

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2009 Term

No. 33350

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**HUGH M. CAPERTON, HARMAN DEVELOPMENT CORPORATION,
HARMAN MINING CORPORATION, AND SOVEREIGN COAL SALES, INC.,
Plaintiffs Below, Appellees,**

V.

**A.T. MASSEY COAL COMPANY, INC., ELK RUN COAL COMPANY, INC.,
INDEPENDENCE COAL COMPANY, INC.,
MARFORK COAL COMPANY, INC., PERFORMANCE COAL COMPANY,
AND MASSEY COAL SALES COMPANY, INC.,
Defendants Below, Appellants.**

**Appeal from the Circuit Court of Boone County
Honorable Jay M. Hoke, Judge
Civil Action No. 98-C-192
REVERSED AND REMANDED**

**Submitted Following Remand: September 8, 2009
Filed: November 12, 2009**

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ACTING CHIEF JUSTICE DAVIS delivered the Opinion of the Court.

CHIEF JUSTICE BENJAMIN, having been disqualified, did not participate in the decision of this case.

SENIOR STATUS JUDGE HOLLIDAY sitting by temporary assignment.

JUSTICE WORKMAN dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. “This Court’s review of a trial court’s decision on a motion to dismiss for improper venue is for abuse of discretion.” Syllabus point 1, *United Bank, Inc. v. Blosser*, 218 W. Va. 378, 624 S.E.2d 815 (2005).

2. Our review of the applicability and enforceability of a forum-selection clause is *de novo*.

3. Where the disqualification of a Justice of this Court, either by decision of the United States Supreme Court or by his or her personal decision made after an opinion has been issued by this Court, renders the decision of this Court a tie vote, then the Chief Justice or Acting Chief Justice of this Court may, in his or her discretion, assign a senior justice, senior judge, or circuit judge to serve in the place of the disqualified justice pursuant to Art. VIII, § 3 of the West Virginia Constitution and Rule 29(g) of the West Virginia Rules of Appellate Procedure.

4. Determining whether to dismiss a claim based on a forum-selection clause involves a four-part analysis. The first inquiry is whether the clause was reasonably communicated to the party resisting enforcement. The second step requires classification of the clause as mandatory or permissive, *i.e.* , whether the parties are *required* to bring any dispute to the designated forum or are simply *permitted* to do so. The third query asks

whether the claims and parties involved in the suit are subject to the forum-selection clause. If the forum-selection clause was communicated to the resisting party, has mandatory force and covers the claims and parties involved in the dispute, it is presumptively enforceable. The fourth, and final, step is to ascertain whether the resisting party has rebutted the presumption of enforceability by making a sufficiently strong showing that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.

5. There are two types of forum-selection clauses: mandatory and permissive. A mandatory forum-selection clause contains clear language indicating that jurisdiction is appropriate only in a designated forum. A permissive forum-selection clause authorizes litigation in a designated forum, but does not prohibit litigation elsewhere.

6. The determination of whether a forum-selection clause is mandatory or permissive requires an examination of the particular language contained therein. If jurisdiction is specified with mandatory terms such as “shall,” or exclusive terms such as “sole,” “only,” or “exclusive,” the clause will be enforced as a mandatory forum-selection clause. However, if jurisdiction is not modified by mandatory or exclusive language, the clause will be deemed permissive only.

7. To determine whether certain claims fall within the scope of a mandatory forum-selection clause, the deciding court must base its determination on the

language of the clause and the nature of the claims that are allegedly subject to the clause.

8. A range of transaction participants, signatories and non-signatories, may benefit from and be subject to a forum selection clause. In order for a non-signatory to benefit from or be subject to a forum selection clause, the non-signatory must be closely related to the dispute such that it becomes foreseeable that the non-signatory may benefit from or be subject to the forum selection clause.

9. In determining whether to extend full retroactivity to a new principle of law established in a civil case that *does not overrule* any prior precedent, which is an issue that was not addressed in Syllabus point 5 of *Bradley v. Appalachian Power Co.*, 163 W. Va. 332, 256 S.E.2d 879 (1979), the following factors will be considered. First, we will determine whether the new principle of law was an issue of first impression whose resolution was clearly foreshadowed. Second, we must determine whether or not the purpose and effect of the new rule will be enhanced or retarded by applying the rule retroactively. Finally, we will determine whether full retroactivity of the new rule would produce substantial inequitable results.

Davis, Acting Chief Justice:

The Appellants herein and defendants below, A.T. Massey Coal Company, Inc., and various of its subsidiaries, appeal from a March 15, 2005, order entered in the Circuit Court of Boone County, which denied their post-judgment motions for judgment as a matter of law, a new trial, or remittitur, in response to the entry of a judgment of more than \$50 million in favor of the appellees herein, and plaintiffs below, Hugh M. Caperton, Harman Development Corporation, Harman Mining Corporation and Sovereign Coal Sales, Inc. In this appeal, A.T. Massey Coal Company and its subsidiaries allege numerous errors that purportedly occurred throughout the proceedings below.

This case is presently before this Court on remand from the United States Supreme Court.¹ Based upon our thorough consideration of the parties' arguments, the relevant case law, and the record on appeal, this Court concludes, based upon the existence of a forum-selection clause contained in a contract that directly related to the conflict giving rise to the instant lawsuit, that the circuit court erred in denying a motion to dismiss filed by A.T. Massey Coal Company and its subsidiaries. Accordingly, we reverse the judgment in this case and remand for the circuit court to enter an order dismissing, with prejudice, this case against A.T. Massey Coal Company and its subsidiaries.

¹The first opinion filed in connection with this appeal was vacated based upon the subsequent voluntary disqualification of two of the justices who participated in the earlier proceedings in this Court. A second opinion entered on rehearing was reversed by the United States Supreme Court based upon that Court's determination that an additional justice should have been disqualified. *See Caperton v. A.T. Massey Coal Co., Inc.*, ___ US ___, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009). A detailed recitation of the complex procedural history of this case is set out in the body of this opinion at Section II, page 10 *infra*.

I.

FACTUAL HISTORY

Central to the dispute underlying this appeal is the Harman Mine, an underground coal mine located in Buchanan County, Virginia, that produced very high quality metallurgical coal. Prior to 1993, Harman Mine was owned by Inspiration Coal Corporation (hereinafter referred to as “Inspiration”) through three subsidiaries: Harman Mining Corporation (hereinafter referred to as “Harman Mining”), Sovereign Coal Sales, Inc. (hereinafter referred to as “Sovereign”), and Southern Kentucky Energy Company (hereinafter referred to as “Southern”). For many years, all of the coal from the Harman Mine had been sold to Wellmore Coal Corporation (hereinafter referred to as “Wellmore”), a subsidiary of United Coal Corporation. In April 1992, Sovereign and Southern entered a coal supply agreement (hereinafter referred to as “the 1992 CSA”) with Wellmore. Under the 1992 CSA, Wellmore was to purchase from Sovereign and Southern approximately 750,000 tons of coal per year for a period of ten years.

In 1993, Hugh M. Caperton (hereinafter referred to as “Mr. Caperton”), a plaintiff below and appellee herein, formed Harman Development Corporation² (hereinafter referred to as “Harman Development”).³ In that same year, Harman Development purchased

²Harman Development Corporation is a Virginia corporation that has its principal place of business in Beckley, West Virginia.

³Mr. Caperton had worked for Sovereign when it was a subsidiary of Inspiration. As Sovereign’s employee, Mr. Caperton sold coal on behalf of Sovereign, including coal from the Harman Mine. Mr. Caperton left Sovereign to form his own coal
(continued...)

the three previously mentioned subsidiaries of Inspiration: Harman Mining,⁴ Sovereign⁵ and Southern, and thereby became the owner of the Harman Mine.⁶ Harman Development, Harman Mining, and Sovereign are all plaintiffs to this action below, and are appellees herein (hereinafter collectively referred to as “the Harman Companies”). In 1997, in order to fund improvements to the Harman Mine, the Harman Companies sold all the Harman Mine reserves to Penn Virginia Corporation, and then leased back those reserves that could be mined in a cost-effective manner.

From the time the Harman Companies became owners of the Harman Mine until 1997, coal from the Harman Mine was purchased by Wellmore in accordance with the 1992 CSA. Prior to the expiration of the 1992 CSA, in March of 1997, a new CSA with a

³(...continued)

brokerage company, Dominion Energy. Through Dominion Energy, Mr. Caperton continued to broker coal from the Harman Mine on behalf of Inspiration. In 1993, Dominion Energy became Harman Development Corporation.

⁴Harman Mining is a Virginia corporation that transacts business in West Virginia and is a wholly-owned subsidiary of Harman Development.

⁵Sovereign is a Delaware corporation that has its principal place of business in Beckley, West Virginia. Sovereign is a wholly-owned subsidiary of Harman Development.

⁶The plan Harman Development established for the Harman Mine was to mine the reserves in a way that would allow convenient access to adjoining reserves owned by Pittston Coal Company. The appellees explain that it is commonplace in the mining industry for coal companies to sell or lease their properties to other operators when it makes economic sense to allow someone else to mine their coal. Due to the topography of the area, the Harman Mine provided better access to the Pittston reserves than Pittston itself had. Thus, Mr. Caperton hoped to one day lease the Pittston reserves. However, no lease agreement was ever executed between Pittston and any of the Harman Companies.

higher price per ton of coal (hereinafter referred to as “the 1997 CSA”) was negotiated between Sovereign, Wellmore, and Harman Mining.⁷ The 1997 CSA was to be in effect for a period of five years, commencing retroactively on January 1, 1997. It included, among other things, a *force majeure* clause,⁸ and a forum-selection clause requiring that “[a]ll

⁷The 1997 CSA specified that Wellmore would purchase a minimum tonnage of coal, 573,000 tons per year, and also gave Wellmore the option to purchase all of the Harman Mine’s production. Historically, Wellmore had purchased all of the coal that the Harman Mine produced.

⁸The *force majeure* clause was nearly identical to one that had been included in the 1992 CSA, and stated, in relevant part,

The term “force majeure” as used herein shall mean any and all causes reasonably beyond the control of SELLER or BUYER, as applicable, which cause SELLER or BUYER to fail to perform hereunder, such as, but not limited to, acts of God, acts of the public enemy, epidemics, insurrections, riots, labor disputes and strikes, government closures, boycotts, labor and material shortages, fires, explosions, floods, breakdowns or outages of or damage to coal preparation plants, equipment or facilities, interruptions or reduction to power supplies or coal transportation (including, but not limited to, railroad car shortages) embargoes, and acts of military or civil authorities, which wholly or partly prevent the mining, processing, loading and/or delivering of the coal by SELLER, or which wholly or partly prevent the receiving, accepting, storing, processing or shipment of the coal by BUYER. . . . Pertaining to BUYER, the term “force majeure” as used herein shall further include occurrence(s) of a force majeure event at any of BUYER’s customer’s plants and facilities, except that the effects of any such force majeure event shall not justify BUYER in reducing its purchase of coal hereunder in greater proportion than the coal to be purchased hereunder bears to all BUYER’s sources of supply, including BUYER’s own mines, for BUYER’s metallurgical coal sold to domestic coke producers. SELLER and BUYER shall promptly notify the other following commencement of a force majeure. If because of a force majeure SELLER or BUYER, respectively, is unable to carry

(continued...)

actions brought in connection with this Agreement shall be filed in and decided by the Circuit Court of Buchanan County, Virginia.”⁹

During the course of the 1992 CSA, and at the time the 1997 CSA was executed, one of Wellmore’s primary customers was LTV Steel (hereinafter referred to as “LTV”). Wellmore sold and shipped nearly two-thirds of the coal it purchased from the Harman Companies to LTV’s coke plant located in Pittsburgh, Pennsylvania.¹⁰ On July 19, 1997, LTV announced that it intended to close its Pittsburgh coke plant due to a change in emissions regulations promulgated by the Environmental Protection Agency.

A.T. Massey Coal Company (hereinafter referred to as “Massey”), a defendant below and appellant herein, had tried unsuccessfully for several years to sell its West

⁸(...continued)

out its obligations under this Agreement and if such Party shall promptly give to the other Party written notice of such force majeure, then the obligations of the Party giving such notice and the corresponding obligations of the other Party shall be suspended to the extent made necessary by such force majeure and during its continuance; provided however, (i) that such obligations shall be suspended only to the extent made necessary by such force majeure and only during its continuance, and (ii) that the Party giving such notice shall act promptly in [sic] reasonable manner to eliminate such force majeure. . . .

⁹This forum-selection clause is identical to one that had been included in the 1992 CSA.

¹⁰LTV purchased from Wellmore a premium blend of coal from the Harman Mine mixed with other, lesser quality coals. The circuit court expressly found that “[c]oal from the Harman Mine is metallurgical coal with very favorable coking characteristics prized by steelmakers like LTV.”

Virginia mined coal directly to LTV.¹¹ Due to its lack of success in selling to LTV on its own, Massey determined to acquire LTV's supplier, Wellmore, and its parent corporation, United Coal Corporation (hereinafter referred to as "United").¹² Massey purchased Wellmore and United on July 31, 1997. Since there was no long-term agreement between LTV and Wellmore, Massey hoped to substitute its own coal for the Harman Mine coal that Wellmore had been supplying to LTV. An internal Massey memorandum admitted during trial revealed that Massey understood there were risks to its plan, most notably the possibility that the relationship between LTV and Wellmore might not continue under Massey ownership of Wellmore. The circuit court found that, in spite of this risk, and despite the knowledge that LTV was "extremely reluctant to change a long-established, successful coal blend" that included coal from the Harman Mine, Massey nevertheless "provided LTV with firm price quotes for coal mainly from Massey Mines, not Harman coal, and insisted that LTV make Massey its sole-source provider via a long-term coal contract."¹³ As a consequence of Massey's actions, LTV ceased buying coal from Wellmore. Thereafter, on August 5, 1997, Wellmore, at the direction of Massey, gave notice to the Harman Companies

¹¹This coal was inferior in quality to the coal obtained from the Harman Mine and sold to LTV through Wellmore.

¹²The Harman Companies and Mr. Caperton presented evidence at trial to establish that Massey had for some time desired to sell coal to LTV, and opined that it was this desire that motivated Massey's acquisition of Wellmore, and further motivated Massey to eliminate the Harman Companies as its competitors via the destruction of those companies.

¹³Massey made these demands notwithstanding its knowledge that LTV had historically demonstrated a preference for multiple suppliers and had not entered multi-year coal supply contracts. Additionally, the firm price for its coal that Massey quoted to LTV represented "a handsome improvement" over the prices at which Massey had been selling its coal.

by letter stating that if LTV did in fact close its Pittsburgh plant, then Wellmore anticipated a pro rata reduction in tonnage under the *force majeure* clause of the 1997 CSA.

Subsequent to Wellmore's August 5th letter, Massey entered into negotiations with the Harman Companies for the purchase of the Harman Mine. During the course of these negotiations, confidential information regarding the Harman Mine's operations, including its desire to eventually mine adjoining Pittston reserves,¹⁴ as well as confidential information pertaining to the finances of the Harman Companies and of Mr. Caperton, personally, was shared with Massey. The Harman Companies also expressed to Massey their disagreement that the LTV closure of its Pittsburgh coke plant constituted a *force majeure* event.

Thereafter, on December 1, 1997, Wellmore, at Massey's direction, declared *force majeure* based on LTV's closure of its Pittsburgh coke plant, and advised the Harman Companies that it would purchase only 205,707 tons of the 573,000 minimum tons of coal required under the 1997 CSA. According to the express findings of the circuit court on this point,

[o]nly after Massey's marketing efforts caused the loss of LTV's business did Massey direct Wellmore to declare "force majeure" against Harman, a declaration which Massey knew would put Harman out of business. Massey acknowledged Wellmore was readily able to purchase and sell the Harman coal, but instead chose to have Wellmore declare "force majeure" based upon a cost benefit analysis Massey performed which indicated that it

¹⁴See *supra* note 6.

would increase its profits by doing so. Furthermore, before Massey directed the declaration of “force majeure”, Massey concealed the fact that the LTV business was lost and Massey delayed Wellmore’s termination of Harman’s contract until late in the year, knowing it would be virtually impossible for Harman to find alternate buyers for its coal at that point in time. Once Wellmore suddenly stopped purchasing Harman’s output, Harman had no ability to stay in business. In the meantime, Massey sold Wellmore.

Massey continued in negotiations with the Harman Companies and Mr. Caperton for Massey’s purchase of the Harman Mine, and the parties agreed to close the transaction on January 31, 1998. However, Massey delayed and, as the circuit court found, “ultimately collapsed the transaction in such a manner so as to increase [the Harman Companies’] financial distress.”¹⁵ In addition, Massey utilized the confidential information it had obtained from the Harman Companies to take further actions, such as purchasing a narrow band of the Pittston coal reserves surrounding the Harman Mine in order to make the Harman Mine unattractive to others and thereby decrease its value. During the negotiations for the sale of the Harman Mine to Massey, Massey had also learned that Mr. Caperton had personally guaranteed a number of the Harman Companies’ obligations.¹⁶ Subsequently, the

¹⁵According to testimony presented at trial, during the negotiations of Massey’s potential purchase of the Harman Mine, Massey represented that it would assume the Harman coal reserves lease from Penn Virginia “as-is.” However, just prior to the scheduled closing of Massey’s purchase of the Harman Mine, Massey demanded changes to numerous material terms of the Harman Companies’ lease agreement with Penn Virginia. Massey and Penn Virginia could not agree on terms; therefore, Massey’s purchase of the Harman Mine was never completed.

¹⁶Mr. Caperton had personal obligations to Inspiration Coal (now known as Terra Industries), Senstar Financial, Grundy National Bank, and Vision Financial, among
(continued...)

Harman Companies filed for bankruptcy.

Thereafter, in May 1998, Harman Mining and Sovereign sued Wellmore in the Circuit Court of Buchanan County, Virginia, alleging causes of action for breach of contract and for breach of the covenant of good faith and fair dealing arising from Wellmore's declaration of *force majeure*. However, Harman Mining and Sovereign voluntarily withdrew their tort claim prior to trial. Following trial on the contract claim, a jury found in favor of Harman Mining and Sovereign and awarded \$6 million in damages.¹⁷

II.

PROCEDURAL HISTORY

Shortly after the Virginia action was filed, on October 29, 1998, Harman Development, Harman Mining, Sovereign and Mr. Caperton, individually, filed the instant action in the Circuit Court of Boone County, West Virginia, against A.T. Massey Coal Company, Inc., Elk Run Coal Company, Inc., Independence Coal Company, Inc., Mar Fork Coal Company, Inc., Performance Coal Company, and Massey Coal Sales Company, Inc.

¹⁶(...continued)

others. The circuit court expressly found that many of the steps Massey took were directed at Mr. Caperton personally, and that Mr. Caperton had relied to his detriment on numerous false representations made by Massey. One example of such false representations made by Massey was that it lead Mr. Caperton to believe that it intended to close its purchase of the Harman Mine on January 31, 1998, when, in fact, Massey had already determined not to close the transaction.

¹⁷Wellmore appealed the verdict to the Supreme Court of Virginia, however the appeal was refused on technical grounds. *See Wellmore Coal Corp. v. Harman Mining Corp.*, 264 Va. 279, 568 S.E.2d 671 (2002).

(hereinafter collectively referred to as “the Massey Defendants”).¹⁸ The first amended complaint in this action was filed on December 10, 1998, and asserted claims of tortious interference with existing contractual relations, tortious interference with prospective contractual relations, fraudulent misrepresentation, civil conspiracy, negligent misrepresentation, and punitive damages. Though numerous pre-trial motions were filed in the underlying action, one in particular is relevant to our resolution of this matter: in December 1998, the Massey Defendants filed a motion to dismiss. In their memorandum in support of the motion, the Massey Defendants argued, *inter alia*, that the forum-selection clause of the 1997 CSA required this action to be filed in Buchanan County, Virginia. The circuit court denied the Massey Defendants’ motion to dismiss.

Ultimately, only three of the theories of liability asserted in this action were presented to the jury for a verdict:¹⁹ tortious interference, fraudulent misrepresentation and fraudulent concealment. On August 1, 2002, the jury found in favor of all plaintiffs on all three grounds and returned a verdict, including punitive damages, of \$50,038,406.00. On August 30, 2002, the Massey Defendants filed a motion seeking judgment as a matter of law, a new trial, or, in the alternative, remittitur. Following a lengthy delay, by order entered March 17, 2005, the circuit court denied the post-trial motions. An appeal to this Court

¹⁸Elk Run Coal Company, Inc., Independence Coal Company, Inc., Mar Fork Coal Company, Inc., Performance Coal Company, and Massey Coal Sales Company, Inc., are all subsidiaries of A.T. Massey Coal Company, Inc.

¹⁹The punitive damages claim was presented also.

followed.²⁰

On November 21, 2007, this Court handed down its written opinion reversing the judgment of the circuit court and remanding for entry of an order dismissing with prejudice the case against the Massey Defendants.²¹ Subsequently, two of the justices who had participated in deciding the appeal voluntarily disqualified themselves, two circuit court judges were designated to sit on this Court by temporary assignment for the purpose of deciding the case on rehearing, and the November 21, 2007, opinion of the Court was vacated. The case was submitted on rehearing on March 12, 2008, and the Court's opinion, again reversing the judgment of the circuit court and remanding for entry of an order dismissing with prejudice the case against the Massey Defendants, was filed on April 3, 2008.²²

Thereafter, Mr. Caperton and the Harman Companies filed a petition for writ

²⁰There were additional delays in this case involving the trial transcript. The circuit court certified the transcript on August 25, 2006. The appeal was then filed on October 24, 2006.

²¹The justices who were sitting on the Court and initially participated in the decision of this case were: Chief Justice Robin Jean Davis, Justice Larry V. Starcher, Justice Elliott E. Maynard, Justice Joseph P. Albright, and Justice Brent D. Benjamin. Justices Starcher and Albright dissented from the decision of the Court.

²²The justices who participated in the decision of this case on rehearing were: Chief Justice Brent D. Benjamin, Justice Robin Jean Davis, Justice Joseph P. Albright, Judge Donald H. Cookman, sitting by temporary assignment, and Judge Fred L. Fox, II, sitting by temporary assignment. Justice Albright and Judge Cookman dissented from the decision of the Court.

of certiorari in the United States Supreme Court asserting that acting Chief Justice Benjamin's refusal to grant their motions seeking his disqualification amounted to a violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.²³ The Supreme Court granted the petition on November 14, 2008. Thereafter, by a five-four decision,²⁴ the Supreme Court reversed and remanded the case concluding that Justice Benjamin's participation in the decision of this case created an "unconstitutional 'potential for bias.'" *Caperton v. A.T. Massey Coal Co., Inc.*, ___ US ___, ___, 129 S. Ct. 2252, 2262, 173 L. Ed. 2d 1208 (2009) (see opinion for factual details regarding the issue of Justice Benjamin's disqualification).

Following the reversal of this case by the United States Supreme Court, the Harman Companies and Mr. Caperton filed in this Court motions seeking, in part, "affirmance of judgment or, in the alternative, for reconsideration and denial of the petition for appeal."²⁵ This Court denied the motions and, on September 9, 2009, oral argument was

²³Prior to the filing of the petition for appeal in this matter, Mr. Caperton filed a motion seeking Justice Benjamin's disqualification, in part, on due process grounds. After the petition was filed, Mr. Caperton and the Harman Companies filed additional motions seeking Justice Benjamin's disqualification on October 19, 2005, January 17, 2008, and March 28, 2008.

²⁴The dissenting justices were: Chief Justice John G. Roberts, Jr., Justice Antonin Scalia, Justice Clarence Thomas, and Justice Samuel A. Alito, Jr.

²⁵The motions by Mr. Caperton and the Harman Companies additionally sought to have this Court order the Massey Defendants to post an appeal bond in the amount of eighty-five million dollars. In denying the motion, this Court, in its Order dated September 3, 2009, noted that "the Order of the circuit court entered July 17, 2003, [which directed the Massey Defendants to post surety in the amount of Fifty-Five Million Dollars,] remains in (continued...)

heard anew in this matter.²⁶

III.

STANDARD OF REVIEW

The dispositive issue in this case is whether the circuit court erred in denying the Massey Defendants' motion to dismiss on the issue of the forum-selection clause. "Courts generally consider a motion to dismiss, based upon a forum selection clause, as a motion to dismiss for improper venue." Franklin D. Cleckley, Robin J. Davis, & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 12(b)(3)[5], at 376 (2d ed. 2006). "This Court's review of a trial court's decision on a motion to dismiss for improper venue is for abuse of discretion." Syl. pt. 1, *United Bank, Inc. v. Blosser*, 218 W. Va. 378, 624 S.E.2d 815 (2005).

In deciding this issue, we must first determine the applicability and enforceability of the forum-selection clause at issue. In this regard, we now hold that "[o]ur review of the applicability and enforceability of [a] forum[-]selection clause is *de novo*." *Hugel v. Corporation of Lloyd's*, 999 F.2d 206, 207 (7th Cir. 1993) (citing *Northwestern*

²⁵(...continued)

full force and effect." Accordingly, this Court directed the appellants to "comply with the circuit court's order forthwith."

²⁶The justices currently sitting on the Court to decide the instant case are: Acting Chief Justice Robin Jean Davis, Justice Margaret L. Workman, Justice Menis E. Ketchum, Justice Thomas E. McHugh, and Senior Status Judge James O. Holliday, sitting by temporary assignment.

Nat'l Ins. Co. v. Donovan, 916 F.2d 372, 375 (7th Cir.1990); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 956 (10th Cir. 1992)). Cf. Syllabus point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995) (“Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.”).

With due consideration for these standards, we proceed to our analysis of this case.

IV.

DISCUSSION

A. Motion for Affirmance or Reconsideration of Petition for Appeal

Prior to reaching the merits of this appeal, we wish to address an issue that developed as a result of the disqualification of Justice Benjamin from this case. In motions filled in this Court following the reversal of the case by the United States Supreme Court, the Harman Companies and Mr. Caperton sought, in relevant part, “affirmance of judgment or, in the alternative, for reconsideration and denial of the petition for appeal.” Although this Court denied the motions by order entered September 3, 2009, we nevertheless wish to discuss our grounds for so doing, and to establish a clear procedure to be applied in the event that similar circumstances arise in the future.

In their motions, Mr. Caperton and the Harman Companies argued, in part, that

the jury verdict should be affirmed, because the disqualification ruling by the United States Supreme Court left the case with a non-majority split vote of two-two. In denying the motion, this Court explained in its Order of September 3, 2009, that

by [asking this Court to] retroactively impose[] a tie vote, the Corporate Appellees [Mr. Caperton and the Harman Companies], in a manner contrary to well-accepted principles of appellate procedure, seek . . . to constrain this Court's discretion to proceed on remand. Plainly stated, this Court has not yet reached a final decision in this matter and therefore cannot be equally divided.

In addition, we note that the motion was properly denied based upon the reasoning used by the United States Supreme Court in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 106 S. Ct. 1580, 89 L. Ed.2d 823 (1986).

In *Aetna Life*, the United States Supreme Court addressed the issue of whether an Alabama Supreme Court Justice should have recused himself from the case. The United States Supreme Court concluded that the justice was disqualified and should have recused himself. As a result of the disqualification of the justice, the vote in the case became four-four. The United States Supreme Court determined that the opinion by the Alabama Supreme Court could not survive because of the four-four decision. Consequently, the Alabama Supreme Court decision was vacated and the case was remanded for further proceedings. The opinion in *Aetna Life* cited the following procedure that was used by Alabama when a justice was disqualified:

If Justice Embry had disqualified himself, the decision of the trial court would not have been affirmed by a vote of an

equally divided court. Rather, Ala. Code § 12-2-14 (1975), which authorizes the appointment of special justices in the event disqualifications result in an even-numbered court which is evenly divided on a matter, would presumably have come into play.

Aetna Life, 475 U.S. at 828 n.5, 106 S. Ct. at 1589 n.5. After the case was remanded, the matter was reheard by the Alabama Supreme Court and that Court once again affirmed the verdict for the plaintiff. *See Aetna Life Ins. Co. v. Lavoie*, 505 So.2d 1050 (Ala. 1987).

Thus, *Aetna Life* stands for the proposition that, when the United States Supreme Court disqualifies a state court justice, and such disqualification leaves an equally divided state court, the case must be remanded for appointment of a new judge as provided by state law.

West Virginia does not have a statute that expressly addresses the issue of the disqualification of a justice. However, the disqualification issue is addressed in our state constitution and rules of appellate procedure. Under Art. VIII, § 3 of the West Virginia Constitution, it is stated that “[w]hen any justice is temporarily disqualified or unable to serve, the chief justice may assign a judge of a circuit court or of an intermediate appellate court to serve from time to time in his stead.” It is further provided in Rule 29(g) of the Rules of Appellate Procedure that:

When any justice shall disqualify himself or herself pursuant to the provisions of this rule, the chief justice or acting chief justice may, in his or her discretion, assign a senior justice, senior judge, or circuit judge to service for the disqualified

justice. The chief justice shall promptly notify the Clerk of the Supreme Court of his or her decision regarding the necessity of the appointment of a substitute justice and the Clerk of the Supreme Court shall promptly notify the other justices and the parties of such decision.

Thus, in accordance with our state constitution, our rules of appellate procedure, and the United States Supreme Court's decision in *Aetna Life Ins. Co. v. Lavoie*, we now expressly hold that, where the disqualification of a Justice of this Court, either by decision of the United States Supreme Court or by his or her personal decision made after an opinion has been issued by this Court, renders the decision of this Court a tie vote, then the Chief Justice or Acting Chief Justice of this Court may, in his or her discretion, assign a senior justice, senior judge, or circuit judge to serve in the place of the disqualified justice pursuant to Art. VIII, § 3 of the West Virginia Constitution and Rule 29(g) of the West Virginia Rules of Appellate Procedure.

The motions by Mr. Caperton and the Harman Companies additionally asked, in the alternative, that this Court reconsider its prior decision to grant Massey's petition for appeal. This motion was also denied in this Court's order of September 3, 2009, wherein the Court observed that "[b]ecause it lacks specific directions about how to proceed, the opinion of the Supreme Court of the United States constitutes a general--rather than a limited--remand." (Citing Syl. Pt. 2, in part, *State ex rel Frazier & Oxley v. Cummings*, 214 W. Va. 802, 591 S.E.2d 728 (2003) ("Limited remands explicitly outline the issues to be addressed by the [lower] court and create a narrow framework within which to [lower] court must

operate. General remands, in contract, give [lower] courts authority to address all matters so long as remaining consistent with the remand.”). This Court went on to explain that, “[e]ven if this Court were obliged to reconsider whether the petition for appeal should be granted, it is plain from the record that this case presents several points that are proper for the consideration of this Court, and that the appeal was properly allowed.” (Citing W. Va. Const. Art. VIII, sec. 4).

B. Forum-Selection Clause

Although numerous issues have been raised on appeal in this case, we find that the instant matter may be resolved on the issue of the forum-selection clause contained in the 1997 CSA between Sovereign Coal Sales, Inc., Wellmore Coal Corporation, and Harman Mining Corporation.

The 1997 CSA between Sovereign, Wellmore, and Harman Mining provided that the “[a]greement, in all respects, shall be governed, construed and enforced in accordance with the substantive laws of the Commonwealth of Virginia. All actions brought in connection with this Agreement shall be filed in and decided by the Circuit Court of Buchanan County, Virginia. . . .” In the proceeding below, the Massey Defendants filed a motion to dismiss alleging, in relevant part, that the forum-selection clause in the 1997 CSA required that any action related to that agreement be brought in the Circuit Court of Buchanan County, Virginia. Accordingly, the Massey Defendants argued that the action was improperly before the Circuit Court of Boone County, West Virginia, and that the instant

action should therefore be dismissed.²⁷ The circuit court denied the motion to dismiss.

This case presents the first opportunity for this Court to address substantive issues involving forum-selection clauses. By way of definition, it has been recognized that “[a] ‘forum selection’ provision in a contract designates a particular state or court as the jurisdiction in which the parties will litigate disputes arising out of the contract and their contractual relationship.” 17A Am. Jur. 2d *Contracts* § 259, at 255 (2004) (footnote omitted). While forum-selection clauses historically were disfavored, such is no longer the case, so long as the clause is fair and reasonable:

The right of an injured party to legal redress is jealously guarded by the courts. Formerly, no agreement confining the right of a party to sue in a particular court or tribunal or in the courts or tribunals of a certain jurisdiction, or to determine the venue of a suit in such a way as to deprive the defendant of his statutory privileges as to place of trial was enforced, unless perhaps where the agreement was made after the cause of action had arisen and was part of a fair compromise. A minority of courts still follow this older rule.

During the past two decades, the rules governing the validity of various “forum selection” clauses have been relaxed considerably, the courts following a pattern similar to that which has already been discussed in connection with arbitration clauses. Thus, while it remains true today that a clause or provision *unreasonably or improperly* attempting to deprive a court of its jurisdiction will not be enforced, the modern trend is to respect the enforceability of contracts containing clauses limiting judicial jurisdiction, if there is nothing unfair or unreasonable about them. This trend is directly traceable to the

²⁷“A motion to dismiss is the proper procedural mechanism for enforcing a forum-selection clause that a party to the agreement has violated in filing suit.” *Deep Water Slender Wells, Ltd. v. Shell Int’l Exploration & Prod., Inc.*, 234 S.W.3d 679, 687 (Tex. App. 2007) (citations omitted).

landmark case of *M/S Bremen v Zapata Off-Shore Co.*, [407 U.S. 1, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972)], in which the United States Supreme Court upheld the validity of a freely negotiated forum selection clause in a commercial contract between an American firm and a German concern, which specified that any dispute must be determined by the English courts. . . .

7 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 15:15, at 290-301 (4th ed. 1997) (footnotes omitted). *See also* 17A Am. Jur. 2d *Contracts* § 259, at 255-56 (“While there is contrary authority, generally modern courts will enforce forum-selection clauses entered into by parties to a contract provided that the clauses are not unfair, unreasonable, or unjust under [the] circumstances.” (footnotes omitted)).

Although this Court has not had occasion to address substantive issues involving forum-selection clauses, we have previously indicated our general approval of forum-selection clauses by noting that they are not contrary to public policy:

Unquestionably, forum selection clauses are not contrary to public policy in and of themselves for they are sanctioned in commercial sales agreements under W. Va. Code § 46-1-105(2). Although an early case in our jurisprudence held void a clause in a stock certificate requiring that stockholders bring suit in New York, *Savage v. People’s Building, Loan and Savings Association*, 45 W. Va. 275, 31 S.E. 991 (1898), later cases have sanctioned, at least implicitly, forum selection clauses. *Axelrod v. Premier Photo Service, Inc.*, 154 W. Va. 137, 173 S.E.2d 383 (1970). *Board of Education v. W. Harley Miller, Inc.*, 159 W. Va. 120, 221 S.E.2d 882 (1975). . . .

As the Federal court observed, West Virginia appears not to subscribe to the rule that choice of forum clauses are void per se. “Rather the rule of most jurisdictions and the rule that this Court believes that West Virginia should and would adopt is that such clauses will be enforced only when found to be reasonable

and just”. *Leasewell, Ltd. v. Jake Shelton Ford Inc.*, 423 F. Supp. 1011, 1015 (S.D.W. Va. 1976). *See also, Kolendo v. Jarell, Inc.*, 489 F. Supp. 983 (S.D.W. Va. 1980).

General Elec. Co. v. Keyser, 166 W. Va. 456, 461-62 n.2, 275 S.E.2d 289, 292-93 n.2 (1981). *See also* Franklin D. Cleckley, Robin J. Davis, & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 12(b)(3)[5], at 376-77 (2d ed. 2006) (hereinafter referred to as “*Litigation Handbook*”) (“The Supreme Court has indicated in passing that forum selection clauses are not contrary to public policy.” (citing *General Electric Co. v. Keyser*)).

Having found no impediment to the enforcement of forum-selection clauses in general, we now must endeavor to specifically determine whether the forum-selection clause of the 1997 CSA should have been enforced in the instant case.

In *Phillips v. Audio Active Limited*, 494 F.3d 378 (2d Cir. 2007), the United States Court of Appeals for the Second Circuit articulated a four-part test for determining whether a claim should be dismissed based upon a forum-selection clause. We find this test supported by reason and logic, and by the manner in which such cases have been resolved in other courts; therefore, we now hold that

[d]etermining whether to dismiss a claim based on a forum[-]selection clause involves a four-part analysis. The first inquiry is whether the clause was reasonably communicated to the party resisting enforcement. . . . The second step requires [classification of] the clause as mandatory or permissive, *i.e.*, . . . whether the parties are *required* to bring any dispute to the designated forum or [are] simply *permitted* to do so. [The

third query] asks whether the claims and parties involved in the suit are subject to the forum selection clause. . . .

If the [forum-selection] clause was communicated to the resisting party, has mandatory force and covers the claims and parties involved in the dispute, it is presumptively enforceable. . . . The fourth, and final, step is to ascertain whether the resisting party has rebutted the presumption of enforceability by making a sufficiently strong showing that “enforcement would be unreasonable [and] unjust, or that the clause was invalid for such reasons as fraud or overreaching.”

Phillips, 494 F.3d at 383-84 (internal citations omitted) (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15, 92 S. Ct. 1907, 1916, 32 L. Ed. 2d 513 (1972)). See also *Dexter Axle Co. v. Baan USA, Inc.*, 833 N.E.2d 43, 49 (Ind. Ct. App. 2005) (“Having found that the forum selection clause in the Consulting Agreement is valid, binding, and enforceable, we must next consider whether it applies to any or all of Dexter’s claims against Baan.”); *Deep Water Slender Wells, Ltd. v. Shell Int’l Exploration & Prod., Inc.*, 234 S.W.3d 679, 687 (Tex. App. 2007) (“In deciding whether to enforce a mandatory forum-selection clause, courts must determine whether the claims in the case at hand fall within the scope of the forum-selection clause and whether the court should enforce the clause. In addition to resolving issues of scope and enforceability, courts also may have to decide issues as to whether nonsignatories to the contract can enforce the forum-selection clause contained therein.”). We now follow this analysis to ascertain whether the instant case should have been dismissed pursuant to the forum selection clause.

1. Reasonably Communicated. The first question we must answer is whether the forum-selection clause was reasonably communicated to Mr. Caperton and the Harman

Companies. “Although a strong presumption of enforceability attaches to forum selection clauses, *see M/S Bremen*, 407 U.S. at 15, 92 S. Ct. 1907, “[t]he legal effect of a forum-selection clause depends in the first instance upon whether its existence was reasonably communicated to the plaintiff” *Electroplated Metal Solutions, Inc. v. American Servs., Inc.*, 500 F. Supp. 2d 974, 976 (N.D. Ill. 2007) (internal citation omitted) (quoting *Effron v. Sun Line Cruises, Inc.*, 67 F.3d 7, 9 (2d Cir. 1995)). *See also* 17A C.J.S. *Contracts* § 237, at 211 (1999) (“A forum selection clause is unenforceable as to a plaintiff who did not have sufficient notice of the forum selection clause prior to entering the contract.”).

This prong of the analysis is easily resolved as Mr. Caperton and the Harman Companies have not argued that the forum-selection clause was not reasonably communicated to them. Furthermore, Sovereign and Harman Mining were parties to the agreement, and Mr. Caperton signed the contract in his capacity as president of Sovereign. Therefore, these parties cannot claim ignorance of the plainly worded forum-selection clause, which “clearly convey[ed] to any reader that any action regarding the [CSA] must be brought in a specific court, and the location of that court [was] readily ascertainable” *Klotz v. Xerox Corp.*, 519 F. Supp. 2d 430, 433 (2007). Moreover, though Harman Development, the parent company of Sovereign and Harman Mining, was not a party to the 1997 CSA, Mr. Caperton is the sole owner of Harman Development. Since Mr. Caperton had knowledge of the clause, Harman Development is deemed to have knowledge of the clause. *See Clark v. Milam*, 192 W. Va. 398, 402, 452 S.E.2d 714, 718 (1994) (“Generally, a corporation

‘knows,’ or ‘discovers,’ what its officers and directors know.”). Thus, we find sufficient evidence in the record of this case to establish that the forum-selection clause was reasonably communicated to those who now resist its application.

2. Mandatory or Permissive. The second step in our analysis is to determine whether the forum-selection clause is mandatory or permissive. It has been widely recognized, and we now expressly hold that “[t]here are two types of forum[-]selection clauses: mandatory and permissive. A mandatory forum[-]selection clause contains clear language indicating that jurisdiction is appropriate only in a designated forum. A permissive forum[-]selection clause authorizes litigation in a designated forum, but does not prohibit litigation elsewhere.” *Litigation Handbook* § 12(b)(3)[5], at 376 (footnote omitted) (citing *K.&V. Scientific Co., Inc. v. Bayerische Motoren Werke Aktiengesellschaft* (“BMW”), 314 F.3d 494 (10th Cir. 2002)). *See also* *Weisser v. PNC Bank, N.A.*, 967 So. 2d 327, 330 (Fla. Dist. Ct. App. 2007) (“Permissive [forum selection] clauses constitute nothing more than a consent to jurisdiction and venue in the named forum and do not exclude jurisdiction or venue in any other forum.’ . . . In contrast, mandatory forum selection clauses provide ‘for a mandatory and exclusive place for future litigation.’” (citations omitted)); *Great N. Ins. Co. v. Constab Polymer-Chemie GmbH & Co.*, No. 5:01-CV-0882 (NAM) (GJD), 2007 WL 2891981, at *8 (N.D.N.Y. 2007) (“A mandatory forum selection clause grants exclusive jurisdiction to a selected forum and should control absent a strong showing that it should be set aside. . . . In contrast, ‘a permissive forum selection clause indicates the contracting parties’ consent to resolve their dispute in a given forum, but does not require the dispute to

be resolved in that forum. . . .” (internal citations omitted)).

Resolution of the question of whether a forum-selection clause is mandatory or permissive requires scrutiny of the particular language used.

In determining whether a forum selection clause is mandatory or permissive, the language of the clause must be examined. For example, in *Quinones*, the Florida Supreme Court found that the forum selection clause was permissive, not mandatory, because it provided that the creditor “**may**” institute legal proceedings in specified courts, not that it “**shall**” do so. [*Quinones v. Swiss Bank Corp. (Overseas)*, S.A., 509 So. 2d 273, 275 (Fla. 1987)] (emphasis added) “Conversely forum selection clauses which state or clearly indicate that any litigation **must** or **shall** be initiated in a specified forum are mandatory.” *Shoppes Ltd. [P’ship v. Conn]*, 829 So. 2d 356, 358 (Fla. Dist. Ct. App. 2002)] (emphasis added) (citing *Mgmt. Computer Controls, Inc. v. Charles Perry Constr., Inc.*, 743 So. 2d 627 (Fla. 1st DCA 1999)).

Weisser, 967 So. 2d at 330. The *Weisser* Court also cited *Regal Kitchens, Inc. v. O’Connor & Taylor Condominium Construction, Inc.*, 894 So. 2d 288, 290 (Fla. Dist. Ct. App. 2005), wherein the court examined a forum-selection clause which stated that “[a]ny litigation concerning this contract shall be governed by the law of the State of Florida, *with proper venue in Palm Beach County.*” (Emphasis added). The *Regal Kitchens* Court observed that the clause was mandatory as to the law to be applied, but permissive as to the forum, commenting that,

[i]n the instant case, although the venue clause unequivocally states that Florida law shall apply to any litigation of the subcontract, it lacks mandatory language or words of exclusivity to show that venue is proper only in Palm Beach County. *See Shoppes Ltd. P’ship v. Conn.*, 829 So. 2d at 357-58. That is to say, this clause does not unequivocally

mandate that a controversy or dispute be litigated in Palm Beach County, nor does it waive any other territorial jurisdiction. The language merely allows a party to file suit in Palm Beach County.

894 So. 2d at 291-92.

Thus, to be enforced as mandatory, a forum-selection clause must do more than simply mention or list a jurisdiction; in addition, it must either specify venue in mandatory language, or contain other language demonstrating the parties' intent to make jurisdiction exclusive.

A forum selection clause is mandatory if jurisdiction and venue are specified with mandatory or exclusive language. *John Boutari & Sons, Wine & Spirits, S.A. v. Attiki Imp. & Distribs., Inc.*, 22 F.3d 51, 53 (2d Cir. 1994). In *Boutari*, the Second Circuit held that “[t]he general rule in cases containing forum selection clauses is that [w]hen only jurisdiction is specified the clause will generally not be enforced without some further language indicating the parties’ intent to make jurisdiction exclusive.” *Boutari*, 22 F.3d at 52

Great N. Ins. Co., 2007 WL 2891981, at *8 (additional citations omitted). See also *K & V Scientific Co., Inc. v. Bayerische Motoren Werke Aktiengesellschaft (“BMW”)*, 314 F.3d 494, 499 (10th Cir. 2002) (“[W]here venue is specified [in a forum-selection clause] with mandatory or obligatory language, the clause will be enforced; where only jurisdiction is specified [in a forum-selection clause], the clause will generally not be enforced unless there is some further language indicating the parties’ intent to make venue exclusive.” (quoting *Paper Express, Ltd. v. Pfankuch Maschinen GmbH*, 972 F.2d 753, 757 (7th Cir.1992))). See also *Printing Servs. of Greensboro, Inc. v. American Capital Group, Inc.*, 637 S.E.2d 230, 232 (N.C. Ct. App. 2006) (“[T]he general rule is when a jurisdiction is specified in a

provision of contract, the provision generally will not be enforced as a mandatory selection clause without some further language that indicates the parties' intent to make jurisdiction exclusive. Indeed, mandatory forum selection clauses recognized by our appellate courts have contained words such as "exclusive" or "sole" or "only" which indicate that the contracting parties intended to make jurisdiction exclusive.'" (quoting *Mark Group Int'l, Inc. v. Still*, 566 S.E.2d 160, 161 (N.C. Ct. App. 2002))).

An example of a case illustrating a forum-selection clause that used mandatory language is *Docksider, Ltd. v. Sea Technology, Ltd.*, 875 F.2d 762 (9th Cir. 1989). In that case, the plaintiff entered into a contract with the defendant to distribute equipment manufactured by the defendant. The contract contained a forum-selection clause that included the following pertinent language: "Licensee hereby agrees and consents to the jurisdiction of the courts of the State of Virginia. Venue of any action brought hereunder shall be deemed to be in Gloucester County, Virginia." *Docksider*, 875 F.2d at 763. A dispute arose over the contract that resulted in the plaintiff filing an action against the defendant in a federal district court in California. The district court dismissed the action, finding that the forum-selection clause required the case be filed in a Virginia court. The plaintiff appealed, arguing that the forum-selection clause was permissive, not mandatory. The Court of Appeals for the Ninth Circuit disagreed with the plaintiff, ruling as follows:

The critical language in [the clause] is the final sentence: "Venue of any action brought hereunder shall be deemed to be in Gloucester County, Virginia." The district judge concluded that this language represented the parties' intent to pursue any litigation that arose only in Virginia. [Plaintiff] contends that

this interpretation is erroneous because the contractual language does not contain any express mandatory term such as “exclusively” that would indicate the parties’ intent to vest Virginia with exclusive jurisdiction. [Plaintiff] has cited numerous cases as support for this position, relying principally on *Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, 817 F.2d 75 (9th Cir. 1987).

....

Hunt Wesson is distinguishable because the forum selection clause underlying this action contains the additional sentence stating that “[v]enue of any action brought hereunder shall be deemed to be in . . . Virginia.” This language requires enforcement of the clause because [plaintiff] not only consented to the jurisdiction of the state courts of Virginia, but further agreed by mandatory language that the venue for all actions arising out of the license agreement would be Gloucester County, Virginia. This mandatory language makes clear that venue, the place of suit, lies exclusively in the designated county. Thus, whether or not several states might otherwise have jurisdiction over actions stemming from the agreement, all actions must be filed and prosecuted in Virginia.

Docksider, 875 F.2d at 763-64.

In accordance with the foregoing authorities, we now hold that the determination of whether a forum-selection clause is mandatory or permissive requires an examination of the particular language contained therein. If jurisdiction is specified with mandatory terms such as “shall,”²⁸ or exclusive terms such as “sole,” “only,” or “exclusive,”

²⁸This Court has often recognized that “[i]t is well established that the word “shall,” in the absence of language . . . showing a contrary intent . . . , should be afforded a mandatory connotation.” Syl. pt. 1, in part, *E.H. v. Matin*, 201 W. Va. 463, 498 S.E.2d 35 (1997) (internal citation omitted). See also *State v. Allen*, 208 W. Va. 144, 153, 539 S.E.2d 87, 96 (1999) (“Generally, ‘shall’ commands a mandatory connotation and denotes that the described behavior is directory, rather than discretionary.” (citations omitted)).

the clause will be enforced as a mandatory forum-selection clause. However, if jurisdiction is not modified by mandatory or exclusive language, the clause will be deemed permissive only.

Turning to the instant case, the forum-selection clause utilized mandatory language that identified the jurisdiction wherein disputes would be tried: “[a]ll actions brought in connection with this Agreement *shall* be filed in and decided by the Circuit Court of Buchanan County, Virginia.” (Emphasis added). Accordingly, we are presented with a mandatory forum-selection clause. *See Ex parte Bad Toys Holdings, Inc.*, 958 So. 2d 852, 856 (Ala. 2006) (“The forum-selection clause in the purchase agreement provides that ‘[v]enue for any legal action which may be brought hereunder *shall* be deemed to lie in Sullivan County, Tennessee’ (emphasis added). The . . . use of the word ‘shall’ in the forum-selection clause makes the clause mandatory, not permissive.”); *Town of Homer v. United Healthcare of Louisiana, Inc.*, 948 So. 2d 1163, 1167 (La. Ct. App. 2007) (“We find the forum selection clause at issue to be clear and explicit. The clause expressly states that the proper venue for **any legal action shall** be East Baton Rouge Parish. There is no ambiguity in this mandatory provision.”); *Polk County Recreational Ass’n v. Susquehanna Patriot Commercial Leasing Co., Inc.*, 734 N.W.2d 750, 758 (Neb. 2007) (“The forum selection clause in the Thornridge lease provides that any action concerning the lease ‘shall be’ brought in Pennsylvania. We read this forum selection clause to be a mandatory clause”); *General Elec. Co. v. G. Siempelkamp GmbH & Co.*, 29 F.3d 1095, 1099 (6th Cir. 1994) (“Because the clause states that ‘all’ disputes ‘shall’ be at Siempelkamp’s

principal place of business, it selects German court jurisdiction exclusively and is mandatory.”). Having determined that the forum-selection clause at issue in this case is a mandatory clause, we must now determine whether the claims and parties involved in the suit are governed by said clause.

3. Claims and Parties. The third part of our analysis is to determine whether the claims and parties involved in the suit are governed by the forum-selection clause. We address these questions separately.

a. Are the claims asserted in the instant suit subject to the forum-selection clause?²⁹ Mr. Caperton and the Harman Companies have argued that the claims asserted in this action are not governed by the forum-selection clause because they are tort, as opposed to contract, claims. We disagree.

It has been recognized that,

[w]hen a party seeks to enforce a mandatory forum-selection clause, a court must determine whether the

²⁹At the outset of this issue, we point out that, because the forum-selection clause issue was addressed by the circuit court in the context of the Massey Defendants’ motion to dismiss, this Court is constrained to address the claims as they were asserted in the amended complaint. This is because the amended complaint represents the record that was before the circuit court at the time of its ruling on the Massey Defendants’ motion to dismiss. Although facts pertaining to the claims asserted in the amended complaint were further developed during the course of the trial, such facts are not proper for our consideration on review of this issue. *See, e.g., Powderidge Unit Owners Ass’n v. Highland Props., Ltd.*, 196 W. Va. 692, 700, 474 S.E.2d 872, 880 (1996) (“To be clear, our review is limited to the record as it stood before the circuit court at the time of its ruling.”).

claims in question fall within the scope of that clause. . . . The court bases this determination on the language of the clause and the nature of the claims that are allegedly subject to the clause.

Deep Water Slender Wells, Ltd. v. Shell Int'l Exploration & Prod., Inc., 234 S.W.3d 679, 687-88 (Tex. App. 2007) (citing *Marinechance Shipping, Ltd. v. Sebastian*, 143 F.3d 216, 221-22 (5th Cir. 1998)). *See also Phillips v. Audio Active Ltd.*, 494 F.3d 378, 388 (2d Cir. 2007) (“[W]hen ascertaining the applicability of a contractual provision to particular claims, we examine the substance of those claims, shorn of their labels.”). Accordingly, we expressly hold that, to determine whether certain claims fall within the scope of a mandatory forum-selection clause, the deciding court must base its determination on the language of the clause and the nature of the claims that are allegedly subject to the clause.

Turning to the case at hand, we must first examine the language of the mandatory forum-selection clause at issue. Because the 1997 CSA expressly states that it “shall be . . . construed . . . in accordance with the substantive laws of the Commonwealth of Virginia,” we will scrutinize the language of the clause pursuant to Virginia law. Notably, under Virginia law, “[w]ritten contracts are construed as written, without adding terms that were not included by the parties. When the terms in a contract are plain and unambiguous, the contract is construed according to its plain meaning. The words that the parties used are normally given their usual, ordinary and popular meaning.” *Heron v. Transportation Cas. Ins. Co.*, 650 S.E.2d 699, 702 (Va. 2007).

The forum-selection clause of the 1997 CSA states in plain language that it

applies to “[a]ll actions brought in connection with this Agreement.” Due to the inclusion of the phrase “all actions,” we perceive no intent by the parties to this agreement to limit in any way the type of actions to which it applies. Thus, for example, it would apply equally to contract claims, tort claims and statutory claims, so long as such claims are “brought in connection with” the 1997 CSA.

Considering next the “usual, ordinary and popular meaning” of the phrase “in connection with,” we find the intended scope of the forum-selection clause to be quite broad. *Heron*, 650 S.E.2d at 702. The word “connection” in the context herein used, is generally understood to mean “[t]he condition of being related to something else by a bond of interdependence, causality, logical sequence, coherence, or the like; relation between things one of which is bound up with, or involved in another.” II *The Oxford English Dictionary* 838-39 (1970 re-issue). *See also* *Random House Webster’s Unabridged Dictionary* 431-32 (2d ed.1998) (defining “connection” in part as “association; relationship . . .”); *Webster’s Third New International Dictionary* 481 (1993) (defining “connection” in relevant part as “the state of being connected or linked . . . relationship or association in thought (as of cause and effect, logical sequence, mutual dependence or involvement)”). Thus, so long as the claims asserted in this action bear a logical relationship to the 1997 CSA, they fall within its scope, regardless of whether they sound in contract, tort, or some other area of the law.

Other courts considering forum-selection clauses that contained broad language such as that used in the instant clause have similarly determined that the clauses were not

intended to apply merely to breach of contract claims, but rather were intended to apply to other claims as well. For example, the United States Court of Appeals for the Second Circuit was asked to determine the scope of a forum-selection clause that stated: “any legal proceedings that may arise out of [the agreement] are to be brought in England.” *Phillips*, 494 F.3d at 382. In determining the meaning of “arise out of,” the court contrasted language such as “in connection with” as being more expansive: “[w]e do not understand the words ‘arise out of’ as encompassing all claims that have some possible relationship with the contract, including claims that may only ‘relate to,’ be ‘associated with,’ or ‘*arise in connection with*’ the contract.” *Id.*, 494 F.3d at 389 (emphasis added) (citations omitted). In a different case, the Second Circuit also rejected an interpretation of a forum-selection clause that utilized the phrase “in connection with” as applying only to breach of contract claims:

There is ample precedent that the scope of clauses similar to those at issue here is not restricted to pure breaches of the contracts containing the clauses. The Managing and Members’ Agent’s Agreements speak, . . . with respect to the forum selection clauses, in terms of submission for “all purposes of and *in connection with*” the agreements (emphasis added). In *Bense v. Interstate Battery System of America*, 683 F.2d 718, 720 (2d Cir.1982), we held that a forum selection clause that applied to “causes of action arising directly or indirectly from [the agreement]” covered federal antitrust actions. Similarly, the Supreme Court in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S. Ct. 2449, 41 L. Ed. 2d 270, *reh’g denied*, 419 U.S. 885, 95 S. Ct. 157, 42 L. Ed. 2d 129 (1974), held that controversies and claims “arising out of” a contract for the sale of a business covered securities violations related to that sale. *Id.*, 417 U.S. at 519-20, 94 S. Ct. at 2457. We find no substantive difference in the present context between the phrases “relating to,” “in connection with” or “arising from.” We therefore reject the [Appellants’] contention that only allegations of contractual

violations fall within the scope of the clauses.

Roby v. Corporation of Lloyd's, 996 F.2d 1353, 1361 (2d Cir. 1993).

Given the similarities between the phrases “in connection with” and “in relation to,” we also note that the Third Circuit has reasoned,

In this case, we must interpret the provision in the forum selection clause that gives the English courts exclusive jurisdiction over “any dispute arising . . . in relation to” the 1990 Agreement. The ordinary meaning of the phrase “arising in relation to” is simple. To say that a dispute “arise[s] . . . in relation to” the 1990 Agreement is to say that the origin of the dispute is related to that agreement, *i.e.*, that the origin of the dispute has some “logical or causal connection” to the 1990 Agreement. *Webster’s Third New International Dictionary*, 1916 (1971).

John Wyeth & Bro. Ltd. v. CIGNA Int’l Corp., 119 F.3d 1070, 1074 (3d Cir. 1997). *See also* *Klotz v. Xerox Corp.*, 519 F. Supp. 2d 430, 434 & n.4 (S.D.N.Y. 2007) (concluding that “[p]laintiff raises no challenge to the scope of the forum selection clause, nor could she, since the expansive language of the provision--covering ‘[a]ny action in connection with the Plan by an Employee’--plainly encompasses her claims”; and further commenting that “[p]laintiff’s state law tort and contract claims are also part of an ‘action in connection with the Plan’ and are covered by the clause” (footnote omitted)); *Doe v. Seacamp Assoc., Inc.*, 276 F. Supp. 2d 222, 227 (D. Mass. 2003) (“A review of the case law leads me to conclude that the tort claims, too, are covered by the forum selection clause. The forum selection clause was worded to indicate that it governed any claim related to or arising from a contract, the subject of which were the terms and conditions of John Doe’s enrollment at Seacamp.”);

Dexter Axle Co. v. Baan USA, Inc., 833 N.E.2d 43, 49 (Ind. Ct. App. 2005) (finding tort and statutory claims were subject to forum-selection clause).

Turning to the instant case, we note that the forum-selection clause issue was addressed below in the context of a motion to dismiss; therefore, we consider the claims as they were asserted in the amended complaint.³⁰ Notably, though, only three of the claims asserted in the amended complaint were ultimately presented to the jury for a verdict, indicating that there was insufficient evidence to support the remaining claims. Accordingly, in deciding whether the claims asserted below were “brought in connection with” the 1997 CSA, we will limit our consideration to only those three claims that ultimately went to the jury. Those three claims, all sounding in tort, were: (1) tortious interference; (2) fraudulent misrepresentation; and (3) fraudulent concealment. Based upon our review of these tort claims, we conclude that they were indeed “brought in connection with” the 1997 CSA.

All of the injuries alleged in connection with the three aforementioned tort claims flow directly from Wellmore’s declaration of *force majeure*, an event that is inextricably connected to the 1997 CSA. While the amended complaint methodically sets out numerous details of purported pre-*force majeure* wrongful conduct, no injury resulted from any of that alleged conduct without the declaration of *force majeure* under the 1997 CSA.

³⁰*See supra* note 29.

For example, “Count I” of the amended complaint alleges tortious interference with existing contractual relations, and specifically identifies existing contracts with Wellmore (the 1997 CSA), Penn Virginia (the lease of the Harman Coal reserves), and the UMWA (a labor contract). Certainly a claim of interference with the 1997 CSA itself is related to that contract. With respect to the Penn Virginia and UMWA contracts, it was Wellmore’s declaration of *force majeure* that placed the Harman Companies and Mr. Caperton in the position of being unable to fulfill their contractual obligations. Without the *force majeure*, those contractual relations would have been unaffected by the actions of the Massey Defendants. Thus, this claim is “brought in connection with” the 1997 CSA.

“Count II” of the amended complaint alleged tortious interference with prospective contractual relations, again involving Wellmore, Penn Virginia and the UMWA. As with Count I, the key to these claims remains Wellmore’s wrongful declaration of *force majeure*. In the absence of the declaration of *force majeure*, the Harman Companies would not have been forced into bankruptcy and their prospective contractual relationships would not have been impeded by Massey. Therefore this claim is “brought in connection with” the 1997 CSA.

Finally, “Count III” alleges fraudulent misrepresentation, deceit and concealment either related to the declaration of *force majeure* itself or related to subsequent negotiations between the Harman Companies and the Massey Defendants “regarding their intentions to enter into a settlement agreement with Harman in connection with the 1997

CSA.” Insofar as this claim either relates directly to the declaration of *force majeure* under the 1997 CSA, or to the parties’ efforts to reach a settlement with respect to the 1997 CSA, it is “brought in connection with” the 1997 CSA.

Accordingly, because none of the relevant claims asserted in the amended complaint would have existed in the absence of Wellmore’s declaration of *force majeure* under the 1997 CSA, these claims are all “brought in connection with” the 1997 CSA and, as a consequence, are within the scope of the forum-selection clause contained therein.³¹

b. Are the parties involved in the suit subject to the forum-selection clause? The Harman Companies and Mr. Caperton have argued that, as strangers to the 1997 CSA, the Massey Defendants are precluded from enforcing its terms as they are not third-party beneficiaries of the contract. The Harman Companies and Mr. Caperton further argued that two of the plaintiffs to this action, Harman Development and Mr. Caperton (in his individual capacity), are not signatories to the 1997 CSA and, therefore, may not be bound

³¹Some courts have concluded that a forum-selection clause is applicable to tort claims only where the resolution of the claim requires interpretation of the contract. *See Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509, 514 (9th Cir. 1988) (“Whether a forum selection clause applies to tort claims depends on whether resolution of the claims relates to interpretation of the contract.” (citing *Weidner Communications, Inc. v. Faisal*, 671 F. Supp. 531, 537 (N.D. Ill. 1987); *Berrett v. Life Ins. Co.*, 623 F. Supp. 946, 948-49 (D. Utah 1985); *Clinton v. Janger*, 583 F. Supp. 284, 288 (N.D. Ill. 1984))). While we might agree with this proposition were we presented with a more narrowly tailored forum-selection clause applying to claims “arising under” or “arising out of” the contract, we see no need for such a narrow rule in the context of a broadly worded forum-selection clause such as the one presently before us. Nevertheless, we do note that, insofar as the claims asserted in this action all flow from the allegedly wrongful declaration of *force majeure*, they would require interpretation of the contract to determine whether the declaration was indeed wrongful.

by its terms. We disagree.

Other courts addressing the issue of whether non-signatories to a contract may enforce, or be subject to, a forum-selection clause have found the clauses to be enforceable under certain circumstances. One such case is *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509 (9th Cir. 1988). The *Manetti-Farrow* case involved a contract between a California corporation, Manetti-Farrow, and Gucci Parfums, an Italian corporation that was a subsidiary of another Italian corporation, Guccio Gucci, S.p.A. (hereinafter referred to as “Guccio Gucci”). The contract included a forum-selection clause that stated: “[f]or any controversy regarding interpretation or fulfillment of the present contract, the Court of Florence has sole jurisdiction.” *Manetti-Farrow*, 858 F.2d at 511. Another company, Gucci America, signed a consent and ratification agreement, in which it consented to the contract between Manetti-Farrow and Gucci Parfums. Ultimately a dispute arose, and Manetti-Farrow filed suit in California alleging numerous causes of action, not only against Gucci Parfums and Gucci America, but also against the parent company, Guccio Gucci, as well as numerous officers of these companies. *Manetti-Farrow*, 858 F.2d at 511-12. Upholding the district court’s dismissal based upon the forum-selection clause, the Ninth Circuit found that a forum-selection clause was applicable to “a range of transaction participants” who were “closely related to the contractual relationship”:

Manetti-Farrow argues the forum selection clause can only apply to Gucci Parfums, which was the only defendant to sign the contract. However, “a range of transaction participants, parties and non-parties, should benefit from and be subject to forum selection clauses.” *Clinton v. Janger*, 583 F. Supp. 284,

290 (N.D. Ill. 1984) (citing *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 202-03 (3d Cir.), *cert. denied*, 464 U.S. 938, 104 S. Ct. 349, 78 L. Ed. 2d 315 (1983)). We agree with the district court that the alleged conduct of the non-parties is so closely related to the contractual relationship that the forum selection clause applies to all defendants.

858 F.2d at 514 n.5.

Similarly, in *Hugel v. Corporation of Lloyd's*, 999 F.2d 206 (7th Cir. 1993), it was argued that two corporate plaintiffs to a lawsuit, GCM and OMI, were not parties to the contract containing the forum-selection clause (which plaintiff Hugel had signed), and therefore, were not bound by the clause. In rejecting the argument, the court relied on the companies' close relationship to the agreement and the foreseeability that they would be bound by the forum-selection clause:³²

In order to bind a non-party to a forum selection clause, the party must be "closely related" to the dispute such that it becomes "foreseeable" that it will be bound. . . . Hugel is President and Chairman of the Board of both GCM and OMI. In addition, Hugel owns 99% of the stock of GCM which, in turn, owns 100% of the stock of OMI. The alleged assurances of confidentiality were made to Hugel alone and Hugel alone decided that his corporations would participate in Lloyd's investigation.

Hugel and Lloyd's contracted to settle all of their

³²The contract dispute in the *Hugel* case arose after plaintiff Dieter Hugel became a member of the Corporation of Lloyd's. *Hugel v. Corporation of Lloyd's*, 999 F.2d 206, 207 (7th Cir. 1993). Hugel signed a membership contract that included the forum-selection clause. *Id.* Thereafter, Lloyd's became suspicious that Hugel and GCM were involved in criminal misconduct and initiated an investigation. *Id.* Hugel cooperated with the investigation and provided confidential information pertaining to GCM and OMI. In the subsequent lawsuit, plaintiffs Hugel, GCM and OMI claimed that "they lost business as the result of Lloyd's breach of confidentiality relating to the investigation." *Id.*

disputes in England. Although GCM and OMI were not members of Lloyd's, in the course of a dispute between Hugel and Lloyd's, Hugel alone involved his two controlled corporations and supplied information allegedly belonging to those corporations. The district court found that the corporations owned and controlled by Hugel are so closely related to the dispute that they are equally bound by the forum selection clause and must sue in the same court in which Hugel agreed to sue. We hold these findings are not clearly erroneous.

999 F.2d at 209-10. Furthermore, the *Hugel* court made clear that a non-party to a contract need not be a third-party beneficiary in order for the forum-selection clause to be binding against such non-party:

Plaintiffs argue that the court must make a threshold finding that a non-party to a contract is a third-party beneficiary before binding him to a forum selection clause. While it may be true that third-party beneficiaries of a contract would, by definition, satisfy the “closely related” and “foreseeability” requirements, *see e.g., Coastal Steel*, 709 F.2d at 203 (refusing to absolve a third-party beneficiary from the strictures of a forum selection clause which was foreseeable); *Clinton v. Janger*, 583 F. Supp. 284, 290 (N.D. Ill. 1984), *a third-party beneficiary status is not required*.

Hugel, 999 F.2d at 209-10 n.7 (emphasis added).³³

In another case, *Great Northern Insurance Co. v. Constab Polymer-Chemie GmbH & Co.*, No. 5:01-CV-0882 NAM GJD, 2007 WL 2891981 (N.D.N.Y. Sept. 28, 2007), two German companies entered into a supply agreement whereby Constab Polymer-Chemie

³³*But see Pixel Enhancement Labs., Inc. v. McGee*, 1998 WL 518187, at *2 (D. Mass. 1998) (“As McGee is not a third party beneficiary of the License Agreement, he has no standing to assert its forum selection clause. *McCarthy v. Azure*, 22 F.3d 351, 362 (1st Cir. 1994) (“[T]hird party beneficiary status constitutes an exception to the general rule that a contract does not grant enforceable rights to non-signatories.”)).

(hereinafter referred to as “Constab”) would supply products used to produce photo paper to Feliz Schoeller GmbH & Co. and its subsidiaries, one of which was Schoeller-USA. 2007 WL 2891981, at *1. The contract included a forum-selection clause specifying that jurisdiction of certain disputes would be in Warstein, Germany. *Id.*, 2007 WL 2891981, at *7. Constab provided defective products to Schoeller USA, and Schoeller USA, through its insurer, filed suit in California.³⁴ In rejecting the argument that, as non-parties to the contract Great Northern and Schoeller-USA could not enforce the forum-selection clause, the court reasoned,

[n]either Great Northern nor [its insured] Schoeller-USA are signatories to the Agreement. However, the enforcement of the forum selection clause is clearly “foreseeable” given the relationships between the parties and the basis upon which plaintiff has commenced this suit. Therefore, the Court finds that the forum selection clause may be invoked against plaintiff

....

2007 WL 2891981, at *8. *See also Hellenic Inv. Fund, Inc. v. Det Norske Veritas*, 464 F.3d 514, 517 (5th Cir. 2006) (enforcing forum selection clause against a non-signatory to the contract on the basis that the non-signatory benefitted from the performance of the contract); *Marano Enters. of Kansas v. Z-Teca Rests., L.P.*, 254 F.3d 753, 757 (8th Cir. 2001) (concluding non-signatory to contract was “closely related to the disputes arising out of the agreements and properly bound by the forum-selection provisions” due to his status of “shareholder, officer and director” of corporate signatory (internal quotations and citation omitted)); *Medtronic, Inc. v. Endologix, Inc.*, 530 F. Supp. 2d 1054, 1056-57 (D. Minn. 2008)

³⁴Great Northern provided indemnity insurance to Schoeller-USA and, in accordance with the insurance policy, compensated Schoeller-USA for its losses resulting from the defective product and became subrogated to Schoeller-USA’s rights.

("[A] third party may be bound by a forum-selection clause where it is closely related to the dispute such that it becomes foreseeable that it will be bound. . . . It is true that the majority of cases binding a third party to a forum-selection clause under the closely-related-party doctrine involved third parties *suing* as plaintiffs, rather than those *being sued* as defendants. . . . But the Court does not believe that the closely-related-party doctrine is limited to third-party plaintiffs. Indeed, when deciding whether the doctrine applies, a court must answer only the following question: should the third party reasonably foresee being bound by the forum-selection clause because of its relationships to the cause of action and the signatory to the forum-selection clause?" (internal quotations and citations omitted)); *Compana LLC v. Mondial Assistance SAS*, No. 3:07-CV-1293-D, 2008 WL 190522, at *4 (N.D. Tex. Jan. 23, 2008) ("The Fifth Circuit recognizes two theories of estoppel that can bind a nonparty of a contract to the contract's arbitration or forum selection clause. The first is called an 'intertwined claims theory' of equitable estoppel, which grants a non-signatory to a contract the right to enforce a provision of the contract against a signatory. . . . The Fifth Circuit recognizes another form of estoppel-'direct benefits estoppel'-which grants a signatory to a contract the right to enforce a contract provision against a non-signatory." (internal citations omitted)); *Aspitz v. Witness Sys., Inc.*, No. C 07-02068 RS, 2007 WL 2318004, at *3 (N.D. Cal. Aug. 10, 2007) (observing fact that party did not sign agreement is not controlling as to whether forum-selection clause would be enforced); *Affiliated Mortg. Prot., LLC v. Tareen*, Civ. A. No. 06 4908 (DRD), 2007 WL 203947, at *4 (D.N.J. Jan. 24, 2007) ("[W]here a third party's conduct is closely related to the contractual relationship, the forum selection clause applies to the third party." (internal quotations and citation omitted));

Novak v. Tucows, Inc., No. 06CV1909 (JFB) (ARL), 2007 WL 922306, at *13 (E.D.N.Y. March 26, 2007) (“[A]t least two courts within this Circuit have held that [i]t is well established that a range of transaction participants, parties and non-parties, should benefit from and be subject to forum selection clauses. . . . A non-party to an agreement may be bound by a forum selection clause where the party is closely related to the dispute such that it becomes foreseeable that it will be bound.” (internal quotations and citations omitted)); *First Specialty Ins. Corp. v. Admiral Ins. Co.*, No. CV 07 408 MO, 2007 WL 1876516, at *3 (D. Or. June 22, 2007) (“[A] range of transaction participants, including non-parties, should be bound by forum selection clauses of an underlying agreement if their conduct is ‘closely related to the contractual relationship.’ . . . The fact that either one or both parties was not a signatory to the underlying contract is not dispositive.” (internal citations omitted)); *Hasler Aviation, L.L.C. v. Aircenter, Inc.*, No. 1:06-CV-180, 2007 WL 2463283, at *6 (E.D. Tenn. Aug. 27, 2007) (“Other courts have enforced a contractual forum selection clause against non-signatories to the contract, so long as those parties were closely related to the dispute and it was foreseeable they might be bound.” (internal quotations and citations omitted)); *Weingard v. Telepathy, Inc.*, No. 05 Civ. 2024 (MBM), 2005 WL 2990645, at *5 (S.D.N.Y. Nov. 7, 2005) (“Other Circuits have held that a contractually-based forum selection clause also covers tort claims against non-signatories if the tort claims ultimately depend on the existence of a contractual relationship between the signatory parties, . . . or if resolution of the claims relates to interpretation of the contract, or if the tort claims involve the same operative facts as a parallel claim for a breach of contract.” . . . (internal quotations and citations omitted)); *Graham Tech. Solutions, Inc. v. Thinking Pictures, Inc.*, 949 F. Supp.

1427, 1434 (N.D. Cal. 1997) (“It is well established that a range of transaction participants, parties and non-parties, should benefit from and be subject to forum selection clauses. . . . [T]he conduct of GTSI and Mr. Fuller are closely related [to] the contractual relationship between Mr. Graham and TPI, and the forum selection clause applies to both GTSI and Mr. Fuller in spite of the fact that they are not signatories to the PSA.” (internal quotations and citations omitted)); *Beck v. CIT Group/Credit Fin., Inc.*, Civ. A. No. 94-5513, 1995 WL 394067, at *6 (E.D. Pa. June 29, 1995) (“That Mr. Beck signed the Security Agreement as president of Beck Co. is of little consequence given his intimate relationship to Beck Co., the benefit to him from the funding provided, the circumstances giving rise to his claims that he was personally injured by the manner in which defendant performed under the agreement and his request to be credited personally for amounts allegedly overcharged to Beck Co. . . . Assuming that Mrs. Beck has standing on the claims asserted, she is similarly subject to the forum selection provisions. Moreover, given the relationship of the Becks and the circumstances presented, it would be wholly inappropriate to permit Mr. Beck to evade the forum provision in his guaranty and elsewhere by initiating suit jointly with Mrs. Beck.” (internal citations and footnote omitted)); *Sparks Tune-Up Ctrs., Inc. v. Strong*, No. 92 C 5902, 1994 WL 188211, at *5 (N.D. Ill. May 12, 1994) (“The binding thread in cases which hold that a non-signatory party should ‘benefit from and be subject to’ a forum selection clause is an overriding concern to prevent a contracting party from escaping contractual obligations which he bargained for and/or agreed upon.”); *Lu v. Dryclean-U.S.A. of California, Inc.*, 11 Cal. App. 4th 1490, 1493-94, 14 Cal. Rptr. 2d 906, 908 (1992) (“[P]laintiffs argue enforcement of the forum selection clause would be unreasonable because

two of the defendants, Dryclean Franchise and Dryclean U.S.A., did not sign the Agreement containing the clause. Again, we are compelled to disagree. A range of transaction participants, parties and non-parties, should benefit from and be subject to forum selection clauses.” (internal quotations and citation omitted)); *Citigroup Inc. v. Caputo*, 957 So. 2d 98, 102 (Fla. Ct. App. 2007) (“Even assuming Citigroup were not covered by the Citibank Agreement, a non-signatory may invoke a signatory’s forum selection clause where the non-signatory and signatory are related.”); *Deloitte & Touche v. Gencor Indus., Inc.*, 929 So. 2d 678, 684 (Fla. Dist. Ct. App. 2006) (observing that “where the interests of a non-party are directly related to or completely derivative of those of the contracting party, the non-signatory is bound by the contract’s forum selection clause.”); *Tuttle’s Design-Build, Inc. v. Florida Fancy, Inc.*, 604 So. 2d 873, 873-74 (Fla. Dist. Ct. App. 1992) (recognizing that reasonable forum-selection clause would be enforced against non-signatory); *Brinson v. Martin*, 220 Ga. App. 638, 640, 469 S.E.2d 537, 539-40 (Ga. Ct. App. 1996) (“[Plaintiff] Brinson also contends the court erred in dismissing his claims against Martin. He argues that regardless of whether the venue clause is applicable to Woodmen, the clause would not apply to his claims against Martin for tortious interference with economic relations and unjust enrichment because those claims do not arise out of the contract and involve parties who were not signatories to the contract. . . . [D]espite Brinson’s attempt to characterize his claims against Martin as falling outside the business relationship he had with Woodmen, it is clear from his complaint that the claims arose either directly or indirectly from his contract with Woodmen. Under these circumstances, we are persuaded that if Martin were not entitled to rely on the clause, separate actions would likely be brought, possibly resulting in

varying decisions, inconsistent with the administration of justice. For these reasons, we conclude that the trial court did not err in ruling that Martin may rely on the forum selection clause in this case.”); *Grott v. Jim Barna Log Sys.-Midwest, Inc.*, 794 N.E.2d 1098, 1104-05 (Ind. Ct. App. 2003) (“The Texas Court of Appeals has applied forum-selection clauses to nonsignatories to a contract who are transaction participants[,] . . . mean[ing] an employee of one of the contracting parties who is individually named by another contracting party in a suit arising out of the contract containing the forum-selection clause.” (internal quotations, citations, and footnotes omitted)); *Titan Indem. Co. v. Hood*, 895 So. 2d 138, 148 (Miss. 2004) (quoting approvingly comment from *Accelerated Christian Educ., Inc. v. Oracle Corp.*, 925 S.W.2d 66, 75 (Tex. Ct. App. 1996), stating “[w]e agree with the federal court that a valid forum selection clause governs all transaction participants, regardless of whether the participants were actual signatories to the contract”); *Dogmoch Int’l Corp. v. Dresdner Bank AG*, 304 A.D.2d 396, 397, (N.Y. App. Div. 2003) (“Although defendant was a nonsignatory to the account agreements, it was reasonably foreseeable that it would seek to enforce the forum selection clause given the close relationship between itself and its subsidiary”); *Kelly v. Bear, Stearns & Co. Inc.*, No. CONTROL 080832, 2001 WL 1807360, at *2 (Pa. Commw. Ct. Dec. 18, 2001) (“[P]laintiffs argue that as non-signatories to the Engagement Letters, the forum selection clause does not apply to them. This court disagrees. This dispute is governed by the forum selection clause because the claims asserted clearly arise out of the only possible relationship plaintiffs had with Bear Stearns--the Engagement Letters.”); *Sevier County Bank v. Paymentech Merch. Servs., Inc.*, No. E2005-02420-COA-R3-CV, 2006 WL 2423547, at *9 (Tenn. Ct. App. Aug. 23, 2006) (“We

agree with the federal court that a valid forum selection clause governs all transaction participants, regardless of whether the participants were actual signatories to the contract. By transaction participant, we mean an employee of one of the contracting parties who is individually named by another contracting party in a suit arising out of the contract containing the forum selection clause. To hold otherwise would allow a nonsignatory employee, who was a transaction participant, to defeat his company's agreed-to forum by refusing to be bound by the employer's contract. This cannot be. We conclude the trial court may apply a valid forum selection clause to all transaction participants. To conclude otherwise would enable a party to bypass a valid forum selection clause by naming in its petition a closely-related party who was not a party to the contract.”); *Accelerated Christian Educ., Inc. v. Oracle Corp.*, 925 S.W.2d 66, 75 (Tex. Ct. App. 1996) (“We conclude the trial court may apply a valid forum selection clause to all transaction participants. To conclude otherwise would enable a party to bypass a valid forum selection clause by naming in its petition a closely-related party who was not a party to the contract.” (footnote omitted)), *overruled in part on other grounds by In re Tyco Electronics Power Systems, Inc.*, No. 05-04-01808-CV, 2005 WL 237232 (Tex. Ct. App. Feb.2, 2005) (mem.).

Based upon the foregoing, we now hold that a range of transaction participants, signatories and non-signatories, may benefit from and be subject to a forum selection clause. In order for a non-signatory to benefit from or be subject to a forum selection clause, the non-signatory must be closely related to the dispute such that it becomes foreseeable that the non-signatory may benefit from or be subject to the forum selection clause.

Applying the foregoing holding to the facts of the instant case, we first note that, as to the plaintiffs, Sovereign; Mr. Caperton, as president of Sovereign; and Harman Mining were signatories to the 1997 CSA; Harman Development and Mr. Caperton, in his individual capacity, were not. However, Sovereign and Harman are wholly-owned subsidiaries of Harman Development, and Mr. Caperton is the sole owner of Harman Development. Under these facts, Mr. Caperton and Harman Development were closely connected to the 1997 CSA such that it was foreseeable that they would be 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 complaint³⁵ 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

³⁵As we noted in the preceding section of this opinion, the forum-selection clause issue was addressed below in the context of a motion to dismiss; therefore, we consider the claims as they were asserted in the first amended complaint. Notably, though, only three of the claims asserted in the amended complaint were ultimately presented to the jury for a verdict, indicating that there was insufficient evidence to support the remaining claims. Therefore, we limit our consideration to only those three claims that ultimately went to the jury.

at the time it declared *force majeure*.³⁶ All 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*. Under these facts, it is clear that the Massey Defendants are closely connected to the 1997 CSA such that it was foreseeable that they should benefit from the enforcement of the forum-selection clause contained therein.

4. Rebuttal. Because the forum-selection clause was communicated to the resisting party, has mandatory force and covers the claims and parties involved in this dispute, it is presumptively enforceable. Thus, the final step to our analysis is to ascertain whether the Harman Companies and Mr. Caperton have rebutted the presumption of enforceability by making a sufficiently strong showing that enforcement would be unreasonable or unjust, or that the clause was invalid for such reasons as fraud or overreaching.

In this regard, it has been recognized that

[m]andatory choice of forum clauses will be enforced unless they are “unreasonable.” *Davis Media Group*, 302 F. Supp. 2d at 466 (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. at 10, 92 S. Ct. 1907). “Choice of forum and law provisions may be found unreasonable if (1) their formation was induced by fraud or overreaching; (2) the complaining party

³⁶The 1997 CSA was executed in March 1997, and was made retroactively effective to January 1, 1997. Massey acquired Wellmore on July 31, 1997, when it purchased United Coal Corporation and United’s subsidiary Wellmore. Wellmore declared *force majeure* on December 1, 1997.

‘will for all practical purposes be deprived of his day in court’ because of the grave inconvenience or unfairness of the selected forum; (3) the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; or (4) their enforcement would contravene a strong public policy of the forum state.” *Allen v. Lloyd’s of London*, 94 F.3d 923, 928 (4th Cir. 1996).

Belfiore v. Summit Fed. Credit Union, 452 F. Supp. 2d 629, 631-32 (D. Md. 2006) (footnotes omitted). Moreover,

[a] party trying to defeat a mandatory choice of forum clause bears a “heavy burden.” See *Davis Media Group v. Best Western Int’l, Inc.*, 302 F. Supp. 2d, 464, 469-70 (D. Md. 2004); see also, e.g., *Sarmiento v. BMG Entm’t*, 326 F. Supp. 2d 1108, 1111 (C.D. Cal. 2003) (“[I]f the resisting party fails to come forward with anything beyond general and conclusory allegations of fraud and inconvenience, the court must uphold the agreement”).

Id. at 631 n.1. In this case, the Harman Companies and Mr. Caperton have not argued, either below or before this Court, that enforcement of the forum-selection clause of the 1997 CSA, i.e. requiring that this case be litigated in Virginia, was unreasonable or unjust at the time of the Massey Defendants’ motion to dismiss,³⁷ or that the clause was invalid for such reasons

³⁷Mr. Caperton asserts that because this action has been fully litigated in West Virginia, and because a remedy may no longer be available in Virginia due to the running of the limitations period, it is unjust to enforce the forum selection clause. We reject this reasoning as it would effectively divest appellate courts of their appellate jurisdiction over a lower court’s denial of a motion to dismiss based upon a forum selection clause as it relates to tort claims. First, because of the lengthy time involved in prosecuting a case to a final judgment and in pursuing the appellate process, the limitations period for filing a tort action in the proper forum is likely to have always run by the time of this Court’s review, thus, there may never be a tort remedy available in the proper forum. Next, the defendants in this action are entitled to seek review of the lower court’s decision on appeal. See Syllabus point 5, *State ex rel. Davis v. Iman Mining Co.*, 144 W. Va. 46, 106 S.E.2d 97 (1958) (“Where an appeal is properly obtained from an appealable decree either final or interlocutory, such appeal will bring with it for review all preceding non-appealable decrees or orders, from which have arisen any of the errors complained of in the decree appealed from, no matter (continued...)”).

as fraud or overreaching. Instead, on the initial rehearing of this case, and again on remand from the United States Supreme Court, the Harman Companies and Mr. Caperton have argued, in part, that it is unjust to apply the forum-selection clause to deprive them of the large jury verdict awarded below. However, this improperly frames the issue. The proper question is whether enforcement of the forum-selection clause was unjust or unreasonable *at the time of the Massey Defendants' motion to dismiss based upon the forum-selection clause*. The Harman Companies and Mr. Caperton have not come forth with any facts or argument that enforcement of the forum-selection clause was unreasonable or unjust at that time. Accordingly, the forum-selection clause should have been enforced by the circuit court, and that court's failure to grant the Massey Defendants' motion to dismiss based upon the forum-selection clause was an abuse of discretion.³⁸

³⁷(...continued)

how long they may have been rendered before the appeal was taken.' Point 2, syllabus, *Lloyd v. Kyle*, 26 W. Va. 534 [1885]."). Finally, the cases cited by Mr. Caperton in support of his argument that it would be unjust to apply the forum-selection clause where the case is now likely time-barred in the contractual forum are unpersuasive. For example, Mr. Caperton cites *Ernest and Norman Hart Brothers, Inc. v. Town Contractors, Inc.* 18 Mass. App. Ct. 60, 65, 463 N.E.2d 355, 359 (1984). Notably, however, that court's decision was not based solely on the lack of a remedy in the contractual forum state. Rather, the court concluded that the contract at issue was a contract of adhesion. More importantly, the court discussed at length the fact that forum-selection clauses had long been viewed as invalid in Massachusetts, and, at that time, there was no clear indication that Massachusetts would follow the modern view of reasonable and just forum-selection clauses being valid and enforceable. As noted above, in 1981 this Court indicated its approval of reasonable and just forum-selection clauses. *General Elec. Co. v. Keyser*, 166 W. Va. 456, 461-62 n.2, 275 S.E.2d 289, 292-93 n.2 (1981).

³⁸We would be remiss if we did not acknowledge that the motivating factor for the Harman Companies and Mr. Caperton to bring the tort claims in West Virginia may have been due to the fact that Virginia has a cap on punitive damages and West Virginia does not. *See Va. Code* § 8.01-38.1 (1987) ("In no event shall the total amount awarded for punitive
(continued...)

5. Retroactivity of the New Forum-Selection Clause. On remand from the United States Supreme Court, the Harman Companies and Mr. Caperton argue, as they did on the initial rehearing of this case, that the new forum-selection clause principles of law herein developed should not be applied retroactively to them.³⁹ They contend, among other things, that due process principles prohibit such application. We disagree.

To begin, we should make clear that, notwithstanding the due process argument made by the Harman Companies and Mr. Caperton, “[i]t is within the inherent power of a state’s highest court to give a decision prospective or retrospective application without offending [federal] constitutional principles.” *Lopez v. Maez*, 98 N.M. 625, 632, 651 P.2d 1269, 1276 (1982). Stated another way,

[t]he United States Constitution neither prohibits nor requires retroactive application of a judicial decision, and the question of retrospective or prospective application of a state judicial decision to civil litigation in the state courts is a matter of state law when, as here, the rule in question involves a matter of a common-law tort and is not based on federal constitutional or statutory law.

Martin Marietta Corp. v. Lorenz, 823 P.2d 100, 112 (Colo. 1992). *See also Harper v. Virginia Dep’t of Taxation*, 509 U.S. 86, 94, 113 S. Ct. 2510, 2516, 125 L. Ed. 2d 74 (1993) (“Nothing in the Constitution alters the fundamental rule of ‘retrospective operation’ that has

³⁸(...continued) damages exceed \$350,000.00.”). Virginia also does not allow punitive damages for contract claims. *See Kamlar Corp. v. Haley*, 224 Va. 699, 705, 299 S.E.2d 514, 517 (Va. 1983).

³⁹The Harman Companies briefed this issue in terms of applying the new principles prospectively.

governed ‘judicial decisions for near a thousand years.’” (citation omitted)); *Great N. Ry. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364, 53 S. Ct. 145, 148, 77 L. Ed. 360 (1932) (“We think the federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward.”). In addition to there being no federal constitutional impediment to a judicial decision being applied retroactively, there is likewise no state constitutional impediment. *See Bradley v. Appalachian Power Co.*, 163 W. Va. 332, 347, 256 S.E.2d 879, 887 (1979) (“We do not find any provision in the West Virginia Constitution which addresses this point.”).

The Supreme Court of Appeals of West Virginia, like all courts in the country, adheres to the common law principle that, “[a]s a general rule, judicial decisions are retroactive in the sense that they apply both to the parties in the case before the court and to all other parties in pending cases.” *Crowe v. Bolduc*, 365 F.3d 86, 93 (1st Cir. 2004). *See also Alaskan Vill., Inc. v. Smalley*, 720 P.2d 945, 949 (Alaska 1986) (“Absent special circumstances, a new rule of law will apply in the case before the court and in all subsequent cases.”); *Citicorp N. Am., Inc. v. Franchise Tax Bd.*, 83 Cal. App. 4th 1403, 1422, 100 Cal. Rptr. 2d 509, 525 (2000) (“[T]he general rule as to judicial opinions is that they are fully retroactive.”); *Findley v. Findley*, 280 Ga. 454, 460, 629 S.E.2d 222, 228 (2006) (“[W]e shall continue to apply the general rule that a judicial decision announcing a new rule is retroactive[.]”); *Aleckson v. Village of Round Lake Park*, 176 Ill. 2d 82, 86, 679 N.E.2d 1224, 1226 (1997) (“Generally, when a court issues an opinion, the decision is presumed to

apply . . . retroactively[.]”); *Dempsey v. Allstate Ins. Co.*, 325 Mont. 207, 217 104 P.3d 483, 489 (2004) (“Therefore today we reaffirm our general rule that [w]e give retroactive effect to judicial decisions.” (internal quotations and citation omitted)); *Ireland v. Worcester Ins. Co.*, 149 N.H. 656, 658, 826 A.2d 577, 580-81 (2003) (“At common law, appellate decisions in civil cases are presumed to apply retroactively.”); *Montells v. Haynes*, 133 N.J. 282, 295, 627 A.2d 654, 660 (1993) (“The final issue is whether our decision should follow the general rule of retroactive application[.]”); *Beavers v. Johnson Controls World Servs., Inc.*, 118 N.M. 391, 398, 881 P.2d 1376, 1383 (1994) (“[W]e believe there should be a presumption that a new rule adopted by a judicial decision in a civil case will operate retroactively.”); *Christy v. Cranberry Volunteer Ambulance Corps, Inc.*, 579 Pa. 404, 418, 856 A.2d 43, 51 (2004) (“Our general principle is that we apply decisions involving changes of law in civil cases retroactively[.]”); *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 515 (Tex. 1992) (“Generally, judicial decisions apply retroactively.”); *State v. Styles*, 166 Vt. 615, 616, 693 A.2d 734, 735 (1997) (“We have previously adopted the common law rule that a change in law will be given effect while a case is on direct review, except in extraordinary cases. This rule applies whether the proceedings are civil or criminal.”); *In re Commitment of Thiel*, 241 Wis. 2d. 439, 449, 625 N.W.2d 321, 326 (Ct. App. 2001) (“Wisconsin generally adheres to the ‘Blackstonian Doctrine,’ which provides that a decision that clarifies, overrules, creates or changes a rule of law is to be applied retroactively.”).

Although the common law rule presumes that appellate judicial decisions apply

retroactively, “[t]he courts of this country long have recognized exceptions to the rule of retroactivity[.]” *Ashland Oil, Inc. v. Rose*, 177 W. Va. 20, 23, 350 S.E.2d 531, 534 (1986). The seminal case by this Court addressing the issue of an exception to retroactivity is *Bradley v. Appalachian Power Co.*, 163 W. Va. 332, 256 S.E.2d 879 (1979).

In *Bradley*, this Court was asked to decide whether or not our contributory negligence rule should be modified to allow for comparative negligence. After an exhaustive examination of the history of the contributory negligence doctrine, *Bradley* found that modification of the doctrine was warranted. In so doing the opinion held,

[o]ur present judicial rule of contributory negligence is therefore modified to provide that a party is not barred from recovering damages in a tort action so long as his negligence or fault does not equal or exceed the combined negligence or fault of the other parties involved in the accident. To the extent that our prior contributory negligence cases are inconsistent with this rule, they are overruled.

Bradley, 163 W. Va. at 342, 256 S.E.2d at 885.

Insofar as *Bradley* overruled prior contributory negligence case law, the opinion addressed the issue of whether or not the new comparative negligence rule would be applied retroactively to cases pending at the time of the decision. To resolve the issue of retroactivity, in the context of new law that overruled prior case law, *Bradley* looked for guidance from the United States Supreme Court’s decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971), *overruled by Harper v. Virginia Department*

of *Taxation*, 509 U.S. 86, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993).⁴⁰ After examining relevant language from the opinion in *Chevron, Bradley* fashioned the following test:

In determining whether to extend full retroactivity, the following factors are to be considered: First, the nature of the substantive issue overruled must be determined. If the issue involves a traditionally settled area of law, such as contracts or property as distinguished from torts, and the new rule was not clearly foreshadowed, then retroactivity is less justified. Second, where the overruled decision deals with procedural law rather than substantive, retroactivity ordinarily will be more readily accorded. Third, common law decisions, when overruled, may result in the overruling decision being given retroactive effect, since the substantive issue usually has a narrower impact and is likely to involve fewer parties. Fourth, where, on the other hand, substantial public issues are involved, arising from statutory or constitutional interpretations that represent a clear departure from prior precedent, prospective application will ordinarily be favored. Fifth, the more radically the new decision departs from previous substantive law, the greater the need for limiting retroactivity. Finally, this Court will also look to the precedent of other courts which have determined the retroactive/prospective question in the same area of the law in their overruling decisions.

Syl. pt. 5, *Bradley*.

The retroactivity test announced in *Bradley* has been relied upon by this Court whenever the issue of retroactivity has arisen in a civil case. However, the *Bradley* test is

⁴⁰The *Bradley* decision acknowledged a prior principle of law created by the Court that involved retroactivity, but found that prior principle was too narrow. See Syl. pt. 2, *Falconer v. Simmons*, 51 W. Va. 172, 41 S.E. 193 (1902) (“An overruled decision is regarded not law, as never having been the law, but the law as given in the later case is regarded as having been the law, even at the date of the erroneous decision. To this rule there is one exception,—that where there is a statute, and a decision giving it a certain construction, and there is a contract valid under such construction, the later decision does not retroact so as to invalidate such contract.”).

narrowly confined to deciding whether to retroactively apply a new principle of law that was created in a case that overruled prior precedent. The narrow constraints of *Bradley* have proved to be problematic whenever this Court has examined retroactivity in the context of a new principle of law created in a case that did not overrule prior precedent. *See, e.g., Richmond v. Levin*, 219 W. Va. 512, 517, 637 S.E.2d 610, 615 (2006) (“[T]he analysis established by *Bradley* is not directly on point since the question in the case before us does not involve overruling any prior authority[.]” (internal quotations and citation omitted)); *Adkins v. Cline*, 216 W. Va. 504, 510, 607 S.E.2d 833, 839 (2004) (“The *Bradley* formula does not give specific guidance to our current situation[.]”); *Kincaid v. Mangum*, 189 W. Va. 404, 414, 432 S.E.2d 74, 84 (1993) (“[T]he plaintiffs correctly point out that the analysis established by *Bradley* is not directly on point since the question in the case before us does not involve overruling any prior authority[.]”). Because of the limitations imposed by *Bradley* on the issue of retroactivity, we believe that another test, designed to compliment *Bradley*, must be utilized whenever this Court is called upon to examine the issue of retroactively applying a new rule of law from a case that did not overrule any prior decision of this Court. In formulating such a test, we need look no further than the *Bradley* opinion itself.

The retroactivity test created in *Bradley* was fashioned from the following language that appeared in *Chevron* and was quoted in *Bradley*:

In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new

principle of law, . . . by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Finally, we have weighed the inequity imposed by retroactive application, for where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity.

Bradley, 163 W. Va. at 347, 256 S.E.2d at 888 (quoting *Chevron*, 404 U.S. at 106-07, 92 S. Ct. at 355 (internal quotations and additional citations omitted)).⁴¹ With the *Chevron* factors as a guide, we now hold that in determining whether to extend full retroactivity to a new principle of law established in a civil case that *does not overrule* any prior precedent, which is an issue that was not addressed in Syllabus point 5 of *Bradley v. Appalachian*

⁴¹The *Chevron* test was overruled in *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993). In *Harper*, the Supreme Court held that new federal judicial rules would no longer be open for selective retroactivity. The Supreme Court addressed the issue succinctly as follows:

When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule. The rule extends *Griffith's* ban against selective application of new rules. Mindful of the basic norms of constitutional adjudication that animated our view of retroactivity in the criminal context, we now prohibit the erection of selective temporal barriers to the application of federal law in noncriminal cases.

Harper, 509 U.S. at 97, 113 S. Ct. at 2517 (internal quotations and citations omitted). It has been correctly noted that “although the United States Supreme Court has rejected *Chevron*, the states are free to continue employing the *Chevron* criteria in deciding questions of retroactivity of state law.” *Dempsey v. Allstate Ins. Co.*, 104 P.3d 483, 488 (Mont. 2004).

Power Co., 163 W. Va. 332, 256 S.E.2d 879 (1979), the following factors will be considered. First, we will determine whether the new principle of law was an issue of first impression whose resolution was clearly foreshadowed. Second, we must determine whether or not the purpose and effect of the new rule will be enhanced or retarded by applying the rule retroactively. Finally, we will determine whether full retroactivity of the new rule would produce substantial inequitable results.

In the instant proceeding, we are called upon to decide whether or not the principles of law developed in this opinion, involving forum-selection clauses, should be applied retroactively to the parties. Under the test set out above, we find no impediment to applying the new forum-selection clause principles to the parties in this case.

a. The new forum-selection clause principles were clearly foreshadowed.

The Harman Companies and Mr. Caperton argue that the new forum-selection clause principles applied in this case were not foreshadowed by any prior decision of this Court. We disagree.

To begin, the Harman Companies and Mr. Caperton misunderstand the meaning of “foreshadowed,” as that term is applied in the present context. Foreshadowing does not mean that “there has to be clear precedent before a holding can be considered clearly foreshadowed.” *Collins v. Department of Corr.*, 167 Mich. App. 263, 267, 421 N.W.2d 657, 659 (1988). All that is required is some indication by a prior decision of this

Court or a national trend that would “put persons on notice that [this Court] could resolve the issue either way[.]” *Id.* See also *Founder v. Cabinet for Human Res.*, 23 S.W.3d 221, 224 (Ky. Ct. App. 1999) (holding that prior judicial decision put plaintiff “on notice that it was possible that the filing of the complaint with the Commission would bar a separate action in circuit court. Thus, it was not error for the court to retroactively apply [a new decision].”). A case which helps illustrate the broad meaning of “foreshadowing” is *Professional Insurance Corp. v. Sutherland*, 700 So. 2d 347 (Ala. 1997).

In *Sutherland*, the plaintiffs sued several defendant insurance companies in an Alabama trial court for tort and breach of contract claims. The defendants filed a motion to dismiss on the grounds that, under the terms of contractual forum-selection clauses between the parties, all causes of action had to be filed in Florida. The trial court denied the motion to dismiss on the grounds that prior Alabama case law held that “outbound” forum-selection clauses were against public policy. The defendants appealed to the Alabama Supreme Court. That Court apparently issued an opinion that was withdrawn after a rehearing was granted. In the rehearing opinion, the Court held that it was overruling prior case law that barred “outbound” forum-selection clauses. More important to the case at hand, the Court addressed the issue of whether or not the new rule would be applied retroactively to the parties before the Court. In finding that the decision would be applied to the parties, *Sutherland* addressed the issue of foreshadowing as follows:

The plaintiffs contend that when they were negotiating their contracts they relied upon the rule making forum selection provisions invalid in Alabama and that the rule we adopt today

represents a fundamental change in the substantive law of this state. Therefore, they claim, an application of the “new” rule against them would be an unfair retroactive application. We disagree.

....

We conclude that it is fair to apply the rule enforcing forum selection clauses to the parties in this case. As noted previously, while American courts traditionally disfavored outbound forum selection clauses, the overwhelming trend, following the United States Supreme Court’s decision in *M/S Bremen, supra*, has been toward allowing enforcement of those clauses. *That nationwide trend foreshadowed our adoption today of the rule that such clauses are not per se void, providing notice that Alabama might follow suit and thereby reducing the reliance these plaintiffs could reasonably have placed upon the continued viability of the traditional rule in Alabama.*

Sutherland, 700 So. 2d at 351-52 (emphasis added).

Although the Alabama Supreme Court relied upon a nationwide trend as foreshadowing its new rule in *Sutherland*, we need not look to a national trend to find that the new forum-selection clause principles developed in this case were foreshadowed. As previously pointed out in this opinion, over twenty-five years ago in *General Electric Co. v. Keyser*, 166 W. Va. 456, 275 S.E.2d 289 (1981), this Court indicated that forum-selection clauses were not against the public policy of this State. Specifically, we stated in *Keyser*,

We have had occasion, however, to discuss, indirectly, forum selection clauses. Although our law on this point is skeletal, it does indicate that contract clauses which affect matters such as jurisdiction and the like should be carefully analyzed. Unquestionably, forum selection clauses are not contrary to public policy in and of themselves for they are sanctioned in commercial sales agreements[.]

Keyser, 166 W. Va. at 461 n.2, 275 S.E.2d at 291 n.2. Clearly, *Keyser* placed the parties in

this action on notice that, when presented with an opportunity, this Court would “carefully” analyze all matters relevant to the forum-selection clause presented on appeal. Contrary to the arguments of the Harman Companies and Mr. Caperton, there is no requirement that there must exist specific precedent that foreshadowed exactly how this Court would resolve new issues involving a forum-selection clause. If such a situation was the law in this State or any jurisdiction in the country, there would be very few cases decided on appeal that created new law which could be applied to the parties before the appellate court. This is not the law in the country nor in West Virginia. Consequently, we find that the new forum-selection clause principles created in this opinion were foreshadowed by *Keyser*.

b. The purpose and effect of the new rules will be enhanced by applying the rules retroactively to the parties. In other parts of this opinion we have discussed the general purpose and effect of forum-selection clauses. The new forum-selection clause principles announced in this decision simply provide parameters for the enforcement of forum-selection clauses. To deny application of those principles to the parties in this litigation would undermine the very essence of forum-selection clauses, which is to require parties and those in privity thereto to litigate claims in a forum voluntarily chosen by them.

c. No substantial inequitable results would flow from applying the new forum-selection clause principles retroactively. We have not been presented with any valid reason to show that applying the new principles would bring about a substantial inequitable result. “Indeed, limiting this decision to prospective application would produce

inequitable results[.]” *Cundiff v. State Farm Mut. Auto. Ins. Co.*, 217 Ariz. 358, 362, 174 P.3d 270, 274 (2008). This is true because there is no evidence in the record to show that the forum-selection clause involved in this case was not freely bargained for by the actual signatories to the agreement. To allow one signatory to the agreement to escape its effects through prospective application of our new principles would simply be inequitable.

Accordingly, we conclude that the forum-selection clause principles of law adopted by this opinion may properly be applied to the parties to the instant proceeding.

6. The bankruptcy court’s order did not have any preclusive effect on the forum selection clause issue. The final matter we must address in this area concerns Mr. Caperton’s argument “that the United States Bankruptcy Court for the Western District of Virginia has rendered a final, uncontested ruling specifically finding West Virginia to be the proper forum for this Action.”⁴² As a result of this alleged final decision, Mr. Caperton contends that the doctrine of collateral estoppel precludes relitigation of the issue in the state court proceedings.⁴³

⁴²We have previously noted that the Massey Defendants attempted to intervene in the bankruptcy proceeding filed by the Harman Companies. The purpose of this attempted intervention was “to determine whether the Caperton’s (sic) and Harman Development’s claims were actually assets of the bankruptcy estates and whether Hugh Caperton was attempting to deprive the bankruptcy estates of those assets improperly.” *Caperton v. A.T. Massey Coal Co., Inc.*, 270 B.R. 654, 655 (S.D.W. Va. 2001).

⁴³Mr. Caperton also contends that the doctrine of res judicata applies. Insofar as Mr. Caperton is only attacking the disposition of the forum selection clause issue, we need not separately address the res judicata claim. The result would be the same under an analysis
(continued...)

To begin, we note that “[t]here is no question that the doctrines of res judicata and collateral estoppel apply to decisions rendered in Federal Bankruptcy Courts.” *Jerome J. Steiker Co., Inc. v. Eccelston Props. Ltd.*, 593 N.Y.S.2d 394, 398 (1992). Further, because Mr. Caperton contends that the bankruptcy proceeding adjudicated the forum selection clause issue, “the federal rules of preclusion must be applied.” *Sea Quest Int’l., Inc. v. Trident Shipworks, Inc.*, 958 So. 2d 1115, 1119 (Fla. Dist. Ct. App. 2007). Under federal law, a party asserting collateral estoppel as a bar to relitigating an issue must establish

(1) the issue to be precluded is identical to the issue already litigated, (2) the issue was actually determined in the prior proceeding, (3) the determination of the issue was an essential part of the decision in the prior proceeding, (4) the prior judgment was final and valid, and (5) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue.

In re Coleman, 426 F.3d 719, 729 (4th Cir. 2005).⁴⁴

We need not labor long on this issue. The second element of collateral estoppel is dispositive of the matter. In order for collateral estoppel to apply to the forum selection clause issue, the matter had to actually be determined in the bankruptcy proceeding. As we shall demonstrate below, it was not.

⁴³(...continued)
of either doctrine.

⁴⁴The elements required to prove collateral estoppel under West Virginia law are almost identical to the federal elements. *See* Syl. pt. 1, *Haba v. Big Arm Bar & Grill, Inc.*, 196 W. Va. 129, 468 S.E.2d 915 (1996).

As previously indicated in this opinion, the Massey Defendants attempted to have the instant case removed to a federal district court in the Southern District of West Virginia. In response to the removal, the Harman Companies and Mr. Caperton asked the federal district court to remand the case to state court. The federal district court issued a written opinion indicating that it would hold in abeyance any ruling about the propriety of the case being in federal court until the bankruptcy court made a ruling on the claims asserted by Massey as an intervenor. *See Caperton v. A.T. Massey Coal Co., Inc.*, 251 B.R. 322 (S.D.W. Va. 2000).⁴⁵ Subsequent to the bankruptcy court issuing an order that involved Massey's intervention claims, the federal district court issued another written order that interpreted the bankruptcy court's order regarding Massey's claims. The federal district court made the following findings:

As set forth in its November 28, 2000 Joint Memorandum Opinion, the Bankruptcy Court attempted to respond to this Court's Memorandum Opinion and Order and determined the crucial question was whether Caperton and/or Harman Development have any independent causes of action under West Virginia law. The Bankruptcy Court then clarified what possible claims Caperton and Harman Development might have that are independent and non-derivative of the bankrupt estates' claims. It declined, however, to decide whether such claims have actual, legal validity under West Virginia state law. Instead, the Bankruptcy Court opined this question was better addressed by a West Virginia court, either state or federal, and abstained from deciding the questions presented by the declaratory judgment/adversary proceedings. *Integral 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*

⁴⁵It appears that the federal district court entertained the Massey Defendants' removal petition under its bankruptcy jurisdiction, because of the bankruptcy proceeding that was pending in Virginia.

Virginia action.

Caperton v. A.T. Massey Coal Co., Inc., 270 B.R. 654, 655-56 (S.D.W. Va. 2001) (emphasis added). As a result of the federal district court's determination that the bankruptcy court abstained from deciding *any* issue involving the Massey intervention claims, the federal district court declined a motion by the Massey Defendants to transfer the case to a federal district court in Virginia. Specifically, the federal district court held that the Massey Defendants' "motion for transfer of venue to the District Court of the Western District of Virginia is DENIED as moot, leaving the Circuit Court of Boone County to decide whether transfer of venue remains for determination." *Caperton*, 270 B.R. at 656.⁴⁶

⁴⁶In a footnote in Mr. Caperton's supplemental brief he attempts to suggest that the federal district court "found it appropriate for the case to ultimately proceed in West Virginia." The footnote is disingenuous in trying to suggest that the federal district court found that West Virginia had to allow the case to be fully litigated on the merits. The federal district court's order, like the bankruptcy court's order, left it up to the West Virginia courts to decide the merits of all claims and defenses asserted in the state court proceeding.

We should point out that the federal district court abstained from hearing any claim or defense asserted in the state court proceeding under the *mandatory* abstention provision of bankruptcy law, because the state law litigation was not a core proceeding for bankruptcy purposes. Specifically, the federal district court held,

The Court holds [the Harman Companies' and Mr. Caperton's] claims are non-core because: 1) the claims are not specifically identified as core proceedings under 28 U.S.C. § 157(b)(2); 2) the claims existed prior to the filing of the [Harman Companies'] bankruptcy petitions; 3) the claims are based solely on state law and therefore exist independent of the provisions of Chapter 11; and 4) the parties' rights are not affected by the outcome of the bankruptcy proceedings.

Caperton, 270 B.R. at 657. It is generally recognized that res judicata and collateral estoppel "bar[] only claims that would constitute a core claim in an earlier bankruptcy action." *Cabrera v. First Nat'l Bank of Wheaton*, 753 N.E.2d 1138, 1147 (Ill. Ct. App. 2001). See (continued...)

It is generally acknowledged that “the lower federal courts do not have appellate jurisdiction over the state courts and their decisions are not conclusive on state courts, even on questions of federal law.” *State v. Robinson*, 82 P.3d 27, 30 (Mont. 2003). *See also Cash Distrib. Co., Inc. v. Neely*, 947 So. 2d 286, 292 n.5 (Miss. 2007) (“[S]tate supreme courts are not duty-bound to follow a federal court of appeals’ interpretation of federal law.”). Thus, the federal district court’s interpretation of the bankruptcy court’s order is not binding on this Court. Even so, we agree with the federal district court that the bankruptcy court’s order did not address the merits of any issue or claim raised by Massey’s attempted intervention in the bankruptcy proceeding.⁴⁷ The bankruptcy court’s Joint Memorandum Opinion made the following findings:

By this adversary proceeding, Massey seeks a determination of the respective ownership interests of Caperton and the bankruptcy estates of the Debtors in causes of action currently being pursued jointly by Caperton and the Debtors in

⁴⁶(...continued)

also I.A. Durbin, Inc. v. Jefferson Nat’l Bank, 793 F.2d 1541, 1548 (11th Cir. 1986) (In “a non-core proceeding, the bankruptcy court could only issue proposed findings of fact and conclusions of law, which would be subject to de novo review by the district court, and such proposed findings would not be entitled to res judicata effect in subsequent litigation because there would have been no final judgment on the merits.” (internal citations omitted)); *SMI/USA, Inc. v. Profile Tech., Inc.*, 38 S.W.3d 205, 211 (Tex. Ct. App. 2001) (“Although a bankruptcy judge may hear non-core proceedings and make proposed Findings of Fact and Conclusions of Law to the District Court, the judge may not render a final judgment on such claims. As a result, a bankruptcy court’s disposition of non-core proceedings is not res judicata as to subsequent state court proceedings regarding the same claims.”).

⁴⁷Mr. Caperton’s res judicata claim would fail because the bankruptcy court did not enter a final judgment on the merits of Massey’s intervention claims. *See Israel Disc. Bank Ltd. v. Entin*, 951 F.2d 311, 314 (11th Cir. 1992) (“Res judicata . . . will bar a subsequent action if: (1) the prior decision was rendered by a court of competent jurisdiction; (2) there was a final judgment on the merits; (3) the parties were identical in both suits; and (4) the prior and present causes of action are the same.”).

the West Virginia Action. . . .

. . . .

. . . Massey alleges that Caperton and Harman Development are seeking to enforce for their own benefit alleged claims which are assets solely of the bankruptcy estates of Harman Mining and Sovereign. However, in these proceedings, Massey's real object appears to be to obtain a judicial determination that under West Virginia law Caperton and Harman Development have no independent claims of their own which they can pursue against Massey for its alleged wrongful conduct. Because such a determination can be better rendered in the West Virginia Action, this Court chooses to abstain from hearing these declaratory judgment actions in favor of resolution by an appropriate West Virginia forum, whether state or federal.

. . .

. . . Most important to this Court's decision to abstain in these adversary proceedings is that the viability of Caperton's and Harman Development's claims is determined by West Virginia state law and not federal bankruptcy law. Accordingly, all of these issues can be addressed satisfactorily and most appropriately in the West Virginia Action.

Additionally, the bankruptcy court's Joint Order filed with the Joint

Memorandum Opinion made the following conclusions of law:

For the reasons expressed in this Court's Joint Memorandum Opinion entered contemporaneously herewith, in the event that Hugh Caperton and/or Harman Development Corporation are determined to have alleged independent, non-derivative claims pursuant to West Virginia law, those causes of action are hereby DECLARED not to be property of the bankruptcy estate of either Harman Mining Corporation or Sovereign Coal Sales, Incorporated. However, also for the reasons stated in such Joint Memorandum Opinion, this Court ABSTAINS from deciding whether any such claims are

properly alleged or have legal validity. Accordingly, it is ORDERED that these adversary proceedings are DISMISSED.

Clearly it is evident that the bankruptcy court's Joint Memorandum Opinion and Joint Order did not address the merits of any claim, issue or defense involved in the state court proceeding. Further, "[b]ecause the [forum selection clause] issue . . . was neither decided on the merits nor necessary to support the bankruptcy court's judgment, we agree with [the Massey Defendants] that the doctrines of collateral estoppel and res judicata do not bar [raising the defense] in this case." *Cousatte v. Lucas*, 136 P.3d 484, 491 (Kan. Ct. App. 2006). *See also Kennedy v. First Nat'l Bank of Decatur*, 473 N.E.2d 604, 608 (Ill. App. Ct. 1985) ("[T]he doctrine of collateral estoppel does not bar the issue of whether [plaintiff] was injured individually because (1) such issue was not actually or necessarily decided in the bankruptcy proceeding, and (2) the Bankruptcy Court expressly determined that it had no jurisdiction over such issue."); *Eicher v. Mid Am. Fin. Inv. Corp.*, 702 N.W.2d 792, 810 (Neb. 2005) ("Because [plaintiff's] claim in this case was not barred by the judgment in the prior bankruptcy action under the doctrines of either res judicata or collateral estoppel, the district court erred in granting the motion for partial summary judgment dismissing his claim.").⁴⁸

⁴⁸Prior opinions issued in this case (one of which was withdrawn by this Court upon granting a rehearing, and one of which was reversed by the United States Supreme Court in *Caperton v. A.T. Massey Coal Co., Inc.*, ___ US ___, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009)), addressed the additional issue of *res judicata*. However, the Justices and Senior Status Judge who make up the Majority in deciding this matter anew have determined that it is not necessary to address the *res judicata* issue.

V.

CONCLUSION

For the reasons stated in the body of this opinion, we reverse the judgment in this case and remand for the circuit court to enter an order dismissing this case against A.T. Massey Coal Company and its subsidiaries with prejudice.

Reversed and remanded.