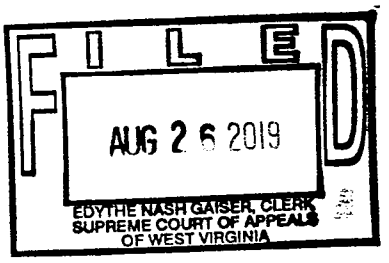
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



State of West Virginia ex rel.
Michael B. Ferrell, American Staffing, Inc.,
Shannon L. Wells, and the Chestnut Group, Inc.
Petitioners

v. No. 19-0658

The Honorable Warren R. McGraw, Judge of the
Twenty-Seventh Judicial Circuit, Employers'
Innovative Network, LLC, and Jeff Mullins,
Respondents.

RESPONSE TO PETITION FOR WRIT OF PROHIBITION

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QUESTION PRESENTED

Whether it was an abuse of discretion for the Circuit Court of Wyoming County to determine that venue was proper in Wyoming County.

SUMMARY OF ARGUMENT

The Defendants' Petition for Writ of Prohibition must be denied because it has failed to satisfy the five elements set forth in State ex rel. Hoover v. Berger, 199 W.Va. 12 (1996). In addition, the Defendants Petition must fail because they only addressed two (2) of the six (6) claims set forth in the Plaintiffs' Complaint.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

ARGUMENT

A. The Circuit Court did not exceed its legitimate powers.

Prohibition, much like its companion original jurisdiction writs of mandamus and habeas corpus, is an extraordinary remedy, the issuance of which is usually reserved for really extraordinary causes. Code, 53-1-1. State ex rel. Davidson v. Hoke, 532 S.E.2d 50, 207 W.Va. 332 (2000). Writs of prohibition provide a drastic remedy to be invoked only in extraordinary situations. State ex rel. Denise L.B. v. Burnside, 547 S.E.2d 251, 209 W.Va. 313 (2001).

Prohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari. Brooke B. v. Ray, 738

S.E.2d 21, 230 W.Va. 355 (2013). Where prohibition is sought to restrain a trial court from the abuse of its legitimate powers, rather than to challenge its jurisdiction, the court will review each case on its own particular facts to determine whether a remedy by appeal is both available and adequate, and only if the court determines that the abuse of power is *so flagrant and violative* of petitioner's rights as to make a remedy by appeal inadequate, will a writ of prohibition issue. State ex rel. State v. Alsop, 708 S.E.2d 470, 227 W.Va. 276 (2009) (emphasis added).

Finally, in determining whether to entertain and issue a writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, the court will examine five factors: (1) whether the petitioner has no other adequate means to obtain the desired relief, (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal, (3) whether the lower tribunal's order is clearly erroneous as a matter of law, (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law, and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. State ex rel. C. H. v. Faircloth, 815 S.E.2d 540, 240 W.Va. 729 (2018); *see also*, State ex rel. Hoover v. Berger, 199 W.Va. 12 (1996). It should be noted that while the Defendants referenced all five (5) of these factors in their Petition, they actually only addressed the third factor. They failed to discuss the remaining four (4) factors at all. Since this Court must consider all five (5) factors, Plaintiffs will address each factor in turn.

(i) Defendants had an adequate means to obtain the requested relief.

The Defendants decided to invoke the drastic means of seeking a writ of prohibition instead of seeking direct relief under the State's venue statute. Pursuant to W.Va. Code § 56-1-1(b):

> Whenever a civil action or proceeding is brought in the county where the cause of action arose under the provisions of subsection (a) of this section, if no defendant resides in the county, a defendant to the action or proceeding may move the court before which the action is pending for a change of venue to a county where one or more of the defendants resides and upon a showing by the moving defendant that the county to which the proposed change of venue would be made would better afford convenience to the parties litigant and the witnesses likely to be called, and if the ends of justice would be better served by the change of venue, the court may grant the motion.

The Defendants have acknowledged that none of them resides in Wyoming County. Therefore, they would have easily sought relief under this provision to have venue transferred to Kanawha County. They chose not to do so, and instead, chose to challenge the Circuit Court's "legitimate powers" through the extraordinary and drastic remedy of a writ of prohibition. This case is not before this Court as a matter of necessity, but instead, as a matter of choice. Accordingly, the first factor weights against the issuance of the Petition.

(ii) *Defendants have failed to allege Prejudice.*

The second factor is whether the Defendants will be prejudiced in a manner that is not correctable on appeal. Not only do the Defendants fail to address this issue in their Petition, they fail to address it in their underlying motion to dismiss. Nowhere in their motion to dismiss do the Defendants even use the word "prejudice." The Defendants expressly acknowledged in their Petition that "prejudice" is one factor this Court is to consider when weighing the merits of their Petition. Despite their express acknowledgement, the Defendants chose not to address the issue before this Court or at the Circuit Court level. Even if this Court were to find that the Defendants did not waive this issue, their failure to even address it shows that they do not believe the issue is of importance in this analysis. Accordingly, the second factor does not weigh in favor of granting the Petition.

(iii) *The Circuit Court's error is not clearly erroneous as a matter of law.*

The true issue in this case is not a question of law, but instead, a mixed question of law and fact. For example, the Circuit Court found as a matter of law that the resolution of a motion to dismiss for lack of venue is within the sound discretion of the trial court. This conclusion of law is correct. The Circuit Court also found that, "a plaintiff may bring suit in the circuit court of any county in which 'the cause of action arose.'" This conclusion of law is also correct.

The Circuit Court next concluded that, the venue of a cause of action in a case involving breach of contract in West Virginia arises within the county: (1) in which the contract was made, that is, where the duty came into existence; or (2) in which the breach or violation of the duty occurs; or (3) in which the manifestation of the breach-substantial damage occurs. Defendants acknowledge that this is a correct statement of the law. The Circuit Court also relied upon this Court for the following conclusions of law:

1) Actions for breach of contract are transitory and consequently not local in nature. Wetzel County Sav. & Loan Co. v. Stern Bros., Inc., 1973, 195 S.E.2d 732, 156 W.Va. 693;

2) The venue statute and the cases construing it recognize that a cause of action may, and in most cases does, consist of more than one element and that these elements may occur severally and in different geographical locations. *See*, Jones v. Main Island Creek Coal Co., 84 W.Va. 245, 99 S.E. 462 (1919); Carson v. Phoenix Ins. Co., Supra; Harvey v. Parkersburg Insurance Co., 37 W.Va. 272, 16 S.E. 580 (1892);

3) For purposes of determining where a cause of action arises in a breach of contract claim for purposes of venue selection, the location where the breach manifests itself and damages are made evident from that breach is not a reference to the physical locale in which a plaintiff's monetary harm is most acutely felt; the place where the damages are made manifest is not the location of the plaintiff's wallet or pocketbook, but instead the physical locale where the damages flowing from the breach are first made evident. State ex rel. Thornhill Group, Inc. v. King, 759 S.E.2d 795, 233 W.Va. 564 (2014); and

4) The person who brings a civil action for a breach of contract has the choice of bringing it in the county where the contract is made or the county where the contract is breached, or the county where the damage occurs. Wetzel Cty. Sav. & Loan Co. v. Stern Bros., 156 W. Va. 693, 698, 195 S.E.2d 732, 736 (1973).

The aforementioned conclusions of law are correct. To be clear, the Defendants are not challenging the Circuit Court's legal conclusion that venue is proper in a location where the breach manifests itself and damages are made evident from that breach. The Defendants are challenging the Circuit Court's factual finding that one location where the breach manifested itself and where damages were made evident from that breach was in Wyoming County. In its attempt to do so, the Defendants rely solely on State *ex rel.* Galloway Group v. McGraw, 711 S.E.2d 257 (2011). Their reliance is misplaced because Galloway was decided upon facts that are not present in this case. In that case, the Plaintiff brought suit to enforce a fee sharing agreement for fees received in UMWA litigation. The Plaintiff argued that venue was proper in Wyoming County because the individual plaintiffs in the underlying UMWA litigation resided in Wyoming County. This Court rejected the argument on two grounds. First, the contract provision regarding UMWA litigation appeared in an agreement to which Defendant Galloway was not a party. Second, this Court found that the sole fact that the individual litigants in the UMWA litigation lived in Wyoming County was too tangential a link to create venue in Wyoming County.

In this case, the Plaintiffs entered into an agreement with the Defendants wherein the Plaintiffs purchased the Defendants' customer lists, customer relationships and good will. As part of this agreement, 350 West Virginia residents became co-employees of Plaintiffs. In other words, under the agreement in dispute in this case, Plaintiffs purchased the employment rights of 350 West Virginia residents, 82 of which lived in Wyoming County. The primary benefit to

Plaintiffs for entering into the Agreement was the Administration Fee Plaintiffs received from the individuals that became its new employees under the Agreement.

Unlike in the Galloway case, the Defendants are parties to the contract that was breached. Unlike in the Galloway case, the employment rights of the residents of Wyoming County are the subject of this matter in dispute and Plaintiffs allege that the Defendants interfered with Plaintiffs' purchase of those rights. The Defendants are missing a critical point in this case. This case's connection to Wyoming County is not simply that the source of lost fees happen to reside in Wyoming County. The connection is that the Plaintiffs purchased the source of the fees, namely the employment rights of the individuals in Wyoming County, from the Defendants and it is that purchase of the employment rights that is the subject of this lawsuit. In Galloway, the Defendant had no substantive connection with the merits of the underlying litigation.

In this case, the Defendants are the cause of the litigation. This is a very important point. The Circuit Court specifically found that the Defendants' alleged breach of the agreement caused EIN to lose 82 employees in Wyoming County (Conclusions of Law, Paragraph 12). Just as important, the Circuit Court found that because "EIN lost the administrative fee that was generated in Wyoming County by Wyoming residents as a result of ASI's breach of the agreement, 'the physical locale of the damages flowing from the breach are first made evident' in Wyoming County." Therefore, unlike in Galloway, the Circuit Court in this case found both that the breach manifested itself and the damages were made evident in Wyoming County. Most importantly, in this case the Circuit Court tied the alleged breach of contract to the resulting damages that were incurred in Wyoming. In other words, but for the Defendants' breach which is the subject of the case, there would not have been any damages incurred in Wyoming County. This is different from the Galloway case because damages were incurred in Wyoming County

(by the UMWA Plainitffs) regardless of whether the fee agreement between counsel was breached. Said differently, the breach of the fee agreement in Galloway was not the cause of the substantive damages incurred in that case. As such, the connection to the Wyoming County residents was too tangential to create venue. In this case, the breach of the agreement by Defendants was the cause of the substantive damages. Accordingly, the Defendants have failed to show that the Circuit Court clearly erred as a matter of law. As such, the third factors weights against granting the Petition.

This factor should also be discussed in relation to the Slander claim. To be clear, the Circuit Court did not find that additional discovery had to be conducted to support the slander claim. Instead, the Circuit Court found that the Plaintiffs properly plead their slander cause of action. The Circuit Court also found that the Plaintiffs alleged in their Complaint that "Chestnut and Wells began soliciting EIN's clients by falsely advising them that EIN was engaged in improper business practices." The Circuit Court also found that some of EIN's clients purchased pursuant to the Agreement had work locations in Wyoming County. Taking these allegations in the light most favorable to the Plaintiffs, which Defendants acknowledged was proper, the Circuit Court found that Plaintiffs alleged that the slanderous comments were made to EIN's clients at their actual work locations in Wyoming County. This finding is legally correct and fatal to Defendants' Petition because if venue is proper as to any defendant under any count, it is proper for all defendants.

(iv) The Circuit Court's ruling is not in "manifest disregard for the law."

There is no allegation that the Circuit Court has a manifest disregard for the law or that its ruling is "oft-repeated." In fact, the Defendants fail to address this factor in either their motion to dismiss or their Petition. As such, this factor weight against issuance of the Petition.

(v) *This is not an issue of first impression.*

The Defendants acknowledge in their Petition (page 5) that this case involves the application of settled law, and therefore, is not a matter of first impression. As such, this final factor weights against issuance of the Petition.

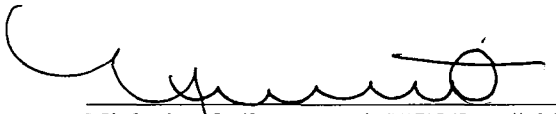
B. Defendants fail to address most of the substantive claims.

The Defendants claim that three of Plaintiffs' claim relate to the contract, and therefore, they should be viewed under the breach of contract analysis. Defendants are wrong. Plaintiffs' fraud in the inducement claim and fraud in the performance claim are separate counts and cannot be discarded under a breach of contract analysis. Whether venue is proper for the fraud counts, the count for outrage or the count for civil conspiracy is independent of whether there is venue for the breach of contract claim or the slander claim. Defendants' only argument relating to these counts is that Plaintiffs did not allege any facts under these counts to sustain venue. West Virginia is a notice pleading state and such allegations do not have to be made in the complaint. Again, Plaintiffs allege that Defendants made slanderous and untruthful comments to EIN's clients, some of which had locations in Wyoming County. This fact taken in the light most favorable to Plaintiffs is enough to sustain a finding that venue is proper under Counts V and VI. As such, Defendants have failed to even address venue in regards to four (4) of the six (6) counts contained in the Complaint.

CONCLUSION

Based upon the arguments set forth herein, the Plaintiffs respectfully request that this Court deny the Defendants unverified Petition for Writ of Prohibition.

EMPLOYERS' INNOVATIVE NETWORK, LLC and JEFF MULLINS,
By Counsel



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