IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Appellants,

v.

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

Appellees.

Appeal No. 33350

BRIEF OF APPELLEE HUGH M. CAPERTON

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BRIEF OF APPELLEE HUGH M. CAPERTON

Appellee Hugh M. Caperton ("Mr. Caperton"), by his undersigned counsel, offers the following regarding why this Honorable Court should AFFIRM the Orders appealed from the Trial Court:

I. KIND OF PROCEEDING AND NATURE OF RULING BELOW

Appellants (collectively, "Massey") take their appeal from four (4) orders of the Boone County Circuit Court. Moreover, the Appellants have altered their statement of issues to be raised on appeal between the time of the filing of their docketing statement and now, having added a generic reference in Appellants' Brief to the Trial Court's denial of their Motion for Judgment as a Matter of Law, Motion for New Trial, or, in the Alternative, Motion for Remittur. *See* Appellants' Brief, pp. 9-10.

Significantly, however, they do not specifically appeal the Trial Court's Amended Circuit Court Order on Jury Award of Punitive Damages. Therefore, as pointed out below, Appellants are without any legitimate basis to contest the entry of that Order, which the Trial Court entered to "DENY the Defendants' Motion to Set Aside the Punitive Damages Award and to CONFIRM AND AFFIRM the Jury's Verdict which awarded $6,000,000 in punitive damages against the Defendants."

II. COUNTERSTATEMENT OF FACTS

Massey now pretends that this case is nothing more than an alleged rehash of the Virginia state court breach of contract action ("Virginia Case"), choosing conveniently to ignore the mountain of evidence proving a calculated effort over a period of years by Massey's management to control the metallurgical coal market by any means necessary, including the intentional elimination of competitors through tortious interference and fraud.

In point of fact, in the Trial Court Massey vociferously objected to *any* reference to the Virginia Case (and the verdict issued there) between Harman Mining Corporation ("Harman Mining") and Sovereign Coal Sales, Inc. ("Sovereign") and Wellmore Mining Corporation ("Wellmore"). In any event, to support their general legal theories of fraud, fraudulent concealment and tortious interference, Appellees did introduce evidence surrounding the *circumstances* of Massey's directive to Wellmore to wrongfully declare *force majeure*, as well as the many other wrongful acts perpetrated either directly by Massey or at its direction in order to "get Harman in the long run." Certainly this was not a breach of contract case (Wellmore was not even a party), and the Trial Court specifically instructed the Jury that they were not to make any award of damages related to any breach of contract. *See* Trial Court's Charge and Instructions of Law, p. 13.

In order to understand this case (and, therefore, the Jury's Verdict and the Trial Court's Orders), it is necessary to understand the entirety of what really happened. In the Appellants' Brief, Massey certainly declined to describe the proof of the many illegal acts undertaken in furtherance of its Monopoly board strategy to control a key segment of the metallurgical coal market. Therefore, for the benefit of the Court, Mr. Caperton offers the following recitation of the facts, as supported by the record.

A. The Parties

Mr. Caperton, who sued Appellants in his personal capacity for personal injuries suffered directly by him, was born in Slab Fork, West Virginia., and has been a longtime resident of Daniels, West Virginia. TT 7/3/02, p. 83:7-15. He is also the President and sole shareholder of Appellee Harman Development, which is headquartered in Beckley, West Virginia. TT 6/19/02, 69:8-12. Harman Development, in turn, owns Harman Mining and Sovereign. TT 7/3/02, 86:2-7. Collectively, Harman Development, Harman Mining, and Sovereign will be referred to as the "Corporate Appellees."

The Appellants, or "Massey", are Massey Coal Sales Company, Inc. ("Massey Coal Sales"), A. T. Massey Coal Company, Inc. ("A. T. Massey"), and four of A. T. Massey's subsidiaries, Elk Run Coal Company, Inc., Independence Coal Company, Inc., Marfork Coal Company, Inc., and Performance Coal Company, Inc. These subsidiary operations are all located in West Virginia. Defendants' Trial Exhibit (hereinafter designated as "Df. Ex.") 71. Fully 60% of Massey's approximately 5,000 employees are employed in West Virginia. Approximately 74% to 80% of Massey's coal reserves are located in the State of West Virginia. TT 7/22/02, 22:24--23:23. Mr. Don Blankenship is the President, Chairman and CEO of A. T. Massey. TT 7/22/02, 22:5-15. According to his trial testimony, Mr. Blankenship has resided in West Virginia for 42 years and, at the time of trial, was residing in Sprigg, West Virginia. TT 7/18/02, 42:21-24.

B. The Coal Supply Agreement And The Corporate Appellees' Business Plan

Beginning in 1992, Sovereign was party to a long-term Coal Supply Agreement with Wellmore by which Wellmore purchased the Harman Mine's production. The long-term Coal Supply Agreement in effect during the relevant time periods in this case was entered into in 1997 ("1997 Coal Supply Agreement"). Plaintiffs' Trial Exhibit (hereinafter designated as "Pl. Ex.") 133. The coal mined by the Corporate Appellees' under the 1992 and 1997 Coal Supply Agreements was in turn supplied by Wellmore to LTV Steel Company, Inc. ("LTV") as the base coal for a blend used by LTV at its coke making facilities. TT 7/3/02, 26:24--28:21. LTV prized Harman's Premium Blend, which was known as "rocket fuel" for its particularly high quality, and LTV therefore paid a premium price for the coal. TT 6/18/02, 37:1-22; Pl. Ex. 133. The 1997 Coal Supply Agreement specified a minimum tonnage Wellmore was required to purchase but gave Wellmore the option to purchase all of the Harman Mine's production. *Id.* Historically, Wellmore took all of the coal that Harman produced. TT 7/18/02, 14:18--15:1.

When Harman Development purchased Harman Mining and its sales company, Sovereign, it developed and implemented a specific business plan and mine plan that called for a substantial initial investment over several years which ultimately would result in years of long-term profitability for the Corporate Appellees and, in turn, significant income to Mr. Caperton.

The evidence adduced at trial established the validity of the Harman mine plan. That evidence included *not only* detailed testimony by a mine valuation expert, officers of the Corporate Appellees, and an officer of Grundy National Bank ("Grundy"), a bank specializing in coal loans which had analyzed the mine plan and made loans to the Corporate Appellees based on its soundness, *but also* Massey's own internal documents and testimony by its top two officers, admitting that the Harman operating plan was solid. TT 6/25/02, 140:7--141:8; TT 6/18/02, 64:2--78:22; 7/3/02, 132:7--141:13; TT 7/12/02, 180:6--181:12; TT 7/8/02, 36:17-23.

C. Mr. Blankenship's Interest In The LTV Business, The Harman Mine, And Control Of The Metallurgical Coal Market

Mr. Blankenship had tried unsuccessfully for many years to sell substantial amounts of Massey's West Virginia coal directly to LTV. TT 7/15/02, 33:10--34:5. As an alternative means to obtain the LTV business, Massey also made several overtures beginning in 1994 to acquire Wellmore and its parent corporation, United Coal Company, Inc. ("United"), because LTV was one of United's customers. TT 7/29/02, 12:23--13:22. During A. T. Massey's investigations of Wellmore and United, Massey learned that coal reserves maintained by the Corporate Appellees were the highest quality reserves available to United. Pl. Ex. 73.

During 1996, also in an attempt to obtain the coveted LTV business, Mr. Blankenship contacted Mr. Caperton and inquired whether he would be interested in selling the Harman Mine. TT 7/8/02, 101:13--103:6. During these discussions, Mr. Caperton advised Massey that Wellmore could not operate without the Harman coal because of its high quality. TT 7/29/02,

37:1--41:16; TT 7/8/02, 101:13--103:6; 165:18--166:19. While Massey did not acquire the Harman properties in 1996, Massey's Chief Acquisition Officer admitted that Massey viewed the Harman properties as an attractive acquisition target. TT 7/29/02, 116:23--117:2.

D. Massey's Acquisition Of United And Wellmore

During 1997, Massey renewed its discussions with Wellmore and United about a potential acquisition. TT 7/29/02, 12:23--13:7. In its internal documents, Massey acknowledges that it viewed the acquisition of United and Wellmore as an opportunity to "eliminate[] a competitor" and thereby "increase[] Massey influence in the high-vol metallurgical coal market." Pl. Ex. 213; Pl. Ex. 316. Massey concluded that "the most favorable economic outcome is created" if the Harman coal sold by Wellmore to LTV could be replaced with coal from Massey's West Virginia mines. Pl. Ex. 213. It was no coincidence that the amount of coal Massey sought to move from Wellmore/Harman to Massey's more profitable West Virginia mines (750-800,000 tons) corresponded to the approximate amount of coal Wellmore purchased from Sovereign each year. TT 7/22/02, 70:7--72:14. Thus, Massey proceeded with the acquisition and aggressively sought to disrupt the existing supply relationship and to substitute Appellants' West Virginia coals in place of the Harman blend.

Massey closed the acquisition of Wellmore and United on July 31, 1997. TT 7/29/02, 12:23--13:7. Immediately after the closing, Massey began its course of conduct designed to have Wellmore walk away from its obligations to Sovereign under the 1997 Coal Supply Agreement, to take the Harman Mine operations, including reserves, by force, and to eliminate the Corporate Appellees as competitors in the metallurgical coal market, even if it meant the financial destruction of Mr. Caperton personally.

E. Wellmore's New Approach Under Mr. Blankenship's Influence

On June 5, 1997, per the terms of the CSA, Sovereign indicated to Wellmore that Harman Mining intended to mine 720,000 tons in 1998. TT 7/17/02, 114-116. Within days of the acquisition, Wellmore's management recommended, as usual, that Massey take all of the Harman Mine's proposed production for the following year. *Id.* However, Mr. Blankenship rebuked Wellmore's newly installed and hand-picked President, Mr. Stan Suboleski, for making this recommendation. Pl. Ex. 267 (Massey Intercompany Memorandum). Mr. Blankenship directed Wellmore to refuse to take any more than the contractual minimums, and threaten instead to take less than the full contractual tonnage because of a purported *force majeure*. *Id.* (Mr. Blankenship wrote, "Stan No! We'll indicate the minimum tons & caution [redacted] of a *force majeure* possibility because of Pitts. I need to review the letter. Don.").

Remarkably, Mr. Blankenship admitted under cross-examination that he did not read the 1997 Coal Supply Agreement or its *force majeure* provision before devising this scheme. TT 7/18/02, 61:11-21. Had he bothered to read it, he might have noticed that the Agreement contained no reference to LTV (despite Appellants' latest effort to insinuate the contrary in their Brief to this Court) and that there was absolutely no basis to declare *force majeure*. Pl. Ex. 133. Even Mr. Suboleski, Wellmore's newly installed president at the time, acknowledged that he was not aware of any situation where the closure of a plant or loss of a customer constituted an event of *force majeure*. TT 7/17/02, 172-73.

Upon learning of the possibility that Wellmore, under Massey's ownership, would not take the full contractual tonnage, Corporate Appellee representative Mr. Henry Cook immediately contacted Mr. Suboleski and inquired as to whether Wellmore actually intended to declare *force majeure* and reduce the purchases. TT 6/19/02, 58:1-6. Mr. Suboleski assured both Messrs. Caperton and Cook that Wellmore had no intent to declare *force majeure* and the letter was simply "CYA." *Id.*, 58:7--58:18; TT 7/8/02, 25:15--26:17. With this assurance, and knowing that any declaration of *force majeure* would be invalid, Mr. Caperton did not attempt to

seek authorization from Wellmore to obtain an alternate buyer for his coal. TT 7/8/02, 27:22--30:3.

Unbeknownst to Mr. Caperton, Massey was not trying to sell the Wellmore/Harman Coal which LTV had happily purchased for many years. Instead, as Mr. Blankenship had planned, Massey was trying to substitute the Wellmore/Harman Coal with Massey's "Route 3" West Virginia coals. TT 7/22/02, 101:1--105:17. On examination, Mr. Blankenship admitted that the reason that he refused to make an offer to LTV for the Harman coal was "margins" -- he could earn a higher profit on the Massey coal. TT 7/15/02, 56:13--57:10. But as much as Mr. Blankenship wanted to sell Massey coal to LTV, LTV found Massey's sales tactics to be too heavy-handed. TT 6/28/02, 29:18--32:19. Predictably, LTV decided by the end of October 1997 that it no longer wanted to do business with Massey Coal Sales. Pl. Ex. 333. As LTV's purchasing manager testified, LTV simply did not trust the Appellants. TT 6/28/02, 29:18--32:19.

Massey began attempting to sell Wellmore even prior to losing the LTV business, and after the loss, those efforts intensified. Pl. Ex. 636; Pl. Exs. 320, 337. Concluding that the loss of the LTV business rendered Wellmore of little or no value, TT 7/30/02, 25, by February 1998, Massey closed the deal to sell Wellmore. TT 7/29/02, 35:20-22. Within seven short months, Massey bought Wellmore, destroyed a ten-year relationship with LTV, and then discarded the remains.

F. Massey Turns Its Sights On The Harman Mine

Mr. Caperton, upon learning through industry channels that Massey had lost all of United's LTV business, became concerned about what the Appellants had in store for the Harman Mine. TT 7/8/02, 29:11--30:3. As a result, on November 6, 1997, Mr. Caperton wrote to Mr. Suboleski memorializing his belief that there was no *force majeure* event under the 1997

Coal Supply Agreement and that the failure to purchase less than the contractual tonnage could dramatically impact Mr. Caperton and the Corporate Appellees' business. Pl. Ex. 340.

The Appellants used this opportunity to again contact Mr. Caperton for the purported purpose of discussing a purchase of the Harman Mine. Pl. Ex. 344. Massey then requested that Mr. Caperton share with its officers confidential data regarding the present and future operations at the Harman Mine, including, but not limited to, reserve reports, mine maps and other data. *Id.*

On November 26, 1997, Messrs. Blankenship and Hatfield traveled to Mr. Caperton's Beckley, West Virginia, office to meet with Mr. Caperton and Mr. Cook about a potential acquisition of the Harman mining operation. TT 7/8/02, 32:1--33:2. At that meeting, Mr. Blankenship *finally* admitted to having lost the LTV business. TT 7/8/02, 173: 19--173:24. The parties discussed the Appellees' view that the threatened *force majeure* was totally without merit. TT 7/8/02, 34:1--34:13. Mr. Blankenship never explained Massey's factual or legal position regarding the threat to declare *force majeure*. TT 7/8/02 174:11--174:14. Instead, Mr. Blankenship explained his threat as a "cost effective" move. TT 7/22/02 77:1--78:6. As the Appellants' *own* notes of that meeting reflect, Mr. Blankenship's response was his belief that the damages payable for Massey's wrongful conduct would be limited. Pl. Ex. 350A.

In addition, Mr. Blankenship threatened protracted litigation should Mr. Caperton and the Corporate Appellees attempt to assert their rights -- presciently noting that the Appellants would tie them up for years in Court. TT 7/8/02, 34:1--34:13. To drive his point home even further, Mr. Blankenship declared that Massey spent "a million dollars a month" on lawyers. *Id.*

With the threat of protracted litigation over Mr. Caperton's head and with no market to sell the Harman Mine's coal so late in the year, Mr. Blankenship asked if Mr. Caperton would be willing to sell his interest in the Corporate Appellees. Left with little choice, Mr. Caperton talked with Mr. Blankenship about the Harman assets and related properties. TT 7/8/02, 34:14--35:17. Mr. Caperton and Mr. Cook discussed the Corporate Appellees' reserve

information with Massey and shared their plans for future development of the Harman Mine. TT 6/21/02, 69:23--70:17. At no time during this meeting did Mr. Blankenship or Massey advise Mr. Caperton or Mr. Cook that the Harman mine plan was a problem or was otherwise unworkable. *Id.* Mr. Caperton, at Massey's request, handed over confidential business information, including copies of mine maps, reserve studies and drill information. *Id.*, Pl. Ex. 190. Mr. Caperton also discussed his intention to mine certain adjoining reserves which were then owned by Pittston. TT 7/8/02, 36:24--37:9. Mr. Caperton advised Massey of the debt obligations of the Corporate Appellees, including the identity of their creditors and the nature of the outstanding debts. Pl. Ex. 350A.

Massey was also advised that the Corporate Appellees leased coal reserves from Penn Virginia Coal Company ("Penn Virginia"), and they were notified of the terms of those leases. *Id.* Mr. Blankenship noted that the lease terms were fair and were in fact better than many of the leases under which Massey was already operating. TT 7/8/02, 63:5--64:12. Thereafter, Mr. Caperton sent a confidentiality agreement to Massey reflecting the parties' intent that the information the Corporate Appellees had provided was to be maintained in confidence and not to be used for any purpose other than in furtherance of a potential acquisition of the Corporate Appellees' assets. Pl. Ex. 353. Mr. Hatfield acknowledged under oath that he believed that it would be "poor business ethics" to use the information in a manner detrimental to Mr. Caperton and the Corporate Appellees. TT 7/30/02, 51:10-19.

Literally within hours of the November 26, 1997, meeting and after obtaining the confidential mine information he desired from Mr. Caperton, Mr. Blankenship directed Mr. Suboleski to send a letter declaring *force majeure* and informing Mr. Caperton for the first time that Wellmore would purchase less than one-third of the Harman Mine's intended production. Pl. Ex. 352. By waiting until December 1 to have Wellmore wrongfully declare *force majeure,* Massey assured that there was simply no time for Mr. Caperton to obtain another purchaser for the Harman Mine's production. Pl. Ex. 367.

Through Messrs. Blankenship and Hatfield, the Appellants continued to discuss the sale of the Corporate Appellees' assets with Mr. Caperton and others. During these discussions, Massey was also made aware that Mr. Caperton was personally guaranteeing a number of the Corporate Appellees' obligations and that Massey's conduct may lead to Mr. Caperton's personal bankruptcy. Pl. Ex. 366. Mr. Caperton described personal obligations to Inspiration Coal, (now known as Terra Industries) ("Terra"), Senstar Financial ("Senstar"), Grundy National Bank ("Grundy"), Vision Financial ("Vision") and others. Pl. Exs. 142; 150; 155; 156; 519; 520; 535. During these discussions, Massey made clear that it intended to assume the Harman coal reserves lease from Penn Virginia "as-is." TT 7/12/02, 25:10--26:7. By the end, faced with the prospect of bankruptcy and the threat of interminable litigation, all because of Massey's wrongful acts, Mr. Caperton simply had no choice but to cave.

G. Massey's "Attempt" To Purchase The Harman Assets

Through December and most of January, Mr. Caperton continued to provide additional confidential information to Massey relating to the sale of Harman. TT 6/28/02, 93:8--95:22. The parties agreed upon key terms, including that the transaction would close on January 31, 1998. TT 7/8/02, 50:1--52:4; TT 7/8/02, 52:8-12; 57:15-17. At the request of Massey, the Corporate Appellees shut down operations on January 19, 1998. TT 7/11/02, 141:23--141:18. However, unbeknownst to Mr. Caperton, Massey had made an internal decision not to close the transaction by the agreed-to date of January 31, 1998. Pl. Ex. 562.

On January 26, 1998, Massey forwarded a series of letters of intent designed to memorialize the transactions by which it would acquire the Harman operations. Pl. Ex. 408. Massey prepared and forwarded a letter of intent to Grundy, a major creditor of the Corporate Appellees to whom Mr. Caperton had provided a personal guaranty. Pl. Ex. 408. The separate letter of intent directed to Mr. Caperton called for an assignment of the 1997 Coal Supply Agreement as of January 31, 1998. *Id.* In addition, the transaction called for the replacement of

the reclamation bond of Terra by a Massey entity. *Id.* The Appellants were aware that Mr. Caperton was personally responsible for reclamation liabilities on the note and were also aware that any default on these reclamation obligations would impair Mr. Caperton's ability to own or operate any mining company in the future. Pl. Exs. 366, 618. In both the letter of intent to Mr. Caperton and to Mr. Caperton's creditor, Grundy, Massey agreed to "pursue good faith negotiations" towards executing the transactions. After the closing deadline had passed, Massey executed substantially similar letters of intent directed to Mr. Caperton and Grundy. Pl. Ex. 451. Mr. Hatfield, A. T. Massey's Chief Acquisition Officer, testified that Mr. Caperton, for his part, throughout the discussions and negotiations, acted in good faith. TT 7/16/02, 93:7-8.

Unbeknownst to Mr. Caperton, and contrary to its obligations of good faith and confidentiality, Massey used Harman's confidential business information to secretly commence negotiations with Pittston to acquire a thin band from adjoining reserves that Mr. Caperton had told Massey he intended to mine. Pl. Ex. 435; TT 7/8/02 88:14--90:2. This "wall of coal" purchased by Massey precluded the Corporate Appellees from mining the adjoining reserves and greatly diminished what they could do with the property in the future. TT 7/8/02, 90:3--90:24; Pl. Ex. 620.

H. Massey Purposefully Collapses The Deal

Massey knew the Harman Mine Property had significant value. Indeed, Massey anticipated generating over $100,000,000 in book *profits* from continued mining of the Harman Mine and the adjoining reserves. Pl. Ex. 429. After enticing Mr. Caperton to shut down the Corporate Appellees' operations and after securing the wall of coal, Mr. Blankenship decided that it was really not necessary to purchase the Corporate Appellees' assets at all. Instead, Mr. Blankenship waited until mere hours before the rescheduled closing in March to direct a radical rewrite of the lease agreement with Harman reserve leaseholder Penn Virginia. TT 7/30/02, 65:15--67:5. Prior to that time, the discussion had always been of a straight

assumption of the lease "as-is," and all parties expected a straight assignment. TT 7/12/02, 25:10--26:7. Now, Massey sought to dramatically change nearly every material term of the lease. TT 6/28/02, 103:13--105:9. Although Penn Virginia of course found these last minute lease term changes to be "extremely offensive," it made concessions in order to complete the deal. TT 6/28/02, 100:22--103:12; TT 6/28/02, 127:4-14. However, Massey refused to concede anything. Pl. Ex. 476. Massey knew that by proposing totally unacceptable lease language at the last possible second, the deal would collapse. With no royalties being earned on the Harman properties, already shut down at the request of Massey, and with Massey's intentional collapse of the deal to acquire the Harman assets, Penn Virginia cancelled the Harman leases. TT 7/8/02 67:15--67:18.

By the end of March 1998, the deal was officially dead, and Mr. Blankenship rebuffed all efforts by Mr. Caperton to resuscitate it. TT 7/29/02, 134:1--135:20. Indeed, when Mr. Caperton approached Mr. Blankenship about trying to complete the deal, Mr. Blankenship offered dramatic insight into his twisted business approach:

> "Hugh, they're weak; they're weak." He said, "Put it this way." He said, "If you're walking down the street and I come up and I put a gun to the back of your head and you say to me, here's-- don't shoot me; here's my wallet, and you hand me your wallet, you've weakened your position considerably, and that's where these guys are. They're weak and they'll continue to give."

TT 7/8/02, 64:21--67:3. Mr. Blankenship never denied making these statements.

After killing the deal with Mr. Caperton, Massey closed the transaction to acquire the "wall of coal" between the Pittston and Harman reserves. An internal e-mail dated May 18, 1998 from Mr. Hatfield disclosed the rationale for acquiring these adjoining reserves: "The property we have acquired ... greatly diminishes the attractiveness of the Harman property to parties other than Massey, so we will more than likely get Harman in the long run." Pl. Ex. 533. The motive was now crystal clear: Massey elected to collapse the transactions with Mr. Caperton and the Corporate Appellees since, by acquiring a block upon the adjoining Pittston reserves, Massey

anticipated that it would be able to eliminate another competitor and pick up Harman without paying anything. Massey had not only put the gun to the Corporate Appellees and Mr. Caperton's head, but it then squeezed the trigger.

I. The Aftermath

As a result of Massey's course of conduct, the Corporate Appellees declared bankruptcy in May of 1998, with 77 claims totaling over $25 million. TT 7/8/02 200:10--201:2; TT 7/8/02, 81:12. Mr. Caperton had personally guaranteed $1.9 million in debt plus interest at the time of the trial of this matter. TT 7/8/02, 145:11--165:17. Prior to Massey's interference, Mr. Caperton enjoyed advantageous business relationships with Terra, Penn Virginia, Senstar, Vision, the UMWA, Grundy and other vendors, whose representatives testified at the trial that, prior to Massey's involvement, Mr. Caperton was in good standing with them . TT 7/10/02, 38:17--39:19; TT 7/10/02, 38:7--39:20. However, after the bankruptcy, creditors have sought to enforce their guaranty rights against Mr. Caperton personally. For example, Grundy has entered judgment against Caperton. TT 7/12/02, 191:6-11. Another creditor, Senstar, filed suit against Mr. Caperton in the United States District Court for the Southern District of West Virginia seeking to enforce personal guaranties against Mr. Caperton for leased mining equipment. Pl. Ex. 535. Because Massey had driven the Corporate Appellees out of business and intentionally collapsed the transaction to acquire the Harman Mine assets and properties, Mr. Caperton has also been permit-blocked on the federal Applicant Violator System ("AVS"), preventing him from owning or operating a mining company. TT 7/10/02, 49:23--50:17; Pl. Ex. 618. Massey thereby forced Mr. Caperton personally out of the coal business, and he has been unable to work in his chosen profession ever since. In addition, Mr. Caperton has seen his credit-worthiness destroyed and has been personally assessed with multiple liens by federal and state taxing authorities. TT 7/10/02, 52:12--53:18; TT 7/10/02, 56:18--57:9.

Massey, however, was not finished with Mr. Caperton. Consistent with its threat to engage Mr. Caperton in protracted litigation, Massey purchased two relatively minor claims in the bankruptcies of the Corporate Appellees, in order to gain standing in the Bankruptcy Court to interfere with Mr. Caperton's management of the bankruptcy. TT 7/8/02 122:16--123:3. Massey filed numerous pleadings in an effort to have Mr. Caperton removed as Debtor-in-Possession, subjected Mr. Caperton to numerous hearings and depositions, and commenced adversary proceedings against Mr. Caperton personally. *Id.* No other creditors sought to have Mr. Caperton removed as the Debtor-in-Possession. TT 7/8/02, 123:13--124:3. Massey's motive was obvious -- it was hoping to have the Bankruptcy Court deprive Mr. Caperton of his personal claims and to get a trustee appointed who would not be motivated to pursue Massey for the damages it had caused. *Id.* These efforts by Massey, while unsuccessful, subjected Mr. Caperton to additional severe emotional distress and financial harm.

As the Trial Court noted in conjunction with the *Garnes* hearing conducted outside the hearing of the Jury, Massey never made a reasonable offer of settlement to any of the Appellees in this case and instead adopted a strategy of attrition. In finding that such refusal and strategy supported the award of punitive damages, the Trial Court wrote as follows:

> [T]he Jury's award of punitive damages in this controversy, in their amount and in their extent, will help promote settlements in future matters of this type, especially where there is a disparity of bargaining power between the parties; and
>
> That the Defendants expressed little interest in settling this matter on reasonable terms and instead appear to have settled on a strategy (consistent with the statements Mr. Blankenship made to Mr. Caperton in November, 1997) designed to wear down the Plaintiffs and their counsel in the hope that eventually they would be unable to pursue this matter to a more favorable conclusion.

Amended Circuit Court Order on Jury Award of Punitive Damages, p. 13. The Appellants have never contested this ruling.

Even during the trial of this matter, Massey's intimidation did not stop. Just *two days* before the scheduled start of trial, Massey came forward with pictures of Mr. Caperton's house and belongings, pictures taken by trespassing photographers hired by Massey or its counsel. TT 7/10/02, 62:1--63:10. In describing the impact these latest tactics by Massey had on Mr. Caperton and his family, Mr. Caperton testified as follows:

> Q Have you had to deal with your family about this invasion of your privacy?
>
> A I mean, you've noticed -- I mean there been days my wife hasn't been here. My wife is now afraid to leave our daughter home with a babysitter because she's afraid who's going to come on our property.
>
> Q How long have you been doing battle with Massey?
>
> A Five years.
>
> Q After what they've put you through, put your family through, why do you continue to fight Massey?
>
> A I'll fight them as long as I need to fight them. What they've done to me they can do to anyone, and I'll stop them. They're not going to do this to anybody else. I'll fight it as long as they want to fight it. I'll go to my last dollar, I'll do whatever it takes, but they're not going to do this to anyone else if I have anything to do with it.

TT 7/10/02, 63:20--64:12.

III. ARGUMENT

A. Appellants' Res Judicata And Collateral Estoppel Arguments Are Without Merit.

1. Appellants Have Failed to Meet Their Burden of Proof in the Trial Court to Establish the Affirmative Defenses of Res Judicata or Collateral Estoppel Regarding the Effect of the Virginia State Court Breach of Contract Verdict.

As a preliminary matter, and as the facts cited above clearly demonstrate, Massey's direction to Wellmore to declare *force majeure* was only one aspect of Massey's overall scheme to eliminate competition and to increase its own market share in the metallurgical coal market by

any available means, including fraud, fraudulent concealment and tortious interference. Accordingly, Massey's present effort to limit its own liability to Wellmore's breach of contract requires it to ignore the great volume of evidence proving those tort claims. And as more fully set forth in the Corporate Appellees' Brief, Massey has failed to establish the substantive legal elements necessary to support an affirmative defense of res judicata or collateral estoppel. Moreover, as set forth below, Appellants completely failed to establish in the Trial Court the evidentiary record necessary to meet their burden of proving either res judicata or collateral estoppel.

The party asserting as an affirmative defense the res judicata or collateral estoppel effect of a prior decision has the burden to make the record proving the applicability of the doctrines. Thus, courts have generally held that it is improper to look outside the record in a case in order to take notice of the proceedings in another case, even if that other case is between the same parties and in the same court, unless the proceedings are put into evidence. *See, e.g., Wilson v Volkswagen of America*, 561 F.2d 494, 510 (4th Cir. 1978), *cert. denied*, 434 U.S. 1020 (1977) (citing *Ellis v. Cates*, 178 F.2d 791, 793 (4th Cir. 1949)); *Morse v. Lewis*, 54 F.2d 1027, 1029 (4th Cir. 1932), *cert. denied* 286 U.S. 557 (1932); *Guam Investment Co. v. Central Building Inc.*, 288 F.2d 19, 23 (9th Cir. 1961); *Paridy v. Caterpillar Tractor Co.*, 48 F. 2d 166, 169 (7th Cir. 1931); *see also City of Moundsville v. Brown,* 127 W. Va. 602, 34 S.E.2d 321 (1945).

Virginia[1] courts have long recognized the significance of setting forth an evidentiary record for purposes of asserting the defense of res judicata. Thus, the Supreme Court of Virginia rejected the application of res judicata and collateral estoppel in *Hairston v. Hairston,* 84 S.E. 15, 16 (Va. 1915) ("It does not appear by record upon what grounds the bill was dismissed, whether

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1 Given Appellants' Full Faith and Credit argument, Virginia law governs the res judicata/collateral estoppel analysis although, as demonstrated below, West Virginia law and Virginia law both require a sufficient evidentiary record in the Trial Court in order to support these affirmative defenses.

upon the merits or upon some of the special causes of demurrer not involving the merits."). Similarly, in *Anderson v. Patterson*, 55 S.E.2d 1, 3 (Va. 1949), the Supreme Court of Virginia stated that "ordinarily to sustain the allegation of res judicata the whole record of the former proceeding must be put in evidence." The court elaborated upon this principle by stating that

> While the admissions in the pleadings or the stipulation of counsel may dispense with the necessity of the production of the entire record in certain cases, generally only an inspection of the entire record in the first action will disclose whether the *identical issue in controversy* in the pending suit was settled between the identical parties thereto in the previous litigation .... Moreover, *only by an examination of the complete record in the first suit* can it be determined whether the vital issue now involved was a material issue in the first action.

55 S.E.2d at 3-4 (internal citations omitted) (emphasis supplied). Here, Appellants make scant reference to any documentation *in the record* in support of their claim. While passing reference was made to the Virginia Case in a few pleadings filed with the Trial Court, Appellants resisted mention of the Virginia Case or resulting verdict at trial of the matter there (moving for a mistrial even upon inadvertent mention of the fact of the *existence* of the Virginia litigation) despite their burden of having to prove by a preponderance of the evidence their affirmative defense at trial[2]. Indeed, Appellants only attached the Virginia verdict form as an exhibit to their Petition for Appeal to this Court. Certainly sufficient *record evidence* to allow the Trial Court to adequately pass upon the question of whether the issues in the case before it had been "necessarily decided" in the Virginia Case was never introduced in the Trial Court. Similarly, Appellants never asked for an evidentiary hearing on the issue.

The seminal Virginia case regarding the burden of producing an evidentiary record in order to assert the affirmative defense of res judicata is *Bernau v. Nealon*, 254 S.E. 2d 82

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2 *See, e.g., Federal Insurance Company v. United States*, 618 F. 2d 661, 663 (10th Cir. 1980) ("Estoppel by adjudication is an affirmative defense, which the party asserting it must plead and prove .... The matter was not raised at trial, and no matter how it might have been raised before trial it nevertheless would have remained an affirmative defense to be established by proof at trial.") (citation omitted).

(Va. 1979). There, a divorced couple had previously litigated over a piece of property. Specifically, Nealon had filed a bill of complaint in the trial court alleging that there had been an oral agreement that Berneau would convey the subject property to Nealon. *Id.* The trial court held that indeed there was an oral agreement between the parties that Berneau would convey to Nealon the property at issue and that Nealon was entitled to $12,826.05 from the sale to a third party. *Id.* at 84. Berneau's appeal was denied. Soon thereafter, Berneau filed a new suit alleging that Nealon owed her $3,739.66 in restitution damages for the money she expended on the property prior to it being sold. *Id.* Nealon then asserted the affirmative defense of res judicata which the lower court accepted. Berneau appealed. The Supreme Court of Virginia reversed and remanded:

> Our problem here is that we have no record before us from which we can determine the essential elements necessary to sustain appellee's [Nealon's] plea of Res judicata. The only information we have of the proceedings ... is a copy of the final decree .... [Nealon] alleged that prior determination as a bar to appellant's [Berneau's] motion for judgment although he neither filed the record as an exhibit with his plea nor offered it into evidence at trial. His failure to do so is fatal for whether the former adjudication is affirmatively or defensively asserted, *the record of the prior action must be offered into evidence.*

Id. at 84 (internal citations omitted) (internal quotations omitted) (emphasis supplied).

The Virginia Supreme Court even found it irrelevant that the adjudication that Nealon relied upon was made by *the same trial court judge who sustained his plea of res judicata*:

> Individual and extrajudicial knowledge on the part of the judge will not dispense with proof of facts not judicially cognizable, and cannot be resorted to for the purpose of supplementing the record. *The consideration of facts outside of and not made a part of the record is improper.*

Id. (emphasis supplied) (citations omitted). The court went on to state that it was Nealon's burden to create a record in accordance with court rules. *Id.* at 85 (citing *Feldman v. Rucker*, 109 S.E.2d 379, 384 (Va. 1959) (stating that "[o]ne who asserts the defense of res judicata has

the burden of proving that the very point or question was in issue and determined in the former suit")).

Here, Massey did not establish in the Trial Court anything approaching a sufficient evidentiary record that the Virginia Case should be afforded some type of preclusive effect. It was Massey's burden to enter into the Trial Court record sufficient *evidence* (as opposed to mere argument, supposition or passing reference) to prove each and every element of its affirmative defenses of res judicata and collateral estoppel. *Altice v. Roanoke County Dept. of Social Services,* 611 S.E.2d 628, 630 (Va. App. 2005) (party asserting defenses of res judicata and collateral estoppel has the burden of proving by a preponderance of the evidence that the claim or issue is precluded by a prior judgment, and to meet that burden, the record of the prior proceeding must be offered in evidence). Since Massey chose not to make such a record, it has lost any opportunity to rely on res judicata and collateral estoppel in the present appeal. In fact, under Virginia law, a trial court commits plain error if it relies on facts outside of the record to sustain a party's res judicata and/or collateral estoppel defenses. *See Russell County School Bd. v. Anderson,* 384 S.E.2d 598, 605 (Va. 1989) (holding that "it was plain error for [the trial judge] to go outside the record to find another reason to support [his] decision").

This Honorable Court has similarly made it clear that it will not speculate as to matters that are not part of the record below designated for appellate review: "[i]f a matter is not adequately preserved in the record or has not been entered into the record during the proceedings below, we cannot find in the appellate record presented for our consideration evidence that simply does not exist." *DeVane v. Kennedy et al.*, 519 S.E.2d 622, 635 (W. Va. 1999). Likewise in *Proudfoot v. Proudfoot*, 214 W. Va. 841, 591 S.E.2d 767 (2003), this Honorable Court stated that

> Historically, this Court has refused to consider matters not first presented to the trial court. We have stated, "Our law is clear in holding that, as a general rule, we will not pass upon an issue raised for the first time on appeal." [T]his Court [has previously] explained that "[t]he appellate review of a ruling of a circuit court is

> limited to the very record there made and will not take into consideration any matter which is not a part of that record." Also, we have held that, "[t]his Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance."

214 W. Va. at 845, 591 S.E.2d at 771 (internal citations omitted).

With respect to res judicata or collateral estoppel, this Court has required the same, if not a more strict application of evidentiary formalities. Thus, in *City of Moundsville v. Brown*, 127 W. Va. 602, 34 S.E.2d 321 (1945), this Court stated that

> [T]he benefit of an alleged former adjudication cannot be pleaded informally or in general terms, nor as a mere conclusion of the pleader. To avail a party in later litigation he must show by his pleadings in the form of quotations or exhibits the complete and exact character of the pleadings in the former suit or action, so that the Court, not the pleader, can say with complete certainty that the issues in the former case and the later one are precisely the same, and that the exact issues sought to be determined in the later case have been, in fact, decided in the former suit or action.

127 W. Va. at 605, 34 S.E.2d at 323 (internal citations omitted); *see also Samples v. United Fuel Gas Co.*, 100 W. Va. 441, 130 S.E. 670, 672 (1925) (finding no res judicata and stating that "[w]e have not examined the record of the former proceeding offered and considered by the trial court on the motion to strike appellant's petitions, to ascertain if that record would, in fact, sustain a plea of res judicata, because it is and was not properly brought into this record"); *Campe v. Bd. of Education et al.*, 95 W. Va. 536, 121 S.E. 735, 736 (W. Va. 1924) (finding res judicata inapplicable because "[n]ot only does the alternative writ fail properly to plead estoppel against the board by an adjudication in a former suit, but the record in that case is neither introduced nor referred to in the pleadings as evidence in this case").

Clearly, Appellants in this case have not set forth a sufficient evidentiary record supporting their claim of res judicata. That Appellants may have brought even a few of the facts surrounding the Virginia Case to the Trial Court's attention is wholly irrelevant since "individual and extrajudicial knowledge on the part of a judge will not dispense with proof of facts judicially cognizable, and cannot be resorted to for the purpose of supplementing the record." 1 M.J.,

Evidence, § 14 (2004) (citing *Insurance Co. of North America v. National Steel Serv. Center, Inc.*, 391 F. Supp. 512 (N.D. W. Va. 1975)).

Similarly, they have failed to identify, let alone meet, the standard of review applicable to a trial court's decision as to whether to give preclusive effect to a prior adjudication: "The application of the doctrine of collateral estoppel is discretionary with the trial court and rests upon a number of factual predicates, therefore, a writ of prohibition will not issue on the basis that the trial court abused its discretion in failing to enforce collateral estoppel." Syllabus Point 2, *Laney v. State Farm Mut. Auto. Ins. Co.*, 198 W. Va. 241, 479 S.E.2d 902 (1996); Syllabus Point 7, *Conley v. Spillers*, 171 W. Va. 584, 301 S.E.2d 216 (1983). Given the broad swath that litigants such as Appellants would cut in wielding the preclusion sword, affording great deference to the discretion of the trial judge only makes sense.

Likewise, this Court has often cautioned about overreaching in the application of such preclusive doctrines. Thus, in *Holloman v. Nationwide,* 217 W. Va. 269, 276, 617 S.E.2d 816, 823 (2005), this Court wrote that "Both the legal issues presented and controlling facts must be identical in each action ...." Moreover, "this Court [has previously] recognized that the issue presented is not identical if the second action involves different facts, legal standards or procedures." *Id.* at 274, 617 S.E.2d at 821 (citations omitted).

Finally, by seeking to assert the preclusive effect of the Virginia Case, which did not even become final until *after* the conclusion of the trial in this case[3], Massey would have this Court simply ignore the primary considerations underlying the doctrines of res judicata and collateral estoppel: "Collateral estoppel has two purposes, to protect litigants 'from the burden of relitigating an identical issue with the same party or his privy, and of promoting judicial

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3 *See* Appellants' Brief, pp. 22-23 ("The judgment in the Virginia case became final on September 13, 2002, when the Virginia Supreme Court dismissed Wellmore's appeal.") Of course the Jury rendered its verdict in this case on August 1, 2002, and the Trial Court entered judgment on that verdict on August 15, 2002.

economy by preventing needless litigation.' *Parklane Hosiery Co. v. Shore*, 439 U.S.322, 326 (1979). Neither of these purposes is served by the application of collateral estoppel after a factual issue has been fully developed through a well-contested trial and submitted to the jury for decision." *Mozingo v. Correct Mfg. Corp.*, 752 F.2d 168, 172 (5th Cir. 1985). Thus the bankruptcy court in *In re Marshall*, 271 B.R. 858, 866-7 (C.D. Cal. 2001) noted the following:

> The Court is not aware of any authority, nor does [movant's] counsel point to any, that would support the proposition of applying *res judicata* or collateral estoppel *after* a trial has been had. The reason is obvious. *Res judicata* and collateral estoppel have "the dual purpose[s] of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co. v. Shore*, 439 U.S.322, 326 (1979). The Supreme Court, "and other courts have often recognized, *res judicata* and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." [Movant's] motion at this stage, after a full trial had been conducted, would do nothing to further those interests. Once a trial has been conducted, there is no judicial economy to applying *res judicata* or collateral estoppel, no needless litigation has been prevented, few, if any judicial resources have been saved, and the parties have in no way spared themselves (or the courts in three states) of the vexation of multiple lawsuits.

Id. at 866-7 (internal citation omitted).

In the end, however, Massey's preclusion claim is moot inasmuch as its direction to Wellmore to declare *force majeure* was only a single aspect of Massey's larger scheme to eliminate competition by all available means to increase its own market share in the metallurgical coal market. In any event, Mr. Caperton respectfully submits that Appellants' overreaching assignment of error regarding their alleged preclusion defenses is untimely and without an appropriate evidentiary foundation in the record.

2. The Dismissal of Appellants' Adversary Proceedings in Bankruptcy Court Has Preclusive Effect Upon Their Contention That the Trial Court Was Not the Appropriate and Proper Forum for The Disposition of Mr. Caperton's Personal Tort Claims.

As just demonstrated, Massey's contention that the breach of contract action in Virginia precludes assertion of the West Virginia Plaintiffs' tort claims is of no import. Appellant

A. T. Massey, on the other hand, *is* precluded from challenging the propriety of the West Virginia Trial Court as the appropriate forum to decide all of the Appellees' tort claims. Moreover, A. T. Massey is precluded from contending that the claims of Mr. Caperton are in any way derivative of the Corporate Plaintiffs' claims. Finally, Appellant A. T. Massey is precluded from arguing that the Virginia Judgment can in any way relate to the damages awarded Mr. Caperton because this issue has already been fully adjudicated in the Bankruptcy Court at A. T. Massey's urging.

Massey dismissively attempts to avoid the implications of the Bankruptcy Court's abstention and dismissal of the adversary proceedings which A. T. Massey instituted there. Without citation to any authority, Massey simply presumes that a bankruptcy court's decision to abstain means that the reasons underlying that decision can never constitute any kind of final adjudication on the merits. Massey's presumption is mistaken. That the Bankruptcy Court decided to abstain is irrelevant to the finality inquiry inasmuch as that decision was appealable to the United States District Court for the Western District of Virginia. "[O]nly abstention decisions of the district court are unreviewable, and abstention decisions of the bankruptcy court are appealable to the district court or should be framed as mere recommendations to the district court." 5B Fed. Proc., L. Ed. Sec. 9:1821. As it was not appealed, the dismissal, as well as the findings and conclusions in the November 28, 2000, Joint Order, leading to the dismissal, became final and binding upon A. T. Massey.

In dismissing A. T. Massey's adversary proceedings, the Bankruptcy Court noted that "This Court is confident that the court that tries the West Virginia Action will be fully able to determine whether Caperton and/or Harman Development have any independent, non-derivative claims against [A. T.] Massey and the other Defendants, and if so, to award and appropriately allocate under the law of West Virginia and in accordance with the evidence presented in the West Virginia Action, and otherwise to award to Harman Mining and Sovereign such damages, if any, as they prove themselves entitled to recover." Joint Memorandum Opinion, p. 18.

A. T. Massey never appealed the dismissal of its adversary proceedings to the United States District Court for the Western District of Virginia, and, as a result, it is now precluded from challenging the impact of the Bankruptcy Court's conclusions upon the West Virginia Action and its present Appeal. *See, e.g., In re Schimmels,* 127 F.3d 875 (9th Cir. 1997) (affirming district court's judgment dismissing adversary proceeding as res judicata); *see also In re R.B.B., Inc.*, 1997 WL 325431 (N.D. Cal.) (where district court reversed bankruptcy court's decision to dismiss and abstain from hearing adversary proceedings in favor of disputes being heard in another forum).

B. Massey's Arguments Regarding The Jury's Award Of Damages To Mr. Caperton Are Without Factual Or Legal Foundation

Massey argues that the Jury's award of damages to Mr. Caperton was improper because "[t]he evidence presented at trial to support [Caperton's] claims was insufficient as a matter of law." Appellants' Brief, p. 44. As noted above, Massey chooses simply to ignore the significant amount of evidence put before the Jury which supports its verdict and, as noted below, chooses simply to ignore the great deference to be afforded that verdict.

Massey argues that Mr. Caperton's personal claims are derivative of the Corporate Appellees' claims, taking two basic approaches: (1) Massey asks this Court, impermissibly, to substitute factual inferences that serve Massey's theory of the case for the factual inferences actually drawn by the Jury; and (2) implicitly recognizing the futility of trying to convince this Court to overturn the Jury's fact findings, Massey attempts to disguise this effort as "legal" argument.

Massey fails on both counts. First, the Jury clearly accepted Mr. Caperton's version of the facts and drew appropriate factual inferences therefrom, and, second, the legal authorities cited by Massey do not support its arguments in any event.

As for the claim that Mr. Caperton's damages are derivative, Massey makes two unfounded assertions: (1) that any recovery by the Corporate Appellees will allow Mr. Caperton, approximately ten years after the fact that he was first individually listed on the Applicant Violator System ("AVS"), to suddenly be made whole, and (2) that the loans personally guaranteed by Mr. Caperton, by virtue of which Mr. Caperton has had multiple personal judgments, lawsuits and liens lodged against him, were somehow guaranteed by Mr. Caperton, not individually, but in his capacity as a shareholder. Massey also claims that Mr. Caperton did not prove personal entitlement to damages for emotional distress.

As a preliminary matter, Massey simply ignores the substantial deference to which a jury verdict is entitled. "[Q]uestions of fact resolved by the jury will be accorded great deference." *Pipemasters, Inc. v. Putnam Cty. Comm'n*, 218 W. Va. 512, 518, 625 S.E.2d 274, 280 (2005). In determining whether there is sufficient evidence to support a jury verdict, this Court should (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved. Syllabus Point 4, *Reynolds v. City Hospital, Inc.*, 207 W. Va. 101, 529 S.E.2d 341 (2000); Syllabus Point 5, *Orr v. Crowder*, 173 W. Va. 335, 315 S.E.2d 593 (1983). "On appellate review of a case wherein a jury verdict has been rendered, it is the duty of the reviewing court to treat the evidence as being favorable to the verdict '... and give it the strongest probative force of which it will admit. So long as there is nothing so inherently or otherwise manifestly improbable in the character of the evidence as to justify the court in ignoring it ...'. *Roberts v. Toney*, 100 W. Va. 688, 693, 131 S.E.2d 552, 553 (1926)." Syllabus Point 4, *Stenger v. Hope Natural Gas Co.*, 141 W. Va. 347, 90 S.E.2d 261 Syllabus Point 4 (1955).

With this legal standard in mind, Mr. Caperton will address each of Massey's arguments in turn.

1. The Evidence Clearly Supports Caperton's Entitlement to Personal Damages for the Actions of Massey that Caused Him to Be Listed on the AVS.

Massey first attacks Mr. Caperton's AVS listing, claiming, without reference to any record citation or legal authority, that all personal injury suffered as a result is derivative because "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." Appellants' Brief, p. 45. Massey has it wrong, both factually and legally. First, Massey simply ignores the evidence actually presented to the Jury. At trial, the following evidence came in without objection:

> [I]t is a system used by federal MSHA and OSM ... to track people who have a history of violations or are trying to get a permit that they can track those people ... they can see what your status is as far as outstanding violations ... [T]hat's very important for a professional engineer or mining engineer, because if he goes to seek employment elsewhere or if he's doing consulting work for someone, that can have a huge, detrimental impact on ... whether he's hired or not. It's very critical in this industry, especially if you're a mining engineer, to be able to not be AVS listed or what we call AVS listed.

TT 7/10/02,. 48-49.

Mr. Caperton, in his personal capacity, was listed on the AVS. TT 7/10/02, 49. He was cited for 25 violations, many of which dealt with forfeitures relating to certain of the Corporate Appellees' bankruptcies and the forfeiting of reclamation bonds. TT 7/10/02, 51. This listing has prevented Mr. Caperton from personally pursuing his "whole dream in life" — namely, to independently own and operate a coal mining business. TT 7/10/02, 52.

Massey now asks this Court to interpret this evidence to mean that, if the Corporate Appellees, which are all in the process of liquidation through bankruptcy, should at some point in the future pay the reclamation fees, he could be removed from the AVS list. Such Pollyanish speculation is of no import here. What matters is the fact that because of his listing on the AVS, for nearly ten years now, Hugh Caperton has been deprived of employment and significant

compensation in his chosen profession, and has seen his personal and professional reputation destroyed because of Massey's actions that caused his good name to be placed on the AVS in the first instance. Nearly ten years since his name first appeared on the AVS, and nearly five years after the Jury's verdict, Massey asks this Court to overrule or ignore these factual truths in favor of its baseless speculation. Massey simply ignores the substantial evidence that the Jury heard over the course of a seven week long trial on the very issue of harm to Mr. Caperton's personal and professional reputation, including the following sampling:

- Mr. Caperton was a business leader with whom his lenders and vendors were willing to do business before Massey's actions; TT 7/10/02, 38:17--39:19.
- The vendors and lenders with whom Mr. Caperton had previously done business now refuse to do business with him due to the tortious and fraudulent actions of Massey; *Id.*
- Mr. Caperton's personal credit rating and creditworthiness were destroyed by the actions of Massey; Pl. Ex. 626.
- Mr. Caperton was and is precluded from obtaining a mining permit and engaging in his chosen livelihood due to an AVS permit block caused by the actions of Massey; TT 7/10/02, 49:6--52:11; Pl. Ex. 618.
- A mining engineer testified at trial that an AVS permit block constitutes a "black-ball" in the mining industry; TT 6/19/02, 74:3-18.

The Jury awarded damages for harm to Mr. Caperton's reputation on the basis of such evidence. The Jury's award in that regard is entitled to substantial deference, *see Pipemasters, Inc.*, 218 W. Va. at 518, 625 S.E.2d at 280, and Massey's after-the-fact, unfounded, unsubstantiated speculation certainly does nothing to undermine that entitlement.

2. Mr. Caperton's Guarantees Were Given in His Personal Capacity and He Is Therefore Entitled to the Jury's Verdict Awarding Damages for Any Resulting Losses.

Massey's second argument that the evidence does not support an award of personal damages to Mr. Caperton is that, to the extent that Mr. Caperton suffered damages relating to his personal guarantees of certain business loans, Mr. Caperton is not entitled to a personal recovery

because he guaranteed the loans in his capacity as the sole shareholder of the Corporate Appellees rather than in his individual capacity.

First, Mr. Caperton has always acknowledged that he cannot recover on his personal guarantees to the extent that the Corporate Appellees recover damages for the same loss. Thus, the Jury specifically awarded $425,000 in damages to Mr. Caperton. That figure represents the amount of the Jury's award to the Corporate Appellees by which Mr. Caperton's personal guaranty obligation would not be retired. That is, assuming a *full recovery* by the Corporate Appellees, and assuming those proceeds are used to retire the debt obligations Mr. Caperton guaranteed, there is *still* a difference of $425,000 for which Mr. Caperton is personally responsible. Of course, Mr. Caperton nevertheless has also suffered injury to his personal and professional reputation because these lenders certainly did not await the ultimate outcome of this litigation before seeking to enforce their guaranty rights against Mr. Caperton personally. Thus, he has been made the personal subject of multiple lawsuits, judgments, liens and enforcement actions.

Additionally, Massey argues that Caperton did not *personally* guarantee any loans to the Corporate Appellees; rather, he "executed each of these contracts in his capacity as sole shareholder of Harman ...." Appellants' Brief, p. 45. Besides being completely irrelevant to the issue of damages inasmuch as the Jury has already segregated a liquidated amount that stands for that portion of the personal guaranty obligation Mr. Caperton will have to satisfy even if the Corporate Appellees obtain full satisfaction of the Jury's verdict, Massey's assertion completely ignores the evidence presented to the Jury. During his direct examination, Caperton testified that he gave guarantees to various creditors on behalf of the Corporate Appellees "*personally* as Hugh M. Caperton, not as the President of the companies but personally." TT 7/8/02, 142:17-18. The Jury was also presented with the actual written instruments by which Mr. Caperton took on these guaranty obligations. For instance, in Mr. Caperton's guaranty of a loan from Inspiration, the instrument provided: "I, *in my individual capacity*, do hereby ... guarantee the performance

of such obligation." TT 7/8/02, 142:4-6 (emphasis supplied); Pl. Exs. 68, 145. The Jury also received evidence proving Mr. Caperton's personal guaranty obligations to Vision Financial, TT 7/8/02, 149; to Senstar, TT 7/8/02, 153-55 and to Grundy National Bank, TT 7/8/02 155-58.

Thus, the Jury had ample proof that Mr. Caperton personally guaranteed the debts of the Corporate Appellees and was personally injured thereby. Indeed, given that Massey never seriously challenged at pre-trial, during trial, or in post-trial proceedings whether Mr. Caperton's guarantees were given in his personal capacity, all that was necessary was for the Jury to find Mr. Caperton credible: "Because of the jury's unique ability to see the evidence and judge the demeanor of the witnesses on an impartial basis, a jury verdict is accorded great deference. It is the province of the jury to weigh the testimony and to resolve questions of fact when the testimony conflicts." *Shiel v. Ryu*, 203 W. Va. 40, 47, 506 S.E.2d 77, 84 (1998). Massey's latest specious argument that Mr. Caperton guaranteed these loans only in his capacity as sole shareholder of the Corporate Appellees is directly contradicted by the evidence.

Given the facts as found by the jury, Caperton was certainly entitled to recover the damages that he personally suffered independent of the Corporate Appellees. Indeed, it is black letter law than an individual who suffers harm separate and independent from the harm suffered by a corporation may bring his own cause of action even though the harm arises from the same set of facts. In *Davis v. United States Gypsum Co.*, 451 F.2d 659 (1971), for example, the United States Court of Appeals for the Third Circuit held unequivocally that an individual shareholder who faced the triggering of guaranty obligations as a result of tortious activity that sent a corporation into bankruptcy was entitled to seek a separate recovery for that injury.:

> Davis' individual claims cannot be circumvented by [the bankruptcy trustee's] release. For example, the release cannot bar Davis' recovery for any loss which he may have sustained by reason of his incurring liability on the notes which he alleges to have executed on behalf of Cardinal American, if it be shown that [defendants] tortiously caused his individual loss.

Id. at 662.[4]

In citing *Lively v. Rufus*, 207 W. Va. 436, 533 S.E.2d 662 (2000), for the proposition that Mr. Caperton cannot recover for injuries that he suffered as the guarantor, Massey reaches too far. While it certainly is true that in *Lively* this Court upheld a Circuit Court's refusal to admit evidence of creditor claims against a corporate shareholder pursuant to a personal guaranty, that particular holding is not nearly as broad as Massey argues and is simply inapposite to the present case.

First, in *Lively*, this Court, employing an abuse of discretion standard, simply refused to overturn a Circuit Court's *evidentiary* ruling regarding the admission of such evidence as an independent basis of measuring damages suffered *by the corporation*. Noting that evidentiary rulings are reviewed under an abuse of discretion standard, this Court noted that "absent few exceptions," the evidentiary rulings of a trial court will be left undisturbed. *Id.* at 443, 669. Massey now seeks to take that particular evidentiary ruling and expand it to stand for the general proposition that a personal guaranty obligation can never serve as the basis of a personal injury claim. Mr. Caperton is the first to admit that there cannot be a recovery by the corporate entity and also a recovery by the individual guarantor for the same obligation. That simply did not

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4 *See also Moffat Enterprises, Inc. v. Borden, Inc.*, 807 F.2d 1169, 1176-77 (3rd Cir. 1986) (complaint not derivative because it avers that the individual plaintiffs sustained actual and consequential damages based upon their personal expenditures); *Howard v. Haddad*, 916 F.2d 167, 170 (4th Cir. 1990) (allegations in complaint claiming fraud upon an individual do state direct, not derivative, cause of action even though liquidator and plaintiff were seeking recovery from same source of assets); *Borak v. J. I. Case Company*, 317 F. 2d 838, 845 (7th Cir. 1963) (facts alleged in complaint which state a derivative cause of action to redress a wrong to corporation may also state a primary cause of action by stockholder for relief from injury to himself resulting from unlawful and fraudulent practice); *Eden v. Miller*, 37 F.2d 8, 10 (2nd Cir. 1930) ("For such damage as [individuals] can prove, they may recover, regardless of any cause of action the corporation may have against the defendant."); *Banker's Trust Co. of Western New York v. Steenburn*, 95 Misc. 2d 967, 990, 409 N.Y.S.2d 51, 65 (1978) ("If the individual stockholder has sustained an injury directly affecting him, he has an action against the promisor even though the corporation may also have an action growing out of the same wrong.").

happen in the present case. As previously explained above, the *only* award the Jury made for personal guaranty obligations was the specific award of $425,000, an amount *specifically not included in the Corporate Appellees' claim* because the creditor, Grundy National Bank, had forgiven the obligation as to them, but refused to release Mr. Caperton from his personal guaranty.

On the other hand, Mr. Caperton has seen his personal and professional reputation destroyed as a result of legal actions brought and personal judgments obtained because of his personal guaranty obligations. Any damages that the Jury awarded for that circumstance, however, were to compensate for the injury to Mr. Caperton's reputation and standing in the community -- i.e., the shift from prosperous and successful businessman to alleged deadbeat -- not to pay twice for the same corporate obligations.[5]

3. Massey's Contention That the Evidence Did Not Support an Award of Damages to Mr. Caperton for Emotional Distress Is Baseless.

Massey's third discrete argument that the evidence does not support a personal recovery by Mr. Caperton is that he did not prove an entitlement to damages for emotional distress. It is telling that the only case Appellants proffered to support this argument is *Monteleone v. Co-Operative Transit Co.*, 128 W. Va. 340, 36 S.E.2d 475 (1945). *Monteleone* has been expressly overruled by this Court on two separate occasions. *See Heldreth v. Marrs*, 188 W. Va. 481, 425 S.E.2d 157 (1992); *Ricottilli v. Summersville Mem. Hosp.*, 188 W. Va. 674, 425 S.E.2d 629 (1992).

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5 Massey has apparently, and wisely, abandoned its prior claim that the entirety of Mr. Caperton's damages are derivative. As the Bankruptcy Court correctly predicted, the Jury was able as *a matter of fact* to distinguish between Mr. Caperton's personal injury damages and the damages suffered by the Corporate Appellees, as compellingly demonstrated by the Jury's specific award of $425,000. With the Jury's factual determination of which party suffered which damages, the legal issue of derivative claims was decided.

Monteleone involved a claim akin to negligent infliction of emotional distress and addressed the question of when a victim of *negligence* can recover for emotional distress. The *Monteleone* Court held that mental distress damages could not be recovered unless they were adequately connected to some physical injury. 128 W. Va. at 348, 36 S.E.2d at 479. *Monteleone* does *not* stand for the proposition that emotional distress damages are not recoverable in the context of the present case. Furthermore, and contrary to Massey's creative assertion that *Heldreth* overruled *Monteleone* "on other grounds," *Heldreth* completely gutted the holding in *Monteleone* and perhaps deprived it of any precedential value whatsoever.[6] *Heldreth*, 188 W. Va. at 486, 425 S.E.2d at 162 (overruling *Monteleone* to the extent that it prohibited recovery for negligent infliction of emotional distress).

Massey also chooses to simply ignore this Court's holding in *Kessel v. Leavitt*, 204 W. Va. 95, 511 S.E.2d 720 (1998), where the Court affirmed an award of emotional distress damages due to *fraudulent conduct* without evidence of any physical manifestations of distress.

Given *Kessel*, any award by the Jury here, in the face of substantial evidence[7] that Mr. Caperton suffered emotional distress, was perfectly appropriate. The Jury was entitled to accept this evidence as true and to award emotional distress damages under *Kessel*.

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6 The errant citation to *Monteleone* is not the only circumstance in which Massey misstates the law. For example, on page 44 of its Brief, Massey cites *Mullins v. First National Exchange Bank of Va.*, 275 F. Supp. 712 (W.D. Va. 1967) for the proposition that, under *West Virginia* law, "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 on the corporation." However, that case clearly states that it is applying the law of Virginia: "The plaintiffs' right to recover will turn not upon anything contained in the statute, but rather upon the tort law of the State of Virginia." *Id.* at 717. Moreover, the case is inapposite to the present case for the simple reason that Mr. Caperton sued for injury and damages personal to him, not the Corporate Appellees. The Jury certainly understood the difference inasmuch as the Verdict form specifically addresses damages to Mr. Caperton in his personal capacity and as the specific award of $425,000 conspicuously demonstrates their concerted effort to avoid any duplicative award.

7 For instance, the evidence was that Mr. Caperton experienced mental anguish and sleepless nights due to the destruction wrought by Massey's fraudulent and tortious

Continued on following page

4. Massey's Contention that Mr. Caperton Did Not Properly Plead the Award of $425,000 in Consequential Damages Is Also Baseless.

Massey attacks the Jury's award of $425,000 in "consequential" damages to Mr. Caperton by claiming that he failed to specifically plead such damages as allegedly required by West Virginia Rule of Civil Procedure 9(g). Rule 9(g) provides that "when items of special damage are claimed, they shall be specifically stated." In their brief, the Appellants provide the text of Rule 9(g) and then move on to claim that "Because consequential damages are special damages, the damages must be pled with specificity in order to be recovered by Appellees under Rule 9(g)." Appellants' Brief, p. 47. In particular, the Appellants claim that, because the word "consequential" does not appear in Mr. Caperton's First Amended Complaint, then as a matter of law, consequential damages may not be recovered under Rule 9(g).

Massey is correct that the word "consequential" does not appear in the First Amended Complaint, but that is the only thing about which Massey is correct. As outlined above, the $425,000 award of consequential damages represents a personal guaranty obligation that Mr. Caperton has to Grundy National Bank independent of any monies owed to Grundy by the Corporate Appellees. While the First Amended Complaint does not use the word "consequential," it does state that "[A]s a direct and proximate result of Defendants' aforesaid misconduct, Caperton has been unable to meet his personal obligations under various guaranties he provided in connection with the Harman businesses." First Amended Complaint, ¶ 184. Furthermore, Massey's statement that "the Demand for Relief ... prayed for judgment ... *to include only* compensatory damages, punitive damages, treble damages, pre-judgment and post-judgment interest, costs and attorney's fees" is inherently misleading. Appellants' Brief, p. 48. Massey conveniently fails to note that the Demand for Relief also asks for "such further relief as is just and proper." First Amended Complaint, Demand for Relief. Clearly, Mr. Caperton did

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conduct as well as the years of hardball litigation tactics utilized by Massey which he and his family have had to endure. TT 7/8/02, 117:1-13.

not intend to limit his entitlement to damages by the language of the Demand for Relief as Massey now insinuates.

In addition to the First Amended Complaint's description of the kind of obligations that formed the basis of the consequential damage award, Massey also had full and fair actual notice of this claim. During discovery, Massey was repeatedly advised that Caperton incurred a separate $425,000 personal obligation to Grundy as a result of Massey's conduct. Indeed, Daniel Selby, MBA, CVA, CPA, specifically identified this $425,000 in damages in his report provided to Massey prior to the trial of this matter, and upon which Appellants engaged in thorough discovery.

Massey provides no case law whatsoever to support its argument for the reversal of the consequential damage award. The one case that it does cite, *Desco Corp. v. Harry W. Trushel Constr. Co.*, 186 W. Va. 430, 413 S.E.2d 85 (1991) only defines special damages and casts no light on the appropriate pleading standard. This is not surprising inasmuch as Mr. Caperton has been able to identify only one case in which this Court has discussed Rule 9(g), *Humphrey v. Armenakis*, 149 W. Va. 607, 142 S.E.2d 883 (1965). In that case, the Court decided the pleading issues on statutory grounds that were specific to wrongful death cases and did not reach the merits of the Rule 9(g) arguments.

As such, it is important to consider that the result advocated by Massey -- namely, that a failure to use the word "consequential" in a complaint completely bars the plaintiff from the recovery of consequential damages despite a clear statement in the same complaint of the behavior claimed to be tortious and giving rise to such damages -- is totally inconsistent with this Court's interpretation of the West Virginia Rules of Civil Procedure: "Rules 1 and 61 make clear our intent to avoid placing form over substance in the procedures of our courts." *Talkington v. Barnhart*, 164 W. Va. 488, 493, 264 S.E.2d 450, 453 (1980). This Court has held that, where the alleged violation of a rule neither prejudices the opponent nor affects the

opponent's substantive rights, there is no basis for reversal. *Holstein v. Norandex, Inc.*, 194 W. Va. 727, 729 n.2, 461 S.E.2d 473, 475 n. 2 (1995). Massey has not been prejudiced in any way regarding the Jury's award of consequential damages. Massey knew full well the amount of the damages claimed and the factual and legal basis underlying the claim well in advance of trial. Massey had ample opportunity to contest Mr. Caperton's entitlement to those damages. Reversal of the award of consequential damages in these circumstances would "be a classic example of placing form over substance, a procedure historically criticized and routinely rejected by this Court." *Id.* Furthermore, the fundamental treatise on civil litigation in West Virginia makes clear that a party is entitled to the relief to which it proves entitlement and is not constrained by the specific words used in the claim for relief. "The demand for judgment forms no part of the claim for relief, and does not restrict the relief to be granted against the defendant. A final judgment must grant all of the relief to which plaintiff is entitled, whether or not demanded in the pleading." Franklin D. Cleckley, Robin J. Davis & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure*, Rule 8 at 198 (2006) (citations omitted).[8]

5. The Award and Amount of Punitive Damages Was Entirely Appropriate and Strongly Supported by Overwhelming Evidence of Reprehensible Conduct by the Appellants

It is worth noting initially that the punitive damages award in this case was less than 1/7th of the total damages awarded to all the Appellees. Although they broadly claim that there was insufficient evidence for the Jury to even *consider* awarding punitive damages, Appellants notably do *not* appeal from the Trial Court's nineteen page Amended Circuit Court Order on Jury Award of Punitive Damage ("*Garnes* Order"). *See* Appellants' Brief, p. 4. In its *Garnes*

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8 Massey also claims that Mr. Caperton did not adequately prove his entitlement to these damages. Setting aside the standard of review, all evidence giving rise to this element of damages was admitted at trial, and the Jury heard both lay and expert testimony regarding the issue. *See, e.g.*, TT 7/8/02, 163:17-165:17; TT 7/16/02, 124:1-22.

Order, the Trial Court discussed in great detail the legal standards for determining whether and what quantity of punitive damages should be awarded, and applied those standards to the facts adduced at trial. The court came to the conclusions that the Jury had been correctly instructed (pp. 5-6, 18); the Jury had correctly applied the instructions (p. 18); there was sufficient evidence for the Jury to "reasonably conclude that the Defendants' conduct was reprehensible, 'evil', and self-serving; and that the punitive damage award, being less than one-seventh (1/7) of the non-punitive damage award, ... is obviously neither arbitrary, grossly excessive, nor in violation of the Defendants' due process rights" (p. 17).

In failing to appeal from this extensive and well-considered Order, the Appellants essentially acknowledge that the jury instructions were correct, the amount of the punitive damages award was appropriate, and that they do not have any valid due process claims. The Appellants do not take exception to the Trial Court's application of the five *Garnes* factors, including the statements that: "the evidence at trial was sufficient for a jury to conclude that the Plaintiffs were severely harmed by the conduct of the Defendants" (p. 7); the Jury "had sufficient evidence before it to conclude that Massey's conduct was reprehensible" (p. 12); the Jury "had before it evidence that Defendants stood to profit substantially from their wrongful conduct" (p. 12); the "award of punitive damages was, by no stretch of the imagination, either 'grossly excessive' or 'arbitrary'" (p. 15); and that "Massey was and is a large company ... [which] generated between approximately $1 and $1.2 billion in annual revenues from 1997 to the present through the time of trial" (p. 12). Further, the Appellants do not object to the Trial Court's conclusions regarding the additional *Garnes* considerations that: "the costs of litigation warrants the imposition of punitive damages ... particularly ... in light of the evidence adduced regarding threats made by the Massey Defendants to Harman of protracted litigation" (p. 13); that "the Court is not aware of any other civil or criminal proceedings against Defendants involving this same conduct" (p. 14); that "the Jury's award of punitive damages in this

controversy ... will help promote settlements in future matters of this type" (p. 14); and that "the Defendants expressed little interest in settling this matter on reasonable terms" (p. 14).

In fact, the Appellants do not address any of these *Garnes* factors at all in either their Petition for Appeal or Appellants' Brief. Therefore, even if the Appellants had bothered to appeal from (or even acknowledge) the *Garnes* Order, they have nevertheless waived their arguments against the award of punitive damages:

> In Syllabus Point 5 of *Garnes*, this Court discussed our review of a petition for appeal on the punitive damage issue and stated that "all petitions must address each and every factor set forth in Syllabus Points 3 and 4 of this case with particularity, summarizing the evidence presented to the jury on the subject." This Court went on to find in Syllabus Point 5 that "assignments of error related to a factor not specifically addressed in the petition will be deemed waived as a matter of state law." We find the defendant waived this issue below. The defendant's petition for appeal and brief fail to set forth the necessary factors outlined in *Garnes*. Furthermore, the defendant does not articulate why the punitive damage award in this case was unfair. The ratio between the punitive damage award and the compensatory damage award is not unreasonable on its face. In view of the defendant's failure to specify facts that would warrant a finding that the punitive damage award was unreasonable, we decline under Syllabus Point 5 of *Garnes* to set aside the award.

Bullman v. D & R Lumber Co., 195 W. Va. 129, 132, 464 S.E.2d 771, 774 (1995) (internal citations omitted); *see also Garnes v. Fleming Landfill*, 186 W. Va. 656, 413 S.E.2d 897 (1991); *Radec, Inc. v. Mountaineer Coal Dev. Co.*, 210 W. Va. 1, 10, 552 S.E.2d 377, 386 (2000); *Boyd v. Goffoli*, 216 W. Va. 552, 563, 608 S.E.2d 169, 180 (2004). In *Bullman*, the above holding of which could be applied almost word for word in the present case, this Court rejected the defendant's due process claims regarding punitive damages because of the defendant's failure to address the *Garnes* factors in its appellate petition and brief. Here, the Appellants' complete failure to address the required *Garnes* factors should likewise operate as a bar to any objections they may have to the award of punitive damages.

The only argument that the Appellants *do* make in relation to punitive damages is that the Jury should not have been permitted to consider awarding punitive damages because "there was

no evidence that any of the Appellants acted with malice in the declaration of *force majeure*." Appellants' Brief, pp. 49-50. This statement ignores *not only* the evidence relating to the circumstances surrounding the declaration of *force majeure* presented during trial, which evidence was persuasive to both the Jury and the Trial Court -- it *also* completely ignores the copious evidence and other findings of fact relating to the Appellants' malicious acts before and after the declaration of *force majeure* for which acts the Jury found Appellants liable for fraud, fraudulent concealment and tortious interference. By way of brief example, since an exhaustive reference to the trial evidence and findings of fact by the Jury and Trial Court would literally fill volumes, the Trial Court noted the following evidence that supported the Jury's conclusion that the Appellants' conduct was "reprehensible, 'evil' and self-serving":

> (d) While marketing their West Virginia Coals to LTV, the Defendants intentionally created the false impression that they were trying to sell Harman Coal to LTV; ...
>
> (f) At a meeting held in November 1997 in West Virginia, the Defendants' CEO threatened Harman and Mr. Caperton with long and protracted litigation in the event Harman did not agree to give up its rights to its reserves; ...
>
> (i) After directing the declaration of "force majeure," the Defendants participated in settlement negotiations with Plaintiffs and the Lessor of Plaintiffs' reserves, not with the intention of settling disputes, but for the purpose of placing the Plaintiffs, corporately and personally, in greater financial distress; ...
>
> (k) The Defendants used [Plaintiffs'] confidential information to acquire adjoining reserves, which the Defendants' own internal documents acknowledged would help insure that Harman would only be valuable to the Defendants; ...
>
> (n) The Defendants' declaration of "force majeure" was without any contractual basis as LTV was neither a customer of Wellmore, effective January 1, 1998, nor had the LTV Pittsburgh plant been directed to close by any governmental action; ...
>
> (p) The Defendants intentionally acted in utter disregard of Plaintiffs' rights and ultimately destroyed Plaintiffs' businesses because, after conducting cost-benefit analyses, the Defendants concluded it was in its financial interest to do so; and
>
> (q) The Defendants consistently attempted to use the disparity of resources and bargaining power between the Defendants and the Plaintiffs to its

> advantage, with little or no regard to the outcome of the Plaintiffs, either corporately or personally.

Garnes Order, pp. 10-11. This litany of facts is familiar, cited in more detail with abundant references to the Trial Transcript in the fact section herein. In contrast, references to the record are conspicuously absent from the Appellants' arguments relating to what evidence was or was not adduced at trial. *See* Appellants' Brief, pp. 49-50.

"The formulation of jury instructions is within the broad discretion of a circuit court, and a circuit court's giving of an instruction is reviewed under an abuse of discretion standard." Syllabus Point 13, *Roberts v. Consolidation Coal Co.*, 208 W. Va. 218, 226, 539 S.E.2d 478, 486 (2000). The Appellants have simply not met their burden of showing that the Trial Court abused its discretion in permitting the Jury to even consider the issue of punitive damages. Further, "[a]n appellate court will not set aside the verdict of a jury, founded on conflicting testimony and approved by the trial court, unless the verdict is against the plain preponderance of the evidence." *Id.* at Syllabus Point 1. More specifically, "in determining whether the verdict of a jury is supported by the evidence, every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered, and those facts, which the jury might properly find under the evidence, must be assumed as true." *Id.* at 226. Under these weighty standards in favor of the Trial Court's instruction and the Jury's verdict, and with such factually meager arguments by the Appellants, there is plainly no basis to discard the findings of the Jury and Trial Judge who attentively sat through the seven week trial and decided that the punitive damages awarded were entirely fitting with the facts in this case.

C. Massey's Assignments of Error Regarding Sufficiency of Proof to Establish Liability for Tortious Interference, Fraud and Fraudulent Concealment Are Without Merit

Massey appears to have essentially abandoned its liability argument, devoting just four and one-half pages to the crux of the case -- whether the Appellants committed the torts of tortious interference, fraud, and fraudulent concealment. *See* Appellants' Brief, pp. 36-40. In

those four and one-half pages, there are no citations to the trial transcript, and only a passing reference or two to evidence actually admitted at the trial. Similarly, there is no specific reference to Mr. Caperton whatsoever.

Massey does continue in its efforts to mislead this Court, however, asserting that because a letter from Mr. Suboleski mentioned LTV's Pittsburgh plant and threatened *force majeure* (per Mr. Blankenship's directive), Massey was not concealing anything from Appellees. This letter is, of course, the same letter Mr. Suboleski described as "CYA" when confronted by Mr. Cook. Mr. Suboleski then gave assurances, falsely, that there would be no declaration of *force majeure*. Of course, Massey conceals in its brief, just at it concealed from Appellees, that in the interim, Massey had lost all of the LTV business. It also concealed, of course, that it later secretly used Appellees' confidential business information to negotiate the purchase of a "wall of coal" from Pittston in order to render the Harman operation valueless to anyone but Massey. This despite the fact that use of this confidential information in such a manner would admittedly be unethical and contrary to the obligation to bargain in good faith. TT 7/30/02, 51:10-19. And Massey also concealed that it never intended to abide by the original agreed-upon closing date for the fire sale transaction with Mr. Caperton, but instead directed Mr. Caperton to shut down his operations in reliance upon that date. And it certainly did not reveal its intent to queer the lease assignment with Penn Virginia at the last moment in a brutish, "gun to the head" attempt to obtain the Harman operation for nothing, resulting in Penn Virginia canceling the leases, depriving Appellees of their last most valuable asset and driving the Corporate Appellees into bankruptcy.

Insofar as tortious interference is concerned, as the Trial Court found in its Final Order, "[t]he evidence was clearly sufficient for the Jury to conclude that Defendants interfered with the Harman Plaintiffs' advantageous relationships with, among others, the United Mine Workers of America, with Penn Virginia Coal Company, with Terra Industries, Inc., with Grundy National Bank, and with Wellmore Coal Corporation." Final Order, p. 11. Massey does not, and cannot,

claim to be a party to any of these relationships except for the very last one on the list, the 1997 CSA with Wellmore.9

As for Mr. Caperton, the evidence proved and the Trial Court found as follows:

> [a]s for Plaintiff Caperton, the evidence was clearly sufficient for the Jury to conclude that Defendants tortiously interfered with, among others, his personal guaranty relationships with Grundy National Bank, his personal liability under the Terra reclamation bonds (and resulting listing on the Applicant Violator System, or 'AVS'), and his personal relationship with United Bank.

Final Order, p. 11. Specifically, the Trial Court wrote that "the Defendants dealt directly with Grundy National Bank pursuant to notes held by Grundy, for which Plaintiff Caperton had given his personal guaranty." *Id.*, p. 12. Additionally, "the Defendants obtained confidential information at their meeting with Plaintiff Caperton in November 1997, and thereafter on the purported promise to purchase Caperton's interest in the Harman assets, the Defendants used that information to acquire adjoining reserves." *Id.*

Evidence was also presented to the Jury to show that Massey also interfered with both Mr. Caperton's personal liability for and Harman's obligations under the reclamation bond with Terra, and precluded Mr. Caperton from future economic benefits in the coal industry by virtue of his listing on the AVS. Further evidence was presented to the Jury to show that Massey tortiously interfered with Mr. Caperton's personal obligations to Senstar, Vision, Penn Virginia, and the UMWA, among others, by intentionally and purposefully forcing Mr. Caperton out of the coal industry. Massey's interference has led directly to Mr. Caperton losing his job, having his personal creditworthiness ruined, being personally listed on the AVS, becoming the victim of personal judgments against him by Grundy and the named Defendant in a lawsuit by Senstar, and

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9 Massey's claim to be a privileged "party" to the CSA by virtue of its brief ownership of Wellmore is inapposite. The privilege of a corporate parent to interfere with the contracts of its subsidiaries (here, a sub-subsidiary) is dependent upon the parent not acting with improper means and wrongful motives. Massey's motive and means were improper from start to finish.

generally having to watch the strong business reputation he had built for himself in the coal industry being reduced to rubble.

Massey does not deny the *existence* of these independent relationships and does not deny that it is a party *outside of* those relationships, *and*, in fact, does not even deny that it *interfered* with these relationships.

As for fraud, the evidence at trial was clear that Massey consistently acted in a fraudulent manner over an eight month period to the detriment of all of the Appellees, from the time of Massey's purchase of United and Wellmore to the collapsed settlement negotiations with Mr. Caperton. As the Trial Court noted, "The evidence was clearly sufficient for the Jury to conclude that Defendants fraudulently misrepresented material information, that Plaintiffs, both personally and corporately, justifiably relied upon Defendants' fraudulent misrepresentations, and that Plaintiffs, both personally and corporately, were damaged because of that justifiable reliance." Final Order, p. 16.

For example, after directing the declaration of *force majeure*, the Appellees participated in settlement negotiations with Mr. Caperton, not with the intention of settling disputes, but for the purpose of placing the Mr. Caperton as well as the Corporate Appellees in greater financial distress. Massey obtained confidential information at the November 1997 meeting in West Virginia and thereafter for the purported purpose of purchasing Mr. Caperton's interest in the Harman assets, but instead used that confidential information to acquire adjoining reserves, which Massey's own internal documents acknowledged would help insure that Harman would only be valuable to Massey.

Massey also misrepresented its intentions to settle any disputes between the parties, reneged on its stated intention to purchase the Harman assets, and collapsed the deal after Mr. Caperton had shut down the Corporate Appellee operations in anticipation of a sale to Massey. Massey intentionally acted in utter disregard of Appellees' rights and ultimately

destroyed the Corporate Appellees because, after conducting cost-benefit analyses, Massey concluded that it was in their financial interest to do so. Finally, Massey consistently attempted to use the disparity of resources and bargaining power between it and the Appellees to Massey's advantage, with little or no regard to the outcome of the Appellees, either corporately or personally. *See generally*, Final Order, pp. 16-17.

These were *affirmative acts*, the making of materially false statements regarding Massey's present intentions in the purported settlement negotiations. These were not, as Massey has previously suggested, mere broken promises or failures to disclose. These were outright lies and fabrications, communicated with the *specific purpose* of making Appellees vulnerable in order to enhance Massey's purpose of gaining the Corporate Appellees' assets, and finally for the purpose of preventing all the Appellees from seeking legal redress.

Mr. Caperton and the Corporate Appellees acted in reliance on Massey's misrepresentations by, for example, not seeking replacement customers for their coal, by sharing confidential information, and by shutting down operations in earnest expectation of completion of Massey's sham settlement negotiations. Massey succeeded in driving the Corporate Appellees out of business and into bankruptcy, and in robbing Mr. Caperton of his livelihood, his credit rating, his business reputation, and his peace of mind.

D. Massey's Miscellaneous Assignments Of Error Regarding The Trial Court's Conducting Of The Trial Are Without Merit

Massey makes various and miscellaneous assignments of error claiming prejudice by the Trial Court in the conduct of the trial below. "A trial court is not only permitted to take part in a trial but has the duty to do so in order to facilitate its orderly progress, and the remarks or conduct of the court in performing its duty will not constitute error if they are such as do not discriminate against or prejudice the defendant" Syllabus Point 4, *State v. Hankish*, 147 W. Va. 123, 126 S.E.2d 42 (1962). Moreover, "[a] trial court has a wide discretion in the control of the

order of proof in jury trials which, in the absence of the abuse thereof, will not be disturbed by this Court on writ of error." Syllabus Point 4, *Nicholas v. Granite State Fire Ins. Co.*, 125 W. Va. 349, 24 S.E.2d 280 (1943). Mr. Caperton will address those few alleged assignments of error which pertain to him, and demonstrate that they are without any foundation whatsoever.

1. The Trial Court Appropriately Sanctioned Massey's Trial Counsel for Flagrant Disregard of the Trial Court's Rulings Regarding Time Limits on the Questioning of Witnesses.

Massey's Appellate Counsel now claims that Massey's Trial Counsel was improperly sanctioned by the Trial Court for ignoring the Trial Court's admonition regarding time remaining to conduct cross-examination of Mr. Caperton's damages expert, Mr. Dan Selby, disingenuously claiming that the Trial Court's "two minute warning," which Massey's Trial Counsel exceeded by an additional half hour or so of questioning, was "interpreted to mean the time remaining on the Court Reporter's tape." Appellants' Brief, p. 55. Given the furor Massey has caused regarding the Trial Transcript precisely because such tapes were never recorded, that excuse rings hollow. In short, Massey's Trial Counsel was "losing the war" to Mr. Selby, and simply did not want to surrender the field despite *two* separate but discreet warnings from the bench that Appellant Trial Counsel was exceeding the time limits that the Trial Court had put into place for all parties. TT 7/17/02, 26:13; TT 7/17/02, 31:16; TT 7/17/02, 37:4-8; TT 7/17/02, 41:1-45:15. As for the Trial Court's "sanction" because of Appellant Trial Counsel's blatant demonstration of disrespect to the Trial Court, the evidence elicited -- information regarding Massey's financial condition -- was absolutely appropriate for the Jury's consideration inasmuch as the financial condition of the defendant is relevant to the Jury's consideration of an award of punitive damages. *See Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991).

2. The Trial Court Appropriately Refused to Declare a Mistrial for Inadvertent Reference Made to the Virginia Case.

It is both incredible and incredulous that Massey would now contend that the Trial Court's refusal to declare a mistrial for passing reference made to the Virginia Case constitutes reversible error when the burden was clearly upon Massey to introduce into evidence the record of the Virginia Case if it truly intended to pursue the affirmative defenses of res judicata and collateral estoppel which it now argues so vociferously. Massey clearly picked its poison. Rather than creating an appropriate record in support of its assertion of those affirmative defenses, Massey chose instead to oppose any mention of the Virginia Case.

Moreover, any reference to "another case" or "the case in Virginia" was so nebulous as to be totally innocuous. For example, when the Virginia Case was inadvertently mentioned at one point towards the end of a two-hour long video deposition, there was little chance that any of the Jurors could have understood the reference. Nevertheless, when the issue was raised, the Trial Court suggested, with the agreement of all counsel, that it would review the Jury's notes in camera to determine if any of the Jurors had picked up on the reference. The Trial Court found that no Juror had noted the reference and so denied any additional relief beyond admonishing the Jury. TT 7/2/02, 4:1--23:2.

As was the case throughout trial with other "slips," the Trial Court made it known that all parties would receive equal treatment if and when required. TT 7/2/02, 21:24--22:18. Massey did indeed require such treatment on the very issue about which it now complains. Specifically, the Trial Court appropriately admonished the Jury when one of Massey's expert witnesses expressly volunteered a reference to the Virginia Case during his examination. TT 7/19/02, 91:17--97:15.

3. Massey Regularly Elicited Testimony from Witnesses on Documents about which the Witness Lacked Personal Knowledge.

The Trial Court permitted both sides to use documents with a witness to determine (1) if the witness had knowledge of the document, or (2) if the document refreshed a witness' recollection, or (3) if a document contained information about which the witness had knowledge. The Trial Court granted "some latitude" in questioning witnesses about such documents, stating that the fact the witness may have no knowledge of the document was "proper foundation" for cross-examination. TT 6/19/02, 79:16-19.

The following exchange exemplifies how Massey, over Appellees' objections, engaged in the very practice about which it now complains:

> MR. STANLEY: ... Nowhere on this document does it indicate that it was ever sent to or received by Mr. Caperton, who when the exhibit was proffered by [Massey Counsel] Mr. Woods, indicated that he had never seen that document before ... so it would be our position that this is a pure hearsay document with regard to this witness and that as a result, it's an inappropriate question.
>
> THE COURT: Irrespective of the hearsay objection, let's hear what you have to got to say under the 404 balancing test. Let's see what that's got to do with it.
>
> MR. STANLEY: If I could just quickly, Your Honor. We also haven't had the opportunity to review the contents of the document, but there's a relevancy issue here, 404. We would contend that the document is highly prejudicial, particularly if it's presented to this witness in the context that it's apparently going to continue to be presented.
>
> THE COURT: What's the purpose of the document being presented to this witness, Mr. Woods?
>
> MR. WOODS: Well, the purpose is to establish whether the information in it is information that was furnished to Terra by the Harman people. Mr. Caperton has testified about the fact that the Terra people came to the mine and the office, they spent a day or two there, and they [sic] showed him everything, opened up everything to them, didn't hide anything and so forth, and this memo then results from that investigation.
>
> ***
>
> THE COURT: There's a couple ways to skin the cat here. The first is, if you're talking about this is information that Mr. Caperton supposedly gave these gentlemen, and they relied on it and it ended up in a memorandum, and you are going to use that for credibility purposes about his own knowledge about his own

stuff and the representations that he made, that may be one thing, but if you want to seek to introduce it through Mr. Caperton and he's never seen the document—

MR. WOODS: I wasn't going to try to introduce it. Very frankly, all I was going to do was ask him whether -- and there's probably two or three sentences in here I would read -- whether that's information they furnished to Terra.

THE COURT: That being the case then, the objection is overruled, and let's rock on.

TT 7/11/02, 86:14--89:19.

4. Massey's Claims that the Trial Court Admitted Irrelevant and Prejudicial Evidence is Without Merit.

The West Virginia Rules of Evidence allow a trial judge significant discretion in making evidentiary rulings because it is the trial judge who has witnessed the conduct of both counsel and witnesses. *McDougal v. McCammon,* 193 W. Va. 229, 235, 455 S.E.2d 788, 794 (1995) ("evidentiary and procedural rulings, perhaps more than any others, must be made quickly, without unnecessary fear of reversal, and must be individualized to respond to the specific facts of each case"); *In Re: State Public Bldg. Asbestos Litig.*, 193 W. Va. 119, 132, 454 S.E.2d 403, 435 (1994).

In the present case, Massey's claims that the Trial Court allowed irrelevant and prejudicial evidence must fail because, in every instance, either Massey opened the door so that the admission of the evidence was proper, or Massey simply failed to object at the time the evidence was adduced and therefore cannot now be heard to complain. "Where objections were not shown to have been made in the trial court, and the matters concerned were not jurisdictional in character, such objections will not be considered on appeal." Syllabus Point 4, *State v. Flanders*, 218 W. Va. 208, 624 S.E.2d 555 (2005). In any event, the Trial Court properly exercised its discretion.

5. Massey's Claims that the Trial Court Improperly Admitted Evidence of Massey's Financial Condition is Without Merit.

Massey also argues that the Trial Court erred in allowing testimony regarding Massey's finances. These objections do not warrant review for several fundamental reasons. First, as pointed out above, evidence of a defendant's financial condition is relevant to the issue of punitive damages.

Second, Massey regularly opened the door to such inquiries. For example, during his direct examination, Mr. Blankenship professed that Massey operated with the highest ethical standards, and that he had no motive to harm Mr. Caperton or the Corporate Appellees. TT 7/15/02, 79:16--80:6, 94:6-10. On cross-examination, however, he admitted that certain Massey companies did commit illegal acts and were driven by the pursuit of margins. Further, Mr. Blankenship did not dispute that he mentioned Massey's vast resources during the conversation that Appellees characterized as a threat. TT 7/18/02, 87:3-13; 136:5--137:10; 87:3-13.

Third, Massey's finances and profits were relative to the issue of motive, as Appellees successfully proved that Massey had a profit motive for tortiously interfering with the Appellees' contracts and other advantageous business relations. Pl. Ex. 429.

Finally, and most significant in this context, Massey's Trial Counsel simply did not object to the questions when posed, and so Massey cannot now be heard to complain. Syllabus Point 4, *State v. Flanders*, 218 W. Va. 208, 624 S.E.2d 555 (2005). For example, Trial Counsel never objected to the following exchange, now pointed to by Massey as warranting reversal:

Counsel:	If you could shed liabilities and raise the company's profits, that would be a benefit to Massey and a benefit to you.
Mr. Blankenship:	That question goes back to what I did answer. The cash -- the question, the way you said it, yes, the shed of liabilities is part of what the management expects.

Counsel:	If you can buy a company at a fire-sale price, that would raise company profits and that would be of benefit to you personally?
Mr. Blankenship:	Yes, that is the way the system works.

TT 7/22/02, 132:8-18.

These questions were fair inquiries that led to relevant evidence, especially given the other clear evidence adduced at trial that Massey first offered to purchase the Corporate Appellees' assets at a fire sale price, and then purposely collapsed the deal after stringing it out for many months, which had the effect of forcing the Corporate Appellees into bankruptcy and causing a higher probability of a "shedding of liabilities," which would fit nicely into Massey's expressed intention of "acquir[ing] Harman in the long run."10 For its part, Massey repeatedly attacked the business acumen and ethics of Mr. Caperton. *See, eg.*, TT 6/17/02, 178, TT 7/18/02, 135-136.

6. The Trial Court Properly Excluded Certain Testimony by Massey's then-General Counsel, Mr. James Gardner.

The Trial Court properly excluded certain testimony by Mr. James Gardner, Massey's General Counsel at the time, as additional testimony by him would have implicated his giving of confidential legal advice to Massey, for which Massey had asserted the attorney-client privilege and which it was not willing to waive at the time of trial. Massey specifically refused to produce documents authored or received by Mr. Gardner under the guise of the privilege, so when Mr. Gardner himself stated outside the presence of the Jury that he could not differentiate

10 Mr. Blankenship also claimed that Massey was justified in its actions because he had an obligation to Massey shareholders to make money, thus making this inquiry of further relevance to the issue of privilege to interfere, which the Massey Defendants raised as an affirmative defense. TT 7/15/02, 79:10--80:22; TT 7/18/02, 56:16--57:17. Mr. Blankenship stated he was motivated by increasing "margins." TT 7/15/02, 56:13--57:10; 132:12-17. If Massey had not interfered with Harman's business, there would have been a "loss of opportunity for Massey." TT 7/22/02, 70:11--71:5. Similarly, Massey's own internal projections showed that it stood to gain well over $100 million through the acquisition of Harman and adjacent reserves. Pl. Ex. 429.

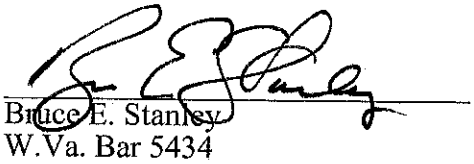
between his roles as business advisor and legal advisor, the Trial Court had no choice but to limit his testimony. TT 7/22/02, 178:19--201:18. The Trial Court properly explained its rationale for excluding Mr. Gardner's testimony in its Final Order at paragraph 17(c), p. 35.

IV. CONCLUSION

Massey's Appeal is without any legitimate basis. As this Court stated many years ago in *Landau v. Farr*, 104 W. Va. 445, 449, 140 S.E.2d 141, 143 (1927), a trial court's "refusal to disturb the verdict is entitled to great weight. Before we could set aside this verdict, we would have to hold, not only that the jury was influenced by improper motives, but that the trial court abused its discretion in sustaining the verdict." Mr. Caperton respectfully suggests that both the Jury Verdict and the Orders of the Trial Court are soundly supported by the great weight of the evidence and by applicable law.

WHEREFORE, Hugh M. Caperton respectfully requests that this Honorable Court AFFIRM the Orders and Rulings of the Circuit Court of Boone County, and assess the costs of this Appeal to Appellants.

Respectfully submitted,



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Dated: June 1, 2007

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Appellants,

Appeal No. 33350

v.

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

Appellees.

CERTIFICATE OF SERVICE

I, Bruce E. Stanley, do hereby certify that I have served the foregoing Brief of Appellee Hugh M. Caperton upon the following by United States Mail, first class and postage prepaid, this 1st day of June, 2007, addressed as follows:

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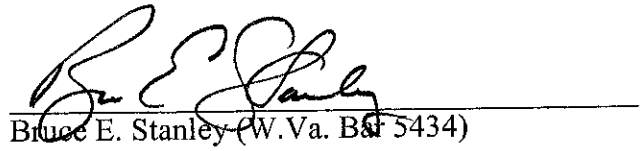

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