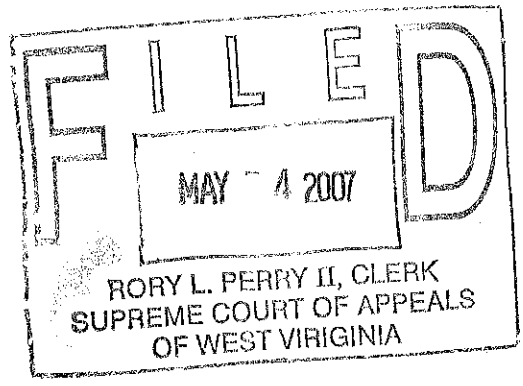
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 33350



A.T. MASSEY COAL COMPANY, INC.,
ELK RUN COAL COMPANY, INC.,
INDEPENDENCE COAL COMPANY, INC.,
MARFORK COAL COMPANY, INC.,
PERFORMANCE COAL COMPANY, and
MASSEY COAL SALES COMPANY, INC.,

Appellants,

v.

HUGH M. CAPERTON,
HARMAN DEVELOPMENT CORPORATION,
HARMAN MINING CORPORATION,
SOVEREIGN COAL SALES, INC.,

Appellees.

APPELLANT BRIEF OF A.T. MASSEY COAL COMPANY, INC., ELK RUN COAL COMPANY, INC., INDEPENDENCE COAL COMPANY, INC., MARFORK COAL COMPANY, INC., PERFORMANCE COAL COMPANY, AND MASSEY COAL SALES COMPANY, INC.

Respectfully submitted,

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MEMORANDUM OF PARTIES

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KIND OF PROCEEDING AND NATURE OF RULING BELOW

Appellants, A.T. Massey Coal Company, Inc. ("A.T. Massey"), Elk Run Coal Company, Inc., Independence Coal Company, Inc., Marfork Coal Company, Inc., Performance Coal Company, Inc., and Massey Coal Sales Company, Inc. appeal from the following orders of the Boone County Circuit Court below:

1) the June 4, 2002, Memorandum Opinion denying Appellants' Motion to Dismiss;

2) the June 28, 2002, Memorandum of Summary Opinion denying Appellants' Motion for Summary Judgment, and Motion *in Limine;*

3) the August 15, 2002, Judgment Order entering the jury verdict; and

4) the March 15, 2005, entry denying Appellants' Motion for Judgment as a Matter of Law, Motion for New Trial, or in the Alternative, Motion for Remittitur.

Appellants seek further relief from numerous errors committed during the trial of this matter.

STATEMENT OF FACTS

This action concerns an underground coal mine located in Buchanan County, Virginia, known as the Harman Mine. Prior to 1993, the Harman Mine was owned by Inspiration Coal Corporation ("Inspiration"), through three subsidiaries, Harman Mining Corporation ("Harman Mining"), Sovereign Coal Sales, Inc. ("Sovereign") and Southern Kentucky Energy Company ("Southern").

On April 15, 1992, Inspiration subsidiaries Sovereign and Southern entered into a coal supply agreement ("1992 CSA") with Wellmore Coal Corporation ("Wellmore"). At that time, Wellmore was a subsidiary of United Coal Corporation ("United"). *See* June 18, 2002 T.T., p. 39, l. 23 - p. 40, l. 2. Under the 1992 CSA, Wellmore was to purchase approximately 750,000 tons of coal per year from Sovereign and Southern. The 1992 CSA also contained a very broad *force majeure* provision,

which provided in pertinent part that if one of Wellmore's customers experienced a *force majeure* event, then Wellmore could reduce its purchases from Sovereign and Southern proportionately:

> The term "*force majeure*" ... shall mean any and all causes reasonably beyond ... [Wellmore's] control ... such as ... government closures ... and acts of ... civil authorities ... which wholly or partly prevent the receiving, adopting, storing, processing or shipment of the coal by [Wellmore]. [*Force majeure*] shall further include occurrences of a *force majeure* event at [LTV]....

See 1992 CSA.

Before 1993, Inspiration endeavored unsuccessfully to sell the unprofitable Harman Mine. *See* June 21, 2002 Trial Transcript, ("T.T.") p. 16, ll. 8-23 and p. 103, l. 13-20. In 1993, Hugh M. Caperton ("Caperton") formed Harman Development Corporation ("Harman Development") and purchased Harman Mining, Southern and Sovereign from Inspiration. (The Harman entities may be collectively referred to herein as "Harman.") *See* June 18, 2002 T.T., p. 30, ll. 7-10. Caperton paid no cash as consideration for the stock of these three companies. *See* June 19, 2002 T.T., p. 97, ll. 3-16. Instead, Caperton assumed the significant financial burdens and liabilities associated with the corporate triad and executed an interest-free note for $2.35 Million to be repaid by a royalty of 50 cents per ton on the Harman coal. *See* June 18, 2002 T.T., p. 45, l. 7 - p. 52, l. 2; *See also* June 19, 2002 T.T., p. 103, ll. 13-20.

During its inaugural year of 1993, the Harman operations reported a profit of approximately $600,000. *See* June 24, 2002 T.T., p. 32, ll. 22-23. Harman's success was short-lived, however, and in 1994 Harman suffered a loss of approximately $1 Million. *Id.*, p. 32, l. 23. Harman then lost increasingly larger amounts of money over the next three years: $1.5 Million in 1995, $2.5 Million in 1996 and $8.5 Million in 1997. *Id.* Appellees candidly admit that Harman had a significant multi-million dollar negative book value during this period. *See* Appellees' Response to Petition for Appeal.

In early 1997, Harman and Wellmore renegotiated the 1992 CSA. *See* June 19, 2002 T.T., p. 40, l. 23 - p. 41, l. 2. Under this new coal supply agreement ("1997 CSA"), Harman received an increase in its selling price per ton. *See Id.*, p. 43, l. 19 - p. 44, l. 3. The 1997 CSA further provided that Harman would deliver 736,000 tons in 1997 and 573,000 tons per year beginning in 1998. As with its forerunner, the 1997 CSA contained the same *force majeure* provision permitting Wellmore to reduce its purchase of coal proportionate to any decrease in its need for coal resulting from a *force majeure* event by one of its customers.

Harman's losses, however, continued through 1997. Desperate for cash, Harman sold all of its coal reserves to Penn-Virginia Corporation ("Penn-Virginia") in a sale/leaseback arrangement. *See* June 19, 2002 T.T., p. 7, ll. 4-13. As part of this agreement, Harman leased back only part of its former reserves. *Id.* Penn-Virginia leased the rest of Harman's former reserves to another company. *See* June 21, 2002 T.T., p. 14, ll. 9-12. During the first half of 1997, Harman's production rate was erratic, and the quantity of coal produced was substantially less than the tonnage necessary to supply Wellmore with the 736,000 tons required under the 1997 CSA. *See* June 18, 2002 T.T., p. 107, ll. 8-12.

On July 19, 1997, one of Wellmore's primary customers, LTV Steel ("LTV"), announced that it intended to shut down its Pittsburgh coke plant due to an unforeseen change in EPA emissions regulations. Previously, Wellmore had sold and shipped nearly two-thirds of the coal purchased from Harman to this LTV Pittsburgh plant. *See* July 15, 2002 T.T., p. 33, ll. 12-23.

On July 31, 1997, A.T. Massey purchased United and its subsidiary Wellmore. *See* June 28, 2002 T.T., p. 25, ll. 12-14. On August 5, 1997, Wellmore gave notice to Harman that if LTV was forced to close its Pittsburgh plant, then Wellmore anticipated a pro rata reduction in tonnage under the 1997 CSA's *force majeure* provision. *See* June 19, 2002 T.T., p. 52, l. 15 - p. 53, l. 22. LTV's

notice regarding the Pittsburgh plant did not affect LTV's Chicago plant, where Wellmore shipped the rest of the coal from Harman. Wellmore's ultimate *force majeure* declaration likewise did not include any reduction for the Chicago plant. *See* July 18, 2002 T.T., p. 82, ll. 3-15. The undisputed testimony established that Wellmore intended to continue to purchase all of the Harman coal it supplied to LTV's Chicago plant. *Id.*

In September 1997, Harman continued to struggle with insufficient production and was unable to meet the 1997 CSA's tonnage requirement. Harman proposed changes in the existing work schedule in an effort to boost its production, but the United Mine Workers of America ("UMWA") rejected the requested modifications. *See* June 21, 2002 T.T., p. 23, ll. 2-24. In response, Henry E. Cook ("Cook"), President of Harman, laid off approximately one-third of the workforce. *Id.*, p. 24, ll. 1-5.

Despite the fact that the Chicago tonnage was not in danger of being reduced, Caperton claimed he heard a rumor in the Fall of 1997 that Wellmore had lost its business at LTV's Chicago plant. *See* June 19, 2002 T.T., p. 65, ll. 10-20. Purportedly reacting to these rumors, Caperton sent a letter to Wellmore on November 6, 1997, in which he disagreed with Wellmore's position that LTV's decision to close its Pittsburgh plant constituted a *force majeure* event under the 1997 CSA. *Id.*, p. 77, l. 5-9. Caperton also threatened to sue if Wellmore did not take the full tonnage in 1998. *Id.*, p. 77, l. 17-20. In response, A.T. Massey, Wellmore's parent corporation, began discussions with Harman in an attempt to settle any dispute regarding the *force majeure* provisions in the 1997 CSA. *See* June 19, 2002 T.T., p. 68, ll. 9-10. In the course of those discussions, A.T. Massey asked what price Harman would be willing to sell its now limited assets for in order to settle the dispute. *Id.*, p. 66, ll. 11-14.

On December 1, 1997, after confirming that LTV's Pittsburgh coke plant indeed was being forced to shut down, Wellmore sent Harman a formal notice of *force majeure*. *See* June 19, 2002 T.T., p. 69, l. 15 - p. 70, l. 2. Wellmore stated it would reduce the tonnage purchased from 573,000 to 203,707 tons, a reduction proportionate to the amount of coal no longer needed because of the LTV's Pittsburgh plant's closure. *Id.*

Caperton unilaterally decided to close the Harman Mine on January 18, 1998. Following the closure, A.T. Massey and Wellmore again tried to settle the *force majeure* dispute and proposed to acquire Harman's assets. *See* July 8, 2002 T.T., p. 58, ll. 11-14. In May 1998, with the idea that it might acquire Harman, A.T. Massey negotiated a separate and unrelated agreement with Pittston Coal Company ("Pittston") to swap certain West Virginia reserves owned by A.T. Massey for the Pittston coal reserves located adjacent to the reserves Harman had previously sold to, and was leasing back from, Penn-Virginia. *See* July 29, 2002 T.T., p. 90, ll. 13-19. A.T. Massey planned to acquire the Penn-Virginia reserves and the adjoining Pittston reserves and to mine them together as part of a single mining plan. *See* July 29, 2002 T.T., p. 74, ll. 5-11. Harman also had tried to purchase the adjoining Pittston reserves in order to pursue such a similar plan, but was unsuccessful. *See* June 19, 2002 T.T., p. 95, ll. 3-17; *See also* June 19, 2002 T.T., p. 40, ll. 9-15. In their Response to the Petition for Appeal, Appellees make great issue of their allegedly excellent mining plan. However, this "excellent plan" had a fatal flaw; it was completely contingent on Harman's access to the Pittston reserves. The undisputed testimony at trial conclusively established that not only did Harman try and fail to purchase these reserves, but also that Pittston would not sell its Virginia reserves to Harman under any circumstances. *See* July 26, 2002 T.T., p. 90, ll. 10-19.

Ultimately, the proposal between A.T. Massey and Pittston to swap reserves never closed because Penn-Virginia, the ultimate owner of Harman's reserves, placed restrictions on the use of the

reserves that A.T. Massey found to be untenable. *See* July 29, 2002 T.T., p. 73, ll. 7-14. In March 1998, all settlement negotiations between A.T. Massey and Harman ceased. *See* July 29, 2002 T.T., p. 78, ll. 1-15.

In May 1998, Harman filed for Chapter 11 Bankruptcy because of: (a) four years of multi-million dollar losses, (b) failure to pay vendors, (c) failure to pay taxes, and d) loan defaults. *See* June 19, 2002 T.T., p. 12, ll. 5-11; p. 13, l. 18 - p. 14, l. 9.

In May 1998, Harman Mining and Sovereign sued Wellmore in Buchanan County, Virginia for breach of contract and for breach of the covenant of good faith and fair dealing arising from Wellmore's declaration of *force majeure*. Harman Mining and Sovereign voluntarily withdrew their tort claim prior to trial in the Virginia action with assurances that they would not later assert such a claim. A Virginia jury awarded $6 Million for lost profits and incidental damages allegedly suffered by Harman Mining and Sovereign. The appeal to the Virginia Supreme Court was refused on technical grounds.

On October 29, 1998, only a few months after filing their Virginia case, Harman Development, Harman Mining, and Sovereign ("Corporate Appellees") and Caperton filed the action below against Appellants in the Circuit Court of Boone County, West Virginia ("Trial Court"). The Complaint as amended included claims for tortious interference with existing contractual relations, tortious interference with prospective contractual relations, fraudulent misrepresentation, negligent misrepresentation, civil conspiracy and punitive damages. Appellees claimed that A.T. Massey, Wellmore's parent, masterminded a "scheme" to wrongfully drive the Harman entities out of business by directing Wellmore to declare the *force majeure*.

Appellants moved to dismiss the Complaint because of the forum-selection provisions in both the 1992 CSA and 1997 CSA, because Harman failed to add Wellmore as an indispensable party; and for *forum non conveniens*. The Trial Court did not rule on any of these motions until on or after the first day of the six-week trial.

On April 1, 2002, Appellants filed various motions *in limine* and moved for summary judgment. The Trial Court summarily denied these motions on June 17, 2002, the first day of trial on which evidence was taken.

During the trial, the Trial Court made numerous errors as more fully set forth herein. On August 1, 2002, the jury returned a verdict that awarded the Harman corporate entities compensatory damages in the amount of $29.7 Million, consequential damages in the amount of $3 Million, no general damages, and $2 Million in punitive damages. The jury awarded Caperton personally compensatory damages in the amount of $3.4 Million, consequential damages in the amount of $425,000, general damages in the amount of $7.5 Million, and $4 Million in punitive damages. On August 16, 2002, the Trial Court entered a judgment based upon the verdict.

On August 30, 2002, Appellants timely filed their Motion for Judgment as a Matter of Law, Motion for New Trial, or in the Alternative, Motion for Remittitur. Some two and one-half years later, on March 17, 2005, the Trial Court entered a final order denying Appellants' post-trial motions. After extended delays and difficulties obtaining a complete and accurate trial transcript, the Trial Court certified the transcript on August 25, 2006. Appellants filed their Petition for Appeal on October 24, 2006. This Court granted the Petition for Appeal on April 4, 2007. This brief follows and incorporates by reference as if fully set forth herein the Petition for Appeal and all Exhibits thereto.

ASSIGNMENTS OF ERROR

1. The Trial Court committed reversible error by denying Appellants' Motion for Summary Judgment and refusing to extend Full Faith and Credit to the verdict in the Buchanan County, Virginia case.

2. The Trial Court committed reversible error by denying Appellants' Motion for Summary Judgment and refusing to apply the doctrines of collateral estoppel and/or *res judicata* to the Appellees' West Virginia tort claims.

3. The Trial Court committed reversible error by denying Appellants' Motion to Dismiss, Motion for Summary Judgment, and Motion *in Limine* on choice of law.

4. The Trial Court committed reversible error by admitting extrinsic evidence at trial to interpret the *force majeure* provisions in the 1992 CSA and 1997 CSA.

5. The Trial Court committed reversible error by denying Appellants' Motion for Summary Judgment on the issue of tortious interference with a contractual relationship and, specifically, by failing to recognize that a parent corporation cannot interfere with a contract of its wholly owned subsidiary.

6. The Trial Court committed reversible error by denying Appellants' Motion for Summary Judgment on the issue of fraudulent misrepresentation and fraudulent concealment, as there is no evidence that Appellants had a "duty to disclose" information, material or business goals to the Appellees and no evidence of any fraudulent act by Appellants.

7. The Trial Court committed reversible error by denying Appellants' Motion for Summary Judgment on the issue of damages potentially recoverable by Caperton individually. The Trial Court committed numerous other errors, including admitting certain damages evidence, placing certain damages on the verdict form and giving certain damages instructions. The Trial Court

committed reversible error by entering the August 15, 2002, Judgment Order entering the jury verdict, when the manifest weight of the evidence was against such an entry of the Order.

8. The Trial Court committed reversible error by denying Appellants' Motion for Judgment as a Matter of Law, Motion for New Trial, or in the Alternative Motion for Remittitur.

9. The Trial Court committed a variety of other judicial, legal, procedural and due process errors before and during trial that are more fully set forth herein, including but not limited to, errors regarding the jury instructions, jury verdict form, admission of evidence, testimony of expert and lay witnesses and other equally prejudicial errors.

STANDARD OF REVIEW

In West Virginia, "a circuit court's entry of summary judgment is reviewed *de novo*." *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). In undertaking its review, the court will apply the same standard for granting summary judgment utilized by the circuit court. *Burless v. West Virginia Univ. Hosp.*, 215 W. Va. 765, 601 S.E.2d 85 (2004). A trial court's ruling on a motion to dismiss is also reviewed under a *de novo* standard. *Rhododendron Furn. & Design, Inc. v. Marshall*, 214 W. Va. 463, 590 S.E.2d 656 (2003). In Syllabus Point 2 of *Walker v. West Virginia Ethics Commission*, 201 W. Va. 108, 492 S.E.2d 167 (1997), this Court held that:

> In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

A trial court's ruling on a motion for a new trial is reviewed under an abuse of discretion standard, and review of a circuit court's underlying factual findings is performed under a clearly erroneous standard. Questions of law are subject to a *de novo* standard. *Tennant v. Marion Health Care*

Foundation, Inc., 194 W. Va. 97, 459 S.E.2d 374 (1995). Evidentiary rulings are reviewed under an abuse of discretion standard. *McDougal v. McCammon,* 193 W. Va. 229, 455 S.E.2d 788 (1995).

ARGUMENT

I. The Virginia Court's Judgment Was Entitled to Full Faith and Credit in West Virginia and Precluded Any Award of Damages in the West Virginia Action.

The Constitutional doctrine of Full Faith and Credit requires that the award of damages in the case below be set aside, because Appellees already litigated and a jury awarded damages of $6 Million for these alleged wrongs in the Circuit Court of Buchanan County, Virginia ("Virginia Court"). This judgment has been satisfied in full.

Article IV of the United States Constitution requires that, "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State." U.S. Const. art. IV. This principle, codified at 28 U.S.C. §1738, provides, in relevant part, that "judicial proceedings ... shall have the same full faith and credit in every court within the United States and its territories and possessions as they have by law or usage in the court of such state ...." 28 U.S.C. § 1738 (2006). Thus, it has long been the law that "the judgment of a state court should have the same credit, validity, and effect, in every other court in the United States, which it had in the state where it was pronounced." *Thomas v. Washington Gas Light Co.,* 448 U.S. 261, 270 (1980).

In May 1998, months before filing the case below in Boone County, West Virginia, Appellees Harman Mining and Sovereign filed suit against Wellmore in Buchanan County, Virginia, the forum mandated by the 1997 CSA, alleging that Wellmore's wrongful declaration of *force majeure* under the 1997 CSA caused the demise of their businesses. Specifically, their Complaint alleged a breach of contract claim arising out of the 1997 CSA between Harman and Wellmore and a claim for breach of the duty of good faith and fair dealing. *See* May 21, 1998 Motion for Judgment.

The Virginia Court later permitted dismissal of Harman Mining's and Sovereign's tort claim for breach of the duty of good faith and fair dealing. Appellees Harman Mining and Sovereign, along with Harman Development and its sole shareholder, Caperton, filed suit in Boone County, West Virginia on October 29, 1998, alleging tort claims for tortious interference, fraudulent misrepresentation, negligent misrepresentation, civil conspiracy and punitive damages. *See* October 29, 1998 Complaint. These claims arise from the same alleged breaches of the 1997 CSA at issue in the Virginia proceeding.

The record is replete with evidence that the two actions seek the same recovery and arise from the same facts – alleged injuries for which appellees recovered $6 Million in Virginia. For example, the first Paragraph of Appellees' Complaint filed in Boone County, West Virginia was nearly identical to the first Paragraph of the Motion for Judgment filed in the Virginia action and sought relief for the same injuries and damages:

> This is an action at law for **compensatory** and punitive **damages** arising out of the tortious interference and fraudulent actions of Defendants **which caused Plaintiffs to lose the ability to continue in the business of mining and selling coal, caused the loss of essentially all of the corporate Plaintiffs' assets, caused the corporate Plaintiffs to lose all profits they would have earned in 1998 and thereafter, and caused the corporate Plaintiffs to become insolvent.**

See Complaint dated October 29, 1998 (emphasis added). Compared to the First Section of the Virginia Motion for Judgment, it is clear that the actions are identical:

> This is an action at law **seeking compensatory damages** based upon the Defendants' breach of the parties' long-term coal supply agreement **which caused Plaintiffs to lose the ability to continue in the business of mining and selling coal, caused the loss of essentially all of Plaintiffs' assets, caused the Plaintiffs to lose all profits they would have earned in 1998 and thereafter, and caused the Plaintiffs to become insolvent.**

Id. (emphasis added). Paragraph 1 of both Complaints sought relief for the same damages; the loss of the ability to continue Appellee's mining business, the loss of corporate assets and profits, and the

insolvency of the corporations. In fact, the Virginia Motion for Judgment was based upon the same 1997 CSA and the same declaration of *force majeure* that was the subject in the West Virginia case below. It is impossible to ignore the fact that Appellees have simply "cut and pasted" the same alleged injuries and damages in both the Virginia and West Virginia actions, and are now attempting to distinguish the two actions by assigning different proximate causes to the same resultant injuries and damages. Unfortunately, Appellees were effective in convincing the Trial Court, contrary to the law, to let them double-dip damages by dressing up the same claim for damages in different clothing for different courts.

Under well-settled legal precedent in both Virginia and West Virginia, Appellees get one and only one recovery. The "one satisfaction rule" entitles a plaintiff "to only one full recovery for the injuries suffered." *Chisholm v. UHP Projects, Inc.*, 30 F. Supp. 2d 928, 936 (E.D. Va. 1998) (citing *MacKetham v. Burrus*, 545 F.2d 1388 (4th Cir. 1976); RESTATEMENT (SECOND) OF TORTS 885 § (3)). *See also Shortt v. Hudson Supply and Equipment Co.*, 191 Va. 306, 313, 60 S.E.2d 900, 904 (1950) (barring the plaintiff from recovering against the defendants where he had previously been compensated by another tortfeasor, and stating that, "the bar arises not from any particular form that the proceeding assumes, but from the fact that the injured party has actually received satisfaction, or what in law is deemed the equivalent."). Likewise, this Court has recognized the well-accepted proposition that, "[u]nder the full faith and credit clause of the Constitution of the United States, when a proceeding has been adjudicated by the court of a sister state, the final judgment of that court must be given the effect of *res judicata* of the forum state." *State ex rel. Lynn v. Eddy*, 152 W. Va. 345, 346, 163 S.E.2d 472, 473-74 (1968).

The pro rata reduction in Wellmore's tonnage requirements under the 1997 CSA and the alleged resulting damages was fully litigated in the Virginia lawsuit, tried to a jury verdict, and

essential to the final judgment. Under the Full Faith and Credit Doctrine, the $6 Million judgment by the Virginia Court must be honored by the West Virginia courts and must act as a complete bar against the recovery of any damages in West Virginia, not just a set-off of the $6 Million received in the Virginia action. As such, the entire damages award in the Boone Circuit case must be vacated.

The Trial Court, however, failed to recognize any impact at all of the Virginia proceeding and judgment on the case below. Under the Constitution of the United States, the Trial Court should have afforded Full Faith and Credit to the Virginia jury's judgment and precluded Appellees from collecting for the same damages in both cases. Therefore, Appellants are entitled to a finding that the Virginia verdict and satisfaction thereof precluded this action for damages in West Virginia. The Trial Court's judgment should be reversed and vacated.

II. Appellees Are Precluded From Bringing These Claims in West Virginia by Their Own Contract and by the Doctrines of Collateral Estoppel and *Res Judicata*.

A. The Parties Agreed to a Forum-Selection Clause in the 1997 CSA Which Required All Actions to be Filed in and Decided by the Circuit Court of Buchanan County, Virginia.

By the terms of the 1997 CSA, Appellees were required to file all actions, "in connection with" the 1997 CSA in the Circuit Court of Buchanan County, Virginia. There is no dispute that the parties voluntarily agreed to the 1997 CSA between Sovereign, Harman Mining and Wellmore. Among other terms of the 1997 CSA, the parties agreed to the following forum selection and choice of law provision:

> This Agreement, in all respects, shall be governed, construed, and enforced in accordance with the substantive laws of the Commonwealth of Virginia. **All actions brought in connection with this Agreement shall be filed in and decided by the Circuit Court of Buchanan County, Virginia.**

By the express terms of the 1997 CSA, Appellees Sovereign and Harman Mining were required to file all actions "in connection with" the 1997 CSA in the Virginia Court. This forum

selection clause not only includes a claim for breach of the 1997 CSA itself, but also any derivative claims connected with the 1997 CSA, including any tort claims. As such, Appellees' tort claims, filed as part of their West Virginia action (and withdrawn from inclusion in their Virginia action) by the express terms of their own contract, had to be filed in Virginia.

Freely negotiated and contractually agreed to forum selection clauses, such as the one contained in the 1997 CSA, are enforceable under West Virginia law unless unreasonable or unjust. *See Leasewell, Ltd v. Jake Shelton Ford, Inc.*, 423 F. Supp. 1011 (S.D. W. Va. 1976), *overruled on other grounds, Hoffman v. National Equip. Rental, Ltd.*, 643 F.2d 987 (4th Cir. 1981). The burden is on the objecting party to establish that such a clause is unreasonable or unjust. *Bryant Electric Co., Inc. v. City of Fredricksburg*, 762 F.2d 1192, 1197 (4th Cir. 1985). The forum selection clause in the 1997 CSA designating Virginia as the proper forum was agreed upon by the parties, is clearly reasonable, and simply gives effect to the legitimate contractual expectations of the parties.

Prior to trial in this case, Appellants filed a Motion to Dismiss the West Virginia action, based on the 1997 CSA's forum-selection clause. *See* Defendants' Motion to Dismiss. The Trial Court erred by denying said motion and by allowing Appellees to proceed with their tort claims in West Virginia despite the forum-selection provision in the 1997 CSA and despite the fact that the West Virginia case involved essentially the same parties, or parties in privity with parties to the Virginia contract action, asserting claims they brought or could have brought in the Virginia action, for damages already awarded by the Virginia jury. As such, Appellants are entitled to a finding that this case was improperly commenced in West Virginia in violation of the 1997 CSA, fully litigated in the proper venue, and the Trial Court's judgment in this case should be reversed and vacated.

B. Collateral Estoppel and *Res Judicata*.

Appellees are also barred from recovery of damages in the tort action in West Virginia by the

related doctrines of collateral estoppel and *res judicata*. "Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude re-litigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v. McCurry*, 449 U.S. 90, 94, (1980) (citing *Montana v. United States*, 440 U.S. 147, 153 (1979)). Under *res judicata*, a final judgment on the merits of an action precludes the parties or their privities from re-litigating issues that were or could have been raised in an earlier action. *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876). Therefore, the Virginia judgment that awarded damages for the alleged loss of business precludes Appellees' recovery in the West Virginia action.

1. Collateral Estoppel Bars Appellees from Attributing the Alleged Failure of Their Business to Any Cause Other than *Force Majeure*, after the Virginia Verdict Found it Was the Sole Cause.

The Virginia jury determined that the sole cause of Appellees' business failure was Wellmore's declaration of *force majeure*. Specifically, the Virginia jury found that Harman lost $6 Million in expected profit solely as a result of "Wellmore's refusal to purchase the full 573,000 tons of coal from Harman in 1998." Since a Virginia jury has already decided that the sole and proximate cause of Harman's failure as a business was Wellmore's declaration of *force majeure*, and since a Virginia jury has already determined the amount of damages for this failure, Appellees are now estopped from asserting that any event other than Wellmore's alleged breach of contract, through declaration of *force majeure*, caused Harman's demise and that the failure of the business caused more than $6 Million in damages.

The record is unclear which state's law the Trial Court applied in determining the applicability of *res judicata* and collateral estoppel. Regardless whether Virginia or West Virginia law is applied, it is clear that the application of both collateral estoppel and *res judicata* preclude Appellees' recovery in the West Virginia action.

Collateral estoppel is a judicial doctrine created to prevent the re-litigation of issues already litigated, but presented again in subsequent lawsuits. As stated in *Dual and Assoc., Inc., v. Wells,* 241 Va. 542, 545, 403 S.E.2d 354, 356 (1991):

> Collateral estoppel is the preclusive effect impacting in a subsequent action based upon a collateral and different cause of action. In the subsequent action, the parties to the first action and their privies are precluded from litigating any issue of fact actually litigated and essential to a valid and final personal judgment in the first action. (Citation omitted.)

For the doctrine to apply: (a) the parties to the two proceedings, or their privies, must be the same; (b) the factual issue sought to be litigated must have actually been litigated in the prior action and must have been essential to the prior judgment; and (c) the prior action must have resulted in a valid, final judgment against the party against whom the doctrine is sought to be applied. *Angstadt v. Atlantic Mut. Ins. Co.,* 249 Va. 444, 446-47, 457 S.E.2d 86, 87 (1995); accord *Arnold Agency v. West Virginia Lottery Comission,* 206 W. Va. 583, 526 S.E.2d 814 (1999). In addition, Virginia courts require mutuality, such that a party is generally prevented from invoking the preclusive force of a judgment unless that party or its privies would have been bound had the prior litigation of the issue reached the opposite result. *Norfolk and W. Ry. Co. v. Bailey Lumber Co.,* 221 Va. 638, 640, 272 S.E.2d 217, 218 (1980).

a) The Party Against Whom the Collateral Estoppel Doctrine is Invoked Was a Party or in Privity With a Party to a Prior Action.

While there is no dispute that the parties to the Virginia action were not exactly the same as the parties to the present case, there can be no dispute that they were in privity. Collateral estoppel should be applied against parties who were in a privity with parties to the first action. "While privity generally involves a party so identical in interest with another that he represents the same legal right, a determination of just who are privies requires a careful examination into the circumstances of each

case." *Nero v. Ferris,* 222 Va. 807, 813, 284 S.E.2d 828, 831 (1981); *see also Kesler v. Fentress,* 223 Va. 14, 17, 286 S.E.2d 156, 157 (1982) (stating that privity means "such an identification of interest . . . as to represent the same legal rights.") (citation omitted). It is noteworthy that a Virginia court has ruled that one party who controlled the defense of another in an earlier suit cannot be allowed to re-litigate an issue that was previously decided in that earlier suit. *See Murphy v. City of Virginia Beach,* 6 Va. Cir. 140 (Va. Cir. Ct. 1984). *See also State v. Miller,* 194 W. Va. 3, 459 S.E.2d 114 (1995); *Gribben v. Kirk,* 195 W. Va. 488, 466 S.E.2d 147 (1995).

There is no question that the Harman corporate entities and their same ultimate sole shareholder (Caperton) were in privity in both the Virginia and West Virginia proceedings. Harman Mining and Sovereign were plaintiffs in both the Virginia and West Virginia actions. Caperton and Harman Development were additional named plaintiffs in the West Virginia action. Caperton is the sole shareholder of Harman Development, the entity he formed in 1993 after he purchased Harman Mining and Sovereign from Inspiration. Because Harman Mining, Harman Development and Sovereign are all owned by Caperton, have the same ultimate sole shareholder (Caperton), and operate interchangeably under the command of that same ultimate sole shareholder (Caperton), clearly there is privity between those parties. Caperton clearly was in charge of the prosecution of the Virginia litigation even though neither he nor Harman Mining were named parties to that action. Because the same ultimate sole shareholder of all the Appellees in the West Virginia action was the same individual who "could control the course of the proceedings" for the prosecution in the Virginia action, there is privity between Appellees in the Virginia and West Virginia actions.

Similarly, there is no question that Appellees were in privity for purposes of collateral estoppel. It is a well-accepted premise that a parent and its wholly owned subsidiary have a complete unity of interest. *See Mullins v. Daily New Leader*, 2001 WL 1772679, *2 (Va. Cir. Ct. Oct. 24,

2001) (holding defendant's claims were barred by *res judicata* because defendant was the parent company of a defendant in a prior suit adjudicating the same issues). *See also Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 770 (1984) (holding that parent and subsidiary could not conspire to violate the Sherman Act); *In re Ray Dobbins Lincoln-Mercury, Inc.*, 604 F. Supp. 203, 205 (W.D. Va. 1984) (construing Virginia Civil Conspiracy statute to disallow consideration of parent and subsidiary as separate "persons"), *aff'd*, 813 F.2d 402 (4th Cir. 1987). *See also Gribben*, 195 W. Va. 488, 466 S.E.2d 147.

The sole defendant in the Virginia case (conveniently omitted as a defendant in the West Virginia case) nonetheless is in privity with the West Virginia defendants for the same reasons. Wellmore was the only named defendant in the Virginia action and is not a party to the West Virginia case, where the primary defendant was A.T. Massey. However, at the time of the alleged wrongful declaration of *force majeure*, Wellmore was A.T. Massey's wholly owned subsidiary, with identical legal rights and interests. A.T. Massey provided defense and indemnification to Wellmore in the Virginia action and, as in *Murphy*, in so doing was bound by the Virginia verdict and can use the verdict as an estoppel:

> The case is within the principle that one who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own, and who does this openly, to the knowledge of the opposing party, is as much bound by the judgment, and as fully entitled to avail himself of it, as an estoppel against an adverse party, as he would be if he had been a party to the record.

See Murphy, at 147-48. There is no doubt, therefore, that A.T. Massey's interests in the Virginia case were identical to those of Wellmore.

The other defendants in the West Virginia case are likewise A.T. Massey's wholly owned subsidiaries. No direct claims were ever made against these A.T. Massey subsidiaries. They were

named solely to defeat diversity jurisdiction and to secure a "second bite at the apple" through a second trial, on the same facts, in West Virginia. Therefore, the first prong of the collateral estoppel test has been satisfied.

b) The force majeure issue was fully litigated and essential to the judgment in the prior proceedings.

The central issue in Appellee's own description of its case in Virginia was whether Wellmore's declaration of *force majeure* caused plaintiffs to go out of business:

> As for the issue of Harman going out of business and whether the actions of Wellmore caused that harm, Wellmore has indicated from the outset of this litigation that its defenses at trial will include evidence that Plaintiffs should not recover any damages in this case based upon Wellmore's theory that Plaintiffs ceased performance (i.e., cancelled the contract) and went out of business as a result of financial difficulties unrelated to Wellmore's repudiation and breach. Unless Wellmore is willing to abandon that defense, Plaintiffs necessarily will be forced to prove that it went out of business as result of the conduct of Wellmore in repudiating its obligations and the timing of those actions, and to offer highly relevant rebuttal evidence as to Wellmore's knowledge that its actions would and did cause the collapse of Harman's business. Further, the fact that Harman was forced out of business based upon Wellmore's breach bears upon the issue of whether Wellmore's breach substantially impaired the value of the whole contract.

See Plaintiffs' Response in Opposition to Wellmore's Motion in Limine to Exclude Evidence at Trial, filed in the Virginia Court on July 31, 2000, p. 3. Thus, when the jury awarded Harman $6 Million in lost profits in 1998, the jury necessarily determined that: (i) Harman would have remained in business but for the declaration of *force majeure,* and (ii) the destruction of Harman's businesses and the resulting $6 Million in lost profits from 1998 were caused "solely" by the declaration of *force majeure.* There is no question that this issue was fully litigated and essential to the Virginia judgment. Thus, the second prong of the collateral estoppel test has been satisfied.

c) The judgment in the Virginia case is a valid, final judgment.

The judgment in the Virginia case became final on September 13, 2002, when the Virginia

Supreme Court dismissed Wellmore's appeal. *Wellmore Coal Corp. v. Harman Mining Corp.*, 264 Va. 279, 568 S.E.2d 671 (2002). Thus, the final judgment in the Virginia action found that the destruction of Harman's businesses was caused solely by Wellmore's breach of contract. This final Virginia judgment precludes Appellees from relitigating why the Harman businesses failed. At a minimum, the Virginia judgment should preclude Appellees from claiming their businesses failed because of Massey's alleged tortious conduct.

d) Appellees' Arguments Regarding Collateral Estoppel are Without Merit.

In analyzing Appellees arguments, as set forth in their Joint Response to Petition for Appeal, it is apparent that the Appellees fail to grasp the application of the doctrine of collateral estoppel and how collateral estoppel is a doctrine distinct from *res judicata*.

First, Appellees' argument that collateral estoppel is not applicable in this matter because the doctrine does not preclude re-litigation, but instead precludes only litigation which produces a contrary result, is without merit and makes little sense. The doctrine of collateral estoppel precludes the re-litigation of any **issue** of fact litigated in an earlier proceeding which is found to be essential to the initial final judgment. *See Dual and Associates, Inc., v. Wells,* 241 Va. 542, 545, 403 S.E.2d 354, 356 (1991). Appellees' argument, taken to its logical conclusion, would never preclude litigation; rather, it would change the results of litigation, i.e. so long as Appellees keep winning, they can re-litigate issues that already have been decided. That is a ridiculous result.

Second, Appellees' argument that the doctrine of collateral estoppel is not applicable because the parties and their privies to both actions are not the same is without merit. As discussed earlier, the parties are in privity and are legally identical despite Appellee's imaginative pleadings that substitute parents, subsidiaries, and parties who have nothing to do with the case.

Third, Appellees' argument that Appellants cannot point to any factual determination necessary to the judgment in the Virginia action that was decided adversely to the Appellees simply misconstrues the law. In *Scales v. Lewis,* 261 Va. 379, 382, 541 S.E.2d 899, 901 (2001), on which Appellees rely for this point, the Court stated, "the prior action must have resulted in a judgment that is valid, final, and **against** the party against whom the doctrine is sought to be applied." Appellees incorrectly interpret "against" to mean that the judgment must be "adverse" to Appellees. "Against" clearly does not mean adverse; it means "involving," as in the same party or privy was involved in both suits. To hold otherwise would vitiate the doctrine of collateral estoppel. Again, Appellees' arguments with regard to the application of collateral estoppel are without merit.

Finally, Appellees incorrectly argue that the November 28, 2000, Joint Order of the United States Bankruptcy Court for the Western District of Virginia (the "Bankruptcy Court") precludes A.T. Massey from (a) challenging the propriety of the Trial Court as the appropriate forum to decide Appellees' tort claims, (b) contending that the claims of Caperton are in any way derivative of the Corporate Appellees' claims and (c) arguing that the Virginia judgment can in any way relate to the damages awarded to Caperton because these issues have already been fully adjudicated in the Bankruptcy Court. A review of the Bankruptcy Court's Order in question reveals that it clearly states: "This Court ABSTAINS from deciding whether any such claims are properly alleged or have legal validity. Accordingly it is ordered that these adversary proceedings are dismissed." *See* November 28, 2000 Joint Order. The Bankruptcy Court never reached a final adjudication on the merits as is required under the doctrines of collateral estoppel and *res judicata*. In their Joint Response to Petition for Appeal, the Appellees cite to *In re Schimmels*, 127 F.3d 875 (9th Cir. 1987), which is clearly distinguishable from the matter at hand. In *Schimmel,* the Court reached a final

judgment on the merits. In that the Bankruptcy Court abstained from a final Order, Appellees' claims in this regard are without merit and deserve no further discussion.

Appellees' arguments are unpersuasive and demonstrate only their confused reading of the fundamental principles of the doctrine of collateral estoppel. As set forth above, all necessary elements have been satisfied and, therefore, the doctrine must be applied either under Virginia or West Virginia law to preclude judgment against Appellants.

2. *Res Judicata* Precludes Appellees from Seeking Damages Resulting from the Declaration of *Force Majeure* in West Virginia.

Under Virginia law, the *res judicata* doctrine prevents "re-litigation of the same cause of action, or any part thereof which could have been litigated, between the same parties or their privies." *Bill Geever Corp. v. Tazewell Nat'l Bank,* 256 Va. 250, 254, 504 S.E.2d 854, 856-57 (1998) (quoting *Bates v. Devers,* 214 Va. 667, 670, 202 S.E.2d 917, 920 (1974)). A party asserting *res judicata* must establish four elements under Virginia law: (a) identity of the remedy sought; (b) identity of the cause of action; (c) identity of the parties; and (d) alignment in the litigation of the persons for or against whom the claim is made. *See State Water Control Board v. Smithfield Foods, Inc.*, 261 Va. 209, 214, 542 S.E.2d 766, 769 (2001). *See also Blethen v. West Virginia Dept. of Revenue/State Tax Dept.*, 219 W. Va. 402, 633 S.E.2d 531 (2006); *Blake v. Charleston Area Medical Center, Inc.*, 201 W. Va. 469, 498 S.E.2d 41 (1997).

a) Appellees Sought The Same Remedy In Both The Virginia Action And West Virginia Action.

In both the Virginia and West Virginia cases, Appellees sought to recover damages to compensate them for Appellants' alleged misconduct leading to the destruction of Appellees' businesses. While Appellees measure those damages differently in each case, they are seeking an identical remedy: monetary compensation for the alleged destruction of Appellees' businesses.

Several courts interpreting Virginia law have found an identity of remedies between two cases based on the fact that both cases sought money damages, even though the calculation of damages was different in each case. In *Ezrin v. Stack,* 281 F. Supp. 2d 67 (D.D.C. 2003), the court held that all elements of *res judicata* under Virginia law were satisfied despite the fact that the plaintiff "measures his damages differently in the instant complaint than in the complaint he filed in Virginia." *Id.* at 71 n.4. The key is the request for money damages and not the method of calculation: "Regardless of the measurement, [plaintiff] continues to seek the same remedy – damages arising from the alleged misappropriation of corporate assets." *Id. See also In re Spike Broadband Systems, Inc.*, 2003 WL 21488663, at *4 (D.N.H. 2003) (finding that identity of remedies requirement under Virginia law had been satisfied because both cases involved a "request for money damages").

b) The Cause of Action Identified for Resolution in the Subsequent Proceeding Either Must be Identical to the Cause of Action Determined in the Prior Action or Must be Such That it Could have Been Resolved, Had it Been Presented, in the Prior Action.

The principal test for determining whether claims are part of the same cause of action, or could have been litigated in a prior suit, "is whether the same evidence will support both claims." *Flora, Flora & Montague, Inc. v. Saunders*, 235 Va. 306, 311, 367 S.E.2d 493, 495 (1988) (citation omitted). Applying this test to the present case, it is clear that the evidence of the propriety of Wellmore's *force majeure* notice under the 1997 CSA, admitted in the previous Virginia suit to support the breach of contract claims, is the same evidence Appellees relied on in the West Virginia action to support their tort claims. The torts alleged in the case below clearly could and should have been litigated, if at all, in the previous Virginia suit. Therefore, under Virginia law, *res judicata*

precludes Appellees from seeking and receiving damages in West Virginia under any tort or contract theory based on the same evidence of *force majeure* and the alleged resulting loss of businesses.

c) The Two Actions Must Involve Either the Same Parties or Persons in Privity With Those Same Parties.

As noted above, the parties in the Virginia and West Virginia actions are not identical, but are in privity with one another and clearly are aligned the same. The same facts which serve to show privity of the parties for purposes of collateral estoppel apply equally for purposes of *res judicata*. "The doctrine of *res judicata* applies not only to the actual parties in a case, but also to those in privity with them." *CDM Enterprises, Inc. v. Commonwealth,* 32 Va. App. 702, 710, 530 S.E.2d 441 (Va. Ct. App. 2000). "The touchstone of privity for purposes of *res judicata* is that a party's interest is so identical with another that representation by one party is representation of the other's legal right." *State Water Control Bd v. Smithfield Foods, Inc.*, 261 Va. 209, 214, 542 S.E.2d 766,769 (2001); *see also State Farm Fire & Casualty v. Mabry,* 255 Va. 286, 289, 497 S.E.2d 844 (1998) (quoting *Nero v. Ferris,* 222 Va. 807, 813, 284 S.E.2d 828, 831 (1981) ("Privity requires that a party's interest be 'so identical' with another 'that he represents the same legal right.'"). Whether the privity exists "requires a "careful examination of the circumstances of each case." *Angstadt v. Atlantic Mut. Ins. Co.,* 249 Va. 444, 447, 457 S.E.2d 86, 87 (1995).

d) Appellees' Arguments Regarding *Res Judicata* Are Without Merit.

In their Joint Response to Petition for Appeal, Appellees erroneously argue that none of the four elements required under the doctrine of *res judicata* are satisfied in the current matter. First, the appellees incorrectly argue that the remedy sought in the Virginia action is separate and distinct from the remedy sought in the West Virginia action. Analysis of Appellees' claims in both the Virginia and West Virginia actions clearly and without question demonstrate that each suit sought an identical

remedy, i.e. monetary compensation for the alleged destruction of Appellees' businesses.

Second, Appellees' argument that the causes of action asserted in Virginia and West Virginia are not the same and that Appellees' actions do not amount to "claim-splitting" flies in the face of their own assertions in pleadings and at trial. They presented almost identical cases relying on identical evidence. As stated above, the principal test for determining whether claims are part of the same cause of action, or could have been litigated in a prior suit, "is whether the same evidence will support both claims." *Flora, Flora & Montague, Inc. v. Saunders*, 235 Va. 306, 367 S.E.2d 493, 495 (1988). As such, Appellees' arguments are unpersuasive due to the fact that the Appellees relied upon the same evidence of *force majeure* and the resulting loss of businesses in both actions.

Third, Appellees argue that the same parties were not involved in both actions. While the parties were not identical, they are clearly in privity, as set forth above, and, therefore, satisfy the applicable test.

Appellees' arguments are unpersuasive regarding the inapplicability of the doctrine of *res judicata*. Clearly, the required elements, as set forth above, have been satisfied and the doctrine is applicable in the present matter under the controlling Virginia law. Properly considered, Appellees' tort claims in the West Virginia case were simply a restatement of the contract claims asserted in Virginia and a means of seeking a double recovery for the alleged destruction of their businesses. These damages were awarded by a Virginia Court and Appellees claim for more damages for the same conduct is precluded by both principles of collateral estoppel and *res judicata.*

III. The Trial Court Should Have Applied the Substantive Law of Virginia and Not West Virginia.

A. The Choice of Law Clause in the 1997 CSA Required the Application of Virginia Law.

By the clear and unambiguous language of the choice of law clause of the 1997 CSA, the Trial Court should have applied the substantive law of Virginia and not West Virginia. Section 8.1 of the 1997 CSA provides:

> **This Agreement, in all respects, shall be governed, construed, and enforced in accordance with the substantive laws of the Commonwealth of Virginia.** All actions brought in connection with this Agreement shall be filed in and decided by the Circuit Court of Buchanan County, Virginia.

As previously noted, freely negotiated and contractually agreed to forum selection clauses as well as choice of law clauses, such as these contained in the 1997 CSA, are enforceable under West Virginia law unless unreasonable or unjust. *See Leasewell, Ltd v. Jake Shelton Ford, Inc.*, 423 F. Supp. 1011 (S.D. W.Va. 1976), *overruled on other grounds, Hoffman v. National Equip. Rental, Ltd.*, 643 F.2d 987 (4th Cir. 1981). Thus, the Trial Court erred in applying the substantive law of West Virginia and Appellants are entitled to a reversal of the Trial Court's judgment, or in the alternative, to a new trial.

B. The Doctrine of *Lex Loci Delicti* Required the Trial Court to Apply Virginia Substantive Law, Which it Failed to Do.

Under West Virginia conflict of law principles, the substantive rights of the parties should have been governed by the law of the Commonwealth of Virginia, since that was the place where the alleged torts and injuries occurred. In a civil action, the court in which an action is filed will apply the procedural law of the state in which it sits. Likewise, a court will apply the substantive law of the state in which it sits, unless as is the case here, there is a contractual forum selection clause, or there exists a conflict of laws issue. When a conflict of laws situation arises in a West Virginia case, courts may use one or both of two traditional tests for determining which state's substantive law to

apply. Traditionally, West Virginia courts have applied the second test, the *lex loci delicti* or choice of law rule, which holds that the law of the forum governs matters of procedure, but the substantive rights of the parties are governed by the law of the place of the injury. *McKinney v. Fairchild International*; 199 W. Va. 718, 487 S.E.2d 913 (1997). *See also Mills v. Quality Supplier Trucking, Inc.*, 203 W. Va. 621, 623, 510 S.E.2d 280, 282 (1998) (holding that West Virginia still follows the traditional doctrine of *lex loci delecti*); *Paul v. National Life*, 177 W. Va. 427, 433, 353 S.E.2d 550, 556 (1986) ("We therefore reaffirm our adherence to the doctrine of *lex loci delecti* today").

The right to recover and the measure of damages are issues of substantive law, rather than procedural law. *Anoldt v. Ashland Oil, Inc.*, 186 W. Va. 394, 402, 412 S.E.2d 795, 803 n.9 (1991). ("[T]he question of the proper measure of damages for a tort is inseparably connected with the right of action, and accordingly . . . is to be treated as a matter of substance") (citations omitted); *Thornsbury v. Thornsbury*, 147 W. Va. 771, 773, 131 S.E.2d 713, 715 (1963) ("[T]he right to recover must be measured and determined in accordance with the laws of [the state where the tort occurred]") (citations omitted).

In this case, all of the events alleged to be actionable occurred in Virginia. Both the Corporate Appellees and Wellmore were Virginia corporations. Harman Mining did business solely in Virginia, mining exclusively Virginia coal reserves, and trucking coal to Wellmore over Virginia public highways to its preparation plant in Big Rock, Virginia. Virginia taxes were paid on the Virginia mining operations. The 1997 CSA was executed and performed entirely in Virginia, and by its agreed upon terms was to be construed, enforced and governed under Virginia law, with all litigation to take place in Virginia courts. The action for breach of contract was litigated in the Virginia Court. All of the acts with respect to the declaration of the *force majeure* occurred in Virginia. In fact, other than a single meeting in West Virginia on November 26, 1997, all of the

interactions between the parties occurred either in Virginia or over the telephone. The alleged harm in the form of impact upon Harman and its collateral contractual relationships with Grundy National Bank, Penn Virginia Coal Co. and the UMWA Local all occurred in Virginia. Thus, the *lex loci delecti* was clearly in Virginia, and under West Virginia choice of law rules, the Trial Court should have applied Virginia's substantive law in the West Virginia action.

Even if this Court chose not to apply *lex loci delicti*, Virginia law is still the applicable law under the "most significant relationship" test set forth in RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 45-46 (1971). *See Oakes v. Oxygen Therapy Services*, 178 W. Va. 543, 545-46, S.E.2d 130, 131-32 (1987) (holding that the "most significant relationship" test may be applied to "thorny conflicts problems" such as non-physical torts). Virginia clearly is the state with the most significant relationships to the claims and the parties in this case, since the alleged tortious acts and injuries all occurred in Virginia, Appellees conducted their coal businesses in Virginia, and the business relationships at issue were centered in Virginia.

Under West Virginia conflict of law principles, whether applying the *lex loci delecti* or the most significant relationship test, the substantive rights of the parties herein should have been governed by the laws of the Commonwealth of Virginia, and the court below erred in its application of West Virginia substantive law at trial. As a result of the Trial Court's error, each and every one of Appellees' claims, causes of action, and damages calculations were incorrect, resulting in a sham trial with an illegitimate verdict. Essentially, it was as if the jury was viewing and awarding damages on a completely different trial than the one they were impaneled for. Because of this judicial error, the jurors were sent on a six-week road-trip with the wrong roadmap and bad directions, inevitably ending up in the wrong place.

Aside from the obvious prejudice to Appellants incurred by having the Trial Court apply the incorrect substantive law, Appellants' constitutional rights have also been infringed upon by the Trial Court's refusal to apply Virginia law. In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), the court held that the application of the wrong state's substantive law during a proceeding is considered arbitrary, unfair and thus a violation of the constitutional rights of the aggrieved party. As such, in this case, Appellants' constitutional rights have been violated by the Trial Court's application of West Virginia substantive law, rather than Virginia substantive law.

Should this Court find that the Trial Court erred in applying West Virginia substantive law, then Appellants are entitled to reversal of the Trial Court's judgment, or in the alternative, to a new trial, and no other analysis or consideration of the issues herein need be considered.

C. The Differences Between Virginia and West Virginia Law are Material.

There are several areas where the laws of Virginia and West Virginia are in direct conflict and the Trial Court's erroneous decision to apply West Virginia law over Virginia law would substantially alter both the trial and the jury's verdict in this case.

First, pursuant to Virginia Code §8.01-38.1, Virginia caps any punitive damages award at $350,000, while West Virginia has no cap on punitive damages. The jury in the instant case awarded the Corporate Appellees $2 Million in punitive damages and awarded individual Appellee, Hugh Caperton, $4 Million in punitive damages resulting in a verdict in excess of $5 Million greater than Virginia law would permit. Had the law of Virginia been applied to the facts of this case, rather than West Virginia law, the total punitive damages award available to each plaintiff would have only been $350,000 and any punitive damages award in excess of that would have been reduced to that statutory limit.

Second, Virginia allows a defendant to argue the affirmative defense of inevitability, while West Virginia does not. In this case, one of Appellants' main affirmative defenses is that Harman's failure was inevitable, due to numerous years of multi-million dollar losses, a poor mine plan and the inability to pay its debts and taxes. Under Virginia law, Appellants would have been allowed to argue at trial that Harman would have failed regardless of the actions of Appellants. Finally, Virginia does not recognize the claims of negligent misrepresentation or civil conspiracy, while West Virginia does. In the West Virginia action, Appellees pled and offered evidence at trial to prove their claims of negligent misrepresentation and civil conspiracy. At the end of trial, Appellees withdrew their claims of negligent misrepresentation and civil conspiracy, but no instruction was provided to the jury that those claims had been withdrawn and should not have been considered. Thus, presumably the jury verdict reflected an award for damages for negligent misrepresentation and civil conspiracy, claims that could not have been advanced if Virginia law had been applied.

By applying West Virginia substantive law to the interpretation of the legal claims asserted in the West Virginia action, the Trial Court committed reversible error, warranting reversal of the Trial Court judgment, or in the alternative, a new trial.

IV. The Trial Court Erred by Allowing Parol Testimony Regarding the *Force Majeure* Clause.

A. The *Force Majeure* Language in the 1997 CSA Was Clear and Unambiguous.

The language of the bargained-for 1997 CSA was clear and unambiguous. Over the objection of Appellants' counsel, the Trial Court committed reversible judicial error by allowing witnesses for Appellees, including Caperton, to offer parol evidence regarding the meaning of the phrase *force majeure*, originally drafted as part of the 1992 CSA and adopted verbatim in the 1997 CSA. *See* July 3, 2002 T.T., pp. 158-162. "The general rule is that unambiguous contractual language expresses the

intent of the parties and extrinsic evidence will not be admitted to contradict such unambiguous language." *Kopf v. Lacey*, 208 W. Va. 302, 309-310, 540 S.E.2d 170, 177-78 (2000). The language in the contract was clear:

> The term "*force majeure*" ... shall mean any and all causes reasonably beyond ... [Wellmore's] control ... such as ... government closures ... and acts of ... civil authorities ... which wholly or partly prevent the receiving, adopting, storing, processing or shipment of the coal by [Wellmore]. [*Force majeure*] shall further include occurrences of a *force majeure* event at [LTV]....

See 1992 CSA and 1997 CSA.

Before the Trial Court could have permitted parol evidence, it was required to find the contract language to be ambiguous. It did not. Further, the Trial Court failed to instruct the jury that such parol evidence was admissible only because the court had determined that the 1997 CSA was ambiguous. With such an instruction, Appellants could have argued to the jury that their declaration of *force majeure* was not the result of an intentional tort aimed at harming the interests of Appellees, but rather was the result of an erroneous, or at the worst negligent, interpretation of an ambiguous *force majeure* clause in the 1997 CSA. These failures go to the heart of the Appellants' claims and constitute reversible error justifying reversal or remand.

B. The Trial Court Erred in Instructing the Jury on *Force Majeure*.

Force majeure is a creature of contract law. As such, plain and unambiguous contract provisions regarding the definition of *force majeure* are not subject to judicial construction or interpretation. *Cotiga Development Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 128 S.E.2d 626 (1962). Both the 1992 CSA and the 1997 CSA plainly and clearly provide that *force majeure* would include events at LTV facilities that were reasonably beyond Wellmore's control, including government closures that prevented shipment of coal by Wellmore.

In its jury instruction regarding tortious interference, the Trial Court determined to create its own definition of *force majeure,* notwithstanding the bargained-for language in the 1992 CSA and the 1997 CSA:

> [C]ontracting parties in various circumstances may agree to *force majeure* clauses in their contracts for the purpose of addressing the circumstances under which the failure to perform results from events reasonably beyond the control of one or more of the contracting parties, resulting either from the acts of nature (such as floods, tornadoes, fires, earthquakes, etc.) or the acts of humans (such as riots, revolutions, strikes, wars, etc.).

See Jury Instructions, at 11. Instead, over Appellants' objection, the Trial Court limited *force majeure* to natural disasters and civic emergencies, such as a riot or flood. *See* August 1, 2002 T.T., pp. 11-12.

It also failed to note that the bargained-for and contractually agreed upon *force majeure* provision in the 1997 CSA specifically permits the declaration of *force majeure* upon the occurrence of any and all causes reasonably beyond the control of the buyer that could cause the buyer to fail to perform its contractual obligations, including the occurrence of a *force majeure* event experienced by one of the buyer's customers. Significantly, the provision makes explicit that the long list of examples provided is not all-inclusive, but merely illustrative. The Court's Instruction on this material issue is so defective that it warrants reversal or remand.

In the end, the Trial Court compounded prejudicial error upon prejudicial error. It first admitted parole evidence concerning a clear and unambiguous contract provisions without a finding of ambiguity. It then failed to instruct the jury on the use of this parole evidence and went on to make matters exponentially worse by narrowly defining the alleged ambiguity. These errors alone would justify reversal. In concert, these errors on a critical issue mandate reversal.

V. Appellees Failed to Establish Liability For Tortious Interference As a Matter of Law.

A. Appellees cannot support a claim for tortious interference with business relationship or expectancy, because Wellmore was the wholly owned subsidiary of A.T. Massey.

Under West Virginia law, in order for Appellees to establish *prima-facie* proof of tortious interference, they must show: (a) the existence of a contractual or business relationship or expectancy; (b) an intentional act of interference by a party outside that relationship or expectancy; (c) proof that the interference caused the harm sustained; and (d) damages. Syl. pt. 2, in part, of *Torbett v. Wheeling Dollar Sav. & Trust Co.*, 173 W. Va. 210, 314 S.E.2d 166 (1983). West Virginia law is clear that a parent company cannot interfere with the contracts or business relationships of its wholly owned subsidiary, because that would be equivalent to the parent company interfering with its own contract. Syl. pt. 1, *Shrewsbery v. National Grange Mut. Ins. Co.*, 183 W. Va. 322, 395 S.E.2d 745 (1990). *See also* 45 AM. JUR. 2D *Interference* § 6 (1999). Because Wellmore was the wholly owned subsidiary of A.T. Massey at the time of the declaration of *force majeure*, A.T. Massey, as the parent company of Wellmore, cannot interfere with its own contract as a matter of law and, therefore, Appellees' claim for tortious interference must fail. Appellants filed a Motion for Summary Judgment on the issue of a parent's inability to tortiously interfere with the contractual relations of its subsidiary, which the Trial Court erroneously denied. *See* Defendants' Motion for Summary Judgment. *See also* March 15, 2005, Order denying Defendants' Motion for Summary Judgment.

B. Appellees' Evidence at the Boone County Trial Was Insufficient, as a Matter of Law to Support the Jury's Verdict on Appellees' Claim of Tortious Interference with Contractual Relationships.

Assuming *arguendo*, the tortious interference claim had legal merits which it did not, Appellees' tortious interference claim was not supported by sufficient evidence. First, there was no

evidence that A.T. Massey engaged in any act with the intention of interfering in Appellees' ability to perform any contract. There was no evidence introduced that A.T. Massey declared *force majeure* with the purpose and intent of putting the Corporate Appellees out of business, irrespective of any of A.T. Massey's legitimate economic or business interests.

Second, Wellmore, through A.T. Massey, was justified to protect its business interests by declaring *force majeure* under the 1997 CSA. It is undisputed that LTV's Pittsburgh plant closed and the tonnage required was ratably reduced. In order to prevail on their tortious interference claim, Appellees have to adduce evidence of wrongful motive, separate and apart from Appellants' general desire to advance itself, even beyond its competitors. It has been noted, "[i]t is not necessary that the interferer's interest outweigh that of the party whose rights are interfered with, it being sufficient if the impetus of the interferer's conduct lies in a proper business interest rather than in wrongful motives." 45 AM. JUR. 2D *Interference* § 28 (1999).

Appellants argued in their Motion for Summary Judgment that Appellees could not support a claim for tortious interference, which the Trial Court denied. *See* Defendants' Motion for Summary Judgment. *See also* June 28, 2002, Memorandum of Summary Opinion.

C. Appellees Failed to Establish a Claim of Tortious Interference With a Business Relationship or Expectancy Between Appellees and Other Outside Entities.

There was no evidence that Appellants intended to interfere with any of Harman's claimed third party contracts. "The general rule is that there is no liability for interference unless the act in question was committed with the intent to interfere. One whose actions were not intended to induce the breach of a contract cannot be held liable even if a breach occurs." 45 AM. JUR. 2D *Interference* §8 (1999) (Footnotes omitted).

Appellants argued in their Motion for Summary Judgment that Appellees could not support a claim for tortious interference with contracts or business relationships between Appellees and third-party business entities, which the Trial Court denied. *See* Defendants' Motion for Summary Judgment. *See also* June 28, 2002, Memorandum of Summary Opinion.

VI. Appellees Failed to Establish Liability for Fraudulent Misrepresentation and Fraudulent Concealment As a Matter of Law and the Trial Court Committed Numerous Errors During Appellees' Attempt To Prove Their Fraud Claims.

A. Fraudulent Misrepresentation.

Appellees cannot demonstrate that Appellants performed any action that could be considered a fraudulent misrepresentation. Appellees' primary, if not sole, claim with respect to fraudulent misrepresentation was that Appellants allegedly entered into sham settlement negotiations to purchase the Harman entities. "[F]raud cannot be predicated on a promise not performed. To make it available there must be a false assertion ***in regard to some existing matter*** by which a party is induced to part with his money or his property." *See* Syl. pt. 3 of *Croston v. Emax Oil Co.*, 195 W. Va. 86, 90, 464 S.E.2d 728, 732 (1995) (emphasis added). Although an "omission" may give rise to a cause of action for fraudulent concealment, a claim for fraudulent misrepresentation requires that a party undertake to affirmatively misrepresent a present or historical fact.

B. Fraudulent Concealment.

As a matter of law, Appellees' claims for fraudulent concealment must fail. In the instant case, Appellees' primary, if not only, claims of fraudulent concealment were Appellants' alleged failure to disclose that during 1997: (a) Wellmore was attempting to sell its coal to LTV, (b) Wellmore had lost LTV's business, and (c) Wellmore was attempting to sell Harman's coal to other purchasers, all at the direction of Wellmore's new parent, A.T. Massey. Appellants filed a Motion for Summary Judgment on April 1, 2002, arguing that Appellees failed to demonstrate that

Appellants had a "duty to disclose" any of the above facts to Appellees, and thus Appellants were entitled to judgment, as a matter of law, on Appellees' fraudulent concealment claim. *See* Defendants' Motion for Summary Judgment, or in the Alternative, for Partial Summary Judgment. The Trial Court committed reversible error by denying said motion.

First, neither A.T. Massey nor Wellmore had any contractual duty to disclose to Harman, their competitor, the fact that they were attempting to sell their own coal to LTV, or for that matter, to any other purchaser. Moreover, there is no general common-law duty between parties to a contract, especially among business competitors, to disclose information that could possibly be harmful to the competitor's business. Further, Appellees already knew or could readily have ascertained that A.T. Massey and Wellmore, being in the business of selling coal, would try to sell its coal to anyone who was interested in buying their coal, including LTV. There was absolutely no evidence that A.T. Massey or Wellmore did anything to conceal from Appellees their efforts to sell their coal to LTV. Moreover, A.T. Massey and Wellmore were never able to sell any of their own coal to LTV in 1998, so the entire issue was of no practical consequence to Appellees.

Second, the fact that LTV feared that new EPA regulations would force the closing of its Pittsburgh coke plant was a matter of public record and known to Appellees. Caperton testified that he knew of the threatened closure. Moreover, Wellmore even told Harman of LTV's intent to close its Pittsburgh plant in a letter to Appellees dated August 5, 1997, specifically advising that, "LTV Steel has announced plans to close one of its coking operations. Should this occur, Wellmore anticipates reducing the tonnage amounts pro rata, in accordance with the *force majeure* provisions in the Agreement." *See* August 5, 1997, letter from Stanley C. Suboleski ("Suboleski"), President of Wellmore. Plainly, Wellmore did not conceal LTV's decision to shut down their Pittsburgh plant from Appellees. The fact is, Wellmore notified Harman of the threat and later LTV's ultimate

decision to shut down the Pittsburgh plant. LTV's inability to comply with new EPA regulations and closure of its Pittsburgh plant had nothing to do with Massey and was reported publicly.

Finally, there was no evidence that either Wellmore or A.T. Massey did anything to conceal their efforts to attempt to sell Harman coal to other purchasers, which would have benefited Harman. In fact, the evidence was that both Caperton and Cook were well aware of the unsuccessful efforts of A.T. Massey and Wellmore to secure other purchasers for the Harman coal. Because the evidence plainly showed that the facts Harman complained were concealed from them were actually known by them, publicly reported and not required to be disclosed by A.T. Massey or Wellmore, this issue should never have gone to the jury and Appellants should have received judgment, as a matter of law, on the issue.

VII. The Trial Court's Damages Award Was Improper And Should Be Vacated or at Least Reduced.

A. The Trial Court Erred in Denying Appellants' Motion to Preclude Appellees' Expert Witness, Mark M. Gleason, From Testifying that the Increased Negative Fair Market Value Was the Proper Measure of Damages Because Such Measure is Wholly Speculative and Does Not Comport with West Virginia Law.

In this case, Appellees offered the expert testimony of Mark M. Gleason ("Gleason") concerning the damages incurred by Harman as a result of the alleged tortious interference of Appellants. Appellants requested that the Trial Court exclude Gleason's expert witness opinions, as they were too speculative. *See* April 4, 2002 Defendant's Motion *in Limine*, and the April 4, 2002 Defendant's Memorandum in Support of Motion *in Limine*. In particular, Appellees relied upon Gleason's fatally speculative and improper concept for determining damages, which utilized a negative calculation to determine fair market loss. However, this damage calculation failed to comply with West Virginia law, which requires "the measure of damages for the destruction of an established business is the difference between the value of the business prior to the wrongful act and

the value following the wrongful act." *Lively v. Rufus*, 207 W. Va. 436, 533 S.E.2d 662 (2000). (citing, *In re Snead*, 1 B.R. 551, 556 (1979)). The Trial Court subsequently denied Appellants' Motion *in Limine*. *See* June 28, 2002 Memorandum of Summary Opinion.

Fair market value is defined as "the highest price a purchaser is willing to pay for property, not being under compulsion to buy, and the lowest price a seller is willing to accept, not being under compulsion to sell." *Id.* (quoting *United States v. Hatahley*, 257 F.2d 920, 923, n.2 (10th Cir. 1958)). Fair market value can never be a negative number because the smallest possible number a buyer can pay for property is nothing and the lowest possible amount a seller is willing to accept for property is nothing. Simply put, nothing is the lowest possible fair market value that can be realized for property pursuant to *Lively*. Conversely, although there can be a negative book value or equity value, there can be no negative fair market value as defined in *Lively*. Thus, in order for Appellees' expert's testimony to be admissible based on *Lively*, the measure of damages must be based on the fair market value, which by definition must be no less than zero.

Pursuant to Rule 702 of the West Virginia Rules of Evidence, a qualified expert witness may testify in the form of opinions, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue." W.VA. R. EVID. 702. Such testimony, however, must be reliable and relevant. *Craddock v. Watson*, 197 W. Va. 62, 475 S.E.2d 62 (1998). Gleason was allowed to offer opinions on behalf of Appellees that Harman Mining had a negative "***fair market value.***" He first testified that Harman had a negative $12 Million fair market value, which decreased to a negative $33 Million fair market value after the actions of Appellants. *See* June 26, 2002 T.T., p. 183, 187. Gleason then opined that the negative difference in the fair market value resulted in a $21 Million decrease in fair market value for which Appellees could

recover. Gleason's opinion testimony is patently unreliable and not admissible under West Virginia law.

B. Appellants' Motion in *Limine* Concerning the Testimony of Alan K. Stagg Should Have Been Granted as it is Irrelevant and Unreliable.

The testimony of Appellees' expert, Alan K. Stagg ("Stagg"), also fails to meet the requirements of Rule 702 as it is also irrelevant and unreliable. Appellees elicited expert testimony from Stagg, to testify regarding the future potential growth of the Harman entities, such future totally based on the assumption that Harman had the growth potential to build a coal preparation plant and loading facility, and the financial stability to survive nearly five years of multi-million dollar annual losses. Stagg's opinion further relied on the unproven assertion that Harman could have secured access to the adjoining coal reserves owned by Pittston in Virginia, contrary to Harman's history of numerous failed attempts to acquire the Pittston reserves previously and testimony from Pittston's President. *See* June 25, 2002 T.T., pp. 73-75.

Appellants requested through a Motion *in Limine*, dated April 4, 2002, that the Trial Court exclude these opinions made by Stagg because they were based upon mere unsupported speculation, rather than independent evidence. *See* April 4, 2002 Defendant's Motion *in Limine*.

The undisputed evidence showed serious and permanent financial problems on the part of Appellees, long before Wellmore's declaration of *force majeure*. Before the alleged misconduct of Appellants, the Harman entities had been insolvent for several years, and were unable to pay their debts as they came due. These entities reported a negative net worth of $12 Million in 1997 and had not reported a profit in any year from 1994 to 1997. Harman issued financial "going concern" warnings in 1995 and 1996 and the evidence at trial revealed that they would have issued another in

1997. In fact, Harman had represented to the IRS that they would have no choice but to file for bankruptcy protection in 1996 if they were required to timely pay their tax obligations. In an attempt to alleviate many of these financial problems, Harman sold far and away their most valuable assets -- their coal reserves -- in early 1997, and were only financially capable of leasing back a portion of those reserves.

Stagg's opinion required the jury to assume that multiple hypothetical events, requiring capital expenses Harman had no money to pay for, would happen. That type of hypothetical leap by an expert is not permitted. In *KW Plastics v. United States Can Co.*, 131 F. Supp. 2d 1289 (M.D. Ala. 2001), the plaintiff's expert witness testified that, "U.S. Can would have spent $2.6 Million for a new plant and new equipment to boost its capacity, if not for KW's tortious interference that led to the loss of a valuable customer." *Id.* at 1292. The court excluded such testimony of damages based upon a hypothetical business with additional capacity as "wholly speculative." *Id.* In this case, it is undisputed that Harman had no ongoing plan to build a preparation plant and loading facility, and there was no factual evidence that prior to the claimed acts of Appellants, Harman had the ability to invest in these capital improvements. Any testimony that Harman could get the necessary capital or build these improvements, or acquire Pittston's reserves, is wholly and completely speculative.

More importantly, Alan Stagg is a geologist, not an engineer. As such, he is unqualified to render any opinions at trial regarding engineering or anything else other than geology. However, despite counsel for Appellants' objection at trial to Stagg offering any opinions outside of his expertise in geology, the trial court allowed Stagg to testify regarding hypotheticals, mostly involving engineering and leasing issues. *See* June 25, 2002 T.T., pp. 66-71. Stagg's testimony was not grounded in any actual facts. Rather he relied upon "facts" he made up that are not found anywhere

in the record, and which are contrary to the actual facts adduced at trial. Thus, his creative and speculative testimony should have been excluded.

C. The Evidence Presented at Trial to Support the Individual Appellees' Claims was Insufficient as a Matter of Law.

In this case, the jury was asked to consider several claims brought by Caperton, personally, in addition to the corporate claims of Harman. Caperton based his personal recovery on two contentions: (a) he allegedly suffered personal injury because he guaranteed numerous business loans made to Harman; and (b) he allegedly suffered injury to his reputation because he was listed on the Applicant Violator System.

On April 1, 2002, Appellants filed a Motion for Summary Judgment, arguing that Caperton was precluded from recovering any personal damages as a result of the alleged injuries he personally suffered from Wellmore's declaration of *force majeure*. *See* Defendants' Motion for Summary Judgment. The Trial Court denied Appellants' motion in its June 28, 2002 Memorandum of Summary Opinion.

As the owner of Harman, every claim that Caperton personally asserted was derivative of the corporate claims. The general rule in West Virginia is that "officer[s] or shareholder[s] of a corporation, even if the sole shareholder, has no personal or individual right of action against third parties for a wrong or injury inflicted by those third parties upon the corporation." *Mullins v. First National Exchange Bank of Va.*, 275 F. Supp. 712 (W.D. Va. 1967). Where breach of a contract results in damages to a corporation and its stockholders, only the corporation may sue for inducing the breach. *See* 45 AM. JUR. 2D *Interference* § 53 (2006). Thus, the recovery that made Harman whole in turn made Caperton whole. Any damage award to Caperton is improper, as Caperton could only have properly been before the Court as a shareholder of the corporation, and any recovery on his

part is derivative and duplicative of the corporate recovery. *See* July 8, 2002 T.T., pp. 139-207; *See also* July 10, 2002 T.T., pp. 36-48.

First, Caperton's allegation that he suffered personal damages because he personally guaranteed business loans for Harman fails as a matter of law because he executed each of those contracts in his capacity as sole shareholder of Harman and not in his personal capacity. As a matter of law, corporate debts for which a shareholder/guarantor remains personally liable after the corporation is liquidated are inadmissible as an independent basis for recovery on a shareholder's claim against those who allegedly caused the destruction of their business. *See Lively*, 207 W.Va. at 444, 533 S.E.2d at 670.

Second, Caperton's assertion that his reputation was injured because he was listed on the Applicant Violator System (hereinafter referred to as "AVS") also is legally insufficient. The AVS is an automated information system containing information on surface coal mining sites, including data on applicants, permittees, operators, and violators of the Surface Mining Control and Reclamation Act. This act requires owners and operators of coal mines to perform reclamation work once the mine has discontinued operations. If the reclamation work is not completed and the operator is cited, the website will note that as a violation. Part of Caperton's claim at trial was that he would be unable to operate a coal mine with an AVS violation on his record. However, once the reclamation work on a site is completed, the listing is removed and there are no further penalties. The AVS clearly targets the corporate entity, not the individual. In this respect, any award for the value of the businesses included the value of any reclamation work that needed to be done for Caperton to be removed from the listing.

Moreover and more importantly, Appellees make no reference to any injury to reputation in any complaint. Consequently, Appellants had no notice of Caperton's individual claims either

through pleadings, filings or discovery. In fact, the first time that Appellants learned of any claim by Caperton for alleged damage to his reputation was when his economist, Daniel L. Selby ("Selby"), produced a summary chart of damages broken into four categories immediately before trial, which the Trial Court allowed over Appellants' objection. These four categories of damages were: (a) lost income, (b) contingent debt structure, (c) restore credit worthiness, and (d) injury to reputation. The section of the report dealing with injury to Caperton's reputation simply had four question marks and nothing more, whereas the other three areas of alleged damages had actual figures provided by Selby. In fact, pursuant to the objection of counsel for Appellants, Selby didn't offer any testimony regarding injury to the reputation of Caperton at trial. *See* June 16, 2002 T.T., pp. 118-120. Despite this lack of expert witness testimony on the unplead, untimely and alleged issue of injury to reputation, the jury was still allowed to consider Selby's chart with the category "injury to reputation" with only question marks for the value of this alleged damages. As such, the jury was led to believe that such damages were recoverable and was left to its own imagination regarding how much to award Caperton for alleged injury to his reputation.

Third, Caperton's allegations that he suffered emotional distress as a result of the alleged actions of Appellants is without legal support. Emotional distress is not recoverable absent physical injury and certainly not recoverable as a result of a business tort. *Monteleone v. Co-Operative Transit Co.*, 128 W. Va. 340, 36 S.E.2d 475 (1945), *overruled on other grounds, Heldreth v. Marrs*, 188 W. Va. 481, 425 S.E.2d 157 (1992). As such, since no such legal claim for emotional distress is cognizable as part of the allegations of a business tort, there can be no injury suffered by Caperton. Moreover, emotional distress was neither pled nor proven by Caperton, and Appellants were not given notice or the opportunity to take discovery to rebut the merits of this claim. Specifically, since the Complaint and Amended Complaint did not make a claim for emotional distress damages,

counsel for Appellants responded accordingly. Interrogatories and requests for production were not drafted to inquire regarding the basis and extent of Appellees' claim of emotional distress, no personal medical records were requested, Caperton was not deposed on this subject, Caperton was not cross-examined at trial regarding his unplead, untimely and alleged emotional distress, and Appellants' damages experts were not provided with any information regarding such a claim. However, despite all these facts, the Trial Court allowed the jury to consider Appellees' emotional distress claims by submitting an instruction to the jury on damages, which included emotional damages, over Appellants' objection. *See* July 31, 2002 T.T., p. 148, ll. 3-12.

D. The Trial Court Should Not Have Permitted An Award of Consequential Damages.

In the verdict form the jury was instructed that it could return a verdict in favor of Harman and in favor of Caperton for consequential damages. *See* Court's Verdict Form, p. 3. Appellees, however, neither pled nor proved consequential damages, and Appellants objected to the inclusion of consequential damages in the Verdict Form. *See* August 1, 2002 T.T., pp.199-200.

In West Virginia, consequential damages, also referred to as special damages, arise from special circumstances that are not usually predictable, but that could reasonably have been anticipated as the probable result of a breach of contract. *Desco Corp. v. Harry W. Trushel Construction, Co.,* 186 W. Va. 430, 434, 413 S.E.2d 85, 89 (1991). Under Rule 9(g) of the West Virginia Rules of Civil Procedure, [w]hen items of special damages are claimed, ***they shall be specifically stated.***" W.VA. R. CIV. P. 9(g) (emphasis added). Because consequential damages are special damages, the damages must be pled with specificity in order to be recovered by Appellees under Rule 9(g).

In this case, Appellees did not plead special damages or consequential damages. In fact, Appellees' forty-five page Amended Complaint does not mention special damages, despite specific references to compensatory and punitive damages. *See* First Amended Complaint. Furthermore, the Demand for Relief in Appellees' First Amended Complaint prayed for judgment against Appellants, jointly and severally, to include only compensatory damages, punitive damages, treble damages, pre-judgment and post-judgment interest, costs, and attorneys' fees. *Id.* at p. 45. Nowhere in this lengthy document does the word "consequential" or "special" ever appear. As such, because Appellees clearly violated Rule 9(g), the verdict form and jury instructions concerning consequential damages should not have been offered to the jury, over Appellants' objection, and the award should be reversed. *See* August 1, 2002 T.T., pp. 199-200.

E. The Trial Court Erred by Allowing The Jury to Hear Evidence Concerning Prejudgment Interest in the Damage Calculations.

During discovery, Appellees' expert, Gleason, issued a report setting forth his opinions, which included an award of over $7 Million in "pre-judgment interest," at 10 percent per annum, as part of Appellees' damages. *See* Gleason's Analysis of Operational Damage Report, at p. C-5. Appellants promptly filed a Motion *in Limine* to exclude Gleason's opinions with respect to any reference of pre-judgment interest, because the award of pre-judgment interest falls within the purview of the judge, and not the jury. Gleason's testimony, therefore, was irrelevant and would only confuse the jury. *See* Defendant's Motion *in Limine* and Memorandum in Support at ¶ 5; p. 16-17. Appellants' Motion was denied by the Trial Court. *See* June 28, 2002 Memorandum of Summary Opinion. At trial, Gleason offered testimony concerning the amount of Appellees' damages, which included pre-judgment interest. *See* July 15, 2002 T.T., pp. 190-91.

It is well settled law that "[u]nder W.VA. CODE § 56-6-31, as amended, prejudgment interest on special or liquidated damages is recoverable as a matter of law and ***must be calculated and added to those damages by the trial court rather than by the jury.***" *Beard v. Lim*, 185 W. Va. 749, 408 S.E.2d 772 (1991) (quoting Syl. pt. 1, *Grove ex rel. Grove v. Myers*, 181 W. Va. 342, 382 S.E.2d 536 (1989) (emphasis added)). Because the calculation is a matter for the Court, not the jury, Gleason's testimony regarding pre-judgment interest was incorrect and misleading. As such, the Trial Court improperly denied Appellant's Motion *in Limine* to exclude the testimony of Gleason regarding pre-judgment interest and Appellants are entitled to either a remitter of damages, or in the alternative, to a new trial.

F. There was Insufficient Evidence to Allow the Jury to Consider Punitive Damages, and as Such, the Trial Court Erred by Permitting a Jury Instruction and Verdict Form Allowing for Punitive Damages.

At the trial of this matter, the court accepted Appellees' jury instruction and verdict form regarding punitive damages, over Appellants' objection. *See* August 1, 2002 T.T., p. 205, ll. 8-12. The jury ultimately returned a verdict in favor of Appellees and against Appellants for punitive damages, without proof of malice, wantonness or oppression. In West Virginia, "[p]unitive or exemplary damages are such as, in a proper case, a jury may allow against the defendant by way of punishment for wilfulness, wantonness, malice, or other like aggravation of his wrong to the plaintiff." Syl. pt. 1, *O'Brien v. Snodgrass*, 123 W. Va. 483, 16 S.E.2d 621 (1941), *overruled on other grounds in Ennis v Brawley*, 129 W. Va. 621, 41 S.E.2d 680 (1946). Malice is "[t]he intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under circumstances that the law will imply an evil intent.... A condition of the mind showing a heart regardless of social duty and fatally bent on mischief." *State v. Burgess*, 205 W. Va. 87, 89, 516 S.E.2d 491, 493 (1999)(quoting BLACK'S LAW DICTIONARY 956 (6th ed. 1990)).

In this case, there was no evidence that any of Appellants acted with malice in the declaration of *force majeure,* but rather that Appellants were acting to protect their own business interests. Caperton testified that Don L. Blankenship ("Blankenship"), President and CEO of A.T. Massey, never expressed anger, but was always businesslike in his demeanor. Further, there was no evidence of any history of acrimony, evil intent or ill will between the parties. Rather, the evidence was that a proper business decision was made, based upon a business interpretation of the *force majeure* provision of the 1997 CSA contract. As this Court has stated many times, "an [allegedly] wrongful act done under a bona fide claim of right and without malice in any form constitutes no basis for punitive damages." *Jopling v. Bluefield Water Works Co.*, 70 W. Va. 670, 74 S.E. 943 (1912).

This case is founded upon a breach of contract claim – the issue being whether the declaration of *force majeure* was justified after LTV's Pittsburgh coke plant was shut down. Despite Appellees' conjecture that Appellants acted to put them out of business, there was no evidence adduced at trial of any evil motive, acrimony or ill will. As such, the Trial Court erred in allowing the jury to consider punitive damages in the absence of evidence of willful, wanton, or reckless conduct, or actual malice.

VIII. Appellants Were Denied A Fair Trial Due to Numerous Highly Prejudicial Errors Made by the Trial Court.

A. The Trial Court Erred by Refusing to Allow the Appellants to State Their Objections to the Jury Instructions and Verdict Form Prior to Submission to the Jury, and Threatening Sanctions If Such Objections Were Made.

Following the Trial Court's denial of the Appellants' motion for judgment as a matter of law, the Trial Court announced that the jury instructions, which had been provided in part to the Appellants by the court the night before and in full only about an hour before they were given to the jury, would be given as they were written, without the opportunity for the Appellants to express their

objections, prior to submission to the jury. Incredibly, the Trial Court indicated that closing arguments were to proceed first and that any objections to the instructions were to be dictated to the court reporter after the jury began deliberating. Of course, counsel for Appellants objected to this unorthodox and legally insufficient procedure. *See* July 31, 2002 T.T., p. 146-47.

In compliance with the Trial Court's decision to hear objections to the court's proposed jury instructions only after they had already been submitted to the jury, and in an effort to avoid sanctions threatened by the court if further objections were made before the jury began deliberating, while preserving their objections for appeal, the Appellants resorted to dictating their objections to the jury instructions to the court reporter, as the jury deliberated. During these dictated objections, counsel for the Appellants voiced objection to the Trial Court's procedures. *See* August 1, 2002 T.T., p. 4.

Rule 51 of the West Virginia Rules of Civil Procedure states before the jury is instructed in the trial of a civil case, the parties are permitted to submit proposed instructions, the court is to inform counsel of its proposed action, and the parties are permitted opportunity to voice objections. Specifically, Rule 51 of the West Virginia Rules of Civil Procedure provides, in pertinent part:

> Either before or at the close of the evidence, any party may file written requests that the court instruct the jury on the law as set forth in the requests, and the court shall inform counsel of its proposed action upon the requests ***before*** it instructs the jury . . . No party may assign as error the giving or the refusal to give an instruction unless the party objects thereto ***before*** the arguments to the jury are begun ... but the court or any appellate court, may, in the interest of justice, notice plain error in the giving or refusal to give an instruction, whether or not it has been made the subject of objection. ***Opportunity shall be given to make objection to the giving or refusal to give an instruction*** out of the hearing of the jury.

See W. VA. R. CIV. P. 51 (emphasis and underscore added). Various cases have echoed this rule by holding that objections to instructions made only after the instructions were submitted to the jury were untimely. *See, e.g., Walker v. Monongahela Power Co.*, 147 W. Va. 825, 131 S.E.2d 736 (1963) (holding that objections to instructions, presented in memorandum filed after verdict, were

not timely); *Roberts v. Powell*, 157 W. Va. 199, 207 S.E.2d 123 (1973) (holding that party may assign error to giving of instructions only if he objects before arguments to jury are begun).

As commentators have noted, "[a] trial court may, whether requested or not, define the issues involved and instruct the jury on the law governing the case, ***provided that all such instructions be first submitted to counsel for an opportunity to object to them***." F. Cleckley, R. Davis, and L. Palmer, Jr., LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE ¶ 51[3] (2002) (emphasis added and footnote omitted). "An underlying purpose of Rule 51 is to have the parties draw the trial court's attention to any error in jury instructions before the jury retires for deliberations." *Id.* at ¶ 51 [21] (footnote omitted). This rule logically preserves the rights of litigants to a fair trial conducted under correct legal standards while preventing the waste of judicial resources by the giving of erroneous instructions and the resultant need for new trials.

In this case, the Trial Court's conduct in connection with the jury instructions explicitly violated the provisions of Rule 51 and completely undermined the obvious rationale underlying the rule. In addition to plainly violating Rule 51, the Trial Court's conduct constituted a violation of the Appellants' due process rights under the state and federal constitutions. The Appellants submit that the Trial Court erred in denying the Appellants' objections to the Court's refusal to apply West Virginia Rule of Civil Procedure 51, and that such violations warrant reversal of the Trial Court's judgment, or in the alternative, a new trial.

B. The Trial Court Erred by Precluding Appellants From Arguing The Affirmative Defense of Inevitability and Instructing the Jury It Could Not Consider That the Financial Failure of Appellees Was Inevitable, Reducing Appellees' Burden of Proving Proximate Cause.

Appellants were precluded from arguing and presenting at trial their defenses to causation, namely even if there had been misconduct, Appellees' business was doomed to fail and Appellant's

alleged misconduct did not cause that failure. Appellees did not dispute or refute that they were plagued by financial troubles for a number of years prior to their dealings with Appellant. However, at the trial of this case and over Appellants' objection, the Trial Court repeatedly admonished Appellants and their defense witnesses that the inevitable failure of Appellees' business was not a valid defense. *See* July 23, 2003 T.T., pp. 42. ll. 8-15. *See also Id* at p. 21, 24, 203.

West Virginia has recognized inevitability as a defense to a claim for interference: "[a] claim of interference with a contract lacks merit where it was inevitable that the contract could not be completed, even absent the alleged interference." *Bailey v. Hans Watts Realty Co.*, 113 W. Va. 739, 169 S.E. 404 (1933). Appellants simply sought to put before the jury the same arguments made in *Bailey,* namely that Harman was destined to fail before any action by Appellant.

The evidence of inevitable business failure was overwhelming and longstanding. As noted above, as early as the 1980's, Inspiration had been attempting to unload Harman Mining, Sovereign, and Southern, with no success. In January 1993, Caperton formed Harman Development and acquired the stock of these three companies, along with their substantial liabilities. Caperton paid no cash in consideration for the transfer of stock. He was effectively given the business. Although Harman Development turned a meager profit during its inaugural year, every year thereafter the company sustained significant net losses. The Harman entities had been insolvent for several years, and were unable to pay their debts as they came due. These entities reported a negative net worth of $12 Million in 1997, and had not reported a profit in any year from 1994 to 1997. Harman issued financial "going concern" warnings in 1995 and 1996, and the evidence at trial revealed that they would have issued another in 1997. Harman was in serious financial trouble prior to its inception and, as established by the evidence adduced at trial, its ultimate demise was not the result of any alleged conduct on the part of Appellants. Appellees' own expert placed a negative fair market value

on the business both before and after any alleged misconduct by Appellants. The Trial Court should have instructed the jury, or at the very least permitted evidence and arguments from Appellants, that if the jury believed from the evidence that the demise of Appellees' business was inevitable or unavoidable, regardless of the conduct of Appellants, then it could find in favor of Appellants as to the claim for interference.

C. The Trial Court Erred by Repeatedly Questioning Appellants' Expert Witnesses And By Sanctioning Appellants For Exceeding Time Limits On Cross Examination, Which Showed Partiality And Bias.

1. The Trial Court's Questioning of Appellants' Expert Witnesses Suggested to the Jury that the Court Did Not Consider Such Expert Testimony Credible.

At trial, the Trial Court committed prejudicial error by continuously and improperly interrogating many of Appellants' experts and by its demeanor suggesting to the jury how they should weigh the testimony. *See* July 26, 2002 T.T., pp. 273-278. When counsel for Appellants objected to the Trial Court's questioning of defense experts, the Court responded that "it had authority to [ask questions] ... in such a way as not to prejudice any of the parties about the way any follow-up questions could be asked or adduced." *See, e.g.,* July 26, 2002 T.T., p. 279-280.

Appellants do not dispute that a judge can question witnesses, but a judge cannot by word or action suggest a personal view of the case or the witness as it so plainly did at this trial. Rule 614(b), of the West Virginia Rules of Evidence plainly authorizes trial courts to question witnesses, ***"provided that such questioning is done in an impartial manner so as to not prejudice the parties."*** Syl. pt. 1, *Alexander ex rel. Ramsey v. Willard*, 208 W. Va. 736, 542 S.E.2d 899 (2000) (citing Syl. pt. 3, *State v. Farmer,* 200 W. Va. 507, 490 S.E.2d 326 (1997) (emphasis added)). Furthermore, trial judges, when engaged in the trial of a case before a jury, "should studiously abstain from indicating by word, gesture or otherwise ***his personal views*** upon the weight of the evidence, or the ***credibility***

or incredibility of the witnesses, or the extent of the damages sued for, thereby to ***invade the province of the jurors, the proper triers of the facts.***" *Id.* at Syl. pt. 2. (emphasis added.)

In this case, despite objection by Appellants, the Court asked extensive questions of Appellants' experts, including hypothetical questions on subjects not covered in cross-exam by Appellees, when it had not asked similar questions of Appellees' experts.

2. The Trial Court Erred By Sanctioning Appellants for Exceeding A Time Limitation on Cross-Examination of an Expert and Not Imposing the Same Sanction Against Appellee for Committing the Same Offense.

During Appellees' case-in-chief, when it was strategically to their advantage, Appellees moved, and the Trial Court ordered, that to the extent possible the time on cross-examination should not exceed the time on direct examination. *See* July 12, 2002 T.T., pp. 78-9.

During Appellees' direct examination of their damage expert Selby, rather than explaining his conclusions in any detail, he simply stated his opinions in a summary fashion using a summary table. During Selby's cross-examination, he withdrew several of his opinions and made important concessions concerning others. Moreover, during his cross-examination, it became apparent that Selby had not thoroughly reviewed the documents he had produced in his work papers, seriously undermining some of his opinions, as well as prolonging his cross-examination.

During Selby's direct examination, Appellants objected to any testimony regarding the consolidated financial statements of Appellants' ultimate parent, Massey Energy Company, and all of its subsidiaries (collectively "Massey"), who other than Appellants were not parties to the litigation and many of which the Trial Court had no jurisdiction over. Further, Selby had not previously been disclosed as a witness on the topic. The Trial Court properly sustained Appellants' objection.

However, near the end of Selby's cross-examination, the Court announced "[t]wo minutes," which counsel for Appellants interpreted to mean the time remaining on the court reporter's tape,

which had been an issue in the case. The Trial Court gave no admonition or warning that the "two minutes" was intended to limit Appellants' remaining cross-examination to two additional minutes. As soon as practically possible, Appellants' cross-examination was concluded. When Caperton's counsel commenced redirect examination and asked a question regarding Massey's consolidated financial information, Appellants again objected to the testimony and that the question exceeded the scope of cross-examination. The court then excused the jury and conducted a hearing on Appellants' objection, at which time it surprisingly announced that, despite its prior ruling, it was allowing the inquiry as **a sanction for the cross-examination exceeding the time on direct examination.**

Ironically, after the Trial Court's imposition of this sanction against Appellants, it allowed Appellees, on more than one occasion, to exceed the time allotted for cross-examination for the same reason asserted by Appellants, i.e., it simply takes longer to cross-examine an expert witness who has given summary testimony than it takes to elicit such summary testimony on direct examination.

Appellants respectfully submit that it was grossly unfair to impose this sanction, without adequate warning. Although the imposition of sanctions is a matter of discretion, such discretion can be abused. *See* Syl. pt. 1, *Hadox v, Martin*, 209 W. Va. 180, 544 S.E.2d 395 (2001). The sanction issued by the lower court, i.e. admission of testimony outside of the experts' proffered testimony, was clearly inappropriate as punishment for exceeding a time limitation with no evidence of wilfulness or abuse by the Appellants.

D. The Trial Court Erred by Failing to Award A Mistrial After Appellees Repeatedly Made Reference to the Virginia Action, in Violation of the Court's Instruction to the Parties Prohibiting Such Reference.

Prior to trial, the Trial Court instructed all parties to refrain from any reference to the Virginia action. *See* June 17, 2002 T.T., pp. 107-108. Despite the Trial Court's admonition, and almost from the very beginning of the trial, Appellees elicited both subtle and blatant references to the Virginia

action. For example, Appellees played a portion of the videotaped deposition of Keith Horton on June 28, 2002, including specific reference to the Virginia action, both by the identity of the parties, the identity of the forum, and the identification and character of the Virginia suit. *See* June 28, 2002 T.T., p. 131, ll. 5-18.

After several discussions out of the presence of the jury to address Appellants objection, the Trial Court took the matter of mistrial under advisement. Later, when Appellees elicited testimony from Caperton regarding the Virginia litigation on July 8, 2002, Appellants renewed their motion for a mistrial. S*ee* July 8, 2002 T.T., p. 87. The Trial Court denied the renewed Appellants' motions.

The Trial Court earlier recognized the prejudicial effect of these references by admonishing the parties. Then, when Appellees continually defied the admonition, the Trial Court failed to enforce its ruling even though it had already realized the prejudicial effect of such statements at the trial. These repeated references by trial witnesses to the Virginia litigation unfairly prejudiced Appellants, because the jury could easily surmise that Appellees prevailed in the breach of contract action filed in Virginia, and the Trial Court's admonition, necessitated by Appellees' flagrant disregard for his ruling, made it easy for the jury to figure out that the Virginia action involved a breach of contract.

E. The Trial Court Erred by Allowing Appellees to Present Heavily Edited Videotaped Deposition Testimony Without Contemporaneously Presenting Appellants' Designations of the Same Videotaped Deposition Testimony.

In this case, the Trial Court erred by allowing Appellees to play heavily edited portions of video depositions, without allowing Appellants to play the portions they wished to designate contemporaneously for the jury. *See* June 25, 2002 T.T., pp. 6-7. This was in direct contravention to Rule 106 of the West Virginia Rules of Evidence: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction ***at that time*** of any

other part or any other writing or recorded statement which ought in fairness to be considered ***contemporaneously*** with it." *See* W. VA. R. EVID. 106 (emphasis added); *State v. Gray*, 204 W. Va. 248, 511 S.E.2d 873, 875-76 (1998) (emphasis added). "Rule 106, based upon the common law 'rule of completeness,' is designed to reduce the risk that a writing or recording *will be taken out of context* or that an initial misleading impression will influence the minds of the jurors." *Id.* The rule serves to cure "misleading impressions created by taking matters out of context," and acknowledges "the inadequacy of repair work when delayed to a point later in the trial." *Id.*

Over Appellants' objection, the Trial Court permitted Appellees to play only those portions of videotaped depositions selected by Appellees and did not allow Appellants to play their selected portions of those same videotaped depositions until much later in the six week trial, during Appellants' case in chief. *See* June 27, 2002 T.T., p. 6, ll. 4-13. Such a ruling by the Trial Court permitted Appellees to take matters out of context, creating a misleading impression based on the introduction of incomplete recorded segments that were edited together out of sequence, creating the appearance of seamless testimony by the witness. This misimpression, which could and by rule should have been countered immediately, was delayed by the Trial Court's ruling until a much later time when it was difficult, if not impossible, to repair the damage done.

F. The Trial Court Erred by Repeatedly Allowing Appellees to Interrogate Witnesses Regarding Documents About Which They Had No Previous Knowledge in Order to Place Evidence Before the Jury That Was Otherwise Inadmissible, and Then Failing to Instruct the Jury to Disregard Such Evidence.

At various times throughout trial, witnesses for Appellees were permitted to improperly testify about certain documents about which they had no personal knowledge. *See* June 19, 2002 T.T., pp. 77-79. Specifically, witnesses were handed documents they had never seen prior to that day of trial and were asked to read aloud the content of said document, in an attempt by Appellee to read

into evidence documents that would otherwise have been inadmissible. In fact, the witnesses admitted that they had not created the documents at issue and had no knowledge whatsoever regarding the contents of the documents prior to trial, as required by the Rules of Evidence. Yet Appellees were still allowed to question witnesses about the content of these documents.

For example, on June 19, 2002, Appellees were permitted to ask Cook about a memorandum written on United stationary, which he testified he knew nothing about. *See* June 19, 2002 T.T., pp. 49-50; pp. 77-79. Again, on June 26, 2002, over the Appellants' objections, Stagg was permitted to testify regarding Suboleski's exhibits, to which he had no personal knowledge. *See* June 26, 2002 T. T., pp. 13-14.

West Virginia Rule of Evidence 602 prohibits witnesses from attempting to testify about matters about which they have no knowledge. Specifically, "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter . . . ." W. VA. R. EVID. 602. "Evidence is *inadmissible* under this rule only if the trial court, in the proper exercise of its discretion, finds that the witness **could not have actually perceived or observed that which he testifies to.**" *State v. Whitt*, 184 W. Va. 340, 400 S.E.2d 584 (1990) (emphasis added).

By allowing Appellees to end-run around the Rules of Evidence, over Appellants' objections, and then by further failing to instruct the jury to disregard this irrelevant and inappropriately admitted evidence, the Trial Court abused its discretion and committed reversible error.

G. The Trial Court Erred by Repeatedly Admitting Evidence That Was Irrelevant, Remote in Time, More Prejudicial Than Probative, and Adduced by Appellees for the Sole Purpose of Improperly Inflaming the Jury on Unrelated Matters.

Prior to trial in this case, Appellants moved *in limine* on several grounds, including but not limited to, excluding evidence of the unrelated consolidated finances of all the Massey entities, most

of which are not involved in the litigation at issue, unrelated environmental matters, unrelated labor matters, unrelated litigation matters and Harman's bankruptcy proceedings. *See* April 1, 2002 Defendants' Motion *in Limine*. The Court denied these motions on June 17, 2002, the first day evidence was taken. *See* June 28, 2002 Memorandum of Summary Opinion. *See* July 22, 2002 T.T., pp. 33-34; p. 132; pp. 138-141. Rule 404(b) of the West Virginia Rules of Evidence prohibits the admission of evidence of other crimes, wrongs, or acts to prove the character of a person, in this case all other Massey entities and/or Blankenship. None of the exceptions to the admission of such evidence applied in this case. For example, it is inconceivable that Massey's environmental record had any relevance to this contract case. None was ever identified by Appellees or the Trial Court.

Despite Appellants' pre-trial motions, at trial the Appellees were permitted to ask questions of witnesses that were irrelevant and greatly prejudiced these Appellants. Specifically, during the cross-examination of Blankenship, Appellees' counsel repeatedly asked questions surrounding Appellants's involvement in Harman's bankruptcy proceeding, suggesting that Massey bought the interests of some of Harman's creditors in order to destroy Harman. *See* July 22, 2002 T.T., pp. 33-34. Appellees' counsel were also permitted to ask prejudicial questions regarding labor unions and the profits of the multiple Massey entities (some of which were not even in existence at the time of the alleged tortious actions of Appellants, and the great majority of which were not involved in and had nothing to do with this case), which placed a prejudicial inference in the jury's mind that Massey, a non-party, was completely profit driven and intentionally putting workers out of work. *See* July 22, 2002 T.T., p. 132. Appellees' counsel was also permitted to ask various prejudicial questions regarding Massey's environmental issues, history of EPA/environmental citations and at least two slurry spills in recent years. *See* July 18, 2002 T.T., pp. 138-141. Finally, during the trial of this case, Appellees introduced evidence of previous litigation involving Massey, and the business

expectancies of Harman, even though such prior litigation was wholly unrelated to the case *sub judice*. The introduction of this evidence was an obvious attempt by Appellees to instill unfair prejudice in the jury against Appellants. This is exactly the type of improper, unduly prejudicial use of prior acts evidence contemplated by Rule 404(b) and, therefore, such evidence should have been excluded by the Trial Court.

H. The Trial Court Erred by Allowing Appellees to Introduce Irrelevant and Highly Prejudicial Evidence of Massey's Consolidated Income and Change in Shareholder's Equity in 1997 and 1998.

Prior to the trial in this case, Appellants filed a Motion *in Limine*, arguing, among other things, that Appellees should be precluded from introducing evidence regarding consolidated financial information of numerous Massey entities that were unrelated and not involved with the pending litigation. *See* April 1, 2002, Defendants' Motion *in Limine* and Memorandum in Support of Motion *in Limine*. The court also denied this motion. *See* June 28, 2002 Memorandum of Summary Opinions.

During the direct examination of Appellees' expert Selby, and during closing arguments, Appellees introduced evidence concerning the difference in Appellants' parent company's consolidated earnings and shareholders' equity between 1997 and 1998. Such information, however, was highly prejudicial and misleading, since it was taken from consolidated financial statements of numerous Massey corporate entities having nothing to do with this case, and was totally irrelevant, since it was never tied in any way to the financial condition of Wellmore or any of the Appellants. *See* June 16, 2002 T.T., pp. 146-47.

Then, having gotten this information in during trial, Appellees' counsel argued, with no evident basis, that all of the consolidated Massey entity earnings in 1998 were somehow related to Harman's alleged tort claim, a complete distortion of the facts made in an effort to inflame the jury

and provoke an exorbitant verdict. The jury listened carefully and awarded Appellees $50 Million, almost precisely one-half of the "$100 Million" Appellees erroneously and improperly inferred to the jury that Massey and all of its subsidiaries earned as a result of the allegedly tortious conduct in this case.

In this case, the Trial Court committed judicial error by allowing Appellees to improperly use evidence of financial information pertaining to numerous other, unrelated Massey entities, to persuade the jury to award a multi-million dollar verdict for Appellees.

I. The Trial Court Erred by Allowing Appellees To Present Improper Rebuttal Evidence.

In the instant case, the Trial Court improperly allowed Appellees to present so-called rebuttal evidence that did not rebut any evidence presented during Appellants' case-in-chief. Specifically, despite the fact that Appellees had ample opportunity to cross-examine Blankenship while he was on the stand, they chose not to ask him certain questions and then re-called him as a rebuttal expert later to attempt to address those points they had either forgotten or failed to make during direct. *See* July 30, 2002 T.T., pp. 103-04, ll. 5-23, 1-3.

Rebuttal evidence has been defined as "evidence that refutes, contradicts, or diminishes evidence presented by another party." *F. Cleckley,* HANDBOOK ON EVIDENCE FOR WEST VIRGINIA LAWYERS § 6-11 (D)(3) (2000) (Footnote omitted). During rebuttal, the plaintiff may not present "witnesses who merely support the allegations of the complaint, but is confined to testimony which is directed to refuting the evidence of the defendant. . . ." *Id.* at 96-111 (D)(3)(b), quoting MCCORMICK ON EVIDENCE 94, at 7 (3d ed. 1984). Rebuttal is designed to allow a plaintiff to address issues raised in a defendant's case-in-chief, not to rehash matters addressed in the plaintiff's case-in-chief or for plaintiff to introduce "new matters."

Little or none of Appellees' supposed "rebuttal" evidence refuted, contradicted, or diminished Appellants' evidence, but rather Appellees' "rebuttal" evidence served only to unfairly and prejudicially repeat evidence already presented during Appellees' case-in-chief. In fact, all of the purported rebuttal evidence could have been elicited more efficiently during Appellees' case-in-chief or through proper cross-examination of Appellants' witnesses.

J. The Trial Court Erred by Refusing to Instruct the Jury That Appellees Had Withdrawn Their Claims for Civil Conspiracy and Negligent Misrepresentation.

At the close of Appellees' case-in-chief, Appellants moved for a directed verdict. The Trial Court was prepared to grant the motion with respect to Appellees' claims of civil conspiracy and negligent interference when Appellees withdrew those claims at the close of their case. *See* July 17, 2002 T.T., pp. 68, 71. However, because the jury had already been made aware of Appellees' assertion of those claims and had heard evidence and arguments relating thereto, Appellants were entitled to have the Trial Court inform the jury that Appellees had withdrawn those claims. Although counsel for Appellants intended on suggesting that the court issue a jury instruction that those claims had been withdrawn by Appellees, as noted above they were not permitted to express any objections to the Jury Instructions or Jury Verdict Form prior to their presentation to the jury. Thus, the jury was allowed to consider damages for civil conspiracy and negligent interference even though those claims had been dismissed. *See* August 1, 2002 T.T., pp. 205-06.

K. The Trial Court Instructions Improperly Addressed Legal Issues Never Raised or Argued at Trial.

The Trial Court instructed the jury on the law pertaining to rescission of a coal mining contract and trade secrets. *See* Court's Charge and Instructions of Law at 11. However, this case deals with an agreement to supply a certain amount of coal, memorialized in a Coal Supply

Agreement. There is no "coal mining contract" at issue in this case, and as such, any instruction in that regard was error. Further, the dispute at issue does not involve trade secrets or the rescission of a contract, and as such, there was no need for the court to offer instructions on trade secrets and the rescission of a coal contract. The inclusion of such irrelevant, confusing, prejudicial and potentially inflammatory language in the jury instructions was entirely inappropriate, and confused rather than clarified the applicable law, injecting legal issues and authority unrelated to Appellees' claims or the evidence. Appellants specifically objected to the court's inclusion of these instructions. *See* August 1, 2002 T.T., p. 11, ll. 10-15. "Instructions must be based upon the evidence, and an instruction which is not supported by evidence should not be given." Syl. pt. 3, *State v. Derr*, 218 W. Va. 225, 624 S.E.2d 572 (2005) (citations omitted).

In the trial of this matter, the Trial Court's instructions on rescission of a coal mining contract and trade secrets bore no correlation to the claims asserted by Appellees, did not conform to the evidence adduced at trial, and constituted reversible error.

L. The Trial Court Erred by Allowing Consequential and General Damages to be Included on the Verdict Form, Which Erroneously Allowed an Additional, Duplicative $3.4 Million Award.

As discussed in more detail previously herein, the Trial Court allowed the jury to award the corporate Appellees consequential damages even though the corporate Appellees never sought such damages, the corporate Appellees never presented any evidence or any proof of consequential damages, Appellants were not given any notice that Appellees were seeking consequential damages, and Appellants did not have an opportunity to conduct discovery of consequential damages. *See* Verdict Form at 3. The Trial Court committed reversible error when it provided a blank space for an award of consequential damages, and the jury awarded $3.4 Million Appellants objected to the inclusion of this interrogatory on the verdict form in that it included categories of damages that were

neither sought nor presented to the jury. *See* August 1, 2002 T.T., p. 21, ll. 19-24; p. 22, ll. 1-14.

M. The Trial Court Erred By Failing To Include a Provision on the Verdict Form for an Offset of $11.3 Million Damages Awarded to the Individual Appellee Against Damages Awarded to the Corporate Appellees

In this case, the Trial Court instructed the jury on the verdict form:

> If you answered 'Yes' to either question 5 or 6 or 7 above, and the damages, if any, awarded by you in answering question 4 for the Harman Plaintiffs does not include money damages for all the claims for which Plaintiff Hugh Caperton personally may have suffered, following your consideration of all the evidence adduced and the Court's Instructions of Law, please denote the amount of money DAMAGES, if any, that the Jury has determined was suffered by Hugh M. Caperton, personally . . . .

See the Jury Verdict Form at 4. The Trial Court, however, failed to provide an explanatory instruction regarding the offset of damages awarded to the corporate Respondents as discussed above.

The damages section of the verdict form submitted by the court to the jury failed to instruct the jury on how they were to separate any damages awarded to the corporation from those awarded to the individual plaintiff. *Id.* at p. 23, ll. 24; p. 24, ll. 1-24. Appellants further objected because this particular interrogatory allowed double recovery. *Id.* at p. 26, ll. 1-7. Moreover, Appellants objected to the use of the three lines on the verdict form that listed compensatory damages, consequential damages, and general damages on the grounds that they were inadequately defined in the court's instructions and duplicative. *Id.* at p. 26, ll. 8-14. *See* Jury Verdict Form at 4.

N. The Trial Court Erred by Excluding Portions of the Testimony of James L. Gardner

Appellants offered the testimony of James L. Gardner ("Gardner"), who was a key witness in the defense of this matter. Although Gardner was an attorney for Massey, he was called by Appellants to testify about his personal knowledge of highly relevant facts that existed outside of his attorney/client relationship with Massey.

Gardner previously worked for Inspiration, and was involved in the decision to effectively terminate Cook after his mine plan resulted in multi-million dollar losses. This was the same mine plan that caused Harman's multi-million dollar losses. Gardner had first hand knowledge regarding the declaration of *force majeure* and the efforts to purchase Harman. The Trial Court permitted Appellants to call and question Gardner regarding some limited issues, but repeatedly interrupted his testimony *sua sponte* to express concern that Gardner had been an attorney for Inspiration. The court ultimately disqualified Gardner from testifying because of some attorney/client privilege, although no privilege was ever asserted by Inspiration or any party to the suit.

This Court has stated that "the attorney-client privilege applies to compelled disclosure of confidences communicated by client to lawyer, and belongs to the client." *Lawyer Disciplinary Bd. v. McGraw*, 194 W. Va. 788, 461 S.E.2d 850 (1995). Furthermore, "as a general rule, courts do not disqualify an attorney on the grounds of conflict of interest unless the former client moves for disqualification." *State ex rel Youndblood v. Saunders*, 212 W. Va. 885, 575 S.E.2d 864 (2002). Therefore, the Trial Court's *sua sponte* dismissal of Gardner was in error, his testimony was improperly withheld from the purview of the jury, and Appellants were deprived an opportunity to present critical evidence.

O. The Trial Court Committed Reversible Error By Failing To Submit Jury Instructions to the Court That Were Required By the Facts of the Case.

West Virginia law has long recognized that a court must instruct the jury on any legal theory of which there is competent evidence. Failure to do so is a question of law subject to *de novo* review. In Syl. pt. 1 of *Reynolds v. City Hospital, Inc.*, 207 W. Va. 101, 529 S.E.2d 341 (2000), "[t]his court has long held that '[w]here [in a trial by jury] there is competent evidence lending to support a pertinent theory in the case, it is the duty of the trial court to give an instruction presenting

such theory when requested so to do.'" *State v. Headley*, 210 W. Va. 524, 558 S.E.2d 324 (2001); Syl. pt. 7, *State v. Alie*, 82 W. Va. 601, 96 S.E. 1011 (1918); *Kizer v. Harper*, 21 W. Va. 47, 561 S.E.2d 368 (2001).

The Trial Court failed to set forth the proper elements to support a cause of action for intentional interference with a contractual or business relationship. The law in West Virginia is well-established that there must be an "action" to make a *prima facia* case of intentional interference. Syl. pt. 2, in part, *Torbett v. Wheeling Dollar Sav. & Trust Co.*, 173 W. Va. 210, 314 S.E.2d 166 (1983). Despite the requirement of some affirmative action prior to a finding of intentional interference, the Trial Court provided the jury with the following instruction of law:

> After giving due consideration to the claims of the Corporate Plaintiffs (known collectively as the "Harman Plaintiffs"), and the affirmative defenses of the Defendants (known collectively as "Massey Defendants"), does the Jury find by a **preponderance of the evidence** that the Massey Defendants, through the acts and omissions of their officers, employees or agents, committed the civil wrong of TORTIOUS INTERFERENCE with the contract or with any of the advantageous business relations of the Harman Plaintiffs, as such is defined in the Court's Instructions of Law?

See the Jury Verdict Form, pp. 2 and 3 (Emphasis in original). Such an instruction is not sufficient for a finding of intentional interference, because it only requires an omission, rather than an affirmative act. Appellants objected to this interrogatory and their objection effectively was overruled, due to the Trial Court's mandate for counsel's objections to be dictated after the jury began deliberations. *See* August 1, 2002 T.T., p. 22, ll. 15-24; p. 23, ll. 1-5.

Prior to trial, Appellants offered their Proposed Instruction No. 4 on the subject of the alleged tortious interference of A.T. Massey with the 1997 CSA between Wellmore, Sovereign and Harman, which stated that the interference required to prove tortious interference had to be by a "third party" outside the contractual relationship. *See* Defendant's Proposed Jury Instructions, No. 4. The Trial

Court declined to adopt Appellants' Proposed Jury Instruction No. 4. over Appellants' objection and failed to instruct the jury in any way on the proper law regarding a parent company's interference with the contract of a subsidiary. *See* August 1, 2002 T.T. at p. 6, ll. 2-15.

Since A.T. Massey, as Wellmore's parent, was not a "party outside the relationship," it could not improperly interfere, as a matter of law, with Wellmore's contract with Harman and Sovereign. As noted above, while Appellants believe it was error to permit the claim at all, nonetheless, the Trial Court should have instructed the jury as to "third party" requirements.

In this case, the Trial Court's instructions to the jury on fraudulent concealment and fraudulent misrepresentation totally confused those elements of the causes of action, allowing the jury to return a verdict on either claim based upon an "omission." *See* Court's Jury Instruction, p. 11. As noted above, fraudulent misrepresentation and fraudulent concealment require an "act" and because the Trial Court erroneously included the term "omission" in its instruction, Appellees were able to inappropriately argue that a failure to disclose certain information was both a fraudulent misrepresentation and a fraudulent concealment.

As explained above, a cause of action for fraudulent concealment requires a "duty to disclose." *Pocahontas Min. Co. Ltd. Partnership v. Oxy USA, Inc.*, 202 W. Va. 169, 175, 503 S.E.2d 258, 264 (1998). In the absence of a "fiduciary relation[ship]" or a "relation of trust and confidence between the parties" there is no "duty to disclose," and there can be no cause of action for fraudulent concealment. In this case, the Trial Court committed reversible error by failing to instruct the jury that before fraudulent concealment can be found, there must be evidence to support a duty to disclose.

Prior to trial in this case, Appellants provided the Trial Court with a proposed jury instruction on fraudulent concealment, specifically requiring a finding of a "duty to disclose. *See,* Defendants'

Proposed Jury Instruction No. 10. Despite this proposed instruction by Appellants, and over objection, the Trial Court provided the jury its own instruction, which did not require the finding of a duty to disclose by the jury. *See* Court's Jury Instructions at 12.

As noted above, the corporate Appellees did not include in their pleadings any entitlement to consequential or general damages. Nevertheless, the Trial Court instructed the jury that it could award the corporate Appellees consequential damages. *See* Trial Court's Charge and Instructions of Law at 13. Appellants objected to the Trial Court's instruction. *See* August 1, 2002 T.T., pp. 181-82. In this case, the result of the Trial Court's instruction on consequential and general damages was "trial by ambush" and an effective denial of Appellants' constitutional due process rights.

The Trial Court submitted an instruction to the jury that permitted the jury to reject Appellants' business justification defense, if the jury determined that Appellants exerted economic pressure in order to induce third parties to refrain from dealing with Appellees. *See* Trial Court's Charge and Instructions of Law at 9-10. Counsel for Appellants objected to the Trial Court's jury instruction regarding business justification, arguing that Appellants were entitled to declare *force majure* because it was in the best interest of their business. *See* August 1, 2002 T.T., p. 15, ll. 12-18. Appellees' made no assertion in the pleading or at trial that Appellants exerted economic pressure in order to induce third parties to refrain from conducting business with Appellees, and Appellees presented no evidence to that effect at trial.

P. The Trial Court Committed Reversible Error By Failing To Submit a Proper Jury Verdict Form that Conformed with the Facts of the Case.

1. The Verdict Form Did Not Allow Determination of the Identity of the Outside Contracts or Business Relationships Found by the Jury to Have Been Improperly Interfered with by Appellants.

Appellants submitted a verdict form that would have allowed the jury to indicate exactly

which third-party contracts, business relationships or expectancies were allegedly interfered with by Appellants. *See* Defendant's Proposed Verdict Form, Question No. 3. The Trial Court, however, rejected Appellants' proposed verdict form and essentially adopted the general verdict form submitted by Appellees, over Appellants' objection, which allowed the jury to find that Appellants "committed the civil wrong of TORTIOUS INTERFERENCE with the contract or with any of the advantageous business relations of the Harman Plaintiffs, such as defined in the Trial Court's Instructions of Law." *See* Jury Instructions, at 2. *See also* August 1, 2002 T.T., pp. 13-18.

It is well-settled law that "[w]here a jury returns a general verdict in a case involving two or more liability issues and its verdict is supported by the evidence on at least one issue, the verdict will not be reversed, unless the defendant has requested and been refused the right to have the jury make special findings as to his liability on each of the issues." Syl. pt. 6, *Orr v. Crowder*, 173 W. Va. 335, 315 S.E.2d 593 (1983), *cert.* denied, 469 U.S. 981 (1984).

In this case, since the Trial Court refused the Appellants' verdict form, which would have allowed the jury to determine which third-party contracts were interfered with by Appellants, the jury was left to assume that interference with <u>any</u> contract was sufficient to award damages for tortious interference for <u>every</u> third party contract allegedly interfered with. This effectively tied Appellants' hands behind its back while the jury was able to place blame on Appellants for the bad outcome of any contract Appellees had with any third parties.

2. The Verdict Form Did Not Include References to the Defenses of Negligence and Business Justification.

The verdict form should have included the option for the jury to find in favor of the Appellants on the affirmative defenses of negligence and business justification. One of Appellants' main defenses to Appellees' claims of tortious interference was that they were justified because they

were acting in the best interest of their business. Appellants submitted a verdict form with affirmative defenses, including the defense of business justification. *See* Defendants' Proposed Jury Verdict Form No. 4. However, the Trial Court denied Appellants' proposed verdict form and offered its own verdict form, without specific mention being made to the affirmative defense of business justification. *See* August 1, 2002 T.T., pp. 16-17. By not allowing Appellants to argue that the *force majeure* was declared because it was in the best interests of Appellants' business, the Trial Court stripped Appellants of one of its main affirmative defenses.

3. The Verdict Form Did Not Require Appellees To Prove That the Representations By Appellants During Negotiations Following the Declaration of *Force Majeure* Were Fraudulent Misrepresentations of a Past or Existing Fact.

As noted above, in order to prove their claim for fraudulent misrepresentation, Appellees must demonstrate that Appellants fraudulently misrepresented a present or historical fact, which they failed to prove. Appellants submitted a proposed verdict form interrogatory, which would have required the jury to find an intentional misrepresentation of a past or existing fact in order to find Appellants liable for fraudulent misrepresentation. *See* Defendants' Proposed Jury Verdict Form, p. 2. Instead of accepting Appellants' proposed Verdict Form Interrogatory Number 5, the Trial Court, over Appellants' counsel's objection, provided the jury with its own verdict form on fraudulent misrepresentation, without the requirement that the alleged misrepresentation concern past or existing facts. *See* July 31, 2002 T.T., p. 17, ll. 4-9.

4. The Verdict Form Did Not Require the Finding of a "Duty to Disclose" on the Part of Appellants to Prove Fraudulent Concealment.

Appellants submitted a proposed jury verdict form requiring the jury to find a "duty to disclose" on the part of Appellants, before it could find for Appellee on a claim for fraudulent concealment. *See* Defendants' Proposed Verdict Form Number 6. This proposed form met all the

requirements of applicable West Virginia law, including the elements of "the concealment of facts by one with knowledge or the means of knowledge, and a duty to disclose, coupled with an intention to mislead or defraud." *Trafalgar House Const., Inc. v. ZMM, Inc.*, 211 W. Va. 578, 584, 567 S.E.2d 294, 300 (2002). The Trial Court's jury verdict form and jury instruction, however, failed to address the legal requirement of a duty to disclose prior to a finding of fraudulent concealment. *See* Court's Jury Verdict Form, No. 2.

Q. The Trial Court Committed Multiple Errors During the Six Week Trial, Each Independently Warranting Reversal or a New Trial.

As specified throughout this brief, numerous procedural errors were committed by the Trial Court during the six weeks of trial, including but not limited to, ignoring the requirements of Full Faith and Credit, collateral estoppel and *res judicata*, applying the wrong state's substantive law and committing numerous errors concerning the sufficiency of the jury verdict form, jury instructions, precluding certain fact and expert witnesses from testifying while allowing others to improperly testify, etc. As a result of the numerous judicial errors made during the course of the litigation, Appellants are entitled to a reversal of the Trial Court's judgment, or in the alternative, to a new trial.

RELIEF PRAYED FOR

For all of the foregoing reasons, Appellants respectfully pray that this Honorable Court reverse the jury's verdict and Trial Court's rulings granting judgment in favor of Appellees. This case should never have gone to trial in West Virginia; it was first properly filed in Virginia and resulted in a verdict that was fully satisfied. On this issue alone, this Court should reverse and vacate. In the alternative, should this court decide not to reverse the jury verdict and Trial Court's judgment in favor of Appellees, Appellants pray that this Honorable Court award Appellants a new trial, or at a minimum a remittitur of the damages awarded to Appellees based upon the numerous

other errors committed by the Trial Court as more fully set forth herein. Further, in light of the cumulative errors of the Trial Court and the necessity for Appellants to bring this appeal, Appellants respectfully request that they be awarded the costs and expenses incurred in prosecuting this appeal, including reasonable attorneys' fees, as well as any other relief deemed appropriate by this Court.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 33350

A.T. MASSEY COAL COMPANY, INC.,
ELK RUN COAL COMPANY, INC.,
INDEPENDENCE COAL COMPANY, INC.,
MARFORK COAL COMPANY, INC.,
PERFORMANCE COAL COMPANY,
and MASSEY COAL SALES COMPANY, INC.,
a corporation,

Appellants,

v.

HUGH M. CAPERTON, individually,
HARMAN DEVELOPMENT CORPORATION,
a corporation, HARMAN MINING CORPORATION,
a corporation, SOVEREIGN COAL SALES, INC.,

Appellees.

CERTIFICATE OF SERVICE

I, Stephen S. Burchett, Esquire, counsel for Appellants, do hereby certify that I served the foregoing, "**Appellant Brief Of A.T. Massey Coal Company, Inc., Elk Run Coal Company, Inc., Independence Coal Company, Inc., Marfork Coal Company, Inc., Performance Coal Company, and Massey Coal Sales Company, Inc.**" upon the following counsel of record by depositing the same in the United States Mail, first class and postage pre-paid this 4th day of May, 2007:

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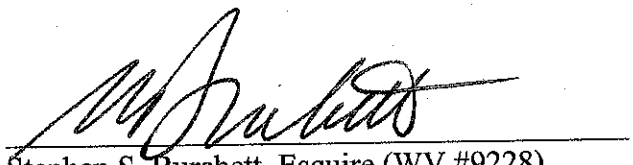

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