

# Will History Repeat Itself?

## SUPREME COURT OF PENNSYLVANIA CONSIDERS RESCISSION OF PIVOTAL MEDICAL MALPRACTICE VENUE RULE THAT HELPED RESOLVE THE STATE'S EARLIER MEDICAL MALPRACTICE CRISIS

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On December 22, 2018, the Pennsylvania Supreme Court Civil Procedural Rules Committee published a proposal to abrogate the current venue rule for medical malpractice cases;<sup>1</sup> the proposal requires a lawsuit to be filed in the county where the alleged malpractice occurred. The current rule was enacted in 2003 to address the severe medical liability insurance crisis ongoing at that time, which stemmed from a spike in medical malpractice verdicts and settlements, and led to a widespread inability for Pennsylvania healthcare providers to maintain liability insurance. The Pennsylvania Supreme Court Civil Procedural Rules Committee is eliciting feedback on the proposed venue rule change until February 22, 2019, motivating healthcare providers, nonprofit organizations, insurance businesses and patients in Pennsylvania to mobilize against the proposal and remind the high court why the current rule was instituted so that history does not repeat itself.

Per the current rule, a medical malpractice plaintiff in Pennsylvania may file suit only in a county where the alleged cause of action arose.<sup>2</sup> If multiple defendants who are located in different counties have been sued, then a plaintiff may bring suit in any county where at least one of the medical defendants may be sued.<sup>3</sup> Generally, with the exception of cases involving

multiple defendants in different counties, a doctor who practices in Bucks County can expect to defend before a Bucks County jury and a Lackawanna County long-term care facility can expect to defend itself before a Lackawanna County jury.

### **BEFORE AND AFTER THE 2003 MEDICAL MALPRACTICE VENUE RULE**

Before 2003, a medical malpractice plaintiff was able to sue a doctor, hospital or long-term care provider almost anywhere the defendant did business, lived or was physically present. Legal entities, such as healthcare facilities and practice groups, could be sued anywhere that the entity conducted business or had a registered office. For example, a hospital located in Montgomery County that maintained an administrative office in Philadelphia County could be sued in Philadelphia County. This meant that, if a plaintiff sued the Montgomery County hospital along with seven of its physicians and nurses, the plaintiff could rightfully bring suit in Philadelphia County, even if all of the treatment occurred in Montgomery County and all of the physicians, nurses and the plaintiff lived and worked in Montgomery County.

Medical malpractice plaintiffs' expanded choice of venue led

to the phenomenon commonly known as “forum shopping,” which is when a plaintiff strategically brings suit in the jurisdiction that will likely yield the highest payout, rather than the jurisdiction that houses the case events, parties and evidence. Prior to 2003, medical malpractice plaintiffs flocked to the Commonwealth’s most plaintiff-friendly jurisdictions, with Philadelphia County at the top of the list. Between 2000 and July 2003, of the 67 counties in Pennsylvania, Philadelphia County produced more than one-third of the medical malpractice jury verdicts. Philadelphia County also produced more than half of the Commonwealth’s medical malpractice plaintiff verdicts during that timeframe.<sup>4</sup> The win rate for plaintiffs was more than double the national average at that time.<sup>5</sup> More than two-thirds of Philadelphia’s plaintiff verdicts were in excess of \$500,000 and about half were in excess of \$1,000,000. By contrast, in the Commonwealth’s 66 other counties, less than half of the medical malpractice plaintiff verdicts were in excess of \$500,000 and only a quarter were in excess of \$1,000,000.<sup>4</sup>

With medical malpractice litigation in the Commonwealth’s plaintiff-friendly counties often resulting in high verdicts and high settlement amounts, insurance carriers faced the crisis of keeping medical liability coverage available to healthcare providers. By 2003, Pennsylvania ranked above the national average with respect to the rate of paid claims, and average payouts were twice the national average when adjusted for population.<sup>5</sup> By the late 1990s, four of Pennsylvania’s major carriers had failed, and the remaining carriers limited or refused new applicants.<sup>5</sup> The medical liability policies that were available to healthcare providers came at a high price. As a result, healthcare providers who were unable or unwilling to pay the cost of liability insurance left Pennsylvania practice or retired.

By 2002, a call for tort reform led to the passing of the Medical Care Availability and Reduction of Error (MCARE) Act.<sup>6</sup> MCARE statutorily established the Interbranch Commission on Venue, which was given the responsibility to study venue issues and make recommendations it deemed appropriate.<sup>7</sup> As a consequence, the venue rule change by the Supreme Court was one of a series of reforms at that time, but many believe that this rule made the most significant impact on tort reform. By 2017, medical malpractice filings had decreased by 47 percent statewide and by 66 percent in Philadelphia County alone, as compared to 2000 through July 2003.<sup>8</sup> After 2003, insurance premiums stabilized, with some specialties seeing their rates drop significantly.<sup>9</sup>

## THE RESULT: MARKET STABILIZATION OR UNCOMPENSATED VICTIMS?

Many have seen the stabilization of the medical liability insurance market and the reduction of medical malpractice claims in Pennsylvania as evidence that the venue rule was successful and remains effective. However, the chairman of the Civil Procedural Rules Committee has taken a different interpretation, stating that the decrease in medical malpractice filings actually represents “fewer compensated victims of medical negligence.”<sup>11</sup> Those who seek to abrogate the current medical malpractice venue rule believe that the rule affords special treatment to healthcare providers that is no longer warranted, now that the market has stabilized and medical malpractice filings have reduced over the past 15 years. The claimed intent of rescinding the rule is to “restore fairness to the procedure for determining venue regardless of the type of defendant.”<sup>11</sup>

In essence, the Civil Procedural Rules Committee is seeking to abrogate a reform measure on the basis that it was successful. Further, the committee’s suggestion that the intent behind this change is to “restore fairness” suggests that the counties where alleged malpractice occurs, where doctors are practicing and where patients live—though less plaintiff-friendly—are somehow less capable of fairly adjudicating medical malpractice claims.

## WHAT TO EXPECT IF THE PROPOSAL PASSES

Eliminating the current medical malpractice venue rule could lead to the very same problems that the rule was enacted to fix. If this proposal were to pass, we should expect to see state-sanctioned forum shopping, with medical malpractice litigation gravitating back to the Commonwealth’s plaintiff-friendly counties, particularly Philadelphia County. This would naturally lead to higher verdicts and higher settlement amounts. We can expect to see an increase in medical malpractice litigation across the state generally—not necessarily because there is more medical malpractice occurring in Pennsylvania, but because attorneys will be more willing to take on less meritorious cases that can be filed in more favorable jurisdictions. Those in the practice of litigation in Pennsylvania know that, regardless of a case’s merit, the fact that a case is venued in a plaintiff-friendly jurisdiction alone raises its value, simply due to the threat of a potential high jury verdict.

Putting aside the issue of keeping healthcare providers in Pennsylvania, we should also look at the future for providers who choose to stay. Eliminating the rule requiring plaintiffs to file medical malpractice suits in the county in which the alleged malpractice occurred will certainly make it easier for plaintiffs to obtain jurisdictions that are more plaintiff-friendly; it will also allow cases to be adjudicated hundreds of miles away from where the patient received care and where the defendant’s healthcare providers practice. Imagine that





## HOPE FOR A CAREFUL REVIEW OF THE FACTS

the seven physicians and nurses from our earlier example actually practice at a facility in Lackawanna County but are forced to clear their calendars to attend a two-week trial in Philadelphia County because the facility is part of a larger structure with a registered agent in Philadelphia. The strain on the provider and on the hospital's resources would be tremendously burdensome and particularly felt by the hospital's patient population.

Even with the protection of the current venue rule, Pennsylvania healthcare providers are not immune to forum shopping. It is not uncommon for medical malpractice plaintiffs to strategically name a specific doctor or hospital located in a plaintiff-friendly county as a defendant in their cases—even if that provider has tenuous liability—simply to serve as a basis for filing the lawsuit in a more favorable jurisdiction. There is case law in place to allow defendants to seek venue transfers on the basis of *forum non conveniens* when the majority of the parties and evidence involved is located in a different county than where the suit was filed, particularly the *Bratic v. Rubendall*<sup>13</sup> decision. However, recent Pennsylvania decisions have gravitated away from *Bratic* and allowed litigation to proceed in venues with weaker connections to the case.

History has shown that forum shopping significantly contributed to the medical liability crisis that caused carriers to leave or limit their participation in the medical liability market, drove healthcare providers out of state and left Pennsylvanians with restricted access to patient care. It is not a stretch to imagine that medical students, many of whom graduate with hundreds of thousands of dollars in loans, will leave Pennsylvania after their graduation, residency or fellowship to practice in a state where the threat of medical malpractice suits and exorbitant liability insurance premiums do not weigh as heavily. Further, it should be noted that Pennsylvania remains in the minority of states in the country that do not impose any type of cap on non-economic damage recovery in medical malpractice claims.


The proposal to eliminate the rule that medical malpractice plaintiffs must file suit in the county where the alleged malpractice occurred has justifiably raised concern among healthcare providers, carriers and patients. History has shown that, without this tort reform measure in place, medical malpractice litigation can spiral beyond the capacity of the insurance market, causing healthcare providers to leave the state and resulting in restricted access to care for Pennsylvanians.

It is difficult to accept the proponent's view that less plaintiff-friendly counties are not as capable of adjudicating medical malpractice claims that occur in their jurisdiction. It is even more difficult to accept the proponent's suggestion that having a plaintiff file suit in the jurisdiction where the alleged malpractice occurred somehow precludes the plaintiff's access to court or compensation.

Proponents liken rescinding the medical malpractice venue rule to stopping an antibiotic once an infection has resolved. However, the reality of rescinding the rule is more like stopping a blood pressure medication because one's blood pressure has improved or discontinuing an exercise routine after reaching a healthy body mass index (BMI). When considering this proposal, one can only hope the Pennsylvania Supreme Court will carefully consider all the facts, evidence and history leading to the adoption of the medical malpractice venue rule and ask whose interests are truly at stake if the current venue rule is rescinded.

The Pennsylvania Supreme Court Rules Committee will be accepting feedback from the general public until February 22, 2019, on the proposal to abrogate the current venue rule for medical malpractice cases. Feedback should be submitted to the Committee via the following (with e-mail being the preferred method of contact):

**Karla M. Shultz, Counsel**  
**Civil Procedural Rules Committee**  
**Supreme Court of Pennsylvania**  
**Pennsylvania Judicial Center**  
**P.O. Box 62635**  
**Harrisburg, PA 17106-2635**  
**FAX: 717-231-9526**  
**civilrules@pacourts.us**

Additionally, healthcare organizations like the Pennsylvania Medical Society (PAMED), Pennsylvania Healthcare Association (PHCA), Hospital and Healthsystem Association of Pennsylvania (HAP) and Pennsylvania Coalition for Civil Justice Reform (PCCLR) are mobilizing and creating online tools to help members of the public express their concerns to the Civil Procedural Rules Committee. 

**Editor's Note:** On February 14, 2019, the Pennsylvania Supreme Court said it will delay the venue decision until after the Legislative Budget and Finance Committee reviews the issue. The committee is charged with reporting the results by January 1, 2020.

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<sup>1</sup> Supreme Court of Pennsylvania Civil Procedural Rules Committee. (2018). *Notice of proposed rulemaking, Proposed amendment of Pa.R.C.P. Nos. 1006, 2130, 2156, and 2179*. [www.pacourts.us/assets/uploads/Resources/Documents/Proposed%20Amendments%20of%20PaRCP%20Nos%201006%202130%202156%20and%202179%20-%20007481.pdf?cb=64836](http://www.pacourts.us/assets/uploads/Resources/Documents/Proposed%20Amendments%20of%20PaRCP%20Nos%201006%202130%202156%20and%202179%20-%20007481.pdf?cb=64836).

<sup>2</sup> See *Pa. R.C.P. 1006(a)(1)*.

<sup>3</sup> See *Pa. R.C.P. 1006(c)(2)*.

<sup>4</sup> Unified Judicial System of Pennsylvania, Research & Statistics Department. (2006, March 22 [updated]). *Table 2: Medical malpractice jury verdicts, January 2000 to July 2003*. [www.pacourts.us/assets/files/setting-771/file-688.pdf?cb=6ff176](http://www.pacourts.us/assets/files/setting-771/file-688.pdf?cb=6ff176).

<sup>5</sup> Bovbjerg, R. R., & Bartow, A. (2003). Understanding Pennsylvania's medical malpractice crisis: Facts about liability insurance, the legal system, and healthcare in Pennsylvania. *The Project on Medical Liability in Pennsylvania*. [www.urban.org/sites/default/files/publication/58841/1000732-understanding-pennsylvania-s-medical-malpractice-crisis.pdf](http://www.urban.org/sites/default/files/publication/58841/1000732-understanding-pennsylvania-s-medical-malpractice-crisis.pdf).

<sup>6</sup> 40 P.S. §§ 1303.101 et seq.

<sup>7</sup> 40 P.S. §1303.514.

<sup>8</sup> Unified Judicial System of Pennsylvania, Research & Statistics Department. (2018, September 20). *Table 1: Pennsylvania medical malpractice filings*. [www.pacourts.us/assets/files/setting-2929/file-7458.pdf?cb=656af3](http://www.pacourts.us/assets/files/setting-2929/file-7458.pdf?cb=656af3).

<sup>9</sup> See e.g., Brubaker, H. (2019, January 18). Philadelphia could be hot destination for medical malpractice suits, again, under proposed rule. *Philly.com*. [www.philly.com/business/medical-malpractice-philadelphia-supreme-court-venue-rule-change-proposal-20190118.html](http://www.philly.com/business/medical-malpractice-philadelphia-supreme-court-venue-rule-change-proposal-20190118.html).

<sup>10</sup> *Bratic v. Rubendall*, 99 A.3d 1 (Pa. 2014).

