

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,

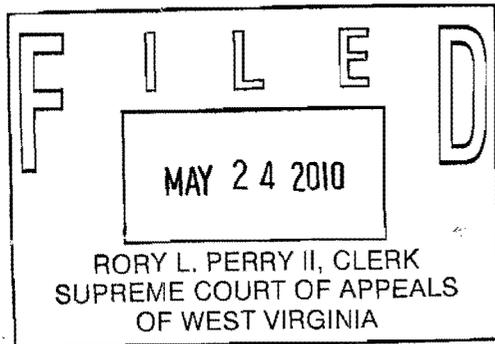
v.

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

Respondents, Defendants Below.

APPELLANT'S REPLY BRIEF

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"), plaintiff below, submits this reply brief in support of her arguments that the Circuit Court of Kanawha County's order of September 16, 2009 should be reversed, and this case remanded for further proceedings.

I. ARGUMENT

As an initial matter, Plaintiff takes great exception to the pervasive statements made throughout the Defendants' brief to the effect that "this dispute does not . . . involve any

significant acts or omissions occurring in West Virginia.” (Brief of Appellees at 42.)¹ Indeed, Defendants go so far as to assert that “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 [sic] Airport, caused O’Brien’s death.” (*Id* at 30.) Such statements completely ignore both Plaintiff’s Complaint, which clearly alleges negligent acts occurring within West Virginia’s borders,² as well as the evidence submitted by Plaintiff in support of jurisdiction to the effect that the aircraft had begun to accumulate ice and lose altitude as a result of Roy Sanwalka’s negligent acts while flying within West Virginia airspace, which acts ultimately resulted in the plane crashing just 20 miles past the Virginia-West Virginia border. At this stage of the litigation, Plaintiff’s allegations must be assumed to be true, and, as discussed *anon*, this mischaracterization of the facts of the instant case renders much of the argument advanced by Defendants irrelevant.

¹Such statements can be found throughout the Defendants’ brief. *See* Brief of Appellees at 23 (“the accident certainly was not caused by and did not arise from any of Roy Sanwalka’s contacts with West Virginia”); *id.* at 29 (“West Virginia has no nexus with the subject matter of the suit”); *id.* at 32 (asserting that Plaintiff would need to “torture the facts so as to plausibly assert some act of negligence in West Virginia”); *id.* at 36 (“nor was the Plaintiff’s [decedent’s] death caused by any action or omission in West Virginia”).

²Complaint at ¶ 7 (asserting that “Defendants are subject to [the] personal jurisdiction of this Court by virtue of defendants’ tortious acts and/or omissions in the State of West Virginia that were the direct and proximate cause of the injuries and death of Margaret O’Brien”) (R. at 5); *see also id.* at ¶ 11 (alleging that pilot Roy Sanwalka was negligent in failing to turn back when the airframe experienced icing conditions).

**A. THE BROAD LANGUAGE OF WEST VIRGINIA'S
LONG-ARM STATUTE PERMITS SERVICE UPON
A PERSONAL REPRESENTATIVE OF THE
ESTATE OF A NONRESIDENT.**

In arguing that the lower court was correct in concluding that the West Virginia Long-Arm Statute, W. Va. Code § 56-3-33, does not authorize service of process upon the personal representative of a nonresident estate, Defendants fail to acknowledge, much less address, Plaintiff's argument that the Legislature's enactment of this statute in 1978 marked a wholesale revision of the law governing personal jurisdiction such that it displaced the common law.

Rather than addressing this argument directly, Defendants instead point to the fact that the Legislature expressly provided for service upon the representatives of nonresident defendants in two other, more specific statutes. Defendants argue that giving the Long-Arm Statute the broad reading advocated by Plaintiffs would render such statutes "redundant and meaningless." (Br. of Appellees at 11.)

What this argument fails to comprehend is the fact that the two statutes pointed to by Defendants, W. Va. Code § 56-3-31 (nonresident motor vehicle operator) and W. Va. Code § 56-3-34 (bail bondsmen), are specific statutes that address very limited subject matters, whereas the Long-Arm Statute is a general statute whose enactment worked a comprehensive revision of the law governing personal jurisdiction. Only the latter, more general enactment had the effect of impliedly superceding the common law. *See State ex rel. Riffle v. Ranson*, 195 W. Va. 121, 128, 464 S.E.2d 763, 770 (1995) ("[W]hen a statute is designed as a revision of a whole body of law applicable to a given subject, it supercedes the common

law.”). In other words, since the statutes pertaining to nonresident motorists and bail bondsmen are specific statutes that do not signal an intent by the Legislature to mark a “revision of a whole body of law,” it was necessary to include express reference to personal representatives in order to overcome the common-law rule. Importantly, at least one of these specific statutes, § 56-3-31 pertaining to nonresident motor vehicle operators, was enacted long *before* the Long-Arm Statute.³

Nor is there any inherent conflict between reading the Long-Arm Statute to permit service upon the personal representatives of out-of-state estates and West Virginia Code § 44-5-3(a)(1) & (c).⁴ This statute generally prohibits a nonresident from being appointed

³The other statute, § 56-3-34 pertaining to bail bondsmen, while admittedly enacted after the Long-Arm Statute, is identical in all material respects to the statute dealing with nonresident motor vehicle operators, and thus should not be read as necessitating a restrictive reading of the Long-Arm Statute.

⁴Section 44-5-3(a)(1) & (c) provides as follows:

(a) Notwithstanding any other provision of law, no individual who is a nonresident of this state, nor any banking institution which does not maintain a main office or branch office within this state nor any corporation having its principal office or place of business outside this state, may be appointed or act as executor, administrator, curator, testamentary guardian, guardian or conservator in this state, except that:

(1) An individual who is a nonresident of this state may be appointed ancillary administrator of a nonresident decedent's assets *situate in this state* if such nonresident individual is lawfully acting as executor in said decedent's state of domicile and submits letters of probate authenticated by the probate authorities of the decedent's state of domicile to the clerk of the county commission of any county of this state wherein ancillary administration is sought;

....

(c) When a nonresident individual is appointed as executor, administrator, testamentary guardian, guardian or conservator pursuant to the provisions of

as an executor or administrator in West Virginia, but permits a nonresident to obtain an ancillary appointment to administer a nonresident decedent's assets located in this state if the individual is acting as executor in the decedent's state of domicile. Section 44-5-3(a)(1) & (c), while it arguably required Plaintiff to seek such an ancillary appointment,⁵ does not, as Defendants assert, insulate a nonresident personal representative from service of process absent an appointment as an ancillary administrator. Indeed, if such were the case it would

subsection (a) of this section, said individual thereby constitutes the clerk of the county commission wherein such appointment was made as his true and lawful attorney-in-fact upon whom may be served all notices and process in any action or proceeding against him as executor, administrator, testamentary guardian, guardian or conservator or with respect to such estate, and such qualification shall be a manifestation of said nonresident individual's agreement that any notice or process, which is served in the manner hereinafter provided in this subsection, shall be of the same legal force and validity as though such nonresident was personally served with notice and process within this state. Service shall be made by leaving the original and two copies of any notice or process together with a fee of five dollars with the clerk of such county commission. The fee of five dollars shall be deposited with the county treasurer. Such clerk shall thereupon endorse upon one copy thereof the day and hour of service and shall file such copy in his office and such service shall constitute personal service upon such nonresident: Provided, That the other copy of such notice or process shall be forthwith sent by registered or certified mail, return receipt requested, deliver to addressee only, by said clerk or to such nonresident at the address last furnished by him to said clerk and either: (1) Such nonresident's return receipt signed by him; or (2) the registered or certified mail bearing thereon the stamp of the post office department showing that delivery therefore was refused by such nonresident is appended to the original notice or process filed therewith in the office of the clerk of the county commission from which such notice or process was issued. No notice or process may be served on such clerk of the county commission or accepted by him less than thirty days before the return date thereof. The clerk of such county commission shall keep a record in his office of all such notices and processes and the day and hour of service thereof. The provision for service of notice or process herein provided is cumulative and nothing herein contained shall be construed as bar to service by publication where proper or the service of notice or process in any other lawful mode or manner.

(Emphasis added.)

⁵Indeed, Plaintiff has obtained such an appointment.

render inoperative the express provisions of West Virginia Code §§ 56-31 & -34 that permit such service.

Quite simply, § 44-5-3 has no application under the present circumstances, since (1) Shashi Sanwalka is not required to be appointed as executor of the Estate of Roy Sanwalka in West Virginia, since his appointment in Ontario, Canada is more than sufficient; and (2) the property and/or insurance available to satisfy any judgment in this case is situated in Canada or some other location outside of West Virginia.

Finally, Defendants rely heavily upon an order issued by the United States District Court for the Southern District of West Virginia, where the court concluded that “West Virginia has not altered the common law rule that ‘an executor or administrator who qualifies in another state or jurisdiction can neither sue nor be sued as such in any other state or jurisdiction.’” *Glucksberg v. Polan*, Civil Action No. 3:99-0129, 2002 WL 31828646 at *8 (S.D. W. Va. Dec. 16, 2002). This conclusion was, in part, based upon an assumption that the Long-Arm Statute does not extend to nonresident executors or personal representatives. *Id.* While the latter conclusion was erroneous for reasons already stated, it was not necessarily integral the court’s decision since in *Polan* there were two competing sets of personal representatives—one set that had been appointed in West Virginia based upon the decedent’s ownership of property in this state, and another which had been appointed in Florida. In this case, by contrast, there is no dispute as to who is the proper personal representative of the Estate of Roy Sanwalka.

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 other conclusion.

B. BOTH SHASHI SANWALKA, AS PERSONAL REPRESENTATIVE, AS WELL AS ARIES ARE SUBJECT TO PERSONAL JURISDICTION IN WEST VIRGINIA.

Defendants have so hopelessly confused the concepts of specific and general jurisdiction, and are so myopic in their recognition of Plaintiff's factual allegations, that their arguments amount largely to an exercise in tilting at windmills.

1. Shashi Sanwalka and Aries Are Subject to Specific Personal Jurisdiction In West Virginia Based Upon Roy Sanwalka's Negligent Acts Committed in this State.

To be clear, again, Plaintiff is asserting that the executor of Roy Sanwalka's estate, Shashi Sanwalka, and his alleged employer, Aries Technologies, Inc. ("Aries"), are subject to *specific* personal jurisdiction based upon Roy Sanwalka's commission of certain negligent acts while physically located in West Virginia, which acts are alleged to have proximately caused the subject airplane accident.

Where a forum seeks to assert specific personal jurisdiction over a nonresident defendant, due process requires the defendant have "fair warning" that a particular activity may subject him to the jurisdiction of a foreign sovereign. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985); *Shaffer v. Heitner*, 433 U.S. 186, 218. This fair warning requirement is satisfied if the defendant has "purposefully directed" his activities at the forum, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 774 (1984), and the litigation results from

alleged injuries that “arise out of or relate to” those activities. *Burger King*, 471 U.S. at 472 (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)).

Additionally, the defendant’s conduct and connection with the forum must be of a character that he should reasonably anticipate being haled into court there. *Burger King*, 471 U.S. at 474; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). This requirement assures that a defendant will not be haled into a jurisdiction as a result of random, fortuitous, or attenuated contacts. *Burger King*, 471 U.S. at 475. Jurisdiction is proper where the defendant’s contacts with the forum proximately result from actions by the defendant himself that create a “substantial connection” with the forum state. *Id.* (quoting *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957)). Although the concept of foreseeability is not irrelevant to this analysis, the kind of foreseeability critical to the proper exercise of personal jurisdiction is whether the defendant’s own purposeful acts will have some effect in the forum. *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987).

Once it has been determined that the nonresident defendant has purposefully established minimum contacts with the forum such that he should reasonably anticipate being haled into court there, these contacts are considered in light of other factors to decide whether the assertion of personal jurisdiction would comport with “fair play and substantial justice.” *Burger King*, 471 U.S. at 476 (quoting *International Shoe Co.*, 326 U.S. at 320). These other factors are the burden on the defendant in defending the lawsuit, the forum state’s interest in adjudicating the dispute, the plaintiff’s interest in obtaining convenient and effective relief,

the interstate judicial system's interest in obtaining the most efficient resolution of controversies and the shared interest of the states in furthering fundamental substantive social policies. *Burger King*, 471 U.S. at 477; *World-Wide Volkswagen*, 444 U.S. at 292; *see also Pries v. Watt*, 186 W. Va. 49, 51, 410 S.E.2d 285, 287 (1991). Minimum requirements of "fair play and substantial justice" may defeat the reasonableness of asserting personal jurisdiction even if the defendant has purposefully engaged in forum activities. *Burger King*, 471 U.S. at 477-78. Conversely, these considerations may serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. *Id.* at 477.

Taking these various criteria into account, courts hold that determination of whether specific jurisdiction exists in a case requires application of a three-prong test: (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 v. Carefirst Pregnancy Centers, Inc.*, 334 F.3d 390, 397 (4th Cir. 2003); *see also Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995).

a. "Purposeful Availment" Requirement.

A defendant purposefully avails itself of a forum when it "has taken deliberate action within the forum state or . . . has created continuing obligations to forum residents." *Ballard*, 65 F.3d at 1498. Although contacts must be more than random, fortuitous, or attenuated, contacts that are "isolated" or "sporadic" may support specific jurisdiction if they create a

“substantial connection” with the forum. *Burger King*, 471 U.S. at 472-73.

In this case, the defendants are not being haled into a West Virginia court as the result of any random, fortuitous, or attenuated contacts. Rather, by purposely flying into West Virginia, landing, filing an ill-advised flight plan at Charleston’s Yeager Airport, taking off again in the face of unfavorable weather conditions, and refusing to turn back when the aircraft began to accumulate ice, all of which occurred in West Virginia, Roy Sanwalka engaged in deliberate activities in this state such that he can reasonably be deemed to have purposely availed himself of the privilege of conducting activities in West Virginia.

b. “Arising Out Of” Requirement.

The “arising out of” requirement is met if but for the contacts between the defendant and the forum state, the cause of action would not have arisen. *See Terracom v. Valley Nat. Bank*, 49 F.3d 555, 561 (9th Cir. 1995).

The ‘but for’ test is consistent with the basic function of the ‘arising out of’ requirement—it preserves the essential distinction between general and specific jurisdiction. Under this test, a defendant cannot be haled into court for activities unrelated to the cause of action in the absence of a showing of substantial and continuous contacts sufficient to establish general jurisdiction. . . . The ‘but for’ test preserves the requirement that there be some nexus between the cause of action and the defendant’s activities in the forum.

Shute v. Carnival Cruise Lines, 897 F.2d 377, 385 (9th Cir.1990), overruled on other grounds, 499 U.S. 585 (1991).

Incredibly, Defendants argue that “the accident certainly was not caused by and did not arise from any of Roy Sanwalka’s contacts with West Virginia.” (Brief of Appellees at 23).

Plaintiff has alleged, and the NTSB determined, that the aircraft piloted by Roy Sanwalka and carrying Plaintiff's decedent crashed as a result of icing. As Plaintiff has not only alleged but has presented by way of expert evidence, such icing was the exclusive result of conduct engaged in within West Virginia.

On the issue of causation, one statement by Defendants requires clarification. Defendants assert that the subject "aircraft traveled for more than 30 minutes and left West Virginia airspace before it crashed." (Br. of Appellees at 20.) In fact, as previously pointed out by Plaintiff, when Roy Sanwalka advised London Radar Control at 14:22:32 that he was "picking up ice," the aircraft was still in West Virginia airspace.⁶ It was only 11 minutes later that Mr. Sanwalka radioed that he was "going down."⁷ The aircraft was later found approximately 20 miles south of the Virginia-West Virginia border. Consequently, any insinuation that the aircraft flew over Virginia for 30 uneventful minutes prior to crashing is false.

c. "Reasonableness" Requirement.

Even if the "purposeful availment" and "arising out of" requirements of the specific jurisdiction test are satisfied, an unreasonable exercise of jurisdiction violates the Due Process Clause. *See International Shoe*, 326 U.S. at 316. However, the exercise of jurisdiction over a defendant is reasonable if the first two requirements of the specific jurisdiction test are met. *See Ballard*, 65 F.3d at 1500. If the first two requirements are

⁶See *Cauble Aff.* at ¶¶ 1 & 2.

⁷See NTSB Report.

satisfied, then the burden of proof shifts to the defendant to “present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.” *Id.* (quoting *Burger King*, 471 U.S. at 477).

Defendants have not presented a “compelling case” that an exercise of jurisdiction over them would be unreasonable. As pointed out *infra* in response to Defendants’ *forum non conveniens* argument, West Virginia has a very strong interest in adjudicating matters involving the safety of her skies. Moreover, contrary to Defendants’ assertions, not “all of the relevant witnesses” reside in Ontario, (Br. of Appellee at 23), since liability issues still exist and there are likely to be a number of witnesses who do not reside in Canada.

2. Plaintiff’s Allegation That Roy Sanwalka Was An Employee of Aries Has Not Been Rebutted.

Defendants also argue that Aries is not subject to personal jurisdiction, contending that (1) Roy Sanwalka was not an employee of Aries; and (2) Aries is not subject to general personal jurisdiction in West Virginia.

As to the second contention, Plaintiff is only alleging specific jurisdiction, while as to the second Plaintiff has clearly alleged that Roy Sanwalka was an employee of Aries,⁸ which allegation has not been rebutted by any evidence presented by Defendants and must therefore be accepted as true at this stage the proceedings. *See* Syl. Pt. 4, in part, *State ex rel.*

⁸*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).

Bell Atlantic-West Virginia, Inc. v. Ranson, 201 W. Va. 402, 497 S.E.2d 755 (1997) (“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”).

Importantly, “the actions of an agent are attributable to the principal” for the purposes of establishing personal jurisdiction. *See Myers v. Bennet Law Offices*, 238 F.3d 1068, 1073 (9th Cir. 2001). Thus, at this point in the litigation Aries is properly subject to specific personal jurisdiction based upon the conduct of its agent and employee, Roy Sanwalka, in West Virginia.

C. DEFENDANTS HAVE FAILED TO MEET THEIR HEAVY BURDEN IN DEMONSTRATING THAT CANADA IS A MORE CONVENIENT FORUM FOR THIS CASE.

Defendants, in arguing in support of the lower court’s ruling that the instant matter should be dismissed on *forum non conveniens* grounds, present a number of arguments aimed both at defeating the deference normally afforded a plaintiff’s choice of forum, as well as justifying a Canadian forum. None of these arguments withstand scrutiny.

1. Plaintiff’s Choice of Forum is Entitled to “Great Deference” Under W. Va. Code § 56-1-1a.

Defendants present a strained and hypertechnical argument in support of their contention that Plaintiff’s choice of a West Virginia forum is not entitled to “great deference” under W. Va. Code § 56-1-1a. The statute provides that such deference “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). Defendants assert that the Legislature’s use of the term “arise” must be construed as being synonymous with “accrued,” such that deference to a nonresident plaintiff’s choice of forum is due only where the injury occurs in West Virginia. Not only is this reading of the statute in conflict with a long line of holdings by this Court to the effect that a cause of action may “arise” in more than one venue,⁹ but it also clashes with language employed elsewhere in § 56-1-1a(a).

Among the factors that a court is required to consider in determining whether to dismiss an action under § 56-1-1a(a) is “[t]he state in which the cause of action *accrued*.” W. Va. Code § 56-1-1a(a)(5) (emphasis added). The Legislature, in making use of both “arise” and “accrue” in the same statute, must be presumed to have intended that such words would be accorded different meanings. “It is presumed the legislature had a purpose in the use of every word, phrase and clause found in a statute and intended the terms so used to be effective, wherefore an interpretation of a statute which gives a word, phrase or clause thereof no function to perform, or makes it, in effect, a mere repetition of another word,

⁹See Brief of Appellant at 28-30 for discussion of cases holding that a cause of action may “arise” in more than one venue. Importantly,

When the Legislature enacts laws, it is presumed to be aware of all pertinent judgments rendered by the judicial branch. By borrowing terms of art in which are accumulated the legal tradition and meaning of centuries of practice, the Legislature presumably knows and adopts the cluster of ideas attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.

Syl. Pt. 2, in part, *Stephen L.H. v. Sherry L.H.*, 195 W. Va. 384, 465 S.E.2d 841 (1995); see also *CB&T Operations Co., Inc. v. Tax Comm’r of State*, 211 W. Va. 198, 204, 564 S.E.2d 408, 414 (2002).

phrase or clause thereof must be rejected as being unsound, if it be possible so to construe the statute as a whole, as to make all of its parts operative and effective.” Syl. Pt. 2, *L.H. Jones Equipment Co. v. Swenson Spreader LLC*, 224 W. Va. 570, 687 S.E.2d 353, 354 (2009) (quoting Syl. Pt. 7, *Ex parte Watson*, 82 W. Va. 201, 95 S.E. 648 (1918)); *see also* Syl. Pt. 3, *Meadows v. Wal-Mart Stores, Inc.*, 207 W. Va. 203, 530 S.E.2d 676 (1999) (“A cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute.”); *State ex rel. Johnson v. Robinson*, 162 W. Va. 579, 582, 251 S.E.2d 505, 508 (1979) (“It is a well known rule of statutory construction that the Legislature is presumed to intend that every word used in a statute has a specific purpose and meaning.”).

In short, Defendants’ argument that a cause of action may “arise” only “where it accrues and becomes actionable”¹⁰ finds no support in either this Court’s jurisprudence or in the wording of the statute. Thus, notwithstanding Defendants’ consistent refusal to acknowledge that Plaintiff is alleging (and has presented proof) that the negligent acts leading up to the airplane crash occurred in West Virginia, Plaintiff’s choice of a West Virginia is entitled to “great deference” in the current circumstance.

2. Dismissal is Not Warranted Under The Criteria Set Forth in W. Va. Code § 56-1-1a.

Defendants also assert that the eight factors that must be considered in the *forum non conveniens* analysis under West Virginia Code § 56-1-1a(a) support dismissal in favor of a

¹⁰Brief of Appellees at 32.

Canadian forum. While, admittedly, some of these eight factors that must be considered under the statute militate in favor of an alternative forum, such factors cannot overcome the heavy burden placed upon a defendant to support dismissal on *forum non conveniens* grounds.

Importantly, West Virginia Code § 56-1-1a(a) is, with a few significant distinctions, largely a codification of the United States Supreme Court's holdings in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947), its companion case, *Kloster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518 (1947), and their progeny. As developed by the federal courts, "dismissal [on *forum non conveniens* grounds] will ordinarily be appropriate where trial in the plaintiff's chosen forum imposes a **heavy burden** on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249 (1981) (emphasis added).

In this case, contrary to Defendants' assertions, the burden imposed by a West Virginia forum will not work any substantial injustice as compared to either Canada or Virginia. As the evidence thus far developed by Plaintiff indicates, the pilot, Roy Sandwalka, acted negligently while both on the ground and in the airspace of West Virginia. Put simply, his personal representative has no basis to now claim that an action predicated upon such conduct works a substantial injustice.

Most importantly, the balancing of private and public interests weigh heavily in support of a forum in the United States rather than Canada. Because the "strong presumption in favor of the plaintiff's choice of forum . . . may be overcome only when the private and

public interest factors clearly point towards trial in the alternative forum,” *Reyno*, 454 U.S. at 255, 102 S.Ct. 252, dismissal on the grounds of *forum non conveniens* is the exception, not the rule. *See Gilbert*, 330 U.S. at 504. This presumption in favor of the plaintiff’s chosen forum is codified in West Virginia Code § 56-1-1a(a)(6), which requires that the private and public interests “predominate” in favor of an alternative forum. Moreover, in undertaking this analysis, the Legislature expressly directed that the courts consider “the extent to which an injury or death resulted from acts or omissions that occurred in [West Virginia].” W. Va. Code § 56-1-1a(a)(6).

As to the private interests implicated by a West Virginia forum, Defendants make a number of irrelevant points. While it is true that evidence regarding Roy Sandwalka’s licensure and training exists in Canada, as well as records regarding the maintenance of the aircraft involved in the accident, none of this evidence is particularly relevant to the instant action, as there is neither an apparent dispute regarding Mr. Sandwalka’s license (it is undisputed that that he has a valid pilot’s license but without an instrument rating) nor any allegation that any maintenance problem contributed to the accident.

Because Defendants’ refusal to so much as acknowledge Plaintiff’s contentions regarding Roy Sandwalka’s negligent acts evidences an apparent intent to strenuously contest liability, and since there can be no dispute that the alleged negligent acts giving rise to the accident occurred in the United States rather than Canada, Plaintiff has a legitimate reason for pursuing a forum in the United States so as to be able to better develop evidence going to liability and, potentially, punitive damages. While Defendants take great pains to point

out that much of the evidence bearing upon liability is located outside of West Virginia, they also implicitly acknowledge that most if not all of this evidence is also located outside of Virginia, which is the only other potential jurisdiction in the United States where this action could be brought. In short, as to the private interests implicated in this case, there is no substantive distinction to be made between Virginia and West Virginia since evidence as to liability is not located in any single forum. Moreover, Defendants have not pointed to any factor that would make Virginia a more convenient forum for anyone presently involved in this litigation. Thus, what Defendants are effectively arguing is that a Canadian forum is appropriate because (1) damages evidence is largely obtainable in Canada, and (2) the evidence bearing upon liability in this case has no single locus within the United States. There is simply no law supporting such an approach.

The argument that Defendants are making in this regard is not substantively different that made by the defendants in *In re Air Crash Off Long Island New York, on July 17, 1996*, 65 F.Supp.2d 207 (S.D.N.Y. 1999). In that case, an action was brought in the Southern District of New York with regard to the crash of TWA Flight 800 shortly following its departure from Kennedy International Airport in New York. There was no dispute that the aircraft crashed in United States territory some eight miles off the coast of New York. The defendants in that sought to have the lawsuits brought by the representatives of French domiciliaries dismissed on the basis of *forum non conveniens*, agreeing that they would not contest liability if the matters were litigated in France. In effect, the defendants in *In re Air Crash Off Long Island New York* were asserting that with the issue of liability removed from

the litigation, the fact that damages evidence was more readily available in France made the cases more properly venued in that country.

The court in *In re Air Crash Off Long Island New York*, while it found that France was an adequate alternative forum, nevertheless denied defendants' motion to dismiss on *forum non conveniens* grounds. As to the balancing of the private interest factors, even taking liability issues out of consideration,¹¹ the court concluded that such factors did not strongly support either dismissal or retention, in part because evidence as to punitive damages and pain and suffering before death was far more likely to be located in the United States. 65 F.Supp.2d at 216. With regard to the public interests involved, the court concluded that such factors weighed strongly against dismissal. Significant was the fact that a considerable amount of governmental resources had gone into the investigation of the crash. *Id.* at 217.

While admittedly *In re Air Crash Off Long Island New York* involved much greater loss of life than the accident in the case *sub judice*, the fact remains that it has been investigated and reported on by the National Transportation Safety Board in the United States. Such fact strongly supports a forum within the United States as opposed to Canada, both from a practical as well as a policy perspective. Even more important, this case involves allegedly negligent conduct that not only cost the life of Plaintiff's daughter, but also put at substantial risk persons and property on the ground both in Virginia and West Virginia. Both states thus have a very substantial interest in adjudicating this matter.

¹¹Indeed, the court made clear that if it were not for the defendants' agreement to stipulate to liability, the motion "would not require serious consideration." 65 F.Supp.2d at 218.

Defendants make the point that in all likelihood foreign law will apply to this case. However, this is not likely to involve any complex problems regarding application of foreign law, since under West Virginia conflict of laws analysis Virginia law would clearly apply. “In general, this State adheres to the conflicts of law doctrine of *lex loci delicti*.” Syl. Pt. 1, *Paul v. National Life*, 177 W. Va. 427, 352 S.E.2d 550 (1986). “[T]hat is, the substantive rights between the parties are determined by the law of the place of injury.” *Vest v. St. Albans Psychiatric Hosp.*, 182 W. Va. 228, 229, 387 S.E.2d 282, 283 (1989) (citation omitted). West Virginia courts are frequently called upon to apply the law of neighboring states, and this negligence case should not pose any novel or particularly complex questions of law. In any event, the application of foreign law is never in itself a controlling factor in a *forum non conveniens* analysis. See *Boosey & Hawkes Music Pub. Ltd. v. Walt Disney Co.*, 145 F.3d 481, 492 (2d Cir. 1998).

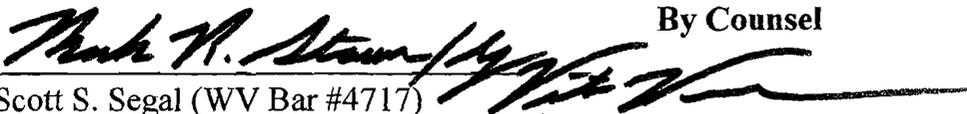
In sum, while not all of the criteria for evaluating a motion for dismissal on *forum non conveniens* grounds militate against dismissal, many of the most significant, including the fact that the Plaintiff’s daughter died as a result of acts and/or omissions that occurred primarily of not exclusively in West Virginia, as well as the balancing of private and public interests, certainly support Plaintiff having a West Virginia forum in which to bring her claims. The unique set of facts posed by this case makes it such that there is no singularly optimal forum, and West Virginia is as convenient a jurisdiction as any other in which to adjudicate this matter.

II. CONCLUSION

WHEREFORE, for the reasons stated above and in Appellant's Brief, 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,

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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, Victor S. Woods, do hereby certify that I have caused to be served true and accurate copies of the foregoing *Appellant's Reply Brief* upon the following counsel of record this 24th day of May, 2010, by the means indicated below, addressed as follows:

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