

*Court of Appeals*  
*Fourth Court of Appeals District of Texas*  
*San Antonio*



**OPINION**

No. 04-11-00629-CV

**HARDING BARS, LLC** d/b/a The Aquifer Bar; Ramsey-White Bars, LLC d/b/a Kennedy's  
Public House; and Robert Stinziano;  
Appellants

v.

Kaylie **MCCASKILL**; Martin Viesca and Sandra Viesca, as Legal Heirs and Personal  
Representatives of Karla Viesca, Deceased;  
Appellees

From the 293rd Judicial District Court, Maverick County, Texas  
Trial Court No. 11-01-26198-MCV  
Honorable Cynthia L. Muniz, Judge Presiding

Opinion by: Sandee Bryan Marion, Justice

Sitting: Catherine Stone, Chief Justice  
Sandee Bryan Marion, Justice  
Marialyn Barnard, Justice

Delivered and Filed: December 14, 2011

**DISMISSED FOR LACK OF JURISDICTION**

This is an interlocutory appeal from a trial court's order denying appellants' motions to transfer venue. Appellees contend this appeal should be dismissed for lack of jurisdiction. We agree and dismiss the appeal for want of jurisdiction.

## **BACKGROUND**

On October 17, 2010, Kaylie McCaskill was a passenger in an automobile driven by Robert Stinziano. According to McCaskill, Stinziano was intoxicated when he drove on the wrong side of the road and ran a red light, broadsiding a vehicle driven by Karla Viesca, the daughter of Martin and Sandra Viesca (“the Viescas”). The accident resulted in Karla’s death and injuries to McCaskill. Prior to this, McCaskill asserts Stinziano was provided alcohol at the bars owned by Harding Bars, LLC and Ramsey-White Bars, LLC. The accident occurred in Bexar County, Texas.

McCaskill filed suit in Maverick County, Texas against Stinziano, the Viescas, Harding Bars, and Ramsey-White Bars. Her suit claimed negligence on the part of both Stinziano and Karla, but she asserted actions under the Dram Shop Act against Harding Bars and Ramsey-White Bars. At the time of the suit, the Viescas were the only defendants residing in Maverick County. Stinziano resided in Bexar County and Harding Bars’ and Ramsey-White Bars’ principal places of business were located in Bexar County. The Viescas filed an answer to this lawsuit. The other defendants, Stinziano, Harding Bars, and Ramsey-White Bars, each filed a motion to transfer venue to Bexar County. Subsequently, the Viescas filed a cross-claim against Stinziano, Harding Bars, and Ramsey-White Bars asserting a survival claim and a wrongful death claim. The trial court denied the motions to transfer venue to Bexar County.

## **DISCUSSION**

On appeal, appellants assert the trial court erred in denying their motions to transfer venue from Maverick County to Bexar County. However, as a threshold issue, we must first determine whether this court’s appellate jurisdiction is properly invoked. Appellees argue this appeal must be dismissed for lack of jurisdiction in accordance with section 15.064 of the Texas

Civil Practice and Remedies Code (“the Code”). *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.064 (West 2002). In response, appellants argue this court has interlocutory jurisdiction pursuant to section 15.003(b) and (c) of the Code. *See id.* § 15.003(b)–(c) (West Supp. 2011).

Generally, interlocutory appeal is unavailable from a trial court’s determination of a venue question. *Id.* § 15.064(a) (“The court shall determine venue questions from the pleadings and affidavits. No interlocutory appeal shall lie from the determination.”). Consequently, a party normally must wait until a final judgment occurs to appeal an erroneous ruling regarding venue. *Id.* § 15.064(b); *Surgitek, Bristol-Myers Corp. v. Abel*, 997 S.W.2d 598, 601 (Tex. 1999); *Elec. Data Sys. Corp. v. Pioneer Elecs. (USA) Inc.*, 68 S.W.3d 254, 257 (Tex. App.—Fort Worth 2002, no pet.).

On the other hand, when a case involves multiple plaintiffs, wherein plaintiffs are included by joinder, intervention, because the lawsuit was begun by more than one plaintiff, or otherwise, section 15.003 establishes a limited right of interlocutory appeal to contest a trial court’s venue determination. TEX. CIV. PRAC. & REM. CODE § 15.003(b)–(c); *Abel*, 997 S.W.2d at 601; *Elec. Data Sys. Corp.*, 68 S.W.3d at 257. This limited right of appeal applies only to a trial court’s determination that a plaintiff was able or unable to independently establish proper venue apart from the factors set out in section 15.003(a). TEX. CIV. PRAC. & REM. CODE § 15.003(b)–(c); *Elec. Data Sys. Corp.*, 68 S.W.3d at 258.

Here, appellants argue this court has jurisdiction to hear the interlocutory appeal because the Viescas were defendants in their representative capacities but were cross-claimants in their individual capacities. In other words, appellants argue the Viescas’ cross-claim was in effect a “joinder” as a second set of “plaintiffs” in the original action because individual and representative capacities are separate and distinct. Appellants contend that an appearance in a

suit in one capacity does not include an appearance in the other capacity unless both capacities are specifically named in the suit. As a result, appellants contend this court has jurisdiction to hear the interlocutory appeal under section 15.003. We disagree.

McCaskill's suit was instituted against the Viescas both as legal heirs and as personal representatives of Karla Viesca, deceased; the Viescas brought their cross-claim both individually and as representatives for all persons entitled to recover for Karla's wrongful death. Nonetheless, the Viescas are the same persons both defending McCaskill's suit and pursuing their own counterclaim. *See Centerpoint Energy Houston Elec., LLC v. Brunkenhoefer*, No. 09-03-492 CV, 2004 WL 256836, at \*3 (Tex. App.—Beaumont Feb. 12, 2004, no pet.) (holding although plaintiff's claims for survival and wrongful death were brought in different capacities, the individuals bringing the suit were the same persons and thus the issue did not involve multiple or intervening plaintiffs under 15.003(a)); *Davis v. Preston*, 16 S.W.2d 117, 118 (Tex. 1929) (opining that a defect in petition wherein woman brought suit as an individual instead of as an administrator of estate did not prevent the suit from being "properly commenced" because the woman "was the real party at interest, no matter by whom the suit was prosecuted"). Additionally, both McCaskill's and the Viescas' claims against Stinziano, Harding Bars, and Ramsey-White Bars are alleged to involve the same series of events. *See* TEX. R. CIV. P. 97(e) ("A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein."); *Brunkenhoefer*, 2004 WL 256836, at \*3. Similarly, the record does not demonstrate the trial court realigned the parties so as to make McCaskill and the Viescas multiple plaintiffs.

We conclude the Viescas filed a cross-claim against the appellants and did not join or intervene in McCaskill's suit as additional plaintiffs. As such, venue for a cross-claim is established in section 15.062(a) of the Code which reads, "Venue of the main action shall establish venue of a counterclaim, cross claim, or third-party claim properly joined under the Texas Rules of Civil Procedure or any applicable statute." TEX. CIV. PRAC. & REM. CODE § 15.062(a). Thus, jurisdiction of this court to hear the interlocutory appeal was not invoked under section 15.003(c). Accordingly, we hold we do not have jurisdiction over this appeal.

### **CONCLUSION**

Based on the foregoing, we dismiss the appeal for want of jurisdiction.

Sandee Bryan Marion, Justice