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Challenges of a Plaintiff's Choice of Venue Must Be Re-Examined

Paraphrasing Robert Kennedy, the long march to justice starts when reasonable people: (a) see the world for what it is; (b) recognize where injustices in the order of things lie; (c) have the courage to call out an injustice when it is identified; and (d) have the wherewithal to see necessary change through to fruition. There is a dire need for reasonable people in our state to join forces in order to rectify the patent injustice inherent in the laws governing how a plaintiff's choice of venue may be challenged by a defendant in civil litigation.

Under the current iteration of the law governing venue (Pa.R.C.P. 1006, as interpreted by *Zappala v. Brandolini Property Management*, 589 Pa. 516, 909 A.2d 1272 (Pa. 2006)), a plaintiff's choice of venue may only be challenged as being improperly laid by preliminary objection and, if it is not so challenged, or if it is challenged and the preliminary objections are overruled, venue may never be again raised by a defendant, regardless of what facts (or the absence of facts) are learned thereafter.

This system, in reality, gives a defendant no meaningful opportunity to challenge the propriety of a plaintiff's venue choice. By way of example, when a plaintiff artfully pleads that venue over a defendant domiciled in a different county exists in the plaintiff's chosen and favored jurisdiction — in the real world, often Philadelphia — by virtue of the mere allegation that an act of supposed negligence purportedly occurred at the hands of a claimed co-defendant in the plaintiff's preferred jurisdiction, the plaintiff's chosen venue is reduced to nothing more than a fait accompli.

Found in the circumstances described above, a suburban co-defendant's fate of being tried in Philadelphia is, maddeningly, sealed by operation of the current system for challenging the propriety of venue within the larger framework of our law.

When a suburban defendant's only way of defeating a plaintiff's choice of venue in Philadelphia is to have a plaintiff's purported claim against a separate co-defendant dismissed (thus, theoretically, severing the alleged factual link to Philadelphia) by preliminary objection, it is utterly impossible for a suburban defendant to actually challenge a plaintiff's venue choice.

Because the only way of defeating a plaintiff's cause of action against an alleged venue-conferring co-defendant at the embryonic preliminary objection stage of the litigation process is by demurrer, and because a demurrer requires the court to resolve the question of whether the challenged claim should be dismissed or not solely upon the basis of the pleadings (no testimony or other evidence outside of the complaint may be considered) and to accept as true all well-pleaded material allegations and any reasonable inferences therefrom, under the circumstances described above, there is no way for a defendant to defeat a plaintiff's venue choice by means of preliminary objection.

But, the system says, once the preliminary objection stage of the proceedings has come and gone, a defendant cannot again challenge venue at any other stage of the proceedings, even if, for instance, the alleged venue conferring a co-defendant is, at some later point, dismissed from the case (e.g., by summary judgment, nonsuit, jury verdict, etc.). A system that ensconces a plaintiff's venue choice behind ramparts, and then actively forbids the use of a metaphoric catapult by a defendant, is, in actuality, no system at all.

But hope still very much remains.

Through the fog that the current system generates, intellectually honest and reasonable people — ones who possess far more of both of those attributes, and (mercifully) more say-so than I, have already pointed out the flaws inherent in the current system.

Justice J. Michael Eakin, joined by Chief Justice Ronald D. Castille, authored a dissent in *Zappala* that reasoned that they would have either interpreted Rule 1006 to allow improper venue to be challenged beyond the preliminary objection stage of the proceedings or, if the words of Rule 1006 could not be interpreted to so permit, simply abrogate Rule 1006, as currently written, and replace it with a rule that did.

Applying Rule 1006 to the real world, the dissent in *Zappala* opined that: "The dilemma is that venue, assessed under the circumstances at the time for preliminary objections, was proper; venue, assessed under the changed circumstances, was not proper. The change in circumstances occurred only after the time for preliminary objections was past. ... Put another way, our rules seem to allow a party to manipulate venue by naming and preserving parties in a case until the time of preliminary objections is past. ... The majority's result forces

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a party to raise an invalid objection to venue — the defense here had no basis for an objection to venue within 20 days of the complaint — then it disallows the objection when it becomes legitimate. This is a Catch–22 that would make Joseph Heller proud."

There is something else. Lurking in the shadows of any consideration of the relative merits of our system for challenging the propriety of a plaintiff's venue choice, at least in the context of medical malpractice cases, is a seemingly forgotten but by no means irrelevant statutory and constitutional conundrum.

In 2002, the Pennsylvania Legislature enacted Act 127, which restricted venue in actions against health care providers to only the county in which the cause of action against that health care provider arose, without exception. In the case of *North-Central Pennsylvania Trial Lawyers Ass'n v. Weaver*, 827 A.2d 550 (Pa.Cmwlth., 2003), the plaintiff challenged the constitutionality of Act 127, claiming that the legislature had violated the separation of powers provisions of our Constitution by improperly passing a "procedural" court rule that was within the exclusive purview of our Supreme Court to enact.

In *Weaver*, the Commonwealth Court, sitting en banc and by a 5-2 vote, determined that Act 127, insofar as it purported to regulate venue, unconstitutionally encroached upon the exclusive purview of the Supreme Court, under Article V, Section 10(c) of the Pennsylvania Constitution, to promulgate "procedural" rules.

However, in a dissenting opinion authored by Judge Dan Pellegrini and joined by Judge Bonnie Brigance Leadbetter, those judges explained in detail why the *Weaver* majority's conclusion that the question of "venue" was "purely procedural" and not "substantive" was, in their view, simply wrong.

According to those judges, a "close relationship exists between venue, i.e., the right of a party sued to have the action brought where there is some contact, and the responsibility of the General Assembly to allocate the resources of the commonwealth to the various judicial districts, as well as its constitutional right to establish additional courts or divisions of existing courts and determine the jurisdiction of courts."

Neither party in *Weaver* sought allocatur (presumably because, while *Weaver* was pending, the Supreme Court had passed Rule 1006, and the constituency of our high court was, at the time that any appeal from the intermediate decision in *Weaver* would have been sought, the same as that which had just promulgated its own venue rule).

Ribinicky unquestionably stands for the proposition that the Supreme Court, at least at one time, believed that the legislature may constitutionally pass statutes that regulate venue.

On the other hand, our legislature has never repealed Act 127. I would suggest that our Supreme Court, following the logic of its earlier decision in *Ribinicky v. Yerex*, 549 Pa. 555, 701 A.2d 1348 (Pa. 1997), today, might disagree with the Commonwealth Court's conclusion that it is impermissible for our legislature to establish by statute rules with affect venue.

In *Ribinicky*, the Supreme Court considered the constitutionality of 42 Pa.C.S. §20043, which legislated venue restrictions in the context of claims against local agencies. As Justice Russell Nigro explained in his concurrence in *Ribinicky*: "The legislature enacted [42 Pa. C.S. §20043] in order to allow a municipality to defend itself in its home jurisdiction and the courts have recognized the importance of this principle."

I would argue that *Ribinicky* unquestionably stands for the proposition that the Supreme Court, at least at one time, believed that the legislature, indeed, may constitutionally pass statutes that regulate venue.

Bringing the discussion full circle, Nigro's concurrence in *Ribinicky*, interestingly, also supports the dissent in *Zappala's* reasoning that venue should be permitted to be challenged at any stage of the proceedings, not merely at the preliminary objection stage: "If joinder of the municipality is not meritorious then the municipality will be removed from the action. Once the municipality is no longer a party to the action," a party "may properly file a petition to transfer venue back to the original jurisdiction."

In attempting to limit the sting to plaintiffs of the holding in *Ribinicky*, the Supreme Court went out of its way to reassure plaintiffs that, if the attempt by a defendant to alter venue was based upon alleged facts against the municipality that proved to be "not meritorious," then, once the venue-conferring party (i.e., the municipality) was "no longer a party to the action," a plaintiff could, without any time limitation thereupon being articulated, "properly file a petition to transfer venue back" to the plaintiff's originally chosen venue.

I would suggest that what was good for the plaintiff-goose in *Ribnicky* should be good for the defendant-gander in all cases. It is imperative that justice — i.e., affording a meaningful opportunity to challenge a plaintiff's venue choice — be made available to defendant-litigants in this state. Otherwise, the ills inherent in the current system — the very ones that were articulated by the dissent in *Zappala* — will be permitted to fester, to the great detriment of the health of our system of justice as a whole. •