

DA 18-0629

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 150

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CHARLES S. LUCERO, as Personal Representative of  
the Estate of Markkaya Jean Gullett, on Behalf of the  
Heirs and Estate of Markkaya Jean Gullett,

Plaintiff and Appellee,

v.

FORD MOTOR COMPANY, a Delaware corporation,

Defendant and Appellant,

and

THE GOODYEAR TIRE & RUBBER COMPANY, an Ohio Corporation;  
THE KELLY-SPRINGFIELD TIRE CORPORATION, a Maryland Corporation;  
LLOYD'S TIRE SERVICE, a Washington Corporation;  
TIRES PLUS, INC., a Montana Corporation; and DOES 1THROUGH 10,

Defendants.

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APPEAL FROM: District Court of the Eighth Judicial District,  
In and For the County of Cascade, Cause No. ADV-18-0247(B)  
Honorable Elizabeth Best, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

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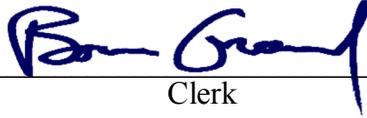
Dennis P. Conner, Keith D. Marr, James Robert "JR" Conner, Conner &  
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Submitted on Briefs: April 17, 2019

Decided: July 2, 2019

Filed:

  
Clerk

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Justice Ingrid Gustafson delivered the Opinion of the Court.

¶1 Defendant Ford Motor Company (Ford) files an interlocutory appeal challenging the Eighth Judicial District Court’s denial of its motion to change venue. We affirm.

¶2 This Court restates the issue on appeal as follows:

*Whether the county in which a decedent’s personal representative resides is a proper venue in survival and wrongful death actions pursuant to § 25-2-122(2), MCA.*

### **FACTUAL AND PROCEDURAL BACKGROUND**

¶3 On May 22, 2015, Markkaya Gullett (Decedent), a resident of Mineral County, Montana, died of injuries suffered when her 1996 Ford Explorer lost stability and rolled into a ditch in Mineral County. Charles Lucero is the personal representative of Decedent’s estate.

¶4 On May 2, 2018, Lucero filed suit against Ford in Cascade County, Montana, on behalf of Decedent and her heirs. The complaint alleges three claims against Ford: strict liability for design defects; strict liability for failure to warn; and negligence. The estate seeks compensatory and punitive damages against Ford. Additionally, the complaint alleges strict liability for design defects and failure to warn, and negligence against Goodyear Tire and Rubber Company, Kelly-Springfield Tire Corporation, and Lloyd’s Tire Service, and negligence against Tires Plus, Inc. (Tires Plus).

¶5 On July 6, 2018, Ford filed a motion to dismiss for lack of personal jurisdiction, or, in the alternative, a motion for change of venue pursuant to § 25-2-201(1) and (3), MCA. On August 31, 2018, Tires Plus joined Ford’s motion to change venue. Ford requested that

venue be changed to Mineral or Missoula County, Montana. Tires Plus requested that venue be changed to Mineral or Sanders County, Montana.

¶6 On October 10, 2018, the District Court denied Ford’s motion to dismiss for lack of personal jurisdiction, and denied Ford’s motion to change venue. Ford petitioned this Court for a writ of supervisory control to determine whether Montana has specific personal jurisdiction over Ford, and filed an interlocutory appeal asking this Court to determine whether Cascade County is a proper venue under Montana law. On May 21, 2019, this Court accepted supervisory control and concluded that Montana has specific personal jurisdiction over Ford in this case. *Ford Motor Co. v. Mont. Eighth Judicial Dist. Court*, 2019 MT 115, ¶ 1, 395 Mont. 478. We presently consider Ford’s interlocutory appeal regarding its motion for a change of venue.

¶7 The facts necessary to determine whether Cascade County is a proper venue are as follows. The rollover and Decedent’s death occurred in Mineral County. Decedent resided in Mineral County. Lucero resides in Cascade County. Lucero filed his complaint in Cascade County. Ford is a Delaware company with its principal place of business in Dearborn, Michigan. Ford sells cars and trucks in all fifty states and has thirty-six dealerships in Montana. Ford’s registered agent is in Missoula County. Tires Plus is a Montana corporation with its principal place of business in Sanders County.

#### **STANDARD OF REVIEW**

¶8 “A district court’s decision to transfer venue because the complaint was not filed in the proper county (i.e., under § 25-2-201(1), MCA) is a conclusion of law,” which this

Court reviews de novo. *BNSF Ry. Co. v. State ex rel. Dep't of Env'tl. Quality*, 2010 MT 46, ¶ 7, 355 Mont. 296, 228 P.3d 1115.

¶9 A district court's decision to transfer venue to promote the convenience of the witnesses and the ends of justice (i.e., under § 25-2-201(3), MCA) is discretionary. *BNSF Ry. Co.*, ¶ 7. Unlike a decision made pursuant to § 25-2-201(1), MCA, a discretionary decision made pursuant to § 25-2-201(3), MCA, is not subject to interlocutory appeal. *BNSF Ry. Co.*, ¶ 11.

### DISCUSSION

*Whether the county in which a decedent's personal representative resides is a proper venue in survival and wrongful death actions pursuant to § 25-2-122(2), MCA.*

¶10 A district court must grant a motion to change venue “when the county designated in the complaint is not the proper county.” Section 25-2-201(1), MCA.<sup>1</sup> Therefore, the dispositive issue is whether Cascade County is a proper venue pursuant to Montana's venue statutes, such that the District Court correctly denied Ford's motion to change venue.

¶11 Pursuant to Montana's venue statutes, venue may be proper in more than one county. Section 25-2-115, MCA. The Montana Legislature has enacted specific venue statutes applicable to certain types of claims. *Farmers Union Ass'n v. Paquin*, 2009 MT 305, ¶ 7,

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<sup>1</sup> Section 25-2-201(3), MCA, additionally states that a court must, on motion, change the place of trial “when the convenience of witnesses and the ends of justice would be promoted by the change.” Ford filed a motion to change venue pursuant to § 25-2-201(1) and (3), MCA, which the District Court denied. The District Court's discretionary decision, made pursuant to § 25-2-201(3), MCA, is not subject to interlocutory appeal. *See BNSF Ry. Co.*, ¶¶ 7, 11. This Court considers de novo only whether Cascade County is a proper county pursuant to § 25-2-201(1), MCA.

352 Mont. 390, 217 P.3d 74. The venue statute applicable to tort claims is § 25-2-122, MCA. Section 25-2-122(2), MCA, states:

[I]f the defendant is a corporation incorporated in a state other than Montana, the proper place of trial for a tort action is:

- (a) the county in which the tort was committed;
- (b) the county in which the plaintiff resides; or
- (c) the county in which the corporation's resident agent is located, as required by law.

“[A]n action brought in any such county is brought in a proper county.” Section 25-2-115, MCA.

¶12 In an action involving multiple defendants, “a county that is a proper place of trial for any defendant is proper for all defendants.” Section 25-2-117, MCA; *Farmers Union Ass'n*, ¶ 8. A defendant in an action involving multiple defendants may file a motion to change venue only when the venue “is not a proper place of trial for any of the defendants.” Section 25-2-117, MCA. “The right to move for a change of venue under § 25-2-117, MCA, applies only if the action is filed in a county that is a proper place of trial for none of the defendants.” *Farmers Union Ass'n*, ¶ 12. Therefore, a district court may not grant a motion to change venue pursuant to § 25-2-201(1), MCA, where any defendant is an out-of-state corporation, the action arises in tort, and the action is brought in a proper county pursuant to § 25-2-122(2)(a)-(c), MCA. Sections 25-2-115, -117, MCA.

¶13 The parties do not dispute that § 25-2-122(2), MCA, governs this case. Ford is a corporation incorporated in a state other than Montana and Lucero brought survival and

wrongful death claims against Ford, which sound in tort. Likewise, neither party disputes that Lucero, as the Decedent's personal representative, is the named plaintiff in this matter.

¶14 “An action must be prosecuted in the name of the real party in interest.” M. R. Civ. P. 17(a)(1). In an action for wrongful death, “the personal representative of the decedent's estate may maintain an action for damages against the person causing the death.” Section 27-1-513, MCA. The personal representative is the proper party to maintain a wrongful death action. M. R. Civ. P. 17(a)(1)(A) expressly states that executors “may sue in their own names” without joining decedents.

¶15 Ford argues that “the county in which the plaintiff resides” means the county in which the Decedent resided before her death. Section 25-2-122(2)(b), MCA, unambiguously employs the terms “plaintiff” and “resides” in the present tense. The Decedent can no longer bring these claims on her own behalf, nor does she reside anywhere in the present tense. Had the Legislature intended to relate venue to the county where a deceased tort victim resided prior to death, it could have inserted the term decedent into the statutory language. It did not. This Court will “not insert omitted terms into a statute.” *See Montco v. Simonich*, 285 Mont. 280, 287, 947 P.2d 1047, 1051 (1997).

¶16 Lucero is the plaintiff in this action, in whose county of residence venue is proper pursuant to § 25-2-122(2), MCA. Based on the plain language of § 25-2-122(2), MCA, Lucero may properly bring a survival and wrongful death action against Ford in: (a) Mineral County, where the rollover and Decedent's death occurred; (b) Cascade

County, where Lucero resides; and (c) Missoula County, where Ford's agent is located.<sup>2</sup> Lucero filed survival and wrongful death claims against Ford in Cascade County, his county of residence, which is a proper venue pursuant to § 25-2-122(2)(b), MCA. The District Court may not grant Ford's motion to change venue pursuant to § 25-2-201(1), MCA, because Ford is an out-of-state corporation, Lucero brought a tort action against Ford, and Cascade County is a proper venue pursuant to § 25-2-122(2)(b), MCA. *See* §§ 25-2-115, -117, MCA. Therefore, the District Court properly denied Ford's motion to change venue.

### CONCLUSION

¶17 Venue is proper in Cascade County. The District Court properly denied Ford's motion to change venue pursuant to § 25-2-201(1), MCA, because Lucero, the named plaintiff in this proceeding, properly brought a survival and wrongful death action against Ford in Cascade County pursuant to § 25-2-122(2)(b), MCA.

¶18 Affirmed.

/S/ INGRID GUSTAFSON

We concur:

/S/ MIKE McGRATH

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<sup>2</sup> Pursuant to § 25-2-122(1), MCA, the proper place of trial for a tort involving Tires Plus, a Montana Corporation, is:

(a) the county in which the defendants or any of them reside at the commencement of the action; or

(b) the county in which the tort was committed.

However, this proceeding involves multiple defendants, including Ford, which is an out-of-state corporation. Therefore, any "county that is a proper place of trial for" Ford is a proper place of trial for Tires Plus. *See* § 25-2-117, MCA.

/S/ DIRK M. SANDEFUR  
/S/ JAMES JEREMIAH SHEA  
/S/ BETH BAKER

Justice Laurie McKinnon, dissenting.

¶19 I easily track the Court’s plain-language approach: in a wrongful death action, a decedent’s personal representative “may maintain an action for damages” against the defendant, § 27-1-513, MCA; the personal representative may sue in his or her “own name,” M. R. Civ. P. 17(a)(1)(A); and venue is proper in “the county in which the plaintiff resides,” § 25-2-122(2)(b), MCA. Because the personal representative is the lawsuit’s named plaintiff, his residential county is a proper venue.

¶20 However, this Court cannot read statutes in a vacuum; we must read them in relationship to one another. “In the construction of a statute, . . . [w]here there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.” Section 1-2-101, MCA. After considering other statutes involving wrongful death actions and personal representatives, I find the Court’s approach overly simplistic and ultimately disagree with its conclusion that a personal representative’s residential county is an appropriate venue option under § 25-2-122(2)(b), MCA. I, accordingly, dissent.

¶21 Section 72-3-604, MCA, provides that “a personal representative of a decedent domiciled in this state at death has the *same* standing to sue and be sued in the courts of this state and the courts of any other jurisdiction as the decedent had *immediately prior to death*.” (Emphasis added.) The plain language of § 72-3-604, MCA, confines the personal

representative’s lawful authority to file suits only in the courts where the decedent could have filed “immediately prior to death.” There is no statute, court precedent, or other mechanism that *expands* the personal representative’s authority or capacity to file suits on behalf of a decedent and that includes circumstances both unrelated to the decedent or the underlying facts which have arisen *after* her death. A personal representative is not the real party in interest; his “[c]apacity to sue . . . is determined by appropriate statutory provisions.” *See* M. R. Civ. P. 17(b). As it applies to a wrongful death action, § 72-3-604, MCA, provides a personal representative with the capacity to sue and limits his authority under § 25-2-122(2)(b), MCA, to bringing the lawsuit in a venue where the decedent could have immediately prior to death.

¶22 A personal representative stands in the decedent’s shoes. *In re Estate of Kindsfather*, 2005 MT 51, ¶ 31, 326 Mont. 192, 108 P.3d 487 (explaining *In re Estate of Long*, 804 N.E.2d 1176, 1181 (Ind. Ct. App. 2004)). To further emphasize the limited scope of the personal representative’s authority, § 72-3-604, MCA, particularizes that a personal representative simply “has the *same* standing” as the decedent; he does not have greater or different rights than those the decedent would have had. Section 72-3-604, MCA (emphasis added); *see, e.g., dck Worldwide Holdings, Inc. v. CH SP Acquisition LLC*, 2015 MT 225, ¶ 33, 380 Mont. 215, 355 P.3d 724 (“The assignee obtains no greater rights against the account debtor than the assignor.” (citation omitted)).

¶23 The Court’s conclusion that a personal representative’s residential county is an appropriate venue under § 25-2-122(2)(b), MCA, bestows upon the personal representative

different rights than those the decedent would have: it permits the personal representative to file a wrongful death action in the personal representative's residential county, which, in cases like this one, was not the decedent's residential county. However, as the majority points out, § 25-2-122(2)(b), MCA, uses the present-tense terms "plaintiff" and "resides." Such language is not practically applied in a wrongful death action, where a decedent can no longer bring her own claims as the "plaintiff" and where a decedent no longer "resides" anywhere. Because the personal representative has the same standing to sue as the decedent and because the personal representative cannot have different rights than the decedent would have had, I would conclude that § 25-2-122(2)(b), MCA, does not confer venue in wrongful death cases. Such an interpretation of § 25-2-122(2)(b), MCA, ensures that the personal representative does not have rights the decedent would not have had. *See* § 72-3-604, MCA.

¶24 Further, the question of proper venue is, most fundamentally, guided by fairness to the defendant. *Howard v. Dooner Labs., Inc.*, 211 Mont. 312, 315-16, 688 P.2d 279, 280 (1984). "The venue statutes should not be interpreted to give a plaintiff the right to choose a forum based on fortuitous fact[s] . . . ." *Howard*, 211 Mont. at 317, 688 P.2d at 281. Concluding that venue is not proper under § 25-2-122(2)(b), MCA, based on the personal representative's residential county is fairest to out-of-state defendants because, otherwise, a decedent's estate could manipulate venue and shop for a preferred forum by choosing a specific personal representative because he resides in a selected county.

¶25 Montana law provides Lucero with the authority to bring a wrongful death claim on Gullett's behalf, but it does not bestow upon Lucero greater or different rights that Gullett did not have herself. In this wrongful death action, § 25-2-122(2)(b), MCA, cannot be utilized to confer proper venue—venue may be found proper under the other subsections of § 25-2-122(2), MCA. Because venue in Cascade County is not otherwise proper, I would reverse the District Court's order denying Ford's motion to change venue.

/S/ LAURIE McKINNON

Justice Jim Rice joins in the dissenting Opinion of Justice McKinnon.

/S/ JIM RICE