IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Robert L. Easterling and
S. Janie Easterling,
Plaintiffs Below,
Appellants

vs. No. 26566

American Optical Corporation,
American Stone-Mix, Inc.,
Clemco Industries Corporation,
Clementina, Ltd.,
E.I. Dupont De Nemours & Company,
P.K. Lindsay Company,
Mine Safety Appliances Company,
Minnesota Mining and Manufacturing Company,
Pulmosan Safety Equipment Corporation,
The Sherwin-Williams Company,
U. S. Silica Company,
Howard M. Weiss and
Woodfield Group, Inc.,
Defendants Below

Bicknell Manufacturing Company and
Buckeye Monument Company,
Defendants Below, Appellees

REPLY BRIEF OF APPELLANTS

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DISCUSSION OF THE LAW

A. Bicknell's Waiver Respecting The Trial Court's Ruling On The Long-Arm Provisions.

In the February 23, 1999 order from which this appeal is taken, the trial court held that Appellants' maintenance of this action against Bicknell is justified under the applicable long arm statute.[1] Moreover, W. Va. Rule of App. Proc. 10(f) of this Court provides:

> Cross assignments of error. - Appellee, if he is of the opinion that there is error in the record to his prejudice, may assign such error in a separate portion of his brief and set out authority and argument in support thereof. Such Cross assignment may be made notwithstanding the fact that appellee did not file a separate petition for an appeal within the statutory period for taking an appeal. Appellant may answer the cross assignment of error in his reply brief.

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[1] R. 535-538.

Under "IV. Statement To Meet Alleged Errors" of its Brief in Response to Brief of Appellants,[2] Bicknell alleges no error as to the trial court's ruling with respect to the Appellants prevailing on the long-arm statute issue. Given the plain import of Rule 10(f), Bicknell's failure is a waiver of its right to have this issue considered on appeal. *See, Abbott v. Owens Corning Fiberglas Corp.*, 191 W.Va. 198, 204, 444 S.E.2d 285, 293 (1994) ("CSR Limited conceded that the long-arm statute conferred jurisdiction by not raising the issue.")

B. Bicknell Is Subject To Personal Jurisdiction Under West Virginia's Long-Arm Provisions.

Assuming, *arguendo*, that Bicknell's reference elsewhere in its brief succeeds in putting the long-arm statute issue before this Court, Appellants offer the following points and authorities as a basis for concluding that the trial court's ruling was correct.

Bicknell asserts that Appellants' complaint did not address W. Va. Code § 31-1-15 (1997), a provision that concerns long-arm jurisdiction solely over corporations.[3] Bicknell implies that Appellants were somehow remiss in that regard, but Bicknell overlooks the fact that Appellants cited § 31-1-15 in opposing

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[2] Hereinafter referred to as "Bicknell Br."

[3] *Id.* at 2, n.10.

Bicknell's motion to dismiss and at oral argument.[4] Bicknell cites nothing to oppose the notion that both of West Virginia's long-arm statutes were before the trial court. Indeed, at the close of evidence, a party may seek leave to amend his complaint to conform with the evidence. W. Va. R. Civ. Proc. 15(b).

The pertinent provisions of the two applicable West Virginia long-arm statutes read as follows:

W. Va. Code § 31-1-15 (1997):

> For the purpose of this section, a foreign corporation not authorized to conduct affairs or do or transact business in this State pursuant to the provisions of this article shall nevertheless be deemed to be conducting affairs or doing or transacting business herein (a) if such corporation makes a contract to be performed, in whole or in part, by any party thereto, in this State, (b) if such corporation commits a tort in whole or in part in this State, or (c) if such corporation manufactures, sells, offers for sale or supplies any product in a defective condition and such product causes injury to any person or property within this State notwithstanding the fact that such corporation had no agents, servants or employees or contacts within this State at the time of said injury. The making of such contract, the committing of such tort or the manufacture or sale, offer of sale or supply of such defective product as hereinabove described shall be deemed to be the agreement of such corporation that any notice or process served upon, or accepted by, the secretary of State pursuant to the next preceding paragraph of this section in any action or proceeding against such corporation arising from, or growing out of, such contract, tort, or manufacture or sale, offer of sale or supply of such defective product shall be of the same legal force and validity

[4] R. at 112, 122-28; Motions Hearing Tr. at 23-26.

as process duly served on such corporation in this State.

W. Va. Code § 56-3-33 (1997):

(a) The engaging by a nonresident, or by his duly authorized agent, in any one or more of the acts specified in subdivisions (1) through (7) of this subsection shall be deemed equivalent to an appointment by such nonresident of the secretary of State, or his successor in office, to be his true and lawful attorney upon whom may be served all lawful process in any action or proceeding against him, in any circuit court in this state, including an action or proceeding brought by a nonresident plaintiff or plaintiffs, for a cause of action arising from or growing out of such act or acts, and the engaging in such act or acts shall be a signification of such nonresident's agreement that any such process against him, which is served in the manner hereinafter provided, shall be of the same legal force and validity as though such nonresident were personally served with a summons and complaint within this state:

(1) Transacting any business in this state;

(2) Contracting to supply services or things in this state;

(3) Causing tortious injury by an act or omission in this state;

(4) Causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;

(5) Causing injury in this state to any person by breach of warranty expressly or impliedly made in the sale of goods outside this state when he might reasonably have expected such person to use, consume or be affected by the goods in this state: Provided, that he also regularly does or solicits business, or engages in any other persistent course of conduct, or

> derives substantial revenue from goods used or consumed or services rendered in this state;
>
> (6) Having an interest in, using or possessing real property in this state; or
>
> (7) Contracting to insure any person, property or risk located within this state at the time of contracting.
>
> (b) When jurisdiction over a nonresident is based solely upon the provisions of this section, only a cause of action arising from or growing out of one or more of the acts specified in subdivisions (1) through (7), subsection (a) of this section may be asserted against him.

The exercise of personal jurisdiction over Bicknell is warranted under either of these statutes. Under § 31-1-15(b), and given that Mr. Easterling's disease is the consequence of all silica exposure had while sandblasting, that portion of Mr. Easterling's silica exposure in West Virginia while using Bicknell's products was a substantial contributing factor to his disease and amounted to tortious conduct by Bicknell in West Virginia. This is tortious conduct by Bicknell, "in part," in West Virginia. Its sale of defective products outside of West Virginia and used by Mr. Easterling here, represents tortious conduct by Bicknell, in part, outside of West Virginia.

Likewise, under § 31-1-15(c), Bicknell sold a product in a defective condition and that product injured Mr. Easterling in this state. The latter provision specifically renders irrelevant Bicknell's observation that it had "no agents,

servants or employees or contacts within this state at the time of said injury." *Id.*

Finally, Bicknell is likewise obliged to defend this action under the provisions of the general long-arm statute, § 56-3-33 (a)(4). Appellants' case against Bicknell need only satisfy one of several disjunctive requirements announced in § 56-3-33(a)(4). Here, however, Appellants can adduce all of the jurisdiction conferring facts set forth in this section of the statute: Bicknell sells defective products from its principal place of business in Elberton, Georgia. That is the act or omission outside of West Virginia that has resulted in the injury here of Mr. Easterling. Moreover, as discussed *infra* and in Appellants' opening brief, Bicknell is a purveyor of dangerous products, regularly solicits business here, engages in a persistent course of conduct here and derives substantial revenue[5] from sales here and injured Mr. Easterling here.[6]

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[5] That Bicknell derived substantial revenue from West Virginia sales cannot seriously be disputed. In the years 1992 through 1998, for example, Bicknell earned a total of $410,246 - an annual average $58,607. If Bicknell's West Virginia dollars are, as it contends, less than 1% of it annual revenue, the sums speak objectively for themselves. *Ajax Realty Corp. v. I.F. Zook, Inc.*, 493 F.2d 818, 821 (4th Cir. 1972).

[6] Moreover, there is no requirement under this section that a plaintiff's cause of action arise from, or grow out of, defendant's actual solicitation of business, course of conduct or derivation of revenue, in West Virginia. *See, Gatewood v. Fiat, S.p.A.*, 617 F.2d 820, 824 (D.C. Cir. 1980).

It is well settled that West Virginia is a single-act state for the purpose of exercising personal jurisdiction. Each time that Mr. Easterling used a Bicknell product in West Virginia, Bicknell committed a tort sufficient to require that it answer for its wrongdoing here. *Lozinski v. Lozinski*, 185 W. Va. 558, 561, 408 S.E.2d 310, 313 (1991).

Bicknell commences its discussion of West Virginia cases, interpreting the general long-arm statute, § 56-3-33, by acknowledging the expanded breadth of personal jurisdiction that recent United States Supreme Court decisions permit.[7] Bicknell further acknowledges that West Virginia enforces personal jurisdiction "to the utmost limit of due process," citing *Harman v. Pauley*, 522 F. Supp. 1130, 1135 (S.D. W.Va. 1981).[8] Notwithstanding the extensive reach of this long-arm statute, Bicknell serves up what it considers apposite examples of what this long-arm cannot reach.

Bicknell first cites *Lane:*[9] there a West Virginia decedent had traveled to a Virginia hospital to undergo catheterization. The catheter had been defectively manufactured in Massachusetts. The catheter manufacturer admitted that it had sent five of its

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[7] *Id.* at 3.

[8] *Id.* at 3.

[9] *Id.* at 4.

sales representatives to promote its wares to West Virginia medical facilities. *Lane*, 198 W. Va. at 455, 481 S.E.2d at 761. The long-arm theory advanced in that case was the applicability of § 56-3-33(a)(1): "Transacting any business in this State." This Court declined the imposition of personal jurisdiction over the catheter manufacturer because, contrary to the requirements of § 56-3-33(b), there existed no nexus between the catheter manufacturer's sales trips to West Virginia and the death that was suffered in a Virginia hospital. *Lane*, 198 W. Va. at 457, 481 S.E.2d at 763.

Appellants here have no occasion to attack the holding in *Lane* because the facts there bear no resemblance to the facts here. Plaintiff here used defendant's products in West Virginia. That was not true in *Lane*. Plaintiff here suffered injury from defendant's products in West Virginia. That was not true in *Lane*. Plaintiff here does not rely on § 56-3-33(a)(1) of the general long-arm statute. That was not true in *Lane*. In short, none of the essential facts of *Lane* are apropos of the instant case. Citing § 56-3-33(a)(4) of the long-arm statute, Appellants here contend that Bicknell's sale from Georgia of defective products is an act or omission outside of West Virginia which has resulted in the injury to Appellant in this state. Bicknell's citation to *Lane* in this context is pointless.

Bicknell proceeds from *Lane* to explain why it, like the Massachusetts catheter manufacturer, is not subject to personal jurisdiction in West Virginia. It is a stunningly wrongheaded argument. Not only is *Lane* inapposite here, but it further appears that Bicknell cannot align itself with the *Lane* defendant without distorting the instant facts. Bicknell urges that the operative facts in this case pertain to Ohio rather than West Virginia.[10] This is patent nonsense. As the complaint and the affidavits of Mr. Easterling and his consulting physician, Dr. Timothy Scott Prince, make clear, this case insofar as Bicknell is concerned is legitimately focused upon Mr. Easterling's use of Bicknell's products in West Virginia and the deleterious health consequences of that use.[11]

Bicknell next argues that the products it sold to Buckeye were "sold F.O.B. Elberton, Georgia and shipped to Buckeye in Ohio."[12] Bicknell asserts that the F.O.B. status of its shipments shifted title, risk and cost to Buckeye in Georgia. This Court is left to infer, unaided by a single citation to case law, that shipment via this method thwarts personal jurisdiction.

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[10] *Id.* at 5.

[11] R. 140-43, 146-148.

[12] *Id.* at 5.

Bicknell further urges that it never sold products to Buckeye in West Virginia.[13] In this, likewise without citation, Bicknell assumes that such a sale would be the only basis for requiring its defense of the action here. Bicknell fails to understand West Virginia law.

C. **Bicknell's Product Shipment Terms Lack Constitutional Significance.**

Throughout its brief, Bicknell asserts that its method of shipping the products at issue in this case (F.O.B. (*i.e.*, "free on board") Elberton, Georgia) insulates it from the assertion of personal jurisdiction in this forum. Historically, however, F.O.B. is of moment only as to whether the buyer or seller pays for shipment and when in the shipping process the risk of loss or damage to the goods passes from seller to buyer. *See*, W. Va. Code § 46-2-319.

Bicknell cites *Federal Ins. Co. v. Lake Shore, Inc.*, 886 F.2d 654 (4th Cir. 1989) as precedent for the holding that shipping terms can thwart the exercise of personal jurisdiction in another state. Bicknell avoids mention of the only two facts about shipping terms that would aid this Court in deciding the F.O.B. issue: First, no American court has ever held that terms of shipping, of themselves, determine the availability of

[13] *Id.* at 5.

personal jurisdiction over a seller. Second, true to the traditional understanding of such shipping terms, the majority rule is that the F.O.B. protection claimed by Bicknell has no impact whatsoever on personal jurisdiction. This is the only inference to be made in West Virginia, where this Court in *State of West Virginia ex reel. CSR, Ltd. v. McQueen*, 190 W. Va. 695, 441 S.E.2d 658 (1994), *cert. denied*, 513 U.S. 822 (1994) apparently saw no significance to the F.O.B. Freemantle, Australia shipment of asbestos to the United States. In refraining from attaching jurisdictional significance to terms of shipment, this Court stands squarely in the mainstream. *See*, *Accura Zeisel Machinery Corp v. Timco, Inc.*,305 N.J. Super. 559; 702 A.2d 1340,1346 (N.J. App. 1997) ("We think it clear, in any event, that a party otherwise subject to long-arm jurisdiction by reason of the substantive nature of his contacts cannot immunize himself from the exercise thereof by the simple and unilateral expedient of a F.O.B. arrangement," quoting *Cruz v. Robinson Egg's. Corp.*, 600 A.2d 1238, 1242 (N.J. Super. Ct. 1992)); *State ex rel. Metal Serve. Ctr. of Ga., Inc. v. Gardner*, 677 S.W.2d 325, 328 (Mo. 1984) (as "[t]he place for total performance is, if anything, more significant than the place of contracting," that goods were F.O.B. in another state is not dispositive on the jurisdiction issue); *Moore v. Little Giant Indus., Inc.*, 513 F. Supp. 1043, 1047 (D. Del. 1981), *aff'd*

without op., 681 F.2d 807, (3d Cir. 1982) (that ladder was shipped F.O.B. Utah, does not determine whether defendant "contracted to supply things" under Delaware long-arm statute); *Oswalt v. Scripto, Inc.*, 616 F.2d 191, 197 (5th Cir. 1980) (the question of when title to goods passes is not relevant to personal jurisdiction); *Wilsey v. Gavett*, 268 N.Y.S.2d 688, 691 (N.Y. Sup. Ct. 1965) (that manufacturer "meticulously made" all sales F.O.B. outside of New York, does not prevent the exercise of personal jurisdiction in that state); *L.D. Reeder Contractors of Az. v. Higgins Indus., Inc.*, 265 F.2d 768, 774 (9th Cir. 1959) (F.O.B. terms not dispositive of personal jurisdiction).

Finally, there is reason to conclude that the Supreme Court impliedly denied that shipping terms are pertinent to personal jurisdiction in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). There, the court discussed the F.O.B. status of shipment of goods by International Shoe Company. The shipment status, however, was not included by the court in setting forth the minimum contacts analysis. *Id.* at 314-15, 320. Under the circumstances, one can only conclude that shipping terms do not determine whether personal jurisdiction is available.

D. **Reply To Bicknell's Points And Authorities On The Constitutionality Of The Exercise Of Personal Jurisdiction Over It In West Virginia.**

Bicknell urges that "nexus cannot be established in this case because the products sold by Bicknell in Elberton, Georgia to customers who happen to be located in West Virginia were not the same products involved in Appellant's alleged injury."[14] First, as a national supplier of the dangerous products at issue in this case, Bicknell is amenable to personal jurisdiction in any state where someone alleges harm caused therein by one of those products.[15] Second, West Virginia has positioned itself at the outer edge of the due process envelope. Third, the stream of commerce theory explicitly contemplates that, as here, goods purchased in one state shall be moved to, and used in, another state. Fourth, to say that the Bicknell products that injured Mr. Easterling were not the same products that Bicknell sold in West Virginia is a disingenuous use of the word "same." Bicknell considers every one of its sandblasting machines to be unique.

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[14] Bicknell Br. 24. Bicknell says: "It is undisputed that [neither] Bicknell, nor the equipment or parts at issue, have any direct connection or nexus to West Virginia." *Id.* at vi. For the reasons discussed infra, this is nonsense.

[15] Bicknell considers Appellants' reliance on the stream of commerce theory as a mere matter of jurisdiction resulting from the national marketing of a product. Bicknell Br. at 10. This is incorrect. Appellants contend that Bicknell is haled before the courts of this state by the confluence of the stream of commerce theory *and* the fact of injury in this forum.

This is true in a sly philosophical sense that sheds no light on this case. The sandblasting machine that Bicknell sold in Ohio was fundamentally the same as the sandblasting machine it sold everywhere else.

Finally, Bicknell's narrow interpretation of the term "nexus" would obliterate Justice Brennan's view that the stream of commerce theory anticipates the movement of products from one state to another by the purchasers or, indeed, by others. Significantly, Bicknell cites no case espousing the narrow nexus rule. Moreover, the U.S. Court of Appeals for the Federal Circuit made it clear in *Akro Corp. v. Luker*, 45 F.3d 1541, 1547 (Fed. Cir.), *cert. denied*, 515 U.S. 1122 (1995) that "nexus" is a concept in the process of being relaxed, not constricted:

> The Supreme Court has avoided general pronouncements on the nexus required to satisfy this "arise out of or relate to" prong of the due process inquiry. *See, e.g.*, *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 589, 113 L. Ed. 2d 622, 111 S. Ct. 1522 (1991) (declining to reach the issue despite having certified it for review); *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 415 n.10, 80 L. Ed. 2d 404, 104 S. Ct. 1868 (1984) (declining to reach the issue). Nonetheless, a few guideposts do exist in this area. The Court's holdings in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 79 L. Ed. 2d 790, 104 S. Ct. 1473 (1984), and *Calder v. Jones*, 465 U.S. 783, 79 L. Ed. 2d 804, 104 S. Ct. 1482 (1984), make it clear that the plaintiff need not be the forum resident toward whom any, much less all, of the defendant's relevant activities were purposefully directed. In both cases, the plaintiffs brought state law libel actions against out-of-state publishers and, in *Calder*, authors and editors. The Court concluded in both cases that personal jurisdiction over the defendants would not

> violate due process where the publications containing the alleged libels were purposefully directed to consumers within the forum state. Indeed, in *Calder*, such purposeful circulation was enough to ground personal jurisdiction over the reporter who wrote the story and the editor who put it into its final form. 465 U.S. at 789-90. Second, as the First Circuit recently observed, "it [is] significant that the constitutional catch-phrase ['arise out of or relate to'] is disjunctive in nature," indicating "added flexibility and signaling a relaxation of the applicable standard" from a pure "arise out of" standard. *Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201, 206 (1st Cir. 1994) (collecting cases).

Inspired by *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, (1980), Bicknell complains that the exercise of personal jurisdiction over it would stem from the "unilateral act" of Appellant's employer in bringing Bicknell's products from Ohio to West Virginia.[16] It is a specious argument because this is not a case where the product at issue has been moved from the state in which it was originally sold to a state where the seller does not do business. In *World-Wide Volkswagen* (where a person who purchased an automobile in New York was injured by the vehicle's alleged defects in an Oklahoma crash), the Supreme Court held that due process would not permit Oklahoma to impose jurisdiction over the New York auto dealer or the New York automobile wholesaler who sold to retailers in New York, Connecticut and New Jersey. However, the Court noted that the

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[16] *Id.* at 25.

automobile manufacturer would have been subject to Oklahoma jurisdiction for having placed the automobile into the national stream of commerce. *Id.* at 289, 297-98.

Appellant's employer moved sandblasting equipment from Ohio to West Virginia. Bicknell sold such equipment in both states. Whether one follows Justice Brennan's stream of commerce theory (as does West Virginia) or follows Justice O'Connor's more stringent stream of commerce standard, which requires additional purposeful conduct toward the forum,[17] Bicknell could surely foresee being haled into a West Virginia court. Under the Brennan test, Bicknell is amenable to West Virginia jurisdiction for having placed its products into the national stream of commerce. Under the O'Connor test, personal jurisdiction lies in West Virginia because Bicknell is a nationwide distributor who specifically sold its products to West Virginia customers (*i.e.*, a forum-directed activity).[18]

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[17] Bicknell refers to Justice O'Connor's opinion in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987) as a "holding." Bicknell Br. 9. That opinion, which is not the law in West Virginia, spoke for four justices - a plurality opinion - that of its nature is not a "holding" of the Supreme Court.

[18] Bicknell notes the "broad and intricate distribution system" considered in *Hill by Hill v. Showa Denko, K.K.*, 188 W. Va. 654, 425 S.E.2d 609 (1992). Bicknell Br. at 10. Whether the purveyors of a product have a distribution scheme that is highly complex or the simpler system that Bicknell claims to be a fair characterization of its "family owned" business is a matter of no constitutional consequence. The purveyors of a *Footnote continued . . .*

E. Further Points And Authorities In Reply To Bicknell's Opposition Brief.

Apropos of nothing at issue in this case, Bicknell declares that Appellant Robert L. Easterling was found by the Industrial Commission of Ohio to have suffered no compensable injury.[19] However, Bicknell fails to inform the Court that the Commission did find that Mr. Easterling has silicosis.[20]

Bicknell asserts that Appellants may not "bring their 'deliberate intent' claim against Buckeye [pursuant to West Virginia law]." [21] The status of that claim is of no moment here, but for the record, Appellants agree that West Virginia law dictates that Ohio law will govern this claim. Ohio provides a deliberate intent cause of action identical to West Virginia's. *See, Johnson v. BP Chems., Inc.*, 85 Ohio St. 3d 298; 707 N.E.2d 1107 (1999); *Blankenship v. Cincinnati Milicron Chems.*, 69 Ohio St. 2d 608, 433 N.E.2d 572, *cert. denied*, 459 U.S. 857 (1982).

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product can be manning a bank of computers or sitting on cracker barrels. If the purveyors are marketing their goods nationally, the Constitution sees no difference between high-tech and homely.

[19] Bicknell Br. at i.

[20] *See*, Industrial Commission of Ohio, Record of Proceedings, dated January 8, 1998, attached hereto.

[21] Bicknell Br. at i, n.3.

Bicknell avers that it has neither a sales office or agents in West Virginia and no national distribution system.[22] As to the latter, Appellants do not have to prove how Bicknell placed its goods into the national stream of commerce, only that it did so. Bicknell's president has testified that his company sells nationally, including, of course, in West Virginia.[23] Indeed, Bicknell's president admitted that the company places no geographic restriction whatsoever on the nationwide scope of its sales.[24]

Citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), Bicknell notes that due process entails the predictable exercise of personal jurisdiction that enables a potential defendant to structure conduct in liability-avoiding ways.[25] Bicknell is correct but, ironically, Bicknell did nothing to structure its own conduct; it markets its goods nationally, and under the law faces the exercise of personal jurisdiction wherever its goods do harm.

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22 *Id.* at iii, n.5.

23 R. at 156.

24 R. at 157.

25 Bicknell Br. at 8.

Bicknell is quick to assert that its West Virginia presence via a toll free telephone number and Internet website postdate the events that give rise to this action.[26] Nevertheless, these means of inducing West Virginians to be customers manifest a continuing presence in this state - a fact that belies any notion that Bicknell is trapped in a "fly by" encounter with West Virginia.

Bicknell admits, pursuant to *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939 (4th Cir. 1994) that jurisdiction of West Virginia is proper where in addition to traditional notions of fair play and substantial justice (discussed in Brief of Appellants' at 32-47), there exists action by Bicknell that invokes "the benefits and protections [of this state]."[27] Bicknell admits too much. By its sale of products to West Virginia customers, Bicknell enjoys all the rights and benefits that inure to a seller who must avail himself of West Virginia remedies when aggrieved by the contractual breach of any customer here. More plainly put, Bicknell enjoys the profits of selling here and the power of suing here. How can it avoid the jurisdiction of West Virginia on the allegation that it did wrong here?

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[26] *Id.* at 22.

[27] *Id.* at 26.

F. **Reply To The Brief Of Appellee Buckeye Monument Company.**

In addition to the points and authorities heretofore asserted by Appellants supporting the reversal of the ruling of the trial court, and further supporting the exercise of personal jurisdiction over Buckeye in West Virginia, Appellants raise the following:

First, W. Va. Rule of App. Proc. 10(f) of this Court burdens a litigant with the obligation, under the decisional facts of the instant case, to specify any assignment of error it would make regarding the holding under review. Buckeye has failed to take issue with the trial court's decision that West Virginia's long-arm standards were met by Appellants. Accordingly, Buckeye has waived its right to assert this issue and therefore the decision of the trial court may not be disturbed.

Second, Buckeye (as does Bicknell) fails to appreciate that Appellant Robert L. Easterling's deliberate intent claim against it is, *pursuant to West Virginia law,* governed by the law of the state of his employment - Ohio. *Gallapoo v. Wal-Mart Stores, Inc.,* 197 W.Va. 172, 475 S.E.2d 172 (1996). Ohio provides a deliberate intent claim against an employer identical to that countenanced in West Virginia. Thus, the trial court will apply Ohio law as to this count of the complaint. *See, supra* at 5.

PRAYER FOR RELIEF

For the reasons asserted by Appellants in the brief lodged in this Court on October 4, 1999 and for the further reasons asserted herein, Appellants ask that this Court reverse the trial court's summary judgment orders respecting Appellees Bicknell Manufacturing Company and Buckeye Monument Company and remand this case for a trial on the merits.

Respectfully submitted,

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