No Sua Sponte Change of Venue Allowed

It is not always clear when a court can exercise authority *sua sponte*, or to put it in English, on its own motion, without a party specifically requesting that the court act. Last week, the court of appeals held that a trial court does not have the authority to change venue *sua sponte*. Unless a defendant files a timely motion requesting a change and establishes grounds for moving the case to another county, a plaintiff has the right to prosecute a civil case in the county of his or her own choosing.

Venue is not jurisdictional

Case law long has been clear that venue – meaning the county in which a civil proceeding is prosecuted – is not a jurisdictional issue. In other words, a civil judgment otherwise appropriate will not be void because it was entered in a county not specified by statute to be the proper county. *See e.g. Shaffer v. Morris Bank,* 201 NC 415 (1931); *Brooks v. Brooks*, 107 NC App 44 (1992). GS 1-83 also makes this clear. That statute provides:

"If the county designated for that purpose in the summons and complaint is not the proper one, the action may, however, be tried therein, unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of parties, or by order of the court."

Any objection to venue is waived if not specifically raised in a timely manner by a defendant. *Chillari v. Chillari*, 159 NC App 670 (2003); *Miller v. Miller*, 38 NC App 278 (1978).

When can the court move a case to another county?

G.S. 1-83 provides that when a defendant files a timely objection to venue, the court can change venue in the following situations:

(1) When the county designated for that purpose is not the proper one;

(2) When the convenience of the witnesses and the ends of justice would be promoted by the change;

(3) When the judge has, at any time, been interested as party or counsel;

(4) When the motion is made by the plaintiff and the action is for divorce and the defendant has not been personally served with the summons.

The decision to change venue generally is a discretionary one for the court, unless the case was filed in an improper venue. If venue is improper, upon objection by defendant, the case must be

transferred. *Cheek v. Higgins*, 76 NC App 151 (1985). One exception to that general rule applies to divorces and all claims filed along with a divorce. GS 50-3 provides:

"[In] any action brought under Chapter 50 for alimony or divorce filed in a county where the plaintiff resides but the defendant does not reside, where both parties are residents of the State of North Carolina, and where the plaintiff removes from the State and ceases to be a resident, the action may be removed upon motion of the defendant, for trial or for any motion in the cause, either before or after judgment, to the county in which the defendant resides. The judge, upon such motion, shall order the removal of the action."

The court of appeals has held that this provision is not discretionary. Rather, the court is required to transfer when transfer is requested by a defendant for reasons set out in this statute. *Dechkovskaia v. Dechkovkaia*, 780 SE2d 175 (NC App, 2015); *Gardner v. Gardner*, 43 NC App 678 (1979).

When is Venue Proper?

Proper venue is set by statute. Many causes of action have specific statutes that designate the proper county or counties for the proceeding. For example, GS 1-76 provides that venue for certain proceedings dealing with real property is in the county in which the land is located. GS 50C-2(c) provides that an action for a Civil No-Contact Order can be filed either in a county permitted under GS 1-82 set out below or where the unlawful conduct took place.

When an action does not have a specific venue provision, proper venue is as provided in GS 1-82 titled "Venue in all other cases". Unless a more specific statute applies, GS 1-82 provides that:

"the action must be tried in the county in which the plaintiffs or the defendants, or any of them reside at its commencement, or if none of the defendants reside in the state, then in the county in which the plaintiffs, or any of them, reside; and if none of the parties reside in the state, then the action may be tried in any county which the plaintiff designates in the plaintiff's summons and complaint, subject to the power of the court to change the place of trial; …".

Last Week's Court of Appeals Decision: Zetino-Cruz v. Benitez-Zetino

Plaintiff grandmother filed an action in Durham County seeking custody of her grandchildren. The complaint alleged that plaintiff and the grandchildren resided in Lee County, defendant father lived in El Salvador and the location of the mother was unknown. An *ex parte* custody order was entered granting grandmother custody of the children. When the matter came before the court for consideration of grandmother's request for a temporary custody order, no Answer had been filed by either defendant and neither defendant appeared for the hearing. After learning that plaintiff and the children resided in Lee County, the court entered an order transferring the case to Lee County over the objection of plaintiff's counsel. In the written order transferring venue, the trial court concluded that:

"because of the convenience of the witnesses, the convenience of the court, significant ties of minor child and plaintiff to the County in which they reside, and the interests of justice, Durham County is not the appropriate forum."

The court of appeals reversed the trial court, holding that "the trial court's authority to change venue is triggered by a defendant's objection to venue whether the filing venue was proper or improper" and that "unless a defendant has filed an objection in writing to venue, the issue has been waived."

Addressing the court's authority to act *sua sponte*, the court of appeals stated:

"We have searched to find any inherent authority for a trial court to change venue *sua sponte* but have not found any legal authority which can support the trial court's order. 'Courts have inherent power to do only those things which are reasonably necessary for the administration of justice within the scope of their jurisdiction. Inherent powers are limited to those powers which are essential to the existence of the court and necessary to the orderly and efficient exercise of the trial court's jurisdiction.' [citation omitted]. We cannot discern any reason that a change of venue in this case would be 'necessary to the orderly and efficient exercise of the trial court's jurisdiction'."

Zetino-Cruz v. Benitez-Zetino.

While making it clear that venue cannot be changed *sua sponte* either for convenience or because venue is improper, the court of appeals also held that venue probably was proper in this case. GS 50-13.5(f) provides that "an action for custody and support of a minor child can be maintained in the county where the child resides or is physically present or where a parent resides." The court of appeals pointed out that during the temporary custody hearing, plaintiff grandmother testified that the children were physically present in Durham County when the action was filed.

Can venue ever be changed *sua sponte*?

In Zetino-Cruz, the court of appeals notes that there are appellate decisions indicating, at least in dicta, that GS 1-84 gives the court the authority to change venue on its own motion when the court concludes, based on "oath or affirmation on behalf of plaintiff or defendant," that "there are probable grounds to believe that a fair and impartial hearing cannot be obtained in the county in which the action is pending."