

STATE OF MICHIGAN
COURT OF APPEALS

OPUS ONE, INC.,

Plaintiff-Appellee,

v

CROSS WROCK, P.C.,

Defendant-Appellant.

UNPUBLISHED
December 1, 2000

No. 222128
Wayne Circuit Court
LC No. 99-915337-CK

Before: Jansen, P.J., Doctoroff and O'Connell, JJ

PER CURIAM.

Defendant appeals by leave granted from the trial court's order denying its motion for a change of venue. We reverse and remand for an evidentiary hearing to determine whether defendant is entitled to compensation for attending in the wrong court.

This legal malpractice action arises out of defendant's alleged negligent representation of plaintiff regarding a business venture and an action in Oakland Circuit Court. In December 1994, plaintiff entered into a partnership called Jake's on the Lake (Jake's), with Buster's Bay, Inc., a company owned by Michael Ilitch. Defendant's attorneys represented plaintiff during negotiations of the partnership agreement that was created for the purpose of operating a restaurant in Orchard Lake. Buster's Bay leased the restaurant premises from Bruce Cameron in 1992, and, pursuant to the partnership agreement, assigned the lease to Jake's in July 1995.

On September 28, 1995, Jake's filed suit against Cameron in Oakland Circuit Court, alleging that the actual square footage of the leased property was inconsistent with the term in the lease and that certain building repairs were necessary. Cameron filed a counter suit for abandonment and for improper assignment of the lease. Defendant represented Jake's in this action.

In July 1996, the parties orally settled the cases on the record. On August 28, 1996, following a hearing, the court entered a written settlement order. The settlement allowed plaintiff the option of leaving the operation, released plaintiff from all obligations under the lease, and provided that Buster's Bay would assume liability under the lease. Some discussion on the record indicated that Ilitch and his other company, Little Caesar's Enterprises, would also remain liable under the lease. Plaintiff claims that defendant's attorneys made assurances that an

indemnification agreement would be drafted between plaintiff, Ilitch, and Little Caesar's, but the final settlement order stated only that Buster's Bay remained liable under the lease.

Plaintiff left the partnership shortly after the settlement and, in May 1997, Cameron filed suit in Oakland Circuit Court against several defendants, including plaintiff, for breach of the lease and violation of the settlement agreement. On May 18, 1999, plaintiff filed the present action in Wayne Circuit Court, alleging that defendant's attorneys committed legal malpractice. Defendant filed a timely motion to change venue pursuant to MCR 2.223(A)(1) and MCR 2.223(B). The trial court denied the motion and entered a written order on September 9, 1999, from which defendant appeals.

We review for clear error a trial court's ruling on a motion to change venue. *Massey v Mandell*, 462 Mich 375, 379; 614 NW2d 70 (2000). Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made. *Id.*

If a defendant files a timely motion to change venue, it is mandatory that the trial court transfer the case to the county with proper venue. MCL 600.1651; MSA 27A.1651; *Miller v Allied Signal, Inc.*, 235 Mich App 710, 716-717; 599 NW2d 110 (1999). The plaintiff has the burden of establishing that the county he chose is the proper venue. *Karpinski v St John Hosp.*, 238 Mich App 539, 547; 606 NW2d 45 (1999).

The proper venue for a tort action, such as legal malpractice, is articulated in MCL 600.1629(1); MSA 27A.1629(1), which provides, in pertinent part:

Subject to subsection (2), in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, all of the following apply:

- (a) The county in which the original injury occurred and in which either of the following applies is a county in which to file and try the action:
 - (i) The defendant resides, has a place of business, or conducts business in that county.
 - (ii) The corporate registered office of a defendant is located in that county.

The term "original injury" is defined as "[a]ny wrong or damage done to another, either in his person, rights, reputation, or property." *Karpinski, supra* at 543. It is undisputed that defendant maintains places of business in both Wayne and Oakland Counties. At issue in this case is what constituted the original injury and where that injury occurred for purposes of MCL 600.1629(1)(a); MSA 27A.1629(1)(a).

The issue of proper venue in a legal malpractice case was recently addressed by this Court in *Bass v Combs*, 238 Mich App 16; 604 NW2d 727 (1999). In *Bass*, the plaintiff filed suit for wrongful discharge in Wayne County, but the case was removed to the United States District Court, Eastern District of Michigan, Southern Division, where it was ultimately dismissed for multiple discovery violations. *Id.* at 18-19. The plaintiff then filed a legal malpractice complaint

against her attorneys in Wayne Circuit Court, however, on the motion of the defendants, the trial court transferred the case to Oakland Circuit Court. *Id.* at 19.

On appeal, this Court held that, for venue purposes in a legal malpractice case, the determinative issue is where the negligence occurred, not where the underlying lawsuit was filed. *Bass, supra* at 21, relying on *Coleman v Gurwin*, 443 Mich 59, 66; 503 NW2d 435 (1993). This Court found that the defendant's negligence occurred in Wayne County because the allegations for failure to comply with the U.S. District Court's discovery orders, failure to appear at a deposition, failure to object to a recommendation for dismissal, failure to properly serve the defendants, and failure to properly manage the case, all occurred in Wayne County. *Id.* at 21-22. Because the plaintiff's original injury occurred in Wayne County, venue was proper in Wayne County. *Id.* at 21-22.

In this case, plaintiff contends that venue was proper in Wayne County because its business is located there and it suffered economic losses in Wayne County. Although defendant's alleged negligence may have impacted plaintiff's Wayne County business, the location where plaintiff suffered damages is not the test for determining venue. As this Court noted in *Karpinski, supra*, the location of the original injury is where the negligence occurred, not where the damages were sustained. *Id.* at 545. This Court similarly concluded in *Bass, supra*, that the location where the allegedly negligent conduct took place represents the situs of plaintiff's injury. *Id.* at 22. In this case, the location of the original injury is not where plaintiff paid out additional attorney fees and court costs or suffered lost profits, but where defendant's alleged negligence occurred that resulted in those damages.

Plaintiff alleges that the majority of the negligent acts or omissions took place in Wayne County because defendant's employees made representations over the telephone and in person in Wayne County that an indemnification agreement would be drafted. Plaintiff further asserts that, because defendant's offices were in Wayne County, the failure to draft the indemnity agreement and the negligent drafting of the settlement order occurred in Wayne County. Plaintiff also contends that defendant's employees failed to call plaintiff at its Wayne County address to discuss the conflict of interest issue.

We find that plaintiff's arguments do not satisfy the requirements of venue pursuant to MCL 600.1629(1); MSA 27A.1629(1). Plaintiff provides no proof that any of defendant's work was actually performed in Wayne County. Even if plaintiff could prove the location of these alleged acts, plaintiff's argument fails because it attempts to establish venue in Wayne County through a showing that the parties conducted business in Wayne County, rather by establishing where the original injury occurred.

By contrast, a review of the allegations in plaintiff's complaint reveals that the location of the malpractice was Oakland County. Plaintiff's primary allegation concerns defendant's involvement in the Oakland Circuit Court settlement agreement. Specifically, plaintiff alleges that defendant's attorneys mishandled the settlement and indemnification by failing to verify Buster's Bay's financial status, failing to articulate the proper settlement terms on the record and in the written order, failing to provide a separate indemnity agreement to include Ilitch and Little Caesar's, agreeing to indemnification only by Buster's Bay without plaintiff's permission, and providing representation in spite of a conflict of interest in defendant's representation of plaintiff

after representing Jake's. Plaintiff also argues that defendant negligently handled the original partnership agreement and lease assignment.

Regardless of where defendant performed this work, it is clear that plaintiff's alleged damages, including additional attorney fees, court costs and an adverse judgment, were triggered when the written settlement order was entered in Oakland Circuit Court. We also note that the Jake's partnership was formed in Oakland County to run the restaurant in Oakland County. Further, the settlement agreement involved not only the dismissal of the Oakland Circuit Court cases, but a modification of the lease agreement concerning Oakland County property. It is apparent that the events which form the basis of plaintiff's allegations of malpractice occurred in Oakland County, therefore, the original injury occurred in Oakland County.

In conclusion, we find that plaintiff failed to meet its burden of proving that venue was proper in Wayne County by failing to show that the original injury occurred in Wayne County. Because venue was not proper in Wayne County, the trial court clearly erred when it denied defendant's motion to change venue. On remand, the trial court should enter an order transferring venue to Oakland Circuit Court.

Defendant also claims it is entitled to expenses and attorney fees pursuant to MCR 2.223(B) which provides, in pertinent part:

(1) The court shall order the change at the plaintiff's cost, which shall include the statutory filing fee applicable to the court to which the action is transferred, and which may include reasonable compensation for the defendant's expense, including reasonable attorney fees, in attending in the wrong court.

It is clear from the language of the court rule that when the trial court orders a change of venue, the order should also direct plaintiff to pay the statutory filing fee for the court to which the action is transferred. However, the use of the term "may" infers that whether defendant is entitled to compensation for the expense of attending in the wrong court is discretionary.

Plaintiff correctly asserts that the court rule does not specifically address plaintiff's payment of defendant's appellate attorney fees. However, due to the trial court's erroneous ruling on venue, defendant's expenses incurred in this appeal were expenses that resulted from "attending in the wrong court." Therefore, in determining the amount of costs plaintiff must pay due to the necessary change in venue, the trial court should consider whether plaintiff should pay defendant's expenses, including the costs defendant incurred in bringing this appeal.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Martin M. Doctoroff
/s/ Peter D. O'Connell