IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: MARCH 24, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000254-MR

JOHN J. SIEGEL, JR.,
STEVEN RICKMEIER,
AND
RICKMEIER ADVISORS, INC. — APPELLANTS

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2009-CA-001935-OA
JEFFERSON CIRCUIT COURT NO. 07-CI-004282

HONORABLE AUDRA ECKERLE
JUDGE, JEFFERSON CIRCUIT COURT
DIVISION SEVEN — APPELLEE

AND

SAMUEL S. FRANCIS — REAL PARTY IN INTEREST

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellants John Siegel, Jr., Steven Rickmeier, and Rickmeier Advisors, Inc. (RAI), defendants in a breach of contract action brought against them by Samuel S. Francis, the real party in interest, appeal from an Order of the Court of Appeals denying their petition for a writ prohibiting Judge Audra Eckerle of the Jefferson Circuit Court from transferring venue in Francis's suit to the Boyd Circuit Court. The Court of Appeals ruled that the Appellants are not entitled to extraordinary relief under CR 81 because the order transferring venue is within Judge Eckerle's authority and because the propriety of the

transfer may be reviewed by appeal in the ordinary course of litigation. We agree and so affirm.

RELEVANT FACTS

The parties' underlying dispute involves a financing agreement between Bowie Resources, LLC, a Kentucky limited liability company headquartered in Ashland Kentucky, and General Electric Capital Corporation. Bowie sought financing to support its mining operations, and in 2006 the Appellants helped design and broker the deal with GE Capital. In exchange for those services, Bowie entered a Consulting Agreement with the Appellants whereby it agreed to pay them mining royalties and other forms of compensation. In May 2007, Francis, a resident of Nevada, brought suit against the Appellants in Jefferson County, where Siegel is a resident,[1] alleging that he, Francis, participated in arranging Bowie's financing and that, pursuant to an agreement he had entered into with the Appellants, he was entitled to a share of the consultants' compensation.

When Francis learned that the compensation included future payments, he notified Bowie of his claim and threatened suit if Bowie did not honor it. At that point, Bowie filed a "Complaint for Interpleader and Declaratory Relief" in the Boyd Circuit Court naming Francis and the Appellants as defendants. Bowie sought to have Francis and the Appellants restrained from taking action against it and sought a determination of Bowie's obligations to them. RAI then filed a counterclaim in the Jefferson County action, in which it alleged that

[1] Rickmeier is a resident of Illinois, where RAI is incorporated and headquartered.

Francis's demand upon Bowie had induced the company to breach its Consulting Agreement with the Appellants. Meanwhile, Francis answered Bowie's complaint and filed cross and counterclaims in Boyd Circuit Court. There then ensued competing motions to transfer. Appellants (with no objection from Bowie) moved the Boyd Circuit Court to transfer Bowie's action to Jefferson County. The Boyd Circuit Court overruled the motion by summary order entered May 29, 2008. That court also denied Bowie's motion for voluntary dismissal approximately four months later. Francis, meanwhile, moved the Jefferson Circuit Court to transfer his action to Boyd County. Noting the risk of inconsistent judgments if the actions remained separate as well as the advantage of Bowie's participation in the Boyd County action, the Jefferson Circuit Court ruled that "[w]hether under the law of venue or its subcategory of *forum non conveniens,* this case should and will be transferred to Boyd County Circuit Court."

Appellants thereupon petitioned the Court of Appeals for a writ prohibiting the transfer. They argued before the Court of Appeals, as they argue now before us, that venue is not proper in Boyd County, and that even if it were, the transfer would still amount to an abuse of the trial court's discretion because venue is also proper in Jefferson County and no showing has been made which would justify a *forum non conveniens'* finding in favor of Boyd County. Appellants also argue that Francis waived any objection to the Jefferson County venue by bringing his suit there.

ANALYSIS

Allegations of error alone, of course, do not justify extraordinary relief under CR 81. On the contrary, a writ for extraordinary relief may be granted only

> upon a showing (1) that the lower court is proceeding or is about to proceed outside its jurisdiction and there is no remedy through an application to an intermediate court; or (2) that the lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted.

Cline v. Weddle, 250 S.W.3d 330, 334 (Ky. 2008) (quoting from *Hoskins v. Maricle,* 150 S.W.3d 1, 10 (Ky. 2004)). Noting succinctly that in its view Judge Eckerle has the authority to order the transfer and that appeal provides an adequate remedy for an erroneous venue determination, the Court of Appeals denied relief. We agree.

I. The Trial Court Has Authority To Order Transfer.

The Appellants challenge this result, first, by contending that Judge Eckerle acted outside the authority to transfer cases created by KRS 452.105 when she ordered a suit transferred from a proper venue to an improper one. That statute provides as follows:

> In civil actions, when the judge of the court in which the case was filed determines that the court lacks venue to try the case due to an improper venue, the judge, upon motion of a party, shall transfer the case to the court with the proper venue.

The Appellants insist that the statute does not authorize transfers to an improper venue, and in a very limited sense that may be true. Presumably a

trial court, having determined that County X was not a proper venue for a suit, could not then turn around and transfer that suit to County X. But that is not what has happened. The statute plainly does authorize the trial court to exercise its discretion in determining where venue is proper, and here both circuit courts have determined that Boyd County is a proper venue. In *Fritsch v. Caudill,* 146 S.W.3d 926 (Ky. 2004), we made clear that that determination, even if erroneous, is not a basis for extraordinary relief. KRS 452.105, we explained, requires a judge who, upon motion, determines that venue has been improperly invoked to transfer the case to an appropriate venue, but it does not create a right to what would amount to interlocutory review of the judge's venue determinations. Those remain subject to appellate review.

The Appellants also contend that KRS 452.105 does not authorize transfers away from a proper venue but only from an improper one. Since the parties apparently agree that Jefferson County is a proper venue, transfer away from that county, the Appellants insist, is outside the trial court's authority. Again, however, the fact that the statute requires transfer in certain situations does not imply that those are the only situations in which transfer is allowed. On the contrary, in *Dollar General Stores, Ltd. v. Smith,* 237 S.W.3d 162 (Ky. 2007), we ruled that KRS 452.105, adopted in 2000, in effect superseded *Beaven v. McAnulty,* 980 S.W.2d 284 (Ky. 1998) wherein this Court held a trial court had no authority to transfer a case to another circuit on *forum non conveniens* grounds. Now, under the doctrine of *forum non conveniens,* even if the trial court's jurisdiction and venue have been properly invoked, the court

may decline to exercise its jurisdiction and may transfer the suit to another appropriate venue upon a determination that the convenience of parties or courts or the interests of justice so requires. *Dollar General Stores,* 237 S.W.3d at 164-67. Thus, even if Jefferson County is a proper venue for Francis's suit, the trial court was within its authority in determining that Boyd County is a more appropriate venue. The Appellants complain that this case does not justify a *forum non conveniens* transfer, that the trial court did not make sufficient *forum non conveniens* findings, and that having brought suit in Jefferson County Francis is precluded from invoking *forum non conveniens,* but those complaints go not to the trial court's authority to act but to the correctness of its action. We agree with the Court of Appeals, in sum, that the transfer to Boyd County is within the trial court's authority.

II. The Appellants Have An Adequate Remedy By Appeal.

Where the trial court is proceeding within its jurisdiction, as noted above, CR 81 relief is available only upon a showing that the court is acting or is about to act erroneously, "and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted." *Cline,* 250 S.W.3d at 334. In those circumstances, "a showing of no adequate remedy by appeal is 'an absolute prerequisite' to obtaining a writ for extraordinary relief." *Id.,* at 335 (quoting from *Independent Order of Foresters v. Chauvin,* 175 S.W.3d 610, 615 (Ky. 2005)). This Court has held on several occasions that appellate review is an adequate remedy for an erroneous venue determination. *Fritsch v. Caudill,* 146 S.W.3d at 930; *Pettit v. Raikes,*

858 S.W.2d 171 (Ky. 1993); *Skidmore v. Meade,* 676 S.W.2d 793 (Ky. 1984). As we noted in *Fritsch*:

> If appellants are correct that the Floyd Circuit Court is an improper venue for appellee's civil action, in due course, the trial court or an appellate court will so recognize and relief in the nature of dismissal for improper venue will be granted. As to great and irreparable injury, we see none. Inconvenience, expense, annoyance, and other undesirable aspects of litigation may be present, but great and irreparable injury is not.

146 S.W.3d at 930. Appellants have not persuaded us to depart from that precedent. If Boyd County is not a proper venue for this suit, the Appellants' remedy is by appeal.

CONCLUSION

In sum, we agree with the Court of Appeals that Judge Eckerle has the authority to transfer Francis's suit to a more appropriate venue and that the propriety of the transfer may be addressed in the ordinary course of appeal. Accordingly, we affirm the Order of the Court of Appeals denying the petition for CR 81 relief.

All sitting. All concur.

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