IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 14-0766

STATE OF WEST VIRGINIA ex rel. FORD MOTOR COMPANY; JACK GARRETT FORD, INC., a West Virginia Corporation; and DOES 1-50 INCLUSIVE,

Petitioners,

v.

The HONORABLE DAVID W. NIBERT, Judge of the Circuit Court of Roane County; and CHRISTIE SIEGEL, Individually and as Successor-In-Interest to the Estate of Jordan Siegel and Ashley Siegel, deceased; MARC SIEGEL, Individually and as Successor-In-Interest to the Estate of Jordan Siegel and Ashley Siegel, deceased; DAWN SIEGEL, an Individual; ERICA FOX, an individual; CHRISTOPHER FOX, an individual; BROOKLYN SIEGEL by and through her Guardian MARC SIEGEL; and MADISON OWENS by and through her Guardian DAWN SIEGEL,

Respondents.

PETITION FOR A WRIT OF PROHIBITION

On Petition for a Writ of Prohibition to the Circuit Court of Roane County, West Virginia (Civil Action No. 14-C-7)

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AND NOW, come the Petitioners, State of West Virginia *ex rel.* Ford Motor Company and Jack Garrett Ford, Inc. (collectively "Ford"), by and through their counsel, Gregory G. Garre and Michael E. Bern of Latham & Watkins, LLP, and Michael Bonasso, William J. Hanna, and Bradley J. Schmalzer of Flaherty Sensabaugh Bonasso PLLC, who hereby petition this Honorable Court to issue a Writ of Prohibition against Respondents, the Honorable David W. Nibert, in his official capacity as Judge of the Circuit Court of Roane County, and Plaintiffs Christie Siegel, *et al.*, thereby prohibiting the Circuit Court of Roane County from taking further action in the underlying case and ordering dismissal thereof pursuant to West Virginia Code § 56-1-1a (forum non conveniens).

I. QUESTION PRESENTED

Whether the Circuit Court erred in refusing to dismiss this case for forum non conveniens pursuant to W. Va. Code § 56-1-1a, where the Circuit Court failed to heed this Court's precedent requiring it to consider *all* the statutory forum non conveniens factors, fundamentally misapplied the statutory factors that it *did* consider, and overlooked the fact that this case lacks any meaningful connection to West Virginia.

II. STATEMENT OF THE CASE

A. Introduction

This case raises important issues concerning the application of West Virginia's forum non conveniens statute (W. Va. Code § 56-1-1a). The case involves a personal injury action stemming from a two-vehicle accident in Michigan with no meaningful connection to West Virginia. The Circuit Court's decision permitting this case to proceed flouts the statutory requirements imposed by West Virginia Code § 56-1-1a as well as this Court's forum non conveniens cases, and readily satisfies the customary criteria for a writ of prohibition.

The complaint alone makes clear the lack of connection between this action and West Virginia. Plaintiffs allege that Michigan residents were injured or killed as a result of an accident in Michigan, which was triggered when a vehicle driven by an Ohio resident "cut[] off" and "struck" their 1999 Ford Expedition, causing Plaintiffs "to lose control" of their vehicle. Compl. ¶ 15, Appendix 12. Plaintiffs assert that their injuries were caused by the tortious conduct of the Ohio driver in Michigan, as well as by purported product defects in their vehicle, which Plaintiffs purchased used in Michigan, and which was designed and manufactured in Michigan by defendant Ford Motor Company ("Ford"), a corporation headquartered in Michigan. The accident was investigated in Michigan by Michigan authorities, Michigan residents witnessed the accident, and Plaintiffs'

injuries were treated by Michigan first responders and Michigan hospitals. The sole connection between this case and West Virginia is that Plaintiffs' Ford Expedition was originally sold 15 years ago by a West Virginia dealership also named as a defendant (Jack Garrett Ford, Inc.)—before being resold to a Michigan resident in 2006, who later resold it to Plaintiffs in 2008, again in Michigan.

Given the obvious lack of any meaningful connection between this case and West Virginia, the overwhelming connection between this case and Michigan, and the fact that the West Virginia courts lack compulsory process over the Michigan witnesses and evidence at the heart of this case, Ford moved to dismiss this case under W. Va. Code § 56-1-1a for forum non conveniens. The Circuit Court, however, denied that motion on the basis of a brief order drafted by Plaintiffs, which the court entered verbatim, without changing a single word. In so doing, the Circuit Court committed the identical error that led this Court to issue a writ of prohibition in *State ex rel. Mylan, Inc. v. Zakaib*, 227 W. Va. 641, 713 S.E.2d 356 (2011), by failing to consider all of the eight statutory forum non conveniens factors enumerated in West Virginia Code § 56-1-1a. Moreover, the court's application of the few statutory factors it did address was legally erroneous, treating—for instance—considerations that the legislature specified should weigh *in favor* of dismissal as points weighing *against* dismissal. *See, e.g.*, *infra* at 16-19.

A straightforward application of the statutory forum non conveniens factors compels dismissal of this action in favor of a Michigan forum. Indeed, if dismissal for forum non conveniens is not warranted based on the undisputed factual record of this case, it is difficult to imagine any case in which a circuit court would err in declining to grant a motion to dismiss for forum non conveniens. That would be plainly inconsistent with the legislature's intent to make forum non conveniens available in cases where the public and private interests favor dismissal in favor of a more appropriate forum. The writ of prohibition should be granted.

B. Factual Background

This case stems from a fatal, two-vehicle 2012 accident in Washtenaw County, Michigan involving only Michigan and Ohio residents. Plaintiff Dawn Siegel, a Michigan resident, was driving a 1999 Ford Expedition when she alleges that her vehicle was "cut[] off" and "struck" by a Honda Odyssey driven by an Ohio resident, "causing Plaintiff [Siegel] to lose control" of her vehicle. Compl. ¶ 15, Appendix 12. All other passengers in the Expedition were Michigan residents at the time of the accident. *Id.* ¶¶ 1-2, Appendix 10. The vehicle itself was purchased used in Michigan. *See* Memorandum in Support of Mot. to Dismiss ("MTD Mem."), Ex. E, Appendix 121-22. The 1999 Expedition was designed in Dearborn, Michigan and manufactured in Wayne, Michigan by Ford, a corporation with its principal place of business in Michigan. *See* Compl. ¶¶ 3, 11, Appendix

10, 11-12; MTD Mem. 41, Ex. D, Appendix 117-18. Two passengers in the Expedition died at the scene of the accident—in Michigan—because of injuries sustained in the accident. Compl. ¶ 16, Appendix 13. Other injured passengers were treated by Michigan first respondents and later in Michigan hospitals. *See* MTD Mem., Ex. C, Appendix 112-13. Michigan residents witnessed the accident, and the accident was investigated by the Michigan Department of State Police as a possible "hit and run." *See* MTD Mem., Ex. B, Appendix 84-111.

The only asserted connection between West Virginia and this case is the allegation that Plaintiffs' Ford Expedition was originally sold 15 years ago to a non-party to this case by a West Virginia dealership, defendant Jack Garrett Ford, Inc. The Plaintiffs themselves purchased the vehicle from a Michigan resident in 2008, who previously had purchased it from another Michigan resident in 2006. Aside from the original sale of the vehicle 15 years ago, West Virginia has no connection to the accident, the Plaintiffs, the design and manufacture of Plaintiffs' vehicle, or any identified fact or expert witnesses in this case.

Michigan—the natural place for this action—is an available and appropriate forum. There is no dispute that Plaintiffs may bring this action in Michigan or that all defendants are either subject to or have consented to jurisdiction in Michigan. *See* MTD Mem. 5, Appendix 44. Plaintiffs' causes of action all indisputably stem from events in Michigan, and the overwhelming majority of witnesses and

evidence are located in Michigan. And because Plaintiffs' alleged injuries occurred in Michigan, Michigan law will apply. *See Blais v. Allied Exterminating Co.*, 198 W. Va. 674, 677, 482 S.E.2d 659, 662 (1996) ("In an action prosecuted in this State for recovery of damages for a personal injury received in a foreign jurisdiction, the substantive law of the foreign jurisdiction controls the right of recovery ...."). At the same time, the West Virginia courts lack compulsory process over the witnesses and evidence in Michigan.

C. Procedural History

On February 11, 2014, Plaintiffs filed a complaint in the Circuit Court for Roane County asserting claims against Ford, Jack Garrett Ford, Kristin Kae Boss ("Boss") (the Ohio driver of the Honda Odyssey), and Prestige Delivery Systems, Inc. ("Prestige"), an Ohio corporation for whom Boss was allegedly acting as an agent at the time of the accident. *See* Compl. ¶¶ 3-6, 67, Appendix 10-11, 33. Plaintiffs allege that Boss "negligently, careless, recklessly, willfully, wantonly, and tortiously operated a motor vehicle . . . in such a manner so as to cause the vehicle to collide with the vehicle occupied by Plaintiffs . . . causing Plaintiffs physical, bodily, mental, emotional, and fatal injuries." Compl. ¶ 65, Appendix 32. Plaintiffs also assert various torts against Ford and Jack Garrett Ford, related to alleged manufacturing and design defects in the Expedition. *See* Compl. ¶¶ 18-20, 49-51, Appendix 13-14, 28-29.

Ford, Jack Garrett Ford, and Prestige jointly moved to dismiss the action for forum non conveniens pursuant to West Virginia Code § 56-1-1a. Plaintiffs then bifurcated their claims, filing a separate complaint against Prestige and Boss in Ohio (a motion to dismiss that complaint for forum non conveniens in favor of a Michigan forum is pending in that action), while maintaining this action against Ford and Jack Garrett Ford in West Virginia. On May 8, 2014, Plaintiffs voluntarily dismissed Prestige and Boss from this action.

Plaintiffs opposed dismissal for forum non conveniens, and prepared a proposed order rejecting defendants' motion. *See* Appendix 217-25. On July 3, 2014, the Circuit Court denied defendants' motion, and entered Plaintiffs' proposed order verbatim, without changing a single word. *See* Appendix 1-8.

D. Standard Of Review

"'Prohibition will lie to prohibit a judge from exceeding his legitimate powers.'" *Zakaib*, 227 W. Va. at 645, 713 S.E.2d at 360 (citation omitted). "In 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.'" *Id.* (alterations in original)

(quoting *State ex rel. Huffman v. Stephens*, 206 W. Va. 501, 503, 526 S.E.2d 23, 25 (1999)).

When there is no dispute that a court has committed a legal error, this Court reviews a circuit court's decision on forum non conveniens for abuse of discretion. *See Nezan v. Aries Techs., Inc.*, 226 W. Va. 631, 637, 704 S.E.2d 631, 637 (2010). 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 Zakaib*, 227 W. Va. at 645-46, 713 S.E.2d at 360-61 (agreeing that de novo review applies to allegation that circuit court "misapplied and/or misinterpreted the [forum non conveniens] statute"). Likewise, when this Court is asked "to determine the correct legal application of the forum non conveniens statute, West Virginia Code § 56-1-1a, [its] review is de novo." *Zakaib*, 227 W. Va. at 646, 713 S.E.2d at 361.

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 would be proper 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 § 56-1-1a. This case involves a personal injury action governed by Michigan law, brought by Michigan plaintiffs primarily against a defendant headquartered in Michigan, in relation to a Michigan accident investigated by Michigan authorities, witnessed by Michigan residents, resulting in damages treated by Michigan physicians, and involving a vehicle designed and manufactured in Michigan, which was purchased used in Michigan by a Michigan resident. Under the statutory factors articulated by the West Virginia legislature, this action should be dismissed for forum non conveniens. Indeed, it is difficult to imagine a case more suited to dismissal for forum non conveniens than this one.

In rejecting Defendants' motion to dismiss for forum non conveniens, the Circuit Court committed several errors of law, including errors of law for which this Court already has determined that a writ of prohibition is appropriate. 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, the writ of prohibition should be granted.

First, the Circuit Court's failure to consider and make findings with respect to all eight statutory forum non conveniens factors is incompatible with this Court's express holding in *Zakaib*. This Court made clear in *Zakaib* that "in all

decisions on motions made pursuant to West Virginia Code § 56-1-1a (Supp. 2010), courts *must state findings of fact and conclusions of law as to each of the eight factors listed for consideration under subsection (a) of that statute.*" 227 W. Va. at 650, 713 S.E.2d at 365 (emphasis added). The Circuit Court indisputably failed to comply with that requirement here. And just as in *Zakaib*, the Circuit Court's failure to make the requisite findings alone requires issuance of a writ of prohibition.

Second, the Circuit Court misapplied those statutory factors that it did purport to analyze. The Circuit Court believed, for instance, that dismissal for forum non conveniens was not warranted because the sole West Virginia defendant in this case, Jack Garrett Ford, is amenable to process in Michigan only because it "agreed not to contest personal jurisdiction there." Order 6, Appendix 6. But West Virginia Code § 56-1-1a(a)(3) expressly provides that it weighs *in favor* of dismissal if courts in an alternative jurisdiction may exercise jurisdiction over all defendants "*as a result of the submission of the parties or otherwise.*" (Emphasis added.) The Court also misapplied West Virginia Code § 56-1-1a(a)(8) by finding that it weighed against dismissal that Plaintiffs allegedly would be less likely to prevail on the merits in Michigan owing to differences in Michigan and West Virginia strict liability law. This Court has made clear that "considering possible changes in substantive law is generally not appropriate when deciding motions to

dismiss based on forum non conveniens." *Zakaib*, 227 W.Va. at 647 n.5, 713 S.E.2d at 362 n.5. The Circuit Court's decision to factor in purported differences in Michigan and West Virginia strict liability law nonetheless is sharply at odds with this Court's clear-cut precedent. The Circuit Court likewise erred by finding that Plaintiffs' cause of action arose, in part, in West Virginia, *see* W. Va. Code § 56-1-1a(a)(5), when it is undisputed that plaintiffs' injuries stemmed from a Michigan accident and alleged torts in Michigan.

Third, the Circuit Court erred in imposing a heightened requirement of proof that is at odds with the statutory language of West Virginia Code § 56-1-1a and the precedents of this Court and the United States Supreme Court. Although Ford indisputably pointed to facts establishing that the vast majority of witnesses and evidence would be located in Michigan—compared to almost nothing located in West Virginia—the Circuit Court believed that Ford was required to make a further "detailed showing of the additional expenses" that would be incurred by litigating in West Virginia. Order 5, Appendix 5. But the forum non conveniens statute does not impose a burden on movants to submit detailed estimates of the precise additional cost of litigating in West Virginia so long as they can demonstrate that "the relative ease of access to sources of proof" weighs in favor of another forum rather than West Virginia. W. Va. Code § 56-1-1a(a)(6). And

Plaintiffs' argument has been expressly rejected by the United States Supreme Court—whose decisions this Court follows in the area of forum non conveniens.

When the factors articulated by the legislature are applied properly, dismissal of this case for forum non conveniens is plainly warranted. Michigan provides an available and far more appropriate forum for this Michigan-focused and Michigan-law governed case. Plaintiffs reside in Michigan; Ford is headquartered there; the cause of action accrued there; and the overwhelming majority of witnesses and evidence are located there. Particularly given West Virginia's negligible connection to this case, the private and public interests weigh substantially in favor of this action being brought in a Michigan forum. And defendants would be seriously prejudiced by having to litigate this case in West Virginia given that the West Virginia courts lack compulsory process over the Michigan witnesses and evidence that will be key to the defense of this action.

As Plaintiffs' filings in the Circuit Court make clear, their decision to pursue this case in West Virginia rather than Michigan was motivated by a desire to attempt to take advantage of perceived differences between Michigan and West Virginia strict liability law. But existing precedent makes clear that that kind of forum shopping provides an utterly inadequate basis to maintain this action in West Virginia in light of the far stronger connection between this case and Michigan. And allowing this action to proceed in the West Virginia courts would

directly contravene the Legislature's intent as evidenced by W. Va. Code § 56-1-1a. The writ of prohibition should be granted.

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

A. The Circuit Court's Forum Non Conveniens Analysis Directly Contravenes This Court's Precedent And The Plain Language Of The Forum Non Conveniens Statute

1. As In *Zakaib*, The Circuit Court Plainly Disregarded This Court's Direction That Courts Must Consider All Of The Statutory Forum Non Conveniens Factors

As an initial matter, a writ of prohibition should be issued for the identical reason that this Court entered a writ of prohibition in *Zakaib* only three years ago. In that case, this Court explained that circuit courts "*must* consider the eight factors enumerated in West Virginia Code § 56-1-1a (Supp. 2010), 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." 227 W. Va. at 649, 713 S.E.2d at 364 (emphasis added). In particular, this Court made clear that "in all decisions on motions made pursuant to

West Virginia Code § 56-1-1a (Supp. 2010), courts *must state findings of fact and conclusions of law as to each of the eight factors listed for consideration under subsection (a) of that statute.*" *Id.* at 650, 713 S.E.2d at 365 (emphasis added). Because the Circuit Court indisputably failed to consider and make appropriate findings with respect to each statutory factor—just as in *Zakaib*—a writ of prohibition is necessary here as well. Indeed, in the wake of this Court's decision in *Zakaib*, the need for the writ is even more clear in this case.

The statute eliminates any doubt by directing that the Circuit Courts "'*shall* consider [factors (1)-(8)].'" *Id.* at 649, 713 S.E.2d at 364 (alteration in original) (citation omitted); *see also Nelson v. W. Va. Pub. Emps. Ins. Bd.*, 171 W. Va. 445, 448, 300 S.E.2d 86, 89 (1982) ("It is well established that the word 'shall,' in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation."). As this Court explained in *Zakaib*, "the Legislature's use of the word 'shall' [was] clearly intentional, given that it used the permissive word 'may' in other contexts within this statute. Thus, the term must be afforded a mandatory connotation in this context." 227 W. Va. at 649, 713 S.E.2d at 364.

The Circuit Court unambiguously failed to consider each statutory factor here. The Court's discussion of the statutory factors is largely restricted to one page of its brief order. *See* Order 6, Appendix 6. There is no attempt to evaluate

or balance the public and private interests outlined in section 56-1-1a(a)(6); to address whether maintenance of the action would work a "substantial injustice" to Ford, W. Va. Code § 56-1-1a(a)(2); to make findings regarding where Plaintiffs reside, *id.* § 56-1-1a(a)(1); or to discuss whether dismissal would result in unreasonable duplication or proliferation of litigation, *id.* § 56-1-1a(a)(7). And to the extent that the Court addressed the remaining factors at all, it generally misapplied them. *See infra* at 16-24.

Plaintiffs cannot overcome the Circuit Court's failure to make findings as to each factor by claiming that the Circuit Court may have "considered" the parties' arguments respecting the statutory factors. The exact same argument was made and rejected in *Zakaib*. *See* 227 W. Va. at 650, 713 S.E.2d at 360 ("Respondent Hall acknowledges that Judge Bailey did not make specific findings as to each factor, but points out that those factors were argued by the parties in their briefs and during the hearing below. Thus, he contends, it is reasonable to infer that Judge Bailey did, in fact, consider the relevant factors even if she did not make findings on the record as to each."). As this Court explained, "the fact that this Court must engage in speculation as to whether the lower court did followed the statutory mandate is, itself, the problem." *Id.* Noting that "[t]he Legislature has similarly gone to great lengths to enumerate eight factors which must be considered in determining whether to grant or deny a motion on the basis of forum

non conveniens," this Court held that "in all decisions on motions made pursuant to West Virginia Code § 56-1-1a (Supp. 2010), courts must state findings of fact and conclusions of law as to each of the eight factors listed for consideration under [the] statute." *Id.* Because the Circuit Court failed to do so in *Zakaib*, this Court issued the writ of prohibition. *See id.* at 652, 713 S.E.2d at 367. The same result necessarily follows here.

That error provides a sufficient basis to grant the writ. As in *Zakaib*, however, this Court should proceed to consider the other errors identified by Ford as well. Doing so would aid in the development of forum non conveniens doctrine in this State and provide helpful guidance to the circuit courts.

2. The Circuit Court Fundamentally Misapplied The Statutory Forum Non Conveniens Factors That It Did Consider

The Circuit Court also fundamentally misapplied statutory forum non conveniens factors that it *did* consider. In particular, the court misapprehended the analysis required by sections 56-1-1a(a)(3) and 56-1-1a(a)(8), and erred in its application of section 56-1-1a(a)(5). Those errors substantially prejudiced the Circuit Court's forum non conveniens analysis and alone warrant granting the writ.

a. The Court Misapplied Section 56-1-1a(a)(3) By Weighing Against Dismissal That All Defendants Were Subject To The Jurisdiction Of Michigan "By Submission Of The Parties Or Otherwise"

Although it is undisputed that Michigan can exert jurisdiction over all defendants to this case, the Circuit Court erred by finding that "[d]efendants [had] not met their burden" to show that "Michigan is substantially more convenient" because, *inter alia*, "Michigan is an alternate forum only because Jack Garrett Ford agreed not to contest personal jurisdiction there." Order 6, Appendix 6. That finding directly conflicts with the plain language of section 56-1-1a(a)(3), which provides that "[i]n determining whether to grant a motion to stay or dismiss an action ... the court shall consider ... [w]hether 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." (Emphasis added). By finding that Jack Garrett Ford's submission to the jurisdiction of the Michigan courts somehow weighed *against* whether defendants could "me[e]t their burden" to demonstrate forum non conveniens is proper, Order 6, Appendix 6, the Circuit Court flatly misconstrued the statute.

Section 56-1-1a(a)(3) is one of several provisions within the forum non conveniens statute designed to ensure that the asserted alternative forum is genuinely available to hear plaintiffs' claims. *See, e.g., Mace v. Mylan Pharms., Inc.*, 227 W. Va. 666, 673, 714 S.E.2d 223, 230 (2011) ("[V]arious phrases and

words used throughout subsections (a) and (c) of West Virginia Code § 56-1-1a imply that an alternate forum must exist in which a plaintiff's claims could be heard in order for a court to grant a motion to dismiss pursuant to this statute."). In evaluating whether an alternative forum "may be found to 'exist,'" courts generally consider whether the statute of limitations precludes the institution of suit in the alternative forum and whether the defendants are amenable to process there. *Id.* at 675-76, 714 S.E.2d at 231-32; *see also Norfolk & W. Ry. Co. v. Tsapis*, 184 W. Va. 231, 234, 400 S.E.2d 239, 242 (1990) ("'In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process ....'" (citation omitted)).

As the statutory language establishes, however, it makes no difference whether a defendant is amenable to process because he is a resident of the alternative forum, availed himself of that forum's jurisdiction through his activities there, or voluntarily submitted to jurisdiction. A defendant satisfies his burden under section 56-1-1a(a)(3) simply by showing that "the alternate forum, *as a result of the submission of the parties or otherwise*, can exercise jurisdiction over all the defendants." (emphasis added). In other words, the essential inquiry under section 56-1-1a(a)(3) is not how, but *whether*, defendants are subject to jurisdiction in the alternative forum. And here, the Defendants plainly are.

That analysis accords with longstanding federal forum non conveniens practice, including United States Supreme Court precedent. *See, e.g.*, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 242 (1981) (finding dismissal for forum non conveniens proper where Pennsylvania and Ohio corporations had "agreed to submit to the jurisdiction of the Scottish courts and to waive any statute of limitations defense that might be available"); *Veba-Chemie A.G. v. M/V Getafix*, 711 F.2d 1243, 1245 (5th Cir. 1983) ("defendant's submission to the jurisdiction of an alternative forum renders that forum available for the purposes of forum non conveniens analysis"). And as this Court has acknowledged, West Virginia forum non conveniens law is intended to be "consistent with the United States Supreme Court case law on this subject" and the "federal common law doctrine of forum non conveniens" generally. *Mace*, 227 W. Va. at 674, 714 S.E.2d at 231. The Circuit Court's misapplication of section 56-1-1a(a)(3) is incompatible with that body of case law as well as the plain language of the statute.

b. The Court Misapplied W. Va. Code § 56-1-1a(a)(8) By Weighing Whether The Substantive Law Is More Favorable To Plaintiffs In Michigan Or West Virginia

The Circuit Court also sharply erred by weighing potential differences in Plaintiffs' likelihood of success on the merits under Michigan and West Virginia law when evaluating whether "remedies [are] available in Michigan." Order 6, Appendix 6. West Virginia Code § 56-1-1a(a)(8) directs circuit courts to evaluate

"[w]hether the alternative forum provides *a remedy*." (Emphasis added.) Although there is no dispute that Michigan law permits Plaintiffs *a remedy* in tort if they can prove that Ford's negligence is liable for their injuries, Plaintiffs disputed that this requirement was met because they believe it would be more difficult to prove that Defendants are liable in Michigan.

Specifically, Plaintiffs argued that Michigan "'ceases to exist' as an alternate forum" because it would require Plaintiffs to prove negligence, instead of relying on strict liability. Pltfs' Opp. 13, Appendix 168. In endorsing Plaintiffs' proposed order, the court agreed that this factor weighed against Ford, focusing on the fact that Michigan law "requires a plaintiff to prove their case without the benefit of presumptions, like strict liability, if the product has been in use longer than 10 years." Order 6, Appendix 6. In other words, while Michigan law indisputably provides a remedy, the court weighed against dismissal for forum non conveniens its view that it would be more "difficult" for plaintiffs to prevail on the merits under Michigan law. Pltfs' Opp. 13, Appendix 168. That reasoning is incompatible with the decisions of this Court and the United States Supreme Court.

In *Piper Aircraft*, the United States Supreme Court held that "[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry." 454 U.S. at 247. In *Mace*, this Court affirmed that West Virginia's forum non conveniens statute

incorporated the *Piper* rule. *See* 227 W. Va. at 675-76, 714 S.E.2d at 232-33. Under West Virginia Code § 56-1-1a(a)(8), therefore, courts should account for a substantive change only "in the rare circumstance that 'the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all.'" *Mace*, 227 W. Va. at 676, 714 S.E.2d at 233 (quoting *Piper Aircraft*, 454 U.S. at 254-55). As *Zakaib* and *Piper Aircraft* make clear, however, that rare exception is not implicated here.

Giving substantial weight to whether or not a claim might be more "difficult" to prove under another State's substantive law is particularly inappropriate given that this Court has specified that even "[t]he fact ... that one of a plaintiff's claims *may not succeed* under the substantive law of the alternative forum is not a sufficient basis to render that alternate forum nonexistent." *Zakaib*, 227 W. Va. at 647 n.5, 713 S.E.2d at 362 n.5 (emphasis added). Because the substantive law frequently varies from one State to another (at least in some respects), "if conclusive or substantial weight were given to the possibility of a change in law [from one forum to another], the *forum non conveniens* doctrine would become virtually useless." *Piper Aircraft*, 454 U.S. at 250. Not to mention, if this were the law, forum shopping would trump the important institutional and fairness interests served by the forum non conveniens doctrine.

Piper Aircraft rejected an argument *identical* to that made by Plaintiffs in this case. In that case, a plaintiff sought to maintain an action in California where she could sue on the basis of "negligence and strict liability," as opposed to Scotland, which did "not recognize strict liability in tort." 454 U.S. at 240. The Supreme Court acknowledged that "if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is *no remedy at all*, the unfavorable change in law may be given substantial weight." *Id.* at 254 (emphasis added). But the Court made clear that "the remedies that would be provided by the Scottish courts do not fall within this category." *Id.* at 254-55. As it explained, "[*a*]*lthough the relatives of the decedents may not be able to rely on a strict liability theory*, and although their potential damages award may be smaller, there is no danger that they will be deprived of any remedy or treated unfairly." *Id.* at 255 (emphasis added). As *Piper Aircraft* makes clear, the unavailability of strict liability does not render the tort remedy provided by another forum so "inadequate or unsatisfactory" as to receive weight in the forum non conveniens analysis.

It is no comfort that the Circuit Court suggested its analysis of the substantive differences in Michigan and West Virginia law was "not necessarily *determinative*" of its ultimate decision in this case. Order 6, Appendix 6 (emphasis added). The Court unquestionably relied on the substantive differences in law in refusing to dismiss the case for forum non conveniens. *See* Order 6-7, Appendix

6-7 ("While not necessarily determinative, Michigan's [strict liability rule] is inconsistent with the principles underlying West Virginia's doctrine of strict products liability, which is critical in protecting West Virginia consumers."). Not only does this case not involve "West Virginia consumers" (Plaintiffs purchased the vehicle at issue in Michigan), but it was also legal error for the Circuit Court to weigh against dismissal *at all* West Virginia's strict liability laws.

c. The Court Erroneously Applied W. Va. Code § 56-1-1a(a)(5) By Suggesting That The Cause Of Action Accrued Both In Michigan And West Virginia

The Circuit Court also erred in purporting to conclude that Plaintiffs' claims accrued, in part, in West Virginia. West Virginia Code § 56-1-1a(a)(5) instructs circuit courts to consider "[t]he state in which the cause of action accrued." Here, the Circuit Court found that it weighed against dismissal that "a portion of plaintiffs' claims arise in West Virginia." Order 6, Appendix 6. Because Plaintiffs' causes of action all unmistakably accrued in Michigan, that was error.

Plaintiffs do not appear to dispute that their causes of action against Ford accrued in Michigan, where "[t]he car collision at issue and the injuries occurred." Pltfs' Opp. 11, Appendix 166. Plaintiffs argued below, however, that the court should account for the fact that Jack Garrett Ford "sold the subject Expedition in West Virginia to a West Virginia resident." *Id.* And the Circuit Court echoed the same theme, reasoning that "a portion of Plaintiffs' claims arise in West Virginia"

because "Plaintiffs allege that Jack Garrett Ford injected the subject Expedition into the stream of commerce in Roane County to a West Virginia citizen." Order 6, Appendix 6.

That was error. Plaintiffs' cause of action did not accrue as the result of Jack Garrett Ford's sale of the Expedition in West Virginia. Under West Virginia law, "'a cause of action accrues (i.e., the statute of limitations begins to run) when a tort occurs.'" *State ex rel. Chemtall, Inc. v. Madden*, 216 W. Va. 443, 455, 607 S.E.2d 772, 784 (2004) (citation omitted). Accordingly, "'[i]n products liability cases, the statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence should know, (1) *that he has been injured*, (2) the identity of the maker of the product, and (3) that the product had a causal relation to his injury.'" *Id.* (emphasis added) (citation omitted).

Plaintiffs' cause of action against Jack Garrett Ford could not possibly have accrued in West Virginia because Plaintiffs did not purchase the vehicle until years later—in Michigan—and were indisputably injured in Michigan. *See* Pltfs' Opp. 11, Appendix 166 ("[T]he injuries occurred in Michigan."). Indeed—if Plaintiffs' claims against Jack Garrett Ford had somehow accrued at the moment that the dealership "injected the subject Expedition into the stream of commerce" in West Virginia—in 1999—the statute of limitations would have expired years ago. *See* W. Va. Code § 55-2-12 ("Every personal action for which no limitation is

otherwise prescribed shall be brought: ... (b) within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries.").

Because Plaintiffs' causes of action accrued only in Michigan, this factor weighs strongly in favor of dismissal as well. *See also* W. Va. Code § 56-1-1a(a) (a court's deference to a plaintiffs' choice of forum "may be diminished when the plaintiff is a nonresident and the cause of action did not arise in this State").

3. The Circuit Court Erred By Imposing A Heightened Requirement Of Proof In Support Of A Forum Non Conveniens Motion On These Undisputed Facts

The Circuit Court also independently erred by imposing a heightened requirement of proof on defendants that is found nowhere in the text of the forum non conveniens statute and is directly at odds with United States Supreme Court precedent, with which West Virginia's forum non conveniens statute is intended to be consistent. *See Mace*, 227 W. Va. at 674, 714 S.E.2d at 231. For these reasons too, the Circuit Court misapplied the statute and a writ of prohibition should issue.

It is undisputed that the "Plaintiffs suffered an injury in Michigan," that this case is based on Michigan evidence and witnesses, and that the only connection between this case and West Virginia is the original sale of the Expedition in West Virginia 15 years ago. Pltfs' Opp. 6, 10-11, Appendix 161, 165-66. Nonetheless, the Circuit Court rejected Ford's argument that Michigan is a more appropriate forum because Ford failed to provide "a detailed showing of the additional

expenses [that would be] incurred by litigating in West Virginia" and failed to identify with specificity "a single witness who believed West Virginia is unfairly burdensome or a witness who refuses to appear in West Virginia." Order 4-5, Appendix 4-5. The Circuit Court likewise criticized Ford for failing to "set forth what evidence the unavailable witnesses might offer" or why that evidence could not be presented through videotaped testimony, and criticized Ford for failing to provide "an affidavit or other form of testimony" to support its claims that West Virginia was burdensome. Order 5, Appendix 5. In so doing, the Circuit Court misinterpreted the forum non conveniens statute.

West Virginia Code § 56-1-1a(a)(6) instructs circuit courts to consider private interests including "the *relative* ease of access to sources of proof," "the cost of obtaining attendance of willing witnesses" and "other practical problems that make trial of a case easy, expeditious and inexpensive." (Emphasis added.) Here, Ford's argument and exhibits indisputably pointed to numerous witnesses and evidence located in Michigan, including the police officers who investigated the accident, the first responders and hospital staff that treated Plaintiffs' injuries, and various witnesses to the accident. That evidence—which will help substantiate that Plaintiffs' injuries were caused by the other driver, rather than the alleged product defects—will be important, if not alone dispositive, to Ford's defense. And because the vehicle that Plaintiffs allege is defective was designed and

manufactured in Michigan, evidence relating to Plaintiffs' affirmative case and Defendants' defenses will undoubtedly be focused there as well. Where the majority of witnesses and evidence is indisputably located in Michigan and virtually no witnesses or evidence is located in West Virginia, it is common sense—and, indeed, undeniable—that Michigan offers greater *relative* ease of access to sources of proof, and that trial in a forum outside Michigan is relatively more expensive. The Circuit Court erred in imposing on Ford an evidentiary burden to prove in detail every way in which it—and others, including witnesses—would be burdened by litigating this case hundreds of miles away in West Virginia.

In concluding otherwise, the Circuit Court misinterpreted this Court's decision in *Abbott v. Owens-Corning Fiberglass Corp.*, 191 W. Va. 198, 203, 444 S.E.2d 285, 290 (1994). In *Abbott*—which predated West Virginia Code § 56-1-1a—this Court held that a trial court "may not rely on the *mere allegations* of the party who is seeking to have a case dismissed on grounds of *forum non conveniens* that there is no nexus between the forum and the plaintiff and that another forum exists in which the case can be tried substantially more expeditiously and inexpensively." *Id.* (emphasis added). In *Abbott*, there was "no evidence in the record" to support that another forum was more appropriate. *Id.* at 205, 444 S.E.2d at 292. Even the defendants acknowledged in seeking dismissal that they could not "identify with precision the residences of all their witnesses." *Id.* at 205 n.1, 444

S.E.2d at 205 n.1 (citation omitted). This case is obviously differently situated. It is *undisputed* that many witnesses and substantial evidence are located in Michigan, and that virtually no evidence is in West Virginia. Moreover, Ford did not rest on mere general allegations, but pointed to specific Michigan evidence and witnesses on which it would rely, including evidence related to Plaintiffs' treatment and the accident's investigation. *See, e.g.*, Mem. in Support of Joint Mot. to Dismiss 9-10, Ex. B (Police Report), Ex. C (News Stories), Appendix 48-49, 84-111, 112-16. No more was required.

The Circuit Court nevertheless believed that *Abbott* demanded more—requiring defendants "to provide testimony or affidavits from any witnesses that they would not appear at trial" and a "detailed showing of the additional expenses [they would] incur[] by litigating in West Virginia." Order 3, 5, Appendix 3, 5. But where the burdens are undeniable, nothing would be gained by requiring defendants to submit projected line item expenses or to burden potential witnesses in advance by requiring affidavits or other evidence in forum non conveniens litigation. Moreover, the United States Supreme Court has expressly rejected the argument that a motion to dismiss for forum non conveniens requires such a showing of proof. As it explained in *Piper Aircraft*:

> The Court of Appeals found that the problems of proof could not be given any weight because Piper and Hartzell failed to describe with specificity the evidence they would not be able to obtain if trial were held in the

> United States. It suggested that defendants seeking *forum non conveniens* dismissal must submit affidavits identifying the witnesses they would call and the testimony these witnesses would provide if the trial were held in the alternative forum. *Such detail is not necessary.* Piper and Hartzell have moved for dismissal precisely because many crucial witnesses are located beyond the reach of compulsory process, and thus are difficult to identify or interview. Requiring extensive investigation would defeat the purpose of their motion.

454 U.S. at 258 (emphasis added) (footnote omitted). Likewise, here it would serve no purpose to require movants to substantiate that it is more expensive or inconvenient for witnesses located in Michigan to travel to and participate in court proceedings in West Virginia. And as the *Piper Aircraft* Court explained, it would defeat the purpose of forum non conveniens if defendants could only produce such detailed proof after conducting discovery in West Virginia—where it cannot invoke compulsory process to interview those Michigan witnesses.

Because the Circuit Court's reading of *Abbott* is incompatible with *Piper Aircraft*, it should be rejected. This Court made clear in *Mace* that "this Court's prior case law"—which includes *Abbott*—"is, in fact, consistent with the United States Supreme Court case law on this subject; indeed, this Court relied heavily on several United States Supreme Court decisions in adopting the common law doctrine of forum non conveniens in this state." 227 W. Va. at 674, 714 S.E.2d at 231. In light of *Mace*, *Abbott* cannot and should not be understood to impose detailed requirements of proof that the United States Supreme Court expressly

rejected. The Circuit Court's interpretation of *Abbott* is also in sharp tension with *Cannelton Industries, Inc. v. Aetna Casualty & Surety Co. of America*, 194 W. Va. 186, 198, 460 S.E.2d 1, 13-14 (1994), which found that a circuit court does not abuse its discretion by concluding that the private interests favor dismissal in favor of a Michigan forum when "the majority of witnesses ... live in Michigan" and other jurisdictions outside West Virginia, on the assumption that it would be "'far less expensive and time consuming'" for those witnesses "to attend court in Michigan rather than to travel to West Virginia." (Citation omitted.)

The Circuit Court's imposition on Ford of a heightened evidentiary burden provides an additional, and independent, basis for granting the writ.

B. By Any Measure, The Forum Non Conveniens Factors Enumerated In West Virginia Code § 56-1-1a Necessitate Dismissal Of This Case In Favor Of A Michigan Forum

Even if the Circuit Court had not committed any errors of law, it would have abused its discretion in declining to dismiss this action for forum non conveniens. It is difficult to imagine a case more suited for dismissal for forum non conveniens than this case. The location of the parties, witnesses, and evidence; the events giving rise to the cause of action; the location at which the vehicle was designed, manufactured, and purchased by Plaintiffs; and the source of law that governs this case all point to Michigan. Because the forum non conveniens factors enumerated

by the legislature weigh substantially in favor of dismissal, this Court should grant the writ and direct the Circuit Court to dismiss this case for forum non conveniens.

The legislature has enumerated eight factors "to aid a court in making the ultimate determination of whether the interest of justice and convenience of the parties would, in fact, be served by staying or dismissing the action in favor of an alternate forum." *Zakaib*, 227 W. Va. at 649 n.6, 713 S.E.2d at 364 n.6. They are:

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

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

(3) Whether the alternate forum, as a result of the submission of the parties or otherwise, can exercise jurisdiction over all the defendants properly joined to the plaintiff's claim;

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

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

(6) Whether the balance of the private interests of the parties and the public interest of the State predominate;

(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 movant need not establish that every factor weighs in favor of dismissal for forum non conveniens. Rather, "[t]he weight assigned to each factor varies because each case turns on its own unique facts." *State ex rel. N.*

River Ins. Co. v. Chafin, 758 S.E.2d 109, 115 (W. Va. 2014). In this case, however, *every* factor weighs in favor of dismissal.

1. An Alternative Forum Exists Where the Action May Be Tried

As Plaintiffs conceded below, Michigan provides an alternative forum in which this action may be tried. *See* Pltfs' Opp. 9, Appendix 164. Indeed, Plaintiffs are all Michigan residents, and both the accident and Plaintiffs' asserted causes of actions accrued in Michigan. Moreover, because Ford's principal place of business is in Michigan, and because Jack Garrett Ford has consented to jurisdiction there, Michigan indisputably can exert jurisdiction over every party to this case.

2. Maintenance Of The Action In West Virginia Would Work A Substantial Injustice On The Moving Party

Maintaining this action in West Virginia would work a substantial injustice on Ford. Most witnesses will be found in Michigan, where the accident occurred and was investigated, the injuries were sustained and treated, and the vehicle was designed and manufactured. Those witnesses are beyond the subpoena power of this state and Ford will not be able to compel their attendance at trial. *See* W. Va. R. Civ. P. 45(b)(2) ("A subpoena may be served at any place within the State."); W. Va. R. Civ. P. 45(c) ("A deponent may be required to attend an examination only in the county in which the deponent resides or is employed or transacts

business in person, or at such other convenient place as is fixed by an order of court."). If the action continues in West Virginia, Defendants also effectively will be forced to conduct this case in two states—conducting factual investigation in Michigan, while traveling to West Virginia for hearings, motions, and trial. The expense and inconvenience of that scenario is easily avoided by dismissing this Michigan-focused action in favor of a Michigan forum.

3. Michigan Can Exert Jurisdiction Over Defendants

As explained, *supra* at 16-19, there is no dispute that Michigan can exert jurisdiction over all defendants "as a result of the submission of the parties or otherwise." W. Va. Code § 56-1-1a(a)(3).

4. Plaintiffs Reside In Michigan

It is undisputed that all Plaintiffs reside in Michigan.

5. Plaintiffs' Cause Of Action Accrued In Michigan

As explained, *supra* at 23-24, Plaintiffs' cause of action accrued exclusively in Michigan. Under West Virginia law, "'a cause of action accrues (i.e., the statute of limitations begins to run) when a tort occurs.'" *Chemtall, Inc.*, 216 W. Va. at 455, 607 S.E.2d at 784 (citation omitted). It is undisputed that Michigan is the location of Plaintiffs' accident and the site of their injuries. And it is black-letter law that "there is no tort without an injury." *United States v. Dosen*, 738 F.3d 874, 878 (7th Cir. 2013). In any event, Plaintiffs' complaint alleges torts stemming from the design and manufacture of this vehicle in Michigan and the alleged

misconduct of the second driver in Michigan. Plaintiffs' causes of action therefore undeniably accrued in Michigan.

6. The Private And Public Interests Weigh In Favor Of Michigan

As an initial matter, the statute makes clear that in weighing the private and public interests in favor of maintaining this suit in West Virginia or dismissing it in favor of Michigan, courts are instructed to consider "the extent to which an injury or death resulted from acts or omissions that occurred in this State." W. Va. Code § 56-1-1a(a)(6). Here, because acts occurring in Michigan resulted in injuries and deaths in Michigan, that consideration weighs powerfully in favor of dismissal.

The other private factors likewise favor Michigan. Because virtually all the relevant witnesses, documents, records, and other evidence in this case are located in Michigan, Michigan offers a greater "relative ease of access to sources of proof." *Id.* A West Virginia court cannot compel the attendance of key out-of-state witnesses (such as the investigating Michigan officers among others) or the production of key out-of-state documents. *See* W. Va. R. Civ. P. 45(b)(2). By contrast, compulsory process would be available if the action was brought in Michigan. The cost of obtaining attendance of Michigan witnesses is necessarily higher in West Virginia because those witnesses would be required to travel from Michigan. And to the extent that a view of the accident site would aid in the resolution of this case, only a Michigan forum would make that feasible.

The public interests similarly weigh in Michigan's favor. The West Virginia legislature directed courts to consider factors such as "the interest in having localized controversies decided within the State," avoiding "problems in conflict of laws, or in the application of foreign law," and "the unfairness of burdening citizens in an unrelated forum with jury duty." W. Va. Code § 56-1-1a(a)(6). Because this case involves claims by a Michigan plaintiff largely against a defendant headquartered in Michigan, in relation to an accident in Michigan involving a vehicle purchased by Plaintiffs, designed, and manufactured in Michigan, it is Michigan which has a far stronger interest in resolving this Michigan-focused controversy. Dismissal would avoid complications from forcing the Circuit Court to apply Michigan law. And a Michigan forum would avoid burdening a Roane County jury from deciding a case involving events and lead parties that have nothing to do with Roane County. *See, e.g.*, *Cannelton Indus.*, 194 W. Va. at 192-98, 460 S.E.2d at 7-13 (where Michigan had greater interest in dispute than West Virginia, and Michigan law would apply, circuit court did not abuse its discretion in finding that public interests weighed in favor of dismissal).

7. Dismissal Offers The Best Hope Of Limiting Duplicative Litigation

Dismissal of this litigation in favor of a Michigan forum offers the best hope to avoid "unreasonable duplication or proliferation of litigation." W. Va. Code § 56-1-1a(a)(7). In order to avoid litigating this case in Michigan, Plaintiffs have

bifurcated their action—suing Ford, Jack Garrett Ford, and Does 1-50 in West Virginia, while suing Boss and Prestige in Ohio. Michigan is the only jurisdiction that can exercise jurisdiction over all the parties. Prestige and Boss have filed a motion to dismiss for forum non conveniens in Ohio. To the extent that they are successful, the dismissal of this action in favor of Michigan would permit consolidation and reduce the duplication unnecessarily created by Plaintiffs' forum shopping. If, by contrast, this Court does not issue the writ, Plaintiffs' tort claims will be litigated in two different forums where they will pursue two different theories—claiming in West Virginia that the design or manufacture of their vehicle is responsible for their injuries, while claiming in Ohio or Michigan that the tortious conduct of the second driver is responsible for their injuries.

8. Michigan Law Provides A Remedy

As explained above, there is no doubt that Michigan law provides a remedy to Plaintiffs. Michigan law recognizes product liability claims against manufacturers of allegedly defective products. *See* Mich. Comp. Laws § 600.2945, et seq. (Michigan's products liability statute); *see also Huff v. Ford Motor Co.*, 338 N.W.2d 387, 390 (Mich. Ct. App. 1983) ("Michigan courts recognize that a manufacturer owes a duty to users of its product to furnish a product which is not unreasonably dangerous when used in a manner intended or in a manner reasonably foreseeable by the manufacturer." (citing *Antcliff v. State*

Employees Credit Union, 290 N.W.2d 420 (Mich. Ct. App. 1980), *aff'd*, 327 N.W.2d 814 (Mich. 1982))). In addition, because Plaintiffs' complaint identifies the date of their accident as June 22, 2012, the statute of limitations has not run. *See* Mich. Comp. Laws § 600.5805(13) ("The period of limitations is 3 years for a products liability action.").

9. Dismissal In Favor Of A Michigan Forum Was Warranted

Because the Circuit Court substantially misapplied the statute, and failed to consider numerous factors identified by the legislature, "'[t]he normal deference accorded to a circuit court's decision to transfer [or not transfer] a case ... does not apply.'" *Zakaib*, 227 W. Va. at 645, 713 S.E.2d at 360. Because all of the factors identified by the legislature weigh heavily in favor of a Michigan forum, dismissal in favor of a Michigan forum was unmistakably warranted.

If dismissal for forum non conveniens is not required here, it is difficult to imagine any circumstances in which a circuit court would abuse its discretion in declining to dismiss an action. That would be inconsistent with the purpose and text of W. Va. Code § 56-1-1a(a), which self-evidently seeks to make forum non conveniens available within this state and specifically directs that when "a claim or action would be more properly heard in a forum outside this State, the court *shall* decline to exercise jurisdiction under the doctrine of forum non conveniens." *See Zakaib*, 227 W. Va. at 649, 713 S.E.2d at 364 ("[T]he Legislature's use of the word

'shall' [in the forum non conveniens statute] [was] clearly intentional, given that it used the permissive word 'may' in other contexts within this statute. Thus, the term must be afforded a mandatory connotation in this context.").

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.

Respectfully Submitted,

STATE OF WEST VIRGINIA ex rel. FORD MOTOR COMPANY; JACK GARRETT FORD, INC., a West Virginia Corporation,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel. FORD MOTOR COMPANY;
JACK GARRETT FORD, INC., a West Virginia Corporation;
and DOES 1-50 INCLUSIVE,

Petitioners,

v. Appeal No.: 14-_____

The HONORABLE DAVID W. NIBERT, Judge of the Circuit Court of Roane County; and CHRISTIE SIEGEL, Individually and as Successor-In-Interest to the Estate of Jordan Siegel and Ashley Siegel, deceased; MARC SIEGEL, Individually and as Successor-In-Interest to the Estate of Jordan Siegel and Ashley Siegel, deceased; DAWN SIEGEL, an Individual; ERICA FOX, an individual; CHRISTOPHER FOX, an individual; BROOKLYN SIEGEL by and through her Guardian MARC SIEGEL; and MADISON OWENS by and through her Guardian DAWN SIEGEL,

Respondents.

VERIFICATION

STATE OF WEST VIRGINIA.

COUNTY OF KANAWHA, to wit:

The undersigned, after being first duly sworn, states that the information contained in the foregoing Petition for Writ of Prohibition is true, except insofar as it is stated to be based upon information and belief. To the extent that any information is based upon information provided to me or on my behalf, it is believed to be true.

William J. Hanna

Taken, subscribed, and sworn to before the undersigned authority, this 8th day of August, 2014.

My commission expires: March 7, 2021

Tracie R. Johns
Notary Public

OFFICIAL SEAL
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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JACK GARRETT FORD, INC., a West Virginia Corporation;
and DOES 1-50 INCLUSIVE,

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Respondents.

CERTIFICATE OF SERVICE

I, William J. Hanna, counsel for Petitioners, do hereby certify that **PETITIONERS' PETITION FOR WRIT OF PROHIBITION** was served on the 8th day of August, 2014 via first class U.S. mail, postage prepaid, to the following counsel of record:

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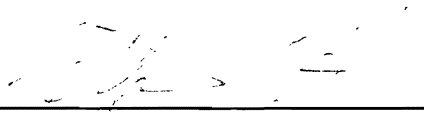

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