

3/16/05

IN THE CIRCUIT COURT  
OF BOONE COUNTY,  
WEST VIRGINIA:

APPENDIX TO DISSENT

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

BOONE CO  
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Plaintiffs,

v.

Civil Action No.

**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.,**

98-C-192

Defendants.

**FINAL ORDER:**

Denying Defendants' Rule 50(b) Motion for Judgment  
As a Matter of Law; Rule 50(c)/59 Motion for New Trial, or  
in the Alternative, Motion for Remittitur

Procedural Posture

On the 8<sup>th</sup> Day of November, 2004, this Court issued a Procedural Order  
in which the Court invited the Parties to submit within ten (10) days any requests for further  
hearing or to submit any and all additional arguments or information as may be relevant in the  
Court's review of Defendant's Motion for Judgment as a Matter of Law, Motion for New Trial  
or, in the Alternative, Motion for Remittitur. Within ten (10) days from the entry of said  
Procedural Order, the Defendants corresponded to the Court that they had no further arguments  
or information they wished to submit for the Court's consideration. Collectively, the Plaintiffs  
submitted Notices withdrawing their post-trial Motions for an Award of Attorneys' Fees.

WHEREUPON, the Court noted that it now appears that this Court is in a  
procedural posture to render a decision and issue the following Order in this matter, given the

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substantial amount of time that has passed since the jury returned its verdict after an approximately seven (7) week trial on or about August 1, 2002, A. D. The Court thereafter entered its Judgement Order on or about August 15, 2002, A. D., followed by this Court's entertainment of numerous Garnes-based post-trial pleadings; memoranda submitted in support of and in opposition to the jury verdict's on punitive damages; subsequent arguments and hearings; and, the Court's receipt of submitted proposed and recommended findings and conclusions. At the conclusion of all of which, the Court rendered its Order affirming the jury verdict's determination of punitive damages on or about June 30, 2004, with the Court entering an Amended Order on Jury Award of Punitive Damages, on or about August 27, 2004, ending approximately two years of litigation in the post-trial posture. During which time, the Court reviewed and considered all of the pleadings; responsive pleadings; arguments; responsive arguments; proposed dispositions; responsive proposed dispositions; followed by objections to the respective responsive dispositions; rebuttal to the objections and sur-rebuttal to the objections.

THEREUPON, with the withdrawal of Plaintiffs' Post-Trial Motions for Attorneys' Fees, the Court was clearly under the impression that all post-trial litigation elements were completed by the respective parties and were properly before the Court, particularly following the Defendants' notice by correspondence dated November 24, 2004, that they would not be submitting any further matters for the Court's review, thereby allowing the Court to complete its post-trial review and consideration of the remaining non-Garnes issues.

WHEREUPON, contrary the Court's understanding of the post-trial procedural posture of this matter, and the Court's first attempt at the drafting and entry of an acceptable "Final Order" in this matter, the Court has continued to receive post-trial submissions from the respective parties hereto through January and February, 2005, with the most recent submission being dated February 14, 2005, A. D.

THEREUPON, the Court upon its review and its consideration of all of the post-trial submissions in this matter, irrespective of whichever party hereto may have made

the submission, has now determined that anything and everything that could be meaningfully submitted to this Court has been submitted, with the Court's corresponding determination that the process of continuing to submit and respond, object and rebut, re-object and sur-rebut, does not serve the interests of justice, nor of these parties. As a result of all of the above, including the other dispositions that have been made in the other respective forums, the Court does hereby expressly determine that this matter is now ripe for a decision.

#### Findings and Conclusions

UPON MATURE CONSIDERATION OF ALL OF WHICH,

including the entire record thus far generated, the Court does hereby make the following findings of fact and conclusions of law:

[1] That this Court continues to have statutory and Rule-based jurisdiction and venue over the subject matter and all of the respective parties hereto, based upon the Court's previous determinations of such, and in light of the applicable provisions of Rules 50(b) and (c), as well as 59 of the West Virginia Rules of Civil Procedure, and the respective authorities cited herein; and,

[2] That in considering the bases of these Motions filed by the Defendants and the responses thereto by the Plaintiffs, the Court outlines the following analysis of the procedural aspects of the Rules at this posture of the case:

[a] In considering a Rule 50(b) motion for judgment as a matter of law (judgment notwithstanding the verdict), it is well settled law that the Court must consider the evidence in the light most favorable to the non-movant, giving the non-movant every reasonable and legitimate inference arising from the testimony, and must assume as true those facts which the jury may properly find under the evidence. See Lambert v. Goodman 147 W. Va. 513 (1963), which was the basis for the old rule, and such cases as Syllabus Point 2, Brannon v. Riffle, 197 W. Va. 97 (1996) decided under the present rule.

[b] In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved. Syllabus Point 4, Reynolds v. City Hospital, Inc., 207 W. Va. 101, 529 S.E.2d 341 (2000); Syllabus Point 5, Orr v. Crowder, 173 W. Va. 335, 315 S.E.2d 593 (1983). Within this context, the same tenor is founded as well in criminal cases, where an even higher burden of proof, i. e. beyond a reasonable doubt, is required. As our Court ruled in the landmark case of State v. LaRock, 196 W. Va. 294 (1996), when a [Defendant] undertakes a sufficiency challenge, all of the evidence, direct and circumstantial, must be viewed from the [opposing party's] coign of vantage, and the viewer must accept all reasonable inferences from it that consistent with the jury's verdict. This rule requires the trial court judge to resolve all evidentiary conflicts and credibility questions in the [prevailing party's] favor; moreover, as among competing inferences of which two or more are plausible, the judge must choose the inference that best fits the [prevailing party's] theory. Syllabus Point 2, *op cit.* LaRock's foundation in this analysis came from the Court's previous year's State v. Guthrie, 194 W. Va. 657 (1995), where our Supreme Court held in Syllabus Point 3:

A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all of the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.

[c] In considering a Rule 59(a) motion for a new trial, the trial court's conclusions as to existence of reversible error are reviewed under an abuse of discretion standard, and the underlying factual findings are reviewed under a clearly erroneous standard. Citizens Bank of Weston, Inc. v. City of Weston, 209 W. Va. 145, 148. The distinction between the effect of entering a judgment notwithstanding the verdict as opposed to granting a new trial is substantial and, thus, warrants a different standard of review. Gonzalez v. Conley, 199 W. Va. 288 (1997). It is error to treat the two (2) motions pursuant to the same standard. In a motion for judgment as a matter of law, it is improper for the trial court to invade the jury's function by weighing the evidence and considering the credibility of the witnesses, while when considering a motion for new trial, the trial judge may weigh the evidence and consider the credibility of the witnesses. Gonzales v. Conley, op cit. If the trial court finds that the verdict is against the clear weight of the evidence, is based on false evidence, or will result in a miscarriage of justice, the trial court may set aside the verdict. See, e.g., Witt v. Sleeth, 198 W. Va. 398, 481 S.E.2d 189 (1996).

[d] In considering a Rule 59(e) motion to alter or amend the judgment (Defendants' Motion for remittitur), it is extremely important to note that a trial court may not enter a new judgment in an action where, as here, there has been a trial by jury. Williams v. Charleston Area Med. Ctr., Inc., 215 W. Va. 15, n. 3 (2003) ("[Plaintiff's] motion also requested the circuit court to alter or amend the judgment pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure. Since the trial below was by jury, this was not a proper request.") For this reason, Defendants' Rule 59(e) motion should be DENIED as a matter of law, but the basis of that Motion should correspondingly be considered within the parameters of the other Motions, which the Court so does by the following; and,

[3] That within a synoptic view of the evidence adduced in this seven (7) week trial, from the Court's review of the relevant evidence within the analytical framework established by the standards set out above, it is clear there was sufficient and credible evidence from numerous

witnesses, including the Defendants' own witnesses, for the Jury to determine that Defendants, through the actions of their officers, employees or agents, committed the civil wrongs of tortious interference, fraudulent misrepresentation and fraudulent concealment. The Court detailed a portion of this evidence in the "Findings and Conclusions" section of its Amended Circuit Court Order on Jury Award of Punitive Damages, which the Court approves, adopts and incorporates herein as though specifically set forth; and,

[4] That in considering the evidence either in the light most favorable to the non-moving parties, in accordance with the Defendants' Rule 50(b) Motion, or in weighing the evidence and considering the credibility of the witnesses, in accordance with the Defendants' Rule 59 (a) Motion, the weight of the evidence at trial fairly established and was clearly sufficient for the Jury to conclude the following:

[a] The Corporate Plaintiffs (collectively "Harman") formerly were in the business of mining and selling high quality metallurgical coal produced from the Harman Mine. The Defendants (collectively "Massey") are also in the business of mining and/or selling metallurgical coal. Harman and Massey were competitors.

[b] Massey desired, among other things, to gain LTV Steel Corporation ("LTV") as a new customer.

[c] For years, LTV had purchased substantial amounts of metallurgical coal from United Coal Company ("UCC"). The coal that LTV preferred and purchased from UCC was a premium blend of Harman coal and other, lesser quality coals (the "UCC/Harman Blend"). Coal from the Harman Mine is metallurgical coal with very favorable coking characteristics prized by steelmakers like LTV.

[d] For many years, Harman sold all of its coal to one of UCC's subsidiaries, Wellmore Coal Corporation ("Wellmore"), which was, in turn, supplied to LTV as part of the UCC/Harman Blend. During the relevant time period, Harman had a long-term coal supply agreement with Wellmore. Harman was almost exclusively reliant on that contract. Wellmore's management had always encouraged Harman to mine and sell to it as much coal as it possibly could. Harman had been supplying Wellmore with its high quality metallurgical coal on a continuous basis for many years.

[e] For years, Massey wanted the LTV business and tried to increase sales of coals from its production sources ("Massey Mines") to LTV, but with little success. So Massey chose to acquire UCC in order to eliminate a competitor and to gain more access to LTV, but fully cognizant of Harman's long-term coal supply agreement with Wellmore and LTV's preference for the UCC/Harman blend. In a document written prior to Massey's purchase of UCC, Massey characterized the situation as follows:

In layman's terms, the UCC metallurgical coal quality is equivalent to Massey's premium Marfork coal, but is further enhanced by having a higher inerts level and a lower sulfur content. UCC had achieved a particularly enviable supplier relationship with LTV Steel Corporation ("LTV") that has now been in place for over 10 years. Surprisingly, the LTV relationship is not secured by a long-term contract, but rather by annual purchase orders that are consistently renewed at favorable pricing levels because of LTV's high regard for the UCC coal quality.

\* \* \*

UCC's degree of dependence on the Harman mining coal is obviously a sensitivity, since that source represents about 40% of the annual shipment level at Wellmore No. 7, and has become a fairly critical ingredient in the LTV coal blend. The term of the Harman mining purchase commitment runs through the year 2001. (Plaintiff's Ex. 27A: "Acquisition of United Coal Company, Overview.")

[f] Massey knew that there were risks associated with its acquisition. In a pre-acquisition document assessing those risks, Massey stated, "The most significant risk

associated with this transaction is that the plus-10-years-old supplier relationship between LTV and UCC may not continue under Massey ownership."

[g] In that same document, however, Massey noted that it would enjoy a very favorable economic outcome if it could cause LTV to purchase coal from Massey Mines, instead of the UCC/Harman Blend, at the price LTV was paying for UCC/Harman coal.

[h] Recognizing that Harman coal was a critical ingredient in the coal blend that LTV preferred, and knowing that LTV in the past had chosen not to purchase much coal from Massey, Massey nonetheless went ahead and purchased UCC. Further, recognizing that "LTV is extremely reluctant to change a long-established, successful coal blend", Massey nonetheless went ahead and marketed coals from Massey Mines to LTV to replace the Harman blend that LTV preferred.

[i] Massey 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, despite the fact that, historically, LTV preferred multiple suppliers and did not utilize multi-year, long-term coal supply contracts. The price that Massey quoted for its coals to LTV constituted a "handsome improvement" over the prices it had been receiving for its coals.

[j] Massey's marketing strategy resulted in a loss of the LTV business – a risk that it fully appreciated, acknowledged and understood prior to its marketing efforts and even prior to its purchase of UCC. Only after Massey's marketing efforts caused the loss of LTV's business did Massey direct Wellmore to declare "force majeure" against Harman, a declaration which Massey knew would put Harman out of business. Massey acknowledged Wellmore was readily able to purchase and sell the Harman coal, but instead chose to have Wellmore declare

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

[k] After Harman shut down operations, Massey took a series of steps to prevent Plaintiffs, both corporately and personally, from pursuing legal remedies arising out of Massey's misconduct. Massey's CEO threatened the Plaintiffs not to undertake legal action. Massey offered to purchase the assets of Harman at a distressed sale price. Massey then delayed and ultimately collapsed the transaction in such a manner so as to increase the Plaintiffs' financial distress. Instead, utilizing confidential information obtained from Plaintiffs for the alleged purpose of negotiating a settlement of their disputes, Massey purchased a narrow band of coal reserves surrounding much of the Harman Mine for the purpose of making Harman unattractive to others and to decrease its value to all but Massey, and Massey planned to acquire Harman in the long run.

[l] Many of the steps Massey took were directed at Plaintiff Caperton personally, including, by way of example, the following:

[i] Massey's conduct in "negotiating" directly with Caperton and under the February 9, 1998 letter agreement: Massey submitted a letter agreement to Mr. Caperton as President of Sovereign and Harman in which Massey and Wellmore expressly agreed to "pursue good faith negotiations toward concluding the described transactions." The transaction described in the agreement was intended to settle all issues relating to 1997 Coal Supply Agreement between the parties and permit Massey to acquire Caperton's interest in the Corporate Plaintiffs.

[ii] Massey's conduct in negotiating a letter of intent with Grundy: In the letter of intent, Massey agreed to purchase the note held by Grundy. Massey entered into the letter of intent with Grundy with full knowledge of Caperton's personal guarantee on the Grundy note.

[iii] Massey's conduct affecting Caperton's Terra obligations: Knowing Caperton's personal responsibilities for reclamation obligations to Terra, Massey agreed to replace the Terra reclamation bond with a Massey bond. During negotiations, Massey internal documents reflect that Caperton's personal guarantees were discussed and, as consideration for the transaction, the parties specifically negotiated the release of "his personal guarantee obligations." Recognizing Caperton's personal interest in the negotiations, Massey required Caperton to be a signatory to the closing documents, sought a far-reaching release from Caperton personally, and agreed to give Caperton a personal release in return.

[iv] Massey's duty to mitigate based upon knowledge of Caperton's actions taken in detrimental reliance: Massey knew through confidential information exchanged during the December 1997 and January 1998 discussions with Caperton, about Caperton's plans to shut down Harman as a result of Massey's wrongful declaration of "force majeure". Massey further knew that, in reliance upon an agreement in principle reached concerning the key terms and a proposed closing date of January 31, 1998. Caperton intended to shut down Harman's operations on January 19, 1998. Massey was also aware of the impact Massey's failure to close as planned would have on Caperton personally (based on his personal guarantees, likely AVS violator listings, etc.). Unknown to Caperton, Massey made an internal decision not to close the transaction by the agreed-to date of January 31, 1998, but chose instead to let Caperton move forward with his plans based upon his mistaken belief concerning the closing date.

[5] That as noted hereinabove from State v. Guthrie, *op cit*, the Court in reviewing not only sufficiency issues, but credibility claims as well, notes that Guthrie requires that:

**An appellate court must review all of the evidence, whether direct or circumstantial, in the light most favorable to the [non-moving] party and must credit all inferences and credibility assessments that the jury might have drawn in favor of the [non-moving party]. Emphasis supplied.**

[6] That in applying this standard, not only this Court but our Supreme Court is required to view all of the credibility of witnesses' issues consistent with the prevailing party's theories, in that the Jury could have properly found that many of the witnesses testifying on behalf of the Defendants were wholly lacking in credibility. For example, despite the fact that

Massey denied an intent to interfere with Harman or to purposely cause financial distress for the Plaintiffs so that Massey would benefit in the long run, numerous pieces of documentary evidence authored by Massey belied that testimony; and,

[7] That in review of the particular theories by the Plaintiff, the Court will review and consider them *in seriatim*, as follows:

A. Tortious Interference

[8] Defendant's Rule 50(b) argument that Defendants could not have tortiously interfered with the Harman Plaintiffs and individual Plaintiff Caperton's advantageous business relationships is not supported by the law or the evidence of record at trial. To establish prima facie proof of tortious interference, Plaintiffs needed only to show (1) the existence of a contractual or business relationship or expectancy; (2) an intentional act of interference by a party outside that relationship or expectancy; (3) proof that the interference caused the harm sustained; and (4) damages. See, e.g., Syllabus Point 2, *Torbett v. Wheeling Dollar Sav. & Trust Co.*, 173 W. Va. 210, 314 S.E.2d 166 (1983); and,

[9] The evidence was clearly sufficient for the Jury to conclude that Defendants tortiously interfered with the Harman Plaintiffs' advantageous relationships with, among others, the United Mine Workers of America, with Penn Virginia Coal Company, with Terra Industries, Inc., with Grundy National Bank, and with Wellmore Coal Corporation. As for Plaintiff Caperton, the evidence was clearly sufficient for the Jury to conclude that Defendants tortiously interfered with, among others, his personal guaranty relationships with Grundy National Bank, his personal liability under the Terra reclamation bonds (and resulting listing on the Applicant Violator System, or "AVS"), and his personal relationship with United Bank. Further, the evidence was clearly sufficient for the Jury to conclude that Defendants engaged in this intentional interference for the specific purpose of financially destroying Plaintiffs, both corporately and personally.

- (a) For example, Massey tried to persuade LTV to buy its coals in place of Harman coal, used "force majeure" and other threats, and otherwise interfered with Harman's contractual relations for the purpose of placing the Plaintiffs, corporately and personally, in great financial distress in order to have Harman, not Massey, bear the cost of Massey's failed marketing strategy with LTV.
- (b) For example, Massey directed Wellmore to declare "force majeure" as a result of Massey losing LTV's business due to Massey's failed marketing attempts.
- (c) For example, after directing the declaration of "force majeure", the Defendants participated in settlement negotiations with Plaintiffs and with Penn Virginia Coal Company, the Lessor of Plaintiffs' reserves, not with the intention of settling disputes, but for the purpose of placing the Plaintiffs, corporately and personally, in greater financial distress.
- (d) For example, after directing the declaration of "force majeure", the Defendants dealt directly with Grundy National Bank pursuant to notes held by Grundy, for which Plaintiff Caperton had given his personal guaranty;
- (e) For example, the Defendants obtained confidential information at their meeting with Plaintiff Caperton in November, 1997, and thereafter on the purported promise to purchase Caperton's interest in the Harman assets, the Defendants used that confidential information to acquire adjoining reserves, which the Defendants' own internal documents acknowledged would help to insure that Harman would only be valuable to the Defendants;
- (f) For example, the Defendants intentionally acted in utter disregard of Plaintiffs' rights and ultimately destroyed Plaintiffs' businesses and

caused Plaintiff Caperton's resultant AVS listing because, after conducting cost-benefit analyses, the Defendants concluded that it was in the Defendants' financial interest to do so;

- (g) For example, Defendants presented evidence to the Jury in support of their claim that their conduct was privileged, and the Court instructed the Jury that it could consider whether Defendants proved their interference resulted from legitimate competition; that their interference resulted from Defendants' having a financial interest in the induced party's business; that Defendants' interference resulted from their having responsibility for another's welfare; that Defendants' interference resulted from their intention to influence another's business policies in which Defendants had an interest; that Defendants' interference resulting from their giving of honest, truthful requested advice; or "other factors which show that Defendants' interference was proper." Court's Charge and Instruction of Law, at 8-11;
- (h) The Defendants employed wrongful means including the following by way of example: The "business justification" defense is subject to the condition that the actor not employ wrongful means, that our Supreme Court has held that a determination of whether conduct is proper or wrongful suggests a review of the factual situation and the factors listed at section 767 of the *Restatement (Second) of Torts*. C.W. Development, Inc. v. Structures, Inc. of W. Va., 185 W. Va. 462, 465 (1991);
- (i) The Court instructed the Jury to consider the various factors listed at section 767 in the context of the totality of the facts and circumstances of this case;
- (j) That the evidence was clearly sufficient for the Jury to conclude that:

- [i] Defendants developed a plan to interfere with Plaintiffs' existing and prospective relations with Wellmore before A.T. Massey Coal Company acquired Wellmore.
- [ii] Massey acquired UCC with the purpose of gaining access to LTV and to have the ability to interfere with the supply of Harman to LTV.
- [iii] The Defendants' Chief Executive Officer (CEO), without ever reading the applicable long term Coal Supply Agreement, directed that Wellmore Coal Corporation ("Wellmore") threaten Plaintiffs with the declaration of "force majeure."
- [iv] At a meeting held in November, 1997 in West Virginia, the Defendants' CEO threatened the Corporate Plaintiffs and Mr. Caperton with long and protracted litigation in the event the Corporate Plaintiffs did not agree to give up the rights to their reserves;
- [v] At the November, 1997 meeting the Defendants obtained confidential information and, thereafter, on the purported promise to purchase Caperton's interest in the assets of the Corporate Plaintiffs, instead used that confidential information to acquire adjoining reserves which the Defendants' own internal documents acknowledged would help to insure that the Plaintiffs' reserves would only be valuable to the Defendants;
- [vi] Massey engaged in a cost-benefit analysis to determine whether it should direct Wellmore to declare "force majeure";
- [vii] On December 1, 1997, at the Defendants' direction and contrary to the recommendations of its management, Wellmore declared the occurrence of a "force majeure" event under the Coal Supply Agreement, which reduced Wellmore's commitment to purchase coal from Plaintiffs by over 60% beginning on January 1, 1998, with full knowledge that the 60% loss would be financially devastating to Plaintiffs;
- [viii] After directing the declaration of "force majeure", the Defendants participated in settlement negotiations with Plaintiffs and the Lessor of Plaintiffs' reserves, not with the intention of settling disputes, but for the purpose of placing the Plaintiffs, corporately and personally, in greater financial distress;
- [ix] The Defendants misrepresented their intention to settle any disputes between the parties through an offered purchase and sale of Harman assets, and instead delayed the transaction and then reneged on their stated intention to purchase the Harman assets by collapsing the deal after the Harman operations were shut down in anticipation of the sale;
- [x] The Defendants intentionally acted in utter disregard of Plaintiffs' rights and ultimately destroyed Plaintiffs' businesses because, after conducting cost-benefit analyses, the Defendants concluded that it was in their financial interest to do so; and
- [xi] The Defendants consistently attempted to use the disparity of resources and bargaining power between the Defendants and the

Plaintiffs to its advantage, with little or no regard to the outcome of the Plaintiffs, either corporately or personally.

- (k) That Defendants' negotiations with Plaintiff Caperton in the time period from November 1997 through March 1998 were conducted directly by Defendants' Chief Executive Officer, Donald Blankenship, and not by Wellmore or any of its corporate officers;
- (l) That Defendants, not Wellmore or any of its corporate officers, interfered with Plaintiff Caperton's management of the bankruptcy of the Corporate Plaintiffs by purchasing claims to obtain standing in the Bankruptcy Court and to have Caperton removed as the debtor-in-possession;
- (m) That Defendants took numerous specific steps pursuant to its plan to wrongfully interfere with Plaintiffs' existing contractual relations with Wellmore before, during and after the short time that Defendant A.T. Massey Coal Company owned Wellmore.
- (n) That, as a matter of law, the circumstances under which a corporate parent has a legitimate justification or privilege to interfere in the contractual relations of its subsidiaries are qualified, subject to factual analysis by the jury, and the justification or privilege is lost if the corporate parent engages in wrongful conduct;
- (o) That, as outlined above, there was substantial evidence for the Jury to conclude that Defendants' conduct was wrongful;
- (p) That additional, substantial evidence of improper motive presented to the Jury included that, on August 1, 1997, one day after the acquisition of United Coal (the parent company of Wellmore), Wellmore's management recommended the purchase of Harman's entire production for the following year, but that Defendants' CEO, Donald Blankenship, overruled this recommendation and directed Wellmore to refuse to purchase more

than the minimum tonnages because of a purported "force majeure", that four days later, after having enacted Blankenship's directive, Blankenship put Wellmore up for sale in September of 1997;

- (q) That the Jury's verdict is supported by the clear weight of the evidence, is not based on false evidence, and will not result in a miscarriage of justice;
- (r) That the Jury verdict form and the instructions to Jurors on the issue of Plaintiffs' claims for tortious interference and Defendants' defenses thereto allowed the Jury to render a verdict on the issues framed consistent with the law of West Virginia, with the evidence presented to the Jury, and with the Jury's own convictions. Williams v. Charleston Area Medical Center, 215 W.Va. 15 (2003).

#### B. Fraudulent Misrepresentation

[10] That the Defendants' Rule 50(b) argument that Defendants are entitled to judgment as a matter of law on Plaintiffs' claims of fraudulent misrepresentation is not supported by the law or the evidence of record at trial. "The essential elements in an action for fraud are: (1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that the plaintiff relied on it and was justified under the circumstances in relying on it; and (3) that he was damaged because he relied on it." Horton v. Tyree, 104 W. Va. 238, 242, (1927), as cited in Syllabus Point 1, Lengyel v. Lint, 167 W. Va. 272 (1981). The evidence was clearly sufficient for the Jury to conclude that Defendants fraudulently misrepresented material information, that Plaintiffs, both personally and corporately, justifiably relied upon Defendants' fraudulent misrepresentations, and that Plaintiffs, both personally and corporately, were damaged because of that justifiable reliance.

- (a) That, by way of example, the following evidence was presented to the Jury:

- [i] While marketing their West Virginia coals to LTV, the Defendants intentionally created the false impression to Plaintiffs that they were actually trying to sell Harman coal to LTV;
  - [ii] In declaring "force majeure", Wellmore was directed by the Defendants' senior management to claim that the supposed event of "force majeure" was unforeseen, when Massey was well aware of and had in fact foreseen the event at least seven months before it occurred;
  - [iii] In declaring "force majeure", Wellmore was directed by Defendants' senior management to claim that a coke facility had shut down, when Defendants knew it had not;
  - [iv] After directing the declaration of "force majeure", the Defendants participated in settlement negotiations with Plaintiffs and the Lessor of Plaintiffs' reserves, not with the intention of settling disputes, but for the purpose of placing the Plaintiffs, corporately and personally, in greater financial distress;
  - [v] The Defendants obtained confidential information at a meeting in November, 1997, in West Virginia and thereafter on the purported promise to purchase Caperton's interest in the Harman assets, instead used that confidential information to acquire adjoining reserves, which the Defendants' own internal documents acknowledged would help insure that Harman would only be valuable to the Defendants;
  - [vi] The Defendants misrepresented their intentions to settle any disputes between the parties and reneged on their stated intention to purchase the Harman assets, and Defendants collapsed the deal after Plaintiffs had shut down operations in anticipation of a sale to the Defendants;
  - [vii] The Defendants intentionally acted in utter disregard of Plaintiffs' rights and ultimately destroyed Plaintiffs' businesses because, after conducting cost-benefit analyses, the Defendants concluded that it was in their financial interest to do so; and
  - [viii] The Defendants consistently attempted to use the disparity of resources and bargaining power between the Defendants and the Plaintiffs to Defendants' advantage, with little or no regard to the outcome of the Plaintiffs, either corporately or personally.
- (b) That the Jury's verdict is supported by the clear weight of the evidence, is not based on false evidence, and will not result in a miscarriage of justice; and
- (c) That the Jury verdict form and the instructions to Jurors on the issue of Plaintiffs' claims for fraudulent misrepresentation and Defendants' defenses thereto allowed the Jury to render a verdict on the issues framed

consistent with the law of West Virginia, with the evidence presented to the Jury, and with the Jury's own convictions. Williams v. Charleston Area Medical Center, 215 W. Va. 15 (2003).

### C. Fraudulent Concealment

[11] That the Defendants' Rule 50(b) argument that Defendants are entitled to judgment as a matter of law on Plaintiffs' claims of fraudulent concealment is not supported by the law or the evidence of record at trial. As stated above, "The essential elements in an action for fraud are: '(1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that the plaintiff relied on it and was justified under the circumstances in relying on it; and (3) that he was damaged because he relied on it.'" Horton v. Tyree, 104 W. Va. 238, 242, 139 S.E. 737 (1927), as cited in Syllabus Point 1, Lengyel v. Lint, 167 W. Va. 272, 280 S.E. 2d 66 (1981). A claim of fraudulent concealment "involves concealment of facts by one with knowledge, or the means of knowledge, and a duty to disclose, coupled with an intention to mislead or defraud." Pocahontas Min. Co. Ltd. Partnership v. Oxy USA, Inc., 202 W. Va. 169, 175, 503 S.E.2d 258, 264 (1998). The evidence was clearly sufficient for the Jury to conclude that Defendants fraudulently concealed material information which they were under a duty to disclose, that Defendants were motivated to conceal material information and prevent the Plaintiffs, both personally and corporately, from discovering the information, and that Plaintiffs, both personally and corporately, were damaged because of Defendants' concealment.

- (a) That, by way of example, the following evidence was presented to the Jury:
- [i] While marketing their West Virginia coals to LTV, the Defendants intentionally created the false impression to Plaintiffs that they were actually trying to sell Harman coal to LTV;
  - [ii] During the months that the Defendants were trying to persuade LTV to buy coal blends containing exclusively Massey coals mined by the West Virginia Defendants in place of Harman coal, the Defendants concealed this fact from Plaintiffs;

- [iii] The Defendants concealed the fact that it made numerous firm offers to sell the Defendants' West Virginia coals to LTV, but did not make firm price offers to sell Harman coal to LTV;
- [iv] The Defendants purposely omitted to disclose the fact that it lost the LTV business, which it lost not because of any "force majeure" but because of Defendants' marketing strategy and dealings with LTV, particularly its insistence that LTV fill all of its coal requirements through Defendants' West Virginia operations via a sole supplier, long-term contract, and through its decision not to allow LTV to purchase Harman coal, LTV's preferred choice;
- [v] Rather than tell Plaintiffs of its efforts to sell the Defendants' coals and its lack of effort in selling Harman coals, the Defendants' Representatives waited until shortly before year-end, when it is nearly impossible to make new coal supply arrangements for the following year, and then directed Wellmore to declare "force majeure" and effectively destroy the Plaintiffs' businesses.
- [vi] At a November, 1997 meeting the Defendants obtained confidential information and thereafter, on the purported promise to purchase Caperton's interest in the assets of the Corporate Plaintiffs, instead used that confidential information to acquire adjoining reserves which the Defendants' own internal documents acknowledged would help to insure that the Plaintiffs' reserves would only be valuable to the Defendants;
- [vii] On December 1, 1997, at the Defendants' direction and contrary to the recommendations of its management, Wellmore declared the occurrence of a "force majeure" event under the Coal Supply Agreement, which reduced Wellmore's commitment to purchase coal from Plaintiffs by over 60% beginning on January 1, 1998, with full knowledge that the 60% loss would be financially devastating to Plaintiffs;
- [viii] After directing the declaration of "force majeure", the Defendants participated in settlement negotiations with Plaintiffs and the Lessor of Plaintiffs' reserves, not with the intention of settling disputes, but for the purpose of placing the Plaintiffs, corporately and personally, in greater financial distress;
- [ix] The Defendants' declaration of "force majeure" was without any contractual basis as Defendants knew LTV was neither a customer of Wellmore, effective January 1, 1998, nor had the LTV Pittsburgh plant been directed to close by any governmental action, but instead was intended to place additional economic pressure upon the Plaintiffs, both corporately and personally;
- [x] The Defendants obtained confidential information at a meeting in November, 1997, in West Virginia and thereafter on the purported promise to purchase Caperton's interest in the Harman assets, instead used that confidential information to acquire adjoining reserves, which the Defendants' own internal documents acknowledged would help insure that Harman would only be valuable to the Defendants;
- [xi] The Defendants concealed their true intention not to settle any disputes between the parties and reneged on its stated intention to purchase the Harman assets, and Defendants collapsed the deal after

Plaintiffs had shut down operations in anticipation of a sale to the Defendants;

- [xii] The Defendants intentionally acted in utter disregard of Plaintiffs' rights and ultimately destroyed Plaintiffs' businesses because, after conducting cost-benefit analyses, the Defendants concluded that it was in their financial interest to do so; and
  - [xiii] The Defendants consistently attempted to use the disparity of resources and bargaining power between the Defendants and the Plaintiffs to its advantage, with little or no regard to the outcome of the Plaintiffs, either corporately or personally.
- (b) That there was sufficient evidence to support a finding of a duty by Defendants to disclose the information concealed from Plaintiffs, both corporately and personally, including, for example, the submission of a letter agreement dated February 9, 1998, to Caperton, in both his personal and corporate capacities, agreeing to "pursue good faith negotiations toward concluding the described transactions", and that the Defendants concealed their true intention at that time not to settle any disputes between the parties and reneged on their stated intention to purchase the Harman assets, and Defendants collapsed the deal after Plaintiffs had shut down operations in anticipation of a sale to the Defendants;
- (c) That the Jury's verdict is supported by the clear weight of the evidence, is not based on false evidence, and will not result in a miscarriage of justice; and
- (d) That the Jury verdict form and the instructions to Jurors on the issue of Plaintiffs' claims for fraudulent concealment and Defendants' defenses thereto allowed the Jury to render a verdict on the issues framed consistent with the law of West Virginia, with the evidence presented to the Jury, and with the Jury's own convictions. Williams v. Charleston Area Medical Center, 215 W. Va. 15 (2003).

[12] That on those issues related to the Defendants' challenges to the Jury's award of compensatory, consequential and general damages as set out in the Jury's Verdict Form, which

damages for the destruction of an established business is the difference between the fair market value of the business before and after its destruction.” Syllabus Point 3, Rufus v. Lively, 207 W.Va. 436 (2000). As for the Plaintiff Caperton, “An individual cause of action can be asserted when the wrong is both to the shareholder and the corporation.” 13 William Meade Fletcher, et al., Cyclopedia of the Law of Private Corporations sec. 5911 (2000). As for Defendants’ claims that the damages awarded were excessive, our Supreme Court has held that:

In reviewing challenges to damages awards generally, a deferential standard is employed: “in the absence of any specific rules for measuring damages, the amount to be awarded rests largely in the discretion of the jury, and courts are reluctant to interfere with such a verdict ....” This judicial hesitance stems from the “strong presumption of correctness assigned to a jury verdict assessing damages.” Accordingly, “[a] jury verdict ... may not be set aside by the trial court merely because the award of damages is greater than the trial judge would have made if he had been charged with the responsibility of determining the proper amount of the award.”

Kessel v. Leavitt, 244 W.Va. 95, 511 S.E.2d 720 (1998)(citations omitted). In fact, as noted above, in considering a Rule 59(e) motion to alter or amend the judgment (Defendants’ motion for remittitur), a trial court may not enter a new judgment in an action where, as here, there has been a trial by jury. Williams v. Charleston Area Med. Ctr., Inc., 215 W.Va. 15, n. 3, 592 S.E.2d 794, 798 (2003) (“[Plaintiff’s] motion also requested the circuit court to alter or amend the judgment pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure. Since the trial below was by jury, this was not a proper request.”).

(a) That, by way of example, the following evidence was presented to the

Jury:

- [i] Corporate Plaintiffs introduced testimony through a number of witnesses and introduced evidence through a number of exhibits, including the expert testimony of Alan Stagg who opined to a reasonable degree of professional certainty regarding the business plan put into place when Caperton took over the business in 1993 and who provided a valuation of the Harman coal reserves, and of Mark Gleason who opined to a reasonable degree of accounting certainty that the Corporate Plaintiffs suffered damages exceeding \$29 million as a result of the destruction of their business, in response to which the jury could reasonably determine that there was sufficient evidence to show that the Corporate Plaintiffs’ damages were caused by Defendants’ tortious misconduct;

- [ii] That Plaintiff Caperton introduced evidence through testimony on his on behalf, through his expert Daniel Selby, who opined to a reasonable degree of accounting certainty, through the testimony of Bobby Reece, an executive at Grundy National Bank, and through the introduction of exhibits all establishing his individual injuries, including injury to his personal and professional reputation resulting in the loss of income, benefits and business opportunities, personal injury by way of lost earnings and employment opportunities by way of his listing on the AVS, and personal injury by way of Defendants' tortious interference with his personal guaranty obligations in response to which the jury could reasonably determine that there was sufficient evidence to show that the Plaintiff Caperton's damages were caused by Defendants' tortious misconduct. Such evidence included, but was not limited to:
    - [iii] The Plaintiff Caperton was a business leader with whom his lenders and vendors were willing to do business before Defendants' tortious conduct;
    - [iv] The vendors and lenders with whom Plaintiff Caperton had previously done business now refuse to do business with him due to Defendants' tortious conduct;
    - [v] Due to the Defendants' tortious conduct, Plaintiff Caperton became a defendant in several lawsuits brought against him personally by the lenders and vendors with whom he had previously enjoyed a beneficial relationship;
    - [vi] Due to the Defendants' tortious conduct, Plaintiff Caperton has had judgments and tax liens entered against him personally throughout the State of West Virginia;
    - [vii] Due to the Defendants' tortious conduct, Plaintiff Caperton's personal credit rating and creditworthiness have been destroyed;
    - [viii] Due to the Defendants' tortious conduct, Plaintiff Caperton was and is precluded from obtaining a mining permit and engaging in his livelihood as a result of his AVS listing;
    - [ix] The Plaintiff Caperton's AVS listing, according to testimony at trial by those in the mining industry, constitutes a "blackball";
    - [x] Due to Defendants' tortious interference, Plaintiff Caperton's personal annual income went from in excess of \$1.3 million to \$60,000.00;
    - [xi] The Defendants' invaded Plaintiff Caperton's personal privacy, including the unwarranted trespass on his personal real estate to photograph his personal residence, and due to Defendants' tortious conduct, Plaintiff Caperton has suffered mental anguish and sleepless nights.
- (b) That the cases cited by Defendants for the proposition that Caperton was not entitled to recover damages for his separate personal injuries actually support the Court's conclusion of law: in that respect, the case of W.

- (b) That the cases cited by Defendants for the proposition that Caperton was not entitled to recover damages for his separate personal injuries actually support the Court's conclusion of law: in that respect, the case of W. Clay Jackson Enterprises, Inc., v. Greyhound Leasing & Fin. Corp., 463 F. Supp. 666 at 671, wherein the federal Court held... "a stockholder may sue to redress 'direct' injuries to himself regardless of whether the same violation injured the corporation". See also Sharp Electronics Corp. v. Yoggev, 1995 WL 263533 (1995), wherein the Pennsylvania Court held: "If the harm he sustained due to Sharp's conduct is not derivative of the harm DBI suffered at Sharp's hands, Yoggev can maintain suit for injuries sustained by him as a result of Sharp's tortious acts." In the U. S. Eight Circuit case of Taha v. Engstrand, 987 F.2d 505 at 507 (1993) the Court held "Recovery is available, naturally, when the defendant owes an individual shareholder ... a special duty, or when the individual suffered an injury separate and distinct from that suffered by other shareholders ...." See also Mullins v. First Nat'l Exchange Bank of Va., 275 F. Supp. 712 at 721-22 (E.D. Va. 1967), recognizing the same theory..
- (c) That from the record and the matters referenced herein, it is clear that there was sufficient evidence for the Jury to rightfully conclude that Plaintiff Caperton suffered injuries separate and distinct from those of the Corporate Plaintiffs;
- (d) That the Court took great pains to restrict, by issuing limiting or cautioning jury instructions at trial, or to eliminate the Jury's awareness or consideration of the other matters in litigation in the State of Virginia, in Federal Bankruptcy Court, or in this Court involving the facts and circumstances of other cases, and, therefore, the possibility of duplicate awards is not represented in the Jury's verdict;

- (e) That the Jury's verdict is supported by the clear weight of the evidence, is not based on false evidence, and will not result in a miscarriage of justice; and
- (f) That the Jury verdict form and the instructions to Jurors on the issue of Plaintiffs' damages allowed the Jury to render a verdict on the issues framed consistent with the law of West Virginia, with the evidence presented to the Jury, and with the Jury's own convictions. Williams v. Charleston Area Medical Center, 215 W. Va. 15 (2003).

[13] That in response to the Defendants' argument that the Court's determination of the laws of this State were the proper choice of law, the Defendant's Rule 50(b) argument that Defendants are entitled to judgment as a matter of law because of Defendants' contention that Virginia substantive law applies to the Plaintiffs' tort claims is not supported by the law or the evidence of record at trial. Under either the principle of *lex loci delicti* (the law of the place where the tort occurred governs) or under the principle of "most significant relationship" test set for the in the *Restatement (Second) of Conflicts of Law*, West Virginia law should govern because: (1) the Defendants are all citizens or residents of, or have substantial contacts, with West Virginia; (2) the Corporate Plaintiffs are either citizens or residents of, or have substantial contacts with West Virginia; (3) the Plaintiff Caperton is a citizen of West Virginia; (4) much of the correspondence and documents submitted as evidence either was sent from, or sent into, West Virginia; (5) the November, 1997, meeting in which many of Defendants' threats and misrepresentations were made occurred in West Virginia. On this issue as well it should be noted that:

- (a) That Defendants' misconduct occurred in substantial part in the State of West Virginia, was for the purpose of benefiting Defendants' West Virginia operations, and substantially injured residents of the State of West Virginia;

- (b) That, while the Coal Supply Agreement between Plaintiff Sovereign Coal Sales and Wellmore required Sovereign to pursue its breach of contract claims against Wellmore in the State of Virginia, the Defendant in that action (Wellmore) was a **different entity** than the Defendants here, that it was litigated and that jury awarded a verdict based upon breach of contract **only**, and that the Virginia defendant's appeal was processed in the State of Virginia **only**;
- (c) That, as the record to this case illustrates in great depth, the Plaintiffs alleged and proved to the jury's satisfaction that the torts occurred in the State of West Virginia;
- (d) That the Defendants argue that their tortious interference with Plaintiffs' business relationships would be lawful in Virginia, where Defendant A.T. Massey Coal Company Inc. is headquartered, is not found by the Court to have substantial merit. Virginia law clearly recognizes a party can be found liable for money damages for the tort of tortious interference with a contract or business relationship. Tazewell Oil Co., Inc. v. United Virginia Bank/Crestar Bank, 243 Va. 94, 413 S.E.2d 611 (1992). While Virginia law, like West Virginia law, recognizes economic justification and self-interest as possible defenses for interference, such possible defenses require factual determination as to whether the interference was conducted through improper or wrongful means or methods. Based upon the evidence adduced at trial, the Jury correctly rejected Defendants' contention that their means or methods were proper and not wrongful. To the extent that any of Defendants' tortious conduct may have occurred in Virginia, Defendants have failed to provide any authority establishing that either Virginia or West Virginia bestows upon a parent corporation an absolute privilege to interfere with the contracts or business relationships of its subsidiaries or third parties, or that a corporation intent upon wrongfully

interfering with contractual relations can acquire another corporation for the purpose of carrying out its interference and then enjoy an absolute privilege against such interference. Similarly, the tort of fraudulent conduct committed by Defendants is unlawful under Virginia law.

Virginia recognizes a claim for fraud where there has been the knowing or intentional making of a false representation of a material fact, or a knowing and intentional concealment of facts, which has been reasonably relied upon by another party resulting in injury to the misled party. Bay Point Condo. Ass'n. v. RML and Dryvit, 2001 WL 792690 (Va. Cir. Ct.); Richmond Metropolitan Authority v. McDevitt Street Bovis, Inc., 256 Va. 553, 507 S.E.2d 344 (1998); Ashmore v. Herbie Morewitz, Inc., et al., 252 Va. 141, 475 S.E.2d 271 (1996).

- (e) That based upon the Court's understanding of the operative elements of those torts, the evidence adduced by the Plaintiffs at trial would clearly have established those elements as well. Nevertheless, while the torts alleged by the Plaintiffs may be the same or similar as a matter of law in Virginia as in West Virginia, and while Defendants' conduct is unlawful in both Virginia and West Virginia, the Defendants were found in this action to have committed the torts in the State of West Virginia, juxtaposed to the State of Virginia.
- (f) That Defendants previously raised these choice-of-law/venue arguments before the United States Bankruptcy Court for the Western District of Virginia by way of adversary proceedings filed there, and before the United States District Court for the Southern District of West Virginia, by way of removal proceedings commenced there, and that both of those courts determined that the Circuit Court of **Boone County, West Virginia** was an appropriate forum for the trial of these matters, that the Circuit

Court was qualified to determine the appropriate substantive law, and that a Boone County jury was competent to determine the facts of this case.

- (g) That in light of the standard for the granting of a new trial, then, the Court further finds and concludes that the Jury's verdict is supported by the clear weight of the evidence, is not based on false evidence, and will not result in a miscarriage of justice. Moreover, upon review of the entirety of the record or of specific references, it is not reasonably clear to this Court that prejudicial error has crept into the record or that substantial justice has not been done, as required in our Court's recent decision in Morrison v. Sharman, 200 W. Va. 192 (1997).

[14] In respect to the Defendants' arguments regarding the punitive damages grounds, the Defendant's Rule 50(b) argument that Defendants are entitled to judgment as a matter of law because of Defendants' contention that the Jury's punitive damages award was either duplicative or unconstitutional is not supported by the law or the evidence of record at trial. On June 30, 2004, the Court, having heard from the parties regarding the Jury's award of punitive damages and Defendants' challenges to the same, entered its Order on Jury Award of Punitive Damages, including the "Findings and Conclusions" section stated therein. On August 27, 2004, the Court entered its Amended Order on Jury Award of Punitive Damages, including the "Findings and Conclusions" section stated therein;

- (a) That, from the evidence set forth in those Orders, the Jury, being a rational trier of fact, had sufficient evidence before it to conclude that Defendants' conduct was reprehensible, as our law defines such, and warranted the imposition of punitive damages in the amounts that such were assessed by the Jury for the conduct of the Defendants that had continued even after the initiation of this litigation;

(b) That even beyond the above referenced evidence, the Jury in this case also had before it evidence that Defendants stood to profit substantially from their wrongful conduct. The Defendants' own internal projections projected that they stood to make as much as \$104 million in profit by mining Harman and certain adjoining reserves. Plaintiffs also introduced evidence that the Defendants' sales to USX, LTV's alternate coke supplier, increased in 1998 after the closure of the Pittsburgh Works. Defendants' revenues were millions higher after Harman was put out of business. Our Supreme Court in the landmark case of Garnes v.

Fleming Landfill, Inc., 186 W. Va. 656(1991), held:

If the defendant profited from his wrongful conduct, the punitive damages award should be in excess of the profit, so that the award discourages future bad acts by the defendant.

Given this guideline, through the destruction of the Plaintiffs' businesses, the Defendants stood to gain additional, though not readily quantifiable, benefits by the elimination of a competitor and an increase in its market share;

(c) That in regard to the Garnes factor of the Defendants' financial position or status, the evidence adduced at trial before the Jury demonstrated that Defendants were and are a large corporation, with annual revenues between approximately \$1 billion and \$1.2 billion from 1997 through the time of trial;

(d) That while the Court in Garnes, as well as its progeny, has consistently held that the ratio of punitive damages to non-punitive damages may be supportive of a factor of 1, 3, 5 or possibly more, given the nature and extent of the evidence in a case, in the present case, **the ratio of punitive**

damages to non-punitive damages being less than 1/7<sup>th</sup> is well within the ratios considered reasonable by our Supreme Court of Appeals;

- (e) That in regard to the other arguments regarding this Jury's award of punitive damages, particularly those of a constitutional dimension (See State Farm Mutual Automobile Ins. Co. v. Campbell, 123 S. Ct. 1513 (2003); BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996)), that have been strenuously argued in the Garnes review proceeding (see August 27, 2004 Order), together with the Defendants' arguments at this time within the Rules 50 and 59 context, the Court has become aware of the standards for analyzing such outlined by our United States Supreme Court. In this case, however, as noted hereinabove there was very significant evidence from which a jury could properly find that Defendants' conduct was reprehensible and, specifically, that the targets of Defendants' conduct were financially vulnerable, as Defendants completely understood and knew; that the destruction of Plaintiffs' businesses was the known and intended result of Defendants' tortious interference and fraud; that Defendants' misconduct involved a series of bad acts taking place over many months; and that Defendants repeatedly disregarded and interfered with Plaintiffs' rights and otherwise deceived Plaintiffs because of Defendants' strict adherence to cost-benefit analyses that concluded Defendants would profit as a result of such misconduct;
- (f) That in the present case, as well, there are no State Farm/Gore-type "due process" concerns because the award of punitive damages (e. g. ratio of 1 to 7) was, by no stretch of the imagination, either "grossly excessive" or "arbitrary", State Farm, *op cit*, at 1519-1520, for operative application of

these elements;

(g) That from the evidentiary record and from the Court's rulings on the legal issues presented, there is no rational support for the argument that this case was used as a platform to expose or punish perceived deficiencies in Defendants' multi-state operations, nor did the Plaintiffs seek to submit substantial evidence regarding other incidents, bad acts or bad policy on the part of Defendants. Any evidence that could have been adduced regarding other bad acts of Defendants was at most limited in nature; with admonishments, cautionary or curative instructions regularly given by the Court; with the Court taking every reasonable precaution to maintain a fair and impartial jury; and, with any such evidence or inferences that could be drawn therefrom largely in response to statements volunteered by Donald Blankenship during his trial testimony;

(h) That while the Court is aware of the United States Supreme Court's determination that it is improper for a jury in one state "to punish [a defendant] for conduct that was lawful where it occurred and that had no impact on [the state where the jury is sitting] or its residents," State Farm, op cit, 1523-1524, citing Gore, 517 U.S. 559, 572-573 (1996), in the present case, however, the Defendants' conduct, and misconduct as the Jury determined: {1} occurred in substantial part in the State of West Virginia; {2} was for the purpose of benefiting the Defendants' West Virginia operations; and {3} substantially injured residents of the State of West Virginia. As the record to this case illustrates in great depth, the Plaintiffs alleged and proved to the Jury's satisfaction that the torts occurred in the State of West Virginia. Therefore, it was the State of West

Virginia's court system that had a legitimate interest in the just and proper determinations of the issues joined between the parties hereto, if such torts were properly established before the Jury and appropriate damages awarded thereon;

- (i) That this Court has determined as a matter of law that the Court properly charged the trial Jury on the issue of punitive damages by giving an instruction of law based on the enumerated factors set out in the Garnes case. Moreover, the Court reiterates from its prior determinations (see August 27, 2004 Order) that: {1} given the evidence adduced at trial; {2} given the Court's Charge and Instructions of Law, which incorporated the Defendants as well as the Plaintiffs proposed instructions; {3} given the closing arguments by counsel before the Jury; {4} given the Jury's deliberations' process itself; and {5} given the Jury's Verdict that it returned awarding less than 1/7<sup>th</sup> of the total award of damages in punitive money damages, that the Jury properly applied the Court's Garnes instructions to the relevant and controlling facts of the case.
- (j) That the Jury's verdict is supported by the clear weight of the evidence, is not based on false evidence, and will not result in a miscarriage of justice, all as outlined above; and
- (k) That as a result of all the findings and conclusions set forth above, as well as all of the conclusions and findings previously set forth in the Court's June 30, 2004, Order on Jury Award of Punitive Damages, including the "Findings and Conclusions" section stated therein, and in the Court's August 27, 2004, Amended Order on Jury Award of Punitive Damages, including the "Findings and Conclusions" section stated therein, that the

August 27, 2004, Amended Order on Jury Award of Punitive Damages, including the "Findings and Conclusions" section stated therein, that the Jury's punitive damages award in the amount of \$6 million was factually supported by the record evidence adduced; properly instructed upon by the Court; thoughtfully argued by the respective counsel; and legally determined and awarded by the Jury. For the Defendants now to argue otherwise, is for the Defendants to argue against their own Garnes-based proposed Instructions of Law offered at trial and incorporated by the Court.

[15] That in regard to the Defendants' respective arguments on alleged trial errors, the Court further notes that in accordance with the applicable provisions of Rule 59(a) of the West Virginia Rules of Civil Procedure, the Defendants' assert that they are entitled to a new trial based upon various errors this Court committed during the course of trial. Within the context of considering such a Rule 59(a) Motion, our Supreme Court has held that the trial court

"...has the authority to weigh the evidence and consider the credibility of the witnesses. If the trial judge finds the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice, the trial judge may set aside the verdict, even if supported by substantial evidence, and grant a new trial. A trial judge's decision to award a new trial is not subject to appellate review unless the trial judge abuses his or her discretion. Syllabus Point 2, Ayre v. Roop, 205 W.Va. 193 (1999).

In considering a Rule 59(a) Motion for a New Trial, the trial court's conclusions as to existence of reversible error are reviewed under an abuse of discretion standard, and the underlying factual findings are reviewed under a clearly erroneous standard. (see our Court's recent analysis of such in Citizens Bank of Weston, Inc. v. City of Weston, 209 W.Va. 145 at 148 (2001).

[16] That within this Rule 59 Motion's context, the Court has determined that it is proper to reiterate certain previous determinations, in that the Court has addressed above the Defendants' arguments regarding its alleged basis for judgment as a matter of law pursuant to

Rule 50(b). In making its findings and reaching its conclusions regarding Defendants' Rule 50(b) motion grounds, the Court has considered the evidence in the light most favorable to Plaintiffs, in accordance with the legal principles articulated by the referenced points and authorities from our Supreme Court.. In considering those same arguments in the context of Rule 59(a), the Court, in independently weighing the evidence and considering the credibility of the witnesses, hereby finds and concludes that, not only is the verdict not against the clear weight of the evidence, but rather the clear weight of the evidence firmly supports the Jury's verdict in its entirety, that the Jury's verdict is not based on false evidence, and that the Jury's verdict will not result in a miscarriage of justice.

[17] That in regard to the Defendants' arguments regarding alleged errors committed by this Court during the course of trial, the Court *in seriatim* finds and concludes as follows:

(a) The Defendants assert more than twenty errors concerning the Court's Jury Charge and Instructions of Law and the Jury Verdict Form submitted to the Jury. The Court's Charge to the Jury was based largely upon the West Virginia Model Jury Instructions suggested by our Supreme Court of Appeals, including language from the section on Business and Commercial Law regarding tortious interference and fraud; the proposed Instructions of Law proposed by the Plaintiffs and the Instructions of Law proposed by the Defendants; the Court's own research, and the facts adduced during the trial of this matter. In that respect, please see the Explanatory Notes on the Court's Charge and Instructions of Law, as well as the Court's Verdict Form, which expressly set forth the legal authorities relied upon by the Court for the generation and utilization of both. These explanations are hereby incorporated as if specifically set forth herein;

(b) Following its further review and consideration of the Court's Jury Charge

and the Instructions of Law, as well as the authorities governing such (see Adkins v. Foster, 195 W. Va. 566 (1995), the Court acknowledges that a trial judge has considerable discretion in submitting instructions and verdict forms to the jury. As our Supreme Court stated in the Adkins case:

The criterion for determining whether the discretion is abused is whether the verdict form, together with any instructions relating to it, allows the jury to render a verdict on the issues framed consistent with the law, with the evidence, and with the jury's own convictions.

Thus, the controlling provisions of Rules 49 and 51 of the West Virginia Rules of Civil Procedure should be read *in para materia* with the provisions of Rule 23.02 of the West Virginia Trial Court Rules, all of which so govern jury instructions and jury verdicts. As they should be read *in para materia*, so should Adkins principles be considered and applied together with State v. Belcher, 161 W. Va. 660 (1978) and State v. Kopa, 173 W. Va. 43 (1983), governing the requirements that instructions of law must correctly state the law and that instructions of law must be supported by the evidence. (see also Radec, Inc. v. Mountaineer Coal Dev. Co., 210 W. Va. 1 (2000) for a recent review by our Court of the appropriate standard.)

As a result therefore, the Court hereby concludes that it sufficiently instructed the Jury so that they understood the issues involved by proper statement of the law, which were properly supported by the evidence. Correspondingly, it concludes that in conformity with the procedural Rules and the legal principles governing such, the Jury's Verdict Form was one which properly framed the issues consistent with the law, with the evidence adduced and with the Jury's own convictions.

testimony of Defendants' witness Mr. James Gardner, a lawyer who sat at counsel table for much of the trial, the Court limited his testimony only to the extent that the witness, who acted as both a legal and business advisor to Defendants, told the Court **outside the hearing of the Jury that he could not distinguish** between advice given in a business capacity and advice given in a legal capacity. Defendants asserted the attorney client privilege to prevent the discovery of memoranda prepared by Mr. Gardner for Defendants. The Court deferred to Mr. Gardner's statement that he could not differentiate between his roles as business advisor and legal advisor before limiting his testimony to only those issues he could testify to in his business capacity. In doing so, the Court ruled partially in favor of both parties by allowing the witness's testimony, but limiting it by the witness's own admission (see CMAC, *op cit*).

- (d) As for the Defendants' contention that the Court erred by questioning certain witnesses at trial, including certain of Defendants' expert witnesses, the Court limited its intervention only for the purpose of discerning information underlying the respective opinions and conclusions reached by each side's expert witnesses. As the Defendants arguments acknowledge, Rule 614 of the West Virginia Rules of Evidence empowers the Court to pose questions to any witness, in its discretion, so long as its conduct of such questioning is fair and impartial (see State v. Farmer, 200 W. Va. 507 (1997)). As the record will reflect, the Court routinely inquired of each party at the conclusion of its questions, whether that party wished to inquire further, all for the express purpose of conducting the questioning "... so as not to prejudice the parties." The Court finds and concludes that its

questioning was not improper, but routine and conducted in the regular manner of questioning. As such, it did not prejudice the parties, and it did not invade the Jury's province.

- (e) As for the Defendant's contention that the Court erred with regard to any references made to the Virginia breach of contract litigation made by all parties, **including the Defendants**, any references that could have been made inadvertently regarding that litigation was limited in nature and was followed reasonably thereafter with cautionary, or curative, instructions following the Court's consultation with counsel for both the Plaintiffs and the Defendants.
- (f) As for the Defendants' contention that the Court erred by not declaring a mistrial as a result of trial publicity, the Court regularly and repeatedly cautioned the Jury to avoid exposure to any media source which might discuss the trial, including newspaper, television and radio accounts regarding the trial or other activities of any of the parties. This determination is reinforced by the fact that there has been no Sutphin-type or Miller-type challenges to the fairness and impartiality of the Jury before, during or after the Jury's return of the verdict.
- (g) As for the Defendants' contention that the Court erred by allowing "opinion evidence" from Plaintiffs' witnesses Henry Cook and Hugh Caperton, the Court, in light of Defendants' assertions, has reviewed the West Virginia Rules of Evidence regarding opinion evidence, particularly Rule 701, as it did at trial, and finds and concludes that the type of "opinion evidence" offered is the same or similar to that allowed within the parameters of Evans v. Mutual Mining, 199 W. Va. 526 (1997), wherein the owner of property is

competent and qualified to offer such, based upon his personal knowledge, with the ultimate decision to be made by the trier of fact.

- (h) As for the Defendants' contention that the Court erred by limiting Defendants from arguing that Corporate Plaintiffs were "inevitably" doomed to financial failure, the Court finds and concludes that Defendants' contention is mistaken as a matter of fact, as well as a matter of law, in that contrary to Defendants' assertion, the Court allowed the Defendants to introduce both testimony and documentary evidence regarding the Corporate Plaintiffs' financial condition throughout the course of the trial. The Court did limit its proximate cause instruction to one generally accepted in West Virginia in order to avoid juror confusion and in order to avoid a possible misstatement of the law, expressly by implicating legal concepts such as "last clear chance", "sudden emergency" or "thin skull". Even a business enterprise which is losing money can nevertheless suffer injury. In that respect, our Supreme Court in Lively v. Rufus, n. 15, 207 W. Va. 436 (2000) held that "... A business with a value of zero or less could, nevertheless, be injured by wrongdoing that created additional debt or further impeded its ability to pay existing debt." Within this context, the Court finds that the evidence of record clearly supports the conclusion that that the Court's instruction of law was proper, and that the Jury's determinations that the Defendants' conduct proximately caused injury, both corporately and personally, to the Plaintiffs was reasonable, given the evidence adduced at trial and the legal principles applicable thereto.
- (i) As for the Defendants' contention that the Court erred by allowing irrelevant evidence to be presented to the Jury, the Court has reviewed the West

Virginia Rules of Evidence, particularly Rules 402 and 403, regarding relevancy in light of Defendants' assertions, and finds and concludes that it acted properly and reasonably in excluding evidence more prejudicial than probative, and admitting evidence that the Court determined was more probative than prejudicial. In this respect, the record is replete with the Court's consonant rulings of what is fair for one side, is fair for the other. Moreover, our Supreme Court has consistently held that the Circuit Court has considerable latitude in determining whether to admit evidence as relevant, and decisions concerning relevancy are reviewed by the Supreme Court under an abuse of discretion standard {see Craddock v. Watson, 197 W. Va. 62 (1996); and Gonzalez v. Conley, 199 W. Va. 288 (1997)}.

- (j) As for the Defendants' contention that the Court erred by refusing to give various instructions as a part of the Court's charge to the Jury, the Court's charge to the Jury was based largely upon the West Virginia Model Jury Instructions suggested by our Supreme Court of Appeals, including language from the section on Business and Commercial Law regarding tortious interference and fraud, and the Court, in reviewing its charge to the Jury as a whole, finds and concludes that it sufficiently instructed the Jury so that they understood the issues involved and were not misled regarding the applicable law. The Court further approves and adopts those findings and conclusions set out above in subsections (a) and (b).
- (k) As for the Defendants' contention that the Court erred regarding the impact or effect of testimony about the availability of the "Pittston Reserves", the Court finds and concludes that resolving any conflicts in such testimony

among the various witnesses was clearly within the province of the Jury, and that the evidence on the issue of the "Pittston Reserves" was clearly sufficient for the Jury to reach the verdict it delivered, when considered after as the legal principles analyzing such verdicts are applied as noted hereinabove from Brannon v. Riffle, *op cit*, or State v. Guthrie, *op cit*.

- (1) As for the Defendants' contention that, pursuant to the "cumulative error doctrine," the Jury's verdict is inherently unreliable, the Court finds and concludes that any errors at the trial of this matter were insignificant or inconsequential (see WVRCP Rule 61), that all material evidence was properly received by the Jury, and that the evidence was clearly sufficient for a jury to properly conclude what represented substantial justice, and render a verdict that reflected such (see also Roberts v. Consolidated Coal Co., 208 W. Va. 218 (2000)).

[18] That when viewed summarily, the evidence at trial was clearly sufficient for a jury to conclude that Defendants' wrongful conduct extended over an extensive period of time and caused substantial injury and damages to all Plaintiffs, and that the evidence was clearly sufficient to support the damages awarded by the jury in its verdict as reflected on the Jury Verdict Form. Moreover, all of the evidence adduced at trial was properly adduced and that the Court has identified no reversible error supporting the relief requested in Defendants' Motion for Judgment as a Matter of Law, Motion for New Trial or, in the Alternative, Motion for Remittitur; and that the evidence at trial was sufficient for a jury to conclude that the Plaintiffs were severely harmed by the conduct of the Defendants and suffered legally-cognizable damages in the amounts determined by the Jury. Finally, the Court concludes that the Jury's verdict is supported by the clear weight of the evidence, is not based on false evidence, and will not result in a miscarriage of justice, all as more particularly set out hereinabove; and,

[19] That as a result of the findings and conclusions set forth above as well as the findings and conclusions set forth in prior Orders of this Court and of all the evidence of record, the Court has expressly determined that it is proper, just and reasonable, as well as equitable and necessary, to DENY the Defendants' Motion for Judgment as a Matter of Law, Motion for New Trial or, in the Alternative, Motion for Remittitur; and to CONFIRM AND AFFIRM the Jury's verdict award to the Plaintiffs in its entirety;

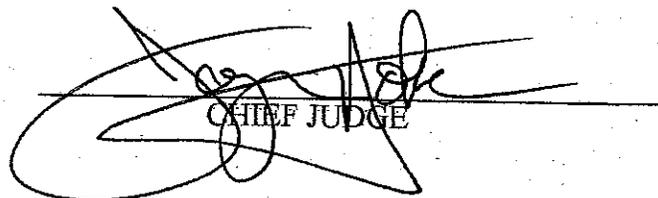
[20] That in accordance with the applicable provisions of West Virginia Code s56-6-31, the Plaintiffs are entitled to post-judgment interest at the rate of ten (10) percent per annum on the full amount of the Jury's verdict award of damages, said interest accruing from the date the judgment was entered by this Court, or August 15, 2002; and

[21] That as a result of the Court's respective findings of fact and conclusions of law, the Court notes the objections and exceptions of both the Plaintiffs and the Defendants for the record in this matter.

All of which is hereby ORDERED, ADJUDGED and DECREED.

It is further hereby ORDERED, ADJUDGED and DECREED that the Clerk of this Court shall provide notice of the entry of this Order by forwarding a certified copy of the same upon all of the parties of record herein, through counsel as appropriate, in accordance with Rules 10.01--12.06, as well as 24.01 of the West Virginia Trial Court Rules, by USPS First Class Mail, Certified Return Receipt Requested; or by hand delivery; or by facsimile transmission/communication at the numbers for such set out in the Court's file.

ENTERED on this 15th day of March, 2005, A.D.

  
CHIEF JUDGE