No. 124798

Appeal to The Supreme Court of Illinois

SERGIU TABIRTA,
Plaintiff-Appellee,

v.

JAMES J. CUMMINGS, individually
and GILSTER MARY LEE CORP.,
Defendants-Appellants,

Appeal from the Appellate Court
First District, No. 1-17-2891

Appeal from Cook County, Illinois
Case No. 16 L 12605

Honorable Judge John Ehrlich
Judge Presiding

BRIEF OF *AMICUS CURIAE*, ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL ON BEHALF OF DEFENDANTS-APPELLANTS, JAMES J. CUMMINGS, INDIVIDUALLY, AND GILSTER MARY LEE CORP.

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STATUTES INVOLVED

Venue

735 ILCS 5/2-101

Except as otherwise provided in this Act, every action must be commenced (1) in the county of residence of any defendant who is joined in good faith and with probable cause for the purpose of obtaining a judgment against him or her and not solely for the purpose of fixing venue in that county, or (2) in the county in which the transaction or some part thereof occurred out of which the cause of action arose.

Residence of corporations, voluntary unincorporated associations and partnerships defined

735 ILCS 5/2-102

For purposes of venue, the following definitions apply:

(a) Any private corporation or railroad or bridge company, organized under the laws of this State, and any foreign corporation authorized to transact business in this State is a resident of any county in which it has its registered office or other office or is doing business. A foreign corporation not authorized to transact business in this State is a nonresident of this State.

ARGUMENT

I. A Party Should Not Have to Defend an Action in a County that has Little or No Relation to the Party or to the Transaction from Which the Case Arises.

A plaintiff's choice of venue is appropriate in the county of residence of any defendant joined in good faith or the county in which the transaction occurred. 735 ILCS 5/2-101. Where the defendant is a corporation, it is a resident of any county in which it has its registered office, "or other office" or is doing business. 735 ILCS 5/2-102.

As this Court noted, proper venue "is an important privilege which is given great weight in Illinois." *Stambaugh v. International Harvester Co.*, 102 Ill. 2d 250, 260 (1984). The Court emphasized this point, stating:

> 'The legislature clearly meant to protect a defendant against being sued in a county arbitrarily selected by a plaintiff, wherein the defendant does not reside, or in which no part of the transaction occurred which gave rise to the cause of action. If a plaintiff could so select the county to bring his suit, obviously a defendant would be entirely at his mercy, since such an action could be made oppressive and unbearably costly.'

Stambaugh, 102 Ill. 2d 250, 260-61 (1984), quoting *Heldt v. Watts*, 329 Ill. App. 408, 414 (1st Dist. 1946). It is now well established that venue statutes "reflect a legislative determination that a party should not have to defend an action in a county that has little or no relation to the party or to the transaction from which the case arises." *Home Depot, U.S.A., Inc. v. Dept. of Revenue*, 355 Ill. App. 3d 370, 377 (2d Dist. 2005); *Jackson v. Reid*, 363 Ill. App. 3d 271, 275 (4th Dist. 2006); *Melliere*

v. Luhr Bros., 302 Ill. App. 3d 794, 796 (5th Dist. 1999). But that is precisely what has occurred as a result of the appellate court's ruling in this case.

The sole issue before the court is whether Gilster Mary Lee Corporation (GML) operates an office in Cook County such that it falls within the parameters of an "other office" required to establish residency under 2-102 of the Code of Civil Procedure. The facts demonstrate that GML does *not* have an office in Cook County. Rather, at best, they have a part-time employee who by mere chance owns a home in Cook County.

The employee, James Bolton, works out of his home where he's lived since 1956—55 years prior to accepting part-time employment with GML. He services three of GML's customer using his own cell phone and computer. He spends 85% of his time dealing with a single customer, Aldi, which is located outside Cook County. He is not reimbursed for his home office expenses, and does not maintain any GML files or records in his home.

He never meets with clients at his home, nor does he hold any work-related meetings or any other corporate activities at his residence. In other words, he could just as easily work out of his car. The fact that he lives and sleeps within Cook County's borders is mere happenstance. He could live almost anywhere in Illinois and still do his job. GML does not have an office in Cook County, it has a *person*, who by mere chance, happens to own a house in Cook County.

The appellate court held that the "relevant inquiry" in determining whether a corporate defendant resides in a particular county is whether the property is a

"fixed location purposely selected to carry on an activity in furtherance of the corporation's business activities." *Tabirta v. Cummings*, 2019 IL App (1st) 172891-B, ¶ 30. The court held:

> GML specifically hired Bolton to service three of its Illinois customers from his Cook County residence and provided him with an e-mail address and a corporate extension with which to do so.

Id. The flaw in the appellate court's ruling is plain to see. GML did *not* hire Bolton to serve customers "from his Cook County residence." GML didn't care where he lived. The fact that he lived in Cook County was entirely fortuitous.

The importance of this factor cannot be understated. Advances in telecommunication technology have nearly eliminated the need for face to face meetings. Virtual offices are now commonplace and the need for brick and mortar offices is diminishing at a rapid pace. Cell phones, text messaging, e-mails, teleconferences, and cloud-based software allow business to go anywhere.

It is no exaggeration to say that a businessman can carry his entire office in a computer. ~~laptop.~~ And many do. Accordingly, the location of where an employee lives and sleeps is becoming increasingly less important. On a commonsense level, the mere fact that an employee uses his or her computer ~~laptop~~ and cell phone at home to conduct business cannot reasonably form the basis of a court's determination of venue.

The appellate court's broad interpretation of the phrase "other office" suggests that corporate residence can be established almost anywhere so long as one of its employees owns a home in the plaintiff's chosen venue and has access to a company provided cell phone. The principle at stake in this case is critical—a party

should *not* have to defend an action in a county that has little or no relation to it. The appellate court's ruling completely eviscerates that rule.

The appellate court's ruling also stands in marked contrast with other rulings of the appellate court that have addressed the meaning of the phrase "other office" in Section 2-102. For example, in *Melliere v. Luhr Bros., Inc.*, 302 Ill. App. 3d 794 (5th Dist. 1999), the "other office" consisted of a hangar at a local airport that was used to house the corporate aircraft. Two full-time employees regularly reported to work at the hangar, which was equipped with a phone and a desk. The hangar had a listing for the company in the local telephone directory and company employees would use the site to fly to job sites.

The *Melliere* court's determination that this hangar constituted an "office" appears to make perfect sense. The fact that the hangar housed company property that was used to conduct the corporation's business, staffed with full time employees, and frequented by corporate employees flying to meet with clients is more than sufficient to characterize this as a corporate facility. But it is difficult to see how that compares with a part-time employee using his cell phone and ~~laptop~~ computer out of his home to conduct business, particularly when 85% of that work is for clients located outside of Cook County.

The *Melliere* court relied upon Georgia case law, *Scott v. Atlanta Dairies Cooperative*, 239 Ga. 721, 238 S.E.2d 340 (1977). In that case, Atlanta Dairies rented an old filling station equipped with a desk, a telephone and a few truck repair tools. The telephone was listed under Atlanta Dairies in both the white and yellow

pages of the local telephone directory. An employee at that location was tasked with scheduling milk pickup performed by ten truck drivers employed by Atlanta Dairies. He also handled equipment breakdowns. Atlanta Dairies owned six bulk tank trucks which were operated by the ten drivers. These trucks were parked in a lot adjacent to the filling station each evening and were picked up there each morning by the drivers who received their schedules for the day from Singleton. *Scott*, 239 Ga. at 722.

The circumstances at issue in the *Scott* decision are easily distinguishable from those in the present case. It take no great stretch of imagination to realize that the cooperative was running an office out of this location. But these facts bear no comparison to the circumstances at issue in the case at bar.

Finally, it is important to note that this Court has applied a narrow interpretation to other provisions in this statute. In *Baltimore & Ohio R.R. Co., v. Moselle*, 67 Ill. 2d 321 (1977), the issue before the Court was whether the defendant was "doing business" within a county for venue purposes. Plaintiffs in that case asked the Court to incorporate the *International Shoe* test arguing that venue in Madison County was proper if the railroad had "minimum contacts with that county such that maintenance of a suit there would not offend traditional notions of fair play and justice." *Moselle*, 67 Ill. 2d at 328, quoting *Intl' Shoe Co. v. Washington*, 326 U.S. 310 (1945).

The Court rejected the argument, explaining that the legislature intended that more extensive contacts with a county are necessary to establish proper venue than

are required when the issue is whether the defendant is subject to the jurisdiction of the courts of this State:

> It would be a distortion of the plain meaning of the words of the venue statute to hold that a corporation is "doing business" within any county with which it has even minimal contacts. Additionally, such a construction of section 6 of the Civil Practice Act would have the effect of negating the principle of convenience upon which section 5 of the Act is based. To judicially define the "doing business" provision of the venue statute as being synonomous with the test for establishing jurisdiction under section 17 would be to allow the institution of actions in locations with little connection with the defendant and with no connection with the activities which give rise to the suit.

Mosele, 67 Ill. 2d at 329. It would seem incongruous for this Court to utilize a narrow interpretation in relation to the "doing business" phrase in Section 2-102, and yet apply an overly broad interpretation of the "other office" phrase within the same statute. Indeed, the appellate court's determination that GML operates an "office" in Cook County appears is reminiscent of the minimum contacts standard this Court refused to adopt in the context of "doing business."

Amicus submits that, should this Court adopt the appellate court's interpretation of the "other office" component of Section 2-102, it would completely undermine the principle that actions should not be brought in venues that have little or no connection with the activities that gave rise to the suit.

In ascertaining the meaning of a statute, the statute should be read as a whole and all of the relevant parts must be considered. *Kraft, Inc. v. Edgar*, 138 Ill. 2d 178, 189 (1990). More importantly, our courts must consider the reason for the law, the evil to be remedied, and the object to be obtained by the statute. *Collins v. Board of*

Trustees of the Firemen's Annuity & Benefit Fund, 155 Ill. 2d 103, 111 (1993). The "evil" that Section 2-102 of the Code of Civil Procedure seeks to remedy is to prevent claims brought in venues that have little or no connection with the party or to the transaction from which the case arises. *Home Depot, U.S.A., Inc. v. Dept. of Revenue*, 355 Ill. App. 3d 370, 377 (2d Dist. 2005). Amicus respectfully submits that, in the interests of maintaining a just and consistent body of law the appellate court's ruling in this case must be reversed.

CONCLUSION

WHEREFORE, the ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL respectfully requests that the appellate court's ruling in this case be reversed.

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Rule 341(c) Certificate of Compliance

I certify that this brief conforms the requirements of Rules 341(a) and (b). The number of words in this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, and the Rule 341(c) certificate of compliance, is 2,070 words.

/s/Craig L. Unrath
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CERTIFICATE OF FILING AND PROOF OF SERVICE

I certify that on December 3, 2019, I electronically filed and transmitted the foregoing Brief of *Amicus Curiae*, Illinois Association of Defense Trial Counsel with the Clerk of the Court by using the Odyssey eFileIL system. I further certify that the other individuals in this case, named below, have been served by sending a copy from my email address to the email addresses listed below on December 3, 2019.

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Under penalties as provided by law and pursuant to section 1-109 of the Illinois Code of Civil Procedure [735 ILCS 5/1-109], I certify that the statements set forth in this Certificate of Filing and Proof of Service are true and correct, except as to maters therein stated to be on information and belief and as to such matters I certify as aforesaid that I verily believe the same to be true.

/s/ Laura Berry