Circuit Court for Baltimore City
Case No. 24-C-19-006988

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0439

September Term, 2020

AMIE LIELY-BAKER, ET AL.

v.

FRANK TODD TAYLOR, JR., ET AL.

Kehoe,
Gould,*
Zic
JJ.

Opinion by Kehoe, J.

Filed: September 29, 2021

*Judge Steven B. Gould, now serving on the Court of Appeals, participated in the hearing and conference of this case while an active member of the Court; he participated in the adoption of this opinion as a specially assigned member of this Court.

This is an appeal from a judgment of the Circuit Court for Baltimore City that granted appellees' motion to transfer venue of a motor vehicle tort action from Baltimore City to Howard County. The appellants are the plaintiffs in the action, Amie Liely-Baker, her spouse, Andre Baker, and their three children, Ari Baker, Ayden Baker, and Austin Baker. The appellees are Frank Todd Taylor Jr. and William Koerner.[1]

Appellants present three issues, which we have condensed into one:

> Did the circuit court err when it granted appellees' motion to dismiss or transfer venue?[2]

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[1] Koerner passed away on January 9, 2021. After oral argument, appellants filed a motion for sanctions relating to his death. We will address this matter in part 5 of our analysis.

[2] Appellants present the following issues:

> 1. Motions relying upon facts outside the record must be supported by affidavit, and movants in an improper venue motion bear the burden of proof. Taylor and Koerner moved for dismissal or transfer for improper venue based on their counsel's assertions that Taylor lives in Howard County and Koerner has no contacts with Baltimore City. Those assertions were unsupported by affidavit. Did the court err in granting Taylor's and Koerner's motion to transfer?
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> 2. Once filed, an amended complaint becomes the operative pleading. The Liely-Bakers filed an amended complaint that deleted Koerner from the complaint before the hearing on the improper venue motion. The trial court ignored the amended complaint. Did the trial court err in granting the motion to transfer without acknowledging that the amended complaint was the operative pleading, and without directing Taylor and Koerner to respond to it?
>
> 3. Trial courts are permitted to strike non-compliant pleadings, but should refrain from striking amended complaints absent prejudice to the defendants.

We conclude that the court erred when it granted the motion.

BACKGROUND

Appellants' complaint alleges that Ms. Liely-Baker and her children were travelling in her automobile when it was struck by a motor vehicle driven by Taylor. The complaint alleges that he was "an agent, servant or employee or in furtherance of the enterprise" of Koerner. Ms. Liely-Baker and her children were injured. The complaint seeks damages for the injuries to the occupants of the vehicle as well as a consortium claim by Mr. Baker. The complaint alleges that Koerner resided in Howard County and that Taylor "carrie[d] on a regular business, [was] employed and habitually engage[d] in a vocation" in the City of Baltimore. The accident took place in Baltimore County, but the Liely-Bakers filed their action in Baltimore City.

After they were served, appellees filed a motion pursuant to Md. Rule 2-327(b)[3] asking the court to dismiss the action or to transfer it to Howard County. The motion asserted that both of them resided in Howard County at the same address. Appellees stated that venue

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> Here, the Liely-Bakers' amended complaint effectively dismissed Koerner. If the trial court's treatment of that amended complaint is viewed as a striking of the complaint, was it error for the court to strike the amended complaint since it caused no prejudice to either defendant?

[3] Rule 2-327(b) states:

> If a court sustains a defense of improper venue but determines that in the interest of justice the action should not be dismissed, it may transfer the action to any county in which it could have been brought.

in the case was governed by Md. Code Courts & Jud. Proc. § 6-201, which states in pertinent part:

> (a) [A] civil action shall be brought in a county where the defendant resides, carries on a regular business, is employed, or habitually engages in a vocation. . . .
>
> (b) If there is more than one defendant, and there is no single venue applicable to all defendants, under subsection (a) of this section, all may be sued in a county in which any one of them could be sued, or in the county where the cause of action arose.

Appellees asserted (emphasis in original):

> In this case, there *is* more than one defendant, and there *is*, in fact, "a single venue applicable to all defendants under subsection (a) of Section 6-201—namely, Howard County, where both defendants reside.
>
> As Baltimore City is not a proper venue for all defendants but there *is* a "single venue applicable to all defendants," venue in Baltimore City is improper, and pursuant to Rule 2-327(b), the case should be dismissed, or in the alternative, transferred to Howard County.

The motion contained no affidavit or other documentation to support the allegation that Taylor resided in Howard County.[4]

Thereafter, three things happened. *First,* appellants filed an opposition to the motion. They argued that venue was proper in Baltimore City because Taylor's primary place of business was in that jurisdiction and Taylor provided no evidence showing that he lived in

[4] *See* Md. Rule 2-311(d):

> A motion or a response to a motion that is based on facts not contained in the record shall be supported by affidavit and accompanied by any papers on which it is based.

Howard County. Significant to this appeal, they also asserted that appellees failed to support their contention that Taylor was a resident of Howard County with an affidavit or any other form of documentary evidence. *Second*, appellees filed an answer to the complaint. *Third*, on April 16, 2020, which was the day before the circuit court's hearing on appellees' motion, appellants filed an amended complaint. The only substantive change was that the amended complaint deleted Koerner as a defendant. The amended complaint was not filed with the consent of appellees or with leave of court. Appellants emailed a copy of the amended complaint to the court and to appellees' counsel on the same day. This brings us to the hearing before the circuit court.

At the hearing, appellees' counsel stated:

> The motion [to dismiss or transfer venue] was based on the original complaint . . . which includes two Defendants, [Taylor and Koerner]. The complaint sets out an address for Mr. Koerner that is in Howard County and only sets out the business address for Defendant Taylor. However, Defendant Taylor's home address is the same as Defendant Koerner's home address, both being in Howard county.
>
> So it's our position that the venue in Baltimore City is improper because there is one single venue. There are actually two venues other than Baltimore City that are proper for both Defendants as the complaint was initially filed, being either Howard County where both Defendants reside or Baltimore County where the accident actually occurred.

In response, appellants' counsel stated in pertinent part:

> My understanding is that the amended complaint will now supersede the initial complaint, rendering the amended complaint the operative complaint.
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> * * *
>
> The initial concern raised by Mr. Koerner was that he was not in the proper venue. The amended complaint . . . just basically looks at Mr. Taylor, and

> as a result of Mr. Taylor being the only party in the amended complaint . . . there is no longer an issue regarding Mr. Koerner's venue.

The circuit court granted appellees' motion. It explained:

> The court has an opportunity to consider the pleadings in this case and to consider the applicable law as well as to consider the arguments of counsel. And this case I guess has a few—I wouldn't say procedural defects, but I would say maybe missteps. The motion before the court is a motion to dismiss or in the alternative to transfer which is what the statute authorizes the court to do.
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> [I]n this particular case . . . there's been an amended complaint which does not include [Koerner] as a party; however, the Defendants [have] already filed an answer, so there's been nothing dismissing him from this case and I don't believe that amending the complaint and not mentioning him in the amended complaint automatically makes him no longer a Defendant. He would have to be dismissed.
>
> So the Court is satisfied that pursuant to [Courts & Jud. Proc. § 6-201], there is single venue that's applicable to all Defendants and that venue is Howard County. . . . The motion is granted and the matter will be transferred to Howard County.

ANALYSIS

1. Some basic legal principles

We have appellate jurisdiction over this appeal even though no final judgment has been entered. *See Smith v. Johns Hopkins Community Physicians*, 209 Md. App. 406, 411–12 (2013) ("The case law makes it clear . . . that although a denial of a transfer of venue is not immediately appealable, the granting of such a motion is.").

We exercise *de novo* review of a circuit court's decision to grant a motion to dismiss or transfer for improper venue. *Payton-Henderson v. Evans*, 180 Md. App. 267, 276 (2008) ("In deciding a Motion to Dismiss for Improper Venue, in stark contrast to deciding

whether to transfer a case on the ground of *forum non conveniens*, there is no balancing of competing interests and the trial judge has no discretion. The venue chosen by the plaintiff is either proper, as a matter of law, or it is not.").

Title 6, subtitle 2 of the Courts and Judicial Proceedings Article set out Maryland's standards for deciding the appropriate forum in civil cases. Md. Code, Courts & Jud. Proc. § 6-201 is the general rule. The statute states in relevant part:

> (a) Subject to the provisions of §§ 6-202 and 6-203[5] of this subtitle and unless otherwise provided by law, a civil action shall be brought in a county where the defendant resides, carries on a regular business, is employed, or habitually engages in a vocation. . . .
>
> (b) If there is more than one defendant, and there is no single venue applicable to all defendants, under subsection (a) of this section, all may be sued in a county in which any one of them could be sued, or in the county where the cause of action arose.

Section 6-202(8) provides that, in tort actions based on negligence, the forum in which "the cause of action arose" is an additional venue.

"[G]enerally, the proper time for determining venue dependent on where a defendant carries on a regular business or habitually engages in a vocation is at the time suit is brought[.]" *Burnside v. Wong*, 412 Md. 180, 211 (2010); *see also Nodeen v. Sigurdsson*, 408 Md. 167, 178 (2009) ("The legal sufficiency of the forum selected is determined at the

[5] Courts & Jud. Proc § 6-203 sets out exceptions to Maryland's general venue rules. None of them has a bearing on the present appeal.

time of filing.").[6] If there is more than one applicable venue, "a plaintiff is entitled to select the forum in which to bring his or her action." *Nodeen*, 408 Md. at 178 (citing *Leung v. Nunes*, 354 Md. 217, 224–25 (1999)).

2. The parties' appellate contentions

Appellants present three contentions to us. The first is that the circuit court "erred in granting the motion to transfer because the movants failed to meet their burden of proof" because the factual assertions in appellees' motion were not supported by admissible evidence in the form of an affidavit or other documentary evidence showing that Taylor lived in Howard County. "Quite simply," they say, "there was no admissible evidence before the trial court establishing that Taylor lives in Howard County."

The remaining contentions are interrelated. Appellants argue that their amended complaint removed Koerner as a party and so appellees' "claim that Howard County was the only single venue applicable to both became a moot point [and their] motion to dismiss or transfer was therefore moot, too." As a corollary to this, they (incorrectly) assert that the circuit court refused to consider the amended complaint in reaching its decision. They

[6] The Court's use of the term "generally" in *Burnside v. Wong*, reflects the fact that when a motion to transfer is based on *forum non conveniens* grounds, a court may consider matters such as the convenience of parties and witnesses, court dockets, and the interests of justice. Paul V. Niemeyer and Linda M. Schuett, MARYLAND RULES COMMENTARY 393 (5th ed. 2019). These considerations may be affected by events occurring after a case is filed. In the present case, appellees did not ask the circuit court to transfer the case based on the doctrine of *forum non conveniens*.

equate the court's purported refusal to do so with striking the amended complaint, an act which, they say, would have been an abuse of discretion.

Appellees present three arguments as to why the circuit court did not err. The first is that, contrary to appellants' assertions, there was sufficient evidence before the circuit court to provide a factual basis for its ruling. (We will discuss this contention in detail later because it is the dispositive issue in this appeal.) Second, appellees argue that appellants' amended complaint was not properly before the circuit court because it wasn't actually filed. Their third argument boils down to the proposition that the amended complaint did not effectively dismiss Koerner as a plaintiff because it constituted a dismissal of a claim, and thus could only be accomplished by court order or consent of the parties. For this proposition, they rely on Md. Rule 2-506.

3. Disposing of some red herrings

a.

The parties spend a considerable amount of their briefs discussing the legal effect of appellants' first amended complaint, which was substantively identical to appellants' initial complaint except that it omitted Koerner as a defendant. The first amended complaint is irrelevant to the disposition of the merits of this appeal. This is because the critical time for assessing the merits of an assertion of improper venue is the time of the filing of the action. *Burnside v. Wong*, 412 Md. at 211; *Nodeen v. Sigurdsson*, 408 Md. at 178. Appellants' effort to hedge their venue bet by filing an amended complaint to delete Koerner as a defendant in reaction to appellees' venue motion was an exercise in futility. Appellants

were certainly free to drop him as a defendant but their decision to do so had no effect on appellees' motion to dismiss or transfer.

b.

Appellees' contention that the amended complaint was not properly filed is puzzling. Md. Rule 1–322(a) states in pertinent part:

> The filing of pleadings, papers, and other items with the court shall be made by filing them with the clerk of the court. . . . On the same day that an item is received in a clerk's office, the clerk shall note on it the date it was received and enter on the docket that date[.][7]

The docket entries in the present case reflect that the amended complaint was filed on April 16, 2020, that is, the day before the hearing, and the first page of the amended complaint is date-stamped accordingly. Thus, the amended complaint was properly filed, and the circuit court addressed its effect in its bench opinion. That appellants emailed a copy of the amended complaint to the motion judge's chambers doesn't change things.[8]

c.

Finally, appellees' reliance on Md. Rule 2-506 is misplaced. The rule states in pertinent part:

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[7] Rule 1-322 also permits parties to file papers with a judge of the court in which they are to be filed and for electronic filing as permitted by Md. Rule 16-203.

[8] As of the date of this opinion, papers in all Maryland jurisdictions other than Prince George's County and Baltimore City are filed through MDEC. The law as to filing court papers in non-MDEC jurisdictions is succinctly and lucidly summarized in *Estate of Vess***,** 234 Md. App. 173, 198–99 (2017).

> (a) By Notice of Dismissal or Stipulation. Except as otherwise provided in these rules or by statute, a party who has filed a complaint . . . may dismiss all or part of the claim without leave of court by filing (1) a notice of dismissal at any time before the adverse party files an answer or (2) a stipulation of dismissal signed by all parties to the claim being dismissed.
>
> * * *
>
> (c) By Order of Court. Except as provided in section (a) of this Rule, a party who has filed a complaint . . . may dismiss the claim only by order of court and upon such terms and conditions as the court deems proper.

The complaint did not assert a claim against Taylor and another claim against Koerner. It alleged one claim against both individuals. Why this is so is the result of the definition of "claim." For purposes of claim preclusion or res judicata, Maryland has adopted the "transactional approach" set out in RESTATEMENT (SECOND) OF JUDGMENTS § 24. *See, e.g., Bank of New York Mellon v. Georg*, 456 Md. 616, 669–70 (2017); *Prince George's County v. Brent*, 414 Md. 334, 341–42 (2010); *Smalls v. Maryland State Dep't of Educ*., 226 Md. App. 224, 238–40 (2015). Section 24 defines "claim" as a "transaction, or series of connected transactions, out of which the [cause of action] arose." *Kent County Board of Educ. v. Bilbrough*, 309 Md. 487, 498 (1987) (quoting § 24). Also quoting from § 24, the Court explained that what constitutes "transactions" and "series":

> are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Id.

As we mentioned, § 24 was developed by the American Law Institute to clarify when a judgment has claim preclusive effects. But this definition of "claim" can be informative in other contexts and this case is one of them.

Appellants seek damages for the negligent operation of a motor vehicle. Their case against Koerner was based on the legal theory of respondeat superior. The facts supporting their assertions against both defendants are clearly "related in time, space, origin, or motivation." Also, the facts "form a convenient trial unit" because agent and principal are routinely joined as parties in such actions. Therefore, in their initial complaint, appellants asserted only one claim.

The amended complaint did not dismiss a claim, it dropped a party. Appellants' ability to do so is controlled by Md. Rule 2-341(c)(5) and not Rule 2-506.

4. Addressing the merits

We turn to the dispositive issue in this case, which is whether there was a sufficient evidentiary basis for appellees' assertion that Taylor was a resident of Howard County. As we have mentioned, appellees' motion to dismiss or to transfer stated that Taylor was a resident of Howard County and that he resided at the same location as did Koerner. However, this factual assertion was not supported by an affidavit (which should have been easy enough to obtain), or any other form of documentary evidence.

It is clear that "[u]nder Maryland law, improper venue is a defense with the duty of averment and the burden of proof fall[s] on the defendant." *Odenton Development Co. v. Lamy*, 320 Md. 33, 39 (1990) (citing *Gambrill v. Schooley*, 95 Md. 260, 271 (1902) (A

party asserting improper venue "is not relieved of the *onus probandi* by reason of the form of the allegation or the inconvenience of proving a negative[.]")); *Lampros v. Gelb*, 153 Md. App. 447, 452 (2003) ("The defendant bears the burden of proving that venue is improper. To meet the burden of proving improper venue, the defendant must do more than merely raise a bare allegation that venue was improper, unsupported by affidavit or evidence." (cleaned up)).

In their brief, appellees assert that it was not necessary for them to make any evidentiary showing because "the evidence acknowledged by [a]ppellants [was] sufficient." This "evidence" consisted of two documents which were attached as exhibits to appellants' response to the motion to dismiss or transfer.

The first exhibit is a copy of the police report of the accident. It indicates that Taylor told the responding officer that his residence was in Howard County and, in fact, was the same as Koerner's. However, although police reports may be admissible under the business records exception to Maryland's hearsay rule, a hearsay statement within a business record is inadmissible. *Diggs & Allen v. State*, 213 Md. App. 28, 74 (2013), *aff'd sub nom*. *Allen v. State*, 440 Md. 643, 305 (2014) ("[E]ven though police reports may, under certain circumstances, be admissible under the public records exception to the hearsay rule, this does not mean . . . that hearsay contained within the report is also admissible." (citing *Ali v. State*, 314 Md. 295 (1988)); *Schear v. Motel Management Corp. of America*, 61 Md. App. 670, 680–81 (1985) ("[P]olice investigative reports are admissible under the business records exception only to the extent that information contained therein is within the

personal observation of the investigating officer and . . . any information based upon hearsay is inadmissible.").

Appellees also rely on another exhibit to appellants' response. This is an affidavit prepared by the process server who served both Koerner and Taylor. The affidavit states that the process server went to Koerner's residence in Ellicott City, and was met there by a man who identified himself as Koerner. She left the summons and related papers with him. She served Taylor the next day at his place of business. The affidavit relates that, when the process server met with him to do so, she

> was shocked as I recognized him as the man who had identified himself as . . . Koerner. I said "you're the guy I met the other night. He just smiled."
>
> * * *
>
> He stated that his residence was [the same as Koerner's].

The affidavit also stated that it was made under penalties of perjury and that its contents were "true and correct."

From appellees' perspective, the process server's affidavit represents a problem similar to the one posed by their reliance on the police report. The affidavit is evidence that Taylor said that he resided at the same address as Koerner but, because the statement was not under oath, it was inadmissible hearsay.

Finally, appellees argue that appellants "acknowledge[d]" that the information in the police report and the affidavit was true by including them as exhibits to their response to their motion to dismiss or transfer. They do not explain why this is so and, in any event, we disagree. Certainly, the two exhibits aver that Taylor said on two occasions that he lived

at the same address as did Koerner. He was not under oath on either occasion. But the affidavit also says that Taylor was untruthful to the process server about his identity and, when asked for an explanation, refused to give one. The two exhibits can hardly be interpreted as an implicit concession by appellants that Taylor resided in Howard County.

It has been appellants' consistent position that appellees did not present any evidence to support their contention that Taylor was a resident in Howard County. Because they are correct on this point, the circuit court erred in granting appellees' motion to dismiss or transfer.

5. Appellants' motion for sanctions

As we mentioned, Koerner passed away while this appeal was pending. After they learned of this, appellants filed a motion for sanctions against appellees. They asserted that appellees' counsel was aware of her client's death, that she was under a duty to inform this Court of this fact, and that she failed to do so. They request that this Court grant them various forms of relief including striking any argument made by appellees as to Koerner's residence, finding that venue is appropriate in Baltimore City, compelling Taylor to respond to discovery in another pending civil action, granting appellants the right to proceed with discovery "including all records regarding insurance coverage available from any party, including the Estate of William Koerner," awarding them attorneys' fees and litigation expenses, as well as costs for the appeal.

In response, and relevant to the arguments made in the sanctions motion, appellees' counsel concedes that she was aware of her client's death but that Koerner's demise was immaterial to the issues raised in this appeal.

We deny the motion. (We are aware that appellants will receive some of the relief they are seeking anyway because they have prevailed in this appeal.)

THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY IS REVERSED. APPELLEES TO PAY COSTS.