IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Andre Powell, an incapacitated person, by Yvonne Sherrill, Guardian	:	
v.	:	No. 2117 C.D. 2008
James Scott, George Krapf, Jr. and Sons, Inc., The Pep Boys - Manny, Moe & Jack, Cee Johnson's Auto Service, LLC, Strauss Discount Auto, Inc. and R&S/Strauss Inc. and Great Valley School District	:	
Appeal of: James Scott and George Krapf, Jr. and Sons, Inc.	:	
Andre Powell, an Incapacitated Person, by Yvonne Sherrill, his duly appointed Guardian, Yvonne Sherrill in her own right	:	
v.	:	
James Scott, George Krapf Jr. and Sons, Inc., The Pep Boys - Manny, Moe and Jack and Cee Johnson's Auto Service, LLC	:	
v.	:	No. 2227 C.D. 2008
Great Valley School District, Inc., Appellant	:	Argued: June 8, 2009

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: September 24, 2009

In these consolidated appeals, James Scott (Scott), George Krapf, Jr. and Sons, Inc. (Krapf), and the Great Valley School District (District) appeal the order of the Court of Common Pleas of Philadelphia County (trial court): (1) overruling the preliminary objections of Andre Powell (Powell) by Yvonne Sherrill (Sherrill) to a Joinder Complaint filed by Scott to join the District as an additional defendant in an action initiated by Powell against Scott, Krapf and others; (2) overruling Powell's preliminary objections to the District's preliminary objections to the Joinder Complaint; (3) sustaining the District's preliminary objections to the Joinder Complaint; and (4) severing the Joinder Complaint action from the action initiated by Powell, and transferring the Joinder Complaint action to the Court of Common Pleas of Chester County (Chester County court). We vacate and remand.

On January 27, 2006, Powell was involved in a collision of his automobile with a school bus driven by Scott that was owned by Krapf and that was transporting students to school in the District. The accident occurred in Willistown Township, Chester County. Powell suffered brain damage as a result of the accident, and Sherrill was later appointed his guardian.

On December 28, 2007, Sherrill initiated an action on Powell's behalf by writ of summons in the trial court in Philadelphia County against Scott, Krapf, The Pep Boys – Manny, Moe & Jack (Pep Boys), and Cee Johnson's Auto Service,

LLC (Cee Johnson).[1] On March 20, 2008, Powell filed a complaint against the named defendants sounding in negligence, negligent entrustment, negligent hiring, respondeat superior, and agency. Both Pep Boys and Cee Johnson filed answers to the complaint, with new matter and cross-claims against the co-defendants. Scott and Krapf filed answers to the cross-claims, and Powell by Sherrill filed replies to the new matter.[2]

On June 17, 2008, Scott and Krapf filed a praecipe for a writ to join the District as an additional defendant to the action.[3] On July 3, 2008, the District

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[1] Strauss Discount Auto, Inc. and R&S/Strauss Inc. were also named defendants in the original action; however, the trial court subsequently granted their unopposed motion for judgment on the pleadings.

[2] Ultimately, on September 24, 2008, Scott and Krapf filed an answer to the complaint, with new matter and cross-claims.

[3] Rule 2252(a) and (b) of the Pennsylvania Rules of Civil Procedure (Pa.R.C.P.) provides, in pertinent part:

> (a) [A]ny party may join as an additional defendant any person not a party to the action who may be
>
> (1) solely liable on the underlying cause of action against the joining party, or
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> * * *
>
> (4) liable to or with the joining party on any cause of action arising out of the transaction or occurrence or series of transactions or occurrences upon which the underlying cause of action against the joining party is based.
>
> (b) The joining party may file as of course a praecipe for a writ of a complaint.
>
> (1) If the joinder is by writ, the joining party shall file a complaint within twenty days from the filing of the praecipe for the writ….
>
> (2) The complaint, in the manner and form required of the initial pleading of the plaintiff in the action, shall set forth the facts relied upon to establish the liability of the joined party and the

(Continued....)

filed a praecipe for the entry of a rule upon Scott and Krapf to file a complaint. On July 22, 2008, Scott filed the instant Joinder Complaint in which he alleged, inter alia, that the accident causing Powell's injuries was due to the District's purported negligence regarding the prescribed route taken by the bus in the District. As a result, Scott alleged that the District was alone liable to Powell or, in the alternative, the District was jointly and severally liable with Scott or liable to Scott for contribution and/or indemnification.

On August 8, 2008, Powell filed preliminary objections to the Joinder Complaint in which he alleged, inter alia, that the District was immune from liability under the relevant provisions of the statute commonly referred to as the "Political Subdivision Tort Claims Act" (Tort Claims Act), 42 Pa.C.S. § 8541 – 8542. On August 12, 2008, the District filed preliminary objections to the Joinder Complaint in which it alleged, inter alia, that the matter should be transferred to the Chester County court as the proper venue pursuant to Pa.R.C.P. No. Rule 2103(b).[4] On August 27, 2008, Powell filed preliminary objections to the District's preliminary objections in which he alleged, inter alia, that the trial court was first required to determine whether the District was immune from liability under the Tort Claims Act; if so, the Joinder Complaint should be dismissed and not transferred to the Chester County court as requested by the District. On September

relief demanded.

[4] Pa.R.C.P. No. 2103(b) provides that "[e]xcept when the Commonwealth is the plaintiff or when otherwise provided by an Act of Assembly, an action against a political subdivision may be brought only in the county in which the political subdivision is located." In turn, Section 333 of the Judiciary Act Repealer Act Continuation Act of 1980 (JARA Act), Act of October 5, 1980, P.L. 693, 42 P.S. § 20043, provides that "[a]ctions … for claims against a local agency may be brought in and only in a county in which the local agency is located or in which the cause of action arose or where a transaction or occurrence took place out of which the cause of action arose…."

25, 2008, the District joined in Powell's preliminary objections to the Joinder Complaint.[5]

On September 30, 2008, the trial court issued an order: (1) overruling Powell's preliminary objections to the Joinder Complaint; (2) overruling Powell's preliminary objections to the District's preliminary objections to the Joinder Complaint; (3) sustaining the District's preliminary objections to the Joinder Complaint; and (4) severing the Joinder Complaint action from the action initiated by Powell pursuant to Pa.R.C.P. No. 213(b)[6], and transferring the Joinder Complaint action to the Chester County court.[7] Scott, Krapf, and the District then

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[5] Scott filed a response to Powell's preliminary objections, a response to Powell's preliminary objections to the District's preliminary objections, and an answer to the District's preliminary objections. Powell filed a response in opposition to the District's preliminary objections, and a sur-reply to Scott's response to his preliminary objections. In turn, Scott filed a response to Powell's response in opposition to the District's preliminary objections, and a sur-reply to Powell's sur-reply to his response to Powell's preliminary objections.

[6] Pa.R.C.P. No. 213(b) provides, in pertinent part, that "[t]he court, in furtherance of convenience or to avoid prejudice, may, on its own motion … order a separate trial of any cause of action, claim, or counterclaim, set-off, or cross-suit, or of any separate issue, or of any number of causes of action, claims, counterclaims, set-offs, cross-suits, or issues."

[7] The trial court stated the following in the opinion filed in support of its order:

> The law is clear, and none of the parties to the joinder complaint contest, that the Preliminary Objections to venue against the [District] were properly sustained, as venue only lies in Chester County, where the [District] is located. Pa.R.Civ.P. 2103(b). Rather, the challenge raised by the motions for reconsideration is to this Court's decision to sever the joinder claims against the [District] and transfer only those claims to Chester County, leaving the balance of the case in Philadelphia. Clearly such a decision is well within this Court's discretion. [See Pa.R.Civ.P. 213(b)]….
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> Here, we concluded that the dubious claims raised by [Scott] against the [District] were appropriately severed to avoid prejudice to, and for the convenience of, Plaintiff.
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> First, we note that the [District] is likely immune from the claims

(Continued....)

filed the instant appeals from the trial court's order disposing of the preliminary objections.[8,9,10,11]

> asserted in the joinder complaint, as there is no credible applicable exception to the [Tort Claims Act]. Thus, we perceive a very high likelihood that the joinder complaint will ultimately be dismissed. Mindful as we are of the great deference our law gives to a plaintiff's choice of forum, we deem it prejudicial, inconvenient, and unreasonable to force Plaintiff from her chosen forum, which is also the forum of her residence, under such circumstances.
>
> Moreover, claims for indemnification and contribution are separate and distinct from the main action, and all the more so when [the] plaintiff has not brought a claim against the joinder defendant. Only if liability is found as to the defendant/joinder plaintiff, will there be a need to address such claims.
>
> Ordinarily, it is not our practice to sever claims. However, here numerous factors tip the scale in favor of severance: failure to sever would require disturbing plaintiff's choice of forum, without application of the inquiry and burdens imposed by Pa.R.Civ.P. 1006(d) [relating to changes of venue]; the claim being severed is of dubious merit, both legally and factually; the severed claim is likely subject to immunity; the severed claim is separate and distinct from Plaintiff's claims against the other defendants; and, claims for indemnification and contribution may, and often are, tried separately from the action from which such obligations may arise.
>
> For all these reasons we deemed severance and transfer of the indemnification and contribution claims against the [District] to be the most just, least prejudicial and most convenient course, and, therefore, exercised our discretion accordingly.

Trial Court Opinion at 2-4 (footnotes omitted).

[8] Scott and Krapf filed the appeal docketed in this Court at No. 2117 C.D. 2008. The District filed the appeal docketed in this Court at No. 2227 C.D. 2008. By order dated December 3, 2008, this Court consolidated the appeals for disposition.

[9] It should be noted that, on October 10, 2008, the District filed a motion in the trial court requesting reconsideration of its order of September 30th, in which it alleged that the trial court erred in severing the Joinder Complaint action from the original action filed by Powell and asserted that both actions should be transferred to the Chester County court. By order dated

(Continued....)

The sole claim raised in these consolidated appeals is that the trial court erred in severing the Joinder Complaint action from the action initiated by Powell, and in only transferring the Joinder Complaint action to the Chester County court. We agree.[12]

As noted above, Section 333 of the JARA Act provides, in pertinent part, that "[a]ctions … for claims against a local agency may be brought in and only in a county in which the local agency is located or in which the cause of

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October 29, 2008, the trial court denied the District's motion for reconsideration.

[10] It should also be noted that, on October 17, 2008, Scott and Krapf filed an Emergency Motion to Vacate and for Reconsideration in which they sought reconsideration of the September 30th order severing the Joinder Complaint action, and in which they also sought certification of the September 30th order as appealable pursuant to the provisions of Rule 1311 of the Pennsylvania Rules of Appellate Procedure (Pa.R.A.P.). On October 29, 2008, the trial court issued an order denying the motion. On November 17, 2008, Scott and Krapf filed a petition for review in this Court, and that appeal was docketed at No. 2188 C.D. 2008. On November 21, 2008, this Court issued an order stating, in pertinent part, that "[t]he Court having concluded that the order of the [trial court] dated 09/30/08 is appealable as of right pursuant to Pa.R.A.P. 311(c), the notice of appeal at 2117 C.D. 2008 is properly before this court, and the appeal at that number shall proceed. The petition for review filed pursuant to the note to Pa.R.A.P. 1311 and docketed at No. 2188 C.D. 2008, seeking leave to appeal from the same order of the trial court, is dismissed as moot."

[11] In addition, on December 8, 2008, Powell filed an application to dismiss the instant appeals based upon lack of jurisdiction, lack of an appealable order, and lack of standing. In the application, Powell alleged, inter alia, that this Court did not possess jurisdiction over the appeals, and the order underlying the appeal was not appealable, because the aspects of the trial court's order questioned by Scott, Krapf, and the District in the appeals were not appealable as of right under to Pa.R.A.P. 311. Powell also alleged that Scott, Krapf, and the District did not possess standing to prosecute these appeals as they were not "aggrieved" by the trial court's order underlying the appeals. However, on December 28, 2008, this Court issued an order denying Powell's application to dismiss the appeals on any of these bases. Moreover, we will not accede to Powell's request to revisit these determinations in this opinion.

[12] This Court's scope of review of a trial court's ruling on preliminary objections is limited to determining whether the trial court committed an error of law or abused its discretion. Delaware County v. City of Philadelphia, 620 A.2d 666 (Pa. Cmwlth. 1993).

action arose or where a transaction or occurrence took place out of which the cause of action arose…." 42 P.S. § 20043.

In Ribnicky v. Yerex, 549 Pa. 555, 701 A.2d 1348 (1997), our Pennsylvania Supreme Court addressed the issue of venue under Section 333 of the JARA Act and a similar provision relating to Commonwealth parties contained in Section 8523 of the Judicial Code, 42 Pa.C.S. § 8523.[13] In Ribnicky, Galena Ribnicky (Ribnicky) had been involved in a two-car accident in Allentown, Pennsylvania. Ribnicky and her husband had filed a personal injury action in the Court of Common Pleas of Philadelphia County against Richard Yerex, MCI Telecommunications Corporation (Yerex's employer), and U.S. Fleet Leasing (collectively, original defendants). The original defendants then filed a writ of summons to join the City of Allentown (Allentown). Allentown moved to transfer venue from Philadelphia County to Lehigh County which was denied by the trial court. Allentown also filed a petition to transfer the action to Lehigh County pursuant to Section 333 of the JARA Act. "The trial court granted Allentown's motion to transfer venue pursuant to Section 333 because Allentown is located in Lehigh County, and the accident occurred there." Ribnicky, 549 Pa. at 558, 701 A.2d at 1351. On appeal, this Court reversed the trial court's order transferring the matter to Lehigh County.

On further appeal, the Supreme Court reversed this Court stating the following, in pertinent part:

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[13] Section 8523 provides, in pertinent part, that "[a]ctions for claims against a Commonwealth party may be brought in and only in a county in which the principal or local office the of the Commonwealth party is located or in which the cause of action arose or where a transaction or occurrence took place out of which the cause of action arose…."

> We disagree with the Commonwealth Court's decision in both this case and *Chen* [*v. Philadelphia Electric Co.*, 661 A.2d 25 (Pa. Cmwlth. 1995), *appeal dismissed*, 545 Pa. 231, 680 A.2d 1156 (1996) (interpreting Commonwealth agency venue provisions)]. A plain reading of Section 333 and Section 8523 does not distinguish between actions brought by a plaintiff against a defendant or a defendant against a third party….
>
> Here, the Original Defendants filed a writ of summons against Allentown, joining the city as an additional defendant pursuant to Pa.R.C.P. 2252. Under the rules, the procedure, including pleadings, between the Original Defendants and Allentown "shall be the same as though the party joining the additional defendant were a plaintiff and the additional defendant were a defendant." Pa.R.C.P. 2255(a). Thus, the Original Defendants have effectively filed an "action" against Allentown, alleging that Allentown is solely liable to the Ribnickys or liable to the Original Defendants for indemnity or contribution. As such, despite the fact that that the Ribnickys did not originally seek damages from Allentown, they "shall recover from the additional defendant found liable to him alone or jointly with the defendant as though such additional defendant had been joined as a defendant and duly served and the initial pleading of the plaintiff had averred such liability." Pa.R.C.P. 2255(d). Accordingly, an action has been brought against a local agency, thus triggering the venue provisions of Section 333. Because Allentown is located in Lehigh County and the cause of action arose in Allentown, Section 333 mandates the transfer of venue to Lehigh County.
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> The same analysis applies to the joinder of a Commonwealth agency as an additional defendant pursuant to Section 8523 of the Judicial Code. Both Section 333 and Section 8523 turn on where actions against a governmental entity "may be brought" and do not differentiate between actions by plaintiffs and actions by defendants….

Id. at 560-561, 701 A.2d at 1351 (footnote omitted).

Thus, under Ribnicky, it is clear that the proper venue in the instant matter is the Chester County court as that is where the District is located and that is where the accident underlying the instant action occurred. See Cummings v. Elinsky, 803 A.2d 850, 852 (Pa. Cmwlth. 2002) ("This case cannot be distinguished from *Ribnicky*. Plaintiffs filed a complaint against Original Defendants, who brought in the Township, a local agency, as an additional defendant through a writ and subsequent complaint. As the writ and joinder complaint constitute the commencement of an 'action' under *Ribnicky*, venue is proper in Bucks County. This is where the Township is located and there the motor vehicle accident, which gave rise to the cause of action, occurred.") (footnote omitted).

Nevertheless, as noted above, in ruling on the preliminary objections, the trial court severed the Joinder Complaint action from the action initiated by Powell, and only transferred the Joinder Complaint action to the Chester County court pursuant to Section 333 of the JARA Act. In its opinion filed in support of its order, the trial court cites to Pa.R.C.P. No. 213 to support its severance of the Joinder Complaint action. See Trial Court Opinion at 3.

However, this Court has specifically rejected the notion that such a severance is proper under Rule 213. Indeed, as this Court has previously stated:

> Appellants' third allegation of error is that the trial court should have taken it upon itself to sever the action and transfer only the actions against the two political subdivisions to Bucks County. Appellants, not surprisingly, do not cite a rule of court which would permit a trial court to unilaterally sever a case when finding a change of venue is appropriate where, as here, the claim against the defendants involves the same transactions or occurrences. In fact, such an action would be contrary Pa.R.C.P. No. 213, which allows courts to consolidate actions where possible to avoid

> delay, cost, prejudice and for the sake of judicial economy. Thus, we conclude that Appellants' third argument is without merit.

Bradley v. O'Donoghue, 823 A.2d 1038, 1041-1042 (Pa. Cmwlth. 2003).

Moreover, the most prominent factors cited by the trial court to support the severance of the Joinder Complaint action from the action initiated by Powell, was that "[t]he dubious claims raised by [Scott] against the [District] were appropriately severed to avoid prejudice to, and for the convenience of, plaintiff…", that "[w]e deem it prejudicial, inconvenient, and unreasonable to force Plaintiff from her chosen forum, which is also her forum of residence…", and that the "[f]ailure to sever would require disturbing plaintiff's choice of forum…." Trial Court Opinion at 3, 4.

However, in Ribnicky, the Pennsylvania Supreme Court has specifically rejected the notion that these considerations regarding a plaintiff's choice of forum somehow alter the provisions of Section 333 of the JARA Act. Indeed, as the Supreme Court has noted:

> The Ribnickys argue that this result disturbs the plaintiff's choice of forum, a decision entitled to considerable weight in this Commonwealth. *See Plum v. Tampax, Inc.*, 399 Pa. 553, 160 A.2d 549 (1960) (involving a forum non conveniens analysis). However, in ascertaining the intention of the General Assembly in the enactment of a statute, we must presume that the legislature intended to favor the public interest over any private interest. 1 Pa.C.S. § 1922(2)(5); *Pennsylvania Financial Responsibility Assigned Claims Plan v. English*, 541 Pa. 424, 664 A.2d 84 (1995). In contravention of this rule of statutory construction, the Commonwealth Court here, and in *Chen*, has elevated the private plaintiff's choice of forum above the public interest embodied in Section 333 [of the JARA Act] and [Section 8523 of the Judicial Code] of protecting governmental entities from suit in inconvenient fora. *See*

> *Simons v. State Correction Institute*, [615 A.2d 924 (Pa. Cmwlth. 1992)].

Ribnicky, 549 Pa. at 561-562, 701 A.2d at 1351.

Based on the foregoing, it is clear that the trial court erred in severing the Joinder Complaint action from the action initiated by Powell, and in only transferring the Joinder Complaint action to the Chester County court. Ribnicky; Bradley; Cummings. As a result, it is clear that that the trial court's order should be vacated, and the case should be remanded to the trial court for transfer of the entire action to the Chester County court pursuant to Section 333 of the JARA Act.

Accordingly, the trial court's order is vacated, and the case is remanded to the trial court for transfer of the entire case to the Chester County court in accordance with the foregoing opinion.

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JAMES R. KELLEY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Andre Powell, an incapacitated person, by Yvonne Sherrill, Guardian	:	
v.	:	No. 2117 C.D. 2008
James Scott, George Krapf, Jr. and Sons, Inc., The Pep Boys - Manny, Moe & Jack, Cee Johnson's Auto Service, LLC, Strauss Discount Auto, Inc. and R&S/Strauss Inc. and Great Valley School District	:	
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v.	:	No. 2227 C.D. 2008
Great Valley School District, Inc., Appellant	:	

<u>O R D E R</u>

AND NOW, this 24th day of September, 2009, the order of the Court of Common Pleas of Philadelphia County, dated September 30, 2008 at December

Term 2007 No. 04282 is VACATED, and the case is REMANDED to the Court of Common Pleas of Philadelphia County for TRANSFER of the entire case to the Court of Common Pleas of Chester County.

Jurisdiction is RELINQUISHED.

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JAMES R. KELLEY, Senior Judge