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

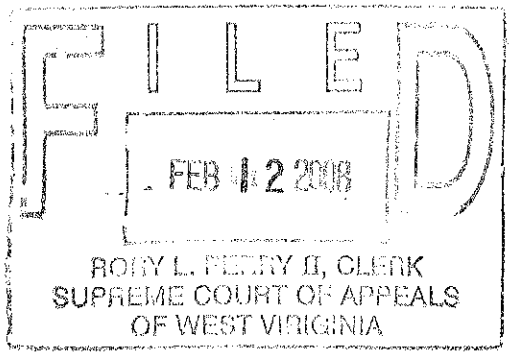
HUGH M. CAPERTON,
HARMAN DEVELOPMENT CORPORATION,
HARMAN MINING CORPORATION,
SOVEREIGN COAL SALES, INC.,

Plaintiffs Below, Appellees.

v.

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.,

Defendants Below, Appellants,



BRIEF OF *AMICUS CURIAE* FILED ON BEHALF OF THE UNITED MINE WORKERS OF AMERICA

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STATEMENT OF INTEREST

The Harman Mine was a union mine. The coal that was produced by Harman Mining Corporation, sold by Sovereign Coal Sales, Inc. and that generated revenue for Harman Development Corporation – the three Corporate Appellees (collectively "the Harman Companies") – was mined by members of the United Mine Workers of America ("UMWA"). In addition, Harman Mining Corporation had hundreds of retirees. Harman had been signatory to collective bargaining agreements with the United Mine Workers for many years. Under the terms of those agreements, UMWA miners who retired from Harman were entitled to lifetime retiree health benefits.

Prior to the tortious conduct of the Appellants (hereinafter collectively referred to as "Massey"), Harman was paying substantial amounts in retiree and medical benefits to active employees and retirees, and also paid contributions to various pension and benefit funds administered by the UMWA Health and Retirement Funds. Those funds included the UMWA 1950 and 1974 Pension Plans, which provided pension benefits to retired miners and the UMWA 1993 Benefit Plan, which provides health benefits to "orphaned" retirees whose employers are no longer in business. Harman also provided health benefits to retirees covered by the Coal Industry Retiree Health Benefit Act of 1992 ("the Coal Act"), which requires employers signatory to UMWA contracts prior to 1993 to provide benefits to retirees eligible under the Act.

The frauds and tortious interference of Massey, as proven before a West Virginia jury, put Harman and its affiliated companies out of business and caused Harman's union miners to lose their jobs and their health care coverage. Those miners and their dependents, as well as retirees who previously retired from Harman and their dependents, were severely harmed by the shutdown of the Harman Mine and the bankruptcies of Harman and its affiliated companies. As a result of Massey's

wrongdoing, which began before it purchased Wellmore and continued well after it had disposed of Wellmore, Harman and its affiliates were left with substantial debts and were precluded from paying not only wages, but also accrued vacation and sick leave benefits, health benefits to both active and retired miners, and their retiree obligations under the Coal Act. In short, the Harman employees and retirees were the collateral damage of Massey's campaign of tortious conduct toward Harman Mining, Sovereign Coal Sales, and Harman Development.

The facts as set forth in the Boone County case prove that the principal frauds and tortious conduct of Massey occurred much later than the declaration of *force majeure* and clearly, as the West Virginia jury found, involved different parties and many bad acts giving rise to jurisdiction in West Virginia.

In the course of that conduct, Massey directed Harman to cease operations in January 1988, in anticipation of Massey purchasing the Harman Mine, although Massey had apparently already determined not to go through with the purchase and ultimately sabotaged the deal by making unacceptable last-minute demands on the lessor, Penn Virginia. As a result, Harman and its related companies filed for protection under Chapter 11 the Bankruptcy Code in May 1998.

The Harman employees and retirees, the UMWA, and the UMWA Health and Retirement Funds are among the largest creditors in the Harman bankruptcy cases, with combined claims exceeding $15.8 million. Those claims include approximately $865,000 in accrued wages and medical benefits owed to UMWA employees and retirees, $1,168,668 for the cost of benefits for retirees during the bankruptcy, $13,278,180 for the estimated cost of funding future retiree benefits for the Harman retirees, and $498,121 in contributions to the UMWA 1974 Pension Plan.

If the West Virginia Supreme Court on rehearing reaches the same result as the initial opinion filed on November 20, 2007, the UWMA and the UMWA Trust Funds, along with all other

creditors in the three bankruptcies of the three Harman Companies, will be deprived of any recovery of the monies due to them by the Harman Companies which a West Virginia jury and a West Virginia trial court found the Harman Companies could not pay because they were wrongfully put out of business and forced into bankruptcy by Massey.

The claim against Massey in this litigation has been the principal asset of the Harman bankruptcy estates from the outset. It is commendable that Harman and Mr. Caperton have pursued this matter for the last ten years instead of just converting the case to a Chapter 7 liquidation and walking away from the wreckage. The bulk of the damages awarded by the jury in this case would go to Harman's creditors, including foremost its employees and retirees, but also its trade creditors and other parties.

If the Court reverses the jury verdict and the judgment of the Circuit Court of Boone County on the grounds set forth in the November 20 opinion, not only will the work of the jury and the Circuit Court have gone for naught, but also the work of the court and the parties in the United States Bankruptcy Court for the Western District of Virginia, which have spent ten years sorting out the claims and issues in the bankruptcy proceeding and confirming a plan. Reversal of the judgment of the Circuit Court defunds the bankruptcy plan, and leaves the creditors with nothing.

BASIS FOR RECONSIDERATION

Although there appear to be many valid grounds for the West Virginia Supreme Court to reconsider and change the November 20 decision, the UMWA particularly urges the Court to reconsider and affirm the judgment of the Circuit Court, or, at a minimum, remand for further proceedings, based upon the following:

1. By overlooking or misapprehending the procedural history of this case – particularly as it pertains to bankruptcy court proceedings and other federal court proceedings – the Court in its November 20 opinion improperly rendered a result that is contrary to the final decisions of other courts;

2. The Court's holding that the causes of action and the remedies in the Virginia case were the same as those pursued in West Virginia is wrong;

3. The Court's reliance on Virginia Rule 1.6 in holding that the Virginia case for breach of the Wellmore contract barred the West Virginia action on the basis of *res judicata* was erroneous.

4. This Court's finding that Harman Development Corporation, a non-signatory to the Coal Supply Agreement, was bound to bring tort claims against third party tortfeasors only in Virginia, where proper jurisdiction and venue over all Defendants may or may not exist, is obviously unjust in the extreme as it deprives miners, retirees, their dependents and their trust funds from being able to recover millions of dollars on their claims in bankruptcy court;

ARGUMENT

A. Principles of *Res Judicata* Should have Precluded Massey from Asserting a Right to a Virginia Forum

This Court entirely overlooked or misapprehended the procedural history of this matter and rulings in bankruptcy court and federal district court which prelude 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 Co., Inc.*, 251 B.R. 322 (S.D. W.Va. 2000). Concurrently, Massey instituted separate adversary proceedings in the United States Bankruptcy Court for the Western District of Virginia against the corporate plaintiffs 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 v. A. T. Massey ("Caperton II)*, 270 B.R. 657 (S.D. W.Va 2001). 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 also never appealed Judge Haden's dismissal of the federal case or his findings, which were in agreement with those of 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 that issue. 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.

This Court's November 20 opinion fails to mention any of the findings and conclusions of the Bankruptcy Court or of the United States District Court for the Southern District of West Virginia. It further fails to address the Appellee's contention that these federal Orders and Opinions preclude Massey from contesting jurisdiction in West Virginia based upon the forum selection clause in the 1997 Coal Supply Agreement. Since the Respondents did not appeal this decision, the conclusions of that order are binding upon the Respondents. *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, *res judicata* is warranted against the Respondents on this matter.

Had the Court not overlooked these final decisions, the judgment in favor of the Harman Companies would stand and bankruptcy claims of the UMWA and other creditors would be paid.

B. This Court's Holding that the Causes of Action and Remedies in the Virginia Case Were Identical to Those in the West Virginia Was Wrong.

This Court found in the November 20 opinion, *inter alia,* that the causes of action and remedies in the Virginia proceeding were essentially the same as those in West Virginia. The court made these findings without Massey submitting any portion of the Virginia trial transcript into the record in this case – not the jury instructions, not the verdict slips, not even any portion of the testimony or arguments of counsel – nothing to show that the case actually tried in Virginia precluded the case tried in West Virginia.

Had Massey – as the party alleging that the parties and the causes of action tried in Virginia were the same as those in the West Virginia proceeding – carried its burden of submitting such materials, those materials would clearly illustrate that the causes of action and remedies were not the same, and that in fact the same lawyers that represented Massey in the West Virginia trial repeatedly took the position in the Virginia proceeding that the causes of action and the remedies in the two cases were different. The Virginia action is replete with examples of counsel stating that Wellmore and Massey are not the same, and that the action in Virginia was very limited in nature, unlike the West Virginia action.

The jury instructions and the verdict slip readily show that the case being tried in Virginia was a simple contract case against Wellmore, not a tort case against Massey. For example, the verdict slip in the liability trial simply asked the jury to make one of the following two findings: 1) "We, the jury on the issues joined, find that Wellmore breached the Coal Supply Agreement, and find in favor of Harman," or 2) "We, the jury on the issues joined, find that Wellmore properly declared force majeure under the Coal Supply Agreement and find in favor of Wellmore."

Relative to damages, the only damages allowed against Wellmore in the Virginia proceeding were one year's worth of contract damages as measured by Virginia's commercial code. This is absolutely clear from the Jury Instructions given during the damage phase of the Virginia proceeding. (*See* Jury Instruction #10, attached hereto as Appendix "A.")

The damages in the West Virginia proceeding, however, as found by the jury and by Judge Hoke, were separate, distinct and far more extensive. They included damages like the inability to pay UMWA miners and retirees their benefits, which resulted from the destruction of the Harman Companies' business under a totally separate and distinct scheme of tortious interference and fraud committed by Massey.

C. Virginia Supreme Court Rule 1.6 Is Not Applicable to This Case.

The November 20, 2007 opinion erroneously relied upon Virginia Supreme Court Rule 1.6 in finding that there was an identity of the cause of action between the Virginia breach of contract litigation and this case based upon a transactional approach. However, Rule 1.6 is, by its own terms, not applicable to judgments entered in civil actions commenced before July 1, 2006. Rule 1.6(b). Since the action filed against Wellmore for breach of the coal sales agreement was filed in 1998, eight years before the effective date of Rule 1.6, the rule cannot be applied in this case.

The law in effect at the time the Virginia judgment was the law stated in *Davis v. Marshall Homes, Inc.*, 265 Va. 179, 576 S.E.2d 504 (Va. 2003), which clearly rejects a transactional approach in favor of the traditional four elements which must be present in order to invoke the doctrine of *res judicata*: identity of the remedy sought, identity of the cause of action, identity of the parties, and identity of the quality of the persons for or against whom the claim is made. *Davis*, 576 S.E.2d at 506. The suggestion that *Davis* was an aberration inconsistent with prior law, and that Rule 1.6

merely restated existing law, is clearly not the case. Davis followed substantial existing precedent. *Smith v. Ware*, 244 Va. 374, 376, 421 S.E.2d 444, 445 (1992); *State Water Control Board v. Smithfield Foods, Inc.*, 261 Va. 209, 542 S.E.2d 766 (2001); *Brown v. Haley*, 233 Va. 210, 216, 355 S.E.2d 563 (1987). In addition, Virginia Code §8.01-272 clearly provides that a party *may* join a claim in tort with one in contract if they arise out of the same transaction, but it is not mandatory. Indeed, the statute altered the previous common law that prohibited such joinder prior to 1977.

D. Enforcement of the Contracting Parties' Forum Selection Clause in Favor of Non-Party Tortfeasors and Against Non-Signatory Victims of Tortious Conduct is Harsh and Unjust.

The Massey Defendants below were found to have acted outrageously and to have committed frauds and other torts that drove the Harman Companies out of business and into bankruptcy.

It is impossible to imagine that this Court would fail to find it "unjust" to give Massey the benefit of a forum selection clause in a contract it was not party to and that, in fact, it destroyed. This conclusion is even more incomprehensible when one realizes that jurisdiction and venue may not have even existed against all of the Massey Defendants in Buchanan County, Virginia.

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 substantial public issues, arising from statutory or constitutional interpretations that represent a clear departure from prior precedent. These new Syllabus Points serve to deprive citizens of West Virginia from seeking relief in the State of West Virginia against a person who is not a party to the contract, did not negotiate for the benefit of the forum selection clause, and may not be subject to the jurisdiction of the state court which is named in the forum selection clause.

In this case, the Appellees were justified in relying on the clear precedent of West Virginia which provided for jurisdiction over this matter. This Court's retroactive application of the new law clearly deprived the Petitioners of their right to due process under the Fourteenth Amendment of the United States Constitution.

This Court's application of the new non-signatory law to this case is particularly unjust in that it relies on the fallacious conclusion that the Petitioners' tort claims against Massey were "closely related" to the contract with Wellmore. As detailed in the trial court record, the tort claims were not related and, in fact, numerous tortious acts were taken by Massey after it had already sold Wellmore. Surely, this Court cannot intend for a party that purchases a company with a contract, to be shielded from liability under a forum selection provision in the contract, for acts that party commits after the party sold the company.

CONCLUSION

The UMWA urges the Court to reconsider its November 20 decision, which is extremely harsh in its current application, not only as to UMWA retirees and employees who are owed wages and benefits, but as to all the creditors of Harman, Sovereign, and Harman Development. The Court's opinion of November 20 in this case means that the real parties in interest here, the retirees, employees, and other creditors of the Harman Companies, after waiting for ten years, will receive nothing. Their only remedy for the damage done to them was Harman's pursuit of the damages it sustained by Massey's actions.

It is disturbing, in a case where the jury found that Massey committed egregious tortious acts against Harman and its affiliates, where the trial court judge, who presided over the trial and heard the evidence, ratified the verdict, and where this Court acknowledges that "the facts of this

case demonstrate that Massey's conduct warranted the type of judgment rendered in this case," that both grounds relied upon in the November 20 opinion require the retroactive application of legal doctrines which did not exist at the time of the contract breach, the tortious conduct, or at the time of the two trials involved in this case. To reach that result requires the creation of a new body of law regarding forum-selection provisions of contracts and broad new rules of privity in applying those rules to parties who were not parties to the contract, and/or the application of Virginia Supreme Court Rule 1.6, changing the standard for the application of *res judicata*, to an action filed eight years prior to the effective date of that rule, a rule which was clearly a change in the standard for the application of *res judicata*. The Virginia Supreme Court acknowledged the due process implications of such a change by clearly making it prospective only, applying only to actions *arising* after the implementation of the rule. Both foundations of the November 20 decision implicate substantial issues of due process, and are unfair not just to the plaintiffs in this case but to the innocent bystanders, like the UMWA retirees and employees, who suffered the consequences of Massey's actions and would be deprived of any remedy in the Harman bankruptcy cases by the reversal of the verdict in this case and the dismissal of Harman's action.

The UMWA respectfully requests the court to reconsider the November 20 opinion and affirm the verdict of the jury and the judgment of the trial court.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that I have served the foregoing **Motion for Leave to File a Brief *Amicus Curiae* and Brief of *Amicus Curiae* filed on Behalf of the United Mine Workers of America**, by U.S. Mail, this 11th day of February, 2008, as follows:

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v.

HARMAN MINING CORPORATION and SOVEREIGN COAL SALES, INCORPORATED,

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APPENDIX
VOLUME X OF XIII

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INSTRUCTION NO. 10

Finding Instruction

Measure for Damages

The measure for damages in this case is the profit, including its reasonable overhead, which Harman would have made had Wellmore fully performed the contract in 1998, together with any incidental damages caused by the breach.

In applying this measure for damages, you should calculate the profit, including reasonable overhead, by taking the contract proceeds that Harman would have received from Wellmore in 1998, then subtracting the direct cost to mine and deliver the coal. You should not subtract unavoidable overhead expenses in making this calculation, nor should you deduct expenses unrelated to performing the contract in 1998. Profit including reasonable overhead, sometimes referred to as gross profit, is not the same as net profit. Reasonable overhead refers to those fixed expenses which Harman continued to incur in 1998 despite Wellmore's breach and which would have been satisfied by this contract. This formula is used because, in order to put Harman in as good a position, but no better or worse position, than if the contract had been performed, it is necessary to award Harman not only its profit, if any, but also its overhead expenses which would have been paid in 1998 but for Wellmore's breach.

Harman is also entitled to recover its costs reasonably incurred in partially performing the contract in 1998 and to its incidental damages, if any, resulting from Wellmore's breach. Incidental damages include any commercially reasonable charges, expenses, or commissions resulting from the breach.