

STATE OF MICHIGAN

IN THE SUPREME COURT FOR THE STATE OF MICHIGAN

DIMMITT & OWENS FINANCIAL, INC.,  
a Michigan Corporation, and JMM  
NOTEHOLDER REPRESENTATIVE, LLC, a  
Michigan Limited Liability Company,

Case No. 134087

Court of Appeals No. 262381

Plaintiffs-Appellants,

Trial Court No. 04-434094-NM

-vs-

DELOITTE & TOUCHE (ISC), L.L.C., a  
Delaware Limited Liability Company,  
DELOITTE SERVICES LIMITED PARTNERSHIP,  
a/k/a DELOITTE & TOUCHE, LLP, a Delaware  
Limited Partnership, PHILIP JENNINGS,  
a Michigan Resident,

Defendants-Appellees;

and

JANE and JOHN DOE,

Defendants.

**DIMMITT & OWENS FINANCIAL, INC.'S AND  
JMM NOTEHOLDER REPRESENTATIVE, LLC'S  
JOINT SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR  
APPLICATION FOR LEAVE TO APPEAL**

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## Introduction

On October 3, 2007, this Court directed the Clerk to schedule oral argument regarding the Application filed on behalf of Plaintiff-Appellant Dimmitt & Owen Financial, Inc. (“Dimmitt”), and Plaintiff-Appellant JMM Noteholder Representative, LLC (“JMM”). This Court identified two issues for the parties to address at oral argument:

(1) Assuming that the Defendants-Appellees breached their contract with Plaintiffs to review the plaintiffs’ financial statements, what “original injury” did the plaintiffs suffer and where; and

and

(2) whether the lower court record is sufficiently developed to make such a determination.

The above-identified Order also allowed the parties to file supplemental briefs.

Appellants Dimmitt and JMM submit this Supplemental Brief in further support of their joint Application seeking reversal of the Michigan Court of Appeals’ published decision, dated March 1, 2007. Appellants request that this Court affirm the trial court’s decision denying the Motion for Change of Venue filed by Defendants-Appellees Deloitte & Touche (ISC), LLC, Deloitte Services Limited Partnership, a/k/a Deloitte & Touche, LLP and Philip Jennings (collectively “Deloitte Appellees”).

**I. THE “ORIGINAL INJURY” IN THIS CASE, WITHIN THE CONTEXT OF THE TORT VENUE STATUTE, IS DELOITTE’S NEGLIGENT ACTS AND BREACH OF CONTRACT.**

MCL 600.1629(1)(a) provides that venue in tort actions such as this one is “[t]he county in which the original injury occurred.” As noted by the Court of Appeals in *Karpinsky v. Saint John Hospital-Macomb Center Corp.*, 238 Mich App 539, 544; 606 NW2d 45, 49 (1999), the Legislature specifically used the word “original” to modify the word “injury.”

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Random House Webster's College Dictionary (1997), p. 921, defines the word "original" in part as "belonging or pertaining to the origin or beginning of something." Similarly, Black's Law Dictionary (6th ed.), p. 1099, defines "original" in part as "first in order." Thus, the only reasonable construction of the statutory language is 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 took place.

*Id.*

The definition of "injury" is equally as important. "'Injury' is defined generally as '[t]he violation of another's legal right, for which the law provides a remedy; a wrong or injustice,' and '[h]arm or damage.'" *People v Melton*, 271 Mich App 590, 600, 722 NW2d 698, 703 (2006), citing Black's Law Dictionary (7th ed).

Quite simply, the "wrong . . . done to another"<sup>1</sup> in this case is the Deloitte Appellees' breach of the agreements and breach of their professional duties to Appellants. Put another way, the "original injury" is the Deloitte Appellees' "violation of [Plaintiffs'] legal rights" and was the "wrong or injustice" suffered by Plaintiffs.

In this case, Appellants specifically identified and pleaded this original injury in the Complaint and Amended Complaint when they set forth that Deloitte "materially breached the parties' agreements by, including but not limited to, failing to provide services complying with applicable professional standards and duties, failing to conduct the audits and reviews in conformity with applicable professional standards and duties, and failing to determine whether Dimmitt's financial statements fairly presented, in all material aspects, its financial position and the results of its operations, in conformity with accounting principles generally accepted in the United States of America." Plaintiffs' Amended Complaint, ¶59.

Also, the Deloitte Appellees breached their professional duties to Appellants, and these negligent acts were outlined in the Amended Complaint as well. First, the duties were pled: The

<sup>1</sup> *Karpinsky* at 543.

Deloitte Appellants must adhere to the duties set forth in the American Institute of Certified Public Accountants ("AICPA") Code of Professional Conduct, the AICPA Statements on Auditing Standards, the AICPA Attestation Standards, the AICPA Standards for Accounting and Review Services, the Financial Accounting Standards Board Statements, and other Statements that define and prescribe United States generally accepted accounting principles. The Deloitte Appellees also owed a duty to determine that Dimmitt's financial statements, as audited and/or reviewed by the Deloitte Appellees, provided a fair presentation of Dimmitt's financial position and the results of its operations, in conformity with generally accepted accounting principles.

Appellants then specifically identified how the Deloitte Appellees breached those duties - and thus committed the acts or omissions of negligence -- by signing off on management letters, audit reports, and interim reviews that violated the above-cited accounting and auditing standards. In the Amended Complaint, Appellants specifically identified those acts as: "Deloitte's failures and/or breaches include, but are not limited to:

- ◆ Failing to determine whether Dimmitt's financial statements provided a fair and accurate presentation of Dimmitt's financial position in conformity with generally accepted accounting principles;
- ◆ Failing to determine whether Dimmitt's financial statements provided a fair and accurate presentation of Dimmitt's operations in conformity with generally accepted accounting principles;
- ◆ Including "purchase discounts" in the category of "Factoring accounts receivable" in Dimmitt's financial statements as audited and reviewed by Deloitte, contrary to generally accepted accounting principles;
- ◆ Failing to determine the collectibility of accounts receivable purchased by Dimmitt and/or purchase discounts of Dimmitt's customers as included in Dimmitt's financial statements, as audited and reviewed by Deloitte, contrary to generally accepted accounting principles;
- ◆ Failing to determine the adequacy of the reserve for potentially uncollectible receivables and/or purchase discounts in Dimmitt's financial statements, as audited or reviewed by Deloitte, contrary to generally accepted accounting principles;

- ◆ Failing to advise Dimmitt of its deficiencies in its bookkeeping practices, credit verifications, and other aspects of its operations;
- ◆ Failing to adequately, appropriately, and/or properly staff the audits and/or reviews;
- ◆ Failing to adequately, appropriately, and/or properly supervise the audit and audit staff; and
- ◆ Failing to adhere to an acceptable standard of technical competence in conducting the audit and/or review of Dimmitt’s financial statements.” Amended Complaint, ¶37.

This should have ended the analysis under the Tort Venue Statute, but unfortunately, the Court of Appeals added a “reliance” element to the determination of venue. In so doing, the Court of Appeals overturned this State’s settled venue laws and muddled the interpretation of the Tort Venue Statute. The Court of Appeals essentially adopted a limitations analysis for the accrual of general negligence actions.<sup>2</sup> This Court expressed a more accurate approach when it defined the issue in its Order of October 3, 2007, as being an issue which depends on where “defendants breached their contract.”

A cause of action for a breach of contract occurs “when the promisor fails to perform under the contract.” *Vandendries v General Motors Corp*, 130 Mich App 195, 201, 343 NW2d 4, 7 (1983). *See also Jacobs v Detroit Auto Inter-Insurance Exchange*, 107 Mich App 424, 430; 309 NW2d 627, 630 (1981) (cause of action accrues when breach of contract occurs which is the day on which performance is refused). However, regardless of any limitations accrual analysis, if the Legislature had intended to cause the determination of venue through an accrual analysis, it would have done so. Instead, the Tort Venue Statute calls for a determination of “original injury.”

The Legislature’s use of the word “*original*” to modify “injury” and the plain definitions of those words cannot be ignored. Moreover, there is no legislative history which supports that a

plaintiff's subjective, and perhaps irrefutable, allegations concerning reliance should control the determination of venue. By interpreting "original injury" in a manner inconsistent with its plain meaning, the Court of Appeals' decision has not only misconstrued the statute but created a subjective test for venue which is purely in control of a plaintiff.

**II. THE ORIGINAL INJURY OCCURRED IN WAYNE COUNTY AT DELOITTE'S OFFICES IN DETROIT.**

It cannot be stressed enough that identification of the "original injury" under the Tort Venue Statute has nothing to do with the identification of Appellants' *damages*, or where those damages were experienced. Often, the tendency is to interchange the terms *damage* and *injury*, or consider them synonymous for this analysis. However, *damage* and *injury* are two completely different (and non-interchangeable) concepts under the Tort Venue Statute. *Karpinsky v St John Hosp-Macomb Ctr Corp*, 238 Mich App 539 (1999) (holding that the place where the damages were sustained does not constitute proper venue). So the fact that Dimmitt experienced damages when its operations ceased in Oakland County, Chicago and San Francisco is irrelevant to the determination of where the "original injury" occurred. Similarly, the fact that Dimmitt's individual investors centralized their interests by forming JMM, which merely has a mailing address in Oakland County, does not mean that Oakland County is the place of "original injury."

As previously stated here and in Appellants' Application, "original injury" is defined by our appellate courts as the "wrong . . . done to another." *Id* at 543, 545. Over and over, Michigan appellate decisions held -- at least before the Court of Appeals' decision in this case -- that the negligent act or omission is the "wrong . . . done to another," and hence, the negligent act is the "original injury." As such, the place where the negligent act occurred is the place where the original injury occurred. This analysis had been used for years under the Tort Venue Statute,

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<sup>2</sup> A cause of action in negligence accrues on "the date on which the plaintiff was harmed by the defendant's negligent act, not the date on which the defendant acted negligently." *Stephens v C J Dixon*, 449 Mich 531, 534-35 (1995).

because it fulfilled both the letter and spirit of the 1995 Tort reform amendments by basing the “original injury” determination squarely on where a defendant’s negligent acts were committed. *Id*; *Bass v Combs*, 238 Mich App 16; 604 NW2d 727 (1999); *Opus One, Inc v Cross Wrock, PC*, 2000 WL 33399784, Mich App, December 1, 2000 (No. 222128).

However, the Court of Appeals’ published decision in this case turned that analysis on its ear. Now, instead of spotlighting where a defendant’s negligent act took place, the focus is on where the plaintiff says he or she *relied* upon the negligent act. By changing the definition of “original injury” to include a determination of where a plaintiff allegedly *relies* on the negligent act, the Court of Appeals has opened the Tort Venue Statute to precisely the kind of interpretation and application that it was meant to preclude. Before the Court of Appeals’ decision in this case, the 1986 and 1995 amendments successfully curtailed forum shopping, because proper Venue was limited to the county where the defendant’s manifest acts of negligence took place. Now a plaintiff need only self-servingly allege that he or she *relied* upon the negligent act in a particular county in order to side-step the limitations of where the negligent acts were triggered.

The following example may be illustrative of the problem introduced by the Court of Appeals’ decision: A plaintiff seeks auditing or tax advice from a certified public accountant. The individual is a resident of Macomb County and visits the CPA at the CPA’s office in Oakland County. The CPA gives tax planning advice to the plaintiff and conducts an audit of plaintiff’s operations. Afterward, the plaintiff leaves his CPA’s office, and he proceeds to his place of employment in Wayne County. As it turns out, the CPA’s advice is completely incorrect, inaccurate and exposes plaintiff to damages. The CPA’s service fell below the standard of care for a reasonable CPA, and plaintiff sues his CPA. Before the Court of Appeals’ decision in this case, the trial court need only determine in which county the original negligent

act took place, i.e., where did the CPA breach the professional duty (so long as the defendant also resides, has a place of business, or conducts business in that county). The review is objective and clean.

However, after the Court of Appeals' decision in this case, a trial court would need to determine in which County the plaintiff *relied* on the CPA's negligent act. But who is to say where the plaintiff *relied* on his CPA's advice? Did the plaintiff rely on the faulty advice while at work in Wayne County? Maybe the plaintiff decided to rely on the faulty advice days later while at his home. Did the plaintiff rely on the CPA's advice right on the spot while sitting in the CPA's office in Oakland County? Maybe the plaintiff decided to rely on the faulty advice while driving his car through some other county.

This new approach to interpretation and application of the Tort Venue Statute eviscerates the purpose of the statute, because it is impossible to question a plaintiff's pronouncement of when or where he or she relied upon defendant's negligent acts. After all, where a plaintiff says he or she relied on the negligent acts is almost unassailably personal. The Court of Appeals' decision in this case put the question of Venue exclusively within the control of plaintiffs and their lawyers because the plaintiff can simply testify that he or she relied on faulty information while in the county of *his or her* choosing.<sup>3</sup>

The Tort Venue Statute should not require such convolutions, and it never did before the Court of Appeals' decision in this case. Wayne County is the location where the Deloitte Appellees' violated their professional duties to Appellants. The professional negligence occurred at the time that Deloitte figuratively and literally signed off on the audited financial statements, management reports, and interim reviews. By signing the audited financial statements, management reports, and interim reviews, the Deloitte Appellees certified and

represented that they were governed by and conformed with all applicable professional duties and standards of auditing and accounting. Plaintiffs' Complaint, ¶¶ 29, 30, 31, 38, 39, 46, 47, 52, 54, and 57. The Deloitte Appellees committed a number of acts that violated their professional duties and the parties' contract terms. Those acts are identified in the Complaint at Paragraphs 32, 40, 41, 49, 54, 61, and 62.

Before signing off on those audits and reports, the Deloitte Appellees could have cured or avoided the "wrong . . . done to another." But once the Deloitte Appellees signed, certified and issued those reports, letters, and audit results from their Wayne County office, the "wrong . . . done to another" was committed. Since the negligent acts are the original injury, and the negligent acts took place at Deloitte's office in Wayne County, the "original injury" in this case took place in Wayne County.

Here, as in all non-medical professional malpractice cases, the "original injury" was the Deloitte Appellees' breach of their contract and their commission of professional negligence. That breach of contract occurred the moment when Deloitte Appellees put pen to paper, thus certifying their faulty management letter, audit, and/or interim-review. As discussed more fully in Dimmitt's and JMM's Application for Leave to Appeal, these "triggering events" are determinative of venue. This analysis for determination of venue in professional malpractice cases is consistent with legislative intent as well as Michigan case law prior to the time of the Court of Appeals' decision below. This "triggering event" analysis also defines venue with a certainty not attainable through any reliance analysis dependent upon a plaintiff's subjective allegations. The original injury suffered by Dimmitt and JMM occurred in Wayne County.

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<sup>3</sup> So long as "the defendant also resides, has a place of business, or conducts business in that county." MCL 600.1629(1)(a)(i).

### III. SUFFICIENCY OF THE LOWER COURT RECORD.

If the Court of Appeals' decision in this case is used, then the lower court record is not sufficiently developed to determine Original Injury. This argument and analysis is already fully set forth in Section III of Appellants' Application. In short, no record exists upon which any Court, let alone the Court of Appeals, could determine where Appellant JMM's reliance took place or where Appellant Dimmitt's reliance took place. Indeed, the Court of Appeals' opinion never even cites any fact upon which to base its determination of where reliance took place. The Court of Appeals' opinion only quotes two paragraphs of Complaint where Dimmitt and the JMM investors state that they relied upon Deloitte's faulty reports. But those allegations do not identify where the reliance took place.

Conversely, the lower court record in this case is sufficiently developed to determine Original Injury if the prevailing law in *Karpinsky*, *Bass*, and *Opus One* is applied, such as the trial court did. Specifically, there is a sufficiently developed record below to determine that the Deloitte Appellees breached their contract with Plaintiffs and committed malpractice in Wayne County. The Deloitte Appellees formulated their audit plan and made faulty decisions regarding the results of the audit and management reports in Wayne County. The Deloitte Appellees drafted the flawed audit and management reports and approved the issuance of the flawed audit and management reports from Wayne County. The Deloitte Appellees had the opportunity to remedy their "violation of [Plaintiffs'] legal rights" and stop the "wrong or injustice" up until the time of their approval of the audit and management reports in Wayne County.

In the end, the trial court was presented with:

- (a) Deloitte's Engagement Letters for the years 1998 through 2002, all of which were drafted, signed and issued from Deloitte's offices in Detroit, Wayne County, Michigan;

- (b) Deloitte's audited Financial Statements and Independent Auditors' Reports of Dimmitt & Owens Financial, Inc., 1996 through 2002, all of which were drafted, signed and issued from Deloitte's offices in Detroit, Wayne County, Michigan;
- (c) Deloitte & Touche LLP Financial Statements and Independent Accountants' Review Reports of Dimmitt & Owens Financial, Inc. for the first six months of years 1996 through 2002, all of which were drafted, signed and issued from Deloitte's offices in Detroit, Wayne County, Michigan;
- (d) Plaintiffs' First Amended Joint Complaint; and
- (e) The affidavit of Paula Crady, owner and officer of Dimmitt.

The trial court was presented with these items, considered these items, and referred to these items when it decided that

THE COURT: All right. I'm ready to rule. It appears that there were some things that were done in Oakland County and some in Wayne County, specifically in the Detroit offices of Deloitte & Touche. The auditors' reports, the financial reports, the – there was some other document.

MR. ARVANT: Interim review.

THE COURT: Interim review, those were apparently done, from what I can determine, in the Detroit office. Those were decisions being made with respect to the financial viability, if you will, of Dimmitt, which is located in Oakland County, by Deloitte, which is located in the City of Detroit, they made those decisions, at least many of the material ones, it appears, in the City of Detroit, which is in the County of Wayne. And certainly with respect to staffing decisions, what personnel Deloitte & Touche were going to send to review whatever documents may have been pertinent to its review or its audit, those decisions were made in the Detroit offices. They certainly wouldn't have been made at the offices of Dimmitt in Oakland County. Motion for change of venue denied. Thank you.

Exhibit 8 to Appellants' Application, pp. 26-27.

There is certainly enough objective evidence in the lower court record upon which the trial court could base its finding that the acts and omissions that constitute Deloitte's negligence and breach of contract took place in Wayne County, Michigan. Remembering that the trial

court's findings can only be overturned due to clear error, it becomes apparent that the Court of Appeals erred.

**Conclusion**

For these reasons, Appellants request that this Court grant leave to appeal, reverse the Court of Appeals' decision, and affirm the trial court's decision to keep Venue for this case in the Wayne County Circuit Court.

Respectfully submitted,

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