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### Summary of Sicor, Inc. v. Hutchinson, 127 Nev. Adv. Op. No. 82

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*Sicor, Inc. v. Hutchinson*, 127 Nev. Adv. Op. No. 82 (Dec. 15, 2011)<sup>1</sup>  
CIVIL PROCEDURE — VENUE

### **Summary**

An appeal of a district court order denying a motion for a change of venue in a tort action.

### **Disposition/Outcome**

The Court added four factors to a *pre-voir dire* multifactor test, and clarified how to apply each of the ten total factors when evaluating *post-voir dire* motions for a change of venue based on pretrial publicity in civil proceedings. Using these factors, the Court affirmed the district court's denial of the appellant's motion for a change of venue because each of the ten test factors either weighed against changing the venue from Clark County or did not significantly impact the change of venue analysis.

### **Factual and Procedural History**

Sicor Incorporated ("Sicor"), manufactured Propofol, an anesthetic drug used in certain medical procedures by nonparties the Endoscopy Center of Southern Nevada, and the Desert Shadow Endoscopy Center. In 2008, the Southern Nevada Health District issued letters to approximately 60,000 patients of these centers, warning the patients that they might have been exposed to blood-borne infections.

The events at the centers produced criminal investigations, bankruptcy proceedings, and approximately 200 civil actions, which were covered by various media outlets. Stacy Hutchinson and the other plaintiffs asserted product liability claims against Sicor and claims against various other defendants. Sicor filed a motion for a change of venue in district court, arguing that adverse pretrial publicity prevented Sicor from receiving a fair trial in Clark County. In support of its motion, Sicor presented survey results and examples of the coverage from the various media outlets.

After considering the parties' initial arguments and the evidence presented, the district court concluded that a change of venue was not warranted at that time, reserving ruling on the motion until after an attempt to seat a jury. Beginning with an initial pool of nearly 500 potential jurors, the district court used questionnaires, individual interviews, and the group voir dire setting to evaluate potential juror exposure to the media coverage of the matter. After seating a satisfactory jury, the district court, using a six-factor *pre-voir dire* test, again denied Sicor's motion for a change of venue. This appeal followed.

### **Discussion**

Writing for a unanimous three-justice panel, Justice Hardesty affirmed the district court's use of a six-factor *pre-voir dire* test to *post-voir dire* motions for a change of venue. The district

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<sup>1</sup> By Joseph Bowen

court may change the place of a civil trial “[w]hen there is reason to believe that an impartial trial cannot be had” in the county designated in the complaint.<sup>2</sup> The district court has the authority to defer ruling on a *pre-voir dire* motion for a change of venue until after it has attempted to seat a fair and impartial jury.<sup>3</sup>

In the civil context, the district court applies the following six factors to *pre-voir dire* motions for a change of venue because of pretrial publicity regarding the matter: (1) the nature and extent of pretrial publicity; (2) the size of the community; (3) the nature and gravity of the lawsuit; (4) the status of the plaintiff and defendant in the community; (5) the existence of political overtones in the case; and (6) the amount of time that separated the release of the publicity and the trial.<sup>4</sup>

The Court confirmed the use of these six factors for evaluating both *pre* and *post-voir dire* motions for a change of venue. Further, after supplemental briefing by the parties, the Court added four additional factors to aid the district courts when considering future *post-voir dire* motions: (7) the care used and the difficulty encountered in selecting a jury; (8) the familiarity of potential jurors with pretrial publicity; (9) the effect of the publicity on the jurors; and (10) the challenges exercised by the party seeking a change of venue.<sup>5</sup>

The Court stressed that when applying the ten-factor test the primary issue is *not* whether the potential jurors have learned information about the case outside the courtroom, as “an ignorant jury is neither the hallmark nor the *sine qua non* of a constitutionally qualified jury.”<sup>6</sup> The question is whether there is a reason to believe that the community in which the case is brought will not “yield a jury qualified to deliberate impartially and upon competent trial evidence.”<sup>7</sup> The Court next examined the ten factors in light of the facts of the case at bar.

#### *The nature and extent of pretrial publicity*

Although Sicor submitted a plethora of media coverage regarding the underlying events, the evidence did not contain emotional outrage or polarizing material directed at Sicor. Rather, the emotional outrage was directed towards the centers’ staff, management, and ownership. Sicor’s media coverage was primarily limited to factual accounts of Sicor’s role in the litigation or accusatory statements made by the plaintiffs’ attorneys, which Sicor countered and explained. Thus, this factor did not weigh in favor of a change of venue.

#### *The size of the community*

Clark County has the largest population and thus, the largest jury pool of any county in the state. In fact, it is more than four times greater than the next largest county. The potential for dilution of information about the case and for a greater number of untainted jurors is far greater in Clark County than elsewhere in the state. Consequently, this factor did not weigh in favor of a

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<sup>2</sup> NEV. REV. STAT. §13.050(2)(b).

<sup>3</sup> Sicor, Inc. v. Sacks, 127 Nev. \_\_\_, \_\_\_ P.3d \_\_\_ (Adv. Op. No. 81, Dec. 15, 2011) (decided contemporaneously with this appeal).

<sup>4</sup> NCAA v. Tarkanian, 113 Nev. 610, 612-14, 939 P.2d 1049, 1051-52 (1997).

<sup>5</sup> See Unger v. Cauchon, 73 P.3d 1005, 1007-08 (Wash. Ct. App. 2003).

<sup>6</sup> Ford v. State, 102 Nev. 126, 129, 717 P.2d 27, 29 (1986).

<sup>7</sup> *Id.*; see also NEV. REV. STAT. §13.050(2)(b) (providing that the district court may change the place of a trial if “there is reason to believe that an impartial trial cannot be had” in the original venue).

change of venue.

*The nature and gravity of the lawsuit*

Although the events underlying the case seriously impacted the lives of thousands of Clark County residents, the record did not demonstrate that these events ignited the emotions of the community against Sicor and would prevent them from receiving a fair trial. In fact, the jury selection process revealed that potential jurors' opinions did not collectively weigh in favor or against Sicor. As a result, this factor did not weigh in favor of a change of venue.

*The status of the parties in the community*

None of the evidence in this case demonstrated that Sicor's status in the community had a significant impact in providing a fair and impartial trial. Accordingly, this factor also did not weigh strongly in favor of or against a change in venue.

*The existence of political overtones in the case*

None of the evidence demonstrated that any political overtones in the case had a significant impact in providing a fair and impartial trial. Thus, this factor did not weigh strongly in favor of or against a change in venue.

*The amount of time that separated the release of the publicity and the trial*

The bulk of the media reports submitted by Sicor were published just under a year and a half before the voir dire proceedings. However, just prior to the proceedings, a verdict was released in a separate civil action rising from the same underlying events. Although this media coverage reminded some potential jurors about the underlying events, several other potential jurors stated they last received information about the case months or even years before jury selection. The evidence suggested that this burst of media coverage was not nearly as pervasive as the earlier publicity. Consequently, this factor did not weigh strongly in favor of, or against, a change in venue.

*The care used and the difficulty encountered in selecting a jury*

The district court took great care during jury selection. While the task was not quick, it was not particularly difficult. The district court began with a large pool of jurors and liberally dismissed those that indicated they had a bias in the case. Therefore, this factor did not weigh in favor of change in venue.

*The familiarity of potential jurors with pretrial publicity*

Nearly half the potential jurors that filled out questionnaires denied having any prior knowledge of the case. Although some had followed the events closely, most of the potential jurors had little more than a general idea about the allegations underlying the case with no significant understanding of the details. Consequently, this factor weighed against a change in venue.

*The effect of the publicity on the jurors*

A very small number of the potential jurors indicated a strong bias for or against Sicor, that the previous cases won against Sicor would affect their consideration of the case, or personal biases unrelated to the underlying events. The district court promptly dismissed these potential

jurors. The overall jury selection process did not show that the pretrial publicity had a substantial effect on the opinions of the members of jury pool. Thus, this factor weighed against a change in venue.

*The challenges exercised by the party seeking a change of venue*

The district court liberally dismissed potential jurors that indicated a bias in the case. Sicor used all of its peremptory challenges but did not request any more from the district court. Moreover, none of the expressly challenged potential jurors remained on the final jury panel. Accordingly, this factor did not weigh in favor of a change in venue.

**Conclusion**

Although the events of this case received a fair amount of media coverage, Sicor failed to demonstrate that the coverage was pervasive or inflammatory enough to taint the jury pool or prevent it from receiving a fair trial in Clark County. Each of the ten factors examined either had no significant impact on, or weighed against, a change in venue for this trial. Therefore, the district court did not abuse its discretion in denying Sicor's motion for a change in venue.