

**THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, PHILADELPHIA COUNTY  
IN THE COURT OF COMMON PLEAS**

SHAWN HAMIEL and SANDRA LIGHTFOOT-HAMIEL	:	
	:	TRIAL DIVISION – CIVIL
	:	
Appellants/Plaintiffs	:	
V.	:	MAY TERM, 2010
	:	NO. 4104
	:	
	:	
RIVERSIDE CONSTRUCTION MATERIALS, INC. and THOMAS P. HODGKINS	:	Superior Court No.
	:	1820 EDA 2011
	:	
Appellees/Defendants	:	
	:	

**OPINION**

**PROCEDURAL HISTORY**

Plaintiffs, Shawn Hamiel and Sandra Lightfoot-Hamiel, appeal an Order dated May 19, 2011, wherein this Court granted Defendants, Riverside Construction Materials, Inc., and Thomas P. Hodgkins’ Motion to Transfer Venue to Bucks County.

**FACTUAL BACKGROUND**

On August 14, 2008, Plaintiff Shawn Hamiel (hereinafter “Hamiel”) was operating a tractor-trailer in Falls Township, Bucks County, Pennsylvania. (Complaint ¶ 6). Plaintiff Hamiel was stopped at the base of the ramp to U.S. Route 1 Southbound coming from Route 13 Northbound. (Complaint ¶ 6). At the aforesaid date and place, Defendant Thomas P. Hodgkins was operating a tractor-trailer owned by Defendant Riverside Construction Materials, Inc. within the scope of his employment. (Complaint ¶

7). Defendant Hodgkins was also attempting to merge onto Route 1 Southbound. (Complaint ¶ 7). At approximately 10:00-10:15 a.m., Defendant Hodgkins' tractor-trailer struck the rear of the tractor-trailer operated by Plaintiff Hamiel, causing injury to Plaintiff Hamiel. (Complaint ¶ 8).

Plaintiff commenced this action by filing his Complaint on June 1, 2010. The Complaint contains five separate claims. Counts I-III are negligence claims against Defendants Construction Materials, Inc., Silvi Concrete Products, Inc., and Thomas Hodgkins (collectively "Defendants"). Count IV is a negligent entrustment claim against Construction Materials, Inc. and Silvi Concrete Products, Inc. Finally, Count V is a Loss of Consortium claim by Plaintiff Sandra Lightfoot-Hamiel, spouse of Plaintiff Shawn Haimel. (Complaint ¶ 24).

Defendants answered the Complaint on July 26, 2010, denying each claim. (See Docket). Defendants then filed a Motion to Transfer Venue based on *Forum Non Conveniens* on September 13, 2010. *Id.* Defendant argued that trial in Philadelphia County would be oppressive and vexatious to the witnesses and defendants involved in the case because: the accident occurred in Bucks County; Riverside Construction Materials, Inc. (hereinafter "Riverside") has a primary place of business in Bucks County; any employees of Riverside to be called as witnesses are employed in Bucks County; Tim Kurz, Senior Vice President of Riverside, would have to miss extended periods of time from work in order to attend a trial in Philadelphia County, which would be detrimental to Riverside's business; and Defendant Thomas Hodgkins resides in Bucks County. (Defendants' Memorandum in Support of Motion to Transfer Venue, pg. 3-4). Additionally, Defendants argued that transfer would be appropriate because

medical records and other sources of proof are easily accessible in Bucks County. (Defendants' Memorandum in Support of Motion to Transfer, pg. 6).

Plaintiffs responded to Defendants' Motion to Transfer on October 1, 2010 (See Docket). Plaintiffs asserted that Defendants have not met the standard for transferring a case based on *forum non conveniens*, and venue in Philadelphia is neither oppressive nor vexatious to Defendants. (Plaintiff's Memo in Opposition to Transfer, pg. 5-6).

This Court denied Defendants' Motion to Transfer Venue based on *Forum Non Conveniens* on October 13, 2010. (See Docket). On April 27, 2011, Defendants Riverside Construction Materials, Inc. and Thomas P. Hodgkins filed a Motion for Reconsideration of this Court's Order of October 13, 2010 denying Transfer of Venue, detailing the oppressive nature of trial in Philadelphia County. (Defendants' Motion for Reconsideration, pg. 11).

Plaintiffs responded to the Motion for Reconsideration on May 10, 2011, stating Defendants' Motion was untimely and alleging Defendants still had not set forth facts that tended to show the oppressive or vexatious nature of trial in Philadelphia County. (Plaintiffs' Response to Defendants Motion for Reconsideration, pg. 2). This Court granted Defendants' Motion for Reconsideration of the Court's Order of October 13, 2010 and ordered that the above matter be transferred to Bucks County on May 19, 2011. (See Docket). On May 31, 2011, Plaintiffs filed a Motion for Reconsideration of this Court's Order of May 19, 2011, arguing that Defendants failed to meet their burden of proof and that their motion lacked merit. *Id.*

Defendants filed a Response in Opposition to the Motion for Reconsideration on June 15, 2011. *Id.* After this Court denied Plaintiffs' Motion for Reconsideration on

June 22, 2011, Plaintiffs then filed their Concise Statement of Errors Complained of on Appeal on August 9, 2011. *Id.*

The issues to be addressed on appeal are: 1) whether this Court abused its discretion or committed an error of law in vacating its order of October 13, 2010 and transferring the case to Bucks County based on *forum non conveniens* where Plaintiffs assert that the motion was untimely and thus waived; and 2) whether this Court abused its discretion or committed an error of law by granting Defendants' Motion for Reconsideration and transferring venue based on *Forum Non Conveniens* when Defendants' established the oppressive nature of having trial in Philadelphia County.

#### **LEGAL ANALYSIS**

In Pennsylvania, “[i]t is well established that a trial court’s decision to transfer venue will not be disturbed absent an abuse of discretion.” *Jackson v. Laidlaw Transit, Inc.*, 822 A.2d 56, 57 (Pa. Super. Ct. 2003). A trial judge abuses his discretion when he overrides or misapplies the law, or decides a matter in a manifestly unreasonable way. *Cooper v. Nationwide Mutual Insurance Company*, 761 A.2d 162, 164 (Pa. Super. Ct. 2000).

Plaintiffs first argue that this Court committed an abuse of discretion when it denied their May 31, 2011 motion for reconsideration of the Court’s May 19, 2011 Order, transferring this case to Bucks County. Generally, however, the denial of reconsideration is not subject to review on appeal. *See Cheatham v. Temple Univ. Hosp.*, 743 A.2d 518 (Pa. Super. 1999) (mere filing of a petition for reconsideration did not toll the 30 day period for appeal from a final order; refusal of the trial court to reconsider, rehear or

permit re-argument of a final decree not reviewable on appeal.) *See also Goodman By Goodman v. Pizzutillo*, 682 A.2d 383 (Pa. Super. 1996).

Second, Plaintiffs argue that this Court should not have entertained Defendants' Motion for Reconsideration of the Court's decision to deny Defendants' petition to transfer venue based on *forum non conveniens* because it was untimely. Petitions to transfer venue based on *forum non conveniens* are governed by Pennsylvania Rule of Civil Procedure 1006(d)(1), which reads, "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). Rule 1006(d)(1) does not, however, place any temporal or procedural restraints on a party's ability to petition to transfer venue based on *forum non conveniens*. *Vogel v. National Railroad Passenger Corp.*, 370 Pa.Super 315, 536 A.2d 422, 425 (1988).

Additionally, the seminal case regarding transfers based on *forum non conveniens* in Pennsylvania does not list timeliness as a factor for the Court's consideration. *Cheeseman v. Lethal Exterminator, Inc.*, 549 Pa. 200, 701 A.2d 156 (1997). However, "a transfer petition should not be a tool by which a defendant may forestall litigation in the underlying case by generating litigation concerning the transfer petition." *Id.* at 162 n. 8. Here, Plaintiffs have not established or attempted to establish that Defendants have used the transfer as a delay tactic and should therefore be precluded from transferring the case.

Plaintiffs cite Pa.R.C.P. 1006(e) to support their claim that Defendants' motion was untimely and thus waived. Rule 1006(e) states that "[i]mproper venue shall be raised by preliminary objection and if not so raised shall be waived." Pa.R.C.P. 1006(e). Here,

however, Defendant is not challenging the appropriateness of venue. Rather, Defendant is challenging the oppressive nature of conducting trial in Philadelphia County under Pa.R.C.P. 1006(d). Therefore, Defendants were not required to raise *forum non conveniens* in the form of a Preliminary Objection, and their motion cannot be considered untimely.

Next, Plaintiffs argue that this court committed error and abused its discretion by granting Defendants' Motion for Reconsideration of the October 13, 2010 order and transferring this action to Bucks County. In Pennsylvania, a plaintiff's choice of forum should "rarely be disturbed." *Cheeseman*, 701 A.2d at 162. Further, our Supreme Court has stated "a petition to transfer venue should be granted unless the defendant meets its burden by demonstrating, with...information on the record, that the plaintiff's chosen forum is oppressive or vexatious to the defendant." *Id.* The Court went on to state two ways for the defendant to meet this burden: (1) by showing "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"; or (2) by showing "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." *Id.*

Here, Plaintiff's choice of forum is oppressive because easy access to sources of proof exists in Bucks County, the cost of obtaining attendance of witnesses is less in Bucks County, and the accident occurred in a county other than the chosen forum. *Id.*

Utilizing the *Cheeseman* framework, courts have considered affidavits of potential witnesses sufficient to allow a transfer of venue based on *forum non conveniens*.

*Wood v. E.I. du Pont de Nemours and Co.*, 2003 Pa.Super 268, 829 A.2d 707 (2003). In *Wood*, a delivery man suffered injuries after he tripped and fell while making a delivery to the defendant's plant in Bradford County, Pennsylvania. The defendant, a Delaware corporation, maintained a research facility (unrelated to the Bradford County plant) in Philadelphia. Despite the fact that the incident occurred in Bradford County and potential witnesses resided in Bradford County, the plaintiff brought the claim in Philadelphia County. The defendant in *Wood* filed affidavits of witnesses stating the oppressive nature of holding a trial in Philadelphia County and describing the disruption it would cause them personally and professionally. On the defendant's petition to transfer, the Court determined, "[Defendant] placed detailed information on the record that...its critical witnesses were plant employees who would be forced to travel...to attend trial in Philadelphia." *Id.* The Court thus transferred the case to Bradford County.

Here, Defendants have sufficiently stated, with facts on the record, how trial in Philadelphia County would be oppressive and vexatious. Defendant submitted an affidavit of Mr. Tim Kurz, Senior Vice President at Riverside Construction Materials. Mr. Kurz states in his affidavit that trial in Philadelphia County would be oppressive to him and a number of employees that would serve as key witnesses. (Affidavit of Tim Kurz, pg. 3). Mr. Kurz supervises eighteen employees at Riverside Construction Materials on a daily basis. (Affidavit of Tim Kurz, pg. 2). Moreover, Mr. Kurz works full-time, Monday through Friday, and states that travelling to Philadelphia County for depositions or trial would negatively affect the production and efficiency of his business. (Affidavit of Tim Kurz, pg. 2). This absence would result in a loss of goodwill because many customer needs would go unsatisfied. (Affidavit of Tim Kurz, pg. 2).

Moreover, the affidavit of Thomas P. Hodgkins points out that all Defendants reside in Bucks County. (Affidavit of Thomas P. Hodgkins, pg. 1). In addition, the time and money spent litigating this case in Philadelphia County would be oppressive and vexatious, and trial in Bucks County would allow Hodgkins to secure non-party witnesses to this matter. (Affidavit of Thomas P. Hodgkins, pg. 2).

The Affidavit of Michael Matalavage, Chief Financial Officer of Riverside Construction Materials, Inc., further demonstrates the oppressive nature of holding trial in Philadelphia County. According to Matalavage, only .46% of all Riverside's revenue in 2010 came from business conducted and/or completed in Philadelphia County. (Affidavit of Michael Matalavage, pg. 1).

The affidavits submitted by Defendants demonstrate that if Riverside was required to defend this case in Philadelphia County, an overwhelming majority of its business would be negatively affected.

Like *Wood*, Defendant has specified key witnesses in this matter that would be unreasonably burdened by trial in Philadelphia County. *Wood*, applying the *Cheeseman* framework, supports this Court's decision to grant Defendant's motion for reconsideration of this court's Order of October 13, 2010 and to transfer venue. *See Mateu v. Stout*, 819 A.2d 563 (Pa. Super 2003) (finding transfer to Delaware County was appropriate where fact witnesses were located outside of Philadelphia); *See also Techtmann v. Howie*, 720 A.2d 143, 1998 Pa. Super. LEXIS 3282 (1998) (transfer to Berks County granted despite plaintiff and medical provider residing in Philadelphia).



**CONCLUSION**

For the foregoing reasons, this Court respectfully requests its decision to grant Defendants Riverside Construction Materials, Inc. and Thomas P. Hodgkins' Motion for Reconsideration and transfer the case to Bucks County be **AFFIRMED**.

**BY THE COURT:**

\_\_\_\_\_  
**DATE**

\_\_\_\_\_  
**ALLAN L. TERESHKO, J.**

cc:  
All counsel  
Feeda R. Musitief, Esq., for Appellants  
Joseph R. Fowler, Esq. for Appellees