

NOTICE: On April 3, 2008 the Court granted a petition for rehearing in this matter. This opinion is therefore withdrawn and no longer effective.

No.33350 – *Hugh M. Caperton, Harman Development Corporation, Harman Mining Corporation, and Sovereign Coal Sales, Inc. v. A. T. Massey Coal Company, Inc., Elk Run Coal Company, Inc., Independent Coal Company, Inc., Marfork Coal Company, Inc., Performance Coal Company, and Massey Coal Sales Company, Inc.*

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Albright, Justice, dissenting:

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The majority opinion in this case, written by Chief Justice Davis and agreed to by Justice Maynard and Justice Benjamin, is a result-driven effort to excuse without penalty an egregious exercise of raw economic power which a West Virginia jury has found seriously injurious to the plaintiffs in the case, deserving of substantial redress under the law.

The majority opinion, rejecting the judgment rendered below, rests on two conclusions, neither of which are valid in the circumstances:

First, the majority opinion concludes that the West Virginia civil action in this case is barred by the doctrine of *res judicata* under Virginia law because an action in contract brought and adjudicated in Virginia in 1998 precluded a

subsequent tort action in West Virginia involving some aspects of that contract and other activities of the defendants.

Second, the opinion concludes that a “forum-selection clause” in a coal supply agreement to which some of the plaintiffs and all defendants *were not parties* required that the West Virginia tort action before us must be brought in Virginia.

The first reason, *res judicata*, is the easiest to address because the majority is just flat-out wrong. The common law of Virginia (and, historically, also of West Virginia) absolutely forbade filing contract and tort causes of action in the same lawsuit. *Goodstein v. Weinberg*, 245 S.E.2d 140, 143 (Va. 1978). That “judge-made” law was altered by the action of the Virginia Legislature in 1977, adopting § 8.01-272 of the Code of Virginia, to *permit but not require* contract and tort causes of action to be pursued in the same lawsuit. Thus, the option belonged to the plaintiffs, not the defendants, to decide whether to pursue one or two lawsuits to vindicate their allegedly infringed rights. The majority opinion engages in a convoluted discussion of claims, causes of action and remedies to hide the fact that it molds the law to attain the desired result, without recourse to the historical differences between contract and tort actions, without reference to the option of the *plaintiffs* to bring one or two actions under the law

of Virginia at that time, and without an orderly discussion of those differences under both Virginia and West Virginia law. The long and the short of it is that the adjudication of the contract action in Virginia, resulting ultimately in a recovery of about \$6 million, did not affect the rights of the plaintiffs in the action *sub judice* to recover damages in tort in a separate action, under *either* Virginia or West Virginia law.¹

The second reason asserted by the majority for vacating the verdict of the West Virginia jury which heard this case and vacating the resulting judgment entered on that verdict is the supposed application to the entire West Virginia action of a “forum-selection clause” in the 1997 coal supply agreement between the Harman companies and Wellmore Coal Corporation (not a party to the present litigation). This asserted reason presents a somewhat more difficult question.

In reviewing this second asserted reason, I start with the “consolation prize” language found in the majority opinion:

[W]e wish to make perfectly clear that the facts of this case demonstrate that Massey’s conduct warranted the type of

¹It is to be noted that the “one recovery rule” was observed in West Virginia, in that the defendants here were accorded full credit against the West Virginia judgment for the contract claim recovery in Virginia. Moreover, the assertion in the majority opinion that a “good faith and fair dealing claim, originally raised in the Virginia action but voluntarily abandoned, was a tort claim does not survive scrutiny. Such a claim is for the breach of a covenant said to be implied in all contracts and sounds much more truly in contract than in tort.

judgment rendered in this case. However, no matter how sympathetic the facts are, or how egregious the conduct, we simply cannot compromise the law in order to reach a result that clearly appears to be justified. As we will demonstrate below, the law simply did not permit this case to be filed in West Virginia.

Slip op. at p. 13. Simply put, the last two sentences of this “consolation prize” language constitute the desired result of the majority, not a result dictated by the law, as the majority would have one believe.

What follows the majority’s confession of the essential justice of the plaintiffs’ suit is a lengthy discussion about “forum-selection clauses” in contracts, resulting in seven new syllabus points, applied to the facts of this case so as to relieve the defendants of a verdict in excess of \$50 million, plus interest and costs, which would have resulted in a judgment calculated to be in excess of \$75 million.

Beyond that result, the unnecessarily broad and sweeping language of the opinion and the syllabus points could close the courthouse doors of this State to citizens with meritorious claims, unwittingly caught up in these “forum-selection clause” contracts, designed in most cases to give some litigants advantages over others and, under the majority’s analysis, applicable in some cases to *litigants not even party to the contracts* containing the “forum-selection clauses.” This is all accomplished by adopting

by judicial fiat “new law” not previously found in West Virginia’s jurisprudence and applying that “new Law” at every turn in the manner most likely to yield the result of overturning the jury’s verdict and the judgment of the lower court giving effect to that verdict.

First, I note that the majority’s discussions leading to syllabus points five, six, seven, eight and nine, all dealing with how to review forum-selection clauses, appear to be, in the abstract, welcome additions to the law of this State. I recognize that it is the peculiar function of this Court in the ongoing development of our common law to speak to issues of law that have not been previously decided by this Court or decided by acts of the Legislature.

I depart from the views of the majority (1) because some of the language of the new syllabus points is unduly and dangerously broad, (2) because of the manner in which the majority then applies that “new Law” to the facts of this case, and (3) because the sweeping language of the syllabus points fails to take into account that their application in certain circumstance may require findings of fact to which this Court ought to give deference, either because the court below is not “clearly wrong” in its consideration of the relevant facts, or because the court below is entitled to deference in

its application of the law to the facts, absent an abuse of discretion. I will apply these concerns concretely to the case before us.

In syllabus point two, the majority asserts that “[o]ur review of the *applicability and enforceability* of a forum-selection clause is *de novo*.” I respectfully suggest that our review is abuse of discretion, in large part because our review of those issues will most often be fact dependent and we should be attentive to the findings of the trial court with respect to those facts. *See Chateau des Charmes Wines Ltd. v. Sabate USA Inc.*, 328 F.3d 528, 530 (9th Cir. 2003) (decision related to enforcement of a forum selection clause is reviewed for abuse of discretion, citing *Kukje Hwajae Ins. Co., Ltd. v. M/V Hyundai Liberty*, 294 F.3d 1171, 1174 (9th Cir.2002)); *TAAG Linhas Aereas de Angola v. TransAmerica Airlines, Inc.*, 915 F.2d 1351, 1353 (9th Cir. 1990) (enforcement of a forum selection clause reviewed for abuse of discretion) citing *Peleport Investors v. Budco Quality Theatres*, 741 F.2d 273, 280 n. 4 (9th Cir. 1984) (basing abuse of discretion standard on *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 7 (1972)).

In syllabus point six, which in the abstract I suggest is a well-stated point of law, the first inquiry is “whether the [forum-selection] clause was reasonably communicated to the party resisting enforcement.” That is a fact-intensive inquiry further complicated by the majority’s later assertion that such clauses may be made to

apply to persons not party to the contract in which the clause is found. The majority blithely asserts that everyone in the instant case knew of the forum-selection clause; perhaps so, but is it the job of this Court to so declare?

The third query listed in syllabus point six asks “whether the claims and parties involved in the suit are subject to the forum-selection clause.” The majority has no trouble finding that the parties to the contract readily understood and agreed that tortious interference, fraudulent misrepresentation and fraudulent concealment, the claims upon which the West Virginia jury returned its verdict, were to be brought in Virginia as matters “related to the contract,” even though the evidence showed that substantial parts of the conduct involved had not one thing to do with the operation of the contract, and even though some of the parties to the tort action were not parties to the contract itself. For example, the purchase by the defendant Massey of a buffer between the Caperton properties and the Pittston property, to prevent the realization of a plan to mine the Pittston field, was in no way related to the coal supply agreement. Rather such was an instance of where the “facts of this case demonstrate that Massey’s conduct warranted the type of judgment rendered in this case.” Slip op. at 13. **The point is that the majority went out of its way to make findings that fit its intended result rather than the justice of the cause.** In short, the inquiry, as posed in the syllabus point, is an either/or inquiry. Some claims here were related to the contract; some were not. The majority

chose, in effect, to say if **any** of the claims were “related” to the contract, all were. The better rule, to withstand the test of time and circumstances in the real world, is the converse: If any of the claims are not related to the contract then plaintiffs may bring suit where they so choose. The majority opted to design the law in a manner that would free Massey from its responsibility in this State.

The lengthy majority opinion cites numerous cases for its various propositions. Practically all of these cases contain an exception by which the harsh rules relied upon by the majority would not be applicable in certain circumstances, or state rules that might not apply unless certain factual scenarios appear in the record. Without fail, the majority has chosen to construe the facts and circumstances of this case so as to prevent a favorable outcome for the plaintiffs. A most clear example of this is the majority’s application of syllabus points ten and eleven.

In syllabus points ten and eleven, the majority adopted sweeping language to compel plaintiffs and defendants alike who are not party to contracts containing forum-selection clauses to be bound by such clauses more often than not. This feat of legerdemain was accomplished by the majority first adopting a “closely related to the contract” test, and then adopting an analysis of the connection between plaintiffs’ tort claims and the “forum- selection clause” contract that, in effect, puts the burden on the

non-party to avoid the application of the “forum-selection clause.” In particular, under the facts of this case, the majority constructed a close relationship almost out of whole cloth to bring about the result it desired. In the long run, the more devastating effect of this particular part of the opinion is that it invites future litigants to attack West Virginia litigants’ ability to sue in the courts of this State based upon “forum-selection clauses” to which such West Virginia litigants were not parties and had received only cursory notice, perhaps by small print in limited warranty notices or financing agreements. The point is that the majority erred in favor of the powerful and against the unsuspecting. The point is our citizens have been put in jeopardy of losing remedies our law provides, in favor of more restrictive remedies provided elsewhere because such “forum-selection clauses” will only be invoked by those seeking to avoid responsibility – as in this case.

Congratulations to the majority. It has decided this case for the sake of Massey by protecting A.T. Massey Coal Company, Elk Run Coal Company, Inc., Independence Coal Company, Inc., Marfork Coal Company, Inc., Performance Coal Company and Massey Coal Sales Company, Inc. from the justified action of a West Virginia jury, rendering its verdict for, in the words of the majority opinion, “Massey’s conduct [that] warranted the type of judgment rendered in this case.” Slip op. at p. 13. The majority has done so by twisting logic, misapplying the law and introducing sweeping “new law” into our jurisprudence that may well come back to haunt us, or more

likely, haunt the people we are duty-bound to protect under our law. The majority of three has saved Massey \$50 million, plus interest² and costs, which some reports calculate to total as much as \$75 million today. For the sake of all West Virginians, young and old alike, I sincerely wish the result reached had been otherwise. Accordingly, I tender this heartfelt dissent.

²I would have granted Massey's prayer for relief from interest accruing during the time the full record could not be reproduced due to problems with court reporting.