

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

ROBERT BEHRENS and TERI BEHRENS,)	1 CA-SA 03-0146
husband and wife, individually and as)	
parents and next friend of CHRISTOPHER)	DEPARTMENT D
BEHRENS and MATTHEW BEHRENS, minors,)	
)	
Petitioners,)	
)	
v.)	O P I N I O N
)	
THE HONORABLE MICHAEL J. O'MELIA, Judge))	Filed 10-23-03
of the SUPERIOR COURT OF THE STATE OF)	
ARIZONA, in and for the County of)	
MARICOPA,)	
)	
Respondent Judge,)	
)	
TED BEHRENS and LAURA BEHRENS, husband)	
and wife, individually and as next)	
friend of HARLEIGH BEHRENS,)	
)	
Real Parties in Interest.)	
)	

Petition for Special Action
from the Maricopa County Superior Court

Cause No. CV 2002-006091

The Honorable Michael J. O'Melia, Judge

AFFIRMED

Burke Panzarella Rich	Phoenix
by Thomas P. Burke, II	
Amanda M. Lorenz	
Attorneys for Petitioners	
Donna Platt Boros	Phoenix
Attorney for Real Parties in Interest	

W E I S B E R G, Judge

¶1 Petitioners Robert and Teri Behrens ("Defendants") ask this court to accept special action jurisdiction and reverse the trial court's grant of a change of venue to Pinal County. Defendants contend that they have no adequate remedy by appeal. We accept jurisdiction because the granting of a motion for change of venue is a nonappealable order. *Lakritz v. Superior Court*, 179 Ariz. 598, 599, 880 P.2d 1144, 1145 (App. 1994). By previous order, we accepted jurisdiction and denied relief with an opinion to follow. This is that opinion.

FACTS AND PROCEDURAL HISTORY

¶2 This action arises out of an accident that occurred on a playground at Rancho Grande City Park in the City of Casa Grande, Pinal County. Real Parties in Interest Ted and Laura Behrens ("Plaintiffs") first filed a complaint in Maricopa County against only the City of Casa Grande (the "City"), which was removed to Pinal County upon the City's Notice of Improper Venue.

¶3 Plaintiffs then filed a second complaint, arising out of the same event, in Maricopa County against Defendants. Plaintiffs subsequently filed a Motion for Change of Venue, requesting that their second case be transferred to Pinal County, so that it could be consolidated with the proceeding against the City. The trial court granted the motion, stating: "There should not be two cases, one here and one in Pinal County. Plaintiff needs to choose the

correct forum. If venue is in Pinal, this case should be dismissed or moved." The court further observed that: "Judge Holt [a judge visiting the Superior Court of Pinal County] will decide if [this] case should be consolidated with the Pinal County case."

DISCUSSION

¶4 Defendants claim that the change of venue was improper because Maricopa County is a "proper county"¹ for venue purposes. They argue that once Plaintiffs' action was initiated in a proper county, the trial court was without authority to order a change of venue. See *Cacho v. Superior Court*, 170 Ariz. 30, 32, 821 P.2d 721, 723 (1991); *Pride v. Superior Court*, 87 Ariz. 157, 161, 348 P.2d 924, 928 (1960). We disagree.

¶5 The cases relied on by Defendants in support of this proposition do not control here. Those cases involved a party attempting to change venue, claiming that suit had been filed in an improper county. In that context, our supreme court considered whether suit had been brought in a proper county and ruled that

¹"Proper county" in this context refers to a court that is authorized to hear a suit pursuant to Arizona Revised Statutes ("A.R.S.") section 12-401 (2003).

once an action was brought in a proper county, the trial court was without authority to order a change of venue. See *Cacho*, 170 Ariz. at 32, 821 P.2d at 723; *Pride*, 87 Ariz. at 161, 348 P.2d at 928. Here, however, the issue is not whether Maricopa County was an improper county for venue purposes. Instead, the issue is whether there was "good and sufficient cause" to change venue because of the ongoing proceeding in Pinal County. See A.R.S. § 12-406(B)(3) (2003). In this context, A.R.S. § 12-406(B)(3) is controlling. We therefore look to it to determine whether a change of venue was within the discretion of the trial court.² See *State v. Eastlack*, 180 Ariz. 243, 252-53, 883 P.2d 999, 1008-09 (1994) (A trial court's ruling on a motion for change of venue will not be disturbed on appeal absent a prejudicial abuse of discretion.).

¶6 Section 12-406(B)(3) provides that venue may be changed upon a finding of "good and sufficient cause, to be determined by the court." We conclude that the trial court had good and sufficient cause to change venue to Pinal County.

¶7 First, the action against Defendants arose out of the same injury as the action against the City, and both actions have common questions of law and fact. Therefore, transferring the action against Defendants to Pinal County so that it can be

²We note that although Maricopa County is a proper county, see A.R.S. § 12-401, venue also is proper in Pinal County, the county in which the accident occurred. See A.R.S. § 12-401(10).

consolidated with the action against the City will serve the interests of judicial economy. See Ariz. R. Civ. P. 42(a).

¶18 Second, consolidating the cases will ensure that one hundred percent of all damages are awarded and apportioned among all negligent defendants, as § 12-2506 requires. See Dan B. Dobbs, *The Law of Torts* § 210 at 532 (2001) (In comparative fault jurisdictions that have abolished joint and several liability, “[o]ne hundred percent is the maximum fault available to share among all the negligent actors.”); see also *Piner v. Superior Court*, 192 Ariz. 182, 190, ¶¶ 32-33, 962 P.2d 909, 917 (1998). If Plaintiffs were allowed to proceed with separate suits against the City and Defendants, the damage awards could be inconsistent, and the resulting allocation of fault among the defendants could be other than one hundred percent. These undesirable results can be avoided by consolidating the two lawsuits, which is possible only with the subject change of venue.

¶19 Because the causes of action against the City and Defendants arise out of the same injury, and because Pinal County is the only proper county in which to hear the action against the City, see A.R.S. § 12-401 and *City of St. Johns v. Superior Court*, 155 Ariz. 369, 371, 746 P.2d 941, 943 (App. 1987), the trial court had good and sufficient cause to transfer the suit against Defendants to Pinal County so that it could be consolidated with

the ongoing action against the City. See A.R.S. § 12-406(B) (3). As such, the trial court did not abuse its discretion in granting the change of venue,³ and we affirm its decision.

SHELDON H. WEISBERG, Judge

CONCURRING:

WILLIAM F. GARBARINO, Presiding Judge

ANN A. SCOTT TIMMER, Judge

³Defendants argue that the trial court was without discretion to grant the change of venue because Plaintiffs failed to present any evidence that Maricopa County is "venue non conveniens." See A.R.S. § 12-406(B) (2); *Dunn v. Carruth*, 162 Ariz. 478, 481, 784 P.2d 684, 687 (1989). However, because we conclude that the trial court properly found good and sufficient cause to transfer venue under A.R.S. § 12-406(B) (3), evidence regarding the most convenient forum was irrelevant.