

APPEAL NO. 32751

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

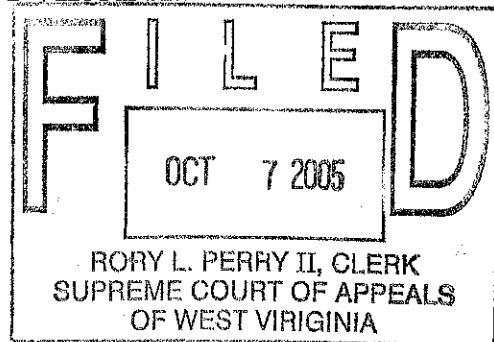
JEREMIAH "BART" MORRIS,

Appellant

VS.

CROWN EQUIPMENT CORPORATION,
a foreign corporation; and JEFFERDS
CORPORATION d/b/a HOMESTEAD
MATERIALS HANDLING COMPANY,
a West Virginia corporation,

Appellees



BRIEF OF APPELLANT, JEREMIAH "BART" MORRIS

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October 6, 2005

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I. KIND OF PROCEEDING AND NATURE OF RULING IN LOWER COURT

The action on appeal is a products liability case arising in the Circuit Court of Kanawha County, West Virginia. Jeremiah "Bart" Morris, appellant herein and plaintiff below, suffered a severe leg injury at his place of employment in Virginia, while operating a stand-up forklift designed, manufactured, and distributed by Crown Equipment Corporation (an Ohio corporation) [hereinafter "Crown"] and distributed and serviced by Jefferds Corporation d/b/a Homestead Materials Handling Company [hereinafter "Jefferds"].¹ Crown and Jefferds are appellees herein and were defendants below.

The Complaint alleged that Jefferds was incorporated under the laws of West Virginia, has its principal place of business in Kanawha County, West Virginia, conducted business in Kanawha County, West Virginia, and was engaged in the business of servicing, maintaining, providing warnings, providing training, testing, inspecting, marketing, distributing, and selling materials handling equipment, including Crown stand-up forklifts. [Complaint ¶ 3]. It further alleged that Jefferds provided, serviced, maintained, tested, inspected, marketed, provided with warnings, provided training for, and distributed to Morris' employer the Crown stand-up fork lift upon which Morris was injured. [Complaint ¶ 6]

Morris, seeks relief from the entry of, and respectfully asks this Court to reverse the "Order[s]" dated September 1, 2004 and November 24, 2004 by the Honorable Tod J. Kaufman,

¹ At the time the Petition for Appeal was argued, Justice Maynard inquired as to whether there was actually a Virginia company instead of Jefferds which distributed and serviced the fork lift in question. Discovery was never permitted below, but from counsel's investigation the correct entity is Jefferds Corporation, doing business as Homestead Materials Handling Company. Homestead is believed to be a business name used by Jefferds Corporation for its branch or division in Virginia.

Kanawha County Circuit Judge, respectively granting the motions to dismiss of appellees and defendants below, Crown and Jefferds, as well as the "Order Denying Plaintiff's Motion to Reconsider" dated November 29, 2004.

Appellees' motions to dismiss were based upon a venue objection pursuant to West Virginia Code §56-1-1(c) which provides that a non-resident of West Virginia may not file a lawsuit in the courts of this state unless all or a substantial part of the acts or omissions giving rise to the claim occurred in this state.

In response to the motions to dismiss, Morris argued that West Virginia Code §56-1-1(c) is unconstitutional under both (1) the Privileges and Immunities Clause of the U.S. Constitution and (2) the Open Courts Clause of the West Virginia Constitution because it impermissibly restricts access to the West Virginia courts based upon the residency of the plaintiff. Morris asserted that West Virginians are permitted to sue in the courts of this State for tortuous acts not arising in West Virginia while non-residents are specifically prohibited from doing so.

[Plaintiff's Response to Defendants' Motions to Dismiss, pp. 2-5]

He further argued: (1) that he had nevertheless complied with West Virginia Code §56-1-1(c) and pled that Jefferds engaged in substantial acts or omissions giving rise to the claim in the State of West Virginia; (2) that Jefferds status as a West Virginia corporation doing business in Kanawha County established proper venue as to it; and (3) that because Jefferds served as a venue-giving defendant he could properly join Crown, as well. [Tr. Sept. 1 hearing, pp. 10-11]

The trial court rejected Morris's arguments and dismissed both Crown and Jefferds, and denied Morris' motion for reconsideration.

II. STATEMENT OF FACTS OF THE CASE

On May 6, 2002, Jeremiah "Bart" Morris, a Virginia resident, suffered a severe left leg injury while operating a stand-up forklift at his place of employment in Grottoes, Virginia. His left leg was ultimately amputated as a result of the injury. [Complaint ¶¶1, 4].

The forklift was designed, manufactured, and distributed by Crown Equipment Corporation, which is incorporated in and has its principal place of business in the State of Ohio. [Complaint ¶¶2, 5]. The forklift was distributed, installed, and serviced by Jefferds Corporation d/b/a Homestead Materials Handling Company, which is incorporated in and has its principal place of business in Kanawha County, West Virginia. [Complaint ¶¶3, 6].

Mr. Morris filed this products liability action in the Circuit Court of Kanawha County on April 30, 2004 against Crown and Jefferds alleging theories of recovery based upon negligence, strict liability, failure to warn, and breach of warranty, as well as asserting a claim for punitive damages. [Complaint ¶¶ 10-26].

Neither Crown, nor Jefferds answered the Complaint. Rather, on June 11, 2004, Crown and Jefferds both moved to dismiss the Complaint for lack of venue pursuant to West Virginia Rule of Civil Procedure 12(b) and recently amended West Virginia Code §56-1-1(c) which states that "a nonresident of the state may not bring an action in a court of this state unless all or a substantial portion of the acts or omissions giving rise to the claim asserted occurred in this state[.]" [Crown Equipment Corporation's Motion to Dismiss for Improper Venue; Motion to Dismiss by Defendant Jefferds Corporation].

Morris responded to the Defendants' motions to dismiss on June 24, 2004, raising constitutionality objections to the amended venue statute and seeking leave to amend his complaint to add venue allegations. [Plaintiff's Response to Defendants' Crown and Jefferds Motions to Dismiss and to Crown's Motion for Protective Order pp. 2-5]. In a further effort to remedy the Defendants' venue objections, on August 20, 2004, Mr. Morris moved to amend the Complaint to add venue allegations and also amended his response to the motions to dismiss citing those venue allegations. [Plaintiff's Amended Response to Defendants' Crown and Jefferds Motions to Dismiss and to Crown's Motion for Protective Order; Plaintiff's Motion to Amend Complaint]. Neither Defendant responded, nor otherwise objected to the amendment to the Complaint.

On September 1, 2004, Judge Kaufman heard arguments on the Defendants' motions to dismiss and requested that the parties submit proposed orders. Morris argued *inter alia* that Jefferds was a valid venue-giving defendant and that Crown could therefore be joined as a proper party defendant. [Tr. Sept. 1 hearing, pp. 10-11]

During the hearing, on September 1st, Jefferds tendered, and the Court accepted and considered the "Affidavit" of David Sorrells in support of its motion to dismiss. [Affidavit]. Later that day, Judge Kaufman entered the order tendered by counsel for Crown, dismissing Crown from this matter. [September 1, 2004 "Order"].

On September 7, 2004, Mr. Morris filed "Plaintiff's Motion to Reconsider" raising additional arguments against the applicability of West Virginia Code §56-1-1(c). [Plaintiff's Motion to Reconsider]. On November 10, 2004, Crown responded to the motion for reconsideration. Jefferds did not file a response. [Crown Equipment Corporation's Opposition

to Plaintiff's Motion to Reconsider].

On November 22, 2004, Mr. Morris tendered "Plaintiff's Supplemental Memorandum" wherein he reiterated several of his arguments and renewed his motion to amend the Complaint. [Plaintiff's Supplemental Memorandum]. Attached to "Plaintiff's Supplemental Memorandum" was a revised "Amended Complaint" which addressed the evolving arguments of the Defendants regarding venue. [Attachment A to Plaintiff's Supplemental Memorandum].

On November 24, 2004, Judge Kaufman entered the order tendered by counsel for Jefferds, dismissing Jefferds from this matter. [November 24, 2004 "Order"].

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

Assignment of Error A. The Circuit Court committed reversible error in failing to hold West Virginia Code §56-1-1(c) unconstitutional pursuant to the Privileges and Immunities Clause of the U.S. Constitution (U.S. Const. Art. IV., §2, Cl. 1) and the Open Courts Clause of the West Virginia Constitution (W.Va. Const. Art. III, §17).

Manner decided in Circuit Court: Interestingly, although the arguments in the memoranda and pleadings filed by the parties, and a segment of the initial oral arguments on September 12th, addressed the Constitutional issues, Judge Kaufmann did not mention the phrases "Privileges and Immunities" or "open courts" in either hearing below. [Tr. Sept 1. hearing and Tr. Nov. 12 hearing]. Nor, did he rule from the bench on any aspect of these constitutional issues. Instead, the Court entered an order prepared and tendered by Crown's counsel at the September 1,

2004, hearing, granting the motion to dismiss of Crown. That order was silent on the Constitutional issues. After a subsequent hearing on November 12, 2004, the Court entered another order granting Jeffers' motion to dismiss. That order, entered on November 24, 2004, again failed to address either Constitutional issue asserted by Morris. On November 12, 2004, Judge Kaufman heard arguments from the parties on the motion to reconsider and requested that the parties submit any additional memoranda and/or proposed orders. On November 29, 2004, the court entered the final order denying Mr. Morris' motion for reconsideration. It too, was silent on the constitutional issues. However, by entry of the three orders relying upon the amended venue statute, the Circuit Court rejected the Constitutional arguments advanced by Morris.

Assignment of Error B. The Circuit Court committed reversible error in failing to grant Morris' motion to amend the Complaint (particularly given that the Circuit Court, nevertheless, relied on the Amended Complaint in ruling on the Defendants' motions to dismiss).

Manner decided in Circuit Court: The Court failed to rule on the motion to amend the Complaint and first amended complaint in any of the 3 orders being reviewed in this appeal. However, the Order of September 1st alludes to the proposed amended complaint in the body of the order [p. 1], in the findings of fact [p. 2 ¶¶ 5, 7, 8] and in the conclusions of law [pp. 3-4, ¶ ¶ 6,7, 8, 10]. The order entered on November 24th likewise alludes to the motion to amend the complaint and proposed amended complaint in the body of the order [p.1], in the findings of fact [p. 2, ¶ 5], and in the conclusions of law [p. 3, ¶ 7]. Furthermore, none of the orders address the revised amended complaint which was attached to the Plaintiff's Supplemental Memorandum of November 22, 2004.

Assignment of Error C. The Circuit Court committed reversible error in failing to hold that Morris had complied with the venue requirements of West Virginia Code §56-1-1(c) by alleging that Jefferds Corporation had engaged in substantial acts or omissions in West Virginia.

Manner decided in Circuit Court: The Circuit Court concluded that Morris had not complied with the requirements of § 56-1-1(c) as to Crown in its order of September 1st holding (1) that the statute required establishing venue separately as to each Defendant, and (2) that Morris omitted any allegations that all, or a substantial portion of the acts or omissions attributed to Crown occurred in West Virginia. [Sept. 1 Order, Findings of Fact ¶¶ 5, 6, 7]. With respect to Jefferds in the November 24th order, the Court found that Morris failed to produce any fact to establish that all or a substantial part of any acts or omissions giving rise to his claim occurred in this State [Nov. 24 Order, Findings of Fact ¶ 4], and concluded that § 56-1-1 (c) does not differentiate between domestic and foreign entities when suits are filed by non-residents, hence all or a substantial part of the acts or omissions must occur within this State. [Nov. 24 Order, Conclusions of Law ¶¶ 5 - 7]. This Order disregards the allegations in Paragraph 7, subparagraphs d, e, f, g, h, i, j, and k of the Amended Complaint and Paragraph 10(a) and 10(b), subparagraphs i, ii, iii, iv, v, vi, vii, viii, ix, x, and xi of the Revised Amended Complaint, which satisfy the venue giving requirements of both §§56-1-1(a)(2) and 56-1-1(c). Instead, the Court partially based its findings upon an affidavit tendered by a Jefferds' employee controverting some of these venue-specific allegations, (thereby effectively converting the motion to dismiss proceeding to a summary judgment motion without first permitting Plaintiff to exercise any discovery to test the affidavit). Finally, the November 29th Order denying Morris' Motion to Reconsider reiterates the conclusion that a non-resident must establish the venue as to each defendant against whom a claim is asserted. (p. 2-3, ¶¶ 5, 7].

Assignment of Error D. The Circuit Court committed reversible error in holding that West Virginia Code §56-1-1(c) requires Morris to separately establish venue as to each individual defendant, and in failing to hold that since venue was proper as to Jefferds Corporation under West Virginia Code §56-1-1(c), venue was also proper as to Crown Equipment Corporation.

Manner decided in Circuit Court: As pointed out above, the Circuit Court held that under the language of the recently amended provisions of West Virginia Code, § 56-1-1, a non-resident must separately establish venue as to each defendant, and, with respect to Jefferds Corporation, held that proper venue was not established even though it was a West Virginia corporation doing business in this State with its principal place of business located in Kanawha County. The court concluded that Morris had failed to establish that all, or a substantial part of any acts or omissions of Jefferds occurred within West Virginia. [Nov. 24 Order, pp. 2-3, Conclusions of Law ¶¶ 5, 6, 7]. It concluded that venue must be established as to each defendant on the face of the Complaint or proposed Amended Complaint (Sept. 1 Order, pp. 3-4, Conclusions of Law ¶¶ 7, 8]. Hence, the Court effectively concluded that the existing law and precedent governing venue-giving defendants did not apply in this case.

Assignment of Error E. The Circuit Court committed reversible error by applying the wrong legal standards in ruling on Jefferds Corporation's motion to dismiss.

Manner decided in Circuit Court: As noted above, the Circuit Court relied solely on subsection c of West Virginia Code, § 56-1-1 to determine venue in cases brought by non-residents against domestic corporations doing business in this State. It apparently disregarded the provisions West Virginia Code, § 56-1-1(a)(2) which holds that venue lies against a domestic corporation doing

business in this State wherein its principal office is located, or where its president or principal officer resides. It also apparently disregarded the allegations in the Complaint, Amended Complaint and Revised Amended Complaint mentioned above which also satisfy the requirements of §56-1-1(c).

Assignment of Error F. The Circuit Court committed reversible error by failing to permit Morris to conduct discovery in opposition to Jefferds Corporation's motion to dismiss.

Manner decided in Circuit Court: Morris served discovery requests upon Defendants at the time the Complaint was served. He later made several written requests for discovery (1) as part of Plaintiff's Response to Defendants' Crown and Jefferds Motions to Dismiss and to Crown's Motion for a Protective Order (Response, pp. 6-7); and (2) as part of Plaintiff's Amended Response to Defendants' Crown and Jefferds Motions to Dismiss and to Crown's Motion for a Protective Order [Amended Response, pp. 6-7].

As indicated above, the Court effectively converted the Motions to Dismiss to motions for summary judgment when it considered the affidavit of David Sorrells submitted in support of Jefferds. [Nov. 24 Order, p. 1 and p. 3, Conclusion of Law ¶ 6]. And the affidavit was specifically discussed in the hearing of September 1, first by Jefferds' counsel when he offered the affidavit in support of his motion to dismiss [Tr. Sept. 1 hearing, pp. 8-9], and later in the hearing when Morris' counsel pointed out that the pending motion was a motion to dismiss even though Jefferds had tendered the affidavit [Tr. Sept. 1 hearing, p. 13]. Twice, at that hearing Morris' counsel requested orally that Morris be given the opportunity to conduct discovery [Tr. Sept. 1 hearing, p. 13, 15, 21, 23]. Ultimately, the Court received the affidavit and made it a part of the record. [Tr. Sept. 1 hearing, p. 24]. The same sequence occurred at the November 12th hearing when the affidavit was discussed

first by Jefferds' counsel [Tr. Nov. 12 hearing, p. 10], and then by Morris' counsel who argued that consideration of the affidavit changes the motion to one for summary judgment, which would entitle Morris to complete discovery [Tr. Nov. 12 hearing, p. 12].

Despite the repeated requests, the Court dismissed the action without ruling upon Morris' requests for discovery thereby effectively denying the discovery requests.

Assignment of Error G. The Circuit Court erred in holding that West Virginia Code §56-1-1 (c) requires the filing of an affidavit of inability to obtain jurisdiction over the defendant in cases where a non-resident plaintiff has alleged that a defendant engaged in substantial acts or omissions in the State of West Virginia.

Manner decided in Circuit Court: In the September 1 hearing [p. 9], Jefferds' counsel asserted that Morris was required to file an affidavit if he is unable to get jurisdiction over the defendant in the sister jurisdiction under West Virginia Code, § 56-1-1(c). In both the Sept. 1 Order [p. 2, ¶8], and the Nov. 24 Order [p.2, ¶ 5], the Court found that Plaintiff had not filed an affidavit of inability to obtain jurisdiction over the defendant. The November 29 order adopted all of the Court's findings in the September 1 hearing by reference [Nov. 29 Order, p. 1] , and denied Morris' motion for reconsideration and granted dismissal of his lawsuit.

IV. POINTS AND AUTHORITIES RELIED UPON.

Statute at Issue in This Appeal - West Virginia Code, § 56-1-1²

A. Effective June 4, 2003, West Virginia Code §56-1-1, the general venue statute, was amended to add a subsection (c) as follows:

(c) Effective for actions filed after the effective date of this section, a nonresident of the state may not bring an action in a court of this state unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state: Provided, that unless barred by the statute of limitations or otherwise time barred in the state where the action arose, a nonresident of this state may file an action in state court in this state if the nonresident cannot obtain jurisdiction in either federal or state court against the defendant in the state where the action arose. A nonresident bringing such an action in this state shall be required to establish, by filing an affidavit with the complaint for consideration by the court, that such action cannot be maintained in the state where the action arose due to lack of any legal basis to obtain personal jurisdiction over the defendant.

In any civil action where more than one plaintiff is joined, each plaintiff must independently establish proper venue. A person may not intervene or join in a pending civil action as a plaintiff unless the person independently establishes proper venue. If venue is not proper as to any such nonresident plaintiff in any court of this state, the court shall dismiss the claims of the plaintiff without prejudice to refile in a court in any other state or jurisdiction.

B. Constitutional challenges to a statute are reviewed pursuant to a *de novo* standard of review. West Virginia ex rel. Citizens Action Group v. West Virginia Economic Development Grant Committee, 213 W.Va. 255, 261-262 (2003).

C. The Privileges and Immunities Clause of the U.S. Constitution provides that “The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” U.S. Const. Art. IV, §2, Cl. 1.

D. The U.S. Supreme Court has held that the terms “citizen” and “resident” are

² See the Addendum for the complete body of West Virginia Code, § 56-1-1.

interchangeable for purposes of analysis of most cases under the Privileges and Immunities Clause. United Building & Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden, 465 U.S. 208, 216 (1984).

E. A non-resident's interest in access to a state's courts is a fundamental interest falling within the scope of the Privileges and Immunities Clause. Missouri Pacific Railroad Co. v. Clarendon Boar Oar Co., 257 U.S. 533, 535 (1922); Travis v. Yale & Towne Manufacturing Co., 252 U.S. 60, 78 (1920); Chambers v. Baltimore & Ohio Railroad Co., 207 U.S. 142, 148 (1907).

F. While a state government may decide whether and to what extent the courts will entertain transitory actions which have arisen in other jurisdictions, those policy decisions must operate in the same way with respect to citizens of the state and non-citizens. Chambers, 207 U.S. at 148-149.

G. "Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from the citizens of other States is void, because it is in conflict with the supreme law of the land." Id. at 149-150; *see also* Missouri ex rel. Southern Railway Co. v. Mayfield, 340 U.S. 1, 3-4 (1950); Miles v. Illinois Central Railroad Co., 315 U.S. 698, 704 (1942).

H. Under the Privileges and Immunities Clause, "If defendant were a domestic corporation, there would be no doubt of plaintiff's right to sue in this State on her cause of action." Gober v. Federal Life Ins. Co., 255 Mich. 20, 24, 237 N.W. 32, 33 (Mich. 1931).

I. "The courts of this State shall be open, and every person for an injury done to him, in his person, property, or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial, or delay." W.Va. Const. Art. 3, §17.

J. All men are, by nature, equally free and independent, and have certain inherent rights,

of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely: the enjoyment of life and liberty, with the means of acquiring and possessing property, and of pursuing and obtaining happiness and safety. W.Va. Const. Art. 3, § 1

K. A trial court's ruling on a motion to amend is reviewed under an abuse of discretion standard. Barney v. Auvil, 195 W.Va. 733, 737 (1995).

L. A party may amend a pleading by leave of court, and that such leave shall be freely given when justice requires. W.Va.R.Civ.P. 15(a).

M. Rule 15 amendments should rarely be denied and are generally allowed to cure jurisdictional or venue defects. Brooks v. Isinghood, 213 W.Va. 675, 684, 685 n.7 (2003).

N. A motion to dismiss based upon improper venue is to be decided on the face of the pleadings. Rhododendron Furniture & Design, Inc. v. Marshall, 214 W.Va. 463, 466 (2003).

O. A trial court's ruling on a motion to dismiss is reviewed under a *de novo* standard. Kopelman and Associates v. Collins, 196 W.Va. 489, 492 (1996).

P. In ruling on a motion to dismiss, the allegations of a complaint are to be taken as true and all reasonable inferences resolved in favor of the plaintiff. John W. Lodge Distributing Co. v. Texaco, 161 W.Va. 603, 605 (1978).

Q. A trial court's ruling on a question of law is reviewed under a *de novo* standard. Lawson v. Hash and Benford, 209 W.Va. 230, 232 (2001).

R. A civil action against a domestic corporation, except where it is otherwise specially provided, may be brought in the circuit court of any county wherein its principal office is located or wherein its president or other chief officer resides. West Virginia Code, § 56-1-1(a)(2).

S. "[O]nce venue is proper for one defendant, it is proper for all other defendants subject

to process.” *See e.g.*, McGuire v. Fitzsimmons, 197 W.Va. 132, 137 (1996); Kenamond v. Warmuth, 179 W.Va. 230, 231-232 (1988); Union Carbide & Carbon Corp. v. Linville, 142 W.Va. 160, 164-165 (1956); Webber v. Offhaus, 135 W.Va. 138, 146-147 (1950); McConaughy & Co. v. Bennett, 50 W.Va. 172, 179 (1901).

T. It shall not be necessary in any declaration or other pleading to set forth the place in which any contract was made, or act done, unless when, from the nature of the case, the place is material or traversable, and then the allegation may be, as to a deed, note or other writing bearing date at any place, that it was made at such place, or as to any other act, according to the fact, without averring or suggesting that it was at or in the county in which the action is brought, unless it was in fact therein. West Virginia Code, § 56-4-14.

U. It shall not be necessary in any action to aver that the cause of action arose, or that the matter is, within the jurisdiction of the court, or to make profert of any deed, letters testamentary, or commission of administration; but any party may have oyer in like manner as if profert were made. West Virginia Code, §56-14-15

V. “[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.” Appalachian Power Co. v. State Tax Department, 195 W.Va. 573, 585-586 (1995).

W. If a court opts to consider matters outside of the pleadings in ruling on a motion to dismiss, the motion is converted into one for summary judgment pursuant to West Virginia Rule of Civil Procedure 56. Rhododendron Furniture & Design, Inc. v. Marshall, 214 W.Va. at 466.

X. When a court opts to treat a Rule 12 motion as one for summary judgment under Rule 56, the responding party is entitled to notice thereof from the court and a reasonable opportunity to

submit the types of materials which may be considered under Rule 56 such as pleadings, depositions, answers to interrogatories, admissions, and affidavits. Kopelman and Associates, 196 W.Va. at 493-495; W.Va.R.Civ.P. 56(c). This includes providing the responding party with a reasonable opportunity to conduct necessary discovery. Elliott v. Schoolcraft, 213 W.Va 69, 73 (2002).

V. DISCUSSION OF LAW

A. **The Circuit Court committed reversible error in failing to hold West Virginia Code §56-1-1(c) unconstitutional pursuant to the Privileges and Immunities Clause of the U.S. Constitution (U.S. Const. Art. IV., §2, Cl. 1) and the Open Courts Clause of the West Virginia Constitution (W.Va. Const. Art. III, §17).**

In the trial court, Mr. Morris argued that West Virginia Code §56-1-1(c) was unconstitutional pursuant to the Privileges and Immunities Clause of the U.S. Constitution and the Open Court Clause of the West Virginia Constitution. [Plaintiff's Amended Response to Defendants' Crown and Jefferds Motions to Dismiss and to Crown's Motion for Protective Order, pp. 2-4]. The trial court erred in ignoring this argument and in granting the Defendants' motions to dismiss. [September 1, 2004 "Order"; November 24, 2004 "Order"; and November 29, 2004 "Order Denying Plaintiff's Motion for Reconsideration"]. Constitutional challenges to a statute are reviewed pursuant to a *de novo* standard of review. West Virginia ex rel. Citizens Action Group v. West Virginia Economic Development Grant Committee, 213 W.Va. 255, 261-262 (2003).

Effective June 4, 2003, West Virginia Code §56-1-1, the general venue statute, was amended to add a subsection (c) as follows:

(c) Effective for actions filed after the effective date of this section, **a nonresident of the state may not bring an action in a court of this state unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state**: Provided, That unless barred by the statute of limitations or otherwise time barred in the state where the action arose, a nonresident of this state may file an

action in state court in this state if the nonresident cannot obtain jurisdiction in either federal or state court against the defendant in the state where the action arose. A nonresident bringing such an action in this state shall be required to establish, by filing an affidavit with the complaint for consideration by the court, that such action cannot be maintained in the state where the action arose due to lack of any legal basis to obtain personal jurisdiction over the defendant.

In any civil action where more than one plaintiff is joined, each plaintiff must independently establish proper venue. A person may not intervene or join in a pending civil action as a plaintiff unless the person independently establishes proper venue. If venue is not proper as to any such nonresident plaintiff in any court of this state, the court shall dismiss the claims of the plaintiff without prejudice to refile in a court in any other state or jurisdiction.

[Emphasis added].

Even a cursory review of the statute makes it clear, that it discriminates against non-residents of West Virginia in the filing of transitory lawsuits in the State of West Virginia. While a resident of West Virginia may sue in West Virginia courts for causes of action which arise outside the state, non-residents are not accorded similar treatment. Whenever a state statute discriminates between those persons who are citizens and residents of the state and those persons who are not, a question arises as to whether that statute violates the Privileges and Immunities Clause of the U.S. Constitution.³

The Privileges and Immunities Clause of the U.S. Constitution provides that "The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. Art. IV, §2, Cl. 1.

³ Although subsection (c) of the West Virginia Code §56-1-1 is phrased in terms of residency and the Privileges and Immunities Clause refers to citizenship, the U.S. Supreme Court has held that the terms "citizen" and "resident" are interchangeable for purposes of analysis of most cases under the Privileges and Immunities Clause. United Building & Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden, 465 U.S. 208, 216 (1984) (holding that prior distinctions between "resident" and "citizen" in Privileges and Immunities Clause analyses are no longer valid).

"The primary purpose of this clause, like the clauses between which it is located -- those relating to full faith and credit and to interstate extradition of fugitives from justice -- was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy. For protection of such equality the citizen of State A was not to be restricted to the uncertain remedies afforded by diplomatic processes and official retaliation."

United Building & Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden, 465 U.S. 208, 216 (1984)(quoting Toomer v. Witsell, 334 U.S. 385, 395 (1948)).

In reviewing a statute under the Privileges and Immunities Clause, a two-step inquiry is used. Id. at 218. First, the court must determine whether or not the statute burdens one of the privileges and immunities protected by the Clause. Id. Only those interests which are sufficiently fundamental to the promotion of interstate harmony fall within the purview of the Privileges and Immunities Clause. Id. at 218-219. Second, when a fundamental interest has been affected, the discrimination must be supported by a substantial reason for the difference in treatment and the discriminatory treatment must bear a close relation to that reason. Id. at 222. As part of the justification for the discriminatory law, non-residents must be shown to constitute a particular source of the evil at which the statute is aimed. Id.

With respect to the first step, the U.S. Supreme Court has held on a number of occasions that a non-resident's interest in access to a state's courts is a fundamental interest falling within the scope of the Privileges and Immunities Clause. Missouri Pacific Railroad Co. v. Clarendon Boar Oar Co., 257 U.S. 533, 535 (1922)("This secures citizens of one State the right to resort to courts of another, equally with citizens of the latter State[.]"); Travis v. Yale & Towne

Manufacturing Co., 252 U.S. 60, 78 (1920)(“Beyond doubt those words [privileges and immunities] are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union...to maintain actions in the courts of the State.”); Chambers v. Baltimore & Ohio Railroad Co., 207 U.S. 142, 148 (1907)(“The right to sue and defend in the courts...is one of the highest and most essential privileges of citizenship, and must be allowed by each State to the citizens of all other States to the precise extent that it is allowed to its own citizens.”).

Having determined that the right of a non-resident to resort to the courts is a fundamental right which falls within the protection of the Privileges and Immunities Clause, the second step of the inquiry is to determine whether the discrimination violates the protections of that Clause. In this context, while a state government may set the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them, it must do so in accordance with the restrictions of the Privileges and Immunities Clause. Chambers, 207 U.S. at 148.

In enacting West Virginia Code §56-1-1(c), the West Virginia Legislature stated that its purpose was to “preserve West Virginia courts for West Virginians and for nonresidents who are injured in this state.” S.B. 213, 2003 Sess. (W.Va. February 13, 2003). Although the legislative history fails to provide any further guidance as to the statute’s purpose, one could assume that subsection (c) was added to address concerns regarding over-crowding of the courts. While there are manifest reasons, such as convenience and administrative expense, for preferring residents in access to over-crowded courts, there is nothing in the legislative history to support the contention that the intent of subsection (c) was in fact to address over-crowding of the courts or

that non-residents are a particular source of such over-crowding. See United Building & Construction Trades Council of Camden County and Vicinity, 465 U.S. at 222. Accordingly, there is no legislative basis for upholding West Virginia Code §56-1-1(c) pursuant to the requirements of the Privileges and Immunities Clause.

More importantly, while a state government may decide whether and to what extent the courts will entertain transitory actions which have arisen in other jurisdictions, those policy decisions must operate in the same way with respect to citizens of the state and non-citizens. Chambers, 207 U.S. at 148-149. “Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from the citizens of other States is void, because in conflict with the supreme law of the land.” Id. at 149; see also Missouri ex rel. Southern Railway Co. v. Mayfield, 340 U.S. 1, 3-4 (1950)(a state violates the Privileges and Immunities Clause if it allows suits by citizens arising from conduct occurring outside the state if it simultaneously denies such suits to non-citizens)⁴; Miles v. Illinois Central Railroad Co., 315 U.S. 698, 704 (1942)(for a given substantive law, a state violates the Privileges and Immunities Clause if it denies non-citizens access to its courts while simultaneously granting access to its own citizens); Chambers, 207 U.S. at 150 (“as the test of jurisdiction is the citizenship of the

⁴ For an example of the practical effects of discriminating between resident and non-resident plaintiffs in transitory actions, consider West Virginia Code §56-1-1(c)'s requirement that a substantial part of the acts or omissions occur in the State of West Virginia in any suit by a non-resident, which would directly conflict with the long arm jurisdiction granted by West Virginia Code §56-6-66(a)(4)-(5) where a non-resident defendant has caused injury in West Virginia “by an act or omission outside this state” or “a sale of goods outside this state[.]” By definition, all actions founded upon the long arm jurisdiction of West Virginia Code §56-6-66(a)(4)-(5) involve acts or omissions which occurred outside the State of West Virginia. Therefore all long-arm actions by non-resident plaintiffs would be subject to dismissal under West Virginia Code §56-1-1(c).

person in whom the right of action was originally vested, and the action is entertained if that person was a citizen of Ohio and declined if he was a citizen of another State, there is a real and substantial sense a discrimination forbidden by the Constitution”).

Therefore, the fact that West Virginia Code §56-1-1(c) allows West Virginia residents to pursue in the West Virginia courts, transitory causes of action arising from events outside the state, while simultaneously prohibiting such actions by non-residents, clearly violates the Privileges and Immunities Clause of the U.S. Constitution. Accordingly, West Virginia Code §56-1-1(c) must be declared unconstitutional.

The Legislature could have avoided the Constitutional flaw in the newly added subsection of 56-1-1 merely by including language which would have made it apply both to West Virginia citizens who are residing outside of the State and to citizens of other states. Instead, it chose to permit all West Virginians the opportunity of utilizing West Virginia courts to seek redress for injuries sustained in other States, while denying that privilege to all citizens of foreign jurisdictions. It is precisely this type of discriminatory legislation that is proscribed by the Privileges and Immunities Clause.

Moreover, the new subsection as written will create havoc for other types of actions and is in conflict with other statutes. For example, The Uniform Enforcement of Foreign Judgments Act⁵ will be rendered impotent when non-residents seek to collect judgments for foreign torts against West Virginia debtors if the new subsection survives. West Virginia Code, § 55-14-2 provides in relevant part: “A judgment so filed has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating or staying as a judgment of a

⁵ The full text of 55-14-2 is found in the Addendum.

circuit court of this state” It is clear that under that statute a domestic corporation wishing to contest a foreign judgment may avail itself of all defenses and procedures for reopening or vacating a judgment against it as could be asserted had the action been maintained in a circuit court of this State. With the language of §56-1-1(c), a domestic corporation wishing to contest collection efforts against it, could raise as a defense or as a basis for reopening or vacating the foreign judgment, the fact that none of the acts giving rise to the foreign civil action arose in this State and therefore the collection efforts initiated by a citizen of another state under § 55-14-2 could be abated. Conversely, a West Virginia citizen obtaining a foreign judgment under identical facts and circumstances could avail himself of collecting a foreign judgment against a West Virginia corporation. The Privileges and Immunities clause was inserted in the federal Constitution to prohibit just such discriminatory treatment of foreign citizens in the courts of this State.

Similarly, another section of the Uniform Reciprocal Enforcement of Foreign Judgments Act which permits a judgment creditor to retain the option of bringing an action instead of proceeding under the procedures of the reciprocal act would also be precluded for non-resident creditors, but would remain intact for judgment creditors who are West Virginia citizens. West Virginia Code, § 55-14-6 provides: “The right of a judgment creditor to bring an action to enforce his judgment instead of proceeding under this article remains unimpaired.” The new venue statute language is in direct conflict with the Uniform Enforcement of Judgments Act.

Mr. Morris suggests that this Court should strike down the new subsection on this basis alone. But, the factual scenario of the instant case presents a further twist to the Privileges and

Immunities Clause analysis of West Virginia Code §56-1-1(c). Constitutional analysis of transitory actions has traditionally been confined to those matters which involve a cause of action which arose out-of-state, non-resident plaintiffs, and non-resident defendants. The matter at hand differs significantly and critically from that factual scenario in that Jefferds is incorporated in and maintains its principal office in West Virginia. Hence, Jefferds is not only effectively a citizen and resident of the West Virginia forum, it owes its very existence to the authority of the State of West Virginia.

Case law exploring the constitutional ramifications of state statutes affecting the rights of non-resident plaintiffs in state court actions against resident defendants is virtually non-existent. The reason for this lack of authority is that the constitutional prohibitions against such statutes are so obvious. This is particularly true for a defendant domestic corporation, which derives its legal status from the laws and authority of the state in which it is incorporated. "If defendant were a domestic corporation, there would be no doubt of plaintiff's right to sue in this State on her cause of action." Gober v. Federal Life Ins. Co., 255 Mich. 20, 24, 237 N.W. 32, 33 (Mich. 1931)(Privileges and Immunities Clause analysis of a non-resident plaintiff suing a non-resident defendant on a cause of action which arose out-of-state); *see also* W.Va. Code §31D-3-302(1)(one of the general powers of a corporation incorporated under the laws of West Virginia is the power "[t]o sue and be sued[.]").

In other words, under the facts of this case, West Virginia Code §56-1-1(c), if valid, would immunize a defendant West Virginia domestic corporation against an action initiated by a non-resident in the very state of authority under which the corporation exists. This provision is blatantly improper under the Privileges and Immunities Clause and is patently

unconstitutional.

Furthermore, West Virginia Code §56-1-1(c) is also unconstitutional when analyzed pursuant to the West Virginia Constitution which provides that “The courts of this State shall be open, and every person for an injury done to him, in his person, property, or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial, or delay.” W.Va. Const. art. III, §17. This constitutional provision does not discriminate between persons who are residents or citizens of West Virginia and those person who are not. Rather, this section simply states that “every person” has a right to seek redress in the courts of this State. And when read in *pari materia* with W.Va. Const. Art. III, § 1, it is clear that our Constitution recognizes the right of all people to protect life and liberty and to seek and obtain safety:

“All men are, by nature, equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely: the enjoyment of life and liberty, with the means of acquiring and possessing property, and of pursuing and obtaining happiness and safety.”
Id.

Our Constitution does not differentiate between the rights of West Virginia citizens and the rights of citizens of sister states. It recognizes that all men have inherent rights. And it affords protection of those rights in the Courts of this State to all citizens under Art. III, § 17.

Therefore, since West Virginia Code §56-1-1(c) clearly discriminates between resident and non-resident plaintiffs in regulating access to the West Virginia courts when a cause of action arises outside the State, that code section is unconstitutional pursuant to both the Privileges and Immunities Clause of the U.S. Constitution and the Open Courts Clause of the West Virginia Constitution. Accordingly, the trial court erred in failing to hold West Virginia

Code §56-1-1(c) unconstitutional and in granting the Defendants' motions to dismiss pursuant to that statute.

B. The Circuit Court committed reversible error in failing to grant the Petitioner's motion to amend the Complaint (particularly given that the Circuit Court nevertheless relied on the Amended Complaint in ruling on the Defendants' motions to dismiss).

Mr. Morris moved in the trial court to amend his Complaint to add venue allegations in response to the Defendants' motions to dismiss. [Plaintiff's Response to Defendants' Crown and Jefferds Motions to Dismiss and to Crown's Motion for Protective Order, pp. 5, 7; Plaintiff's Amended Response to Defendants' Crown and Jefferds Motions to Dismiss and to Crown's Motion for Protective Order, 4-6, 7; Plaintiff's Motion to Amend Complaint]. Although the trial court referred to the proposed amendments to the Complaint in ruling on the Defendants' motions to dismiss, and may have effectively treated the first Amended Complaint as though it were granted in its rulings, the Circuit Court erred in failing formally to allow the amendment of the Complaint. [September 1, 2004 "Order," Findings of Fact ¶7, Conclusions of Law ¶6; November 24, 2004 "Order," Conclusions of Law ¶7; November 29, 2004 "Order Denying Plaintiff's Motion to Reconsider"]. And it never acted upon the revised Amended Complaint. A trial court's ruling on a motion to amend is reviewed under an abuse of discretion standard. Barney v. Auvil, 195 W.Va. 733, 737 (1995).

Mr. Morris' original Complaint did not contain allegations of the facts supporting his choice of venue, as there is no requirement in West Virginia that such facts be pled in a complaint.⁶ Accordingly, the relevant inquiry before the trial court was not whether the

⁶ To the contrary, the only statute which speaks to the issue is 56-4-14 which specifically provides that allegations of venue need not be pleaded.

Complaint alleged facts supporting venue, but whether Mr. Morris could allege such facts supporting venue. As noted above, the Defendants' sole response to the Complaint was the filing of motions to dismiss alleging that venue was improper under West Virginia Code §56-1-1.

After reviewing the Defendants' motions to dismiss and noting the nature of those motions, on August 20, 2004, Mr. Morris moved to amend the Complaint to address the Defendants' objections. [Plaintiff's Response to Defendants' Crown and Jefferds Motions to Dismiss and to Crown's Motion for Protective Order, pp. 5, 7; Plaintiff's Amended Response to Defendants' Crown and Jefferds Motions to Dismiss and to Crown's Motion for Protective Order, 4-6, 7; Plaintiff's Motion to Amend Complaint]. On November 22, 2004, Mr. Morris renewed his motion to amend the Complaint in "Plaintiff's Supplemental Memorandum" and attached a revised Amended Complaint in light of the Defendants' evolving arguments. [Plaintiff's Supplemental Memorandum; Attachment A to Plaintiff's Supplemental Memorandum].

The trial court never explicitly ruled on the Mr. Morris' motion to amend although it is clear that the trial court considered the Amended Complaints in issuing its orders dismissing the Defendants from this action. [September 1, 2004 "Order" ("The Court has considered the...proposed Amended Complaint[.]"); November 24, 2004 "Order" ("The Court having considered...the allegations in the plaintiff's complaint and proposed amended complaint[.]")].

Rule 15(a) of the West Virginia Rules of Civil Procedure provides that a party may amend a pleading by leave of court, and that such leave shall be freely given when justice requires. The West Virginia Supreme Court has noted that Rule 15 amendments should rarely be denied and are generally allowed to cure jurisdictional or venue defects. Brooks v. Isinghood,

213 W.Va. 675, 684, 685 n.7 (2003). This principle should hold particularly true with respect to a motion to dismiss based upon improper venue, which is to be decided on the face of the pleadings. Rhododendron Furniture & Design, Inc. v. Marshall, 214 W.Va. 463, 466 (2003)(only matters contained in the pleadings can be considered in ruling on a motion to dismiss under Rule 12(b)).

Mr. Morris contends that the trial court abused its discretion in failing to permit the amendment of the Complaint for the following reasons: (1) Given that a party is not required to plead facts establishing venue in his complaint and that motions to dismiss are decided upon the contents of the pleadings, amendment of a complaint should be permitted to address objections raised in a motion to dismiss. (2) Neither Defendant objected to Mr. Morris' motions to amend the Complaint. (3) Discovery in the case had not yet begun and the Defendants would suffer no prejudice in their preparation for trial as a result of the amendment. (4) The trial court actually considered the Amended Complaints in ruling on the Defendants' motions to dismiss.

Accordingly, the trial court erred in failing to grant the Petitioner's motion to amend his Complaint to address the venue objections raised by the Defendants.

C. The Circuit Court committed reversible error in failing to hold that the Petitioner had complied with the requirements of West Virginia Code §56-1-1(c) by alleging that Jefferds had engaged in substantial acts or omissions in West Virginia.

As an alternative response to the Defendants' motions to dismiss, Mr. Morris alleged that he had complied with the requirements of West Virginia Code §56-1-1(c) by alleging that Jefferds had engaged in substantial acts or omissions in the State of West Virginia which gave rise to Mr. Morris' claim. [Plaintiff's Amended Response to Defendants' Crown and Jefferds

Motions to Dismiss and to Crown's Motion for Protective Order, pp. 4-6; Plaintiff's Supplemental Memorandum, pp. 3-4]. The trial court ignored the allegations of the Amended Complaint and erred in granting the Defendants' motions to dismiss. [September 1, 2004 "Order"; November 24, 2004 "Order," Findings of Fact ¶4, Conclusions of Law ¶¶6-7; November 29, 2004 "Order Denying Plaintiff's Motion to Reconsider"]. A trial court's ruling on a motion to dismiss is reviewed under a *de novo* standard. Kopelman and Associates v. Collins, 196 W.Va. 489, 492 (1996).

Without waiving any of his arguments against the constitutional validity of West Virginia Code §56-1-1(c), Mr. Morris alternatively responded to the Defendants' motions to dismiss asserting that the Amended Complaint complies with that code section and alleged that a substantial part of the acts or omissions giving rise to the Complaint occurred in West Virginia. [Plaintiff's Amended Response to Defendants' Crown and Jefferds Motions to Dismiss and to Crown's Motion for Protective Order, pp. 4-6; Plaintiff's Supplemental Memorandum, pp. 3-4].

West Virginia Code §56-1-1(c) provides that a non-resident may file suit in a West Virginia court if "all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state."

In paragraph 10 of the Amended Complaint,⁷ the Plaintiff alleged that Jefferds engaged in numerous and substantial acts and omissions which give rise to the Plaintiff's claims, in the State of West Virginia:

⁷ Mr. Morris actually submitted two Amended Complaints in light of the Defendants' evolving arguments in their motions to dismiss. The first amended complaint was attached to "Plaintiff's Motion to Amend Complaint" and the second was attached as Exhibit A to the "Plaintiff's Supplemental Memorandum." Reference herein is made to the Amended Complaint attached to the "Plaintiff's Supplemental Memorandum."

Venue is proper in the State of West Virginia (including pursuant to West Virginia Code §56-1-1(c)) because, upon information and belief:

- (a) Defendant Jefferds is a citizen and resident of West Virginia and does continuous and systematic business throughout the State of West Virginia; and
- (b) The following acts or omissions which form a substantial part of the acts or omissions giving rise to the Plaintiff's claims occurred within the State of West Virginia:
 - (i) Defendant Jefferds inadequately serviced and maintained, failed to provide adequate warnings, failed to provide adequate training, provided warranties, failed to adequately test, failed to adequately inspect, failed to adequately analyze the dangers of, failed to adequately disclose the dangers of, failed to guard against the dangers of, marketed, distributed, installed, and / or sold the forklift at issue at or from its offices in West Virginia;
 - (ii) Defendant Jefferds made (or failed to make) management level analyses and decisions from its West Virginia corporate headquarters related to service and maintenance schedules and items; training of service and maintenance personnel; product safety and the dangers associated with the use of the product; operator safety; warnings to be provided and the sufficiency thereof; operator training and instruction and the sufficiency thereof; warranties to be provided; testing; inspection; necessary guarding; product lines to be carried; marketing; distribution; sale; installation; associated contractual arrangements or other agreements; and other items related to stand-up forklifts in general, and the forklift which caused the Plaintiff's injury in particular;
 - (iii) Defendant Jefferds made the contractual arrangements or other agreements related to the provision and installation of the subject forklift to the Alcoa facility, through its office in West Virginia;
 - (iv) The instructions, manuals, warnings, service records, installation records, warranties, and other information about the forklift were provided by Defendant Jefferds out of its West Virginia offices;
 - (v) The employees of Defendant Jefferds who serviced the forklift both prior to and after installation at the Alcoa facility were

provided from its office in West Virginia;

- (vi) The employees of Defendant Jefferds who serviced the forklift both prior to and after installation at the Alcoa facility were trained at its office in West Virginia;
- (vii) Defendant Jefferds failed, at its office in West Virginia, to properly evaluate and investigate the design of Crown's stand-up forklifts and the associated dangers;
- (viii) Defendant Jefferds failed, at its office in West Virginia, to properly evaluate and investigate the accident history of Crown stand-up forklifts, and to warn its customers and end users thereof;
- (ix) Defendant Jefferds failed, at its office in West Virginia, to adequately analyze the hazards to the operators of the forklifts and guard against the same;
- (x) Defendant Jefferds failed, from its offices in West Virginia, to provide adequate operator training and instruction;
- (xi) Defendant Jefferds marketed, distributed, sold, or otherwise installed the forklift from its offices in West Virginia;
- (xii) Defendant Jefferds engaged in other, as yet unidentified, substantial acts or omissions related to the claims being asserted.

In ruling on a motion to dismiss, the allegations of a complaint are to be taken as true and all reasonable inferences resolved in favor of the plaintiff. John W. Lodge Distributing Co. v. Texaco, 161 W.Va. 603, 605 (1978). Taking the foregoing allegations as true, venue was proper given that Morris alleged substantial acts and omissions on the part of Defendant Jefferds in the State of West Virginia which gave rise to Morris' claims.

Therefore, the trial court erred in failing to find that the Petitioner had complied with the venue requirements of West Virginia Code §56-1-1(c) and in granting the Defendants' motions to dismiss.

D The Circuit Court committed reversible error in holding that West Virginia Code §56-1-1(c) requires the Petitioner to separately establish venue as to each individual claim and each individual defendant, and in failing to hold that since venue was proper as to Jefferds under West Virginia Code §56-1-1(c), venue was also proper as to Crown.

In the trial court, Mr. Morris alleged that since venue was proper as to Jefferds, venue was also proper as to Crown under existing precedent. [Plaintiff's Motion to Reconsider, pp. 2, 4; Plaintiff's Supplemental Memorandum, pp. 3-4]. The trial court erred in holding that venue under West Virginia Code §56-1-1(c) had to be separately established with respect to each Defendant and in granting Crown's motion to dismiss. [September 1, 2004 "Order," Conclusions of Law ¶¶5-8; November 24, 2004 "Order"; November 29, 2004 "Order Denying Plaintiff's Motion to Reconsider," ¶¶4-5]. A trial court's ruling on a question of law is reviewed under a *de novo* standard. Lawson v. Hash and Benford, 209 W.Va. 230, 232 (2001).

Mr. Morris argued in the trial court, as described above, that venue pursuant to West Virginia Code §56-1-1(c) was properly established as to Jefferds in Kanawha County where its principal place of business was located and where its president resides.⁸ He further asserted that having established venue with respect to Jefferds, venue was also proper as to Crown. [Plaintiff's Motion to Reconsider, pp. 2, 4; Plaintiff's Supplemental Memorandum, pp. 3-4]. In support of this argument, Morris noted that West Virginia law does not require a plaintiff to

⁸ Additionally, Morris submits that because Jefferds is a domestic corporation, that pursuant to West Virginia Code, 56-1-1(a)(2), venue lies to it in any county where it has its principal place of business or wherein its president or chief executive officer resides:

“(a) Any civil action or other proceeding, except where it is otherwise specially provided, may hereafter be brought in the circuit court of any county”

(2) If a corporation be a defendant, wherein its principal office is or wherein its mayor, president or other chief officer resides”

“

establish venue with respect to each defendant. Rather, West Virginia follows the well-established principle that “once venue is proper for one defendant, it is proper for all other defendants subject to process.” *See e.g., McGuire v. Fitzsimmons*, 197 W.Va. 132, 137 (1996); *Kenamond v. Warmuth*, 179 W.Va. 230, 231-232 (1988); *Union Carbide & Carbon Corp. v. Linville*, 142 W.Va. 160, 164-165 (1956); *Webber v. Offhaus*, 135 W.Va. 138, 146-147 (1950); *McConaughey & Co. v. Bennett*, 50 W.Va. 172, 179 (1901)(seminal case from which the other cases are derived).

However, in dismissing the Mr. Morris’ Complaint, the trial court held that West Virginia Code §56-1-1(c) requires that Mr. Morris separately establish venue with respect to Crown, including the allegation of substantial acts or omissions by Crown in the State of West Virginia. [Sept. 1, 2004 “Order,” Conclusions of Law ¶¶5-8; Nov. 29, 2004 “Order Denying Plaintiff’s Motion to Reconsider,” ¶¶4-5].

Mr. Morris asserts that this conclusion of law by the trial court was erroneous for the following reasons.

First, there is nothing in West Virginia Code §56-1-1(c) or its legislative history which states that the West Virginia Legislature intended to abrogate the traditional rule that once venue was proper as to one defendants, it is proper as to all defendants. *See e.g., McGuire*, 197 W.Va. at 137; *Kenamond*, 179 W.Va. at 231-232; *Union Carbide & Carbon Corp.*, 142 W.Va. at 164-165; *Webber*, 135 W.Va. at 146-147; *McConaughey & Co.*, 50 W.Va. at 179.

Second, in stating that venue is improper unless “all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state,” the focus of West Virginia Code §56-1-1(c) is clearly on whether any such acts or omissions occurred in the State. This

inquiry is not tied to the conduct of the individual defendants, and in fact, the word “defendant” doesn’t even appear in this clause!

Furthermore, nothing in any other part of West Virginia Code §56-1-1(c) or its legislative history suggests that the Legislature intended to require a plaintiff to establish venue with respect to each defendant. Certainly, had the Legislature intended such a construction, it would have stated that venue had to be established with regard to each defendant. In fact, the Legislature did choose to require that “each plaintiff must independently establish proper venue.” W.Va. Code §56-1-1(c). The fact that the Legislature added a specific requirement with respect to “each plaintiff,” but did not choose to do the same for “each defendant,” strongly suggests that the trial court’s conclusion that West Virginia Code §56-1-1(c) requires that venue be established with respect to each defendant, is not only contrary to the actual language of the statute, but also contrary to the Legislature’s intent. “[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.” Appalachian Power Co. v. State Tax Department, 195 W.Va. 573, 585-586 (1995)(cits. omitted).

Third, requiring a non-resident plaintiff to establish venue under West Virginia Code §56-1-1(c) with respect to each defendant would create a conflict with respect to the procedural rules related to joinder of parties. The mandatory joinder rule of W.Va.R.Civ.P. 19(a) requires a plaintiff to join in one action all persons who are subject to service of process and in whose absence complete relief cannot be accorded among those already parties. Similarly, the permissive joinder rule of W.Va.R.Civ.P. 20 permits a plaintiff to join as defendants, all persons whose liability arises “out of the same transaction, occurrence, or series of occurrences and if any question of law or fact common to all defendants will arise in the action.” The goal of both

mandatory and permissive joinder is the promotion of judicial economy by preventing both the duplication of effort and the uncertainty embodied in piecemeal litigation.

In a case such as this one however, where a substantial part of the acts or omissions of one joint tortfeasor occurred in West Virginia, but where the acts or omissions of the second joint tortfeasor occurred outside the State, a requirement under West Virginia Code §56-1-1(c) that the non-resident plaintiff independently establish venue with respect to the out-of-state tortfeasor would prevent joinder in a single action of the out-of-state tortfeasor. There is nothing in West Virginia Code §56-1-1(c) or its legislative history which suggests that the Legislature intended to abolish the joinder rules in such circumstances.

Therefore, the trial court erred in holding that a plaintiff is required to establish venue separately with respect to each defendant pursuant to West Virginia §56-1-1(c) and in failing to find that since the Petitioner had established venue with respect to Jefferds, venue was also proper with regard to Crown.

As a final note on this issue, Morris would point out that there is no requirement that a Complaint allege matters of venue or jurisdiction. Indeed, the Legislature enacted law which eliminated the need for either type of averment.⁹

E. The Circuit Court committed reversible error by applying the wrong legal standards in ruling on Jefferds' motion to dismiss.

In ruling on Jefferds' motion to dismiss, the trial court erred in applying the wrong legal standards by failing to take the allegations of the Morris' Amended Complaint as true and by

⁹ See the texts of West Virginia Code, § 56-4-14 and § 56-4-15 which are included in the Addendum..

basing its decision in part on an affidavit submitted by Jefferds. [Affidavit of David Sorrells signed August 30, 2004; September 1, 2004 "Order"; November 24, 2004 "Order," Conclusions of Law ¶6; November 29, 2004 "Order Denying Plaintiff's Motion to Reconsider"]. A trial court's ruling on a question of law is reviewed under a *de novo* standard. Lawson, 209 W.Va. at 232. A trial court's ruling on a motion to dismiss is also reviewed under *de novo* standard. Kopelman and Associates, 196 W.Va. at 492.

In ruling on a motion to dismiss, the allegations of a complaint are to be taken as true and all reasonable inferences resolved in favor of the plaintiff. John W. Lodge Distributing Co., 161 W.Va. at 605. In light of the allegations in paragraph 10 of the Plaintiff's Amended Complaint described in subsection (C) above, the trial court erred when it held that "there is a complete absence of any proof that all or a substantial part of any acts or omissions giving rise to plaintiff's claims against Jefferds Corp. in this action occurred in the state of West Virginia[.]" [November 24, 2004 "Order," Conclusions of Law ¶6].

Furthermore, in ruling on a motion to dismiss under West Virginia Rule of Civil Procedure 12(b), only matters contained in the pleadings are to be considered. Rhododendron Furniture & Design, Inc., 214 W.Va. at 466. Accordingly, the trial court erred when it relied upon the Affidavit of David Sorrells supplied by Defendant Jefferds in granting the Defendants' motions to dismiss.¹⁰

Therefore, the trial court erred in ruling on the Defendants' motions to dismiss when it failed to take the allegations of the Petitioner's Amended Complaint as true and when it relied

¹⁰ Notably, Mr. Morris was never given the opportunity to test the sufficiency of the affidavit or to otherwise conduct discovery related to the issues raised in the Defendants' motions to dismiss. See subsection (F), *infra*.

upon matters outside of the pleadings.

F. The Circuit Court committed reversible error by failing to permit the Petitioner to conduct discovery in opposition to Jefferds' motion to dismiss.

Upon converting the Defendants' motions to dismiss to motions for summary judgment, the trial court erred in failing to permit Mr. Morris to engage in discovery to support his responses to the motions to dismiss. A trial court's ruling on a motion to dismiss is reviewed under a *de novo* standard. Kopelman and Associates, 196 W.Va. at 492.

In ruling on a motion to dismiss under West Virginia Rule of Civil Procedure 12(b), only matters contained in the pleadings are to be considered. Rhododendron Furniture & Design, Inc., 214 W.Va. at 466. If a court opts to consider matters outside of the pleadings, the motion is converted into one for summary judgment pursuant to West Virginia Rule of Civil Procedure 56. Id. Furthermore, when a court opts to treat a Rule 12 motion as one for summary judgment under Rule 56, the responding party is entitled to notice thereof from the court and a reasonable opportunity to submit the types of materials which may be considered under Rule 56 such as pleadings, depositions, answers to interrogatories, admissions, and affidavits. Kopelman and Associates, 196 W.Va. at 493-495; W.Va.R.Civ.P. 56(c). This includes providing the responding party with a reasonable opportunity to conduct necessary discovery. Elliott v. Schoolcraft, 213 W.Va 69, 73 (2002).

When the trial court opted to consider the Sorrells Affidavit supplied by Jefferds in ruling on the motions to dismiss, it effectively converted those motions to motions for summary judgment pursuant to Rule 56. [Affidavit of David Sorrells signed August 30, 2004; September 1, 2004 "Order"; November 24, 2004 "Order," Conclusions of Law ¶6; November 29, 2004

“Order Denying Plaintiff’s Motion to Reconsider”]. At that point, Mr. Morris was entitled to notice from the trial court that it intended to treat the motions as motions for summary judgment and a reasonable opportunity to conduct discovery on those issues. However, despite Mr. Morris’ requests to conduct discovery on the venue issues [*see e.g.*, “Plaintiff’s Amended Response to Defendants’ Crown and Jefferds Motions to Dismiss and to Crown’s Motion for Protective Order,” pp. 6-7], the trial court erred in failing to provide the required notice and in failing to permit Mr. Morris to conduct discovery on the venue issues.

Therefore, the trial court erred in failing to provide notice to the Mr. Morris that the court intended to treat the Defendants motions as motions for summary judgment and in failing to permit the Petitioner to conduct discovery to respond to the venue objections raised by the Defendants.

G. The Circuit Court erred in holding that West Virginia Code §56-1-1(c) requires the filing of an affidavit of inability to obtain jurisdiction over the defendant in cases where a non-resident plaintiff has alleged that a defendant engaged in substantial acts or omissions in the State of West Virginia.

In ruling on the Defendants’ motions to dismiss, the trial court erred in holding that the Mr. Morris was required to file an affidavit under West Virginia Code §56-1-1(c) even though he alleged that a substantial part of the acts or omissions giving rise to Mr. Morris’ claim occurred in the State of West Virginia. [September 1, 2004 “Order,” Findings of Fact, ¶8; November 24, 2004 “Order,” Findings of Fact ¶5; November 29, 2004 “Order Denying Plaintiff’s Motion to Reconsider”]. A trial court’s ruling on a question of law is reviewed under a de novo standard. Lawson, 209 W.Va. at 232.

As noted above, the first paragraph of West Virginia Code §56-1-1(c) reads as follows:

Effective for actions filed after the effective date of this section, a nonresident of the state may not bring an action in a court of this state unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state: Provided, That unless barred by the statute of limitations or otherwise time barred in the state where the action arose, a nonresident of this state may file an action in state court in this state if the nonresident cannot obtain jurisdiction in either federal or state court against the defendant in the state where the action arose. A nonresident bringing such an action in this state shall be required to establish, by filing an affidavit with the complaint for consideration by the court, that such action cannot be maintained in the state where the action arose due to lack of any legal basis to obtain personal jurisdiction over the defendant.

The plain language of the statute reveals that there are two conditions under which a non-resident plaintiff may file suit in a West Virginia court: (1) if a substantial part of the acts or omissions giving rise to the claim occurred in the State of West Virginia or (2) if the non-resident plaintiff cannot obtain jurisdiction against the defendant in the state where the cause of action arose. These two avenues are in most cases mutually exclusive of each other in that if substantial acts or omissions giving rise to the claim occurred in West Virginia (option 1), then the cause of action did not arise in a foreign state (option 2); and vice versa.

The distinct clause breaks in the statute's legislative history further reinforces these two separate avenues for a non-resident plaintiff to file suit in West Virginia based upon a transitory action, when they state that the addition of subsection (c) to West Virginia Code 56-1-1 is an act "...; providing that a nonresident may not bring an action in this state unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state; setting forth the conditions under which a nonresident can file an action in this state if the nonresident cannot obtain jurisdiction over a defendant in the state where the cause of action arose;..." Enrolled S.B. 213, 2003 Sess. (W.Va., Mar. 6, 2003).

Only if a non-resident plaintiff brings suit under the second option of West Virginia Code §56-1-1(c) where the cause of action arose in a foreign state, must he file an affidavit with the complaint stating “that such action cannot be maintained in the state where the action arose due to lack of any legal basis to obtain personal jurisdiction over the defendant.” The fact that the affidavit requirement is specifically tied to the non-resident plaintiff’s inability to obtain jurisdiction over a defendant makes it clear that the affidavit requirement is only applicable to the second of West Virginia Code §56-1-1(c)’s avenue under which a non-resident plaintiff may file an action in West Virginia. *See also* Enrolled S.B. 213, 2003 Sess. (W.Va., Mar. 6, 2003)(“...; setting forth the conditions under which a nonresident can file an action in this state if the nonresident cannot obtain jurisdiction over a defendant in the state where the cause of action arose; requiring a nonresident to establish that such action cannot be maintained in the state where the cause of action arose due to lack of any legal basis to obtain personal jurisdiction over the defendant;...”).

Accordingly, the trial court erred in ruling that a non-resident plaintiff who files a lawsuit in West Virginia alleging that a substantial part of the acts of omissions occurred in the State is required to file an affidavit stating that the plaintiff is unable to obtain jurisdiction over the defendant in the state where the cause of action arose.

VI. PRAYER FOR RELIEF

For the foregoing reasons, Appellant, Jeremiah “Bart” Morris respectfully requests that the Supreme Court of Appeals grant his Appeal and reverse the “Order[s]” dated September 1, 2004, and November 24, 2004, respectively granting the motions to dismiss of Defendants

Crown and Jefferds, as well as the "Order Denying Plaintiff's Motion to Reconsider" dated November 29, 2004; and reinstate the Plaintiff's causes of action against Defendant Crown and Defendant Jefferds.

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ADDENDUM TO BRIEF

1. United States Constitution, Article IV, § 2 ¶ 1

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

2. West Virginia Constitution, Article III, § 1.

All men are, by nature, equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely: the enjoyment of life and liberty, with the means of acquiring and possessing property, and of pursuing and obtaining happiness and safety.

3. West Virginia Constitution, Article III, § 17

The courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay.

4. West Virginia Code, § 56-1-1

Venue generally

(a) Any civil action or other proceeding, except where it is otherwise specially provided, may hereafter be brought in the circuit court of any county:

(1) Wherein any of the defendants may reside or the cause of action arose, except that an action of ejectment or unlawful detainer must be brought in the county wherein the land sought to be recovered, or some part thereof, is;

(2) If a corporation be a defendant, wherein its principal office is or wherein its mayor, president or other chief officer resides; or if its principal office be not in this state, and its

mayor, president or other chief officer do not reside therein, wherein it does business; or if it be a corporation organized under the laws of this state which has its principal office located outside of this state and which has no office or place of business within the state, the circuit court of the county in which the plaintiff resides or the circuit court of the county in which the seat of state government is located shall have jurisdiction of all actions at law or suits in equity against the corporation, where the cause of action arose in this state or grew out of the rights of stockholders with respect to corporate management;

(3) If it be to recover land or subject it to a debt, where the land or any part may be;

(4) If it be against one or more nonresidents of the state, where any one of them may be found and served with process or may have estate or debts due him or them;

(5) If it be to recover a loss under any policy of insurance upon either property, life or health or against injury to a person, where the property insured was situated either at the date of the policy or at the time when the right of action accrued or the person insured had a legal residence at the date of his or her death or at the time when the right of action accrued;

(6) If it be on behalf of the state in the name of the attorney general or otherwise, where the seat of government is; or

(7) If a judge of a circuit be interested in a case which, but for such interest, would be proper for the jurisdiction of his or her court, the action or suit may be brought in any county in an adjoining circuit.

(b) Whenever a civil action or proceeding is brought in the county where the cause of action arose under the provisions of subsection (a) of this section, if no defendant resides in the county, a defendant to the action or proceeding may move the court before which the action is

pending for a change of venue to a county where one or more of the defendants resides and upon a showing by the moving defendant that the county to which the proposed change of venue would be made would better afford convenience to the parties litigant and the witnesses likely to be called, and if the ends of justice would be better served by the change of venue, the court may grant the motion.

(c) Effective for actions filed after the effective date of this section, a nonresident of the state may not bring an action in a court of this state unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state: *Provided*, That unless barred by the statute of limitations or otherwise time barred in the state where the action arose, a nonresident of this state may file an action in state court in this state if the nonresident cannot obtain jurisdiction in either federal or state court against the defendant in the state where the action arose. A nonresident bringing such an action in this state shall be required to establish, by filing an affidavit with the complaint for consideration by the court, that such action cannot be maintained in the state where the action arose due to lack of any legal basis to obtain personal jurisdiction over the defendant.

In a civil action where more than one plaintiff is joined, each plaintiff must independently establish proper venue. A person may not intervene or join in a pending civil action as a plaintiff unless the person independently establishes proper venue. If venue is not proper as to any such nonresident plaintiff in any court of this state, the court shall dismiss the claims of the plaintiff without prejudice to refile in a court in any other state or jurisdiction.

5. West Virginia Code, § 56-4-14

Allegations of place where contract was made or act done

It shall not be necessary in any declaration or other pleading to set forth the place in which any contract was made, or act done, unless when, from the nature of the case, the place is material or traversable, and then the allegation may be, as to a deed, note or other writing bearing date at any place, that it was made at such place, or as to any other act, according to the fact, without averring or suggesting that it was at or in the county in which the action is brought, unless it was in fact therein.

6. West Virginia Code, § 56-4-15

Averments as to jurisdiction; profert; oyer

It shall not be necessary in any action to aver that the cause of action arose, or that the matter is, within the jurisdiction of the court, or to make profert of any deed, letters testamentary, or commission of administration; but any party may have oyer in like manner as if profert were made.

7. West Virginia Code, § 55-14-2

Filing and status of foreign judgments

A copy of any foreign judgment authenticated in accordance with an act of Congress or the statutes of this state may be filed in the office of the clerk of any circuit court of this state.

The clerk shall treat the foreign judgment in the same manner as a judgment of any circuit court of this state. A judgment so filed has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating or staying as a judgment of a circuit court of this state and may be enforced or satisfied in like manner: Provided, That

notwithstanding any other provision of this article to the contrary, a citizen of this state shall be entitled to the same exemption from execution, attachment or seizure and sale as a citizen of the state where the original judgment was entered. A debt collector seeking to enforce a foreign judgment in this state shall ensure that any suggestee execution or other legal process seeking to seize property of a debtor pursuant to a foreign judgment shall clearly state, on the face of the petition or other filing, any property exempt in the state in which the original judgment was entered and it shall specify that the property is exempt from execution, attachment or seizure and sale in this state. Any person seeking to enforce a foreign judgment in this state who violates any provision of this section shall be liable to the person against whom the judgment is sought to be enforced for actual damages and, in addition thereto, shall be liable to such person for a penalty in an amount not more than one thousand dollars. Any person seeking to enforce a foreign judgment in this state who willfully violates any provision of this section shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than one thousand dollars or confined in jail not more than one year, or both fined and confined.

8. West Virginia Code, § 55-14-6

Optional procedure

The right of a judgment creditor to bring an action to enforce his judgment instead of proceeding under this article remains unimpaired.