

# General Tort Reform

By Stuart G. Kruger

## INTRODUCTION

Following a couple of months of contentious debate, the Mississippi Legislature on November 25, 2002, passed civil justice reform during a special session called by Governor Ronnie Musgrove. The reforms apply to all causes of action filed on or after January 1, 2003. This article addresses the significant provisions of the bill which affect civil remedies.

## SECTION 1: VENUE

Although venue is not a civil remedy, since the venue of a case can and often does have a dramatic impact on the value of a case and the damages awarded, an analysis of the venue changes is appropriate. The reforms enacted by the Legislature produced significant changes to the venue framework. The general venue statute, § 11-11-3, previously provided venue in the county where the defendant or any of them may be found, or in the county where the cause of action occurred or accrued. Instead of providing venue where the defendant or any of them may be found, the amendments provide venue where the defendant resides. In cases of individuals, the logical interpretation of this provision, which is consistent with current case law, is that an individual defendant resides (and therefore can be sued) where he has his principal residence. **Dunn v. Dunn**, 577 So. 2d 378 (Miss. 1991). Courts typically consider where a person owns a home, registers to vote, files homestead exemption, and similar factors

in analyzing the principal residence of a party. **Id.**

The statute, though, does not address the question of timing. Is venue proper where the individual defendant resided at the time of the event in question or at the time the lawsuit is filed? Since the Legislature used the present tense “resides” rather than the past tense “resided,” a reasonable interpretation is that the Legislature intended for venue to be determined at the time of the filing of the civil action. This is consistent with current case law. **Jones v. Quinn**, 716 So. 2d 624 (Miss. 1998).

Prior to the amendments, § 11-11-3 provided venue for a domestic corporation where the corporation was domiciled or where the cause of action occurred or accrued. Prior case law treated foreign corporations which had designated a registered agent no differently for venue purposes. **Hartford Fire Ins. v. Producer’s Gin of Hernando**, 326 So. 2d 807 (Miss. 1976). The statute now simply speaks to resident defendants, without addressing corporations specifically. Since the Legislature eliminated references to corporations, we logically may assume that the Legislature intended that all residents and non-residents, whether individuals or some corporate form, will be treated the same for venue purposes.

As to resident corporations, the Legislature did not define what constitutes the residence of a corporation for venue purposes. Strict constructionists would

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### Non-Resident Individuals and Corporations in a Product Liability Case

- Where the Plaintiff resides or is domiciled
- Where the alleged act or omission occurred
- Where the event that caused the injury occurred
- Where the plaintiff obtained the product

One final change in § 11-11-3 is significant. Prior to the amendment, venue was proper in the county in which the defendant or any of them may be found. The Legislature eliminated the phrase “or any of them.” This language long has been interpreted to mean that in civil actions involving multiple defendants, a venue proper for one defendant is proper for all. **Indianola Cotton Oil v. Crowley**, 83 So. 409, 121 Miss. 262 (1920). By eliminating this language, the Legislature attempted to abrogate **Crowley** and its progeny. If the amendment is effective, venue must be proper for all defendants in multiple defendant cases. The practical effect will be to eliminate the residency prong in some cases, which will force plaintiffs to file where the act or omission occurred,

where the event that caused the injury occurred, or in product liability cases, where the plaintiff obtained the product.

But one rather large obstacle remains. Rule 82(c) of the Mississippi Rules of Civil Procedure provides that in cases involving several claims or parties, suit may be brought in the county in which any one of the claims could have been brought. This rule was enacted to track the requirements formerly set forth in § 11-11-3. **See** Miss. R. Civ. P. 82(c) comment. Since the Supreme Court has inherent authority to adopt rules of practice and procedure, **Newell v. State**, 308 So. 2d 71 (Miss. 1975), one could argue that Rule 82(c) controls, and this amendment will have no effect unless and until the Supreme Court amends Rule 82(c). The counter, of course, is that the Supreme Court has recognized that venue is a function of statute. **Flight Line v. Tanksley**, 608 So. 2d 1149 (Miss. 1992). Since Rule 82(c) simply was drafted to follow the dictates of the Legislature on an issue within its authority, the conflict must be resolved in favor of the statute, and the Supreme Court should amend Rule 82(c) accordingly. This argument is more persuasive and should be followed by the courts.

While questions remain unanswered

regarding certain aspects of the amendments regarding venue, the new venue provisions, together with the repeal of the special venue statutes, significantly simplify the analysis of proper venue in a given case. Unfortunately, however, the venue changes do not address joinder issues, which continue to plague courts across the state. Joinder issues hopefully will be addressed by the Supreme Court in the near future.

### SECTION 2: REPEALED VENUE STATUTES

With the amendments to § 11-11-3, the Legislature repealed the special venue statutes in §§ 11-11-5 (transportation and communication companies), 11-11-7 (insurance companies), 11-11-11 (non-residents), and 11-11-13 (non-resident motorists).

### SECTION 3: JOINT AND SEVERAL LIABILITY

Under prior Mississippi law, juries were allowed to allocate fault both to named defendants and to most non-joined alleged tortfeasors (for reasons of settle-

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ment, out of jurisdiction, etc.). Juries, however, were not permitted to consider the fault of an absent tortfeasor who had not been joined because it was immune from suit. **Accu-Fab & Constr. v. Ladner**, 778 So. 2d 766 (Miss. 2001).<sup>1</sup> The amendments provide that the jury shall determine the percentage of fault for each joint tortfeasor, including named parties and absent tortfeasors, without regard to whether the joint tortfeasor is immune from suit. This change will apply most often in cases where a plaintiff has failed to join his employer, because the employer is protected by Workers' Compensation exclusivity. Now, a jury will be allowed to consider the employer's wrongdoing in determining the percentage of fault for each alleged tortfeasor.

Once the percentage of fault was allocated under prior law, each tortfeasor was jointly and severally liable to the plaintiff to the extent necessary for the plaintiff to recover 50% of his recoverable damages. A defendant could have been allocated as little as 1% of fault and still have

been forced to pay up to 50% of the recoverable damages. See e.g., **Mack Trucks v. Tackett**, 841 So. 2d 1107 (Miss. 2003). The statute now provides that non-economic damages (e.g., pain and suffering) are no longer subject to joint and several liability. A defendant's liability is several only. In other words, each defendant is liable only for the percentage of fault allocated to it by the jury for non-economic damages, and one defendant cannot be forced to pay any non-economic damages caused by the conduct of another tortfeasor. For economic damages (e.g., lost wages), joint and several liability is abolished for any defendant determined to be less than 30% at fault. Defendants found to be more than 30% at fault will continue to face joint and several liability to the extent necessary for the plaintiff to recover up to 50% of his recoverable economic damages.

While the amendments do not place a cap on non-economic damages as with the medical malpractice reform legislation, the new structure for allocating fault and

limiting joint and several liability is a significant step in holding parties responsible only for the damages they caused. The new structure will require alterations to the standard jury instructions and will require special interrogatories in cases involving multiple defendants. Having this additional information from the jury regarding its assessment of damages also will provide litigants and judges with a better opportunity to determine whether the verdict was a product of bias, passion, or prejudice.

### SECTION 4: INNOCENT SELLERS – LIABILITY

The Legislature enacted a new statute, Miss. Code Ann. § 11-1-64, to address the long-standing problem of attorneys joining innocent resident retailers of a product to defeat federal diversity jurisdiction. The new statute unfortunately does not prohibit this practice, but it allows the local retailer the opportunity to be dismissed in cases where it is an innocent seller. A defendant whose liability is based solely on his status as a seller in the stream of commerce may be dismissed from any product liability case, so long as another defendant, including the manufacturer, is properly before the court, and recovery may be had from the other defendant(s) for plaintiff's claim.

The innocent seller may move for dismissal within 180 days from the date an answer or other pleading is due to be filed. The Court has discretion to enlarge this time for good cause shown. Along with the motion, the innocent seller must submit an affidavit which states that it is aware of no facts or circumstances upon which a verdict might be reached against it, other than its status as a seller in the stream of commerce. After the motion is filed, the parties have 60 days to conduct discovery on the issues raised in the motion and affidavit. The Court also has the discretion to extend this time for good cause shown, and the Court may limit the scope of discovery on the issues raised in the motion and affidavit.

Following the discovery period, any party may move for a hearing on the motion. If no evidence is presented which would render the innocent seller liable on some basis other than its status as a seller in the stream of commerce, then the Court is required to dismiss the claim against the innocent seller without prejudice. Curi-

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ously, the dismissed innocent seller must remain a party for the sole purpose of preventing the Court from being divested of venue or jurisdiction which otherwise was proper at the time the action was commenced. The order of dismissal is interlocutory until final disposition of plaintiff's claim.

Certain aspects of § 11-1-64 are ripe for motion practice. For example, sub-section (2) provides that the dismissal applies only when "another defendant, including the manufacturer, is properly before the court and from whom recovery may be had for plaintiff's claim." Does this require the presence of the manufacturer only, or is another defendant required in addition to the manufacturer? What did the Legislature intend when it said that the manufacturer (and another defendant, if necessary,) must be "properly before the court?" What did the Legislature intend when it said that the manufacturer (and another defendant, if necessary,) must be a party "from whom recovery may be had for plaintiff's claim?" Does this mean that the manufacturer (and another defendant, if necessary,) must be solvent? Not in bankruptcy? Not immune? Have a certain level of insurance coverage? Have a certain net worth? If so, then the innocent seller cannot be dismissed.

The practical effect of sub-section (2) will be to eliminate indemnification in most cases. When the manufacturer receives a demand for indemnification from a local retailer, the manufacturer likely will wait to address the issue until the dismissal process set forth in sub-section (2) runs its course. If the local retailer is dismissed, then indemnification is moot.<sup>2</sup> If the local retailer is not dismissed because evidence was presented which could render it liable on the merits, then the local retailer will not have a right of complete indemnification under Section 11-1-63(g). If the local retailer is not dismissed because the manufacturer is not available to pay any judgment obtained by plaintiff, then the local retailer does not have anyone from whom to seek indemnity in the first instance.

Certain situations could arise where indemnification could become an issue after trial. For example, a judge could find that sufficient evidence exists for an independent claim against the local retailer and refuse to dismiss it from the case. If the case proceeds to trial, and the jury

returns a verdict in favor of the local retailer, but against the manufacturer, then the local retailer likely will demand indemnification for its costs, expenses, and attorney's fees pursuant to Section 11-1-63(g). The response of the manufacturer will be that such costs, expenses, and fees were incurred by the local retailer in defense of its own conduct, and not that of the manufacturer, and indemnification is not required under Section 11-1-63(g). The manufacturer probably has the better argument here.

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Section 11-1-63 previously allowed innocent sellers 30 days from filing of the Complaint to request indemnification. The amendment allows 90 days from the service of the Complaint on the innocent seller.

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One scenario could arise where a local retailer would be entitled to indemnification as follows: the judge denies the local retailer's motion to dismiss, because sufficient evidence is presented which could give rise to independent liability for the local retailer. The case proceeds to trial. The jury assesses the manufacturer 60% at fault for a defect in the design of the product and assesses the local retailer 40% at fault for misrepresenting the proper use of the product. Under the amendments to Section 85-5-7(8), the plaintiff could recover up to 50% of its recoverable economic damages from the local retailer. In

that instance, the local retailer would be entitled to indemnification from the manufacturer for the additional 10%.

Another provision, which is certain to be contested, is the language in sub-section (6), which provides that the order of dismissal should not operate to divest a Court of venue or jurisdiction. If an innocent seller is dismissed because there are no facts or circumstances upon which a verdict might be reached against it, the remaining defendant(s), in the appropriate cases, no doubt will remove the case to federal court based upon fraudulent joinder of the innocent seller. Despite the language of the statute, a federal court may refuse to recognize the intended effect of the statute in limiting federal court jurisdiction. If so, the effort of the Legislature to sanction the practice of joining an innocent seller to defeat diversity jurisdiction will be nullified. Expect this issue to be hotly contested and raised often.

### SECTION 5: INNOCENT SELLER'S — INDEMNITY

Section 11-1-63 previously allowed innocent sellers 30 days from filing of the Complaint to request indemnification. The amendment allows 90 days from the service of the Complaint on the innocent seller. This approach obviously is more practical. In the real world, process often is served more than 30 days following the filing of the Complaint, which arguably prevents innocent sellers from realizing the protections afforded by § 11-1-63. Allowing 90 days from the date of service is a more workable approach.

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### SECTION 6: PUNITIVE DAMAGES

The Legislature amended §11-1-65 to place caps on certain punitive damage awards. The caps are tied to the net worth of the defendant, which is determined in accordance with generally accepted accounting principles. The cap on punitive damages decreases with the net worth of the defendant.

The following table illustrates the sliding scale:

NET WORTH	CAP FOR DEFENDANT
More than \$1 billion	\$20 million
More than \$750 million but less than \$1 billion	\$15 million
More than \$500 million but not more than \$750 million	\$10 million
More than \$100 million but not more than \$500 million	\$7.5 million
More than \$50 million but not more than \$100 million	\$5 million
\$50 million or less	4% of net worth of defendant

The caps do not apply to a defendant whose tortious conduct resulted in a

felony conviction or occurred while the defendant was under the influence of alcohol or non-prescription drugs. These exceptions, however, do not apply to an employer whose employee causes injury while acting outside the scope of his employment. Finally, prior to the amendments, § 11-1-65 did not apply to causes of action for persons or property arising out of asbestos. The limitations imposed by the amendments, however, do apply in asbestos cases.

### SECTION 7: PREMISES LIABILITY

This is a new section which protects owners, occupants, lessees, and managing agents of property from civil liability for the criminal acts of third parties. The provision does provide for liability where the owner, occupant, lessee, or managing agent knew or, in the exercise of reasonable care, should have known of the risk of criminal conduct and failed to exercise reasonable care to deter it. This section appears to codify current case law. See *Gatewood v. Simpson*, 812 So. 2d 212 (Miss. 2002).

### SECTION 9: GUN MANUFACTURER PROTECTION

This is a new section which grants exclusive authority to the state to bring any action against a manufacturer, distributor, or dealer of firearms or ammunition.

### SECTION 10: HEDONIC DAMAGES

In *Kansas City So. Ry. v. Johnson*, 798 So. 2d 374 (Miss. 2001), the Mississippi Supreme Court officially sanctioned awards of hedonic damages in addition to damages for pain and suffering. The Court also allowed the introduction of expert opinion testimony on the monetary value of such damages. The Legislature abrogated *Johnson* by prohibiting any award of hedonic damages separate and apart from pain and suffering damages. Section 10 also prohibits instructing the jury to separate hedonic damages from pain and suffering. The Legislature also excluded expert testimony on hedonic damages and prohibited the recovery of hedonic damages in wrongful death cases. This is a sensible approach and one which was advocated by defense counsel in *Johnson*.

### SECTION 11: WRONGFUL DEATH DAMAGES

This section amends § 11-7-13 to make the recovery of damages in a wrongful death case subject to the limitations on the recovery of hedonic damages as outlined in Section 10 of the bill.

### CONCLUSION

The amendments enacted by the Legislature provide much-needed reforms in civil litigation. The business community, of course, is happy with the reforms but believes that more are needed. The plaintiff's bar, on the other hand, believes that the reforms are too restrictive of the rights of injured parties. Overall, most objective viewers consider this legislation a step in the right direction. Some questions remain unanswered, which will provide advocates on both sides with the opportunity to shape the interpretation and application of this legislation by trial and appellate courts in the state. ■

<sup>1</sup> *Ladner* subsequently was overruled in this regard after the effective date of the legislation. See *Mack Trucks v. Tackett*, 841 So. 2d 1107 (Miss. 2003).

<sup>2</sup> The local retailer, though, could argue that it should be reimbursed for the fees and expenses associated with obtaining the dismissal.

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