

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-440

Filed: 20 February 2018

Union County, No. 16-CVD-2822

BREE RUSHING STOKES, Plaintiff/Mother,

v.

WILLIAM COREY STOKES, II, Defendant/Father

Appeal by plaintiff from order entered 9 February 2017 by Judge N. Hunt Gwyn in Union County District Court. Heard in the Court of Appeals 31 October 2017.

Collins Family Law Group, by Rebecca K. Watts, for plaintiff-appellant.

Passenant & Shearin Law, by Brione B. Pattison, for defendant-appellee.

BRYANT, Judge.

Where the trial court's order granting defendant's motion to change venue was based on N.C. Gen. Stat. § 1-83(2), the convenience of the witnesses, and where a motion for change of venue filed contemporaneously with responsive pleadings is not untimely filed, the trial court's order is interlocutory and not immediately appealable, and we dismiss plaintiff's appeal.

Plaintiff Bree Stokes and defendant William Stokes were married on 6 April 2002 and separated on 20 April 2016. During the marriage, the parties had two children. In April 2016, defendant filed an action for domestic violence against

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plaintiff in Pitt County. Plaintiff counterclaimed, asking for child custody, child support, alimony, and equitable distribution. At some point, an *ex parte* domestic violence protective order was entered against plaintiff, which included temporary custody provisions. Before 20 October 2016, both parties dismissed their claims, and the domestic violence order was set aside.

On or about 20 October 2016, plaintiff and the minor children relocated from Pitt County to Union County, while defendant remained a resident of Pitt County. On 24 October 2016, plaintiff filed a complaint for child custody, child support, and equitable distribution in Union County. On 26 October 2016, defendant filed his own custody action in Pitt County. Thereafter, on 9 November 2016, defendant filed a motion in Union County for emergency *ex parte* custody and motion to dismiss for improper venue, or in the alternative, a motion to change venue in the Union County case.

On 6 December 2016, the trial court in Union County conducted a hearing on defendant's motion to change venue. After hearing testimony from the parties and the arguments of counsel on the issue of venue, the trial court ruled that venue was proper in both Pitt and Union Counties, but ordered that venue be changed to Pitt County by order entered 9 February 2017. Plaintiff appeals.

On appeal, plaintiff argues the trial court erred as a matter of law and abused its discretion in changing venue from Union County to Pitt County. Specifically, plaintiff contends that venue is proper in Union County and to the extent the order is an attempt to change venue for the convenience of witnesses, the trial court abused its discretion in changing venue to Pitt County. We disagree.

A. The Nature of Defendant's Motion

The trial court's venue order is an interlocutory order in that the parties' claims for child custody, child support, and equitable distribution remain unresolved. "An appeal of an order disposing of . . . a [venue] motion is interlocutory because 'it does not dispose of the case.'" *Snow v. Yates*, 99 N.C. App. 317, 319, 392 S.E.2d 767, 768 (1990) (quoting *DesMarais v. Dimmette*, 70 N.C. App. 134, 135, 318 S.E.2d 887, 888 (1984)). "Generally, there is no right to appeal an interlocutory order, unless the trial court's decision affects a substantial right of the appellant which would be lost absent immediate review." *Caldwell v. Smith*, 203 N.C. App. 725, 727, 692 S.E.2d 483, 484 (2010) (citing *Boynton v. ESC Med. Sys., Inc.*, 152 N.C. App. 103, 105–06, 566 S.E.2d 730, 731 (2002)). "Our courts have established, however, that '[m]otions for change of venue because the county designated is not proper affect a substantial right and are immediately appealable.'" *Heustess v. Bladenboro Emergency Servs., Inc.*, ___ N.C. App. ___, ___, 791 S.E.2d 669, 671 (2016) (alteration in original) (quoting *Hawley v. Hobgood*, 174 N.C. App. 606, 608, 622 S.E.2d 117, 119 (2005)).

“[G]rant or denial of a motion asserting a *statutory right* to venue affects a substantial right and is immediately appealable.” *Snow*, 99 N.C. App. at 319, 392 S.E.2d at 768 (emphasis added) (citing *Gardner v. Gardner*, 300 N.C. 715, 719, 268 S.E.2d 468, 471 (1980)). On the other hand, “an order denying [or granting] a motion for change of venue . . . *based upon the convenience of witnesses and the ends of justice*, is an interlocutory order and not immediately appealable.” *Kennon v. Kennon*, 72 N.C. App. 161, 164, 323 S.E.2d 741, 743 (1984) (emphasis added) (citations omitted). In other words, “an appeal from a discretionary ruling as to venue is interlocutory, does not affect a substantial right, and is not immediately appealable[;] a determination of venue based upon a statutory right to venue in a particular county is immediately appealable.” *ITS Leasing, Inc. v. RAM DOG Enters., LLC*, 206 N.C. App. 572, 574, 696 S.E.2d 880, 882 (2010) (citations omitted).

In the instant case, defendant filed a motion in response to plaintiff’s complaint in Union County titled “Motion for Emergency *Ex Parte* Custody and Motion To Dismiss For *Improper Venue*, or in the alternative, *Motion to Change Venue*.” (Emphasis added). In his motion filed in Union County, defendant objected to venue based on subsections (1) and (2) of N.C. Gen. Stat. § 1-83, and requested as follows:

3. That the Court dismiss Plaintiff’s Complaint for Child Custody, Child Support, and Equitable Distribution;
4. Or in the alternative, that the Court change venue of this action from Union County, North Carolina to Pitt County, North Carolina and consolidate the matter with the action

filed by Father in that county.

Our Court has stated that “[u]nlike motions for change of venue based upon allegations of improper venue, which must be made a part of the answer or filed as separate motions prior to answering, motions for change of venue made pursuant to G.S. 1-83(2) are properly made only after an answer has been filed.” *Godley Constr. Co., Inc. v. McDaniel*, 40 N.C. App. 605, 607, 253 S.E.2d 359, 360 (1979) (citations omitted).

However, the instant case is analogous to *ITS Leasing*:

Analysis of this case, and even the determination of whether this interlocutory appeal is immediately appealable, is complicated by the fact that neither defendant’s motion nor the trial court’s order identified the specific basis for the change of venue, although one basis for the change of venue is of right and the other is discretionary. Also, an appeal from a discretionary ruling as to venue is interlocutory, does not affect a substantial right, and is not immediately appealable, *Kennon v. Kennon*, 72 N.C. App. 161, 164, 323 S.E.2d 741, 743 (1984); a determination of venue based upon a statutory right to venue in a particular county is immediately appealable. *Snow v. Yates*, 99 N.C. App. 317, 319, 392 S.E.2d 767, 768 (1990).

206 N.C. App. at 574, 696 S.E.2d at 882. Thus, where, as here, “the parties have raised arguments both as to discretionary venue under N.C. Gen. Stat. § 1-83(2) and venue as of right[,] . . . and the trial court did not specify the basis for its ruling, we must address both.” *Id.* at 575, 696 S.E.2d at 882.

Pursuant to N.C. Gen. Stat. § 1-83,

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[i]f 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.

The court may change the place of trial in the following cases:

- (1) When the county designated for that purpose is not the proper one.
- (2) When the convenience of witnesses and the ends of justice would be promoted by the change.

N.C.G.S. § 1-83(1)–(2) (2015). “In all other cases the action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement” N.C. Gen. Stat. § 1-82 (2015).

In the instant case, the trial court made the following findings of fact in its order to change venue:

1. Plaintiff (hereinafter “Mother”) is a citizen of North Carolina and has resided in Union County, North Carolina since October 20, 2016. Prior to October 20, 2016, Mother was a citizen and resident of Pitt County, North Carolina.
2. Defendant (hereinafter “Father”) is a citizen and resident of Pitt County, North Carolina.
3. The parties are parents of (2) minor children, . . . born August 22, 2003, and . . . June 14, 2008 (hereinafter the “minor children”).
4. The minor children have resided in Pitt County, North

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Carolina since their birth. Mother moved to Union County, North Carolina on October 20, 2016 without Father's knowledge or consent.

5. On October 24, 2016, Mother filed a Complaint for Child Custody in Union County District Court.

6. On November 9, 2016, Father filed a Motion to Dismiss, a Motion to Change Venue and an Ex Parte Motion for Emergency Custody in Union County.

7. The parties own several businesses, a home and a parcel of real estate which are all located in Pitt County, North Carolina.

8. The minor children have attended school in Pitt County their entire lives.

9. The minor children's therapists, doctors, coaches and teachers all reside in Pitt County.

10. N.C.G.S. § 1-82 allows for the proper venue of cases to be heard in the county in which the Plaintiff's [sic] or the Defendant's [sic] reside with the emphasis on the word "or". The disjunctive allows some cases, such as this one, to be in either venue.

11. N.C.G.S. § 1-83 literally says, "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 the parties, or by order of the court." The Defendant filed a written response on November 9, 2016 that was filed within the time for answering and it is a written request of the court to change venue along with other relief requested. *The Court finds this is a responsive pleading amounting to an answer and that was timely filed.*

(Emphasis added).

The trial court's findings of fact do not make it abundantly clear under which subsection of N.C. Gen. Stat. § 1-83—(1) or (2)—the trial court concluded that “[v]enue of this action is proper in Pitt County, North Carolina[,]” and granted defendant's motion to change venue to Pitt County. However, as the trial court specifically found venue to be proper “in either venue,” it would appear that the trial court's decision to grant defendant's motion to change venue to Pitt County was based on subsection (2), the convenience of the witnesses. *See* N.C.G.S. § 1-83(2) (“The court may change the place of trial . . . [w]hen the convenience of witnesses and the ends of justice would be promoted by the change.”).

Thus, because the trial court's order granting defendant's motion to change venue was based on N.C. Gen. Stat. § 1-83(2), the convenience of the witnesses, such an order is interlocutory “and not immediately appealable.” *Kennon*, 72 N.C. App. at 164, 323 S.E.2d at 743. Nevertheless, plaintiff argues that defendant's motion to change venue was prematurely filed, and as a result the order should be vacated.

B. The Timeliness of Defendant's Motion

“Motions for change of venue based on the convenience of witnesses, pursuant to section 1-83(2), *must be filed after the answer is filed.*” *ITS Leasing*, 206 N.C. App. at 576, 696 S.E.2d at 883 (emphasis added) (citation omitted) (quoting *Smith v. Barbour*, 154 N.C. App. 402, 407, 571 S.E.2d 872, 876 (2002)) (holding that where the

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defendant's motion for change of venue was based upon the convenience of the witnesses and filed prior to an answer, "it was therefore prematurely filed").

In the instant case, the trial court found as fact that defendant's motion for change of venue "is a responsive pleading *amounting to an answer* and that was timely filed." (Emphasis added). While our case law makes clear that a defendant's motion for change of venue based on subsection (2) of section 1-83 is premature if filed before the answer, *see id.*, it is less clear what result issues when a motion for change of venue is filed *at the same time* as an answer, or is deemed to also amount to answer, as occurred in the instant case. In other words, the question is whether a motion to change venue based on the convenience of the witnesses filed contemporaneously with an answer is "prematurely filed." We conclude that it is not.

In *Hartford Accident & Indemnity Co. v. Hood*, the North Carolina Supreme Court stated as follows:

Of course it is impossible to anticipate what issues may be raised, when [an] answer or other pleadings are filed. But, *until the allegations of the complaint are traversed*, the occasion for the exercise of discretion will not arise upon the motion for removal for the convenience of witnesses and the promotion of justice. If issues of fact are raised when the answer is filed, which will necessitate a jury trial and the attendance of witnesses, the court may in its discretion grant defendant's motion to remove . . . for the convenience of witnesses and the promotion of justice.

225 N.C. 361, 362, 34 S.E.2d 204, 204–05 (1945) (emphasis added) (citations omitted).

In other words, a case is not appropriate for removal to a different venue "until the

allegations of the complaint are traversed.” The “traversing” refers to the work done by the defendant in filing his answer; by filing his answer, the defendant “traverses” the allegations in the complaint by answering them in a responsive pleading. Thus, where a defendant’s answer is filed contemporaneously with a motion to change venue or where a motion to change venue is such a responsive pleading that it amounts to an answer, it is presumed that a defendant has “traversed” the allegations of the plaintiff’s complaint such that any motion to change venue filed along with an answer will, therefore, not be deemed to be prematurely filed.

In the instant case, the trial court found that “[d]efendant filed a written response [to plaintiff’s complaint] . . . that was filed within the time for answering and it is a written request of the court to change venue *along with other relief requested*. The Court finds this is a *responsive pleading amounting to an answer* and that was timely filed.” (Emphasis added). Plaintiff has challenged this finding of fact (Finding of Fact No. 11) as erroneous, arguing that defendant’s motion to change venue does not meet the definition of an answer.

Plaintiff argues that a motion to change venue for the convenience of the witnesses is premature even if it is filed as part of the answer. However, because we agree with the trial court that defendant’s responsive pleading in the instant case amounts to an answer in that it addresses, *inter alia*, plaintiff’s claim for child custody with defendant’s counterclaim for emergency ex parte custody, and moreover because

defendant's thirty-four factual allegations listed therein address issues not relevant to the issue of venue. *See Steel Creek Dev. Corp. v. James*, 35 N.C. App. 272, 273, 241 S.E.2d 122, 123 (1978) ("The order of Judge Thornburg provided that defendants were granted 30 days after the filing of an amendment to the complaint to file responsive pleadings. We do not believe that the word "responsive" should be given such a limited definition as to require that the defendants could only answer pleadings filed by the plaintiff. We interpret the order allowing the defendants to file responsive pleadings to give them the right to respond in any proper way they deem appropriate to the amended complaint. This would include further answers and counterclaims."); *see also* Answer, *Black's Law Dictionary* (10th ed. 2014) (defining an "answer" as "usu[ally] set[ting] forth the defendant's defenses and counterclaims").

Accordingly, we conclude that because the trial court found that defendant filed a responsive pleading amounting to an answer contemporaneously with his motion to change venue, the venue motion was not prematurely filed. We now address the interlocutory nature of plaintiff's appeal.

Having concluded that the trial court's venue change order is based on the convenience of the witnesses, N.C. Gen. Stat. § 1-83(2), this conclusion renders plaintiff's appeal interlocutory. *Kennon*, 72 N.C. App. at 164, 323 S.E.2d at 743 ("[A]n order granting a motion for a change of venue is interlocutory and not immediately appealable."). Therefore, plaintiff's interlocutory appeal is

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DISMISSED.

Judge ARROWOOD concurs.

Judge MUPRHY dissents in a separate opinion.

MURPHY, Judge, dissenting.

I accept the facts as set out by the Majority and I agree with the Majority's holding that the Order to Change Venue ("Order") is based on N.C.G.S. § 1-83(2). However, I respectfully dissent from the Majority's holding that Defendant's 9 November 2016 motion is a responsive pleading equating to an answer. In this case, the trial court's ruling on Defendant's motion to change venue was premature because Defendant had not yet filed an answer or responsive pleading traversing the allegations in the complaint. Our appellate courts have consistently exercised jurisdiction to reverse an untimely order related to the inconvenience of venue. *See Thompson v. Horrell*, 272 N.C. 503, 505, 158 S.E.2d 633, 655 (1968); *ITS Leasing, Inc. v. Ram Dog Enters.*, 206 N.C. App. 572, 576, 696 S.E.2d 880, 883 (2010); *Smith v. Barbour*, 154 N.C. App. 402, 407, 571 S.E.2d 872, 876 (2002); *Godley Const. Co., v. McDaniel*, 40 N.C. App. 605, 607, 253 S.E.2d 359, 360-61 (1979); *Poteat v. S. Ry. Co.*, 33 N.C. App. 220, 222, 234 S.E.2d 447, 449 (1977); *Lowther v. Wilson*, 257 N.C. 484, 485, 126 S.E.2d 50, 51 (1962). We have jurisdiction to address this issue, and the Order must be vacated as untimely.

If a plaintiff files suit in an improper venue, a defendant must "demand[] in writing that the trial be conducted in the proper county." N.C.G.S. § 1-83 (2017). A trial court has no discretion to deny a timely request to change the place of trial from an improper venue to a proper one. *Nello L. Teer Co. v. Hitchcock Corp.*, 235 N.C.

741, 743, 71 S.E.2d 54, 56 (1952). A request is timely if it occurs “before the time of answering expires.” N.C.G.S. § 1-83. A defendant must allege improper venue in a motion prior to answering or as a part of the answer. *Godley Const. Co.*, 40 N.C. App. at 607, 253 S.E.2d at 360. “Under G.S. 1A-1, Rule 12(b)(3), the defense of improper venue may be raised in the answer if no pre-answer motions have been made.” *Swift & Co. v. Dan-Cleve Corp.*, 26 N.C. App. 494, 495, 216 S.E.2d 464, 465 (1975). However, because venue is not jurisdictional, it can be waived. *Nello L. Teer Co.*, 235 N.C. at 744, 71 S.E.2d at 56. If a defendant fails to make such a request before answering, he or she waives the objection to venue as of right. *Id.* As there is no way to determine convenience prior to knowing what will be and will not be an issue at trial, no such waiver occurs when a party fails to make an immediate motion to change venue for convenience.

A party may move the trial court to change venue “[w]hen the convenience of witnesses and the ends of justice would be promoted by the change.” N.C.G.S. § 1-83(2). The authority to grant such a request is within the trial court’s discretion, reviewable only for manifest abuse of discretion. *Godley Const. Co.*, 40 N.C. App. at 607, 253 S.E.2d at 361. Unlike a motion to change venue as of right, a motion to change venue based on the convenience of the parties may only be made after an answer has been filed. *Id.* The Supreme Court of North Carolina explained the rationale for this interpretation in *Hartford Accident & Indem. Co. v. Hood*, 225 N.C.

361, 34 S.E.2d 204 (1945). The trial court cannot reasonably exercise its discretion as to the convenience of parties and promotion of justice “until the allegations of the complaint are traversed.” *Id.* at 362, 34 S.E.2d at 204. Our appellate courts have reaffirmed this holding over the course of many generations. *See Thompson*, 272 N.C. at 505, 158 S.E.2d at 635; *ITS Leasing, Inc.*, 206 N.C. App. at 576, 696 S.E.2d at 883; *Smith*, 154 N.C. App. at 407, 571 S.E.2d at 876; *McCullough v. Branch Banking & Trust Co.*, 136 N.C. App. 340, 350, 524 S.E.2d 569, 575-76 (2000); *Godley Const. Co.*, 40 N.C. App. at 607, 253 S.E.2d at 360-61; *Poteat*, 33 N.C. App. at 222, 234 S.E.2d at 449; *Lowther*, 257 N.C. at 485, 126 S.E.2d at 51.

When the initial venue is proper, any change in venue must be based on considerations of convenience and justice. Under *Hartford* and its progeny, a trial court has authority to exercise its discretion in ordering a change in venue only after a defendant has filed an answer. In this way, the two means of changing venue are harmonious: before and up until the answer, a defendant may allege improper venue and move for a change in venue as of right. After the answer, the previous objection is waived, but a defendant may move the court for a change in venue as a matter of convenience and justice.

The Majority observes that a motion to change venue under N.C.G.S. § 1-83(2) “is premature if filed before the answer.” The Majority also holds that a motion to change venue under N.C.G.S. § 1-83(2) is proper when “filed contemporaneously with

an answer.” While this holding is not supported by precedent, it is logically consistent. However, we need not decide the propriety of filing a motion to change venue under N.C.G.S. § 1-83(2) at the same time as an answer, because Defendant’s motion does not constitute an answer or other responsive pleading.

Defendant’s *Motion for Emergency Ex Parte Custody and Motion to Dismiss for Improper Venue, or in the alternative, Motion to Change Venue* is not a responsive pleading within the meaning of the North Carolina Rules of Civil Procedure. By definition, Defendant’s request is a motion, not an answer. More importantly, Defendant’s motion does not “traverse” the allegations of Plaintiff’s Complaint, which is the rationale underlying the rule from *Hartford*. See *Hartford*, 225 N.C. at 362, 34 S.E.2d at 204 (holding that a trial court cannot exercise its discretion to change venue “until the allegations of the complaint are traversed”). Defendant moved to change venue before filing an answer and the motion, under N.C.G.S. § 1-83(2), was not properly before the trial court.

Under N.C.G.S. § 1A-1, Rule 7(a), responsive pleadings include “a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a crossclaim, if the answer contains a crossclaim” and other similar pleadings, which are relevant only when third parties are involved. N.C.G.S. § 1A-1, Rule 7(a) (2017). Rule 7(b)(1) defines “[m]otions and other papers” as “application[s] to the court for an order” and requires that motions are written and that they include particular grounds

and relief sought. N.C.G.S. § 1A-1, Rule 7(b)(1). Rule 7(b)(2) provides that rules applicable to the form of pleadings—like captions and signatures—apply to “all motions and other papers provided for by these rules.” N.C.G.S. § 1A-1, Rule 7(b)(2). The definitions within Rule 7 suggest that the terms “pleading” and “motion” are not interchangeable. Pleadings are limited to complaints, answers, and replies, whereas motions may include many types of requests for relief. *See* N.C.G.S. § 1A-1, Rule 7(a), (b).

Rule 8 provides for “[g]eneral rules of pleadings” and dictates the requirements for claims for relief. N.C.G.S. § 1A-1, Rule 8 (2017). Rule 8(a) reiterates that pleadings include “an original claim, counterclaim, crossclaim, or third-party claim” and requires that pleadings include a demand for judgment. N.C.G.S. § 1A-1, Rule 8(a). Rule 8(b) details the “form of denials” in pleadings and requires a party to “admit or deny the averments upon which the adverse party relies.” N.C.G.S. § 1A-1, Rule 8(b).

Admittedly, at times, this Court has interpreted some provisions of the above Rules in a flexible manner. For example, in *Brown v. Am. Messenger Serv.*, 129 N.C. App. 207, 498 S.E.2d 384 (1998), this Court concluded that a letter that admitted liability, included a certified check, and promised future payment amounted to an answer, even though the letter did not conform to the requirements under the Rules. *Id.* at 213, 498 S.E.2d at 388. We emphasized that “the general policy of the Rules of

Civil Procedure is to disregard the technicalities of form and determine the rights of litigants on the merits.” *Id.* at 211, 498 S.E.2d at 387. Accordingly, noncompliance with the form of pleadings required by the Rules is not dispositive. *Id.* at 212, 498 S.E.2d at 387. A response may constitute an answer if it “respond[s] to the allegations of a complaint.” *Id.*

Here, Defendant’s motion is not a responsive pleading but “[a]n application to the court for an order.” N.C.G.S. § 1A-1, Rule 7(b)(1). The filing is titled a “motion,” and the motion does not include admissions or denials as required by Rule 8(b). *See* N.C.G.S. § 1A-1, Rule 8(b). The trial court found that Defendant’s motion is “a written request of the court to change venue along with other relief requested,” but this description does not resemble the standard for a responsive pleading like an answer. Despite its written form and inclusion of a separate claim for relief—emergency ex parte custody—Defendant’s motion does not constitute an answer. Although the trial court found that Defendant’s motion was “a written response . . . filed within the time for answering,” this standard appears in a part of N.C.G.S. § 1-83 that addresses improper—not inconvenient—venue. As discussed above and by the Majority, the Order does not conclude that venue is improper in Union County.

Moreover, the failure of Defendant’s motion to respond to the allegations in Plaintiff’s complaint is more than a mere Rule 8(b) violation. Unlike the response at issue in *Brown*, where a letter was construed to constitute an answer, the

shortcomings in Defendant's motion are substantive, not technical. *See Brown*, 129 N.C. App. at 213, 498 S.E.2d at 388. Without Defendant's answer, the trial court cannot exercise its discretion to grant a motion to change venue based on interests of convenience or justice. Once Defendant answers and the allegations of the complaint have been traversed, the trial court may exercise its discretion under N.C.G.S. § 1-83(2) to change venue. In this case, Defendant must file an answer in Union County before he may move for a change of venue to Pitt County.

Domestic disputes often present our courts with the perceived responsibility to prevent gamesmanship by litigants, however, we must step back and review this case in light of the general application of our Rules throughout the state and throughout all types of civil litigation. The importance of maintaining *Hartford* can be illustrated in a simple breach of contract case. Company A sues Company B for breach of contract in Cherokee County. The following alternatives could be the next steps in the litigation:

- Company B files an answer to the complaint saying it performed the contract without a breach in Vance County, and, therefore, the case should be transferred to Vance County for convenience of the witnesses to show there was no breach.
- Company B files an answer to the complaint saying there never was a contract between the parties, because of fraud in the inducement, and,

therefore, the case should be transferred to Pender County where the contract was executed for the convenience of the witnesses as to the facts and circumstances surrounding the execution of the contract.

- Company B files an answer to the complaint alleging an affirmative defense, such as accord and satisfaction, and, therefore, the case should be transferred to Catawba County for the convenience of the witnesses as to whether Company A cashed Company B's check.
- Company B files an answer to the Complaint claiming that its alleged agent did not have authority to bind Company B and, therefore, the case should be transferred to Johnston County for the convenience of the witnesses for the testimony of the alleged agent and Company B's president.
- Company B files an answer to the complaint admitting the breach and that there will only be a need for a trial on the amount of damages, and there may be no need to transfer the case from Cherokee County.

The potential scenarios are endless and require the trial court to exercise discretion. However, all of these scenarios require that a defendant has answered and traversed the complaint so that the trial court knows what to consider in exercising discretion. Without an answer, there cannot be an exercise of discretion and an order under N.C.G.S. § 1-83(2) is untimely.

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MURPHY, J., dissenting.

The Majority's decision allowing the trial court to transfer venue may eventually be the proper result after a timely consideration in the correct procedural context. However, it was not possible for the trial court to exercise discretion without Defendant first traversing the allegations in Plaintiff's Complaint. Admittedly, this is a labored method of determining venue, and eventually may result in this case being transferred to Pitt County; but this is not an exercise in form over function, this is an exercise in the potential realities of litigation.