IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 35519

JILL ANN WILLEY, individually,
and MICHAEL ALLEN WILLEY,

Plaintiffs/Respondents,

v.

SAMUEL J. BRACKEN, JR., M.D.,

Defendants/Petitioner.

Civil Action No.: 06-C-479

UPON CERTIFIED QUESTIONS
FROM THE CIRCUIT COURT
OF OHIO COUNTY

BRIEF OF PETITIONER SAMUEL J. BRACKEN, JR., M.D.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

I. THE KIND OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER TRIBUNAL 1

II. STATEMENT OF THE FACTS OF THE CASE 2

III. ASSIGNMENT OF ERROR RELIED UPON AND THE MANNER IN WHICH THEY WERE DECIDED IN THE LOWER TRIBUNAL 4

IV. ARGUMENT 7

A. Standard for Certification and Standard of Review 7

B. This Court Should Reformulate the Certified Questions As Authorized Under W.Va. Code § 51-1A-4 7

C. Respondents' Complaint Fails As A Matter Of Law 10

1. Background on West Virginia's Uniform Statute of Limitations on Foreign Claims Act, W. Va. Code § 55-2A-1, et seq 10

2. Based on the Application of West Virginia's Borrowing Statute, W. Va. Code § 55-2A-2, Respondents' Claims Accrued in Ohio 13

3. West Virginia's Substantive and Procedural Law Require the Application of West Virginia's Borrowing Statute 16

4. This Court Has Determined That Application of the Borrowing Statute Does Not Violate West Virginia Public Policy 17

V. CONCLUSION 18

VI. STATEMENT OF RELIEF SOUGHT 19

VII. REQUEST FOR ORAL ARGUMENT 19

TABLE OF AUTHORITIES

Supreme Court of Appeals of West Virginia Cases **PAGE(S)**

Cart v. Marcum, 188 W.Va. 241, 423 S.E.2d 644 (1992) 15

Hayes v. Roberts & Schaefer Co., 192 W. Va. 368, 452 S.E.2d 459 (1994).3, 9, 10, 11, 13, 17, 18

Jones v. Trustees of Bethany College, 177 W.Va. 168, 351 S.E.2d 183 (1986)..... 15

Kincaid v. Mangum, 189 W.Va. 404, 432 S.E.2d 74 (1993)..... 7

McKinney v. Fairchild Int., Inc., 199 W. Va. 718, 487 S.E.2d 913 (1997)...3, 9, 10, 11, 12, 14,15

Oakley v. Wagner, 189 W.Va. 337, 431 S.E.2d 676 (1993)..... 18

Robinson v. Pack, 223 W.Va. 828, 679 S.E.2d 660 (2009)..... 7

Shaffer v. Fort Henry Surgical Ass'm, Inc., 215 W.Va. 453, 599 S.E.2d 876 (2004)..... 7

State ex rel. Goff v. Merrifield, 191 W.Va. 473, 446 S.E.2d 695 (1994)..... 18

Stuyvesant v. Preston County Comm., 223 W.Va. 619, 678 S.E.2d 872 (2009)..... 15

Toler v. Shelton, 159 W.Va. 476, 223 S.E.2d 429 (1976)..... 8

Weethee v. Holzer Clinic, Inc., 200 W.Va. 417, 490 S.E.2d 19 (1997)... 2, 3, 9, 10, 13, 14, 15, 16

West Virginia Code

West Virginia Code § 51-1A-4..... 2, 6, 9, 19

West Virginia Code § 55-2A-1..... 10

West Virginia Code § 55-2A-2..... 1, 2, 4, 9, 10, 16, 18, 19

West Virginia Code § 55-2-18 12

West Virginia Code § 58-5-2 7

West Virginia Code § 55-7B-4..... 3

West Virginia Rules

Rule 56 of West Virginia Rules of Civil Procedure 1

Other Cases

Gwaltney v. Stone, 387 Pa. Super. 492, 564 A.2d 498, (Pa. Super. Ct.1989) 13

Rostron v. Marriott Hotels, 677 F. Supp. 801 (E.D.Pa. 1987) 13

Other Statutes

Ohio Rev. Code Ann. § 2305.113(A) 3, 5, 15

Other References

Black's Law Dictionary 21 (6th ed. 1990) 13

Uniform Conflict of Laws-- Limitation Act, 12 U.L.A. 156 (1996) 11

Uniform Statute of Limitations on Foreign Claims Act, 14 U.L.A. 383 (1957) 3, 10, 13

I. THE KIND OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER TRIBUNAL

This certified question proceeding arises upon a challenge to the sufficiency of a pleading, brought under West Virginia Code § 55-2A-2 and Rule 56 of the West Virginia Rules of Civil Procedure. On June 26, 2009, the Circuit Court of Ohio County, Gaughan, J., denied Petitioner's *Revised Motion for Summary Judgment*.[1] On September 22, 2009, Judge Gaughan entered an Order certifying the following questions to this Court:[2]

> Question 1: Does a cause of action for medical negligence "accrue" for the purposes of the West Virginia borrowing statute, W.Va. Code § 55-2A-2, in the State of West Virginia or the state of Ohio where the Defendant doctor is a West Virginia doctor, where the plaintiff is a West Virginia resident, where the doctor-patient relationship between the plaintiff-patient and defendant-doctor is established in the state of West Virginia, where the Defendant-doctor performs a tubal ligation in the state of Ohio, with no immediate injury, where the defendant-doctor chose the location for the tubal ligation procedure, where the tubal ligation is the only procedure which occurred in the state of Ohio in the course of the patient-doctor relationship between plaintiff and defendant, and where the plaintiff-patient suffers a sigmoid colon rupture in the State of West Virginia in the week following the tubal ligation procedure?
>
> Question 2: Does the West Virginia Borrowing statute, W.Va. Code § 55-2A-2 apply to a medical negligence claim where the Defendant, a West Virginia physician, admits that both the substantive and procedural law of the state of West Virginia applies to the plaintiff's claim?
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> Question 3: As a matter of public policy, should the West Virginia borrowing statute be construed so as not to bar a claim for medical negligence by a West Virginia resident patient, where the defendant doctor is a West Virginia doctor, where the Plaintiff is a West Virginia resident, where the doctor-patient relationship between the plaintiff-patient and defendant-doctor is established in the State of West Virginia, where the defendant-doctor performs a tubal ligation in the state of Ohio with no immediate injury, where the defendant-doctor chose the location for the tubal ligation procedure, where the tubal ligation is the only procedure which occurred in the state of Ohio in the course of the patient-doctor relationship between Plaintiff and Defendant, and where the Plaintiff-patient suffers a sigmoid colon rupture in the state of West Virginia in the week following the tubal ligation procedure?

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[1] *See* Record at 142.
[2] *See* Record at 144.

On October 26, 2009, Petitioner filed a *Motion to Amend Certification Order* asking the circuit court to reformulate the certified questions to comport with procedural mandates by removing irrelevant disputed facts.[3] On December 16, 2009, the circuit court denied the motion.[4]

For the reasons set forth below, Petitioner respectfully requests that this Court employ its power under West Virginia Code § 51-1A-4 to reformulate the certified questions as follows:

> West Virginia Code § 55-2A-2 provides: "[t]he period of limitation applicable to a claim accruing outside of this State shall be either that prescribed by the law of the place where the claim accrued or by the law of this State, whichever bars the claim."
>
> a. Based upon this statute, is the term "accrued" interpreted by the Court to mean "where the tort occurs" and/or "the injury is sustained"?
>
> b. If not, where does the cause of action "accrue" when a tortious injury is sustained in another State and is later discovered in West Virginia?

II. STATEMENT OF THE FACTS OF THE CASE

Answering the certified questions as presently stated by the circuit court or as reformulated by Petitioner is crucial for resolving important issues regarding W. Va. Code § 55-2A-2 ("Borrowing Statute"), and its application to the barring of claims filed beyond the properly applied statute of limitations. The Borrowing Statute provides: "the period of limitation applicable to a claim accruing outside of this state shall be either prescribed by the law of the place where the claim accrued or by the law of this state, which ever bars the claim." *Id.* It mandates an exception to the general rule of applying West Virginia procedural law to claims brought in this state **only as to the application of the statute of limitations** and **only when** the cause of action accrued outside this state and that foreign state has a shorter limitations period. *See Weethee v. Holzer Clinic, Inc.*, 200 W.Va. 417, 490 S.E.2d 19 (1997).

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[3] *See* Record at 146.
[4] *See* Record at 168.

The Petitioner respectfully submitts that the court below improperly ruled that Respondents' medical negligence claim accrued in West Virginia. In accordance with past decisions of this Court, Petitioner submits that Respondents' cause of action accrued in Ohio where Respondent, Jill Ann Willey, sustained an alleged injury to her sigmoid colon while undergoing a sterilization procedure performed by Petitioner. The location where the alleged injury was sustained is undisputed and is established by the testimony of Respondents' own expert, Melvyn J. Ravitz, M.D. Dr. Ravitz testified that Dr. Bracken negligently performed Jill Willey's surgery by causing a "serosal tear" to her sigmoid colon and by failing to find that injury intraoperatively.[5] The Borrowing Statute mandates that because the cause of action accrued in Ohio, the shorter of West Virginia or Ohio's statute of limitations for medical negligence claims apply. Since Ohio has a shorter limitations period, and since the claim was initiated beyond Ohio's one-year limitations period, Respondents' claims are barred.[6]

Permitting this suit to proceed would defy the letter and spirit of the Borrowing Statute, which was adopted in 1959 when the West Virginia legislature passed into law the Uniform Statute of Limitations on Foreign Claims Act, § 2, 14 U.L.A. 383 (1957). *See Hayes v. Roberts & Schaefer Co.*, 192 W.Va. 368, 371, 452 S.E.2d 459, 462 (1994). This Court has had the opportunity to specifically address the Borrowing Statute's intended purpose. *See Id.*; *McKinney v. Fairchild Int., Inc.*, 199 W. Va. 718, 487 S.E.2d 913 (1997); *Weethee v. Holzer Clinic, Inc.*, 200 W.Va. 417, 490 S.E.2d 19 (1997). In doing so, it has held that the substantive law of West Virginia mandates, and public policy concerns do not prohibit, the application of the shorter period of limitation to a claim brought in West Virginia but which accrued outside this state. *Id.*

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[5] *See* Record at 86 and 87, Exhibit 'C" at pages 24 and 32.
[6] *See* Ohio Rev. Code Ann. § 2305.113(A); W. Va. Code § 55-7B-4.

Petitioner submits that the direct application of the Borrowing Statute to the Certification Questions and consideration of past decisions upon cases with similar fact patterns should lead this Court to reverse the decision of the circuit court below and find:

(1) Respondents' cause of action accrued for purposes of the Borrowing Statute, W. Va. Code § 55-2A-2, in Ohio, where the tort allegedly occurred and the injury was allegedly sustained;

(2) The substantive law of West Virginia mandates the application of the Borrowing Statute, W. Va. Code § 55-2A-2, and an exception to the general rule of applying West Virginia law only as to the statute of limitations and only when a cause of action accrues outside this state and that foreign state has a shorter limitations period that would bar the claim.

(3) Public Policy principles do not prohibit the application of the Borrowing Statute, W. Va. Code § 55-2A-2.

III. ASSIGNMENT OF ERROR RELIED UPON AND THE MANNER IN WHICH THEY WERE DECIDED IN THE LOWER TRIBUNAL

Respondents initiated this matter by serving a Notice of Claim upon Samuel J. Bracken, M.D., dated October 27, 2006, and a Screening Certificate of Merit authored by Melvyn J. Ravitz, M.D., P.A., dated August 23, 2006.[7] On December 14, 2006, Plaintiffs filed a Complaint in the Circuit Court of Ohio County, alleging various injuries and damages emanating from a sterilization procedure performed upon Jill Ann Willey by Dr. Bracken on December 15, 2004, in Martins Ferry, Ohio. The Complaint specifically alleges that Dr. Bracken was negligent by "perforating the sigmoid colon during the performance of a laproscopic tubal ligation", which was discovered in West Virginia, and by "failing to recognize that he had perforated the colon".[8]

On January 5, 2007, Dr. Bracken filed an Answer, specifically preserving the right to assert that Respondents' claims "are barred by the applicable statute of limitations. . . "[9]

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[7] *See* Record at 86.
[8] *See* Record at 1.
[9] *See* Record at 3.

At the end of the initial discovery period, Petitioner timely filed a *Motion for Summary Judgment* on July 30, 2008.[10] Thereafter, due to the necessity of gathering additional discovery, the circuit court set new deadlines, including one for dispositive motions.

On April 16, 2009, the deposition of Melvyn J. Ravitz, M.D., Respondents' expert, was taken. Dr. Ravitz testified that his only criticism of Dr. Bracken concerned Petitioner's use of blunt dissection and/or cautery without adequate visualization. Dr. Ravitz testified that this alleged negligence resulted in a "serosal tear" of Mrs. Willey's sigmoid colon and that Petitioner was negligent in failing to discovery this injury intraoperatively.[11]

On May 18, 2009, Petitioner filed a *Revised Motion for Summary Judgment* ("*Revised Motion*") which asserted that Respondents' claims are barred based on the Borrowing Statute and Ohio's one year statue of limitations.[12] Petitioner argued that because Respondents allege that Dr. Bracken negligently performed a laparoscopic sterilization in Ohio and caused an injury to Mrs. Willey's sigmoid colon at the time of surgery, then the cause of action accrued in Ohio. Petitioner further argued that the fact that Respondent did not discover the injury in Ohio or that the injury allegedly became worse once Mrs. Willey returned to West Virginia makes no difference to the determination of where the action accrued as it pertains to the Borrowing Statute. Because Respondents failed to timely initiate their claim, their claims are barred.

On July 14, 2009, the circuit court denied the *Revised Motion*. The circuit court held that "[t]he Plaintiff's cause of action did not accrue per the statute in the state of Ohio," and that the Plaintiffs' cause of action accrued in West Virginia, "where the injury occurred."[13]

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[10] *See* Record at 38.
[11] *See* Record at 86 and 87, Exhibit 'C" at pages 24 and 32.
[12] *See* also Ohio Rev. Code Ann. § 2305.113(A); Record at 86 and 87.
[13] *See* Record at 142.

The circuit court then permitted the filing of certified questions. On August 7, 2009, Petitioner filed proposed Questions of Law and Relevant Undisputed Facts and on August 11, 2009, Respondents submitted only proposed Questions of Law. On September 22, 2009, the circuit court prepared and filed a Certification Order, adopting Respondents' Proposed Questions of Law without changes and Petitioner's proposed Relevant Undisputed Facts without changes.[14] Petitioner filed a *Motion to Amend Certification Order* on October 26, 2009, requesting that the circuit court reformulate the certified questions because they were factually charged, assumed disputed facts, and contained facts that had no relevance to the specific legal issues that needed to be ruled upon.[15] On December 16, 2009, the circuit court denied the motion.[16]

For the reasons more fully set forth below, Petitioner respectfully requests that this Court exercise its power under W. Va. Code § 51-1A-4 to reformulate the certified questions as proposed by Petitioner to remove disputed factual issues. It is further requested that this Court respond to the certifications, as originally offered or as reformatted by Petitioner, by finding the term "accrued" for the purposes of the Borrowing Statute means "where the tort occurs" and/or "the injury is sustained". West Virginia substantive law requires, and public policy principles do not prohibit the application of the exception to the general rule of applying West Virginia law **only as to the statute of limitations**, since Respondents' cause of action accrued in Ohio and Ohio has a shorter limitations period. Upon reaching these findings, Petitioner submits that Respondents' claims are barred by Ohio's one year limitations period.

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[14] *See* Record at 144.

[15] *See* Record at 146. Notably, the questions contain the phrase "with no immediate injury". *Id.* This is an inaccurate statement as Respondents' own expert testified that it was negligent for Dr. Bracken not to have found the insult intraoperatively. *Id.* An opinion which clearly indicates that Mrs. Willey's injury was "immediate" and was sustained during surgery in Ohio.

[16] *See* Record at 168.

IV. ARGUMENT

A. Standard for Certification and Standard of Review

West Virginia Code § 58-5-2 provides that any question of law relating to the sufficiency of a motion for summary judgment when the motion is denied may, in the discretion of the circuit court in which it arises, be certified by it to the Supreme Court of Appeals for its decision. In this case, Petitioner sought dismissal of Respondents' claims on the basis that those claims were barred by the application of the Borrowing Statute, which mandates that Ohio's statute of limitations be applied as Respondents' cause of action accrued in Ohio. The certified questions now before this Court concern questions of law arising from the denial of that motion. The questions presented are dispositive of all remaining issues in this civil action.

The "standard of review of questions of law answered and certified by a circuit court is *de novo*." Syl. Pt. 1, *Robinson v. Pack*, 223 W.Va. 828, 679 S.E.2d 660 (2009).

B. This Court Should Reformulate The Certified Questions As Authorized Under W.Va. Code Section 51-1A-4

This Court should exercise its plenary authority to reformulate the questions certified by the circuit court, since doing so would significantly narrow the issues and would focus the inquiry more precisely on the contentions of the parties below.

W. Va. Code § 51-1A-4 provides that this Court "may reformulate a question certified to it." As a result, "[w]hen a certified question is not framed so that this court is able to fully address the law which is involved in the question, then this Court retains the power to reformulate questions certified to it . . ." Syl. Pt. 3, *Kincaid v. Mangum*, 189 W.Va. 404, 432 S.E.2d 74 (1993). This Court often exercises the authority to reformulate questions that do not permit the Court to address the legal issues implicated by the questions. *See Shaffer v. Fort Henry Surgical Ass'n, Inc.*, 215 W.Va. 453, 599 S.E.2d 876 (2004).

The circuit court's questions are factually charged and assume irrelevant, disputed facts which cloud the legal issues this Court is asked to resolve. Such questions are inappropriate as "[c]ertification is a procedure which is available only to examine the facial sufficiency of a pleading and does not lie to test the sufficiency of a pleading when measured against underlying facts." *See* Syl. Pt. 2, *Toler v. Shelton*, 159 W.Va. 476, 223 S.E.2d 429 (1976).

In its Certification Order, the circuit court adopted, without change, Respondents' Questions of Law. This was contested through *Defendant's Motion to Amend Certification Order.*[17] Petitioner submits that the circuit court's questions are problematic in numerous respects; and specifically, by including the following "factual assertions" in Questions 1 and 3:

> (1) "**where the Defendant doctor is a West Virginia doctor**", which Petitioner disputes as he was licensed to practice medicine in Ohio and West Virginia at the time of the subject incident and is an Ohio resident;
>
> (2) "**where the doctor-patient relationship between the plaintiff-patient and the defendant-doctor is established in the State of West Virginia**", which Petitioner disputes as no doctor-patient "relationship" apart from that established by the Petitioner and Mrs. Willey on the date of the laparoscopic sterilization procedure is in question as to the application of West Virginia's Borrowing Statute;
>
> (3) "**where the Defendant-doctor performs a tubal ligation in the State of Ohio, with no immediate injury**", which Petitioner vigorously disputes as Respondents claim that Jill Willey suffered a serosal insult during the laproscopic serialization performed in Ohio and that Petitioner was negligent in failing to discovery that injury during surgery;
>
> (4) "**where the tubal ligation is the only procedure which occurred in the State of Ohio in the course of the patient-doctor relationship between Plaintiff and Defendant**", which Petitioner disputes as the Respondents are not claiming medical negligence upon any other action by Petitioner outside of what occurred in Ohio; and
>
> (5) "**where the Plaintiff-patient suffers a sigmoid colon rupture in the State of West Virginia in the week following the tubal ligation procedure**", which Petitioner disputes both the place where and the time when the sigmoid colon rupture allegedly occurred, both being crucial fact issues in the case.

[17] *See* Record at 146.

These factual assertions should be stricken from the certified questions, which, by law, must contain an ***undisputed*** factual record on which the legal issues can be determined.

Further, Questions 2 and 3 have already been answered by this Court. *See Hayes v. Roberts & Schaefer Co.*, 192 W.Va. 368, 371, 452 S.E.2d 459, 462 (1994); *McKinney v. Fairchild Int., Inc.*, 199 W. Va. 718, 487 S.E.2d 913 (1997). These prior cases establish that the Borrowing Statute is the substantive law of West Virginia which mandates that for claims brought in this state that there be an exception to the general rule of applying West Virginia law **only as to the statute of limitations** and **only when** a cause of action accrues outside this state and that foreign state has a shorter limitations period. *Id.* Similarly, this Court has rejected arguments that West Virginia "public policy" prohibits the application of the Borrowing Statute even if its application results in harsh results. *See Hayes*, 192 W.Va. at 371, 452 S.E.2d at 462. Therefore, both Questions 2 and 3 should be stricken.

Dr. Bracken requests that this Court reformulate the certified questions, as authorized under West Virginia Code § 51-1A-4, and consider the following questions in their stead:

> West Virginia Code § 55-2A-2 provides: "[t]he period of limitation applicable to a claim accruing outside of this State shall be either that prescribed by the law of the place where the claim accrued or by the law of this State, whichever bars the claim."
>
> a. Based upon this statute, is the term "accrued" interpreted by the Court to mean "where the tort occurs" and/or "the injury is sustained"?
>
> b. If not, where does the cause of action "accrue" when a tortious injury is sustained in another State and is later discovered in West Virginia?

By considering these clear legal issues devoid of disputed facts, this Court should find that Respondents' cause of action "accrued" in Ohio, since the subject tubal ligation was performed there and the claimed injury was sustained there, although later discovered in West Virginia.

C. Respondents' Complaint Fails As A Matter Of Law

Regardless of whether the Court reformulates the certified questions, Respondents' cause of action must be dismissed as their claims accrued in Ohio since the alleged tort occurred in Ohio and the alleged injury was sustained in Ohio. This is not prohibited by public policy, as the clear intent of the legislature when it enacted the Borrowing Statute was to extinguish claims.

1. Background on West Virginia's Uniform Statute of Limitations on Foreign Claims Act, W. Va. Code § 55-2A-1, et seq.

Traditionally, statutes of limitations have been characterized as "procedural" laws, which mandate the application of the forum state's limitation period. Forum shopping has resulted in states enacting Borrowing Acts, which provide exceptions to this traditional rule. In 1957, the National Conference of Commissioners of Uniform State Laws promulgated a Uniform Statute of Limitations on Foreign Claims Act ("the Act") that was designed to replace variant Borrowing Acts being enacted. *See Uniform Statute of Limitations on Foreign Claims*, 14 U.L.A. 381 (1957). Section 2 of the Act dealt with the periods of limitations on foreign claims. *Id.* Although it achieved no general adoption, West Virginia specifically adopted it in 1959.[18]

W. Va. Code § 55-2A-2 provides: "the period of limitation applicable to a claim accruing outside of this state shall be either prescribed by the law of the place where the claim accrued or by the law of this state, which ever bars the claim." Since its enactment, this Court has discussed the Borrowing Statute's proper application and intended purpose. *See Hayes*, 192 W.Va. at 371, 452 S.E.2d 459 at 462; *McKinney*, 199 W. Va. at 718, 487 S.E.2d at 913; *Weethee*, 200 W.Va. at 417, 490 S.E.2d at 19. In doing so, this Court has held that the substantive law of West Virginia mandates, and public policy concerns do not prohibit, the application of the shorter period of limitation to a claim brought in West Virginia but which accrued outside this state. *Id.*

[18] The Act was also adopted in Michigan in 1963, Oklahoma in 1965, and Pennsylvania in 1976.

In *Hayes*, this Court reviewed a certified question as to whether a plaintiff was entitled to bring an unsafe workplace claim against his employer and a contractor in West Virginia where the alleged tortuous conduct and injury occurred in Kentucky. 192 W.Va. at 370, 452 S.E.2d at 461. This Court noted the Borrowing Statute was mirrored after Section 2 of the Act and defined the words "claim" and "accrued" as it related to the Borrowing Statute. *Id.* The Court also rejected the argument that the public policy of West Virginia would be offended through the application of the Borrowing Statute. *Id.* The Court held that the cause of action accrued in Kentucky where the injury was "sustained", and since Kentucky had a shorter statute of limitations, its limitations period barred the plaintiff's claim. *Id.* at 371, 452 S.E.2d at 462.

The Court next in *McKinney v. Fairchild Int., Inc.*, addressed the issue of the applicable tolling provisions which applied to claims accruing outside this state and held that although the Borrowing Statute requires the application of the shorter limitation period, it did not mandate the application of the foreign state's tolling provisions. 199 W. Va. at 721, 487 S.E.2d at 916. The Court found that tolling provisions are to be determined by a choice of law analysis. *Id.* at 727, 487 S.E.2d at 922. While reaching this decision, the Court noted that the Borrowing Statute "clearly favors the extinguishment of the claim." *Id.* at 724, 487 S.E.2d at 919 (*citing Hayes*, 192 W. Va. at 371, 452 S.E.2d at 462). The Court also stated:

> According to the Prefatory Note, for the *Uniform Conflict of Laws-- Limitation Act*, 12 *U.L.A.* 156 (1996), the *Uniform Statute of Limitation on Foreign Claims Act* (the West Virginia borrowing statute) 'achieved no general adoption, and was officially withdrawn in 1978' in part because of 'its abrupt harshness.' In 1982, the National Conference of Commissioners on Uniform State Laws approved the *Uniform Conflict of Laws-- Limitation Act*, which attempted to address some of the problems arising from the previous uniform borrowing act.

McKinney, 199 W. Va. at 725, 487 S.E.2d at 920. This clearly shows that this Court has recognized that: (1) the Borrowing Statute, as presently written, is the law in West Virginia; (2)

the West Virginia legislature has not amended the Borrowing Statute to require a choice of law analysis to determine the applicable statute of limitations; and (3) the intent of the Borrowing Statute is to extinguish claims even if it achieves harsh results to West Virginia citizens. *Id.*

Most recently, the Court has addressed the Borrowing Statute in the case of *Weethee v. Holzer Clinic, Inc*, 200 W.Va. 417, 490 S.E.2d 19 (1997). The facts in *Weethee* are nearly identical to the facts of this case. In *Weethee*, a defendant-physician performed a tubal ligation in Ohio on plaintiff, a West Virginia resident, who alleged that the surgery was negligently performed as the plaintiff later discovered an alleged injury as she became pregnant in West Virginia. *Id.* at 418, 490 S.E.2d at 20.

Similar to *McKinney*, the *Weethee* Court was asked to decide whether the Savings Statute, W.Va. Code § 55-2-18, a tolling provision to the running of the applicable statute of limitations applied, even though Ohio's statute of limitations applied as it was "undisputed that the claim in this case accrued in Ohio, when Mrs. Weethee underwent the sterilization procedure." *Weethee*, 200 W.Va. at 419, 490 S.E.2d at 21. The Court found that although the Borrowing Statute required Ohio's statute of limitations to apply, tolling provisions, such as the savings statute, are to be resolved under conflicts of law provisions. *Id.* at 423, 490 S.E.2d at 23. On this basis, the Court remanded the case to determine whether West Virginia or Ohio had a more significant relationship for the applicability of the Savings Statute. *Id.*

Based on the above, even when jurisdiction and venue are proper in West Virginia and West Virginia substantive and procedural law apply, if a tort occurs and an injury is sustained in a foreign state, the Borrowing Statute requires the application of the shorter limitations period to bar the plaintiff's claim.

2. Based on an Application of West Virginia's Borrowing Statute, Respondents' Claims Accrued in Ohio.

The circuit court found that the Borrowing Statute "does not bar the Plaintiff's claims for medical negligence pursuant to the Ohio one-year statute of limitations as 'the Plaintiff's cause of action did not accrue per the statute in the state of Ohio.'"[19] Rather, the circuit court found that Respondents' claims accrued in West Virginia, "where the injury occurred."[20] This conclusion is not accurate or legally sound given the undisputed facts and the proper application of the Borrowing Statute.

In *Hayes*, 192 W.Va. at 370, 452 S.E.2d at 461, while attempting to define "accrued", this Court noted that the Borrowing Statute was mirrored after the "Uniform State of Limitation on Foreign Claims Act". *Id.* (*citing* Statute of Limitation on Foreign Claims § 1, 14 U.L.A. 382 (1957)). The Court then defined accrued as "to arise, to happen, to come into force or existence." *Id.* (*citing* Black's Law Dict. 21 (6th ed. 1990)). The Court went on to state that in that particular case, the claim accrues "when and where the injury was sustained." *Id.* (*citing Gwaltney v. Stone*, 387 Pa. Super. 492, 564 A.2d 498, 503 (Pa. Super. Ct.1989)(a cause of action accrued "where the accident occurred."); *Rostron v. Marriott Hotels*, 677 F.Supp. 801, 802 (E.D.Pa. 1987)(a cause of action accrues "in the state where the final significant event essential to the bringing of a claim occurs.")). It is clear that while the courts in *Hayes*, *Gwaltney* and *Rostron* use different language to define precisely when a cause of action "accrues", each lead to the undeniable conclusion for the Respondents: their claims accrued in Ohio, "when and where the injury was sustained"; "where the accident occurred"; and "where the final significant event essential to the bringing of the claim occurred."

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[19] *See* Record at 142.
[20] *Id.*

Even more on point is *Weethee v. Holzer Clinic, Inc.*, 200 W.Va. at 417, 490 S.E.2d at 19. In *Weethee*, a defendant-physician performed a tubal ligation in Ohio on plaintiff, a West Virginia resident. Thereafter, the plaintiff became pregnant in West Virginia and gave birth to a child who had a genetic abnormality. The Court found "[i]t is undisputed that the claim in this case accrued in Ohio, when Mrs. Weethee underwent the sterilization procedure." *Id.* at 419, 490 S.E.2d at 21. This Court held that although the Borrowing Statute required Ohio's statute of limitations to apply, tolling provisions are to be resolved under conflicts of law provisions. On this basis, the Court remanded the case to determine whether West Virginia or Ohio had a more significant relationship for the applicability of the Savings Statute. *Id.* at 421, 490 S.E.2d at 23.

In the current case, the essence of Respondents' argument as to why their claim did not accrue in Ohio is that Mrs. Willey did not discover her alleged injury in Ohio, and that it may have later developed into a more significant injury, a rupture or perforation of her sigmoid colon, that was found in West Virginia. However, the fact that Respondent did not discovery the injury or that it may have later developed into a more significant injury has no role in the determination as to where the cause of action accrued as it pertains to the Borrowing Statute. *See Id.* at. 417, 490 S.E.2d at 19; *McKinney v. Fairchild Int., Inc.*, 199 W. Va. 718, 487 S.E.2d 913 (1997).

When a case is properly brought in West Virginia, the Borrowing Statute mandates the application of the shorter limitation period of West Virginia or the state where the cause of action accrued. However, determination of which state's tolling provisions should be applied is resolved by a conflicts of law analysis. *Id.* This is best shown by *Weethee* where the Court found that although the substantive law of West Virginia required Ohio's statute of limitations to apply, since the "claim in this case accrued in Ohio, when Mrs. Weethee underwent the

sterilization procedure", a choice of law analysis should be conducted to determine "which state's tolling provision should be applied." *Weethee*, 200 W. Va. at 421, 490 S.E.2d at 23.

A recent decision solidifies this extremely important distinction. In *Stuyvesant v. Preston County Comm.*, this Court stated:

> Generally, a cause of action accrues (i.e., the statute of limitations begins to run) when a tort occurs; under the 'discovery rule,' the statute of limitations is tolled until a claimant knows or by reasonable diligence should know of his claim.

Syl. Pt. 2, 223 W.Va. 619, 678 S.E.2d 872 (2009) (*citing Cart v. Marcum*, 188 W.Va. 241, 423 S.E.2d 644 (1992)). *See also* Syl. Pt. 1, *Jones v. Trustees of Bethany College,* 177 W.Va. 168, 351 S.E.2d 183 (1986)("the right to bring an action for personal injuries accrues . . . when the injury is inflicted.")

Here, regardless of the outcome of the choice of law analysis and regardless of whether Ohio or West Virginia's discovery rules are used to toll the running of the statute of limitations, the outcome does not change. In Ohio, a medical malpractice action must be commenced within one year after the cause of action accrues. Ohio Rev. Code Ann. § 2305.113(A). The subject tubal ligation was performed on December 15, 2004, at East Ohio Regional Hospital in Martins Ferry, Ohio. On December 20, 2004, Mrs. Willey was taken to surgery at Ohio Valley Medical Center in Wheeling, West Virginia, and a perforation of her sigmoid colon was discovered in the area that the tubal ligation had been performed five days earlier. Thus, the alleged tortious injury was discovered on that date. Even if tolled, the statute of limitations for Respondents to initiate their claim began to run, at the very latest, on December 20, 2004. Nearly one year and nine months later, on October 27, 2006, Respondents served a Notice of Claim on the Petitioner, well past the applicable one-year statute of limitations.

The undisputed facts being nearly identical to the *Weethee* case, it is clear that the instant cause of action accrued in Ohio were the tort occurred and Mrs. Willey sustained the alleged injury. This is true even though the statute of limitations would have been tolled until she discovered the injury. As found in *Weethee*, the realization of the injury (i.e., the pregnancy) although occurring in West Virginia, did not prevent Ohio's statute of limitations to apply to the matter. This Court should follow its holdings in *Weethee* and find that Plaintiffs' cause of action accrued in Ohio where the alleged tort occurred and find that Respondents' claims are barred by Ohio's one year statute of limitations applicable to medical negligence claims.

3. West Virginia's Substantive and Procedural Law Require the Application of West Virginia's Borrowing Statute

The Borrowing Statute, W. Va. Code § 55-2A-2, was enacted to alter the traditional rule to apply West Virginia procedural rules to claims brought in this state. Prior case precedent make it clear that the Borrowing Statute mandates an exception to the general rule of applying West Virginia law only as to the statute of limitations and only when a cause of action accrues outside this state and that foreign state has a shorter limitations period. *See McKinney*, 199 W. Va. 718, 487 S.E.2d 913; *Weethee*, 200 W.Va. at 417, 490 S.E.2d at 19. The circuit court is then free to apply West Virginia rules and regulations to all other procedural issues.

The same cannot be said as to the applicable tolling provisions, such as the discovery rule or the savings statute, which this Court has explained would be resolved under a conflicts of law analysis. *Id.* Thus, whether or not Respondent discovered her injury, the serosal insult, in this state and whether the tolling of the limitations is determined by West Virginia law or Ohio, the actual applicable statute of limitations would still be determined by the Borrowing Statute.

In *Hayes*, certified questions were submitted to this court to address similar issues when jurisdiction and venue were found to be proper in West Virginia:

> Whether in this Court, in which jurisdiction and venue have been found to be proper, a personal injury claim of a West Virginia resident plaintiff whose employer, defendant J & K Erection engages in business activity in West Virginia, and J & K Erection which is in turn employed by Defendant [R &S] which also engages in business activity in West Virginia and which Plaintiff is injured in Kentucky, is the claim barred by operation of Kentucky's one year statue of limitations when the action is brought in this West Virginia Court within West Virginia's two year statute of limitations?

The Court answered this question in the affirmative. 192 W.Va. at 371, 452 S.E.2d at 462. Although the employee's claims were properly brought in West Virginia and even though West Virginia substantive and procedural law applied to the case, it did not prohibit the application of the Borrowing Statute and Kentucky's shorter limitations period.

In the current case, similar *Hayes*, since the cause of action accrued outside of this state, as the tort occurred and the injury was sustained in Ohio, applying West Virginia substantive law requires the application of Ohio's shorter limitations period since it bars Respondents' claim.

4. This Court Has Determined that Application of the Borrowing Statute Does Not Violate West Virginia Public Policy

This Court has specifically considered and plainly denied the argument that public policy concerns prohibit the application of the Borrowing Statute. *See Hayes*, 192 W.Va. at 371, 452 S.E.2d at 462. In *Hayes*, the plaintiff, a West Virginia resident, argued that the "public policy of West Virginia would be offended through the application of Kentucky law because the plaintiff would be denied access to the courts and compensation for his injuries." *Id.* at 370, 452 S.E.2d at 461. This Court held, based on the clear intent of the legislature and the specific mandates of the Borrowing Statute, that where a personal injury claim is filed in West Virginia more than one year after an alleged negligent act in Kentucky, the shorter statute of limitations applied to bar the claim. *Id.* at 371, 452 S.E.2d at 462. The Court further stated that "[t]he spirit of

W.Va.Code, 55-2A-2 [1959] clearly favors the extinguishment of the claim." *Id.* (citing *Oakley v. Wagner,* 189 W.Va. 337, 340, 431 S.E.2d 676, 679 (1993)). The Court explained:

> A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith . . .

Id. (*citing* Syl. Pt. 7, *State ex rel. Goff v. Merrifield,* 191 W.Va. 473, 446 S.E.2d 695 (1994)). Thus, consistent with the Court's holding in *Hayes,* since Respondents failed to initiate their claim within one year after the cause of action accrued, the Complaint is barred by the Borrowing Statute which mandates the application of Ohio's shorter limitations period.

V. CONCLUSION

Consistent with this Court's holdings in *Hayes, McKinney,* and *Weethee,* even when jurisdiction and venue are proper in West Virginia and this state's substantive and procedural law apply, the Borrowing Statute mandates, and public policy principles do not prohibit, an exception to the general rule of applying West Virginia law only as to the statute of limitations and only when a cause of action accrues outside this state and that foreign state has a shorter limitations period which bars the claim. Petitioner, thus, respectfully submits that this Court should respond to the proffered certified questions, whether those offered by the circuit court or as reformulated by Petitioner, by finding that the term "accrued" means "where the tort occurs" and/or "where the injury is sustained". Based on this definition, Petitioner requests that the Court find Respondents' cause of action is barred by Ohio's statute of limitations because it "accrued" in Ohio, since the subject tort occurred there and the claimed injury was sustained there -- despite the fact that the injury was later discovered in West Virginia.

V. STATEMENT OF RELIEF SOUGHT

Petitioner respectfully requests that this Court:

1. Pursuant to W. Va. Code § 51-1A-4, to reformulate the questions as follows:

> West Virginia Code § 55-2A-2 provides that "[t]he period of limitation applicable to a claim accruing outside of this State shall be either that prescribed by the law of the place where the claim accrued or by the law of this State, whichever bars the claim."
>
> a. Based upon this statute, is the term "accrued" interpreted by the Court to mean "where the tort occurs"?
>
> b. If not, where does the cause of action "accrue" when a tortious injury is sustained in another State and is later discovered in West Virginia; and

2. Answer Question (a) in the affirmative, and if not, respond to Question (b) by recognizing that a cause of action accrues in the state where a tortious injury is incurred, even though the injury sustained is later discovered in West Virginia.

3. If the Court declines to reformulate the questions as requested by Petitioner, it is requested the Court Answer Questions (1) and (2) in the affirmative and Question (3) in the negative and find that:

> a. Respondents' cause of action accrues for purposes of the Borrowing Statute in the state of Ohio, where the tort occured and the injury was sustained;
>
> b. The substantive law of West Virginia mandates the application of the Borrowing Statute and the period of limitations provided by the law of the place where the claim accrued or West Virginia, whichever bars the claim; and
>
> c. Public Policy principles do not prohibit the application of the Borrowing Statute.

VII. REQUEST FOR ORAL ARGUMENT

Dr. Bracken requests an opportunity to present oral argument to the Court.

SAMUEL J. BRACKEN, JR., M.D.

Defendant.

By _____
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CERTIFICATE OF SERVICE

I, Phillip T. Glyptis, do hereby certify that service of the foregoing *Brief of Petitioner Samuel J. Bracken, Jr., M.D.*, has been made upon the parties herein by mailing a true and exact copy of the same in a properly stamped and addressed envelope, to the following counsel of record:

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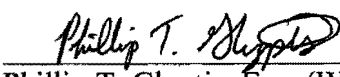
This 5th day of May, 2010.



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