for which the corporation was created. Ex parte SouthTrust Bank of Tuscaloosa Cnty., N.A., 619 So. 2d 1356, 1358 (Ala. 1993). However, this Court has considered extraneous relationships insufficient to constitute "doing business." For example, in Ex parte Parsons & Whittemore Alabama Pine Construction Corp., 658 So. 2d 414 (Ala. 1995), and Ex parte Real Estate Financing, Inc., 450 So. 2d 461 (Ala. 1984), this Court held that for a construction company and real-estate financing company, respectively, retaining the services of an attorney in a county on a case-by-case basis did not constitute doing business in that county. Hiring an attorney was tangential to the fulfillment of their primary business functions. IP's and Chapman's primary business function of operating a plywood-manufacturing plant, however, depends on obtaining timber from suppliers with whom it has exclusive long-term contracts.

The Court of Civil Appeals identified evidence before the trial court indicating that IP's "'ordinary course of business' involved entering into purchase obligations as to components, such as 'certain pulpwood, wood chips, raw materials, energy and services,' used to prepare finished

products." ___ So. 3d at ___. That court also identified evidence indicating that Chapman undertook as a core corporate function "the purchase and cutting of timber." ___ So. 3d at ___. As to evidence submitted by Elliott, the Court of Civil Appeals stated:

> "According to the filings submitted by [Elliott], Chapman, as of January 1, 2008, assumed all the rights and duties inuring to IP under various logging agreements. The logging agreements themselves do not appear in the record, but the 'termination' document ... indicates that they were entered into by IP with third parties in [2006 and] 2007 and that they evidently obligated those third-party entities (1) to provide a specified volume of timber products to Chapman and (2) to 'make available' cutting rights to certain land. The record indicates that the 'termination' document was filed in the probate court of three counties--Conecuh County, Butler County, and Covington County--implying that the foregoing obligations applied to lands situated in those counties. ... The wording of the 'termination' document does not specify that any portion of the timber products must come from Conecuh County, only that they could. ..."

___ So. 3d at ___. The Court of Civil Appeals drew an inference that, "from all that appears in the record, all the timber supplied to Chapman pursuant to the log agreements came from Butler County and Covington County," and it concluded that venue was improper in Conecuh County because neither IP

nor Chapman was doing business there at the time Elliott filed his action. ___ So. 3d at ___.

Judge Pittman disagreed. In his dissent, he states:

> "The termination-of-log-agreements document states that various third-party entities had agreed to supply and sell to IP (and later Chapman) 'logs and other wood products for use by IP [and later Chapman] at certain of its saw mills and wood product facilities,' including the Butler County facility. Further, the memorandum of the log-supply agreement was 'recorded in every county where timberlands are situated which are subject to the Log Agreements' (emphasis added). The inference that can properly be drawn, and the one that we should accept in reviewing the petitions for the writ of mandamus, is that there would have been no need to record the log-agreement memorandum in Conecuh County if IP (and later Chapman) was not to be supplied any logs that came from Conecuh County under the agreements originally entered into by IP."

___ So. 3d at ___ (Pittman, J., dissenting).

Elliott contends that the Court of Civil Appeals' inference that no timber from Conecuh County had actually been cut under the agreements was speculative. He argues that the trial court correctly found, and Judge Pittman, in his dissent, correctly reasoned, that the filing of long-term timber agreements by IP and Chapman in the Conecuh Probate Court constituted "doing business" in Conecuh County and that that finding should have ended the inquiry.

According to the documents submitted by Elliott, both IP and Chapman secured exclusive timber-harvesting agreements for Conecuh County timber during the time Elliott was employed by them. The primary purpose of the plywood-manufacturing plant operated by IP and then Chapman was to produce a plywood product made from a wood supply, and the documents recorded by IP in the Conecuh Probate Court to secure the 10- and 20-year exclusive-supply agreements is indicative of doing business in Conecuh County. An exclusive right to buy timber from landowners in order to have an adequate supply to make plywood for 10 and 20 years is clearly part of the "business function" of making wood products and one that would be exercised with "some regularity." IP's suggestion that such long-term contracts constitute an "isolated transaction" ignores the business reality that a 10- and 20-year exclusive right to timber harvested in Conecuh County establishes that all other companies are eliminated from harvesting timber -- i.e., doing business -- on that particular Conecuh County land.

This case is analogous to Ex parte Scott Bridge Co., 834 So. 2d 79 (Ala. 2002). In Scott Bridge, a former employee who lived in Chambers County filed a retaliatory-discharge action

in Chambers County against Scott Bridge, a bridge-building company headquartered in Lee County. Scott Bridge moved to dismiss or, in the alternative, to transfer the case to Lee County, claiming that venue in Chambers County was improper because it did not do business in Chambers County in that it had never constructed a bridge there. The evidence showed that Scott Bridge had purchased from vendors in Chambers County in excess of $50,000 worth of supplies necessary for building bridges; this Court held that that constituted doing business in Chambers County. Based on this Court's reasoning in Scott Bridge, we conclude that, because the timber-supply agreements gave IP and Chapman the exclusive rights to timber on land in Conecuh County, because the agreements were recorded in the Conecuh Probate Court, and because the purpose of the agreements was to fulfill IP's and Chapman's principal corporate function of manufacturing plywood products, IP and Chapman were doing business in Conecuh County.

In order to be entitled to the writs of mandamus issued by the Court of Civil Appeals, IP and Chapman had the burden of showing that they had a clear legal right to the relief they requested. A writ of mandamus should not have been

granted unless they made a clear showing of error on the part of the trial court. Ex parte Greenetrack, Inc., 25 So. 3d 449 (Ala. 2009). They did not do so. The trial court correctly denied their motions to transfer this case to Butler County; therefore, the Court of Civil Appeals should not have issued the writs directing that transfer.

IV. Conclusion

Elliott's petitions for the writ of mandamus are granted; the Court of Civil Appeals is directed to quash the writs of mandamus it issued on December 30, 2010, in Ex parte International Paper Co., case no. 2090352 and case no. 2090368, requiring the Conecuh Circuit Court to transfer the case to Butler County.

1100479--PETITION GRANTED; WRIT ISSUED.

1100497--PETITION GRANTED; WRIT ISSUED.

Malone, C.J., and Stuart, Parker, and Wise, JJ., concur.

Woodall, J., concurs in the result.

Bolin, Murdock, and Shaw, JJ., dissent.

MURDOCK, Justice (dissenting).

In the present case, International Paper Company, Inc. ("IP"), entered into two contracts with other parties pursuant to which those parties were to supply raw material, i.e., harvested timber, needed by IP for the production by IP of plywood at its plywood-manufacturing plant in Butler County. The materials before us indicate that IP's agents entered into these contracts in various counties other than Conecuh County, and there is no evidence indicating that IP and Chapman Forest Products, Inc. -- the respondents here -- actually ever received any timber harvested in Conecuh County pursuant to these agreements,[2] much less, I would add, that IP itself went onto any lands in Conecuh County and harvested any timber. Furthermore, for all that appears from the materials before us, which do not include the contracts themselves, these contracts contemplated that timber might be harvested by other parties and delivered to IP at its plant in Butler County.

[2]Although these contracts were recorded in the probate records of Butler, Conecuh, and Covington Counties, this fact alone would allow one to infer only that timber might be supplied from any one of these counties, not that it was necessarily supplied from any one of them.

Consistent with my discussion of Ex parte Scott Bridge Co., 834 So. 2d 79 (Ala. 2002), and other cases in my dissenting opinion in Ex parte Greenetrack, Inc., 25 So. 3d 449 (Ala. 2009), I respectfully dissent. As I wrote in that case:

> "In Ex parte Scott Bridge Co., [834 So. 2d 79 (Ala. 2002),] the sale and purchase of supplies in Chambers County appear to me to have been activities by which the sellers of those supplies did their business. I question whether the fact that Scott Bridge was the purchaser in those transactions meant that it was 'do[ing] business by agent in [Chambers County]' within the meaning of § 6-3-7(a)(3), Ala. Code 1975, intended by the legislature. Specifically, I question whether Scott Bridge was doing its business by making the purchases it made.
>
> "Meaningful authority exists for drawing the foregoing distinction. For example, in Frees v. Southern Michigan Cold Storage Co., 43 Mich. App. 756, 757, 204 N.W.2d 782, 783 (1972), the court explained: '[T]he defendant's business is that of storing fruits and vegetables. The farmers and processors bring their fruits and vegetables to defendant's warehouse in Hart, Oceana County for storage. Defendant's contacts with Muskegon County are limited to the purchasing of equipment and material for the maintenance of its refrigeration equipment,' except for one customer that the court noted actually brought its produce to Oceana County for storage. (Emphasis added.) Under these facts, the court held that the defendant 'was not doing business in Muskegon County by purchasing equipment and materials in Muskegon County to maintain its refrigeration equipment.' 43 Mich. App. at 758, 204 N.W.2d at 783-84.[6]

"_____

"[6]In Hartung v. Central Illinois Public Service Co., 110 Ill. App. 3d 816, 66 Ill. Dec. 493, 443 N.E.2d 16 (1982), the court reasoned:

> "'The evidence further revealed that defendant consummated commercial transactions with 10 different Madison County residents which totaled nearly $4.4 million in 1979[, including purchases of approximately $1 million of parts and supplies from numerous vendors]. ...
>
> "'Plaintiff maintained that these commercial transactions contributed directly to defendant's production and marketing of its principal consumer product, electricity. Plaintiff further contends that these transactions were done systematically and continuously thus establishing that defendant was "doing business" within Madison County within the meaning of the venue statute.
>
> "'....
>
> "'"... [I]n order to establish that a defendant is doing business within a county for purposes of venue, quantitatively more business activity within the county must be demonstrated than where the question is whether the defendant has transacted any business within the State for purposes of service of process pursuant to section 17. The defendant must, in short, be conducting its usual and customary business within the county in which venue is sought." [Baltimore & Ohio R.R. v. Mosele,] 67 Ill. 2d 321, 329-330[, 10 Ill. Dec. 602, 606], 368 N.E.2d 88, 92 [(1977)].
>
> "'... [W]e believe the evidence does not support the trial court's finding of venue in Madison County in the present

> case. Defendant's business is the production and marketing of electricity which is not carried on by defendant in Madison County.'
>
> "110 Ill. App. 3d at 818-20, 66 Ill. Dec. at 495-96, 443 N.E.2d at 17-19 (emphasis added). Similarly, in Gardner v. International Harvester Co., 113 Ill. 2d 535, 541, 101 Ill. Dec. 842, 845, 499 N.E.2d 430, 433 (1986), the Illinois Supreme Court rejected an argument that purchases of materials by a manufacturer constituted doing business for venue purposes: 'Nor do we believe that Harvester's purchases from St. Clair County suppliers show that the company is engaged in business there. Harvester buys the materials for use in its business of designing, manufacturing, and marketing tractors, trucks, and other machines, and the purchases are but a necessary incident of that.' See also Saturn Sys., Inc. v. Saturn Corp., 659 F. Supp. 865 (D. Minn. 1987); Westinghouse Electric Corp. v. Superior Court, 17 Cal. 3d 259, 270, 551 P.2d 847, 855, 131 Cal. Rptr. 231, 239 (1976) (also noting that '[t]he change of venue issue is directed at completely different policy considerations' and that '[i]t is inappropriate to apply a "minimum contacts" test to determine whether defendants are doing business' in a given county for venue purposes)."

25 So. 3d at 458 (Murdock, J., dissenting).

Additional authority -- namely the decisions of this Court in Farmers' & Ginners' Cotton Oil Co. v. Baccus, 207 Ala. 75, 92 So. 4 (1921), and in the various cases discussed therein -- though not referenced in my dissent in Greentrack, is also instructive. By way of example in Farmers' itself, the Court concluded:

> "The purchase of cotton seed by the defendant corporation was of course within its corporate powers, but it was an adjunct, or merely a necessary

> incident to its business, and not in the exercise of functions for which the corporation was created. It was incorporated for the purpose of manufacturing cotton seed into oil and other products for the market. None of this was done in Marion county, nor were any of the products sold by agents therein. It merely purchased direct from the owner, and also through witness Perry, who resided in that county, the raw material, the cotton seed, for the purpose of manufacturing it into cotton seed products. This was a preliminary step, but, as previously stated, a necessary incident to its business, but not an exercise of its corporate functions within the meaning of the foregoing statutory provision."

207 Ala. at 77, 92 So. at 5 (emphasis added).[3]

To the foregoing I would add the following thought: In Greenetrack this Court held that a corporation that engaged in the active conduct of operating a bus on a regular basis in a county neighboring the county in which it did business to transport residents of the neighboring county to its primary business facility so that they could serve as customers of that facility was not doing business in that neighboring county. 25 So. 3d at 452-55. If such active conduct does not constitute doing business in a neighboring county, I question how the relatively passive conduct of merely entering into timber-supply contracts -- contracts actually executed

[3]If this was a case in which the evidence indicated that IP or Chapman itself actively engaged in the harvesting of timber from Conecuh County on a regular basis, my conclusion might be different.

outside Conecuh County -- constitutes the doing of business by IP in Conecuh County.

Based on the foregoing, I respectfully dissent.

SHAW, Justice (dissenting).

I respectfully dissent. Venue in this case is determined by Ala. Code 1975, § 6-3-7(a)(3), which states that, as to a foreign or domestic corporation, venue is proper:

> "(3) In the county in which the plaintiff resided ... at the time of the accrual of the cause of action, if such corporation does business by agent in the county of the plaintiff's residence ...."

In explaining this section, we have stated:

> "This Court has stated that '"[a] corporation 'does business' in a county for purposes of § 6-3-7 if, with some regularity, it performs there some of the business functions for which it was created."' Ex parte Wiginton, 743 So. 2d 1071, 1074-75 (Ala. 1999) (quoting Ex parte SouthTrust Bank of Tuscaloosa, N.A., 619 So. 2d 1356, 1358 (Ala. 1993)). Furthermore, 'isolated transactions' in the past are inconclusive in determining venue. Ex parte Jim Skinner Ford, Inc., 435 So. 2d 1235, 1236 (Ala. 1983)."

Ex parte Pike Fabrication, Inc., 859 So. 2d 1089, 1093 (Ala. 2002).

I believe that the transaction at issue in this case--the execution of the timber-purchase and log agreements for the rights to timber on property located in Conecuh County--was simply an isolated transaction. Nothing before us indicates that International Paper Company and Chapman Forest Products, Inc., the respondents here, executed those transactions in Conecuh County "with some regularity." Further, there is no

evidence indicating that the respondents used timber harvested in Conecuh County pursuant to these agreements. Additionally, it is unclear whether the respondents' "agents" did business in Conecuh County; specifically, copies of various agreements and documents in the materials before us indicate that the respondents' agents executed those agreements and documents in other counties, including Shelby County and Jefferson County, as well as out-of-state locations.

I have previously expressed concern regarding this Court's rationale in Ex parte Scott Bridge Co., 834 So. 2d 79 (Ala. 2002), upon which the main opinion relies:

> "I question the conclusion reached in Scott Bridge that a corporation's mere purchase of materials necessary to fulfill a principal corporate function actually equates, for purposes of § 6-3-7(a)(3), to the performance of the principal corporate function for which the corporation was created; however, this Court is not asked in the instant case to overrule Scott Bridge."

Ex parte Greenetrack, Inc., 25 So. 3d 449, 456 n.4 (Ala. 2009) (Shaw, J., concurring specially). Jerry Elliot, however, does not rely on or cite Scott Bridge, and, in my view, it is not dispositive of this case, so I see no need to address it.

Bolin, J., concurs.