IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
January 22, 2003 Session

BOBBY WYLIE AND JANIE WYLIE
v.
FARMERS FERTILIZER & SEED COMPANY, INC., SHIRLEY HANKS, AND J. B. SIMMONS

FARMERS FERTILIZER & SEED COMPANY, INC.,
v.
BITUMINOUS CASUALTY CORPORATION, KEITH J. SILER, AND SILER THORNTON AGENCY, INC.

An Interlocutory Appeal from the Circuit Court for Dyer County
No. 01-129 R. Lee Moore, Jr., Judge

No. W2002-01227-COA-R9-CV - Filed August 21, 2003

This case involves damage to an orchard. The plaintiffs' orchard was located entirely in Gibson County. The defendant fertilizer company was located in Dyer County. The plaintiff orchard owners sued the fertilizer company, alleging that the trees in their orchard were damaged by the negligent spraying of herbicides on nearby crops. The lawsuit was filed in the Dyer County circuit court. The fertilizer company moved to dismiss for lack of venue, asserting that the action was local in nature and had to be filed in the county in which the orchard was situated. The trial court denied the motion to dismiss, finding that the action was transitory, not local, in nature and was properly filed in Dyer County. The fertilizer company was granted an interlocutory appeal from that decision. We reverse, finding that the action is primarily local, not transitory, in nature and was required to have been brought in Gibson County. In the interest of justice, however, we remand to the trial court with instructions to transfer the case to Gibson County, pursuant to Tennessee Code Annotated § 16-1-116.

Tenn. R. App. P. 9 Interlocutory Appeal by Permission; Judgment of the Circuit Court is Reversed and Remanded

HOLLY M. KIRBY, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and DAVID R. FARMER, J., joined.

C. Timothy Crocker and Michael A. Carter, Milan, Tennessee, for the appellant, Farmers Fertilizer & Seed Company, Inc.

Mark D. Johnston, Dyersburg, Tennessee, for the appellees, Bobby Wylie and Janie Wylie.

Parks T. Chastain, Nashville, Tennessee, for the appellee, Bituminous Casualty Corporation.

Gary H. Nichols, Dyersburg, Tennessee, for the appellees, Keith J. Siler and Siler Thornton Agency, Inc.

OPINION

Plaintiffs/Appellees Bobby and Janie Wylie ("the Wylies") own and operate an apple and peach orchard located in Gibson County, Tennessee. Shirley Hanks ("Hanks") and J. B. Simmons ("Simmons"), residents of Dyer County, owned land planted with crops located across Highway 77 from the Wylies' fruit orchard. On April 17, 1999, the Defendant/Appellant Farmers Fertilizer and Seed Company, Inc. ("Farmers Fertilizer"), sprayed herbicides on the crops owned by Hanks and Simmons. The Wylies allege that these herbicides drifted onto their fruit trees, causing damage. On August 2, 2001, the Wylies filed the instant lawsuit in the Dyer County Circuit Court against Farmers Fertilizer, Hanks, and Simmons, all of whom reside in Dyer County. In the lawsuit, the Wylies asserted claims based on damage to the trees and for the loss of reasonable profits they would have made from the fruits of the trees.

On November 29, 2001, Farmers Fertilizer filed a motion to dismiss the complaint for improper venue, arguing that the lawsuit should have been filed in Gibson County, in which the orchard was situated. On January 23, 2002, following oral argument, the trial court denied the motion to dismiss, determining that the Wylies' lawsuit was "a transitory action" and was "properly filed in this court." On January 30, 2002, Farmers Fertilizer filed a motion for permission to file an interlocutory appeal from that order, pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure. Permission to appeal was granted by the trial court and by this Court. (Tr. 41, 254).

On January 31, 2002, Farmers Fertilizer filed an answer to the Wylies' complaint, as well as a third-party complaint against Third-Party Defendants/Appellees Bituminous Insurance Companies ("Bituminous"), Keith Siler ("Siler"), and Siler Thornton Agency, Inc. ("the Agency"). The third-party complaint sought a declaration that Bituminous was obligated to defend and indemnify Farmers Fertilizer under its insurance contract. In the alternative, the third-party complaint alleged that Siler and the Agency were liable to Farmers Fertilizer for negligently failing to report the claim to Bituminous. On July 1, 2002, the trial court declined to consider any motions in the case and stayed the trial court proceedings pending the outcome of this appeal.

On appeal, Farmers Fertilizer argues that this is a local action, not a transitory one, and that proper venue lies in Gibson County, where the land is located. On this basis, Farmers

Fertilizer claims that the case should be dismissed for lack of venue. The Wylies argue that the trial court was correct in finding that the action is transitory. In the alternative, the Wylies contend that, if this is a local action, this Court should transfer the case to a Gibson County court pursuant to Tennessee Code Annotated § 16-1-116, rather than dismiss it for lack of venue. Third-party defendants Bituminous, Siler, and the Agency argue that, because Farmers Fertilizer filed its third-party complaint against them in Dyer County, it is estopped from arguing that venue in Dyer County is improper for the third-party claims, regardless of the proper venue for the underlying suit. They argue that, even if venue for the underlying suit lies in Gibson County, the third-party action should be severed and permitted to proceed in Dyer County.

The facts in this case are undisputed, and only legal issues are involved. Therefore, our standard of review is *de novo* with no presumption of correctness in the trial court's decision. ***See Koger v. Koger***, No. 01A01-9011-CH-00401, 1991 WL 57979, at *1 (Tenn. Ct. App. Apr. 19, 1991); ***see also State v. Levandowski***, 955 S.W.2d 603, 604 (Tenn. 1997).

At the outset, we must recognize the distinction between local and transitory actions. Whether an action is local or transitory depends on the subject matter of the injury. ***See State ex rel. Logan v. Graper***, 4 S.W.2d 955, 956 (Tenn. 1927) ("The subject of the action – that is, the nature of the thing toward which the remedy is directed – determines whether the action is local or transitory . . . ."); ***Hall v. Southhall Bros. & Carl***, 240 S.W. 298, 298-99 (Tenn. 1922) (stating that whether an action is local or transitory depends on the nature of the injury); ***Mattix v. Swepston***, 155 S.W.2d 928, 929 (Tenn. 1913) (indicating that the test of whether a lawsuit is a local and a transitory action is the subject matter of the injury); ***Hawkins v. Tennessee Dep't of Correction***, No. M2001-00473-COA-R3-CV, 2002 WL 1677718, at *2 (Tenn. Ct. App. July 25, 2002) (stating that whether an action is legal or transitory "depend[s] on the subject matter of the cause of action"). The Tennessee Supreme Court has described legal and transitory actions as follows:

> There are two types of actions for purposes of venue. A transitory action is one in which the injury occurred to a subject not having an immovable location; therefore a transitory action could have occurred anywhere. Typical examples of transitory actions are actions sounding in tort and contract. On the other hand, a local action is an action in which the injury occurred to an immovable object; the classic example is an action involving injury to real property. ***Curtis v. Garrison***, 211 Tenn. 339, 364 S.W.2d 933 (1963); ***Mattix v. Swepston***, 127 Tenn. 693, 155 S.W. 928 (1913).

Five Star Express, Inc. v. Davis, 866 S.W.2d 944, 945 n.1 (Tenn. 1993). Stated simply, "[a] cause of action that may arise anywhere is transitory, but one that could arise in only one place is local." ***Hawkins***, 2002 WL 1677718, at *2 (citing ***Burger v. Parker***, 290 S.W. 22, 22-23 (Tenn. 1926)). Recognizing that distinction, the Tennessee Supreme Court has said that "the most apt illustration of a local action is an injury to real estate, and of a transitory action an injury to the

person." ***Hall***, 240 S.W. at 299; ***see also Five Star Express***, 866 S.W.2d at 945 n.1 ("Typical examples of transitory actions are actions sounding in tort or contract. . . . [T]he classic example [of a local action] is an action involving injury to real property."); ***Mattix***, 155 S.W.2d at 929 (stating that "[t]he most typical illustration of a local action is an injury to real estate, and of a transitory action an injury to the person"). A local action must be brought in the county in which the property is located, pursuant to Tennessee Code Annotated § 20-4-203.[1] ***See Five Star Express, Inc. v. Davis***, 866 S.W.2d 944, 945 n.1 (Tenn. 1993). A transitory action, however, "may be brought in the county where the cause of action arose or in the county where the defendant resides or is found." Tenn. Code Ann. § 20-4-101(a) (1994).

On appeal, Farmers Fertilizer argues that the Wylies' lawsuit is a local action because it involves injury to real estate, the Wylies' fruit trees. The fruit trees were rooted in Gibson County soil and were "immovable." The alleged damages, therefore, could have only occurred in Gibson County. In support of its argument, Farmers Fertilizer relies on ***Hall v. Southhall Bros. & Carl***. In ***Hall***, the plaintiff sued the defendants in Williamson County, alleging that the defendants negligently burned and destroyed the plaintiff's two wooden barns and the personal property in the barns on a farm located in Hickman County. The Tennessee Supreme Court held that, because the lawsuit involved "damages for injury to real estate," the action was local in nature and, therefore, could not have been brought in Williamson County. ***Hall***, 240 S.W. at 299. Likewise, Farmers Fertilizer argues that, because the trees were part of the real estate in Gibson County, the Wylies' lawsuit was local in nature and, therefore, could not have been brought in Dyer County.

The Wylies argue that this action is transitory, relying on ***Ducktown Sulpher, Copper & Iron Co. v. Barnes***, 60 S.W. 593 (Tenn. 1900), and ***Mattix v. Swepston***, 155 S.W. 928 (Tenn. 1913). In ***Ducktown Sulpher***, the owners of land located in Georgia sued a Tennessee corporation in Tennessee for damages to their Georgia trees and crops caused by the smoke and noxious gases emanating from corporation's mining business in Polk County, Tennessee. The defendant insisted that, because the damage was inflicted on its timber and crops, i.e. real estate, the lawsuit was local in nature and should have been brought in the county and state in which the land was situated. ***Ducktown Sulpher***, 60 S.W. at 599. The Tennessee Supreme Court rejected

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[1] That section provides in pertinent part:

> In actions commenced by the attachment of property without personal service of process, and in cases where the suit is brought to obtain possession of personal property, or to enforce a lien or trust deed or mortgage, or where it relates to real property, the attachment may be sued out or suit brought in any county where the real property, or any portion of it, lies, or where any part of the personal property may be found.

Tenn. Code Ann. § 20-4-103 (1994).

that argument and concluded:

> The actions of [the owners] for damages do not involve title to land, nor the assertion of a right to an interest in land. The actions are purely actions for damages sustained by virtue of a nuisance operated by the complainant. The action was personal, and not local; and the [owners], although residents of the state of Georgia, and although the injury done was to property in the state of Georgia, had the right to maintain their suits in the courts of Tennessee.

Id. at 606-07. Therefore, because the action did not "involve title to land, nor the assertion of a right to an interest in land," the action was considered to be "personal" and, consequently, transitory in nature.

In ***Mattix***, the plaintiffs entered into a contract to purchase timber in Crittenden County, Arkansas. The seller entered into a contract with the plaintiffs, allowing the plaintiffs five years in which to come onto his land and cut and remove the timber. The seller also gave the plaintiffs a right of way over his adjacent lands for the purpose of hauling the timber to the nearby railroad. ***Mattix***, 155 S.W. at 929. In accordance with the contract, the plaintiffs cut and manufactured timber for approximately one year. After this time, the landowner leased the adjacent property to the defendant Swepston. Though Swepston knew of the plaintiffs' contract with the owner of the property, he obstructed the roadway in which the plaintiffs had the easement and prevented the plaintiffs from using the right of way. ***Id.*** The plaintiffs sued Swepston in Shelby County, Tennessee, claiming that his conduct caused them to default in the performance of other contracts and, consequently, forced them into bankruptcy. The plaintiffs claimed damages of $4,000 in the loss of timber and breach of contracts, as well as $3,500 resulting from a sacrifice sale of their milling plant in the bankruptcy proceedings. Swepston argued that the action was local in nature and, therefore, should have been brought in Crittenden County, Arkansas. The Tennessee Supreme Court rejected this argument, determining that the action was transitory in nature. ***Id.*** at 930. Though the Court acknowledged the generally accepted principle that an action arising from injury to real estate is local, it found that the injury at issue related to the plaintiffs' business. The Court reasoned that the right of way obstructed by Swepston did not "arise in privity of title," but, rather, arose because of "privity of contract," that is, the contract related to the purchase, manufacture, and sale of the timber. ***Id.*** The Court opined that "where an action on covenant broken is founded on privity of contract between the parties, it is transitory; but, where it is on privity of estate, it is local . . . , because the latter covenants run with the land and the former do not." ***Id.*** Therefore, because the plaintiffs' right to the damaged property arose out of a business contract and not out of title to the land, the Court concluded that the action was transitory in nature. ***Id.***

In this case, there is no dispute that an action arising from injury to real property is local and must be brought in the county in which the property is found. ***See Hall***, 240 S.W. at 299 ("The most apt illustration of a local action is an injury to real estate . . . ."); ***Mattix***, 155 S.W. at

930 ("The most typical illustration of a local action is an injury to real estate . . . ."). The issue is whether the subject matter of this lawsuit is injury to real property or to personalty.

The Wylies' complaint alleged that "[a]s a result of the contact of the herbicide mist or drift with the [Wylies'] orchard, the useful purpose of 106 peach trees of various varieties and 20 apple trees of various varieties is now fully destroyed." Complaint at ¶13. According to the complaint, the trees that were damaged were "mature and fully productive" at the time the herbicides were sprayed. Complaint at ¶7. The complaint further alleged that the negligently sprayed herbicide caused "damage to [the Wylies'] orchard including the loss of the fruit trees and the loss of income reasonably expected to be produced by such fruit trees." Complaint at ¶14. Based on those facts, the Wylies requested $75,000 in compensation and $50,000 in punitive damages. Thus, from the language of the complaint itself, the Wylies sought compensation for the damage to the trees themselves and also for the income reasonably expected to be derived from the trees in the future.

In a different context, the Tennessee Supreme Court has stated that trees are considered real estate until they are severed from the land. ***New River Lumber Co. v. Blue Ridge Lumber Co.***, 240 S.W. 763, 768 (Tenn. 1922). In determining the rightful owner of trees that were transferred by deed, the Court in ***New River Lumber Co.*** stated that "[t]he rule is well established in this state and elsewhere that standing trees must be regarded as part of the realty on which they stand . . . . They cannot be levied upon or sold as chattels while standing, but trees as soon as they are severed from the land lose their character as realty and become personalty." ***Id.***; ***see Summerlin v. Orange Shores, Inc.***, 122 So. 508, 511 (Fla. 1929) (concluding that the fruits from trees are chattels, while the tree itself is regarded as realty). If uncut trees are considered real property under Tennessee law, an action alleging damage to such trees would be local in nature because it would arise out of damage to real property.

The Wylies note, however, that their complaint alleged injury to their business as well as injury to the trees themselves. They argue that, under ***Mattix***, an action arising out of damage to a business enterprise is considered to be transitory, not local in nature. However, the facts in this case are distinguishable from those in ***Mattix***. In ***Mattix***, the defendant allegedly interfered with the plaintiffs' ability to profit under their contracts to resell timber by blocking their right of way over the adjacent property thereby blocking the way to remove the timber. In ***Mattix***, the Court reasoned that, because the plaintiffs' rights arose out of a business contract for goods and not out of legal title to the land, the action was considered to be transitory. In the instant case, the Wylies own title to the land and the trees that were damaged by Farmers Fertilizer's allegedly negligent conduct. While the Wylies also seek recovery for a loss of income reasonably expected from the damaged trees, the gist of the lawsuit is damage to the uncut trees, which are considered to be real property under Tennessee law.

In reaching this conclusion, we must find that this case is not controlled by ***Ducktown Sulpher***. Though somewhat analogous on its facts, ***Ducktown Sulpher*** was decided prior to the

other decisions cited in this Opinion that have concluded specifically that an action arising out of damage to real property is local in nature.[2] Moreover, ***Ducktown Sulpher*** was later recognized as being an exception to the general rule, because the act or omission allegedly causing the injury in that case did not occur in the state or the county in which the real property was located. ***See McCormick v. Brown***, 297 S.W.2d 91, 92-93 (Tenn. 1956). In the case at bar, such an exception would not be applicable, because the negligent acts or omissions in this case occurred in Gibson County where the real property was located. Accordingly, we are of the view that the result in this case is not dictated by the reasoning in ***Ducktown Sulpher***.

The Wylies argue that, if this Court finds that the case is local and should have been brought in Gibson County, then we should exercise our discretion and transfer the case to an appropriate court in Gibson County pursuant to Tennessee Code Annotated § 16-1-116. That statute provides in pertinent part:

> **16-1-116. Transfer of actions or appeals. –** Notwithstanding any other provision of law or rule of court to the contrary, when an original civil action . . . is filed in a state or county court of record . . . and such court determines that it lacks jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was originally filed. Upon such a transfer, the action or appeal shall proceed as if it had been originally filed in the court to which it is transferred on the date upon which it was actually filed in the court from which it was transferred.

Tenn. Code Ann. § 16-1-116 (Supp. 2002). Under the circumstances presented here, the interest of justice would best be served by transferring the lawsuit to Gibson County rather than dismissing it. Therefore, on remand, the trial court is directed to transfer this case to an appropriate court in Gibson County.

We specifically do not address in this appeal whether the third-party claims against Bituminous, Siler, and the Agency should be severed and maintained in Dyer County. This issue may be addressed by the trial court on remand, in the discretion of the trial court.

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[2] The ***Ducktown Sulpher*** Court concluded that the action in that case was transitory in nature because the damages alleged did not "involve title to land, nor the assertion of a right to an interest in land." ***Ducktown Sulpher***, 60 S.W. at 606-07. We have found no other subsequent cases that have limited the scope of local actions to those involving a legal interest in the real property at issue. Rather, as we have explained, the more recent cases hold that an action is local if the subject matter of the action involved injury to real property, even in the physical sense, because the action could only have arisen in one place – the locale of the realty. ***See, e.g., McCormick v. Brown***, 297 S.W.2d 91, 92-93 (Tenn. 1956) (holding that damage to residence resulting from blasting operations of a nearby stone quarry is local in nature because the complaint alleged a tort against real property); ***Hall***, 240 S.W. at 299 (finding that action based on negligent burning and destruction of barn was local because it involved damage to real estate). For this additional reason, we are not inclined to apply the reasoning employed by the Court in ***Ducktown Sulpher***.

The decision of the trial court is reversed and remanded for further proceedings not inconsistent with this Opinion. Costs are to be taxed equally to the appellees, Bobby Wylie and Janie Wylie, Bituminous Casualty Corporation, Keith J. Siler, and Siler Thornton Agency, for which execution may issue, if necessary.

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HOLLY M. KIRBY, J.