

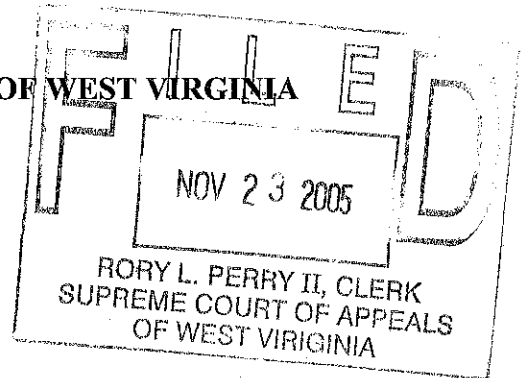
APPEAL NO. 32751

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



REPLY BRIEF OF APPELLANT, JEREMIAH "BART" MORRIS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

I. DISCUSSION OF LAW - REPLY TO BRIEFS OF JEFFERDS CORPORATION AND CROWN EQUIPMENT CORPORATION 1

 A. Appellees' Briefs Both Fail To Respond Sufficiently to Morris' Contention That West Virginia Code, 56-1-1(c) Provides Access To The Courts To All West Virginia Citizens While Denying Access to Nonresidents Thus Violating The Privileges and Immunities Clause Of The United States Constitution 1

 B. West Virginia Constitution, Art. III, §17 (Open Courts Clause) Supercedes West Virginia Code, § 56-1-1 4

 C. If A Plaintiff Establishes Venue As To One Defendant, Nothing in West Virginia Code, § 56-1-1(c) Requires That Venue Be Established As To The Remaining Defendants 5

II. CONCLUSION 7

TABLE OF AUTHORITIES

CONSTITUTIONS

U.S.Const. Art. IV, §2, Cl. 1 (Privileges and Immunities Clause) 1, 2, 3, 5, 7

W.Va. Const. Art. III, §17 (Open Courts Clause) 4, 7

STATUTES

W.Va. Code §56-1-1 1, 2, 4, 7

W.Va. Code §56-1-1(c) 1, 2, 4, 5

W.Va. Code §56-3-33 7

W.Va. Code §56-3-33(a) 6

CASE LAW

Lane v. Boston Scientific Corp., 198 W. Va. 447, 481 S.E.2d 753 (1996) 6

Riffle v. Ranson, 195 W. Va. 121, 464 S.E.2d 763 (1995) 2

COURT RULES

W.Va.R.Civ.P. 23 (d) 2

W.Va. Trial Court Rules 26.01 2

LEGISLATIVE MATERIALS

S.B. 213, 2003 Sess. (W.Va. February 13, 2003) 1

PUBLICATIONS

Blacks Law Dictionary, Centennial Edition, 6th Edition 5

**DISCUSSION OF LAW - REPLY TO BRIEFS OF JEFFERDS CORPORATION
AND CROWN EQUIPMENT CORPORATION**

**A. Appellees' Briefs Both Fail To Respond Sufficiently to Morris' Contention
That West Virginia Code, 56-1-1 (c) Provides Access To The Courts To All
West Virginia Citizens While Denying Access to Nonresidents Thus Violating
The Privileges and Immunities Clause Of The United States Constitution.**

The thrust of Morris' Federal Constitutional attack is that the amendment to West Virginia Code, § 56-1-1 treats West Virginia citizens quite differently than those of sister states in the identical factual context. If Morris were a citizen of West Virginia residing in Virginia he clearly could maintain the action against both defendants in this State, but because he is a citizen of Virginia he is barred. In his initial brief, Morris disclosed that the statute could have been drafted to exclude both West Virginia non-residents, and citizens of sister states -- in which case the statute could withstand the Federal Constitutional challenge. Instead, the Legislature elected to protect West Virginians while limiting citizens of other states in their recourse to the courts. Both the Appellant and Appellees acknowledge that the stated Legislative purpose behind the amendment 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). [Morris Brief, p. 24; Crown Brief, p. 8, 17; Jefferds Brief, p. 7]. Notably, Jefferds concedes that "West Virginia Code § 56-1-1 (c) does not distinguish between West Virginia citizens and West Virginia residents." That succinct Legislative history discloses the Constitutional infirmity. That Legislative history clearly establishes the Legislature's intent that all West Virginians have access to the courts, not just those residing in West Virginia. That history just as clearly expresses the intent that non-residents are to be excluded unless the additional statutory requisite is satisfied that all or a substantial part of the cause of action for their claim occurred in this

jurisdiction. Such discrimination is impermissible under the Privileges and Immunities Clause for the reasons set forth in Mr. Morris' original brief.

Jefferds correctly asserts that since Justice Cleckley's scholarly opinion in *Riffle v. Ranson*, 195 W.Va. 121, 464 S.E.2d 763 (1995), the common law doctrine of *forum non conveniens* no longer exists. The common law doctrine has been fully supplanted by 56-1-1. Unfortunately, when the Legislature amended the statute in 2003, it did so in a manner that fails to satisfy Constitutional muster.

Moreover, this Court is fully aware of the recent history of mass litigation in the courts of this State which litigation certainly was a precipitating factor in the enactment of the amendment to 56-1-1. Much of the mass litigation arose from the asbestos cases brought in this State in the late 1990's and early 2000's -- where there was no nexus between the plaintiffs, many of the defendants, nor this State. Dozens, and, sometimes, hundreds of non-resident plaintiffs were joined in class action lawsuits brought against foreign corporations when the plaintiffs had never been exposed to asbestos in this state, and the Defendants had virtually no connection to this jurisdiction either. This Court previously attempted to deal with mass litigation in its amendments to Rule 23(d) of the West Virginia Rules of Civil Procedure governing class actions and in its adoption of Rule 26.01 of the West Virginia Trial Court Rules governing mass litigation. Understandably, the Legislature felt some need to limit the influx of such cases. Against this backdrop, the Legislature enacted 56-1-1 (c). The language in part of the last paragraph of the amendment evidences an intention to require that the number of these mass tort cases be reduced by compelling each plaintiff to establish proper venue:

"In a civil action where more than one plaintiff is joined, each plaintiff must

independently establish venue. A person may not intervene or join in a pending civil action as a plaintiff unless the person independently establishes proper venue.”

Mr. Morris understands why the Legislature was interested in restricting mass tort litigation. Had it expanded its statutory *foreign non conveniens* in a non-discriminatory manner, the problem would not exist. As he indicated in his initial brief and above, all the Legislature had to do to make the new statute valid under the Privileges and Immunities Clause was to impose the restrictive language upon both West Virginia citizens who reside outside the state and citizens of other states. Instead, as the Legislative history discloses, all West Virginians retained full access to the courts, while the impediment was placed upon all citizens of other states. The federal Constitutional cases cited by Mr. Morris in his original brief hold that equal access to the courts is a fundamental right protected by the Privileges and Immunities Clause. The limitations upon non-residents' access to West Virginia Courts imposed by the 2003 Legislature violate that clause.

Jefferds asserts in its brief that Mr. Morris offers a twisted “knot of ‘what ifs’” as the basis for the Constitutional attack. That suggestion is without merit. Simply stated, the 2003 legislative history Appellees have cited with respect the venue statute is fatal to their argument that the statute is constitutional. Jefferds and Crown are unable to refute Mr. Morris' assertion that if the Legislature had drafted the amendment to impose the new limitations on both non-resident West Virginians and other non-residents, the statute would have withstood federal Constitutional challenge under the Privileges and Immunities Clause. They are caught in the knot created by the Legislature in drafting, not by anything Mr. Morris did. The Legislature's stated goal and the statute's discriminatory requirements render the statute inconsistent with the Privileges and Immunities Clause. Mr. Morris prays that this Court will hold the amended

statute unconstitutional and reverse the three orders issue by Judge Kaufmann below.

B. West Virginia Constitution, Art. III, §17 (Open Courts Clause) Supercedes West Virginia Code, § 56-1-1.

Mr. Morris asserted in his earlier brief that 56-1-1(c) violates the "Open Courts Clause" of the West Virginia Constitution. Nothing in either brief of the Appellees provides persuasive argument that the Open Courts Clause is compatible with 56-1-1. The language of Article III, Section 17 is quite clear and unambiguous:

"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."

Mr. Morris agrees with the arguments of Appellees that this Court must try to reconcile statutes with Constitutional provisions in an effort to uphold the Constitutionality of the statutes when if they are consistent therewith and to resort to every reasonable construction of a statute to sustain its constitutionality. However, where, as here, there is no ambiguity in the clear language of the Constitutional provision, and the Constitutional provision is incompatible with the statutory provision, the Constitutional provision prevails. The requirements of the amendment to West Virginia Code, § 56-1-1 found in subsection (c) simply cannot be reconciled with Article III, Section 17. The Constitutional provision does not say the Courts of this State shall be open, and every *West Virginian* for an injury done to him shall have remedy by due course of law. It says *every person* shall have a remedy by due course of law. If the Legislature wishes to limit the breadth of Article III, Section 17 to West Virginia citizens in matters relating to venue, it must seek to amend the State Constitution. The statute as amended violates the West Virginia Constitution and Mr. Morris prays that this Court will so hold and reverse the three orders of the

trial court. Moreover, by holding the statute in violation of this State Constitutional provision, this Court can place finality upon its judgment and further appeal to the United States Supreme Court under the Privileges and Immunities Clause can be avoided.

C. If A Plaintiff Establishes Venue As To One Defendant, Nothing in West Virginia Code, § 56-1-1(c) Requires That Venue Be Established As To The Remaining Defendants.

Crown Equipment contends in section 3 of its discussion that a plaintiff is required to establish venue separately as to each Defendant. The trial court erroneously included a conclusion of law¹ that venue had to be established as to each defendant in its order dismissing Crown.

Crown bases its assertion upon the use of the term “claim” in the phrase that states that the non-resident plaintiff may not maintain an action “unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state . . . “ The trial court gave no reason for its conclusion of law on this issue.

Crown concedes “that West Virginia follows the venue-giving principle, whereby venue can be found as to all defendants if it is proper for one . . .”² However, it then posits that the amendment to West Virginia Code, § 56-1-1 (c) requires more where non-residents are involved. Its argument is based upon a tenuous assertion that there is a distinction between the term “claim” and the phrase “cause of action”. Frankly, this argument is absurd. *Blacks Law Dictionary, Centennial Edition, 6th Edition*, defines the term “claim” as “A cause of action.” The terms are

¹ Order of Judge Kaufman of September 1, 2004, p. 3, conclusion of law n. 7.

² Crown Brief, p. 26

interchangeable. To suggest a different meaning is disingenuous at best. Crown offers a strained explanation to suggest some different meaning. It suggests that “the word ‘claim’, a clearly singular term, reflects the intent that venue must be established by the non-resident plaintiff as to each defendant.” Frankly, if the Legislature had intended to dismantle the “venue-giving defendant” principle, it would have said so. There is absolutely nothing in the amendment which says that the validity of the “venue-giving defendant” principle is abolished. Crown does not deny the allegations in Plaintiffs Complaint that “Crown has conducted and continues to conduct continuous and systematic business in West Virginia, including Kanawha County.”³ Crown asserts on appeal that there may be an issue of minimum contacts for jurisdiction but that issue is not before this Court, nor was it before the circuit court. Indeed, the motions to dismiss of both parties only challenged venue. Neither party filed a motion to dismiss for lack of jurisdiction below! Crown cites *Lane v. Boston Scientific Corp.*, 198 W.Va. 447, 481 S.E.2d 753 (1996) as the apparent authority for its assertion that venue also must be proven as to each defendant separately.⁴ Crown’s reliance upon that case is misplaced because *Lane* dealt with the jurisdictional issue of the West Virginia long-arm statute — NOT WITH VENUE. Whether Mr. Morris can establish jurisdiction by one of the 7 grounds under West Virginia Code, § 56-3-33(a) is an issue for another day for which discovery clearly would have to be developed.

³ See, (1) Morris Complaint, paragraph 2; (2) Plaintiff’s Amended Response to Defendants’ Crown and Jefferds Motions to Dismiss and Crown’s Motion for Protective Order, p. 5; (3) Plaintiff’s Amended Complaint, paragraph 2.

⁴ Crown cites this case in its table of authorities, but does not utilize it in its discussion of law. However, the only salient place for its inclusion would have been in its discussion on page 26-27 where it attempts to boot-strap the jurisdiction argument into the venue statute. The jurisdiction issue is not before the court.

Plaintiff did allege jurisdictional grounds in its Complaint and Amended Complaint for § 56-3-33 and he may meet other jurisdictional grounds, but that issue has not been decided and it is not before this Court. The only motion to dismiss being reviewed by this Court are the two motions to dismiss for lack of venue. Not one of the three orders entered below made a finding of fact or a conclusion of law that the court lacked jurisdiction over the case. Rather, these orders dealt with the issue of lack of venue based upon the new amendment. Hence, Mr. Morris prays that this Court will create a syllabus point that holds that the venue-giving principle in West Virginia remains in full force and effect.

Conclusion:

The remaining arguments of Jefferds and Crown are covered in Mr. Morris original brief and further comment will not be offered herein. Jeremiah "Bart" Morris respectfully prays that this Court will hold the parts of the 2003 amendment to West Virginia Code, § 56-1-1 which violate the Privileges and Immunities Clause of the Federal Constitution unconstitutional. He further prays that this Court will likewise hold the same parts of the amendment unconstitutional under the Open Courts Section of the West Virginia Constitution. He prays that the three orders of the circuit court dismissing the case for lack of venue be reversed and that this case be remanded to the Circuit Court of Kanawha County for trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John W. Cooper, undersigned counsel for Appellee, Jeremiah "Bart" Morris, hereby certify that I have caused a true and exact copy of the foregoing **REPLY BRIEF OF APPELLANT, JEREMIAH "BART" MORRIS**, to be served by United States first class mail, postage prepaid on this 22nd day of November, 2005, to the following counsel for Appellees:

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