

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**EDITH NEZAN, in her capacity as  
Personal Representative of the  
ESTATE OF MARGARET O'BRIEN,**

*Petitioner, Plaintiff Below,*

v.

**ARIES TECHNOLOGIES, INC.; and SHASHI SANWALKA,  
in his capacity as Legal Representative of the  
ESTATE OF ADITYA ROY SANWALKA,**

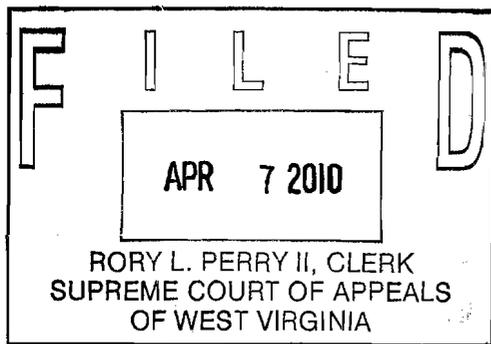
*Respondents, Defendants Below.*

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**BRIEF OF APPELLANT**

Appeal from the Circuit Court of Kanawha County  
Honorable Louis H. Bloom, Judge  
Civil Action No. 08-C-3451

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Scott S. Segal (WV Bar #4717)  
Mark R. Staun (WV Bar #5728)  
Deborah L. McHenry (WV Bar #4120)  
Victor S. Woods (WV Bar #6984)  
**THE SEGAL LAW FIRM**  
A Legal Corporation  
810 Kanawha Boulevard, East  
Charleston, West Virginia 25301  
Telephone: (304) 344-9100  
Facsimile: (304) 344-9105

Michael A. Sullivan (GA Bar I.D. #691431),  
*Pro Hac Vice*  
**FINCH MCCRANIE, LLP**  
225 Peachtree Street, Northeast  
1700 South Tower  
Atlanta, Georgia 30303  
Telephone: (404) 658-9070

*Counsel for Appellant*

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**BRIEF OF APPELLANT**

Appeal from the Circuit Court of Kanawha County  
Honorable Louis H. Bloom, Judge  
Civil Action No. 08-C-3451

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Appellant Edith Nezan, as Personal Representative of the Estate of Margaret O'Brien, plaintiff below ("Plaintiff"), appeals from the *Order Granting Defendants' Motions to Dismiss* entered by the Circuit Court of Kanawha County on September 16, 2009 (the "Final Order") (R. at 91), which dismissed defendants Aries Technologies, Inc. and Shashi Sanwalka, as Legal Representative of the Estate of Aditya Roy Sanwalka (collectively, "Defendants") on the basis that it lacked personal jurisdiction over such parties, or, in the alternative, that such dismissal was warranted under the *forum non conveniens* provisions of West Virginia Code § 56-1-1a. As set forth below, none of these grounds for dismissal were justified in this case, where the subject airplane crash occurred as a result of the pilot's

negligence in undertaking to fly in conditions for which he was not qualified and failing to take proper action once the aircraft began to collect ice and lose altitude, all of which acts occurred in West Virginia.

## I. BACKGROUND

This case arises out of an airplane crash that occurred on March 16, 2008 due to the pilot's negligent acts and/or failures to act in departing Charleston, West Virginia under icing conditions, which acts were quickly followed by the pilot's negligent failure to return to Charleston after the aircraft began to accumulate ice and lose altitude—*all of which negligent acts took place in West Virginia*. After the airplane iced and began to lose altitude while in West Virginia airspace, it eventually crashed in the Jefferson National Forest near Atkins, Virginia, approximately 20 miles south of the Virginia-West Virginia border.

The day before the accident, the pilot of the aircraft, Roy Sanwalka (“Sanwalka”), and his passenger, Margaret O’Brien, flew the subject 1969 Mooney M20C Ranger (registered tail number C-FRSK) from Buffalo International Airport to Charleston, West Virginia, where they spent the night before continuing their ill-fated journey the next morning.<sup>1</sup>

Significantly, Sanwalka’s Canadian private pilot license did *not* include an instrument rating.<sup>2</sup> Sanwalka’s log book also indicated that he had a scant 327 hours of total flight time, with a mere 10 hours of actual instrument time and 10 hours of simulated instrument time

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<sup>1</sup>See National Transportation Safety Board, “Factual Report–Aviation,” attached to *Plaintiff’s Motion to Supplement Record* (R. at 87) (hereinafter the “NTSB Report”).

<sup>2</sup>*Id.*

flown nearly 12 years before the date of this accident.<sup>3</sup>

An instrument rating refers to the qualifications that a pilot must have in order to fly under Instrument Flight Rules or “IFR” conditions. It requires additional training and instruction beyond that which is required for a private pilot certificate, and includes rules and procedures specific to instrument flying, additional instruction in meteorology, and training on flying in adverse weather conditions. An IFR-rated pilot can be authorized to fly through clouds using Air Traffic Control procedures designed to maintain separation from other aircraft. Also, a pilot with an IFR rating can fly while only looking at the instrument panel, even if nothing can be seen outside the cockpit window. The most significant value of flying under IFR is the ability to fly in instrument meteorological conditions, such as inside clouds.

A pilot’s “rating” is of utmost importance when making a determination on whether to fly in certain weather conditions. Sanwalka, not having an instrument rating, could only fly legally under Visual Flight Rules or “VFR.” VFR are a set of regulations that allow a pilot to operate an aircraft in weather conditions generally clear enough to allow the pilot to see where the aircraft is going. A VFR pilot is expected to “see and avoid” obstacles and other aircraft. Pilots who are operating an aircraft under VFR assume responsibility for their separation from other aircraft, and are not assigned routes or altitudes by Air Traffic Control. There are specific requirements for a VFR flight, including minimum visibility and distance from clouds, to make certain that aircraft operating under VFR are visible from enough distance to ensure safety.

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<sup>3</sup>*Id.*

Inasmuch as he did not have the necessary instrument rating, Sanwalka filed an illegal IFR flight plan in relation to the flight that crashed. The reason he did this is simple: He would not have been permitted to fly his Mooney M20C Ranger, an aircraft known to pose dangers in icing conditions, had he filed the appropriate VFR flight plan.

All of Sanwalka's negligent acts took place in West Virginia, and substantial negligent acts committed by Sanwalka, which are alleged to have caused the crash, occurred before the wheels of his aircraft ever left the ground in Charleston, West Virginia. To substantiate this, Plaintiff, out of an abundance of caution, retained an expert witness, Richard P. Burgess, to analyze the facts and circumstances surrounding the crash of the subject aircraft, which evidence was submitted to the lower court in response to Defendants' motion to dismiss.<sup>4</sup> Mr. Burgess reviewed weather information available to the weather briefer, air traffic communications, and radar data, and based upon his experience as a certified weather briefer, air traffic controller for the Federal Aviation Administration and pilot, made several determinations regarding Sanwalka's acts and/or failures to act in causing the death of Margaret O'Brien.

First, Mr. Burgess concluded that had Sanwalka filed a VFR (Visual Flight Rules) flight plan in accordance with his rating, he would have been told that VFR flight rules were

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<sup>4</sup>Mr. Burgess's Affidavit ("Burgess Aff.") and *Curriculum Vitae* were attached as Exhibit 2 to *Pl.'s Am. Resp. to Defs.' Mot. to Dismiss* (R. at 67). Mr. Burgess specializes in the analysis of services at the Federal Aviation Administration and contract Automated Flight Service Stations (AFSS), Airport Traffic Control Towers (ATCT), Terminal Radar Approach Control Facilities (TRACON) and Air Route Traffic Control Centers (ARTCC). He is also a certified flight instructor in both single and multi engine aircraft with commercial and instrument ratings. Mr. Burgess has over 3,100 hours of experience in operating such aircraft.

not recommended due to the AIRMETs (Airmens' Meteorological Information, which is a description of the occurrence or expected occurrence of specified *en route* weather phenomenon that may affect the safety of an aircraft operation) for low ceilings and mountain obscuration, and multiple cloud layers to 15,000 feet. This briefing would have been based upon Sanwalka's actual qualifications and the briefer's knowledge that the pilot was not instrument rated and equipped. Mr. Burgess concludes that the briefing would have ended at this point, and the pilot would have been told to call back when the AIRMETs were forecasted to expire or the weather was forecasted to improve.<sup>5</sup> Thus, it can be reasonably inferred that Sanwalka decided to file an illegal flight plan in Charleston, Kanawha County, West Virginia, so that he would be able to operate his aircraft in weather that would otherwise be inadvisable and dangerous.

Sanwalka's negligent decision-making process in deciding to fly the aircraft illegally with his scant instrument experience, in an aircraft that was known to ice in the prevailing weather conditions and which would not have permitted him to fly a VFR flight plan, are all acts that occurred in Charleston, Kanawha County, West Virginia, before the wheels left the ground. These are not insignificant or unimportant actions. It can hardly be disputed that a pilot's decision to fly in certain weather conditions given his training, experience and rating, are actions integral to the operation of an aircraft, as the pilot in command.

Despite his lack of certification and experience, Sanwalka filed an IFR (Instrument Flight Rules) plan in Charleston, West Virginia, from Yeager Airport to Craig Field in

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<sup>5</sup>Burgess Aff. at ¶¶ 5 & 6.

Jacksonville, Florida. Sanwalka's briefing would have still contained the weather advisories about the AIRMETs. In addition, Sanwalka would have been briefed that the base of the clouds were at 2,500 feet, with the tops at 15,000 feet, and freezing levels at approximately 4,000 feet. Once Sanwalka reached the West Virginia-Virginia border, the tops of the clouds would be around 8,000 feet.

Sanwalka's negligent decision making and flight planning placed Ms. O'Brien in peril as he headed the aircraft into weather conditions neither he nor his aircraft were equipped to handle. Once Sanwalka's wheels left the ground in Charleston, West Virginia, his negligent acts and failures to act continued while airborne. There is and can be no doubt that a proximate cause of the crash was airframe icing. Sanwalka's actions while he operated the plane, all within the confines of the airspace over the State of West Virginia, constituted additional actions in this state, which proximately caused the plane to ice and crash.

The plane crash occurred when Sanwalka entered the clouds and his aircraft experienced icing. His negligent operation of the aircraft in the face of airframe icing occurred within the confines of the airspace over the State of West Virginia. Mr. Burgess provided opinions regarding Sanwalka's actions during particular points in the flight.<sup>6</sup> This analysis is important because it demonstrates that *all* of Sanwalka's acts and/or failures to act after departure occurred *while he was in the airspace over West Virginia*.

After takeoff, Sanwalka operated the aircraft through instrument conditions to 7,000

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<sup>6</sup>*Id.* at ¶¶ 8-15.

feet for terrain avoidance.<sup>7</sup> At 14:14 Zulu time,<sup>8</sup> Sanwalka advised London Radar Control that his flight was level at 7,000 feet. Radar indicates that Sanwalka was just south of Kee Field Airport at Pineville, West Virginia.<sup>9</sup> Mr. Burgess is of the opinion that Sanwalka was in the clouds upon reaching 7,000 feet and began to pick up ice shortly after this time due to the freezing level.<sup>10</sup> It is also at this point that Sanwalka doomed the aircraft. Specifically, it is Mr. Burgess' opinion that a reasonable and prudent pilot would have requested to return to Charleston, West Virginia and for descent to a lower altitude given the minimums for terrain avoidance and the AIRMETs that were in effect for low ceilings and mountain obscuration. Sanwalka nevertheless marched forward.<sup>11</sup>

Eight minutes later, at 14:22:32, Sanwalka advised London Radar Control, “[P]icking up ice at this altitude. Can you change altitude?” Prior to making this call, radar indicates that Sanwalka’s aircraft had already descended to 6,700 feet without permission and was in West Virginia airspace, north of the Virginia border, when this call was made.<sup>12</sup> This descent is indicative that the flight was in peril and that a later attempt to climb to 8,000 feet came too late and was therefore futile. Within twelve minutes of the first report of icing, at approximately 14:33:48 Zulu, Mr. Sanwalka reported that “we’re going down,” and the plane

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<sup>7</sup>*Id.* at ¶ 12.

<sup>8</sup>This equates to 10:14 a.m. local Eastern Daylight Savings Time.

<sup>9</sup>*Id.* at ¶ 13.

<sup>10</sup>*Id.* at ¶¶ 13 & 16.

<sup>11</sup>*Id.* at ¶¶ 13 & 16.

<sup>12</sup>*Id.* at ¶ 14.

thereafter likely stalled, causing it to plummet to the earth at a near vertical angle.<sup>13</sup>

To verify the radar data, Plaintiff also engaged one of the foremost forensic radar experts, Robert L. Cauble, to review the radar data and to pinpoint Sanwalka's location when the icing occurred and was reported.<sup>14</sup>

Mr. Cauble obtained recorded radar data from the Air Traffic Control Voice Communication tapes from the Federal Aviation Administration and plotted the track of Sanwalka's aircraft through the use of computer software. He has determined that at 14:22:32, when Sanwalka reported picking up ice and requested a change in altitude, the aircraft was within the boundaries of the State of West Virginia. Additionally, Mr. Cauble has determined that prior to Sanwalka reporting that he was picking up ice, his flight had descended from an altitude of 7,000 feet to 6,700 feet. This descent likewise took place within the boundaries of West Virginia.<sup>15</sup>

Plaintiff alleges that Sanwalka's continued operation of the aircraft towards its destination and his failure to return to Charleston, West Virginia, to get out of the icing conditions was a proximate cause of the continued icing of his airframe. All of this indisputably occurred over the State of West Virginia.

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<sup>13</sup>See NTSB Report.

<sup>14</sup>Mr. Cauble's Affidavit ("Cauble Aff.") and *Curriculum Vitae* were attached hereto as Exhibit 3 to *Pl. 's Am. Resp. to Defs. ' Mot. to Dismiss* (R. at 67). Since his retirement from the United States Navy in 1992 as an Air Traffic Control Specialist, Mr. Cauble has worked on more than 150 aircraft accident investigations and his work has encompassed reconstruction of flight tracks based on recorded radar data. Mr. Cauble holds a commercial pilot's license, single engine, with an instrument rating.

<sup>15</sup>Cauble Aff. at ¶¶ 1 & 2.

Plaintiff filed this action on December 30, 2008, alleging wrongful death and negligence against Sanwalka and his employer and the owner of the subject aircraft, Aries Technologies, Inc. After extensive briefing, the circuit court in its Final Order dismissed Plaintiffs' complaint pursuant to West Virginia Rule of Civil Procedure 12(b)(2), ruling that it lacked personal jurisdiction over Defendants because (1) the West Virginia Long-Arm Statute, W. Va. Code § 56-3-33, does not sanction service of process on the personal representative of a non-resident estate such as that of Mr. Sanwalka; and (2) personal jurisdiction over Defendants was lacking because their purportedly "tenuous" contacts with West Virginia failed to satisfy the requirements of federal due process. As alternative grounds for dismissal, the circuit court also ruled that such dismissal was warranted under the *forum non conveniens* provisions of West Virginia Code § 56-1-1a.

## **II. ASSIGNMENTS OF ERROR**

1. The Circuit Court erred in dismissing Plaintiffs' complaint on the basis that it lacked personal jurisdiction over the Defendants.
2. The Circuit Court abused its discretion in dismissing Plaintiffs' complaint on the basis of the *forum non conveniens* provisions of West Virginia Code § 56-1-1a.

## **III. STANDARD OF REVIEW**

The standard of review of the Circuit Court's ruling on the Appellees' motions to dismiss under West Virginia Rule of Civil Procedure 12(b)(2) is *de novo*. See Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516

(1995); see also *Easterling v. American Optical Corp.*, 207 W. Va. 123, 127, 529 S.E.2d 588, 592 (2000).<sup>16</sup> With respect to the lower court's alternative ruling invoking the *forum non conveniens* provisions of West Virginia Code § 56-1-1a, such rulings are reviewed under an abuse of discretion standard. Cf. Syl. Pt. 3, *Cannelton Industries, Inc. v. Aetna Cas. & Sur. Co. of America*, 194 W. Va. 186, 460 S.E.2d 1 (1994) ("A circuit court's decision to invoke the doctrine of *forum non conveniens* will not be reversed unless it is found that the circuit court abused its discretion."), *overruled in part on other grounds, Mitchem v. Kirkpatrick*, 199 W. Va. 501, 485 S.E.2d 445 (1997) (per curiam). Where, however, the issue on appeal from the circuit court is clearly a question of law, the Court applies a *de novo* standard of review. Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

#### IV. ARGUMENT

The circuit court in its Final Order dismissed both of the Defendants in this action, ruling that it lacked personal jurisdiction over such parties, or, alternatively, that such dismissal was warranted under the *forum non conveniens* principles set forth in West Virginia Code § 56-1-1a. Neither of these grounds for dismissal withstand scrutiny.

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<sup>16</sup>The lower court did not hold an evidentiary hearing on the subject motion to dismiss, and therefore the more deferential standard applicable to such proceedings, see *Easterling*, 207 W. Va. at 127, 529 S.E.2d at 592, does not apply in the instant case.

**A. THE CIRCUIT COURT ERRED BY DISMISSING PLAINTIFF’S COMPLAINT ON THE BASIS OF LACK OF PERSONAL JURISDICTION.**

The circuit court’s dismissal of Plaintiff’s case for want of personal jurisdiction over the Defendants was predicated upon its alternative conclusions that (1) the West Virginia Long-Arm Statute, W. Va. Code § 56-3-33(a), does not support jurisdiction over the administrator or executor of the estate of a nonresident<sup>17</sup>; and (2) the Defendants lacked the minimum contacts with West Virginia necessary to comport with federal due process.

In order for ““a court to hear and determine an action, suit or other proceeding it must have jurisdiction of the subject matter and jurisdiction of the parties; both are necessary and the absence of either is fatal to its jurisdiction.”” *State ex rel. Barden and Robeson Corp. v. Hill*, 208 W. Va. 163, 166, 539 S.E.2d 106, 109 (2000) (quoting syl. pt. 3, *State ex rel. Smith v. Bosworth*, 145 W. Va. 753, 117 S.E.2d 610 (1960)); *see also* syl. pt. 1, *McClay v. Mid-Atlantic Country Magazine*, 190 W. Va. 42, 435 S.E.2d 180 (1993). In syllabus point 4 of *State ex rel. Bell Atlantic-West Virginia, Inc. v. Ranson*, 201 W. Va. 402, 497 S.E.2d 755 (1997), the Court detailed the framework for dealing with situations where, as in this case, lack of personal jurisdiction is seasonably raised as a defense:

When a defendant files a motion to dismiss for lack of personal jurisdiction under W. Va. R. Civ. P. 12(b)(2), the circuit court may rule on the motion upon the pleadings, affidavits and other documentary evidence or the court may permit discovery to aid in its decision. At this stage, the party

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<sup>17</sup>As discussed *infra*, while the circuit court employed this reasoning to justify its dismissal of *both* defendants in this action, it failed to articulate how this lack of authority to serve the personal representative of a non-resident justified the dismissal of Mr. Sanwalka’s employer and the owner of the subject aircraft, which is alleged, *inter alia*, to be vicariously liable for his negligent acts.

asserting jurisdiction **need only make a prima facie showing of personal jurisdiction in order to survive the motion to dismiss**. In determining whether a party has made a *prima facie* showing of personal jurisdiction, the court must view the allegations in the light most favorable to such party, drawing all inferences in favor of jurisdiction. If, however, the court conducts a pretrial evidentiary hearing on the motion, or if the personal jurisdiction issue is litigated at trial, the party asserting jurisdiction must prove jurisdiction by a preponderance of the evidence.

(Emphasis added.) Thus, at the stage of the proceedings where Plaintiff's complaint was dismissed, she was only required to make a *prima facie* showing of personal jurisdiction over the Defendants.

The Court in syllabus point 5 of *Abbott v. Owens-Corning Fiberglass Corp.*, 191 W. Va. 198, 444 S.E.2d 285 (1994), relying on *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 268, 290 (1980), set forth a two-part analysis for determining whether a circuit court has personal jurisdiction over a nonresident defendant or foreign corporation:

A court must use a two-step approach when analyzing whether personal jurisdiction exists over a foreign corporation or other nonresident. The first step involves determining whether the defendant's actions satisfy our personal jurisdiction statutes set forth in *W. Va. Code*, 31-1-15 [1996] and *W. Va. Code*, 56-3-66 [1996]. The second step involves determining whether the defendant's contacts with the forum state satisfy federal due process.

Accord, *Easterling v. American Optical Corp.*, 207 W. Va. 123, 135, 529 S.E.2d 588, 594 (2000).

**1. The Circuit Court Erred by Dismissing the Defendants on the Basis That a Personal Representative of the Estate of a Nonresident Is Not Amendable to Service of Process under the West Virginia Long-Arm Statute.**

In its Final Order, the circuit court alternatively ruled that dismissal of Plaintiff's claims against *both* Defendants for want of personal jurisdiction was also warranted on the basis that the West Virginia Long-Arm Statute, W. Va. Code § 56-3-33(a), does not support jurisdiction over the personal representative of the estate of a nonresident.<sup>18</sup> Not only is such a conclusion erroneous as a matter of law, but even assuming *arguendo* that it is correct, it would not justify dismissal of Plaintiff's claims against the pilot's employer, Aries Technologies, Inc., which is subject to vicarious liability for the pilot's negligence and is clearly subject to service under the Long-Arm Statute based upon its employee having committed negligent acts in West Virginia.

**a. The Circuit Court Erred as a Matter of Law by Concluding That the Personal Representative of an Estate Of a Nonresident Is Not Amendable to Service of Process under the West Virginia Long-Arm Statute.**

In concluding that the personal representative of an estate of a nonresident is not subject to service of process under the Long-Arm Statute,<sup>19</sup> the circuit court made two

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<sup>18</sup>The lower court did not make any distinction between the estates of nonresidents from within the United States and those nonresidents from foreign countries such countries as Canada, nor would such a distinction have been appropriate for the jurisdictional matter at issue in this case.

<sup>19</sup>The Court previously dealt with the issue of whether the personal representative of the estate of a nonresident is subject to personal jurisdiction in West Virginia in *Robinson v. Cabell Huntington Hosp.*, 201 W. Va. 455, 498 S.E.2d 27 (1997), where the Court concluded that the plaintiff could not rely upon the Long-Arm Statute to establish jurisdiction over the executor of a Florida estate in a case where the cause of action arose prior to the 1978 effective date of the statute.

fundamental mistakes. First, it strictly construed the statute as being in derogation of the common law, notwithstanding the clearly remedial purpose that lay behind the Long-Arm Statute. And second, the lower court failed to appreciate the broad language employed by the Legislature when it defined the category of persons subject to service under § 56-3-33.

As has been widely recognized, “[t]he passage of [West Virginia Code] § 56-3-33 by the Legislature was intended to permit the courts of this state to exercise personal jurisdiction over a non-resident defendant to the extent permitted by the due process clause.”<sup>20</sup> *Lozinski v. Lozinski*, 185 W. Va. 558, 562, 408 S.E.2d 310, 313 (1991) (quoting *Harman v. Pauley*, 522 F.Supp. 1130, 1135 (S.D. W.Va. 1981)); see *Clark v. Milam*, 830 F.Supp. 316, 319 n.3 (S.D. W.Va.1993) (citing *Pittsburgh Terminal Corp. v. Mid Allegheny Corp.*, 831 F.2d 522, 525 (4th Cir.1987)). In light of the remedial purpose that lay behind the statute, it should be liberally construed to provide a forum where due process requirements are otherwise satisfied. *Cf. syl. pt. 5, McDavid v. United States*, 213 W. Va. 592, 584 S.E.2d 226 (2003) (“Because the wrongful death act alleviates the harshness of the common law, it is to be given a liberal construction to achieve its beneficent purposes.”) (citation omitted).<sup>20</sup>

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The Court in *Robinson*, while it tacitly assumed that personal jurisdiction would otherwise be afforded by the Long-Arm Statute, did not specifically address the issue raised by the case *sub judice*.

<sup>20</sup>Courts in other jurisdictions have had no difficulty concluding that their long-arm statutes should be liberally construed. See, e.g., *Tri-State Energy Solutions, LLP v. KVAR Energy Sav., Inc.* 2008 WL 5245712, 5 (D.Del. 2008) (“the Delaware long-arm statute is to be construed liberally—to provide jurisdiction to the maximum extent possible—so that Delaware residents have redress against those not subject to service in Delaware.”); *Blimka v. My Web Wholesaler, LLC*, 143 Idaho 723, 152 P.3d 594, 597 (2007) (long-arm statute “is remedial legislation designed to provide a forum for Idaho residents and should be liberally construed to effectuate that purpose”); *Strother v. Strother*, 120 N.C.App. 393, 395, 462 S.E.2d 542, 543 (1995) (“In determining whether the ‘long-arm’ statute

Thus, the approach taken by the circuit court, which strictly construed the statute in relation to prior common law, was erroneous.

Moreover, it is clear that the Legislature enacted the Long-Arm Statute with the intent to fully displace existing common law regarding the assertion of jurisdiction over non-resident defendants. While the court below was correct in observing that legislation is presumed to “harmonize completely” with existing common law, syl. pt. 7, *State ex rel. Goff v. Merrifield*, 191 W. Va. 473, 446 S.E.2d 695 (1994), “when a statute is designed as a revision of *a whole body of law* applicable to a given subject, it supercedes the common law.” *State ex rel. Riffle v. Ranson*, 195 W. Va. 121, 128, 464 S.E.2d 763, 770 (1995) (emphasis added). As in *Riffle*, where the Court concluded that the enactment of West Virginia Code § 56-1-1a was intended to completely displace the common law as it related to the doctrine of *forum non conveniens*, the adoption of the Long-Arm Statute represents a “wholesale abandonment” of the common law as it previously governed the limits of personal jurisdiction. Consequently, there is no justifiable basis for concluding that prior common-law restrictions have a place in analyzing the Long-Arm Statute.

Finally, and most importantly, the language employed by the Legislature in § 56-3-33 makes clear an intent that the statute should be applied broadly to all non-resident defendants

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permits our courts to entertain an action against a particular defendant, the statute should be liberally construed in favor of finding jurisdiction.”); *In re Heston Corp.*, 254 Kan. 941, 870 P.2d 17, 25 (1994) (“The Kansas long arm statute . . . is liberally construed to assert personal jurisdiction over nonresident defendants to the full extent permitted by the due process clause of the Fourteenth Amendment to the United States Constitution.”); *Robinson v. Vanguard Ins. Co.*, 468 So.2d 1360, 1365 (La.App. 1st Cir.1985) (Louisiana’s long-arm statute is to be liberally construed in favor of the exercise of jurisdiction); *Schroeder v. Raich*, 89 Wis.2d 588, 593, 278 N.W.2d 871 (1979) (Wisconsin long-arm statute liberally construed in favor of the exercise of jurisdiction).

regardless of their status. Under the statute, personal jurisdiction is derived from a “nonresident” engaging in certain ascribed activity, including “[c]ausing tortious injury by an act or omission in this state.” W. Va. Code § 56-3-33(a). The statute defines a “nonresident” as “*any person, other than voluntary unincorporated associations, who is not a resident of this state or a resident who has moved from this state subsequent to engaging in such act or acts, and among others includes a nonresident firm, partnership or corporation or a firm, partnership or corporation which has moved from this state subsequent to any of said such act or acts.*” W. Va. Code § 56-3-33(e)(2) (emphasis added). As pointed out by the court below, the statute makes no specific reference to executors of out-of-state estates; but in light of the broad language otherwise employed, such specification was not required. *See State ex rel. Nguyen v. Berger*, 199 W. Va. 71, 76, 483 S.E.2d 71, 76 (1996) (“[T]he Legislature . . . made it clear that the list . . . was not intended to be an exhaustive list, as evidenced by the addition of the qualifier ‘but is not limited to’ . . . .”); *see also State Human Rights Comm’n v. Pauley*, 158 W. Va. 495, 502, 212 S.E.2d 77, 80 (1975) (“the term ‘including’ in a statute is to be dealt with as a word of enlargement and this is especially so where . . . such word is followed by ‘but not limited to’ the illustrations given.”).

The circuit court stated that in reaching its ruling it was applying the canon of construction *expressio unius est exclusio alterius* (“the express mention of one thing implies exclusion of all others”), Final Order at 6-7, which “is premised upon an assumption that certain omissions from a statute by the Legislature are intentional.” *Phillips v. Larry’s*

*Drive-In Pharmacy, Inc.* 220 W. Va. 484, 492, 647 S.E.2d 920, 928 (2007).<sup>21</sup> More specifically, the court reasoned that because service upon the executors of out-of-state estates is expressly provided for in statutes dealing with “similar subjects”—namely, the nonresident motorist statute, W. Va. Code § 56-3-31, and the nonresident bail bondsman statute, W. Va. Code § 56-3-34—that it may be inferred that the omission of similar provisions in the Long-Arm Statute may be was intended by the Legislature to prohibit the assertion of personal jurisdiction over the representatives of estates of nonresidents.

What the lower court did in this case was to create ambiguity where none in fact

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<sup>21</sup>This Court has previously recognized that “[i]n the interpretation of statutory provisions the familiar maxim *expressio unius est exclusio alterius*, the express mention of one thing implies the exclusion of another, applies.” Syl. pt. 3, *Manchin v. Dunfee*, 174 W. Va. 532, 327 S.E.2d 710 (1984); see also *State ex rel. Riffle v. Ranson*, 195 W.Va. 121, 128, 464 S.E.2d 763, 770 (1995). The *expressio unius* maxim is premised upon an assumption that certain omissions are intentional, and as the Court explained in *Riffle*, “[i]f the Legislature explicitly limits application of a doctrine or rule to one specific factual situation and omits to apply the doctrine to any other situation, courts should assume the omission was intentional; courts should infer the Legislature intended the limited rule would not apply to any other situation.” 195 W. Va. at 128, 464 S.E.2d at 770.

Importantly, *expressio unius* is not a rule of law, but merely an aid to construing an otherwise ambiguous statute. See 2A Norman J. Singer, *Sutherland Statutory Construction* § 47:23, at 315 (6th ed.2000). And even in this limited capacity other courts, and even members of this Court, have admonished that “[t]he maxim is to be applied with great caution and is recognized as unreliable.” *State v. Euman*, 210 W. Va. 519, 524, 558 S.E.2d 319, 324 (2001) (McGraw, J. concurring) (quoting *Director, Office of Workers’ Compensation Programs v. Bethlehem Mines Corp.*, 669 F.2d 187, 197 (4th Cir.1982)). The feebleness of the rule stems from the very nature of the inference that underlies it. One commentator has stated that the *expressio unius* maxim “is a questionable one in light of the dubious reliability of inferring specific intent from silence.” Cass R. Sunstein, *Law and Administration after Chevron*, 90 Colum. L.Rev.2071, 2109 n.182 (1990); see also Max Radin, *Statutory Interpretation*, 43 Harv. L.Rev. 863, 873-74 (1930) (calling the canon “one of the most fatuously simple of logical fallacies, the ‘illicit major,’ long the pons asinorum of schoolboys”) (citation omitted). Thus, as the Seventh Circuit Court of Appeals succinctly observed, “[n]ot every silence is pregnant; *expressio unius est exclusio alterius* is therefore an uncertain guide to interpreting statutes . . . .” *Illinois Dep’t of Public Aid v. Schweiker*, 707 F.2d 273, 277 (7th Cir.1983) (citations omitted).

exists. The statute's unambiguous use of the term "any person" to define those non-residents subject to its jurisdictional reach precludes the restrictive interpretation applied by the circuit court. And without such ambiguity, the need to apply any canon of construction, including the *expressio unius* maxim, does not exist. See *State ex rel. Van Nguyen v. Berger*, 199 W. Va. 71, 76-77, 483 S.E.2d 71, 76-77 (1996) (stating that "because [the penal statute] is not vague or ambiguous, there is no need to construe the statute, and we need not turn to the rules of statutory construction, including the maxim of *expressio unius est exclusio alterius*").

In any event, even if there is an ambiguity on this issue so as to require construction of the statute, it has been emphasized by some courts that the *expressio unius* canon "should be invoked only when other aids to interpretation suggest that the language at issue was meant to be exclusive." *Bailey v. Federal Intermediate Credit Bank*, 788 F.2d 498, 500 (8th Cir.), cert. denied, 479 U.S. 915 (1986). Thus, application of the presumption generally occurs only where "there [is] some evidence the legislature intended [the presumption's] . . . application lest it [should] prevail as a rule of construction despite the reason for and the spirit of the enactment." *Columbia Hospital Ass'n. v. City of Milwaukee*, 35 Wis.2d 660, 151 N.W.2d 750, 754 (1967)); see also *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (*expressio unius* maxim "must yield to clear contrary evidence of legislative intent.").

In this case, there is no evidence of legislative intent to preclude actions against the personal representatives of estates of nonresidents. Nor is there a rational reason why the Legislature would have intended to so restrict the class of persons subject to the Long-Arm

Statute, particularly where it has otherwise provided for the initiation and continuation of suits against the personal representatives of deceased wrongdoers. *See, e.g.*, W. Va. Code § 55-7-5 (right of action for wrongful death “shall survive the death of the wrongdoer, and may be enforced against the executor or administrator”); W. Va. Code § 55-7-8a (causes of action for injuries to property and/or person survive the death of the person liable and may be brought against the wrongdoer’s personal representative).

At the very least, such statutes should be read *in pari materia* with the Long-Arm Statute to reach the conclusion that the personal representatives of non-resident wrongdoers are subject to personal jurisdiction in this state. *See* syl. pt. 5, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W. Va 14, 217 S.E.2d 907 (1975) (“Statutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded *in pari materia* to assure recognition and implementation of the legislative intent. Accordingly, a court should not limit its consideration to any single part, provision, section, sentence, phrase or word, but rather review the act or statute in its entirety to ascertain legislative intent properly.”).

In sum, the West Virginia Long-Arm Statute should be broadly construed to provide personal jurisdiction over nonresidents, including their estates, where the same comports with due process, since the statute’s use of the term “any person” to define those nonresidents subject to its jurisdictional reach forecloses any finding of ambiguity requiring resort to statutory construction.

**b. Assuming *Arguendo* That a Representative of a Non-Resident's Estate Is Not Subject to Service of Process under the Long-Arm Statute, Such Ruling Does Not Justify Dismissal of the Employer of the Representative's Decedent.**

Absent the purported limitation on obtaining service of process over the personal representative of a non-resident estate, there is no other basis for concluding that the Defendants are not subject to the service under the West Virginia Long-Arm Statute, since the statute provides for personal jurisdiction over both persons who transact business in West Virginia, as well as those who cause tortious injury by an act or omission in this state. W. Va. Code § 56-3-33(a)(1) & (3).<sup>22</sup> As discussed *supra*, there is and can be no dispute that

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<sup>22</sup>The West Virginia Long-Arm Statute, codified at W. Va. Code § 56-3-33(a), confers personal jurisdiction over a nonresident defendant who engages in one or more of the following acts:

- (1) Transacting any business in this state;
- (2) Contracting to supply services or things in this state;
- (3) Causing tortious injury by an act or omission in this state;
- (4) Causing tortious injury in this state by an act or omission outside this state if he or she regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumes or services rendered in this state;
- (5) Causing injury in this state to any person by breach of warranty expressly or impliedly made in the sale of goods outside this state when he or she might reasonably have expected such person to use, consume or be affected by the goods in this state: *Provided*, That he or she also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
- (6) Having an interest in, using or possessing real property in this state; or

Sanwalka engaged in negligent acts within the borders of West Virginia that proximately caused injury to the Plaintiff's decedent. Thus, even assuming arguendo that the personal representative of Sanwalka is not subject to service under the Long-Arm Statute, such statutory limitation clearly does not prohibit service upon Sanwalka's employer, Aries Technologies, Inc., which is alleged to be vicariously liable for Sanwalka's negligent acts.<sup>23</sup>

In this case, the circuit court clearly erred by failing to account for the separate status of the two defendants. Under West Virginia law, an injured plaintiff has a "right . . . to join in the same action master and servant where the right of action springs from the wrongful act of the servant for which the master is liable." *Wills v. Montfair Gas Coal Co.*, 97 W. Va. 476, 478, 125 S.E. 367, 366-67 (1924); *see also Harless v. First Nat. Bank in Fairmont*, 169 W. Va. 673, 684, 289 S.E.2d 692, 699 (1982). There is no authority in this or any other jurisdiction supporting the lower court's dismissal of the employer, Aries Technologies, Inc., based upon the inability to obtain service of process upon the employee's personal representative. *Cf. syl. pt. 1, O'Dell v. Universal Credit Co.*, 118 W. Va. 678, 191 S.E. 568

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- (7) Contracting to insure any person, property or risk located within this state at the time of contracting.

<sup>23</sup>See Complaint at ¶ 5 (asserting "Roy Sanwalka was an agent and employee of defendant Aries Technologies, Inc., was acting within the course and scope of his employment with Aries Technologies, Inc., and was also operating the airplane pursuant to the authorization, permission, and direction of defendant Aries Technologies, Inc.," and that therefore "Aries Technologies, Inc. is liable for the acts and omissions of the agent and employee, Roy Sanwalka") (R. at 5). Importantly, the defendants have not presented any documentary evidence disputing such allegations. Indeed, that evidence has been produced by the Defendants indicates that Roy Sanwalka owned 50 percent of defendant Aries Technologies, Inc., and that Aries was the owner of the aircraft involved in the accident. *See* Affidavit of Shashi Sanwalka at ¶ 5, attached as Exhibit 1 to *Motion to Dismiss* filed by Shashi Sanwalka (R. at 22).

(1937) (“plaintiff may dismiss the servant for a reason not going to the merits, without impairing his right to proceed against the master, although the latter is liable only under the doctrine of respondeat superior”); *see also Woodrum v. Johnson*, 210 W. Va. 762, 559 S.E.2d 908 (2001) (settlement with and release of agent does not release party principal who is vicariously liable for agent’s conduct).

Importantly, § 56-3-33(a) predicates personal jurisdiction upon acts engaged in by “a non-resident, or by his or her duly authorized agent . . . .” (Emphasis added.) Under the statute, therefore, a nonresident defendant may be subject to personal jurisdiction in West Virginia based on the imputed contacts of the defendant’s agent. This accords with basic principles of agency law, whereby the forum-related contacts of an agent acting within the scope of an agency relationship are attributable to the principal for jurisdictional purposes:

[W]e remark the obvious: the contacts of a corporation’s agent can subject the corporation to personal jurisdiction. This result flows naturally from the corporate form. “Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, it is clear that unlike an individual its ‘presence’ without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it.”

*United Elec., Radio and Mach. Workers of America v. 163 Pleasant Street Corp.*, 960 F.2d 1080, 1090 (1<sup>st</sup> Cir. 1992) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158 (1945)); *see also Guyton v. Pronav Ship Management, Inc.*, 139 F.Supp.2d 815, 818 (S.D.Tex. 2001) (“An agent’s contacts can be imputed to the principal for the purposes of the jurisdictional inquiry.”).

Thus, even if the executor or administrator of Sanwalka’s estate is not subject to

personal jurisdiction in this state, such fact does not prohibit consideration of Sanwalka's conduct and actions in determining whether there is jurisdiction over his employer, Aries Technologies, Inc. And in this case, since Plaintiff has alleged and proffered evidence that Sanwalka engaged in negligent acts and/or omissions in West Virginia, there is no justification for the lower court dismissing Aries based upon the Long-Arm Statute.

**2. The Circuit Court Erred by Dismissing Plaintiff's Complaint on the Alternative Basis That the Defendants' Contacts with West Virginia Failed to Satisfy Due Process, Where Plaintiff Has Not Only Alleged, but Has Presented Proof by Way of Expert Testimony, That All of the Pilot's Negligent Acts And/or Failures to Act Proximally Causing the Accident Occurred in West Virginia.**

Due process requires that a defendant have sufficient "minimum contacts" with the forum state such that maintenance of an action in the forum does not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154 (1945); syl. pt. 1 *Hodge v. Sans Mfg. Co.*, 151 W. Va. 133, 150 S.E.2d 793 (1966). A plaintiff may establish such minimum contacts by demonstrating "general jurisdiction" with respect to a defendant's regular and systematic contacts with the forum state. Alternatively, if a defendant's contact with the forum state form the basis for the suit, "specific jurisdiction" may be established over the defendant. *Carefirst of Maryland v. Carefirst Pregnancy Centers, Inc.*, 334 F.3d. 390, 397 (4<sup>th</sup> Cir. 2003); see also *Helicopteros Nacionales De Colombia, S.A. v. Hall*, 466 U.S. 408, 414 & n.8 (1984).

Since the jurisdictional analysis in this case is focused upon whether a West Virginia court may exercise specific jurisdiction over the Defendants based upon the specific actions of Sanwalka within the borders of West Virginia, an analysis of the Defendants' "regular and

systematic contacts” with West Virginia, which would form the basis of general jurisdiction, is unnecessary.

In determining whether specific jurisdiction exists, the primary focus is on whether plaintiff’s suit “sufficiently arises from, or relates to, [the defendant’s] contacts” with the forum state. *The Christian Science Bd. of Dir’s. of the First Church of Christ v. Nolan*, 259 F.3d 209, 216 (4<sup>th</sup> Cir. 2001). More specifically, consideration is to be given to: (1) the extent to which defendant has purposely availed itself of the privilege of conducting activities in the state; (2) whether the plaintiff’s claims arise out of those activities directed at the state; (3) whether the exercise of personal jurisdiction would be constitutionally “reasonable.” *Carefirst of Maryland*, 334 F.3d at 397; *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 711-12 (4<sup>th</sup> Cir. 2000), *cert. denied*, 537 U.S. 1105 (2003); *see also Helicopteros Nacionales De Colombia, S.A. v. Hall*, 466 U.S. 408, 414 & n.8 (1984).

Due process requires a showing of “some act [related to the cause of action alleged] by which the [non-resident] defendant purposefully avails [himself or herself] of the privilege of conducting activities within the Forum State. . . .” *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Generally, the commission of a single tortious act within the forum state is sufficient to establish purposeful availment. *See Columbia Briargate Co. v. First National Bank in Dallas*, 713 F.2d 1052, 1057 (4<sup>th</sup> Cir. 1983); *Waller v. Butkovich*, 584 F.Supp. 909 (M.D.N.C. 1984); *see also Rosenblatt v. American Cyanamid Company*, 86 S.Ct. 1, 3, 15 L.Ed.2d 39 (Goldberg, Circuit Justice 1965) (noting that “[i]n cases under these [long-arm statutes providing for service based upon a defendant’s commission of a ‘tortious act’ in the forum

State] in state and federal courts, jurisdiction on the basis of a single tort has been uniformly upheld.”).

As contained in the extensive recitation of facts set forth above, Plaintiff has alleged and presented evidence that Sanwalka committed negligent acts and/or failures to act regarding his flight planning and operation of the aircraft while the plane was located in West Virginia. Thus, there can be no dispute that by using airport facilities and airspace in West Virginia, Sanwalka purposely availed himself of the privilege of conducting activities within West Virginia.

Nor can there be any dispute as to whether Plaintiff's claims arise out of Sanwalka's activities in West Virginia. As demonstrated by Plaintiff through expert evidence, the subject aircraft was experiencing substantial difficulty staying aloft well before it reached the Virginia-West Virginia border, which difficulty was the result of negligent acts committed by Sanwalka while in this state. Courts have had no difficulty finding a due process basis for personal jurisdiction in far more attenuated circumstances. *See, e.g., In re Oil Spill by Amoco Cordiz off Coast of France*, 491 F.Supp. 170 (N.D. Ill. 1979), *aff'd* 699 F2d 907 (7th Cir. 1983) (personal jurisdiction over Spanish shipbuilder defendant under Illinois long-arm statute in accord with due process notwithstanding fact that oil-tanker accident occurred off coast of France, where such defendant was involved in meetings concerning design of subject ship that took place in Illinois).

Consequently, there is more than ample basis to conclude that the assertion of personal jurisdiction over Defendants in West Virginia comports with due process.

**B. THE CIRCUIT COURT ABUSED ITS DISCRETION BY DISMISSING PLAINTIFF'S COMPLAINT FOR *FORUM NON CONVENIENS* UNDER WEST VIRGINIA CODE § 56-1-1a, WHERE PLAINTIFF'S CAUSE OF ACTION AROSE IN WEST VIRGINIA AND WHERE THE FACTORS FOR DISMISSAL UNDER THE STATUTE DO NOT MILITATE IN FAVOR OF DISMISSAL.**

As an additional, alternative ground for dismissing Plaintiff's case, the circuit court ruled that such dismissal was warranted based upon the doctrine of *forum non conveniens* as set forth in West Virginia Code § 56-1-1a. The lower court clearly abused its discretion, however, in making such ruling, where Plaintiff's cause of action arose from acts and omissions committed in West Virginia, and where none of the factors set forth in the statute justify dismissal.

West Virginia Code § 56-1-1a(a) provides that a plaintiff's choice of forum is entitled to great deference where the cause of action arises in West Virginia:

In any civil action if a court of this state, upon a timely written motion of a party, finds that 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, the court shall decline to exercise jurisdiction under the doctrine of *forum non conveniens* and shall stay or dismiss the claim or action, or dismiss any plaintiff: *Provided, That the plaintiff's choice of a forum is entitled to great deference*, but this preference may be diminished when the plaintiff is a nonresident *and* the cause of action did not arise in this state. . . .

W. Va. Code § 56-1-1a(a) (emphasis added).<sup>24</sup>

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<sup>24</sup>W. Va. Code § 56-1-1a(a) provides in full:

(a) In any civil action if a court of this state, upon a timely written motion of a party, finds that 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, the court shall decline to exercise jurisdiction under the doctrine of *forum non conveniens* and

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shall stay or dismiss the claim or action, or dismiss any plaintiff: Provided, That the plaintiff's choice of a forum is entitled to great deference, but this preference may be diminished when the plaintiff is a nonresident and the cause of action did not arise in this state. In determining whether to grant a motion to stay or dismiss an action, or dismiss any plaintiff under the doctrine of forum non conveniens, the court shall consider:

(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 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 conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty;

(7) Whether not granting the stay or dismissal would result in unreasonable duplication or proliferation of litigation; and

(8) Whether the alternate forum provides a remedy.

In this case, the lower court determined that the deference to Plaintiff's choice of forum was "diminished" by virtue of the fact that she is a nonresident and because "it is questionable whether the cause of action . . . did in fact arise in this state." Final Order at 11. This discounting of the deference that should have been accorded Plaintiff's forum choice was erroneous insofar as it was based upon the assumption that there is no evidence that the subject cause of action arose, at least in part, in West Virginia.

Defendants have asserted, and the circuit court apparently agreed, that Plaintiff's cause of action did not "arise" in West Virginia because Plaintiff's decedent died in Virginia. According to Defendants, under *Guyan Motors v. Williams*, 133 W. Va. 630, 635, 57 S.E.2d 529, 532 (1950), damages are an integral part of a cause of action, and a cause of action can arise *only* where the plaintiff's damages are sustained. Defendants are wrong both as to their reading of *Guyan Motors*, as well as their characterization of the damages in this case being limited to Margaret O'Brien's death in Virginia.

First, contrary to Defendants' interpretation of *Guyan Motors*, West Virginia law does not hold that a cause of action may only "arise" in the place where damages are sustained. *Guyan Motors* addressed the straightforward question of whether "*a part* of the cause of action" for breach of contract brought by the plaintiff arose in the county wherein the plaintiff suffered her damages. 133 W. Va. at 631, 57 S.E.2d at 530. More specifically, the Court was presented with the question of whether the plaintiff, whose automobile was destroyed in Wyoming County as a result of the defendant's alleged failure to properly repair the vehicle, could maintain her action in Wyoming County notwithstanding the fact that the

work was performed at the defendant's garage in Logan County. *Id.* The Court held that "a cause of action for breach of contract arises in the county where the contract is made **and breached, or** in the county where substantial damage actually accrued as a result of the failure to perform such contract." *Id.* at Syllabus (emphasis added). Thus, under *Guyan Motors* the plaintiff was free to bring her cause of action in either Wyoming or Logan County, and, contrary to Defendants' interpretation of the case, was not limited to bringing the action in the venue where she sustained her damages. Indeed, this Court has recognized that "[i]n contract cases, . . . venue may arise in more than one county because the elements of a contract case are divisible." *McGuire v. Fitzsimmons*, 197 W. Va. 132, 136, 475 S.E.2d 132, 136 (1996) (citing Syl. Pt. 3, *Wetzel County Savings and Loan Co. v. Stern Bros., Inc.*, 156 W. Va. 693, 195 S.E.2d 732 (1973)).

In the tort context, this Court has likewise made clear that a tort may "arise" in more than one venue. For example, in *McGuire* the Court held that "[v]enue based on where the cause of action for the legal malpractice suit arose is proper in the following counties: (1) where the attorney's employment was contracted, that is, where the duty came into existence; **or (2) where the breach or violation of the duty occurred;** or (3) where the manifestation of the breach-substantial damage-occurred." *McGuire*, Syl., in part (emphasis added). While *McGuire* cautioned that such holding was limited to a cause of action for legal malpractice, 197 W. Va. at 136 n.5, 475 S.E.2d at 136 n.5, there is no reason why Plaintiff's cause of action, grounded as it is in the negligent acts committed by Roy Sanwalka in Kanawha County and other locations within West Virginia airspace, is not similarly divisible with

respect to breach of duty and manifestation of damages.

In any event, even if Plaintiff's cause of action may only arise in such place as her decedent sustained injury and/or death, based upon the facts as developed by Plaintiff's experts, and as alleged by Plaintiff in her complaint,<sup>25</sup> Margaret O'Brien would have suffered actionable fear and emotional distress related to her impending death well before she reached the Virginia border. Specifically, at the very least, she would have experienced an increasingly great "fear and apprehension of imminent death"<sup>26</sup> for more than twelve minutes between the time when Roy Sanwalka first reported icing while the aircraft was losing altitude, and when it eventually crashed.<sup>27</sup> A significant portion of this ordeal would have transpired in West Virginia. In fact, given evidence from Plaintiff's expert that icing would have begun in the vicinity of Pineville, West Virginia, a jury could reasonably infer that Ms. O'Brien's fear and apprehension would have begun before Mr. Sanwalka reported the icing

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<sup>25</sup>See Complaint at ¶ 13 (R. at 6-7).

<sup>26</sup>See *Beynon v. Montgomery Cablevision Limited Partnership*, 351 Md. 460, 718 A.2d 1161 (1998) (holding in survival action that "where a decedent experiences great fear and apprehension of imminent death before the fatal physical impact, the decedent's estate may recover for such emotional distress and mental anguish as are capable of objective determination"); *Nelson v. Dolan*, 230 Neb. 848, 434 N.W.2d 25 (1989) (conscious prefatal-injury fear and apprehension of impending death survives decedent's death and inures to benefit of decedent's estate); *cf.*, Syl. Pt. 6, *McDavid v. United States*, 213 W. Va. 592, 584 S.E.2d 226 (2003) ("Under the wrongful death act, W. Va. Code, 55-7-6 [1992], a jury's verdict may include damages for the decedent's pain and suffering endured between the time of injury and the time of death, where the injury resulted in death but the decedent did not institute an action for personal injury prior to his or her death."); *Johnson v. West Virginia University Hospitals, Inc.*, 186 W. Va. 648, 413 S.E.2d 889 (1991) (permitting cause of action for negligent infliction of emotional distress where plaintiff sustained fear of exposure to AIDS virus resulting from being bitten by hospital patient who was infected with the disease).

<sup>27</sup>According to the NTSB Report (R. at 87), Roy Sanwalka reported icing to air traffic controllers at 14:22 Zulu (10:22 a.m. local time), and the last radar contact occurred at 14:34 Zulu (10:34 a.m.), while the aircraft was not far for the eventual crash site.

to air traffic controllers. Consequently, there is no merit whatsoever to Defendants' assertion that Plaintiff's cause of action arose exclusively in Virginia for purposes of determining whether "great deference" should be accorded Plaintiff's choice of a West Virginia forum.

Moreover, as with its ruling on the minimum contacts necessary to satisfy the requirements for personal jurisdiction, the lower court's ruling on *forum non conveniens* was premised largely upon the flawed notion that the cause of action against Defendants has no substantial connection with West Virginia.<sup>28</sup> As has been clearly shown *supra*, Plaintiff's entire cause of action is grounded on the acts and/or failures to act of Sanwalka in the flight planning, decision making, and operation of the subject plane while it was in West Virginia.

The circuit court was similarly mistaken as to its assumption that the private interests of the parties and the public interest of the state clearly "predominates in favor of the action being brought in an alternative forum." (Final Order at 13 (citing W. Va. Code § 56-1-1a(a)(6)).) In reaching this conclusion, the lower court emphasized that potential witnesses in this case may be drawn from a number of jurisdictions, including Canada, Virginia, Georgia (where the air traffic controller was located). (*Id.*) While it is true that witnesses may be drawn from all three of these places, the fact remains that there will also be witnesses from West Virginia, including (1) individuals who have information regarding the atmospheric conditions at Charleston's at Yeager Airport that led to Sanwalka landing

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<sup>28</sup>See Final Order at 12 (trial court finding that "[t]he only contact of the decedents with this state was when the airplane in which they were traveling made an unplanned stop in Charleston, West Virginia, due to weather conditions.") (R. at 91).

in Charleston the day before the crash; (2) individuals who have information regarding the atmospheric conditions at Yeager Airport on the day of the crash; (3) persons in the Yeager tower who had radio contact with Sanwalka, both the day before the crash and the day of the crash; (4) individuals who recorded and have information on the content of the Automated Terminal Information System; and (5) members of the Ground Control. The circuit court's consideration of this issue completely ignored these witnesses.

While it is true that several damages witnesses for the Plaintiff (including the decedent's mother, Edith Nezan, her brother, Dave O' Brien, and her two children, Ben Griffin and Gillian Griffin), reside in Canada, all have consented to voluntarily appearing before this court for trial. These witnesses will be made available at a mutually convenient location for deposition. Thus, there will be no need to compel these witnesses' appearance.

As to other Canadian witnesses, the only facts that Plaintiff has pled in her Complaint pertain to Sanwalka's acts and/or failures to act that *occurred in West Virginia*. There is simply no evidence at this juncture that Sanwalka's negligence in his flight planning, decision making and operation of the aircraft occurred anywhere other than West Virginia. And one thing is for certain—*none of the acts or omissions alleged to have proximately caused the crash took place in Canada.*<sup>29</sup>

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<sup>29</sup>There are, moreover, serious questions as to whether Plaintiff has recourse to a meaningful remedy in Canada given important differences between West Virginia law and the law in Ontario. Unlike the Federal and West Virginia Rules of Civil Procedure, a plaintiff in Canada has *no right* to take discovery of non-parties without leave of court. (See Ontario Rule of Civil Procedure 31.10, attached to Appendix to *Pl. 's Am. Resp. to Defs. ' Mot. to Dismiss* (R. at 67).) Under Ontario Rule of Civil Procedure 31.10(2), a moving party wishing to take the deposition of a non-party witness would have to show the following:

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- (a) the moving party has been unable to obtain the information from other persons whom the moving party is entitled to examine for discovery, or from the person the party seeks to examine;
  - (b) it would be unfair to require the moving party to proceed to trial without having the opportunity of examining the person; and
  - (c) the examination will not,
    - (i) unduly delay the commencement of the trial of the action,
    - (ii) entail unreasonable expense for other parties, or
    - (iii) result in unfairness to the person the moving party seeks to examine.

See Affidavit of Ian Roland Stauffer ("Stauffer Aff.") at ¶¶ 12-15, attached as Exhibit 4 to *Pl. 's Am. Resp. to Defs. ' Mot. to Dismiss* (R. at 67); see also Ontario Rules of Civil Procedure, Rule 31.10(2).

To satisfy the test under Rule 31.10(2)(a), there must be a refusal, actual or constructive, by the opposing party, to obtain the information from the non-party. See, *Famous Players Development Corp. v. Central Capital Corp.*, 6 O.R. 3d 765, C.P.C. (3d) 286, 53 O.A.C. 185 (Div. Ct. 1991). The moving party must show that it has exhausted its rights to complete a full examination for discovery and, further, has made efforts to obtain the information directly from the non-party from whom the examination is sought. Non-parties are under no obligation to cooperate by giving answers, whether sworn or unsworn. This would be particularly true when the witnesses are located in the United States. (Stauffer Aff. at ¶¶ 13-16.)

Thus, Ms. O'Brien's estate would have no guarantee that they would be able to come to the United States to take discovery depositions of witnesses in West Virginia, the first responders in Virginia, and members of the National Traffic Safety Board who investigated the accident. This would entail extensive motion practice in Canada, with no guarantee that the court would allow the depositions to go forward. If the Canadian court were to even allow the depositions to go forward in the United States, additional expense of securing counsel in West Virginia, subpoenas through miscellaneous actions and a host of other logistic issues would be encountered. With this case properly venued in Kanawha County, West Virginia, Plaintiff would have the right to conduct the discovery needed to prove her case, by examining the witnesses available that would entail little expense, as these witnesses are mainly domiciled in Kanawha County.

Additionally, under Ontario law, Ms. O'Brien's two children, ages 20 and 15, would only be entitled to claim a loss of support income, which would be restricted to the portion of the income that was available to support the dependent children until such time as they would no longer be dependent. Typically, this is until the children turn 23 or are no longer enrolled full time in an undergraduate program at a university. In addition, earnings are reduced by taxes and for personal consumption, reductions not allowed in West Virginia. *Butterfield (Litigation Guardian of) v. Butterfield Estate, et al.*, 96 O.A.C. 262, 23 M.V.R. 3d 192. Given the fact that Margaret O'Brien had an income in excess of \$67,000 US, Defendants and their insurance carrier would potentially have far less liability in Canada than they would in West Virginia.

Importantly, there are no issues surrounding the maintenance of the aircraft. Nor are there questions regarding Sanwalka's pilot training and rating—he did not have an instrument rating permitting him to fly in the weather that was predicted for, and encountered on, the day of the crash. Any assumption by the circuit court that there are matters in controversy that involve the testimony of Canadian witnesses is erroneous.<sup>30</sup>

As to adjudicating this case in Virginia, it is almost certain that few, if any of, Sanwalka's negligent acts occurred in that state. The plane crashed in Virginia after it had

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There are also serious issues as to when this matter could be tried in Canada. There are a minimum of five stages in any civil action commenced in Ottawa, assuming that a case goes all the way to trial and judgment. (Stauffer Aff. at ¶ 4.) Step 1 involves the issuing of a "Statement of Claim," which must be done within two years of the date of the loss. Step 2 is a "Statement of Defense" which must be served between twenty (20) to sixty (60) days, depending on where the service takes place and subject to ten days being added where a defendant first delivers a notice of intent to defend. (*Id.* at ¶ 5.) Step 3 involves examination of witnesses for discovery or mediation. Typically, documentary disclosure and oral examinations of witnesses would not take place for at least eight to twelve months following the delivery of the Statement of Defense and frequent objections occur with respect to the propriety of questions which may necessitate motion practice. (*Id.* at ¶¶ 6-11, 17.) The defendants may choose to proceed with either of these steps first. Mediation is to be conducted within one hundred twenty (120) days of the Statement of Defense being filed, and the time frame can be extended on the consent of the parties in order to allow time to conduct examinations for discovery or simply due to the unavailability of counsel. Step 4 involves a settlement conference and that cannot be conducted until the mediation has been completed and the mediator has filed his or her report. A settlement conference would likely not occur until at least four to six months following mediation. (*Id.* at ¶ 18.) Step 5 is a trial that is usually scheduled at the settlement conference. (*Id.* at ¶¶ 19-21.)

<sup>30</sup>To the extent that the defendants argue that documentary evidence concerning Sanwalka's pilot training and maintenance records are located in Canada, the law is clear that if the parties themselves are in control of the relevant documentary evidence, the physical location of that evidence is irrelevant to *forum non conveniens* analysis. See e.g., *Societe Nationale Industrielle Aerospatiale v. United States District Court for the So. District of Iowa*, 482 U.S. 522, 107 S.Ct. 2542 (1987). The same would apply to information regarding Margaret O'Brien and her estate, as these documents would be in the possession of Plaintiff.

already iced and started losing altitude while in West Virginia airspace. If anything was “fortuitous” in this case, it is the fact that the plane ultimately crashed in Virginia, rather than West Virginia.

The difficulties in adjudicating this case cited by the circuit court as grounds for dismissal would be encountered regardless of the forum in which the case was brought. West Virginia has a substantial public policy interest in making sure that pilots, regardless of their country of residence or nationality who use facilities in this State, follow the rules and regulations that govern the safe operation of their aircraft. As critical fact witnesses reside in West Virginia, and Sanwalka’s negligence occurred in both Kanawha County and other airspace within West Virginia, the Plaintiff is entitled to adjudicate her claims in this forum.

Because plaintiff’s choice of forum is entitled to great deference, there was no sound basis for the circuit court to apply the doctrine of *forum nonconveniens*, particularly where the factors for dismissal under the doctrine set forth in W. Va. Code § 56-1-1(a) do not come close to preponderating in favor of such dismissal. Consequently, the circuit court abused its discretion in dismissing Plaintiff’s case on such basis. *See Gentry v. Mangum*, 195 W. Va. 512, 520 n.6, 466 S.E.2d 171, 179 n.6 (1995) (explaining that “an abuse of discretion occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed but the circuit court makes a serious mistake in weighing them.”).

**V. CONCLUSION**

WHEREFORE, for the reasons stated above, Appellant requests that the Circuit Court's dismissal of Appellant's claims be reversed, and that this case be remanded for further proceedings.

*Respectfully submitted,*

**EDITH NEZAN, in her capacity as  
Personal Representative of the  
Estate of MARGARET O'BRIEN,  
By Counsel**



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Scott S. Segal (WV Bar #4717)  
Mark R. Staun (WV Bar #5728)  
Deborah L. McHenry (WV Bar #4120)  
Victor S. Woods (WV Bar #6984)

**THE SEGAL LAW FIRM**  
A Legal Corporation  
810 Kanawha Boulevard, East  
Charleston, West Virginia 25301  
Telephone: (304) 344-9100  
Facsimile: (304) 344-9105

Michael A. Sullivan (GA Bar I.D. #691431), *Pro Hac Vice*  
**FINCH MCCRANIE, LLP**  
225 Peachtree Street, Northeast  
1700 South Tower  
Atlanta, Georgia 30303  
Telephone: (404) 658-9070

*Counsel for Appellant*

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

EDITH NEZAN, in her capacity as  
Personal Representative of the  
ESTATE OF MARGARET O'BRIEN,

*Appellant, Plaintiff Below,*

v.

ARIES TECHNOLOGIES, INC.; and SHASHI SANWALKA,  
in his capacity as Legal Representative of the  
ESTATE OF ADITYA ROY SANWALKA,

*Appellees, Defendants Below.*

CERTIFICATE OF SERVICE

I, Mark R. Staun, do hereby certify that I have caused to be served true and accurate copies of the foregoing *Brief of Appellant* upon the following counsel of record this 7<sup>th</sup> day of April, 2010, by the means indicated below, addressed as follows:

Ted M. Kanner, Esq.  
THE TED KANNER LAW OFFICE  
606 Virginia Street, East  
Suite 100  
Charleston, WV 25301  
*(Via Hand Delivery)*

Joseph F. McDonough, Esq.  
Robert D. Finkel, Esq.  
MANION MCDONOUGH & LUCAS, P.C.  
Suite 1414 - U.S. Steel Tower  
600 Grant Street  
Pittsburgh, PA 15219  
*(Via First Class U.S. Mail)*

  
\_\_\_\_\_  
MARK R. STAUN (WV State Bar #5728)