

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

RANDY L. MACE, personal representative
of the Estate of Kathy W. Mace, deceased,

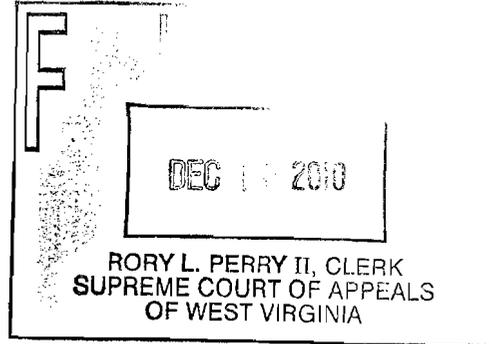
Appellant/Plaintiff,

v.

**MYLAN PHARMACEUTICALS, INC.,
MYLAN, INC., AND
MYLAN TECHNOLOGIES, INC.,**

Appellees/Defendants.

APPEAL NO. 35710



BRIEF OF APPELLANT

**APPEAL FROM THE CIRCUIT COURT OF MONONGALIA COUNTY
HONORABLE RUSSELL M. CLAWGES, JR., JUDGE
CIVIL ACTION NO. 08-C-480**

Presented by:

Kathryn Reed Bayless (WVBN 0272)
BAYLESS LAW FIRM, PLLC
1607 W. Main Street
Princeton, WV 24740
Phone: 304-487-8707
Fax: 304-487-8705
Email: kay@baylesslawfirm.com
Counsel for Appellant/Plaintiff

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. STATEMENT OF FACTS.....4

III. ISSUES PRESENTED.....6

 (1) Whether the Circuit Court erred in dismissing this case on *forum non
conveniens* grounds on the basis that North Carolina is an alternate forum in
which this case may be tried.....6

 (2) Whether the Circuit Court erred in ruling that North Carolina law
regarding the discovery rule would apply even if this case were to
remain in West Virginia.....6

IV. STANDARD OF REVIEW.....6

V. DISCUSSION OF LAW.....6

 A. THE CIRCUIT COURT ERRED IN DISMISSING THIS CASE
ON *FORUM NON CONVENIENS* GROUNDS ON THE BASIS
THAT NORTH CAROLINA IS AN ALTERNATE FORUM IN
WHICH THIS CASE MAY BE TRIED.....6

 1. W. Va. Code § 56-1-1a prohibits a court from dismissing a case
on *forum non conveniens* grounds when the action would be barred
by the statute of limitations in the alternate forum.....7

 2. North Carolina is not an alternate forum in which this action
may be tried because this action would likely be barred by the
statute of limitations if commenced there.....9

 B. THE CIRCUIT COURT ERRED IN RULING THAT NORTH
CAROLINA LAW REGARDING THE DISCOVERY RULE
WOULD APPLY EVEN IF THIS CASE WERE TO REMAIN
IN WEST VIRGINIA.....10

VI. CONCLUSION.....14

TABLE OF POINTS AND AUTHORITIES

Cases

<i>Abbott v. Owens-Corning Fiberglas Corp.</i> , 191 W.Va. 198, 444 S.E.2d 285 (1994).....	8
<i>Bradshaw v. Soulsby</i> , 210 W. Va. 682, 558 S.E.2d 681 (2001).....	2, 5, 11
<i>Cannelton Industries, Inc. v. The Aetna Cas. & Surety Co. of America</i> 194 W. Va. 186, 460 S.E.2d 1 (1994).....	6
<i>Cunningham v. Hill</i> , 225 W. Va. 180, 698 S.E.2d 944 (2010).....	7
<i>Lee v. Saliga</i> , 179 W. Va. 762, 373 S.E.2d 345 (1988).....	13
<i>Mace v. Alzo Corp.</i> , Case No. 1-07-CV-09861 (Superior Court of Santa Clara, California)....	2
<i>McKinney v. Fairchild</i> , 199 W. Va. 718, 487 S.E.2d 913 (1997).....	5, 11, 12, 13
<i>Norfolk and Western Ry. Co. v. Tsapis</i> , 184 W. Va. 231, 400 S.E.2d 239 (1990).....	8, 9, 10
<i>Savarese v. Allstate Ins. Co.</i> , 233 W. Va. 119, 672 S.E.2d 255, (2008).....	6
<i>State v. Snyder</i> , 64 W. Va. 659, 63 S.E. 385 (1908).....	8
<i>Udzinski v. Lovin</i> , 358 N.C. 534, 597 S.E.2d 703 (N.C. 2004).....	2, 5
<i>West Virginia ex rel. Riffle v. Ranson</i> , 195 W. Va. 121, 464 S.E.2d 763 (1995).....	6

Statutes (North Carolina)

N.C.G.S §1-53(4).....	2, 5
-----------------------	------

Statutes (West Virginia)

W. Va. Code § 55-2-18 (1985).....	12
W. Va. Code § 55-2A-2.....	12
W. Va. Code § 55-7-6(d).....	2
W. Va. Code § 56-1-1a.....	1, 7, 8
W. Va. Code § 56-1-1a(a)(1).....	7

I. INTRODUCTION

This appeal presents the Court with the opportunity to rule on the important and unresolved question of whether the West Virginia legislature's recent enactment of *W. Va. Code* § 56-1-1a modified the common law doctrine of *forum non conveniens*. More specifically, this appeal asks the Court to decide whether *W. Va. Code* § 56-1-1a eliminated the requirement that an alternate forum in which the case may be tried must exist in order for a dismissal on *forum non conveniens* grounds to be proper. How the Court rules on this issue will have a significant impact on the ability of litigants to access the courts of this state, as well as the ability of circuit courts to decline jurisdiction even when it is otherwise proper.

Second, this case will allow the Court clarify under what circumstances West Virginia's "discovery rule," which tolls the statute of limitations, applies in cases in which there is a conflict of laws. Though there is guidance in this area from the Court's prior decisions, it is of considerable importance that the Court make clear the rule's applicability, as the question of which state's discovery rule applies in a case can often be, as is the case here, dispositive.

This is an appeal from an order denying a motion to reinstate this case. Appellant's complaint alleges that a fentanyl pain patch manufactured, designed, and marketed by Appellees killed Decedent Kathy Mace through an overdose of fentanyl. The circuit court dismissed this case on *forum non conveniens* grounds, concluding that this case should be re-filed in North Carolina. As a condition of dismissal, however, the circuit court originally ordered that Appellees "must each waive the right to assert a limitations defense in the . . . North Carolina Courts." This condition was critical because a central issue in this case is when the statute of limitations on Appellant's claims began to run. West Virginia and North Carolina both have a

two-year statute of limitations for wrongful death actions, both of which generally begin to run on the date of the decedent's death. See *W. Va. Code* § 55-7-6(d); N.C.G.S § 1-53(4). West Virginia, however, applies the “discovery rule” to wrongful death actions, which tolls the running of the statute of limitations until “a claimant knows or should know by reasonable diligence of his claim.” Bradshaw v. Soulsby, 210 W. Va. 682, 685, 558 S.E.2d 681, 684 (2001). North Carolina, in contrast, does not recognize tolling based on the discovery rule. Udzinski v. Lovin, 597 S.E.2d 703, 706 (N.C. 2004). Decedent died on October 25, 2005, and this action was not commenced in West Virginia until July 1, 2008. While this action was commenced in West Virginia more than two (2) years after decedent's death, it is, and has always been, Appellant's position that Appellant should be permitted to argue that this action was timely filed because the discovery rule tolled the running of the statute of limitations.¹

After the action was dismissed on *forum non conveniens* grounds, the circuit court reversed itself and modified the Dismissal Order to allow Appellees to assert the statute of limitations as a defense in any action filed in North Carolina. The circuit court then denied Appellant's motion to reinstate this case, which argued that allowing Appellees to assert a statute of limitations in North Carolina would eliminate the availability of an alternate forum in which this action could be tried and effectively end this case. In deciding to modify the Dismissal

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Appellant originally filed suit against different manufacturers of a fentanyl pain patch on October 18, 2007, in California state court in the case of Mace v. Alza Corp., Case No. 1-07-CV-09861 in the Superior Court of Santa Clara, California. It was only through that proceeding that Appellant learned that Appellees were in fact the ones who manufactured, designed, and marketed the patch that killed decedent. Though these facts were not before the circuit court because the circuit court never ruled on whether the discovery rule tolled the statute of limitations in this case, Appellant provides them solely for context and to identify the basis for the Appellant's assertion that the discovery rule tolled the statute of limitations.

Order and deny the motion to reinstate, the circuit court recognized that this action may be time-barred in North Carolina, but reasoned that this did not matter because the circuit court would have applied North Carolina's prohibition of the discovery rule if the case were to remain in West Virginia.

The circuit court's denial of the motion to reinstate is fundamentally flawed for a number of reasons. First, under West Virginia law, a circuit court cannot dismiss an action on *forum non conveniens* grounds when the action would be barred by the statute of limitations in the alternate forum. North Carolina was never an alternate forum that could support a dismissal on *forum non conveniens* grounds, absent an agreement by Appellees that they would waive their limitations defense.

Second, the circuit court was wrong to base its decision on the conclusion that West Virginia's discovery rule would not apply in this case if it remained in West Virginia. As soon as the circuit court recognized that there was a statute of limitations problem with commencing this suit in North Carolina, it had only two options: (1) dismiss on *forum non conveniens* grounds on the condition that Appellees waive any limitations defense in North Carolina; or (2) refuse to dismiss on *forum non conveniens* because there is no alternate forum in which this case could be tried. The circuit court did not have the option to dismiss this case on *forum non conveniens* grounds because, in its assessment, West Virginia's discovery rule would not otherwise apply in this case. The circuit court's decision was procedurally improper, and effectively converted its *forum non conveniens* ruling into one on the merits. Moreover, the circuit court's conclusion that West Virginia's discovery rule does not apply is erroneous under existing court precedent. In short, the circuit court's decision not to reinstate this case after

dismissing it on *forum non conveniens* grounds suffers from a number of fatal deficiencies that warrant its reversal.

II. STATEMENT OF FACTS

The procedural history of this case is more complicated than the typical case involving a dismissal on *forum non conveniens* grounds. Decedent died on October 25, 2005, of a fentanyl overdose. Appellant, as personal representative of the decedent's estate, filed suit against Appellees in the Circuit Court of Monongalia County, West Virginia on July 1, 2008.² On July 22, 2008, Appellees moved to dismiss the case on *forum non conveniens* grounds. The circuit court granted the motion on December 16, 2008, concluding that this action should be dismissed and re-filed in North Carolina. See Order Granting Defendants' Motion to Dismiss at 8 (filed December 16, 2008) (hereinafter the "Dismissal Order"). As a condition of dismissal, the circuit court ordered that Appellees "must each waive the right to assert a limitations defense in the . . . North Carolina Courts." Id.

On February 12, 2009, Appellees moved to amend the Dismissal Order to provide that Appellees could in fact assert any limitations defense that existed at the time of the filing of the complaint in this action. See Motion to Amend and or Clarify the Opinion and Order of December 16, 2008, (filed February 17, 2009) (hereinafter the "Motion to Amend"). On February 19, 2009, Appellant moved to reinstate this action on the basis that Appellees' intention to assert a limitations defense in North Carolina would effectively end this case and

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Appellee/Defendant Mylan Pharmaceuticals, Inc., which distributed the fentanyl pain patch, is a West Virginia-based corporation with its headquarters in Morgantown. Moreover, Defendant Mylan Technologies, Inc., which designed the fentanyl pain patch, is incorporated West Virginia. See Dismissal Order at 3. Both Appellant and decedent are residents of North Carolina. Id.

eliminate the availability of an alternate forum. See Motion to Reinstate (filed February 19, 2009).

On June 3, 2009, the circuit court granted Appellees' Motion to Amend, modifying the Dismissal Order to provide that Appellees could assert in the North Carolina courts any statute of limitations defense that was available to Appellees on July 1, 2008, the date when Appellant first filed this action. See Order Regarding Defendants' Motion to Amend and/or Clarify (filed June 3, 2009) ("Motion to Amend Order"). In amending the Dismissal Order, the circuit court recognized that this action may be time barred if commenced in North Carolina, but reasoned that this did not matter because the circuit court would have applied North Carolina's prohibition of the discovery rule even if the action were to be litigated in West Virginia. See id.

On March 19, 2010, the circuit court denied Appellant's Motion to Reinstate.³ See Order Denying Plaintiff's Motion to Reinstate (filed March 19, 2010). The court incorporated by reference its Motion to Amend Order, and found as follows:

North Carolina has a two-year statute of limitations on wrongful death actions, N.C.G.S § 1-53(4), with no discovery rule. *Udzinski v. Lovin*, 597 S.E.2d 703, 706 (N.C. 2004). The decisions in *Bradshaw v. Soulsby*, 210 W. Va. 682, 558 S.E. 2d 681 (2001) and/or *McKinney v. Fairchild*, 199 W. Va. 718, 487 S.E.2d 913 (1997) do not require application of West Virginia's state of limitations discovery rule to a wrongful death case governed by North Carolina substantive law under the facts of this case, and the court declines to find that West Virginia's discovery rule should be applied in this case.

This timely petition for appeal followed the entry of the Order on the Motion to Reinstate.

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On July 16, 2009, Appellant moved the circuit court to reconsider its Motion to Amend Order, but the circuit court never ruled on that motion. Appellant eventually requested that the court treat the July 16, 2009, motion for reconsideration as a motion for entry of an order on the Motion to Reinstate.

III. ISSUES PRESENTED

- (1) Whether the circuit court erred in dismissing this case on *forum non conveniens* grounds on the basis that North Carolina is an alternate forum in which this case may be tried.
- (2) Whether the circuit court erred in ruling that North Carolina law regarding the discovery rule would apply even if this case were to remain in West Virginia.

IV. STANDARD OF REVIEW

The standard of review in this case is *de novo*. Normally, a circuit court's decision as to a venue issue like *forum non conveniens* is reviewed under an abuse of discretion standard. See Cannelton Industries, Inc. v. The Aetna Cas. & Surety Co. of America, 194 W. Va. 186, 191, 460 S.E.2d 1, 6 (1994). This normal deference, however, does not apply when a circuit court misapplies the law or when the decision depends on an interpretation of a controlling statute. See West Virginia ex rel. Riffle v. Ranson, 195 W. Va. 121, 125, 464 S.E.2d 763, 767 (1995). Under such circumstances, the Court's review is plenary and *de novo*. See id.; Savarese v. Allstate Ins. Co., 233 W. Va. 119, 124, 672 S.E.2d 255, 260 (2008).

V. DISCUSSION OF THE LAW

A. The Circuit Court erred in dismissing this case on *forum non conveniens* grounds on the basis that North Carolina is an alternate forum in which this case may be tried.

As soon as the circuit court recognized that there was a statute of limitations problem with commencing this suit in North Carolina, it had only two (2) options: (1) dismiss on *forum non conveniens* grounds on the condition that Appellees waive their right to assert a limitations defense in North Carolina; or (2) refuse to dismiss on *forum non conveniens* grounds because no alternate forum exists in which this case could be tried. It could not — as it ultimately

did —simply dismiss on *forum non conveniens* grounds without requiring a waiver of the limitations defense.

1. **W. Va. Code § 56-1-1a prohibits a court from dismissing a case on *forum non conveniens* grounds when the action would be barred by the statute of limitations in the alternate forum.**

The *forum non conveniens* doctrine was recently codified in 2007 at *W. Va. Code* § 56-1-1a. That statute provides that a court may decline to exercise jurisdiction if it finds “that in the interest of justice and for the convenience of the parties a claim or action would be more properly heard in a forum outside this State.” *W. Va. Code* § 56-1-1a. The statute sets forth a number of considerations that a court “shall consider” before dismissing an action, including “[w]hether an alternate forum exists in which the claim or action may be tried.” *W. Va. Code* § 56-1-1a(a)(1).

The statute is silent, and this Court has not ruled, as to the weight or dispositive nature of any of the listed considerations. As a matter of first impression, however, this Court should interpret the consideration of whether an alternate forum exists as dispositive. That is, the Court should read *W. Va. Code* § 56-1-1a as requiring the existence of an alternate forum in which the action may be tried in order for a dismissal on *forum non conveniens* grounds to be proper. This is the only interpretation that furthers the legislative intent of the statute.

In interpreting a statute, this Court looks to the legislative intent of the statute. Cunningham v. Hill, 226 W. Va. 180, 698 S.E.2d 944 (2010) A statute “should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law applicable to the subject matter, whether constitutional,

statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.” Id. (quoting State v. Snyder, 64 W. Va. 659, 63 S.E. 385 (1908)).

W. Va. Code § 56-1-1a was intended to be a “codification of the doctrine of *forum non conveniens*” and there is nothing to suggest that the statute was intended to modify the common law doctrine. The common law doctrine of *forum non conveniens* required the existence of an alternate forum for dismissal. See Norfolk and Western Ry. Co. v. Tsapis, 184 W. Va. 231, 236, 400 S.E.2d 239, 244 (1990); (“[T]he doctrine [of *forum non conveniens*] is not triggered if there is no available forum.”); Abbott v. Owens-Corning Fiberglas Corp., 191 W. Va. 198, 204, 444 S.E.2d 285, 292 (1994) (requiring that defendant show “that another forum exists in which the suits [could] be tried substantially more inexpensively and expeditiously”). Because it is presumed that the legislature was aware of the common law at the time it enacted *W. Va. Code* § 56-1-1a, and there is no evidence that the statute was intended to change the common law, the Court should interpret the statute consistently with the common law and conclude that the statute requires the existence of an alternate forum in which the case may be tried.

Such an interpretation is consistent the purpose of the doctrine of *forum non conveniens*. The doctrine is not supposed to function as a dismissal on the merits, but rather as a venue provision to “promote the convenience of witnesses and ends of justice.” Abbott, 191 W. Va. at 201, 444 S.E.2d at 289. The purpose of the doctrine would be wholly thwarted if *W. Va. Code* § 56-1-1a was interpreted so that a court could dismiss a case in the absence of an alternate forum as this would effectively turn such a ruling into a dismissal on the merits.

2. North Carolina is not an alternate forum in which this action may be tried because this action would likely be barred by the statute of limitations if commenced there.

This Court has recognized that there is no alternate forum in which the case may be tried — and thus no basis for dismissing on *forum non conveniens* grounds — when the action would be barred by the statute of limitations in the alternate forum. Norfolk, 184 W. Va. at 236, 400 S.E.2d at 244. To dismiss on *forum non conveniens* grounds under such circumstances, the circuit court must require, as a condition of dismissal, that the defendant agree not to raise a limitations defense in the alternate forum. Norfolk, 184 W. Va. at 237, 400 S.E.2d at 245.

No one disputes that, if this case was commenced in North Carolina, it would likely be barred by North Carolina’s statute of limitations because there is no discovery rule that would have tolled the two-year statute of limitations. Consistent with the Supreme Court’s dictates as to proper practice, the circuit court’s Dismissal Order, which originally dismissed this case on *forum non conveniens* grounds, required that Appellees “must each waive the right to assert a limitations defense in the . . . North Carolina Courts.” Dismissal Order at 8. In doing so, the Dismissal Order essentially created in North Carolina an alternate forum in which Appellant’s action could be tried.

When, however, the circuit court modified the Dismissal Order to allow Appellees to raise a limitations defense in North Carolina, the circuit court reversed itself and deprived Appellant of an alternate forum. See Motion to Amend Order. Even though the circuit court recognized that “the case may be time barred as North Carolina does not recognize the discovery rule in wrongful death actions,” the Court still concluded that “an alternate forum exists in which to bring these actions.” Id. This conclusion was wrong. As set forth above, this Court has

already recognized that there is no alternate forum under such circumstances. See Norfolk, 184 W. Va. at 236, 400 S.E.2d at 244. Upon identifying a “possible statute of limitations problem in the alternative jurisdiction,” the circuit court should have maintained its requirement that Appellees waive their statute of limitations defenses or simply refused to dismiss. See Norfolk, 184 W. Va. at 237, 400 S.E.2d at 245. Because the circuit court’s amendment of the Dismissal Order deprived Appellant of an alternate forum, the circuit court erred in denying Appellant’s motion to reinstate this case on the basis that no alternate forum existed in which this case may be tried.

B. The Circuit Court erred in ruling that North Carolina law regarding the discovery rule would apply even if this case were to remain in West Virginia.

To justify its decision to dismiss on *forum non conveniens* grounds without requiring waiver of a limitations defense, the circuit court reasoned that it did not matter if this case would be time barred in North Carolina. According to the circuit court, even if this case remained in West Virginia, the court would still apply North Carolina law regarding the discovery rule. The circuit court’s conclusions were erroneous for two reasons.

First, the circuit court should not have ruled on this dispositive choice-of-law issue because it was the wrong procedural context. Upon identifying a statute of limitations problem in North Carolina, the court should have ended its inquiry there and either (1) required the waiver of a limitations defense by Appellees as a condition of dismissal — as it originally did — or (2) refused to dismiss on *forum non conveniens* grounds because no alternate forum exists. See Norfolk, 184 W. Va. at 237, 400 S.E.2d at 245. It should not have proceeded any further and ultimately ruled on the issue of which state’s discovery rule would apply if the case remained in West Virginia. That issue has nothing to do with the question of whether an

alternate forum exists in North Carolina or, more specifically, whether this action would be barred by the statute of limitations if commenced in North Carolina.⁴ The applicability of West Virginia's discovery rule should have been ruled on in the context of a motion to dismiss or motion for summary judgment on statute of limitations grounds, not in the context of a *forum non conveniens* motion. See McKinney, 199 W. Va. at 721, 487 S.E.2d at 916 (ruling on applicability of tolling provision from another state in the context of a summary judgment motion). By ruling on the issue, the circuit court essentially converted Appellees' motion to dismiss on *forum non conveniens* grounds into a dispositive motion to dismiss and thwarted the basic purpose of the *forum non conveniens* doctrine.

Second, even if this Court were to conclude that it was proper for the circuit court to rule on the applicability of West Virginia's discovery rule, the circuit court's decision should still be reversed because the court was wrong as a matter of law. This Court has characterized the discovery rule as an equitable tolling provision. Bradshaw, 558 S.E.2d at 685. Moreover, this Court has stated that West Virginia law "does not require the application of any *tolling* provisions from the place where the claims accrued when a claim accruing outside West Virginia is filed in this State." McKinney v. Fairchild Int'l Inc., 199 W. Va. 718, 726, 487 S.E.2d 913, 922 (emphasis in original). Instead, the determination of which state's tolling provisions apply

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The issue of whether West Virginia's discovery rule would apply in this case was not even raised until Appellant moved the circuit court to reconsider the order amending the Dismissal Order to allow Appellees to raise the statute of limitations as a defense in North Carolina. See Plaintiff's Motion to Reconsider (filed July 20, 2009). In doing so, Appellant sought only to alert the circuit court to the fact that its decision to transfer this case to North Carolina without a waiver of limitations defense was a decision that likely resulted in a different outcome for this case. Appellant's argument, however, was that this case could not be transferred to North Carolina without a waiver of the statute of limitations defense.

requires a conflict of law analysis. Id. Importantly, this analysis does *not* involve a determination of substantive law, which would require the application of the law of the place of injury. Id. Instead, this Court has stated the tolling provisions are procedural in nature and require courts to apply a test heavily weighted towards the application of West Virginia law:

We find that the traditional approach to conflict of laws creates a presumption that that the forum state’s tolling provisions, as a matter of procedure, apply [W]e hold that where a choice of law question arises about whether the tolling provisions of West Virginia, *W. Va. Code*, 55-2-18 (1985) or of the place where the claim accrued should be applied, the circuit court should ordinarily apply West Virginia law, unless the place where the claim accrued has a more significant relationship to the transaction and the parties.

Id. at 923. Thus, in a case where West Virginia “borrowed” Kentucky’s statute of limitations pursuant to *W. Va. Code* § 55-2A-2, the court applied the West Virginia, not Kentucky’s, savings statute to avoid dismissing the case on the basis of limitations.⁵ See id. at 917-23.

In the instant case, the circuit court had no reason to overturn the presumption that West Virginia’s tolling provisions should apply. North Carolina does not have a “more significant relationship to the transaction” than West Virginia. The “transaction” at issue in this case is the improper design, manufacture, and labeling of the Mylan Fentanyl Transdermal System (the

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In that same case, Kentucky’s discovery rule was applied without any choice-of-law analysis. Presumably, this was because (1) the parties had agreed to its applicability, and (2) there was no indication that it was any different than West Virginia’s discovery rule. See id. at 729-30. Thus, in McKinney, the Court addressed only whether the Kentucky discovery rule had been properly applied under the facts of that case, not the issue of whether Kentucky’s or West Virginia’s discovery rule applied under a choice-of-law analysis. See id. at 729-30. In contrast to McKinney, this case involves a situation in which the parties disagree as to which state’s discovery rule applies, and there is a direct conflict between West Virginia’s discovery rule, which will save the claim, and North Carolina’s, which will not.

“FTS”) — none of which took place inside North Carolina. Critically, Appellant does not allege that Defendants’ misconduct occurred in North Carolina, and the circuit court made factual findings precluding such a conclusion.⁶ Instead, the “transaction” — the tortious conduct at issue in this litigation — occurred outside of North Carolina. In sum, the only connection North Carolina has to the wrongful conduct in this dispute “is the fortuity that the accident [or death] occurred there,” which is insufficient to establish a significant relationship to the transaction. See McKinney, 199 W. Va. at 728, 487 S.E. 2d at 923 (citing Lee v. Saliga, 179 W. Va. 762, 769, 373 S.E.2d 345, 352 (1988).)

There is also no reason to conclude that North Carolina has a more significant relationship *to the parties* than West Virginia. The circuit court found that Defendant Mylan Pharmaceuticals, Inc., which distributed the FTS, is a West Virginia-based corporation with its headquarters in Morgantown. Dismissal Order at 3. Moreover, the circuit court found that Defendant Mylan Technologies, Inc., which designed the FTS is incorporated in West Virginia. None of the defendants are citizens of North Carolina. Thus, North Carolina does not have a more significant relationship to the parties than West Virginia. See McKinney, 487 S.E.2d at 923. Because North Carolina does not have a more significant relationship to the transaction or the parties, the circuit court should have concluded that West Virginia’s discovery rule applied, with the result that Appellant’s claims would be preserved.

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The circuit court found as a matter of fact that the FTS was distributed by Defendant Mylan Pharmaceuticals, Inc., a West Virginia-based corporation, with its headquarters in West Virginia. Dismissal Order at 3. The circuit court also found as a matter of fact that the FTS was manufactured in Vermont by Defendant Mylan Technologies, Inc., which is a West Virginia corporation headquartered in Vermont. Id.

VI. CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse the decision of the circuit court denying Appellant's Motion to Reinstate and order that this case be reinstated to the active docket of the circuit court so that it may proceed through the ordinary course of litigation.

Respectfully submitted,



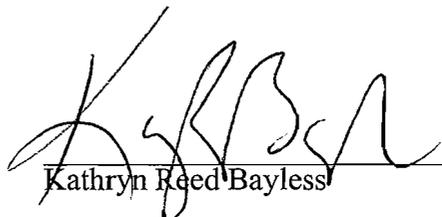
Kathryn Reed Bayless
Bar No. 0292
BAYLESS LAW FIRM, PLLC
1607 W. Main St.
Princeton, WV 24740
Phone: 304.487.8707
Fax: 304.487.8705
Email: kay@baylesslawfirm.com

**ATTORNEY FOR
APPELLANT/PLAINTIFF
RANDY L. MACE**

CERTIFICATE OF SERVICE

I do hereby certify that on this 9th day of December 2010, I served the foregoing Brief of Appellant, by U.S. first-class mail on the following known counsel of record:

Clem C. Trischler
PIETRAGLO GORDON ALFANO BOSICK & RASPANTI, LLP
One Oxford Centre, 38th Floor
Pittsburgh, PA 15219


Kathryn Reed Bayless