

No. 35710 - *Randy L. Mace, personal representative of The Estate of Kathy W. Mace, deceased, v. Mylan Pharmaceuticals, Inc., Mylan Inc., and Mylan Technologies, Inc.*

**FILED**

**July 22, 2011**

RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

Benjamin, J., concurring in part and dissenting in part:

I agree in part with the result reached in the majority opinion insofar as it recognizes that the existence of a viable alternative forum is a prerequisite to the application of the doctrine of *forum non conveniens*.. However, I dissent to the majority opinion insofar as it declares W. Va. Code 56-1-1a (Supp. 2010) ambiguous. I do not believe that it is.

“The existence of a viable alternate forum is a prerequisite to the application of the doctrine of *forum non conveniens*.” C.J.S. *Courts* §94 (footnote omitted).

Commentators have further explained:

A court may not dismiss an action on the ground of *forum non conveniens* unless the plaintiff could have brought the action before a court other than the court in which he or she did bring it, and he or she still has such an alternate forum. In other words, the doctrine of *forum non conveniens* presupposes the existence of more than one forum in which jurisdiction may be obtained over the parties and the subject matter of a case in which the controversy may be tried. Thus, the doctrine generally may not be applied where the plaintiff’s cause of action was barred by the statute of limitations prevailing in the jurisdiction of the other court. AmJur. *Courts* § 117 (footnotes omitted).

Though North Carolina would appear at first blush to be the best forum for this action, West Virginia is nevertheless a legally viable alternative forum. In the instant case, the appellant's cause of action is barred by the applicable statute of limitations in North Carolina. Therefore, North Carolina is not a viable alternative forum and the doctrine of *forum non conveniens* is not properly applicable. Under our existing law, plaintiff may maintain his action in Monongalia County where venue does lie. I would note that the appellant would have to successfully argue that the discovery rule would apply lest this case be likewise time-barred in West Virginia.