Rieders, Travis, Humphrey, Waters & Dohrmann - 161 West Third St. - Williamsport, PA. 17701

by Clifford A. Rieders, Esquire

PENNSYLVANIA MEDICAL MALPRACTICE

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1 Venue/Jurisdiction

1.1 Proper Venue–New Rule and Act

1.1.1 Traditional Rule

Masel v. Glassman, 689 A.2d 314 (Pa.Super. 1997) Cercone, P.J.E.

Robert B. Masel went to the emergency room at St. Mary's Hospital, seeking treatment for pain in his jaw, neck, upper arms and shoulders. Masel drove himself home from the emergency room. About an hour and a half later, a jogger found Masel dead in his vehicle, one block from his home. The death was caused by cardiac arrest.

Theresa C. Masel, decedent's wife, filed a medical malpractice action against defendants in Philadelphia County. St. Mary's Hospital and Langhorne Physician Services filed preliminary objections, asserting improper venue. The Court of Common Pleas of Philadelphia County sustained the objections and transferred the matter to the Court of Common Pleas of Bucks County.

Plaintiff's appeal was unavailing.

A trial court's decision with respect to grant of petition to transfer venue will not be disturbed absent an abuse of that discretion. "If there exists any proper basis for the trial court's decision to grant the petition to transfer venue, the decision must stand." *Id*. at 316.

The Pennsylvania Rules of Civil Procedure dictate where a cause of action may be properly filed against a corporation:

> (a) Except as otherwise provided by an Act of Assembly or by subdivision (b) of this rule, a personal action against a corporation or similar entity may be brought in and only in
>
> (1) the county where its registered office or principal place of business is located;
>
> (2) a county where it regularly conducts business; Note: *See* Rule 2198.
>
> (3) the county where the cause of action arose; or
>
> (4) a county where a transaction or occurrence took place out of which the cause of action arose.

Plaintiff contended that venue in Philadelphia was proper because St. Mary Hospital regularly conducts business in Philadelphia.

The contacts asserted consisted of the following:

> (1) St. Mary's Hospital advertises in Philadelphia publications to attract patients and personnel;
>
> (2) St. Mary's Hospital has entered into contracts with Philadelphia hospitals.
>
> (3) St. Mary's Hospital buys equipment from Philadelphia businesses and maintains educational affiliations with Philadelphia institutions.

The court placed heavy reliance on *Purcell v. Bryn Mawr Hosp.*, 579 A.2d 1282 (Pa. 1990).

It was asserted that Langhorne Physician Services had sufficient contacts with Philadelphia in the following respects:

(1) Langhorne Physician Services receives 20% of its gross revenues from Philadelphia third-party payers.

(2) Philadelphia residents account for 3% of its gross revenues.

(3) Langhorne has used a Philadelphia recruiting agency to hire new physicians.

None of these were sufficient under the ruling of the court.

Transfer to no other county was sufficient either.

In *Gale v. Mercy Catholic Med. Ctr.*, 698 A.2d 647 (Pa.Super. 1997), *alloc. denied*, 716 A.2d 1249 (Pa. 1998). Before McEwen, President Judge, Cavanaugh, J., and Montemuro, Senior Judge. Opinion by Senior Judge Montemuro, an Order of the Philadelphia Court of Common Pleas sustaining preliminary objections of venue and transferring the action to Delaware County was reversed.

The following connections with Philadelphia existed, sufficient to keep that case in that county:

(1) Mercy Hospital has sued numerous defendants in the Philadelphia Court of Common Pleas.

(2) Mercy is listed in the *Philadelphia White Pages*, and *Dorland's Medical Directory of Eastern Pennsylvania and Southern New Jersey*, as having a division in Philadelphia, specifically Misericordia Hospital.

(3) Mercy is listed in the *Philadelphia White Pages* as having three additional offices in Philadelphia, specifically Mercy Catholic Emergency Psychiatric Crisis Center, Mercy Care Port, a division of Mercy Care Hospital, and Mercy Catholic Occupational Health.

One of the three doctors also maintained an affiliation with Misericordia Hospital in Philadelphia.

Once again, the court recited that whether a corporation "regularly conducts business" requires a "focus on the nature of the acts the corporation allegedly performs in that county, which must be assessed both as to their quantity and quality." *Id*. at 651-52.

The acts that are performed satisfy the quality test where they directly further or are essential to corporate objects. They do not include incidental acts. Acts of sufficient quantity are those so continuous and sufficient so as to be general or habitual. *Id*.

Purcell and *Masel* are both distinguished, of course.

In *Gilfor ex rel. Gilfor v. Altman*, 770 A.2d 341 (Pa.Super. 2001), a transfer from Philadelphia County to Montgomery County was upheld. The court notes that due to the doctrine of joint and several liability, and therefore under Pa.R.Civ.P. 1006(c), the action could be brought in any county where venue lies against any one of the defendants. The court rejected the argument that venue lies in Philadelphia because one of the individual doctors regularly conducts business there.

The rule that venue lies against a defendant because of the defendant's regular conduction of business in a county applies to corporations and other similar entities, but such rule does not apply to individuals. *Id*. at 345.

As to an individual, that person must be served where he resides, or at any office/usual place of business.

As to another doctor in the case, it was alleged that his corporation regularly conducted business in Philadelphia. As to a corporation, its acts must be so continuous and sufficient as to be general or habitual. *Masel* was relied upon.

The court found that a *curriculum vitae*, which listed hospitals located in Philadelphia, does not suffice. Further, the teaching position of the doctor at Temple University "did not directly further, and was not essential to, the corporation's object." *Id*. at 346, relying upon *Purcell*.

Sunderland v. R. A. Barlow Homebuilders, 791 A.2d 384 (Pa.Super. 2002) *aff'd* 576 Pa. 22 (2003) is not a medical malpractice case, but nevertheless raised the issue as to venue where a cause of action accrues in one county

but death occurs in a different county. The court finds this to be an issue of first impression in Pennsylvania. It is noted that different states have differing approaches:

(1) Some states place venue in a wrongful death action at the site of the death.

(2) Other states have determined that venue is proper only at the site of the underlying tortious conduct that led to the death.

(3) A third group of states allow venue in either the place of death or the place of the initial tortious conduct.

It is the tortious act or negligence of the wrongdoer, and not its consequence, that is the basis or ground of action which the statute authorizes to be brought. A wrongful death action is not for damages sustained by the decedent, but for damages to his or her family caused by the death. The action does not compensate the decedent's estate. Because the statute creates a right of action unknown to the common law, "we must construe it narrowly." *Id*. at 390. Looking to the statute of limitations, the court finds that for a wrongful death action, the statute begins to run when a pecuniary loss is sustained by the beneficiaries of the person who has died due to the tort of another.

After a lengthy discussion concerning the origins of a wrongful death action, the court observes that such an action is derivative of the injury that would have supported the decedent's own cause of action and is dependent upon the decedent's cause of action being viable at the time of death. Thus, although death is the final necessary event in a wrongful death claim, the cause of action is derivative of the underlying tortious acts that cause a fatal injury. In view of the derivative nature of the cause of action, the court concluded that a wrongful death claim arises in, and venue is proper in, the county in which a decedent was fatally injured, not the county of death.

Simply stated, the court believes that because the death is necessary for a wrongful death action, venue can only be triggered by the initial event. The logic is self-fulfilling but unimpressive. In a survival action, the cause of action is not occasioned by the death of the decedent. Rather, it is a cause of action accruing to the plaintiff that survives his or her death. The court acknowledges as much, but in essence finds that their survival action would not have placed proper venue in Philadelphia County had decedent survived and brought suit. There was no contact with Philadelphia County alleged, other than the fact that the victim received medical treatment there.

See also, Hoffman v. Abington Mem. Hosp., PICS No. 02-2088 (C.P. Phila. Oct. 22, 2002), *petition for review*, No. 166 EDM 2002 (Pa.Super.), *transferred*, No. 3843 EDA 2002 (Pa.Super. Dec. 27, 2002), *discontinued* (March 20, 2003), which disagreed with prior decisions concerning Abington Hospital but concluded that Abington Memorial Hospital does regularly conduct business in Philadelphia by maintaining two physician practices in Philadelphia and by providing 17,985 home health care visits per year in Philadelphia. This represents daily and continuous contacts with Philadelphia, which are sufficient to establish venue in that city. *See, contra, Tompkins v. Abington Mem. Hosp*., PICS No. 02-1888 (C.P. Phila. Nov. 25, 2002), which transferred a case against Abington Hospital to the Court of Common Pleas of Montgomery County. The court held that merely because some members of joint committees may practice in Philadelphia is insufficient to establish venue. Vague assertions that one or two doctors in a particular practice that are owned by Abington Hospital having offices in Philadelphia are not sufficient to permit these cases to proceed in Philadelphia in light of the fact that all the co-defendant physicians practice in Montgomery County and the alleged malpractice took place at Abington Hospital as well. The court also cited to 42 Pa.C.S.A. § 5101.1(b), to be discussed below.

Bitner v. Kenepp, PICS No. 03-0104, No. 704 Nov. Term 2001 (C.P. Phila. Jan. 13. 2003), *aff'd*, 847 A.2d 753 (Pa.Super. 2004) (Table), upheld transfer to Bucks County. The trial court repudiated the argument that agreements between University of Pennsylvania Hospital and St. Luke's Health Network, advertising, web pages, revenue sharing agreements, etc., demonstrated that St. Luke's Health Network does substantial and continuing business within the County of Philadelphia. The court relied upon *Masel v. Glassman*, 689 A.2d 314 (Pa.Super. 1997) and *Purcell v. Bryn Mawr Hosp*., 579 A.2d 1282 (Pa. 1990). The ties between St. Luke's and the Hospital of the University of Pennsylvania were insufficient.

In *Krosnowski v. Ward*, 836 A.2d 143 (Pa.Super. 2003), the Superior Court *en banc* affirmed transfer of a medical malpractice case from Philadelphia County to a suburban county where defendant doctor practiced with Abington Primary Care Medicine, P.C. This pre-venue rule case held irrelevant that Abington Memorial Hospital had a connection with Philadelphia. The *collateral estoppel* effect of *Purcell v. Bryn Mawr Hosp*., 579 A.2d 1282 (Pa. 1990) was rejected. Abington's contacts with Children's Hospital of Philadelphia and Philadelphia generally do

act in regard to venue. *Id*. at footnote 3. However, the court relied upon the new Pa.R.Civ.P. 1006. The court refused to find that the new rule was in direct conflict with Pa.R.Civ.P. 152, which suggests that Rules of Civil Procedure should not be retroactive. The court held that appellant failed to develop her claim adequately, and therefore refused to address the March 5, 2003, Amendatory Order with respect to its constitutionality. A waiver was found for failure adequately to develop the issue.

A mammogram was taken and read in Montgomery County. A cancerous lesion was missed, resulting in a much more serious cancer when finally diagnosed. The corporate defendants in Philadelphia were sued because the Montgomery County physicians and facilities were agents of the Philadelphia corporate defendants or because of corporate liability in failing to retain competent physicians, inadequate rules and procedures, and failure of supervision. All the medical care was furnished to the patient in Montgomery County. The court held that the cause of action arose in Montgomery County and, under the new venue rules, venue was not proper in Philadelphia County. The court based its ruling upon the definition of the medical professional liability care found in the MCARE Act. 40 P.S. §§ 1303.101, *et seq*. The court will look to the county where the "action affected the patient." *Olshan v. Tenet Health Sys. City Ave., LLC*, 849 A.2d 1214 (Pa.Super. 2004) *appeal denied* 581 Pa. 692. The court gave the example that if the hospital pharmacy in Philadelphia mislabeled the drug in Philadelphia by putting it into the wrong vial when repacking it for administration to patients, and a patient in Montgomery County received the drug, the hospital would be liable as a healthcare provider. However, since the drug was *furnished* to the patient in Montgomery County, venue would not be proper in Philadelphia County. Likewise, with an x-ray taken and read in Montgomery County by a staff radiologist employed by a Philadelphia hospital and paid out of the Philadelphia hospital, which would be an act of the Philadelphia hospital as health care provider but would still not create venue in Philadelphia.

A surgical procedure in New Jersey resulted in a lawsuit in Northampton County, Pennsylvania. Plaintiffs reside in Northampton County. In *Searles v. Estrada*, 856 A.2d 85 (Pa.Super. 2004) *appeal denied* 582 Pa. 701 (2005), the court ruled that Rule 1006(a.1) placed venue in medical professional liability actions in the county in which the transaction or occurrence arose, and since all of the care and treatment took place in New Jersey, no county in Pennsylvania had venue. Unfortunately, the court dismissed the case rather than entering a dismissal conditional upon preservation of the statute of limitations to the time when the complaint was originally filed. This is a case where jurisdiction and venue were said to merge. When a trial court cannot transfer a case, the only alternative is dismissal since both jurisdiction and venue must exist simultaneously.

The venue rules permit a trial court to dismiss a medical professional liability action when the cause of action arose outside of Pennsylvania. *Id*. The court expressed an understanding of the fusion between the concept of jurisdiction and venue. A medical professional liability action was commenced in Northampton County, Pennsylvania. The surgical procedure from which the medical professional liability action arose occurred at Warren Hospital in Phillipsburg, New Jersey.

Venue is limited to the location of the alleged negligent care by declining to expand venue to include any county where a patient happens to ingest a medication she alleges is negligently prescribed by a physician. *Peters v. Sidorov*, 855 A.2d 894 (Pa.Super. 2004). A personal injury cause of action arises where the injury is inflicted and not where the negligent act leading to it is committed. The alleged negligent act of prescribing the drug Prednisone occurred in Montour County, and that is where venue lies regardless of the county where the death occurred. The decision was arrived at in the context of "reform," which the court divined from the unconstitutional statute, although relying upon the procedural rule. The court claimed that it was not bound by *North Central Pennsylvania Trial Lawyers Ass'n v. Weaver*, 827 A.2d 550, 558 (Pa.Cmwlth. 2003), *Peters*, 855 A.2dat 895 n2. Where defendant doctor practiced medicine and was negligent while at his home in Northampton County (by giving orders over the phone and not by immediately caring for his patient as he specifically agreed to do) resulting in the hospitalization in Lehigh County, the action should be transferred to Lehigh County. *Bilotti-Kerrick v. St. Luke's Hosp*., 873 A.2d 728 (Pa.Super. 2005). "[W]e hold that for venue purposes the cause of action arose in the county where the negligent act or omission of failing to provide the needed care occurred." *Id*. at 731. Even though the medical orders were given over the phone from the doctor's home in Northampton County, the orders were carried out in Lehigh County. All of the medical care was furnished in Lehigh County, the cause of action, the failure to provide the requisite care arose in Lehigh County.

In *Forrester v. Hanson*, 901 A.2d 548 (Pa.Super. 2006), the court held that Pa.R.Civ.P. 1006(a.1) does not apply to the situation where a motor vehicle defendant attempted to join motorist plaintiff's treating physician and

no more "than aid or enhance a main purpose and must be deemed collateral and incidental." At 149. Advertisements in the Philadelphia phonebook and newspaper failed to establish venue in Philadelphia County and do not amount to conducting business there. *Krosnowski*, 836 A.2d at 150.

Likewise, *Goodman v. Fonslick*, 844 A.2d 1252 (Pa.Super. 2004) affirmed a transfer from Philadelphia County to Montgomery County. Once again, Abington Memorial Hospital was involved, and the case was changed to Pa.R.Civ.P. 1006. Citing *Krosnowski*, the court held that advertisements in the Philadelphia telephone book or newspaper were insufficient to establish venue in Philadelphia County. The mere fact that physician's offices are located in Philadelphia does not constitute sufficient business contacts to support venue. All treatment for referrals is conducted in Montgomery County, and patients of the hospital cannot seek hospital care at group offices in Philadelphia. A hospital's relationship with small Philadelphia County practice groups is incidental to its main goal of providing care in Montgomery County.

1.1.2 Rule 1006(a.1)

The landscape has been changed by statute and rule. The statute essentially adopts the *lex loci delictus* rule. 42 Pa.C.S.A. § 5101.1. However, thanks to the efforts of the North Central Pennsylvania Trial Lawyers Association, the Commonwealth Court *en banc* denied preliminary objections of the Commonwealth and ruled in a comprehensive opinion that the statute is unconstitutional and is violating the prerogative of the courts. *NorthCentral Pennsylvania Trial Lawyers Ass'n v. Weaver*, 827 A.2d 550 (Pa.Cmwlth. 2003) *en banc*.

Shortly after the statute was passed, but prior to the Commonwealth Court ruling, the Supreme Court adopted its own *lex loci delictus* rule by amending Rule 1006 and provided that a medical professional liability action may be brought against a health care provider for a medical professional liability claim only in the county where the cause of action arose.

The Administrative Office of Pennsylvania Courts, which compiles statistics regarding statewide civil filings, announced in May 2015 that the number of medical malpractice case filings in 2014 had dipped to the lowest point since statewide tracking began in 2000. *See* "Medical Malpractice Case Filings Reach 14-year Low" http://www.pacourts.us/news-and-statistics/news?Article=414 (May 8, 2015). The decline was 46. 5 percent from the number recorded in the "base years" of 2000-2002, and 68.3 percent in Philadelphia during the same period. The data also shows that the number of jury verdicts was roughly a third of those rendered in 2000. Approximately 81% of the verdicts in 2014 were for the defense. The News Release by the AOPC issued May 8, 2015, points to the fact that the "base years" were just prior to two significant rule changes by the Supreme Court, the change in venue rules discussed herein, which the News Release describes as aimed at eliminating "forum shopping", *id*., and the certificate of merit rule discussed in Chapter 26.6.1.

Updated statistics regarding 2015 case filings may be found at http://www.pacourts.us/news-andstatistics/research-and-statistics/medical-malpractice-statistics. The number of jury verdicts fell again in 2015, to 102, eighty (80) of which were defense verdicts. *Id.*

There are those who will argue that the Supreme Court rule is a temporary solution to a perceived crisis, and there are even those who will argue that the Supreme Court rule represents a lack of equal protection, given that it is only applied to a small class of cases.

Another disturbing aspect of the Supreme Court rule is that it is retroactive to professional liability actions filed on or after January 1, 2002. Therefore, the question arises as to whether a Supreme Court rule can violate *ex post facto* restrictions of the Constitution. It should be noted that the Explanatory Comment to the amended rule seems to justify its actions exclusively on the statute. In the fourth year following promulgation of the venue rule, a full evaluation of the rule will be conducted by the Supreme Court. The effective date was July 1, 2004, thus making the evaluation date July 1, 2008. Nonetheless, the rule remains in effect.

The Court of Common Pleas of Philadelphia County transferred a medical malpractice case to Delaware County, and the transfer was affirmed. *Conner v. Crozier Keystone Health Sys.*, 832 A.2d 1112 (Pa.Super. 2003). The court cited *North-Central Pennsylvania Trial Lawyers Ass'n v. Weaver*, 827 A.2d 550 (Pa.Cmwlth. 2003) *en banc*, holding that statutory venue 42 Pa.C.S.A. § 5101.1 is unconstitutional since the legislature is not permitted to

expert witness due to his alleged negligent treatment. Once again, the court cited *North-Central Pennsylvania Trial Lawyers Ass'n v. Weaver*, 827 A.2d 550 (Pa.Cmwlth. 2003) *en ban* for the proposition that § 5101.1, Statutory Venue, is unconstitutional because the legislature is not permitted to act "in regard to venue." *Forrester*, 901 A.2d at 552-53 n3. Judge Gantman, writing for the panel, noted that the joinder complaint does not assert a medical professional liability claim against the treating physician. The court further held that it had no jurisdiction to entertain the challenge to the joinder complaint. The trial court's order sustaining the physician's objections to venue and transferring the matter to the Montgomery County Court of Common Pleas was reversed. The proceedings were remanded to the Philadelphia County Court of Common Pleas for further proceedings.

In *Cohen v. Furin*, 946 A.2d 125 (Pa.Super. 2008), a child died shortly after birth in Montgomery County where pre-natal care was rendered at Lankenau Hospital. Plaintiff sued a certified childbirth educator who worked at the Maternal Wellness Center in Philadelphia. Plaintiff's parents also consulted with a certified nurse-midwife at Woman's Wise Midwifery, which was a healthcare facility located at Lankenau Hospital. The court held that even if the Philadelphia defendants' referral was negligent, an award would be unlikely if all the subsequent treatment was not negligent because there would be no damages. A telephone call getting medical advice from a different county, where the care was not rendered, does not create venue where the call was made. All of the care that was provided, or not provided, occurred in Montgomery County and hence that is where venue is properly placed.

Cohen was considered in *Wentzel v. Cammarano*, 166 A.3d 1265 (Pa.Super. 2017) Stevens, P.J.E., *rehearing denied*, 2017 Pa.Super. LEXIS 719 (Sept. 18, 2017), as were *Olshan v. Tenet Health Sys. City Ave., LLC*, *supra*, and *Bilotti-Kerrick v. St. Luke's Hosp., supra*, discussed above. The Court of Common Pleas of Philadelphia County relied upon this triad of cases in sustaining preliminary objections to venue and transferring the action to Berks County, but the Superior Court found the trial court's application of these cases to the circumstances in *Wentzel* to be "unpersuasive,…as our jurisprudence expressed therein does not support transfer of venue as it occurred here." *Wentzel*, 166 A.3d at1269.

The action arose from, *inter alia*, the allegedly negligent failure of Philadelphia's St. Christopher's Hospital ("SCHC") and its resident cardiologist, Dr. Lindsay Rogers, to timely transmit her diagnosis and treatment plan for Maximor based on her reading of an emergency transthoracic echocardiogram performed on the premature newborn, who was receiving neonatal intensive care at Reading Hospital, Berks County. Dr. Rogers' diagnosis was pulmonary hypertension requiring immediate treatment or intervention, which she recommended SCHC should provide. Plaintiffs alleged in their complaint that the resultant one-day delay in putting Dr. Rogers' treatment plan into effect amounted to the negligent provision of health care services causing harm to Maximor. The trial court, however, rejected the Plaintiffs' argument that transmission of Dr. Rogers' impressions, diagnoses, and treatment plan for immediate transfer to SCHC constituted the furnishing of "health care services" as defined under both the MCARE Act and Pennsylvania Rules of Civil Procedure implementing such legislation. Instead, the court agreed with Defendants' position that the complaint was predicated on an allegation of mere clerical error falling outside of such controlling authority.

The Superior Court disagreed, viewing the complaint as asserting both corporate and vicarious liability based on the omissions of Dr. Rogers and hospital staff, which it found set forth claims of medical malpractice against the Defendants. The Court relied upon the rationale expressed in *Rostock v. Anzalone*, 904 A.2d 943 (Pa.Super. 2006) to reject the conclusion of the trial court that Plaintiffs' complaint alleged merely clerical or ministerial negligence. The allegation of errors committed by Dr. Rogers and the support staff at St. Christopher's Hospital, causing delay in care to Maximor, sounded, instead, in medical malpractice. In *Rostock:*

> This Court held that a complaint accusing a medical care professional of failure to recommend appropriate work-up for a patient, to notify a patient of test results, or to maintain proper patient records made out allegations of professional, not clerical, failure, as such services strongly imply acts of diagnosis and/or treatment which may only be provided by a medical professional. *Id*. at 946. Even if the maintenance of patient records were largely clerical, we continued, the physician, "as the professional charged with supervising employees in a professional context, would be responsible for their derelictions under the doctrine of vicarious liability." Id.

Wentzel, supra, at 1269.

The Superior Court also rejected the trial court's reasoning that Dr. Rogers' alleged negligence occurring on September 12, 2013, occurred before Maximor was in her direct care in Philadelphia and therefore *Cohen, Bilotti* and *Olshan* dictated the transfer of venue from Philadelphia County to Berks County. Instead, the Superior Court held that "the essence of Appellant's complaint was that Dr. Rogers and SCHC failed to furnish Maximor, whom they intended to treat upon his immediate transfer to SCHC, with the timely care Dr. Rogers indicated he should receive at SCHC. As described, Dr. Rogers' involvement in Maximor's case transcended the mere offer of advice from a remote location. She was, instead, expected to direct Maximor's course of care, and she clearly commenced in that role with her report. Like in *Bilotti* and *Cohen,* the complaint alleged negligent acts in Philadelphia that deprived Maximor of the health care services Dr. Rogers indicated he should have in Philadelphia at a critical time in his case." *Wentzel, supra,* at 1271-1272. Because the trial court's rationale for transferring venue to Berks County was flawed, the Superior Court vacated the order transferring venue and reinstated venue in Philadelphia County.

Defendants argued, however, that even if Dr. Anderson was subject to jurisdiction, the court should find that venue was improper for all defendants because the statutory basis for venue, under the 2011 amendment to Pa. R.Civ.P. 1006(a.1), is unconstitutional. Plaintiffs brought the case in Philadelphia County pursuant to Rule1006(a.1). The 2011 amendment to the Rule added the phrase "This provision does not apply to a cause of action that arose outside the Commonwealth" to the subparagraph that restricts venue for medical professional liability actions to the county where the cause of action arose. *See* Rule 1006 (a.1). Prior to the amendment, plaintiffs whose claims arose outside the Commonwealth were without a venue in Pennsylvania, even if the suit could otherwise be brought in Pennsylvania, *i.e.*, jurisdiction was proper under the Long Arm Statute. Therefore, the amendment furthered a state interest of fixing a procedural quirk that operated to grant immunity to certain health care providers, restoring a plaintiff's ability to find a venue for a case that was otherwise properly filed in Pennsylvania. In view of the fact that the amendment is rationally related to a legitimate state goal, and because it does not arbitrarily discriminate against out-of-state health care providers, it survived constitutional scrutiny.

1.1.3 Common Pleas Decisions

Nees v. Anderson, 28 Pa. D.&C. 5th 539 (C.P. Philadelphia April 10, 2013) Robinson, J., concerned the death of 15-year-old Michael Fisher. At 4 years of age, Michael Fisher came under the care of Dr. Anderson for a heart murmur. Dr. Anderson's office is located in New Jersey and he sees patients only in New Jersey. He is employed by Children's Hospital of Philadelphia, but as indicated his office was a CHOP Specialty Care Center. All bills were sent from Pennsylvania through the CHOP system. Plaintiff's allegations were that testing revealed cardiac-related abnormalities. Dr. Anderson failed to place any restrictions on athletic activity. While playing roller hockey in September 2010, Michael Fisher collapsed and died. Defendants challenged both venue and jurisdiction. *See* discussion in Section 1.3 below. The court found that Dr. Anderson had minimum contact sufficient to satisfy the legal standards. During the course of Dr. Anderson's treatment of Michael Fisher, the doctor was part of a Pennsylvania-based network of health care services. Dr. Anderson had purposeful, extensive, and significant contact with Pennsylvania. Dr. Anderson did not physically travel to Pennsylvania in order to treat Michael Fisher, but that did not defeat jurisdiction.

Riggio v. Katz, 64 Pa.D.&C.4th 395 (C.P. Phila. 2003), *aff'd*, 859 A.2d 844 (Pa.Super. 2004) (Table). Defendant physicians in the health care center were negligent and failed to provide authentic results of urinalysis that revealed a bacterial infection and in failing to prescribe the medication necessary to treat the condition. Plaintiff alleged that because defendants failed to prescribe medication, the infection went untreated, eventually leading to emergency room admittance in Philadelphia County two days later. "Cascading diagnosis relate back to the breach of the standard of care or there is no causation." *Id*. at 401. Plaintiff's position that a cause of action arises where the injury occurred was rejected. The court ruled that a medical liability cause of action arises in the county in which the negligent acts or omissions occurred. The trial court's transfer was affirmed, and the motion to transfer to Montgomery County was granted.

Noel v. Doolin, 65 Pa.D.&C.4th 149 (C.P. Phila. 2004), *aff'd*, 863 A.2d 1239 (Pa.Super. 2004) (Table). The cause of action was in New Jersey where the tort was committed. The fact that defendants regularly conduct business in Philadelphia County was held to be irrelevant. *Garcia ex rel. Romero v. Mabine*, 67 Pa.D.&C.4th 49

(C.P. Phila. 2004), *aff'd*, 875 A.2d 396 (Pa.Super. 2005) (Table). Negligent tort in New Jersey. Plaintiffs argued that Pa.R.Civ.P. 1006 (a.1) could not eliminate jurisdiction in Pennsylvania. "It would make for an anomalous result if a doctor practicing only minutes away from Philadelphia in Montgomery County cannot be sued in Philadelphia County, while a doctor practicing the same a few minutes away in Camden, New Jersey, is permitted to be sued in Philadelphia." *Id*. at 55. Hence, the preliminary objections for lack of proper venue were affirmed.

Other cases of interest:

1. *Shapiro v. Albert Einstein Med. Ctr.*, 71 Pa.D.&C.4th 272 (C.P. Phila. 2005), *aff'd*, 885 A.2d 595 (Pa.Super. 2005). Transfer from Philadelphia County to Montgomery County affirmed. The health care services provided to plaintiff comprised the taking and reading of a mammogram in Montgomery County and not the indirect administrative acts in Philadelphia. All medical care was furnished in Montgomery County, and venue was appropriate there.

2. *Selby v. Abington Memorial Hospital*, PICS Case No. 05-0759, No. 1729 October Term 2004 (C.P. Philadelphia April 5, 2005), *aff'd*, 889 A.2d 124 (Pa.Super. 2005) (Table). Complaint filed in Philadelphia County alleging negligence with respect to incorrect diagnosis of non-Hodgkin's lymphoma. Plaintiff's decedent went to Abington Memorial Hospital to receive chemotherapy treatments and signed an agreement with Abington Memorial Hospital relating to venue and providing that any action would be brought in Montgomery County. The Court sustained the forum selection clause. We believe this decision is an aberration since such "sign or die" provisions are generally regarded as contracts of adhesion.

3. *Berry v. Fitz*, 79 Pa.D.&C.4th 296 (C.P. Clearfield 2006) relied upon *Bilotti-Kerrick v. St. Luke's Hosp.*, 873 A.2d 728 (Pa.Super. 2005), where suit was filed in Northampton County notwithstanding the fact that St. Luke's Hospital is located in Lehigh County and that the decedent had been provided with medical care at St. Luke's. The only connection with the Northampton County was that defendant doctor has his residence there and took a phone call at his residence from a hospital employee and provided directions relative to decedent's care.

4. *Nelson v. Rosen, DDS, et al.*, 34 PLW 482, No. 3471 2010 (C.P. Phila.) Judge Tereshko. The court held that a reading of 1006(a.1) and (c)(2) together shows that the proper venue for an action of medical professional liability where a plaintiff is alleging joint and several liability is in a county where venue is proper against any defendant that is a health care provider. Although the health care was rendered in Montgomery County, that is not the proper county of venue for the claim.

1.1.4Objections to Venue

Objections to venue must be brought by a preliminary objection or else they are waived, *see* Rule 1006(e), except to challenges to venue made within ninety days of the date of the March 5, 2003 Amendatory Order. Amendatory Order of March 5, 2003, No. 381, Civil Procedural Rules Docket No. 5. (Pa Orders 2003-7). A trial court's ruling on venue will not be disturbed if the decision is reasonable in light of the facts. *Riggio v. Katz*, 64 Pa.D.&C.4th 395 (C.P. Phila. 2003), *aff'd*, 859 A.2d 844 (Pa.Super. 2004) referencing *Mathues v. Tim-Bar Corp*., 652 A.2d 349 (Pa.Super. 1994). Furthermore, a decision to transfer venue will not be reversed unless the trial court abused its discretion. *Id*. 64 Pa.D.&C.4th at 400, *citing, Mathues*, 652 A.2d at 351.

1.1.5Retroactive Application of Rule 1006

The Pennsylvania Supreme Court made its amendments to Rule 1006, providing that professional liability actions may only be brought in the county in which the cause of action arose, retroactive to January 1, 2002. Amendatory Order, March 5, 2003; Pa.R.Civ.P. 1006(a.1). It is arguable that this retroactive application is

unconstitutional and contrary to established precedents and Pa. R. Civ. P. 152. Pennsylvania's Constitution authorizes the Supreme Court to prescribe general rules "governing practice, procedure and the conduct of all courts . . . if such rules are consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant . . ." Pa. Const. Art V, § X(c). Although the Court is vested with sole rulemaking authority over court procedure, *North Central Pennsylvania Trial Lawyers Ass'n v. Weaver*, 827 A.2d 550, 558 (Pa.Cmwlth. 2003), citing *In re42 Pa. C.S. § 1703*, 394 A.2d 444, 451 (Pa. 1978), as is apparent from the quoted language, that power is circumscribed by the limitations imposed expressly and impliedly by the Pennsylvania and United States Constitutions.

The principles of equal protection and substantive due process, for example, apply to the rules of procedure promulgated by a Supreme Court directive as well as to statutory and regulatory enactments. *See, e.g., Laudenberger v. Port Auth. of Allegheny County*, 436 A.2d 147 (Pa. 1981) (constitutional challenge to Pa. R.Civ.P. 238).

Under principles of substantive due process, "[a] law which purports to be an exercise of the police power must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained." *Id*. at 156. The touchstone of due process, as with equal protection, is whether the rule in question is rationally related to a legitimate state goal or whether the state action arbitrarily works to deny an individual of life, liberty, or property. *Id.* at 157, *citing*, *Rogin v. Bensalem Twp.*, 616 F.2d 680 (3rd Cir. 1980). The Pennsylvania and United States Constitutions guarantee a right of access to the courts, *see* Pa. Const., Art I, § II, but limitations on the right of access that resemble time, place and manner restrictions on protected speech are not subjected to strict scrutiny and may be upheld as constitutional if they are reasonable and promote significant governmental interests. *Commonwealth v. Davis*, 635 A.2d 1062, 1066 (Pa.Super. 1993). *See also, Costa v. Lauderdale Beach Hotel*, 626 A.2d 566 (Pa. 1993) (Rule 238 does not unconstitutionally infringe on the right of access where it is substantially and rationally related to a legitimate goal.)

It will undoubtedly be argued in favor of constitutionality that the governmental purposes behind the new venue rule is a salutary one, to discourage the forum shopping that has allegedly characterized medical malpractice cases, impacting the administration of justice in certain judicial districts and affecting the operation of corporate healthcare facilities throughout the Commonwealth. *See, North-Central Pennsylvania Trial Lawyers Ass'n v. Weaver*, 827 A.2d 550, 563 (Pa.Cmwlth. 2003); *See also*, 40 Pa.C.S.A. §1303.514 (a) (2002) (declaration of policy for Interbranch Commission on Venue). If the smooth administration of causes in the justice system and the avoidance of court congestion is a major goal, however, the application of the new rule to cases pending *before* its promulgation and the encouragement of wholesale transfers (by alteration of the waiver of objection rule) regardless of the status of proceedings in the individual cases only serves to contradict that goal. The unreasonableness of proceeding in this fashion is evidenced by the fact that it contravenes long-standing precedent that rights in procedural matters are determined by the law in force at the time of the institution of the action, *see Schladensky v. Ellis*, 275 A.2d 663 (Pa. 1971), and it also violates Rule 152, which specifies that when a procedural rule is amended, "the new provisions shall be construed as effective only from the date when the amendment became effective." Pa.R.Civ.P. 152. These latter rules demonstrate that retroactive application is arbitrary and runs counter to fundamental principles of fairness: the rules should not be changed in the middle of the game. As Judge Wieand said in *Lites v. Berman*, 567 A.2d 1093 (Pa.Super 1989) (dissenting), "To hold otherwise is to forget the courts exist to serve the litigants and not vice versa." *Id*. at 1094. The majority in *Lites* relied upon *Joseph Palermo Dev. Corp. v. Bowers*, 564 A.2d 996 (Pa.Super. 1989); *Palermo*, however, distinguished the rule in question as being one of appellate procedure, as opposed to civil procedure, and as involving its own jurisdiction, thereby expressly recognizing the policy of Rule 152 and the "inherent injustice of changing the rules in the middle of the game . . ." *Id*. at 998. The question of Rule 152 and the constitutionality of Pa.R.C.P. 1006(a.1) was recently raised in *Connor v. Crozer Keystone Health Sys.*, 832 A.2d 1112 (Pa.Super. 2003), but the court did not reach the issue because it was deemed waived.

Given the Supreme Court rules, Pa.R.C.P. 1006(a.1), Amendatory Order of March 5, 2003, No. 381, Civil Procedural Rules Docket No. 5. (Pa Orders 2003-7) and 42 Pa.C.S.A. § 5101.1 (2003), it is questionable whether the case law on venue issues decided prior to the amended procedural rule regarding venue will continue to have any influence.

1.2Forum Non Conveniens

Goodman by Goodman v. Pizzutillo, 682 A.2d 363 (Pa.Super. 1996). On November 7, 1980, Jennifer Goodman, who was born November 2, 1971, was taken by her parents to consult a staff pediatric orthopedist at the du Pont Institute to find out about treatment for her leg. The doctor, Peter Pizzutillo, began a program of casting the child's left foot. This was followed by stretching exercises. The condition of the child's left extremity began to deteriorate, and continued to deteriorate through the period July, 1983 to June, 1984. Finally, the parents were informed that their daughter had an osteochondroma on the fibular head of her left leg which was destroying her peroneal nerve. This led to surgery, and a lawsuit followed.

The du Pont Institute was dismissed from the action based on the lack of *in personam* jurisdiction in Philadelphia. The case against the doctors was transferred to the state of Delaware on *forum non conveniens* grounds.

A civil action may be transferred for the convenience of the parties pursuant to Pa.R.Civ.P. 1006(d)(1). When a change of venue occurs in a civil action, there is an interlocutory right of appeal. *Id*. at 367. An appellate court looks at the change of venue from an abuse of discretion point of view. *Id*.

Under what circumstances should a plaintiff be deprived of her/his choice of forum?

> [Where] the defendant *clearly adduces* facts that either (1) establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience . . . or (2) make[s] trial in the chosen forum inappropriate because of considerations affecting the court's own private and public interest factors *unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed*.

Scola v. AC & S, Inc., 657 A.2d 1234, 1241 (Pa. 1995), *quoting, Okkerse v. Howe*, 556 A.2d 827, 831-32 (Pa. 1989).

One of the major issues which must be examined is whether an alternative forum is available to plaintiff. *Goodman*, 682 A.2d at 368. The suit will be entertained, no matter how appropriate the forum may be, if defendant cannot be subjected to jurisdiction in other states. This is also true if plaintiff's cause of action would elsewhere be barred by the statute of limitations, unless the court is willing to accept defendant's stipulation that he will not raise this defense in the second state. *Plum v. Tampax, Inc*., 160 A.2d 549, 553 (Pa. 1960). Of course, this assumes that there is at least jurisdiction in the initial court and that the statute of limitations has not run there.

Plum teaches that the trial court must make a finding, on the record, as to the availability of other forums, and then exercise its discretion after considering all other factors. Dismissal of a complaint on the grounds of *forum non conveniens* should not be granted when such a decision results in the plaintiff being unable to institute an action elsewhere. *Miller v. Gay*, 470 A.2d 1353 (Pa.Super. 1983).

In *Goodman*, the trial court approved a stipulation reserving all defenses regarding the statute of limitations available in Pennsylvania in May of 1988. The trial court failed to understand that the Delaware statute of limitations was, however, an available defense to the doctors in May of 1988. The Goodmans' case was not time-barred by the Pennsylvania statute of limitations. This was because of the Minor's Tolling Act in Pennsylvania. 42 Pa.C.S.A. § 5533(b).

The effect of the stipulation was to place the Goodmans out of court in Delaware without an alternative forum in which to bring the action. Therefore, the trial court erred when it dismissed the Goodmans' complaint where there was no alternative available forum in which to bring the action.

The lower court also erred by finding insufficient contacts with Philadelphia County. The doctors had failed to adduce facts on the record that "either showed that trying the case in Philadelphia County was so oppressive and vexatious to them as to be out of proportion to the Goodmans' convenience; nor is the evidence presented and made at trial in Philadelphia County inappropriate." *Goodman*, 682 A.2d at 369. The trial court should have considered the following facts:

(1) The Goodmans and Dr. Pizzutillo currently reside in the Commonwealth of Pennsylvania, and the doctor practices medicine in Philadelphia County.

(2) During the relevant period, all three doctors involved were licensed to practice medicine in Pennsylvania.

(3) One of the defendant treating doctors had been a clinical assistant professor of pediatrics and neurology at Temple University Medical Center and St. Christopher's Hospital in Philadelphia.

(4) One of the defendants continued to have staff privileges at both Philadelphia institutions.

(5) The court failed to consider the six years of discovery and pre-trial preparation which had taken place in Philadelphia County.

(6) Defendant doctors had participated in trial videotape depositions and settlement conferences in Pennsylvania.

(7) The child's subsequent diagnosis and treatments were rendered in Pennsylvania.

(8) The plaintiff's expert witnesses are located in Pennsylvania.

Congestion in Philadelphia courts should not be viewed as giving trial courts carte blanche authority to transfer any case which may be as conveniently litigated elsewhere. *Farley v. McDonnell Douglas Truck Services, Inc*., 638 A.2d 1027, 1032 (Pa.Super. 1994).

A plaintiff's choice of forum is not unassailable. *Forman v. Rossman*, 672 A.2d 1341, 1343 (Pa.Super. 1996), *rev'd*, 701 A.2d 156 (Pa. 1997). However, this case was essentially overruled by *Cheeseman v. Lethal Exterminator, Inc.*, 701 A.2d 156 (Pa. 1997), *infra.*

Sheila J. Forman filed a medical malpractice case in Philadelphia, and the Delaware Valley Medical Center petitioned to transfer the action to Bucks County based upon the doctrine of *forum non conveniens*. The standard on appeal from the trial court's ruling is an abuse-of-discretion standard. *McCrory v. Abraham*, 657 A.2d 499 (Pa.Super. 1995).

The legislature has adopted the doctrine of *forum non conveniens* in order to move a case to a different forum when defendants demonstrate that they fairly and practically deserve a change in the venue of a case. *See*, Pa.R.Civ.P. No. 1006(d)(1). If the balance of factors weighs heavily in defendant's favor, then the plaintiff's forum choice may be disturbed. *Rini v. New York Cent. R.R. Co*., 240 A.2d 372 (Pa. 1968).

The Supreme Court addressed many of the issues which the Superior Court struggled with in the case of *Cheeseman v. Lethal Exterminator, Inc*., 701 A.2d 156 (Pa. 1997), before Flaherty, C.J., and Zappala, Cappy, Castille, and Newman, JJ. Opinion by Justice Cappy.

The trial court was said to have abused its discretion in transferring an action from Philadelphia County to Bucks County. All of the parties and fact witnesses resided in Bucks; all of Cheeseman's treating physicians resided in Bucks; and no significant aspect of the case involved Philadelphia. The Cheesemans noted that Philadelphia was not inconvenient because all of the witnesses lived or worked within a 45-minute drive from Center City Philadelphia.

Language in both *Okkerse v. Howe*, 556 A.2d 827 (Pa. 1989) and *Incollingo v. McCarron*, 611 A.2d 287 (Pa.Super. 1992), *overruled by Cheeseman*, 701 A.2d 156, 160 (Pa. 1997), had caused confusion in the lower courts. A policy had developed of according court congestion great weight at the expense of the plaintiff losing his chosen forum. *Scola v. AC&S, Inc*., 657 A.2d 1234 (Pa. 1995), *reversed German v. AC&S, Inc*., 635 A.2d 159 (Pa.Super. 1993) and overruled the Superior Court's decision in *Incollingo*, *supra*.

The *Cheeseman* court flagellated itself for unfortunate language in *Scola* borrowed from *Okkerse*. Dealing with all of that confusion, the court stated as follows:

> We recognize that virtually every forum in Pennsylvania is busy and even backlogged, so that, of necessity, the plaintiff's chosen forum will almost always be a busy forum. It is, thus, the usual circumstance, rather than the unusual circumstance, that the chosen forum will be concerned about its own congestion. In fact, congestion in the courts of Pennsylvania, as in most other jurisdictions, is a fact of life which one could easily view as being a given.

701 A.2d at 161.

The court emphasizes once again that deference must be given to the plaintiff's choice of forum in ruling on a petition to transfer venue.

> [A] petition to transfer venue should not be granted unless the defendant meets its burden of demonstrating, with detailed information on the record, that the plaintiff's chosen forum is oppressive or vexatious to the defendant.

Id. at 162.

How does the defendant establish vexatiousness?

> [W]ith facts on the record that the plaintiff's choice of forum was designed to harass the defendant, even at some inconvenience of the plaintiff himself. . . . Alternatively, the defendant may meet his burden by establishing on the record that trial in the chosen forum is oppressive to him; for instance, that trial in another county would provide easier access to witnesses or other sources of proof, or to the ability to conduct a view of premises involved in the dispute. But, we stress that the defendant must show more than that the chosen forum is merely inconvenient to him.

Id.

Pa.R.Civ.P. 213.1 governs coordination of actions in different counties. The Rule spells out the criteria for determining whether to order coordination and which location is appropriate for the coordinated proceedings. The court shall consider, among other matters:

(1) whether the common question of fact or law is predominating and significant to the litigation;

(2) the convenience of the parties, witnesses and counsel;

(3) whether coordination will result in unreasonable delay or expense to a party or otherwise prejudice a party in an action which would be subject to coordination;

(4) the efficient utilization of judicial facilities and personnel and the just and efficient conduct for the actions;

(5) the disadvantages of duplicative and inconsistent rulings, orders or judgments;

(6) the likelihood of settlement of the actions without further litigation should coordination be denied.

In *Trumbauer v. Godshall*, 686 A.2d 1335 (Pa.Super. 1997), the parties did not dispute that the "common question" requirement of Rule 213.1(a) has been met. At issue was the forum chosen by the court. It was held that discovery was not necessary in order to discern what was the proper forum. Apparently, oral argument was held to be sufficient, which seems to take judicial notice to an extreme.

One of the first important post-*Cheeseman* cases was *Hoose v. Jefferson Home Health Care, Inc*., 754 A.2d 1 (Pa.Super. 2000) *appeal denied* 564 Pa. 734 (2001), involving a case properly brought against Jefferson Home Health Care, among others, in Philadelphia County, but where a change of venue was sought because no care or treatment took place in Philadelphia. The court, after remonstrating defendants for citing *Techtmann v. Howie*, 692 A.2d 230 (Pa.Super. 1997), *reconsideration denied* 548 Pa. 567 (1998), because it was reversed by the Pennsylvania Supreme Court at 699 A.2d 729 (Pa. 1997), found *Cheeseman* to be controlling. *Cheeseman* required, in order to support a change of venue, that litigation in the county objected to must be "vexatious and oppressive." *Hoose* noted that just because no significant aspect of a case involves the chosen forum, that forum is not thereby "oppressive or vexatious."

There were several other factors important in *Hoose* as well, although it is unclear as to whether they were controlling:

> A majority of pre-trial procedures, including depositions of various witnesses, had already been conducted in Philadelphia.
>
> At the behest of one of the defendants, the case had already been removed to federal court located in Philadelphia.
>
> The objecting defendant has consistently been appearing in plaintiff's chosen forum for purposes of the case to date.

> Plaintiff had denied that no medical treatment occurred in Philadelphia, and claimed that Mr. Hoose in fact received medical care relevant to his underlying condition at Hahnemann University Hospital in the City of Philadelphia.
>
> A number of non-Philadelphia County medical providers had been granted the opportunity to stipulate to their dismissal from the plaintiffs' case.
>
> What the court must look at is the oppressiveness suffered by the witnesses, not their patients or clients.

Hoose, at 4.

Borger v. Murphy, 797 A.2d 309 (Pa.Super. 2002), may signal a major change in direction of Superior Court panels. This decision was authored by Judge Hudock, also the author of *Sunderland v. R. A. Barlow Homebuilders*. In *Borger*, venue in Philadelphia County was based on the fact that the doctor defendants were residents of Philadelphia County at the time the suit was commenced. No allegations of medical malpractice were made against the doctors, according to the court. It was concluded that venue in Philadelphia County was not merely inconvenient, but also oppressive. The case was transferred three days before trial. The court relied upon the following:

(1) All the witnesses who could testify as to damages were located in Lehigh County.

(2) An affidavit was filed that trial in Philadelphia County would burden a defendant doctor's participation in his medical practice in Lehigh County.

(3) One of the defendant doctors testified in a deposition that he would have to travel 80 miles each way between Lehigh County and the site of the trial if the case were heard in Philadelphia County.

(4) The commute to Philadelphia County would take an hour and a half compared to the 20 minutes for a trip to the courthouse in Lehigh County.

(5) The time required for travel would make it necessary for defendant doctor to stay in Philadelphia County, or at least greatly curtail his ability to see patients in Lehigh County before and after court sessions.

(6) The defendant doctor indicated that many of his employees in his office, although not specifically named in his pre-trial memorandum, were potential witnesses, and thus attending trial in Philadelphia County would lead to a temporary closing of the office.

(7) Another defendant doctor testified that he would have to travel two hours each way for trial in Philadelphia.

Because of the travel difficulties alone, it seems, the court held that although venue was proper in Philadelphia County, it was oppressive and the case was transferred. It seems quite clear that this opinion violates the dictates of the Supreme Court in *Cheeseman*. *Borger's* analysis may be superseded by rule as stated in *Stoner v. Penn Kleen, Inc.*, 2012 WL 4748204 (Pa.Super. Oct. 5, 2012).

Humes v. Eckerd Corp., 807 A.2d 290 (Pa.Super. 2002) specifically discussed whether *Cheeseman* applies to § 5322(e) petitions. The court ruled that in the absence of specific guidelines from the Pennsylvania Supreme Court, the particular panel in this case will follow *Poley v. Delmarva Power & Light Co*., 779 A.2d 544 (Pa.Super. 2001) and decline to find error in the lower court's refusal to apply *Cheeseman* to a § 5322(e) petition. The unusual facts in *Humes* involving an out of state complaint make it unlikely that this ruling failing to apply *Cheeseman* will be adopted universally. The Superior Court nevertheless reversed the grant of Appellees' petition to dismiss and remanded the case. By relying on facts contained in a New Jersey complaint instead of waiting until a complaint was actually filed in Pennsylvania, the lower court speculated on what Appellant would have pleaded had she been permitted to file a complaint in Pennsylvania. This opinion also seems to give some new vitality to the writ of summons procedure, generally under attack in medical malpractice cases as we shall see *infra*.

Much of the previous discussion is rendered moot in the typical medical malpractice case because of Pa.R.Civ.P. 1006(a.1). However, where venue is proper under Rule 1006 (a.1), there may still be occasion for a motion to transfer on *forum non conveniens* grounds when suit is brought under Rule 1006(c) (2) which provides that "[i]f the action to enforce a joint or joint and several liability against two or more defendants includes one or

more medical professional liability claims, the action shall be brought in any county in which the venue may be laid against any defendant under subdivision (a.1)."

An example is the case of *Moody v. Lehigh Valley Hospital – Cedar Crest*, 179 A.3d 496 (Pa.Super. 2018), *rehearing denied*, 2018 Pa.Super. LEXIS 257 (Mar. 22, 2018) Bowes, J., a wrongful death and survival action sounding in medical malpractice which was filed in Philadelphia County. A 17-month-old presented at Lehigh Valley Hospital with a history of vomiting and coughing. She came under the care of physicians there. After further doctor and hospital visits to various doctors and Lehigh Valley Hospital, the child was transferred to Children's Hospital of Philadelphia by helicopter. The doctors at Children's Hospital performed a cardiac procedure and administered an overdose of Versed, 10 times the proper dose. The child died at Children's Hospital eight (8) days later. Suit was brought against the Lehigh Valley defendants for initially failing to recognize cardiac abnormalities, which increased the risk of death, as well as against Children's Hospital for the medical error that occurred there. The trial court transferred the case to Lehigh Valley on *forum non conveniens* grounds. Relying on *Cheeseman*, discussed above, the Superior Court reversed and remanded for further proceedings consistent with the opinion. The Superior Court reversed the trial court because it applied the wrong standard. The trial court improperly engaged in a balancing test to determine which forum would be more appropriate, an approach that was rejected in *Cheeseman.* Rather, great weight must be afforded to the plaintiff's initial choice of forum, and it can rarely be disturbed. The burden on the defendant to transfer on *forum non conveniens* grounds is a heavy one. It must be shown that the chosen forum is either vexatious or oppressive. Vexatious means that the plaintiff's choice was intended to harass the defendant, even at some inconvenience to the plaintiff himself. Oppressiveness requires a detailed factual showing by the defendant that the chosen forum is oppressive to him. In this case, the Philadelphia County involvement was not incidental or tangential, and there was nothing in the record to support a finding that the filing of the case in Philadelphia was vexatious.

In addition, the Superior Court faulted the lower court because it played into defendants' hands by ignoring the untimeliness of the late joinders and petitions to transfer by certain defendants, which were calculated to avoid discovery and ambush the plaintiffs with new claims of oppressiveness and no notice or opportunity to refute them.

Wright v. Aventiapps Pasteur, Inc., 905 A.2d 544 (Pa.Super. 2006) *appeal denied* 591 Pa. 674 (2007) was a products liability action where there was allegedly severe neurological damage as a result of high levels of mercury found in a preservative for blood products and vaccines. Decided on *forum non conveniens* grounds, the panel held that the lower court should not have dismissed the action. The panel reviewed whether "weighty reasons" existed to overcome the plaintiff's choice of forum. An abuse of discretion was found in the dismissal because the trial court did not discuss the arguments presented by plaintiff but focused primarily on the parties' lack of ties to Philadelphia County. The *forum non conveniens* motion to dismiss was not filed until the last date for the submission of pretrial motions and only three months before the scheduled trial date. All the discovery had been performed. There was no basis upon which to conclude that Texas would be a more convenient forum for the corporate employee witnesses. In fact, the court found that Philadelphia, with its proximity to relevant corporate offices of a number of defendants, appeared to be a quite convenient jurisdiction for the trial of the case. The law demands that plaintiff's choice of forum is "entitled to great weight. . . ." *Wright v. Aventis Pasteur, Inc*., at 552.

In accord is *Hunter v. Shire US, Inc.*, 992 A.2d 891 (Pa.Super. 2010), where the manufacturer of plaintiff's heart medication was located in Chester County, Pennsylvania. This was a failure to warn case in connection with increased risk of heart attack from the use of the drug. The patient was a resident of Georgia and was prescribed the drug in that state and purchased and consumed the drug there. The manufacturer conducted business in Pennsylvania, including Philadelphia County. The claim involved the development, testing and marketing of the drug and the manufacturer's knowledge of and warnings about the risks of heart attacks from ingesting that drug. Those activities were conducted by the manufacturer's employees in Pennsylvania. *Wright* is followed, and the Superior Court affirmed the trial court's refusal to dismiss the action. The trial court was also correct in refusing the transfer request from Philadelphia to Chester County.

Other Common Pleas decisions:

1. *Rodger v. Bethlehem Obstetrics*, PICS No. 03-1141, No. 4115 Nov. Term, 1999 (C.P. Phila. July 8, 2003), *aff'd*, 859 A.2d 845 (Pa.Super. 2004) (Table). Defendant medical providers meet the demands of *Cheeseman* by providing a proper basis for establishing that it would be oppressive for all parties to have to travel to Philadelphia for trial. Evidence of record shows that there is no justification for trying the case in Philadelphia County as opposed to Lehigh

County. All defendants and every potential deponent are located in Lehigh County or Northampton County and service could be made in those counties. The cause of action giving rise to the medical malpractice suit arose in Lehigh or Northampton County, and every transaction took place in one of those counties.

2. *Albert v. Chory*, PICS No. 03-1194 (C.P. Berks July 3, 2003). Case transferred to Lancaster County from Berks County. The attendance of three doctors at trial would cause a substantial hardship for the doctors, for the defendant, Lancaster Infectious Diseases, Inc., and for the Lancaster community as well. Their absence from trial would also create a substantial hardship in presenting their defense to plaintiff's claims. These hardships were found significantly to outweigh the right of plaintiffs to make the decision on where the claim shall be brought. Moving defendants established that the processing of this litigation in Berks County would be oppressive to their needs and concerns.

3. *Heckman v. WE Pharmaceuticals, Inc*., 65 Pa.D.&C.4th 523 (C.P. Phila. 2004). The public interests and efficient judicial administration strongly favor dismissing the action pending and refiling same in the available alternate forum of California. There is simply no valid reason that the people of Philadelphia County should bear the burdens of adjudicating this case, including jury duty and the expense of conducting a trial. Trial of the lawsuit in Philadelphia would also give rise to needless legal complexity. California law would likely apply. Perhaps most important is that several hundred claims have been filed concerning the prescription drug Sinuvent containing Phenylpropanolamine ("PPA") in Philadelphia County. Most of those cases involve out-of-state plaintiffs who chose to file in Philadelphia County for no apparent reason other than the fact that their attorneys have offices in Philadelphia. The fact that discovery has already taken place was not significant in mitigating against the transfer. The court went so far as to implicitly ignore *Cheeseman* by stating there is enough of an exploding area of complex mass tort litigation involving Pennsylvania citizenry and/or key witnesses connected to liability and/or damages to Pennsylvania without burdening a valuable system by stretching its resources to an undesirable limit. *Id*. at 552. The court expressed a concern about the number of mass tort cases filed in Philadelphia, and was clearly influenced by that statistical analysis.

4. *Enstrom v. Bayer Corp*., 855 A.2d 52 (Pa.Super. 2004), *appeal denied* 585 Pa. 690 (2005), arose in the context of a mass tort product liability case advanced by purchasers with respect to their ingestion of Alka-Seltzer Plus containing the decongestant ingredient Phenylpropanolamine (PPA), causing them to suffer hemorrhagic stroke resulting in permanent and profound physical damage. Even though jurisdiction was proper in Pennsylvania, Pennsylvania had essentially no other contact with the controversy and hence the matter was properly transferred.

5. *Shala v. Ryan*, 53 Pa.D.&C.4th 129 (C.P. Lackawanna 2001), was a case in which Geisinger physician defendants presented a petition to transfer venue from Lackawanna County to Montour County based upon convenience. This opinion is significant in its citation to *Osterholzer v. Penn State Geisinger Clinic*, 100 Lacka. Jur. 89, 93-94 (1998) "that Geisinger is the single largest employer in the proposed transferee forum, Montour County." In *Osterholzer*, it was noted that trial in Lackawanna County would "obviate any possible compromise of [plaintiff's] ability to transfer and effectively challenge Geisinger, its administration, policies and institutional conduct." The problem of rural and suburban counties whose hospitals are a controlling force in those counties continues to be a problem ignored by those trying to keep medical malpractice cases out of Philadelphia County.

Prior to Rule 1006(a.1), even Philadelphia County joined the trend of moving cases from that jurisdiction. *See*, i.e., *Grace Community, Inc. v. KPMG Peat Marwick, LLP*, 60 Pa.D.&C.4th 513 (C.P. Phila. 2003), a nonmedical malpractice case.

1.3Jurisdiction

Mendel v. Williams, 53 A.3d 810 (Pa.Super. 2012) posed the question as to whether a Pennsylvania court may assert personal jurisdiction over an out-of-state doctor, or corporate health care provider, in a medical malpractice action by a Pennsylvania resident who receives negligent treatment in a foreign jurisdiction. The Superior Court concluded that there was no jurisdiction and affirmed the trial court which had sustained preliminary objections for lack of jurisdiction. Two doctors performed a laminectomy on plaintiff's spine at the Albert Einstein Medical Center in Philadelphia. The patient returned to her home in New Jersey. A week later, the plaintiff experienced drainage from her wound and developed a fever. The patient sought emergency room treatment in New Jersey. After being treated in New Jersey, the patient was finally transported to Einstein in Pennsylvania where defendant doctor performed additional surgery at Einstein to correct the infected wound. The abscess resulted in paralysis below the waist.

The case was filed in Philadelphia against the New Jersey doctors who failed timely to diagnose and treat her injury or to warn the doctors at Einstein of her worsening condition, causing paraplegia in Pennsylvania. Section 5301 of the Judicial Code, 42 Pa.C.S.A. § 5301(a)(2)(iii) authorizes jurisdiction over a foreign corporation that carries on a "continuous and systematic part of its general business within this Commonwealth." This section permits jurisdiction regardless of whether the defendant's conduct occurred in Pennsylvania. After examining the litmus test supplied by the due process clause of the Federal Constitution as enunciated by a number of United States Supreme Court cases, the *Mendel* court concluded that the New Jersey doctors do not operate a substantial portion of their business in Pennsylvania. They maintain no real property in Pennsylvania, have no offices in Pennsylvania, and do not provide any services in Pennsylvania. Even the problematic fact that the New Jersey doctors used Jefferson's logo on their office stationery and on a non-interactive website, "is not activity which could be said to occur substantially in Pennsylvania." *Id.*, at 820. *Mendel v. Williams* relied heavily upon *McCall v. Formu-3 Intern, Inc.*, 650 A.2d 903 (Pa.Super. 1994) in its analysis of Section 5301(a)(2)(iii).

Pennsylvania's long arm statute also supplies a basis for jurisdiction in Pennsylvania, 42 Pa.C.S.A. § 5322. Certain specific conduct representing particular types of contact in Pennsylvania, are sufficient to invoke jurisdiction in Pennsylvania courts. *See* 42 Pa.C.S. § 5322(a). In addition, § 5322(b) functions as a grab bag section providing jurisdiction that may be exercised over persons who do not fall within the express provisions of the statute to the fullest extent permitted by the Due Process Clause of the United States Constitution. The Due Process Clause requires the following:

> The plaintiff must demonstrate that the defendant purposefully established minimum contacts with the forum state; and
>
> The maintenance of the suit must not offend traditional notions of fair play and substantial justice.

Mendel v. Williams, supra, at 821.

The Court in *Mendel* ultimately concluded that the Long Arm Statute did not provide a basis for specific jurisdiction over the defendants. Their negligence occurred in New Jersey and caused harm to the patient there which subsequently continued in Pennsylvania and was discovered there, but it originated in New Jersey. *Id*. at 822-824.

Nees v. Anderson, 28 Pa. D.&C.5th 539 (C.P. Philadelphia April 10, 2013) Robinson, J., is noteworthy because the trial court considered *Mendel* and found it distinguishable. The case concerned the death of 15-year-old Michael Fisher. At 4 years of age, Michael Fisher came under the care of Dr. Anderson for a heart murmur. Dr. Anderson's office is located in New Jersey and he sees patients only in New Jersey. He is employed by Children's Hospital of Philadelphia, but as indicated his office was a CHOP Specialty Care Center. All bills were sent from Pennsylvania through the CHOP system. Plaintiff's allegations were that testing revealed cardiac-related abnormalities. Dr. Anderson failed to place any restrictions on athletic activity. While playing roller hockey in September 2010, Michael Fisher collapsed and died.

The court found that Dr. Anderson had minimum contacts sufficient to satisfy the legal standards. During the course of Dr. Anderson's treatment of Michael Fisher, the doctor was part of a Pennsylvania-based network of health care services. Dr. Anderson intentionally affiliated himself with a Pennsylvania facility, and further, told Michael Fisher to go to a facility that was part of the network. Unlike Mendel, "where a New Jersey doctor treated a New Jersey patient in New Jersey, and the patient just so happened to have been eventually transferred to a hospital

in Pennsylvania…" *Nees*, *supra*, at 546, "Dr. Anderson [sent]patients to a Pennsylvania site (with which he is affiliated) when orchestrating a patient's care…" *Id*. at 545. The fact that Dr. Anderson did not physically travel to Pennsylvania in order to treat Michael Fisher did not defeat jurisdiction. Dr. Anderson had purposeful, extensive, and significant contacts with Pennsylvania. *Id.* at 544. *See also* Section 1.1.2 above for a discussion of the court's ruling on venue.

Searles v. Estrada, 856 A.2d 85 (Pa.Super. 2004) *appeal denied* 582 Pa. 701 (2005) concerned a suit filed by Northampton County, Pennsylvania, residents involving a surgical procedure by a hospital in New Jersey. The court relied upon Pa.R.Civ.P. 1006(a.1), which places venue in medical professional liability actions in the county in which the transaction or occurrence arose. Nothing was furnished to Ms. Searles in Northampton County, Pennsylvania. Therefore, the court found that the Rule originally intended to transfer cases from Philadelphia to surrounding counties required dismissal based upon lack of venue. This confusion between venue and jurisdiction is not uncommon. Personal jurisdiction is based upon the concept of doing business, while venue reflects a policy decision about convenience of the parties. The court held that because Northampton County did not have venue, and venue could not be transferred to another county in Pennsylvania, there could be no jurisdiction. The court could have dismissed the case contingent upon defendants' waiving the statute of limitations in the subsequent jurisdiction. However, the court merely dismissed the case.

The question as to whether medical treatment by a doctor or corporate medical care provider outside the Commonwealth, which later results in injury to a Pennsylvania resident inside the Commonwealth, has been addressed in *McAndrew v. Burnett*, 374 F.Supp. 460 (M.D. Pa. 1974) and *Kurtz v. Draur*, 434 F.Supp. 958 (E.D. Pa. 1977) (mem.). Those cases supported the conclusion of the *Mendel* court that the mere fact that the patient's paralysis was discovered in Pennsylvania, was manifested in Pennsylvania, or that the New Jersey doctors had to transfer their patient to Pennsylvania did not necessarily mean that the injury was ***caused in Pennsylvania.*** *Mendel*, 53 A.3d at 823. Even the failure of the New Jersey doctors to notify Einstein of the patient's condition prior to her transfer was not harm or tort committed in Pennsylvania. Simply stated, the New Jersey doctors did not have sufficient minimum contacts with Pennsylvania to satisfy the requirements of Due Process. The majority of jurisdictions were said to be in accord.

Common Pleas cases of interest are as follows:

1. *Spence v. O'Neal*, PICS No. 01-1377 (C.P. Philadelphia June 27, 2001), addressed the question of jurisdiction in a medical malpractice case. Defendants doctor and hospital were located in New Jersey. The defendants were providers of medical services with an HMO of Pennsylvania and New Jersey. As a result of allegedly negligent care in New Jersey, decedent was transferred to defendant Thomas Jefferson Hospital in Philadelphia, where death ensued. An action brought under the Wrongful Death and Survival Act was initiated in Philadelphia.

   Pennsylvania may exercise personal jurisdiction over non-residents if it comports with the state's long-arm statutes (42 Pa.C.S.A. §§ 5301 and 5322), and with the due process clause of the Fourteenth Amendment of the United States Constitution. Relying upon *McCall v. Formu-3 Intern, Inc*., 650 A.2d 903 (Pa.Super. 1994).

   The ultimate question with regard to due process is whether the quality and nature of the defendant's activity is such that it is reasonable and fair to require the defendant to conduct a defense in the forum state chosen by a plaintiff. *Id*. at 14. "Thus, the existence of personal jurisdiction generally depends upon the presence of reasonable notice to the defendant that an action has been brought, and sufficient connection between the forum state and the defendant to make it fair to require a defense of the action in the forum state." *Id.*

   A defendant's contacts are sufficiently substantial whenever a defendant has maintained continuous and systematic general business contacts with the forum. It seemed to be crucial to the court that Thomas Jefferson Hospital in Pennsylvania was only sued because defendant died there. The judge considered that subsequent death did not confer *in personam* jurisdiction over the New Jersey defendants.

Further, the court found that New Jersey defendants' participation in a health care plan operating in Pennsylvania was not sufficient to confer jurisdiction. The maintenance of medical licensure in Pennsylvania was not sufficient. *Lebkuecher v. Loquasto*, 389 A.2d 143 (Pa.Super. 1978).

In conclusion, it was held that there was nothing about defendant's conduct and connection with the forum state that should have alerted defendant to the possibility that he could reasonably anticipate being hauled into court in Pennsylvania.

2. *Garcia ex rel. Romero v. Mabine*, 67 Pa.D.&C.4th 49 (C.P. Phila. 2004), *aff'd*, 875 A.2d 396 (Pa.Super. 2005) (Table), was another case where the cause of action arose in New Jersey. The argument was made that suit in Philadelphia was proper because the new venue rule, Pa.R.Civ.P. 1006(a.1) could not eliminate jurisdiction where it would otherwise exist within the Commonwealth. The court dismissed the case, finding that it would be an anomalous result if a doctor practicing only minutes away from Philadelphia in Montgomery County could not be sued in Philadelphia County, while the doctor practicing the same few minutes away in Camden, New Jersey, is permitted to be sued in Philadelphia. However, the decision once again reflects the basic misunderstanding between venue and jurisdiction. The "anomaly" of which the court speaks is merely attendant to the structure of state government and the mobility of citizens to seek services in other states.

3. *Shank v. Raval*, No. GD 11-18098, GD 11-22007 (C.P. Allegheny Dec. 27, 2012) Friedman, J. Plaintiff sued defendants in Ohio, although the medical care was rendered in Ohio by Ohio entities and doctors. The only connection with Pennsylvania thus seems to be that the patient ultimately died in Allegheny General Hospital, Pittsburgh. Even the patient was an Ohio resident. The estate was opened in Ohio. Under these circumstances, there is no jurisdiction over the Ohio defendants.

4. *Georgia Brown, et al. v. Black, et al.*, No. 12MM000070 (C.P. Bradford November 8, 2013) Beirne, J. It was ruled that the court had personal jurisdiction over defendants Lawrence Dolkart, M.D., The Health Center for Women and The Perinatal Center even though they were located in New York State. They waived the right to object to personal jurisdiction by taking active steps in litigating the merits of the case.

   The court examined the facts with respect to Dolkart's office. Twenty-five to thirty percent (25%-30%) of his practice involves the treatment of Pennsylvania patients even though he is located in New York State. The doctor has maintained his Pennsylvania license. The doctor received over $122,000.00 in Medicare reimbursement payments from the Commonwealth of Pennsylvania. In this case Georgia Brown was referred by her doctor, Dr. Black, to Dr. Dolkart for evaluation. The Pennsylvania resident saw the New York State doctor, who allegedly malpracticed in failing to diagnose diabetes in the pregnant woman.

   The Pennsylvania doctor, in the 2009-2010 period, referred 90%-95% of his 20-30 high-risk patients to Dr. Dolkart, the New York State doctor, including Mrs. Brown.

   The court noted that there is a question as to whether Dr. Dolkart had the minimum contacts with Pennsylvania to establish jurisdiction, but ruled that Defendants participated in the litigation beyond merely entering an appearance. In fact, the Defendants asked the Chemung County, New York court to dismiss the Complaint filed there due to the Pennsylvania court being the "first exercised jurisdiction in this matter." It is therefore clear that Defendants manifested their intent to submit to Pennsylvania court jurisdiction notwithstanding the residency of Defendant physician.

In the federal forum, *Johnson v. SmithKline Beecham Corp.*, 724 F.3d 337 (3rd Cir. 2013) addressed the citizenship of a corporation in a pharmaceutical case for purposes of diversity jurisdiction. The Supreme Court has emphasized that although a corporation has citizenship, unincorporated entities do not, regardless of their substantive similarities to corporations. The question is whether GSK Holdings can be recognized as a citizen of Pennsylvania. Each of its activities must be examined. Because it is a holding company and not an operating

company, GSK Holdings has no sales or production, only one part-time employee and little infrastructure. Its activities primarily consist of owning its interests in GSK, LLC and related activities. The District Court had concluded that GSK Holdings' principal place of business is in Wilmington, Delaware. Accordingly, GSK Holdings is not a Pennsylvania citizen. The District Court rightly held that GSK, LLC and GSK Holdings are both citizens of Delaware, that SmithKline Beecham is a nominal party and that Avantor was a citizen of New Jersey at the time the case was removed. None of the defendants, at the time of removal, were citizens of the state where plaintiffs were citizens and therefore the parties satisfied the diversity of citizenship requirement.