

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 35519

Samuel J. Bracken, Jr., M.D.,

Petitioner,

Vs.

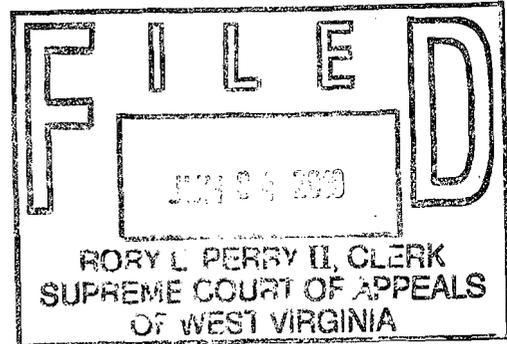
Ohio Co. Civil Action No.: 06-C-459

Jill Ann Willey, individually,
And Michael Allen Willey,

UPON REVIEW OF CERTIFIED QUESTION
FROM OHIO COUNTY CIRCUIT COURT

Respondents.

**RESPONSE IN OPPOSITION TO BRIEF OF PETITIONER SAMUEL J.
BRACKEN, JR., M.D.**



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I. KIND OF PROCEEDING AND NATURE OF RULING

The Petitioner seeks appeal, by way of certified question, of the July 14, 2009 Order of Circuit Court of Ohio County (Hon. Martin J. Gaughan, Circuit Judge for the First Judicial Circuit) wherein it denied the Petitioners' Revised Motion for Summary Judgment, filed pursuant to **W.Va. R. Civ. P. 56**. Specifically, the Circuit Court's July 14, 2009 Order found that the medical negligence claims of the Respondents and Plaintiffs herein below, Jill Willey and her husband Michael Allen Willey, were not barred by the application of a one (1) year statute of limitations under Ohio law pursuant to the operation of the West Virginia borrowing statute, **W.Va. Code § 55-2A-2**. Rather, the two (2) year statute of limitations applicable to medical negligence claims in West Virginia was found to apply to the Willeys' claims. The Circuit Court, *sua sponte*, entered a Certification Order (though the same was at the request of the Petitioner) on or about September 22, 2009.¹ The Petitioner untimely moved to amend the Certification Order on or about October 26, 2009. The Court denied the Petitioner's Motion to Amend Certification Order by Order dated December 16, 2009.

The Certified Questions adopted by the Circuit Court of Ohio County, West Virginia, as follows:

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

¹ See Certification Order.

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?

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?

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 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?

II. STATEMENT OF FACTS

The Respondent, Jill Willey, suffered a delayed perforation to her sigmoid colon in the days following a December 15, 2004 outpatient tubal ligation performed by the Petitioner, Dr. Samuel Bracken, at East Ohio Regional Hospital in Martins Ferry, Ohio. *See Complaint.* After a few days had passed following Ms. Willey's return home to Wheeling, Ohio County, West Virginia, she started to feel bloated and observed herself with a distended stomach.² She did not feel that way immediately after the surgery and prior to her arrival home.³ In fact, Ms. Willey did not experience any change in her post-

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² See Exhibit A to Plaintiffs' (Respondent) Response in Opposition to Defendant's Renewed Motion for Summary Judgment (Jill Willey depo. pp. 81-84).

³ See *Id.*

operative condition until approximately December 17, 2004.⁴

As a result of her newly discovered and increasing pain, Ms. Willey presented herself for treatment at the Ohio Valley Medical Center Emergency Room in Wheeling, Ohio County, West Virginia on or about December 19, 2006.⁵ Ms. Willey was eventually admitted to the hospital and had exploratory surgery performed upon her by Dr. Howard L. Shackelford. Ms. Willey was found to be suffering from sepsis secondary to a perforation of her sigmoid colon, which the Respondents maintain was a direct and proximate result of Dr. Bracken's negligence. As a result, she was forced to undergo a colostomy by Dr. Shackelford and had to wear an ostomy bag for quite some time causing her tremendous humiliation and embarrassment. Approximately, five (5) months later, Ms. Willey had to undergo a second surgery to reverse the colostomy and remove the ostomy bag.⁶ As a result of these procedures, Ms. Willey has incurred at least Eighty-One Thousand Three Hundred Sixty-Nine Dollars (\$81,369.79) in medical specials to date. She also suffered a great deal of physical pain and emotional distress as a result of Dr. Bracken's negligence and the multiple surgeries she underwent, not to mention suffering significant and permanent scarring about her body.

On or about December 14, 2006, Ms. Willey and her husband, Michael Allen Willey, timely filed suit against Dr. Bracken in the Circuit Court of Ohio County, West Virginia, alleging a claim of medical negligence under West Virginia law.⁷ On January 5, 2007, the Respondent, Dr. Bracken, by and through counsel, filed his Answer.⁸ The underlying case actively proceeded through discovery, and at least a dozen depositions had been

⁴ See Exhibit A to Id. (Jill Willey depo. pp. 91-92).

⁵ See Complaint, ¶ 7.

⁶ See Id.

⁷ See Summons.

⁸ See Defendant Bracken's Answer.

completed. This case was set for Trial three (3) times. The Petitioner herein had disrupted two prior Trial dates of February 2, 2008 and March 2, 2009 by moving to modify the scheduling order(s).⁹ Despite engaging in years of discovery and having this matter been near Trial on several occasions, the Petitioner never filed a Motion or otherwise made issue with the Circuit Court regarding the application of the statute of limitations to the Respondents' claims.

This case was, again, set to be tried on a third date of August 13, 2009 and Pre-Trial filings began to be filed. Along with its Pre-Trial filings the Petitioner, for the first time in the more than three (3) years that this case was pending (and despite the fact that the Motion was styled as "revised"), raised the issue of the application of the statute of limitations to the Respondents' claims for the very first time.¹⁰ Therein, the Petitioner argued that the West Virginia borrowing statute, **W.Va. Code § 55-2A-2**, would cause a one-year statute of limitations to apply to the Respondents' claims under Ohio law and that said statute would bar the same as untimely filed. The matter was fully briefed and oral argument was received by the Circuit Court on this issue.

After entertaining the arguments of counsel, the Circuit Court, by Order dated July 14, 2009, rejected the Petitioner's contentions, denied his Revised Motion for Summary Judgment, and properly found that the Respondent's claims did not "accrue" in the State of Ohio, for the purposes of the West Virginia borrowing statute.¹¹ The Circuit Court found that Ms. Willey suffered an actionable injury in West Virginia, not Ohio, which

⁹ See *Defendant's (Petitioner) First and Second Motions for Leave to Modify Scheduling Order*.

¹⁰ If fact, the original Motion for Summary Judgment filed by the Petitioner and defendant herein below set forth **no** legal or factual basis for the Motion. Rather, it was a bare bones Motion filed simply to preserve future issues for summary judgment. It stated nothing regarding the statute of limitations. See *Defendant's Motion for Summary Judgment*.

¹¹ See *July 14, 2009 Order from June 26, 2009 Hearing*.

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caused her claim to “accrue” in the State of West Virginia for the purposes of the West Virginia Borrowing Statute.¹² The Court found that a two (2) year statute of limitations applied to the Respondents’ claims under West Virginia law and, thus, the same were timely filed.¹³

The record in this case clearly supported the Circuit Court’s conclusion that the Respondents’ claims “accrued” in the State of West Virginia when and where Ms. Willey suffered her injury – a rupture of her sigmoid colon. As previously indicated, Ms. Willey did not have immediate problems following her surgery. Even the Petitioner, Dr. Bracken, testified in his deposition that he was not aware of Jill Willey suffering a perforation to her sigmoid colon during the subject December 15, 2004 surgery.¹⁴ Moreover, he asserted that he did not believe that Respondent, Jill Willey, suffered a laceration of her sigmoid colon during the December 15, 2004 procedure.¹⁵ Thus, Petitioner Bracken would have to agree that Ms. Willey suffered a perforation at some point after the surgery, after returning home to Wheeling, Ohio County, West Virginia, and prior to her seeking treatment at Ohio Valley Medical Center on or about December 19, 2004. Howard L. Shackelford, Jr., M.D., the doctor who performed the subsequent exploratory surgery on plaintiff, Jill Willey, testified in deposition that, with respect to the timing of the perforation, he “would lean toward probably a delayed perforation”.¹⁶ Dr. Shackelford also indicated that he did not remove necrotic or blackened tissue (seemingly indicative of an older perforation) from plaintiff Jill Willey’s sigmoid colon,

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¹² *See Id.*

¹³ *See Id.*

¹⁴ *See Exhibit B to Plaintiffs’ Response in Opposition to Defendant’s Renewed Motion for Summary Judgment (Bracken depo. p. 12).*

¹⁵ *See Exhibit B to Id. (Bracken depo. p. 11).*

¹⁶ *See Exhibit C to Id., (Shackelford depo. pp. 16-17).*

and if the same would have existed he would have removed it.¹⁷ Moreover, the Respondent's expert witness, Melvyn J. Ravtiz, M.D., further testified that the perforation to the sigmoid colon suffered by Ms. Willey was "delayed".¹⁸ Thus, as can be seen from the factual record, it is indisputable that the Respondent, Jill Willey, did not suffer an actionable injury (a rupture/perforation in her sigmoid colon) from Petitioner Bracken's negligence until her colon ruptured and/or perforated in the State of West Virginia in the days following the subject outpatient procedure.

In his brief, Petitioner Bracken attempts to suggest that the factual record evinces that an actionable injury was suffered contemporaneously with the subject surgery per the deposition testimony of Respondent's expert witness, Dr. Ravtiz.¹⁹ This is a gross misconstruction of Dr. Ravtiz's testimony. When asked by the Petitioner's counsel whether he believed that a perforation injury suffered by Ms. Willey was delayed or late, Dr. Ravtiz testified that "I believe that the actual perforation through the three layers of the serosa, muscularis and mucosa of the sigmoid colon did not occur during the actual procedure."²⁰ Clearly, Petitioner Bracken's representation of Dr. Ravtiz's testimony misconstrues the point that Dr. Ravtiz was making – that the actionable injury did not occur during the surgery itself.

Of further note, the location of the subject outpatient procedure in Ohio was an anomaly in the long-standing doctor-patient relationship between Respondent, Jill Willey, and Petitioner, Samuel E. Bracken, Jr., M.D. Prior to the subject outpatient surgery, this relationship had developed solely in the State of West Virginia at Medical

¹⁷ See *Id.* (Shackleford depo. pp. 38-44).

¹⁸ See *Exhibit C to Defendant's Revised Motion for Summary Judgment* (Ravitz depo. p. 35).

¹⁹ See *Brief of Petitioner Samuel J. Bracken, Jr., M.D.*, p. 5.

²⁰ See *Exhibit A to Reply to Plaintiff's Response to Defendant's Revised Motion for Summary Judgment*, p. 24 (Depo. of Dr. Ravtiz).

Park in Wheeling, Ohio County, West Virginia, over the course of decades. The doctor-patient relationship went back to at least 1977 or 1978.²¹ The only treatment provided by Petitioner Bracken (a West Virginia doctor) to Ms. Willey (a West Virginia resident) in the State of Ohio was in relation only to the December 15, 2004, outpatient tubal ligation at East Ohio Regional Hospital. Defendant Bracken, not the plaintiff, chose the location for the tubal ligation.²² Upon information and belief, the outpatient surgery could have occurred in Wheeling, Ohio County, West Virginia.²³

II. STANDARD OF REVIEW

The instant proceeding involves questions of law certified by the Circuit Court of Ohio County. “The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*.” Syl. Pt. 1, Holloman v. Nationwide Mut. Ins. Co. 217 W.Va. 269, 271, 617 S.E.2d 816, 818 (2005)(citing Syl. Pt. 1, Gallapoo v. Wal-Mart Stores, Inc., 197 W.Va. 172, 475 S.E.2d 172 (1996)).

III. LAW AND ARGUMENT

A. Insofar as 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.

The Petitioner argues extensively that the Certified Questions presented by the Circuit Court of Ohio County must be reformulated insofar as they contain facts which he alleges are in dispute. However, if the Petitioner is correct in his assertion that the

²¹ See Exhibit A to Plaintiffs’ Response in Opposition to Defendant’s Renewed Motion for Summary Judgment, (Jill Willey depo. pp. 34-35).

²² See Exhibit B to Id., (Bracken depo. p. 20); and Exhibit A to Id., (Jill Willey depo. p. 76).

²³ See Exhibit B to Id. (Bracken depo. p. 21).

material facts set forth in the Certified Question are disputed facts, the Court is without jurisdiction over the certificate presented herein.

It is well settled law in West Virginia that a Certified Question cannot be addressed by the Court unless it is based upon a “sufficiently precise and undisputed factual record”. See Hannah v. Heeter, 213 W.Va. 704, 707, 584 S.E.2d 560, 563 (2003)(citing Syl. Pt. 5, Bass v. Coltelli, 192 W.Va. 516, 453 S.E.2d 350 (1994)); see also Syl. Pt. 2, McMahon v. Advanced Title Services Co. of West Virginia, 216 W.Va. 413, 414, 607 S.E.2d 519, 520 (2004); and Elmore v. State Farm Mut. Auto Ins. Co., 202 W.Va. 430, 504 S.E.2d 893 (1998). The remedy for addressing certified questions which are based upon allegedly disputed material facts is not reformulation of the questions presented, as the Petitioner requests. See Id. Rather, in such a circumstance the questions are not certifiable and the Court should refuse to address the certificate. See Id. The reason for this is because “[t]he question of certifiability of decisions of a lower court to this Court is one which goes to the jurisdiction of this Court.” Syl. Pt. 1, State v. Lewis, 188 W.Va. 85, 86, 422 S.E.2d 807, 808 (1992)(citing Syl. Pt. 2, State v. Brown, 159 W.Va. 438, 223 S.E.2d 193 (1976)); see also Bass at 519, 453 S.E.2d at 353. As the Court stated in State v. Lewis at Syllabus Point 2, “[t]his Court will make an independent determination of whether the matters brought before it lie within its jurisdiction.” “The statute governing the procedure for presenting interlocutory decisions of a lower court to the Supreme Court of Appeals by certificate, being in degradation of the common law, is strictly construed.” Syl. Pt. 1, Toller v. Shelton, 159 W.Va. 476, 223 S.E.2d 429 (1976).

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The Petitioner takes issue with virtually every material fact set forth in the Certified Questions on appeal, and, requests that the Court reformulate the question accordingly. However, these positions are mutually incompatible. Any argument that the Certified Questions on appeal regard disputed material facts is an argument that divests this Court of its jurisdiction over the questions presented in the certificate. Thus, under the circumstances the Court cannot reformulate, but should properly dismiss this appeal and remand the case back to the Circuit Court of Ohio County for further proceedings.

B. The Court must refuse to reformulate the Certified Questions presented in the certificate as the issues presented by the Circuit Court in the certificate are properly articulated. Moreover, the Petitioner seeks reformulation in an effort to distort the issues decided at the Circuit Court level.

The Court must refuse to reformulate the Certified Questions raised in the certificate as the same properly and accurately set forth the issues decided by the Circuit Court of Ohio County below. The Petitioner has already been unsuccessful in his attempts to persuade the Circuit Court to reformulate the Certified Questions on appeal in an effort to distort the issues decided by the Circuit Court and draw attention away from material facts which the Circuit Court relied upon in denying Petitioner's Revised Motion for Summary Judgment herein below.

The Respondents do not contest this Court's ability to reformulate Certified Questions on appeal. See W.Va. Code § 51-1A-4. However, the Court's authority to reformulate a Certified Question certainly would be coextensive with the scope of its jurisdiction over the questions presented. Thus, if the Court is presented with a set of Certified Questions containing alleged factual disputes therein, it does not have jurisdiction over the same. In such as circumstance, the Court seemingly could not vest itself with jurisdiction

simply by erasing or ignoring facts material to the Circuit Court's decision. Rather, the Court should dismiss the appeal in such a circumstance.

Second, the reformulated Certified Questions proposed by the Petitioner misconstrue the issues below. Both of the Petitioners' proposed Certified Questions conflate the legal concepts of actionable injury with tortious conduct. In his first proposed reformulated Certified Question the Petitioner incorrectly infers and/or assumes that the tortious act and the actionable injury must occur or did occur in the same location.²⁴ As will be discussed in subsection C herein below, West Virginia law simply does not support this proposition. Furthermore, his second proposed reformulated Certified Question misconstrues the issues *sub judice* as regarding the application of the "discovery rule" and implies that the Respondent suffered an actionable injury in Ohio, which she clearly did not.²⁵ Ms. 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. For these reasons and for the reasons stated throughout this brief, the Petitioner's request for reformulation should, again, be denied.

Third, the Petitioner's arguments that Certified Questions 2 and 3 should be stricken should also be disregarded. Both questions address unresolved issues regarding the application of the West Virginia borrowing statute to the present factual scenario. Insofar as there may be public policy issues raised by the same, these issues were not previously decided by this Court in **Hayes v. Roberts & Schaefer Co.**, 192 W.Va. 368, 452 S.E.2d 459 (1994) and **McKinney v. Fairchild Int., Inc.**, 199 W.Va. 718, 487 S.E.2d 913 (1997) as the Petitioner asserts. As will be discussed in subsections D and E herein

²⁴ See *Petitioner's Brief*, p. 9.

²⁵ See *Id.*

below, these cases are not directly on point and are not dispositive of the issues raised by Certified Questions 2 and 3.

Lastly, the Petitioner's assertions that the facts contained within the Certified Questions on appeal contain disputed material facts should fall upon deaf ears. The facts contained within the Certified Questions presented were not challenged by the Petitioner at the summary judgment phase.²⁶ Rather, the Petitioner took issue with the factual record for the first time when he filed his untimely **W.Va. R. Civ. P. 59(e)** Motion styled as a Motion to Amend Certification Order.²⁷ It must be noted that the facts that the Petitioner alleges are in dispute, in large part, come straight from the admissions in the Petitioner's Answer and the parties' depositions.²⁸ The allegation that Petitioner Bracken was a West Virginia physician came directly from paragraph 2 of his Answer to the Petitioner's Complaint. It is uncertain how this could be disputed. Moreover, the Respondent's allegation that there existed a long-standing doctor-patient relationship between Dr. Bracken and Ms. Willey, and that the same was established in West Virginia, is indisputable. The Petitioner has not submitted any evidence contrary to this allegation and it would be false for the defendant to suggest otherwise. Similarly, the tubal ligation was the only procedure that the Respondent received from Petitioner Bracken in the State of Ohio. The Petitioner now seemingly disputes this fact, but, again, submitted no

²⁶ See Respondent's Revised Motion for Summary Judgment and Memorandum in Support thereof; see also Respondent's Reply to Plaintiffs' Response in Opposition to Defendant's Renewed Motion for Summary Judgment.

²⁷ See Respondent's Motion to Amend Certification Order; see also Respondent's Reply to Plaintiff's Response in Opposition to His Motion to Amend Certification Order.

²⁸ See Defendant's Answer.

evidence in the course of the underlying proceedings sufficient to place this fact in dispute.²⁹

The issue of the physical location of the sigmoid colon rupture also cannot be reasonably disputed. Petitioner Bracken testified that he did not believe that Respondent, Jill Willey suffered a laceration of her sigmoid colon during the December 15, 2004 procedure which occurred at East Ohio Regional Hospital.³⁰ In fact, Petitioner Bracken testified that he is not aware of Respondent, Jill Willey, suffering a perforation of her sigmoid colon during the December 15, 2004 surgery.³¹ As stated herein above, Respondent, Jill Willey, further testified that she did not recall having the bloated and gaseous feeling in her abdomen after going home to West Virginia from the outpatient surgery.³² Ms. Willey did not experience a change in her post-operative condition until about December 17, 2004.³³ Also, Dr. Shackelford, the doctor who performed the subsequent exploratory surgery on plaintiff, Jill Willey, testified that, with respect to the timing of the perforation he “would lean toward probably a delayed perforation”.³⁴ Lastly, despite the defendant’s assertions in the instant Motion, the plaintiffs’ expert witness, Melvyn J. Ravnitz, M.D., testified the perforation to the sigmoid colon was

²⁹ See Respondent’s Revised Motion for Summary Judgment and Memorandum in Support thereof; see also Respondent’s Reply to Plaintiffs’ Response in Opposition to Defendant’s Renewed Motion for Summary Judgment; Respondent’s Motion to Amend Certification Order; and Respondent’s Reply to Plaintiff’s Response in Opposition to His Motion to Amend Certification Order.

³⁰ See Exhibit B to Plaintiff’s Response in Opposition to Defendant’s Renewed Motion for summary Judgment, (Bracken depo. p. 11).

³¹ See Id. (Bracken depo. p. 12).

³² See Exhibit A to Plaintiff’s Response in Opposition to Defendant’s Renewed Motion for summary Judgment (Jill Willey depo. pp. 81-84).

³³ See Id., (Jill Willey depo. pp. 91-92).

³⁴ See Exhibit C to Plaintiff’s Response in Opposition to Defendant’s Renewed Motion for summary Judgment, (Shackelford depo. pp. 16-17).

“delayed”.³⁵ If the Petitioner had a valid challenge to these facts, he should have presented evidence at the summary judgment stage to counter it, but he did not.

Accordingly, the Court should refuse to reformulate the Certified Questions on appeal. At the very least, it should reject the Certified Questions proposed by the Petitioner to the extent that the same are self-serving, distort and/or conflate the underlying issues, and infer legal principles which are not supported by West Virginia law. Moreover, to the extent that the Court should find that material facts are in dispute in the Certified Questions presented, it should refrain from reformulation and dismiss the appeal.

C. The Court should uphold the judgment of the Circuit Court of Ohio County denying Petitioner’s Revised Motion for Summary Judgment as the Respondents’ “claims” clearly “accrued” in the State of West Virginia for the purposes of the West Virginia Borrowing Statute, West Virginia Code § 55-2A-2. As such, the answer to Certified Question No. 1 should be “West Virginia”, and the judgment of the Circuit Court of Ohio County should be affirmed.

The judgment of the Circuit Court of Ohio County denying the Petitioner’s Revised Motion for Summary Judgment should be affirmed as the Circuit Court was correct in its conclusion that the Respondents’ claims “accrued” in the State of West Virginia for the purposes of the West Virginia Borrowing Statute, **West Virginia Code § 55-2A-2**. As such, the answer to Certified Question No. 1 should be “West Virginia”, as West Virginia’s two-year statute of limitations governing medical negligence actions applies to the Respondents’ underlying claims.

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.” Thus, in

³⁵ See Exhibit C to Defendant’s Renewed Motion for Summary Judgment, (Ravitz depo. p. 35).

order for the one-year Ohio statute of limitations to apply to the Respondents' claims of medical negligence, that "claim" must "accrue" in the State of Ohio.

This Court has previously addressed the meaning of the terms "claim" and "accrue" as used in the West Virginia borrowing statute, and the relation of those terms to the concept of actionable injury, in Hayes v. Roberts & Schaefer Co., 192 W.Va. 368, 452 S.E.2d 459 (1994). In Hayes at 370-371, 452 S.E.2d at 461-462, the Court reasoned, with emphasis added, that:

... **the claim accrued when and where the injury was sustained.** See *Gwaltney v. Stone*, 387 Pa.Super. 492, 564 A.2d 498, 503 (1989) ("The accident occurred in Tennessee. Hence, the cause of action accrued in Tennessee.") and *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. . . .**")(citations omitted). . . .

Per Hayes, the location of the last significant event in relation to a cause of action is the determinative event for locating where a claim "accrues" under the borrowing statute.³⁶ Moreover, per Hayes, it is recognized that, for the purposes of the borrowing statute, the actionable injury and the tortious act giving rise to a cause of action are severable and distinct events. The Court in Hayes reasoned that the "injury" itself could serve as the occurrence that defines when and where a claim "accrues".

This Court has taken a similar approach in its application of the "discovery rule" to an applicable statute of limitations. For example, the West Virginia Courts treat the concept of "injury" as a separate and distinct event when applying the "discovery rule" to

³⁶ The Court in Meadows v. Wal-Mart Stores, Inc., 207 W.Va. 203, 215, 530 S.E.2d 676, 688 (1999), also found that the phrase "then accrue" meant the point where a valid claim was "vested". Clearly, a claim for negligence is vested once all of the elements constituting the cause of action have occurred, including an actionable injury.

a statute of limitations in negligence cases. See Gaither v. City Hosp., Inc., 199 W.Va. 706, 714, 487 S.E.2d 901, 909 (1997); see also Merrill v. West Virginia Dept. of Health and Human Resources, 219 W.Va. 151, 632 S.E.2d 307 (2006); and Dunn v. Rockwell, 225 W.Va. 43, 689 S.E.2d 255 (2009). The Court recognized that statute of limitations is tolled until each essential element, including injury, has or should have been discovered. Thus, the Courts have treated the elements of tortious conduct and injury as severable and distinct occurrences with some consistency in matters outside the scope of the borrowing statute.

Numerous courts across the United States have similarly interpreted the term “accrue” in the context of a borrowing statute. For example, the Missouri Court of Appeals, Western District, recognized the severability of “injury” and “tort” in interpreting the term “accrue” under the Missouri Borrowing Statute. Wright v. Campbell, 277 S.W.3d 771 (Mo.App., W.D., 2009). The Court of Appeals, in reviewing the application of its borrowing statute to a professional legal malpractice claim, held in Wright at 774 (emphasis added), that

... a cause of action accrues, and “originates” for purposes of § 516.190, when and **where the damage “is sustained and is capable of ascertainment.”** The Missouri Supreme Court has emphasized that “the mere occurrence of an injury itself does not necessarily coincide with the accrual of a cause of action,” since “[s]uch a reading would deprive the additional language ‘and is capable of ascertainment’ of any meaning.” *Martin v. Crowley, Wade & Milstead, Inc.*, 702 S.W.2d 57, 58 (Mo. banc 1985).

In its application of the New York borrowing statute, the United States District Court for the Eastern District of New York found that

[u]nder CPLR 202, a cause of action “accrues” where the injury is suffered as opposed to where the allegedly tortious act occurred. *Global Fin. Corp. v. Triarc Corp.*, 93 N.Y.2d 525, 529, 693 N.Y.S.2d

479, 715 N.E.2d 482 (1999) (“we have consistently employed the traditional definition of accrual—a cause of action accrues at the time and in the place of the injury—in tort cases involving the interpretation of CPLR 202”); *Martin v. Dierck*, 43 N.Y.2d 583, 403 N.Y.S.2d 185, 374 N.E.2d 97 (1978) (holding that product liability claim accrued in Virginia for purposes of CPLR 202 where plaintiff was injured in Virginia but product was manufactured in New York); *Williams*, 131 F.Supp.2d at 455 (“For purposes of New York borrowing statute, a cause of action accrues where the injury is sustained rather than where the defendant committed the wrongful acts”).

Bennett v. Hannelore Enterprises, Ltd., 296 F.Supp.2d 406, 411 (E.D.N.Y.,2003).

Moreover, Michigan too has found that *all* elements of a cause of action (including injury) are determinative of deciding where a cause of action accrues for the purposes of its borrowing statute. See **Parish v. B. F. Goodrich Co.** 395 Mich. 271, 235 N.W.2d 570, (Mich. 1975). In **Parish** at 284, 235 N.W.2d at 575-576 the Court of Appeals of Michigan held, with emphasis added:

We conclude that the product liability claim of a consumer for personal injury against a manufacturer, whether postulated on theories of tort or contract or an amalgam of both, **does not accrue for purposes of the borrowing statute until all elements of the cause of action are present.**

The term “accrue” has also been similarly interpreted by various other courts across the United States in their analysis of when claims “accrue” for statute of limitations purposes. In those jurisdictions, the final significant event for determining when a claim “accrues” and the applicable statute of limitations begins to run is often when the injury occurs. See **Omaha Paper Stock Co., Inc., v. Martin K. Eby Construction Co., Inc.**, 193 Neb. 848, 230 N.W.2d 87 (Neb. 1975)(Nebraska follows majority rule that cause of action “accrues” when injury actually occurs and there is a basis for right of action); **Gilger v. Lee Construction, Inc.**, 249 Kan. 307, 820 P.2d 390 (Kan. 1991)(Kansas statute of limitations does not accrue until cause of action first causes

substantial injury); Cook v. Yager, 13 Ohio App.2d 1, 233 N.E.2d 326 (Ohio App. 1968)(In Ohio, cause of action for negligence causing subsequent and consequential injury accrues when consequential injury manifests itself); and Crosslin v. Health Care Auth. Of the City of Huntsville, 5 So.3d 1193 (Ala. 2008)(under Alabama Medical Liability Act, it is cognizable that wrongful act and injury may not coincide/accrual date of cause of action in such situation is date of discovery or manifestation of injury). The foregoing points of law and authority are just a few of many examples of this consistent interpretation of the term “accrue” in statute of limitations jurisprudence.

The instant case is a medical negligence action. As in any negligence action, the essential elements of a claim for medical negligence are duty, breach, causation and injury. See Atkinson v. Harman, 151 W.Va. 1025, 1031, 158 S.E.2d 169, 173 (1967)(“...elements of duty, breach and injury are essential to actionable negligence and in the absence of any of them the action must fall. 38 Am.Jur., Negligence, Sec. 11.”); see also Crane & Equipment Rental Co., Inc. v. Park Corp., 177 W.Va. 65, 66, 350 S.E.2d 692, 693 (1986); Gaither v. City Hosp., Inc., 199 W.Va. 706, 714, 487 S.E.2d 901, 909 (1997)(discovery rule in medical negligence action tolled until discovery of all essential elements of claim: duty, breach, causation, and injury); and Harris v. R.A. Martin, Inc., 204 W.Va. 397, 403, 513 S.E.2d 170, 176 (1998)(J. Maynard, dissent)(Four D’s of negligence claim: duty, dereliction, damage and direct cause). Injury is a distinct and material element to maintaining a medical negligence claim. It is axiomatic that, without an actionable injury and resultant damages, a plaintiff is without a claim for negligence, including medical negligence.

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The Petitioner attempts to suggest that the Respondent suffered an actionable injury at the time of the subject surgery. As previously asserted hereinbefore, this argument is premised upon a misconstruction of the Respondents' expert's deposition testimony. The fact of the matter is that the Respondent suffered no actual damage or legally cognizable injury until she suffered a rupture and/or perforation of her sigmoid colon in Wheeling, Ohio County, West Virginia. This injury was the final significant event for maintaining their claims of medical negligence and it occurred solely in the State of West Virginia as clearly evinced by the factual record; the opinions of the Respondents' expert witnesses, Dr. Ravitz and Dr. Shackelford; and the deposition testimony of Petitioner, Bracken, himself. If not for the rupture and burst of her sigmoid colon, Ms. Willey would never have had an actionable claim for medical negligence, as any breach of duty on the part of Petitioner Bracken would have been of no consequence or effect.

In its brief, the Petitioner makes the sweeping conclusion that the place of the tort is the determinative location for deciding where a claim "accrues" under the borrowing statute. However, none of the cases interpreting the borrowing statute support this result. The Petitioner acts as if Weethee v. Holzer Clinic, Inc., 200 W.Va. 417, 490 S.E.2d 19 (1997) supports this contention, but he fails to acknowledge that his quote from Weethee is out of context. The subject claim in Weethee "accrued" in the State of Ohio because the underlying plaintiff did not contest that issue. Where the claim "accrued", for the purposes of the borrowing statute, was not at issue in Weethee and the Court did not address the same. Thus, the sole authority the Petitioner relies upon for his broad and unfounded statement of law that the term "accrue" has been defined in other contexts in West Virginia to mean simply the place where the tort occurs is Stuyvesant v. Preston

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County Comm., 223 W.Va. 619, 678 S.E.2d 872 (2009). Stuyvesant relies upon Cart v. Marcum, 188 W.Va. 241, 423 S.E.2d 644 (1992) for this proposition insofar as the Cart Court applied the term in the “discovery rule” context. Unfortunately for the Petitioner’s sake, subsequent this Court’s June 9, 2009 decision in Stuyvesant, this Court on November 24, 2009 overruled Cart v. Marcum and all of its progeny on this exact issue. Syl. Pt. 1, Dunn v. Rockwell, 225 W.Va. 43, 689 S.E.2d 255 (2009)(expressly overruling Cart v. Marcum and its progeny). Thus, the Petitioner’s reliance upon this case is misplaced. The Dunn Court adopted a more holistic approach to the “discovery rule” and, in essence, found that, in West Virginia, the “discovery rule” tolls an applicable statute of limitations until all elements of a cause of action (injury included) have or should have been discovered. Therefore, the only authority that the Petitioner relies upon that directly infers that for the proposition that “accrue” in West Virginia means place of the tort is bad law. West Virginia now undertakes an approach on discovery rule tolling issues that determines when a cause of action accrues by looking at each element of the cause of action, including injury, as severable event. The same result must occur here in construction of the term “accrue” as it applies to “where” the cause of action arises. Thus, there is no authority supporting the Petitioner’s definition regarding the term “accrue”.

As can be seen from the foregoing, the Circuit Court of Ohio County was correct when it found that the West Virginia borrowing statute did not to apply to the Respondents’ claims (and did not cause the Ohio medical negligence statute of limitations to apply to

the Respondents’ claims), as that the same did not “accrue” in the State of Ohio. Ms. Willey first suffered an actionable injury while she was recovering from her outpatient

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surgery in West Virginia. Therefore, the claim “accrued” in the State of West Virginia pursuant to both West Virginia law and the strong weight of extra-jurisdictional authority. The Respondents’ Complaint, filed on December 14, 2006 was timely filed pursuant to the West Virginia two-year statute of limitations. Thus, in the event that the Court finds it has jurisdiction over the same, the answer to Certified Question No.1 should be “West Virginia” and the Circuit Court of Ohio County’s application of the two-year statute of limitations to Respondents’ claims of medical negligence should be affirmed.

D. The Petitioner’s assertions that (1) both West Virginia substantive and procedural law apply to the Respondents’ claims and (2) that those claims accrued in Ohio for statute of limitations purposes, are mutually exclusive positions. To the extent that the Petitioner maintains that West Virginia substantive law applies, he must admit that the place of the Respondent’s injury was West Virginia. As such, the answer to Certified Question No. 2 should be “No” and the judgment of the Circuit Court of Ohio County should be affirmed.

The Court should answer “No” to Certified Question No. 2, insofar as the Petitioner admits that the substantive and procedural law of West Virginia governs the Respondents’ claims pending in the underlying action, but argues that those claims are barred by the application of a one-year Ohio statute of limitations. The Petitioner’s arguments in this regard are inconsistent. To the extent that the Petitioner admits that West Virginia substantive law applies to the Respondents’ claims, it further admits that West Virginia is the place of the injury under the applicable choice of law analysis. Accordingly, the Court should affirm the decision of the Circuit Court of Ohio County to the extent that the Petitioner admits this fact.

West Virginia generally adheres to the choice of law doctrine of *lex loci delicti* to decide the substantive law to apply to a tort claim. **Paul v. Nat’l Life**, 177 W.Va. 427,

352 S.E.2d 550 (1986). Pursuant to the doctrine, the substantive rights of the parties are generally determined by the law of the **place of the injury**. See McKinney v. Fairchild Inter., Inc., 199 W.Va. 718, 487 S.E.2d 913 (1997); Blais v. Allied Exterminating Co., 198 W.Va. 674, 482 S.E.2d 659 (1996); and Mills v. Quality Supplier Trucking, Inc., 203 W.Va. 621, 510 S.E.2d 280 (1998). By utilizing the phrase “place of the injury”, application of the doctrine must not be focused on the *lex loci* of the actions of the tortfeasor, but upon the *lex loci* of the injuries and damages suffered by the victim of the alleged tort. The **Restatement of Conflict of Law § 337** is instructive on this point insofar as it states that the *lex loci* is “the state where the last event necessary to make an actor liable for an alleged tort takes place.” Miller v. Holiday Inns, Inc., 436 F.Supp. 460 (E.D. Va. 1977) (citing the Restatement of Conflicts of Laws § 377); see also Quillen v. Int’l Plaxtex, Inc., 789 F.2d 1041 (4th Cir. 1986).³⁷ Moreover, as eloquently stated in Michie’s *Jurisprudence of West Virginia and Virginia, Conflict of Laws, Domicile and Residence*, § 34, p. 159 (1999), “[w]hen a cause of action put in motion in one jurisdiction results in injury in another, the law of the jurisdiction where the injury occurred controls the substantive rights of the parties.”

Clearly, the Petitioner’s admission that he is protected by both West Virginia substantive and procedural law in the underlying case is further an admission that West Virginia is the place of the injury. Choice of law jurisprudence in West Virginia is clear that, in order for the substantive law of this State to apply to a tort claim in a choice of law scenario, the place of the injury dictates the result. Moreover, the Petitioner should

be estopped from arguing that he gets the benefit of the protections of West Virginia

³⁷ Interestingly, the application of the doctrine of *lex loci delicti* sounds strikingly similar to the concept of “accrue” as it has been defined in West Virginia and abroad as hereinbefore stated.

substantive law in regard to the Respondents' claims, but may secure the protections of an Ohio law when it suits him. This case arises in either West Virginia or Ohio. The Petitioner admits it is a West Virginia case. The Petitioner should not be permitted to pick and choose amongst the law of various jurisdictions in an effort to apply the law at each juncture of the case that benefits him most. Accordingly, the Court should answer "No" to Certified Question No. 2 and affirm the judgment of the Circuit Court of Ohio County.

E. If found to bar the Respondents' claims, the West Virginia Borrowing Statute, W.Va. Code § 55-2A-2, should be found to offend West Virginia public policy insofar as it applies to the facts of the instant case and creates an absurd result. As such, Certified Question No. 3 should be answered that the borrowing statute should not be construed to bar the Respondents' claims and the judgment of the Circuit Court of Ohio County should be affirmed.

Holding that the Ohio statute of limitations bars the Respondents' claim in the instant case should be found to violate West Virginia public policy. This is especially so considering that the Petitioner asserts that this is a claim governed by substantive West Virginia law. Here, a West Virginia physician took a West Virginia patient across state lines for the purposes of a single surgery. The location of the subject outpatient procedure in Ohio was an anomaly in the long-standing doctor-patient relationship between Respondent, Jill Willey, and Petitioner, Samuel E. Bracken, Jr., M.D. Prior to the subject outpatient surgery, this relationship had developed solely in the State of West Virginia at Medical Park in Wheeling, Ohio County, West Virginia, over the course of decades. The doctor-patient relationship went back to at least 1977 or 1978.³⁸ The only treatment provided by Petitioner Bracken (a West Virginia doctor) to Ms. Willey (a West

³⁸ See Exhibit A to Plaintiffs' Response in Opposition to Defendant's Renewed Motion for Summary Judgment, (Jill Willey depo. pp. 34-35).

Virginia resident) in the State of Ohio was in relation only to the December 15, 2004, outpatient tubal ligation at East Ohio Regional Hospital. Petitioner Bracken, not the Respondent, chose the location for this tubal ligation.³⁹ Upon information and belief, the outpatient surgery could have occurred in Wheeling, Ohio County, West Virginia.⁴⁰ As discussed numerous times herein, the Respondents' injury also occurred in the State of West Virginia. It would be fundamentally unfair to exclude the Respondents from the West Virginia courts where their claims have such deep and distinct contacts to the State of West Virginia, and where the decision to perform surgery outside of this State was solely the choice of the treating physician. To apply an Ohio statute of limitations to this case simply because an outpatient surgery occurred there, would, in effect, permit a West Virginia border-town doctor to evade the protections and benefits that West Virginia law provides to the Respondents and would incentivize physicians in this State to evade this jurisdiction by pre-suit forum shopping.

There is no case in West Virginia regarding the application the West Virginia Borrowing Statue that is directly on point to the facts in the case at bar. Thus, Petitioner's contention that the public policy issues raised herein have already been addressed is incorrect. Despite the Petitioners' contention, **Weethee v. Holzer Clinic, Inc.**, 200 W.Va. 417, 490 S.E.2d 19 (1997) is not determinative of the case at bar or dispositive of the public policy concerns in the instant case even though it regards a tubal ligation procedure. The factual issues in **Weethee** are profoundly distinct. In **Weethee at 20, 490 S.E.2d at 418**, the plaintiff was a West Virginia resident who *chose* to be

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³⁹ See Exhibit B to Id., (Bracken depo. p. 20); and Exhibit A to Id., (Jill Willey depo. p. 76).

⁴⁰ See Exhibit B to Id. (Bracken depo. p. 21).

treated by physicians in the State of Ohio, and whose offices were principally and solely located in the State of Ohio during the relevant time period. Weethee did not involve a long-standing and ongoing doctor-patient relationship in the State of West Virginia. Furthermore, in Weethee, the injury suffered by the plaintiff therein occurred simultaneous with the tort. The injury in Weethee was a failed surgery, not a subsequent complication. In the instant case, there is no complaint raised by the Respondents as to whether the tubal ligation was unsuccessful, only that the successful tubal ligation caused subsequent injuries to Ms. Willey. Most importantly, however, Weethee provides absolutely no instruction on the issue of *where* a cause of action “accrues” under the West Virginia borrowing statute. As previously suggested, the plaintiff in Weethee stipulated (or did not dispute) that her cause of action accrued in Ohio, per the statute. Thus, the Court did not even address the issue of accrual. That is simply not the case herein.

McKinney v. Fairchild Int., Inc., 199 W.Va. 718, 487 S.E.2d 913 (1997) has no bearing on the issues in the instant case concerning the subject borrowing statute or the public policy implications in the instant matter. Rather, McKinney did not concern the application of the borrowing statute, but rather addresses issues regarding choice of law concerning savings statutes. Insofar as the borrowing statute was discussed therein, the parties in McKinney at 722, 487 S.E.2d at 917, did not dispute that the claim arose out-of-state in Kentucky insofar as there was no indication in the case that the underlying plaintiff suffered an actionable injury anywhere other than in Kentucky.

Similarly, Hayes v. Roberts & Schaefer Co., 192 W.Va. 368, 452 S.E.2d 459 (1994) does not directly address the public policy concerns raised herein. While Hayes

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at 369-70, 452 S.E.2d at 460-61, regarding an out-of-state claim filed in West Virginia against an out-of-state defendant and a defendant who had business contacts to the State of West Virginia, it does not address the issues in the context of the West Virginia plaintiff versus West Virginia defendant. Moreover, in Hayes at 370-71, 452 S.E.2d at 461-62, the injuries suffered by the underlying plaintiff clearly occurred in Kentucky contemporaneously with the tortious event.

It would further offend West Virginia public policy to construe the borrowing statute as barring of the Respondents' claims under the Ohio statute of limitations, as it would achieve an absurd result. If this case would have been filed in Ohio, the State of Ohio would have applied West Virginia substantive law to the plaintiffs' medical negligence claims. Ohio has largely abandoned the antiquated *lex loci delicti* approach to resolving conflict of laws issues to a "more significant relationship" approach found in 1 Restatement of the Law 2d, Conflict of Laws § 146 (1971). See White v. Crown Equip. Corp., 160 Ohio App.3d 503, 827 N.E.2d 859 (2005); Morgan v. Biro Mfg. Co., 15 Ohio St.3d 339, 474 N.E.2d 286 (1984). Under the Restatement 2d "significant relationship" approach to resolving conflict of laws issues, the law of the jurisdiction with the most significant relationship to the dispute applies based upon a balancing of the following factors: (1) the place of the injury; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation, and place of business of the parties; (4) the place where the relationship between the parties, if any, is located; and (5) any factors under Section 6 which the court may deem relevant to the litigation. Under that test, the State of West Virginia would meet all factors except factor number 2, heavily weighing in favor of the application of West Virginia law to the case.

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In fact, the weight of the factors militate in favor of the application of West Virginia law and may be further influenced, pursuant to factor number 5, to the extent that the Ms. Willey had all of her subsequent corrective surgeries in the State of West Virginia at OVMC, each of which were necessitated by Dr. Bracken's negligence. Interestingly, in White v. Crown Equip. Corp., supra., the Court of Appeals of Ohio, Third District, found that the State of Georgia had a more significant relationship to a products liability claim pending in Ohio, and applied the State of Georgia's statute of repose to the appellants' claims as opposed to Ohio's. Moreover, the Court in McKinney v. Fairchild Inter., Inc., 199 W.Va. 718, 487 S.E.2d 913 (1997)(footnote 8), which the Weethee Court relied upon, suggests that the State of Ohio would borrow both West Virginia's statute of limitations and savings statute where it found West Virginia law to apply to the plaintiffs' claims. It is a violation of West Virginia law and public policy to construe a statute to reach an unjust and absurd result, and where an absurd and unjust result will occur, a reasonable construction which will not produce absurdity must be made. See Syl. Pt. 2, Newhart v. Pennybacker, 120 W.Va. 774, 200 S.E.2d 350 (1938).

IV. CONCLUSION AND/OR PRAYER FOR RELIEF

The Respondents, Jill Willey, individually, and Michael Allen Willey respectfully request that this Honorable Court dismiss the instant appeal for want of jurisdiction over the subject matter insofar as the Certified Questions presented contain disputed material facts. Insofar as the Court may be inclined to find that it has jurisdiction over the certificate, it should refuse to modify the Certified Questions, should answer each Certified Question to uphold and/or affirm the judgment of the Circuit Court of Ohio

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County denying the Petitioner's Revised Motion for Summary Judgment, and provide such additional relief as the Court deems just and appropriate.

V. REQUEST FOR ORAL ARGUMENT

The Respondents request an opportunity to present oral argument on the issues herein, in the event that the Court would find that it is with jurisdiction over the Certified Questions set forth in the certificate.

Respectfully submitted,

JILL A. WILLEY and
MICHAEL ALLEN WILLEY, Plaintiffs,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 35519

Samuel J. Bracken, Jr., M.D.,

Petitioner,

Vs.

Ohio Co. Civil Action No.: 06-C-459

Jill Ann Willey, individually,
And Michael Allen Willey,

UPON REVIEW OF CERTIFIED QUESTION
FROM OHIO COUNTY CIRCUIT COURT

Respondents.

CERTIFICATE OF SERVICE

Service of the foregoing **RESPONSE IN OPPOSITION TO BRIEF OF PETITIONER SAMUEL J. BRACKEN, JR., M.D.** was had upon counsel of record, via U.S. Mail, this 4th day of February 2010, by hand delivery, as follows:

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