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.

PETITION FOR REHEARING OF APPELLEES HARMAN DEVELOPMENT CORPORATION, HARMAN MINING CORPORATION AND SOVEREIGN COAL SALES, INC.

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Appellees, Harman Development Corporation, Harman Mining Corporation and Sovereign Coal Sales, Inc. (collectively, "Harman"), by their undersigned counsel and pursuant to Rule 24 of the West Virginia Rules of Appellate Procedure, respectfully request this Court to rehear and reconsider its decision in this appeal, and thereafter withdraw its opinion and affirm the judgment entered in the Trial Court, or refer it back to the lower Court for further proceedings. Harman further relies on and incorporates by reference the grounds asserted in the Petition for Rehearing submitted by Appellee Hugh M. Caperton.[1]

I. INTRODUCTION

The Court creates extensive new law in West Virginia with its opinion holding that the forum selection clause in the 1997 Coal Supply Agreement between Harman and Wellmore required this action by Harman against Massey to be brought and tried in Virginia.[2] The Court adopts a four-part test never argued for by Massey and first articulated nearly a decade after this case was filed (after briefing and oral argument) by the Federal Court of Appeals for the Second Circuit in *Phillips v. Audio Active Limited*, 494 F.3d 378 (2d Cir. 2007).

The Court analyzes at length the first three parts of its newly-minted four part test for determining whether Massey may enforce the forum selection clause in the Sovereign Coal-Wellmore contract, but it entirely avoids confronting the one part which so clearly favored Harman's position on the issue, that is the fourth and final step, ascertaining whether enforcing

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[1] Specifically, Harman asserts that the Court should reconsider and change its decision due to not only the grounds stated herein, but also the following:

- The failure of Justice Benjamin to recuse himself in violation of substantive and procedural due process rights;
- The failure to give preclusive effect to final decisions of the Federal Bankruptcy Court and the District Court
- The violations of Harman's constitutional rights by retroactive application of new law, unequal treatment under the law, and failure of adequate recusal procedures.
- The usurpation of the roles and functions of the jury and the circuit court.

[2] In contrast, Massey spent – at best – one page on this issue in its 150 pages of briefing on appeal.

the clause would be unreasonable and unjust. Under the new law pronounced in the Court's opinion, it is now Harman's burden under this new West Virginia law to show that enforcement of the forum selection clause would be unreasonable and unjust. Harman would welcome the opportunity to meet such a burden should this matter be remanded for hearing on this issue.

Harman, of course, made no such showing back in 1998 when Massey's motion to dismiss was filed, since it could not have possibly known it needed to carry such a burden. That Harman could not have known in 1998 or 1999 – or indeed, at the time it submitted its brief in this appeal – the standard by which the forum selection clause would be judged by this Court should be enough, in and of itself, to demonstrate just how unreasonable and unjust the application of this new test is to Harman.

The Court also applied the doctrine of *res judicata* and used the decision of a contract case in Virginia against Wellmore to bar the West Virginia tort case against Massey. The core of this Court's ruling on both issues relied upon the erroneous conclusions that the causes of action tried in the Virginia breach of contract proceeding against Wellmore were "in connection with" and/or arose from the same transactional facts as the tort and fraud claims tried in the West Virginia proceeding against A. T. Massey and its subsidiaries. The Court's retroactive application of such new law against the Appellees, violated the Appellees' constitutional right to due process under the Fourteenth Amendment of the United States Constitution.

II. ARGUMENT

A. The Court's Decision Wrongly Concludes that This Action Is Barred by Harman's Earlier Filed Action Against Wellmore in Virginia.

1. The Court erred when it applied the transactional approach to determining whether the causes of action brought by Harman in Virginia and West Virginia were the same.

The Court based its holding as to *res judicata* on the following: "As demonstrated by Rule 1:6 of the Rules of the Supreme Court of Virginia, Virginia applies the transactional approach to the element of res judicata requiring identity of the cause of action." Although recently amended Virginia Rule 1:6 indeed adopts the transactional approach to the element of *res judicata* requiring identity of the cause of action, Rule 1:6 clearly has no application to this case because it expressly states that it is effective only with respect to Virginia judgments entered in civil actions commenced after July 1, 2006. Va R S Ct 1:6(b) ("Effective Date: This rule shall apply to all Virginia judgments entered in civil actions commenced *after* July 1, 2006.") Harman's Virginia action was commenced on May 21, 1998 – *over eight years* before July 1, 2006

Wellmore breached its contract with Sovereign when it declared *force majeure*. Sovereign sued Wellmore over this breach in Virginia, as required by the forum selection clause in the contract.

Several to many months later, Massey as well as its subsidiaries and Chairman, tortiously interfered with and fraudulently misrepresented its intentions to buy Harman, obtaining confidential information in the process, resulting in a totally separate claim being filed in West Virginia. Unfortunately, this court was mislead into believing these unconnected events were inextricably connected.

Thus, the Virginia law with regard to the element of res judicata requiring identical causes of action which is relevant to *this* case is the law as it existed with regard to civil actions filed prior to July 1, 2006 and, as the Court acknowledges in its footnote 37, that law is something "significantly" different from the transactional approach. The law set forth in *Davis v Marshall, Inc*., 265 Va. 159, 166, 576 S.E.2d 507 (2003), must be applied to determine whether the Virginia and West Virginia actions involve the same cause of action.

Davis makes it perfectly clear that the question which must be asked in order to determine whether the plaintiff has one or more than one cause of action is whether the same evidence supports both claims. Only if the same evidence supports the claims are they one and the same cause of action. This Court did not ask that question and, indeed, very different evidence was required to prove Harman's tortious interference and fraud claims against Massey as compared to proving the breach of contract claim of Sovereign Coal Sales, Inc. ("Sovereign") against Wellmore. The measure of damages was different and, as in *Davis*, the burden of proof for fraud is a higher burden than for breach of contract. Therefore, this action should not have been barred by the Virginia action because Harman's claims in this action and the Virginia action were different causes of action.

2. The Court erred when it concluded that Harman sought the same remedies in Virginia and West Virginia.

The Court concludes that both the Virginia and West Virginia actions "sought the legal remedy of monetary damages stemming from Wellmore's wrongful declaration of *force majeure* under the 1997 CSA." The Court finds the remedies the same in both actions despite the fact that the remedy in Virginia was one year's worth of profits as defined under the Uniform Commercial Code (net profit under the contract plus reasonable overhead) that Sovereign would have earned but for Wellmore's breach of contract, while the remedy in West Virginia was the value of

Harman's business operations that Massey destroyed by its tortious interference, failure to abide by its agreements and its fraudulent representations and concealment.

The Court rests its conclusion with regard to the element of *res judicata* requiring identity of remedies on its "same cause of action" analysis on the factual assumption that *but for* Massey's direction to Wellmore to delay the declaration of *force majeure,* Harman would have survived. This conclusion is at odds with the voluminous testimony of Appellees' trial witnesses – testimony which the trial judge heard, observed being given, and took into account, but which the Court ignored, as set forth in detail in Section D of this brief.

3. The Court erred when it concluded that Wellmore and Massey are in privity and, therefore, the parties in Virginia and West Virginia are identical.

Virginia res judicata law requiring identity of the parties is straightforward. As the Court states, "res judicata applies to anyone 'so identified in interest with [a party] that he represents the same legal right, precisely the same question, particular controversy, or issue '" (quoting *Cmwlth. of Va. ex rel Gray v. Johnson*, 7 Va. App. 614, 618, 376 S.E.2d 787, 788 (1989)).

In this case, Massey did not have the same relationship to the issue determined by the Virginia court as Wellmore did because the issue determined by the Virginia court is not dispositive on any issue presented against Massey in West Virginia. The Virginia jury determined that Wellmore breached the 1997 Coal Supply Agreement between Wellmore and Harman. Whether or not that contract was breached was not dispositive on any theory of recovery in the West Virginia case.

To establish tortious interference of contract, a party need not prove that the underlying contract was breached. Syl. pt. 2, *Torbett v. Wheeling Dollar Sav. & Trust Co.*, 173 W.Va. 210, 314 S.E.2d 166 (1983). That is, the party that ends the contractual relationship may well be

within his rights to do so, but the party who induced the end may nonetheless be liable for tortious interference.

On the issue of privity, the Court erred first on a matter of law, by combining the requirement of same remedies with the requirement of privity, and then erred on a matter of fact, that is, in its declaration that "A.T. Massey Coal Company is in privity with its subsidiary Wellmore." Wellmore and Massey were not, as the Court concludes, in privity because they were parent and subsidiary. They are *not* parent and subsidiary, and were not parent and subsidiary when either action was tried, in stark contrast to the parent and subsidiary relationship in *Mullins v. Daily News Leader*, 2001 WL 1772679, at *2 (Va. Cir. Ct. 2001).

The relevant inquiry with regard to privity is whether a party's legal rights were being protected by another party in an earlier action. Wellmore was indeed Massey's subsidiary for a brief time in the past, but it was not Massey's subsidiary at the relevant time, that is, during the pendency of the Virginia action. As Wellmore was not protecting the same legal right in Virginia that Massey was protecting in West Virginia, it is obvious that Massey and Wellmore are not and were not in privity, and accordingly, this Court obviously erred when it concluded that this action is barred by the Virginia action because of *res judicata*.

B. This Court Violated the Appellees' Constitutional Right to Due Process Under the Fourteenth Amendment of the United States Constitution by Retroactively Applying New Law Regarding Forum Selection Clauses to the Appellees' case.

The Court adopts a new four-part test for determining whether a forum selection clause can be enforced by a non-party to the contract. Under this test, the party advocating for application of the clause bears the burden with regard to the first three factors and the party arguing against application bears the burden with regard to the last factor.

> If the [forum-selection] clause was communicated to the resisting party, has mandatory force and covers the claims and parties involved in the

> dispute, it is presumptively enforceable . . . The fourth, and final, step is to ascertain whether the resisting party has rebutted the presumption of enforceability by making a sufficiently strong showing that "enforcement would be unreasonable [and] unjust . . ."

Caperton, et al. v. A. T. Massey, et al., (W.Va. 2007) p. 9, quoting *Phillips*, 494 F.3d at 383-84 (internal citations omitted) (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15, 92 S.Ct. 1907, 1916, 32 L.Ed.2d 513 (1972)).

The Court concludes that Massey successfully carried its burden with regard to each of the first three elements and that Harman did not carry its burden with regard to the last. Obviously, however, if Harman did not carry its burden, it had no reason to think it had a burden to bear.

In its briefs, Massey never advanced anything but the very general statements that the tort claims were in connection with the 1997 Coal Supply Agreement. There was no argument advanced by Massey that this Court should adopt new law pertaining to the enforcement of forum selection clauses to non-signatories, such as that contained in Syllabus Points 10 and 11. One could surmise that the reason Massey did not advance such an argument is because there has never been any law in West Virginia holding or even suggesting that non-signatories would be subject to or the beneficiary of a forum selection clause. Rather, the longstanding law of West Virginia and Virginia *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. *Robinson v. Cabell Huntington Hospital*, 201 W.Va. 455 (W.Va. 1997); *Verosol B.V. v. Hunter Douglas, Inc.*, 806 F. Supp. 582 (E.D. Va. 1992). There was simply no discussion by this Court which addressed its decision to abolish the long standing principle 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 (W.Va. 1961).

Massey's brief ownership of Wellmore should not entitle it to the benefit of any forum-selection clause contained in the 1997 Coal Supply Agreement, particularly with regard to its tortious and fraudulent actions which were undertaken separate and distinct from its ownership of Wellmore, and/or after its sale of Wellmore in February 1998.

Furthermore, this Court should not have applied the newly adopted law retroactively to this case. This Court has had occasion to address the issue of when a newly adopted law should be applied retroactively versus prospectively. *Bradley v. Appalachian Power Company*, Syl. Pt. 4, 163 W.Va. 332, 256 S.E.2d 879 (1979). In *Bradley*, this Court held:

> In determining whether to extend full retroactivity, the following factors are to be considered: First, the nature of the substantive issue overruled must be determined. If the issue involves a traditionally settled area of law, such as contracts or property as distinguished from torts, and the new rule was not clearly foreshadowed, then retroactivity is less justified. Second, where the overruled decision deals with procedural law rather than substantive, retroactivity ordinarily will be more readily accorded. Third, common law decisions, when overruled, may result in the overruling decision being given retroactive effect, since the substantive issue usually has a narrower impact and is likely to involve fewer parties. Fourth, where, on the other hand, substantial public issues are involved, arising from statutory or constitutional interpretations that represent a clear departure from prior precedent, prospective application will ordinarily be favored. Fifth, the more radically the new decision departs from previous substantive law, the greater the need for limiting retroactivity. Finally, this Court will also look to the precedent of other courts which have determined the retroactive/prospective question in the same area of the law in their overruling decisions.

Id. at Syl. Pt. 5.

Under a *Bradley* analysis, this new law, which was adopted *sua sponte*, should not have been applied retroactively to the Appellees. Furthermore, the mere fact that the law was adopted *sua sponte* with no request or argument brief filed by the Appellants further denies the Appellees due process rights under the Fourteenth Amendment of the United States Constitution, as they were given absolutely no opportunity to address the legal implications of such law before this Court. This deprivation of constitutional rights is clearly unreasonable and unjust. The new law announced by this Court in Syllabus Points 6, 10 and 11 relating to the enforcement of forum selection clauses by non-signatories clearly involves a substantial public issue, arising from statutory or constitutional interpretations that represent a clear departure from prior precedent.

At an absolute minimum, this Court should grant Harman's Petition for Rehearing and consider Harman's arguments with regard to the showing it now knows – and only now knows – it must make. The Court should remand the case to the Trial Court for the initial application of its new test. *See e.g., Tuttle's Design-Build, Inc. v. Florida Fancy, Inc.*, 604 So.2d 873, 874 (Fla.2d D.C.A. 1992) ("We reverse the order denying change of venue and remand allowing the trial court to determine whether circumstances exist which would cause enforcement of the forum selection clause to be unreasonable."). However, the Court could also take into account its own pronouncements which so clearly support a finding that enforcement of the forum selection clause would be both unreasonable and manifestly unjust without further consideration or additional argument.

The unreasonableness of the enforcement of this clause is further evidenced by the fact that the Harman entities can hardly be held to have foreseen that Massey would one day seek to take advantage of the forum selection clause in the contract between Sovereign and Wellmore, whose parent at the time was United Coal Company. Harman had a long-term relationship with

Wellmore, and through Wellmore, with United, and knew who it was dealing with. It had no reason to believe that it would ever be dealing with Massey when it agreed to the forum selection clause. At the very least, it would be unreasonable and unjust to allow Massey to enforce the clause, due to its brief ownership of Wellmore.

Nothing in the new law enunciated by this Court compels the outcome in this appeal. No case in the string of cases cited by the Court is like this case. No case compels allowing Massey – not only a non-signatory to the contract, but a complete stranger to it at the time of contracting, and someone who utterly disregarded the contract and actively worked to subvert it – being allowed to take advantage of a forum selection clause to escape liability after ten years of litigation. Enforcement of the clause under these circumstances is wholly unreasonable and unjust.

C. This Court Overlooked and/or Misapprehended that Counsel for Massey, while also acting as Counsel for Wellmore in the Virginia Action, made numerous representations that the Virginia and West Virginia actions were separate and distinct.

It should be noted that Jeff Woods, Massey's counsel, acted as counsel for Wellmore in the Virginia breach of contract action and also acted as lead counsel for A.T. Massey and its subsidiaries in the West Virginia action. As set forth in the *Joint Response to the Petition for Appeal*, Wellmore, the actual Defendant in the Virginia Action, *via* Mr. Woods' firm, moved to keep out of the Virginia Action any evidence identifying Massey or any evidence supportive of the tort claims in the West Virginia Action because, *inter alia*,

> Wellmore is the only party defendant in this case and the only issue before the jury now is damages for breach of contract. There could be no purpose for injecting Massey, motives, tortious conduct, and the like in this case other than to attempt to inflame the jury . . .

See Wellmore July 22, 2000 Motion in Limine, attached to the Joint Response to the Petition for Appeal as App. Ex. 6.

In addition, Wellmore, via counsel Jeff Woods, successfully argued that Massey should not have to produce various documents in discovery. In fact, Wellmore's counsel argued as follows:

> Wellmore acknowledges that Massey could have shipped some of the Harman coal at some price. What Massey could have done and what Wellmore was required to do under the agreement are two very distinct things, however. Only the second is an issue in this litigation.
>
> * * *
>
> *Massey is not a named party in this litigation and was not even an affiliate at the time the contract at issue was negotiated and signed... [Thus,] the motion to compel the production of the five year plan should be denied.*

Wellmore's Response to Motion and Memorandum to Compel Discovery of Massey Sales Information, pp. 8, 9 (emphasis supplied). During the opening statement in the Virginia case, counsel for Wellmore stated the following:

> One of the things that I want you to remember and I will emphasize again, A.T. Massey is not a party to this lawsuit. Wellmore Coal Corporation, a separate corporation, is the defendant. That's who I represent. Wellmore Corporation, like all corporations, acts on its own behalf...

Opening Statement of Richard Ward on behalf of Wellmore Coal, Designated Record in the Supreme Court of Virginia, Record No. 011755, Appendix Vol. II, pp. 701-702.

This Court may have come to its conclusion that the parties and causes of action were the same without being aware of these facts, perhaps due to the enormity of the record below and undoubtedly due to Massey's failure to appropriately file the record regarding the Virginia

proceeding.[3] Massey's trial counsel, the very same counsel that represented Wellmore in the Virginia case, took an unequivocal and contrary position in the Virginia proceedings. This Court's failure to address Appellants' wholly inconsistent positions is especially disconcerting given that, in this very same term, this Court rendered a decision based upon its holding that the doctrine of judicial estoppel precludes a lawyer from taking contrary positions in a subsequent proceeding. Syl. pt. 3, *Riggs v. West Virginia University Hospitals* ("Judicial estoppel bars a party from re-litigating an issue when: (1) the party assumed a position on the issue that is clearly inconsistent with a position taken in a previous case, or with a position taken earlier in the same case; (2) the positions were taken in proceedings involving the same adverse party; (3) the party taking the inconsistent positions received some benefit from his/her original position; and (4) the original position misled the adverse party so that allowing the estopped party to change his/her position would injuriously affect the adverse party and the integrity of the judicial process.")

Thus, given the statements by Massey's Counsel, while acting as counsel for Wellmore, and this Court's holding in *Riggs*, Massey should have been estopped from advancing the argument that the West Virginia and Virginia proceedings are not separate and distinct cases. Massey's Counsel should not be allowed to assume successive inconsistent positions after benefiting from its original position. In addition, for this Court to allow Massey to benefit from a contrary position would injuriously affect the Appellees in this matter as well as the integrity of the judicial process.

[3] While the Court created new legal hurdles and burdens for Harman in its opinion, it disregarded Massey's failure to meet its burdens under existing law

D. This Court Overlooked or Was Mislead as to Essential Facts Pertaining to Massey's Acts of Tortious Interference and Fraudulent Misrepresentation, as well as A.T. Massey's Ownership of United/Wellmore.

The fact finding of the Court leading to the conclusion that all of the many acts of fraud and tortious interference were "in relation to" the long term coal supply agreement is the result of an improper standard of review, an erroneous view of the factual record, and leads to a result that is unjust in the extreme. A thorough review of the briefs filed with this Court, Judge Hoke's Orders, the trial transcript, and the jury verdict establishes that the West Virginia tort action asserted against Massey and its subsidiaries involved numerous actions, omissions, and fraud, which occurred before and after Massey's brief ownership of United/Wellmore.

Contrary to this Court's findings of fact, the jury and presiding judge concluded that Massey's tortious and fraudulent behavior did not arise out of the single act of Massey's directive to Wellmore to declare *force majeure* in December of 1997 and, thus, were not "in connection with" the Coal Supply Agreement of 1997. Furthermore, Massey's fraudulent misrepresentations to the Appellees regarding the potential acquisition of the Harman mining operation, took place in West Virginia, were not "in connection with" the Coal Supply Agreement of 1997, mainly did not involve Wellmore, and were outside the time period that it owned Wellmore.

The long-term Coal Supply Agreement relied upon by this Court was entered into in 1997 between Wellmore and Appellee Sovereign. Massey closed its acquisition of United and Wellmore on July 31, 1997. TT 7/29/02, 12:23 - 13:7. As early as October 13, 1997 – just 2 1/2 months later – Massey began actively attempting to sell Wellmore. *See* App. Ex. 16 to the *Joint Response to Petition for Appeal*. While actively attempting to sell Wellmore, Massey directed

United/Wellmore to declare *force majeure* on December 1, 1997. Massey then sold Wellmore to another coal company by February, 1998. TT 7/29/02, 35:20-22.

Through December of 1997 and into January of 1998, Massey continued to discuss the sale of Harman's operations with Mr. Caperton and then reached an agreement in principle. TT 7/8/02, 50:1-52:4. The parties agreed that the transaction would close on January 31, 1998. TT 7/8/02, 52:8-12; 57:15; 184:6-14. At the request of Massey, the Appellees shut down operations on January 19, 1998. TT 7/11/02, 141:23-142:18. However, unbeknownst to Mr. Caperton, Massey had made an internal decision not to close the transaction by the agreed-upon date. P1. Ex. 562. The closing was rescheduled to March, 1998. During this time, Massey used the confidential information it had gathered during the acquisition discussions and purchased the adjoining "wall of coal" from Pittston. TT 7/8/02, 88:14-90-2.

Massey's own witness and documents establish that the declaration of *force majeure* was unrelated to Massey's other tortious conduct. Ben Hatfield, Massey's former Chief Acquisition Officer, testified that his discussions with Caperton regarding Massey's potential acquisition of the Harman property and certain assets were wholly unrelated to Wellmore's declaration of *force majeure* under the 1997 Coal Supply Agreement. (TT 7/30/02, p. 44.) In fact, contemporaneous with his discussions with Caperton, Hatfield wrote:

> I contacted Hugh Caperton to follow up on our previous (informal) discussions about possibly acquiring some of the Harman group properties. Caperton is clearly interested in discussing a transaction of that nature. *He inquired as to whether my call was related to his earlier call from Stan about a meeting to discuss a buyout of the Coal Purchase Contract. My response was that he and Stan could continue to trade nasty letters for as long as they wished, but our interest in acquiring that the property was not connected to that discussion.*

PX 334 (emphasis supplied).

In March, 1998, Massey waited until mere hours before the transaction was rescheduled to close to direct a radical rewrite of the lease agreement with Harman reserve leaseholder Penn Virginia. TT 7/30/02, 65:15-67:5. Penn Virginia made concessions in order to finalize the deal; however, Massey refused to concede any of its last minute radical changes. TT 6/28/02, 127:4-14. Thus, in March of 1998, Massey collapsed the deal to purchase Harman and caused Penn Virginia to cancel the Harman leases. TT 7/8/02, 67:15-67:18.

An internal Massey e-mail dated May 18, 1998 – well after Massey had sold Wellmore – disclosed the rationale for acquiring the adjoining reserves:

> the property [the "wall of coal"] we have acquired provides a fairly effective block against anyone else cutting a deal with Pittston on the balance of their Splashdam coal. It also greatly diminishes the attractiveness of the Harman property to parties other than Massey, *so we will more than likely get Harman in the long run.*

App. Ex. 23 (emphasis supplied).

As a result of Massey's tortious interference and fraudulent conduct, the Corporate Appellees declared bankruptcy in May of 1998. TT 7/8/02, 67:19-68:8; 200:10-201:2. At the time of the filing of Bankruptcy, Harman Mining's Claims' Register showed 77 claims totaling in excess of $25 million. Pl. Ex. 606. (Since the filing, the claim amounts have increased significantly.)

A thorough review of these facts, coupled with the time line relating to Massey's actions, in correlation with its very brief ownership of Wellmore, simply do not justify this Court's factual conclusion that the West Virginia tort claims against Massey were "in connection with" and/or arise from the same transactional facts. The record clearly indicates that Massey had sold Wellmore by the time Massey had purposefully collapsed the deal to purchase Harman and bought the "wall of coal" using confidential Harman information. These findings of the Court

also are completely contrary to the findings of the trial court and jury, and substitute this Court as the factfinder – a role totally incongruent with the applicable standard of review, and totally at odds with the role of an appellate court.

E. This Court Overlooked or Was Mislead as to the Procedural History in This Case Pertaining to the Orders of the United States Bankruptcy Court and the United States District Court of the Southern District of West Virginia and the *Res Judicata* Effect of These Orders on Massey's Challenge to the Propriety of the West Virginia Forum.

This Court essentially overlooked or was mislead as to the procedural history set forth in the Appellees' briefs involving the West Virginia case, which would preclude Massey from challenging the propriety of the West Virginia forum. On the eve of the Virginia trial, Massey removed the West Virginia action to the United States District Court for the Southern District of West Virginia and filed a Motion for Transfer of Venue, seeking to move the West Virginia action to the United States District Court for the Western District of Virginia." *See, Caperton v. A.T. Massey Coal Col., Inc.*, 251 B.R. 322 (S.D. W.Va. 2000). Concurrently, Massey instituted separate adversary proceedings in the United States Bankruptcy Court against the Corporate Appellees and against Mr. Caperton personally.

The Bankruptcy Court dismissed the adversary proceedings, noting that "[b]ecause such a determination can be better rendered in the West Virginia Action, this Court chooses to abstain from hearing these declaratory judgment actions in favor of resolution by an appropriate West Virginia forum, whether state or federal." *See Joint Order and Memorandum Opinion*, previously attached as App. Ex. 4, p. 5 to the *Joint Response to Petition for Appeal*. The Bankruptcy Court also noted that "this Court is confident that the court that tries the West Virginia Action will be fully able to determine whether Caperton and/or Harman Development have any independent, non-derivative claims against [A.T.] Massey and the other Defendants,

and if so, to award and appropriately allocate under the law of West Virginia and in accordance with the evidence presented in the West Virginia Action, and otherwise to award Harman Mining and Sovereign such damages, if any, as they prove themselves entitled to recover." *Id.* at p. 18. Significantly, Massey never appealed the dismissal of its adversary proceedings, and, as a result, it is now precluded from challenging the impact of the Bankruptcy Court's conclusions upon the West Virginia Action.

Also, as a result of that dismissal, Judge Haden determined that the United States District Court had to abstain from hearing the West Virginia Action, declared the Motion to Transfer the West Virginia Action to Virginia moot, and granted the Plaintiff's Motion to Remand the case to the Boone County Circuit Court. *Caperton II*, 270 B.R. 657. Judge Haden further noted that "[i]ntegral to its decision to abstain and dismiss the adversary proceedings, the Bankruptcy Court determined that the claims of all parties, and defenses thereto, can be adjudicated satisfactorily in the West Virginia Action." *Caperton, II* 270 B.R. 656.

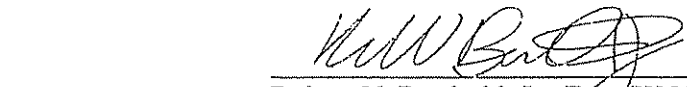
Massey never filed an appeal of Judge Haden's Dismissal of the federal case or his findings in agreement with the Bankruptcy Court that the claims could be adjudicated satisfactorily in the West Virginia Action. In addition, Massey never filed a Motion for Writ of Prohibition to this Court regarding this issue. Thus, Massey had numerous opportunities to litigate the application of the 1997 Coal Supply Agreement forum selection clause, and no legal tribunal, save this Court, found that the West Virginia tort claims against Massey were "in connection with" the agreement. Since the Appellants did not appeal this decision, the conclusions of that order are binding upon the Appellants. *See, e.g. In re Schimmels*, 127 F.3d 875 (9th Cir. 1997).

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 v. Dep't of Air Force v. Carolina Parachute Corp*., 907 F.2d 1469, 1474-1475(4th Cir. 1990). All of the requirements for *res judicata* are met in this case, thus, the application of the doctrine of *res judicata* is warranted against the Appellants on this matter.

III. CONCLUSION

For all the above cited reasons, Harman asks this Court to grant its Petition for Rehearing, to reconsider its decision, and to thereafter withdraw its opinion and affirm the judgment of the Trial Court. In the alternative, Harman requests that this Court remand this case to the lower court for further proceedings to determine the fourth factor of its newly stated law that is whether or not the enforcement of the forum selection clause would be unfair, unreasonable and unjust to Harman, or for such other factors as this Court deems appropriate.

Respectfully submitted,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
APPEAL NO. 33350

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

Appellants,

v.

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

Appellees.

CERTIFICATE OF SERVICE

The undersigned counsel for the Corporate Plaintiffs-Respondents, do hereby certify that I have served the foregoing **Petition for Rehearing of Appellees Harman Development Corporation, Harman Mining Corporation and Sovereign Coal Sales, Inc.**, by U.S. Mail, this 20th day of December, 2007.

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