

IN THE SUPREME COURT OF APPEALS
OF THE STATE OF WEST VIRGINIA

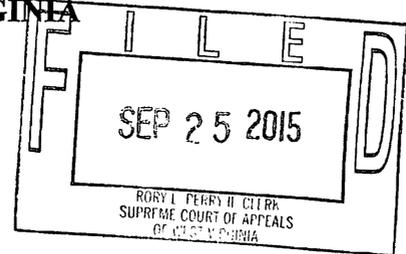
STATE OF WEST VIRGINIA ex rel.
RAJAI T. KHOURY, M.D. and
KHOURY SURGICAL GROUP, INC.,

Petitioners

v.

HON. JASON A CUOMO, Judge
of the Circuit Court of Ohio County and
NICOLE SCARCELLI,

Respondents.



No. 15-0852

**RESPONDENT, NICOLE SCARCELLI'S OPPOSITION TO PETITIONERS'
APPLICATION FOR A WRIT OF PROHIBITION**

NICOLE SCARCELLI, Respondent

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TABLE OF CONTENTS

I. QUESTIONS PRESENTED 1

II. STATEMENT OF THE CASE..... 1

 A. Introduction1

 B. Factual Background.....2

 C. Procedural History.....4

 D. Standard of Review5

III. SUMMARY OF ARGUMENT 6

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION 10

V. LEGAL ARGUMENT 11

 A. The Circuit Court Properly Held that Respondent’s Choice of Venue was Entitled to Statutory Deference12

 B. The Circuit Court Properly Held that Maintenance of this Civil Action Will Not Work a Substantial Injustice to the Petitioners.15

 C. The Circuit Court Properly Found that the Balance of the Private Interests of the Parties and the Public Interest of the State Predominate in Favor Against Dismissal of the Civil Action..20

 D. The Circuit Court Considered the 5th Factor Under the Forum Non Conveniens Statute, W.Va. Code § 56-1-1a, and Properly Concluded it was a Neutral Factor Based Upon the Unique Facts of this Case.28

VI. CONCLUSION..... 30

VERIFICATION..... 32

CERTIFICATE OF SERVICE 33

TABLE OF AUTHORITIES

Abbott v. Owens-Corning Fiberglass Corp., 191 W.Va. 198, 444 S.E.2d 285 (1994)13, 24

Hatfield v. Hatfield, 113 W.Va. 135, 167 S.E.89 (1932) 5

Health Mgmt., Inc. v. Lindell, 207 W.Va. 68, 72, 528 S.E.2d 762, 766 (1999) 5

Naum v. Halbritter, 172 W.Va. 610, 309 S.E.2d 109 (1983)..... 5

Nezan v. Aries Technologies, Inc., 226 W.Va. 631, 704 S.E.2d 631 (2010)..... 6

Norfolk and Western Ry. Co. v. Tsapis, 184, W.Va. 231, 400 S.E.2d 239 (1990) 13

Piper Aircraft Co. v. Reyno, 454 U.S. 235, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981)..... 14

State ex rel. Allen v. Bedell, 193 W.Va. 32, 454 S.E.2d 77 (1994) 5

State ex rel. J.C. v. Mazzone, 235 W.Va. 151, 772 S.E.2d 336 (2015)12, 13, 14

State ex rel. Maynard v. Bronson, 167 W.Va. 35, 277 S.E.2d 718 (1981)..... 5

State ex rel. Mylan, Inc. v. Zakaib, 227 W.Va. 641, 713 S.E.2d 346 (2011) passim

State ex rel. Nelson v. Frye, 221 W.Va. 391, 394, 655 S.E.2d 137, 140 (2007) 5

State ex rel. North River Ins. Co. v. Chafin, 233 W.Va. 289 (2014) 14

State ex rel. Riffle v. Ranson, 195 W.Va. 121, 464 S.E.2d 763 (1995) 5

United Bank, Inc. v. Blosser, 218 W.Va. 378, 624 S.E.2d 815 (2005)..... 5

Statutes

W.Va. Code § 53-1-1..... 5

W.Va. Code §56-1-1a..... passim

Rules

W.Va. R. App. P. 18(a) 10

W.Va. R. App. P. 21 10

W.Va. R. C. P. 12(b)(3)..... 7

W.Va. R. C. P. 30(b)(3)..... 22, 23

W.Va. R. C. P. 32(a)(3)..... 22, 23

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS

Now comes Respondent Nicole Scarcelli, by and through her counsel, Brent E. Wear and Robert P. Fitzsimmons of the Fitzsimmons Law Firm PLLC, who hereby request that this Honorable Court deny Petitioners' application for a Writ of Prohibition.

I. QUESTIONS PRESENTED

1. Whether the Circuit Court properly denied Petitioners' motion under the *forum non conveniens* statute, W.Va. Code § 56-1-1a, to transfer this case to the State of Ohio when: (a) Petitioners reside and practice medicine in Ohio County, West Virginia; (b) Petitioners principal place of business is located in Ohio County, West Virginia; (c) Petitioners' committed tortious conduct in Ohio County, West Virginia, causing harm to the Respondent; and (d) Prior to the institution of this civil action, Petitioners entered into a "Tolling Agreement" with the Respondent consenting to Ohio County, West Virginia, as a proper venue for any and all disputes arising from the tolling agreement?

II. STATEMENT OF THE CASE

A. Introduction

This medical malpractice action arises from the Petitioners' indefensible conduct in removing the wrong bone during surgery. This is a clear liability medical malpractice claim that was properly filed in Ohio County, West Virginia, and for multiple reasons, this Court should uphold the Circuit Court's ruling and reject the Petitioners' improper attempt to forum shop and move this case to the State of Ohio.

Petitioner, Dr. Khoury, resides and practices medicine in Ohio County, West Virginia, and Petitioner, Khoury Surgical Group, Inc., has its principal place of business located in Ohio County, West Virginia. In addition, part of Respondent's cause of action arose in Ohio County and the

pertinent medical records of the Respondent's care and treatment with Dr. Khoury are also located in Ohio County. In light of these facts, as well as numerous others, the Circuit Court properly found that the venue choice of Ms. Scarcelli, as an out-of-state plaintiff, is entitled to statutory deference and there is no requirement that the deference given to the Respondent's choice of forum be diminished in light of the facts and the meaningful connections West Virginia has to this matter, including, but not limited to, tortious conduct occurring in Ohio County, West Virginia, and the Petitioners both being domiciled in Ohio County.

In sum, the Circuit Court was correct in holding that maintaining this action in Ohio County would *not* work a substantial injustice to the Petitioners; and both the private and public interests weigh heavily in favor of this Court retaining this case in preference to Ohio. Accordingly, the Circuit Court correctly held that, the 2nd and 6th factors of the *forum non conveniens* statute weighed significantly against dismissal, outweighing all other enumerated factors in the statute. As such, the trial court was correct in its conclusion that moving this case from the proper forum in Ohio County, West Virginia, to the State of Ohio would *not* serve the interests of justice *nor* would it be more convenient for the parties involved.

B. Factual Background

This case arises from Dr. Khoury's indefensible decision to remove Nicole Scarcelli's clavicle bone instead of removing her right first rib during the surgery to treat Nicole Scarcelli's thoracic outlet syndrome. (App. 001; ¶1). Nicole Scarcelli initially presented to Dr. Khoury with complaints of severe right arm pain. (App. 027; ¶9).¹ After undergoing testing that revealed a right subclavian vein occlusion and being diagnosed with thoracic outlet syndrome, Dr. Khoury advised

¹ Respondent originally filed her Complaint on March 24, 2015, along with discovery requests directed to the Petitioners. Thereafter, on March 25, 2015, Respondent filed her Amended Complaint to correct a typographical error with respect to a date of treatment referenced in the Original Complaint. All other aspects of the Amended Complaint are identical to the original Complaint, and accordingly, all references herein are made to the Amended Complaint. (See App. 027-038)

Nicole Scarcelli to undergo surgery, specifically, a right first rib resection. (App. 028-029; ¶¶10-11). On May 28, 2013, Nicole Scarcelli and Dr. Khoury signed an “informed consent” form permitting Dr. Khoury to remove her right first rib to treat her thoracic outlet syndrome. (App. 029; ¶12). At no point did Nicole Scarcelli consent to allowing Dr. Khoury to remove her right clavicle bone. *Id.*

On May 28, 2013, Nicole Scarcelli underwent what was intended to be a “right first rib resection” at East Ohio Regional Hospital in Belmont County, Ohio, performed by Dr. Khoury. (App. 029; ¶15). During the May 28, 2013, surgery, Dr. Khoury wrongfully and inexcusably removed Nicole Scarcelli’s clavicle bone instead of her right first rib. *Id.* On May 30, 2013, Nicole Scarcelli was discharged from East Ohio Regional Hospital with a discharge diagnosis from Dr. Khoury of “Right thoracic outlet syndrome status post right 1st rib resection.” (App. 030; ¶18).

On May 31, 2013, Dr. Khoury sent a letter to Nicole Scarcelli’s family physician and affirmatively made the following misrepresentation: “Your patient Nicole Scarcelli underwent a right 1st rib resection on May 28, 2013 at East Ohio Regional Hospital.” (App. 30; ¶19). The May 31, 2013, letter to Respondent’s family doctor misrepresenting the status and condition of Nicole Scarcelli, was sent from Dr. Khoury’s office and principal place of business in Ohio County, West Virginia. (App. 147). Thereafter, Dr. Khoury improperly ordered that Nicole Scarcelli undergo physical therapy despite his misdiagnosis and misrepresentations of her medical condition causing Respondent further injury and damage. (App. 30-31; ¶¶ 22-23).

As a result of continued complaints of severe pain, Nicolle Scarcelli sought a second opinion from a thoracic surgeon and was referred to the Cleveland Clinic where it was discovered that Dr. Khoury removed the wrong bone during the May 28, 2013, surgery. (App. 31; ¶¶24-26). Based upon the radiographic and vascular studies performed at the Cleveland Clinic, Nicole Scarcelli was again diagnosed with a “right upper extremity venous obstruction with thoracic outlet syndrome” and

underwent another operation on September 5, 2013, wherein Respondent had her right first rib resected, which should have been initially performed and completed by Dr. Khoury on May 28, 2013. (App. 31; ¶29).

Following the September 5, 2013, surgery, Nicole Scarcelli underwent intense physical therapy to treat the injuries and damages from the improper clavicle resection performed by Dr. Khoury, and Nicole Scarcelli was further advised that her injuries and damages from the improper removal of her clavicle are permanent and lasting in nature. (App. 32; ¶¶ 30-31).

C. Procedural History

On October 24, 2014, prior to instituting this civil action in the Circuit Court of Ohio County, Petitioners and Respondent entered into a “Tolling Agreement” for purposes of exploring the possibility of a settlement prior to the commencement of any civil action. (Supp. App. 234-236). The tolling agreement was entered into by the Defendant Khoury, as evidenced by his own signature, and expressly states that the Agreement shall be governed by and enforced under the laws of the State of West Virginia. (Supp. App. 235; ¶ 6). In addition, the Agreement contained a forum selection clause stating: “The parties hereby agree that **jurisdiction and venue** over any and all disputes that arise with respect to this Agreement **shall be in West Virginia.**” (Supp. App. 235; ¶ 6). (Emphasis added).

On March 24, 2015, Respondent filed her Complaint including specific counts for Medical Negligence (Count One), Battery (Count II), Lack of Informed Consent (Count Three) and Intentional Infliction of Emotional Distress (Count Four). (App. 027-038).

On April 16, 2015, Petitioners filed their motion to dismiss this action for *forum non conveniens* pursuant to West Virginia Code § 56-1-1a, and on June 23, 2015, Respondent filed her Response in Opposition to the motion to dismiss. (App. 039-130; App 131-158; Supp. App. 222-236). The Circuit Court heard oral argument on the subject motion on June 26, 2015. (App. 187-

203). On July 31, 2015, after receipt of the proposed order and objections thereto, the Circuit Court entered an Order denying Petitioners' motion to dismiss for *forum non conveniens*. (App. 001-015).

Petitioners then filed their writ of prohibition concerning the denial of their motion to dismiss for *forum non conveniens*. *Id.*²

D. Standard of Review

“[W]rits of prohibition provide a drastic remedy [that] should be invoked only in extraordinary situations.” *Health Mgmt., Inc. v. Lindell*, 207 W.Va. 68, 72, 528 S.E.2d 762, 766 (1999). The petitioner has the burden of showing that the trial court either (a) has no jurisdiction or (b) has jurisdiction but exceeds its legitimate powers. *State ex rel. Nelson v. Frye*, 221 W.Va. 391, 394, 655 S.E.2d 137, 140 (2007); *see also*, W.Va. Code § 53-1-1; *State ex rel. Allen v. Bedell*, 193 W.Va. 32, 37, 454 S.E.2d 77, 82 (1994). “The right to prohibition must clearly appear . . .” *State ex rel. Maynard v. Bronson*, 167 W.Va. 35, 41, 277 S.E.2d 718, 722 (1981).

A writ of prohibition may be appropriate “to resolve the issue of where venue for a civil action lies.” *State ex rel. Mylan, Inc. v. Zakaib*, 227 W.Va. 641, 645, 713 S.E.2d 346, 360 (2011). The general rule is that review of a trial court's decision on a motion to dismiss, remove or transfer on venue-related grounds is for abuse of discretion. *See, e.g., State ex rel. Riffle v. Ranson*, 195 W.Va. 121, 124, 464 S.E.2d 763, 766 (1995) (“review of a trial court's decision on a motion to dismiss for improper venue is for abuse of discretion”); *United Bank, Inc. v. Blosser*, 218 W.Va. 378, 383, 624 S.E.2d 815, 820 (2005) (same); *Hatfield v. Hatfield*, 113 W.Va. 135, 167 S.E.89, 90 (1932) (review of trial court's decision on removal is for abuse of discretion); *Naum v. Halbritter*, 172 W.Va. 610, 612, 309 S.E.2d 109, 112 (1983) (review of trial court's decision on transfer is for abuse

² On or about September 3, 2015, Petitioners filed a “Motion for Stay of Proceedings Pending Consideration of Petition for Writ of Prohibition” in this Court, and simultaneously filed a Motion for Stay in the Circuit Court. Respondent/Plaintiff has filed her Response in Opposition to the motion for stay contemporaneously with this response brief and has also filed a response in the Circuit Court. (See Supp. App. 237-256).

of discretion); *Nezan v. Aries Technologies, Inc.*, 226 W.Va. 631, 644, 704 S.E.2d 631, 644 (2010) (review of trial court's determination of *forum non conveniens* is for abuse of discretion).

Pursuant to the *forum non conveniens* statute and the controlling case authority, the Circuit Court properly issued detailed findings of fact and conclusions of law for each of the eight (8) factors enumerated in the statute. Because there has been no misinterpretation and misapplication of the *forum non conveniens* statute, an abuse of discretion standard is to be applied, and contrary to Petitioners' assertion, *de novo* review is inappropriate.

III. SUMMARY OF ARGUMENT

The decision of the Circuit Court to deny Petitioners' motion to dismiss this action pursuant to West Virginia's *forum non conveniens* statute, W.Va. Code § 56-1-1a, should be upheld for numerous reasons. The Circuit Court properly interpreted and applied West Virginia Code § 56-1-1a, and pursuant to the applicable controlling case authority, the Circuit Court issued detailed findings of fact and conclusions of law for each of the eight (8) factors enumerated in the *forum non conveniens* statute.

The Circuit Court, in finding that the Respondent's choice of forum was entitled to statutory deference, properly held that West Virginia has more than a slight nexus to the subject matter of this lawsuit and, in fact, West Virginia has a meaningful connection to the Respondent's claims. Moreover, the Petitioners failed to demonstrate that the State of Ohio would enable the case to be tried *substantially* more inexpensively and expeditiously. With the proper deference afforded to Respondent's choice of forum, the Circuit Court properly held that the 2nd and 6th factors enumerated in the *forum non conveniens* statute substantially weighed against dismissal of a properly filed claim, outweighing all other enumerated factors in the statute, and thus required a denial of the Petitioners' motion to dismiss.

Venue for a cause of action lies in the county wherein the cause of action arose or in the county where the defendant resides. *W. Va. Code §56-1-1(a)(1)*. Being that Dr. Khoury is a resident of Ohio County and practices medicine at Khoury Surgical Group, Inc., also located in Ohio County at 20 Medical Park, Suite 203, Wheeling, West Virginia, the Petitioners have not challenged personal jurisdiction nor have they asserted improper venue pursuant to Rule 12(b)(3) West Virginia Rule of Civil Procedure. Instead, the Petitioners continue in their forum shopping efforts by asking this court to take the drastic step and improperly dismiss this case based upon *forum non conveniens*.

The Petitioners' attempts at forum shopping are even more egregious when considering they themselves have consented and invoked the jurisdiction and venue of the Circuit Court of Ohio County, West Virginia, when they entered into a "Tolling Agreement" to explore the possibility of a pre-suit resolution, and specifically agreed that Ohio County would serve as a proper venue for any disputes arising out of the tolling agreement. (Supp. App. 234-236). For the Petitioners to now argue that the very same forum that was selected by them as a proper venue for the tolling agreement has somehow magically transformed into an unjust venue for them to litigate the very same claims necessitating the creation of the tolling agreement, is without merit. In addition, while the Petitioners' motion to dismiss was pending in the Circuit Court of Ohio County, the Petitioners themselves also selected the Circuit Court of Ohio County as their venue of choice when they instituted a civil action against out-of-state defendants who reside in Texas, seeking to enforce the terms of a promissory note that was executed in Texas which contains the following language: "THIS NOTE SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF TEXAS." See *Rajai T. Khoury, M.D., and Nahla Khoury v. RRE Austin Solar, LLC, et al.*, Civil Action No. 15-C-213; Ohio County, West Virginia. (Supp. App. 224-231; 230).

Petitioners pre-suit conduct in invoking the jurisdiction and venue of Ohio County in this matter for any issues arising from the tolling agreement, as well as invoking the jurisdiction and venue of Ohio County in their own personal civil action seeking to enforce a promissory note against Texas residents pursuant to Texas law, both of which should preclude the Petitioners from asserting that it is unjust or inconvenient for them to litigate this claim in West Virginia, the Circuit Court nonetheless properly considered the facts and allegations of this case and correctly concluded that the 2nd and 6th factors enumerated in the *forum non conveniens* statute substantially weighed against dismissal of a properly filed claim.

Dr. Khoury is a resident of Ohio County, West Virginia, is licensed to practice medicine in West Virginia, and practices medicine from his offices located in Ohio County, West Virginia. Likewise, Defendant Khoury Surgical Group, Inc. has its principal place of business located in Ohio County, West Virginia. Respondent filed suit in Ohio County because it is where the Petitioners reside, and it is where Petitioners committed tortious conduct causing harm to the Respondent. To suggest that there is any injustice or inconvenience to the Petitioners by being sued in their home county where they practice medicine, transact business, committed tortious conduct against the Respondent, and filed their own personal lawsuit (unrelated) is simply incorrect and not supported by the facts of this case.

The principal argument relied upon by the Petitioners in seeking a dismissal of this claim asserts that Respondent's treating physicians are located in the state of Ohio. Notably, the Petitioners are not arguing that they will be unable to obtain the testimony from Respondent's treating physicians, but rather the Petitioners solely rely upon speculation that these treating physicians will not agree to testify live at the trial. Petitioners do not have a fundamental right to cross-examine, live at trial, Respondent's treating physicians as this is not a criminal proceeding. Moreover, the issue

raised by the Petitioners is not that they will be deprived of the testimony and evidence from these witnesses; instead it is the *possibility* that these physicians *may not* agree to testify live at the trial and Petitioners may have to secure this testimony by way of a trial deposition presented by videotape at the trial. The Circuit Court acknowledged and analyzed this speculative argument by the Petitioners and advised the parties there are procedures in place to secure the testimony from out-of-state treating physicians, such as foreign subpoenas and trial depositions. In concluding that there are procedures in place to ensure that the testimony and evidence from Respondent's treating physicians can be obtained, the Court properly concluded that speculation that a witness may not testify live at trial was an insufficient basis, under the facts of this case, to conclude that litigating this claim in this forum would result in substantial injustice to the defendants or that the private interests of the parties favored another forum. The Circuit Court also properly concluded that there is not a considerable distance between the bordering counties of Ohio County, West Virginia, and Belmont County, Ohio, that would render interstate discovery and procuring the voluntary attendance of nonparty witnesses for depositions and trial more complicated or expensive.

Additionally, the Circuit Court appropriately concluded this is a straight-forward medical malpractice action that presents no administrative difficulties for the trial court. The nature of the Petitioners' medical practice spreads across the Ohio River and involves patients in both West Virginia and Ohio. This medical malpractice claim arises from tortious conduct committed in both West Virginia and Ohio, involving a doctor who practices medicine in this forum. Petitioners are entrusted to provide health care services to residents and citizens of West Virginia, and the public has a significant interest in holding their own residents and health care providers accountable for tortious conduct. Any burden this straight-forward medical malpractice action might place on the courts or citizens of this state or the parties is slight, justified, and inherent in our justice system, and

accordingly, the Circuit Court properly held that the citizens of West Virginia would not be unfairly burdened in light of the particular facts of this case.

The Circuit Court was correct in holding that maintaining this action in Ohio County would *not* work a substantial injustice to the Petitioners; and both the private and public interests weigh heavily in favor of this Court retaining this case in preference to Ohio. It was also proper, based upon tortious conduct having been committed in both West Virginia and Ohio that resulted in harm to the Respondent, for the Circuit Court to find that the 5th factor of the statute was neutral for purposes of its analysis under the *forum non conveniens* statute. Accordingly, the Circuit Court correctly held that, the 2nd and 6th factor of the *forum non conveniens* statute weighed significantly against dismissal, outweighing all other enumerated factors in the statute, and as such, the trial court was correct in its conclusion that moving this case from the proper forum in Ohio County, West Virginia, to the State of Ohio would *not* serve the interests of justice *nor* would it be more convenient for the parties involved.

For these reasons, the Circuit Court properly denied Petitioners' motions to dismiss this action for *forum non conveniens* and the petition for writ of prohibition should be denied.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary pursuant to W.Va. Rule of App. Proc. 18(a), because the petition for writ is without substantial merit; the dispositive issues have been authoritatively decided; the facts and legal arguments are adequately presented in the briefs and record on appeal; and the decisional process would not be significantly aided by oral argument. Indeed, the matter is appropriate for memorandum decision pursuant to W.Va. Rule of App. Proc. 21, because there is no substantial question of law and the trial court's decision was correct; there is no prejudicial error; and other just cause exists for summary affirmance.

V. LEGAL ARGUMENT

The *forum non conveniens* statute should not be used as a tool for defendants to engage in forum shopping. When examining the unique facts of this case, along with the actions taken by the Petitioners to selectively invoke the jurisdiction and venue of Ohio County when they deem it advantageous for them to do so, it is abundantly clear that the Petitioners are improperly using the *forum non conveniens* statute to seek a dismissal of a properly filed claim in the Petitioners' home county where tortious conduct occurred. Simply stated, the Circuit Court of Ohio County is the proper venue for this straight-forward medical malpractice claim and the Circuit Court properly interpreted and applied the *forum non conveniens* statute. To overturn the Circuit Court's ruling would only serve to incentivize defendants to seek a dismissal for *forum non conveniens* any time a claim is brought by a non-resident plaintiff who has treating physicians located beyond the borders of West Virginia. Such a precedent being sought by the Petitioners would eviscerate the policy and purpose behind West Virginia's general venue statute, W.Va. Code § 56-1-1(a)(1), which permits the filing of a civil action in the county where the defendants reside or the cause of action arose.

The Circuit Court properly interpreted and applied West Virginia Code § 56-1-1a, and pursuant to the controlling case authority, the Circuit Court issued detailed findings of fact and conclusions of law for each of the eight (8) factors enumerated in the *forum non conveniens* statute. As further explained herein, West Virginia has more than a slight nexus to the subject matter of this lawsuit and, in fact, West Virginia has a meaningful connection to the Respondent's claims. The Circuit Court was correct in its conclusion that moving this case from the proper forum in Ohio County to another state would *not* serve the interests of justice *nor* would it be more convenient for the parties involved.

For each of these reasons and the many that follow, Petitioners' motion to dismiss this case for *forum non conveniens* was properly denied.

A. **The Circuit Court Properly Held that Respondent's Choice of Venue was Entitled to Statutory Deference**

Petitioners incorrectly suggest that the venue choice of Ms. Scarcelli, as an out-of-state plaintiff, is not entitled to statutory deference. Petitioners are wrong. Because the cause of action for Respondent's injuries and damages arose, in part, from tortious conduct in Ohio County, West Virginia, statutory deference applies with full force to Ms. Scarcelli's selection of the forum:

[T]he 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.*" ***Nothing in the statute requires a court to diminish, or abolish altogether, the deference it normally affords a plaintiff's choice of forum.*** Rather, it permits courts to do so, when the precedent factors have been met.

State ex rel. Mylan, Inc. v. Zakaib, 227 W.Va. 641, 648, 713 S.E.2d 356, 363 (2011). (Emphasis added).

Even assuming *arguendo* that Petitioners' contentions are accurate and Plaintiff's cause of action arose solely from tortious conduct in the State of Ohio, there is no requirement that the deference given to the Plaintiff's choice of forum be diminished, and should not be diminished in light of the facts of this case.

Recently, in *State ex rel. J.C. ex rel. Michelle C. v. Mazzone*, this Court addressed the issue of preference given to the plaintiff's choice of forum and reaffirmed its prior rulings:

"[t]he doctrine [of *forum non conveniens*] accords a preference to the plaintiff's choice of forum, but the defendant may overcome this preference by demonstrating that the forum 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.*"

State ex rel. J.C. v. Mazzone, 235 W.Va. 151, 772 S.E.2d 336, 345 (2015) citing, Syl. Pt. 3, in part, *Norfolk and Western Ry. Co. v. Tsapis*, 184 W.Va. 231, 400 S.E.2d 239 (1990). (Emphasis added).

Intertwined with the deference given to a plaintiff's choice of forum is the concomitant principle that "the doctrine of *forum non conveniens* is a drastic remedy that should be used with caution and restraint." *Abbott v. Owens-Corning Fiberglass Corp.*, 191 W.Va. 198, 205, 444 S.E.2d 285, 292 (1994). "Mere allegations that a case can be tried more conveniently in another forum are not sufficient to dismiss a case on grounds of *forum non conveniens*." *Id.* "[F]or courts to determine whether the doctrine of *forum non conveniens* should be applied, the court's analysis must be supported by a record." *Id.* at 290.

The Petitioners have been unable to meet their burden and demonstrate that Respondent's claims against them, as resident defendants, have only a *slight nexus* to the subject matter. As is set forth hereinafter in greater detail, the defendants are residents of Ohio County, operate a surgical practice in Ohio County, and engaged in tortious conduct in Ohio County which resulted in harm to the Respondent. As is also set forth hereinafter in greater detail, the Circuit Court properly held that the Petitioners have not shown in any way that this matter would be tried *substantially* more inexpensively and expeditiously by moving the case across the river to Belmont County, Ohio. In fact, as acknowledged by the trial court, the Ohio County Courthouse is located: (a) 4.71 miles from Petitioners' residence (b) 3.58 miles from Petitioners' principal place of business; and (c) 3.85 miles from the site of the initial negligent surgery at East Ohio Regional Hospital. (App. 7; ¶28; App. 149-152, 157). Conversely, to have this case transferred to Belmont County, Ohio, would result in the Petitioners having to travel a further distance for trial, as Dr. Khoury's residence in Ohio county is located 14.32 miles from the Belmont County Courthouse. (App. 7; ¶29; App. 153-156).

The unique facts of this case clearly support the Circuit Court's finding that the Plaintiff's choice of venue was entitled to statutory deference and was not required to be diminished. Accordingly, keeping in mind the preference afforded to Ms. Scarcelli's choice of forum and the burden imposed on the Petitioners, the Circuit Court properly determined the motion to dismiss pursuant to the *forum non conveniens* statute by issuing detailed findings on the eight (8) enumerated factors set forth in the statute. *Mylan*, 227 W.Va. at 649.

The Petitioners also incorrectly argue that because the Circuit Court found that two of the factors in the *forum non conveniens* statute (factors two and six) supported the denial of the motion to dismiss, and the other factors were either neutral or favored the relief sought by the Petitioners, the Circuit Court must have provided improper deference to Respondent's choice of forum. In essence, the Petitioners seek a bright line rule that whenever a greater percentage of the factors in the *forum non conveniens* statute favor dismissal, such a finding is dispositive, relieving the Circuit Court of its obligation to assign the appropriate weight to each factor in reaching its decision. This logic posited by the Petitioners is fundamentally flawed and simply wrong based upon the controlling case authority from this Court.

This Court has repeatedly recognized that "the weight assigned to each factor varies because each case turns on its own unique facts." See *State ex rel. J.C. v. Mazzone*, 235 W.Va. 151, 772 S.E.2d 336, 345, citing, *State ex rel. North River Ins. Co. v. Chafin*, 233 W.Va. 289 (2014), citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981) (stating that *forum non conveniens* analysis is highly fact specific). With respect to the weight assigned to each factor set forth in W.Va. Code § 56-1-1a, the Circuit Court's Order correctly reflects that the weight assigned to each factor can vary, and accordingly, instead of simply looking at the percentage of factors that favor dismissal or non-dismissal, the Circuit Court issued detailed findings of facts on all

eight (8) factors. Contrary to the Petitioners' flawed logic, it was permissible and proper for the Circuit Court to find the 2nd and 6th factor of the *forum non conveniens* statute weighed significantly against dismissal, outweighing all other enumerated factors in the statute.

B. The Circuit Court Properly Held that Maintenance of this Civil Action Will Not Work a Substantial Injustice to the Petitioners.

The 2nd enumerated factor in the *forum non conveniens* statute requires that the Circuit Court consider “[w]hether maintenance of the claim or action in the courts of this state would work a substantial injustice to the moving party.” *W. Va. Code § 56-1-1a(a)(2)*. In a thinly veiled attempt to support their position, the Petitioners repeatedly allege that all tortious conduct occurred in Ohio, and West Virginia has little to no nexus to the subject matter of this case. Both of these contentions are simply incorrect.

To begin, it should not go overlooked that prior to the filing of this civil action, Petitioners (who had counsel) voluntarily entered into a “Tolling Agreement” with the Respondent to explore the possibility of a pre-suit resolution. Contained within the tolling agreement, signed by Petitioner Khoury himself, is a forum selection clause which specifically states:

“6. This Agreement shall, in all respects, be subject to, governed by, and enforced under the laws of the State of West Virginia. The parties hereby agree that **jurisdiction and venue** over any and all disputes that arise with respect to this Agreement **shall be in West Virginia.**” (Supp. App 235; ¶ 6). (Emphasis added).

As demonstrated by paragraph six (6) in the Agreement with the Respondent, Petitioners themselves selected West Virginia jurisdiction and venue, which includes the Circuit Court of Ohio County, as the proper venue for any disputes arising from the tolling agreement. Thus, the Petitioners themselves consented and were willing to invoke the jurisdiction and venue of Ohio County and for the Petitioners to now argue that the very same forum that they selected as a proper venue for the

tolling agreement has somehow magically transformed into an unjust and inconvenient venue is without merit.

Additionally, while the Defendants / Petitioners' motion to dismiss for *forum non conveniens* was pending in the Circuit Court of Ohio County, Petitioner Khoury, by and through his attorneys, who are representing him in this medical malpractice claim, filed a separate civil action (unrelated) in the very same court (Circuit Court of Ohio County) seeking to enforce the terms of a promissory note that was executed in Texas, by Texas defendants, requiring the application of Texas law. See *Rajai T. Khoury, M.D., and Nahla Khoury v. RRE Austin Solar, LLC, et al.*, Civil Action No. 15-C-213; Ohio County, West Virginia. (See promissory note which states: "This note shall be governed by, and construed in accordance with, the laws of the State of Texas.") (Supp. App. 230). Thus, the Petitioners themselves are seeking to have the Circuit Court of Ohio County apply foreign law (Texas law), against a non-resident defendant (Texas) for a promissory note that was executed in Texas.

The old adage of "what is good for the goose is good for the gander" should apply with full force and effect as the Petitioners' own actions should preclude them from arguing that litigating this claim in Ohio County would unfairly burden the courts and citizens of this state, as well as precluding them from arguing that litigating this claim in the county where they are domiciled is unjust or inconvenient.

Irrespective of whether this Court concludes that such conduct by the Petitioners should preclude them from seeking a dismissal on the basis of *forum non conveniens*, the Circuit Court nonetheless addressed the allegations at issue in this civil action and properly found that maintaining this action in Ohio County would not work a substantial injustice to the Petitioners. As set forth in the Complaint, Respondent has asserted that Dr. Khoury was not only negligent during the May 28,

2013, surgery, but also committed tortious conduct thereafter by misrepresenting to both the Respondent and her treating physicians, including her primary care doctor, that he removed the wrong bone. (App. 027-038).

For example, on May 31, 2013, Dr. Khoury sent a letter to Nicole Scarcelli's family physician making the following misrepresentation: "Your patient Nicole Scarcelli underwent a right 1st rib resection on May 28, 2013 at East Ohio Regional Hospital." (App. 030; App. 147). The May 31, 2013, letter, an outrageous act of misrepresentation, gross negligence and recklessness, was sent from Dr. Khoury's office and principal place of business located at 20 Medical Park, Suite 203, Wheeling, Ohio County, West Virginia. (See letter from Dr. Khoury to Dr. Beetham; App. 147).³

Notably, Petitioners do not contest that the May 31, 2013, letter (an independent tortious act) originated and occurred in Ohio County. Instead Petitioners attempt to argue, albeit unsuccessfully, that these tortious actions are a part of a continuing tort, and therefore, should not be considered in analyzing whether tortious conduct occurred in the forum selected by the Respondent. Again, the Petitioners argument is illogical. The affirmative actions taken by Dr. Khoury in Ohio County in penning a letter that blatantly misrepresents which bone he removed during the surgery constitutes a separate tortious act (not a continuing tort) committed in Ohio County, West Virginia. Moreover, whether this egregious conduct is characterized as a separate act or as part of a continuing tort, the reality is that it still constitutes tortious conduct committed in Ohio County, West Virginia, not the State of Ohio.

As set forth in the Complaint, Dr. Khoury inexcusably and recklessly ordered that Nicole Scarcelli undergo physical therapy with a resected clavicle causing her further injury and damage. (App. 030-036; ¶¶ 19, 22-24, 34, 49-54, 56-57). As a directed and proximate result of Dr. Khoury's

³ In addition, Petitioners made another misrepresentation by billing Nicole Scarcelli's insurance for the removal of her rib, when in fact he removed her clavicle, and further collected the fee from the surgery here in West Virginia. (App. 148).

May 31, 2013, letter sent from his offices in Ohio County, West Virginia, to Dr. Porsche Beetham, Respondent's primary care physician was prevented from taking any action to prevent further damage and injury to Nicole Scarcelli by cancelling the improper medical treatment ordered by the Petitioner following the initial surgery, as well as preventing Respondent's primary care doctor from promptly sending her to another surgeon to have the correct surgery performed. As a result, unbeknownst to Respondent and her health care providers, including her physical therapists, Nicole Scarcelli underwent physical therapy with a resected clavicle causing her extreme pain, suffering and further injury, and Respondent was further caused to endure months of pain and suffering while her condition went misdiagnosed.

The May 31, 2013, letter sent from the Petitioner's medical office in Ohio County, an independent and affirmative act, constitutes a blatant and outrageous misrepresentation that serves in and of itself as a basis to support Respondent's claims for intentional infliction of emotional distress, and could further support Respondent's allegations of recklessness and/or intentional misconduct entitling Respondent to an award of punitive damages. Accordingly, the Circuit Court correctly held that Defendants tortious conduct in both West Virginia and Ohio demonstrates that West Virginia does have a meaningful connection to the Respondent's claims for this reason alone, as well as for reasons hereinafter set forth.

In addition, for purposes of the 2nd factor in the *forum non conveniens* statute, this Court has specifically acknowledged that consideration of the Defendant's domicile is relevant and permissible. *Mylan*, 227 W.Va. at 651. As identified hereinbefore, Dr. Khoury is a resident of Ohio County, is licensed to practice medicine in West Virginia, and practices medicine from his offices located in Ohio County. Likewise, Khoury Surgical Group, Inc. has its principal place of business located in Ohio County. To suggest that it would cause the Defendants substantial injustice to defend

this clear liability claim in the forum of their own residency under the facts is nonsensical. By choosing to practice medicine in Ohio County, West Virginia, and incorporating in West Virginia, the Defendants have chosen to take advantage of the laws of West Virginia and cannot now complain about being held accountable in this forum for their tortious conduct. (App. 007). Moreover, by transacting business in this state the Petitioners' developed a reasonable expectation that they would be subject to being named a defendant in this state's civil justice system for acts occurring both inside and outside of West Virginia.⁴ (App. 008).

Contrary to the Petitioners' position, the quality of contacts and expectations of being a defendant in a lawsuit are proper considerations for a trial court to undertake for purposes of a *forum non conveniens* analysis, particularly when the action is pending in the county where the defendants are domiciled, and the Petitioners themselves have chosen, apparently when they determine it to be in their best interests, to invoke the jurisdiction and venue of Ohio County, West Virginia. Indeed this Court has reviewed decisions of trial courts making similar findings when analyzing the 2nd and 6th factors under the *forum non conveniens* statute and has not found such considerations to be improper. (See *Mylan*, at 651, discussing the findings made by the trial court judges). It is completely logical and permissible for the trial court to consider a defendant's quality of contacts with the forum for purposes of determining whether West Virginia has more than a slight nexus and meaningful connections to the controversy at issue, along with the convenience and expenses of litigating in the forum. Also, and perhaps even more importantly in this case, such an analysis of the quality of contacts with the forum is particularly important when weighing the public interests under the 6th factor of the statute. Evidence of such contacts is particularly salient when considering punitive damages are being sought against a resident defendant, as is the case here, for tortious

⁴ Indeed, as indicated hereinbefore, the Petitioners agreed to Ohio County as a proper venue for the tolling provision and have also filed suit as plaintiffs against non-resident defendants in the Circuit Court of Ohio County even though they had a motion to dismiss for *forum non conveniens* pending before the very same court.

conduct occurring in the forum. In such cases as this one, the extent of the defendants contacts with the forum are elevated to an even greater importance and significance as it is prudent for the trial court to weigh the interest the state has in regulating and deterring tortious conduct from being committed by its residents. Thus, the attempt by the Petitioners to manufacture error by arguing it was improper for the Circuit Court to consider the Petitioners' contacts with the forum as a part of its *forum non conveniens* analysis are misplaced and unavailing.

Based upon the facts and the reality that suit was brought in the county where the Petitioners reside and their tortious conduct, in part, occurred, it is abundantly clear under the circumstances present that the Circuit Court was correct in finding that maintenance of this action in this forum will not work a substantial injustice to the Petitioners.⁵

C. **The Circuit Court Properly Found that the Balance of the Private Interests of the Parties and the Public Interest of the State Predominate in Favor Against Dismissal of the Civil Action..**

The Circuit Court correctly found that the balance of public and private interests weigh heavily in favor of it retaining this case in preference to the State of Ohio. The 6th enumerated factor in the *forum non conveniens* statute requires that the Circuit Court consider: “Whether 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, *which shall include consideration of the extent to which an injury or death resulted from acts or omissions that occurred in this state.*” *W.Va. Code §56-1-1a(a)(6)*. (Emphasis added). As previously discussed herein, part of Respondent’s injuries and damages arise from the Petitioners tortious acts or omissions that occurred in Ohio County. Respondents for their part have not provided any evidence to refute that the May 31, 2013,

⁵ The Circuit Court also examined the access to evidence and the location of witnesses as a part of its analysis of the 2nd factor set forth in the *forum non conveniens* analysis. Because a similar analysis was also undertaken by the Circuit Court with respect to the 6th factor set forth in the statute, Respondent will address these factors under the next argument section of this Response to avoid duplication of the argument.

letter authored by Dr. Khoury in Ohio County constitutes a tortious act, nor have they provided countervailing public or private interest in an Ohio forum resolving this case.

1. Private Interest of the Parties

Regarding private interest, the *forum non conveniens* statute requires the Court to consider (i) the relative ease of access to sources of proof; (ii) availability of compulsory process for attendance of unwilling witnesses; (iii) cost of obtaining attendance of willing witnesses; (iv) a possible view of the premises (if appropriate) and (v) all other practical problems that make trial of a case easy, expeditious and inexpensive. *W.Va. Code §56-1-1a(a)(6)*. None favor Ohio over West Virginia.

First, transferring the case to Ohio will not improve ease of access to proof. The key witness in this matter, Dr. Khoury, is located in Ohio County. As for the Respondent and any lay witnesses the Respondent may designate to testify at trial who are not residents of this state, these witnesses will voluntarily appear at trial resulting in no injustice or prejudice to the Petitioners. In addition, the Respondent has retained expert witnesses and provided the Petitioners with expert reports pre-suit. Respondent's expert economist is located in West Virginia, while Respondent's other experts who are out of state (and notably also not residents of Ohio), will agree to testify at trial, again resulting in no prejudice to the Petitioners. In addition, the records from Dr. Khoury's office are also located in this forum. With respect to the remaining medical records of the Respondent, these records have already been provided and an authorization for the release of Respondent's records will likewise be provided eliminating any issue with respect to obtaining said records.

Despite these realities, Petitioners seek a dismissal relying principally on the fact that Respondent received subsequent medical treatment from medical providers located in the State of Ohio, who are located in the Ohio Valley near the Circuit Court of Ohio County, and at the Cleveland Clinic. Petitioners are not arguing they will be unable to obtain the testimony from

Respondent's out of state treating physicians, but rather the Petitioners solely rely upon speculation that these treating physicians will not agree to testify live at the trial.

The Petitioners principal reliance on the asserted inability to secure live testimony from Respondent's treating physicians is in essence seeking to elevate the fact that Respondent's treating physicians are not located in West Virginia to a dispositive level for purposes of a *forum non conveniens* analysis. Applying the Petitioners rationale, a dismissal for *forum non conveniens* would be required any time a claim is brought by a non-resident plaintiff who has treating physicians who are located beyond the borders of West Virginia simply because the defendant could allege the possibility that such a witness *may not* be willing to testify live at the trial. The problem for the Petitioners is there is no fundamental right to have witnesses testify live at the trial of a civil action. In addition, the West Virginia Rules of Civil Procedure specifically authorize the presentation of videotape deposition testimony at trial. See *Rule 30(b)(3) of the West Virginia Rules of Civil Procedure; Rule 32(a)(3) of the West Virginia Rule of Civil Procedure*. Therefore, the Circuit Court was correct that this speculative argument is an insufficient basis to conclude that litigating this claim in this forum would result in substantial injustice to the defendants, as well as being an insufficient basis to conclude that the private interests of both parties favors dismissal.

Contrary to Petitioners argument, the Circuit Court did not impose an "evidentiary showing" on Petitioners to prove that these witnesses will not agree to voluntarily participate. (See Petition, p. 20). Instead, the Circuit Court was confronted with speculative statements that Respondent's treating physicians *may not* testify live at trial, and therefore, the defendants claimed they *may* be deprived of the ability to cross-examine these witnesses live at trial. Faced with such speculative arguments, the Court, having properly recognized that seeking a dismissal of a properly filed claim is a drastic remedy and it is the moving party's burden to prove that the interests of justice and the convenience

of parties require such a dismissal, properly considered such evidence, assigning it the weight it deemed appropriate in light of the other evidence of record before the Court, and determined it was insufficient for the Petitioners to meet their burden that this case should be dismissed. Simply put, the Circuit Court did not ignore the argument set forth by the Petitioners, but rather it conducted a reasonable analysis of the impact these treating physicians could have on the case and reached an appropriate conclusion that the presence of out of state treating physicians and speculation that they may not agree to testify live at trial, does not rise to a level requiring the drastic step of dismissing the case.

The Circuit Court specifically found that the presence of treating physicians located in the state of Ohio would not be problematic for the parties. The Circuit Court, relying on its own experiences (and recognition that Ohio County, as a border county to the State of Ohio and the Commonwealth of Pennsylvania) properly concluded that counsel for the parties regularly encounter this issue with ease in practically every tort claim that is filed. (App. 008; ¶ 35; App. 011, ¶ 47-48). The Circuit Court also acknowledged that it is not uncommon for the parties to issue foreign subpoenas and conduct discovery depositions of treating physicians, and if they are designated to testify at trial and are unable to testify live at trial, counsel for the parties regularly take evidentiary depositions of these witnesses via videotape to be used at trial. *Id.*; See also *Rule 30(b)(3) of the West Virginia Rules of Civil Procedure*; *Rule 32(a)(3) of the West Virginia Rule of Civil Procedure*.

The court properly analyzed any potential prejudice to the parties and acknowledged that regardless of the state where trial occurs, it is probable that it will be necessary to secure some third-party testimony through the usual methods of foreign depositions and/or videotape depositions to be played at trial in that treating physicians located several hours away are typically presented by videotape depositions to accommodate these health care providers' busy schedules. (App. 011; ¶ 48).

This is a reality commonly encountered in every tort claim and will be an issue irrespective of the case being in West Virginia or Ohio. *Id.* Another reality is that the Petitioners will rely heavily upon their own retained medical experts to contest damages in this case, as opposed to Respondent's treating physicians that are located at the Cleveland Clinic and thus several hours away from the Defendants preferred forum of Belmont County, Ohio.

Again, it is worth re-stating that the Petitioners have not shown that they will be deprived of the testimony and evidence from these treating physicians, but rather they *may* be unable to have them testify live at trial. Contrary to the Petitioners position, this in no way deprives them of their right to challenge the evidence presented against them, as any such challenges can be presented to the jury either via live testimony or by way of testimony via videotape deposition. The Circuit Court did not ignore the speculative argument raised by the Petitioners and it is clear from the Circuit Court's order that it considered such a possibility and assigned the proper weight to the arguments set forth by the Petitioner with respect to the issue of out-of-state treating physicians. The analysis undertaken by the Circuit Court on this issue was proper and it was permissible for the Court to discount speculative, self-serving arguments advanced by the Petitioners when determining the private interests of the parties. ("Mere allegations that a case can be tried more conveniently in another forum are not sufficient to dismiss a case on grounds of *forum non conveniens*.") See *Abbott v. Owens-Corning Fiberglass Corp.*, 191 W.Va. 198, 205, 444 S.E.2d 285, 292 (1994).

In its analysis of the private interests of the parties, the Circuit Court also acknowledged that the Ohio County Courthouse is located only several miles from the Petitioner's residence (4.71 miles) and his principal place of business (3.58 miles). (App. 149-152). In addition, the Ohio County Courthouse is located only several miles (3.85 miles) from where the initial malpractice took place in Belmont County, Ohio. (App. 153-156). Inexplicably, the Petitioners seek to increase the

distance of travel for the Defendants and their counsel. The sheer proximity of the Petitioners' residence and principal place of business to the Circuit Court, as well as the proximity of this forum to the site of the tortious conduct (both in Ohio and West Virginia) further substantiates that there is no reason to believe that an Ohio venue would result in lower costs, a more expeditious trial or provide greater access to witnesses or evidence.

Lastly, the Petitioners incorrectly suggest that the Circuit Court's Order did not address the private interests of the Respondent in litigating this matter in Ohio County. Again, the petitioners are simply wrong and this argument is nonsensical. As indicated throughout the Circuit Court's Order, the Respondent's choice of forum is entitled to deference and the entire Order encompasses findings that Ohio County is the proper forum for all parties to this matter. However, to further demonstrate that Respondent's private interests are met by litigating this matter in this forum, this Court does not need to look any further than the specific finding and acknowledgement by the Circuit Court that in the event a verdict is obtained against the defendants, the assets used to satisfy any such judgment are also located in Ohio County, West Virginia, where the Petitioners are domiciled. (App. 012-013; ¶ 57). This conclusion by the Court is particularly important considering there is no dispute that Dr. Khoury removed the wrong bone during the surgery. As Respondent's counsel specifically advised the Court during oral argument, that it is all but certain that a judgment as a matter of law would be obtained in this clear liability claim, and it is nonsensical to transfer this case to the State of Ohio, to then turn-around and force the Respondent to come back to West Virginia to execute her judgment. (App. 193-194). The reality of such an absurd result clearly demonstrates that litigating in West Virginia is appropriate, practical and equally convenient for the parties involved.

For the aforementioned reasons, the Circuit Court was correct in holding the balance of private interests weighs against dismissal.

2. **Public Interest of the State**

Regarding public interest, the *forum non conveniens* statute requires the Court to consider: (i) the administrative difficulties flowing from court congestion; (ii) the interest in having localized controversies decided within the state; (iii) the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and (iv) the unfairness of burdening citizens in an unrelated forum with jury duty. *W.Va. Code §56-1-1a(a)(6)*.

The Circuit Court properly found this is a clear cut case of medical malpractice that presents no administrative difficulties for the Circuit Court. (App. 012; ¶ 53). In this action, Ms. Scarcelli will present evidence that Petitioner Khoury, a physician and a health care provider licensed by regulatory agencies of West Virginia, recklessly violated applicable standards of care in his treatment of the Respondent. The Petitioners are entrusted to provide health care services to residents and citizens of West Virginia and when they seek to shield gross violations of the standards of care from scrutiny in the community where the Petitioners reside and practice medicine, the public has a significant interest in holding their own residents and health care providers accountable for such egregious conduct. (App. 012).

The nature of the Defendants' medical practice spreads across the Ohio River and involves both patients in West Virginia and Ohio. *Id.* Moreover, this is a straightforward medical malpractice claim arising from tortious conduct committed in both West Virginia and Ohio involving a doctor who practices medicine in this forum, and is a resident of this forum. *Id.* As discussed hereinbefore, the Defendants have sought the benefits and protections of West Virginia law by seeking licensure and residency in this state and the Circuit Court was correct in concluding West Virginia has a great interest in deciding this matter which involves egregious conduct by a health care provided within the local community. *Id.*

While the Petitioners attempt to argue otherwise, the facts clearly support that the Petitioners engaged in tortious conduct in this forum. Therefore, it is conceivable, if not likely, that predicate acts to support a potential punitive damage award also occurred in this forum and West Virginia has a great interest in regulating such conduct. *Id.* In addition, based upon the fact that Dr. Khoury removed the wrong bone, it is all but certain that a judgment as a matter of law will be obtained against the Petitioners and the assets used to satisfy any such judgement are also located in West Virginia where the Petitioners are domiciled; further supporting that West Virginia has an interest in having this local controversy decided in this state.

With respect to any conflict of laws or application of Ohio law to this matter, should it ultimately be decided that Ohio substantive law applies to Respondent's claims, being that the Circuit Court of Ohio County is situated on the border of Ohio wherein many medical doctors practice in both states, the Circuit Court specifically stated that it has regularly applied Ohio and/or West Virginia law to medical malpractice claims. (App. 13; ¶ 58). As such, should it be determined that Ohio law applies, the Circuit Court expressly stated this poses no unusual difficulty or problems for the trial court. *Id.*

Finally, the Circuit Court properly found that any burden that this clear liability action might place on the courts or citizens of this state or the parties is slight, justified, and inherent in our justice system, and accordingly, the citizens of West Virginia would not be unfairly burdened in light of the particular facts of this case. (App. 13; ¶ 59).

Simply put, the Circuit Court properly interpreted and applied this factor of the *forum non conveniens* statute and properly held that both the private and public interests weigh heavily in favor of the Circuit Court of Ohio County retaining this case in preference to Ohio.

D. The Circuit Court Considered the 5th Factor Under the Forum Non Conveniens Statute, W.Va. Code § 56-1-1a, and Properly Concluded it was a Neutral Factor Based Upon the Unique Facts of this Case.

The 5th factor enumerated in the *forum non conveniens* statute requires the Circuit Court to consider “[t]he state in which the cause of action accrued.” *W.Va. Code § 56-1-1a (a)(5)*. While Respondent’s cause of action initially arose from the Petitioner’s removal of the clavicle, instead of the right first rib, during a surgery in Ohio, Respondent alleges that Dr. Khoury also committed tortious conduct here in Ohio County, West Virginia. Accordingly, it was proper for the Circuit Court to deem this a neutral factor in its analysis.

As discussed hereinbefore, while the Petitioners repeatedly attempt to categorize all of the tortious conduct committed by them as occurring in the State of Ohio, the reality is the record demonstrates that the Petitioners have committed separate tortious acts in Ohio County, West Virginia, which independently support Respondent’s claims for intentional infliction of emotional distress, as well as supporting Respondent’s claims that the Petitioners’ acts and/or omissions in making such a misrepresentation was reckless, entitling her to an award of punitive damages. Specifically, Respondent alleges the misrepresentations made to Respondent’s primary care doctor were committed from Dr. Khoury’s office location in Wheeling, Ohio County, and Respondent alleges this caused further injury and harm to the Respondent as previously set forth herein. Notably, the Petitioners have not contested that tortious conduct occurred in Ohio County. Instead, the Petitioners have attacked the significance of the tortious conduct and whether it constitutes part of a continuing tort and whether it is of a sufficient egregious nature to support Respondent’s claims for intentional infliction of emotional distress and punitive damages.

While the cause of action initially arose from the Petitioners’ removal of the wrong bone during a surgery in Ohio, Dr. Khoury also committed tortious conduct here in Ohio County, West

Virginia. Contrary to the illogical and flawed hypothetical posed by the Petitioners in their brief, Respondent is not alleging that Dr. Khoury committed tortious conduct in West Virginia merely because he returned to his home state and continued in his misdiagnosis of Respondent's condition. (See Petition, p. 26-27). The relevance of Dr. Khoury's conduct in West Virginia goes beyond merely returning to his offices in Ohio County. The facts clearly demonstrate that Dr. Khoury, *affirmatively acted* and *participated* in the care and treatment of the Respondent while he was in West Virginia, albeit negligently and recklessly, when he wrote a separate letter to Respondent's primary care doctor misrepresenting what bone he removed from the surgery. Dr. Khoury authored the May 31, 2013, letter stating he successfully removed the Respondent's right first rib, despite having a radiology report within his office chart that clearly stated he removed the wrong bone, namely, the collar bone. The misrepresentations made to Respondent's primary care doctor from Dr. Khoury's Wheeling, Ohio County office location caused injury and harm to the Respondent as previously discussed.

The May 31, 2013, letter sent from the defendant doctor's office in Ohio County constitutes a blatant and outrageous misrepresentation that is sufficient, in and of itself, to establish Respondent's claim for intentional infliction of emotional distress, and could further support Respondent's allegations of recklessness thereby entitling Respondent to an award of punitive damages.⁶ While the Petitioners attempt to mischaracterize the Circuit Court's Order as improperly finding the Respondent seeks independent causes of action for misrepresentation and punitive damages, such a statement is misleading. Respondent is indeed seeking a claim for intentional infliction of emotional distress and is seeking punitive damages against the Petitioners as a result of claims they made repeated misrepresentations to the Respondent. To support her claims, Respondent has identified

⁶ See Complaint ¶ 19 and 34, wherein the Plaintiffs specifically set forth this allegation and further incorporated said averment into each and every count of the Complaint, which includes Intentional Infliction of Emotion Distress. (App. 27-28).

acts of misrepresentation by the Petitioners, including the May 31, letter. This misrepresentation, as well as others, while not separately pled as an independent cause of action, are nonetheless relevant facts to support Respondent's claim for intentional infliction of emotional distress, as well as providing a basis for the jury to conclude the Petitioners' conduct was reckless and outrageous, warranting the assessment of punitive damages. It was within this context that the Circuit Court properly addressed "misrepresentations" and "punitive damages" and the attempts by the Petitioners to re-write the Circuit Court's Order to suggest otherwise is misplaced, and should be summarily discarded. (App. 009; ¶ 41).

Based upon the uncontroverted acts of the Petitioners committed in Ohio County, the Circuit Court correctly held that Petitioners committed tortious conduct in both West Virginia and Ohio. While the cause of action may have initially arose in Ohio, the fact that additional and/or separate tortious conduct is alleged to have occurred in this forum as well, which independently establishes Respondent's claims for intentional infliction of emotional distress, it was proper for the Circuit Court to conclude the 5th factor was a neutral factor in the analysis for *forum non conveniens*.

VI. CONCLUSION

The Circuit Court was correct in holding that maintaining this action in Ohio County would *not* work a substantial injustice to the Petitioners; and both the private and public interests weigh heavily in favor of this Court retaining this case in preference to Ohio. It was also proper, based upon tortious conduct having been committed in both West Virginia and Ohio that resulted in harm to the Respondent, for the Circuit Court to find that the 5th factor of the statute was neutral for purposes of its analysis under the *forum non conveniens* statute. Accordingly, the Circuit Court correctly held that, the 2nd and 6th factor of the *forum non conveniens* statute weighed significantly against dismissal, outweighing all other enumerated factors in the statute. As such, the trial court was

correct in its conclusion that moving this case from the proper forum in Ohio County, West Virginia, to another state would *not* serve the interests of justice *nor* would it be more convenient for the parties involved.

For these reasons, the Circuit Court properly denied Petitioners' motions to dismiss this action for *forum non conveniens* and the Court should deny Petitioners' Writ of Prohibition and grant such further relief as is just and proper.

Respectfully Submitted,

NICOLE A. SCARCELLI, *Respondent*

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VERIFICATION

STATE OF WEST VIRGINIA,

COUNTY OF OHIO, to wit:

The undersigned deposes and says that the contents of the foregoing **RESPONDENT**, **NICOLE SCARCELLI'S OPPOSITION TO PETITIONER'S APPLICATION FOR A WRIT OF PROHIBITION** are true to the best of his information and belief and to the extent they are based upon information and belief he believes them to be true.



BRENT E. WEAR
Counsel for Respondent

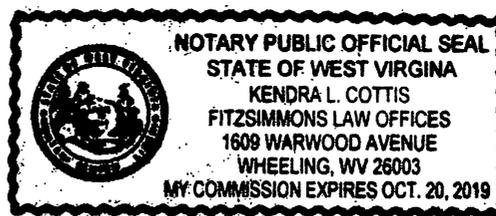
I, a Notary Public of, in, and for said County and State, do hereby certify that Brent E. Wear, whose name is signed to the foregoing writing and being a person known or positively identified to me, this day came forth and appeared and acknowledged the same before me, the undersigned notary public, in my said County on this 23rd-day of September, 2015.



Notary Public in and for
Ohio County, West Virginia

My Commission Expires:

October 20, 2019



CERTIFICATE OF SERVICE

Service of the foregoing ***RESPONDENT, NICOLE SCARCELLI'S OPPOSITION TO PETITIONER'S APPLICATION FOR A WRIT OF PROHIBITION*** was made upon the defendants by mailing a true copy thereof by United States mail, postage prepaid, to their attorneys on the 24th day of September, 2015, as follows:

The Honorable Jason A. Cuomo
Judge of the Circuit Court of Ohio County
Brooke County Courthouse
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Wellsburg, WV 26070

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