

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

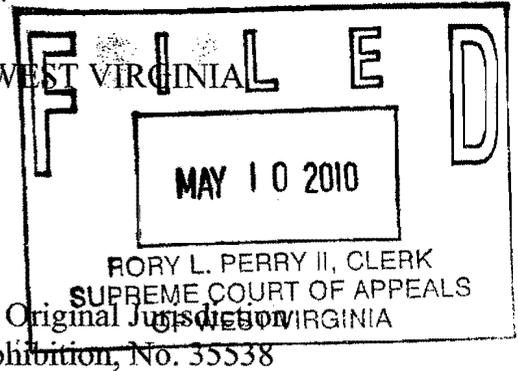
STATE OF WEST VIRGINIA, EX REL.
ROBERT WAKENIGHT,

Petitioner,

vs.

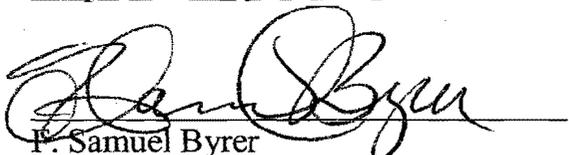
THE HONORABLE DAVID H. SANDERS,
JUDGE OF THE CIRCUIT COURT OF
JEFFERSON COUNTY, WEST VIRGINIA, and
MELANIE MAINES,

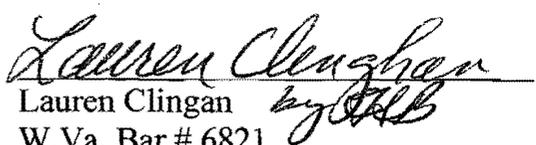
Respondents.



RESPONSE OF MELANIE MAINES IN OPPOSITION TO
PETITION FOR WRIT OF PROHIBITION BY ROBERT WAKENIGHT

Melanie Maines, individually and as parent and next friend of
Ross Wilson, a minor, and Riley Wilson, a minor,
Respondents, by Counsel


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I. Summary of Argument

Petitioner Robert Wakenight is a drunk driver who had several alcoholic drinks at his home in Maryland, then left his home specifically to travel to a Jefferson County, West Virginia, strip club called "Divas." Wakenight spent approximately five hours in the strip club in Jefferson County, West Virginia, drinking Corona beer and gin and tonic with Beefeater's gin. He then left the bar to drive back to his home near Frederick, Maryland. He was drunk when he left the West Virginia strip club. He drove for fifteen or twenty minutes and, just after crossing into the State of Maryland on his way home from the strip club, lost control of his vehicle, crossed into the opposite lane, and crashed head-on into a car in which West Virginia resident Melanie Maines was a passenger. Ms. Maines suffered multiple injuries in the wreck and underwent arthroscopic shoulder surgery as a result. This wreck occurred on a bridge over the Potomac River within sight of Harpers Ferry, West Virginia. Wakenight, who voluntarily came to West Virginia for the specific purpose of drinking alcohol at a strip club, who bought alcoholic drinks in West Virginia, who then drove drunk along the roads of West Virginia on his way back home from the strip club, and who caused injury to a West Virginia resident within eyesight of Harpers Ferry, West Virginia, on his drunken trip home from the West Virginia strip club, is subject to personal jurisdiction in West Virginia for his tortious actions.

II. Kind of Proceeding and Nature of Ruling Below

The Petition comes after the circuit court denied Wakenight's Motion to Dismiss for lack of personal jurisdiction. Six weeks later, Wakenight filed a motion to reconsider the refusal to dismiss, which the circuit court also denied. In both instances, the circuit court correctly found that Wakenight was subject to personal jurisdiction in the Circuit Court of Jefferson County, West Virginia. Petitioner Wakenight filed this Petition for Writ of Prohibition claiming that the Circuit Court of Jefferson County, West Virginia, lacked personal jurisdiction over him, even though a motion for default judgment is pending against him for failing to file an answer to the complaint. The West Virginia Supreme Court of Appeals issued a rule to show cause dated April 14, 2010, returnable September 8, 2010. The circuit court's rulings were correct. Wakenight is subject to personal jurisdiction in West Virginia.

III. Statement of Facts

Petitioner Robert Wakenight resides in Frederick County, Maryland, less than twenty-five miles from Jefferson County, West Virginia. On October 6, 2006, Petitioner Robert Wakenight's wife was out of town. After drinking two or three bottles of beer, Mr. Wakenight decided to go to a strip club.¹ Specifically, because there are no strip clubs in Frederick County, Maryland, Wakenight decided to travel to nearby Jefferson

¹ Wakenight deposition at 38-39, 41, copy attached as Exhibit 1.

County, West Virginia, to patronize a strip club there.² Mr. Wakenight had been to West Virginia strip clubs in the past.³ That day, he decided to go to Divas, a strip club on Route 9 in Kearneysville, because Divas advertised in the Frederick News Post.⁴ In addition to two or three beers, Wakenight had a sandwich and chips and a gin and tonic with a double shot of gin at his home around 5:00 p.m.,⁵ and left home between 6:00 p.m. and 6:30 p.m. with \$75.00 cash in his pocket for a Saturday night at Divas.⁶

Wakenight drove from his home in Maryland to Divas in Jefferson County, West Virginia. Wakenight persuaded the doorman to waive the cover charge. Wakenight bought a Beefeater's gin and tonic at the bar,⁷ and then took a seat beside the stage.⁸ He drank bottles of Corona beer and another Beefeater's gin and tonic.⁹ Wakenight did not recall how many bottles of beer he had that night at Divas.¹⁰ He tipped the dancers between ten and fifteen times by placing dollar bills in their garters.¹¹ Wakenight departed from Divas at approximately midnight, when he had approximately \$5.00 left in his pocket.¹² One can reasonably infer that he spent at least \$40.00 to \$45.00 on beer and gin. He testified the liquor drinks were \$5.50 or \$6.00 each.¹³

² Wakenight deposition at 51.

³ Wakenight deposition at 49.

⁴ Wakenight deposition at 37.

⁵ Wakenight deposition at 39-40.

⁶ Wakenight deposition at 67-68.

⁷ Wakenight deposition at 62.

⁸ Wakenight deposition at 66.

⁹ Wakenight deposition at 74 and 81.

¹⁰ Wakenight deposition at 76.

¹¹ Wakenight deposition at 69-70.

¹² Wakenight deposition at 82.

¹³ Wakenight deposition at 64.

After hours of drinking alcohol while watching exotic dancers at the Jefferson County strip club, Mr. Wakenight got in his car and drove on West Virginia Route 9 to its intersection with Route 340, a main artery for commuter and Charles Town Races & Slots' traffic, in Jefferson County, West Virginia. He then headed east on Route 340 toward his home in Maryland. This section of Route 340 near Harpers Ferry is interesting geographically; over an approximately one-half mile stretch, Route 340 passes from Jefferson County, West Virginia, a few hundred yards through a finger of Loudoun County, Virginia, and then over the Potomac River and into Washington County, Maryland. The 2008 West Virginia Department of Highways traffic count shows a daily average of approximately 38,000 vehicles moving through the Route 9/Route 340 intersection, and approximately 23,100 vehicles crossing the West Virginia state line on Route 340.¹⁴ As Wakenight was drunkenly traversing this passage of Route 340, just two-hundredths of a mile into Maryland, his car crossed the solid center line on the Potomac River Bridge, crashed into one oncoming car, and bounced like a pinball until it crashed head-on into the car in which Melanie Maines was a passenger.¹⁵ The town of Harpers Ferry is visible from the bridge where the wreck occurred.¹⁶

Mr. Wakenight said he had no recollection of the actual crash, as he claimed he was "asleep."¹⁷ Mr. Wakenight failed field sobriety tests administered by the Maryland

¹⁴ See traffic count map, attached as Exhibit 2.

¹⁵ See Maryland automobile accident report, copy attached as Exhibit 3.

¹⁶ See affidavit of Melanie Maines and photograph attached as Exhibit 4.

¹⁷ Wakenight deposition at 90.

State police trooper.¹⁸ Mr. Wakenight's blood alcohol, when taken, was 0.14, nearly twice the legal limit.¹⁹

Ms. Maines filed her Complaint against Wakenight and Diva's in October 2008. Shortly thereafter, Wakenight filed a motion to dismiss for lack of personal jurisdiction. Wakenight was deposed. Ms. Maines then responded to the motion to dismiss, and on September 16, 2009, the circuit court denied the motion to dismiss. In accordance with well-settled law, the circuit court construed the facts in the light most favorable to Ms. Maines, drew all inferences in favor of jurisdiction, and applied the correct two-step test for analyzing whether personal jurisdiction over nonresident Wakenight is appropriate. The circuit court's ultimate conclusion is clear: "Defendant Wakenight was in West Virginia purposefully availing himself of the law here that allows for exotic dancers in certain establishments. Having done so and caused injury to West Virginia residents, he cannot now escape the consequences of West Virginia law on a motion to dismiss for lack of personal jurisdiction."²⁰

Despite the denial of the motion to dismiss, Wakenight failed to file an answer to the complaint. He propounded and responded to discovery and served subpoenas duces tecum on Ms. Maines' medical providers.²¹ Almost six weeks after denial of his motion to dismiss, on October 28, 2009, Wakenight filed a motion for reconsideration, asking the circuit court to reconsider its ruling finding that personal jurisdiction was appropriate.

¹⁸ Wakenight deposition at 97.

¹⁹ Exhibit 3.

²⁰ September 16, 2009, Order Denying Defendant Wakenight's Motion to Dismiss, at pages 4-5.

²¹ Notices of Service and Intent to Serve are attached as Exhibit 5.

On January 15, 2010, the circuit court denied Wakenight's motion to reconsider, and again ruled that Wakenight was subject to personal jurisdiction in West Virginia. The basis for the trial court's ruling was not only that personal jurisdiction at this stage of the case was appropriate, but also that the request for reconsideration was simply an attempt at a second bite at the apple. In addition, the circuit court considered, addressed, and dismissed Wakenight's arguments concerning the non-binding authority he cited. Despite this second adverse ruling on the personal jurisdiction argument, Wakenight still failed to file an answer to the complaint. Instead, another six weeks later, Wakenight sought a writ of prohibition from this Court.

IV. Discussion of Law

Wakenight is not entitled to relief for three reasons. First, the Petition fails to meet the strict requirements for extraordinary relief. Second, the trial court's ruling concerning personal jurisdiction was correct. Third, Petitioner waived any objection to personal jurisdiction by failing to file an Answer to the complaint and by taking other action in the case, including participating in discovery.

A. The Petition fails to meet the strict requirements for extraordinary relief.

This case presents no extraordinary issue. This Court has stated that “. . . prohibition . . . against judges [is a] drastic and extraordinary remed[y] . . . As [an] extraordinary remed[y], [it is] reserved for really extraordinary causes.” *State ex rel. United States Fid. & Guar. Co. v. Canady*, 194 W.Va. 431, 436, 460 S.E.2d 677, 682 (1995) (citations omitted); *State ex rel. Tucker County Solid Waste Authority v. West*

Virginia Division of Labor, 222 W.Va. 588, 668 S.E.2d 217 (2008). In considering whether to grant relief in prohibition, this Court stated in the syllabus point of *State ex rel. Vineyard v. O'Brien*, 100 W.Va. 163, 130 S.E. 111 (1925), as follows: “The writ of prohibition will issue only in clear cases where the inferior tribunal is proceeding without, or in excess of, jurisdiction.” Syl. pt. 1, *State ex rel. Johnson v. Reed*, 219 W.Va. 289, 633 S.E.2d 234 (2006). In *Bowers v. Wurzburg*, 205 W.Va. 450, 501 S.E. 2d 479 (1999), this Court held the trial court’s decision on personal jurisdiction will not be overturned absent an abuse of discretion.

The absence of an extraordinary issue is demonstrated by Wakenight’s lack of urgency in seeking relief. After losing his motion to dismiss, Wakenight waited six weeks, then filed a motion to reconsider. After losing the motion to reconsider, Wakenight waited another six weeks, then filed his petition for a writ. In the midst of all that, he propounded and responded to discovery and served subpoenas duces tecum on Ms. Maines’ medical providers. His dilatoriness in seeking relief merits a denial of the relief he seeks.

This Court refused to grant a writ of prohibition in *State ex rel. Progressive Classic Ins. Co. v Bedell*, 224 W.Va. 454, 686 S.E.2d 593 (2009), where the petitioner had not sought prompt relief, having filed a petition for writ of prohibition six weeks after denial of the underlying motion. Importantly, this Court stated:

While . . . there is no specific time frame for the filing of a writ of prohibition, an extended discourse is not necessary for the principle that, where the petitioner asserts that the lower court was without jurisdiction *ab initio*, rather than acting in excess of its jurisdiction, a

petition seeking the extraordinary remedy of prohibition should, *a fortiori*, be promptly filed.

Id. at 601. Wakenight did not act promptly and thus violated the above-recognized principle. Indeed, the time period in the *Progressive* case is shorter than in the case at hand.

The six week delay between the circuit court's denial of Wakenight's motion to dismiss and the filing of the motion to reconsider demonstrates a lack of urgency. In addition, correspondence from Wakenight's counsel²² reveals a second motive: delay and avoid answering until after the expiration of the Maryland statute of limitations on any claim Ms. Maines might file in that state. As Wakenight's counsel points out, "[s]hould we prevail, the settlement value of Ms. Maines' case will be zero, insofar as the three-year Maryland limitations is not tolled by the pendency of the West Virginia proceeding and has now run." *Id.* Although Respondents do not agree with Wakenight's legal conclusion, Wakenight's intent is clear. The motion to reconsider was merely a stalling tactic designed to allow the Maryland statute of limitations to expire. Assuming Wakenight's legal conclusion is correct, then a ruling that Wakenight is not subject to personal jurisdiction in this state allows him and his insurance company to avoid the civil consequences of his drunk driving.

Moreover, although Wakenight attempts to portray this case as unprecedented, the fact is this case involves a typical application of the minimum contacts analysis in a routine way. This is not the first West Virginia case to involve an injury on a bridge

²² Wakenight's counsel's letter of December 16, 2009, attached as Exhibit 6.

leading to another state, *see Russell v. Bush & Burchett, Inc.*, 210 W.Va. 699, 559 S.E.2d 36 (W.Va. 2001), nor is it the first West Virginia case to involve a West Virginia resident injured in the state of Maryland, *see Mills v. Quality Supplier Trucking, Inc.*, 203 W.Va. 621, 510 S.E.2d 280 (1998). Robert Wakenight is not the first resident of another state to act wrongfully in another state, yet be subject to personal jurisdiction in West Virginia. *See Hinerman v. Levin*, 172 W.Va. 777, 310 S.E.2d 843 (1983) (defendant, a Florida resident, refused to pay attorney's fees associated with a West Virginia workers compensation case); *Lozinski vs. Lozinski*, 185 W.Va. 558, 408 S.E.2d 310 (1991) (defendant, a Florida resident, failed to pay child support to his children's mother in West Virginia). Contrary to Wakenight's attempts to portray it otherwise, the circuit court's ruling was not a groundbreaking judicial expansion; it involved a simple minimum contacts analysis at the motion to dismiss stage. This case is not extraordinary, and Wakenight deserves no extraordinary relief.

B. The circuit court's refusal to dismiss Wakenight on jurisdictional grounds where he voluntarily came to West Virginia, drank beer and gin to excess, drove while drunk, and crashed into Plaintiffs' vehicle just a short distance from and within sight of the state line, was correct.

The circuit court's ruling on Defendant Wakenight's motion to dismiss was correct. The circuit court considered the arguments of the parties, properly considered the factual allegations in the light most favorable to the non-moving party, and performed a due process/minimum contacts analysis. Defendant Wakenight's late submission of non-binding authority for his earlier, already-briefed position was not a reason for the

circuit court to change its ruling and is not a reason for this Court to grant extraordinary relief.

Essentially, Wakenight, who came to West Virginia for the sole purpose of drinking alcohol and watching strippers at Defendant Divas club, who bought and drank alcohol to excess in West Virginia, who drove drunk on West Virginia's roads, and who, within sight of the West Virginia state line, crossed the highway's center line and collided with the vehicle carrying West Virginia residents, sought to dismiss for lack of personal jurisdiction against him in West Virginia. His motion was properly denied.

1. *The burden for demonstrating personal jurisdiction at the motion to dismiss stage is low.* Jurisdiction is proper when the allegations of the First Amended Complaint are viewed in a light most favorable to Plaintiff. "Motions to dismiss are generally viewed with disfavor because the complaint is to be construed in the light most favorable to the plaintiff and its allegations are to be taken as true." *Sturm v. Bd. Of Ed. Of Kanawha County*, 223 W.Va. 277, 672 S.E.2d 606, 609 (2008); *Collia v. McJunkin*, 178 W.Va. 158, 160, 358 S.E.2d 242, 243-44 (1987). With specific regard to motions to dismiss for lack of personal jurisdiction, this Court directs:

[w]hen a defendant files a motion to dismiss for lack of personal jurisdiction under *W. Va. R Civ. P.* 12(b)(2), the circuit court may rule on the motion upon the pleadings, affidavits and other documentary evidence or the court may permit discovery to aid in its decision. **At this stage, the party asserting jurisdiction need only make a prima facie showing of personal jurisdiction in order to survive the motion to dismiss. In determining whether a party has made a prima facie showing of personal jurisdiction, the court must view the allegations in the light most favorable to such party, drawing all inferences in favor of jurisdiction.** If, however, the court conducts a pretrial evidentiary hearing on the motion, or if the

personal jurisdiction issue is litigated at trial, the party asserting jurisdiction must prove jurisdiction by a preponderance of the evidence.

Syl. Pt. 4, *State ex rel. Bell Atlantic-West Virginia, Inc. v. Ranson*, 201 W.Va. 402, 497 S.E.2d 755 (1997). In this case, the Plaintiffs' First Amended Complaint alleges, *inter alia*, that Defendant Wakenight consumed excessive amounts of alcoholic beverages in Jefferson County, West Virginia. Adherence to the *Bell Atlantic* rule, cited above, led to the conclusion that Plaintiffs made a *prima facie* showing of personal jurisdiction. The motion was properly denied.

2. *Application of the two-step test for jurisdiction demonstrates that personal jurisdiction over Wakenight satisfies constitutional requirements.*-- The West Virginia Supreme Court of Appeals has enumerated a two-step test for determining personal jurisdiction.

A court must use a two-step approach when analyzing whether personal jurisdiction exists over a foreign corporation or other nonresident. The first step involves determining whether the defendant's actions satisfy our personal jurisdiction statutes set forth in W. Va.Code, 31-1-15 [1996] and W. Va.Code, 56-3-33 [1996]. The second step involves determining whether the defendant's contacts with the forum state satisfy federal due process.

Syl. Pt. 1, *Easterling v. American Optical Corporation*, 207 W.Va. 123, 529 S.E.2d 588 (2000); syl. pt. 5, *Abbott v. Owens-Corning Fiberglas Corp.*, 191 W.Va. 198, 444 S.E.2d 285 (1994).

Wakenight's actions satisfy the West Virginia personal jurisdiction statutes. Wakenight voluntarily came to West Virginia and caused tortious injury by virtue of, and as a direct result of, his tortious acts and omissions in the State of West Virginia. Those

tortious acts consist primarily of drinking to excess and then driving his vehicle in West Virginia while having a blood alcohol content in excess of .08. *See* W.Va. Code §17C-5-2. The drunk driving was a single continuous act which began at Divas in West Virginia and which ended with the collision within sight of the West Virginia state line. Wakenight's actions satisfy the requirements of the long-arm statute. W.Va. Code §56-3-33(a)(3). He also purchased alcoholic drinks and transacted business in West Virginia.

Moreover, Wakenight's contacts with West Virginia are such that due process is satisfied by the exercise of personal jurisdiction over him in this state. The trial court conducted the fact-specific analysis of personal jurisdiction by applying the factors set forth by this Court: "the burden on the defendant, the interests of the forum state, . . . the plaintiff's interest in obtaining relief . . . [and] the interstate judicial system's interest in obtaining the most efficient resolution of controversies and the shared interest of the several states in furthering fundamental substantive social policies." *Pries v. Watt*, 186 W.Va. 49, 52, 410 S.E.2d 285, 288 (1991). In the same case, the Court held "[t]o what extent a nonresident defendant has minimum contacts with the forum state depends upon the facts of the individual case. **One essential inquiry is whether the defendant has purposefully acted to obtain benefits or privileges in the forum state.**" *Id.* at syl. pt. 3 (emphasis added). Indeed, minimum contacts can be established, even where the defendant has never physically entered the forum state. *Surrillo v. Drilake Farms, Inc.*, 186 W.Va. 105, 411 S. E. 2d 248 (1991).

The trial court correctly determined that Plaintiffs made a *prima facie* showing that Wakenight purposefully acted to obtain the benefit of West Virginia law. Application of the *Pries* factors shows this.

a. Wakenight acted purposefully to obtain the benefits and privileges of West Virginia.-- Wakenight purposefully 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 consumed alcohol to excess while watching the exotic dancers. While in West Virginia, after consuming alcohol to excess, he began driving home on West Virginia roads. Wakenight purposefully availed himself of the laws in West Virginia which allow exotic dancers and alcohol service in certain establishments. While availing himself, he consumed alcohol to excess and, a short while later, crashed while drunk into Plaintiffs' vehicle. Wakenight received the benefit of West Virginia law; he should face the responsibility associated with it. This essential element of the personal jurisdiction analysis, especially when viewed in the light most favorable to Plaintiff, dictates that Wakenight had sufficient minimum contacts with West Virginia to make him subject to personal jurisdiction in this State.

b. The burden on the defendant is small.-- Wakenight resides in the town of New Market, located in Frederick County, Maryland. New Market is just thirty-five miles from Charles Town. In fact, Hagerstown, Maryland, where Wakenight's drunk driving prosecution occurred, is approximately the same distance from his home. In any event, “modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.” *Burger*

King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985), citing *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957). Wakenight appeared for his deposition in West Virginia without apparent difficulty, and his insurance company hired a West Virginia law firm to defend him. Wakenight is not burdened by litigating in West Virginia.

c. West Virginia, the forum state, has an interest in this matter.—The United States Supreme Court has recognized a state’s interest in matters such as this. “A State generally has a ‘manifest interest’ in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors.” *Id.*, at 473 (1985), citing *McGee, supra*, at 223. Furthermore, “[a] State has a legitimate interest in imposing damages to punish a defendant for unlawful acts committed outside of the State’s jurisdiction where the State has a significant contact or significant aggregation of contacts to the plaintiffs’ claims which arise from the unlawful out-of-state conduct.” Syl. Pt. 1, *Boyd v. Goffoli*, 216 W.Va. 553, 608 S.E.2d 169 (2004). The *Boyd* case involved a punitive damages review in which the defendant claimed constitutional due process violations as a result of a punitive damages award apparently based upon out-of-state conduct. This Court found that the trial court’s actions complied with due process. In the opinion, Justice Maynard also pointed out that the plaintiffs’ economic losses occurred in West Virginia, that the fact that some of the defendant’s misconduct occurred in another state was “legally insignificant,” and that “a West Virginia court has an interest in protecting its citizens from tortious conduct and is not precluded from doing so simply because some of the tortious conduct occurred in another state.” *Id.* at 179. The due process analysis in the

Boyd case provides guidance for the due process analysis in this case. West Virginia has an interest in this matter.

d. Ms. Maines and her children have an interest in obtaining relief.— The Respondents have an interest in pursuing their case in their home state, where Wakenight came to drink Beefeater's gin, Corona beer, and tip exotic dancers, yet where he also claims he should not be forced to litigate over the tortious consequences of his actions. Respondents note that the drunk driver Wakenight is subject to punitive damages against him in West Virginia. *Wilt v. Buracker*, 191 W.Va. 39, 443 S.E.2d 196 (1993), cert. denied (1994). This would not be the case in Maryland. *Komornik v. Sparks*, 629 A.2d 721 (Md. 1993). Moreover, as shown by the letter from Wakenight's counsel, Wakenight takes the position that he is not now subject to suit in Maryland. In other words, if the case is dismissed for lack of personal jurisdiction in West Virginia, Wakenight and his insurer assert that Ms. Maines' claim is time-barred in Maryland.

e. Litigation in West Virginia furthers the interstate judicial system's interest in obtaining the most efficient resolution of controversies.—Ms. Maines' case is pending against two defendants: Wakenight and Divas. If Wakenight is dismissed for lack of personal jurisdiction, Ms. Maines would be required to file suit against him in Maryland. Meanwhile, the dram shop action against Divas would continue in West Virginia. The police report identifies other witnesses to the wreck as being West Virginia residents. Litigating this case in two forums, utilizing the judicial resources of two forums, and requiring witnesses to testify in two cases would be extremely inefficient. As this Court has often stated when discussing the potential for multiple suits to arise from contribution

claims, "[t]he fundamental purpose of inchoate contribution is to enable all parties who have contributed to the plaintiff's injuries to be brought into one suit. Not only is judicial economy served, but such a procedure also furthers one of the primary goals of any system of justice-to avoid piecemeal litigation which cultivates a multiplicity of suits and often results in disparate and unjust verdicts." *Board of Educ. v. Zando, Martin & Milstead, Inc.*, 182 W.Va. at 603-04, 390 S.E.2d at 802-03). This Court should refuse the relief sought by Wakenight which would cultivate a multiplicity of suits.

f. Litigating in West Virginia would promote the shared interest of the several states in furthering fundamental substantive social policies.—Sadly, Wakenight argues that drunk driving by itself is harmless. As this Court has noted, “any drunk person is a physical danger to himself and others. We know that drunkenness contributes to accidents of all kinds. Most disturbing of these are automobile accidents, where there is an immediate risk, to the drunk and others, of grave injury or death.” *Bailey v. Black*, 183 W.Va. 74, 77, 394 S.E.2d 58, 61 (1990). This interest is not simply one which is recognized in West Virginia; the federal government only provides crime victim funding grants to states which provide crime victims compensation fund recoveries to victims of drunk driving. 42 U.S.C. §10602. This congressional mandate establishes that the several states have a shared interest in protecting victims of drunk driving.

Thus, application of the *Pries* factors demonstrates that due process is not violated by this State's exercise of personal jurisdiction over Petitioner Wakenight.

3. *The nonbinding authority cited by Wakenight can be distinguished from this case.* -- Finally, the cases cited by Petitioner Wakenight should not persuade this Court to

grant extraordinary relief. Personal jurisdiction in West Virginia may be based upon a nonresident “[c]ausing tortious injury by an act or omission in this state.” W.Va. Code §56-3-33. (a)(3). As the Fourth Circuit has recognized, “the West Virginia long-arm statute is coextensive with the full reach of due process.” *In re Celotex Corp.*, 124 F.3d 619, 627-28 (4th Cir. 1997). As a result, “the statutory inquiry necessarily merges with the Constitutional inquiry.” *Id.*²³ In dramatic contrast to West Virginia’s coextensive-with-due-process statute, the primary case cited by Petitioner is from Michigan. *Green v. Wilson*, 565 N.W.2d 813 (Mich. 1997). Michigan’s long-arm statute only provides for “limited personal jurisdiction” over non-residents. The *Green* opinion specifically clarified previous holdings of that court to emphasize that the Michigan long-arm statute was *not* coextensive with due process so as to eliminate the two-step personal jurisdiction test. *Id.* at 816-17.²⁴ The New York case cited by Defendant, *Chaitman v. Jaycox*, is a forty-five-year-old trial court opinion that was apparently not appealed.

A more appropriate analysis is provided in Wright and Miller’s treatise on federal practice, and was cited by this Court in *Lozinski vs. Lozinski*, 185 W.Va. 558, 408 S.E.2d 310 (1991). *Lozinski* allowed use of the West Virginia long-arm statute to obtain

²³ Respondents note that the *Celotex* case dealt specifically with the West Virginia corporate long-arm jurisdiction statute; however, *Celotex* cited as authority the case of *Pittsburgh Terminal Corp. v. Mid Allegheny Corp.*, 831 F.2d 522, 525 (4th Cir. 1987), which addressed the issue in a case involving W.Va. Code §56-3-33(a), the same long-arm statute used in this case. The analysis under both statutes is the same. The constitutional inquiry merges with the statutory inquiry.

²⁴ Plaintiffs also note the dissent in *Green* of the Michigan Supreme Court’s Chief Justice, who, like the circuit court in the instant case, noted that the defendant’s “contacts with Michigan are not random, fortuitous, or attenuated. He deliberately entered the state, patronized establishments that are licensed and regulated by Michigan law, and drove on roads that are maintained and governed by this state. By using Michigan’s roads and patronizing Michigan’s establishments, [defendant] purposefully availed himself of the benefits and protections of Michigan law.” *Id.* at 822 (Mallett, C.J., concurring in part and dissenting in part).

personal jurisdiction over a nonresident where child support is at issue. This Court quoted the following passage from Wright & Miller:

On the surface, state long-arm statutes and single-act statutes appear to be examples of legislative self-interest. In part they represent attempts by the one state to provide a litigation forum for the convenience of its own citizens at the expense of citizens of other states. **Nonetheless, most observers have agreed that the statutory trend is a healthy and natural one in a mobile, industrialized society that effectively has reduced the time and rigors of travel....** *[L]ong-arm statutes promote the determination of jurisdictional questions on the basis of the relationship of defendant and the dispute to the forum state...* Finally, by providing a plaintiff with a forum near his home, many injuries can be rectified that simply were uneconomic to litigate under a system that forced the plaintiff to journey to the defendant.

4 C. Wright & A. Miller, Federal Practice and Procedure 1068 at pp. 335-36 (2d ed. 1987) (footnotes omitted and emphasis supplied), quoted in *Lozinski*, at 560, 313. In the case before the Court, Petitioner and the dispute have strong relationships to the West Virginia forum.

C. Petitioner waived any objection to personal jurisdiction by failing to file an Answer to the complaint and by conducting discovery.

After Petitioner was served with the Complaint in this matter, he filed a motion to dismiss for lack of personal jurisdiction. That motion was denied on September 16, 2009. Pursuant to W.Va.R.Civ.P. 12(a)(3)(A), Wakenight had ten days from receipt of that Order to file his responsive pleading. Wakenight failed to file a responsive pleading. “Averments in a pleading to which a responsive pleading is required, . . . are admitted when not denied in the responsive pleading.” W.Va.R.Civ.P. 8(d). Accordingly, Wakenight has admitted the allegations of Respondents’ Complaint, including those

concerning jurisdiction, and waived any further objections to jurisdiction. As a result of Wakenight's failure to answer, Plaintiff filed a motion for default judgment with the circuit court, which motion was pending and is now stayed as a result of this Court's issuance of a rule to show cause.

Petitioner's failure to answer and other actions taken by him in the case constitute a waiver of the personal jurisdiction objection. "Jurisdiction of the person may be conferred by consent of the parties or the lack of such jurisdiction may be waived." *Kessel v. Leavitt*, 204 W.Va. 95, 117, 511 S.E.2d 720, 742 (W.Va. 1998), citing syl. pt. 4, in part, *West Virginia Secondary Sch. Activities Comm'n v. Wagner*, 143 W.Va. 508, 102 S.E.2d 901 (1958). Petitioner's actions in the underlying case reflect that he has waived any entitlement to extraordinary relief. Wakenight's counsel is well aware of the waiver problem. He noted in his December 16, 2009, letter: "[t]o avoid any potential argument of waiver, I do not intend to pursue discovery in this case pending resolution of the jurisdictional issue." Interestingly, by the time of this statement, Wakenight had already responded to discovery from Plaintiff and from co-Defendant Diva's. Wakenight also served subpoenas *duces tecum* upon Ms. Maines' medical providers, and Wakenight personally appeared for deposition in Charles Town, Jefferson County, West Virginia. Respondent submits that the defendant who takes all of these actions, yet who has failed for almost six months to take the ordinary step of filing an answer to the complaint, is not entitled to extraordinary relief. Wakenight is not only subject to personal jurisdiction in West Virginia, but he also has waived any objection thereto.

V. Conclusion

Plaintiffs Melanie Maines and her children, by and through undersigned counsel, respectfully oppose the drunk driver Robert Wakenight's Petition for a Writ of Prohibition. No extraordinary relief should be granted because the Circuit Court was correct in its ruling. Respondents' claims arise from Defendant Wakenight's voluntary illegal activities in Jefferson County, West Virginia-- namely, his drunk driving in Jefferson County, West Virginia, and drinking Corona beer and Beefeater's gin to excess at Divas. Respondents, accordingly, respectfully ask this Court to deny the Petition.

Melanie Maines, et al., Plaintiffs

By counsel


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA, EX REL.
ROBERT WAKENIGHT,

Petitioner,

vs.

Upon Original Jurisdiction
In Prohibition, No. 35538

THE HONORABLE DAVID H. SANDERS,
JUDGE OF THE CIRCUIT COURT OF
JEFFERSON COUNTY, WEST VIRGINIA, and
MELANIE MAINES,

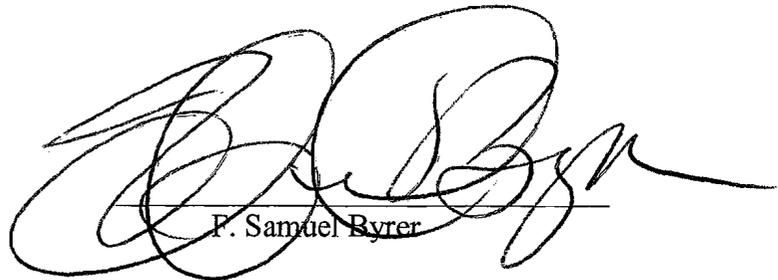
Respondents.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **Response of Melanie Maines in Opposition to Petition for Writ of Prohibition by Robert Wakenight and Appendix to Response of Melanie Maines, et al., and Appendix of Exhibits** were served on the following counsel of record by first-class mail, postage prepaid on May 7, 2010:

Paul Weiss, Esq.
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Honorable David Sanders
Judge of the Circuit Court of Jefferson County
Jefferson County Courthouse
100 East Washington Street
Charles Town, WV 25414



F. Samuel Byrer

EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE