

NO. 2013-48071

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| JULIE HANNAH | § | IN THE DISTRICT COURT OF |
| | § | |
| vs. | § | |
| | § | HARRIS COUNTY, TEXAS |
| DAVID LEE HATCHER, | § | |
| ROBERT ALAN HATCHER, AND | § | |
| MARJORIE CORDES | § | 125th JUDICIAL DISTRICT |

**RESPONSE TO DAVID LEE HATCHER’S PLEA TO THE JURISDICTION, AND, IN
THE ALTERNATIVE, MOTION TO TRANSFER VENUE**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Plaintiff, Julie Hannah ("Plaintiff"), filing her Response to Defendant David Lee Hatcher’s (“Defendant”) Plea to the Jurisdiction, and, in the Alternative, Motion to Transfer Venue, and in opposition thereto would show as follows:

1. This Defendant advances the same theory relied on by another Defendant, Marjorie Cordes. Defendant also hopes to convince this Court that Plaintiff’s claim for slander, tortious interference, and conspiracy is a probate proceeding. Defendant argues this Court should dismiss, or alternatively, transfer this case to Aransas County. The rationale for both requests is Defendant’s erroneous assertion that this is a second probate proceeding which must defer to the Aransas County probate proceeding. That position is unsupportable.

2. Tex. R. Civ. P. 86(3) specifies that a motion requesting a transfer of venue must either provide a legal and factual basis for asserting that the county where the action is pending is not a proper county or must provide a legal and factual basis for asserting that mandatory venue, as established by one or more specifically and clearly designated statutory provisions, lies in a county other than the one in which the suit is pending. Defendant’s motion does neither and, instead, relies entirely on Defendant’s claim that this lawsuit is really an attempt at another probate proceeding.

By making that leap from reality, Defendant argues that because David Burnell Hatcher's (the "Decedent") estate was already probated in Aransas County, this case should be transferred there even though Decedent's estate is not a party to this case, this case has no impact on Decedent's estate, and there is no proceeding pending in Aransas County at this time. This is not a probate proceeding and Plaintiff's claims are not otherwise related to a probate proceeding, as those terms are defined by the Texas Probate Code and interpreted by related case law. Because Defendant's underlying premise is incorrect, as well as for other reasons set forth below, Defendant's motion fails.

3. It is unclear whether Defendant is even trying to argue that one of the provisions of Tex. R. Civ. P. 86(3) applies. That rule is never mentioned by Defendant, and the requirements for a successful motion to transfer venue under that rule are not met by Defendant. Regardless of whether Defendant wants his motion to be governed by that rule, however, it is. That means Defendant must defeat Plaintiff's choice of venue and prevail on his own based on the requirements of Tex. R. Civ. P. 86, using the procedures established by Tex. R. Civ. P. 87.

4. Apparently Defendant realizes he can not defeat Plaintiff's choice of venue because, he does not even address the provisions of Tex. R. Civ. P. 86 or 87. Defendant does not specifically deny or otherwise refute Plaintiff's venue facts which establish venue in Harris County. That would admittedly be an impossible task, because Plaintiff relies on both a mandatory venue provision (Tex. Civ. P. & Rem. Code §15.017) and the general venue provision (Tex. Civ. P. & Rem. Code §15.002), and under both, venue is established by the Harris County residence of Defendant. Tex. R. Civ. P. 87 provides that the party seeking to maintain venue has the burden to establish that venue can be maintained where the action is filed. Plaintiff does that through her venue facts in paragraphs

III and IV of Plaintiff's Original Petition. Tex. R. Civ. P. 87(3) provides that properly pleaded venue facts are taken as true unless specifically denied by the opposing party. Defendant did not specifically deny any of Plaintiff's venue facts, and therefore, Plaintiff has met her burden of showing that the case is maintainable in Harris County based upon the venue facts set forth in paragraphs III and IV of her petition. As a result, Tex. R. Civ. P. 87(3)(c) prevents this Court from transferring the case to Aransas County.

5. Defendant also fails to meet the other burdens placed on him by Tex. R. Civ. P. 87. Tex. R. Civ. P. 87 specifies that the party seeking to transfer venue has the burden to prove that venue is maintainable in the county to which the transfer is sought. Since Defendant has not complied with Tex. R. Civ. P. 87 by making the proof required by that rule, it is difficult for Plaintiff to identify what in Defendant's motion might be a venue fact. Most of Defendant's statements appear to be unsupportable legal allegations, for which no facts are provided. But to make clear her specific denial of Defendant's contentions, to the extent they could be considered venue facts, Plaintiff specifically denies all of the following:

- (1) that Plaintiff's lawsuit is, either in form or substance, a probate proceeding;
- (2) that Plaintiff's lawsuit is derivative to a probate matter already filed;
- (3) that the substance of Plaintiff's claim is a right to receive a distribution from Decedent's estate;
- (4) that Plaintiff's claim is a matter or proceeding relating to the estate of Decedent;
- (5) that Plaintiff's claim is one related to the distribution of an estate;
- (6) that the Aransas County probate proceeding has priority venue over this case;

- (7) that this Court does not have priority venue over this case;
- (8) that the Aransas County probate proceeding and this action involve the same parties;
- (9) that the Aransas County probate proceeding in this case involve the similar issues between similar parties;
- (10) that the issues in this case are inextricably intertwined with the issues in the Aransas County probate proceeding;
- (11) that transferring the case would promote judicial efficiency; and
- (12) that the best interest of the heirs or beneficiaries of Decedent's will would be served by a dismissal or transfer even if such was a relevant inquiry when addressing the dismissal or transfer of this action.

6. Defendant does not assert this is an improper county or that mandatory venue exists in another county for any reason other than his erroneous claim that this is a second probate proceeding and Aransas County has priority because it was the first probate proceeding. The basis for that position is Tex. Prob. Code §8, and the rationale is necessarily premised entirely on the erroneous position that this lawsuit is a second probate proceeding. This is a proceeding for damages against the Defendants named in the case. It is not a proceeding seeking to probate a will of Decedent or to contest the probate of a will of Decedent. Likewise, no claim is made against the Decedent, and no claim is even made against anyone in their capacity as a personal representative for Decedent's estate. It would be error to transfer the action to the Aransas County probate proceeding, even if that case was still pending, because the estate is not a party to this action. *In re Swepi*, 85 S.W.3d 800 (Tex. 2002, original proceeding). This is a claim for damages against the

Defendants named in Plaintiff's suit. The venue statutes mandate the proceeding be filed either in the county of Plaintiff's residence or the county of one of the Defendants' residence. Plaintiff has complied with those venue requirements and Defendant has not denied or otherwise refuted the fact establishing that venue.

7. Of course, Tex. Prob. Code §8 only deals with venue. Defendant never addresses the jurisdictional provisions of the Probate Code which are equally unsupportive of Defendant's position. Tex. Prob. Code §4B addresses jurisdiction for matters relating to probate proceedings as follows:

- (a) For purposes of this code, in a county in which there is no statutory probate court or county court at law exercising original probate jurisdiction, a matter related to a probate proceeding includes:
 - (1) an action against a personal representative or former personal representative arising out of the representative's performance of the duties of a personal representative;
 - (2) an action against a surety of a personal representative or former personal representative;
 - (3) a claim brought by a personal representative on behalf of an estate;
 - (4) an action brought against a personal representative in the representative's capacity as personal representative;
 - (5) an action for trial of title to real property that is estate property, including the enforcement of a lien against the property; and
 - (6) an action for trial of the right of property that is estate property.

- (b) For purposes of this code, in a county in which there is no statutory probate court, but in which there is a county court at law exercising original probate jurisdiction, a matter related to a probate proceeding includes:
 - (1) all matters and actions described in Subsection (a) of this section;
 - (2) the interpretation and administration of a testamentary trust if the will creating the trust has been admitted to probate in the court; and
 - (3) the interpretation and administration of an inter vivos trust created by a decedent whose will has been admitted to probate in the court.

- (c) For purposes of this code, in a county in which there is a statutory probate court, a matter related to a probate proceeding includes:
 - (1) all matters and actions described in Subsections (a) and (b) of this section; and
 - (2) any cause of action in which a personal representative of an estate pending in the statutory probate court is a party in the representative's capacity as personal representative.

This case does not fall within any of the categories specified as matters related to a probate proceeding.

8. In his futile attempts to approach it some way other than by complying with Tex. R. Civ. P. 86 and 87, Defendant relies on Tex. Prob. Code §3(bb), to support his request. In doing so, he necessarily ignores the fact that this case does not fit the definitions upon which Defendant relies. Defendant necessarily ignores the fact that this case does not fit the definitions provided in that section. Defendant claims the Probate Code defines a probate proceeding broadly and even relies

on language taken out of context such as “any other matter related to the settlement, partition, or distribution of an estate.” Even then, Defendant can not provide merit for his position.

9. This case does not fall within even that so-called “broad language.” Neither the estate nor a personal representative of the estate in his representative capacity is a party to this case. As previously stated, it is not a proceeding to probate a will of Decedent or attack the probate of a will of Decedent, nor is it an action to recover anything from the Decedent or his estate. Plaintiff’s claims arise from the false statements Defendants made and the resulting interference with Plaintiff’s rights. Any suggestion that this is a claim for money owed by the Decedent is simply incorrect. This is a claim of damages against Defendants because Defendants cause Decedent to change his will to eliminate the bequest to Plaintiff. In other words, the intended interference was successful. That interference by Defendants resulted from Defendants’ wrongful actions. Those wrongful acts by Defendants are the subject of this case.

10. Defendant makes no plausible argument for avoiding the venue of this Court in this case seeking the damages caused by Defendants’ slander and tortious interference. The mere mention of Decedent’s name in Plaintiff’s Original Petition does not make this an action incident to Decedent’s estate. Plaintiff discusses her right to bequests under prior wills of Decedent because it relates to one of the elements of her claims. That does not make Plaintiff’s filing a contest of the will in existence at the time of Decedent’s death. This is a case involving slander, the consequence of which was to interfere with the bequest Plaintiff was to have received from Decedent under prior wills. Both Plaintiff and Defendants have to deal with the reality that the interference was successful and the change was made. Because that change resulted from wrongful acts of Defendants, the damage done should be borne by the Defendants who caused it. This is not a probate proceeding, nor is it so intertwined with a probate proceeding to require transfer to Aransas County.

11. Likewise, this is not a claim arising from the administration of an estate. In fact, there does not appear to have even been an administration of decedent's estate. While Plaintiff does not disagree that an order probating Decedent's will as a muniment of title was signed in Aransas County,¹ that does not impair this Court's jurisdiction or make venue improper in Harris County in this slander and tortious interference action.

12. Even under the probate code provisions Defendant cites, there are at least two impediments to Defendant's motion. In order to establish jurisdiction over matters incident to an estate, the matters must actually be incident to an estate and a probate estate must actually be pending at the time Plaintiff's suit was filed. The exhibit attached to Defendant's motion clearly shows Decedent's will was probated as a muniment of title. The order even specifies that there will be no administration of Decedent's estate (See Exhibit A to Defendant's motion). Even if the order itself did not indicate there was to be no administration of Decedent's estate, a Texas court has already spoken on this issue and nullified Defendant's position that there is still a pending action. The court in *Chamberlain v. Witts*, 696 S.W.2d 204, 206 (Tex. App.—Dallas, 1985) held that, to be incident to an estate, the case must be one in which the outcome will have direct bearing on assimilating, collecting, or distributing decedent's estate. This case does not have the necessary impact on the outcome of the probate proceeding because that is not what it is about.

13. Also, just as in the *Chamberlain* case, there is no estate pending that needs to be assimilated, collected, or distributed. Even though the *Chamberlain* case did actually involve two probate proceedings and what is before this Court does not, the *Chamberlain* case does have a similarity to this case. The probate proceeding in the *Chamberlain* case also involved a will

¹ Since Defendants did not bother to notify Plaintiff of either the existence of Decedent's new will or the fact that it was being probated, it is particularly ironic that they now claim she is somehow bound by what occurred in that proceeding or either should have somehow been a party to the proceeding.

probated as a muniment of title. The *Chamberlain* court held that because the probate was filed as a muniment of title, there was no estate pending and the case filed in connection with the probate proceeding, as if incident thereto, had to be dismissed for lack of jurisdiction. So, there is no proceeding incident to the Aransas County probate and there is no “estate” in Aransas County. Thus, this suit could not be moved to that court on the theory that it is incident to the estate, even if it was necessary to the resolution of Decedent’s estate, which it clearly is not.

14. These same problems prevent Defendant from prevailing on his requests that the proceeding be dismissed or stayed. Defendant also seeks the dismissal of this case because Defendant claims that since the Aransas County probate proceeding and this case are so related as to involve similar issues between similar parties, this case must be dismissed to allow the Aransas County case to exercise some type of dominant jurisdiction. As stated, there is no case in which these issues could be addressed even if they had something in common with the probate issues—which they don’t. Defendant presents no authority for the position that a case in which the Decedent’s estate is not even a party should somehow be dismissed in deference to a now-closed probate proceeding on which the case has no impact.

15. This theory is also without merit for the same reasons previously discussed in this response. This case does not have common parties or issues, but there is no estate pending the Aransas County in which to insert it even if it did. In making his argument, Defendant simply ignores the fact that the Aransas County muniment of title proceeding is over; that Plaintiff was not a party to that proceeding, and in fact, was not even informed of its existence; and that the Aransas County probate proceeding and Plaintiff’s tort claims are not intertwined.

16. Defendant also argues that Tex. Prob. Code §8 required subsequent probate proceedings filed in other counties to be stayed in favor of venue determinations in the probate

proceeding first commenced. That provision is not helpful to Defendant's position, however, because this is not a subsequent probate proceeding. Defendant's plea to the jurisdiction should also be denied, as should Defendant's request that this proceeding be stayed which necessarily flows from the argument that this was a second probate proceeding should also be denied.

WHEREFORE, PREMISES CONSIDERED, Plaintiff asks that Defendant's Plea to the Jurisdiction, and, in the Alternative, Motion to Transfer Venue be denied, and for such other and further relief to which she may show herself entitled.

Respectfully submitted,

BAYLESS & STOKES

By: /s/ Bobbie G. Bayless

Bobbie G. Bayless

State Bar No. 01940600

2931 Ferndale

Houston, Texas 77098

Telephone: (713) 522-2224

Telecopier: (713) 522-2218

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded to all counsel of record via Telecopier on this 1st day of November, 2013.

Erika C. Anderson
The Stinemetz Law Firm PLLC
5120 Woodway Dr., Suite 6019
Houston, Texas 77056
Fax: 713.456.2908

Odean L. Volker
Haynes and Boone, LLP
One Houston Center
1221 McKinney, Suite 2100
Houston, Texas 77010
Fax: 713.547.2600

Robert Hatcher
822 W. San Antonio
Lockhart, Texas 78644
Fax: 866.860.4272

/s/ Bobbie G. Bayless
BOBBIE G. BAYLESS