

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2018-IA-01421-SCT

DR. TIMOTHY CHEN

v.

DANIEL SHOPE

DATE OF JUDGMENT: 09/27/2018
TRIAL JUDGE: HON. LARITA M. COOPER-STOKES
TRIAL COURT ATTORNEYS: ABBY GALE ROBINSON
TONEY ANTHONY BALDWIN
EUGENE RANDOLPH NAYLOR
REX MORRIS SHANNON, III
COURT FROM WHICH APPEALED: HINDS COUNTY COUNTY COURT
ATTORNEYS FOR APPELLANT: REX MORRIS SHANNON, III
EUGENE RANDOLPH NAYLOR
ATTORNEY FOR APPELLEE: ABBY GALE ROBINSON
NATURE OF THE CASE: CIVIL - MEDICAL MALPRACTICE
DISPOSITION: REVERSED AND REMANDED - 09/12/2019
MOTION FOR REHEARING FILED:
MANDATE ISSUED:

BEFORE RANDOLPH, C.J., ISHEE AND GRIFFIS, JJ.

RANDOLPH, CHIEF JUSTICE, FOR THE COURT:

¶1. This interlocutory appeal is taken from the trial court's denial of Dr. Timothy Chen's motion to transfer venue from Hinds County to Madison County and the denial of his motion to strike the affidavit of Daniel Shope. We find that the trial court abused its discretion in denying both motions, that the trial court's order should be reversed, and that this case should be remanded with instructions to transfer venue to the County Court of Madison County.

FACTS AND PROCEEDINGS BELOW

¶2. Shope filed his original complaint against Chen in the County Court of the First Judicial District of Hinds County, alleging that Chen “medically aided and contributed” to Shope’s opioid drug dependency by prescribing Shope Hydrocodone-Acetaminophen and Tramadol after he was hospitalized for an opioid overdose. In his complaint, Shope admits that a separate doctor was the “initial tort feisor [sic]” and that Chen had exacerbated Shope’s injuries. Chen was the only defendant in the original complaint.

¶3. Chen immediately moved to transfer venue to Madison County because Chen only practiced in Madison County, where he saw Shope. In support of his motion, Chen filed an affidavit stating that

The only location where I ever saw Plaintiff Daniel Shope as a patient was at the Baptist Medical Clinic—Madison located at 401 Baptist Drive, Suite 104, Madison, Madison County, Mississippi, 39110.

In response, Shope filed his own affidavit which stated, in full,

1. My name is Daniel Shope. I am a citizen of Hinds County.
2. When I overdosed on Opioids, I went to the Baptist Hospital in Jackson.
3. The Baptist Hospital called Dr. Timothy Chen and asked him what to do for me. Dr. Chen told them to give me medicine and they did what he said and gave me the medicine.
4. All of this happened at Baptist Hospital in Jackson.

Chen moved to strike Shope’s affidavit because of numerous legal deficiencies: (1) it was not made on personal knowledge, (2) it was predicated on inadmissible hearsay, (3) it was void of supporting foundational facts, and (4) it was void of evidence that Shope was competent to testify on the matters stated.

¶4. On the same day Chen filed his motion to transfer venue, Shope filed an amended

complaint adding Mississippi Baptist Hospital (Baptist). Baptist moved for dismissal based on Shope's failure to provide presuit notice. In response, Shope argued that notice was provided to Baptist when he provided notice to one of its doctors—Chen. Alternatively, Shope moved to stay the case for thirty days in an attempt to cure his failure to give presuit notice.¹ Later, Shope filed a motion for leave to amend his complaint “to resolve excusable neglect [Miss. R. Civ. P.] 6(b) defects” that would “dispose of all of Defendants’ motions. . . .” Baptist opposed Shope’s motion to amend again because Shope had failed to provide the requisite presuit notice to Baptist Hospital, and the amendment of the complaint could not cure that failure. Baptist Hospital argued that the court lacked subject-matter jurisdiction and that its motion to dismiss should be granted.

¶5. After hearing all pending motions, the trial judge denied Chen’s motion to transfer venue and motion to strike Shope’s affidavit, granted Baptist Hospital’s motion to dismiss, and dismissed without prejudice Shope’s amended complaint.

¶6. Chen petitioned this Court for interlocutory review of the trial judge’s denial of his motion to transfer and motion to strike Shope’s affidavit. Chen’s petition was granted.

STATEMENT OF THE ISSUES

- I. Whether the trial court erred by denying Chen’s motion to strike Shope’s affidavit.
- II. Whether the trial court erred by denying Chen’s motion to transfer venue.

STANDARD OF REVIEW

¹ Shope does not provide an explanation or legal support as to how a stay could cure his failure to provide presuit notice.

¶7. “The decision to deny or grant a motion for a change of venue lies within the discretion of the trial court.” *Bayer Corp. v. Reed*, 932 So. 2d 786, 788 (Miss. 2006) (citing *Beech v. Leaf River Forest Prods., Inc.*, 691 So. 2d 446, 448 (Miss.1997)). “[T]he plaintiff selects among the permissible venues, and his choice must be sustained unless in the end there is no credible evidence supporting the factual basis for the claim of venue.” *Wilkerson v. Goss*, 113 So. 3d 544, 548 (Miss. 2013) (footnote omitted) (internal quotation marks omitted) (quoting *Hedgepeth v. Johnson*, 975 So. 2d 235, 238 (Miss. 2008)). Likewise, a trial court’s grant or denial of a motion to strike an affidavit also is subject to an abuse-of-discretion standard of review. *Trustmark Nat’l Bank v. Meador*, 81 So. 3d 1112, 1116 (Miss. 2012) (citing *Schmidt v. Catholic Diocese of Biloxi*, 18 So. 3d 814, 832 (Miss. 2009)).

ANALYSIS

I. Whether the trial court erred by denying Chen’s motion to strike Shope’s affidavit.

¶8. We find that the trial court abused her discretion by denying Chen’s motion to strike Shope’s affidavit. Under Mississippi Rule of Civil Procedure 56(e), “[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify on the matter stated therein.” Miss. R. Civ. P. 56(e). “While most affidavits are hearsay, they are nevertheless properly considered . . . as long as they are based on personal knowledge and set forth facts such as would be admissible in evidence.” *Levens v. Campbell*, 733 So. 2d 753, 758 (Miss. 1999) (citing *Stewart v. Se. Foods, Inc.*, 688 So. 2d 733, 734 (Miss. 1996);

Miss. R. Civ. P. 56(e)). “Therefore, portions of affidavits that contain inadmissible testimony or allegations that are not based on personal knowledge must be struck and cannot be considered” *Meador*, 81 So. 3d at 1117.

¶9. Shope’s affidavit is based only on an alleged telephone conversation between Baptist and Chen. Shope admits that he was at the hospital because of a drug overdose. He does not identify the person who allegedly called Chen, the person who allegedly informed Shope of the call, the substance of the call, or even the medicine that was allegedly prescribed by Chen. His conclusory, self-serving affidavit is unsupported by material facts and is insufficient to support his claim that venue is proper in Hinds County. *See Buckel v. Chaney*, 47 So. 3d 148, 154 (Miss. 2010).

¶10. Shope has no proof based on personal knowledge that “[t]he Baptist Hospital called Dr. Timothy Chen and asked him what to do for me. Dr. Chen told them to give me medicine and they did what he said and gave me the medicine.” Shope’s statements in his affidavit are inadmissible hearsay and should have been excluded. Hearsay is defined as “a statement, other than one made by the declarant while testifying at trial or hearing, offered into evidence to prove the truth of the matter asserted.” Miss. R. Evid. 801(c). Although there are some exceptions to the hearsay rule, this hearsay does not fall under any of the recognized exceptions provided in the Mississippi Rules of Evidence. Given the fact that Shope’s statements in his affidavit are hearsay, are not based on personal knowledge, and are not supported by material facts, this Court reverses the order of the trial court denying Chen’s motion to strike Shope’s affidavit.

II. Whether the trial court erred by denying Chen’s motion to transfer venue.

¶11. “Venue is a function of statute.” *Park on Lakeland Drive, Inc. v. Spence*, 941 So. 2d 203, 206 (Miss. 2006) (internal quotation marks omitted) (quoting *Flight Line, Inc. v. Tanksley*, 608 So. 2d 1149, 1155 (Miss. 1992)). The venue statute implicated in today’s case is Mississippi Code Section 11-11-3(3) (Rev. 2004), which provides that venue in an alleged medical-malpractice action filed against the physician is only proper “in the county in which the alleged act or omission occurred.”

¶12. Venue is determined at the time the lawsuit is filed. *Forrest Gen. Hosp. v. Upton*, 240 So. 3d 410, 416 (Miss. 2018) (citing *Austin v. Wells*, 919 So. 2d 961, 964 (Miss. 2006)). “In venue disputes courts begin with the well-pleaded allegations of the complaint. These, of course, may be supplemented—and contested—by affidavits or other evidence in cognizable form.” *Miss. Dep’t of Human Servs. v. S.C.*, 119 So. 3d 1011, 1013 (Miss. 2013) (internal quotation marks omitted) (quoting *Tanksley*, 608 So. 2d at 1155). While it is well settled that it is the plaintiff’s right to select among permissible venues, venue is also a valuable right to the defendant. *See Tanksley*, 608 So. 2d at 1155; *Spence*, 941 So. 2d at 207.

¶13. Here, venue was not proper in Hinds County at the time of filing. The initial complaint named only Chen as a defendant. The initial complaint made no statement concerning why venue was proper in Hinds County. Chen maintains that he never treated Shope outside of his practice, which is solely in Madison County. The only other evidence submitted by Shope, aside from the affidavit this Court has found should have been struck by the trial court, were two pages from Shope’s medical records from Baptist. One page reflects after-

care instructions for opioid dependence provided to Shope by a Dr. Johnson. Chen's name is nowhere in this record. The second page is from an emergency department nursing assessment, which merely lists Chen as Shope's primary-care physician in the "Additional Pertinent History" section. Neither of these records reflect any instruction, order, or care provided by Chen to Shope at Baptist in Hinds County.

¶14. Moreover, were this Court to find that the trial judge did not abuse her discretion by denying the motion to strike the affidavit, Shope offers no evidence that Chen committed any act or omission in Hinds County. The affidavit, at best, merely states that Chen ordered an unknown drug for Shope after his overdose and that the drug was administered to Shope at Baptist Hospital. His affidavit makes no claim that Chen engaged in any tortious conduct or that he caused harm to Shope. Because the record in today's case supports that venue is only proper in Madison County, we reverse the order of the trial court denying Chen's motion to transfer venue and remand this case with instructions to transfer venue to the County Court of Madison County.

CONCLUSION

¶15. The trial court abused its discretion in denying Chen's motion to strike Shope's affidavit and his motion to transfer venue. This Court reverses both orders and remands this case with instructions to transfer venue to the County Court of Madison County.

¶16. **REVERSED AND REMANDED.**

**KITCHENS AND KING, P.JJ., COLEMAN, MAXWELL, BEAM,
CHAMBERLIN, ISHEE AND GRIFFIS, JJ., CONCUR.**