

SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

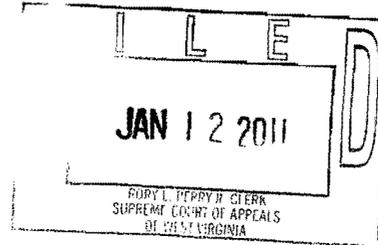
Appellant,

v.

MYLAN PHARMACEUTICALS, INC.,  
MYLAN, INC. and MYLAN  
TECHNOLOGIES, INC.,

Appellees

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Appeal No. 35710

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**BRIEF OF APPELLEE**

**Appeal from the Circuit Court of Monongalia County  
Honorable Russell M. Clawges, Jr.  
Civil Action No. 08-C-480**

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RANDY L. MACE, personal	)	THE WEST VIRGINIA SUPREME COURT
representative of the estate of	)	OF APPEALS
Kathy W. Mace, deceased,	)	
	)	
Plaintiff/Plaintiff,	)	
	)	
vs.	)	
	)	
MYLAN PHARMACEUTICALS, INC.	)	
MYLAN, INC. and MYLAN	)	
TECHNOLOGIES, INC.,	)	
	)	
Defendants/Respondents	)	

**I. INTRODUCTION<sup>1</sup>**

No matter how nobly Plaintiff, Randy L. Mace, Appellant herein, attempts to cast the issue before the Court, underlying Plaintiff's request for relief is an appeal to this Court's mercy, seeking to permit Plaintiff to restore a claim that was stale at the time of its instantiation in all relevant forums. Plaintiff brought his claim in West Virginia after the expiration of the statutes of limitation in both West Virginia, which has no relevant connection to the underlying injury complained of, and North Carolina, in which the claim accrued. Thus the trial court did not abuse its discretion in dismissing the case for *forum non conveniens*, notwithstanding that the alternate forum lacks a "discovery rule," the tolling provision necessary to give Plaintiff even a sliver of hope of trying his case on the merits.

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<sup>1</sup> The Mylan Defendants, Appellees herein, have filed a Motion seeking, *inter alia*, dismissal of this appeal due to Plaintiff's undisputed failure to comply with this Court's briefing order. Plaintiff filed his brief eight days after the deadline specified by this Court. The Mylan Defendants file this Brief to comply with this Court's order, filing it on or before January 12, 2011, thirty days after their receipt of Plaintiff-Appellant's Brief on December 13, 2010. The Mylan Defendants emphasize, however, that their timely filing of this Brief is not intended as a waiver of their Motion to Dismiss, or a signal of any kind suggesting acceptance of Appellant's late filing. To the contrary, the Mylan Defendants submit that the potential for prejudice in Plaintiff's late filing remains, and the propriety of dismissal for non-compliance with this Court's Order is the appropriate remedy.

Plaintiff's arguments lack support in the West Virginia Code and caselaw decided both before and after the West Virginia refined and / or added the statutory provisions relevant to Plaintiff's arguments. This is not due to any important lacuna in West Virginia law, but rather a consequence of the fact that nothing in West Virginia law suggests hospitality to claims brought in West Virginia by forum-shopping plaintiffs whose claims have gone stale in every jurisdiction having a significant relationship with the claimants and the injuries underlying those claims. Were this Court to rule in favor of Plaintiff in this matter, it would not only disregard Plaintiff's lack of diligence in bringing his claims timely, but invite similarly stale claims from any number of other claimants nationwide in the future by identifying itself as a safe harbor for such untimely claims. Based on numerous clear signals that West Virginia's public policy does not require or recommend such a ruling, the Mylan Defendants urge this Court to reject Plaintiff's claim. Instead, they ask this Court to rule that the trial court did not abuse its discretion in granting the Mylan Defendants' Motion to Dismiss for *forum non conveniens* without requiring waiver the statute of limitation defenses that inhered upon Plaintiff's filing in the trial court.

As notable as anything in the arguments Plaintiff makes in support of his appeal are those important considerations that Plaintiff mischaracterizes or declines to mention. Plaintiff argues that W.Va. Code § 56-1-1a prohibits a court from dismissing a case for *forum non conveniens* when the action would be barred by an applicable statute of limitations in the proposed alternate forum. The plain language of the provision in question, however, vests the circuit court with sole discretion to assess the propriety of dismissing for *forum non conveniens* based on its review of numerous non-dispositive factors and the facts and circumstances of the case, including "availability" of an "alternate forum." No factor has been made mandatory by the common-law *forum non conveniens* doctrine or by West Virginia's recent codification at § 56-1-1a.

Plaintiff next argues that the circuit court erred in reaching the question whether North Carolina law would govern the interposition of that state's discovery rule because it was premature. Yet Plaintiff simultaneously would have the court speculate as to whether the North Carolina forum would, in fact, have been "available" had Plaintiff actually brought and maintained his claim in that forum. As discussed below, however, Plaintiff quickly withdrew the complaint he filed in North Carolina before that premise could be established, and hence before any argument based on that premise could ripen for consideration in this appeal.

Plaintiff further argues that even if the court's analyses were not premature, the court erred in determining that North Carolina's tolling provisions – *i.e.*, its lack of a discovery rule – would apply in this case. As various cases make clear, however, the quintessential element of "availability" is personal jurisdiction of the defendant, not a guarantee of a hearing on the merits of claims gone stale by plaintiff's own actions. The Mylan Defendants have made clear that they would not contest personal jurisdiction in North Carolina, rendering that forum "available" had Plaintiff's claims been filed timely in the West Virginia circuit court.

Moreover, despite relying – explicitly and implicitly – on a cribbed, self-serving interpretation of West Virginia public policy lacking support in West Virginia law, Plaintiff fails even to **address** the effect of West Virginia's borrowing statute, W.Va. Code § 55-2A-2 on his claims, or how that provision informs public policy as effectuated by the West Virginia legislature. That provision, in directing courts to apply, as between multiple potentially applicable statutes of limitations, the provision that bars the claims, contradicts his insistence that West Virginia does or should welcome a suit brought in West Virginia transparently to rehabilitate claims that he permitted to go stale in the forum in which they accrued.

Ultimately, the considerations that led the circuit court to dismiss Plaintiff's case for *forum non conveniens* lay in that court's discretion, which that court did not abuse. Moreover, nothing about this case or any of its kind merits the judge-made sea change in West Virginia law that Plaintiff seeks. Such a consequential change in the law should be entrusted to the West Virginia legislature, which, as set forth below, not only has heretofore declined to do so, but has indeed enacted provisions strongly suggesting a contrary policy. Accordingly, the circuit court's ruling should be affirmed as a proper exercise of its considered discretion.

## II. BACKGROUND

Plaintiff's characterization of the procedural steps underlying this case is accurate enough, but leaves out important contextual details. Plaintiff suggests the circuit court's initial Order was consistent with its in-court discussions and findings, and that the court was swayed only after the fact by the Mylan Defendants' Motion to Amend the court's order.

While the circuit court at first included in its order granting dismissal for *forum non conveniens* an unqualified requirement that the Mylan Defendants waive any applicable statute of limitations defense in the alternate forum, this ruling diverged from the discussion held in open court regarding the intended effect of the dismissal. Based on those discussions, the Mylan Defendants understood that dismissal would not be made contingent on their waiver of the statute of limitations defense that inhered in either West Virginia or North Carolina upon the instantiation of the suit in West Virginia on July 1, 2008, approximately thirty-two months after Decedent's death. Rather, the dismissal was to require only the Mylan Defendants' submission to the alternate forum's personal jurisdiction and their waiver of any statute of limitations defense that accrued **after** commencement of suit in West Virginia.<sup>2</sup>

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<sup>2</sup> Notably, Plaintiff employs a *non sequitur* when he argues that "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

When the Mylan Defendants filed a motion to amend and/or clarify the circuit court's first order dismissing for *forum non conveniens*, the court effectively restored its order to embody the original understanding, preserving any timeliness defenses to which the Mylan Defendants were entitled at the time that Plaintiff filed his initial untimely suit in West Virginia.

### III. POINTS AND AUTHORITIES RELIED UPON AND LEGAL DISCUSSION

#### A. A Circuit Court's Ruling on a Motion to Dismiss for *Forum non Conveniens* Should Be Overturned Only for an Abuse of Discretion.

Plaintiff attempts to invoke plenary review by this Court by casting the circuit court's decision as one requiring statutory interpretation. Notably, however, virtually all of Plaintiff's arguments focus on *forum non conveniens* caselaw decided before the 2007 codification of § 56-1-1a, and depend on Plaintiff's contention that the statute should be read consistently with the common-law doctrine. See Petition for Review at 8 (“[T]here is nothing to suggest that the statute was intended to modify the common law doctrine.”). The circuit court, however, did not rule otherwise, and the Mylan Defendants have neither sought nor relied upon any claimed change in the underlying doctrine. Rather, this case involves the circuit court's discretionary ruling, based on the facts of this case, applying a long-standing, uncontroversial doctrine and the statute unambiguously codifying that historic body of caselaw.

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limitations if commenced there.” That consideration is only relevant if Plaintiff has a justiciable claim in one of the two forums in question in the first instance. Notably, following the trial court's initial ruling granting dismissal, Plaintiff filed his suit in North Carolina, only to voluntarily dismiss it and seek restoration of his claims in West Virginia, an action the Circuit Court made contingent on Plaintiff's failure to establish jurisdiction in North Carolina, a contingent event that Plaintiff's dismissal prevented from occurring. Thus, while the effect of North Carolina's statute of limitations and tolling provisions are at the center of Plaintiff's arguments before this Court, no ruling that conclusively decides that issue has issued or been relied upon by any court. That particular issue has not ripened because Plaintiff voluntarily dismissed his North Carolina claims prior to any such ruling.

As Plaintiff acknowledges, decisions regarding *forum non conveniens* historically have been entrusted to the trial court's discretion. See Cannelton Industries, Inc., v. Aetna Cas. & Surety Co. of Amer., 460 S.E.2d 1, 6 (W.Va. 1994)(citing Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981)). "[W]here the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, [the circuit court's] decision deserves substantial deference," and will not be reversed absence an abuse of discretion. Id. (quoting Piper, 454 U.S. at 257);<sup>3</sup> see Norfolk & W. Ry. Co. v. Tsapis, 400 S.E.2d 239, 243 (W.Va. 1990)("[U]ltimately the decision to apply or to reject the *forum non conveniens* doctrine in a particular case rests within the sound discretion of the trial court.").

Seeking to persuade this Court to apply a *de novo* standard of review, Plaintiff directs this Court's attention to its decision in Riffle v. Ranson, 464 S.E.2d 763 (W.Va. 1995), which it argues requires the Court to exercise plenary review because the circuit court either "misapplie[d] the law" or because "the decision depend[ed] on an interpretation of a controlling statute." In Riffle, however, this Court explained its decision to apply the more strict standard of review by reference to a statutory provision that "adopt[ed] explicit limitations to a preexisting common law rule," presenting a question of statutory interpretation.

Plaintiff has not demonstrated that this case presents such an interpretive issue under § 56-1-1a or otherwise. The questions raised by Plaintiff reveal no material dispute regarding the import of the statute in question, but fix instead upon the common-law doctrine it codified.<sup>4</sup> Moreover, as developed and discussed below, the long list of factors to be considered in deciding

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<sup>3</sup> The factors are discussed, *infra*.

<sup>4</sup> Plaintiff attempts to have it both ways when, after arguing that the common law remains unchanged after the enactment of § 56-1-1a, he asks this Court, "[a]s a matter of first impression," to "interpret the consideration of whether an alternate forum exists is dispositive." The common law, as

a motion seeking dismissal for *forum non conveniens* requires the trial court to exercise considerable discretion. Given the sensitivity to case-specific facts reflected in law and custom, an appellate court should not supplant the circuit court's judgment with its own absent an abuse of discretion.

**B. The Circuit Court Properly Identified and Applied the Factors Governing Dismissal for *Forum non Conveniens*, and It Did Not Abuse Its Discretion.**

Plaintiff serially uses mandatory language to characterize the circuit court's burden in evaluating a motion seeking dismissal for *forum non conveniens*. Although Plaintiff correctly quotes § 56-1-1a as directing that a circuit court facing such a motion "shall consider" certain factors in exercising its discretion, that initial direction to the court is the only thing mandatory about the statute. Directing a court to "consider" certain specified and unspecified factors unmistakably calls for that court to exercise its discretion, and compels no specific outcome on the basis of the availability of an alternate forum or any other factor standing alone.

Section 56-1-1a requires a court deciding a motion to dismiss for *forum non conveniens* to consider, *inter alia*, the following factors:

- (1) Whether an alternate forum exists in which the claim or action may be tried;
- (2) Whether maintenance of the claim or action in the courts of this state would work a substantial injustice to the moving party;
- (3) Whether the alternate forum, as a result of the submission of the parties or otherwise, can exercise jurisdiction over all the defendants properly joined to the plaintiff's claim;
- (4) The state in which the plaintiff(s) reside;
- (5) The state in which the cause of action accrued;

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discussed at length below, is virtually monolithic in its holding that no one factor bearing on *forum non conveniens* analysis is dispositive. See Cannelton, 460 S.E.2d at 6-7.

(6) 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 . . . ;

(7) Whether the alternate forum provides a remedy.

W.Va. Code section 56-1-1a(a). Subsection (6) also identifies numerous public and private factors “relevant” to the court’s consideration, but makes clear that the list is non-exhaustive.

In addition to these factors, this Court, citing Piper, has identified additional non-dispositive considerations, including the favorability of the substantive law to the plaintiff in the chosen forum. Tsapis, 400 S.E.2d at 243. Of particular relevance to this case, the Tsapis Court, citing Piper, emphasized that the traditional deference afforded a plaintiff’s preference as to forum is “diminished when, as in this case, the plaintiff is a nonresident and the cause of action did not arise in the forum state.” Id.

With regard to West Virginia’s statute of limitations, the statute provides: “If the statute of limitations in the alternative forum expires **while the claim is pending in a court of this state**, the court shall grant a dismissal under this section only if each defendant waives the right to assert a statute of limitation defense in the alternative forum.” Id. § 56-1-1a(c)(emphasis added). Thus, while the statute protects a claimant who timely files a suit that becomes untimely due to delay associated with the interposition of a statute of limitations defense or otherwise, it is conspicuously silent regarding the circumstance at bar, when the statute of limitations in both forums expired **before** suit was filed in the circuit court.

That the legislature considered statute of limitations issues that might arise in the context of a motion for *forum non conveniens* and provided mandatory relief for a specified circumstance underscores its omission of a parallel provision directed to the circumstance at bar. Under

express statutory language, the circuit court in granting a dismissal for *forum non conveniens* must compel a moving defendant to give up **only** those limitation defenses that arose **after** the West Virginia suit was commenced. Under time-honored canons of construction, the inclusion of one specific remedy implies the exclusion of another. That the legislature explicitly requires retention of jurisdiction or waiver of a statute of limitations only when a foreign-forum statute of limitations expires **during** the case's pendency before a West Virginia court all but compels the conclusion that the legislature intended to vest in circuit courts' the discretion to assess the various non-mandatory factors bearing on such motions collectively, and in particular did not intend that availability or any other single factor be dispositive by itself.

This reading also finds support in West Virginia caselaw, which Plaintiff contends – and the Mylan Defendants do not dispute – the legislature intended to codify without material modification in § 56-1-1a. In Cannelton, for example, this Court emphasized that “any single factor was not necessarily dispositive in a *forum non conveniens* analysis and that the doctrine had to be applied flexibly and on a case-by-case basis.” 460 S.E.2d at 6-7 (relying on Piper, *supra*); see Tsapis, 400 S.E.2d at 243 (citing Piper as “stress[ing] that no one factor was necessarily dispositive”). No exception is stated or implied in Cannelton or Tsapis, or in any other West Virginia cases cited by Plaintiff that should apply to this case. No statutory or common-law authority cited by Plaintiff demands or even recommends that a circuit court retain jurisdiction of a case more properly tried elsewhere solely because the claimant has allowed his claim to become untimely in both jurisdictions **before** filing suit in either jurisdiction.<sup>5</sup>

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<sup>5</sup> Of course Plaintiff's claim is only untimely in West Virginia if it is determined that the discovery rule should not apply to his claim. This question has yet to be addressed by any lower court, and hence should not be decided by this Court. It is worth noting, however, that the Circuit Court's discretionary determination in this case may have been swayed by the fact that Plaintiff may not deserve the benefit of West Virginia's discovery rule, even were it applicable in principle. Indeed, the court effectively so

Other jurisdictions similarly have indicated that a trial court retains discretion to dismiss a suit for *forum non conveniens* even when granting dismissal for *forum non conveniens* might have the effect of denying plaintiff a forum in which to seek relief. For example, in Miller v. United Technologies Corp., 515 A.2d 390 (Conn. Super. Ct. 1986), reviewing the Supreme Court's decision in Piper, the court cautioned a trial court against "go[ing] so far as to consider the putative transferee forum's law on the plaintiff in its decisions," but made discretionary the decision whether a lack of remedy in the alternate forum rendered that forum "unavailable" for *forum non conveniens* analysis. Id. at 393 (discussing In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India, 634 F. Supp. 842, 845 (S.D.N.Y. 1986)).

Notably, the Miller court tied the "availability" inquiry to amenability to service: "Ordinarily, if a defendant is amenable to process [in the alternate forum], then the court can end its inquiry and make a finding that there is an alternative forum" for purposes of a *forum non conveniens* analysis. Id. (citing Union Carbide, supra). Similarly, in Harry David Zutz Insurance, Inc., v. H.M.S. Assocs., Ltd., 360 A.2d 160 (Del. Super. Ct. 1976), the court held that "[a]pplication of the doctrine of [f]orum non conveniens presupposes at least two forums in which the defendant is amenable to process." Id. at 165-66.

Sound policy considerations recommend such an approach: The moving party's amenability to process, or its willingness to concede jurisdiction, prevents that party from using *forum non conveniens* as a sword rather than a shield, and still preserves for the moving party any affirmative defenses couched in the alternate forum's substantive law that existed at the time of filing, an especially appropriate result when a case accrued in that forum, **and** the inconvenient forum embraces *lex loci delicti* choice of law principles, as does West Virginia.

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ruled, in that it applied McKinney and held that North Carolina's tolling provisions would apply in any event to bar Plaintiff's claims.

Moreover, such an approach does not invite forum-shopping in the way that a ruling in Plaintiff's favor would do. If this Court holds that a case duly subject to an affirmative defense in a foreign jurisdiction must be retained and tried on the merits in West Virginia for that reason alone – the outcome Plaintiff seeks – widespread forum-shopping inevitably will result. There is no reason as a matter of positive or common law, or of equity, to restore in West Virginia claims that are stale in the jurisdiction in which they accrued, especially when neither the underlying claim nor the plaintiff has any material connection whatsoever to the state of West Virginia. The very prospect of such a consequence illustrates why tradition and statute vest the trial court with discretion to evaluate the propriety and consequence of dismissing a case for *forum non conveniens*. Furthermore, the West Virginia legislature's manifest resistance to such an outcome is embodied in its borrowing statute, discussed at length *infra*.

For these reasons, Plaintiff's insistence that the circuit court lacked discretion under West Virginia law to dismiss a case that was brought in that state when it was untimely there and in North Carolina should be rejected as a matter of law and policy. Plaintiff's argument depends on treating as mandatory what this Court and others consistently have recognized as discretionary. It further depends on this Court treating as a dispositive question of law a matter that properly rests in the circuit court's discretion as informed by uncontroversial and long-standing legal principles; this Court should disturb the circuit court's decision only when it is abused.

Plaintiff cites no West Virginia authority for the proposition that any one factor, including the "availability" of an alternate forum, decisively governs the disposition of a dismissal sought for *forum non conveniens*. Neither can Plaintiff establish that the expiration of the statute of limitations in both "available" forums should be obviated whenever a claimant

chooses the forum with a potentially more favorable tolling provision specifically to effectuate that result.

The precedents granting relief from the effect of foreign statutes of limitations in the context of *forum non conveniens* questions are those in which the statute of limitations in question expired during the **pendency** of the underlying claim. Plaintiff's claim in this case expired in both North Carolina and West Virginia before its commencement in either state, and nothing about the *forum non conveniens* doctrine in West Virginia changes that fact. While the circuit court was not **required** to rule as it did, nothing prevented it from ruling that the North Carolina forum was "available" to Plaintiff, and that the case warranted dismissal for *forum non conveniens*.<sup>6</sup>

**C. The Circuit Court Did Not Err in Addressing a Choice of Law Question Bearing on the Claim Before It.**

Plaintiff objects to the fact that the circuit court reached the question of whether it would have applied West Virginia's tolling provisions to Plaintiff's claims – which it properly found accrued in North Carolina – were it to retain jurisdiction. While the court's brief discussions on this topic might have informed its rulings, and thus are addressed below, the essence of its rulings was based upon the many traditional factors that bear on a *forum non conveniens* motion, which militated against the circuit court retaining jurisdiction in this case.

The only case cited by Plaintiff to support this aspect of his argument is McKinney v. Fairchild International, Inc., 487 S.E.2d 913 (W.Va. 1997). Plaintiff correctly observes that the McKinney Court ruled on a choice of law issue pertaining to tolling provisions in the context of a motion for summary judgment. Nothing in that case or any other cited by Plaintiff, however,

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<sup>6</sup> Similarly, Plaintiff's claim that the trial court's actions transformed a venue-related ruling into a premature "dismissal on the merits" is misleading. The ruling was based on a jurisdictional question and in no way addressed the merits.

suggests that summary judgment is the **only** context in which choice of law considerations may arise or properly be addressed.

Compounding its intrinsic flaws, Plaintiff's argument here also undermines his broader Petition. His attempt to characterize as premature the circuit court's review of a choice of law question bearing on the effect of a given *forum non conveniens* ruling rests on the premise that the effect of the court's ruling – *i.e.*, what the court determined would happen in choice of law terms if the circuit court retained jurisdiction – is immaterial to the *forum non conveniens* question itself.

This is analogous to the rulings in Miller and Harry David Zuts Insurance, *supra*, in which the courts deemed it better to set aside questions about likely outcomes in alternate forums and to focus primarily on personal jurisdiction, along with the weight of the other prescribed *forum non conveniens* factors, over the defendant to determine “availability.” If Plaintiff's argument is correct, that is to say, the Mylan Defendants' argument gains force, as set forth in the above analysis: Personal jurisdiction is and should be the primary, if not the exclusive, consideration in determining the “availability” of an alternate forum, an approach that ensures that claimants are not rewarded for shopping for any forum that will forgive their want of diligence in pursuing their claims.

Conversely, Plaintiff simultaneously maintains that the circuit court should have penetrated the multi-factor *forum non conveniens* inquiry to anticipate its effect on Plaintiff's claims in North Carolina. Plaintiff asks this Court to determine that **because** North Carolina has no discovery rule, and **because** West Virginia has such a rule, the circuit court erred in deeming the North Carolina forum “available” to Plaintiff to pursue her claims. This inquiry, however, asks the circuit court to conjecture even more than it did in considering the choice of law issue's

practical effect on the case. It is far more difficult for a judge to predict another court's decision than his own. Once again, if this were the proper approach, the Mylan Defendants would reap the benefits: The trial court correctly ruled that it would have applied North Carolina's statute of limitations even had it retained the case, an outcome in harmony with West Virginia's borrowing statute, as discussed below.

That Plaintiff cannot make these arguments without such a fundamental internal contradiction is a symptom of that argument's essential invalidity. In either event, the circuit court's discretion to decide a *forum non conveniens* motion is broad, informed as it is by at least a dozen criteria and a considerable volume of cases applying those factors in West Virginia and elsewhere. Thus, in a *forum non conveniens* motion necessarily must be evaluated case-by-case, and the analysis should not be restricted by disparately weighted or overdetermined criteria or bright-line rules. Caselaw and § 56-1-1a provide a roadmap to guide a circuit court's analysis, but one governed by guidelines rather than strict prescriptions – a roadmap that permits, under these circumstances, a court to dismiss for *forum non conveniens* even when a claimant may not ultimately be able to obtain relief. Availability cannot hinge on a plaintiff's likelihood of recovery, or some guarantee of a forum to hear claims that are stale anywhere he turns, the premise at the heart of Plaintiff's entire argument.

Plaintiff cannot reasonably ask this Court to grant the circuit court latitude to consider legal questions and outcomes that ostensibly serve his purposes, while denying the court its time-honored discretion to anticipate other consequences and the interests of justice, when all of these questions ultimately deal with the justiciability of Plaintiff's claims in North Carolina and West Virginia. Such a comprehensive analysis not only is encompassed in the circuit court's

considerable discretion, but intrinsically is demanded of it. The court in this case did not abuse that discretion.

**D. The Circuit Court Also Did Not Err in Determining That, Were It to Retain Jurisdiction, It Would Apply North Carolina's Tolling Provisions Because That State Had a More Significant Relationship with the Claims at Bar.**

If the circuit court did not abuse its discretion in reaching the choice of law issue, Plaintiff argues in the alternative, it erred as a matter of law in its analysis of that issue. The parties do not dispute that McKinney outlines the relevant approach. That approach requires the circuit court to make case-specific determinations regarding the interplay of those considerations with the facts and circumstances of the case before it. Thus, the real question is not one of law, but one addressed to the court's case- and fact-specific, discretionary application of a settled legal principle. The inquiry is not unlike the *forum non conveniens* inquiry, which precedent long has held is better entrusted to the trial court's discretion, and should be disturbed only when that discretion is abused.

This Court in McKinney noted that the traditional approach to conflicts of law favored in West Virginia courts creates a presumption in favor of applying the West Virginia forum's tolling provisions to statute of limitation questions. Thus, West Virginia's discovery rule would be presumed to apply at the outset, even when West Virginia law requires that it borrow the other forum's statutes of limitation when it would bar the claim. The Court went on to hold, however, that the presumption is rebuttable, and should yield to the foreign forum's tolling provisions when "the place where the claim accrued has a more significant relationship to the transaction and the parties." 487 S.E.2d at 923.

Establishing the weakness of the underlying presumption, and by itself providing a strong basis for its rebuttal, is the application and effect of West Virginia's "borrowing statute."<sup>7</sup> This is striking but unsurprising, given that provision's bias in favor of barring an extra-jurisdictional claim when any applicable statute of limitations will do so, which obviously bears on this case. Section 55-2A-2 ("Period of limitation") provides: "The period of limitation applicable to a claim accruing outside of this State shall be either that prescribed by the law of the place where the claim accrued or by the law of this State, **whichever bars the claim**" (emphasis added). It is impossible to read this provision and accept, without support from some other source, Plaintiff's implicit premise that West Virginia courts should tilt in favor of providing a forum for reaching the merits of claims that would be time-barred where they accrued or elsewhere.

Even without the borrowing statute, however, the circuit court need to look no further than McKinney to reach the ruling it did. There could be no question that North Carolina has a more significant relationship to the parties under a proper choice of law analysis. Courts in West Virginia and elsewhere consistently hold that a tort claim accrues where the injury occurs. See, e.g., Weethee v. Holzer Clinic, Inc., 490 S.E.2d 19, 21-22 (W.Va. 1997); Hayes v. Roberts & Schaefer Co., 452 S.E.2d 459, 461-62 (W.Va. 1994)(citing Rostron v. Marriott Hotels, 677 F. Supp. 801, 802 (E.D.Pa. 1987))("[T]he claim accrued when and where the injury was sustained."); Gwaltney v. Stone, 564 A.2d 498, 503 (Pa. Super. Ct. 1989).

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<sup>7</sup> Appellant may reply as to this or other arguments raised herein that they were not expressly considered by the trial court. First, that is no less true of certain of Appellant's arguments on a strict reading. Second, in this regard, an Appellee's posture on appeal is fundamentally different. This Court may affirm – and Appellee may seek support for – a trial court's ruling "when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment." Cabot Oil & Gas Corp. v. Huffman, \_\_\_ S.E.2d \_\_\_, 2010 WL 4398151, at n.6 (W.Va. Nov. 3, 2010)(quoting Barnett v. Wolfolk, 140 S.E.2d 466 (W.Va. 1965)).

Nonetheless, Plaintiff would divert this Court's attention to some underspecified "transaction" that putatively underlies Plaintiff's claims, which he characterizes as "the tortious conduct at issue in this litigation." Plaintiff cites no authority for this formulation, or why it should shift the focus in this case away from the traditional reliance on the law of the place where the claim accrued. Plaintiff contends that the "transaction" in this case occurred in West Virginia due to the Mylan Defendants' corporate connections to that state, or in Vermont, where Mylan Technologies manufactures its fentanyl product. Moreover, no authority pertinent to a *forum non conveniens* analysis so much as suggests that the defendant's residence or state of incorporation pertains in any way to the question of accrual, and it is but one of the many factors applicable to the prescribed *forum non conveniens* inquiry.

Surprisingly, Plaintiff goes on to state that "the only connection North Carolina has to the wrongful conduct in this dispute 'is the fortuity that the accident occurred there,' which is insufficient to establish a significant relationship to the transaction." Petition at 13 (quoting McKinney, 487 S.E.2d at 923). North Carolina might beg to differ. In addition to the "fortuity" that the accident occurred there, there are additional "fortuities" to consider: The "fortuities" that Plaintiff and Plaintiff's Decedent lived in North Carolina at all times relevant to the claimed injury; that Decedent allegedly was prescribed fentanyl by a North Carolina physician in that state; and that Decedent allegedly filled the prescription, used that product, and sustained injury in North Carolina. These "fortuities," caselaw unanimously demonstrates, effectively comprise the sum and substance of the analysis of where a tort claim accrued. See Weethee, Holzer, *supra*.

Moreover, while McKinney does inform the analysis in this case, the degree and nature of Plaintiff's reliance on that case is misplaced. McKinney addressed in the relevant discussion

this Court's decision in Lee v. Saliga, 373 S.E.2d 345 (W.Va. 1988), an insurance case analyzing a conflict of law bearing on the interpretation of an insurance contract. In a contracts case, a choice of law analysis in West Virginia requires the application of the substantive law that best reflects the "reasonable expectation of the [contracting] parties, rather than [the law] of another state whose only connection to the dispute is the fortuity that the accident [for which coverage is sought] occurred there." Id. at 352.

Although McKinney did concern a tort claim, it raised the Lee language in the context of a broader, non-case-specific and non-dispositive examination of trends in West Virginia conflict of law analysis – indeed, in *dicta*. It did not even suggest that the Lee analysis applied to a tort claim, and said nothing relevant to where a claim "accrues" in a personal injury case. In the context of a tort, even a glancing review of West Virginia law makes clear, the "fortuity" that the accident occurred somewhere is critical to the inquiry, and often dispositive: Where the injury occurs is the **principal** consideration in choice of law analyses in tort cases, as reflected in West Virginia's ongoing adherence to the principle of *lex loci delicti*. Under that doctrine, West Virginia courts must presume that the substantive law of the place of injury will govern tort claims brought in West Virginia. McKinney, 487 S.E.2d at 922.

The circuit court therefore correctly applied West Virginia's variation of the modern, Restatement-driven approach to conflicts of law to determine whether the tolling provisions of a foreign state applied to a statute of limitations analysis for a claim that accrued in that state. If the foreign state's limitations period would, in itself, bar the claim in question, then the question arises, as it does in this case, whether that state's tolling provisions – *e.g.*, that state's discovery rule or lack thereof – attach to the statute of limitations imported by operation of the borrowing statute. As discussed in McKinney, that determination must be made based upon a court's

analysis of whether the foreign state has a more “significant relationship” to the claim in question. As set forth above, that analysis should be informed by the anti-forum-shopping policy embodied in West Virginia’s borrowing statute, and by the specificity of the *forum non conveniens* provision’s safe harbor for claims that – unlike Plaintiff’s claim in this case – are timely filed in the first instance, but become untimely during pendency of a *forum non conveniens* motion.

While McKinney recognizes a presumption in favor of the forum state’s procedural law, and identifies tolling provisions as fitting that category, it also recognizes that another forum’s connection to the case may exceed that of West Virginia such that the interests of justice require application of the foreign state’s tolling provisions as well. In McKinney, the court applied West Virginia procedural law because the plaintiffs were West Virginia residents and the defendant was a West Virginia corporation; Kentucky, where the accident occurred, had only “minor contacts with the parties.” 487 S.E.2d at 923.

Here, conversely, every material occurrence that Plaintiff relies upon in seeking relief happened in North Carolina. Indeed, Plaintiff can advert only to the Mylan Defendants’ corporate connections to West Virginia to bear the burden of his argument that North Carolina’s involvement in this case, including hosting every aspect of Plaintiff’s Decedent’s injury, is not sufficiently significant to warrant application of its tolling provisions in this case. As West Virginia statutory law and interpretive precedents make clear, those connections, without more, cannot carry that weight when the accrual inquiry so conclusively recommends application of North Carolina law, as the circuit court correctly concluded.

#### IV. CONCLUSION

The circuit court's ruling was consistent with the applicable law and represented a proper exercise of its discretion. The circuit court correctly applied the choice of law analysis prescribed by McKinney. Moreover, its ruling reflected due regard for the principles embodied in West Virginia's *forum non conveniens* and borrowing statutes, which focus, respectively, on fairness and expediency to the parties under the totality of the circumstances, and on the discouragement of forum-shopping.

The court duly reviewed the numerous public and private factors and determined that the North Carolina forum was jurisdictionally available to Plaintiff and that the case, on balance, should be dismissed for *forum non conveniens*. Notably, Plaintiff does not materially suggest that any factor other than "availability" was evaluated incorrectly by the circuit court, which, in effect, reinforces the ruling it reached. Because the law does not render "availability" (in Plaintiff's confabulated sense of an opportunity to try a claim that is stale as a matter of law in both forums) a dispositive or even disproportionately weighty factor in *forum non conveniens* analyses, that factor alone should not carry the day when the other factors weigh so strongly in favor of dismissal.

Decedent allegedly resided, was prescribed, obtained, and used fentanyl in North Carolina, and purportedly suffered injury in that state. Under these circumstances, the rebuttable presumption that West Virginia's tolling provisions should apply even if North Carolina's statute of limitations is "borrowed" pursuant to West Virginia's "borrowing" statute is rebutted; indeed, if these circumstances did not warrant rejection of the presumption, none would, and the presumption would be "rebuttable" in name only. Rather, the circuit court had discretion to determine that North Carolina's relationship to the claims at issue was sufficiently more

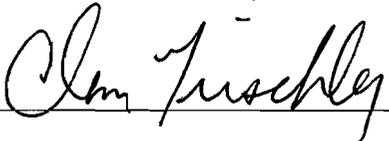
significant than West Virginia's at best attenuated interests, and consequently that North Carolina's tolling provisions should apply.

Finally, to rule in Plaintiff's favor patently would invite forum-shopping. Moreover, it would amount to a rule **requiring** circuit courts to require waiver of meritorious statute of limitation defenses even when a claimant brings a stale claim in West Virginia solely to rehabilitate that claim. This would run counter to the status quo, which prudently defers to the circuit court's discretion in assessing each case individually to determine the fairness of dismissing a case for *forum non conveniens*, pursuant to its careful analysis of the case pursuant to the non-exhaustive list of twelve factors that the United States Supreme Court, this Court, and the legislature have all required trial court's to consider, with none being dispositive of the issue.

For all the foregoing reasons, the Mylan Defendants urge this Court to affirm the Circuit Court Order dismissing Plaintiff's claims for *forum non conveniens*, and affirm as well its subsequent Order clarifying that the Mylan Defendants did not, in connection with that dismissal, waive any statute of limitations defense that inhered at the time that Plaintiff first filed his claim in West Virginia.

Respectfully submitted,

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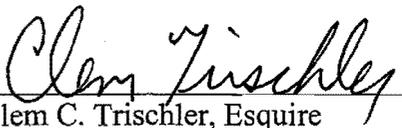
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was served via U.S. first-class mail, postage prepaid, this 11<sup>th</sup> day of January, 2011, upon the following:

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