

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 33665

Joseph E. Baker, *et al.*, Appellants
vs.
Consolidated Rail Corporation, and American Premier Underwriters, Inc., Appellees

and

Charles S. Adams, *et al.*, Appellants
Herbert J. Adams, *et al.*, Appellants
Jerry M. Abbott, *et al.*, Appellants
Peggy Tackett, Administratrix of the Estate of Walk Tackett, Deceased, Appellant

vs.

CSX Transportation, Inc., Appellee

and

Charles C. Albright, *et al.*, Appellants
vs.
Norfolk Southern Railway Company, Appellee

and

Paul D. Anthony, *et al.*, Appellants
vs.
CSX Transportation, Inc. and Norfolk Southern Railway Company, Appellees

Appeal from the Circuit Court of Kanawha County, West Virginia
The Honorable Arthur J. Recht, Judge
Civil Action No.: 02-C-9500

BRIEF OF APPELLANTS

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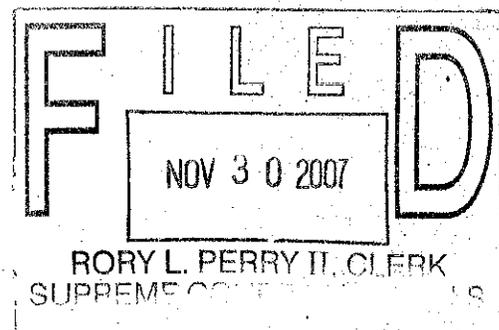


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO.: 33665

**IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
IN RE: FELA ASBESTOS CASES
CIVIL ACTION NO.: 02-C-9500**

ORIGINALLY in the Circuit Court of Brooke County, West Virginia:

JOSEPH E. BAKER, *et al.*,

Appellants,

vs.

Civil Action No.: 06-C-89

CONSOLIDATED RAIL CORPORATION and
AMERICAN PREMIER UNDERWRITERS, INC.,

Appellee.

ORIGINALLY in the Circuit Court of Harrison County, West Virginia:

CHARLES S. ADAMS, *et al.*,

Appellants,

vs.

Civil Action No.: 06-C-72

CSX TRANSPORTATION, INC.,

Appellee.

and

HERBERT J. ADAMS, *et al.*,

Appellants,

vs.

Civil Action No.: 06-C-182

CSX TRANSPORTATION, INC.,

Appellee.

ORIGINALLY in the Circuit Court of Marshall County, West Virginia:

JERRY M. ABBOTT, *et al.*,

Appellants,

vs.

Civil Action No.: 05-C-63M

CSX TRANSPORTATION, INC.

Appellee.

and

PEGGY TACKETT, Administratrix of the Estate of
Walk Tackett, Deceased,

Appellants,

vs.

Civil Action No.: 06-C-27M

CSX TRANSPORTATION, INC.

Appellee.

ORIGINALLY in the Circuit Court of Mercer County, West Virginia:

CHARLES C. ALBRIGHT, *et al.*

Appellants,

vs.

Civil Action No.: 06-C-409 to 588

NORFOLK SOUTHERN RAILWAY COMPANY,

Appellee.

and

PAUL D. ANTHONY, *et al.*,

Appellants,

vs.

Civil Action No.: 06-C-188

CSX TRANSPORTATION, INC. and NORFOLK
SOUTHERN RAILWAY COMPANY,

Appellees.

BRIEF OF APPELLANTS

AND NOW, come the Appellants, by and through their undersigned counsel, Robert F. Daley, Esquire; D. Aaron Rihn, Esquire; R. Scott Marshall, Esquire; and the law firm of Robert Peirce & Associates, P.C., and submit the following Appellants' Brief in Support of Appeal to the Supreme Court of the State of West Virginia, and in support thereof aver as follows:

I. LOWER COURT PROCEEDING AND NATURE OF RULING

— This action is a consolidated matter involving the individual claims of hundreds of railroad employees who allege that they were injured by exposure to hazardous asbestos containing products through the course of their employment with the Defendants. They each brought an action against their respective railroad employer pursuant to the Federal Employer's Liability Act (FELA), 45 U.S.C. § 51, *et seq.* These claims were filed under seven different captions in four separate West Virginia counties, but were ultimately consolidated in the Circuit Court of Kanawha County at Civil Action No.: 02-C-9500, before the Honorable Arthur M. Recht, pursuant to the rules governing the West Virginia Asbestos Mass Litigation Panel.

Appellants asserted that jurisdiction was proper before the state courts of West Virginia in accordance with 45 U.S.C. § 56, which provides that an injured railroader may institute an action against his or her employer in state or federal court in any jurisdiction in which that employer transacts business. The Appellants are non-residents of the State of West Virginia. The respective railroad Appellees filed Motions to Dismiss the Appellants' claims pursuant to West Virginia Code § 56-1-1(c) (2003), on the grounds that the Appellants were not residents of West Virginia, and because not "all or a substantial part" of the transactions or omissions giving rise to the claims occurred within the State. The Honorable Arthur M. Recht granted the Appellees' Motions, and consolidated these matters for Appeal.

II. STATEMENT OF FACTS

All of the Appellants are current or former employees of Consolidated Rail Corporation; CSX Transportation Inc.; and/or Norfolk Southern Railway Company. All of the hundreds of Appellants involved in this consolidated action worked in a variety of different crafts and trades; and they all allege that they were injured as a result of occupational exposure to hazardous asbestos and asbestos containing products.

III. ASSIGNMENTS OF ERROR.

1. The Trial Court erred in applying West Virginia Code § 56-1-1(c) (2003) to dismiss the suits of non-resident Plaintiffs against non-resident Defendants under the Federal Employers Liability Act, 45 U.S.C. § 51, *et seq.* (FELA), in violation of the Privileges and Immunities Clause of the United States Constitution, Art. IV, Sec. 2.

2. The Trial Court erred in applying West Virginia Code § 56-1-1(c) (2003) to dismiss the suits of non-resident Plaintiffs against non-resident Defendants under the Federal Employers Liability Act, 45 U.S.C. § 51, et seq. (FELA), because § 56-1-1(c) (2003) violates the "Right to Open Courts" secured by Article III, Section 17, of the West Virginia Constitution.

3. The Trial Court erred in applying West Virginia Code § 56-1-1(c) (2003) to dismiss the suits of non-resident Plaintiffs against non-resident Defendants under the Federal Employers Liability Act, 45 U.S.C. § 51, et seq. (FELA), because § 56-1-1(c) (2003) violates the "Separation of Powers" Clause of the West Virginia Constitution, Article V, Section 1.

IV. POINTS AND AUTHORITIES.

A. The Trial Court's Dismissal of Appellants' Claims Violated the Privileges and Immunities Clause of the United States Constitution, Art. IV, Sec. 2.

The Trial Court committed reversible error in dismissing the Appellants' claims pursuant to West Virginia Code § 56-1-1(c) (2003), which provides, in relevant part, that "a non-residents 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..." While the Trial Court's decision properly applied the statute as written, the statute itself is unconstitutional as applied to these Appellants in that it clearly violates the Privileges and Immunities Clause, Article IV, Sec. 2, of the United States Constitution. This Honorable Court recently reached a similar determination in the case of Morris v. Crown Equipment Corporation, 633 S.E.2d 292, 298 (W.Va. 2006).

The Privileges and Immunities Clause provides that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." US CONST., Article

IV, Sec. 2. The United States Supreme Court has repeatedly declared that "It was undoubtedly the object [of this clause] to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." Baldwin v. Fish and Game Commission of Montana, 436 U.S. 371, 380-82 (1978). Further, it has been established that there is "ordinarily no difference between discrimination based on a person's 'residence' and discrimination based on a person's 'citizenship.'" Morris, 633 S.E.2d at 296, n. 2. Thus, discrimination based upon residency and citizenship is equally abhorrent under the United States Constitution.

As this Court itself has recognized, "Among the privileges and immunities of citizenship is included the right of access to courts for the purpose of bringing and maintaining actions." Id., 633 S.E.2d at 298. The United States Supreme Court has declared,

The right to sue and defend in the courts is the alternative to force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It 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.

Chamber v. Baltimore & Ohio R.R. Co., 207 U.S. 142, 148-49 (1907).

The Appellants bring their claims pursuant to the Federal Employers Liability Act, 45 U.S.C. § 51, *et seq.* (FELA). The FELA was enacted for the humanitarian purpose of providing a remedy to railroad employees for injuries and death resulting from their work on interstate railroads. See Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 542-43 (1994). The FELA favors workers, and any doubts as to its meaning should be construed in favor of the worker. See Id. ("We have liberally construed FELA to further Congress' remedial goal."); and Gardner v. CSX Transp., Inc., 201 W.Va. 490, 498 (1997) ("The FELA is intended to be a broad, remedial

statute, and like the FBIA, it has been construed liberally to effectuate its humanitarian purposes.”).

In furtherance of the FELA’s liberal and humanitarian purposes, the United States Congress specifically provided that an action under the FELA “may be brought in a district court of the United States, in the district of the residence of the Defendant, or in which the cause of action arose, or in which the Defendant shall be doing business at the time of commencing such action.” 45 U.S.C. § 56. Congress further provided that “The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.” Id. This means that an FELA Plaintiff may bring his or her claims in any jurisdiction in which the Defendant conducts business, and that he or she may do so in either federal or state court.

While the individual states are not compelled to accept this grant of jurisdiction, once the grant is accepted, they may not apply it discriminatorily in favor of their own citizens and to the detriment of the citizens of other states. As was noted by this Court:

While a state may decide whether and to what extent its courts will entertain particular causes, any policy the state may choose to adopt must operate in the same way upon citizens of other states as upon its own, and the privileges it affords to the later class it must afford to the same extent to the other, but not to any greater extent.

Morris, 633 S.E.2d at 298, *quoting* AmJur.2d, *Constitutional Law*, Sec. 769 (2006).

West Virginia Code § 56-1-1(c) (2003) violates this well established constitutional principle by permitting West Virginia’s own residents to pursue claims under the FELA against non-resident Defendants, even though “all or a substantial part of the acts or omissions giving rise to the claim” occurred in another state, while it denies this same basic right to the residents of other states.

The Trial Court improperly attempted distinguish the claims in the instant matter from the claims asserted in Morris by focusing on the fact that one of the Defendants in Morris was a resident of the State of West Virginia. While it is true that one of the Morris Defendants was a West Virginia resident, and that this fact was specifically noted by this Court in its decision, it would be inappropriate to conclude that this was the sole or even a predominate factor in this Court's decision in that case. The Trial Court's myopic focus on the residence of the Defendant caused it to overlook this Court's broader, more pervasive theme that "there is a strong categorical exclusion of non-residents Plaintiffs from a state's courts under venue statutes when a state resident would be permitted to bring a similar suit." Id., 633 S.E.2d at 299. This is the true Constitutional anathema which this Court sought to remedy in Morris, and it is as equally present in this case as it was there. This assertion is buttressed by this Court's statement when discussing venue for the non-resident co-Defendant that:

Crown's suggestion that such a rule should be applied only to non-residents runs headlong into the forgoing-discussed constitutional principles that strongly favor discrimination on the basis of residency in access to courts. Application of these principles further weighs against such a reading of the statutory language.

Id. 633 S.E.2d at 302. This comment was well placed, since there is no support in any modern United States Supreme Court Opinion to justify the application of a different Privileges and Immunities analysis for cases involving resident or non-resident Defendants. It simply is not a factor in the discrimination analysis.

Practically speaking, the residency of the West Virginia Defendant in Morris was really only an issue in that case because it provided the sole potential grounds for the exercise of jurisdiction under West Virginia law, and the notions of due process as proscribed by the United

States Constitution. In this case, jurisdiction was specifically provided for by the United States Congress.

Even if it were true that the presence of a resident Defendant in Morris was such a significant factor so as to render its general holding inapplicable to this case, this Court would still need to perform a separate analysis of the constitutionality of W.Va. § 56-1-1(c) (2003) as applied to Appellants' claims in the instant matter. Such an analysis reveals that W.Va. § 56-1-1(c) (2003) is still unconstitutionally discriminatory.

While the scope of the protection afforded by the Privileges and Immunities Clause is not absolute, the clause "does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other states." Toomer v. Witsell, 344 U.S. 385, 396 (1948).

Although the dissent in Morris was able to cite to several cases in which a distinction might be inferred between residency and citizenship for the purposes of a discrimination analysis, it is significant that none of those cases were decided within the last 50 years. See Morris, 633 S.E.2d at 303. As noted by the majority opinion, modern constitutional jurisprudence has evolved greatly since the days of Douglas v. New Haven R. Co., 279 U.S. 377 (1929), and the artificial distinction between residency and citizenship is no longer recognized. Id. at 296, n.2.

In Douglas, the Court upheld a New York statute which permitted the discretionary dismissal of both federal and state claims where neither the Plaintiff nor the Defendant was a resident of the forum state. Id. at 388. However, the logic of the Douglas Court stands in stark contrast to the rule of law developed more recently by the Supreme Court that has applied a three

pronged test.¹ The explanation for this conflict is quite simple, Douglas, a case decided in 1929, is an anachronism. Modern day Privileges and Immunities jurisprudence has evolved to the point that the Douglas decision is obsolete, and is no more controlling on this Court than is Plessy v. Ferguson, 163 U.S. 537 (1896), with the only difference being that one was rendered obsolete through gradual evolution, and the other was rendered obsolete over night.

For starters, Douglas was decided during a period in which discrimination against non-residents was more acceptable. The modern trend is to afford non-residents the same or similar protections that are afforded non-citizens. In recent decades, the Supreme Court and Circuit Courts have repeatedly reaffirmed the modern principle that citizenship is synonymous with residency for the purposes of analyzing the Privileges and Immunities clause. See: Supreme Court of Virginia v. Friedman, 487 U.S. 59, 64 (1988); United Building & Construction Trades Council v. Mayor and Council of Camden, 465 U.S. 208, 216 (1984); O'Reilly v. Board of Appeals for Montgomery County, Maryland, 942 F.2d 281, 284 (4th Cir. 1991). More important than this, however, is simply the fact that Privileges and Immunities law has become more refined and exacting in the modern era with the adoption of the three pronged test. It is no longer sufficient that a State merely rely upon "rational considerations" when discriminating against non-residents, as was the rule when Douglas was decided. Douglas, 279 U.S. 377.

It should also be noted that the statute at issue in Douglas was discretionary, rather than mandatory. This is an important distinction given a State's ability to decline non-resident Plaintiffs' cases under the doctrine of *forum non conveniens*. The Appellants are not contending

¹ The three prongs are: 1) Is the right "fundamental"; 2) does the State have a "substantial reason" for the disparate treatment; and, 3) does the discrimination bear a "substantial relationship to the government's objectives. Toomer,

that West Virginia must entertain all non-resident FELA cases, but rather that a statute which requires the courts to reject non-resident Plaintiffs' cases under the same circumstances in which the court may hear the claims of a resident Plaintiff is impermissibly discriminatory. Regardless of the constitutionality of W.Va. Code 56-1-1(c) (2003), the Courts of West Virginia may still apply the doctrine of *forum non conveniens*, so long as this doctrine is applied to residents and non-residents alike.

The modern scope of the Clause's protection was summed up by the Third Circuit by the following three pronged standard:

The Privileges and Immunities Clause precludes discrimination against non-residents when the government action "burdens" one of the privileges or immunities protected under the clause, and the government does not have a "substantial reason" for the difference in treatment or the discrimination does not bear a "substantial relationship" to the government's objectives.

A. L. Blades & Sons, Inc. v Yerusolim, 121 F.3d 865, 870 (3rd Cir. 1997).

This modern evolution of Privileges and Immunities jurisprudence was recognized by the West Virginia Supreme Court in Sargus v. West Virginia Board of Law Examiners, 170 W.Va. 453 (W.Va. 1982). In Sargus a non-resident attorney challenged a West Virginia bar admission rule requiring that any applicant to the State bar must be a resident of West Virginia for at least 30 days prior to taking the bar examination. Id. at 454. The Petitioner's position was that this requirement was impermissible discrimination against non-residents in violation of the Privileges and Immunities Clause and the 14th Amendment to the United States Constitution. Id. at 455. The Board contended that its discriminatory policy was permissible under the rule of law

344 U.S. at 396.

espoused in Wilson v. Wilson, 416 F. Supp. 984 (D. Or. 1976), a case which was summarily affirmed by the United States Supreme Court at 430 U.S. 925 (1977). Applying the three pronged analysis, the West Virginia Supreme Court struck down the Board's residency requirement because it failed to demonstrate that non-residents constituted a "peculiar source" of evil, or that the residency requirement bore a close relationship to the State's goal of a competent bar. Id. at 457-58. With respect to the Wilson decision, the Court noted that it was decided prior to the "revitalization" of the Privileges and Immunities Clause in 1978. Id. at 459. The Sargus decision is of particular importance to the issue at bar as it is the seminal, modern day decision of the West Virginia Supreme Court with respect to the Privileges and Immunities Clause. With its adoption of the three pronged analysis, the Sargus decision compels this Court to declare W.Va. Code § 56-1-1(c) (2003) unconstitutional for all of the reasons discussed above.

Thus, as noted earlier, any determination of whether a State's discrimination against non-residents or non-citizens necessarily involves a three part inquiry: 1) is the right at issue a "fundamental" right protected by the Clause; 2) does the State have a "substantial reason" for the disparity in treatment; and, 3) does the practiced discrimination bear a "substantial relationship" to the government's objectives. This three pronged test is utilized by the United States Supreme Court whenever it is asked to analyze a State's discriminatory practices under the Privileges and Immunities Clause. See: Toomer, 344 U.S. at 396; 8 United Bldg. & Constr. Trades Council of Camden v. Mayor and Council of the City of Camden, 465 U.S. 208, 218 (1984); Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 284 (1985). If the State's conduct at issue fails under either prong two or three of this analysis, it runs afoul of the Privileges and Immunities Clause's protections. Applying this analysis to the discrimination at issue in this case, namely disparate

treatment of non-residents under W.Va. Code § 56-1-1(c) (2003), it is apparent that the statutory provision is unconstitutional.

First, the privilege infringed upon under the statute is a non-resident's right to equal access to the courts of the State of West Virginia. This privilege or right is undeniably fundamental. Although no court has attempted to compile an exhaustive list of those privileges considered "fundamental" for the purposes of Privileges and Immunities Clause protection, the Supreme Court has repeatedly concluded that the right to "institute and maintain actions of any kind in the courts of the state" is unquestionably among them. Saenz v. Roe, 526 U.S. 489, 524 (1999)(citing Corfield v. Coryell, 6 F.Cas. 546, 551-52 (CCED Pa. 1825)); See also: Canadian Northern Ry. Co. v. Eggen, 252 U.S. 553, 560 (1920). This is not to say that states are not permitted to discriminate in any manner against non-residents in the use of their court systems, since numerous rationale requirements such as the imposition of security for costs for non-residents have passed constitutional muster in the past, but only that a non-resident must be given access to the courts of a state "upon terms which in themselves are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens." Eggen, 252 U.S. at 562. However, the West Virginia statute at issue is not an additional but reasonable requirement that must be satisfied by a non-resident before he can access the courts, it is an outright and total exclusion of non-resident Plaintiffs from the court system under the same circumstances in which resident Plaintiffs are granted access. This is patently impermissible. There is nothing so anathema to established Privileges and Immunities jurisprudence as total exclusion. See: e.g., Toomer, 334 U.S. at 398-99 (Even if State was permitted to discriminate against non-resident shrimp boats, it

would be required to do so through the adoption of some reasonable method other than the “near equivalent of total exclusion”). Thus, in this instance, the first prong of the Supreme Court’s test is satisfied.

Once it is determined that the privilege or right at issue is fundamental, the second prong of the Supreme Court’s test requires that the state have a “substantial reason” for the discriminatory treatment beyond the mere fact that the targeted group is comprised of non-citizens or non-residents. In order to satisfy this prong, a state has the burden of establishing that there is a valid independent reason for the disparate treatment, and that non-residents are “a peculiar source of evil at which the statute is aimed.” Blades, 121 F.3d at 871 (quoting Toomer, 334 U.S. at 399). It is this requirement that the non-residents must comprise a “peculiar source of evil” that renders W.Va. Code § 56-1-1(c) (2003) unconstitutional.

As Justice Benjamin prudently noted in his Concurring Opinion in Morris, the West Virginia legislature failed to supply any rationale to support the existence of such a “substantial reason” for the discrimination found in § 56-1-1(c) (2003). Morris, 633 S.E.2d at 307. As his opinion states:

However, because the Legislature failed to articulate a proper rational basis for discriminating between residents and non-residents for the purposes of establishing venue in our courts, this Court cannot now, recognizing the limitations of our Constitutional charge, speculate as to the Legislature’s intentions. Without such a proper rationale basis for enacting a seemingly discriminatory venue statute, a court left to speculate as to both proper and improper rationales for residency discrimination cannot rightly guess in favor of one possible rationale more than it can favor another.

Id. If this was true for Morris, it is equally true for this case as well.

Further, even if it could be assumed that the goal of the West Virginia Legislature in enacting W.Va. Code § 56-1-1(c) (2003) was to lessen the burden on the State’s judicial system,

in order to legitimize this goal, the State of West Virginia would need to demonstrate that: 1) its court system is in fact overburdened; and 2) non-resident Plaintiffs are a “peculiar source” of this overburdening. The Statute at issue fails on both of these counts.

First, there is no evidence that the West Virginia court system is overburdened, at least not to the extent that would justify abandoning the principles of comity that underpin the Privileges and Immunities Clause. To the extent that the West Virginia court system is subject to mass filings in asbestos cases, there is nothing that sets West Virginia apart in this regard, as this condition has been experienced by most, if not every, federal and state court system in this Country. As noted by Judge Ronald Wilson recently in the case of Wagner v. 20th Century Glove Corporation, 05-C-1833 (Kanawha County, West Virginia, 2006), there are “about 600,000 asbestos cases pending in state and federal courthouses.” Thus, if West Virginia has experienced an increase in asbestos filings, this is more a reflection of the times than it is an indicator of some local crisis in the State’s judicial system. In fact, the State of West Virginia is actually doing a much better job than most of its sister states in resolving these cases in a timely and efficient manner. As Judge Wilson noted, “Trial courts in this state provide a quick and responsible system for the resolution of asbestos claims,” and more importantly, the West Virginia courts are resolving these cases “without any appreciable cost to our citizens.” Id. If there was an asbestos crisis overburdening the state’s court system, the state’s judges would be acutely aware of the problem. According to Judge Wilson, the West Virginia judges “do not complain that they have an overwhelming work burden. They do not claim that there is an ‘improper pilgrimage’ of out-of-state Plaintiffs.” Id. Since the West Virginia Court system is not overburdened, W.Va. Code § 56-1-1(c) (2003) violates the Privileges and Immunities Clause of the United States Constitution.

Furthermore, even if this State's court system was overburdened, West Virginia would need to establish that non-resident Plaintiffs are a "peculiar source" of this problem in order to justify discriminating against them. It is not enough to merely declare that there are too many cases being filed, and some of them are being filed by non-resident Plaintiffs, the state must actually demonstrate that the non-resident Plaintiffs are a "peculiar" cause of the overburdening. This burden has not been met. From a practical standpoint, W.Va. Code § 56-1-1(c) (2003) affects Federal Employer Liability Act (FELA) claimants, like the Appellants in this suit, in a disproportionate manner. Simply put, most non-resident Plaintiffs will not be affected by the statutory provision because if a "substantial part of the acts or omissions" giving rise to the claim did not occur within the State, then jurisdiction will most likely not be present to begin with. One exception to this general statement is, of course, the scenario in which a West Virginia citizen is the Defendant, but "a substantial part of the acts or omissions" did not occur in the State, but this Court has already ruled in Morris that such cases are not affected by W.Va. Code § 56-1-1(c) (2003). Since the FELA's broad venue and jurisdictional provisions are a rarity, if not entirely unique, the true burden of W.Va. Code § 56-1-1(c) (2003) falls upon FELA Plaintiffs exclusively. Therefore, since the FELA claims are truly affected by W.Va. Code § 56-1-1(c) (2003), the provision can only be upheld if it can be demonstrated that the West Virginia court system is peculiarly overburdened by FELA cases filed by non-resident Plaintiffs. Given the fact that such cases inevitably account for only a relatively minor percentage of all cases currently pending in West Virginia courts, this burden cannot be met.

The aforementioned Toomer case provides an excellent example of the heavy burden a state must meet in order to permissibly discriminate against non-residents. Toomer involved a

South Carolina statute that required non-resident shrimp boats to pay a license fee to fish for shrimp in South Carolina waters that was one hundred times greater than the fee which resident shrimp boats were required to pay. Toomer, 334 U.S. at 389. The stated purpose of the statute was to “conserve the shrimp supply” and “head off an impending threat of excessive trawling.” Id. at 397. The Supreme Court invalidated the statute on the grounds that it violated the Privileges and Immunities Clause. In so holding, the Court focused on South Carolina’s failure to demonstrate that the non-resident shrimp boats were a “peculiar source” of the evil the statute was designed to prevent. Id. at 398. As noted by the Court, there was nothing in the record to suggest that “non-residents use larger boats or different fishing methods, or that the costs of enforcing laws against them are appreciably greater.” Id. The Toomer case teaches us that it is not enough to simply say there is a problem and that the non-residents are a part of it, or that discriminating against them may help alleviate it, but a state must rather make a showing that there is a problem and the non-residents themselves are causing it, or at least contributing to it in a fashion that is disproportionately large relative to residents. As applied to this matter, it is not sufficient for West Virginia to say that they have an overburdened court system and non-resident Plaintiffs are a part of this problem; instead, West Virginia must demonstrate that it has an overburdened court system and the non-resident Plaintiffs themselves are the, or at least a, peculiar cause of that overburdening. This is where W.Va. Code § 56-1-1(c) (2003) undoubtedly fails.

Furthermore, even if such a showing could be made, W.Va. Code § 56-1-1(c) (2003) would still fail because it fails to satisfy the third prong of the Supreme Court’s test, that the practiced discrimination bear a “substantial relationship” to the government’s objectives. In

Toomer, the Court declared that a state is not entitled to employ severe discrimination policies against non-residents when less severe policies can be employed to accomplish the same objectives. Id., at 399. For instance, since South Carolina could have employed less severe sanctions against non-resident shrimp boats, such as a “differential which would merely compensate the State for any added enforcement burden” imposed by the non-residents, it would be unconstitutional for the state to impose a license fee that was so high that it was tantamount to “total exclusion.” Again, as discussed above, “total exclusion” is an option of last resort. Similarly, in this case, even if West Virginia could demonstrate that non-resident Plaintiffs are a “peculiar” source of the State’s hypothetically overburdened court system, there are a myriad of options available to the State which are less harsh, but still prove to be an effective remedy. The most obvious solution would be to merely charge non-resident Plaintiffs a heightened filing fee to litigate their cases in West Virginia. This option would serve to compensate the court system for any extra burden placed upon it by non-resident Plaintiffs without impermissibly excluding the non-residents from the courts of West Virginia. Simply put, the State cannot wield a broadsword when a scalpel would suffice.

In short, it is constitutionally impermissible for the West Virginia legislature to deny non-residents the same access to its courts that it provides residents. If the legislature wishes to bar the suits of non-resident FELA Plaintiffs, it is free to do so, but only if it equally bars the suits of its own residents under the same circumstances.

- B. Section 56-1-1(c) (2003) of the West Virginia Code is an Impermissible Violation of the "Right to Open Courts" Secured by Article III, Section 17 of the Constitution of the State of West Virginia.**

The West Virginia Constitution guarantees that the courts of this State shall remain open to the Appellants' claims. Article III, § 17 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 a remedy by due course of law; and justice shall be administered without sale, denial or delay." W.Va. Const. Art III, § 17. This section is commonly referred to as both the "Open Courts" and/or "Certain Remedy" provision of the West Virginia Constitution.

Certainly this constitutional provision protects the rights of all West Virginia citizens to pursue their otherwise lawful claims in the courts of this State. As currently written, W.Va. Code § 56-1-1(c) (2003) tramples on this right. As has been observed by at least one legal commentator, "How can the right to resort to the courts of the state be denied to a non-residents citizen when in the same circumstances that right is accorded to resident aliens?" Carrie and Schechter, "UNCONSTITUTIONAL DISCRIMINATION IN THE CONFLICT OF LAWS: PRIVILEGES AND IMMUNITIES," 69 Yale Law Journal 1323, 1383 (1960).

Although the Appellants are not a citizens of the State of West Virginia, the West Virginia Supreme Court has always held that the citizens of other states have, by the Constitution of the United States, the same privileges accorded to West Virginia citizens, and "any of them who has availed themselves of the legal remedies furnished by our laws ... has the same claim to the assistance of our courts that one of our own citizens would have." Stevens v. Brown, 20 W.Va. 450 (W.Va. 1882). Furthermore, the statutory provision at issue, W.Va. Code § 56-1-1(c) (2003), does not distinguish between citizens and non-citizens, so it denies a non-resident West Virginia citizen access to the courts of this State as well.

Even if this Court were to hold that the Open Courts provision only confers rights to West Virginia citizens, it would still find itself in a constitutional quagmire. In that instance, West Virginia Code § 56-1-1(c) (2003) would run afoul of the "Open Courts" provision because it would prohibit actions in the state of West Virginia brought by West Virginia residents.

It is undeniable that the Appellants in this case have a cause of action under the FELA, and that prior to the enactment of W.Va. Code § 56-1-1(c) (2003), this action would have been enforceable in the courts of this State. This right derives not from common law, but from a legislative enactment of the United States Congress. With the enactment of W.Va. Code § 56-1-1(c) (2003), the West Virginia legislature closed the door on a Plaintiff who would have otherwise been permitted access to this State's courts.

Although there is a "presumption of constitutionality" with regard to legislation enacted by the Legislature, when a legislative enactment "either substantially impairs vested rights or severely limits existing procedural remedies permitting court adjudication of cases, then the certain remedy provision of Article III, Section 17, of the West Virginia Constitution is implicated." Gibson v. West Virginia Department of Highways, 185 W.Va. 214 (W.Va. 1991). In the case at bar, there can be no doubt that W.Va. Code § 56-1-1(c) (2003) "severely limits" the remedies available to the Appellants and others like them, and therefore Article III, § 17 is certainly implicated.

This is not to say that any and all legislative enactments affecting an individual's right to seek redress in the West Virginia courts are automatically unconstitutional, as there are certainly circumstances under which such enactments are permissible, but when the legislature seeks to limit such a fundamental right it is under a heavy burden to justify its actions. Specifically, when

a legislative enactment implicates the “certain remedy” provision of the West Virginia Constitution, the enactment is only constitutionally permissible if it is designed to address a “clear social or economic problem,” and the enactment itself must be a “reasonable method of eliminating or curtailing” the problem at issue. Robinson v. Charleston Area Medical Center, Inc., 186 W.Va. 720, 728 (W.Va. 1991). Thus, the standard for constitutionality under Article III, § 17, is remarkably similar to the three pronged analysis utilized under the Privileges and Immunities Clause. Since, as discussed in the preceding question, non-resident Plaintiffs do not present a “clear social or economic problem,” W.Va. Code § 56-1-1(c) (2003) is an impermissible violation of the Certain Remedy/Open Courts provision of Article III, § 17. Furthermore, even if such a “clear social or economic problem” existed, the provision would still violate Article III, § 17, since it is not a “reasonable” method of eliminating or curtailing the problem, given the fact that the institution of an increased filing fee would alleviate the “problem” in a manner that is much less harsh and offensive.

C. Section 56-1-1(c) (2003) of the West Virginia Code Violates the Separation of Powers Clause of the West Virginia Constitution, Article V, Section 1

The Separation of Powers Clause, Article V, §1 of the West Virginia Constitution provides, in relevant part, that “the legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to the other.” It has been said that this Clause “is given life by each branch of government working exclusively within its constitutional domain and not encroaching upon the legitimate powers of any other branch of government.” State ex rel. Affiliated Constr. Trades Found. V. Viewig, 205 W.Va. 687, 702 (W.Va. 1999)(Davis, J., concurring). Thus, those powers properly bestowed upon the

judicial branch under the West Virginia Constitution are not to be usurped by either of the other two branches.

One of the powers exclusively bestowed upon the judicial branch is the power to promulgate the rules of practice and procedure. The Rule Making Clause of Article VIII, § 3, specifically provides that the Supreme “[C]ourt shall have the power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the state relating to writs, warrants, process practice and procedure, which shall have the force and effect of law.” W.Va. Const. art VII, § 3. As a result of the authority granted the West Virginia Supreme Court under this Clause, any “statute governing procedural matters in [civil or] criminal cases which conflicts with a rule promulgated by the Supreme Court would be a legislative invasion of the court’s rule-making powers.” Louk v. Cormier, 622 S.E.2d 788, 795 (W.Va. 2005).

Although the issue of venue has not been specifically addressed by the West Virginia Supreme Court in the form of a procedural rule, it is certainly within the power of the Court to do so if it wishes. As has been held in other jurisdictions that have examined this issue, the matter of venue, as opposed to jurisdiction, is procedural in nature. See e.g. North Central Pennsylvania Trial Lawyers Association v. Weaver, 827 A.2d 550 (Pa. Cmwlth 2003) (invalidating an enactment of the Pennsylvania General Assembly pertaining to venue on the grounds that venue is procedural in nature, and, therefore, regulation of such is committed to the exclusive authority of the Pennsylvania Supreme Court under Article V, Section 10(c)). Therefore, even the enactment of W.Va. Code § 56-1-1(c) (2003) could be interpreted as an improper encroachment upon the powers of the judicial branch. However, according to the controlling precedent, a legislative enactment is not invalid simply because it encroaches upon the powers properly

reserved for the courts, and that such enactments are only invalid to the extent they actually conflict with a promulgated Rule of Court. See *e.g.* Laxton v. National Grange Mutual Insurance Company, 150 W.Va. 598, 601 (W.Va. 1982). Therefore, for the time being at least, the West Virginia Legislature is free to pass legislation dealing with the issue of venue generally.

However, W.Va. Code § 56-1-1(c) (2003), goes beyond the issue of venue generally, and attempts to place specific limitations on both the joinder of parties and intervention. Specifically, the provision provides “In a civil action where more than one Plaintiff is joined, each Plaintiff must independently establish venue,” and “A person may not intervene or join in a pending civil action as a Plaintiff unless the person independently establishes proper venue.” W.Va. Code § 56-1-1(c) (2003). These sections of the provision go too far.

The West Virginia Supreme Court has already enacted rules specifically addressing the issues of “joinder of parties” and “intervention.” These rules are West Virginia Rules of Civil Procedure 19 (Joinder of Persons Needed for Just Adjudication), Rule of Civil Procedure 20 (Permissive Joinder of Parties), and Rule of Civil Procedure 24 (Intervention). Through these rules, the West Virginia Supreme Court has specifically set forth the requirements for joinder of parties and intervention, and therefore any encroachment by the Legislature into these areas is specifically prohibited. If the West Virginia Supreme Court wishes to permit the joinder of parties (or intervention) without specifically requiring that each an every party independently establish venue, it is free to do so. Certainly such a position can be easily defended on the grounds of judicial efficiency.

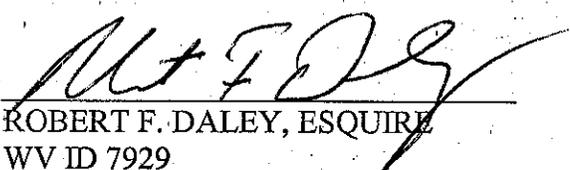
The invalidity of these provisions is relevant to the instant matter, since the Appellants' actions were initially joined (permissibly under Rule 20) with the actions of a number of other Plaintiffs, of whom at least one was a resident of the State of West Virginia.

V. PRAYER FOR RELIEF

Wherefore, for the reasons stated herein, the Appellants hereby request this Honorable Court reverse the decision of the Trial Court and remand these cases for further proceedings.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO.: 33665

**IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
IN RE: FELA ASBESTOS CASES
CIVIL ACTION NO.: 02-C-9500**

ORIGINALLY in the Circuit Court of Brooke County, West Virginia:

JOSEPH E. BAKER, *et al.*,

Appellants,

vs.

Civil Action No.: 06-C-89

CONSOLIDATED RAIL CORPORATION and
AMERICAN PREMIER UNDERWRITERS, INC.,

Appellee.

ORIGINALLY in the Circuit Court of Harrison County, West Virginia:

CHARLES S. ADAMS, *et al.*,

Appellants,

vs.

Civil Action No.: 06-C-72

CSX TRANSPORTATION, INC.,

Appellee.

and

HERBERT J. ADAMS, *et al.*,

Appellants,

vs.

Civil Action No.: 06-C-182

CSX TRANSPORTATION, INC.;

Appellee.

ORIGINALLY in the Circuit Court of Marshall County, West Virginia:

JERRY M. ABBOTT, *et al.*,

Appellants,

vs.

Civil Action No.: 05-C-63M

CSX TRANSPORTATION, INC.

Appellee.

and

PEGGY TACKETT, Administratrix of the Estate of
Walk Tackett, Deceased,

Appellants,

vs.

Civil Action No.: 06-C-27M

CSX TRANSPORTATION, INC.

Appellee.

ORIGINALLY in the Circuit Court of Mercer County, West Virginia:

CHARLES C. ALBRIGHT, *et al.*

Appellants,

vs.

Civil Action No.: 06-C-409 to 588

NORFOLK SOUTHERN RAILWAY COMPANY,

Appellee.

and

PAUL D. ANTHONY, *et al.*,

Appellants,

vs.

Civil Action No.: 06-C-188

CSX TRANSPORTATION, INC. and NORFOLK
SOUTHERN RAILWAY COMPANY,

Appellees.

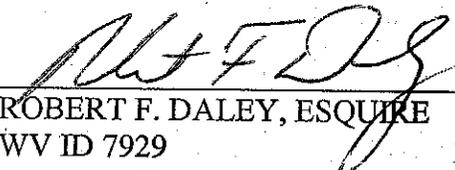
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Brief of the Appellants was served this 29th day of November, 2007, by first class United States mail, postage pre-paid, upon the following:

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