

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 16-0607

STATE OF WEST VIRGINIA, *ex rel.* BETTY J. ALMOND and THEODORE H. ALMOND, et al.,

Petitioners,

v.

THE HONORABLE RUDOLPH MURENSKY, McDowell County Circuit Court Judge, and PFIZER INC.,

Respondents.

Civil Action No. (Below) 13-C-159  
McDowell County Circuit Court

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**PFIZER INC.'S RESPONSE IN OPPOSITION  
TO PETITION FOR WRIT OF PROHIBITION**

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## **QUESTIONS PRESENTED**

- 1) Did the Circuit Court properly exercise its discretionary and statutory authority when it extended the period for filing forum non conveniens motions under West Virginia Code § 56-1-1a(b) as part of its Scheduling Order and based on good cause shown?
- 2) Did the Circuit Court act consistently with West Virginia law when it entertained Pfizer's motion to dismiss on forum non conveniens grounds the claims of 30 out-of-state Plaintiffs who jointly filed this case with 10 West Virginia Plaintiffs?
- 3) Did the Circuit Court act within its legitimate authority when it applied West Virginia's forum non conveniens statute, West Virginia Code § 56-1-1a, evaluated each of the statutory factors, and concluded that West Virginia is not a convenient forum in which to litigate the claims of the 30 out-of-state Plaintiffs?

## **STATEMENT OF THE CASE**

### **I. Procedural History**

Plaintiffs are 40 unrelated women, some of whom are joined by their husbands, who allege that they developed type 2 diabetes as a result of taking Lipitor, Pfizer's cholesterol-lowering prescription medication. Plaintiffs claim that Pfizer failed to adequately warn that Lipitor could cause diabetes.

The litigation began with 14 Plaintiffs – 10 from West Virginia and four from New York – who filed a single complaint in McDowell County Circuit Court on September 4, 2013. On October 3, 2013, Plaintiffs filed an Amended Complaint joining 26 new Plaintiffs, all from Texas, and the spouses of 18 Plaintiffs. None of the non-West Virginia Plaintiffs alleges that she was prescribed Lipitor in West Virginia, developed diabetes in West Virginia, or has any other connection to West Virginia. Pfizer is a Delaware corporation based in New York.

Between October 11 and 15, 2013, Pfizer removed this litigation to federal court on diversity grounds as to the 36 non-New York Plaintiffs. Pfizer filed answers in federal and state court that included inconvenient venue as an affirmative defense. In December 2013, the federal court granted Plaintiffs' motion to remand to McDowell County Circuit Court.

Plaintiffs' counsel also represent plaintiffs in cases filed in federal court who allege that Lipitor caused diabetes. In February 2014, the Judicial Panel on Multidistrict Litigation established *In re Lipitor (Atorvastatin Calcium) Marketing, Sales Practices and Products Liability Litigation*, MDL No. 2502 (the "Lipitor MDL"), in the District of South Carolina before Judge Richard M. Gergel. In April 2014, Judge Gergel appointed Plaintiffs' counsel in this litigation as lead plaintiffs' counsel in the Lipitor MDL. The parties agreed that general discovery conducted in the Lipitor MDL would apply in this litigation. For example, the parties cross-noticed in this litigation the common depositions taken in the Lipitor MDL.

In March 2014, before any scheduling or discovery activity took place in the Circuit Court, Pfizer moved for referral of this litigation to West Virginia's Mass Litigation Panel ("MLP") based on its interpretation of West Virginia Rule of Civil Procedure 3(a) as creating separate actions in multi-plaintiff cases like this. At the time, this Court had not yet addressed Pfizer's interpretation of Rule 3(a). Thereafter, in May 2014, this Court held in *State ex rel. J.C. v. Mazzone*, 233 W.Va. 457, 759 S.E.2d 200 (2014) ("*Mazzone I*"), that Rule 3(a) "is an administrative fee and record keeping provision" that requires separate docket numbers for each plaintiff in matters like this but "does not provide authority for severing a complaint substantively into two or more separate civil cases." *Id.* at 470, 759 S.E.2d at 213. On August 12, 2014, in light of *Mazzone I*, this Court permitted Pfizer to withdraw its request for referral to the MLP without prejudice to renewing it if additional complaints were filed.

On November 21, 2014, the parties appeared for a telephonic status conference with the Circuit Court, during which the court and parties discussed scheduling and case management. Pfizer noted its intent to propose a procedure and timeframe for filing forum non conveniens motions, and the Circuit Court directed the parties to attempt to agree upon a proposed scheduling and case management order. Following the conference, Pfizer sent Plaintiffs a proposed scheduling and case management order that included a provision for "fil[ing] any motion to dismiss any Plaintiff's claims, including any motion to dismiss on forum non conveniens grounds" by January 30, 2015. App. 497 ¶ 6. Plaintiffs responded with a

counterproposal that sought to modify certain aspects of Pfizer’s proposed schedule but retained the paragraph providing for a briefing schedule on forum non conveniens motions. Plaintiffs’ proposal simply moved the filing date for such motions out a few weeks, to March 2, 2015. App. 504 ¶ 6. The parties conferred but were unable to agree on a proposed scheduling order because they disagreed on how many Plaintiffs should be subject to discovery and preparation for trial. Plaintiffs ultimately proposed that the scheduling order provide for discovery of two Plaintiffs and trial of one Plaintiff (App. 642-44), while Pfizer proposed that all Plaintiffs provide fact sheets and authorizations and that additional discovery be conducted as to 10 Plaintiffs (App. 683-86).

On August 11, 2015, the Circuit Court held a status conference. On August 14, 2015, the court entered a Scheduling Order that included a deadline for Pfizer to file dispositive motions and provided that “Plaintiffs are not precluded from asserting the untimeliness of any such motion.” App. 627 ¶ 5. The Scheduling Order directed the parties to conduct discovery in four of the 10 West Virginia Plaintiffs’ cases and prepare them for trial. *Id.* ¶ 6. It did not provide for discovery or trial preparation of any of the non-West Virginia Plaintiffs’ cases, and no discovery has taken place in those cases.

Pursuant to the Scheduling Order, Pfizer filed a motion to dismiss the non-West Virginia Plaintiffs on the grounds of forum non conveniens. App. 442-68. Plaintiffs opposed the motion only on timeliness grounds. App. 341-50. They did not argue that the motion should be denied pursuant to an analysis of the forum non conveniens factors under West Virginia Code § 56-1-1a. Nor did they contend that any Plaintiff lacked an adequate remedy in her home state. On October 29, 2015, the Circuit Court heard argument. The parties then submitted proposed findings of fact and conclusions of law. On June 16, 2016, the Circuit Court issued an order granting Pfizer’s motion (the “Order”). App. 35-50.

## **II. The Trial Court’s Forum Non Conveniens Decision**

In its Order, the Circuit Court first concluded that Pfizer’s motion to dismiss on forum non conveniens grounds was timely. The court noted that the case “is a highly complex products

liability case” involving 40 primary Plaintiffs and 18 spouses. App. 38-39. The court observed that Pfizer had asserted a forum non conveniens defense in the answers it timely filed under Rule 12(b) and that “Plaintiffs were on notice of this defense.” App. 39.

The court further noted that “[a]lthough this case was originally filed on September 4, 2013, matters concerning same didn’t come before this Court on a regular basis until the telephonic conference on November 21, 2014,” and “[i]t wasn’t until the request for a date for another scheduling conference that the Court was aware of the problems concerning the scheduling order.” App. 39. After the court conducted a scheduling conference in August 2015, it “entered its Scheduling Order dated August 14, 2015, with dates for case management,” and “in effect, extended the time period for filing a motion to dismiss for forum non conveniens.” App. 40. The court cited West Virginia Code § 56-1-1a(b), which

provides that a motion to dismiss on grounds of forum non conveniens “is timely if it is filed either concurrently or prior to the filing of either a motion pursuant to Rule twelve of the West Virginia Rules of Civil Procedure or a responsive pleading to the first complaint that gives rise to the grounds for such a motion: *Provided*, That a court may, for good cause shown, extend the period for the filing of such a motion.”

App. 39 (citing W. Va. Code § 56-1-1a(b)).

The Circuit Court held that Pfizer’s forum non conveniens motion was timely filed because it complied with the date for dispositive motions that the court set in its August 2015 Scheduling Order and “because there is ‘good cause shown’ to ‘extend the period for the filing of such a motion’” under the forum non conveniens statute. App. 40. Citing this Court’s decision in *Caruso v. Pearce*, 223 W.Va. 544, 678 S.E.2d 50 (2009), the Circuit Court observed that “[a] party may establish good cause for extending a statutory deadline in the interest of justice and based on the procedural history and circumstances in a given case.” App. 40. The Circuit Court found that under *Caruso* and Rule 16, trial courts “can and should design case-specific plans, including with respect to deadlines to file and hear motions.” App. 40 (internal quotation marks and citations omitted). The Circuit Court also noted that this Court, in *State ex rel. J.C. ex rel. Michelle C. v. Mazzone*, 235 W.Va. 151, 772 S.E.2d 336 (2015) (“*Mazzone II*”), “expressly

recognized that timeframes can be adjusted for a forum non conveniens motion based on the needs of the case.” App. 40.<sup>1</sup>

The Circuit Court held that “[t]o the extent that an extension of time for good cause shown was necessary, the Court concludes that Pfizer has demonstrated good cause based on the history of this litigation, the record of the communications between the parties, and the absence of any prejudice to Plaintiffs.” App. 41. The Circuit Court cited specific facts in support of its conclusion that “Pfizer’s record of preservation of its forum non conveniens defense, its diligence in defending this case, and the absence of any prejudice to Plaintiffs warrant extension of the time to file this motion under section 56-1-1a(b)”:

Pfizer included the defense of inconvenient forum in its answers filed in both state and federal court. Following remand of this litigation to state court, Pfizer sought transfer to the MLP, and there was a period of several months during which that issue was being addressed by the parties and the Supreme Court of Appeals. Although Pfizer ultimately withdrew that motion following the decision in *Mazzone I*, the Court finds that it would be unfair to penalize Pfizer for advancing a good faith jurisdictional motion and then engaging in good faith scheduling negotiations that included a schedule for filing [a forum non conveniens] motion. This Motion to Dismiss for Forum Non Conveniens is not a surprise to anyone.

App. 40-41. The Circuit Court also found that “Plaintiffs cannot show prejudice because no case-specific discovery or dispositive rulings have occurred with respect to the non-West Virginia Plaintiffs and common discovery from the MDL will be readily transferrable to these cases upon any refiling.” App. 41. The court noted that “Plaintiffs’ only claim of prejudice is that they ‘have spent a significant amount of time and resources fighting Pfizer to stay in this forum[,]’ [b]ut those efforts apply equally to the ten West Virginia Plaintiffs in this action to whom Pfizer’s motion does not apply.” App. 41.

Next, the Circuit Court held that the statutory factors set forth in W. Va. Code § 56-1-1a and this Court’s decision in *Mazzone II*, which involved another pharmaceutical product liability

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<sup>1</sup> Plaintiffs erroneously state that *Mazzone II* was issued in May 2014, before the parties began negotiating a scheduling order in this litigation. Pet. at 19. *Mazzone II* was not issued until April 2015, after the parties had exchanged proposed scheduling orders that contained a briefing schedule for forum non conveniens motions.

litigation against Pfizer, supported the forum non conveniens dismissal of the non-West Virginia Plaintiffs. App. 41-49. The Circuit Court noted that there was no evidence that any of the non-resident Plaintiffs had any contact with West Virginia, and it held that “the same essential and undisputed facts concerning the out-of-state origin of [Plaintiffs’] claims” that this Court cited in affirming the forum non conveniens dismissal of non-West Virginia plaintiffs in *Mazzone II* “show that Plaintiffs’ choice of forum is entitled to less deference, weighing in favor of dismissal based on forum non conveniens.” App. 42. The Circuit Court applied each of the eight statutory factors and held that each supported a finding that West Virginia is not a convenient forum to litigate the 30 out-of-state Plaintiffs’ claims. App. 43-49. Among other findings, the Circuit Court found that the out-of-state Plaintiffs had adequate alternative forums in which they could pursue remedies, namely, their home states of New York and Texas. App. 43-44, 49. The Circuit Court noted that both states “recognize product liability causes of action” and thus “provide a remedy,” App. 49, a fact that Plaintiffs did not contest below.

The Circuit Court concluded:

The claims of the thirty (30) non-West Virginia Plaintiffs identified above are hereby **DISMISSED WITHOUT PREJUDICE**, subject to refiling only in each Plaintiff’s home state within 150 days and to tolling of the statutes of limitations to the extent they were not already expired at the time Plaintiffs’ claims were originally filed.

App. 49-50.

## SUMMARY OF ARGUMENT

This Court should deny Plaintiffs' petition for a writ prohibiting enforcement of the trial court's Order, an extraordinary remedy not warranted here. Plaintiffs disagree with the Order, but they do not identify any error that justifies issuing a writ.

The trial court appropriately and effectively exercised its discretion in managing this litigation and addressing Pfizer's motion to dismiss under West Virginia law. Based on the procedural history and circumstances of the case, the trial court included in its first Scheduling Order a deadline for dispositive motions and extended the time period for filing forum non conveniens motions for good cause shown pursuant to W. Va. Code § 56-1-1a(b).

The trial court also acted within its discretionary authority and consistent with this Court's prior rulings when it entertained Pfizer's motion directed to some but not all of the Plaintiffs, and it reached the right conclusion in dismissing the out-of-state Plaintiffs' claims. The trial court correctly applied the statutory forum non conveniens factors and made specific factual findings supported by the record. Plaintiffs did not oppose Pfizer's motion on any ground other than timeliness, and, in any case, they have not identified any error in the trial court's application of the forum non conveniens statute and West Virginia law.

Plaintiffs concede that they did not present any argument to the Circuit Court that Plaintiffs from Texas would have no remedy in Texas, and that argument is therefore waived. Even if it had been presented, the Circuit Court properly found that the Texas Plaintiffs' home state offers an adequate remedy and would permit their claims to be decided on their merits.

In short, the Circuit Court acted within its authority and consistent with West Virginia law. As this Court held in *Mazzone II*, "West Virginia has no real interest in trying non-resident plaintiffs' claims against non-resident defendants involving causes of action that accrued in states other than West Virginia." 235 W.Va. 151, 164, 772 S.E.2d 336, 349. A writ of prohibition is not a proper remedy for alleged abuse of discretion by a trial court, and Plaintiffs' petition should be denied.

## STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, Pfizer waives any request for oral argument under Rules 19 or 20.

Plaintiffs have not demonstrated that this petition involves a “clear error of law” or “clear abuse of discretion” warranting argument under Rule 19. Pet. at 8-9. The Circuit Court acted within its discretionary authority when it: issued a Scheduling Order that provided a deadline for dispositive motions; evaluated the timeliness of the forum non conveniens motion that Pfizer filed pursuant to that Scheduling Order; found good cause under the forum non conveniens statute to “extend the period for the filing of . . . a motion” under the statute, W. Va. Code § 56-1-1a(b); and granted the motion after finding the eight statutory factors supported dismissal in favor of Plaintiffs proceeding with their cases in their home states. The Circuit Court did not “amend” any statute, exceed its authority to manage the litigation pursuant to the Rules or the forum non conveniens statute, or depart from any controlling precedent. To the contrary, its decision is consistent with this Court’s decision in *Mazzone II*, which involved an analogous timeline and forum non conveniens analysis. Here, as there, there is no ground to warrant a writ.

### ARGUMENT

#### **I. The Circuit Court Appropriately Exercised its Discretion and Statutory Authority in Extending the Time to Move to Dismiss on Forum Non Conveniens Grounds**

The Circuit Court’s discretionary decision to extend the deadline for forum non conveniens motions based on a finding of good cause under the statute is not an appropriate matter for a writ of prohibition, which “will not issue to prevent a simple abuse of discretion.” Syl. Pt. 1, *State ex rel. Farber v. Mazzone*, 213 W.Va. 661, 662, 584 S.E.2d 517, 518 (2003).

West Virginia’s forum non conveniens statute provides that a motion “is timely if it is filed either concurrently or prior to the filing of either a motion pursuant to Rule twelve . . . or a responsive pleading . . . : *Provided*, That a court may, for good cause shown, extend the period for the filing of such a motion.” W. Va. Code § 56-1-1a(b). Contrary to Plaintiffs’ contention, the Circuit Court did not “amend” this statute through its Scheduling Order. Pet. at 11. Rather,

the Circuit Court exercised its discretion under the statute, which expressly permits trial courts to extend the statutory deadline for filing forum non conveniens motions based on a finding of good cause. The Circuit Court issued a Scheduling Order under West Virginia Rule of Civil Procedure 16 that extended Pfizer’s deadline to file motions to dismiss while allowing Plaintiffs to “assert[] the untimeliness of any such motion.” App. 626-29. The parties thereafter briefed and argued, and the Circuit Court evaluated, the timeliness of Pfizer’s motion to dismiss on forum non conveniens grounds. The Circuit Court found that Pfizer’s motion was timely because there was good cause to extend the time for filing the motion through the dispositive motions deadline the court included in its Scheduling Order.

“Pursuant to Rule 16(b) of the West Virginia Rules of Civil Procedure, a trial court has the discretion to enter a scheduling order in any action, limiting the time that parties have, *inter alia*, to amend the pleadings, file motions, and complete discovery.” *State ex rel. Weirton Med. Ctr. v. Mazzone*, 214 W.Va. 146, 150-51, 587 S.E.2d 122, 126-27 (2002). The ability to issue such scheduling orders is fundamental to the discretionary authority of a trial court. *See Mazzone I*, 233 W.Va. at 474, 759 S.E.2d at 217; *accord McCoy v. CAMC, Inc.*, 210 W.Va. 324, 328, 557 S.E.2d 378, 382 (2001). “Rule 16 is explicitly intended to encourage active judicial management of the case development process . . . and judges are encouraged to actively participate in designing case-specific plans for positioning litigation as efficiently as possible for disposition . . . .” *Caruso v. Pearce*, 223 W. Va. 544, 549, 678 S.E.2d 50, 55 (2009) (quoting 3 James Wm. Moore et al., *Moore’s Federal Practice* ¶ 16.02 (3d ed. 2007)) (internal quotation marks omitted).

The Circuit Court, like the MLP in *Mazzone II*, has ““significant flexibility”” to manage cases before it, particularly where multiple plaintiffs are at issue, including by adopting case-specific schedules and case management orders. *Mazzone II*, 235 W.Va. at 157, 772 S.E.2d at 342 (quoting *State ex rel. Mobil Corp. v. Gaughan*, 211 W. Va. 106, 111, 563 S.E.2d 419, 424 (2002)). The Circuit Court’s Scheduling Order was tailored to the nature and procedural history of this litigation, and its decision to extend Pfizer’s deadline to move to dismiss served the

efficiency and economy objectives of Rule 16 and the forum non conveniens statute. Recognizing that the litigation remained at an early stage, the Circuit Court set a deadline for dispositive motions approximately two weeks after the date of the Scheduling Order. The Scheduling Order also set deadlines for the first stages of discovery and provided for such discovery as to four West Virginia Plaintiffs.

At the time that Pfizer filed its motion to dismiss, Plaintiffs had already had the benefit of full discovery of Pfizer for nearly two years based on the parties’ agreed coordination of discovery in the Lipitor MDL. By contrast, no discovery of the 30 out-of-state Plaintiffs had taken place, nor was it requested to take place by Plaintiffs or provided for in the Scheduling Order. Thus, when Pfizer filed its motion to dismiss, Plaintiff-specific proceedings were at an even earlier stage here than they were in the Zolofit litigation in *Mazzone II*, where this Court agreed with the MLP that “unique circumstances” existed that made an extended timeframe for forum non conveniens motions appropriate. *Mazzone II*, 235 W.Va. at 157 n.20, 772 S.E.2d at 342 n.20. The “unique circumstances” this Court identified there involved a focus during the initial stages of the litigation on various jurisdictional issues, including removal to federal court and referral to the MLP, such that “the matter had not progressed very far despite the lapse of time since the filing of the first complaint.” *Id.*

At the time that Pfizer filed its motion to dismiss pursuant to the Scheduling Order here, the procedural history of the litigation included the following events:

<b>Date</b>	<b>Event</b>
September 4, 2013	Plaintiffs filed their Original Complaint, naming 14 Plaintiffs.
September 12, 2013	Plaintiffs served their Original Complaint on the Secretary of State.
October 3, 2013	Plaintiffs filed an Amended Complaint, joining 26 new Plaintiffs and 18 spouses.
October 7, 2015	Plaintiffs served their Amended Complaint on the Secretary of State.
October 11-15, 2013	Pfizer filed notices of removal in the U.S. District Court for the Southern District of West Virginia as to the 36 Plaintiffs against which it is diverse.

<b>Date</b>	<b>Event</b>
October 16, 2013	Pfizer filed Answers to the Amended Complaint in the Circuit Court, listing the New York Plaintiffs in the captions.
October 16-17, 2013	Pfizer filed Answers to the Amended Complaint in federal court.
October 22- December 6, 2013	In the 36 federal actions, Plaintiffs moved for remand, and the parties briefed the motions.
December 19, 2013	The federal court granted Plaintiffs' motions to remand.
December 26, 2013	The federal court sent the clerk of the Circuit Court a letter advising that the cases had been remanded and enclosed a copy of federal court documents.
December 31, 2013	The Circuit Court clerk acknowledged receipt of the federal court's correspondence and files.
March 4, 2014	Pfizer filed a Combined Motion for Referral to the MLP.
March 24, 2014	Plaintiffs filed an Opposition to Defendants' Motion for Referral to the MLP.
March 25, 2014	The Circuit Court ordered that Pfizer's Motion for Referral to the MLP and Plaintiffs' Opposition be transmitted to the Supreme Court of Appeals for review.
May 27, 2014	This Court issued its decision in <i>Mazzone I</i> , addressing the impact of Rule 3(a) on joinder of multiple plaintiffs in a single complaint.
June 11, 2014	This Court issued an Administrative Order directing the parties to submit supplemental filings by July 11, 2014, regarding Pfizer's pending Motion for Referral to the MLP in light of <i>Mazzone I</i> .
July 11, 2014	Pfizer submitted a supplemental filing withdrawing its request for referral to the MLP in light of <i>Mazzone I</i> . Plaintiff also submitted a supplemental filing.
August 12, 2014	This Court ordered that Pfizer's motion for referral to the MLP be deemed withdrawn without prejudice.
October 30, 2014	The parties jointly filed a Motion for Relief From Local Counsel In-Person Deposition Attendance, which the Circuit Court granted on November 3, 2014. Over the next five months, 16 company witness depositions took place.
November 21, 2014	The parties appeared before the Circuit Court for a telephonic status conference and discussed scheduling and case management matters.
December 22, 2014	Pfizer sent Plaintiffs a proposed case management and scheduling order that included a proposal for discovery of all Plaintiffs and a schedule for briefing motions to dismiss, including motions to dismiss on forum non conveniens grounds.

<b>Date</b>	<b>Event</b>
January 9, 2015	Plaintiffs sent Pfizer a counter-proposal on case management and scheduling that accepted a number of provisions in Pfizer's proposal, including a briefing schedule for forum non conveniens motions.
February 2, 2015	The parties met and conferred about their respective case management and scheduling proposals.
July 9, 2015	Plaintiffs' counsel sent Pfizer's counsel a revised proposed case management order.
August 5, 2015	Pfizer filed a Proposed Scheduling and Case Management Order and Statement in Support with the Circuit Court.
August 7, 2015	Plaintiffs filed an Opposition to Pfizer's Proposed Case Management and Scheduling Order and Statement in Support of Plaintiffs' Proposed Case Management and Scheduling Order with the Circuit Court.
August 11, 2015	The parties appeared before the Circuit Court for a status conference.
August 14, 2015	This Circuit Court entered a Scheduling Order that provided for discovery and trial preparation in four of the West Virginia Plaintiffs' cases and set a September 1 deadline for dispositive motions, as to which Plaintiffs were "not precluded from asserting the untimeliness of any such motion." App. 627 ¶ 5.
August 31, 2015	Pfizer filed its Motion to Dismiss the Non-West Virginia Plaintiffs on the Grounds of Forum Non Conveniens and Motion to Dismiss the Texas Plaintiffs Under Texas Law.

Pfizer never argued and the Circuit Court did not find, as Plaintiffs contend, that the purported untimeliness of Pfizer's motion "was the [Circuit] Court's fault for not issuing a Scheduling Order." Pet. at 15.<sup>2</sup> Rather, as the Circuit Court's Order and the record demonstrate, this litigation, like *Mazzone II*, involved early jurisdictional motions and raised complex case management issues that took the parties and court a number of months to address. Here, as there,

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<sup>2</sup> The Circuit Court cited *Caruso* as authority not for a finding that a trial court's failure to issue a scheduling order excuses a party's untimeliness but for this Court's recognition in that case that "[a] party may establish good cause for extending a statutory deadline in the interest of justice and based on the procedural history and circumstances in a given case." App. 40 (citing *Caruso*, 223 W.Va. at 550, 678 S.E.2d at 56). Even under the dissenting analysis in *Caruso*, on which Plaintiffs rely, Plaintiffs cannot show that Pfizer "did nothing" or "[slept] on [its] rights" with respect to its forum non conveniens motion. *Caruso*, 223 W.Va. at 552, 678 S.E.2d at 58. As the Circuit Court held, Pfizer acted diligently in asserting its defense and pursuing an orderly process for timely making such a motion pursuant to a scheduling order after jurisdictional issues were resolved.

the parties and court had not yet devoted significant resources to the non-residents' cases when Pfizer filed its motion to dismiss. Like the MLP's scheduling order there, the Circuit Court's Scheduling Order served the objective of hearing forum non conveniens motions early in the litigation to avoid unnecessary consumption of party and judicial resources in West Virginia.

Also consistent with *Mazzone II*, the Circuit Court appropriately declined to "penalize Pfizer" for making threshold jurisdictional arguments and motions in good faith before it moved to dismiss the out-of-state Plaintiffs' cases on forum non conveniens grounds. App. 41. As Plaintiff acknowledges, Pfizer made those jurisdictional arguments before this Court addressed the interpretation of West Virginia Rule of Civil Procedure 3(a) on which Pfizer relied and which the MLP endorsed in the Zoloft litigation. This Court subsequently resolved the issue in *Mazzone I*, and Pfizer has since been guided by that decision. Pfizer did not make arguments it knew "would be unsuccessful," Pet. at 18, or otherwise improperly delay this litigation.

Plaintiffs thus cannot support their contention that "this case differs significantly from *Mazzone II*," Pet. at 6, for purposes of evaluating whether the Circuit Court properly exercised its discretion in finding good cause to extend the time for Pfizer to move to dismiss. This Court's analysis of the statutes and rules governing the MLP's exercise of its discretion to manage the multi-plaintiff litigation before it supports a similar analysis here. See *Mazzone II*, 235 W.Va. at 157-58, 772 S.E.2d at 342-43. Like the MLP, which acted within its authority in adopting a scheduling order under the mass litigation rules, the Circuit Court here acted within its discretionary and statutory authority in finding good cause to extend the time for filing a forum non conveniens motion through the deadline for dispositive motions that it included in its Rule 16 Scheduling Order.

The Circuit Court did not hold, as Plaintiffs assert, that as long as a defendant includes a defense of forum non conveniens in its answer, a motion to dismiss "[can] be filed any time thereafter." Pet. at 6-7. Rather, the Circuit Court found good cause to extend the statutory deadline in this matter based on the status of the litigation and because Pfizer had acted diligently by including the defense in its answers, "advancing a good faith jurisdictional motion" relating to

the treatment of multi-plaintiff cases in West Virginia before *Mazzone I* was decided, and “engaging in good faith scheduling negotiations that included a schedule for filing [a forum non conveniens] motion.” App. 41. Although Plaintiffs later objected to Pfizer’s motion on timeliness grounds, Pfizer reasonably believed, based on Plaintiffs’ inclusion of a deadline and briefing period for forum non conveniens motions in the scheduling order counter-proposal they sent back to Pfizer, that there was mutual agreement by the parties to request a time period early in the schedule for briefing motions to dismiss on forum non conveniens grounds. The Circuit Court did not find, and did not need to find, that Plaintiffs “acquiesced to the untimely filing of an inconvenient forum motion.” Pet. at 7. Instead, it appropriately considered the nature of the parties’ scheduling negotiations, along with other events in the procedural history of the litigation, in finding good cause to extend the statutory deadline.

The Circuit Court also appropriately found that Plaintiffs did not identify any prejudice from the Circuit Court’s consideration of a forum non conveniens motion as to the out of-state Plaintiffs. Those Plaintiffs had not been subject to any discovery, had not had to travel to West Virginia, and had and will continue to have access to full document and deposition discovery of Pfizer conducted by their counsel in the Lipitor MDL. Plaintiffs did not and could not claim that Pfizer’s motion would delay their ability to reach a resolution on the merits of their cases if they refiled in their home states. Plaintiffs had requested that the Circuit Court adopt a schedule and case management order that involved discovery of only two of the 40 Plaintiffs. The Circuit Court instead ordered that the parties conduct discovery in and prepare for trial the cases of four West Virginia Plaintiffs. Under Plaintiffs’ proposal and the Circuit Court’s Scheduling Order, the non-West Virginia Plaintiffs’ cases were not going to be subject to discovery or prepared for trial for more than another year. Further, as the Circuit Court found, Plaintiffs’ efforts “to stay in this forum” by moving to remand and opposing Pfizer’s motion for MLP transfer were not expended separately on behalf of the out-of-state Plaintiffs. Rather, they “appl[ied] equally to the ten West Virginia Plaintiffs . . . to whom Pfizer’s motion [to dismiss] does not apply.” App. 41.

Plaintiffs now argue that “dismissal would severely handicap [their] ability to successfully present their claim” and “result in Plaintiffs having to start litigation all over again three years later in a new forum.” Pet. at 20. This is not the case. Plaintiffs have all of the fact and expert discovery that has been completed in the Lipitor MDL and was fully coordinated here. Their counsel took the lead in conducting that discovery, which includes nearly 12 million pages of documents and 18 company witness depositions that took place between September 2014 and September 2015. Plaintiffs also have the benefit of extensive expert discovery in the Lipitor MDL, along with briefing, hearing transcripts, and decisions on expert and other pretrial issues. If Plaintiffs re-file their claims in their home states, they will continue to have access to all of this discovery and litigation work. This would hardly put them in a position of starting from scratch. Case-specific discovery will need to begin upon refiling, but it was Plaintiffs who declined to conduct such discovery while their cases were pending in West Virginia. There is no dispute that it will be more convenient for Plaintiffs to proceed with that discovery and advance to the merits of their claims in their own states. Plaintiffs provide no support for their claim that “it could be close to seven or eight years before they have an opportunity to have their claim heard” if they proceed with their cases in their home states. Pet. at 20.

For all of these reasons, the Circuit Court appropriately exercised its authority in extending Pfizer’s time to file a forum non conveniens motion for good cause.

## **II. The Circuit Court Acted Consistently with West Virginia Law in Addressing and Deciding Pfizer’s Motion Directed to Some But Not All of the Plaintiffs**

Consistent with West Virginia’s joinder rules and this Court’s rulings in *Mazzone I* and *Mazzone II*, the Circuit Court recognized that it could and should analyze the claims of individual Plaintiffs on an individual basis for purposes of addressing Pfizer’s forum non conveniens motion. Rule 20(a), which governs permissive joinder of parties, provides: “Judgment may be given for one or more of the Plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.” W. Va. R. Civ. P. 20(a). In *Mazzone I*, this Court held that while Rule of Civil Procedure 3(a) does not

provide for the “substantive division” of unrelated plaintiffs who join in a single complaint under Rule 20, the Rules continue to permit trial courts to “implement procedural mechanisms to address the numerous individual and collective unique issues that are inherent in mass litigation,” including by addressing dispositive motions that apply to some but not all plaintiffs. 233 W.Va. 474, 759 S.E. 2d at 217. This Court explained that “to the extent that some plaintiffs may be subject to dispositive motions based upon such issues as statutes of limitation or summary judgment,” the trial court may “permit[] the defendants to raise those issues and have them addressed *separately*.” *Id.* (emphasis added). Consistent with that analysis, *Mazzone II* confirmed that a trial court can consider whether certain plaintiffs in a multi-plaintiff case like this one should be dismissed on the grounds of forum non conveniens. 235 W.Va. 151, 159-61, 772 S.E.2d at 344-6.

*Mazzone I* and *II* thus directly support the Circuit Court’s decision to hear and grant Pfizer’s motion to dismiss the out-of-state Plaintiffs’ cases. Plaintiffs’ contention that the Circuit Court exceeded its authority by not considering “the impact that dismissal would have on the West Virginia Plaintiffs,” Pet. at 25, does not withstand scrutiny under those decisions. In *Mazzone II*, this Court addressed and rejected a similar argument in the Zolofit litigation, which involved plaintiffs from outside West Virginia who joined their claims under Rule 20(a):

[T]he ability to meet the liberal standard for Rule 20(a) does not correspondingly guarantee the existence of a convenient forum . . . .

We recognize that permissive joinder under Rule 20(a) is designed to expedite litigation and relieve the burden on the courts and the litigants by allowing a single suit to determine the rights and liabilities of the parties. This purpose is necessarily attenuated when considered in the context of multiple parties from multiple states who have no connection to West Virginia and whose causes of action did not arise in West Virginia. While there can be factors that favor joinder, we cannot ignore the countervailing concerns associated with litigating claims in a convenient forum.

235 W.Va. at 160, 772 S.E.2d at 345 (footnote omitted). Here, as there, Plaintiffs’ argument that the Circuit Court should have conducted a forum non conveniens analysis as to all Plaintiffs together, rather than as to individual out-of-state Plaintiffs, “would essentially render West

Virginia Code § 56-1-1a a nullity in pharmaceutically-related litigation.” *Id.* at 159-60, 772 S.E.2d at 344-45. This Court rejected that result in *Mazzone II*, and the Circuit Court properly evaluated the forum non conveniens motion as to the individual out-of-state plaintiffs here.

Plaintiffs’ contention that as a result of the Circuit Court’s Order, the “West Virginia Plaintiffs at a minimum will have to fight Defendant on yet another removal action,” Pet. at 25, is a red herring. As Pfizer set forth in its opposition to Plaintiffs’ motion in the Circuit Court to stay activity in the West Virginia cases pending the outcome of Plaintiffs’ writ petition, those cases are not impacted by the Order dismissing the out-of-state cases or this writ petition, and Pfizer does not intend to remove the West Virginia Plaintiffs’ cases. *See* Supp. App. 1-3.<sup>3</sup> Plaintiffs subsequently withdrew their motion to stay, and the West Virginia cases are now proceeding in the Circuit Court pursuant to an amended scheduling order.

Plaintiffs’ reliance on an order by the trial court in the Zolofit litigation before that litigation was transferred to the MLP is also misplaced. The trial court’s order denying a motion to dismiss the claims of a New York Zolofit plaintiff was superseded by the MLP’s order granting Pfizer’s motion as to that plaintiff and 19 others, as to which this Court denied plaintiffs’ writ petition in *Mazzone II*. *See In re Zolofit Litig.*, No. 14-C-700 (W. Va. Cir. Ct. Oct. 21, 2014) (“MLP Order”) at App. 358-78; *Mazzone II*, 235 W.Va. at 164-65, 772 S. E.2d at 349-50.

### **III. The Circuit Court Properly Applied the Forum Non Conveniens Statute**

An extraordinary writ is not necessary or appropriate because the Circuit Court properly applied West Virginia’s forum non conveniens statute. This Court reviews a lower court’s decisions on venue, including forum non conveniens decisions, under an abuse of discretion standard. *Mazzone II*, 235 W.Va. at 156, 772 S.E. 2d at 341; *State ex rel. Mylan, Inc. v. Zakaib*, 227 W.Va. 641, 645, 713 S.E.2d 356, 360 (2011); *see also* Syl. Pt. 2, *State ex rel. N. River Ins. Co. v. Chafin*, 233 W.Va. 289, 758 S.E.2d 109, 110 (2014); 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 writ of

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<sup>3</sup> This document was not included in the Appendix because it was filed with the Circuit Court the same day that Plaintiffs filed their Petition with this Court.

prohibition is not an available remedy where petitioners allege only abuse of discretion; it “will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers.” Syl. Pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W.Va. 314, 233 S.E.2d 425 (1977); *see also* Syl. Pt. 1, *State ex rel. Farber*, 213 W.Va. at 662, 584 S.E.2d at 518.

In deciding a motion under West Virginia’s forum non conveniens statute, “courts must state findings of fact and conclusions of law as to each of the eight factors listed for consideration under subsection (a) of that statute.” *Zakaib*, 227 W.Va. at 650, 713 S.E.2d at 365. The relative weight of these various factors varies based on the unique facts of each case, and the trial court’s weighing of the factors is reviewed for abuse of discretion. *See State ex rel. N. River Ins. Co.*, 233 W.Va. at 293, 758 S.E.2d at 113.

Plaintiffs cannot show that the Circuit Court exceeded its legitimate powers in applying West Virginia’s forum non conveniens statute and granting Pfizer’s motion to dismiss the out-of-state Plaintiffs’ claims. Plaintiffs did not dispute before the Circuit Court that each of the statutory forum non conveniens factors supports dismissal, and they do not deny that the Circuit Court evaluated each of the eight statutory factors and entered findings of fact and conclusions of law as to each. App. 43-49. The Circuit Court’s analysis is fully consistent with this Court’s analysis in *Mazzone II*, in which this Court found “no ground to warrant the issuance of a writ of prohibition” as to the forum non conveniens dismissal of the non-West Virginia Zolofit plaintiffs there. 235 W.Va. at 165, 772 S.E.2d at 350.

Plaintiffs do not contend that the Circuit Court erred in its analysis of any of the statutory forum non conveniens factors with respect to the four New York Plaintiffs or with respect to seven of the eight factors as to the Texas Plaintiffs. But Plaintiffs argue in their writ petition, for what they concede is the first time (*see* Pet. at 22), that one of the statutory factors does not support dismissal of the Texas Plaintiffs’ claims. They contend that the Circuit Court exceeded its authority in granting Pfizer’s motion because, they now assert, the Texas Plaintiffs’ home state does not provide an adequate remedy for their claims under W. Va. Code § 56-1-1a(8). Pet. at 20. Plaintiffs rely on the 2014 MLP Order in the Zolofit litigation to deny the forum non

conveniens motion there with respect to plaintiffs from Texas because plaintiffs conceded that their claims would fail on their merits under Texas's product liability statute. *Id.* at 21-23.

As a threshold matter, because Plaintiffs failed to raise this argument before the Circuit Court, it should not be considered by this Court and cannot support an extraordinary writ. This Court's "general rule is that nonjurisdictional questions not raised at the circuit court level, but raised for the first time on appeal, will not be considered." *Shaffer v. Acme Limestone Co.*, 206 W.Va. 333, 349 n. 20, 524 S.E.2d 688, 704 n. 20 (1999); *accord State ex rel. State Auto Prop. Ins. Cos. v. Stucky*, No. 15-1178, 2016 WL 3410352, at \*2 (W. Va. June 14, 2016); *Lin v. Lin*, 224 W. Va. 620, 624, 687 S.E.2d 403, 407 (2009); *Barney v. Auvil*, 195 W. Va. 733, 741-42, 466 S.E.2d 801, 809-810 (1995).

Plaintiffs provide no basis for an exception to that general rule here. Their new argument that they do not have an adequate remedy under Texas law does not involve a jurisdictional or constitutional issue. *See, e.g., Whitlow v. Bd. of Ed. of Kanawha Cty.*, 438 S.E.2d 15, 18-19, 190 W.Va. 223, 226-27 (1993). Moreover, it is directly contrary to the position Plaintiffs took in the Circuit Court about their ability to proceed under Texas law. *See Lin*, 224 W.Va. at 623 n.7, 687 S.E. 2d at 408 n.7 ("[T]he appellants waived their argument . . . by taking a contrary position in their cross-motion for summary judgment below."); *see also State v. Rodoussakis*, 204 W.Va. 58, 66, 511 S.E. 2d 469, 477 (1998) ("[P]arties cannot elect to try their causes on one theory in the lower court, and, when defeated on that line, assume a different position in the appellate court.") (quoting *Bush v. Ralphsnyder*, 100 W.Va. 464, 470, 130 S.E. 807, 809 (1925)); *Maples v. W. Va. Dep't of Commerce*, 197 W.Va. 318, 323, 475 S.E. 2d. 410, 415 (1996) ("A litigant may not silently acquiesce to [an alleged] error, or actively contribute to such error, and then raise that error as a reason for reversal on appeal.") (internal quotation marks and citation omitted). Plaintiffs not only did not dispute Pfizer's argument in its motion to dismiss on forum non conveniens grounds that the Texas Plaintiffs had an adequate remedy because Texas recognizes product liability causes of action like theirs, but they also opposed Pfizer's separate motion to dismiss the Texas Plaintiffs' claims under Texas law and argued that their claims survived.

Specifically, in their 34-page opposition (App. 297-331) to Pfizer's motion to dismiss the Texas Plaintiffs' claims on their merits under Texas Civil Practice & Remedies Code § 82.007 (the "Texas Act"), which Plaintiffs agreed governed those Plaintiffs' claims, Plaintiffs contended:

[T]he Texas Act provides no basis for this Court to dismiss Plaintiffs' claims. The Texas Act creates a *rebuttable* presumption that a defendant is not liable for injuries arising from the use of a pharmaceutical product if the labeling that accompanied the product was approved by the federal Food and Drug Administration ("FDA"). Under the statute, the presumption is rebutted upon a showing that the defendant withheld from or misrepresented to the FDA information that was material and relevant to the performance of the product and was causally related to the claimant's injury. Pfizer cannot show, and certainly not at this early stage of the case, that Plaintiffs will be unable to rebut the presumption in this way.

App. 301-02. Unlike the plaintiffs in the Zolofit litigation before the MLP, Plaintiffs here never asserted (until after the Circuit Court granted the forum non conveniens motion) that the Texas Plaintiffs would not be able to proceed with their claims under Texas law.

The Circuit Court chose not to decide Pfizer's separate motion to dismiss under Texas law and instead dismissed the Texas Plaintiffs' claims on forum non conveniens grounds based in part on its finding that they could refile in Texas and pursue a remedy under its laws. Plaintiffs' briefing in the Circuit Court on both the forum non conveniens motion and motion to dismiss under Texas law makes clear that they intentionally argued that the Texas Plaintiffs could and should proceed to the merits of their claims under Texas law, notwithstanding the Zolofit MLP order, which both sides discussed in their briefing here. *See, e.g.*, App. 346, 464-65. Plaintiffs also raised the MLP Order during the August 2015 status conference with the Circuit Court. Pet. at 21. They never argued in opposition to Pfizer's forum non conveniens motion, as they do now, that the "Texas Plaintiffs do not have a forum to be heard in Texas," Pet. at 25, and they provide no legitimate basis for their about-face in their writ petition. Their new and contrary argument is not properly before this Court.

In any case, even if Plaintiffs had made the argument below and preserved it for review, Plaintiffs could not support an argument that the Circuit Court erred in finding that the Texas

Plaintiffs have a remedy at law in their home state. Three of the statutory forum non conveniens factors under W. Va. Code § 56-1-1a bear on the question of whether an adequate alternate forum exists for the out-of-state Plaintiffs' claims: whether there is an alternate forum, whether a court in that forum can exercise jurisdiction over Pfizer, and "[w]hether the alternate forum provides a remedy." W. Va. Code § 56-1-1a(a)(1), (3), (8). As Pfizer argued, Plaintiffs did not dispute, and the Circuit Court held below, all three criteria are satisfied here: New York and Texas are alternate forums that would have jurisdiction over Pfizer as to the New York and Texas Plaintiffs' claims, and both states' laws provide remedies for product liability claims. App. 43-44, 45, 49.

To show that a forum is inadequate, a plaintiff must do more than show that her "claims may not succeed under the substantive law of the alternative forum"; she must show that the law of the other forum "provides no remedy at all." *Zakaib*, 227 W. Va. 641 at 648 n.5, 713 S.E.2d at 363 n.5. Plaintiffs have not done so here. As their own opposition to Pfizer's motion to dismiss the Texas Plaintiffs' claims under Texas law demonstrates, the Texas statute that governs their claims includes a rebuttal presumption that permits product liability claims like theirs to proceed. Whether Plaintiffs can satisfy that presumption remains an open and contested issue. As Plaintiffs noted in their opposition to Pfizer's motion to dismiss, the Lipitor MDL court denied a similar motion by Pfizer there to dismiss the federal Lipitor cases involving Texas plaintiffs. App. 302. If Plaintiffs refile their Texas cases, Pfizer may choose to move to dismiss the claims under Texas law, but there is no reason why Plaintiffs could not seek to oppose that motion on the merits again and argue, as they did in the Lipitor MDL and in their opposition before the Circuit Court here, that their claims survive under Texas law. Plaintiffs themselves assert that such a motion by Pfizer would be "more suitable as a summary judgment motion when it becomes ripe," Pet. at 23, acknowledging that Pfizer's arguments under Texas law go to the merits of Plaintiffs' claims. They have made no showing that they would not "have an opportunity to have their case decided on the merits of their claim" if they refiled their cases in their home state. Pet. at 23.

Plaintiffs' reliance on the MLP Order is misplaced. The MLP determined that because Pfizer argued that the Zolofit plaintiffs' claims were subject to dismissal under Texas law and plaintiffs there agreed, plaintiffs' claims were "precluded" under Texas law. App. 376-77. The MLP further determined that West Virginia law required that it apply the law of the place of injury, or Texas law, only to the Texas plaintiffs' failure-to-warn claims. It denied the forum non conveniens motion as to the Texas plaintiffs based on its finding that it could apply "the common law of West Virginia" to their non-failure-to-warn claims, such as design defect claims. App. 376. The West Virginia legislature has since clarified the state's public policy on this issue by amending W. Va. Code § 55-8-16(a) to declare that West Virginia public policy is to apply the law of the place of injury to *all* product liability claims by a non-resident, not just failure-to-warn claims. *See* W. Va. Code § 55-8-16(a).

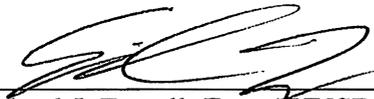
As the Circuit Court found, although Plaintiffs filed their complaint prior to the statutory amendment's effective date, West Virginia's public policy is relevant to the choice-of-law public policy analysis that the forum non conveniens statute directs the court to conduct. App. 44 n.2. The amended statute makes clear that the public policy of West Virginia supports the application of the law of the state of injury in product liability cases like this. It does not support applying West Virginia's or another state's laws to certain claims, as the MLP indicated it could do as to the Texas plaintiffs' non failure-to-warn claims. Further, and as the Circuit Court also held, even without regard to the statutory amendment clarifying West Virginia's public policy, Plaintiffs' counsel has recognized that Plaintiffs are presenting "nothing but a failure-to-warn case," App. 609 (8/11/15 Hr'g Tr. at 22:8-9), and thus, even the prior version of section 55-8-16(a) supports applying Texas law to the Texas Plaintiffs' claims. App. 44 n.2.

As this Court recognized in *Zakaib*, just because a claim may fail on its merits under another state's laws does not mean that the state "provides no remedy" and is rendered inadequate as an alternative forum. *Zakaib*, 227 W.Va. at 648 n.5, 713 S.E.2d at 363 n.5; *see also Stroitelstvo Bulgaria Ltd. v. Bulgarian-Am. Enter. Fund*, 589 F.3d 417, 421-24 (7th Cir. 2009); *In re Ethicon, Inc.*, 2014 WL 346717, at \*3 (S.D. W. Va. Jan. 30, 2014). Unlike in *Mace*

*v. Mylan Pharmaceuticals, Inc.*, 227 W.Va. 666, 714 S.E.2d 223 (2011), which the MLP cited, Plaintiffs cannot show that Texas law provides no remedy for their claims. In *Mace*, plaintiff argued that if his wrongful death case were dismissed in favor of the case proceeding in his home state of North Carolina, he would not be able to pursue a claim because it would be barred by North Carolina's statute of limitations. The Supreme Court of Appeals agreed, citing its own precedent: "[T]he doctrine [of forum non conveniens] is not triggered if there is no other available forum. Courts have recognized that unavailability is brought about if the statute of limitations *precludes the institution of suit in another forum.*" *Id.* at 675, 714 S.E.2d at 232 (quoting *Norfolk and W. Ry. Co. v. Tsapis*, 184 W.Va. 231, 236, 400 S.E.2d 239, 244 (1990)) (emphasis added). In the Circuit Court, Plaintiffs filed a nearly three-dozen page brief arguing that their claims are *not* subject to dismissal under Texas law. They cannot show that they would be unable to initiate lawsuits in Texas or present those merits arguments there.

### CONCLUSION

This Court should deny Plaintiffs' petition for a writ of prohibition because Plaintiffs have not demonstrated that the Circuit Court abused its discretion, misapplied the forum non conveniens statute, or committed any other error. The Circuit Court appropriately exercised its discretion in scheduling and addressing pretrial motions in this complex multi-plaintiff litigation. The Circuit Court also correctly applied the forum non conveniens statute by carefully considering all eight statutory factors and making specific factual findings based on the record before it and the briefing and arguments of the parties. Plaintiffs' Petition is directed at the Circuit Court's exercise of its discretion in routine case management and pretrial motion practice, and there is no basis to grant an extraordinary writ.



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 16-0607

STATE OF WEST VIRGINIA, *ex rel.* BETTY J. ALMOND and THEODORE H. ALMOND, et al.,

Petitioners,

v.

THE HONORABLE RUDOLPH MURENSKY, McDowell County Circuit Court Judge, and PFIZER INC.,

Respondents.

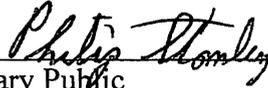
Civil Action No. (Below) 13-C-159  
McDowell County Circuit Court

VERIFICATION

I, Erik W. Legg, counsel for Respondent, Pfizer Inc., in accordance with W. Va. Code § 53-1-3 and Rule 16(d)(9) of the West Virginia Rules of Appellate Procedure, hereby verify that I am familiar with these proceedings, and that the Response and Appendix hereto and submitted herewith constitute a fair and correct statement of the proceedings in the civil action identified in this Response, based upon information and belief.

  
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Counsel for Respondent, Pfizer Inc.

Subscribed and sworn before me this 25th day of July, 2016.

  
Notary Public

