NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

NEVIN A. MAURER, SR. AND RUTH MAURER, HUSBAND AND WIFE, Appellants v. REINHARD'S AUTO CENTER AND VOLKSWAGEN GROUP OF AMERICAN, INC., v. T.L. EDKIN AUTOMOTIVE SERVICE, Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2791 EDA 2011

Appeal from the Order Entered September 13, 2011
In the Court of Common Pleas of Philadelphia County
Civil Division at No(s): No. 01964 May Term 2010

BEFORE: STEVENS, P.J., BOWES, J., and PLATT, J.*

MEMORANDUM BY STEVENS, P.J. Filed: February 21, 2013

Appellant Nevin Maurer[1] appeals from the order of the Court of Common Pleas of Philadelphia County, which granted the petition of Appellees, Volkswagen Group of America, Inc. (VWGA) and Reinhard's Auto

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* Retired Senior Judge assigned to the Superior Court.

[1] Ruth Maurer is also an appellant based on her loss of consortium claim, but because all the facts and issues mostly involve Nevin, we will refer to Nevin alone as Appellant.

Center (Reinhard's),[2] to transfer venue to Dauphin County pursuant to the doctrine of *forum non conveniens*. We affirm.

Appellant filed the instant products liability action in Philadelphia County on July 26, 2010, based on injuries he allegedly sustained from defects in his 2002 Volkswagen Jetta. Appellant contends that on February 19, 2009, he was traveling in his Jetta on State Route 225 in Jackson Township, Dauphin County, at a normal rate of speed when suddenly the side/curtain driver's-side airbags deployed, striking Appellant and causing injury. Trial Ct. Op., filed 6/18/2012, at 1. Appellant claims he was neither driving erratically nor involved in an accident at the time the airbags deployed.[3] ***Id***. Appellant commenced this action by filing a complaint in Philadelphia on July 26, 2010, which contained six separate claims against VWGA and Reinhard's.[4] ***Id***.

Appellee Reinhard's answered the complaint on January 31, 2011, denying all claims, and on August 11, 2011, Appellee VWGA filed preliminary

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[2] T.L. Edkin Automotive Service, a named defendant, did not file a brief on appeal.

[3] Contrarily, Appellees claim that Appellant struck a curb with his car, and they have deposed witnesses, repair technicians who inspected Appellant's vehicle following the alleged incident, in Dauphin County to testify to that averment.

[4] Counts I and II are strict liability claims against Reinhard's and VWGA, count III is a breach of warranty claim against VWGA, Counts IV-V are negligence claims against Reinhard's and VWGA, and Count VI is a loss of consortium claim by Ruth Maurer against VWGA.

objections, in part challenging venue as improper based on *forum non conveniens*, pursuant to Pa.R.C.P. 1006(e). ***Id***. VWGA argued Appellant's choice of forum of Philadelphia County was vexatious and oppressive because the accident occurred in Dauphin County and all fact witnesses reside and work in that area. ***Id***. Appellant responded to the motion to transfer on August 31, 2011, asserting VWGA's motion was improper because the discovery deadline and trial date were imminent, VWGA failed to prove Appellant's choice of forum was vexatious and oppressive, and Appellees submitted to the choice of forum. ***Id***. at 1-2. On September 13, 2011, the trial court granted VWGA's motion to transfer venue, from which Appellant filed this timely appeal. ***Id***. at 2.

Appellant raises the following issues for our review:

> A. Whether the trial court abused its discretion in granting [Appellee's] Motion to Transfer for *Forum Non Conveniens* where [Appellee] had already submitted to the jurisdiction of the Court of Common Pleas of Philadelphia County?
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> B. Whether the lower court abused its discretion in granting [Appellee's] Motion to Transfer Venue for *forum non conveniens* where the [trial] court considered improper and irrelevant factors and where it failed to hold [Appellee] to its burden of proving with detailed record evidence that the Appellants' choice of forum was harassing, oppressive, or vexatious?

Appellant's Brief, at 4.

Each of Appellant's issues challenges the trial court's granting of Appellee's motion for change of venue for *forum non conveniens*. Our standard of review is "whether the trial court committed an abuse of

discretion." ***Catagnus v. Allstate Ins. Co.***, 864 A.2d 1259, 1263 (Pa. Super. 2004); ***see also Engstrom v. Bayer Corp.***, 855 A.2d 52, 55 (Pa. Super. 2004). It is well-established that the trial court's decision on whether to transfer venue is not to be disturbed absent an abuse of its discretion. ***See Purcell v. Bryn Mawr Hosp.***, 525 Pa. 237, 242, 579 A.2d 1282, 1284 (1990).

> If there exists any proper basis for the trial court's decision to transfer venue, pursuant to Rule 1006(d)(1), the decision must stand. An abuse of discretion is not merely an error of judgment, but occurs only where the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill will, as shown by the evidence or the record.

Bratic v. Rubendall, 43 A.3d 497, 499 (Pa. Super. 2012) (*en banc*) (quoting ***Zappala v. Brandolini Prop. Mgmt.***, 589 Pa. 516, 536, 909 A.2d 1272, 1284 (2006)) (citations omitted). "[A] trial court's failure to hold the defendant to the proper burden constitutes an abuse of discretion." ***Catagnus***, ***supra*** at 1264. "Procedurally there are no time limitations placed on a motion to transfer venue pursuant to Rule 1006(d)(1)." ***Zappala***, ***supra*** at 537, 909 A.2d at 1283.

In the case *sub judice*, the trial court found that discovery remains to be completed, and most of the key fact witnesses in the case live an average of 100 miles from Philadelphia but only about 20 to 40 miles from Dauphin County. Trial Ct. Op., at 7. As a result, the trial court concluded that

Appellees carried their burden of proof by showing, through affidavits, the vexatious and oppressive nature of Appellant's chosen forum. ***Id***.

First, Appellant argues that the trial court erred in granting VWGA's motion because VWGA submitted to the jurisdiction of the Philadelphia court for fifteen months prior to filing its motion. Appellant's Brief, at 9. Appellant contends that the trial court misapplied the law and misapprehended his argument because, contrary to the trial court's interpretation, he did not argue that Appellees must raise the doctrine of *forum non conveniens* within a certain time and that failure to do so would compel denial of the motion. ***Id***. Rather, he maintains that the trial court must consider timeliness as a factor in the analysis. ***Id***. In such an analysis, Appellant concludes, Appellees evidenced a clear intent to submit to Philadelphia as the forum. We disagree.

The timeliness of a motion to transfer is a factor that our Courts have considered in the *forum non conveniens* analysis. ***See***, ***e.g.***, ***Wright v. Aventis Pasteur, Inc.***, 905 A.2d 544, 551 (Pa. Super. 2006); ***D'Alterio v. New Jersey Transit Rail Operations, Inc.***, 845 A.2d 850, 854 (Pa. Super. 2004); ***Hoose v. Jefferson Home Health Care, Inc.***, 754 A.2d 1, 4 (Pa. Super. 2000); ***Farley v. McDonnell Douglas Truck Servs., Inc.***, 638 A.2d 1027, 1031 (Pa. Super. 1994). In ***Wright***, the plaintiffs, residents of Texas, initiated a products liability action in Philadelphia County against an immune globulin blood products and vaccines manufacturer. ***Wright***, 905 A.2d at

545-46. After the case was in progress for two years, the defendant filed a *forum non conveniens* motion to dismiss on the last day for the submission of pretrial motions, and only three months before the scheduled trial date. ***Id***. at 551. This Court considered the timeliness of the motion, along with other mandated factors, and held that "there [was] an insufficient basis upon which to find that there [were] 'weighty reasons' to disturb plaintiffs' choice of forum." ***Id***. ***See also D'Alterio***, 845 A.2d at 854 (where the trial court failed to consider one year and three months of discovery and completion of pre-trial preparation in Philadelphia and the record failed to demonstrate how trial in Philadelphia would create great hardship for Appellee, the private factors did not supply sufficiently weighty reasons for depriving Appellant of his choice of forum and dismissing case on ground of *forum non convenien*s); ***Hoose***, 754 A.2d at 4-5 (where a majority of pre-trial procedures had already been conducted in Philadelphia and Appellee consistently appeared in plaintiff's chosen forum, after a review of the record our Court concluded that the plaintiff's chosen forum was not designed to harass the defendants or one so oppressive and vexatious as to require transfer of venue); ***Farley***, 638 A.2d at 464-67 (our Court stated that the trial court did not consider all the factors on the record, including whether an alternative forum existed and that a year's worth of discovery had taken place in Philadelphia, and held that no weighty reasons in the record supported the dismissal of plaintiff's choice of forum).

In the case *sub judice*, Appellant fails to cite case law holding that actively litigating in a jurisdiction for a certain amount of time constitutes submitting to a jurisdiction or waiver of a defendant's right to file a Rule 1006(d)(1) motion. While timeliness is a factor considered in a court's transfer of venue analysis, and we will consider it in Appellant's second issue, VWGA's allegedly delayed motion does not mean it submitted to the Philadelphia court as the proper forum.[5]

We therefore consider Appellant's argument that the trial court erred in granting Appellee's motion because it "misapplied and over-rode well-established standards regarding: (i) the factors that are to be considered in a *Forum Non Conveniens* challenge; and (ii) the burden a moving party must meet before a case will be transferred on *Forum Non Conveniens* grounds." Appellant's Brief at 14. Appellant specifically argues that the trial court considered impermissible and irrelevant factors in its analysis, and it failed to hold Appellee to its burden of showing, with detailed record evidence, that Appellants' choice of forum was vexatious, oppressive, or harassing. ***Id***. Appellant further argues that the Dauphin County witnesses are inconsequential because Appellees failed to point to any record evidence

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[5] Appellant presents us with a somewhat confusing argument, at first claiming he never argued to the trial court that untimeliness necessitates denial of Appellant's motion, but then averring that Appellant submitted to Philadelphia as the proper forum by virtue of its untimeliness. In either event, we will consider his arguments in his second issue.

indicating why they are relevant in this case. ***Id.*** at 17. Appellant concludes the trial court erred in transferring forum to Dauphin County. We disagree.

Pa.R.C.P. 1006(d)(1) governs transfers of venue based on *forum non conveniens*, stating, "For the convenience of parties and witnesses the court upon petition of any party may transfer an action to the appropriate court of any other county where the action could originally have been brought." Pa.R.C.P. 1006(d)(1). As noted by our Court *en banc*, the analysis is governed by what has become known as the "***Cheeseman*** factors:"

> Our Supreme Court has carefully outlined the relative burdens and the relevant considerations to be weighed by a trial court when entertaining a petition under Rule 1006(d)(1). [T]he plaintiff's choice of forum should rarely be disturbed by the grant of a Rule 1006(d)(1) petition. We cannot overemphasize . . . a trial court, even if congested, must give deference to the plaintiff's choice of forum in ruling on a petition to transfer venue
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> [A] petition to transfer venue should not be granted unless the defendant meets its burden of demonstrating, with detailed information on the record, that the plaintiff's chosen forum is oppressive or vexatious to the defendant.
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> Thus, . . . the defendant may meet its burden of showing that the plaintiff's choice of forum is vexatious to him by establishing with facts on the record that the plaintiff's choice of forum was designed to harass the defendant, even at some inconvenience to the plaintiff himself. Alternatively, the defendant may meet his burden by establishing on the record that trial in the chosen forum is oppressive to him; for instance, that trial in another county would provide easier access to witnesses or other sources of proof, or to the ability to conduct a view of premises involved in the dispute. But, we stress that the defendant

> must show more than that the chosen forum is merely inconvenient to him.

Bratic, 43 A.3d at 500 (quoting ***Cheeseman v. Lethal Exterminator Inc.***, 549 Pa. 200, 213, 701 A.2d 156, 162 (1997)).

To determine whether weighty reasons exist to overcome the plaintiff's choice of forum, we must examine both the private and public interest factors involved. ***Engstrom***, 855 A.2d at 55. These considerations include:

> The relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; . . . and all other practical problems that make trial of a case easy, expeditious and inexpensive. . . . The court will weigh relative advantages and obstacles to a fair trial.
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> Factors of public interest also have [a] place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. There is appropriateness, too, in having the trial . . . in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

Id. at 56 (quoting ***Petty v. Suburban Gen. Hosp.***, 525 A.2d 1230, 1232 (Pa. Super. 1987)).

In the case *sub judice*, the trial court found that Appellee sufficiently stated, with facts on the record, how trial in Philadelphia County would be oppressive and vexatious. Appellant's argument that Appellee failed to point to any evidence explaining the relevancy of the testimony of Dauphin County

witnesses is without merit. In its memorandum in support of its *forum non conveniens* motion, VWGA specifically noted that, "contrary to [Appellant's] claim that the airbags spontaneously deployed without any warning, [Appellee witness] Mr. Roeske testified at deposition that he found damage to the undercarriage of the subject vehicle consistent with someone driving over a curb when he was asked to repair it following the February 19, 2009 incident." Def.'s Mem. of Law in Supp. of Def.'s Mot. to Dismiss and Transfer Venue, filed 8/10/11, at 3-4. Additionally, Appellee witness Mr. Hartman testified that he saw the same damage as Mr. Roeske.[6] ***Id.***

Further, it is apparent that trial in Philadelphia County would create hardships for Appellee witnesses John Heim, Nicole Kehler, and Brett Kehler,[7] because of the distance they would need to travel. ***Id.*** at 5-6. Although Appellant contends the affidavits alone must contain the defense's theory and to what each witness will testify, Appellant cites no authority for this proposition and we find none. ***Cheeseman***, in fact, provides only that the defendant must state detailed reasons on the record why the chosen

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[6] Brian Roeske is the repair technician who inspected, worked on, and repaired Appellant's vehicle following the alleged February 19, 2009 incident at issue. George Hartman is a repair technician who assisted with the diagnosis of Appellant's vehicle following the alleged February 19, 2009 incident at issue.

[7] John Heim is the owner and operator of John Heim Garage, a motor vehicle service and repair facility that has provided service and repair to Appellant's vehicle. Nicole and Brett Kehler owned the subject vehicle prior to Appellant.

forum is oppressive or vexatious, which VWGA did in the case *sub judice* through its *forum non conveniens* motion and the depositions of Mr. Roeske and Mr. Hartman. ***Cheeseman***, ***supra*** at 213, 701 A.2d at 162.

The record thus establishes the following: Appellee presented facts showing that the accident occurred in Dauphin County, and several key witnesses live in or close to Dauphin County. Additionally, affidavits of potential witnesses highlighted the long distances between their residences and Philadelphia County, the hardship on the witnesses' businesses, and the excessive forced travel and lodging expenses that important witnesses would incur. Although Appellant argues that many of VWGA's employee-witnesses have easier access to Philadelphia than Dauphin County, we observe that such burden will ultimately be borne by Appellee. ***See Walls v. Phoenix Ins. Co.***, 979 A.2d 847, 853 (Pa. Super. 2009) (noting that the witness who would allegedly suffer hardship if asked to testify in the plaintiff's chosen forum, an insurance adjuster employed by the defendant, was not "a hapless citizen being hauled into court, but is a professional insurance claims adjuster who will surely be fully compensated by his client. . . .").[8]

The trial court's conclusion, that choosing Philadelphia as the forum for this case would needlessly burden important defense witnesses, is supported

[8] These employees would not require subpoenas in order to compel their testimony in Dauphin County, whereas the Dauphin County witnesses are small-business owners, small-business workers, or homemakers who stated in affidavits that they would testify in Philadelphia only if subpoenaed.

by the record. ***See Catagnus***, ***supra***. We also find no issue with regard to the timing of VGW's motion. Notably, depositions for Mr. Roeske and Mr. Hartman took place at the end of May 2011, and VGW filed the motion on August 10, 2011, approximately two-and-a-half months later. Such amount of time is reasonable, given the amount and type of information necessary to support a motion to transfer venue. We therefore conclude the timing of VGW's motion is not a substantial factor in the ***Cheeseman*** analysis.

After considering all of the relevant factors contained in the ***Cheeseman*** analysis, including timeliness, we conclude that the trial court did not abuse its discretion when it granted Appellee's motion to transfer venue based on *forum non conveniens*. Accordingly, we affirm the order transferring venue to Dauphin County.

Order affirmed.