

STATE OF MICHIGAN
COURT OF APPEALS

GIOVANNI PATERRA and VIOLA PATERRA,

Plaintiffs-Appellees,

v

LINDHOUT ASSOCIATES ARCHITECTS,
A.I.A., P.C.,

Defendant-Appellee/
Cross-Appellant,

and

ITALY AMERICAN CONSTRUCTION COMPANY,
INC.,

Defendant-Appellant/
Cross-Appellee.

UNPUBLISHED

June 17, 1997

No. 182946

Wayne Circuit Court

LC No. 94-430866-NO

Before: Wahls, P.J., and Gage and W.J. Nykamp,* JJ.

PER CURIAM.

Defendant Italy American Construction Company, Inc. (Italy American) appeals by leave granted from the January 19, 1995, order of the Wayne Circuit Court denying defendants' motion for change of venue. By cross-appeal, defendant Lindhout Associates Architects, A.I.A., P.C. (Lindhout) joins Italy American in this challenge. We reverse and remand.

Plaintiff Giovanni Paterra, a brick mason, was injured while working at a construction site in Livingston County. Italy American was the general contractor of the project, and plaintiff worked for a

* Circuit judge, sitting on the Court of Appeals by assignment.

subcontractor. Plaintiffs' complaint, filed in Wayne County, alleges that Italy American breached its duties and was negligent in several respects including the failure to properly supervise construction safety on the job site, conduct inspections, have safety meetings, and provide a safe work environment at the job site. Plaintiffs allege that Lindhout, the architectural developer, negligently designed the project.

Italy American filed a motion for change of venue improperly laid pursuant to MCR 2.223 and MCR 2.224, and Lindhout joined in the motion. Defendants argued that none of plaintiffs' allegations of negligence, if they occurred at all, occurred in Wayne County, that all of the elements of plaintiffs' cause of action arose in Livingston County, that Italy American conducts business in Livingston County, and that Lindhout maintains an office in Livingston County. Defendants contended that under MCR 600.1629; MSA 27A.1629, Livingston County is the proper venue for the cause of action. In support of the motion, defendants presented the affidavit of the president of Italy American, stating that all of the activity concerning the construction and the accident occurred at the accident site in Livingston County, that the plans, bids and negotiations with the brick mason occurred at the construction site, that Italy American received the plans for the project from the building owner at the construction site, and that none of the work performed by Italy American concerning the project occurred in Wayne County. The affidavit of the C.E.O. of Lindhout was also presented to the trial court, indicating that Lindhout's principal office is located in Livingston County and that all design services were performed at that location.

At the hearing on the motion, plaintiffs asserted that the complaint showed that it was the "drawing up of paperwork" that would have contemplated workers' safety which would have been done at the office of Italy American in Wayne County. Upon being informed that Italy American does not have an office in Livingston County, the trial court denied defendants' motion.

Defendants argue that the trial court erroneously concluded that venue is proper in Wayne County. We agree. We review a trial court's decision concerning a motion for change of venue to determine whether it was clearly erroneous. *Huhn v DMI, Inc (On Remand)*, 215 Mich App 17, 18; 544 NW2d 719 (1996). A motion for venue improperly laid in a tort action is governed by MCR 2.223 and MCR 2.224. If venue in a civil action is improper, the trial court shall order a change of venue on timely motion of a defendant or on its own initiative. MCR 2.223(A). The action may be transferred only to a county in which venue would have been proper. MCR 2.224(B)(2). When a challenge to venue has been raised by a defendant under MCR 2.223, the burden is on the plaintiff to establish that the county he chose is a proper venue. *Gross v General Motors Corp*, 448 Mich 147, 155; 528 NW2d 707 (1995); *Marsh v Walter L Couse & Co*, 179 Mich App 204, 208; 445 NW2d 204 (1989).

The venue provision for tort actions states that an action may be brought in "[a] county in which all or part of the cause of action arose" and in which either the defendant resides, has a place of business or conducts business, or where the defendant's registered corporate office is located. MCL 600.1629(1)(a); MSA 27A.1629(1)(a). The primary concern is that venue should first be proper in the county where all or part of the cause of action arose. *Marsh, supra* at 207.

In response to defendants' motion for change of venue, plaintiffs argued that their cause of action arose out of negligence that occurred in Wayne County where Italy American maintains its only office and where Lindhout maintains its principal office. Plaintiffs asserted that the only event that occurred in Livingston County was the accident, and that the unsafe work practices giving rise to plaintiff's injury occurred in Wayne County where Italy American operated. Because the office of Italy American is located in Wayne County, the trial court accepted plaintiffs' argument and found that venue was proper in Wayne County.

However, plaintiffs failed to provide the trial court with any factual evidence to establish that venue is proper in Wayne County. The uncontradicted affidavits filed by defendants establish that all decisions affecting the design of the project were made in Livingston County. In a similar case, *Marsh, supra*, this Court reversed the decision of the trial court denying the defendant's motion for change of venue where the plaintiff, who was injured in a construction accident in Livingston County, filed suit against the defendant, the general contractor, in Wayne County. The plaintiff alleged that the defendant breached several duties of care including the failure to provide adequate safety measures and supervision over the work being performed and the failure to supply the plaintiff with a safe place in which to work. The defendant argued that the cause of action arose in Livingston County because the plaintiff was injured there and because it conducted business there. In response to the motion, the plaintiff argued that the plans and drawings were prepared by the defendant in Wayne County, where the defendant was located, and could have included diagrams and specifications for the scaffolding from which the plaintiff fell. Therefore, the plaintiff argued, some of the defendant's negligent acts could have occurred at the time the plans were drawn, making venue proper in Wayne County. On appeal, this Court found that the plaintiff failed to provide the trial court with any credible factual evidence to establish that venue was proper in Wayne County and that the plaintiff's argument was based on pure speculation. 179 Mich App at 208. The Court further found that the evidence presented to the trial court established only that the defendant was located in Wayne County, the defendant conducted business in both Wayne County and Livingston County, and that the plaintiff's cause of action arose entirely in Livingston County. *Id.*

Further, the trial court's decision must be reversed under the reasoning applied in *Gross, supra*. In *Gross*, a product liability design defect case, the Supreme Court, construing MCL 600.1629(1); MSA 27A.1629(1), held that "the county most tangibly related to an alleged defect in design is the location where a design defect cause of action arises." 448 Mich at 160. The Court stated that, "[w]hile undoubtedly corporate executives make decisions that establish the parameters within which design decisions are made, it cannot be forthrightly maintained that [the defendant's] executives designed the [subject vehicles] any more than their approval of a new car model means that it was manufactured where it was approved. The approval of a particular design concept has little to do with the actual design. What makes a design defect actionable is not its approval, but its tangible design." *Id.*

We believe that defendants' affidavits establish that the county most tangibly related to the alleged defect in design of the construction project is Livingston County. Therefore, venue is proper in Livingston County and the trial court clearly erred in denying defendants' motion for change of venue.¹

The trial court's decision is reversed and the case is remanded to the trial court for transfer of plaintiff's complaint to Livingston County. We do not retain jurisdiction. Defendants being the prevailing party, they may tax costs pursuant to MCR 7.219.

/s/ Myron H. Wahls

/s/ Wesley J. Nykamp

Hilda R. Gage concurs in result only.

¹ We need not address defendants' argument regarding a stay of proceedings because the motion has been granted by this Court.