

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

ROBERT TED PRITCHARD AND	:	IN THE SUPERIOR COURT OF
ELIZABETH ANN PRITCHARD,	:	PENNSYLVANIA
	:	
Appellants	:	
	:	
v.	:	
	:	
DAVID B. RODES, GOLDBERG,	:	
PERSKY & WHITE, P.C.,	:	
	:	
Appellees	:	No. 1205 WDA 2012

Appeal from the Order dated July 17, 2012,
Court of Common Pleas, Fayette County,
Civil Division at No. 1012-2012

BEFORE: FORD ELLIOTT, P.J.E, BOWES and DONOHUE, JJ.

MEMORANDUM BY DONOHUE, J.: Filed: February 8, 2013

Robert Ted Pritchard and Elizabeth Ann Pritchard (collectively the "Pritchards") appeal *pro se* from the July 17, 2012 order granting David B. Rodes's ("Rodes") and Goldberg, Persky & White's ("GPW") preliminary objection seeking a change of venue.¹ After careful review, we vacate and remand.

On May 9, 2012, the Pritchards filed a *pro se* complaint in the court of common pleas, Fayette County, asserting a professional malpractice claim against Rodes and GPW. Therein, the Pritchards alleged that Rodes and

¹ This appeal is properly before this Court for review, as Pa.R.A.P. 311(c) regarding interlocutory appeals as of right, specifically provides: "An appeal may be taken as of right from an order in a civil action or proceeding changing venue [...] ." Pa.R.A.P. 311(c).

GPW were negligent in their representation of the Pritchards in a toxic tort action² that they filed on behalf of the Pritchards against Dow Agro Sciences.

On June 6, 2012, Rodes and GPW responded by filing preliminary objections on the basis of improper venue, the failure of the complaint to conform to law or rule of court, and that certain averments were pled with insufficient specificity. On June 8, 2012, the Pritchards filed a response to the preliminary objections regarding venue and the specificity of the complaint, and the Pritchards also requested permission to amend their complaint to add more details and to comply with Pa.R.C.P. 1024 regarding verified pleadings. On June 11, 2012, the Pritchards filed interrogatories directed to Rodes and GPW that sought information regarding their representation of the Pritchards in the toxic tort action and information regarding venue. Thereafter, the Pritchards' filed two additional requests seeking leave to amend their complaint.

On July 16, 2012, the trial court granted the Pritchards' request to amend their complaint and the Pritchards filed an amended complaint the same day.³ On July 18, 2012, the trial court granted in part Rodes's and

² Rodes filed the toxic tort action in the United States District Court for the Western District of Pennsylvania, and Rodes appealed the resulting decision to the United States Court of Appeals for the Third Circuit.

³ The Pritchards' amended complaint includes the addition of averments as to venue, a certificate of merit, verification, and revised claims of negligence, legal malpractice and professional misconduct. **See** Amended Complaint, 7/16/2012.

GPW's preliminary objection to the original complaint by ordering that the case be transferred from Fayette County to Allegheny County.

Thereafter, the Pritchards filed a timely notice of appeal followed by a court-ordered Pa.R.A.P. 1925(b) statement. The trial court filed its Pa.R.A.P. 1925(a) opinion on September 5, 2012.

On appeal, the Pritchards challenge the trial court's decision to transfer venue to Allegheny County. We have stated our standard of review as follows:

It is well established that a trial court's decision to transfer venue will not be disturbed absent an abuse of discretion. A Plaintiff's choice of forum is to be given great weight, and the burden is on the party challenging the choice to show it was improper. However, a plaintiff's choice of venue is not absolute or unassailable. Indeed, if there exists any proper basis for the trial court's decision to grant a petition to transfer venue, the decision must stand.

Wimble v. Parx Casino & Greenwood Gaming & Entm't, Inc., 40 A.3d 174, 177 (Pa. Super. 2012) (quoting ***Fritz v. Glen Mills Schools***, 840 A.2d 1021, 1023 (Pa. Super. 2003)).

The Pritchards first argue that the trial court erred in granting Rodes's and GPW's preliminary objection as to venue. According to the Pritchards, the preliminary objection was filed to the original complaint. The trial court granted the Pritchards' request to file an amended complaint, and the Pritchards filed the amended complaint the same day. Appellant's Brief at 1-

2. Thus, the Pritchards argue the filing of the amended complaint rendered the original complaint and the preliminary objections a nullity. *Id.*

In its 1925(a) opinion, the trial court responds to this argument by stating: “Defendants’ [p]reliminary [o]bjections are not moot as the objections have not been resolved, and [the Pritchards] have yet to substantively amend their [c]omplaint.” Trial Court Opinion, 9/5/2012, at 5. This is error on the part of the trial court.

In the instant case, the Pritchards filed an amended complaint, which, as noted previously, included the addition of averments as to venue, a certificate of merit, verification, and revised claims of negligence, legal malpractice and professional misconduct. *See* Amended Complaint, 7/16/2012. With respect to the effect of an amended pleading, our Supreme Court has stated that the filing of an amended pleading in effect constitutes a withdrawal of the original pleading. *Fleming v. Strayer*, 367 Pa. 284, 288, 80 A.2d 786, 788 (1951). Therefore, the Pritchards’ original complaint was no longer in effect at the time the trial court granted the preliminary objection to the original complaint based on venue.

Furthermore, Pa.R.C.P. 1028(f) provides that “[o]bjections to any amended pleading shall be made by filing new preliminary objections.” Pa.R.C.P. 1028(f). As a result, objections to the Pritchards’ amended complaint must be made by filing new preliminary objections. *See Allegheny Inst. Taxpayers Coal. v. Allegheny Reg’l Asset Dist.*, 556

Pa. 102, 113 n.*, 727 A.2d 113, 119 n.* (1999) (stating that “the 1991 amendments to Pa.R.C.P. 1028(f) changes the prior practice, providing that a party who wishes to object to an amended complaint should file new preliminary objections”).⁴ Because an amended complaint was the only pleading before the trial court at the time it ruled on the preliminary objection to venue, the trial court’s order transferring venue to Allegheny County was of no effect. ***See Francesco v. Group Health Inc.***, 964 A.2d 897, 898-99 (Pa. Super. 2008), *appeal denied*, 606 Pa. 650, 992 A.2d 889 (2010) (finding that the trial court’s order sustaining preliminary objections to the original complaint was of no effect where an amended complaint was filed prior to the trial court’s ruling).⁵

⁴ The “prior practice” for objecting to an amended complaint follows:

If the amendment [of the complaint] removes all of which the defendant has complained, the preliminary objection should be withdrawn or dismissed by the court. If the defendant is not satisfied that the amendment cures all the errors, he need not file a new preliminary objection, but may order down the original objection for argument on the original complaint as well as the amendment.

Allegheny Reg'l Asset Dist., 556 Pa. at 113 n.*, 727 A.2d at 119 n.* (citation omitted).

⁵ We also point out that when ruling on a preliminary objection based on improper venue, “the court relies on facts raised by deposition or otherwise.” ***McMillan v. First National Bank of Berwick***, 978 A.2d 370, 373 (Pa. Super. 2009) (quoting ***Kubik v. Route 252, Inc.***, 762 A.2d 1119 (Pa. Super. 2000)); ***see also*** Pa.R.C.P. 1028(c)(2) (stating that “[i]f an issue of fact is raised, the court shall consider evidence by depositions or otherwise). The burden rests on the party challenging the plaintiff’s choice of venue to

We accordingly vacate the trial court's order granting Rodes's and GPW's preliminary objection to venue and remand this case for proceedings consistent with this memorandum.⁶

Order vacated. Case remanded. Jurisdiction relinquished.

show that it was improper. *See Wimble*, 40 A.3d 174, 177 (Pa. Super. 2012) (citation omitted). In this case, the record shows that the trial court did not hold a hearing or argument on the issue of venue. The Pritchards filed of record on June 11, 2012, interrogatories directed to Rodes and GPW, four of which apply to venue. There is no response to the interrogatories of record. There is no indication in the record that any depositions occurred. Instead, it appears that the trial court concluded that GPW does not regularly conduct business in Fayette County pursuant to Pa.R.C.P. 2179(a)(2) based on information it obtained following a "search in the Fayette County Prothonotary's Office," which revealed that five of GPW's 23 attorneys have ever had cases in Fayette County. Trial Court Opinion, 9/5/2012, at 4. The trial court further found (in some manner dehors the record) that five GPW attorneys represented clients in 12 cases in Fayette County, including the instant case, and the most recent case, excluding the instant action, was from 2004. *Id.*

⁶ Due to our disposition of the Pritchards' first claim on appeal, we have no need to address their remaining claims.