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

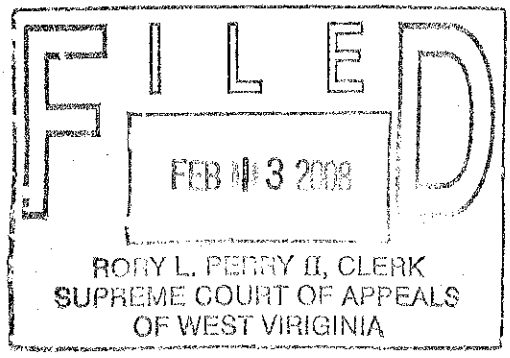
A.T. MASSEY COAL COMPANY, INC.,
ELK RUN COAL COMPANY, INC.,
INDEPENDENCE COAL COMPANY, INC.,
MARFORK COAL COMPANY, INC.,
PERFORMANCE COAL COMPANY, and
MASSEY COAL SALES COMPANY, INC.,

Appellants,

v.

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

Appellees.




**REHEARING BRIEF OF APPELLEES HARMAN DEVELOPMENT CORPORATION, HARMAN MINING CORPORATION, AND SOVEREIGN COAL SALES, INC.,**

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Appellees Harman Development Corporation, Harman Mining Corporation and Sovereign Coal Sales, Inc. (collectively "Harman"), by their undersigned counsel, respectfully ask this Honorable Court to withdraw its prior decision in this matter and to substitute in its place a decision affirming in all respects the judgment below, in favor of Harman and against all Defendants, which was rendered after a seven week jury trial.

Appellees are unaware of little West Virginia precedent wherein this Court has reversed a jury verdict, and instead of remanding for resolution of the issues, has abolished the Appellees causes of action, in totality, primarily through the retroactive application of new law created by this Court.

## INTRODUCTION

On November 21, 2007, this Court, by a 3-2 vote, reversed the judgment in this case against A.T. Massey Coal Company and its subsidiaries (collectively "Massey") and remanded the case to the circuit court with directions to enter an order dismissing it with prejudice. The decision was fatally tainted by the participation in the three justice majority ("the Majority") of then Justice, now Chief Justice, Elliot E. Maynard. When it came to the attention of Appellees that Chief Justice Maynard and Massey's CEO had socialized during the pendency of this lawsuit, Appellees moved to disqualify Chief Justice Maynard from any further participation in this appeal, and to have his vote in support of the majority decision in this case withdrawn. On January 18, 2008, Chief Justice Maynard issued a brief statement disqualifying himself, without indicating what impact his disqualification had on the decision of the Court. On the same day, Justice Benjamin, acting in the role of Chief Justice for the purposes of this case, appointed Circuit Judge Donald H. Cookman to sit in Justice Maynard's place in this matter.

On January 24, 2008, this Court granted the Appellees' Petitions for Rehearing and listed the matter for reargument on March 12, 2008 and ordered supplemental briefing.

The Majority based its decision reversing the Trial Court on two grounds: first it concluded that a forum selection clause in a Coal Supply Agreement between Sovereign Coal Sales, Inc. and Wellmore Coal Corporation ("Wellmore") required this action to be tried in Virginia; and second, it found that the judgment against Wellmore in Virginia for breach of contract barred this action against Massey for fraud and tortious interference with contract.

In this Supplemental Brief, Harman will also address each of the two bases for the Majority's November 21, 2007 opinion. Harman will also argue first that the disqualification of Justice Maynard requires the withdrawal of his vote in support of the Majority, resulting in an evenly divided Court, and the affirmance of the judgment below. Harman incorporates by reference in this rehearing brief it's Appeal Brief, its Petition for Rehearing, as well as the Appeal Brief and the Rehearing Brief of Appellee Hugh M. Caperton.

## ARGUMENT

### I. Justice Maynard's Post-Decision Recusal Should Result in Affirmance

As far as the Appellees can tell, the decision of a Justice of the Supreme Court of Appeals to recuse himself after deliberating with the full court and then casting the deciding vote in a case has never occurred in the history of West Virginia. The improper appearance of this post-decision recusal is heightened by the fact that the Majority decision reversed a jury verdict and extensive findings of a Circuit Court Judge. The improper appearance of this is also heightened by the unprecedented expenditures of Massey's CEO to elect another individual to the Court, after the trial court proceedings, who also voted in favor of not just reversal, but dismissal, of the action.[1] In this situation, only one result is fair – the decision of the Court must stand as a tie.

[1] Harman has twice also sought the disqualification of Justice Benjamin and continues to object to his participation in this appeal. Harman first moved for the disqualification of Justice Benjamin on October, 19, 2005 and renewed its motion on January 17, 2008. Harman believes that the November 21, 2007 opinion of this Court was tainted not only by Justice Maynard's presence in the majority, but also by the presence of Justice Benjamin, based upon the matters asserted in its Motions for Disqualification of Justice Benjamin, which are incorporated herein by reference.

The highest courts of other states and, indeed, the highest court of the United States, the U.S. Supreme Court, hear cases as important as this one, and in those courts a tie vote on an appeal acts as an affirmance of the result below. This Court, as a matter of fairness to the litigants and as a matter of perceived integrity, should not prolong these proceedings further, but should adopt the view of other courts that a tie vote constitutes an affirmance. This is especially appropriate given the unprecedented circumstances of Justice Maynard's post-decision recusal.

## II. The Majority's Holding that the Doctrine of Res Judicata Bars, with Prejudice, All of Plaintiffs' Claims against Massey, Creates New Law for the Commonwealth of Virginia and Unfairly Applies it Retroactively

Res judicata, a judicially-created doctrine designed to prevent unnecessary re-litigation that would unfairly subject a defendant to multiple lawsuits ("no person shall be twice vexed for one and the same cause"[2]), can only apply if a four-part test is satisfied. Even then, it is a matter within the province of the court whether or not to apply the doctrine, after a review of the circumstances.

If the Majority finds it was incorrect on any one point in application of the four-point test, then its conclusion, that res judicata bars this action, must be reversed. Appellants believe that the Majority was wrong on at least three points of the four-point test, each of which will be discussed below.

However, the conclusion emanating from the Majority's analysis is a more glaring error than any error on one of the components of the four-point test. This overriding error is that Virginia law required all four plaintiffs – including Harman Development Corporation and Hugh M. Caperton – 1) to all join as plaintiffs in the Virginia action against Wellmore Coal Corporation; 2) to then join as defendants in that action all parties – including A.T. Massey Coal

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[2] *Diamond State Iron Co. v. Rarig Co.*, 93 Va. 595, 25 S.E. 894, 897 (Va. 1896).

Company, Inc., Elk Run Coal Company, Inc. Independence Coal Company, Inc., Marfork Coal Company, Inc. and Massey Coal Sales Company, Inc. – against whom they had claims ostensibly "related" to the facts alleged in that case; and 3) to assert in the Virginia action all of their claims against all of those parties. This conclusion is entirely, clearly, and indeed shockingly contrary to Virginia law.

The evidence giving rise to tort liability on the part of the Massey companies differs from the facts giving rise to liability for breach of contract on the part of Wellmore. Wellmore's breach of contract consisted of its failure to purchase coal under a long-term coal supply agreement without a valid excuse. The torts committed by Massey, on the other hand, arise out of a whole series of misrepresentations and acts of interference designed to inflict financial distress upon Appellees, and to prevent them from pursuing legal redress.

The fact that this evidence may overlap to some degree with evidence of Wellmore's breach of contract is of no moment, because Virginia does not have a compulsory joinder rule that would require the joinder in one action of all of plaintiffs' different claims, based on different facts, against different parties – even where Massey's torts may have been "related to" Wellmore's breach of contract. Although one state in the country has such a rule, Virginia does not. Not one case cited by Massey, not one case referenced by the Majority and, indeed, not one case ever decided under Virginia law has come to such a conclusion. As a result, the Majority's finding that res judicata is a bar to the claims asserted in this action is wrong as a matter of law.

The result reached by the Majority is also wrong for other reasons, most importantly because res judicata is a doctrine designed to avoid re-litigation of causes, especially where inconsistent results are possible. It is not a legal principle which compels an unjust outcome. The doctrine is technical in nature, *Byrum v. Ames & Webb, Inc.*, 196 Va. 597, 603-04, 85 S.E. 2d 364, 367 (1955), requiring the party seeking its application to affirmatively prove all of its

various technicalities, but even then, it need not be adhered to blindly. *Bates v. Devers*, 214 Va. 667, 670, n.2, 671, n.7, 202 S.E. 2d 917, 920, n.2, 921, n.7 (1974). No case decided under Virginia law holds that it must be applied woodenly where its application would absolve a tortfeasor from all liability for carrying out an outrageous scheme to destroy competition and to impede the administration of justice through a series of misrepresentations and acts of interference. Where its application would undermine other legitimate interests, would not prevent duplicative litigation (the trial having been completed), and would reverse findings of a circuit court judge and a jury after seven weeks of trial and ten years of litigation, being a judicial creation, it need not dictate such an enormous miscarriage of justice. *Bates*, 214 Va. at 670, n.2, 671, n.7, 202 S.E. 2d at 920, n.2, 921, n.7 (1974).

The Majority also errs in concluding Virginia courts would apply a "transactional approach" to determine whether Plaintiffs' claims are barred.

Furthermore, in determining whether there is an identity of causes of action in two separate proceedings, no case applying Virginia law stands for the proposition that different claims *against different parties* based on different acts and omissions of each party constitute the identical cause of action for res judicata purposes. Similarly, no case applying Virginia law stands for the proposition that different standards of monetary damages *against different parties* constitute identical remedies for res judicata purposes simply because they are both monetary remedies at law.

Likewise, no case applying Virginia law holds that there is an identity of parties for res judicata purposes where the parties are different entities, except where one party in a subsequent action is found to stand in the shoes of a party in a previously-decided action based upon the same factual allegations. In such a case, where a court concludes that privity exists between two individuals or entities, privity may be used to conclude that one is vicariously liable for the acts

of another, or that one is bringing a claim for another. However, such a finding of privity would not allow a person to make claims against a subsidiary corporation for acts and omissions of the parent.

The Majority's incorrect analysis has directly led it to a conclusion that is readily and obviously incorrect: that Virginia law would require all four West Virginia plaintiffs to join in the Virginia action and bring all of their claims not just against Wellmore, but also against all of the West Virginia Massey Defendants, in the Virginia action. Such a mandatory joinder rule does not exist under Virginia law.

### A. The Result Reached by the Majority that Virginia Law would Mandate the Joinder of all Claims by and Against all Parties is Entirely Incorrect

The facts giving rise to the claims asserted in Virginia are fundamentally different than the facts giving rise to the tort claims asserted against Massey in West Virginia.[3] The acts giving rise to the tort claims were acts committed by Massey, not Wellmore. Plaintiffs alleged and proved in West Virginia, *inter alia*, that Massey 1) took Harman's confidential information and improperly used it as a means of interfering with Harman; 2) bought a wall of coal from the property owner adjacent to Harman for the sole purpose of interfering with Harman's ability to seek legal redress; and 3) misrepresented to Harman that it would buy Harman's assets, when at the time it had no intention of doing so, but instead intended to drag out the closing of the transaction until Harman would have no financial ability to seek recourse, and then collapse the deal and renege on its agreement to buy Harman's assets.

Each of these bad acts was committed by Massey (all at the express direction of Massey's CEO). They were not committed by Wellmore. In fact, when most of these acts were

[3] The claims against Wellmore as alleged in Virginia were for breach of contract and breach of the covenant of good faith and fair dealing. Contrary to the characterization of Massey (apparently accepted by this Court), the claim asserted for breach of the covenant of good faith and fair dealing is not a tort claim under Virginia law, and evidence supporting such a cause against Wellmore were not developed to support such an action.

committed, Massey had already sold Wellmore. So, by concluding that Plaintiffs were required to bring these tort claims in Virginia in the same action that they brought their claims against Wellmore (or suffer the harsh consequences of application of the doctrine of res judicata), the Majority necessarily found that Virginia is a jurisdiction that requires the joinder of all claims against all parties where the claims arise out of the same conduct, transaction or occurrence, i.e., a mandatory party joinder rule that bars any subsequent claim against any party arising out of the same core set of facts.[4]

Virginia has no such rule. Virginia does not require the joinder of all claims against all parties arising out of the same conduct, transaction or occurrence. In fact, no jurisdiction in the country – except one – has adopted such a broad mandatory joinder rule. Only the State of New Jersey has such a rule – known as The Entire Controversy Doctrine – which requires the joinder of all claims *against all parties* in one action.

"The fundamental goal of the Entire Controversy Doctrine is to promote the adjudication of a legal dispute in one litigation in one court; 'accordingly, all parties involved in a litigation should at the very least present in that proceeding all of their claims and defenses that are related to the underlying controversy.'" *Nubenco Enterprises, Inc. v. Inversiones Barberena*, S.A., 963 F. Supp. 353, 363 (D. N.J. 1997) (citations omitted). According to the New Jersey Supreme Court, the principles it attempts to promote are "economy and the avoidance of waste, efficiency and the reduction of delay, fairness to parties and the need for complete and final disposition

[4] Federal courts and some state courts require joinder of parties where a party is deemed to be an indispensable party. However, the application of the indispensable party rule is generally limited to unique situations, such as the litigation of property rights involving a property with multiple owners, and the test for determining whether one is an indispensable party is far different and far more narrow than simply determining whether the claims against that party arise out of the same event or occurrence, the same series of events or occurrences, or the same core of operative facts. Rule 19 of the Federal Rules of Civil Procedure, for example, defines a test for joining a party if feasible and then when a party must be deemed to be indispensable.

through the avoidance of 'piecemeal decisions.'" *Cogdell v. Hospital Ctr.*, 116 N.J. 7, 560 A.2d 1169, 1173 (1989).

Under the Entire Controversy Doctrine, the key consideration in determining whether claims against one or more parties *must* be brought in one action is "whether the claims arise from related facts or the same transaction or series of transactions." If distinct claims against the same or different parties arise from a "core set of facts," the entire controversy doctrine is triggered and the plaintiffs *are required to* join all parties and bring all claims against all such parties in one proceeding. *Nubenco Enterprises,* 963 F. Supp. at 364, citing *DiTrolio v. Antiles*, 142 N.J. 253, 267, 622 A.2d 494 (1995).

The New Jersey Entire Controversy Doctrine is the broadest joinder rule in the country, more preclusive than the doctrine of claim preclusion and the doctrine of res judicata as articulated in the Restatement of Judgments. Under New Jersey law, a party who does not bring all claims against all parties involved in any dispute arising out of the same core set of facts is, with some minor exceptions, barred from thereafter raising them or suing other parties in a subsequent proceeding. The doctrine evolved in New Jersey courts over time and was codified in 1990 with the adoption of Rule 4:30A of the New Jersey Rules of Civil Procedure.

The Entire Controversy Doctrine has been roundly criticized.[5] Not surprisingly, no other state in the country, including Virginia, has adopted such a broad doctrine precluding the bringing of claims against parties who were not party to the original action.

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[5] Dissenting Justices on the New Jersey Supreme Court sharply criticized it, *see Mortgageling v. Commonwealth Land Title Ins. Co.*, 142 N.J. 336, 348-355, 662 A.2d 536, 542-546 (Pollock J. dissenting); and the Supreme Court's Civil Practice Committee proposed eliminating it entirely, *see Mortgageling,* 142 N.J. at 351, 662 A.2d at 543-544. Among the criticisms are that when two litigations have almost no shared elements, it is possible that a complex, multi-party, multi-claim action will absorb greater resources and vastly over complicate the scope of the litigation. See Editorial, Efficiency and Justice, N.J. L.J. July 28, 1997 at 26 and Editorial, An Unfortunate One-Two Punch, N.J. L.J. Feb. 15, 1990 at 6. Cited as evidence of the doctrine's impracticality is the fact that no other jurisdiction in the United States, with the possible exception of Kansas, has a remotely similar preclusive joinder rule. Stacey Eisenberg, The Rise And Fall of the Entire Controversy Doctrine, as Applied to Attorney Malpractice Actions, Seaton Hall L.R., Vol. 28: 1292 (1998). The New Jersey Supreme Court in *Olds v. Donnelly,* 150 N.J. 424, 696

In this case, even if the actions of the parties were found to arise from the same transaction or occurrence, Virginia law would not require them to be joined in the same action.

In Virginia, not only were the plaintiffs not required to bring their claims against Massey, they may have been barred from bringing their claims against Massey in the same action as their claims against Wellmore, or they may have been severed. In *Powers v. Cherin*, 249 Va. 33, 452 S.E. 2d 666 (1995), a motor vehicle accident victim brought a personal injury action against another driver and then amended to add a claim against her treating physician for malpractice, which allegedly aggravated her previous injuries and also caused separate injuries. The court held that the two causes of action did not arise from the same transaction or occurrence and, therefore, could not be joined. *Id.* at 699. The court reasoned that neither defendant could be held liable for the injuries caused by the other and that the plaintiff sought damages from the physician for "distinct injuries resulting from malpractice that are not mere aggravation." *Id.*

### B. Virginia Courts Would Not Apply a "Transactional Approach" to Determine the Applicability of Res Judicata to this Case

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

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A.2d 633 (1997), in overruling its own application of the doctrine in attorney malpractice cases, declined to overrule the doctrine entirely. Id. at 446, 449, 696 A.2d at 644, 646. And so the criticism continues, one law journal article calling the entire controversy doctrine "draconian" and stating that the doctrine has made the State of New Jersey "the laughing stock of the American bar." Bennett J. Wasserman, The Circle Chevrolet Fall Out Continues, Problems The Supreme Court Did Not Solve, 149 N.J. L.J. 320 (1997).

apply to all Virginia judgments entered in civil actions commenced after July 1, 2006.") (Emphasis supplied). Harman's Virginia action was commenced on May 21, 1998 – over eight years before July 1, 2006.

Thus, the Virginia law with regard to the element of res judicata requiring identical causes of action is the law as it existed prior to July 1, 2006 and, as the Majority acknowledges in its footnote 37, that law is something "significantly" different from the transactional approach. The law set forth in *Davis v. Marshall, Inc.*, 265 Va. 159, 166, 576 S.E.2d 507 (2003), must be applied to determine whether the Virginia and West Virginia actions involve the same cause of action. That law clearly would not utilize a "transactional approach" to bar the claims in this action.

### C. Therefore, The Majority Opinion Is Wrong in Concluding that the Causes of Action Are Identical for Res Judicata Purposes

There is not an identity of causes of action between the breach of contract claims against Wellmore and the tort claims against Massey. The Majority's test, derived from Rule 1:6, is not the test applied by Virginia or other courts in determining whether claims *against different parties* constitute the same cause of action for res judicata purposes. In fact, Rule 1:6 expressly states that it applies to claims against the same opposing party:

> A party whose claim for relief arising from identified conduct, a transaction, or an occurrence, is decided on the merits by a final judgment, shall be forever barred from prosecuting any second or subsequent civil action *against the same opposing party or parties* on any claim or cause of action that arises from that same conduct, transaction or occurrence.... (Emphasis supplied.)

None of the cases cited by the Majority stands for the proposition that a cause of action in contract is the same as a cause of action in tort against a different party for res judicata purposes.

Indeed, even if the basis for liability on the part of Massey was not a series of bad acts, but just one bad act – the directive to Wellmore to breach its contract with Sovereign Coal Sales – the Restatement (Second) of Torts and legions of cases have held that a cause of action

against a third party for tortious interference with a contract is different from the cause of action for breach of contract between the two contracting parties. As stated in the Restatement (Second) of Torts, the fact that the plaintiff has an available action for breach of contract does not prevent him from maintaining an action against the person who has induced or otherwise caused the breach. Restatement (Second) of Torts, § 766, comment v, citing § 774A(2).

If this court is correct that the tort claims against Massey are the same as the breach of contract claims against Wellmore because they arise out of the same conduct, transaction or occurrence, then all tortious interference claims would always have to be brought in the same action in which the breach of contract claims are asserted against a different party. This clearly is not the law of Virginia.

To establish tortious interference with a contract, a party need not prove that the underlying contract was breached. Syl. pt. 2, *Torbett v. Wheeling Dollar Sav. & Trust Co.*, 173 W.Va. 210, 314 S.E.2d 166 (1983). That is, the party that ends the contractual relationship may well be within his rights to do so, but the party who induced the end may nonetheless be liable for tortious interference. Thus, breach of contract and tortious interference are not equivalent causes of action, and the evidence to prove one necessarily is different than the evidence needed to prove the other.

As difficult as it is to see how breach of contract and tortious interference could be determined to be the same causes of action, it is more difficult to imagine how breach of contract and fraud are the same. The evidence adduced to prove fraud is so different and so much more extensive than the evidence to prove breach of contract on the part of a different party. The duty in a fraud cause of action is a common law duty, not one arising out of the contract.

This is clearly the situation here. Massey had no contract with the Virginia plaintiffs and owed them no duties stemming from a contract. This West Virginia case was a pure tort case.

Wellmore's failure to purchase coal from Sovereign Coal Sales under its long term coal sales agreement with Sovereign and Harman Mining Company was the lone fact that gave rise to the claims asserted and proven in the Virginia action. As represented to the Court at oral argument, the evidence to prove this breach of contract was extremely narrow: proof of the existence of the contract which provided a duty to buy all the metallurgical coal mined at the Harman mine in 1998, and proof that Wellmore refused to honor that contractual commitment.

Importantly, this lone fact did not give rise to any cause of action against Massey. The facts that gave rise to claims against Massey by Harman Mining Corporation, Sovereign Coal Sales, Harman Development Company and Hugh Caperton were a whole series of acts and omissions committed with wrong intentions by Massey, most if not all of which Wellmore had no part in, taking place over approximately a year's time beginning before the breach of contract and extending well beyond it and even well beyond the time that Wellmore was affiliated with Massey.[6]

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[6] Additionally, contrary to the Court's conclusion, Virginia courts do not use the phrase "cause of action" to mean simply the underlying series of facts giving rise to claims; rather, Virginia courts, like West Virginia courts and lawyers and judges throughout the land, use the phrase cause of action to mean – i.e., the legal theory pled.
For example, in *Smith v. Ware*, 244 Va. 374, 421 S.E.2d 444 (Va. 1992), a case cited by the Majority for other purposes, the Supreme Court of Virginia found that res judicata did not bar a subsequent suit because different causes of action were pled:

> The causes of action are also different. Mrs. Smith asserted a right to occupy the property in her [first case] for unlawful detainer.
>
> * * *
>
> Mrs. Smith, in her [second case] seeks a commutation of her dower interest. *She pled a different cause of action...*

421 S.E.2d at 446.

In both cases, the underlying series of facts giving rise to the claims was exactly the same – Mr. and Mrs. Smith lived in Mr. Smith's house until he died. His will devised the residence to his sister, Ellen Ware. Mrs. Smith lived in the house for several years until Ms. Ware notified her she had to vacate. Thus, under this application of Virginia law by the Supreme Court of Virginia, it was the fact that different claims (i.e., causes of action) were pled that kept the doctrine of res judicata from applying, not that different underlying facts were at issue in each case. Indeed, the underlying facts were exactly the same.

Wellmore breached its contract with Sovereign and Harman Mining when it repudiated its obligation to purchase Harman coal in the fall of 1997. Sovereign and Harman Mining sued Wellmore over this breach in Virginia, as required by the forum selection clause in the contract.

As later discovered, Massey interfered with Harman's business and the Sovereign/Wellmore coal supply agreement pursuant to a scheme it hatched prior to Massey's purchase of Wellmore. Thereafter, over the course of many months and after it arranged to sell Wellmore, Massey engaged in an extensive series of misrepresentations and acts of interference through the conduct and at the direction of Massey's CEO. First, Massey misrepresented its intentions to buy Harman. Several months later it purposely collapsed that deal in order to interfere with Harman. Next, Massey improperly misused confidential information against Harman in order to purchase a wall of coal adjacent to the Harman mine with an intent to further interfere with Harman's business relations. Finally, Massey undertook wrongful measures, with wrongful intent, expressly designed to preclude plaintiffs' ability to get this case to trial. These actions occurred in the 1998 - 2000 time frame. This action was initiated in 1998.

Obviously, cases exist where different claims against the same person are found to be barred by the doctrine of res judicata. But no case has been located where a court, applying Virginia law, found that different claims against different parties arising out of separate and distinct conduct were essentially the same cause of action for res judicata purposes.

### D. This Court Misapplied the Transactional Approach

Even if a transactional approach is applied, this case would not be barred under a proper interpretation of Virginia law for the additional reasons that the remedies and parties are not the same in the two actions.

### 1. The Majority Opinion is Wrong in Concluding that the Remedies are Identical for Res Judicata Purposes

The remedy for breach of a contract for the sale of goods (generally lost profits) is not the same as a remedy under West Virginia law for the destruction of a business (the difference in the value of the business before and after the alleged bad acts). *Compare* Va. Code Ann. § 8.2-708 to *Rufus v. Lively*, 207 W.Va. 436, 533 S.E.2d 662 (W.Va. 2000). Similarly, the remedies for fraud and tortious interference are different and much broader than claims for breach of contract. The damages for fraud under West Virginia law are consequential damages and, if warranted, punitive damages. *Persinger v. Peabody Coal Co.*, 196 W. Va. 707, 719, 474 S.E. 2d 887, 899 (1996) (Damages in fraud action are any injury incurred as a result of the defendant's conduct and, in addition, punitive damages in a proper case).

As to the damages recoverable for tortious interference, the Restatement (Second) of Torts § 774A provides for all "consequential losses for which the interference is a legal cause; emotional distress or actual harm to reputation, if they are reasonably expected to result from the interference." More specifically:

> In an action for interference with a contract by inducing or causing a third person to break the contract with the other, the fact that the third person is liable for the breach does not affect the amount of damages awardable against the actor; but any damages in fact paid by the third person will reduce the damages actually recoverable on the judgment.

Punitive damages are also recoverable under appropriate circumstances. Id. at comment a.

Further, comment d to section 774A explains that:

> The action for interference with contract is one in tort and damages are not based on the contract rules, and it is not required that the loss incurred be one within the contemplation of the parties to the contract itself at the time it was made. The plaintiff can also recover for consequential harms, provided they were legally caused by the defendant's interference.

*Id.* at comment d.

Here, the Plaintiffs did not seek contract damages against Massey for Wellmore's breach of its contract with Sovereign Coal Sales. Rather, Plaintiffs sought damages for the series of acts that Massey committed which destroyed Plaintiffs' business and business relations. Even if it were found that the damages are somehow duplicative (the trial court (Hoke, J.) expressly found that they were not and so instructed the jury), this would only reduce recovery against Massey by the amount of the Virginia judgment; it would not be a bar to any and all liability.

In *Gentile Bros., Corp. v. Rowena Hames, Inc.*, 352 Mass. 584, 227 N.E. 2d 338 (1967), the Supreme Judicial Court of Massachusetts rejected the argument that damages for tortious interference are identical to the damages available for breach of contract:

> The damages assessed for interference with a contractual relationship are "not for breach of contract but for tort, and include such loss of profits as the plaintiff can prove resulted directly and proximately from the wrongful acts of the defendants."

*Id.* at 591-92, 343.

Likewise, in *Duff v. Engelberg*, 237 Cal. App. 2d 505, 47 Cal. Rptr. 114 (1965), the court held that purchasers under an executory contract to purchase real property could recover, in addition to specific performance and consequential damages from the sellers, compensatory and punitive damages from the party that induced the seller not to go forward with the sale. The court there adopted an analysis suggested by Professor Prosser:

> A third [line of tortious interference cases], perhaps the most numerous, has treated the tort as an intentional one, and has allowed recovery for unforeseen expenses, as well as for mental suffering, damage to reputation, and punitive damages, by analogy to the cases of intentional injury to person or property. *In the light of the intent and the lack of justification necessary to the tort, this seems the most consistent result.* (Citations omitted; emphasis added.) (Prosser, Torts (3d ed.) ch. 26, sec. 123, pp. 972-973). We accept the rule last stated as being the proper one for the reasons quoted in italics.

The court in *Duff* noted that specific performance gave plaintiff the property he was entitled to receive and an award of incidental expenses and other damages against the contracting party were *Hadley v. Baxendale*[7] type damages, but found that they "are not necessarily the total damages suffered when a tort is intentional." *Id.* at 508, 116. Thus, the court held that Plaintiffs were entitled to recover from those committing the intentional harm damages for all harm resulting from their acts. *Id.* at 508-09, 116, citing Restatement (Second) of Torts § 915.[8]

The fact that Harman sought and was awarded money damages in both actions does not mean, as Massey argues, that Harman was awarded the same remedy in both actions for res judicata purposes. *See e.g., Carter v. Hinkle*, 189 Va. 1, 52 S.E.2d 135 (1949) (money damages awarded for property damages did not preclude later action for money damages for personal injuries sustained in the same accident). "Remedy" for res judicata purposes refers to what the judgment compensates the plaintiff for, not to the form of the judgment, as the cases relied on by Massey make plain.[9]

Indeed, no case decided under Virginia law has held, as the Majority Opinion did, that vastly different standards of damages utilizing different measurements of damages against different parties for different injuries sustained (i.e., one year's worth of loss of profits versus difference in company's value before and after its destruction) constitute identical remedies for res judicata purposes.

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[7] Ex. 341, 156 Eng. Rep. 145 (1854).

[8] *See also, e.g., Green v. Zimpel*, 23 Va. Cir. 524, 1989 WL 646458 (Va. Cir. Ct.1989) (attorney's fees awarded for tortious interference where claimant was forced to maintain suits against third parties to protect his interests); and *Dassance v. Nienhuis*, 57 Mich. App. 422, 225 N.W.2d 789 (1975) (attorneys' fees incurred in specific performance action were properly awarded to potential purchases for broker's tortious interference with contract).

[9] *See Ezrin v. Stack*, 281 F.Supp.2d 67 (D.C. D.C. 2003) (in both actions, Ezrin sought damages for Stack's failure to pay taxes on behalf of a business jointly owned by Ezrin and Stack and for Stack's alleged wrongful sale of the parties' restaurant); *In re Spike Broadband Systems, Inc.*, No. 01-13453 - JMD, 2003 WL 21488663 (June 19, 2003 Bkrtcy. D.N.H. 2003) (both actions sought damages for breach of the same contract).

## 2. The Majority Opinion is Wrong in Concluding that the Parties are Identical for Res Judicata Purposes Based on a Finding of Privity

The Majority Opinion relies on an erroneous and distorted view of the doctrine of privity. Privity is a doctrine by which one party can be held liable for breach of contract or tortious conduct of a related party, such as a wholly-owned subsidiary. However, it is not a means of absolving one party of liability for different acts and omissions committed by that party.

There is no better example of this than the present case. A finding of privity based upon the parent-subsidiary relationship or the operational control of Massey over Wellmore could result in a finding that Massey is responsible for the breach of contract committed by Wellmore. However, the doctrine of privity cannot and would not be a means of holding Wellmore liable for the tortious conduct committed by Massey. Indeed, Massey had sold Wellmore in the midst of undertaking the series of bad acts it committed to interfere with and defraud Harman.

In its section on res judicata, the Majority Opinion contains citations to twenty nine (29) cases decided under Virginia law. Only five of those cases involve a finding that an action is barred by a previously-adjudicated action involving different parties based in whole or in part on the doctrine of privity. Each of those cases is readily distinguishable because each involves an attempt at re-litigation of claims by or against different parties *arising out of identical facts*:

1. In *Mullins v. The Daily News Leader*, 2001 WL 1772679 (Va. Cir. Ct.), res judicata was applied where a subsidiary corporation, *The Daily News Leader*, was named in a subsequent action based upon factual allegations (alleged harm from the publication of newspaper articles) that were dismissed with prejudice in a previously-decided action against its parent, Gannett Publishing Company.

2. In *Nero v. Ferris*, 222 Va. 807, 284 S.E.2d 828 (Va. 1981), an accident victim was precluded from recovery on an action against a son who allegedly was driving a truck owned

by his father that struck her after a previously-decided action against his father found that the son was not driving the truck in the state where the accident occurred at the time.

3. In *CDM Enterprises, Inc. v. Cmwlth., Manufactured Housing Board*, 32 Va.App. 702, 530 S.E.2d 441 (2000), a wife was precluded from recovery against a home builder for failure to install a deck in one case where liability and damages were adjudicated in a previously-decided case brought by her and her husband against the home builder.

4. In *State Water Control Board v. Smithfield Foods, Inc.*, 261 Va. 209, 542 S.E.2d 766 (Va. 2001), a state environmental board authorized to act on behalf of the EPA was precluded from bringing a subsequent enforcement action where the EPA had already pursued, to conclusion, a prior action for the exact same violations of the Clean Water Act.[10]

5. In *Ward v. Charlton*, 177 Va. 101, 12 S.E.2d 791 (1941), a suit against an employer was dismissed after the adjudication of a prior action against his employee, where liability, if any, of employer was entirely dependent upon the liability of the employee under the doctrine of *respondeat superior.*

None of these cases cited by the Majority held that a party is barred from bringing different claims against different parties. Similarly, none of the cases involved the issue of whether a plaintiff is barred from suing a parent corporation for its wrongful conduct separate and apart from conduct by a previously-sued subsidiary.

As noted, the only case cited by the court involving a parent-subsidiary relationship is *Mullins v. The Daily News Leader*, 2001 WL 1772679 (Va. Cir. Ct. 2001). There, a newspaper published several articles about the plaintiff with which she took issue. First, Ms. Mullins sued the paper's parent company. Those claims were dismissed with prejudice. Then she sued *The*

[10] *See also Jordache Enterprises, Inc. v. Nat'l Union Fire Ins. Co.*, 204 W.Va. 465, 513 S.E.2d 692 (W.Va. 1998) (where one of three shareholders in a close corporation is sought to be found liable in a subsequent case based upon factual allegations rejected in an earlier action against the corporation and the other two shareholders).

*Daily News Leader* itself, realleging the same causes of action arising out of publication of the same articles. The Daily prevailed on a defense of res judicata, the court noting that The Daily was in privity with its parent in the first action. Here, plaintiffs sued Massey based upon distinct facts and distinct causes of action than the lone fact upon which Wellmore was sued – its failure to purchase coal.[11]

Clearly, a parent can be liable for the acts of its subsidiary if it exercised undue dominion and control over the subsidiary in such a manner as to defraud and wrong a party dealing with the subsidiary. *Eure v. Norfolk Shipbuilding & Drydock Corp.*, 263 Va. 624, 634, 501 S.E. 2d 663, 669 (2002). However, a subsidiary cannot be sued for conduct of its parent that is different, more extensive and gives rise to causes of action in tort.

Here, the Virginia action against Wellmore did not concern the tortious acts of Massey, but rather Wellmore's own breach of contract; nor, did the West Virginia action concern Massey's liability for Wellmore's breach of contract or any other vicarious liability of Massey for the acts of its subsidiary. None of the cases cited by the Court address, let alone found that where a subsidiary has been sued, its parent cannot be sued separately for the parent's own separate conduct.

### E. The Record does not Support the Court's Holding that this Case is Barred by Res Judicata

#### 1. The Record is Insufficient to Conclude that the Virginia Case was the Same as this One

Another glaring error with Massey's position that this case is barred by the doctrine of res judicata is its failure to properly set a record. If Massey had submitted relevant and necessary

[11] Massey and Wellmore are not parent and subsidiary, and were not parent and subsidiary when either action was tried, in stark contrast to the parent and subsidiary relationship in *Mullins v. Daily News Leader*, 2001 WL 1772679, at *2 (Va. Cir. Ct. 2001).

facts relating to the Virginia case to support its position, as they had the burden of doing, it would be readily apparent that res judicata does not apply.

The touchstone of any sound res judicata analysis under Virginia law is a comparison of the evidence submitted in one proceeding with the evidence that would be or actually was submitted in a subsequent proceeding. If the evidence to prove the causes of action asserted in the second proceeding differs substantially, it is likely that the causes of action in the second proceeding will be deemed to be different causes of action, then it is likely that the second action will not be barred. *Brown v. Haley*, 233 Va. 210, 355 S.E.2d 563, 567 (1987) ("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.") (citations omitted).

How does this Court know what evidence came in at the Virginia trial, what causes of action were heard in that case, and what remedies were allowed under the law?

Massey, the party who bears the burden of proving the affirmative defense of res judicata never submitted in this West Virginia proceeding any of the evidence submitted in Virginia. Nor did it submit the jury instructions from the Virginia trial, the verdict slips from the Virginia trial, or the final judgment in the Virginia case.

Had Massey made such materials part of the record in this case, it would be perfectly clear that the issues decided in the Virginia case were very narrow and that the vast bulk of evidence submitted to prove Massey's liability at the seven-week trial of the West Virginia case against Massey were not submitted in Virginia. The only issue decided in Virginia was whether Wellmore's refusal to purchase coal was a breach of contract without proper justification. The only damage evidence permitted in that trial was evidence tending to establish what amount of lost profit (including reasonable overhead) Sovereign Coal Sales and Harman Mining Company suffered in 1998 – one year's of contract damages under the Uniform Commercial Code.

The very extensive evidence and testimony establishing Massey's wrongful intentions, Massey's scheme to defraud and interfere with Harman and Massey's actual execution of that scheme over several years was not adduced at the Virginia trial. Indeed, at Wellmore's request, Plaintiffs in the Virginia case were precluded from entering evidence of Massey's tortious conduct.

A comparison of the evidence in the two cases would show that literally hundreds of documents submitted at the West Virginia trial were not submitted and, indeed, would not have been permitted in the Virginia action. Weeks of witness testimony in West Virginia was not elicited nor would it have been permitted in the Virginia case. Further, evidence establishing and quantifying plaintiff's damages consisting of the destruction of their business was not submitted nor would it have been permitted at the Virginia trial.

Thus, one must conclude that Massey has failed to meet its burden of establishing a record to support its defense of res judicata. Furthermore, it is incomprehensible that an actual review of the evidence in the two proceedings would allow the conclusion that the causes of action in the two cases were the same for res judicata purposes.

**2. This Court Overlooked and/or Misapprehended that Counsel for Massey, while also acting as Counsel for Wellmore in the Virginia Action, made Numerous Representations that the Virginia and West Virginia Actions were Separate and Distinct**

In fact, Wellmore moved to keep out of the Virginia Action any evidence identifying Massey or any evidence supportive of the tort claims in the West Virginia Action because, *inter alia,*

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

*See Wellmore July 22, 2000 Motion in Limine, attached to the Joint Response to the Petition for*

*Appeal* as App. Ex. 6.

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

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

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

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

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

This Court may have come to its conclusion that the parties and causes of action were the same without being aware of these facts, perhaps due to the enormity of the record below and undoubtedly due to Massey's failure to appropriately file the record regarding the Virginia proceeding. Massey's trial counsel, the very same counsel that represented Wellmore in the Virginia case, took an unequivocal and contrary position in the Virginia proceedings. This Court's failure to address Appellants' wholly inconsistent positions is especially disconcerting given that the Majority apparently treated Wellmore and Appellants as one and the same and given that in this very same term, this Court rendered a decision based upon its holding that the doctrine of judicial estoppel precludes a lawyer from taking contrary positions in a subsequent proceeding.

Syl. pt. 3, *Riggs v. West Virginia University Hospitals,* 2007 WL 4150878 *1 (W. Va. Nov. 20, 2007) ("Judicial estoppel bars a party from re-litigating an issue when: (1) the party assumed a position on the issue that is clearly inconsistent with a position taken in a previous case, or with a position taken earlier in the same case; (2) the positions were taken in proceedings involving the same adverse party; (3) the party taking the inconsistent positions received some benefit from his/her original position; and (4) the original position misled the adverse party so that allowing the estopped party to change his/her position would injuriously affect the adverse party and the integrity of the judicial process.")

### 3. The Record does not Support the Facts Found by this Court Which are Contrary to the Facts Found by the Judge and Jury

The fact finding by the Majority which lead to the conclusion that all of the many acts of fraud and tortious interference were "in relation to" the long term coal supply agreement was not a relevant inquiry under Virginia law; moreover, it is the result of an improper standard of review, an erroneous view of the factual record, and leads to a result that is unjust in the extreme. A thorough review of the briefs filed with this Court, Judge Hoke's Orders, the trial transcript, and the jury verdict establishes that the West Virginia tort action asserted against Massey and its subsidiaries involved numerous tortious acts and omissions which occurred before and after Massey's brief ownership of United/Wellmore.

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

The long-term Coal Supply Agreement was entered into in early 1997 by Wellmore and Sovereign Coal Sales before Wellmore's parent corporation, United Coal Company, was purchased by Massey. Massey closed its acquisition of United and Wellmore on July 31, 1997. TT 7/29/02, 12:23 - 13:7. As early as October 13, 1997 – just 2 1/2 months later – Massey began actively attempting to sell Wellmore. *See* App. Ex. 16 to the *Joint Response to Petition for Appeal.* While actively attempting to sell Wellmore, Massey directed United/Wellmore to declare *force majeure* on December 1, 1997. Massey then sold Wellmore to another coal company by February, 1998. TT 7/29/02, 35:20-22.

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

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

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

PX 334 (emphasis supplied).

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

An internal Massey e-mail dated May 18, 1998 discussing Massey's purchase of the wall of coal – well after Massey had sold Wellmore – and disclosed the rationale for acquiring the adjoining reserves:

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

App. Ex. 23 (emphasis supplied).

As a result of Massey's tortious interference and fraudulent conduct, the Harman companies declared bankruptcy in May of 1998. TT 7/8/02, 67:19-68:8; 200:10-201:2.

A thorough review of these facts, coupled with the time line relating to Massey's actions, in correlation with its very brief ownership of Wellmore, simply do not justify this Court's factual conclusion that the West Virginia tort claims against Massey were "in connection with" and/or

arise from the same transactional facts. The record clearly indicates that Massey had sold Wellmore by the time Massey had purposefully collapsed the deal to purchase Harman and bought the "wall of coal" using confidential Harman information. These findings of the Court also are completely contrary to the findings of the trial court and jury, and substitute this Court as the factfinder – a role totally incongruent with the applicable standard of review, and totally at odds with the role of an appellate court.

#### 4. The Rule of Res Judicata should not Absolve Defendants of Liability, Especially After a Long Trial, Years of Litigation and Findings of Outrageous Wrongful Conduct Issued by a West Virginia Judge and Jury

Res judicata is a judicially-created doctrine based upon public policy considerations. *Bates*, 214 Va. at 670, 202 S.E. at 920. In an appropriate case, "it may give way when in irreconcilable conflict with other, more important public policies." *Id.* at 670, n.2, 920, n.2. As is the case with any other judicial doctrine grounded in public policy, like the collateral estoppel mutuality doctrine, it should not be "mechanistically" applied, such as where it is compellingly clear that the party in the subsequent action has fully and fairly litigated and lost an issue essential to the prior judgment. *Id.* at 671, n.7, 921, n.7. Public policy considerations concerning the sanctity of jury verdicts and the need to compensate businesses tortiously destroyed should take precedence over any mechanistic application of res judicata.

### III. This Case Should Not be Dismissed as the Result of a Forum Selection Clause Because Massey is not Entitled to Enforce it; Because to do so Would be Unreasonable and Unjust; and Because the New Law Announced by the Majority Should be Applied Purely Prospectively

No case cited by the Majority in its lengthy discussion of the law relating to forum selection clauses – nor any case that Appellees have been able to find through their own research – overturned a jury verdict because of the failure of a trial court to enforce a forum selection clause requiring trial in another jurisdiction. To do so would be an unreasonable and unjust

result. To do so in *this* case is especially unjust because: (1) the corporation seeking to enforce the forum selection clause was *never* a party to the contract, was not even related to the parties to the contract at the time of its making or at the time of suit, and only acquired one of the parties for a very brief period precisely for the purpose of interfering with the contract; (2) overturning the jury's verdict would deprive Plaintiffs of their wholly warranted victory without vindicating, in any way, the purpose of a forum selection clause; and (3) the Court applied new law as to forum selection clauses which Harman could not possibly have taken into account when it was making its decision, in good faith and in reliance on existing law, to file this action in West Virginia.

The Court's new law relating to forum selection clauses allows for the possibility, for the first time in West Virginia, that non-parties to the agreement who are not third party beneficiaries may be able to enforce them. The majority not only embraces law from other jurisdictions allowing for this possibility, it also expands that law significantly by permitting non-parties to take advantage of a contract they are seeking to destroy. Nothing in West Virginia law prior to the majority opinion would mandate such a harsh result.

Massey first moved to dismiss Harman's complaint because of the forum selection clause in the coal supply agreement between Wellmore and Sovereign Coal Sales, Inc. ("Sovereign") on December 29, 1998, shortly after this action was filed. The Court verbally denied the motion on March 11, 2000. The appropriate way for Massey to have appealed the Trial Court's ruling refusing to dismiss the Plaintiffs' Complaint because of the forum selection clause in the CSA was to seek this Court's intervention immediately after Judge Hoke announced his decision.

Because it did not do so, Massey accepted and received its full serving of due process in West Virginia – that is, the same full and fair opportunity to present its case to an impartial jury that it argues it should have received in Virginia. Massey was not harmed by the Trial Court's

refusal to mandate trial of this action in Virginia because the purpose of a forum selection clause is not to provide the parties with a *better* forum, or *better* justice, or a *better* result, but rather, to provide certainty and predictability in contracting, a purpose which can not be vindicated now. Harman, on the other hand, is about to be deprived of a verdict that the jury found it was entitled to receive – and which this Court unanimously found was wholly warranted – for nothing related to the merits of the case. A comparison of the harm to Massey if the judgment below *is not* overturned to the harm to Harman if the judgment *is* overturned provides a stark contrast showing just how unreasonable, unjust and harsh this *post facto* enforcement of the forum selection clause is in actual application.

Alternatively, the Court should decide to apply its new law purely prospectively because, in fact, the Trial Court was not wrong when it decided Massey's Motion to Dismiss, but rather was wholly correct in its application of then-existing West Virginia law. The Trial Court *became* wrong only upon this Court's issuance of its majority opinion on November 21, 2007, 7 1/2 years later. Now that Harman is threatened with being put out of court because of its reasonable reliance on the law as it existed in 1998 when this action was filed, the Court should decline to apply its new law to Harman and apply it to future litigants only.

### A. Massey is not a Party Entitled to Enforce the Forum Selection Clause

#### 1. Massey's Connection to the Relevant Contract is Tenuous, Brief, and only for a Tortious Purpose

The forum selection clause which the Majority allows Massey to enforce against the Appellees is contained in a contract which was first entered into between Wellmore and Sovereign[12] in 1992. In 1997, Wellmore and Sovereign renegotiated certain of the agreement's

[12] Sovereign was the Seller under the contract. As the parties to the contract contemplated that Harman Mining Company would produce the coal that Sovereign would sell, Harman Mining Company was a signatory to the contract.

terms and entered into a successor contract, effective January 1, 1997, which also contained a forum selection clause. Wellmore's parent at the time the contract was first entered into and at the time it was renegotiated was United Coal Company. United was not a party to the contract, nor was it owned by Massey at the time.

Sometime thereafter, Massey formulated a plan to acquire United for the purpose of capitalizing on Wellmore's relationship with the customer, LTV, to which United sold all of the Harman coal that Sovereign sold to Wellmore. Massey hoped by acquiring United it would be in a position to convince LTV to buy coal mined by the other named defendants, Massey subsidiaries, rather than the coal mined by Harman. In other words, it bought United not to enjoy the fruits of the Wellmore-Sovereign contract, but to interfere with it.

Even prior to Massey acquiring United on July 31, 1997, LTV had announced its intention to shut down its Pittsburgh coke plant. Nonetheless, Wellmore fully intended to continue to buy from Sovereign all the coal Harman could produce. Massey, well after LTV's announcement concerning its Pittsburgh coke plant and despite the recommendation of its top management at Wellmore to buy all the coal Harman could produce, directed Wellmore to declare *force majeure,* citing LTV's closure of the Pittsburgh coke plant. Massey could have directed Wellmore to declare *force majeure* at or shortly after it acquired United – it already had all the knowledge it needed to justify such a move – but at that point Harman would have been able to find another buyer for its coal and that would not have achieved another goal of Massey's – to gain leverage over Harman and, if necessary, run it out of business. If Massey had directed Wellmore to declare *force majeure* shortly after acquiring United, Harman would have suffered the loss of its bargain with Wellmore, but likely not been put out of business. Caperton testified that had Harman been given sufficient notice of the reduction in tonnage that Wellmore would take under the contract, Harman would have made alternate plans which would have allowed it

to remain in business. TT. 7/8/02, pp. 112-114. Blankenship admitted that the timing and manner of the notice made it difficult for Harman to remain viable. TT. 7/19/02, p. 16:12-16:24. So, it was only Massey's conduct above and beyond the declaration of *force majeure*, including its decision to delay its directive to breach until it would create the most financial hardship for Harman to actively conceal its intentions, to thereafter lead Harman to believe that it would buy its mine, to misuse confidential information, to acquire property for no purpose other than to diminish Harman's value, and other such misconduct that led to the ultimate annihilation of Harman. Massey took these additional steps – steps beyond what was necessary simply to destroy the contractual relationship between Harman and Wellmore – in an attempt to assure itself that Harman would be unable to fight back.

On February 7, 1998, Massey, having failed in its attempt to convince LTV to buy its subsidiaries' coal rather than Harman's coal from Wellmore, and having interfered with the relationship between Wellmore and Harman, divested itself of Wellmore. After selling Wellmore to a third party, Massey continued its campaign to increase Harman's financial hardship which ended with Harman's bankruptcy.

This lawsuit was filed on October 29, 1998. Thus, Massey acquired Wellmore's parent six years into the contractual relationship between Wellmore and Harman, owned Wellmore for only a few days more than six months and only for the purpose of destroying the contractual relationship between Wellmore, Sovereign and Harman, and gave up its ownership interest in Wellmore more than eight months before suit was filed. Under these circumstances, to allow Massey to use a contract it had so little interest in and so much contempt for to deprive Harman of its verdict would be manifestly unreasonable and unjust and would be a wholly unwarranted extension of the law adopted by the majority for the first time in its November 21, 2007 opinion.

### 2. A Non-Party must be a "Transaction Participant," that is, a Participant in the Underlying Contracting Relationship in Order to be Entitled to Enforce a Forum Selection Clause

The Majority Opinion cites 12 cases in support of its conclusion that "a defendant who is a non-signatory to a contract containing a forum-selection clause may enforce that clause when it is shown that the *claims* against him or her are closely related to the contract." Putting aside the fact that the fraud claims against Massey had nothing to do with Wellmore's contract, none of the cases relied on stand for that bald proposition. What the cases do stand for is that non-signatories to a contract containing a forum selection clause may enforce the clause when *they* themselves have a sufficiently close relationship to the performance of the contract such that it can be said that they too are participants in the contracting relationship. Because of this close relationship between the non-signatory and the contracting relationship, it is foreseeable that the non-signatory will be entitled to enforce the forum selection clause.

In fact, only five of the cases cited by the Majority even involve defendants who were non-signatories to a contract seeking to enforce a forum selection clause in a contract between the plaintiff and another party. *See Manetti-Farrow Inc. v. Gucci America, Inc. et al.,* 858 F.2d 509 (9th Cir. 1988); *Dogmach Int'l Corp. v. Dresdner Bank AG,* 304 A.D.2d 396 (N.Y. S.Ct., App. Div. 1st Dept., 2003); *World Vacation Travel v. Brooker,* 799 So.2d 410 (Fla. Dist. Ct. App., 3d Dist., 2001); *First Specialty Ins. Corp. v. Admiral Ins. Co.,* No. CV 07-408, 2007 WL 1876516 (D.Or., June 22, 2007); *Clinton v. Janger*, 583 F.Supp. 284 (N.D. Ill. 1984). *See also Belfiore v. Summit Fed'l Credit Union*, 452 F.Supp.2d 629 (D. Md. 2006) (cited by the Court for a different proposition but also involving a non-signatory defendant seeking to enforce a forum

selection clause against a signatory plaintiff)[13]. All the other cases cited by the Court involve defendant-signatories of a contract seeking to enforce the agreement's forum selection clause against non-signatory plaintiffs.

None of the cases relied on by the Majority allow a non-signatory defendant with no relationship to the contracting parties at the time the contract was entered into to enforce a forum selection clause. None of the cases relied on by the Majority allow a non-signatory defendant with no relationship to the contracting parties at the time the lawsuit was filed to enforce the forum selection clause. Lastly, none of the cases relied on by the Majority involve a non-signatory defendant who acquired an interest in a signatory company for the purpose of interfering with the contractual relationship.

Rather, each of the cases relied on by the Majority involved claims with a close relationship to a contract containing a forum selection clause – otherwise the issue would not have arisen – but what allowed the non-signatory defendant to enforce the clause against the signatory plaintiff was not just that the plaintiff's claims referred to or implicated the contract in some way, but that the claims implicated the non-signatory defendant's actual participation in the contractual relationship, making the non-signatory a "transaction participant." "[T]he cases hold that a range of *transaction participants*, parties and non-parties, should benefit from and be subject to forum selection clauses." *Clinton v. Janger,* 583 F.Supp. at 290 (emphasis added).

Typically in these cases, the non-signatory defendant was actually involved in the performance of the contract which gave rise to the plaintiff's causes of action. *See e.g., Dogmach Int'l Corp. v. Dresdner Bank AG,* 304 A.D.2d at 397 (dispute arose over bank deposits in non-signatory defendant bank pursuant to bank deposit agreement between plaintiff and non-

[13] One of the defendants in *Deloitte & Touche*, 929 S.2d 678 (Fla.App. 5 Dist. 2006), was also a non-signatory to the contract containing the forum selection clause. However, only the signatory defendant sought to enforce the clause.

signatory defendant's subsidiary); *World Vacation Travel, S.A. v. Brooker*, 799 So.2d at 413 (both signatory and non-signatory defendants sued for conduct which allegedly breached time share agreement between signatory plaintiff and signatory defendant); *Clinton v. Janger*, 583 F.Supp. at 289-90 (non-signatory bank sued for conduct in connection with trust funds deposited with it pursuant to trust agreements containing forum selection clause). The performance by the non-signatory defendants of acts required by the contract containing the forum selection clause made them "transaction participants," and, therefore, entitled to enforce the clause.[14]

The same dynamic is present in the cases relied on by the Majority involving signatory defendants being allowed to enforce a forum selection clause against a non-signatory plaintiff. In each one of these cases, the non-signatory plaintiff, in some way, reaped the benefits of the contract and having reaped the benefits of the contract, found itself saddled with the detriment of the contract's forum selection clause. In *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190 (3d Cir. 1983) and *Tuttle's Design-Build, Inc. v. Florida Fancy, Inc.*, 604 So.2d 873 (Fla. Dist.Ct.App., 2d Dist., 1992), the non-signatory plaintiffs were actual third-party beneficiaries of the contract. In *Great Northern Ins. Co. v. Constab Polymer-Chemie,* No. 5:10-CV-0882, 2007 WL 2891981 (N.D. N.Y., Sept. 28 2007) and *Deloitte & Touche v. Gencor Industries, Inc.*, 929 S.2d 678 (Fla. D.Ct. of App., 5th Dist. 2006), the rights the non-signatory plaintiffs were seeking to vindicate were "completely derivative" of those of a non-party signatory. *See also XR Co. v. Block & Balestri, P.C.*, 44 F.Supp.2d 1296 (S.D. Fla. 1999) (non-plaintiff signatory both a beneficiary of the contract and the possessor of rights completely derivative of the contracting party's rights).

[14] *See also, First Specialty Ins. v. Admiral Ins.*, where both the plaintiff and defendant were non-signatories of the contract containing the forum selection clause but where both were assignees of the contracting relationship, in effect becoming parties to the contract, forum selection clause included.

Of course, any claim of tortious interference with a contract is a claim with a close relationship to a contract. Surely all such claims are not subject to a forum selection clause in the underlying contract, however, regardless of how distant and removed the alleged tortfeasor is to the contractual relationship. If ever a non-contracting torteasor should be allowed to enforce a forum selection clause, it should be only when it has close ties to the contractual relationship quite apart from the relationship created by the defendant's tortious conduct. The tortfeasor should not be allowed to create the relationship, by his tortious conduct alone, to allow him to enforce a forum selection clause in a contract to which he is not a party and which he is trying to destroy.

The only case relied on by the Majority which possibly involves a claim of tortious interference with the contract containing the forum selection clause is *Manetti-Farrow, Inc. v. Gucci America, Inc.,* a 858 F.2d 509 (9th Cir. 1988). In *Manetti-Farrow,* the plaintiff sued Guccio Gucci S.p.A., the parent of two subsidiaries, one of which, Gucci Parfums, was a direct party to a contract containing a forum selection clause and one of which, Gucci America, was an indirect party by way of its signature on a Consent and Ratification to the subject contract. Plaintiff also sued three directors of the contracting parties, two of whom were also directors of the parent, Guccio Gucci. Neither the parent nor the three directors were parties to the contract between the two subsidiaries and the plaintiff, Manetti-Farrow.

Nonetheless, the Ninth Circuit allowed each of the defendants, signatories and non-signatories alike, to enforce the forum selection clause in the contract between Manetti-Farrow and Gucci Parfums, which was consented to and ratified by Gucci America. The Court found that each of the six tort claims brought against various of the parties depended on the interpretation of the contract and could not be adjudicated without analyzing whether they were in compliance with the contract.

The difference between Guccio Gucci's participation in the contracting relationship at issue in that case and Massey's total lack of participation in the contracting relationship at issue in this case is apparent. In *Manetti-Farrow*, Guccio Gucci created Gucci Parfums for the express purpose of entering into just the kind of contracts at issue in the case. Guccio Gucci was there at the inception of the contracting relationship, there throughout the performance of it, there at the end of it, and still in the role of parent at the time of the suit. In other words, Guccio Gucci had been accepting the benefits of the contract for years and, therefore, in ways that cannot be said of Massey, Guccio Gucci was a "transaction participant." Cf. *Dayhoff Inc. v. H.J. Heinz Co.*, 86 F.3d 1287, 1296-97 (3d Cir. 1996), a case alleging tortious interference in which the court refused to allow a parent corporation to enforce a forum selection clause between its subsidiary and the signatory plaintiff, disagreeing with *Manetti-Farrow,* and commenting, "there is no more reason to disregard the corporate structure with respect to such claims as there would be to disregard it with respect to other legal matters."

In all of these cases, as in *Manetti-Farrow,* the rights of the plaintiffs and/or the duties of the defendants arose from the contract and depended on the interpretation of the contract containing the forum selection clause. For example, in *Hugel v. Corp. of Lloyd's*, 999 F.2d 206, 209 (7th Cir. 1993), the non-signatory plaintiff was seeking to enforce a confidentiality obligation that could only be found in the contract between the signatory plaintiff and signatory defendant. Based on the duty of confidentiality the non-signatory plaintiff contended defendant owed it arose from the contract, the court found it was foreseeable that the non-signatory plaintiff would be bound by the forum selection clause. *See also, Graham Technology Solutions, Inc. v. Thinking Pictures,* 949 F.Supp. 1434 (1997) (claims of two non-signatory plaintiffs depend on interpretation of contract containing forum selection clause).

Non-parties to a contract whose rights and/or duties nonetheless arise from the contract are, therefore, in some way, participants in the contracting relationship. Because of this close relationship between the non-party's conduct and the contracting relationship, such non-parties are bound by forum selection clauses in the underlying contracts.

### 3. Massey Was Never a Transaction Participant and Therefore Cannot Enforce the Forum Selection Clause

In all of these cases, whether involving a non-signatory defendant or a non-signatory plaintiff, the non-signatory party can truly be described as a "transaction participant," that is, a participant in the business relationship created by the contract and in the acts and duties required by the contract. In contrast, Massey was *never* a "transaction participant," but only a transaction destroyer. It never participated in the performance of the contract, never received a benefit from the contract that it sought to protect, and never asserted any rights under the contract, save one, its alleged right to have this action tried in Virginia.

It is not just that Massey is charged with tortious interference with the subject contract that is the basis for Harman's contention that Massey should not be able to take advantage of the contract's forum selection clause. It is that Massey's *only* relationship to the contract is its tortious interference with it. As Massey had no other relationship with the contract before, during or after its interfering conduct, it cannot possibly be said that Harman could have foreseen that Massey would try to take advantage of the contractual relationship. Its acts demonstrated nothing but contempt for the contractual relationship. Massey should not be allowed now to rely on a term in the contract with which it has absolutely no relationship, except by virtue of its tortious conduct, to rob Harman of its victory in the Trial Court.

Furthermore, the success of Harman's claim against Massey did not depend in any way on the interpretation of the Coal Supply Agreement. Regardless of whether Wellmore actually

breached the contract when it declared *force majeure*, Massey would have been liable for tortious interference with the contract.

Massey was not a third party beneficiary of the contract, was not an assignee of the contract and possessed no rights derived from the contract. The duty Harman contends Massey owed it did not arise from the contract, but rather arose from the common law.

For all these reasons, Massey is not a party entitled to enforce the forum selection clause in the contract with which it interfered.

### B. Enforcing the Forum Selection Clause in this Case Would be Unreasonable and Unjust

Under the Majority's new test, the final step in the analysis of the applicability of a forum selection clause is "to ascertain whether the Harman Companies and Mr. Caperton have rebutted the presumption of enforceability by making a sufficiently strong showing that enforcement would be unreasonable or unjust, or that the clause was invalid for such reasons as fraud or overreaching." Enforcing a forum selection clause would be unreasonable and unjust according to the Majority, if the product of overreaching or fraud, if the plaintiff would be deprived of its day in court or of a remedy if the clause is enforced, or if enforcement would contravene a strong public policy of West Virginia.

The Majority concluded Harman had not rebutted the presumption of enforceability either in the Trial Court or before this Court. However, the grave injustice of enforcing the forum selection clause in the Wellmore-Sovereign contract to overturn the jury's verdict in this case is apparent. Enforcing the forum selection clause now only thwarts a jury's verdict that all agree (except Massey) was wholly warranted. Enforcing the forum selection clause now would be contrary to West Virginia's public policy of deference to jury verdicts, without serving the purpose of forum selection clauses. Massey could have taken steps to enforce what it believed

was its right to a trial in Virginia of Harman's claims against it, but it elected not to do so. Given that the right it sought to protect was not important enough for it to seek immediate review of the Trial Court's denial of Massey's Motion to Dismiss, there is no reason to upset a jury verdict.

### 1. Massey Failed to Follow the Correct Procedural Path for Review of the Denial of Its Motion to Dismiss and Thereby Accepted the Exhaustive Due Process Afforded it in West Virginia's Legal System

Massey's motion which sought to enforce the forum selection clause was a motion to dismiss for improper venue. When such a motion is granted, the decision is final and, therefore, immediately appealable. When the motion is denied, it is also appealable in West Virginia by way of a writ of prohibition. *See State ex rel. Stewart v. Alsop*, 207 W.Va. 430, 533 S.E.2d 362 (2000) (writ of prohibition appropriate to prevent exercise of improper venue.) *See also Bad Toys Holdings, Inc. v. Emergystat of Sulligent, Inc.*, 958 S.2d 852, 855 (Ala. 2006) ("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.").

Massey's failure to immediately appeal the denial of its motion seeking to enforce the forum selection clause demonstrates that it did not consider the right it believed it had to have this case tried in Virginia sufficiently important to act quickly, or did not believe it really had such a right at all. This Court should not elevate Massey's entitlement to a Virginia forum beyond that which Massey accorded it itself.

The purpose of a forum selection clause is to add predictability and certainty into the contracting relationship. Overturning a jury verdict because it was not rendered in the proper state does not serve the purpose underlying the forum selection clause and only provides the defendant who has lost at trial with a reprieve, even though it has already been provided with a full and fair opportunity to be heard.

As Massey has already received all the due process to which it is entitled and because overturning the verdict can not now, in retrospect, provide the parties with the certainty and predictability that the forum selection clause was entered into and intended to provide, and because Massey could have sought an earlier review of the decision denying its motion to dismiss for improper venue but failed to do so, it would be manifestly unreasonable and unjust to deprive Harman of its wholly warranted verdict under these circumstances.

### 2. No Case Has Overturned a Judgment Entered After a Jury Trial on Forum Selection Grounds

Not a single case has been found in which the enforcement of a forum selection clause has resulted in a jury verdict being overturned. To do so would contravene the strong public policy of West Virginia in favor of jury verdicts. "This Court has historically favored jury verdicts and will affirm a verdict, short of compelling reasons to set a verdict aside." *Pipemasters, Inc. v. Putnam County Commission,* 218 W.Va. 512, 518, 625 S.E.2d 274, 280 (2005). "Traditionally, jury verdicts are viewed with high esteem and accorded great deference in light of the jury's invaluable role as finder of fact." *State v. Cottrill,* 204 W.Va. 77, 511 S.E.2d 488 (1988). "When a case involving conflicting testimony and circumstances has been fairly tried, under proper instructions, the verdict of the jury will not be set aside unless plainly contrary to the weight of the evidence or without sufficient evidence to support it." Syl. Pt. 4, *Laslo v. Griffith,* 143 W.Va. 469, 102 S.E.2d 894 (1958).

*Harman,* however, is a glaring anomaly. It is the only case where an award of damages to a plaintiff was overturned. It is the only case where the error did not strike at the jury system itself or was not of constitutional dimensions. More importantly, it was the only case where the decision did not allow a remand to the Trial Court to consider any issue, such as whether application of the forum selection clause would lead to a harsh result.

To overturn this verdict on the basis of the forum selection clause is contrary to West Virginia public policy and this Court's practice of according great deference to jury verdicts, and therefore, is an unreasonable and unjust result. For this additional reason, this Court should not reverse the judgment of the Trial Court in reliance on the forum selection clause in the Harman-Wellmore CSA and, instead, should affirm the judgment in all respects.

### C. Alternatively, the Court's New Law on Forum Selection Clauses Should Be Applied Prospectively Only

This Court adopted for the first time in the Majority Opinion in this case the Second Circuit's four-part test, originally set forth in *Phillips v. Audio Active Limited,* 494 F.3d 378 (2d Cir. 2007), for determining whether a claim should be dismissed based a forum selection clause. Because the Court enunciated new law, the issue of whether the decision should be applied to Harman, or to any other current litigant, arises. Harman asks the Court to now address this issue and to hold that the decision should not be applied retroactively to Harman because Harman relied on the state of the law as it then existed when it filed its West Virginia action. To penalize it for such good faith reliance – especially given the extreme sanction visited upon Harman as a result of the majority's decision – would be unfair and unjust.

#### 1. West Virginia Recognizes That Some Cases Should Be Applied Prospectively Only.

This Court has grappled on a number of occasions with the issue of whether a decision should be applied fully retroactively, only partially retroactively, or purely prospectively.[15] This

[15] A decision is given full retroactivity when the ruling is applied to both the litigants before the court and to all others. *James Beam Distilling Company v. Georgia,* 501 U.S. 529, 535, 111 S.Ct. 2439, 2443 (1991). "This practice is overwhelmingly the norm and is in keeping with the traditional function of the courts to decide cases before them based upon their best current understanding of the law." *Id.* Selective retroactivity (or selective prospectivity) occurs when a decision is applied to the parties before the court, but not to others with similar pending cases. *Id.* at 536, 111 S.Ct. at 2444. Finally, a decision is applied purely prospectively when it is applied to neither the parties before the court or to others with cases arising in the past, but only to future litigants with notice of the new rule. *Id.*, 111 S.Ct. at 2443-44.

issue arises most commonly when established precedent is overruled and when statutes are invalidated on constitutional grounds. *See e.g., Hamric v. Doe,* 208 W.Va. 319, 540 S.E.2d 536 (2000) (decision overturning rule that actual physical contact required for insured party to recover under uninsured motorist provision not applied retroactively); *Devrnja v. W.Va. Bd. of Medicine*, 185 W.Va. 594, 408 S.E.2d 346 (1991) (declaration that statute requiring permanent licensure of physicians who held temporary certificates was unconstitutional applied retroactively).

> In the ordinary case, no question of retroactivity arises. Courts are as a general matter in the business of applying settled principles and precedents of law to the disputes that come to bar. . . It is only when the law changes in some respect that an assertion of nonretroactivity may be entertained, the paradigm case arising when a court expressly overrules a precedent ... by which the parties may previously have regulated their conduct.

*James Beam Distilling Company*, 501 U.S. at 534, 111 S.Ct. at 2442-43.

The issue also arises when new requirements are placed on parties that were previously unknown to them. *See Richmond v. Levin*, 219 W.Va. 512, 637 S.E.2d 610 (2006) (foreshadowing portion of retroactivity analysis "becomes a critical point ... when this Court overrules a prior decision *or imposes new requirements*." [emphasis added]) *See also*, *SASCO v. Zudkewich*, 767 A.2d 469 (N.J.S.Ct. 2001) (prospectivity appropriate when court renders decision on matter of first impression). The justification for applying a decision purely prospectively is "that to apply the new rule to parties who relied on the old would offend basic notions of justice and fairness." *James Beam,* 501 U.S. at 535, 111 S.Ct. at 2444.

A state court clearly has the authority to apply its decision prospectively. *Great Northern Railway v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364, 53 S.Ct. 145, 148 (1932) ("A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operating and that of relation backward."). Where circumstances warrant it, West

Virginia has applied new law prospectively. *Kincaid v. Mangum*, 189 W.Va. 404, 432 S.E.2d 74 (1993).

### 2. Courts Apply New Law Purely Prospectively in Two Circumstances, Including When Application of New Law Will Put a Party Who Relied on Then Existing Law Out of Court

Courts have applied decisions purely prospectively in two circumstances. One circumstance is exemplified by this Court's decision in *Kincaid v. Mangum, supra*, that is, when the Court's decision invalidating a statute was not clearly foreshadowed and applying it retroactively would seriously disrupt the operations of government. In *Kincaid v. Mangum,* the Court invalidated the West Virginia Minimum Standards for Construction, Operation and Maintenance of Jails because, the Court concluded, legislative rules authorized in an omnibus bill violated the one object rule of West Virginia's Constitution. *Kincaid,* 189 W.Va. at 406-07, 432 S.E.2d at 76-77. Concerned that "chaos" could result if all legislative rules were suddenly declared void, the Court directed that its decision apply prospectively only. *Id.* at 83, 86, 432 S.E.2d at 413, 416. *See also, Lemon v. Kurtzman*, 411 U.S. 192, 93 S.Ct. 1463 (1973) (refusing to apply decision holding that reimbursements to parochial schools for secular education services violated First Amendment to forbid payment for past services).

In *Kincaid v. Mangum*, this Court noted the great weight given to the reliance interests of the parties affected by changes in the law by the U.S. Supreme Court in its decisions. 189 W.Va. at 414-15, 432 S.E.2d at 84-85. The reliance parties place in the law as it exists has also caused courts to apply decisions purely prospectively in a second circumstance, that is, when they have announced new law which would effectively put a litigant out of court who had relied on the earlier state of the law. *See, e.g., Crowe v. Bolduc*, 365 F.3d 86 (1st Cir. 2004); *England v. La. Bd. of Medical Examiners,* 375 U.S. 411, 84 S.Ct. 461 (1964); and *SASCO v. Zudkewich, supra,* 767 A.2d at 471.

Interestingly, the New Jersey Supreme Court applied its decision in *Cogdell v. Hosp. Center of Orange,* discussed above, extending the entire controversy doctrine to parties prospectively only because "justice requires ...it." 560 A.2d at 1179. *See also Callaway v. Sec'y Health and Human Services,* U.S. Dist. Ct., E.D. Cal., Civ. No. S-91-125, 1992 WL 317567 (September 4, 1992) (refusing to apply decision retroactively which would have deprived appellant of an award of fees to which it was entitled under the Equal Access to Justice Act because time-barred, when prior law would have permitted filing application at that time).

Finally, the New Mexico Supreme Court, in the analogous case of *Stein v. Alpine Sports, Inc.,* 968 P.2d 769 (N.M. 1998), applied a decision involving venue prospectively only. Plaintiff Stein sued defendant Alpine for personal injuries, making no allegation of venue in her complaint. Alpine moved for a transfer on *forum non conveniens* grounds, which Alpinc did and the court granted. At the time, New Mexico allowed intrastate transfers on *forum non conveniens* grounds. The case was tried and Alpine prevailed. On the day the trial court entered judgment on the jury verdict for Alpine, the New Mexico Supreme Court decided that New Mexico trial courts did not have authority to order intrastate *forum non conveniens* transfers. Stein appealed arguing for the application of the new law. The New Mexico Supreme Court refused to apply its decision in *Scott* retroactively to Stein's case.

The Court relied heavily on the reliance that both the Court and the parties, *particularly* Stein, placed in the prior law. The Court noted that Stein had not sought interlocutory review of the trial court's transfer order, but rather waited until after the jury trial was concluded and she received an adverse verdict before renewing her challenge to the transfer. "'The extent to which the parties in a lawsuit, or others, may have relied on the state of the law before a law-changing decision has been issued can hardly be overemphasized.'" 968 P.2d at 773, quoting *Beavers v. Johnson Controls World Services, Inc.*, 881 P.2d 1376, 1384 (N.M. 1994).

Of equal importance was the court's conclusion that to overturn a jury verdict would be unjust. No allegation was made that the result was unmerited and both parties and the judicial system had expended a great deal of time, money, and resources in trying the case. Under these circumstances, the Court declined to apply its decision disallowing intrastate *forum non conveniens* transfers retroactively.

### 3. The Trial Court Properly Followed West Virginia Law on Forum Selection Clauses as such Law Existed When this Case was Filed and Massey's Motion to Dismiss was Ruled Upon

The West Virginia Supreme Court has made sweeping new law in this case with regard to forum selection clauses. It has enunciated a new test for determining whether a forum selection clause should be enforced. More specifically, however, it has addressed for the very first time the issue of whether a non-party can enforce a contract's forum selection clause.

This Court's prior jurisprudence on forum selection clauses generally has been aptly described by the Court as skeletal. *See General Electric Co. v. Keyser*, 166 W.Va. 456, 461 n.2, 275 S.E.2d 289, 292 n.2 (1981), (forum selection clauses not void as against public policy, but enforceable "only when found to be reasonable and just.").

Because no case in West Virginia had yet addressed whether a non-party to a contract could enforce a forum selection clause in the contract, Harman, when defending against Massey's motion to dismiss on the basis of the forum selection clause in the Harman-Wellmore CSA, turned to well-established principles of West Virginia contract law. Certainly, Harman's reliance was reasonable in this regard, as West Virginia courts traditionally have independently developed their own law and are reluctant to suddenly adopt whole cloth principles from other jurisdictions. *E.g., Estate of Tawney v. Columbia Natural Resources*, 219 W.Va. 266, 217, 633 S.E.2d 22, 27 (2006) ("This Court finds it unnecessary to adopt wholesale the reasoning of either

of the courts above in answering the question before us. Instead, we simply look to our own settled law.").

The Majority Opinion unfairly criticized Harman for failing to address the fourth prong of its newly adopted test regarding the applicability of forum selection clauses which examines whether the enforcement of the clause would be unreasonable or unjust. Under the new law, pronounced for the first time in the Majority's Opinion, it is now Harman's burden to show that enforcement of the forum selection clause would be unreasonable and unjust. Clearly, Harman could not have known that the Majority was going to adopt the newly pronounced test prior to the issuance of the Majority's Opinion, and accordingly, it would have been impossible to anticipate this new test. However, common sense indicates that such a draconian and harsh result is "unreasonable and unjust" as it relates to the Appellees.

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

Rather, in 1998, Harman argued, accurately, that under West Virginia law, the only non-parties entitled to enforce a contract were third party beneficiaries. The Trial Court apparently agreed, denying Massey's motion to dismiss, also apparently in reliance on West Virginia general contract law as it existed in 1998.

### 4. Harman Should Not be Put Out of Court Because it Relied on Existing Law

In *LaRue v. LaRue*, 172 W.Va. 158, 170 n. 20, 304 S.E.2d 312, 324 n. 20 (1983), this Court stated:

> At the heart of any retroactivity issue is the attempt to draw some just balance line between two competing issues: the reliance by the parties on the prior law with its settled expectations, as against the need to bring new principles to bear on the changing conditions of society in pending cases.

In *Bradley v. Appalachian Power,* 163 W.Va. 332, 349-50, 256 S.E.2d 879, 889 (1979), this Court listed six factors of relevance to the determination of whether to apply newly enunciated law retroactively. 163 W.Va. at 349-50, 256 S.E.2d at 889. Several of the *Bradley* factors emphasize the importance of reliance when determining the effect of a pronouncement of new law. The first *Bradley* factor is "the nature of the substantive issue overruled, " and more specifically, whether, prior to the new pronouncement, it was a "traditionally settled area of the law," and the new rule, therefore, "not clearly foreshadowed." *Id.* at 349, 256 S.E.2d at 889. The fourth *Bradley* factor asks whether "substantial public issues are involved, arising from statutory or constitutional interpretations that represent a clear departure from prior precedent." *Id.* at 349-50, 256 S.E.2d at 889. The fifth *Bradley* factor is: "the more radically the new decision departs from previous substantive law, the greater the need for limiting retroactivity." *Id.* at 350, 256 S.E.2d at 889.

Each of these factors emphasize the importance of taking into account the size of the gap between the prior and the newly pronounced law, recognizing that parties conform their behavior and their decisions to the law as they know it to be, especially when nothing signals a seismic shift in the law to come.

Both the Plaintiffs and the Trial Court knew West Virginia law to be that forum selection clauses "should be carefully analyzed," *General Electric Co.,* 166 W.Va. at 461 n. 2, 275 S.E.2d

at 292 n. 2, and "are subject to careful analysis and scrutiny," *Cannelton Industries*, 194 W.Va. at 201 n. 17, 460 S.E.2d at 16 n. 17. *No* West Virginia case had ever embraced forum selection clauses with the enthusiasm of this Court in this case and *no* West Virginia case had ever allowed a non-party to enforce a forum selection clause. Furthermore, settled principles of West Virginia contract law mandated that third part beneficiaries were the only non-parties able to enforce a contract.

It may be, as Justice Albright suggest in his dissent, that the Court's new pronouncements relating to forum selection clauses are welcome additions to West Virginia law. However, they should not be applied to Harman because Harman reasonably relied on existing West Virginia law in deciding to file this action in West Virginia and in defending against Massey's motion to dismiss on the basis of the forum selection clause in the Harman-Wellmore CSA. The Trial Court also reasonably relied on existing law in denying Massey's motion to dismiss.

Penalizing a litigant because of its reliance on existing law, as the New Jersey Supreme Court noted in *Cogdell v. Hosp. Center of Orange,* would be inequitable. It would be particularly inequitable in this case, because, as in *Stein v. Alpine Sports, Inc., supra,* Massey waited until after an adverse verdict to appeal a decision that it could have appealed before. As in *Stein,* the judicial system has expended a great deal of time, money and resources in trying the case. No one but Massey believes the result in this case was unmerited. Indeed, every Supreme Court justice believed it was wholly "warranted."

Under these circumstances, the interests of justice require that the new law announced in this case relating to forum selection clauses be applied prospectively only and not applied to deny Harman its victory in the Trial Court. Otherwise, permitting a tortfeasor to reap the benefit of a post-trial application of a forum selection clause would, in this case, cause an enormous miscarriage of justice.

## CONCLUSION

In consideration of the foregoing, Appellees submit that this Court conclude that the effect of Justice Maynard's post-decision recusal results in a tie vote which, following the precedent of the United States Supreme Court, acts as an affirmance of the result below. Therefore, Harman respectfully requests that this Court find 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, and to affirm the underlying decision. 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. Harman further requests this Court to find that the application of any new law advanced in the Majority Opinion should be applied prospectively, and not retroactively. In the alternative, Harman requests this Court to remand this case for resolution of the issues as to the applicability of the forum selection clause, particularly, whether or not the enforcement of such clause would be unreasonable and unjust.

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

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

Appellants,

v.

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

Appellees.

**CERTIFICATE OF SERVICE**

The undersigned counsel for the Corporate Plaintiffs-Respondents, do hereby certify that I have served the foregoing **Rehearing Brief of Appellees, Harman Development Corporation, Harman Mining Corporation and Sovereign Coal Sales, Inc.,** by U.S. Mail, this ____ day of February, 2008.

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