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To the Members of the House Republican Policy Committee:

Good morning. My name is Mark Zolfaghari, I am an attorney, and I serve as the Chief Medical Litigation Officer for St. Luke's University Health Network. Before coming to work in the Lehigh Valley six years ago, I worked as a litigation attorney in Philadelphia and its suburbs with Blank Rome and prior to that with Kevin H. Wright and Associates. I have been practicing law since 1995, solely in the field of medical malpractice defense.

St. Luke's University Health Network is a fully integrated health system with 10 hospitals and more than 300 outpatient sites. We have facilities located in 11 counties in eastern Pennsylvania as well as in Warren County, New Jersey.

I want to thank the Policy Committee for allowing me to testify about the proposal of the Pennsylvania Civil Rules Committee to change the current rules governing venue in medical malpractice actions. As this Policy Committee is aware, the MCARE act was passed in 2002 in part to respond to a crisis in the medical malpractice insurance marketplace. As noted in the MCARE Act, the General Assembly recognized that

> "recent changes in the health care delivery system have necessitated a revamping of the corporate structure of various medical facilities and hospitals across this Commonwealth. This has unduly expanded the reach and scope of existing venue rules."

The General Assembly established the Interbranch Commission on Venue which recommended in 2002 the current rules on venue that were adopted by the Supreme Court in 2003. These rules require that claims against health care professionals and hospital be filed in the county where treatment was rendered. This reform is widely seen as the most important step in Pennsylvania's efforts to address the medical liability insurance crisis, and as a byproduct has substantially reduced medical malpractice filings statewide.

At the end of 2018, the Rules Committee recently published a proposal to change the rules concerning venue to the pre-2002 version, for the alleged purpose of restoring "fairness to the procedure for determining venue." We believe, however, that the proposed change will again unduly expand the reach

and scope of litigation, create a level of unfairness to hospitals and physicians that will usher in a litigation crisis, and increase healthcare cost for the citizens of Pennsylvania.

My testimony today has four (4) objectives:

1. Provide an overview of the impact on medical malpractice insurance rates and healthcare costs if the medical professional liability venue reform is repealed;
2. Refute claims of unfairness as pronounced by the Rules Committee;
3. Reveal the hidden cost of allowing venue shopping;
4. Discuss how a repeal of the venue rules would only inhibit our ability to provide access to healthcare providers and specialists for our residents, especially those in rural areas.

First, the cost impact of this repeal.

By allowing venue in counties with little to no relation to the underlying medical care, claimants will shop for verdict-friendly venues in which to file their suits. This would again lead to higher premiums for medical liability insurance and make Pennsylvania less attractive to physicians considering practicing in the state, and to higher overall healthcare costs.

According to the October 2018 Aon/ASHRM benchmark report, the average loss rate per occupied bed used in establishing malpractice premiums for the high risk venues like Philadelphia County and its immediate suburbs is 80% higher, or approximately $2000 per bed higher than the rest of Pennsylvania.

By changing the rule, there will be a sharp increase in the cases brought in these high risk venues, syphoning them from the venues where the treatment was actually rendered. If you multiply the premium effect the venue rule change will have on the tens of thousands of occupied beds throughout Pennsylvania outside the high risk venues, the rule change could cause more than $50 million per year of premium increases. The increases in premiums will necessarily be absorbed through increased healthcare costs to the citizens of these lower risk venues, with benefits to only a few, including the trial lawyers who are compensated with 33%-40% of the awards.

Second, the fairness of the current rule.

The Rules Committee, in its Explanatory Comment, suggests that venues with lower verdicts are somehow unfair to the patients bringing the claims. While the number of lawsuits and plaintiffs' verdicts has decreased when compared to the time prior to the rules change in 2003, this needs to be put in the proper context.

According to a study from Pew Research Foundation, from 1999 to 2001, Philadelphia juries were finding in favor of Plaintiffs approximately 40% of the time, which was double the national average. And in that period, Philadelphia verdicts in excess of $1 Million approached the number of verdicts and settlements of the same magnitude for the entire state of California.

Furthermore, the decrease in the number of case filings and Plaintiffs' verdicts, as reported by the Pennsylvania Supreme Court, do not tell the entire picture, as it does not capture matters resolved by settlement or arbitration. Based on data available from the MCARE fund, in 2017, the MCARE fund paid $181 Million on 402 claims. Since any payment by MCARE requires, for the most part, an initial payment of $500,000 by a primary insurer, one can surmise that plaintiffs, and their lawyers, were paid over $382 Million dollars on 402 claims. This data underestimates total compensation to injured patients, as it does not include any payments over $1 Million, or settlements and awards on claims below $500,000.

As the objective data suggests, litigation in Philadelphia is more likely to result in an award for a plaintiff and at greater monetary value than claims brought in the counties where the treatment occurred. So we need to ask: How can subjecting physicians and hospitals that treat the citizens of the Lehigh County to such a disparate system ever be considered "restoring fairness". What makes a Philadelphia jury "more fair" in determining the liability of healthcare providers in the Lehigh Valley than the citizens of the counties in which the treatment is rendered?

Third, there is a significant, hidden cost in allowing cases to be heard away from where the treatment is rendered.

Physician defendants most often have to attend the entire length of a trial to assist in their defense. It allows the physician to aid the defense lawyers in understanding the evidence, and rebut the testimony of the Plaintiffs' experts. With the shortage of physicians that Pennsylvania faces, particularly in venues outside of the high risk venues, the loss of these physician services for weeks of trial is expensive and life threatening to the citizens of the communities they serve. When cases are brought in venues close to where physicians practice, they can see patients before or after court hours.

However, if these physicians are forced to defend their care outside their practice areas, the extra travel time will prevent any practice of medicine during the pendency of the trial. In fact, St. Luke's recently had a trial that resulted in a defense verdict, but tied up two oncological surgeons, one infectious disease physician, and two gastroenterologists for four weeks. Because this trial was in a Lehigh County Court, these physicians were able to see patients during the trial. Had the trial been held in Philadelphia, with an additional 3-4 hours of travel time per day, these patients would not have been treated in a timely manner.

Finally, changing the venue rule will detrimentally impact the ability to provide access to healthcare

St. Luke's has, through an affiliation with Temple University School of Medicine, established the first regional medical school in the Lehigh Valley. Although this medical school is not central to the healthcare operations of St. Luke's, it provides a significant opportunity to retain future physicians in Pennsylvania and in particular the Lehigh Valley.,

We suspect that, if the rule is changed, Plaintiffs will file their actions in Philadelphia involving treatment within the St. Luke's network, on a claim that St. Luke's through this medical school affiliation is now "regularly conducting business in Philadelphia". While such a statement is not accurate, lawyers will attempt to pull St. Luke's into Philadelphia as a result of trying to expand educational opportunities in the

Lehigh Valley. If the current rules regarding venue were not in place and such an affiliation would result in St. Luke's being forced to defend itself and its physicians in Philadelphia, St. Luke's might never have created such an affiliation..

Similarly, recruitment of physicians becomes more difficult should the rules regarding venue allow a hospital system like St. Luke's to be forced to defend itself in Philadelphia or other high risk venues. Our Network recently took over the provision of maternal fetal medicine specialists at Grand View Hospital, due to its inability to recruit this high-risk specialty. Although our specialists would be treating patients in Bucks County, the possibility of being drawn into Philadelphia under the proposed venue rule would likely require our Network to rethink this relationship, resulting in Grand View Hospital having to transfer any high risk pregnancies to another facility.

In 1965, Chief Justice Bell of the Pennsylvania Supreme Court predicted the malpractice crisis when the Court abolished the charitable immunity that previously applied to hospitals. It took the legislative tort reform and venue rule change that is now in effect to abate the crisis from the 1990s.

As Chief Justice Bell noted In his dissenting opinion in *Flagiello vs. Pennsylvania Hospital*, eliminating nonprofit hospital immunity would "(a) harm all patients for the benefit of an injured few, and (b) jeopardize the existence of a number of hospitals, or (c) require them to reduce or curtail or eliminate a number of the essential services and their functions, facilities, research and other activities and benevolences" thereby harming the general public.

Changing the venue rule back to its pre-2003 version will likely have a similar effect. The Pennsylvania Supreme Court should not change the venue rules and thereby increase malpractice insurance costs, increase healthcare costs, reduce physician services, and create unfairness for the vast majority of Pennsylvania residents who live outside of Philadelphia and its suburbs.

Thank you.

Respectfully submitted,

/s/ Mark R. Zolfaghari

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