Circuit Court for Baltimore City
Case No. 24-C-21-001333

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 884

September Term, 2021

PATRICE D. FOREHAND

v.

PLANNED PARENTHOOD OF MARYLAND, *et al.*

Beachley,
Ripken,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: April 15, 2022

Appellant Patrice Forehand filed suit in the Circuit Court for Baltimore City against appellees Planned Parenthood of Maryland ("PPM"), Avi Lovette, CRNP, and three foreign corporations for injuries related to an allegedly defective Paragard intrauterine device ("IUD").[1] Ms. Forehand appeals from the Circuit Court for Baltimore City's order granting appellees' motion to transfer the case to the Circuit Court for Baltimore County on the basis of improper venue.

Ms. Forehand raises the following question on appeal:

> Did the [c]ircuit [c]ourt err when it found, as a matter of law, that [Ms. Forehand's] chosen venue of Baltimore City was improper and transferred the case to Baltimore County?

We shall vacate the circuit court's order of transfer and remand the case to that court for further proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND[2]

On August 10, 2010, Ms. Forehand underwent a procedure at a PPM facility in Baltimore City to implant a Paragard IUD. On October 30, 2018, Ms. Lovette, a nurse practitioner at PPM, removed Ms. Forehand's IUD at a PPM facility in Baltimore County. During the removal procedure, one of the IUD's arms broke off, leaving a broken fragment in Ms. Forehand's uterus. A subsequent procedure to remove the remaining fragment was

[1] Ms. Lovette and PPM are the only appellees in this appeal. The three foreign corporations that manufactured and distributed the IUD have not filed an answer to the complaint and therefore have not participated in these proceedings.

[2] Because of the procedural status of this case, the majority of the factual recitation has been gleaned from Ms. Forehand's complaint and the affidavit accompanying appellees' motion.

unsuccessful. Ultimately, Ms. Forehand underwent a hysterectomy on January 23, 2020.

On March 30, 2021, Ms. Forehand filed suit against Ms. Lovette and PPM, as well as Teva Pharmaceuticals USA, Inc., Teva Women's Health, Inc., and CooperSurgical, Inc. ("Product Defendants"), foreign corporations involved in the manufacture, marketing, and distribution of the Paragard IUD. The complaint alleged that Ms. Lovette was negligent in the removal of the IUD, that PPM was vicariously liable for Ms. Lovette's negligence, and that an unidentified PPM employee in 2010 and Ms. Lovette in 2018, respectively, failed to obtain Ms. Forehand's informed consent prior to the implantation and the removal of the IUD. The allegations against the Product Defendants included claims of negligence, strict liability, negligent and fraudulent misrepresentation, breach of express and implied warranties, and violations of consumer protection laws.

On June 11, 2021, Ms. Lovette and PPM filed a Motion to Dismiss or Transfer Plaintiff's Complaint for Improper Venue, or in the Alternative, to Transfer Based on Forum Non-Conveniens, seeking to have the case transferred to the Circuit Court for Baltimore County. The motion included an affidavit from Ms. Lovette stating that she only works in Baltimore County and that she neither works nor lives in Baltimore City. It is undisputed that PPM's principal place of business is located in Baltimore City and the agency does business in both Baltimore City and Baltimore County.

The Product Defendants did not join the motion, and no evidence was presented as to whether they do business in Baltimore County. The Product Defendants are all foreign corporations without a principal place of business in Maryland. Ms. Lovette and PPM argued that Baltimore County was the proper venue for the Product Defendants.

After a hearing on August 9, 2021, the court found that venue was improper in Baltimore City and transferred the case to the Circuit Court for Baltimore County. Ms. Forehand noted this timely appeal.

DISCUSSION

There are two statutes relevant to the issue of venue in this case: Md. Code (1974, 2020 Repl. Vol.), §§ 6-201 and 6-202 of the Courts and Judicial Proceedings Article ("CJP"). The general venue provisions in Maryland are found in CJP § 6-201:

> (a) Subject to the provisions of §§ 6-202 and 6-203[3] of this subtitle and unless otherwise provided by law, a civil action shall be brought in a county where the defendant resides, carries on a regular business, is employed, or habitually engages in a vocation. In addition, a corporation also may be sued where it maintains its principal offices in the State.
>
> (b) If there is more than one defendant, and there is no single venue applicable to all defendants, under subsection (a) of this section, all may be sued in a county in which any one of them could be sued, or in the county where the cause of action arose.

Section 6-202 provides additional venue options for the plaintiff, which are not limited by the provisions in CJP § 6-201. *See Wilde v. Swanson*, 314 Md. 80, 93–94 (1988). CJP § 6-202 provides, in relevant part, that:

> In addition to the venue provided in § 6-201 or § 6-203, the following actions may be brought in the indicated county:
>
> . . .
>
> (8) Tort action based on negligence -- Where the cause of action arose[.]

We shall address the venue issue as follows. First, if Ms. Forehand is correct that

[3] The parties agree that CJP § 6-203 is not applicable to this case.

her negligence actions arose in Baltimore City, then, pursuant to CJP § 6-202(8), she would be permitted to bring her cause of action against all defendants in that jurisdiction. If, however, Ms. Forehand's negligence claims did not arise in Baltimore City pursuant to CJP § 6-202(8), then pursuant to CJP § 6-201(b), she could only bring her action in that venue if there is no single venue applicable to all defendants. As we shall explain, we conclude that Ms. Forehand's negligence claims arose in Baltimore County, thereby precluding her from asserting venue in Baltimore City under CJP § 6-202(8). Nevertheless, we must vacate and remand this matter because the court failed to explain why all defendants could be sued in Baltimore County.

We begin our analysis pursuant to CJP § 6-202(8). The elements of a cause of action for negligence are, (1) a duty on the part of the defendant to protect the plaintiff from injury, (2) a breach of that duty, (3) "actual injury or loss" suffered by the plaintiff, and (4) that such injury or loss resulted from the defendant's breach of duty. *Hamilton v. Kirson*, 439 Md. 501, 523–24 (2014) (quoting *Taylor v. Fishkind*, 207 Md. App. 121, 148 (2012)). "[A] cause of action in negligence arises when facts exist to support each element of the action." *Green v. N. Arundel Hosp. Ass'n., Inc.*, 366 Md. 597, 607 (2001) (citing *Owens-Illinois v. Armstrong*, 326 Md. 107, 121 (1992)). The *Green* Court further noted that "the elements of duty, breach, and causation tend naturally to precede the element of injury, which 'would seemingly be the last element to come into existence.'" *Id.* (quoting *Owens-Illinois*, 326 Md. at 121). A claim for failure to provide informed consent is a type of negligence action. *McQuitty v. Spangler*, 410 Md. 1, 18 (2009).

The Court of Appeals's decision in *Burnside v. Wong*, 412 Md. 180 (2010), is

instructive. Mrs. Burnside suffered from retinopathy, a progressive and degenerative eye disease. *Id.* at 186. She alleged that Dr. Wong, her doctor in Baltimore County, failed to properly diagnose and treat her disease, allowing it to progress to proliferative retinopathy, a more serious eye condition. *Id.* at 187. Mrs. Burnside visited Dr. Wong exclusively in Baltimore County for her eye appointments. *Id.* at 184. Nevertheless, Mrs. Burnside argued that her eyes deteriorated to the point of proliferative retinopathy while she was living in Baltimore City. *Id.* at 185. Because this deterioration took place in Baltimore City, Mrs. Burnside argued that her injury arose in Baltimore City, thereby providing venue in Baltimore City. *Id.* The Court of Appeals disagreed, holding that, because "the disease must have been germinating" after Dr. Wong's initial misdiagnosis, "Mrs. Burnside's cause of action arose in Baltimore County," where all of the elements of her cause of action occurred. *Id.* at 207.

The *Burnside* Court's holding is consistent with *Green*, which held that the minor plaintiff's cause of action against doctors located in Anne Arundel County arose in Anne Arundel County because he first experienced injury there as a result of their alleged medical negligence. 366 Md. at 612. Because all four elements of the minor plaintiff's claim against his Anne Arundel doctors coalesced while he was being treated in Anne Arundel County, his cause of action arose there pursuant to CJP § 6-202(8). *Id.* at 607, 612. That the minor plaintiff later suffered a cardiac arrest and brain damage while being treated in Baltimore City did not make the Anne Arundel doctors subject to suit in Baltimore City because, under CJP § 6-202(8), the cause of action had already ripened in Anne Arundel County. *Id.* at 612.

With these precepts in mind, we turn to the negligence counts in Ms. Forehand's complaint. In Counts XI through XIV, Ms. Forehand alleges negligence and lack of informed consent against Ms. Lovette and PPM. In the complaint's "Facts Common to All Counts," Ms. Forehand asserts that "[w]hen Nurse Lovette attempted to explant the Paragard IUD, she met difficulty and/or resistance, and the IUD did break as she proceeded with the removal, leaving one 'arm' within Ms. Forehand's uterus." She further alleges that a "total abdominal hysterectomy" was ultimately required to remove the IUD fragment. Because it is undisputed that Ms. Lovette provided healthcare to Ms. Forehand only at PPM's facility in Baltimore County, it is clear that the "injury" element of Ms. Forehand's negligence claims against Ms. Lovette (and vicariously against PPM) first arose during or after the October 30, 2018 procedure in Baltimore County. Pursuant to CJP § 6-202(8), Baltimore County is the proper venue for the negligence and informed consent counts against Ms. Lovette and PPM.[4]

[4] Ms. Forehand also alleges that an unidentified PPM health care provider implanted the IUD in 2010 in Baltimore City, and that the implant procedure lacked informed consent. Our review of the motions hearing transcript reveals that Ms. Forehand did not assert that Baltimore City had venue under CJP § 6-202(8) because she sustained injury in Baltimore City subsequent to the implant procedure. During argument on the motion, counsel made a fleeting reference to "complications" and "infections" that were treated in Baltimore City, but that reference was made in the context of Ms. Forehand's forum non conveniens argument. At oral argument in this Court, counsel noted that Ms. Forehand's affidavit stated that "[d]uring the years 2011 through 2017 [Ms. Forehand] sought and received medical evaluation and treatment for bacterial infections related to the IUD" in Baltimore City. Nevertheless, Ms. Forehand did not argue at the motions hearing that the "medical evaluation and treatment" between 2011 and 2017 qualified as an "injury" caused by the alleged lack of informed consent. To the extent that Ms. Forehand argues that CJP § 6-202(8) provides venue in Baltimore City on this basis, we decline to consider it. *See*

In Counts I, V, IX, and X of her complaint, Ms. Forehand alleges negligence, negligent misrepresentation, gross negligence, and negligent failure to warn against the Product Defendants. As claims sounding in negligence, each cause of action carries the requisite "injury" element. Here, Ms. Forehand did not sustain any injury until the October 30, 2018 explant procedure resulted in the breaking of the IUD, leaving the "arm" fragment in Ms. Forehand's uterus. As noted, because the October 30, 2018 procedure occurred in Baltimore County, the negligence causes of action arose in Baltimore County for purposes of CJP § 6-202(8).[5] In conclusion, CJP § 6-202(8) provides for venue only in Baltimore County.

We next turn our attention to CJP § 6-201, the primary venue statute in Maryland. CJP § 6-201(b) provides that, if there is no single venue applicable to all defendants, the plaintiff may file suit "in a county in which any one of [the defendants] could be sued, or in the county where the cause of action arose." Ms. Forehand argues that Ms. Lovette and PPM failed to establish that Baltimore County is a venue "applicable to all defendants"

Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court.").

Moreover, a fair reading of Ms. Forehand's complaint reveals that the basis of her lack of informed consent action is that she was not informed of complications resulting from the IUD breaking on removal (as opposed to bacterial infections), which corroborates our conclusion that the injury occurred in Baltimore County when the IUD arm broke during the explant procedure.

[5] As noted in footnote 4, Ms. Forehand did not argue at the motions hearing that she sustained injury as a result of the Product Defendants' negligence prior to the October 30, 2018 explant procedure.

under CJP § 6-201(b) because they failed to produce an affidavit or evidence showing that the Product Defendants conduct regular business in Baltimore County. Thus, absent a venue applicable to all defendants, Ms. Forehand contends that she may "sue[] in a county in which any one of [the defendants] could be sued," CJP § 6-201(b), and Baltimore City is a proper venue because PPM is amenable to suit there.

In reply, Ms. Lovette and PPM rely upon the language in the complaint itself, arguing: "Nowhere in Ms. Forehand's [c]omplaint does she contend that the Product Defendants regularly conduct business in Baltimore City *only*. Instead, by her own pleading, the Product Defendants 'regularly and systematically conduct business in the State of Maryland,' which includes Baltimore County." Ms. Lovette and PPM therefore assert that, because Baltimore County is a "single venue applicable to all defendants," CJP § 6-201 authorizes Ms. Forehand to institute suit only in Baltimore County.

"Under Maryland law, improper venue is a defense with the duty of averment and the burden of proof falling on the defendant." *Odenton Dev. Co. v. Lamy*, 320 Md. 33, 39 (1990) (citing *Gambrill v. Schooley*, 95 Md. 260, 271 (1902)). Generally, a party moving to have a case dismissed or transferred due to inappropriate venue must provide an affidavit or evidence to prove that the chosen venue is improper. *Pac. Mortg. & Inv. Grp., Ltd. v. Horn*, 100 Md. App. 311, 322–23 (1994) (quoting *Odenton*, 320 Md. at 39). Here, Ms. Lovette and PPM did not produce an affidavit or submit any evidence concerning the Product Defendants. Instead, they relied exclusively on language in Ms. Forehand's complaint to support their contention that the Product Defendants conduct business in

Baltimore County—specifically, Ms. Forehand's allegation that the Product Defendants "regularly and systematically conduct business in the State of Maryland."

In its ruling, the court first addressed CJP § 6-202, concluding (as we have) that venue was proper in Baltimore County under that Section because the cause of action occurred in Baltimore County. The court then proceeded to address CJP § 6-201:

> And so either for that reason [CJP § 6-202(8)] *or for the second reason, which is if you refer back to 6-201, there is a venue under which all of the Defendants can be sued, which is also Baltimore County.* And I will note that I just am not persuaded by the Plaintiff's argument that Defendant Lovette can be sued in Baltimore City, simply because the corporate headquarters of her employer is Baltimore, his or her employer, is in Baltimore City. When it is clear that her employment, and her employer, quite frankly because there is Planned Parenthood of Maryland in Baltimore County or also in Baltimore County. And so I'm not persuaded by that.

(Emphasis added). Other than stating "if you refer back to 6-201, there is a venue under which all of the Defendants can be sued," the court provided no explanation or basis for its conclusion that all defendants could be sued in Baltimore County.[6] We are concerned about the absence of any indication that the court understood that it was the defendants' burden to prove improper venue. We are similarly concerned that the court did not identify any evidence or, for that matter, any rationale for its conclusion that "all defendants," including the Product Defendants, could be sued in Baltimore County. Indeed, the record does not indicate that the court understood that the language in Ms. Forehand's complaint was ambiguous with regard to whether the Product Defendants regularly conducted

[6] The court rejected Ms. Forehand's argument that Ms. Lovette could be sued in Baltimore City because PPM's corporate headquarters are located in Baltimore City. Ms. Forehand has abandoned that argument on appeal.

business in Baltimore County. Fairness to the parties requires a remand to the circuit court to ensure that the court not only allocates the burden of proof to appellees as mandated by Maryland law, but that it appropriately evaluates the relevant evidence informing its determination of venue.[7]

CIRCUIT COURT FOR BALTIMORE CITY'S ORDER OF TRANSFER TO THE CIRCUIT COURT FOR BALTIMORE COUNTY VACATED. CASE REMANDED TO CIRCUIT COURT FOR BALTIMORE CITY FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE DIVIDED EQUALLY BETWEEN APPELLANT AND APPELLEES (LOVETTE AND PPM).

[7] We agree with appellees that the circuit court did not address the forum non conveniens argument. Accordingly, we shall not consider that issue in this appeal. To avoid multiple appeals, we encourage the circuit court to consider and decide the forum non conveniens argument on remand.

On the other hand, we decline appellees' invitation to take judicial notice that because the Paragard IUD is "ubiquitous" in Maryland, the Product Defendants engage in business throughout the State. Because this argument was raised for the first time during oral argument, we shall not consider it. *See Scott v. State*, 247 Md. App. 114, 152 (2020) ("[A]rguments not presented in a brief or not presented with particularity will not be considered on appeal." (quoting *Klauenberg v. State*, 355 Md. 528, 552 (1999))).