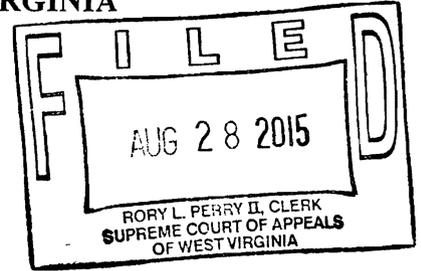


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 15-0852



State of West Virginia ex rel.
RAJAI T. KHOURY, M.D., and
KHOURY SURGICAL GROUP, INC.,

Petitioners and
Defendants Below,

v.

Upon Original Jurisdiction
in Prohibition
No. _____

THE HONORABLE
JASON A. CUOMO, Judge of the
Circuit Court of the First Judicial Circuit,
and NICOLE SCARCELLI

Respondents.

From the Circuit Court of Ohio County, West Virginia
Civil Action No. 15-C-90

PETITION FOR WRIT OF PROHIBITION

RAJAI T. KHOURY, M.D., and
KHOURY SURGICAL GROUP, INC.

By Counsel

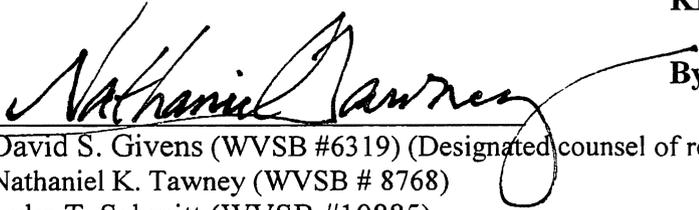

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I. QUESTION PRESENTED

1. Whether a trial court abuses or exceeds its legitimate powers when it denies a motion to dismiss based upon *forum non conveniens* in a medical malpractice action where the plaintiff was a resident of the State of Ohio at the time of the subject surgery and remains a resident of the State of Ohio; where the plaintiff's pre-surgical medical treatment was rendered in Ohio; where the defendant physician performed the surgery in Ohio; where the defendant physician conducted the post-surgical follow-up visits in Ohio; where the alleged negligence was discovered in Ohio; where the plaintiff received all subsequent medical treatment in Ohio; and where the only known witness located in West Virginia is the defendant physician.

The circuit court¹ concluded that a balancing of the factors set forth in West Virginia Code Section 56-1-1a weighed in favor of denial of the Defendants' motion to dismiss.

II. STATEMENT OF THE CASE

A. Introduction

This case raises important issues concerning the application of West Virginia's *forum non conveniens* statute, West Virginia Code Section 56-1-1a. The case is a medical professional liability action alleging that Petitioner and Defendant Below, Rajai T. Khoury, M.D. ("Dr. Khoury"), negligently performed a right first rib resection on Respondent and Plaintiff Below,

¹ The Order from which Petitioners seek relief was signed and entered by the Honorable Martin J. Gaughan on Friday, July 31, 2015. (See Order, p. 14, Appendix 14.) The Honorable Jason A. Cuomo was appointed to serve as Judge of the First Judicial Circuit of West Virginia by Governor Earl Ray Tomblin and was sworn into office on Monday, August 3, 2015, and now presides over this action pending in the Circuit Court of Ohio County, West Virginia. Because the Petitioners ask this Court to prohibit the circuit court from proceeding further, the named Respondent is the Honorable Jason A. Cuomo – the presiding judicial officer.

Nicole A. Scarcelli, resulting in the removal of a portion of the Plaintiff's clavicle bone rather than her right first rib.

The Plaintiff is and was a resident of Ohio. All of her pre-surgical care was rendered in Ohio. Her diagnosis of thoracic outlet syndrome ("TOS") was made in Ohio. The surgery to treat her TOS was performed in Ohio. The post-surgical follow-up visits were conducted in Ohio. The alleged negligence was discovered in Ohio by Ohio health care providers. All of the Plaintiff's subsequent medical treatment was provided in Ohio by Ohio health care providers. The only connection to West Virginia is that the Defendants maintain residence in this State.

B. Factual Background

This case arises out of a surgery Dr. Khoury performed on the Plaintiff on May 28, 2013, at East Ohio Regional Hospital ("EORH") located in Martin's Ferry, Ohio. The Plaintiff, an Ohio resident, was undergoing the procedure to treat her thoracic outlet syndrome ("TOS"). TOS is a term to describe a group of disorders that occur where there is compression, injury, or irritation of the nerves and/or blood vessels (arteries and veins) in the lower neck and upper chest area.²

1. The Plaintiff's pre-surgical treatment

The Plaintiff, a resident of Trumbull County in northern Ohio, began treatment related to her TOS with her primary care physician, Porsche Beetham, D.O. ("Dr. Beetham"), at her office

² TOS is named for the space (the thoracic outlet) between the lower neck and upper chest where a grouping of nerves and blood vessels is found. When the blood vessels and/or nerves in the tight passageway of the thoracic outlet are abnormally compressed, it can cause TOS. The signs and symptoms of TOS include neck, shoulder, and arm pain, numbness or impaired circulation. Typically, the pain of TOS increases when raising the affected arm. (See "Diseases and Conditions Thoracic Outlet Syndrome," available at http://my.clevelandclinic.org/services/heart/disorders/hic_Thoracic_Outlet_Syndrome.)

in Cadiz, Ohio. (See Am. Compl., p. 1, ¶ 1, Appendix 027.)³ Subsequently, Dr. Beetham referred the Plaintiff to Dr. Khoury, who the Plaintiff saw initially on Wednesday, April 3, 2013, at his office located at 51520 National Road, East, St. Clairsville, Ohio. (See Am. Compl., p. 2, ¶ 9, Appendix 028.)

In connection with Dr. Khoury's initial treatment, the Plaintiff underwent diagnostic procedures including a venogram procedure at EORH by Carl Barosso, M.D. ("Dr. Barosso") and an MRI at Harrison Community Hospital in Cadiz, Ohio. Subsequent follow-up treatment with Dr. Khoury in Ohio resulted in the diagnosis of TOS and the May 28, 2013, surgery giving rise to this cause of action. The surgery was performed in Ohio at EORH. (See Am. Compl., p. 3, ¶ 15, Appendix 029.)

2. The Plaintiff's post-surgical treatment

All of the Plaintiff's medical treatment following the May 28, 2013, surgery occurred in Ohio. The Plaintiff underwent physical therapy at Harrison Community Hospital in Cadiz, Ohio.

The Plaintiff also visited her primary care physician, Dr. Beetham, with continued complaints, and was referred for a second opinion to the Cleveland Clinic located in Cleveland, Ohio on July 16, 2013. (See Am. Compl., p. 5, ¶ 25, Appendix 031.) Sudish Murty, M.D. ("Dr. Murty") at the Cleveland Clinic concluded that the Plaintiff had a partially resected clavicle and an intact right first rib. (See Am. Compl., p. 5, ¶¶ 25-26, Appendix 031.)

Following her initial visit to the Cleveland Clinic, the Plaintiff continued to treat with Dr. Beetham in Cadiz and also returned to the Cleveland Clinic to be evaluated by Rebecca L. Kelso, M.D. ("Dr. Kelso") and Daniel Clair, M.D. ("Dr. Clair"). (See Am. Compl., p. 5, ¶¶ 26-29,

³ The day after the Plaintiff filed her Complaint, she filed an Amended Complaint to correct typographical errors. (See Compl., Appendix 016-026); (See Am. Compl., Appendix 027-038). For purposes of this Petition, all subsequent references to the Plaintiff's Complaint will be to her Amended Complaint.

Appendix 031.) She subsequently underwent procedures by Jeanwan Kang, M.D. (“Dr. Kang”) and then a right first rib resection by Dr. Kelso at the Cleveland Clinic on September 5, 2013. (See Am. Compl., p. 5, ¶¶ 25-26, 29, Appendix 031.)

After Dr. Kelso’s surgery, the Plaintiff also had follow-up care at the Cleveland Clinic with Peter Evans, M.D. (“Dr. Evans”) and again underwent physical therapy at Harrison Community Hospital. (See Am. Compl., p. 6, ¶ 30, Appendix 032.)

C. Procedural History

On March 24, 2015, the Plaintiff filed her Complaint in the Circuit Court of Ohio County, West Virginia, asserting claims against Dr. Khoury and Khoury Surgical Group. (See Compl. ¶¶ 1-59, Appendix 016-026.) Specifically, the Plaintiff asserts the following causes of action: (1) negligence, (2) battery, (3) lack of informed consent, and (4) intentional infliction of emotional distress.

The Defendants moved to dismiss the action for *forum non conveniens* pursuant to West Virginia Code Section 56-1-1a. The Plaintiff opposed the motion. Following a hearing on June 26, 2015, the circuit court denied the Defendants’ motion by entering the Plaintiff’s proposed order verbatim on July 31, 2015. (See Proposed Order, Appendix 204-219); (See Order, Appendix 001-015).

D. Standard of Review

“This Court has consistently held that ‘[p]rohibition will lie to prohibit a judge from exceeding his legitimate powers.’ *State ex rel. Mylan, Inc. v. Zakaib*, 227 W. Va. 641, 645, 713 S.E.2d 356, 360 (2011) (citing Syl. Pt. 2, *State ex rel. Winter v. MacQueen*, 161 W. Va. 30, 239 S.E.2d 660 (1977)). With regard to venue disputes specifically, this Court recently held:

[i]n the context of disputes over venue, such as dismissal for *forum non conveniens*, this Court has previously held that a writ of prohibition is an appropriate remedy “to resolve the issue of where venue for a civil action lies,” because “the issue of venue [has] the potential of placing a litigant at an unwarranted disadvantage in a pending action and [] relief by appeal would be inadequate.” *State ex rel. Huffman v. Stephens*, 206 W. Va. 501, 503, 526 S.E.2d 23, 25 (1999); *see also 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.”)

State ex rel. Ford Motor Co. v. Neibert, 2015 W. Va. LEXIS 252, *9 (April 9, 2015).

When there is no claim that a court has committed a legal error, this Court reviews a circuit court’s decision on *forum non conveniens* under an abuse of discretion standard. *Mylan*, 227 W. Va. at 645, 713 S.E.2d at 360. However, “[t]he normal deference accorded to a circuit court’s decision . . . does not apply where the law is misapplied or where the decision to transfer hinges on an interpretation of a controlling statute.” *State ex rel. Riffle v. Ranson*, 195 W. Va. 121, 124, 464 S.E.2d 763, 766 (1995); *see also Mylan*, 227 W. Va. at 645-46, 713 S.E.2d at 360 (holding that *de novo* review applies to allegation that circuit court “misapplied and/or misinterpreted the [*forum non conveniens*] statute”).

The circuit court’s ruling places the Defendants at an unwarranted disadvantage in a pending action by denying them access to material evidence and a fair trial and relief by appeal would be inadequate. For this reason, this Court has original jurisdiction over this action and a writ of prohibition is an appropriate remedy.

Because this case implicates the circuit court’s misinterpretation and misapplication of the *forum non conveniens* statute, as in *Zakaib*, *de novo* review is appropriate. Nevertheless, for the reasons explained below, a writ of prohibition should issue even under an abuse of discretion standard.

III. SUMMARY OF ARGUMENT

The circuit court erred in refusing to dismiss this case for *forum non conveniens* under West Virginia Code Section 56-1-1a. This case is a personal injury action governed by Ohio law, brought by an Ohio resident against a physician licensed by the State of Ohio who performed the surgery in question in Ohio, for injuries suffered in the State of Ohio, which were discovered in and subsequently treated in Ohio. Under the statutory test articulated by the West Virginia Legislature, this action should be dismissed for *forum non conveniens*.

In denying the Defendants' motion to dismiss for *forum non conveniens*, the circuit court committed several errors of law. Because the circuit court's decision conflicts with the decisions of this Court and the plain language of the *forum non conveniens* statute in numerous respects, a writ of prohibition should be issued.

The circuit court misinterpreted and misapplied the second, fifth, and sixth statutory factors of West Virginia Code Section 56-1-1a.

With regard to the second and sixth statutory factors, the circuit court found that maintenance of this action in West Virginia would not work a substantial injustice against the Defendants and that the balance of the private and public interests favored its retaining jurisdiction over this case. In so ruling, the circuit court incorrectly rejected the Defendants' argument that they would be substantially prejudiced by their inability to compel the attendance at a trial in West Virginia of key witnesses residing in the State of Ohio, and that the Plaintiff would suffer no prejudice by litigating her claims in Ohio – where she resides.

The circuit court then compounded this error by imposing a heightened burden of proof upon the Defendants that is at odds with the statutory language of West Virginia Code Section 56-1-1a. The circuit court erred in finding that “[t]he Defendants have offered insufficient

evidence to support their speculative statements that they may have limited access to Plaintiff's treating physicians or that these health care providers will be unwilling to cooperate." (See Order, p. 11, ¶ 48, Appendix 011.) West Virginia Code Section 56-1-1a imposes no evidentiary burden on a moving party to demonstrate prospectively that individuals will not later appear voluntarily at trial.

For these reasons, the second and sixth statutory factors both favor dismissal and the circuit court's determination constitutes error.

With regard to the fifth statutory factor, the circuit court erred in ruling that the cause of action accrued, in part, in West Virginia. The arguments raised by the Plaintiff, and accepted by the circuit court, are erroneous. Because all causes of action pled accrued in Ohio, the circuit court should not have placed any weight on the Plaintiff's choice of forum, let alone the tremendous deference demonstrated in its Order.

When the factors articulated by the Legislature are applied properly, dismissal of this case for *forum non conveniens* is plainly warranted. Ohio provides an available and far more appropriate forum for this Ohio-based case governed by Ohio law. The Plaintiff resides in Ohio. The Plaintiff's medical condition was treated in Ohio before the surgery. The surgery was performed in Ohio. All (non-retained) witnesses but Dr. Khoury are located in Ohio. The Defendants will be seriously prejudiced by having to litigate this case in West Virginia given that West Virginia courts lack compulsory process over the Ohio witnesses that will be key to the defense of this action.

This Court should proceed to consider the errors identified by the Petitioners. Doing so will further aid in the development of the *forum non conveniens* doctrine in this State, provide

additional guidance to the circuit courts and litigants in West Virginia, and afford the Defendants a fair trial.

IV. STATEMENT RESPECTING ORAL ARGUMENT AND DECISION

Oral argument is appropriate pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure to aid in this Court's consideration of this case. Argument is proper pursuant to Rule 19 because this case involves, *inter alia*, assignments of error in the application of settled law and an exercise of discretion that is unsustainable. *See W. Va. R. App. P. 19(a)(1), (2)*.

V. ARGUMENT

The *forum non conveniens* statute mandates that a trial court must consider all eight enumerated factors in determining whether or not to dismiss an action. When the circuit court's Order is examined, it is apparent that the circuit court committed error regarding the second, fifth, and sixth statutory factors and improperly based its decision almost exclusively upon deference to the Plaintiff's choice of venue. Such a ruling only facilitates the improper forum shopping the statute was designed to curtail.

A. The *forum non conveniens* statute

Trial courts in West Virginia "shall decline to exercise jurisdiction" under the doctrine of *forum non conveniens* and "shall . . . dismiss the claim or action" when, "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 . . ." *W. Va. Code § 56-1-1a(a)* (emphasis added).⁴

⁴ In 1990, this Court "first adopted the common law doctrine of *forum non conveniens*, permitting courts to decline to exercise jurisdiction in favor of an alternate forum outside of the state when doing so would 'promote the

The *forum non conveniens* statute expressly states that although a plaintiff's choice of forum is entitled to deference, that preference is "diminished when the plaintiff is a non-resident and the cause of action did not arise in this state." *Id.* Acknowledging this statutory language, this Court has held that, in cases where none of the plaintiffs are residents and no cause of action arose in this state, "the preference ordinarily granted to the plaintiff's choice of forum 'may be diminished.'" *Mylan*, 227 W. Va. 648, 713 S.E.2d at 363. In such cases, reliance on the plaintiff's choice of forum without due consideration of the factors enumerated in the statute constitutes reversible error. *Ford Motor Co.*, 2015 W. Va. LEXIS 252. Indeed, this Court has indicated that it would not necessarily be error for a trial court to give no deference to a plaintiff's choice of forum. *State ex rel. J.C. v. Mazzone*, 2015 W. Va. LEXIS 259, *31 n.35 (April 10, 2015) (affirming lower court's dismissal based upon the doctrine of *forum non conveniens*).

Moreover, while some consideration of the defendant's domicile is proper under the second and sixth enumerated statutory factors, "no presumption of convenience should be afforded a forum on the basis that it is the defendant's domicile[.]" *Mylan*, 227 W. Va. at 651, 713 S.E.2d at 366.

In determining whether to grant a motion to dismiss based upon the doctrine of *forum non conveniens*, a trial court must consider several factors:

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

convenience of the witnesses and the ends of justice.'" *Mace v. Mylan Pharms., Inc.*, 227 W. Va. 666, 671 n.3, 714 S.E.2d 223, 228 n.3 (citing Syl. Pt. 1, *Norfolk & W. Ry. Co. v. Tsapis*, 184 W. Va. 231, 400 S.E.2d 239 (1990), superseded by statute, W. Va. Code § 56-1-1a). "In 2003, the Legislature attempted to codify a version of that doctrine by amending West Virginia Code 56-1-1, the general venue statute, to add a provision governing the dismissal of a case in West Virginia on the basis that the acts or omissions giving rise to the claim(s) occurred in another state." *Mace*, 227 W. Va. at 671 n.3, 714 S.E.2d at 228 n.3. "After this Court invalidated that provision under the Privileges and Immunities Clause of the United States Constitution, the Legislature, in 2007, enacted West Virginia Code § 56-1-1a, entitled '*Forum non conveniens*.'" *Id.* (internal citation omitted).

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 conflicts of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty;**
7. Whether or 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. Va. Code § 56-1-1a(a)(1)-(8) (LEXIS 2015) (Emphasis added to factors at issue in this Petition); *see also Mace*, 227 W. Va. 666, 714 S.E.2d 223.

Trial courts must consider all eight of these enumerated factors “as a means of determining whether, in the interest of justice and for the convenience of the parties, a claim or

action should be stayed or dismissed on the basis of *forum non conveniens*.” *Mylan*, 227 W. Va. at 649, 713 S.E.2d at 364.

B. The ruling of the circuit court

The circuit court found only two out of eight factors favored a denial of the motion to dismiss.⁵ As explained below, the circuit court’s findings that factors two and six favored its continued exercise of jurisdiction were based upon error, and the circuit court improperly based its decision upon its deference to the Plaintiff’s choice of forum.

The Respondent and Plaintiff Below did not contest factors 1, 3, 4, or 8. In other words, the parties were in agreement that fifty percent (50%) of the statutory factors favored dismissal of this action. Accordingly, in its Order denying the motion to dismiss, the circuit court found that these four factors favored dismissal. (See Order, pp. 5, 9, 14, ¶¶ 16, 38, 39, and 64, Appendix 005, 009, 014.)

In addition, the circuit court found that the seventh statutory factor also favored dismissal because dismissal would not result in an unreasonable duplication of litigation, fees and costs. (See Order, p. 13, ¶ 63, Appendix 013.) Therefore, the circuit court found that five of the eight statutory factors favored dismissal.

⁵ The table below outlines the circuit court’s findings on the eight statutory factors:

Favors Dismissal of Action	“Neutral” Factor	Favors Denial of Motion
1		
		2
3		
4		
	5	
		6
7		
8		

Of the three remaining factors, the circuit court found that the fifth factor was “neutral” and did not favor dismissal or denial of the motion. (See Order, p. 10, ¶ 42, Appendix 010.) Thus, the circuit court found that only factors two and six favored denial of the Defendants’ motion.

Accordingly, the circuit court determined that this action ought to remain in West Virginia despite finding that only two of eight statutory factors favored such an outcome, demonstrating the improper weight and deference the circuit court afforded the Plaintiff’s choice of forum. Further, the circuit court’s analysis regarding the two factors it found in the Plaintiff’s favor is erroneous.

C. The circuit court erred in its determination that maintaining venue would not work a substantial injustice to Respondents under W. Va. Code § 56-1-1a(2).

The circuit court erred in its determination that the Petitioners and Defendants Below were not subjected to substantial injustice in this forum. As justification for its conclusion that this case should proceed in West Virginia, the circuit court found that Dr. Khoury, as a resident of Ohio County, and Khoury Surgical Group, with its principle place of business in Ohio County, chose to practice medicine in West Virginia and to take advantage of the laws of West Virginia. (See Order, pp. 6-7, ¶¶ 25-26, Appendix 006-007.) Similarly, the circuit court concluded that, by transacting business in this state, the defendants developed a reasonable expectation that they would be subject to being named a defendant in West Virginia’s civil justice system. (See Order, p. 7, ¶ 27, Appendix 007.) These considerations, however, have no place in the statutorily-guided *forum non conveniens* analysis. While such facts inform a trial court’s determination where personal jurisdiction is challenged, the Defendants conceded that the Circuit Court of

Ohio County, West Virginia may permissibly exercise personal jurisdiction over them.⁶ This reasoning by the circuit court demonstrates a fundamental misunderstanding of the analysis required by the statute. The Defendants argued not that the circuit court was without jurisdiction *ab initio*, but instead that the court should decline to exercise that jurisdiction. To lend weight to these jurisdiction-giving factors in a *forum non conveniens* inquiry turns the *forum non conveniens* analysis on its head.

The purpose of the *forum non conveniens* statute is to permit courts which *may* validly exercise personal jurisdiction over defendants to decline to do so where there is an alternative forum where the action may be more appropriately adjudicated. Without personal jurisdiction over a defendant, a trial court would have no occasion to engage in a *forum non conveniens* analysis. Therefore, the circuit court's consideration of matters not set forth in West Virginia Code Section 56-1-1a and relevant only to a personal jurisdiction inquiry constitutes a misapplication of law. That Dr. Khoury and Khoury Surgical Group may have purposefully availed themselves of the laws of West Virginia generally, and may have reasonably anticipated being hailed into court here generally, is immaterial to the analysis.

Petitioners are mindful of this Court's conclusion in *State ex rel Mylan, Inc.* that some consideration of the moving party's ties to West Virginia are necessary under West Virginia Code Section 56-1-1a(2). *See* 227 W. Va. at 365-367, 713 S.E.2d at 650-652. However, in *State ex rel. Mylan* the operative consideration for whether "substantial injustice" existed concerned the fact that Mylan Pharmaceuticals, Inc., a large corporation, had many witnesses in West

⁶ There is no dispute that Ohio is an available, alternative forum for the adjudication of this action. (See Memorandum of Law in Support of Motion to Dismiss, p. 6, Appendix 046 ("Defendants consent to personal jurisdiction in Ohio for purposes of this litigation" and "agree to waive [statute of limitations] defenses"); (See Pl.'s Resp. in Opp. to Def.'s Mot. to Dismiss, p. 6, Appendix 136 ("based upon the Defendants consenting to personal jurisdiction in Ohio and waiving any applicable statute of limitations defenses, plaintiffs do not dispute that Ohio is an alternate forum").)

Virginia as well as corporate documents. Such is not the case here, where Dr. Khoury is a party and the sole witness located in West Virginia, and the production of the Respondent's medical records is a non-issue because those records were provided to the Plaintiff prior to the commencement of this action when she requested them and provided a medical records authorization form to Petitioners.⁷

Accordingly, the circuit court's reliance on the Petitioners' decision to do business in West Virginia as articulated in its Order constitutes error.

D. The circuit court erred in determining that the sixth factor of W. Va. Code § 56-1-1a, concerning the balance of the private interests of the litigants, did not favor dismissal.

The circuit court erred in determining that the private interests of the litigants weighed "heavily" in favor of retaining jurisdiction over this action and should have determined the opposite given the Petitioners' interest in a fair trial and the lack of any advantage to the Respondent/Plaintiff Below.

West Virginia Code Section 56-1-1a(a)(6) requires trial courts to evaluate whether the private interests of the litigants before it and the public interest in general favor dismissal of an action so that it may proceed in an alternative forum. A specific private factor cited in the statute pertinent to this matter includes the "availability of compulsory process for attendance of unwilling witnesses." *See W.Va. Code § 56-1-1a(a)(6)*.

The primary issues in this case will be the damages suffered by the Plaintiff as a result of the procedure performed by Dr. Khoury on May 28, 2013. The Plaintiff presented to Dr. Khoury with an existing medical condition which caused her significant discomfort and limitation. Dr.

⁷ The *Mylan* Court also considered the residence of the defendant relevant to the sixth factor concerning "relative ease of access to sources of proof" and the cost of obtaining attendance of witnesses. 227 W. Va. at 651, 713 S.E.2d at 366. For the same reasons as above, the Petitioners' residence is not relevant to this factor in this particular case.

Khoury agreed to treat this condition surgically. During the surgery, Dr. Khoury removed a portion of the Plaintiff's clavicle instead of a portion of her right first rib. The Plaintiff alleges significant limitations and complications as a result of this alleged negligence. Accordingly, evidence relating to the Plaintiff's mental and physical condition prior to and following the surgery is paramount in this case.

Aside from retained experts, the Plaintiff's health care providers (both those seen before and after the surgery) and the Plaintiff's acquaintances exclusively possess knowledge of her condition both before and after the surgery. Aside from the Plaintiff, these witnesses are the sole sources of information concerning the Plaintiff's pain and limitations before the surgery and those she experienced after the surgery. All of these witnesses reside in Ohio.

In support of their motion to dismiss, the Defendants identified the primary and unavoidable consequence of proceeding in West Virginia: the risk that witnesses and evidence may be unavailable to them (or the Plaintiff) as a result of the circuit court's inability to compel residents of Ohio to appear before it and give testimony at trial. (See Appendix 046-047, 049-051, and 164-166.)

Notwithstanding, the circuit court found that “[a]s for any concern with lay witnesses and expert witnesses designated by the Plaintiff, it has been represented to the Court that these witnesses (as well as the Plaintiff herself), *absent any unforeseen circumstances*, will voluntarily appear for their depositions and trial testimony.” (See Order, p. 10-11, ¶ 46, Appendix 010-011.) (Emphasis added). The circuit court further found that “[w]hile Defendants’ principally rely upon the fact that Plaintiff’s treating physicians are located out of state, this fact alone is insufficient to overcome the significant private interests of the parties and public interests of this State.” (See Order, p. 11, ¶ 47, Appendix 011.) Notably, the circuit court cited no advantage to

the Plaintiff in proceeding in West Virginia over Ohio, and made no findings as to how proceeding in West Virginia promoted the Plaintiff's private interests. Instead, the circuit court focused on the proximity of the Petitioners' residence to the Ohio County courthouse and accepted Respondent's speculative representations that witnesses will cooperate— ignoring the risk Petitioners will face in securing a fair trial.

The plaintiff in a civil case has neither control over lay witnesses not employed by her to give testimony at trial nor a duty to ensure such witnesses appear. Neither the Plaintiff nor the circuit court can guarantee the voluntary cooperation of fact witnesses and treating physicians, and neither the circuit court nor the parties possess the means to compel unwilling residents of Ohio to travel to West Virginia to give trial testimony.

The circuit court improperly characterized the Defendants' arguments as "speculative" and found that the Defendants offered "insufficient evidence" to prove "that they may have limited access to Plaintiff's treating physicians or that these health care providers will be unwilling to cooperate." The Petitioners should not have to demonstrate or prove that witnesses known or learned through discovery will not cooperate. Because of state and federal privacy laws, the Petitioners cannot speak to the Plaintiff's health care providers. Presumably, the Plaintiff, who has treated with these physicians and has access to them, knows what their testimony will be. The Petitioners do not. Likewise, because there has been no discovery, the Petitioners do not even know the identities of all persons known to have discoverable information. Put simply, the Petitioners currently have no way of knowing what witnesses they may wish to call at trial, or what the Plaintiff's treating physicians might say. What the Petitioners do know conclusively is that proceeding in West Virginia puts them at substantial risk

of having material evidence in the form of live fact and expert witness testimony unavailable to them.

The Plaintiff has not identified a single witness who may be called at trial who resides in West Virginia save for Dr. Khoury (who is a party and must participate). Therefore, at present only an Ohio court will have the ability to ensure that all witnesses may be compelled to appear if necessary. West Virginia courts cannot provide this important fairness to the litigants.

The circuit court further erred when it imposed a requirement on the Defendants not found in the statute. Neither West Virginia Code Section 56-1-1a(a)(2) nor Section 56-1-1a(a)(6) requires an evidentiary showing that witnesses will not agree to voluntarily participate before discovery has even been conducted. Imposing such an unfair burden on the Defendants is a misapplication of West Virginia Code Section 56-1-1a and constitutes error.

Finally, the circuit court also supported its conclusion by noting that “regardless of the state where the trial occurs, it is probable that it will be necessary to secure some third-party testimony through the usual methods of foreign depositions and/or videotape depositions to be played at trial as this is a reality commonly encountered in tort claims filed in this forum.” (See Order, p. 11, ¶ 48, Appendix 011.) This finding strips the Petitioners of the fundamental right to call witnesses, present live testimony, and challenge live witnesses from the witness stand. Any lawyer who has tried a case knows there is simply no substitute for live examination of witnesses at trial. Indeed, this Court has previously observed, “[c]ross-examination is the engine of truth.” *State v. Thomas*, 187 W. Va. 686, 691, 421 S.E.2d 227, 232 (1992); see *Multiplex, Inc. v. Town of Clay*, 231 W. Va. 728, 738, 749 S.E.2d 621, 631 (2013) (parties must be allowed “to present evidence on their own behalf and to test their opponents’ evidence by cross-examination, ‘the greatest legal engine ever invented for the discovery of truth[.]’”).

To the fullest extent possible, litigants should have the right to have the jury – the arbiters of fact and sole judges of credibility – assess a witness’ live presentation under direct and cross examination. Proceeding in Ohio rather than West Virginia would guarantee both the Defendants and the Plaintiff the ability to offer or challenge witnesses in this fashion. As such, the circuit court erred in finding that the private interests of the litigants did not warrant dismissal for *forum non conveniens*.

E. The circuit court erred in determining that the public interest consideration of the sixth factor also does not favor dismissal.

The circuit court erroneously concluded that the public interest also favored denial of the motion. When weighing this interest, the circuit court is to consider, among other things, “the interest in having localized controversies decided within the State”, “the avoidance of unnecessary problems in conflicts of laws, or in the application of foreign law”, and “the unfairness of burdening citizens in an unrelated forum with jury duty”. See *W. Va. Code § 56-1-1(a)(6)*. Ohio has an interest in regulating the conduct of physicians it licenses who practice in its hospitals on its residents. Similarly, Ohio courts have an interest in applying and construing their own laws, which will apply since West Virginia courts apply the doctrine of *lex loci delicti* (“the substantive rights between the parties are determined by the law of the place of injury”). *Chemtall Inc. v. Madden*, 216 W. Va. 443, 451, 607 S.E.2d 772, 780 (2004); see *Weethee v. Holzer Clinic*, 200 W. Va. 417, 490 S.E.2d 19 (1997); *Hayes v. Roberts & Schafer Co.*, 192 W. Va. 368, 452 S.E.2d 459 (1994); *J.C.*, 2015 W. Va. LEXIS at *37-38 (“[r]ecognizing that West Virginia law cannot govern the petitioners’ claims because their alleged injuries arose in other states”).

Moreover, Ohio citizens have a substantial interest in deciding controversies, such as this one, which arise out of torts allegedly committed within its boundaries against its residents. See

Heritage Funding & Leasing Co. v. Phee, 120 Ohio App. 3d 422, 430, 698 N.E.2d 67, 73 (1997) (holding “[a] state has an especial interest in exercising jurisdiction over those who commit torts within its territory because torts involve wrongful conduct which a state seeks to deter, and against which it attempts to afford protection . . . Ohio has an obvious interest in exercising jurisdiction over torts committed within its territory”) (internal citations omitted); *see also Fallang v. Hickey*, 40 Ohio St. 3d 106, 532 N.E.2d 117 (1988).

Finally, the service of the citizens of West Virginia on juries should be reserved for those matters involving torts committed in West Virginia against West Virginia residents. The imposition and burden of this case should rest on the residents and jurists of Ohio. *See Mace*, 227 W. Va. at 677, 714 S.E.2d at 234 (Ketchum, J., dissenting) (“West Virginia has very few trial judges and limited judicial resources . . . [w]e should worry about West Virginia residents and torts that occur in West Virginia, rather than injuries suffered by [residents of other states] that occurred in [those states].”)

F. The circuit court erred in its determination that the fifth factor of W. Va. Code § 56-1-1a was neutral because none of the claims of the Plaintiff Below accrued in West Virginia.

The circuit court erroneously concluded that the fifth statutory factor, which requires consideration of “where the cause of action accrued,” was “neutral” and did not favor either a grant or denial of the motion to dismiss. As explained below, this factor clearly favors dismissal of this action and the circuit court’s determination that the factor was “neutral” was based upon legal error. Further magnifying this error is the weight assigned by the circuit court to the Plaintiff’s choice of forum based upon its erroneous legal conclusions. (See Order, pp. 3, 4, 14, ¶¶ 12, 14, 65, Appendix 003-004, and 014.)

1. The circuit court erred in concluding that Dr. Khoury committed tortious conduct in West Virginia.

The circuit court's conclusion that certain acts alleged by the Plaintiff constitute additional or separate tortious acts or omissions is error. The Plaintiff argued that the cause of action accrued, in part, in West Virginia based upon Dr. Khoury's mailing of a letter three days after the surgery from his office in West Virginia to her primary care physician in Ohio wherein he erroneously stated that the Plaintiff had undergone a first rib resection when he had inadvertently resected a portion of her clavicle instead. Because the alleged surgical negligence was committed in Ohio, this derivative continuation of that alleged negligence relied upon by the circuit court does not change the conclusion that the cause of action accrued, in whole, in the State of Ohio.

Although the circuit court ultimately ruled that the fifth factor was a "neutral" factor which did not favor dismissal or its exercise of jurisdiction, in doing so the circuit court incorrectly agreed with the Plaintiff's argument that her cause of action arose, in part, in West Virginia. (See Order, p. 5-6, 9-10, ¶¶ 17, 21-23, 40-42, Appendix 005-006, and 009-010.) To the contrary, this factor wholly favors dismissal for *forum non conveniens*.

Specifically, the circuit court found:

17. Plaintiff has asserted that Dr. Khoury was not only negligent during the May 28, 2013, surgery, but also committed tortious conduct thereafter by failing to advise both the Plaintiff and her treating physicians, including her primary care doctor, that he removed the wrong bone.

18. For example, on May 31, 2013, Dr. Khoury sent a letter to Nicole Scarcelli's family physician stating: "Your patient Nicole Scarcelli underwent a right 1st rib resection on May 28, 2013, at East Ohio Regional Hospital." Plaintiff contends the May 31, 2013, letter, constitutes an act of misrepresentation, gross negligence and recklessness; and was sent from Dr. Khoury's

office and principle place of business located at 20 Medical Park, Suite 203, Wheeling, Ohio County, West Virginia.

...

20. In addition, Plaintiff asserts the Defendants made further representations by billing Nicole Scarcelli's insurance for the removal of her rib, when in fact he removed her clavicle, and further collected the fee from the surgery here in West Virginia, which Plaintiff again contends are predicate acts to support an award of punitive damages.^[8]

21. Plaintiff also alleges, in part, that Dr. Khoury's misrepresentations to Nicole Scarcelli's primary care doctor, Dr. Porsche Beetham, prevented Plaintiff's primary care physician from taking action to prevent further damage and injury to Nicole Scarcelli by cancelling the improper medical treatment ordered by the Defendant following the initial surgery, as well as preventing Plaintiff's primary care doctor from promptly sending the Plaintiff to another surgeon to have the correct surgery performed.

22. As a result, Plaintiff alleges that she underwent physical therapy with a resected clavicle causing her extreme pain, suffering and further injury, as well as causing Plaintiff to endure months of pain and suffering while her condition went misdiagnosed.

(See Order, pp. 5-6, ¶¶ 17-22, Appendix 005-006.) The circuit court then found:

23. These allegations of the Plaintiff support that the Defendants committed tortious conduct in both West Virginia and Ohio, demonstrating that West Virginia has more than a slight nexus to this controversy and, in fact, West Virginia has a meaningful connection to the Plaintiff's claims.

...

40. While Plaintiff's cause of action initially arose from the defendant doctor's removal of the clavicle, instead of the right first rib, during a surgery in Ohio, Plaintiff alleges that Dr. Khoury also committed tortious conduct here in Ohio County, West Virginia.

41. As discussed hereinbefore, Plaintiff has alleged that the defendants have committed separate tortious acts in Ohio County,

⁸ This claim is irrelevant, however, as the Plaintiff fails to explain how the Defendants' billing of her insurer caused her harm and presented no evidence that she is obligated to pay.

West Virginia, which support Plaintiffs [*sic*] claim for intentional infliction of emotional distress, misrepresentation and punitive damages. Specifically, Plaintiff alleges the misrepresentations made to Plaintiff's primary care doctor were committed from Dr. Khoury's office location in Wheeling, Ohio County, and Plaintiff alleges this caused further injury and harm to the plaintiff as previously set forth herein.

42. Thus, while the cause of action may have initially arose in Ohio, the fact that additional and/or separate tortious conduct is alleged to have occurred in this forum as well, renders this as a neutral factor.

(See Order, pp. 6, 9-10, ¶¶ 23, 40-42, Appendix 006, and 009-010.) (Emphasis added).

The stated basis of the Plaintiff's causes of action⁹ is her allegation that Dr. Khoury "failed to properly identify and recognize anatomical structures" and, "as a result, [he] wrongfully removed [her] clavicle bone instead of her right first rib." (See Am. Compl., at pp. 3, 6-7, ¶¶ 16, 36, Appendix 029.) In her response to the motion to dismiss, the Plaintiff argued that after the surgery "Dr. Khoury *continued to misdiagnose* [her] with a resected right first rib, when in fact she had a resected right clavicle, and Dr. Khoury improperly ordered that [the Plaintiff] undergo physical therapy despite his 'misdiagnosis' of her medical condition causing her further injury and damage. " (See Pl.'s Resp. in Opp. to Defs.' Mot. to Dismiss, p. 3, Appendix 133) (emphasis added); (see also Am. Compl., p. 4, ¶ 22, Appendix 030 ("Thereafter, Dr. Khoury '*continued to misdiagnose*' [the Plaintiff] with a resected right first rib, when in fact she had a resected right clavicle . . .")) (emphasis added).

Characterizing the allegations in her Amended Complaint further, the Plaintiff argued below that she asserts "allegations that in addition to removing the wrong bone, Dr. Khoury also failed to recognize, both during and *after* the surgery, that he removed the wrong bone, as well as improperly advising the Plaintiff, and her primary care doctor, that he removed [the Plaintiff's]

⁹ In her Amended Complaint, the Plaintiff asserts the following causes of action: negligence, battery, lack of informed consent, and intentional infliction of emotional distress. (See Am. Compl., pp. 6-10, Appendix 032-036.)

right first rib, when in fact he removed her clavicle.” (See Pl.’s Resp. in Opp. to Defs.’ Mot. to Dismiss, p. 4, Appendix 134).; (see also Am. Compl., at p. 7, ¶ 36(e), Appendix 033 (Dr. Khoury breached the standard of care by “failing to recognize both during the May 28, 2013, surgery, and thereafter, that he performed a right clavicular resection and not a right first rib resection;”). The Plaintiff then argued that “Dr. Khoury’s inexcusable and *continual misdiagnose* [*sic*] of [the Plaintiff] following the initial surgery caused him to improperly order that [the Plaintiff] undergo physical therapy causing her further injury and damage.” (See Pl.’s Resp. in Opp. to Defs.’ Mot. to Dismiss, p. 7, Appendix 137) (emphasis added); (see also Am. Compl., at p. 4, ¶ 22, Appendix 030.)

As cited above, the circuit court agreed and found that Dr. Khoury’s continued failure to appreciate his alleged negligence after the procedure constitutes an additional or separate tortious act which was committed, in part, in West Virginia.

Notably, the Plaintiff did not allege in her Amended Complaint, and never claimed in her Response, that she treated with Dr. Khoury in West Virginia. The circuit court likewise made no such finding. Instead, the circuit court relied upon the Plaintiff’s allegation that Dr. Khoury mailed a letter following the procedure from West Virginia to her primary care physician in Ohio.

Under the Plaintiff’s argument, if a physician who resides in West Virginia performs a surgery in Ohio on an Ohio resident wherein an undetected surgical error occurs, and the physician then returns to his home state, he will be subject to suit in West Virginia if he undertakes any act consistent with or evidencing a continued failure to recognize his mistake. Taken to its logical conclusion, a physician who negligently performs a surgery could potentially

be subject to suit in any jurisdiction he or she visits before the negligence is discovered as a result of his or her continued failure to appreciate the prior conduct.

In short, adopting the Plaintiff's position leads to absurd results. The crux of this case is the Plaintiff's allegation that Dr. Khoury negligently performed surgery on an Ohio resident in Ohio. That Dr. Khoury continued to fail to realize his alleged negligence while he was located in West Virginia cannot serve as a basis for maintaining jurisdiction here.

2. The circuit court erred in concluding that Dr. Khoury's May 31, 2013, correspondence was a "predicate act" supporting a claim for punitive damages which accrued in West Virginia.

In further analyzing the fifth statutory factor – where the cause of action accrued – the circuit court wrongfully determined that certain “predicate acts to support a potential punitive damage award” occurred in West Virginia and, therefore, separate tortious acts occurred in Ohio County which supported the Plaintiff's claims. (See Order, pp. 5-6, 9, 12, ¶¶ 17-20, 23, 41, 56, Appendix 005-006, 009, and 012.)

Specifically, the conduct referenced by the circuit court was (1) Dr. Khoury's post-operative mailing of correspondence to the Plaintiff's primary care physician wherein he stated the Plaintiff had undergone “a right 1st rib resection”, and (2) Dr. Khoury and Khoury Surgical Group's having mailed, from West Virginia, to the Plaintiff's insurance carrier a medical bill for the surgery performed in Ohio and having received monies from that insurer in West Virginia. (See Order, pp. 5-6, 9-10, 12, ¶¶ 18-20, 41, 56, Appendix 005-006, 009-010, and 012.)

To find that the Plaintiff's cause of action accrued, in part, in West Virginia based upon this logic is legal error. Punitive damages are just that – a type of damages – not an independent cause of action. *See* J., Robin Davis, Punitive Damages Law in West Virginia (“Punitive damages are allowed against a defendant as punishment for proven aggravating circumstances of

his or her wrong to the plaintiff, over and above full compensation for all injuries directly or indirectly resulting from such wrong”) (citing *Marsch v. American Elec. Power Co.*, 207 W. Va. 174, 530 S.E.2d 193 (1999)).

The Plaintiff is entitled to recover punitive damages, if at all, only upon first successfully establishing the Defendants’ liability under the causes of action pled: medical professional negligence, battery,¹⁰ lack of informed consent, and intentional infliction of emotional distress¹¹. To employ the terminology advanced by the Plaintiff and adopted by the circuit court, the “predicate acts” underlying her causes of action are those alleged acts and omissions committed by Dr. Khoury during the May 28, 2013, surgery performed in Ohio.

3. The circuit court erred in concluding that Dr. Khoury’s May 31, 2013, correspondence to the Plaintiff’s primary care physician containing “misrepresentations” constitutes a separate tortious act in West Virginia giving rise to a cause of action.

In its analysis regarding the fifth statutory factor, the circuit court reiterated that the Plaintiff argued that the May 31, 2013, letter, sent by Dr. Khoury from his Wheeling, West Virginia office to her primary care physician (who is located in Ohio) “constitutes an act of misrepresentation . . .”, and that “this separate act committed in Ohio County, West Virginia, is a predicate act that supports her claims for . . . misrepresentation . . .” (See Order, p. 5, ¶¶ 18-20, Appendix 005.) The circuit court also noted that the Plaintiff argued that the Defendants “made further misrepresentations by billing Nicole Scarcelli’s insurance for the removal of her rib, when in fact he removed her clavicle, and further collected the fee from the surgery here in West Virginia . . .” (See Order, p. 6, ¶ 20, Appendix 006.) The circuit court then concluded that

¹⁰ See *Criss v. Criss*, 177 W. Va. 749, 356 S.E.2d 620 (1987).

¹¹ See *Dzingski v. Weirton Steel Corp.*, 191 W. Va. 278, 445 S.E.2d 219 (1994); *Sheetz, Inc. v. Bowles Rice McDavid Graff & Love*, 209 W. Va. 318, 547 S.E.2d 256 (2001).

“[t]hese allegations of the Plaintiff support that Defendants committed tortious conduct in both West Virginia and Ohio, demonstrating that West Virginia has more than a slight nexus to this controversy and, in fact, West Virginia has a meaningful connection to the Plaintiff’s claims.” (See Order, p. 6, ¶ 23, Appendix 006.)

In determining that the Defendants committed tortious acts in both West Virginia and Ohio, the circuit court relied upon the Plaintiff’s arguments in her response to the motion to dismiss that Dr. Khoury committed a separate, discrete tortious act by mailing a letter from his Wheeling, West Virginia office to her primary care physician in Ohio. However, this analysis is fatally flawed in that the Plaintiff did not plead a cause of action based upon fraud or misrepresentation.

An alleged “predicate act” underlying a tort not asserted in a complaint cannot serve as the basis for a determination that a plaintiff’s cause of action accrued in West Virginia. The circuit court’s finding in this regard is error.

More importantly, even if this “misrepresentation” claim had been pled, the allegations do not establish that the cause of action accrued in West Virginia. The Plaintiff impliedly argues that Dr. Khoury had a duty to correctly inform her of the bone he removed and that his failure to do so constitutes some form of actionable misrepresentation. However, when the Plaintiff’s actual allegations are examined it is clear that the allegations raised are directed to Dr. Khoury’s failure to appreciate her anatomy during the course of the procedure and his resultant and continued failure to realize he removed a portion of the clavicle rather than the first rib. The Plaintiff characterizes Dr. Khoury’s continued failure to recognize his mistake when sending a letter to her primary care physician as a “misrepresentation”; however, the Plaintiff does not allege that anything changed from the completion of the procedure to the sending of this letter.

In other words, the Plaintiff does not allege that Dr. Khoury learned of his alleged negligence and nefariously tried to conceal it. The Plaintiff simply alleges that he never discovered his alleged negligence. Such an allegation does not state a separate, discrete, or independent tort and cannot serve as a basis for determining that a different cause of action arises in part in West Virginia.

4. The circuit court erred in concluding that Dr. Khoury’s sending of the May 31, 2013, correspondence was a “predicate act” supporting Plaintiff’s claim for intentional infliction of emotional distress.

The circuit court further erred when it determined that plaintiff’s intentional infliction of emotional distress claim at least partially accrued in West Virginia.

This Court first defined the tort of outrage, or intentional infliction of emotional distress (“IIED”), in *Harless v. First National Bank in Fairmont*, 169 W. Va. 673, 289 S.E.2d 692 (1982):

One who by extreme or outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm results from it, for bodily harm.

Syl. Pt. 2, 169 W. Va. 673.

The Plaintiff’s cause of action for IIED is predicated upon Dr. Khoury’s removal of a portion of her clavicle. (See Am. Compl., p. 9, ¶ 49, Appendix 035 (“The conduct of Dr. Khoury in removing Nicole Scarcelli’s clavicle bone as set forth was extreme and outrageous”).) In opposing the motion to dismiss, the Plaintiff argued that this cause of action accrued, in part, in West Virginia based upon Dr. Khoury’s having sent a correspondence to her Ohio primary care physician after the surgery indicating that she had undergone a “right 1st rib removal.” The circuit court’s determination that the Plaintiff’s cause of action for IIED arose, in part, in West Virginia based upon this conduct was improper and inconsistent with the allegations before it.

The continued failure to recognize the problem may be relevant to the claim, but the claim did not arise in West Virginia. As such, the circuit court further erred in declaring factor five of the statutory test “neutral” on the basis that the Plaintiff’s causes of action accrued, in part, in West Virginia.

G. The *forum non conveniens* factors enumerated in W. Va. Code § 56-1-1a necessitate dismissal of this case in favor of an Ohio forum.

Even if the circuit court had not committed these errors of law, it would have abused its discretion in declining to dismiss this action for *forum non conveniens*. The overwhelming balance of the factors delineated in West Virginia Code Section 56-1-1a favors a dismissal of this action. Under the circuit court’s own analysis, only two of the eight statutory factors favored its continued exercise of jurisdiction over this action. Such a conclusion constitutes an abuse of discretion.

VI. CONCLUSION

For the foregoing reasons, the Court should grant the writ of prohibition and direct that the case be dismissed for *forum non conveniens* pursuant to West Virginia Code Section 56-1-1a.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. _____

State of West Virginia ex rel.
RAJAI T. KHOURY, M.D., and
KHOURY SURGICAL GROUP, INC.,

Petitioners and
Defendants Below,

v.

Upon Original Jurisdiction
in Prohibition
No. _____

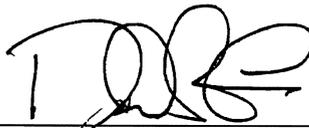
THE HONORABLE
JASON A. CUOMO, Judge of the
Circuit Court of the Third Judicial Circuit,
and NICOLE SCARCELLI

Respondents.

From the Circuit Court of Ohio County, West Virginia
Civil Action No. 15-C-90

VERIFICATION

I, David S. Givens, counsel for Petitioners, in accordance with W. Va. Code § 53-1-3 and Rule 16(d)(9) of the West Virginia Rules of Appellate Procedure, hereby verify that I am familiar with these proceedings, and that the Verified Petition and Appendix hereto and submitted herewith constitute a fair and correct statement of the proceedings in the civil action identified in this Verified Petition, based upon information and belief.



David S. Givens (#6319)
Counsel for Petitioners

Subscribed and sworn before me this 25th day of August, 2015.

Jeanie M. McFarland
Notary Public

My Commission Expires: 3-23-2020

