IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

AFLAC INSURANCE COMPANY,
RICHARD J. ATKINSON AND ANITA
ATKINSON, INDIVIDUALLY, AND
D/B/A AFLAC/ ANITA ATKINSON — APPELLANTS

VS. — NO.2007-AI-01610-SCT

VIRGIL ELLISON — APPELLEE

BRIEF OF THE APPELLEE
VIRGIL ELLISON

ORAL ARGUMENT IS NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. American Family Life Assurance Company of Columbus ("AFLAC"), Appellant;
2. Richard J. Atkinson and Anita Atkinson, Appellants;
3. Virgil Ellison, Appellee;
4. Robert F. Lingold, Attorney for Richard J. Atkinson and Anita Atkinson;
5. James G. Wyly, III, Scott Ellzey and Michael Held, Phelps Dunbar, LLP Attorneys for AFLAC; and
6. Eugene C. Tullos, Tullos & Tullos, Attorney for Virgil Ellison.

Respectfully submitted,

Eugene C. Tullos
Attorney for Virgil Ellison

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VS. — **NO.2007-IA-01610-SCT**

VIRGIL ELLISON — **APPELLEE**

BRIEF OF THE APPELLEE

STATEMENT OF THE ISSUES

Did the Circuit Court of Smith County abuse its discretion in refusing to grant the AFLAC's Motion to Change Venue?

STATEMENT OF THE CASE

The Plaintiff, Virgil Ellison instituted an action in the Circuit Court of Smith County, Mississippi due to AFLAC's wrongful denial of a claim for benefits under the subject life insurance policy which was in effect at the time of the death of the Plaintiff's father, Mr. Henry Myers. AFLAC filed its Rule 82(d) Motion to Transfer venue to Rankin County, Mississippi, which was denied by the Circuit Court of Smith County. AFLAC argues on interlocutory appeal that venue should be changed from Smith County to Rankin County, Mississippi.

STATEMENT OF FACTS

On or about October 10, 2003, the Plaintiff was issued a certain life insurance policy by the Appellants herein which would pay benefits upon the death of Mr. Henry J. Myers, the Plaintiff's father. On or about October 13, 2003, Henry J. Myers died. The Defendants have wrongfully refused to pay the benefits to which the Plaintiff is entitled to receive under the policy. The Plaintiff filed this action on October 12, 2006, to enforce his rights under the policy. Defendant, AFLAC now

seeks a change of venue claiming that Smith County is not the proper venue for this action but rather that Rankin County is the only proper venue.

STANDARD OF REVIEW

This Court has repeatedly stated, "We apply an abuse of discretion standard of review to decisions made by a trial court concerning a motion for a change of venue. We have stated that "[t]he trial judge's ruling will not be disturbed on appeal unless it clearly appears that there has been an abuse of discretion or that the discretion has not been justly and properly exercised under the circumstances of the case." Austin v. Wells, 919 So.2d 961, 963 (Miss. 2006) (Citations Omitted).

SUMMARY OF THE ARGUMENT

The trial court did not abuse its discretion in denying the Motion to Change Venue. AFLAC argues that the Defendants' residence should control in this action. However, the trial court found that the failure to pay was "a substantial omission which gave rise to this cause of action, thus satisfying paragraph 1(a)(i) of Section 11-11-3." [R.E. 39] The Plaintiff is permitted to choose the permissible venue under §11-11-3 which in this case is the location of the omission and/or substantial event resulting in the Appellee's injuries. Because there has been no abuse of discretion, the decision of the trial court to deny the motion for change of venue should be affirmed. Furthermore, the AFLAC argues that the legislative intent of §11-11-3 would be upheld if venue were transferred. However, this argument was not put forth to the trial court and should not be considered on appeal.

ARGUMENT

In Flight Line, Inc. v. Tanksley, 608 So.2d 1149, 1155 (Miss.1992), this Court held,

> Of right, the 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. Put otherwise, the court at trial must give the plaintiff the benefit of the reasonable doubt, and we do so on appeal as well.

AFLAC argues that §11-11-3 of the Mississippi Code Annotated of 1972, as amended establishes venue in Rankin County rather than in Smith County, Mississippi. Mississippi Code Ann. §11-11-3(1)(a)(i) provides in pertinent part:

> Civil actions of which the circuit court has original jurisdiction shall be commenced in the county where the defendant resides, **OR**, if a corporation, in the county of its principal place of business, **OR** in the county where a substantial alleged act or omission occurred **OR** where a substantial event that cause the injury occurred.

This Court recently reviewed the venue statute with regard to the unambiguous wording in setting out the four choices available to the Plaintiff when filing an action in circuit court, in the case of Hedgepeth v. Johnson, 975 So.2d 235,239 (Miss.2008). The Court in Hedgepath stated,

> Clearly 11-11-3(1)(a)(i) lays out four venue options from which plaintiffs can choose when filing a lawsuit. The first two are based on the status of the defendant; that is, if the defendant is a resident defendant, the suit may be filed in his county of residence; or, if the defendant is a corporation, the suit may be filed in the county of its principal place of business. The latter two venue options focus on the alleged acts or omissions of the defendants; that is, the suit may be filed where a substantial alleged act or omission occurred; or, finally, suit may be filed where a substantial event that caused the injury occurred. According to the clear language of the statute, "[c]ivil actions of which the circuit court has original jurisdiction shall be commenced in" one of these four places.

In Hedgepeth, this Court considered the change of venue on interlocutory appeal from the Circuit Court of Jackson County. Mitchell and Catherine Hedgepeth filed a complaint in Jackson County against Melody Johnson, individually and as an agent of State Farm Fire and Casualty Insurance Company, and State Farm Fire and Casualty Insurance Company following State Farm's denial of coverage for property damage incurred as a result of Hurricane Katrina. The trial court granted Defendants' Motion for Change of Venue from Jackson County to Madison County (Johnson's

county of residence), finding that the general venue statute required the case be transferred to the defendant's home county. However, this Court reversed the change of venue on appeal holding that the general venue statute is plain and unambiguous. Because "substantial alleged acts," as well as "a substantial event that caused injury" occurred in Jackson County, the Court in Hedgepeth, found that Jackson County was a proper venue.

It seems that AFLAC, as is so common the case in venue actions, asserts the defendant's county of residence as having more importance than the other equally important options available to the plaintiff when filing a complaint. AFLAC has wrongfully denied the claim to which Ellison, the Appellee, is entitled to recover. Therefore, Ellison's injury is the denial of the claim by AFLAC. This wrongful denial of the claim and payment of insurance benefits is the substantial event which caused Ellison's injury, which occurred in Smith County and which he experienced the effects of said omission or substantial event resulting in his injury in Smith County, Mississippi. As in Hedgepeth, the event causing the injury occurred in the plaintiff's county of residence, not that of the defendants. AFLAC argues that Medical Assur. Co. of Mississippi v. Myers, 956 So. 2d 213 (Miss. 2007) is controlling authority in this case and was summarized in Hedgepeth, as follows,

> The trial court listed the following factors supporting Myers's claim that venue was proper in Holmes County: (1) Holmes County is where Myers had completed his application; (2) the policy had been issued to Myers in Holmes County; (3) the premiums were mailed from Holmes County; (4) there were communications by mail and phone between Holmes County and Madison County; (5) one of Myers's clinics was in Holmes County; and (6) Holmes County is where Myers chose to file suit. Applying in Myers the same version of Section 11-11-3 as in the current case, this Court held that venue was proper in Madison County. No "substantial event that caused injury" to Dr. Myers occurred in Holmes County. Therefore, in order to obtain proper venue in Holmes County, Myers needed to show that a substantial alleged act or omission occurred there. Obviously, the facts laid out by the trial court in Myers were not enough to tie venue to Holmes County. "The venue statute does not allow the piling of acts or events to establish venue. It specifically requires a substantial alleged act, omission, or injury-causing event to have happened in a particular

> jurisdiction in order for venue to be proper there." The mere fact that Holmes County is the place where Myers had "experienced" being uninsured was not enough to meet the venue requirements of Section 11-11-3.
>
> Id. at 239.

The case *sub judice,* is more analogous to the facts of Hedgepeth than to those of Myers. In Myers, the Court considered a simple "non-renewal" of a policy to Dr. Myers. In this case, as in Hedgepeth, the claims of the Plaintiff are a result of the wrongful denial of coverage and/or benefits due under the insurance policy. The denial of a valid claim is not the same as the insurance company's election to not renew an insurance policy. The non-renewal of a policy is the free will of two contracting parties, one of which elects at the end of the original period of the contract to dissolve the business relationship of the parties. In other words, in Myers, the insurance company chose not to renew and/or to extend the contract. In this action, as was the case Hedgepeth, there is a contract for coverage which the defendant has refused to honor. The bad faith breach of the insurance contract is totally different than a decision on the part of the insurance provider to not renew a policy.

This Court has held that, "[a]n application for change of venue is addressed to the discretion of the trial judge, and his ruling thereon will not be disturbed on appeal unless it clearly appears that there has been an abuse of discretion or that the discretion has not been justly and properly exercised under the circumstances of the case." Austin, at 963. Further, the trial court must give the plaintiff the benefit of reasonable doubt with respect to the venue selection. Earwood v. Revees, 798 So.2d 508, 512 (Miss. 2001). Therefore, the decision of the Circuit Court of Smith County was reasonable and was not an abuse of discretion warranting a reversal by this Court.

Finally, in support of its argument that venue should be changed, AFLAC argues that the legislative intent would be served by changing venue. AFLAC then goes on to argue that, "The most

convenient venue location for the subject cause of action is in Rankin County." This is essentially a forum non-conveniens argument under Rule 82(e) of the Mississippi Rules of Civil Procedure. This argument however was not presented to the trial court in the Appellants' Motion to Change Venue. AFLAC's only arguments to the Circuit Court of Smith County regarding its motion related to Rule 82(d) improper venue and this is the first time this argument has been put forth. In fact, AFLAC expressly stated in its Rebuttal to the Plaintiff's response that, **"AFLAC is not moving this court to change venue based on forum non conveniens..."**

In the recent case of Amsouth Bank v. Quimby, 963 So.2d 1145, 1155 (Miss.2007), this court restated its position that it would only consider arguments on appeal which were put before the trial court.

> This Court has stated, "[w]e accept without hesitation the ordinarily sound principle that this Court sits to review actions of trial courts and that we should undertake consideration of no matter which has not first been presented to and decided by the trial court."Educ. Placement Serv. v. Wilson, 487 So. 2d 1316,1320 (Miss. 1986)We find no reason to depart from this practice now.
>
> Quimby, at 1155.

Following this established principal, this Court should refuse to consider the arguments regarding the legislative intent and the forum non-conveniens argument under Rule 82(e).

In the alternative, in the event this Court wishes to address this argument, the Appellee would show that Smith County is not an *inconvenient* forum or venue for AFLAC. Until recently Mississippi did not recognize the doctrine of forum non-conveniens as applicable to forums within the state. However, Rule 82(e) now recognizes the doctrine in intrastate forum selection processes by the courts. The comments to Rule 82(e) provide, "The doctrine is one of reason and common sense to be applied to avoid significant geographical disadvantage." The comments go on to

discuss the fact that advancements in technology and transportation now make the forum less significant than in the past, but that they still remain factors for consideration.

The factors discussed in considering an inconvenient forum may be valid factors if a case is filed on the gulf coast for example in Harrison County, and all of the witnesses, and parties reside in the northern part of the state, for example in Desoto County. However, the current case is between the adjoining counties of Smith County and Rankin County. With the drive time between the two county seats being approximately 30-40 minutes, the argument that Smith County is an inconvenient forum is without merit.

CONCLUSION

The trial court did not abuse its discretion in denying the Motion to Change Venue. The trial court found that the failure to pay was "a substantial omission which gave rise to this cause of action, thus satisfying paragraph 1(a)(i) of Section 11-11-3." [R.E. 39] Because there has been no abuse of discretion, the decision of the trial court to deny the motion for change of venue should be affirmed.

Further, AFLAC's assertions that the legislative intent of §11-11-3 would be upheld by transferring venue to Rankin County is without merit for two reasons. First the Appellant did not argue this before the trial court and in fact asserted that it was not arguing forum non-conveniens whatsoever. To now argue this doctrine and/or the legislative intent on interlocutory appeal subverts the principal that this Court sits in review of only those matters which have been properly presented to the trial court. Furthermore, to claim that Smith Count is an inconvenient forum when it actually adjoins the county to which the Appellant is seeking to have venue transferred is without merit. As such the ruling the Circuit Court of Smith County should be affirmed, with all cost of appeal

assessed to the Appellant AFLAC.

Respectfully submitted,

Eugene C. Tullos

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ATTORNEY FOR THE APPELLEE

CERTIFICATE OF SERVICE

I do hereby certify that I have this day delivered, via U. S. Postal Service, postage prepaid, a true and correct copy of the Appellee's Brief Pursuant to M.R.A.P. 5(a) to:

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This the 13th day of May, 2008.

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