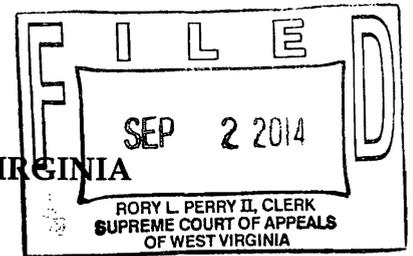


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No.: 14-0766



State of West Virginia ex rel., Ford Motor Company,
Jack Garrett Ford, Inc., a West Virginia corporation,
and Does 1-50 Inclusive, *Petitioners*

vs.

The Honorable David W. Nibert, Judge of the
Circuit Court of Roane County, West Virginia;
Christie Siegel, individually and as Successor-in-Interest
to the Estate of Jordan Siegel and Ashley Siegel, deceased;
Marc Siegel, individually and as Successor-in-Interest to the
Estate of Jordan Siegel and Ashley Siegel, deceased; Dawn
Siegel, an individual; Erica Fox, an individual; Christopher
Fox, an individual; Brooklyn Siegel, by and through her
Guardian, Marc Siegel; and Madison Owens, by and through
her Guardian, Dawn Siegel, *Respondents*.

PETITION FOR WRIT OF PROHIBITION TO THE CIRCUIT COURT OF ROANE
COUNTY, WEST VIRGINIA (CIVIL ACTION NO.: 14-C-7)

RESPONDENTS' BRIEF

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To: *The Honorable Chief Justice and The Honorable Justices of the Supreme Court of Appeals of West Virginia*

Now come the Respondents, by counsel, and pray that the Petitioners' request for the issuance of a Writ of Prohibition be denied so that this matter may proceed according to the Rules of Civil Procedure in the Circuit Court of Roane County, West Virginia before the Honorable David W. Nibert.

I. QUESTION PRESENTED

Whether it was a proper exercise of judicial discretion for Judge Nibert to refuse to dismiss the Petitioners' cases based upon West Virginia Code § 56-1-1a where the Circuit Court considered and applied all statutorily listed factors and where this matter has a very strong significance to the State of West Virginia.

II. STATEMENT OF THE CASE

A. Introduction:

This case is not the novelty that the Petitioners claim; rather, it involves precedent highly supportive of the Circuit Court's decision. Even if not artfully, the discretionary decision made by the Circuit Court was made considering *all* of the factors set forth in W.Va. Code § 56-1-1a. The Circuit Court's decision was also made keeping in mind the burden on those opposing a plaintiff's chosen forum and the fact that, even if more convenient, the alternative forum must permit the Plaintiffs' claims to be brought justly.

Moreover, the Petitioners (particularly Ford Motor Company) desire so badly to force this case to the State of Michigan where that State's laws would all but nullify the Plaintiffs' claims that they have chosen to ignore or mischaracterize the incredibly significant connection of this case to the State of West Virginia - the precise type of connection that revolutionized West Virginia's products liability law when this Court decided Morningstar v. Black and Decker Mfg. Co., 162 W.Va. 857, 253 S.E. 2d 666 (1979).

B. Factual Background and Procedural History:

Insofar as the Petitioners' "Factual Background" sets forth facts, it is accurate; however, the Respondents dispute the arguments made in connection therewith. For example, it is true that the connection to the State of West Virginia is the undisputed fact that the subject vehicle was originally sold in West Virginia to a West Virginia resident by a West Virginia resident (Defendant Jack Garrett Ford). However, the Petitioners choose to ignore that Jack Garrett Ford is a proper venue and jurisdiction-establishing Defendant that placed an allegedly defective motor vehicle into the stream of commerce in West Virginia.

The entire Morningstar, supra, purpose and public policy behind permitting Plaintiff's to proceed against retailers, wholesalers and others in the stream of commerce under the same burden and with the same presumptions that apply to manufacturers was the overarching need and desire to protect the consumers of the State of West Virginia. Thus, to entertain Petitioners' arguments that placing a defective

product (that arguably contributed to the death of two children and caused serious injuries to others) into the stream of commerce in West Virginia is not significant and of crucial importance to the citizens of West Virginia would be to ignore the entire purpose and foundation upon which this Court built West Virginia's products liability law.

Moreover, as was argued before the Circuit Court, although the facts asserted by the Petitioner as to where things happened may be accurate, it does not necessarily mean that Michigan is more convenient in the context of a products liability case or significant enough to overcome the burden associated with abrogating the Plaintiffs' choice of forum. It also does not mean that the Petitioners carried their burdens to demonstrate that Michigan is more convenient by presenting something more than unsupported assertions.

With regard to procedural history, the Petitioners' recitation is accurate.

C. Standard of Review:

Rulings with regard to W.Va. Code § 56-1-1a are reviewed under an abuse of discretion standard. State ex rel. North River Ins. Co. v. Chafin, 233 W.Va. 289, 758 S.E.2d 109, 113 (2014) (citing Syl. Pt. 3, Cannelton Indus., Inc. v. Aetna Cas. & Sur. Co. of Am., 194 W.Va. 186, 460 S.E.2d 1 (1994)).

However, this Court also reiterated in Chafin that "a writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate

powers. W.Va. Code § 53-1-1.” (citing Syl. Pt. 2, State ex rel. Peacher v. Sencindiver, 160 W.Va. 314, 233 S.E.2d 425 (1977) and Syl. Pt. 1, State ex rel. York v. W.Va. Office of Disciplinary Counsel, 231 W.Va. 183, 744 S.E.2d 293 (2013).)

III. SUMMARY OF ARGUMENT

Because the Circuit Court considered and applied all of the W.Va. Code § 56-1-1a factors as required by State ex rel. Mylan v. Zakaib, 227 W.Va. 641, 713 S.E.2d 356 (2011) it did not exceed its authority; therefore, its decision to deny the motion was purely discretionary. Discretionary decisions, including specifically those made with regard to W.Va. Code § 56-1-1a, are not subject to prohibition pursuant to W.Va. § 53-1-1.

Ultimately, the Petitions is a plea for form to surpass substance, in claiming that the Circuit Court’s decision on the merits to deny Petitioners’ motion to dismiss should be reversed – rather than corrected – merely because of certain alleged minor failings in the Order’s wording or organization. Moreover, the Petitioners seek to have this Court supplant the Circuit Court’s discretion, which is not permitted as part this Court’s prohibition jurisdiction. In both respects, the Petition is unfounded and overreaching and should be denied.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondents agree that oral argument is appropriate in aid of this Court’s consideration of this matter. More specifically, the Respondents seek Rule 20 argument based upon the fundamental public policy issues addressed herein.

V. ARGUMENT

A. The Circuit Court Considered and Applied the Statutory *Forum Non Conveniens* Factors

Although perhaps not artfully organized, the Circuit Court did consider all eight statutory factors as required by State ex rel. Mylan v. Zakaib, 227 W.Va. 641, 713 S.E.2d 356 (2011). Each of the factors is discussed in turn below:

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

It appears to be conceded that Petitioner Jack Garrett Ford, but for its submission, would not be subject to personal jurisdiction in Michigan. And so, assuming that Jack Garrett Ford maintains its position that it will submit to jurisdiction in Michigan, this factor is conceded.

However, like the other factors below, which way this factor militates is not the issue with regard to whether a Writ of Prohibition should issue. Instead, the issue is whether the Circuit Court considered this factor as required by W.Va. § 56-1-1a as set forth in Zakaib. It is beyond argument that the Circuit Court did consider that Michigan as an alternative forum, satisfying this Zakaib requirement. See Order, pp. 6-7, AR 6-7. Indeed, the Petitioners openly concede that this factor was considered by the Circuit Court in its Order. Petition, p. 15.

(2) Whether maintenance of the claim or action in the courts of this state would work a substantial injustice to the moving party:

It is beyond question that the Circuit Court considered, and in fact spent much of its Order, on this issue. The Circuit Court made it plain in its Order Denying Dismissal

that it was well aware, through the briefs and the arguments of counsel, that this case involves a Michigan incident with Michigan witnesses. Thus, the Court was well within its discretion to require, based upon Abbott v. Owens-Corning Fiberglass Corp., 191 W.Va. 198 (1994)¹, that the Petitioners make more than cursory allegations that the Michigan-centric nature of this matter would work a “substantial injustice” on either Ford Motor Company or Jack Garrett Ford.

Regardless, the primary point here is that the Circuit Court considered this statutory factor as required by Zakaib in the exercise of its discretion. See Order, pp. 3-6, AR 3-6. Specifically, the Circuit Court addressed the “substantial injustice” point by stating that Respondents, rather than Petitioners, would fall victim to substantial injustice if this case were venued in Michigan. See Order, pp. 6-7, AR 6-7. That is, the Circuit Court discussed Michigan’s statute of repose and how it is “inconsistent with the principles underlying West Virginia’s doctrine of strict products liability, which is critical in protecting West Virginia consumers.” Id.

For these reasons, the Circuit Court considered and correctly applied this factor.

- (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:

As with the first factor, assuming that Petitioner Jack Garrett Ford maintains its submission to Michigan’s jurisdiction, there is no apparent reason not to concede this

¹ As the Circuit Court and the Petitioners point out, Abbott preceded the passage of W.Va. Code § 56-1-1a; however, there is no reason to believe that Abbott’s precedential value with regard to how a Circuit Court should exercise its discretion is lost. After all, our Legislature constructed W.Va. § 56-1-1a, and selected the considerations therein, based upon a long line of West Virginia and Federal precedent.

factor. Again, however, the Zakaib requirement was met when the Circuit Court, on page 6 of its Order (AR 6), stated “Michigan is an alternate forum only because Jack Garrett Ford agreed not to contest personal jurisdiction there.” Thus, in exercising its discretion, the Circuit Court openly took into account the third statutory factor. Indeed, Petitioners concede that this factor was considered by the Circuit Court in its Order. Petition, p. 15.

(4) The state in which the plaintiffs reside:

The Circuit Court’s Order makes plain that it was well aware and considered that the Plaintiffs are residents of Michigan when it exercised its discretion to deny the Motion to Dismiss. On page 3 of the Order (AR 6) the Court reiterates that “Defendants argued that West Virginia was an inconvenient forum because plaintiffs were residents of Michigan.” Moreover, on page 4 of the Order (AR 4), the Circuit Court addressed the Respondents/Petitioners’ residence by discussing the Abbott decision and how that case “involved non-resident plaintiffs whose cause of action accrued in another state. “

Also, just as in their Petition, the Petitioners make nothing other than a blanket argument unsupported by facts or logic as to why plaintiffs’ residence (which is typically of no consequence regarding venue) would make West Virginia a less convenient forum. This is particularly true where the Plaintiffs have obviously submitted to venue and will travel to West Virginia for any legitimate litigation purpose.

Once again, however, the cogent point is that this factor was considered by the Circuit Court in the exercise of its discretion, and Zakaib is therefore satisfied.

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

Preliminarily, Petitioners have conceded that this factor (No. 5) was considered by the Circuit Court in its Order. Petition, p. 15. Further, the Circuit Court considered and applied this factor correctly.

The Respondents do not disagree that a tort cause of action “accrues” when a party knows, or by the exercise of reasonable diligence should know, the nature of his or her injury and its sources. See, e.g., Casto v. Dupuy, 204 W.Va. 619, 515 S.E.2d 364 (1999). This, however, only defines *when* a cause of action accrues, not *where*. The Petitioners’ semantics aside, the statutory language in W.Va. Code § 56-1-1a, and this Court’s holding in Zakaib demonstrate a legislative and judicial intent for the Circuit Court to consider the physical *where* of the tort and the tortfeasors because that is what actually matters in terms of convenience.

Thus, even though the Respondents disagree with the Petitioners’ definition of the state in which a cause of action accrued against the Petitioners, there is no question based upon the entirety of the Circuit Court’s Order that it was well aware of and considered for purpose of W.Va. Code § 56-1-1a where the injuries happened, where Jack Garrett Ford is located and the Morningstar nature of Plaintiffs’ claims against both Petitioners. Therefore, the Circuit Court considered and applied this factor, and the Zakaib requirement is met.

- (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:

Much as with Factor No. 2, the Petitioners are attempting to rehash their disfavor regarding *how* the Circuit Court exercised its discretion rather than the only point relevant to whether a Writ of Prohibition should issue - *whether* the Circuit Court exercised its discretion in a reviewable fashion as required by Zakaib.

In fact, to the issues laid out in Factor 6, the Court dedicated much of the body of its Order. The Circuit Court plainly stated its awareness of the fact that the injuries and deaths occurred in Michigan, but found that this factor, on balance, did not require dismissal. Order, pp. 1-3, AR 1-3. The Circuit Court openly stated that it was Petitioners' burden "to establish that the private and public interests factors heavily weigh in favor of dismissal." Order, p. 4, AR 4. The Circuit Court then discussed the ease of access to proof (documents) and the difficulties that might arise with respect to witnesses, but likewise found that, on balance, those factors did not require dismissal. Order, pp. 4-7, AR 4-7.

Nevertheless, as to any and all factors upon which the Petitioners now attempt to rely, the Circuit Court held that it was within its discretion, under Abbott, to require the Petitioners to make something more than blanket assertions as to the convenience factors.

Additionally, the Petitioners, unlike the Circuit Court, intentionally gloss over the fact that Roane County, West Virginia, is actually very convenient for Jack Garrett Ford, whose principle place of business is virtually in the shadow of the Roane County Courthouse and whose trial counsel all work in West Virginia.

Lastly on this point, the Petitioners (Ford Motor Company in particular) claim that this case bears no meaning to the State of West Virginia and complain about the Circuit Court's disagreement with them - "a two-vehicle accident in Michigan with no meaningful connection between this action and West Virginia." Petition, p. 2; "The Circuit Court likewise erred by finding that Plaintiffs' cause of action arose, in part, in West Virginia." Petition, p. 11; and, "Plaintiffs' causes of action all unmistakably accrued in Michigan." Petition, p. 23.

Not only are these claims insulting to our State, but they are also bitterly inconsistent with the public policy basis discussed in Morningstar, supra, and its progeny. West Virginians have a strong and palpable interest in assuring, through litigation or otherwise, that dangerous and defective motor vehicles are not sold here, regardless of where they end up hurting or killing someone². As noted above, in this regard the Circuit Court thus discussed how Michigan's statute of repose is inconsistent

² Morningstar is invoked here because it abolished the need for a plaintiff to prove that the manufacturer was negligent in some particular fashion during the manufacturing process and permitted proof of the defective condition of the product as the principal basis of liability. That the Morningstar rule was designed to protect consumers was made further clear in Star Furniture v. Pulaski Furniture Co., 171 W.Va. 79, 297 S.E.2d 854 (1982) when this Court stated that the "philosophical underpinning of strict liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturer that put such products on the market rather than by the injured persons who are powerless to protect themselves."

with West Virginia's strict liability in tort doctrine that is "critical in protecting West Virginia Consumers." Order, p. 7, AR 7.

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

This factor is another that is discussed in various ways in the Circuit Court's Order. The Court found that the Plaintiffs' choice of forum was entitled to weight (albeit reduced by the fact that the Plaintiffs are not residents of West Virginia) and that the Petitioners did not make sufficient arguments or present sufficient evidence as to any of the *forum non conveniens* factors, including this one.

Most notably, the Petitioners made no argument to the Court that failing to dismiss the action would result in unreasonable duplication of or proliferation of litigation. Rather, the Petitioner only made the argument that dismissing it would not do the same. With this factor not seeming to weigh in either side's favor, the Circuit Court found that it did not, on balance, change its analysis. Order, p. 4, AR 4. Thus, having considered this factor generally, the Circuit Court satisfied the Zakaib requirement.

(8) Whether the alternate forum provides a remedy:

There is no doubt that the Circuit Court considered and applied this factor (Order, pp. 6-7, AR 6-7) and therefore satisfied the Zakaib requirement. The Petitioners even conclude that this factor was considered by the Circuit Court in its Order. Petition, at p. 15. Critically, the parties differ sharply on how this factor should impact the Circuit Court and this Court's *forum non conveniens* analysis. This disagreement arises

over the differences between West Virginia's strict liability in tort law as represented by Morningstar, *supra*, and its progeny versus Michigan's statute of repose applicable to product defect cases, Mich. Stat. Ann. § 600.5805(13). This statute states, in pertinent part, "[I]n the case of a product that has been in use for not less than 10 years, the plaintiff, in proving a *prima facie* case, shall be required to do so without benefit of any presumption."

Because the automobile at issue here has been "in use" for about 15 years, this statute of repose would apply in Michigan. The Respondents argue that this difference is so critical and so inconsistent with our public policy as set forth in Morningstar that Syllabus Point 9 of Mace v. Mylan Pharm., Inc., 227 W.Va. 666, 714 S.E.2d 223 (2011) should apply. Mace, Syl. Pt. 9, indicates that if "the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all then it ceases to exist as an alternative forum and dismissal in favor of that forum would constitute error."

In making this argument, the Respondents are mindful of the holding in Piper Aircraft Co. v. Reyno, 454 U.S. 235, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981) that "if the possibility of an unfavorable change in substantive law is given substantial weight in the *forum non conveniens* inquiry, dismissal would rarely be proper." Id. at 250, 102 S.Ct. 252. Despite Piper, the Respondents maintain that the substantive difference between the States is so great that Michigan law would abrogate Plaintiffs' strict liability in tort case. In other words, for vehicles 10 or more years old, there is no strict liability in tort

in Michigan (which is obviously the primary reason that the Petitioners are fighting so hard to get this case to Michigan). Without the benefit of the Morningstar presumptions, it would be especially impossible for the Respondents to prove a cause of action against Jack Garrett Ford. Therefore, because Michigan, particularly regarding Defendant Jack Garrett Ford, provides little or no remedy at all, this factor militates heavily, if not conclusively, in favor of supporting the Circuit Court's denial of the Motion to Dismiss based upon *forum non conveniens*.

In making this argument the Respondents are also mindful that it requires a deviation from the traditional *lex loci delicti* principle that West Virginia courts will apply the law of the place of the wrong. See, Syl. Pt. 1, Paul v. National Life, 177 W.Va. 427, 352 S.E.2d 550 (1986). In this regard, the Petitioners respectfully request that this Court adopt the reasoning set forth by the Supreme Court of New Jersey in Gantes v. Kason Corp., 145 N.J. 478, 679 A.2d 106 (1996).

In Gantes the Supreme Court of New Jersey was faced with deciding whether to apply the New Jersey two year tort statute of limitations or the Georgia 10 year statute of repose (O.C.G.A. § 51-1-11(b)(2)) to a wrongful death claim that was based upon strict liability in tort principles. Like Michigan, Georgia's statute of repose eliminates Morningstar-type strict liability in tort product cases for products sold 10 or more years prior to filing. Id. at 485, 109.

The decedent in Gantes was killed in Georgia by an allegedly defective machine that was manufactured and sold in New Jersey. The decedent's estate filed suit in New

Jersey and the seller/manufacturer argued that Georgia's statute of repose barred the action. The seller/manufacturer also argued that *forum non conveniens* principles dictated that Georgia law should apply for many of the same reasons that Ford argues here - it was the site of the death, the plaintiffs resided there, the witnesses are there, etc.

Thus, Gantes bears incredible similarity to this Action both factually and given that it is both a products liability choice of law case and a *forum non conveniens* case. The New Jersey Supreme Court held that (1) New Jersey's substantial interest in deterring manufacturers and sellers from distributing unsafe products within New Jersey outweighed Georgia's policy concerns in stabilizing Georgia's insurance industry and keeping stale claims out of Georgia's courts and (2) *forum non conveniens* was not appropriate relief where it would eliminate or bar the plaintiff's cause of action.

Therefore, in addition to rejecting the Petitioners' application for a Writ of Prohibition, the Plaintiffs/Respondents pray that this Court find that the strict products liability law of the State of West Virginia applies to their claims rather than Michigan's statute of repose, Mich. Stat. Ann. § 600.5805(13).

B. BECAUSE THE COURT CONSIDERED AND APPLIED THE STATUTORY FACTORS AS REQUIRED BY ZAKAIB, IT DID NOT EXCEED ITS LEGITIMATE POWERS AND A WRIT OF PROHIBITION IS NOT AVAILABLE

This Court's very recent decision of State ex rel. North River Ins. Co. v. Chafin, 233 W.Va. 289, 758 S.E.2d 109 (2014) (Syl. Pt. 1), reiterates the steadfast rule that

prohibition is not available to correct discretionary rulings, including those made pursuant to W.Va. Code § 56-1-1a. Therefore, as long as the Circuit Court considered and applied the eight (8) statutory factors contained in W.Va. Code § 56-1-1a, and therefore adhered to Zakaib, it did not exceed its powers and its decision was a discretionary one against which prohibition is not available.

VI. CONCLUSION

Because the Circuit Court of Roane County considered and applied that which is required by W.Va. § 56-1-1a it properly exercised its discretion and did not exceed its authority. Therefore, because this Court does not invoke its W.Va. Code 53-1-1 jurisdiction to correct or address alleged abuses of discretion, a Writ of Prohibition should not issue.

Moreover, as it regards the choice-of-law question inherent in the issue before the Court, the Respondents pray that Your Honors adopt in this case the detailed and well-reasoned holding set forth by the Supreme Court of New Jersey in Gantes v. Kason Corp., 145 N.J. 478, 679 A.2d 106 (1996).

Finally and alternatively, should the Court for any reason find inadequacy with the Circuit Court's Order Denying Defendants' Motion to Dismiss, then the Respondents would respectfully request that this Court issue an order instructing the Circuit Court to revise, amend or supplement its Order or to reconsider the matter with

instruction rather than the draconian relief of outright dismissal sought by the
Petitioners.

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Siegel, an individual; Erica Fox, an individual; Christopher
Fox, an individual; Brooklyn Siegel, by and through her
Guardian, Marc Siegel; and Madison Owens, by and through
her Guardian, Dawn Siegel, *Respondents*.

CERTIFICATE OF SERVICE

I, T. Keith Gould, counsel of record for the Respondents, do hereby certify that on the 29th day of August 2014 the foregoing **RESPONDENTS' BRIEF** was served upon counsel of record and judicial officer by placing true copies hereof in the United States Mail, postage pre-paid, in envelopes addressed as follows:

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