

SUPREME COURT OF MISSISSIPPI

Rochelle Culbert, et al. v. Johnson & Johnson, Mallan G. Morgan,
M.D., and Sav-On-Drugs of Columbia, Inc.

Culbert · No. No. 2003-IA-00881-SCT; consolidated with No. 2003-IA-00918-SCT · Decided April 16, 2003

SUMMARY

The Mississippi Supreme Court addresses the permissive joinder and venue of thirty plaintiffs alleging injuries from the prescription drug Propulsid. Applying Mississippi Rule of Civil Procedure 20 and related transfer provisions, the Court affirms severance of the plaintiffs' claims, remands for transfer of in-state claims, and directs dismissal without prejudice of out-of-state claims. The Court also orders separate trials for two improperly joined Jefferson County plaintiffs.

CASE DETAILS

COURT	Supreme Court of Mississippi
WRITING FOR THE COURT	Easley, Justice; Cobb, P.J.; Easley, J.; Graves, J.; Smith, C.J.; Waller, P.J.; Carlson, J.; Dickinson, J.; Diaz, J.; Randolph, J.
JURISDICTION	Mississippi
DECIDED	April 16, 2003
DOCKET	No. 2003-IA-00881-SCT; consolidated with No. 2003-IA-00918-SCT
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Permission interlocutory appeals and a cross-appeal from orders of the Jefferson County Circuit Court concerning permissive joinder, severance, venue, transfer, and dismissal on forum non conveniens or venue grounds.
STANDARD OF REVIEW	The Court reviewed joinder and venue rulings for abuse of discretion. It would not disturb a plaintiff's choice of venue absent a lack of credible evidence supporting the factual basis for venue.
PRECEDENTIAL VALUE	published opinion
PARTIES	Rochelle Culbert, et al. v. Johnson & Johnson, Mallan G. Morgan, M.D., Sav-On-Drugs of Columbia, Inc.

TOPICS

- joinder
- venue
- forum non conveniens
- interlocutory appeal
- civil procedure

PRACTICE AREAS

civil procedure

appellate procedure

torts

QUESTIONS PRESENTED

1. Whether the plaintiffs were properly joined under Mississippi Rule of Civil Procedure 20 despite differing times of use, warnings, marketing materials, medical conditions, and alleged injuries.
2. Whether the trial court properly severed the claims of plaintiffs lacking original jurisdiction and venue in Jefferson County.
3. Whether claims filed in the wrong Mississippi county should be transferred rather than dismissed under Mississippi Code section 11-11-17 and Mississippi Rule of Civil Procedure 82(d).
4. Whether the claims of the out-of-state plaintiffs should be dismissed without prejudice on forum non conveniens or venue grounds.
5. Whether the claims of the two Jefferson County plaintiffs were properly joined for trial.

HOLDINGS

1. The plaintiffs' claims were improperly joined because the claims did not satisfy the same-transaction-or-occurrence requirement and the proposed joinder created a substantial risk of undue prejudice and unfairness.
2. Claims of the ten in-state plaintiffs lacking venue in Jefferson County were to be transferred to counties in which they could properly have been filed, rather than dismissed.
3. The claims of the eighteen out-of-state plaintiffs were to be dismissed without prejudice.
4. The claims of Clara Malone and Janice Davis were improperly joined for trial and had to be severed.

KEY QUOTATIONS

“It is imperative we strike a balance in our jurisprudence between the need for fairness to the parties and judicial economy. In the end, the benefits of efficiency must never be purchased at the cost of fairness.” (§6)

“The two prongs of Rule 20 must always be met. While it does not rise to the level of a distinct factor in the joinder analysis, an important consideration is if the joinder will result in undue prejudice to the parties.” (§7)

“When an action is filed laying venue in the wrong county, the action shall not be dismissed, but the court, on timely motion, shall transfer the action to the court in which it might properly have been filed and the case shall proceed as though originally filed therein.” (§8)

FACTUAL BACKGROUND

Thirty plaintiffs alleged injuries from using the prescription drug Propulsid. Two plaintiffs lived in Jefferson County, ten other plaintiffs were Mississippi residents from eight different counties, and eighteen plaintiffs lived outside Mississippi. The plaintiffs took the drug at different times, under different labels and warnings, and in

connection with different marketing materials and medical conditions, leading the defendants to challenge joinder and venue.

PROCEDURAL HISTORY

Thirty plaintiffs sued manufacturers, physicians, pharmacies, and other defendants for injuries allegedly arising from use of Propulsid. The circuit court severed plaintiffs lacking original jurisdiction and venue in Jefferson County, later clarified its order, denied rehearing in part, and declined to certify the case for interlocutory appeal. The Mississippi Supreme Court granted permission for interlocutory appeals and a cross-appeal, affirmed the severance and transfer-related rulings in No. 2003-IA-00881-SCT, and reversed and remanded in No. 2003-IA-00918-SCT.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

For No. 2003-IA-00881-SCT, the trial court was to require transfer of the ten in-state plaintiffs' claims to venues where they could properly have been filed. The eighteen out-of-state plaintiffs' claims were to be dismissed without prejudice. The trial court was also instructed to sever the claims of Clara Malone and Janice Davis for separate trials. No. 2003-IA-00881-SCT was affirmed and remanded; No. 2003-IA-00918-SCT was reversed and remanded.

CASES CITED

- Janssen Pharmaceutica, Inc. v. Armond, 866 So. 2d 1092
- Burgess v. Lucky, 674 So. 2d 506
- Scott v. Janssen Pharmaceutica, Inc., 876 So. 2d 306
- Malcolm v. Nat'l Gypsum Co., 995 F.2d 346
- Janssen Pharmaceutica, Inc. v. Keys, No. 2003-IA-00275-SCT

OPINION

PER CURIAM.

IN THE SUPREME COURT OF MISSISSIPPI NO. 2003-IA-00881-SCT ROCHELLE CULBERT, ET AL. v. JOHNSON & JOHNSON, MALLAN G. MORGAN, M.D., AND SAV-ON-DRUGS OF COLUMBIA, INC. DATE OF JUDGMENT: 4/16/2003 TRIAL JUDGE: HON. LAMAR PICKARD COURT FROM WHICH APPEALED: JEFFERSON COUNTY CIRCUIT COURT ATTORNEYS FOR APPELLANTS: RICHARD CLINTON STRONG KEN R. ADCOCK MARK D. MORRISON LESTER JOSEPH MENG, III ATTORNEYS FOR APPELLEES: DONNA BROWN JACOBS CHRISTY D. JONES JOHN C. HENEGAN ROBERT L. JOHNSON, III KARI LOUISE FOSTER CHRIS J. WALKER JOHN LEWIS

HINKLE AL NUZZO THOMAS M. LOUIS NATURE OF THE CASE: CIVIL - PERSONAL INJURY DISPOSITION: AFFIRMED AND REMANDED - 09/23/2004 MOTION FOR REHEARING FILED: MANDATE ISSUED: CONSOLIDATED WITH NO. 2003-IA-00918-SCT JANSSEN PHARMACEUTICA, INC. AND JOHNSON & JOHNSON v. ROCHELLE CULBERT, ET AL. DATE OF JUDGMENT: 4/16/2003 TRIAL JUDGE: HON. LAMAR PICKARD COURT FROM WHICH APPEALED: JEFFERSON COUNTY CIRCUIT COURT ATTORNEYS FOR APPELLANTS: DONNA BROWN JACOBS CHRISTY D. JONES ANITA MODAK-TRURAN JOHN C. HENEGAN ROBERT L. JOHNSON, III ATTORNEYS FOR APPELLEES: RICHARD CLINTON STRONG KEN R. ADCOCK MARK D. MORRISON LESTER JOSEPH MENG, III NATURE OF THE CASE: CIVIL - PERSONAL INJURY DISPOSITION: REVERSED AND REMANDED - 09/23/2004 MOTION FOR REHEARING FILED: MANDATE ISSUED: BEFORE COBB, P.J., EASLEY AND GRAVES, JJ. EASLEY, JUSTICE, FOR THE COURT: STATEMENT OF THE CASE ¶1.

Thirty plaintiffs, collectively known as the "Plaintiffs," filed suit in Jefferson County Circuit Court for injuries allegedly sustained from using the prescription drug Propulsid. Two of those plaintiffs were from Jefferson County, ten are Mississippi residents who live in eight different counties and eighteen reside out- of-state.

The two plaintiffs that are Jefferson County residents are Clara Malone and Janice Davis. The filed complaint named as defendants, the makers of Propulsid, Janssen Pharmaceutica, Inc., which is a corporation based in New Jersey; Janssen's New Jersey-based parent corporation, Johnson & Johnson (collectively, "Janssen"); Ashraf M. Nofal, M.D.; Nathan Bradford, M.D.; Stephen Harless, M.D.; Simon 2 Cofrancesco, D.O.1; Mallan Morgan, M.D.; Bankston Pharmacy; Henrich Drug Store, Inc.; Conova's City Drug Store; Fred's Pharmacy, Inc.; Eckerd Corporation; Rite-Aid/K&B; Wal-Mart Stores, Inc.; Condon's East Union Pharmacy; Kroger Limited Partnership I; People's Drug Store; Sav-on Drugs, Inc., who allegedly filled the prescriptions and John Does 1-10 as yet unidentified individuals, collectively identified as the "Defendants." ¶2.

Janssen contends that the Plaintiffs' claims were improperly joined. Janssen argues that the Plaintiffs took Propulsid at different times, under different labels and warnings and in response to different marketing materials. Janssen further contends that the Plaintiffs have different pre-existing conditions that might bear upon any injury.

Because of those differences, Janssen sought to have the Plaintiffs' joinder in Jefferson County severed, alleging that the inquiries into alleged defective design, failure to warn, breach of warranty and misrepresentation will be wholly distinct in each plaintiff's case. Furthermore, Janssen states that none of the non-Jefferson County Plaintiffs purchased the allegedly defective product or received medical treatment in Jefferson County. ¶3.

The trial court granted Janssen's motion to sever as to any plaintiffs without original jurisdiction and venue in Jefferson County. The Plaintiffs filed a motion for clarification and rehearing of, order. The trial court granted the Plaintiffs' motion for clarification and rehearing, in part, as to clarification and denied, in part, as to rehearing.

The trial court's order also denied the Plaintiffs' request to certify the case for interlocutory appeal. The trial court's order stated that "those plaintiffs without original jurisdiction in Jefferson County, Mississippi,... should be transferred to the court or courts of the plaintiffs' counsel's 1 Dr. Confranceso was granted summary judgment by the trial court and is not a party to this case on appeal.

3 choosing as provided for in the Mississippi Rules of Civil Procedure." However, the trial court's order did not specify to which counties the cases were to be transferred. On cross-appeal, the Defendants seek to have this Court remand this matter to the trial court to order the transfer into the appropriate jurisdictions for the in-state Plaintiffs without venue in Jefferson County and dismissal of the out-of-state Plaintiffs under the doctrine of forum non conveniens, or in the alternative, for lack of venue.² ¶4.

In turn, we granted permission for these interlocutory appeals. Justice Kay Cobb issued an order granting the Plaintiffs' petition for interlocutory appeal by permission and the Defendants' cross-petition for interlocutory appeal pursuant to M.R.A.P. 5 (a). Justice Cobb also executed an order on behalf of the Court declining the Plaintiffs' request to consolidate this matter with Janssen Pharmaceutica, Inc. v. Keys, No. 2003-IA-00275-SCT.

DISCUSSION ¶5. The standard of review regarding the joinder of Plaintiffs and the correctness of venue used by this Court is to determine whether the trial court abused its discretion. Janssen Pharmaceutica, Inc. v. Armond, 866 So.2d 1092, 1097 (Miss. 2004).

We will not disturb a plaintiff's choice of venue unless there is no credible evidence supporting the factual basis for the claim of venue. Burgess v. Lucky, 674 So.2d 506, 510 (Miss. 1996). See also Armond, 866 So. 2d at 1098 ("plaintiff's choice of a forum should not be disturbed except for weighty reasons").

As in Armond, our review in this case turns on 2 As the argument in support of the 18 out-of-state Plaintiffs being allowed to be joined with the in-state-Plaintiffs, the Plaintiffs state that "Janssen is already defending numerous claims resulting from the use of Propulsid in Mississippi...and will not result in unnecessary expense or trouble for the Defendant."

The Plaintiffs further contend that since "there are several Mississippi Plaintiffs already involved...there is a local interest in deciding these cases in Mississippi and the administrative costs on the courts will not increase." 4 whether the trial court properly applied M.R.C.P. 20, our permissive joinder rule. Armond, 866 So. 2d at 1094.

We find that Armond controls the disposition of the substantive issues raised by the parties on appeal. ¶6. In *Scott v. Janssen Pharmaceutica, Inc.*, 876 So.2d 306 (Miss. 2004), this Court recently addressed a similar factual situation as the case at hand, stating: It is imperative we strike a balance in our jurisprudence between the need for fairness to the parties and judicial economy.

In the end, the benefits of efficiency must never be purchased at the cost of fairness. Armond, 866 So.2d at 1100 (quoting *Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 350 (2d Cir.1993)). For "it is possible to go too far in the interests of expediency and to sacrifice basic fairness in the process." Malcolm, 995 F.2d at 354.

The discretion to consolidate cases is restrained by our paramount concern for a fair and impartial trial for all parties, plaintiffs and defendants. Armond, 866 So.2d at 1100. There is an innate danger in asking jurors to assimilate vast amounts of information against a variety of defendants and then sort through that information to find what bits of it apply to which defendant. ¶7.

Here, as in Scott, a jury might well be overwhelmed with thirty separate fact patterns that are offered to prove medical malpractice. See Scott, 876 So.2d at 308. That is why in Armond, 866 So.2d at 1102, we ordered the claims against the defendant physicians severed. See Scott, 876 So.2d at 308. "The two prongs of Rule 20 must always be met. While it does not rise to the level of a distinct factor in the joinder analysis, an important consideration is if the joinder will result in undue prejudice to the parties."

Id. ¶8. Our decisions in Armond and Scott fully control the case at hand. Accordingly, we affirm the trial court's decision to sever the Plaintiffs' claims. We further affirm the trial court's April 17, 2003, order granting clarification as it required the Plaintiffs to provide the trial court an order of transfer, "transferring 5 the claims of those Plaintiffs without jurisdiction in Jefferson County, Mississippi,... to the court or courts of the Plaintiffs' counsel's choosing as provided for in the Mississippi Rules of Civil Procedure."

Miss. Code Ann. § 11-11-17 provides for the transfer, rather than dismissal, of an action that lacks venue to the venue which it belongs.³ M.R.C.P. 82(d) provides: When an action is filed laying venue in the wrong county, the action shall not be dismissed, but the court, on timely motion, shall transfer the action to the court in which it might properly have been filed and the case shall proceed as though originally filed therein....The plaintiff shall have the right to select the court to which the action shall be transferred in the event the action might properly have been filed in more than one court. ¶9.

Accordingly, we remand this case to the trial court for the Plaintiffs to comply with the trial court's order to provide an order of transfer as to the ten in-state Plaintiffs' claims to the venues where the claims could have been properly filed.

We further remand this case to the trial court to dismiss the eighteen out- of-state Plaintiffs' claims without prejudice. ¶10. Finally, we find that two Jefferson County Plaintiffs, Clara Malone and Janice Davis, do not meet the same transaction or occurrence test established by this Court in Armond.

Therefore, we further instruct the trial court to sever the claims of the improperly joined Jefferson County plaintiffs for separate trials. CONCLUSION ¶11. Therefore, for the reasons stated herein, the judgment of the Circuit Court of Jefferson County, Mississippi, is affirmed as to No. 2003-IA-00881-SCT and reversed as to No. 2003-IA-00918-SCT, 3 Miss. Code Ann. § 11-11-3 provides where civil actions may be commenced.

Miss. Code Ann. § 11-11-3 also references transfer to the proper county under Miss. Code Ann. § 11-11-17 when a civil action is brought in an improper county. 6 and these cases are remanded for further proceedings consistent with this opinion. ¶12. NO. 2003-IA-00881-SCT; AFFIRMED AND REMANDED. NO. 2003-IA-00918-SCT; REVERSED AND REMANDED. SMITH, C.J., WALLER AND COBB, P.JJ., CARLSON AND DICKINSON, JJ., CONCUR.

GRAVES, J., CONCURS IN PART. DIAZ AND RANDOLPH, JJ., NOT PARTICIPATING. 7