IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2008 Term

No. 33443

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

FRANK A. SAVARESE,
Plaintiff Below, Appellant,

V.

ALLSTATE INSURANCE COMPANY, KIM JOZSA LASHWANDA CARTER, and KIRA HILL,
Defendants Below, Appellees,

Appeal from the Circuit Court of Ohio County
The Honorable James P. Mazzone, Judge
Civil Action No. 06-C-69

AFFIRMED

Submitted: January 23, 2008
Filed: September 26, 2008

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JUSTICE BENJAMIN delivered the opinion of the Court.
JUSTICE STARCHER dissents and reserves the right to file a dissenting opinion.
JUSTICE ALBRIGHT did not participate in the issuance of this opinion.

SYLLABUS BY THE COURT

1. "Under the Privileges and Immunities Clause of the *United States Constitution*, Art. IV, Sec. 2, the provisions of *W. Va. Code*, 56-1-1(c) [2003] do not apply to actions filed against West Virginia citizens and residents." Syllabus point 2, *Morris v. Crown Equipment Corporation*, 219 W. Va. 347, 633 S.E.2d 292 (2006).

2. Pursuant to West Virginia Code § 56-1-1(c) (2003), a nonresident plaintiff must establish that all or a substantial part of the acts giving rise to his or her claims occurred in West Virginia in order to establish that venue is appropriate in this state where no claims are asserted against a West Virginia resident. In an action arising from the failure to pay a nonresident plaintiff's medical payment claims arising under a contract of insurance entered into and governed by the law of another state, the nonresident plaintiff's retention of a West Virginia attorney and communications to that attorney in West Virginia that the medical payment claims have been denied are insufficient, standing alone, to satisfy the requirements of West Virginia Code § 56-1-1(c)(2003).

Benjamin, Justice:

In the instant matter, Appellant Frank A. Savarese (hereinafter "Mr. Savarese") seeks reversal of the Circuit Court of Ohio County's October 11, 2006, Memorandum Opinion and Order dismissing, without prejudice, this first party bad faith action, pursuant to West Virginia Code § 56-1-1(c)(2003), for lack of subject matter jurisdiction. After thorough consideration of the arguments of the parties, the record below and all pertinent legal authorities, we affirm the circuit court's dismissal order.

I.

FACTUAL AND PROCEDURAL HISTORY

Mr. Savarese, a resident of Yorkville, Jefferson County, Ohio, was injured in a March 14, 2003, automobile accident occurring in Yorkville, Belmont County, Ohio.[1] Mr. Savarese thereafter retained an attorney located in Wheeling, Ohio County, West Virginia, to pursue any claims arising from this automobile accident.[2] This attorney promptly filed suit in the Court of Common Pleas for Jefferson County, Ohio, against the other driver who was resident of Belmont County, Ohio.

[1]The town of Yorkville, Ohio, is situated partially in Jefferson County, Ohio, and partially in Belmont County, Ohio.

[2]Wheeling, West Virginia, is situated east of Belmont County, Ohio, directly across the Ohio River and is south of Yorkville.

At the time of the accident, Mr. Savarese was insured by the Appellee Allstate Insurance Company (hereinafter "Allstate") under a policy of insurance providing for Twenty-five Thousand Dollars ($25,000) in medical payments coverage. As a result of injuries sustained in this accident, Mr. Savarese sought treatment from medical providers in both Ohio and West Virginia. His claims for medical payments under his Allstate policy were handled by Allstate representative Kim Jozsa (hereinafter "Ms. Jozsa") in Allstate's Hudson, Ohio, office, Allstate representative Lashwanda Carter (hereinafter "Ms. Carter") in Allstate's Birmingham, Alabama, office,[3] and Allstate representative Kira Hill (hereinafter "Ms. Hill") in Allstate's Birmingham, Alabama, office. During the course of handling Mr. Savarese's medical payment claims, requests for information and notification of benefit payments were directed to Mr. Savarese's counsel in Wheeling, West Virginia.

In March 2006, Mr. Savarese filed suit in the Circuit Court of Ohio County, West Virginia, against Allstate, an Illinois corporation with a principal place of business in Illinois, Ms. Jozsa, Ms. Carter and Ms. Hill alleging that they failed to exercise good faith in handling his first-party medical payment claims, that they breached his insurance contract by failing to pay such claims, that their failure to pay his medical payment claims caused him severe emotional distress and that Allstate failed to properly train its employees. In his complaint, Mr. Savarese sought both compensatory and punitive damages. The defendants

[3]Mail for Allstate's Birmingham, Alabama, office is sent to a Dallas, Texas, address.

promptly removed the action to federal court, however the case was remanded to the Circuit Court of Ohio County on the basis that the defendants did not demonstrate that the jurisdictional amount in controversy requirement had been satisfied. Upon remand, Allstate filed a motion to dismiss asserting that the circuit court lacked both subject matter jurisdiction and venue over Mr. Savarese's action because it involves no West Virginia parties and is governed by Ohio law. The individual defendants, appearing specially to challenge jurisdiction and venue, also filed a motion to dismiss. In addition to the issues raised by Allstate, the individual defendants argued insufficiency of service of process and lack of personal jurisdiction as to the claims asserted against them.

In his response to the motions to dismiss, Mr. Savarese admitted that Ohio law governed his claims but asserted that the Circuit Court of Ohio County, West Virginia, had jurisdiction to hear this matter because Allstate had directed communications regarding his medical benefit payments to his Wheeling, West Virginia, attorney and that some of his medical providers were located in Ohio County, West Virginia. To support this position, he attached numerous letters directed to his counsel involving his medical payment claims. Of the fifty-three (53) letters attached, thirty-three (33) involved the denial of payment, in whole or in part, to an Ohio chiropractor,[4] David A. Smith, D.C.[5] Seven (7) letters indicated

[4]After noting the medical providers he saw in West Virginia, Mr. Savarese makes a somewhat disingenuous statement in his brief before this Court that he "received no medical treatment in Jefferson County, Ohio, save an MRI performed in Steubenville, Ohio." (continued...)

payment in full had been remitted to medical providers.[6] Eight (8) letters were requests for medical records, medical records release authorizations, and/or further information such as diagnostic codes and tax identification numbers so that payments could be processed.[7] Two (2) letters evidence direct reimbursements to Mr. Savarese. An April 13, 2005, letter indicated that $18,522.57 had been paid in medical expenses to date. The remaining two (2) letters, both dated March 30, 2005, notified Mr. Savarese's counsel that partial payment had been made to David Liebeskind, M.D., a West Virginia provider. The Explanation of Benefits referenced as attached to these two letters which would explain the decision were

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[4](...continued)
However, in the materials he filed before the circuit court he admits to receiving treatment from David A. Smith, D.C., a chiropractor practicing in St. Clairsville, Ohio, and Thomas J. Romano, M.D., a physician practicing in Martins Ferry, Ohio. Both St. Clairsville and Martins Ferry are located in Belmont County, Ohio.

[5]Of these thirty-three (33) letters, four (4) were dated July 17, 2003, nine (9) were dated January 21, 2004, four (4) were dated May 19, 2004, two (2) were dated October 4, 2004, two (2) were dated January 5, 2005, and six (6) were dated March 29, 2005. Although each letter referenced an attached explanation of benefits to explain why full payment was not rendered, no attachments were included with any of the letters submitted by Mr. Savarese. Therefore, it is impossible for this Court to know, based upon the record before it, whether the letters bearing the same dates involved distinct payment decisions or were simply duplicates.

[6]Again, the explanation of benefits referenced in these letters were not included in the materials submitted to the circuit court so there way for this Court to know what medical provider had received payment.

[7]Two of these letters involved four West Virginia health care providers, Wheeling Hospital, A.V. Jellen, M.D., the Howard Long Wellness Center and the Ohio Valley Medical Center. There is no evidence on the record before this Court that these providers were not ultimately paid in the fourteen months between the date of the last letter and filing of Mr. Savarese's response to the motions to dismiss.

not included in the record created in the circuit court and there is no way for this Court to determine whether the April 13, 2005, letters were duplicates, whether they involved one or more charges, the reason Dr. Liebeskind was not fully reimbursed, or if he eventually received full payment.

Applying West Virginia Code § 56-1-1(c)(2003), the circuit court dismissed the underlying civil action. This statute provided,[8] in pertinent part, that "a nonresident of the state may not bring an action in a court of this state unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state." In its October 11, 2006, order, the circuit court noted that no party was a resident of West Virginia and that "[a]ll parties have agreed that Ohio law should apply to the claims." Acknowledging Mr. Savarese's argument that "the acts or omissions giving rise to jurisdiction in West Virginia are several calls and letters from the Defendants directed to [his] attorney located in Ohio County, West Virginia[,]" the circuit court framed the question before it as "whether these communications constitute 'a substantial part of the acts or omissions giving rise to the claim asserted.'" Answering this question in the negative, the circuit court explained its decision

[8]Subsequent to this Court's decision in *Morris v. Crown Equipment Corporation*, 219 W. Va. 347, 633 S.E.2d 292 (2006), *cert. denied*, 127 S.Ct. 833, 166 L.Ed.2d 665 (2006), *cert. denied*, 127 S.Ct. 833, 166 L.Ed.2d 665 (2006), which found this statute constitutionally infirm when a claim was asserted against a West Virginia defendant, the Legislature repealed W. Va. Code § 55-1-1(c) (2003) and enacted a separate *forum non conveniens* statute at W. Va. Code § 56-1-1a (2007). As subsection (c) to W. Va. Code § 56-1-1 has been repealed, all references to W. Va. Code § 56-1-1(c) herein are to 2003 enactment.

stating that it did:

> not agree that the communications sent to the Plaintiff's attorney are a substantial part of the acts giving rise to the claims. The claim was adjusted in offices located in Hudson, Ohio, and Birmingham, Alabama. Any decisions involving whether to pay or to deny benefits under the policy were made at these locations. The decisions were then simply communicated to the Plaintiff's attorney, but they were already finalized before they were communicated.
>
> A mere communication to an attorney that a decision has been made, without more, cannot confer subject matter jurisdiction. To find differently would put the Defendants in a situation where they would either have to 1) submit to jurisdiction anywhere a claimant hires an attorney simply because they have a duty to communicate with the attorney, or 2) refuse to send correspondence to a claimant's attorney in order to preserve their jurisdictional defenses, but possibly give rise to additional bad faith claims for failure to communicate. The Court believes that more than Plaintiff's counsel's physical location is contemplated by W. Va. Code § 56-1-1(c) in order for subject matter jurisdiction to exist over claims filed in this state by nonresidents.

(footnote omitted). Accordingly, the circuit court dismissed the action, without prejudice, for lack of subject matter jurisdiction.[9] It is from this order that the instant appeal was taken. As explained in further detail below, we agree that the mere presence of Mr. Savarese's counsel in West Virginia, including communications directed to him, is insufficient to permit the instant action to proceed in the courts of our state. Accordingly, we affirm the circuit

[9]The circuit court recognized the additional grounds raised by the appellees in their motions to dismiss, specifically W. Va. R.Civ. Pro. 12(b)(2) (lack of jurisdiction over the person), W. Va. R.Civ. Pro. 12(b)(3) (improper venue), and W. Va. R.Civ. Pro. 12(b) (5) (insufficiency of service of process). However, the circuit court declined to address these grounds based upon its lack of subject matter jurisdiction.

court's dismissal order.

II.

STANDARD OF REVIEW

As noted above, the circuit court dismissed Mr. Savarese's for lack of subject matter jurisdiction based upon motions to dismiss filed by the various Appellees. Although it characterized its ruling as one based upon a lack of subject matter jurisdiction, the circuit court's ruling is clearly based upon application of the then-existing venue statute, W. Va. Code § 56-1-1(c). In general, this Court will apply a *de novo* standard of review to a circuit court's order granting a motion to dismiss. Syl. pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995). *See also, Elmore v. Triad Hospitals, Inc.*, 220 W. Va. 154, 157-58, 640 S.E.2d 217, 220-21 (2006) (*per curiam*) (noting applicability of *de novo* standard of review to dismissal pursuant to Rule 12(b)(1) and 12(b)(6)); *Johnson v. C.J. Mahan Const. Co.*, 210 W. Va. 438, 441, 557 S.E.2d 845, 848 (2001) (*per curiam*) (noting applicability of *de novo* standard of review to motion filed pursuant to Rule 12 (b)(1)). However, we recently set forth an abuse of discretion standard applicable to dismissals for improper venue. Syl. pt. 1, *United Bank, Inc. v. Blosser*, 218 W. Va. 378, 624 S.E.2d 815 (2005) ("This Court's review of a trial court's decision on a motion to dismiss for improper venue is for abuse of discretion."). A *de novo* standard of review is likewise applicable to the extent the circuit court's application of W. Va. Code §

56-1-1(c) is implicated. Syl. pt. 1, *Crystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995) ("Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review."). With these applicable standards guiding our decision, we affirm the circuit court's decision to dismiss the underlying action, without prejudice to refile in another jurisdiction.

III.

DISCUSSION

At the outset, in affirming the circuit court's decision, we observe that we are not bound by the reasons set forth by the circuit court in its decision to dismiss this matter. As we recently recognized in *Hoover v. Moran*, 222 W. Va. 112, 662 S.E.2d 711, 718 (2008) (*per curiam*), "our cases have made clear that 'it is permissible for us to affirm the granting of [dismissal] on bases different or grounds other than those relied upon by the circuit court.'" *Hoover v. Moran*, 222 W. Va. at __, 662 S.E.2d at 718, quoting, *Gentry v. Mangum*, 195 W. Va. 512, 519, 466 S.E.2d 171, 178 (1995). *See also*, *Schmehl v. Helton*, 222 W. Va. 98, 662 S.E.2d 697, 705, n.7 (2008) ("this Court may in any event affirm the circuit court on any proper basis, whether relied upon by the circuit court or not."); *Murphy v. Smallridge*, 196 W. Va. 35, 36-7, 468 S.E.2d 167, 168-9 (1996) ("An appellate court is not limited to the legal grounds relied upon by the circuit court, but it may affirm or reverse a decision on any independently sufficient ground that has adequate support."); Syl. pt. 3, *Barnett v. Wolfolk*,

149 W. Va. 246, 140 S.E.2d 466 (1965) ("This Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment."). Thus, while the circuit court based its dismissal order upon a finding that it lacked subject matter jurisdiction, this finding was grounded upon application of W. Va. Code § 56-1-1(c), a venue statute. So long as W. Va. Code § 56-1-1(c) was properly applied, this Court may affirm the decision of the circuit court regardless of the label the circuit court attached to its reasoning.

A.

W. Va. Code § 56-1-1 (2003)

At the heart of this appeal is whether the circuit court properly applied W. Va. Code § 56-1-1(c) to prohibit Mr. Savarese's action, based upon Ohio bad faith law, from proceeding in the Circuit Court of Ohio County, West Virginia. Contained within W. Va. Code § 56-1-1 (2003), a statute entitled "Venue generally", subsection (c) provided in its entirety:

> Effective for actions filed after the effective date of this section, a nonresident of the state may not bring an action in a court of this state unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state: Provided, That unless barred in the state where the action arose, a nonresident of this state may file an action in state court in this state if the nonresident cannot obtain jurisdiction in either federal or state court against the defendant in the state where the

> action arose. A nonresident bringing such an action in this state shall be required to establish, by filing an affidavit with the complaint for consideration by the court, that such action cannot be maintained in the state where the action arose due to lack of any legal basis to obtain personal jurisdiction over the defendant.
>
> In a civil action where more than one plaintiff is joined, each plaintiff must independently establish proper venue. A person may not intervene or join in a pending action as a plaintiff unless the person independently establishes proper venue. If venue is not proper as to any such nonresident plaintiff in any court of this state, the court shall dismiss the claims of the plaintiff without prejudice to refiling in a court in any other state or jurisdiction.

This Court has had two prior opportunities to address this venue provision. In the first, *Morris v. Crown Equipment Corporation*, 219 W. Va. 347, 633 S.E.2d 292 (2006), we held, in syllabus point 2, that "[u]nder the Privileges and Immunities Clause of the *United States Constitution*, Art. IV, Sec. 2, the provisions of *W. Va. Code*, 56-1-1(c) [2003] do not apply to actions filed *against West Virginia citizens and residents*." (emphasis added). In the second, *In re FELA Asbestos Cases*, – W. Va. –, – S.E.2d –, 2008 WL 3843830 (W. Va. July 2, 2008), we affirmed the application of W. Va. Code § 56-1-1(c) to dismiss complaints filed by over a thousand railroad employees against their railroad employers where the parties stipulated that all of the employee/plaintiffs resided outside of West Virginia, all of their injuries occurred outside of West Virginia and all of the defendant employers were incorporated outside of West Virginia. Indeed, in *In re FELA Asbestos Cases*, –W. Va. at –, –S.E.2d at –, 2008 WL 3843830 at *4, we expressly recognized the limited scope of

Morris stating that "in *Morris* [we] construed the 2003 venue statute to mean that if one of the defendants in the action was a West Virginia resident, then the action could properly be filed in a West Virginia court. . . . We therefore permitted the action by a Virginia resident that arose in Virginia to proceed, because one of the defendants was a West Virginia citizen and resident." In neither case did we address the degree of conduct which would satisfy the "substantial part of the acts or omissions giving rise to the claim" requirement of W. Va. § 56-1-1(c).

B.

"all or a substantial part of the acts or omissions giving rise to the claim"

All parties admit that no party herein is a resident of West Virginia and that Ohio law governs Mr. Savarese's claims. In arguing that it is appropriate to proceed with his claim in the Circuit Court of Ohio County, West Virginia, Mr. Savarese maintains that the communications which Allstate directed to his West Virginia attorney were sufficient to satisfy W. Va. Code § 56-1-1(c)'s requirement that "all or a substantial part of the acts or omissions giving rise to the claim" occur in West Virginia where plaintiff is a not a resident of West Virginia.[10] Relying upon footnote 4 of *Morris*, Mr. Savarese argues that we should

[10]Mr. Savarese has made reference to the fact that Allstate does business in West Virginia by issuing policies and adjusting claims arising in West Virginia. He also admits, however, that such business is unrelated to his claims. As we recognized in *In re FELA Asbestos Cases*, venue is not proper, under W. Va. Code § 56-1-1(c) over a defendant who (continued...)

look to federal decisions discussing the concept of substantiality under the federal venue statute, 28 U.S.C. § 1391(a)(2) (2002),[11] as persuasive authority in discussing the scope of the concept under W. Va. Code § 56-1-1(c).[12] In further support of this argument, Mr. Savarese relies upon a number of federal cases which stand for the proposition that venue over a defendant may be proper where the defendant has directed communications into a jurisdiction. While such a finding may be appropriate in circumstances where the defendant challenging venue voluntarily directed the relied upon communications to the jurisdiction, such is not the situation currently before this Court. In the instant matter, Allstate and the

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[10](...continued)
may do business in this state where the defendant is not incorporated in this state *and* the claim is unrelated to the business conducted by the defendant in this state.

[11]28 U.S.C. § 1391(2002), the federal general venue statute provides, in pertinent part:

> (a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

[12]Although Mr. Savarese asserts that this Court "clearly recognized federal law in this area as persuasive for defining this term" in footnote 4, we would note that footnote 4 was included in the factual background portion of the *Morris* opinion and set forth the arguments made by the appellant therein. However, it is correct that this Court often relies upon federal authority addressing similar concepts as persuasive authority.

individual defendants were required to direct communications to Mr. Savarese's attorney in West Virginia solely due to Mr. Savarese's decision to retain a West Virginia attorney. Mr. Savarese's decision necessitated Allstate directing communications to Mr. Savarese's chosen representative in order to perform its preexisting contractual duties to Mr. Savarese. Had Mr. Savarese not retained a West Virginia attorney to represent him in seeking performance of an Ohio contract for a claim arising in Ohio, the communications relied upon would not have been directed to West Virginia.

The federal cases relied upon by Mr. Savarese are easily distinguishable from the situation currently before this Court because each involves circumstances where the underlying claim arose in the challenged jurisdiction or the defendant voluntarily directed communications into a jurisdiction in an effort to establish a business relationship or fraudulently induce action in that jurisdiction. For example, in *Uffner v. La Reunion Francaise, S.A.*, 244 F.3d. 38 (1st Cir. 2001), a case heavily relied upon by Mr. Savarese, the United States Court of Appeals for the First Circuit found venue to be appropriate in Puerto Rico for a claim of bad faith/wrongful denial of an insurance claim asserted against a French insurer and underwriters located in England and the State of Georgia. The plaintiff therein, Uffner, was a resident of the Virgin Islands. Critical to the court's decision that venue was appropriate in Puerto Rico was the fact that the underlying claim arose from the sinking of Uffner's yacht in Puerto Rican waters. *Uffner*, 344 F.3d at 43. The court rejected

the district court's conclusion that the underlying event, the sinking of the yacht, did not constitute a "substantial" part of the events underlying the claim because the loss constituted a tort action and the bad faith action asserted against the insurers and underwriters sounded in contract. *Id*. at 41. The court explained its reasoning stating:

> Appellees argue that Uffner's complaint alleges a bad faith denial of his insurance claim, not that the loss itself was due to their fault or negligence. Consequently, they reason, the sinking of the vessel cannot be considered "substantial." It is true, as the district court pointed out, that the legal question in the suit is "whether [an out-of-water survey] was necessary under the terms of the insurance contract." Resolving this issue does not require an investigation into how, when, or why the accident occurred. In this sense, the sinking of Uffner's yacht is not related to the principal question for decision.
>
> However, an event need not be a point of dispute between the parties in order to constitute a substantial event giving rise to the claim. *Cf. Woodke v. Dahm*, 70 F.3d 983, 986 (8th Cir.1995) (requiring that the event itself be "wrongful" in order to support venue). In this case, Uffner's bad faith denial claim alleges that the loss of his yacht was covered by the contract and the payment due to him wrongfully denied. Thus, although the sinking of *La Mer* is itself not in dispute, the event is connected to the claim inasmuch as Uffner's requested damages include recovery for the loss. We conclude that, in a suit against an insurance company to recover for losses resulting from a vessel casualty, the jurisdiction where that loss occurred is "substantial" for venue purposes.

Id. at 43. Had Mr. Savarese been injured in an accident occurring in West Virginia, *Uffner* would be on point and persuasive to this Court. In such an event, West Virginia may arguably have an interest in insuring that damages sustained in this state are appropriately compensated such that venue for Mr. Savarese's action arising under an Ohio contract and

governed by Ohio law may be appropriate in this state. However, those are not the facts with which we are presented.

In another case relied upon by Mr. Savarese, *Mitrano v. Hawes*, 377 F.3d 402, 405 (4th Cir. 2004), the United States Court of Appeals for the Fourth Circuit set forth the following test for determining whether an act was substantial enough to support venue:

> in determining whether events or omissions are sufficiently substantial to support venue under the amended statute, a court should not focus only on those matters that are in dispute or that directly led to the filing of the action. Rather, it should review the entire sequence of events underlying the claim.

(internal citations and quotations omitted). *Mitrano* involved a claim for attorneys fees asserted in the United States District Court for the Eastern District of Virginia by an attorney against his former client, a resident of Massachusetts. *Mitrano*, 377 F.3d at 404. At the time the contract was entered, the attorney was a resident of New Hampshire, but thereafter moved to Virginia. *Id.* Pursuant to this contract, the attorney initiated an action on behalf of the client in the Eastern District of Virginia challenging the transfer of an internet domain name to the registry of a French court where a trademark infringement case against the client was pending. *Id.* The district court found venue to be improper in "the Eastern District because Mitrano's performance of legal work was 'tangential, not substantial' to Mitrano's breach of contract claim." *Id.* at 405. The Fourth Circuit disagreed, finding that work performed under the contract in the Eastern District of Virginia could constitute a

"'substantial part of the events [and] omissions giving rise to [Mitrano's] claim' for breach of contract." *Id.* at 405-06. Accordingly, the matter was remanded to the district court for a determination of the extent of work performed within the Eastern District of Virginia and whether the same constitutes a substantial part of the attorney fee claim. *Id.* at 406.

Additionally, in *Verizon Online Services, Inc. v. Ralsky*, 203F.Supp.2d 601 (E.D.Va. 2002), the United States District Court for the Eastern District of Virginia denied defendants' motions to dismiss for lack of personal jurisdiction and venue in an action brought by an internet service provider against the Michigan originators of unsolicited bulk e-mails (hereinafter "UBE's") or "spam" which were transmitted to and through seven of the internet service provider's servers located in Virginia. Explaining the situation before it, the court stated:

> Crediting the allegations in Verizon's Amended Complaint, [d]efendants deliberately transmitted millions of UBE to and through Verizon's e-mail servers in Virginia. In doing so, [d]efendants solicited business from Verizon's subscribers for pecuniary gain, while at the same time trespassing on Verizon's proprietary network causing harm to its servers located in Virginia.
>
> Defendants knew or should have known that such trespass violated Verizon's public anti-UBE policy and that the brunt of the harm caused by their allegedly tortious conduct would fall on Verizon's servers. Allowing [d]efendants to escape personal jurisdiction in a forum they have exploited for pecuniary gain while causing a tort to a Virginia resident would constitute a manifest unfairness to the rights of Verizon and the

> interests of Virginia. Defendants cannot bombard with impunity a Virginia Internet Service Provider ("ISP"), consuming server capacity and deluging the ISP's customers with spam, and then avoid jurisdiction by asserting ignorance of where the UBE was going or the harm such spam would cause the ISP's servers and its customers. Defendants knew or should have known that their UBE was harming Verizon and that Verizon would bring suit against them where Defendants' spam caused Verizon the greatest injury. When a business directs UBE advertising of its products to a Virginia ISP and causes a tort within Virginia, the business tortfeasor is purposefully availing itself of the laws of Virginia and thereby subjects itself to long-arm jurisdiction in Virginia within the contours of the Constitution.

Verizon Online, 203 F.Supp. 2d at 604. In finding venue to be appropriate in Virginia, the district court noted that substantial part of the events giving rise to the action requirement of the venue statute was fulfilled where the gravamen of the complaint involves millions of messages directed to and through servers located in Virginia. *Id*. at 623. Specifically, the Court found that a substantial portion of the defendants' actions giving rise to the claims occurred in Virginia and harmed property in Virginia and that "[a]lthough [d]efendants' conduct may have originated in Michigan, under Virginia's long-arm statute [d]efendants' transmission of UBE to and through Verizon's Virginia computers constitutes a 'use' of those servers which in turn constitutes an act within the Commonwealth." *Id.*

The remaining cases relied upon by Mr. Savarese in support of his argument that directing communications into a jurisdiction is sufficient to establish venue in that

jurisdiction involve voluntary actions by the venue-challenging defendant to establish a new business relationship with a party located in that jurisdiction or fraudulently induce that party to act. *See, e.g., U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co., Ltd.*, 241 F.3d 135, 153 (2nd Cir. 2001) (communications directed to plaintiff in the Southern District of New York in effort to induce plaintiff into entering charter agreement with defendant were sufficient to confer venue in Southern District of New York over claims involving charter agreement and related negotiations regardless of whether communications first passed through broker in Connecticut); *Vishay, Intertechnology, Inc. v. Delta International Corp.*, 696 F.2d 1062, 1065-66 (4th Cir. 1982) (finding intentional telephonic and written communications directed to plaintiff within subject jurisdiction in effort to induce plaintiff to enter into business contract constituted tortious conduct within the jurisdiction and were sufficient to establish personal jurisdiction over defendant for state law based claims of unfair business practices, interference with contractual relations and abuse of process arising from the communications); *Murphy v. Erwin-Wasey, Inc.*, 460 F.2d 661, 664 (1st Cir. 1972) ("Where a defendant knowingly sends into a state a false statement, intending that it should there be relied upon to *the injury of a resident of that state*, he has, for [personal] jurisdictional purposes, acted within that state.") (emphasis added); *F.C. Investment Group, L.C. v. Lichtenstein*, 441 F.Supp.2d 3, 11-12 (D.D.C. 2006) (venue was appropriate in District of Columbia where defendant directed communications to plaintiff in the District of Columbia with purpose of furthering scheme to defraud plaintiff); *Sacody Technologies,*

Inc. v. Avant, Inc., 962 F.Supp 1152 (S.D.N.Y. 1994) (finding venue appropriate over Massachusetts business and its agent in Southern District of New York in action involving confidentiality agreement where agent initiated contact with New York company, discussed confidentiality agreement during telephone calls and facsimiles to New York business and faxed executed confidentiality agreement to New York). Under these cases, venue would be appropriate in West Virginia if Allstate or its agents directed communications to Mr. Savarese in West Virginia in an effort to form a new business relationship or to fraudulently induce Mr. Savarese to act in West Virginia to his detriment. However, those are not the facts with which we are presented and are not analogous to the situation with which we are presented where Mr. Savarese's actions caused the communications to be directed to his attorney in West Virginia. At all times pertinent hereto, Mr. Savarese was a resident of Ohio.

The sole support in the Complaint filed in the Circuit Court of Ohio County for Mr. Savarese's claim that venue and jurisdiction are appropriate in West Virginia is the allegation that "Allstate, through its agents, employees and representatives, Defendants Jozsa, Carter, and Hill, adjusted plaintiff's claims in West Virginia by telephoning plaintiff's counsel and mailing correspondence to plaintiff's counsel located in Wheeling, Ohio County, West Virginia." Thus, the crux of Mr. Savarese's argument is that he retained an agent in West Virginia to pursue his claims under this contract with Allstate, directed Allstate to

communicate with his agent in West Virginia and by Allstate and its agents communicating with his agent as required under his pre-existing Ohio contract, West Virginia is an appropriate venue in which to resolve his claims. We find this argument unpersuasive. While it is true that an attorney serves as an agent of a client, *see e.g.*, *May v. Seibert*, 164 W. Va. 673, 680, 264 S.E.2d 643, 646 (1980) ("Rules of ethics declare that a lawyer is an agent of his client. It is the client's cause and decision that should prevail."), where the agent's acts are not at issue, the mere presence of the agent in a jurisdiction should not be the sole foundation to support venue in that jurisdiction. Indeed, a fundamental tenet of agency law is that the principal is liable for the acts of the agent. Where the acts of the agent are not at issue in determining liability, the location of the agent is not relevant to a venue determination. As noted by Appellees in response to Mr. Savarese's argument that his bad faith claim arose upon his attorney's receipt of communications that medical payments had been refused, the claim belongs to Mr. Savarese, an Ohio resident, not his attorney. Allstate owed a contractual obligation to Mr. Savarese, not his attorney. Until Mr. Savarese was aware that the payment has been denied and incurred damages as a result, he had no claim arising from the refused payment. His attorney merely served as a conduit of the denial information to him, much as the Connecticut brokers served as conduits of information in *U.S. Titan*, *supra*. We agree with the circuit court that a finding that the attorney's physical location is sufficient to satisfy the requirements of W. Va. Code § 56-1-1(c) would subject a defendant to claims in whatever venue in which a plaintiff decides to retain an attorney,

regardless of the venue's connection to the claim itself.

Accordingly, we now hold that the retention by Mr. Savarese, an Ohio resident, of a West Virginia attorney to pursue medical payment claims under an Ohio insurance contract for an injury sustained in Ohio is insufficient to establish venue under W. Va. Code § 56-1-1(c) for a cause of action governed by Ohio law arising from the denial of payment of such medical claims where no party to the action is a West Virginia resident. Pursuant to West Virginia Code § 56-1-1(c) (2003), a nonresident plaintiff must establish that all or a substantial part of the acts giving rise to his or her claims occurred in West Virginia in order to establish that venue is appropriate in this state where no claims are asserted against a West Virginia resident. In an action arising from the failure to pay a nonresident plaintiff's medical payment claims arising under a contract of insurance entered into and governed by the law of another state, the nonresident plaintiff's retention of a West Virginia attorney and communications to that attorney in West Virginia that the medical payment claims have been denied are insufficient, standing alone, to satisfy the requirements of West Virginia Code § 56-1-1 (c)(2003).

In a final effort to support his argument that West Virginia has sufficient contacts with this action to support jurisdiction and venue, Mr. Savarese attached additional correspondence from Allstate involving West Virginia providers to both his Petition for

Appeal and his Appeal Brief. However, these materials *were not* submitted to the circuit court, are not a part of the circuit court record and are not properly before this Court. As we recently stated in *Jackson v. Putnam County Board of Education*, 211 W. Va. 170, 178, 653 S.E.2d 632, 640 (2007) (*per curiam*), "the parties have an obligation to 'make sure that evidence relevant to a judicial determination be placed in the record before the lower court' so that this Court may properly consider it on appeal. *West Virginia Department of Health and Human Resources ex rel. Wright v. Doris S.*, 197 W. Va. 489, 494 n. 6, 475 S.E.2d 865, 870 n. 6 (1996)." In *Powderidge Unit Owners Association v. Highland Properties*, 196 W. Va. 692, 700, 474 S.E.2d 872, 880 (1996), this Court clearly stated that "our review is limited to the record as it stood before the circuit court at the time of its ruling." *See also*, *Pearson v. Pearson*, 200 W. Va. 139, 145, 488 S.E.2d 414, 420, n. 4 (1997) ("This Court will not consider evidence which was not in the record before the circuit court."). As the neither the allegations set forth in the Complaint nor the materials submitted for consideration to the circuit court in ruling upon the motions to dismiss demonstrate that all or a substantial part of acts or omissions forming the basis of Mr. Savarese's claims occurred in West Virginia, this action was properly dismissed pursuant to W. Va. Code §56-1-1(c)(2003).

IV.

CONCLUSION

For the reasons set forth herein, the Circuit Court of Ohio County's October 11, 2006, is affirmed. Communications directed to Mr. Savarese's West Virginia attorney are insufficient to satisfy the requirements of W. Va. Code §56-1-1(c)(2003).

Affirmed.