

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 35519

**JILL ANN WILLEY, individually,
and MICHAEL ALLEN WILLEY,**

Plaintiffs/Respondents,

Civil Action No.: 06-C-479

v.

**UPON CERTIFIED QUESTIONS
FROM THE CIRCUIT COURT
OF OHIO COUNTY**

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

Defendants/Petitioner.

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

**David S. Givens, Esq. (W. Va. Bar No. 6319)
Phillip T. Glyptis, Esq. (W. Va. Bar No. 9378)
FLAHERTY SENSABAUGH BONASSO PLLC
1225 Market Street
P.O. Box 6545
Wheeling, WV 26003
(304) 230-6600**

**Attorneys for Defendant-Petitioner,
Samuel J. Bracken, Jr., M.D.**

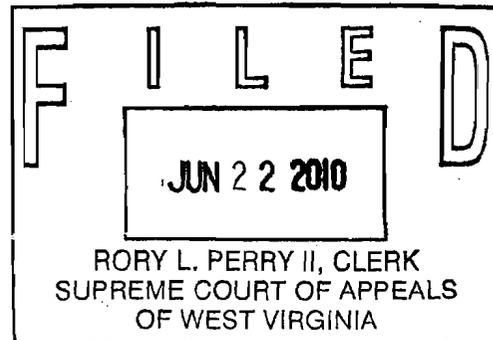


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I. INTRODUCTION

This certified question proceeding arises upon a challenge to the sufficiency of a motion for summary judgment. On June 26, 2009, the Circuit Court of Ohio County, denied Petitioner's *Revised Motion for Summary Judgment*.¹ On September 22, 2009, the Circuit Court entered an Order certifying three questions to this Court.² On October 26, 2009, Petitioner, Samuel J. Bracken, Jr., M.D. ("Dr. Bracken"), filed a *Motion to Amend Certification Order* asking the lower court to reformulate the certified questions to comport with procedural mandates by removing irrelevant disputed facts.³ This motion was denied on December 16, 2009.

Petitioner submitted his Brief Regarding Certified Questions on May 5, 2010 and on June 4, 2010, Respondents, Jill Ann Willey and Michael Allen Willey, submitted their Response. Pursuant to this Court's Order dated March 30, 2010, and Rule 10(c) of the West Virginia Rules of Appellate Procedure, Dr. Bracken submits this Reply Brief Regarding Certified Questions.

II. PRELIMINARY STATEMENT

The certified questions as presently stated or as reformulated by Petitioner present issues regarding the proper application of W. Va. Code § 55-2A-2 ("Borrowing Statute"). The Borrowing Statute provides: "[t]he 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, whichever bars the claim." *Id.* It mandates an exception to the general rule of applying West Virginia procedural law to in-state claims only as to the application of the statute of limitations and only when the cause of action accrued in a foreign state that has a shorter limitations period. *See Weethee v. Holzer Clinic, Inc.*, 200 W.Va. 417, 490 S.E.2d 19 (1997).

¹ See Record at 142.

² See Record at 144.

³ See Record at 146.

Petitioner respectfully submits that the court below improperly ruled that Respondents' medical negligence claim accrued in West Virginia, thus finding West Virginia's two-year statute of limitations applicable to this medical negligence action. 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 injury to her sigmoid colon while undergoing a sterilization procedure performed by Petitioner at East Ohio Regional Hospital in Martins Ferry, Ohio on December 15, 2004.⁴ *See Id.*

Respondents contend that they did not have an "actionable injury" until a "delayed" perforation to Mrs. Willey's sigmoid colon was discovered during a surgery performed on December 20, 2004, in Wheeling, West Virginia. Respondents further contend that this lack of an actionable injury until Mrs. Willey returned to West Virginia is further evidenced by the fact that she experienced no change in her post-operative condition until December 17, 2004. However, these assertions are both incorrect and irrelevant.⁵ The fact that the injury became worse over time and was not discovered until Mrs. Willey returned to West Virginia is irrelevant to the determination of where the action accrued as it pertains to the Borrowing Statute. These issues go to the determination of which state's tolling provisions should be applied, which this Court has stated should be resolved by a conflicts of law analysis. The determination of the applicable statute of limitations and the applicable discovery rules are separate and distinct analyses, where the laws of different states could apply to each. *See McKinney v. Fairchild Int., Inc.*, 199 W. Va. 718, 487 S.E.2d 913 (1997); *Weethee*, 200 W.Va. at 417, 490 S.E.2d at 19.

⁴ The Complaint specifically alleges that Dr. Bracken was negligent by "perforating the sigmoid colon during the performance of a laparoscopic tubal ligation," and by "failing to recognize that he had perforated the colon."

⁵ Her testimony reveals that she did not feel well from the time of the surgery; her stomach was distended and her problems got progressively worse between the date of the procedure and her presenting to the emergency room on December 19, 2004. (See Jill Willie Depo. pps. 81, 85-86 and 96).

Further, the location where the injury was sustained is undisputed and is established by the testimony of Respondents' own expert, Melvyn J. Ravitz, M.D.⁶ Dr. Ravitz clearly opines that Dr. Bracken negligently performed Jill Willey's surgery by causing a "serosal tear" to her sigmoid colon during surgery, and that this injury should have been discovered intraoperatively.⁷

The Borrowing Statute mandates that because the cause of action accrued in Ohio that has a shorter limitations period applicable for medical negligence claims, and since Respondents' claims were initiated beyond Ohio's one-year limitations period, Respondents' claims are barred.⁸ Permitting this suit to proceed would defy both the letter and spirit of the Borrowing Statute. *See McKinney*, 199 W. Va. at 724, 487 S.E.2d at 919.

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.

⁶ Respondents take issue with the timing of the filing of Dr. Bracken's *Revised Motion for Summary Judgment*. Respondents' summary is inaccurate and irrelevant, as all materials needed to file the motion were not obtained until the deposition of Dr. Ravitz was completed on December 15, 2004.

⁷ *See* Record at 86 and 87, Exhibit 'C' at pages 24 and 32. Contrary to Respondents claim that Dr. Bracken "grossly misconstrued" Dr. Ravitz' testimony, Dr. Ravitz clearly stated that the serosal tear is an injury. *Id.* at page 32.

⁸ *See* Ohio Rev. Code Ann. § 2305.113(A); W. Va. Code § 55-7B-4.

III. REPLY ARGUMENT

A. Standard for Certification and Standard of Review

West Virginia Code § 58-5-2 provides, in part, that:

Any question of law, including . . . questions arising . . . upon the sufficiency of a motion for summary judgment where such 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, and further proceedings in the case stayed until such question shall have been decided and the decision thereof certified back.

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 § 51-1A-4

Respondents argue that since "the Petitioner alleges that the facts contained within the Certified Questions on appeal are in dispute, this Court is without jurisdiction over the issues presented in the certificate." (citing *Hannah v. Heeter*, 213 W. Va. 704, 707, 584 S.E.2d 560, 563 (2003); *McMahon v. Advanced Title Services Co. of W. Va.*, 216 W. Va. 413, 414, 607 S.E.2d 519, 520 (2004); *Elmore v. State Farm Mut. Auto. Inc. Co.*, 202 W. Va. 430, 504 S.E.2d 893 (1998); and *State v. Lewis*, 188 W.Va. 85, 86 422 S.E.2d 807, 808 (1992)). Respondents further argue that the Court must refuse to reformulate the Certified Questions "as the issues presented by the Circuit Court in the Certificate are properly articulated" and "Petitioner seeks reformulation in an effort to distort the issues decided at the Circuit Court level." However, the

Court clearly has jurisdiction over the certified questions and this Court should exercise its plenary authority to reformulate the certified questions, since doing so would significantly narrow the issues and would focus the inquiry more precisely on the contentions of the parties.

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 Assoc, Inc.*, 215 W.Va. 453, 599 S.E.2d 876 (2004).

Each of the cases cited by the Respondents for this alleged lack of jurisdiction do not dispute the inherent right of the Court to reformulate the questions if there is a sufficiently precise and undisputed record on which the legal issues can be determined. In *Hannah*, the Court specifically recognized and exercised this power. 213 W. Va. at 708, 584 S.E.2d at 564 (citing Syl. Pt. 3, *Kincaid v. Mangum*, 189 W.Va. 404, 432 S.E.2d 74 (1993)). The *McMahon* and *Elmore* Courts confirmed the need for an adequate factual record for certified questions. 216 W. Va. at 419, 607 S.E.2d at 525; 202 W. Va. at 431, 504 S.E.2d at 894. The *Lewis* Court held that the Court is without jurisdiction to entertain a certified question only in **criminal cases**. 188 W.Va. 85, 422 S.E.2d 807 (1992) (emphasis added).

Contrary to Respondents’ assertion, Dr. Bracken is not attempting to “distort the issues.” Rather, Petitioner submits that the circuit court’s questions are problematic in that they are factually charged and assume irrelevant, disputed facts which cloud the legal issues this Court is asked to resolve. 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*.⁹ It was specifically argued that given that the certified questions in their current form were rife with factually-charged phrases and assume factual issues which are in dispute, there was a significant risk that this Court would refuse to docket it. Respondents opposed this Motion and argued that the questions contain no disputed facts and even if they did, it was proper for the court to determine the relevant facts and state them as part of its certification order. Similarly, Respondents argued that Questions 2 and 3 have not been answered by this Court. Now, the Respondents are arguing that the Court lacks jurisdiction over the very same questions that they submitted to the lower court, defended as being proper, and did not oppose or raise until this stage of the certification process.

In either case, Respondents fail to recognize that the court has jurisdiction over this case as there is a sufficiently precise and undisputed record on which the legal issues can be determined. These factual assertions should be stricken from the certified questions, since by law, they must contain an *undisputed* factual record on which the legal issues can be determined. Similarly, *Hayes* and *McKinney* 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. *See Hayes*, 192 W.Va. at 371, 452 S.E.2d at 462; *McKinney*, 199 W. Va. at 723, 487 S.E.2d at 918. Similarly, this Court has rejected public policy arguments. *See Hayes*, 192 W.Va. at 371, 452 S.E.2d at 462. Therefore, Questions 2 and 3 should be stricken.

⁹ See Record at 146.

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 as the Respondents’ Claims Clearly “Accrued” in Ohio for the Purposes of the Borrowing Statute

Regardless of whether the Court reformulates the certified questions, Respondents’ cause of action must be dismissed as their claims accrued in Ohio. Dismissal is warranted by the well reasoned and long-standing laws of this State and 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 the Borrowing Statute, W. Va. Code § 55-2A-2.

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 around the country to prevent forum shopping. *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. Only three other states adopted this

same Act, which included Michigan in 1963, Oklahoma in 1965, and Pennsylvania in 1978. *See McKinney*, 199 W. Va. at 726, 487 S.E.2d at 921.¹⁰

Many of the cases cited by Respondents in their brief are extra-jurisdictional and do not interpret a borrowing statute identical to that which was adopted by West Virginia. As recognized by this Court in *McKinney*, “[a]lthough most states have enacted borrowing statutes, there is little uniformity in construction. ‘Cases interpreting one of these statutes, or defining its scope, have little relevance to other differently worded statutes.’” *Id.* (citing *American Conflicts Law* § 128). Therefore, cases cited by Respondents concerning the application of the Borrowing Statute outside of Oklahoma, Pennsylvania, and Michigan (concerning the Act applicable from 1963 to 1978) are inapplicable.

The Court in *McKinney* also 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.

Id. 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.*

¹⁰ The Michigan Act was substantially amended in 1978.

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

Respondents assert that "Mrs. Willey had no cause of action for medical negligence until she suffered an actionable injury and damages when her sigmoid colon ruptured in West Virginia." However, this conclusion is not accurate or legally sound, given the undisputed facts and the testimony of Respondents' own expert, Melvyn J. Ravitz, M.D.

This is a "surgical mishap" case which, at its core, claims and seeks to prove that Mrs. Willey suffered an injury during surgery due to the surgeon's negligence. Respondents' expert, Dr. Ravitz, testified that Dr. Bracken negligently performed a tubal ligation, resulting in an intraoperative serosal "injury", which Dr. Bracken negligently failed to discover and correct intraoperatively in Ohio.¹¹ Respondents' argument that their claim did not accrue in Ohio because the intraoperative injury was not discovered is misplaced. *See Hayes*, 192 W.Va. at 370, 452 S.E.2d at 461 (defining "accrued" as it relates to the Borrowing Statute as "to arise, to happen, to come into force or existence" and "when and where the injury was sustained.").

This is best shown by *Weethee*, where the facts are nearly identical to the facts at hand. In *Weethee*, a defendant-physician performed a tubal ligation in Ohio on plaintiff, a West Virginia resident, who alleged negligent performance of a surgery based a later discovery of being pregnant. 200 W.Va at 418, 490 S.E.2d at 20. Therefore, at the time of the conclusion surgery, Mrs. Weethee had an actionable injury, as the surgery was allegedly negligently performed, which proximately caused an injury in that she was not sterile in Ohio. The fact that she later discovered the injury when she became pregnant in West Virginia was irrelevant to the determination as to which state's limitations period applied. *Id.* at 421, 490 S.E.2d at 23.

¹¹ See Record at 86 and 87, Exhibit 'C' at page 32.

Respondents attempt to distinguish *Weethee* based upon the fact that Mrs. Weethee did not contest the issue of where the claim accrued. Nevertheless, the Court's decision hinged on where the alleged negligent surgery was performed. The Court found that although the Borrowing Statute required Ohio's statute of limitations to apply as it was "undisputed that the claim in this case accrued in Ohio, where Mrs. Weethee underwent the sterilization procedure", tolling provisions, such as the savings statute, are to be resolved under conflicts of law provisions. *Id.* Similarly, Respondents' reliance on cases concerning products liability claims to establish that a tort and an injury may occur in different places is misplaced. (citing *Parish v. B. F. Goodrich Co.*, 395 Mich. 271, 235 N.W.2d 570 (Mich. 1975)). Under the facts of this case, similar to *Weethee*, the tort and an actionable injury both occurred intraoperatively in Ohio, which mandates the application of Ohio's shorter limitations period.

Respondents further assert that Petitioner's reliance on *Stuyvesant v. Preston Co. Comm.*, 233 W. Va. 619, 678 S.E.2d 872 (2009) is improper as this Court in *Dunn v. Rockwell*, 225 W. Va. 43, 689 S.E.2d 225 (2009) expressly overruled *Cart v. Marcum*, 188 W. Va. 241, 423 S.E.2d 644 (1992) and its progeny as to the proper application of the discovery rule. However, it appears that Respondents do not understand what *Stuyvesant* was offered for: the distinction between the applicable statute of limitations and the applicable tolling provisions as they are separate and distinct analyses. Further, *Dunn* actually confirms this distinction and the notion that an accrual of the action for the determination of the applicable statute of limitations and the discovery of an injury may not occur at the same time and may be determined by separate laws and analyses, as the *Dunn* Court articulated a five-step analysis to determine whether a cause of action is time-barred. *See* Syl. Pt. 5, 188 W. Va. at 241, 689 S.E.2d at 255 ("First, the court

should identify the applicable statute of limitations for each cause of action . . . Third, the discovery rule should be applied to determine when the statute of limitation began to run . . .”).

Moreover, here, regardless of whether Ohio or West Virginia’s discovery rule applies, the outcome does not change. The subject tubal ligation was performed on December 15, 2004, in Ohio, and on December 20, 2004, a perforated sigmoid colon was discovered in West Virginia. Even if tolled, the statute of limitations 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 Petitioner, well past the applicable one-year statute of limitations.¹²

The undisputed facts being nearly identical to the *Weethee* case, it is clear that the instant cause of action accrued in Ohio where 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 Respondents’ 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 was enacted to alter the traditional rule to apply West Virginia procedural rules to claims brought in this state. Case precedents 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. at 718, 487 S.E.2d at 913;

¹² See Ohio Rev. Code Ann. § 2305.113(A).

Weethee, 200 W.Va. at 417, 490 S.E.2d at 19. Thus, regardless of whether West Virginia law applies to the entire case, the Borrowing Statute determines the limitations period.

This is best evidenced by *Hayes*, where certified questions were submitted to this court to address similar issues where jurisdiction and venue were found to be proper in West Virginia. 192 W.Va. at 371, 452 S.E.2d at 462. The Court answered the question in the affirmative and found that although the plaintiff'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 to *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

Respondents argue that Ohio's statute of limitations should not be applied because the result would be "absurd and unjust" and would be "a violation of West Virginia law and public policy." This Court has specifically considered and plainly denied these arguments. *See Id.* 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 Kentucky's shorter statute of limitations applied to bar the claim. *Id.* at 371, 452 S.E.2d at 462 (the Borrowing Statute was mirrored after the *Uniform Statute of Limitations on Foreign Claims*, 14 U.L.A. 381 (1957)). Since Respondents failed to timely initiate their claim, it is barred by Ohio's limitations period.

IV. 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 occurred 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.

VI. REQUEST FOR ORAL ARGUMENT

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

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

Defendant.

By Phillip T. Glyptis
Counsel for Petitioner

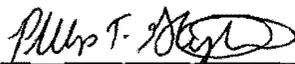
David S. Givens, Esq. (W. Va. Bar No. 6319)
Phillip T. Glyptis, Esq. (W. Va. Bar No. 9378)
FLAHERTY SENSABAUGH BONASSO PLLC
1225 Market Street, P.O. Box 6545
Wheeling, WV 26003
(304) 230-6600

CERTIFICATE OF SERVICE

I, Phillip T. Glyptis, do hereby certify that service of the foregoing *Reply 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:

David A. Jividen, Esq.
Chad C. Groome, Esq.
Jividen Law Offices
729 North Main Street
Wheeling, WV 26003
Counsel for Respondent

This 21st day of June, 2010.



Phillip T. Glyptis, Esq. (W. Va. Bar No. 9378)

FLAHERTY SENSABAUGH BONASSO PLLC
P.O. Box 6545
1225 Market Street
Wheeling, WV 26003
Telephone: (304) 230-6600
Telefax: (304) 230-6610