IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Appellants,

v.

Appeal No. 33350

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

Appellees.

PETITION FOR REHEARING OF APPELLEE HUGH M. CAPERTON

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I. INTRODUCTION

Appellee Hugh M. Caperton ("Mr. Caperton"), by his undersigned counsel, respectfully petitions this Court pursuant to Rule 24 of the West Virginia Rules of Appellate Procedure to grant a rehearing in this matter in order to correct numerous significant errors of law and fact.

The Court's Opinion in this case shattered West Virginia precedent, broke new legal ground, and misinterpreted and misapplied the law of a foreign jurisdiction in order to overturn a fair and justified jury verdict—a verdict which was duly rendered after an exhaustive seven week trial, and which has been reaffirmed by the Circuit Court in its thorough, carefully-considered Final Order. The consequences of this Court's ruling are neither fair nor just. While rehearings are not a routine matter, they do exist for a reason, and surely their most valuable application is in reconsidering an outcome that deprives gravely injured plaintiffs of a fair and fully-warranted jury verdict. Under those circumstances, the decision undoubtedly requires greater scrutiny. The Opinion of the majority simply cannot withstand such scrutiny in this case, for many fundamental substantive reasons.

First, in overturning settled West Virginia law and creating a new and drastically different test for the applicability of forum selection clauses, and then applying that test retroactively to the Appellees so as to deprive them of any meaningful opportunity to have their claims heard, this Court has violated the Appellees' fundamental right to due process under the Fourteenth Amendment of the United States Constitution. This Court has the authority under West Virginia law to apply its newly announced test prospectively only, and leave the jury verdict and court findings below intact with respect to the parties before it. This is the fair and equitable course of action because it accords with the constitutional rights of all Parties in this case, gives full and appropriate regard to the "justified" findings rendered by the jury and Circuit Court judge after a lengthy trial, and would work substantial justice here, as the Court itself recognizes that the judgment for the Appellees was "warranted" because of their "sympathetic" facts and the Appellants' "egregious... conduct." Opinion at 13. This outcome is also mandated by the very terms of the Court's new test.

Second, this Court's Opinion failed to address the fact that the United States Bankruptcy Court for the Western District of Virginia has already carefully considered the Parties' arguments regarding the proper forum for this action, and expressly ruled that the appropriate forum is West Virginia. Appellants never appealed that final ruling, and Appellees have timely raised this issue in this Court and below. Under governing federal law, the Virginia Bankruptcy Court's thoughtful and thorough order must be given preclusive effect in this Court, and *res judicata* should therefore have barred the Appellants' claims that West Virginia was not the proper forum for this case.

Third, in addressing the Appellants' *res judicata* arguments regarding the Virginia contract action, this Court improperly applied a Virginia statute to Appellees, which, by its own terms, does not apply to any case brought before 2006. This improper retroactive application is a violation of Appellees' constitutional rights. Additionally, this Court ignored well-settled Virginia law which permits but *does not require* plaintiffs to pursue both contract and tort claims in the same action. Therefore, Appellees' choice to bring the tort action separately was entirely valid and supported by Virginia law, and it is error to assert that Virginia law would support *res judicata* under these circumstances.

Fourth, in making its rulings that there was identity of remedy, cause of action, parties, and quality of persons for or against whom the claim was made, this Court made factual assertions and conclusions that were unsupported by the record and which contradicted the substantial factual findings of the jury and judge below. In so doing, this Court implicitly overturned the factual findings below without declaring any abuse of discretion as required by West Virginia law. The factual findings below unequivocally stated that the Plaintiffs in the West Virginia action had individual and corporate damages that were *not* redressed in the Virginia contract action, and which occurred due to the Defendants' tortious actions separate from and in addition to Wellmore's wrongful declaration of *force majeure*. These improper factual findings are especially egregious as applied to Mr. Caperton, who was not represented in nor compensated by the Virginia action.

Fifth, by making and applying these erroneous factual conclusions, the Court has particularly contravened Appellee Caperton's state and federal due process rights. Mr. Caperton was neither a party nor a privy to any of the parties to the Virginia case, and has nevertheless been bound to a decision which deprived him of his rights without any opportunity for a hearing. This is the most fundamental sort of due process violation, and it cannot be allowed to stand.

Finally, the Appellees' federal due process rights have been violated by the actual judicial bias or appearance of bias as evidenced by external factors which undermine confidence in the impartiality of some members of this Court. The Supreme Court of the United States has held that impartiality and appearance of impartiality are the sine qua non of the legal system, and recusal is constitutionally mandated if a judge's impartiality could reasonably be questioned. Under this standard, it was error and a violation of Appellees' constitutional rights for Justice Benjamin to refuse to disqualify himself upon Appellees' motion.

Because of all these issues and more, as will be described below, the application of this Court's decision to the Appellees cannot be squared with the mandates of the Constitution of the United States, principles of appellate review, West Virginia law, and the most fundamental rights of a citizen of this state and nation to receive a fair hearing and just redress for the substantial harm that has been illegally inflicted upon him. The integrity of the judicial system hangs in the balance, and demands a different result.

II. ARGUMENT

A. Forum Selection Clause

1. Retroactive Application Of The Court's Newly Announced Forum Selection Clause Test Was Inappropriate And Unnecessary Under West Virginia Law, And Unjust Under The Terms Of The Test Itself.

The Court's Opinion in this case was groundbreaking, announcing seven new syllabus points. Among these points was a four-part test, previously unheard of in West Virginia, which is intended to determine under what circumstances a claim should be dismissed based upon a

forum selection clause. Additionally, the Court overruled a long line of West Virginia precedent which prevented non-signatories to a contract from enforcing any part of that contract unless the non-signatory was an intended third-party beneficiary of the contract. The Court replaced that rule with the radically different holding that *non-signatory plaintiffs* may be bound to a contract by *non-signatory tortfeasors*, if the claims are in some way related to the contract.[1] This Court then applied those new and unforeseeable statements of law retroactively to the Appellees. Such application was not only unnecessary, but also unconstitutional, and cannot stand against Mr. Caperton and the Corporate Appellees.[2]

This Court has often recognized that West Virginia courts have discretion in deciding whether to apply a new principle of law prospectively only, or retroactively to the parties before it. In *Bradley v. Appalachian Power Co* , 163 W. Va. 332 (1979), this Court stated the following considerations which govern whether a court should apply a decision prospectively:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, ... or by deciding an issue of first impression whose resolution was not clearly foreshadowed.... Second, it has been stressed that we must ... weigh the merits and demerits in each case by looking to the prior history of the rule in question, its

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1 This decision has effectively created a new loophole that will allow any party to a contract with greater bargaining power to maneuver its way out of any accountability to West Virginia citizens in West Virginia Courts for wrongs done and harms suffered in West Virginia. In this case, the Jury and Circuit Court unequivocally found that the Appellees suffered major harm because of independent wrongs committed against them by the Appellants *after* Massey had already bought and sold Wellmore. *See infra*, pp. 16-18. Therefore, it is the holding of this Court that an entity can take advantage of a forum selection clause of a *former* subsidiary in order to shield from West Virginia review its *subsequent* tortious acts against non-signatories to the forum selection clause. With such blindly sweeping application of these clauses, it will certainly be increasingly common to see unsuspecting West Virginia citizens dragged into less favorable foreign jurisdictions, based solely upon contract terms about which they had no say, and to which they never agreed.

2 The Court took these extraordinarily damaging steps against the Appellees by reversing the Circuit Court's denial of Appellants' Motion to Dismiss. This, in itself, is also an extraordinarily rare act. An informal survey revealed that this Court has only reversed the *denial* of a civil Motion to Dismiss two other times in the last *decade*. One of these cases provided some indication as to why this might be. in addition to the fact that such denials are interlocutory: "Generally, a motion to dismiss should be granted only where it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. For this reason, motions to dismiss are viewed with disfavor, and we counsel lower courts to rarely grant such motions." *Ewing v. Board of Educ* , 202 W. Va. 228 (1998). This same disfavor should be applied by this Court on review. *See also Zaleski v. W. Va. Physicians' Mut. Ins. Co.*, 647 S.E.2d 747 (W. Va. 2007).

> purpose and effect, and whether retrospective operation will further or retard its operation. Finally, we have weighed the inequity imposed by retroactive application, for where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity.

Id. at 347 (internal citations omitted). The *Bradley* opinion proceeded to set forth numerous additional factors which may help courts decide whether a particular change of law should be applied prospectively or retroactively, such as the degree to which the prior law was settled, whether the issue at hand is procedural or substantive, the potential impact of the decision, and the degree of departure from prior law. *Id.* at 349. However, the Court took care to note that "while general guidelines can be evolved to determine whether retroactive or prospective application should be given to an overruling decision, it is difficult to etch them with precision so that they will fit all cases." *Id.* at 348. The Court also cautioned that "[i]n any attempt to list factors, it should be stressed that not all factors always carry the same weight, for the weight of any given factor may vary with the facts of a given case." *Id.* at 349. Thus, in *Bradley*, and the numerous decisions relying upon it, it is evident that the decision to apply a new rule retroactively depends heavily on the facts, equities, and impact of each case before the court.

Applying *Bradley* to this case, the balance of all factors clearly falls in favor of the Court's new law operating prospectively only. First, the Court openly states that "[t]his case presents the first opportunity for this Court to address substantive issues involving forum-selection clauses." Opinion at 15. The Court used this opportunity to adopt the United States Court of Appeals for the Second Circuit's four-part test for determining whether to dismiss a claim based upon a forum selection clause. The progression of West Virginia law did not foreshadow this change. In fact, the only West Virginia law on forum selection that the Court found relevant to this decision was the very general statement that forum selection clauses are not void per se, but rather "will be enforced only when found reasonable and just." Opinion at 16, citing *General Elec. Co. v. Keyser*, 166 W. Va. 456, 461-462 (1981). While somewhat vague, this statement does evidence an apparent reluctance or caution in enforcing forum selection clauses. The Court's new test, to the contrary, sweepingly broadens the meaning and

effect of such clauses. For example, in applying part of the third prong of the test, considering whether the claims in this case are covered by the forum selection clause, the Court staked out a position which bestows greater reach by forum selection clauses than the reach of proximate causation in tort. As a consequence, although the judge and jury below emphatically held that the Appellees' injuries were *not* caused by Wellmore's breach of the 1997 CSA, but rather by the separate and additional actions of the Appellants both before and after that breach, the Court concluded that the Appellees' injuries may not have existed *but for* Wellmore's breach, and were therefore sufficiently "in connection with" the 1997 CSA's forum selection clause to be governed by it.

In addition to setting forth this new and unforeseeable change in the law, this Court also overturned well-settled West Virginia precedent regarding the applicability of contract clauses to non-signatories. The prevailing law up to the time of this Opinion was that

> even where the right [of a non-signatory to enforce a contract] is most liberally granted it is recognized as an exception to the general principle, which proceeds on the legal and natural presumption, that a contract is only intended for the benefit of those who made it. Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must, at least show that it was intended for his direct benefit

Ison v. Daniel Crisp Corp., 146 W. Va. 786, 792-793 (1961). This doctrine has withstood the test of time, and has been recently repeated, both in West Virginia and Virginia. *See, e.g.*, *Robinson v. Cabell Huntington Hosp.*, 201 W. Va. 455 (1997) ("in order for a contract concerning a third party to give rise to an independent cause of action in the third party, it must have been made for the third party's sole benefit."); *Elmore v. State Farm Mut. Auto. Ins. Co.*, 202 W. Va. 430 (1998) (same); *Casto v. Dupuy*, 204 W. Va. 619 (1999) (same); *Eastern Steel Constructors, Inc. v. City of Salem*, 209 W. Va. 392 (2001) (same); *Verosol B.V. v. Hunter Douglas, Inc.*, 806 F. Supp. 582 (E.D. Va. 1992) ("Under well-settled principles of contract law, a stranger to a contract ordinarily has no rights under the contract and cannot sue to enforce it."). This Court did not address this clear and undisputed line of West Virginia cases in making its decision to allow non-signatories, for whose benefit the contract was *not* made, to enforce the

terms of that contract against persons who were *also* not parties to the contract. Instead, the Court found only cases from several foreign jurisdictions to support its new and contrary rule of law. The Appellees were justified in relying on the clear past precedent of West Virginia.

Regarding the remainder of the *Bradley* factors, there is no indication that the Court's new rule would be furthered by retroactive application. Rather, retroactive application would cause grave injustice and hardship to the Appellees, who have already waited over a decade to be made whole for their approximately $50 million in injuries, and who now face the possibility of never obtaining any justice, despite the fact that this Court readily agrees with the jury and judge below that the Appellants' actions were unlawful and that the Appellees deserve compensation for their damages. The injustice and hardship are felt particularly by Mr. Caperton, who, according to this Court, may never have an opportunity to be made whole. The Appellees' most basic and substantive right to redress for their injuries is at stake due to this Court's radical departure from previous substantive law.

In any event, the Court has failed to apply the mandates of the United States Supreme Court and its own tests in determining whether to enforce a forum selection clause. In *M/S Bremen*, relied upon by this Court, the United States Supreme Court found forum selection to be valid unless, *inter alia*, "enforcement would be unreasonable or unjust." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972). Here, this Court has acknowledged "the facts of this case demonstrate that Massey's conduct warranted the type of judgment rendered in this case," then found that it could not "compromise the law" "to reach a result that clearly appears to be justified." Recognizing the unjust and unreasonable outcome wrought by forum selection clause enforcement does not "compromise the law," but rather is a mandated element which must be satisfied before such a clause can be enforced.[3]

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[3] Other courts that have applied this test to determine that the application of the forum selection clause is unjust have done so for much less compelling reasons than the circumstances at bar. For instance, in *Goff v. AAMCO Automatic Transmissions, Inc.*, 313 F. Supp. 667 (D. Md. 1970), the court held that the application of a clause which required a Pennsylvania forum was "unreasonable" and "seriously impair[ed] plaintiff's ability to pursue his cause of action" where the wrongs were committed in Maryland, one of the parties was located in Maryland, and most of the witnesses were in Maryland. *See*

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None of the cases cited by Appellants or this Court applied a forum selection clause to reverse an otherwise valid jury verdict, and for good reason. This Court and others have recognized that there are proper procedural mechanisms which should be used to make a final determination as to forum *before* trial on the merits. Disrupting the judgment is particularly egregious where, as here, Appellants failed to avail themselves of those appropriate procedural remedies—namely, petitioning for a writ of prohibition or mandamus. *See, e.g., State ex. rel. Stewart v. Alsop*, 207 W. Va. 430 (2000) (court found that writ of prohibition is appropriate remedy for challenging denial of motion for improper venue); *Smith v. Maynard*, 186 W. Va. 421 (1991) (writ of prohibition granted against the respondent where improper ruling as to venue was made); *Bad Toys Holdings, Inc. v. Emergystat of Sulligent, Inc.*, 958 So.2d 852, 855 (Ala 2006) (cited by the majority) ("A petition for writ of mandamus is the proper vehicle for obtaining review of an order denying enforcement of an 'outbound' forum-selection clause when it is presented in a motion to dismiss."). Under these facts and in the face of Appellants' own procedural neglect, this Court cannot apply a forum selection clause to commit the ultimate injustice—to nullify an admittedly warranted judgment rendered by a West Virginia jury and endorsed by the trial court, and give absolution to Appellants who are acknowledged to be guilty of fraud and other tortious acts. It is particularly unjust for Appellee Caperton to now discover that a forum selection clause in a contract to which he was not a party, and in which he was in no way personally represented, can be employed to bestow a benefit upon the companies that defrauded him and to deprive him of the opportunity to have his personal claims heard and his personal injuries redressed.

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also Carefree Vacations, Inc. v. Brunner, 615 F. Supp. 211 (W.D. Tenn. 1985); *Exum v. Vantage Press, Inc.*, 17 Wash. App. 477 (1977). All of those facts are present here as well, but seem comparatively minor in relation to the loss of a fair and warranted $50 million jury verdict won after a decade of litigation that was dragged through one forum after another and multitudes of bad faith dilatory pleadings and maneuvers by the Appellants.

Therefore, this Court's assertion that "no matter how sympathetic the facts are, or how egregious the conduct, [it] simply cannot compromise the law in order to reach a result that clearly appears to be justified" is actually a misapprehension of the Court's discretion and indeed its *duty* in this case. Opinion at 13. Because of the Court's professed sympathy for the Appellees here, and because of its "wish to make [it] perfectly clear that the facts of this case demonstrate that Massey's conduct warranted the type of judgment rendered in this case," the Court may be pleased to discover that the law in fact does "permit this case to be filed in West Virginia." *Id.*

2. Retroactive Application Of The Court's Newly Announced Forum Selection Clause Test Violates The Appellees' Due Process Rights

Prospective application of the Court's new law is not only warranted under West Virginia precedent, it is also mandated by the Fourteenth Amendment of the federal Constitution. Although retroactive application of new common law is constitutionally permitted under general circumstances, the facts in this case require a different result. When the practical effect of a judgment is to deprive a plaintiff of property without allowing the plaintiff any opportunity to defend against the deprivation, that judgment violates the Due Process Clause of the Fourteenth Amendment. *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673 (1930). In *Brinkerhoff*, the plaintiff sued to protest the collection of a tax. The taxpayer followed the state's recognized means of protesting the tax at the time, but on appeal in the Missouri Supreme Court, it was newly informed that it should have brought its action in the State Tax Commission, and that action below was therefore invalid. At the time of the Missouri Supreme Court's decision, the allowed time for making a claim before the Tax Commission had passed. The United States Supreme Court overturned the Missouri decision, holding that "a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." *Id.* at 682.

This decision was more recently applied in *Bouie v. Columbia*, 378 U.S. 347 (1964), which held that "when a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law in its primary sense of an opportunity to be heard and to defend his substantive right." *Id.* at 355. Again, in *Boddie v. Connecticut*, 401 U.S. 371 (1971), the Supreme Court held that "a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question." *Id.* at 379. Further, "[t]he State's obligations under the Fourteenth Amendment are not simply generalized ones; rather, the State owes to each individual that process which, in light of the values of a free society, can be characterized as due." *Id.* at 380. *See also Williams v. United States*, 470 A.2d 302, 308-09 (D.C. 1983) (even where a litigant may have had the opportunity to comply with new procedural requirement, due process was nevertheless denied --"[F]or all practical purposes, appellant—encouraged by decisions of this court and the federal courts—found himself in the same position as the petitioner in *Brinkerhoff-Faris*, ousted from court by a newly-announced rule after he had reasonably relied on a different, generally followed and approved practice.").

This line of cases is squarely applicable to the case at hand. The Appellees here followed all of the procedural rules for choosing a forum and bringing their claims, as those rules were known up until the announcement of this Court's instant Opinion. As described in the preceding section, West Virginia and Virginia law were clear that the forum selection clause could not be enforced by or against the Parties to this case. Now, without any fault of the Appellees, they have been deprived not only of their otherwise valid verdict below, but also any opportunity to have their claims heard in accordance with the Court's new rules. The Appellees have the right, and must at least be granted the opportunity, to address the factual and legal issues raised by this Court's new four-part test before that new law may be applied retroactively to them. Particularly, the Court criticizes the Appellees for not briefing an argument in response to the third prong of the Court's new test. Opinion at 28, FN 24 and 35, FN 26. While the Court calls

this fact "inexplicable," it is actually quite obvious that a party would have no reason to brief arguments based on a test that did not exist at the time of the briefing. Similarly, the Court notes that the Appellees have not made any argument in response to the fourth prong of the new test, which is intended to give parties an opportunity to rebut the enforcement of a forum selection clause against them, either by showing that such enforcement is "unreasonable" or "unjust," or that it would cause them to, "for all practical purposes be deprived of [their] day in court," or because the enforcement "would contravene a strong public policy of the forum state." Opinion at 43-44. Of course Appellees have not yet made such arguments, since those criteria had not been announced until this decision, but Appellees could make strong arguments in response to all of those factors, and must at least be given a hearing in which to do so. But because this Court elected to reverse the judgment and remand for the sole purpose of dismissing the Appellees' claims with prejudice, the Appellees have been left without any process to recover the $50 million in damages which this Court agrees was due and warranted. This decision therefore works an impermissible violation of the Appellees' federal due process rights, and must be corrected.

3. *Res Judicata* Prevents This Court From Entertaining Appellants' Argument That West Virginia Was Not The Proper Forum In Which To Hear Appellees' Tort Claims

In their Brief on Appeal and below, the Appellees raised the fact that the United States Bankruptcy Court for the Western District of Virginia has rendered a final, uncontested ruling specifically addressing the proper forum for this Action. In November 2000, that court ruled that a decision on the Parties' dispute "can be better rendered in the West Virginia Action, [and] this Court chooses to abstain from hearing these declaratory judgment actions in favor of resolution by an appropriate West Virginia forum." Bankruptcy Decision at 5. Abstention decisions of bankruptcy courts are final and appealable. 5B Fed. Proc., L. Ed. Sec. 9:1821. Since the Appellants did not appeal this decision, the conclusions of that order are binding upon the

Appellants.[4] *See, e.g., In re Schimmels*, 127 F.3d 875 (9th Cir. 1997). As such, it was a violation of fundamental principles of federalism and applicable federal law for this Court to ignore the final ruling of the Western District of Virginia Bankruptcy Court, which squarely addressed the issue at hand and rendered a decision directly contrary to the majority's present Opinion.

The relevant law holds that the elements of *res judicata* are "(1) a final judgment on the merits in an earlier suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) an identity of parties or their privies in the two suits." *United States, Dep't of Air Force v. Carolina Parachute Corp.*, 907 F.2d 1469, 1474-1475 (4th Cir. 1990). All of those requirements are met here. The Bankruptcy Court's decision was a final judgment on the merits. Additionally, the relevant cause of action is the same. The Bankruptcy Court described the issue before it as Massey's attempt to "obtain a judicial determination that under West Virginia law Caperton and Harman Development have no independent claims of their own which they can pursue against Massey for its alleged wrongful conduct." Bankruptcy Decision at 5. Of course, the main questions at issue in the present Action are the same—whether the Appellees have independent claims against Appellants for Appellants' wrongful conduct under West Virginia law. Additionally, all of the Appellees and the primary Appellant (the parent corporation in privity with the other Appellants) were present in the Virginia bankruptcy action.[5] Under these elements, *res judicata* is warranted against the Appellants, and it is error to fail to recognize this fact. *Id.*

Finally, the United States Supreme Court has "required that effect be given in both state and federal courts to a plea of *res judicata* arising from decrees of a bankruptcy court." *Heiser v.*

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[4] In fact, the Appellants seemed to recognize the finality and authority of the Bankruptcy Court's decision, not only because they failed to appeal from it, but because they elected not to raise the forum selection clause issue again when they filed their Motion for Summary Judgment in April 2002. In effect, they have twice waived this argument, and they cannot be heard to raise it now, at this late stage, and when it will cause so much hardship and injustice to the Appellees.

[5] This is in stark contrast to the Virginia action, where Mr. Caperton had no personal representation at all, and where none of the Defendants in this case were parties.

Woodruff, 327 U.S. 726, 733 (1946). In the same context, the Supreme Court has also ruled that "[a]fter a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined." *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938). *See also Monarch Life Ins Co. v. Ropes & Gray*, 65 F.3d 973, 978 (1st Cir. 1995) ("unless a party in interest objects, and appeals an erroneous ruling by the bankruptcy court that it had 'jurisdiction' to confirm terms of plan, the ruling is conclusive in subsequent proceedings," and "bankruptcy court decisions trigger normal *res judicata* principles"); *Peloro v. United States*, 488 F.3d 163, 178-176 (3d Cir. 2007) ("The normal rules of *res judicata* and collateral estoppel apply to the decisions of bankruptcy courts," and "bankruptcy court orders allowing or denying claims are final and appealable").

Given the clarity of the law and undisputed facts, there is no proper justification for failing to recognize the *res judicata* effect of the Bankruptcy decision against the Appellants.

B. Res Judicata

1. This Court's Application Of *Res Judicata* Against Appellees Is Erroneous Because It Is Based On A Misapprehension Of The Relevant Law

In its Opinion, this Court overlooks the most relevant statement of Virginia law with respect to Appellees' right to bring their contract and tort claims separately. Virginia Code § 8.01-272 clearly states that "[a] party *may* join a claim in tort with one in contract provided that all claims so joined arise out of the same transaction or occurrence." (emphasis supplied). This statute, adopted in 1977, altered the previous common law of Virginia which *prohibited* joining contract and tort claims in the same action. Therefore, joining of tort and contract claims is now a permissive option which plaintiffs may or may not exercise *as they so choose*. Appellees' decision to bring their tort claims against Appellants separately from the contract action against Wellmore was entirely proper, and cannot form the basis of *res judicata* against them.

Additionally, the Court's reliance upon Virginia Supreme Court Rule 1:6 to support its assertion that there is identity of the causes of action in the present case and the Virginia contract case is erroneous. By its own terms, that statute applies only to "all Virginia judgments entered in civil actions commenced after July 1, 2006." Clearly, it has no application to the case at bar. The Court's improper retroactive application of this statute constitutes a due process violation and a taking under the Fifth Amendment of the United States Constitution. The United States Supreme Court has declared that statutes "will not be construed to have retroactive effect unless their language requires this result," because "the presumption against retroactive legislation is deeply rooted in our jurisprudence." *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 264 (1994). This rule is based in part on "the Fifth Amendment's Takings Clause [which] prevents the Legislature (and other government actors) from depriving private persons of vested property rights except for a 'public use' and upon payment of 'just compensation.'" *Id.* at 266.

Furthermore, "[t]he Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause 'may not suffice' to warrant its retroactive application." *Id.* Because the Appellees were deprived of their right to their cause of action (*see, e.g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982), holding that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause"), and because this retroactive application granted them no fair notice of the effects on their interests, their constitutional rights have been violated. There was no justification for this Court to contravene the plain language of the Virginia statute and apply it retroactively to the Appellees, and this constitutional violation must be ameliorated.

Instead of the wrongful reliance on Virginia Supreme Court Rule 1:6, this Court should have applied the correct law in effect during the pendency of both the Virginia and West Virginia actions, which was fully described in *Davis v. Marshall Homes, Inc.*, 265 Va. 159 (2003). Inexplicably, this Court incorrectly stated that *Davis* represented a "significant[] change in how [the Supreme Court of Virginia] defined the term 'cause of action.'" Opinion at 56, FN 37.

However, the *Davis* decision itself takes great care in explaining how its holding is entirely consistent with that court's own precedent. *Davis* held that the "plaintiff's fraud and contract actions arose from different definable factual transactions and, just as important, these actions constituted assertions of different particular legal rights. Clearly, the right to enforce a contract is a separate and distinct particular legal right from the right to enforce an action for fraud." 265 Va. at 172. In reaching its decision, the *Davis* court relied in part upon well-settled Virginia precedent that "the test to determine whether claims are part of a single cause of action is whether the same evidence is necessary to prove each claim." *Id.* at 166, citing *Brown v. Haley*, 233 Va. 210, 216 (1987). The court held that the evidence required to prove the plaintiff's fraud and contract claims was so different that the fraud evidence would have been largely irrelevant and therefore inadmissible in the contract action, and vice versa. *Id.* at 166-167. Moreover, the *Davis* decision specifically rejected the "transactional approach" (embraced by this Court's Opinion) to determining identity of the cause of action, in accordance with its own precedent, citing *Haley*, 233 Va. at 216; *State Water Control Bd. v. Smithfield Foods, Inc.*, 261 Va. 209, 214, 542 S.E.2d 766, 769 (2001); *Smith v. Ware*, 244 Va. 374, 376, 421 S.E.2d 444, 445 (1992); *Flora, Flora & Montague, Inc. v. Saunders*, 235 Va. 306, 310-311, 367 S.E.2d 493, 495 (1988).

The same law applies squarely to the Appellees. Appellees' tort and contract claims arose from different definable transactions, and asserted different legal rights. It is therefore beyond doubt that the Appellees were fully entitled to bring their tort claims separately from any contract action, and that relevant Virginia law does *not* support this Court's assertion of *res judicata* in this case.[6]

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[6] In addition, from the time the Virginia decision became final on September 13, 2002 through the entry of the Circuit Court's Final Order, Appellants never raised *res judicata* in a pleading with the Circuit Court, thus waiving their right to assert the defense on appeal under Virginia law principles, as cited by this Court. *See Ward v. Charlton*, 177 Va. 101, 110-15 (Va. 1941) ("an appellate court ... will not entertain the defense of *res judicata* if it was available and was not made below.").

2. This Court's Application Of *Res Judicata* Against Appellees Is Erroneous Because It Overrules Factual Findings Below Without Showing Error Below

While this Court did not explicitly declare its intent to overturn the factual findings below, it made numerous statements in support of its *res judicata* argument which directly contradicted those findings. The West Virginia Constitution and the precedent of this Court prevents such reexamination of facts tried by juries, and this Court has been "admonish[ed] . . . not to interfere in the jury's domain except with extreme reluctance." Constitution of West Virginia, Art. III, section 13; *Addair v. Majestic Petroleum Co., Inc.*, 160 W. Va. 105 (1977). The majority disturbed the factual findings of both the jury and the Circuit Court without *any* apparent reluctance, and without even addressing why the Court deemed it defensible to take this extraordinary step. There is, in fact, no justification for this action, and the findings of fact below must stand.

As an example of this indefensible fact-finding of the majority, this Court claimed that "[b]oth the tort claims asserted in the case *sub judice* and the earlier contract claims asserted in the Virginia proceeding arise from . . . the wrongful declaration of *force majeure* by Wellmore, which was carried out under the direction and control of the Massey Defendants. Opinion at 59. However, the Circuit Court's Final Order found, *inter alia*, that the Appellants here "developed a plan to interfere with Plaintiffs' existing and prospective relations with Wellmore *before* A.T. Massey Coal Company acquired Wellmore"; that the "Defendants' negotiations with Plaintiff Caperton in the time period from November 1997 through March 1998 were conducted directly by Defendants' Chief Executive Officer, Donald Blankenship, *and not by Wellmore or any of its corporate officers*"; that the "Defendants, *not Wellmore or any of its corporate officers*, interfered with Plaintiff Caperton's management of the bankruptcy of the Corporate Plaintiffs by purchasing claims to obtain standing in the Bankruptcy Court and to have Caperton removed as debtor-in-possession"; and that the "Defendants took *numerous specific steps* pursuant to its plan to wrongfully interfere with Plaintiffs' existing contractual relations with Wellmore *before, during and after* the short time that Defendant A.T. Massey Coal Company owned Wellmore."

Final Order, pp. 14-15 (emphasis supplied). Clearly, the Circuit Court, after attentively sitting through the seven week trial, did not agree that the Appellees claims were all related to Wellmore's declaration of *force majeure*.

This Court also found that there was "identity of remedies" because "both the Virginia proceeding and the instant proceeding sought the legal remedy of monetary damages stemming from Wellmore's wrongful declaration of *force majeure* under the 1997 CSA. Opinion at 56. In addition to the factual findings, quoted in part above, that the Plaintiffs' damages were *not* all a result of Wellmore's declaration of *force majeure*, the Circuit Court also found that it "took great pains to restrict, by issuing limiting or cautioning jury instructions at trial, or to eliminate the Jury's awareness or consideration of the other matters in litigation in the State of Virginia, in Federal Bankruptcy Court, or in this Court involving the facts and circumstances of other cases, and, therefore, the possibility of duplicate awards is not represented in the Jury's verdict." Final Order, p. 23. The remedies therefore could not be identical, because they were based on different wrongful actions, and relied upon different evidence put before a jury that was either unaware of or instructed not to consider the legal remedy sought in the Virginia action.

Similarly, this Court found that "the parties to the Virginia proceeding 'are so identified' in interest with the parties to the instant proceeding that they 'represent the same legal rights.'" Opinion at 61. This Court also asserted that the "original plaintiffs in the Virginia suit are plaintiffs in the West Virginia proceeding, and they sued in the same capacity in both litigations." *Id.* at 63. At the outset it must be noted that Mr. Caperton was not a party at all in the Virginia action, and that nobody in that action represented him in his individual capacity or redressed his individual claims and damages. Accordingly, the Circuit Court made the factual finding that "it is clear that there was sufficient evidence for the Jury to rightfully conclude that Plaintiff Caperton suffered injuries separate and distinct from those of the Corporate Plaintiffs." Final Order, p. 23.

It is well-settled that "this Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard, [and] review[s] challenges to findings of fact

under a clearly erroneous standard...." *Haines v. Kimble*, 2007 W. Va. LEXIS 60 (W. Va. 2007). Yet even though this Court asserted numerous factual claims that directly contradict the findings of fact below, it has never intimated that Judge Hoke abused his discretion in rendering his Final Order, nor that any of his or the Jury's findings of fact were clearly erroneous. It appears that this Court has not followed its own mandate to accord great deference to the factual findings of the judge and jury who were able to evaluate the credibility of all the evidence before them, and who emphatically declared that the Appellees in this case have suffered injuries apart from and in addition to any simple breach of contract damages. Without any justification for this violation of its own established rule, the Court's findings of fact contrary to those below are improper.

3. The Court's Erroneous Factual Findings And Application Of Law Violated Appellee Caperton's Due Process Rights

Without regard for the jury's specific finding that Appellee Caperton suffered personal injury separate and apart from the harm suffered by the Corporate Appellees, this Court declared that he was privy to the Virginia contract action. Thus, this Court concludes, per the doctrine of *res judicata*, a West Virginia citizen who suffered individual harm in West Virginia at the hands of companies whose principle place of business is in West Virginia nevertheless is precluded from bringing his personal injury claims because of a previously litigated breach-of-contract action among different entities in Virginia.

As this Court noted in *Conley v. Spillers*, 171 W. Va. 584, 590, n.6 (1983), "[i]t is generally recognized that under due process concepts a judgment cannot be binding on one who is not a party to the original suit...." Indeed, the Supreme Court has held that "[i]t is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard. *Richards v. Jefferson County*, 517 U.S. 793 (1996); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 91 S.Ct. 1434, 1443; *Hansberry v. Lee*, 311 U.S. 32, 40, 61 S.Ct. 115, 117; *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 328, 99 S.Ct. 645, 650, 58 L.Ed.2d 552, 560, n.7 (1979). Again, as this

Court noted in *Conley*, "[c]ases as well as the Restatement demonstrate that the privity doctrine does not apply when a person sues in a representative capacity, and then brings his own individual cause of action even though it arises from the same transaction." *Conley*, 171 W. Va. at 595.

This is nothing novel or new. Through the years, the caselaw has been consistent that claim preclusion cannot apply when separate personal injuries are at issue. *See, e.g., Hornstein v. Kramer Bros. Freight Lines, Inc.*, 133 F.2d 143 (3d Cir. 1943); *Wolf v. Paving Supply & Equip. Co.*, 154 A.2d 544 (D.C. Mun. App. 1959); *Sautbine v. Keller*, 423 P.2d 447 (Okla. 1966); *Industrial Park Corp. v. U.S.I.F. Palo Verde Corp.*, 26 Ariz. App. 204, 547 P.2d 56 (1976).

Putting aside the gulf that exists between the acts giving rise to the contract breach and those resulting in Mr. Caperton's personal injury, whether analyzed under identity of parties or identity of claims, there is no rational basis for giving preclusive effect to the Virginia breach-of-contract verdict upon the personal injury claims of Appellee Caperton. And as this Court noted in *Jordache Enterprises, Inc. v. National Union Fire Ins. Co. of Pittsburgh*, 204 W.Va. 465 (1998), even if an adjudication of a declaratory judgment action in another state is *res judicata* to a declaratory judgment action in West Virginia because of identity of parties and identity of claims, it still would not be *res judicata* to a separate statutory bad faith settlement claim. With its holding, this Court has denied Appellee Caperton the opportunity to have his personal injury claim heard and has thereby denied him his federal and state constitutional right to due process.

C. Judicial Impartiality And Due Process

Finally, the Appellees respectfully submit that it was erroneous and a violation of their due process rights for Justice Benjamin to refuse to disqualify or recuse himself from this case. The standard for recusal is an objective one. The United States Supreme Court has held that recusal is *mandated* if a judge's impartiality could reasonably be questioned. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988). The judge need not be subjectively biased or

prejudiced as long as he appears to be so. *Id.* This is a matter of fundamental importance, because due process requires, at its very base, confidence that a person can receive a "fair trial in a fair tribunal." *Louk v. Haynes*, 159 W. Va. 482, 489 (1976), citing *Tumey v. Ohio*, 273 U.S. 510 (1927).

As described more fully by the Individual and Corporate Appellees' papers directed to Justice Benjamin on the topic of disqualification, there are a number of factors which would lead a reasonable and objective person to question Justice Benjamin's ability to rule impartially in this case. In addition to the millions of dollars that Appellee Massey's CEO Mr. Blankenship personally contributed to his 527 organization for the purpose of electing Justice Benjamin, and the more than $500,000 spent directly by Mr. Blankenship to elect Justice Benjamin, there have been reports of Mr. Blankenship and Justice Benjamin meeting in the private and political sphere. As a result of this, political commentators and news sources have questioned Justice Benjamin's ability to rule impartially in a case involving Massey entities, and Justice Benjamin himself suggested that he would consider removing himself from any case involving Massey Energy. After the publishing of this Court's Opinion, which contains numerous novel statements of law and mischaracterizations of fact and applicable precedent, and in which Justice Benjamin was the deciding vote, the appearance of bias to an objective party is only strengthened.

Appellees have a due process right to be heard before a tribunal which is not only unbiased, but lacks the appearance of bias. Appellees did not have such a tribunal in this case, and a rehearing on this issue is necessary to comport with this Court's duties under the federal Constitution.

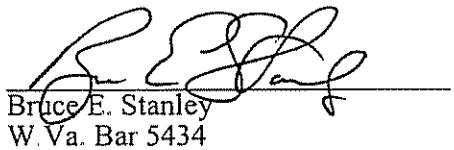
III. CONCLUSION

In consideration of the above, Appellees submit that this Court made numerous errors in interpreting and applying the relevant law to the facts in this case, resulting in grave injustice to the Appellees, and in violations of their federal constitutional rights. The injustice and constitutional violations are especially egregious with respect to Mr. Caperton, who was not

personally represented in either the contract or foreign state action that are now being wrongfully held against him. Each of the errors raised herein would *individually* be enough to require a rehearing resulting in a corrected decision by this Court. Cumulatively, the errors in the majority's Opinion strain the very integrity of this Court, and absolutely demand a complete reversal of the Court's decision, and a reinstatement of the verdict below. Accordingly, it is essential that rehearing be granted to ameliorate these serious issues.

WHEREFORE, Hugh M. Caperton respectfully requests that this Honorable Court grant his Petition for Rehearing.

Respectfully submitted,



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Dated: December 19, 2007

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Appellants,

v. **Appeal No. 33350**

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

Appellees.

CERTIFICATE OF SERVICE

I, Bruce E. Stanley, do hereby certify that I have served the foregoing Petition for Rehearing of Appellee Hugh M. Caperton upon the following by United States Mail, first class and postage prepaid, this 19th day of December, 2007, addressed as follows:

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