

STATE OF MICHIGAN
COURT OF APPEALS

CARL CROCKETT, Personal Representative of
the Estate of HOMER CROCKETT, Deceased,
CARL CROCKETT, DEVISSI CROCKETT and
CAMILLE CROCKETT,

UNPUBLISHED
October 28, 2003

Plaintiffs-Appellees,

v

FIEGER FIEGER KENNEY & JOHNSON, P.C.,
a/k/a FIEGER FIEGER SCHWARTZ &
KENNEY, a/k/a FIEGER FIEGER &
SCHWARTZ, P.C.,

No. 240863
Wayne Circuit Court
LC No. 02-200577-NM

Defendant-Appellant.

Before: Bandstra, P.J., and Hoekstra and Borrello, JJ.

PER CURIAM

Plaintiff brought an action against defendant alleging legal malpractice. At issue in this case is whether venue properly lies within the County of Wayne or the County of Oakland. Defendant appeals by leave granted from a circuit court order denying its motion for change of venue. This appeal is being decided without oral argument pursuant MCR7.214(E).

Plaintiffs' decedent died in March 1996. Plaintiffs, who are residents of Wayne County, retained defendant law firm, which is located in Oakland County, to pursue a medical malpractice action against decedent's treating physicians. Letters of authority were issued to Carl Crockett, as successor personal representative, on November 7, 1997 and defendant apparently used that date to calculate the limitations period. See MCL 600.5852. However, Camille Crockett had previously been appointed personal representative of the estate on April 10, 1998. Defendant allegedly did not know Camille Crockett was appointed personal representative. Thereafter, pursuant to MCR 600.2912b, defendant sent notices of intent to sue on May 14, 1998, and filed suit on January 7, 1999. The Wayne Circuit Court dismissed plaintiffs' action on the ground that the statute of limitations expired on April 10, 1998. Shortly thereafter, plaintiffs commenced this action in Wayne County. Defendant brought a motion for change of venue, alleging that the injury giving rise to the claim of action arose in its Oakland County offices. The trial court denied the motion, ruling that the injury was the failure to timely file the medical malpractice action, and because that omission occurred in Wayne County, venue was proper. We affirm the ruling of the trial court for the reasons stated by the trial judge.

In their action, plaintiffs alleged their primary claim was the loss of the medical malpractice action. Plaintiffs specifically alleged that defendant was negligent in failing to “file” the notice of intent before May 14, 1998. Defendant argues that the alleged legal malpractice arose at defendant’s Southfield office when defendant neglected to mail the notice of intent before the limitations period expired. What neither plaintiff nor defendant realizes is that even if defendant had mailed the notice earlier, the tolling provision would not have saved plaintiff’s case from being untimely. The parties to this action agree, in accord with MCL 600.5852, that the limitations period was actually two years from April 10, 1996. Assuming *arguendo* the notice of intent had been sent on April 10, 1998, the limitations period would have been tolled until Friday, October 9, 1998 pursuant to MCL 600.5856(d), and suit would have been filed by the following Monday, MCR 1.108(1), well before defendant actually filed suit in January 1999. Therefore, contrary to defendant’s argument, and in accord with the ruling of the trial court, the negligent act was the omission to file suit within the two-year limitations period.

If the venue of a civil action is improper, the court must order a change of venue at the plaintiffs’ cost on the timely motion of a defendant. MCR 2.223(A)(1), (B)(l). “Where a defendant challenges venue, the plaintiff has the burden to establish that the county he chose is a proper venue.” *Witt v C J Barrymo’s*, 195 Mich App 517, 521; 491 NW2d 871 (1992), overruled in part on other grounds by *Russell v Chrysler Corp.*, 443 Mich 617; 505 NW2d 263 (1993). “This Court reviews a trial court’s ruling in response to a motion to change improper venue under the clearly erroneous standard. Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake has been made.” *Massey v Mandell*, 462 Mich 375, 379; 614 NW2d 70 (2000) (citations omitted).

In a tort action such as legal malpractice, venue is controlled by MCL 600.1629. *Coleman v Gurwin*, 443 Mich 59, 62; 503 NW2d 435 (1993). That statute provides that venue is proper first in the county in which “the original injury occurred” and in which the defendant has a place of business or conducts business or in which its corporate registered office is located. MCL 600.1629(l)(a). An “injury” is “[a]ny wrong or damage done to another, either in his person, rights, reputation, or property.” *Karpinski v St John Hosp-Macomb Ctr Corp.* 238 Mich App 539, 543; 606 NW2d 45 (1999), quoting Black’s Law Dictionary (6th ed), p 785. The original injury in a legal malpractice action occurs where the defendant’s negligent act or omission occurred. *Bass v Combs*, 238 Mich App 16, 20-22; 604 NW2d 727 (1999).

The original injury in this case was the loss of the underlying malpractice action. However, that case was not dismissed simply because defendant omitted to mail the requisite notice of intent in a timely manner.¹ Rather, it was dismissed because defendant omitted to file

¹ As stated, the limitations period was two years from April 10, 1996. MCL 600.5852. Assuming the notice of intent had been sent on the last day of the limitations period or April 10, 1998, the limitations period would have been tolled until Friday, October 9, 1998, MCL 600.5856(d), and suit would have had to have been filed by the following (continued...)

suit within the two-year limitations period, taking into account the notice of intent and any tolling of the limitations period for compliance with the statutory waiting period. Had defendant timely filed the medical malpractice action, that filing would have occurred in Wayne County. Because the original injury occurred in Wayne County and defendant does business in Wayne County, the trial court did not err in ruling that venue was in Wayne County was proper.

Affirmed.

/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra
/s/ Stephen L. Borrello

(...continued)

Monday, MCR 1.108(1), which was still nearly three months before defendant actually filed suit.