No. 35495

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 of Legal Representative of the Estate of ADITYA ROY SANWALKA,

Appellees, Defendants Below.

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BRIEF OF APPELLEES

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

Ted M. Kanner, Esquire
WV State Bar No. 4523
The Ted Kanner Law Office
606 Virginia Street, East, Suite 100
Charleston, WV 25301
304-343-6300

Of Counsel:
Joseph F. McDonough, Esquire
Pa. I.D. #19853
jmcdonough@mmlpc.com
Robert D. Finkel, Esquire
Pa. I.D. #71130
Pro Hac Vice
rfinkel@mmlpc.com
MANION McDONOUGH & LUCAS, P.C.
Suite 1414 - U.S. Steel Tower
600 Grant Street
Pittsburgh, PA 15219
412-232-0200

Counsel for Appellees

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Appellees, Defendants Below.

BRIEF OF APPELLEES

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

Appellees (Defendants in the court below), Shashi Sanwalka, in his capacity as legal representative of the Estate of Aditya Roy Sanwalka ("Shashi Sanwalka"), and Aries Technologies, Inc. ("Aries") (collectively "Appellees" or "Defendants"), by and through their attorneys, hereby file this Brief of Appellees in this appeal from the *Order Granting Defendants' Motions to Dismiss* entered by the Circuit Court of Kanawha County, Judge Louis H. Bloom, on September 16, 2009 (the "Final Order"). In the Final Order, the Circuit Court properly dismissed this action in its entirety because (1) the West Virginia long-arm statute does not permit service upon Shashi Sanwalka as the personal representative of a foreign estate, (2) the Court lacks personal jurisdiction over both Shashi Sanwalka and Aries, and (3) in the interests of justice and the convenience

of the parties, these claims are more properly heard in an alternative forum pursuant to the doctrine of *forum non conveniens* as codified at West Virginia Code § 56-1-1a. Like both Defendants, Appellant Edith Nezan ("Appellant" or "Plaintiff"), the personal representative of the Estate of Margaret O'Brien, is a citizen of Ontario, Canada. This appeal relates to an action filed relating to an airplane crash that occurred near Atkins, Virginia, killing two Canadian citizens, who were traveling from Buttonville, Ontario, Canada over the United States en route to Florida and, ultimately, the Bahamas. The couple made an unplanned landing in Charleston, West Virginia and then took off the next day before crashing in Virginia. Because there is no basis for the assertion of personal jurisdiction over Defendants in West Virginia, and further because Ontario, Canada, is a more convenient, alternative forum, the Final Order should be affirmed.

I. BACKGROUND

A. Introduction

This action arises out of a March 16, 2008 airplane crash that occurred near Atkins, Virginia, killing the pilot, Aditya Roy Sanwalka ("Roy Sanwalka"), and the only passenger, his girlfriend, Margaret O'Brien ("O'Brien"). Both Roy Sanwalka and passenger O'Brien were residents of Ontario, Canada. They departed Buttonville Airport in Ontario, Canada on March 14, 2008 in a Mooney M2OC Ranger aircraft, tail number C-FRSK (the "Mooney"), heading for a planned vacation in the Bahamas. The couple had no intention of stopping in West Virginia. On the day before the crash, the couple elected to land in West Virginia because of inclement weather. The next day, the couple took off from West Virginia and flew into Virginia where, shortly after radio notification to an air traffic controller in Atlanta, Georgia that there was icing on the wings, the airplane crashed near Atkins, Virginia, killing both occupants.

Plaintiff is the mother of passenger O'Brien, who filed this action on behalf of O'Brien's Estate, an estate established and administered in Ontario, Canada. Both Defendants likewise are residents of Ontario, Canada -- one an Estate established and administered in Ontario, Canada that has no assets in West Virginia and the other an Ontario corporation that has never had any contact with this state. The selection of this forum is blatant forum shopping because none of the parties reside in or have any relationship to West Virginia, the cause of action did not arise in West Virginia, none of the witnesses and none of the evidence is located in West Virginia, and West Virginia has **no** interest in this action. Simply put, this is an action that belongs in Ontario, Canada -- an available and more convenient and efficient forum to resolve this damages action between citizens of that province that directly implicates the administration of two estates that have been established and are being administered therein.

B. Parties

Edith Nezan, a Canadian citizen, brings this action in her capacity as Personal Representative of passenger O'Brien, who was a resident and citizen of Ontario, Canada. (R. at 4, ¶¶ 1-2.) The Appellees/Defendants in this action are Aries Technologies, Inc. ("Aries"), an Ontario, Canada corporation, and Shashi Sanwalka, an Ontario resident and citizen, in his capacity as Legal Representative of the Estate of Roy Sanwalka, who was a resident and citizen of Ontario, Canada at the time of his death. *Id.* ¶¶ 3-4. Roy Sanwalka's Estate is being administered in Ontario, Canada, and the only contact Shashi Sanwalka has ever had with the State of West Virginia in his capacity of Legal Representative of the Estate of Roy Sanwalka is to authorize his counsel to make filings seeking the dismissal of this action. (Affidavit of Shashi

Sanwalka ("Sanwalka Affidavit") ¶¶ 6-7, attached as Exhibit 1 to Shashi Sanwalka's Motion to Dismiss (R. at 22).) Likewise, the Estate of passenger O'Brien was established under the laws of Ontario, Canada and is being administered in Ontario, Canada. (R. at 4, ¶ 3.) Shashi Sanwalka does not regularly do or solicit business or engage in any other persistent course of conduct or derive substantial revenues from goods used or consumed or services rendered in West Virginia and does not have an interest in, use or possess real property in West Virginia. (Sanwalka Affidavit ¶¶ 9-10, Exhibit 1 to Motion to Dismiss (R. at 22).) Shashi Sanwalka has been appointed personal representative of Roy Sanwalka's Estate in Ontario, Canada **only**. He has never been appointed nor recognized as an administrator or representative of that estate in West Virginia, nor could he because that Estate has no assets in West Virginia.

Roy Sanwalka lived and worked in Ontario, Canada. *Id.* ¶ 4. Roy Sanwalka did not conduct or solicit business or engage in any other persistent course of conduct, or derive any revenues from goods used or consumed or services rendered in West Virginia and did not have an interest in or possess real property in West Virginia. *Id.* ¶¶ 11-12. The only contact between Roy Sanwalka and the State of West Virginia is that while piloting an aircraft over West Virginia on March 15, 2008, on his way from Buttonville, Ontario, Canada, over the United States en route to Florida and, ultimately, the Bahamas, Roy Sanwalka made an unplanned landing in Charleston, West Virginia due to bad weather, where he refueled and remained until resuming his flight the following day. *Id.* ¶ 13. At the time of the accident, Roy Sanwalka was vacationing with his girlfriend O'Brien. Roy Sanwalka was not employed by Aries, the owner of the

Mooney. The Estate of Roy Sanwalka does not have any assets located in West Virginia and has not sought appointment of an ancillary administrator in West Virginia.

Aries has neither registered nor qualified to do business in West Virginia, does not conduct or solicit business or engage in any other persistent course of conduct or derive any revenues from goods used or consumed or services rendered in the State of West Virginia, and does not have an interest in, use or possess real property in the State of West Virginia. (R. at 52, ¶ 8.) In fact, Aries has **never** done business in West Virginia. The only contact Aries ever had with West Virginia before the filing of this Action was the unexpected landing of the Mooney, which Aries owned, in West Virginia when it was being piloted by Roy Sanwalka, who was traveling on vacation with his girlfriend. *Id.* ¶13. Contrary to Plaintiff's mistaken assertions, Pilot Roy Sanwalka was not an employee of Aries and was neither performing services for nor conducting business on behalf of Aries at the time. Plaintiff has not and cannot offer any evidence to the contrary.

All of the parties in this action are citizens of Ontario, Canada. (R. at 4, ¶¶ 1-4.) None of the parties are residents or citizens of the United States let alone West Virginia. *Id.* ¶¶ 1-4.

C. Pilot License and Aircraft Registration

Roy Sanwalka held a Canadian private pilot license, which he both trained for and obtained in Ontario, Canada. (Affidavit of Bruce Garrow ("Garrow Affidavit") ¶¶ 10-11, attached as Exhibit 2 to Shashi Sanwalka's Motion to Dismiss (R. at 22).) Roy Sanwalka's latest Canadian Medical Certificate regarding his pilot license was issued on May 24, 2005. *Id.* ¶10. Roy Sanwalka owned 50% of Defendant Aries, the Ontario

entity that owned the Mooney. *Id.* ¶¶ 12-13. The other owner is also a Canadian citizen. The Mooney was licensed and certificated by Transport Canada and was kept at Buttonville, Ontario Airport. *Id.* Tri City Aero, located in Kitchener, Ontario, Canada, performed all of the maintenance on the Mooney. *Id.* ¶ 14. All of the annual inspections of the Mooney were performed in Ontario, Canada, and all of the maintenance records for the Mooney are maintained at Tri City Aero in Kitchener, Ontario, Canada. *Id.*[1]

D. Ill-Fated Trip to the Bahamas

The vacationing Canadian couple, Roy Sanwalka and passenger O'Brien, were flying the Mooney from Buttonville, Ontario over the United States to the Bahamas. (Sanwalka Affidavit ¶ 13, Exhibit 1 to Motion to Dismiss (R. at 22).) The couple was not planning on landing or staying in West Virginia. *Id.* On March 14, 2008, the couple flew in the Mooney from Buttonville, Ontario to Buffalo International Airport. The next day, the couple departed Buffalo, New York en route to Jacksonville, Florida when they encountered inclement weather in West Virginia and then diverted and landed at Charleston, West Virginia. (Preliminary Investigation Report, Exhibit B to Garrow Affidavit, which is Exhibit 2 to Motion to Dismiss (R. at 22).)

According to the preliminary investigation report authored by the National Transportation Safety Board ("NTSB"), the Mooney took off on March 16, 2008 at 10:30 a.m. from Yeager Airport, Charleston, West Virginia, heading towards Craig Municipal Airport, Jacksonville, Florida. *Id.* The supplemental NTSB Factual Report dated August 21, 2009 (attached to Plaintiff's Motion to Supplement Record (R. at 87)) confirms that all of the relevant communications between the deceased pilot Roy Sanwalka and

[1] Tri City Aero is not a party to this case nor affiliated with any of the Parties. Thus, contrary to Plaintiff's claim, any documents or information from it would need to be obtained through judicial process.

governmental flying authorities occurred by telephone or radio with individuals located outside of the State of West Virginia. Specifically, pilot Roy Sanwalka contacted Raleigh, North Carolina Automated Flight Service Station to obtain a weather briefing and to file a flight plan. Contrary to Plaintiff's assertion, the filing of an IFR (instrument flight rules) flight plan was not a prerequisite to pilot Roy Sanwalka being permitted to take off that day. Pilot Roy Sanwalka was not required to file a flight plan at all. Moreover, as conceded by Plaintiff's "expert," there was no **prohibition** against VFR (visual flight rules) flights on March 16, 2008 when the Mooney departed Yeager Airport. *See* Brief of Appellant, at 4-5 (Mr. Burgess opines that pilot Roy Sanwalka would have been told that "VFR flight rules were not recommended"). Thus, pilot Roy Sanwalka did not need to file an IFR flight plan to take off that day.

Following takeoff, pilot Roy Sanwalka received air traffic control instructions and guidance from the air traffic control centers in Indianapolis, Indiana and then in Atlanta, Georgia. The Mooney was in cruise flight at 6,200 feet when Roy Sanwalka contacted the air traffic control center in Atlanta, Georgia, reported airframe icing and requested a lower altitude. (Preliminary Investigation Report, Exhibit B to Garrow Affidavit, which is Exhibit 2 to Motion to Dismiss (R. at 22).) Because the airplane was flying at the minimum sector altitude for that location, the air traffic controller gave the pilot a 30 degree left turn. *Id.* "The controller asked the pilot if he would like a climb to 8,000 feet and [Roy Sanwalka] responded that he would. About three minutes later, [Roy Sanwalka] advised the controller that he was losing altitude. The controller told him to maintain whatever altitude he could, and advised him of the location of the nearest airport. There were no further communications from the airplane." *Id.* At the time of the last few radio communications, the aircraft was over Virginia. Likewise, the nearest

airport was located in Virginia. The Mooney crashed in Jefferson National Forest, near Atkins, Virginia shortly after the last radio communication with the controller. *Id.*

E. Motions to Dismiss

Shashi Sanwalka and Aries each moved to dismiss this Action on the grounds of, *inter alia*, lack of personal jurisdiction, improper venue, or *forum non conveniens*. Shashi Sanwalka further sought dismissal on the grounds that West Virginia's long-arm statute, W. Va. Code § 56-3-33, does not authorize a suit in West Virginia against a non-resident personal representative of a deceased non-resident individual. In support of their Motions to Dismiss, Shashi Sanwalka and Aries submitted Affidavits that demonstrated that neither of them had sufficient contacts with West Virginia to permit the exercise of jurisdiction over them and further that the evidence and witnesses relevant to this matter may not be found in West Virginia but instead are predominately located in Ontario, Canada.

Plaintiff filed a Brief in opposition to Sanwalka's Motion to Dismiss, which attached three purported "expert" reports identified as Affidavits. Plaintiff neither submitted any factual affidavits regarding any contacts with West Virginia by Shashi Sanwalka, Roy Sanwalka or Aries nor requested leave to conduct discovery.

Prior to oral argument, the Court issued an Order dated June 30, 2009 requiring that the parties brief the issue of whether West Virginia's long-arm statute even permitted service upon the personal representative of a foreign estate. Both parties fully briefed that issue, and oral argument was held on July 10, 2009. During the oral argument, the Court confirmed that the issues raised by the two Motions to Dismiss had been thoroughly briefed and further that the Court completely understood the issues. Both sides were presented a full opportunity to present argument.

The Motions, Briefs, and argument establish the following uncontroverted facts: (1) Shashi Sanwalka, an Ontario citizen, has been appointed **in Ontario** as the personal representative of the Estate of Roy Sanwalka, which estate is being administered in Ontario; (2) Shashi Sanwalka has not been appointed nor sought appointment in West Virginia as the personal representative of Roy Sanwalka's Estate; (3) Aries is an Ontario corporation that has never conducted business in the United States and has no offices, employees or assets in the United States let alone in West Virginia; (4) Plaintiff is an Ontario resident, who was appointed in Ontario as the personal representative of the Estate of a deceased citizen of Ontario, which Estate is being administered in Ontario;[2] (5) the crash occurred in Virginia; and (6) all witnesses and documentary evidence regarding this matter are located outside West Virginia, predominately in Ontario with other possible witnesses or evidence in Virginia, Indiana, Georgia, and North Carolina.

F. Final Order

By Order dated September 16, 2009, the Circuit Court, Judge Bloom dismissed the case in its entirety holding that (1) the Court did not have personal jurisdiction over either Defendant, Shashi Sanwalka or Aries, due to their lack of contacts with West Virginia; (2) the West Virginia long-arm statute does not permit service upon Shashi Sanwalka; and (3) West Virginia is not an appropriate forum under the doctrine of *forum non conveniens* as codified W. Va. Code §56-1-1a. The Court made clear that each of these three holdings provides a separate and independently sufficient ground for the dismissal.

[2] Subsequent to the filing of this case, Plaintiff sought and obtained appointment as Ancillary Administratrix of the Estate by the County Commission of Kanawha County, West Virginia.

II. DECISION BELOW

1. The Circuit Court properly determined that the West Virginia long-arm statute does not authorize service upon the personal representative of a foreign estate.

2. The Circuit Court properly determined that it lacks personal jurisdiction over either Shashi Sanwalka or Aries because neither has sufficient "minimum contacts" with West Virginia.

3. The Circuit Court properly exercised its discretion and determined that Plaintiff's Complaint should be dismissed on the basis of *forum non conveniens* pursuant to West Virginia Code § 56-1-1a.

III. STANDARD OF REVIEW

The standard of review of the Circuit Court's ruling is:

> a two-prong deferential standard of review. [This Court] review[s] the Final Order and the ultimate disposition under an abuse of discretion standard, and will review the Circuit Court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

Phillips v. Fox, 193 W. Va. 657, 661, 458 S.E.2d 327 (1995). Likewise, it is clear that this Court reviews the Circuit Court's ruling on *forum non conveniens* under an abuse of discretion standard. *See Cannelton Industries, Inc. v. Aetna Cas. & Sur. Co. of America*, 194 W.Va. 186, 460 S.E.2d 1 (1994), *overruled in part on other grounds, Mitchem v. Kirkpatrick*, 199 W.Va. 501 (1997). ("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.")

IV. ARGUMENT

The Circuit Court in its Final Order properly dismissed this action in its entirety because (1) the West Virginia long-arm statute does not permit service upon Shashi

Sanwalka as the personal representative of an Ontario estate, (2) this Court lacks personal jurisdiction over either Shashi Sanwalka or Aries, and (3) under the doctrine of *forum non conveniens*, the public and private interest factors strongly weigh in favor of dismissal in favor of an alternative forum, *i.e.*, the courts of Ontario, Canada.

A. The West Virginia Long-arm Statute Does Not Permit Service Upon the Representative of an Out of State Estate

The Circuit Court properly dismissed this Action against Shashi Sanwalka for lack of personal jurisdiction because the general West Virginia long-arm statute, W.Va. Code § 56-3-33, does not authorize a suit in West Virginia against the personal representative of a deceased non-resident individual. Furthermore, Defendants are unaware of a single West Virginia case holding that W.Va. Code § 56-3-33 authorizes such a suit, and Plaintiff has not cited such a case. Plaintiff instead asks this Court to ignore the plain language of § 56-3-33 and render other Code sections redundant and meaningless. This is improper.

At common law, "[n]othing is better settled than that letters testamentary or letters of administration have no legal operation out of the state from whose court they issue." *Glucksberg v. Polan*, No. C.V.A. 3:99-0129, 2002 WL 31828646, at *7 (S.D.W. Va. Dec. 16, 2002) (quoting *Harrison on Wills and Administration* § 200(1)). "'It follows as a necessary corollary from this principle . . . that an executor or administrator who qualified in another state or jurisdiction can neither sue nor be sued as such in any other state or jurisdiction.'" *Id.* The West Virginia Supreme Court has long followed this common law rule.[3]

[3] *See Welsh v. Welsh*, 136 W. Va. 914, 924, 69 S.E.2d 34, 40 (1952); *Joseph v. National Bank*, 124 W. Va. 500, 21 S.E.2d 141, 142 (1942); *Curl v. Ingram*, 121 W. Va. 763, 6 S.E.2d 483, 484 (1939); *Winning v. Silver Hill Oil Co.*, 89 W. Va. 70, 108 S.E. 593, 594-95 (1921); *Oney v. Ferguson*, 41 W. Va. 568, 23 S.E. 710, 711 (1895); *Crumlish's Adm'r v. Shenandoah Val. R. Co.*, 40 W. Va. 627, 22 S.E. 90 (1895);

West Virginia's general long-arm statute (W. Va. Code § 56-3-33) provides that:

> The engaging by a non-resident, or by his or her duly authorized agent, in any one or more of the acts specified in subdivisions (1) through (7) of this subsection shall be deemed equivalent to an appointment by such non-resident of the Secretary of State, or his or her successor in office, to be his or her true and lawful attorney upon who may be served all lawful process in any action proceeding against him or her, in any circuit court in this state, including an action or proceeding brought by a non-resident plaintiff or plaintiffs, for a cause of action arising from or growing out of such act or act . . . .

There is no mention of executor or administrator of an estate in this provision. Within this Section, "Non-resident" is defined as:

> any person, other than voluntary unincorporated associations, who is not a resident of the state or resident who has moved from the state subsequent to engaging in such act or acts, and among others includes a non-resident firm, partnership or corporation or firm, partnership or corporation which has moved from the state subsequent to any of said such act or acts.

W. Va. Code § 56-3-33(e)(2). Once again, neither executor nor administrator of an estate is mentioned.

In addition to the general long-arm statute, West Virginia also has two other long-arm statutes covering specific activities, *i.e.*, operation of motor vehicles (W. Va. Code § 56-3-31) and acting as a bail bondsman (W. Va. Code § 56-3-34). In stark contrast to the general long-arm statute, both the motor vehicle operator and the bail bondsman long-arm statutes **expressly** provide for service of process upon not only the nonresident motor vehicle operator or bail bondsman but also on the motor vehicle operator or bail bondsman's "administrator, administratrix, executor or executrix in the

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see also, e.g., Strawder v. Thomas, 846 S.W.2d 51, 63-64 (Texas Ct. App. 1992); *Palmer v. L.E. Leach Co.*, 60 F.R.D. 602, 604 (D. Vt. 1973).

event the nonresident dies. . . ." W.Va. Code §§ 56-3-31(c) & 56-3-34(c). Despite the fact that the definitions of "Non-resident" in the motor vehicle operator and bail bondsman long-arm statutes are materially identical to the one in the general long-arm statute, the general long-arm statute does **not** contain this language. *Compare* W. Va. Code § 56-3-31(g)(3) *with* W. Va. Code § 56-3-33(e)(2).

In analyzing this statutory scheme, the Circuit Court properly concluded that:

> The West Virginia long-arm statute does not provide personal jurisdiction over the Defendants in the above-styled action. Unlike the non-resident motorist statute and the non-resident bail bondsman statute, which both do specifically provide for service of process on the administrator, administratrix, executor and executrix of a non-resident, the West Virginia long-arm statute has no such similar language.

(Final Order (R. at 91) at 7.) In reaching this result, the Circuit Court recognized that "'we are obliged not to add to statutes something the Legislature purposely omitted.'" *Id.* (quoting *Phillips v. Larry's Drive-In Pharmacy, Inc.*, 220 W. Va. 484, 486 (2007)). The Circuit Court properly concluded that:

> All three statutes concern actions by non-residents in this state, which subject such non-residents to service of process within this state for the purpose of personal jurisdiction. Thus, failure of the Legislature to include language covering service of process over a nonresident decedent's personal representative in the long-arm statute indicates a purposeful act on the part of the Legislature.

Id. at 7-8.

The Circuit Court's decision is not only supported by the plain language of the long-arm statutes but also comports fully with the common law. "Apart from certain limited circumstances, West Virginia has not generally authorized foreign executors to sue and be sued in local courts." *Glucksberg*, 2002 WL 31828646 at *8; *see also Holsten v. Massey*, 200 W. Va. 775, 786, 490 S.E.2d 864, 875 (1997) ("a statute will be

read in context with the common law unless it clearly appears from the statute that the purpose of the statute was to change the common law"). The general West Virginia long-arm statute does not include executors, administrators or personal representatives within the definition of "nonresidents" subject to jurisdiction, and there is nothing in the statute to even remotely suggest any intent to change the common law regarding personal representatives. *See Glucksberg*, 2002 WL 31828646 at *8; W. Va. Code § 56-3-33(e)(2).

Likewise, the West Virginia Code section relating to Trusts and Estates provides that a nonresident may be served with process in his capacity as personal representative **only** when, after submitting letters of probate **to the clerk of the county commission of any county of West Virginia** wherein ancillary administration is sought, the nonresident individual is appointed **by West Virginia** as an ancillary administrator of a nonresident decedent's assets **situate in West Virginia**.[4] *See* W. Va. Code § 44-5-3(a)(1), (c). Such language would be unnecessary if the general long-arm statute already permitted actions generally against foreign administrators or executors.

Elementary canons of statutory construction require that these statutes, which relate to the same subject matter, be construed in harmony, with the specific statutes taking precedence over the general statute. *See Carvey v. West Va. State Bd. of Educ.*, 206 W. Va. 720, 731, 527 S.E.2d 831, 842 (1999). This Court must also adopt a construction that gives meaning to all provisions of the statutory scheme. *Belt v. Cole*, 172 W. Va. 383, 385, 305 S.E.2d 340, 342 (1983). Thus, § 56-3-33 cannot be

[4] Shashi Sanwalka has not sought ancillary administration in West Virginia and has not submitted letters here, nor could he because Roy Sanwalka had no assets in West Virginia.

interpreted to reach personal representatives or executors and render the specific jurisdictional provisions in §§ 44-5-3, 56-3-31, and 56-3-34 mere nullities. Accordingly, in the absence of a statute expressly providing that an out-of-state personal representative may sue or be sued in West Virginia, Shashi Sanwalka lacks standing to represent the Estate in West Virginia courts and may not be sued there. *See Glucksberg*, at *9 & n.9.

The Circuit Court also properly rejected Plaintiff's assertion that West Virginia's "wrongful death" statute confers jurisdiction against foreign executors and administrators. The sections establishing a cause of action for wrongful death do only that, *i.e.* establish a cause of action, they do not confer jurisdiction. Moreover, the references in the "wrongful death" statute to causes of action against executors or administrators are necessary to create the cause of action, even as to estates being administered in West Virginia. Plaintiff's proffered statutory interpretation violates these fundamental canons of construction.

Accordingly, there is no basis for overturning the Circuit Court's ruling that:

> Because the Legislature failed to provide for service of process on the personal representatives of nonresidents under the West Virginia long-arm statute, for the purpose of personal jurisdiction over such nonresidents, while so providing in other statutes of similar subject, it purposely intended its exclusion. As such, the Court concludes that the West Virginia long-arm does not provide personal jurisdiction of the Defendants in the above action.

(Final Order (R. at 91) at 9.)

B. The Circuit Court Properly Held That Neither Shashi Sanwalka Nor Aries are Subject to the Personal Jurisdiction of the Courts of West Virginia

1. West Virginia Courts Do Not Have Personal Jurisdiction Over Defendant Sanwalka

On a nonresident defendant's motion to dismiss for lack of personal jurisdiction, "it is the plaintiff's burden to establish sufficient facts upon which a court may exercise jurisdiction." *State ex rel. Bell Atlantic-West Virginia v. Ranson*, 201 W. Va. 402, 414, 497 S.E.2d 755, 767 (1997). The Court may rule on the motion upon the pleadings, affidavits and other documentary evidence submitted, in which case the plaintiff has the burden of making a prima facie showing of personal jurisdiction, or it may conduct a pretrial evidentiary hearing, in which case the plaintiff bears the burden of proving jurisdiction by a preponderance of the evidence. *See id.; Town of Fayetteville v. Law*, 201 W. Va. 205, 209, 495 S.E.2d 843, 847 (1997). Where the nonresident defendant offers affidavits supporting its motion, the plaintiff "may not stand on its pleadings [but] must come forward with affidavits or other proper evidence detailing specific facts demonstrating that the court has jurisdiction over the defendant." *State ex rel. Bell Atlantic-West Virginia*, 201 W. Va. at 415, 497 S.E.2d at 768; *accord Lane v. Boston Scientific Corp.*, 198 W. Va. 447, 452, 481 S.E.2d 753, 758 (1996) ("In ruling on a motion to dismiss for lack of personal jurisdiction, the allegations of the complaint, **except insofar as controverted by the defendant's affidavit**, must be taken as true." (emphasis added)) (quoting *Wolf v. Richmond Co. Hosp. Auth., 745 F.2d 904, 908 (4th Cir. 1984).*

It is well-established law that "'jurisdiction cannot be asserted over a defendant with which a state has no contacts, no ties and no relations." *Easterling v. American*

Optical Corp., 207 W.Va. 123, 129-130, 529 S.E.2d 588, 594 - 595 (2000). "[I]n each case the reasonableness of a state's exercise of jurisdiction over a nonresident foreign corporation must focus on a qualitative analysis of the foreign corporation's contacts with the forum state.'" *Id.* (quoting *Norfolk S. Ry. Co. v. Maynard,* 190 W.Va. 113, 116, 437 S.E.2d 277, 280 (1993)).

This Court in *Abbott v. Owens-Corning Fiberglass Corp.,* 191 W.Va. 198, 444 S.E.2d 285 (1994), set forth a two-prong 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,* 56-3-33 [1996]. The second step involves determining whether the defendant's contacts with the forum state satisfy federal due process.

Id. (quoted in *Easterling*, 207 W.Va. at 129-130, 529 S.E.2d at 594).

a. The Long-Arm Statute Is Not Satisfied.

West Virginia's primary long-arm statute, W. Va. Code § 56-3-33(a), confers personal jurisdiction over a nonresident who engages in one of following seven 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 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;

(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 might reasonably have expected such person to use, consume or be affected by

the goods in this state: Provided, That he 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

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

W. Va. Code § 56-3-33(a).

The statute cautions, however, that when jurisdiction is based solely upon the provisions of § 56-3-33(a), it may be asserted only as to a cause of action that "aris[es] from or grow[s] out of" the acts specified in subdivisions (1) through (7). W. Va. Code § 56-3-33(b); *see also Lane*, 198 W. Va. at 458, 481 S.E.2d at 764 (personal jurisdiction cannot be asserted under the statute where the contacts between West Virginia and the defendants are incidental and unrelated to the cause of action).

Moreover, although the *Abbott* analysis has two distinct steps, this Court has explained that in applying the long-arm statutes under the first step, the statutes "must be read in conjunction with the constitutional due process concept that a foreign corporation must have certain 'minimum contacts' before it is amenable to personal jurisdiction in our courts." *Easterling*, 207 W. Va. at 130, 529 S.E.2d at 595 (quoting *Kidwell v. Westinghouse Elec. Co.*, 178 W.Va. 161, 162, 358 S.E.2d 420, 421 (1986)). Thus, application of the long-arm statute also requires a determination that the defendant has the requisite "minimum contacts" with West Virginia such "that the maintenance of an action in the forum does not offend traditional notions of fair play and substantial justice." *Id.* (quoting *Hodge v. Sands Mfg. Co.*, 151 W.Va. 133, 150 S.E.2d 793 (1966)).

"[T]he critical element for determining minimum contacts is not the volume of activity but rather 'the quality and nature of the activity in relation to the fair and orderly administration of the laws.'" *Id.* (quoting *Norfolk S. Ry. Co.*, 190 W.Va. at 116, 437 S.E.2d at 280 (quoting *International Shoe Co. v. Washington,* 326 U.S. 310, 319 (1945))). Moreover, foreseeability is a necessary prerequisite to the assertion of jurisdiction, and, in this regard, "'the foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.'" *Id.* (quoting *Hill v. Showa Denko, K.K.,* 188 W.Va. 654, 657, 425 S.E.2d 609, 612 (1992) (quoting *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297 (1980))).

Plaintiff's Complaint asserts that this Court has personal jurisdiction over Shashi Sanwalka as personal representative of the estate of Roy Sanwalka due to pilot Roy Sanwalka's alleged commission of tortious acts in West Virginia that caused O'Brien's death in Virginia, invoking jurisdiction under § 56-3-33(a)(3).[5] Moreover, despite the fact that Defendants submitted factual affidavits as to the lack of any contacts, Plaintiff did not present any contrary factual evidence.

It is undisputed that Shashi Sanwalka has had no contacts with West Virginia, (*see* Sanwalka Affidavit ¶¶ 7-10, attached as Exhibit 1 to Shashi Sanwalka's Motion to Dismiss (R. at 22)), other than his causing filings in this Action. In fact, he is not even

[5] Plaintiff's Complaint does not even allude to the possibility that either Roy Sanwalka or Shashi Sanwalka transacted any business in this state, contracted to supply services or things in this state, had an interest in, used or possessed real property in this state, or contracted to insure any person, property or risk located within this state at the time of contracting. The Complaint similarly does not even suggest that either Sanwalka regularly did or solicited business, or engaged in any other persistent course of conduct, or derived substantial revenue from goods used or consumed or services rendered in this state. In fact, neither Sanwalka has done any of these things. (*See* Sanwalka Affidavit, ¶¶ 9-12, attached as Exhibit 1 to Motion to Dismiss (R. at 22).) Thus it is plain that none of the subsections of § 56-3-33(a) other than subsection (3) can possibly apply to confer jurisdiction.

alleged to have committed any acts in West Virginia. Moreover, the only contact between pilot Roy Sanwalka and the State of West Virginia is the single, unplanned landing in West Virginia on March 15, 2008 and subsequent departure the following day. *See id.* ¶13. It is this lone contact upon which Plaintiff seeks to rely as a basis for jurisdiction.

Plaintiff's attempt to manufacture jurisdiction in this state, while creative, simply cannot withstand even the most cursory scrutiny, where it is readily apparent that none of Roy Sanwalka's contacts with the state during his brief stop here **caused** the death of passenger O'Brien. The only actions alleged to have taken place in West Virginia are Roy Sanwalka's actions in filing a flight plan by telephone with an operator in North Carolina and then proceeding over West Virginia and into Virginia before crashing. (R. at 4, ¶ 9.) Plainly, the filing of a flight plan did not and could not cause the crash or O'Brien's death, which occurred in Virginia. Likewise, it is clear that neither the taking off from Yeager Airport in West Virginia nor the flying over West Virginia towards inclement weather caused the crash in Virginia. Plaintiff's baseless contention that the decision to take off doomed the flight is without any factual support and belied by the fact that the aircraft traveled for more than 30 minutes and left West Virginia airspace before it crashed.

Lastly, *In re Oil Spill by* Amoco Cordiz *off Coast of France*, 491 F. Supp. 170 (N.D. Ill. 1979), cited by Plaintiff, is completely inapposite. In that case, the district court asserted jurisdiction based upon the defendants having "transacted business within the state" within the meaning of the long-arm statute, expressly disavowing reliance on the "the commission of a tortious act within the state," the long-arm provision comparable to the one on which Plaintiff relies. *See id.* at 172-74. There is, however, absolutely no

evidence that Shashi Sanwalka, Roy Sanwalka or Aries ever transacted business in West Virginia, and Plaintiff does not even allege to the contrary.

b. Assertion of Jurisdiction Against Shashi Sanwalka Would Not Comport with Federal Due Process Requirements.

The Circuit Court properly held that even if the West Virginia long-arm statute was satisfied, the exercise of personal jurisdiction against the Defendants would violate due process, holding that:

> Even viewing all allegations in the Plaintiff's Complaint in the light most favorable to the Plaintiff, the connection of the Defendants to West Virginia, as related to the airplane crash giving rise to the above cause of action, is tenuous at best. Although the decedent Roy Sanwalka, landed the airplane at Yeager Airport in Charleston, West Virginia, and then the next day, before taking off, refueled the airplane and filed a flight plan, it is unlikely that these brief and minimal contacts with West Virginia satisfy federal due process. Furthermore, the airplane crash occurred in Virginia, not West Virginia, and thus, Virginia is where the above cause actually accrued. Also, it [is] unlikely that the decedent's brief contact with West Virginia made it foreseeable that he could be haled into court in West Virginia. Thus, under federal due process and, based on the tenuous contacts of the decedent with West Virginia and the connection of those contacts with the airplane crash giving rise to the action, it would be unfair and unjust to require the Defendants to defend the above action in this state.

(Final Order (R. at 91), at 9-10.

As discussed above, federal due process concerns mandate that this Court may assert jurisdiction over a nonresident defendant **only** when the defendant has the requisite "minimum contacts" with West Virginia such "that the maintenance of an action in the forum does not offend traditional notions of fair play and substantial justice." *Easterling*, 207 W. Va. at 130, 529 S.E.2d at 595 (quoting *Hodge,* 151 W.Va. 133, 150 S.E.2d 793). Initially, the court must determine that the defendant has ties or

connections to the forum state "by which the defendant purposefully avails [him]self of the privilege of conducting activities within the forum State." *Pries v. Watt*, 186 W.Va. 49, 51, 410 S.E.2d 285, 287 (1991).

The minimum contacts determination, however, requires inquiry not only into the "precise nature" of the defendant's contacts with the forum, but also "**the relationship of these contacts with the cause of action**, and a weighing of whether 'the nature and extent of the contacts . . . between the forum and the defendant . . . satisfy the threshold demands of fairness.'" *Grove v. Maheswaran*, 201 W. Va. 502, 506, 498 S.E.2d 485, 489 (1997) (quoting *Presbyterian Univ. Hosp. v. Wilson*, 654 A.2d 1324, 1330 (1995)) (emphasis in original)). This relationship between the forum contacts and the cause of action must be such that it is foreseeable that the defendant would be sued in the forum and reasonable to expect him to defend there. *See Easterling*, 207 W. Va. at 130, 529 S.E.2d at 595

Further, "[a] court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It must also weigh in its determination 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.'" *Pries*, 186 W.Va. at 51, 410 S.E.2d at 287 (quoting *World-Wide Volkswagen Corp.*, 444 U.S. at 292).

In order to exercise specific jurisdiction over the defendant, the action must arise out of the defendant's contact with the forum. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984); *Estate of Fraser v. Smith*, No. 04-22191-CIV, 2007 WL 5007084, at *11 (specific jurisdiction requires a causal connection, not mere relation, between the defendant's forum contacts and the cause of action).

There can be no dispute that neither Shashi Sanwalka nor the Estate created in and by Ontario law have any contacts with West Virginia. Thus, Plaintiff must seek to impute Roy Sanwalka's contacts, from this single, unplanned stop, against the administrator of his Estate. Plaintiff's attempt fails.

In the first instance, pilot Roy Sanwalka's brief, unplanned stop in West Virginia as a result of bad weather does not constitute "purposeful availment" of the benefits and privileges of conducting activities there. Moreover, as discussed above, the accident certainly was not caused by and did not arise from any of Roy Sanwalka's contacts with West Virginia. Maintaining this action against his estate in this State therefore offends traditional notions of fair play and substantial justice, and this Court may not exercise specific jurisdiction.

This becomes clear beyond peradventure when one considers the factors set forth in *Pries*. Litigating these claims in this State would impose a significant burden on Shashi Sanwalka when he and virtually all of the relevant witnesses are in Ontario, Canada, and the few remaining witnesses are scattered throughout states other than West Virginia. *See infra* Part IV.C.6. West Virginia has **no** interest in this action between nonresident parties regarding an accident in another state. *See id.* The Plaintiff's interest in obtaining relief for injury in another state is centered in Ontario, Canada, where passenger O'Brien resided and was a citizen and does not depend on this action in West Virginia. Moreover, "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies" is not served by having West Virginia adjudicate this action between nonresidents when it can be resolved more efficiently in a jurisdiction that has an exponentially greater interest in the

case. *See id.* All of these factors further bolster the conclusion that specific jurisdiction is lacking.

In order to exercise general jurisdiction over the defendant on a cause of action that does not arise from the defendant's activities in the forum state, the defendant's activities in the forum state must be both "continuous and systematic." *See id.* at 415-16. As explained *supra*, Shashi Sanwalka has no contacts with West Virginia, and the only contact between Roy Sanwalka and the State of West Virginia is this single unplanned landing in Charleston, West Virginia due to bad weather, where he refueled, telephonically filed a flight plan and remained until resuming his flight the following day. (*See* Sanwalka Affidavit ¶¶ 11-14, attached as Exhibit 1 to Shashi Sanwalka's Motion to Dismiss (R. at 22).) Obviously, this single contact does not constitute the kind of continuous and systemic activity that would support general jurisdiction. In sum, there is no basis for this Court to assert personal jurisdiction over Shashi Sanwalka, and the claims against him must be dismissed.

2. This Court Does Not Have Personal Jurisdiction Over Aries

Plaintiff's claim against Aries is based exclusively upon a theory of vicarious liability based upon the actions of pilot Roy Sanwalka. This claim is erroneously premised upon the contention that Roy Sanwalka was an employee of Aries. In fact, Pilot Roy Sanwalka was not an employee of Aries, was vacationing at the time of the accident and clearly was not performing services for nor conducting business on behalf of Aries. Moreover, because the contacts of Roy Sanwalka are insufficient to establish personal jurisdiction against him or his Estate, the same contacts imputed to Aries cannot support jurisdiction against it.

It is clear that neither West Virginia's long-arm statute nor due process is satisfied with respect to Aries. Aries has never transacted any business in this state, never contracted to supply services or things in this State, did not cause tortious injury by an act in this State, did not cause tortious injury in this State, and does not have an interest in, use or possess real property in this State. Aries, in fact, has not taken any actions in West Virginia. Thus, the long-arm statute is not satisfied.

Because Aries has no contacts with West Virginia, it is clear that the exercise of jurisdiction over Aries would violate the Due Process Clause. *See World-Wide Volkswagen Corporation v. Woodson*, 444 U.S. 286 (1980). In *World-Wide Volkswagen*, the United States Supreme Court held that "[t]he Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a non-resident defendant." *Id.* at 291. In *World-Wide Volkswagen*, the Supreme Court found that the exercise of personal jurisdiction violated the Due Process Clause where:

> Plaintiffs carry on no activity whatsoever in Oklahoma. They close no sales and perform no services there. They avail themselves of none of the privileges and benefits of Oklahoma law. They solicit no business there either through sales persons or through advertising reasonably calculated to reach the State. Nor does the record show that they regularly sell cars at wholesale or retail to Oklahoma customers or residents or that they indirectly, through others, serve or seek to serve the Oklahoma market. In short, respondents seek to base jurisdiction on one, isolated occurrence and whatever inferences can be drawn therefrom: the fortuitous circumstance that a single Audi automobile, sold in New York to New York residents, happened to suffer an accident while passing through Oklahoma.

Id. at 295.

The facts of this case are similar -- Aries carries out no activity whatsoever in West Virginia, makes no sales and performs no services here, and does not avail itself of the privileges and benefits of West Virginia law, and the Mooney, owned by Aries, which was certificated and maintained in Ontario, Canada, was flown by an Ontario resident, who was intending to fly over the various states on his way to the Bahamas, when it was diverted unexpectedly into West Virginia before resuming its voyage before crashing in Virginia. Under *World-Wide Volkswagen*, Aries is clearly not subject to personal jurisdiction of this Court.

C. The Circuit Court Properly Exercised its Discretion to Decline to Exercise Jurisdiction Under the Doctrine of *Forum Non Conveniens*.

Beginning with the 2003 enactment of the subsequently repealed § 56-1-1(c) of the West Virginia Code,[6] the legislature has worked diligently to limit out-of-state plaintiffs' use of West Virginia courts to adjudicate cases in which the State has little interest. *See Judicial Hellholes, Lawsuit Climates and Bad Social Science: Lessons from West Virginia*, 110 W. Va. L. Rev. 1097, 1098 (Spring 2008). In response to the decision in *Morris v. Crown Equip. Corp.*, 219 W. Va. 347, 633 S.E.2d 292 (2006), which held that the Privileges and Immunities Clause of the United States Constitution precluded application of § 56-1-1(c) to claims brought against a resident defendant, the legislature repealed § 56-1-1(c).[7] In its place, effective June 7, 2007, the legislature codified the doctrine of *forum non conveniens* at West Virginia Code § 56-1-1a. *See*

[6] Section 56-1-1(c) provided that "a nonresident of the state may not bring an action in a court of this state unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state." W. Va. Code § 56-1-1(c) (repealed).

[7] After § 56-1-1(c) had already been repealed, the Supreme Court of Appeals of West Virginia held that the statute was constitutional as applied to nonresident defendants. *See In re FELA Asbestos Cases*, 222 W. Va. 512, 665 S.E.2d 687, 691 (July 2, 2008).

Savarese v. Allstate Ins. Co., 223 W. Va. 119, 123 n.8, 672 S.E.2d 255 (2008) (explaining that § 56-1-1a was enacted in response to decision in *Morris*).

Section 56-1-1a provides that:

(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 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 <u>this preference may be diminished when the plaintiff is a nonresident and the cause of action did not arise in this state</u>. 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.

W. Va. Code § 56-1-1a (emphasis added).

This statutory *forum non conveniens* provision significantly expands the availability of the doctrine. Whereas at common law, a party seeking a dismissal on the grounds of *forum non conveniens* had to demonstrate that West Virginia had only a "**slight** nexus" with the subject matter of the suit and that an alternative forum existed where the case could be "tried **substantially** more inexpensively and expeditiously," *see, e.g., Norfolk & Western Ry. Co. v. Tsapis*, 184 W. Va. 231, 236, 400 S.E.2d 239, 244 (1990) (emphasis added), *overruled on other grounds by State ex rel. Riffle v. Ranson* 195 W.Va. 121, 464 S.E.2d 763 (1995), and *superseded by statute*, W. Va. Code § 56-1-1a,[8] section 56-1-1a directs that a court shall decline to exercise jurisdiction upon a finding 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 the state," § 56-1-1a(a) (emphasis added). Moreover, while under § 56-1-1a the availability of an alternate forum is still a factor to consider, it is no longer required that the forum be "substantially" more inexpensive and expeditious in which to litigate. *See* W. Va. Code

[8] Although *Tsapis* is described on Westlaw as disagreed with by *State ex rel. Mitchem v. Kirkpatrick*, 199 W.Va. 501, 485 S.E.2d 445 (1997), *Mitchem* merely recognized the distinction between *Tsapis* and other cases under common law applicable to interstate *forum non conveniens* analysis prior to the enactment of § 56-1-1a, and the statutory law, W. Va. Code § 56-1-1(b), applicable to intrastate transfers. *See id.* at 504, 485 S.E.2d at 448.

§ 56-1-1a(a)(1). The relative expense of litigating in the alternative forum is to be considered, of course, but the statute directs that a court considering this factor determine only whether the balance of interests "predominate" in favor one forum over the other, *i.e.*, a preponderance test, and does not require that the difference be substantial. W. Va. Code § 56-1-1a(a)(6).

Although the distinctions between the new statutory doctrine and the prior common law doctrine are interesting, in the instant case, they are academic. In this case, not only do the interests of justice and the convenience of the parties compel the conclusion that this action would be "more properly" heard in Ontario, Canada, where all parties reside, but it is also clear that West Virginia has no nexus with the subject matter of the suit and that the case can be tried both substantially more inexpensively and substantially more expeditiously in Ontario.

Indeed, suits by foreign plaintiffs relating to foreign aviation accidents present the quintessential case for the application of the doctrine of *forum non conveniens*, and numerous courts have so held. *See, e.g.*, *Piper Aircraft*, 454 U.S. 235 (1981); *Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279 (11th Cir. 2001); *Lueck v. Sundstrand Corp.*, 236 F.3d 1137 (9th Cir. 2001); *Kryvicky v. Scandinavian Airlines Sys.*, 807 F.2d 514 (6th Cir. 1986); *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824 (5th Cir. 1993) *cert. denied,* 508 U.S. 973 (1993). The fact that the accident here occurred in a foreign state as opposed to a foreign nation does not make it any less foreign for purposes of *forum non conveniens* analysis.

Moreover, while the balance is weighted in favor of the forum choice of a **resident** plaintiff, the statute expressly states that 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); *see also Piper Aircraft v. Reyno*, 454 U.S. 235, 255-56 (1981) ("[T]he central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient," and "when the home forum is chosen, it is reasonable to assume that this choice is convenient [but w]hen the plaintiff is foreign . . . this assumption is much less reasonable."); *Loney v. E.I. Du Pont De Nemours & Co.*, 886 F.2d 628, 634 (3d Cir. 1989) (presumption of less deference to a nonresident plaintiff's choice of forum may only "be overcome by a strong showing of convenience").

Plaintiff's argument that her choice of forum is entitled to great deference based upon her theory that acts of negligence occurred in West Virginia misstates both the facts and the law. Section 56-1-1 provides that plaintiff's choice of forum may be diminished where, like here (1) Plaintiff is a non-resident and (2) the cause of action did not **arise** in this state." As discussed in detail *supra*, neither of the West Virginia contacts on which Plaintiff relies, the optional filing of a flight plan and the uneventful take-off from Yeager International Airport, caused O'Brien's death, and thus, as the Circuit Court correctly held, her cause of action cannot, as a matter of fact, be said to arise in West Virginia for purposes of determining the deference due to her forum choice under the forum non conveniens statute.

Thus, the Circuit Court correctly held that:

> The Plaintiff in the above action is a Canadian resident, as was the decedent of the estate Plaintiff represents. Thus, for purposes of *forum non conveniens* statute, the Plaintiff is a nonresident. Furthermore, as stated above, it is questionable whether the cause of action in this case did in fact arise in the state. As such, under the statute the preference provided to Plaintiff's choice of this state is the forum to bring her action is diminished.

(Final Order (R. at 91), at 11.)

Moreover, even if O'Brien's death could be deemed to have been caused by negligent acts in West Virginia, no cause of action arises from any such negligence until injury is suffered as a result. Negligence without damages is simply not actionable.

Plaintiff cites in vain to authority for the proposition that venue is proper and that at least **part** of cause of action can be considered to "arise" not only where and when the cause of action accrues and becomes actionable, *i.e.*, where and when the Plaintiff suffers injury, but where **any** of the elements of the cause of action took place, notwithstanding the fact that the cause of action itself does not arise and become actionable until damage is suffered. *See McGuire v. Fitzsimmons*, 197 W. Va. 132, 475 S.E.2d 132 (1996); *Wetzel Co. Sav. & Loan Co. v. Stern Bros.*, 156 W. Va. 693, 195 S.E.2d 732 (1973); *Guyan Motors, Inc. v. Williams*, 133 W. Va. 630, 57 S.E.2d 529 (1950). As set forth in *Wetzel Company Savings and Loan* and *Guyan Motors, Inc.*, this was the case under West Virginia's prior venue statute, West Virginia Code § 56-1-2 (repealed by Acts 1986, c.170), which expressly provided that "[a]n action . . . may be brought in any county wherein the cause of action, **or any part thereof**, arose . . . ."

Defendants acknowledge that in *McGuire*, this Court continued to apply this line of authority "using *Wetzel County* as [its] guide." *See McGuire*, 197 W. Va. at 136-37, 475 S.E.2d at 136-37. In that case, this Court did not consider the effect of the intervening change in the venue statute, which the Legislature repealed in 1986 and replaced with the current statute that, significantly, omits the statutory language laying venue where "any part" of a cause of action arose. *Compare* W. Va. Code § 56-1-2(a) (repealed by Acts 1986, c.170) *with* W. Va. Code § 56-1-1(a)(1). Defendants respectfully submit that the clear and only possible legislative intent behind this express change in the language of the venue statute is to lay venue only where the cause of

action itself arose, *i.e.*, where it accrues and becomes actionable, which is where injury is suffered. *See, e.g., Worley v. Beckley Mech., Inc.*, 220 W. Va. 633, 637-38, 648 S.E.2d 620, 624-25 (2007) ("the right to bring an action for personal injuries accrues . . . when the injury is inflicted"); *Vansickle v. Kohout*, 215 W. Va. 433, 437, 599 S.E.2d 856, 860 (2004); *see also Green v. North Arundel Hosp. Ass'n*, 730 A.2d 221, 229 n.8 (Md. Ct. Spec. App. 1999) (explaining that majority of states hold that cause of action arises for purposes of venue only where injury occurs and collecting cases).

This Court, however, need not compound this error by accepting Plaintiff's invitation to read the language that was expressly deleted from the venue statute into the *forum non conveniens* statute, which never contained such language and which speaks only in terms of where the cause of action itself arose. W. Va. Code § 56-1-1a(a). This is exactly the kind of situation that § 56-1-1a gives circuit courts the discretion to address, and both the plain language of § 56-1-1a and the legislative intent behind it compel the conclusion that the circuit courts need not give deference to blatant forum-shopping such as this non-resident Plaintiff engaged in here. Therefore, even if Plaintiff could torture the facts so as to plausibly assert some act of negligence in West Virginia and some causal connection between that act and O'Brien's death, which, as the Circuit Court found, she could not, this would have no effect on the Circuit Court's *forum non conveniens* analysis.

Similarly unavailing is Plaintiff's strained attempt to argue that O'Brien in fact suffered injury in West Virginia. There is absolutely no evidence to support an allegation that O'Brien suffered shock, fright, terror, and mental pain and suffering while in the air over West Virginia, and Plaintiff's conclusory allegation to that effect is speculative and inherently incapable of proof. Furthermore, Plaintiff does not cite and

Defendants have not located a single case applying West Virginia law that permits the recovery of damages for pre-impact fright. Instead, even the West Virginia cases cited by Plaintiff make clear that the damages available for pain and suffering under the wrongful death statute are limited to "pain and suffering endured between the time of injury and the time of death," *i.e.*, **post-impact** pain and suffering. *See McDavid v. United States*, 213 W. Va. 592, 584 S.E.2d 226 (2003); *see also In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979*, 507 F. Supp. 21, 23-24 (N.D. Ill. 1980) (pre-impact emotional distress is not recoverable under Illinois law, which limits recovery to emotional distress caused by physical injury); *cf. Nye v. Pennsylvania*, 480 A.2d 318, 321-22 (Pa. Super. Ct. 1984) (noting that Pennsylvania law has always limited recovery to emotional distress occurring after the time of injury, but finding it unnecessary to determine if pre-impact distress is recoverable where Plaintiff presented insufficient evidence of distress).

Plaintiff's citation to a case involving the tort of negligent infliction of emotional distress is equally unavailing. This Court has never allowed a cause of action for negligent infliction of emotional distress to go forward on the basis of pre-impact distress. Even more fundamental, however, is that this Court has imposed a strict requirement that in order to support a claim of negligent infliction of emotional distress, a plaintiff must prove serious emotional distress either by evidence that the emotional distress caused physical injuries to manifest or by expert medical and psychiatric evidence. *See Heldreth v. Marrs*, 188 W. Va. 481, 490-91, 425 S.E.2d 157, 166-67 (1992). Plaintiff has not, and, under the circumstances of this case, cannot, present such evidence. *Cf. Nye*, 480 A.2d at 321-22 (pre-impact distress not recoverable where plaintiff offered no evidence that any pre-impact distress manifested

in physical injuries). Indeed, Plaintiff could never meet her burden to prove that O'Brien suffered any pre-impact fright at all, and this Court should decline to expand West Virginia damages law to permit recovery for such purely speculative damages.

Thus, not only is the Plaintiff **not** a resident of West Virginia, but her cause of action likewise did not arise here. Final Order (R. at 91), at 10 ("Virginia is where the above cause actually occurred"); *see also Guyan Motors*, 133 W. Va. at 635. Accordingly, under § 56-1-1a(a), the deference afforded Plaintiff's choice of forum is diminished. Plaintiff did not choose to sue in West Virginia because it is her home, because it is where the accident occurred, because it is where the evidence is located, because West Virginia authorities investigated the accident, or because West Virginia has an interest in determining the cause of action. None of these things is true. Instead, this is nothing more than forum shopping. In these circumstances, particularly when weighed against Plaintiff's diminished interest in her choice of forum, consideration of the statutorily enumerated factors leads to the inescapable conclusion that this case would be more properly heard in Ontario, Canada.

As required, the Circuit Court examined the eight factors set forth in W. Va. Code § 56-1-1(a) and properly concluded that those factors "weigh greatly in the favor of dismissing the above action." (Final Order (R. at 91), at 11.) In fact, each of these factors support dismissal because this case has almost nothing to do with West Virginia because the parties are from Ontario, the cause of action accrued elsewhere, and all witnesses and documents are located outside West Virginia.

1. Ontario, Canada Is An Alternate Forum in Which the Claims Against Defendants May Be Tried.

Both Defendants in this action are residents and citizens of Ontario, Canada, are subject to suit there, and could be served with process there. (Garrow Affidavit ¶¶ 6-7, 18, attached as Exhibit 2 to Shashi Sanwalka's Motion to Dismiss (R. at 22).) Moreover, Plaintiff is entitled to bring an action against Defendants in the courts of Ontario, Canada, to recover damages suffered as a result of the death of Margaret O'Brien in the plane crash. *Id.* ¶ 15. Ontario law also provides a statutory claim under the Family Law Act that provides for damages suffered by dependents for loss of earnings as well as for loss of care, guidance, and companionship. *Id.* ¶16. Thus, Plaintiff could file a damages action in the courts of Ontario, Canada. *Id.* Plaintiff has conceded this fact. In fact, not long after the accident, an Ontario solicitor, Tierney Stauffer LLP, notified Shashi Sanwalka that he represented Plaintiff and that the Plaintiff "intend[s] to commence an action against the Estate of Roy Sanwalka for damages arising from the above-noted accident, together with pre-judgment interest in accordance with the provisions of the *Courts of Justice Act* and the *Rules of Civil Procedure*." *Id.* ¶17 and Exhibit A thereto. In fact, Plaintiff recognizes that she has a cause of action available in an Ontario forum but wrongly alleges that it is inadequate because the nature and type of damages available are different. *See* Section IV.C.8 *infra*.

Accordingly, Ontario, Canada is an alternate forum in which the claims against both defendants could be tried. *Cf. Piper Aircraft Co.*, 454 U.S. at 254 n.22 (applying the federal doctrine of *forum non conveniens* and holding that the alternative forum requirement will ordinarily be satisfied "when the defendant is 'amenable to process' in

the other jurisdiction."). Indeed, courts have consistently approved the adequacy of Ontario courts. *See, e.g., DiRienzo v. Philip Servs. Corp.*, 294 F.3d 21, 29 (2d Cir. 2002); *Arsape S.A. v. JDS Uniphase Corp.*, No. C 03-4535, 2004 WL 2663180 (N.D. Cal. July 29, 2004); *Groeneveld Transp. Efficiency, Inc. v. Eisses*, No. 1:07 CV 1298, 2007 WL 2769595, at *2 (N.D. Ohio 2007), *app. dismissed*, 297 Fed.Appx. 508, 2008 WL 4659844 (6th Cir. Oct. 20, 2008); *ISI Intl., Inc. v. Borden Ladner Gervais, LLP*, No. 98 C 7614, 2001 WL 1382572 (N.D. Ill. Nov. 5, 2001). There is no basis for Plaintiff's contention that Ontario is an inadequate alternative forum especially considering that Plaintiff is an Ontario citizen. Thus, her claim that Ontario's damage laws are inadequate is absurd.

2. Maintaining this Action in a West Virginia Court Would Work Substantial Injustice to Defendant Sanwalka.

This is a suit between residents of Ontario, Canada, concerning an accident in the State of Virginia. Defendant Shashi Sanwalka has had no contacts with the State of West Virginia, either in his capacity as Legal Representative of the Estate of Roy Sanwalka or in any other capacity, other than causing the dismissal motion and supporting affidavits to be filed, and the only contact between Roy Sanwalka and the State of West Virginia is the single unplanned landing in West Virginia on March 15, 2008. (*See* Sanwalka Affidavit ¶¶ 7-14, attached as Exhibit 1 to Shashi Sanwalka's Motion to Dismiss (R. at 22).) As discussed above, Plaintiff's cause of action arose in Virginia not West Virginia, nor was the Plaintiff's death caused by any action or omission in West Virginia.

Moreover, as set forth in Part IV.C.6 *infra*, this case can be tried substantially more easily, expeditiously, and inexpensively in Ontario, Canada. Given that the

estates of both Plaintiff and Pilot Roy Sanwalka are being administered in the Province of Ontario, Canada, it has a significant interest in this litigation while the State of West Virginia has none.

In these circumstances, to require a Canadian resident and citizen to defend at substantially greater expense, inconvenience and disadvantage against claims brought on behalf of the estate of another Canadian resident and citizen in a state far from both of their homes, a state with which the defendant and the decedent whose estate he represents had only the most *de minimis* contacts unrelated to the cause of action and which has no interest in the litigation, would indeed work substantial injustice to Defendants.

3. Courts of Ontario, Canada Can Exercise Jurisdiction Over Both Defendants.

As discussed *supra* Part IV.C.1, both Defendants are citizens and residents of Ontario, Canada. Thus, Ontario courts may exercise jurisdiction over them. *See supra* Part III.C.1; Garrow Affidavit ¶¶ 6-7, 18, attached as Exhibit 2 to Shashi Sanwalka's Motion to Dismiss (R. at 22); Sanwalka Affidavit ¶¶ 2-3, attached as Exhibit 1 to Shashi Sanwalka's Motion to Dismiss (R. at 22).

4. Plaintiff is a Resident and Citizen of Ontario, Canada.

Plaintiff is a citizen of Ontario, Canada. Moreover, Plaintiff has alleged that she has brought this suit in her capacity as Legal Representative of the Estate of Margaret O'Brien, who, like both Defendants, was an Ontario citizen and resident and, further, that the Estate of Margaret O'Brien has been established and is being administered in Ontario, Canada. (Complaint (R. at 4) ¶ 2; Garrow Affidavit ¶ 8, attached as Exhibit 2 to Shashi Sanwalka's Motion to Dismiss (R. at 22).) This factor thus not only reduces the

amount of deference that this Court owes to Plaintiff's choice of forum, *see* West Va. Code § 56-1-1a(a), but also weighs heavily in favor of a finding that this dispute between Ontario residents is more properly heard in Ontario.

5. Plaintiff's Cause of Action Occurred in Virginia.

This case arises out of an airplane crash in the State of Virginia, not West Virginia, and accordingly that is where Plaintiff's cause of action arose. *See Guyan Motors,* 133 W. Va. at 635 (damage is an integral part of a cause of action, and a cause of action does not arise until, and arises in the place where, damage occurs); *see also supra* pp. 30-34. Consideration of this factor also reduces the amount of deference that this Court owes to Plaintiff's choice of forum. *See* West Va. Code § 56-1-1a(a).

6. The Balance of Private and Public Interests Weighs Heavily in Favor of the Action Being Heard in Ontario, Canada.

As the Circuit Court correctly held, the private and public interests weigh heavily in favor of transfer. The private interests of the litigants clearly predominate in favor of the claim being heard in Ontario, Canada. All sources of proof are located at a substantial distance from West Virginia. All records and information regarding the Defendants are located in Ontario, Canada, where Roy Sanwalka resided and Aries is located. (Garrow Affidavit ¶¶ 6-7, attached as Exhibit 2 to Shashi Sanwalka's Motion to Dismiss (R. at 22).) All records relating to the licensing and certification of pilot Roy Sanwalka and the Mooney by Transport Canada are maintained in Canada. *Id.* ¶¶ 10-12. All of pilot Roy Sanwalka's training was performed in Canada, and, accordingly, all witnesses with respect to his training, certification, and licenses are located in Ontario, Canada. *Id.* ¶ 11. All maintenance of the airplane occurred in Kitchener, Ontario, Canada, and, accordingly, all service and maintenance records and all witnesses

regarding service and maintenance are located in Ontario, Canada. *Id.* ¶ 14. Contrary to Plaintiff's baseless assertion, Defendants do not control any of the witnesses or evidence regarding pilot Roy Sanwalka's training, the maintenance of the Mooney or the licensing or certification performed by Transport Canada as such information is controlled by non-parties. These are the kinds of considerations that routinely compel courts to dismiss on the ground of *forum non conveniens* cases between nonresidents arising from airplane crashes outside the forum. *See In re Taiwan Air Crash Over Taiwan Straits on May 25, 2002*, 331 F. Supp. 2d 1176, 1196 (C.D. Cal. 2004).

Similarly, all records and information regarding O'Brien and her Estate are located in Ontario, Canada, and, significantly, all witnesses with respect to potential damages recoverable by Plaintiff are thus located in Ontario, Canada. Garrow Affidavit ¶¶ 8-9, 18, attached as Exhibit 2 to Shashi Sanwalka's Motion to Dismiss (R. at 22); *see also Nai-Chao v. Boeing Co.*, 555 F. Supp. 9, 18 (N.D. Cal. 1982), *aff'd Cheng v. Boeing*, 708 F.2d 1406 (9th Cir. 1983) ("[W]itnesses who knew the decedents and whose testimony would be necessary to ascertain damage[ ] are located in Taiwan. It is doubtful whether this Court could enforce process compelling the attendance of persons with relevant knowledge who are not parties to this litigation, and compelling the litigants to try their case without the benefit of live testimony from important witnesses would impose a serious hardship upon them and upon this Court."); *Jennings v. Boeing Co.*, 660 F. Supp. 796, 805 (E.D. Pa. 1987) *aff'd*, 838 F.2d 1206 (3d Cir. 1988) (table opinion) (noting that "[c]learly the bulk of relevant evidence and the witnesses with regards to damages are located" in the forum where decedents were domiciled); *In re Disaster at Riyadh Airport*, 540 F. Supp. 1141, 1147 (D.D.C. 1982) (same).

In sum, most of the witnesses are located in Ontario, Canada, including the parties, Plaintiff's children, and anyone with knowledge regarding the maintenance and operation of the airplane, or pilot Roy Sanwalka's training. The only likely witnesses in the United States would include the air traffic controllers (located in Georgia and Indiana), the person who provided the weather briefing (located in North Carolina) and any first responders to the accident site in Virginia. Contrary to Plaintiff's assertion, no **material** witnesses are located in West Virginia. None of the five individuals Plaintiff identifies as potential witnesses located in West Virginia are likely to be witnesses in this matter because they have **no** information regarding the accident or the damages sought. Simply put, the facts and circumstances regarding (1) the landing of the Mooney the day before, (2) the departure of the Mooney on the day of the accident, (3) contact with ground personnel, or (4) the weather at Yeager Airport are not relevant because Pilot Roy Sanwalka successfully took off from Yeager Airport and flew for more than 30 minutes through West Virginia airspace and into Virginia before the accident occurred. (*See* Exhibit B to Exhibit 2 to Shashi Sanwalka's Motion to Dismiss (R. at 22).)

Instead, the witnesses are all located outside West Virginia, *i.e.* the damages witnesses in Ontario, the flight training and aircraft service witnesses in Ontario, the first responders in Virginia, and the air traffic controllers and weather specialists in Indiana, Georgia and North Carolina. None of these witnesses could be compelled to attend proceedings in West Virginia, and the cost to obtain voluntary witnesses here would be excessive compared to the costs that would be incurred by trying this case in Ontario. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 511 (1947) ("to fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases

on deposition, is to create a condition not satisfactory to the court, jury or most litigants.").

Adding to the relative costs to all parties of proceeding in West Virginia are the additional complexities resulting from the need to apply foreign law with which this Court is not likely to be familiar. This choice of law issue is made even more complex because the parties are foreign estates being administered under Ontario law and thus, consideration of Ontario trust and estate law is implicated. Even more significant, Canadian procedures provide for adequate but more limited discovery than West Virginia courts, leading to considerably more streamlined and less expensive pretrial proceedings. (Garrow Affidavit ¶¶ 20-21, attached as Exhibit 2 to Shashi Sanwalka's Motion to Dismiss (R. at 22).) Contrary to Plaintiff's suggestion otherwise, the discovery available in Ontario is more than adequate, and courts in the United States have routinely dismissed cases on *forum non conveniens* grounds in favor of a Canadian forum, holding that Ontario offers an adequate, alternative forum so long as the parties are amenable to process. *See Lana International Ltd. V. Boeing Co.*, No. 93 Civ. 7169, 1995 WL 144152 at *2 (S.D.N.Y. Mar. 30, 1995). In *Lana,* the Court held neither substantive law differences nor differences in litigation procedure make Canadian courts inadequate. *Id.* That court expressly held that "[n]or do Canada's different discovery procedures render it an inadequate forum." *Id.* at *3. *See also Blanco v. Banco Industrial de Venezuela, S.A.*, 997 F.2d 974, 982 (2d Cir. 1993) (collecting cases that differences in litigation procedures do not render an alternative forum inadequate).

Thus, the private interests of all parties, including Plaintiff, who also will incur lower costs and will obtain a speedier resolution in Ontario than in West Virginia, weigh

heavily in favor of dismissal of the West Virginia action so that the case may be heard in Ontario.

The public factors also weigh heavily in favor of this case being heard in Ontario. Because this dispute does not involve any citizens of West Virginia or a cause of action arising in West Virginia, or any significant acts or omissions occurring in West Virginia, it would unfairly burden West Virginia citizens to serve as jurors. In contrast, both Defendants and Plaintiff are Ontario residents and citizens, and Ontario thus has a significant local interest in this dispute. *See Baumgart*, 981 F.2d at 837 n. 15 (noting "strong interest" Germany has in ensuring that its citizens are compensated for harms); *Chhawchharia v. Boeing Co.*, 657 F. Supp. 1157, 1162 (S.D.N.Y. 1987) ("The domiciliary state has the strongest interest in providing for prompt and adequate compensation of decedent's survivors."). Any suggestion that this is a "localized controversy" implicating West Virginia's interest in having such controversies decided within the state is ludicrous. Furthermore, because federal, not state, law regulates the licensing of pilots and aircraft as well as rules concerning such matters, there is no state interest in adjudicating whether such regulations were followed.

Moreover, this case could be tried much sooner and with much lower costs in Ontario, Canada, as compared to West Virginia. (Garrow Affidavit ¶¶ 20-21, attached as Exhibit 2 to Shashi Sanwalka's Motion to Dismiss (R. at 22).) Accordingly, the administrative difficulties flowing from court congestion also weigh heavily in favor of proceeding in Ontario. Lastly, Ontario law will govern this lawsuit, especially with respect to damages. *Id.* ¶ 16. As to liability, it is likely that Ontario law will apply. Regardless, it is clear that West Virginia law would not.

In sum, not one of the factors to be considered in balancing the private and public interests points to having this action tried in West Virginia. Rather, all factors collectively weigh overwhelmingly in favor of proceeding in Ontario, Canada.

7. Dismissing This Action Will Not Result in Unreasonable Duplication or Proliferation of Litigation.

Because this action may be maintained against both Defendants in a single action in Ontario, Canada, dismissal will not result in duplication or proliferation of litigation. In contrast, because the West Virginia long-arm statute clearly does not permit an action against Shashi Sanwalka, maintenance of this Action against Aries alone in West Virginia would create duplicative litigation.

8. The Law of Ontario, Canada, Provides a Remedy.

Ontario law provides a remedy to both the estate and the decedent's lawful heirs for the alleged injuries and wrongful death arising out of this airplane crash. *Id.* ¶¶ 15-16. Plaintiff is entitled to bring an action against Defendants in the courts of Ontario, Canada, to recover damages suffered as a result of the death of Margaret O'Brien in the plane crash. *Id.* ¶ 15. Ontario law also provides a statutory claim under the Family Law Act that provides for damages suffered by dependents for loss of earnings as well as for loss of care, guidance, and companionship. *Id.* ¶ 16.

That Ontario law may impose limitations on Plaintiff's claims that do not apply under West Virginia law does not make the remedy afforded Ontario citizens and residents under Ontario law inadequate. In *Vest v. St. Albans Psych. Hosp.*, this Court stated that it "would not permit Virginia citizens with few contacts in this state to sue Virginia [defendants] here simply to avoid [unfavorable law] in the Commonwealth of Virginia." *Vest v. St. Albans Psych. Hosp.*, 182 W. Va. 228, 232, 387 S.E.2d 282, 286

(1989); *see also Piper Aircraft*, 454 U.S. at 255 (alternative forum's lack of strict products liability cause of action did not make it inadequate); *Lacey v. Cessna Aircraft Co.*, 862 F.2d 38, 46 (3d Cir. 1988) (that "Canadian law might not arm [plaintiffs] with as favorable a cause of action" does not affect its adequacy as an alternative forum because "the possibility of an unfavorable change in substantive law should not be given substantial weight in the *forum non conveniens* inquiry").

Similarly, the mere fact that a nonresident plaintiff may recover less, or may not be able to recover certain types of damages, at home does not make the home forum inadequate. *See Lexington Ins. Co. v. Forrest*, 263 F. Supp. 2d 986, 1000 (E.D. Pa. 2003) (finding England adequate even though it did not allow recovery of treble damages); *Jennings v. Boeing Co.*, 677 F. Supp. 803, 804 (E.D. Pa. 1987) *aff'd*, 838 F.2d 1206 (3d Cir. 1988) (table opinion) (English courts were adequate even though they did not permit punitive damages). Rather, as explained by the United States Supreme Court, an unfavorable change in substantive law is a relevant consideration in the *forum non conveniens* inquiry only "if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all." *Piper Aircraft*, 454 U.S. at 254. Clearly that is not the case here.

In sum, the interests of justice and the convenience of the parties, viewed through the prism of the eight statutory factors enumerated in § 56-1-1a, and weighed against the interest of the nonresident Plaintiff in attempting to avoid the law of the home forum of Margaret O'Brien and both Defendants by substituting the arguably more favorable law of a completely disinterested forum, fully demonstrates that the Circuit

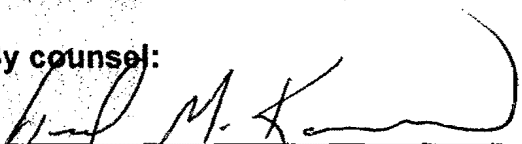
Court properly exercised its discretion to decline jurisdiction under the doctrine of *forum non conveniens.*

V. CONCLUSION

WHEREFORE, for the foregoing reasons, Appellees/Defendants respectfully request that this Court affirm the Circuit Court's Final Order dismissing this Action.

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

By counsel:



Ted M. Kanner, Esquire
WV State Bar No. 4523
kanners@aol.com
THE TED KANNER LAW OFFICE
606 Virginia Street, East, Suite 100
Charleston, WV 25301
Telephone: 304-343-6300
Facsimile: 304-343-0639

Robert D. Finkel, Esquire (Pro Hac Vice)
Pa. I.D. #71130
rfinkel@mmlpc.com
MANION McDONOUGH & LUCAS, P.C.
Suite 1414 - U.S. Steel Tower
600 Grant Street
Pittsburgh, PA 15219
412-232-0200

No. 35495

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,

v.

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

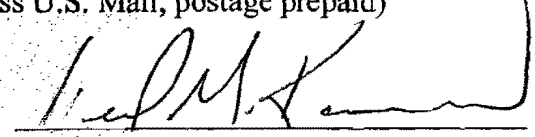
Appellees/Defendants.

CERTIFICATE OF SERVICE

I, Ted M. Kanner, co-counsel for Appellees/Defendants, do hereby certify that the foregoing BRIEF OF APPELLEES was served on counsel for the Appellant/Plaintiff on this the 7th day of May, 2010, addressed as follows:

Scott S. Segal, Esquire
Mark R. Staun, Esquire
THE SEGAL LAW FIRM
810 Kanawha Boulevard, East
Charleston, WV 25301
(Via Hand Delivery)

Michael A. Sullivan, Esquire
FINCH McCRANIE, LLP
225 Peachtreet Street, N.E.
1700 South Tower
Atlanta, GA 30303
(Via First Class U.S. Mail, postage prepaid)



Ted M. Kanner, Esquire