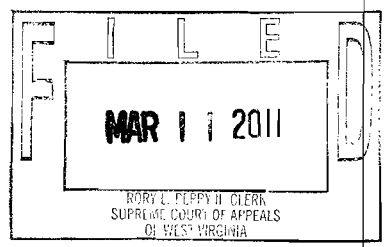
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-0440



STATE OF WEST VIRGINIA
ex rel. MYLAN TECHNOLOGIES, INC., f/k/a BERTEK, INC.,
MYLAN INC., MYLAN PHARMACEUTICALS, INC.,

Petitioners,

v.

THE HON. JENNIFER BAILEY;
and WILLIAM DAVIS HALL, individually as Next of Kin of HARRIET ELIZABETH HALL, Deceased, and as Personal Representative of the Estate of HARRIET ELIZABETH HALL, Deceased,

Respondents.

PETITION FOR A WRIT OF PROHIBITION

On Petition for a Writ of Prohibition to the Circuit Court of Kanawha County
(Civil Action No. 09-C-1777)

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PETITION FOR WRIT OF PROHIBITION

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

AND NOW, come the petitioners, State of West Virginia *ex rel.* Mylan Technologies Inc., Mylan Inc., and Mylan Pharmaceuticals, Inc. (collectively hereinafter "Mylan Defendants" or "Mylan"), by and through their counsel, Clem C. Trischler, Esq., Ryan J. King, Esq., and Pietragallo Gordon Alfano Bosick & Raspanti, LLP, and hereby petition this Honorable Court to issue a Writ of Prohibition against Respondents, the Honorable Jennifer Bailey ("Judge Bailey"), in her official capacity as Judge of the Circuit Court of Kanawha County, and William Davis Hall, thereby prohibiting the Circuit Court of Kanawha County from taking further action in the underlying case and ordering dismissal thereof pursuant to W.V. Code § 56-1-1a.

I. Questions Presented

1. Did the Circuit Court of Kanawha County err when it failed to recognize that, because Plaintiff and Decedent are non-residents and the cause of action arose outside this State, Plaintiff's choice of forum is not entitled to "great deference" pursuant to W.V. Code § 56-1-1a?

2. Did the Circuit Court of Kanawha County err when, in denying the Mylan Defendants' motion to dismiss, it considered factors beyond those specifically enumerated by this State's Legislature in W.V. Code § 56-1-1a?

3. Did the Circuit Court of Kanawha County err when it failed to address and analyze the eight factors a court "shall consider" pursuant to W.V. Code § 56-1-1a?

4. Is the Circuit Court's Order denying the Mylan Defendants' Motion to Dismiss pursuant to W.V. Code § 56-1-1a erroneous as a matter of law, as it stands as an outlier to the

numerous decisions in both West Virginia state and federal courts which have held that West Virginia is not a proper venue in factually indistinguishable cases?

II. Statement of the Case

A. Statement of Jurisdiction

This Petition for Writ of Prohibition is filed pursuant to Article VIII, § 3 of the West Virginia Constitution, granting this Court original jurisdiction in prohibition, Rule 16 of the West Virginia Revised Rules of Appellate Procedure, and W.V. Code §§ 51-1-3 and 53-1-1.

In denying the Mylan Defendants' Motion to Dismiss based on W.V. Code § 56-1-1a, the Circuit Court of Kanawha County misinterpreted the controlling statute, impermissibly considered factors beyond those specifically listed by the Legislature, failed to address the factors a court "shall consider" in its *forum non conveniens* analysis, and reached a clearly erroneous and unreasonable conclusion.

This Court has consistently held that a Writ of Prohibition is an appropriate remedy to resolve issues relating to venue and the doctrine of *forum non conveniens*. *See State ex rel. Huffman v. Stephens*, 206 W.Va. 501, 503, 526 S.E.2d 23, 25 (1999) ("[T]he exercise of original jurisdiction in prohibition by this Court [is] appropriate to resolve the issue of where venue for a civil action lies," because "the issue of venue ha[s] the potential of placing a litigant at an unwarranted disadvantage in a pending action and [] relief by appeal would be inadequate.") (citation omitted); *State ex rel. Riffle v. Ranson*, 195 W.Va. 121, 124, 464 S.E.2d 763, 766 (1995) ("In recent times in every case that has had a substantial legal issue regarding venue, we have recognized the importance of resolving the issue in an original action."); *and State ex rel. Mitchem v. Kirkpatrick*, 199 W. Va. 501, 503 (1997) ("[O]riginal actions have recently been used to resolve substantial legal issues concerning venue.") (citation omitted).

Moreover, this case is ripe for adjudication via original jurisdiction because the Circuit Court's denial of the Mylan Defendants' Motion to Dismiss under W.V. Code § 56-1-1a has created a circuit split within the state. Judge Bailey's decision is directly contrary to a growing body of case law out of the Circuit Court of Monongalia County and the United States District Court for the Southern District of West Virginia.

Reflecting the majority position, the Honorable Russell M. Clawges, Jr., Chief Judge for the 17th Judicial Circuit, Monongalia County, has dismissed no less than seven (7) factually indistinguishable cases under the doctrine of *forum non conveniens*. *See Garner v. Mylan, Inc.*, No. 05-C-260; *Pope v. Mylan, Inc.*, No. 08-C-478; *Mace v. Mylan, Inc.*, No. 08-C-480; *Apple v. Mylan, Inc.*, No. 10-C-116; *Pratt v. Mylan, Inc.*, No. 10-C-196; *Meyer v. Mylan, Inc.*, No. 10-C-305; *and Surma v. Mylan, Inc.*, No. 10-C-306 (each case dismissing, pursuant to W.V. Code § 56-1-1a, a wrongful death lawsuit filed by nonresident plaintiff against Mylan Defendants). Judge Clawges' Orders in *Garner*, *Pope*, *Mace*, and *Apple* are included within the Appendix hereto at 191-207.

Nine (9) other analogous cases were also dismissed by Agreed Order of Dismissal, adopting Judge Clawges' prior findings of fact and judicial determinations. *See Duncan v. Mylan Inc., et al.*, No. 10-C-697; *Holland v. Mylan Inc.*, et al., No. 10-C-490; *Zinda v. Mylan Inc., et al.*, No. 10-C-487; *Russell v. Mylan Inc., et al.*, No. 10-C-489; *Hoberek v. Mylan Inc, et al.*, No. 10-C-488; *Land v. Mylan Inc.*, et al. No. 10-C-304; *Simmons v. Mylan Inc., et al.*, No. 10-C-303; *Guglielmetti v. Mylan Inc., et al.*, No. 10-C-301; *and Reber v. Mylan Inc., et al.*, No. 10-C-302 (each case dismissing, pursuant to W.V. Code § 56-1-1a, a wrongful death lawsuit filed by nonresident plaintiff against Mylan Defendants).

In a similar vein, the Honorable Joseph R. Goodwin, Chief Judge for the District Court for the Southern District of West Virginia, has dismissed an additional seven (7) similar actions based on the federal *forum non conveniens* statute.[1] *See Reed v. Mylan, Inc.*, No. 2:10-cv-00404 (S.D. W.Va. Sept. 13, 2010); *Booker v. Mylan, Inc.*, No. 2:10-cv-00196 (S.D. W.Va. Sept. 13, 2010); *Urich v. Mylan, Inc.*, No. 2:10-cv-00330 (S.D. W.Va. August 23, 2010); *Sanner v. Mylan, Inc.*, No. 2:10-cv-00166 (S.D. W.Va. August 19, 2010); *Arnett v. Mylan, Inc.*, No. 2:10-cv-00114 (S.D. W.Va. August 13, 2010); *Gardner v. Mylan, Inc.*, No. 2:09-cv-01289 (S.D. W.Va. June 24, 2010); *and Leonard v. Mylan, Inc.*, No. 2:09-cv-01160 (W.D. W.Va. June 21, 2010) (each case transferring, pursuant to 28 U.S.C. § 1404(a), a wrongful death lawsuit filed by nonresident plaintiff against Mylan Defendants). Judge Goodwin's Opinions and Orders in the *Leonard* and *Gardner* matters are included within the Appendix hereto at 178-190.

Finally, because resolution of the issue of forum may be dispositive of the case, a rule should be issued and writ should be granted. *See Norfolk and Western Ry. Co. v. Tsapis*, 184 W.Va. 231, 237, 400 S.E.2d 239, 245 (1990) ("Where resolution of the issue may be dispositive of the case, we may grant the writ in order to achieve an 'over-all economy of effort and money among litigants, lawyers and courts[.]'") (quoting Syllabus Point 1, in part, *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979)).

B. Parties

Respondent Honorable Jennifer Bailey is a Judge in the Circuit Court of Kanawha County, West Virginia, and is the presiding Judge in the underlying lawsuit, styled: *William Davis Hall, individually as Next of Kin of Harriet Elizabeth Hall, Deceased, and as Personal Representative of the Estate of Harriet Elizabeth Hall, Deceased, Plaintiff v. Mylan*

[1] These cases were transferred pursuant to 28 U.S.C. § 1404(a), which provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Technologies, Inc., f/k/a Bertek, Inc., Mylan, Inc., Mylan Pharmaceuticals, Inc., Defendants, Civil Action No. 09-C-1777, Circuit Court of Kanawha County, West Virginia.

Respondent Plaintiff William Davis Hall ("Plaintiff") is the Next of Kin and Personal Representative of the Estate of Harriet Elizabeth Hall ("Decedent"). *See* Complaint at ¶ 1 (Included within the Appendix hereto at 4-21). Plaintiff is a resident of the State of New York. Id. Decedent was a resident of the State of Georgia at the time of her death. Appendix at 6, ¶ 9.

Petitioner Mylan Inc. ("MI") is a holding company incorporated under the laws of the Commonwealth of Pennsylvania, with its headquarters in Canonsburg, Pennsylvania.

Petitioner Mylan Technologies, Inc. ("MTI") is a West Virginia corporation and has its headquarters in St. Albans, Vermont. MTI developed and manufactures the Mylan Fentanyl Transdermal System® ("MFTS") at the company's production facilities in St. Albans, Vermont. The MFTS is an FDA-approved prescription drug product that delivers the active drug, fentanyl, transdermally. The MFTS is indicated for the treatment of persistent, moderate to severe chronic pain.

Petitioner Mylan Pharmaceuticals, Inc. ("MPI") is a West Virginia corporation, with its headquarters in Morgantown, Monongalia County, West Virginia. MPI distributes the MFTS from its distribution facility located in Greensboro, North Carolina.

C. Statement of Facts and Proceedings Below

The crux of Plaintiff's underlying product liability suit is that Decedent died while wearing a MFTS, the MFTS was allegedly defective, and such alleged defects caused Decedent's death. *See, generally* Complaint, Appendix at 4-21.

According to the Complaint, Decedent lived in Georgia, was prescribed the MFTS in Georgia, filled her prescription in Georgia, used the allegedly defective product in Georgia, and

died in Georgia. *See* Appendix at 6-7, ¶¶ 9, 16. Decedent's prescribing and treating physicians are located in and practice medicine in Georgia. Appendix at 6, ¶ 9. Upon information and belief, Decedent's death was investigated by the Murray County (Georgia) Sheriff's Office, and her autopsy was performed by the Georgia Bureau of Investigation, Division of Forensic Sciences, in Decatur, Georgia.

Plaintiff, a New York resident, commenced this wrongful death suit on September 23, 2009 in the Circuit Court of Kanawha County, West Virginia. *See* Appendix at 4, ¶ 1. In the underlying suit, Plaintiff seeks monetary recovery based on a variety of common law and statutory claims, including, *inter alia*, strict liability, negligence, and breach of warranty. *See, generally* Appendix at 6-21, ¶¶ 7-79. Judge Bailey presides over the underlying case, Civil Action No. 09-C-1777.

On or about October 23, 2009, the Mylan Defendants moved the Circuit Court to dismiss the Complaint under the doctrine of *forum non conveniens*, W.V. Code § 56-1-1a. *See* Defendants' Motion to Dismiss and Brief in Support (Included within the Appendix hereto at 22-70). In the alternative, the Mylan Defendants moved to dismiss several of Plaintiff's claims for failure to state a claim upon which relief can be granted.

Plaintiff filed a Response to Defendants' Motion to Dismiss. *See, generally* Plaintiff's Response to Defendants [sic] Mylan's Motion to Dismiss (Included within the Appendix hereto at 71-171). The Mylan Defendants submitted a Reply to Plaintiff's Response. *See* Defendants' Reply to Plaintiffs' Response in Opposition to Defendant's Motion to Dismiss (Included within the Appendix hereto at 172-207).

Judge Bailey heard arguments regarding the Mylan Defendants' Motion to Dismiss on October 1, 2010. *See* Motions Hearing Transcript, Dated October 1, 2010 (Included within the

Appendix hereto at 208-223). Judge Bailey then denied the Mylan Defendants' Motion to Dismiss based on *forum non conveniens*. *See Hall, et al. v. Mylan, et al.*, No. 09-C-1777, Circuit Court of Kanawha County, Order Dated February 2, 2011 (Included within the Appendix hereto at 1-3).

III. Summary of Argument

The Circuit Court's denial of Mylan's Motion to Dismiss was erroneous because: (1) Judge Bailey failed to recognize that any deference owed to Plaintiff's choice of forum was "diminished" because Plaintiff and Decedent are nonresidents and the cause of action arose in Georgia; (2) Judge Bailey impermissibly considered factors beyond those specifically enumerated by the Legislature; (3) Judge Bailey failed to address and analyze the eight factors a court "shall consider" under W.V. Code § 56-1-1a; and (4) even assuming, *arguendo*, that the Circuit Court had properly applied W.V. Code § 56-1-1a and considered the statutory factors therein, its conclusion is erroneous as a matter of law and stands as an outlier to the numerous decisions in both West Virginia state and federal courts which have held that West Virginia is not a proper venue in factually indistinguishable cases.

Section 56-1-1a of the West Virginia Code reads, in part: "[T]he plaintiff's choice of a forum is entitled to great deference, but **this preference may be diminished when the plaintiff is a nonresident and the cause of action did not arise in this State**." W.V. Code § 56-1-1(a) (emphasis added). According to the Complaint, Plaintiff resides in New York. Decedent allegedly was prescribed and used the MFTS in Georgia, and she ultimately died in Georgia. Thus, any deference owed to Plaintiff's choice of forum is "diminished" in this case.

However, in denying Mylan's Motion to Dismiss, Judge Bailey stated, "I think that there's a lot of deference given to the choosing of the forum by the plaintiff." Appendix at 216.

Judge Bailey did not mention, let alone recognize the significance of Plaintiff's residency. *See* W.V. Code § 56-1-1a(a)(4) (the court "shall consider .... the state in which the plaintiff(s) reside"); *and* W.V. Code § 56-1-1a(a) ("the plaintiff's choice of a forum is entitled to great deference, but this preference may be diminished when the plaintiff is a nonresident and the cause of action did not arise in this State"). Therefore, because Plaintiff and Decedent are nonresidents and the cause of action arose outside of West Virginia, the Circuit Court's ruling was legally flawed as it placed undue weight on the Plaintiff's choice of venue in contravention of the clear statutory language.

Further, Judge Bailey's denial of Mylan's *forum non conveniens* argument centered upon the fact that two defendants, Mylan Pharmaceuticals Inc. and Mylan Technologies Inc., are incorporated in West Virginia. *See* Appendix at 1 ("the Court finds Plaintiff's suit against the Defendants, *two of which are West Virginia corporations*, was properly brought in the Circuit Court of Kanawha County, West Virginia.") (emphasis added); *and* Appendix at 216 ("This is a West Virginia corporation and appears to be proper."). In fact, in her Order denying Mylan's Motion to Dismiss, the corporate residence of MPI and MTI is the *only* rationale cited by Judge Bailey.

Judge Bailey's elevation of the issue of defendants' residence to a near-dispositive level amounts to legal error. Put simply, a corporate defendant's residence is not relevant under the *forum non conveniens* analysis delineated by the West Virginia Legislature. *See* W.V. Code § 56-1-1a (listing eight factors that a court "shall" consider, including plaintiff's residency, but <u>not</u> including defendant's residency). As the Legislature chose not to include <u>defendants'</u> residence as a relevant factor in the *forum non conveniens* analysis, the Circuit Court's consideration thereof is erroneous. *See Riffle*, 195 W.Va. at 128 ("*Expressio unius est exclusio alterius*

(express mention of one thing implies exclusion of all others) is a well-accepted canon of statutory construction.") (citations omitted).

Moreover, during oral argument and in the relevant Order, Judge Bailey addressed (at most) just one of the eight factors a court "shall consider" under W.V. Code § 56-1-1a. The relevant portion of Judge Bailey's Order – spanning just one paragraph – cites a singular fact to support the denial of Mylan's Motion to Dismiss: the corporate residence of MPI and MTI. *See* Appendix at 1 ("the Court finds Plaintiff's suit against the Defendants, two of which are West Virginia corporations, was properly brought in the Circuit Court of Kanawha County, West Virginia."). During oral argument and in the relevant Order, the Circuit Court did not dedicate a single sentence to the following seven factors, as mandated by the Legislature: whether an alternative forum exists, *see* W.V. Code § 56-1-1a(a)(1); whether maintenance of the claim or action in the courts of this state would work a substantial injustice to the moving party, *see* id. at § 56-1-1a(a)(2); whether the alternative forum can exercise jurisdiction over the defendants, *see* Id. at § 56-1-1a(a)(3); the state in which the Plaintiff resides, *see* Id. at § 56-1-1a(a)(4); the state in which the cause of action accrued, *see* Id. at § 56-1-1a(a)(5); whether not granting the stay or dismissal would result in unreasonable duplication or proliferation of litigation, *see* Id. at § 56-1-1a(a)(7); and whether the alternative forum provides a remedy, *see* Id. at § 56-1-1a(a)(8).

The Circuit Court's failure to consider the statutory factors a court "shall consider" is clearly erroneous as a matter of law. *See State Farm Mutual Automobile Insurance Co. v. Stephens*, 425 S.E.2d 577, 585 (W.Va. 1992) (holding that, because "the circuit court failed to consider all of the appropriate factors" in making its legal determination, its conclusion is clearly erroneous as a matter of law).

After completely omitting seven of the eight statutory factors, the Circuit Court arguably addressed, without citation, the remaining factor – private/public interests, Id. at § 56-1-1a(a)(6). In what could be construed as consideration of the private and public interest factor, Judge Bailey stated during oral argument: "No doubt there will have to be some testimony from persons, perhaps, who reside in other states, and I think that can be addressed in this day and age with not a whole lot of inconvenience or where parties can agree that discovery will take place." Appendix at 216. Clearly, this cursory analysis of just one of the eight statutory factors a court "shall consider" does not satisfy the requirements of W.V. § 56-1-1a.

Finally, *even if* the lower court (a) properly recognized that Plaintiff's choice of forum is not entitled to "great deference", (b) did not impermissibly consider factors outside those listed in the controlling statute, and (c) actually analyzed the factors a court "shall consider" under W.V. Code § 56-1-1a, the Circuit Court's denial of Mylan's Motion to Dismiss is still erroneous as a matter of law. Judge Bailey reached an unreasonable conclusion, which is contrary to the well-reasoned decisions of both federal and state courts within the State that have concluded that these cases are not properly litigated in West Virginia.

Therefore, to the extent Judge Bailey even considered the factors listed in W.V. Code § 56-1-1a, her denial of Mylan's Motion to Dismiss is clearly erroneous as a matter of law, exceeds the legitimate powers of the Circuit Court, and contradicts the decisions of the vast majority of state and federal courts addressing precisely the same issue. Thus, this Court is called upon to resolve a circuit split among the lower courts and clarify a significant area of law.

With her ruling, Judge Bailey erroneously rendered the Circuit Court of Kanawha County and, more broadly, the Courts of West Virginia, safe havens for litigants from all fifty (50) states to bring and maintain litigation against the Mylan Defendants based on nothing more than the

fact that the Defendants are subject to jurisdiction in this State. W.V. Code § 56-1-1a was enacted for the express purpose of preventing this type of blatant forum shopping.

If allowed to stand, the Circuit Court's ruling will undermine the intent of the West Virginia Legislature, eviscerate the long standing doctrine of *lex loci delecti* and unfairly prejudice West Virginia businesses by providing an open door to the Courts of West Virginia for litigants from all reaches of the country.

IV. Statement Regarding Oral Argument and Decision

Oral argument is necessary pursuant to Rule 18(a) of the West Virginia Revised Rules of Appellate Procedure, as the Mylan Defendants submit that the decision process would be significantly aided by such argument. This matter should be set for an argument under Rule 20 of the West Virginia Revised Rules of Appellate Procedure, because the case involves inconsistencies or conflicts among the decisions of lower tribunals.

V. Argument

A. The Exercise of Original Jurisdiction Is Proper

As this case presents a clearly erroneous legal conclusion that is (1) contrary to the vast majority of both state and federal courts addressing factually identical circumstances and (2) relating to the dispositive issue of venue, original jurisdiction is proper.

"In determining whether to entertain and issue the writ of prohibition for cases not involving the absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether

the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression." Syl. pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996).

We do not approach this intersection of venue and original jurisdiction without a roadmap. This Court has consistently held that questions regarding the doctrine of *forum non conveniens* and related statutes are properly addressed via original jurisdiction in prohibition. "[T]he exercise of original jurisdiction in prohibition by this Court [is] appropriate to resolve the issue of where venue for a civil action lies," because "the issue of venue ha[s] the potential of placing a litigant at an unwarranted disadvantage in a pending action and [] relief by appeal would be inadequate." *Huffman*, 206 W.Va. at 503, 526 S.E.2d at 25 (1999) (citation omitted). *See, also Riffle*, 195 W.Va. at 124, 464 S.E.2d at 766 (1995) ("In recent times in every case that has had a substantial legal issue regarding venue, we have recognized the importance of resolving the issue in an original action."); *Mitchem*, 199 W. Va. at 503 ("[O]riginal actions have recently been used to resolve substantial legal issues concerning venue.") (citation omitted).

The Mylan Defendants encourage this Honorable Court to follow the clear guidance of *Huffman* and exercise its original jurisdiction in this case. The factors cited in *Hoover* strongly favor intervention. As acknowledged in the above-cited cases, post-trial appeal is inadequate to remedy the Circuit Court's plainly erroneous denial of Mylan's Motion to Dismiss. *See, e.g. Mitchem*, 199 W. Va. at 503 ("In *Riffle* ... we noted that questions involving transfers and venue are 'of considerable importance to the judicial system' and the relief permitted by appeal might be inadequate"); *Riffle*, 195 W.Va. at 124 ("Considering the inadequacy of the relief permitted by appeal, we believe this issue should be settled in this original action if it is to be settled at

all."). The purpose of the *forum non conveniens* doctrine is to prevent forum shopping and the costs and challenges associated with trying a case outside its factual epicenter. The Mylan Defendants submit that, in these circumstances, post-verdict relief is no relief at all.

As discussed thoroughly, *infra*, the Circuit Court's denial of Mylan's Motion to Dismiss is clearly erroneous as a matter of law. *See Stephens*, 425 S.E.2d at 585 (W.Va. 1992) (holding that, because "the circuit court failed to consider all of the appropriate factors" in making its legal determination, its conclusion is clearly erroneous as a matter of law). Moreover, Judge Bailey's decision runs contrary to an overwhelming body of case law dismissing similar suits by nonresident plaintiffs against the Mylan Defendants. Therefore, the Mylan Defendants ask the Court to resolve this circuit split and stop the flood of nonresident plaintiffs pouring into the state for perceived strategic advantages.

For example, the Honorable Russell L. Clawges, Jr., Chief Judge for the Circuit Court of Monongalia County, has dismissed no less than seven (7) analogous cases on the grounds of *forum non conveniens*. *See Garner v. Mylan, Inc.*, No. 05-C-260; *Pope v. Mylan, Inc.*, No. 08-C-478; *Mace v. Mylan, Inc.*, No. 08-C-480; *Apple v. Mylan, Inc.*, No. 10-C-116; *Pratt v. Mylan, Inc.*, No. 10-C-196; *Meyer v. Mylan, Inc.*, No. 10-C-305; *and Surma v. Mylan, Inc.*, No. 10-C-306 (each case dismissing, pursuant to W.V. Code § 56-1-1a, a wrongful death lawsuit filed by a nonresident plaintiff against the Mylan Defendants). Judge Clawges' Orders in the *Garner*, *Pope*, *Mace*, and *Apple* matters are included within the Appendix hereto at 191-207.

Nine (9) other factually similar cases were also dismissed by Agreed Order of Dismissal, adopting Judge Clawges prior findings of fact and judicial determinations. *See Duncan v. Mylan Inc., et al.*, No. 10-C-697; *Holland v. Mylan Inc.*, et al., No. 10-C-490; *Zinda v. Mylan Inc., et al.*, No. 10-C-487; *Russell v. Mylan Inc., et al.*, No. 10-C-489; *Hoberek v. Mylan Inc, et al.*, No.

10-C-488; *Land v. Mylan Inc.*, et al. No. 10-C-304; *Simmons v. Mylan Inc., et al.*, No. 10-C-303; *Guglielmetti v. Mylan Inc., et al.*, No. 10-C-301; and *Reber v. Mylan Inc., et al.*, No. 10-C-302 (each case dismissing, pursuant to W.V. Code § 56-1-1a, a wrongful death lawsuit filed by a nonresident plaintiff against the Mylan Defendants).

In a similar vein, the Honorable Joseph R. Goodwin, Chief Judge for the District Court for the Southern District of West Virginia, has dismissed an additional seven factually similar actions based on the federal *forum non conveniens* statute.[2] *See Reed v. Mylan, Inc.*, No. 2:10-cv-00404 (S.D. W.Va. Sept. 13, 2010); *Booker v. Mylan, Inc.*, No. 2:10-cv-00196 (S.D. W.Va. Sept. 13, 2010); *Urich v. Mylan, Inc.*, No. 2:10-cv-00330 (S.D. W.Va. August 23, 2010); *Sanner v. Mylan, Inc.*, No. 2:10-cv-00166 (S.D. W.Va. August 19, 2010); *Arnett v. Mylan, Inc.*, No. 2:10-cv-00114 (S.D. W.Va. August 13, 2010); *Gardner v. Mylan, Inc.*, No. 2:09-cv-01289 (S.D. W.Va. June 24, 2010); *and Leonard v. Mylan, Inc.*, No. 2:09-cv-01160 (W.D. W.Va. June 21, 2010) (each case dismissing, pursuant to 28 U.S.C. § 1404(a), a wrongful death suit filed by a nonresident plaintiff against the Mylan Defendants). Judge Goodwin's Opinions and Orders in the *Leonard* and *Gardner* matters are included within the Appendix hereto at 178-190.

The cases cited in the preceding paragraphs are indistinguishable from the case at bar. Each case featured a nonresident plaintiff representing a nonresident decedent who was allegedly prescribed the MFTS outside West Virginia by nonresident physicians. Each case was investigated by police departments and medical examiners' offices outside the jurisdiction of the courts of this State. Each case would have required West Virginia courts to apply foreign law. Each case would have involved a plethora of practical and procedural obstacles to the speedy and efficient pursuit of justice. Thus, each case was dismissed to be re-filed in a more convenient

[2] These cases were transferred pursuant to 28 U.S.C. § 1404(a), which provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

venue. Against this discernible judicial momentum, Judge Bailey's decision in the underlying case stands as an outlier and represents a clearly erroneous application of the law.

Moreover, considerations of judicial economy lend support for the Court's original jurisdiction over this case. "Where resolution of the issue may be dispositive of the case, we may grant the writ in order to achieve an 'over-all economy of effort and money among litigants, lawyers and courts[.]'" *Tsapis*, 184 W.Va. at 237, 400 S.E.2d at 245 (1990) (quoting Syl. pt. 1, in part, *Hinkle*, 164 W.Va. 112, 262 S.E.2d 744 (1979)). Because this action should be heard by a Georgia court and jury, and proper application of the law demands dismissal, the Supreme Court of Appeals should hereby dispense of the matter by way of original jurisdiction.

Finally, this Court should exercise original jurisdiction to put an end to problems that will inevitably arise if the Circuit Court's Order is allowed to stand. In particular, as reflected in the decisions by Chief Judges Clawges and Goodwin, foreign plaintiffs are attempting to forum shop and hope to make the Courts of West Virginia the home for a host of lawsuits and claims that have no connection to this State other than Mylan's presence. Plaintiffs have pursued this tactic in the hope that they will reap the benefit of the Court's refusal to adopt the Learned Intermediary Doctrine when the plaintiffs' respective home states apply the same. If a Writ of Prohibition is not issued, this Court will send an open invitation to plaintiffs across the country that the Courts of West Virginia are open to hear all claims against Mylan and other West Virginia corporations, regardless of where the plaintiff is domiciled and, more importantly, where the causes of action arose or the difficulties presented by litigating foreign claims.

Since a Writ of Prohibition should issue to address new and important problems created by the lower tribunal's Order, Mylan requests the issuance of a Writ in this case to avoid the prejudice and hardship the lower court's Order foreshadows for West Virginia businesses if the

Courts of this State become a safe haven for lawsuits brought by residents of every state in the Union.

B. Standard of Review Is Plenary

In its exercise of original jurisdiction in this case, this Court applies a *de novo* standard of review. As this Court explained in *Riffle*, wherein the Court exercised its original jurisdiction to analyze the doctrine of *forum non conveniens*:

> The normal deference accorded to a circuit court's decision to transfer a case, Syl. pt. 3, *Cannelton Industries, Inc. v. Aetna Casualty & Surety Co.*, 194 W.Va. 186, 460 S.E.2d 1 (1994) ("[a] circuit court's decision to invoke the doctrine of *forum non conveniens* will not be reversed unless it is found that the circuit court abused its discretion"), does not apply where the law is misapplied or where the decision to transfer hinges on an interpretation of a controlling statute. *See Mildred L.M. v. John O.F.*, 192 W.Va. 345, 350, 452 S.E.2d 436, 441 (1994) ("[t]his Court reviews questions of statutory interpretation *de novo*"). Under these circumstances, our review is plenary.

Riffle, 195 W.Va. at 124, 464 S.E.2d at 766. *See, also Savarese v. Allstate Ins. Co.*, 223 W.Va. 119, 124 (2008) (indicating that a "*de novo* standard of review is likewise applicable to the extent the circuit court's application of [the predecessor to W.V. Code § 56-1-1a] is implicated").

Given the clear legal error committed by the lower court, as well as the circuit split thereby created, this is an instance of misapplication of the controlling statute involving an important issue of statutory interpretation. Plenary review is proper.

C. Legal Backdrop

Plaintiff is a resident of New York. Appendix at 4, ¶ 1. He alleges that Decedent, a resident of Georgia, died due to defects in a product that was prescribed and used in Georgia. Decedent's prescribing and treating physicians practice in Georgia, and any first responders, police investigators, and medical examiners will also be found in Georgia.

The MFTS is an FDA-approved prescription drug product that delivers the active drug, fentanyl, transdermally. The MFTS is indicated for the treatment of persistent, moderate to severe chronic pain. MTI developed and manufactures the MFTS at its production facilities in St. Albans, Vermont. After being manufactured in Vermont, the MFTS is shipped to MPI's distribution facilities in Greensboro, North Carolina. From North Carolina, the MFTS is distributed nationwide through a network of independent wholesalers and distributors.

Nevertheless, in a brazen display of forum shopping, Plaintiff now appears in Kanawha County, West Virginia in an attempt to recover monetary damages. This is a textbook case for the application of the doctrine of *forum non conveniens*, as codified at W.V. Code § 56-1-1a.

The doctrine of *forum non conveniens* is well-established in West Virginia. This Honorable Court specifically adopted the common law doctrine two decades ago: "The common law doctrine of *forum non conveniens* is simply that a court may, in its sound discretion, decline to exercise jurisdiction to promote the convenience of witnesses and the ends of justice, even when jurisdiction and venue are authorized by the letter of a statute." Syl. pt. 1, *Tsapis*, 184 W.Va. 231.

However, the Legislature acted to amend and codify the doctrine of *forum non conveniens* in 2003. *See, generally Morris v. Crown Equipment Corp.*, 633 S.E.2d 292 (W.Va. 2006) (discussing the predecessor to W.V. Code § 56-1-1a). The initial statute, W.V. Code § 56-1-1(c) (2003), clearly evinced the Legislature's intent to prevent forum shopping by nonresident plaintiffs: "Effective for actions filed after the effective date of this section, a nonresident of the state may not bring an action in a court of this state unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state ...." In *Morris*, this Court declared the subsection unconstitutional, in certain circumstances, under the Privileges and

Immunities Clause of the United States Constitution. *Morris*, 633 S.E.2d at Syl. pt. 2 ("Under the Privileges and Immunities Clause of the United States Constitution, Art. IV, Sec. 2, the provisions of W.Va. Code, § 56-1-1(c) [2003] do not apply to civil actions filed against West Virginia citizens and residents.").

The Legislature responded by adopting an amended version of the *forum non conveniens* statute. *See* W.V. Code § 56-1-1a. The relevant portion of the current statute, reads:

> (a) In any civil action if a court of this state, upon a timely written motion of a party, 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, 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 a forum is entitled to great deference, but this preference may be diminished when the plaintiff is a nonresident and the cause of action did not arise in this State. In determining whether to grant a motion to stay or dismiss an 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 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;
>
> (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. 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 the 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).

Plaintiff's briefing before the lower court made much of the sanctity of his choice of forum, as well as the purported requirement that the Mylan Defendants make a "detailed" offer of proof demonstrating that the case can be tried "substantially more inexpensively and expeditiously" in another forum. *See* Appendix at 75-76. Revealingly, in his analysis of the "Forum Non Conveniens Standard," Plaintiff did not even cite the controlling statute, W.V. Code §56-1-1a, let alone provide a meaningful analysis of the factors a court "shall consider." *See* Appendix at 72-73. Instead, Plaintiff grounded his argument on *Abbott v. Owens-Corning Fiberglas Corp.*, a decision predating the passage of W.V. Code §56-1-1a(a) by over a decade. 191 W. Va. 198 (1994).

However, a cursory reading of the controlling statute reveals the fact that Plaintiff's choice of venue is not entitled to the level of deference sought by Plaintiff and improperly recognized by Judge Bailey. As clearly written by the Legislature, "[T]he plaintiff's choice of a forum is entitled to great deference, **but this preference may be diminished when the plaintiff is a nonresident and the cause of action did not arise in this State.**" W.V. Code § 56-1-1a(a) (emphasis added). In the case *sub judice*, Plaintiff lives in New York. Decedent was a resident of Georgia. These claims arose in Georgia, where Decedent allegedly was prescribed, dispensed, used, and died while utilizing an MFTS. Thus, Plaintiff's choice of forum is entitled to little, if any, deference.

Along with limiting a court's deference to plaintiff's choice of forum, W.V. Code § 56-1-1a also stands as a restriction on a Circuit Court's discretion in comparison to the common law doctrine of *forum non conveniens*. Before the Legislature acted to codify and reform the doctrine of *forum non conveniens*, the law "was broad and permitted circuit courts enormous discretion in its application." *Riffle*, 195 W.Va. at 127. Specifically, the common law doctrine provided "simply that a court ***may***, in its sound discretion, decline to exercise jurisdiction to promote the convenience of witnesses and the ends of justice, even when jurisdiction and venue are authorized by the letter of a statute." Syl. pt. 1, in part, *Tsapis*, 184 W.Va. 231 (emphasis added).

The unambiguous language of W.V. Code § 56-1-1a effectively amended the common law and limited a court's discretion. *See* W.V. Code § 56-1-1a(a) ("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"; "the court ***shall*** consider" eight enumerated factors) (emphasis added). The Legislature thereby acted to remove much of the discretion previously exercised by courts pursuant to the common law, and mandated that courts consider eight enumerated factors in making their *forum non conveniens* rulings.

The Legislature's decision to adopt the mandatory "shall" in both sentences of W.V. Code § 56-1-1a(a), as well as other modifications of the common law, cannot be considered unintentional. "We may 'assume that our elected representatives ... know the law.' Thus, it is logical that the West Virginia legislature was fully aware of this Court's formulation of the *forum non conveniens* doctrine and, in its wisdom, chose to revise it." *State ex rel. Smith v. Maynard*, 193 W.Va. 1, 8, 454 S.E.2d 46, 53 (1994) (citation and footnote omitted). In other

words, the Legislature recognized this Court's *forum non conveniens* jurisprudence, including *Tsapis*, and acted to revise the doctrine. As the Court stated in *Riffle*:

> To be clear, the West Virginia Legislature is the paramount authority for deciding and resolving policy issues pertaining to venue matters .... When the Legislature places strict limits on the application of an old legal doctrine, it is in a revisionary mode. Indeed, the plain language of the statute indicates the Legislature "was revising as well as codifying." *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955).

Riffle, 195 W.Va. at 126-27.

Therefore, this Court need not resort to common law pronouncements of the doctrine of *forum non conveniens* to determine the relevance of Plaintiffs' choice of venue. The Legislature has settled the issue: "[T]he plaintiff's choice of a forum is entitled to great deference, but this preference may be diminished when the plaintiff is a nonresident and the cause of action did not arise in this State." In this case, any deference owed to Plaintiffs' choice of forum is "diminished" because they are nonresidents and the cause of action accrued in Georgia. Judge Bailey's failure to properly decide this foundational issue amounts to plain error. *See* Appendix at 216 ("[T]here's a lot of deference given to the choosing of the forum by the plaintiff.").

Additionally, the Legislature made no mention of the burdensome requirement, endorsed by Plaintiff, that the Mylan Defendants prove "in detail" that the case could be litigated "substantially more inexpensively and expeditiously" in another forum. Appendix at 75-76.[3] To the contrary, the Legislature decided generally that "if a court of this state ... 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, the court shall decline to exercise jurisdiction." W.V. Code §56-1-1a(a).

[3] Such an onerous, fact-specific requirement would be out of step with the common law version of the doctrine. *See Piper Aircraft v. Reyno*, 454 U.S. 235, 258 (1981) (noting that requiring detail and extensive investigation regarding witnesses beyond the reach of compulsory process would defeat the purpose of a *forum non conveniens* motion).

More importantly, the Legislature specifically outlined the relevant characteristics of the alternate forum which are relevant in the prescribed *forum non conveniens* analysis. First, the court must consider whether there is an alternate forum in which the claim can be heard. *Id.* at § 56-1-1a(a)(1). Next, it is relevant whether the alternate forum can exercise jurisdiction over the defendants. *Id.* at § 56-1-1a(a)(3). Lastly, a court must consider whether the alternative forum provides a remedy. *Id.* at § 56-1-1a(a)(8). Significantly, the Legislature did not mandate, or even list as a factor, the issue of whether the moving party can prove "in detail" that the case can be litigated "substantially more inexpensively and expeditiously" elsewhere. As the legislative branch has enumerated the relevant factors, all others are thereby excluded. *See Riffle*, 195 W.Va. at 128 ("*Expressio unius est exclusio alterius* (express mention of one thing implies exclusion of all others) is a well-accepted canon of statutory construction.") (citations omitted). In short, Plaintiff seeks to impose an obligation and burden on Mylan that does not exist under the law.

Similarly, the Legislature chose not to include the residence of the moving party as a relevant factor that a court "shall consider" under the doctrine of *forum non conveniens*. A defendant's residence was, at most, a *de minimis* factor in the common law iteration of the doctrine of *forum non conveniens*. *See* Syl. pt. 3, in part, *Abbott*, 191 W.Va. 198, 444 S.E.2d 285 (1994) (holding that a defendant's residence is relevant but not dispositive in a *forum non conveniens* analysis). However, as thoroughly discussed, the Legislature acted to revise the common law. *See Maynard*, 193 W.Va. at 8 ("We may 'assume that our elected representatives ... know the law.'") (citation omitted). In so doing, the state's lawmaking branch deemed relevant <u>plaintiff's</u> residence, *see* W.V. Code § 56-1-1a(a)(4) (including the "state in which the plaintiff(s) reside" as a factor the court "shall consider"), but omitted any mention of <u>defendant's</u>

home state. As the legislative branch has enumerated the relevant factors, all others are thereby excluded. *See Riffle,* 195 W.Va. at 128 ("*Expressio unius est exclusio alterius* (express mention of one thing implies exclusion of all others) is a well-accepted canon of statutory construction.") (citations omitted). *See, also Raleigh & Gaston R. Co. v. Reid,* 13 Wall. 269, 270 (1872) ("When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode.").

Thus, from this brief outline of the common law doctrine of *forum non conveniens* and the subsequent statutory modification thereof, there are three takeaway points: (1) Any deference owed to Plaintiff's choice of venue is diminished in this case; (2) as the Legislature did not include the residence of the moving party as a relevant factor under W.V. Code § 56-1-1a, any consideration thereof is legal error; and (3) the Legislature's use of the mandatory ("shall") was not accidental, such that a court's failure to consider each factor enumerated by the Legislature in the controlling statute, W.V. Code § 56-1-1a, amounts to plain error.

D. Assignments of Error

The Circuit Court's denial of Mylan's Motion to Dismiss was erroneous because: (1) Judge Bailey failed to recognize that any deference owed to Plaintiff's choice of forum was "diminished" because Plaintiff and Decedent are nonresidents and the cause of action accrued in Georgia; (2) Judge Bailey impermissibly considered factors beyond those specifically enumerated by the Legislature; (3) Judge Bailey failed to address and analyze the eight factors a court "shall consider" under W.V. Code § 56-1-1a; and (4) even assuming, *arguendo*, that Judge Bailey had properly understood W.V. Code § 56-1-1a and considered the statutory factors therein, her conclusion is erroneous as a matter of law and stands as an outlier to the numerous

decisions in both West Virginia state and federal courts which have held that West Virginia is not a proper venue in factually indistinguishable cases.

A cursory perusal of the statutory text reveals the plain error committed by Judge Bailey, as she granted an extraordinary and impermissible level of deference to Plaintiff's choice of venue. Even under the common law iteration of the doctrine, a plaintiff's choice of venue was not entitled to the level of deference accorded by Judge Bailey in this case. *See, e.g.* Syl. pt. 3, in part, *Tsapis*, 184 W.Va. 231 (interpreting the common law doctrine of *forum non conveniens* and finding that "the defendant may overcome this preference by demonstrating that the forum has only a slight nexus to the subject matter of the suit and that another available forum exists which would enable the case to be tried substantially more inexpensively and expeditiously."); *Sinochem Intern. Co. Ltd. v. Malaysia Intern. Shipping Corp.*, 549 U.S. 422, 430 (2007) ("When the plaintiff's choice is not its home forum, however, the presumption in the plaintiff's favor 'applies with less force,' for the assumption that the chosen forum is appropriate is in such cases 'less reasonable.'") (citation omitted); *Piper Aircraft v. Reyno*, 454 U.S. 235, 256 (1981) ("Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.").

Nowhere in her analysis did Judge Bailey recognize that this deference is "diminished" when a lawsuit is brought by nonresident plaintiffs based on a cause of action that accrued outside of West Virginia. *Compare* W.V. Code § 56-1-1a(a) ("the plaintiff's choice of a forum is entitled to great deference, but this preference may be diminished when the plaintiff is a nonresident and the cause of action did not arise in this State"), *with* Appendix at 216 ("[T]here's a lot of deference given to the choosing of the forum by the plaintiff."). As quoted, *supra*, the applicable statute flatly refutes the proposition that Plaintiff's choice of venue is somehow

sacrosanct. *See Nezan v. Aries Technologies, Inc.*, No. 35495, 704 S.E.2d 631, 2010 WL 4674266 at *13 (W.Va. 2010) ("What diminishes the choice of forum within the language of the statute is whether the plaintiff is a non-resident and the cause of action did not arise in this state.").

It is beyond debate that (1) Plaintiff is a nonresident (from New York), (2) Decedent was a resident of Georgia, and (3) the cause of action did not arise in West Virginia. *See, e.g. Surma v. Mylan, Inc.,* No. 10-C-306 at 6 (unpaginated) (W.Va. Cir. Ct. Oct. 1, 2010) (Clawges, C.J.) ("Decedent ... was prescribed the product in South Carolina, apparently by a South Carolina physician, he used the product in South Carolina, and died in South Carolina. Therefore the *Surma* cause of action accrued in South Carolina."). Therefore, Plaintiff's choice of forum is *not* entitled to great deference in this case. This conclusion is reinforced given the unambiguous legislative policy, particularly evinced in the 2003 statute, disfavoring nonresident plaintiffs suing in West Virginia for perceived strategic advantages.

Moreover, Judge Bailey misinterpreted the relevant statute by placing undue weight on the residence of two corporate defendants in her analysis of *forum non conveniens*. Even at common law, the fact that MPI and MTI are organized under the laws of West Virginia was, *at most*, a *de minimis* factor in the *forum non conveniens* analysis. For example, this Court wrote that the common law's multi-factor framework "ensures that the doctrine of *forum non conveniens* is applied flexibly and on a case-by-case basis. ***A presumption that the forum is convenient when a defendant is a resident of that forum would undercut the flexibility of the doctrine.***" Syl. pt. 3, in part, *Abbott*, 191 W.Va. 198, 444 S.E.2d 285 (1994) (emphasis added).

However, in amending and codifying the doctrine, the Legislature chose not to include the defendant's residence as a relevant factor the courts "shall consider." *See* W.V. Code § 56-1-

1a; *and Riffle*, 195 W.Va. at 128 ("*Expressio unius est exclusio alterius* (express mention of one thing implies exclusion of all others) is a well-accepted canon of statutory construction."). Nevertheless, the sole justification provided by Judge Bailey in her Order denying Mylan's Motion to Dismiss is that two defendants are West Virginia corporations. *See* Appendix at 1 ("the Court finds Plaintiff's suit against the Defendants, two of which are West Virginia corporations, was properly brought in the Circuit Court of Kanawha County ....). The Mylan Defendants submit that the lower court's elevation of the issue of corporate residence to a near-dispositive level was obviously unwarranted, unsupported by the text of the controlling statute, and erroneous as a matter of law.

Judge Bailey's denial of Mylan's Motion to Dismiss based on the fact that MPI and MTI are incorporated in West Virginia essentially and erroneously merged the separate concepts of personal jurisdiction and venue. *See International Shoe Co. v. State of Wash., Office of Unemployment Compensation and Placement*, 326 U.S. 310, 316 (1945) (holding that "due process requires only that, in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'") (citation omitted). A federal court summarized the distinction between personal jurisdiction and venue:

> Although the Court has found that [defendant's] contacts with [the forum state] are sufficient to support the Court's exercise of personal jurisdiction, it does not follow automatically that venue in this district is proper. As the language of [the federal venue statute] makes clear, ***the focus in assessing venue is not on the "defendants' 'contacts' with a particular district, but [on] the location of those 'events or omissions giving rise to the claim.'"*** *Cottman Transmission Sys. v. Martino*, 36 F.3d 291, 294 (3d Cir. 1994). In order to establish specific jurisdiction, a plaintiff must show only that at least one contact on the part of the Defendant related to the Plaintiff's claim.

> The inquiry with respect to proper venue, however, is significantly more circumscribed, requiring a showing that a substantial part of the events or omissions giving rise to the claim occurred in the district.

Pullman Financial Corp. v. Hotaling, No. 07-1703, 2008 WL 2563372 at *6 (W.D. Pa. June 24, 2008) (citations omitted) (emphasis added).

Viewing the *forum non conveniens* analysis in isolation, personal jurisdiction is assumed. Put differently, for purposes of their Motion to Dismiss, the Mylan Defendants conceded that there are certain "minimum contacts" with West Virginia, but maintain that the Circuit Court of Kanawha County is an inconvenient forum in which to litigate Plaintiff's claims. By effectively merging the two concepts, Judge Bailey committed plain error.

Further, while the Circuit Court's analysis was impermissibly over-inclusive in its consideration of the Mylan Defendants' corporate residence, the lower court was under-inclusive in its consideration of the eight statutory factors prescribed by the Legislature. *See* W.V. Code § 56-1-1a(a)(1)-(8). In fact, Judge Bailey did not dedicate a single sentence to the following factors during oral argument or in the relevant Order, as mandated by the Legislature: whether an alternative forum exists, *see* W.V. Code § 56-1-1a(a)(1); whether maintenance of the claim or action in the courts of this state would work a substantial injustice to the moving party, *see* id. at § 56-1-1a(a)(2); whether the alternative forum can exercise jurisdiction over the defendants, *see* Id. at § 56-1-1a(a)(3); the state in which the Plaintiff resides, *see* Id. at § 56-1-1a(a)(4); the state in which the cause of action accrued, *see* Id. at § 56-1-1a(a)(5); whether not granting the stay or dismissal would result in unreasonable duplication or proliferation of litigation, *see* Id. at § 56-1-1a(a)(7); and whether the alternative forum provides a remedy, *see* Id. at § 56-1-1a(a)(8).

The lower court's failure to consider the statutory factors a court "shall consider" is clearly erroneous as a matter of law. *See Stephens*, 425 S.E.2d at 585 (holding that, because "the

circuit court failed to consider all of the appropriate factors" in making its legal determination, its conclusion is clearly erroneous as a matter of law).

Finally, even if Judge Bailey had not misinterpreted the applicable statute and impermissibly considered irrelevant factors, her denial of the Mylan Defendants' Motion to Dismiss based on the doctrine of *forum non conveniens* would still be erroneous as a matter of law. *See, infra*, Section V.E. Her conclusion stands as an outlier in a series of decisions by West Virginia courts applying the same statutory factors in factually indistinguishable cases. As previously noted, Chief Judge Clawges has dismissed no less than sixteen analogous cases.[4] The Mylan Defendants invite this Honorable Court to bring the Circuit Court of Kanawha County into line with the well-reasoned decisions of Chief Judges Clawges and Goodwin.

E. Revisiting the Statutory Factors

For purposes of completeness, this Memorandum will apply the factors listed in W.V. Code § 56-1-1a, *seriatim*, to demonstrate the gravity of Judge Bailey's misapplication of the statute. The Mylan Defendants submit that not a single factor weighs in favor of litigating these claims in West Virginia. Thus, when the *forum non conveniens* statute is properly understood and applied, it becomes abundantly clear that this case should be heard in Georgia.

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

This factor weighs entirely in favor of dismissal.

"Ordinarily, this requirement will be satisfied when the defendant is 'amenable to process' in the other jurisdiction." *Piper*, 454 U.S. at 254 n.22. Only in "rare circumstances ... where the remedy offered by the other forum is clearly unsatisfactory" would an alternative forum be considered inadequate. *Id.*

[4] This does not include the decisions by Chief Judge Goodwin, out of the Southern District of West Virginia, wherein the federal court dismissed an additional seven (7) factually indistinguishable cases pursuant to the federal *forum non conveniens* statute, 28 U.S.C. § 1404(a).

This case does not involve such a close call. "Decedent was prescribed the patch by a doctor at Georgia Pain Physicians, P.C. for chronic back pain in Georgia. Decedent filled a prescription on August 20, 2007, and was found dead on September 29, 2007." Appendix at 7, ¶ 16. The Mylan Defendants will consent to personal jurisdiction in Georgia. The Mylan Defendants also agree that the filing date of any subsequent complaint filed by Plaintiff in Georgia will relate back to September 23, 2009, the date Plaintiff filed his Complaint in West Virginia, for statute of limitation purposes. *See* W.V. Code § 56-1-1a(c). Also, Georgia law provides a remedy. *See* GA. CODE ANN. § 51-1-11(b)(1) ("The manufacturer of any personal property sold ... shall be liable in tort, irrespective of privity, to any natural person who may use, consume, or reasonably be affected by the property and who suffers injury to his person or property because the property when sold by the manufacturer was not merchantable and reasonably suited to the use intended, and its condition when sold is the proximate cause of the injury sustained."). Therefore, Georgia stands as an alternative forum in which this claim can and should 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

This factor weighs heavily in favor of dismissal.

First, if the case remains in West Virginia, the Mylan Defendants may be forced to try the case by videotape. According to the Complaint, Decedent lived in Georgia, was prescribed the MFTS in Georgia, used the MFTS in Georgia, and died in Georgia due to defects in the MFTS. The "majority of witnesses – witnesses such as law enforcement officers, medical examiners and toxicologists, as well as [Decedent's] medical providers – are in" Georgia. *Gardner v. Mylan, Inc.*, No. 05-C-260 at 6 (S.D. W.Va. June 24, 2010) (Included within the Appendix hereto at 184-190).

As non-resident third parties, these crucial witnesses are beyond West Virginia's compulsory process to compel appearance within the state for trial. "Certainly to fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their case on deposition, is to create a condition not satisfactory to court, jury or most litigants." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 511 (1947). Therefore, the Mylan Defendants would face substantial injustice due to the inability to present live testimony, thereby depriving the jury of the optimal conditions in which to make factual determinations. *See Iragorri v. United Technologies Corp.*, 274 F.3d 65, 75 (2d Cir. 2001) ("[L]ive testimony of key witnesses is necessary so that the trier of fact can assess the witnesses' demeanor."). In other words, trying this case in West Virginia may impact the overall accuracy and fundamental fairness of trial.

Additionally, because the majority of third party witnesses are beyond the state's subpoena power, discovery will be far more costly and time consuming. The Mylan Defendants will have to resort to letters rogatory to obtain relevant information. Both the interests of justice and the convenience of the parties counsel against this result.

Moreover, if discovery and investigation were to warrant such action, <u>litigation of this case in West Virginia would preclude the possibility of the Mylan Defendants joining Decedent's prescribing physician as a third-party defendant due to a lack of personal jurisdiction</u>. *See* Appendix at 7, ¶ 16 ("Decedent was prescribed the patch by a doctor at Georgia Pain Physicians, P.C. for chronic back pain in Georgia."). Thus, the Mylan Defendants may be forced to shoulder the additional costs of litigating separate trials in two jurisdictions based on the same common nucleus of operative facts. That outcome is substantially unjust.

(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

This factor weighs entirely in favor of dismissal. The Mylan Defendants consent to personal jurisdiction in Georgia.

(4) The state in which the plaintiff(s) reside

This factor weighs entirely in favor of dismissal, as Plaintiff is a New York resident, and Decedent was a Georgia resident. Appendix at 4, 7, ¶¶ 1, 16.

(5) The state in which the cause of action accrued

This factor weights entirely in favor of dismissal.

Plaintiff is "claiming injuries resulting from the use of the [MFTS], a prescription drug product. This product is manufactured in the State of Vermont and shipped to North Carolina for distribution." *Pope v. Mylan, Inc.*, No. 08-C-478 at 6 (W.Va. Cir. Ct. Dec. 16, 2008) (Clawges, C.J.) (Included within the Appendix hereto at 61-70).

The events or omissions giving rise to Plaintiff's claims all occurred in Georgia, not Kanawha County, West Virginia. Decedent "was prescribed the patch in [Georgia], she filled her prescription there, she [is alleged to have] overdosed there, and she died there. Conversely, no material facts relating to [Plaintiff's] injuries occurred" in Kanawha County. *Leonard v. Mylan, Inc.*, No. 2:09-cv-01160 at 4 (W.D. W.Va. June 21, 2010) (Included within the Appendix hereto at 178-183). *See, also Mace v. Mylan, Inc.*, No. 08-C-478 at 7 (W.Va. Cir. Ct. Dec. 16, 2008) (Clawges, C.J.) ("[T]he injury and death of each Plaintiff's decedent did not result from acts or omissions that occurred in this state.") (Included within the Appendix hereto at 61-70).

(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

The private interest factors weigh heavily in favor of dismissal.[5]

The allegedly defective product – the MFTS – is manufactured in Vermont and shipped to North Carolina for distribution. Plaintiff's causes of action accrued in Georgia, where the majority of third party witnesses reside. *See In re Hanger Orthopedic Group, Inc. Sec. Litig.*, 418 F. Supp. 2d 164, 168 (E.D.N.Y. 2006) (***"The convenience of non-party witnesses is usually the most important factor to consider in deciding whether to depart from the plaintiff's choice of forum."***) (emphasis added). Given the limits of the trial court's subpoena power, *see* W.Va. R.C.P. 45(b)(2) ("A subpoena may be served at any place within the State."), discovery will be inherently inefficient and inconvenient. Chief Judge Clawges summarized:

> Many of the nonparty witnesses reside outside of West Virginia and compulsory process will not be available to compel the attendance of unwilling witnesses at trial. Access to documents and important witnesses will be substantially more convenient for the Defendants and less costly to both the Plaintiffs and Defendants if the cases are tried [in the state in which the causes of action accrued].

Mace v. Mylan, Inc., No. 08-C-478 at 7 (W.Va. Cir. Ct. Dec. 16, 2008) (granting motion to dismiss based on *forum non conveniens*) (Included within the Appendix hereto at 61-70).

The public interest factors also weigh heavily in favor of dismissal.[6]

There is no reason why the courts and juries of West Virginia should be called upon to resolve a claim brought by a citizen of New York based on a cause of action that accrued in Georgia. Instead, the state of Georgia has a strong interest in ensuring the safety of its citizens

[5] "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." § 56-1-1a(a)(6).

[6] "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 the 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." § 56-1-1a(a)(6).

and convenience of its third party witnesses, including physicians, medical examiners, and law enforcement agents.

Furthermore, Georgia substantive law applies to Plaintiff's causes of action.[7] *See McKinny v. Fairchild Int'l, Inc.*, 487 S.E.2d 913, 924 (W.Va. 1997) ("Traditionally, we apply the *lex loci delicti* choice-of-law rule; that is, the substantive rights between the parties are determined by the law of the place of injury."); *Mace v. Mylan, Inc.*, No. 08-C-478 at 7 ("Due to West Virginia' [sic] choice of law rules, this Court will need to apply [the substantive law of the state in which the cause of action accrued] and instruct the jury as to that law.") (Included within the Appendix hereto at 61-70).

Therefore, in order to avoid the "application of foreign law" and "unnecessary problems in conflict of laws," Plaintiff's claims should be dismissed and re-filed in Georgia. W.V. Code § 56-1-1a(a)(6). *See, also Gilbert*, 330 U.S. at 508-09 ("There is an appropriateness, too, in having the trial ... in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself."). Certainly Georgia has an interest in seeing its law properly and consistently interpreted, just as West Virginia judges need not spend precious judicial resources applying law with which they are not familiar.

(7) Whether not granting the stay or dismissal would result in unreasonable duplication or proliferation of litigation

This factor weighs entirely in favor of dismissal.

As discussed, *supra*, in relation to the second statutory factor, the Mylan Defendants may bring a third-party action against Decedent's prescribing physician. Upon information and

[7] In his briefing before the Circuit Court of Kanawha County, Plaintiff did not dispute this point. *See* Appendix at 76. Instead, he returns to *Abbott* for the proposition that the "mere fact" that West Virginia courts must apply foreign law does not necessitate dismissal. *Id.*

belief, Decedent's prescribing physician is a resident of Georgia. If Plaintiff's causes of action are tried in West Virginia, the prescribing physician will not be subject to personal jurisdiction. Therefore, "it would be necessary for the Defendants to sue him in [Georgia]. This would result in duplicative litigation for this action." *Garner v. Mylan, Inc.*, No. 08-C-260 at 7 (W.Va. Cir. Ct. Dec. 16, 2008) (Clawges, C.J.) (Included within the Appendix hereto at 61-70).

(8) Whether the alternate forum provides a remedy.

This factor weighs entirely in favor of dismissal.

Georgia law provides a remedy for the Plaintiff. *See* GA. CODE ANN. § 51-1-11(b)(1) ("The manufacturer of any personal property sold ... shall be liable in tort, irrespective of privity, to any natural person who may use, consume, or reasonably be affected by the property and who suffers injury to his person or property because the property when sold by the manufacturer was not merchantable and reasonably suited to the use intended, and its condition when sold is the proximate cause of the injury sustained."). Based on this strict liability statute, Georgia courts recognize claims for design defect, manufacturing defect, and marketing defect. *See Banks v. ICI Americas, Inc.*, 450 S.E.2d 671, 672 (Ga. 1994) ("There are three general categories of product defects: manufacturing defects, design defects, and marketing/packaging defects.") (citation omitted). Notably, under West Virginia law, an "action may be dismissed upon *forum non conveniens* even if the plaintiff has a lesser likelihood of recovery in the other forum." *Cannelton Industries, Inc. v. Aetna Casualty & Surety Co.*, 194 W.Va. 186, 197, 460 S.E.2d 1 (1994) (*citing Piper*, 454 U.S. at 250 (1981)).

VI. Conclusion

WHEREFORE, the Petitioners pray for the following relief:

a. That this Petition for a Writ of Prohibition be accepted for filing;

b. That this Honorable Court issue a rule to show cause against the Respondents directing them to show cause as to why a Writ of Prohibition should not be awarded against them;

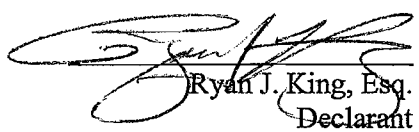
c. That all proceedings before the Circuit Court of Kanawha County, West Virginia be stayed in the underlying action, Civil Action No. 09-C-1777;

d. That this Honorable Court issue a Writ of Prohibition against the Respondents, directing the Circuit Court to grant the Mylan Defendants' Motion to Dismiss pursuant to W.V. Code § 56-1-1a;

e. Such other relief as this Honorable Court deems necessary, appropriate, or proper.

VII. Verification

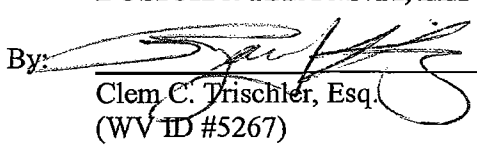
I, Ryan J. King, hereby declare, under penalty of perjury under the laws of the State of West Virginia, that I have read the above Petition and I know it is true of my own knowledge, except to those things stated upon information and belief, and as to those I believe it to be true.



Ryan J. King, Esq.
Declarant

Respectfully submitted,

PIETRAGALLO GORDON ALFANO BOSICK & RASPANTI, LLP

By: 

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CERTIFICATE OF SERVICE

I do hereby certify that on this 7th day of March, 2011, I served the foregoing **Petition for Writ of Prohibition** and **Appendix** by U.S. first-class mail, on the following:

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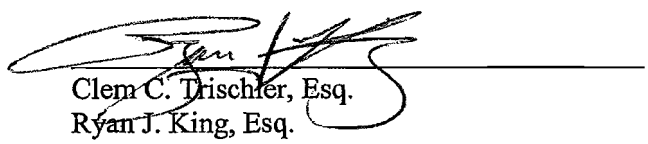

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