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STATE OF MICHIGAN
IN THE SUPREME COURT

STATE OF MICHIGAN, DEPARTMENT OF HEALTH AND HUMAN SERVICES, OFFICE OF INSPECTOR GENERAL	Supreme Court No. 167917
	Court of Appeals No. 364206
Plaintiff–Appellant	Ingham Circuit Court No. 22–000441–CZ

v

NRK RX, INC. AND RAAD KOUZA

Defendants–Appellees
_____/

REPLY BRIEF OF APPELLANT STATE OF MICHIGAN, DEPARTMENT OF HEALTH AND HUMAN SERVICES, OFFICE OF INSPECTOR GENERAL

Stephanie L. Seery (P73408)
Assistant Attorney General
Attorney for State of Michigan
Plaintiff–Appellant
Revenue and Tax Division
P.O. Box 30754
Lansing, MI 48909
(517) 335–7584

Dated: January 30, 2025

RECEIVED by MSC 1/30/2025 10:45:58 AM

TABLE OF CONTENTS

Page

Index of Authorities iii

Introduction 1

Argument 1

I. State law is clear that Ingham County is a proper venue for suits brought by the Attorney General under MCL 14.102 and MCL 600.1631. 1

A. The State preserved its arguments regarding the Attorney General venue statutes. 2

B. There is clear legal authority for the Attorney General to sue in Ingham County. 2

C. The tort venue statutes do not override the venue provisions specific to suits brought by the Attorney General. 4

II. Even if this Court were to apply the tort venue statute, venue is proper under MCL 600.1629(1)(b)(i) and MCL 600.1629(1)(d) because the original injury occurred in Ingham County. 6

A. Venue is proper under (1)(b)(i) because Ingham County is where the original injury occurred. 7

1. Caselaw distinguishes the original injury from the wrongful conduct and further narrows the definition to the first actual injury existing in fact. 7

2. For intangible property, the first actual injury occurs where plaintiff is located—here, Ingham County. 8

3. *Ground Development* is unpersuasive. 9

4. Other tort caselaw helps illuminate the common-sense point that the location of the injury to the plaintiff occurs where the plaintiff is located. 11

5. The type of conversion does not change the legal standard for analyzing the location of the original injury. 11

B. Venue is also proper under (1)(d), referring to MCL 600.1627, because Ingham County is where the cause of action arose..... 12

Conclusion and Relief Requested..... 13

Word Count Statement..... 14

RECEIVED by MSC 1/30/2025 10:45:58 AM

RECEIVED by MSC 1/30/2025 10:45:58 AM

INDEX OF AUTHORITIES

Page

Cases

Colucci v McMillin
256 Mich App 88 (2003) 5

De Martinez v Lamagno
515 US 417 (1995) 5

Dep't of Natural Resources v Wisconsin Electric Power Co
unpublished opinion per curiam, July 20, 2023 (Docket No. 360932) 3

Dimmitt & Owens Fin, Inc v Deloitte & Touche (ISC) LLC
481 Mich 618 (2008) 7, 8, 10

Evanston YMCA Camp v State Tax Comm
369 Mich 1 (1962) 4

Gross v General Motors Corp
448 Mich 147 (1995) 7

Ground Development, Inc v Doyle & Lang, LLC
unpublished per curiam opinion of the Court of Appeals, issued November 1, 2005 (Docket No. 255202) 9, 10

Massey v Mandell
462 Mich 375 (2000) 6

McMullen v Ingham Circuit Judge
102 Mich 608 (1894) 3

NRK Rx, Inc et al
__ Mich App at __ (2024) (Docket 364206) 2

People v Metamora Water Serv
276 Mich App 376 (2007) 2

Taha v Basha Diagnostics, PC
275 Mich App 76 (2007) 11

Statutes

MCL 14.102 ..... 1, 2, 3, 4

MCL 400.227 3
MCL 600.1621 12
MCL 600.1627 12
MCL 600.1629 ..... passim
MCL 600.1629(1)(a) 7, 8
MCL 600.1629(1)(a)(i) 6
MCL 600.1629(1)(a)(ii) 7, 10
MCL 600.1629(1)(b) 7
MCL 600.1629(1)(b)(i) 6, 7
MCL 600.1629(1)(c)(ii) 6
MCL 600.1629(1)(d) 6, 7, 12
MCL 600.1631 ..... 1, 3, 4, 5
MCL 600.1631(a) 1, 2
MCL 600.1641 ..... 4, 5
MCL 600.1641(1) 5
MCL 600.1641(2) 5, 6

Other Authorities

Law Reform Committee, *Conversion and Detinue* (Law Reform Comm No 18 Cm 4774, 1971) 10

Rules

MCR 2.222(A) 2
MCR 7.123(E) 9
MCR 7.305(B)(3) 1

RECEIVED by MSC 1/30/2025 10:45:58 AM

RECEIVED by MSC 1/30/2025 10:45:58 AM

INTRODUCTION

The Michigan Attorney General brought suit on behalf of the State in the Ingham County Circuit Court to recoup improperly retained Medicaid money—money that belongs to the People's Treasury, not in the hands of Defendants. Yet in this case, in a published opinion the Court of Appeals held that venue is proper outside of Ingham County, erroneously relying on the tort venue statutes and sending the Attorney General across the state.

The State's Application for Leave to Appeal should be granted because this Court needs to clarify this venue issue, an issue of major jurisprudential significance, see MCR 7.305(B)(3), for which the State has sought appellate review in multiple other cases.[1]

ARGUMENT

I. State law is clear that Ingham County is a proper venue for suits brought by the Attorney General under MCL 14.102 and MCL 600.1631.

The law, both past and present, establishes that actions by the state Attorney General are properly brought in Ingham County Circuit Court under MCL 14.102 and MCL 600.1631(a).

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[1] Those cases include:

- *State of Michigan v Saeed et al.*, Docket No. 165870;
- *State of Michigan v IRXPlus.com, Inc. et al.*, Docket No. 165869;
- *State of Michigan v NRK Rx, Inc. et al.*, Docket No. 165868;
- *State of Michigan v Seaway Pharmacy, P.C. et al.*, Docket Nos. 166140 and 166142.

RECEIVED by MSC 1/30/2025 10:45:58 AM

A. The State preserved its arguments regarding the Attorney General venue statutes.

Defendants argue that the State failed to preserve its arguments as to MCL 600.1631(a) and MCL 14.102 because the Court of Appeals recognized that the State failed to preserve those arguments. (Def Ans to App for Lv at 12.) But this Court's review is appropriate because the Court of Appeals addressed and ultimately ruled on the arguments related to MCL 600.1631(a) and MCL 14.102. See *NRK Rx, Inc et al*; __ Mich App at __; slip op at 7-10. The decision is published and thus controls on this issue. See *People v Metamora Water Serv*, 276 Mich App 376, 382 (2007) (an issue is preserved for appeal if it was raised, addressed, and decided by the lower court.) [2]

B. There is clear legal authority for the Attorney General to sue in Ingham County.

The law is expressed that actions brought by the state Attorney General are properly brought in Ingham County Circuit Court under MCL 14.102 and MCL 600.1631(a).

First, the Attorney General venue statutes apply where the Attorney General brings the action on behalf of the State, including its departments. The "State" encompasses its departments and agencies because agencies are units of the state and created by the constitution, statute, or by agency action.

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[2] In contrast, Defendants failed to preserve their argument that Oakland County is more convenient under MCR 2.222(A) because their trial court motion only argued that *Wayne* County was more convenient, and their later briefings abandoned the argument altogether.

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For example, the Court of Appeals addressed the venue provisions in MCL 14.102 and MCL 600.1631 in a case in which the Attorney General brought a suit on behalf of the Michigan Department of Natural Resources. The Court held that "read together," the very same statutes relevant here "direct that the attorney general is the attorney for state departments and when the attorney general files suit on behalf of the state or its populace, that suit may be filed in Ingham Circuit Court." *Dep't of Natural Resources v Wisconsin Electric Power Co*, unpublished opinion per curiam, July 20, 2023 (Docket No. 360932).

Here, the facts are analogous because the Attorney General brought suit on behalf of a State department: the Department of Health and Human Services. In sum, when the Attorney General has filed suit on behalf of a state agency (as opposed to a *parens patriae* case on behalf of the people), the suit falls within the category of a those filed "in the name of the state" as described in MCL 600.1631 and MCL 14.102.[3]

The Attorney General's ability to sue in Ingham County has a long history. See *McMullen v Ingham Circuit Judge*, 102 Mich 608, 611 (1894). And the legislative histories underlying MCL 14.102 and MCL 600.1631 support that Ingham County is a proper venue for any suit in which the Attorney General is the

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[3] It is true that the Office of Inspector General is independent or free from oversight by the Department of Health and Human Services (as all auditing agencies are). (Def Ans to App for Lv at 13.) But it is still a unit *within* the Department of Health and Human Services and therefore an agency of the State. MCL 400.227 ("The Office of Inspector General is created as an independent and autonomous entity *within the Michigan Department of Health and Human Services*.") (emphasis added).

RECEIVED by MSC 1/30/2025 10:45:58 AM

plaintiff seeking relief for the State. When the legislation that would become MCL 14.102 was originally proposed, the Legislature specifically stated that a purpose of the proposed legislation was "to permit the bringing of any suit at law in which the State is a party plaintiff in the circuit court of Ingham County." (Appellants' Court of Appeals Appx, p 376.) Similarly, when MCL 600.1631 was proposed, the committee report and recommendations show that the legislation was intended to "reflect[ ] the philosophy of existing statutes." (Appellants' Court of Appeals Appx, p 379.)

This authority supports the proposition that the Attorney General can choose to sue in Ingham County.

C. The tort venue statutes do not override the venue provisions specific to suits brought by the Attorney General.

Defendants argue that the Legislature intended either MCL 600.1629 or MCL 600.1641 to override the Attorney General's discretion to file this suit in Ingham County. But that is not correct because the Legislature gave the choice to enforce the law in Ingham County to the Attorney General.

The general tort venue statute in MCL 600.1629 does not override the State's discretion to bring suit in Ingham County under MCL 600.1631 because § 1631 is more specific than § 1629. See *Evanston YMCA Camp v State Tax Comm*, 369 Mich 1, 8 (1962). Indeed, MCL 600.1629 applies broadly to litigants in tort cases– the bulk of which involve only private party litigants. And the more specific statute

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governs that narrow band of cases where the State brings forward a tort action as here under MCL 600.1631.

This interpretation makes sense because otherwise, the rule would be that when the Attorney General brings a single claim which happens to be a tort, § 1631 controls, allowing the Attorney General to bring suit in Ingham County, but if any other counts are added, then § 1629 applies. That convoluted understanding is not supported by law or by common sense.

Relatedly, Defendants argue that the use of "shall" in MCL 600.1641 overrides the State's discretion under MCL 600.1631. (Def Ans to App for Lv at 14.) But MCL 600.1641 can be read harmoniously with MCL 600.1631 and does not interfere with the Attorney General's choice of venue, let alone override it.

MCL 600.1641(1) provides the general venue rule for joined claims, stating that venue is proper "in any county in which either cause of action, if sued upon separately, could have been commenced and tried." Subsection (2) "creates an exception to the general rule set forth in MCL 600.1641(1)" for complaints where one of the causes of action sounds in tort and provides that MCL 600.1629 governs venue for such suits. *Colucci v McMillin*, 256 Mich App 88, 96 (2003); MCL 600.1641(2).

A harmonious reading of the statutes is that the word "shall" in MCL 600.1641 generally directs parties in tort suits to use the tort venue provision even if there is an additional cause of action in the complaint. See *De Martinez v Lamagno*, 515 US 417, 434 n 9 (1995) ("legal writers sometimes use . . . 'shall' to

RECEIVED by MSC 1/30/2025 10:45:58 AM

mean 'will' "). But in the specific circumstance in which the State is the plaintiff filing suit, it has the discretion to file the suit in Ingham County.

II. Even if this Court were to apply the tort venue statute, venue is proper under MCL 600.1629(1)(b)(i) and MCL 600.1629(1)(d) because the original injury occurred in Ingham County.

Even under the tort venue statute, venue is still proper in Ingham County under sections (1)(b)(i) and (1)(d) of the tort venue statutes because that is the location of "the original injury." MCL 600.1641(2) and MCL 600.1629.

Not only does this reflect the state of the law, but the result makes sense given the nature of the claims against Defendants—that they have improperly withheld funds that properly belong to the State. Rather than requiring the Attorney General to chase wrongdoers across the state and beyond, venue in Ingham County is proper.

To begin, the language of the relevant statutes bears discussion. MCL 600.1641(2) provides that where there are multiple causes of action brought, if one of the causes of action is based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, then the standard tort—venue statute, § 1629 applies. That provision places proper venue in a number of locations, set forth in a hierarchy.

As a preliminary matter, MCL 600.1629(1)(a)(i) and (1)(c)(ii) do not apply because those refer to ***the*** *defendant,* and Michigan courts have read these provisions to mean that the option does not apply when there are multiple defendants. *Massey v Mandell*, 462 Mich 375, 382 (2000). Additionally, the original

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injury did not occur in the same county as the defendant's residence or place of business, and therefore (1)(a)(ii) is inapplicable.

However, as discussed below, MCL 600.1629(1)(b)(i) and (1)(d) do apply and compel the conclusion that, for the conversion of intangible, electronic funds, the place of the original injury is where the plaintiff is located at the time of the wrongful conduct, and thus, where venue lies.

A. Venue is proper under (1)(b)(i) because Ingham County is where the original injury occurred.

If no county meets the criteria outlined in (1)(a), then venue is proper in the county in which the original injury occurred, so long as that county is also where the plaintiff resides, has a place of business, conducts business, or has a registered office. MCL 600.1629(1)(b).

1. Caselaw distinguishes the original injury from the wrongful conduct and further narrows the definition to the first actual injury existing in fact.

The location of plaintiff's "original injury" is determinative in identifying a proper venue. MCL 600.1629; see also *Dimmitt & Owens Fin, Inc v Deloitte & Touche (ISC) LLC*, 481 Mich 618, 630 (2008) (plaintiff was located in Oakland County at the time of the injury and therefore venue was proper there).

Courts have defined "the original injury" as the first harm to plaintiff that flows from defendant's wrongful conduct. *Dimmitt & Owens Fin, Inc*, 481 Mich at 630; see also *Gross v General Motors Corp*, 448 Mich 147, 161 (1995). Because the injury is distinguishable from the wrongful conduct that caused the injury,

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Michigan courts apply a two-step process, first identifying the wrongful conduct and second identifying the first actual injury flowing therefrom. *Dimmitt & Owens Fin, Inc*, 481 Mich at 630.

In sum, only the location of the first injury is relevant in determining venue.

2. For intangible property, the first actual injury occurs where plaintiff is located—here, Ingham County.

The State's application for leave discussed how, in the context of intangible property such as electronic funds, trade secrets, or domain names, courts have found that the injury occurs to the plaintiff where the plaintiff is located. (Pl's App for Lv at 18–20.) Defendants cast aside this authority with the argument that "none analyzed venue" and "none even mentioned MCL 600.1629." (Def Ans to App for Lv at 23–24.) True enough, but the State plainly never cited those cases for those propositions. Instead, those cases reveal how several courts have evaluated the location of the relevant injury where electronic funds and other intangible property are at issue—they show that, when intangible interests are involved, the location of the plaintiff is where the injury occurs. And if the original injury did not occur in the same county as the defendant's residence or place of business, MCL 600.1629(1)(a) is simply inapplicable. The Court of Appeals erred when it applied MCL 600.1629(1)(a) because, even if that provision could be interpreted to apply when there is more than one defendant, the original injury was not in Oakland County.

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Here, the wrongful conduct occurred when Defendants retained the funds after the State demanded their return. Retention of the funds was wrongful at this point because Defendants' circuit court appeal did not include a motion to stay enforcement and no appeal bond was filed; therefore, the State was entitled to seek enforcement of the final agency decision. MCR 7.123(E).

Because the elements of conversion do not contemplate a physical injury in this case, an additional analysis is needed to identify the resulting harm in fact resulting from the conversion. Indeed, the resulting harm (not the wrongful conduct) is the original injury.

3. *Ground Development* is unpersuasive.

Defendants rely on *Ground Development, Inc v Doyle & Lang, LLC*, unpublished per curiam opinion of the Court of Appeals, issued November 1, 2005 (Docket No. 255202) (Def Ans to App for Lv at 21). The problem with *Ground Development* is twofold: first, its non-binding reasoning incorrectly defined "injury." In particular, *Ground Development* defined "injury" in a conversion case based on the physical location of the tangible *property itself*. But here, the property is not tangible with one physical location. Applying that rule to a case involving undifferentiated electronic funds, possibly spread across multiple accounts and jurisdictions, means venue could be proper in multiple locations.

Second, the *Ground Development* rationale premises the tort injury based on where the defendant wrongfully kept the property, not where the plaintiff was injured. Yet, in Michigan, conversion "is and always has been primarily an action

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for the protection of ownership." Law Reform Committee, *Conversion and Detinue* (Law Reform Comm No 18 Cm 4774, 1971).

Because the "location" of the property at issue here is not helpful in deciding venue, then the only other alternative, if this Court were to follow the unpublished *Ground Development* decision, would be the location of the wrongful conduct, which contradicts this Court's binding decision in *Dimmitt & Owens Fin, Ins v Deloitte & Touche (ISC), LLC*, 481 Mich 618, 631 (2008). *Dimmitt* held that the wrongful conduct must be separated from the resulting injury. The Court in *Dimmitt* did not limit its ruling to only certain types of torts; the decision is applicable across the board. Thus, Defendants' argument that *Dimmitt* does not apply because it did not involve the specific tort of conversion fails.

Because "the original injury" is based on the location of the plaintiff at the time of the wrongdoing, not the defendant, then it goes without saying that MCL 600.1629(1)(a)(ii) does not apply because that provision requires that the location of the original injury be in the same county as the defendant. Here, it is uncontested that Defendant Raad Kouza resides in Wayne County, while Defendant NRK is located in Oakland County. It is also uncontested that the State is located in Ingham County. Thus, the location of the original injury is not the same as the Defendants' and therefore (1)(a) would not apply.

In sum, there could be multiple situses for wrongful conduct. As such, Michigan courts have held that "injury" for purposes of venue is proper where the

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plaintiff is located when the injury occurs. This simplified rule not only clarifies the venue question but limits forum shopping, as the Legislature intended.

4. Other tort caselaw helps illuminate the common-sense point that the location of the injury to the plaintiff occurs where the plaintiff is located.

Defendants claim they were "unable to locate published authority addressing the location of the original injury in the context of *this type* of alleged conversion." (Def Ans to App for Lv, p 21 n 4 (emphasis added).) This carefully crafted response leverages the relatively unique nature of this kind of conversion a bit too far.

But looking to other tort caselaw helps illuminate the common-sense point. See, for example, *Taha v Basha Diagnostics, PC*, 275 Mich App 76, 78–79 (2007), in which the plaintiff sued for damages done to his wrist. The defendants were physicians who misread the x-ray results and communicated their findings to the plaintiff's doctor, who began treating the plaintiff based on their findings. The Court held that the injury was not the defendants' failure to correctly read the x-ray, but the corporeal harm that resulted therefrom. *Id*. at 79–80. Similarly here, the injury does not occur at the time or place of the Defendants' wrongdoing, but the time and place of the injury to the State.

5. The type of conversion does not change the legal standard for analyzing the location of the original injury.

Defendants claim that the type of conversion could affect the location of venue; for example, if Defendants physically approached the State and removed the funds from the State as opposed to passively receiving the funds and failing to repay

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them after a demand for their return, then venue could change. (Def Ans to App for Leave, p 26.)

Both instances show how assigning venue to the location of the wrongdoing encourages forum shopping and rewards wrongful conduct. As background, conversion by demand and refusal occurs when one originally has lawful possession of the property. In that case, the conversion does not occur until the owner makes a demand for the return of the property and the person in possession refuses to return it. Restatement Torts, 2d, § 237.

This exemplifies how assigning "injury" to Defendants' wrongful conduct results in forum shopping because, as Defendants suggest, if Defendants were to have actively removed the funds from the State, that wrongful conduct would have occurred in Ingham County, where the State was located. Setting aside that the entire cause of action would be different had Defendants actively taken funds from the State, that logic still does not hold up. In short: Defendants propose that they get to choose venue by choosing where to commit their bad acts.

It is because of this that the law says otherwise; venue is where the first tangible harm to the plaintiff occurs.

B. Venue is also proper under (1)(d), referring to MCL 600.1627, because Ingham County is where the cause of action arose.

Under MCL 600.1629(1)(d) if a county does not meet the prior criteria, then a county that satisfies the criteria under MCL 600.1621 or MCL 600.1627 is a county in which to file the action. Under MCL 600.1627, the county in which all or a part

of the cause of action arose is a proper county. As discussed, the original injury and therefore the cause of action itself, as well as a part of the cause of action, arose in Ingham County, where the State was located at the time of injury.

CONCLUSION AND RELIEF REQUESTED

The State respectfully requests that this Court grant the State's Application for Leave to Appeal.

Respectfully submitted,

/s/ Stephanie L. Seery
Stephanie L. Seery (P73408)
Assistant Attorney General
Attorney for State of Michigan
Plaintiff–Appellant
Revenue and Tax Division
P.O. Box 30754
Lansing, MI 48909
(517) 335–7584

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WORD COUNT STATEMENT

This document complies with the type–volume limitation of Michigan Court Rule 7.305(E) because, excluding the part of the document exempted, this **reply brief at the application stage** contains no more than 3,200 words. This document contains 3,186 words.

/s/ Stephanie L. Seery
Stephanie L. Seery (P73408)
Assistant Attorney General
Attorney for State of Michigan
Plaintiff–Appellant
Revenue and Tax Division
P.O. Box 30754
Lansing, MI 48909
(517) 335–7584