

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-0392

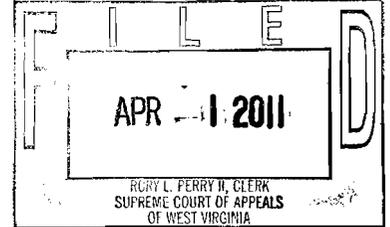
STATE OF WEST VIRGINIA, ex. rel.
MYLAN, INC., MYLAN PHARACEUTICALS, INC., and
MYLAN TECHNOLOGIES, INC.,

Petitioners,

v.

THE HON. PAUL ZAKAIB, JR.;
and JAMES SHERMAN JOHNSON, Individually,
DIAMOND JOHNSON, Individually, and KAREN MARIE HAYDEN-
JEFFERSON, As Administrator for the Estate of JAMES HAYDEN,
and as Next Friend to the Minor Plaintiffs,

Respondents.



RESPONDENTS', JAMES SHERMAN JOHNSON, DIAMOND JOHNSON, and
KAREN MARIE HAYDEN-JEFFERSON'S, RESPONSE TO
PETITION FOR A WRIT OF PROHIBITION

On Petition for a Writ of Prohibition to the Circuit Court of Kanawha County
(Case No. 09-C-2031)

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Respondents', James Sherman Johnson, Diamond Johnson,
and Karen Marie Hayden-Jefferson's, Response to Petition
for Writ of Prohibition

TO: THE HONORABLE CHIEF JUSTICE AND
THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS

AND NOW, come the respondents, James Cherman Hayden (identified in the petition as James Sherman Johnson), Diamond Ariana Hayden (identified in the petition as Diamond Johnson) and Karen Marie Hayden-Jefferson, and, by and through their counsel of record, and in accordance with the Court's Scheduling Order of March 4, 2011, and the West Virginia Revised Rules of Appellate Procedure, Rule 16, hereby respond to the Petition For Writ of Prohibition that seeks to void the Honorable Paul Zakaib, Jr.'s proper exercise of discretion in denying the Mylan Defendants' Motion to Dismiss, filed November 17, 2009, and Order dated March 2, 2010, and seeking to prohibit the Circuit Court of Kanawha County from taking further action in Case No. 09-C-2031(J. Zakaib).

I. Questions Presented

As an initial matter, Respondents/Plaintiffs believe Petitioners' Questions Presented inaccurately state the questions to be considered, are duplicative, and seek to apply a standard not found in W.V. Code § 56-1-1a. Respondents present the following questions:

- 1) Did the Circuit Court of Kanawha County abuse its discretion in denying Petitioners' (also hereafter "Mylan Defendants") Motion to Dismiss on the basis of *forum non conveniens*?
- 2) Can the Circuit Court of Kanawha County abuse its discretion in denying the Mylan Defendants' Motion to Dismiss on the basis of *forum non conveniens* when the Mylan Defendants presented no factual basis for their assertions that "in interest[s] of justice and for the convenience of the parties" the case should be heard in a forum outside the state?

- 3) Was the Circuit Court of Kanawha County required to address and analyze the factors enumerated in W.V. Code § 56-1-1a in its Order denying the Mylan Defendants' Motion to Dismiss?

II. Statement of Case

Jurisdiction of the Court

Respondents/Plaintiffs do not contest that the West Virginia Supreme Court of Appeals has original jurisdiction to hear this petition under the West Virginia Revised Rules of Appellate Procedure, rule 16, and W.V. Code § § 51-1-1 and 51-1-3.

Respondents/Plaintiffs do, however, maintain that the Court should decline to issue a rule to show cause in this matter. As this Court has historically maintained, the *forum non conveniens* analysis is a flexible one that must be assessed on a case-by-case basis. *Cannelton Industries, Inc. v. Aetna Casualty & Surety Company of America*, 460 S.E.2d 1, 6-7(W.Va. 1994), citing *Norfolk and Western Railway Company v. Tsapis*, 400 S.E.2d 239, 243(W.Va. 1990)(The doctrine of *forum non conveniens* has to be applied flexibly and on a case-by-case basis.) W.V. Code § 56-1-1a has not stripped the trial courts of the discretion to decide *forum non conveniens* issues. See *Abbott v. Owens-Corning Fiberglass Corp.*, 444 S.E. 2d 285, 290(W.Va. 1994)(The proper standard of review on *forum non* issues is determining whether the trial court abused its discretion.), see also, *Norfolk and Western Ry. Co. v. Tsapis*, 400 S.E.2d 239, 242(1990)(Simply put, “a court may, in its sound discretion, decline to exercise jurisdiction, to promote the convenience of the witnesses and the ends of justice, ...”*further citations omitted*; see also, *State ex rel. Riffle v. Ranson*, 464 S.E. 2d 763, 770(W.Va. 1995)(at footnote 11, “To exhaust the issue, we further find that unless directed otherwise by statute, the doctrine of *forum non conveniens* has continued application only in cases where the alternative forum is in another state.”).

Parties

Respondents/Plaintiffs do not contest the identity of the parties as set out in the Petition, however Petitioners' inclusion of extraneous facts regarding the status of its/their Mylan Fentanyl Transdermal System® ("MFTS") is not a matter established in the record below, and not proper for consideration on this Petition. Likewise the Petitioners' recitation of the roles the various Mylan Defendants played in the design, manufacture and distribution of the MFTS are not a matter established in the record below, and are not proper for consideration on this Petition.

Proceedings in Circuit Court of Kanawha County

Respondents/Plaintiffs filed the subject action in the Circuit Court of Kanawha County on October 29, 2009. Appx. 0009. The individual Plaintiffs are the minor children of James Hayden, deceased, and Karen Marie Hayden-Jefferson is the Administrator of the Estate of James Hayden, and Next Friend of the Minor Plaintiffs. Appx. 0009, ¶¶ 1-2. This action arises out of the wrongful death of James Hayden, who at the time of his death was a resident of Kenosha, Wisconsin. Appx. 0012, ¶ 13. The Respondents/Plaintiffs are residents of Wisconsin. Appx. 0009-0010, ¶¶ 1.3.

Petitioners/Mylan Defendants' Motion to Dismiss in the Circuit Court of Kanawha County was based upon two, and only two, established facts plead in Respondents/Plaintiffs' Complaint: "[p]laintiffs do not reside in West Virginia, and the cause of action did not arise in West Virginia." Appx. 0026 Beyond these elementary facts, Petitioners offered no further factual basis in support of their motion to dismiss.¹

In denying the Mylan Defendants' Motion to Dismiss based on W.V. Code § 56-1-1a, the Circuit Court of Kanawha County, the Hon. Paul Zakaib, Jr., properly exercised its judicial

¹ Petitioner cites the Court to ¶¶ 1, 2, 3, and 13 of Plaintiffs' Complaint, however all factual allegations in these paragraphs are consistent with the two points of fact set out on p. 1 of Petitioners' Motion to Dismiss. See. Appx. 0026.

discretion. See *Abbott, supra.*; *Cannelton Industries, Inc. v. Aetna Casualty & Surety Company of America*, 460 S.E.2d 1, 5(W.Va. 1994); *Tsapsis*, 400 S.E.2d at 242. The Circuit Court of Kanawha County specifically addressed the necessary threshold issues established in W.V. Code§ 56-1-1a (the interests of justice and the convenience of the parties), and further addressed the lack of any factual basis for the Petitioners' requested relief. Appx. 0004-0006, ¶¶ 1-6. This Court should not disturb the trial Court's Order, there being no factual or legal basis for a finding that the Circuit Court of Kanawha County abused its discretion in rendering its Order of March 2, 2010. Appx. 0001-0008.

Further, in its Order denying Petitioners' Motion to Dismiss, the Circuit Court of Kanawha County held, consistent with this Court's repeated holdings that "where a foreign state's laws conflict with those of West Virginia, and operate to provide a bar to recovery, then such laws violate the public policy of West Virginia and will not be enforced in the court's of this State." *Mills v. Quality Superior Trucking*, 510 S.E 2d 280, 283(W. Va. 1998) (Holding Maryland's contributory negligence law violates West Virginia's public policy because it operates to bar recovery if the plaintiff is guilty of any negligence.).

III. Summary of Argument

"On the issue of *forum non conveniens*, [this court has] held that the standard of review of this Court is an abuse of discretion." *Nezan v. Aries Technologies, Inc.*, 704 S.E. 2d 631, 637(W.Va. 2010), citing *Callelton Industries, Inc., supra.* (A circuit court's decision on issues of *forum non conveniens* will not be reversed unless the circuit court abused its discretion.)

The Circuit Court's denial of the Mylan Defendants' Motion to dismiss was proper, and was made pursuant to the discretion vested in the trial court to determine issues of *forum non conveniens* on a flexible and case-by-case basis, within the bounds of the discretion vested in the

trial court under W.V. Code§ 56-1-1a, see, *Abbott v. Owens-Corning Fiberglass Corporation*, 444 S.E. 2d 285, 290(W.Va. 1994)(further citations omitted). The Circuit Court was not required to assess and analyze the eight factors enumerated in W.V. Code§ 56-1-1a, absent first making a threshold finding that the interests of justice and the convenience of the parties would dictate that the matter properly be heard in another forum outside of West Virginia. Because the Circuit Court determined there was not a sufficient showing for the Mylan Defendants to prevail on the threshold issues, it was not necessary for the court to address the eight factors enumerated in W.V. Code§ 56-1-1a. Where a factual basis for a dismissal on *forum non conveniens* is lacking, it is an abuse of the court's discretion to base dismissal on the defendant's allegations and conclusions alone. *Abbott*, 444 S.E. 2d at 392.

Further, the Circuit Court's findings on West Virginia's public policy exception to the *lex loci delicti* rule provides a separate and independent basis for declining to issue a rule to show cause in this matter. West Virginia's strong public policy is in favor of providing an avenue for recovery where a foreign state would bar recovery; "this Court has held repeatedly that where a foreign state's laws conflict with those of West Virginia, and operate to provide a potential bar to recovery, then such laws violate the public policy of West Virginia and will not be enforced in the courts of this State. *See Mills, supra*. And as this Court has stated,"the public policy exception to the *lex loci delicti* rule is designed to enforce the public policy of West Virginia in actions filed in this state and *is not dependent upon the residence of the plaintiff.*"*Id.* at 510 S.E.2d at 283. (italics added) Judge Zakaibs Order of March 2, 2010, specifically held that West Virginia would not apply Wisconsin's law on Plaintiffs' warranty claims, as Wisconsin requires privity of contract. Appx. pp. 0006-0008 Applying and enforcing Wisconsin's rule of privity would essentially destroy any right the Plaintiffs have on recovering on their warranty

claims. The Circuit Court's holding is consistent with the Court's prior similar rulings, and does not evidence an abuse of discretion.

VI. Statement Regarding Oral Argument and Decision

Oral argument has been requested by the Petitioner, pursuant to Rule 18(a) and Rule 20(a), West Virginia Revised Rules of Appellate Procedure, and thus Respondents request to be heard. Notwithstanding this, Respondents disagree that this matter is one legitimately ripe for oral argument under Rule 20(a)(4), as proposed. Petitioners seek a writ of prohibition on an issue the determination of which this Court has recognized is vested in the sound discretion of the trial judge, and that such issues of *forum non conveniens*, where the alleged alternate forum is outside this State, must be determined on a case-by-case basis, thus inviting divergent decisions among Circuit Courts.

V. Argument

Contrary to the Mylan Defendants' assertions, W.V. Code§ 56-1-1a does not mandate or require that an order on a motion under this section specifically "address and analyze" the eight factors enumerated in W.V. Code§ 56-1-1a. Rather, instead, the code section states clearly that

- (a) In any civil action **if** a court of this state, upon a timely written motion of a party, finds that in the interests of justice **and** for the convenience of the parties a claim or action would be more properly heard in a forum outside this State, the court shall decline to exercise jurisdiction under the doctrine of *forum non conveniens* and shall stay or dismiss the claim or action, or dismiss any plaintiff: Provided, That the plaintiff's choice of forum entitled to great deference, but this preference may be diminished when the plaintiff is a non-resident and the cause of action did not arise in this State. In determining whether to grant a stay or dismiss the action, or dismiss any plaintiff under the doctrine of *forum non conveniens*, the court **shall** consider:

- (1) Whether an alternate forum exists in which the claim or action may be tried;

- (2) Whether the 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 plaintiffs' claim;
- (4) The state in which the plaintiff(s) reside;
- (5) The state in which the cause of action accrued;
- (6) Whether the balance of the private interests of the parties and the public interests 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. Factors relevant to the private interests of the parties include, but are not limited to, the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling witnesses; the cost of obtaining attendance of willing witnesses; possibility of a view of the premises, if a view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. Factors relevant to the public interest of the State include, but are not limited to, the administrative difficulties flowing from court congestion; the interest in having localized controversies decided within a State; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty;
- (7) Whether not granting the stay or dismissal would result in unreasonable duplication or proliferation of litigation; and
- (8) Whether the alternate forum provides a remedy.

W.V. Code§ 56-1-1a(a)(1-8)(emphasis added)

Recognizing that the provisions of W.V. Code§ 56-1-1a should be read as a complete statement, it is virtually impossible to reach the conclusions drawn by Petitioners. W.V. Code§ 56-1-1a does not state that an out of state plaintiff's choice of forum is to be afforded "little, if any, deference," as suggested by the Petitioners. See Petition at p. 20. Contrary to Petitioners assertions, W.V. Code§ 56-1-1a does not limit the trial Court's deference in any respect until it makes two key threshold findings: 1) "that in the interests of justice" and 2) "for the convenience of the parties a claim would be more properly heard in a forum outside the State, . . ." Id.

(underline added) Until the trial court makes these critical, initial finding it is not obligated to take any further action. It is only after the trial Court finds **both** of these threshold issues weigh in favor of an alternate forum in another state that the statute's mandatory language (e.g.: the "shall" language emphasized in Petitioners' papers) becomes operational. See Id. Even then, however, the statute does not address the requirements of an order as described by the Petitioners. The only encroachment upon the trial Court's discretion addressed in the statute is that any deference to the plaintiff's chosen forum is "diminished" if the plaintiff is a nonresident and the cause of action did not arise in West Virginia. See Id. Again, even then the statute does not mandate what Petitioners seek in their petition.

The trial Court's Order addresses the first two threshold issues, and holds that the Mylan Defendants provided no evidence to substantiate a finding that the interests of justice weighed in favor of an alternative forum. Appx 0005, ¶ 5. ("The Mylan Defendants arguments for dismissal based upon *forum non conveniens* are unsupported by any evidence establishing substantial injustice or undue burden, . . .). Further, the trial Court took note of the short duration of use of the product alleged to have caused James Hayden's death (1 day) mitigating towards few witnesses being involved, and likewise noted the lack of any demonstrated inability to compel the testimony of potential witnesses. Id. Indeed, the record before the trial Court, as here, is devoid of any factual basis for the Petitioners' claimed witness concerns; there is no factual basis of any sort in the record to demonstrate the threshold issues of "the interest of justice and . . . the convenience of the parties." As a result, the Circuit Court of Kanawha County properly exercised its discretion in denying the Mylan Defendants' Motion to Dismiss, and as a result this Court should decline to issue a rule to show cause in this matter. It would be an abuse of discretion to do otherwise. See *Abbott*, 444 S.E. 2d at 292.("[T]he doctrine of *forum non*

conveniens is a drastic remedy which should be used with caution and restraint.”). Where all a moving party offers are allegations and conjecture, and cannot demonstrate with any precision the basis for a motion, it would be an abuse of discretion to dismiss on grounds of *forum non conveniens*. Id.

Looking past the threshold issues of W.V. Code § 56-1-1a, the trial Court’s Order also addresses an issue that runs parallel to the eighth enumerated paragraph of the statute: whether the alternate forum provides a remedy. Appx. 0006 – 0008. In addition to seeking dismissal on the basis of *forum non conveniens*, the Mylan Defendants also sought to dismiss Plaintiffs’ claims based on express and implied warranties. Appx. 0031-0034, 0044-0047. The trial court clearly and concisely addressed the conflict of laws between West Virginia and Wisconsin regarding Plaintiffs’ warranty claims, and applied controlling law to resolve the conflict. Specifically, the Circuit Court noted this Court’s instruction that “[it] has held repeatedly that where a foreign state’s laws conflict with those of West Virginia, and operate to provide a potential bar to recovery, then such laws violate the public policy of West Virginia and will not be enforced in the courts of this State. Appx. 0006-0008; citing *Mills v. Quality Superior Trucking*, 510 S.E.2d 280, 283(W.Va. 1998)(The contributory negligence law of Maryland contravenes the public policy of West Virginia because it operates to present a bar to recovery if the plaintiff is guilty of any negligence.); *See also, Johnson & Johnson, Inc. v. Karl*, 647 S.E.2d 899, 914(W.Va. 2007) (West Virginia will not enforce a foreign state’s learned intermediary doctrine because the very doctrine has been abolished in this State.). In its Order the trial Court quoted *Mills*, stating “the public policy exception to the *lex loci delicti* rule is designed to enforce the public policy of West Virginia in actions filed in this state and *is not dependent upon the residence of the plaintiff.*” Appx. 0007, ¶ 6, quoting *Mills*, 10 S.E.2d at 283.(italics added)

As the trial Court's Order points out, the very fact that the West Virginia Supreme Court of Appeals points out that the plaintiff's residency is irrelevant to the application of West Virginia's public policy exception to the *lex loci delicti* rule is further instruction that an out of state plaintiff can maintain an action in this state, even if the injury was suffered in another state. *Id.* Thus, it was proper and within Judge Zakaib's discretion to deny the Mylan Defendants' Motion to Dismiss Plaintiffs' warranty claims under West Virginia's public policy exception to the *lex loci delicti* rule. Such a public policy exception to the *lex loci delicti* rule would be rendered meaningless if it were not proper for an out of state plaintiff to bring their action in West Virginia, even where the injury was suffered outside of this state. This provides another independent basis for affirming Judge Zakaib's March 2, 2010, Order and ruling by way of declining to issue a rule to show cause on the present petition.

Further, Petitioners spend nearly their entire argument on assertions and suppositions regarding the eight factors of W.V. Code§ 56-1-1a, without referring this Court to any factual undergirding to support their petition, or which was presented as factual support for their Motion to Dismiss below. As stated herein, W.V. Code§ 56-1-1a does not mandate or require a trial court to assess and document the eight factors as Petitioner suggests. The plain language of W.V. Code§ 56-1-1a simply does not require what Petitioner boldly professes it states.

Petitioners make much about the Circuit Court's mention of an assessment of two of the Mylan Defendants' strong ties to West Virginia. These strong ties demonstrate a lack of any injustice or inconvenience to these West Virginia corporate citizens, rather than an improper elevation of defendant's residence as a "factor." To the contrary, the existence of two of the Mylan Defendants as corporate citizen residents of West Virginia are clearly considerations of the Circuit Court in declining to rule in the Defendants' favor on the first critical threshold issue,

the “interests of justice.” Appx pp.4-6. In fact, the presence of these Defendants in West Virginia makes it highly likely that several present and past corporate witnesses with relevant information will be in the state.

The Petitioners cite the Court to *State ex. rel. Riffle v. Ranson*, 464 S.E.2d 763, 770(W.Va. 1995) for the maxim of statutory construction *expressio unius est exclusio alterius* (expression of one thing implies exclusion of all other), for the proposition that W.V. Code§ 56-1-1a mandates evaluation of the “eight factors,” and precludes consideration of anything not found in items (1)-(8). Petitioners’ position in this regard is baffling in light of the Latin referenced. Petitioners would have the Court ignore the threshold issue of “the interests of justice,” and then “the convenience of the parties,” and jump directly to the “eight factors” that by the express language of the statute do not come become operative considerations until the threshold findings are made by the Circuit Court. See. W.V. Code§ 56-1-1, (“ . . . if a court in this state . . . finds that in the interests of justice, and for the convenience of the parties, . . .” the court shall act; but not before)

Moreover, *Riffle* did not deal with a situation remotely analogous to the present facts, and offers no instruction on mandatory considerations. *Riffle* deals with two competing venue statutes: one old and one new. The older statute, W.V. Code § 56-9-1, allowed, basically, for unfettered transfer of venue intra-state at the whim of any party or judge. The then-newly enacted statute, W.V. Code§ 56-1-1b, provided for very specific venue provisions, and by whom and to where, and under what circumstances, venue could be transferred intra-state. This Court was asked to resolve the competing conflict between these statutory provisions. In short, applying the maxim *expressio unius est exclusio alterius*, the Court held that when the legislature enacted W.V. Code§ 56-1-1b, providing for very specific venue choices, and likewise providing

a very specific mechanism for transferring venue, and in such cases how to determine the receiving court, it did not leave open the possibility that W.V. Code § 56-9-1 would still allow unrestricted transfer without regard to W.V. Code § 56-1-1b. see *ex re. Riffle*, 464 S.E.2d at 770. The court made clear such a conclusion would be absurd, and would conclude the Legislature did a useless act. *Id.* In short, *Riffle* brought an end to intra-state *forum non conveniens* transfers of venue, but in a footnote drew a clear distinction between issues of intra-state transfers and *forum non conveniens* transfers where the alternative forum is in another state. *Id.* at 770, see footnote 11 (“To exhaust the issue, we find further that unless directed otherwise by statute, the doctrine of *forum non conveniens* has continued application only in cases where the alternative forum is in another state.”)

Similarly, in addition to Petitioners’ misguided notion that W.V. Code § 56-1-1a *requires* the Circuit Court to include an assessment of the eight enumerated factors, Petitioners misplace reliance upon *State Farm Mutual Automobile Insurance Co. v. Stephens*, 425 S.E.2d 577(W.Va. 1992). This case deals entirely with a discovery dispute, and a challenge to discovery the defendant claimed was overly broad and unduly burdensome. Plaintiff requested all bad faith, unfair practices or settlement practices, settlement practices, and excess verdict claims filed against State Farm, throughout the entire country, for an extended period of time. The trial court in *Stephens* simply ordered the production of discovery and issued a sanction order against the defendant without assessing whether there were less restrictive or intrusive means of ordering discovery, or a means of limiting its scope, noting that even discovery of relevant evidence can be denied where production could be overly broad and unduly burdensome. *Stephens*, 425 S.E. 2d at 584. This Court held that the trial court abused its discretion by not considering all of the possible alternatives, to consider all of the appropriate factors, that is to say the options.

Stephens, 425 S.E.2d at 585. In *Stephens* the circuit court was not assessing discovery through the paradigm of a formal list of factors, but rather this Court offered a general admonishment that the circuit court could and should have considered other options, and the failure to consider them was an abuse of discretion. Id. The *Stephens* holding simply does not lend any force to the Petitioners' misplaced assertion that the Court below was required to assess particular factors within its Order denying Petitioners' Motion to Dismiss.

Finally, after driving the eight factors argument to a conclusive end, the Petitioners get to their ultimate concern: even if Judge Zakaib had performed the analysis that the Petitioners argument suggests is proper, they argue Judge Zakaib's Order is erroneous because it reaches an unreasonable conclusion. In their displeasure with the court's ruling, Petitioners simply misstate the standard of review to be applied. See *Nezan, supra*. (Abuse of discretion is the standard.)

Additionally, the very fact that the *forum non conveniens* analysis must be determined on a case-by-case basis opens the door for divergent holdings by trial courts. Unanimity of decisions portends that little if any analysis is going into the process of evaluating the case-specific nature the inquiry demands. Thus, Petitioners' recitation of 23 cases dismissed, with roughly only half of those by contested motions, and virtually all state court matters from a single judge, suggests little in this case. To put too great an emphasis on these dismissals, many of which were voluntary by Petitioners' admission, would be to transfer the duty of this Court, and all Circuit Courts, to Monongalia County. Again, the very fact that the *forum non conveniens* analysis calls for a case-by-case assessment indicates that there will be some that, in the discretion of the reviewing jurist meet the threshold for further analysis under W.V. Code§ 56-1-1a, and some that won't. see *Cannelton Industries, Inc.*, 460 S.E. 2d at 6-7(*forum non conveniens* analysis

should be applied flexibly and on a case-by-case basis), citing *Norfolk & Western Ry Co. v. Tsapi*, 400 S.E. 2d 239, 243(W.Va. 1990).

Further still, each case will have its unique blend of defendants and unique issues. For all of the forgoing, it is evident that the Circuit Court of Kanawha County did not abuse its discretion in denying Petitioners' November 17, 2009, Motion to Dismiss. As stated previously, the additional public policy issue preserving Respondents/Plaintiffs' warranty claims sheds additional light on the requirements of justice weighing in favor of declining to issue a rule to show cause.

Additional Response to Petitioners Unsupported
Factual Statements and Argument

Because Petitioners set out various factual allegations and arguments that the Court may deem as not touched upon by the above, in an abundance of caution, Respondents further state:

Petitioners make numerous and repeated statements of both fact and conclusions of law to support their conclusions that the facts of this matter support dismissal, yet the record continues to be a factual vacuum, conspicuously lacking in any facts to support their conclusions. For example, Petitioner states that the majority of the witnesses – witnesses such as the law enforcement officers, medical examiners and toxicologists, as well as the Decedents medical providers – are in Wisconsin. See. Petition p. 29. Yet the petition herein, as well as the record below (the Mylan Defendants' Motion and Brief) fail to provide the court with a reference to Appended Record. The petition is simply lacking factual support. In fact, the medical examiner that performed the autopsy on James Hayden is no longer residing in Wisconsin; Dr. Mary Mainland, former Kenosha medical examiner, is currently employed by the Hillsborough County

Medical Examiner's office.² As with the medical examiner and toxicology laboratory, the Petitioner has failed to provide this Court or the Circuit Court with facts to establish if there is in fact a concern over local witnesses predominating. Presumably, Petitioners has employees, past and present, in West Virginia, as well as Vermont and North Carolina, and perhaps many places beyond. But the fact remains there have been no facts provided to establish what the Petitioners simply state as truisms. Where a Defendant cannot establish with some level of precision the facts necessary to justify dismissal for *forum non conveniens*, it is an abuse of discretion to grant dismissal on nothing more than a defendant's speculation and conjecture. See *Abbott v. Owens Corning Fiberglass Corp.*, 444 S.E. 2d at 292("Mere allegations that a case can be tried more conveniently in another forum are not sufficient to dismiss a case on *forum non conveniens*.")

Similarly, Petitioner's stated concerns regarding third party witnesses are not supported by record references; Petitioners have not identified a single third party witness over whom they have this concern, and they certainly have not provided a factual showing of either state of residency of the witness, or whether the concern would be remedied by a move to another forum. The Court cannot accept a writ, and beyond that entertain issuing a writ tantamount to dismissal, where Petitioners have provided no facts to support their motion below or petition herein. At best, currently Petitioners' concerns are hypothetical and supposition at best. Petitioner states that "a majority of the third party witnesses" are in Wisconsin, but fails to establish this as fact through any record citation or reference.

Further, to relieve the Petitioner of this hypothetical burden would work to create a similar, but known and certain, burden on the Plaintiffs. We know where Petitioner Mylan

² Plaintiffs provided discovery responses to Petitioners over six months ago, setting out the address for Dr. Mainland in Tampa, Florida. Likewise, included in Plaintiffs' discovery responses provided months ago is the toxicology report that was performed on Mr. Hayden's blood, and this reveals that the toxicologist/laboratory that performed these tests is, in fact, in St. Louis, Missouri.

Pharmaceutical, Inc. is located; we know where Mylan Technologies, Inc. is incorporated. To take compulsory process away from Plaintiffs/Respondents works an immediate and very real harm.

Finally, Petitioners' statements of rhetoric that recognizing the legitimacy of the present action as properly venued in West Virginia would somehow "invite a flood of opportunistic litigation by plaintiffs from other jurisdictions, clogging the West Virginia courts. . .," has no place in the Petition before the Court. It smacks of sensationalism best left to the political arena or worse yet the media battle between the Chamber of Commerce and victims rights groups. As has been discussed herein, West Virginia recognizes Plaintiffs' claims for breach of express and implied warranties, and upon public policy grounds will not enforce Wisconsin's draconian privity rule, giving Plaintiffs an avenue of recovery. Dismissal would destroy that avenue of recovery. This avenue of recovery is protected for Plaintiffs/Respondents as a matter of policy and Plaintiffs' residency is irrelevant to this exception to the *lex loci delicti* rule; and it is further instructive that an out of state plaintiff can maintain an action in West Virginia, even if the injury is suffered in another state. See *Mills v. Quality Superior Trucking, Inc.*, *supra*; See also *Johnson & Johnson, Inc. v. Karl*, *supra*; See also, *Nezan v. Aries Technologies, Inc.*, 704 S.E. 2d 631(W.Va. 2010)(Canadian decedent's representative allowed to maintain an action in West Virginia against Canadian entities, and no West Virginia defendant. Decided on personal jurisdiction and *forum non conveniens* grounds.)³

³ To the extent that Petitioners rely upon *Nezan v. Aries Industries, Inc.*, for a proposition that the W.Va. Code §56-1-1a requires a Circuit Court's Order to include a recitation of the enumerated subparagraphs included in the statute, it should be noted that *Nezan* was decided a full year after Petitioners filed their motion to dismiss, or eight months after Judge Zakaib issued his March 2, 2010 Order. To the extent *Nezan* represents the Court's edification of duties imparted on trial courts in what an Order must include, Judge Zakaib's Order should not be viewed through any heightened standard announced in *Nezan*. See *Mitchem v. Kirkpatrick*, 485 S.E. 2d 445, 450(W.Va. 1997).

As the foregoing demonstrates the Circuit Court of Kanawha County did not abuse its discretion in denying Petitioners' factually unsupported motion to dismiss on grounds of *forum non conveniens*, and this Court should decline to issue a rule to show cause.

VI. Conclusion

WHEREFORE, the Respondents pray for the following relief:

- a. That the Petition for Writ of Prohibition be denied, and turned away;
- b. That this Honorable Court decline to issue a rule to show cause in all respects;
- c. That this Honorable Court rule that the Petition not be accepted for filing, and that the Circuit Court of Kanawha County, Hon. Paul Zakaib, Jr., properly exercised his judicial discretion in issuing his Order Denying Petitioners' Motion to Dismiss, on March 2, 2010; and
- d. That the action in the Circuit Court of Kanawha County, Case No. 09-C-2031, be allowed to proceed with adjudication in that court, forthwith; and
- e. Such other relief as this Honorable Court deems necessary, appropriate and proper.

This 1st day of April, 2011.

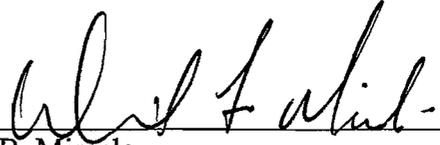
Respectfully submitted,



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[Signatures continue on subsequent page.]



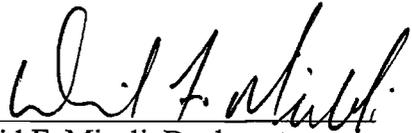
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VERIFICATION

I, David F. Miceli, hereby declare, under penalty of perjury under the laws of the State of West Virginia, that have read the above Response to Petition for Writ of Prohibition, and I know the it is true of my knowledge, except as to those things stated upon information and belief, if there be any, and as to those I believe them to be true.



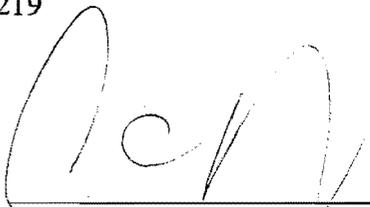
David F. Miceli, Declarant

CERTIFICATE OF SERVICE

I, Carl J. Roncaglione, Jr., counsel for Respondents, do hereby certify that on the 1st day of April, 2011, I served a copy of the foregoing upon counsel of record, email, and by placing a true and accurate copy thereof, U.S. Mail, postage prepaid, to the address that follows:

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