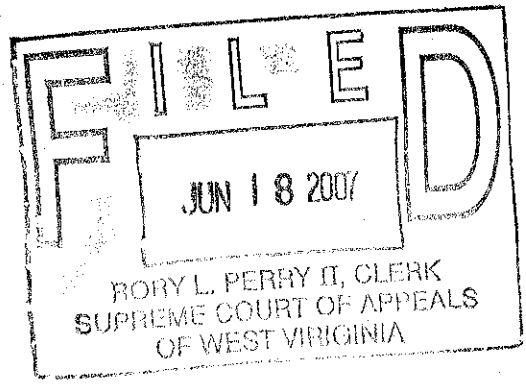
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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.

APPELLANTS' REPLY TO BRIEF OF APPELLEE HUGH M. CAPERTON

Respectfully submitted,

D.C. Offutt, Jr., Esquire (WV #2773)
Stephen Burchett, Esquire (WV #9228)
Perry W. Oxley, Esquire (WV #7211)
David E. Rich, Esquire (WV #9141)
Offutt, Fisher & Nord
949 Third Avenue, Suite 300
Post Office Box 2868
Huntington, WV 25728-2868
Telephone: (304) 529-2868
Facsimile: (304) 529-2999
Counsel for Appellants

I. Introduction.

Appellee, Hugh M. Caperton ("Caperton"), like the other Appellees, Harman Development Corporation, Harman Mining Corporation and Sovereign Coal Sales, Inc. (collectively "Harman"), clearly has a great dislike and disdain for Appellants, A.T. Massey Coal Company, Inc. ("A.T. Massey"), Elk Run Coal Company, Inc., Independence Coal Company, Inc., Marfork Coal Company, Inc., Performance Coal Company, Inc., and Massey Coal Sales Company, Inc. However, such animosity is neither pertinent nor relevant to the legal issues before this Court. In his response brief, Caperton spends much of his recitation of his fanciful version of the facts on what a fabulous and noble corporate citizen he is and how purportedly evil both A.T. Massey and its Chairman, Don L. Blankenship ("Blankenship"), are. The undisputed fact of the matter is that A.T. Massey is a subsidiary of a major publicly traded energy company, Massey Energy Company (collectively with its dozens of subsidiaries "Massey"), which is in the business of mining and selling coal in order to make a profit for its investors. Massey is also in the business of acquiring coal producers and coal reserves, which necessarily means that one of its business goals is to strengthen its position in the marketplace. By strengthening its position in the marketplace, Massey is not committing some horrible, egregious act as claimed by Caperton; rather, it is doing what the modern market-based American economy requires of it.

More importantly, in his response brief, Caperton fully dismisses the significance that prior to A.T. Massey's purchase of Wellmore Mining Corporation ("Wellmore"), Harman was losing money at an astounding rate and had sold off its only real asset, all of its coal reserves, to Penn Virginia Coal Company ("Penn Virginia"). In fact, Caperton does not challenge a single fact asserted by Appellants in their brief. He concedes that he did not pay any cash for Harman, that it was losing millions of dollars per year, and that it had a significant negative book value.

Caperton also fails to explain why Harman failed to profitably mine and sell its purportedly super high-quality coal on the open market after Wellmore declared *force majeure*. If Harman was such a fabulously run company with such an excellent mine plan, investors should have been flocking either to purchase the company or assist Caperton in making even more money on the open market, even after Wellmore declared *force marjeure*. Clearly, this Court should be able to see through Caperton's flowery, poetic praise of himself and his failed company, as well as his condemnation of A.T. Massey and Blankenship.

Caperton claims that A.T. Massey acted to "take the Harman Mine operations, including reserves, by force..." Brief of Appellee, Hugh M. Caperton ("Caperton Brief") at 5. There was certainly no force used and to suggest as such is irresponsible. At the very worst, A.T. Massey, through its wholly owned subsidiary Wellmore, mistakenly declared *force majeure*. A.T. Massey attempted to purchase Harman, but the negotiations were unsuccessful and the transaction did not take place. No court has ever found that an alleged breach of a contract or the failure to complete the purchase of another business are "illegal" acts that constitute a business tort.

Caperton and Harman both concede that the evidence at trial was undisputed that the Harman mine plan was contingent on access to adjoining Pittston Coal Company ("Pittston") reserves and that despite Harman's best efforts, Pittston was never going to sell those reserves to Harman. T.T. 06/26/02, 121-125. Therefore, both Caperton and Harman implicitly admit that virtually all of their alleged damages are wholly speculative. While the mine plan may have been "solid" in theory, it was based upon a pipe dream. The simple undisputed fact is that Harman did not and was never going to have access to the adjoining Pittston reserves.

II. Factual Misstatements of Caperton.

In his brief, Caperton engages in an extensive and concerted pattern of factual misstatements and mis-characterizations that are material and must be addressed. First, Caperton attempts to argue that there is no mention of customers, such as LTV Steel Company, Inc. ("LTV"), in the *force majeure* provisions of the 1997 Coal Supply Agreement ("1997 CSA"). Nothing could be further from the truth. The 1997 CSA specifically states:

> Pertaining to Buyer (Wellmore), the term "*force majeure*" as used herein shall further include occurrence(s) of a force majeure event at **any of Buyer's customer's plants and facilities**...

1997 CSA at 35 (emphasis added). Clearly, the 1997 CSA expressly contemplates *force majeure* events at a customer's facility. Any attempt by Caperton to argue otherwise is simply deluded.

Caperton also claims that A.T. Massey executive, Ben Hatfield, testified that it was "poor business ethics" for A.T. Massey to use confidential information in a manner detrimental to Caperton and Harman. T.T. 7/30/02, 56:9. However, Hatfield expressly explained that "[A.T. Massey] did not use the information in any fashion to hurt Harman." *Id.*, 56:4. Caperton further alleges that Wellmore sent a letter declaring *force majeure* to Harman within hours of a November 26, 1997 meeting. Caperton Brief at 9. The actual letter, however, is dated five days later on December 1, 1997. Pl. Ex. 352. Most incredulously, Caperton claims that Harman's December 18, 1997 letter establishes there was simply no time for Harman to obtain a purchaser for its "rocket fuel" coal. Caperton Brief at 9. However, this letter establishes no such fact. Pl. Ex. 367. It merely states that Harman's efforts to secure other purchasers "will not be successful in the short term." *Id.* Nowhere in the December 18, 1997 letter does Caperton claim that there was not enough time to find a purchaser. *Id.*

Appellee expends great effort in attempting to demonstrate that A.T. Massey's acquisition of Wellmore caused Wellmore to lose the LTV business because LTV did not trust A.T. Massey. This argument is grossly erroneous. LTV historically purchased Massey coal, going back a number of years. According to Dennis Smonko, an LTV executive, "[w]e purchased [coal] from Massey Coal Company." T.T. 6/28/02, 16:23. The fact is that the 1997 CSA contained complex pricing and quality provisions. 1997 CSA at 18-33. After some issues with contaminants, Smonko stated that, "[A.T. Massey] would have to agree to our terms and conditions." T.T. 6/28/02, 31:15-18. Smonko never stated that A.T. Massey's sales tactics were "heavy-handed", as Caperton claimed. When Smonko was specifically asked if the contaminants issue led him to have some reluctance in doing business with A.T. Massey, the answer was, "No." *Id.*, 31:8-12. Appellees' argument flies in the face of reason because Wellmore clearly indicated in its *force majeure* declaration that it still planned to purchase more than 200,000 tons of coal from Harman. Pl. Ex. 352.

Caperton and Harman ("Appellees") both claim that A.T Massey either instructed or requested that Harman shut down operations on January 19, 1998. Caperton Brief at 10; Brief of Appellees Harman Development Corporation, Harman Mining Corporation and Sovereign Coal Sales, Inc. ("Harman Brief"), at 8-9. However, there is no mention of such a request or instruction in any of the trial transcript portions cited by Appellees. T.T. 7/8/02, 50-52; 57-58; 184; T.T. 7/11/02, 141-142; T.T. 7/12/02, 25.

Appellees also make a point of describing the "thin wall" or "thin band" of coal A.T. Massey purchased from Pittston. Harman Brief at 9. This was not a thin wall or band of coal but rather more than 2200 acres and nearly 5 million tons of reserves. *See* "Exhibit A", 1998 Corporate Reserve Report, 1998 Clinchfield Property Description and 1998 Pyxis Property

Description. It is a distortion of the facts for Appellees to describe thousands of acres and millions of tons of reserves as a "thin band." In fact, the Harman/Penn Virginia reserves, which totaled about 3.5 million tons, were nearly 40% larger than the Pittston reserves purchased by A.T. Massey. T.T. 6/26/02, 134:15-23. Harman states in its brief that the reserves A.T. Massey purchased "completely surrounded" the Harman reserves. Harman Brief at 9. This is an outright fabrication and not supported anywhere in the record. More importantly, this purchase by A.T. Massey from Pittston is completely irrelevant to Caperton's and Harman's claims. It has already been conclusively established that Pittston would not sell its coal reserves to Harman. T.T. 6/26/02, 121-125; T.T. 6/25/02, 65:20--66:8. Appellees do not dispute this fact whatsoever. Therefore, it did not matter to Harman whether A.T. Massey held the reserves or Pittston held the reserves. The matter of importance to Harman was that it did not and was never going to have those reserves. Furthermore, Caperton cites to no evidence that any "confidential information" was used by A.T. Massey to purchase the Pittston reserves.

Caperton's magical mystery tour of his version of the facts continues. Appellees asserted in the last minutes of a six week trial, during closing arguments, that A.T. Massey anticipated $100 million in book profits from mining the combined Harman and Pittston reserves. T.T. 7/31/02, 45:13-16. If this were the case, why would Blankenship purposely collapse A.T. Massey's purchase of Harman? In fact, the revenue analysis that Caperton references was a "best case" hypothetical, stretched out over a 19 year period, based on 15 million tons of potential reserves, that dwarfed the 3.5 million tons actually controlled by Harman. Pl. Ex. 429. Caperton fails to mention that the analysis also required capital investment by A.T. Massey of over $50 million. Caperton cites to no evidence in the record that "Blankenship decided that it was really not necessary to purchase the Corporate Appellee's assets at all." *See* Caperton Brief at 11.

Likewise, Caperton does not cite to any evidence that A.T. Massey knew that its attempt to purchase Harman would collapse or that A.T. Massey intended to collapse the deal. Again, these allegations are Caperton's fantasies. The real reason that the transaction could not be completed was that Penn Virginia, the company that actually owned all of Harman's "rocket fuel" coal, required a "diligent mining clause" that A.T. Massey could not accept. Pl. Ex. 476.

Finally, Caperton references A.T. Massey's involvement in the bankruptcy proceedings and photographs of Caperton's home. Caperton Brief at 14-15 All these actions took place after this lawsuit was filed. As such, these events are part of the litigation of this case and not relevant to Caperton's claims.

Rather than contest any of the specific essential and undisputed facts asserted by A.T. Massey in its brief, Caperton and Harman both engage in a practice of pulling sound-bites out of a 31 day trial and then embellishing those sound-bites with descriptive language that is wholly unsupported by the record. Such a practice renders the entirety of Caperton's and Harman's briefs untrustworthy and unreliable.

III. Appellants Have Established Valid Affirmative Defenses of *Res Judicata* and Collateral Estoppel.

In responding to arguments set forth by Caperton in his response brief, Appellants first state that the preclusive effect of both the doctrines of *res judicata* and collateral estoppel have been extensively addressed previously in Appellants' brief. In response to the extensive substantive arguments set forth in Appellants' brief, Caperton has concocted a procedural argument that the Appellants' defense of *res judicata* and collateral estoppel must fail because Appellants failed to submit adequate documentation concerning the earlier filed contract case in Buchanan County, West Virginia ("Virginia Action") to the Boone Circuit Court ("Trial Court").

Clearly, after viewing the extensive record produced at the Trial Court level regarding the Virginia Action, such arguments can only be viewed as absurd. The Appellee entirely neglects to address the substantive issues presented. This is quite interesting in light of Caperton's earlier complaints regarding the voluminous nature of previous pleadings.

(a) Appellants Have Made an Adequate Record.

Caperton attempts to convince this Honorable Court that the Appellants failed to make a sufficient record to support the affirmative defenses of *res judicata* and collateral estoppel. However, Caperton is wrong. The Appellants created an extensive record of the Virginia Action containing all documents essential to the defenses of *res judicata* and collateral estoppel.

In claiming that the Trial Court record is insufficient to support the affirmative defenses of *res judicata* and collateral estoppel, the Appellee first relies upon *Hairston v. Hairston*, 84 S.E. 15 (Va. 1915) and *Anderson v. Patterson*, 189 Va. 793, 55 S.E.2d 1 (1949). In *Hairston*, the Supreme Court of Appeals of Virginia stated:

> It is undoubtedly settled law that a judgment of a court of competent jurisdiction upon a question directly involved in one suit is conclusive as to that question in another suit between the same parties. But to this operation of the judgement it must appear, **either upon the face of the record or be shown by extrinsic evidence,** that the precise question was raised and determined in the former suit...

Hairston, 84 S.E. at 16 (emphasis added).

Caperton contends that a sufficient record must consist of every document produced in the Virginia Action. A thorough analysis of Virginia and West Virginia law indicates that only those documents which are essential to the defenses asserted need be preserved in the record.

In *Anderson*, the Supreme Court of Appeals of Virginia sought to determine if the defendant was a party to the initial action and determined that it was necessary to review the "whole" record to render a decision. *Anderson,* 189 Va. at 799, 55 S.E.2d at 3. Since this opinion in 1949, Virginia has not used the term "whole" and an analysis of the case law since that date reveals that only essential documents are required to be made part of the record.

In *Scales v. Lewis*, 261 Va. 379, 541 S.E.2d 899 (2001), the Supreme Court of Virginia stated:

> It is firmly established that the party who asserts the defenses of *res judicata* or collateral estoppel has the burden of proving by a preponderance of the evidence that the claim or issue is precluded by a prior judgment.... Scales contends that *Bernau* required Lewis to offer into evidence a transcript of the proceedings in the general district court. We do not agree. While a transcript might be useful, it is not essential in every case.

Scales, 261 Va. at 383, 541 S.E.2d at 901. Therefore, the *Scales* Court makes it clear that not every document must be introduced in the second trial court action. Only those documents that are essential to the defenses of *res judicata* and collateral estoppel must be introduced.

In the case of *Altice v. Roanoke County Dep't of Soc. Servs.*, 45 Va. App. 400, 611 S.E.2d 628 (2005), the Court of Appeals of Virginia stated:

> In this case, at the first evidentiary hearing, the JDR court denied and dismissed the initial petition that was based solely on an affidavit. On appeal, the record does not contain the affidavit alleged to have been filed with the first petition. RCDSS supported its second petition with a letter and the testimony of Dr. Kees. In order for Altice to prove that the second petition was barred by the doctrine of *res judicata* or collateral estoppel, he had the burden of proving that the same question was in issue and determined in the first evidentiary hearing.
>
> The appellate record does not contain the affidavit from the initial evidentiary proceeding in the JDR court. It merely contains a petition referencing an affidavit. The affidavit was not included in the record on appeal to the circuit court or to this Court, although

> both petitions indicated that they were supported by facts contained in the affidavit submitted to the court by RCDSS. Without the affidavit from the initial proceeding, no determination can be made as to the validity of Altice's pleas of *res judicata* and collateral estoppel.

Altice, 45 Va. App. at 404, 611 S.E.2d at 630. As is clearly set forth, the *Altice* Court was not concerned with the "whole" record, but only sought those documents that were essential to the pleas of *res judicata* and collateral estoppel. In the present matter, as is set forth below, all essential documents have been preserved in the Trial Court record.

In claiming the Appellants' record lacks sufficient evidence to support the defenses of *res judicata* and collateral estoppel the Appellee also relies upon *Bernau v. Nealon,* 219 Va. 1039, 254 S.E.2d. 82 (1979). In *Bernau,* the Supreme Court of Virginia stated:

> Our problem here is that we have **no record** before us from which we can determine the essential elements necessary to sustain appellee's plea of *res judicata.* The only information that we have of the proceedings had in the chancery suit of *Nealon v. Nealon* is a copy of the final decree, entered on March 3, 1976, which was attached to appellee's plea.

Bernau, 219 Va. at 1041, 254 S.E.2d at 84. (emphasis added). The *Bernau* Court continued stating:

> The general rule is that the court will not travel outside the record of the case before it in order to take notice of the proceedings in another case, even between the same parties and in the same court, unless the proceedings are put in evidence. The reason for the rule is that the decision of a cause must depend upon the evidence introduced. If the courts should recognize judicially facts adjudicated in another case, it makes those facts, though unsupported by evidence in the case at hand, conclusive against the opposing party; while if they had been properly introduced they might have been met and overcome by him. (Citation omitted).

Bernau, 219 Va. at 1043, 254 S.E.2d at 85.

The Appellants are not asking this Court to travel outside the Trial Court record. Quite to the contrary, all evidence necessary for Appellants to prevail on the defenses of *res judicata* and collateral estoppel was introduced in the Trial Court. The following is a summation of documents provided to the Trial Court:

On December 29, 1998, Appellants filed a Motion to Dismiss and the following were attached:

1. The 1997 Coal Supply Agreement.

2. Motion for Judgment filed in the Commonwealth of Virginia, in the Circuit Court for Buchanan County by Plaintiffs Harman Mining Corporation and Sovereign Coal Sales, Inc, against Wellmore Coal Corporation.

3. A cross-reference between the substantially same allegations in the Virginia and West Virginia Actions.

4. Demurrer, Answer and Grounds for Defense filed by Wellmore Coal Corporation in Commonwealth of Virginia, in the Circuit Court for Buchanan County.

5. Plaintiff's First Request for Production of Documents filed in Commonwealth of Virginia, in the Circuit Court for Buchanan County.

6. Portions of the deposition Transcript of Gary Chilcot taken in the Virginia Action.

7. Portions of the deposition of David Fortner taken in the Virginia Action.

8. Portions of the deposition of Bennett Hatfield taken in the Virginia Action.

9. Portions of the deposition of Jeffery Wilson taken in the Virginia Action.

10. Portions of the deposition of Dennis Smoko taken in the Virginia Action.

11. Portions of the deposition of Donald Blankenship taken in the Virginia Action.

12. Portions of the deposition of Thomas Smith taken in the Virginia Action.

13. Portions of the deposition of Dr. Stanley Suboleski taken in the Virginia Action.

Defendants' Motion to Dismiss dated December 29, 1998.

On January 22, 1999, the Appellees in the West Virginia Action filed Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss. Attached as exhibits were:

1. Deposition of Donald Blankenship taken in the Virginia Action.

2. Affidavit of James Blevins, Clerk of Court for the Circuit Court for Buchanan County.

3. Motion for Judgment filed in the Commonwealth of Virginia, in the Circuit Court for Buchanan County by Plaintiffs Harman Mining Corporation and Sovereign Coal Sales, Inc, against Wellmore Coal Corporation.

Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss dated January 22, 1999.

On December 3, 2001, Appellants in the West Virginia Action filed a Motion to Dismiss, attached were the following documents:

1. The 1997 Coal Supply Agreement.

2. Motion for Judgment filed in the Commonwealth of Virginia, in the Circuit Court for Buchanan County by Plaintiffs Harman Mining Corporation and Sovereign Coal Sales, Inc, against Wellmore Coal Corporation.

3. July 20, 2000, Correspondence from Keary R. Williams, Judge, Circuit Court for Buchanan County, to all Counsel.

4. February 25, 2000 Order from the Circuit Court for Buchanan County.

5. August 8, 2000, Correspondence from Keary R. Williams, Judge, Court for Buchanan County, to all Counsel.

6. Plaintiffs' Motion in Limine / Motion for Partial Summary Judgment to Preclude Defendant's Introduction of Certain Evidence Relating to the Parties' 1997 Coal Supply Agreement filed in the Circuit Court for Buchanan County dated January 12, 2000.

7. Brief in Support of Plaintiffs' Motion in Limine / Motion for Partial Summary Judgment to Preclude Defendant's Introduction of Certain Evidence Relating to

the Parties' 1997 Coal Supply Agreement filed in the Circuit Court for Buchanan County dated January 12, 2000.

8. August 11, 1999, Correspondence from Keary R. Williams, Judge, Court for Buchanan County, to all Counsel.

9. Proposed Order Regarding Plaintiffs' Motion in Limine / Motion for Partial Summary Judgment to Preclude Defendant's Introduction of Certain Evidence Relating to the Parties' 1997 Coal Supply Agreement filed in the Circuit Court for Buchanan County dated January 12, 2000.

10. Defendant's Motion in Limine to Preclude Plaintiffs from introducing Evidence of Damages After December 31, 1998 filed in the Circuit Court for Buchanan County dated January 27, 2000.

11. First Amended Motion for Judgment filed in the Commonwealth of Virginia, in the Circuit Court for Buchanan County by Plaintiffs Harman Mining Corporation and Sovereign Coal Sales, Inc, against Wellmore Coal Corporation.

Defendants' Motion to Dismiss Dated December 3, 2001.

Also on December 3, 2001, Appellants filed a Memorandum of Law in Support of Defendants' Motion to Dismiss. Attached thereto as Exhibit B to Appendix 2 was the $6 million Judgment in favor of Appellees in the Virginia Action. On April 1, 2002, Appellants filed Defendants' Memorandum of Support of Motion in Limine. Attached thereto was:

1. Portions of the February 29, 2000 Hearing in Buchanan Circuit Court.

2. Portions of the Brief in Opposition of Appeal filed in the Supreme Court of Virginia.

Defendants' Memorandum of Support of Motion in Limine dated April 1, 2002.

On April 19, 2002, Appellants filed Defendants' Response to Plaintiffs' Motion to Exclude Evidence of LTV's Arbitration, with portions of the deposition of J. James Murray taken in the Virginia Action attached thereto. On April 22, 2002, Appellants filed their Reply in Support of Defendants' Motion in Limine with portions of the deposition of Henry Cook Jr. taken

in the Virginia Action attached thereto. Reply in Support of Defendants' Motion in Limine dated April 22, 2002.

Clearly, Appellee's claim that a sufficient record was not introduced to allow the Trial Court to determine whether the issues before it had been "necessarily decided" in the Virginia Action is disingenuous. Clearly, a sufficient record was created at the trial court level in the Virginia Action.

Courts in other jurisdictions have determined that whether a prior judgment is properly put into evidence is a procedural question. *Rees v. Heyser*, 404 N.E.2d 1183 (Ind. App. 1980). If this Honorable Court determines that this is a procedural issue then West Virginia law must apply. In *DeVane v. Kennedy, et al.*, 205 W.Va. 519, 519 S.E.2d 622 (1999), this Honorable Court stated,

> If a matter is not adequately preserved in the record or has not been entered into the record during the proceedings below, we cannot find in the appellate record presented for our consideration evidence that simply does not exist.

Devane, 205 W.Va. at 532, 519 S.E.2d at 635. As is demonstrated above, the matter has been adequately preserved in the record. Therefore, Appellants have met their burden in creating a sufficient record to support the defenses asserted.

Finally, Appellee argues that the preclusive effect of the Virginia Action should not apply to this case due to the timing of the final decision of the Virginia Supreme Court. Appellee cites to *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), in which the United States Supreme Court stated, "Collateral estoppel, like the related doctrine of *res judicata*, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Id.* at 326. It is for

these very reasons that Appellants asserted the defenses of collateral estoppel and *res judicata* during the pendency of the underlying case in West Virginia.

Appellee's argument is both unpersuasive and unsupported. Appellee's contention that, "neither of these purposes is served by the application of collateral estoppel after a factual issue has been fully developed through a well-contested trial and submitted to the jury for decision," neglects the obvious fact that in the matter at hand this occurred twice, first in the Virginia Action and again in this case. Due to error at the Trial Court level, Appellants were prevented from availing themselves with the preclusive effect of the doctrines of *res judicata* and collateral estoppel. Appellants asserted these defenses and do not lose them simply because their attempts to assert these defenses were erroneously denied at the Trial Court level.

Appellee cites *In re Marshall*, 271 B.R. 858, 866-7 (C.D. Cal. 2001), in an apparent attempt to support his position. In *Marshall*, the court was faced with a motion for summary judgment in bankruptcy court, not raised until after trial, based on the preclusive effect of a judgment previously entered in a Texas probate proceeding. The matter at hand is clearly distinguishable from the *Marshall* case. In fact, it is difficult to see what relevance the *Marshall* case has to the matter at hand, in that collateral estoppel and *res judicata* were pled before the Trial Court.

The defenses of collateral estoppel and *res judicata*, as set forth above, were properly pled to the Trial Court. Without question, the record preserved and designated for appeal demonstrates that sufficient evidence was introduced to allow the Trial Court to adequately determine that the issues and claims before the Trial Court had been previously decided in the Virginia Action. Therefore, Appellee's claim that Appellants' assignment of error regarding the

preclusive effect of the defenses of *res judicata* and collateral estoppel is untimely and without evidentiary foundation in the record is utterly absurd.

(b) The Bankruptcy Court's Decision to Abstain Has No Relevance to the Present Action.

Appellee incorrectly argues that the November 28, 2000 Joint Order of the United States Bankruptcy Court for the Western District of Virginia ("Bankruptcy Court") precludes Appellants from: (1) challenging the propriety of the Trial Court as the appropriate forum to decide Appellees' tort claims, (2) contending that the claims of Caperton are in any way derivative of the Corporate Appellees' claims; and (3) arguing that the Virginia judgment can in any way relate to the damages awarded to Caperton because these issues have already been fully adjudicated in the Bankruptcy Court. Appellee's analysis with regard to these issues is both flawed and confused. The Order in question states: "This Court **ABSTAINS from deciding whether any such claims are properly alleged or have legal validity**. Accordingly it is ordered that these adversary proceedings are dismissed." November 28, 2000 Joint Order. (Emphasis added). There are no findings of fact or conclusions of law contained in the Order. Attached to the Order is a Joint Memorandum and Opinion in which Judge Stone, Jr. sets forth his rationale for abstention. Once again, Appellee cites to *In re Schimmel*, 127 F.3d 875 (9th Cir. 1987), which is clearly distinguishable from the matter at hand. In *Schimmel*, the Court reached a final judgment on the merits. In this matter, the Bankruptcy Court abstained and there are no findings or conclusions set forth which can become binding upon Appellants. The Bankruptcy Court never reached a final adjudication on the merits, as is required under the doctrines of collateral estoppel and *res judicata*.

IV. The Evidence Presented At Trial was Insufficient as a Matter of Law to Support Caperton's Individual Claims.

Caperton's arguments with respect to his entitlement to an award of personal damages in this case ignore the fundamental black letter law that a shareholder does not have standing to sue individually for an injury resulting from a wrong to the corporation. Recovery is only available when the defendant owes an individual shareholder, creditor or guarantor a special duty that has its origin in circumstances independent of the plaintiff's status as a stockholder and independent of the duty owed to the corporation. *See Mullins v. First Nat'l Exch. Bank of Va.*, 275 F. Supp. 712 (W.D. Va 1967); *Gregory v. Bryan-Hunt Co.*, 295 Ky. 345, 174 S.W.2d 510 (1943); *Strougo v. Bassini*, 282 F.3d 162 (2nd Cir. 2002); *Flynn v. Merrick*, 881 F.2d 446 (7th Cir. 1989); *Smith Setzer & Sons, Inc. v. S.C. Procurement Review Panel*, 20 F.3d 1311 (4th Cir. 1994); *Nicholas v. Ticketmaster*, 42 Fed. Appx. 696 (6th Cir. 2002); *Taha v. Engstand*, 987 F.2d 505 (8th Cir. 1993). Caperton does not even enunciate, let alone establish, any such duty A.T. Massey purportedly owed to him. Instead, he attempts to divert the Court's attention from the issue that he has no standing to bring claims for individual damages by reciting a long litany of alleged personal injuries. Caperton ignores the simple fact that such "personal" damages are all derivative of injuries to the Corporate Appellees and as such, a shareholder, even a sole shareholder like Caperton, is precluded, as a matter of law from maintaining an action in his own name. *Mullins,* 275 F. Supp. 712 (W.D. Va. 1967).

Courts in other jurisdictions have applied this basic rule to claims such as Caperton's, where the alleged "personal" damages to the shareholder arise out of tortious interference claims. In those jurisdictions, the courts have held that a claim for tortious interference with or destruction of a business belongs to the corporation, and shareholders, even sole shareholders,

are not entitled to recover damages. Notwithstanding the fact that the individual ultimately suffered financial injuries as a result of the alleged tortfeasor's conduct, the corporation was the target of the tortfeasor's scheme, and it was the corporation that directly suffered any damage. The harm suffered by the individual was merely derivative of the harm suffered by the corporation. *See, Sharp Elecs. Corp. v. Yoggev*, 1995 W.L. 263533 (E.D. Pa. 1995); *Motorola v. Chapman*, 761 F.Supp.458 (S.D. Tex. 1991). In *Motorola*, the principal shareholders argued that the alleged tortfeasor conspired to destroy them personally by destroying their business. The *Motorola* Court held there was no evidence of personal animosity toward the shareholder and no evidence of a duty owed to them by the tortfeasor, separate and apart from that owed to the corporation. Therefore, the shareholder lacked standing to maintain individual claims. *See also PI, Inc. v. Ogle*, 1997 W.L. 37941 (S.D.N.Y. 1997) (shareholder could not show the tortfeasor owed him a duty independent of its duty to the corporation or other shareholders and therefore, could not maintain an independent action for tortious interference, based on his alleged damages for lost profits); *Healthsource, Inc. v. X-Ray Assocs. of N.M., P.C.*, 138 N.M. 70, 116 P.3d 861 (2005) (sole shareholder's injury was the diminution in the value of his corporate shares, and therefore, he did not acquire standing to maintain an action in his own right).

Caperton's claims for personal damages are in the same posture. There is no evidence that there was any personal animosity toward Caperton, nor any duty owed to him by A.T. Massey. In Caperton's own recitation of the facts in his brief, he states that A.T. Massey's conduct was designed to eliminate the **Corporate Appellees** as competitors:

> Massey closed the acquisition of Wellmore and United on July 31, 1997. T.T. 7/29/02, 12:23 -- 13:7. Immediately after the closing, Massey began its course of design to have Wellmore walk away from its obligations to Sovereign under the 1997 Coal Supply Agreement, to take the Harman Mine operations, including reserves, by force, and to eliminate the Corporate Appellees as

> competitors in the metallurgical coal market, even if it meant the financial destruction of Mr. Caperton personally.

Caperton Brief at 5. Thus, even Caperton acknowledges that the alleged tortious acts by A.T. Massey were suffered by the Corporate Appellees, and any damages to Caperton were merely derivative of that harm.

(a) Caperton Is Not Entitled To Personal Damages Resulting From His Guarantee Of Certain Debts Of The Corporate Appellees.

The fact that Caperton acted as guarantor on certain debts of the Corporate Appellees does not afford him any greater standing than a mere shareholder with respect to his ability to maintain a claim for personal damages arising therefrom. Caperton cites *Davis v. U.S. Gypsum Co.*, 451 F.2d 659 (3rd Cir. 1971) to support his argument that any damages he suffered as a result of his personal guaranty of loans for the Corporate Appellees are personal damages, and as such, he is entitled to a separate recovery for that injury. Caperton Brief at 29.

However, courts in a majority of the jurisdictions that have addressed the issue have held the fact that shareholders are guarantors on a note executed by the corporation will not suffice to create a personal right of action independent of the harm suffered by the corporation. *Mullins v. First Nat'l Bank of Va.*, 275 F.Supp. 712 (W.D. Va. 1967); *Abraham Lincoln Hotel Corp. v. Metro. Edison*, 1988 W.L. 215418 (Pa. Com. Pl.); *Sherman v. British Leyland Motors, Ltd.*, 601 F.2d 429 (9th Cir. 1979) (the fact that a shareholder guaranteed certain obligations of the corporation did not warrant departure from the general rule of separation of identities, nor give him standing to bring suit in his individual capacity as a shareholder of the corporation).

In *Joe Conte Toyota, Inc. v. Toyota Motor Sales, U.S.A,*, 689 So. 2d 650, (4th Cir. 1997), the court held that the shareholder guarantor of an automobile dealership lacked standing to bring an action against the automobile manufacturer, distributor and credit corporation for claims

arising out of the termination of the dealership. The shareholder, as guarantor of the corporate debt, did not incur damages separate and independent of the damages suffered by the corporation. *See also Around the World Importing, Inc. v. Merchantile Trust Co., N.A.*, 795 S.W.2d 85, (Mo. App. E.D. 1990) (shareholder guarantors did not have standing to bring lender liability claims where the loan was made to the corporation and they were required to sign guaranties because of the financial condition of the company); *Walstad v. Norwest Bank of Great Falls*, 240 Mont. 322, 783 P.2d 1325 (1989) (shareholders who guaranteed a loan to the corporation did not have standing to bring a claim against the lenders for tortious interference); *Pepe v. Gen. Motors Acceptance Corp.*, 254 N.J. Super. 662, 604 A.2d 194 (1992) (the fact that shareholders had guaranteed corporate debt or given mortgages or other collateral to secure corporate obligations did not render their liability claims any less derivative of corporate claims).

Finally, despite Caperton's flawed attempts to distinguish the holding in *Lively v. Rufus*, 207 W. Va. 436, 533 S.E.2d 662 (2000) from the facts of this case, the fact remains that in West Virginia, as in a majority of other jurisdictions, corporate debts for which a shareholder/guarantor remains personally liable after the corporation is liquidated are inadmissable as an independent basis for recovery on a shareholder's claim against those who allegedly caused the destruction of their business. *Lively,* 207 W.Va. at 443, 533 S.E.2d at 669.

(b) Caperton's Assertion That His Reputation Was Injured Because He Was Listed On The Applicant Violator System ("AVS") Is Legally Insufficient.

Like Caperton's claim for damages based on his personal guarantee of loans for the Corporate Appellees, his claim for damages based on his AVS listing is also derivative of the claims of the Corporate Appellees. Although Capterton accuses Appellants of "Pollyanish speculation" regarding the criteria for Capterton's removal from the AVS list, (Caperton Brief at

26), he does not dispute the fact that once reclamation work on a site is completed, the AVS listing is removed and there are no further penalties asserted. Any award in the Virginia Action for the value of the corporations included the value of any reclamation work that needed to be done in order for Caperton to be removed from the AVS listing. As such, Caperton's claim for damages based on his AVS listing is clearly derivative of the corporate claim.

(c) The Evidence At Trial Did Not Support An Award Of Damages To Caperton For Emotional Distress.

Caperton argues in his brief that the cases cited by Appellants to support their argument that he was not entitled to damages for emotional distress are inapplicable because they address the question of when a victim of negligence can recover for emotional distress. However, the evidence at trial equally fails to support an award of damages to Caperton based on intentional or reckless infliction of emotional distress. Under West Virginia law, in order for a plaintiff to prevail on a claim for intentional or reckless infliction of emotional distress, four elements must be established. It must be shown that the: (1) defendant's conduct was atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency; (2) defendant acted with the intent to inflict emotional distress or acted recklessly when it was certain or substantially certain emotional distress would result from his conduct; (3) actions of the defendant caused the plaintiff to suffer emotional distress; and (4) emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it. Syl. pt. 3 *Travis v. Alcon Labs.*, 202 W. Va. 369, 504 S.E.2d 419 (1998).

The evidence at trial does not support even the first two elements of this test. None of the evidence suggests that Appellants' conduct was "atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency." Nor did the evidence establish any intent by

Appellants to inflict emotional distress upon Caperton. More importantly, Caperton's assertion that he experienced mental anguish and sleepless nights (T.T. 8/08/02, 117:1-13) is insufficient to rise to the level of "emotional distress so severe that no reasonable person could be expected to endure it."

Therefore, the evidence at trial was insufficient under West Virginia law to support an award of damages to Caperton for emotional distress.

(d) The Trial Court Should Not Have Permitted An Award Of Consequential Damages.

Under Rule 9(g) of the West Virginia Rules of Civil Procedure,"[w]hen items of special damages are claimed, they shall be specifically stated." W.Va. R. Civ. P. 9(g). Because consequential damages are special damages, alleged damages must be pled with specificity in order to be recovered by Caperton under Rule 9(g).

Caperton's attempt to divert the Court's attention from his failure to comply with this fundamental rule of pleading ignores the fact that he neither pled nor proved consequential damages, and as such, the inclusion of consequential damages in the Verdict Form was highly prejudicial to Appellants. Appellees issued no interrogatories, took no depositions and submitted no evidence at trial regarding any consequential damages. Neither the Appellees' forty-five page Amended Complaint, nor the Demand for Relief in Appellees' first Amended Complaint, even mention special or consequential damages, despite specific references to compensatory and punitive damages. Caperton's argument that his Demand for Relief asks for "such further relief as is just and proper" is ludicrous in the face of the plain language of Rule 9(g), which requires that special damages be specifically pled. This is not a matter of form over substance. Because Caperton clearly violated Rule 9(g), and no actions were taken by any party concerning

consequential damages, the verdict form and jury instructions concerning consequential damages should not have been offered to the jury, over Appellants' objection, and the award should be reversed.

(e) There Was Insufficient Evidence To Allow The Jury To Consider Punitive Damages, And As Such, The Trial Court Erred By Permitting A Jury Instruction And Verdict Form Allowing For Punitive Damages.

At the trial of this matter, the Trial Court accepted Appellees' jury instruction regarding punitive damages, over Appellants' objection. The Trial Court also accepted a jury verdict form that allowed the jury to award punitive damages "for acts or omissions" of Appellants, over Appellants' objection. T.T. 9/26/02, 205. The jury ultimately returned a verdict in favor of Appellees and against Appellants, without a single shred of proof of malice, wantonness or oppression, as required by West Virginia law. In fact, there was insufficient evidence for the jury to even consider punitive damages.

Caperton apparently misunderstands Appellants' argument on this issue. Appellants are not merely arguing under *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991), that the award of punitive damages was excessive. If that was the argument Appellants asserted, they would have addressed the *Garnes* factors in their Petition. Rather, Appellants' argument is that the evidence in the trial of this case was insufficient to allow the jury to even **consider**, let alone award, punitive damages.

In West Virginia, "[p]unitive or exemplary damages are such as, in a proper case, a jury may allow against the defendant by way of punishment for wilfulness, wantonness, malice, or other like aggravation of his wrong to the plaintiff." Syl. pt. 1, *O'Brien v. Snodgrass*, 123 W. Va. 483, 16 S.E.2d 621 (1941), *overruled on other grounds by Ennis v Brawley*, 129 W. Va. 621, 41 S.E.2d 680 (1946). Malice is "[t]he intentional doing of a wrongful act without just cause or

excuse, with an intent to inflict an injury or under circumstances that the law will imply an evil intent... A condition of mind showing a heart regardless of social duty and fatally bent on mischief." *State v. Burgess*, 205 W. Va. 87, 89, 516 S.E.2d 491, 493 (1999) (quoting BLACK'S LAW DICTIONARY 956 (6th ed. 1990)).

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

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

V. Appellee Caperton Fails To Address The Critical Issues When Analyzing The Insufficiency Of Proof Offered To Establish Tortious Interference, Fraud And Fraudulent Concealment During The Trial.

In his response brief, Caperton ignores the technical insufficiencies in the proof offered by Appellees at the Boone County, West Virginia trial, instead attempting to inflame this Court with theories of sabotage and conspiracy. Regarding the claim of tortious interference, what Caperton ignores is that Wellmore, through A.T. Massey, was justified to protect its business interests by declaring *force majeure* regarding the 1997 CSA. Appellants are not liable for interference:

> that is negligent rather than intentional, or if they show defenses of legitimate competition between plaintiff and themselves, their financial interest in the induced party's business, their responsibility for another's welfare, their intention to influence another's business policies in which they have an interest, their giving of honest, truthful requested advice, or other factors that show the interference was proper.

Syl. pt. 2, in part, *Torbett v. Wheeling Dollar Sav. & Trust Co.*, 173 W. Va. 210, 210, 314 S.E.2d 166, 166 (1983). Thus, if a company acts in furtherance of its own business interests, it is protected from liability for improper interference unless its primary motivation was to wrongfully interfere in another's contract. *See Cedar Ridge Trailer Sales, Inc. v. Nat'l Cmty. Bank of N.J.*, 312 N.J. Super. 51, 711 A.2d 338 (App. Div. 1998) (while an individual acts with malice, for purposes of a claim for intentional interference with contractual relations, when he intentionally commits a wrong without excuse or justification, the fact that a breaching party acted to advance its own interest and financial position does not establish the necessary malice or wrongful conduct). In this case, Appellees have attempted and failed to turn Appellants' motivation to protect its business interests, by declaring *force majeure* in light of the inevitable closure of LTV's Pittsburgh coke plant, into a motivation to maliciously injure the Appellees.

Although Caperton made numerous assertions regarding alleged acts of fraud committed by Appellants upon him, he failed to address the fact that fraud "cannot be predicated on a promise not performed." Syl. pt. 3, *Croston v. Emax Oil Co.*, 195 W. Va. 86, 90, 464 S.E.2d 728, 729 (1995). Rather, "there must be a false assertion in regard to some existing matter by which a party is induced to part with his money or his property." *Id.* In this case, Appellees' primary fraud claim is that Appellants entered into sham negotiations to purchase the Harman entities. However, since such a claim is based upon a promise not performed, instead of a false assertion in regard to some existing matter by which a party is induced to part with his money or his property, Caperton and Harman failed to offer sufficient evidence at trial to support a claim for fraud.

Regarding Caperton's claim of fraudulent concealment, Caperton seems repeatedly intent on reiterating his theory of sabotage and ignoring whether Appellants had any "duty to disclose" certain information during the negotiation for the purchase of Harman. A cause of action for fraudulent concealment requires a "duty to disclose" on the one allegedly committing the concealment. *Pocahontas Mining Co. Ltd. P'ship v. Oxy USA, Inc.*, 202 W. Va. 169, 175, 503 S.E.2d 258, 264 (1998). In the absence of a creditor-debtor relationship, some other "fiduciary relationship" or a relationship of trust and confidence between the parties, there is no common-law duty to disclose and there can be no cause of action for fraudulent concealment. Despite this fact, Caperton asserts that Appellants, entities who are clearly business competitors with Appellees and not in any fiduciary relationship with them, fraudulently concealed that they were attempting to sell their own coal to LTV. However, there is no general common-law duty between parties to a contract to disclose information that could be harmful to the competitor's business. Moreover, it was public record that LTV had decided to shut down their Pittsburgh

coke plant. As such, since there was no duty to disclose, Appellants could not have fraudulently concealed any information from Caperton or Harman.

VI. The Trial Court Committed Several Highly Prejudicial Errors that Denied Appellants' Their Right to a Fair and Impartial Trial.

"The paramount function of a trial judge is to conduct trials fairly and to maintain an atmosphere of impartiality." *McDonald v. Beneficial Standard Life Ins. Co.*, 160 W. Va. 396, 398, 235 S.E.2d 367, 368 (1977). With this cornerstone of legal jurisprudence in mind, the Appellants now reply to Caperton's assertion that the following assignments of error "are without any foundation whatsoever." Caperton Brief at 44.

(a) The Trial Court Erred by Sanctioning Appellants for Exceeding a Time Limitation on Cross-Examination.

In the underlying trial of this matter, Appellees requested, and the Trial Court granted, a time limit for the cross-examination of their expert witness, specifically limiting cross-examination to a time period not exceeding direct examination of a witness. Thereafter, Appellees strategically conducted a short direct examination of their expert witness, Dan Selby, which consisted of conclusory testimony and summary opinions, undoubtedly designed to undermine Appellants' chances at a meaningful cross-examination. During such cross-examination, however, it became apparent that Mr. Selby had not thoroughly reviewed the documents set forth as the foundation for his opinions, which seriously undermined his testimony and equitably necessitated a more searching line of questioning. Mr. Selby ultimately withdrew several of his opinions and made important concessions concerning others. Accordingly, the cross-examination performed its truth-seeking function and should have been considered a victory. The results, however, were not beneficial.

During the earlier direct-examination of this expert witness, Appellants objected to any testimony regarding the consolidated financial statements of Appellants' ultimate parent, Massey Energy Company, and **all** of its subsidiaries, the great majority of which were not parties to the litigation or subject to the Trial Court's jurisdiction. Moreover, this testimony was inadmissible in any event, as Appellees neglected to disclose an expert witness on the topic. The Trial Court properly sustained Appellants' objection. However, subsequent to this evidentiary ruling and near the end of Mr. Selby's cross-examination, the Trial Court ambiguously announced "two minutes," which counsel for Appellants interpreted to mean the time remaining on the court-reporter's tape. The Trial Court gave no admonition or warning that the statement was intended as a notice of limitation upon Appellants' remaining right of cross-examination, in any manner.

Once Appellants' cross-examination of the aforementioned witness was concluded, Appellees' counsel commenced redirect of Mr. Selby by again inquiring as to Massey's consolidated financial information. Appellants again objected, at which time the Court surprisingly announced that, despite its prior ruling, the inquiry was allowed as a sanction for the cross-examination exceeding the time on direct examination. Inequitably, however, later throughout the remainder of the trial, Appellees were allowed to repeatedly violate the lower courts' mandated cross-examination time limit without sanction or reprimand. Thereafter, Appellants assigned error.

Caperton has responded by stating that such assignment is disingenuous "given the furor Massey has caused regarding the Trial Transcript precisely because the tapes were never recorded, [and] that excuse rings hollow." Caperton Brief at 44. Unfortunately, the only disingenuous proposition concerning this assignment of error is Appellee's response to the same. Specifically, it goes without saying that Appellants had no idea during Mr. Selby's cross-

examination that the transcript was in the process of being botched by the court reporter. This fact came to light months after the trial concluded. In fact, the only reason there is an adequate transcript and record from the Trial Court to form a basis for this appeal is due to the efforts of Appellants, and this Court. Otherwise, a new trial would be mandated on that basis alone. The lack of substantive response from Appellee throughout Appellants' efforts speaks volumes to the severity of the error. As such, Appellants again submit that it was grossly unfair for the Trial Court to impose a sanction directly adverse to its very own interpretation and application of the Rules of Evidence promulgated by this Court, simply because the Trial Court voiced an unspecific time limitation warning during Appellants' fundamental right of cross-examination. This sanction was clearly inappropriate as punishment for an unknowing violation of the cross-examination time limit, prejudicially affected the outcome of the trial, and had no basis in law or equity.

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

Prior to trial, as stated in Appellants' Brief and briefly summarized herein, the parties agreed to make no references to the Virginia Action. T.T. 6/17/02, 107. Despite such agreement, and almost from the very beginning of the trial, Appellees interjected numerous references to the Virginia Action. *e.g.,*. T.T. 6/28/02, 131:5-18. Appellants repeatedly moved for a mistrial. *See, e.g.,* T.T. 6/28/02, 137:8. Such motions were denied and Appellants assigned error.

Appellees have responded to such assignment of error by stating:

> It is both incredible and incredulous that Massey would now contend [error exists] if it truly intended to pursue the affirmative defenses of *res judicata* and collateral estoppel which it now argues so vociferously.... Moreover, any reference to "another case" or "the case in Virginia" was so nebulous as to be totally innocuous.

Caperton Brief at 45. While Caperton's counsel's use of the English language appears adroit, their understanding of the law is far from it. Simply put, a court of law determines the viability of the doctrines of *res judicata* and collateral estoppel, not a jury. Accordingly, the jury need not have been apprised of the existence of the Virginia Action in order for the Appellants to properly maintain these legal contentions. Such is the distinction between a trier of law and a trier of fact.

Furthermore, Appellee contends that a reference to the Virginia Action "towards the end of a two-hour long video deposition" would not have been understood by the jury. Caperton Brief at 45. Appellee assumably believes that the jury in this matter did not possess the intellectual capacity or attention span to absorb this information, but otherwise perfectly understood Appellees' case. Moreover, a thorough review of the trial transcript in which Appellees cite a reference to the Virginia Action by one of Appellants' expert witnesses is, in fact, devoid of such testimony. Caperton Brief at 45; T.T. 7/19/02, 91:17 -- 97:15. For these reasons, the Appellee Caperton's response to the present assignment of error is unpersuasive.

The prejudicial effect of references to the Virginia Action is undeniable and the Trial Court agreed when it admonished the parties of the same. These repeated references by trial witnesses to the Virginia Action unfairly prejudiced Appellants because the jury could easily surmise that Appellees prevailed in the breach of contract action filed in Virginia. Appellees flagrant disregard for this ruling made it easy for the jury to figure out that the Virginia Action involved a breach of contract, and the Trial Court erred when it did an about face and failed to grant the proper remedy.

(c) The Trial Court Erred by Repeatedly Allowing Appellees to Interrogate Witnesses Regarding Documents About Which They Had No Previous Knowledge in Order to Place Evidence Before the Jury That Was Otherwise Inadmissible.

The Trial Court erroneously allowed Appellees to elicit testimony from their witnesses regarding documents about which they had absolutely no personal knowledge. T.T. 6/19/02, 45-50; T.T. 6/10/02 77-79; T.T. 6/26/02, 13-14. Specifically, witnesses were simply handed documents they had admittedly never seen prior to the day of questioning and were then instructed to read the contents of said documents to the jury. This practice completely circumvented numerous evidentiary rules, over Appellants' objection, and allowed prejudicial testimonial evidence incapable of being scrutinized through meaningful cross-examination into the purview of the jury.

Appellee Caperton responded, not with substantive legal argument addressing the above-mentioned error, but by asserting that "Massey engaged in the practice about which it now complains[.]" Caperton Brief at 46. In support of this assertion, Appellee points out a single reference to an interoffice memorandum from Mr. Frank Myer to Mr. Bert Joyce. T.T. 7/11/02, 82-86. Upon this reference rests Appellee's response to Appellants' present assignment of error.

For purported persuasive effect, Appellee's brief reproduced a portion of the transcript from the Trial Court's decision concerning the reference to this memorandum, but deleted a substantial part of the conversation between counsel of record and the Trial Court. Specifically, in the deleted portion of the conversation, trial counsel for Appellants explained to the Trial Court:

> Mr. Woods: The document was discussed at-length in the testimony of Mr. Myer, which will be presented here. The document will be offered through Mr. Myer when he testifies.

T.T. 7/11/02, 84:18-20. As such, trial counsel for Appellants intended to question Mr. Caperton concerning the document, knowing it would later be deemed relevant and admissible through Myers. T.T. 7/11/02, 85:21-22. Thus, as the memorandum was later admitted through Mr. Myers' testimony, there would have been no reason for the Trial Court to exclude the earlier use of it under the evidentiary rules.

Specifically, Rule 104 of the West Virginia Rules of Evidence provides that "[w]hen the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." W. Va. R. Evid. 104(b). Thus, the rules allowed the interoffice memorandum to be admitted subject to Mr. Myers' testimony, and the Trial Court's ruling to allow questioning concerning said document is nothing but a modification of this evidentiary rule. Therefore, the sole instance on which Caperton relies to refute Appellants' current assignment of error is unpersuasive.

(d) Despite Caperton's Assertions to the Contrary, The Trial Court Improperly Admitted Irrelevant and Prejudicial Evidence Over The Appellants' Timely Objections.

In his response brief, Caperton argues that the Trial Court properly allowed irrelevant and prejudicial evidence because Appellants either opened the door or failed to timely object. Caperton, however, offers no examples of how Appellants opened the door or failed to object. Instead, he offers a blanket assertion that the court properly exercised its discretion, but offers no reasoning.

While the West Virginia Rules of Evidence do provide a trial judge with discretion in making evidentiary rulings, they do not permit the Trial Court to abuse its discretion in making such rulings, as the Trial Court did in this matter. Trial counsel for Appellants properly and

timely objected to the admission of irrelevant and prejudicial evidence through its motions *in limine* prior to trial, which were denied. Further, trial counsel did not open the door to the admission of such evidence, which is supported by the fact that Caperton fails to provide one example of such conduct. For the reasons set forth more fully in Appellants' brief, the introduction of prejudicial and irrelevant evidence specifically referred to in Section VIII, G of Appellants' brief constitutes reversible error.

(e) The Trial Court Improperly Allowed Appellees To Introduce Irrelevant Evidence of Massey's Consolidated Financial Condition.

While Caperton asserts that evidence of Massey's financial condition is relevant to the issue of punitive damages, as well as to demonstrate the motive required to prove tortious interference, it simply is not. Consolidated financial information of numerous, unrelated Massey subsidiaries cannot, by any stretch of the imagination, be tied to Caperton's claims, and was only advanced at trial to inflame the jury and to provoke an outrageous verdict.

Moreover, Caperton's assertion that Appellants regularly opened the door to such inquiries, and failed to properly object is ludicrous. Blankenship's testimony that Appellants operated with the highest ethical standard and had no motive to harm Caperton or the Corporate Appellees clearly does not open the door to the introduction of evidence concerning the financial status of unrelated Massey entities. Further, Appellants filed a motion *in limine* on April 1, 2002 to preclude the introduction of such irrelevant evidence, which was denied. Because the lower court had already ruled on this issue, trial counsel was precluded from raising any objections at trial. The Trial Court's allowance of such evidence was highly prejudicial, and warrants a new trial.

(f) The Trial Court Improperly Excluded Portions of James L. Gardner's Testimony.

Although Gardner was an attorney for A.T. Massey, he was also a key witness to the defense of this matter. Gardner was called by Appellants at trial to testify regarding his personal knowledge of relevant facts that existed outside of his attorney/client relationship with A.T. Massey. Specifically, he previously worked for Inspiration Coal Company ("Inspiration") and was involved in the decision to terminate Henry Cook after his mine plan resulted in multi-million dollar losses. He also had first hand knowledge regarding the declaration of the *force majeure*, as well as the efforts to purchase Harman. None of his testimony was protected or prohibited from being disclosed under any attorney/client privilege with A.T. Massey. Rather, his testimony was based on relevant factual information that was critical to the Appellants' defense.

Furthermore, "as a general rule, courts do not disqualify an attorney on the grounds of conflict of interest unless the former client moves for disqualification." *State ex rel Youngblood v. Saunders*, 212 W. Va. 85, 575 S.E.2d 864 (2002). "The attorney-client privilege applies to compelled disclosure of confidences communicated by client to lawyer, and belongs to the client." *Lawyer Disciplinary Bd. v, McGraw*, 194 W. Va. 788, 461 S.E.2d 850 (1995). Therefore, the privilege belonged to Inspiration, not the Court. Because neither Inspiration, nor A.T. Massey asserted any attorney/client privilege, Gardner's testimony should not have been stricken. During the trial, the Trial Court permitted Appellants to call and question Gardner regarding some limited issues but repeatedly interrupted *sua sponte* to express concern regarding the attorney/client privilege. Ultimately, the Trial Court disqualified Gardner from testifying under the guise of the attorney/client privilege, although it was never asserted. The Trial Court's

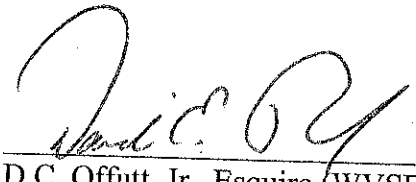
improper *sua sponte* dismissal of Gardner based upon the attorney/client privilege was in error, and deprived Appellants of an opportunity to present critical evidence.

VII. Conclusion.

Based upon the foregoing, and the arguments set forth in both their original Petition for Appeal and their original Brief, Appellants respectfully request that the Trial Court judgment be vacated and set aside. In the alternative, Appellants request a new trial or reduction in the judgment.

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.

BY COUNSEL

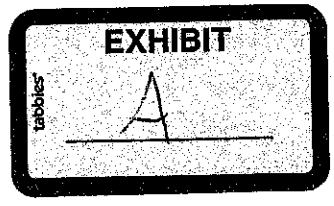


D.C. Offutt, Jr., Esquire (WVSB #2773)
Stephen S. Burchett, Esquire (WVSB #9228)
Perry W. Oxley, Esquire (WVSB #7211)
David E. Rich, Esquire (WVSB #9141)
Offutt, Fisher & Nord
949 Third Avenue, Suite 300
P.O. Box 2868
Huntington, West Virginia 25728-2868
(304) 529-2868 facsimile (304) 529-2999
dcoffutt@ofnlaw.com
ssburchett@ofnlaw.com
pwoxley@ofnlaw.com
derich@ofnlaw.com

A.T. MASSEY COAL COMPANY, INC.

CORPORATE RESERVE REPORT

OCTOBER 31, 1998



Hayden Farms, Inc. (Pysix Acquisition)

Seam	Seam Thickness Range	Reserves Beginning 11/01/97	11/1-10/31 Production Pre-1987	11/1-10/31 Production Total	Other Adjustments Pre-1987	Other Adjustments Total	Reserves As Of 10/31/98 Pre-1987	Reserves As Of 10/31/98 Total	30"-36" Deep Mine Reserves	Major End Use	Sulfur Category +1%	Sulfur Category -1%	Sulfur Category (Compl)	Reserve Classification Proven	Reserve Classification Probable	Reserve Classification Assigned	Reserve Classification Unassigned	Reserve Classification Category I	Reserve Classification Category II	Reserve Classification Category III
Splashdam No. 2	+30"	0	0	0	0	4,934	0	4,934	3,020	Met	0	4,934	4,934	2,023	2,783	0	4,934	0	0	4,934

Basis of Adjustment: Addition of 4,934,000 tons by acquisition from Pyxix Resources Co.

NOTE: Quality analysis came from two mines operating adjacent to the property lying to the northeast

ATTACHMENT A(A)
(Pyxis)

BEGINNING on a white oak on a spur, corner to Pyxis' K. S. Colley "221.89 acre" mineral tract, chestnut, sourwood witness; thence, with Colley tract, N 40°-43' E 186.10 feet to a chestnut oak stump on the spur, hickory, chestnut oak, beech witness; thence, S 69°-25' E 269.20 feet to a stake on a knob, chestnut, sourwood witness; thence, N 49°-39' E 159.20 feet to a sourwood and chestnut oak snag on spur, sourwood, chestnut oak witness; thence, S 80°-50' E 275.90 feet to a white oak stump in Fouch's Gap, hickory, black oak witness; thence, N 09°-00' W 349.50 feet to a poplar and poplar stump on hillside, poplar, hickory witness; thence, N 14°-31' E 924.40 feet to a white oak by Fouch's Branch; thence, S 40°-42' E 2,681.30 feet to a dead mulberry on hillside, chestnut witness; thence, N 75°-39' E 1,152.80 feet to a point in Colley tract line and corner to Pyxis' Big Sandy Fuel "13,000 acre" mineral tract; thence, leaving Colley tract and with Big Sandy tract, N 09°-54' E 1,033.60 feet to a concrete monument, dogwood, beech witness; thence, N 76°-23' E 555.20 feet to two black oaks, black oaks witness; thence, S 87°-27' E 619.20 feet to a beech and a maple, sourwood witness; thence, N 70°-17' E 1,099.30 feet to a beech on lower side of road, beech, birch witness; thence N 35°-18' E 361.50 feet to a beech and white oak in forks of hollow, beech, sourwood witness; thence, N 82°-58' W 1,404.90 feet to a concrete monument, chestnut oak, black oak witness; thence, N 25°-50' W 350.50 feet to a chestnut, sourwood, dogwood witness; thence, N 30°-45' W 1,025.70 feet to a locust and a dead dogwood on hillside, dogwood, hickory witness; thence, N 70°-09' W 278.10 feet to a concrete monument by a forked chestnut oak and chestnut saplings, chestnut, sourwood witness; thence, S 82°-41' E 2,914.00 feet to a concrete monument by a dead black pine and two chestnut oaks on a high ridge, dogwood, maple, hickory witness; thence, N 86°-04' E 2,893.80 feet to a black oak, chestnut and chestnut oak on a spur, black oak, chestnut witness; thence, N 57°-16' E 1,753.20 feet to a hickory in head of Staggerwood Hollow, dogwood, cucumber, chestnut witness; thence, N 08°-46' W 824.90 feet to a concrete monument between two beeches on north bank of Middle Fork Creek, beech, dogwood witness; thence, severing the "13,000 acre" tract, S 86°-27' E 3,057.08 feet to a chestnut, corner to "13,000 acre" mineral tract, sourwood, dogwood witness; thence, with "13,000 acre" tract, S 48°-20' W 696.30 feet to a concrete monument between a hickory and a chestnut oak in a gap at head of Middle Fork Creek, white oak, dogwood witness; thence, S 22°-43' W 620.00 feet to a double chestnut on a ridge, speckled oak, chestnut witness; thence, S 58°-27' W 802.30 feet to a concrete monument by a white oak snag, maple, dogwood, sourwood witness; thence, S 45°-09' W 507. 40 feet to two gums on a flat on top of ridge, sourwood witness; thence, S 17°-15' E 830.40 feet to a double maple and a chestnut oak, cucumber, dogwood, sourwood witness; thence, S 65°-57' E 1,508.70 feet to a chestnut about twenty feet east of center of ridge, chestnut, dogwood witness; thence, S 13°-22' E 494.30 feet to a concrete monument in a maple stump hole, black oak, gum, sourwood witness; thence, S 61°-07' W 485.30 feet to a chestnut on center and top of ridge, dogwood,

sourwood witness; thence, S 22°-36' W 978.70 feet to a concrete monument by a dogwood about thirty feet north of center of ridge, sourwood, black oak witness; thence, S 55°-39' E 299.60 feet to a concrete monument on center of ridge between two black oaks and a maple sprout, chestnut, sourwood witness; thence, S 44°-26' E 721.20 feet to a cucumber on northeast side of ridge, chestnut, dogwood witness; thence, S 51°-47' W 1,243.40 feet to a dead double dogwood, four hickory witness, corner to a 5,779 acre tract of Splashdam coal conveyed to H. E. Harman Coal Corporation by Big Sandy Fuel Corporation by Deed dated June 29, 1953; thence, leaving the outside boundary of the "13,000 acre" tract and down the ridge with the 5,779 acre tract, S 30°-36' W 322.62 feet; thence, S 89°-30' W 143.59 feet; thence, S 88°-19' W 179.20 feet; thence, S 59°-19' W 233.15 feet; thence S 71°-56' W 190.15 feet; thence, N 62°-52' W 160.56 feet; thence N 83°-37' W 137.27 feet; thence, S 72°-48' W 165.48 feet; thence, S 51°-34' W 220.71 feet; thence, S 87°-13' W 142.85 feet; thence, N 68°-56' W 240.22 feet; thence, N 61°-27' W 123.83 feet; thence, N 64°-29' W 242.27 feet; thence, S 72°-07' W 280.89 feet; thence, S 56°-39' W 109.43 feet; thence, S 77°47' W 263.49 feet; thence, S 53°-11' W 171.38 feet; thence, S 29°-07' W 239.96 feet; thence, S 25°-51' W 233.51 feet; thence, S 38°-33' W 155.29 feet; thence, S 15°-33' W 121.69 feet; thence, S 26°-12' E 188.12 feet; thence, S 46°-41' E 173.79 feet; thence, S 59°-37' E 163.79 feet; thence, S 18°-48' W 50.06 feet; thence, S 05°-41' W 188.24 feet; thence, S 16°-55' E 165.22 feet; thence, S 56°-09' W 315.84 feet; thence, S 58°-48' W 161.10 feet; thence, S 11°-01' W 182.28 feet; thence, S 63°-18' W 236.33 feet; thence, S 23°-20' W 271.26 feet; thence, N 87°-45' W 269.08 feet; thence, N 85°-48' W 153.17 feet; thence, S 46°-13' W 273.86 feet; thence, S 57°-00' W 114.26 feet; thence, S 08°-06' W 84.33 feet; thence, S 00°-21' E 284.92 feet; thence, S 16°-48' E 63.80 feet to a hickory and black gum in Meadow Gap, corner to Buchanan and Dickenson Counties; thence, leaving the 5,779 acre tract and with the county line S 87°-48' W 234.94 feet; thence, N 67°-22' W 318.60 feet; thence, N 56°-48' W 243.80 feet; thence, N 31°-40' W 262.50 feet; thence, N 29°-30' W 204.70 feet; thence, N 39°-47' W 308.30 feet; thence, N 16°-59' W 297.00 feet; thence, N 05°-55' E 187.40 feet; thence, N 05°-29' W 288.00 feet; thence, N 04°-11' W 150.50 feet; thence, N 70°-57' W 280.91 feet to a point in outside line of the "13,000 acre" tract; thence, leaving the county line and with the "13,000 acre" tract, N 11°-10' E 345.15 feet to a beech and a poplar on hillside, black oak witness; thence, N 32°-58' W 732.30 feet to a stake, sourwood, white oak witness; thence, N 31°-55' E 515.70 feet to a concrete monument, chestnut, white oak, sourwood witness; thence, N 65°-19' E 2,623.30 feet to two beeches by a branch, hemlock, maple witness; thence, N 45°-12' W 342.20 feet to two beeches beside a branch, hemlock, hornbeam witness; thence, S 65°-16' W 292.30 feet to a maple and a beech stump, birch, hickory witness; thence, S 76°-10' W 1,580.50 feet to a concrete monument in center of a hollow, black walnut witness; thence, S 42°-17' W 243.30 feet to a beech and a chestnut, hickory witness; thence, S 77°-13' W 387.20 feet to a double chestnut, black oak witness; thence, N 49°-11' W 360.10 feet to a white oak stump on side of a hollow, dogwood, poplar witness; thence, S 42°-42' W 199.60 feet to a stake; thence, S 07°-29' E 431.90 feet to chestnut sprouts on a point, maple, hickory, dogwood witness; thence, S 21°-32' W 1,105.70 feet to a beech and a poplar, black oak, white oak witness; thence, S 86°-53' W 406.30 feet to a concrete monument by a white oak on a hillside, black oak and chestnut oak witness; thence,

N 57°-30' W 1,580.59 feet to a point in "13,000 acre" tract line, corner to Pyxis' K. S. Colley "221.89 acre" mineral tract; thence, leaving "13,000 acre" and with Colley tract, S 47°-11' W 351.76 feet to a black gum, chestnut, white oak witness; thence, S 44°-14' W 341.95 feet to a point in line of "13,000 acre" tract; thence, with lines common to "13,000 acre" tract and Colley tract, N 56°-50' W 688.23 feet to a concrete monument on a small spur, forty feet above a small cliff, poplar, dogwood, black oak witness; thence, N 28°-57' W 1,124.10 feet to a stake; thence, S 69°-54' W 909.88 feet to a concrete monument twenty-seven feet south of a hollow, white walnut, poplar witness; thence, S 55°-24' W 277.49 feet to a stake, apple tree witness; thence, S 42°-48' W 153.22 feet to a point in line of "13,000 acre" and Colley tracts; thence, leaving "13,000 acre" tract and severing the Colley tract, N 52°-16' W 2,596.24 feet to a point in line of Colley tract; thence, with Colley tract, N 47°-52' E 509.93 feet to the Beginning, containing 1,443.27 acres more or less. And being 163.49 acres of Pyxis' K. S. Colley 221.66 acre tract and 1,279.78 acres of Pyxis' Big Sandy Fuel "3,413 acre" tract which is a portion of Big Sandy Fuel Corporation's "13,000 acre" tract.

CHASFS2:144118

ATTACHMENT A(A)
(Clinchfield)

Parcel #1

BEGINNING on a stake in line of K. S. Colley 221.66 acre mineral tract, apple tree witness; thence, with Colley tract N 55°-24' E 277.49 feet to a concrete monument twenty-seven feet south of a hollow, white walnut, poplar witness; thence, running with and leaving the Colley tract, N 69°-54' E 909.88 feet to a stake; thence, S 28°-57' E 1,124.04 feet to a concrete monument on a small spur, forty feet above a small cliff, poplar, dogwood, black oak witness; thence, S 56°-50' E 2,418.34 feet to a small chestnut stump, birch, dogwood witness; thence, S 86°-45' E 1,785.45 feet to a concrete monument where a birch stood, chestnut, white oak, dogwood witness; thence, N 11°-10' E 112.87 feet to a point in the Buchanan-Dickenson County line; thence with the county line, S 70°-57' E 280.91 feet; thence, S 04°-11' E 150.50 feet; thence, S 05°-29' E 288.00 feet; thence, S 05°-55' W 187.40 feet; thence, S 16°-59' E 297.00 feet; thence, S 39°-47' E 308.30 feet; thence, S 29°-30' E 204.70 feet; thence, S 31°-40' E 262.50 feet; thence, S 56°-48' E 243.80 feet; thence, S 67°-22' E 318.60 feet; thence, S 87°-48' E 234.94 feet to a hickory and black gum in Meadow Gap, corner to Buchanan and Dickenson Counties and corner to a 5,779 acre tract of Splashdam coal conveyed to H. E. Harman Coal Corporation by Big Sandy Fuel Corporation by Deed dated June 29, 1953; thence, leaving the county line and running with the 5,779 acre tract, S 52°-16' E 15,898.69 feet to a point; thence, leaving the 5,779 acre tract, S 12°-46' W 623.00 feet to a point; thence, N 77°-14' W 2,215.44 feet to a point; thence, N 52°-16' W 24.89 feet to a point; thence, N 12°-46' E 769.49 feet to a point; thence, N 77°-14' W 1,545.00 feet to a point; thence, N 12°-46' E 160.00 feet to a point; thence, N 77°-14' W 150.00 feet to a point; thence, N 12°-46' E 95.00 feet to a point; thence, N 77°-14' W 505.06 feet to a point; thence, N 52°-16' W 19,518.97 feet to a point in line of K. S. Colley 221.66 acre mineral tract; thence, with Colley tract, N 42°-48' E 153.22 feet to the Beginning, containing 726.36 acres, more or less. And being 487.85 acres of Clinchfield's Big Sandy Fuel "1,216 acre" tract lying in Buchanan County and being 238.51 acres of Clinchfield's Big Sandy Fuel "2,074.13 acre" tract lying in Dickenson County, all 726.36 acres being a portion of Big Sandy Fuel Corporation's "13,000 acre" tract.

Parcel #2

BEGINNING on a concrete monument on a hillside, chestnut, sourwood and beech witness; thence, S 35°-50' W 715.20 feet to a lynn; thence, N 78°-06' W 287.60 feet to a lynn stump; thence, S 54°-54' W 415.00 feet to a stake; thence, S 23°-07' W 117.74 feet to a point; thence, leaving the outside line, N 52°-16' W 2,847.38 feet to a point; thence, N 12°-46' E 617.95 feet to a point; thence S 77°-14' E 300.00 feet to a point; thence, N 12°-46' E 897.00 feet to a point in line of a 5,779 acre tract of Splashdam coal conveyed to H. E. Harman Coal Corporation by Big Sandy Fuel Corporation by Deed dated June 29, 1953; thence, with 5,779 acre tract, S 52°-16' E 3,304.51 feet to a point in outside line; thence, leaving the 5,779 acre tract, S 20°-10' E 281.19 feet to the Beginning, containing 110.59 acres, more or less. And being 8.68 acres of Clinchfield's Big Sandy Fuel "1,216 acre" tract which is a portion of Big Sandy Fuel Corporation's "13,000 acre" tract and 101.91 acres of Clinchfield's Big Sandy Fuel "2,227.78 acre" tract which is a portion of Big Sandy Fuel Corporation's "2,507 acre" tract.

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.

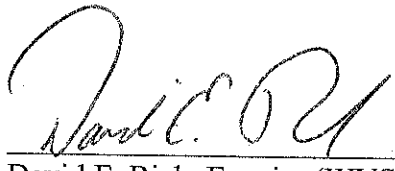
CERTIFICATE OF SERVICE

I, David E. Rich, Esquire, counsel for Petitioners, do hereby certify that I served the foregoing, **"Appellants' Reply To Brief Of Appellee Hugh M. Caperton"** upon the following counsel of record via facsimile and by depositing the same in the United States Mail, first class and postage pre-paid this 18th day of June, 2007:

Robert V. Berthold, Jr., Esquire
Berthold, Tiano & O'Dell
208 Capitol Street
Charleston, WV 25301
Counsel for the Corporate Plaintiffs/Appellees
Harman Development Corporation,
Harman Mining Corporation and
Sovereign Coal Sales, Inc.

David B. Fawcett, III, Esquire
Buchanan Ingersoll
One Oxford Centre
301 Grant Street, 20th Floor
Pittsburgh, PA 15219
Counsel for the Corporate Plaintiffs/Appellees
Harman Development Corporation,
Harman Mining Corporation and
Sovereign Coal Sales, Inc.

Bruce E. Stanley, Esquire
Tarek Abdalla, Esquire
Reed & Smith, LLP
435 Sixth Avenue
Pittsburgh, PA 15219
Counsel for the Plaintiff/ Appellees
Hugh M. Caperton



David E. Rich, Esquire (WVSB #9141)
Offutt, Fisher & Nord
949 Third Avenue, Suite 300
P.O. Box 2868
Huntington, West Virginia 25728-2868
Phone (304) 529-2868
facsimile (304) 529-2999
derich@ofnlaw.com