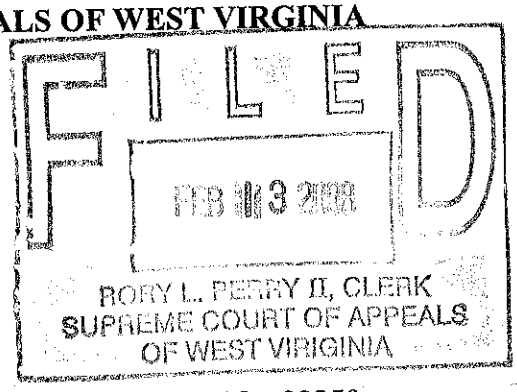
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



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.

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

Appellees.

Appeal No. 33350

REHEARING BRIEF OF APPELLEE HUGH M. CAPERTON

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REHEARING BRIEF OF APPELLEE HUGH M. CAPERTON

I. INTRODUCTION

Appellee Hugh M. Caperton ("Mr. Caperton"), by his undersigned counsel, respectfully requests that this Honorable Court affirm the Orders and Rulings of the Circuit Court of Boone County and thereby uphold the fair and just verdict of the Jury. The Orders below were fully supported by law and fact, effectuated an entirely just result, and cannot legitimately be attacked.

Respectfully, when a different panel of this Honorable Court first decided this matter in November 2007, that Opinion (the "Vacated Opinion") contained numerous misapprehensions of established law and fact in this case, and consequently arrived at an unjust decision. This result may have been due in large part to the immense factual and procedural record in this case, developed over the course of a decade of litigation and a lengthy Jury trial, combined with the necessarily limited space available on appeal to address the relevant issues and the argument proffered by a now-disqualified Chief Justice. While the Appellees attempted to fully cover those issues raised by the Appellants in their papers, that particular panel of the Court ultimately focused on points which were not extensively briefed by either side. On rehearing, in the event that the Court might be tempted to revisit the Vacated Opinion, Mr. Caperton will address the Vacated Opinion's issues by highlighting facts which were previously on record but may not have come to the Court's attention, and by clarifying the state of the law relevant to that analysis.

By way of outlining their arguments, first, the Appellees certainly do not contest this Court's authority to overturn settled law and create new legal tests, nor even the essential merit of any newly adopted legal test for the application of forum selection clauses. However, the Appellees strongly contend that the Court's particular application of a new test in the Vacated Opinion, under the circumstances at bar, was inappropriate. In overturning settled West Virginia law and creating this new and significantly different test, 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 would have ignored the express language of the test announced and further would have violated the Appellees' fundamental right to Due Process under the Fourteenth Amendment of the United States Constitution. This Court has the ability, and, given the facts at hand, the *duty* under West Virginia law to apply any such newly announced test prospectively only, and to 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 has recognized that the judgment for the Appellees was "warranted" because of their "sympathetic" facts and the Appellants' "egregious ... conduct." *Caperton v. A.T. Massey Coal Co.*, 2007 W. Va. LEXIS 119, 23 (2007). This outcome is also mandated under the terms of the new test as laid out by the Court in the Vacated Opinion.

Second, in the Vacated Opinion, the Court seemed to overlook 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 should therefore bar the Appellants' claim that West Virginia was not the proper forum for this case.

Third, in addressing the Appellants' *res judicata* arguments regarding the Virginia contract action, the Vacated Opinion improperly applied a Virginia statute to Appellees, which, by its own terms, does not apply to any case brought before 2006. This misapprehension of Virginia law, which was never fully briefed by the Parties, would allow the Court to reach an incorrect decision and would result in a violation of the Appellees' Constitutional rights. Additionally, this Court overlooked well-settled Virginia law which permits but *does not require*

Appellees 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 erroneous to assert that Virginia law supports *res judicata* under these circumstances.

Fourth, in concluding that there was identity of remedy, cause of action, parties, and quality of persons for or against whom the claim was made, the Vacated Opinion made factual assertions and conclusions that were unsupported by the record and which actually contradicted the substantial factual findings of the Jury and judge below. In so doing, this Court would have implicitly overturned the factual findings below without finding any abuse of discretion as required by West Virginia law. The factual findings below unequivocally stated that Mr. Caperton had individual 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*. Unsupported factual findings such as those found in the Vacated Opinion are especially improper as applied to Mr. Caperton, who was not represented in nor compensated by the Virginia action.

Fifth, finding and applying such erroneous factual conclusions would particularly contravene Mr. 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. To nevertheless bind him to a decision which would deprive him of his rights without any opportunity for a hearing is the most fundamental sort of Due Process violation.

Finally, the Appellees' federal Due Process rights have been and continue to be 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 the 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 Mr. Caperton's

Constitutional and Civil Rights for Justice Maynard to have participated in the Vacated Opinion and for Justice Benjamin to continue to refuse to disqualify himself despite Appellees' motions.

Because of all these issues and more, as will be described below and as found in the Corporate Appellees' Rehearing Brief, in which Mr. Caperton joins, the application of decision of this Court such as that found in the Vacated Opinion cannot be squared with principles of appellate review, West Virginia law, the mandates of the Constitution of the United States, 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. On second review, provided with full briefing on the relevant subjects, the Court has the opportunity to right these wrongs and restore the just and proper verdict.

II. FACTUAL AND PROCEDURAL HISTORY

The Court is already largely aware of the facts and background of this case, and has unanimously already deemed those facts to be sufficiently egregious to justify the Jury's verdict below. Therefore, only a brief summary of the relevant facts is included here.

A. The Parties

This is a dispute between Appellees Mr. Caperton and Harman Development Corporation, Harman Mining Corporation, and Sovereign Coal Sales ("Corporate Appellees") on the one hand, and Massey Coal Sales Company, Inc. ("Massey Coal Sales"), A.T. Massey Coal Company, Inc. ("A.T. Massey"), and four of A.T. Massey's subsidiaries, Elk Run Coal Company, Inc., Independence Coal Company, Inc., Marfork Coal Company, Inc., and Performance Coal Company, Inc. (collectively, "Massey") on the other.

Mr. Caperton is a resident of West Virginia, and is the President and sole shareholder of Appellee Harman Development ("Harman"), which is headquartered in Beckley, West Virginia. TT 7/3/02, p. 83:7-15; TT 6/19/02, 69:8-12. Harman, in turn, owns Harman Mining and

Sovereign. TT 7/3/02, 86:2-7. A.T. Massey is a Virginia corporation, while its four appellant subsidiaries are all located in West Virginia. Defendants' Trial Exhibit (hereinafter designated as "Df. Ex.") 71. Fully 60% of Massey's approximately 5,000 employees are employed in West Virginia. Approximately 74% to 80% of Massey's coal reserves are located in the State of West Virginia. TT 7/22/02, 22:24--23:23.

B. The Coal Supply Agreement And The Corporate Appellees' Business Plan

This dispute arose in relation to the Harman Mine, which was owned from 1993 to 1997 by Harman, and which produced very high quality metallurgical coal. 2007 W. Va. LEXIS 119, 6-7. For many years, Wellmore Coal Corporation ("Wellmore"), a subsidiary of United Coal Corporation (United), had purchased all of the coal produced at the Harman Mine. *Id.* at 6. In 1992, while the Harman Mine was owned by Inspiration Coal Corporation ("Inspiration") through three subsidiaries: Harman Mining Corporation ("Harman Mining"), Sovereign Coal Sales, Inc. ("Sovereign"), and Southern Kentucky Energy Company ("Southern"), Wellmore entered into a ten year coal supply agreement (the "1992 CSA") with Sovereign and Southern to purchase the Harman Mine's production. *Id.* at 6-7. In 1993, Mr. Caperton formed Harman, which became the owner of the Harman Mine that year by purchasing Harman Mining, Sovereign, and Southern. *Id.* at 7. In 1997, Wellmore, Sovereign, and Harman Mining, entered a renewed coal supply agreement for a period of five years (1997 CSA), which required Wellmore to buy a specified minimum tonnage of coal from the Harman Mine at a price higher than that agreed to in the 1992 CSA, and also gave Wellmore the option of purchasing the Harman Mine's entire production. *Id.* at 9; Pl. Ex. 133. The 1997 CSA, to which neither Mr. Caperton nor Harman Development are parties, also contained a *force majeure* provision and a forum selection clause. *Id.*

When Harman purchased the Harman Mine and the related companies, it had developed and implemented a business plan that called for a substantial initial investment over several

years, and which would ultimately result in significant long-term profitability for Harman and income for Mr. Caperton. This strategy, in part, involved a plan to eventually lease and mine the Pittston reserves, which adjoin the Harman Mine. 2007 W. Va. LEXIS 119 at 8. Because of the topography in the area, the Harman Mine actually provided better access to the Pittston reserves than Pittston itself had. *Id.* In such instances, it is common for coal companies to enter into arrangements for other operators to mine their coal. *Id.* Evidence adduced at trial established the soundness of Harman's business plan. *See, e.g.,* TT 6/25/02, 140:7--141:8; TT 6/18/02, 64:2--78:22; 7/3/02, 132:7--141:13; TT 7/12/02, 180:6--181:12; TT 7/8/02, 36:17-23.

C. Mr. Blankenship's Interest In The LTV Business And The Harman Mine, And Massey's Acquisition Of United And Wellmore

The coal purchased by Wellmore under the 1992 and 1997 CSAs was in turn sold largely to LTV Steel Company, Inc. (LTV). 2007 W. Va. LEXIS 119 at 11-12. LTV prized the Harman Mine's high quality coal, and therefore paid a premium price for it. TT 6/18/02, 37:1-22; Pl. Ex. 133. Massey coveted LTV's business, and for years had unsuccessfully tried to sell its own West Virginia mined coal to LTV. 2007 W. Va. LEXIS 119 at 12. As an alternate method of obtaining the LTV business, Massey had made overtures in the past to purchase both Wellmore and its parent, United, and to purchase the Harman Mine itself. TT 7/29/02, 12:23--13:22; TT 7/8/02, 101:13--103:6; TT 7/29/02, 116:23--117:2. Ultimately, Massey purchased Wellmore and United on July 31, 1997. 2007 W. Va. LEXIS 119 at 12.

At that time, Massey's plan was to try to substitute its own lower quality West Virginia coal for the premium Harman Mine coal that Wellmore had been supplying to LTV at premium prices. *Id.* at 12-13. Massey's own internal documents recognized that this was a risky plan, which could cause Wellmore to lose the LTV business altogether. *Id.* at 13. However, Massey went forward with the plan because of the potential economic boon, and because of the additional benefit to Massey of eliminating Mr. Caperton and Harman as competitors by destroying their supply relationship with their primary customer, Wellmore. *Id.* at 13-14.

Predictably, as a consequence of Massey's actions, LTV ceased buying coal from Wellmore. *Id.* at 14. Immediately after losing LTV's business, on August 5, 1997, Massey directed Wellmore to notify Harman that if LTV closed its Pittsburgh coking plant, Wellmore would vastly reduce the amount of Harman coal it would purchase, citing the *force majeure* clause in the 1997 CSA.[1] *Id.*

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1 The *force majeure* clause clearly did not apply to the situation at hand, where the buyer had acted independently to lose the business of one of its customers, as shown by the clause language itself:

> The term "*force majeure*" as used herein shall mean any and all causes reasonably beyond the control of SELLER or BUYER, as applicable, which cause SELLER or BUYER to fail to perform hereunder, such as, but not limited to, acts of God, acts of the public enemy, epidemics, insurrections, riots, labor disputes and strikes, government closures, boycotts, labor and material shortages, fires, explosions, floods, breakdowns or outages of or damage to coal preparation plants, equipment or facilities, interruptions or reduction to power supplies or coal transportation (including, but not limited to, railroad car shortages) embargoes, and acts of military or civil authorities, which wholly or partly prevent the mining, processing, loading and/or delivering of the coal by SELLER, or which wholly or partly prevent the receiving, accepting, storing, processing or shipment of the coal by BUYER. . . . Pertaining to BUYER, the term "*force majeure*" as used herein shall further include occurrence(s) of a *force majeure* event at any of BUYER's customer's plants and facilities, except that the effects of any such *force majeure* event shall not justify BUYER in reducing its purchase of coal hereunder in greater proportion than the coal to be purchased hereunder bears to all BUYER's sources of supply, including BUYER's own mines, for BUYER's metallurgical coal sold to domestic coke producers. SELLER and BUYER shall promptly notify the other following commencement of a *force majeure*. If because of a *force majeure* SELLER or BUYER, respectively, is unable to carry out its obligations under this Agreement and if such Party shall promptly give to the other Party written notice of such *force majeure*, then the obligations of the Party giving such notice and the corresponding obligations of the other Party shall be suspended to the extent made necessary by such *force majeure* and during its continuance; provided however, (i) that such obligations shall be suspended only to the extent made necessary by such *force majeure* and only during its continuance, and (ii) that the Party giving such notice shall act promptly in [sic] reasonable manner to eliminate such *force majeure*. . . .

Id. at 10-11.

D. Massey's "Attempt" To Purchase The Harman Assets

With Harman vulnerable after the threatened loss of its most essential customer, Massey entered into negotiations with Harman to purchase the Harman Mine. *Id.* at 14. On November 26, 1997, Massey President and CEO Don Blankenship, traveled to Mr. Caperton's Beckley, West Virginia office to discuss the purchase. TT 7/8/02, 32:1--33:2. In point of fact, Massey's Chief Acquisition Officer, Mr. Ben Hatfield called Mr. Caperton before the Beckley meeting and ***explicitly stated*** *that their discussions about Massey buying out Harman were unrelated to the force majeure discussions Mr. Caperton had been engaging with Wellmore President, Mr. Stan Suboleski.* TT 7/30/02, 48 – 51 (emphasis added).

However, at the Beckley meeting, Mr. Blankenship threatened protracted litigation should Mr. Caperton and the Corporate Appellees attempt to assert their rights regarding the wrongful declaration of *force majeure*—presciently noting that the Appellants would tie them up for years in Court. TT 7/8/02, 34:1--34:13. To drive his point home, Mr. Blankenship declared that Massey spent "a million dollars a month" on lawyers. *Id.* With the threat of protracted litigation over Mr. Caperton's head and with no market to sell the Harman Mine's coal so late in the year, Mr. Blankenship asked if Mr. Caperton would be willing to sell his interest in the Corporate Appellees. Left with little choice, Mr. Caperton talked with Mr. Blankenship about the Harman assets and related properties. TT 7/8/02, 34:14--35:17. As part of these and other negotiations, Massey learned confidential information regarding the Harman Mine's operations, including the plan to mine the adjoining Pittston reserves. 2007 W. Va. LEXIS 119 at 14. Massey also obtained confidential information regarding the finances of the Corporate Appellees and Mr. Caperton personally. *Id.*

On December 1, 1997, Wellmore, at Massey's direction, declared *force majeure* and told Harman that it would buy less than half the minimum tonnage required by the 1997 CSA. *Id.* at 15. The Circuit Court expressly found that:

> [o]nly after Massey's marketing efforts caused the loss of LTV's business did Massey direct Wellmore to declare "*force majeure*" against Harman, a declaration which Massey knew would put Harman out of business. Massey acknowledged Wellmore was readily able to purchase and sell the Harman coal, but instead chose to have Wellmore declare "*force majeure*" based upon a cost benefit analysis Massey performed which indicated that it would increase its profits by doing so. Furthermore, before Massey directed the declaration of "*force majeure,*" Massey concealed the fact that the LTV business was lost and Massey delayed Wellmore's termination of Harman's contract until late in the year, knowing it would be virtually impossible for Harman to find alternate buyers for its coal at that point in time. Once Wellmore suddenly stopped purchasing Harman's output, Harman had no ability to stay in business. In the meantime, Massey sold Wellmore.

Id. at 15-16.

After the declaration of *force majeure*, Massey's tortious conduct continued. Massey continued *negotiating* with Mr. Caperton and Harman for the purchase of the Harman Mine, and agreed to close the deal on January 31, 1998. *Id.* at 16 (emphasis added). During these negotiations, Massey learned further confidential information, including the fact that Mr. Caperton had personally guaranteed a number of Harman's obligations, such as those to Inspiration Coal (now known as Terra Industries), Senstar Financial, Grundy National Bank, and Vision Financial. *Id.* at 16-17. However, just before the scheduled closing, Massey demanded numerous unacceptable material concessions from Penn Virginia Coal Company, the Harman Mine's lessor, even though Massey had previously agreed to accept the lease "as-is." *Id.* Penn Virginia predictably refused to accede to these last-minute demands, and Massey terminated the deal. *Id.* According to the express finding of the Circuit Court, Massey "ultimately collapsed the transaction in such a manner so as to increase [the Appellees'] financial distress." *Id.* at 16.

Additionally, after killing the deal with Mr. Caperton, Massey utilized the confidential information it had obtained from Harman to take further harmful actions, such as purchasing a band of the Pittston coal reserves surrounding the Harman Mine in order to make the Harman Mine unattractive to any other potential buyers. *Id.* In an internal e-mail dated May 18, 1998, Mr. Hatfield disclosed the rationale for acquiring these adjoining reserves: "The property we

have acquired ... 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." Pl. Ex. 533.

After Massey purposefully collapsed the deal, leaving Harman with no customers for its coal and no potential buyers for its other assets, the Corporate Appellees filed for bankruptcy. *Id.* The Circuit Court expressly found that many of the steps Massey took were directed at Mr. Caperton personally, and that Mr. Caperton had relied to his great detriment on numerous false representations made by Massey. *Id.* at 17.

E. The Aftermath

In May 1998, Harman Mining and Sovereign sued Wellmore for breach of the 1997 CSA in the Circuit Court of Buchanan County, Virginia. *Id.* at 17-18. A jury awarded those plaintiffs $6 million, which represented purely contractual damages, and was limited to one year's worth of loss to those two corporations. *Id.* at 18, Mr. Caperton was not a party to nor was he represented by legal counsel in the Virginia contract action.

In October 1998, Mr. Caperton, Harman Development, Harman Mining, and Sovereign filed the instant tort action in the Circuit Court of Boone County, West Virginia, against A.T. Massey Coal Company, and its subsidiaries, Elk Run Coal Company, Independence Coal Company, Marfork Coal Company, Performance Coal Company, and Massey Coal Sales Company ("the Massey Defendants). *Id.* at 18. Among the claims asserted were tortious interference, fraudulent misrepresentation, and fraudulent concealment. *Id.* at 18-19.

Massey made numerous attempts to delay and disrupt the proceedings through various means, including the purchase of two relatively minor claims in the Corporate Appellees' bankruptcies, in order to gain standing in the Virginia Bankruptcy Court to interfere with Mr. Caperton's management of the bankruptcy. TT 7/8/02 122:16--123:3. Additionally, in March 2000, A.T. Massey filed suit in the Bankruptcy Court for the Western District of Virginia

against Mr. Caperton and Harman Development. That complaint asserted that Mr. Caperton and Harman Development were not parties to the 1997 CSA, and that they, therefore "did not acquire any benefits, rights, causes of action, choses in action, or remedies by reason of the 1997 Coal Supply Agreement...." Massey Adversary Proceedings Complaint at 6. That complaint further asserted that "any injury or damage that [Harman Development and Mr. Caperton] may have suffered from [each of the claims in the West Virginia action] would have been indirect and derivative of harm allegedly suffered by Harman Mining or Sovereign," and that "Caperton and Harman Development are not the real parties in interest for the claims asserted... and have no right to maintain an action to recover any damages for those claims." *Id.* at 10. In response, the Bankruptcy Court dismissed A.T. Massey's claims, noting 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 to Harman Mining and Sovereign such damages, if any, as they prove themselves entitled to recover."[2] Joint Memorandum Opinion, p. 18. A.T. Massey never appealed this dismissal of its adversary proceedings to the United States District Court for the Western District of Virginia.

Accordingly, the instant case proceeded to conclusion in Boone County, West Virginia. On August 1, 2002, after a seven week trial, the jury found in favor of all plaintiffs, and returned a verdict exceeding $50 million. 2007 W. Va. LEXIS 119 at 20.

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2 Notably, the Appellants also attempted to remove this case to the United States District Court for the Southern District of Virginia contemporaneously with these adversary bankruptcy proceedings. Chief Judge Charles Haden reviewed that claim, and determined not to rule on the issue of forum selection, pending this forum decision in the Bankruptcy Court. Judge Haden therefore had the opportunity to move this case to Virginia, but found it appropriate for the case to ultimately proceed in West Virginia.

III. ARGUMENT

A. Forum Selection Clause

West Virginia was the proper forum to hear this case, and for several reasons, the 1997 CSA forum selection clause does not alter that fact. A long line of West Virginia precedent clearly holds that only parties to contracts, or intended third-party beneficiaries of contracts, may legally enforce the terms of a contract. Because none of the Appellants in this case are parties to, nor intended third-party beneficiaries of, the 1997 CSA, they have no legally cognizable right to enforce the forum selection clause contained in that contract. Moreover, West Virginia law prevents the retroactive application of any such new rule to the Parties in this case. Retroactive application of new law in this case would overturn clear law on which the Parties have justifiably relied, would create enormously inequitable results, and would serve no public purpose.[3]

Independent of this retroactive application test, West Virginia and other courts (including the Second Circuit court announcing the four-part test in *Phillips v. Audio Active Limited*, 494 F.3d 378 (2d Cir. 2007)) have ruled consistently that forum selection clauses should only be applied when the results would not be unreasonable or unjust. Application of the 1997 CSA's forum selection clause in this case would be profoundly unreasonable and unjust, not only because the Court has unanimously recognized that the Jury's verdict was warranted and that the

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3 Indeed, any application of proposed new law that would enforce the forum selection clause under the facts in this case would effectively create a new loophole that would 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, such a holding by this Court would mean 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.

Appellees were severely damaged by the Appellants' wrongful acts, but because it would have the extraordinary effect of overturning a justified jury verdict after more than a decade of litigation, where the Appellees failed to timely utilize proper procedural mechanisms to prevent such an outrageously belated result, and where it would likely operate to deprive injured parties to this case from ever having their day in court.[4]

1. West Virginia Law Precludes Appellants From Enforcing The Forum Selection Clause In This Case, And Also Prevents Retroactive Application Of Any Newly Announced Law That Would Give Effect To That Clause

Well-settled West Virginia precedent holds that non-signatories to contracts may not enforce contractual provisions and rights unless they can show that they are intended third-party beneficiaries. Specifically, the prevailing law in West Virginia is 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 law is based in part upon W. Va. Code § 55-8-12 (2007), extant in some form since 1849.[5] This doctrine has withstood

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4 Moreover, to reach this result, the Court would have to reverse the Circuit Court's denial of Appellants' Motion to Dismiss. This, in itself, would also be 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).

5 The statute, W. Va. Code § 55-8-12, reads:

> *Third party may sue on covenant or promise made for his sole benefit.* If a covenant or promise be made for the sole benefit of a person with whom it is not made, or with whom it is made jointly with others, such

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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); *Valley Landscape Co. v. Rolland*, 218 Va. 257, 263 (1977) (stating that "one not a party to a contract can sue for a breach thereof only when the condition which is alleged to have been broken was placed in the contract for his direct benefit" and *further* that a third party may not sue on a contract "unless the party sought to be held liable has assumed an obligation for the benefit of a third party. The statute does not purport to create a contract when no contract exists."). In this case, by all accounts, none of the Appellants now seeking to enforce the 1997 CSA were parties to it, and they are not and do not claim to be intended third-party beneficiaries of the CSA. It is iconoclastic to suggest that these strangers to the contract should be able to enforce the terms of it *at all*, much less against persons who are *themselves* not parties to that contract.[6] The Appellees, and the court below, have justifiably relied on the clear past precedent of West Virginia and Virginia.

If, regardless of this clear law, this Court elects to treat this case as a matter of first impression regarding the application of forum selection clauses, there are still solid barriers to applying any such new law prospectively to the Plaintiffs. This Court has often recognized that West Virginia courts have discretion in deciding whether to apply a new principle of law

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person may maintain, in his own name, any action thereon which he might maintain in case it had been made with him only, and the consideration had moved from him to the party making such covenant or promise.

6 No case has been cited that allows the outlandish combination of non-parties enforcing contracts against other non-parties, and Appellees are aware of none. Such a scenario would create a very perilous and capricious litigation environment, where parties who never had any meeting of the minds could surprise one another by enforcing the terms of unfamiliar contracts against each other.

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 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 any new law operating prospectively only. First, relevant to the first *Bradley* factor, this Court openly stated in the Vacated Opinion that "[t]his case presents the first opportunity for this Court to address substantive issues involving forum-selection clauses." 2007 W. Va. LEXIS 119 at 24. The Court then used the 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 such a change. In fact, the only West Virginia law on forum selection that the Court found relevant 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." *Id.*, 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 Vacated Opinion's suggested application of the new test, to the contrary, would sweepingly broaden 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 Vacated Opinion staked out a position which would bestow 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 Vacated Opinion 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.

Regarding the remainder of the *Bradley* factors, there is no indication that the Vacated Opinion's proposed new rule would be furthered by retroactive application. Rather, retroactive application would cause grave inequitable results 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 would be particularly felt by Mr. Caperton, who 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 the Vacated Opinion's

proposed radical departure from previous substantive law. Therefore, under West Virginia law, any new rules relating to forum selection clauses should not be applied retroactively to the Appellees.

2. Retroactive Application Of A New Law That Enforces The Forum Selection Clause Would Violate The Appellees' Due Process Rights

Prospective application of any new law which would enforce the forum selection clause is not only warranted under West Virginia precedent, it is also mandated by the Fourteenth Amendment of the federal Constitution. 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 deadline 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.

This principle was also discussed in the analogous case of *Williams v. United States*, 470 A.2d 302 (D.C. 1983). There, the retroactive application of a procedural rule announced in a separate decision (known as *Nunzio*) to the appellant's pending motion in *Williams* caused Williams's motion to be deemed untimely, even though he had filed it within the 120-day limit which was commonly followed prior to *Nunzio*. The *Williams* court ruled that "[t]he Supreme Court ... has recognized a due process limitation on a state court's ability to apply retroactively a case overturning precedent that defined the procedure a party followed in asserting his or her rights." *Id.* at 307. The court interpreted the existing Supreme Court cases to stand for the proposition that a "state cannot, consistent with due process, grant an adjudicative right and then, after a party fully complies with the procedures prescribed for asserting the right, dismiss the action because the party—without fault, and at the instance of the state itself—slips out of compliance with the state's procedural rules." *Id.* at 308. Significantly, the court also recognized that even though the appellant in *Williams* was in a slightly different factual position than the plaintiff in *Brinkerhoff*, because Williams *could* technically have filed his motion early enough to comply with both the old 120-day rule and the subsequently announced rule in *Nunzio*, "for 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." *Id.* at 308-309.

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 the Vacated 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. Retroactive application of new law which would enforce the forum selection clause against the Appellees would deprive them not only of their otherwise valid verdict below, but also any real opportunity to have their claims heard at all. There is a significant likelihood that the Appellees would not be permitted, at this late stage, far after the expiration of applicable statutes of limitations, to bring their claims in Virginia. Even if the Appellees managed to be heard in Virginia, the prospect of conducting another full trial, after one jury has already reached a wholly justified verdict, is clearly unreasonable, and places a huge and unwarranted burden not only on the parties to this case, but on the court systems in two states (on West Virginia, for having conducted a full seven week trial and having reviewed the myriad of motions and other pleadings before and after that trial, all of which being ultimately disregarded despite the justness of the verdict, and on Virginia, for being asked to needlessly repeat the good work already done by the West Virginia court and jury). Moreover, it has been more than a decade since the relevant facts in this case took place. At this point, witnesses may be unavailable, and the memories of those who are available will surely have been dulled and even altered by time. Therefore, without any fault of the Appellees, they would find themselves without any suitable process to recover the $50 million in damages which this Court agrees was due and warranted. This outcome is especially harsh as to Mr. Caperton, who was not a party to the CSA, whose individual rights were not represented in the Virginia action, and who, therefore, may never have his personal claims heard or redressed. Not only does this scenario violate the Appellees' federal due process rights—it also violates the very test proposed in the Vacated Opinion. As already described herein, enforcement of the forum selection clause is clearly "unreasonable" or "unjust," and would cause the Appellees to, "for all practical purposes be deprived of [their] day in court." 2007 W. Va. LEXIS 119 at 65.

3. *Res Judicata* and Collateral Estoppel Prevent 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 expressly raised the fact that the United States Bankruptcy Court for the Western District of Virginia has rendered a final, uncontested ruling specifically finding West Virginia to be 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.[7] *See, e.g., In re Schimmels*, 127 F.3d 875 (9th Cir. 1997). As such, it would be 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 Vacated Opinion.

The relevant federal case 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). Similarly, under federal principles of collateral estoppel, the required elements are that:

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7 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.

> (1) the issue sought to be precluded was the same as that involved in the prior action; (2) that issue was actually litigated; (3) it was determined by a valid and final judgment; and (4) the determination was essential to the prior judgment.

Nestorio v. Associates Commer. Corp. (In re Nestorio), 250 B.R. 50, 59 (D. Md. 2000).

All of those requirements are met here. The Bankruptcy Court's decision that the parties' disputes should be tried in West Virginia was a final judgment on the merits that necessarily considered and decided forum issues. Additionally, the relevant cause of action and issues are 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. As noted in greater detail above (*supra*, p. 9) the Bankruptcy Court rendered this decision in response to A.T. Massey's own assertions that Mr. Caperton had no interest in, or remedies under, the 1997 CSA. Of course, the main questions at issue in the present Action are the same—whether the Mr. Caperton has independent claims against Appellants for Appellants' wrongful conduct under West Virginia law, and whether the 1997 CSA can be enforced against him. *See, e.g., Riggs v. West Virginia University Hospitals, Inc.*, ___ S.E.2d ___, 2007 W. Va. LEXIS 107 (Nov. 27, 2007) (judicial estoppel applied to prevent a litigant from taking contrary positions in the same litigation). 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.[8] Under these elements, *res judicata* and collateral estoppel bar the Appellants from arguing that Virginia is the proper forum for these claims.

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. Woodruff*, 327 U.S. 726, 733 (1946). In the same context, the Supreme Court has also ruled that

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8 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.

"[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 can be no proper justification for failing to recognize the *res judicata* and collateral estoppel effects of the Bankruptcy decision against the Appellants.

4. In Any Event, Application of the Virginia Forum Selection Clause to Overturn an Otherwise Valid Jury Verdict is Both Unjust and Unreasonable.

The issue of injustice arises not only in the *Bradley* test, but in several other dispositive areas as well. The United States Supreme Court and others have held that a forum selection is 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 acknowledged that "the facts of this case demonstrate that Massey's conduct warranted the type of judgment rendered in this case," only to state that it could not "compromise the law" "to reach a result that clearly appears to be justified." However, 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 considered and eliminated before such a clause can be enforced.

Other courts that have found the enforcement of forum selection clause clauses to be unjust or unreasonable for similar but much less compelling reasons than the circumstances at bar. For instance, in *Ernest & Norman Hart Bros., Inc. v. Town Contractors, Inc.*, 18 Mass. App. Ct. 60 (1984), the court stated that it followed "the modern view" applied in the First Circuit and elsewhere, which holds that "forum clauses should be enforced unless enforcement is shown to be unreasonable under the circumstances." *Id.* at 65 (internal citations omitted). In that case, the trial court, after deciding not to enforce an outbound forum selection clause, held a trial on the merits and ruled in favor of the plaintiff. The appellate court decided it would be unreasonable to enforce a forum selection clause where, among other things, the case had already been fully tried on the merits and the statute of limitations in the contractual forum state had probably expired. The court specifically held that "[a]ll considerations of efficient judicial administration support treating this case, now fully tried on the merits, as one which should not be dismissed in Massachusetts, leaving Hart to seek whatever remedy in Connecticut remains available. Given the probability that the Connecticut statute of limitations concerning contracts will bar relief in that State, considerations of justice support allowing Hart to recover, as soon as possible, its fairly earned compensation, already unduly delayed." *Id.* at 66-67. *See also In re Healthco International, Inc.*, 195 B.R. 971, 989 (Bankr. D. Mass. 1996) (court refused to enforce forum selection clause where case in contractual forum was now time barred); *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 in the instant case, 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 by use of multitudes of bad faith dilatory pleadings and maneuvers by the Appellants.

Furthermore, overturning a jury verdict to belatedly enforce a forum selection clause is, in itself, an extraordinary and unjust act. No cases cited in these proceedings 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 in 2007 W. Va. LEXIS 119 at 40) ("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, applying the forum selection clause here would effect 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 would be particularly unjust for Mr. 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.

Finally, the Second Circuit test cited in the Vacated Opinion also prevents enforcement of a forum selection clause if "enforcement would be unreasonable and unjust ...." 2007 W. Va. LEXIS 119 at 29. Even if prospective application of new law to the Appellees *were* appropriate here, the proposed new law itself would oppose the enforcement of the CSA's forum selection clause against the Appellees for all the reasons stated above.

Therefore, this Court's previous 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, under any and all applicable authority. 2007 W. Va. LEXIS 119 at 22-23. 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," it is gratifying to note that the law will not tolerate the injustice of enforcing the forum selection clause against the Appellees under these circumstances, and that not only does the law "permit this case to be filed in West Virginia," but rather *requires* that the West Virginia verdict be allowed to stand. *Id.*

B. Res Judicata

In stating that *res judicata* precluded the bringing of Appellees' claims in West Virginia, the Vacated Opinion erroneously concluded that Virginia law required that all tort and contract claims must be brought together, and that there was identity of remedy, cause of action, parties, and quality of persons for or against whom such claims were made. In support of these erroneous legal conclusions, the Vacated Opinion also made factual assertions and conclusions that were unsupported by the record and which actually contradicted the substantial factual findings of the Jury and judge below. As pointed out below, if adopted by this panel of the Court, the opinions and conclusion reached in the Vacated Opinion would work a violation of the Constitutional rights of all the Appellees in general, and of the rights of Mr. Caperton in particular.

1. Applicable Virginia Law Allows Plaintiffs To Bring Tort And Contract Claims In Separate Actions

The Virginia law which applied when both the Virginia contract action and the instant tort case were filed clearly did not require the Appellees to bring both actions together. Virginia Code § 8.01-272 explicitly 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.

The Virginia *res judicata* law in effect during the pendency of both the Virginia and West Virginia actions was fully described in *Davis v. Marshall Homes, Inc.*, 265 Va. 159 (2003). Although this Court opined in the Vacated Opinion that *Davis* represented a "significant[] change in how [the Supreme Court of Virginia] defined the term 'cause of action,'" the *Davis* decision itself takes great care in explaining how its holding is entirely consistent with that court's own precedent. 2007 W. Va. LEXIS 119 at 86, FN 37. The court applied the standard threshold test of *res judicata*, stating that

> [t]he doctrine of res judicata only applies if the cause of action a plaintiff asserts in the pending proceeding is the same as the cause of action asserted in the former proceeding. And, the litigant who asserts the defense of res judicata has the burden of proving by a preponderance of the evidence that the claim is precluded by a prior judgment.

265 Va. at 165 (Va. 2003). The facts in that case also involved two actions, one in contract and one in tort. Regarding that scenario, *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 the Vacated 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.*, 542 S.E.2d 766, 769 (Va. 2001); *Smith v. Ware*, 421 S.E.2d 444, 445 (Va. 1992); *Flora, Flora & Montague, Inc. v. Saunders*, 367 S.E.2d 493, 495 (Va. 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 any assertion of *res judicata* relating to the tort and contract actions involved here.[9]

This is unequivocally true, regardless of Virginia Supreme Court Rule 1:6, which applies the contrary "transactional approach" in determining whether rights of action are the same "cause of action" for the purposes of *res judicata*. That Rule was promulgated in 2006, and, by its own terms, 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, where the Virginia action was commenced in May 1998, and the West Virginia action was commenced in October 1998. Any retroactive application of this statute would constitute 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

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9 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 previously by this Court. *See Ward v. Charlton*, 177 Va. 101, 110-15 (1941) ("an appellate court ... will not entertain the defense of *res judicata* if it was available and was not made below.").

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 would be deprived of their right to their cause of action by a retroactive application of this Rule (*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 such retroactive application would grant them no fair notice of the effects on their interests, their Constitutional rights would be violated by a retroactive reading of Virginia Supreme Court Rule 1:6. There can be no justification for this Court to contravene the plain language of the Virginia statute and apply it retroactively to the Appellees. Indeed, such singling out of the Appellees when the statute will not be applied to others similarly situated would result in a violation of Appellees' Constitutional guarantee of Equal Protection.

2. The Factual Findings Below Clearly Preclude Application Of *Res Judicata* Against Appellees

The factual findings of the jury and court below all strongly oppose any holding of *res judicata* against the Appellees in the instant action. In Virginia, as elsewhere:

> four elements must be present before res judicata can be asserted to bar a subsequent proceeding: (1) identity of the remedies sought; (2) identity of the cause of action; (3) identity of the parties; and (4) identity of the quality of the persons for or against whom the claim is made.

2007 W. Va. LEXIS 119 at 78, citing *Smith v. Ware*, 421 S.E.2d 444, 445 (Va. 1992). While the second element was disposed of above on the basis of clear and applicable Virginia law, the factual findings of the trial court address these elements as well, further demonstrating that *res judicata* is inappropriate here.

For instance, with respect to the first element, identity of remedies, the Circuit Court found that the Plaintiffs' damages were *not* all a result of Wellmore's declaration of *force majeure*. To the contrary, the Circuit Court 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 in the instant case and the Virginia contract case 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. The suggestion of the Vacated Opinion, then, 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," is contradicted by the detailed record below. 2007 W. Va. LEXIS 119 at 82. Indeed, if the identity of remedies were the same, Massey would have had no motive in filing its adversary proceedings in the Bankruptcy Court and that same court would have had no reason to conclude that a West Virginia jury should determine as a matter of fact whether Mr. Caperton suffered injury separate and apart from the injury suffered by the Corporate Appellees, and Judge Haden would not have decided to remand the case back to Boone County for trial.

Relating to the second element, identity of causes of action, the Circuit Court found that the claims in the tort action were based upon independent actions by the Defendants in this case,

separate and apart from the declaration of *force majeure* by Wellmore. The Circuit Court held, *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 believe that the Appellees claims were all related to Wellmore's declaration of *force majeure*.

The contrary assertion in the Vacated Opinion 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" is simply not supported by the record. 2007 W. Va. LEXIS 119 at 88.

Specifically, after the threatened declaration of *force majeure*, Massey entered into "negotiations" to purchase the Harman Mine. However, Mr. Ben Hatfield called Mr. Caperton before the Beckley meeting and ***explicitly stated*** *that their discussions about Massey buying out Harman were unrelated to the force majeure discussions Mr. Caperton had been engaging with Wellmore President, Mr. Stan Suboleski.* TT 7/30/02, 48 – 51. Mr. Blankenship traveled to Mr. Caperton's Beckley, West Virginia office to discuss the purchase, where, when told that

Harman was prepared to defend itself in court against Massey's bullying tactics, he promptly responded that Massey "spends a million dollars a month on lawyers. Through such intimidation, Mr. Blankenship then learned confidential information regarding the Harman Mine's operations, including the plan to mine the adjoining Pittston reserves. Massey also obtained confidential information regarding the finances of the Corporate Appellees and Mr. Caperton, personally. After the actual declaration of *force majeure*, which was based upon a cost benefit analysis Massey performed and which indicated that it would increase its profits by doing so, Massey's tortious conduct continued, with Massey continuing to "negotiate" with Mr. Caperton and Harman for the purchase of the Harman Mine, and "agreeing" to close the deal on January 31, 1998. During these negotiations, Massey learned further confidential information, including the fact that Mr. Caperton had personally guaranteed a number of Harman's obligations, such as those to Inspiration Coal (now known as Terra Industries), Senstar Financial, Grundy National Bank, and Vision Financial. However, just before the scheduled closing, Massey demanded numerous unacceptable material concessions from Penn Virginia Coal Company, the Harman Mine's lessor, even though Massey had previously agreed to accept the lease "as-is." Penn Virginia predictably refused to accede to these last-minute demands, and Massey terminated the deal. According to the express finding of the Circuit Court, Massey "ultimately collapsed the transaction in such a manner so as to increase [the Appellees'] financial distress." *Id.* at 16. Additionally, Massey utilized the confidential information it had obtained from Harman to take further harmful actions, such as purchasing a band of the Pittston coal reserves surrounding the Harman Mine in order to make the Harman Mine unattractive to any other potential buyers. *Id.*

After Massey purposefully collapsed the deal, leaving Harman with no customers for its coal and no potential buyers for its other assets, the Corporate Appellees filed for bankruptcy. Moreover, the Circuit Court expressly found that many of the steps Massey took were directed at Mr. Caperton personally, and that Mr. Caperton had relied to his great detriment on numerous

false representations made by Massey. *Id.* at 17. For instance, Mr. Caperton relied on Massey's representation that it would engage in good faith negotiations, and therefore shared confidential business information, including Harman Development's intentions regarding the Pittston reserves. Massey, however, used this information to further cripple Mr. Caperton and the Corporate Appellees, as shown by Massey's acquisition of those Pittston reserves, and the subsequent internal email stating that: "The property we have acquired ... 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." Pl. Ex. 533.

Clearly, the record from the trial court does not comport with the Vacated Opinion's assumption that the declaration of *force majeure* is the sole underpinning of both actions when Massey carried out its scheme through repeated and multiple tortious contacts with all of the Appellees. If the only purpose of Massey' scheme was to cause Wellmore to breach its contract with Harman Mining and Sovereign Coal Sales, what was the purpose of the post-breach phony negotiations, of the purposeful collapse of the deal, of the wrongful use of the confidential information, and of the secret purchase of the wall of coal, all of which were carried out not by Wellmore, but by Massey through the direct actions of Mr. Blankenship? Indeed Massey had already ridded itself of Wellmore by this time.

Similarly, with respect to identity and quality of parties, the Vacated Opinion stated 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.'" *Id.* at 90. The Vacated Opinion 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 92-93. At the outset it must be noted that Mr. Caperton--acting solely in the representative capacity of debtor-in-possession of the bankrupt entities--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. Moreover, such a finding by the Jury is clearly consistent with the Order of the Bankruptcy Court dismissing Massey's adversary proceedings, where the Bankruptcy Court held 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 ...." Joint Memorandum Opinion, p. 18.

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 the Vacated Opinion asserted numerous factual claims that directly contradict the findings of fact below, it 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. Additionally, the West Virginia Constitution and the precedent of this Court disfavors 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). This Court should follow its own precedent and the Constitutional 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 violating these established and sensible rules, any factual findings by this Court which contradict the findings below would be improper.

3. Application Of *Res Judicata* Against Mr. Caperton Would Violate His Due Process Rights

Although the Jury specifically found that Mr. Caperton suffered personal injury separate and apart from the harm suffered by the Corporate Appellees, the Vacated Opinion said that his interests were represented in the Virginia contract action. This conclusion is extraordinary, and would operate to mean that 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, is nevertheless precluded from bringing his personal injury claims because of a previously litigated breach-of-contract action among different entities in another state.

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 United States 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, (1971); *Hansberry v. Lee*, 311 U.S. 32, 40, (1940); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 328, (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.*, 547 P.2d 56 (Ariz. App. 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 Mr. 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. If this Court were to apply *res judicata* against Mr. Caperton personally, it would deny him the opportunity to have his personal injury claim heard, and would thereby deny him his federal and state constitutional rights to due process.

C. Judicial Impartiality And Due Process

Finally, Mr. Caperton again respectfully submits that it is error and a violation of his Due Process rights for Justice Benjamin to continue to refuse to disqualify himself from this case. Mr. Caperton has a Due Process right to be heard before a tribunal which is not only unbiased, but lacks the appearance of bias. Mr. Caperton unfortunately did not have such a tribunal in the first hearing of this Appeal. Now, before this rehearing, there has been a call for the recusal of both Justices Benjamin and Starcher in this case in order to remove the appearance of bias and to stabilize public confidence in the essential fairness and integrity of this tribunal. Although it is essential to the protection of Mr. Caperton's federal Constitutional rights that Justice Benjamin disqualify himself from this case, Mr. Caperton would also welcome a dual recusal, which would certainly ameliorate at least some of the public perception surrounding this Court's prior treatment of this case.

It is well known that Mr. Blankenship spent an unprecedented amount of money to see Justice Benjamin elected to this Court. At the time, many members of the West Virginia

community questioned Justice Benjamin's ability to fairly resolve disputes involving Massey and its subsidiaries, including this appeal. Even Justice Benjamin recognized the likely appearance of impropriety, vowing to consider disqualifying himself in cases involving Massey.

On three occasions (once by Mr. Caperton and twice by the Corporate Appellees) the Appellees have asked Justice Benjamin to disqualify himself, and on all three occasions Justice Benjamin has refused. On each occasion, Justice Benjamin ignored the applicable standard for recusal—namely, whether Mr. Blankenship's inordinately immense campaign contributions would create reasonable doubts concerning Justice Benjamin's impartiality when confronted with a Massey case. On each occasion, Justice Benjamin concluded that Appellees had failed to prove something which they were not required to prove—namely, that the role which Mr. Blankenship played in Justice Benjamin's election would give rise to an appearance of impropriety whenever Justice Benjamin might choose to participate in decisions involving Mr. Blankenship's company.

In fact, Justice Benjamin's requirement that Appellees' somehow plead additional facts concerning the scope of his relationship with Mr. Blankenship turns upside down the law and the ethical canons governing disqualification. Each individual Justice bears the *affirmative* burden of disclosing any facts that the parties might consider relevant to disqualification, even when the Justice believes that there is no basis for disqualification. Certainly a party is not under any particular obligation to independently discover and disclose such facts.

West Virginia's interest in maintaining the integrity of an independent judiciary is a compelling one. *State of West Virginia ex rel. Carenbauer v. Hechler*, 208 W. Va. 584, 586-87, 542 S.E.2d 405, 408-09 (2000). In fact, this state's interest in maintaining the integrity of the judiciary is so great that it has chosen to require that a judge to disqualify him or herself not only when he or she is actually biased or prejudiced for or against a party, but also whenever

reasonable observers might suspect possible bias or prejudice. *See, e.g., Tennant v. Marion Health Care Found., Inc.*, 194 W. Va. 97, 459 S.E.2d 374 (1995).

Canon 3E(1) of the Judicial Code of Conduct states that "A judge *shall* disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned ..." (emphasis added). The test for determining whether a judge or justice must recuse himself or herself pursuant to Canon 3E(1) is whether "a reasonable and objective person knowing all the facts would harbor doubts concerning the judge's impartiality." *Tennant,* 194 W. Va. at 108, 459 S.E.2d at 385. *See also State ex rel. Brown v. Dietrick*, 191 W. Va. 169, 174, 444 S.E.2d 47, 52 (1994) ("The question of disqualification focuses on whether an objective assessment of the judge's conduct produces a reasonable question about impartiality, not on the judge's subjective perception of the ability to act fairly.").

The Commentary to Canon 3E(1) states, in relevant part, that "A judge should disclose on the record information that the judge believes the parties or their lawyers *might* consider relevant to the question of disqualification, *even if* the judge believes there is no real basis for disqualification" (emphasis supplied).

In 2004, Mr. Blankenship expended over $3 million to obtain Justice Benjamin's election to this Court, including contributions of $2,460,500 to a Section 527 organization, And For the Sake of the Kids, that was devoted solely to defeating Justice Benjamin's opponent, and $515,708 in direct campaign expenditures in support of Justice Benjamin's candidacy. Mr. Blankenship also donated $100,000 to Citizens for Quality Health Care, another 527 political organization, and about $50,000 to "West Virginia Wants to Know," a group that ran advertisements attacking Justice Benjamin's opponent.

And For the Sake of the Kids was established by Mr. Blankenship approximately one month after the Trial Court affirmed the punitive damages award against Massey and its subsidiaries. The magnitude of Mr. Blankenship's involvement in Justice Benjamin's election is

impossible to overstate. And For the Sake of the Kids was the *largest* 527 political organization active in a state supreme court race *in the country*. Additionally, the amount Mr. Blankenship spent on Justice Benjamin's behalf was more than that spent in the race by all other citizens of West Virginia combined.

Justice Benjamin denied the Appellees' motions to disqualify him by finding that the fact that Mr. Blankenship had spent so much money in his favor would not cause any reasonable person to doubt his impartiality in any matter involving Massey, and that Appellees had not offered any *affirmative* facts concerning the relationship between him and Mr. Blankenship which could *prove* actual bias.

However, only Justice Benjamin knows the complete extent of his relationship with Mr. Blankenship. Yet, Justice Benjamin has never made any disclosure regarding the true nature of his relationship with Mr. Blankenship or his relationship, if any, with Massey and its employees, agents, representatives or consultants. Surely Justice Benjamin must know that the parties to this appeal "*might* consider relevant to the question of disqualification" (*see* Commentary to Canon 3E(1) of the Code of Judicial Conduct) what, if any, communications, meetings, relationships, dealings, etc., he has had with Mr. Blankenship, Massey, its subsidiaries, or agents or consultants employed by any one of them.

In the Vacated Opinion, Justice Benjamin voted with the three person majority despite concluding that it was "perfectly clear that the facts of this case demonstrate that Massey's conduct warranted the type of judgment rendered in this case." The three person majority also included Chief Justice Maynard, who has subsequently disqualified himself after it came to light (though not through any voluntary disclosure from Chief Justice Maynard) that he and Mr. Blankenship have maintained a 30-year friendship and had spent significant time together while this matter was pending at, among other places, the French Riviera.

The unusually passionate dissenting opinion of Justice Albright, as well as the dissenting opinion of Justice Starcher, accused the majority of constructing an opinion that justified the outcome they desired—namely, a reversal of the judgment and the dismissal of Appellees' claims with prejudice. Justice Benjamin not only joined Justices Maynard and Davis in the majority, and not only offered his own concurring opinion, but apparently on the same day that this Court released the Vacated Opinion, also joined them in a vote which deprived one of the justices in the minority, Justice Albright, from his regular turn at serving as Chief Justice. Specifically choosing to disregard a December 6, 1979 Order of the Court which provides, "The office of Chief Justice shall be rotated among the members of the court in accordance with the justices' seniority on the court," Justices Benjamin, Maynard, and Davis voted to elect Justice Benjamin to the post of Chief Justice beginning in January 2009, bypassing Justice Albright who otherwise would have held the post under the 1979 order. In January 2009, Justice Albright will have served on the Court for more years than Justice Benjamin.

It would be impossible not to reasonably question Justice Benjamin's impartiality in deciding appeals involving a judgment against Massey, given a) the enormous sums spent by Massey's CEO to elect Justice Benjamin to this Court; b) the enormously high *percentage* of all monies spent to elect Justice Benjamin coming from Massey's CEO; c) Justice Benjamin's apparent decision to not make disclosures as required by the Judicial Code of Conduct; d) Justice Benjamin's continuing refusal to apply the proper test for determining whether he must disqualify himself; e) Justice Benjamin's refusal to view his unique circumstances in an objective manner; f) Justice Benjamin's adversarial response to those who have reasonably questioned his impartiality; g) the circumstances involving Justice Benjamin's alliance with now-disqualified Chief Justice Maynard to bypass a long-standing rule governing the position of chief justice while this appeal was pending; h) the fact and nature of Justice Benjamin's ruling in Massey's favor in November; and i) the nature of the dissents to that vote.

A reasonable person would harbor doubts that Justice Benjamin could be fair and impartial in deciding an appeal involving any substantial judgment, including an award of punitive damages, against Massey arising out of the conduct of Mr. Blankenship. Many reasonable people do harbor doubts that Justice Benjamin can be fair and impartial in deciding any appeal involving a substantial judgment against Massey. They have expressed their concerns via newspaper editorial boards (*see, e.g., Charleston Gazette,* 11/4/04 Editorial; *Huntington Herald-Dispatch*, 1/19/08 Editorial; *Pittsburgh Post-Gazette*, 1/22/08 Editorial); via ordinary citizens of West Virginia (*see, e.g.*, 11/19/04 Letter to the Editor, *The Register-Herald* ("Massey bought a seat on the Supreme Court ..."); 3/22/05 Letter to the Editor, *The Charleston Gazette* ("Only political favors will come from Brent Benjamin being that [Mr. Blankenship] donated almost $3 million dollars in order to get him elected to the West Virginia Supreme Court."); 1/24/08 Reader's Voice, *The Charleston Gazette* ("Benjamin should realize that many of us supported him despite his connection with Massey. ... the appearance is Massey is his friend. The Supreme Court of West Virginia should avoid the appearance of impropriety. Right now, it stinks.")); via the West Virginia Legislature, which has enacted a law which prohibits political action committees from accepting contributions from individuals in excess of $1,000 before the primary and general elections; and via various national media outlets (*e.g. Christian Science Monitor*, C. Corliss ("Merit, not money, should sway judicial elections"). Indeed, respected ethics scholars have noted the appearance of impropriety. *See, e.g.*, comments given by Deborah Rhode of Stanford University on National Public Radio's "All Things Considered" broadcast of Friday, February 8, 2008. Clearly this outpouring of concern makes it undeniable that, in this case, the appearance to the reasonable person mandates disqualification.

Additionally, media outlets across the nation as well as internationally have noted the fact of Mr. Blankenship's campaign expenditures on behalf of Justice Benjamin, usually in conjunction with recent reports of Mr. Blankenship's meetings with Chief Justice Maynard in Monaco.

Even Justice Benjamin's own law clerk and former law partner previously filed a motion suggesting that he would find the appearance of impropriety manifest where much smaller campaign contributions were at issue. In 1996, in the case of *In re: Mon-Mass II, #93-C-362* (Monongalia County), attorney Charles McElwee filed a motion to disqualify then Circuit Court Judge Larry Starcher from hearing asbestos cases where the judge had received campaign contributions from 42 of the lawyers whose firms represented plaintiffs in that litigation. None of those contributions exceeded $1,000, and the amount of the combined contributions to the judge in that situation totaled $39,000—a relative pittance when compared to the amount expended by Mr. Blankenship to secure Justice Benjamin's election. Yet Mr. McElwee, Justice Benjamin's partner at the time, averred that "under the proper standard—whether a reasonable and objective person knowing of such campaign contributions would harbor doubts about the judge's impartiality"—"*the proper finding is manifest*.... A reasonable and objective person knowing of the timing and amounts of *such large contributions* would indeed harbor doubts...." Motion of Defendant Owens-Corning Fiberglass Corp. to Disqualify Judge Starcher. If Attorney McElwee believes that $39,000 in contributions from 42 lawyers manifestly represents the appearance of impropriety, how could it be that over $3,000,000 in expenditures by one person for the purpose of obtaining a judge's election does not constitute grounds for disqualification in a matter involving fraud and other tortious conduct by that same benefactor?

When Chief Justice Maynard voluntarily disqualified himself from participating any further in this matter, he wrote:

> Without question, the Judicial Branch of state government should always be held in the highest confidence and trust. The mere appearance of impropriety, regardless of whether it is supported by fact, can compromise the public confidence in the courts. For that reason—and that reason alone—I will recuse myself from this case.

For the same reason that Chief Justice Maynard disqualified himself, Justice Benjamin should also disqualify himself from this appeal. However, he has steadfastly refused to do so.

"[Our] legal system will endure only so long as members of society continue to believe that our courts endeavor to provide untainted, unbiased forums in which justice may be found and done.... [F]undamental to the judiciary is the public's confidence in the impartiality of our judges and the proceedings over which they preside." *Tennant, supra*, 194 W. Va. at 107, 459 S.E.2d at 384.

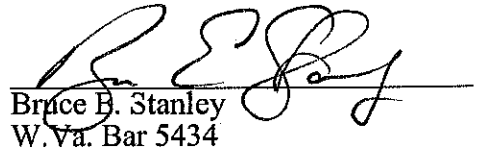
Mr. Caperton again respectfully submits that it is error and a violation of his due process rights for Justice Benjamin to refuse to disqualify himself from further participation in this case.

IV. CONCLUSION

In consideration of the foregoing, Appellees submit that the Defendants' appeal lacks any legitimate basis, and calls for a profoundly unjust and unjustifiable result. Mr. Caperton respectfully suggests that both the Jury Verdict and the Orders of the Trial Court are soundly supported by the great weight of the evidence and by all applicable law. A decision to the contrary would not only be counter to controlling law and established facts, but would be an extraordinary and disfavored measure, given that this Court has unanimously agreed that the jury's verdict was entirely just and warranted. Even more importantly, a decision to the contrary would create multiple serious violations of Mr. Caperton's federal Constitutional rights.

WHEREFORE, Hugh M. Caperton respectfully requests that this Honorable Court AFFIRM the Orders and Rulings of the Circuit Court of Boone County appealed from, and assess the costs of this Appeal to Appellants.

Respectfully submitted,



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Dated: February 13, 2008

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 Rehearing Brief of Appellee Hugh M. Caperton upon the following by United States Mail, first class and postage prepaid, this 13th day of February, 2008, addressed as follows:

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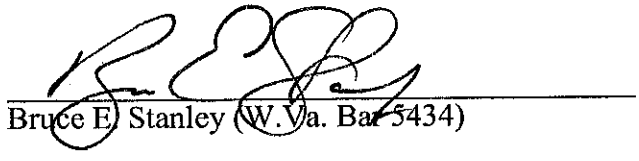

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