

IN THE SUPREME COURT OF THE STATE OF NEVADA

H&L WELLS, LTD., A NEVADA CORPORATION; WELLS CARGO, INC., A NEVADA CORPORATION; HOWARD A. WELLS, JR.; AND GUY WELLS, Appellants,

vs.

JAMES M. WELLS, INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF H&L WELLS, LTD., AND WELLS CARGO, INC.; CHERYL WELLS, INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF H&L WELLS, LTD., AND WELLS CARGO, INC.; LISA WELLS REEDER, INDIVIDUALLY, AS BENEFICIARY OF THE LKK TRUST, AND DERIVATIVELY ON BEHALF OF H&L WELLS, LTD., AND WELLS CARGO, INC.; KERRI WELLS MANSON, INDIVIDUALLY, AS BENEFICIARY OF THE LKK TRUST, AND DERIVATIVELY ON BEHALF OF H&L WELLS, LTD., AND WELLS CARGO, INC.; KIMBERLY WELLS PETERSON, INDIVIDUALLY, AS BENEFICIARY OF THE LKK TRUST, AND DERIVATIVELY ON BEHALF OF H&L WELLS, LTD., AND WELLS CARGO, INC.; LKK TRUST AND HELEN OLIVAS, AS TRUSTEE IF THE LKK TRUST, DERIVATIVELY ON BEHALF OF H&L WELLS, LTD., AND WELLS CARGO, INC.; AND THE JIM AND CHERYL WELLS GRANDCHILDREN'S TRUST, Respondents.

No. 45979

FILED

JUL 20 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY G. Alvarado
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a motion to change venue. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

The parties are familiar with the facts and we do not recount them here except as necessary for our disposition. After respondents filed the action below in Washoe County, appellants moved the district court in the second judicial district to change the venue to Clark County. The district court denied the motion and this appeal followed. We affirm.

Standard of Review

A district court's denial of a motion for a change of venue is independently reviewed by this court for a manifest abuse of discretion.¹ Manifest abuse of discretion can only occur "[w]hen the evidence is clear, unconflicting in the essentials, and points unerringly to one result."²

Discussion

Appellants' argue that Washoe County is the improper venue because they reside in Clark County, and because several other related matters are currently pending in the Eighth Judicial District.. While these assertions may or may not be true, we need not determine whether the district court erred in its ruling below because appellants have effectively waived their right to a change of venue.

¹Nat'l Collegiate Athletic Ass'n v. Tarkanian, 113 Nev. 610, 613, 939 P.2d 1049, 1051 (1997).

²Fabbi v. First National Bank, 62 Nev. 405, 414, 153 P.2d 122, 125 (1944) (quoting State ex rel. Merritt v. Superior Court for Kitsap County, 267 P. 503, 505 (Wash. 1928)).

To explain, NRS 13.050 provides that an action may be tried within the improper county, unless the defendant files a timely demand to change venue.³ “To obtain a change of venue [based on residence] as a matter of right, the demand must [first] be timely filed.”⁴ The demand for a change of venue is timely when filed within twenty days of service of the summons and complaint.⁵ If a defendant timely demands and moves for a change of venue on the basis of residence, a change of venue is mandatory unless the current venue is proper.⁶ However, if the defendant does not timely demand a change in venue, the defendant “waives [the] right to have the trial held in the proper county.”⁷

Here, appellants failed to demand a change in venue. Appellants concede that they presented no “demand” but contend that despite the absence of a timely demand, they have preserved the right to change venue because they list improper venue as an affirmative defense in their answer. Improper venue is not an affirmative defense.⁸

³See Nevada Transit Co. v. Harris Bros., 80 Nev. 465, 468, 396 P.2d 133, 134 (1964).

⁴Grey v. Grey, 111 Nev. 388, 389, 892 P.2d 595, 596 (1995).

⁵Id.; see also NRS 13.050(1).

⁶Western Pacific Railroad v. Krom, 102 Nev. 40, 42-43, 714 P.2d 182, 184 (1986); Williams v. Keller, 6 Nev. 476, 478 (1870).

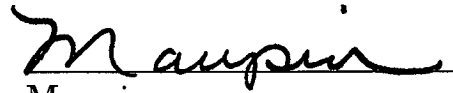
⁷Nevada Transit Co., 80 Nev. at 468, 396 P.2d at 134.


⁸Graham v. Sylvan Lawrence Co., 440 N.Y.S. 405, 406 (App. Div. 1980).


[A]ffirmative defenses go to the merits of an action and not to the interlocutory matter of venue.”⁹

In light of the above, we conclude that the district court was well within its discretion in denying the motion to change venue. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 _____, C.J.
Maupin

 _____, J.
Hardesty

 _____, J.
Saitta

cc: Hon. Steven P. Elliott, District Judge
Cathy Valenta Weise, Settlement Judge
Foley & Foley
Santoro, Driggs, Walch, Kearney, Johnson & Thompson
Woodburn & Wedge
McDonald Carano Wilson LLP/Reno
Washoe District Court Clerk

⁹Berton Land Development v. Ryan Mtg. Investors, 563 S.W.2d 811, 812 (Tex. 1978).