IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2008 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 on Rehearing: March 12, 2008
Filed: April 3, 2008

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JUSTICE DAVIS delivered the Opinion of the Court.

CHIEF JUSTICE MAYNARD and JUSTICE STARCHER, deeming themselves disqualified, did not participate in the decision of this case.

JUDGE COOKMAN and JUDGE FOX, sitting by temporary assignment.

JUSTICE ALBRIGHT and JUDGE COOKMAN dissent and reserve the right to file dissenting opinions.

ACTING CHIEF JUSTICE BENJAMIN and JUDGE FOX concur and reserve the right to file concurring opinions.

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. "A circuit court's entry of summary judgment is reviewed *de novo*." Syllabus point 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

4. "'"A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963).' Syllabus Point 1, *Andrick v. Town of Buckhannon*, 187 W. Va. 706, 421 S.E.2d 247 (1992)." Syllabus point 2, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

5. "The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there

is a genuine issue for trial." Syllabus point 3, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

6. 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.

7. 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.

8. 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.

9. 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.

10. A plaintiff who is a non-signatory to a contract containing a forum-selection clause may be bound by that clause when it is shown that his or her claims are closely related to the contract.

11. A defendant who is a non-signatory to a contract containing a forum-selection clause may enforce that clause when it is shown that the claims against him or her are closely related to the contract.

12. In determining whether to extend full retroactivity to a new principle of law, established in a civil case that did not overrule any prior precedent, 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.

13. A party may raise the defense of res judicata on appeal when the prior judgment relied upon becomes final during the pendency of his/her appeal.

Davis, 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 rehearing.[1] Based upon our thorough consideration of the parties' arguments on rehearing, the relevant case law and the record on appeal, we again conclude that this case may be resolved on two separate and mutually exclusive grounds. First, we find that the circuit court erred in denying a motion to dismiss filed by A.T. Massey Coal Company and its subsidiaries, 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. Assuming, *arguendo*, that the circuit court's denial of the motion to dismiss was not in error, we further conclude that the judgment should be reversed based

[1]The opinion formerly filed in connection with this appeal has been vacated based upon the subsequent voluntary disqualification of two of the justices who participated in the earlier proceedings in this Court.

upon the doctrine of res judicata due to an earlier action that had been litigated in Buchanan County, Virginia. 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.

I.

FACTUAL AND PROCEDURAL 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 Corporation[2] (hereinafter referred to as "Harman Development").[3] In that same year, Harman Development purchased the three previously mentioned subsidiaries of Inspiration: Harman Mining,[4] Sovereign[5] 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

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

[3]Mr. 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 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.

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

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

[6]The 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.

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 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. However, the 1997 CSA included, among other things, a *force majeure* clause,[8] and a forum-selection clause

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[7]The 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.

[8]The *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,

(continued...)

requiring that "[a]ll 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

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[8](...continued)
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 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. . . .

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

"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 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

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[10]LTV 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."

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

[12]The 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.

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 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,

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[13]Massey 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.

[14]*See supra* note 6.

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 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 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

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[15]According 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.

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

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]

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. (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, two in particular are relevant to our resolution of this matter. First, in

[17]Wellmore 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).

[18]Elk 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.

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. Thereafter, in April 2002, the Massey Defendants filed a motion for summary judgment, arguing, in relevant part, that the instant action was barred under the legal principal of res judicata. The circuit court denied this motion as well.

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. This appeal followed.[20]

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[19]The punitive damages claim was presented also.

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

II.

STANDARD OF REVIEW

Our analysis of this case will consider two issues: first, whether the circuit court erred in denying the Massey Defendants' motion to dismiss on the issue of the forum-selection clause, and, in the alternative, whether the circuit court erred in denying the Massey Defendants' motion for summary judgment on the issue of res judicata.

We first review the correctness of the circuit court's denial of the Massey Defendants' motion to dismiss for improper venue in light of the forum-selection clause contained in the 1997 CSA. "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).[21] However, 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 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

[21]"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).

apply a *de novo* standard of review.").

We next consider the circuit court's denial of the Massey Defendants' motion for summary judgment on the issue of res judicata. "A circuit court's entry of summary judgment is reviewed *de novo*." Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). For purposes of our *de novo* review, we further note that

> "'[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.' Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963)." Syllabus Point 1, *Andrick v. Town of Buckhannon*, 187 W. Va. 706, 421 S.E.2d 247 (1992).

Syl. pt. 2, *Painter*. Finally, we note that "[t]he circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." Syl. pt. 3, *Painter*. With these considerations in mind, we proceed to address the dispositive issues raised in this appeal.

III.

DISCUSSION

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. In the alternative, this case may be resolved based on the doctrine of

res judicata. We address each of these issues in turn.

A. Forum-Selection Clause

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.[22] 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

[22]"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).

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 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). . . .
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> 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.*, No. 07 CIV 1734 (GEL), ___ F. Supp. 2d ___, ___, 2007 WL 3100220, at *2 (S.D.N.Y. Oct. 22, 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.*, No. 3D07-487, ___ So. 2d ___, 2007 WL 2848118, at *2 (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), ___ F. Supp. 2d ___, 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, 2007 WL 2848118, at *2-3. 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 contained 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 on the grounds that the forum-selection clause required the case be filed in a Virginia court. The plaintiff appealed on the grounds 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,"[23] 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.

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

[23]This 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)).

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? 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 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.*, No. 07 CIV 1734 (GEL), ___ F. Supp. 2d ___, ___ & n.4, 2007 WL 3100220, at *2 & n.4 (S.D.N.Y Oct. 22, 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. 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.

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.[24]

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[24]Some 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 (continued...)

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 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

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[24](...continued)
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.

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:[25]

> 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 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

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[25]The 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.*

> 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).[26]

In another case, *Great Northern Insurance Co. v. Constab Polymer-Chemie GmbH & Co.*, No. 5:01-CV-0882 NAM GJD, ___ F. Supp. 2d ___, 2007 WL 2891981 (N.D.N.Y. Sept. 28, 2007), two German companies entered into a supply agreement whereby Constab Polymer-Chemie (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. ___ F. Supp. 2d at ___, 2007 WL 2891981, at *1. The contract included a forum-selection clause specifying that jurisdiction of certain disputes would be in Warstein, Germany. *Id.*, ___ F. Supp. 2d at ___, 2007 WL 2891981, at *7. Constab provided defective products to Schoeller USA, and Schoeller USA, through its insurer, filed

[26]*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).").

suit in California.[27] 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 . . . .

___ F. Supp. 2d at ___, 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) ("[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

[27]Great 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.

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)).

Based upon the foregoing, we now hold that a plaintiff who is a non-signatory to a contract containing a forum-selection clause may be bound by that clause when it is shown that his or her claims are closely related to the contract. We further hold that a defendant who is a non-signatory to a contract containing a forum-selection clause may

enforce that clause when it is shown that the claims against him or her are closely related to the contract.

Applying the foregoing holdings 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, any claim brought by Mr. Caperton and Harman Development in connection with the 1997 CSA are closely related to the contract and are, therefore, subject to the forum-selection clause contained therein. As we determined in the preceding section of this opinion, the three factually-supported claims asserted in the first amended complaint[28] 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.

[28]As 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.

Turning to the Massey Defendants, we note that none of them were signatories to the 1997 CSA. However, Defendant Massey subsequently became the parent company to Wellmore, who is a signatory of the 1997 CSA, and Wellmore was Massey's subsidiary at the time it declared *force majeure*.[29] 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*. Because, as we previously determined, all of the claims in this action flow directly from the declaration of *force majeure*, and the complaint alleges that the Massey Defendants controlled Wellmore's declaration of *force majeure*, the complaint plainly demonstrates that the claims against the Massey Defendants are closely related to the contract. Therefore, we find that the Massey Defendants are entitled to enforce the forum-selection clause of the 1997 CSA.

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

[29]The 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.

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 '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,[30] or that the clause was invalid for such reasons as fraud or overreaching. 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

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[30]On rehearing, the Harman Companies and Mr. Caperton argue, in part, that it is unjust to apply the forum-selection clause to deprive them of the large jury verdict awarded below. The proper question, however, 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. In addition, Mr. 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 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).

dismiss based upon the forum-selection clause was an abuse of discretion.[31]

5. Retroactivity of the New Forum-Selection Clause. On rehearing, the Harman Companies and Mr. Caperton have argued that the new forum-selection clause principles of law developed in this case should not be applied retroactively to them.[32] 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

[31]We 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 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).

[32]The Harman Companies briefed this issue in terms of applying the new principles prospectively.

> 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 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 doing so 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).[33] 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

[33]The *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.").

> 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 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)).[34] With the *Chevron*

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[34]The *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

(continued...)

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 did not overrule any prior precedent, 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.

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[34](...continued)

> 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).

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.
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> . . . .
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> 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, ___, 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."[35] 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.[36]

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

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[35]We 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).

[36]Mr. 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 of either doctrine.

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).[37]

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.

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

[37]The 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).

by Massey as an intervenor. *See Caperton v. A.T. Massey Coal Co., Inc.*, 251 B.R. 322 (S.D.W. Va. 2000).[38] 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 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

[38]It 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.

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.[39]

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[39]In 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 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 (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.[40] 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 the West Virginia Action. . . .
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> . . . .

[39](...continued)
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.").

[40]Mr. 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.").

> . . . Massey alleges that Caperton and Harman Development are seeking to enforce for their own benefit alleged claims which are assests 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.
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> . . . 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.").

B. Res Judicata

Although the forum-selection clause is dispositive of this case, we further conclude that, assuming *arguendo* the forum-selection clause did not apply here, this case is nevertheless barred by the doctrine of res judicata.

In addressing this issue, we are called upon to decide the res judicata effect of the Virginia judgment on the instant West Virginia proceeding. We have previously held that "[u]nder Article IV, Section 1, of the Constitution of the United States, a valid judgment of a court of another state is entitled to full faith and credit in the courts of this State." Syl. pt. 1, *State ex rel. Lynn v. Eddy*, 152 W. Va. 345, 163 S.E.2d 472 (1968). Further, "[b]y virtue of the full faith and credit clause of the Constitution of the United States, a judgment of a court of another state has the same force and effect in this State as it has in the state in which it was pronounced." Syl. pt. 3, *id.* "In order to ensure that another state's judgment is given the same force and effect it would have in that state, the general rule appears to be that '[t]he validity and effect of a judgment must be determined by reference to the laws of the state where it was rendered.'" *Jordache Enters., Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 204 W. Va. 465, 474, 513 S.E.2d 692, 701 (1998) (quoting 50 C.J.S. § 969, at 563). Further, "the full faith and credit clause generally requires the courts of this State to give [a foreign] judgment at least the res judicata effect which it would be accorded by [the foreign] courts." *Jordache Enterprises*, 204 W. Va. at 476, 513 S.E.2d at 703. *See also Martin v. SAIF Corp.*, 167 P.3d 916, 918-19 (Mont. 2007) ("Full faith and credit generally requires every State to give to a judgment at least the *res judicata* effect which the judgment would be accorded in the State which rendered it." (internal quotations and citation omitted)).

Before discussing the specific elements that must be established in order for

the preclusive effect of res judicata to apply under Virginia law, we must first address a preliminary issue. Under the laws of Virginia, "a judgment is not final for the purposes of res judicata . . . when it is being appealed or when the time limits fixed for perfecting the appeal have not expired." *Faison v. Hudson*, 243 Va. 413, 419, 417 S.E.2d 302, 305 (1992). In the instant case, it appears that a trial court judgment in the Virginia proceeding was entered on May 7, 2001. Subsequently, on April 1, 2002, Massey filed a motion for summary judgment with the West Virginia circuit court, arguing that principles of res judicata required dismissal of the West Virginia case as a result of the judgment in the Virginia case. On June 17, 2002, the circuit court denied the motion. The circuit court was correct in denying summary judgment on res judicata grounds because, at the time Massey filed its motion and the circuit court decided the matter, the Virginia judgment was being appealed by Wellmore. As we have pointed out, under Virginia law "a judgment is not final for *res judicata* purposes if it is being appealed." *CDM Enters., Inc. v. Commonwealth/Manufactured Hous. Bd.*, 32 Va. App. 702, 709, 530 S.E.2d 441, 445 (2000) (emphasis in original).

The Virginia judgment did not become final for purposes of res judicata until September 13, 2002, when the Supreme Court of Virginia dismissed Wellmore's appeal. *See Wellmore Coal Corp. v. Harman Mining Corp.*, 264 Va. 279, 568 S.E.2d 671 (2002) (dismissing appeal). Consequently, the issue we now confront is whether or not this Court may recognize the finality of the Virginia judgment, for purposes of addressing the res

judicata issue on appeal. A case squarely addressing this issue is *Aronow v. Lacroix*, 268 Cal. Rptr. 866, 219 Cal. App. 3d 1039 (1990).

The facts of *Aronow* involved two separate lawsuits filed by different plaintiffs against the same law firm for malicious prosecution.[41] One lawsuit was filed by Dr. Ann Fitzsimmons, and the other was filed by Betty Aronow. In the case brought by Dr. Fitzsimmons, a judgment was rendered in favor of the law firm on January 27, 1981. However, as a result of an appeal, the case was not finally disposed of until June 24, 1987. The action brought by Ms. Aronow went to trial on October 5, 1982. Prior to trial the law firm raised the issue of res judicata, but the trial court found that res judicata did not apply because Dr. Fitzsimmons' case was pending an appeal and therefore had not become final. A jury ultimately returned a verdict in favor of Ms. Aronow and awarded her damages. The law firm appealed the judgment. While the case was pending on appeal, Dr. Fitzsimmons' case became final after an appellate court rendered a decision affirming the verdict in favor of the law firm. As a result of Dr. Fitzsimmons' case becoming final, the law firm raised the issue of res judicata in the appeal of Ms. Aronow's case. The appellate court in *Aronow* found that the issue could be raised on appeal:

> First, we consider the question of a final judgment on the merits. At the time the court trial of [Ms. Aronow] began, [Dr. Fitzsimmons' case] was on appeal, so there was no final judgment . . . on which [the law firm] could rely to raise a res

[41]Both plaintiffs had been sued by the law firm in a previous action.

> judicata defense in the trial court. . . . However, . . . our affirmance of the judgment in [the law firm's] favor [became] final, . . . on September 28, 1987, while the present appeal was pending.
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> Under these circumstances, [the law firm] now ha[s] a final judgment on which to base a claim of res judicata, and they can raise the issue on appeal. Although normally the res judicata effect of a prior judgment must be pleaded and proven at trial, when the judgment becomes final during the pendency of an appeal in another action, the first final judgment may be brought to the attention of the appellate court in which the appeal is pending and may there be relied on as res judicata.

Aronow, 268 Cal. Rptr. at 870, 219 Cal. App. 3d at 1046 (internal quotations, citations, and footnote omitted). The appellate Court in *Aronow* went on to analyze the case under res judicata principles and found that the doctrine applied "to preclude [Ms.] Aronow from a judgment in her favor in her own case." *Aronow*, 268 Cal. Rptr. at 875, 219 Cal. App. 3d at 1053.

In accordance with *Aronow*, we now hold that a party may raise the defense of res judicata on appeal when the prior judgment relied upon becomes final during the pendency of his/her appeal. Although our holding on this issue permits us to exercise our inherent authority to consider Massey's res judicata argument, we believe the decisions of the Supreme Court of Virginia demonstrate that that Court would also exercise its inherent authority to address the issue under the facts presented.

The decision by the Supreme Court of Virginia in *Ward v. Charlton*, 177 Va.

101, 12 S.E.2d 791 (1941), is instructive of how we believe that Court would respond to the issue of res judicata raised in this case. The facts of *Ward* show that James R. Ward drove his car into the rear of a tractor being driven by Henry Harper. The tractor was owned by Sidney Charlton. Mr. Ward sued Mr. Charlton, and, in a separate action, Mr. Harper sued Mr. Ward. Mr. Ward also brought a counter-claim against Mr. Harper.

In Mr. Ward's suit against Mr. Charlton, a jury returned a verdict in favor of Mr. Ward. However, the trial court set aside the verdict and granted judgment to Mr. Charlton. Mr. Ward appealed. While Mr. Ward's appeal was pending, a jury decided the case brought by Mr. Harper. In that case, the jury determined Mr. Harper was not entitled to recover from Mr. Ward, and Mr. Ward was not entitled to recover from Mr. Harper on the counter-claim.

As a result of the disposition of the Harper-Ward lawsuit, Mr. Charlton asked the Supreme Court of Virginia to dismiss Mr. Ward's appeal on res judicata grounds. Mr. Charlton took the position "that since it has been adjudicated by a court of competent jurisdiction that Ward . . . can not recover of Harper, the original tort feasor, *a fortiori* Ward can not recover of Harper's master, Charlton, whose liability, if any, depends entirely upon the liability of Harper, under the doctrine of respondeat superior." *Ward*, 177 Va. at 106, 12 S.E.2d at 792. In response, Mr. Ward argued, among other things, that Mr. Charlton could not raise the defense of res judicata for the first time on appeal. The Supreme Court of

Virginia disagreed:

> The present [appeal] presents the sole question as to whether Ward is entitled to a judgment against Charlton by reason of the alleged negligent acts of Charlton's servant, Harper. The petition for a writ of error prays that the verdict which Ward obtained against Charlton and which the trial court set aside, be restored, and that this court enter a final judgment on said verdict against Charlton. It conclusively appears from extrinsic evidence, which is not controverted, that subsequent to the closing of the record in the instant case a court of competent jurisdiction has determined that Ward is not entitled to recover the judgment which he here seeks.[42]
>
> Must this court shut its eyes to these admitted facts and sagely proceed to consider an issue which has already been decided by a court of competent jurisdiction, and possibly enter a final judgment directly in conflict with that already rendered? We think not. In our opinion this court has the jurisdiction and it is its duty to examine this extrinsic evidence in determining whether it will proceed to hear the pending matter or dismiss it because the issue between the parties has been settled.
>
> . . . .
>
> It is true, as argued by the learned counsel for [Ward], that an appellate court in reviewing the record of the proceedings in the court below will not entertain the defense of res judicata if it was available and was not made below. This is so because the defense is an affirmative one and if not asserted below is deemed to have been waived. . . .
>
> But this principle does not apply to the instant case where the defense was not available and could not have been asserted during the trial below.

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[42]It should be pointed out that, at the time of this case, the Supreme Court of Virginia had not adopted the rule that a judgment is not final for the purposes of res judicata when it is being appealed. This rule was first adopted in 1992, in *Faison v. Hudson*, 417 S.E.2d 302 (Va. 1992).

. . . .

> The doctrine of res judicata or estoppel by judgment is based on public policy. . . . It proceeds upon the principle that one person shall not the second time litigate, with the same person or with another so identified in interest with such person that he represents the same legal right, precisely the same question, particular controversy, or issue which has been necessarily tried and finally determined, upon the merits, by a court of competent jurisdiction, in a judgment in personam in a former suit. . . .
>
> The doctrine is firmly established in our jurisprudence and should be maintained where applicable. . . .
>
> Here it has been brought to our attention by undisputed evidence that since the trial below another court of competent jurisdiction has finally adjudicated that the plaintiff in error, Ward, is not entitled to a judgment against Charlton, the defendant in error. Hence, the plaintiff in error is estopped to ask this court to review the record before it and to enter in his favor a judgment. . . .

Ward, 177 Va. at 110-15, 12 S.E.2d at 793-96 (internal quotations and citations omitted) (footnote added).

Clearly, under the decision in *Ward*, the Supreme Court of Virginia would address the issue of res judicata presented in this case, even though the doctrine did not become ripe until the case was presented on appeal. Consequently, we find that, although the circuit court was correct in denying summary judgment to Massey on res judicata grounds because the Virginia judgment was pending appeal, this Court may now address the issue anew because a final judgment was rendered in the Virginia case by the time this appeal

was prosecuted.

The Supreme Court of Virginia has described the doctrine of res judicata, and its purpose, as follows:

> the rationale for this judicially created doctrine [is that] it "rests upon public policy considerations which favor certainty in the establishment of legal relations, demand an end to litigation, and seek to prevent the harassment of parties. . . . The doctrine prevents 'relitigation of the same cause of action, or any part thereof which could have been litigated, between the same parties and their privies.'"

City of Virginia Beach v. Harris, 259 Va. 220, 229, 523 S.E.2d 239, 243 (2000) (quoting *Bill Greever Corp. v. Tazewell Nat'l Bank*, 256 Va. 250, 254, 504 S.E.2d 854, 856 (1998)) (additional citation omitted). *See also Smith v. Ware*, 244 Va. 374, 376, 421 S.E.2d 444, 445 (1992) ("The bar of *res judicata* precludes relitigation of the same cause of action, or any part thereof, which could have been litigated between the same parties and their privies." (citing *Bates v. Devers*, 214 Va. 667, 670-71, 202 S.E.2d 917, 920-21 (1974); *Flora, Flora & Montague, Inc. v. Saunders*, 235 Va. 306, 310, 367 S.E.2d 493, 495 (1988); *Brown v. Haley*, 233 Va. 210, 215, 355 S.E.2d 563, 567 (1987); and *Worrie v. Boze*, 198 Va. 533, 537-38, 95 S.E.2d 192, 196-97 (1956), *aff'd on reh'g*, 198 Va. 891, 96 S.E.2d 799 (1957))).

With respect to the application of res judicata, the Virginia Court has been consistent in holding that

> [f]our elements must be present before *res judicata* can be

> asserted to bar a subsequent proceeding: "(1) identity of the remedies sought; (2) identity of the cause of action; (3) identity of the parties; and (4) identity of the quality of the persons for or against whom the claim is made." *Wright v. Castles*, 232 Va. 218, 222, 349 S.E.2d 125, 128 (1986). *See also Mowry v. City of Virginia Beach*, 198 Va. 205, 211, 93 S.E.2d 323, 327 (1956).

Smith v. Ware, 244 Va. at 376, 421 S.E.2d at 445. *See also State Water Control Bd. v. Smithfield Foods, Inc*. 261 Va. 209, 214, 542 S.E.2d 766, 769 (2001) (same); *Balbir Brar Assoc., Inc. v. Consolidated Trading & Servs. Corp*., 252 Va. 341, 346, 477 S.E.2d 743, 746 (1996) (same). We will address each of these elements in turn.

1. Identity of the remedies sought. The Harman Companies argue that because the Virginia proceeding awarded damages for breach of contract, while the instant action awarded damages in tort, the remedies sought in these two actions are not the same. We disagree.

The Supreme Court of Virginia has not squarely defined what is meant by "identity of the remedies sought" for purposes of the res judicata test. *Ware*, 244 Va. at 376, 421 S.E.2d at 445. However, in the *Ware* case, the Court addressed the issue of whether there was identity of remedies, and concluded that because the earlier action sought relief in the court of law, while the latter action sought equitable relief in the court of chancery, there was no identity of remedy: "Mrs. Smith, in her motion for judgment for unlawful detainer, sought the remedy of possession and damages. . . . Mrs. Smith, in her bill of complaint, does

not seek possession of the property. Rather, she seeks a commutation of her dower interest, which is a different remedy." *Ware*, 244 Va. at 376-77, 421 S.E.2d 445-46.[43] Thus, it appears that the "remedy" element of res judicata refers, at least in significant part, to the distinction between legal and equitable remedies. The legal definition of the term "remedy" supports this view. *See, e.g., Black's Law Dictionary* 1296 (7th ed. 1999) (defining "remedy" as "[t]he means of enforcing a right or preventing or redressing a wrong; legal or equitable relief").

Our conclusion is further supported by the opinion in *Cherokee Corp. of Linden, Virginia, Inc. v. Richardson*, Chancery No. 95-130, Chancery No. 96-34, now Law No. L-96-148, 1996 WL 1065553, at *1 (Va. Cir. Ct. June 5, 1996), wherein the Circuit Court of Virginia explained the concept in this way:

> At first brush [*Wright v. Castles*, 232 Va. 218, 222, 349 S.E.2d 125, 128 (1986),] appears to [be] a retrenchment in the scope of the doctrine of res judicata by its addition of the requirement of "identity of remedies," because if remedy were synonymous with "right of action," the implication is that the aggrieved party, confronted with a judgment for the defendant, may simply successively file actions based on different remedies or rights of action until he receives a favorable verdict. If this were true, the doctrine of Res Judicata would be substantially emasculated.

[43]Until January 2006, Virginia continued to separately recognize actions at law and actions in chancery. However, that distinction was abolished as of January 1, 2006. *See Williams & Connolly, L.L.P. v. People for Ethical Treatment of Animals, Inc.*, 273 Va. 498, 517 n.6, 643 S.E.2d 136, 145 n.6 (2007) ("As of January 1, 2006, Virginia abolished the procedural distinctions between actions at law and suits in chancery.").

> Black's Law Dictionary (5th ed. 1979) defines remedy as "the rights given to a party by law or by contract which that party may exercise upon a default by the other party, or upon the commission of a wrong (a tort) by another party," so remedy in this context is actually consonant with the broader concept of "cause of action." Moreover, the Supreme Court in *Ware v. Smith*, [244 Va. 374, 421 S.E.2d 444 (1992)], noted that the causes of action were different and relied upon *Bates v. Devers*, 214 Va. 667, 670-71, 202 S.E.2d 917, 920-21 (1974), which clearly held:
>
> > Res judicata-bar, is the particular preclusive effect commonly meant by the use of the term "res judicata." A valid, personal judgment on the merits in favor of a defendant bars relitigation of the same cause of action, or any part thereof which could have been litigated, between the same parties and their privies. *See* Restatement of Judgments 47, 62, 83 (1942).
>
> Collateral estoppel is the preclusive effect impacting in a subsequent action based upon a collateral and different cause of action.
>
> *The ostensibly inconsistent rule of this case derives from the fact that Virginia still recognizes a distinction between law and equity, and this legal relic affects the court's res judicata decisions.* In *Ware v. Smith*, *supra*; *Brown v. Haley*, 233 Va. 210, 219, 355 S.E.2d 563 (1987) (equitable claim for easement arose from different transaction and could not be asserted in earlier ejectment action at law between the same parties); and *Wright v. Castles*, 232 Va. 218, 349 S.E.2d 125 (prior chancery suit for injunction does not bar later suit for monetary damages, the court was confronted by later cases being filed on a different side of the court, because of the dichotomy between law and equity[)]. . . .

1996 WL 1065553, at *10 (emphasis added). *See also Davis v. Marshall Homes, Inc.*, 265 Va. 159, 175, 576 S.E.2d 504, 512 (2003) (Kinser, J., dissenting) ("Nor was there an identity

of remedies [in *Brown v. Haley*, 233 Va. 210, 355 S.E.2d 563 (1987),] because the two claims could not have been brought in one proceeding. If the Haleys had asserted what would have been a counterclaim in the ejectment action, the court could not have granted the requested relief regarding the easement in that action *since the relief was equitable in nature and the ejectment action was at law*. [*Brown*] at 218, 355 S.E.2d at 568." (emphasis added)).

With respect to the case presently before us, both the Virginia proceeding and the instant proceeding sought the legal remedy of monetary damages stemming from Wellmore's wrongful declaration of *force majeure* under the 1997 CSA. Accordingly, the identity of remedy element of Virginia's res judicata test has been met.

2. Identity of the cause of action. The Harman Companies contend that the breach of contract cause of action litigated in Virginia differs from the tort claims asserted in the instant action. In reaching this conclusion, the Harman Companies argue that the proper standard to be applied is the "same evidence" test set out in *Davis v. Marshall Homes, Inc.*, 265 Va. 159, 166, 576 S.E.2d 504, 507 (2003). We disagree.

To decide the proper rule to be applied in addressing this issue, we look to the Virginia law in effect at the time the complaint was filed in the Circuit Court of Boone

County in October, 1998.[44] At that time, Virginia applied the transactional approach to determine whether there was identity of the cause of action for purposes of res judicata. *See Allstar Towing, Inc. v. City of Alexandria*, 231 Va. 421, 344 S.E.2d 903 (1986). In *Allstar*, the City of Alexandria, Virginia, had initiated a bidding process to procure a contract to tow vehicles in the City. Allstar Towing, Inc., was the only company to submit a bid, but the company was declared ineligible because Allstar "was not a registered corporation" on the bid opening date. *Id.* at 422, 344 S.E.2d at 904. Allstar's certificate of incorporation was issued by the State Corporation Commission the following day. Allstar petitioned the circuit court for an appeal of the determination of ineligibility, or in the alternative, an award of the "'reasonable profits' which it would have earned 'over the course of the prospective agreement.'" *Id.* Allstar also sought a temporary injunction to prevent the city from awarding a towing contract. The circuit court denied both the petition for appeal and the motion seeking injunctive relief. Meanwhile, the City requested and accepted bids for a towing contract a second time. Allstar again submitted a bid, but the contract was awarded to another company, Franconia Towing & Storage. Allstar then filed a second action against the city in the circuit court alleging that Franconia had failed to meet the city's specifications, which Allstar had met. Allstar sought damages "representing 'lost income that it would have received . . . had the contract been awarded to it.'" *Id.* at 423, 344 S.E.2d at 905. The circuit

[44]We believe the Virginia Supreme Court would likewise apply the procedural rule in existence at the time the complaint was filed. *See, e.g.*, Rule 1:6 of the Rules of the Supreme Court of Virginia (making new res judicata rule applicable to "all Virginia judgments entered in civil actions *commenced* after July 1, 2006" (emphasis added)).

court ruled that, under the principles of res judicata, the second action was barred by the earlier action. Allstar appealed the case to the Supreme Court of Virginia, where that court found that the second action was not barred, as "the same cause of action was not involved in the two cases." *Id.* at 425, 344 S.E.2d at 906. The Supreme Court of Virginia found that "[i]n the first case, Allstar sought relief because the City had determined it to be a 'non-responsible' bidder," based on its lack of a certificate of incorporation; while in the second action Allstar sought relief in connection with a second invitation to bid, which it claimed was improperly awarded to a contractor who failed to meet the city's specifications. *Id.* The Allstar Court then concluded that the second action asserted by Allstar was not barred by the first because "the facts giving rise to the second cause of action were not even in existence when the first action was heard and decided on the merits on December 31, 1984." *Id.* In reaching its conclusion, the Supreme Court of Virginia adopted the transactional approach when it announced that "[f]or the purposes of res judicata, a 'cause of action' may be defined broadly 'as an assertion of particular legal rights which have arisen out of a definable factual transaction.'" *Id.* (internal citation omitted)).[45]

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[45]Subsequently, in 2003, the Supreme Court of Virginia handed down an opinion that significantly changed how that Court defined the term "cause of action" for purposes of *res judicata*. *See Davis v. Marshall Homes, Inc*., 265 Va. 159, 166, 576 S.E.2d 504, 507 (2003) (adopting the "same evidence test" by concluding that fraud claim did not bar subsequent breach of contract claim involving same deed of trust notes, and commenting that "[t]he mere fact that some evidence relevant in plaintiff's action for fraud may be relevant to prove her distinct and separate contract claim for nonpayment of the deed of trust notes does not, for purposes of res judicata, mean that plaintiff only has one cause of action. Evidence of defendants' failure to satisfy the deed of trust notes does not prove that (continued...)

The transactional approach has also been explained as follows:

> As can be seen, Virginia follows the transaction rule set forth in the Restatement of Judgments 2d, '24 for purposes of defining "cause of action." The importance of understanding the broad concept of "cause of action" is essential to understanding the application of res judicata. One "cause of action" may give rise to myriad rights of action, *e.g.*, breach of contract, breach of warranty, negligence, and statutory claims; however, *if the rights of action arise from the same operative set of facts and could legally be asserted therein, they are all the same "cause of action" for purposes of the application of the doctrine of res judicata*. "There can be no right of action until there is a cause of action." *Stone v. Ethan Alan*, 232 Va. 365, 368-369, 350 S.E.2d 629 (1986), citing *Caudill v. Wise Rambler*, 210 Va. 11, 13 168 S.E.2d 257, 259 (1969). However, as broad as the application of the doctrine of res judicata is, it applies only to rights of action which have accrued from the

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[45](...continued)
defendants made false representations of the values of the real properties intentionally and knowingly, with the intent to mislead plaintiff. Evidence of defendants' failure to satisfy the deed of trust notes does not establish plaintiff's reliance upon defendants' alleged misrepresentations."). The Harman Companies' assertion that we should apply the *Davis* case in resolving this issue is misplaced, as the *Davis* opinion had not yet been handed down at the time the Harman Companies filed their complaint in this action. Moreover, we believe that the *Davis* opinion was a temporary aberration in Virginia law that rejected the existing transactional approach and developed a new "same evidence" rule. *See Davis*, 265 Va. at 180, 576 S.E.2d at 515 (Kinser, J., dissenting) ("In truth, the effect of the majority's explicit rejection of a transactional approach is to overrule our decision in *Allstar Towing*. However, the majority does not explain why this precedent should be cas[t] aside. Despite rejecting a transactional approach and overruling *Allstar Towing*, the majority, nevertheless, utilizes the *Allstar* Towing definition of the term 'cause of action,' and the majority states that its decision is supported by the holding in that case."). In 2006, the Supreme Court of Virginia adopted Rule 1:6, through which the Virginia Supreme Court rejected the *Davis* "same evidence" rule and returned to the transactional approach previously applied in Virginia when addressing the element of res judicata requiring identity of the cause of action. *See Virginia Imports, Ltd. v. Kirin Brewery of America, LLC*, 50 Va. App. 395, 410 n.6, 650 S.E.2d 554, 561 n.6 (2007) (observing that the transactional approach adopted by Rule 1:6 was promulgated to supersede the holding in *Davis*).

> cause of action and could have been asserted in the proceeding upon which the plea is based. As the Supreme Court of Virginia noted in *Southern. R. Co. v. Wash. & C. R. Co.*, 102 Va. 483, 491, 46 S.E. 784 (1904):
>
> > [R]es judicata applies, except in special cases, *not only to points upon which the court was actually required, by the parties, to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. Diamond State Iron Co. v. Rarig & Co.*, 93 Va. 603, 25 S.E. 894, and authorities cited. But it cannot be applied to a matter not adjudicated in a former action and which could not have been brought forward for adjudication upon the pleadings in the cause; nor to a matter arising after the former adjudication, even in a second suit between the parties to the former or their privies, if the causes of action are not the same. (cites omitted).

Cherokee Corp., 1996 WL 1065553, at *8 (emphasis added). *See also Virginia Imports*, 50 Va. App. at 410 n.6, 650 S.E.2d at 561 n.6 ("Under settled principles, the 'effect of a final decree is not only to conclude the parties as to every question actually raised and decided, but as to every claim which *properly belonged to the subject of litigation* and which the parties, by the exercise of reasonable diligence, *might have raised at the time*.' *Smith v. Holland*, 124 Va. 663, 666, 98 S.E. 676, 676 (1919) (emphasis added).").

Turning to the case at bar, although the Virginia proceeding addressed contract claims, while the instant proceeding addressed tort claims, this distinction is of no moment.

Both the tort claims asserted in the case *sub judice* and the earlier contract claims asserted in the Virginia proceeding arise from the same "conduct, transaction or occurrence," namely the wrongful declaration of *force majeure* by Wellmore, which was carried out under the direction and control of the Massey Defendants. Thus, the tort claims asserted in this action arise from the same transactional facts as the Virginia proceeding and should have been asserted in that proceeding.

3. Identity of the parties. Mr. Caperton and Harman Development were not parties to the Virginia action, and neither were any of the Massey Defendants named in the instant suit. The Harman Companies argue that there is no identity of the parties as there is no privity between the Massey Defendants and Wellmore. We disagree, finding there is identity of the parties between the Virginia proceeding and the instant proceeding under the doctrine of privity.

> Pursuant to Virginia law,
>
> > [t]he doctrine of *res judicata* applies not only to the actual parties in a case but also to those in privity with them. *See City of Virginia Beach v. Harris*, 259 Va. 220, 229, 523 S.E.2d 239, 243 (2000). In other words, res judicata applies to anyone "'so identified in interest with [a party] that he represents the same legal right, precisely the same question, particular controversy, or issue.'" *Johnson*, 7 Va. App. at 618, 376 S.E.2d at 788 (citation omitted).

CDM Enters., Inc. v. Commonwealth/Manufactured Housing Bd., 32 Va. App. 702, 710, 530

S.E.2d 441, 445 (2000). One Virginia court has explained the requirement for the identity of parties in this way:

> "One of the fundamental prerequisites to the application of the doctrine of *res judicata* is that there must be an identity of the parties between the present suit and prior litigation asserted as a bar. A party to the present suit, to be barred by the doctrine, must have been a party to the prior litigation, or represented by another so identified in interest that he represents the same legal right." *Dotson*, 232 Va. at 404-405, 350 S.E.2d at 644.
>
> > There is no fixed definition of privity that automatically can be applied in all cases involving *res judicata* issues. While privity generally involves a party so identified in interest with another that he represents the same legal right, a determination of . . . who are privies requires a careful examination of the circumstances of each case.
>
> *Nero v. Ferris*, 222 Va. 807, 813, 284 S.E.2d 828, 831 (1981).
>
> In *Patterson v. Saunders*, the Supreme Court stated:
>
> > It is generally held that "'privity' means a mutual or successive relationship to the same rights of property, or such an identification in interest of one person with another as to represent the same legal rights, and the term 'privy,' when applied to a judgment or decree refers to one whose interest has been legally represented at the trial."
>
> 194 Va. at 613, 74 S.E.2d at 208 (citation omitted).

Commonwealth ex rel. Gray v. Johnson, 7 Va. App. 614, 619, 376 S.E.2d 787, 789 (1989).

Turning to the case *sub judice*, we find that the parties to the Virginia

proceeding "are so identified in interest" with the parties to the instant proceeding that they "represent the same legal right[s]." *CDM Enters., Inc.*, 32 Va. App. at 710, 530 S.E.2d at 445 (internal quotations and citations omitted). In the Virginia proceeding, Harman Mining and Sovereign sued Wellmore for breach of contract related to the wrongful declaration of *force majeure* under the 1997 CSA. It bears reiterating that all of the harm that has been claimed by Mr. Caperton and the Harman Companies in the instant action has stemmed directly from that wrongful declaration of *force majeure* under the 1997 CSA. Because the question of whether the declaration of *force majeure* was wrongful was the exact issue addressed in the Virginia proceeding, the interests of the various parties to the instant suit, which also depends upon the propriety of the declaration of *force majeure,* is directly aligned with the interests of the related corporate entities who participated in the Virginia action.

Moreover, it has been recognized that a parent company is in privity with its subsidiary. *See Mullins v. Daily New Leader*, 2001 WL 1772679, at *2 (Va. Cir. Ct. Oct. 24, 2001) ("The Daily News Leader and Gannett Co., Inc., are in privity as Gannett is the parent company of the Daily News Leader."). Thus, Harman Development is plainly in privity with its susidiaries, Harman Mining and Sovereign, who were parties to the Virginia action. Mr. Caperton is also in privity with Harman Mining and Sovereign to the extent that he signed the 1997 CSA in his capacity as president of Sovereign, and insofar as Harman Mining and Sovereign are wholly-owned subsidiaries of Harman Development, and Mr. Caperton is the sole owner of Harman Development. Likewise, A.T. Massey Coal Company is in privity

with its subsidiary Wellmore, as are the remaining Massey Defendants, who are also subsidiaries of Massey and sister corporations to Wellmore.

4. Identity of the quality of the persons for or against whom the claim is made. As previously indicated, for purposes of res judicata, Virginia requires a determination be made of the identity of the quality of the persons for or against whom the claim was made. As explained by a Virginia trial court, "[t]he 'identity of quality' element is a requirement that the parties in conflict appear in the identical capacities or on 'the same side of the versus' in both proceedings." *Winchester Homes, Inc. v. Hoover Universal, Inc*., LAW NO. 122509, 1994 WL 1031408, at *2 (Va. Cir. Ct. Nov. 2, 1994) (citing *Greene v. Warrenton Prod. Credit Ass'n*, 223 Va. 463, 291 S.E.2d 209 (1982)). The facts of the instant case clearly establish that this element has been met. The original plaintiffs in the Virginia suit are plaintiffs in the West Virginia proceeding, and they sued in the same capacity in both litigations. None of the Massey Defendants in the instant proceeding was a plaintiff in the Virginia proceeding. *See Byrum v. Ames & Webb, Inc*., 196 Va. 597, 85 S.E.2d 364 (1955) (finding that prior litigation was not res judicata to subsequent litigation because plaintiff and defendant were both nonadversarial defendants in the prior litigation); *Ezrin v. Stack*, 281 F. Supp. 2d 67 (D.D.C. 2003) (applying Virginia law to find that res judicata applied where both parties were on opposite sides of the "v." in prior litigation).

5. Preclusive Effect of Res Judiciata. Because the four elements of res

judicata have been met in this case, as demonstrated above, we conclude that the instant action is barred.

IV.

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.