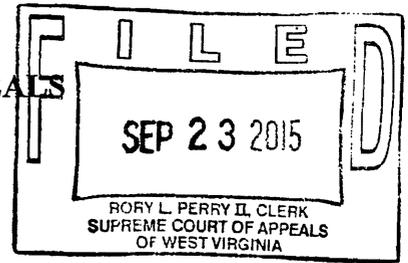


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. 15-0819



STATE OF WEST VIRGINIA EX REL.
AMERICAN ELECTRIC
POWER CO., INC., ET AL.

Petitioners,

CIRCUIT COURT OF MASON COUNTY,
VIRGINIA
(Civil Action No. 14-C-101-139)

v.

THE HONORABLE DAVID W. NIBERT,
JUDGE OF THE CIRCUIT COURT OF
MASON COUNTY, WEST VIRGINIA,
ESTATE OF BOBBY CLARY BY
JOY CLARY, ADMINISTRATOR, ET AL.

Respondents.

RESPONSE TO PETITION FOR WRIT OF PROHIBITION

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 1. The Respondent Judge did not err when he incorporated references to this Court’s decision in *Abbott* into the Order, because the decision to deny Petitioners’ Motion to Dismiss was based upon application of the eight factor test for *forum non conveniens*.9

 2. The Respondent Judge did not err by examining and addressing W.Va. Code § 56-1-1(a), this Court’s decision in *Crown Equipment v. Morris*, and W. Va. R. Civ.P. 20, in addition to applying the eight factor test for *forum non conveniens* which formed the basis of the decision to deny Petitioner’s Motion to Dismiss.....12

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I. QUESTIONS PRESENTED

1. Do the Respondent Judge's references to *Abbott v. Owens-Corning Fiberglass Corp.*, 191 W. Va. 198, 444 S.E.2d 285 (1999) preclude a finding that the case should not be dismissed under the doctrine of *forum non conveniens* where the Respondent Judge applied the eight factor test set forth in W. Va. Code § 56-1-1a to reach that decision?

Suggested Answer: No.

2. Does it constitute error for the Respondent Judge to have considered and discussed W. Va. R. Civ. P. 20, W. Va. Code § 56-1-1(a)(1), and the decision in *Morris v. Crown Equipment Corp.*, 219 W. Va. 347, 633 S.E.2d 292 (2006), where he ultimately based his decision not to dismiss the case under the doctrine of *forum non conveniens* following the application of the eight factor test set forth in W. Va. Code § 56-1-1a?

Suggested Answer: No.

3. Did the Respondent Judge err where he found that the Petitioners' argument regarding *forum non conveniens*, which pertained to the facts of this case, specifically, was foreclosed by this Court's holding in *Morris v. Crown Equipment Co.*, regarding the Privilege and Immunities Clause of the United States Constitution as applied to venue statutes?

Suggested Answer: No.

4. Did the Respondent Judge commit clear error where he applied the eight factor test as required by W. Va. Code § 56-1-1a, and set forth findings of fact and conclusions of law which supported the decision not to dismiss?

Suggested Answer: No.

II. STATEMENT OF THE CASE

The instant lawsuit, which was filed in the Circuit Court of Mason County, West Virginia on August 9, 2014, arises out of Respondents' long-term exposure to coal combustion waste at the instruction, and for the benefit, of the Petitioners. App. 15. Petitioner entities, American Electric Power, Inc., American Electric Power Service Corporation, and Ohio Power Company, own and/or operate the General James M. Gavin Power Plant ("the Gavin Plant"), the General James M. Gavin Landfill ("the Gavin Landfill"), and associated facilities. App. 22-24. The Gavin Plant and the Gavin Landfill are located at 7397 State Rte. 7 North, in Gallipolis, Ohio. App. 25. State Rte. 7 runs along the bank of the Ohio River, the other side of which is the state of West Virginia. It is approximately 8 miles from the site of the Gavin Plant and the Gavin Landfill to the Silver Memorial Bridge, which connects Ohio and West Virginia.

The Gavin Plant generates large amounts of coal combustion byproduct waste, which is currently placed in a 246-acre landfill located north of the plant, and known as the Gavin Landfill. App. 24. Coal combustion waste poses a significant threat to human health for many reasons, including, but not limited to, the presence of toxic metals in the ash, such as arsenic, mercury, chromium (including the highly toxic and carcinogenic chromium VI), lead, uranium, selenium, molybdenum, antimony, nickel, boron, cadmium, thallium, cobalt, copper, manganese, strontium, thorium, vanadium and others. App. 24-28. Coal combustion waste is also harmful due to the microscopic nature of the particles which compose it, which can easily enter the bloodstream and immune system. *Id.* Workplace exposure to coal combustion waste, such as the types of exposure involved in the instant matter, occurs through inhalation, particularly when the individual is not wearing a respirator or other personal protection equipment. *Id.* Exposure also occurs through dermal contact and ingestion. *Id.*

Respondents, the majority of whom were workers at the Gavin Landfill, worked under the supervision, instruction, and, in certain respects, under the direction of West Virginia resident, Petitioner, Doug Workman. App. 29. The work performed by Respondents required them to spend many hours each day in direct contact with, and/or in close proximity to, the coal combustion waste produced by the corporate Petitioners' plant and disposed of at the corporate Petitioners' landfill. App. 29-30. At no time did the Petitioners ever warn or tell the Respondents the truth about the toxic dangers to which they were being exposed on a daily basis. App. 30-32, 33-36, 40-41. In fact, the Petitioners took various steps to actively conceal the hazardous nature of the material. App. 30-32. On numerous occasions, Petitioner, Doug Workman, and other agents, representatives, and employees of the corporate Petitioners, falsely asserted to the Respondent workers that coal waste was safe and non-hazardous, and that Respondents should not be concerned for their health after exposure to the coal combustion waste, even after incidents in which certain Respondents were literally buried in the material while working on-site at the Gavin Landfill. *Id.* Moreover, Mr. Workman also placed his fingers in his mouth on more than one occasion, with coal waste on his fingers, exclaiming that the coal waste was "safe to eat." Mr. Workman also specifically interceded against Respondent workers, on at least one occasion, by instructing a subordinate agent, representative, or employee of the corporate Petitioners not to provide Respondents with personal protective equipment. *Id.* Respondents believed and trusted these false and misleading statements, and continued to work, unprotected, in the coal combustion waste, carrying home the material on their clothes and bodies, and in their vehicles, to their homes and families. App. 30-32, 33-36, 40-41.

Many Respondents are now seriously ill with health problems, various cancers, and diseases known to be caused by exposure to coal waste. App. 16-18, 26-28, 43-46. Six Respondents

had died from illnesses related to their coal combustion waste exposure as of the filing of the Complaint in this matter. App. 16-18, 33. Since that time, three more Respondents have died from illnesses and conditions caused by their exposure. App. 150. Others are actively being treated with debilitating chemotherapy treatments.

Rather than filing an Answer to the Complaint, Petitioners filed their Motion to Dismiss Pursuant to Rule 12(b)(6) and the Doctrine of *Forum Non Conveniens*, on September 12, 2014. App. 48. Respondents filed their response in opposition brief on February 23, 2015. App. 146. Counsel for both parties appeared before the Respondent Judge in the Circuit Court for Mason County, West Virginia, on February 27, 2015, for oral argument on Petitioners' Motion to Dismiss Pursuant to Rule 12(b)(6) and the Doctrine of *Forum Non Conveniens*, Petitioners' Motion to Stay Discovery, and Respondents' Motion to Compel Discovery Responses. App. 142.

During oral argument on the Motion to Dismiss, Petitioners addressed each of the eight factors of *forum non conveniens*, making self-serving, conclusory statements as to why the Motion to Dismiss should be granted, with little, or in some cases no, specific factual support for their reasoning. For example, when discussing factor two, whether maintaining the claim or action in the Circuit Court of Mason County, West Virginia would work a substantial injustice to the Petitioners, Petitioners stated that "other than the fact that nine of the 77 plaintiffs are from West Virginia, nothing in the case has to do with West Virginia" as grounds for the "substantial injustice" they alleged would result from keeping the case before the Respondent Judge. App. 198. With respect to factor four, which looks to the state or states in which the plaintiffs reside, the Petitioners simply made the broad, self-serving, conclusory statement that, because the "vast majority of plaintiffs reside in the state of Ohio," this factor weighed in favor of dismissal, completely ignoring the fact that this case involves a number of West Virginia plaintiffs, who

brought suit against a West Virginia Defendant. The *forum non conveniens* analysis simply requires no such examination of whether there are more or less plaintiffs in the forum state than where the defendant would chose to litigate. App. 198, 202.

Petitioners went on to address the sub-elements of factor six, which requires the court to determine “[w]hether the balance of the private interests of the parties and the public interest of the state predominate in favor of the claim or action being brought in an alternate forum,” in a similarly conclusory fashion. Stating that “[t]here’s no question it’s easier access to prove over in Ohio because that’s where the cause of action arose, that’s where the evidence is,” plainly ignores the fact that the situs of the cause of action in this matter, as well as much, if not all, relevant evidence is within the custody, control and/or possession of the Petitioners themselves. App. 198. Petitioners also stated, without elaboration, that compulsory process is “going to be available in Ohio” but is “very difficult over here.” App. 199. Petitioners’ final argument as to why the private interests should weigh in favor of dismissal was to state that, although “it’s just driving over the bridge,” it is going to be more inconvenient for witnesses to come to the Mason County courthouse, again ignoring the plain facts of the case, that the majority of these Ohio witnesses are, in fact, party to the case and that the “inconvenient travel” involved in litigating before a West Virginia court is merely minutes from the West Virginia courthouse. App. 199. With respect to the public interest factors, Petitioners once again made sweeping conclusions, which included reference to the Respondents’ claims as “junk science,” the fact that counsel for the parties are “West Virginia lawyers,” and the assertion that the Respondents “don’t dispute” that Ohio law would apply, a claim which the record in this matter proves to be incorrect.¹ App. 199-200.

¹ During the February 27, 2015 hearing, counsel for the Petitioners plainly stated that:

A second thing that is important to pay attention to is we do not concede in any way, shape, or form that exclusively Ohio law would apply to this case. That’s not correct. And you don’t need to go to

Petitioners' broad-sweeping conclusions, with little to no specific, supportive evidence, on each of the factors in dispute, made clear that the corporate Defendants failed to carry their heavy burden to diminish the great deference that is to be afforded to the Plaintiffs' chosen forum. *See State, ex rel. Mylan, Inc. v. Zakaib*, 713 S.E.2d 356, 227 W.Va. 641 (2011) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839 (1947) (“[U]nless the balance is *strongly* in favor of the defendant, the Plaintiff's choice of forum should rarely be disturbed.”)). Petitioners failed to demonstrate that the chosen forum of *all* Plaintiffs in this matter, West Virginia or otherwise, could be overcome because Petitioners did not, and could not, show that the Circuit Court of Mason County, West Virginia “has *only a slight nexus* to the subject matter of the suit and that another available forum exists which would enable the case to be tried *substantially* more inexpensively and expeditiously,” as required by authoritative West Virginia law on the doctrine of *forum non conveniens*. *State ex rel. J.C. ex rel. Michelle C. v. Mazzone*, 772 S.E.2d W.Va. 336 (2015) (emphasis supplied). The Respondent Judge recognized this, and on August 5, 2015, entered an order accordingly, which denied Petitioners' Motion to Dismiss Pursuant to *Forum Non Conveniens*. App. 1. It is from that order that Petitioners filed their petition for the extraordinary relief of a writ of prohibition, on August 26, 2015. Plaintiffs in the underlying matter respond herein, in opposition.

Ohio law to find that out. West Virginia applies a modified version of choice of law, the *lex loci delicti* choice of law rule, wherein – where the law of the other forum would be contravened of substantial public policy of the state of West Virginia, West Virginia law takes over and controls. And that may well be the case in regard to certain issues in this case. Again, issues which have not yet been developed because of the defendants' refusal to answer discovery and get the case going so that these things can be presented in an orderly way.

. . . We don't concede, and it is not necessarily the case that Ohio Law would control everything.

III. SUMMARY OF ARGUMENT

The instant Petition for a Writ of Prohibition mischaracterizes the Order entered by the Respondent Judge which denied Petitioners' Motion to Dismiss Under the Doctrine of *Forum Non Conveniens*. Petitioners incorrectly argue that the Respondent Judge failed to apply the eight factor test of the *forum non conveniens* statute, and, instead, relied on the general venue statute and related case law to reach the decision to deny the motion to dismiss. In reality, and as the language of the order makes clear, the Respondent Judge properly assessed each of the eight factors, as required by W. Va. Code § 56-1-1a, to determine that dismissal on grounds of *forum non conveniens* was not appropriate in this matter. While the Respondent Judge *comprehensively* addressed *additional* legal arguments pertaining to venue and dismissal, this did not affect the ultimate analysis which led to the decision, and is not grounds for reexamination or reversal. Petitioners' attempt to repaint the thoroughness of the lower court's analysis as an erroneous application of the law should not be given credit, and their Petition for a Writ of Prohibition should be denied.

IV. STATEMENT REGARDING ORAL ARGUMENT

Respondents believe that the Petition for Writ of Prohibition should be denied without oral argument. Respondents believe that oral argument is unnecessary because the Petition for Writ of Prohibition only seeks to question the discretionary application of well-settled law, and simply causes more delay for Respondents, too long suffering from such delay tactics.

V. ARGUMENT

A. **This case does not meet the standards necessary for issuance of the extraordinary remedy of a Writ of Prohibition.**

As Petitioners themselves acknowledged in their Petition for a Writ of Prohibition, a writ of prohibition is a remedy not lightly granted. A familiar five-factor test applies to determine whether such extraordinary remedy should issue:

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996). The instant Petition for Writ of Prohibition should be rejected because no clear error of law has been committed in denying Petitioners' Motion to Dismiss Pursuant to Rule 12(b) and the Doctrine of *Forum Non Conveniens*. Petitioners claim that the Respondent Judge concluded, without basis or analysis, that the instant matter should not be dismissed under the doctrine of *forum non conveniens*. In reality, the Order entered on this issue makes clear that the Respondent Judge addressed and applied each of the eight factors established by W. Va. Code § 56-1-1a to determine that dismissal was not appropriate on grounds of *forum non conveniens*, and set forth the basis for this determination with accompanying findings of fact and conclusions of law for each factor, as required.

B. Standard of Review

It is well-established under West Virginia law that this Court's review of a lower court's decision with respect to issues of venue, including the doctrine of *forum non conveniens*, is to be under an abuse of discretion standard. Syl. Pt. 3, *Cannelton Indus., Inc. v. Aetna Cas. & Sur. Co. of Am.*, 194 W. Va. 186, 187, 460 S.E.2d 1, 2 (1994) ("A circuit court's decision to invoke the doctrine of *forum non conveniens* will not be reversed unless it is found that the circuit court abused

its discretion.”). Ignoring this long-standing principle of law, Petitioners advocate for the application of a *de novo* standard of review in this matter, arguing that the Respondent Judge “misapplied and/or misinterpreted” the *forum non conveniens* statute, and instead relied upon the decision in *Abbott* to determine that dismissal would not be granted. It is clear that the Respondent Judge did not base the decision to deny Petitioners’ Motion to Dismiss on *Abbott*, but instead examined and discussed *Abbott* as part of a comprehensively thorough analysis of all issues and arguments presented by the parties. The Order entered by the trial court clearly shows that the Respondent Judge addressed and applied each of the eight factors, as required under W. Va. Code § 56-1-1a, to reach the decision to deny Petitioners’ Motion to Dismiss. As such, this Court’s review should be conducted under the abuse of discretion standard, as there was neither misapplication nor misinterpretation of any statute. No writ should issue, as there was no clear error in the underlying decision.

C. The Respondent Judge committed no clear error because the decision to deny Petitioners’ Motion to Dismiss was reached after application of the eight factors of W. Va. Code § 56-1-1a, the *forum non conveniens* statute, and sets forth the requisite findings of fact and conclusions of law.

1. The Respondent Judge did not err when he incorporated references to this Court’s decision in *Abbott* into the Order, because the decision to deny Petitioners’ Motion to Dismiss was based upon application of the eight factor test for *forum non conveniens*.

Petitioners argue, again in a conclusory fashion, that the Respondent Judge reached the same decision as was reached in *State ex rel. Ford Motor Co. v. Nibert*, 235 W. Va. 235, 773 S.E.2d 1 (2015), and that he applied the same analysis and included “virtually the same language.” Petition for Writ of Prohibition, at 15. In support of this allegation that the decision in this case was simply a repetition of the decision in *Ford Motor Co.*, Petitioners offer only two examples of the language they claim to be virtually identical, and provide only parsed quotes from the order entered in *Ford Motor Co. Id.* This provides a misleading presentation of both *Ford Motor Co.*, a

case which is distinguishable both factually and legally from the instant matter, and also the Respondent Judge's analysis and ruling in denying Petitioners' Motion to Dismiss.

Ford Motor Co. involved a motor vehicle collision which occurred in the state of Michigan, in which a vehicle, designed and manufactured in the state of Michigan, resold twice to Michigan residents, and driven by Michigan residents at the time of the subject collision, rolled over multiple times, resulting in the death and serious injury of several passengers. The defendant driver was an Ohio resident. The case was filed in Roane County, West Virginia, based upon the fact that the vehicle had originally been sold to an unidentified individual at a dealership located in Spencer West Virginia, and the dealership was joined as a defendant.

The stark contrast of the *Ford* case facts to the facts of the instant matter is glaring, and reveals that the Petitioners' reliance on such tortured comparison in support of their argument is misplaced. The instant matter involves a number of Plaintiffs who are, in fact, residents of West Virginia, (9). The locations at issue, the Gavin Landfill and the Mason County courthouse, are mere miles away over the border of the states of West Virginia and Ohio.² The corporate Petitioners are and/or were licensed to conduct business, and were conducting business at times relevant to this litigation, in the state of West Virginia. Finally, the instant matter involves a West Virginia resident who is a named Defendant, Doug Workman, who played a significant role in the case. This is a stark contrast to the facts of *Ford Motor Co.*, wherein the only factor tying the case to the state of West Virginia was that, thirteen years prior to the subject accident, the vehicle at issue had been sold by a car dealership located in a small town in West Virginia.

² Petitioners themselves recognize this. At the February 27, 2015 hearing on the Motion to Dismiss, counsel for the Petitioners stated that "it's just driving over the bridge" when discussing the need for witnesses to travel from Ohio to the Mason County courthouse. App. 199.

In addition to the fact that *Ford Motor Co.* is clearly distinguishable factually, the legal issue which was central to this Court's ruling in *Ford Motor Co.* is not present in the instant matter. The decision in *Ford Motor Co.* made clear that the issue before the Court in that case was "whether the circuit court failed to consider the statutory factors set forth in West Virginia Code § 56-1-1a in determining whether to dismiss the case for *forum non conveniens*." *State ex rel. Ford Motor Co. v. Nibert*, 235 W. Va. 235, 773 S.E.2d 1, 5 (2015). The Court went on to explain that the circuit court in *Ford Motor Co.* "fail[ed] to state 'findings of fact and conclusions of law as to the eight factors' listed in the [*forum non conveniens*] statute, despite both the Legislature and this Court mandating that such findings of fact and conclusions of law must be expressly made when determining whether *forum non conveniens* is applicable." *Id.* at 6. In that case, this Court found that the Respondent Judge *solely* relied upon the holding in *Abbott* in rendering his decision not to dismiss on grounds of *forum non conveniens* and failed to complete the requisite analysis of each of the eight factors. Such treatment is demonstrably different from the reasoning in the instant matter, in which the Respondent Judge thoroughly addressed each of the eight factors in the Order Denying Defendants' Motion to Dismiss Under *Forum Non Conveniens*, as required under W. Va. Code § 56-1-1a, and also provided findings of fact and conclusions of law to accompany analysis of each factor, as required by West Virginia case law. *See State ex rel. Mylan, Inc. v. Zakaib*, 713 S.E.2d 356, 227 W. Va. 641 (2011) (courts must state findings of fact and conclusions of law as to each of the eight factors listed for consideration); *State ex rel. Ford Motor Co. v. Nibert*, 235 W. Va. 235, 773 S.E.2d 1 (2015) (In all decisions on motions made pursuant to the *forum non conveniens* statute, courts must state findings of fact and conclusions of law as to each of the eight factors listed for consideration in subsection of that statute). Simply because the Respondent Judge also addressed *Abbott* in the Order entered in the instant matter, in addition to other require factors,

does not constitute clear error; the Court's decision to deny Petitioners' Motion to Dismiss was reached after a thorough and proper application and discussion of the eight factors set forth in the *forum non conveniens* statute.

2. **The Respondent Judge did not err by examining and addressing W. Va. Code § 56-1-1(a), this Court's decision in *Crown Equipment v. Morris*, and W. Va. R. Civ. P. 20, in addition to applying the eight factor test for *forum non conveniens* which formed the basis of the decision to deny Petitioners' Motion to Dismiss.**

Petitioners make a similar, yet equally misleading argument that the Respondent Judge incorrectly relied upon *Abbott* in reaching his decision to deny the Motion to Dismiss in arguing that the Respondent Judge incorrectly relied upon the general venue statute, W. Va. Code § 56-1-1(a), and this Court's decision in *Crown Equipment v. Morris*, and West Virginia Rule of Civil Procedure 20, in reaching the decision not to dismiss on grounds of *forum non conveniens*. Once again, Petitioners flatly ignore that the Respondent Judge did not solely base his decision to deny Petitioners' Motion to Dismiss on any one of these legal authorities, but rather examined and discussed them *in addition to* addressing each of the requisite eight factors for *forum non conveniens*. The Order makes clear that the decision was the result of the application and weighing of the eight factors, and that discussion of any additional, relevant statutes, rules, and cases simply served as evidence of the thoroughness of the Respondent Judge's analysis in responding to the parties' briefs on the issues.

At the initial stage of analysis in the Order Denying Defendants' Motion to Dismiss Upon *Forum Non Conveniens*, the Respondent Judge discussed the propriety of venue in the Circuit Court of Mason County, West Virginia. A motion to dismiss on the basis of *forum non conveniens* presupposes that the court in which the action is filed both has jurisdiction and is a proper venue in which to hear the claims. *State ex rel. Mylan, Inc. v. Zakaib*, 713 S.E.2d 356, 227 W.Va. 641

(2011). As such, it is far from clear error for the Respondent Judge to have addressed the elements which establish venue in the Circuit Court of Mason County, West Virginia. In fact, this analysis has no bearing on the ultimate decision of whether or not to dismiss for *forum non conveniens*, and cannot serve as a basis for Petitioners to appeal the lower court's decision on their motion, as the filing of the motion to dismiss for *forum non conveniens*, in and of itself, concedes that the court is a proper venue. *Mylan v. Zakaib*, 713 S.E.2d 356, 227 W. Va. 641 (2011). Petitioners' argument that the Respondent Judge's examination and discussion of the propriety of venue in Mason County was erroneous serves as nothing more than an attempt to distract from the eight factor analysis that the Respondent Judge applied to reach his decision to deny the motion.

Similar to the selective quoting of the Order entered in the *Ford Motor Co.* case, set forth in Section V.C.1 of their Petition for Writ of Prohibition, Petitioners have bolded and underlined choice words and phrases from the Order Denying Defendants' Motion to Dismiss Upon *Forum Non Conveniens* in an attempt to repaint the order as relying upon statutes and case law to reach the conclusion not to dismiss, when, in reality, no such reliance was placed. A reading of the paragraphs in which Petitioners have chosen to selectively highlight shows that the excerpted material, when read in context and as a whole, is a summary of the arguments set forth by the parties in their briefs and oral argument on Defendants' Motion to Dismiss Pursuant to *Forum Non Conveniens*. See Petition for Writ of Prohibition, at 17.

In their Motion to Dismiss Pursuant to *Forum Non Conveniens*, Petitioners, correctly, stated that “. . . Plaintiffs' choice of forum preference can be diminished when the plaintiff is a non-resident” App. 54. Neither the Respondents nor the Respondent Judge disagreed with this correct statement of the law. What Petitioners failed to state, however, was that in the instant matter, nine (9) Plaintiffs are, in fact, West Virginia residents, and filed suit in West Virginia

against a Defendant who is also a West Virginia resident. Rather, Petitioners stated that “[t]herefore, the statute mandates that the Court dismiss the non-resident Plaintiffs if it finds that another forum appears more proper.” *Id.* In their Response in Opposition to Defendants’ Motion to Dismiss, Respondents argued that this statement was incorrect, both in application of the law and in conclusion, and cited to this Court’s decision in *Morris v. Crown Equipment* to support their argument. In *Morris v. Crown Equipment*, this Court found, among other reasons, that the Privileges and Immunities clause of the United States Constitution prohibits such discriminatory dismissal against the Ohio Plaintiffs whenever a West Virginia Plaintiff can bring such action. As such, Petitioners’ argument that “the statute mandates that the Court dismiss the non-resident Plaintiffs if it finds another forum appears more proper” was, in fact foreclosed. It was to this *specific* aspect of Petitioners’ argument regarding *forum non conveniens* which the Respondent Judge addressed his statements about foreclosure under *Morris* in the Order, rather than to the motion as a whole, as Petitioners attempt to re-characterize.

3. **The Respondent Judge did not err by examining the relationship between the *forum non conveniens* statute and the non-West Virginia Respondents’ rights under the Privileges and Immunities Clause of the United States Constitution because the decision not to dismiss the case was made after application of the eight factor test set forth in W. Va. Code § 56-1-1a.**

Even error is alleged for the Respondent Judge to have analyzed the Petitioners’ arguments under the framework set forth in *Morris v. Crown Equipment*, with which Respondents strongly disagree, it would be harmless error, as the ultimate decision to deny the Motion to Dismiss Pursuant to *Forum Non Conveniens* was made after application and analysis of each of the eight factors, as required by the *forum non conveniens* statute and relevant case law. Because this eight factor analysis served as the ultimate grounds for the decision, any additional analyses under *Morris v. Crown Equipment*, or other venue-related legal authority, would constitute only harmless

error (or simply thorough analysis) in the application and analysis of law which did not control the ultimate decision reached on the matter. There is nothing under W. Va. Code § 56-1-1a, or any authoritative case law on the doctrine of *forum non conveniens*, which prohibits a judge from examining and discussing other legal principles, cases, statutes, and rules in addition to rendering a decision based upon the eight factor test. So long as the eight factor test is satisfied, as it was here, any additional analysis or thorough discussion is not erroneous and provides no grounds for issuance of a writ of prohibition or other reversal of the decision of the lower court.

4. The Respondent Judge did not err where he applied the eight factor test as required by W. Va. Code § 56-1-1a, and set forth findings of fact and conclusions of law which supported the decision not to dismiss.

Essentially, the only issue presented by Petitioners' Motion to Dismiss for *Forum Non Conveniens*, and central to the Respondent Judge's decision to deny that motion, was whether Petitioners made a sufficient showing to overcome the strong presumption in favor of the Respondent-Plaintiffs' choice of venue, where nine (9) West Virginia resident Plaintiffs brought suit against a West Virginia Defendant when such suit also happens to contain other out-of-state Plaintiffs and Defendants. The Respondent Judge was required to apply the eight factors set forth in W. Va. Code § 56-1-1a, the *forum non conveniens* statute, and to provide findings of fact and conclusions of law to accompany analysis of each factor, pursuant to this Court's holdings in *Mylan v. Zakaib* and *Ford Motor Co.* The Order Denying Defendants' Motion to Dismiss Pursuant to *Forum Non Conveniens* clearly illustrates that the Respondent Judge addressed each of the eight factors, applied them to the facts of the case, weighed them, and rendered his decision not to dismiss with accompany findings of fact and conclusions of law as to each factor. App. 5-9. Petitioners now argue that, because they disagree with the outcome of this legal analysis, it must be erroneous. Review of the record and the Order makes clear that there is no error, let alone clear

error, which would justify the extraordinary remedy of a Writ of Prohibition or otherwise support any reversal of the lower court's decision.

In reviewing the Respondent Judge's decision not to dismiss this matter on grounds of *forum non conveniens*, it is important to note the long-standing and well-established legal principle which provides that "the plaintiff's choice of a forum is entitled to great deference," a principle which has been confirmed in this Court's decisions, including those which address the possibility of dismissal under the doctrine of *forum non conveniens*. See W. Va. Code § 56-1-1a(a) (West, 2014); see also, e.g., *Norfolk and Western Railway Co. v. Tsapis*, 184, W. Va., 231, 236, 400 S.E.2d 239, 244 (1990) ("[A] key consideration is the residence of the plaintiff, since the doctrine historically accords preference to the choice of the resident plaintiff."). In determining whether the case may be dismissed under *forum non conveniens*, great deference is given to the plaintiff's choice of forum, and the residence of the plaintiff, because "[f]orum non conveniens is not a substantive right of the parties, but a procedural rule of the forum." *State ex rel. North River Ins. Co. v. Chafin*, 233 W.Va. 289, 294, 758 S.E.2d 109, 114 (2014) (citing n. 4, *Am. Dredging Co. v. Miller*, 510 U.S. 443, 454, 114 S.Ct. 981, 127 L.Ed.2d 285 (1994)) (*emphasis supplied*). "A party seeking dismissal on grounds of *forum non conveniens* 'ordinarily bears a heavy burden in opposing the Plaintiff's chosen forum.'" *Id.* (citing *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 423, 127 S.Ct. 1184, 1186 (2007)). A court may only dismiss when "an alternative forum has jurisdiction to hear the case, and trial in the chosen forum would establish oppressiveness and vexation to a defendant out of all proportion to plaintiff's convenience". *Sinochem Int'l Co.*, 549 U.S. at 423, 127 S.Ct. at 1186; see also *State, ex rel. Mylan, Inc. v. Zakaib*, 713 S.E.2d 356, 227 W.Va. 641 (2011) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S.Ct.

839 (1947) (“[U]nless the balance is *strongly* in favor of the defendant, the Plaintiff’s choice of forum should rarely be disturbed.”) (*italics emphasis supplied*).

In addition to the well-established legal principles which give great deference to the plaintiff’s chosen forum, the plain language of the *forum non conveniens* statute, W. Va. Code § 56-1-1a(a), states that a plaintiff’s choice of forum may be diminished only “when the plaintiff is a nonresident and the cause of action did not arise in this state.” W. Va. Code § 56-1-1a(a). The conjunctive construction of the statute, and clear principles of statutory construction, make clear that a party moving to dismiss on grounds of *forum non conveniens* must demonstrate *both* prerequisites to diminish the deference given to the plaintiff’s choice of forum. This Court has also stated as much:

[a] statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect. Here, the statute *plainly states* that, in cases in which the Plaintiff is not a resident of West Virginia *and* the cause of action did not arise in West Virginia, the “great deference” typically afforded to a Plaintiff’s choice of forum “may” be diminished.

State, ex rel. Mylan, Inc. v. Zakaib, 713 S.E.2d 356, 362, 227 W. Va. 641, 647 (2011) (*citing* Syl. Pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951); Syl. Pt. 1, *State v. Jarvis*, 199 W. Va. 635, 487 S.E.2d 293 (1997)) (*emphasis supplied*); *see also Nezan v. Aries Technologies, Inc.*, 226 W. Va. 631, 643-44; 704 S.E.2d 631, 643-44 (2010) (“[W.Va. Code § 56-1-1a] provides a mechanism for the court to weigh the various factors, and places emphasis on the Plaintiff’s choice of forum. What diminishes the choice of forum within the language of the statute is whether the Plaintiff is a non-resident and the cause of action did not arise in this state.”) The plain and simple fact is that, in the instant matter, numerous Respondent-Plaintiffs *are* residents of West Virginia, and therefore both elements required to be established in order to diminish deference to their choice of forum simply do not exist. As such, the great deference to be afforded to the Respondents’

choice of forum is not to be diminished, and the Respondent Judge correctly explained this in the Order Denying Defendants' Motion to Dismiss Under *Forum Non Conveniens*. App. 4-5.

In their Petition for Writ of Prohibition, Petitioners argue that the Respondent Judge failed in his obligation under *Mylan* to apply the eight factors established by W. Va. Code § 56-1-1a(a) and to set forth findings of fact and conclusions of law to support and explain the application and analysis of each factor, stating that “although the Respondent Judge’s order mentions the eight factors, it does not contain the requisite findings of fact and conclusions of law.” Petition for Writ of Prohibition, at 24. Petitioners go on to reference “concessions” made by Respondents with respect to several of the factors, several of which are simply not supported by the record in this matter to date, and provide conclusory arguments that the analysis applied to each factor was insufficient. The Respondent Judge adequately addressed each factor, weighed the factors, and reached an appropriate decision, that the Petitioners had failed to meet their heavy burden to show that the great deference afford to the Respondent-Plaintiffs’ choice of forum was to be diminished. A review of the analysis given to each factor in the Order confirms that no clear error was made in reaching the decision to deny the Petitioners’ motion.

The first factor under W. Va. Code § 56-1-1a(a) is whether an alternate forum is available. An alternate forum almost always exists, otherwise, there would be no reason behind the argument for the application of the doctrine of *forum non conveniens*. If no alternate forum existed, it would be nonsensical to argue that some other forum was more proper or convenient. Neither party to the instant matter disputed that alternate forums do exist in this matter, and any such argument would bend credibility. The Respondent Judge recognized this plain and simple fact, stating in the Order that “practically speaking, alternate forums almost always exist.” App. 5. Petitioners attempt to argue otherwise, citing to *Mace v. Mylan Pharmaceuticals, Inc.*, 227 W. Va. 666, 714 S.E.2d 223

(2011) as “but one example,” but providing no direct citations, or other explanation, in support thereof, let alone any “other examples.” Coincidentally, *Mace v. Mylan Pharmaceuticals* examined the “existence” of an alternate forum where the remedy which would be available in the alternate forum is so clearly inadequate or unsatisfactory that it is no remedy at all.” Syl. Pt. 9, *Mace v. Mylan Pharm., Inc.*, 227 W. Va. 666, 668, 714 S.E.2d 223, 225 (2011). This holding in *Mylan* essentially addresses the other half of the Petitioners’ Motion to Dismiss, in which they argued that all of the Respondents’ claims required dismissal on substantive grounds under Ohio law, yet continued to argue, in their Motion to Dismiss Pursuant to the Doctrine of *Forum Non Conveniens*, that Ohio provided the proper forum to litigate these claims. The Respondent Judge provided this thorough analysis in the Order Denying Defendants’ Motion to Dismiss Under *Forum Non Conveniens*:

This Court also notes that, on the one hand, the Defendants allege that Ohio provides an alternative forum for this lawsuit, the Defendants also allege that the Plaintiffs’ claims requires dismissal under the substantive law of that same Ohio forum, thereby calling into question whether Ohio actually provides a true remedy for the Plaintiffs’ claims.

App. 5. To argue that the Respondent Judge provided only a cursory, or insufficient, analysis of this first factor is glaringly false.

The second factor under W. Va. Code § 56-1-1a(a) requires an examination of whether maintaining the claim or action in the Circuit Court of Mason County, West Virginia would work a substantial injustice to the moving parties, the corporate Defendants. The third factor looks at whether the alternate forum can exercise jurisdiction over all defendants in this matter. As the Respondent Judge explained, where numerous West Virginia Plaintiffs have brought suit against a West Virginia Defendant, and three large, corporate entities, which are or were licensed to do business in the state of West Virginia, who did conduct or are currently conducting business in the

state of West Virginia, and derive substantial revenue from the business conducted in the state of West Virginia, it is neither surprising nor unjust that these Defendants may be sued in the state of West Virginia. App. 5. Furthermore, with respect to factor two, Petitioners failed to provide any specifics in support of their argument as to how maintaining this lawsuit in a West Virginia court would work substantial injustice upon them, such as to meet their burden to diminish Respondents' chosen, and proper, forum.

The fourth factor looks at the state or states in which the several plaintiffs reside. The fifth factor looks to the state in which the cause of action accrued. The disparity between these factors was a basis for the Petitioners' Motion to Dismiss Pursuant to the Doctrine of *Forum Non Conveniens* in the first place. Were these two factors the same, it is less likely any dispute over proper forum would have arisen. Nonetheless, as the Respondent Judge correctly recognized, neither of these factors requires any particular attention, as they swing the scale little in either direction. App. 5; *See State ex. rel. North River Ins. Co. v. Chafin*, 233 W. Va. 289, 295, 758 S.E.2d 109, 115 (2014) ("The weight assigned to each factor varies because each case turns on its own unique fact."). And, as previously addressed, this case undisputedly involves numerous West Virginia resident Plaintiffs, and the *forum non conveniens* analysis does not place any requirement to balance the number of resident plaintiffs with non-resident plaintiffs in assigning weight to these factors.

The sixth factor under W. Va. Code § 56-1-1a(a) requires the court to determine "[w]hether the balance of the private interests of the parties and the public interest of the state predominate in favor of the claim or action being brought in an alternate forum." W. Va. Code § 56-1-1a(a)(6). This factor examines a series of sub-factors which aid in determining whether private or public interests are better served by retention or dismissal. With respect to the private interest factors,

which include the parties' ease of access to sources of proof, compulsory process for the attendance of unwilling witnesses, views of the premises, where warranted, and other practical matters which affect the ability to litigate the matter easily, expeditiously, and inexpensively, it is clear that these factors weigh in favor of the Circuit Court of Mason County retaining this matter. As the Respondent Judge correctly discussed in the Order, Petitioners offered only conclusory statements that it would be, somehow, more difficult to litigate in Mason County, West Virginia. App. 6. Access to proof and compulsory process are essentially resolved by the fact that the vast majority of witnesses to this matter, be they residents of West Virginia, Ohio, or some other location, are parties to the action. Similarly, the majority of tangible evidence will be found in the custody, control, or possession of one of the parties. As for a view of the premises, the corporate Petitioners own or operate the Gavin Landfill, which yet again, in the words of Petitioners' counsel, is "just over the bridge," and would be able to provide access, should it even prove to be necessary. App. 6-7.

The public factors similarly favor retention in Mason County. The Respondent Judge, who is very arguably in the best position to determine the congestion of his court and docket, rejected Petitioners' conclusion that the Mason County docket is too crowded, and that litigation would be too slow-paced in that forum. App. 7. Similarly, the Respondent Judge found unpersuasive the Petitioners' arguments regarding the application of Ohio law. As addressed in footnote 2 of this brief, *supra*, the issue of which law may apply to which claims remains as one to be determined through discovery and the progression of the case. However, where Ohio law need be applied, a border state court, such as the Circuit Court of Mason County, which is located mere miles from the state of Ohio, is more than capable to apply Ohio law as necessary. App. 6. In a similar vein, citizens of a border state to a coal combustion plant such as the Gavin Power Plant and Landfill,

i.e. West Virginians, who live within the shadow of the plant, breathe the air polluted by the plant, and work at the plant or landfill, or have relatives, friends, neighbors, and fellow West Virginians who do, clearly have an interest in deciding an action brought in their home state and county. App. 7-8. It is clear that the Respondent Judge took ample consideration of each of the private interest versus public interest factors, contrary to Petitioners' claims that the Court merely brushed over them. The Court carefully weighed such interests and found in favor of maintaining the Respondent-Plaintiffs' chosen forum.

The seventh factor under W. Va. Code § 56-1-1a(a) directs the court to consider whether dismissal would result in "unreasonable duplication or proliferation of litigation," in cases ". . . when the Plaintiff is a nonresident and the cause of action did not arise in this state." *See* W. Va. Code § 56-1-1a(a); W. Va. Code § 56-1-1a(a)(7). As argued by the Respondents in their opposition brief, and discussed by the Respondent Judge in the Order, the law makes clear that dismissal of the West Virginia Plaintiffs' claims in this matter is prohibited. App. 8. If the West Virginia Plaintiffs would remain in the case before the Respondent Judge in Mason County, while the out-of-state Plaintiffs would be required to refile the very same lawsuit in another forum, this would certainly constitute a duplication and proliferation of litigation by forcing the same lawsuit to proceed in an essentially bifurcated, piecemeal fashion in two different states, despite the fact that all Plaintiffs' claims arose out of the very same acts, omissions, and incidents. Litigation would be fragmented, additional judicial resources would be unnecessarily expended, and significant risk would arise for numerous appeals and motions practice on issues of *res judicata*/collateral estoppel, as well as for potentially inconsistent rulings and outcomes. As such, this factor clearly weighs in favor of the Circuit Court of Mason County maintaining the suit, and the Respondent Judge recognized as much in the Order. App. 8. Furthermore, as discussed in detail in the

arguments set forth in Sections 2 and 3, *supra*, and incorporated fully herein by reference, the issue of what constitutes a lawful forum for the additional out-of-state Plaintiffs' claims, under a Privileges and Immunities clause analysis, has already been resolved and precedent set in *Crown v. Morris Equipment*.

The eighth, and final, factor examines whether the alternate forum provides a remedy. As discussed in the analysis of factor one, the Respondent Judge addressed that "the Defendants allege that Ohio provides an alternative forum for this lawsuit," but "the Defendants also allege that the Plaintiffs' claims requires dismissal under the substantive law of that same Ohio forum, thereby calling into question whether Ohio actually provides a true remedy for the Plaintiffs' claims." App. 5. Where there is a dispute over whether there is even a true remedy, as in the instant matter, a judge makes a proper determination in favor of retention, as the Respondent Judge did here. Such a finding can hardly constitute clear error.

A review of the Order Denying Defendants' Motion to Dismiss Under *Forum Non Conveniens* shows that, far from the Petitioners' allegations that the Order was entered with insufficient and vague analysis, the Respondent Judge thoroughly addressed each of the eight factors set forth under W. Va. Code § 56-1-1a. The Order explains the weight afforded to each factor, either in favor of retention or dismissal by the lower court, with requisite findings of facts and conclusions of law. Furthermore, any additional examination or discussion of relevant case law, statutes, or rules set forth in the Order simply speaks even further to the thoroughness of the Respondent Judge's analysis of the issues, as well as the arguments of each of the parties, and does not somehow detract from the ultimate conclusion to retain the case based upon the eight factor analysis. Petitioners can point to no clear error of law, in any aspect of the Order, which would

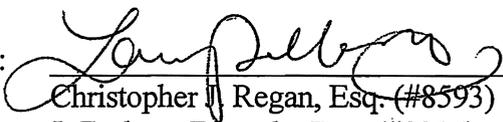
support the necessity of issuing the extraordinary remedy of a Writ of Prohibition, or otherwise upset the decision reached by the lower court in this matter.

VI. CONCLUSION

WHEREFORE, for the reasons set forth herein, the Respondents, the Estate of Bobby Clary, by Joy Clary, Administrator, *et al.*, respectfully request that an Order be entered denying the Petitioners' Verified Petition for Writ of Prohibition.

Respectfully submitted,

The ESTATE of BOBBY CLARY, by Joy Clary,
Administrator, *et al.*,
Respondents

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CERTIFICATE OF SERVICE

Service of the foregoing *Response to Petition for Writ of Prohibition* was had upon counsel of record herein by mailing a true and exact copy thereof, by regular United States Mail, postage prepaid, this 22nd day of September, 2015 as follows:

The Honorable David W. Nibert, Judge
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