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STATE OF MICHIGAN

COURT OF APPEALS

LOUIS TELERICO,

Plaintiff-Appellant,

v

ALEXANDER V. LYZOHUB,

Defendant-Appellee.

UNPUBLISHED
April 29, 2021

No. 353032
Wayne Circuit Court
LC No. 19-002915-NM

Before: O'BRIEN, P.J., and STEPHENS and BOONSTRA, JJ.

PER CURIAM.

Plaintiff appeals by leave granted[1] the Wayne Circuit Court's order granting defendant's motion to transfer venue to Washtenaw Circuit Court. We affirm.

I. BACKGROUND

This case arises from a prior action filed by plaintiff in the Washtenaw Circuit Court (the "Washtenaw action") in which plaintiff accused the Washtenaw defendants of unlawful taking and retention of construction vehicles. Defendant in this appeal was plaintiff's attorney in the Washtenaw action. Shortly before trial in the Washtenaw action, defendant moved the Washtenaw Circuit Court to withdraw his representation of plaintiff because plaintiff had allegedly failed to pay defendant for his legal fees and expenses accrued. The Washtenaw Circuit Court granted defendant's motion and plaintiff retained new counsel. The Washtenaw action was settled for $50,000. Defendant filed a charging lien against the settlement to recoup his legal fees and expenses. An evidentiary hearing was conducted by the Washtenaw Circuit Court and defendant was awarded $28,907.28 in fees and costs.

A short time later, plaintiff filed the present action in the Wayne Circuit Court. In his complaint, plaintiff alleged that defendant committed malpractice in the Washtenaw action and

[1] *Telerico v Lyzohub*, unpublished order of the Court of Appeals, entered July 9, 2020 (Docket No. 353032).

consequently plaintiff was entitled to damages. The complaint contained a certification by plaintiff that "[t]here is no other pending or resolved civil action arising out of the same transaction or occurrence as alleged in the complaint." Defendant moved the Wayne Circuit Court for a change of venue under MCR 2.223, alleging that the proper forum for the instant case was the Washtenaw Circuit Court. Specifically, defendant alleged that the two actions arose from the same transaction or occurrence, and therefore the Washtenaw Circuit Court should hear the present case. The Wayne Circuit Court conducted oral argument on the motion. The Wayne Circuit Court held that "while this matter is technically proper in Wayne for the convenience of witnesses that may be called, in review of the witness list in the underlying case pursuant to MCR 2.222 this matter is transferred to Washtenaw County." The Wayne Circuit Court later issued a written order stating "that the case be transferred to the Washtenaw County Circuit Court pursuant to MCR 2.222." This appeal followed.

II. PROPER VENUE

Plaintiff argues the Wayne Circuit Court erred when it ordered a transfer of the case because the proper venue of the case is Wayne Circuit Court. We disagree.

A. STANDARD OF REVIEW

"An appellate court uses the clearly erroneous standard to review a trial court's ruling on a motion to change venue." *Brightwell v Fifth Third Bank of Mich*, 487 Mich 151, 156; 790 NW2d 591 (2010). "A decision is clearly erroneous if the reviewing court is left with the definite and firm conviction that a mistake has been made." *Shiroka v Farm Bureau Gen Ins Co of Mich*, 276 Mich App 98, 102; 740 NW2d 316 (2007).

"[T]his Court reviews de novo issues of statutory construction." *Nason v State Employees' Retirement Sys*, 290 Mich App 416, 424; 801 NW2d 889 (2010). "The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature . . . ." *Tevis v Amex Assurance Co*, 283 Mich App 76, 81; 770 NW2d 16 (2009). "If the language is clear and unambiguous, this Court must enforce the statute as written. . . . Unless defined by statute, words and phrases are to be given their plain and ordinary meaning, and this Court may consult a dictionary to determine that meaning." *Tree City Props LLC v Perkey*, 327 Mich App 244, 247; 933 NW2d 704 (2019). We also apply principles of statutory construction to the interpretation of court rules. See *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009).

B. LAW AND ANALYSIS

"Venue is determined at the time the suit is filed and is not normally defeated by subsequent events." *Shiroka*, 276 Mich App at 104. "In Michigan, plaintiffs carry the burden of establishing the propriety of their venue choice." *Karpinsky v Saint John Hosp-Macomb Ctr Corp*, 238 Mich App 539, 547; 606 NW2d 45 (1999).

Defendant initially brought the motion to transfer venue on the basis of his belief that "the collateral case in Washtenaw County is the proper venue for the transaction or occurrence alleged." The Michigan Court Rules articulate two processes that trial courts must follow with respect to transference of venue—MCR 2.222 and MCR 2.223. MCR 2.222 articulates the process to transfer venue in cases where venue is proper, and MCR 2.223 articulates the process when venue

is improper. Because there are different processes depending on the propriety of venue, the first question we consider is whether venue in Wayne County in this case was proper.

MCL 600.1629 sets forth the hierarchy of criteria for determining the propriety of venue in tort actions.[2] MCL 600.1629 states, in pertinent part,

> (1) 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.
>
> (b) If a county does not satisfy the criteria under subdivision (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 plaintiff resides, has a place of business, or conducts business in that county.
>
> (*ii*) The corporate registered office of a plaintiff is located in that county.
>
> (c) If a county does not satisfy the criteria under subdivision (a) or (b), a county in which both of the following apply is a county in which to file and try the action:
>
> (*i*) The plaintiff resides, has a place of business, or conducts business in that county, or has its corporate registered office located in that county.
>
> (*ii*) The defendant resides, has a place of business, or conducts business in that county, or has its corporate registered office located in that county.
>
> (d) If a county does not satisfy the criteria under subdivision (a), (b), or (c), a county that satisfies the criteria under section 1621 or 1627 is a county in which to file and try an action.

[2] Plaintiff brings the instant case alleging "attorney malpractice." Attorney malpractice is considered a tort. See *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586; 513 NW2d 773 (1994).

(2) Any party may file a motion to change venue based on hardship or inconvenience.

Under the plain language of the statute, MCL 600.1629(1)(a) is the starting place for a determination of proper venue. Only if venue is improper under subsection (1)(a), should a court consider subsequent subsections. In this case, the parties do not appear to dispute that they each have "a place of business, or conduct[] business" in Wayne County. Conversely, there is no real dispute that the parties conduct business in Washtenaw County.[3] They do, however, dispute the site of the alleged "original injury" incurred by plaintiff. Defendant alleges that the injury occurred in Washtenaw County because plaintiff's complaint of injury arose within the context of the Washtenaw action. In contrast, plaintiff asserts that he suffered economic damage due to defendant's malpractice at plaintiff's place of business in Wayne county. "[C]ourts must look to the first injury resulting from an act or omission of a defendant to determine where venue is proper. It is the original injury, not the original breach of the standard of care, that establishes venue under MCL 600.1629(1)(a) and (b)." *Dimmitt & Owens Fin, Inc v Deloitte & Touche (ISC), LLC*, 481 Mich 618, 630; 752 NW2d 37 (2008). See also *Karpinsky*, 238 Mich App at 546 ("[t]he Legislature clearly did not intend to allow venue to be established in any county where the plaintiff continues to suffer from an injury."). In accordance with *Dimmitt & Owens Fin, Inc*, courts should follow a two-step process in the context of legal malpractice to determine the situs of the original injury. First, the court must identify the alleged malpractice. And, second the court must determine the situs of the *first* injury that flowed from that malpractice.

Applying that reasoning to this case, plaintiff's complaint identifies defendant's alleged malpractice as follows:

a. In failing to adequately represent the [p]laintiff;

b. In failing to properly prosecute the action;

c. In failing to timely file pleading necessary and/or required by the Court;

d. In abandoning the [p]laintiff's cause of action because of an alleged failure to pay attorney fees;

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[3] Plaintiff asserts that he does not conduct business in Washtenaw County—however this assertion stands in contrast to his own evidence. Indeed, plaintiff's response to defendant's motion to transfer venue includes a number of exhibits which purport to show cases filed by defendant on plaintiff's behalf seeking to obtain judgments for the benefit of plaintiff's businesses, Excalibur Electric Co. and American Fire Board Up Inc. Plaintiff entered into a bailment with two of the Washtenaw defendants in which the Washtenaw defendants agreed to store property belonging to Excalibur Electric Co. and American Fire Board Up Inc. at their Washtenaw County residence in exchange for use of the equipment. Because plaintiff entered into a bailment in Washtenaw County on behalf of Excalibur Electric Co. and American Fire Board Up Inc., it can be said that he "conducts business" in Washtenaw County.

e. In failing to enter a Default Judgment against defaulted party;

f. In conspiring with [d]efendants to the detriment of the [p]laintiff;

g. In failing to conduct discovery;

h. In failing to conduct an adequate investigation regarding facts made known to the [d]efendant by the [p]laintiff;

i. In other ways that may become known through the course of discovery.

Plaintiff bases his claim of economic injury on his inability to ply his trade due to the loss of his construction equipment. Plaintiff's loss of construction equipment flowed from the settlement reached in the Washtenaw litigation because he did not recover the construction equipment in that settlement. Thus, the first injury suffered by plaintiff as a result of defendant's malpractice was the loss of the construction equipment, which occurred in Washtenaw County.

Looking again at the requirements of MCL 600.1629(1)(a), venue is proper where,

> (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.

Because there is no real dispute that the parties "conduct[] business" in Washtenaw County and because the "original injury" occurred in Washtenaw County, venue was proper in Washtenaw County.

Further, defendant properly moved the Wayne Circuit Court for transfer of venue under MCR 2.223. MCR 2.223 states that "[i]f the venue of a civil action is improper, the court . . . shall order a change of venue on a timely motion of a defendant . . . ." Here, because venue was improper, and because defendant moved the Wayne Circuit Court for a change in venue, it was not erroneous for the Wayne Circuit Court to transfer the case to Washtenaw Circuit Court. With this conclusion in mind, we note our disagreement with the Wayne Circuit Court's statement "that the case be transferred to the Washtenaw County Circuit Court pursuant to MCR 2.222." That order notwithstanding, the Wayne Circuit Court's ultimate conclusion was correct—the case should be transferred to Washtenaw Circuit Court because venue is proper in Washtenaw Circuit Court under MCL 600.1629(1)(a) and because defendant made a timely motion under MCR 2.223. See *Gleason v Mich Dep't of Transp*, 256 Mich App 1, 3; 662 NW2d 822 (2003) ("A trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason.").

Even though we conclude the issue of proper venue can be resolved under MCL 600.1629(1)(a), we nevertheless consider the parties' arguments with respect to whether this case arose out of the same "transaction or occurrence" as the Washtenaw action. On this point, defendant states, "[t]his is not an original venue case. Plaintiff is attempting to forum shop. The original and related transaction or occurrence in this matter, and appropriate venue was started in Washtenaw County Circuit Court on June 25, 2015." Plaintiff argues that the claim in this case—

attorney malpractice—differs from the claims of conversion and breach of contract in the Washtenaw action; accordingly, the events leading this case are separate and apart from the events leading the Washtenaw action. Although unclear, it appears the parties believe that the question of whether two actions arose from the same "transaction or occurrence" bears on the question of venue. Presumably, this belief is on the basis of the Wayne Circuit Court's statement in its order that,

> the Court having found the [p]laintiff made a false statement to "no other pending or resolved civil action arising out of the same transaction or occurrence as alleged in the Complaint" since there was a prior action of the same transaction or occurrence under MCR 8.11(D)(1) previously filed in the Washtenaw County Circuit Court, case *Telerico v Maihofer*, No: 2015:000640-CB.

MCR 8.111(D)(1) is entitled, "Actions Arising out of Same Transaction or Occurrence." Subsection (1) of the court rule states, "if one of two or more actions arising out of the same transaction or occurrence has been assigned to a judge, the other action or actions must be assigned to that judge." Actions arise from the same transaction or occurrence "only if each arises from the identical events leading to the other or others." *Wayne Co Prosecutor v Parole Bd*, 210 Mich App 148, 156; 532 NW2d 899 (1995). The trial court erred in holding that MCR 8.111(D)(1) applied to the current case because this case did not arise from "identical events" as the Washtenaw action.

As previously discussed, the Washtenaw action was initiated by plaintiff on the basis of allegations of "unlawful taking and retention of construction vehicles" by the Washtenaw defendants. Here, plaintiff filed suit in the Wayne County Circuit Court because he believed defendant violated his duty "to provide competent and skillful representation in accordance with the standards of the legal profession." Because the Washtenaw action arose from an alleged "taking and retention," and the instant case arose from alleged attorney malpractice, it cannot be said that each case "[arose] from identical events leaving to the other or others." *Wayne Co Prosecutor*, 210 Mich App at 156.

Further, there can be no argument that the events leading to the evidentiary hearing on the charging lien could be considered "identical events" as the present case. Indeed, defendant filed the charging lien against plaintiff because he "was seeking payment of unpaid professional legal services/costs advanced." The events leading to the evidentiary hearing on the charging lien were defendant's legal bills and costs advanced to plaintiff—not, plaintiff's duty "to provide competent and skillful representation." Thus, the Wayne Circuit Court's application of MCR 8.111(D)(1) was erroneous.

The parties' arguments with respect to the "transaction or occurrence" could also be in reference to the statement in the complaint in which plaintiff certified that "[t]here is no other pending or resolved civil action arising out of the same transaction or occurrence as alleged in the complaint." However, similar to the previous discussion, the truthfulness of this statement does not bear on the ultimate conclusion of venue under MCL 600.1629. In reading the full context of the hearing transcript and the Wayne Circuit Court's order, it seems that the truthfulness of this statement was dispositive on the Wayne Circuit Court's conclusion as to sanctions against plaintiff, not venue. However, plaintiff does not dispute sanctions in this appeal—thus, again, the arguments with respect to "transaction or occurrence" have no merit.

In sum, while the Wayne Circuit Court erred in its analysis of the issue, its ultimate conclusion was correct. Accordingly, the Wayne Circuit Court did not err when it transferred the case to the Washtenaw Circuit Court.

III. SUA SPONTE

Plaintiff argues that we should reverse this case because, according to plaintiff, the trial court ruled, sua sponte, that transfer of venue was warranted under MCR 2.222. We disagree.

A. PRESERVATION OF ISSUE

"An issue must have been raised before and addressed and decided by the trial court to be deemed preserved for appellate review." *Lenawee Co v Wagley*, 301 Mich App 134, 164; 836 NW2d 193 (2013). Plaintiff argues that the Wayne Circuit Court acted sua sponte when it determined that transfer was warranted under MCR 2.222. Logically, arguments related to MCR 2.222 were not presented by the parties. We have recently discussed the preservation requirement for issues believed to be made sua sponte, stating,

> issue preservation requirements only impose a general prohibition against raising an issue for the first time on appeal. Consistent with that principle, a party also need not preserve an objection to "a finding or decision" made by the trial court, MCR 2.517(A)(7); or, at least under some circumstances, other acts or omissions undertaken sua sponte by a court. Furthermore, so long as the issue itself is not novel, a party is generally free to make a more sophisticated or fully-developed argument on appeal than was made in the trial court. [*Glasker-Davis v Auvenshine*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 345238), slip op at 3 (citations omitted).]

Here, even though the arguments under MCR 2.222 were not presented to the Wayne Circuit Court, under the reasoning articulated in *Glasker-Davis*, this issue is treated as preserved for appeal.

B. STANDARD OF REVIEW

"An appellate court uses the clearly erroneous standard to review a trial court's ruling on a motion to change venue." *Brightwell*, 487 Mich at 156. "A decision is clearly erroneous if the reviewing court is left with the definite and firm conviction that a mistake has been made." *Shiroka*, 276 Mich App at 102.

Further "this Court reviews de novo issues of statutory construction." *Nason*, 290 Mich App at 424. "The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature . . . ." *Tevis*, 283 Mich App at 81. "If the language is clear and unambiguous, this Court must enforce the statute as written. . . . Unless defined by statute, words and phrases are to be given their plain and ordinary meaning, and this Court may consult a dictionary to determine that meaning." *Tree City Props LLC*, 327 Mich App at 247. This Court should also apply principles of statutory construction to the interpretation of court rules. See *Henry*, 484 Mich at 495.

C. ANALYSIS

Plaintiff argues that the trial court erred when it transferred venue on the basis of MCR 2.222, despite no argument by the parties that transfer was warranted under MCR 2.222. We disagree that this issue bears on the ultimate disposition of this appeal. For the reasons stated in the previous discussion, venue in this case is proper in the Washtenaw Circuit Court under MCL 600.1629, and defendant's motion to transfer venue was properly brought under MCR 2.223.

Affirmed.

/s/ Colleen A. O'Brien
/s/ Cynthia Diane Stephens
/s/ Mark T. Boonstra