

9-1-1999

CIVIL PRACTICE Civil Practice and Procedure Generally: Change Venue Provisions for Cases Involving Certain Joint or Joint and Several Defendants Residing in Different Counties; Provide for Transfer of Cases in Certain Specified Circumstances; Provide for the Burden and Standard of Proof on Venue Issues; Provide that Certain Pleading Requirements Are Not Altered or Amended

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Recommended Citation

Ellner, Tiffany (1999) "CIVIL PRACTICE Civil Practice and Procedure Generally: Change Venue Provisions for Cases Involving Certain Joint or Joint and Several Defendants Residing in Different Counties; Provide for Transfer of Cases in Certain Specified Circumstances; Provide for the Burden and Standard of Proof on Venue Issues; Provide that Certain Pleading Requirements Are Not Altered or Amended," *Georgia State University Law Review*: Vol. 16 : Iss. 1 , Article 26.
Available at: <http://readingroom.law.gsu.edu/gsulr/vol16/iss1/26>

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CIVIL PRACTICE

Civil Practice and Procedure Generally: Change Venue Provisions for Cases Involving Certain Joint or Joint and Several Defendants Residing in Different Counties; Provide for Transfer of Cases in Certain Specified Circumstances; Provide for the Burden and Standard of Proof on Venue Issues; Provide that Certain Pleading Requirements Are Not Altered or Amended

CODE SECTION:	O.C.G.A. § 9-10-31 (amended)
BILL NUMBER:	HB 370
ACT NUMBER:	364
GEORGIA LAWS:	1999 Ga. Laws 734
SUMMARY:	The Act changes venue provisions for cases involving certain joint or joint and several defendants residing in different counties. The Act requires courts to transfer certain cases in certain specified circumstances and provides a statutory burden of proof and standard of proof on venue issues. The Act does not change certain specified pleading requirements.
EFFECTIVE DATE:	July 1, 1999

History

Historically, Georgia has had a peculiar venue provision regarding two co-defendants who reside in different counties.¹ The old venue provision created the problem of “vanishing venue.”² For example, if a Fulton County resident and a DeKalb County resident were co-defendants in a case in Fulton County and the jury returned a verdict against the DeKalb County defendant but not against the Fulton County resident, the DeKalb County defendant could have the verdict

1. See Code 1933, § 3-204 (formerly found at O.C.G.A. § 9-10-31 (1993)).
2. See *id.*

set aside for improper venue.³ The Act prevents this potentially inequitable and costly result.⁴

Georgia courts have created a “vanishing venue” loophole through their interpretations of the previous Code section.⁵ For example, in *Evans v. Garrett*,⁶ the plaintiff sued two Fulton County residents and one Cobb County resident in Cobb County.⁷ The jury found the Cobb County resident not liable and the two Fulton County residents liable for damages.⁸ However, the trial court set aside the verdict against the two Fulton County residents for lack of personal jurisdiction.⁹ Thus, the plaintiff would have had to file an entirely new suit in Fulton County to recover against the Fulton County defendants. In *Woods v. Universal C.I.T. Credit Corp.*,¹⁰ however, the Bibb County trial court entered a default judgment against a Bibb County resident, and the Court of Appeals held that jurisdiction over the nonresident defendant was proper.¹¹

Introduction

The House Judiciary Committee Chairman, Representative Jim Martin of the 47th District, introduced the bill late in the 1998 session.¹² However, it never made it to a floor vote because the House Judiciary Committee was concerned that the General Assembly did not have an opportunity to consider the business community's concerns.¹³ In the 1999 legislative session, Chairman Martin

3. See, e.g., *O'Neill v. Western Mortgage Corp.*, 153 Ga. App. 151, 264 S.E.2d 691 (1980). In *O'Neill*, the Court of Appeals allowed the Fulton County defendant to be dismissed when the DeKalb County jury at the trial court level returned a verdict against the Fulton County defendant, and not against two DeKalb County defendants. See *id.*

4. See Telephone Interview with Rep. Len Walker, House District No. 87 (May 6, 1999). Representative Walker stated that the Act merely corrected a flaw that existed in the prior Code section. See *id.*

5. See, e.g., *O'Neill*, 153 Ga. App. 151, 264 S.E.2d 691; *Evans v. Garrett*, 72 Ga. App. 846, 35 S.E.2d 387 (1945).

6. 72 Ga. App. 846, 35 S.E.2d 387 (1945).

7. See *id.*

8. See *id.* at 847-48, 35 S.E.2d at 388.

9. See *id.*

10. 110 Ga. App. 394, 138 S.E.2d 593 (1964).

11. See *id.* at 397, 138 S.E.2d at 596.

12. See Interview with Rep. Jim Martin, House District No. 47 (May 6, 1999) [hereinafter Martin Interview].

13. See Telephone Interview with Nick Moraitakis, Legislative Chairman of the Georgia Trial Lawyers' Association (May 20, 1999) [hereinafter Moraitakis Interview].

introduced the bill early to provide adequate time to address these concerns.¹⁴ The General Assembly passed the bill with the support of the Georgia Trial Lawyers' Association (GTLA) and with the Georgia Chamber of Commerce (Chamber) not opposing the bill; these groups helped negotiate a compromise on the bill's content.¹⁵

Consideration by House Judiciary Committee

The House Judiciary Committee added several important provisions to the bill that resulted from the compromise between the GTLA and the Chamber.¹⁶ First, the Committee substitute provided that the court must determine whether venue is proper for the nonresident defendants before trial, rather than wait to see if a verdict is returned against the resident defendant.¹⁷ Second, the House Committee substitute provided for a venue transfer if the plaintiff brings an action in bad faith against all defendants residing in the county where the plaintiff filed suit.¹⁸ Third, the Committee substitute also provided the party claiming improper venue bears the burden of proof; they must prove improper venue by a preponderance of the evidence.¹⁹ Further, the Committee substitute defined the commencement of a jury trial as the moment when the court swears in the jury; a nonjury trial begins when the first witness is sworn.²⁰ Finally, the Committee substitute provides that the Act does not alter the pleading and filing requirements of Chapter 11 of Title 9.²¹

14. *See id.*

15. *See id.*

16. *Compare* HB 370, as introduced, 1999 Ga. Gen. Assem., *with* HB 370 (HCS, 1999 Ga. Gen. Assem.

17. *Compare* HB 370, as introduced, 1999 Ga. Gen. Assem., *with* O.C.G.A. § 9-10-31 (Supp. 1999). By allowing a pre-trial determination of venue, the Act prevents plaintiffs from suing a "straw defendant" merely to obtain venue in a pro-plaintiff jurisdiction. *See* Moraitakis Interview, *supra* note 13. One of the Chamber's main concerns was that corporations would be subject to suit in unfriendly and inappropriate jurisdictions because plaintiffs could possibly manipulate the system and, essentially, forum shop by using a "straw defendant." *See id.*

18. *Compare* HB 370, as introduced, 1999 Ga. Gen. Assem., *with* O.C.G.A. § 9-10-31(a) (Supp. 1999).

19. *Compare* HB 370, as introduced, 1999 Ga. Gen. Assem., *with* O.C.G.A. § 9-10-31(a) (Supp. 1999).

20. *Compare* HB 370, as introduced, 1999 Ga. Gen. Assem., *with* O.C.G.A. § 9-10-31(d) (Supp. 1999).

21. *Compare* HB 370, as introduced, 1999 Ga. Gen. Assem., *with* O.C.G.A. § 9-10-31(e) (Supp. 1999).

The Act

The Act alters the current venue provision to prevent the vanishing venue loophole by allowing for a pre-trial determination of venue.²² For purposes of the Act, a jury trial commences when the court swears in the jury, and a nonjury trial commences when the first witness is sworn.²³ The pre-trial determination of venue and the other provisions of the Act do not alter the pleading requirements or the requirements for filing complaints and answers under Chapter 11 of Title 9.²⁴ During the pre-trial determination, the party claiming improper venue has the burden of proving improper venue by a preponderance of the evidence, and if a court finds venue to be improper, it shall transfer the action to a county of the plaintiff's choice where venue is proper.²⁵

If the trial court dismisses all resident defendants before a trial begins, a nonresident defendant may require that the action be transferred to a county where venue is proper; if venue is proper in more than one county, the plaintiff may elect the county.²⁶ If, however, the court dismisses all resident defendants after commencement, the court may transfer the action to a county where venue is proper, if all parties consent.²⁷

In addition, Section 2 of the Act, not codified by the General Assembly, stated that the legislature intended to address the problem with vanishing venue in actions involving joint or joint and several tort-feasors, obligors and promisors, joint contractors, or copartners residing in different counties.²⁸ In order to provide a more fair and predictable rule of venue, the General Assembly provided for a pre-trial determination of venue to eliminate wasting time and resources of courts and parties and to bring the law of venue in line with the constitutional venue provision.²⁹

22. Compare Code 1933 § 3-204 (formerly found at O.C.G.A. § 9-10-31 (1983)), with O.C.G.A. § 9-10-31 (Supp. 1999).

23. See O.C.G.A. § 9-10-31(d) (Supp. 1999).

24. See *id.* § 9-10-31(e).

25. See *id.* § 9-10-31(a).

26. See *id.* § 9-10-31(b).

27. See *id.* § 9-10-31(c).

28. See 1999 Ga. Laws 734, § 2, at 736.

29. See *id.*; see also 1983 GA. CONST. art. VI, § 2, ¶ 4 (stating that suits against joint obligors, joint tort-feasors, joint promisors, co-partners, or joint trespassers residing in different counties may be tried in either county).

Opposition to HB 370

The business community was the primary source of opposition to HB 370. The Chamber wanted to prevent abuse of the system by plaintiffs using a straw defendant to establish venue in a plaintiff-friendly forum.³⁰ The compromise between the GTLA and the Chamber, which prompted the addition of a pre-trial determination of venue of the Act, calmed the business community's fears.³¹ This pre-trial determination protects defendants from the assertion of jurisdiction in an improper forum by providing a means to raise the issue of improper venue and to achieve a transfer of venue if appropriate.³² Because the General Assembly had the time to address these fears, the Act passed with both sides relatively pleased.³³

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30. See Moraitakis Interview, *supra* note 13.

31. See *id.*

32. See O.C.G.A. § 9-10-31 (Supp. 1999); Moraitakis Interview, *supra* note 13.

33. See Martin Interview, *supra* note 12; Moraitakis Interview, *supra* note 13.