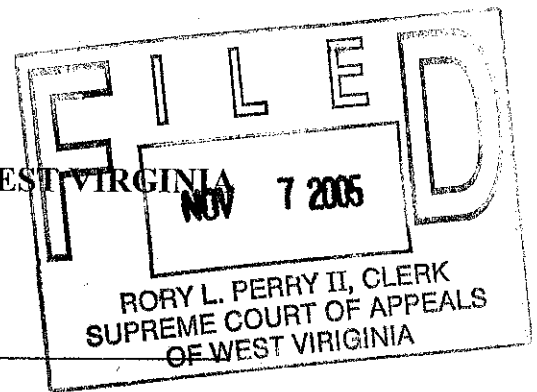


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



Appeal No. 32751

JEREMIAH "BART" MORRIS

Appellant,

v.

**CROWN EQUIPMENT CORPORATION, and
JEFFERDS CORPORATION**

d/b/a HOMESTEAD MATERIALS HANDLING COMPANY

Appellees

**BRIEF OF APPELLEE
CROWN EQUIPMENT CORPORATION**

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TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES	iv
I. NATURE OF THE PROCEEDING AND THE RULINGS BELOW	1
II. STATEMENT OF FACTS	4
III. RESPONSE TO APPELLANT'S ASSIGNMENTS OF ERROR	5
1. The trial court was correct as a matter of law in holding 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 Courts Clause of the West Virginia Constitution.	5
2. The trial court was correct as a matter of law in denying Appellant's motion to amend the Complaint.....	5
3. The trial court was correct as a matter of law in finding that Appellant did not comply with the requirements of West Virginia Code § 56-1-1(c) by alleging that Defendant Jefferds had engaged in substantial acts or omissions in West Virginia.....	5
4. The trial court was correct as a matter of law in holding that West Virginia Code § 56-1-1(c) requires the Appellant to separately establish venue as to each individual defendant.	6
5. The trial court was correct as a matter of law in ruling on Defendant Jefferds' motion to dismiss.....	6
6. The trial court was correct as a matter of law in not permitting the Appellant to conduct discovery in opposition to Defendant Jefferds' motion to dismiss.	6
7. The trial court was correct as a matter of law in holding that West Virginia Code § 56-1-1(c) requires the filing of an affidavit of inability to obtain jurisdiction over the defendant(s) in cases where a non-resident plaintiff has alleged that a defendant engaged in substantial acts or omissions in the State of West Virginia.....	6
IV. POINTS AND AUTHORITIES RELIED UPON	6

V.	DISCUSSION OF LAW.....	8
A.	THE TRIAL COURT WAS CORRECT AS A MATTER OF LAW IN GRANTING CROWN'S MOTION TO DISMISS PURSUANT TO WEST VIRGINIA CODE § 56-1-1(C).....	10
1.	Appellant Cannot Establish Venue in West Virginia and Dismissal Was Proper Pursuant to West Virginia Code § 56-1-1(c).....	11
2.	West Virginia Code § 56-1-1(c) is Constitutional.....	14
i.	West Virginia Code § 56-1-1(c) does Not Violate the Privileges and Immunities Clause.....	15
ii.	West Virginia Code § 56-1-1(c) is a <i>Forum Non Conveniens</i> Statute.....	20
iii.	West Virginia Code § 56-1-1(c) is Not Inconsistent with the Uniform Enforcement of Foreign Judgments Act.....	22
iv.	West Virginia Code § 56-1-1(c) does Not Inappropriately Immunize Domestic Corporations From Suit.....	23
v.	West Virginia Code § 56-1-1(c) does Not Violate the Open Courts/Speedy Trial Clause of West Virginia Constitution.....	24
3.	West Virginia Code § 56-1-1(c) Requires Appellant To Separately Establish Venue As To Each Defendant.....	26
4.	West Virginia Code § 56-1-1(c) Required Appellant To File An Affidavit Of Inability To Obtain Jurisdiction.....	32
5.	The Trial Court Properly Dismissed Appellant's Complaint Against Crown Without Permitting Him to Conduct Discovery.....	33
B.	THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY NOT EXPRESSLY GRANTING APPELLANT'S MOTION TO AMEND.....	34
VI.	CONCLUSION AND REQUEST FOR RELIEF.....	35

TABLE OF AUTHORITIES

Reported Cases of the Supreme Court of Appeals of West Virginia

<u>Appalachian Power Company v. State Tax Department of West Virginia</u> , 195 W.Va. 573, 466 S.E.2d 424 (1995).....	8, 28
<u>Barker v. Traders Bank</u> , 152 W.Va. 774, 166 S.E.2d 331 (1969).....	6
<u>Barney v. Auvil</u> , 195 W.Va. 733, 466 S.E.2d 801 (1995).....	8, 10, 34
<u>Ewing v. Board of Educ. Of County of Summers</u> , 202 W.Va. 228, 503 S.E.2d 541 (1998).....	10
<u>Hansbarber v. Cook</u> , 177 W.Va. 152, 351 S.E.2d 65 (1986).....	6, 11
<u>Jennings v. Smith</u> , 165 W.Va. 791, 272 S.E.2d 229 (1980).....	8, 35
<u>Lane v. Boston Scientific Corp.</u> , 198 W.Va. 447, 481 S.E.2d 753 (1996).....	8
<u>McConaughey & Co. v. Bennett</u> , 50 W.Va. 172, 40 S.E. 540, 542 (1901).....	27
<u>Newhart v. Pennybacker</u> , 120 W.Va. 774, 200 S.E. 350, 352 (1938).....	24, 25
<u>Pioneer Co. v. Hutchinson</u> , 159 W.Va. 276, 220 S.E.2d 894 (1975).....	8, 35
<u>Union Carbide & Carbon Corp. v. Linville</u> , 142 W.Va. 160, 164-65, 95 S.E.2d 54 (1956) ..	27

Other Reported Cases

Federal

<u>Chambers v. Baltimore & Ohio Railroad Co.</u> , 207 U.S. 142 (1907).....	7, 14-15
<u>Douglas v. N.Y., New Haven & Hartford R.R.</u> , 279 U.S. 377 (1929).....	7, 18
<u>Supreme Court of New Hampshire v. Piper</u> , 105 S.Ct. 1272 (1985).....	7, 15, 17
<u>Supreme Court of Virginia v. Friedman</u> , 108 S.Ct. 2260 (1988).....	7, 15

United Building & Construction Trades Council of Camden City and Vicinity v. Mayor and Council of the City of Camden, 465 U.S. 208, 216, 104 S.Ct. 1020, 1026 (1984) 16

State

Gober v. Federal Life Ins. Co., 255 Mich. 20, 237 N.W. 32 (1931)..... 20

Grand Truck Railway Co. v. Wayne Circuit Judge, 106 Mich. 248, 64 N.W. 17 (1895) 20

Larson v. Fire & Marine Insurance Co.; National Coal Co. v. Gas Coke Co.,
168 Mich. 195, 131 N.W. 580 (1911)..... 19

Morgan v. City of Wheeling, 205 W.Va. 34, 43 (1999)..... 16

National Coal Co. v. Gas Coke Co., 168 Mich. 195, 131 N.W. 580 19-20

Owens Corning v. Carter, 997 S.W.2d 560 (Tex. 1999) 21

Rhododendron Furniture & Design, Inc., 214 W.Va. 463, 466 (2003)..... 33

Riffle v. Ranson, 195 W.Va. 121, 126 (1995) 28, 29, 30

Robinson v. Oceanic Steam Navigation Co.,
112 N.Y. 315, 19 N.E. 625, 627, 2 L.R.a. 636..... 19

Whitney v. Madden, 400 Ill. 185, 190, 179 N.E.2d 593, 595 (Ill. 1948)..... 21

Court Rules

West Virginia Rule of Civil Procedure 12(b) 6, 11

West Virginia Rule of Civil Procedure 19(a)..... 31

West Virginia Rule of Civil Procedure 61 8

West Virginia Rule of Civil Procedure 82 8, 31

West Virginia Statutes and Regulations

West Virginia Code 56-1-1(c) [2003] 1-2, 5-6, 8-20, 22-26, 28-29, 31, 35

West Virginia Code 56-3-3 27

Other

West Virginia Senate Bill No. 213, 2003 Sess. (W.Va. February 13, 2003)..... 8, 17

“Georgia On The Nonresident Plaintiff’s Mind: Why The General Assembly Should
Enact Statutory Forum Non Conveniens,” 36 Ga.L.Rev. 1109 (Summer 2002)..... 7, 20, 21

Black’s Law Dictionary, 7th Ed. (1999) 20

Appellee Crown Equipment Corporation (hereafter "Crown"), by its undersigned counsel, respectfully submits this brief in opposition to the Brief of Appellant, Jeremiah "Bart" Morris. This is a products liability case in which a forum-shopping Virginia resident who sustained an injury in Virginia is attempting to establish venue in West Virginia in an effort to avoid Virginia law, including its contributory negligence statute, and make use of what he perceives as advantageous law in West Virginia. There is no connection whatsoever between the accident at Appellant's job in Virginia, Crown, and the State of West Virginia. As such, pursuant to W.Va. Code §56-1-1(c), the Circuit Court dismissed Appellants' action. For the reasons more fully set forth below, Crown respectfully requests that this Honorable Court deny the relief requested in Appellant's Brief on the grounds that the Order dismissing Crown with prejudiced entered on September 1, 2004 and the Order entered on November 29, 2004 denying Appellant's motion for reconsideration by the Circuit Court of Kanawha County, West Virginia were legally correct and did not constitute an abuse of discretion.

I. NATURE OF THE PROCEEDING AND THE RULINGS BELOW

Appellant, a resident of Grottoes, Virginia, filed a multi-count lawsuit in the Circuit Court of Kanawha County, West Virginia seeking compensatory and punitive damages related to personal injuries he allegedly sustained during a May 4, 2002 accident while operating a Crown stand-up forklift at his place of employment in Grottoes, Virginia (Virginia Complaint ¶4.) The forklift was sold by Jefferds Corporation (hereafter, "Jefferds") and manufactured by Crown. In his Complaint, Appellant sought

to impose liability upon both defendants for his alleged injuries, and asserted the following causes of action: Negligence (Count I), Strict Liability (Count II), Failure to Warn (Count III), Breach of Warranty (Count IV), and Punitive Damages (Count V).

Crown filed a motion to dismiss pursuant to West Virginia Code § 56-1-1(c), which provides in part that “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.”¹ In its motion, Crown asserted that Appellant, a Virginia resident seeking damages for injuries he suffered during an accident in Virginia, failed to sufficiently allege that “a substantial part of the acts or omissions giving rise to [his] claim” occurred in West Virginia.

After conducting a hearing, the trial court agreed and granted Crown’s motion to dismiss. Appellant then filed both (1) an Amended Response to Defendants’ Crown and Jefferds Motions to Dismiss and Crown’s Motion for Protective Order, and (2) a Motion to Amend Complaint. The proposed Amended Complaint contained additional

¹ In complete form, Rule 56-1-1(c) states 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. (emphasis added). This subsection became effective June 2003.

allegations against Jefferds alone, claiming that Jefferds conducted various business activities relating to the forklift at issue at its office in West Virginia.

(See Plaintiff's Amended Complaint (Am. Compl.) ¶¶ 3-4.) There were no additional factual allegations in the proposed Amended Complaint that Crown engaged in any acts or omissions in the State of West Virginia giving rise to Appellant's claim.

Thereafter, Crown filed a Reply to Plaintiff's Response to Defendants' Crown and Jefferds Motions to Dismiss, and to Crown's Motion for Protective Order. On September 1, 2004, the Honorable Tod J. Kaufman held a hearing on the motions to dismiss and, by Order of the same date, granted Crown's Motion to Dismiss. See Order dated September 1, 2004.

On September 7, 2004, Appellant filed a Motion to Reconsider the granting of Crown's Motion to Dismiss, for which a hearing was held and for which the court took the matter under advisement. He directed the parties to submit proposed findings of fact and conclusions of law.

On November 22, 2004, Appellant filed a Supplemental Memorandum with an attached second proposed Amended Complaint. As Appellant acknowledges, he attempted to submit two amended complaints. (App. Petition at 20 n.3.) The "second" amended complaint did not contain any new allegations that Crown engaged in any acts or omissions that occurred in West Virginia. (See Attachment A to Plaintiff's Supplemental Memorandum; Petition at 20-21.)

By Order dated November 24, 2004, the trial court granted Jefferds' Motion to Dismiss. Thereafter, Appellant filed a motion for reconsideration, which the trial court

denied by order of November 29, 2004. The findings of each of the three Orders are incorporated herein.

II. STATEMENT OF FACTS

The following facts are beyond refutation. Appellant's Complaint, filed on April 30, 2004, stems from injuries he allegedly sustained during an accident he had while operating a Crown forklift at his place of business in Grottoes, Virginia. Appellant has alleged claims of negligence, strict product liability, failure to warn, and breach of warranty against Crown Equipment Corporation (Crown), the manufacturer of the forklift, and Jefferds Corporation (Jefferds), the company that delivered the forklift to Appellant's Virginia employer, through its office in Virginia.

Crown is an Ohio corporation with its principal place of business in Ohio. (Compl. ¶2.) Jefferds is a West Virginia corporation. However, Jefferds' handling and servicing of the subject forklift took place at and through its facility in Verona, Virginia.

The subject forklift has never been in the State of West Virginia, and Appellant does not allege otherwise.

Appellant claims that "[t]he forklift was designed, manufactured, assembled, tested, inspected, marketed, provided with warnings, provided with training information, distributed, and sold by Defendant Crown." (Compl. ¶5.) Appellant's proposed Amended Complaint further alleges that Crown "does continuous and systematic business throughout the State of West Virginia, including Kanawha County." (Proposed

Am. Compl. ¶7.) There is no allegation that Crown committed any act or omission in West Virginia related to the present action.

Neither the complaint nor the proposed amended complaints alleges that Crown engaged in any acts or omissions within the State of West Virginia. There are no facts plead in the complaint or amended complaints that Crown is not subject to jurisdiction within the Commonwealth of Virginia for the alleged acts or omissions that gave rise to Appellant's cause of action. Appellant did not file an affidavit with the complaint or proposed amended complaint that this action cannot be maintained in Virginia due to the lack of any legal basis to obtain personal jurisdiction over Crown.

Accordingly, as set forth in more detail below, the trial court correctly (1) concluded that Appellant has not alleged sufficient facts to establish venue in Kanawha County or elsewhere in West Virginia; (2) granted Crown's (and Jefferds') motion to dismiss; and (3) denied Appellant's motion for reconsideration.

III. RESPONSE TO APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court was correct as a matter of law in holding that West Virginia Code § 56-1-1(c) was constitutional pursuant to the Privileges and Immunities Clause of the U.S. Constitution and the Open Courts Clause of the West Virginia Constitution.
2. The trial court was correct as a matter of law in denying Appellant's motion to amend the Complaint.
3. The trial court was correct as a matter of law in finding that Appellant did not comply with the requirements of West Virginia Code § 56-1-1(c) by alleging that Defendant Jefferds had engaged in substantial acts or omissions in West Virginia.

4. The trial court was correct as a matter of law in holding that West Virginia Code § 56-1-1(c) requires the Appellant to separately establish venue as to each individual defendant.
5. The trial court was correct as a matter of law in ruling on Defendant Jefferds' motion to dismiss.
6. The trial court was correct as a matter of law in not permitting the Appellant to conduct discovery in opposition to Defendant Jefferds' motion to dismiss.
7. The trial court was correct as a matter of law in holding that West Virginia Code § 56-1-1(c) requires the filing of an affidavit of inability to obtain jurisdiction over the defendant(s) in cases where a non-resident plaintiff has alleged that a defendant engaged in substantial acts or omissions in the State of West Virginia.

IV. POINTS AND AUTHORITIES RELIED UPON

1. The proper method of raising the question of improper venue is by a motion to dismiss. See W.Va.R.Civ.P., Rule 12(b). Hansbarber v. Cook, 177 W.Va. 152, 157, 351 S.E.2d 65, 71 (1986).
2. Effective for actions filed after the effective date of this section [i.e., June 4, 2003], 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. W.Va. Code § 56-1-1(c) [2003].
3. Only matters contained in a pleading can be considered on a motion to dismiss the complaint. See W.Va.R.Civ.P. Rule 12(b), Barker v. Traders Bank, 152 W.Va. 774, 779, 166 S.E.2d 331,334-35 (1969).
4. “[W]hile 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 v. Baltimore & Ohio Railroad Co., 207 U.S. 146, 148 (1907).

5. When examining claims that citizenship or residency classification offends privileges and immunities protection, a two-step inquiry is undertaken: (1) the activity in question must be sufficiently basic to livelihood of the nation so as to fall within purview of privileges and immunities clause, and (2) if challenged, and the restriction deprives nonresidents of protected privilege, it will be invalidated only if the restriction is not closely related to advancement of substantial state interest. Supreme Court of Virginia v. Friedman, 108 S.Ct. 2260 (1988).
6. “[T]here is nothing to prohibit the legislature from using ‘resident’ in the strict primary sense of one actually living in the place for the time,” but a legislature cannot “discriminate between citizens as such.” Douglas v. New York, New Haven & Hartford R.R., 279 U.S. 377, 386-87 (1929).
7. The Privileges and Immunities clause does not preclude discrimination against nonresidents where there is substantial reason for difference in treatment and discrimination practiced against nonresidents bears substantial relationship to state's objective. Supreme Court of New Hampshire v. Piper, 105 S.Ct. 1272 (1985).
8. *Forum non conveniens* enables courts, for fairness and efficiency reasons, to dismiss cases brought by plaintiffs who are non-residents of the forum state. “Georgia On The Nonresident Plaintiff’s Mind: Why The General Assembly Should Enact Statutory Forum Non Conveniens,” 36 Ga.L.Rev. 1109 (Summer 2002). Judicial economy is a common policy objective among jurisdictions that have adopted *forum non conveniens*. 36 Ga.L.Rev. at 1111. *Forum non conveniens* not only provides efficiency benefits for the state judicial system, it also furnishes fairness benefits for litigants. 36 Ga.L.Rev. at 1112. Typically, a case is dismissed (or stayed) under the doctrine when the trial court finds that the case would be heard more conveniently in an alternative forum. *Id.* The reasons are simple: (1) the alternative forum might be more convenient because the witnesses are amenable to process there; (2) the case could require application of the law of the alternative forum state, and such law might be better understood and applied by a court sitting in that state; and (3) the alternative forum might be more accessible to relevant physical evidence; one example being the accident site in a tort case. Ga.L.Rev. at 1112.

9. The West Virginia Legislature's stated purpose of § 56-1-1(c) 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).
10. Plaintiff bears the burden of establishing sufficient jurisdictional facts as to *each* defendant. See Lane v. Boston Scientific Corp., 198 W.Va. 447, 451, 481 S.E.2d 753, 758 (1996).
11. Under West Virginia law, there are two presumptions that apply when interpreting legislative intent: "First, the Legislature is presumed to have known and understood the laws they had earlier enacted. Second, courts must presume that a legislature says in a statute what it means and means in a statute what it says there." See Appalachian Power Company v. State Tax Department of West Virginia, 195 W.Va. 573, 585-586, 466 S.E.2d 424, 436-437 (1995)(citations omitted).
12. The Rules of Civil Procedure are not to be construed to extend or limit jurisdiction or venue. See W.Va.R.Civ.P. 82.
13. The trial court's ruling on a motion to amend is reviewed under an abuse of discretion standard. Barnery v. Auvil, 195 W.Va. 733, 737 (1995).
14. Errors that are harmless or do not affect the substantial rights of parties do not require reversal. See W.Va. R.Civ.P. 61; Jennings v. Smith, 165 W.Va. 791, 272 S.E.2d 229 (1980); Pioneer Co. v. Hutchinson, 159 W.Va. 276, 220 S.E.2d 894 (1975).

V. DISCUSSION OF LAW

Under West Virginia Code § 56-1-1(c), the circuit court did not err by finding that Appellant could not establish venue over Crown because he did not allege that Crown committed any acts or omissions in West Virginia from which his cause of action arose. This finding stands regardless of the determinations regarding Jefferds because, pursuant to W. Va. Code § 56-1-1(c), Appellant was required to establish venue as to Crown, individually, irrespective of Jefferds. In any event, the circuit court did not err in finding

that, under W. Va. Code § 56-1-1(c), Appellant failed to establish venue for Jefferds because he failed to allege that “substantial acts or omissions” giving rise to his claims were committed by Jefferds in West Virginia.

Moreover, W.Va. Code § 56-1-1(c) does not violate the Privileges and Immunities Clause (Clause) of either the United States or the West Virginia Constitution because the right of access to West Virginia courts of a non-resident whose claim took place outside West Virginia and who could raise that action in the state where the claim occurred is not a protected privilege. However, even if it were protected by the Clause, the restriction presented by W.Va. Code § 56-1-1(c) represents the least restrictive means for addressing the substantial state interest of preserving judicial resources for West Virginia residents and non-residents whose claims occurred in West Virginia, i.e., to prevent forum shopping and overcrowding of the state’s court system.

To the extent that the Court considers Appellant’s argument that the circuit court failed to grant his motion to amend his complaint, Crown argues that, if the court determines that the circuit denied the motion, such denial is inconsequential because Appellant’s Amended Complaint still failed to establish venue over Crown. Additionally, the circuit court properly heard Crown’s motion to dismiss without requiring discovery. Finally, because Appellant did not allege that Crown committed substantial acts or omissions in West Virginia from which his claim arose, to establish venue pursuant to W. Va. Code § 56-1-1(c), he was required to produce an affidavit that he could not obtain jurisdiction over Crown in Virginia, where the accident occurred.

Because Appellant did not produce said affidavit, he did not establish venue over Crown and the circuit court appropriately granted Crown's motion to dismiss.

Appellant asserts that the trial court committed reversible error in granting the motions to dismiss and denying his motion to amend. The standard of review for the former is *de novo*, whereas the latter is for an abuse of discretion.² See Ewing v. Board of Educ. of County of Summers, 202 W.Va. 228, 503 S.E.2d 541 (1998); Barney v. Auvil, 195 W.Va. 733, 737 (1995). The record established below clearly demonstrates that the trial court was correct in granting Crown's motion to dismiss, and there was no abuse of discretion in denying the motion to amend.

A. THE TRIAL COURT WAS CORRECT AS A MATTER OF LAW IN GRANTING CROWN'S MOTION TO DISMISS, PURSUANT TO WEST VIRGINIA CODE § 56-1-1(c).³

Crown filed a motion to dismiss pursuant to West Virginia Code § 56-1-1(c), asserting that the cause of action filed by Appellant, who is not a resident of West Virginia, must be dismissed because a substantial part of the acts or omissions giving rise to his claim did not occur in West Virginia. The trial court agreed and dismissed Crown. Where the issue on an appeal from the circuit court is clearly a question of law or involving the interpretation of a statute, the Supreme Court of Appeals applies a *de novo* standard of review. Ewing v. Board of Educ. of County of Summers, 202 W.Va. 228, 503 S.E.2d 541 (1998). A review of the complete record, together with the applicable

² The Circuit Court did not expressly deny Appellant's motion to amend his complaint. However, the court did consider the proposed amended complaint in dismissing this case and, obviously, found the proposed amendments insufficient to establish venue. However, for the sake of completeness, Crown will address the argument.

³ The assignments of error identified in the Petition as A, C-G are addressed in this section.

law, supports the trial court's ruling dismissing Crown's motion to dismiss. Accordingly, this Court should affirm the trial court's ruling and deny the relief requested in Appellant's Brief.

1. Appellant Cannot Establish Venue in West Virginia and Dismissal Was Proper Pursuant to West Virginia Code § 56-1-1(c).

Crown challenged venue by filing a motion to dismiss, which is the proper method of raising the question of improper venue. See W.Va.R.Civ.P., Rule 12(b)(3); Hansbarber v. Cook, 177 W.Va. 152, 157, 351 S.E.2d 65, 71 (1986). It is the plaintiff's burden under West Virginia law to allege facts sufficient to establish venue in West Virginia. See W.Va. Code § 56-1-1(c). West Virginia Code § 56-1-1(c) [2003] states:

Effective for actions filed after the effective date of this section [i.e., June 4, 2003], 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.

(emphasis added). Appellant has conceded both that he is a Virginia resident, and that the accident giving rise to his alleged injuries and this cause of action occurred at his place of employment in Virginia. (Compl. ¶¶ 1, 4; Am. Compl. ¶¶ 1, 4.) Appellant has alleged only that Crown "has conducted and continues to conduct regular and systemic

business in West Virginia.” (Am. Compl. ¶ 2.) However, even assuming this allegation to be true, Appellant still makes no assertion of any wrongdoing by Crown in West Virginia that is specific to his claim. Accordingly, because Appellant, a non-resident of West Virginia, did not allege that any “acts or omissions giving rise to the claim asserted [against Crown] occurred in this state,” Appellant cannot establish venue over Crown and the circuit court appropriately granted Crown’s motion to dismiss. See W.Va. Code § 56-1-1(c) (emphasis added).

Moreover, under W.Va. Code § 56-1-1(c), Appellant cannot establish venue with respect to Jefferds. In a blatant effort to disguise the absence of any connection between his accident and the State of West Virginia, in his Amended Complaint, Appellant attempts to assert vague allegations of activities in which he contends Jefferds engaged in West Virginia. (See Am. Compl. ¶ 7.)

However, it defies reason that any of allegations set forth in Paragraph Seven of the Amended Complaint, assuming they were true, were of the kind that the legislature contemplated would fall within the scope of W.Va. Code § 56-1-1(c) as “a substantial part of the acts or omissions giving rise to the claim.” (emphasis added). Most, if not all, of those activities are standard, commonplace events that would occur at a company’s headquarters during the ordinary course of business. (See, e.g., Am. Compl. ¶ 7(f) and (g) (alleging that arrangements for the service of the forklift and dissemination of instructions, etc. “were provided . . . out of” the West Virginia office.)) If the legislature had intended for such commonplace corporate activities to be sufficient to establish venue, it would have used the language from subsection (a)(2) and provided expressly for

a non-resident plaintiff to establish venue based on the location of the principal office, or where the company does business. Indeed, the rule suggests that these kinds of general activities completed in the ordinary course of business are precisely the types of conduct that the legislature intended to preclude venue for non-residents, as it represents the main distinction between the scope of the actions for which residents and non-residents may establish venue. See W. Va. Code § 56-1-1(a); cf. W.Va. Code §56-1-1(c).

More significantly, a review of the actual tortious allegations in the complaints reveal that none of the alleged activities identified by Appellant as establishing venue relate to the specific claim alleged by Appellant. The allegations against Jefferds (Crown already established, supra, that Appellant alleged no wrongdoing in West Virginia) stem from its purported installation, maintenance, service, and provision of information to its end-users. Appellant has not alleged that any of those activities occurred in West Virginia. For example, there is no allegation that any installation, service, or maintenance of the forklift was conducted in West Virginia. Furthermore, Appellant does not dispute that the end-users, Appellant and his employer, reside in Virginia. Accordingly, any advice, instruction, or warning to them (or failure thereof) would have occurred in Virginia.

Thus, because no alleged substantial acts or omissions giving rise to Appellant's claim, against either Crown or Jefferds, occurred in West Virginia, Appellant failed to

establish venue under W.Va. Code § 56-1-1(c) [2003], and his claims against Crown were properly dismissed.⁴

2. West Virginia Code § 56-1-1(c) is Constitutional.

Because even Appellant realizes the fate of his Complaint under W.Va. Code § 56-1-1(c), he asserts on appeal that West Virginia Code § 56-1-1(c) is unconstitutional because it violates the Privileges and Immunities Clause of the United States Constitution and the Open Courts/Speedy Trial Clause of the West Virginia Constitution. (App. Br. at 21-30.) The trial court correctly found that West Virginia Code § 56-1-1(c) is constitutional because the statute does not distinguish between residents and non-residents. Rather, the statute draws a distinction among non-residents - between those plaintiffs with claims arising outside the state who can and those who cannot obtain jurisdiction in the states in which their claims occurred.

Furthermore, subsection (c) uses the least restrictive means for addressing a substantial state interest: alleviating forum shopping by plaintiffs whose claims are not associated with the state, and preserving the state's scarce judicial resources for the actions appropriately brought in West Virginia. It essentially is a *forum non conveniens* statute which constitutionally preserves the resources of West Virginia for cases that bear a substantial relationship to the State.

⁴ Appellant also argues that because the circuit court relied on an affidavit submitted by Jefferds, the motions to dismiss were converted into summary judgment motions, pursuant to which he is entitled to discovery prior to the motions being heard. However, no supporting documents were submitted by Crown with respect to its motion to dismiss, and the court granted the motion based solely on the pleadings.

i. West Virginia Code § 56-1-1(c) does Not Violate the Privileges and Immunities Clause.

Preliminarily, unlike West Virginia Code § 56-1-1(c), the Privileges and Immunities Clause (Clause) applies to jurisdiction. Appellant admits as much in his argument. Appellant's Brief at p. 24 (citing Chambers v. Baltimore & Ohio Railroad Co., 207 U.S., 142, 148) (1907) ("[W]hile 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.") (emphasis added). West Virginia has not sought to limit jurisdiction pursuant to West Virginia Code § 56-1-1(c); rather, it has clarified that venue will only be appropriate for non-resident cases where at least a substantial part of the acts causing the injury occur in West Virginia, or the suits cannot be brought in the jurisdictions where the injury occurred.

Contrary to Appellant's argument, W.Va. Code § 56-1-1(c) does not run afoul of the Privileges and Immunities Clause. When examining claims that citizenship or residency classifications offend privileges and immunities protection, courts will reject statutes only if they meet two criteria:

(1) the activity in question must be sufficiently basic to livelihood of the nation so as to fall within purview of privileges and immunities clause, and (2) if challenged, and the restriction deprives nonresidents of protected privilege, it will be invalidated only if the restriction is not closely related to advancement of substantial state interest.

Supreme Court of Virginia v. Friedman, 108 S.Ct. 2260 (1988); see also Supreme Court of New Hampshire v. Piper, 105 S.Ct. 1272 (1985) (the Privileges and Immunities clause

does not preclude discrimination against nonresidents where there is substantial reason for difference in treatment and discrimination practiced against nonresidents bears substantial relationship to state's objective).

Initially, this Court must determine whether access to West Virginia's courts by a non-resident who was not injured in West Virginia and who can bring his or her cause of action in the state where the claim occurred, is a privilege protected by the Clause. See Morgan v. City of Wheeling, 205 W.Va. 34, 43 (1999). Crown does not dispute that access to courts is a fundamental privilege. Accordingly, when implementing subsection (c), the legislature ensured that non-residents would not be denied this right by expressly providing for non-residents otherwise excluded from the jurisdiction in which their claims took place⁵ to bring their causes of action in West Virginia. W.Va. Code § 56-1-1(c) (“... 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 he defendant in the state where the action arose.”).

Notably, Appellant quotes the Supreme Court's statement that the Privileges and Immunities Clause “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.” United Building & Construction Trades Council of Camden City and Vicinity v. Mayor and Council of the city of Camden, 465 U.S. 208, 216, 104 S.Ct. 1020, 1026 (1984) (citations omitted) (emphasis added). Thus, while a non-resident's interest in access to a state's court is

⁵ The lone exception to this provision would be if the plaintiff rested on his or her laurels and failed to act within the limitations period set by that jurisdiction. See W.Va. Code §56-1-1(c).

protected generally, the Supreme Court in United Building suggests that this interest may not be protected unless the non-resident enters or makes use of the state's resources.

West Virginia Code § 56-1-1(c) is consistent with this notion.

Here, should this Court find that access to West Virginia courts by non-residents not injured in West Virginia who can bring their action in the state where the claim arose is a privilege protected by the Clause, it should hold that W.Va. Code § 56-1-1(c)'s restriction is closely related to the State's interest in preserving judicial resources, which only West Virginia residents fund, for actions with a substantial relationship to the state. As even Appellant acknowledges, the West Virginia Legislature's stated purpose of W.Va. Code § 56-1-1(c) was to "preserve West Virginia courts for West Virginians and for nonresidents who are injured in this state." (App. Br. at 24 (citing S.B. 213, 2003 Sess. (W.Va. February 13, 2003))). Certainly, a state has a substantial interest in preventing forum shopping and prohibiting plaintiffs who have no connection to the West Virginia, either personally or through their alleged injuries, from usurping state resources and hindering the judiciary simply because they believe West Virginia law may be more favorable to their allegations than the jurisdiction where the accident occurred.

And, contrary to Appellant's argument, the Legislature is not required to describe at length in its legislative history the analytical process or rationale on which the statute is based. Rather, to find that a statute satisfies constitutional requirements, courts need only be presented with a substantial reason for the dissimilar treatment that is closely related to a state interest. Piper, 470 U.S. at 284. Obviously, the courts are being inundated with suits from plaintiffs whose claims are more appropriately heard in other jurisdictions and

who are forum shopping. Otherwise, the State would not have added this provision to the venue statute; it simply defies logic that the Legislature would burden itself with an issue that did not exist. Furthermore, even if lawsuits from plaintiffs with allegations not based in West Virginia had not been burdening the courts prior to 2003, the fear alone of such a problem constitutes a substantial state interest. Certainly, the State cannot be faulted for acting prophylactically.

Appellant even conceded the likelihood that “subsection (c) was added to address concerns regarding over-crowding of the courts” and that “there are manifest reasons, such as convenience and administrative expense, for preferring residents in access to over-crowded courts.” (App. Br. at 24.) And the United States Supreme Court has found that “[t]here are manifest reasons for preferring residents in access to often overcrowded Courts, both in convenience and in the fact that broadly speaking it is they who pay for maintaining the Courts concerned.” Douglas v. New York, N.H. & H.R. Co., 279 U.S. 377, 387, 49 S.Ct. 355, 356 (1929). Accordingly, because W.Va. Code § 56-1-1(c)’s restriction is closely related to the State’s substantial interest in preserving its judicial resources, minimizing overcrowding, and preventing forum shopping, if this Court were to find that the use of West Virginia’s courts by a non-resident whose claim occurred outside of West Virginia and who could bring his or her cause of action in the state where the claim occurred, is protected by the Privileges and Immunities Clause, it should find that the restriction is not unconstitutional.

Furthermore, Appellant completely ignores the legislature’s clear efforts to use the least restrictive means for addressing this important state interest. The Legislature

defined the restriction narrowly, not placing a wholesale restriction on all non-resident plaintiffs, but rather excluding only those non-resident actions involving claims that do not take place in West Virginia and which can be brought in the jurisdiction where the claim arose. West Virginia Code § 56-1-1(c) simply allows for the state to effectively target its scarce judicial resources, provided by its citizens, while distinguishing only those persons who can bring actions in other venues - venues which in most scenarios would be more convenient and better equipped to handle an action where the injury occurred.

In a case upholding the constitutionality of a statute that prohibited non-residents from maintaining a cause of action against a non-resident corporation, such as Crown here, where the subject matter of the claim occurred outside of that state, the appellate court stated:

We quote with approval from 12 R. C. L. p. 116: 'While as just seen the weight of authority is apparently to the effect that in the absence of statutory provisions on the subject, the residence of the plaintiff is not material in determining the question of the liability of a foreign corporation to suit, yet in a number of states statutes have been enacted which, while allowing a resident of the state or a domestic corporation to maintain an action against a foreign corporation for any cause of action, no matter where it arose, provide that an action against a foreign corporation can be maintained by another foreign corporation or a non-resident only in the cases specified; a common provision of this kind being to the effect that such suits can be brought in the domestic courts only where the cause of action arose in the state or the subject matter thereof is situated therein. **The constitutionality of statutes of this nature has been generally upheld.** *

* *'

Of a similar statutory provision then in force in New York, it was said in Robinson v. Oceanic Steam Navigation Co., 112 N.Y. 315, 19 N.E. 625, 627, 2 L.R.a. 636 'The discrimination between resident and non-resident plaintiffs is probably based upon reasons of public policy, that our courts

should not be vexed with litigations between non-resident parties over causes of action which arose outside of our territorial limits. Every rule of comity and of natural justice and of convenience is satisfied by giving redress in our courts to non-resident litigants, when the cause of action arose or the subject-matter of the litigation is situated within this State.' Larson v. Fire & Marine Insurance Co.; National Coal Co. v. Gas Coke Co., 168 Mich. 195, 131 N.W. 580; Grand Truck Railway Co. v. Wayne Circuit Judge, 106 Mich. 248, 64 N.W. 17; 15 C. J. p. 791; 14a C. J. p. 1384.

Gober v. Federal Life Ins. Co., 255 Mich. 20, 22-24, 237 N.W. 32-33 (Mich. 1931).

(emphasis added).

ii. West Virginia Code § 56-1-1(c) is a *Forum Non Conveniens* Statute.

In essence, West Virginia Code § 56-1-1(c) merely is a codification of *forum non conveniens*. By definition, "*Forum non conveniens* is that an appropriate forum – even though competent under the law – may divest itself of jurisdiction if, for the convenience of the litigants and witnesses, it appears that the action should proceed in another forum in which the action might originally have been brought." Black's Law Dictionary, 7th Ed. (1999). *Forum non conveniens* enables courts, for fairness and efficiency reasons, to dismiss cases brought by plaintiffs who are non-residents of the forum state. See "Georgia On The Nonresident Plaintiff's Mind: Why The General Assembly Should Enact Statutory Forum Non Conveniens," 36 Ga.L.Rev. 1109 (Summer 2002) (hereafter, "Georgia on the Nonresident Plaintiff's Mind"). Judicial economy is a common policy objective among jurisdictions that have adopted *forum non conveniens*. Id. at 1111. *Forum non conveniens* not only provides efficiency benefits for the state judicial system, it also furnishes fairness benefits for litigants. Id. at 1112. Typically, a case is dismissed

(or stayed) under the doctrine when the trial court finds that the case would be heard more conveniently in an alternative forum. Id.

That is precisely why W.Va. Code § 56-1-1(c) prevents the non-resident from maintaining suit in West Virginia if a substantial part of the acts giving rise to the injury occurred elsewhere. The reasons are simple: (1) the alternative forum might be more convenient because the witnesses are amenable to process there; (2) the case may and likely would require application of the law of the alternative forum state, and such law might be better understood and applied by a court sitting in that state; and (3) the alternative forum might be more accessible to relevant physical evidence - one example being the accident site in a tort case. Ga.L.Rev. at 1112.

All of the above factors, which are designed to direct the court to the forum where the circumstances of trial will be most fair for the parties, support the trial court's ruling in this case. Appellant admits that the alleged tort occurred in Virginia. The accident site is located there and that state's law would apply. Likewise, all of the witnesses are located in that state, or at a minimum, not in the state of West Virginia.

Other states have similar statutes that have been held constitutional. A Texas court, in Owens Corning v. Carter, 997 S.W.2d 560 (Tex. 1999), concluded that § 71.052 of the Texas Civil Practice and Remedies Code, which contains provisions requiring a court to dismiss any asbestos claim in which the plaintiff was not a resident of Texas at the time the claim arose outside Texas, did not violate the Privileges and Immunities Clause of Article IV of the United States Constitution or the special laws provision of the Texas Constitution.

Furthermore, at least one court has held that the doctrine of *forum non conveniens* is not repugnant to the Privileges and Immunities clauses of the Constitution. See Whitney v. Madden, 400 Ill. 185, 190, 179 N.E.2d 593, 595 (Ill. 1948).

iii. West Virginia Code § 56-1-1(c) is Not Inconsistent with the Uniform Enforcement of Foreign Judgments Act.

Appellant further claims that “the new subsection as written will create havoc for other types of actions and is in conflict with other statutes.” (App. Br. at 26.) However, he argues only that the Uniform Enforcement of Foreign Judgments Act (UEFJA) will be so affected, that the act “will be rendered impotent when non-residents seek to collect judgments for foreign torts against West Virginia debtors if the new subsection survives.” (App. Br. at 26 (citing W.Va. Code § 55-14-2)). Appellant’s argument is misplaced and again fails to understand the purpose and meaning of West Virginia Code § 56-1-1(c).

West Virginia Code § 55-14-2, as cited by Appellant, states, “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” From this, Appellant argues that under West Virginia Code § 56-1-1(c), a domestic corporation could abate the collection efforts of a citizen of another state where the acts giving rise to the claim did not occur in West Virginia. West Virginia Code § 56-1-1(c), however, is clear that such an action could be maintained by the non-resident upon a showing by affidavit that there was no alternative forum available. Appellant’s argument that the Act would be available only for West Virginia residents who are judgment creditors similarly fails. In fact, enforcement actions under the UEFJA represent precisely the type of action

that should be brought in West Virginia and that would not violate W.Va. Code § 56-1-1(c) because, presumably, the creditor would seek to enforce judgment in West Virginia because the assets were here; accordingly, West Virginia would be the only place that would have jurisdiction over the enforcement.

In any event, West Virginia Code § 56-1-1(c) would never apply anyway to an action brought under UEFJA because enforcement actions do not address or involve the events that led to the judgment. Accordingly, the only acts or omissions giving rise to the enforcement efforts would be the filing of the foreign judgment in the clerk's office and any other procedural issues involving the judgment itself and the nature of its collection. Moreover, the statute states expressly that the foreign judgment would have "the same effect" and would be treated in the same manner as a judgment handed down by a circuit court in West Virginia. W.Va. Code § 55-14-2. West Virginia Code § 56-1-1 also states that language in a conflicting statute will govern. W.Va. Code § 56-1-1 (addressing venue, "except where it is otherwise specially provided"). Thus, a debtor could not argue successfully for a change in venue under subsection (c), as West Virginia clearly can enforce its own judgments.

iv. West Virginia Code § 56-1-1(c) does Not Inappropriately Immunize Domestic Corporations From Suit.

Next, and without any relevant legal support, Appellant argues that West Virginia Code § 56-1-1(c) violates the Privileges and Immunities Clause simply because Jefferds is a West Virginia corporation. However, contrary to Appellant's argument, W.Va. Code § 56-1-1(c) does not "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.” A domestic corporation may indeed be sued by a non-resident so long as a substantial part of the acts occur in West Virginia. In any event, this argument does not apply to Crown because it is not a West Virginia corporation.

v. West Virginia Code § 56-1-1(c) does Not Violate the Open Courts/Speedy Trial Clause of West Virginia Constitution.

Finally, Appellant argues that W.Va. Code § 56-1-1(c) violates the West Virginia Constitution, which states that “[t]he 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.” (App. Br. at 29 (citing W.Va. Const. Art. III, § 17)). While Appellant somehow interprets this language as precluding all distinctions between residents and non-residents, a statute cannot be construed to result in absurdity. See Newhart v. Pennybacker, 120 W.Va.774, 200 S.E. 350, 352 (1938).

In any event, this provision does not foreclose the requirement that an injury or a substantial portion of relevant, injury-causing conduct must occur in West Virginia. Support for this conclusion is found in the comparison between the constitutional language and the long arm statute. The latter, of course, is an enactment by the legislature that is subsequent to the constitutional provision and purports to expand the jurisdiction of the West Virginia courts to those injured in West Virginia by an out-of-state person or entity. Similarly, the statute at issue in this case requires that a substantial

part of the act leading to the injury sustained by a non-resident occur within West Virginia to establish venue.

Furthermore, if this Court were to follow Appellant's overly broad interpretation of the Open Courts/Speedy Trial Clause, it would be required to deem unconstitutional any limitations or other statute that restricted the right of a person, citizen or not, to raise a cause of action in a West Virginia court. For example, W.Va. Code § 56-1-1(a) would be unconstitutional because it limits the venue in which a West Virginia resident can bring a cause of action, and limits the causes of actions that can be raised in West Virginia, based on certain characteristics of the defendant. Under Appellant's interpretation, regardless of whether the plaintiff was a resident of the State, any restriction on the nature or type of action brought in a West Virginia court would be unconstitutional. Statutes may not be construed to result in absurdity. Newhart, 120 W.Va. at 352. States have the right and responsibility to formulate their procedure and define the scope and nature of the actions their courts will hear. Through W.Va. Code § 56-1-1(c), the State has done so to address a substantial state interest.

West Virginia Code § 56-1-1(c) is constitutionally valid. It does not discriminate against non-residents, *per se*. Rather, it excludes only those actions brought by non-resident plaintiffs whose cause of action did not arise in West Virginia and which can be brought in the jurisdiction in which the claim took place. Such a limited restriction allows the State to advance the legitimate and substantial state interest of preventing forum shopping, reducing overcrowding, and preserving judicial resources for residents and those non-residents whose claims have substantial relationship with the State. It

further prevents West Virginia from becoming a haven for non-resident plaintiffs who believe West Virginia's law may be more favorable than that of their home state.

Accordingly, W.Va. Code § 56-1-1(c) is constitutional and serves a legitimate purpose.

Appellant should have filed his lawsuit in Virginia, where a substantial part of the acts or omissions giving rise to the claim occurred.

3. West Virginia Code § 56-1-1(c) Requires Appellant To Separately Establish Venue As To Each Defendant.

Appellant also argues that the circuit court erred in finding that W.Va. Code § 56-1-1(c) requires him to establish venue as to Crown, i.e., that under this provision, the plaintiff cannot establish venue as to all defendants simply by showing that the court has venue over one defendant. Appellant concedes that he has not alleged that Crown committed any act or omission in West Virginia giving rise to his specific claim. (See App. Br. at 39; Am. Compl.) Rather, Plaintiff hopes that the court will ignore both the absence of process over Crown and the intent of the legislature when it enacted W.Va. Code § 56-1-1(c), and will find venue over Crown because he thinks he has alleged sufficient facts to establish venue over Jefferds. As already demonstrated, Plaintiff's complaints have not sufficiently alleged facts to establish venue over Jefferds.

Accordingly, this argument is moot. However, for purposes of this argument only, Crown will assume that this Court would find that venue is proper for Jefferds in West Virginia.

While Appellant is correct that West Virginia follows the venue-giving principle, whereby venue can be found as to all defendants if it is proper for one, he forgets the

critical distinction here that makes the principle inapplicable: this principle only applies when all defendants are residents of West Virginia or the State otherwise has jurisdiction over all defendants. Crown is not a West Virginia corporation, and Crown is not alleged to have committed any act in West Virginia giving rise to the present action. Thus, because Crown is not subject to process in this state,⁶ venue cannot be established simply by showing venue is proper for its co-defendant.

As the cases cited by Appellant in support of his argument (App. Br. at 37) show, the fact situations involving the venue-giving principle involve West Virginia residents, and the issue to be determined is which county of West Virginia should have venue. (See App. Br. at 37 (citing cases applying the venue-giving principle)). Indeed, this Court in McConaughey & Co. v. Bennett, which Appellant concedes is the “seminal case from which the other cases [he cites] are derived” (App. Br. at 37), made clear that this principle applies only to state residents. “[W]here the circuit court of a county has jurisdiction as to one of the proper parties defendant, the others, being residents of the state, are subject to its process and jurisdiction, also.” 50 W.Va. 172, 40 S.E. 540, 542 (1901) (emphasis added).

The only case cited by Appellant regarding non-residents involved a cause of action that arose from an auto accident that occurred in West Virginia, and the issue to be determined was whether the defendants, two of whom were non-residents subject to service under the state motor vehicle statute, were required to defend against the action in

⁶ The long arm statute does not apply because Appellant has not brought a “cause of action arising from or growing out of [any] act or acts” committed by Crown in West Virginia. See W.Va. Code § 56-3-3.

the county in which the accident took place. See Union Carbide & Carbon Corp. v. Linville, 142 W. Va. 160, 164-65, 95 S.E.2d 54 (1956). Contrarily, here, the accident from which Appellant's cause of action arose occurred entirely in Virginia.

Appellant sets forth no argument to address the simple fact that, to advance the intent of the statute to preserve its courts for West Virginia residents and non-residents whose claims took place in West Virginia, under the specific provision at issue the legislature made a marked decision that the plaintiff must establish venue as to each defendant.

This Court previously has expressed its limited role regarding West Virginia's policies on venue.

To be clear, the West Virginia Legislature is the paramount authority for deciding and resolving policy issues pertaining to venue matters. Once the Legislature indicates its preference by the enactment of a statute, the Court's role is limited. Our duty is to interpret the statute, not to expand or enlarge upon it. More significantly, any subsequent policy changes must come from the Legislature itself and, in the absence of constitutional or statutory authority to the contrary, this Court has no blanket power to recast the statute to meet its fancy.

Riffle v. Ranson, 195 W. Va. 121, 126 (1995) (citations omitted).

Under West Virginia law, two presumptions apply when interpreting legislative intent: "First, the Legislature is presumed to have known and understood the laws they had earlier enacted. Second, courts must presume that a legislature says in a statute what it means and means in a statute what it says there." See Appalachian Power Company v. State Tax Department of West Virginia, 195 W.Va. 573, 585-586, 466 S.E.2d 424, 436-437 (1995) (citations omitted).

Unlike the older subsections of the statute, which follow the venue-giving defendant principle but which refer to "civil action" or "cause of action," subsection (c) introduces the word "claim." See W.Va. Code § 56-1-1(c) ("... unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state.") (emphasis added). Presuming, as is required, that the Legislature understood what it meant by the old statute, its decision to add a paragraph that introduced a new term, "claim," signifies that the Legislature intended a different meaning from its use of "cause of action" or "civil action." The use of the word "claim," a clearly singular term, reflects the intent that venue must be established by the non-resident plaintiff as to each defendant. Had the Legislature intended the rule requiring only a single venue-giving defendant to apply, it would have either expressly stated so or repeated the terminology used in the earlier portions of the statute.

This Court has stated that if the Legislature limits application of a rule or amends it for a specific set of facts, courts should assume that modification was intentional. See Riffle v. Ranson, 195 W. Va. 121, 128 (1995). The Legislature's use of different terminology for the limited circumstances addressed by subsection (c) signifies that it intended for the common law venue-giving rule not to apply in those instances. As this Court has recognized when discussing earlier revisions to the venue statute, "[West Virginia's] venue statutes are carefully sculpted" Id. The Legislature's use of different terminology in subsection (c) is particularly telling in light of its uniform use of the term "cause of action" in the other subsections, despite revisions to the statute in 1986. See Riffle, *supra* (discussing W.Va. Code § 56-1-1(b)).

Moreover, a logical assessment of subsection (c) reveals that the Legislature recognized that a limitation on the traditional venue-giving rule was necessary in the limited circumstances arising under W.Va. Code §56-1-1(c). The intent of the statute is to preserve the courts' resources for actions with a substantial relationship to the state, by preventing plaintiffs from forum shopping and protecting defendants from being hailed into court here when a substantial part of the acts or omissions that form the basis of the lawsuit occurred in another state. The traditional rule finding venue proper as to all defendants if proper for one defeats this legislative intent because it allows plaintiffs like Mr. Morris, who has no connection whatsoever to this State – either individually or by the nature of his allegations – and whose action appropriately lies in Virginia, to take advantage of this State's resources. Thus, the interpretation of the Legislature's use of the term "claim" in subsection (c) as requiring that the plaintiff allege sufficient facts to establish venue for each claim, and thus each defendant, "is compelled by both reason and common sense. To conclude otherwise would mean the Legislature did a useless act" when it added subsection (c) to the venue statute. See Riffle, 195 W. Va. at 128.

Appellant also engages in selective reading of subsection (c) in an effort to defy the clear implication that the Legislature intended for non-residents to establish venue for each defendant. While Appellant highlights the provision under subsection (c) requiring that plaintiffs establish venue individually to compare to the absence of such a clause regarding defendants, he ignores the critical clause conditioning that requirement on there being joinder of plaintiffs. The provision in complete form states, "In a civil action where more than one plaintiff is joined, each plaintiff must independently establish

proper venue.” (emphasis added). This provision makes sense in light of the Legislature’s focus on plaintiffs and intent to prevent forum shopping by plaintiffs like Mr. Morris who have no relationship or contacts to West Virginia. It likewise makes sense that the Legislature would not deem it necessary to include a specific provision expressly requiring that venue be established for each defendant where it is consistent with case law, statute, and legislative intent.

Finally, Appellant argues that “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,” and would inhibit the goal of the joinder rule to prevent duplicated judicial efforts and piecemeal litigation (App. Br. at 38-39.) However, the Rules of Civil Procedure are clear that they “shall not be construed to extend or limit the jurisdiction of the courts or the venue of actions therein.” W.Va.R.Civ.P. 82. Moreover, subsection (c) is consistent with the mandatory joinder rule, which requires that an action be dismissed against any party who objects to venue and whose joinder would render venue of the action improper. See W.Va.R.Civ.P. 19(a). Such is the case with Crown.

Ironically, the extent to which there would be any “piecemeal litigation” is the direct result of Appellant’s attempt to litigate his claim in West Virginia, rather than Virginia, where the alleged acts or omissions occurred. Appellant could and should have sued Crown and Jefferds in Virginia, which would promote judicial economy and prevent the duplication of effort and uncertainty.

To advance its purpose of preventing forum shopping and preserving its judicial resources for West Virginia residents and non-residents whose claims took place in West Virginia, West Virginia Code § 56-1-1(c) requires that non-residents establish venue as to each defendant before venue will be found proper, and the circuit court appropriately so required. As Appellant concedes (see App. Br. at 39), because he has not alleged that Crown committed any act or omission in the state of West Virginia that gave rise to his cause of action, he cannot establish venue in West Virginia for his causes of action against Crown, and, accordingly, the circuit court did not err in dismissing the case against Crown.

4. West Virginia Code § 56-1-1(c) Required Appellant To File An Affidavit Of Inability To Obtain Jurisdiction.

The trial court did not err in concluding that Appellant was required to file an affidavit of inability to obtain jurisdiction outside of West Virginia. West Virginia Code § 56-1-1(c) prevents a non-resident from maintaining suit in West Virginia if a substantial part of the acts giving rise to the injury occurred elsewhere:

... 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.

Because a substantial part of the alleged acts or omissions giving rise to Appellant's injuries took place in Virginia, to establish venue under subsection (c), he was required to submit an affidavit that he could not obtain jurisdiction there.

5. The Trial Court Properly Dismissed Appellant's Complaint Against Crown Without Permitting Him to Conduct Discovery.

This issue appears to be directed at Jefferds. As such, Crown adopts by reference and incorporates herein Jefferds arguments as to that issue, to the extent consistent with Crown's position. To the extent that it is directed to Crown, discovery would be improper because courts only consider pleadings under Rule 12(b) motions to dismiss. Rhododendron Furniture & Design, Inc., 214 W.Va. 463, 466 (2003). Crown submitted no additional materials to the court beyond its pleadings and, based solely on the pleadings, the lower court appropriately determined that venue was improper and dismissed the case against Crown. (See Order, 9/1/04, at 1 (listing the documents that the court considered.))

As admitted in the Amended Complaint, "Plaintiff Bart Morris was injured while operating a Crown 30RCTT190 stand-up forklift, serial number 1A129286 (hereinafter "the forklift"), at his place of employment, RMC Grottoes/Alcoa Flexible Packaging, in Grottoes, Virginia." (See Am. Compl. ¶ 2.) There simply is no allegation that Crown did anything whatsoever in West Virginia that gave rise to the present complaint. Accordingly, dismissal of the actions against Crown were appropriate. Besides, were the court to allow discovery, no discovery from Crown could assist the trial court in ruling on Crown's motion to dismiss.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY NOT EXPRESSLY GRANTING APPELLANT'S MOTION TO AMEND.⁷

The trial court did not expressly deny Appellant's Motion to Amend.⁸ In fact, because the trial court did consider Appellant's proposed amended complaint when it granted the motions to dismiss, the logical assumption is that the court simply found that the proposed amended complaint still did not establish venue. Thus, even if the court had expressly granted the motion to amend, dismissal still would have been warranted.

Appellant agrees that a trial court's ruling on a motion to amend is reviewed under an abuse of discretion standard. (App. Br. at 30 (citing Barney v. Auvil, 195 W.Va. 733, 737 (1995))).

Appellant concedes that the circuit court considered his proposed amended complaint when it ruled on the motions to dismiss. (See App. Br. at 30.) Without any basis, Appellant assumes that because the court failed to find venue over either of the defendants, it must have denied the motion to amend. However, he fails to explain why a the court would have considered or mentioned in its orders an amended complaint the admission of which it had denied.

In any event, as demonstrated supra (Section V.A.1.), in neither complaint did Appellant allege that Crown committed any act or omission in West Virginia related to his claim. Furthermore, as argued previously, Appellant has not sufficiently alleged that Jefferds committed substantial acts or omissions in the state of West Virginia that gave

⁷ This section addresses assignment of error B identified in the Petition.

⁸ Accordingly, this court does not have jurisdiction to review this argument because there is no final judgment to review. However, because the circuit court considered the proposed amended complaint when determining whether to grant the motions to dismiss, Crown will address the argument.

rise to Appellant's claim. Accordingly, the technical denial of the motion to amend, if error at all, is harmless error because the allegations were considered by the trial court in ruling on Crown's motion to dismiss. See W.Va.R.Civ.P. 61 (Errors that are harmless or do not affect the substantial rights of parties do not require reversal); Jennings v. Smith, 165 W.Va. 791, 272 S.E.2d 229 (1980) (same); Pioneer Co. v. Hutchinson, 159 W.Va. 276, 220 S.E.2d 894 (1975) (same).

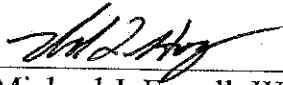
For the reasons stated, there was no abuse of discretion in failing to expressly deny the motion to amend because, even considering the allegations in the amended complaint, the trial court properly granted Crown's motion to dismiss.

VI. CONCLUSION AND REQUEST FOR RELIEF

Venue in West Virginia is improper as to Crown pursuant to W.Va. Code § 56-1-1(c) [2003], which passes constitutional muster. Appellant, a Virginia resident, has not alleged the occurrence of any substantial act or omission in West Virginia that would establish venue in this State. The only alleged nexus to West Virginia is that Defendant Jefferds is incorporated in this State, which is not sufficient to establish venue under the statute. It is clear that Appellant is forum shopping. The trial court correctly dismissed Appellant's cause of action against Crown. Accordingly, this Court should affirm the trial court's orders for granting of Defendant's Motion to Dismiss and denying Plaintiff's Motion to Amend.

CROWN EQUIPMENT CORPORATION,

By Counsel,


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703713

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JEREMIAH "BART" MORRIS,
Plaintiff,

v.

Appeal No. 32751

**CROWN EQUIPMENT CORPORATION
and JEFFERDS CORPORATION
D/B/A HOMESTEAD MATERIALS
HANDLING COMPANY,**

Defendants.

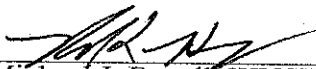
CERTIFICATE OF SERVICE

I hereby certify that the foregoing BRIEF OF APPELLEE CROWN EQUIPMENT CORPORATION was served upon counsel of record by placing a true copy of the same in the United States Mail, postage prepaid, this 7TH day of November, 2005, and addressed as follows:

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