

**IN THE SUPREME COURT OF APPEALS  
OF THE STATE OF WEST VIRGINIA**

**T & R TRUCKING CO., INC., a  
West Virginia corporation,**

**Appellant,**

**VS.**

**RICK MAYNARD,**

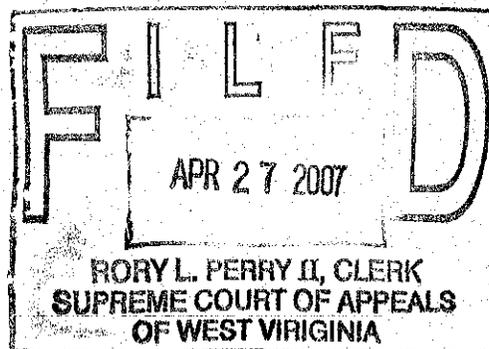
**Appellee,**

**VS.**

**TOM BENJAMIN FARLEY, individually and  
in as official capacity as President of  
T & R TRUCKING CO., INC., a  
West Virginia corporation,**

**Appellant.**

**APPEAL NO. 33346**



**BRIEF ON BEHALF OF APPELLANTS,  
T & R TRUCKING CO., INC. AND TOM BENJAMIN FARLEY**

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**APPEAL**

Plaintiff and Third-Party Defendant appeal the order of Judge Darrell Pratt of the Circuit Court of Wayne County, West Virginia entered September 19, 2006 granting judgment for defendant against plaintiff and third-party defendant.

**KIND OF PROCEEDING AND NATURE  
OF THE RULING IN THE LOWER TRIBUNAL**

This is an action instituted by the plaintiff against defendant, Rick Maynard, for damage to a Western Star coal truck leased by plaintiff to defendant with an option to purchase and a counter claim and third party claim of the defendant against the plaintiff and third party defendant, Tom Benjamin Farley, for breach of contract. The case was tried by a jury resulting in

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a verdict in favor of the defendant against the plaintiff in the amount of \$64,029.40 and against third party defendant, Tom Benjamin Farley, in the amount of \$36,000.00. Plaintiff and third party defendant contend that the jury verdict resulted from improper rulings by the Circuit Court in not permitting evidence of the lack of good faith on the part of the defendant, Maynard; by permitting defendant to argue to the jury that inasmuch as plaintiff corporation was in a revoked status for a period of time for nonpayment of taxes, it did not exist; and submitting a jury verdict form to the jury whereby if they found in favor of the defendant, they could only find against Thomas B. Farley individually or Thomas B. Farley as President.

**ASSIGNMENT OF ERRORS RELIED UPON ON APPEAL AND THE MANNER IN WHICH THEY WERE DECIDED IN THE LOWER TRIBUNAL**

The Circuit Court refused to permit plaintiff to submit evidence of the lack of good faith on the part of defendant, Rick Maynard, in not disclosing that he had no drivers license and did not have a coal mine truck driver certification as required by law.

The Circuit Court erred in not granting the motion to dismiss of third party defendant, Tom Benjamin Farley, and permitting counsel for defendant to argue that inasmuch as the plaintiff corporation was in a revoked status for a period of time, it did not exist and therefore third party defendant, Tom Benjamin Farley, was responsible to the defendant.

The Circuit Court erred in submitting a verdict form to the jury whereby if they found in favor of the defendant, they could only find against "Thomas B. Farley, individually" or against "Thomas B. Farley as President of T & R Trucking Co., Inc."

**STATEMENT OF THE FACTS OF THE CASE**

In the year 2000 and prior thereto, T & R Trucking Co., Inc. was operating under a coal

hauling contract for Pen Coal Company in Wayne County, West Virginia and had several trucks, including ten Western Star trucks. Defendant, Rick Maynard, was employed by the plaintiff, T & R Trucking Co., Inc., in 1998, at which time he had a valid driver's license, which was necessary because all of the haul roads on the Pen Coal Company property were county roads under the jurisdiction of the Sheriff and State Police and at which time, he had an independent coal mine truck driver certification as required by West Virginia Code Chapter 22A, Article 8, Section 1, Title 48, Series 3, entitled "Safety Training Program for Prospective Surface Coal Miners" of the Mining Laws, Rules and Regulations of the State of West Virginia in order to drive a coal truck on mine property.

The manufacturer, Western Star, was not honoring the warranties on the ten Western Star trucks, so T & R Trucking Co., Inc. sent the ten trucks back to Western Star at the dealers location, Stephens Truck & Trailer Sales, Salyersville, Kentucky, in approximately December of 2000. Two of these trucks were financed by Financial Federal Credit Union and Gary Pace of Financial Federal contacted Tom Farley, Jr., President of T & R Trucking Co., Inc. and T & R agreed to take back the two Western Star trucks financed through Financial Federal and Financial Federal agreed to let T & R catch up with the payments in arrears over the next year or so.

In June 2000, defendant, Rick Maynard, returned to T & R Trucking for employment as a truck driver but failed to disclose to T & R Trucking that he no longer had a drivers license or the required independent coal mine truck drivers certification because the same had been revoked as a result of numerous convictions for driving under the influence. Had he made such a disclosure, T & R Trucking would not have been able to employ him because his employment required that he travel over roads which are part of the State highway system and over coal hauling roads.

Sometime prior to April 16, 2001, the defendant, Rick Maynard, asked Thomas B. Farley, Jr., President of the plaintiff if he could have a truck and he was told to go out in the lot and pick out one. When he picked out the truck, they found out what the payment was on the truck and Maynard was to make that payment and at the end of the term, it would be his truck. The arrangement was that he would lease the Western Star truck and make 25 equal installments of \$2,875.00 commencing April 16, 2001 and should defendant make all the payments as due, then defendant could purchase the same. At that time, defendant, Maynard, well knew that plaintiff's truck was financed with Financial Federal Credit Union and his payments on the truck would be used by the plaintiff to pay the monthly installment due Financial Federal Credit Union. In addition, the defendant was to keep the truck in good condition and fully insured. While Maynard was employed by T & R Trucking, he was driving a truck over the county roads on Pen Coal Company property without a driver's license or certification. After entering into the lease purchase agreement, Maynard did contract hauling work for T & R Trucking under the name of Shepherds Trucking up until February 2002. Some time later, Maynard had his attorney draw up an agreement with reference to the truck, which was signed and dated February 22, 2002, which defendant recorded in the office of the Clerk of the County Commission of Wayne County, West Virginia, on February 27, 2002 in Lease Book 32, at page 606. Maynard was advised by T & R Trucking that the payments he made on the truck would be used to pay the monthly payments due the finance company. T & R Trucking would not have agreed to the lease agreement had it known that Maynard had no driver's license or certification.

After Maynard defaulted in making his payments, T & R Trucking was not able to timely make payments to Financial Federal.

After agreeing to the lease purchase of the truck with Maynard, prior to which T & R had already made arrangements with Gary Pace of Financial Federal to catch up his payments when it could, T & R Trucking made the following payments:

March 19, 2001 in March

April 2, 2001 in April

May 4, 2001 in May

June 12, 2001 in June

June 12, 2001 for the month of July

July 18, 2001 for the month of August

August 6, 2001 for the month of September

August 6, 2001 for the month of October

September 27, 2001 for the month November

January 11, 2002 for the month of December

February 25, 2002 for the month of January

March 12, 2002 for the month of February

March 12, 2002 for the month of March

The truck payment was deducted from Maynard's hauling payments in the months of March, April and May of 2001, but T & R Trucking was advised this was not a good audit track and they needed to pay the hauling payment to the hauler in full and then have Maynard write a check for the truck payment. Commencing May 2001, no deductions were made from any haul payments to Maynard. Maynard claimed that the truck payment was deducted from his haul payment for September 2001 in the amount of \$8,317.44, but no deduction was made from his

haul payment for the truck payment and Maynard did not make the truck payment for September. The check to Maynard was for the total due. Maynard also claimed that the truck payment was deducted from his hauling payment for February of 2002, which is not true. The hauling payment was \$3,742.31 and he was paid that amount and there was no deduction for the truck payment and no payment was made by Maynard for February 2002 and thereafter.

As shown by the records of Financial Federal Credit, T & R Trucking had finally brought its payments up to date under its arrangement with Gary Pace of Financial Federal as of August 2001. Maynard failed to make the next truck payment in September 2001 and continued in default thereafter. He failed to make any payment for February 2002 and made no payments after February 2002. A notice of default by letter dated May 7, 2002 was mailed by T & R Trucking to defendant, Maynard.

Maynard contends that he didn't make his truck payments because he had trouble locating Tom Farley, Jr., which is not true. He had Mr. Farley's Chapmanville telephone number and knew that he lived in Chapmanville. Mr. Farley's name and address were listed in the Chapmanville telephone book. He had talked to Mr. Farley many times before on the telephone and could easily have contacted him and found out where he could deliver his truck payment. When Pen Coal went into bankruptcy, the T & R Trucking office at Pen Coal was closed, however, Mr. Farley was there everyday for several months moving equipment in and out of the Pen Coal property and could certainly have been found at the office. In addition, the guard shack at Pen Coal had Mr. Farley's address also, as did the Pen Coal office, which remained open. He certainly could have mailed the payment to the mailing address of T & R Trucking. The address of P.O. Box 70, Delbarton, WV 25672 was printed on the checks and invoices.

T & R Trucking Co., Inc. notified Maynard of his responsibility to obtain insurance on the truck in question, by letter of March 11, 2002. Maynard obtained insurance on the truck from Shamrock Insurance Agency on March 13, 2002. It was canceled two months later, effective May 12, 2002 for non-payment to the premium finance company, who financed the insurance premium payment to Essex Insurance Company.

In May 2002, Maynard called Mr. Farley's home and left messages on his answering machine acknowledging that he was at least three months behind in his payments and that he was parking the truck at Triad Mining. The answering machine tape is in evidence. The reason he parked the truck at Triad Mining at this time was because he was going to prison by the Court's order of May 15, 2002, for driving drunk on a revoked license. He left word on the answering machine that "it's sitting up there, better do something with it". This as well as the numerous missed truck payments, constituted default of the lease purchase agreement.

Another primary reason why Maynard parked the truck on the Triad Mining property was because he defaulted in the payment to the insurance premium finance company who was financing the insurance premiums to Essex Insurance Company, who insured the truck. As a result, Maynard had no insurance and could not operate the truck without insurance on it.

Maynard contends that Financial Credit called him seeking to repossess the truck, which cannot possibly be correct. T & R Trucking was in contact from time to time with Gary Pace of Financial Federal and Financial Federal did not consider T & R Trucking to be in default and, if so, would have called T & R Trucking not Mr. Maynard. If Financial Federal had wanted to repossess the truck, they would have just picked it up. They would have sent someone to drive the truck to wherever they wanted to take it or, at the least, they would have asked Maynard to

deliver it or park it somewhere where they could obtain it. Instead, Maynard abandoned the truck on the Triad Mining property.

There were no repossession efforts made by Financial Federal Credit prior to their letter of January 7, 2003. T & R Trucking Co., Inc. was never told by any representative of Financial Federal Credit, Inc. that it was in default until the receipt of the letter of January 7, 2003, notifying T & R Trucking that the balance was being accelerated and twenty three days later advised that it would accept a check in the amount of \$62,000.00, which check was sent to Financial Federal Credit four days later on February 3, 2003 paying off the entire account, after which, Financial Federal Credit returned the title to the truck stamped "satisfied."

After defendant, Maynard, abandoned the truck at the Triad Mining Property, Mr. Farley's father got a call from the security guards saying that they thought his truck was up there and it had been vandalized. Mr. Farley then went to Triads property and took pictures of the truck, showing that the tires were gone, the drive shaft was gone and some parts of the engine were gone. Mr. Farley then called the State Police on his cell telephone and they investigated and made a report. Mr. Farley then notified the insurance company that had the insurance on the truck and took possession of the truck.

After defendant, Maynard, abandoned the truck on the Triad Mining property, he either removed parts and damaged the same or it was vandalized by others and, as shown by the repair estimate of Stephen's Truck & Trailer Sales, Inc., the damage amounted to \$23,507.29. Further, the lease agreement provides that should the seller choose to declare the agreement forfeited, then thirty days after mailing the notice of default, the seller could record in the office of the Clerk of the County Commission of Wayne County, West Virginia an affidavit stating the

facts of forfeiture and the facts of mailing the notice of default and all right, title and interest of the buyer shall immediately cease and the lease agreement shall be terminated, which provision was totally unnecessary, but nevertheless, T & R Trucking complied with the same by recording said notice on August 25, 2004.

### **POINTS AND AUTHORITIES RELIED UPON**

#### **I.**

Had plaintiff known defendant did not possess a coal truck driver's certification, plaintiff would not and could not have entered into any lease purchase agreement with defendant for the lease of the truck in question.

"No person shall work or be employed for the purpose of performing normal duties as a surface or underground miner in any mine in this state unless the person holds at the time he or she performs such duties a certificate of competency and qualification or a permit of apprenticeship issued under the provisions of this article." West Virginia Code, § 224-8-1.

"2.9 Independent Coal Truck Driver's Certification;

"a. Independent Coal Mine Truck Drivers Who Possess an Independent Coal Truck Driver's Certification are not required to complete the approved surface mining (40 hours) or underground (80 hours) apprenticeship program nor must they possess a coal miner's certification in order to drive a coal truck on mine property.

"b. To obtain an independent coal truck driver certificate, a prospective independent coal truck driver must first possess a first-aid card, a valid driver's license, and must successfully complete an eight-hour training course, prescribed by the Board of Miner Training, Education, and Certification prior to taking the examination. Successful completion means a score of at

least 80 percent.

"c. Persons who possess an independent coal truck driver's certification are limited to driving coal trucks on mine property and are not to engage in reclamation work or other mining activities. This experience will not be applicable towards a miner's certificate." Title 48, Series 3, Safety Training Program For Perceptive Coal Miners, Mining Laws, Rules and Regulations, State of West Virginia.

## II.

"Every contract or duty within this chapter imposes an obligation of good faith in its performance or enforcement." West Virginia Code §46-1-203.

"The concept, however, is broader than any of these illustrations and applies generally, as stated in this section, to the performance or enforcement of every contract or duty within this Act. It is further implemented by Section I-205 on course of dealing and usage of trade." Footnote, West Virginia Code, §46-1-203.

## III.

"Remedies for material misrepresentation or fraud include all remedies available under this article for nonfraudulent breach. Neither rescission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy." West Virginia Code, §46-2-721.

## IV.

"Any corporation whose certificate of incorporation or certificate of authority has been revoked due to non-payment of its corporate license taxes shall be reinstated to its former rights as if it had not been delinquent upon payment to the Tax Commissioner of all delinquent license

taxes, plus any interest, additions or penalties accruing thereon." West Virginia Code, §11-12C-8.

V.

"When the reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative dissolution and the corporation resumes carrying on its business as if the administrative dissolution had never occurred." West Virginia Code, §31D-14-1422(c).

"Suits either for or on behalf of the corporation pending at the time of the dissolution are expressly held not abated thereby." Greenbrier Lumber Co. v. Ward, 30 W.Va. 43; Stiles v. Laurel Fork Oil & Coal Co., 47 W.Va. 838; Board of Education v. Berry, 62 W.Va. 433.

**DISCUSSION OF LAW**

**EVIDENCE OF LACK OF GOOD FAITH**

Plaintiff's previously filed Motion In Limine With Reference to Good Faith should have been granted and plaintiff should have been permitted to produce evidence that defendant did not have a proper drivers license or certification and did not act in good faith.

The Court erroneously refused to permit plaintiff to introduce the evidence that upon defendant's return to employment with plaintiff and at the time of the lease purchase agreement concerning the truck in question between the plaintiff and defendant, the defendant did not have a valid drivers license and did not have the required independent coal mine truck driver's certification, as a result of which he could not legally be employed by plaintiff. Had plaintiff known he did not possess a coal truck driver's certification, plaintiff would not and could not have entered into any lease purchase agreement with defendant for the lease of the truck in question.

West Virginia Code Chapter 22A, Article 8, Section 1, provides that "No person shall work or be employed for the purpose of performing normal duties as a surface or underground miner in any mine in this state unless the person holds at the time he or she performs such duties a certificate of competency and qualification or a permit of apprenticeship issued under the provisions of this article."

Title 48, Series 3, entitled "Safety Training Program for Prospective Surface Coal Miners" of the Mining Laws, Rules and Regulations of the State of West Virginia provides:

"2.9 Independent Coal Truck Driver's Certification;

"a. Independent Coal Mine Truck Drivers Who Possess an Independent Coal Truck Driver's Certification are not required to complete the approved surface mining (40 hours) or underground (80 hours) apprenticeship program nor must they possess a coal miner's certification in order to drive a coal truck on mine property.

"b. To obtain an independent coal truck driver certificate, a prospective independent coal truck driver must first possess a first-aid card, a valid driver's license, and must successfully complete an eight-hour training course, prescribed by the Board of Miner Training, Education, and Certification prior to taking the examination. Successful completion means a score of at least 80 percent.

"c. Persons who possess an independent coal truck driver's certification are limited to driving coal trucks on mine property and are not to engage in reclamation work or other mining activities. This experience will not be applicable towards a miner's certificate."

At the time of defendant's initial employment by the plaintiff as a truck driver, he was advised that he must have an "independent coal truck driver's certification" and "a valid driver's

license." It was determined that he had such licenses and had completed an eight-hour training course. Prior to his second employment by plaintiff, defendant lost his driving privileges due to alcoholism and did not disclose to plaintiff that he was not permitted to drive a coal truck, although he well knew that the law required him to have the "independent coal mine truck driver's certification and a valid driver's license, did not so disclose this to the plaintiff and illegally drove plaintiff's coal trucks, objecting not only himself but the plaintiff to liability for violation of coal mining laws, rules and regulations. Had plaintiff known that defendant did not possess authority to drive a coal truck, he would not have been re-employed and certainly plaintiff would never have considered selling any coal truck to him which, at the very least, amounts to bad faith on the part of the defendant.

The concept of good faith and fair dealing required him to disclose that to the plaintiff at the time he entered into the lease agreement for the truck and also at the time he contracted to do hauling for the plaintiff. West Virginia Code §46-1-203 states "Every contract or duty within this chapter imposes an obligation of good faith in its performance or enforcement." The footnote to this statute states "The concept, however, is broader than any of these illustrations and applies generally, as stated in this section, to the performance or enforcement of every contract or duty within this Act. It is further implemented by Section I-205 on course of dealing and usage of trade." The failure of defendant, Maynard, to disclose that it was illegal for him to drive the truck, which was the subject of the lease agreement, constitutes fraud or, at the very least, material misrepresentation and West Virginia Code §46-2-721 provides that "Remedies for material misrepresentation or fraud include all remedies available under this article for nonfraudulent breach. Neither rescission or a claim for rescission of the contract for sale nor

rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy."

There is no question but that the defendant had a duty to disclose to the plaintiff that he was not able to perform the employment arrangement whereby he was employed as a driver of the plaintiff's trucks on a coal mine and certainly at the time of executing the lease purchase agreement for the lease purchase of a truck, which in turn he was going to use to haul loads by contractual arrangement with the plaintiff over a coal mine, and there is no question but that plaintiff would not have employed defendant and certainly would not have entered into a lease purchase agreement for one of plaintiff's truck had he known that the defendant was not permitted to drive the vehicle involved.

The only argument presented by defendant with reference to the refusal of the Court to permit evidence that defendant did not, at the time of his re-employment by plaintiff, have a valid drivers license and the required independent coal mine truck driver certification was that the Court had previously denied the same on three occasions.

Therefore plaintiff was entitled to introduce evidence as to lack of good faith on the part of the defendant.

#### **LIABILITY DUE TO CORPORATION'S REVOKED STATUS**

This action was tried and the jury on October 17, 2005 returned a verdict in favor of the plaintiff, T & R Trucking Co., Inc., against the defendant, Rick Maynard, in the sum of \$23,507.29, which verdict was set aside by Judge Pratt on the grounds the jury was confused. Pending the second trial, defendant, Maynard, petitioned the Supreme Court of Appeals for a writ of prohibition seeking to prohibit Judge Pratt from permitting the plaintiff, T & R Trucking Co.,

Inc., from prosecuting any claims against the defendant on the grounds that the corporation T & R Trucking Co., Inc. was in a revoked status due to failure to pay taxes, which petition was refused.

The case was again tried on August 3, 2006 and at the conclusion of all the evidence, third-party defendant, Thomas B. Farley, Jr., moved for a directed verdict on the grounds that there had been no evidence whatsoever during the trial of this cause that he acted in any way or manner other than as an officer of the plaintiff, T & R Trucking Co., Inc., which the Court denied, because during a period of time, the corporation T & R Trucking Co., Inc. was in a revoked status. As a result, defendant's counsel argued to the jury that Thomas B. Farley, Jr. was liable to the plaintiff because the corporation had been in a revoked status for some period of time during the transaction in question.

In February 2005, defendant's counsel had moved to dismiss the plaintiff, T & R Trucking Co., Inc., stating that it had been in a revoked status beginning September 11, 1996, which motion was denied by the Court March 7, 2005 on the grounds that the plaintiff was reinstated in good standing on February 14, 2005, and the plaintiff could pursue its claim against the defendant. Plaintiff had submitted in response a certificate of fact of the Secretary of State indicating that T & R Trucking Co., Inc. was registered with the State of West Virginia as a domestic corporation and is in good standing and a certificate of existence of the Secretary of State stating that a certificate of incorporation was issued on March 15, 1966 and that the corporation had not been revoked by the State of West Virginia nor has the West Virginia Secretary of State issued a certificate of dissolution to the corporation. What, in fact, had happened was that in accordance with Chapter 11, Article 12C, Section 8 of the West Virginia

Code, the West Virginia State Tax Commissioner placed the plaintiff, T & R Trucking Co., Inc., in a revoked status and advised the Secretary of State. There was never at any time any proceedings by the Secretary of State under West Virginia Code § 31D-14-1421 to dissolve T & R Trucking Co., Inc. nor were there any grounds nor need for plaintiff, T & R Trucking Co., Inc. to apply for reinstatement in accordance with the West Virginia Code § 31D-14-1422. T & R Trucking Co., Inc. was to be "reinstated to its former rights as if it had not been delinquent." Therefore, T & R Trucking Co., Inc. had not been delinquent, had not been dissolved and remained in good standing and the Order of the Circuit Court of Wayne County, West Virginia dismissing the motion of defendant, Maynard, was proper. Maynard then filed a Writ of Prohibition with the Supreme Court of Appeals, which was summarily denied and, as stated in the West Virginia Code § 31D-14-1422(c), "When the reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative dissolution and the corporation resumes carrying on its business as if the administrative dissolution had never occurred." , Further, Section 1405 of this chapter states that such dissolution does not (3) "Subject its directors or officers to standards of conduct different from those prescribed in Article 8 of this chapter."

"Suits either for or on behalf of the corporation pending at the time of the dissolution are expressly held not abated thereby." Greenbrier Lumber Co. v. Ward, 30 W.Va. 43; Stiles v. Laurel Fork Oil & Coal Co., 47 W.Va. 838; Board of Education v. Berry, 62 W.Va. 433.

Since upon reinstatement a corporation resumes carrying on its business as if the dissolution had never occurred, then any actions of third party defendant, Thomas B. Farley, Jr., were taken by him as an officer of the corporation as if the dissolution had never occurred and it

was prejudicial and grossly improper for Maynard's counsel to argue that since the corporation was in default, he was acting individually. Accordingly, the motion for directed verdict for the dismissal of Thomas B. Farley, Jr., individually, should have been granted and it was prejudicial error for defendant, Maynard's counsel to argue otherwise.

Defendant cited the case of Laya v. Erin Holmes, Inc., 352 S.E.2d 93 for the proposition that an individual may be liable (a) if there is such a unity of interest and ownership that the separate personalities of the corporation and of the individual no longer exists and (b) an inequitable result would occur if the acts are treated as those of the corporation alone. The Laya case is not pertinent because it deals with the personalities of the corporation and of its stockholders and "piercing the corporate veil", not actions taken by an officer of a corporation. In the Laya case, the Court stated that factors to be considered in deciding whether or not to pierce the corporation veil are:

"(1) commingling of funds and other assets of the corporation with those of the individual shareholders;

(2) diversion of the corporation's funds or assets to noncorporate uses (to the personal uses of the corporation's shareholders);

(3) failure to maintain the corporate formalities necessary for the issuance of or subscription to the corporation's stock, such as formal approval of the stock issue by the board of directors;

(4) an individual shareholder representing to persons outside the corporation that he or she is personally liable for the debts or other obligations of the corporation;

(5) failure to maintain corporate minutes or adequate corporate records;

- (6) identical equitable ownership in two entities;
- (7) identity of the directors and officers of two entities who are responsible for supervision and management (a partnership or sole proprietorship and a corporation owned and managed by the same parties);
- (8) failure to adequately capitalize a corporation for the reasonable risks of the corporate undertaking;
- (9) absence of separately held corporate assets;
- (10) use of a corporation as a mere shell or conduit to operate a single venture or some particular aspect of the business of an individual or another corporation;
- (11) sole ownership of all the stock by one individual or members of a single family;
- (12) use of the same office or business location by the corporation and its individual shareholder(s);
- (13) employment of the same employees or attorney by the corporation and its shareholder(s);
- (14) concealment or misrepresentation of the identity of the ownership, management or financial interests in the corporation, and concealment of personal business activities of the shareholders (sole shareholders do not reveal the association with a corporation, which makes loans to them without adequate security);
- (15) disregard of legal formalities and failure to maintain proper arm's length relationships among related entities;
- (16) use of a corporate entity as a conduit to procure labor, services or merchandise for another person or entity;

(17) diversion of corporate assets from the corporation by or to a stockholder or other person or entity to the detriment of creditors, or the manipulation of assets and liabilities between entities to concentrate the assets in one and the liabilities in another;

(18) contracting by the corporation with another person with the intent to avoid the risk of nonperformance by use of the corporate entity; or the use of a corporation as a subterfuge for illegal transactions;

(19) the formation and use of the corporation to assume the existing liabilities of another person or entity."

The Laya Court further stated that to justify piercing the corporate veil, specifically, the avoidance of clearly inequitable consequences of not piercing, "this evidence must be analyzed in conjunction with evidence that a corporation attempted to use its corporate structure to perpetrate a fraud or do grave injustice on an innocent third party seeking to "pierce the veil", citing the case of Southern Electrical Supply Co. v. Raleigh County National Bank, 173 W.Va. 780. The Court further stated that there is normally a two-prong test: (1) there must be such unity of interest and ownership that the separate personalities of the corporation and of the individual shareholders no longer exists (a disregard of formalities requirement) and (2) an inequitable result would occur if the acts are treated as those of the corporation alone (a fairness requirement). There is no relation whatsoever of the Laya decision to this case and it does not in any way deal with liability of officers of a corporation for actions taken.

#### **LIABILITY OF THIRD PARTY DEFENDANT, TOM B. FARLEY**

After the jury verdict on September 19, 2006, counsel for T & R Trucking Co., Inc. and Thomas B. Farley, Jr. made his Motion to Dismiss Thomas B. Farley, Jr. and the Court stated

(beginning at page 19 in the transcript of Proceedings of September 19, 2006) "so I'm trying to remember if there was any evidence that there was any conduct that was by Mr. Farley that was beyond his scope and his role as corporate officer. That is more of the reason why I separated -- made the verdict form where it separated the two. I do not want to confuse the issue for the jury by just saying Thomas Farley, Jr., and T & R Trucking, a corporation, as a third-party defendant jointly. I don't know how the jury would view that.

"I think I do have to review some of the rulings and some of the evidence in this case to make a ruling on that. My gut feeling is that probably he enjoys the protection of the corporation from his personal assets in this dealing. I think the truck was owned by T & R Trucking. The contract was made with T & R Trucking. The checks were all T & R Trucking. The payments were received at the office of T & R Trucking. The secretary of T & R Trucking handled most of the accounting. I'm going to withhold ruling on that issue." The Court never made any ruling.

### **JURY VERDICT FORM**

The jury interrogatory form provided to the jury was improper, erroneous, misleading and prejudicial, inasmuch as should the jury have decided to find in favor of the defendant, Maynard, then in accordance with the verdict form, they could not find against the plaintiff, T & R Trucking Co., Inc., but only against Thomas B. Farley. The verdict form was so worded that the verdict could only be against "Thomas B. Farley, individually" or against "Thomas B. Farley, as President of T & R Trucking Co., Inc." Therefore the jury verdict form was improper, misleading and prejudicial.

Defendant contends there was no objection to the jury interrogatory form, which is incorrect. The Court did ask if counsel had any problems with the original verdict form, that is,

the form that was used in the first trial. Thereafter on pages 293 through 297 of the trial transcript, defendant's counsel argued that the corporation was defunct and counsel for Thomas B. Farley made a motion to dismiss him. The Court then stated that he would change the jury verdict form, which he did, but the parties were never given the new jury verdict form until after the jurors had reached their verdict. Such a matter was considered in the case of Pullin v. State of West Virginia, 216 W. Va. 231 dealing with the "plain error doctrine." In that case the Court stated that "invited error" is a cardinal rule of appellate review applied to a wide range of conduct. It is a branch of the doctrine of waiver which prevents a party from inducing an inappropriate or erroneous response and then later seeking to profit from that error. The idea of invited error is not to [legitimize the error] but to protect principles underlying notions of judicial economy and integrity by allocating appropriate responsibility for the inducement of error. Having induced an error, a party in a normal case may not at a later stage of the trial use the error to set aside its immediate and adverse consequences.

"The Court has also noted, in State v. Knuckles, 196 W.Va. 416, 421, 473 S.E.2d 131, 136 (1996) (per curiam), that "waiver necessarily precludes salvage by plain error review."

"In rare instances however, this Court has used the plain error doctrine to review an error that was invited. See State v. Redden, 199 W.Va. 660, 487 S.E.2d 318 (1997) (using plain error to address an invited error issue that involved a fundamental right secured by the state and federal constitutions); State v. Miller, 184 W.Va. 367, 400 S.E.2d 611 (1990) (sam). We believe the invited error in this case is an instance where the plain error doctrine must be invoked. "To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation

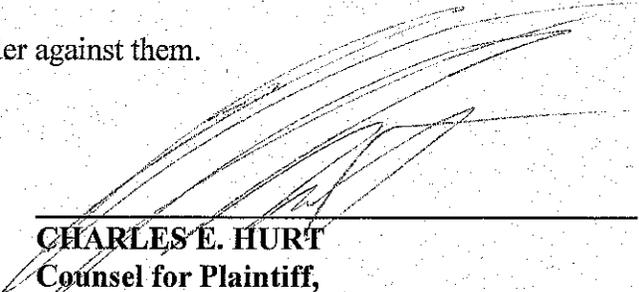
of the judicial proceedings." Syl. pt. 7, State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995).

The error in this case satisfies the requirements of the plain error doctrine."

In the Pullin case, the verdict form stated "we, the jury, find beyond a reasonable doubt, the defendant, John David Pullin, not guilty", which may have required the jury to find that Pullin was not guilty only if he presented evidence to establish beyond a reasonable doubt that he was innocent. In the instant case, the verdict form was worded so that the verdict could only be against "Thomas B. Farley, individually or against Thomas B. Farley as President of T & R Trucking Co., Inc." Therefore, the jury verdict form was improper, misleading and prejudicial and constitutes plain error.

#### CONCLUSION

Plaintiff and third party defendant, appellants, respectfully request that the Court grant this Appeal setting aside the judgment order against them.



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IN THE SUPREME COURT OF APPEALS  
OF THE STATE OF WEST VIRGINIA

**T & R TRUCKING CO., INC., a  
West Virginia corporation,**

**Appellant,**

**VS.**

**RICK MAYNARD,**

**Appellee,**

**VS.**

**TOM BENJAMIN FARLEY, individually and  
in as official capacity as President of  
T & R TRUCKING CO., INC., a  
West Virginia corporation,**

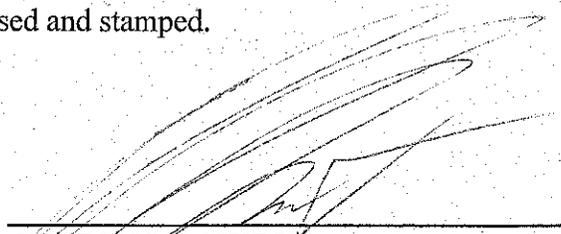
**APPEAL NO. 33346**

**Appellant.**

**CERTIFICATE OF SERVICE**

I, Charles E. Hurt, counsel for plaintiff and third party defendant, appellants, T & R Trucking Co., Inc. and Tom Benjamin Farley, do hereby certify that I have served a copy of the attached "Brief of Appellants" upon the defendant by mailing a copy thereof to Gail Henderson-Staples, his counsel, in an envelope properly addressed and stamped.

Dated this 27<sup>th</sup> day of April, 2007.



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**CHARLES E. HURT**  
Counsel for Plaintiff,  
T & R Trucking Co., Inc. and  
Third Party Defendant,  
Tom Benjamin Farley