

INTERIM JUDICIARY COMMITTEE
Wednesday, April 11, 2012 – 9:00 a.m.

HOUSE BILL NO. 1365 (enacted)
Study of Statutes of Limitation and Venue Requirements

Testimony of:

Larry L. Boschée,
appearing on behalf of the
North Dakota Defense
Lawyers Association

Chairman Nething and Members of the Committee:

My name is Larry Boschée and I am appearing for the North Dakota Defense Lawyers Association. The North Dakota Defense Lawyers Association is a statewide association whose member lawyers are primarily engaged in defending civil lawsuits. The North Dakota Defense Lawyers Association opposes the proposed amendment to the venue statutes. That amendment would require that unless another statute provides otherwise, “[i]f none of the defendants reside in the state, the action must be brought in the county in which the plaintiff resides.”

The proposed amendment to section 28-04-05 of the North Dakota Century Code would violate the Privileges and Immunities Clause of the United States Constitution. U.S. Const. Art. IV, Sec. 2. Under the Privileges and Immunities Clause, “there is a strong constitutional disfavoring of the categorical exclusion of non-resident plaintiffs from a state’s courts under venue statutes when a state resident would be permitted to bring a similar suit.” Morris v. Crown Equip. Corp., 633 S.E.2d 292, 299 (W. Va. 2006).

The proposed amendment would categorically preclude a nonresident from suing a nonresident in North Dakota in situations where a state resident could do so.

Even if this proposed amendment did not violate the Privileges and Immunities Clause, many would conclude that it operates unfairly when the accident happened here, the defendant is a resident of another state, and the plaintiff is also a resident of another state, either never having lived here, or having moved away since the accident.

The residence of a corporation is its principal place of business. City of Granville v. Kovash, 96 N.W.2d 168, 169 (N.D. 1959). Many corporations do business in North Dakota, but have their principal place of business in other states.

Assume that an oil and gas drilling company with its principal place of business in Texas causes disabling injuries to a North Dakotan in North Dakota. All the witnesses to the accident live in North Dakota. The drilling company is registered to do business only in Texas and North Dakota, and does business only in those two states. After the accident, the injured party moves to Moorhead, Minnesota to live with his children. The drilling company is not located in Minnesota, is not registered to do business there, and does not conduct any activities there.

Under these facts, the injured party could not sue the drilling company in Minnesota because a Minnesota court would not have personal jurisdiction over the drilling company. Personal jurisdiction is the power of a court to determine a matter involving a particular person or entity. 16 James W. Moore, Moore's Federal Practice §108.02[1] (2012). In general, for a court of a state to have personal jurisdiction over a nonresident person or entity, that person or entity must have continuous and systematic

activities in the state or have directed some activity toward the state out of which the lawsuit has arisen. Beaudoin v. South Texas Blood & Tissue Ctr., 2005 ND 120, ¶ 9-12, 699 N.W.2d 421. Additionally, some courts hold that personal jurisdiction exists over a defendant when that defendant has registered to do business in the state, and has appointed an agent for service of process there. E.g., Sondergard v. Miles, Inc., 985 F.2d 1389, 1396-97 (8th Cir. 1993); Bane v. Netlink, Inc., 925 F.2d 637, 641 (3d Cir. 1991).

A North Dakota court would have personal jurisdiction over the drilling company for the injured person's lawsuit. The drilling company directed activities toward North Dakota out of which the injured party's lawsuit arose. Under current North Dakota venue law, the injured person could sue here. With the proposed amendment, however, the injured person could not sue here, even though the accident happened here and all the witnesses live here. He would be limited to suing in Texas, a far away state, where no witness lives.

Finally, the amendment would also encourage tenuous lawsuits against local persons or entities to defeat dismissal. A nonresident plaintiff could sue here under the proposed amendment if that plaintiff were to name a local person or entity as a defendant. A nonresident plaintiff wanting to sue here to take advantage of the state's longer statute of limitations would look for any reason to sue a North Dakotan or a North Dakota company.

The best way to eliminate forum shopping by out-of-state plaintiffs is to have a limitation period that is similar to what most other states have. Additionally, changes to the venue statutes would not address two fundamental matters that a shorter statute of

limitations would address: (1) preventing stale claims and (2) bringing North Dakota into the mainstream.