STATE OF MICHIGAN

COURT OF APPEALS

J. MARK LASH, Administrator of the Estate of JEREMY MARK LASH, Deceased,

Plaintiff-Appellant,

v

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

UNPUBLISHED
May 28, 1999

No. 203407
Wayne Circuit Court
LC No. 95-509392 NZ

Before: Talbot, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals by leave from an order changing the venue from Wayne County to Macomb County. We reverse and remand.

Plaintiff's decedent was killed on December 16, 1994, when the 1978 K-20 Chevrolet pick-up truck he was driving collided with two other vehicles in Shelbyville, Illinois. The pick-up truck was designed by defendant at General Motors Warren Technical Center in Macomb County and manufactured by defendant in Missouri. Defendant's world headquarters are located in Wayne County. On April 2, 1995, plaintiff filed a wrongful death suit against defendant in Wayne Circuit Court. Plaintiff's complaint asserted six different causes of action: (1) negligent design and manufacture; (2) breach of implied warranty, (3) failure to warn/failure to recall; (4) fraud; (5) civil conspiracy; and (6) violation of the Michigan Consumer Protection Act (MCPA). After the case had been removed to federal district court and remanded back to state court, defendant moved for a change of venue pursuant to MCR 2.224(B)(2).[1]

Because plaintiff's complaint was filed before March 28, 1996, the former versions of MCL 600.1629; MSA 27A.1629 and MCL 600.1641; MSA 27A.1641 apply to this case.[2] Former § 1629 provided that venue was properly laid in "[a] county in which all or a part of the cause of action arose" and in which the defendant was present in at least one of four specific ways. See generally *Lorencz v Ford Motor Co*, 439 Mich 370; 483 NW2d 844 (1992). Under former § 1629, a defective design claim was said to arise in the county where the product was actually designed. *Gross v General Motor Corp*, 448 Mich 147, 160; 528 NW2d 707 (1995). Accordingly, plaintiff did not argue that its

"negligent design/negligent manufacture" (defective design) claim arose in Wayne County. Instead, plaintiff argued that venue was properly laid in Wayne County because its additional claims arose in Wayne County. Former § 1641 provided:

> Where causes of action are joined, whether properly or not, the venue may be laid in any county in which either cause of action, if sued upon separately, could have been commenced and tried, subject to separation and change pursuant to and subject to the conditions imposed by court rules.

In response, defendant argued that all of plaintiff's additional claims were dependent on, or derivative of, his defective design claim and that, therefore, venue was proper only in Macomb County. See *Gross*, *supra* at 161 n 8. Adopting defendant's argument, the trial court entered an order transferring the case to Macomb County upon a finding that venue was not properly laid in Wayne County.

On appeal, plaintiff contends that the trial court erred in finding that venue was not properly laid in Wayne County. This Court reviews for clear error a trial court's decision regarding whether venue was properly or improperly laid. *Shock Bros, Inc v Morbark Industries, Inc*, 411 Mich 696, 698-699; 311 NW2d 722 (1981). In resolving venue disputes we bear in mind the fact that venue is simply a matter of location, and not the merits of the dispute. See *Gross*, *supra* at 156. "Battles over venue that endure for years and are a great expense should be discouraged and avoided when there are convenient and fair locations for trial that fulfill the venue requirements of Michigan statutes and court rules." *Id*. After reviewing plaintiff's complaint, we conclude that the trial court's finding constituted clear error. Contrary to defendant's argument below and on appeal, plaintiff's failure to warn claim was not dependent on, or derivative of, his defective design claim.

Two different theories will support a finding of "negligent design." See *Gregory v Cincinnati, Inc*, 450 Mich 1, 11; 538 NW2d 325 (1995). One theory, defective design, "questions whether the design chosen renders the product defective, i.e., whether a risk-utility analysis favored an available safer alternative." *Id.* The other "negligent design" theory, failure to warn, questions whether the manufacturer was negligent for failing to issue a warning about a dangerous characteristic associated with a product. *Gregory*, *supra* at 11. A manufacturer's failure to warn of a dangerous characteristic may render a product defective even if the design chosen does not itself render the product defective. *Id.*; see also American Law of Products Liability, 3d, § 32.2, pp 17-19 (explaining that "a finding of failure to warn does not require a finding of defective design"). In some circumstances, the duty to warn may continue after the product has been manufactured and sold. In Michigan, there exists, at minimum, a postmanufacture duty to warn of "defects" *undiscoverable* at the time of manufacture. *Gregory*, *supra* at 17-18. The duty may be even broader:

> Even if a product is reasonably safe when manufactured and sold and involves no then-known risks of which a warning need be given, risks thereafter revealed by user operation and brought to the attention of the manufacturer or vendor may impose upon the one or both a duty to warn. [American Law of Products Liability, 3d, § 32.79, pp 131-132.]

It is an open question whether this particular sort of continuing-duty-to-warn claim is viable in Michigan.[3] See *Gregory*, *supra* at 17 n 18 ("We emphasize that we are not presented with and do not decide whether manufacturers of distinct products have a continuing duty to warn consumers or learned intermediaries of dangers discovered after the product enters the market.").

The elements of a failure to warn claim are (1) that the defendant owed a duty to warn, (2) that the defendant breached that duty, (3) that the defendant's breach was a proximate cause of the damages suffered by the plaintiff, and (4) that the plaintiff suffered damages. See *Warner v General Motors Corp*, 137 Mich App 340, 348; 357 NW2d 689 (1984). The county where the breach occurs is a proper county for venue purposes under former § 1629. *Lorencz*, *supra* at 375. In this case, plaintiff alleged that both before and after the manufacture of the truck driven by plaintiff's decedent, defendant became aware of facts regarding a potential danger posed by its product. Plaintiff further alleged that upon learning of these potential dangers, defendant breached a duty to issue a warning of the potential danger to all foreseeable users of its product, including plaintiff's decedent. Unlike plaintiff's defective design claim, the alleged breach was not in the actual design of the product itself, but rather in the decision not to issue a warning. Accordingly, the county in which this decision was made is the proper venue for the trial. Because the trial court did not address the question whether any part of plaintiff's failure to warn claim arose in Wayne County, we are constrained to remand for further proceedings. See, e.g. *Bowers v Bowers*, 216 Mich App 491, 495; 549 NW2d 592 (1996) (explaining that appellate review is generally limited to issues decided by the trial court).

We agree with the trial court that plaintiff's other remaining claims are dependent on his defective design claim. We offer no opinion on the merit of any of plaintiff's claims. On remand, the trial court shall determine whether any part of plaintiff's failure to warn claim arose in Wayne County. If so, venue is properly laid in Wayne County under former § 1629 and former § 1641.

Reversed and remanded. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ Michael R. Smolenski

[1] MCR 2.224, which covered change of venue in tort actions, was repealed effective February 1, 1997. MCR 2.224(B)(2) provided that if venue was changed because the action was brought in a county where venue was improper, it could be transferred only to a county in which venue would have been proper.

[2] Effective March 28, 1996, those sections were substantially modified by 1995 PA 161 and 1995 PA 249.

[3] We will not attempt to resolve the scope of the postmanufacture duty to warn in the context of a venue dispute.