IN THE SUPREME COURT OF MISSISSIPPI
CASE NO. 2008-IA-01191-SCT

SHANNON HOLMES AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY — APPELLANTS

VS.

LEE MCMILLAN — APPELLEE

APPEAL FROM THE COUNTY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANTS

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I. ARGUMENT

A. MISS. CODE § 61-9-3(3) DOES NOT APPLY FOR THE VENUE DETERMINATION OF CIVIL ACTIONS

McMillan struggles to escape the venue provisions of Miss. Code § 11-11-3 and argues that Miss. Code § 61-9-3(3), which has never been applied to civil actions, should instead be applied.

McMillan correctly states that Miss. Code § 61-9-3(3) contains provisions for "venue of actions," but he incorrectly ignores that those provisions relate to - - criminal actions charging offenses against municipal ordinances. Section 61-9-3(3)states that its venue provisions apply to:

> ...all **laws, municipal ordinances, and local options** effective in the municipality as a result of municipal, judicial district and county options exercised in the municipality, judicial district or the county within which the principal office of the municipality is located, **and all other laws, orders, codes and resolutions of and applicable to the municipality** availing or having availed itself of the provisions hereof as well as those of the board of supervisors of the county in which the principal office of the municipality is located, shall be applicable to such airport or air navigational facility...**Venue for the trial of all offenses against such laws and ordinances shall be in the county in which the principal office of the municipality is located.** (Emphasis added.)

This statutory language clearly shows no intended application to civil actions between private persons for the alleged violation of Mississippi's State Rules of the Road statutes, especially where such State Common Law and State Statute-based civil actions are already specifically regulated by Miss. Code §11-11-3.

Instead of addressing the complete provisions of § 61-9-3(3),

McMillan argues that Holmes' violation of a Miss. **State Statute** (Mississippi Code § 63-15-43, prohibiting operation of an automobile without Liability insurance) was a substantial act alleged in the breach of contract action against State Farm for UM benefits. It is admitted that Holmes' having no Automobile Liability Insurance is relevant to the issues of Plaintiff's UM claim with State Farm. However, the violation of a statutory requirement to have Liability Insurance is not required to be superfluous and irrelevant in a UM cause of action. See: MRE 403. The Mississippi UM Statute, at § 83-11-103(c), defines an "uninsured motor vehicle," and it does not require any reference to the (subsequently enacted by amendment) mandatory Liability Insurance Requirements of Miss. Code § 63-15-43. Notably, Miss. Code § 63-15-43 is also a State Statute, not a Municipal Ordinance, and it is therefore not a law referenced in Miss. Code § 61-9-3, even if it were a statutory violation necessary to be established in order for Plaintiff to maintain his UM claim.

It is the automobile accident itself, and not any violation of Miss. Code § 63-15-43, which gave rise to McMillan's present action. Indeed, even driving without a license, much less without insurance, would not be admissible evidence to show negligence on the part of Holmes. See: *Allen v. Blanks*, 384 So.2d 63 (Miss. 1980); and MRE 411.

McMillan also argues that Hinds County venue is proper in this case under the authority of *Jackson Municipal Airport Authority v.*

Evans, 191 So.2d 126 (Miss. 1966). However, the *Evans* case is totally devoid of any ruling, dicta, or comment of any type that would affect or relate to Mississippi's Venue Law in any way.

Evans arose when the City of Jackson, purportedly acting in accordance with the Federal Aviation Act of 1958, Mississippi's 1950 Airport Zoning Act, and a local statute adopted jointly by the City of Jackson, Rankin County, and Hinds County that created a Joint Airport Zoning Board, filed suit in Hinds County Chancery Court against certain landowners to compel them to top off or remove trees that exceeded 50 feet in height within the landing zone of aircraft using the Jackson Airport. **There is absolutely no reference in that case to indicate that the Defendants were not residents of Hinds County, as no venue issues are discussed in it.** The whole subject matter of that case was instead whether, on a Demurrer submitted by Defendant Evans, the City of Jackson's case would be a taking of property for public use without due compensation having first been made, as required in Section 17 of the Constitution of the State of Mississippi; this Court concluded that the Demurrer was proper and the City of Jackson's case was properly subject to dismissal on those Constitutional grounds. (191 So.2d at 133).

Even if *Evans* **had** shown that Defendant therein was a resident of Rankin County, Mississippi law is clear that a Defendant may voluntarily waive his right to objection of such improper venue and proceed to resolution of the case in the improper Judicial District

of which it was filed, as long as that Court had valid statutory subject matter jurisdiction. See *Wofford v. Cities Service Oil Co.*, 236 So.2d 743, 745 (Miss. 1970); *King v. Ainsworth*, 83 So.2d 97, 98 (Miss. 1955). For McMillan to suggest in the Brief of Appellee, that *the Evans* case held or even implied, that Miss. Code § 61-9-3(3) was an applicable and valid venue basis for that suit to proceed in Hinds County, that such statute applied to civil actions, or that Mississippi's Venue Law was addressed or affected by *Evans* at all, is just plain false.

The present case is before this Court precisely because Appellant Holmes, a resident of Rankin County who is being sued for a purported violation of a Mississippi Statute (Miss. Code § 63-3-801, according to Plaintiff's Complaint and Brief of Appellee), along with the other Defendant in this case, State Farm, do **not** waive their objection to improper venue. Holmes asserts her right to be sued only in the Judicial District in which she resides and in which she allegedly committed her violation of Mississippi Statutory and Common Law duties.

Plaintiff/Appellee correctly notes the general Rule of Statutory Construction to the effect that specific on-point statutory provisions control over more general and vague ones. However, for the present case, Plaintiff seeks to overlook (indeed, not even listing it in his Statement of Facts) the critically important point that Defendant Holmes is a resident of Rankin County and the very specific venue rights that are therefore

granted to Holmes by Miss. Code § 11-11-3.

Miss. Code § 11-11-3 **specifically** states that it applies to "civil actions," and it specifically states that such actions are **required** ("shall be") to be commenced in the county where the Defendant resides or where a substantial alleged act or omission occurred or where a substantial event that caused the injury occurred. That specific language completely, within the realms of logic and reason, applies directly to this case.

To the contrary, Miss. Code § 61-9-3 notes, although in a specific manner, that venue for the trial of all "offenses against" municipal laws (and local options) is required to be in the county in which the principal office of the municipality is located. That statute does specifically mean that offenses against the laws of Jackson that are committed on the grounds of the Jackson Airport are to be heard, as Holmes' citation for driving without insurance was, in the Municipal Court of Jackson. However, by no stretch of logic does it even vaguely or generally state that it is intended to contradict the specific provisions of Miss. Code § 11-11-3 governing the venue of civil actions nor otherwise to serve as a basis for hauling a Rankin County citizen into Hinds County to defend a civil negligence charge that is based solely on an alleged violation of State Statutory and Common Law that occurred solely in Rankin County. Appellants herein therefore respectfully submit that, in order to avoid this and other potential violations of the provisions of the Mississippi Code, this Court should issue a

ruling in this case definitively stating that Miss. Code § 61-9-3 does not apply to the determination of venue in civil actions.

B. THE ONLY SUBSTANTIAL ALLEGED ACT, OMISSION OR INJURY CAUSING EVENT OCCURRED IN RANKIN COUNTY

McMillan, perhaps realizing that Miss. Code § 11-11-3 is actually the proper and specifically controlling venue statute for this civil action, then proceeds to present an argument under that proper statute, contending that McMillan is entitled to sue Holmes and State Farm in Hinds County since State Farm could purportedly be deemed as having breached its insurance contract with McMillan in Hinds County. In support of that argument, McMillan states that he communicated with the State Farm adjuster from his home in Jackson and that State Farm's letters were mailed to him in Jackson. However, that argument is contrary to the provisions of Miss. Code § 11-11-3 as interpreted in the prior precedent of this Court.

If Plaintiff was suing only State Farm in this action, it is conceded that, as a Hinds County Plaintiff suing an Illinois Corporation, Plaintiff would be allowed to file that suit in his home county even though the subject matter of the claim arose in Rankin County. However, the basis for allowing Hinds County Venue in that circumstance would be due to the fact that the Plaintiff was a Mississippi resident and the **sole Defendant** was a foreign corporation. Since McMillan also sued an in-state Defendant, Holmes, in this action, he is required to proceed with this action

only within a Judicial District in which venue is also proper for this Mississippi Defendant. Miss. Code § 11-11-3(1)(a)(i).

Since the accident that gave rise to the claim against State Farm occurred in Rankin County, Rankin County is not only the home county of the in-state Defendant and the only county in which Holmes is properly subject to prosecution of this civil action, it is also an allowed venue for the cause of action against State Farm. In *Snyder v. Logan*, 905 So.2d 531 (Miss.2005) the Mississippi Supreme Court specifically discussed the venue basis for that suit (unlike the *Jackson Municipal Airport Authority v. Evans* Decision, which, as discussed above, did **not** discuss any venue issues). In *Snyder*, this Court discussed an earlier statutory provision that had allowed actions against insurance companies to be brought in the county in which the loss occurred, and the fact that such statute had been repealed effective January 1, 2003. In doing so, you specifically noted that the applicable Venue Statute for such civil actions is now Miss. Code § 11-11-3, which was specifically amended effective January 1, 2003. Appellants herein respectfully submit that *Snyder* properly serves as an applicable precedent holding that Miss. Code § 11-11-3, as amended, does apply to this action. *Snyder* holds that the county in which an insured loss occurs is the county where the cause of action occurs or accrues, as those terms are intended to apply under Miss. Code § 11-11-3. Therefore, in the present case, although the Hinds County Plaintiff would be allowed to sue the

Illinois Defendant, State Farm, alone in Hinds County, the Plaintiff would also be allowed to sue State Farm in Rankin County.

The automobile accident in this case occurred in Rankin County, which therefore entitles Plaintiff to sue both the in-state Defendant, Holmes, and the Illinois Defendant, State Farm, in Rankin County. State Farm, being a foreign Defendant, does not have the same absolute right that Holmes has to be sued solely in Rankin County, since State Farm is not a Mississippi resident. However, Holmes does have that absolute right, being a Rankin County Defendant who allegedly committed an act of negligence in his home county. As discussed morefully in Section C, of this Brief, *infra*, the fact that Plaintiff here includes State Farm as a Defendant cannot properly be used as a valid basis to overcome the absolute right of Holmes to be sued in this civil action only in Rankin County.

McMillan cites to *Hedgepeth v. Johnson*, 975 So.2d 235 (Miss. 2008) in support of his argument that venue is proper in Hinds County. However, McMillan's reliance on that case is also misplaced, as it is distinguishable on its facts. In *Hedgepeth*, there are two significant underlying events that gave rise to Plaintiff's civil action: 1) Hurricane Katrina's damage to their home; and 2) an alleged inducement to commit fraud committed by the Mississippi (Madison County) Defendant, Johnson. A critically important fact in that case was that the **alleged commission of that tort by the in-state Defendant, Johnson, occurred in Plaintiff's**

home county of Jackson, rather than the Defendant's home county of Madison. Therefore, in accordance with the requirements of Miss. Code § 11-11-3, the in-state Defendant in that case was properly subject to venue of that civil in the county in which the tort occurred, such being Jackson County. *Hedgepeth* is therefore shown by its facts to not apply to the present case, in which it is an undisputed fact that Holmes's alleged tort occurred solely in Rankin County.

Medical Assurance Co. Of Mississippi v. Myers is more apropos to the present case than Plaintiff's misleading reliance on *Hedgepeth*. Plaintiff herein suggests that, since State Farm communicated with Plaintiff at Plaintiff's home address in Jackson and sent correspondence to him at his Jackson address about his UM claim, the UM claim suit against State Farm should be deemed as having "occurred or accrued" or a "substantial event that caused injury" in Hinds County, rather than the Rankin County location of the accident. In *Medical Assurance Co. Of Mississippi v. Myers*, 956 So.2d 213 (Miss.2007), just such a contention was held to be incorrect. [1]

In *Myers*, Medical Assurance Co. Of Mississippi sought a transfer of venue from Holmes County to Madison County. The trial

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[1] The subsequent *Hedgepeth* decision specifically confirmed that this Court had been correct in its application of Miss. Code § 11-11-3, as the controlling venue statute for these types of cases in the prior *Myers* case. See *Hedgepeth v. Johnson*, 975 So.2d at 240, ¶15.

court retained venue in Holmes County and noted the following facts in support of its decision: that Myers had completed his application in Holmes County; the policy was issued to Myers in Holmes County; the premiums were mailed from Holmes County; there were communications by mail and phone between Holmes County and Madison County; one of Myers' clinics was in Holmes County; and Holmes County is where Myers chose to file suit. *Id.* at 218.

In the present case, as in *Myers*, the only connection to Hinds County is Plaintiff's residence and the facts regarding the sale and correspondence from State Farm to Plaintiff in Hinds County. Such has been held to not suffice to establish a finding that a "substantial event that caused injury" occurred in Plaintiff's home county, when the underlying loss actually took place in another County. In *Hedgepeth*, the Mississippi Supreme Court recognized that the facts distinguished it from *Myers*. *Hedgepeth* is likewise property distinguished from the facts of *this case - in Hedgepeth,* the in-state Madison County Defendant was accused of committing a wrongful act while physically present in Jackson County, Defendant was therefore properly subject to venue in Jackson County.

In the present case, as in *Myers*, the underlying event occurred solely in a County other than Plaintiff's home county, and the in-state Defendant is subject to suit only in the county in which she resides (Rankin) and in which, as a matter of law, the underlying "substantial event that caused injury" occurred (Rankin). Defendants/Appellants therefore respectfully submit that

the County Court of the First Judicial District of Hinds County, Mississippi, would be in error if the basis for assuming venue jurisdiction of this case were to be a finding that the underlying cause of action and/or substantial event causing injury in this matter occurred anywhere other than Rankin County.

C. A MISSISSIPPI DEFENDANT IS NOT ARBITRARILY SUBJECT TO PROSECUTION OF CIVIL ACTIONS IN A FOREIGN COUNTY MERELY BECAUSE SUCH VENUE WOULD BE ALLOWED AGAINST AN OUT-OF-STATE FELLOW DEFENDANT

In the Brief of Appellee, Plaintiff cites certain general principles incorrectly, seeking to specifically apply them in a manner that would be in violation of Mississippi's Supreme Court precedents and Statutory Provisions regarding the proper venue of civil actions.

Plaintiff cites the general principle of *Flight Line, Inc. v. Tanksley*, 608 So.2d 1149, 1155 (Miss.1992) to the effect that, "In the final analysis, venue is about convenience." Brief of Appellee, at p.9. However, that principle only applies with regard to a choice among multiple valid venues. Surely, Plaintiff does not mean to suggest, and would not ask this esteemed Court of Law to hold, that statutorily prescribed rules validly enacted by the joint coordinated Constitutional authority and acts of the Legislative and Executive Branches of Mississippi are subject to being disregarded as a matter of mere convenience. As Plaintiff notes elsewhere, again citing the *Flight Line* case, "When filing a Complaint, the Plaintiff may select **among permissible venues**,..."

Brief of Appellee, p.4, (emphasis added). The issue presently before this Court is not one of convenience, nor is it the acknowledged right of a Plaintiff to choose in **which of various statutorily permitted venues** he may proceed with his civil action. This case instead presents the issue of what is the **statutorily permitted venue** for this civil action.

Likewise, Plaintiff seeks an invalid application and invocation of the long standing general rule of Mississippi law to the effect that, "Where venue is proper for one defendant, it is proper for all defendants." Brief of Appellee, at p.7. Appellee's reference to this demonstrates a need for this Court to clarify the limitation of its proper scope, in light of the 2002 Amendment of Miss. Code 11-11-3, in the text of the Opinion to be issued in this case.

The 2002 Amendment of Miss. Code § 11-11-3, effective January 1, 2003, specifically altered and limited the former cite to the effect that, if venue is proper as to any defendant, it is proper to all. Miss. Code § 11-11-3, as amended, now specifically requires that the venue rights of a Mississippi Defendant be given paramount importance and acknowledgment, so that Mississippi residents are no longer arbitrarily subject to being hauled into Court in a foreign county to defend civil actions filed against them for torts that occurred solely in their own home county.

Every Mississippi Litigator and Judge likely recalls the political discourse that accompanied the 2002 Amendment of Miss.

Code § 11-11-3. A significant driving force to that Amendment was a complaint of unfairness raised by Mississippi residents sued in civil actions in a County in which the Mississippi Defendant was not alleged to have committed any tort, simply because the Plaintiff also sued an out-of-state Defendant in that same suit.

The amendment of Miss. Code § 11-11-3 therefore specifically included the requirement, in subsection (1)(a) of the Statute, that in civil actions in which a Mississippi Defendant is present, the suit "shall be" commenced only in the county of that Defendant's residence or the county where the tort or injury occurred.

Subsection (1)(b) of the Statute then notes that, "**If** venue in a civil action against a non-resident Defendant cannot be asserted under paragraph (a) of this subsection (1), a civil action against a non-resident may be commenced in the county where the Plaintiff resides or is domiciled." (Emphasis added.)

These amendments, effective January 1, 2003, clearly and unambiguously changed the prior, more permissive, rule which had allowed that, where venue was proper as to one Defendant, it was arbitrarily proper to all Defendants. Appellants respectfully submit that Plaintiff's reference to such prior rule is therefore misleading, and that such rule is not a valid controlling principle that would properly subject Defendant Holmes (nor, since the conditional requirement of Miss. Code § 11-11-3(1)(b) does not apply here, even Defendant State Farm) to the prosecution of this

civil action in any county other than Rankin County.

II. CONCLUSION

Holmes and State Farm respectfully submit that Miss. Code § 61-9-3 is not a proper controlling venue statue for civil actions between private parties for automobile negligence and UM insurance civil actions, Miss. Code § 11-11-3, as amended, is instead the proper controlling venue statute. If a Plaintiff sues both a Mississippi tortfeasor and an out-of-state insurance company in a single action, paragraph (a) of subsection (1) of that statute controls for venue purposes, and a Plaintiff cannot subject the Mississippi Defendant to venue in a foreign county merely because an out-of-state Defendant is also joined in the suit. A Plaintiff may still control the choice of venue among multiple statutorily permitted venues where the facts of a particular case result in a finding that such multiple venues are allowed, but a Plaintiff cannot properly subject a Mississippi Defendant to a civil suit in a county of improper venue merely because such venue would be proper for the cause of action alleged against an out-of-state fellow defendant.

Holmes and State Farm, as Appellants herein, do therefore respectfully pray for the issuance of a published opinion clarifying and affirming these principles, and for a ruling reversing the decision of the County Court of the First Judicial Distict of Hinds County, Mississippi, and mandating a required dismissal or transfer of this action to the County Court of Rankin

County, Mississippi, and for all applicable costs of this appeal.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Jeremy T. Hutto, hereby certify that I have this day mailed via United States Mail, postage fully prepaid, a true and correct copy of the above and foregoing instrument to:

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Honorable Houston J. Patton
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So certified, this the 6th day of March, 2009.

Jeremy T. Hutto