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CHANGE OF VENUE IN COVID-19 “HOT SPOTS”:

CAN CORONAVIRUS RELATED LAWSUITS GET FAIR
TRIALS IN LOCATIONS HIT HARDEST BY THE
DISEASE?

*Marc Consalo*¹

I. INTRODUCTION

As our country struggles with returning to normalcy after the difficulties inflicted by the novel coronavirus, COVID-19, lawsuits are beginning to originate throughout the fifty states, at least in part, from repercussions associated with the outbreak. With companies just starting to reopen their doors, some experts believe that tort lawyers are readying clients to file lawsuits claiming lost wages and medical costs associated

¹ Marc Consalo is an associate lecturer at the University of Central Florida in the College of Community Innovation and Education. In the legal studies department, he has taught a variety of classes including trial advocacy and advanced trial advocacy as well as assisted with both the school’s moot court program and mock trial team. He earned his J.D. with Honors from the University of Florida College of Law and his LL.M. with distinction from Stetson Law School in trial advocacy.

with contracting the disease while in a person's employment.² The possibility of wrongful death lawsuits initiating from the cruise ship industry is a valid concern as well. Indeed, an April 23, 2020, *Miami Herald* article reported at least seventy-six deaths related to the industry.³ The list of potential cases is endless. There are nursing home industry fatalities; employment issues for back pay; commercial real estate leases broken by once-profitable companies; and criminal charges for breaking stay-at-home orders. The list goes on and on.

Ultimately, should these cases be brought to trial, jurors will decide their fate. But, as with any proceeding, the parties' ability to obtain a fair trial is paramount. Many mechanisms have been put in place to guarantee this protection. One in particular is the use of change of venue requests. Lawyers who believe that it is impossible to select a fair jury from a particular location may seek this unusual remedy hoping to have their case transferred to a different locale to ensure fairness and impartiality. Typically, these requests are made in high profile cases when an overabundance of media attention has tainted the jury pool. But other examples also exist. Changes of venue have occurred either because a party employed several individuals in a town, or a community was significantly impacted by a defendant's misdeeds.

This article attempts to determine the validity of change of venue requests for COVID-19 related cases in "hot spots" where the disease has been extremely prevalent or deadly. The hypothesis is that these locations will have a greater potential for jurors to be tainted because it will be unlikely that enough potential jurors will be affected from the repercussions of the disease. It will begin by tracing the history of change of venue motions to determine the rationale behind their use. Next, examples will be provided of successful and unsuccessful change of venue requests to determine how the courts will decide when the remedy is appropriate versus when it is not.

² Amanda Bronstad, *As Businesses Reopen, Lawsuits Loom Over COVID-19 Exposure*, LAW.COM (May 1, 2020, 10:00 AM), <https://www.law.com/2020/05/01/as-businesses-reopen-lawsuits-loom-over-covid-19-exposure/>.

³ Sarah Blaskey, *et al.*, *COVID-19 Cruises, How Many Coronavirus Cases Have Been Linked to Cruises? Check Out the Latest Numbers*, MIAMI HERALD (April 23, 2020, 12:01 PM, UPDATED May 15, 2020, 02:31 PM), <https://www.miamiherald.com/news/business/tourism-cruises/article241914096.html>.

Based on this analysis, the article will then attempt to predict the general likelihood that these requests will be successful in COVID-19 related cases.

The document's ultimate goal is to provide guidance on if and how these challenges should be made. As of the writing of this article, the United States is approaching nearly five million confirmed cases of the disease.⁴ It is predicted that by December, 2020, our country will see three hundred thousand Americans lose their lives because of the illness.⁵ At its peak, the unemployment rate hit 14.7%--numbers not seen since the Great Depression.⁶ There is no doubt that COVID-19 has infiltrated every part of society. Most courts have been closed for months, and as such, they have halted the filing of new claims. But the keys to the courthouse cannot be withheld forever. It is only a matter of time before the flood gates open.

II. HISTORY BEHIND CHANGE OF VENUE

The right to a fair and impartial jury in a specific venue is fundamental to our country's jurisprudence. The protection is guaranteed to every litigant by the Federal Constitution. For instance, the Sixth Amendment to the United States Constitution states, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed"⁷ The privilege is extended to certain civil cases by the Seventh Amendment.⁸ And while an argument can be made that these rights have been extended to state proceedings through the Fourteenth Amendment, many states have taken it

⁴ CDC COVID-19 DATA TRACKER, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last visited Oct. 6, 2020).

⁵ Cecilia Smith-Schoenwalder, *Key Model Predicts Nearly 300,000 Coronavirus Deaths by December*, U.S. NEWS AND WORLD REPORTS (Aug. 6, 2020, 3:27 PM), <https://www.usnews.com/news/health-news/articles/2020-08-06/key-model-predicts-nearly-300-000-coronavirus-deaths-by-december>.

⁶ THE EMPLOYMENT SITUATION – AUGUST 2020, <https://www.bls.gov/news.release/pdf/empsit.pdf> (last visited Oct. 6, 2020).

⁷ U.S.CONST. amend. VI.

⁸ U.S.CONST. amend. VII.

upon themselves to assert similar guarantees in their state constitutions.⁹

In Florida, for instance, the right to a specific venue and an impartial jury in criminal cases can be found in Article I Section 16.¹⁰ The text of the document states that all criminal defendants will be tried by a fair jury,

. . . in the county where the crime was committed. If the county is not known, the indictment or information may charge venue in two or more counties conjunctively and proof that the crime was committed in that area shall be sufficient; but before pleading the accused may elect in which of those counties the trial will take place. Venue for prosecution of crimes committed beyond the boundaries of the state shall be fixed by law.¹¹

Section 22 of the Florida Constitution also grants this same right to litigants in civil cases.¹² However, Florida is not alone in extending this privilege to its citizens. In Maine, the state constitution employs the word “vicinity” in defining where an impartial jury should be selected from.¹³ Other states such as Montana and Minnesota utilize the word “district” in characterizing venue.¹⁴ And, in West Virginia, the term “vicinage” is applied.¹⁵

Some states go to great pains to recognize the relationship between venue and a fair jury.¹⁶ The Alabama Constitution, for example, explicitly safeguards the connection between the two concepts.¹⁷ Specifically, the section regarding due process in the state constitution reads:

[T]he legislature may, by a general law, provide for a change of venue at the instance of the

⁹ U.S.CONST. amend. XIV.

¹⁰ FLA. CONST. art I. § 16.

¹¹ *Id.*

¹² FLA. CONST. art I. § 22.

¹³ ME. CONST. art I. § 6.

¹⁴ MONT. CONST. art. II. § 24; MINN. CONST. art. I. § 6.

¹⁵ W.VA. CONST. art 1. § 8.

¹⁶ ALA. CONST. art. I. § 6.

¹⁷ *Id.*

defendant in all prosecutions by indictment, and such change of venue, on application of the defendant, may be heard and determined without the personal presence of the defendant so applying therefor; provided, that at the time of the application for the change of venue¹⁸

The Arkansas Constitution also acknowledges the interplay between the two concepts by specifically mentioning a defendant's right to change venue to receive a fair trial in Article II.¹⁹

One of the earliest notations regarding the importance of venue and a fair jury can be found in England from 1856 when their Parliament passed a law known as the Central Criminal Court Act.²⁰ This was later called the Palmer Act after the notorious defendant in the case, Dr. William Palmer.²¹ In 1855, Dr. Palmer, also known as the "Prince of Poisoners," was tried for the murder of his friend, John Cook.²² Allegations against the doctor focused on the victim being poisoned by strychnine.²³

Before the trial occurred, Palmer raised a concern that he could not be tried by an impartial jury in the town of Staffordshire, where the murder had occurred.²⁴ The case had received a high degree of notoriety in the press and newspapers.²⁵ At one point, it was reported that Palmer's wife and four children had previously died under mysterious circumstances from poisoning.²⁶ In response to his concern, the English Parliament passed a law that allowed any crime committed outside of London to be tried at the Old Bailey

¹⁸ *Id.*

¹⁹ ARK. CONST. art. II § 10.

²⁰ Noah Feldman, *Can Boston Strong be Boston Fair?*, *LOWELL SUN* (Jan. 11, 2015),

<https://advance.lexis.com/api/document?collection=news&id=urn:contentItem:5F23-36H1-DYT4-V08M-00000-00&context=1516831>.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

Courthouse,²⁷ which had served as London's central criminal courthouse since 1674.²⁸

Ultimately, Palmer was convicted and then later executed.²⁹ But the infamy of the proceeding drew attention from the United States.³⁰ Initially, the British decision was met with trepidation.³¹ The phrase "wherein the crime shall have been committed," found in the Sixth Amendment, was a direct response to a worry that a powerful central government would unfairly try people away from their homes.³² Yet, as time progressed, Americans began to see the value of the Palmer Act in ensuring fundamental fairness.³³

One of the earliest United States Supreme Court cases mentioning the concept of change of venue was the case of *Cook v. Burley*, 78 U.S. 659 (1867).³⁴ While the case itself does not center on the issue of change of venue, comments made by the trial judge regarding the defendant's concern over an inability to obtain a fair and impartial trial can be found in dicta.³⁵ The case involved a land deal in Texas between two parties.³⁶ Both litigants alleged title to the same plot of land, which was approximately three-hundred acres in size.³⁷

Shortly before trial, the defendant requested a change of venue as he felt that he could not receive a fair trial in the current locale.³⁸ In part, his concern was based on comments that the trial judge had made in a publication about the defendant before the start of the trial.³⁹ The Court ultimately

²⁷ Available at

<https://www.oldbaileyonline.org/static/Punishment.jsp> (last visited on Oct. 12, 2020)

²⁸ Old Bailey Online, <https://www.oldbaileyonline.org> (last visited Oct. 6, 2020).

²⁹ Feldman, *supra* note 20.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Cook v. Burley*, 78 U.S. 659, 660 (1867).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

refused the request, and the denial was later affirmed by the United States Supreme Court.⁴⁰

Yet, the opinion itself references a March 3, 1821, act referring to change of venue.⁴¹ The act stated:

'in all suits and actions in any District Court of the United States in which it shall appear that the judge of such court is in any way concerned in interest or has been of counsel for either party, or is so related or connected with either party as to render it improper for him, in his opinion, to sit on the trial of such suit or action, it shall be his duty, on application of either party, to cause the fact to be entered on the records of the court, and also an order certifying the case for trial⁴²

While the use of venue was clearly focused on judicial recusal rather than location, the ultimate result was the same because of a lack of judicial officers. The need for an impartial magistrate, and therein a fair trial, clearly necessitated a transfer to a new location.

Article III of the United States Constitution is often considered the ultimate authority on venue for purposes of criminal cases.⁴³ The text of the document specifically requires that an individual be tried for crimes "where said crimes shall have been committed."⁴⁴ It goes on to indicate that, if the locale of the crime cannot be determined, ultimate authority rests with Congress to prescribe a location for a trial to occur.⁴⁵

To further this goal in civil cases, the Federal Government passed Title 28 of the United States Code Section 1404, which guides changes of venue in civil cases.⁴⁶ The rule grants authority to the presiding judge to transfer jurisdiction of a civil matter to any other "district" or "division" that it may

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 660-61.

⁴³ U.S.CONST. art. III.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ 28 U.S.C. § 1404 (2019).

have originally been filed in.⁴⁷ It further permits, by mutual consent of the parties, a transfer of location to any venue.⁴⁸

Under this section of the U.S. Code, the idea of transferring venue should be based upon the need for a matter to be resolved justly.⁴⁹ This can be seen in the case of *Emerson Electric Company v. Black and Decker Manufacturing Company*, 606 F.2d 234, 241 (8th Cir. 1979).⁵⁰ The case revolved around a patent that had been originally issued to a Mr. Ronald Hickman on October 26, 1971.⁵¹ Two years later, Mr. Hickman chose to assign the patent to a company called Inventec.⁵² Soon after, Inventec granted a license to a second company called Limited, who then provided a sublease to Black and Decker.⁵³ The patent itself applied to a specific type of workbench originally invented by Mr. Hickman.⁵⁴ The product was trademarked as the "Workmate."⁵⁵

In December of 1975, Limited and Inventec filed a lawsuit against a manufacturing company located in Milwaukee, Wisconsin, by the name of Hemepe.⁵⁶ The lawsuit arose from an allegation that Hemepe was infringing on Hickman's original patent by selling a similar product trademarked the "Porta Bench" to Sears.⁵⁷ The parties were able to resolve the matter relatively quickly with a consent judgment, which initially seemed to put the matter to rest.⁵⁸ However, approximately three years later in July, 1978, Sears began to purchase a new type of portable workbench from a different company called Emerson.⁵⁹ This product was called the "Work Buddy."⁶⁰

⁴⁷ 28 U.S.C. § 1404(a) (2019).

⁴⁸ 28 U.S.C. § 1404(b) (2019).

⁴⁹ *Emerson Elec. Co. v. Black & Decker Mfg. Co.*, 606 F.2d 234, 241 (8th Cir. 1979).

⁵⁰ *Id.*

⁵¹ *Id.* at 236.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

Approximately one month into the relationship, Inventec sued Sears for patent infringement. The lawsuit was brought in Federal District Court in Maryland.⁶¹ Venue was chosen because Inventec's main office, legal counsel, and patent records were housed in that state.⁶² Sears was defended by Emerson because of a contractual agreement between the two companies.⁶³

In response, Emerson filed its own lawsuit.⁶⁴ This case charged Inventec, Limited, Black and Decker, and Hickman as defendants in an action to declare the initial patent for the "Workmate" invalid.⁶⁵ In the alternative, it sought to distinguish the "Work Buddy" from the "Workmate" so as to find no patent or trademark violation.⁶⁶ This subsequent case was filed in Missouri.⁶⁷ Similarly to Inventec's choice to file in Maryland, venue was chosen based on Emerson's ties to the state.⁶⁸ Emerson then moved for a temporary restraining order and injunction against proceeding in the Maryland case.⁶⁹ Black and Decker responded by requesting that the Missouri case be stayed until the original lawsuit was resolved or, in the alternative, transferring the Missouri lawsuit to Maryland.⁷⁰ Black and Decker cited United States Code Section 1404 as authority for the court to be able to grant the request.⁷¹ The other defendants in the Missouri case moved to dismiss the case entirely for lack of personal jurisdiction.⁷²

The trial judge granted the motions to dismiss.⁷³ The decision was based on the defendants having few if any contacts to the state of Missouri.⁷⁴ The judge further granted Black and Decker's Motion to Transfer.⁷⁵ In coming to this

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

conclusion, the court found that Black and Decker had “sufficient” motives for suing Sears (Emerson) and that “convenience factors” did not support the Missouri lawsuit.⁷⁶ Emerson appealed.⁷⁷

Affirming the lower court’s decision, the appellate court provided guidance on how venue transfers should occur.⁷⁸ It started by expounding on the general federal venue rule.⁷⁹ This rule can be found in Title 28 of the United States Code Section 1391.⁸⁰ The code focuses on the defendant’s ties to the location.⁸¹ Section (b) of the states that venue is proper so long as “all defendants” are residents of the locale.⁸² Venue can also rest in a place where the actions that necessitated the lawsuit occur.⁸³ Corporations are found to have residency if their “principal place of business” is in a specific district.⁸⁴

The *Emerson* court ultimately sided with Black and Decker because, as a defendant, it could have originally been sued in Maryland because of its ties to the state.⁸⁵ In reaching its decision, the Eighth Circuit noted that it was not Emerson’s ties to the venue that mattered as the plaintiff but Black and Decker’s ties as the defendant that were germane. “What counts under s 1391 is that the Defendant here, B&D (Black and Decker), could have been sued in Maryland.”⁸⁶ There was no other appropriate outcome but to permit the transfer.

Emerson clearly illustrates one of the most fundamental principles as it comes to venue in civil cases. Venue is a protection for defendants in lawsuits. This concept directly relates back to the concern our forefathers had when forming our country; that was that they specifically did not want Americans to be tried in a difficult locale which could prevent citizens in any way from being able to exercise their rights due

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 238.

⁷⁹ *Id.*

⁸⁰ 28 U.S.C. § 1391 (1979).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 240.

⁸⁶ *Id.*

to inconvenience or hardship.⁸⁷ If a party was going to sue someone, it had to occur in a venue that provided the defendant the utmost chance of being able to avail themselves of the abilities needed to defend the lawsuit appropriately.

Federal Rule of Criminal Procedure 18 provides further guidance regarding this idea in criminal cases.⁸⁸ It reads, "[u]nless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed."⁸⁹ The rationale for the rule is provided within the text of the document itself.⁹⁰ Specifically, Congress requires such a venue restriction for the ease of the defendant, victims, or other witnesses in the matter.⁹¹ However, if the court concludes that a "great" prejudice against the defendant exists, a change of venue may occur.⁹² Under Federal Rule of Criminal Procedure 21, a judge must grant a transfer if the defendant is unable to obtain a fair and impartial jury in the location where a case is to be tried.⁹³

Interestingly, it was not until 1944 that such an exception was created.⁹⁴ According to the committee notes for the 1944 amendments to the rule, most lawyers did not know that there was no authority to change venue based upon bias in the jury composition.⁹⁵

'Lawyers not thoroughly familiar with Federal practice are somewhat astounded to learn that they may not move for a change of venue, even if they are able to demonstrate that public feeling in the vicinity of the crime may render impossible a fair and impartial trial. This seems

⁸⁷ Available at <https://knowledge.wharton.upenn.edu/article/colonial-complaints-u-s-founding-fathers-wanted-activist-government/> (last visited on Oct. 12, 2020).

⁸⁸ Fed. R. Crim. P. 18.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Fed. R. Crim. P. 21(a) (2020).

⁹³ *Id.*

⁹⁴ *See id.*

⁹⁵ Fed. R. Crim. P. 21 advisory committee's note (1944).

to be a defect in the federal law, which the proposed rules would cure.⁹⁶

But in 1970, the Supreme Court of the United States proclaimed the importance of an unbiased venue in the case of *Groppi v. Wisconsin*, 400 U.S. 505 (1971).⁹⁷ In *Groppi*, the Court considered a Wisconsin law that prevented a change of venue request made by a defendant in all misdemeanor level cases even if an unbiased jury in the case could not be selected.⁹⁸ Father Groppi was a Catholic priest who had participated in a form of civil disobedience during a protest.⁹⁹ He was officially charged by law enforcement with resisting arrest.¹⁰⁰ Eventually, his case was tried before a jury in Milwaukee County, Wisconsin.¹⁰¹ However, this was over the objection of the defendant who moved to change venue arguing an impartial jury could not be selected.¹⁰² In his motion, Father Grupper's attorney asked the court to take judicial notice of "the massive coverage by all news media in this community of the activities of this defendant."¹⁰³ The trial court denied the objection, finding that change of venue requests for misdemeanors were strictly forbidden under Wisconsin law.¹⁰⁴

The statute in question was Wisconsin Statute Section 956.03. Subsection 3 of the statute read:

If a defendant who is charged with a felony files his affidavit that an impartial trial cannot be had in the county, the court may change the venue of the action to (any county where an impartial trial can be had). Only one change may be granted under this subsection.¹⁰⁵

⁹⁶ Homer Cummings, 29 A.B.A. JOUR. 655; Medalie, 4 Lawyers Guild R. (3)1, 5.

⁹⁷ *Groppi v. Wis.*, 400 U.S. 505, 512 (1971).

⁹⁸ *Id.* at 506.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ WIS. STAT. SECT. 956.03(3) (1967).

As the statute specifically applied to defendants charged with "felonies," the Wisconsin Supreme Court affirmed the trial court's decision to deny the request.¹⁰⁶ In reaching this conclusion, the Wisconsin court discerned that it would be rather unusual for a jury pool to have preconceived notions about a defendant in a misdemeanor case as the stakes were so low for such a crime.¹⁰⁷ It also believed that other safeguards were in place to get a fair trial, such as continuances and strikes to improper jurors.¹⁰⁸

The Supreme Court of the United States disagreed and found the statute invalid.¹⁰⁹ In making this decision, the Court emphasized the importance of a citizen's right to a fair trial provided in the Sixth Amendment and enforced in state prosecutions by the Fourteenth Amendment.¹¹⁰ In writing the opinion, the justices relied heavily on a case the Court had encountered ten years prior.¹¹¹ There, an Indiana death row inmate challenged his conviction and sentence through a habeas corpus petition.¹¹² He argued that his second change of venue request was improperly denied because the new venue was still composed of biased jurors because the publicity surrounding the crimes bled into neighboring counties.¹¹³ His request was denied because the Indiana statute permitted only one change of venue request not two.¹¹⁴ However, the United States Supreme Court rejected the statute finding that the constitutional right to a fair trial trumps the requirement to be tried in the location where the crime occurred.¹¹⁵ While it may be inconvenient or burdensome to the prosecution and witnesses, "the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process."¹¹⁶

¹⁰⁶ *Groppi*, 400 U.S. at 506.

¹⁰⁷ *Id.* at 507.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 508.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Irvin v. Dowd*, 366 U.S. 717, 718 (1961).

¹¹³ *Id.* at 721.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 722.

Therefore, in *Groppi*, the Court faced a similar issue.¹¹⁷ However, instead of a law permitting only one change of venue, this law permitted no change of venue in minor cases.¹¹⁸ While the Court agreed with the Wisconsin Supreme Court that the chances of a jury pool being tainted in a misdemeanor trial were questionable, a defendant must nevertheless be given an opportunity to show entitlement to change venue no matter the unlikelihood of bias existing.¹¹⁹ To fail to do so would, in essence, rob the defendant of his constitutional right to a jury trial at all.¹²⁰

Surprisingly, a review of state laws and cases finds an acknowledgement of the right to change venue when an impartial jury cannot be found existing much earlier than federal court.¹²¹ Indeed, one of the first references found stems from a case arising in 1796 out of the state of Delaware.¹²² The rather short opinion describes a case involving reimbursement for a runaway slave between two parties.¹²³ The defendant cited two grounds to change the venue of the case from one county in Delaware to another.¹²⁴ The state Supreme Court focused its opinion on only one of the grounds raised on appeal, specifically centering on an inability to pick an impartial jury.¹²⁵ In denying the claim, the court ruled that a defendant's mere belief that an unbiased venire could not be acquired did not rise to the level necessary to mandate a change of locale.¹²⁶ The judges wrote, "[t]he defendant's belief is not enough, and beyond that there is little or no ground for the motion."¹²⁷

Approximately thirty years later, a case from the state of Tennessee provided even greater clarity on the early American view of venue in *Ex parte Williams*.¹²⁸ There, the plaintiff sought the ability to create a road in Smith County, Tennessee.¹²⁹ The

¹¹⁷ *Groppi*, 400 U.S. at 509.

¹¹⁸ *Id.* at 506.

¹¹⁹ *Id.* at 509.

¹²⁰ *Id.*

¹²¹ *Jacobs v. Aydelot*, 1 Del. Cas. 411, 411 (1796).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Ex parte Williams*, 12 Tenn. 578, 580 (1833).

¹²⁹ *Id.* at 579.

road would be laid through the property belonging to the defendant.¹³⁰ Completely by coincidence, Williams also served as a circuit judge for Smith County.¹³¹ Therefore, by agreement of the parties, venue was changed to neighboring Wilson County where Judge Williams ultimately lost his fight to stop the road's construction.¹³² He then appealed to the appellate court.¹³³

Ruling in favor of Judge Williams, the Supreme Court of Errors and Appeals for Tennessee focused on the purpose behind the state's rule for change of venue.¹³⁴ The court referenced state acts that dated back to 1809 which permitted change of venue in civil cases.¹³⁵ In reviewing the laws, the court concluded the acts' purpose was to ensure that a fair jury panel could be obtained in the venue where the case would be tried.¹³⁶ "The sole object of the whole legislation on the subject was to obtain an impartial jury."¹³⁷

In the *Williams* case, the purpose of the change of venue was not to get a fair jury but rather to find a judge who was not a party to the case to handle the matter.¹³⁸ If, for some reason, a matter arose where a judge was a party, it fell on him to find one of his brethren to try the case.¹³⁹ The stand-in would come to the county of proper venue and hear the matter.¹⁴⁰ Therefore, the impetus for change of venue statutes, at least in civil matters, remained to ensure the parties a fair trial.¹⁴¹

State laws providing for change of venue in criminal matters are supported based on a similar foundation.¹⁴² In 1841, jurisprudence from the state of New York illustrated this concept in the matter of *People v. Webb*.¹⁴³ In that case, the State

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 579-80.

¹³⁵ *Id.* at 579.

¹³⁶ *Id.* at 580.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Dula v. State*, 16 Tenn. 511, 511 (1835).

¹⁴³ *People v. Webb*, 1 Hill 179, 182 (N.Y. 1841).

of New York charged a defendant with two counts of libel.¹⁴⁴ The charges were originally filed in the county of Otsego.¹⁴⁵ However, due to a high amount of publicity surrounding the circumstances of the crime, a motion was made to change venue to a neighboring county.¹⁴⁶ Interestingly, said motion was made by the prosecution not the defendant.¹⁴⁷

Under New York Law at the time, a change was permitted if either party could not receive a fair trial because an impartial jury was unattainable.¹⁴⁸ Therefore, the issue in the *Webb* case was not if the change of venue could happen but rather if it could happen when the basis rested solely on an affidavit provided by one of the parties and not an actual attempt to obtain an impartial venire.¹⁴⁹ The prosecutor asserted that, "the public mind has become so much prejudiced against him (the state) in respect to the prosecutions, that a fair and impartial trial cannot be had in Otsego."¹⁵⁰

In affirming the trial court's decision to change venue and have the case tried in a different county, the Supreme Court of New York looked at the sufficiency of the affidavit alleging bias rather than the procedure for establishing bias to the court.¹⁵¹ Unlike previous decision based on speculation, the prosecutor's affidavit set out numerous undisputed facts that provided a basis for a change in location.¹⁵² To begin, the affidavit specified precise information as to how a local newspaper had sought to undermine the credibility of the prosecution.¹⁵³ The prosecution proved that copies of various articles were delivered to potential jurors before the trial began to taint them against the state.¹⁵⁴ Ultimately, the court determined:

¹⁴⁴ *Id.* at 181.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 181.

¹⁴⁷ *Id.* at 182-82.

¹⁴⁸ *Id.* at 182.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

As to the weight of evidence, therefore, on which the motion rests, very little comment would seem to be necessary.¹⁵⁵ The power of the three presses has been accidentally or purposely combined to work a prejudice in the public mind against the complainant, on the very questions involved in the prosecutions, and in a manner entirely adequate to the proposed effect.¹⁵⁶ The only options to ensure an impartial jury was to grant a change of venue request thereby recognizing that the rate of a fair trial is shared by all parties to a case.

Thus, a review of the history of venue and motions to change venue draws some universal concepts. First, venue is tied to the concept of a jury trial. It is clear from hundreds of years of jurisprudence as well as our legal roots from English Common Law that our Constitutional right to a fair trial is meaningless without honoring the need for an unbiased locale. Second, the right to an unbiased locale applies to all parties in a lawsuit. Despite an initial concern for defendants, plaintiffs in civil cases and the government in criminal cases also enjoy similar protections. Finally, at the root of a majority of the concerns surrounding venue is the fear of polluting the jury pool through peripheral information. No matter the format, as individuals learn information in different formats, the potential ways to contaminate a jury pool increase.

III. CHANGE OF VENUE GROUNDS

One need not look far to find case law involving change of venue requests grounded in coverage by the media. Media attention could taint a jury in many ways. For instance, the press can provide information about a case not subject to rules of evidence or proper court procedure that could influence a jury's verdict making it a result of outside information instead of the facts presented in the courtroom. The news also has the power to foster sympathy for one side in a lawsuit by identifying common ground between would be jurors and a party. Jurors who learn of hardships or obstacles faced by one

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 183.

side may see themselves in the plaintiff or defendant if they faced similar events in their lives. Lastly, one of the greatest potential threats the press poses for our legal system is the creation of a group think mentality. With many stations turning more to opinion pieces than unbiased reporting, there is an equal concern that a juror could decide a high-profile case based on what Rachel Maddow or Sean Hannity tells them.

In *Rideau v. Louisiana*, 373 U.S. 723 (1963), an example of a verdict reached by information outside the courtroom can be found.¹⁵⁷ In the case, the defendant, Wilbert Rideau committed a bank robbery in the town of Lake Charles, Louisiana.¹⁵⁸ During the commission of the robbery, he also kidnapped three bank tellers ultimately causing the death of one of his hostages.¹⁵⁹ Soon after the murder, authorities arrested Rideau and placed him in the local jail.¹⁶⁰

As part of their investigation into the crime, local law enforcement conducted a jail house interview with the defendant.¹⁶¹ Investigators both filmed the interview and recorded audio.¹⁶² Eventually, during the twenty-minute interrogation, Rideau confessed to the robbery, kidnapping, and murder charges.¹⁶³ While it is not exactly known how, a few hours later a local television station broadcasted the interview to the entire town.¹⁶⁴ The next day another broadcast of the interview launched over the airways.¹⁶⁵ Because of high ratings, the footage ran yet a third time the next day.¹⁶⁶ Altogether, estimates believed that just shy of a hundred-thousand people saw the report on the news.¹⁶⁷ This was for a town of an estimated population of one-hundred-and-fifty-thousand citizens.¹⁶⁸

¹⁵⁷ *Rideau v. Louisiana*, 373 U.S. 723, 727 (1963).

¹⁵⁸ *Id.* at 723.

¹⁵⁹ *Id.* at 724.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

Around two weeks later Mr. Rideau's attorney moved to change venue, citing the news report.¹⁶⁹ The trial judge denied the motion and ultimately, at trial, the defendant was convicted.¹⁷⁰ He was sentenced to death for the murder.¹⁷¹ On appeal to the Louisiana Supreme Court, appellate attorneys argued that the request for change of venue should have been granted. Still, the appellate court confirmed the conviction.¹⁷² The United States Supreme Court disagreed with the findings of the lower court and reversed the conviction, ordering a new trial.¹⁷³

In reaching a decision, the Justices reviewed portions of the recorded video televised to the parishioners of the town.¹⁷⁴ The United States Supreme Court characterized the film: "What the people of Calcasieu Parish saw on their television sets was Rideau, in jail, flanked by the sheriff and two state troopers, admitting in detail the commission of the robbery, kidnapping, and murder, in response to leading questions by the sheriff."¹⁷⁵ The Court questioned whether the defendant even knew he was being recorded but conceded, it was not his idea to make the production.¹⁷⁶ No matter whose idea the film was, the ultimate effect was the same.¹⁷⁷ Through consistent and continued subjection to the program, the jury pool of the town became tainted, and the request for a change of venue was required.¹⁷⁸ In failing to grant the motion, the trial judge robbed the defendant of due process.¹⁷⁹ The Court considered the entire trial a "hollow process" infected by a "spectacle" furthered by a "kangaroo court."¹⁸⁰ In fact, so great was the taint that the justices concluded a review of the *voire dire* transcript was unnecessary as no possible impartial jury could be found in Lake Charles.¹⁸¹

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 725.

¹⁷² *Id.*

¹⁷³ *Id.* at 727.

¹⁷⁴ *Id.* at 725.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 726.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

One of the most infamous cases about publicity and change of venue was the trial of Jack Ruby for the murder of Lee Harvey Oswald.¹⁸² The trial centered on the death of President John F. Kennedy and the subsequent murder of his alleged assassin.¹⁸³ Jack Ruby whose real name was Jack Rubenstein was tried in Dallas, Texas on March 14, 1964.¹⁸⁴ Ultimately, Ruby was found guilty and sentenced to death. But before jury selection, the defense team for Ruby moved for a change of venue arguing it was impossible to find an impartial jury in Dallas.¹⁸⁵ The trial judge denied the motion which was brought up on appeal to the Court of Criminal Appeals for Texas.¹⁸⁶

While the opinion in the case is brief, the concurring opinion issued by Judge McDonald merits consideration in a discussion on venue.¹⁸⁷ McDonald began his concurrence by enumerating several potential sources of bias a jury would encounter in trying Ruby in Dallas.¹⁸⁸ For instance, the trial itself occurred in the same courthouse that the alleged crime, the murder of Oswald, happened in.¹⁸⁹ Furthermore, the courthouse in general was around a hundred yards from where President Kennedy had been shot.¹⁹⁰ McDonald surmised that jurors would see the site where Kennedy was murdered “daily” while coming in to hear the case. In fact, the location was still being visited by mourners while the trial was occurring.¹⁹¹

Another concern was the guilt that many citizens of Dallas felt from the death of the president occurring in their city.¹⁹² This shame amplified when the alleged murderer, Oswald, could no longer be held accountable by a court of law as Dallas law enforcement officials failed to keep him safe.¹⁹³ This resulted in the belief in some that Dallas was responsible

¹⁸² Rubenstein v. State, 407 S.W.2d 793, 795 (Tex. Crim. App. 1966).

¹⁸³ *Id.* at 794.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 795.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 796.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

for one of our most beloved Presidents being denied justice for his untimely and brutal assassination.¹⁹⁴ As McDonald wrote:

Dallas was being blamed directly and indirectly for President Kennedy's assassination and for allowing the shooting of Oswald by Ruby. The feeling and thought had been generated that Dallas County's deprivation of prosecuting Oswald could find atonement in the prosecution of Ruby. The writer feels it fair to assume that the citizenry of Dallas consciously and subconsciously felt Dallas was on trial and the Dallas image was uppermost in their minds to such an extent that Ruby could not be tried there fairly while the state, nation and world judged Dallas for the tragic November events.¹⁹⁵

This bias showed in other ways, such as the Dallas local media writing editorials and reports about Ruby, describing him as a potential mobster involved with organized crime as "strip-joint" owner.¹⁹⁶ There were even Antisemitic insults levied against the defendant necessitating the modification of his name from Rubenstein to Ruby.¹⁹⁷ Ruby's attorneys bantered about the defense of insanity.¹⁹⁸ Yet when brought to the local hospital for competency testing to stand trial, administrators refused Ruby entrance to their facility.¹⁹⁹

McDonald conceded that finding an impartial jury anywhere in the country would be a herculean effort.²⁰⁰ The murders of both the president and Oswald had been televised multiple time across the airwaves.²⁰¹ Ultimately, ten members of the jury who sat in judgment of Ruby saw the video of Oswald's death.²⁰² But with the entire city of Dallas invested in seeking justice for their president, their state, and their city, an

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at 797.

impartial jury could not be found in that location.²⁰³ McDonald concluded his concurrence by writing, "Against such a background of unusual and extraordinary invasions of the expected neutral mental processes of a citizenry from which a jury is to be chosen, the Dallas County climate was one of such strong feeling that it was not humanly possible to give Ruby a fair and impartial trial which is the hallmark of American due process of law."²⁰⁴

While *Ruby* serves as a prime example in which an entire jury pool can be tainted by a specific act, an even harder case arises where the potential jury pool consists of similarly situated individuals to a party in the proceeding. In *A. C. Ferrellgas Corp., Inc. v. Phoenix Insurance Company*, 358 P.2d 786 (Kan. 1961), the Kansas Supreme Court encountered this precise situation.²⁰⁵ In the case, a company sued its insurance carrier for failing to cover a claim filed due to damage to one of its buildings.²⁰⁶ The company alleged that the damage had occurred during a storm due to strong winds.²⁰⁷ The insurance carrier denied the claim under the guise of arguing the cause of the loss was flood waters and not wind.²⁰⁸ As there was an exclusion in the policy for damage caused by flood, there was no protection under the policy.²⁰⁹

Before trial, the defense moved to change venue to a neighboring county.²¹⁰ The basis of the request stemmed from the argument that the insurer covered several members of the community and many had filed claims for losses due to the same storm.²¹¹ Even if claims had not been made with this specific insurance company, the mere fact that potential jurors had filed claims biased them from serving as an impartial panel.²¹² By one account, up to thirteen-hundred claims were filed from the county in response to the storm.²¹³ The trial court

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *A. C. Ferrellgas Corp. v. Phoenix Ins. Co.*, 358 P.2d 786, 790 (Kan. 1961).

²⁰⁶ *Id.* at 787.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.* at 790.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

denied the motion and ultimately the insurance company was ordered to cover the loss.²¹⁴

In affirming the trial court's decision to deny the request to change venue, the Kansas Supreme Court looked to the state's statutory language regarding venue.²¹⁵ The text permitted a switch in location, "when a fair and impartial trial cannot be had in the county where a case is pending."²¹⁶ The only evidence presented by the defendant that the jury was biased was its supposition that because so many had suffered from the same event sympathy must exist for the plaintiff as a form of common ground or universal bond between members of the same community.²¹⁷ The appellate court believed that the selection process successfully operated through its inherent safeguards and procedures to weed out such concern and arrive at a jury who could obtain a verdict based on the evidence presented, not on outside commiseration brought into the courthouse.²¹⁸ The court reminded the defendant that decisions on venue rest largely in the discretion of the trial judge and should be disrupted only if the evidence that a fair jury cannot be found is "readily apparent."²¹⁹

Yet an appellate court in New York held the opposite in a similar case involving dairy farmers that same year.²²⁰ In *Althiser v. Richmondville Creamery Company*, 13 A.D.2d 162, 215 N.Y.S.2d 122 (1961), the plaintiffs in the lawsuit appealed a decision to allow a change of venue from the County of Schoharie, New York.²²¹ The plaintiffs were a group of dairy farmers who sued the defendant for the difference between the amounts they received for milk and other dairy products, versus the amounts they would have received from the defendant's competitors.²²²

²¹⁴ *Id.* at 787.

²¹⁵ *Id.* at 790.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.* at 790-91.

²²⁰ *Althiser v. Richmondville Creamery Co.*, 215 N.Y.S.2d 122, 125 (N.Y. App. Div. 1961).

²²¹ *Id.* at 123.

²²² *Id.*

The lawsuit was comprised of one-hundred-twenty-six different dairy farmers.²²³ The defense's contention was that the pool of potential jurors found in the County of Schoharie included friends, family, and other dairy ranchers who could sympathize with the plaintiffs.²²⁴ Of note was that the trial court described Schoharie as a "small rural county."²²⁵ It would therefore be impossible for an impartial jury to be found in this location.²²⁶

In affirming the lower court transfer of venue, the appellate court agreed that because of ties through familial bonds, friendship, or simply a common bond from sharing the same profession, an impartial jury could not be found.²²⁷ The decision asides any possible jury venire as:

. . . [P]ersons and the members of their families plus a substantial number of other producers selling milk to defendants, and 'in the same position' as plaintiffs, and the members of such other producers' families, constitute a not inconsiderable part of the adult population of the 'small rural county' in which the venue was laid and for which the jury list is of but 1,500 names.²²⁸

Yet the appellate court did not stop there.²²⁹ It noted that even those members of the local community who are not similarly situated to the plaintiffs could still pose concerns as milk producing was a major economic force in the County of Schoharie.²³⁰ The lawsuit itself centered on loss of funds that would have ultimately been pumped into the community's economy if awarded.²³¹ As a result, a sympathetic jury was likely during the jury selection process.²³² Ultimately, it was not

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.* at 123-24.

²²⁹ *Id.* at 124.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

the appellate court's place to overturn the "sound exercise" of the trial court's discretion in granting the request.²³³

A final example of cases involving venue changes that merit comment are those situations in which damage awards could create potential consequences for the individual jurors themselves. More specifically, if a lawsuit involves suing a local municipality, could potential payouts demand the raising of taxes or other fees to compensate the plaintiff which would ultimately be passed on to the citizenry of the locale. In *Hanson v. Garwood Indus.*, 279 N.W.2d 647 (N.D. 1979), the North Dakota Supreme Court addressed the issue in a negligence case involving the City of Jamestown, North Dakota.²³⁴

The case arose from an incident involving a six-year-old child who was injured when he pulled himself on to the top of a garbage dumpster.²³⁵ The force of his action caused the dumpster to fall on top of him, harming himself.²³⁶ The garbage container was owned by the City of Jamestown, North Dakota and had been fabricated by a company called Garwood Industry.²³⁷ The child's mother sued on behalf of her son both the city and the company for negligence and strict liability for their failure to properly maintain the dumpster.²³⁸

Before trial, the plaintiff moved to change venue.²³⁹ An affidavit accompanied the pleading in support of the transfer.²⁴⁰ The only basis for the request was grounded in the argument that should the child succeed in his effort to obtain compensation for his injuries, the funds to pay said award would come from taxpayer money.²⁴¹ Taxpayers were the potential pool of jurors to hear the case.²⁴² Thus, the plaintiff's attorney wrote in the affidavit, "clearly an impartial trial could not be conducted by jurors who are taxpayers of Defendant city which might well have to respond in money damages to Plaintiffs."²⁴³ As a result, the trial court granted the motion and

²³³ *Id.*

²³⁴ *Hanson v. Garwood Indus.*, 279 N.W.2d 647, 648 (N.D. 1979).

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

venue was moved from Stutsman County where the City of Jamestown was seated to Burleigh County.²⁴⁴

The City appealed the transfer noting that as the defendant's residence in the case as well as the location of where the events took place that were the basis of the claim, venue was proper in Stutsman County.²⁴⁵ In North Dakota, the law at that time prohibited change of venues unless there was "reason to believe" that an impartial jury could not be found in that setting.²⁴⁶ Precedent elaborated that a trial court's decision to grant or deny a motion to change venue would be judged by an abuse of discretion standard.²⁴⁷ But, the burden to establish that a venue would be unfair rested with the moving party.²⁴⁸

The City's argument focused on the insufficiency of the plaintiff's affidavit to meet the standard that an impartial jury could not be found in Stutsman County.²⁴⁹ The child asserted that because the City of Jamestown was in the county and that the city was largest municipality in that location, logic dictated that most of the jurors would pay city taxes.²⁵⁰ Yet Jamestown responded that according to a 1970 census, thirty-five percent of the residents lived in unincorporated Stutsman County.²⁵¹ With an estimated population of twenty-three-thousand-five-hundred-and-fifty total residents, there were over eight-thousand individuals who could serve on the panel.²⁵²

In ruling for the city and reversing the trial court's decision, the appellate court reviewed precedent from other jurisdictions.²⁵³ The justices looked to the Alaska Supreme Court case *Maier v. City of Ketchikan*, 403 P.2d 34 (Alaska 1965), overruled on other grounds, *Johnson v. City of Fairbanks*, 583 P.2d 181 (Alaska 1978).²⁵⁴ There too a similar argument was made for change of venue that a lower court had accepted.²⁵⁵ The Alaska Supreme Court found the argument lacked merit because it

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 648-49.

²⁴⁸ *Id.* at 649.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.* at 650 n.2.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

would create an automatic requirement that whenever a municipality was sued its trial could not occur in its home county.²⁵⁶ This went directly against the foundation behind why venue is situated where it is situated...to protect the defendant.²⁵⁷ It also opposed specific guidance provided by the United States Supreme Court who wrote, "In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only."²⁵⁸ There is a local interest in having localized controversies decided at home."²⁵⁹

Yet the North Dakota Supreme Court did not pronounce a per se rule that similar arguments could not persevere in the future.²⁶⁰ It noted its own decision in *Sheridan County v. Davis*, 240 N.W. 867 (1932).²⁶¹ There, the court found that a change of venue was proper because the "entire jury" would consist of taxpayers.²⁶² The situation with the City of Jamestown was different in that "some" of the potential jurors would be taxpayers.²⁶³ The two decisions were therefore consistent with each other.²⁶⁴

Indeed, in similar scenarios other courts have concluded that a change of venue was proper.²⁶⁵ In Florida for example, the Florida Supreme Court upheld a transfer of venue decision by a trial judge when a bank requested a change of venue in a case involving obtaining financial damages as a payee on a local school board's note.²⁶⁶ The court held that as taxpayers, the potential jurors had an adverse interest to the plaintiff's success.²⁶⁷ In *Berry v. N. Pine Elec. Company, Incorporated*, 50 N.W. 2d 117 (Minn. 1951), the Minnesota Supreme Court found that a trial judge had abused his discretion by failing to order

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947).

²⁶⁰ *Id.* at 650.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Bd. of Pub. Instruction for Lafayette Cty. v. First Nat. Bank*, 143 So. 738, 742 (Fla. 1932).

²⁶⁶ *Id.*

²⁶⁷ *Id.*

venue changed.²⁶⁸ Here, the plaintiff was a child injured by an electric pole falling on him.²⁶⁹ Most of the residents of the county where venue was proper were stockholders in the electric company and therefore would be impacted should a verdict in favor the child be issued.²⁷⁰ And in the State of Washington, their Supreme Court held that a lawsuit for attorney fees against a utility company required venue to be changed.²⁷¹ Potential jurors could presume, depending on the amount of the award, rates would increase to cover the costs.²⁷² This resulted in the would-be venire panel having a contrary interest to the plaintiff's success.²⁷³

IV. SIMILARITIES TO COVID-19 CASES

In the beginning of this document, the fact that the coronavirus has not only infected millions of U.S. citizens, but every aspect of our society became a springboard to a discussion on change of venue. But the reality of this statement cannot be overlooked. The author of this article is hard-pressed to find a single aspect of society that has not potentially forever been changed by the disease. As lawsuits begin to work their way through our legal system, will there be a single juror who has not seen media coverage about the pandemic? Will attorneys and courts be able to empanel an impartial group who can sit in judgment of a case that relates in part back to COVID-19?

One study launched in May 2020 found a direct connection between the amount of media consumed by the public on the topic of the coronavirus and how affected the home country of those consumers was.²⁷⁴ More specifically, the worse hit by the virus the more media watched.²⁷⁵ In August,

²⁶⁸ *Berry v. N. Pine Elec. Co-op.*, 50 N.W.2d 117, 123 (Minn. 1951).

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Kimball v. Pub. Util. Dist. No. 1 of Douglas Cty.*, 391 P.2d 205, 209 (Wash. 1964).

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *A Big Data Analysis of Medica Coverage Shines Light on COVID-19-19 Impact*, BBVA RESEARCH, <https://www.bbva.com/en/a-big-data-analysis-of-media-coverage-shines-light-on-COVID-19-19-impact/> (last visited Oct. 6, 2020).

²⁷⁵ *Id.*

the United States became the world leader in virus death surpassing all other countries.²⁷⁶ As a result, Americans have become some of the largest consumers of media on the subject and with it, some of the least impartial individuals on the planet.

Setting aside media coverage for a moment, case law shows that a second way venue may be tainted is if a large proportion of potential jurors from that locale are affected by a specific incident and that incident somehow plays a role in the case. Here too, COVID-19 has wreaked havoc on venues throughout American jurisdictions.²⁷⁷ At first it appeared that urban areas such as New York and Los Angeles would be the hardest hit areas from the virus.²⁷⁸ Yet over the summer, that quickly changed.²⁷⁹ Late July and early August saw some of the highest increases in infection rates and deaths in states like Missouri, Minnesota, Oklahoma, South Dakota, Wyoming, and Nebraska.²⁸⁰ This trend even prompted a direct warning from Dr. Deborah Brix, a lead on President Trump's COVID-19 Taskforce to state on live television, "[t]o everybody who lives in a rural area, you are not immune or protected from this virus."²⁸¹

No location has been spared from the virus' effects. People everywhere have lost jobs, wages, and loved ones from the disease. Once lawsuits begin making their way through our legal system, transferring venue from a hard-hit area to a less

²⁷⁶ Antonia Noori Farzan, Jennifer Hassan, and Rick Noack, *Live updates: Trump Administration Sticks to School Reopening Plan as U.S. Death Toll Exceeds 153,000*, WASHINGTON POST (Aug. 5, 2020), <https://www.washingtonpost.com/nation/2020/08/05/coronavirus-COVID-19-live-updates-us/>.

²⁷⁷ Kendal Orgera, Daniel McDermott, Matthew Rae Twitter, Gary Claxton, Wyatt Koma, and Cynthia Cox, *Urban and Rural Differences in Coronavirus Pandemic Preparedness*, PETERSON-KFF HEALTH SYSTEM TRACKER, (Apr. 22, 2020), <https://www.healthsystemtracker.org/brief/urban-and-rural-differences-in-coronavirus-pandemic-preparedness/>.

²⁷⁸ *Id.*

²⁷⁹ Christopher Curley, *Rural America Could Be the Region Hardest Hit by the COVID-19 Outbreak*, HEALTHLINE (Aug. 3, 2020), <https://www.healthline.com/health-news/rural-america-hardest-hit-by-covid-19-outbreak>.

²⁸⁰ *Id.*

²⁸¹ *Id.*

hard-hit area may be impossible. Finding an impartial venue may become a herculean task if there is no locale not impacted by the disease.

Ultimately, who will bear financial responsibility for all the losses associated from COVID-19 could also make the prospect of finding a fair venue impossible. When lockdowns began, local and state governments led the charge to shutter businesses to protect public health.²⁸² Those business owners began fighting back demanding the right to reopen.²⁸³ Although the United States Supreme Court seems to have issued some case law supporting the states' right to close such business, what happens in the future remains to be seen.²⁸⁴ And of course, just because the Supreme Court may provide some protection to governments does not mean that concept will protect them from large jury verdicts by angry citizens in the future.

The possibility of state coffers paying out large awards is a double-edged sword in the sense that it cuts both ways. The jury pool could be tainted because, as has been seen in prior cases, a concern may exist that taxes will be raised to pay these amounts. That said, on the flip side, jurors angry at their political leaders for closing business downs because of COVID-19 could purposely side with the business owner as payback. In essence, the potential taint from this concern increases exponentially.

V. SOLUTIONS

As time progresses in the spread of the illness, the potential reality exists that there may be no "hot spot" free venues available to try cases in. If this occurs, then judges and lawyers need to consider alternative solutions in finding unbiased venues to try cases. One potential idea is to utilize the voir dire process to ask more probing questions as to the

²⁸² Andrew Keshner, *Closing Our Business to Stop the Coronavirus Violated Our Employees' Rights, Lawsuit Claims*, MARKETWATCH (Mar.30, 2020 at 4:42 p.m.), <https://www.marketwatch.com/story/closing-our-business-to-stop-the-coronavirus-violated-our-employees-rights-lawsuit-claims-2020-03-30>.

²⁸³ *Id.*

²⁸⁴ *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020).

specific effect of COVID-19 on a potential juror. If enough of a difference exists between their experience with the disease and the case's tie to the illness, the likelihood exists that the person still may be able to hear the case. For example, if a juror lost their job because of COVID-19 closures, he or she still may be able to hear a wrongful death case arising out of negligent care for sickness in a nursing home. Potentially, anger over losing a job to the disease does not bias someone similarly to losing a loved one. Yet the importance of probing questions on the part of the trial attorneys during the jury selection process cannot be overstated for this idea to succeed.

A second proposal to combat the venue issue could be reliance on more bench trials where the judge sits as the fact finder together with their role as law interpreter. If the concern is that potential jurors could not set aside their biases, then the hope would be that a single judge could. Understandably, judges too have been affected by COVID-19. This suggestion is not to imply that this group has somehow been spared from the ravages of the disease. Rather, the proposal acknowledges that judges are trained and duty bound to remain neutral in a case. Capitalizing on these qualities may better serve parties for the time being than be tried by a jury of one's peers.

A third idea could be the development of a specific jury instruction to address COVID-19 bias. Special jury instructions are used throughout the litigation process. Criminal lawyers often see this occur in death penalty cases to help seat a death qualified jury.²⁸⁵ For that reason, writing guidance for jurors to recognize potential bias on the topic is not an extraordinary remedy. The key would be involving lawyers, judges, and those impacted by the illness during the drafting process to ensure an adequate remedy.

One final thought would be the potential of wiping the COVID-19 taint from the case altogether to see if it is relevant and necessary to the determination of a verdict. Imagine an argument centered on the idea that the role the illness plays in a matter is too prejudicial outweighing its probative value. Like the evidentiary objection found in most venues, a judge could

²⁸⁵ *Project Declarations - Jury Instructions*, FEDERAL DEATH PENALTY RESOURCE Council, <https://fdprc.capdefnet.org/project-declarations/jury-instructions> (last visited Oct. 6, 2020).

erase, if not limit, the mentioning of COVID-19 during the case in chief thereby erasing if not limiting its effect.²⁸⁶

VI. CONCLUSION

Ultimately, it remains unclear what life after the pandemic will look like. With courthouses across the country shuttered, the number of lawsuits waiting to be filed is akin to a ticking time bomb about to explode. Whether those cases are heard by a fair and impartial jury from a specific location, at the moment, seems uncertain. But moving forward it falls to judges and attorneys to approach the *voir dire* process in a different way to root out bias. Inquiries about life during the pandemic may soon become standard questioning procedure for many lawyers litigating cases post COVID-19. One thing is certain, ignoring the subject altogether equates to a failure to provide adequate legal representation, inviting a reversal on appeal.

²⁸⁶ Fed. R. Evid. 403.