

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
No. 11-1488

Manville Personal Injury Settlement Trust; §  
Amalgamated Bank, as Trustee for the Longview §  
Collective Investment Funds; and California State §  
Teachers' Retirement System, §

Petitioners Below/Petitioners, §

v. §

Don L. Blankenship; Baxter F. Phillips, Jr.; E. §  
Gordon Gee; Richard M. Gabrys; James B. §  
Crawford; Bobby R. Inman; Robert H. Foglesong; §  
Stanley C. Suboleski; J. Christopher Adkins; M. §  
Shane Harvey; Mark A. Clemens; Elizabeth S. §  
Chamberlin; and Richard R. Grinnan, §

Contemners Below/Respondents. §

(On Appeal From The Circuit Court of  
Kanawha County No. 07-C-1333)

REPLY BRIEF FOR PETITIONERS

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## **I. INTRODUCTION**

Petitioners, Manville Personal Injury Settlement Trust (the “Manville Trust”), Amalgamated Bank, as Trustee for the LongView Collective Investment Funds (“Amalgamated Bank”), and California State Teachers’ Retirement System (“CalSTRS”) (collectively, “Petitioners”), respectfully submit this Reply to the Brief of Respondents.

## **II. ARGUMENT**

West Virginia law is clear that compensation of a person aggrieved by civil contempt is appropriate upon a proper showing. The Circuit Court, in following Respondents’ suggestions—and in signing a proposed order they had submitted without changing a single word—vacated two outstanding show cause orders requiring Respondents to bring forth evidence of their compliance and, thereby, prevented Petitioners from making any such showing of the damages they suffered, the costs they incurred, or the standing that they have to assert any derivative claims that may be at issue (in that regard, what are the direct and what are the derivative claims at issue is a subject of this appeal). In so doing, the Circuit Court relied on facts outside the four corners of the two petitions involving events that occurred after they were filed. For the reasons stated in Petitioners’ opening brief and in this Reply, the Circuit Court’s order dismissing these proceedings should be reversed and the case remanded.

### **A. THE CIRCUIT COURT’S RULING ON CIVIL CONTEMPT CONTRADICTS WELL-SETTLED WEST VIRGINIA LAW**

As Petitioners explained in their Notice of Appeal, the Circuit Court’s ruling that contemnors can avoid responsibility for willfully violating a court order if compliance becomes impossible conflicts with established principals of West Virginia law. Because civil contempt frequently becomes an important means of enforcing orders involving domestic relations, the

custody of children, labor disputes, discovery matters in civil litigation, and other important matters to the protection of West Virginia's citizens and the fair and efficient administration of justice, the precedent that would be established by the Circuit Court's decision cannot stand. The idea that victims of contemptuous conduct are deprived of any remedy in litigation ongoing for more than year—whether because the object of a court order ceases to exist, the contemnners change roles, or because they belatedly come into compliance—is fundamentally contrary to existing West Virginia law.

In an analogous situation to this case, this precedent would discourage future victims of contemptuous conduct from seeking to use the court's contempt power to protect the beneficiaries of court orders, often the state's most vulnerable citizens. It would mean, for example, that where a parent diligently litigated a year-long effort to compel another parent to comply with a court order implemented to protect the health and welfare of a child (for instance, an order requiring the payment of child support), the first parent would be without any remedy to collect compensatory damages to pay for the inconvenience and cost of litigation or associated attorneys' fees in the event that the child died or for other reasons compliance with the relevant court order became impossible (for instance, the child became the age of majority). In the context of discovery disputes, it would mean that a contemner who had refused compliance with a court order by failing to produce documents for an extended period of time, could avoid all responsibility to compensate the aggrieved party by belatedly providing those documents days or minutes ahead of a show cause hearing. Under the Circuit Court's precedent, the only recourse for an aggrieved parent or frustrated litigant under these circumstances would be to seek the participation of a county prosecutor to recover any compensation to indemnify them for their

damages, and if the county prosecutor were too busy or otherwise uninterested, they would be out of luck.<sup>1</sup> That is not the law in West Virginia, nor should it be.

In its order drafted exclusively by Respondents, the Circuit Court would create a false and unfortunate dichotomy that divorces the determination of the “purpose of a contempt proceeding” from the “nature of the contempt sanction.” JA001769 ¶ 91, JA001770 ¶ 95. Contrary to the language in the Circuit Court’s order—“[w]hich sanction, if any, is appropriate in a civil contempt proceeding is a different question from whether a civil contempt proceeding is appropriate” (JA001770 ¶ 95) —determining the purpose of the contempt necessarily requires a court to consider the nature of the contempt sanction sought. As this Court explained in *Robinson*, the contempt is civil in nature where the remedy sought is “to compel compliance with a court order by the contemner *so as to benefit the party bringing the contempt action by enforcing, protecting, or assuring the right of that party under the order*” (*State ex. rel. Robinson v. Michael*, 166 W. Va. 660, 670, 276 S.E.2d 812, 818 (1981)) rather than “to punish the contemner for an affront to the dignity or authority of the court, or to preserve or restore order in the court or respect for the court.” Syl. Pt. 4, *Robinson*, 166 W. Va. 660, 276 S.E.2d at 813.

There is no dispute that the order was in place when these proceedings were initiated, and Respondents concede that Petitioners had standing to enforce the order at that time. According to the Circuit Court and Respondents, on June 1, 2011, Petitioners “lost” that standing to seek contempt against Respondents when the Alpha-Massey merger closed (*see, e.g.*, Resp’ts’ Br. 2,

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<sup>1</sup> Although the West Virginia Rules of Civil Procedure might provide some relief to a frustrated litigant if the contemner also violated applicable rules in addition to the court’s order, the Circuit Court’s decision would prevent that party from seeking compensation for civil contempt.

12, 13). By that date, the original civil contempt proceeding was more than a year old, and the new contempt petition had been thoroughly investigated, drafted, supported by summary-judgment type evidence and was already on file. Indeed, throughout the pendency of this civil contempt proceeding, the Respondents never asserted—despite numerous opportunities to raise and brief the issue over the course of a year—that Petitioner Manville Trust had no standing to enforce the order on behalf of Massey Energy. Accordingly, there is no dispute that the instant proceeding was *initiated* to benefit the Petitioners by enforcing, protecting, or assuring their rights under the order at issue. *See Robinson*, 166 W. Va. at 670, 276 S.E.2d at 818. Just as in *United Mine Workers of America v. Faerber*, 179 W. Va. 73, 365 S.E.2d 353 (1986), this “contempt action *was brought* . . . to enforce an order of the Court” and “[t]herefore, this case squarely fits the test set out in [*Robinson*] as one of civil contempt.” *Faerber*, 179 W. Va. at 76, 365 S.E.2d at 356.

The Respondents and the Circuit Court misinterpret this Court’s decision in *Robinson* and *Czaja v. Czaja*, 208 W. Va. 62, 537 S.E.2d 908 (2000). Contrary to what the Circuit Court’s order and Respondents’ briefing would suggest, *Robinson* and *Czaja* both broadened the applicability of civil contempt. In rejecting the appellant’s argument in *Czaja* that “by imposing a fine [the circuit court] converted the civil contempt proceeding into a criminal matter,” the Court quoted its discussion of the civil-criminal contempt distinction in *State ex rel. Lambert v. Stephens*, 200 W.Va. 802, 490 S.E.2d 891 (1997) to reaffirm its holding that “[a]nother appropriate sanction in civil contempt cases is an order requiring the contemner to pay a fine as a form of compensation or damages to the party aggrieved by the contemptuous conduct.” *Czaja*, 208 W. Va. at 73, 537 S.E.2d at 919. In fact, it is in rejecting the *Czaja* appellant’s argument

that “because the circuit court failed to impose a sanction that included a method for purging the contempt, the civil contempt proceeding necessarily was transformed into a criminal matter” that the Court discusses *Robinson* and explains in a footnote that “[w]hereas we previously looked to the penalty imposed (e.g., jail term with opportunity for purging vs. without and determinate vs. indeterminate sentencing) in labeling contempt matters, this Court altered that approach beginning with *Robinson* and now examines the purpose of the sanction, rather than the sanction itself, to identify the nature of the contempt ruling.” *Czaja*, 208 W. Va. at 75 n.38, 537 S.E.2d at 921 n.38. Nothing in either of these opinions suggests that the Court sought to fundamentally alter the contempt jurisprudence of this State to limit the availability of civil contempt proceedings as a means for aggrieved parties to seek sanctions in the form of compensatory fines.

The Respondents’ and the Circuit Court’s discussion of *Faerber* is even further off base. Respondents’ and the Circuit Court’s suggestion that *Faerber*’s award of compensatory damages in civil contempt hinged on the potentiality for future non-compliance requires an imaginative reading of the plain text of that opinion. If this Court intended the potentiality of future non-compliance to be a necessary condition for backward-looking compensatory fines in a civil contempt proceeding, it would have said so. The Court did not because West Virginia civil contempt law is well-settled and straightforward: an “appropriate sanction in a civil contempt case is . . . an order requiring the payment of a fine in the nature of compensation or damages to the party aggrieved by the failure of the contemner to comply with the order.” Syl. Pt. 4, *Faerber*, 179 W. Va. at 74, 365 S.E.2d at 354 (quoting Syl. Pt. 3, *State ex rel. Robinson v. Michael*, 166 W.Va. 660, 276 S.E.2d 812). In their response, Respondents also incorrectly

suggest that “[t]ellingly, the Court . . . declined to hold Respondent Lay . . . in contempt since he ‘*did not*’ have authority on his own to comply with the Court’s order.” Resp’ts’ Br. 28 (quoting *Faerber*, 179 W. Va. 74 n.1, 365 S.E.2d at 354) (emphasis added by Petitioner). Petitioners agree that the statement is telling—if Respondents’ reading of *Faerber* were correct, this sentence would be in the present or future progressive tense.

In a footnote (Resp’ts’ Br. 30-31, n.26), Respondents quote extensively from the Maryland Court of Appeals opinion in *Dodson v. Dodson*, 380 Md. 438, 845 A.2d 1194 (2004), which held that “compensatory damages may not ordinarily be recovered in a civil contempt action.” *Dodson*, at 380 Md. 454, 845 A.2d 1203. With that holding, however, *Dodson* contradicts well-settled West Virginia law that the assessment of coercive or compensatory fines is a permissive sanction in a civil contempt proceeding. *See, e.g., Czaja*, 208 W. Va. at 74, 537 S.E.2d at 920. The *Dodson* court also stepped out of line with “the federal courts and a clear majority of the state courts[, which] allow compensatory damages or fines payable to the injured party.” *Right of injured party to award of compensatory damages or fine in contempt proceedings*, 85 A.L.R.3d 895 § 2[a] (Originally published in 1978).

For a more mainstream opinion consistent with West Virginia jurisprudence on the distinction between civil and criminal contempt, the Court may reference an opinion issued by the South Carolina Supreme Court entitled *Poston v. Poston*, 331 S.C. 106, 502 S.E.2d 86 (1998). In remanding a case with instructions for the trial court to be clear in its order, the court provided examples of the types of sanctions that are appropriate under civil and criminal contempt. In line with the method that this Court and the majority of courts have employed to distinguish civil from criminal contempt proceedings, the *Poston* court explained that “[t]he

major factor in determining whether a contempt is civil or criminal is the purpose for which the power is exercised, *including the nature of the relief and purpose for which the sentence is imposed.*” *Poston*, 331 S.C. at 111, 502 S.E.2d at 88 (emphasis added). In this analysis, “[i]f the sanction is a fine, it is remedial and civil if paid to the complainant even though the contemnor has no opportunity to purge himself of the fine or if the contemnor can avoid the fine.” *Id.*, 331 S.C. at 112, 502 S.E.2d at 89. The court further explained that “[i]n a civil contempt proceeding, a contemnor may be required to reimburse a complainant for the costs he incurred in enforcing the court’s prior order, including reasonable attorney’s fees,” and in such instances, “[t]he award of attorney’s fees is not a punishment but an indemnification to the party who instituted the contempt proceeding.” *Id.*, 331 S.C. at 114, 502 S.E.2d at 90. Accordingly, like other civil compensatory fines, “the court is not required to provide the contemnor with an opportunity to purge himself of these attorney’s fees in order to hold him in civil contempt,” and therefore, compelling compliance need not be the purpose behind assessing such fines against contemnors in favor of the aggrieved party. *Id.*

The *Poston* case supports this Court’s decisions in *Czaja* and *Faerber*, which are consistent with “the clear majority of the state courts” in allowing compensatory damages, 85 A.L.R.3d 895 § 2[a], and the “[t]he general rule, supported by numerous cases, . . . that in proper circumstances a reasonable attorney’s fee may be allowed to the prevailing plaintiff in a civil contempt proceeding . . . for the investigation and prosecution of the contempt proceeding.” A. S. Klein, *Allowance of attorneys’ fees in civil contempt proceedings*, 43 A.L.R.3d 793 § 3[a] (Originally published in 1972). Neither *Robinson*, *Czaja*, *Faerber*, *Poston*, nor the clear majority

of state courts would require the possibility of future noncompliance as a necessary precondition to a compensatory sanction for civil contempt. *Id.*

**B. THE RECORD DOES NOT SUPPORT THE COURT’S CHOICE-OF-LAW RULING**

The Circuit Court’s ruling that Delaware law applies to the Stipulation directly contradicts the plain meaning of the Stipulation’s choice-of-law provision. The meaning of that provision is clear and unambiguous: the Stipulation “shall be considered to have been negotiated, executed and delivered, and to be wholly performed, in the State of West Virginia, and the rights and obligations of the parties to the Stipulation shall be construed and enforced in accordance with, and governed by, the internal, substantive laws of the State of West Virginia without giving effect to that State’s choice of law principles.” JA000052. As noted by Respondents in their brief, moreover, the Stipulation and its incorporated Corporate Governance Agreement (“CGA”) were “heavily negotiated.” Resp’ts’ Br. 2. Yet nowhere in that Stipulation is an exception to this clear choice-of-law directive.

In their brief, the Respondents accurately characterize the Circuit Court’s order as “recogniz[ing] [that] the Stipulation’s choice-of-law clause is of no moment to the applicable law governing the rights that a shareholder has with respect to the corporation.” Resp’ts’ Br. 16. Exactly how and why the Circuit Court reached this recognition is not clear.<sup>2</sup> Without explicitly finding these terms ambiguous, the Circuit Court disregarded their plain meaning and substituted an alternative one that appears nowhere in the four corners of the Stipulation, much less in the

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<sup>2</sup> Particularly in light of the fact that Manville Trust was a Massey shareholder and party to the Stipulation whose “rights and obligations shall be construed and enforced in accordance with, and governed by, the internal, substantive laws of the State of West Virginia without giving effect to that State’s choice of law principles” with respect to the Stipulation which “shall be considered to have been negotiated, executed and delivered, and to be wholly performed, in the State of West Virginia,” the Circuit Court’s analysis is difficult to understand. JA000052.

Circuit Court's interpretation of it. The Circuit Court would seem to have simply read in an exception for the benefit of Respondents that purports to give effect to the State's choice of law principles for certain matters (rights of a shareholder in a corporation in the absence of any particular agreement) but not others (presumptive validity of choice-of-law provisions). Respondents' briefing can offer no better explanation for it (*see* Resp'ts' Br. 16-17), and Respondents are the ones who wrote the order.

The Circuit Court's ruling in this regard should be reversed because it directly contradicts the plain meaning of the Stipulation without explanation, fails to give its choice-of-law provision the presumptive validity to which it is entitled or even entertain an appropriate analysis (Pet'rs' Br. 23), and is unsupported by any record or explanation as to how the Circuit Court conducted its analysis and reached its decision that the case of *State ex rel. Elish v. Wilson*, 189 W. Va. 739, 434 S.E.2d 411 (1993)—despite contemplating a case-by-case analysis of applicable choice-of-law principles—somehow trumps any and all heavily negotiated and explicit contractual provisions to the contrary.

**C. DISMISSAL WAS IMPROPER EVEN IF THE COURT ACCEPTS SOME OR ALL OF RESPONDENTS' ARGUMENTS REGARDING PETITIONERS' STANDING**

Respondents maintain in their response that the Circuit Court correctly found that it lost jurisdiction when Petitioners lost their shares in Massey Energy on June 1, 2011. As noted above, however, by the time the merger between Massey and Alpha closed and Petitioners allegedly "lost" standing, Petitioner Manville Trust had litigated the civil contempt proceeding for over a year and successfully defeated successive motions to vacate and dismiss the initial petition. During this time, Respondents never challenged Petitioner Manville Trust's standing to enforce the settlement. Thereafter, Petitioners Amalgamated Bank, California State Teachers'

Retirement System, and Manville Trust investigated and documented more far-reaching violations of the Circuit Court's order, and submitted that evidence to the Circuit Court prior to June 1, 2011. Resp'ts' Br. 12-13. Petitioners disagree for the reasons stated in their opening brief and opposition to Respondents' motion to dismiss before the Circuit Court.

It is undisputed, however, that by the time the merger between Massey and Alpha closed and Petitioners allegedly "lost" standing, Petitioner Manville Trust had litigated the civil contempt proceeding for over a year and successfully defeated successive motions to vacate and dismiss the initial petition. While Petitioners and Respondents disagree about whether Petitioners have a legally cognizable interest in the 2008 Order, there is no dispute that Petitioners initiated these civil contempt proceedings prior to the closing of the Alpha-Massey merger.

In their response, Respondents point out that the court in *In re Tyson Foods, Inc. Consol. S'holder Litig.*, 919 A.2d 563 (Del. Ch. 2007) "easily dismissed" plaintiffs' attempted contempt claim as "procedurally improper." Resp'ts' Br. 21 (quoting *Tyson*, 919 A.2d at 598-99 (internal quotations omitted).) The Court of Chancery did so because, under Chancery Court Rule 70(b), the plaintiffs were supposed to file an affidavit "*in the cause*" of the settled case as was done to initiate this civil contempt proceeding. *See id.* (emphasis in original). Particularly after the Circuit Court's considering and denying Respondents motion to vacate the initial rule to show cause, there is no dispute that Petitioners' civil contempt proceedings were procedurally proper. (JA001589)

Accordingly, in addition to the reasons already set forth as to why these claims are direct, Petitioners maintain that, *at minimum*, they have a direct interest in seeking compensation for the

time and expense devoted to investigating and documenting Respondents contemptuous conduct and for prosecuting the civil contempt proceeding. In that regard, to the extent that the Court finds that it is appropriate to further analyze what are direct and derivative claims, under these circumstances, the case should be remanded for the continued prosecution of the direct claims owed to Petitioners and other Massey shareholders. To the extent the Court finds that Petitioners' pleadings did not sufficiently establish their standing, Petitioners should be permitted an opportunity to amend them to take into account this Court's ruling. Franklin D. Cleckley et al., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 15(2), at 407 (3rd ed. 2008) ("The underlying purpose of Rule 15 is to facilitate decision on the merits, rather than on the pleadings or technicalities."). The fact that the Circuit Court relied on facts outside the four corners of those petitions involving events after they were filed only makes remand for further proceedings more appropriate.

Moreover, to the extent the Court finds that any claim asserted is derivative, the case should be remanded to afford the Respondents an opportunity to submit proof of their continued standing to prosecute those claims. As Respondents argued in their motion to stay (JA001587) and in oral argument on their motions to stay and dismiss, "standing goes to the subject matter jurisdiction of the court" (JA001625). As such, a challenge to a plaintiffs' standing is a challenge to the Court's jurisdiction over the subject matter under West Virginia Rule of Civil Procedure 12(b)(1). See *State ex rel. Paul B. v. Hill*, 201 W.Va. 248, 256, 496 S.E.2d 198, 206 (1997) ("Generally speaking, standing is an element of jurisdiction over the subject matter." (internal quotations and citation omitted)); *Men and Women Against Discrimination v. Family Prot. Servs. Bd.*, -- S.E.2d --, 2011 WL 2119028 (W. Va. May 26, 2011) (per curiam) (explaining

that “[s]tanding is a jurisdictional requirement”). This Court has recognized that circuit courts may generally consider matters outside the pleadings in determining whether it lacks subject-matter jurisdiction. See *Elmore v. Triad Hosp., Inc.*, 220 W. Va. 154, 158, 640 S.E.2d 217, 221 n.7 (2006) (holding that a trial court may properly consider materials outside the pleadings in ruling on a Rule 12(b)(1) motion to dismiss); see also Franklin D. Cleckley et al., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 12(b)(1), at 296 (3rd ed. 2008) (“Trial courts are not bound to the pleadings in making a subject matter determination.”).

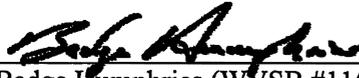
Therefore, the Circuit Court erred in dismissing the petitions without permitting Petitioners an opportunity to make a showing of their continued standing, particularly in the face of their request for further discovery and the opportunity to make such a showing. As the Respondents acknowledge, assuming Delaware law applies to this matter, a well-recognized exception exists to the general rule that a shareholder loses standing to pursue purely derivative claims after a merger: “if the plaintiffs are able to prove *on a full record* that the Merger with Alpha was undertaken ‘merely’ to deprive the Massey stockholders of their standing to sue derivatively, then they will be entitled to continue the Derivative Claims notwithstanding the fact that as a result of the Merger, they will no longer hold Massey shares.” *In re Massey Energy Co. Derivative and Class Action Litig.*, C.A. No. 5430-VCS, 2011 WL 2176479, at \*30 (Del. Ch. May 31, 2011) [hereinafter “*In re Massey Energy*”] (footnotes omitted). Petitioners should be afforded to make this showing on a full record, or at least, be permitted to submit such proof currently available in a subsequent pleading.

### III. CONCLUSION

For the above reasons, the Circuit Court’s decision should be reversed and this case remanded for further proceedings.

Dated June 4, 2012

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing Brief for Petitioner has been served upon the following counsel of record as indicated below on this the 4th day of June, 2012.

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