CHERRY v. FALVEY.

4-3346

Opinion delivered February 12, 1934.

1. LIMITATION OF ACTIONS—MALPRACTICE.—An action against a physician for malpractice is controlled by the limitation of three years provided by Crawford & Moses' Dig., § 6950, relating to "actions founded upon contract or liability, expressed or implied, not in writing.
2. LIMITATION OF ACTIONS—NONSUIT AND COMMENCEMENT OF NEW ACTION.—The issuance of a summons in a transitory action within one year after nonsuit taken and delivery thereof to the sheriff of the county of the venue is not the commencement of a new action within Crawford & Moses' Dig., § 6969, where in the meantime defendant had changed his residence to another State.
3. LIMITATION OF ACTIONS—MALPRACTICE.—Where an action for malpractice was nonsuited and defendant, having changed his residence to another State, was never served with process in the county of the venue until after expiration of three years after the cause of action accrued and more than a year after nonsuit taken, the action is barred.

Appeal from Union Circuit Court, Second Division; *W. A. Speer,* Judge; affirmed.

STATEMENT BY THE COURT.

This appeal is prosecuted from a judgment of dismissal of a suit for damages against a physician, for

alleged malpractice in treating appellant for an injury, for compensation of which he recovered damages against the Root Refining Company, in Union County, Arkansas.

The original injuries were set up in that suit, including amputation of appellant's foot, and on October 2, 1929, a consent judgment was entered in the United States District Court in appellant's favor for $7,500, which judgment was duly satisfied in full by appellant and his attorney. On January 4, 1930, suit for damages was instituted in the Union Circuit Court against Dr. Falvey, appellee herein, alleging the same injuries to the foot had been caused by the malpractice of the physician. A nonsuit was taken to said suit on November 10, 1930. At the time of the filing of that suit, and at the time of dismissal of same, Dr. Falvey, appellee, was a citizen and resident of El Dorado, Union County, Arkansas. On January 1, 1931, appellee moved to Longview, Texas, where he engaged in business, and he has been a citizen and resident of that place ever since. On March 24, 1931, a second suit was instituted by appellant upon said cause of action, and summons originally issued and placed in the hands of the sheriff, and returned "*non est,*" appellee not being found in Union County.

The motion to dismiss alleged that the second suit was not commenced in the proper court, and, at the time of the service of the second summons therein, appellant's cause of action was barred by the statute of limitations, and should be dismissed.

Appellant filed a reply to the motion of appellee on May 9, 1933, admitting all the allegations of said motion, except the allegation that appellee changed his residence on January 1, 1931, from Arkansas to Texas, which was denied; alleged the issuance of original summons and the issuance of the second summons, together with the service of the second summons on June 4, 1932, upon the appellee; denied that the suit was not commenced in the proper court, and that, at the time of the service of the second summons, June 4, 1932, said action was barred by the statute of limitations.

Upon a hearing on the motion, and after all the testimony was taken, an order was made by the court sustain-

ing the motion to dismiss and dismissing the complaint of appellant, to which he excepted and appealed therefrom.

John E. Harris and *C. W. Smith*, for appellant.

Mahony & Yocum and *John Sherrill*, for appellee.

KIRBY, J., (after stating the facts). It is insisted by appellant that his cause of action alleged necessarily falls within the 5-year statute of limitations, not being covered by the general statute of 3 years, and concedes that otherwise, if the 3-year statute applies, the cause of action is barred thereby.

The evidence is virtually undisputed that Dr. Falvey, appellee, dissolved his partnership with the other physicians in El Dorado, with whom he had been associated, had his household goods removed to Longview, Texas, in February, 1931, the doctor having moved there in January, 1931. He had a contractor to build him a home and garage apartments there in February, 1931, the doctor paying a half year's rent in advance and moving into it. He had been living with his brother at the hotel before getting into the house. One of the attorneys for appellee testified: "It was after that service of the summons in the second suit that I knew he had actually moved to Texas. I knew he had relatives in Longview, and I saw Dr. Falvey down there several times during the months that he stated in his testimony a while ago."

The original summons was issued on March 24, 1931, on this second suit, and on August 13, 1931, a *non est* return was made thereon by the sheriff, stating that appellee could not be found in Union County, Arkansas. Another, an alias summons, was issued upon this complaint June 4, 1932, and served on the appellee in Union County, where he had returned on a visit.

Appellee contends, and we have concluded his contention must be sustained, that the cause of action is controlled by § 6950, Crawford & Moses' Digest, which reads as follows:

"Contracts or liability not in writing.

"The following action shall be commenced within three years after the cause of action shall accrue, and not after.

"'All actions founded upon any contract or liability, expressed or implied, not in writing.'"

The testimony shows that appellee had moved his residence from Union County, Arkansas, to Longview, Texas, after the nonsuit was taken in the suit first filed and before summons was issued in the second suit, and that he has continued to reside in Longview since that time. The issuance of the summons therefore for him in the second suit and delivery thereof to the sheriff of Union County was not the commencement of a new action within one year after the nonsuit suffered. An action properly commenced in this manner arrests the statute of limitations, even though summons is not served until after the statutory period elapses. In order for it to have that effect, however, the action must be properly commenced, if it be a transitory action, in the county where the defendant is served with summons or may be served. Such an action instituted in a county other than the residence of the defendant does not arrest the statute of limitations until the writ is served, and when served it relates back to the date of the issuance of the writ. The commencement of the action is by filing in the office of the clerk of the proper court a complaint and causing a summons to be issued thereon. *Simms* v. *Miller,* 151 Ark. 377, 236 S. W. 828.

The services of summons upon appellee on June 4, 1932, upon a return visit to Union County was more than 3 years after the injury on January 27, 1929, and more than one year after the dismissal of the prior suit which was filed on September 10, 1930. A summons was issued and served on June 4, 1932, but the issuance and service of summons on that date constituted the bringing of a new action against the appellee upon June 4, 1932, and said action was barred by the statute of limitations and also by the statute of nonsuit. *Field* v. *Gazette Pub. Co.,* 187 Ark. 253, 59 S. W. (2d) 19.

Such being the case, the court did not err in granting the motion to dismiss the cause of action, and its judgment must be affirmed. It is so ordered.