S T A T E   O F   M I C H I G A N

C O U R T   O F   A P P E A L S

Estate of MICHAEL ERNEST GREKOWICZ, a/k/a MICHAEL E. GREKOWICZ, by ROSA GREKOWICZ, Personal Representative,

UNPUBLISHED
November 8, 2011

Plaintiff-Appellee,

v

No. 299469
Wayne Circuit Court
LC No. 10-005664-NH

ZIA Q. FAROOKI, ST. JOHN HOSPITAL AND MEDICAL CENTER, and ST. JOHN HEALTH,

Defendants-Appellants,

and

PETER P. KARPAWICH, CHILDREN'S HOSPITAL OF MICHIGAN, and DETROIT MEDICAL CENTER,

Defendants.

Estate of MICHAEL ERNEST GREKOWICZ, a/k/a MICHAEL E. GREKOWICZ, by ROSA GREKOWICZ, Personal Representative,

Plaintiff-Appellee,

v

No. 299494
Wayne Circuit Court
LC No. 10-005664-NH

ZIA Q. FAROOKI, ST. JOHN HOSPITAL AND MEDICAL CENTER, and ST. JOHN HEALTH,

Defendants-Appellees,

and

PETER P. KARPAWICH, CHILDREN'S HOSPITAL OF MICHIGAN, and DETROIT MEDICAL CENTER,

Defendants-Appellants.

Before: K. F. KELLY, P.J., and METER and GLEICHER, JJ.

PER CURIAM.

Defendants are individual and institutional medical care providers who supplied cardiovascular treatment to decedent Michael Grekowitz in Wayne County. After Michael's death in Macomb County, plaintiff Rose Grekowitz filed a medical malpractice action against defendants in Wayne County. Defendants sought to change venue to Macomb County, where Michael's corporeal harm resulting from defendants' allegedly substandard care occurred. We conclude that venue is improper in Wayne County and therefore reverse the circuit court's denial of defendants' change of venue motion.

I. BACKGROUND

Michael was diagnosed with a serious heart condition shortly after his birth in 1991. From 1991 through 2008, Michael treated with the individual defendant physicians and the institutional medical centers and hospitals in Wayne County. In May 2008, defendant Zia Farooki prescribed an automatic external defibrillator (AED) to detect abnormalities in Michael's heartbeat and to restart Michael's heart following a cardiac event. On August 11, 2008, however, Michael died during a car accident in Macomb County from "sudden cardiac arrest." Plaintiff, Michael's mother acting as personal representative of his estate, filed suit against defendants in Wayne County, alleging that defendants breached their standards of care by failing to include an automatic implantable cardioverter defibrillator (ICD) in Michael's treatment plan to reduce his risk of sudden cardiac arrest. An ICD would have monitored Michael's heart rhythms and automatically corrected any detected abnormalities.

Defendants filed a motion to change venue to Macomb County, where Michael suffered the corporeal injury resulting from defendants' alleged failure to meet their standard of care. The circuit court denied defendants' motion, relying on *Karpinski v St John Hosp-Macomb Ctr Corp*, 238 Mich App 539; 606 NW2d 45 (2000), for the proposition that the "original injury" for venue purposes in a "wrongful death case" "is the injury that caused death." The circuit court reasoned that Michael's death resulted from or was a consequence of defendants' failure to implant an ICD, which occurred in Wayne County. Accordingly, the court refused defendants' request to transfer the case.

II. STANDARD OF REVIEW

The plaintiff bears "the burden of establishing the propriety of [his or her] venue choice." *Karpinski*, 238 Mich App at 547. We review a trial court's decision on a change of venue motion for clear error. *Dimmitt & Owens Financial, Inc v Deloitte & Touche, LLC*, 481 Mich 618, 624; 752 NW2d 37 (2008). "Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.* Venue selection is governed by

statute. *Id.* We review questions of statutory interpretation de novo, applying the plain and unambiguous statutory language to give effect to the Legislature's intent. *Id.*

III. VENUE WAS IMPROPER IN WAYNE COUNTY

MCL 600.1629(1) provides the venue guidelines for "action[s] based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death." The statute sets out a hierarchy of appropriate venue choices, *Yono v Carlson*, 283 Mich App 567, 572; 770 NW2d 400 (2009). The first provision in the hierarchy, MCL 600.1629(1)(a), states:

> (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.

Although the statute does not define "original injury," this Court has twice construed and applied the term in medical malpractice cases. In *Karpinski*, 238 Mich App at 542, the plaintiff's decedent received treatment in Macomb County on July 1 and 6, 1995. On the latter date, he suffered a ruptured aortic aneurysm in the emergency room and died in an ambulance while in transit to a Wayne County hospital. The plaintiff filed suit in Wayne County. Her complaint alleged that the failure to timely diagnose and treat the aneurysm resulted in the decedent's death. She maintained that proper venue lay in Wayne County because the decedent died there. The defendants argued that venue was proper in Macomb County, the location where the decedent suffered the ruptured aneurysm. *Id*. at 542.

This Court construed MCL 600.2922(1) (the wrongful death statute) with the venue statute to define an "original injury" for the purpose of a wrongful death suit. "[I]n a wrongful death action," this Court explained, "the word 'injury' in the venue statute refers to the injury resulting in death, rather than the death itself." *Id.* at 544. By modifying "injury" with the word "original," the Legislature intended "that, in a wrongful death action, venue rests with the county where the injury resulting in death occurred, and not the place where the death itself tool place." *Id.* This Court emphasized, "the Legislature intended to make the place where the injury transpires paramount for venue purposes." *Id.* at 546.

Although *Karpinski* clearly established that the location of death does not automatically determine proper venue, the decision does not explicitly address the issue presented here, which is whether the "original injury" in a medical malpractice case involving a failure to recommend a course of treatment occurs at the time of treatment. In *Taha v Basha Diagnostics, PC*, 275 Mich App 76, 78-79; 737 NW2d 844 (2007), this Court filled that gap. The plaintiff in *Taha* consulted non-party Dr. Sinan in Wayne County for treatment of a wrist injury. Dr. Sinan obtained an x-ray in Wayne County, but the x-ray film was sent to Oakland County for interpretation by the defendants. The defendants purportedly misread the x-ray and communicated erroneous findings to Dr. Sinan in Wayne County. Dr. Sinan treated the plaintiff in Wayne County, in reliance on the allegedly misread film. This Court explained that the injury that was the subject of the action

"is the corporeal harm *that results from* the defendant's alleged failure to meet the recognized standard of care." *Id*. at 79 (emphasis in orginal). This Court stated:

> Contrary to defendants' contention, the mere misreading of the x-ray itself resulted in no actual corporeal harm, and therefore did not constitute an "injury" for medical-malpractice purposes. Similarly, the x-ray misreading, without more, did not become an "injury" within the meaning of MCL 600.1629 until it resulted in an actual injury to the plaintiff. Only when the alleged breach of the standard of practice resulted in actual harm—at Dr. Sinan's office in Wayne County—did plaintiff suffer an "original injury" for the purpose of establishing venue.
>
> In sum, the location of plaintiff's treatment by Dr. Sinan following defendants' services was determinative of venue in this case. Not until Dr. Sinan designed a treatment plan or course of therapy for plaintiff in reliance on the x-ray interpretation did defendants' alleged breach of the standard of care actually result in an "injury" to plaintiff. The trial court incorrectly ruled that the physical location of defendants' x-ray interpretation was determinative of venue. [*Id.* at 79-80.]

The essential point of *Taha* is that the location of the alleged breach of the standard of care is not the place of the "original injury." In explaining that point, however, this Court seemed to indicate that the place where the plaintiff's treatment was deficient (i.e., Dr. Sinan's office) was the place of the original injury.

In *Dimmitt,* 481 Mich at 630 n 25, the Supreme Court discussed *Taha*, and clarified that a deficient treatment plan is only a potential injury until the plan proves ineffective and itself causes an injury. *Dimmitt* involved alleged accounting malpractice on which the plaintiffs relied in making investment decisions. This Court had concluded that the location where the plaintiffs relied on the defendants' work product was the location of the "original injury" for purposes of MCL 600.1629(1). Citing *Taha,* 275 Mich App 76, the Supreme Court stated that a breach of the standard of care does not constitute an injury, and further reasoned that the plaintiffs did not suffer an injury when they relied on the defendants' reports. *Dimmitt*, 481 Mich at 630-631. The Court stated:

> We have explained, however, that "Michigan law requires more than a merely speculative injury. . . . It is a *present* injury, not fear of an injury in the future, that gives rise to a cause of action under negligence theory." At the time of plaintiffs' reliance, plaintiffs suffered only a *potential* injury, namely, that their investment decisions based on defendants' negligence *might* turn out to be poor ones that *might* injure plaintiffs. The original injury did not occur until plaintiffs allegedly suffered an *actual* injury as a result of their reliance on defendants' services. The first actual injury plaintiffs allegedly suffered occurred when Dimmitt could not satisfy its financial obligations and was forced to liquidate its assets. [*Id.* at 631, quoting *Henry v Dow Chem Co*, 473 Mich 63, 72-73; 701 NW2d 684 (2005) (emphasis in original).]

The Court expressly addressed the portion of *Taha* that seemed to indicate that Dr. Sinan's office, as a place of deficient treatment, was the site of the original injury:

> Justice Kelly notes [in dissent] that "the original injury in *Taha* was the *ineffective* treatment devised in reliance on the negligent radiological reading.". . . We agree. The plaintiff suffered an injury because he had been treated *ineffectively,* i.e., he was injured because he did not receive the treatment of his wrist that he needed for it to heal properly. *The treatment plan created in reliance on the negligent reading of the x-ray created only a potential injury.* Once that treatment plan proved ineffective, the plaintiff suffered an actual injury. [*Dimmitt,* 481 Mich at 630 n 25 (emphasis added in the penultimate sentence).]

Thus, *Dimmitt* instructs that in a malpractice case, the location of an allegedly breached duty of care does not control venue. Rather, for venue purposes, the appropriate focus must remain on the location of the plaintiff's injury.

In the present case, plaintiff bases her venue choice on the locations where defendants allegedly failed to provide adequate advice and treatment for Michael's heart condition. Plaintiff contends that the injury was the lack of a protective device. However, as the Supreme Court explained in *Dimmitt,* the absence of a protective device created a mere potential injury. Michael did not experience an actual injury until he suffered a sudden cardiac arrest and died. That was the "original injury," and it occurred in Macomb County.

Plaintiff argues that, regardless of whether the original injury occurred in Macomb County, venue is improper in that county because not all of the defendants are located there. Plaintiff's argument is directed solely at § 1(a)(*i*) ("[t]he defendant resides, has a place of business, or conducts business in that county"). We agree with plaintiff that subsection (a)(*i*) is inapplicable. See *Massey v Mandell,* 462 Mich 375, 381-382; 614 NW2d 70 (2000). However, subsection (a) provides that venue is proper in the county in which the original injury occurred and in which "either" subsection (a)(*i*) or (a)(*ii*) applies. As defendants observe, subsection (a)(*ii*) requires only that "a defendant" corporation's registered office be located in the same county as the original injury. Plaintiff does not dispute that defendant St. John Hospital and Medical Center is a domestic nonprofit corporation with its registered office in Warren, Michigan, which is in Macomb County. Accordingly, under subsection (1)(a)(*ii*), venue is proper in Macomb County.

In sum, the trial court erred in determining that the "original injury" for purposes of MCL 600.1629(1) occurred in Wayne County. Because the original injury occurred in Macomb County and the corporate registered office of a defendant is also located in Macomb County, the trial court erred in denying defendants' motion to change venue.

Reversed.

/s/ Kirsten Frank Kelly
/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher