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# Civil Procedure - Georgia Venue Requirements in Impleader - Are They Realistic?

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# CIVIL PROCEDURE—GEORGIA VENUE REQUIREMENTS IN IMPLEADER—ARE THEY REALISTIC?

In *Register v. Stone's Independent Oil Distributors, Inc.*,[1] counsel for the third-party defendants filed motions to dismiss the third party complaint on the grounds that the venue requirements of Article VI, section 14 (4) and (6) of the Georgia Constitution[2] were not met since the third party defendants were not residents of the county in which the suit was brought. The main action resulted from plaintiff's husband being injured as a result of a collision involving four motor vehicles. Plaintiff originally named all parties involved as co-defendants. Only one of the defendants was a resident of the forum county. Plaintiff claimed that all defendants were jointly and severally liable. Under Georgia law, plaintiff was able to sue all defendants in one county even though only one was a resident of that county.[3] Plaintiff amended the complaint by striking four of the co-defendants. Defendant Stone then filed a third party complaint against the stricken parties under section 14(a) of the Georgia Civil Practice Act.[4] Two of the impleaded parties filed motions to dismiss which were denied by the trial court. On appeal, the Georgia Supreme Court transferred the case to the court of appeals.[5] The court of appeals, two justices dissenting, affirmed.[6] The court held that the impleading of a third party defendant under Ga. Code Ann. § 81A-114(a) (1967) is not an independent suit but is ancillary to the main action and need not meet the venue requirements of the Georgia Constitution. The supreme court granted certiorari and reversed.[7] That court held that the third party defendants must be impleaded in the counties of their residences since this was a separate suit.[8]

The Georgia Supreme Court has correctly construed the current venue requirements in cases where the attempted joinder of parties was clearly

1. 227 Ga. 123, 179 S.E.2d 68 (1971).
2. GA. CONST. art. VI, § 14(4) & (6) (1945); GA. CODE ANN. §§ 2-4904, 4906 (Rev. 1948).
3. "Suits against joint ogligors, joint promissors, corporations, or joint trespassers, residing in different counties, may be tried in either county." GA. CONST. art. VI, § 14(4) (1945); GA. CODE ANN. § 2-4904 (Rev. 1968).
4. GA. CODE ANN. § 81A-114 (1967).
5. Register v. Stone's Independent Oil Distrib., Inc., 225 Ga. 490, 169 S.E.2d 781 (1969).
6. Register v. Stone's Independent Oil Distrib., Inc., 122 Ga. App. 335, 177 S.E.2d 92 (1970).
7. 227 Ga. 123, 179 S.E.2d 68 (1971).
8. *Id.* at 127, 179 S.E.2d at 71.

improper. *I. Perlis & Sons v. National Security Corp.*[9] was a case where the venue requirements were not met. There, the plaintiff, a surety on a completion bond, sued the principal to compel him to perform his work. The plaintiff had sued because of a demand by the obligee on the completion bond. Plaintiff attempted to join the obligee, a resident of another county, to force him to assert his claim for damages against the principal. Clearly this was an example of an attempt to bring two separate *suits* and the court so found and disallowed the attempt by relying on Ga. Code Ann. § 2-4903 (Rev. 1948).[10] Moreover, section 2-4903 is not the applicable section insofar as *Register* is concerned since *Register* involves an action at law for money damages and is not an equitable action.

The issue in *Register* is whether the impleading of third party defendants is such an independent suit as to require the impleading to be brought in the counties of their residences. The question is one of first impression in Georgia. None of the cases cited in the opinion deal with a factual situation such as the one in *Register*.

The Georgia Court of Appeals, in an opinion written by Judge Eberhardt, held that if the action of impleader in *Register* was ancilliary to the main action it would not need to meet the venue requirements of the constitution.[11] The Georgia Supreme Court disagreed; and, by ignoring the numerous federal decisions which would seem to support the court of appeals,[12] the result is a narrow interpretation of Georgia's venue requirements in impleader cases. The supreme court's reasoning is strained, unduly technical and certainly questionable. The court reasons that this is an action whereby the defendant, as third party plaintiff, is seeking contribution by the third party defendants of their pro rata share of any verdict and judgment obtained against the third party plaintiff. The court concludes that such an action cannot be brought in a county other than that of the residence of the third party defendant.[13] The court cites two cases to support this conclusion.[14] These two cases only illustrate the clear meaning of Ga. Code Ann. § 2-4903 (Rev. 1948) by not allowing a suit in *equity* to be brought against a defendant for substan-

9. 218 Ga. 667, 129 S.E.2d 915 (1963).

10. "Equity cases shall be tried in the county where a defendant resides against whom substantial relief is prayed."

11. 122 Ga. App. 335, 177 S.E.2d 92 (1970).

12. 227 Ga. at 127, 179 S.E.2d at 71.

13. *Id.* at 126, 179 S.E.2d at 71.

14. Huckabee Auto Co. v. Norris, 190 Ga. 515, 9 S.E.2d 840 (1940); Barnes v. Banks, 154 Ga. 706, 115 S.E. 71 (1922).

tial relief in a county other than his home county.[15] These cases are not in point here as they construed Ga. Code Ann. § 2-4903 (Rev. 1948) rather than section 2-4906. The Georgia Supreme Court says that simply because a proceeding is ancilliary to the main action does not prevent it from being a separate suit.[16] A 1903 Georgia case[17] is the authority relied on by the court in reaching this conclusion. As discussed below, the real question is not whether it is a separate suit in a technical sense, but whether the third party complaint is ancillary and incidental to the main suit.[18] Ga. Code Ann. § 81A-114 (1967) is almost *identical* to Federal Rule of Civil Procedure 14. The reasoning of the Georgia Supreme Court contradicts such authorities as Professors Moore[19] and Wright.[20] The Georgia Court of Appeals appears not only to be using the better reasoning, but also reasoning which is supported by the weight of authority as discussed below.

Although the federal decisions were not considered by the Georgia Supreme Court, perhaps they are of some value to those not as "enlightened" as the court. Federal cases are numerous in this area. Hopefully some of these can be mentioned without needless repetition.

Any court should first consider the purpose behind the statute which they are construing. Federal decisions have repeatedly stated the purpose of Federal Rule 14 as being to avoid two actions which should be tried together in the interest of judicial efficiency.[21] In *Wiggins v. City of Philadelphia*,[22] the Court of Appeals for the Third Circuit held that by refusing to allow impleader and thereby requiring two trials instead of one would be a waste of time for jurors, witnesses, attorneys, and judges.[23] Basically, the federal courts are simply saying the same thing

15. *See* Terhune v. Pettit, 195 Ga. 793, 25 S.E.2d 660 (1943); Etowah Milling Co. v. Crenshaw, 116 Ga. App. 406, 42 S.E. 709 (1902).

16. 227 Ga. at 125, 179 S.E.2d at 70.

17. Dant v. Dant, 118 Ga. 853, 45 S.E. 680 (1903).

18. *See* Waylander-Peterson Co. v. Great N. Ry., 201 F.2d 408 (8th Cir. 1953).

19. J. MOORE, FEDERAL PRACTICE ¶ 14.02 (2d ed. 1968).

20. C. WRIGHT, LAW OF FEDERAL COURTS § 76 (2d ed. 1970).

21. Jones v. Waterman S.S. Corp., 155 F.2d 992 (3d Cir. 1946).

22. 331 F.2d 521 (3d Cir. 1964).

23. Many cases can be cited which discuss the purpose of Rule 14 and indicate a definite trend toward a broad and liberal application of the Rule. *See* Lasa Per L'Industria Del Marmo Societa Per Azioni of Lasa, Italy v. Alexander, 414 F.2d 143 (6th Cir. 1969); Noland Co. v. Graver Tank & Mfg. Co., 301 F.2d 43 (4th Cir. 1962); St. Paul Fire and Marine Ins. Co. v. United States Lines Co., 258 F.2d 374 (2d Cir. 1958); American Fidelity & Cas. Co. v. Greyhound Corp., 232 F.2d 89 (5th Cir. 1956); Henry Fuel Co. v. Whitebread, 236 F.2d 742 (D. C. Cir. 1956); Thomas v. Malco Refineries, Inc., 214 F.2d 884 (10th Cir. 1954); Waylander-Peterson Co. v. Great N. Ry., 201 F.2d 408 (8th Cir. 1953); Blair v. Cleveland Twist Grill Co., 197 F.2d 842 (7th Cir. 1952); Carlisle v. S. C. Loveland Co., 175 F.2d 418 (3rd Cir. 1949).

over and over, to wit: Rule 14 is designed to permit the disposition of the entire subject matter in one economic and expeditious action, and only where the allowance of the impleading will unnecessarily complicate and prejudice the original claims should separate trials be required.[24] In *Waylander-Peterson Co. v. Great Northern Railway*,[25] the Eighth Circuit Court of Appeals made a statement which is clear and supports Judge Eberhardt's reasoning in the Georgia Court of Appeal's decision. The court stated:

> Clearly, a third party claim by a defendant that a third person is liable to him for all or part of the claim in suit is so closely involved with the subject matter of the action as to be regarded as ancillary thereto. Thus, if the court has jurisdiction of the principal action, it needs no independent grounds of jurisdiction to entertain and determine the defendant's third party claim . . . . In other words, if the third party claim is ancillary and incidental to the principal action, independent grounds of jurisdiction need not exist.[26]

This statement seems to refute the Georgia Supreme Court's reasoning holding that because an action is ancillary to the main action it is not necessarily prevented from being a separate suit. In fact, it appears that such reasoning by the Georgia high court begs the question. The real concern is not whether the new claim is a "separate suit" but whether the third party claim is ancillary to the principal action.

One must be aware that impleader should not always be allowed. Federal courts do not always allow impleader even though two trials and duplication of evidence will result.[27] There must be a balance between the desire to avoid circuity and to obtain consistent results against any prejudice to the parties.[28] While some restrictions on impleader are necessary, the *Register* decision goes too far. It has basically eliminated third party practice in Georgia.[29] By placing such a strict interpretation

24. Baker v. Moors, 51 F.R.D. 507 (W. D. Ky. 1971); *see also* Weisman v. Ashplant, 326 F. Supp. 825 (S. D. N.Y. 1971).

25. 201 F.2d 408 (8th Cir. 1953).

26. *Id.* at 415.

27. Johns Hopkins Univ. v. Hutton, 40 F.R.D. 338 (D. Me. 1966).

28. *Id.* at 346.

29. It has been recognized that important provisions relating to the addition of parties will have a limited effect if the same jurisdictional and venue requirements are to be applied in the case of added parties as to the action between the original parties. *See* Brandt v. Olson, 179 F. Supp. 363 (N. D. Iowa 1959).

on the venue requirements impleader will be of very little value.[30] As a result of *Register*, a party can now only implead a third party in the county of his residence regardless of where the main action is brought, unless it is in the third party's county. This is true even though the plaintiff can sue the third party in any county where one of the defendants resides, if he alleges they are jointly and severally liable. This is not consistent or logical. If the Georgia Supreme Court insists on maintaining its position in this area, it is clear that the only solution is a constitutional amendment. However, such an amendment is not necessary. By using such reasoning and basic logic as the federal courts, as Judge Eberhardt, and as the court of appeals have used, the Georgia Constitution is not in irreconcilable conflict with Ga. Code Ann. § 81A-114 (1967).

Georgia has adopted, for all practical purposes, the same rules of civil procedure as the federal courts. Since our impleader provision is the same as that of the federal courts, it would seem that the federal interpretations on the subject should at least be considered. As a result of *Register*, Georgia has the same rule in text but not in meaning! Why not adopt a different set of rules? At least that would be logical. Here the plaintiff could have sued the third party defendants under Ga. Code Ann. § 2-4904 (Rev. 1948), but, after she amended her complaint by striking these defendants, these same defendants could not be impleaded. Is this logical? As noted above, impleader should not be allowed where *any* of the parties will suffer prejudice. How could the third-party defendants possibly suffer prejudice? If they could suffer prejudice by being impleaded it would seem that they would suffer that very same prejudice by being joined by the original plaintiff. If anyone has suffered prejudice here, it is the third party plaintiff. The United States Court of Appeals for the Second Circuit has stated that, in addition to the purposes already mentioned, impleader is also designed to eliminate the handicap to a defendant of a time difference between a judgment against him and a judgment in his favor against the third party defendant.[31] Has the Georgia Supreme Court refuted such reasoning by saying "the jurisdictional questions in federal courts are not the same as in our courts, and venue questions in our courts *must* be decided under the constitution of this state?"[32]

JAMES B. MCLAUGHLIN, JR.

30. *See* Morrill v. United Air Lines Transport Corp., 29 F. Supp. 757 (S.D. N.Y. 1939). There the court held that the spirit and purpose of Rule 14 would be frustrated if the venue statute had to be applied to a third party proceeding under Rule 14.

31. Dery v. Wyer, 265 F.2d 840 (2d Cir. 1959).

32. 227 Ga. at 127, 179 S.E.2d at 71. (Emphasis added.)