

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 19-0043

DAVID W. BETTS, individually and through his conservator, the Western Montana Chapter for the Prevention of Elder Abuse, and JENNIFER BETTS and DAVID W. BETTS II, as co-Trustees of the David William Betts, Trust,

Plaintiffs and Appellees,

v.

REED J. GUNLIKSON, individually and as former Trustee of the David William Betts Trust and DOES 1-10

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

On appeal from the Fourth Judicial District Court
Missoula County, District Court No. DV 18-1236
Hon. Leslie Halligan, Dept. 1, Presiding

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I. STATEMENT OF THE ISSUE

Whether the District Court erred in denying Defendant/Appellant Reed Gunlikson's ("Gunlikson") Motion to Transfer Venue to the county where Gunlikson resides and where the alleged torts were committed.

II. STANDARD OF REVIEW

"The determination of whether a county is the proper place for trial involves a question of law." *Nelson v. Cenex, Inc.*, 2004 MT 170, ¶ 5, 322 Mont. 54, 56, 97 P.3d 1073. This Court's review of a decision to grant or deny a motion for change of venue is therefore plenary. *Lockhead v. Weinstein*, 2001 MT 132, ¶ 5, 305 Mont. 438, 28 P.3d 1081. This Court will determine if the trial court was legally correct. *Id.*; *Nelson*, ¶ 5.

III. STATEMENT OF THE CASE

This is an appeal from an Order denying Gunlikson's motion to transfer venue. This case involves claims brought by Plaintiffs/Appellees David Betts, Jennifer Betts, and David Betts II (collectively the "Betts"). They allege breach of fiduciary duties, breach of duties as trustee, professional negligence, negligent misrepresentation, and constructive fraud. Those claims are based on alleged tortious acts and omissions. The facts related to the Complaint's allegations took place in Flathead County where Gunlikson resides and works. But the Betts filed in Missoula County. Gunlikson moved to transfer venue to Flathead County in November 2018. After briefing from both sides was submitted, the District Court denied Gunlikson's

motion on January 2, 2019. This appeal followed, pursuant to Mont. R. App. P. 6(3)(f).

IV. STATEMENT OF THE FACTS

This lawsuit arises out of the alleged acts and/or omissions of Gunlikson in his capacity as David Betts, Sr.'s accountant and as the Trustee for the David William Betts Trust ("the Trust"). (**App., Ex. C**, Complaint.) David Betts, Sr. resides in Flathead County and is the Trustor of the Trust, and sole current beneficiary. (*Id.*, p. 2.) David Sr. has three adult children, Jennifer Betts, David II, and Jodi Egren. (*Id.*, p. 4.) Jodi is not a party to this lawsuit. (*Id.*) He was the Trustee until 2011 when he appointed Gunlikson as the Successor Trustee. (*Id.*) Gunlikson has been a Kalispell accountant for many years and served as the accountant and trusted advisor to David Betts, Sr. for multiple years. (*Id.*, Ex. C, p. 5; **App., Ex. D**, Answer, p. 2.) David Betts, Sr. set up the Trust in Kalispell with the assistance of his then attorney, Dan Wilson.¹ He also hired investment firms in Kalispell, and hired Gunlikson as his accountant, who also resides in Kalispell. (**App., Ex. C**, p. 4; **App., Ex. D**, p. 2.)

Upon information and belief, Jennifer Betts is a resident of California and David Betts, II is a resident of Colorado. In 2017, Jennifer and David II filed a petition to approve the Western Montana Chapter for the Prevention of Elder Abuse (based in Missoula) as the Successor Trustee and therefore removed Gunlikson as

¹ Judge Wilson is currently a Judge in Flathead County.

Trustee. (Fourth Judicial District Court Missoula County, District Court No. DP-18-137.) That cause of action involved the same trust, parties, and judge that are involved in this proceeding.

Gunlikson's position in the original action was that his removal as Trustee was contrary to David Sr.'s wishes, and thus he initially objected to that proceeding. (*Id.*, Ex. C, Compl., pp. 7, 12, 17; Ex. D, Answer, p. 3.) Gunlikson challenged venue in that matter as well. (**App., Ex. E**, DP-17-137 Venue Order.) There, the District Court found that the Petition certainly "involved" the Trust or required an interpretation of the Trust, therefore implicating § 72-38-205, M.C.A. (*Id.*) That matter was litigated in Missoula County for five months until Gunlikson ultimately agreed to step down from his position as Trustee. (*Id.*, Ex. C, Compl., p. 7.)

After Gunlikson stepped down as Trustee, Jennifer and David II petitioned the District Court for an order requiring Gunlikson to return certain funds to the Trust. (**App., Ex. F**, DP-17-137, Funds Order.) The Court ruled that the "[p]etition alleges several tort claims for breach of fiduciary duty against the Trust's former trustee[.]" and that Jennifer and David II were required to pursue their claims by commencing a civil suit against Gunlikson. (*Id.*) Further, the District Court clarified that:

[b]ecause the Petition is **making tort claims against the former Trustee** – who now sits in the position of a third party in relationship to the Trust – **this is neither an "internal matter" or a petition 'to determine the existence of the trust.**

(*Id.*, emphasis added). In other words, the District Court properly distinguished tort actions from trust actions. Based on that order, the Betts filed the present lawsuit alleging tort claims.

The Betts' present tort claims are based on representations Gunlikson allegedly made during a 2010 meeting he had with Jennifer Betts, David Betts Sr., and Jodi Edgren. (*Id.*, Ex. C, Compl., pp. 4-10.)

The Betts claim that, during the 2010 meeting, Gunlikson represented he would take various actions in his capacity as Trustee. (*Id.*) They further allege Gunlikson "coerced" David Sr. into appointing him as Trustee. Gunlikson denies he sought the position of Trustee, and, in fact, he initially declined David Sr.'s request to serve as Trustee. (*Id.*, Ex. D, Answer, pp. 2-3 & 6.)

Now, in the current tort action, the Betts claim Gunlikson failed to adequately take such action, which is the factual basis for their legal theories in the Complaint. (*Id.*, Ex. C, Compl., pp. 10-22.) Additionally, The Betts assert David Sr. was in a deteriorating mental and physical condition, and Gunlikson failed to keep himself or David Sr.'s children adequately informed of David Sr.'s condition. (*Id.*)

The Betts also allege Gunlikson failed to perform in his capacity as Trustee, which led Jennifer and David II to file the aforementioned petition to remove Gunlikson as Successor Trustee in May 2017. (*Id.*) Around that same time, and before Gunlikson was removed as Trustee, Jodi, with the help of her attorney, filed

a petition to appoint her as David Sr.'s guardian. (*Id.*, pp. 8-9.) The Betts claim Gunlikson is liable for Jennifer and David Jr.'s attorneys' fees incurred contesting the guardianship action. (*Id.*). Gunlikson had little to no involvement in that proceeding. (*Id.*, Ex. D, Answer, p. 4.)

Based on the foregoing, the Betts pled causes of action for Gunlikson's performance as Trustee as well as his performance in his capacity as a CPA. Those claims are as follows:

- COUNT I: BREACH OF FIDUCIARY DUTIES
- COUNT II: BREACH OF DUTIES AS TRUSTEE
- COUNT III: PROFESSIONAL NEGLIGENCE
- COUNT IV: NEGLIGENT MISREPRESENTATION
- COUNT V: CONSTRUCTIVE FRAUD
- COUNT VI: STATUTORY ATTORNEYS' FEES²

(*Id.*, Ex. C, Compl. pp. 10-20.) The basis for those claims are the alleged acts and omissions of Gunlikson as referenced above, and as set forth in the Complaint, all of which took place in Flathead County. (*Id.*)

Thus, despite this case arising from a Kalispell accountant's work for a Kalispell client, and involving Kalispell witnesses to all claims, the Betts later sought to appoint a Missoula replacement trustee, and selected Missoula County as the venue for this proceeding. Gunlikson accordingly filed its Motion to Transfer Venue, which the District Court denied. (**App., Ex. A, Order.**)

² Count VI: Statutory Attorneys' Fees is a claim for relief, not a legal claim, and is therefore not relevant to motion in question.

V. SUMMARY OF THE ARGUMENT

The Complaint is solely based on torts allegedly committed in Flathead County. (App., Ex. C, Compl., pp. 10-20.) Because the specific claims in the Complaint sound in tort, the specific tort venue statute, § 25-2-122, M.C.A., should apply. The trust specific statute, § 72-38-205, M.C.A., is defeated by the tort specific statute, and therefore the trust statute does not apply. It is undisputed that Flathead County is the appropriate venue in tort. Further, at the very least, the two statutes are in conflict and the plain language of § 25-2-122, M.C.A. is more specific than the plain language of § 72-38-205, M.C.A. and thus the tort venue statute should control.

VI. ARGUMENT

Montana's statutory scheme governs where venue is appropriate in civil cases. Section 25-2-201, M.C.A. provides:

The court or judge must, on motion, change the place of trial in the following cases:

- (1) when the county designated in the complaint is not the proper county;
- (2) when there is reason to believe that an impartial trial cannot be had therein;
- (3) when the convenience of witnesses and the ends of justice would be promoted by the change.

The statute uses the word “must,” so the decision to transfer venue is not discretionary. The Complaint designates Missoula County as the venue. (*Id.*, Ex. C,

Compl., p. 4.) Despite the Complaint consisting of exclusively tort-based claims, the District Court ruled that the trust specific statute applies and kept Missoula County as the venue for this matter. (App., Ex. A, Order.) For the following reasons, that ruling was made in error, and should be reversed.

A. The Tort Specific Statute Requires that Venue be Transferred to Flathead County.

The venue statutes control the analysis. “[T]he proper place of trial for a tort action is:

- (a) the county in which the defendants or any of them reside at the commencement of the action; or
- (b) the county in which the tort was committed. If the tort is interrelated with and dependent upon a claim for breach of contract, the tort was committed, for the purpose of determining the proper place of trial, in the county in which the contract was to be performed.

. . .

Section 25-2-122(1), M.C.A. Applying this statute, this Court has observed the “general rule is that the proper place of trial for a tort action is the county in which the defendant resides or the tort was committed.” *Rule v. Burlington N. & Santa Fe Ry.*, 2005 MT 6, ¶ 13, 325 Mont. 329, 332, 106 P.3d 533; *see Bradley v. Valmont Indus.*, 216 Mont. 429, 430-31, 701 P.2d 997, 998 (1985) (observing the general rule for tort actions, holding that the tort statute is a permissive statutory exception to the general rule). And while § 25-2-122, M.C.A. has exceptions for defendant

corporations, out-of-state defendants, and railroads, none of those exceptions apply here. *See generally* § 25-2-122, M.C.A.

Section 25-2-122, M.C.A. mandates the venue for tort-based causes of actions. The plain language of that statute does not allow this lawsuit to be litigated in Missoula County and requires venue to be transferred to Flathead County.

The conclusion stems from the Complaint. The averments of the complaint will be taken as true in considering a motion for change of venue. *Lockhead v. Weinstein*, 2001 MT 132, ¶ 10, 305 Mont. 438, 28 P.3d 1081. First, as stated in the Complaint, Gunlikson is a resident of Flathead County, satisfying the first prong of § 25-2-122, M.C.A. Second, the legal theories for each claim in the Complaint are based on the alleged torts which occurred in Flathead County. Therefore, the second prong of § 25-2-122, M.C.A. is also satisfied. Simply put, the undisputed fact that the acts and omissions which are the subject of the Complaint took place in Flathead County and the fact that Gunlikson is a resident of Flathead County requires this case to be litigated in that jurisdiction.

This is further supported by § 25-2-201, M.C.A. which states venue must be changed when the designated venue is not proper (as is the case here) or when the convenience of witnesses would be promoted. Certainly, the convenience of the parties and relevant witnesses would be promoted by transferring venue to Flathead county. Upon information and belief, nearly all pertinent witnesses for this matter

reside in Flathead County (i.e. Defendant, David Betts Sr., David Betts Sr. daughter Jodi Egren, Defendant's personal counsel, David Sr.'s prior counsel (Dan Wilson), David Sr.'s current personal counsel, David Sr.'s healthcare providers, financial advisors for the Trust, and other witnesses to the interactions set forth in the Complaint etc.). The only witnesses who are not located in Kalispell are Jennifer (California), David II (Colorado), and the present Successor Trustee (Missoula).

Because all of the alleged acts and omissions of Gunlikson occurred in Flathead County, that is where nearly all of the necessary witnesses reside. That is part of the fundamental purpose of § 25-2-122, M.C.A. and § 25-2-201, M.C.A. *See Rule, ¶¶19-29; Bradley*, 216 Mont. 431 at 701 P.2d at 998.

The only apparent reason this lawsuit, and the preceding trust petition action, were filed in Missoula is because the Betts hired counsel in Missoula who retained the new Successor Trustee in Missoula. That is not enough to supersede the purpose of § 25-2-201, M.C.A. and § 25-2-122, M.C.A. which together promote convenience of the parties and witnesses by requiring venue to be the County in which the defendant resides or where the tort was allegedly committed. Rather than acknowledge the tort-based allegations of the Complaint, the Betts' argument relies primarily on the fact that a Trust is referenced in the Complaint.

B. The Broader Trust-Related Venue Statute is Defeated by the More Specific Tort Statute.

The Betts argue that the mere existence of the Trust (and more accurately the location of the new trustee) requires this case to be litigated in a county which has no connection with the allegations or individuals set forth in the Complaint. The basis for that argument is that the trust specific venue statute is a “more specific venue provision” than the trust specific statute. (App., Exh. A, p. 4; Exh. B., pp. 2-4).

1. *The trust venue statute is broad and does not apply to tort-based claims.*

Section 72-38-205(1), M.C.A. states that the “venue for a judicial proceeding involving a trust is in the county of this state [in which the trust’s principal place of administration is or will be located.]” As discussed in the District Court’s Order, there appears to be no Montana Supreme Court decision that interprets the term “involving a trust” means. (*Id.*) Therefore, the District Court stated that the plain meaning of that language provides a very low bar to establish venue. (*Id.*) Based on that interpretation, the District Court simply determined that this suit “involves” a trust which ended the inquiry. (*Id.*) In essence, the Betts’ reading of § 72-38-205, M.C.A. is so broad that it encompasses any case in which a trust is referenced in a Complaint, no matter the actual claims in the complaint.

The trust statute is included in Montana’s statutory scheme for the regulation of trusts. Presumably this venue statute addresses lawsuits seeking to appoint

trustees, appoint beneficiaries, divide trust assets, as well as declaratory judgment actions seeking interpretations of trust terms. Further, the plain language of that statute shows it is for the current or future administration of trusts: “in which the trust’s principal place of administration **is or will be located.**” § 72-38-205, M.C.A. (emphasis added). As such, the District Court’s ruling in the related petition to remove Gunlikson held the action “involved a trust.” (*Id.*, Ex. F, DP-17-137 Funds Order.) By doing so, the District Court seemingly distinguished tort actions are separate from trust actions.

There is no precedent supporting the proposition that a lawsuit consisting of entirely tort-based claims falls within the spectrum of statutes governing trusts. This suit is for money damages against an individual. This suit does not involve the the current or future management of the trust, and therefore certainly does not “involve a trust.” Rather, the allegations specifically implicate the tort venue statute.

2. *The tort venue statute is more specific than the general trust venue statute.*

Regardless of whether the Complaint “involves a trust” that does not necessarily defeat the tort specific statute. The pleaded facts must be applied in determining the proper county for trial. *Wentz v. Montana Power Co.* 280 Mont. 14, 17, 928 P.2d 237, 238 (1996) and *Allend v. Alantic Richfield Co.*, 2005 MT 281, ¶ 13, 329 Mont. 230, 124 P.3d 132. The Court should look to the allegations in the complaint in determining venue issues. *Id.* General venue statutes do not repeal

specific statutes designated the proper place of trial. § 25-2-131, M.C.A. Specific venue statutes supersede generalized venue statutes. *See e.g. Nelson v. Cenex, Inc.* 2004 MT 170, 322 Mont. 54, 97 P.3d 1073; § 25-2-131, M.C.A. Here, the tort specific venue statute is triggered, and supersedes the venue statute, because the stated causes of action are all tort claims.

Nelson involved a worker at a petroleum refinery in eastern Montana who contracted an asbestos-related lung disease during his employment at the refinery. *Id.* That plaintiff filed his complaint in Lewis and Clark County and named three corporate entities as defendants, as well as two managers from the refinery. *Id.* CHS, the successor-in-interest who is incorporated in Minnesota and maintains its principal place of business there, appeared on behalf of the three corporations. CHS also had registered agents located in Lewis and Clark County for purposes of receiving service of process. *Id.* CHS argued that the residence statute, § 25-2-118, M.C.A., applied and superseded the tort statute. *Id.* The Court disagreed and held that the proper place for trial of a tort action is as set forth in § 25-2-122, M.C.A. *Id.* at ¶ 13. The same reasoning applies here.

The claims at issue here are all tort-based claims; the Betts do not dispute that. (**App., Ex. B**, Response Brief.) Indeed, the District Court confirmed that “Plaintiffs exclusively assert tort claims.” (*Id.*, Ex. A, Order, p. 6.) Thus, there is no question that this lawsuit qualifies as a “tort action” pursuant to § 25-2-122, M.C.A. Again,

the District Court's July 2, 2018 order in the related petition, clarified that trust actions are distinct from trust actions:

[b]ecause the Petition is **making tort claims against the former Trustee** – who now sits in the position of a third party in relationship to the Trust – **this is neither an “internal matter” or a petition ‘to determine the existence of the trust.**

(*Id.*, App, Ex. F, DP-17-137 Funds Order, emphasis added.) The District Court required the Betts to file the present lawsuit because their tort claims could not be adjudicated under that trust proceeding, making it clear that tort actions are easily distinguished from matters “involving a trust.” (*Id.*)

There is, however, a lack of clarity in Montana's jurisprudence as to what the generalized statement of “involving a trust” means under § 72-38-205(1), M.C.A. This was discussed by the District Court as a “very low bar” which evidences the breadth of that language. (*Id.*, p. 5.) In fact, that broad, unclear language is apparently what led the District Court to its ruling. (*Id.*)

Simply put, § 25-2-122, M.C.A. establishes proper venue specifically for “tort actions” and this lawsuit specifically involves only tort claims. On the other hand, the plain language, as well as the interpretation by the District Court, shows that § 72-38-205(1), M.C.A. is not so specific as it only requires a “very low bar.” In other words, that statute is generalized and not specific. Again, the plain language of that statute is for the current or future administration of trusts: “in which the trust's principal place of administration **is or will be located.**” § 72-38-205, M.C.A.

(emphasis added). This action is not for the current or future administration of a trust. It is for alleged tortious acts which occurred during the past administration of a trust. Therefore, the more specific statute must be applied to the facts and claims set forth in the Complaint. *Nelson*, ¶¶ 10-14; *Lockhead*, ¶ 10; § 25-2-122, M.C.A. Section 25-2-122, M.C.A. is most specific to the allegations set forth in the Complaint, and therefore defeats § 72-38-205(1), M.C.A.

3. *The tort venue statute and trust venue statute are in conflict and, therefore, the plain specific language of the tort venue statute controls.*

At the very least, the tort venue and the trust venue statute are in conflict. A statute should be construed according to its plain meaning. *Ravalli County v. Erickson*, 2004 MT 35, ¶¶ 11-12, 320 Mont. 31, 85 P.3d 772 (citation omitted). The Court may not insert what has been omitted. *Infinity Ins. Co. v. Dodson*, 2000 MT 287, ¶ 46, 302 Mont. 209, 223, 14 P.3d 487; *See, e.g., Rimrock Chrysler, Inc. v. State Dep't of Justice, Motor Vehicle Div.*, 2018 MT 24, ¶ 13, 390 Mont. 235 (“It is blackletter law that in the construction of a statute, the office of a judge is simply to ascertain and declare what is in terms or in substance contained therein, not to omit what has been inserted or insert what has been omitted.”); *See, e.g., MacMillan v. State Comp. Ins. Fund*, 285 Mont. 202, 207, 947 P.2d 75, 78 (1997) (courts presume the legislature knows existing law and would say so expressly if it intended to change it).

In interpreting conflicting statutes, this Court follows the rule that where a specific statute conflicts with a general statute, the specific statute controls over the general. *State v. Feight*, 2001 MT 205, ¶ 21, 306 Mont. 312, 317, 33 P.3d 623, 626-27; § 1-2-102, M.C.A. A statute with general terms will not control over a statute with detailed and definite terms. *Id.* In *Feight*, this Court held that the specific terms in the statutory scheme defining jurisdiction of district courts to hear appeals from justice court controlled over the statute generally defining the scope of criminal appeals.

Similarly, here, the tort-based statute specifically sets out the venue requirements for tort related causes of actions, where the defendant resides or where the alleged tortious conduct occurred. On the other hand, the trust-based venue statute only provides only the broad language of “involving a trust.” Even assuming the Betts are correct that this matter “involves” a trust, there is clearly a conflict between the two venue statutes. As was the case in *State*, the more specific statute must therefore control. Based on the plain language of both § 25-2-122, M.C.A. and § 72-38-205(1), M.C.A., it is clear that § 25-2-122, M.C.A. is more specific and thus controls.

C. Section 72-38-205(1), M.C.A. Requires Interpretation from the Court.

As discussed *supra*, the language of § 72-38-205(1), M.C.A. is broad and undefined. There appears to be an unanswered question as to what “involving a trust”

means. As written, and based on the District Court's interpretation, that statute is broad enough to control venue at the first mention of a trust in a complaint. That certainly cannot be what the legislature intended.³

Based on that logic, the Betts could have chosen to hire a Trustee who administered the trust from Plentywood, Montana (Sheridan County) and filed the present lawsuit there. Based on the Betts' argument, and the broad language of § 72-38-205(1), M.C.A., that would have placed venue in Sheridan County, over 500 miles from where the alleged tortious acts occurred and where Gunlikson resides. That logic certainly does not promote convenience of the parties or of any witnesses. Therefore, § 72-38-205(1), M.C.A. requires additional interpretation and clarity from the Court. Even if the Court does not agree that § 72-38-205(1), M.C.A. requires interpretation and clarity, Gunlikson maintains that § 25-2-122, M.C.A. defeats that general trust venue statute.

VII. CONCLUSION

Section 25-2-122, M.C.A. is a tort-specific venue statute. The Complaint is solely based on tort causes of action. Therefore, § 25-2-122, M.C.A. defeats the broader § 72-38-205(1), M.C.A. Venue is proper in Flathead County where Gunlikson resides, and where the alleged tortious acts occurred. At the very least,

³ Defendant was unable to find any legislative intent on this topic.

the two statutes are in conflict and the clear, specific language of § 25-2-122, M.C.A. controls.

Gunlikson respectfully requests that the Court reverse the District Court's January 2, 2019 Order denying Gunlikson's Motion to Transfer Venue and to transfer venue of this matter to Flathead County.

DATED this 28th day of March, 2019.

/s/ Mark S. Williams

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(a) of the Montana Rules of Appellate Procedure, I certify that this Opening Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points, is double-spaced, and the word count (3972) calculated by Microsoft Word 2016 does not exceed 10,000 words, excluding the Certificate of Service and Certificate of Compliance.

Dated this 28th day of March, 2019.

/s/ Mark S. Williams

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CERTIFICATE OF SERVICE

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