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.

SUPPLEMENTAL BRIEF OF APPELLANTS

Respectfully submitted,

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I. INTRODUCTION

Appellants, A.T. Massey Coal Company, Inc., Elk Run Coal Company, Inc., Independence Coal Company, Inc., Marfork Coal Company, Inc., Performance Coal Company, Inc. and Massey Coal Sales Company, Inc. (hereinafter collectively "Massey"), hereby reassert, incorporate and adopt, as if fully set forth herein, all arguments, assertions and statements of fact previously set forth in Appellants' Petition for Appeal, Appellants' Appellate Brief, Appellants' Reply to Brief of Appellee, Hugh Caperton and Appellants' Reply to Brief of Appellee, Harman. In addition, Appellants assert that the November 21, 2007 decision of this Court was wholly proper and that alteration of said decision is not warranted.[1]

II. ARGUMENT

1. Forum Selection Clause

A. Appellees' Arguments Regarding Retroactive Application are Improper, Confused and Wholly Unsupported.

Appellees contend that this Court retroactively and improperly applied the applicable rule of law regarding the enforcement of a forum selection clause to the facts presented in this case. Such an argument is flawed and based upon a fundamental misunderstanding of retroactive application of precedent. "The concept of retroactivity determines how a case which substantially alters a relevant body of prior law **should**

[1] If this Court determines upon reconsideration that it was incorrect in determining that both the forum selection clause and the doctrine of *res judicata* bar the claims of the Appellees and can find no other basis at law to uphold their decision, then a determination as to all other issues asserted by Appellants on Appeal must be addressed by this Court.

be applied to other cases." *Adkins v. Leverette*, 161 W. Va. 14, 239 S.E.2d 496 (1977). Retroactive application, by definition, determines the extent, in scope or effect, that a court's decision will have on matters that have occurred in the past, but have yet to come before the Court. *See Black's Law Dictionary* (8th Ed. 2004).

In support of this argument, Appellees rely upon this Court's decision in *Bradley v. Appalachian Power Company,* 163 W. Va. 332, 256 S.E.2d 879 (1979). The *Bradley* Court, after considering the law of West Virginia and numerous other jurisdictions, adopted a newly developed comparative negligence standard, replacing the previously accepted contributory negligence standard. The retroactivity discussion in *Bradley* had to do with the extent to which the decision in *Bradley* was binding on other pending cases that had yet to come before the Court, not whether the opinion was binding on the parties before the Court.

If taken to its logical conclusion, Appellees' confused application of retroactivity would provide for a reoccurring and previously non-existent legal phenomenon. Each time a rule of law is modified or clarified by an opinion of this Court, additional briefing and oral arguments will have to be conducted to determine if the law is applicable to the case before the Court. While Appellees may not like the opinion handed down in this matter, it is both the duty and prerogative of the Supreme Court of Appeals of West Virginia to either affirm, create or modify a rule of law and apply that rule the facts of the dispute before the Court. The Court's ruling then becomes binding upon the parties to the litigation. Any other result would be utterly irrational

and defy the fundamental tenets of American jurisprudence.

B. This Court Properly Determined that the Parties Involved in this Suit are Subject to the Forum Selection Clause.

Appellees contend that this Court overturned West Virginia precedent in determining that the parties involved in this suit are subject to the forum selection clause contained in the Virginia coal supply agreement. This contention is flawed. In ruling on the legal effect of the fourm selection clause, the Court was addressing a matter of first impression. Appellees erroneously string cite six (6) cases which stand for the general principle that in order for a contract concerning a third party to give rise to an independent cause of action in the third party, it must have been made for the third party's sole benefit. In its Opinion, the Court made no reference to the cases cited by Appellee, nor did it indicate that prior precedents where overruled as a result of its decision in this matter.[2] This is due to the fact that the issue addressed by this Court was separate and distinct from the issue present in the authority cited by Appellees. The issue presented before this Court was whether a party who is a non-signatory to a contract containing a forum selection clause may be bound by that clause when it is shown that his or her claims are closely related to the contract. Opinion at 16. This Court continued stating:

> "Furthermore, the *Hugel* court made it clear that a non-party to a contract **need not be a third-party beneficiary in order for the forum selection clause to**

[2]In addition, legal research conducted on the Westlaw search engine demonstrates that none of the cases cited by Appellees have been overruled or received negative citation reference as a result of this Court's opinion in this case.

> **be binding against such non-party**: Plaintiffs argue that the court must make a finding that a non-party to a contract is a third-party beneficiary before binding him to a forum selection clause. **While it is true that third party beneficiaries of a contract would, by definition, satisfy the "closely related" and "foreseeability" requirements** (internal citation omitted) **a third-party beneficiary status is not required."**

Opinion at 14-15. (emphasis added). Therefore, the issue of third party beneficiary status, which is advanced by Appellees, is not determinative of the issue presented and this Court's Opinion has no impact upon the case law cited by Appellees. This Court, applying applicable law, found that the parties to the matter at hand were not strangers to the Coal Supply Agreement. This Court stated:

> Applying the foregoing holdings to the facts of the instance case, we first note that, as to the plaintiffs, Sovereign and Harman Mining were signatories to the 1997 CSA, and Harman Development and Mr. Caperton, in his individual capacity, were not. **However, Sovereign and Harman are holly-owned subsidiaries of Harman Development, and Mr. Caperton is the sole owner of Harman Development. Under these facts, any claim brought by Mr. Caperton and Harman Development in connection with the 1997 CSA are closely related to the contract and are, therefore, subject to the forum-selection clause contained therein.** As we determined in the preceding section of this opinion, the three factually-supported claims asserted in the first amended complaint all flowed from the wrongful declaration of force majeure under the 1997 CSA, and were brought in connection with that contract. Accordingly, we find that Mr. Caperton and Harman Development are bound by the forum-selection clause of the 1997 CSA.Turning to the Massey Defendants, we note that none of them were signatories to the 1997 CSA. However, Defendant Massey subsequently became the parent company to Wellmore, who is a signatory of the 1997 CSA, and Wellmore was Massey's subsidiary at the time it declared force majeure. All of the other Massey Defendants

> are also subsidiaries of Massey. The complaint plainly alleges that Massey, along with all its subsidiaries who are defendants in this action, exercised "domination and control" over Wellmore and directed Wellmore to wrongfully declare force majeure. Because, as we previously determined, all of the claims in this action flow directly from the declaration of force majeure, and the complaint alleges that the Massey Defendants controlled Wellmore's declaration of force majeure, the complaint plainly demonstrates that the claims against the Massey Defendants are closely related to the contract. Therefore, we find that the Massey Defendants are entitled to enforce the forum-selection clause of the 1997 CSA.

Opinion at 16. This Court did not overrule existing precedent, it created original precedent regarding the enforcement of a forum selection clause to those parties who are closely related to the contract. As such, Appellees' arguments are without merit.

C. This Court Appropriately Determined that the Enforcement of the Subject Forum Selection Clause was Reasonable and Just.

Appellees argue that this Court failed to determine if enforcement of the forum selection clause would be unreasonable or unjust. This Court engaged in a thorough analysis of this very issue prior to reaching the determination that enforcement of the forum selection clause was both reasonable and just. Opinion at 16-17. This Court clearly stated that, "a party trying to defeat a mandatory choice of forum selection clause bears a 'heavy burden,'" and ultimately determined that Appellees failed to establish that enforcement of the forum selection clause would be unreasonable or unjust. In fact, quite the opposite is true. Appellees initially brought their tort claims in Virginia then voluntarily dismissed them. Engaging in rank forum shopping, Appellees chose to pursue their tort claims in West Virginia. Appellees offer nothing

new in an attempt to satisfy their "heavy burden," but instead simply state that enforcement is unreasonable and unjust. Such representations clearly fail to satisfy the applicable burden. As such, Appellees' arguments are without merit.

D. The Supreme Court of Appeal's Standard for Review of a Trial Court's Decision on a Motion to Dismiss for Improper Venue is Abuse of Discretion as Set Forth in *United Bank, Inc. v. Blosser.*

Appellees contend that a final determination as to forum must occur before a trial on the merits and that the only appropriate procedural remedy available to Appellants, regarding the denial of the motion to dismiss for improper venue, is to petition for a writ of prohibition or mandamus. Appellees cite to three case in support of this proposition, *Stewart v. Alsop,* 207 W.Va. 430 (2000), *Smith v. Maynard,* 186 W. Va. 421 (1991), and *Bad Toys Holdings, Inc. v. Emergystat of Sulligent, Inc.,* 958 So.2d 852 (Ala. 2006). A review of these cases demonstrates that they stand for the legal principle that a writ is an appropriate remedy to preclude a circuit court from proceeding without proper venue, but they do not hold or stand for the legal principle that a writ is the only appropriate procedural avenue. In fact, Appellees cite no case law supporting the premise that if a writ is not filed challenging the denial of a motion to dismiss for improper venue, the issue is waived on appeal.

In *United Bank, Inc. v. Blosser,* 218 W. Va. 378, 383, 624 S.E.2d 815, 820 (2005), a case not discussed or cited by Appellees, this Court addressed the applicable standard of review for an appeal from a circuit court's denial of a motion to dismiss for improper venue. The *United Bank* Court stated the following:

> First, they appeal the circuit court's order denying their motion to dismiss for improper venue. Heretofore, this Court has not established the proper standard for our review of such a ruling. It has been recognized, however, that "[r]eview of a trial court's decision on a motion to dismiss for improper venue is for abuse of discretion." Franklin D. Cleckley, Robin J. Davis & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 12(b)(3)[2], at 281 (2002) (footnote omitted) (citing *Robinson v. Giarmarco & Bill, P.C.*, 74 F.3d 253 (11th Cir.1996); *Milwaukee Concrete Studios, Ltd. v. Fjeld Mfg. Co.*, 8 F.3d 441 (7th Cir.1993); *In re Cuyahoga Equip. Corp.*, 980 F.2d 110 (2d Cir.1992); *Howell v. Tanner*, 650 F.2d 610 (5th Cir.1981)). *See also Palmer v. Braun* 376 F.3d 1254, 1257 (11th Cir.2004) ("We review for abuse of discretion a district court's denial of a motion to transfer or dismiss for lack of venue." (citation omitted)); *In re Volkswagen AG*, 371 F.3d 201, 203 (5th Cir.2004) ("We review all questions concerning venue under the abuse of discretion standard." (citation omitted)); *Waeltz v. Delta Pilots Retirement Plan*, 301 F.3d 804, 806 (7th Cir.2002) ("This court ordinarily defers to a district court's venue determinations unless the district court has abused its discretion." (citation omitted)). **Accordingly, we now expressly hold that this Court's review of a trial court's decision on a motion to dismiss for improper venue is for abuse of discretion.**

United Bank, Inc., at 383, 820. (emphasis added). This issue was proper preserved by the Appellants and asserted on appeal. As such, Appellees' arguments with regard to procedural neglect are without merit and deserve no further consideration.

E. Appellees' Due Process Rights were not Violated by the Application of the Appropriate Test to Determine Applicability of the Forum Selection Clause.

Appellees' contention that this Court retroactively applied the applicable test to determine the enforceability of a forum selection clause is without merit and simply

attempts to confuse and torture the very definition of retroactive application in hopes of inventing an issue appropriate for appeal to the United States Supreme Court. As such, Appellees' contention that retroactive application violated Appellees' due process rights is without merit.

Appellees argue that the practical effect of this Court's opinion is to deprive plaintiffs of property without allowing plaintiffs any opportunity to defend against the deprivation. In support of this contention, the Appellees cite to *Brinkerhoff-Faris Trust & Sav. Co. v. Hill,* 281 U.S. 673 (1930), a case which is clearly distinguishable from the matter at hand. First and most obvious, in *Brinkerhoff* the court was presented with an overruling decision. As stated above, in this case this Court is dealing with a matter of first impression. Additionally, in *Brinferhoff* the Missouri court deprived the plaintiff of property without affording it at any time an opportunity to be heard. The Missouri state court refused to hear the plaintiff's complaint and denied the relief it requested. As such there was no opportunity to be heard at the trial court level. On appeal the Supreme Court of Missouri affirmed the judgment of the trial court. The Supreme Court of the United States stated:

> If the judgment is permitted to stand, deprivation of plaintiff's property is accomplished **without its ever having had an opportunity to defend against the exaction.** The state court refused to hear the plaintiff's complaint and denied it relief, and because of lack of power or because of any demerit in the complaint, but because, assuming power and merit, the plaintiff did not first seek an administrative remedy which, in fact was never available and which is not now open to it. Thus, by denying to it the only remedy ever available for the enforcement of its right to prevent the seizure of its property, the judgment deprives

the plaintiff of its property.

Brinkerhoff at 679, 453. Therefore, the *Brinkerhoff* Court found that a due process violation had occurred as a result of plaintiffs never having an opportunity to be heard. The Court explained:

> Under the settled law of the state, that remedy was the only one available. That a bill in equity is appropriate and that the court has power to grant relief, even under the new construction of the statute dealing with the tax commission, is not questioned. And it is held by the state court in this case that no other judicial remedy is open to the plaintiff and that no administrative remedy, other than that before the state tax commission, has been provided. But, after the decision in the Laclede Case, it would have been entirely futile for the plaintiff to apply to the commission. That body had persistently refused to entertain such applications; and the Supreme Court of the state had supported it in its refusal. Thus, until June 29, 1929, when the opinion in the case at bar was delivered, the tax commission could not, because of the rule of the Laclede Case, grant the relief to which the plaintiff was entitled on the facts alleged. After June 29, 1929, the commission could not grant such relief to this plaintiff because, under the decision of the court in this case, the time in which the commission could act had long expired. **Obviously, therefore, at no time did the state provide to the plaintiff an administrative remedy against the alleged illegal tax; and in invoking the appropriate judicial remedy, the plaintiff did not omit to comply with any existing condition precedent.** *Montana National Bank v. Yellowstone County*, 276 U. S. 499, 505, 48 S. Ct. 331, 72 L. Ed. 673.

Id. (emphasis added). The *Brinkerhoff* Court continued:

> It is true that the **courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state**; that this court's power to review decisions of state courts is limited to their decisions on federal questions; and that the mere fact that a state court has rendered an erroneous decision on a question of

> state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this court.

Id. (emphasis added). Finally, the Court stated:

> **But our decision in the case at bar is not based on the ground that there has been a retrospective denial of the existence of any right or a retroactive change in the law of remedies. We are not now concerned with the rights of the plaintiff on the merits**, although it may be observed that the plaintiff's claim is one arising under the federal Constitution and, consequently, one on which the opinion of the state court is not final; or with the accuracy of the state court's construction of the statute in either the Laclede Case or in the case at bar. **Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense-whether it has had an opportunity to present its case and be heard in its support.** Undoubtedly, the state court had the power to construe the statute dealing with the state tax commission; and to re-examine and overrule the Laclede Case. Neither of these matters raises a federal question; neither is subject to our review. But, while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.[FN9] *Compare Postal Telegraph Cable Co. v. Newport*, 247 U. S. 464, 475, 476, 38 S. Ct. 566, 62 L. Ed. 1215.

Id. Unlike the Plaintiffs in *Brinkerhoff*, Appellees have been accorded due process in the primary sense, in that, they have had every opportunity to present their case and

be heard in its support. While they may not agree with the rule of law applied to the facts of this case, disappointment in the outcome is an insufficient basis for a due process claim.

Appellees next cite to *Bouie v. City of Columbia,* 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964), a case that referenced the *Brinkerhoff* decision, in support of their contention. In *Bouie* the Supreme Court of the United States was reviewing a state court's interpretation of a criminal statute and determined that the petitioners were convicted of an offense which was not enumerated in the statute. *Id.* at 350. *Bouie* clearly has no application to the matter at hand.

The Appellees also rely upon *Boddie v. Connecticut,* 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971). *Boddie* involved a class action on behalf of women in Connecticut receiving state welfare assistance and desiring to obtain a divorce, but were barred from doing so by an inability to pay required court fees and costs as set by the applicable statute. Therefore, the plaintiffs were denied access to the court system and due process requires both access and an opportunity to be heard. Appellees were given access to the courts to present their case and be heard in its support. Therefore, Appellees have been accorded due process in the most fundamental sense. As such, *Boddie* is clearly distinguishable from the matter before the Court.

Finally, Appellees cite to *Williams v. United States,* 470 A.2d 302 (D.C. 1983), in support of their argument. The Williams' opinion was vacated on April 2, 1984. As such, the case has no precedential value.

Appellees' arguments regarding a violation of due process rights are simply incorrect and unsupported by law. Their case has been heard by the highest court in the State of West Virginia. Therefore, without question, Appellees have not deprived of their day in court. Appellees are simply unsatisfied with the outcome of their day in court. As such, Appellees' due process arguments are without merit.

II. The Rulings of the Bankruptcy Court and District Court Have No *Res Judicata* Affect on the Contract Issue Involving the Forum Selection Clause

Neither the federal bankruptcy court nor the federal district court ever reached the merits of the parties' claims or defenses and, thus, neither of their decisions to abstain could possibly preclude, as *res judicata*, Massey's invocation of the forum selection clause. Both decisions, as with all abstention decisions, simply concluded that the exercise of federal jurisdiction over this matter would be inappropriate. As even a cursory review of either decision reveals, it is Appellees, rather than Appellants, who are attempting to mislead the Court regarding the procedural history in this matter.

Procedural History

In early 1998, Appellees filed for bankruptcy in the federal bankruptcy court located in the Western District of Virginia. In October 1998, Appellees filed this tort action against Massey in West Virginia state court. In response to Appellees' complaint, Massey filed a motion to dismiss based, in part, on its argument that a contract between the parties – the 1997 coal supply agreement – contained a forum selection clause that required the action to be filed in Virginia. When the state court

did not rule on the motion after a year, Massey sought removal to the federal district court in the Southern District of West Virginia and also sought to change venue to the Western District of Virginia, where the bankruptcy matter was situated. Meanwhile, Massey also filed an adversary proceeding in the federal bankruptcy case to determine the narrow bankruptcy issue regarding whether various claims raised in the West Virginia court case were actually assets of the bankruptcy estate. Ultimately, the federal bankruptcy court abstained from deciding this issue; likewise, the federal district court in West Virginia also abstained from deciding the merits of the case and remanded it back to state court.

Decision of the Bankruptcy Court

The bankruptcy court, in abstaining, made no decision on the merits of either Appellees' complaint or Massey's defenses. The court, instead, was presented with a very narrow question of bankruptcy law: "whether Caperton and/or Harman Development have any independent causes of action under West Virginia law . . . ." Joint Memorandum Op. at 6. The court, however, refused to reach the merits of this or any other issue, saying, "It will not attempt to decide whether such claims have actual, legal validity under state law." *Id.* The bankruptcy court concluded that such questions "can best be decided in the West Virginia Action." *Id.; see also id. at 18* ("The court trying the West Virginia Action is in the best position to assure that the rights of all parties are protected.") Consequently, the bankruptcy court did not nearly reach the contract issue presented by the forum selection clause; it only said that whatever court ultimately heard Appellees' complaint would be in a better position than a

federal bankruptcy court to resolve the narrow question presented.

Decision of the District Court

The district court also decided to abstain without touching any issue on the merits. As a preliminary matter, the district court recognized that the bankruptcy court had abstained and that "[i]ntegral to its decision to abstain and dismiss the adversary proceedings, the Bankruptcy Court determined the claims of all parties, and defenses thereto, can be adjudicated satisfactorily in the West Virginia action." *Caperton v. A.T. Massey Coal Co.*, 270 B.R. 654, 656 (S.D.W. Va. 2001) (emphasis added). The district court then set forth the six elements that guided its own decision to abstain, none of which was focused on the merits, much less the forum selection provision. The court considered whether: 1) the abstention motion was timely; 2) the matter was based on a state law claim; 3) the proceeding was not a core part of the bankruptcy matter; 4) there was not an independent basis for federal jurisdiction; 5) the action was begun in state court; and 6) the state court action can be timely adjudicated. *Id.* at 656 (applying 28 U.S.C. § 1334 (c)(2)). There is, therefore, nothing about the court's analysis that involved the merits of the complaint or Massey's defenses. The district court simply ruled that the exercise of federal jurisdiction over the parties' claims and defenses was not appropriate.

Res Judicata

West Virginia law holds that before a suit may be barred on the principles of *res judicata*, three elements must be satisfied:

First, there must have been a final adjudication on the merits in the

> prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.

Blake v. Charleston Area Medical Center, Inc., 498 S.E.2d 41, 49 (W. Va. 1997).[3]

Under this standard, Plaintiffs cannot possibly argue that the rulings of either the federal bankruptcy court or the federal district court preclude, under *res judicata* principles, Massey's defense under the forum selection provision of the 1997 coal supply agreement.

First, Appellees' argument fails at the threshold because there was no final adjudication by the bankruptcy court on the merits of Massey's defense under the forum selection clause. "Abstention" in its most commonly understood sense simply means "abstention from the exercise of federal jurisdiction . . . ." See *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976). By definition, therefore, abstention is the court's decision that it should not render a decision on the merits. As even the Appellees note in their petition, the bankruptcy court made clear that "the claims of all parties, and defenses thereto, can be adjudicated satisfactorily in the West Virginia action." (Appellees' Brief at 17) (quoting Caperton, 270 B.R. at 656)

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[3] The elements of collateral estoppel similarly require a decision on the merits. Under that doctrine, a claim is barred if 1) the issue previously decided is "identical to the one presented in the action in question; 2) there is a final adjudication on the merits of the prior action; 3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and 4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action." *State ex rel. Fed. Kemper Ins. Co. v. Zakaib*, 506 S.E.2d 350, 354 (W.Va. 1998); *see also State v. Miller*, 459 S.E.2d 114, 120 (W.Va. 1995); *Christian v. Sizemore*, 407 S.E.2d 715, 718 (W.Va. 1991); *see also Johnson ex rel. Estate of Johnson v. Acceptance Ins. Co.*, 292 F. Supp. 2d 857, 867

(emphasis added). Massey's position regarding the forum selection clause, which it had raised as a defense in its motion to dismiss by that point, was a defense that the bankruptcy court believed could be decided by in "the West Virginia action." Obviously, the bankruptcy court did not decide the issue.

Second, the district court likewise did not reach the merits of the substantive contract issue regarding the forum selection clause. In its decision, the district court explicitly enumerated the six factors that it considered in deciding whether to retain jurisdiction. None of the factors even remotely involved a decision on the merits of any claims or defenses. As with all abstention decisions, the federal court simply concluded that the issues raised by the parties were not federal in nature and, thus, should not be decided by a federal court.

Third, to the extent that either federal court decision contains language discussing the appropriateness of the West Virginia courts to decide the merits, those comments are simply meant to convey that state proceedings are more appropriate than federal porceedings to resolve Massey's contractual defense, not that West Virginia is appropriate in spite of the terms of the forum selection clause. Indeed, the abstention issues before those courts did not even consider the possibility of Virginia state court review of the Plaintiffs' complaint. It is the Appellees, rather than Massey, who have completely taken the courts' comments out of context in an attempt to mislead this Court. Not surprisingly, Appellees make no genuine effort in their brief to

(N.D.W.Va. 2003) (holding that collateral estoppel applies when "the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in a prior action.").

apply a *res judicata* analysis to either court decision.

Consequently, the federal courts abstained from deciding any of the merits issues, leaving those to the state courts of West Virginia unencumbered by any principles of *res judicata*. At the end of the day, Appellees are simply unhappy that, when the West Virginia courts – specifically the West Virginia Supreme Court of Appeals – ultimately resolved the merits, the forum selection clause in the 1997 coal supply agreement was construed against Appellees.

III. *Res Judicata*

A. This Court Properly Applied the Transactional Approach in Determining that the Causes of Action Brought by Appellees in Virginia and West Virginia Were One and the Same.

Appellees contend that this Court erred in applying the transactional approach to determine whether the causes of action brought by Appellees in Virginia and West Virginia were the same. In support of their contention Appellees rely soley on *Davis v. Marshall, Inc.*, 265 Va. 159, 576 S.E.2d 504 (2003), a decision which was not in existence, and thus, not controlling Virginia law at any relevant time during the course of this litigation. The "same evidence" test used to determine the identity of causes of action, which was first employed by the *Davis* Court, represents only a brief anomalous period in the history of Virginia jurisprudence. Before and after *Davis*, Virginia courts applied the transactional approach to determine the identity of causes of action. The Supreme Court of Virginia, the same court which decided *Davis*, adopted Rule 1.6 in

2006, which, in effect, overruled *Davis* and returned Virginia to the application of the transactional approach. As such, *Davis* represents an anomaly in Virginia law and the decision is simply not applicable to the matter at hand.

In determining the application of *res judicata*, Virginia courts followed the transactional approach at the time theVirginia Coal Supply Agreement was reached in 1997, at the time Massey acquired Wellmore's parent company, United Coal, in 1997, at the time of the alleged breach of the Coal Supply Agreement in 1997, at the time Caperton closed the Harmon mine in 1998, at the time of the filing of the Virginia action in 1998, at the time of the filing of the West Virginia complaint in 1998, at the time Appellants moved to dismiss their "bad faith" claims from the Virginia case in 2000, at the time the Virginia jury verdict was reached in 2000, at the time Appellants moved for summary judgment in the West Virginia case in 2001 and again in 2002, at the time of the verdict in the West Virginia case in 2002, at the time Appellants filed a motion for new trial and/or motion notwithstanding the verdict in the West Virginia case in 2002, at the time the Virginia judgment became final in 2002, and at the time the West Virginia action was appealed to this Court. In fact, the only time *Davis* was agruably the law of Virginia relative to this case was during the period of time when nothing whatsoever was occurring in the West Virginia case because of problems with the preparation of the trial transcript.

In its Opinion in this case this Court determined that under the law of Virginia, a "judgment is not final for the purposes of *res judicata*...when it is being appealed or

when the time limits fixed for perfecting the appeal have not expired," citing to *Faison v. Hudson*, 243 Va. 413, 417 S.E.2d 302, 305 (1992) and *CDM Enters., Inc. v. Commonwealth / Manufactured Housing Bd.*, 32 Va. App. 702, 709, 530 S.E.2d 441, 445 (2000). The Virginia judgment became final for purposes of *res judicata* on September 13, 2002. As of September 13, 2002, Virginia applied the transactional approach to determine identity of cause of action, because *Davis* was not decided until February 28, 2003.[4]

A review of Virginia law clearly demonstrates that prior to *Davis* the transactional approach was consistently applied to determine identity of causes of action. In *Gimbert v. Norfolk S.R. Co.*, 152 Va. 684, 148 S.E. 680, 682 (Va. 1929), the Supreme Court of Appeals of Virginia set forth that:

> 'When the second suit is between the same parties as the first, and on the same cause of action, the judgment in the former is conclusive of the latter not only as to every question which was decided, but also as to every other **matter which the parties might have litigated and had determined, within the issues as they were made or tendered by the pleadings or as incident to or essentially connected with the subject matter of the**

[4] In their Virginia Motion for Judgment (Complaint), Appellees set forth substantially the same allegations of fact they plead in the West Virginia Complaint and made reference to Massey as an important "non-party" in their allegations. In the West Virginia Complaint they named Wellmore Coal Corporation as an important "non-party. They included a section entitled the "1997 Coal Supply Agreement" in both Complaints. They referenced the declaration of *force majeure* in both Complaints. They also included a separate claim in their Virginia Complaint designated as Court II, making a claim for damages as a result of a "Breach of Contractual Duty of Good Faith and Fair Dealing." After completing discovery, the Appellees moved for leave to amend their Complaint so as to abandon the tort claims made in Court II. Appellees' motion to amend their Motion for Judgment was granted by the Virginia trial court "[b]ased upon the assurances of Plaintiffs' counsel that the allegations of Count II **will not be reasserted later** . . . ." (emphasis added). *See* 2/25/00 Order attached as Exhibit A. As set forth above, in February of 2000, a full three years before *Davis,* Virginia applied the transactional approach in its *res judicata* analysis. As such, applying the transactional approach, the tort claims dismissed by Appellees on February 25, 2000 are forever barred under Virginia law as they arise from the same "conduct, transaction or occurrence," namely the alleged breach of the Coal Supply Agreement by an alleged wrongful declaration of *force majeure*.

> **litigation, whether the same, as a matter of fact, were or were not considered.** As to such matters a new suit on the same cause of action cannot be maintained between the same parties. (internal citations omitted)...
>
> Applying this rule to the question here presented, it is perfectly clear that this is the same cause of action which was presented in the first suit.

Gimbert at 689-690, 682. This language was cited with approval by the Supreme Court of Virginia, in *Allstar Towing, Inc., v. City of Alexandria,* 231 Va. 421, 344 S.E.2d 903 (1986). In addition, the *Allstar* Court stated:

> Manifestly, the same cause of action was not involved in the two cases. For the purposes of *res judicata,* a "cause of action" may be defined broadly "as an assertion of particular legal rights which have arisen out of a definable factual transaction." *Bates v. Devers,* 214 Va. 667, 672 n.8, 202 S.E.2d 917, 921 n.8 (1974). In the first case, Allstar sought relief because the City had determined it to be a "non-responsible" bidder. The City's ruling was based on the fact that Allstar was not incorporated on the day the first bid was opened. In the second action, Allstar sought relief because the City, after issuing a second invitation to bid to which Allstar responded, had awarded the contract to a bidder that allegedly did not meet the City's specifications. As Allstar points out, the facts giving rise to the second cause of action were not even in existence when the first action was heard and decided on the merits on December 31, 1984. **In sum, the legal rights asserted in the second action arose from a factual transaction that was different from the factual transaction giving rise to the assertion of legal rights in the first action.**

Allstar at 424-425, 905-906. The *Davis* Court cited to the definition of "cause of action," for purposes of *res judicata* provided in *Allstar* with approval. *Davis* at 171, 510. The *Davis* Court then proceeded to employ a substantially narrower "same evidence test" to

determine identity of cause of action for the first, and ultimately last, time.[5]

The Virginia Court of Appeals acknowledged that *Davis* altered the applicable test in *Virginia Imports, Ltd. v. Kirin Brewery of America, LLC,* 50 Va. App. 395, 410 n.6, 650 S.E.2d 554, 561 n.6 (2007). The Court stated in footnote 6 that, "This could-have-should-have-litigation principle applies to the narrow 'same evidence' test employed by *Davis v. Marshall Homes, Inc.*, 265 Va. 159, 166, 576 S.E.2d 504, 507 (2003), and the broader transactional approach adopted by Rule 1.6." *Virginia Imports* at 410 n.6, 561 n.6. (emphasis added) Therefore, it is clear that the "same evidence" test was not employed prior to *Davis.* The Court of Appeals of Virginia, in *Virginia Imports,* also clearly indicated that Rule 1.6 was promulgated to supercede the holding in *Davis*, as such the holding in *Davis* no longer represents the law regarding this issue in Virginia. Therefore, this Court correctly applied the transactional approach in this reaching its decision in this matter, rather than the "same evidence" test which was not applied by Virginia courts prior to *Davis* and which is no longer applied by Virginia courts.

In addition, Appellees' analysis of *Davis* fails to discuss the Supreme Court of Virginia's reliance upon its previous holding in *Brown v. Haley*, 233 Va. 210, 216, 355

[5] A review of decisions from the Supreme Court of Virginia demonstrates that the "same evidence" test employed by *Davis* has not been cited with approval or followed by any subsequent Supreme Court of Virginia decision.

S.E.2d. 563, 567 (1987), in reaching the result in *Davis*. In citing to *Brown*, the Court stated, "[t]he test to determine whether claims are part of a single cause of action is whether the same evidence is necessary to prove each claim." *Davis,* 265 Va. at 166, 576 S.E.2d at 507. In *Davis,* the Supreme Court of Virginia rejected the application of *res judicata* to the case before the Court because it determined that the same evidence was not necessary to prove actual fraud and breach of contract. The fraud action was based upon plaintiff's reliance upon defendants' misrepresentations as to the value of collateral that was to secure the deed of trust notes. *Id.* The breach of contract sought to recover losses sustained because of defendants' failure to pay the deed of trust notes. The first cause of action, fraud, revolved around the value of real property, while the second cause of action, breach of contract, revolved around the failure to pay the deed of trust notes. *Davis,* 265 Va. at 165-66, 576 S.E.2d at 506-07. Therefore, unlike the case before this Court, the two causes of action presented in *Davis* shared few evidentiary similarities. In the present action, both the torts asserted in the West Virginia action and the breach of contract asserted in the Virginia action arise from the same "conduct, transaction, or occurence;" Wellmore's *force majeure* notice under the 1997 CSA. The torts alleged in the West Virginia action clearly could and should have been litigated as part of the Virginia action because the same evidence was necessary to prove each claim. In fact, the Motion for Judgment (Complaint) filed in Virginia by the Appellees and the Complaint filed in West Virginia shortly thereafter are essentially identical other than the identities of the parties.

The Virginia Motion for Judgment (Complaint) and the West Virginia Complaint are remarkably similar other than the identity of the parties. The Virginia Complaint makes reference to A. T. Massey Coal Company, Inc., one of the defendants in the West Virginia case, as an important "non-party." The West Virgina Complaint makes reference to Wellmore Coal Corporation, the only defendant in the Virginia case, as an important "non-party." The West Virginia Complaint and the Virginia Complaint both devote several separate numbered paragraphs discussing the Coal Supply Agreement. Both Complaints devote several paragraphs to allegations regarding the declaration of *force majeure*. The Virginia Complaint alleges that the conduct of the defendant resulted in "Harmon has been injured in the form of lost profits, termination of the Lease with Penn Virginia, loss of all rights and interests in the Reserves, and **the total and complete destruction of its business.**" Paragraph 56 of the Virginia Motion for Judgment. (Emphasis added.) The West Virginia Complaint alleges that the "[a]s a direct and proximate result of Defendants' aforesaid misconduct, Harman has been damaged in the form of loss profits, termination of the Coal Lease with Penn Virginia, loss of all rights and intersts in the Reserves, and **the total and complete destruction of its business.**" Paragraph 177 of the West Virginia Complaint. (Emphasis added.) Many of the same witnesses also testified in the Virginia and West Virginia trials, including Henry Cook, Hugh Caperton, Allen Stagg, Mark Gleason, Bobby Rease, Michael Shortridge and Tom Hicok.

If any doubt exists as to whether similar evidence was presented in the two trials, one needs to go no further than to make a quick analysis of the West Virginia

trial transcript. The transcript reveals that the term "Coal Supply Agreement" appears in the West Virgina trial transcript no less that 111 times. The term "*force majeure*" appears 587 times. For comparison purposes, the term "Massey," which was used to collectively refer to the defendants, appears only 2,265 times.

In the final analysis, under Virginia law, *res judicata* precludes Appellees from seeking and receiving damages in West Virginia under any tort or contract theory based on the same evidence of *force majeure* and the alleged resulting destruction of Appellees' businesses previously litigated in the Virginia action whether the "same evidence" test is applied or the "same transaction" test is used. Therfore, Appellees' arguments with regard to the application of *res judicata* are not only without merit, but they are inconsequential. Regardless of which test is applied, this Court will ultimately reach the same conclusion, the identity of the cause of action in the Virginia action is the same as the identity of the cause of action in the West Virginia action. While the tests are difference, it is ultimately a difference without a distinction, as either test provides the same end result.

B. This Court Properly Determined That the Remedies Sought by Appellees in the Virginia Case Were the Same Remedies Sought by Appellees in the West Virginia action.

Appellees contend that this Court erred when it concluded that the remedies sought in the Virginia and West Virginia action were the same. Appellees cite no case law in support of their argument, but instead opine that this Court's conclusion is at odds with "voluminous testimony." This Court appropriately determined that the

remedy element of *res judicata* refers to the distinction between legal and equitable remedies in its extensive analysis and discussion of this issue, Opinion at 20. In addition, it was determined that both the Virginia proceeding and the instant proceeding sought the legal remedy of monetary damages stemming from Wellmore's wrongful declaration of *force majeure* under the 1997 Coal Supply Agreement. Opinion at 21. This Court correctly determined that the remedies sought by Appellees in the Virginia case were the same remedies sought by Appellees in the West Virginia action.

C. This Court Properly Determined That Wellmore and Massey Were in Privity.

Appellees contend that this Court erred when it determined that Wellmore and Massey were in privity. At the time of the declaration of *force majeure*, Wellmore was Massey's wholly-owned subsidiary with identical legal rights and interests as required under *CDM Enters., Inc. v. Commonwealth/Manufactures Housing Bd.*, 32 Va. App. 702, 710, 530 S.E.2d 441, 445 (2000). Massey provided a defense and indemnification to Wellmore in the Virginia action and, as in *City of Richmond*, in so doing was bound by the Virginia verdict and can use the verdict as an estoppel:

> The case is within the principle that one who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own, and who does this openly, to the knowledge of the opposing party, is as much bound by the judgment, and as fully entitled to avail himself of it, as an estoppel against an adverse party, as he would be if he had been a party to the record.

City of Richmond, 135 Va. at 321, 116 S.E. at 494. There is no doubt, therefore, that Massey's interests in the Virginia action were identical to those of Wellmore. As the Second Circuit Court of Appeals in *Stichting Ter Berjartiging* states:

> In addition to being compelled by the right to due process, this result follows from our "actual control" line of cases, in which we have found privity not simply because a person exercised control at any point over a party to a previous proceeding, but only where the person **"controlled or substantially participated in the control of the *presentation on behalf of a party to the prior action.*"** *Central Hudson,* 56 F.3d at 368 (emphasis added and internal quotation marks and punctuation omitted).

Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt International B.V. v. Schreiber, 327 F.3d 173, 186 Fn14, (2nd Cir. 2003) (emphasis added).

As set forth above, Massey provided a defense and indemnification to Wellmore in the Virginia action. Therefore, Massey controlled or substantially participated in the control of the presentation on behalf of a party in the prior action. In addition, during the relevant period of time Massey was the parent company of Wellmore. As this Court stated citing *Mullins v. Daily News Leader*, 2001 WV S.E.2d and 1772679, "It has been recognized that a parent company is in privity with its subsidiary." Opinion at 23.

This Court provided a thorough analysis of this issue and determined that Massey and Wellmore were in privity, and as such, the parties in the Virginia and West Virginia actions were identical. Therefore, Appellees' contentions are without

merit and no further consideration is necessary.

IV. Statements Made by Appellants' Counsel During Opening Statements in the Virginia Action or in Pleadings Filed in the Virginia Action Do Not Constitute an Admission

Appellees direct this Court to the opening statement made in the Virginia case where counsel for the defendant, Wellmore, pointed out to the jury that although Massey was the parent company of Wellmore, Wellmore was the only defendant, and claim that this and other statements made by counsel during the Virginia litigation constituted admissions that the West Virginia action was a separate and distinct action from the Virginia case. As a general proposition, statements made by counsel for a party during an opening statement do not constitute admissions of fact or law unless they clearly and unequivically were intended to be admissions by counsel. *See, for example, Eads v. Spoden*, 172 Colo. 231, 472 P.2d 131 (1970), *Silva v. Pereira*, 1 Mass. App. Ct. 268, 298 N.E.2d 701 (1973), *Raitt v. Johns Hopkins Hospital*, 22 Md. App. 196, 322 A.2d 548 (1974). In *Raitt*, the Maryland Court of Appeals held that counsel for the defendant was not making admission on behalf of his client in a medical malpractice action when he informed the jury during his opening statement what he believed the evidence at trial would show, what he intended to prove and that his statements were not evidence. Counsel's statements in the Virginia trial merely informed the jury as to the identity of the parties and explained the nature of the case to be heard. There is absolutely nothing in the opening statement in the Virginia trial that indicates that counsel was doing anything other than explaining to the jury the identity of the parties and what he expected the evidence presented at trial would show.

Appellees also point to pre-trial motions made by Virginia defense counsel to limit the evidence to be presented at trial as a further admission that the cause of action in Virginia was separate and distinct from the case pending in West Virginia. As set forth above, after completing discovery in the Virginia action, the Appellees moved for leave to amend their complaint so as to abandon their tort claims. An order was entered by the Virginia court on February 25, 2000, granting the Appellees' motion to amend their Motion for Judgment "[b]ased upon the assurance of counsel that the allegations of Count II will not be reasserted later . . . ." *See* 2/25/00 Order attached as Exhibit A." (Count II alleged a breach of the contractual duty of good faith and fair dealing.) Therefore, pre-trial motions made by counsel for Wellmore did nothing more than accurately reflect the status of the case. Appellees had dismissed their tort claims prior to the trial and, therefore, those issues had no relevance in the Virginia court proceeding. Appellees' argument in this regard are disingenuous at best. The statements in question clearly represent the posture of litigation in Virginia. Appellees simply attempt to confuse and torture the statements of counsel, while conveniently failing to address the context in which the statements were made. Under no reasonable interpretation can the statements cited by Appellees be said to create inconsistent positions between the Virginia and West Virginia cases.

V. This Court Properly Applied the Facts Preserved in the Record to Applicable Law.

Appellees claim that this Court either overlooked or was mislead as to the facts pertaining to the tortious interference and fraudulent misrepresentation claims.

Appellees make the same contention with regard to Massey's ownership of United/Wellmore. Appellees recite to an extremely limited portion of the record in support of their arguments. The entire record was properly before this Court when the decision was rendered. This Court appropriately determined 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 owned Wellmore during the relevant time period when the declaration of force majeure occurred. Without question, both the Virginia action and the West Virginia action involve the same coal, the same coal supply agreement, the same ultimate customer and the same parties. While Appellees would have this court pick and chose selected facts from the record, this Court appropriately interpreted the record as a whole in rendering its decision. Such is the province and prerogative of this Court. As such, Appellees' arguments are without merit.

VI. Justice Benjamin Properly Ascertained that His Recusal Was Not Warranted in This Case.

Appellees contend that Justice Benjamin's decision refusing to disqualify or recuse himself from the case was erroneous and a violation of due process rights. In the April 10, 2006 Order Denying Recusal, Justice Benjamin stated,

> Consideration of a motion seeking disqualification should not be undertaken lightly. As well-stated by Judge John Sirica, "(t)here is as much obligation upon a judge not to recuse himself when there is no occasion as there is for him to do so when there is." *U.S. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), at FN 360. The proper purpose of such a motion is to preserve, not inhibit, the administration of justice. The

> measure of whether a Justice should or should not recuse himself necessarily is not the bias or prejudice which a litigant may have regarding the Justice. Our judicial system requires more. **A litigant's subjective belief that a Justice may be more or less favorable to his position is therefore an insufficient basis for disqualification.**

Order at 2. (emphasis added). It is clear that Justice Benjamin carefully considered Appellees claims prior to rending his decision, but found no justification for recusal. Appellees argue that there exists an appearance of prejudice due to the fact that Justice Benjamin received judicial campaign contributions. Clearly, each Justice now sitting on this Court has received contributions from numerous sources. In fact, Appellees and their counsel have made substantial contributions to the political campaign of candidates seeking to be elected to the West Virginia Supreme Court of Appeals.[6] To rule that recusal is mandated when an attorney or party which contributed to a judicial campaign is before the court creates a dangerous and unyielding standard. In addition, Appellees failed to cite to a single authority, from any jurisdiction, which would mandate recusal by Justice Benjamin in this matter. Appellees cite only to unsupported supposition and hearsay as a basis for recusal. A litigant's subjective belief is simply insufficient to support recusal. As such, Appellees claims are without merit.

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[6] According to a report in the January 24, 2008 edition of the *West Virginia Record*, Appellee Caperton contributed $10,000.00 in 2004 to a non-profit political organization, West Virginia Consumers for Justice. Caperton's counsel, Bruce Stanley with Reid-Smith, a law firm in Pittsburgh, contributed $5,000.00 to the same group. The Pittsburgh law firm repesenting the Harman corporations, Buchanan Ingersoll, also gave $15,000.00 to the group. West Virginia Consumers for Justice spent approxiametly $1.5M in support of Warren McGraw's campaign to be re-elected to the West Virginia Supreme Court of Appeals in 2004.

VII. A Proper Record is Currently in Front of the West Virginia Supreme Court of Appeals on the Issue of *Res Judicata*.

Appellees content that an insufficient record is currently before the Court upon which a decision on the issue of *res judicata* can be based because they contend that Appellants' Motion to Dismiss dated December 3, 2001 was never filed with the Boone County Circuit Court. The Motion to Dismiss was properly filed in accordance with the W. Va. Rules of Civil Procedure. The Motion to Dismiss and Memorandum of Law in Support of Motion to Dismiss was prepared by one of Massey's trial attorneys, Ancil Ramey. Certificates of Service signed by Mr. Ramey showing service of the Motion and Memorandum of Law on Appellees' counsel on December 3, 2001 are attached hereto as "Exhibit B." Furthermore, a review of the entire record demonstrates that there are numerous references to the Virginia action in a variety of pleadings and numerous attempts by the Appellants to have the trial court dismiss the West Virginia case on *res judicata* and/or collateral estoppel grounds.

The first and most obvious reference to the defense of *res judicata* is the Sixth Defense contained in Defendants' Answer to Plaintiffs' First Amended Complaint, wherein counsel for Defendants raised the affirmative defense that "[t]he Plaintiffs' claims are barred by the doctrine of *res judicata*, by the judgment entered in the Circuit Court of Buchanan County, Virginia Civil Action Number CL226-98." See the Defendants' Answer to Plaintiffs' First Amended Complaint.

On December 3, 2001, after the Virginia jury verdict, but prior to the judgment

becoming final, Appellants filed a Motion to Dismiss and a Motion for Summary Judgment. Both motions referenced the Virginia verdict and the Motion for Summary Judgment included a copy of the Virginia judgment as an Exhibit.

On March 22, 2002, Defendants filed a Motion to Hold Case in Abeyance Pending Virginia Supreme Court Ruling. At that time the Virginia case had been decided by a jury and was in the process of being appealed. In that Motion, defense counsel stated, "[a]s this Court is already aware, a Buchanan County, Virginia jury adjudicated a breach of contract action based upon a declaration of force majeure involving the very contract that is at the heart of this Boone County action. Many of the issues adjudicated in the Virginia action are also central to this action." *See* Defendants' Motion to Hold Case in Abeyance Pending Virginia Supreme Court Ruling in the Boone County Circuit Court. Attached to the Motion to Hold Case in Abeyance was a copy of the Order by the Virginia Supreme Court granting Wellmore's Petition for Appeal and noting that an appeal bond in the amount of $7,100,000 had been filed with the Court. Based upon the argument contained in that motion, and the attached Order granting the Petition for Appeal by the Virginia Supreme Court, Judge Hoke of the Boone County Circuit Court had sufficient evidence before him on the issue of *res judicata*, including the amount of the Virginia verdict and an argument that the issues adjudicated in the Virginia action were also central to the West Virginia action.

On April 1, 2002, Defendants filed a Motion for Summary Judgment, or in the alternative, For Partial Summary Judgment. In that motion, Defendants moved the Court to dismiss the Boone County Circuit Court action pursuant to the legal doctrine

of *res judicata* and the State of Virginia's stated policy against claim-splitting. *See* Defendants' Motion for Summary Judgment, or in the Alternative, For Partial Summary Judgment, p. 22-25. The *res judicata* argument in that motion is extremely thorough, analyzing the concept of privity between the plaintiffs in the Boone County, West Virginia suit and the plaintiffs in the Virginia action. Essentially, the *res judicata* argument contained in the Motion for Summary Judgment is the same as the *res judicata* argument contained in the December 3, 2001 Motion to Dismiss at issue and in the Petition for Appeal.

Shortly before the West Virginia trial began, Appellants again barraged the trial court with motions concerning judicial effect of the Virginia case. On April 4, 2002, Defendants filed a Motion *in Limine* on the issues of *res judicata* and collateral estoppel. In the Memorandum in Support of that motion, an entire section is entitled "Plaintiffs Should Be Precluded From Litigating Again Issues That Were Finally Resolved in the Virginia Action." *See* Defendants' Motions *in Limine* at 3.

In Defendants' Reply in Support of Defendants' Motions *in Limine*, the first lengthy argument addresses the issue of Plaintiffs attempting to relitigate the issues in the Virginia action. On page 3 of that pleading, Defendants assert that "Plaintiffs insist they are entitled to relitigate factual issues in the Virginia action during the course of this trial, even though some of those issues have become the law of the case in Virginia."

On May 10, 2002, Defendants filed their Response to Plaintiffs' Proposed

Summary Judgment Orders. That response almost entirely addresses the issues of collateral estoppel and *res judicata* barring the West Virginia action from going forward. After analyzing the West Virginia law on collateral estoppel and *res judicata*, defense counsel offers the following:

> Likewise, in the instant case, nothing precluded the Plaintiffs or their privies from asserting in the Virginia action the very same causes of action they have alleged in the West Virginia action. As they could have litigated these claims in Virginia, which arose from the same set of predicate facts, they are now precluded from litigating such claims in West Virginia. See Defendants' Reply in Support of Defendants' Motions in Limine at 10.

The Defendants went on to argue:

> Yet, this is precisely what has been done in this case, i.e., parties or the privies to the Virginia action could have asserted the same tortious interference, civil conspiracy, and fraudulent concealment claims that are being asserted in this Court. Consequently, under either Virginia law or West Virginia, they should be barred from asserting such claims in piecemeal fashion in West Virginia. See Defendants' Reply in Support of Defendants' Motions in Limine at 12.

After the West Virginia verdict was rendered, Appellants once again brought motions before the trial court seeking to dismiss the West Virginia action as a result of the judgment rendered in Virginia. On August 29, 2002, Defendants filed a Motion for Judgment as Matter of Law, Motion for New Trial, or, In the Alternative, Motion for Remittur with the Boone County Circuit Court. In an opening section summarizing the litigation proceedings, the Boone County Circuit Court was once again informed

that the Virginia action was "based upon the same coal supply agreement and the same declaration of *force majeure* as Plaintiffs have placed in issue in the West Virginia action. Reference was made to the Virginia jury awarding $6 Million Dollars for the alleged lost profits of Harman and Sovereign, damages claimed as part of the West Virginia action. Likewise, the Defendants devoted nearly ten pages of their Motion for New Trial to the issue of collateral estoppel and the premise that Plaintiffs were awarded a second bite at the apple by litigating their claims in both Virginia and West Virginia.

The Boone County Circuit Court record contains numerous pleadings containing clear argument before the trial court on the same issues contained in the Petition for Appeal argued in front of the West Virginia Supreme Court of Appeals, including the *res judicata* and collateral estoppel issues. The record is abundantly clear that Judge Hoke was repeatedly made aware of the existence of the Virginia action, the fact that it went to trial, the amount of the Virginia verdict, that the plaintiffs in the Virginia action were the same or were in privity with the plaintiffs in the West Virginia action, that the same claims and same damages were alleged in both the Virginia and West Virginia actions and that the judgment in Virgina became final shortly after the verdict was reached in the West Virginia case. To suggest that these matters were not part of the record prior to the appeal in the West Virginia action is disingenuous.

VIII. CONCLUSION

Based upon the foregoing, including all arguments, assertions and statements of fact previously set forth in Appellants' Petition for Appeal, Appellants' Appellate Brief, Appellants' Reply to Brief of Appellee, Hugh Caperton and Appellants' Reply to Brief of Appellee, Harman, Appellants respectfully request that this Court uphold the Decision of November 21, 2007.

Respectfully submitted,

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COMMONWEALTH OF VIRGINIA:
IN THE CIRCUIT COURT FOR BUCHANAN COUNTY

HARMAN MINING CORPORATION, and
SOVEREIGN COAL SALES, INC.,

Plaintiffs

v.

WELLMORE COAL CORPORATION,

Defendant

AT LAW

Case No. 226-98

EXHIBIT
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ORDER

The Court, having held a hearing on Tuesday, December 7, 1999 on various pending contested Motions, having considered the memoranda and arguments of counsel thereon, and being sufficiently advised, hereby ORDERS as follows:

1. The Plaintiffs' Motion for authorization to take the out of state depositions of the Environmental Protection Agency, Region 3, and the Allegheny County Health Department, Division of Air Quality are GRANTED, subject to the right of the Defendant to contest the admissibility of same if any new or different evidence arises therefrom as such parties were not included on the Plaintiffs' Witness List, and to seek such other relief as may be appropriate with respect thereto.

2. "Plaintiffs' Motion in Limine to Preclude the Testimony of James Freeman" is [GRANTED] ~~[DENIED], plaintiffs to have thirty (30) days to submit report in rebuttal to Mr. Freeman's report as to the proper measure of damages in this case.~~].

3. The Plaintiffs' Motion to Strike the Defendant's Witness List is DENIED.

4. Based upon the assurances of Plaintiffs' counsel that the allegations of Count II will not be reasserted later, the Plaintiffs' Motion to Amend their Motion for Judgment is GRANTED. The Plaintiffs may file and serve their First Amended Motion for Judgment as previously tendered within 10 days after the date of entry of this Order.

5. The Plaintiffs' Motion to Compel production of various documents is DENIED, except as follows:

a. With respect to marketing information of A.T. Massey Coal Company, Inc., the Defendant shall cause to be produced to Plaintiffs summary statements of sales transactions made in the fall of 1997 (September through December) and the early part of 1998 (January through March) for 1998 sales setting forth the following elements: producer, customer, sales price, and tonnage.

b. Sales contracts or purchase orders for deliveries in years 1990 through 1993 between or on behalf of the Defendant and

(1) LTV Steel Company.

(2) Suppliers of outside coal that was shipped on the above-referenced LTV sales, excepting contract miners of the Defendant or its affiliates.

Entered this 25TH day of ~~December, 1999~~ February 2000 NUNC PRO TUNC until DECEMBER 7, 1999.

Hon. Keary R. Williams, Judge
21th Judicial Circuit

IN THE CIRCUIT COURT OF BOONE COUNTY, WEST VIRGINIA

HUGH M. CAPERTON, HARMAN DEVELOPMENT CORPORATION, HARMAN MINING CORPORATION, and SOVEREIGN COAL SALES, INC. Plaintiffs, v. A.T. MASSEY COAL COMPANY, INC., ELK RUN COAL COMPANY, INC., INDEPENDENCE COAL COMPANY, INC. MARFORK COAL COMPANY, INC. PERFORMANCE COAL COMPANY, and MASSEY COAL SALES COMPANY, INC. Defendants.	)	Case No. 98-C-192

CERTIFICATE OF SERVICE

It is hereby certified that a true and accurate copy of Defendants' Motion to Dismiss to all Plaintiffs was served, via facsimile and U.S. mail, postage prepaid, to the following on this the 3rd day of December, 2001:

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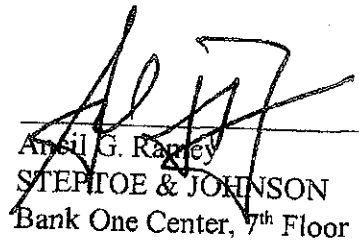

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IN THE CIRCUIT COURT OF BOONE COUNTY, WEST VIRGINIA

HUGH M. CAPERTON, HARMAN DEVELOPMENT CORPORATION, HARMAN MINING CORPORATION, and SOVEREIGN COAL SALES, INC. Plaintiffs, v. A.T. MASSEY COAL COMPANY, INC., ELK RUN COAL COMPANY, INC., INDEPENDENCE COAL COMPANY, INC. MARFORK COAL COMPANY, INC. PERFORMANCE COAL COMPANY, and MASSEY COAL SALES COMPANY, INC. Defendants.	)	Case No. 98-C-192

CERTIFICATE OF SERVICE

It is hereby certified that a true and accurate copy of Defendants' Memorandum of Law in Support of Motion to Dismiss to all Plaintiffs was served, via facsimile and U.S. mail, postage prepaid, to the following on this the 3rd day of December, 2001:

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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

I, D. C. Offutt, Jr., Esquire, counsel for Petitioners, do hereby certify that I served the foregoing, "Supplemental Brief of Appellant" upon the following counsel of record by depositing the same in the United States Mail, first class and postage pre-paid this 13th day of February, 2008:

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