

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

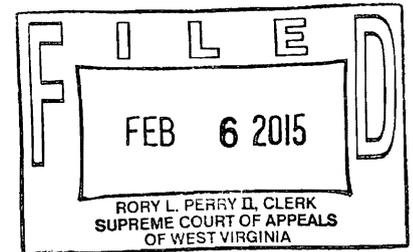
No. 15-0098

STATE OF WEST VIRGINIA EX REL. AIRSQUID
VENTURES, INC. (DBA AMPHIBIOUS MEDICS), and
TRAVIS PITTMAN

Defendants Below, Petitioners,

v.

HONORABLE DAVID W. HUMMEL, JR., Judge of the
Circuit Court of Marshall County, West Virginia,
Respondent.



PETITION FOR WRIT OF PROHIBITION

Action Pending in the Circuit Court of Marshall County
Civil Action No. 14-C-66-H

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QUESTIONS PRESENTED

This petition presents the following questions for review:

1. Pursuant to West Virginia law, is venue determined by the residence of any of the defendants or where the cause of action arose, even in the instance of a corporate defendant and an individual plaintiff?
2. Is a corporate defendant said to reside, pursuant to West Virginia's venue statute, *W. Va. Code* §56-1-1(a)(2), "wherein its principal office is...or if its principal office be not in this state...wherein it does business"?
3. If a corporation's office is not in West Virginia, is the phrase "wherein it does business" interpreted by the sufficiency of the corporation's minimum contacts in such county, that is, whether it is doing a "substantial portion" of its business therein?
4. If a civil action is filed in a county in which no venue determinative connections exist, is venue appropriate there?
5. If, pursuant to West Virginia Rules of Civil Procedure Rule 12(b)(3), West Virginia Code Section 56-1-1(a), and this Court's opinions construing same, a civil action is improperly filed in the wrong county, and therefore is pending before the wrong Circuit Court, must that civil action be dismissed or, in the alternative, transferred to the appropriate venue within West Virginia?
6. Should this Honorable Court intervene here, where the lower tribunal has misstated and, therefore, misconstrued the terms of the forum selection clause included in the Assumption of Risk, Waiver of Liability and Indemnity Agreement (Agreement) entered between the parties?
7. Should this Honorable Court intervene here, where the lower tribunal has misconstrued West Virginia law, where this Court otherwise would not have the opportunity to clarify this point of law before unnecessary discovery and where to proceed will lead to delay and unnecessary cost for which an appeal cannot compensate?

STATEMENT OF THE CASE

The underlying wrongful death action arises from the accidental drowning of Avishek Sengupta in April 2013 as he participated in the Tough Mudder Mid-Atlantic event (Event), held in Gerradstown, Berkeley County, WV. [App.000003] Mr. Sengupta's Estate, the plaintiff below, alleges that, as a result of defendants' negligence, Mr. Sengupta drowned during the Event. [App. 000028-29] Prior to participating, Avishek Sengupta agreed to and executed defendant Tough Mudder, LLC's **Assumption of Risk, Waiver of Liability, and Indemnity Agreement** (Agreement). [App. 000075] The Agreement is a three-page contract that contains a section entitled "Other Agreements," which includes a sub-section titled Venue and Jurisdiction:

I understand that if legal action is brought, the appropriate state and federal trial court in which the TM event is held has the sole and exclusive jurisdiction and that only the substantive laws of the State in which the TM event is held shall apply.

[App. 000075] In addition to initialing the five different sections of the Agreement, Avishek Sengupta signed and dated the Agreement at the bottom of both page 2 and page 3. [App. 000076-77] The Estate filed suit in the Circuit Court of Marshall County, West Virginia, on April 18, 2014. In response to the Estate's suit in Marshall County, Airsquid Ventures, Inc., d/b/a Amphibious Medics and Travis Pittman (hereinafter referred to collectively for purposes of this Petition as "Airsquid") (among other defendants) filed a motion to dismiss based upon the venue statute and the contract provisions, and this Court's analysis of same through its reported opinions. [App. 000139] Defendant Airsquid argued that both the venue statute and the case law demonstrate that "the appropriate state court" is not the Circuit Court of Marshall County because none of the defendants reside there and because the cause of action did not arise there. [App. 0000142] Moreover, none of the defendants conducted a substantial portion of their business in Marshall County.

Defendants' venue motions were brought on for hearing before the Circuit Court of Marshall County on August 22, 2014. In its September 15 correspondence to all counsel relative to venue, the Court advised that it "adopt[ed] the reasoning and analysis set forth by the Plaintiff" and further stated that its "'Venue' ruling and analysis begins and necessarily ends with the '**Venue and Jurisdiction**' clause of the putative agreement." [App. 000979] The Circuit Court ended its letter by instructing Plaintiff to "prepare a draft order reflective of the Court's foregoing determinations." [App. 000979]

Plaintiff prepared an order, "Order Denying Defendants' Motions to Dismiss Based on Venue and *Forum Non Conveniens*" (hereinafter "Venue Order"), which was submitted pursuant to Trial Court Rule 24.01. Airsquid submitted objections, setting out West Virginia law on venue but also noting that plaintiff's proposed order repeatedly misstated the terms of the Venue and Jurisdiction clause in the Agreement. Airsquid urged the Circuit Court to consider the importance of the order's addressing fully, fairly and, most importantly, accurately the 'Venue and Jurisdiction' clause, especially because the Circuit Court stated expressly that its ruling "begins and necessarily ends with the '**Venue and Jurisdiction**' clause of the putative agreement." [App. 000981]

Specifically, plaintiff repeatedly substituted the indefinite article "any" -- "**any** 'appropriate state or federal court'" -- for the definite article in the actual language: "**the** appropriate state or federal court" (emphasis added). [App. 000988-89, 0000991, 001012-13, 001015] Beyond the inaccuracy itself, Airsquid further has maintained that the use of the definite article "the" is an express enlistment of the venue statute -- where **the** cause of action arose -- all of which is lost in the Venue Order's error. W. Va. Code 56-1-1. [App. 000998] Nonetheless, over the objections of defendants, the Circuit Court adopted plaintiff's order virtually verbatim,

including the substitution of “any appropriate state or federal court” for “the appropriate state or federal court” (emphases added).

On January 9, 2015, the Circuit Court of Marshall County denied defendants’ motions to dismiss based on venue by entering virtually verbatim the Venue Order submitted by the Estate.¹ [App. 001006]

Defendant Airsquid Ventures, Inc., d/b/a Amphibious Medics and Travis Pittman petition this Honorable Court for a writ, prohibiting the enforcement of the January 9, 2015, Order entered by the Circuit Court of Marshall County because the Venue Order is clearly erroneous as a matter of law. Petitioners further move this Court to grant their motion to dismiss based on lack of venue in Marshall County. These petitioners requests the relief this Court deems just.

SUMMARY OF ARGUMENT

Avishek Sengupta drowned while participating in a Tough Mudder sports event in Berkeley County, West Virginia. [App. 000003] His Estate filed the subject wrongful death action in Marshall County, West Virginia, against five defendants, none of whom resides in Marshall County and none of whom conducts a substantial portion of its business in Marshall County. [App. 000004-5] Plaintiff has failed to identify any venue determinative event in or feature of Marshall County, West Virginia. App. 000005-6, 000139ff] While four of the five defendants are foreign, one of the defendants, Peacemaker National Training Center, resides in

¹ Order Denying Defendants’ Motions to Dismiss Based on Venue and Forum *non Conveniens* (Hummel, J.) is verbatim to the order submitted by the Estate, absent one sentence that the Court literally physically redacted: “ORDERED Defendants’ agreement as to the form of this Order shall not affect the Defendants’ right to appeal the substance of this Order.” *See State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 214, 470 S.E.2d 162, 168 (1996), finding that verbatim adoption of one party’s proposed order is not the preferred practice but is not, absent more, reversible error. Additionally, the draft order was submitted pursuant to Trial Court Rule 24.01, and all defendants submitted objections to the proposed order (none of which were adopted or at least successfully considered in the venue context).

Berkeley County, West Virginia, and conducts a substantial portion of its business in Berkeley County. Additionally, the cause of action (the drowning) arose in Berkeley County. [App. 000005] Each of the defendants has challenged venue. Specifically, defendant Airsquid filed a motion to dismiss this action or, in the alternative, to transfer the action to Berkeley County. [App. 000139]

In denying the defendants' motions, the Circuit Court of Marshall County adopted the plaintiff's order (and thereby, its reasoning) virtually verbatim, thereby misconstruing West Virginia law on venue and misstating the Venue and Jurisdiction clause in the agreement between the parties. [App. 001015] Defendant Airsquid reasserts its position that the venue determination made by the Circuit Court of Marshall County is clearly erroneous as a matter of law. Whereas direct appeal could be available, defendant would spend unnecessary time and expense in pursuing a full litigation in the wrong venue prior to appealing the venue determination. Airsquid seeks relief from the Venue Order below and asks this Court to intervene because the lower court exceeded its legitimate powers by proceeding where venue does not lie.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to West Virginia Rules of Appellate Procedure Revised Rule 19(a)(1), brief oral argument is necessary in this instance because this case presents questions that allege error in the application of settled law.

ARGUMENT

A. Introduction and Factual Background

The Estate of Avishek Sengupta (hereinafter "plaintiff"), filed suit in the Circuit Court of Marshall County, West Virginia, on April 18, 2014, alleging wrongful death arising out of the

death of Mr. Sengupta (hereinafter “Decedent”) while participating in the Tough Mudder Mid-Atlantic event held on April 20, 2013 (hereinafter “the Event”). [App. 000003] According to the Complaint, Mr. Sengupta and his teammates decided to sign up for the Event several months prior to April 20, 2013. [App. 000012] The Event took place in Gerradstown, Berkeley County, West Virginia, on property owned by Peacemaker National Training Center (Peacemaker), a West Virginia limited liability corporation, with its sole place of business in Berkeley County, West Virginia. [App. 000005]

The Estate has brought suit against Peacemaker, Tough Mudder LLC (Delaware), Airsquid (California), General Mills, Inc. and General Mills Sales, Inc. (Delaware corporations, with their principal place of business in Minnesota) and Travis Pittman, an individual (resident of Maryland). [App. 000004-5] Plaintiff alleges that venue and jurisdiction are proper in the Circuit Court of Marshall County, West Virginia, because all defendants transacted business, contracted to supply services or things, caused tortious injury by act or omission, used or possessed real property, and/or resided in West Virginia. [App. 000006] Additionally, Plaintiff alleges venue is proper in Marshall County, West Virginia, because “one or more of the Defendants deliberately and regularly engages in commerce in Marshall County and/or resides in Marshall County.” [App. 000007]

Plaintiff does not allege that any of the defendants reside or maintain a principal place of business within Marshall County. Further, as the Complaint alleges, this cause of action arose only out of events occurring within Berkeley County, West Virginia. [App. 000005] While plaintiff alleges that the defendants caused tortious injury by act or omission within West Virginia, per plaintiff’s Complaint, all such alleged acts or omissions occurred solely in Berkeley County; no act or omission occurred in Marshall County. Notwithstanding plaintiff’s general

allegations that *some* of the defendants advertise or conduct minimal business within Marshall County, none of the defendants conduct a substantial portion of their business in Marshall County – indeed, plaintiff has not even alleged that they do. Nothing in Marshall County is venue determinative.

Defendants filed motions to dismiss based on improper venue, which motions were denied. [App. 000033, 000139, 001006] Defendant Airsquid petitions this Court for a finding that the Venue Order is a clear misstatement of West Virginia law and that venue does not lie in Marshall County.

B. Standard of Review

This Court has held that it is well-settled law that the issue of venue may properly be addressed through a writ of prohibition. *See State ex rel. Thornhill v. King*, 233 W. Va. 564, 567, 759 S.E.2d 795, 798 (2014). The *Thornhill* Court further cited *State ex re. Riffle v. Ranson*, 195 W. Va. 121, 464 S.E.2d 763 (1995), for the Court’s preference for “resolving this issue [venue] in an original action” given the “inadequacy of the relief permitted by appeal.” *Id.* at 124, 464 S.E.2d at 766. Additionally, the *Thornhill* Court relied extensively upon *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996), in determining whether to intervene in instances where the lower court is alleged to have exceeded its legitimate powers, as follows:

- (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.

This Court has found these factors to be “general guidelines,” further finding that not all of the factors need to be met for this Court to act. “Although all five factors need not be satisfied, it is

clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.” Syl. pt. 4, *State ex rel. Hoover*, 199 W. Va. 12, 483 S.E.2d 12. This Court has explained further the standard of review applicable to a writ of prohibition as follows:

“ ‘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.’ Syl. pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W.Va. 314, 233 S.E.2d 425 (1977).” Syl. pt. 2, *State ex rel. Kees v. Sanders*, 192 W.Va. 602, 453 S.E.2d 436 (1994).

State ex rel. Farber v. Mazzone, 213 W. Va. 661, 664, 584 S.E.2d 517, 520 (2003), *quoting* Syl. pt. 1, *State ex rel. United Hospital Center, Inc. v. Bedell*, 199 W.Va. 316, 484 S.E.2d 199 (1997).

As demonstrated herein, the lower tribunal has misconstrued well-settled West Virginia law -- that venue is appropriate where the cause of action arose or where any of the defendants resides. Whereas West Virginia law sets corporate residence by sufficient minimum contacts so as to comport with substantial justice and fair play, West Virginia law also mandates that, for venue purposes, the corporate contacts with the venue must constitute a substantial portion of the corporate defendants’ business in order to be venue determinative. The Venue Order entered by the Circuit Court of Marshall County misstates West Virginia law on venue. [App. 001011] The Venue Order further misstates the Venue and Jurisdiction clause in the contract between the parties. [App. 001012-13] The Venue Order places venue in a county that has no ties to the events at issue and no recognized venue-determinative ties to any of the defendants or the claims. [App. 000139] Defendant Airsquid moved to dismiss the claim based on venue being improper in Marshall County. [App. 000139] Defendant Airsquid alternatively moved to transfer the claim to Berkeley County, where the one domestic defendant resides (Peacemaker) and where the cause of action arose. When the Circuit Court of Marshall County denied the motions, Airsquid advanced to this petition for writ so that all parties could avoid the delay and unnecessary

expense of litigating the Estate's claim, both of which (delay and expense) cannot be recouped upon even a subsequently successful appeal.

C. Questions Presented

1. Pursuant to West Virginia law, is venue determined by the residence of any of the defendants or where the cause of action arose, even in the instance of a corporate defendant and an individual plaintiff?

Venue in West Virginia is defined and set by where the cause of action arose or where any defendant West Virginia's venue statute at its most basic provides that "[a]ny civil action or other proceeding...may hereafter be brought in the circuit court of any county...[w]herein any of the defendants may reside or the cause of action arose." W. Va. Code § 56-1-1(a). While the venue statute and this Court have considered a variety of factors that can determine venue, a plaintiff's choice of venue, absent other determining factor, is never compelling. *State ex rel. Thornhill*, 233 W. Va. at 571, 759 S.E.2d at 802, removing the situs of plaintiff's harm from the venue determination; *State ex rel. Riffle*, 195 W. Va. at 126, 464 S.E.2d at 768, finding West Virginia Legislature paramount authority (statute) for deciding venue issues.

In this instance, the Estate has filed suit against four corporate defendants and one individual defendant. resides. [App. 000004-5] By the terms of plaintiff's Complaint and the discovery done herein, the individual, Travis Pittman, is a resident of Maryland. [App. 000005] Three of the corporate defendants reside outside West Virginia: New York, California, and Delaware. [App. 000004-5] The final corporate defendant, Peacemaker National Training Center (Peacemaker), is a West Virginia limited liability corporation, with its only place of business in Berkeley County, West Virginia. [App. 000004-5].²

² The defendants herein are as follows: (1) Tough Mudder LLC, a Delaware limited liability company with its principal place of business at 15 Metrotech Center, 7th Floor, Brooklyn NY, 11201 (hereinafter "Defendant Tough Mudder"); (2) Airsquid Ventures, Inc. d/b/a Amphibious

The cause of action arose on Peacemaker's property, located in Berkeley County, where the Event was held in April 2013. Avishek Sengupta drowned during the event held on the Peacemaker property in Berkeley County, WV. All five defendants have challenged venue in Marshall County. All five defendants have sought dismissal or transfer as a result. Venue is improper in Marshall County because none of the defendants reside there and the cause of action did not arise there. For these reasons and those set out further herein, the Venue Order cannot stand.

2. Is a corporate defendant said to reside, pursuant to West Virginia's venue statute, *W. Va. Code* §56-1-1(a)(2), "wherein its principal office is...or if its principal office be not in this state...wherein it does business"?

In its Complaint, the Estate alleges that venue and jurisdiction are proper in the Circuit Court of Marshall County, West Virginia, because "one or more of the Defendants deliberately and regularly engages in commerce in Marshall County and/or resides in Marshall County." [App. 000007] While the Estate has alleged that the defendants engage in business in Marshall County generally (such as that General Mills products can be purchased in Marshall County), the Estate has not effectively alleged that any defendant conducts a *substantial portion* of its business in Marshall County as distinguished from any other location in West Virginia, the United States or the world.

Medics, a California Corporation with its principal place of business at 2201 Lakewood Blvd. Suite D, Long Beach, CA 90815 (hereinafter "Airsquid"); (3) Travis Pittman, an individual with a primary residence of 6662 Seagull Court, Frederick MD, 21703 (hereinafter "Mr. Pittman"); (4) Peacemaker National Training Center, a West Virginia limited liability company with its principal place of business of 1624 Brannon Ford Road, Gerradstown, WV 25420 (hereinafter "Defendant Peacemaker"); and (5) General Mills, Inc. and General Mills Sales, Inc., both Delaware corporations with their principal place of business at 1 General Mills Boulevard, Minneapolis, MN 55426 (hereinafter collectively "Defendant General Mills).

Notably, the Estate has not alleged that any of the defendants maintain a principal place of business in Marshall County. All of the events at issue occurred in Berkeley County, West Virginia. [App. 000035] The only defendant with an actual presence in West Virginia, Defendant Peacemaker, maintains its principal place of business in Berkeley County, West Virginia. [App. 000005] Therefore, venue could be appropriate in Berkeley County due to the alleged events occurring in Berkeley County, due to Defendant Peacemaker's principal place of business existing in Berkeley County and due to the fact that none of the non-resident defendants conduct a "substantial portion" of its business in any county in West Virginia.

In response to the Estate's suit in Marshall County, Airsquad (among other defendants) filed a motion to dismiss based upon the venue statute and this Court's analysis of same through its reported opinions. [App. 000139, 000142] Airsquad argued, pursuant to West Virginia law, "[a]ny civil action or other proceeding...may hereafter be brought in the circuit court of any county...[w]herein any of the defendants may reside or the cause of action arose." *W. Va. Code* § 56-1-1(a). Further, venue is appropriate against a corporate defendant "wherein its principal office is...or if its principal office be not in this state...wherein it does business." *W. Va. Code* §56-1-1(a)(2). In its motion to dismiss for improper venue, Airsquad relied upon this Court's opinions to provide meaning to the phrase "wherein it does business," noting that this Court has held that "[w]hether a corporation is subject to venue in a given county...under the phrase... 'wherein it does business' depends upon the sufficiency of the corporation's minimum contacts in such county that demonstrate it is doing business." Syl. Pt. 1, *State ex rel. Huffman v. Stephens*, 206 W.Va. 501, 526 S.E.2d 23 (1999). [App. 000142] This Court has found the contacts sufficient for venue where the imposition of suit does "not offend traditional notions of

fair play and substantial justice.” *Westmoreland Coal Co. v. Kaufman*, 184 W. Va. 195, 197, 399 S.E.2d 906, 908 (1990). [App. 000143]

Moreover, Defendant General Mills did not have sufficient connection with Marshall County to satisfy the requirements outlined in W. Va. Code §56-1-1(a)(2). [App. 000888] Defendant General Mills, upon information and belief, is a nationwide manufacturer and distributor of Wheaties brand cereal, along with many other products. Plaintiff alleges that Defendant General Mills derives substantial revenue from residents of Marshall County who purchase its goods and numerous locations. However, the Complaint alleges a wrongful death cause of action due to the alleged negligent acts that occurred during an endurance or obstacle race occurring in Berkeley County. Plaintiff does not allege that the Decedent was enticed to participate in the Event due to the purchase of defendant General Mills’ product in Marshall County. Further, Plaintiff does not allege that products sold in Marshall County caused and/or contributed to Decedent’s death. Defendant General Mills, while conducting unrelated business in Marshall County, did not engage in a substantial portion of business within Marshall County and, importantly, Defendant General Mills’ presence within Marshall County was completely devoid of any connection to the events that occurred within Berkeley County. [App. 000155] Plaintiff worked to establish venue in Marshall County based upon wholly unrelated advertising and/or sales from efforts completely unrelated to the events and allegations at issue in this civil action, wherein none of the defendants conduct a substantial portion of their business, where none of the defendants reside and where none of the events arose.

Venue is improper in Marshall County, and the Venue Order is clearly erroneous under West Virginia law and cannot stand.

3. If a corporation's office is not in West Virginia, is the phrase "wherein it does business" interpreted by the sufficiency of the corporation's minimum contacts in such county, that is, whether it is doing a "substantial portion" of its business therein?

Although "a corporation may transact some business in a county, it is not 'found' therein, if its officers or agents are absent from such county and the corporation is not conducting a **substantial portion** of its business therein, with reasonable continuity." *Crawford v. Carson*, 138 W. Va. 852, 860, 78 S.E.2d 268, 273 (1953) (emphasis added).

Airsquid moved the Court below to dismiss the instant action for improper venue because none of the defendants conduct a substantial portion of its business in Marshall County. Alternatively, Airsquid moved the Court below to transfer the action to Berkeley County, WV, where defendant Peacemaker maintains its principal place of business, where it conducts a substantial portion of its business with reasonable continuity, and where the cause of action arose. While evidence was presented that some of the defendants are present in Marshall County (for example, that General Mills goods may be purchased there), plaintiff has been unable to prove that any of the defendants has made a concentrated effort to have more of a presence in Marshall County than anyplace else in this state or in this country or internationally. Of note, plaintiff has not identified any tie to Marshall County that would qualify as a venue determinative factor under West Virginia law.

Rather than recognize the residence of the one domestic corporate defendant Peacemaker or concede venue in the county where the cause of action arose, the Estate has focused most intently on General Mills' presence in Marshall County, West Virginia. [App. 000148] Specifically, the Estate focused on defendant General Mills, providing "evidence" of its presence

in Marshall County.³ [App. 000155] The Estate worked to prove that General Mills “deliberately and regularly engages in commerce in Marshall County and/or resides in Marshall County.” However, this Court has held that, absent conducting a *substantial portion* of business here, deliberate and regular contact is insufficient. *Crawford* 138 W. Va. at 860, 78 S.E.2d at 273 (emphasis added). While the Estate expended considerable effort in identifying General Mills’ activity in Marshall County, it did nothing to demonstrate that any of the occurrences in West Virginia constituted a *substantial portion* of General Mills’ business.

For venue purposes, West Virginia analyzes the phrase “wherein it does business” in terms of minimum contacts reaching a level sufficient for *in personam* jurisdiction over the foreign defendant. Specifically, in determining the sufficiency of a corporation’s minimum contacts in a county to demonstrate that it is doing business, this Court has found, in terms of venue, notions of fair play and substantial justice require a **substantial connection** between a

³ The Estate provided, by example, the following “evidence” of General Mills’ presence in Marshall County:

General Mills, Inc., Annual Report (that does not reference West Virginia nor Marshall County at any point).

General Mills 2013 Annual Report, stating that “at least one of our brands is found in 97 percent of U.S. homes”; that, over the last five years, media spending has increased by more than 50 percent to \$895 million in 2013; that international market growth has been exponential, with the Latin American market growing 139 percent. (5, 7)

Affidavit of William C. Beatty, retired police officer and investigator, and retained private investigator, who was sent by plaintiff to the Walmart and Kroger in Marshall County, where he found General Mills products.

Affidavit of Thomas Burgoyne, retained private investigator, whom plaintiff sent to Walmart, Dollar General and Family Dollar, where he found General Mills products, along with advertising circulars included in the local paper for Kroger and Walmart that included ads for General Mills products.

Affidavit of Cathy L. Gellner, who watched television for the plaintiff and saw General Mills advertisements on national networks (NBC, CBS, TLC, Nickelodeon) that were aired in Marshall County, West Virginia.

Affidavit of Corey Murphy, currently superintendent of Marshall County Schools, recounting the nineteen General Mills products that, to his knowledge, are served in the Marshall County schools.

defendant and the forum to establish minimum contacts that result from an action of the defendant purposefully directed toward the forum. *Id.* In the current action, none of the defendants purposefully directed actions toward Marshall County generally nor in connection with the events alleged in plaintiff's Complaint.

Further, several defendants, including defendant Airsquid, Tough Mudder and General Mills, are foreign corporations organized under the laws of different states with principal places of business outside the state of West Virginia. Plaintiff alleges that these defendants conducted business in Marshall County that was of such a nature to satisfy the requirements of W. Va. Code §56-1-1(a)(2). Plaintiff attempts to allege that these defendants "engage in purposeful and regular commercial activities in Marshall County" based upon their advertising efforts and operation in close proximity to Marshall County. However, defendant Airsquid has never engaged in advertising efforts in Marshall County and, in fact, Airsquid performs no advertising in West Virginia. Airsquid's only connection to West Virginia occurred on April 20, 2013, in Berkeley County. Further, defendant Tough Mudder did not conduct business within Marshall County and, if it had any presence in Marshall County at all, it was due to Tough Mudder's social media or website presence. Pursuant to West Virginia case law, neither defendant Airsquid nor defendant Tough Mudder conducted a "substantial portion" of their business within Marshall County. Once again, while plaintiff has alleged that the defendants have a presence in Marshall County, it is no different a presence then they have elsewhere. It is not a **substantial portion** of their effort or enterprises, and plaintiff has not alleged that it is.⁴

The Estate and the Circuit Court of Marshall County have relied extensively on the advertising and marketing the defendants – but mostly General Mills – has conducted in

⁴ Of the 1.6 million Tough Mudder participants, Tough Mudder reports that, in 2013, 64 persons registered listing Marshall County addresses. [App. 000231]

Marshall County, although the advertising was unrelated to the cause of death in this instance.⁵ This Court has clarified the phrase “where the subject cause of action arose” to mean the exact location where the duty owed is alleged to have been violated or breached. *State ex rel. Thornhill v. King*, 233 W. Va. 564, 759 S.E.2d 795 (2014). While *Thornhill* arises in the context of employment contract formation and breach, it is analogous to the instant situation where the Estate has asked this Court to find venue on impermissible grounds – venue in a place where none of the defendants reside and where the cause of action did **not** arise. Airsquid argued *Thornhill* in the Circuit Court, believing it to provide meaningful guidance in this matter, where plaintiff relies upon advertising campaigns by General Mills and/or promotional materials by Tough Mudder as somehow venue determinative. The Court in *Thornhill* found that the locations of offer, acceptance and performance do not set venue; conversely, the location of violation or breach is “where the subject cause of action arose,” and venue is correct at that location. 233 W. Va. 571, 759 S.E.2d at 802.

The *Thornhill*, plaintiff George Roberts worked for Thornhill Group, an automobile dealership in Logan County, West Virginia. *Thornhill*, 233 W. Va. at 566, 759 S.E.2d at 797. In spring 2011, Mr. Roberts learned of Thornhill’s plans to replace him with a younger employee, and in February 2013, Mr. Roberts filed suit in Kanawha County, alleging *inter alia* breach of contract. *Id.* *Thornhill*, by counsel, filed a motion to dismiss, stating that venue was improper in Kanawha County; plaintiff opposed the motion, citing West Virginia case law that identified a three-prong test for selecting venue – where the duty was created, where duty was breached,

⁵ General Mills markets consumer goods, including Wheaties, internationally, including in Marshall County. However, Avishek Sengupta’s death was not as a result of Wheaties purchase or consumption, and Avishek Sengupta’s death did not result from General Mills’ contact with Marshall County, which is not a substantial portion of its corporate footprint in any event.

where the damage was felt. *Id.*⁶ The trial court denied Thornhill's motion to dismiss for improper venue, finding that venue was proper in Kanawha County because the employment contract was formed when Mr. Roberts accepted the contract (by telephone) while standing in his home in Kanawha County and because the damage arising from the breach would be felt most severely in Kanawha County because Mr. Roberts lived there. *Id.* at 567, 759 S.E.2d at 798.

This Court reversed the ruling of the trial court, finding that venue in West Virginia is determined by the residence of any of the defendants or where the cause of action arose, even in the instance of a corporate defendant and an individual plaintiff. *Id.* at 801. While the factual predicates in *Thornhill* (employment contract) may be factually inapposite to this wrongful death claim, nonetheless, *Thornhill* remains among the more recent statements of venue. As such, Airsquid provided it to the Circuit Court and moved for a finding that venue is most appropriate where the cause of action arose, that is, where the alleged breach or violation of duty occurred, that is, in this instance, Berkeley County.⁷ See also Syl., *McGuire v. Fitzsimmons*, 197 W. Va.

⁶ See *Thornhill* at 233 W. Va. at 566, 759 S.E.2d at 797, quoting Syl. pt. 3, *Wetzel County Savings & Loan v. Stern Bros., Inc.*, 156 W. Va. 693, 195 S.E.2d 732 (1973):

[t]he venue of a cause of action in a case involving breach of contract in West Virginia arises within the county: (1) in which the contract was made, that is, where the duty came into existence; or (2) in which the breach or violation of the duty occurs; or (3) in which the manifestation of the breach—substantial damage occurs.

⁷ *Thornhill* also stands for the proposition that several locations can be seen as venue determinative, such as the location where the parties entered the contract, where the parties performed the contract, where the breach occurred and where the damage from the breach is felt most severely. 759 S.E.2d at 799. Indeed, the trial court in *Thornhill* considered several other factors:

Three additional factors that the trial court cited in support of its ruling included: (1) the fact, of which it took judicial notice, that "the Thornhill Group advertises extensively in Kanawha County via both print and broadcast media;" (2) the Thornhill Group's operation of a dealership in Kanawha County, and (3) the likely recusal of the two sitting

132, 135, 475 S.E.2d 132, 135 (1996), finding in the context of legal malpractice that venue can be proper in more than one location – either where the instant (alleged) negligent act occurred or the defendant resides.

To the extent that the Venue Order found venue in Marshall County when the alleged breach occurred in Berkeley County and when none of the defendants reside in Marshall County, it is clearly erroneous and cannot stand.

4. If a civil action is filed in a county in which no venue determinative connections exist, is venue appropriate there?

Pursuant to West Virginia law, venue cannot stand in a county where none of the defendants reside and where the cause of action did not arise. This Court has considered a variety of venue scenarios where the plaintiff can point to some connection to the county in which plaintiff filed; however, this Court has stated repeatedly that it must be where a defendant resides or where the cause of action arose. In *State ex rel. Galloway v. McGraw*, 227 W. Va. 435, 711 S.E.2d 257 (2011), this Court considered a suit brought by Fredeking Law Offices (located in Wyoming County) against Galloway Group (located in Kanawha County), arising out of an alleged breach of contract to share legal fees. 227 W. Va. at 436, 711 S.E.2d at 258. Defendant Galloway challenged venue in Wyoming County by filing a motion to dismiss, but the Circuit Court of Wyoming County denied the motion on the basis that a portion of the fees at issue arose

circuit court judges in Logan County based on their prior actions in suits involving the petitioners.

Id. at 798 n.10. Of note, the *Thornhill* plaintiff, like the plaintiff here, asked the Circuit Court of Kanawha County and then the West Virginia Supreme Court of Appeals to find venue based upon television advertisements televised within the venue plaintiff had selected *sua sponte*. The Supreme Court re-directed course on that determination, relying upon the venue statute in clarifying that the appropriate test is wherein any of the defendants may reside or the cause of action arose.

from WMWA litigation. *Id.* The Circuit Court reasoned in that instance, because some members of the UMWA reside in Wyoming County, then venue is appropriate there. *Id.* This Court granted the petition for writ, dismissing the underlying action. 227 W. Va. at 438, 711 S.E.2d at 260. In granting the petition for writ in *Galloway*, this Court reiterated its position in *Wetzel County Savings & Loan Co. v. Stern Bros. Inc.*, 156 W. Va. 693, 195 S.E.2d 732 (1973), that a breach of contract cause of action arises either where the contract was formed, where the breach occurred or where the damages are made manifest. Syl. pt. 1, *Galloway*. Finding that the contract between Galloway and Fredeking was not formed or breached in Wyoming County, and finding that the damages were not manifest there, this Court granted the writ and dismissed Fredeking's claim. 227 W. Va. at 438, 711 S.E.2d at 260.

In like manner, the instant Agreement was not formed in Marshall County, the alleged breach did not occur in Marshall County, and no damages whatsoever are manifest in Marshall County. To the extent that the Venue Order finds venue in Marshall County, it is clearly erroneous as a matter of law and cannot stand.

5. If, pursuant to West Virginia Rules of Civil Procedure Rule 12(b)(3) and W. Va. Code § 56-1-1(a), a civil action is improperly filed in the wrong county, and therefore is pending before the wrong Circuit Court, should that civil action be dismissed or, in the alternative, transferred to the appropriate venue within West Virginia?

Pursuant to West Virginia law, the appropriate method for challenging venue is through a motion to dismiss. *See Hansbarger v. Cook*, 177 W. Va. 152, 157, 351 S.E.2d 65, 71 (1986), stating that “[t]he proper method of raising the question of improper venue is by a motion to dismiss under Rule 12(b).”⁸ Upon receipt of the Estate's Complaint, Airsquid filed a motion to

⁸ Pursuant to the venue statute, West Virginia Code Section 56-1-1(b), a motion to transfer venue is appropriate

dismiss or, in the alternative to transfer venue to the Circuit Court of Berkeley County, WV, where the cause of action arose and where the only domestic defendant – Peacemaker – resides. This Court has repeatedly granted petitions for writ and granted motions to dismiss, where the underlying suit was filed other than where any of the defendants reside and/or where the cause of action arose. *See, e.g., State ex rel. Thornhill v. King*, 233 W. Va. at 567, 759 S.E.2d at 798; *State ex rel. Galloway v. McGraw*, 227 W. Va. 435, 711 S.E.2d 257 (2011); *State ex rel. Stewart v. Alsop*, 207 W. Va. 430, 533 S.E.2d 362 (2000); *State ex rel. Huffman v. Stephens*, 206 W. Va. 501, 526 S.E.2d 23 (1999).

For all of the reasons demonstrated herein, the Venue Order that places venue in Marshall County operates outside the mandates of West Virginia law as set forth in West Virginia Code Section 56-1-1 and as further delineated by this Court. Because the Venue Order is clearly erroneous as a matter of law, the Venue Order cannot stand, and dismissal is the appropriate remedy.

6. Should this Honorable Court intervene here, where the lower tribunal has misstated and, therefore, misconstrued the terms of the forum selection clause included in the Assumption of Risk, Waiver of Liability and Indemnity Agreement (Agreement) entered between the parties?

At the direction of the Circuit Court of Marshall County and as prescribed in the Trial Court Rules, the Estate initially circulated a proposed order, and defense counsel provided comments and objections (to both form and content). Airsquid received the official submission to the Court of the current bifurcated (venue, arbitration) orders on November 6, 2014, and filed

[w]henever a civil action or proceeding is brought in the county where the cause of action arose under the provisions of subsection (a) of this section, if no defendant resides in the county, a defendant to the action or proceeding may move the court before which the action is pending for a change of venue to a county where one or more of the defendants resides.

formal objections below. Nonetheless, plaintiff's Venue Order was entered virtually verbatim. *See State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 214, 470 S.E.2d 162, 168 (1996).

In its September 15 ruling on venue, the Court had "adopt[ed] the reasoning and analysis set forth by the Plaintiff" and further stated that its "'Venue' ruling and analysis begins and necessarily ends with the '**Venue and Jurisdiction**' clause of the putative agreement." [App. 000979] The Court ended its letter by instructing the Estate to "prepare a draft order reflective of the Court's foregoing determinations." [App. 000980]

Beyond the Court's September 15 correspondence, West Virginia law provides that the test of an appropriate order is whether the order as "adopted by the circuit court accurately reflect[s] the existing law and the trial record." *Cooper*, 196 W. Va. at 214, 470 S.E.2d at 168.

Defendant Airsquid has objected to plaintiff's proposed Venue Order to the extent it fails to be "reflective of the Court's . . . determinations" and to the extent it deviates from the law and/or the record before this Court. Specifically, Airsquid objects as follows: [App. 001000]

Because the Circuit Court's ruling "begins and necessarily ends with the '**Venue and Jurisdiction**' clause of the putative agreement," it is imperative that the Venue Order address fully, fairly and, most importantly, accurately the '**Venue and Jurisdiction**' clause. The Estate repeatedly misstated the venue clause at issue, referencing its terms as "**any** 'appropriate state or federal court'" as opposed to the actual language: "**the** appropriate state or federal court." *See* Venue Order at ¶¶ 22, 27, 28, 29 (emphasis added). Defendant Airsquid maintained below that the use of the definite article "the" is an express enlistment of the venue statute -- where **the** cause of action arose. W. Va. Code 56-1-1.

The Estate's use of "any" is particularly egregious in its analysis of "place" for legal action and "type" of court eligible to consider the claim. Venue Order at ¶ 27. The Circuit

Court's directive that the ruling and analysis begin and end with the Venue and Jurisdiction clause. The draft order expressly and dangerously deviates from that language, stating that the "type of court eligible to hear lawsuits is also defined to be any 'appropriate state or federal court.'" *Id.* Plaintiff has added *sua sponte* the place and type dichotomy, which exceeds the Circuit Court's directive, misstating the clause in a significant manner, broadening "the appropriate" into "any appropriate" court.

Virtually without exception, the Venue Order as prepared by the Estate and entered by the Circuit Court includes the phrase "any appropriate state or federal trial court," which is clearly inaccurate and fails to adhere to the Circuit Court's ruling. Venue Order at ¶¶ 22, 27, 28, 29 (emphasis added). Of particular note, the Estate extended the misstatement even further, claiming that defendants are "consenting to venue in any West Virginia court having subject matter jurisdiction over this case. Thus, Defendants are bound by the terms of their own contract to honor Mrs. Sengupta's selection of Marshall County." Venue Order at ¶ 22 (emphasis added). The Circuit Court of Marshall County entered the draft order in virtually its verbatim form, thereby memorializing incorrectly the Agreement and misstating the facts and law of the case. For that reason, the Venue Order is clearly erroneous, and the petition for writ should be granted.

7. Should this Honorable Court intervene here, where the lower tribunal has misconstrued West Virginia law, where this Court otherwise would not have the opportunity to clarify this point of law before unnecessary discovery and where to proceed will lead to delay and unnecessary cost for which an appeal cannot compensate?

It is axiomatic in West Virginia law that the issue of venue may properly be addressed through a writ of prohibition given this Court's preference for resolving the issue in an original action and given the inadequacy of relief upon appeal.. *See State ex rel. Thornhill*, 233 W. Va. at 567, 759 S.E.2d at 798, relying upon *State ex re. Riffle v. Ranson*, 195 W. Va. 121, 464 S.E.2d

763 (1995). Additionally, this Court has found relief appropriate where the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; where the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; where the lower tribunal's order is clearly erroneous as a matter of law; where the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and where the lower tribunal's order raises new and important problems or issues of law of first impression. *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996). Among these factors, Airsquid and the other defendants have already expended considerable time and resources to the venue issue before beginning what, by all appearances, will be a lengthy, protracted and contentious litigation. To maintain the action in Marshall County – the incorrect venue – only to face the prospect of litigating again in the correct venue seems particularly onerous and wasteful of judicial and other resources. As set forth below and here, the Venue Order falls outside the mandates of West Virginia's venue law, and while a review of the case law demonstrates that this is a recurring issue this Court faces, it is nonetheless an important issue to litigants and to tribunals. For these reasons, Airsquid petitions this Honorable Court for relief at this time, further seeking a finding that the Venue Order is clearly erroneous and cannot stand.

Conclusion.

For all of the reasons set forth herein, defendant Airsquid Ventures, Inc. d/b/a Amphibious Medics and Travis Pittman petition this Honorable Court for relief from “Order Denying Defendants’ Motions to Dismiss Based on Venue and *Forum Non Conveniens*,” entered by the Circuit Court of Marshall County on January 9, 2015. These petitioners seek the relief this Court deems just.

AIRSQUID VENTURES, INC. d/b/a
AMPHIBIOUS MEDICS and
TRAVIS PITTMAN,

By counsel.



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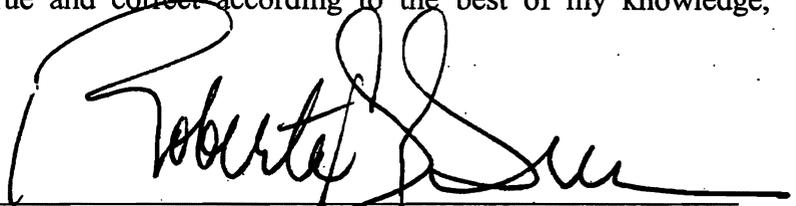
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VERIFICATION

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, TO-WIT:

I, Roberta F. Green, counsel for Airsquid Ventures, Inc. d/b/a Amphibious Medics, being first duly sworn, state and say that the facts and documents contained in the foregoing "Petition for Writ of Prohibition" are true and correct according to the best of my knowledge, information and belief.



Roberta F. Green (WV State Bar #6598)

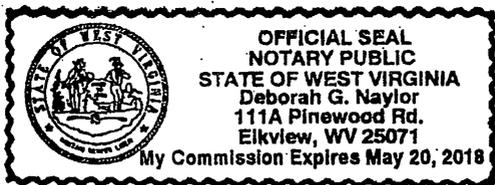
Taken, subscribed and sworn to before me this the 6th day of February, 2015.

My commission expires:



Notary Public

[NOTARY SEAL]



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. _____

STATE OF WEST VIRGINIA EX REL. AIRSQUID
VENTURES, INC. (DBA AMPHIBIOUS MEDICS),
Defendant Below, Petitioner,

v.

HONORABLE DAVID W. HUMMEL, JR., Judge of the
Circuit Court of Marshall County, West Virginia,
Respondent.

CERTIFICATE OF SERVICE

I, David L. Shuman / David L. Shuman, Jr./Roberta F. Green do hereby certify that I served this 6th day of February, 2015, the foregoing "Petition for Writ of Prohibition" upon the below listed counsel of record, by depositing true copies thereof in the United States mail, postage prepaid, in an envelope addressed to them, which address is their last known address:

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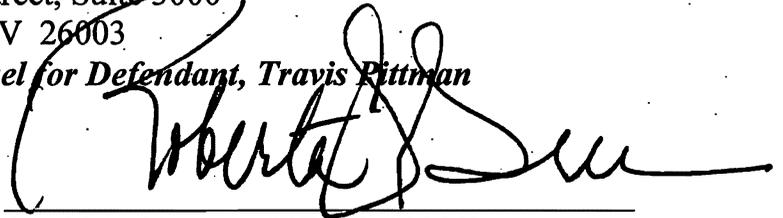
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