

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2018 CA 1271

TERENCE ALOST, M.D.

VERSUS

DANNY LAWLER, DANNY LAWLER ENTERPRISES, L.L.C.  
AND WILLIS-KNIGHTON MEDICAL CENTER

*Judgment Rendered:* MAY 08 2019

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Appealed from the  
19th Judicial District Court  
In and for the Parish of East Baton Rouge  
State of Louisiana  
Case No. 665848

The Honorable Richard M. Moore, Judge Presiding

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BEFORE: GUIDRY, THERIOT, AND PENZATO, JJ.

*MT*  
*Qly*  
*zhp*

## **THERIOT, J.**

Terence Alost, M.D. appeals the Nineteenth Judicial District Court's judgment granting Willis-Knighton Medical Center's exceptions of improper cumulation of actions and improper venue, and Danny Lawler and Danny Lawler Enterprises, L.L.C.'s exception of improper venue and motion for *forum non conveniens*. For the following reasons, we affirm in part as amended, reverse in part, and remand this matter to the Nineteenth Judicial District Court for further proceedings consistent with this opinion.

### **FACTS AND PROCEDURAL HISTORY**

On October 14, 2017, shortly after 1:00 p.m., Joe Lawler was transported via ambulance to the Willis-Knighton Bossier Emergency Department, located in Shreveport, Louisiana. The Willis-Knighton Bossier Emergency Department is owned and operated by Willis-Knighton Medical Center ("Willis-Knighton"), which also employs the hospital's staff. At this time, Terence Alost, M.D. ("Dr. Alost") was working as a physician in the Willis-Knighton Bossier Emergency Department. Joe Lawler was seen by Dr. Alost shortly after arriving, but was not admitted into the hospital until after 5:00 p.m. Joe Lawler's son, Danny Lawler ("Mr. Lawler"), arrived at the hospital after his father was brought in but before his father was admitted. While waiting with his father, Mr. Lawler created a Facebook post about the poor service his father had allegedly received at the Willis-Knighton Bossier Emergency Department.

Dr. Alost claims that, on October 19, 2017, his supervisor brought Mr. Lawler's Facebook post to his attention. Subsequently, in the October 20-26, 2017 issue of *The Inquisitor*, a publication owned and operated by Mr. Lawler, an article written by Mr. Lawler titled "Untold Horror Stories of the ER" was published. In the article, Mr. Lawler alleged that several hours had passed before his father was seen by an emergency room ("ER") doctor. Mr. Lawler also claimed that the

nurses at Willis-Knighton told him that Dr. Alost was the “worst” doctor at the hospital. The article included allegations made by others involving their own bad experiences at Willis-Knighton; these allegations seem to have come in part from comments on Mr. Lawler’s Facebook post. One of these allegations was that “the ER doctor” had been rude. Another claimed that Dr. Alost had insulted and belittled a patient who feared that she was having a heart attack. The article then reiterated that the service provided by Dr. Alost had been “poor”.

On January 30, 2018, Dr. Alost filed a petition for damages against Mr. Lawler, Danny Lawler Enterprises, L.L.C.<sup>1</sup> (collectively “the Lawler defendants”) and Willis-Knighton. In his petition, Dr. Alost claimed that any negative comments about him made by a nurse employed by Willis-Knighton were made with malice, knowledge of the statement’s falsity, reckless disregard for the truth, or negligence.<sup>2</sup> Dr. Alost alleged the same of the stories posted in Mr. Lawler’s article. Dr. Alost further claimed that his employment with Willis-Knighton was terminated shortly after the article was published. Dr. Alost alleged that, as a result of the publication, he sustained damages in East Baton Rouge Parish and “endured the loss of the public’s goodwill, damage to his professional reputation, loss of past and future income, pain and suffering, and emotional distress.” This petition was filed in the Nineteenth Judicial District Court in East Baton Rouge Parish.

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<sup>1</sup> Mr. Lawler publishes *The Inquisitor* through Lawler Enterprises.

<sup>2</sup> Although the petition does not specifically state that Dr. Alost’s suit is defamation-based, the language used within suggests as much. Defamation is a tort involving the invasion of a person’s interest in his or her reputation and good name. *Kennedy v. Sheriff of East Baton Rouge*, 2005-1418 (La. 7/10/06); 935 So.2d 669, 674. Four elements are necessary to establish a claim for defamation: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault (negligence or greater) on the part of the publisher; and (4) resulting injury. *Id.* The fault requirement is generally referred to in the jurisprudence as malice, actual or implied. *Id.*

Further, based on the language within the petition, it appears that Dr. Alost is alleging that Willis-Knighton is vicariously liable for the alleged actions of the nurse. An employer may be held vicariously liable in tort for the intentional acts of its employees. *Carr v. Sanderson Farm, Inc.*, 2015-0953 (La. App. 1 Cir. 2/17/16); 189 So.3d 450, 454. An employer is not vicariously liable, however, merely because his employee commits an intentional tort on the business premises during work hours. *Id.* Vicarious liability will attach in such a case only if the employee who commits the intentional act does so within the ambit of his assigned duties and in furtherance of his employer’s objective. *Id.* Although the parties have asserted arguments regarding whether Willis-Knighton is vicariously liable for the unnamed nurse’s alleged actions, the issue of vicarious liability is not properly before this court.

On March 16, 2018, Willis-Knighton filed a dilatory exception of improper cumulation of actions and a declinatory exception of venue. Willis-Knighton argued that Dr. Alost failed to name a cause of action anywhere in his lawsuit. Accordingly, Willis-Knighton asserted that the only possible claims Dr. Alost could be attempting to assert would be a breach of contract claim against Willis-Knighton because of his termination, and a defamation lawsuit against the Lawler defendants. Willis-Knighton alleged that Dr. Alost's legal arguments against Willis-Knighton and his legal arguments against the Lawler defendants were independent from one another and based on separate and distinct fact patterns. As such, Willis-Knighton asserted that Dr. Alost had improperly cumulated his action against the Lawler defendants with his action against Willis-Knighton. Willis-Knighton also challenged Dr. Alost's choice of venue, arguing that venue would be more appropriate in Caddo Parish or Bossier Parish rather than in East Baton Rouge Parish.

On March 23, 2018, the Lawler defendants filed a declinatory exception of improper venue and a motion for *forum non conveniens*. In a supporting memorandum, the Lawler defendants asserted that the proper venue for Dr. Alost's lawsuit was Caddo Parish, not East Baton Rouge Parish. Alternatively, the Lawler defendants argued that East Baton Rouge Parish is a *forum non conveniens*, because the majority of the witnesses, parties, and evidence are located in Caddo Parish and Bossier Parish. On March 23, 2018, the Lawler defendants filed a dilatory exception of improper cumulation of actions, asserting essentially the same arguments as Willis-Knighton.

On May 4, 2018, the trial court signed a judgment that granted Willis-Knighton's exceptions of improper cumulation of actions and improper venue, as well as the Lawler defendants' exception of improper venue and motion for *forum*

*non conveniens*.<sup>3</sup> The trial court dismissed Dr. Alost's action, without prejudice, at his cost. Dr. Alost filed a motion for new trial on May 15, 2018, which was denied. This appeal followed.

### ASSIGNMENT OF ERROR

Dr. Alost assigns the following as error:

- (1)The trial court erred by granting defendants' exceptions of improper venue, exception of improper cumulation, and the motion for *forum non conveniens*.

### STANDARD OF REVIEW

A trial court's dismissal for *forum non conveniens* is reviewed by a court of appeal for an abuse of discretion. *Martinez v. Marlow Trading, S.A.*, 2004-0538 (La. App. 4 Cir. 2/2/05); 894 So.2d 1222, 1225. Venue is a question of law, which is reviewed *de novo* by the appellate court. *Price v. Roy O. Martin Lumber Co.*, 2004-0227 (La. App. 1 Cir. 4/27/05); 915 So.2d 816, 824, *writ denied*, 2005-1390 (La. 1/27/06); 922 So.2d 543. A trial court's granting of a dilatory exception raising the objection of improper cumulation is a final judgment subject to a manifest error standard of review. *Alonzo v. Cain*, 2014-0172 (La. App. 1 Cir. 9/19/14); 154 So.3d 551, 553, *writ denied*, 2014-2165 (La. 12/8/14); 153 So.3d 445.

### DISCUSSION

#### Willis-Knighton's Exception of Improper Venue

We first address whether East Baton Rouge Parish is a proper venue for Dr. Alost's claims against Willis-Knighton. As a general rule, an action against an individual who is domiciled in Louisiana shall be brought in the parish of his domicile. La. Code. Civ. P. art. 42(1). An action against a domestic limited

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<sup>3</sup> The judgment at issue did not mention the Lawler defendants' dilatory exception of improper cumulation of actions. Generally, silence in a judgment of the trial court as to any issue, claim, or demand placed before the court is deemed a rejection of the claim and the relief sought is presumed to be denied. *Schoolhouse, Inc. v. Fanguy*, 2010-2238 (La. App. 1 Cir. 6/10/11); 69 So.3d 658, 664.

liability company shall be brought in the parish where its registered office is located. La. Code Civ. P. art. 42(2). An action against a domestic corporation shall be brought in the parish where its registered office is located. La. Code Civ. P. art. 42(2). The general rules of venue set out in La. Code Civ. P. art. 42 are subject to certain exceptions. La. Code Civ. P. art. 43. Generally, for purposes of the venue exception, the allegations of the plaintiff's petition are taken as true. *Chumley v. White*, 46,479 (La. App. 2 Cir. 11/9/11); 80 So.3d 39, 42, *writ denied*, 2011-2741 (La. 2/17/12); 82 So.3d 288. However, when evidence is offered at trial on the exception, the court is not bound to accept as true the allegations of the petition. *Chumley*, 80 So.3d at 42 (citing *Price*, 915 So.2d at 825).<sup>4</sup>

Louisiana Code of Civil Procedure article 74 provides that an action for the recovery of damages for an offense may be brought in the parish where the wrongful conduct occurred, or in the parish where the damages were sustained. According to Dr. Alost's petition, the alleged defamatory statement made by the nurse at Willis-Knighton occurred in the Willis-Knighton Bossier Emergency Department, which is located in Bossier Parish.

A plaintiff invoking the provisions of La. Code Civ. P. art. 74 must allege sufficient facts to prove that the chosen venue is proper. *Sorrento Companies, Inc. v. Honeywell Intern., Inc.*, 2004-1884 (La. App. 1 Cir. 9/23/05); 916 So.2d 1156, 1162, *writ denied*, 2005-2326 (La. 3/17/06); 925 So.2d 541. Considering that the only allegations against the Willis-Knighton nurse related to conduct that occurred in the Willis-Knighton Bossier Emergency Department, we find that Dr. Alost has failed to allege sufficient facts in his petition to support his assertion that venue is proper in East Baton Rouge Parish as to Willis-Knighton. Therefore, Willis-

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<sup>4</sup> On March 16, 2018, Willis-Knighton filed a dilatory exception of improper cumulation of actions and a declinatory exception of venue. Attached to this exception was an affidavit in which Mr. Lawler attests to the number of subscribers that The Inquisitor has in East Baton Rouge Parish. This affidavit was not entered into evidence at the April 9, 2018 hearing on the exceptions. Evidence not properly and officially offered and introduced cannot be considered, even if it is physically placed in the record. *Denoux v. Vessel Management Services, Inc.*, 2007-2143 (La. 5/21/08); 983 So.2d 84, 88. Documents attached to memoranda do not constitute evidence and cannot be considered as such on appeal. *Denoux*, 983 So.2d at 88. Accordingly, we cannot consider Mr. Lawler's affidavit.

Knighton's exception of improper venue was properly granted by the trial court. Willis-Knighton was thus properly dismissed, without prejudice.<sup>5</sup> Accordingly, we affirm the portion of the judgment granting Willis-Knighton's exception of improper venue.

#### Willis-Knighton's Exception of Improper Cumulation

Willis-Knighton's exception of improper cumulation was supported by Willis-Knighton's reading of Dr. Alost's petition as alleging a breach of contract. Thus, their exception of improper cumulation was based on the premise that Dr. Alost's causes of action were independent from one another and based on separate and distinct fact patterns. However, Dr. Alost has asserted that his claims against Willis-Knighton, like his claims against the Lawler defendants, are not based upon breach of contract but are defamation-based. Accordingly, Willis-Knighton's exception of improper cumulation is moot. *See In re E.W.*, 2009-1589 (La. App. 1 Cir. 5/7/10); 38 So.3d 1033, 1037 ("An issue is moot when a judgment or decree on that issue has been 'deprived of practical significance' or 'made abstract or purely academic.'").

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<sup>5</sup> Dr. Alost has asserted in brief that Willis-Knighton and the Lawler defendants should be solidarily liable as joint tortfeasors. Louisiana Code of Civil Procedure article 73, which governs venue for actions against joint or solidary obligors, provides in pertinent part:

A. An action against joint or solidary obligors may be brought **in a parish of proper venue, under [La. Code Civ. P. art.] 42 only**, as to any obligor who is made a defendant provided that an action for the recovery of damages for an offense or quasi-offense against joint or solidary obligors may be brought in the parish where the plaintiff is domiciled **if the parish of plaintiff's domicile would be a parish of proper venue against any defendant under either [La. Code Civ. P.] art. 76 or R.S. 13:3203.** (Emphasis added.)

Louisiana Code of Civil Procedure article 76 provides an exception to the general venue rules in certain circumstances involving insurance policies. Louisiana Revised Statutes 13:3203 applies to suits brought under La. R.S. 13:3201, which governs personal jurisdiction over nonresidents. Because neither of these circumstances are pertinent here, the exception provided in La. Code Civ. P. art. 73 does not apply.

The general rule in La. Code Civ. P. art. 73 is that an action against joint or solidary obligors may be brought in a parish of proper venue under La. Code Civ. P. art. 42 only. As stated above, La. Code Civ. P. art. 42 provides the general rule that actions against an individual domiciled in Louisiana shall be brought in the parish of his domicile, while actions against a domestic limited liability company or a domestic corporation shall be brought in the parish where its registered office is located. According to Dr. Alost's petition, all of the defendants are domiciled in Caddo Parish. Thus, even if the defendants are solidarily liable, the venue exception provided in La. Code Civ. P. art. 76 is not applicable.

## The Lawler Defendants' Exception of Improper Venue

The trial court also granted the Lawler defendants' exception of venue. Generally, for purposes of the venue exception, the allegations of the plaintiff's petition are taken as true. *Chumley*, 80 So.3d at 42. We note that when evidence is offered at trial on the exception, the court is not bound to accept as true the allegations of the petition. *Chumley*, 80 So.3d at 42 (citing *Price*, 915 So.2d at 825). However, no evidence was presented at the hearing on the exceptions raised by the defendants.<sup>6</sup> Accordingly, we must accept Dr. Alost's allegations within his petition as true. In his petition, Dr. Alost asserts that venue is proper in East Baton Rouge Parish because his injuries were sustained there. Dr. Alost further asserts that Mr. Lawler (via Lawler Enterprises) directed his remarks at Dr. Alost in East Baton Rouge Parish and that publication was made throughout Louisiana via Facebook, the electronic version of *The Inquisitor*, and the physical version of the publication.

Dr. Alost argues that, according to La. Code Civ. P. art. 74, East Baton Rouge Parish is the proper venue for his claims against the Lawler defendants because defamation is a transitory tort that can be perpetrated in multiple places at once, meaning that venue is proper wherever publication is made. Dr. Alost asserts that *The Inquisitor* was published throughout the state of Louisiana, meaning venue would also be proper in East Baton Rouge Parish.

Allegation #6 of Dr. Alost's petition alleges the following:

Venue is proper in [East Baton Rouge Parish] because Dr. Alost's injuries were sustained in East Baton Rouge Parish. Defendant Lawler directed his remarks at Dr. Alost in East Baton Rouge Parish. And publication was made throughout the State of Louisiana via Facebook, the electronic version of The Inquisitor, and the physical version of the paper.

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<sup>6</sup> In brief, the Lawler defendants also reference Mr. Lawler's affidavit. As previously stated, this affidavit was not properly entered into evidence and thus cannot be considered. See *Denoux*, 983 So.2d at 88.



Considering these allegations, and because the Lawler defendants offered no evidence to the contrary at the hearing on their exceptions, we are constrained to accept as true Dr. Alost's assertions that Mr. Lawler directed his remarks towards Dr. Alost in East Baton Rouge Parish and that both the electronic version and the physical version of *The Inquisitor* were accessed throughout Louisiana, including in East Baton Rouge Parish. Thus, under the facts of this case, we are compelled to find that the trial court erred in granting the Lawler defendants' exception of venue. Accordingly, we reverse the portion of the judgment granting the Lawler defendants' exception of improper venue.

The Lawler Defendants' Motion for *Forum Non Conveniens*

The trial court also granted the Lawler defendants' motion for *forum non conveniens*. The doctrine of *forum non conveniens* is set forth in La. Code Civ. P. art. 123(A), which states:

For the convenience of the parties and the witnesses, in the interest of justice, a district court upon contradictory motion, or upon the court's own motion after contradictory hearing, may transfer a civil case to another district court where it might have been brought; **however, no suit brought in the parish in which the plaintiff is domiciled, and in a court which is otherwise a court of competent jurisdiction and proper venue, shall be transferred to any other court pursuant to this Article.** (Emphasis added.)

Dr. Alost brought suit in East Baton Rouge Parish, which is his parish of domicile. Because East Baton Rouge Parish is a proper venue for Dr. Alost's action against the Lawler defendants, and because Dr. Alost brought suit in the parish in which he is domiciled, Dr. Alost's suit against the Lawler defendants cannot be transferred based on *forum non conveniens*. See *Antin-Quealy, Inc. v. WTA Marine, Inc.*, 99-0952 (La. 6/4/99); 735 So.2d 623, 623-24. Accordingly, the trial court abused its discretion in granting this motion. We therefore reverse the portion of the judgment granting the Lawler defendants' motion for *forum non conveniens*.

## DECREE

For the above and foregoing reasons, the judgment of the Nineteenth Judicial District Court is affirmed insofar as it granted Willis-Knighton Medical Center's exception of improper venue. Willis-Knighton Medical Center's exception of improper cumulation is moot. The judgment is reversed insofar as it granted Danny Lawler and Danny Lawler Enterprises, L.L.C.'s exception of improper venue and motion for *forum non conveniens*. The judgment is amended to dismiss Willis-Knighton Medical Center. This matter is remanded to the Nineteenth Judicial District Court for further proceedings consistent with this opinion. Costs of this appeal are assessed one-half to Terence Alost, M.D., and one-half to Danny Lawler and Danny Lawler Enterprises, L.L.C.

**AFFIRMED IN PART AS AMENDED, REVERSED IN PART, AND REMANDED.**