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by Clifford A. Rieders, Esquire

PENNSYLVANIA MEDICAL MALPRACTICE

Law & Forms

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PENNSYLVANIA MEDICAL MALPRACTICE LAW & FORMS

2023 EDITION

BY
CLIFFORD A. RIEDERS, ESQ.

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PREFACE

This work is the 2023 Edition of the book on Pennsylvania Medical Malpractice published by Clifford A. Rieders.

It is our expectation that lawyers will make good use of this work now, and as it grows over the years.

Users of this book should be aware that it is anticipated that updates will be available every 7 years. Researchers should take care that statements in this book and its anticipated supplements have not been made incorrect by subsequent legal developments. Further, users should be cautioned that the author does not represent that the forms contained herein are models, or that they are immune to successful objections. Rather, they are merely offered as samples from the author, and may not be appropriate for every reader's use.

ABOUT THE AUTHOR

Clifford Rieders is a partner in the firm that now bears his name, one of the oldest firms in the state tracing its roots back to the early 1800s. Rieders is a graduate of New York University, Washington Square College of Arts and Sciences, Phi Beta Kappa, Cum Laude, Coat of Arms Society, and received an academic scholarship. After Rieders obtained his Juris Doctorate degree from Georgetown University Law Center in 1973, he spent two years as a law clerk to the Honorable Malcolm Muir, who became one of the most senior federal judges in the Middle District of Pennsylvania.

Rieders is a past president of the Pennsylvania Association for Justice. In 1989, he received the Milton D. Rosenberg award presented by PAJ. He is also the 2006 recipient of the George F. Douglas Amicus Curiae Award given by PAJ as well as a Special Service Award given in 2009 by then PAJ President Michael J. Foley. He is admitted to many courts including New York State, Pennsylvania, District of Columbia, Supreme Court of the United States, the Second and Third Circuits, numerous district courts, and the United States Court of Appeals for the Federal Circuit. Mr. Rieders is a member of the Pennsylvania Supreme Court's Standard Jury Instruction Committee. He is also an original member of Pennsylvania's Patient Safety Authority created under Act 13, the Mcare Act.

The author is on many Consultative Groups within the American Law Institute and has been instrumental in reshaping the Restatement Third concerning products liability. Mr. Rieders is also on the Consultative Group for the Restatement, General Torts, Restitution, Employment Law, Apportionment, and others and worked actively on the Restatement Apportionment Project. Rieders is a Life Member of the American Law Institute. Rieders is a Founding Sponsor of the Civil Justice Foundation and is a B'nai B'rith recipient of its prestigious Justice Award. He is a recipient of the Israel Bonds Gates of Jerusalem Award.

Aside from many pro bono efforts, the author writes extensively for PAJ and other organizations. One of his articles has been placed in the Gerald Ford Library in Ann Arbor, Michigan, at the former President's request. Rieders has lectured for the Pennsylvania Bar Institute and the Pennsylvania Advocacy Foundation, among others. He has taught at both Lock Haven University and Lycoming College. Rieders is a past president of the Federal Bar Association, Central Pennsylvania Chapter. Rieders was a longtime Amicus Chair of the Pennsylvania Bar Association. The author is a member of the Pennsylvania Bar Association, American Bar Association, American Association for Justice, and New York State Bar Association. He is also the author of the text "Workers' Rights in Pennsylvania"; Pennsylvania Financial Responsibility Law"; "Attorney's Fees"; "Bad Faith Insurance"; and others.

The author is an active trial lawyer with a substantial practice in the medical malpractice field in counties throughout the Commonwealth of Pennsylvania. The author has pioneered the creation of injunctions following successful results which have required the appointment of a medical evaluator at the charged facility as well as the creation and implementation of new protocol to improve health care standards. Rieders also handles anatomical and medical device litigation.

Rieders is nationally Board Certified in Civil Trial Advocacy by the National Board of Trial Advocacy. He is also a member of the Million Dollar Advocates Forum and has received the highest med-mal verdicts in the middle part of the state. He is a Super Lawyer and has received many other accolades.

Table of Forms

Gallbladder Removal Surgery with Complications Right Brachial Artery Injury

Death Due to Dietary Supplement

C Interrogatories and Petitions

Medical Malpractice Interrogatories

Punitive Damages Interrogatories and Document Requests re: Financial Worth

Expert Interrogatories Supplemental Interrogatories I Supplemental Interrogatories II Supplemental Interrogatories III

Interrogatories & Document Request Regarding How

Defendant Has Complied With Patient Safety Authority Under Act 13 Plaintiffs' Interrogatories

Adult Death Adult Death II Minor Death

Incapacitated Person

D Production of Documents

Request for Production of Documents I Request for Production of Documents II Request for Production of Documents III

Request for Production of Documents IV Request for Production of Documents V

E Stipulation and Order

F Order: Settlement Agreement

G G Points for Charge

Medical Malpractice Points for Charge

Medical Malpractice Points for Charge Supplemental Birth Trauma Case

Use of Factual Cause Charge & List of Judges Who Have Used Charge Jury Charge Using the 2003 Material from the Standard Pa. Jury Charge Including Factual Cause

Points for Charge - Negligence Resulting in Injured Ureter Gall Bladder Removal Case

Ureter Injury Case

H Special Verdict

I Acts & Statutes

Act 13

Act 93 § 1Act 135

J Legislative History Unofficial Record of H.B. 2210 Senate Discussion of S.B. 9

Legislative History of H.B. 1802

K Decisions & Orders

L Rules & Regulations

HIPAA Notification regarding use of records

Protection of lien/reimbursement – HIPAA Authorization to disclose health information

I. Jurisdiction and Venue

1.1 Jurisdiction

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 the 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 doctor who failed timely to diagnose and treat her injury or to warn the doctors at Einstein of her worsening condition, causing paraplegia in Pennsylvania. The court recognized that a defendant's activities in a forum may give rise to either specific jurisdiction or general jurisdiction and explained that "[s]specific jurisdiction … depends on an 'affiliatio[n] between the forum and the underlying controversy,' principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Id*. at 817. "Because due process may permit specific jurisdiction based solely on 'single or occasional' acts purposefully directed at the forum, it is narrow in scope, limiting a cause of action to the extent that it 'arises out of or relates to' the very activity that establishes jurisdiction…. Alternatively, general jurisdiction involves 'circumstances, or a course of conduct, from which it is proper to infer an intention to benefit from[,]' and thus an intention to submit to[,] the laws of the forum State[.]' … In contrast to specific jurisdiction, a state that has general jurisdiction may adjudicate 'both matters that originate within the State and those based on activities and events elsewhere.'" *Id.* (internal citations omitted).

Analyzing the case for purposes of general jurisdiction, the court looked to Section 5301 of the Judicial Code, specifically, 42 Pa.C.S. § 5301(a)(2)(iii), which 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 several 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).

For a foreign defendant who does not have sufficient contacts with Pennsylvania to establish general jurisdiction, Pennsylvania's long arm statute may also supply a basis for jurisdiction in Pennsylvania, 42 Pa.C.S. § 5322. Certain specific conduct representing 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. 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 conclusions 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.

Specific jurisdiction was considered by the Pennsylvania Supreme Court in *Hammons v. Ethicon*, 240 A. 3d 537 (Pa. Oct. 21, 2020) (Baer, J.), a medical device case. The New Jersey corporate defendants challenged the exercise of specific personal jurisdiction in Pennsylvania in a pelvic mesh case filed by an Indiana resident alleging injuries caused by pelvic mesh implanted in Indiana. Although the device was assembled by the defendants out of state, the mesh component of the device was manufactured by a separate entity in Bucks County, Pennsylvania, under the supervision of Defendant Ethicon.

Under settled Pennsylvania law, the burden is first on the defendant, the moving party, to object to jurisdiction; once raised, the burden of establishing personal jurisdiction under Pennsylvania's long arm statute is placed on the plaintiff. The defendant can then respond by demonstrating that the imposition of jurisdiction would be unfair. *Hammons v. Ethicon, supra,* 2020 Pa. LEXIS 5511, at *561.

The Court reviewed recent decisions from the United States Supreme Court regarding its personal jurisdiction jurisprudence and concluded that the imposition of personal jurisdiction over defendants met the relevant constitutional and statutory requirements. Absent further clarification from the High Court, the Pennsylvania Supreme Court declined to narrow the application of specific jurisdiction to require a claim-by-claim analysis, which could unnecessarily restrict access to justice for plaintiffs, and instead, looked more broadly to whether the case establishes ties between the defendant's actions in the forum state and the litigation. *Id.* at 556-560.

For purposes of specific jurisdiction, in order to assure that sufficient minimum contacts exist to satisfy due process, a three-prong analysis is applied: "(1) did the plaintiff's cause of action arise out of or relate to the out-of-state defendant's forum-related contacts? (2) Did the defendant purposely direct its activities, particularly as they relate to the plaintiff's cause of action, toward the forum state or did the defendant purposely avail itself of the privilege of conducting activities therein? (3) [W]ould the exercise of personal jurisdiction over the nonresident defendant in the forum state satisfy the requirement that it be reasonable and fair?" *Id.* at 556.

The dispute in the *Hammons* case revolved around the first prong, which the Court found was met because the plaintiff's claim that she suffered injury resulting from the transvaginal mesh device, "arises out of and indisputably relates to the mesh that was manufactured in Bucks County, Pennsylvania, by Secant under the careful supervision of Ethicon." *Id.* at *562. Moreover, the other two prongs of the specific jurisdiction test were met because "Ethicon purposefully availed itself of the privilege of conducting business in the Commonwealth and because it would not be unfair to subject Ethicon to jurisdiction here given that it was already litigating the related claims brought by Pennsylvania Plaintiffs across the state line from New Jersey, where it is headquartered and incorporated." *Id.* at 563.

Specific jurisdiction in Pennsylvania was also examined in another medical device case, *Freeman Maurice Vaughan v. Olympus America, Inc.*, 208 A. 3d 66 (2019). The case involved protocols for use of a duodenoscope.

According to the complaint, the defendant redesigned the scope but did not update the reprocessing procedure and instructions so it could be used on multiple patients. Plaintiff alleged the scope used on Mrs. Vaughan during procedures at Carolinas Medical Center in Charlotte, North Carolina, was contaminated and she developed a multi-drug resistant infection which resulted in her death. Suit was instituted in Philadelphia. Defendant manufacturer Olympus Medical System Corp. ("OMSC") was a Japanese corporation which marketed its device in the United States and under FDA regulations designated Olympus Corporation of the Americas ("OCA") as its agent. Defendant OMSC allegedly remained directly involved with the dissemination of information in the United States about the device such as warnings, instructions and safety information. Defendants OCA and Olympus American Inc. ("OAI") were both New York corporations with principal places of business in Center Valley, Pennsylvania. The Superior Court reversed the trial court's dismissal of OMSC for lack of personal jurisdiction in Pennsylvania. The Superior Court relied upon concessions by OCA's Vice President that OCA was OMSC's agent for purposes of OMSC's statutory reporting requirements with the FDA, which extended to premarket notifications including submission of proposed directions for use. Therefore, the Superior Court concluded that the activity regarding the scope that occurred in Pennsylvania was sufficient to establish the minimum contacts required for specific jurisdiction. "Here, OMSC engaged in relevant acts together with OCA, an in-state company, and it is liable for OCA's FDA-related conduct in Pennsylvania." *Id.* at74. Furthermore, "[h]aving availed itself of doing business in this Commonwealth, specifically regarding the scope, the attendant burden of being subject to specific jurisdiction in Pennsylvania regarding the same could hardly be unfair, unreasonable, or even unexpected." *Id.* at 75.

The other defendants sought dismissal based on *forum non conveniens, See* Section 1.2 below.

Nees v. Anderson, 28 Pa. D.&C. 5th 539 (C.P. Phila. 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 into 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 contracts sufficient to satisfy the legal standards. During 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 1.2 below 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.

Common Pleas cases of interest are as follows:

1. *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.

2. *Shank v. Raval*, No. GD 11-18098, GD 11-22007, 2012 Pa. Dist. & Cnty. Dec. LEXIS 421 (C.P. Allegheny Dec. 27, 2012) (Friedman, J). Plaintiff brought suit in Allegheny County, Pennsylvania, although the medical care was rendered in Ohio, by Ohio entities. 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.

3. *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 a case where the cause of action arose in New Jersey. The argument was made that the suit in Philadelphia was proper because the new venue rule, Pa.R.Civ.P. 1006(a.1) could not eliminatejurisdiction 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.

4. *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.
>
> The court noted that Pennsylvania may exercise personal jurisdiction over non-residents if it comports with the state's long-arm statutes (42 Pa.C.S. §§ 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.

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 with 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 co-defendant 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.

1.2 Proper Venue

1.2.1 Traditional Rule

Prior to 2003, venue was governed by the Rules of Civil Procedure which applied to civil actions generally. As discussed below, beginning in 2003 special venue rules were created for medical professional liability actions. Those actions include claims against corporate entities, such as hospitals, as well as partnerships, unincorporated associations and similar entities, which fall within the category of "healthcare providers." The traditional rules were applied to matters where medical professionals are not involved, such as medical devices and prescription drug cases. In such instances, the case law applying the prior rules detailed below may be instructive. After a hiatus with respect

to traditional venue rules governing medical malpractice, the prior system treating medical malpractice cases like any others, has now been reinstated. See below.

Est. of Quigley v. Pottstown Hosp., LLC, 286 A.3d 1240 (Pa. Super. 2022) (Lazarus, J.). The Estate of Rita Quigley (Decedent), by its representative Edward Clemson, Executor (Plaintiff), appealed from the order of the Court of Common Pleas Philadelphia County sustaining the preliminary objections of Pottstown Hospital, LLC, Tower Health, and John Does 1-10 (collectively, Defendants) to Plaintiff's first amended complaint and transferring venue of the matter to Montgomery County. Because Defendant Tower Health's acts are more than sufficient to establish venue in Philadelphia County, we reverse and remand. Decedent was a resident of Chestnut Knoll, an assisted living facility located in Boyertown, Berks County, Pennsylvania. The decedent suffered from dementia and cognitive impairment. On October 28, 2020, Decedent was admitted to Pottstown Hospital. Pottstown Hospital is in Montgomery County, Pennsylvania, and is owned by Tower Health. Tower Health's registered office and principal place of business are located in West Reading, Berks County, Pennsylvania. On November 1, 2020, the Decedent was discharged and transported from Pottstown Hospital to PowerBack Rehabilitation Center, which is located in the Phoenixville area. Upon the Decedent's arrival at PowerBack, PowerBack's medical staff conducted a routine physical exam and discovered Decedent had significant injuries consistent with a sexual assault. Unable to admit Decedent based upon those injuries, PowerBack immediately transferred Decedent to Phoenixville Hospital, a facility also owned by Tower Health, where medical personnel performed a medical examination of Decedent and made notes about her physical condition. On July 23, 2021, Plaintiff filed a complaint against Defendant Tower Health in Philadelphia County, at 8835 Germantown Avenue, Philadelphia, alleging that the Decedent was raped and sexually assaulted while she was a patient at Pottstown Hospital. Bearing in mind that "each case rests on its own facts," *Purcell, supra* at 1286, we conclude that Tower Health regularly conducts business in Philadelphia County to establish venue. Specifically, Tower Health has the requisite quality and quantity of contacts with that county where it: (1) wholly and partially owns multiple Philadelphia properties, including an acute-care hospital, two urgent care facilities, and a children's hospital; (2) is the managing partner of an LLC that owns a Philadelphia children's hospital; (3) conducts medical billing of all of its subsidiary hospitals through a Philadelphia post office box; (4) actively asserts control and authority over its subsidiaries by: procuring their insurance policies, providing them general counsel, conducting hospital CEO performance reviews and disciplinary actions, ratifying the hospitals' boards of directors, implementing acute-care hospitals' federal mandates, providing infrastructure support to hospitals, and making final decision on hospitals' large capital projects. *Cf. Battuello v. Camelback Ski Corp.*, 409 Pa. Super. 642, 598 A.2d 1027 (Pa. Super. 1991) (corporate defendant's single act of soliciting business in Philadelphia not enough to confer venue). Here, the evidence demonstrates that Tower Health, a parent corporation and named defendant, regularly conducts business in Philadelphia County for purposes of establishing venue in Plaintiff's chosen forum. Accordingly, we conclude that the trial court abused its discretion when it granted Defendants' preliminary objections and transferred the action from Philadelphia County to Montgomery County. Order reversed. Case remanded. Venue of matter transferred to Philadelphia County. Jurisdiction relinquished.

- Hospital sued because of a rape.
- Case filed in Philadelphia County but was transferred to suburban county.
- Tower Health regularly conducts business in Philadelphia County, which establishes venues.
- Tower Health owned the hospital in question, and it owns multiple Philadelphia properties.
- It asserts control and authority over subsidiaries.
- The evidence demonstrates that Tower Health, a parent corporation and named defendant, regularly conducts business in Philadelphia County for purposes of establishing venue in plaintiff’s chosen forum.
- The trial court abused its discretion when it granted defendant’s preliminary objections and transferred the action from Philadelphia County to Montgomery County.
- Order reversed and matter transferred back to Philadelphia County.

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 decisions 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's 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.

It was asserted with respect to defendant Langhorne Physician Services sufficient contacts with Philadelphia existed as follows:

> (1) Langhorne Physicians Services receives 20% of its gross revenue from Philadelphia third-party payers;
>
> (2) Philadelphia residents account for 3% of its gross revenue;
>
> (3) Langhorne has used a Philadelphia recruiting agency to hire new physicians.

None of these were sufficient under the ruling of the court. In so ruling, the court places heavy reliance on *Purcell v. Bryn Mawr Hosp.,* 579 A.2d 1282 (Pa. 1990). 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) (Montemuro, S.J.), 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 651-652.

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* were 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 the 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 conducting 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, supra,* 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.*

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 no more "than aid or enhance a main purpose and must be deemed collateral and incidental." *Krosnowski, supra,* at 139. Advertisements in the Philadelphia phonebook and newspaper failed to establish venue in Philadelphia County and do not amount to conducting business there. *Id.* at150.

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 decided under Pa.R.Civ.P. 1006, and not the new rule. *Compare* Section 1.2.2 below. 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 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.

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 a 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, that is insufficient to establish venue. Vague assertions that one or two doctors in a particular practice that is owned by Abington Hospital having offices in Philadelphia are not sufficient to permit that case to proceed in Philadelphia since 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.

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 found 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 sued. There was no contact with Philadelphia County alleged, other than the fact that the victim received medical treatment there.

1.2.2 Rule 1006(a.1) Medical Professional Liability Actions

Pennsylvania Rule of Civil Procedure addressing medical malpractice cases, 1006.1(a.1) has been repealed by the Pennsylvania Supreme Court.

The Court did agree, however, to look at the rule change once again on January 1, 2025, and study it until July 1, 2025. The committee studying same will submit its analysis to determine any further procedural revisions.

The new rule, in its entirety, is as follows:

Rule 1006. Venue. Change of Venue.

(a) General Rule. Except as otherwise provided by subdivisions **[(a.1), (b),] (b)** and **(c)** of this rule, an action against an individual may be brought in and only in a county **[in which] where**

[(1) the individual may be served or in which the cause of action arose or where a transaction or occurrence took place out of which the cause of action arose or in any other county authorized by law, or]

(1) the individual may be served;

(2) the cause of action arose;

(3) a transaction or occurrence took place out of which the cause of action arose;

[Note:For a definition of transaction or occurrence, see Craig v. W. J. Thiele & Sons, Inc., 149 A.2d 35 (Pa. 1959).]

(4) venue is authorized by law; or

[(2)](5) the property or a part of the property, which is the subject matter of the action, is located provided that equitable relief is sought with respect to the property.

[(a.1) Except as otherwise provided by subdivision (c), a medical professional liability action may be brought against a health care provider for a medical professional liability claim only in a county in which the cause of action arose. This provision does not apply to a cause of action that arises outside the Commonwealth.

Note: See Section 5101.1(c) of the Judicial Code, 42 Pa.C.S. § 5101.1(c), for the definitions of ''health care provider,'' ''medical professional liability action,'' and ''medical professional liability claim.''']

(b) Venue Designated by Rule. Actions against the following defendants, except as otherwise provided in subdivision (c), may be brought in and only in the counties designated by the following rules: political subdivisions, Rule 2103; partnerships, Rule 2130; unincorporated associations, Rule 2156; corporations and similar entities, Rule 2179. 2

[Note: Partnerships, unincorporated associations, and corporations and similar entities are subject to subdivision (a.1) governing venue in medical professional liability actions. See Rules 2130, 2156 and 2179.

Subdivision (a.1) is a venue rule and does not create jurisdiction in Pennsylvania over a foreign cause of action where jurisdiction does not otherwise exist.]

(c)[(1) Except as otherwise provided by subdivision (c)(2), an] Joint and Several Liability Actions. An action to enforce a joint or joint and several liability against two or more defendants, except actions in which the Commonwealth is a party defendant, may be brought against all defendants in any county in which the venue may be laid against any one of the defendants under the general rules of subdivisions (a) or (b).

[(2) If 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). This provision does not apply to a cause of action that arises outside the Commonwealth.]

(d) Transfer of Venue.

(1) For the convenience of parties and witnesses, the court upon petition of any party may transfer an action to the appropriate court of any other county where the action could originally have been brought.

(2) **[Where] If,** upon petition and hearing **[thereon]**, the court finds that a fair and impartial trial cannot be held in the county for reasons stated of record, the court may order that the action be transferred. The order changing venue shall be certified **[forthwith]** to the Supreme Court, which shall designate the county to which the case is to be transferred.

[Note:For the recusal of the judge for interest or prejudice, see Rule 2.11 of the Code of Judicial Conduct.]

(3) It shall be the duty of the prothonotary of the court in which the action is pending to forward to the prothonotary of the county to which the action is transferred, certified copies of the docket entries, process, pleadings, depositions, and other papers filed in the action. The costs and fees of the petition for transfer and the removal of the 3 records shall be paid by the petitioner in the first instance to be taxable as costs in the case.

(e) Improper Venue to be Raised by Preliminary Objection. Improper venue shall be raised by preliminary objection and if not so raised shall be waived. If a preliminary objection to venue is sustained, and there is a county of proper venue within the State, the action shall not be dismissed but shall be transferred to the appropriate court of that county. The costs and fees for transfer and removal of the record shall be paid by the plaintiff.

(f)**[(1) Except as provided by subdivision (f)(2), if] Multiple Causes of Action. If** the plaintiff states more than one cause of action against the same defendant in the complaint pursuant to Rule 1020(a), the action may be brought in any county in which any one of the individual causes of action might have been brought.

[(2) Except as otherwise provided by subdivision (c), if one or more of the causes of action stated against the same defendant is a medical professional liability claim, the action shall be brought in a county required by subdivision (a.1).]

(g) The Civil Procedural Rules Committee shall reexamine the 2022 rule amendments two years after their effective date.

Comment: For a definition of transaction or occurrence, see Craig v. W. J. Thiele & Sons, Inc., 149 A.2d 35 (Pa. 1959).

For the recusal of the judge for interest or prejudice under subdivision (d)(2), see Rule 2.11 of the Code of Judicial Conduct.

[EXPLANATORY COMMENT—1982

The revision of subdivision (d) of Venue Rule 1006 is made necessary by the repeal by the Judiciary Act Repealer Act (JARA) of several Acts of Assembly providing for a change of venue in civil actions for inability to obtain a fair and impartial trial because of interest or prejudice. The acts were repealed by JARA as of June 27, 1978, and they were not re-enacted as part of the Judicial Code. However, they remained in force under the "fail-safe provision" of Section 3(b) of JARA, 42 P.S. § 20003(b), until such time as general rules governing the subject were promulgated.

Among the acts repealed were the following:

(5) The Act of March 30, 1875, as amended, 12 P.S. § 111 et seq., provided for change of venue on the general ground that a fair and impartial trial cannot be held in the county. It also contained the following specific grounds: (1) whenever the judge is personally interested in the case, (2) whenever title under which the parties claim has been derived from or through the judge, (3) whenever a relative of the judge is a party or is interested in the case, unless the judge so interested shall select another judge, not so related, to hear the case, (4) whenever the county or municipality or an official thereof is a party and it shall appear that local prejudice exists so that a fair trial cannot be had in such county, (5) whenever a large number of the inhabitants of the county have an interest in the question adverse to the applicant and it shall appear to the court that he cannot have a fair and impartial trial, (6) whenever it shall appear that any party has undue influence over the minds of the inhabitants or that they are prejudiced against the applicant so that a fair and impartial trial cannot be had, and (7) whenever any plea of land has been tried by two juries which have disagreed and have been discharged without rendering a verdict.

1. The Act of April 14, 1834, 15 P.S. § 4184, provided that in any action by or against a canal or a railroad company, the case shall be removed upon affidavit of the applicant that the removal is not made for the purpose of delay but because he firmly believes a fair and impartial trial cannot be held in a county through which the canal or railroad may pass.

2. The Act of May 22, 1878, § 117, provided that whenever an action to recover the purchase price of realty is brought in a county other than that in which the real estate is located, the defendants may obtain a change of venue upon filing an affidavit that the action involves an adjudication of the title, boundaries, location, condition, or value of such real estate.

Rule 1006(d)(2) provides for a change of venue "where, upon petition and hearing thereon, the court finds that a fair and impartial trial cannot be held in the county for the reasons stated of record." This provision follows Rule of Criminal Procedure 312(a), which provides for certification of an order changing venue to the Supreme Court, which shall designate the transferee county.

The disqualification of a judge "in a proceeding in which his impartiality might reasonably be questioned" is governed by Canon 3C of the Code of Judicial Conduct. A note which cross-refers to the Code is added to new subdivision (d)(2).]

[EXPLANATORY COMMENT--JAN. 27, 2003

Act No. 127 of 2002 amended the Judicial Code by adding new Section 5101.1 providing for venue in medical professional liability actions. Section 5101.1(b) provides

> **(b) General rule.--Notwithstanding any other provision to the contrary, a medical professional liability action may be brought against a health care provider for a medical professional liability claim only in the county in which the cause of action arose.**

This provision has been incorporated into Rule of Civil Procedure 1006 governing venue as new subdivision (a.1). The new subdivision uses the terminology of the legislation. "Medical professional liability action," "health care provider" and "medical professional liability claim" are terms defined by Section 5101.1(c) of the Code.

Joint and Several Liability

Under new subdivision (c)(2) of Rule 1006, an action to enforce a joint and several liability against two or more health care providers may be brought in any county in which venue may be laid against at least one of the health care providers under subdivision (a.1). Therefore, an action to enforce a joint and several liability against Health Care Provider A that provided treatment in County 1 and against Health Care Provider B that provided treatment in County 2 may be brought in either County 1 or County 2.

However, subdivision (c)(2) does not allow an action to enforce a joint and several liability to be brought against a health care provider in a county in which venue may be laid against a defendant that is not a health care provider. Therefore, an action to enforce a joint and several liability against

Health Care Provider A that provided treatment in County 1 and against a product manufacturer that does business in County 2 may be brought only in County 1.

Multiple Causes of Action

Subdivision (f) of Rule 1006 provides that where more than one cause of action is asserted against the same defendant pursuant to Rule 1020(a), venue as to one cause of action constitutes venue as to all causes of action. In an action in which there are asserted multiple causes of action but only one is a claim for medical professional liability, the application of this provision could frustrate Section 5101.1 and result in an action being brought in a county other than the county in which the cause of action for medical professional liability arose. New subdivision (f)(2) limits venue in such cases to the county required by new 6 subdivision (a.1), e.g., the county in which the cause of action for medical professional liability arose.

The new venue provision for a medical professional liability claim is to be made applicable not only to individual defendants (Rule 1006(a.1)) but also to partnerships (Rule 2130(a)), unincorporated associations (Rule 2156(a)) and corporations and similar entities (Rule 2179(a)).

[EXPLANATORY COMMENT--DEC. 16, 2003

See Explanatory Comment Preceding Pa.R.C.P. No. 1501.]

[EXPLANATORY COMMENT—2011

Currently, a lawsuit based on medical treatment furnished in another state cannot be brought in Pennsylvania even if the defendants have substantial contacts with the state whereas Pennsylvania defendants can be sued in any state in which they have at least minimum contacts. The amendment to this rule would eliminate this discrepancy.]

[EXPLANATORY COMMENT—2016

On January 8, 2014, the Supreme Court rescinded the then-existing provisions of the Code of Judicial Conduct effective July 1, 2014, and adopted new Canons 1 through 4 of the Code of Judicial Conduct of 2014, also effective July 1, 2014. See 44 Pa.B. 455 (January 25, 2014). At the direction of the Court, the Civil Procedural Rules Committee has identified and updated references to the Code of Judicial Conduct in the Rules of Civil Procedure to reflect these changes. Technical amendments to the Note to Rule 225 have also been made which do not affect practice and procedure.]

Rule 2130. Venue <u>in an Action Against a Partnership</u>.

(a) **<u>General Rule.</u>** Except as otherwise provided **[by Rule 1006(a.1) and]** by subdivision (c) of this rule, an action against a partnership may be brought in and only in a county where **[the partnership regularly conducts business, or in the county where the cause of action arose or in a county where a transaction or occurrence took place out of which the cause of action arose or in the county where the property or a part of the property which is the subject matter of the action is located provided that equitable relief is sought with respect to the property.]**

(1) **<u>the partnership regularly conducts business;</u>**

(2) **<u>the cause of action arose;</u>**

(3) **a transaction or occurrence took place out of which the cause <u>of action arose; or</u>**

(4) **the property or a part of the property, which is the subject <u>matter of the action, is located provided that equitable relief is sought with respect to the property.</u>**

[Note:Rule 1006(a.1) governs venue in actions for medical professional liability.]

(b) **Venue in Actions Against a Liquidator.** Except as otherwise provided by subdivision **(c)** of this rule, an action against a liquidator may be brought in and only in a county where **[the liquidator is liquidating the partnership business or in which the partnership last regularly conducted business, or in the county where the cause of action arose or in a county where a transaction or occurrence took place out of which the cause of action arose.]**

(1) **the liquidator is liquidating the partnership business;**

(2) **the partnership last regularly conducted business;**

(3) **the cause of action arose; or**

(4) **a transaction or occurrence took place out of which the cause of action arose.**

This rule shall not apply to an action against a liquidator deriving authority under the laws of the United States.

(c) **Exception.** Subdivisions (a) and (b) of this rule do not restrict or affect the venue of an action

(1) against a partnership commenced by or for the attachment, seizure, garnishment, sequestration**,** or condemnation of real or personal property**;** or

(2) **[an action]** for the recovery of the possession of or the determination of the title to real or personal property.

(d) **The Civil Procedural Rules Committee shall reexamine the 2022 rule amendments two years after their effective date.**

[EXPLANATORY COMMENT—2003

Act No. 127 of 2002 amended the Judicial Code by adding new Section 5101.1 providing for venue in medical professional liability actions. Section 5101.1(b) provides

> **(b) General rule.--Notwithstanding any other provision to the contrary, a medical professional liability action may be brought against a health care provider for a medical professional liability claim only in the county in which the cause of action arose.**

This provision has been incorporated into Rule of Civil Procedure 1006 governing venue as new subdivision (a.1). The new subdivision uses the terminology of the legislation. "Medical professiona liability action," "health care provider" and "medical professional liability claim" are terms defined by Section 5101.1(c) ofthe Code.

Joint and Several Liability

Under new subdivision (c)(2) of Rule 1006, an action to enforce a joint and several liability against two or more health care providers may be brought in any county in which venue may be laid against at least one of the health care providers under subdivision (a.1). Therefore, an action to enforce a joint and several liability against Health Care Provider A that provided treatment in County 1 and against Health Care Provider B that provided treatment in County 2 may be brought in either County 1 or County 2. However, subdivision (c)(2) does not allow an action to enforce a joint and several liability tobe brought against a health care provider in a county in which venue may be laid against a defendant that is not a health care provider. Therefore, an action to enforce a joint and several

liability against Health Care Provider A that provided treatment in County 1 and against a product manufacturer that does business in County 2 may be brought only in County 1.
Multiple Causes of Action

Subdivision (f) of Rule 1006 provides that where more than one cause of action is asserted against the same defendant pursuant to Rule 1020(a), venue as to one cause of action constitutes venue as to all causes of action. In an action in which there are asserted multiple causes of action but only one is a claim for medical professional liability, the application of this provision could frustrate Section 5101.1 and result in an action being brought in a county other than the county in which the cause of action for medical professional liability arose. New subdivision (f)(2) limits venue in such cases to the county required by new subdivision (a.1), e.g., the county in which the cause of action for medical professional liability arose.

The new venue provision for a medical professional liability claim is to be made applicable not only to individual defendants (Rule 1006(a.1)) but also to partnerships (Rule 2130(a)), unincorporated associations (Rule 2156(a)) and corporations and similar entities (Rule 2179(a)).]
Rule 2156. Venue in an Action Against an Unincorporated Association.

(a) **General Rule.** Except as otherwise provided **[by Rule 1006(a.1) and]** by subdivision (b) of this rule, an action against an association may be brought in and only in a county where **[the association regularly conducts business or any association activity, or in the county where the cause of action arose or in a county where a transaction or occurrence took place out of which the cause of action arose or in the county where the property or a part of the property which is the subject matter of the action is located provided that equitable relief is sought with respect to the property.]**

(1) **the association regularly conducts business or any association activity;**

(2) **the cause of action arose;**

(3) **a transaction or occurrence took place out of which the cause of action arose; or**

(4) **the property or a part of the property, which is the subject matter of the action, is located provided that equitable relief is sought with respect to the property.**

[Note: Rule 1006(a.1) governs venue in actions for medical professional liability.]

(b) **Exception.** Subdivision (a) of this rule shall not restrict or affect the venue of an action

(1) against an association commenced by or for the attachment, seizure, garnishment, sequestration, or condemnation of real or personal property; or

(2) **[an action]** for the recovery of the possession of or the determination of the title to real or personal property.

(c) **The Civil Procedural Rules Committee shall reexamine the 2022 rule amendments two years after their effective date.**

[EXPLANATORY COMMENT—2003

Act No. 127 of 2002 amended the Judicial Code by adding new Section 5101.1 providing for venue in medical professional liability actions. Section 5101.1(b) provides

> **(b) General rule.--Notwithstanding any other provision to the contrary, a medical professional liability action may be brought against a health care provider for a medical professional liability claim only in the county in which the cause of action arose.**

This provision has been incorporated into Rule of Civil Procedure 1006 governing venue as new subdivision (a.1). The new subdivision uses the terminology of the legislation. "Medical professional liability action," "health care provider" and "medical professional liability claim" are terms defined by Section 5101.1(c) of the Code.

Joint and Several Liability

Under new subdivision (c)(2) of Rule 1006, an action to enforce a joint and several liability against two or more health care providers may be brought in any county in which venue may be laid against at least one of the health care providers under subdivision (a.1). Therefore, an action to enforce a joint and several liability against Health Care Provider A that provided treatment in County 1 and against Health Care Provider B that provided treatment in County 2 may be brought in either County 1 or County 2.

However, subdivision (c)(2) does not allow an action to enforce a joint and several liability to be brought against a health care provider in a county in which venue may be laid against a defendant that is not a health care provider. Therefore, an action to enforce a joint and several liability against Health Care Provider A that provided treatment in County 1 and against a product manufacturer that does business in County 2 may be brought only in County 1.

Multiple Causes of Action

Subdivision (f) of Rule 1006 provides that where more than one cause of action is asserted against the same defendant pursuant to Rule 1020(a), venue as to one cause of action constitutes venue as to all causes of action. In an action in which there are asserted multiple causes of action but only one is a claim for medical professional liability, the application of this provision could frustrate Section 5101.1 and result in an action being brought in a county other than the county in which the cause of action for medical professional liability arose. New subdivision (f)(2) limits venue in such cases to the county required by new subdivision (a.1), e.g., the county in which the cause of action for medical professional liability arose.

The new venue provision for a medical professional liability claim is to be made applicable not only to individual defendants (Rule 1006(a.1)) but also to partnerships (Rule 2130(a)), unincorporated associations (Rule 2156(a)) and corporations and similar entities (Rule 2179(a)).]

Rule 2179. Venue <u>in an Action Against a Corporation or Similar Entity</u>.

(a) <u>**General Rule.**</u> Except as otherwise provided by an Act of Assembly **[, by Rule 1006(a.1)]** or by subdivision (b) of this rule, a personal action against a corporation or similar entity may be brought in and only in <u>**a county where**</u>

(1) **[the county where its]** <u>**the**</u> registered office or principal place of business <u>**of the corporation or similar entity**</u> is located;

(2) **[a county where it]** <u>**the corporation or similar entity**</u> regularly conducts business;

(3) **[the county where]** the cause of action arose;

(4) **[a county where]** a transaction or occurrence took place out of which the cause of action arose**[,]**; or

(5) **[a county where]** the property or a part of the property**,** which isthe subject matter of the action**,** is located provided that equitable relief is sought with respect to the property.

[Note: Rule 1006(a.1) governs venue in actions for medical professional liability.]

(b) **Venue in Actions on an Insurance Policy.** An action upon a policy of insurance against an insurance company, association or exchange, either incorporated or organized in Pennsylvania or doing business in this Commonwealth, may be brought **in a county**

(1) **[in a county]** designated in **[Subdivision]** **subdivision** (a) of this rule; **[or]**

(2) **[in the county]** where the insured property is located; or

(3) **[in the county]** where the plaintiff resides, in actions upon policies of life, accident, health, disability, and **[livestock]** **livestock** insurance or fraternal benefit certificates.

(c) **The Civil Procedural Rules Committee shall reexamine the 2022 rule amendments two years after their effective date.**

[EXPLANATORY COMMENT—2000

The Supreme Court of Pennsylvania has amended the following rules of civil procedure: Rule 76 which contains a definition of the term "political subdivision", Rules 2126, 2151 and 2176 which provide definitions governing associations as parties and Rule 2179(a)(2) which governs venue when a corporation or similar entity is a party to an action.

Political Subdivision

The rules of civil procedure have heretofore made no provision for a municipal authority as a party. The definition of the term "political subdivision" as set forth in Definition Rule 76 has now been amended to include the phrase "municipal or other local authority". The phrase "municipal or other local authority" is derived from Section 102 of the Judicial Code and Section 101 of Title 2 of the Consolidated Statutes relating to Administrative Law and Procedure.

The primary effect of the amendment is to bring a municipal or other local authority within the chapter of rules governing the Commonwealth and Political Subdivisions as Parties and subject an authority to three rules. Under Rule 2102(b) governing the style of action, an action will be brought by or against an authority "in its name." Rule 2103(b) will limit venue to the county in which the political subdivision is located unless the Commonwealth is the plaintiff or an Act of Assembly provides otherwise. Service upon an authority will be made pursuant to subdivision (b) of Rule 422 governing service upon a political subdivision.

It is recognized that a municipal or other local authority may perform a "sovereign or governmental" function, a "business or proprietary" function or a combination of both. It is useful, however, to have a unified practice which applies to all such entities. It is therefore appropriate that municipal or other local authorities be made subject to the rules governing political subdivisions in view of their performance of sovereign or governmental functions.

The characterization of a municipal or other local authority as a political subdivision is a procedural device only. As the note to the definition states, "he definition of the term 'political subdivision' in this rule has no bearing upon whether a particular entity is or is not a political subdivision for substantive matters."

Partnerships as Parties

The amendment to Rule 2176 defining the term "partnership" continues to provide that "partnership means a general or limited partnership" and adds new language: "whether it is also a registered limited liability partnership or electing partnership". The reference to a registered limited liability partnership and an electing partnership is derived from Section 8311(b) of the Associations Code, "Partnership defined".

The amendment excludes from the definition "limited liability company, unincorporated association, joint stock company or similar association". The reference to a limited liability company is new and takes into account Act No. 126 of 1994 which amended Title 15 of the Consolidated

Statutes, the Associations Code, by adding Chapter 89 relating to limited liability companies. Although excluded here from the definition of partnership, the limited liability company is included in the revised definition of "corporation or similar entity" found in Rule 2176.

As revised, the exclusionary language of the definition no longer contains the terms "partnership association and registered partnership" which are obsolete.

Unincorporated Associations as Parties

The term "association" as used in Rule 2151 et seq. is not the broad term found in the "Associations Code". Rather, it has the limited meaning set forth in Rule 2151. The basic definition continues unchanged: "an unincorporated association conducting any business or engaging in any activity of any nature whether for profit or otherwise under a common name...." However, the definition excludes certain types of "associations" as used in the broader sense of that term. Whereas the former rule excluded from the definition the catalog of "an incorporated association, general partnership, limited partnership, registered partnership, partnership association, joint stock company or similar association", the amended definition simply states that "unincorporated association" does not include "a partnership as defined in Rule 2126, or a corporation or similar entity as defined in Rule 2176."

Corporations or Similar Entities as Parties

Rule 2176 is revised in two respects. First, the term "executive officer" is put in its rightful place alphabetically in the list of definitions, but it is not otherwise changed. Second, the term "corporation or similar entity" is revised to include the terms "limited liability company, professional association and business trust" and to delete as obsolete the terms "registered partnership", "Massachusetts Trust" and "partnership association limited".

The addition of "business trust" includes within the definition of corporation or similar entity a "trust subject to Chapter 95 (relating to business trusts)." The addition of "professional association includes a professional association as defined in Section 9302 of the Associations Code, i.e., "a professional association organized under the Act of August 7, 1961 (P.L. 941, No. 416), known as the Professional Association Act."

The addition of a "limited liability company" to the definition is in accord with the Source Note to Section 8906 of the Associations Code which states:

> **Notwithstanding the policy of Chapter 89 that a limited liability company is a form of partnership entity, for purposes of the Pennsylvania Rules of Civil Procedure a limited liability company will probably be deemed a "corporation or similar entity" under Pa.R.C.P. 2176, rather than a "partnership" under Pa.R.C.P. 2126 or an "association" under Pa.R.C.P. 2151.**

The amendment to Rule 2179(a)(2) governing venue when a corporation or similar entity is a party to an action simply deletes a note containing an obsolete cross-reference.]

[EXPLANATORY COMMENT—2003

Act No. 127 of 2002 amended the Judicial Code by adding new Section 5101.1 providing for venue in medical professional liability actions. Section 5101.1(b) provides

> **(b) General rule. --Notwithstanding any other provision to the contrary, a medical professional liability action may be brought against a health care provider for a medical professional liability claim only in the county in which the cause of action arose.**

This provision has been incorporated into Rule of Civil Procedure 1006 governing venue as new subdivision (a.1). The new subdivision uses the terminology of the legislation. "Medical professional

liability action," "health care provider" and "medical professional liability claim" are terms defined by Section 5101.1(c) of the Code.

Joint and Several Liability

Under new subdivision (c)(2) of Rule 1006, an action to enforce a joint and several liability against two or more health care providers may be brought in any county in which venue may be laid against at least one of the health care providers under subdivision (a.1). Therefore, an action to enforce a joint and several liability against Health Care Provider A that provided treatment in County 1 and against
Health Care Provider B that provided treatment in County 2 may be brought in either County 1 or County 2.

However, subdivision (c)(2) does not allow an action to enforce a joint and several liability to be brought against a health care provider in a county in which venue may be laid against a defendant that is not a health care provider. Therefore, an action to enforce a joint and several liability against Health Care Provider A that provided treatment in County 1 and against a product manufacturer that does business in County 2 may be brought only in County 1.

Multiple Causes of Action

Subdivision (f) of Rule 1006 provides that where more than one cause of action is asserted against the same defendant pursuant to Rule 1020(a), venue as to one cause of action constitutes venue as to all causes of action. In an action in which there are asserted multiple causes of action but only one is a claim for medical professional liability, the application of this provision could frustrate Section 5101.1 and result in an action being brought in a county other than the county in which the cause of action for medical professional liability arose. New subdivision (f)(2) limits venue in such cases to the county required by new subdivision (a.1), e.g., the county in which the cause of action for medical professional liability arose.

The new venue provision for a medical professional liability claim is to be made applicable not only to individual defendants (Rule 1006(a.1)) but also to partnerships (Rule 2130(a)), unincorporated associations (Rule 2156(a)) and corporations and similar entities (Rule 2179(a)).]

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 New Release describes as aimed at eliminating "forum shopping", *id.*, and the certificate of merit rule discussed in Chapter 26.6.1.

Updated statistics regarding 2018 case filings as compiled by the Department of Research and Statistics may be found on the website for the Unified Judicial System of Pennsylvania, at http://www.pacourts.us/news- and-statistics/research-and-statistics/medical-malpractice-statistics. The number of case filings statewide in 2018 was down 42.1% from the 2000-2002 average and filings in Philadelphia were down 65.4%. *id.* (The Unified Judicial System of Pennsylvania, "Medical Malpractice Statistics: Case Filings"). In jury cases tried to verdict statewide, defense verdicts occurred in 83% of the cases. *Id*. (The Unified Judicial System of Pennsylvania, "Medical Malpractice Statistics: Jury Verdicts") (2018).

Based upon the data compiled by the Supreme Court, the Civil Procedural Rules Committee proposed that Rule 1006 be amended to rescind subdivision (a.1), 48 Pa.B. 7744, Proposed Amendment of Pa.R.Civ.P. Nos. 1006, 2130, 2156 and 2179, explaining that "[t]he current rule provides special treatment of a particular class of defendants, which no longer appears warranted …. The proposed recission of subdivision (a.1) is intended to restore fairness to the procedure for determining venue regardless of the type of defendant." *Id.*, ExplanatoryComment.

In one of the first cases under the now rescinded statute and rule, 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 under 42 Pa.C.S. § 5101.1 is unconstitutional since the legislature is not permitted.to act regarding venue. *Id.* at fn. 3. However, the court relied upon the new Pa.R.Civ.P. 152, which suggests that the 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.

In *Olshan v. Tenet Health Sys. City Ave., LLC*, 849 A.2d 1214 (Pa. Super. 2004), *appeal denied,* 581 Pa. 692, the new venue rules were applied in a case involving a mammogram which 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 "medical professional liability claim" 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," that is where the care was furnished. *Olshan v. Tenet Health Sys. City Ave., LLC,* 849 A.2d 1214, 1216 (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 Count. Likewise, 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, would be an act of the Philadelphia hospital as healthcare provider but would still not create venue in Philadelphia.*Id.*

A surgical procedure in New Jersey resulted in a lawsuit in Northampton County, Pennsylvania, in *Searles v. Estrada*, 856 A.2d 85 (Pa. Super. 2004), *appeal denied*, 582 Pa. 701 (2005). Plaintiffs resided in Northampton County. The surgical procedure from which the medical professional liability action arose occurred at Warren Hospital in Phillipsburg, New Jersey. 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 the care and treatment took place in New Jersey, no county in Pennsylvania had venue. The venue rules permit a trial court to dismiss a medical professional liability action when the cause of action arose outside of Pennsylvania. *Id.* 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. The court expressed an understanding of the fusion between the concept of jurisdiction and venue. When a trial court cannot transfer a case, the only alternative is dismissal since both jurisdiction and venue must exist simultaneously. *See also* Section 1.1 above.

Venue was limited to the location of the alleged negligent care by a court decision 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). The decision turned on the question of where the cause of action arose. Pennsylvania courts have defined "cause of action" to mean the negligent act or omission, as opposed to the injury which flows from the tortious conduct, in cases involving claims based upon negligence. *Id.* at 896. The alleged negligent act of prescribing the drug Prednisone occurred in Montour County, and that is where the venue lies regardless of the county where the allergic reaction 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.2d at 895 n. 2.

In another similar case, 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 court held that 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, and therefore the cause of action, the failure to provide the requisite care, arose in LehighCounty.

In *Forrester v. Hanson*, 901 A.2d 548 (Pa. Super. 2006), the court held that, Pa.R.Civ.P. 1006(a.1) did not apply to the situation where a motor vehicle defendant attempted to join motorist plaintiff's treating physician and 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 banc*) for the proposition that § 5101.1, Statutory Venue, is unconstitutional because the legislature is not permitted to act "in regard to venue," but the court declined to decide the case on that basis. *Forrester*, 901 A.2d at 552-553 n.3. Instead, Judge Gantman, writing for the panel, noted that the joinder complaint does not assert a medical professional liability claim directly against the treating physician, but rather sought judgment in favor of the motor vehicle defendants or a jury determination regarding the amount of the physician's liability to the plaintiff in the event of a verdict against defendants. Therefore, the venue rules governing medical malpractice claims did not apply. 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 Montgomery County Court of Common Pleas was reversed. The proceedings were remanded to the Philadelphia County Court of Common for further proceedings.

In *Cohen v. Furin*, 946 A.2d 125 (Pa. Super. 2008), a child died shortly after birth in Montgomery County where prenatal 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 Women'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 the 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 the 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 the 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 if it occurred here." *Wentzel*, 166 A.3d at 1269.

The action arose from, *inter alia*, the allegedly negligent failure of Philadelphia's St. Christopher's Hospital for Children ("SCHC") and its resident cardiologist, Dr. Lindsay Rogers, to timely transmit her diagnosis and treatment plan for an infant, Maximor, based on the cardiologist's 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. As 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.

1.2.3 Common Pleas Decisions

Nees v. Anderson, 28 Pa. D.&C. 5th 539 (C.P. Phila. April 10, 2013) (Robinson, J.), concerned the death of 15-year-old Michael Fisher. At 4 years or 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. With respect to jurisdiction, the court found that Dr. Anderson had minimum contact sufficient to satisfy the legal standards. During 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. *See* discussion in Section 1.1 above.

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 Rule 1006(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 clams 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.

The necessity for the 2011 amendment is illustrated by *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 the 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. Similarly, in *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), the negligent tort occurred in New Jersey. Plaintiffs argued that, Pa.R.Civ.P. 1006(a.1) could not eliminate jurisdiction in Pennsylvania. The trial court observed, however, "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.

Riggio v. Katz, 64 Pa.D.&C. 4th (C.P. Phila. 2003), *aff'd*, 859 A.2d 844 (Pa. Super. 2004) (Table) involved defendant physicians in the health care center in Montgomery County who 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. Plaintiff's position that a cause of action arises where the injury occurred was rejected. "Cascading diagnoses relate back to the breach of the standard of care or there is no causation." *Id.* at 401. "The process of infection existed and proceeded at the time the infection allegedly went untreated. Therefore, the plaintiff's injury began to accrue at the time the defendants allegedly failed to prescribe the proper treatment." *Id.* 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.

Other cases of interest:

1. *Nelson v. Rosen, DDS, et al.*, 34 PLW 482, 2011 Phila Ct. Com. Pl. LEXIS 111, No. 3471 2010 (C.P. Phila. May 5, 2011) (Tereshko, J.). 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. Because the defendant dentist and dental clinic are not healthcare providers under Rule 1006(a.1) and 42 Pa.C.S. § 5101.1(c), the court held that venue was proper only in Montgomery County where the healthcare was rendered by defendants who were subsequent treaters of the plaintiff's infection.

2. *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 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.

3. *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.

4. *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 the venue was appropriate there.

1.2.4 Objections to Venue

Objections to venue must be brought by a preliminary objection or else they are waived. Pa.R.Civ.P. 1006(e). However, "[o]f the three grounds available to challenge venue, only improper venue may be raised by preliminary objections as provided by Rule 1006(e). *Forum non conveniens* and inability to hold a fair and impartial trial are raised by petition as provided by Rule 1006(d)(1) and (2)." Pa.R.Civ.P. 1028(a)(1), Note. *See* Section 1.3 below for a discussion of challenges based upon *forum non conveniens.*

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.

While a challenge to improper venue may be made by filing preliminary objections, if an issue of fact is raised by the preliminary objections, the court is required to take evidence on disputed facts. Pa.R.Civ.P. 1028(c)(2)("The court shall determine promptly all preliminary objections. If an issue of fact is raised, the court shall consider evidence by depositions or otherwise."). "In such a situation the court may not reach a determination based on its view of controverted facts but must resolve the dispute by receiving evidence thereon through interrogatories, depositions or an evidentiary hearing." *Delaware Valley Underwriting Agency, Inc. v. Williams and Sapp, Inc.*, 359 Pa. Super 368, 518 A.2d 1280, 1283 (Pa. Super. 1986) (citations and internal quotation marks omitted).

1.2.5 Retroactive Application to Rule 1006

One of the more disturbing aspects of the Supreme Court's action when it originally imposed Rule 1006, to apply only to medical malpractice cases, is that it was made retroactive to professional liability actions filed on or after January 1, 2002.

1.3 Forum Non Conveniens

A civil action may be transferred for the convenience of the parties and witnesses, upon petition of any party, to another county where the action could originally have been brought pursuant to Pa.R.Civ.P. 1006(d)(1). However, a plaintiff's choice of forum should not be disturbed except for weighty reasons, and the action will not be dismissed in any event unless an alternative forum is available to the plaintiff. *Rini v. New York Cent. R.R. Co.,* 240 A.2d 372, 373 (Pa. 1968). The issue depends upon the specific facts of each case and rests within the sound discretion of the trial court. *Id.* It is well-established that the trial court's decision on whether to transfer venue is not to be disturbed absent an abuse of its discretion. *See Purcell v. Bryn Mawr Hospital,* 525 Pa. 237, 579 A.2d 1282 (1990).

Petitions filed under Rule 1006(d)(1) are currently decided under the analysis set forth by the Supreme Court in *Cheeseman v. Lethal Exterminator, Inc.*, 701 A.2d 156 (Pa. 1997) (Cappy, J). *Cheeseman* was involved in a motor vehicle accident. The trial court was said to have abused its discretion in transferring an action from Philadelphia County to Bucks County. Venue was proper in Philadelphia because one of the joint defendants, Lethal Exterminator, is a corporation which regularly conducts business in Philadelphia, but the action originally could have been filed in Bucks because the cause of action arose there. 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. In making his decision to transfer the case, the trial judge heavily weighed the fact that the Cheesemans were not Philadelphia residents and that their case was imposing an extra matter on Philadelphia's already burdened court system.

On appeal before the Supreme Court, the *Cheeseman* case was consolidated with *Forman v. Rossman*, 672 A.2d 1341, 1343 (Pa. Super. 1996), a medical malpractice action. 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.* Because this action was filed prior to the Rule 1006(a.1) amendments, venue was proper in Philadelphia because some of the joint defendants regularly conducted business in Philadelphia.

Delaware Valley Medical Center argued that venue should be transferred to Bucks County because the alleged medical malpractice occurred in Bucks, and "all of the parties and the vast majority of perspective [sic] trial witnesses and sources of proof are located in Bucks." The Plaintiff asserted that Philadelphia was an equally convenient forum and was convenient for her because she worked in Philadelphia. As in *Cheeseman,* the trial judge emphasized that the Philadelphia courts were congested, that the Formans were not Philadelphia residents, and that the only connection the case had to Philadelphia was some of the defendant's conducted business in Philadelphia.

The Superior Court affirmed the trial court's transfer decision in both the *Cheeseman* and *Forman* cases. The Pennsylvania Supreme Court reversed. In its opinion, the Supreme Court observed that a policy had developed in the lower courts of according to court congestion great weight at the expense of the plaintiff losing his chosen forum. The Court pointed to 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), as causing confusion in the lower courts. Justice Cappy noted that the Court's decision in *Scola v. AC & S, Inc.* 657 A.2d 1234, 1241 (Pa. 1995), reversing *German v. AC & S, Inc.*, 635 A.2d 159 (Pa. Super. 1993) and overruling *Incollingo, supra,* was intended to rectify this policy. "We observed in *Scola* that the trial court's analysis therein failed to articulate a basis from which it could be concluded from the record that the defendants had demonstrated that trial in another county would provide easier access to witnesses or other sources of proof. Thus, with the defendants failing to sustain their burden, we ruled in *Scola* that the transfer of venue in these actions was an abuse of the trial court's discretion. While recognizing the desire of the trial court to clear its backlog, we admonished the lower courts in *Scola* that the plaintiffs' choice of forum is entitled to deference." *Cheeseman, supra*, at 160-161.

However, the *Cheeseman* court flagellated itself for unfortunate language in *Scola* borrowed from *Okkerse*, which had the effect of perpetuating the confusion. The confusion emanated from the fact that the *Okkerse* language implied that a defendant could justify transfer from the plaintiff's choice of forum either by showing the oppressiveness of the forum to the defendant out of proportion to the plaintiff's convenience, or in absence of that showing, by demonstrating the balance of the court's "private and public interest factors," weighed heavily in favor of transfer. The court noted that the language in question was borrowed from the federal diversity of citizenship cases, which have different considerations that are <u>not</u> necessarily identical to the concerns a trial court must assess in ruling on a Rule 1006(d)(1) petition asserting *forum non conveniens.* The convenience to the court is not mentioned in Rule 1006(d)(1) and is not an appropriate consideration for a Rule 1006(d)(1) inquiry. *Cheeseman, supra*, at 160- 161.

Dealing with all of this 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, then, 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. If the trial court located in the forum chosen by the plaintiff is permitted to consider its own backlog, the end result will almost always be the transfer of the litigation matter from the plaintiff's chosen forum, as occurred in the instant matters. Such a result frustrates this court's intent that the plaintiff's choice of forum should rarely be disturbed by the grant of a Rule 1006(d)(1) petition.

701 A.2d at 161-162.

The court emphasized 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 designated to harass the defendant, even at some inconvenience to 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.

Goodman by Goodman v. Pizzutillo, 682 A.2d 363 (Pa. Super. 1996), quoted the same problematic language in *Scola* and *Okkerse*, but the Superior Court in that case appears to have ultimately struck the proper balance. The Superior Court concluded that the court below did not fully consider all the facts on the record, and noted that while it was aware of the increased congestion in the Philadelphia courts,

> This factor alone should not be viewed as giving trial courts *carte blanche* authority to transfer any case which may be as conveniently litigated elsewhere. *See Rini v. New York Central Railroad Co.*, 429 Pa. 235, 240 A.2d 372 (1968) (Musmanno, J., dissenting) ("if case load is to determine availability of the courts to injured persons, then justice has become a commodity dependent on the size of the courthouse and the number of personnel therein rather than on the intrinsic merit of claims filed by litigants"); *Greenfeig v. Seven Springs Farm, Inc.*, 416 Pa. Super. 580, 611 A.2d 767 (1992) ("Although we certainly recognize the tremendous burden placed upon our courts by inadequate and unreasonable funding limitations, such circumstances do not provide the basis for a *forum non conveniens* transfer of a case.

Goodman, supra, at 369-370, *quoting Farley v. McDonnell Douglas Truck Services, Inc.*, 638 A.2d 1027, 1032 (Pa. Super. 1994).

The facts recited in the opinion indicate that 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 in Delaware 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, filed in Philadelphia County.

The du Pont Institute was dismissed from the action based on the lack of *in personam* jurisdiction in Philadelphia. The trial court transferred the case against the doctors to the state of Delaware on *forum non conveniens* grounds.*Goodman* demonstrated that one of the major issues which must be examined when *forum non conveniens* is raised 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 the 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 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 deposition 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.

Goodman, supra, at 369.

One of the first important post-*Cheeseman* cases was *Hoose v. Jefferson Home Health Care, Inc.*, 754 A.2d (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 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, supra, at 4.

Borger v. Murphy, 797 A.2d 309 (Pa. Super. 2002) (Hudock, J.). 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. It was concluded that the 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.

Cheeseman and *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(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 was 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. The *forum non conveniens* issue will also continue to arise in prescription drug and medical devices cases. *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 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.

Wright v. Aventis 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. *Wright* further noted the defendant pharmaceutical companies marketed vaccines and immune globulin products in Pennsylvania such that the people of Pennsylvania had an interest in the outcome, "particularly since [plaintiffs] aver that several of these companies make critical … marketing decision in the commonwealth." *Id.* at 551.

In accord is *Hunter v. Shire US, Inc.*, 992 A.2d 891 (Pa. Super. 2010), where the manufacturer of plaintiff's heart medication was in Chester County, Pennsylvania. This was a failure to warn cases in connection with increased risk of heart attack from the use of the drug. The patient was a resident of Georgia, 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. These 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.

Also applying *Wright's* dictates that the plaintiff's choice of forum should not be disturbed except for "weighty reasons" was *Freeman Maurice Vaughan v. Olympus America, Inc.*, 208 A.3d 66 (2019). The case involved protocols for use of a duodenoscope. According to the complaint, the defendant redesigned the scope but did not update the reprocessing procedure and instructions so it could be used on multiple patients. Plaintiff alleged the scope used on Mrs. Vaughan during procedures at Carolinas Medical Center in Charlotte, North Carolina, was contaminated and she developed multi-drug resistant infection which resulted in her death. The suit was instituted in Philadelphia. Defendant manufacturer Olympus Medical System Corp. ("OMSC") was a Japanese corporation which marketed its device in the United States and under FDA regulations designated Olympus Corporation of the Americas ("OCA") as its agent. Defendant OMSC allegedly remained directly involved with the dissemination of information in the United States about the device such as warnings, instructions, and safety information. If OMSC wanted or needed to disseminate information about changes to the reprocessing protocol, it would do so through OCA. Defendants OCA and Olympus America, Inc. ("OAI") were both New York corporations with principal places of business in Center Valley, Pennsylvania. The Superior Court reversed the trial court's dismissal of OMSC for lack of personal jurisdiction in Pennsylvania, as discussed in Section 1.1 above.

The other defendants sought dismissal based on *forum non conveniens*. The Superior Court determined that the lower court abused its discretion in moving the case to North Carolina. The Superior Court weighed the various private and public factors and determined that "[t]here is little doubt OCA and OAI conduct extensive operations in Pennsylvania, in relative proximity to Philadelphia … including regulatory compliance, marketing and distribution…" and "evidence critical to support Vaughan's claims will be found in Pennsylvania, where, as discussed, OCA acts as OMSC's agent for FDA purposes." *Id*. at 76-77. The court also noted that, as in *Wright*, the people of Pennsylvania had an interest in the case, because the Pennsylvania-based Olympus companies maintain robust sales and marketing departments in Pennsylvania.

Wright, supra, and *Vaughan, supra*, were relied upon in *McConnell v. B. Braun Medical, Inc.*, 221 A.3d 221 (Pa. Super. 2019) (Pellegrini, J.). The Appellant, Beonca Maria McConnell (McConnell), appealed the order of the Court of Common Pleas of Philadelphia County (trial court) dismissing her products liability suit against B. Braun Medical, Inc. (BMI) , a Pennsylvania corporation headquartered in Lehigh County; B. Braun Interventional Systems, Inc., a Delaware Corporation (BIS);and B. Braun Medical S.A.S., a French Corporation (B. Braun France) (collectively, the Braun Defendants), on the ground of *forum non conveniens.* The case arose from the implantation of a "VenaTech LP Vena Cava Filter" which took place in Michigan. Thereafter, while residing in Texas, McConnell underwent a CT scan that allegedly revealed that the filter had caused recoverable damages, requiring ongoing medical care and monitoring. McConnell argued that the trial court abused its discretion because the Braun Defendants failed to show that Pennsylvania is an inconvenient forum for her claims. The Superior Court agreed:

> Because the burden of establishing the factors of *forum non conveniens* lies with the Braun Defendants, it was up to them and not McConnell to show that Pennsylvania is less convenient than another available forum. The trial court could not assume facts that are not contained in the certified record or otherwise put the burden on McConnell to show that private and public factors support keeping this case in Pennsylvania. Nor could the trial court focus exclusively on this case's remoteness from Pennsylvania without weighing them against the relevant circumstances which link this case to Pennsylvania. If it does so, it is an abuse of discretion.

Id. at 229.

The trial court abused its discretion because it gave no weight to many relevant factors and too much weight to irrelevant ones. The Braun Defendants, as the parties moving for dismissal, did not carry their burden of showing why a trial in Pennsylvania would be inconvenient. *Id*. at 232, citing *Vaughan, supra*, 208 A.3d at 77 ("In sum, faced with private and public factors that clearly support Vaughan's choice to proceed in Philadelphia, we conclude there were not weighty reasons to disturb [plaintiff's] choice of forum.") A defendant must show that the plaintiff's chosen forum is inconvenient to the *defendant*. A defendant cannot merely assert that dismissal is warranted because the chosen forum is inconvenient to the plaintiff in some way. Thus, the Braun Defendants could not rely on potential inconveniences to McConnell as a basis for dismissal on the grounds of *forum non conveniens.* "As the plaintiff, McConnell has the burden of proof at trial as to causation and damages, making it her obligation to procure evidence to that effect. If McConnell is unable to elicit the evidence, she needs to prove her case, then it is a *benefit* to the Braun

Defendants, not an inconvenience." *McConnell, supra*, at 229. The Braun Defendants also contended that Philadelphia was an inconvenient forum because many of McConnell's claims hinged on evidence located in France. "However, for the purposes of *forum non conveniens* in this case, the French connection is a wash. The Braun Defendants do not suggest that McConnell must seek relief in a European court. The parties and the trial court agreed that McConnell should be able to file suit somewhere in the United States. This means that any domestic venue – whether in Pennsylvania, Texas or Michigan – would be equally remote from evidence of a design and manufacturing defect in France." *Id*. at 230. BMI and BIS both had corporate offices in Pennsylvania, so in terms of convenience for those defendants, Pennsylvania as a forum state was as good as any other. *Id. citing Wright*, 905 A.2d at 551 ("In fact, Philadelphia County, with its proximity to the relevant corporate offices of four appellees- defendants, appears to be quite a convenient jurisdiction for the trial of this case."). Nor was the fact that the law of Texas applied an impediment. "The trial court could not find that it would be inconvenient or undesirable for a Pennsylvania court to apply the law of another jurisdiction without evidence that the law of the two forums is materially different in some way or cumbersome for a judge in that forum to apply." *McConnell, supra*, at 221, *citing Wright*, 905 A.2d at 551 ("[T]here is no basis upon which to conclude that the law determined to be applicable is beyond the ken of a Philadelphia trial judge.").

Based upon the foregoing, the order of the trial court was vacated, and the case remanded. However, because the issue of transfer from Philadelphia County to Lehigh County was not before the Superior Court, the Braun Defendants' pending motion on the issue could be considered by the trial court on remand.

Other *forum non conveniens* decisions in the courts of common pleas:

(1) *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 involved 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 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.

(2) *Rodger v. Bethlehem Obstetrics*, 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 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.

(3) *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.

(4) *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, 93-93 (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, e.g. Grace Community, Inc. v. KPMG Peat Marwick, LLP*, 60 Pa.D.&C. 4th 513 (C.P. Phila. 2004), a nonmedical malpractice case.

1.3.1 Coordination of Actions

Although technically not a *forum non conveniens* issue, the coordination of actions in different counties is governed by Pa.R.Civ.P. 213.1, when actions pending in different counties involve a common question of law or fact or arise from the same transaction or occurrence. Any party may file a motion seeking an order of coordination and designating the location for the coordinated proceedings. 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 issues 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.