

STATE OF MICHIGAN
IN THE SUPREME COURT
(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)

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

Supreme Court No. 134087

Plaintiff-Appellants,

Court of Appeals No. 262381

vs.

DELOITTE & TOUCHE (ICC), LLC, a
Delaware Limited Liability Company,
DELOITTE SERVICES LIMITED PARTNERSHIP,
a/k/a DELOITTE & TOUCHE, LLP,
a Delaware Limited Partnership,
PHILIP JENNINGS, a Michigan resident,
JANE and/or JOHN DOE, a Michigan resident,

Wayne County Circuit Court
Case No. 04-434094-NM

134087 (73) Defendants-Appellees.

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3253
PETER L. ARVANT (P52809)
GREGORY S. PIERCE (P45552)
STARK REAGAN, P.C.
Attorneys for Dimmitt & Owens Financial, Inc.
1111 W. Long Lake Road – Suite 202
Troy, MI 48098
(248) 641-9955

JOHN A. HUBBARD (P39624)
ERIC A. PARZIANELLO (P42797)
BEALS HUBBARD, P.L.C.
Attorneys for JMM Noteholder Rep., L.L.C.
30665 Northwestern Hwy., Suite 100
Farmington Hills, MI 48334
(248) 932-1101

ERNEST R. BAZZANA (P28442)
PLUNKETT COONEY
Attorney for Amicus Curiae Michigan Assoc.
of Certified Public Accountants
535 Griswold – Suite 2400
Detroit, MI 48226
(313) 983-4798

JOHN P. JACOBS (P15400)
JOHN P. JACOBS, P.C.
Appellate Counsel for Deloitte & Touche LLP and
Philip Jennings
The Guardian Building
500 Griswold Street – Suite 2825
Detroit, MI 48226
(313) 965-1900

JEFFREY C. SHARER
KRISTEN R. SEEGER
SIDLEY AUSTIN, LLP
Counsel for Deloitte & Touche LLP and
Philip Jennings
One South Dearborn Street
Chicago, IL 60603
(312) 853-7000

FILED

DEC 10 2007

CORBIN E. DAVIS
CLERK
MICHIGAN SUPREME COURT

**MOTION TO FILE AMICUS CURIAE BRIEF OF MICHIGAN ASSOCIATION OF
CERTIFIED PUBLIC ACCOUNTANTS IN SUPPORT OF
DEFENDANTS-APPELLEES**

**MOTION TO FILE AMICUS CURIAE BRIEF OF MICHIGAN ASSOCIATION OF
CERTIFIED PUBLIC ACCOUNTANTS IN SUPPORT OF
DEFENDANTS-APPELLEES.**

Michigan Association of Certified Public Accountants (MACPA) moves for an Order permitting it to file an Amicus Curiae Brief supporting the position of the Defendants-Appellees. In support of its Motion, MACPA states as follows:

1. The question before this Court is which county is the county of proper venue in an action alleging accounting malpractice. The MACPA is a professional organization that collectively represents the interests of its more than 16,000 members in Michigan. MACPA is interested in securing a ruling from this Court that the determination of where an original injury occurred within the meaning of MCL 600.1629(1)(a) is solely a function of where the Plaintiff sustains initial damage allegedly as a result of the Defendant's actions.

2. The amicus curiae brief will assist the Court by demonstrating that the "original injury" within the meaning of the statute is suffered where the plaintiff sustains initial damage and that, where, as here, an injury is economic, the place of injury is where the plaintiff resides and sustains the economic impact of the loss.

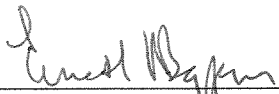
3. Defendants-Appellees consented to the filing of a brief by MACPA in this case.

4. While mention of an amicus curiae brief appears only in the rule relating to briefs in calendar cases, MCR 7.306(D), this Court has acknowledged that an amicus curiae brief is not only permitted at the application stage, but is encouraged generally. Moreover, in this case, this Court has encouraged "other persons or groups interested in the determination of the issues presented in this case" to seek permission to file briefs amicus curiae. Order dated October 3, 2007.

WHEREFORE, the Michigan Association of Certified Public Accountants respectfully requests that this Court grant it permission to file as amicus curiae in support of the position of Defendants-Appellees.

Respectfully submitted,

PLUNKETT COONEY

By: 
ERNEST R. BAZZANA (P28442)
Attorney for MACPA
535 Griswold – Suite 2400
Detroit, MI 48226
(313) 983-4798

DATED: December 6, 2007

Detroit.05841.74378.1270089-1

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1111 W. Long Lake Road – Suite 202
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500 Griswold Street – Suite 2825
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JEFFREY C. SHARER
KRISTEN R. SEEGER
SIDLEY AUSTIN, LLP
Counsel for Deloitte & Touche LLP and
Philip Jennings
One South Dearborn Street
Chicago, IL 60603
(312) 853-7000

**AMICUS CURIAE BRIEF OF MICHIGAN ASSOCIATION OF CERTIFIED PUBLIC
ACCOUNTANTS IN SUPPORT OF POSITION OF DEENDANTS-APPELLEES**

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STATEMENT OF THE QUESTION PRESENTED

WHERE DOES THE “THE ORIGINAL INJURY” OCCUR
WITHIN THE MEANING OF MCL 600.1629(1)(a) FOR VENUE
PURPOSES?

Amicus Curiae, MACPA, contends that “the original injury”
occurs where the Plaintiff sustains initial damage as a result of the
Defendant’s actions.

STATEMENT OF FACTS

MACPA adopts the recitation of facts set forth on pages 1-6 of Defendants-Appellees' Brief in Opposition to Application for Leave to Appeal under the heading entitled "Counter-Statements of Facts."

ARGUMENT

THE DETERMINATION OF WHERE “THE ORIGINAL INJURY” OCCURS WITHIN THE MEANING OF MCL 600.1629(1)(a) IS SOLELY A FUNCTION OF WHERE THE PLAINTIFF SUSTAINS INITIAL DAMAGE AS A RESULT OF THE DEFENDANT’S ACTIONS.

A. Burden of Proof.

When a defendant challenges venue, the plaintiff has the burden to establish that the county it chose is a proper venue. *Gross v General Motors Corp*, 448 Mich 147; 528 NW2d 707 (1995); *Marsh v Walter L. Couse & Co*, 179 Mich App 204, 208; 445 NW2d 204 (1989).

B. The Statute Involved.

MCL 600.1629(1) provides:

“(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.”

The question presented concerns the proper interpretation of the phrase “the county in which the original injury occurred.”

C. Analysis.

In *Lorencz v Ford Motor Co*, 439 Mich 370; 483 NW2d 844 (1999), this Court interpreted the prior version of MCL 600.1629(1)(a) which set first priority venue as “. . . a county in which all or part of the cause of action arose . . .” and held that venue was proper in any county where any part of the cause of action arose, not merely at the situs of the injury. This Court reached this result while acknowledging, based on legislative history underlying MCL 600.1629(1)(a), that the Legislature intended to set first priority venue in the county which was the situs of the injury. Significantly for the purpose of the present analysis, this Court acknowledged that the situs of the Plaintiff’s injury in that case was Gratiot County, where the motor vehicle accident occurred.

Subsequently, in *Gross v General Motors Corp, supra*, this Court refined the holding of *Lorencz, supra*, and stated that the “damages” part of a cause of action arises only at the situs of the injury, *i.e.*, where the initial damage is sustained. Subsequent damages are irrelevant to the venue determination. *See also, Barnes v International Business Machines Corp*, 212 Mich App 223, 226; 537 NW2d 265 (1995) (the place where subsequent damages are sustained, if different from where the injury occurred, does not constitute proper venue).

Following this Court’s decision in *Gross, supra*, the Legislature amended MCL 600.1629(1)(a) by eliminating the phrase “a county in which all or part of the cause of action arose” and replacing it with the phrase “the county in which the original injury occurred.” In doing so, the Legislature accomplished two things. First, it effectuated the intent which this Court acknowledged in *Lorencz, supra*, to restrict venue solely to the place of injury and eliminated counties in which parts of the cause of action arose as proper counties for venue purposes. Secondly, and more importantly for the present purpose, it codified the holding of *Gross v General Motors¹, supra*, that venue is proper only where initial damage is sustained and not where subsequent damages occur.

The Court of Appeals, in the view of MACPA, has subsequently and correctly recognized that the current version of MCL 600.1629(1)(a) simply reflects the holding of this Court in *Gross v General Motors, supra*. In *Karpinski v St. John Hospital-Macomb Center Corp*, 238 Mich App 539, 544-546; 606 NW2d 45 (1999), the Court of Appeals stated:

“Moreover, any doubt is resolved by the Legislature’s use of the word ‘original’ to modify the word ‘injury’.

* * *

¹ The Legislature is presumed to act with knowledge of appellate court statutory interpretations. *Glancy v Roseville*, 216 Mich App 390, 394; 549 NW2d 78 (1996); *Cook v Dep’t of Treasury*, 229 Mich App 653; 583 NW2d 696 (1998).

The Legislature clearly did not intend to allow venue to be established in any county where the plaintiff continues to suffer from an injury.”

In *Taha v Basha Diagnostics PC*, 275 Mich App 76, 78-79; 739 NW2d 844 (2007), the Court of Appeals stated:

“ . . . [T]o determine venue in tort actions, it is necessary to identify the actual place of occurrence of the damage or injury that gives rise to the plaintiff’s cause of action.”

As a general rule, words and phrases used in statutes are to be construed according to the common and approved usage of the language. MCL 8.3a; *Horace v City of Pontiac*, 456 Mich 744, 756; 575 NW2d 762 (1998); *Greene v AP Products, Ltd*, 475 Mich 502, 509; 717 NW2d 855 (2006). When a word or phrase has not been given prior legal meaning, resort to a lay dictionary is appropriate. *Id* at 510. The word “injury” is defined to mean “any wrong or damage done to another, either in his person, rights, reputation or property.” Black’s Law Dictionary (6th Ed., p 785). The word “injury” is modified by the word “original”² which is defined as “belonging or pertaining to the origin or beginning of something,” Random House Webster’s College Dictionary (1997), p 921 and as “first in order.” Black’s Law Dictionary (6th Ed.), p 1099. Based on the foregoing, MACPA contends that the correct construction of the statutory phrase “the county in which the original injury occurred” is the county where the plaintiff sustains initial damage as a result of the defendant’s actions. The situs of the initial damage is exclusively determinative of the venue issue under MCL 600,1629(1)(a).

² Every word used in a statute should be given meaning and no word should be rendered nugatory. *Stowers v Wolodzko*, 386 Mich 119; 191 NW2d 355 (1971). The American Heritage Dictionary of the English Language (2nd Ed.) defines the word “nugatory” as “. . . having no power; invalid; inoperative.”

MACPA contends that the law concerning where and when a cause of action accrues is applicable by analogy. The last fact necessary to complete a cause of action is the injury to the plaintiff. As a necessary consequence, the question of venue does not even arise until after the cause of action comes into existence, *i.e.*, accrues. As such, the law which instructs when and where a cause of action accrues is, in our view, applicable by analogy in determining where an original injury occurs.

A cause of action accrues at the moment the right to commence the action comes into existence. *Moll v Abbott Laboratories*, 444 Mich 15-16; 506 NW2d 816 (1993). If there is a coincidence of a negligent act with the fact of some damage, the cause of action comes into existence. *Connelly v Paul Ruddy's Equip Repair and Service Co*, 388 Mich 146, 151; 200 NW2d 70 (1972); *Gross v General Moto Corp*, 448 Mich 147; 528 NW2d 707 (1995). Thus, a cause action accrues at the time some damage is sustained. *Parish v BF Goodrich Co*, 395 Mich 271; 235 NW2d 570 (1975). It is the fact of injury which establishes the damage element of a cause of action. A cause of action arises where as well as when the final significant event that is essential to a suable claim occurs. *Mack Trucks, Inc v Bendix-Westinghouse Automotive Air Brake Co*, 372 F2d 18, 20, (3rd Cir 1966); *Giacobbe v Celotex Corp*, 629 F Supp 827 (ED Pa 1985). Distinguishing between “damage” which gives rise to a cause of action and subsequent “damages,” this Court stated:

Once all of the elements of an action for personal injury, including the element of damage, are present, the claim accrues and the statute of limitations begins to run. Later damages may result, but they give rise to no new cause of action” *Connelly v Paul Ruddy's Co*, *supra* at p 151.

Based on the foregoing, MACPA contends that the only fact that is legally relevant in the venue inquiry under MCL 600.1629(1)(a) is the fact of initial damage to the Plaintiff. The preceding acts of the Defendant allegedly leading to the initial damage and subsequent damages

sustained by the Plaintiff play no role in the venue inquiry.³ The Court of Appeals was correct to reject the argument that the location of the acts of the Defendant determined proper venue.

Dimmitt & Owens Financial, Inc v DeLoitte & Touche (ISC) (LLC), 274 Mich App 470, 478; 735 NW2d 288 (2007). The Court of Appeals' analysis then proceeded in the correct direction and arrived at the proper end. The Court stated that an original injury for venue purposes is the first injury that the Plaintiff actually suffered. *Id* at p 478. That is a correct statement of the law.

Then, the Court of Appeals held that Plaintiff "... suffered the original injury when they relied on Defendants' allegedly faulty information in making investment decisions." *Id* at p 479.

While that is not always correct, because reliance is not always contemporaneous with damage sustained,⁴ it was correct in this case because Dimmitt's detrimental reliance occurred in the same county, Oakland.

In this case, Dimmitt asserts that it sustained economic injury as a result of its inability to comply with a forbearance agreement with Standard Federal Bank and the reorganization plan with its investors. *Dimmitt, supra* at p 472. The claims asserted in the Complaint flow from the alleged failure of Dimmitt's business which allegedly was caused by Defendants' failure to properly conduct audits of Dimmitt's financial statements. Those are economic injuries.

³ Even if the acts of the Defendant did play a role in the venue inquiry, in the case of alleged audit malpractice that would point to venue being proper in the same location as where the audit client sustains the economic loss that is the original injury. That is because audits take place principally at the location of the audit client, where the audit client's management is located and where it keeps its books and records. It is at the audit client's location that the auditors examine and substantively test the client's financial statements, prepare work papers, and meet with the audit client's management concerning the audit. Key determinations with respect to significant accounting issues are typically made there. In short, the center of gravity of the auditor's activity is at the client's site.

⁴ For example, someone could rely on information, make an investment decision based on that information and sustain damage at some later point in time when the investment loses value. It is the last point in time where "the original injury" is suffered.

Where an alleged injury is economic, the place of injury is where the Plaintiff resides and sustains the economic impact of the loss. *Global Financial Corp v Triarc Corp*, 93 NY2d 525; 715 NE2d 482 (1999); *Cantor Fitzgerald, Inc v Lutnik*, 313 F3d 704, 710 (2nd Cir 2002); *Whale Telecom, Ltd, v Qualcomm, Inc*, 41 AD3d 348; 839 NYS2d 726 (2007) (Russia was place of injury where economic impact of alleged tortious conduct was in Russia).

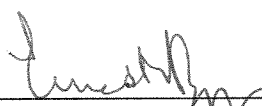
A corporation resides for venue purposes in the county designated as its location in its Michigan Articles of Incorporation. *Higgins v Hampshire Products, Inc*, 319 Mich 674; 30 NW2d 390 (1948); MCL 450.1202(f); 6 Michigan Civil Jurisprudence, *Corporations*, §4. The Articles of Incorporation for both Plaintiffs show that their registered offices are in Oakland County. Accordingly, Oakland County is where they sustained the economic impact of the Defendants' action and that is where the original injury occurred for venue purposes.

CONCLUSION

For the foregoing reasons, Amicus Curiae, Michigan Association of Certified Public Accountants, contend that this Court should deny leave to appeal or, in the alternative, issue its decision, either in lieu of granting leave to appeal or after full briefing and argument as a calendar case, stating that "the original injury" within the meaning of MCL 600.1629(1)(a) occurs where the Plaintiff sustains initial damage as a result of the Defendant's actions.

PLUNKETT & COONEY, P.C.

By: _____


ERNEST R. BAZZANA (P28442)
PLUNKETT COONEY
Attorney for Amicus Curiae MACPA
535 Griswold – Suite 2400
Detroit, MI 48226
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