

STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
(Talbot, P.J. and Bandstra and Gleicher, J.J.)

BRANDON BRIGHTWELL,

Plaintiff-Appellant,

v.

FIFTH THIRD BANK of MICHIGAN,

Defendant-Appellee.

Supreme Court No. 138920

Court of Appeals Case No. 280820

Wayne Circuit Case No. 07-718898-CZ
Hon. Prentis Edwards

SHARON CHAMPION,

Plaintiff-Appellant,

v.

FIFTH THIRD BANK of MICHIGAN,

Defendant-Appellee.

Supreme Court No. 138921

Court of Appeals Case No. 281005

Wayne Circuit Case No. 07-718890-CZ
Hon. Warfield Moore

DEFENDANT-APPELLEE FIFTH-THIRD BANK'S BRIEF ON APPEAL

****ORAL ARGUMENT REQUESTED****

BUTZEL LONG

By: Daniel B. Tukel (P34978)
Michael F. Smith (P49472)

150 W. Jefferson Ave.

Suite 100

Detroit, Michigan 48226

(313) 225-7000

**Attorneys for Defendant-Appellee
Fifth Third Bank of Michigan**

Dated: December 10, 2009

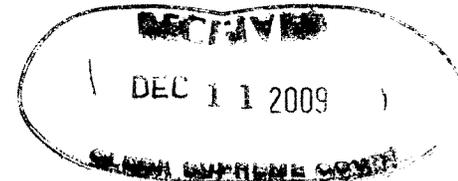


TABLE OF CONTENTS

	<u>Page</u>
INDEX OF AUTHORITIES.....	iii
STATEMENT OF JURISDICTION.....	vi
STATEMENT OF QUESTIONS PRESENTED FOR REVIEW	vii
INTRODUCTION	1
STATEMENT OF PROCEEDINGS AND FACTS	1
I. Plaintiffs’ employment with Fifth Third, and their termination from that employment.....	1
II. Brightwell and Champion file suit in Wayne County, and Fifth Third seeks to change venue to Oakland County	4
III. The motions are denied, though not before plaintiffs’ counsel admits to seeking a jury pool based on perceived racial lines	4
IV. The Court of Appeals reverses and finds venue proper in Oakland County	6
STANDARD OF REVIEW	8
RELEVANT STATUTORY PROVISION	8
SUMMARY OF ARGUMENT	9
ARGUMENT	9
I. The Court of Appeals correctly followed the language of the ELCRA’s venue provision, and a consistent line of case law interpreting it, in finding venue proper in the county in which the allegedly discriminatory decision was made.....	9
A. A straightforward reading of the statute provides that the “county where the alleged violation occurred” in this case is Oakland County, and not Wayne County.....	9
B. Plaintiffs’ proposed interpretation would upset a longstanding, consistent interpretation of the ELCRA’s venue provision in a manner that runs flatly contrary to principles of <i>stare decisis</i>	14

II.	<i>Barnes</i> did not engraft this Court’s analysis of MCL 600.1629 from <i>Gross v General Motors</i> onto ELCRA claims, nor does affirmance of the Court of Appeals’ decision require such a finding.....	17
A.	<i>Barnes</i> did not apply the tort venue statute to ELCRA claims.....	18
B.	The <i>Barnes</i> Court correctly decided that a violation of ELCRA “occurs” only when and where the corporate decision affecting a plaintiff’s employment is made.	20
III.	Reversal of the Court of Appeals would permit and even encourage forum-shopping, the “Pandora’s Box” against which this Court cautioned in <i>Gross</i>	20
	CONCLUSION/RELIEF REQUESTED.....	25

INDEX OF AUTHORITIES

	<u>Page</u>
Cases	
<i>Allison v AEW Capital Mgt LLP</i> , 481 Mich 419; 751 NW2d 8 (2008).....	18
<i>Barnes v Int'l Business Machines Corp</i> , 212 Mich App 223; 537 NW2d 265 (1995).....	<i>passim</i>
<i>Batson v Kentucky</i> , 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986).....	23
<i>Chambers v Trettco, Inc</i> , 463 Mich 297; 614 NW2d 910 (2000).....	11
<i>Champion v Nationwide Security</i> , 450 Mich 702; 545 NW2d 596 (1996).....	<i>passim</i>
<i>Dimmitt & Owens Financial, Inc v Deloitte & Touche</i> , 481 Mich 618; 752 NW2d 37 (2008)	7, 8
<i>Edmonson v Leesville Concrete Co, Inc</i> , 500 US 614; 111 S Ct 2077; 114 L Ed 2d 660 (1991).....	23
<i>Green v R J Reynolds Tobacco Co</i> , unpublished per curiam opinion of the Court of Appeals, decided May 26, 1998 (Docket No. 196355).....	15
<i>Gross v General Motors Corp</i> , 448 Mich 147; 528 NW2d 707 (1995)	<i>passim</i>
<i>Haynie v State of Michigan</i> , 468 Mich 302; 664 NW2d 129 (2003).....	11
<i>Johnson v Simongton</i> , 184 Mich App 186; 457 NW2d 129 (1990).....	8
<i>Keuhn v Michigan State Police</i> , 225 Mich App 152; 570 NW2d 151 (1997).....	6, 15-16
<i>Koester v City of Novi</i> , 458 Mich 1; 580 NW2d 835 (1998).....	11
<i>Lorencz v Ford Motor Co</i> , 439 Mich 370; 483 NW2d 844 (1992)	18-19
<i>Marsh v Walter L Couse & Co</i> , 179 Mich App 204; 445 NW2d 204 (1989).....	8
<i>Massey v Mandell</i> , 462 Mich 375; 614 NW2d 70 (2000)	8
<i>McCrorry v Abraham</i> , 441 Pa Super 258; 657 A2d 499 (Super Ct Penn, 1995)	23
<i>Moody v Westin Renaissance Co</i> , 162 Mich App 743; 413 NW2d 96 (1987)	2
<i>Patterson v McLean Credit Union</i> , 491 US 164, 172; 109 S Ct 2363; 105 L Ed 2d 132 (1989)	17

<i>People v Gardner</i> , 482 Mich 41; 753 NW2d 78 (2008)	16-17
<i>Reeves v Int'l Business Machines Corp</i> , unpublished per curiam opinion of the Court of Appeals, decided July 15, 1997 (Docket No. 191111).....	14
<i>Russell v Chrysler Corp</i> , 443 Mich 617; 505 NW2d 263 (1993)	18-19
<i>Sniecinski v Blue Cross and Blue Shield of Mich</i> , 469 Mich 124; 666 NW2d 186 (2003)	7, 11
<i>Storey v Meijer, Inc</i> , 431 Mich 368; 429 NW2d 169 (1988).....	2
<i>Thomas v Hoyt, Brumm & Link, Inc.</i> , 910 F Supp 1280 (ED Mich 1994).....	13
<i>Welch v Texas Dep't of Hwys and Public Transp</i> , 483 US 468; 107 S Ct 2941; 97 L Ed 2d 389 (1987)	17
<i>Wilcoxon v Minnesota Mining & Mfg Co</i> , 235 Mich App 347; 597 NW2d 250 (1999)	8
<i>Wilson v Stroh Companies</i> , 952 F2d 942 (CA 6, 1992)	13
<i>Witt v CJ Barrymore's</i> , 195 Mich App 517; 491 NW2d 871 (1992)	18-19

Statutes

1976 PA 453	8, 17
MCL 37.2201	9
MCL 37.2801	8
MCL 37.2801(2)	<i>passim</i>
MCL 421.11(b)(1).....	2
MCL 421.11(b)(1)(iii).....	2
MCL 600.1629.....	<i>passim</i>
MCL 600.1645.....	vi

Other Authorities

Black's Law Dictionary (2009 ed)	13
Encarta World English Dictionary (1999 ed)	13

M Civ JI 105.02 12
Random House Webster’s College Dictionary (1997) 19

Rules

MCR 2.223(A) 9
MCR 7.203(B)(1)..... vi
MCR 7.203(B)(4)..... vi
MCR 7.214(E)..... 6
MCR 7.301(A)(2) vi

Constitutional Provisions

Const 1963, art VI, § 4..... vi

STATEMENT OF JURISDICTION

Plaintiffs-appellants Brandon Brightwell and Sharon Champion on May 21, 2009 timely filed their application for leave to appeal from the unpublished per curiam opinion issued by the Court of Appeals on April 9, 2009, and thus this Court has jurisdiction under Const 1963, art VI, § 4 and MCR 7.301(A)(2).

The Court of Appeals properly invoked its jurisdiction under MCR 7.203(B)(1) in granting Fifth Third Bank of Michigan's timely applications for leave to appeal from the September 6, 2007 order entered by the Wayne County Circuit Court, Hon. Prentis Edwards (COA No. 280820), and the September 13, 2007 order entered by the same court, Hon. Warfield Moore (COA No. 281005), denying Fifth Third's motions for change of venue.

Arguably the Court of Appeals also had jurisdiction under MCR 7.203(B)(4), since MCL 600.1645 effectively mandates that a ruling denying a motion for change of venue be appealed immediately, or not at all.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

- I. Did the Court of Appeals correctly interpret the venue provision of the Elliott-Larsen Civil Rights Act in determining that venue over plaintiffs' discrimination claims was proper in the county in which the allegedly unlawful termination decisions were made, where that conclusion is fully consistent with the plain text of and legislative intent underlying the statute, and where plaintiffs admit that they seek to litigate in Wayne County so as to influence the racial composition of the jury?

Plaintiffs-appellants answer: No
Defendants-appellees answer: Yes
The Wayne County Circuit court answered: No
The Court of Appeals answered: Yes

- II. Did the Court of Appeals correctly decide in *Barnes v IBM*, 212 Mich App 223; 537 NW2d 265 (1995)

- a) that an alleged violation of the ELCRA "occurred" only when and where the corporate decision affecting the plaintiff's employment was made, under MCL 37.2801(2)?

Plaintiffs-appellants answer: No
Defendants-appellees answer: Yes
The Wayne County Circuit Court answered: No
The Court of Appeals answered: Yes

- b) that this Court's analysis of MCL 600.1629 in *Gross v General Motors Corp*, 448 Mich 147; 528 NW2d 707 (1995) should be applied to discrimination cases brought under MCL 37.2801(2)?

Plaintiffs-appellants answer: No
Defendants-appellees answer: *Barnes did not so hold*
The Wayne County Circuit Court answered: Did not answer
The Court of Appeals answered: Did not answer

- III. Did the Court of Appeals correctly determine that the alleged violation "occurred" only in Oakland County, where the decision to terminate the plaintiffs was made, rather than in Wayne County, where the plaintiffs worked and where that decision was implemented?

Plaintiffs-appellants answer: No
Defendants-appellees answer: Yes
The Wayne County Circuit Court answered: No
The Court of Appeals answered: Yes

NOTE: Issues II and III were not raised by appellants in their application for leave to appeal, but rather are included by instruction of this Court in its September 30, 2009 Order granting leave.

INTRODUCTION

These are race-discrimination cases brought under the Elliot-Larsen Civil Rights Act (“ELCRA” or “the Act”), which provides that venue is proper in the county “where the alleged violation occurred.” MCL 37.2801(2).¹ Michigan law has long recognized that an alleged civil rights violation “occurs” in the county where the employment decision at issue is made, *not* where the employee suffers from the effects of the alleged discrimination. At no time since the ELCRA’s enactment in 1976 has the Legislature amended the statute’s venue provision, despite that consistent judicial interpretation.

In these cases, it is undisputed that Fifth Third made all of its decisions relating to the termination of plaintiffs’ employment at its regional offices in Southfield, Oakland County. The rule followed by the Court of Appeals is the proper rule to apply in determining venue under the ELCRA, since it is only a discriminatory *decision* that is actionable – its implementation is not the “violation.” Venue, therefore, is properly determined by where the decision was made. The Court of Appeals’s ruling should be affirmed.

STATEMENT OF PROCEEDINGS AND FACTS

I. Plaintiffs’ employment with Fifth Third, and their termination from that employment.

Although the parties vigorously dispute the facts underlying plaintiffs’ discrimination complaints, the merits of plaintiffs’ claims are not at issue on appeal, and the facts germane to

¹ The Act also provides that venue is proper in the circuit court for the county where the person against whom the civil complaint is filed resides or has his principal place of business. MCL 37.2801(2). Neither Brightwell nor Champion has ever contended that that provision made venue proper in Wayne County. Moreover, it is undisputed that Fifth Third’s regional offices in Southeast Michigan are in Southfield, which is in Oakland County, and thus Fifth Third both “resides” and has its principal place of local business in Oakland County.

this venue dispute largely are uncontroverted. However, one glaring impropriety in plaintiffs' brief must be pointed out.

Plaintiffs' brief at pp 2-3 quotes extensively from the determination of the ALJ who presided over the hearing on Champion's application for unemployment benefits. This is in plain violation of MCL 421.11(b)(1), which provides (with exceptions not applicable here) that such information "shall not be used in any action or proceeding before any court or administrative tribunal unless the [Unemployment Insurance Agency] is a party." MCL 421.11(b)(1)(iii). As this Court has previously held – indeed, at the urging of Brightwell and Champion's current counsel – that statutory provision "is a clear and unambiguous expression of the Legislature's intent 'to isolate [UIA] determinations within the narrow confines of eligibility for benefits, leaving resolution of labor disputes, civil rights violations and contract disputes to forums more uniquely adapted to resolution of those disputes.'" *Storey v Meijer, Inc*, 431 Mich 368, 374-375; 429 NW2d 169 (1988) (Cavanagh, J), *quoting Moody v Westin Renaissance Co*, 162 Mich App 743, 748; 413 NW2d 96 (1987). As the *Storey* Court noted, "section 11(b)(1) clearly and unambiguously prohibits the use of [UIA] information and determinations in subsequent civil proceedings unless [the Agency] is a party or complainant in the action." 431 Mich at 376. Plaintiffs' counsel obviously is aware of this, and the only reason to include material from the (uncontested) UIA proceeding is to pollute the record with extraneous material wholly irrelevant to the venue issue before this Court. *See, e.g.*, plaintiffs brief at 2 & n 1. The Court should disregard that portion of their brief.

As to the facts that are relevant to the venue issue, Fifth Third is a Michigan charter bank; it divides the state into banking regions, and its Detroit-area operations are run from its Southeast Michigan Regional Office in Southfield, Oakland County. (Apx 19a-20a, Affidavit of Michael

Andrzejewski, ¶¶ 3-4). It has branches (banking centers) in Wayne County, but does not have any management facilities there. (*Id.*)

Plaintiff-Appellee Brandon Brightwell (“Brightwell”) lives in Oakland County. (Apx 3a, *Brightwell* Complaint, ¶ 1). He worked as a Relationship Manager for Fifth Third at a branch on East Jefferson in Detroit. (*Id.*, ¶ 3; *see also* Apx 19a, Andrzejewski Affidavit, ¶ 2). Plaintiff-Appellee Sharon Champion (“Champion”) worked as a Financial Center Manager II for Fifth Third at its branch at Eight Mile and Livernois in Detroit. (Apx 7a, *Champion* Complaint, ¶¶ 3, 7; *see also* Apx 31a, Andrzejewski Affidavit, ¶ 2).

In 2007, Fifth Third began investigating Brightwell, Champion, and others after learning of their involvement in financial activities it deemed suspicious. Michael Andrzejewski, an Employee Relations Consultant who works at Fifth Third’s Southfield regional office, personally participated in and monitored the investigations. (Apx 20a & 32a, Andrzejewski Affidavits, ¶ 5). The investigation regarding both Brightwell and Champion originated at the Oakland County regional office, and all investigative activities were directed from individuals working from it. (*Id.*, ¶ 6). As a matter of routine practice, materials relating to each individual, including his/her personnel file, were kept at the Oakland County office. (*Id.*) Fifth Third officials based in the Oakland County regional office discussed terminating each plaintiff’s employment; the discussions took place in that office, as did the final decision to terminate each individual’s employment. (*Id.*) After making the decisions to terminate the employment of Champion and Brightwell at the Oakland County office, Fifth Third officials communicated that decision to each individual from that office.

II. Brightwell and Champion file suit in Wayne County, and Fifth Third seeks to change venue to Oakland County.

Brightwell and Champion retained the same counsel, and each filed a separate, single-count complaint in Wayne County Circuit Court, alleging that his/her termination constituted unlawful race discrimination in violation of the Elliott-Larsen Civil Rights Act. (Apx 2a *Brightwell* Complaint; Apx 6a, *Champion* Complaint). Brightwell's suit was assigned to the Hon. Prentis Edwards, while Champion's was assigned to the Hon. Warfield Moore.

In lieu of answering, Fifth Third timely filed motions in each case for change of venue to Oakland County, where its decision regarding each individual's termination was made. Brightwell and Champion each objected to the motion, but neither disputed Fifth Third's factual allegations that the decision to terminate his or her employment was made exclusively in Oakland County. (Apx 35a, *Brightwell* answer; Apx. 43a, *Champion*). Each did, however, inject race into the issue, arguing that venue in Wayne County "offers Plaintiff, an African American, his best chance of obtaining his constitutional right to a jury of his peers. [Query: is that what motivated Defendant to file a Motion for Change of Venue.]" (Apx 42a, *Brightwell*; Apx 52a, *Champion* (in the latter, "her" in place of "his")). While Champion's answer noted that she was advised of her termination at her home in Wayne County, Brightwell's was silent regarding his notification – which he in fact received at his home in Oakland County. Compare Apx 52a (*Champion*) and Apx 41a (*Brightwell*).

III. The motions are denied, though not before plaintiffs' counsel admits to seeking a jury pool based on perceived racial lines.

Judge Edwards heard oral argument on Brightwell's motion on August 31, 2007. (Apx 53a). Focusing on Brightwell's employment in Detroit and that "he was terminated from that position while there," the trial court held that the alleged discrimination "occurred" in Wayne

County, and that therefore venue was proper there. (Apx 61a, Tr 8/31/07, p 9; *see also* Apx 77a (order)).

One week later, Judge Moore heard argument on Champion's motion. (Apx. 63a). After rejecting Fifth Third's assertion of *forum non conveniens* because Fifth Third's Southfield office was "probably equal distance" from the courthouses in Pontiac and Detroit (Apx. 65a), the court extracted from plaintiff's counsel an admission that he was seeking to pick a jury of one race, over another:

THE COURT: ...Sir, you argued that, well the only reason [Fifth Third] wants to try it in Oakland County [is] because they're white people out there and you've got a Black client.

You say on the other hand, which sounded as bad as what you claim them to do, I want it in Detroit because there're Black people here.

MR. MARSHALL: No. I didn't say that.

THE COURT: Yeah, you did. Yeah, you did.

MR. MARSHALL: What I said was that my client has his (*sic*) best chance of getting a jury of his (*sic*) peers.

THE COURT: Well, what are you saying in so many words?
You call peers only if people are Black?

MR. MARSHALL: No.

THE COURT: If you're Black or White, the only peers you could have are Black folks or White folks?

You're saying there are no bank people that live in Oakland County?

MR. MARSHALL: I would not want to appear in a place where I didn't have a ghost of a chance of having –

THE COURT: *That's because you believe – Your client is Black and you believe that [Oakland] county is more White than Black in terms of population. That if you go out there it's more a likelihood that you'll get a White jury than a Black jury?*

MR. MARSHALL: *Yes, sir.*

THE COURT: Well, sir, you say, therefore, that's why they want it out there. But I want it in Detroit because I want hopefully a Black jury rather than a White jury. So I want to play the race card in Detroit where they want to play it in Oakland –

* * *

I think what you ought to do is look for some fair people. (Apx. 74a-76a (emphasis added)).

Despite counsel's admission that he was seeking to tilt the jury pool in favor of one race, to the exclusion of another, the trial court denied Fifth Third's motion. (Apx. 73a, 78a).

IV. The Court of Appeals reverses and finds venue proper in Oakland County.

Fifth Third sought leave to appeal from the Court of Appeals along with peremptory reversal; the court denied peremptory relief but granted leave and consolidated the cases. Following full briefing, the court invoked MCR 7.214(E) and decided the cases without oral argument, issuing an unpublished per curiam opinion on April 9, 2009 in which each judge wrote an opinion. (Apx 314a). Writing for the majority, Judge Bandstra correctly placed on plaintiffs the burden of establishing proper venue, and noted that since Fifth Third's principal place of business is not Wayne County, "venue is proper in that county only if the alleged violation occurred there." (Apx 315a). Applying the plain statutory language of MCL 37.2801(2), as well as the binding precedent of *Barnes v Int'l Business Machines Corp*, 212 Mich App 223, 226; 537 NW2d 265 (1997), the majority held that the alleged violation "occurred" in Oakland County, the place of corporate decision-making, and not the place where its effects were felt or damages accrued. *Id.* The court noted that the lack of any evidence that the allegedly discriminatory decision was made in Wayne County distinguished these cases from *Keuhn v Michigan State Police*, 225 Mich App 152; 570 NW2d 151 (1997), on which the dissent relied, as well as

Dimmitt & Owens Financial, Inc v Deloitte & Touche (ISC), LLC, 481 Mich 618, 624; 752 NW2d 37 (2008), which construed the general tort venue provision of MCL 600.1629, containing a significant difference in wording. (Apx. 315a-316a).

Judge Talbot wrote a separate concurrence, noting that the dissent relied on authority that either was non-binding (Judge White’s concurrence in *Barnes*) or distinguishable, i.e. the venue provision of MCL 600.1629, which looks to where “the original injury occurred” rather than where “the alleged violation occurred,” as in the ELCRA. (Apx. 318a-319a). Judge Talbot also noted that the majority’s reasoning was consistent with this Court’s interpretation of the prima-facie case requirement under anti-discrimination case law, which requires a causal link “between the discriminatory animus and the *adverse employment decision*.” (Apx. 320a, citing *Sniecinski v Blue Cross and Blue Shield of Mich*, 469 Mich 124, 134-135; 666 NW2d 186 (2003) (emphasis added by Judge Talbot)).

Judge Gleicher dissented, reasoning that because a “claim” or a cause of action for discriminatory discharge does not arise until plaintiff actually is terminated, the claims here “arise from [plaintiffs’] actual employment discharge, which occurred in Wayne County,” rendering venue proper in Wayne County. (Apx. 321a-322a). (Judge Gleicher evidently construed the trial court’s comment that Brightwell worked in Detroit and was terminated “while there” (Apx. 61a) to mean that Brightwell was told of his termination at work in Detroit – Brightwell actually was told of his termination at his home in Oakland County. Compare Apx. 51a, final paragraph with Apx. 41a, final full paragraph (referencing Champion being called at home in Detroit, but omitting reference to Brightwell learning of termination)). In other words, the dissent reasoned that a “violation” of the ELCRA “occurs only when a plaintiff suffers ‘an adverse employment *action* under circumstances giving rise to an inference of discrimination.’”

(Apx 323a-324a, *citing Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 359; 597 NW2d 250 (1999) (emphasis added by Judge Gleicher)).

Brightwell and Champion now appeal by leave granted.

STANDARD OF REVIEW

A trial court's interpretation of a venue statute is reviewed de novo, and its ruling on a motion to change venue is reviewed for clear error. *Dimmitt & Owens Financial, Inc v Deloitte & Touche*, 481 Mich 618, 624; 752 NW2d 37 (2008); *Massey v Mandell*, 462 Mich 375, 379; 614 NW2d 70 (2000). A decision is clearly erroneous if the reviewing court is left with the definite and firm conviction that a mistake has been made. *Id.*

Where a defendant challenges venue, plaintiff bears the burden of establishing that the county he or she chose is a proper venue. *Johnson v Simongton*, 184 Mich App 186, 188; 457 NW2d 129 (1990). As the Court of Appeals properly recognized, plaintiff in doing so "must present some credible factual evidence showing that the venue chosen is proper because the choice of venue must be based on fact, not mere speculation." (Apx 315a, *citing Marsh v Walter L Couse & Co*, 179 Mich App 204, 208; 445 NW2d 204 (1989)).

RELEVANT STATUTORY PROVISION

MCL 37.2801 Action for injunctive relief or damages; venue; "damages" defined

Sec. 801

- (1) A person alleging a violation of this act may bring a civil action for appropriate injunctive relief or damages, or both.
- (2) An action commenced pursuant to subsection (1) may be brought in the circuit court for the county where the alleged violation occurred, or for the county where the person against whom the civil complaint is filed resides or has his principal place of business.
- (3) As used in subsection (1), "damages" means damages for injury or loss caused by each violation of this act, including reasonable attorney's fees.

1976 PA 453, Eff. Mar. 31, 1977.

SUMMARY OF ARGUMENT

The Court of Appeals properly interpreted MCL 37.2801(2) in holding that an alleged “violation” of the ELCRA “occurred” only in Oakland County, the undisputed location of the decisions to terminate each plaintiff’s employment, and not in the county where the effect of those decisions were felt. The ELCRA’s venue provision consistently has been applied in that fashion in the more than three decades since its enactment, and thus principles of *stare decisis* counsel heavily in favor of continuing that interpretation.

The Court of Appeals correctly reversed the trial courts’ denials of Fifth Third’s motions to change venue. Its ruling should be affirmed.

ARGUMENT

- I. **The Court of Appeals correctly followed the language of the ELCRA’s venue provision, and a consistent line of case law interpreting it, in finding venue proper in the county in which the allegedly discriminatory decision was made.**
 - A. **A straightforward reading of the statute shows that the “county where the alleged violation occurred” in these cases is Oakland County, and not Wayne County.**

MCR 2.223(A) provides that when venue is improper, upon a timely motion venue *must* be transferred to a county in which venue is proper (emphasis added). Plaintiffs’ single-count complaints each allege race discrimination against Fifth Third under the ELCRA, MCL 37.2201 *et seq.* Both Brightwell and Champion filed their actions in the Wayne County Circuit Court. The issue here is whether Wayne County can be considered a county “where the alleged violation occurred” for venue purposes.² The Court of Appeals correctly followed a long line of settled jurisprudence in answering that question in the negative.

² As previously indicated, neither Brightwell nor Champion ever claimed that Fifth Third “resides” or has its principal place of business in Wayne County, or that venue was proper in Wayne County Circuit Court on either of those bases. In any event, because it is undisputed that

Michigan appellate decisions are consistent in interpreting the ELCRA's venue provision, which states venue is only proper:

[I]n the circuit court for the county where the alleged violation occurred, or for the county where the person against whom the civil complaint is filed resides or has his principal place of business. [MCL 37.2801(2).]

Michigan has long recognized that the county “where the alleged violation occurred” means the county in which the allegedly discriminatory employment *decision* was made. This is true regardless of whether the employee worked or experienced the effects of the allegedly discriminatory decision in a different county. *Barnes v Int'l Business Machines Corp*, 212 Mich App 223; 537 NW2d 265 (1995), which in all pertinent respects is identical to this case, illustrates this principle.

In *Barnes*, the plaintiff filed a race-discrimination claim against his former employer in Wayne County Circuit Court; however, unlike these plaintiffs, he also asserted a tort claim. The defendant moved to change venue to Oakland County because Oakland County was the location of defendant's corporate headquarters and the place where the allegedly discriminatory decision was made – just as in these cases. Barnes opposed the motion because he “experienced at least some of the effects of the defendant's decisions and ... suffered resulting damages” in Wayne County. *Id* at 226. The trial court agreed with the plaintiff and denied the motion to change venue.

The Court of Appeals granted leave and reversed, finding that venue should have been transferred to Oakland County, the county in which the employment decision had been made. The court specifically noted that while Barnes did perform work in Wayne County (like Brightwell and

Fifth Third's regional office is in Oakland County, that is the county in which it would be deemed to “reside” and have its principal place of business for venue purposes.

Champion), that fact was irrelevant to the issue of venue. 212 Mich App at 226. Because Barnes “provided no credible factual evidence that any of the allegedly discriminatory *decisions* were made in Wayne County, as distinguished from their effects being felt there,” venue was deemed improper in Wayne County, and proper in Oakland, where the decisions *were* made. *Id* (emphasis added).

Barnes was correctly decided. A “violation” of ELCRA occurs at the time and place that the allegedly discriminatory decision is made. This Court has repeatedly indicated that it is the discriminatory nature of an employment *decision* that renders it actionable. *See, e.g., Chambers v Tretco, Inc*, 463 Mich 297, 313; 614 NW2d 910 (2000) (*quid pro quo* sexual harassment occurs when submission to or rejection of the impermissible behavior is “a factor *in decisions* affecting the plaintiff’s employment”) (emphasis added); *Sniecinski*, 469 Mich at 134 (“Under either the direct evidence test or the *McDonnell Douglas* test, a plaintiff must establish a causal link between the discriminatory animus and the adverse *employment decision*”) (emphasis added); *Koester v City of Novi*, 458 Mich 1, 11; 580 NW2d 835 (1998), *overruled in part on other grounds, Haynie v State of Michigan*, 468 Mich 302; 664 NW2d 129 (2003) (in gender-discrimination claim based on pregnancy, “[u]nlawful employment practices occur ‘whenever pregnancy is a motivating factor for an adverse employment *decision*’”) (emphasis added).

Indeed, in *Chambers*, in discussing sexual-harassment and constructive-discharge claims, this Court stated explicitly that “It was this ‘decision to discharge’ that constituted a decision affecting employment.” *Chambers*, 463 Mich at 322, *discussing Champion v Nationwide Security*, 450 Mich 702; 545 NW2d 596 (1996). This Court consistently, and properly, has focused on the decision, rather than on the implementation of that decision, in determining whether discrimination has occurred. After all, it is the discriminatory nature of an employment decision that renders it unlawful, and thus actionable – not the fact of its communication.

Of course, a decision must be implemented in order to make it an actual decision, and not simply a thought or rumination about what might or might not happen in the future. But a decision that is legally impermissible does not become actionable simply because it has been implemented. Indeed, the implementation of a decision is often a purely administrative task, effectuated by individuals who had no involvement at all in making the decision, and who have no information as to its basis. And further, in these cases even the *implementation* occurred in Oakland County – where Fifth Third decisionmakers at the Southfield regional office told other employees at that office that plaintiffs were being terminated, they should be removed from the payroll, etc. The only aspect of the decisions’ implementation that in any way involved Wayne County was the notification of one plaintiff, Champion, at her home there.

But even assuming that communicating an adverse employment decision is part of its implementation, that still does not become part of the alleged *violation* – which is the focus of the inquiry under the ELCRA’s venue provision. As the name indicates, intentional discrimination – as claimed by both Brightwell and Champion – requires intent. *See e.g.*, M Civ JI 105.02:

Intentional discrimination means that ***one of the motives*** or reasons for plaintiff’s [discharge/failure to be hired/failure to be promoted/failure to be trained/harassment/] was [religion/race/color/national origin/age/sex/height/weight/marital status]. [Religion/race/color/national origin/age/sex/height/weight/marital status] does not have to be the only reason, or even the main reason, but it does have to be one of the reasons which made a difference ***in determining*** whether or not to discharge/hire/promote/train/harass/[other] the plaintiff (emphasis added).

Therefore, it is the intention of the individual(s) making the decision at issue which determines whether an actionable claim has occurred. The motivation of the individuals who merely implement that decision is irrelevant.

The element that makes a claim actionable is the intention of the person making the allegedly discriminatory decision. One method “for establishing a case of discrimination is to

present credible, direct evidence *of discriminatory intent on the part of the decision-makers.*” *Thomas v Hoyt, Brumm & Link, Inc.*, 910 F Supp 1280, 1288 (ED Mich 1994) (emphasis added). Stated differently, among the elements of a *prima facie* case of intentional discrimination is that “the individual that discharged [plaintiff] was predisposed to discriminate against members of the protected class” and that “the individual acted on this predisposition.” *Wilson v Stroh Companies*, 952 F2d 942, 946 (CA 6, 1992). However plaintiff’s burden is stated, it is the intent of the decision-maker(s) that is at issue. And the intent to discriminate, if any, occurs at the time and place where the individual makes the discriminatory decision – making venue appropriate in that place, and not where it is later implemented.

The dictionary supports this interpretation of the statutory phrase “where the alleged violation occurred.” A “violation” is “the act or an example of violating somebody or something,” while “violate” in turn is defined as, “to act contrary to something such as a law, contract, or agreement, *especially in a way that produces significant effects.*” Encarta World English Dictionary (1999 ed) (emphasis added). Thus, the dictionary plainly distinguishes between an act that “violates,” and the *effects* of that act – the former takes place before the latter. Under this view, plaintiffs allege a “violation” of the ELCRA by Fifth Third in Oakland County, where the decisions were made – not in Wayne. *See also*, Black’s Law Dictionary (2009 ed) (defining a “violation” as “1. [a]n infraction or breach of the law; a transgression....2. The act of breaking or dishonoring the law; the contravention of a right or duty”). Like any employer, Fifth Third is under a duty not to intentionally discriminate based on impermissible factors such as race. If it breaches that duty and makes an unlawfully discriminatory employment decision, the “violation” has taken place at the moment the decision is made – even if it is never communicated to the employee. Thus, a shift manager who is given a completed job application by an African-American, then throws it in the

trash due to racial animus once the applicant/prospective employee leaves, has committed a “violation” of the ELCRA – even though it may *never* be communicated to the victim.

Plaintiffs’ proposed venue rule would stand the intent element of the ELCRA on its head. In order to be able to advance the argument that venue here was proper in Wayne County – because that is where the decisions to terminate were implemented – they argue that “Plaintiff did not complain that Defendant made a *decision* to discharge them.” (Brief, pp. 7-8, emphasis in original). But that argument is flatly wrong. Plaintiffs are complaining – indeed, *must* complain – that the decisions to discharge them were discriminatory. If the decisions to discharge themselves were not impermissibly tainted by discriminatory intent, they are not actionable, and their implementation cannot be the basis for an award.

Thus, to adopt plaintiffs’ position and determine venue where the effects of the decision are felt or the decision implemented, is to focus on the wrong factor. The mere implementation of a discriminatory action is itself a neutral, ministerial act. Determining venue by where the decision was implemented would result in trials outside the location where the elements of the violation occurred. It would eliminate the logical nexus between the county of the trial and the county where the elements, and therefore the violation, occurred. Because what is at issue is the motive of the people making the disputed employment decision, *Barnes* correctly determined that the location of those people – that is, the location at which the decision was made – determines venue.

B. Plaintiffs’ proposed interpretation would upset a longstanding, consistent interpretation of the ELCRA’s venue provision in a manner that runs flatly contrary to principles of *stare decisis*.

Barnes’s application of the ELCRA venue provision has been applied consistently. For example, in *Reeves v Int’l Business Machines Corp*, unpublished per curiam opinion of the Court of Appeals, decided July 15, 1997 (Docket No. 191111), **Tab 1**, plaintiff filed a discrimination

claim in Wayne County Circuit Court and defendant moved to change venue to Oakland County.

The trial court denied the motion, but the Court of Appeals granted leave and reversed:

[A]lthough plaintiffs worked in Wayne County, they have provided no credible factual evidence that any allegedly discriminatory *decisions* were made in Wayne County, as opposed to merely their effects being felt there. In other words, plaintiffs have not shown that Wayne County is where the alleged violation of the civil rights act occurred. [Tab 1, slip Op at 5 (emphasis added)].

The Court of Appeals again followed that rule in *Green v R J Reynolds Tobacco Co*, unpublished per curiam opinion of the Court of Appeals, decided May 26, 1998 (Docket No. 196355), **Tab 2**. There, plaintiff also brought a discrimination claim in Wayne County and defendant sought to change venue to Oakland County, where its regional office was located and the adverse employment decision was made. The trial court granted that motion and the Court of Appeals affirmed – despite the fact that Green (like these plaintiffs) performed work in Wayne County:

In this case, we are satisfied that any adverse employment decisions by defendant regarding plaintiff Willie James Green were made at defendant R.J. Reynolds' regional office in Oakland County or at its headquarters in North Carolina. Although Green works in both Wayne and Oakland Counties, *he has failed to establish that any of the alleged discriminatory decisions were made in Wayne County*. In fact, plaintiffs, at best, have only shown that the alleged effects of defendants' discriminatory actions were felt in Wayne County. This Court, however, has stated that *the location where a party's discriminatory actions are felt is not sufficient to establish venue under the civil rights laws*. [Tab 2, slip Op at 1-2 (emphasis added)].

Surprisingly, Brightwell and Champion continue to cite to *Keuhn v Michigan State Police* as supporting their position (Brief, p. 16), just as they did in the Court of Appeals. In *Keuhn*, the Court of Appeals affirmed the trial court's denial of a motion to change venue from Livingston to Ingham County. But contrary to Brightwell and Champion's assertion, the Court of Appeals in doing so did not reject the rule from *Barnes* that venue is proper in the county in which the

allegedly discriminatory decision was made – rather, it followed the rule. Brightwell and Champion assert to this Court that the *Keuhn* court rejected defendant’s request to change venue “on the basis of its conclusion that discrimination had also allegedly occurred in the county in which the plaintiff was employed.” (Brief, p. 16). To the contrary, the *Keuhn* court’s finding that venue was proper in Livingston County was not based on the fact that it was a county in which the plaintiff had worked, and therefore where the discriminatory decision had been implemented. Rather, the decision was based on the fact that “the allegedly discriminatory promotional process *included decisions made in that county*, not merely because damages from the discrimination resulted in that county.” *Id* at 154 (emphasis added). Thus, in *Keuhn* (unlike this case), there was a specific allegation that discriminatory *decisions* were made in the county in which the matter was filed. As Judge Talbot noted in his concurrence here, the plaintiff in *Keuhn* – unlike the plaintiff in *Barnes* or the two in this case – “demonstrated to [the Court of Appeals’s] satisfaction that discriminatory decisions pertaining to [him] occurred *in more than one county*. (Apx. 318a) (emphasis added)). *Keuhn* is, therefore, entirely consistent with the holding in *Barnes*, that venue under the ELCRA is determined according to the location at which the allegedly discriminatory decision was made – not where it was implemented or its effects felt.

The plain fact is that, since the ELCRA’s enactment in 1976, plaintiffs and defendants alike have known how to interpret its venue provision. In doing so they have been guided by a consistent application of that language by the Court of Appeals, an interpretation that plaintiffs now urge this Court to upset, solely in order to placate plaintiffs’ desire for a jury pool comprised of more members of one race, and less of another. But as (then) Justice Kelly recently observed, “[t]he doctrine of *stare decisis* is of fundamental importance to the rule of law.” *People v Gardner*, 482

Mich 41, 80 n 2; 753 NW2d 78 (2008) (Kelly, J, dissenting), *quoting Welch v Texas Dep't of Hwys and Public Transp*, 483 US 468, 494; 107 S Ct 2941; 97 L Ed 2d 389 (1987) (opinion of Powell, J). And under the “hierarchy approach” to *stare decisis*, “[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and [the legislative branch] remains free to alter what we have done.” *Id*, 483 Mich at 84 n 17, *quoting Patterson v McLean Credit Union*, 491 US 164, 172-173; 109 S Ct 2363; 105 L Ed 2d 132 (1989).

This Court is now faced with interpreting a venue provision that has not been amended since its enactment more than three decades ago. 1976 PA 453. Plaintiffs ask the Court to cast aside an unbroken, entirely consistent line of case law interpretations providing that, *under the specific wording of this statutory provision*, venue is appropriate in the count(ies) where the allegedly discriminatory decision was made, and not where its effects were felt. There is no valid reason for such a radical revision of the ELCRA’s venue provision. If such a change is to be made, the editing pen should be wielded by the Legislature, and not this Court.

II. *Barnes* did not engraft this Court’s analysis of MCL 600.1629 from *Gross v General Motors* onto ELCRA claims, nor does affirmance of the Court of Appeals’ decision require such a finding.

Among the questions this Court directed the parties to brief is whether the Court of Appeals in *Barnes* “correctly decided...that an alleged violation of [the ELCRA] ‘occurred’ only when and where the corporate decision affecting the plaintiff’s employment was made,” and “that this Court’s analysis of MCL 600.1629 from *Gross v General Motors Corp*, 448 Mich 147; 528 NW2d 707 (1995), should be applied to discrimination cases brought under MCL 37.2801(2).” 9/30/09 Order granting leave, p 1.

A. Barnes did not apply the tort venue statute to ELCRA claims.

Taking the latter question in the Court's Order first, Fifth Third's reading of *Barnes* is that that case simply did not "apply" the tort venue provision to ELCRA claims. In contrast to these cases, where Brightwell and Champion bring only an ELCRA claim, the plaintiff in *Barnes* also brought a tort claim against his former employer. In the course of determining the proper venue, the Court of Appeals properly discussed the ELCRA's venue provision in connection with the ELCRA claim, and MCL 600.1629 in connection with the tort claim. 212 Mich App at 225-226. Only after holding that plaintiff could not pursue his tort action in Wayne County did the Court embark on an extended discussion of *Gross* – and even there, it noted that *Gross* "does not technically apply to discrimination cases," but that its reasoning supported the policy common to venue analysis in both types of cases – that of discouraging forum-shopping. *Id* at 226. Thus, *Barnes* did not "apply" *Gross* to ELCRA cases in the sense that its ruling was driven by *Gross*. To the contrary, its discussion of *Gross* in connection with plaintiff's ELCRA claim was a textbook example of *obiter dictum* – an "incidental remark or opinion....related but not essential to a case." *Allison v AEW Capital Mgt LLP*, 481 Mich 419, 436-437; 751 NW2d 8 (2008), citing Random House Webster's College Dictionary (1997).

Beyond that, to the extent that the *Barnes* panel looked to the policy considerations discussed in *Gross* as supporting its outcome, it did so properly. In *Barnes*, plaintiff argued that the county in which he experienced the *effects* of the discriminatory decision caused him damages in that county, thereby rendering venue proper. He based that position on this Court's decision in *Lorencz v Ford Motor Co*, 439 Mich 370; 483 NW2d 844 (1992), and on *Witt v CJ Barrymore's*, 195 Mich App 517; 491 NW2d 871 (1992), *overruled on other grounds*, *Russell v Chrysler Corp*, 443 Mich 617, 621; 505 NW2d 263 (1993). But the *Barnes* panel not only noted

that *Russell* had overruled *Witt*, and that this Court had clarified its *Lorencz* decision in *Gross*; it also held that the policy reasons underpinning *Gross* supported rejection of plaintiff's position. Allowing venue to be determined where the effects of alleged discrimination were felt, rather than where the challenged decision was made, would encourage forum shopping, a pernicious result contrary to the goals of the venue provisions. 212 Mich App at 226. Secondly, *Barnes* noted that the ELCRA provided for venue "where the alleged violation occurred," and *not* where its effects were felt or where damages accrued – the latter of which were permissible considerations under the tort venue statute, MCL 600.1629(1)(a) (a county "in which all or part of the cause of action arose..."). *Id.* Thus, far from "applying" MCL 600.1629(1)(a) to ELCRA cases, *Barnes* used it to distinguish why defendant's venue argument in that case – and this – was correct.

Though *Barnes* properly borrowed the policy underpinnings of *Gross* (discouraging forum-shopping), it was correct to avoid "applying" that case to this one. In *Gross*, the issue was the allegedly defective design of a product. The question became where the "design" had occurred, in the county in which the product itself was actually designed, or the county in which the allegedly defective design (arrived at elsewhere) was approved. Rather than relying on *Gross*, the *Barnes* Court noted the difference between an approval "decision" in a design defect case, and a discriminatory employment decision in an ELCRA case. The court stated that the "decision" in *Gross* was simply the ministerial one of approving a design which had been developed elsewhere – but it was not that approval decision that rendered the product defective, and therefore actionable. 212 Mich App at 226 n 3. In an ELCRA claim, by way of contrast, "the actions allegedly giving rise to liability are the corporate decisions themselves" and that "therefore the place of corporate decision making is an appropriate venue." *Id.* As Judge Talbot

correctly noted in concurring below, the ELCRA’s venue provision is not interchangeable with the tort venue provision of MCL 600.1629 – differences in their phrasing leads to a wider choice of possible venues in tort actions, and in ELCRA cases it is the “more specific venue provision” of MCL 37.2801 that should be applied. (Apx. 319a).

B. The *Barnes* Court correctly decided that a violation of ELCRA “occurs” only when and where the corporate decision affecting a plaintiff’s employment is made.

The first part of this Court’s question – whether *Barnes* correctly determined that an ELCRA violation “occurred” only when and where the corporate decision was made – should be answered, yes. The key question under the statute is where the *violation* occurred, and as discussed above, discriminatory conduct – hinging as it does on the actor’s intent – necessarily “occurs” where the actor is located, not where his or her unlawful decision is eventually communicated, or has effects. *Barnes* itself was ultimately based on recognition of this fact; that the decision in an ELCRA claim is the basis of the action. In *Gross*, by way of contrast, the intent of the decision-maker was entirely irrelevant. *Barnes* was properly decided.

III. Reversal of the Court of Appeals would permit and even encourage forum-shopping, the “Pandora’s Box” against which this Court cautioned in *Gross*.

In *Gross*, this Court found that venue in tort actions was proper where the actual injury (in that case an auto accident) took place, or where the breach of a legal duty (in that case the design of a defective product) occurred. While it is certainly possible that the effects of such an injury or breach of a legal duty could be felt elsewhere, this Court indicated that damages which occurred in other locations “are irrelevant to venue determination.” *Gross*, 448 Mich at 165. The Court specifically noted the Legislature’s “overall desire to limit abusive forum shopping.” *Id* at 159. The Court rejected plaintiff’s argument as to where venue would be proper, because adopting “[s]uch a rule could greatly intensify the problem of venue shopping” allowing what

this Court characterized as a “‘Pandora’s Box’ regarding forum shopping...” *Id* at 159, 164. Indeed, the Court indicated that in enacting tort reform, “[o]ne of the Legislature’s remedial goals was to limit venue shopping by plaintiffs.” *Id* at 157. Noting the Legislature’s goal, and characterizing forum-shopping as a “Pandora’s Box,” makes clear the seriousness with which this Court views such conduct.

Echoing those concerns, the *Barnes* court noted that if a plaintiff were permitted to file suit in the county where he or she allegedly suffered the effects of a discriminatory employment decision, it would encourage forum-shopping:

It is undisputed that venue in this case would be proper in either statute in Oakland County because that is the location of defendant’s corporate headquarters in Michigan and where the allegedly discriminatory and tortuous decisions were made.

* * *

As noted by the Court, *allowing an action to be brought where its effects or damages occur would encourage forum shopping in contravention of the goals of the venue provisions*. Further, the civil rights statute clearly provides that venue is proper where “the alleged violation occurred,” not where its effects were felt or where the damages accrued. The violations alleged are adverse employment decisions. Although plaintiff performed some work in Wayne County, he has provided no credible factual evidence that any of the allegedly discriminatory decisions were made in Wayne County, as distinguished from the effects being felt there. [212 Mich App at 225-226 (emphasis added)].

Certainly, it could not have been the Legislature’s intent to draft legislation for the purpose of curbing forum-shopping under one statute, while simultaneously allowing it to take place under another. Fifth Third’s interpretation of the ELCRA venue provision discourages forum-shopping; that of Brightwell and Champion promotes it.

The record here bears that out. Neither Brightwell nor Champion has ever disputed that the employment decisions about which they complain were made in Oakland County. But in response to Fifth Third’s motion to change venue, each argued that venue should remain in

Wayne County because transferring venue to Oakland County would deprive them of the “best chance of obtaining his constitutional right to a jury of his peers.” (Apx. 42a Brightwell response, p 8; Apx. 52a, Champion response, p 8). Indeed, each plaintiff’s response outrageously “queried” whether Fifth Third’s motion was motivated by the desire to deny him or her that “best chance.” (*Id.*).

Further, at the motion hearing in *Champion*, plaintiff flatly admitted to trying to tilt the jury pool toward members of one race, to the exclusion of members of another:

The Court: [S]ir, you [plaintiff] argued that, well, the only reason he wants to try it in Oakland County because they’re White people out there and you’ve got a Black client.

You say on the other hand, which sounded as bad as what you claim them to do, I want it in Detroit because there’re Black people here.

* * *

...you believe – Your client is Black and you believe that that county is more White than Black in terms of population. That if you go out there it’s more a likelihood that you’ll get a White jury than a Black jury.

Plaintiff: ***Yes, sir.*** (Apx. 74a-76a (emphasis added)).

Thus, counsel explicitly admitted that plaintiffs’ desire to stay in Wayne County is based on their expectations as to the racial composition of the juror pool. This is not only blatant forum-shopping, but forum-shopping based on the most pernicious of impermissible reasons: to seek a jury of one race, and exclude jurors of another. This takes the very type of conduct with which this Court expressed concern in *Gross*, and about which the *Barnes*’s court cautioned, and adds to the mix the incendiary element of racial jury-packing. Indeed, if there is any “query” to be made, along the lines of plaintiffs’ response (Apx. 42a, 52a), it should be to ask what the response would be if an ELCRA *defendant* asserted, as brazenly as do plaintiffs, that its venue

position were motivated by a desire to seek a jury venire including more members of one race, and fewer of another.³

Race has no valid role to play in the question of where venue is proper, especially in an ELCRA action. Indeed, courts have acknowledged that racial considerations are so improper as to warrant restrictions on what was once sacrosanct – the peremptory juror challenge – in both criminal *and* civil cases. *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986); *Edmonson v Leesville Concrete Co, Inc*, 500 US 614; 111 S Ct 2077; 114 L Ed 2d 660 (1991). “[I]f our society is to continue to progress [as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury.” *Edmonson*, 500 US at 630-631. Applying that notion in another case where a plaintiff made identical arguments as *Brightwell and Champion*, one court noted:

Where [plaintiff] asserts that he should only be tried in a county with a certain percentage of black residents, implying that he will get a more fair or favorable verdict from black jurors, he is himself engaging in racial stereotyping. Such assertions are not only harmful to our continued progress toward a multiracial society, they are also irrelevant to a *forum non conveniens* analysis. [*McCrorry v Abraham*, 441 Pa Super 258, 266; 657 A2d 499, 503-504 (Super Ct Penn, 1995) (*citing Edmondson*).

Brightwell and Champion concede that it is appropriate to construe the ELCRA venue statute “so as to limit abusive venue shopping and uncertainty about the proper place to commence an action.” (Brief, p. 11). They concede the legitimacy of both the legislative and judicial concern to do so. *Id.* Yet, it is *Brightwell and Champion* who have admitted, on the record, that their desire to maintain venue in Wayne County is based on their belief as to the racial composition of the eventual jury, and the strategic, but stereotypical, assessment that such a racial composition will

³ *Brightwell’s* position in this regard is an especially puzzling one – he claims that an Oakland County jury would not consist of his peers, despite the fact that he chose it, and not Wayne County, to be his home. (Apx. 3a).

result in a more favorable outcome for them. That is venue-shopping for the most impermissible of reasons.

Plaintiffs also attempt to construct a hypothetical demonstrating the possibility that in some cases, retaining the current venue rule could result in venue being appropriate in a county distant from the place of employment. This case, however, presents no such situation. Here there is no dispute that the decisions about which Brightwell and Champion complain all occurred in Oakland County. Nor is there any suggestion that it is defendant that is attempting to move venue to a particular county based on any impermissible factors. While plaintiffs claim that the current ELCRA venue rule is capable of creating mischief, the facts they offer are those of another case – not this one. Further, the rule they advocate is itself certainly capable of manipulation. Suppose, as is often the case, an individual is required to travel to perform his or her duties. If such an individual travelled to every county in Michigan, and his or her employment was terminated, under plaintiffs' proposed rule, that individual could pick any county to file suit, based on any strategic calculation or even an impermissible factor, regardless of where the decision was made, and regardless of where the primary place of employment was located. Not only does plaintiffs' proposed rule permit venue shopping in the abstract, plaintiffs here are admittedly engaging in venue shopping, based on an improper factor.

As the trial court stated in *Champion*, the concern should not be whether ones gets a “Black jury or a white jury.” Rather, “what you ought to do is look for some fair people.” (Apx 75a-76a). There has never been any suggestion that plaintiffs would not find fair people in Oakland County. That is the County in which the decisions they complaint about were made, and indeed, the County in which plaintiff Brightwell has chosen to live. That is the County in which venue for the ELCRA claim is proper.

CONCLUSION/RELIEF REQUESTED

For the above-stated reasons, Defendant-Appellee Fifth Third respectfully requests that this Court affirm the decision of the Court of Appeals.

Respectfully submitted,

BUTZEL LONG

By: Daniel B. Tukel

Daniel B. Tukel (P34978)

Michael F. Smith (P49472)

150 W. Jefferson, Suite 100

Detroit, Michigan 48226

(313) 225-7000

Attorneys for Defendant-Appellant

Fifth Third Bank of Michigan

Dated: December 10, 2009

TAB 1



3 of 3 DOCUMENTS

**JOHN E. REEVES, EDWIN R. HARLIN, and WILLIAM T. MERRIWEATHER,
Plaintiffs-Appellees, v INTERNATIONAL BUSINESS MACHINES, a/k/a IBM,
CHRIS SCHADE, and CHARLES CHILDRESS, Defendants-Appellants.**

No. 191111

COURT OF APPEALS OF MICHIGAN

1997 Mich. App. LEXIS 741

July 15, 1997, Decided

NOTICE: [*1] IN ACCORDANCE WITH THE MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

PRIOR HISTORY: Wayne Circuit Court. LC No. 93-304132-CZ.

DISPOSITION: Reversed.

JUDGES: Before: Holbrook, Jr., P.J., and MacKenzie and Murphy, JJ.

OPINION

PER CURIAM.

Defendants appeal by leave granted the circuit court's denial of their motion to change venue from Wayne County to Oakland County. We reverse.

Plaintiffs filed suit in Wayne County against their former employer, IBM, and two individual supervisors. Plaintiffs alleged defendants violated the Civil Rights Act, *MCL 37.2101 et seq.*; *MSA 3.548(101) et seq.*, by discriminating against them on the basis of their race when it came to things such as assigning sales territories, promotions, and pay increases.

Defendants sought to change venue to Oakland County. ¹ In opposing the motion, plaintiffs argued that venue was proper in Wayne County because defendant IBM's registered corporate office and agent were in Wayne County and both individually named defendants resided in Wayne County. In addition, plaintiffs argued that they had all serviced accounts and, at times, been stationed [*2] in Wayne County. The trial court denied defendants' motion and ruled that venue was proper in Wayne County because "it is possible that adverse employment decisions were made" there, and because the two individually named defendants reside there. On appeal, we review the trial court's ruling on the motion to change venue for clear error. *Vermilya v Carter Crompton Site Development Contractors, Inc*, 201 Mich App 467, 471; 506 NW2d 580 (1993).

¹ This appeal is actually from a renewed motion for change of venue. Defendants' original motion was denied without opinion. However, after this Court's decision in *Barnes v IBM*, 212 Mich App 223; 537 NW2d 265 (1995), discussed *infra*, defendants' renewed their motion. It is after the denial of this renewed motion that the instant appeal was taken.

According to *MCL 37.2801(2)*; *MSA 3.548(801)(2)*, "an action commenced pursuant to [the civil rights act] may be brought in the circuit court [*3] for the county where the alleged violation occurred, or for the county

where the person against whom the civil complaint is filed resides or has his principal place of business." Plaintiffs have the burden to establish that the county chosen is the proper venue, *Johnson v Simongton*, 184 Mich App 186, 188; 457 NW2d 129 (1990), and they must present some credible factual evidence that the venue chosen is proper, *Marsh v Walter L. Couse & Co*, 179 Mich App 204, 208; 445 NW2d 204 (1989). The choice of venue must be based on fact, not mere speculation. *Id.*

In *Barnes v IBM*, 212 Mich App 223; 537 NW2d 265 (1995), the plaintiff brought a civil rights act claim against IBM in Wayne County. As in the case at bar, IBM sought a change of venue to Oakland County. The plaintiff argued that venue was proper in Wayne County because "that is where he experienced at least some of the effects of defendants' decisions and where he suffered resulting damages." *Id.* at 225. This Court disagreed with the plaintiff and held that he had failed to carry his burden of establishing that venue was proper in Wayne County. [*4] The Court opined that venue for civil rights act claims is proper where the alleged violation occurred, not where its effects were felt or where the damages occurred. The Court concluded that the alleged violations were "adverse employment decisions," and although "plaintiff performed some work in Wayne County, he has provided no credible factual evidence that any of the allegedly discriminatory decisions were made in Wayne County, as distinguished from their effects being felt there," *Id.* at 226. The Court then noted that "the actions allegedly giving rise to liability are the corporate decisions themselves and therefore the place of corporate decision making is an appropriate forum." *Id.* at 226 n 3. As mentioned by the Court, IBM's corporate headquarters in Michigan are located in Oakland County. *Id.* at 225.

We too conclude that plaintiffs have failed to carry their burden to show that venue is proper in Wayne County. The trial court clearly erred in denying defendants' motion for a change of venue.

The trial court ruled that because it was "possible" that adverse employment decisions were made in Wayne County, venue was proper. However, plaintiffs' choice of venue [*5] must be based on fact, not speculation or possibility, and as in *Barnes*, although plaintiffs worked in Wayne County, they have provided no credible factual evidence that any allegedly discriminatory decisions were

made in Wayne County, as opposed to merely their effects being felt there. In other words, plaintiffs have not shown that Wayne County is where the alleged violations of the civil rights act occurred. Plaintiffs did submit a negative evaluation of plaintiff Reeves by defendant Schade to the trial court as evidence of discrimination. Although the evaluation was given after the filing of the original complaint in this action, the trial court ruled that "the evaluation, whenever done, can well reflect negative attitudes - including ones based on discrimination - that have existed for some time, including time before the case was filed." In our opinion, a finding of the existence of potential negative, discriminatory, attitudes prior to the start of this action, based on an evaluation received after the action began can be based on nothing but speculation, and not credible, factual evidence of such attitudes. To the extent the trial court relied on this evaluation to find [*6] venue in Wayne County, it clearly erred.

Venue in Wayne County was also justified with the fact that defendants Schade and Childress reside in Wayne County. Defendants argued that Schade and Childress were joined in bad faith merely to control venue. Defendants referred to *MCR 2.225(A)*, which states that "venue must be changed on a showing that the venue of the action is proper only because of the joinder of a codefendant who was not joined in good faith but only to control venue." However, the trial court stated that "while we acknowledge that defendants have submitted some evidence in support of their claim of procedural bad faith here, we cannot hold this evidence to be enough." In our opinion, the evidence in support of bad faith on plaintiffs' part was sufficient to prevent plaintiffs from satisfying their burden and renders the trial court's decision clearly erroneous.

Defendants Schade and Childress were selected, without explanation, from among nearly forty other managers named in the complaint. Other individual managers, not joined as codefendants, appear to have been at higher management levels, and were managers of the plaintiffs for longer periods of time. In addition, [*7] six managers, also not named as codefendants, managed all three plaintiffs at one point or another during their employment at IBM. Defendants have presented evidence that of all the managers named in the complaint, only defendant Schade lives in Wayne County, and she never managed plaintiffs Merriweather or Harlin, and only managed plaintiff Reeves for six months. Contrary to plaintiffs' claim, evidence also indicates that while

defendant Childress' mailing address is Wayne County, he actually resides in Oakland County. Plaintiffs have offered no credible justification for selecting these two individual managers to join as codefendants, and the evidence indicates that the only possible justification was to control venue. Therefore, the trial court clearly erred in denying defendants' motion for change of venue.

Although not addressed by the trial court, plaintiffs also argue that venue is proper in Wayne County because defendant IBM's corporate registered office and agent, for service of process purposes, are located in Wayne County. Plaintiffs argue that because of this, defendant IBM "resides" in Wayne County. We disagree.

As previously indicated, venue is proper for civil rights [*8] act purposes where the alleged violation occurred, or where the defendant resides or has his principal place of business. This is different from the general venue provision for tort actions that states that venue is proper in the county where the injury occurred and where the defendant either "resides, has a place of business, or conducts business," or has a "corporate registered office." *MCL 600.1629(1)(a)*; *MSA 27A.1629(1)(a)*.² To the extent that plaintiffs equate where defendant IBM "resides" to where defendant IBM's corporate registered office is located, their claim must fail. We must presume from the general venue statute's differentiating between where a defendant resides, conducts business and has a corporate registered office, that the legislature intended, at least for purposes of the general venue statute for tort actions, each phrase to have a separate meaning, see *Frank v Kibbe & Associates, Inc*, 208 Mich App 346, 350-351; 527 NW2d 82 (1995), and we have not been persuaded that we should treat the phrases as equivalent for civil rights act purposes.

² The general venue statute for tort actions also

provides for alternatives in case the requirements in subsection (1)(a) cannot be met. See *MCL 600.1629(1)(b) - (1)(d)*; *MSA 27A.1629(1)(b) - (1)(d)*.

[*9] In addition, we do not consider the location of the corporate registered office and agent to be sufficient to independently satisfy the civil rights act's venue requirements. The civil rights act's venue statute does not list such a location as sufficient, and we cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there. See *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993). Moreover, where the Legislature lists items in a statute, it is the general rule that express mention of one thing implies the exclusion of other similar things. See *USF&G v Amerisure Ins. Co*, 195 Mich App 1, 6; 489 NW2d 115 (1992). In our opinion, the Legislature simply did not intend the location of the corporate registered office and agent to be sufficient grounds on which to base venue.

In other words, we conclude that it would be improper to equate the location of defendant IBM's registered corporate office and agent with where defendant IBM "resides" for civil rights act's venue purposes, and [*10] we decline to infer that such a location is independently sufficient in light of the fact that it is not listed as grounds for venue in the civil rights statute.

Reversed.

/s/ Donald E. Holbrook, Jr.

/s/ Barbara B. MacKenzie

/s/ William B. Murphy

TAB 2

STATE OF MICHIGAN
COURT OF APPEALS

WILLIE JAMES GREEN and JACKIE L. GREEN,

Plaintiffs-Appellants,

v

R. J. REYNOLDS TOBACCO CO.
and DONALD F. KNOLL,

Defendants-Appellees.

UNPUBLISHED

May 26, 1998

No. 196355

Wayne Circuit Court

LC No. 96-600111 NZ

Before: Hood, P.J., and MacKenzie and Doctoroff, JJ.

PER CURIAM.

Plaintiffs appeal by leave granted from an order denying their motion for reconsideration of a prior order changing venue in this employment discrimination case. We affirm.

Plaintiff's first argue that the trial court erred in denying their motion for reconsideration because its previous order granting a change of venue to Oakland Circuit Court was incorrect. This Court reviews a trial court's decision to deny a motion for reconsideration for an abuse of discretion. *In re Beglinger Trust*, 221 Mich App 273, 279; 561 NW2d 130 (1997). We review a trial court's decision to grant or deny a motion for a change of venue for clear error. *Vermilya v Carter Crompton Site Development Contractors, Inc*, 201 Mich App 467, 471; 506 NW2d 580 (1993).

The venue provision of the Civil Rights Act, MCL 37.2801(2); MSA 3.548(801)(2), states that an action "may be brought in the circuit court for the county where the alleged violation occurred, or for the county where the person against whom the civil complaint is filed resides or has his principal place of business." In this case, we are satisfied that any adverse employment decisions by defendants regarding plaintiff Willie James Green were made at defendant R.J. Reynolds' regional office in Oakland County or at its headquarters in North Carolina. Although Green works in both Wayne and Oakland Counties, he has failed to establish that any of the alleged discriminatory decisions were made in Wayne County. In fact, plaintiffs, at best, have only shown that the alleged effects of defendants' discriminatory actions were felt in Wayne County. This Court, however, has stated that the location where a party's

discriminatory actions are felt is not sufficient to establish venue under the civil rights laws. *Barnes v Int'l Business Machines Corp*, 212 Mich App 223, 226; 537 NW2d 265 (1995).

Plaintiff's also argue that the trial court erred in declining to hear their motion for reconsideration on the ground that it no longer had jurisdiction over the matter. We disagree. We review questions of law de novo. *Markillie v Bd of Co Road Comm'rs of Co of Livingston*, 210 Mich App 16, 21; 532 NW2d 878 (1995). Once a trial court orders a change of venue, the court is without power to hear any further matters in the case since jurisdiction is vested in the transferee court. *Saba v Gray*, 111 Mich App 304, 311-312; 314 NW2d 597 (1981); *Sugar, Schwartz, Silver, Schwartz & Tyler v Thomas*, 25 Mich App 41, 44; 181 NW2d 59 (1970). Because the trial court in this case granted a change in venue effective immediately, it did not err in declining to hear plaintiffs' motion for reconsideration on the basis that it lacked jurisdiction to do so. See *Saba, supra*, p 312.

Affirmed.

/s/ Harold Hood
/s/ Barbara B. MacKenzie
/s/ Martin M. Doctoroff