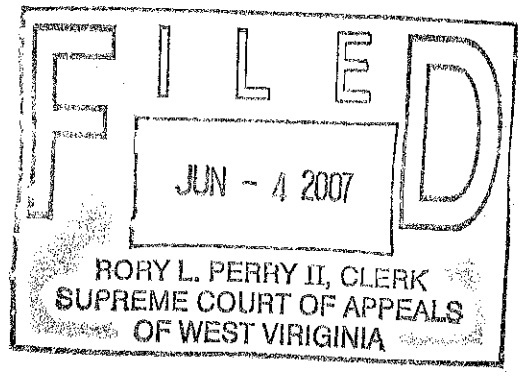
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 33350



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

Appellants,

v.

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

Appellees.

BRIEF OF APPELLEES HARMAN DEVELOPMENT CORPORATION, HARMAN MINING CORPORATION AND SOVEREIGN COAL SALES, INC.

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The Trial Court held several post-trial hearings and heard extensive argument in support of Massey's 189-page omnibus post-trial motion. Thereafter, the Trial Court entered its well-reasoned Final Order denying Massey's post-trial motion. This appeal followed.

II. COUNTERSTATEMENT OF FACTS

The facts as stated by Massey in its Brief submitted to this Court present the facts that Massey wishes the jury had found. They are not, however, a reliable or accurate portrayal of the evidence over the course of the 31 days of trial and they are not, therefore, the facts that are properly before this Court. Where there is a conflict in the evidence presented below, Massey states its side of the story, ignoring the contrary evidence submitted by Harman. Inferences that could be fairly drawn favorably to Harman are ignored. In short, the evidence presented by Massey in its Brief is not the evidence most favorable to Harman, the verdict winner, but rather only the evidence favorable to Massey. The obligations owed to this Court by those coming before it to challenge a jury verdict require a different approach. *See* Syl. Pt. 4, *Pipemasters, Inc. v. Putnam County Commission*, 218 W.Va. 512, 514, 625 S.E.2d 274, 276 (2005).

In this case, the jury was entitled to believe – and clearly did believe – that the three Corporate Appellees were destroyed by a series of tortious acts perpetrated by Massey over an extended period of time for the purpose of ridding itself, *first*, of the companies standing in its way to selling coal to LTV Steel and *then*, of the nasty consequences of its botched attempt to bully LTV into buying only from it. Among the evidence presented to the jury at trial was evidence of the enormous investment made in Harman that would have ensured Harman a long and prosperous financial future had it not been for Massey's extensive and ruthless unlawful conduct.

Hugh Caperton worked for Sovereign Coal Sales, Inc. when it was a subsidiary of Inspiration Coal Corporation. TT 7/3/02, p. 85:1-12. Caperton sold coal for Sovereign,

including coal from the Harman mine then owned by Inspiration. *Id.*; TT 6/18/02, p. 13:22 -- 14:7. Caperton continued to sell coal for Inspiration when he left Sovereign to broker coal for his own company, Dominion Energy. TT 7/3/02, p. 85:13-23. In mid-1992, the president of Inspiration asked Caperton if he might be interested in purchasing the Harman mine. *Id.*, p. 88:2-9, 90:1-20. Inspiration was in the process of getting out of the coal business and, in fact, had sold off all the equipment that had been used in the Harman mine, leaving it for contract operators to mine. TT 6/18/02, p. 58:13 -- 59:3.

Caperton, born in Slab Fork, W.Va. into a mining family, was interested in the opportunity. TT 7/3/02, p. 83:21-84:2; p. 90:18-20. He knew Harman coal was excellent coal. *Id.*, p. 91:1-15. He reached out to Henry Cook, a mining engineer whom Caperton had met when Cook was running the Harman mine for Inspiration, to advise him about the "mineability" of the coal. *Id.*, p. 93:1-10. During the 16 months he had run the mine for Inspiration, Cook had constructed a solid mine plan that would modernize the Harman operations and expand its production capacity. TT 6/18/02, p. 20:3 -- 22:14.

In 1993, Caperton's Dominion Energy became Harman Development Corporation and bought from Inspiration three companies: Harman Mining Corporation, Sovereign Coal Sales, Inc. and Southern Kentucky Energy Corporation. TT 7/3/02, p. 86:2-7; p. 99:2-14. Between 1993 and 1998, Harman paid millions of dollars to Inspiration for the three companies, both in the form of royalties on coal taken from the Harman mine and payment of assumed liabilities. Harman would have continued to pay many millions more, but for Massey's bad acts which caused Harman to have to declare bankruptcy. *See* Pl. Ex. 6.

Cook signed on to run Harman mine for Caperton, a "huge step" for Cook who had worked his entire career for large coal companies. TT 6/18/02, p. 31:5-15. He decided to take

the plunge because, "I knew . . . that it was a great coal mine." *Id.*, p. 32:8-17. The Harman mine was a great coal mine because (1) it produced very high quality metallurgical coal, referred to alternatively as "dictator coal" (because it dictated the market) or "rocket fuel"; (2) it had great miners; and (3) it had a 10 year contract with Wellmore Coal Corporation. *Id.*, p. 34:22 -- 35:12; 37:1-22; 38:10-20; 39:10-22. Wellmore blended the high quality Harman coal with lesser grade coal and sold it to LTV Steel for its coke ovens. *Id.*, p. 40:7-15.

It took Caperton and Cook over a year to get their mine up and running. TT 7/3/02, p. 109:10 -- 110:5. Over time, Caperton financed significant capital improvements to the mine with the cash generated from operations. TT 6/18/02, p. 58:4-12. He and Cook were committed to creating a top quality operation that would be there for the long term. *Id.*, p. 84:9 -- 85:11. The goal of both Caperton and Cook was to retire from Harman. *Id.*; TT 7/3/02, p. 98:8-12. Caperton and Cook shared their plans with their miners, their bank and with Wellmore, all of whom supported their business plan. TT 6/18/02, p. 101:7 -- 102:22.

Caperton and Cook could have made the decision to "pillar the mine" – that is, pull the existing pillars and engage in inexpensive "retreat mining" – and make a handsome short-term profit. Instead, they chose to invest in the long term by engaging in advance or development mining pursuant to a detailed mine plan explained in precise detail to the jury. TT 7/3/02, p. 133:14 -- 135:16.

Cook's mine plan was designed to allow him to mine the reserves owned by Harman in such a way that Harman would have convenient access to the adjoining Pittston Reserves. TT 6/18/02, p. 82:4-19. It is commonplace in the mining industry for coal companies to sell or lease their properties to other operators when it makes economic sense to allow someone else to mine their coal. *Id.*; p. 94:17-20. Because of the topography in the area, Harman had far better access

to the Pittston Reserves than Pittston did and, therefore, could reach and mine the coal far more economically than Pittston. TT 6/19/02, p. 39:6 -- 40:15. Cook had had two informal conversations with Pittston about the possibility of one day leasing its reserves. *Id.*, p. 35:2-10. On the first occasion, Pittston said it would be interested in a trade and mentioned an area of Harman's in which it might be interested in the future. *Id.*, p. 35:13 -- p.36:19. In fact, Harman had already given Pittston permission to preliminarily explore the area. *Id.*, p. 36:12-16. In the second meeting, "Jim Campbell, the fellow I was talking to, he got very interested in that and he assigned one of his marketing people to come over and take look at our side and look at potential possibilities for how some of that coal could be mined." *Id.*, p. 38:15 -- 39:5.

Even aside from the Pittston Reserves, Harman had seven million tons of coal still to mine – enough to take Cook to his retirement. *Id.*, p. 34:7-13. In each year between 1993 and 1996, Harman exceeded the minimum amount of coal the contract with Wellmore required Harman to produce and Wellmore bought every ton of it. TT 6/18/02, p. 106:3-6. Wellmore repeatedly assured Harman that it would buy every ton it produced. *Id.*, p. 103:19 -- 104:17; p. 109:15-18.

Harman took in a little less than $2 million per month from Wellmore. TT 6/19/02, p. 16:12-16. From 1993-1996, it had generated $100 million in revenues. TT 7/3/02, p. 111:1-9. It was paying its bills. *Id.*, p. 115:4-18; p. 116:12 -- 117:3. Its miners were always paid on time. *Id.*, p. 116:5-11. It was paying the retirement and Medicare obligations it had assumed from Inspiration. *Id.*, p. 119:11-16; Pl.Ex. 632. In short, it was a well managed company executing a well thought out plan.

In 1997, Harman decided to add a third production unit to the mine. TT 6/18/02, p. 97:17-23. Because of this developmental work, as well as some necessary maintenance work in

the mine, Harman advised Wellmore that production would be down in 1997. *Id.*, p. 103:2-4; p. 109:23 -- 110:10. Wellmore responded it would take whatever Harman produced. *Id.*

To fund the planned improvements, Harman sold its reserves to Penn Virginia for cash and leased back the reserves, except for those portions that could not be mined in a cost effective manner. TT 7/3/02, p. 135:19 -- 137:8. With the cash received from Penn Virginia, not only was Harman able to fund its developmental work, but it was also able to prepay the royalties owed to Inspiration. *Id.*, p. 137:9 -- 138:4.

At the same time, Wellmore expressed its confidence in Harman by its willingness to negotiate a new long-term contract with Harman with a higher price to be paid for Harman's coal. TT 6/19/02, p. 40:23 -- 42:15; 43:19 -- 44:2. In exchange for the higher price, Wellmore got a right of first refusal on every ton of coal produced by Harman. *Id.*, p. 46:19-23. In June, Harman provided Wellmore with a projection that it would produce 720,000 tons of coal in 1998. *Id.*, p. 51:12-17. As a result of its developmental work, Harman expected increased production at a lower cost. TT 6/18/02, p. 99:21 -- 100:4.

Meanwhile, unbeknownst to Harman, A.T. Massey Coal Company, under the leadership of its President and Chairman, Don Blankenship, was developing and implementing a plan to destroy its competitor, Harman, in its continuing effort to dominate the metallurgical coal market. Blankenship had tried for many years to sell coal mined from Massey's West Virginia mines to LTV, but he could never convince LTV to purchase any substantial amount of Massey coal because LTV preferred Harman's "rocket fuel."

In 1997, Massey decided that acquiring Wellmore and its parent company, United Coal Company, Inc. ("United") would assist it in obtaining the "highly enviable supplier relationship" with LTV, and, at the same time, eliminate Wellmore and United as competitors and thereby

"increase Massey influence in the high-vol metallurgical coal market." Pl. Ex. 213, 316. As recounted more fully in the Caperton's Brief, Massey, however, failed at its effort to divert the LTV business from Wellmore (and by extension, from Harman) and because of its arrogant and heavy-handed way of going about it, lost the LTV business altogether.

Having lost the LTV business, Massey decided to avoid the consequences of having to buy Harman's coal without a ready customer to sell it to. Don Blankenship directed Wellmore's president, who had just recommended that Massey take all of Harman's projected 1998 production, to threaten Harman with a declaration of *force majeure.* TT 7/17/02, p. 114-116; Pl. Ex. 267. Massey used LTV's announced intention to close its Pittsburgh coke plant as an excuse to threaten a substantial cutback of its coal purchases from Harman. *Id.*

When Cook received a letter from Wellmore threatening *force majeure*, he immediately picked up the phone and called Wellmore's president, Stanley C. Suboleski, and told him Wellmore could sell Harman's coal to anyone and, therefore, the threatened closing of the LTV plant could not be used as an excuse to purchase less coal than the contract with Harman required. TT 6/19/02, p. 52:15-24; 53:14-22; 57:12 -- 58:18. Suboleski responded by describing the letter as a "CYA." *Id.*, p. 57:21 -- 58:3. The parties agreed to meet soon to get to know each other. Cook described the subsequent meeting as "pleasant." Cook took a map of the Harman mine and he, Caperton, and the Wellmore representatives talked about Harman's plans for the future. TT 6/19/02, p. 59:4-13. There was no discussion of *force majeure. Id.*

It was not until well after that meeting that Harman learned of Massey's loss of LTV's business and sought out a meeting with Blankenship. *Id.*, p. 60:3-7; 63:3-7. At a November 26, 1997 meeting at Harman Development and Sovereign's headquarters in Beckley, West Virginia, Caperton confronted Blankenship with the fact that Massey had lost the LTV business. Caperton

told Blankenship that the loss of business was not an event of *force majeure* and not an excuse to purchase the required amount of Harman's coal in 1998. *Id.*, p. 64:20 -- 65:9; 65:22 -- 66:4. Cook described Blankenship's response: "He said for every person that you guys go out fine [sic] that says that this is not *force majeure*, I'll get three that says that it does. I spend a million dollars a month on lawyers, and if you take me to task I'll stretch this thing out for years." *Id.*, p. 66:6-10.

Harman reluctantly began discussing with Massey the possibility of Massey purchasing Harman. TT 7/8/02, p. 34:14-35:17. Harman shared with Massey at this meeting, in the context of Massey's suggestion that it buy Harman, confidential information, including future mine development plans, reserve studies, and, importantly, plans to mine the adjoining Pittston Reserves. *Id.*, p. 36:24-37:9; TT 7/30/02, p.45-46.

Within days of receiving Harman's confidential mine information, Massey delivered on its threat of a last minute notice of a drastic cutback in coal purchases. Pl. Ex. 352. Wellmore informed Harman that it would take only 205,707 of the 573,000 minimum amount of tons required under the 1997 CSA because of the closing of LTV's Pittsburgh coke plant. Pl. Ex. 352; TT 6/19/02, p. 69:15-70:2. The jury was entitled to believe that the notice was given so late in the year so that Harman would not have a chance of finding an alternative buyer for the other 500,000 tons it had projected it would produce in 1998, further pressuring Harman to negotiate with Massey for Massey's purchase of Harman. *Id.*, p. 48:17-24; Pl. Ex. 367.

As described more fully in the Caperton Brief, Massey led Harman to believe that it was engaging in good faith negotiations with Caperton for the purchase of Harman, and Harman continued to share with Massey its confidential business information. The parties agreed to a closing date for the transaction of January 31, 1998. Massey told Harman that it would assume

Harman's lease with Penn Virginia "as is" and directed Caperton to shut down the mine to prepare for the transfer to Massey. TT 7/8/02, p. 50:1-52:4; 52:8-12; 57:15-58:3; 184:6-14; TT 7/11/02, p. 141:23 -- 142:18; 7/12/02, p. 25:10 -- 26:7; Pl. Ex. 408.

Unbeknownst to Harman, however, Massey knew it would not close the transaction by the agreed upon January 31, 1998 date. Pl. Ex. 562. Massey let Harman move forward with the mistaken belief that the deal would close while Massey secretly set about using Harman's confidential information to begin negotiations to acquire a thin "wall of coal" of the Pittston Reserves completely surrounding Harman's reserves. TT 7/8/02, p. 88:14 -- 90:2. The reason was explained by Massey's Ben Hatfield. Hatfield wrote: "The property we have acquired ... greatly diminishes the attractiveness of the Harman property to parties other than Massey, and so we will more than likely get Harman in the long run." Pl. Ex. 533.

Hours before the transaction was set to close, Massey demanded changes to virtually every material term of the lease with Penn Virginia, including its term, the royalty rate, mining provisions and the recoupment period. TT 6/28/02, p. 100:22-105:9; 7/29/02, 69:1-73:10; Pl. Ex. 469. Penn Virginia attempted to salvage the deal by making concessions, but Massey refused to negotiate, hewing to its egregious demands. *Id.*, p. 100:22-103:12.

Massey rebuffed all subsequent efforts by Harman to resuscitate the deal. TT 6/28/02, p. 122:24-129:10; TT 7/29/02, p. 134:1-135:20. The bankruptcy of the Harman companies followed. Contrary to Massey's assertion in its Brief that Harman filed for bankruptcy because of a four year history of financial difficulties, the jury was fully entitled to conclude that Harman filed for bankruptcy because of Massey's intentional acts of tortious interference and its fraudulent lies and concealments that stole from Caperton his dream of following his father and

grandfather into the mining business, and left him and Harman with only a handful of assets and a mountain of liabilities.

III. ARGUMENT

A. The Judgment in Virginia in Favor of Harman Mining Corporation and Sovereign Coal Sales, Inc., Was Given Full Faith and Credit by the Trial Court, and Does Not Preclude Harman's West Virginia Case Because of Fundamental Differences Between the Two Cases.

Massey argues that a verdict rendered in a Virginia lawsuit in favor of two of the four Plaintiffs in this action against Wellmore Coal Corporation, which for a brief six month period was a sub-subsidiary of Massey, is a complete bar to Harman's recovery in this case. In support of this argument, Massey invokes the Full Faith and Credit Clause of the U.S. Constitution, the "one satisfaction rule," collateral estoppel and *res judicata*.

The Full Faith and Credit Clause of the U.S. Constitution requires West Virginia to apply the law of Virginia to determine whether, as Massey argues, the "one satisfaction rule," collateral estoppel or *res judicata* requires reversal of the judgment in favor of Plaintiffs in this action. *See Jordache Enterprises, Inc. v. National Union Fire Ins. Co. of Pittsburgh,* 204 W.Va. 465, 474, 513 S.E.2d 692, 701 (W.Va. 1998) ("In order to ensure that another state's judgment is given the same force and effect it would have in that state, the general rule appears to be that '[t]he validity and effect of a judgment must be determined by reference to the laws of the state where it was rendered.'")

Analysis of the effect of the Virginia judgment under Virginia law reveals that the Virginia judgment does not bar, in any way, the West Virginia case now before this Court. Most significantly, the Virginia judgment does not bar this case because the causes of action alleged, tried and decided in Virginia and West Virginia are different, requiring different issues to be

decided, different proof to be offered, and a different measure of damages. The Virginia and West Virginia actions were also brought against wholly different defendants.

Since the day they filed their first responsive pleading in this case, Massey has argued, when it served its purposes, that this action is about just one thing, the declaration of *force majeure* by Wellmore that a Virginia jury concluded was a breach of the 1997 Coal Supply Agreement ("CSA") between Wellmore and Harman Mining Corporation ("Harman Mining") and Sovereign Coal Sales Company, Inc. ("Sovereign"). Massey has repeated this assertion over and over again, all the way to the door of this Honorable Court, where once again, it characterizes all of Harman's claims as arising out of this single event. However, saying it – even saying it over and over and over again – does not make it so.

While the Virginia case *was* about the Wellmore breach of the 1997 CSA and *only* about Wellmore's breach of that contract, this case is about a series of tortious acts, representations and concealments by Massey undertaken for the purpose of harming – indeed, for destroying – its competitor and rival for the buying favors of LTV. Some of Massey's tortious acts, representations and concealments caused Wellmore to declare *force majeure* in such a way and at such a time as to cause maximum harm to Harman. Other of Massey's tortious acts, representations and concealments relate to communications by Massey with Harman which Massey cloaked as good faith negotiations to acquire Harman, but which were actually for the purpose of destroying Harman's relationships with its lessor, creditors, suppliers, and other parties. Massey's ultimate aim was to acquire Harman not at an agreed-upon fair price, but for nothing.

The Virginia and West Virginia actions are fundamentally different actions. For this very basic reason, the jury verdict in Harman Mining and Sovereign's favor in Virginia does not bar the jury verdict in Harman's favor in this action.

1. The "One Satisfaction Rule" Addresses the Effect of a Settlement in an Action against a Joint Tortfeasor and, Therefore, Has No Application to this Case.

Massey seems to think that Full Faith and Credit bars this action by way of the "one satisfaction rule" and that collateral estoppel and *res judicata* somehow independently achieve the same result. Collateral estoppel and *res judicata*, however, are subsets of Massey's Full Faith argument and there is no "one satisfaction rule" applicable to this case.

The "one satisfaction rule" addresses the effect of a release given to a settling tortfeasor on other jointly liable non-settling tortfeasors. This is the subject of the three cases and Section 855 of the Restatement (Second) of Torts cited by Massey in support of its "one satisfaction rule" argument.[1] This case does not involve the effect of a prior settlement on the remaining defendants in a tort action. Rather, this case involves the effect of a prior verdict in a contract action on a later tort action. Even if the Virginia and West Virginia cases were two tort actions, Section 855 of the Restatement (Second) of Torts, dealing with the effect of an earlier settlement and the giving of a release on a later action, and Virginia's related "one satisfaction rule" would have no bearing on the issues before this Court. The effect of an earlier judgment on a later action or judgment is determined solely by principles of collateral estoppel and *res judicata*. *See*

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[1] *See Chisholm v. UHP Projects, Inc.*, 30 F.Supp.2d 928, 937 n. 7 (E.D.Va. 1998) (one satisfaction rule, which "ordinarily applies when a damages award is based on a claim for which the defendants are jointly and severally liable," required amount received by seaman in settlement of admiralty action against ship owner to be set off against verdict in favor of seaman in admiralty action against contractor because both amounts were received for same injuries sustained by seaman when struck with hose being used by contractor performing services on ship); *MacKethan v. Burrus, Cootes and Burrus*, 545 F.2d 1388 (4th Cir. 1976) (payment in settlement by alleged joint tortfeasors applied as credit wiping out entire judgment against defendant accounting firm for securities fraud); *Shortt v. Hudson Supply and Equipment Co.*, 191 Va. 306, 311, 60 S.E.2d 900, 903 (1950) (Virginia adheres to "strict common-law view of the effect of ... the release of, one joint tortfeasor as affecting the rights and liabilities of others liable for the same injury.")

Restatement (Second) of Torts, Section 884 ("The effect of a judgment for or against one of several tortfeasors upon claims against others who were or may have been liable for the same harm or with reference to the same subject matter is determined by the principles of *res judicata*.") Therefore, Virginia's "one satisfaction rule" has no application to this case.

2. Collateral Estoppel Does Not Preclude Harman in this Action Because No Issue Was Decided Adversely to Harman in the Virginia Action; No Issue Decided in Virginia Was Relitigated in this Case; and the Defendants in the Two Actions Are Different.

Virginia law requires a party seeking the bar of collateral estoppel to establish by a preponderance of the evidence *in the record* all the elements necessary for its application. *Scales v. Lewis*, 261 Va. 379, 382, 541 S.E.2d 899, 901 (Va. 2001). As argued more fully in the Caperton Brief, Massey has not created the record in the Trial Court to support either its collateral estoppel or *res judicata* arguments and, therefore, its arguments fail. Its arguments also fail because, as to both collateral estoppel and *res judicata*, Massey cannot make out all of the required elements, not only because of the lack of a record, but also on the merits.

Collateral estoppel has no application to this case because: (1) most obviously, the Virginia action did not result in a valid and final judgment against Harman, the party against whom Massey seeks to apply the doctrine of collateral estoppel; (2) Massey has not carried its burden to demonstrate that any issue essential to the judgment in the prior action was relitigated in this action; and (3) the defendants in the Virginia action and this action are different and not in privity with each other.

a) No issue was decided adversely to Harman in Virginia.

Amazingly, Massey argues that the verdict in Virginia, which was in favor of Harman and against Wellmore, the party Massey contends it is in privity with, somehow benefits Massey. If, in fact, collateral estoppel had any application as between the Virginia action and this action,

it would benefit Harman and not Massey. Massey is, therefore, forced to argue, preposterously, with no citation to authority whatsoever, that the word "against," as used by the Supreme Court of Virginia in *Scales v. Lewis*, does not mean against at all, but rather means "involving." Massey has not cited one case where a Virginia court has applied collateral estoppel to bar the victor, rather than the vanquished for the obvious reason that "against" in the context of collateral estoppel means against and does not mean something entirely different.

b) No issue decided in Virginia was relitigated in this case.

Collateral estoppel precludes a party from contending differently than was previously adjudicated as to a necessary and decided issue in a prior proceeding. *See*, Restatement of Judgments, Section 27. Here, Massey has failed to identify any factual issue which was decided in the Virginia action *against* Harman and which Harman now seeks to evade in this action. Massey contends that because the Virginia jury found that Wellmore's breach of contract damaged Harman in the amount of $6 million it must have determined that nothing and no one else damaged Harman and its eventual destruction could have been caused only by the contract breach. In support of this proposition, Massey cites to a single document from the Virginia action – not the verdict, not the jury charge, not the evidence submitted in support of Harman's claimed damages, but Harman's original complaint.[2]

As this Court well knows, complaints are not uncommonly amended and cases go to the jury on theories and facts different than those originally pled often years earlier. Massey has failed to meet its burden to prove exactly what the jury in Virginia determined, the harm being compensated for, how the damages were measured, and the proof offered in support of such damages. Because Massey cannot support its argument from the record below, it resorts to arguing that "the jury necessarily determined" such facts. Massey cannot meet its burden to

[2] In Virginia, a complaint is called a motion for judgment.

prove by a preponderance of evidence that the Virginia jury made such a finding by such "necessarily determined" divination, but must show those facts from the record of the Virginia action. No such proof could be offered because there is no inconsistency between the Virginia jury's determination that Harman suffered $6 million in lost profits for breach of contract and the West Virginia jury's determination that Harman suffered greater damages because of Massey's tortious conduct. For this additional reason, therefore, Massey's challenge to the West Virginia verdict on the basis of collateral estoppel must fail.

c) The defendants in this action are not in privity with the defendant in the Virginia action.

The defendant in the Virginia action was Wellmore. The Defendants in this action are A.T. Massey Coal Company, Inc. and five of its subsidiaries. Massey argues, first, that because Wellmore was a sub-subsidiary of Massey from July 31, 1997 to February 7, 1998, that Massey was in privity with Wellmore at the time the Virginia action was tried in March 2000. In support of this proposition, Massey relies on *Mullins v. Daily News Leader*, 2001 WL 1772679 (Va.Cir.Ct. Oct. 24, 2001), a case applying *res judicata*. However, *Mullins* and this case are factually distinguishable in two key respects.

In *Mullins*, the Daily News Leader of Staunton, Virginia, was sued for libel and denial of equal protection of the law for articles about Mullins. Earlier, Mullins had unsuccessfully sued the Gannett Co., Inc., the owner of the Daily News Leader, for six causes of action for the same articles. The trial court in the second action found the Daily News was entitled to the bar of the first action because, "The touchstone of privity for purposes of *res judicata* is that a party's interest is so identical with another that representation by one party is representation of the other's legal interest." *Id.* at *2, *quoting State and Water Control Bd. v. Smithfield Foods,* 261 Va. 209, 214, 542 S.E.2d 766, 769 (2001). The trial court's conclusion was correct because the

parent, Gannett, was sued in the first case for the acts of its subsidiary. Gannett's interest in defending those acts was obviously the same as the newspaper's interest in defending the same acts.

In this case, Massey was not sued for what Wellmore did, but was sued for what Massey did to cause Wellmore to take certain actions *and* for other wrongful actions of Massey not involving Wellmore at all. *See also Hermes Automation Technology, Inc. v. Hyundai Electronics Industries Co., Ltd.*, 915 F.2d 739, 751 (1st Cir. 1990) (fact that defendant was prime shareholder of entity in prior action does not automatically entitle it to the benefit of *res judicata*, distinguishing *Capraro v. Tilcon Gammino, Inc.*, 751 F.2d 56 (1st Cir. 1985), where parent was entitled to preclusive effect of prior judgment in favor of subsidiary because plaintiffs sought relief against parent for acts of subsidiary).

Furthermore, Gannett and the Daily News were parent and subsidiary at the time of both lawsuits. At the time the Virginia action was tried, Wellmore had not been a Massey subsidiary for over two years. Although Virginia has not spoken to the issue, the weight of authority is that the relevant time for determining privity is (as logic would indicate) the time of the prior proceeding, not the time the acts complained of occurred. *See Stichting Ter Bejartiging (etc.) v. Schreiber*, 327 F.3d 173, 186 (1st Cir. 2003) ("...because the doctrine of collateral estoppel asks whether a party is bound by the result of a prior judicial proceeding . . . the relevant inquiry is the closeness of the relationship at the time of the prior proceeding."); *Texas Capital Securities Management, Inc. v. J.D. Sandefer, III*, 80 S.W.3d 260, 266 (Tex. Ct. App. 2002) ("The question of privy revolves around the prior cause of action, not the time of injury."); *Nordhorn v. Ladish Company, Inc.*, 9 F.3d 1402, 1405 (9th Cir. 1993) (same).

Massey also argues that it is in privity with Wellmore because "A.T. Massey provided defense and indemnification to Wellmore in the Virginia action." Massey Brief, p. 21. Regardless of whether this alone would allow for a determination that Massey and Wellmore are in privity for the purposes of either collateral estoppel or *res judicata*, this fact is simply not in the record, as the gaping absence of any citation to the record in support of this bald assertion would indicate. Neither does Massey cite any Virginia authority in support of the proposition that Massey's alleged "defense and indemnification" of Wellmore in the Virginia action would result in a finding of privity under Virginia law, nor does there appear to be any such authority.

Additionally missing for a finding of privity between Wellmore and Massey is the essential element of mutuality. "A litigant cannot invoke collateral estoppel unless he would have been bound had the litigation of the issue in the prior action reached the opposite result." *Scales v. Lewis*, 261 Va. at 382, 541 S.E.2d at 901. At the same time Massey has argued that this action and the Virginia action are about the same thing between the same parties, it has also fought tooth and nail to save itself from any adverse consequence of the finding against Wellmore in Virginia. In its Memorandum in Support of Motion in Limine filed April 1, 2002, p. 6, Massey argued that Wellmore's conduct should not be attributed to it, stating, "There is no legal basis for Plaintiffs' attempt to hold the Defendants in this case responsible for conduct on the part of Wellmore, particularly for conduct even prior to the time Massey acquired its parent, United Coal."

Under Virginia law, Massey cannot have it both ways. Massey cannot be in privity with Wellmore when it suits its interests and not be in privity when it does not. For all these reasons, Massey's privity argument fails and with it fails its collateral estoppel argument.

3. *Res judicata* Does Not Bar This Action Because Massey Cannot Meet Any of the Virginia Requirements for *Res judicata.*

Massey's *res judicata* argument similarly fails because the defendants in the Virginia and West Virginia action were not the same and not in privity. Massey's *res judicata* argument also fails because Massey cannot show by a preponderance of the evidence *any* of the other requirements for a finding of *res judicata* under Virginia law, again, both because of the lack of any record to support any of the requirements and on the merits. *Davis v. Marshall Homes, Inc.*, 265 Va. 159, 165, 576 S.E.2d 504, 506 (Va. 2003) (a finding of *res judicata* requires: "identity of the remedy sought; identity of the cause of action; identity of the parties; and identity of the quality of the persons for or against whom the claim is made.")

a) The remedies in Virginia and West Virginia are not the same.

Without a record, the Court must rely on those few facts about the Virginia judgment that are undisputed to determine whether the verdict in Virginia and the verdict in West Virginia provided Harman with the same remedy. The parties agree that the verdict in Virginia was for $6 million and it was awarded for the breach by Wellmore of the 1997 CSA with Harman. Beyond that, Harman emphatically disagrees that the damages awarded in Virginia represented, in any fashion, an amount to compensate Harman for the destruction of its business. As this Court well knows, the remedy for breach of a contract for the sale of goods (generally lost profits) is not the same as a remedy under West Virginia law for the destruction of a business (the difference in the value of the business before and after the alleged bad acts). *Compare* Va. Code Ann. § 8.2-708 to *Rufus v. Lively*, 207 W.Va. 436, 533 S.E.2d 662 (W.Va. 2000) .

The fact that Harman sought and was awarded money damages in both actions does not mean, as Massey argues, that Harman was awarded the same remedy in both actions for *res judicata* purposes. *See e.g., Carter v. Hinkle*, 189 Va. 1, 52 S.E.2d 135 (1949) (money damages

awarded for property damages did not preclude later action for money damages for personal injuries sustained in the same accident). "Remedy" for *res judicata* purposes refers to what the judgment compensates the plaintiff for, not for the form of the judgment, as the cases relied on by Massey make plain.[3]

The damages awarded in West Virginia did not compensate Harman for Wellmore's breach of contract. Indeed, Judge Hoke charged the jury: "[Y]ou may not award any money amounts as compensatory damages for breach of contract. The civil wrong of tortious interference here is separate and apart from any damages for breach of contract." TT 7/31/02, p. 188:11-18. "Where a case has been submitted to a jury an appellate court cannot presume that the jury did not understand or follow the clear import of the instructions given." *Dustin v. Miller*, 180 W.Va. 186, 189, 375 S.E. 2d 818, 821 (1988) (citing *Iacuone v. Pietranton*, 138 W. Va. 775, 77 S.E.2d 884 (1953).

Therefore, *res judicata* does not bar this action because, in addition to the defendants in Virginia and West Virginia being different, so too are the remedies.

b) The causes of action in Virginia and West Virginia are not the same.

The causes of action litigated in West Virginia (various torts) and the cause of action litigated in Virginia (breach of contract) are obviously different. Therefore, Massey must argue that although Harman did not bring the same causes of action in Virginia as in West Virginia, the causes of action brought in West Virginia were merged into the Virginia judgment and, thereby, extinguished. Massey's argument lies in the face of joinder rules commonly followed at both the state and federal levels of the judicial system.

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[3] *See Ezrin v. Stack*, 281 F.Supp.2d 67 (D.C. D.C. 2003) (in both actions, Ezrin sought damages for Stack's failure to pay taxes on behalf of a business jointly owned by Ezrin and Stack and for Stack's alleged wrongful sale of the parties' restaurant); *In re Spike Broadband Systems, Inc.*, No. 01-13453 - JMD, 2003 WL 21488663 (June 19, 2003 Bkrtcy D.N.H. 2003) (both actions sought damages for breach of the same contract).

In *Davis v. Marshall Homes, Inc., supra*, the Virginia Supreme Court confronted a similar argument involving two similar actions, one for breach of contract and one for fraud. The plaintiff in *Davis* had filed an earlier suit for fraud against three defendants, alleging they had misrepresented the value of homes that she had lent them money to acquire and further misrepresented their intention to refurbish the homes before selling them for a profit. 265 Va. at 163, 576 S.E.2d at 505. She sought damages in an amount representing the difference in the actual value of the homes and the value of the homes as represented to her. *Id.* The action for fraud was dismissed with prejudice. *Id.* In the action before the Virginia Supreme Court, Davis had subsequently sued two of the three defendants in the prior action for money due and owing on the notes evidencing the money she had lent them and for money she had expended herself to refurbish the homes. *Id.* The defendants in the second action sought dismissal of the case, arguing that the fraud action was based on the same facts and sought the same remedy as the contract action. *Id.* at 163-64, 576 S.E.2d at 505-506.

The Virginia Supreme Court rejected defendants' argument that Davis had only one cause of action and improperly split it. The Court found that the evidence necessary to prove the breach of contract would have been admissible in the fraud action, but the fraud action required the proof of much more than the breach of contract. *Id.* at 166, 576 S.E.2d at 507.

> The mere fact that some evidence relevant in plaintiff's action for fraud may be relevant to prove her distinct and separate contract claim for nonpayment of the deed of trust notes does not, for purposes of *res judicata*, mean that plaintiff only has one cause of action.

Id. Further, fraud must be proved by clear and convincing evidence, rather than the preponderance of evidence required to sustain the breach of contract claim. *Id.; accord, MDM Associates v. Johns Bros. Energy Technologies, Inc.*, No. L:01-1190, 2003 WL 24291248 (Va.

Cir. Ct. Sept. 15, 2003) ("Clearly, to establish fraud requires proof of different facts than that necessary to prove breach of contract; furthermore, it also requires a higher standard of proof.")

The causes of action litigated in this action are different causes of action than that litigated in the Virginia action because they involve different legal theories (including fraud, as in *Davis v. Marshall),* result in different measures of damages, involve parties which were not parties to the Virginia case and involve evidence which was separate and distinct from that offered in Virginia and which was weighed against different burdens of persuasion. That there may have been some overlap in the evidence in the two proceedings does not make them "one cause of action." *Davis v. Marshall,* 265 Va. at 165-66, 576 S.E.2d at 507.

c) Because the defendants in Virginia and West Virginia are not in privity, the quality of the parties involved in the two actions are not the same.

For all the reasons already argued above, the Defendants in this action are not in privity with Wellmore and therefore, "the quality of the persons" involved in the two actions is not the same. *See Rawlings v. Lopez*, 267 Va. 4, 5, 591 S.E.2d 691, 692 (2004) (interchangeably using "privity" and "quality of persons" for *res judicata* purposes). For this reason too, this action was not barred by Virginia's *res judicata* laws.

B. The Trial Court Correctly Applied West Virginia Law in This Action to Harman's Tort Claims.

1. There Is Only One Material Distinction between Virginia Law and West Virginia Law that is Relevant to this Appeal.

West Virginia begins any choice of law analysis by determining first whether there is any actual conflict between its laws and the laws of any other state that needs to be resolved. *State of West Virginia ex rel. Chemtall Inc. v. Madden*, 216 W.Va. 443, 451, 607 S.E.2d 772, 780 (2004). Massey ignores this principle and instead labels the entire trial a "sham" and the jury's verdict "illegitimate" because of the Trial Court's purportedly erroneous refusal to apply Virginia law to

the entire proceeding. Massey Brief, p. 31. However, Massey ultimately identifies only the following claimed distinctions between the two state's laws: (1) Virginia law would have allowed an affirmative defense of "inevitability" to Massey but West Virginia law does not; and (2) Virginia law does not recognize causes of action for negligent misrepresentation and civil conspiracy, but West Virginia law does; and (3) punitive damages are capped at $350,000 under Virginia law but are not limited by statute under West Virginia law. *Id.*, p. 32-33.

Massey claims that it desired to argue at trial that it could not have destroyed Harman because Harman's failure was "inevitable." Massey does not cite to a single Virginia statute, case or other authority supporting the availability of such a defense on the facts of this case and Harman knows of no such authority. Without legal authority to frame Massey's argument or any clearer articulation of Virginia's supposed "defense of inevitability," there is no reason to believe that the laws of the two states differ on this point.[4]

With regard to negligent misrepresentation and civil conspiracy, Massey concedes that Harman withdrew these claims prior to jury deliberation. Thus, no portion of the judgment was based on these theories. In any event, once again Massey offers no authority for the proposition that Virginia does not recognize the torts of negligent misrepresentation and civil conspiracy.[5]

Massey does, however, identify one distinction between Virginia and West Virginia law that at least has colorable relevance to this appeal. A Virginia statute caps punitive damages at $350,000, *see* Va. Code Ann. § 8.01-38.1, whereas punitive damages under West Virginia law are limited only by the jury's good judgment, review by the courts, and the requirements of due

[4] Notably, later in their brief, Massey argues that West Virginia, in fact, *does* permit such an "inevitability defense" to claims of tortious interference. Br. Appellant at 52-54.

[5] Virginia courts clearly do recognize civil conspiracy claims, both under the common law and as a statutory cause of action. *See Catercorp, Inc. v. Catering Concepts, Inc.*, 246 Va. 22, 431 S.E.2d 277 (1993) (stating elements of both common law and statutory conspiracy claims). Virginia law appears to be unclear on the existence of a negligent misrepresentation cause of action, at times construing claims for negligent misrepresentation as claims for constructive fraud. *See Richmond Metro. Auth. v. McDevitt Street Bovis, Inc.*, 256 Va. 553, 559, 507 S.E.2d 344, 347 (1998) ("The essence of constructive fraud is negligent misrepresentation.").

process. *See Boyd v. Goffoli*, 216 W.Va. 552, 563-67, 608 S.E.2d 169, 180-84 (2004). In this case, the jury awarded punitive damages of $2,000,000 to Harman, an award which would be reduced to $350,000 under Virginia law.[6] As discussed below, the Trial Court properly allowed the jury's full award to stand.

2. A *Lex Loci* Analysis Compels Application of West Virginia's Punitive Damages Law.

West Virginia applies the *lex loci delicti* doctrine in choice of law analyses, providing, in tort cases, "the substantive rights between the parties are determined by the law of the place of injury." *Vest v. St. Albans Psychiatric Hosp., Inc.*, 182 W.Va. 228, 229, 387 S.E.2d 282, 283 (W.Va. 1989). Under a *lex loci delicti* analysis, West Virginia law applies to Harman's tort claims and to the measure of damages for the complained of tortious conduct.

The corporate headquarters for two of the three corporate Plaintiffs was in West Virginia and all three corporate Plaintiffs received revenues in West Virginia. Consequently, they suffered the injury for which they sought compensation – their financial ruination – in West Virginia. When Massey interfered with Harman's business relationships, it caused those revenues to disappear, and the impact on Harman was felt in West Virginia. *See, e.g., ORI, Inc. v. Lanewala*, 147 F. Supp.2d 1069, 1077 n.9 (D. Kan. 2001) (applying *lex loci delicti* rule to tortious interference claim and holding that "where the wrong alleged is a financial harm, the court looks to the state in which the plaintiff felt the financial harm"); *Janmark, Inc. v. Reidy*, 132 F.3d 1200, 1202 (7th Cir. 1997) (injury stemming from tort of interference occurred in Illinois, where plaintiffs suffered financial harm); *Medline Indus., Inc. v. Maersk Medical Ltd.*, 230 F. Supp.2d 857, 864 (N.D. Ill. 2002) (place of injury for tortious interference claim was state of plaintiff's principal place of business where "economic impact of tortious interference will be

[6] At most, any error in applying West Virginia's punitive damages law over Virginia's would call for a reduction in the punitive damage award to $350,000 for Harman and $350,000 for Caperton, not a new trial.

felt"). Therefore, the Trial Court properly applied West Virginia's law on punitive damages to this case.

3. A Second Restatement Analysis Likewise Compels Application of West Virginia's Punitive Damages Law.

This Court has utilized the "most significant relationship test" articulated in the Restatement (Second) of Conflicts when dealing with complex choice of law issues. *See Lee v. Saliga*, 179 W.Va. 762, 768-69, 373 S.E.2d 345, 351-52 (W.Va. 1988). With respect to the availability of damages stemming from tortious conduct, Sections 145 and 171 of the Restatement provide that the state with the most significant relationship to the underlying tort, in light of the principles articulated in Section 6 of the Restatement, determines the measure of damages.[7] Section 6, in turn, lists the factors generally relevant to the choice of the applicable rule of law. Those factors include the policies of the forum and other interested states, as well as certainty, predictability, and uniformity of result. *See* Section 6(2)(b), (c), (e) and (f). Further, Section 145 specifies four particular contacts to be taken into account in applying the principles of Section 6 to torts: (a) the place where the injury occurred; (b) the place where the conduct causing the injury occurred; (c) the domicile, residence, nationality, place of incorporation and place of business of the parties; and (d) the place where the relationship, if any, between the parties is centered.

Importantly, West Virginia has a strong interest in the application of its punitive damages law to the facts of this case. *See* Restatement, Section (2)(b), (c), and (e). Two of the three corporate plaintiffs are West Virginia residents and the impact on all three of them was felt in West Virginia. West Virginia's punitive damages law is designed to protect such plaintiffs by deterring individuals and businesses from wrongfully injuring West Virginia citizens and

[7] All references to the Restatement in this section of the brief are to the Restatement (Second) of Conflicts.

businesses operating in West Virginia. Accordingly, Massey's implausible argument that its federal constitutional rights were violated through application of West Virginia law is clearly misplaced. *See Phillips Petroleum Company v. Shutts*, 472 U.S. 797, 818 (1985); *Boyd v. Goffoli*, 216 W. Va. at 562, 608 S.E.2d at 179 (2004) (West Virginia has a legitimate interest in imposing punitive damages to punish a defendant for unlawful acts against its citizens even when committed outside of West Virginia).

A comprehensive analysis of the relevant contacts in this case and the contacts listed in Section 145 of the Restatement confirms that West Virginia's rule on punitive damages is the appropriate rule to apply. For the same reasons discussed in the context of the *lex loci delicti* discussion above, the place of the injury was West Virginia. Much of the conduct causing the injury occurred in West Virginia – telephone calls to Harman's West Virginia office, letters received by Harman in West Virginia, meetings in West Virginia, and other acts which together constituted tortious interference and fraud causing harm in West Virginia. *See* Final Order at 14-20, 24. Most of the interactions between Harman and Massey occurred in or were tied to West Virginia and, thus, West Virginia's punitive damages rule should apply.

4. The Choice Of Law Provision in the 1997 CSA Does Not Govern This Dispute.

Defendants argue that the choice of law clause in the 1997 CSA between Harman and Wellmore compels the application of Virginia law to Harman's tort claims against wholly different defendants in this action. The CSA provides: "This Agreement, in all respects, shall be *governed, construed, and enforced* in accordance with the substantive laws of the Commonwealth of Virginia." Pl. Ex. 133, CSA § 8.1 (emphasis added).

The present action, unlike the prior action in Virginia, is not an action to "enforce[]" the 1997 CSA. Nor does the judgment below depend on a construction or interpretation of the 1997

CSA. The CSA does not and could not purport to dictate the law to be applied in a tort action between a group of parties, all but two of whom are non-signatories to the contract, premised on a far larger course of tortious and fraudulent activity undertaken by Massey, a non-party to the Agreement. *See e.g., Lazard Freres & Co. v. Protective Life Ins. Co.*, 108 F.3d 1531, 1540 (2d Cir. 1997) ("[A] contractual choice of law provision governs only a cause of action sounding in contract, not one sounding in tort."); *Triad Int'l Maintenance Corp. v. Guernsey Air Leasing, Ltd.*, 178 F. Supp.2d 547, 552 (M.D.N.C. 2001) (rejecting argument that non-party to contract was bound by choice of law provision on ground that "[i]t is a fundamental principle of contract law that parties to a contract may bind only themselves and . . . may not bind a third person who is not a party to the contract in absence of his consent to be bound.")

C. The Jury's Damages Awarded Was Wholly Proper.

1. Harman's Damages Expert Followed *Rufus v. Lively* and Calculated Harman's Value Before and After Massey's Bad Acts, Resulting in a Damages Claim Reflecting an Amount that Would Put Harman in the Same Financial Condition but for Massey's Conduct.

There can be no doubt that Harman was worse off after Massey's tortious conduct than before it. Before Massey acquired United Coal Company for the purpose of interfering with the Wellmore-Harman relationship and began its campaign to disrupt Harman's business relations, Harman was receiving a little less than $2 million a month from Wellmore. Harman had just negotiated an increase in the price Wellmore would pay for its coal, and Wellmore had recently repeated what it had said on many earlier occasions, that it would purchase as much coal as Harman could mine. Harman had been investing heavily in capital improvements to its mine and equipment and expected to be rewarded in 1998 with increased production and decreased costs. Harman projected for Wellmore that it would extract 720,000 tons of coal from its mine in 1998. When Henry Cook was asked whether he thought, mid-year 1997, that Harman was going to

make it, he responded unequivocally, "Oh, I knew we'd stay in business." TT 6/18/02, p. 100:11-14.

However, because of Massey's tortious conduct, Harman did not stay in business, however. Rather than increased production in 1998, Harman had increased debt and significantly fewer assets. The jury properly determined that Harman's destruction was proximately caused by Massey's bad acts and awarded Harman the full amount of the damages claimed by Harman.

The question raised by Massey's challenge to the testimony of Harman's damages expert, Mark Gleason, is whether someone can cause so much harm and get away without having to pay a single cent in damages. Massey says it can because Harman's fair market value can only be characterized as zero before Massey's bad acts and was still zero after its bad acts.

Harman put before the jury in this case evidence in support of a claim for compensatory damages in the total amount of $29,696,000. According to Gleason, $21,501,000 of this amount was the difference in the value of Harman before and after Massey's tortious conduct. TT 7/16/02, p. 189:1 -- 191:8.

Gleason calculated the value of Harman on July 31, 1997, the date on which Massey acquired Wellmore, by (1) accepting the business enterprise value of Harman's assets as determined by Alan K. Stagg, an expert in the appraisal of coal mining operations; (2) adding to it the value of certain tax credits that Harman was entitled to receive in the future; (3) deducting from it three percent of the business enterprise value to account for a lack of marketability; and finally, (4) deducting all of Harman's liabilities, including both short and long-term liabilities. *Id.;* p. 173:19-24, 177:11 -- 178:2. Because Harman's short and long-term liabilities exceeded

the adjusted business enterprise value of its assets, Gleason testified the company had a negative value of $11,799,000. *Id.*, p. 181:21-23.

After Massey's bad acts, Harman had virtually no assets left – just a small piece of real estate unrelated to its coal operations and some remaining tax credits. At the same time Harman's assets had shrunk (by almost $16.5 million), its liabilities had grown (by $4.8 million). *Id.*, 185:21 -- 187:10.

Massey's argument that Harman is not entitled to recover any damages because it had a zero or negative value even before Massey's bad acts is *precisely* the argument that was made by the defendants and rejected by this Court in *Rufus v. Lively*, *supra*. In *Lively,* the trial court submitted to the jury a verdict form that allowed it to stop deliberating if it concluded the value of the plaintiffs' business was zero or less prior to the wrongful conduct of defendants. This Court found the use of this special interrogatory to be "inconsistent with and contradictory to the law … and otherwise obtuse," explaining:

> We are unpersuaded by [defendants'] contention that a determination that the business had a value of zero or less rendered all other issues in the case moot. A business with a value of zero or less could, nevertheless, be injured by wrongdoing that created additional debt or further impeded its ability to pay existing debt.

207 W.Va. at 445 and n.15, 533 S.E.2d at 671 and n.15. The import of Gleason's testimony was that Harman, a business worth a value less than zero, was injured by Massey's wrongdoing that created additional debt and further impeded Harman's ability to pay existing debt because of the near total desolation of its assets.

Lively set forth the basic template to be employed for the calculation of damages for the wrongful destruction of a business – that is, a before and after comparison of the business' value. *Id.* at 444, 533 S.E.2d at 670. Although the Court did not set forth exactly how a business with

an original fair market value of zero or less should go about proving the damages it incurred as the result of its wrongful destruction, clearly the Court believed it could be done.

Gleason's approach in this case clearly mirrors the *Lively* formulation, adapted to the problem of calculating damages for a company with greater liabilities (including very long-term liabilities that did not threaten its continued existence) than assets. His approach also conforms to two fundamental and well-accepted principles of West Virginia damages law. First, West Virginia law holds that "[p]rimarily, the aim of compensatory damages is to restore a plaintiff to the financial position he/she would presently enjoy but for the defendant's injurious conduct." *Id.* at 442, 533 S.E.2d at 668; *accord Hannah v. Heeter,* 213 W.Va. 704, 584 S.E.2d 560 (W.Va. 2003). Second, West Virginia law does not require that damages be calculated "to the exactitude of a mathematical calculation," but only "to a reasonable certainty or a reasonable probability." *Mollohan v. Black Rock Contracting, Inc.*, 160 W.Va. 446, 452, 235 S.E.2d 813, 816 (W.Va. 1977).

Although when a business is susceptible to standard valuation methods, a before and after comparison of fair market value is the best method of calculating damages, it is the wrongdoer and not the innocent victim who should shoulder the burden of any uncertainty in the amount of damages. *Indu Craft, Inc. v. Bank of Baroda*, 47 F.3d 490, 496 (2d Cir. 1995). "[W]hen reviewing the sufficiency of the damages evidence, we are guided by the principle that if a plaintiff has shown it more likely than not that it has suffered damages, the amount of damages need only be proved with reasonable certainty." *Id.*

In *Bishop v. East Ohio Gas Co.*, 143 Ohio St. 541, 56 N.E.2d 164 (Oh. 1944), the defendant gas company was accused of destroying the plaintiff's business of manufacturing and

selling a kind of yogurt when it broke the flasks containing the yogurt cultures.[8] The Court of Appeals held that because the plaintiff's business had no market value, the plaintiff could recover nothing more than the value of the cultures themselves, which it put at $4. The Ohio Supreme Court reversed, accusing the Court of Appeals of substituting its judgment for the judgment of the jury and the trial court.

In reaching its decision, the Ohio Supreme Court cited two treatises, McCormick on Damages ("The rule that the market value is the measure of damages for the wrongful conversion of personal property is subordinate to the fundamental rule that the owner must be fully compensated.") and American Jurisprudence ("Where personal property is without market value, then the law allows the next best evidence to be given to ascertain its value.") 143 Ohio St. at 546, 56 N.E.2d at 166. These common sense guidelines are equally applicable to this case and provide further confirmation of the validity of Gleason's approach to calculating the amount of damages suffered by Harman because of Massey's wrongful conduct. The damages calculated by Gleason and awarded by the jury represent the amount of money required to return Harman, as near as money can do it, to the position it was in prior to Massey's bad acts – before it lost the vast bulk of its assets and incurred additional liabilities – and, therefore, satisfied the objective of any damages award and met the requirements of *Lively*.

2. Harman's Expert in Valuing Mining Operations Met All the Rule 702 Requirements.

Massey complains that the Trial Court also should have excluded the testimony of Alan K. Stagg, who computed the business enterprise value of Harman's assets prior to Massey's bad acts, which Gleason used as the starting point for his analysis of the value of Harman as of July 31, 1997. Massey contends that Stagg's testimony failed to meet the requirements of

[8] The facts of the case are best derived from the opinion of the Court of Appeals at No. 18969, 1943 WL 3194 (June 28, 1943).

W.Va.R.Evid. 702 because it was both unreliable and irrelevant. "Rule 702 has three major requirements: (1) the witness must be an expert; (2) the expert must testify to scientific, technical or specialized knowledge; and (3) the expert testimony must assist the trier of fact." *Gentry v. Mangum*, 195 W.Va. 512, 524, 466 S.E.2d 171, 183 (W.Va. 1995).

Massey raises the issue of Stagg's qualification as an expert for the first time on appeal and, for this reason, this issue is waived.[9] Nonetheless, the Court may be assured that Stagg is a qualified expert when it comes to valuing mining operations. In fact, nothing illustrates so starkly Massey's penchant for omitting from its discussion any evidence that would undermine its position, than its attack on Stagg.

Stagg is, as Massey points out, a geologist. However, Massey fails to point out many additional facts of relevance to Stagg's qualifications, including:

- Stagg's entire professional career has been spent in the mining and natural resources industry. TT 6/25/02, p. 96.
- Stagg began his career in 1964 at New Jersey Zinc Company. In 1970, he designed and implemented a coal program for New Jersey Zinc Company after conducting a study of the coal industry and recommending it as an area in which New Jersey Zinc Company should become involved. Most of his time thereafter was spent identifying coal properties and operations that were for sale or potentially for sale and then conducting an evaluation of them. *Id.*, p. 99-100.
- In 1975, Stagg started his own consulting business and for the past 27 years he has spent the major portion of his time consulting in coal. *Id.*, p. 103.
- Stagg has appraised at least 150 mineral properties and 80 - 85% of these have been coal properties. *Id.*, p. 107.
- Stagg has extensive experience in Buchanan County, where the Harman mine was located, having completed more than 50 projects there. *Id.*, p. 105.

[9] At the end of Mr. Stagg's voir dire, Harman proffered him as an expert "in the area of mineral appraising, mineral appraisals, in the area of projecting costs, economic forecasts, and generally, in the coal industry." Massey did not object to qualifying Mr. Stagg as an expert in mineral appraisals and in projecting costs and economic forecasts, but did object to qualifying him as an expert in the coal industry generally. Mr. Stagg's qualifications as an expert in the appraisal of mineral properties is the only thing at issue on this appeal. TT, 6/25/02, p. 111.

- Stagg has taught a number of courses, seminars and workshops in the economic evaluation of mineral deposits. *Id.*, p. 97.

Furthermore, Stagg did not work alone. He was assisted in his work by a team of individuals, including a mining engineer, a coal preparation engineer, and a financial analyst, as well as others. *Id.*, p. 117.

Stagg's testimony was based on technical and specialized knowledge. At trial, Stagg explained that the business enterprise value of a company's assets is the value of the assets assuming that they will continue to be used in an ongoing business. *Id.*, p. 120. To determine the business enterprise value of Harman's assets, Stagg and his team calculated the amount of the available reserves of coal which could be mined by Harman (which is not the same thing as the amount of coal owned by Harman); the rate at which the reserves could be mined (right down to the number of cuts which could be made per shift); the price at which the coal could be sold (a potential buyer of Harman's assets would not have assumed an increase in the price of coal and, in fact, would have assumed the price would go down (*id.*, p. 53)); and the cost to mine it (both labor and supplies, even going so far as to call suppliers to determine the cost of "belts, roofbolts"). *Id.*, p. 59. Finally, the Stagg team constructed a cash flow model and discounted the cash flow to determine the final business enterprise value of Harman's assets. *Id.*, p. 65.

Stagg's testimony assisted the Harman jury because he testified about something outside the common knowledge and experience of a jury, and because his testimony was relevant. *See Watson v. Inco Alloys International, Inc.*, 209 W.Va. 234, 545 S.E.2d 294, 303 (W.Va. 2001) ("This standard is a liberal one that favors admissibility.")

Massey argues that Stagg's testimony was irrelevant because it was wholly speculative; however, in order to support this argument, Massey again misrepresents Stagg's testimony. Notably, Stagg did *not* determine the value of the Harman mining operation to *Harman* – that is,

to the three corporate Plaintiffs as they existed on July 31, 1997 – but to a potential buyer of the mine and its related assets who is "a typical, reasonable, competent, and [knowledgeable] coal operator." TT 6/25/02, p. 150. Thus, it does not matter to Stagg's valuation whether the three corporate Plaintiffs could have acquired the Pittston Reserves or whether they had the financial wherewithal to build a preparation plant.

The sole case relied on by Massey in support of its attack on Stagg did not involve a business valuation expert standing in the shoes of a hypothetical reasonable buyer, but the calculation of future lost profits by a proffered expert standing in the shoes of the plaintiff company. In *KW Plastics v. U.S. Can Co.*, 131 F.Supp.2d 1289 (M.D. Ala. 2001), a financial officer of U.S. Can calculated future lost profits based on a plant capacity which he admitted was "a guess." When confronted with proof that his "guess" was in error, he opined that U.S. Can could increase its capacity by spending $2.6 million for a new plant and new equipment, but his report and deposition testimony were "at war with each other" over the basis for calculation of the costs associated with the expansion. *Id.* at 1293. It was his failure to adequately explain the basis for these cost calculations that caused the court to conclude that it could not find "with any degree of certainty that [the expert] applied sound economic principles in a reliable way." *Id.*

Stagg, however, adequately explained the bases for all of his calculations or conclusions as the 166 pages of his direct examination clearly attests and the jury was free to accept or reject any of them. TT 6/25/02, p. 96; 6/26/02, p. 1-99. "Once a witness is permitted to testify, it is within the province of the jury to evaluate the testimony, credentials, background, and qualifications of the witness to address the particular issue in question. The jury may then assign the testimony such weight and value as the jury may determine." *West Virginia Div. of*

Highways v. Butler, 205 W.Va. 146, 516 S.E.2d 769, 775 (W.Va. 1999), *quoting Cargill v. Balloon Works, Inc.*, 185 W.Va. 142, 405 S.E.2d 642, 647 (W.Va. 1991).

"'The admissibility of testimony by an expert witness is a matter within the sound discretion of the trial court, and the trial court's decision will not be reversed unless it is clearly wrong.'" Syl. Pt. 1, *Watson v. Inco Alloys Int'l, Inc,* 209 W.Va. 234, 545 S.E.2d 294 (2001), *quoting* Syl. Pt. 6, *Helmick v. Potomac Edison Co.*, 185 W.Va. 269, 406 S.E.2d 700 (1991), *cert. denied,* 502 U.S. 908 (1991). The Trial Court did not err in admitting the testimony of Mr. Stagg, a qualified expert in the valuation of mining assets, who undertook a thorough and detailed analysis of the task assigned to him by Harman, and who fully explained the bases for all of his assumptions and conclusions, none of which were mere speculation.

3. The Jury Was Entitled to Award Harman Consequential Damages

Harman presented extensive evidence of costs incurred and expenditures made as a direct consequence of the actions of Massey. The award of consequential damages is within the province of the jury and should not be disturbed. Syl. Pt. 6, *Roberts v. Stevens Clinic Hospital,* 176, W.Va. 492, 345 S.E.2d 791(1986). The trial judge's endorsement of the jury's award is also entitled to great deference. Syllabus Pt. 9, *Alley v. Charleston Area Medical Center, Inc.*, 216 W.Va. 63, 602 S.E.2d 506 (2004).

The jury's award of consequential damages to Harman, therefore, should be affirmed by this Court.

4. The Jury Accurately Calculated Pre-Judgment Interest And, for This Reason, the Failure to Have the Court Calculate It Is Harmless Error.

Massey does not argue that Harman is not entitled to an award of pre-judgment interest on the amount of its compensatory damages, nor that the amount was calculated incorrectly. Rather, Massey argues only that the Trial Court erred when it allowed the jury to calculate the

pre-judgment interest. Massey is correct that West Virginia requires that the calculation of pre-judgment interest be done by the Court and not the jury. W.Va. St. § 56-6-31. However, this does not mean that Massey is entitled, as requested, to a remittitur of the interest awarded by the jury. "[A] technical error that does not affect the judgment, because the correction of such error would not tend to produce a different result" is a harmless error. *Weirton Medical Center, Inc. v. West Virginia Board of Medicine,* 192 W.Va. 72, 78, 450 S.E.2d 661, 667 (W.Va. 1994);. *see also* Syl. pt. 4, *Burns v. Goff,* 164 W.Va. 301, 262 S.E.2d 772 (W.Va. 1980) ("'An error which is not prejudicial to the complaining party is harmless and does not require reversal of the final judgment'").

In this case, the jury awarded precisely the amount of damages calculated by Harman's expert, Gleason, including the amount of pre-judgment interest he calculated was due. The Trial Court could be confident that it would have awarded the same amount in prejudgment interest because the jury's award was the mirror image of the expert's calculations, and because his calculation of pre-judgment interest was in accordance with the law at the time (allowing ten percent pre-judgment interest). This is undoubtedly what the Trial Court had in mind when it denied Massey's post-trial challenge to the jury's award of pre-judgment interest. By entering judgment in the amount awarded by the jury, the Trial Court ratified the jury's calculation of pre-judgment interest and embraced it as its own.

Any error committed in allowing the jury to calculate and award pre-judgment interest was harmless because it was not prejudicial to Massey in any way.

D. The Trial Court Properly Allowed Caperton to Testify Concerning the 1997 CSA's *Force Majeure* Provision Because the Testimony Was Relevant to Harman's Tortious Interference Claim.

Massey complains that the Trial Court improperly allowed Caperton to offer testimony on his understanding of the *force majeure* provision of the 1997 CSA between Wellmore and

Harman Mining and Sovereign. Massey argues that the *force majeure* provision is clear and unambiguous and, therefore, Caperton's testimony was inadmissible.

Caperton did not testify regarding the meaning of the *force majeure* provision for purposes of establishing that Wellmore breached the Wellmore-Harman CSA – that was decided in the Virginia action, was not at issue in this case, and the jury here was not asked to interpret the provision. Rather, Caperton testified regarding the meaning of the *force majeure* provision only to illustrate that Wellmore was not prevented from performing its contractual obligations with Harman and that Massey tortiously interfered with Wellmore's performance. In other words, Caperton testified to meet Massey's position, argued in its Brief to this Court (p. 37) that Wellmore, at the direction of Massey, was justified in declaring *force majeure.*

Caperton testified, first, concerning the use of the term "*force majeure*" in coal contracts generally, TT 7/3/02, p. 163:2 -- 164:10, and then about some of the examples of *force majeure* in the Wellmore-Harman CSA, *id.,* p. 165:5 -- 167:15. He then went on to express his opinion that the *force majeure* provision would not excuse performance because it was unprofitable or economically infeasible to perform. *Id.,* p. 168:15-21. The import of Caperton's testimony was that the closure of LTV's Pittsburgh plant – Massey's ostensible reason for instructing Wellmore to declare *force majeure* – did not *prevent* Wellmore from taking Harman's coal at all, that Wellmore could sell Harman's coal to whomever it wanted, and that, in fact, it was Massey and only Massey that prevented Wellmore's performance.

Caperton's testimony was relevant to Harman's tortious interference claim because it tended to show that the closure of LTV's Pittsburgh plant did not prevent Wellmore from taking Harman's coal, especially in light of the fact that Wellmore had recommended to Massey that

Wellmore take all of Harman's coal in 1998. Therefore, Massey's tortious interference with the Harman-Wellmore relationship had real consequence to Harman.

In any event, to suggest that there was no ambiguity in the language of the over three page long *force majeure* provision in the CSA is ludicrous and the seriously truncated quotation Massey provides from the provision is misleading in the extreme. *If* the meaning of the *force majeure* provision were at issue in this case (which it is not), both the definition of *force majeure* (14 lines long) and the amount of the allowable reduction in the coal purchased by the buyer in the event of a *force majeure* event (eight lines long) would have been at issue. Both require elucidation and Caperton would be entitled to express Harman's understanding of the provision.

Furthermore, Caperton's testimony relating to the meaning of the *force majeure* provision is wholly consistent with the language of the provision. The provision excuses performance only when performance is wholly or partly *prevented* by some event. Wellmore was certainly not under any contractual obligation to sell Harman's coal to LTV and only LTV. Accordingly, Wellmore could not rely on a purported *force majeure* event to excuse its performance based on the closing of a single LTV plant. Indeed, this is precisely what the Virginia jury found.

As the testimony was relevant to Harman's tort claim, and the testimony offered a reasonable interpretation of an ambiguous contractual provision, the Court did not err in overruling Massey's objection to it.

E. Massey's Relationship with Wellmore Does Not Bar Harman's Tortious Interference Claim to the Limited Extent It Is Related to the Contract between Harman and Wellmore.

Massey argues that it cannot be held liable for interfering with the contract between Harman and Wellmore because, at the time of the interference, Wellmore was Massey's wholly-owned subsidiary. Contrary to Massey's assertion, this Court has never ruled that a parent company is free to tortiously interfere with its subsidiary's contracts without fear of resultant

civil liability.[10] However, even if the Court had so held, the verdict against Massey for tortious interference would be unaffected, because, as Judge Hoke found, "[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.

In fact, this Court has ruled that a defendant may attempt to prove, as an affirmative defense, that its interference was "justified" or "privileged" and has listed among a number of factors relevant to that determination a defendant's "financial interest in the induced party's business." Syl. Pt. 2, *Torbett v. Wheeling Dollar Savings & Trust Co.*, 173 W.Va. 210, 211, 314 S.E.2d 166, 167 (1984). Section 767 of the Restatement (Second) of Torts, which this Court has looked to for the factors determining whether an alleged interference is improper, *see C.W. Development, Inc. v. Structures, Inc.*, 185 W.Va. 462, 465, 408 S.E.2d 41, 45 (1991), also recognizes "the relations between the parties" as one such factor to consider. Courts in other jurisdictions treat the parent-subsidiary relationship, as this Court suggests is proper in *Torbett,* as a justification or privilege which can be overcome by proof that the parent employed wrongful means or acted with an improper purpose. *See e.g., James M. King & Assocs. v. G.D. Van Wagenen,* 717 F.Supp. 667, 681 (D.Minn. 1989) ("[T]he Court holds that a parent is privileged to, or justified in, interfering with the contracts of its wholly-owned subsidiary provided it does not use wrongful means and acts to protect its economic interests.").[11]

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[10] Massey relies solely on *Shrewsberry v. National Grange Mutual Ins. Co.*, 183 W. Va. 322, 395 S.E.2d 745 (1990) for the proposition that a parent company cannot interfere with the contracts or business relationships of its wholly owned subsidiary. But *Shrewsberry* merely holds that "[i]t is impossible for one party to a contract to maintain against the other party to the contract a claim for tortious interference with the parties' own contract." Syl. Pt. 1, *id.*

[11] Numerous other cases to this same effect were cited in Appellees' Joint Response to Petition for Appeal at pp. 91-92.

Massey is simply disappointed with the jury's conclusion that even though Massey may have had a financial interest in Wellmore's business for a portion of the relevant period, Massey nonetheless acted wrongly and employed wrongful means in interfering with Wellmore's relationship with Harman. As explained in the Caperton brief, and incorporated herein, there was more than adequate evidence for the jury to make that determination.

F. All of Massey's So-called "Highly Prejudicial Errors" of the Trial Court Are Completely Unfounded.

1. The Trial Court Fairly Considered the Positions of Both Sides Prior to Formulating the Jury Charge and Verdict Form and Massey's Objections Were Properly Preserved.

Massey suggests that the Trial Court failed to take into account its views before formulating its jury instructions and the verdict form and even went so far as to threaten it with sanctions if its lawyers objected to the charge and verdict form prior to the jury beginning deliberations. These allegations are simply not true.

The parties submitted multiple proposed jury instructions in advance of and during trial. With these multiple exchanges before it, the Court drafted its own 17 page charge and five page verdict form. The Court provided the parties with his completed charge and verdict form, together with a document entitled Court's Rationale on Court's Charge and Instructions, prior to the parties' final arguments to the jury. (The Rationale was provided only to the parties and not to the jury.) With regard to its instructions, the Court stated at pp. 17-18:

> [T]here were proposed Instructions of Law offered which were: (1) not properly supported by, or appropriate to, the evidence adduced; (2) redundant with the Court's Charge, or with other proposed Instructions of Law offered by the same party; (3) contradictory to the Court's Charge, or with other proposed Instructions of Law offered by the same party; and/or (4) not complete listings of the elements of a particular legal principle or standard that our Supreme Court has set out as the law of this State. The Court's efforts here attempt to convey as clearly as practical for the lay person the legal principles involved, and attempt to avoid obscuring the forest of the law with the trees of

overly complicated analysis [see *Barlow v. Hester Industries, Inc.*, 198 W.Va. 118 (1996).]

With regard to the verdict form, the Court stated: "In general, the Court has included more information than submitted by the Plaintiffs, but less than that submitted by the Defendants with the guiding principle being to produce a jury verdict form that was the least confusing in its composition but adequate to meet its goals." *See* p. 18. Obviously, the Trial Court took very seriously its obligations to present the jury with an accurate but understandable set of instructions and verdict form.

The only talk of threatened sanctions by the Court after the close of evidence related not to the jury instructions and verdict form at all, but only to objections that the Court feared might be raised during closing arguments. Referring to "a continued pattern by counsel for both sides for interruptions based upon mischaracterization of the evidence," the Court admonished all counsel not to object on that basis during closing arguments, stating, "Now if anybody interrupts closing argument with such objections, you better pray that you are right. Otherwise, I shall treat it as contempt of court." TT 7/31/02, p. 155-56.

Massey was given the opportunity to place on the record its objections to both the jury charge and verdict form and it took full advantage of the opportunity. More importantly, no one is arguing that any objection has been waived for any reason whatsoever and, therefore, Massey has not been prejudiced in any way. If there were any error in the Trial Court's procedure, it is harmless error.

2. The Trial Court's Charge to the Jury Was a Correct Statement of the Law and Reflected the Evidence at Trial.

Massey complains on appeal about both the jury charge of Judge Hoke and the verdict form submitted to the jury. "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." Syl. Pt. 13, *Roberts v. Consolidation Coal Co.*, 208 W.Va. 218, 226, 539 S.E.2d 478, 486 (2000).

> Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misle[d] by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy.

Syl. Pt. 14, *Keesee v. General Refuse Service, Inc.*, 216 W.Va. 199, 202-03, 604 S.E.2d 449, 453-54 (2002) (internal citation omitted). Similarly, "[a] verdict should not be disturbed based on the formulation of the language of the jury instructions so long as the instructions given as a whole are accurate and fair to both parties." Syl. Pt. 3, *id.* at 202, 604 S.E.2d at 451.

Some of Massey's complaints about the charge reflect arguments on legal issues that Harman has already addressed above. For example, Massey assigns as error Judge Hoke's charge on consequential damages and the inclusion of a line on the verdict form for an award of consequential damages. (Massey Brief, pp. 64-65.) The issue of consequential damages has already been argued fully, *supra.*

Similarly, Massey finds error in Judge Hoke's refusal to charge that Massey was not a third party outside the relationship between Harman and Wellmore and, therefore, could not interfere with that contract. (*Id.*, pp. 67-68.) Again, the issue of whether Massey can interfere with the Harman/Wellmore contract is fully briefed above. Furthermore, the Trial Court appropriately charged the jury, precisely following *C.W. Development* and *Torbett*, that an affirmative defense to Harman's claim for tortious interference was "that the Defendants have a legal justification or privilege for its conduct," and that among the factors that could be considered in order to determine whether Massey was justified or privileged in its actions was "If the Defendants have shown that the Defendants' intention to influence another's business policies were those in which the Defendants' have an interest." TT 7/31/02, p. 178:6-18, 182:22--183:2.

The Court also charged, again in keeping with this Court's precedents, that among the totality of the circumstances to be considered in determining whether Defendants' conduct was improper was "[t]he relations, and relationships, of all of the parties." *Id.*, p. 183:10-13, 185:9-10. *Compare* Syl. Pt. 1, *C.W. Dev., Inc.*, 185 W.Va. at 463, 408 S.E.2d at 42; Syl. Pt. 2, *Torbett* 173 W. Va. at 211, 314 S.E.2d at 167.

Finally, Massey argues that the Court should not have charged the jury concerning *force majeure*. Again, the relevance to this case of the *force majeure* provision in the Harman/Wellmore contract is addressed above and is reflected in the Court's instructions. Another of the circumstances that the jury was instructed to take into account in determining whether Plaintiffs had met their burden to prove all the elements of tortious interference was "the contractual interests of the Plaintiffs." TT 7/31/02, p. 184:2 -- 185:5. In connection with that instruction, the Court accurately and fairly instructed the jury on *force majeure* provisions which address "the circumstances under which the failure to perform results from events reasonably beyond the control of one or more of the contracting parties." *Id.*, 184: 17 -- 185:5.

Massey's additional challenges to the jury charge are addressed below.

a) The Trial Court's refusal to charge on "inevitability."

Massey complains both that the Trial Court did not allow it to argue and did not charge the jury on what Massey characterizes as the affirmative defense of "inevitability." The Trial Court's ruling was that "inevitability" is not an affirmative defense to the tort of interference. The Court did not rule, however, that Harman's financial condition was totally irrelevant in the case, but rather recognized that its relevance went to one of the four elements of a tortious interference claim, that is, damages. Related to damages, of course, is the requirement that the damages be proximately caused by the defendant's tortious conduct and not the product of something else, for example, bad business practices.

Massey's attack on the Trial Court's refusal to recognize and charge on "inevitability" as an affirmative defense to the tort of interference is a variant of its attack of the jury's damages award on the basis that a business with a value of zero or less cannot prove damages. As argued more fully above, and as recognized by this Court in *Rufus v. Lively*, and as clearly proven by Harman at trial, even a business with no fair market value can be harmed, and, in fact, severely harmed.

Massey's reliance on *Bailey v. Hans Watts Realty Co.*, 113 W.Va. 739, 169 S.E. 404 (1933) is misplaced. In *Bailey*, the Court held no more than that the plaintiff claiming that the defendant prevented the sale of a property to a buyer must prove that the buyer had the wherewithal to complete the sale – in other words, the plaintiff had to prove damages. Here too, Harman had to prove damages. Harman offered evidence that it had invested wisely in the future of its mine and that it anticipated increased production and lower costs in 1998 and a long-term future. For its part, Massey introduced evidence and argued that Harman suffered no damages because it was allegedly worthless, unlikely to ever show a profit and its "demise" was inevitable. Massey was given more than sufficient room to argue its "inevitability" defense by the Trial Court's charge on proximate cause:

> The proximate cause of an event is the act, or omission, contributing to the result, *without which the result would not have occurred*. The proximate cause of an event is that cause which in actual sequence, unbroken by an independent cause, produces an event, *and without which*, the event would not have occurred.

TT 7/31/02, p. 176:17-23.

b) The Trial Court's refusal to instruct the jury that Harman had withdrawn its civil conspiracy and negligent misrepresentation claims.

Harman withdrew its claims for negligent misrepresentation and civil conspiracy prior to jury deliberations. Massey apparently argues to this Court that the jury must have nonetheless

considered them because they were not affirmatively told by the Trial Court not to consider them. However, the Trial Court did not instruct on those claims. The Trial Court's decision not to caution jurors to refrain from considering claims which they were not instructed to consider in the first place was obviously the right decision, and, in any event, would fall well within its discretion in light of the potentially confusing nature of such a superfluous instruction.

c) The Trial Court's charge as it related to rescission.

This charge related to the evidence offered by Harman (and believed by the jury) that the real reason that Massey directed Wellmore to declare *force majeure* was because taking the Harman coal it was contractually bound to take would be unprofitable after it lost the LTV business. The charge, therefore, was relevant and supported by the evidence.

d) The Trial Court's charge as it related to trade secrets.

Massey defended against Harman's tortious interference claim by arguing that its interference was justified by competition between it and Harman. The Court correctly charged the jury that such justification could be considered only if Massey did not interfere with Harman's contractual relations by "improper means." TT 7/31/02, p. 178. The Court went on to provide the jury with six examples of "improper means," including theft of trade secrets. *Id.* 179-82.

Harman introduced evidence that Massey used confidential information provided to it during meetings Massey misrepresented as good faith negotiations for the purchase of Harman by Massey to interfere with its contractual relations with a number of parties. The charge, therefore, was relevant and supported by the evidence.

e) The Trial Court's charge as it related to damages.

The notion that the Trial Court somehow committed error by failing to instruct the jury to "offset" from the award to Harman damages awarded to Caperton personally simply ignores the

fact that Caperton proved, as demonstrated by the meticulous nature of the jury's award, injury personal to him that was clearly separate and apart from the harm suffered by Harman. The verdict form provided clarity by requiring the jury to find liability, if any, separately for Harman and Caperton personally and then to enter, if warranted, separate damages awards.

f) The Trial Court's charge as it related to fraud.

Massey complains that the Trial Court's charge confused fraudulent misrepresentation and fraudulent concealment and allowed a finding of either based on an omission. Massey also complains that the Trial Court failed to charge the jury before it could find fraudulent concealment that it must find whether Massey was under a duty to disclose the withheld information.

The Trial Court's charge on fraud was a statement of black letter law. The act complained of as fraudulent can be either an affirmative utterance or an omission or a concealment. *See Stanley v. Sewell Coal Co.*, 169 W.Va. 72, 76, 285 S.E.2d 679, 682 (1981) ("Fraud has been defined as including ... acts, omissions, and concealments..."). Concealment is a kind of fraud. *Smith v. First Community Bancshares, Inc.*, 212 W.Va. 809, 822, 575 S.E.2d 419, 432 (2002) ("We have also recognized that "'an action for fraud can arise by the concealment of truth.'"). Speaking of them separately, but in similar language, therefore is not an error.

As for whether Massey was under a duty to disclose information that it withheld, that was a determination to be made as a matter of law and not as a matter of fact. Restatement (Second) of Torts, Section 551, comment m ("Whether there is a duty to the other to disclose the fact in question is always a matter for the determination of the court.") The appropriate way for Massey to raise the issue was not, therefore, by way of a requested jury charge, but by way of a motion

for summary judgment. *See e.g., Thacker v. Tyree*, 171 W.Va. 110, 11; 297 S.E.2d 885, 886 (1982) (finding duty to disclose as a matter of law).

g) The Trial Court's charge as it related to the business justification defense.

The Trial Court correctly charged the jury that they could reject Massey's business justification defense if they concluded Massey utilized improper means to interfere with Harman's business relationships. One of the examples of improper means that the Trial Court charged the jury on was "[w]hether the Defendants exerted economic pressure in order to induce third parties not to deal with the Plaintiffs." The charge correctly stated the law, and it was adequately supported by evidence offered at trial, e.g., evidence of Massey's heavy pressure on Penn Virginia to give in to all of its demands for changes in the lease with Harman.

h) Massey's challenges to the verdict form.

Massey's challenge to the verdict form as relates to consequential damages, differentiating damages to be awarded to Harman from damages to be awarded to Caperton, and the duty to disclose as it relates to fraudulent concealment raise issues which have been addressed *supra*.

Massey also complains that the verdict form failed to include references to the affirmative defenses of negligence and business justification. However, the jury was adequately charged on these defenses and then charged to complete the verdict form in conformance with the law as given by the Court. TT 7/31/02, p. 178, 194-95.

Massey also argues that the verdict form should have listed each individual contract that Harman claimed Massey wrongfully interfered with, supporting this novel argument for a retrial by mischaracterizing the verdict form as a general verdict form. A general verdict form in a multiple count action makes no reference to individual causes of action. The verdict form in this

action was a five-page verdict form which asked the jury for individual findings relating to both tortious interference and fraud. Therefore, *Orr v. Crowder*, 173 W.Va. 335, 315 S.E.2d 593 (1984), relied on by Massey, has no applicability here. Furthermore, Massey's proposed verdict form listing the business relations it allegedly interfered with was both incomplete and misleading and, therefore, it was entirely appropriate for the Court to reject Massey's form.

Massey's challenges to the form's questions regarding fraud and tortious interference are similarly unfounded. The jury was adequately charged on these causes of action, the form instructed the jury to follow the instructions as given by the Court, and the relevant questions were presented in a straightforward manner.

3. The Court's Questioning of Massey's Expert Was Even-Handed and Did Not Prejudice Massey in Any Way.

Massey complains of the Trial Court's questioning of its expert witnesses, citing to but a single example of such questioning. Massey fails to explain exactly how such questioning prejudiced it, and an examination of the cited testimony clearly refutes Massey's claim of prejudice. In fact, the respectful questioning by Judge Hoke of Massey's expert embodied two hypothetical factual scenarios, one reflecting Harman's view of the case and one reflecting Massey's view.

"The plain language of Rule 614(b) of the West Virginia Rules of Evidence authorizes trial courts to question witnesses – provided that such questioning is done in an impartial manner so as to not prejudice the parties." Syl. Pt. 3, *State v. Farmer*, 200 W.Va. 507, 508, 490 S.E.2d 326, 327 (1997). Judge Hoke's questioning was neither extensive nor disruptive. His questioning came at the end of Mr. Osbourne's direct and cross examination and sought further elucidation of an analogy Mr. Osbourne had used during his earlier testimony. After the Court's questioning, Massey's lawyer followed up with further questions on the analogy. The content,

manner and timing of the questioning by the Court all signaled the Court's impartiality. Judge Hoke's fair treatment of all parties throughout the case provided further context to his questioning. Massey has no reason to complain about the Trial Court's questioning of its expert.

4. The Trial Court Permitted Massey to Play Counter-designations of Videotaped Deposition Testimony Contemporaneously with Harman's Designated Testimony.

Massey complains of two instances of Harman's playing of videotaped deposition testimony. In both instances, Massey contends that the failure to play its counter-designations contemporaneously with Harman's designations violates W.Va. R. Evid. 106. In both instances, however, the Trial Court ruled that Massey's counter-designations were to be played for the jury immediately after Harman's designations were played. "The idea here," the Court explained, "is to get you the entire picture but one which conveys what the Defendants want to convey and the Plaintiffs want to convey." TT 6/25/02, p. 13; *see also* TT 6/27/02, p. 20. It is simply not true that the Trial Court did not allow Massey to play its counter-designations until much later in the trial. In fact, on the first occasion the issue arose, Massey decided not to play its counter-designations and admitted later that it had, therefore, waived its right to have its evidence played contemporaneously with Harman's. TT 6/27/02, p. 4.

W.Va. R. Evid. 611 provides: "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to ... make the interrogation and presentation effective for the ascertainment of truth." *See also* Syl. Pt. 1, *McDougal v. McCammon,* 193 W.Va. 229, 232, 455 S.E.2d 788, 791 (1995) ("The West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary and procedural rulings.") The Trial Court's ruling allowing Massey to play its designations immediately after Harman's designations met the requirements of

W.Va. R. Evid. 106 and was well within the discretion allowed the Court by Rule 611 and West Virginia case law.

5. Harman's Rebuttal Evidence Was Properly Allowed.

Massey complains that Harman's rebuttal evidence did not fairly meet any evidence offered in its defense to Harman's case-in-chief. Massey does not point to any particular rebuttal evidence as straying beyond its defense case, does not explain why it was not fairly rebuttal evidence, and does not set forth how it was prejudiced by this evidence. However, assuming (without conceding) that Massey is correct, it would not warrant a new trial, most obviously because of the lack of any prejudice to Massey, but also because the admissibility of evidence in rebuttal that should have been admitted in the plaintiff's case-in-chief is entirely within the trial court's discretion. *Wheeler v. Murphy*, 192 W.Va. 325, 334, 452 S.E.2d 416, 425 (1994).

IV. CONCLUSION

For all of the above reasons, as well as for arguments set forth in the Brief of Appellee, Hugh M. Caperton, Harman Development Corporation, Harman Mining Corporation and Sovereign Coal Sales, Inc. respectfully ask this Court to 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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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 33350

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

Appellants,

v.

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

Appellees.

CERTIFICATE OF SERVICE

The undersigned counsel for the Corporate Plaintiffs-Respondents, do hereby certify that I have served the foregoing **Brief Of Appellees Harman Development Corporation, Harman Mining Corporation and Sovereign Coal Sales, Inc.**, by U.S. Mail, this 4th day of June, 2007.

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