

**ADRIFT IN A SEA OF VENUE:  
DETERMINING “ORIGINAL INJURY”  
IN A LEGAL MALPRACTICE CASE WITHOUT A COMPASS**

**BY**

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In 1995, as part of a collection of tort reform measures, the venue statute governing tort claims in Michigan was amended. The amendments, which became effective on March 28, 1996, were intended to "strengthen . . . provisions aimed at preventing 'forum shopping.'" House Legislative Analysis, SB 344, June 8, 1995, p 9. Under the new venue statute, the location of the “original injury” has now become the paramount focus for determining venue in all tort cases, including the tort of legal malpractice. However, unlike tort claims involving car accidents, exploding machinery, assaults and other affirmative manifestations of wrongful conduct, the often more theoretical, abstract and ethereal injury that may occur to a legal right, remedy or interest presents a special set of challenges in determining the site of “original injury” for venue purposes in a legal malpractice case.

**The Prior Venue Standard For Tort Claims**

Prior to the amendments, the statute controlling venue in tort actions, including legal malpractice claims, provided that venue was proper in "a county in which all or part of the cause of action arose." The Michigan Supreme Court interpreted this language to mean that venue was "proper where part or all of the cause of action arose, not merely the situs of the injury." See *Lorencz v Ford Motor Co*, 439 Mich 370, 376, 483 NW2d 844 (1992). Nevertheless, the Court held that the site of tangential damages flowing from a tort injury, such as pain and suffering, was irrelevant under the venue statute. See *Gross v General Motors Corp*, 448 Mich 147, 164-65; 528 NW2d 707 (1995). Instead, “venue in a tort action is proper *only at the situs of an injury*, or in the place or places where *the breach of a legal duty occurs* that subsequently causes a person to suffer damages.” *Id.*

The Michigan Court of Appeals later construed *Gross* as clarifying that, "in determining where a tort action accrues, the place where damages were sustained (if different from where the injury or the breach of duty occurred) does not constitute proper venue." *Barnes v Int'l Business Machines Corp.*, 212 Mich App 223, 226, 537 NW2d 265 (1995). In short, prior to the 1995 amendments, the phrase “county in which all or a part of the cause of action arose” meant either (1) a county where the breach of duty occurred **or** (2) where the injury occurred.

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In *Coleman v Gurwin*, 443 Mich 59; 503 NW2d 435 (1993), the Michigan Supreme Court addressed determining proper venue for a legal malpractice action under the former venue statute. The Court observed that while a plaintiff in a legal malpractice action must show that but for the attorney's alleged malpractice he would have been successful in the underlying suit, the "suit within a suit" is not a part of a legal malpractice action in and of itself. *Coleman, supra* at 63, 66. Consequently, in the context of a blown statute of limitations case, the location where the underlying lawsuit should have been filed by the negligent attorney was immaterial to establishing venue. The Court explained that because legal malpractice is a separate, distinct cause of action, its venue is determined by the location of the primary malpractice suit, i.e., where the elements of the alleged legal malpractice claim occurred. *Id.* at 66. This necessitated an analysis of such things as the location where the attorney-client relationship was formed, where the alleged breaches of duty occurred, and where the injury flowing from the breach of duty occurred.

With the advent of the new 1996 tort venue statute, MCL §600.1629(1)(a)-(c); MSA §27A.1629(1)(a)-(c), the Legislature, in subsection (1)(a), deleted "a county in which all or part of the cause of action arose" and replaced it with "the county in which the original injury occurred" for determining the location of venue. This change underscores a legislative intent "to make the place where the injury transpires paramount for venue purposes." *Karpinski v Saint John Hospital-Macomb Center Corp*, --- Mich App --- ; Docket No. 206923 (November 16, 1999). Ascertaining the location of the breach of duty by the lawyer, as in *Coleman, supra*, is no longer the guidepost. Determining where the "original injury" occurred in a legal malpractice case, however, may be more difficult than contemplated by the legislature. Under the law of unintended consequences, a broad construction of "original injury" may result in improperly widening and not narrowing the field of possible venue locations for legal malpractice claims. Appropriate judicial guidance and interpretation of the "original injury" limitation, therefore, is necessary.

### **What is "Original Injury" in a legal malpractice case?**

In *Coleman, supra*, the Michigan Supreme Court reaffirmed the separate and independent nature of a legal malpractice claim as distinct from the underlying suit or transaction the malpractice may arise from. Accordingly, the evaluation of "injury" in the legal malpractice tort context necessarily involves an assessment of the *legal* interests or rights that have been impaired or lost by virtue of the alleged negligence of the attorney. One court expressed the view that "injury" in a legal malpractice case involves either the loss or impairment of a right, remedy, or interest, or the imposition of a liability, regardless of whether future events may affect the permanency of the injury or the amount of monetary damages eventually incurred. *Foxborough v Van Atta*, 26 Cal App 4th 217, 227; 31 Cal Rptr 2d 525, 530 (1994). Adopting this formulation as including the full gamut of "injury" in the legal malpractice context, the question becomes how does a court determine *where* the "original injury" to such rights and interests occur?

The new venue statute's reference to "*the*" original injury strongly suggests that there is only one original injury in a tort case. Perhaps in most tort cases this is true: *the* back injury, *the* leg injury, *the* arm injury, *the* bodily injury or *the* property damage. However, in a legal malpractice case, there may be multiple injuries to a variety of legal

rights or interests. Under Michigan's new compulsory joinder rule, effective June 1, 1999 and located at MCR 2.203(A)(1), a malpractice plaintiff is required to join all claims he may have against the attorney arising out of the transactions and occurrences of the attorney-client relationship – an obligation that may produce a number of claims asserting the impairment of different legal rights and interests. The statute does not specify how such injuries are to be categorized or how “the original” injury is to be discerned.

In the recent case of *Karpinski v Saint John Hospital-Macomb Center Corp, supra*, the Michigan Court of Appeals applied the new venue statute to a wrongful death claim and held that “venue rests with the county where the injury resulting in death occurred, and not the place where the death itself took place.” This analysis was based, in part, on the Court's interpretation of the word “original” which modifies “injury” in the statute. The *Karpinski* Court held that “original” meant “belonging or pertaining to the origin or beginning of something” or “first in order”, citing dictionary definitions. Under this view, the “first” fact of “injury” to a legal right or legal interest may be the controlling event for purposes of venue. Determining the *first fact of legal injury* and its *location* in a legal malpractice case, however, may be a tricky matter.

In certain cases, the determination is relatively simple. For example, if an attorney fails to appear at a court hearing in a particular courthouse and, as a result, the clients' rights or interests are effected (e.g., an order is entered dismissing a civil case or terminating parental rights or dissolving an injunction), an event has occurred (the entry of the judgment or order) that has directly impacted and impaired the legal rights or interests of the client and the event can be connected to the negligent acts or omissions of the attorney (the failure to appear). Under these circumstances, the “original injury” should be the county where the judgment or order was entered -- the place where the client's legal rights were altered as a result of the attorney's negligence. See e.g. *Bass v Combs, --- Mich App ---*; (Docket Nos. 201367, 213889, issued 10/8/99)(venue proper in county where court dismissed plaintiff's underlying lawsuit due to attorney's violations of court discovery orders and non-appearance at motion to dismiss)(dicta).

On the other hand, the place where the attorney commits negligence (i.e., fails to abide by the standard of care) may not necessarily be the same place where the legal right, interest or remedy is injured or impaired. For example, a failure by an attorney to properly draft a negotiated settlement agreement in a law office located in County A, in order to resolve a lawsuit pending in County B, may constitute a breach of duty of care to the client. However, no “injury” has occurred relative to the client's actual legal rights or interests unless and until the negligently prepared settlement document becomes legally binding or enforceable *against* the client, i.e., once the settlement terms are “put on the record” in a court room or reduced to a writing signed by the parties (see MCR 2.507[H]). This is so because the mere negligent *drafting* of the agreement did not give the agreement *legal force or effect*. Only when the client's legal position has been altered -- in this case, by the act of entering into a binding understanding and creating legal obligation -- can it be said that the rights and interests of the client have been injured or diminished. If the settlement is placed on the record before a court in County B, thereby directly affecting the scope and content of the client's legal rights, the acts or omissions in the lawyer's office in County A should be immaterial to *locating* the *situs* of the injury to the legal rights lost by the client at the court house in County B.

The difficulties in determining the existence and location of “original injury” can also be seen in this hypothetical: when a lawyer prepares a usurious note, is there an “injury” to the client’s legal rights and interests at that point or only when the defense of usury is raised at the time the client seeks enforcement of the note in court? Where is the *situs* of the injury? Where the attorney drafted the note? Where the payor of the note executed the instrument, with the usurious rate, thereby making it a legally binding obligation? Or the court house where the defense of usury is raised for the first time in a pleading by the payor? Does the notion of “original” injury require some kind of relation back to the breach by the attorney and, if so, how far back do you go? The time of drafting, the time the note was delivered to the client, the time the payor signed the note making it a legally binding obligation, or the time the usury defense was invoked?

Another potential area of confusion may be where the determination of “injury” is dependant on the future resolution of the facts or the law by a judicial or administrative tribunal. Should the declaration by the tribunal, in a fashion that is detrimental to the client, be considered the creation of the “original injury.” Probably not. The Michigan Supreme Court has instructed: “The law is more akin to mathematics: only one result exists, it need only be deduced.” When an “appellate court binds the jurisprudence of the state by resolving a legal issue, it has deduced that answer.” *Charles Reinhart Co v Winiemko*, 444 Mich 579, 595; 513 NW2d 773 (1994). Under this view, judicial processes do not create liabilities or destroy rights. They merely declare what exists through established procedures in deciding the facts and applying the law. A legal right, remedy or interest may be lost or liability imposed due to attorney error, although a court or administrative agency may not so declare until a much later time. See *Gephardt v O’Rourke*, 444 Mich 535, 546; 510 NW2d 900 (1994)(“The statute of limitations is not tolled by an appeal of the underlying matter”). The delay and unpredictability may excuse discovery of the claim, for limitations purposes, but the subsequent determination or declaration by the tribunal does not create the “injury.” In this setting, the focus should be on the events that resulted in the loss of the right or the creation of the liability, not a subsequent court pronouncement. For example, a subsequent declaration by a court that a settlement agreement should be interpreted to exclude a contested term or condition, resulting in damages to the client, should not constitute the *location* of the “original injury”: rather, the place where the defective settlement agreement became legally binding on the client would be the proper venue priority.

### **Injury vs. Damages**

Does the venue statute contemplate that “original injury” should be the place where the client must actually pull out and write a check for damages allegedly resulting from the attorney’s misconduct? The answer should be an unequivocal “No.” As discussed above, under the former tort venue statute, venue was **not** proper in a county where a plaintiff had allegedly suffered or paid *damages* if either the location of the alleged *breach of duty* or the alleged *injury* had occurred in a different county. The Legislature is presumed to act with knowledge of judicial statutory interpretations when it amends and enacts new law, like the 1996 tort venue statute. *Karpinski, supra*. Changes in statutory language are generally presumed to reflect a change in meaning. *Id.*

The statute uses the phrase “injury” and not “damages.” Although “damages” and “injury” are often used interchangeably, there has always been a difference in meaning that is significant in determining venue. The Restatement of Torts defines “injury” as “the invasion of any legally protected interest of another.” Restatement, Second, of Torts §7(1). On the other hand, the Restatement defines “damages” as “a sum of money awarded to a person *injured* by the tort of another.” Restatement, Second, of Torts §12A (Emphasis added). Michigan courts have always recognized this distinction when determining the proper venue for a tort action. See *Gross v General Motors Corp, supra; Barnes, supra*.

In short, damages flowing from the “original injury” are, in effect, consequential injuries. For example, emotional distress, economic loss, impairment of reputation or loss of property value may all flow from the “original” injury to the legal right, interest or remedy allegedly lost or impaired, but they should not constitute *the* injury to the legal right or interest that gives rise to such collateral consequences. In *legal* malpractice, it is the location of the “original injury” to legal rights, interests or remedies that should be the determinative factor – not the place where the damages flowing from that injury necessarily manifest themselves. Compare *Karpinski, supra* (“Although death is a prerequisite to a wrongful death action, for venue purposes the location of the injury *leading to the death*, rather than the location of the death, *is determinative*”)(Emphasis added).

Michigan courts have long recognized that the legal *injury*, necessary for a legal malpractice claim to accrue, arises *well before* the client is required to actually pay out any *monetary damages* or *before* there is any finality as to the amount of monetary damages. For example, in *Adell v Sommers, Schwartz, Silver & Schwartz*, 170 Mich App 196, 207-208; 428 NW2d 26 (1988), the Court of Appeals found that the client should have discovered that the attorney’s alleged negligent tax advice caused additional tax liability (and therefore *injury*) when the client received *notice* of a tax deficiency and *not* later when the client settled and actually paid the IRS ten years after receipt of the notice. Additionally, in *Seebacher v Fitzgerald, Hodgman, et al*, 181 Mich App 642, 647-648; 449 NW2d 673(1989), the Michigan Court of Appeals held that the cause of action had accrued when the client received *notice* from Internal Revenue Service, not when he later received the actual tax assessment and became aware of full extent of damages. See *Luick v Rademacher*, 129 Mich App 803; 342 NW2d 617(1983)(injury in legal malpractice occurred after improper settlement agreement was placed on the record and new attorney was retained to overturn settlement, not years later when Michigan Supreme Court formally denied application for leave seeking to overturn settlement).

If the term “original injury” simply means paying money, then the “original injury” in a legal malpractice case will always occur where a plaintiff has its place of business or lives. As a result, the county where the plaintiff resides or conduct business becomes the *first choice* in selecting venue even though it is the *second choice* listed in the 1996 Tort Venue Statute. Recognizing this fallacy, the Supreme Court expressly rejected this very hypothesis in *Gross, supra*, 448 Mich at 162-165.

Clients retain lawyers' to provide professional judgment and skill in multiple fields of personal and commercial affairs. The circumstances and variations of attorney error reflect the diverse tasks and responsibilities attorneys undertake. The variety of situations in which such error can occur, and the injuries that can result, make it difficult to formulate

and apply a bright-line test for "original injury" that will resolve venue problems in all settings. Even the seemingly straightforward circumstance of a failure to file a timely suit may resist a hard and fast rule. The facts and circumstances of each case will determine when the plaintiff suffered an actual injury to a legal right, interest or remedy to the point that such rights or interests became detrimentally altered and affected. The task remains for the courts to help fill out the parameters for determining the location of "original injury" in legal malpractice cases. Recently, the Court of Appeals granted an interlocutory petition, filed by the authors, on the issue of locating "original injury" in the context of a legal malpractice case. Hopefully, the Court of Appeals will assist in establishing meaningful contours to provide guidance to the bench and bar in navigating the venue waters of "original injury."