PURCHASE GEORGE & MURPHEY P.C.
ATTORNEYS AT LAW

Eric J. Purchase
eric@purchasegeorge.com

June 21, 2019

Senators Mensch & Brewster
Chairmen – Legislative Budget and Finance Committee
Room 400A, Finance Building
613 North Street
Harrisburg, PA 17105

Re: Written Testimony, Senate Resolution 20 Hearing

Dear Senators Mensch and Brewer:

I am a lawyer from Western Pennsylvania (Erie) who primarily represents plaintiffs in personal injury and medical malpractice litigation. I submit this written testimony as one of two representatives of the Pennsylvania Bar Association ("PBA"). The PBA has not taken a position on the proposed amendments to the Rules of Civil Procedure relating to venue. PBA desires to present the different perspectives of the plaintiff and defense bars for the benefit of the Committee.

History and Context of Venue Rules

Prior to 2003, Pennsylvania's venue rules (the rules that dictate where a lawsuit may be filed) were the same for all Pennsylvania people and businesses. Specifically, a plaintiff could commence a lawsuit where the incident giving rise to the lawsuit occurred, where the defendant resides or where the defendant (if a business entity) regularly conducts business.

Prior to 2003 and continuing through today, Pennsylvania's venue rules allow a defendant to contest the plaintiff's choice of venue and require a court to mandate a change in venue should it be determined that the plaintiff's venue choice was improper. For example, when the plaintiff's chosen venue is inconvenient for the parties or witnesses, the court may transfer the lawsuit to a different and more appropriate venue so long as the alternate venue otherwise meets the minimum venue requirements. Similarly, should the plaintiff's choice of venue be found to be "vexatious and oppressive" or "designed to harass the defendant" the court may direct the lawsuit be transferred to a different and more appropriate venue.

The principle that venue is appropriate in either the county where the case arose or the county where the defendant resides or does business is not only well established in Pennsylvania law but is the prevailing rule in most other American jurisdictions. This well-established rule exists for good reason.

Pennsylvania courts are inherently fair. Our courts are not corrupt or biased. Our juries, absent circumstances that implicate self-interest, do not come to the courthouse with a vested interest in the outcome of a trial. Rather, fair proceedings are the rule and choice of venue is, far more often than not, a matter of convenience and efficiency.

Because Pennsylvania's courts are not corrupt, the only credible complaints about our venue rules are already addressed by the exceptions that allow courts, on a case-by-case basis, to change venue for reasons of convenience or to avoid the advancement of improper goals. In this regard, corporations who are required to defend themselves in a venue where they have voluntarily chosen to do business cannot, as a general proposition, plausibly articulate that they are inconvenienced by that venue.

Despite the inherent fairness of our courts, there may nevertheless be good reason in some cases for individual plaintiffs to view with skepticism the real or perceived self-interest of jury pools in small counties. In small communities, large corporations can exercise considerable influence, either as an employer of or customer/vendor to large percentages of the populace. Thus, the plaintiff in a small county who seeks justice against the region's largest employer faces considerable hurdles in finding jurors who are not, directly or otherwise, aligned with or dependent on the defendant. Having an alternative choice, a venue where the defendant has chosen to do business but is not as economically dominant, offers an increased likelihood of both actual and perceived impartiality while exacting no cost of inconvenience to the defendant.

In 2003, the Pennsylvania Supreme Court adopted changes to Pennsylvania's venue rules that required special treatment for medical malpractice defendants. After these changes, medical malpractice defendants stood apart from all other Pennsylvanians as the only defendants who could be sued only in the county where the cause of action arose.

At approximately the same time as the change in venue rules, other legislative and judicial reforms were enacted. The goals of these other reforms included the limitation of compensation to victims of medical negligence and reduction in the number of malpractice lawsuits. These reforms included reductions in the amount of insurance coverage required of physicians; the elimination of the collateral source rule; reduction to present worth for future lost earnings; periodic payments of future medical and personal care expenses terminable on death of the victim; and the requirement of a "Certificate of Merit" from a physician attesting to both negligence and harm.

At the time, lobbying groups working to effect these reforms claimed that medical malpractice lawsuits and payouts were causing a reduction in insurance offerings and increases in insurance premiums for policies that were offered. These groups claimed that physicians were retiring early or leaving Pennsylvania as a result and that Pennsylvania was at risk of being under-served by health care professionals.

In fact, medical malpractice insurance premiums were rising because of faulty pricing and insurance company investment losses, not because of indemnity payouts. More to the point, and despite the rise in insurance costs, physicians were not leaving Pennsylvania.[1]

Since 2003, medical malpractice lawsuits have decreased by 47% statewide, averaging 1,540 new lawsuits every year over the last 10 years.[2] Meanwhile, Patient Safety Authority data reveals that health care facilities, not including doctor's offices, reported 7,881 events of patient harm caused by medical error.[3] Clearly, there is more medical malpractice than there are medical malpractice lawsuits.

Despite the prevalence of medical malpractice, verdicts in Pennsylvania have skewed dramatically in favor the defense. In 2017, defendants won 79.4% of all malpractice trials; in 2016, 84.5%; in 2015, 78.4%; in 2014, 82%; and so on. In no year since 2000, when data on Pennsylvania medical malpractice verdicts first was available, did plaintiffs win more than 30% of all trials.[4] These trial results do not suggest that the tried cases were examples of weak claims. On the contrary, a study of over 20 years of malpractice verdicts found that defendants won 80 to 90% of jury trials with weak evidence of medical negligence, 70% of borderline cases and, astoundingly, 50% of trials with strong evidence of medical negligence.[5] The New England Journal of Medicine confirms, "(A)lthough the number of claims without merit that resulted in compensation was fairly small, the converse form of inaccuracy — claims associated with error and injury that did not result in compensation — was substantially more common."[6] Health care providers are winning trials they should lose at an alarming rate.

Pennsylvania Should Not Have Preferential Venue Rules for Medical Malpractice Defendants

A. Fundamental Fairness

It is axiomatic that the law should apply equally to all Pennsylvanians. Providing special privileges for people and corporations engaged in health care and no one else undermines faith in the impartiality of our laws. Compounding the inequity of this special treatment is that it only applies one way. That is, a hospital may sue to protect its own interests in any venue where the defendant resides or does business but, when an injured victim sues a hospital for malpractice, the victim is limited to the venue of the hospital's choosing.

---

[1] http://www.mcall.com/news/nationworld/pennsylvania/mc-nws-medical-malpractice-court-change-fight-20190204-story.html
[2] http://www.pacourts.us/news-and-statistics/research-and-statistics/medical-malpractice-statistics
[3] See, http://patientsafety.pa.gov/PatientSafetyAuthority/Documents/annual_report_2017.pdf
[4] http://www.pacourts.us/news-and-statistics/research-and-statistics/medical-malpractice-statistics
[5] Clin. Orthop. Relat. Res (2009) Feb., 467(2): 352- 357; https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2628515/
[6] David M. Studdert, et al., Claims, errors, and compensation payments in medical malpractice litigation, N. Engl. J. Med. 2006; 354, 2024-33.

B. There is No Good Reason for Special Venue Rules

1. There is No Plaintiff Friendly Venue

As discussed above, no venue in Pennsylvania is inherently corrupt or biased. Health care providers cannot claim otherwise. Instead, they state that medical malpractice plaintiffs, should they be allowed the full range of venue choices available to all other Pennsylvanians, will "venue shop," hinting darkly at some magical venue that is unjustly favorable to medical malpractice plaintiffs.

In fact, no venue in Pennsylvania is favorable to medical malpractice plaintiffs. Statewide, medical malpractice plaintiffs lose, on average, 80% of the time. In many counties, the rate of defense verdicts is above 90%. A defense verdict pattern spanning over 18 years at a rate in excess of 90% is alarming because it suggests it is nearly impossible, no matter how strong the case, for a medical malpractice plaintiff to prevail in those counties.

Beneath the face of the pro-defense verdict statistics lies an even more alarming fact: as a rule, reasonable and experienced medical malpractice lawyers do not knowingly take weak cases anywhere in Pennsylvania and certainly not in counties with an 18-year history of defense verdicts. The cost of medical malpractice litigation and the risk of loss to both plaintiff and plaintiff attorney is simply too high to invest in weak cases or cases with limited economic value. On the contrary, for an experienced medical malpractice lawyer to accept a case that is to be tried in a county with a history of defense bias, there must be compelling evidence of negligence coupled with very serious injury. Thus, those counties demonstrating 90% + defense verdict rates are, as a general proposition, finding for defendants in cases with both strong evidence of liability and serious injuries.

Even in Philadelphia County, the county with the highest plaintiff success rate, defendants win, on average, 65% of the time.[7]

The question is not whether there are venues that are unfairly biased in favor of plaintiffs – there are not - but rather why there are so many that are so clearly biased in favor of defendants. Seen in this light, it is apparent that the "forum shopping" that is happening in Pennsylvania medical malpractice is being done by hospitals and defendants, who recognize the unfair advantage they enjoy in many counties and who, with the aid of effective lobbyists, have succeeded in foisting their choice of forum on the people they injure.

As the Explanatory Comment from the Rules Committee accurately notes with respect to Rule 1006, "[t]he current rule provides special treatment of a particular class of defendants, which no longer appears warranted."

---

[7] http://www.pacourts.us/news-and-statistics/research-and-statistics/medical-malpractice-statistics

2. Venue Rules Have Not Reduced Medical Malpractice Filings

While true that the number of medical malpractice lawsuits has dropped since 2003, the drop is attributable to other changes made at the same time. Specifically, those measures that increased the cost of malpractice litigation (e.g., the certificate of merit rule) and decreased the economic value of verdicts (reduction in required liability coverage, elimination of the collateral source rule, abrogation of joint liability, reduction to present worth for future earnings loss, and periodic payments of future care expenses) have led plaintiff lawyers to accept fewer meritorious cases because cases with moderate injuries are unlikely to yield an economic result sufficient to warrant the cost of litigation. Thus, there is no reason to believe that applying equal venue rules to medical malpractice defendants will result in an increase in medical malpractice litigation.

This is not to suggest that an increase in medical malpractice litigation is to be feared. On the contrary, there is far more malpractice than there is malpractice litigation and thus, too many Pennsylvanians are denied compensation they are justly owed. Moreover, there is no material problem with excessive litigation. As the New England Journal of Medicine concluded, "Our findings suggest that moves to curb frivolous litigation, if successful, will have a relatively limited effect on the caseload and costs of litigation. The vast majority of resources go toward resolving and paying claims that involve errors. A higher-value target for reform than discouraging claims that do not belong in the system would be streamlining the processing of claims that do belong."[8]

Conclusion

No single class of individuals or corporations should be given special treatment and a preferred status. By abrogating the special venue rule, equality and fairness will be restored to the civil justice system.

Sincerely,

Purchase, George & Murphey, P.C.

By: _____
Eric J. Purchase

[8] David M. Studdert, et al., Claims, errors, and compensation payments in medical malpractice litigation, N. Engl. J. Med. 2006; 354, 2024-33.