

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

AUG -4 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

SANTO VALLARTA LAND PARTNERS,)	2 CA-SA 2010-0037
LLC, an Arizona limited liability company;)	DEPARTMENT B
WARD REAL ESTATE DEVELOPMENT,)	
LLC, an Arizona limited liability company;)	<u>DECISION ORDER</u>
KPFF, INC., a Washington corporation;)	
PATRICK MCGRODER III and SUSAN)	
MCGRODER, husband and wife; SCOTT)	
WARD and JANE DOE WARD, husband and)	
wife; HOPE WHITE and JOHN DOE WHITE,)	
wife and husband; STEPHEN R. SMITH and)	
JANE DOE SMITH, husband and wife; JOEL)	
KRAMER and JANE DOE KRAMER,)	
husband and wife; ANN BUTLER and JOHN)	
DOE BUTLER, wife and husband; PATRICIA)	
ERICKSON and JOHN DOE ERICKSON,)	
wife and husband; MACLEOD FAMILY)	
LIMITED PARTNERSHIP, an Arizona limited)	
partnership; PATRICK MCGRODER IV, an)	
individual; CAROLINE MCGRODER, an)	
individual; ELIZABETH MCGRODER, an)	
individual; TERRENCE HAHNE and)	
BARBARA HAHNE, husband and wife;)	
SARAH STOKER and JOHN DOE STOKER,)	
wife and husband; LAURA HAHNE, an)	
individual; DANIEL LUX and KAREN LUX,)	
husband and wife; KENDRA LUX, an)	
individual; WILLIAM LUX and ROSEMARY)	
LUX, husband and wife; and FRANCES)	
HAHNE, an individual,)	
)	
Petitioners/Defendants,)	
)	
v.)	
)	

HON. GILBERTO V. FIGUEROA, Judge of)
the Superior Court of the State of Arizona, in)
and for the County of Pinal,)

Respondent,)

and)

KAREN BREDESON, an individual; TROY)
COLBY and TERI COLBY, husband and wife;)
DEL MAR INVESTMENTS, LLC, an)
Arizona limited liability company; JEFFREY)
DOVE, an individual; JACK GARRETT, an)
individual; EDWARD HINES, an individual;)
JM CAPITAL, LLC, an Arizona limited)
liability company; DANNY JONES, an)
individual; HARPREET KAUR, an individual;)
PATRICK KERRIGAN and NANCY)
KERRIGAN, husband and wife; LAKESIDE)
REAL ESTATE & INVESTMENTS, LLC,)
an Arizona limited liability company; DEAN)
LAVERGNE, an individual; GRANT)
MADDIGAN and LAURIE MADDIGAN,)
husband and wife; DAVID MALOOF, an)
individual; ERIC MCHANEY and MANDY)
MCHANEY, husband and wife; TIM OWENS)
and CARRIE OWENS, husband and wife;)
CHARLES PAYNE and BONNIE PAYNE,)
husband and wife; WILLIAM PITTS, an)
individual; RAYMOND SANCHEZ and)
LINDA SANCHEZ, husband and wife;)
STEPHEN SUHRE and JOAN SUHRE,)
husband and wife; and PAUL WILSON,)

Plaintiffs/Real Parties in Interest.)

SPECIAL ACTION PROCEEDING

Pinal County Cause No. S1100CV200903933

JURISDICTION ACCEPTED; RELIEF GRANTED

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¶1 Petitioners in this special action, defendants below, seek relief from the respondent judge's order of May 25, 2010, denying their motion to change venue of the underlying action from Pinal County to Maricopa County. "Because an appeal cannot adequately cure an erroneous venue ruling, such orders 'are appropriately reviewable by special action.'" *Yarbrough v. Montoya-Paez*, 214 Ariz. 1, ¶ 1, 147 P.3d 755, 756 (App. 2006), quoting *Floyd v. Superior Court*, 125 Ariz. 445, 445, 610 P.2d 79, 79 (App. 1980). And because we conclude the respondent's ruling rests on an error of law, we accept jurisdiction to correct that legal error. See *State v. Noceo*, 223 Ariz. 222, ¶ 3, 221 P.3d 1036, 1038 (App. 2009) ("An error of law constitutes an abuse of discretion."); Ariz. R. P. Spec. Actions 3(c) (abuse of discretion addressable in special action).

¶2 After oral argument on the petitioners’ motion for change of venue, the respondent judge found that transferring the action to Maricopa County “would be appropriate, and transfer is supported by the facts.” But he concluded he “lack[ed] jurisdiction to change venue” because the action concerns real property located in Pinal County and A.R.S. § 12-401(12) provides that “actions concerning real property . . . shall be brought in the county in which the real property . . . is located.” Thus, the respondent concluded, venue in Pinal County was not only proper but mandatory.

¶3 Within Arizona’s venue statutes, A.R.S. §§ 12-401 through 12-404 govern where an action may or must be filed—that is, where venue properly lies in the first instance. Separately, A.R.S. § 12-406 permits a trial court, “after answer has been filed,” to subsequently order a change of venue for cause, based on the grounds enumerated in § 12-406(B). Whether grounds exist to change venue for cause is an entirely separate, analytically distinct issue from whether venue is proper in the first instance. *See, e.g., Dunn v. Carruth*, 162 Ariz. 478, 480, 784 P.2d 684, 686 (1989) (“A party will not be precluded from moving for a venue change for cause under A.R.S. § 12-406 because the state has obtained transfer to Maricopa County.”); *Reilly v. Superior Court*, 141 Ariz. 540, 543, 687 P.2d 1295, 1298 (App. 1984) (“Unlike A.R.S. § 12-401[,] A.R.S. § 12-406 does not provide independent grounds for venue in the first instance. The trial court cannot properly consider the discretionary criteria provided by A.R.S. § 12-406 in ruling on a venue objection under A.R.S. §§ 12-401 and 12-404.”).

¶4 Thus, the mandatory “shall be brought” language in § 12-401(12) applies only to the plaintiffs’ initial selection of venue. *See Maricopa County v. Barkley*, 168 Ariz. 234, 238, 812 P.2d 1052, 1056 (App. 1990) (“The ability to change venue suggests that the language ‘shall be brought’ [in § 12-401(15)] means that while the action must be *initiated* in the selected venue, it need not be maintained permanently there.”). Moreover, the often repeated statement that “once an action has been brought in a proper county, the trial court has no jurisdiction to change venue,” *Cacho v. Superior Court*, 170 Ariz. 30, 32, 821 P.2d 721, 723 (1991), applies only when discussing proper venue for purposes of §§ 12-401 and 12-404. *E.g.*, *Ellsworth v. Layton*, 97 Ariz. 115, 119, 397 P.2d 450, 453 (1964); *Pride v. Superior Court*, 87 Ariz. 157, 161, 348 P.2d 924, 927 (1960); *Zuckernick v. Royston*, 140 Ariz. 605, 606-07, 684 P.2d 177, 178-79 (App. 1984). None of these cases addressed whether venue could be changed for cause pursuant to § 12-406 when the action had been brought in a proper county. And, in *Behrens v. O’Melia*, 206 Ariz. 309, ¶¶ 4-5, 78 P.3d 278, 279 (App. 2003), this court expressly distinguished the two different analyses, rejecting the defendants’ contention that the trial court lacked jurisdiction to order a change of venue under § 12-406 because the action was already pending in a proper county.

¶5 Because § 12-406 by its terms requires that a defendant first have filed an answer before seeking a change of venue for cause pursuant to §§ 12-406 and 12-407, the petitioners’ motion for change of venue below was premature. Once an “answer has been filed,” however, the respondent judge has authority to entertain and, if appropriate, to

grant a motion to change venue for cause based on any of the grounds provided in § 12-406(B). Because the respondent was legally mistaken in concluding the court lacked jurisdiction to grant a change of venue pursuant to § 12-406, we accept jurisdiction of the special action, grant relief, and vacate the respondent's order denying the petitioners' motion for change of venue.

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Presiding Judge

Judge Eckerstrom and Judge Kelly concurring.