DIVISION IV

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
ROBERT J. GLADWIN, Judge

CA05-594

MAY 3, 2006

TASHA ORR, personal representative of the Estate of MELVIN WOODSON, JR., deceased

APPELLANT

APPEAL FROM THE LEE COUNTY CIRCUIT COURT
[NO. CIV 2002-19]

V.

HON. HARVEY YATES, JUDGE

TIMOTHY CALICOTT, M.D. and STEPHEN HUDSON, M.D.

APPELLEES

AFFIRMED

Appellant Tasha Orr, individually and as court-appointed personal representative of the estate of her infant son Melvin Woodson, Jr., filed a complaint in the Lee County Circuit Court alleging that appellees Dr. Timothy Calicott and Dr. Stephen Hudson[1] committed medical negligence and wrongful death. Appellees filed a motion to dismiss in which they alleged that venue was improper in Lee County because treatment was rendered at Conway Regional Medical Center located in Faulkner County and because Woodson was a resident of Faulkner County. Following a hearing on appellees' motion, the trial court initially denied it. Appellant then filed a second amended complaint, and appellees filed another motion to dismiss for lack of venue, alleging that they had discovered additional information that contradicted appellant's claims that venue was proper in Lee County. Following a second hearing, the trial court granted appellees' motion to dismiss. Appellant filed a timely notice of appeal from that order and raises four points for our review: (1) the trial court erred in

[1] Appellant moved for a voluntary nonsuit against defendants Conway Regional Medical Center and Dr. Samual William Winston, and the trial court granted her motion.

granting appellees' motion to dismiss on the venue issue; (2) the trial court erred by improperly weighing the affidavit testimony of affiants who did not testify at either hearing; (3) the trial court erred in considering documents and other items not properly admitted into evidence; (4) the trial court erred in admitting a note from the Department of Finance and Administration. We affirm.

Melvin Woodson, Jr., was born on August 17, 1999, at Helena Regional Medical Center in Phillips County, where he was hospitalized soon after his birth for dehydration. In early March 2000, appellant took her six-month-old son to Dr. Winston in Phillips County. Dr. Winston changed Woodson's baby formula due to the baby's history of problems with lactose intolerance and difficulty gaining weight. On March 14, 2000, appellant took her son to the emergency room at Conway Regional Medical Center in Faulkner County because he was experiencing recurrent vomiting and diarrhea, elevated temperature, cough, and congestion. Appellee Dr. Calicott instructed appellant to decrease the volume of Woodson's feedings and suction his nose prior to all feedings, and then he discharged the infant. On March 15, 2000, appellant returned to the hospital and saw appellee Dr. Hudson, who suspected that Woodson was infected with a resistant microorganism for which he prescribed antibiotics. Once again, the infant was discharged. Early on the morning of March 16, 2000, appellant awoke to find that Woodson was not breathing. He was taken back to the hospital where, shortly after arrival, Dr. Hudson pronounced that the infant was dead. Dr. William Sturner, Chief Medical Examiner at the Arkansas State Crime Laboratory, was involved in Woodson's autopsy. According to Sturner's affidavit, Woodson died as a result of moderate to severe dehydration.

On February 19, 2002, appellant filed a complaint against appellees, Conway Regional Medical Center, and Dr. Winston. On May 20, 2002, appellees filed a motion to dismiss for lack of venue. Attached to that motion were admission records from Conway Regional

Medical Center in which appellant's and her infant son's address was listed as 2840 Dave Ward, Apt. D-3, Conway, Arkansas 72032, and a Conway telephone number was provided. In a reply to appellant's response to their motion to dismiss, appellees attached a rental application executed by appellant on March 3, 2000, and an apartment lease contract executed on March 10, 2000, with Salem Park Apartments at 2840 Dave Ward Drive. The lease was for a term of one year and listed Woodson and her older son Demarius Orr as occupants of the apartment.

In an affidavit filed on June 10, 2002, appellant stated that she and her son had been in Conway for less than a week at the time of his death. She stated that she and Melvin Woodson, Sr., had gone to Conway to look for employment but that she had maintained her residence in Lee County. She stated that most of her personal possessions remained in Lee County and that she rented a furnished apartment in Faulkner County. Appellant stated that while she looked for work in Conway, she continued to return to Lee County to launder clothes and visit her family. According to her affidavit, she had remained a voter and continued to receive mail in Lee County. Appellant stated that she considered Lee County to be her residence for all practical purposes and that her only connection to Conway and Faulkner County was that she had gone there to look for work. Appellant stated that at the time she took her son to Conway Regional Medical Center, his Medicaid card, which was issued by Lee County, indicated that her son's residence was in Lee County. She stated that, following her son's death, he was buried in Lee County. Appellant submitted her voter registration records for the court's consideration.

A hearing was held on August 19, 2002, at which Lee County Clerk Pat Wilson testified that she kept a record of the county's registered voters. She stated that appellant's address of Highway 121 South in Lexa was a Lee County address. Following the hearing,

the trial court filed a letter opinion on December 30, 2002, in which it denied appellees' motion to dismiss. The trial court made the following findings:

> That plaintiff had been a resident and lived at a Lexa, Arkansas address in Lee County for some 12 years. That a few days before the death of Melvin Woodson, Jr., plaintiff, Tasha Orr and Melvin Woodson, Sr., along with Melvin Woodson, Jr., had traveled from Lee County to Faulkner County to look for work. They continued to maintain their residence in Lee County and left personal belongings such as furniture and clothing in Lee Co. They returned to Lee County on weekends and Tasha Orr continued to be a registered voter in Lee Co. and still does. Melvin Woodson, Jr. was buried in Lee Co. and the probate of his estate was opened in Lee Co.
>
> Basically, the only contact with Faulkner County was the renting of an apartment in Conway a few days before the events in issue and looking for employment there.

On October 24, 2003, appellant moved for a voluntary nonsuit against Conway Regional Medical Center and Dr. Winston, which was granted. Appellant filed a second amended complaint against appellees. In addition to the previous exhibits, appellant attached an affidavit from Lisa Johnson, an employee at the Lee County Assessor's Office. Johnson stated that, according to her records, appellant had assessed her personal property in Lee County each year from 1998 to 2004.

Appellees filed another motion to dismiss for lack of venue, alleging that they had discovered information that contradicted appellant's claim that she was a Lee County resident. In addition to their previous exhibits, appellees submitted case details from the Office of Child Support Enforcement, consisting of, among other things, a note signed by Karen Liesche as "Document Examiner II," and dated November 2, 2004, in which she stated in reference to the number 231 on some documentation, "This is the county code for Faulkner County." In addition, appellees submitted a copy of a brochure for Salem Park Apartment Community. They also presented appellant's deposition testimony dated October 15, 2003, in which she stated that after she left the emergency room on March 15, 2000, she, Melvin Woodson, Sr., and Woodson, Jr., went to sleep that night in the same bed and that her other

son slept in his own bed. She also stated that the television had remained on all night. Finally, appellees included a Lee County voter registration card.

Several affidavits were submitted. In her affidavit dated November 12, 2004, appellant stated that, following Woodson's birth, she applied for and was issued a Medicaid card in Lee County and that it was the only card Woodson had during his life. Appellant denied appellees' assertion that she had filed an application for or sought assistance from the Faulkner County Child Support Unit to obtain child-support benefits or establish her son's paternity. Appellant also stated that she had always assessed in Lee County, that she was registered to vote in Lee County, and that her driver's license was issued out of Lee County.

According to Marzella Robins's affidavit, she rented a home to appellant on Highway 121 South in Lexa and that appellant continued to pay rent on the home in Lexa even though appellant, her children, and Melvin Woodson, Sr., had traveled to Conway to look for work. Robins stated that appellant's furniture and much of her and her children's personal belongings and clothing remained at the home in Lexa. According to Robins, appellant returned to Lexa on weekends to launder clothes and visit her family.

Alice Orr, appellant's grandmother, submitted an affidavit in which she stated that appellant resided in Lee County both before and after her son's death and that appellant's son was buried in Lee County. According to Orr, appellant stayed at her home in Lexa where she mourned for Woodson for an extended period of time following the infant's death. Orr also stated that appellant attended Sequel Baptist Church on Highway 121 every weekend and on religious holidays.

Roy Stanley, president of Lindsey Management Company, Inc., which is the managing agent for Salem Park Apartments in Conway, submitted an affidavit stating that Salem Park

had never offered furnished apartments to its residents. He maintained that the only furnishings in the apartments were bar stools.

An affidavit from Susan Stacks, an employee at the Faulkner County Assessor's Office, was presented. She stated that she had found nothing in her records to indicate that appellant had ever assessed personal property in Faulkner County.

In another affidavit dated November 12, 2004, appellant stated that her income tax returns indicated that her home address was in Lee County. She stated that she has a bank account in Marianna, Arkansas, which is in Lee County. In response to Stanley's affidavit, appellant stated that the apartment at Salem Park was furnished with two beds and that her beds remained at her home in Lee County. She stated that the apartment had a washer and dryer and that her washer and dryer remained at her home in Lee County. Appellant stated that her Lee County address was noted on records from Helena Regional Medical Center.

A hearing was held on November 12, 2004, at which time a fax was received from the Department of Finance and Administration, dated November 12, 2004, in which Sharon Chew from the driver's license division stated:

> I am writing in regards to address information that you requested on Tosha Lesha Orr. Ms. Orr has resided at the following addresses.
>
> September 25, 1998
> 11755 Hwy 121 S. Lexa, AR 72355
>
> August 4, 2000
> 2840 Dave Ward Dr. #D3 Conway, AR 72032
>
> September 6, 2002
> 11713 Hwy 121 SDR #D3

At the conclusion of the hearing, the trial court granted appellees' motion to dismiss for lack of venue. The trial court found:

> Upon considering the matters previously brought before the Court and additional evidence concerning the Medicaid and Child Support Records for Faulkner County, the Department of Finance and Administration Records including reconsideration of

> the lease agreement for the apartment in Conway and the affidavit of Roy Stanley, the weight of the evidence on the issue of venue is that Melvin Woodson, Jr., resided in Faulkner County at the time of his death.

Act 649 of 2003 provides that any action for medical injury against a medical care provider shall be filed in the county in which the alleged act or omission occurred, but that act does not apply to causes of action accruing prior to the effective date of the act, which was March 25, 2003. Because the events at issue in this appeal occurred in March 2000, we turn to Ark. Code Ann. § 16-60-112 (1987), as it existed prior to the passage of Act 649 of 2003. According to Ark. Code Ann. § 16-60-112(a), "All actions for damages for personal injury or death by wrongful act shall be brought in the county where the accident occurred which caused the injury or death, or in the county where the person injured or killed resided at the time of injury." Our supreme court has interpreted the statute to include causes of action for medical malpractice. *See Goodwin v. Harrison*, 300 Ark. 474, 780 S.W.2d 518 (1989).

Our supreme court in *Leathers v. Warmack*, 341 Ark. 609, 19 S.W.3d 27 (2000), stated:

> Under our case law, the distinction between the terms "domicile" and "residence" is often subtle; however, our supreme court has consistently held that the terms are not synonymous. A person's "residence" is the place of actual abode, not a home that a person expects to occupy at some future time. This court has defined "place of abode" as "something more than a place of temporary sojourning," implying a degree of permanence. "[A] given place may be a 'place of abode' of a party, though he may be actually absent therefrom for a long period of time. No particular length of time is necessary to establish residence. Rather, the key consideration is whether the place is an "established abode, fixed permanently for a time for business or other purpose, although there may be an intent existing all the while to return at some time or other to the true domicile[.]" Each case must be decided on its own facts.

Leathers, 341 Ark. at 618, 19 S.W.3d at 33-34 (citations omitted).

First, appellant argues that it was appellees' burden to prove that she and her son were not residents of Lee County and that the only exhibit actually submitted by them as evidence was the letter from the Department of Finance and Administration. Appellant also points out

that the only testimony offered was from Wilson, whose testimony was uncontroverted. Although it is listed as her third point on appeal, we find it necessary to address it along with the first point, as the two arguments are linked. In her third point on appeal, appellant contends that the trial court considered and weighed documents that were not introduced into evidence or offered for introduction into evidence.

In a letter filed on December 10, 2004, trial judge Harvey L. Yates stated:

> The Court heard arguments and accepted exhibits in support of said arguments concerning the defendants' Motion to Dismiss Plaintiff's Second Amended Complaint on November 12, 2004. At the conclusion of the hearing, the Court took the Motion as submitted and rendered a decision on November 18, 2004.
>
> The Court has not accepted any other exhibits since then and the record will consist of those matters presented up to the conclusion of the hearing on November 12, 2004.

The record on appeal demonstrates that the exhibits attached to the pleadings by both parties were presented as evidence by them at the hearing. In any event, the purpose for the contemporaneous-objection rule is to give the trial court the opportunity to know the reasons for disagreement with its proposed action before or at the time the court makes its ruling. *See Mackey v. State*, 329 Ark. 229, 947 S.W.2d 359 (1997); *see also Withers v. State*, 308 Ark. 507, 825 S.W.2d 819 (1992) (finding that Withers's argument that there was a lack of evidence as to his prior convictions because the State failed to introduce a pen-pack was not preserved for review where no objection was made to the trial court).

When venue is questioned, there must be a determination on the facts; unless the pleadings on their face show that an action was commenced in the wrong county, a defendant objecting to the venue has the burden of proving the essential facts. *Ison Properties, L.L.C. v. Wood*, 85 Ark. App. 443, 156 S.W.3d 742 (2004). An appellate court will not reverse a trial court's findings of fact, whether they are based on oral or documentary evidence, unless they are clearly erroneous or clearly against the preponderance of the evidence. *See* Ark. R. Civ. P. 52(a); *Two Brothers Farm, Inc. v. Riceland Foods, Inc.*, 57 Ark. App. 25, 940 S.W.2d

889 (1997). However, whether venue is appropriate in a particular county is a matter of law. *River Bar Farms, L.L.C. v. Moore*, 83 Ark. App. 130, 118 S.W.3d 145 (2003).

Here, appellant executed a one-year lease for an apartment in Faulkner County several days prior to Woodson's death. The apartment contained, at a minimum, two beds and a television, and appellant agreed to pay Salem Park Apartments an additional sum of money per month for the use of a washer and dryer in the apartment. Moreover, each time appellant took Woodson to the emergency room at Conway Regional Medical Center, she listed her Faulkner County address and telephone number on the hospital's admission reports. Also, records from the Office of Child Support Enforcement indicated that a case had been opened for Woodson in Faulkner County.

The law as it existed in March 2000 provided appellant with two choices for filing her lawsuit in terms of venue: either where the alleged wrongful conduct occurred that resulted in Woodson's death or where Woodson resided at that time. We find no error in the trial court's granting of appellees' motion to dismiss for lack of venue as venue was appropriate only in Faulkner County.

Appellant's second argument on appeal is that it was improper for the trial court to weigh the affidavits without having the opportunity to assess the credibility of the affiants through testimony. Besides the fact that appellant failed to voice any objection, there is no indication that the trial court found that the affidavits lacked credibility. In any event, the affidavits presented by appellant went more toward proving her domicile, rather than Woodson's residence or actual place of abode.

Finally, appellant argues that the trial court erred in admitting the letter from the Department of Finance and Administration because it was in an unsworn format and lacked a proper foundation. She contends that the trial court recognized the necessity of having a witness's sworn testimony. Appellant argues that, although she would have thought the error

was harmless in light of the fact that the letter indicates that from September 25, 1998, until August 4, 2000, she had a Lee County address, the trial court interpreted it incorrectly.

Appellant objected to the letter from the Department of Finance and Administration as follows: "Your Honor, over my objections, again, I think 90% of their evidence is in improper format, but I understand at this late date it may be hard to get it in proper format." Although appellant raised an objection, the objection not only lacked specificity, it appears to have been withdrawn in the same breath that it was made. Error may not be predicated upon a ruling admitting evidence unless there is a timely, specific objection. *Bohannan v. Underwood*, 300 Ark. 110, 776 S.W.2d 827 (1989). Accordingly, appellant's final point is not preserved for our review.

Affirmed.

VAUGHT and CRABTREE, JJ., agree.