No. _____

In the Supreme Court of Appeals of West Virginia

At Charleston

State of West Virginia ex rel.
Robert Wakenight,

Petitioner (Defendant Below),

v.

Hon. David Sanders,
Judge of the Circuit Court for Jefferson County

Respondent.

From Proceedings In The Circuit Court
Of Jefferson County, West Virginia
Civil Action No. 08-C-407

PETITION FOR WRIT OF PROHIBITION

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MAR 2 2010
RORY L. PERRY, II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Pursuant to West Virginia Rule of Appellate Procedure 14(a), Petitioner Robert Wakenight, by undersigned counsel, petitions the Court for issuance of a writ of prohibition enjoining the Circuit Court for Jefferson County from holding him subject to its *in personam* jurisdiction in a civil action styled *Maines v. Wakenight*, No. 08-C-407, for the reasons and on the grounds set forth in the accompanying Memorandum of Law in Support of Petition for Writ of Prohibition and Appendix thereunto.

Should this Court be disposed to enter a rule to show cause, service of the said rule should be made upon the following persons:

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Issues Presented

Petitioner Robert Wakenight, a citizen and resident of Maryland at all relevant times, moves for a writ of prohibition to enjoin the Circuit Court for Jefferson County from holding him subject to its *in personam* jurisdiction in a civil action styled *Maines v. Wakenight*, No. 08-C-407, for damages arising from a motor vehicle collision which occurred in Maryland as he was driving home after having consumed alcohol, allegedly to excess, at a West Virginia establishment. Wakenight's only contact with the State of West Virginia was that he visited a West Virginia night club prior to the collision. Wakenight concedes that he is solely liable for the collision. The following issues of law are presented:

A. Whether a West Virginia court may, consistently with West Virginia Code Section 56-3-33(a)(3) ("Causing tortious injury by an act or omission in this state"), exert long-arm jurisdiction over a nonresident driver in a negligence action arising from a collision in another state where the defendant's only contact with West Virginia is that he had operated the motor vehicle in West Virginia in an allegedly intoxicated state at some time prior to the collision. Wakenight argues that it may not. The exercise of long-arm jurisdiction pursuant to West Virginia Code Section 56-3-33(a)(3) may not properly be founded upon an act or omission in West Virginia which is not, of itself, tortious in nature and, while drunk driving may be criminal, irresponsible and otherwise reprehensible conduct, it is not tortious. At the time Wakenight left West Virginia, no tort had been committed. The "act or omission in [West Virginia]" language of Section 56-3-33(a)(3), by necessary implication, requires that jurisdiction may only be founded upon conduct which amounts to the commission of a tort in West Virginia and that anything less is insufficient as a matter of law.

B. Whether a West Virginia court may, consistently with due process, exert long-arm jurisdiction over a nonresident driver in a negligence action where no *prima facie* element of the tort of negligence occurred within West Virginia and no aspect of the defendant's culpable conduct was purposefully directed toward the plaintiff in the forum state. Wakenight argues that it may not. In a "specific jurisdiction" case where no element of the tort occurs within the forum state, due process requires as a minimum jurisdictional contact that some aspect of the defendant's culpable conduct have been purposefully directed toward the plaintiff (or some group of people which includes the plaintiff) within the forum state and actually interact with the plaintiff within the forum state. Wakenight's negligent act of crossing left-of-center and colliding with the vehicle occupied by the plaintiffs was not purposefully directed toward the West Virginia plaintiffs or any group within West Virginia which included the plaintiffs. The fact that the plaintiffs are residents of West Virginia was purely fortuitous and is insufficient for jurisdictional purposes.

C. Whether a West Virginia court may, consistently with due process, exert long-arm jurisdiction over a nonresident driver in a negligence action arising from a collision in another state where, at the time of the collision, the driver had left West Virginia with no immediate intention to return. Wakenight argues that it may not. At the time he crossed the state line into Virginia (and thereafter into Maryland), he ceased to avail himself of the protections and benefits of West Virginia law and any "minimum contacts" he may have had with West Virginia were severed.

D. Whether a West Virginia court may, consistently with Section 56-3-33(a)(3) and principles of due process, exert long-arm jurisdiction over a nonresident driver in a negligence action

arising from a collision in another state upon a premise that alleged drunk driving in West Virginia which preceded the subsequent accident (but not was the immediate proximate cause) may be melded with the defendant's subsequent negligent act to constitute a "single continuous act" which renders the driver amenable to personal jurisdiction in West Virginia notwithstanding the foregoing considerations. Wakenight argues that this premise offends both Section 56-3-33(a)(3) and well-established principles of due process for the reasons stated above. Additionally, no reported case has recognized such a concept and those reported cases which have considered it in analogous circumstances have universally rejected it.

Proceedings and Rulings Below

This action arises from a motor vehicle collision which occurred in Washington County, Maryland on October 8, 2006, in which the vehicle operated by the defendant Robert Wakenight went left-of-center and collided with the vehicle occupied by the plaintiff Melanie Maines and her infant children. Wakenight was then and continues to be a citizen and resident of Frederick County, Maryland. At the time of the collision, he was returning to his home after having consumed alcohol at Diva's, an establishment in Jefferson County, and was allegedly intoxicated. He has no contacts with West Virginia other than having frequented Diva's on the night in question.

Upon leaving West Virginia, he would have passed through the Commonwealth of Virginia before entering Maryland. The collision occurred upon the bridge over the Potomac River between

Maryland and Virginia. In its entirety, the Potomac River lies within the sovereignty of the State of Maryland.[1] Wakenight's route home would not have required him to re-enter West Virginia.

Suit was instituted in the Circuit Court for Jefferson County in October 2008.[2] In lieu of responsive pleading, Wakenight filed a motion to dismiss pursuant to Rule 12(b)(2) for lack of personal jurisdiction.[3] This motion was denied by order of September 16, 2009.[4] On October 28, 2009, Wakenight filed a motion for reconsideration of the aforesaid order or, in the alternative, to certify questions to this Court upon specific findings of fact and conclusions of law.[5] This motion was denied by order of January 15, 2010.[6]

Neither of the two foregoing orders contains specifically-denominated findings of fact and conclusions of law. The court below found that the requirements of Section 56-3-33(a)(3), "causing tortious injury by an act or omission in this state," were satisfied . . .

> [B]y virtue of his tortuous *[sic]* acts or omissions in the State of West Virginia. Those tortuous *[sic]* acts consists *[sic]* primarily of drinking to excess and then driving his vehicle in West Virginia while having a blood alcohol content in excess of .08. The drunk driving was a single continuous act that began at Divas in West Virginia and which ended with the collision.

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[1]Except for that portion of it which abuts Washington, D.C.

[2]Amended Complaint, *App'x* at 1.

[3]*App'x* at 9.

[4]*App'x* at 33.

[5]*App'x* at 38. In the interim, Wakenight's original counsel, C. Brian Matko, changed employment and the case was assigned to undersigned counsel.

[6]*App'x* at 64.

Order of September 16, 2009 at 3, *App'x* at 35. The court below found that due process considerations were satisfied by virtue of Wakenight having availed himself of the protection of West Virginia laws.

> Although Defendant Wakenight lives in Frederick County, Maryland, there are no establishments with exotic dancers where he lives. He came to West Virginia for the specific purpose of going to Divas, a bar with exotic dancers. While in West Virginia at Divas, knowing that he would have to drive home, he allegedly consumed excessive amounts of alcohol. While in West Virginia, after allegedly consuming excessive amounts of alcohol, he began driving home on West Virginia roads. Defendant Wakenight purposefully availed himself of the laws in West Virginia that allow exotic dancers in certain establishments. While availing himself, he consumed alcohol and later crashed while intoxicated into Plaintiff's vehicle. Defendant Wakenight received the benefit of West Virginia law and should now face the responsibility associated with it. This essential element of the personal jurisdiction analysis, especially when viewed in the light most favorable to the Plaintiff, leads the Court to the conclusion that Defendant Wakenight had sufficient minimum contacts with West Virginia to make him subject to personal jurisdiction here.

Id. at 4, *App'x* at 36.

The court below cited no legal authority for its holding that it might properly assert long-arm jurisdiction over a foreign defendant with respect to a tort committed in a foreign state based upon the single act of having previously operated a vehicle in the forum state, intoxicated or not, when as of the time Wakenight left the forum state, no actionable tort had been committed. Nor did the plaintiffs cite any legal authority for this premise in their arguments. In his motion for reconsideration, Wakenight cited substantial authority deriving from numerous jurisdictions which established that not a single reported case had held a nonresident defendant amenable to a forum's personal jurisdiction with respect to a collision occurring outside the forum based upon a single previous contact with the forum. These included identical cases from Michigan and New York – the only reported cases addressing circumstances analogous to those presented here – which also

specifically rejected the "single continuous act" argument embraced by the court below. In light of this, Wakenight argued that the court's ruling either constituted manifest error of law or a novel rule of law unprecedented in American jurisprudence. Wakenight requested that the court reconsider in light of these authorities whether its prior ruling constitutes manifest error of law or, if it were indeed the court's intention to enunciate a new rule of law, to fully define this new rule and inform the bench and bar of its precise scope, what operative facts trigger it, what its limitations are and what legal authorities support it, addressing the various questions raised in Wakenight's motion. In its order of January 15, 2010, the court below tacitly declined to do so, reiterating its prior ruling almost verbatim.

Wakenight further argued that, as of the moment he crossed the state line from West Virginia into Virginia on his way home and no longer availed himself of the protections of West Virginia law, any purposeful minimum contacts he had with West Virginia ceased to exist – that, accordingly, the requisite due process nexus between his activities in West Virginia and the subsequent collision in Maryland was lacking under any analysis. This argument was not addressed in either the September 16, 2009 order of the court below or its order of January 15, 2010. In the latter order, the court below additionally ruled that motions for reconsideration are not recognized, tacitly rejecting Wakenight's premise that all courts may (*a fortiori*, must) notice and correct manifest errors of law which are apparent on the record.

Statement of Facts

At all relevant times and continuing through the present time, Wakenight was a citizen and resident of Frederick County, Maryland. *Amended Complaint*, ¶ 4, *App'x* at 2. On October 7, 2006, Wakenight traveled from his home in Frederick County to Diva's, an establishment in Jefferson County, West Virginia, where he consumed alcoholic beverages. *Id.*, ¶ 11. Upon leaving Diva's, Wakenight left Jefferson County, crossing into Loudoun County, Virginia, via U.S. 340 East. *Id.*, ¶15. The Court may take judicial notice that, upon exiting West Virginia, U.S. 340 East does not re-enter West Virginia. Upon the U.S. 340 bridge over the Potomac River between Virginia and Maryland, Wakenight's vehicle went left-of-center and collided with a vehicle occupied by the plaintiffs. *Id.*, ¶ 16. The Court may take judicial notice that, at this point, the Potomac River and its attendant bridge are located entirely within the sovereignty of the State of Maryland. Wakenight was allegedly intoxicated at the time of the collision. *Id.*, ¶ 18.

Assignments of Error

A. The court below erred in holding that West Virginia Code Section 56-3-33(a)(3) authorizes the exercise of long-arm personal jurisdiction over a nonresident defendant with respect to a tort committed in another state.

1. Section 56-3-33(a)(3) requires as a jurisdictional predicate that the "act or omission in this state" referenced therein be tortious in nature and occur within West Virginia and does not, in any event, extend to situations in which no tortious conduct has occurred within West Virginia.

2. Section 56-3-33(a)(3) requires the commission of a completed tort within West Virginia and does not extend in negligence cases to situations where neither the tortious act nor the proximately resulting injury occurred in West Virginia.

B. The court below erred in holding that the exercise of personal jurisdiction over Wakenight is consistent with due process.

1. In a "specific jurisdiction" case founded upon a single contact with the forum state, where no *prima facie* element of the tort occurs within the forum state, due process requires that there be a causal nexus between the plaintiff's claim and some purposeful conduct on the part of the defendant which was directed to the plaintiff (or some group of people which includes the plaintiff) within the forum state. Such a nexus is lacking in the case at bar.

2. "Purposeful availment of the protections and benefits of the laws" of the forum state is not a separate factor to be considered in the jurisdictional analysis and it is not an alternative to the foregoing causal nexus which must still be satisfied. "Purposeful availment" is a broad, general concept which has been refined and explained in specific jurisdiction cases by those subsequent decisions of the Supreme Court of the United States enunciating the requirement of the foregoing causal nexus.

3. Under any analysis, at the time of the allegedly tortious conduct in question, Wakenight had left West Virginia with no immediate intention to return and had ceased to "purposefully avail" himself of the protections and benefits of the laws of the West Virginia forum; he had no contacts at all with West Virginia at that point in time.

C. The unprecedented "single continuous act" postulate embraced by the court below is an end-run around and is contrary to the foregoing statutory and Constitutional requirements and constitutes manifest error of law insofar as it would allow personal jurisdiction to be exercised in cases, such as the present one, where none of the foregoing jurisdictional requisites have been met.

Points & Authorities

A. Standard of Review.

Prohibition lies as a matter of right whenever an inferior court lacks or exceeds its legitimate jurisdiction regardless of whether the aggrieved party has another available remedy. *State ex rel. Nelson v. Frye*, 221 W. Va. 391, 655 S.E.2d 137 (2007). Where it is alleged, as in the present case, that the inferior court lacks jurisdiction a question of law is presented which this Court reviews *de novo*. *Id.*[7]

B. Overview of Long-Arm Jurisdiction Requirements.

Long-arm jurisdiction may be either general or specific in nature. Where a nonresident defendant's contacts with the forum are continuous and systematic such that it may reasonably anticipate being haled into court there, general jurisdiction over it may exist even as to lawsuits which do not arise from the defendant's activities directed to the forum. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415-16 (1984). Where such continuous and systematic

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[7]By contrast, where it is alleged that the inferior court exceeded its legitimate powers, a multi-factor test is applied to determine if prohibition will issue as a matter of discretion. *See, e.g., State ex rel. Nationwide Mut. Ins. Co. v. Marks*, 223 W. Va. 452, 676 S.E.2d 156 (2009).

contacts with the forum are lacking, the cause of action as to which jurisdiction is asserted must specifically arise out of a defendant's contacts with the forum. *Id.* at 414; *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977). In the present case, Wakenight had no continuous and systematic contacts with West Virginia and jurisdiction over him, if proper, would necessarily be specific in nature.

This begs the question of which contacts with the forum are constitutionally sufficient and which are not. The line of demarcation is whether the defendant's allegedly culpable conduct occurred within the forum or whether, at minimum, some aspect of the defendant's allegedly culpable conduct was purposefully directed toward the plaintiff (or some group of people which included the plaintiff) within the forum state. The operative word is "purposeful."

The seminal case in support of this point is *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), in which the Supreme Court found the connection between the defendant's allegedly culpable conduct and the forum to be inconsistent with due process because it was not purposeful in nature, but was merely fortuitous. *World-Wide Volkswagen* was a wrongful death case arising in Oklahoma from an allegedly defective vehicle which was sold by a New York dealer to New York residents in New York. Other than the injury suffered, no element of the plaintiff's *prima facie* cause of action arose, in whole or in part, in Oklahoma. The alleged negligence of the defendant in selling a defective vehicle occurred in New York and was not *purposefully* directed toward Oklahoma – it was a matter of chance that the vehicle found its way to Oklahoma. *World-Wide Volkswagen* rejected the premise that placing an item in the stream of commerce, standing alone, is sufficient for due process purposes. While it was foreseeable that the vehicle might find its way to Oklahoma and cause injury there if it were indeed defective, foreseeability alone is insufficient for due process purposes. The due process requirement is that some *purposeful* conduct

on the part of the defendant have been directed toward the plaintiff (or some group of people which included the plaintiff) within the forum and constitute part of the chain of causation giving rise to the plaintiff's claim.

> If foreseeability were the criterion, a local California tire retailer could be forced to defend in Pennsylvania when a blowout occurs there, *see Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*, 239 F.2d 502, 507 (CA4 1956); a Wisconsin seller of a defective automobile jack could be haled before a distant court for damage caused in New Jersey, *Reilly v. Phil Tolkan Pontiac, Inc.*, 372 F. Supp. 1205 (N.J.1974); or a Florida soft-drink concessionaire could be summoned to Alaska to account for injuries happening there, *see Uppgren v. Executive Aviation Services, Inc.*, 304 F. Supp. 165, 170-171 (Minn.1969). Every seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel. We recently abandoned the outworn rule of *Harris v. Balk*, 198 U.S. 215, 25 S. Ct. 625, 49 L. Ed. 1023 (1905), that the interest of a creditor in a debt could be extinguished or otherwise affected by any State having transitory jurisdiction over the debtor. *Shaffer v. Heitner*, 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed.2d 683 (1977). Having inferred the mechanical rule that a creditor's amenability to a quasi in rem action travels with his debtor, we are unwilling to endorse an analogous principle in the present case.

444 U.S. at 296.

This point was amplified in *Asahi Metal Indus., Ltd. v. Superior Court,* 480 U.S. 102 (1987), where the Supreme Court found the exercise of personal jurisdiction by a California court to offend due process in a defective product case where the manufacturer not only could foresee, but knew, that some of its products (manufactured by a Japanese corporation in Japan and sold in Taiwan) would ultimately find their way to the forum state. Here again, the alleged negligence of the defendant in manufacturing or selling a defective tire valve did not occur in California and was not purposefully directed toward any person or group of people in California, such as by selling, marketing or shipping the defective valves to a California buyer. No element of the plaintiff's cause of action (other than the injury) arose in that state. The lacking element in both *World-Wide Volkswagen* and *Asahi Metal Industry* was that no aspect of the alleged negligent conduct was

specifically and purposefully directed to the plaintiff (or some group of people which included the plaintiff) within the forum.

The clear principle to be derived from these cases is that, in order to satisfy due process where the allegedly tortious conduct occurs outside the forum, some aspect of it must have been purposefully directed toward the plaintiff within the forum and anything less is constitutionally insufficient. This is in accord with prior decisions of this Court and federal courts within West Virginia. *Grove v. Maheswaran*, 201 W. Va. 502, 498 S.E.2d 485 (1997); *Lane v. Boston Scientific Corp.*, 198 W. Va. 447, 481 S.E.2d 753 (1996); *Bashaw v. Belz Hotel Mgmt. Co.*, 872 F. Supp. 323 (S.D. W. Va. 1995) (specific jurisdiction improper where none of defendant's allegedly culpable actions occurred in West Virginia). *Cf. Hinzman v. Superior Toyota, Inc.*, 660 F. Supp. 401 (N.D. W. Va. 1987) (jurisdiction proper with respect to Kentucky defendant who had sold vehicles with rolled-back odometers to West Virginia dealers).

In determining if specific personal jurisdiction over Wakenight is proper, a two-part inquiry is undertaken: (1) whether the provisions of the West Virginia long-arm statute are satisfied, and if so, (2) whether his contacts with the West Virginia forum satisfy federal and state due process requirements. *Lane*, 198 W. Va. at 450, 481 S.E.2d at 756. As a general matter, all courts which have considered the issue have found specific personal jurisdiction over a nonresident defendant to be improper with respect to an accident occurring outside the forum.[8] *See* Robert C. Casad & William M. Richman, *Jurisdiction in Civil Actions* § 7-2 at 97-98, fn. 160 (2nd ed. 1991) (listing 57 cases from four federal circuits, 18 federal districts sitting in 15 states and the courts of 20 sister

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[8]As noted above general personal jurisdiction may be found where the defendant had pervasive contacts with the forum such that the exercise of general personal jurisdiction over the defendant was appropriate.

states all holding that specific long-arm jurisdiction over a nonresident motorist with respect to a collision occurring outside the forum state was improper).[9] Contrasting this, Wakenight has been unable to locate a single case wherein long-arm personal jurisdiction was found to be proper in a case involving a motor vehicle accident occurring in a foreign state based upon a single contact between the foreign defendant and the forum state preceding the negligent act or omission alleged to have proximately caused the collision. Nor have the plaintiffs in their arguments nor the court below in its rulings cited to any such authority.

C. By Necessary Implication, the "Act or Omission" Referenced in West Virginia Code Section 56-3-33(a)(3) Must Be Tortious in Nature; an "Act or Omission" Which Is Not Tortious Fails to Meet the Statutory Requirement. In the Case at Bar, No Tortious Conduct Occurred within West Virginia.

Section 56-3-33(a) of the West Virginia Code enumerates seven circumstances under which the courts of this state may exercise specific long-arm jurisdiction over a nonresident defendant based upon forum-related activities. In keeping with *Helicopteros*, subsection (b) of the statute provides that only a cause of action arising from those activities may be asserted when jurisdiction is founded solely upon the provisions of Section 56-3-33. In the present case, the jurisdictional predicate relied upon by the court below was Section 56-3-33(a)(3) "Causing tortious injury by an act or omission in this state."

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[9]Conceptually, where all *prima facie* elements of the tort of negligence resulting in a collision occur outside the forum, specific personal jurisdiction can never be proper. Because negligence, by definition, is matter of inadvertence, the required causal nexus of *purposeful* conduct directed toward the plaintiff in the forum would always be lacking in such cases. Negligence cases in which such a causal nexus might be found are more typically those in which a nonresident vendor sells or markets allegedly defective products within the forum or ships such products to the forum and cases involving services to be performed outside the forum which were advertised or marketed in the forum.

Admittedly, the text of Section 56-3-33(a)(3) does not explicitly state that the referenced "act or omission in this state" giving rise to tortious injury must be an act or omission which is itself tortious in nature. Superficially, it might be argued that the "act or omission" language encompasses any act or omission, tortious in nature or not, which results in tortious injury. However, it is implicit in the language of the statute that it refers only to tortious acts or omissions. It is a factual and legal impossibility for a tortious injury to be caused by conduct which is not tortious in and of itself. Hence, "causing tortious injury by an act or omission in this state" necessarily means that the character of the act or omission must amount to the commission of a tort in West Virginia.

This Court's holding in *Lozinski v. Lozinski*, 185 W. Va. 558, 408 S.E.2d 310 (1991), underscores this point. In *Lozinski*, this Court predicated its ruling that jurisdiction pursuant to Section 56-3-33(a)(3) was proper upon the premise that a nonresident defendant's failure to support his child in West Virginia constituted the commission of a tort in this state. Had it been the Court's view that anything less than tortious conduct would satisfy the requirements of Section 56-3-33(a)(3), it would have been unnecessary to characterize nonsupport as the commission of a tort (as the Court did as a matter of first impression) in order to assert jurisdiction over the defendant under Section 56-3-33(a)(3). The courts of sister states having the identical statutory language are in unanimous accord that the "act or omission" referenced must be tortious.[10] *See Hildebrand v. Steck Mfg. Co.*, 279 F.3d 1351 (Fed. Cir. 2002) (construing Ohio law); *DeSantis v. Hafner Creations, Inc.*, 949 F. Supp. 419 (E.D. Va. 1996); *Gor-Vue Corp. v. Hornell Elektrooptik AB,* 634 F. Supp. 535

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[10]The long-arm statutes of seven other states or territories – Kentucky, Massachusetts, Nebraska, Ohio, Tennessee, Virgin Islands and Virginia – contain the identical provision. *See* Ky. Rev. Stat. § 454.210 (Baldwin 2009), Mass. Gen. Laws ch. 223A, § 3 (2009), Neb. Rev. Stat. § 25-236 (2009), Ohio Rev. Code Ann. § 2307.382 (Baldwin 2009), Tenn. Code Ann. § 20-2-223 (2009), Va. Code Ann. § 8.01-328.1 (West 2009), 5 V.I. Code Ann. § 4903 (2009).

(N.D. Ohio 1986); *Kolikof v. Samuelson*, 488 F. Supp. 881 (D. Mass. 1980); *Bradley v. Cheleuitte*, 65 F.R.D. 57 (D. Mass. 1974); *Wilson v. Case*, 85 S.W.3d 589 (Ky. 2002); *Malakpa v. Red Cab Co.*, 72 Ohio Misc. 2d 27, 655 N.E.2d 458 (Ohio Com. Pl. 1995).

While several of the foregoing cases arise in the arena of patent infringement, where such questions are wont to arise, two sister states' cases are of particular interest insofar as they are identical to the present action on their facts. The long-arm statutes they construed, while not verbatim identical to Section 56-3-33(a)(3), are identical in substance and underscore the foregoing premise. *Green v. Wilson*, 455 Mich. 342, 565 N.W.2d 813 (1997); *Chaitman v. Jaycox*, 49 Misc. 2d 90, 266 N.Y.S.2d 902 (N.Y. Sup. Ct., Spec. Term 1966).[11]

There is no doubt that at the moment Wakenight, on his way to Maryland, crossed the state line from West Virginia into Virginia with no immediate intention to ever return to West Virginia, no person anywhere had a cause of action against him sounding in tort and no *prima facie* element of the tort of negligence had been committed. He had breached no duty of care which proximately resulted in injury to another. While drunk driving may be criminal, irresponsible and otherwise reprehensible in nature, it is not tortious in and of itself.[12] The act of driving upon West Virginia

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[11]These cases also address and reject the "single continuous act" premise as addressed *infra*.

[12]Drunk diving is not even an act of negligence in and of itself insofar as it is not the immediate proximate cause of a collision. Every day, nationwide, hundreds of drunk drivers navigate to their destinations without incident. Additionally, drunk drivers are not uncommonly involved in accidents in which they committed no negligent act and were not at fault. Drunk driving merely impairs the ability to operate a vehicle and thereby increases the likelihood that the operator will commit some act of negligence which proximately causes harm – as do other activities such as texting or talking on a cell phone, dealing with disruptive passengers, fatigue, roadside distractions, etc. In this case, the immediate negligent act was crossing left of center, which might have occurred without the addition of alcohol to the equation, as occurs with drivers who are merely fatigued or inattentive on a daily basis. Intoxication merely increases the likelihood of such an occurrence but does not forebode it as an inevitable outcome. It is not the "but for" cause of injury, but merely contributing factor in those circumstances where a drunk driver negligently

(continued...)

roads in an intoxicated state is analogous to disregarding a stop sign or red light. Unless there is a resulting collision, there is no tort – only an infraction of the highway safety laws. Thus, as a matter of law, the tortious "act or omission" required by Subsection (a)(3) as a jurisdictional predicate is lacking as a matter of law in this case and it is error of law for the court below to assert personal jurisdiction over Wakenight.

D. West Virginia Code Section 56-3-33(a)(3) Requires Not Merely Tortious Conduct, but That a Completed Tort Occur Within West Virginia. In the Case at Bar, No Completed Tort Occurred within West Virginia.

In *Lozinski*, the Court notes that a nonresident parent's failure to support a child in West Virginia is not only tortious in nature, but constitutes the commission of a completed tort in West Virginia.

> By defining the term "tortious act" as including any act committed in the state *which involved a breach of duty to another and resulted in ascertainable damages*, the *Poindexter* court ruled that nonsupport qualified as a tortious act within the meaning of the Illinois long-arm statute.

185 W. Va. at 562, 408 S.E.2d at 314, *citing Poindexter v. Willis,* 87 Ill. App. 2d 213, 231 N.E.2d 1 (1967) (emphasis added). The predicate for the Court's ruling in *Lozinski* was not merely the commission of some element of a tort, but that the "tortious act" necessary to satisfy Section 56-3-33(a)(3) meant the commission of a completed tort in West Virginia – both a breach of duty and ensuing injury.

> Had appellant cited only the "single act" of appellee's interest in West Virginia real estate as her basis for applying the long-arm statute, we might be more inclined to agree with the circuit court. The appellant also alleged, however, that appellee

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[12](...continued)
causes a collision.

> *committed a tort within this state* by not supporting his children and that appellee had transacted business in this state. Given the fact that the relief requested by appellant in her amended complaint included child support, we find it impossible to conclude that the divorce action did not in some way arise from or grow out of appellee's commission of a tort-his failure to support his children. Accordingly, we find no statutory bar to applying the long-arm statute to permit the exercise of substituted personal service over appellee. When an individual commits a tort by failing to support his children, personal jurisdiction may be obtained over that individual pursuant to the West Virginia long-arm statute provided that the statutory requirements for asserting jurisdiction have been met.

185 W. Va. at 563, 408 S.E.2d at 315.

The courts of sister states which have considered the question in circumstances identical to those presented here have found that the completion of a tort within the state was necessary to satisfy the parallel provisions of their long-arm statutes which were substantively identical to Section 56-3-33(a)(3). In *Green v. Wilson*, 455 Mich. 342, 565 N.W.2d 813 (1997), a Michigan plaintiff was injured in an accident with a Canadian citizen which occurred in Canada after the defendant had allegedly become intoxicated drinking at bars in Michigan. Following a thoughtful analysis of long-arm statutes in general, the Michigan Supreme Court found that the tortious act necessary to trigger long-arm jurisdiction occurred entirely in Canada, specifically rejecting the "single continuous act" argument.

> We are unpersuaded by the dissent's contention that the "act" is Wilson's drinking and driving while in Michigan. At the time Wilson left Michigan, he had committed no tort. The acts in Michigan that preceded Wilson's allegedly tortious acts in Canada were insufficient to subject him to subsection 2 of M.C.L. § 600.705; M.S.A. § 27A.705.

455 Mich. at 355, 565 N.W.2d at 817. The court in *Chaitman v. Jaycox*, 49 Misc. 2d 90, 266 N.Y.S.2d 902 (N.Y. Sup. Ct., Spec. Term 1966), reached the same result.

> In the case at bar, clearly the alleged tortious act of the defendant Robert Tuthill is the negligent manner of the operation of his vehicle at the time and place of the accident, and it was committed in the State of Connecticut. The said defendant's act

> in New York (becoming intoxicated and driving in such condition there), while it may have some causal nexus with the accident is not the act, within the expressed purpose of the draftsmen of Section 302(a) CPLR, which 'gives rise to a cause of action.'
>
> * * *
>
> [T]he events which occurred in New York cannot be the basis for subjecting defendants Janet Tuthill and Robert Tuthill to the jurisdiction of this court.

49 Misc. 2d at 92-93, 266 N.Y.S.2d at 904.

Here, the completed tort occurred entirely within the State of Maryland. It was in Maryland where Wakenight, at the time of the occurrence, owed a duty of care to other motorists on the road, where that duty was breached when he failed to control his vehicle and where the ensuing injury was inflicted. No element of the tort – much less the completed tort of negligence – occurred within West Virginia and it was error for the court below to find that the requirements of Section 56-3-33(a)(3) had been satisfied.

E. <u>In a Specific Jurisdiction Case Where No Element of the Tort Occurs Within the Forum State, Due Process Requires a Causal Nexus Wherein Some Aspect of the Defendant's Culpable Conduct Have Been Purposefully Directed Toward the Plaintiff in the Forum State for Long-Arm Jurisdiction to be Proper. In the Case at Bar, No Conduct on the Part of the Defendant Was Purposefully Directed Toward the Plaintiffs in West Virginia.</u>

As noted above, both *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) and *Asahi Metal Indus., Ltd. v. Superior Court,* 480 U.S. 102 (1987), found the exercise of specific long-arm jurisdiction to be constitutionally deficient where the tort did not occur within the forum state and no part of the defendant's allegedly culpable conduct was *<u>purposefully</u>* directed to the plaintiff (or some group which included the plaintiff) in the forum state. This principle has been followed in this state and is a matter of established law. *Grove v. Maheswaran*, 201 W. Va. 502, 498 S.E.2d

485 (1997); *Lane v. Boston Scientific Corp.*, 198 W. Va. 447, 481 S.E.2d 753 (1996); *Bashaw v. Belz Hotel Mgmt. Co.*, 872 F. Supp. 323 (S.D. W. Va. 1995); *Hinzman v. Superior Toyota, Inc.*, 660 F. Supp. 401 (N.D. W. Va. 1987). *Grove* is particularly instructive in its holding that, not only must there be some aspect of the defendant's allegedly culpable conduct which is purposefully directed toward the plaintiff within the forum state, but that there must be some interaction in fact between the plaintiff and the defendant's purposeful conduct. There must be at least some element of a "but for" or an "arising from" relationship between the two.

> The facts of this case stand in contrast to those presented in *Presbyterian* and *Cubbage*. The record does not reveal that the plaintiff in the instant case is a Medicaid patient *or that her decision to seek treatment at Loudoun Hospital was in response to the hospital's West Virginia telephone listing*.

201 W. Va. at 507, 498 S.E.2d at 490 (emphasis added). Likewise in *Lane*, this Court noted "The [defendant] never had an office in West Virginia. In particular, it never had contact with [plaintiff's decedent] in West Virginia prior to her treatment at the University of Virginia Hospital." 198 W. Va. at 456, 481 S.E.2d at 762.

While Wakenight, in the case at bar, engaged in conduct in West Virginia consisting of frequenting a night club, consuming alcohol allegedly to the point of intoxication and thereafter operating a vehicle on West Virginia roads, none of this conduct was the immediate cause of the collision at issue and none of this conduct was specifically and purposefully directed toward the plaintiffs (or any group of people which included the plaintiffs) in West Virginia. Wakenight's conduct did not ever touch the plaintiffs in West Virginia.

While it may have been foreseeable that he would be involved in a collision a before or after leaving West Virginia, that persons might be injured and even that those injured persons might be residents of West Virginia, mere foreseeability is not a constitutionally sufficient criterion for the

exercise of long-arm jurisdiction as *World-Wide Volkswagen* and *Asahi* make clear. To the extent that his conduct in operating the vehicle in an allegedly impaired state might be deemed purposeful, it was no longer directed toward any person in West Virginia as of the moment he crossed the state line into Virginia and thereafter into Maryland. His legal duty was to exercise due care for the safety of other users of the highway – in *those* states. The injury to the plaintiffs was not causally connected to any purposeful conduct on the part of Wakenight which was directed toward them in the State of West Virginia. That West Virginia residents were injured in a Maryland accident was a matter of pure fortuity which is insufficient as a matter of law for jurisdictional purposes.

F. At the Time of the Collision at Issue, the Defendant Had Ceased to "Purposefully Avail" Himself of the Protections and Benefits of West Virginia Law as Required by Due Process.

The concept of "purposeful availment" of the protections and benefits of the laws of the forum first appears in *Hanson v. Denckla*, 357 U.S. 235 (1958), in characterizing the nature of the requisite minimum contacts necessary to support long-arm jurisdiction which were referenced in the Supreme Court's prior holding in *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945). It is a general term which has been repeated innumerable times by various courts and has been refined and more narrowly focused by the Supreme Court in subsequent cases, most notably for purposes of the instant petition in *World-Wide Volkswagen* and *Asahi Metal Industry*. It must be read in conjunction with those later cases and cannot be read to expand upon statements as to the nature or sufficiency of constitutionally acceptable minimum contacts made in those cases. To the contrary, the subsequent cases must be read as further and more narrowly defining the concept of "purposeful availment" in certain factual situations. Thus, in the factual situation presented here,

mere statements that Wakenight "purposefully availed" himself of the protections and benefits of the laws of West Virginia are insufficient for due process purposes without also considering his activities within the framework of those subsequent cases, as argued in the preceding sections of this petition.

Here, the court below goes astray in its finding that Wakenight "purposefully availed" himself of the protections and benefits of West Virginia law by (1) entering West Virginia to frequent a night club featuring adult entertainment and (2) thereafter operating a vehicle on West Virginia roads while allegedly intoxicated. The court below entirely failed to consider such conduct within the context of *World-Wide Volkswagen* and *Asahi Metal Industry*, particularly whether any aspect of Wakenight's activities in West Virginia were purposefully directed toward the plaintiff s(or any group of persons which included the plaintiffs). As argued above, this necessary element is entirely lacking.

Moreover, "purposeful availment" is temporally finite – it begins at a certain point in time and ends at a certain point in time. As this Court noted in *Grove*, a West Virginia telephone listing relied upon by the third-party plaintiff as a "jurisdictional handle" for asserting long-arm jurisdiction over a third-party defendant appeared a year *after* the claim arose. 201 W. Va. at 507, fn. 12, 498 S.E.2d at 490, fn. 12 (emphasis by the Court). Implicitly, the defendant did not "purposefully avail" itself of the protections and benefits of West Virginia law prior to that time. It necessarily follows that a defendant no longer "purposefully avails" himself/herself of the protections and benefits of West Virginia law after his/her dealings with West Virginia have terminated. Clearly, the concept of "purposeful availment" comes into existence only at the point in time a defendant directs some purposeful conduct toward the forum state and terminates when the defendant ceases to do so.

Here, Wakenight never encountered or interacted with the plaintiffs in any way within that window of time. When he left West Virginia with no immediate intention of ever returning, he ceased to "purposefully avail" himself of the protections and benefits of West Virginia law for any reason or purpose. At the moment he breached his duty of care toward the plaintiffs, resulting in the collision and ensuing injuries, he was no longer availing himself of the benefits and protections of West Virginia laws, but those of the State of Maryland.

G. The "Single Continuous Act" Precept Embraced by the Court Below Is Contrary to the Statutory Requirements of West Virginia Code Section 56-3-33(a)(3) and Fundamental Requirements of Due Process.

In apparent recognition of the foregoing principles, the plaintiffs argued that the act of drunken driving on West Virginia roads and the subsequent negligent act in Maryland constituted a "single continuous act" of tortious conduct, thereby satisfying Subsection (a)(3)'s requirement of a tortious "act or omission in this state." They cited no legal authority whatsoever for the premise that this jurisdictional requirement might be met by coupling a tortious act in a foreign state with previous non-tortious conduct in the forum state for jurisdictional purposes, nor did the court below cite any such authority. Extensive research by Wakenight fails to disclose any court anywhere which has adopted such a precept. The only two courts which have considered it have rejected it on narrower grounds, *viz.* that the exercise of long-arm jurisdiction was not authorized by the state long-arm statute, finding it unnecessary to reach the broader due process question. *Green v. Wilson*, 455

Mich. 342, 565 N.W.2d 813 (1997); *Chaitman v. Jaycox*, 49 Misc. 2d 90, 266 N.Y.S.2d 902 (N.Y. Sup. Ct., Spec. Term 1966).[13]

The court below declined to state the parameters or legal basis for this novel rule of law and with good reason. It is a contrived effort to assert jurisdiction where none properly exists and is baldly inconsistent with Section 56-3-33(a)(3) and established principles of due process as argued above. No more is needed in support of this assertion than the observation that it would permit a nonresident defendant to be subjected to suit in West Virginia where:

- No tort or *prima facie* element of a tort occurred in West Virginia in contravention of the requirements enunciated in Section 56-3-33(a)(3) and in *Lozinski*.
- No part of the defendant's conduct was purposefully directed toward the plaintiffs (or any group of people which included the plaintiffs) in West Virginia as required by *World-Wide Volkswagen, Asahi Metal Industry* and *Grove*.
- The plaintiffs' claim arose at a time when the defendant had ceased to "purposefully avail" himself of the protections and benefits of West Virginia law, as referenced in *Grove*.

In sum and substance, it would permit the exercise of long-arm jurisdiction over a nonresident defendant where none of the minimal jurisdictional requisites are present. Moreover, it is an unlimited "catchall" concept. If a nonresident motorist may be held amenable to jurisdiction in the West Virginia courts by virtue of having non-tortiously operated a vehicle in West Virginia prior to committing some act of negligence in another state, a motorist passing through West Virginia, committing no wrongful act at all, en route to California might be haled into court here for

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[13]Discussed, *supra*, pp. 17-18.

an accident in Colorado if the journey were to be considered "a single continuous act." If read less expansively to require some wrongful, though not necessarily tortious, act in West Virginia, the California motorist might be haled into court here for the Colorado accident if he/she had been guilty of speeding or operating a vehicle with defective equipment while passing through West Virginia – perhaps even days earlier – on the same journey.

Construing such a rule of law even more narrowly to impose some time or distance constraint at which point the nexus is considered broken merely begs the question: what is the precise nature of the constraint and what is its duration? The court below answers neither question. Is the "continuous single act" no longer continuous if a day has passed? An hour? 50 miles? If the driver stops for some reason after leaving West Virginia and then resumes his/her journey? If the driver stops for a meal, but not if the driver consumes another drink? If the driver stops for gas?

The court below declined to specifically state the parameters of this novel rule of law, what operative events trigger it and what events terminate its operation. Worse, the court failed to state any legal basis whatsoever for this novel rule, whatever it may be (and with good reason as noted above – it is a blatant "end run" around the requirements of Section 56-3-33(a)(3) and due process considerations and rests upon no accepted legal principles whatsoever). The "single continuous act" postulate is an *ipsi dixit* ruling without any known foundation in the law. It is the essence of legislating from the bench, is plainly incorrect and constitutes manifest error of law.[14]

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[14]Even if the "single continuous act" precept was consistent with Section 56-3-33(a)(3) and due process, it is a rule of law which should not be applied retroactively but only prospectively. When a court adopts a new rule of law or a novel interpretation and applies it to a case before it, it makes as statement not only the "this is what the law is," but also that "this is what the law was all along." Clearly, where the new rule or interpretation has no precedent, it is patently unfair to apply it *ex post facto*. *See Dalton v. Doe,* 208 W. Va. 319, 540 S.E.2d 536 (2000) (holding that the alteration of common law adopted in *Hamric v. Doe,* 201 W. Va. 615, 499 S.E.2d 619 (1997), applied only prospectively).

H. Irrelevant Considerations Referenced by the Court Below.

Adding to this, the court below appeared to be distracted by clearly irrelevant considerations, noting first that the accident, though two states away, occurred within sight of West Virginia, *App'x* at 36, as though the sovereignty of West Virginia extends not to its borders, but as far as the eye can see from its borders. Once Wakenight crossed the state line between West Virginia and Virginia, West Virginia ceased to exert any sovereign authority over him. West Virginia authorities were powerless at this point to restrain him from any unsafe or unlawful operation of his vehicle if they had known of it. At most, they could inform Virginia and Maryland authorities of the situation.

The jurisdictional requirement is explicit. Section56-3-33(a)(3) requires that the tort must occur within West Virginia – not within sight of it. Due process requires either that the tort occur in West Virginia or that it result at least in some part from purposeful conduct directed toward the plaintiffs in West Virginia – not within sight of it. The fact that the collision occurred within sight of West Virginia is an irrelevancy.

Similarly, the court below may have been swayed that the plaintiffs are West Virginia citizens. Numerous courts have considered whether a state may exercise long-arm jurisdiction over a nonresident defendant concerning an accident which occurred outside the forum state on the basis that the plaintiff, a resident of the forum state, continued to suffer the "effects of injury" there. Those courts have universally rejected this "place of suffering" argument, holding that the jurisdictional operative is the place where the injury is inflicted, not where its effects may continue to be felt. *See, e.g., Whitaker v. American Telecasting, Inc.*, 261 F.3d 196 (2nd Cir. 2001); *Estate of Portnoy v. Cessna Aircraft Co.*, 730 F.2d 286 (5th Cir. 1984); *McAvoy v. District Court*, 757 P.2d 633 (Colo. 1988); *Lancaster v. Colonial Motor Freight Line, Inc.*, 177 A.D.2d 152, 581 N.Y.S.2d 283 (N.Y.

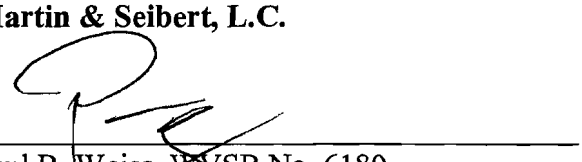
App. Div. 1992); *State ex rel. Connor v. McGough*, 46 Ohio St. 3d 188, 546 N.E.2d 407 (1989); *Bloom v. Fine,* 439 Pa. Super. 350, 653 A.2d 1292 (1995). Such a holding is mandated by due process. If it were otherwise, an injured plaintiff who subsequently moves to California might subject a tort defendant to long-arm jurisdiction there even though the defendant had never been there or directed any conduct toward any person there. The domicile of the plaintiffs is also an irrelevancy for purposes of jurisdictional analysis.

Conclusion

For the foregoing reasons, it is clear beyond refute that the exercise of *in personam* jurisdiction over Wakenight by the court below is inconsistent as a matter of law with West Virginia Code Section 56-3-33(a)(3) and fundamental principles of due process and constitutes manifest error of law. The court below should be enjoined from proceeding with the pending civil action against Wakenight and this defendant respectfully so prays.

ROBERT WAKENIGHT
By Counsel

Martin & Seibert, L.C.



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Certificate of Service

Undersigned counsel hereby certifies that, this **1st** day of **March, 2010,** copies of the foregoing document, together with this defendant's Petition for Writ of Prohibition and Appendix hereto, were served *via* United States Mail, postage prepaid, upon the following persons:

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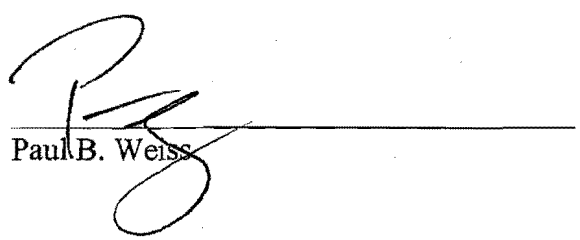

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