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Venue - Juries: Changing Venue to Obtain a Fair and Impartial Trial: Trial Court Discretion or Subjective Evaluation - Is This the End of Trials in Rural North Dakota Counties

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VENUE—JURIES: CHANGING VENUE TO OBTAIN A FAIR AND IMPARTIAL TRIAL: TRIAL COURT DISCRETION OR SUBJECTIVE EVALUATION? IS THIS THE END OF TRIALS IN RURAL NORTH DAKOTA COUNTIES?

Slaubaugh v. Slaubaugh, 499 N.W.2d 99 (N.D. 1993)

I. FACTS

Karen Slaubaugh sustained serious personal injuries in a one-vehicle accident on April 13, 1986.[1] She brought suit against the driver of the vehicle, Pierce County, and Wold Engineering for negligence.[2] Slaubaugh also asserted a punitive damages claim against Wold Engineering and Pierce County.[3]

Trial was held in Pierce County in May, 1989.[4] A jury awarded damages to Slaubaugh in the amount of $233,000 for past and future medical expenses, past and future lost wages, and permanent disability.[5] On appeal, the supreme court reversed and remanded for a new trial.[6] In that appeal, the supreme court declined Slaubaugh's request to change venue on remand, stating that the district court was in a better position to make that decision.[7]

A second jury trial in Pierce County was scheduled for March 23, 1992.[8] A venire panel of 100 individuals was assembled and voir dire proceeded in chambers, two or three individuals at a time.[9] The court conducted its own examination of the prospective jurors to determine

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1. Slaubaugh v. Slaubaugh, 466 N.W.2d 573, 576 (N.D. 1991) [hereinafter *Slaubaugh I*]. Karen was a passenger in a vehicle driven by her husband, Wilmer Slaubaugh. *Id.* The vehicle sped through an unmarked "T" intersection and hit a railroad embankment. *Id.*

2. *Id.* The claims against Pierce County and Wold Engineering were based on negligence for failing to place traffic control or warning signs on the road in question, on which improvements had been undertaken. Slaubaugh v. Slaubaugh, 499 N.W.2d 99, 101 (N.D. 1993) [hereinafter *Slaubaugh II*]. Wold Engineering was the project engineer for road improvements. *Slaubaugh I*, 466 N.W.2d at 576.

3. *Slaubaugh I*, 466 N.W.2d at 576. The district court dismissed the claims for punitive damages prior to trial. *Id.* at 581. The North Dakota Supreme Court ordered reinstatement of the punitive damages claim against Pierce County on remand. *Id.* at 582.

4. Brief for Appellant Wold Engineering at 2, *Slaubaugh II*, 499 N.W.2d 99 (N.D. 1993) (No. 920142) [hereinafter Wold's Brief].

5. *Slaubaugh II*, 499 N.W.2d at 101. Nothing was awarded to the plaintiff for pain, discomfort, and mental anguish. *Id.* Liability was apportioned forty percent to Slaubaugh and sixty percent to Defendant Wilmer Slaubaugh. *Id.*

6. *Id.*; *Slaubaugh I*, 466 N.W.2d at 583. The grounds for reversal were the district court's improperly allowing Defendants to overemphasize Slaubaugh's possession of marijuana; the jury verdict being contrary to the evidence; the jury instructions erroneously emphasizing language "favorable to the defendants"; the erroneous dismissal of Slaubaugh's punitive damages claim; and an erroneous ruling of inadmissibility of photographs Slaubaugh sought to introduce. *Slaubaugh II*, 499 N.W.2d at 101 n.1.

7. *Slaubaugh I*, 466 N.W.2d at 583; *Slaubaugh II*, 499 N.W.2d at 101.

8. *Slaubaugh II*, 499 N.W.2d at 101.

9. Wold's Brief, *supra* note 4, at 3. Trial was to be before a jury of nine. *Id.* at 4. No decision as to the number of peremptory challenges had yet been made. *Slaubaugh II*, 499 N.W.2d at 105.

whether anything in their background would prevent them from being fair and impartial.[10] Extensive voir dire was then conducted by counsel.[11] After two days, fifty prospective jurors had been examined and twenty remained.[12] None of those twenty had been challenged on the grounds of statutory cause for juror dismissal.[13] At that time, the court expressed "concern about many of the prospective jurors."[14] The court was disturbed by jurors who knew the parties and potential witnesses, who were related to the parties, who were clients of the attorneys, who knew things about the case, and who had traveled on the road in question.[15] The court stated it had never before been involved in a case where so many prospective jurors had potential challenges for cause.[16]

At the start of the third day of voir dire, Slaubaugh renewed her motion to change venue.[17] The motion was based on several grounds. First, Slaubaugh's counsel voiced his concern about the responses of some jurors, who were also county taxpayers, regarding the issue of punitive damages.[18] He stated that Defendant Pierce County had "only about 6,000 people in it," and that county taxpayers would be concerned about the impact a punitive damages award would have upon their county taxes.[19] Counsel for Pierce County claimed these taxpayer-jurors would be reluctant to grant punitive damages against the county.[20]

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10. Record at 27, *Slaubaugh II*, 499 N.W.2d 99 (N.D. 1993) (No. 920142) [hereinafter Record]; Wold's Brief, *supra* note 4, at 4.

11. *Id.*

12. *Id.*; *Slaubaugh II*, 499 N.W.2d at 102.

13. Wold's Brief, *supra* note 4, at 4-5. Under section 28-14-06 of the North Dakota Century Code, prospective jurors may be dismissed for cause on one or more of the following grounds:

> 1. A want of any of the qualifications prescribed by law to render a person competent as a juror;
> 2. Consanguinity or affinity within the fourth degree to either party;
> 3. Standing in the relation of guardian and ward, master and servant, debtor and creditor, employer and employee, attorney and client, or principal and agent to either party, or being a member of the family of either party, or being a partner in business with either party, or surety on any bond or obligation for either party;
> 4. Having served as a juror or been a witness on a previous trial between the same parties for the same claim for relief;
> 5. Interest on the part of the juror in the event of his action, or in the main question involved in the action, except his interest as a member or citizen of a municipal corporation;
> 6. Having an unqualified opinion or belief as to the merits of the action founded upon knowledge of its material facts or some of them;
> 7. The existence of a state of mind in the juror evincing enmity against or bias for or against either party; or
> 8. That he does not understand the English language as used in the courts.

N.D. CENT. CODE § 28-14-06 (1991).

14. *Slaubaugh II*, 499 N.W.2d at 101.

15. *Id.* at 101-102.

16. *Id.* at 102.

17. Wold's Brief, *supra* note 4, at 5; *Slaubaugh II*, 499 N.W.2d at 102.

18. Record, *supra* note 10, at 505.

19. *Id.* at 505-506.

20. *Slaubaugh II*, 499 N.W.2d at 102.

Slaubaugh's counsel also was uneasy about pretrial publicity.[21] The *Pierce County Tribune* had run a story in April of 1991, about a year prior to the start of the second trial, regarding the drugs and drug paraphernalia involved in the accident.[22] In addition, local media coverage relating to the case continued to be extensive.[23] Slaubaugh's counsel asserted that there was no way to assure that pretrial publicity about the case and the fact that drugs were found in Slaubaugh's possession would not enter into the jury's verdict.[24]

It was also noted by Slaubaugh's counsel that it appeared "everybody seems to know everybody."[25] There apparently were numerous interrelationships between prospective jurors, litigants, and witnesses.[26] Additionally, there was concern about undisclosed bias and prejudice on the part of the jurors.[27]

The district court determined that in its discretion, it was impossible to impanel a fair and impartial jury in Pierce County, and granted Slaubaugh's motion for change of venue.[28]

Defendants Wold, Pierce County and Wilmer Slaubaugh all appealed, contending the district court abused its discretion by changing venue.[29] The defendants asserted that Slaubaugh waived her right to seek a change of venue by failing to challenge prospective jurors for cause during voir dire.[30] The defendants further contended that there was no basis to conclude that a fair and impartial trial could not take place in Pierce County, as twenty prospective jurors had already been approved by the

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21. Record, *supra* note 10, at 506.

22. *Id.*

23. *Id.*

24. *Id.* In the first trial, the supreme court found that the district court improperly allowed the defendants to overemphasize the marijuana possession issue "resulting in a trial of her character rather than a trial of the merits." *Slaubaugh I*, 466 N.W.2d at 580. A pretrial ruling before the second trial prohibited introduction of evidence of marijuana and drug paraphernalia found in Slaubaugh's possession at the accident scene. *Slaubaugh II*, 499 N.W.2d at 101. Therefore, the parties were precluded from asking prospective jurors about that issue. *Id.* As a result, Slaubaugh's counsel was concerned that he could not inquire of jurors about their knowledge of Slaubaugh's drug possession. *See* Record, *supra* note 10, at 506.

25. Record, *supra* note 10, at 506.

26. *Id.*; *Slaubaugh II*, 499 N.W.2d at 102-103.

27. Brief for Appellee at 6, *Slaubaugh II*, 499 N.W.2d 99 (N.D. 1993) (No. 920142); Record, *supra* note 10, at 507-510, 512, 522. The undisclosed bias or prejudice claim relates to general juror reluctance to admit bias or prejudice. *See* Basin Elec. Power Coop. v. Boschker, 289 N.W.2d 553, 559 (N.D. 1980) (holding that the trial court was allowed great latitude on voir dire examination in order to disclose any existing bias or prejudice on the part of jurors). In *Basin Electric*, the supreme court questioned whether a concern that jurors are reluctant to admit bias or prejudice was a valid contention. 289 N.W.2d at 559.

28. *Slaubaugh II*, 499 N.W.2d at 104; Record, *supra* note 10, at 542. The court certified its order as a final judgment under Rule 54(b) of the North Dakota Rules of Civil Procedure, which allows a court to direct entry of a final judgment upon a determination that there is no "just reason for delay." *Slaubaugh II*, 499 N.W.2d at 104 n.5 (quoting N.D. R. Civ. P. 54(b)).

29. *Slaubaugh II*, 499 N.W.2d at 104.

30. *Id.*

parties.[31] Additionally, they charged that the district court's order was based "on a belief that the prospective jurors were not telling the truth."[32]

On appeal, the North Dakota Supreme Court addressed whether a party who fails to challenge prospective jurors for statutory cause waives its right to seek a change of venue for inability to obtain a fair and impartial trial.[33] The supreme court further addressed what it considered "implicit" in the defendants' abuse of discretion argument; that when considering whether to change venue, a district court may not look beyond the statutory criteria for removal of jurors.[34]

The supreme court rejected the defendants' arguments and affirmed the district court's order changing venue.[35] It *held* that a plaintiff does not waive the right to seek a change of venue by failing to challenge prospective jurors for cause during voir dire.[36] It further *held* that when considering a motion to change venue to obtain a fair and impartial trial, a trial court may consider more than the statutory criteria for the removal of jurors.[37]

II. BACKGROUND

The term "venue" originally meant the county from which the jury was to come.[38] The rule under early English common law was that a jury of one county could not try a matter which arose in another county.[39] Jurors of the locality were witnesses to prove or disprove the allegations of the parties, and were presumed to have personal knowledge of the parties and the facts of the case.[40] Jury members were picked because of their possession of prior knowledge of the facts, and they rendered their verdict upon this prior knowledge.[41]

In contrast, venue in civil actions under modern law is ordinarily fixed by constitutional and statutory provisions.[42] Changes of venue or

31. *Id.* at 106.
32. *Id.*
33. *Slaubaugh II*, 499 N.W.2d at 105.
34. *Id.* at 106. *See* N.D. CENT. CODE § 28-14-06 (1991), *supra* note 13 (providing the statutory grounds for removal of jurors for cause).
35. *Slaubaugh II*, 499 N.W.2d at 107.
36. *Id.* at 105.
37. *Id.* at 106. *See* N.D. CENT. CODE § 28-14-06 (1991), *supra* note 13 (setting forth the statutory grounds for removal of jurors for cause).
38. 77 AM. JUR. 2D *Venue* § 1 (1975).
39. *Id.* § 2.
40. *Id.*
41. John Marshall Mitnick, *From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror*, 32 AM. J. LEGAL HIST. 201, 202 (1988).
42. 77 AM. JUR. 2D *Venue* § 3; Cavalier County v. Geston, 31 N.W.2d 787, 789 (N.D. 1948) (discussing statutory provisions for venue of civil actions in North Dakota). The North Dakota civil venue statute, section 28-04-05 of the North Dakota Century Code, has been the law in North Dakota ever since it was "embodied in the Code of Civil Procedure of the Territory of Dakota of 1877." Thorson v. Weimer, 230 N.W. 596, 598 (N.D. 1930).

place of the trial are generally permitted under modern venue statutes.[43] There are many statutory bases for seeking a change of venue, such as local prejudice, bias, and inability to obtain a fair and impartial trial in the particular county.[44] Jurors no longer serve as witnesses in trials and are not desired to possess any knowledge of the parties or facts of the case.[45] Rather, a jury is sought which is comprised of "a panel of impartial, 'indifferent' jurors."[46]

In North Dakota, a defendant has a statutory right to trial of an action in the county of his or her residence.[47] This right is subject to the power of the court to change the place of trial as provided in the relevant statute.[48] In *American State Bank of Dickinson v. Hoffelt*,[49] the supreme court stated that a defendant's right to trial at his or her place of residence is a "significant factor" which the court is "bound" to take into account when considering a motion for change of venue.[50]

Ordinarily, a trial court defers ruling on a motion for change of venue until or upon completion of voir dire, as any existing prejudice in the potential jurors can usually be determined by the voir dire examination.[51] However, in *Jerry Harmon Motors, Inc. v. First National Bank & Trust Co.*,[52] the supreme court held that a trial court need not wait until voir dire to determine whether a fair and impartial jury could be selected.[53]

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43. 77 AM. JUR. 2D *Venue* § 48.

44. *Id.* § 58.

45. Mitnick, *supra* note 41, at 202.

46. Irvin v. Dowd, 366 U.S. 717, 722 (1961). *See also* Mitnick, *supra* note 41 (analyzing the evolution of juror selection for their personal knowledge to that based upon lack of knowledge of the parties and issues of the case).

47. *Slaubaugh II*, 499 N.W.2d at 106. Section 28-04-05 of the North Dakota Century Code states:

> Actions having venue where defendant resides.
> In all other cases, except as provided in section 28-04-03.1, and subject to the power of the court to change the place of trial as provided by statute, the action must be tried in the county in which the defendant or one of the defendants resides at the time of the commencement of the action . . . .

N.D. CENT. CODE § 28-04-05 (1991).

48. N.D. CENT. CODE § 28-04-05 (1991). *See infra* note 53 (identifying circumstances under which a court may change venue).

49. 246 N.W.2d 484 (N.D. 1976).

50. American State Bank of Dickinson v. Hoffelt, 246 N.W.2d 484, 487 (N.D. 1976). *See also* Bartholomay v. St. Thomas Lumber Co., 124 N.W.2d 481, 485 (N.D. 1963) (stating that this statutory right is not to be "taken away except for good cause shown"). The burden is on the party seeking the change in venue to establish facts which warrant the court making the change. *Id.*; Haugo v. Haaland, 349 N.W.2d 25, 27 (N.D. 1984). A change of venue has been characterized as an "extraordinary remedy." *Basin Electric*, 289 N.W.2d 553, 559 (N.D. 1980)(citing Olson v. North Dakota Dist. Court, Etc., 271 N.W.2d 574, 583 (N.D. 1978)).

51. *See Basin Electric*, 289 N.W.2d at 559 (maintaining use of "extensive voir dire" should help insure the selection of a jury panel which is reasonably free of prejudice).

52. 440 N.W.2d 704 (N.D. 1989).

53. Jerry Harmon Motors, Inc. v. First National Bank & Trust Co., 440 N.W.2d 704, 711 (N.D. 1989). In Knoepfle v. Suko, 114 N.W.2d 54 (N.D. 1962), the supreme court recognized that the question of whether a change of venue is necessary to obtain a fair and impartial trial is a question

In *Jerry Harmon Motors*,[54] the supreme court stated that in a motion for change of venue pursuant to section 28-04-07(2) of the North Dakota Century Code, the "primary consideration" is "whether a fair and impartial trial" is possible in the county.[55] Motions for change of venue on this basis frequently include claims of local prejudice,[56] pretrial publicity,[57] and taxpayer interest.[58] Although prior decisions of the supreme court have not articulated a precise test or rule to follow in assessing whether the quantum of evidence presented is sufficient to establish that a fair and impartial trial can be had in the county, the court will look to whether there is a "reasonable and intelligent basis" for the trial court's decision.[59]

In discussing what would constitute an impartial jury, the United States Supreme Court in *Irvin v. Dowd*[60] stated that a juror need not be "totally ignorant of the facts and issues involved."[61] In *Irvin*, the Supreme Court held that an impartial jury may be had if a juror "can lay aside [his or her] impression or opinion and render a verdict based on the evidence

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which the presiding judge is in a better position to determine, "having knowledge of all of the facts and circumstances of the case." *Knoepfle*, 114 N.W.2d at 56. Section 28-04-07 of the North Dakota Century Code sets forth circumstances when a court may change venue: Court may change venue — Cases. The court may change the place of trial in the following cases:

> 1. When the county designated for that purpose in the complaint is not the proper county.
> 2. When there is reason to believe that an impartial trial cannot be had therein.
> 3. When the convenience of witnesses and the ends of justice would be promoted by the change.
> 4. Where upon the call of the calendar at any regular or special term there appears to be an insufficient number of jury cases for trial to warrant the expense of a jury, the court, on application of any party to such an action, or on its own motion, taking into consideration the convenience of witnesses and the promotion of justice, may order the transfer of such jury cases as are on the calendar to any county within the judicial district where the jury session of court will be held in the immediate future, so that a prompt trial of such cases may be had.

N.D. CENT. CODE § 28-04-07 (1991). The basis for the change of venue in *Slaubaugh II* was to obtain a fair and impartial trial, and thus, this comment will focus on a party's ability to change venue on that basis, pursuant to section 28-04-07(2) of the North Dakota Century Code. *Slaubaugh II*, 499 N.W.2d at 106.

54. 440 N.W.2d 704 (N.D. 1989).

55. *Jerry Harmon Motors*, 440 N.W.2d 704, 711 (N.D. 1989) (affirming trial court order granting motion for change of venue pursuant to section 28-04-07(2) of the North Dakota Century Code). For a review of section 28-04-07(2), see *supra* note 53.

56. 77 AM. JUR. 2D *Venue* § 59.

57. *Id.* § 60.

58. *Id.* § 59.

59. Hanson v. Garwood Industries, 279 N.W.2d 647, 650 (N.D. 1979) (finding that the trial court abused its discretion in changing venue on the basis of a single affidavit which stated an impartial trial could not be had in the county because one of the defendants was a major city in that county). *See also American State Bank*, 246 N.W.2d 484, 486 (N.D. 1976) (stating that moving parties must "affirmatively establish facts" entitling them to a change of venue, and any affidavits in support of the motion must state "specifics" from which a trial court can make its determination); Linington v. McLean County, 150 N.W.2d 239, 240 (N.D. 1967) (stating that the trial court weighs the allegations and contentions of parties in reaching its conclusion).

60. 366 U.S. 717 (1960).

61. Irvin v. Dowd, 366 U.S. 717, 722 (1961).

presented in court."[62] Similarly, the North Dakota Supreme Court has stated that a jury with no prior knowledge may be "ideal to strive for," but it is not absolutely required.[63]

The North Dakota Supreme Court confronted juror impartiality in the context of a motion for change of venue in *Haugo v. Haaland*.[64] The supreme court in *Haugo* held that a mere assertion of the taxpayer status of potential jurors in an action against a municipality is insufficient to obtain a change of venue.[65] As a general proposition, a juror's interest as a taxpayer is not an automatic disqualification from service.[66]

Noting its decision in *Sheridan County v. Davis*,[67] the supreme court in *Haugo* stated that although an individual juror may not be subject to challenge for cause on the basis of his or her taxpayer status, a transfer of a case may be required if it appears that all prospective jurors will have a taxpayer interest adverse to the moving party.[68] Yet, the supreme court has acknowledged that if it were only necessary to assert that prospective jurors were taxpayers, no action could be tried where a municipality was involved as a defendant in the suit.[69] Accordingly, *Haugo* supports the proposition that standing alone, the assertion of a "taxpayer interest" on the part of potential jurors would be an insufficient basis for granting a motion for change of venue.[70] However, where it is one of "several factors" in the decision to grant change of venue, it would not be an abuse of discretion for a trial judge to take it into consideration.[71]

The controlling case in North Dakota using pretrial publicity as a basis for a change of venue is *Olson v. North Dakota District Court*.[72] *Olson* set forth eight factors for determining whether there was a reason-

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62. *Id.* at 723. Although *Irvin* was a criminal case, it is often cited for the same proposition as applied to civil trials. *See* Cummins v. Rachner, 257 N.W.2d 808, 812 (Minn. 1977) (citing *Irvin* language in a wrongful death action); Claxton Poultry Co. v. City of Claxton, 271 S.E.2d 227, 232 (Ga. Ct. App. 1980) (citing *Irvin* language in a negligence action).

63. State v. Olson, 290 N.W.2d 664, 666 (N.D. 1980).

64. 349 N.W.2d 25 (N.D. 1984).

65. Haugo v. Haaland, 349 N.W.2d 25, 28 (N.D. 1984).

66. Sheridan County v. Davis, 240 N.W. 867, 871 (N.D. 1932) (opining that interest as a taxpayer generally does not disqualify a person from serving as a juror in an action against a public corporation); Marshall v. City of Beach, 294 N.W.2d 623, 627 (N.D. 1980) (stating that the statutory provisions on challenges of jurors for cause recognize that a juror is still competent despite a taxpayer interest in the outcome of the suit). *See supra* note 13 (providing text of N.D. CENT. CODE § 28-14-06(5) (1991)).

67. 240 N.W. 867 (N.D. 1932).

68. *Haugo*, 349 N.W.2d at 28.

69. Hanson v. Garwood, 279 N.W.2d at 649 (citing Maier v. City of Ketchikan, 403 P.2d 34 (Alaska 1965)); *Marshall*, 294 N.W.2d 623, 627 (N.D. 1980). *See also Jerry Harmon Motors*, 440 N.W.2d 704, 709 (N.D. 1989) (rejecting the contention that a fair and impartial trial could not be had in the county where potential jurors included a large number of customers with deposits with the defendant, one of the largest banking organizations in the county).

70. *Haugo*, 349 N.W.2d at 28.

71. *Id.*

72. 271 N.W.2d 574 (N.D. 1978).

able likelihood of prejudice resulting from pretrial publicity.[73] Although *Olson* was a criminal case, the supreme court in *Basin Electric Power Coop. v. Boschker* stated that four of the eight *Olson* factors were also relevant in considering a motion for change of venue in a civil action with a similar claim.[74] The factors from *Olson* which the court found pertinent were: (1) whether the pretrial publicity was recent, widespread, or damaging; (2) whether a party or a third person was responsible for the objectionable material; (3) whether any inconvenience to the parties and administration of justice would result by changing venue; and (4) whether a substantially better juror panel could be obtained at another time or place.[75] A "substantially better juror panel" presumably refers to a location which has avoided the effects and influence of the pretrial publicity.[76]

Ultimately, the question in a motion for change of venue based on section 28-04-07(2) of the North Dakota Century Code is "whether or not it is impossible to select a fair and impartial jury."[77] The supreme court has not outlined when it would be impossible to select a fair and impartial jury. Therefore, in making its determination, trial courts can only look for guidance from past decisions on change of venue and those discussing what constitutes a fair and impartial jury.[78]

III. ANALYSIS OF THE OPINION

The decision in *Slaubaugh II* may be viewed as allowing a party unsatisfied with his or her jury panel to seek a change of venue, and an opportunity to get a more favorable panel elsewhere.

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73. Olson v. North Dakota District Court, 271 N.W.2d 574, 580 (N.D. 1978).

74. *Basin Electric*, 289 N.W.2d at 558.

75. *Id.* The four additional factors to consider in a criminal case are: (1) the nature and gravity of the offense; (2) the size of the community; (3) the status of the defendant in the community; (4) the popularity and prominence of the victim(s). *Id.* at n.1 (citing *Olson*, 271 N.W.2d at 580). The supreme court concluded the pretrial publicity in *Basin Electric* was "not nearly as inflammatory nor widespread as in *Olson*." *Id.* In *Olson*, the defendant was charged with the murder of his wife. *Id.* He was further charged with the subsequent murder of a sixteen year-old local girl. There was widespread pretrial publicity consisting of approximately 56 news articles in a span of less than two years concerning the arrest, pretrial proceedings, trial, and sentencing of Olson. *Id.* Furthermore, there was extensive television coverage concerning the two murders. *Id.* Such extensive and widespread coverage created a "substantial and reasonable" likelihood that Olson could not obtain a fair trial in the county. *Id.* The defendants in *Basin Electric* based their motion to change venue on three articles appearing in a magazine which was disseminated primarily to rural electric customers, as well as a letter sent to members of an electric cooperative. *Id.* The supreme court determined that it would be impossible to determine the number of potential jurors who had access to, and actually read these materials. *Id.*

76. *See Olson*, 271 N.W.2d at 582 (stating that venue should be changed to a community which has escaped the influences of the pretrial publicity).

77. *Basin Electric*, 289 N.W.2d at 559. For a review of section 28-04-07(2), see *supra* note 53.

78. *See* notes 64-66 and accompanying text (discussing prior change of venue decisions to obtain a fair and impartial trial). *See also* notes 60-63 and accompanying text (discussing what constitutes an impartial jury).

The court in *Slaubaugh II* held that failure to challenge prospective jurors for cause during voir dire did not waive a party's right to seek a change of venue.[79] A failure to so challenge jurors, however, does waive any objections to their selection as jurors.[80] The court theorized that a broader analysis by the trial court is required when confronted with a claim to change venue to obtain a fair and impartial trial.[81] No authority was cited for this proposition, except the court noted that challenges to individual jurors for cause[82] focused on individual jurors.[83]

The court further stated that a trial court should give weight to the fact that a party did not challenge a prospective juror for cause when deciding a motion for change of venue.[84] Further, if a party's claims of juror impartiality are unsupported by voir dire testimony, the trial court should view the motion "skeptically."[85] A party who believes a motion to change venue was improperly granted can challenge the decision on appeal as an abuse of the trial court discretion.[86]

A further issue which the supreme court addressed in *Slaubaugh II* which it considered to be implicit in defendants' abuse of discretion argument was whether trial courts may look beyond the statutory criteria[87] for removing jurors for cause when considering a change of venue to obtain a fair and impartial trial.[88] The court stated that a determination of whether a fair and impartial trial in a particular county is possible demands analyzing the jury as a whole as well as the place of trial.[89] It reasoned that jury decisions are not "rendered in a vacuum," and that juries, not individual jurors, decide cases.[90] Therefore, the court deduced that although there may not be grounds to remove an individual juror for cause, the sum of individual juror characteristics may justify a change of venue.[91] By implication, this includes factors other than those included in section 28-14-06 of the North Dakota Century Code for challenging individual jurors for cause.[92] Thus, the trial court must be allowed to con-

79. *Slaubaugh II*, 499 N.W.2d at 105.
80. *Id.* (citing Basin Elec. Power Coop. v. Miller, 310 N.W.2d 715, 719 (N.D. 1981)).
81. *Slaubaugh II*, 499 N.W.2d at 105.
82. *Supra* note 13.
83. *Slaubaugh II*, 499 N.W.2d at 105.
84. *Id.*
85. *Id.*
86. *Id.* at 105-106.
87. *See supra* note 13.
88. *Slaubaugh II*, 499 N.W.2d at 106.
89. *Id.* The court observed that challenges for statutory cause focus on the characteristics of individual jurors. *Id.* at 105.
90. *Id.* at 106.
91. *Id.* at 107.
92. *Slaubaugh II*, 499 N.W.2d at 106-107. *See supra* note 13 (reviewing the statutory bases for challenging individual jurors for cause).

sider the "aggregate effect of many factors," even though there may be insufficient grounds to remove a juror for cause.[93]

In rendering this decision, the court identified factors which, standing alone, would be insufficient to justify a change of venue.[94] The court looked at taxpayer interest,[95] "common gossip" (that is, pretrial publicity),[96] and familiarity with counsel.[97] For the first time, the supreme court stated that trial courts could "consider the aggregate effect" of the connections between prospective jurors, witnesses, parties, and counsel in its change of venue determination.

Surrogate Judge Pederson[98] submitted a short dissent. He first drew attention to section 28-04-05 of the North Dakota Century Code,[99] which assures defendants that lawsuits against them will be tried in the county in which they live, subject to the power of the court to change the place of trial as provided in the statute.[100] Prior decisions of the supreme court have recognized that the right of a defendant to be tried in the county of his or her residence is a "significant factor"[101] which should not be "taken away except for good cause shown."[102] The majority opinion did not discuss these decisions. Judge Pederson urged that the exception "should not supersede the purpose of the statute."[103]

Judge Pederson also noted the problem of appellate review of the subjective trial court decision on change of venue under an abuse of discretion standard.[104] He cautioned that ad hoc determinations by a trial judge may allow law to be made out of the judge's "idiosyncrasies."[105]

IV. IMPLICATIONS OF THE DECISION

Judge Pederson's dissent raises several important implications of the decision in *Slaubaugh II*. First, the decision may impact trials in rural North Dakota counties.[106] Of the fifty-three counties in North Dakota, twenty have fewer than 4,000 residents.[107] These figures include all resi-

93. *Id.* at 107.
94. *See id.* at 107 n.7, 108.
95. *Id.* at 106 (discussing *Haugo*, 349 N.W.2d 25, 28 (N.D. 1984)).
96. *Slaubaugh II*, 499 N.W.2d at 106 n.7 (citing State v. Olson, 290 N.W.2d 664 (N.D. 1980)).
97. *Slaubaugh II*, 499 N.W.2d at 106-07.
98. Sitting in place of Neumann, J., disqualified.
99. *Supra* note 47.
100. *Slaubaugh II*, 499 N.W.2d at 107 (Pederson, S.J. dissenting).
101. *American State Bank*, 246 N.W.2d at 487.
102. *Bartholomay*, 124 N.W.2d at 485.
103. *Slaubaugh II*, 499 N.W.2d at 107 (Pederson, S.J. dissenting).
104. *Id.* at 108.
105. *Id.*
106. *Slaubaugh II*, 499 N.W.2d at 107 (Pederson, S.J. dissenting).
107. 1990 CENSUS OF POPULATION, U.S. DEP'T OF COMMERCE, ECONOMICS AND STATISTICS ADMINISTRATION, BUREAU OF THE CENSUS, GENERAL POPULATION CHARACTERISTICS NORTH DAKOTA 1 (1990) [hereinafter 1990 CENSUS].

dents in the county, including minors who would not be competent to be jurors.[108] Thus, the pool from which to draw potential jurors in these counties is relatively small.

The rationale in *Slaubaugh II* suggests that a trial court may "aggregate" factors and consider the "cumulative effect" of connections among potential jurors, litigants, and witnesses.[109] Lawsuits against a county, a major city, or a large business within a small rural county will be particularly vulnerable to a plaintiff's claim that a fair and impartial trial is not possible. For example, a plaintiff may have a taxpayer interest argument in a suit against a county or municipality. Further, there would be an increased likelihood of a *Slaubaugh II* scenario where there were interrelationships and familiarity between the litigants, attorneys, witnesses, and jurors simply because of the limited juror pool from which to select a jury.[110] In light of this, it is difficult to explain the supreme court's earlier statement in *Hanson v. Garwood*,[111] which articulated that a fair trial can be had in a county where a major city is a defendant.[112]

Thus, under *Slaubaugh II*, a trial court will be allowed to consider the "aggregate effect" of many factors when deciding a motion for change of venue under section 28-04-07(2) of the North Dakota Century Code.[113] Although each of these factors, considered alone, may not be sufficient to provide a rational and reasonable basis to change venue, after *Slaubaugh II*, trial courts now may view all factors "as a whole" and may consider the "cumulative effect of the connections" in its determination.[114]

In *State v. Olson*,[115] the supreme court declared that it is not an absolute requirement that a jury have no prior knowledge of the facts surrounding the case.[116] Furthermore, in *State v. McLain*,[117] the court pronounced that "great weight" was to be given to a juror's statement during voir dire that he or she will serve as a fair and impartial juror.[118] The decision in *Slaubaugh II* appears to be contrary to these decisions

108. *Id.*

109. *See Slaubaugh II*, 499 N.W.2d at 106.

110. Consider, for example, the possible interconnections in a small rural county such as Slope, which according to the 1990 Census had a population of 907. 1990 CENSUS, *supra* note 107, at 1.

111. 279 N.W.2d 647 (N.D. 1979).

112. Hanson v. Garwood, 279 N.W.2d 647, 650 (N.D. 1979). The court cited the example of Falkenstein v. City of Bismarck, 268 N.W.2d 787 (N.D. 1978). *Falkenstein* was an action against the Bismarck Police Department for the suicide of plaintiff's son. Falkenstein v. City of Bismarck, 268 N.W.2d 787, 789 (N.D. 1978). A jury rendered a verdict against the City. *Id.*

113. *Slaubaugh II*, 499 N.W.2d at 106. For a review of section 28-04-07(2), see *supra* note 53.

114. *Slaubaugh II*, 499 N.W.2d at 107.

115. 290 N.W.2d 664 (N.D. 1980).

116. State v. Olson, 290 N.W.2d 664, 666 (N.D. 1980).

117. 301 N.W.2d 616 (N.D. 1981).

118. State v. McLain, 301 N.W.2d 616, 622 (N.D. 1981). *See also* State v. Olson, 274 N.W.2d 190, 193 (N.D. 1978) (stating that "the court will not readily discount the assurances of a juror as to his impartiality").

and the court's belief that "jurors in North Dakota have a high regard for the truth, the oath, and our judicial system."[119] In *Slaubaugh II*, the supreme court explicitly rejects this contention: "Our holding does not alter our firm belief that the jurors of North Dakota have a high regard for the truth, the oath, and our judicial system."[120] However, the decision leaves the impression that in less populated counties, jurors may not be trusted to lay aside any biases, impressions, or opinions and render a verdict based on the evidence presented at trial.[121] The North Dakota bar can only wait and see how this decision impacts jury trials in the smaller rural counties.

A related ramification raised by Judge Pederson's dissent is the impact of the decision on the statutory right of defendants to be tried in the county of their residence, subject to a court's power to change venue.[122] The supreme court has previously held that a defendant has an absolute right to have an action tried in the county of his or her residence.[123] Following *Slaubaugh II*, this "absolute right" of a defendant appears to be swallowed up by the exception that the trial court may change the place of the trial pursuant to section 28-04-07 of the North Dakota Century Code.[124] Furthermore, the supreme court has previously recognized that it is not in the public interest to impose jury duty on people in a community which has no relationship with the litigation.[125]

Finally, the abuse of discretion standard of review for grants or denials of motions for change of venue makes the implications of *Slaubaugh II* more troublesome. In these types of cases, the supreme court has generally held that the lower courts did not abuse their discretion when the motions were made on the ground that a fair and impartial trial could not be had in the county in which the action was commenced.[126] However, in

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119. *Basin Electric*, 289 N.W.2d at 559.

120. *Slaubaugh II*, 499 N.W.2d at 107.

121. *See Irvin*, 366 U.S. at 723 (stating that impartial jurors are those which can lay aside impressions or opinions and render a verdict on the evidence presented in court).

122. *Slaubaugh II*, 499 N.W.2d at 107 (Pederson, S.J. dissenting). *See* N.D. CENT. CODE § 28-04-05, *supra* note 47 (quoting the statute).

123. Dorgan v. Mercil, 269 N.W.2d 99, 104 (N.D. 1978)(citing American State Bank v. Hoffelt, 246 N.W.2d 484 (N.D. 1976)); Summers v. Summers, 24 N.W.2d 688, 689 (N.D. 1946); Springer v. Paulson, 9 N.W.2d 440, 442 (N.D. 1943).

124. *See Slaubaugh II*, 499 N.W.2d at 107. For a review of the basis on which a trial court may change venue see section 28-04-07 of the North Dakota Century Code, *supra* note 53.

125. *Hanson*, 279 N.W.2d at 649 (citing *Maier*, 403 P.2d 34, 39-40 (Alaska (1965)). *See also* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947) (stating that "there is a local interest in having localized controversies decided at home").

126. *Jerry Harmon Motors*, 440 N.W.2d at 710. Prior supreme court decisions include: *Haugo*, 349 N.W.2d 25, 29 (N.D. 1984) (affirming change of venue); Marshall v. City of Beach, 294 N.W.2d 623, 628 (N.D. 1980) (affirming denial of change of venue); *Basin Electric Power*, 289 N.W.2d 553, 560 (N.D. 1980) (affirming change of venue); *Linington*, 150 N.W.2d 239, 240 (N.D. 1967) (affirming change of venue); *Knoepfle*, 114 N.W.2d 54, 56 (N.D. 1962) (affirming denial of change of venue); Hovland v. Waller, 98 N.W.2d 893, 895 (N.D. 1959) (affirming change of venue); Brace v. Steele County, 50 N.W.2d 90, 91 (N.D. 1951) (affirming change of venue); Farmers' State Bank of Harvey v.

Hanson v. Garwood,[127] the supreme court did reverse an order granting a plaintiff's motion for change of venue.[128] Nevertheless, *Hanson*[129] is the only case in which the supreme court reversed a trial court's decision to change venue on the basis that a fair and impartial trial could not be had in the county.

A trial court's determination of whether a fair and impartial trial is possible in a county is by nature a subjective determination. Consequently, the "amorphous" abuse of discretion standard of review is difficult for appellate courts to apply consistently.[130]

By way of contrast, in criminal actions the appellate court, when reviewing a change of venue decision, makes "an independent review of the record to determine if a reasonable likelihood of prejudice exists, giving appreciable weight to the trial court's findings of fact. . . ."[131] Such an enhanced standard of review would also give the supreme court the ability to provide some direction to district courts regarding the factors which may properly be considered and the weight that each should be given in a motion for change of venue to obtain a fair and impartial trial. A more meaningful analysis of the appropriateness of trial court evaluations would then be possible. It may also help to alleviate the problem which Judge Pederson characterized as making "law out of every judge's idiosyncrasies."[132]

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Hager, 225 N.W. 128, 129 (N.D. 1929) (affirming change of venue); Kaczor v. Swendseid, 215 N.W. 271, 272 (N.D. 1927) (affirming denial of change of venue); Langer v. Courier News, 186 N.W. 102, 103 (N.D. 1921) (affirming denial of change of venue); Stockwell v. Haigh, 135 N.W. 764, 766 (N.D. 1912) (affirming change of venue); Boeren v. McWilliams, 157 N.W. 117, 119 (N.D. 1916) (affirming denial of change of venue).

127. 279 N.W.2d 647 (N.D. 1979).

128. Hanson v. Garwood, 279 N.W.2d 647, 650 (N.D. 1979). In *Hanson*, the trial court had granted a change of venue based upon a single affidavit stating that an impartial trial could not be had in the county. *Id.* at 649. The supreme court held that this was an abuse of discretion, since the affidavit merely stated an impartial trial could not be had in a county where one of the defendants was a major city in the county. *Id.* at 648, 650.

129. 279 N.W.2d 647 (N.D. 1979).

130. W. Wendell Hall, *Revisiting Standards of Review in Civil Appeals*, 24 ST. MARY'S L.J. 1045, 1051 (1993).

131. Olson v. North Dakota Dist. Court, Etc., 271 N.W.2d 574, 579 (N.D. 1978). The court stated that this standard is "comparable" to "the model outlined by the United States Supreme Court in Sheppard v. Maxwell [384 U.S. 333 (1966)]." *Id.*

132. *Slaubaugh II*, 499 N.W.2d at 108 (Pederson, S.J. dissenting).