

TESTIMONY OF REP. LAWRENCE R. KLEMIN
BEFORE THE INTERIM JUDICIARY COMMITTEE
ON VENUE BILL 13.0056.03000 (THIRD DRAFT)
OCTOBER 11, 2012

I am Lawrence R. Klemin, Representative from District 47 in Bismarck. I am appearing before you today in support of the venue bill that this Committee has been studying.

The proposed amendment to Section 28-04-05, relating to venue, applies only after all of the other venue provisions have been found to be inapplicable. If none of the defendants reside in North Dakota, then the venue for the action is in the county in which the plaintiff, or one of the plaintiffs, resides, or in the county in which the cause of action arose. This venue requirement applies equally to both resident and nonresident plaintiffs and will prevent forum shopping by both resident plaintiffs and nonresident plaintiffs.

The proposed amendment to Section 28-04-05 will only deny access to the courts of the State of North Dakota in those situations where:

1. None of the plaintiffs are residents of this state;
2. None of the defendants are residents of this state;**and**
3. The cause of action did not arise in this state.

In other words, only in those cases where there is no connection to the State of North Dakota would a plaintiff be precluded from using the North Dakota state courts. In such a case, a nonresident plaintiff suing a nonresident defendant in a North Dakota state court concerning a cause of action that did not arise in North Dakota would have to challenge the venue statute as unconstitutional in order to be able to use the North Dakota state courts for the lawsuit. Even then, other principles of law, such as jurisdiction or inconvenient forum, may apply to preclude litigation in North Dakota. If there is no connection of the case to North Dakota, then why should the taxpayers of North Dakota be required to bear the cost to the judicial system of such litigation? Our judicial system is overworked and understaffed. Our courts should not be burdened by litigation from nonresident plaintiffs against nonresident defendants for causes of action that did not arise here.

It has been asserted that the proposed amendment to Section 28-04-05 would be unconstitutional because it would violate the Privileges and Immunities Clause contained in Article IV, Section 2, of the U.S. Constitution. I disagree.

The North Dakota Supreme Court has held that all regularly enacted statutes carry a strong presumption of constitutionality, which is conclusive unless the party challenging the statute clearly demonstrates that it contravenes the state or federal constitution. *Olson v. Bismarck Parks and Recreation Dist.*, 2002 ND 61, P11, 642 N.W.2d 864.

The justice, wisdom, necessity, utility and expediency of legislation are questions for legislative, and not for judicial determination. *Manikowske v. North Dakota Workmen's Comp. Bureau*, 338 N.W.2d 823, 825 (N.D. 1983) (quoting *Asbury Hosp. v. Cass County*, 72 N.D. 359, 7 N.W.2d 438, 442 Syllabus P11 (1943)). The Supreme Court exercises the power to declare legislation unconstitutional with great restraint. *MCI Telecomms. Corp. v. Heitkamp*, 523 N.W.2d 548, 552 (N.D. 1994). Under Article VI, Section 2 of the North Dakota Constitution, the Supreme Court "shall not declare a legislative enactment unconstitutional unless at least four of the members of the court so decide."

In *Law v. Maercklein*, 292 N.W.2d 86, 90-91 (N.D. 1980), a case challenging the constitutionality of a residency requirement in order for a plaintiff to participate in the North Dakota Unsatisfied Judgment Fund, the North Dakota Supreme Court stated:

We next consider Mrs. Law's challenge to the constitutionality of this requirement. In considering a constitutional challenge to a statute, it is presumed that an enactment of the Legislature is constitutional and that such presumption is conclusive unless the Act is clearly shown to be in contravention of the State or Federal Constitution. Where the Act is regularly enacted by the Legislature, the only test of its validity is whether or not it violates either the State or Federal Constitution. *Gableman v. Hjelle*, 224 N.W.2d 379 (N.D. 1974); *Souris River Telephone Mutual Aid Corp. v. State*, 162 N.W.2d 685 (N.D. 1968).

In *Benson v. Schneider*, *supra*, this court upheld the constitutionality of the residency requirement, stating:

"Chapter 39-17, NDRC 1953 Supp. which confines to residents of North Dakota the right to participate in the fund is not by reason of such limitation unconstitutional and violative of plaintiff's right to participate in the fund by reason of the provision of the federal constitution that citizens of each state shall be entitled to all privileges and immunities of citizens in several states or the constitutional requirements of the equal protection of the laws." 68 N.W.2d at 670. We reaffirm that holding and apply it here.

Article IV, Section 2, of the United States Constitution provides, in part:

"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

This provision does not require that the rights of nonresidents at all times equal those of the residents of a State. *Benson v. Schneider*, *supra*. As noted by the United States Supreme Court in *Baldwin v. Montana Fish and Game Commission*, 436 U.S. 371, 98 S. Ct. 1852, 56 L. Ed. 2d 354 (1978):

"When the Privileges and Immunities Clause has been applied to specific cases, it has been interpreted to prevent a State from imposing

unreasonable burdens on citizens of other States in their pursuit of common callings within the State, *Ward v. Maryland*, 12 Wall. 418 [79 U.S. 418, 20 L. Ed. 449] (1870); in the ownership and disposition of privately held property within the State, *Blake v. McClung*, 172 U.S. 239 [43 L. Ed. 432, 19 S. Ct. 165] (1898); and in access to the courts of the State, *Canadian Northern R. Co. v. Eggen*, 252 U.S. 553 [64 L. Ed. 713, 40 S. Ct. 402] (1920). "It has not been suggested, however, that state citizenship or residency may never be used by a State to distinguish among persons. Suffrage, for example, always has been understood to be tied to an individual's identification with a particular State. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330 [92 S. Ct. 995, 31 L. Ed. 2d 274] (1972). No one would suggest that the Privileges and Immunities Clause requires a State to open its polls to a person who declines to assert that the State is the only one where he claims a right to vote. The same is true as to qualification for an elective office of the State. *Kanapaux v. Ellis*, 419 U.S. 891 [95 S. Ct. 169, 42 L. Ed. 2d 136] (1974); *Chimento v. Stark*, 353 F. Supp. 1211 (NH), *aff'd*, 414 U.S. 802 [94 S. Ct. 125, 38 L. Ed. 2d 39] (1973). Nor must a State always apply all its laws or all its services equally to anyone, resident or nonresident, who may request it so to do. *Canadian Northern R. Co. v. Eggen*, *supra* cf. *Sosna v. Iowa*, 419 U.S. 393 [95 S. Ct. 553, 42 L. Ed. 2d 532] (1975); *Shapiro v. Thompson*, 394 U.S. 618 [89 S. Ct. 1322, 22 L. Ed. 2d 600] (1969). Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single union of those States. Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally." 436 U.S. at 383, 98 S. Ct. at 1859-1860, 56 L. Ed. 2d at 364-365.

The authority given for the proposition that the amendment to Section 28-04-05 would be unconstitutional is the West Virginia state court case of *Morris v. Crown Equip. Corp.*, 633 S.E. 2d 292 (W.Va. 2006). A copy of that case has been provided to Committee counsel for inclusion in the record. If any of you would like a copy, I would be happy to email it to you. In the *Morris* case, an injured forklift operator, a citizen and resident of Virginia, brought an action in a West Virginia state court against a West Virginia forklift seller and an Ohio forklift manufacturer. The West Virginia Court of Appeals upheld the West Virginia venue statute as constitutional under the Privileges and Immunities clause. The West Virginia venue statute did not bar a nonresident plaintiff from suing a West Virginia defendant and an Ohio defendant in the West Virginia courts. West Virginia follows the "venue-giving defendant principle", whereby once venue is proper for one defendant, it is proper for all other defendants subject to process.

If the facts in the *Morris* case were applied to the North Dakota venue statute, the North Dakota law would also be upheld as constitutional. In addition, the West Virginia Court of Appeals, in both the majority opinion, in the dissenting opinions, and in the concurring opinion, gave several examples and citations to decisions of the United States Supreme

Court where discriminatory treatment of nonresidents was upheld under the Privileges and Immunities clause. Some of those citations are the same as those that the North Dakota Supreme Court referred to in the *Law v. Maercklein* case that I cited above.

North Dakota Section 28-04-05 also follows the "venue-giving defendant principle" in that the action must be brought in the county in which the defendant, *or one of the defendants*, resides at the time of the commencement of the action. This is the existing law and is not changed by the venue bill. The only change is that if none of the defendants reside in North Dakota, then the action can't be brought in North Dakota by a nonresident plaintiff unless the cause of action arose here. The amendment to Section 28-04-05 would also create a "venue-giving *plaintiff* principle" in that if venue is appropriate for one plaintiff in an action, it is also appropriate for all co-plaintiffs, regardless of their residency. The amendment provides that the action must be brought in the county in which the plaintiff, *or one of the plaintiffs*, resides, or in the county in which the cause of action arose.

A test for constitutionality under the Privileges and Immunities clause is whether there is a rational basis for the differing treatment of residents and nonresidents. In addition, has that basis been considered by the Legislature in enacting the law?

There is a rational basis for the differing treatment of nonresident plaintiffs who have no connection to North Dakota. The North Dakota courts are stressed at the present time by the amount of litigation, in both civil and criminal cases, as a result of the economic activity and population increase in North Dakota. Caseloads are increasing substantially. This is evidenced by the Justice System Energy Impact Task Force Report dated August 16, 2012, which was sponsored by the State Bar Association of North Dakota (SBAND). The Task Force concluded that there is a growing need for additional judges and other court personnel in the judicial districts of North Dakota, particularly in the western half of North Dakota. The SBAND Task Force also found that there is a need for additional judges in non-energy impact parts of the state, such as in Cass County. A copy of the report has been provided to Committee counsel for inclusion in the record. I understand that a copy of the report has been sent to all members of the Legislature by SBAND. It is also available on the SBAND website.

Consequently, there are valid reasons for amendment of the venue statute in North Dakota: to prevent forum shopping by both resident and nonresident plaintiffs when none of the defendants reside in this state, and to prevent our already over-burdened courts from becoming even more over-burdened by out-of-state cases that have no connection to North Dakota. The venue amendment to Section 28-04-05 will accomplish that objective without violating the Privileges and Immunities clause of the United States Constitution.

This Committee should recommend to Legislative Management that the venue bill be introduced for consideration in the 2013 Legislative Session.

Rep. Lawrence R. Klemin
District 47, Eismarck, ND

Table 53**North Dakota****2012 Overall Ranking: 8****Ratings on Key Elements of State Liability Systems (n=52)**

		"A"	"B"	"C"	"D"	"F"	Mean Grade	Ranking Within Element
Having and Enforcing Meaningful Venue Requirements	%	20	36	25	5	4	3.7	28
Overall Treatment of Tort and Contract Litigation	%	20	47	16	9	2	3.8	8
Treatment of Class Action Suits and Mass Consolidation Suits	%	13	22	18	7	7	3.4	29
Damages	%	25	35	25	*	4	3.9	4
Timeliness of Summary Judgment or Dismissal	%	20	42	24	4	4	3.8	6
Discovery	%	18	42	29	5	*	3.8	9
Scientific and Technical Evidence	%	22	29	22	2	4	3.8	9
Judges' Impartiality	%	33	38	18	5	*	4.0	2
Judges' Competence	%	27	36	25	5	*	3.9	6
Juries' Fairness	%	13	44	20	5	*	3.8	11
Overall State Grade	%	15	47	29	7	*	3.7	16