Michigan Supreme Court
Lansing, Michigan

Syllabus

DAWLEY v HALL

Docket No. 155991. Decided January 3, 2018.

Joanne D. Dawley, individually and as personal representative of the estate of her husband, James Armour II, brought a tort action in the Wayne Circuit Court against Rodney W. Hall, the driver of a vehicle involved in a motor vehicle collision in Lake County that allegedly caused Armour's death. Defendant moved to transfer venue to Mason County or Lake County, claiming among other things that he conducted business in Mason County by owning and operating a resort there. The Wayne Circuit Court, John A. Murphy, J., granted the motion and transferred venue to Mason County in March 2015. Ten months later, plaintiff moved under MCR 2.223 to change venue back to Wayne County after discovery revealed that defendant was merely a member of the investment company that owned the resort in Mason County and not its owner. The Mason Circuit Court, Susan K. Sniegowski, J., denied the motion, and plaintiff appealed. The Court of Appeals, WILDER and SWARTZLE, JJ. (BORRELLO, P.J., concurring in the result only), reversed and remanded for transfer of venue to Wayne County. 319 Mich App 490 (2017). Defendant sought leave to appeal.

In a unanimous per curiam opinion, the Supreme Court, in lieu of granting leave to appeal and without holding oral argument, *held*:

Plaintiff's motion for a change of venue was not permitted under MCR 2.223(A), which only permits a court to change venue on timely motion of a defendant or on the court's own initiative. The Court of Appeals' decision ordering a transfer of venue was vacated.

1. MCR 2.223(A) states that if the venue of a civil action is improper, the court shall order a change of venue on timely motion of a defendant or may order a change of venue on its own initiative with notice to the parties and opportunity for them to be heard on the venue question. Neither avenue contemplates a plaintiff's motion. Similarly, the relevant venue statute, MCL 600.1651, does not provide for a plaintiff's motion to change venue, but it states that a defendant may move for a change of venue within the time and in the manner provided by court rule, in which case the court will transfer the action to a proper county on such conditions relative to expense and costs as provided by court rule and MCL 600.1653. By expressly recognizing that the defendant and the court can effect a change in venue but including no similar provision for the plaintiff, the rule and the statute must be read to exclude the plaintiff. Considered together, the court rules and the statute in this case demonstrate purposeful choices

about which actors can seek to effect a change in venue. Accordingly, the decision not to include the plaintiff in MCR 2.223(A) must be interpreted as a meaningful choice to preclude plaintiffs from filing motions under that rule.

2. It was unnecessary to address plaintiff's argument on appeal that MCR 2.612(C)(1)(b) would allow a plaintiff to effect a change in venue when a defendant has obtained a transfer to an improper venue because plaintiff did not properly raise the argument below. Plaintiff argued on appeal that she was prevented from acting sooner to transfer venue back to Wayne County because defendant had concealed the fact that he was merely a member of an LLC that owned the resort in Mason County and not its owner. MCR 2.612(C)(1)(b) does permit a court to overturn a prior order on the basis of newly discovered evidence, but only if that evidence by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B), which must be done within 21 days. It was questionable whether plaintiff's evidence could have met this test, given that information regarding the corporate ownership of the lodge was publicly available on a state government website. Even if plaintiff's evidence had been new, her argument would have failed because neither her motion to transfer venue nor the accompanying brief mentioned MCR 2.612(C) or requested relief from the Wayne Circuit Court's prior order. Instead, plaintiff's request for a venue transfer was explicitly based on the premise that venue was improper in Mason County.

Court of Appeals judgment vacated; case remanded to the Mason Circuit Court for further proceedings.

Justice WILDER did not participate because he was on the Court of Appeals panel.

Justice CLEMENT took no part in the decision of this case.

Michigan Supreme Court
Lansing, Michigan

OPINION

FILED January 3, 2018

S T A T E O F M I C H I G A N

SUPREME COURT

JOANNE D. DAWLEY, Individually and as Personal Representative of the Estate of JAMES ARMOUR II,

Plaintiff-Appellee,

v No. 155991

RODNEY W. HALL,

Defendant-Appellant.

BEFORE THE ENTIRE BENCH (except WILDER and CLEMENT, JJ.)

PER CURIAM.

At issue is whether plaintiff, arguing that venue is improper, can avail herself of MCR 2.223(A), which permits a court to order a venue change "on timely motion of a defendant," MCR 2.223(A)(1), or on the court's "own initiative," MCR 2.223(A)(2). To ask the question is nearly to answer it. Because plaintiff's motion is neither a motion by defendant nor an action on the court's "own initiative," we hold that plaintiff cannot file a

motion for a change of venue under MCR 2.223(A). Accordingly, we vacate the Court of Appeals' decision ordering transfer of venue.

This case arose out of a fatal automobile accident in Lake County between defendant Rodney W. Hall and decedent James Armour II. Plaintiff Joanne O. Dawley, Armour's spouse, sued Hall in Wayne County in August 2014. Defendant moved to transfer venue to Mason County or Lake County, alleging among other things that he conducted business in Mason County by owning and operating Barothy Lodge.[1] The Wayne Circuit Court granted the motion and transferred venue to Mason County in March 2015.

Ten months later, on January 8, 2016, plaintiff moved under MCR 2.223 to change venue back to Wayne County. She alleged that discovery had revealed that defendant did not, in fact, own the resort in his name; he was merely a member of Hall Investments, LLC, which owned the resort. Therefore, according to plaintiff, venue in Mason County was improper because defendant did not conduct business there. The trial court disagreed, but the Court of Appeals reversed and remanded for transfer of venue to Wayne County.[2] Defendant now seeks leave to appeal in this Court, arguing among other things that MCR 2.223 does not permit a plaintiff to move for transfer of venue.

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[1] In tort actions like the present case, MCL 600.1629(a), (b), and (c) provide three possible venue locations. The parties agree that none of the three is appropriate here. In such cases, MCL 600.1629(d) provides that venue is proper where the defendant resides or conducts business, MCL 600.1621, or in the county where the accident occurred, MCL 600.1627.

[2] *Dawley v Hall*, 319 Mich App 490; 902 NW2d 435 (2017).

We review interpretation of court rules "de novo and under the same principles that govern the construction of statutes."[3] "Namely, the court rule is to be interpreted according to its plain language," giving each word and phrase its common, ordinary meaning.[4]

MCR 2.223(A) states in pertinent part:

> If the venue of a civil action is improper, the court
>
> (1) shall order a change of venue on timely motion of a defendant, or
>
> (2) may order a change of venue on its own initiative with notice to the parties and opportunity for them to be heard on the venue question.

The rule thus provides two avenues for changing venue: the defendant's timely motion or the court's order on its own initiative. Neither avenue contemplates a plaintiff's motion. That is likely because "[a] transfer under MCR 2.223 necessarily implies an erroneous choice of court by the plaintiff."[5] Similarly, the relevant venue statute, MCL 600.1651, does not provide for a plaintiff's motion to change venue. It states, "An action brought in a county not designated as a proper county may nevertheless be tried therein, *unless a*

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[3] *Fraser Trebilcock Davis & Dunlap PC v Boyce Trust 2350*, 497 Mich 265, 271; 870 NW2d 494 (2015).

[4] *Id.*

[5] 2 Longhofer, Michigan Court Rules Practice, Text (6th ed), § 2223.6, p 190; but see 1 Longhofer, Michigan Court Rules Practice, Forms (3d ed), § 3:38, commentary, p 109 (recognizing that MCR 2.223 is "silent" on whether a plaintiff can file a motion and suggesting that "[a] logical resolution" is to permit the plaintiff to file a late, but not a timely, motion).

defendant moves for a change of venue within the time and in the manner provided by court rule, in which case the court shall transfer the action to a proper county on such conditions relative to expense and costs as provided by court rule and [MCL 600.1653]."[6] The rule and statute, then, expressly designate who can bring about a change in venue. Under well-established interpretive principles, by expressly recognizing that the defendant and the court can effect a change in venue, but including no similar provision for the plaintiff, the rule and statute must be read to exclude the plaintiff.[7]

This conclusion becomes even clearer when these provisions are compared to MCR 2.222. That rule allows a court in a proper venue to nonetheless transfer the case

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[6] Emphasis added. MCL 600.1653 is a cost-shifting provision involving motions for change of venue when venue is improper. It states that "[i]f a party brings a motion for a change of venue in an action based on tort alleging improper venue, the court shall award expenses and costs as follows . . . ." MCL 600.1653. The fees are to be paid by the losing party, after a hearing. MCL 600.1653(a) and (b). While this could be read to suggest that either party can file the motion, such an interpretation would contradict the clear language of MCL 600.1651 and MCR 2.223, which specifically provide that only a defendant can file the motion to change venue on the ground that present venue is improper.

[7] See *Bradley v Saranac Community Schs Bd of Ed*, 455 Mich 285, 298; 565 NW2d 650 (1997) ("This Court recognizes the maxim *expressio unius est exclusio alterius*; that the express mention in a statute of one thing implies the exclusion of other similar things.").

Plaintiff argues that "[i]f a court has authority to change venue without any motion, that the plaintiff filed a motion does not deprive the court of that authority." We do not reach this argument because there is no indication that the trial court acted on its own initiative in this case. We note, however, that the court rule gives the trial court broader discretion when it acts on its own initiative, even if such action may be spurred by information provided by the parties. Compare MCR 2.223(A)(1) (stating that if venue is improper, the court "*shall* order a change of venue on timely motion of a defendant") (emphasis added) with MCR 2.223(A)(2) (stating that if venue is improper, the court "*may* order a change of venue on its own initiative") (emphasis added). And it is the latter provision that courts must follow to transfer venue on their own initiative.

"on motion of *a party*"[8] on the basis of, among other things, the convenience of the parties.[9] Unlike MCR 2.223, then, MCR 2.222 does not limit which party may initiate a change of venue. Other rules allowing the court to act on its "own initiative" also explicitly provide for the filing of "the motion of *a party*," further demonstrating that actions taken on the court's "own initiative" are distinct from actions prompted by motions of *any* party.[10] Considered together, the court rules and the statute in this case demonstrate purposeful choices about which actors can seek to effect a change in venue. Accordingly, the decision not to include the plaintiff in MCR 2.223(A) must be

[8] MCR 2.222(B) (emphasis added).

[9] MCR 2.222(A) ("The court may order a change of venue of a civil action, or of an appeal from an order or decision of a state board, commission, or agency authorized to promulgate rules or regulations, for the convenience of parties and witnesses or when an impartial trial cannot be had where the action is pending.").

[10] See, e.g., MCR 2.612(A)(1) ("Clerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of a party and after notice, if the court orders it."); MCR 2.402(B) ("A court may, on its own initiative or on the written request of a party, direct that communication equipment be used . . . ."); MCR 2.316(B)(3) ("On motion of a party, or on its own initiative after notice and hearing, the court may order discovery materials removed at any other time on a finding that the materials are no longer necessary."); MCR 2.115(B) ("On motion by a party or on the court's own initiative, the court may strike" certain matters from a pleading); MCR 2.114(E) ("If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose" reasonable expenses); MCR 2.207 ("Parties may be added or dropped by order of the court on motion of a party or on the court's own initiative . . . ."); see also MCR 2.509(A)(2) (requiring the court to hold a jury trial unless "the court on motion or on its own initiative finds that there is no right to trial by jury").

interpreted as a meaningful choice to preclude plaintiffs from filing motions under that rule.[11]

Plaintiffs' inability to file a motion under MCR 2.223 does not leave them in the lurch. In this case, for example, plaintiff could have challenged the Wayne Circuit Court's order transferring venue if she had filed a motion for rehearing or reconsideration within 21 days pursuant to MCR 2.119(F)(1), or by filing an application for leave to appeal, MCR 7.205. Plaintiff bypassed these options and instead waited roughly 10 months to file a new motion to change venue.

Plaintiff also protests that defendant concealed the fact that he was merely a member of an LLC that owned the resort in Mason County by suggesting that he actually owned it himself. It was this chicanery, according to plaintiff, that prevented her from acting sooner to transfer venue back to Wayne County. Plaintiff argues that the concealment is legally significant because, under MCL 600.1651, the transferee court obtains "full jurisdiction of the action as though the action had been originally commenced therein." Therefore the transferee court, plaintiff contends, "acquires

[11] Plaintiff cites *Eigner v Eigner*, 79 Mich App 189; 261 NW2d 254 (1977), in support of her argument that MCR 2.223 does not preclude plaintiffs from bringing motions to change venue. In *Eigner*, the plaintiff successfully moved to transfer venue under GCR 1963, 404, a predecessor of MCR 2.223 that similarly stated, "[t]he venue of any civil action improperly laid shall be changed by order of the court on timely motion by any defendant, or may be changed by the court on its own motion." The Court of Appeals affirmed the trial court's transfer based on that rule. *Eigner*, 79 Mich App at 197. But much like the Court of Appeals in the instant case, *Eigner* offered no analysis of the rule's text and, indeed, it is unclear whether the defendant even challenged the plaintiff's authority to invoke the rule. To the extent that *Eigner* did hold that the court rule permitted plaintiffs to file a motion under this rule, we disagree with that holding.

jurisdiction to do anything the transferor court could have done. . . . One of the things the Wayne Circuit Court could have done (had it not lost jurisdiction) was reverse itself based on newly discovered evidence. MCR 2.612(C)." Consequently, plaintiff concludes that the Mason Circuit Court had the authority to do the same thing.

MCR 2.612(C)(1)(b) does permit the court to overturn a prior order on the basis of "[n]ewly discovered evidence," but only if that evidence "by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B)," which must be done within 21 days. It is highly questionable whether plaintiff's "new evidence" could meet this test, given that the Department of Licensing and Regulatory Affairs (LARA) has publicly provided online documents, dating back to 2010, revealing that "Barothy Lodge" is an assumed name for an entity known as Hall Investments, LLC.[12] Even if plaintiff's evidence were new, her argument would still fail: she never made a motion under MCR 2.612(C). Instead, she simply observes that the Wayne and Mason Circuit Courts *could* have granted relief under that rule. However, the rule states that a court can grant relief "[o]n motion and on just terms[.]"[13] Plaintiff's motion to transfer venue and accompanying brief never mentioned MCR 2.612(C) or requested relief from the Wayne Circuit Court's prior order. Instead, she explicitly requested a venue transfer on the basis that venue was improper in Mason County. Consequently, because plaintiff has not properly raised the argument, we do not decide here whether MCR

[12] See LARA, Corporations Online Filing System, <https://cofs.lara.state.mi.us/CorpWeb/CorpSearch/CorpSummary.aspx?ID=801162077&SEARCH_TYPE=1> (accessed December 20, 2017) [https://perma.cc/CWL8-FX68].

[13] MCR 2.612(C).

2.612(C)(1)(b) would allow, in certain cases, a plaintiff to effect a change in venue when a defendant has obtained a transfer to an improper venue.[14]

For the reasons above, plaintiff could not move for a change of venue under MCR 2.223(A). Accordingly, we vacate the Court of Appeals decision[15] and remand to the Mason Circuit Court for proceedings consistent with this opinion.

Stephen J. Markman
Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein

WILDER, J., did not participate because he was on the Court of Appeals panel.

CLEMENT, J., took no part in the decision of this case.

[14] We would note, however, that it is unclear whether MCR 2.612(C)(1)(b) even applies to motions to change venue in light of MCR 2.221(B), which is more specific and allows for the late filing of motions for change of venue "if the court is satisfied that the facts on which the motion is based were not and could not with reasonable diligence have been known to the moving party more than 14 days before the motion was filed." In this case, while no party has raised the issue, even if plaintiff had been permitted to file a motion to change venue under MCR 2.223, the motion would not have been timely under MCR 2.221(A) (requiring a motion for change of venue to be filed before or at the time the defendant files an answer), and, for the reasons discussed above, likely would not have satisfied the criteria for allowance of a late motion for change of venue under MCR 2.221(B).

[15] The Court of Appeals did not directly address defendant's argument that plaintiff could not utilize MCR 2.223, but it implicitly assumed that plaintiff could. Because we conclude that this argument is determinative, we need not reach the issues the Court of Appeals did address.