Link to Appendix

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., Independence Coal Company, Inc., Marfork Coal Company, Inc., Performance Coal Company, Inc., and Massey Coal Sales Company, Inc.*

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Albright, Justice, and Cookman, Judge, sitting by special assignment, dissenting:

This case is before the Court on rehearing granted after the five elected Justices on the Court, while disagreeing about the proper ultimate outcome of the case, unanimously agreed that defendant **"Massey's conduct warranted the type of judgment rendered [below] in this case."** *Caperton v. A.T. Massey Coal Co., Inc.*, 2007 WL 415960, Slip Op. at 13 (No. 33350, filed November 21, 2007), *withdrawn*.

Nevertheless, on a vote of three for and two against, the original Court reversed the judgment of the Circuit Court of Boone County, which awarded Plaintiffs (Appellees here) over $50 million, plus interest and costs, on account of that egregious conduct. The majority explained its rejection of the lower court's judgment by saying **"we simply cannot compromise the law in order to reach a result that clearly appears to be justified."** *Id.*

After that opinion was filed, two of the elected Justices recused themselves from further consideration of the case. A motion to rehear the case was granted by this Court on the unanimous vote of the remaining three Justices and two circuit judges, Judge Cookman and Judge Fox, appointed by acting Chief Justice Benjamin. Now, the reconstituted Court has again reversed the lower court by a vote of three (Davis, J.; Benjamin, J., and Fox, J.) to two (Albright, J. and Cookman, J.)

Today's "new" opinion of the Court rests on the same indefensible legal grounds as the original opinion – supplemented by even more extended discussion of some of the points – but, strangely, omitting the clearly correct assertion in the original majority opinion that **"Massey's conduct warranted the type of judgment rendered [below] in this case."** *Id*. This time the majority stands silent regarding any disdain of Massey's conduct. Once again it bends the law to deny Plaintiffs the proper **"result that clearly appears to be justified."** *Id*.

For the record, we wholeheartedly embrace the determination of this Court in the original, now withdrawn, opinion that **"Massey's conduct warranted the type of judgment rendered [below] in this case."** *Id*. Likewise, we do not shrink from saying without reservation that this Court should now affirm the judgment against the Massey Defendants for the reasons outlined in this dissent. Moreover, the failure of the Court now

to even acknowledge the justice of Plaintiffs' case below, as it had in the previous opinion, underlines the result-driven nature of the current majority opinion. *Id*.

In terms of the law, the errors of the majority opinion are not complex or difficult to explain. They are few in number.

First, under our law as it existed before the majority decision in this case, the proper inquiry regarding the enforceability of a forum selection clause in a contract was whether, with careful analysis, its enforcement was reasonable and just in the circumstances of the case. In this case it was not.

Second, under the law of Virginia as it existed at all times relevant to the case before us, res judicata applied when, under the facts of the case, all of the issues fairly arising under the facts pled, or which could have been pled, could have been proved with the same evidence. In the case before us, several occurrences and transactions between the parties to this case, which were not involved in the original Virginia contract action, required substantial amounts of evidence which would not have been relevant in the Virginia contract action.

Finally, under West Virginia law as it existed before the majority opinion was filed in this case, the decision of a lower court on the venue questions raised by a plea of res judicata were to be reviewed under an abuse of discretion standard, evaluating the lower court's application of the law to the facts, not *de novo*, as the majority has now ruled.

The more narrow and focused legal arguments and supporting facts of the rehearing process make it all the more clear that (1) Massey's conduct was outside the bounds of human decency and respectable business practices, and (2) the law poses no barrier to upholding the Boone County jury verdict finding such behavior repugnant and deserving of redress. As opposed to simply deciding the case on the facts and law as they existed at the time the events complained of occurred, the majority kneads the facts so that they better fit the new law the majority finds necessary to create not only for West Virginia but also for Virginia. As we explain in detail below, neither res judicata principles nor the presence of a forum selection clause serve as an impediment to upholding the lower court's actions and jury verdict. Instead, the majority decision now ignores the admitted injustice done to Plaintiffs. It fashions no less than nine new points of law to achieve the result desired by the majority. To accomplish this goal, the majority:

1. Broadly endorses forum selection clauses, makes them applicable to persons not party to the contracts containing such clauses, removes any hint of the cautious, limited

approval of such clauses in our jurisprudence, extends their effect to causes of action in which the related contract is but one of several factors justifying recovery, and charges those who would resist their application with the obligation of proving them unreasonable – even when the time for adducing evidence to meet that new requirement has irretrievably passed – making it impossible for Plaintiffs to defend their $50 million judgment.

2. With respect to the principle of res judicata – whether a prior suit adjudicated or could have adjudicated the issues raised in a suit filed later – the majority now makes the lower court's decisions reviewable *de novo,* that is, removing any requirement that this Court give any deference to the lower court's consideration of the proper application of the law to the facts of a particular case. In that regard, the majority opinion now opens the door to this Court systematically reviewing all such decisions of lower courts without regard to the reasonable discretion of the trial courts and their view of the applicable facts.

3. Lastly, this Court imperially found in the majority opinion that the law of Virginia on the issue of res judicata has been clearly settled from 1998 through 2002. Any fair review of the cases in Virginia and the course of development of Virginia law demonstrates beyond doubt that Virginia law in that time frame would not deprive the Circuit Court of Boone County of venue in the cause before us to hear and determine and

grant the relief "**Massey's conduct warranted** . . . ." *Caperton*, 2007 WL 415960, Slip Op. at 13 (No. 33350, filed November 21, 2007), *withdrawn*.

I. DISCUSSION OF THE FACTS

Nothing so completely highlights the errors of the majority opinion and the outright injustice of its result as a thorough review of the evidence admitted in the trial of this case. In the forty-page order denying Appellants (Defendants below) judgment as a matter of law or a new trial, that is, refusing to overturn the jury verdict in this case, the lower court found that there was sufficient evidence from which the jury could have found that the coal supply agreement containing the forum selection clause was but one factor in a far-reaching scheme by which Massey set out to ruin Harman Mining and its owner Hugh Caperton – beginning before Massey's involvement with the coal supply agreement and ending after Massey's brief ownership of a company party to that agreement.

In its order, the Circuit Court of Boone County said "[T]he weight of the evidence at trial fairly established and was clearly sufficient for the Jury" to conclude that:

> **Massey chose to acquire [United Coal Company] in order to eliminate a competitor and to gain more access to LTV [Steel Corporation], . . . [while] fully cognizant of Harman's long-term coal supply agreement with Wellmore and LTV's preference for the UCC/Harman blend.**

In paragraph 4 of that order, the trial court further said that the weight of the evidence at trial fairly established and was clearly sufficient for the jury to further conclude that:[1]

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

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

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

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[1]This opinion will now directly quote extensively from the lower court's very thorough order. It will not cite to particular pages or utilize in all cases the conventional means of indicating quotations, such as quotation marks, double indentations, and single spacing. However, the full text of the order is attached to this dissenting opinion as an appendix. We are grateful to Judge Jay Hoke of the 25th Judicial Circuit, sitting in the Circuit Court of Boone County, for his exhaustive review of the evidence.

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

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

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

> UCC's decree [sic] of dependence on the Harman mining coal is obviously a sensitivity, since that source represents about 40% of the annual shipment level at Wellmore No. 7, and has become a fairly critical ingredient in the LTV coal blend. The term of the Harman mining purchase commitment runs through the year 2001 . . . .

[f] Massey knew that there were risks associated with its acquisition. In a pre-acquisition document assessing those risks, Massey stated, "The most significant risk associated with this transaction is that the plus-10-years-old supplier relationship between LTV and UCC may not continue under Massey ownership."

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

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

[i] Massey provided LTV with firm price quotes for coal mainly from Massey Mines, not Harman coal, and insisted that LTV make Massey its sole-source provider via a long-term coal contract, despite the fact that, historically, LTV preferred multiple suppliers and did not utilize multi-year, long-term coal supply contracts. The price that Massey quoted for it is [sic] coals to LTV constituted a "handsome improvement" over the prices it had been receiving for its coals.

[j] Massey's marketing strategy resulted in a loss of the LTV business – a risk that it fully appreciated, acknowledged and understood prior to its marketing efforts and even prior to its purchase of UCC. Only after Massey's marketing efforts caused the loss of LTV's business did Massey direct Wellmore to declare "*force majeure*" against Harman, a declaration which Massey knew would put Harman out of business. Massey acknowledged Wellmore was readily able to purchase and sell the Harman coal, but instead chose to have Wellmore declare "*force majeure*" based upon a cost benefit analysis Massey performed which indicated that it would increase its profits by doing so. Furthermore, before Massey directed the declaration of "*force majeure*", Massey concealed the fact that the LTV business was lost and Massey delayed Wellmore's termination of Harman's contract until late in the year, knowing it would be virtually impossible for Harman to find alternate buyers for its coal at that point in time. Once Wellmore suddenly stopped

purchasing Harman's output, Harman had no ability to stay in business. In the meantime, Massey sold Wellmore.

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

A. Actions Against Plaintiff Caperton Personally

The trial court identified, by way of example, specific actions which the jury could find were directed by Defendants against Plaintiff Caperton in his personal capacity, as follows:

> [i] Massey's conduct in "negotiating" directly with Caperton and under the February 9, 1998 letter agreement: Massey submitted a letter agreement to Mr. Caperton as President of Sovereign and Harman in which Massey and Wellmore

expressly agreed to "pursue good faith negotiations toward concluding the described transactions." The transaction described in the agreement was intended to settle all issues relating to 1997 Coal Supply Agreement between the parties and permit Massey to acquire Caperton's interest in the Corporate Plaintiffs.

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

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

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

> agreed-to date of January 31, 1998, but chose instead to let Caperton move forward with his plans based upon his mistaken belief concerning the closing date.

B. Additional Facts

In paragraph 6 of its order, the trial court took note of Massey's assertion that it had no "intent to interfere with Harman or to purposely cause financial distress for the Plaintiffs so that Massey would benefit in the long run . . . ." The lower court simply noted that "numerous pieces of documentary evidence authored by Massey belied that testimony . . . ."

In paragraphs 9 through 11 of the order, the lower court undertook a thorough review of the evidence supporting each of three causes of action upon which the case was tried and upon which the jury rendered its verdict: tortious interference, fraudulent misrepresentation and fraudulent concealment. The lower court identified the essential elements for each cause of action and analyzed the evidence adduced with respect to each such cause of action, finding a *prima facia* case established on each count.[2] In some

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[2]The three causes of action and their essential elements are identified in the order as follows:

> 1. Tortious interference with Plaintiffs' advantageous business relationships:
>
> (a) the existence of a contractual or business relationship or expectancy;
>
> (b) an intentional act of interference by a party

(continued...)

[2](...continued)

> outside that relationship or expectancy;
> (c) proof that the interference caused the harm sustained; and
> (d) damages.

See, e.g., Syllabus Point 2, *Torbett v. Wheeling Dollar Sav. & Trust Co.*, 173 W.Va. 210, 314 S.E.2d 166 (1983);

> 2. The tort of fraudulent misrepresentation:
> (a) that the act claimed to be fraudulent was the act of the defendant or induced by him;
> (b) that it was material and false; that the plaintiff relied on it and was justified under the circumstances in relying on it; and
> (c) that he was damaged because he relied on it.

See, e.g., Syllabus Point 1, *Llengvel v. Lint*, 167 W.Va. 272, 280 S.E.2d 66 (1981), citing *Horton v. Tyree*, 104 W.Va. 238, 242, 139 S.E. 737, 738 (1927).

> 3. Fraudulent concealment:
> (1) that the act claimed to be fraudulent was the act of the defendant or induced by him;
> (b) that it was material and false; that the plaintiff relied on it and was justified under the circumstances in relying on it; and
> (c) that he was damaged because he relied on it."

See, e.g., Syl. Pt. 1, *Llengvel v. Lint*, 167 W.Va. 272, 280 S.E.2d 66 (1981), citing *Horton v. Tyree*, 104 W.Va. 238, 242, 139 S.E. 737, 738 (1927).

The trial court also noted that:

> A claim of fraudulent concealment "involves concealment of facts by one with knowledge, or the means of knowledge, and a duty to disclose, coupled with an intention to mislead or defraud." *Pocahontas Min. Co. Ltd. Partnership v. Oxy*

(continued...)

respects, the evidence supporting an element in one count was the same evidence supporting an element of another count, findings which we will endeavor not to repeat except where the context requires it. However, the facts the lower court found to be supported by the evidence paint in further detail a dastardly course of action by Defendants which will now go unredressed.

In paragraph 9, the trial court found *prima facia* proof that:

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

[2](...continued)
USA, Inc., 202 W.Va. 169, 175, 503 S.E.2d 258, 264 (1998).

Defendants engaged in this intentional interference for the specific purpose of financially destroying Plaintiffs, both corporately and personally.

(a) For example, Massey tried to persuade LTV to buy its coals in place of Harman coal, used "*force majeure*" and other threats, and otherwise interfered with Harman's contractual relations for the purpose of placing the Plaintiffs, corporately and personally, in great financial distress in order to have Harman, not Massey, bear the cost of Massey's failed marketing strategy with LTV.

(b) For example, Massey directed Wellmore to declare "*force majeure*" as a result of Massey losing LTV's business due to Massey's failed marketing attempts.

(c) For example, after directing the declaration of "*force majeure*", the Defendants participated in settlement negotiations with Plaintiffs and with Penn Virginia Coal Company, the Lessor of Plaintiffs' reserves, not with the intention of settling disputes, but for the purpose of placing the Plaintiffs, corporately and personally, in greater financial distress.

(d) For example, after directing the declaration of "*force majeure*", the Defendants dealt directly with Grundy National Bank pursuant to notes held by Grundy, for which Plaintiff Caperton had given his personal guaranty;

(e) For example, the Defendants obtained confidential information at their meeting with Plaintiff Caperton in November, 1997, and thereafter on the purported promise to purchase Caperton's interest in the Harman assets, the Defendants used that confidential information to acquire adjoining reserves, which the Defendants' own internal documents acknowledged would help to insure that Harman would only be valuable to the Defendants;

(f) For example, the Defendants intentionally acted in utter disregard of Plaintiffs' rights and ultimately destroyed Plaintiffs' businesses and caused Plaintiff Caperton's resultant AVS listing because, after conducting cost-benefit analyses, the Defendants concluded that it was in the Defendants' financial interest to do so[.]

In its order under discussion here, the trial court next commented on the evidence from which the jury might properly find that Defendants failed to establish their defense of "business justification" under section 767 of the *Restatement (Second) of Torts* and our case of *C.W. Development Inc. v. Structures, Inc. of West Virginia*, 185 W.Va. 462,

465, 408 S.E.2d 41, 44 (1991), finding that the evidence was clearly sufficient for the jury to conclude that:

> [i] Defendants developed a plan to interfere with Plaintiffs' existing and prospective relations with Wellmore before A.T. Massey Coal Company acquired Wellmore.
>
> [ii] Massey acquired UCC with the purpose of gaining access to LTV and to have the ability to interfere with the supply of Harman to LTV.
>
> [iii] The Defendants' Chief Executive Officer (CEO), without ever reading the applicable long term Coal Supply Agreement, directed that Wellmore Coal Corporation ("Wellmore") threaten Plaintiffs with the declaration of "force majuere;"
>
> [iv] At a meeting held in November, 1997 in West Virginia, the Defendants' CEO threatened the Corporate Plaintiffs and Mr. Caperton with long and protracted litigation in the event the Corporate Plaintiffs did not agree to give up the rights to their reserves;
>
> [v] At the November, 1997 meeting the Defendants obtained confidential information and, thereafter, on the purported promise to purchase Caperton's interest in the assets of the Corporate Plaintiffs, instead used that confidential information to acquire adjoining reserves which the Defendants' own internal documents acknowledged would help to insure that the Plaintiffs' reserves would only be valuable to the Defendants;
>
> [vi] Massey engaged in a cost-benefit analysis to determine whether it should direct Wellmore to declare "*force majeure*";
>
> [vii] On December 1, 1997, at the Defendants' direction and contrary to the recommendations of its management, Wellmore declared the occurrence of a "*force majeure*" event under the Coal Supply Agreement, which reduced Wellmore's commitment to purchase coal from Plaintiffs by over 60%

> beginning on January 1, 1998, with full knowledge that the 60% loss would be financially devastating to Plaintiffs;
>
> [viii] After directing the declaration of "*force majeure*", the Defendants participated in settlement negotiations with Plaintiffs and the Lessor of Plaintiffs' reserves, not with the intention of settling disputes, but for the purpose of placing the Plaintiffs, corporately and personally, in greater financial distress;
>
> [ix] The Defendants misrepresented their intention to settle any disputes between the parties through an offered purchase and sale of Harman assets, and instead delayed the transaction and then reneged on their stated intention to purchase the Harman assets by collapsing the deal after the Harman operations were shut down in anticipation of the sale;
>
> [x] The defendants intentionally acted in utter disregard of Plaintiffs' rights and ultimately destroyed Plaintiffs' businesses because, after conducting cost-benefit analyses, the Defendants concluded that it was in their financial interest to do so; and
>
> [xi] The Defendants consistently attempted to use the disparity of resources and bargaining power between the Defendants and the Plaintiffs to its advantage, with little or no regard to the outcome of the Plaintiffs, either corporately or personally.

Returning to the evidence supporting the essential elements of the three counts, the trial court recited:

(k) That Defendants' negotiations with Plaintiff Caperton in the time period from November 1997 through March 1998 were conducted directly by Defendants' Chief Executive Office, Donald Blankenship, and not by Wellmore or any of its corporate officers;

(l) That Defendants, not Wellmore or any of its corporate officers, interfered with Plaintiff Caperton's management of the bankruptcy of the Corporate Plaintiffs by purchasing claims to obtain standing in the Bankruptcy Court and to have Caperton removed as the debtor-in-possession;

(m) That Defendants took numerous specific steps pursuant to its plan to wrongfully interfere with Plaintiffs' existing contractual relations with Wellmore before, during and after the short time that Defendant A.T. Massey Coal Company owned Wellmore.

The trial court further observed that any legitimate justification or privilege to interfere in the contractual relations of subsidiaries may be lost by wrongful conduct and further observed that the preceding recital established the evidence was sufficient to allow the jury to so conclude in this case, and then found further:

(p) That additional, substantial evidence of improper motive presented to the Jury included that, on August 1, 1997, one day after the acquisition of United Coal (the parent company of Wellmore), Wellmore's management recommended the purchase of Harman's entire production for the following year, but that Defendants' CEO, Donald Blankenship, overruled this recommendation and directed Wellmore to refuse to purchase

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

In paragraph 10 of its order, the trial court found that: "The evidence was clearly sufficient for the Jury to conclude that Defendants fraudulently misrepresented material information, that Plaintiffs, both personally and corporately, justifiably relied upon Defendants' fraudulent misrepresentations, and that Plaintiffs, both personally and corporately, were damaged because of that justifiable reliance." The order specifically noted eight examples of this sufficiency, five previously cited and the following three:

> [i] While marketing their West Virginia coals to LTV, the Defendants intentionally created the false impression to Plaintiffs that they were actually trying to sell Harman coal to LTV;
>
> [ii] In declaring "*force majeure*", Wellmore was directed by the Defendants' senior management to claim that the supposed event of "*force majeure*" was unforeseen, when Massey was well aware of and had in fact foreseen the event at least seven months before it occurred;
>
> [iii] In declaring "*force majeure*", Wellmore was directed by Defendants' senior management to claim that a coke facility had shut down, when Defendants knew it had not[.]

With respect to the tort of fraudulent concealment, the trial court concluded that: "The evidence was clearly sufficient for the Jury to conclude that Defendants

fraudulently concealed material information which they were under a duty to disclose, that Defendants were motivated to conceal material information and prevent the Plaintiffs, both personally and corporately, from discovering the information, and that Plaintiffs, both personally and corporately, were damaged because of Defendants' concealment." The lower court then gave thirteen examples, including these nine:

> [i] While marketing their West Virginia coals to LTV, the Defendants intentionally created the false impression to Plaintiffs that they were actually trying to sell Harman coal to LTV;
>
> [ii] During the months that the Defendants were trying to persuade LTV to buy coal blends containing exclusively Massey coals mined by the West Virginia Defendants in place of Harman coal, the Defendants concealed this fact from Plaintiffs;
>
> [iii] The Defendants concealed the fact that it made numerous firm offers to sell the Defendants' West Virginia coals to LTV, but did not make firm price offers to sell Harman coal to LTV;
>
> [iv] The Defendants purposely omitted to disclose the fact that it lost the LTV business, which it lost not because of any "*force majeure*" but because of Defendants' marketing strategy and dealings with LTV, particularly its insistence that LTV fill all of its coal requirements through Defendants' West Virginia operations via a sole supplier, long-term contract, and through its decision not to allow LTV to purchase Harman coal, LTV's preferred choice;
>
> [v] Rather than tell Plaintiffs of its efforts to sell the Defendants' coals and its lack of effort in selling Harman coals, the Defendants' Representatives waited until shortly before year-end, when it is nearly impossible to make new coal supply arrangements for the following year, and then directed

Wellmore to declare "*force majeure*" and effectively destroy the Plaintiffs' businesses.

* * *

[vii] On December 1, 1997, at the Defendants' direction and contrary to the recommendations of its management, Wellmore declared the occurrence of a "*force majeure*" event under the Coal Supply Agreement, which reduced Wellmore's commitment to purchase coal from Plaintiffs by over 60% beginning on January 1, 1998, with full knowledge that the 60% loss would be financially devastating to Plaintiffs;

* * *

[ix] The Defendants' declaration of "*force majeure*" was without any contractual basis as Defendants knew LTV was neither a customer of Wellmore, effective January 1, 1998, nor had the LTV Pittsburgh plant been directed to close by any governmental action, but instead was intended to place additional economic pressure upon the Plaintiffs, both corporately and personally;

* * *

[xi] The Defendants concealed their true intention not to settle any disputed between the parties and reneged on its stated intention to purchase the Harman assets, and Defendants collapsed the deal after Plaintiffs had shut down operations in anticipation of a sale to the Defendants;

* * *

[xiii] The Defendants consistently attempted to use the disparity of resources and bargaining power between the Defendants and the Plaintiffs to its advantage, with little or no regard to the outcome of the Plaintiffs, either corporately or personally.

The lower court also found "[t]hat there was sufficient evidence to support a finding of a duty by Defendants to disclose the information concealed from Plaintiffs, both corporately and personally, including, for example, the submission of a letter agreement dated February 9, 1998, to Caperton, in both his personal and corporate capacities, agreeing to 'pursue good faith negotiations toward concluding the described transactions', and that Defendants concealed their true intention at that time not to settle any disputes between the parties and reneged on their stated intention to purchase the Harman assets, and Defendants collapsed the deal after Plaintiffs had shut down operations in anticipation of a sale to the Defendants[.]"

Finally, the trial court reviewed the evidence supporting the award of damages for the three tort claims. Again, the evidence was in part related to the coal supply agreement, but in a much larger part was completely different from that admissible in a contract action. After noting the proper measure of damages for each of the three torts, the trial court offered the following review of the substantial evidence, by way of example, from which the jury could reach its verdict on compensatory and punitive damages:

> [i] Corporate Plaintiffs introduced testimony through a number of witnesses and introduced evidence through a number of exhibits, including the expert testimony of Alan Stagg who opined to a reasonable degree of professional certainty regarding the business plan put into place when Caperton took over the business in 1993 and who provided a valuation of the Harman coal reserves, and of Mark Gleason who opined to a

reasonable degree of accounting certainty that the Corporate Plaintiffs suffered damages exceeding $29 million as a result of the destruction of their business, in response to which the jury could reasonably determine that there was sufficient evidence to show that the Corporate Plaintiffs' damages were caused by Defendants' tortious misconduct;

[ii] That Plaintiff Caperton introduced evidence through testimony on his own behalf, through his expert Daniel Selby, who opined to a reasonable degree of accounting certainty, through the testimony of Bobby Reece, an executive at Grundy National Bank, and through the introduction of exhibits all establishing his individual injuries, including injury to his personal and professional reputation resulting in the loss of income, benefits and business opportunities, personal injury by way of lost earnings and employment opportunities by way of his listing on the AVS, and personal injury by way of Defendants' tortious interference with his personal guaranty obligations in response to which the jury could reasonably determine that there was sufficient evidence to show that the Plaintiff Caperton's damages were caused by Defendants' tortious misconduct. Such evidence included, but was not limited to:

[iii] The Plaintiff Caperton was a business leader with whom his lenders and vendors were willing to do business before Defendants' tortious conduct;

[iv] The vendors and lenders with whom Plaintiff Caperton had previously done business now refuse to do business with him due to Defendants' tortious conduct;

[v] Due to the Defendants' tortious conduct, Plaintiff Caperton became a defendant in several lawsuits brought against him personally by the lenders and vendors with whom he had previously enjoyed a beneficial relationship;

[vi] Due to the Defendants' tortious conduct, Plaintiff Caperton has had judgments and tax liens entered against him personally throughout the State of West Virginia;

> [vii] Due to the Defendants' tortious conduct, Plaintiff Caperton's personal credit rating and creditworthiness have been destroyed;
>
> [viii] Due to the Defendant's tortious conduct, Plaintiff Caperton was and is precluded from obtaining a mining permit and engaging in his livelihood as a result of his AVS listing;
>
> [ix] The Plaintiff Caperton's AVS listing, according to testimony at trial by those in the mining industry, constitutes a "blackball";
>
> [x] Due to Defendants' tortious interference, Plaintiff Caperton's personal annual income went from in excess of $1.3 million to $60,000.00;
>
> [xi] The Defendants' invaded Plaintiff Caperton's personal privacy, including the unwarranted trespass on his personal real estate to photograph his personal residence, and due to Defendants' tortious conduct, Plaintiff Caperton has suffered mental anguish and sleepless nights.

Lastly, in paragraph 13 of its order, the lower court took note of the arguments regarding choice of law, and in its analysis noted the following:

> Under either the principle of *lex loci delecti* (the law of the place where the tort occurred governs) or under the principle of "most significant relationship" test set forth in the *Restatement (Second) of Conflicts of Law*, West Virginia law should govern because: (1) the Defendants are all citizens or residents of, or have substantial contacts, with West Virginia; (2) the Corporate Plaintiffs are either citizens or residents of, or have substantial

contacts with West Virginia; (3) the Plaintiff Caperton is a citizen of West Virginia; (4) much of the correspondence and documents submitted as evidence either was sent from, or sent into, West Virginia; (5) the November, 1997, meeting in which many of Defendants' threats and misrepresentations were made occurred in West Virginia. On this issue as well it should be noted that:

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

(b) That, while the Coal Supply Agreement between Plaintiff Sovereign Coal Sales and Wellmore required Sovereign to pursue its breach of contact claims against Wellmore in the State of Virginia, the Defendant in that action (Wellmore) was a different entity than the Defendants here, that it was litigated and that jury awarded a verdict based upon a breach of contract only, and that the Virginia defendant's appeal was processed in the State of Virginia only;

(c) That, as the record to this case illustrates in great depth, the Plaintiffs alleged and proved to the jury's satisfaction that the torts occurred in the State of West Virginia[.]

II. DISCUSSION OF THE APPLICABLE LAW

It is clear from the foregoing recital that Plaintiffs' claims in the West Virginia suit related to much more than just the coal supply agreement. Notwithstanding the fact that the improper declaration of *force majeure* gave rise to a legitimate contract action in Virginia directly related to the coal supply agreement, the entire course of dealings by Massey with Plaintiffs as revealed in the West Virginia action created additional causes of action in tort that properly could be pursued in a subsequent suit in West Virginia.

Nothing underlines this more than a fair consideration of the evidence introduced at trial of Massey's actions directed against Plaintiff Caperton in his individual capacity. He was never a party in his own right to the contract action in Virginia. The Massey actions against him personally reached far beyond the enforcement of the coal supply agreement.

Similarly, it cannot be legitimately argued that the entire course of dealings by Massey with Plaintiffs that established tortious interference by Massey with the Harman companies and Plaintiff Caperton was related to the coal supply agreement or involved facts to be properly asserted and proved in connection with the Virginia contract action on the coal supply agreement.

Moreover, while Massey's involvement in the declaration of *force majeure* under the coal supply agreement is related substantially to the tort of fraudulent misrepresentation found by the jury, it is inaccurate to say that the evidence necessary to prove that tort was in all respects the same as that necessary to show a valid contract claim in the Virginia contract action.

It is likewise clear from the trial court's recital that the coal supply agreement and the Virginia contract action were only tangentially involved in proving the fraud case and that the evidence necessary to the proof of the fraud claim in tort was in very large part quite different from any evidence properly necessary to the contract claim.

With this startling and deeply disturbing evidence in mind, from which the West Virginia jury drew its conclusion that the Massey Defendants were liable for compensatory and punitive damages, we move on to a discussion of the reasons why the majority opinion in this case is just plain wrong and is a complete denial of justice.

A. Forum Selection Clause

The majority approached the forum selection clause issue in this appeal with the single-minded purpose of nullifying the work of the Boone County Circuit Court. In so doing, the majority unnecessarily formulated the law of this state regarding forum selection

clauses in a variety of ways. The new law was created to achieve the ultimate result desired in the case before us and by so doing falls short of advancing justice in this case and no doubt in others to come.

1. Standard of Review

At the outset, the majority furthered its cause by needlessly changing this state's law governing the standard of review applied to forum selection clauses. As related in the majority opinion, Appellants attempted to enforce the forum selection clause before the lower court by motion to dismiss based on venue. The majority correctly noted that this Court employs an abuse of discretion standard when reviewing motions to dismiss based on venue. Syl. Pt. 1, *United Bank, Inc. v. Blosser*, 218 W. Va. 378, 624 S.E.2d 815 (2005). With the ink hardly dry on the 2005 opinion announcing this standard, the majority proclaims – without expressing any reason for trumping the rule of stare decisis – that "review of the applicability and enforceability of a forum selection clause is *de novo*." Syl. Pt. 2, *Caperton v. Massey,* ___ W.Va. ___, ___ S.E.2d ___ (No. 33350, filed April __, 2008). For some inexplicable reason, the majority has decided that the deference this Court normally affords lower court decisions regarding application of the law to the facts is suspended when the matter under consideration involves "applicability and enforceability of a forum selection clause." *Id*.

2. Prior West Virginia Law Governing Forum Selection Clauses

We are equally perplexed with the majority's position that this Court has generally approved forum selection clauses. While this Court in *General Electric Company v. Keyser*, 166 W. Va. 456, 275 S.E.2d 289 (1981), acknowledged *in a footnote*[3] that such clauses are not *per se* invalid, it was further recognized in that footnote that even though "our law on this point is skeletal, it does indicate that [forum selection] contract clauses which affect such matters as jurisdiction and the like should be carefully analyzed." *Id*. at 461-62 n. 2, 275 S.E.2d at 292-93 n. 2. While omitting this portion of the footnote from its quotation[4] the majority did include the paragraph noting:

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[3]The issue before the Court in *Keyser* was a choice of law clause rather than a forum selection clause.

[4]The entire test of footnote two in *Keyser* reads as follows:

> 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 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.*, W.Va.,

(continued...)

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.*,

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[4](...continued)
221 S.E.2d 882 (1975). Both *Axelrod* and *Miller* involved contracts which contained arbitration clauses. In *Axelrod*, we gave full faith and credit to a New York Court decision which confirmed an arbitration award made pursuant to the contract terms requiring arbitration. In *Miller*, we held valid a contract provision which made arbitration a condition precedent to suit in the West Virginia courts. The writer of the *Miller* opinion noted that the common law rule preventing parties from ousting the court of jurisdiction by their agreement was "archaic". 221 S.E.2d at 885.

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).

The factors to be weighed in determining the effectiveness of a forum selection clause are materially different from the factors a court will consider in determining the effectiveness of a choice of laws clause and speak to very different problems. *Leasewell, supra* at 1014. Choice of law clauses, however, are not automatically void either, as they too are sanctioned in commercial transactions by the West Virginia Code. W.Va.Code 46-1-105(1). Thus it appears that we should not per se invalidate a choice of law clause without analysis anymore than we should invalidate a choice of forum clause without careful scrutiny.

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).

See Slip Op. at 16. By selectively quoting from *Keyser*, the majority reaches the sweeping conclusion that the law of this state favors enforcing forum selection clauses. An objective reading of the entire footnote hardly supports such a conclusion. Moreover, there are no subsequent cases in our jurisprudence suggesting a move in that direction in this area of our law. The extensions of forum selection clause law in this case to cover and govern the tort claims brought in the West Virginia suit before us ignores the very spirit of a "reasonable and just" outcome contemplated by the Court in *Keyser*.

The majority likewise ignores the express caution in *Keyser* that forum selection clauses affecting "jurisdiction and the like" – e.g., venue – should be "carefully analyzed." 166 W.Va. at 461 n. 2, 275 S.E.2d at 292 n. 2. As a result of the majority's reliance on selective portions of a footnote, Mr. Caperton's individual right to due process and a fair and just determination of his claims has been foreclosed.[5] Mr. Caperton as an individual was not a party to the coal supply agreement (hereinafter also referred to as "CSA") and did not have standing in his individual capacity to enforce the CSA. The majority has left him without remedy or a place where one could be sought.

[5]The parties named in the Virginia case were Harman Mining Corporation, Sovereign Coal Sales, Inc. and Wellmore Coal Corporation. *See Wellmore Coal Corp. v. Harman Mining Corp.*, 568 S.E.2d 671 (Va. 2002).

The long and the short of it is that the majority simply pushed right past the cautious and judicious language of *Keyser* to construct and apply sweeping new law clearly fashioned to unequivocally deprive Plaintiffs, both corporate and individual, of the relief to which they are entitled.

3. Scope of New Law Governing Forum Selection Clauses

Not only did the majority institute new law regarding forum selection clauses on doubtful precedent, it also applied the new law by consistently turning a blind eye toward the actual facts of this case. The majority continuously repeats its assertion that the forum selection clause in the 1997 CSA is the basis for the conflicts giving rise to this lawsuit,[6] yet the majority fails to explain how Massey's conduct, conduct subsequent to Wellmore's

[6]Specific supporting examples found in the majority opinion include: "[T]he circuit court erred in denying a motion to dismiss . . . 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." Slip Op. at 1; "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." *Id*. at 32; "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." *Id*. at 33; "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." *Id*.; "[B]ecause 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." *Id*. at 34.

declaration of *force majeure*, is related to the CSA.[7] Moreover, the trial court specifically found that Massey's actions were not connected with the 1997 CSA, a factual finding that is entitled to deference by this Court. As determined by the trial court, some of Massey's unsavory conduct was performed prior to Massey's acquisition of United, Wellmore's parent company. It was also proven that even more of Massey's unsavory conduct was performed after Massey had sold Wellmore. Despite these proven facts, the majority says that all of Massey's conduct is somehow related to the CSA. The majority improperly substitutes its own judgment without acknowledging the relevant findings of the lower court or declaring the findings of the trial court to be clearly erroneous. The majority says that "[i]n 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." *Caperton*, ___ W.Va. at ___, ___ S.E.2d at ___, Slip Op. at 33. Not only is this argument circular – that is, in the absence of Massey's deceitful plan, Wellmore would have never declared *force majeure* and the Harman companies would not have been impeded by Massey – but it also does not reconcile with the facts of the case. Summarizing the findings of the circuit court, the majority noted that subsequent to Wellmore's declaration of *force majeure*, 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,

[7]The majority also says that all damages incurred by the Plaintiffs resulted from Wellmore's declaration of *force majeure*.

"ultimately collapsed the transaction in such a manner so as to increase [the Harman companies'] financial distress." 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. **Subsequently**, *the Harman companies filed for bankruptcy*.

The majority provides no explanation whatsoever as to how these acts committed by Massey are related to Wellmore's declaration of *force majeure*, and the failure to do so is because they bear no relationship to Wellmore's declaration of *force majeure*. Using the majority's line of reasoning, had Massey not entered into "sham" negotiations with the Harman companies and Mr. Caperton for Massey's purchase of the Harman Mine, the Harman companies may not have been forced into bankruptcy. Or had Massey not purposefully collapsed the transaction, after multiple delays, the Harman companies may not have been forced into bankruptcy. Or had Massey not improperly used Mr. Caperton and the Harman companies' confidential information for Massey's personal benefit, the Harman companies may not have been forced into bankruptcy.

To say that Massey's deceitful conduct "flowed from" Wellmore's declaration of *force majeure* is utterly unjustifiable. Wellmore's declaration may have made the Harman companies more vulnerable to this attack by Massey. However, it was Massey's *subsequent actions* that were the **proximate cause** of the Harman companies destruction.

With respect to the Harman companies' claim of tortious interference with existing business relationships, the majority says

> "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.

Caperton, ___ W.Va. at ___, ___ S.E.2d at ___, Slip Op. at 32-33.

Contrary to this assertion by the majority, the trial court specifically found that it was Massey's conduct subsequent to the *force majeure* declaration that affected the lease of the Harman Coal reserves and the labor contract. Had Massey not engaged in its deceptive conduct – pretending to carry on purchase negotiations in order to gain confidential information for use against the Harman companies and Mr. Caperton – who knows what the outcome may have been. Not surprisingly, that was the question presented

to the Boone County jury: had Massey not engaged its deceptive actions, what position would Mr. Caperton and the Harman companies have been in? Stated another way, what injuries did Massey inflict on Mr. Caperton and the Harman companies by engaging in its deceptive actions?

Although unsupported by the evidence, the majority sweepingly states that "insofar as the claims asserted in this action all flow from the allegedly wrongful declaration of *force majeure*, they would require interpretation of the contract to determine whether the declaration was indeed wrongful." *Caperton*, ___ W.Va. at ___, ___ S.E.2d at ___, Slip Op. at 34 n. 24. The majority inaccurately indicates that a wrongful declaration of *force majeure* is necessary to the claims presented in this case. According to the majority, had Wellmore rightfully declared *force majeure*, the Harman companies and Mr. Caperton would not have a claim against Massey. The majority's new formulation of the law now permits companies to enter into "sham" negotiations and thereby acquire confidential information, only to use that information to drive their competitors out of business.

4. Due Process

The manner in which the majority applied its newly announced four-part test for determining whether a forum selection clause should be enforced violates the due process rights of not only Mr. Caperton, but the corporate appellees as well. As the majority points

out by reference to multiple pages of authority, retroactive application by courts of a newly announced law is not a *per se* violation of due process. However, when a new burden is placed on a party as part of that new law and the party charged with carrying the burden is not permitted an opportunity to go forward with evidence to meet the burden, procedural due process guarantees are violated. "[A] State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 682 (1930); *see also Harper v. Virginia Dept. of Taxn.*, 509 U.S. 86, 101 (1993). There is absolutely no way that the corporate appellees or Mr. Caperton could have heretofore attempted to meet the burden the new standard imposes in order to overcome the presumption of enforceability. The majority affords no opportunity after announcing the new standard for the affected parties to meet the newly established burden. Obviously, Appellees' rights to due process have been abridged.

5. Contractual Rights of Third-parties

To attain its objective in this case, the majority has also ignored one of the most basic principles of contract law, that being "the primary purpose and function of the court in interpreting a contract is to ascertain the parties' intention so as to give effect to that intention." 11 *Williston on Contracts* § 32:2 at 397 (4th ed. 1999); *see also Restatement (Second) of Contracts* § 201. Courts are obligated to interpret and give effect to the mutual

intention of the parties at the time of contracting. Parties to a contract may create rights in third parties by manifesting an intention to do so within the contract or by the circumstances surrounding the making of the contract. "However, in order to be entitled to relief as a third-party beneficiary, the protection afforded must have been in the contemplation of the parties at the time of the execution of the contract." 17B C.J.S. *Contracts* § 621 (1999); *see also* W.Va. Code § 55-8-12 (1923) (Repl. Vol. 2000). It is inconceivable that any of the parties to the CSA could have or should have foreseen or expected at the time of contracting that Massey would unlawfully undertake to do irreversible harm to the Harman mining operation, and to Mr. Caperton as an individual, since he was not a party to the contract in his individual capacity. Even though the contract played a role in different facets of the case brought in West Virginia, Appellees' tort claims against Massey embraced more than the obligations and duties arising out of the CSA or conduct undertaken pursuant to the CSA.

In syllabus point eleven, the majority announces a new rule, 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." In the first case cited by the majority in support of this rule, *Hellenic Inv. Fund, Inc. v. Det Norske Veritas*, 464 F.3d 514, (5th Cir. 2006), the reviewing court enforced a forum selection clause against a non-signatory to the contract on the basis that the non-signatory benefitted

from *performance* of the contract. The same cannot be said for the instant case where Massey benefitted from the *destruction* of the 1997 CSA.

The trial court found that Harman Development and Wellmore had formed a strong coal supply relationship with LTV Steel – a relationship that Massey desperately wanted, and apparently would stop at nothing to get. Massey developed and executed a very risky plan to obtain LTV's business[8], and when that plan failed, Massey refused to accept responsibility for it actions. Massey admits that it did a "cost-benefit" analysis and determined that it was in its best interest to declare *force majeure*. However, it does not seem the declaration was in Wellmore's best interest, as the trial court found that Wellmore sold and shipped nearly two-thirds of the coal purchased from the Harman companies to LTV Steel. The majority's casting of the Wellmore-Massey relationship as being closely connected in interest is simply not correct according to the facts. Even though Massey owned Wellmore for a brief period of time – less than eight months – Massey did not further

[8]After years of trying, unsuccessfully, to obtain LTV Steel's business, and knowing that Wellmore was one of LTV Steel's primary customers for its Pittsburgh plant, Massey decided to acquire Wellmore. Massey purchased Wellmore on July 31, 1997, despite LTV's July 19, 2007, announcement that it intended to close the Pittsburgh coke plant for EPA reasons. Massey's internal memos introduced at trial in West Virginia clearly showed that Massey realized that in doing this, there was a high risk that LTV Steel would simply end the relationship with Wellmore, which happened. In its final order, the circuit court found that "[o]nly after Massey's marketing efforts caused the loss of LTV's business did Massey direct Wellmore to declare '*force majeure*' against Harman. . . ."

the interests of Wellmore by destroying Wellmore's relationship with LTV Steel and then with the Harman companies.

The majority emphasizes that Mr. Caperton or the Harman companies could reasonably foresee that they would be bound by the forum selection clause. However, could Mr. Caperton or the Harman companies reasonably foresee that Massey would acquire Wellmore's parent company of United Coal for a brief eight-month period, by which Massey would be able to enforce the forum selection clause? Could Mr. Caperton or the Harman companies reasonably foresee the actions Massey took after it had sold Wellmore – which removed any type of contractual relationship whatsoever between the parties – would still fall within the forum selection clause in the 1997 CSA? Apparently the majority believes Mr. Caperton and the Harman companies should have anticipated all of the peculiarities arising in this case. Ultimately, by placing such unrealistic requirements as to foreseeability on contracting parties, the majority makes West Virginia a truly vulnerable place to do business.

Another basic tenet of contract law is that the parties approach the contracting process act with good faith and the intent to deal fairly. As summarized by one authority,

> there is an implied covenant of good faith and fair dealing in every contract, whereby neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract . . . .

> The scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract.

17A Am. Jur. 2d *Contracts* § 370. Initially, Harman had included in its Virginia suit a claim sounding in contract for breach of the duty of good faith and fair dealing,[9] but withdrew the claim before the trial in that case. Withdrawal of the claim is fully understandable because only Wellmore, as a party to the CSA, could be bound by the *contractual* duty of good faith and fair dealing. As the lower court herein concluded from the evidence before it, manipulation of the CSA and its forum selection clause was just one of many tools Massey used both before, during and after its ownership of Wellmore. The aim of Massey's plan was either to directly cause the demise of the Harman corporations and the financial ruin of Mr. Caperton as an individual, or at least use the Harman coal operation and Mr. Caperton as pawns to force United to accept the lower grade Massey coal for the premium coal produced from the Harman mine. There was no indication that Wellmore was aware of Massey's plan to eliminate the Harman mining operation or could have foreseen the implementation of such a plan when it entered and renewed the CSA with the corporate appellees. Essentially, the majority, by extending the right to enforce a forum selection clause under the circumstances of this case to Massey as a non-signatory to the CSA, has created a loophole whereby a non-party to a contract may gain the benefit of enforcing a

[9]The majority mis-characterized this claim as a tort claim, but the corporate appellees made it clear during oral argument that no claims sounding in tort were filed in Virginia.

forum selection clause without having the burden of accountability for acting in good faith and dealing fairly. Massey and others like Massey can simply ride the coattails of good business citizens in order to accomplish covert, questionable and reprehensible acts. We hardly find this conducive to promoting trust in the contracting process or otherwise furthering commerce and business interests – nor does it foster trust in the judicial process.

6. Weaknesses of the Announced Forum Selection Clause Test

Even if one acknowledges the suitability – in the abstract – of the test made applicable to forum selection clauses by the majority opinion, two very serious problems are readily apparent with the application to the case sub judice of the new test announced by the majority in syllabus point six. First, as mentioned earlier, retroactive application of this test does not allow parties the opportunity to overcome the newfound presumption of enforceability, thereby depriving the parties opposing enforcement of the clause their due process rights. Our second concern rests with the new test not giving trial courts, charged with weighing the evidence regarding forum selection clause issues, the freedom to decide that the presumption of enforceability has been rebutted purely on the circumstances as revealed in the record before them. This flexibility, placed in the hands of our capable trial court judges, would serve to eliminate unnecessary expenditure of time and resources in appropriate cases.

We fear that the readily apparent flaws in the new standards embraced by the majority as governing enforcement of forum selection clauses in this state represent only the tip of the iceberg of problems which will surface upon pragmatic application of the standards in the courtrooms of this state. All lawyers know that the law can be read and written to accommodate the needs of a situation, and that the law has to be malleable in order to address a variety of ever-evolving circumstances. Consequently, good, enduring and meaningful law must be written in such a manner as to promote the noble cause of the larger good and not merely support the agenda of a few. Unfortunately, the new law governing forum selection clause issues which the majority has designed in this case reaches unreasonable and unjust results not only for the affected parties, but also for the judge and jury who heard this case and all businesses and individuals who will be impacted by anticipated as well as unexpected results.

B. Res Judicata

Dismissal on res judicata grounds was unnecessary and again exemplifies the majority's results-driven approach to this appeal.

Because the law of Virginia controls the application of res judicata in this case, a close examination of the decisions of the Supreme Court of Virginia *governing the relevant*

time period[10] is essential. This study, however, must be undertaken with the understanding that the pertinent cases were decided at a time when common law and equity pleading were not merged in Virginia.[11] Such recognition is necessary because the separation of law and equity often affected whether one or more of the four elements necessary to invoke application of the doctrine of res judicata[12] was present under the facts of a given case. For example, some remedies were only available in actions brought in the chancery side of the courts while others were only obtainable on the law side of the courts.[13] Moreover, the discussion in the cases does not always address the law-equity distinction when examining the presence or absence of the elements substantiating application of res judicata, and sometimes reasoning based on the distinction is applied in cases where the basis of the two suits is not split between common law and equity. As a result, the status of the applicable

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[10]The relevant time period would logically be when the tort claim could have been joined with the contract claim filed in Virginia. Thus the relevant period would be May 21, 1998, when the contract case was filed, until no later than when the final judgment order in Virginia was entered on May 7, 2001.

[11]Common law and equity procedure were not merged in Virginia until January 1, 2006. *See* W. Hamilton Bryson, *The Merger of Common-law and Equity Pleading in Virginia*, 41 U. Rich. L. Rev. 77 (2006).

[12]The elements necessary to justify application of the doctrine of res judicata in Virginia are: "(1) identity of 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*, 349 S.E.2d 125, 128 (Va. 1986); *Mowry v. City of Virginia Beach*, 93 S.E.2d 323 (1956).

[13]This is not to say as the majority suggests that the law/equity distinction is the only factor considered in Virginia to determine whether the same remedy is available for res judicata purposes.

law involving res judicata in Virginia simply was not as clear as the majority opinion leads one to believe. This is particularly true in Virginia's Supreme Court cases involving the meaning of the element of "identity of cause of action." A review of these cases, all decided no later than the time that the final judgment was entered in the Virginia suit, does not support the majority's conclusion that Virginia would have applied the transactional approach to the res judicata cause of action element. Instead, such review discloses that this area of Virginia's jurisprudence was in a state of flux at the time the final judgment order was entered against Wellmore in the breach of contract suit brought in Virginia.

More than one test has been employed over the years in Virginia to determine whether the element of "identity of cause of action" has been satisfied. One approach most commonly applied involves an analysis of the evidence. The extended vitality of this approach was attested to in the 1988 case of *Flora, Flora & Montague, Inc. v. Saunders*, 367 S.E.2d 493 (Va. 1988), in which it was stated that for res judicata purposes,

> [t]he principal test to determine whether claims are a part of the same cause of action is whether the same evidence will support both claims. *Brown v. Haley*, 233 Va. 210, 216, 355 S.E.2d 563, 567 (1987)[("The test to determine whether claims are part of a single cause of action is whether same evidence is necessary to prove each claim.")]; *Jones [v. Morris Plan Bank]*, 168 Va. [284] at 290-91, 191 SE [608] at 609-610 [(1937) [("One of the principal tests in determining whether a demand is single and entire, or whether it is several, so as to give rise to more than one cause of action, is the identity of facts necessary to maintain the action. If the same evidence will support both actions, there is but one cause of action.")]; *see also Wright v. Castles*, 232

> Va. 218, 223-24, 349 S.E.2d 125, 129 (1986) [(relying on *Jones v. Morris Plan Bank* to apply the same evidence test)]; *Bates [v. Devers]*, 214 Va. [667] at 672, 202 S.E.2d [917] at 922 [(1974) (applying same evidence test)].

Saunders at 495-96. Some additional older cases in which the "same evidence test" was employed to determine whether claims were part of a single cause of action are *Kelly v. Board of Public Works*, 25 Gratt. 755, 763, 1875 WL 5640, *4 (Va.1875) ("The two claims . . . are distinct divisible claims, depending on separate contracts, made at different times and upon different principles; and the evidence to support one is not necessary to support the other, but much of it that would be material to sustain the one would be irrelevant to the other."), *Cohen v. Power*, 32 S.E.2d 64, 65 (Va. 1944) ("The test generally applied in the application of the doctrine of res adjudicata is to determine whether the facts essential to the maintenance of the two actions are the same. If the same facts or evidence would sustain both actions . . . subsequent action based upon the same facts [is barred]."), and *Feldman v. Rucker*, 109 S.E.2d. 379, 384 (Va. 1959) (second suit found to be a different cause of action because its outcome "was dependent upon different proof and principles of law.") Since the same evidence test did not always serve justice, other factors were also considered by the high court of Virginia when deciding the presence or absence of similarity between causes of action. In *Smith v. Ware*, 421 S.E.2d 444 (Va. 1992), the Virginia Supreme Court found that different causes of action existed because different *rights* were asserted in each suit, one based in equity and the other based in law. In another case in which one suit was filed in the chancery court and the other was filed in the law court, the examination of the cause of

action element turned on whether the *purposes and issues* in both suits were the same. *Worrie v. Boze*, 95 S.E.2d 192, 197 (1956). Yet another approach used in Virginia to vary the result achieved by strict application of the same evidence rule was to look at the transaction from which the suits arose.

It was in the 1974 case of *Bates v. Devers* – a case earlier noted as applying the same evidence test – that the Virginia Supreme Court first referred in a footnote to the term "transaction" in relation to the res judicata element of cause of action. The footnote from *Bates* was elevated to the body of the discussion in *Allstar Towing, Inc. v. City of Alexandria*, 344 S.E.2d 903 (Va. 1986), in the following manner:

> For the purposes of res judicata, a 'cause of action' may be defined broadly 'as an assertion of particular legal rights which have arisen of a definable factual transaction.' *Bates v. Devers*, 214 Va. 667, 672 n. 8, 202 S.E.2d 917, 921 n. 8 (1974).

Allstar at 905-06. Since the same evidence test was thereafter touted in the 1988 case of *Saunders* as the principal test in this regard, a fair reading of *Allstar* is that the result the high court of Virginia believed would serve justice could not be attained by strict application of the same evidence test. Although the two suits which were the subject of the res judicata inquiry in *Allstar* would have relied upon the same evidence, the spin the Virginia Supreme Court placed on the same evidence test in *Allstar* allowed the high court to reach the conclusion that the second suit should proceed because some of the relevant events had not occurred until after the first suit was decided. The *Allstar* court did not approach the matter

before it using the transactional analysis method in order to find that the facts supported an inseparable amalgam constituting but one cause of action. Rather, the Court in *Allstar* relied upon the term "definable factual transactions" to separate the interrelated facts before it and find two identifiable causes of action. *Id*. Furthermore, there was no indication in the body of the *Allstar* opinion that prior decisions were overruled, superseded or should be read in light of the adoption of a new standard for determinations of causes of action for res judicata purposes. Thus the principal insight *Allstar* provides is that the Supreme Court of Virginia would not strictly adhere to a test for cause of action which would serve to eliminate a party's right to a full and fair hearing on matters which had not previously been adjudicated.

Although decided outside of the relevant time period of the case sub judice, the later case of *Davis v. Marshall Homes, Inc*., 576 S.E.2d 504 (Va. 2003), supports this reading of *Allstar* while serving as further testament that the law in this area remained unsettled in Virginia until the Supreme Court of Virginia adopted Rule 1:6 of the Rules of the Supreme Court of Virginia in 2006. The majority and dissenting opinions filed in the *Davis* case nicely summarize the differing viewpoints on the proper test to apply in this regard.

The majority simply ignores the unsettled status of this area of law in Virginia in 2001 when the Virginia suit was concluded and instead looks to what the Virginia

Supreme Court eventually did to resolve the dilemma. It also ignores the Virginia high court's overarching concern with achieving justice when faced with a decision of what constituted an identity of cause of action for res judicata purposes. The only Virginia cases within the relevant time period upon which the majority squarely relies are *Allstar* and the unpublished *circuit court case* of *Cherokee Corporation v. Richardson*, 1996 WL 1065553 (Va. Cir. Ct. 1996). This reliance could have only been used to substantiate the Virginia Supreme Court's later adoption in 2006 of a transactional analysis rule.[14] It is noteworthy for due process purposes that the Supreme Court of Virginia prospectively applied the new rule only to those cases brought on or after the effective date of July 1, 2006. To say that the parties knew, should have or even could have known that the high court of Virginia would – some five years after the final judgment was entered in the Virginia contract case – adopt a transactional analysis approach as the sole means to define cause of action for res judicata purposes is to assume that the parties had access to a crystal ball or possessed prescient abilities.

Significantly, the majority could not have followed the precedential law of Virginia and applied the same evidence test in any form since the entire record of the Virginia proceeding was not admitted into the record of this appeal, making a comparison of evidence between the Virginia suit and the West Virginia suit impossible. This serves to

[14]*See* Rule 1:6, Rules of Supreme Court of Virginia, regarding res judicata claim preclusion and therein defining "cause of action" for res judicata purposes.

further demonstrate the majority's dogged pursuit of a course which would produce the results it desired in whatever available manner.

Even if the transactional analysis test was the controlling law of Virginia in 2001, the matters raised in the West Virginia suit went beyond what the majority found to be central to the transaction: the CSA.[15] The evidence introduced in the Boone County suit proved that Massey developed its plans to undermine the Harman Mine operations and to place Mr. Caperton's individual interests in jeopardy before the first CSA was signed, that is before Massey had any ownership interest in Wellmore, and carried that effort forward long after Massey sold Wellmore. Furthermore, the purposes of the transactional analysis approach have been frustrated by the way that the majority undertook to apply it in the instant case. It is recognized in the federal courts which have adopted the transactional analysis test that "[n]o simple test exists to determine whether causes of action are identical for claim preclusion purposes, and each case must be determined separately within the conceptual framework of the doctrine." *Pittston Co. v. U.S.*, 199 F.3d 694, 704 (4th Cir. 1999); *see also* Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, 18 Fed. Prac. & Proc. Juris. 2d § 4407 nn. 53-54 (2002) (citing cases finding either no definition possible or no definition desirable). It is further recognized that the utility of the transactional analysis test is that it affords flexibility in examining cases which are more complex, and has been

[15]The coal supply agreement was part of the record in this appeal.

used to justify separating claims in such circumstances even though the claims arise from a common background. As summarized by one authority commenting on how the federal courts have applied the transactional analysis test in complex cases:

> One of the most general reasons for separating claims is that a broad course of completed unlawful conduct has included a clearly separable event that gave rise to distinctive injury. Thus the victim of a long conspiracy to destroy a business was permitted to follow an action for libel with an antitrust action in which the libel was merely one piece of evidence to prove the overall conspiracy. In like fashion, a trustee in bankruptcy was permitted both to recover a judgment against the controlling stockholder for breach of fiduciary responsibilities in a specific transaction, and later to subordinate the stockholder's rights to the rights of other stockholders on the basis of continuing breach of its responsibilities throughout the entire period of ownership. Despite the relationship among the facts of these separate actions in origin and motivation, these decisions seem to respond well to pragmatic considerations of trial efficiency and do not pose any substantial threat to interests of repose.

Wright, Miller, Cooper, 18 Fed. Prac.& Proc. Juris. 2d § 4408, 195-196 (footnotes omitted).

The majority failed to closely examine whether there were clearly separable events and distinctive injuries arising in the instant case, and did not consider the pragmatic implications of joining all claims into one trial. Regrettably, it appears the majority was more committed to the aim of reaching a desired conclusion rather than arriving at a just result – which the transactional analysis approach would clearly support under the facts presented in this case.

III. SUMMATION

Although the majority opinion made substantial additions to the opinion vacated as a result of granting the rehearing motion, the omissions from the original decision overshadow the additions. Specifically, despite the disagreements among the individual Justices in the vacated opinion, all five did agree on one point:

> [**A]t the outset, we wish to make perfectly clear that the facts of this case demonstrate that Massey's conduct warranted the type of judgment rendered in this case.**

Caperton v. A.T. Massey Coal Co., Inc., 2007 WL 4150960, Slip Op. at 13 (No. 33350, filed November 21, 2007), *withdrawn*.

As amply demonstrated by the preceding analysis, the majority could have readily allowed the work of the Boone County Circuit Court to stand. Instead, the majority consciously chose to decide this case in such a way as to allow wrongdoers to skirt the consequences of their actions. In pursuit of its desired outcome, the majority did not apply the controlling law of Virginia and instead rigidly applied a test unknown to the parties at the time the litigation was pending in Virginia, and did so without regard to the inherent flexibility of the rule. The new test was applied in such a way as to ignore the complexities of the transaction and with gross disregard for the due process rights of the litigants. Not

only is the majority opinion unsupported by the facts and existing case law, but it is also fundamentally unfair. Sadly, justice was neither honored nor served by the majority.[16]

While it gives us no pleasure to write this dissent, we recognize a duty to do so in the name of justice. Indeed, embodied in our constitution is the clear statement that "[f]ree government and the blessings of liberty can be preserved to any people only by a firm adherence to justice, moderation, temperance, frugality and virtue, and by a frequent recurrence to fundamental principles." W. Va. Const. Art. 3, §20. Regrettably, the majority has radically strayed from the fundamental principles of fairness and justice in maintaining its course of setting aside the Boone County decision in this case, a course to which we wholeheartedly and fervently dissent.

Link to Appendix

[16]Mr. Caperton raised a further issue regarding possible disqualification of Justice Benjamin. The majority did not address this issue, likely because it is the practice of this Court, as it is the practice of the United States Supreme Court and other federal courts, to leave decisions on disqualification motions for each judge to decide individually. Unfortunately, with true regret, we are unable to stand silent in the present circumstances. Upon reviewing the cases of *Aetna Life Insurance Company v. Lavoie*, 475 U.S. 813 (1986), and *In re Murchison*, 349 U.S. 133, 136 (1955), it is clear that both actual and apparent conflicts can have due process implications on the outcome of cases affected by such conflicts. On the record before us, we cannot say with certainty that those cases have application here. It is now clear, especially from the last motion for disqualification filed in this case, that there are now genuine due process implications arising under federal law, and therefore under our law, which have not been addressed.