IN THE SUPREME COURT OF MISSISSIPPI
No. 2007-IA-01610-SCT

AFLAC INSURANCE COMPANY, RICHARD J. ATKINSON AND ANITA ATKINSON, INDIVIDUALLY AND D/B/A AFLAC/ANITA ATKINSON,	APPELLANTS
VERSUS	
VIRGIL ELLISON,	APPELLEE

ON PETITION FOR INTERLOCUTORY APPEAL FROM THE CIRCUIT COURT OF SMITH COUNTY, MISSISSIPPI
PETITION GRANTED BY ORDER DATED OCTOBER 17, 2007

REPLY BRIEF OF APPELLANT AMERICAN FAMILY LIFE ASSURANCE COMPANY OF COLUMBUS

ORAL ARGUMENT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

This case presents important issues regarding Mississippi Code Annotated Section 11-11-3, Mississippi's general venue statute, warranting oral argument on interlocutory appeal before this Court.

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ARGUMENT

Venue for this case is proper only in Rankin County, Mississippi. In order to establish venue in Smith County, Mississippi Plaintiff must allege in his Complaint that a substantial act, omission or event that caused injury occurred in Smith County.

Here, nothing occurred in Smith County. The individual Atkinson Defendants are residents of Rankin County[1]; the life insurance policy was applied for in Rankin County where Plaintiff resided[2]; Plaintiff made a claim from Rankin County; American Family Life Assurance Company of Columbus (hereinafter sometimes referred to as "AFLAC") made the decision to deny that claim at its office in Columbus, Georgia[3], and communicated that denial to Plaintiff at his residence in Rankin County.[4] Plaintiff's contention that he is now "experience[ing] the effects of" the denial in Smith County is insufficient to establish venue under Mississippi's general venue statute.

By Plaintiff's rationale, one could get in a car and drive all across the state in order to "experience" the loss in all 82 counties for the purpose of establishing venue. This Court has specifically rejected this argument in previous cases, and should do so again now.

Plaintiff spends the majority of his brief setting up a straw-man argument concerning forum non conveniens, and attempting to draw some sort of a distinction between situations involving an insurer's decision not to renew a policy, versus an insurer's decision to deny a claim under a policy. Of course, this is not a forum non conveniens matter, and the question of a non-renewal versus a denial is, for venue purposes, a distinction without a difference. The analysis for this matter begins and ends with the general venue statute.

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[1] CP 1:1-2; SV 1:17; RE 4. The Record is cited herein as "[CP volume:page(s)]." Supplemental Volume is cited as "SV [volume:page(s)]." Appellant's Record Excerpts are cited as "RE [tab number]."
[2] CP 1:2; SV 1:18; RE 4
[3] CP 1:56.
[4] CP 1:56.

All of the Mississippi Defendants live in Rankin County[5]; and, no substantial act, omission or event that caused injury whatsoever occurred in Smith County.

The trial court's denial of the rule 82(d) Motion To Transfer Venue to Rankin County was an abuse of discretion, and this Court should reverse that ruling.

A. All Of The Mississippi Defendants Reside Or Have Their Principal Place Of Business In Rankin County.

This is a breach of contract matter, which is based on the Plaintiff's claim that AFLAC wrongfully denied him life insurance proceeds.[6] Mississippi Code Annotated Section 11-11-3 controls. This statute provides four potential options upon which to establish venue.[7]

Here, the individual defendants, Anita and Richard Atkinson (the retail agents), both reside in Rankin County.[8] No individual defendants reside in Smith County. Defendant AFLAC/Anita Atkinson (the retail insurance agency) has its principal place of business in Rankin County.[9] Defendant AFLAC has its principal place of business in Columbus, Georgia.[10] No corporate defendants have their principal place of business in Smith County.

Since all Mississippi Defendants reside in and have their principal place of business in Rankin County, if venue is to be established under Section 11-11-3(1) or (2), then venue is only proper in Rankin County.

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[5] CP 1:1-2; SV 1:17-18; RE 4.
[6] CP 1:1-4; SV 1:17-19; RE 4.
[7] These four options are:
(1) In the county where the defendant resides; or
(2) If a corporation, in the county of its principal place of business; or
(3) In the county where a substantial alleged act or omission occurred; or
(4) In the county where a substantial event that caused the injury occurred.
[8] CP 1:1-2; SV 1:17; RE 4.
[9] CP 1:2; SV 1:18; RE 4.
[10] CP 1:1; SV 1:17; RE 4.

B. No Substantial Act, Omission Or Event That Caused Injury Occurred In Smith County.

As a matter of law, venue cannot be established under Mississippi Code Annotated Section 11-11-3(3) or (4) because no substantial act, omission or event that caused injury occurred in Smith County. Absolutely nothing occurred there, and this Court has previously ruled that the location of a claimant's residence is of no consequence and is irrelevant to the venue analysis under these circumstances. Indeed, even if it were relevant, it must be remembered that the denial was made in Columbus, Georgia, and communicated to Plaintiff at his residence in Rankin County. See Denial Letter, CP 1:56.

The case of *Medical Assur. Co. of Mississippi v. Myers,* 956 So.2d 213, 218 (Miss. 2007) is instructive. There, the basis of the claimant's action was the insurer's decision not to renew the insured's coverage. *Id.* at 215. The claimant attempted to establish venue in Holmes County, where he was located and where he received his non-renewal letter. *Id.* The insurer argued that venue was only proper in Madison County, the county of its principal place of business. *Id.* This Court noted that the insurer never communicated to the insured from Holmes County, and all of the insurer's deliberations, meetings, correspondence and communication with the insured occurred in or were transmitted from the insurer's offices in Madison County. *Myers* at 219. This Court also noted that the insurer never met with the insured in Holmes County. *Id.* This Court stated, "[i]n other words, [the insured] is suing [the insurer] based on the company's own acts or omissions, all of which occurred in Madison County." *Id.* This Court also stated that,

> **"[t]he location of the mailbox where [the insured] received his policy, non-renewal notice, or other communication is likewise immaterial."**

Id. (emphasis added). Finally, this Court stated that,

> **"[the insured's] receipt of information in Holmes County is a passive function of his presence there and is not a substantial event causing the damages he claims."**

Id. (emphasis added). Since the alleged cause of the insured's injuries was the insurer's decision not to renew the insurance policy, this Court held that every substantial act, omission, or injury-causing event occurred in Madison County. *Id.* As such, this Court specifically held that venue could not be established in Holmes County, and that venue was only proper in Madison County because that is where the insurer was located and where the insurer made its decision not to renew the policy. *Id.* at 220.

In his brief, Plaintiff attempts to distinguish a situation involving an insurer's decision not to renew a policy form an insurer's decision to deny a claim on the policy. This would merely be a distinction without a difference. As in *Myers*, it is AFLAC's decision concerning the insurance policy that is the alleged basis for the claim. However, here, Plaintiff cannot even point to the passive function of having received the denial in Smith County. The denial was made in Columbus, Georgia, and communicated to the Plaintiff at his home in Rankin County.[11] For purposes of venue, Smith County has nothing more to do with this case than any other county in Mississippi where Plaintiff's present existence would support his contention that he is "experiencing" the loss, which allegedly resulted from AFLAC's denial.

In this brief, Plaintiff completely misconstrues the basis and holding of *Hedgepeth v. Johnson*, 975 So.2d 235 (Miss. 2008).

In *Hedgepeth*, the insureds resided in Jackson County, Mississippi and suffered personal property damage in Jackson County. *Id.* at 236. The insurance agency was located in Hinds County, Mississippi and the insurance agent resided in Madison County, Mississippi. *Id.* The insureds attempted to establish venue in Jackson County, while the insurance agency attempted to have venue transferred to Madison County. *Id.* at 237. The *Hedgepeth* case was based on the

[11] CP 1:56.

following facts as outlined by this Court: (1) the claims were based on actual losses suffered due to Hurricane Katrina; (2) the insureds alleged that the insurance agent had urged them to commit fraud; and (3) the insurer had two representatives personally inform the insureds that their claim would be denied. *Id.* at 240. All of these facts and bases of the *Hedgepeth* claims, upon which this Court looked to base venue, occurred in Jackson County. *Id.* The personal property was located and damaged in Jackson County. *Id.* at 236. The insurance agent came to Jackson County and allegedly urged the insureds to commit fraud at their rental property located in Jackson County. *Id.* at 237. The insurer sent two representatives to Jackson County where they informed the insureds, in person, that their claim would be denied. *Id.*

In the present case, the life insured died in South Carolina, there is no fraud claim which is even alleged to have occurred in Smith County, and the decision to deny the claim was made in Columbus, Georgia, and communicated to Plaintiff by letter sent to his residence in Rankin County.[12] In *Hedgepeth*, everything occurred in Jackson County. In the present matter, nothing occurred in Smith County.

The Plaintiff fails to note that the denial in *Hedgepeth* was made physically, in person, in the county where the insured resided. In *Hedgepeth*, because the decision to deny took place in the county where the insured resided, this Court held venue was appropriate there. *Id.* at 240. This Court did not hold that, whenever there is a denial of insurance proceeds, venue is proper in the county where the insured resides. In fact, this Court specifically held in *Myers* that the location of the mailbox where the insured receives a communication is immaterial, and that the receipt of information from the insurer is a passive function of the insured's presence there. *Myers* at 219. It is clear that venue cannot be based on the location of receipt of information, and that it must be based on the location from where the decision was made.

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[12] CP 1:56.

In *Myers*, this Court cited the case of *American Home Products Corp. v. Sumlin* in support of its ruling that where a Plaintiff experiences his injuries is not substantial enough to establish venue in a particular county. 942 So.2d 766 (Miss. 2006). In *Sumlin*, the plaintiff filed a lawsuit against a pharmaceutical company for injuries sustained from taking a drug. *Id.* at 771. The plaintiff obtained the prescription, filled it, and ingested the drug in Wayne County; however, the plaintiff filed suit in Smith County because the echocardiogram revealing her injuries was performed there. *Id.* Whether the test was properly performed was a major point of contention in the suit. *Id.* at 769. The *Sumlin* court held that venue was only proper in Wayne County. *Id.* at 771. While analyzing the *Sumlin* case, the *Myers* court noted that the place where the plaintiff experienced her injuries was not "substantial" enough to establish venue in a particular county. *Myers* at 220.

Similarly, in *Myers*, the claimant argued that he was damaged when he experienced being uninsured in Holmes County. *Myers* at 219. This Court stated that such an experience of being injured (or uninsured) was the *result* of a substantial act, omission, or injury-causing event. *Id.* Mississippi Code Annotated Section 11-11-3 does not provide for venue to be based on where the *result* of the substantial act, omission or injury-causing event occurred. Venue can be based only where the substantial act, omission or injury-causing event itself occurred. This Court in *Myers* went on to state that, following the plaintiff's logic, a plaintiff injured in an automobile accident in Madison County could establish venue in every county in which the plaintiff traveled after the accident. *Id.* at 219.

This Court rejected this rationale in *Myers*, and should do so again now.

CONCLUSION

Plaintiff's claim is based on an alleged wrongful denial of life insurance proceeds. AFLAC's decision to deny the claim occurred in Columbus, Georgia and the life insurance proceeds denial letter was sent from Columbus, Georgia to the Plaintiff in Rankin County. Because absolutely nothing occurred in Smith County, and all resident Defendants are located in Rankin County, venue is proper only in Rankin County.

This Court should reverse the trial court's ruling and order that this matter be transferred from the Circuit Court of Smith County, Mississippi to the Circuit Court of Rankin County, Mississippi, with all costs taxed to Plaintiff.

RESPECTFULLY SUBMITTED, this the 28th day of May, 2008.

AMERICAN FAMILY LIFE ASSURANCE COMPANY OF COLUMBUS

BY: PHELPS DUNBAR, LLP

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CERTIFICATE OF SERVICE

I do hereby certify that I have this date mailed, via UPS, a true and correct copy of the above and foregoing ***REPLY BRIEF OF APPELLANT AMERICAN FAMILY LIFE ASSURANCE COMPANY OF COLUMBUS*** to the following:

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Honorable Judge Robert G. Evans
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This, the 28th day of May, 2008.

SCOTT ELLZEY

ADDENDUM A

C *WEST'S* ANNOTATED MISSISSIPPI CODE
TITLE 11. CIVIL PRACTICE AND PROCEDURE
CHAPTER 11. VENUE OF ACTIONS
IN GENERAL

→§ 11-11-3. Proper county; transfers; considerations; limitations waiver

(1)(a)(i) 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 caused the injury occurred.

(ii) Civil actions alleging a defective product may also be commenced in the county where the plaintiff obtained the product.

(b) If venue in a civil action against a nonresident defendant cannot be asserted under paragraph (a) of this subsection (1), a civil action against a nonresident may be commenced in the county where the plaintiff resides or is domiciled.

(2) In any civil action where more than one (1) plaintiff is joined, each plaintiff shall independently establish proper venue; it is not sufficient that venue is proper for any other plaintiff joined in the civil action.

(3) Notwithstanding subsection (1) of this section, any action against a licensed physician, osteopath, dentist, nurse, nurse-practitioner, physician assistant, psychologist, pharmacist, podiatrist, optometrist, chiropractor, institution for the aged or infirm, hospital or licensed pharmacy, including any legal entity which may be liable for their acts or omissions, for malpractice, negligence, error, omission, mistake, breach of standard of care or the unauthorized rendering of professional services shall be brought only in the county in which the alleged act or omission occurred.

(4)(a) If a court of this state, on written motion of a party, finds that in the interest of justice and for the convenience of the parties and witnesses a claim or action would be more properly heard in a forum outside this state or in a different county of proper venue within this state, the court shall decline to adjudicate the matter under the doctrine of forum non conveniens. As to a claim or action that would be more properly heard in a forum outside this state, the court shall dismiss the claim or action. As to a claim or action that would be more properly heard in a different county of proper venue within this state, the venue shall be transferred to the appropriate county. In determining whether to grant a motion to dismiss an action or to transfer venue under the doctrine of forum non conveniens, the court shall give consideration to the following factors:

(i) Relative ease of access to sources of proof;

(ii) Availability and cost of compulsory process for attendance of unwilling witnesses;

(iii) Possibility of viewing of the premises, if viewing would be appropriate to the action;

(iv) Unnecessary expense or trouble to the defendant not necessary to the plaintiff's own right to pursue his remedy;

(v) Administrative difficulties for the forum courts;

(vi) Existence of local interests in deciding the case at home; and

(vii) The traditional deference given to a plaintiff's choice of forum.

(b) A court may not dismiss a claim under this subsection until the defendant files with the court or with the clerk of the court a written stipulation that, with respect to a new action on the claim commenced by the plaintiff, all the defendants waive the right to assert a statute of limitations defense in all other states of the United States in which the claim was not barred by limitations at the time the claim was filed in this state as necessary to effect a tolling of the limitations periods in those states beginning on the date the claim was filed in this state and ending on the date the claim is dismissed.

DATE EFFECTIVE AND APPLICATION

<Sections relating to tort reform, civil proceedings and jury service in civil actions were amended or added by Laws 2004, 1st Ex. Sess., Ch. 1. This section was amended by § 1 of Laws 2004, 1st Ex. Sess., Ch. 1. Section 19 of Laws 2004, 1st Ex. Sess., Ch. 1 is a severability provision. Section 20 of Laws 2004, 1st Ex. Sess., Ch. 1 provides:>

<"Sections 8 through 15 of this act shall take effect and be in force from and after January 1, 2007; the remainder of this act shall take effect and be in force from and after September 1, 2004, and Sections 1 through 7 of this act shall apply to all causes of action filed on or after September 1, 2004.">

Current through End of the 2007 Regular Session and 1st Ex. Session

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