

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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.,

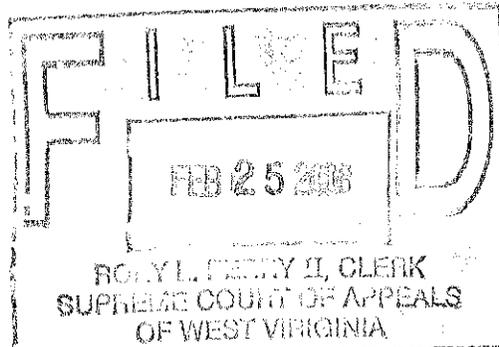
Appellants,

v.

Appeal No. 33350

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

Appellees.



**APPELLEE HUGH M. CAPERTON'S RESPONSE  
TO SUPPLEMENTAL BRIEF OF APPELLANTS**

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**APPELLEE HUGH M. CAPERTON'S RESPONSE  
TO SUPPLEMENTAL BRIEF OF APPELLANTS**

**I. INTRODUCTION**

Appellee Hugh M. Caperton ("Mr. Caperton"), by his undersigned counsel, hereby reasserts, as though set forth fully herein, his prior pleadings before this Court, including his Petition for Rehearing, Rehearing Brief, and Disqualification Motions. Mr. Caperton respectfully requests that this Honorable Court affirm the Orders and Rulings of the Circuit Court of Boone County and thereby uphold the fair and just verdict of the Jury. All persons involved with this case appear to agree that the equities of the case are wholly in favor of the Appellees, including the Jury, the Circuit Court judge, a unanimous West Virginia Supreme Court, and even the Appellants, who do not challenge the earlier ruling that their "egregious conduct" caused Appellees' damages, and that the Jury's verdict against them was "warranted." Under these circumstances, and others as will be described further below, the only just and justifiable outcome is to uphold the Jury's verdict in favor of the Appellees.

**II. ARGUMENT**

**A. Forum Selection Clause**

**1. The Forum Selection Clause May Not Be Enforced by the Appellants**

In their Supplemental Brief, the Appellants confuse the forum selection clause issue by attempting to show that a forum selection clause may be enforced *against* Massey. They then leap to the distinct conclusion, without *any* legal support, that the forum selection clause may therefore also be enforced *by* Massey. Since it is the latter situation at issue here, the arguments

about whether the clause may be enforced against Massey are completely irrelevant and misleading.<sup>1</sup> In fact, the law is clear that Massey may not enforce this clause against others.

As already explained in greater length in Appellees' Petitions for Rehearing and Rehearing Briefs, West Virginia and Virginia law are clear on the topic of non-signatories to contracts enforcing contract terms: "Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must at least show that it was intended for his direct benefit." *Ison v. Daniel Crisp Corp.*, 146 W. Va. 786, 792-793 (1961); *see also Valley Landscape Co. v. Rolland*, 218 Va. 257, 263 (1977) (stating that "one not a party to a contract can sue for a breach thereof only when the condition which is alleged to have been broken was placed in the contract for his direct benefit"). It is beyond doubt that the forum selection clause in the 1997 CSA was *not* intended or placed in the contract for the Appellants' direct benefit. The CSA was drafted originally in 1992, and renewed in March 1997. Massey did not purchase Wellmore until July 31, 1997. Thus, the relevant language was drafted *years* before Massey was in the picture, and agreed to again *months* before Massey's purchase. It is simply not possible for Massey to have been an intended beneficiary of the forum selection clause, and it therefore has no basis for enforcing this contractual term. The Appellants, like the Vacated Opinion, cite absolutely no precedent that allows a party to enforce terms of a contract to which it was *not* a signatory and *not* a third party beneficiary. Given the utter absence of such precedent, there was no reason for the Appellees to foresee that they could be bound to that term by Massey, and it is unreasonable and unjust to now allow this anomalous result.

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<sup>1</sup> The only legal support Appellants raise in their argument is *Hugel v. Corporation of Lloyd's*, 999 F.2d 206 (7th Cir. 1993), as cited in the Vacated Opinion. That case, as noted by this Court, *only* addressed the question of who may be bound by a forum selection clause: "the *Hugel* court made clear that a non-party to a contract need not be a third-party beneficiary in order for the forum-selection clause to be binding against such non-party." *Caperton v. A.T. Massey Coal Co.*, 2007 W. Va. LEXIS 119, 56 (W. Va. 2007).

Further, neither Appellants nor the Court stated any binding precedent, either from West Virginia or Virginia, that supported the proposition that Mr. Caperton, in his individual capacity, may be bound by a contract that he did not sign. Rather, this was a matter of first impression for this Court, and a Virginia court addressing this issue has previously held that a third party may not sue on a contract “unless the party sought to be held liable has assumed an obligation for the benefit of a third party. The statute does not purport to create a contract when no contract exists.” *Valley Landscape Co. v. Rolland* at 263 (1977) (referring to Virginia’s third party beneficiary statute, Va. Code Ann. § 55-22, which is largely parallel to West Virginia’s statute, W. Va. Code § 55-8-12). The fact remains that Mr. Caperton *never agreed* to limit *his* legal remedies for torts committed against him to any particular forum, and to hold such a clause against him is fundamentally unjust.

Finally, Appellants attempt to defend this injustice by claiming that the Vacated Opinion “did not overrule existing precedent, [but] created original precedent.” Supplemental Brief at 5. As will be described below, in either event, the retroactive application of this surprising new law against Mr. Caperton is unjust and violates his due process rights.

**2. Enforcement of the Forum Selection Clause against Appellees Is Otherwise Unreasonable and Unjust**

The Appellants contend that it was reasonable to enforce the forum selection clause but were again unable to cite absolutely *any* law or fact to support this statement. The only argument they muster is that “the Court engaged in a thorough analysis” on this topic, and reached “the determination that enforcement of the forum selection clause was both reasonable and just.” Supplemental Brief at 5. In fact, the Court did not and *could not* have possibly engaged in a “thorough analysis” of this issue. What the Court *did* (as the Appellants themselves quote, and attempt to mischaracterize) was make the first impression ruling that “a party trying to defeat a mandatory choice of forum selection clause bears a heavy burden,” and then conclude that the Appellees had not met that burden in their original brief to the Court. *Id.* As the Appellees have

now pointed out repeatedly, there was no reason that they would or could have met this burden in the original pleadings to this Court, because the test applied by the Court did not exist in this jurisdiction when the original pleadings were written. Appellants themselves admit that, in drafting this test, the Court “created original precedent.” *Id.*

As Appellees described at greater length in their prior filings, enforcement of the forum selection clause against the Appellees would be unreasonable and unjust for numerous reasons. The most basic and glaring of these reasons, as the Vacated Opinion admitted, was that the findings rendered by the Jury and Circuit Court judge after a lengthy trial were “justified,” and the judgment for the Appellees was “warranted” because of their “sympathetic” facts and the Appellants’ “egregious... conduct.” 2007 W. Va. LEXIS at 23-24. Even the Appellants themselves have not challenged that finding. It therefore appears to be universally agreed that the equities of this case are entirely in favor of the Appellees, and it is equally clear that enforcing the forum selection clause against them at this juncture would deprive them of their “justified” jury verdict and allow Appellees to escape justice despite their “egregious conduct.” Courts have refused to enforce forum selection clauses for similar and lesser injustices, such as where the case had already been fully tried on the merits and the statute of limitations in the contractual forum state had possibly expired (*Ernest & Norman Hart Bros., Inc. v. Town Contractors, Inc.*, 18 Mass. App. Ct. 60 (1984)); where the case in the contractual forum would now be time barred (*In re Healthco International, Inc.*, 195 B.R. 971, 989 (Bankr. D. Mass. 1996)); where the contractual forum state had a much weaker relationship to the parties and wrongful acts at issue (*Carefree Vacations, Inc. v. Brunner*, 615 F. Supp. 211 (W.D. Tenn. 1985); or where holding the trial in the forum state would be seriously inconvenient for one party (*Exum v. Vantage Press, Inc.*, 17 Wash. App. 477 (1977)).

In such cases “[a]ll considerations of efficient judicial administration support treating this case, now fully tried on the merits, as one which should not be dismissed in [the state where it was tried], leaving [the Plaintiff] to seek whatever remedy in [the contract forum state] remains

available.” *Ernest & Norman Hart Bros.* at 66-67. Additionally, “considerations of justice support allowing [the Plaintiff] to recover, as soon as possible, its fairly earned compensation, already unduly delayed.” *Id.* Here, the Appellees’ fairly earned and “warranted” compensation has already been delayed far too long. Now, the unforeseeable and unprecedented enforcement of the forum selection clause would leave Appellees with the possibility of finding no remedy at all for their massive financial harm. *At best*, such enforcement would force Appellees to undertake the immense burden and expense of trying the case *again*, in a forum to which they *never* agreed, and where they are *not* residents and where the majority of the operative facts did *not* occur, and attempt to locate witnesses and elicit testimony regarding facts that happened over a decade ago. Not only would this be an utterly *unreasonable* and *unjust* burden on the Appellees (and an equally unjust windfall for the Appellants’ “egregious conduct”), but would also be an outrageous waste of judicial resources in both West Virginia and Virginia.

Appellants have been able to cite no authority to support such an offensive result, where a court applied a forum selection clause to overturn an otherwise valid jury verdict. One reason for the lack of such precedent is that this ridiculous situation is easily avoided by routine procedural mechanisms, which the Appellants failed to follow. While Appellees do not assert that writs of prohibition or mandamus are the *only* possible mechanisms to challenge a court’s refusal to apply a forum selection clause, Appellants’ failure to use these standard, readily available procedures certainly contributed to the stark injustice that results from tardy enforcement of a forum selection clause only after trial, jury verdict and post-trial motions. Appellants cite to *United Bank, Inc. v. Blosser*, 218 W. Va. 378 (2005) for the proposition that the proper standard of review of a trial court’s denial of a motion to dismiss for improper venue is abuse of discretion, intimating that courts do sometimes consider this issue after a judgment. However, there are two significant problems with this retort. First, it does nothing to refute Appellees’ argument that the late and surprising application of the forum selection clause at this phase in the litigation, due entirely to Appellants’ failure to exercise available options in a timely

fashion, and which operates to deprive Appellees of a justified jury verdict and allows Appellants to get away with their wrongful acts, is patently unjust and unreasonable. The Court in *United Bank* did not encounter any such facts—rather, it *affirmed* a declaratory judgment action, with no jury verdict involved, holding that the trial court’s forum determination had been appropriate.<sup>2</sup> Second, even if the standard of review here were abuse of discretion, there can be no justification for enforcing the forum selection clause on those grounds. The Court never conducted such an analysis in its Vacated Opinion, and never determined that Judge Hoke abused his discretion in denying the Motion to Dismiss on the basis of the forum selection clause. If indeed such an analysis were conducted, it would be impossible to find that Judge Hoke abused his discretion, considering that he applied the well-settled precedent existing at the time, and not the “original precedent” this Court created in its Vacated Opinion, years *after* Judge Hoke’s decision.

Finally, while Appellants audaciously accuse the Appellees of “rank forum shopping” (p. 5), the Appellees, in fact, followed the existing law to the letter and, moreover, were exercising their right to have their claims heard in the jurisdiction where all of the parties either reside or do significant business, where the torts occurred, and where the harm was suffered. This is not forum shopping, but the most rudimentary application of jurisdictional principles. And while it is clear that overturning an admittedly justified jury verdict after a decade of litigation, which was drawn out and delayed at every turn by the Appellants, and leaving the Appellees with potentially no remedy for the great harm intentionally inflicted upon them by the Appellants—the Appellants have *never* stated why it was *unjust* for them to be heard by a fair

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<sup>2</sup> Additionally, it is interesting to note that this case was decided in 2005, and specifically states that it was a matter of first impression. In their Brief, Appellants argue vehemently that the relevant time period was 1997 to 2003, and that new propositions of law created after that have no bearing on the parties’ acts. Following this line of reasoning, Appellants should have acted on the law as it existed at the time, using the writ of prohibition as stated in Appellees’ cited cases, *State ex. rel. Stewart v. Alsop*, 207 W. Va. 430 (2000); *Smith v. Maynard*, 186 W. Va. 421 (1991).

and legitimate jury and judge in the state where they do so much business and where they committed these wrongful acts. Where the application of the forum clause after the fact would so clearly cause injustice to one party, and has worked no apparent injustice on the other, there can be no reasonable basis for applying that clause.

**3. Retroactive Application of New Law in This Case Would Violate Mr. Caperton's Due Process Rights**

Appellants appear to be confused about the legal concept of retroactive application of new law. They argue that the only type of retroactivity is that in which new law is applied to the case before the court, but not to other cases arising before the new law. Brief at 1-2. Actually, there are at least three possible ways of dealing with issues related to the creation of new law. Depending on the factual and legal circumstances, a court may apply the new law to the case before it and all others potentially pending ("fully retroactive"), or to the case before it but not to other parties whose claims arose before the decision ("selective prospectivity"), or only to parties whose claims arise after the new decision ("purely prospective"). *See, e.g., James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (U.S. 1991) (superseded on other grounds). While the Vacated Opinion was either fully retroactive or selectively prospective, the equities of this case and federal constitutional rights of the Appellees demand that the new law raised in the Vacated Opinion *not* be applied retroactively to the parties here. The Appellants further claim a prospective application of law is a "previously non-existent legal phenomenon." Supplemental Brief at 2. This is obviously nonsense. New judicial law has been applied prospectively in many cases, not only in the United States Supreme Court and other federal cases already cited by Appellees, but throughout the country, and in this very Court. *See, e.g., Kincaid v. Mangum*, 189 W. Va. 404 (1993).

The Appellants also assert that it is the "duty and prerogative" of this Court to create or modify a rule and apply it to the parties before it, and that any other rule "def[ies] the fundamental tenets of American jurisprudence." Brief at 2-3. This may be true in general, but is

absolutely not the case where, as here, to do so would violate the fundamental constitutional rights of the parties.

As the Supreme Court has clearly stated, “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). Such an action was determined to be a violation of the Due Process Clause of the Fourteenth Amendment. The issue here is *not* the misapplication of state law by state courts, as Appellants deceptively assert, but rather the misuse of judicial power to deprive a person of his fundamental constitutional right to be heard.

The Appellants initially attempt to distinguish *Brinkerhoff* on the basis that it dealt with a decision overruling precedent, rather than a matter of first impression. This argument fails for several reasons. First, Appellants only address the Court’s decision to allow enforcement of the forum selection clause *against* the Appellees, which the Appellants deem to be a matter of first impression. Throughout their Supplemental Brief, the Appellants attempt to ignore or downplay the issue of the Court allowing the forum selection clause to be enforced *by* the Appellants, which flew in the face of well-settled Virginia and West Virginia law that non-signatories to contracts may enforce their terms *only* if they are intended third-party beneficiaries. Therefore, this case is absolutely not distinguishable from *Brinkerhoff* on those grounds. Secondly, Appellants’ argument may be a distinction without a difference. While *Brinkerhoff* dealt with a case overruling precedent, subsequent cases have focused more on the unforeseeability or lack of support for the new law. *See, e.g., Bouie v. Columbia*, 378 U.S. 347 (1964).<sup>3</sup> As neither the Court nor the Appellants have been able to cite *any* precedent in *any* jurisdiction in this country

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<sup>3</sup> Appellants also endeavor to distinguish *Bouie*, apparently on the grounds that it involved a criminal statute. This is irrelevant to the issues at hand, especially considering that *Bouie* itself cited to *Brinkerhoff* as a basis for its holdings, even though *Brinkerhoff* was a civil case.

where non-signatories to a contract were permitted to enforce clauses of that contract against other non-signatories, it can scarcely be argued that this decision was either foreseeable or supported.

The Appellants further attempt to dismiss the import of *Brinkerhoff* by stating that the lower court's rule made it such that the plaintiff never had any opportunity to comply with the law. However, a subsequent case, *Williams v. United States*, 470 A.2d 302 (D.C. 1983), citing to *Brinkerhoff*, held specifically that even if a plaintiff theoretically *could* have complied with both the old and new law and thereby gotten a hearing, his due process rights were violated if he complied with the requirements of the old law, and was later informed by a court that that compliance was not "good enough," because it did not *also* meet brand new requirements not in existence when he made his litigation decisions.<sup>4</sup> The result in *Williams* is foreshadowed and strongly supported by the language of *Brinkerhoff* itself, which states that "in invoking the appropriate judicial remedy, the plaintiff did not omit to comply with any existing condition precedent." *Brinkerhoff* at 679. Like the plaintiffs in *Brinkerhoff* and *Williams*, Appellees "did not omit to comply with any existing condition precedent," but "found [themselves]... ousted from court by a newly-announced rule after [they] had reasonably relied on a different, generally followed and approved practice." *Williams* at 309.

Appellants outrageously argue that the Appellees have had their chance to be heard, but simply do not like the outcome. In making this argument, Appellants miss the entire meaning and import of the Supreme Court's holdings. Appellees, like the plaintiffs in the cited cases, complied with existing law to the letter. They filed tort claims in West Virginia because jurisdiction and venue were proper there, given the contacts of the parties and the location of the

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<sup>4</sup> The Appellants try to downplay *Williams* by presenting the half-truth that the original decision was vacated. Although the original *Williams* decision was vacated, it was reheard and affirmed on appeal. While this D.C. decision is not binding precedent on this Court, it is certainly persuasive authority, with sound reasoning in accordance with the Supreme Court principles in *Brinkerhoff*.

wrongful acts and harm. They relied on existing law that stated that persons not party to a contract could not enforce it unless they were intended third-party beneficiaries of that contract, which Appellants inarguably were *not*. They proceeded through more than ten years of litigation in entirely justified reliance on these existing conditions, only to be told, after all of that, that the well-settled law had been pulled out from underneath them—that even though the Court agreed that the Jury verdict was *justified*, and that the plaintiffs *had* been harmed by the defendants’ illegal acts, the plaintiffs could receive no compensation for these damages *solely* because of new procedural requirements the Court had instituted after the fact. This simply does not qualify as a proper hearing under the stringent requirements of the Constitution and due process. It is, in fact, a travesty of justice which cannot stand.

**4. The Bankruptcy Decision Has a Preclusive Effect on Appellants’ Arguments Regarding the Appropriate Forum for These Claims**

The Appellants appear to have some fundamental misconceptions about the nature and impact of the bankruptcy court’s ruling. The United States Bankruptcy Court for the Western District of Virginia *expressly* considered the issue of which venue was appropriate to adjudicate the claims between the parties to *this* case, and declared that a decision on the Parties’ dispute “can be better rendered in the West Virginia Action, [and] this Court chooses to abstain from hearing these declaratory judgment actions in favor of resolution by an appropriate West Virginia forum.” Bankruptcy Decision at 5. Further, as the Appellants themselves cited, that court held that “[t]he court trying the West Virginia Action is in the best position to assure that the rights of all parties are protected.” *Id.* at 18; Supplemental Brief at 13. Unbelievably, in their very next sentence, the Appellants twist and torture this language, asking this Court to believe that that clear language did not actually *mean* what it said—that *West Virginia* was in *the best* position to hear the claims—but that “whatever court ultimately heard Appellees’ complaint would be in a better position than a federal bankruptcy court....” Supplemental Brief at 13-14. Such a glaring misrepresentation is farcical, if not downright unethical.

Similarly, the Appellants next argue that the bankruptcy court's clear statements above "are meant simply to convey that *state* proceedings are more appropriate than federal proceedings to resolve Massey's contractual defense, not that West Virginia is appropriate in spite of the terms of the forum selection clause." *Id* at 16 (emphasis in original). Perhaps the Appellants simply assume that the bankruptcy court is too incompetent to be capable of saying what it means and meaning what it says, but litigants are not generally at liberty to construe the language of a valid holding to intend something counter to the plain language on the page. The bankruptcy court, well aware of the Virginia state court action, quite clearly held that the West Virginia court was in "*the best position*" to hear the dispute. And to the extent that the Appellants did not raise the forum selection clause at that time, when the court was expressly determining the appropriate forum for the parties' dispute, they have waived that defensive argument. Fed.R.Civ.P. 12; *see also Lanehart v. Devine*, 102 F.R.D. 592, 594 (D. Md. 1984) ("the message conveyed by the present version of Rule 12(h)(1) seems quite clear. It advises a litigant to exercise great diligence in challenging personal jurisdiction, venue, or service of process.").

Finally, the Appellants argue that because the bankruptcy court abstained from hearing their claims, it did not render a final decision on the issue of venue. This is simply not true. While the *res judicata* requirement of a "final decision on the merits" generally refers to the substantive claims at issue, and not procedural issues such as venue, where venue itself *is* the issue under dispute, then a court's ruling on venue *must* preclude relitigation of venue. The fundamental purpose of the preclusive doctrines is "to prevent relitigation of issues raised and resolved in a previous action." *Geiger v. Tokheim*, 191 B.R. 781, 791-790 (D. Iowa 1996).<sup>5</sup> The issue of forum expressly decided in the bankruptcy court is identical to the forum issue now

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<sup>5</sup> While the Appellants cite to West Virginia law in discussing this issue, it is actually federal law that must be applied. *See, e.g., Monarch Life Ins. Co. v. Ropes & Gray*, 65 F.3d 973, 978 (1st Cir. 1995) ("Since the judgment was rendered by a federal tribunal, the bankruptcy court, ... federal preclusion principles apply") (internal citations omitted).

raised again by the Appellants—i.e., in what court should the claims between these parties be heard?<sup>6</sup> As such, the bankruptcy court decision also meets all of the requirements of collateral estoppel:

(1) the issue sought to be precluded was the same as that involved in the prior action; (2) that issue was actually litigated; (3) it was determined by a valid and final judgment; and (4) the determination was essential to the prior judgment.

*Nestorio v. Associates Commer. Corp. (In re Nestorio)*, 250 B.R. 50, 59 (D. Md. 2000). The issue of forum was actually litigated and decided (as shown by the bankruptcy court's quotes above), this decision was valid and final (abstention decisions of bankruptcy courts, and those which put litigants out of federal court, are final and appealable, see, e.g. 5B Fed. Proc., L. Ed. Sec. 9:1821; *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 713 (1996); *Bryan v. BellSouth Communs.*, 377 F.3d 424, 428 (4th Cir. 2004)), and the issue of forum was most undeniably essential to the court's decision to abstain and remand to the West Virginia court.

**B. Res Judicata**

**1. The "Transactional Approach" May Not Lawfully Be Applied to Determine Res Judicata Effect in This Case**

As the Court recognized in its Vacated Opinion, Virginia law governs the *res judicata* effect of its decision on the instant case ("the validity and effect of a judgment must be determined by reference to the laws of the state where it was rendered." 2007 W. Va. LEXIS 119 at 68, citing *Jordache Enters., Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 204 W. Va. 465, 474, 513 S.E.2d 692, 701 (1998)). Here, Virginia law unequivocally dictates

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<sup>6</sup> By extension, the issue of forum was also considered in the United States District Court for the Southern District of West Virginia. The Appellants also attempted to remove this case to that forum contemporaneously with these bankruptcy proceedings. Chief Judge Charles Haden reviewed that claim, and determined not to rule on the issue of forum pending the forum decision by the Bankruptcy Court. Judge Haden therefore had the opportunity to move this case to Virginia, but found it appropriate for the case to ultimately proceed in West Virginia.

a transactional analysis test when we decided whether the claims at issue were barred by the doctrine of *res judicata*.” *Davis* at 171.

It is almost ironic, then, that the Appellants raise *Allstar* as an instance where the Virginia Supreme Court applied or adopted a transactional analysis. Supplemental Brief at 20-21. The Appellants apparently do not understand that their bald assertions cannot trump the express holdings of the Supreme Court of Virginia on this matter. The Appellants argue that the relevant time period with respect to Virginia law is from 1997 (when Massey acquired Wellmore) to September 13, 2002 (when the Virginia judgment became final for purposes of *res judicata*), and that *Davis*, being an “anomaly” which decided in 2003 “for the first, and ultimately the last, time” that the “same evidence” test applied, is inapplicable to this case. Supplemental Brief at 18, 21. It is unclear how the Appellants can rectify this argument with the fact that the *Davis* court relied specifically on *Allstar* (1986), *Haley* (1987), *Flora, Flora & Montague, Inc. v. Saunders*, 235 Va. 306 (1988), *Smith* (1992), and *State Water Control Bd. v. Smithfield Foods, Inc.*, 261 Va. 209 (2001) to support its “same evidence” test.<sup>7</sup> The *Davis* court, referring to those cases, clearly held that, “*in accordance with our precedent, we explicitly reject the application of the transactional analysis test when deciding whether a claim is barred by res judicata.*” *Davis* at 171 (emphasis supplied).

The Appellants’ effort to apply post-*Davis* law to this case is equally misguided. They argue that Virginia Supreme Court Rule 1:6, which does apply the transactional approach, superseded the rule in *Davis* and should therefore govern this case. However, the Appellants conveniently neglect to mention that the Rule was promulgated in 2006, and, by its own terms, applies only to “all Virginia judgments entered in civil actions commenced after July 1, 2006.”

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<sup>7</sup> Appellants do argue that the 2007 lower court holding in *Virginia Imports, Ltd. v. Kirin Brewery of America, LLC*, 50 Va. App. 395, 650 S.E.2d 554 (2007), proves that *Davis* was the first Virginia decision to use the “same evidence” test. Supplemental Brief at 21. However, the language the Appellants cite proves no such thing. It states only that the “same evidence” test [was] employed by *Davis*...,” not that it was *created by Davis*.

Obviously, it has *no* application to the instant case, where both the Virginia and West Virginia actions were commenced in 1998.

Lastly, the Appellants boldly assert that “[r]egardless of which test is applied, [‘same evidence’ or transactional], this Court will ultimately reach the same conclusion.” Supplemental Brief at 24. Their basis for this statement is the thoroughly counterfactual argument that the same evidence was presented in both the Virginia and West Virginia actions. *Id.* at 23-24. Considering that the trial judge expressly ruled that the Appellants engaged in numerous torts “before, during and after the short time that Defendant A.T. Massey Coal Company owned Wellmore,” evidence of which was excluded during the Virginia trial at Massey’s request, there can be no serious claim that the same evidence was presented, or even *could have been* presented, in each action. Final Order, pp. 14-15 (emphasis supplied). The Appellants later admit this reality when they write that “Appellees had dismissed their tort claims [in the Virginia action] prior to trial and, therefore, those issues had no relevance in the Virginia Court proceeding.” Supplemental Brief at 28. Plainly, irrelevant facts about tort claims would not have been admissible in the Virginia action, and the Appellants’ claim of *res judicata* necessarily fails the applicable “same evidence” test.

**2. The Parties in the Instant Case and the Virginia Action Were Not in Privity for the Purposes of *Res Judicata***

The Appellants conduct their privity analysis without once mentioning any privity between Mr. Caperton individually and the corporate plaintiffs in the Virginia action. Mr. Caperton was not a party to the Virginia action, nobody in that action represented his individual interests and claims, and there is therefore no valid argument to be made that Mr. Caperton was in privity with the Virginia parties.

The West Virginia Circuit Court made the factual finding that “it is clear that there was sufficient evidence for the Jury to rightfully conclude that Plaintiff Caperton suffered injuries

separate and distinct from those of the Corporate Plaintiffs,” and Mr. Caperton has a right to have these claims heard. Final Order, p. 23. To give the Virginia decision *res judicata* effect against Mr. Caperton would be a due process violation. *See, e.g., Richards v. Jefferson County*, 517 U.S. 793 (1996) (“[i]t is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard”; *see also Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, (1971); *Hansberry v. Lee*, 311 U.S. 32, 40, (1940); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 328, (1979); *Conley v. Spillers*, 171 W. Va. 584, 595 (1983) (“[c]ases as well as the Restatement demonstrate that the privity doctrine does not apply when a person sues in a representative capacity, and then brings his own individual cause of action even though it arises from the same transaction”). The analysis of privity could end here, at least with regard to Mr. Caperton’s individual claims, because regardless of any possible privity between the Appellants and the Virginia defendants, Mr. Caperton cannot lawfully be bound by the Virginia decision.

Instead of addressing this dispositive issue, the Appellants focus entirely on the claimed privity between Massey and Wellmore in the Virginia action. The Appellants argue that, although none of the Appellants were party to the Virginia action, they were in privity with Wellmore because Massey was briefly Wellmore’s parent, and participated in the defense of Wellmore. Supplemental Brief at 26. While corporate parents, especially those that participate in the defense of their subsidiaries, may often have identity of interest with the subsidiary, such was not the case here. Massey purchased Wellmore with the specific intent of having it breach its long term, highly beneficial contract, and dumped Wellmore immediately after the breach predictably destroyed Wellmore’s important relationship with a customer. This was essentially a takeover for hostile purposes, where Massey intended to use Wellmore up and then throw it away. This scenario is the precise opposite of “such an identification in interest of one person with another as to represent the same legal rights.” *Commonwealth ex rel. Gray v. Johnson*, 7 Va. App. 614, 619, 376 S.E.2d 787, 789 (1989), as cited by 2007 W. Va. LEXIS 119 at 90.

The Appellants have presented no authority that supports privity between a short-term subsidiary and its hostile parent.

**3. The Remedies in the Instant Case and the Virginia Action Were Not in the Same for the Purposes of *Res Judicata***

In its Vacated Opinion, this Court recognized that Virginia's law is not settled or clear on the definition of what qualifies as the "same remedy" for the purposes of *res judicata*. 2007 W. Va. LEXIS 119 at 78-79. The Court indicated that the distinction may be based almost exclusively on whether the remedy was at law or equity, and concluded that since both contractual and tort damages are remedies at law, the remedy is the same. *Id.* at 78-82. This is an extremely broad method of categorizing remedies, and later Virginia cases suggest that it is an incorrect method. For instance, *Sprint Corp. v. Brooks*, 2006 Va. App. LEXIS 129 (Va. Ct. App. 2006) deemed two kinds of legal monetary damages to be different for the purposes of *res judicata* where they compensated a plaintiff for two different harms (medical bills and lost wages). This analysis is far more sensible, and accords with commonly understood meanings of the words "same remedy." Likewise, in the case at bar, the Virginia damages for the breach of contract for one year compensate an entirely different harm than the West Virginia damages for tortious destruction of businesses and especially the financial ruin of Mr. Caperton personally.

The Appellants cite no authority, either legal or factual, for their claim that the remedies here are the same, yet ironically accuse Appellees of citing no support to the contrary. Supplemental Brief at 24. In their prior pleadings, Appellees cited at length from the record, fully demonstrating that Mr. Caperton and the Corporate Appellees had significant damages which were not addressed or remedied in the Virginia action, and that the West Virginia court took pains to prevent any duplication of the remedy obtained by some of the Appellees in the Virginia action. Furthermore, it borders on ridiculous to assert that Mr. Caperton, who was not at all represented in the Virginia action, and whose claims were never heard there, would

somehow have identity of remedy with those parties who did appear and receive some relief in the Virginia action.

4. **Massey Utterly Failed to Meet Its Responsibility of Establishing an Appropriate Record of the Virginia Action in the Trial Court**

Recognizing both its obligation to establish the required record in the trial court for purposes of making its *res judicata* argument and its absolute failure to do so, Massey revisits the fact that the Motion to Dismiss its claims to have filed on December 3, 2001 never was. Massey needs this Court to conclude that the motion actually was filed because the attachments to it were the lone instance where Massey apparently intended to make a record in the trial court of the judgment order from the Virginia contract case. However, to repeat, that motion was *never* filed. There is no trace of it in the official Record, no trace of it on the Circuit Court Clerk's docket, and no trace of it in any of the Appellees' contemporaneous case files. The first time undersigned counsel saw the motion was when Appellants belatedly filed it as an exhibit with this Court.

If by appending to their supplemental brief the certificate of service allegedly attached to said motion and signed by attorney Ancil Ramey, the Appellants are contending that Attorney Ramey is vouching that such a filing actually occurred, then all involved in Massey's representation both then and now owe this Court an explanation, for a review of the Circuit Court docket and the official Record plainly reveals that no such filing was ever made. The only Motion to Dismiss ever filed by Massey was the one filed on or about December 29, 1998, which primarily sought dismissal on the basis of forum non conveniens and which apparently served as a basis for the Vacated Opinion. With respect to the December 3, 2001 time-period, the Circuit Court docket and the official Record reflect that the only pleading filed on behalf of Appellants close to that date was Massey's Motion for Extension of Time for Filing Dispositive Motions, which was filed on or about November 29, 2001, and which sought to *move* the December 3,

2001 deadline for the filing of such motions. The trial court accommodated Massey's request for an extension of time by entering an *Agreed Scheduling Order* on January 16, 2002, which set a new date of April 1, 2002 for the filing of all dispositive motions. On that new deadline for the filing of dispositive motions, Massey did not file a motion to dismiss, but rather filed a motion for summary judgment, which motion did not even address the arguments contained in the alleged December 3 motion to dismiss nor did it attach any of the exhibits appended to that alleged motion. For Massey to contend otherwise is for Massey to practice deception upon this Honorable Court.

**C. Judicial Impartiality and Due Process**

Appellants, unsurprisingly, support Justice Benjamin's decision to remain on this Court. Indeed, after the Appellants' CEO personally spent almost \$4 million to ensure Justice Benjamin's election to the Court, it would be shocking if the Appellants did *not* argue vehemently for him to continue to make key decisions in their cases. And truly, that is the heart of the problem here. Whether or not Justice Benjamin believes that he can rule fairly in this case, there is an undeniable and overwhelming *appearance* of bias, easily visible to any reasonable observer. To Appellants' false assertion that no authority has been cited that would mandate Justice Benjamin's recusal under these circumstances, Appellees repeat the citation to *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988), which held that recusal is *mandated* on due process grounds if a judge's impartiality could reasonably be questioned, and *Louk v. Haynes*, 159 W. Va. 482, 489 (1976), which held that this is a matter of fundamental importance, because due process requires, at its very base, confidence that a person can receive a "fair trial in a fair tribunal." (citing *Tumey v. Ohio*, 273 U.S. 510 (1927)). The legal basis for this requirement is described at greater length in the Appellees' Rehearing Brief, and the motions to recuse Justice Benjamin.

Incredibly, at this juncture, Appellants still argue that a “litigant’s subjective belief that a Justice may be more or less favorable to his position is [] an insufficient basis for disqualification.” Supplemental Brief at 30. While that may be true as a general proposition, the circumstances at hand are so far beyond the “litigant’s subjective belief” at this point that the statement simply has no relevance here.<sup>8</sup> The issues surrounding the relationship between Don Blankenship and several members of the Court have attracted negative attention on a local and national level, and are building to a crisis of public confidence in the very integrity of this judicial body. As recently as the past week, several newspaper editorial boards have once again called upon Justice Benjamin to step aside because of the obvious appearance of impropriety. The editors of the Beckley Register-Herald wrote that

Benjamin clearly was aided by Blankenship’s multi-million dollar campaign against incumbent Warren McGraw in 2004 and, even though the justice has stated unequivocally he isn’t influenced by Blankenship, it just doesn’t look good.

Remember, it’s all about perception and being on the up and up in the eye of the public.

Last month, Maynard was adamant that his relationship with Blankenship was never a factor in how he ruled. Again we say, maybe so. But the appearance of impropriety was just too hard to look past and the chief justice finally wised up.

Here’s hoping that Benjamin is perceptive enough to do the same because if he doesn’t, that cloud, generated by coal dust, will hang over him for a long time.

*Beckley Register-Herald, 2/20/08 Editorial.*

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<sup>8</sup> The Appellants also make the irrelevant argument that the Appellees and some of their attorneys donated a total of \$30,000 to a non-profit organization which supported Warren McGraw’s judicial campaign against Justice Benjamin. While this amount pales in comparison to the multi millions spent by Mr. Blankenship on Justice Benjamin’s campaign, and arguably does not raise the same appearance of impropriety issues as Mr. Blankenship’s donations, it is all quite beside the point. Appellees do not raise the issue of campaign donations as part of some sort of mud-slinging competition, but because of the disquieting effect of having a Justice who received such massive donations from a litigant actually sitting on the Court in judgment of that litigant’s interests. Even if Appellees had given \$3 million instead of \$30 thousand, it would make little difference, because Warren McGraw, *unlike* Justice Benjamin, is not sitting on the Court, deciding these parties’ fates.

The editorial board of the Charleston Gazette offered the following observations:

Previously, Justice Elliott "Spike" Maynard removed himself from Massey cases because snapshots showed him vacationing at the Mediterranean Riviera with the coal firm's president while a Massey case was before the court. Next, Justice Larry Starcher likewise recused himself because he once called the Massey chief "stupid" and "a clown," and told a Virginia assembly that the coal president "purchased a seat on our Supreme Court."

However, a third Massey-compromised justice won't step aside. Brent Benjamin was elected to the high court in 2004 by a \$3.5 million advertising blitz funded by the coal CEO - yet he continues to preside over various Massey cases. This clashes with state court rules requiring judges to abstain from any cases in which their "impartiality might reasonably be questioned."

\* \* \*

West Virginia's court system has two ethics panels to examine judge behavior. Why haven't they ruled on Benjamin's serious situation? The problem is too disturbing to ignore.

Meanwhile, a dozen legislators want to change the state constitution to remove such judges. They sponsored House Joint Resolution 104, which would ask voters next November to approve a three-member Judicial Recusal Commission. Any party involved in a case could ask the proposed panel to "issue a binding decision on whether a family court judge, a circuit court judge or a Supreme Court justice should be recused from hearing, deciding or participating in deciding the matter at issue."

Since Benjamin won't act, it's probably wise to create a commission for such instances. But changing West Virginia's constitution is a major undertaking. Could the same result be achieved through passage of a simple law?

Until then, the immediate concern would end if Benjamin took an ethical stance as Maynard and Starcher did.

*Charleston Gazette*, 2/20/08 Editorial. That opinion followed on the heels of one printed four days earlier in the *Sunday Gazette-Mail*. *Charleston Sunday Gazette-Mail*, 2/16/08 Editorial.

The editors of the *Pittsburgh Post-Gazette* have offered a similar observation:

Nothing so damns a court as the appearance of bias, yet the West Virginia Supreme Court has been operating under a cloud in the \$75 million fraud case involving Massey Energy. Two of the court's five justices have recused themselves from the case's rehearing on March 12 -- and a third, Brent Benjamin, should do the same.

Chief Justice Elliott Maynard stepped down from the case last month after photos were made public showing him vacationing in Monte Carlo with Massey CEO

Don Blankenship. Then last week Justice Larry Starcher disqualified himself after being an outspoken critic of, first, the CEO's spending of more than \$3 million in 2004 to help defeat the incumbent opposed by Mr. Benjamin and, second, Justice Benjamin's refusal to step aside despite being the beneficiary of such extraordinary political muscle.

Justices Benjamin and Maynard were part of the three-member majority that in November overturned the verdict won by Harman Mining against Massey. Justice Maynard has since been replaced by another judge in the rehearing, and none other than Justice Benjamin gets to appoint the replacements since he is next in line to be chief justice. Justice Benjamin, who was asked two years ago by attorneys to disqualify himself, should step aside and be replaced as well.

Till then, this will be a court dispensing tainted justice -- and tainted justice is not good for Massey Energy, Brent Benjamin or the state of West Virginia.

*Pittsburgh Post-Gazette*, 2/20/08 Editorial. These calls for Justice Benjamin to step aside are only the latest in a multitude of such requests.<sup>9</sup>

Perhaps most notable of all are the comments of concern voiced from within the Court itself. Justice Starcher recently made the admirable decision to recuse himself from this case, in hopes of being part of the solution rather than part of the problem. Starcher Disqualification at 2. He made this principled choice despite the fact that any appearance of bias that may be attributed to him is far and away less problematic than that associated with Justice Benjamin. In his disqualification memorandum, Justice Starcher gave an inside view of Don Blankenship's effect on the Court. He stated, in general, that he believes "Mr. Blankenship's conduct does have an

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<sup>9</sup> See, e.g., *Charleston Gazette*, 11/4/04 Editorial; *Huntington Herald-Dispatch*, 1/19/08 Editorial; *Pittsburgh Post-Gazette*, 1/22/08 Editorial; 11/19/04 Letter to the Editor, *The Register-Herald* ("Massey bought a seat on the Supreme Court ..."); 3/22/05 Letter to the Editor, *The Charleston Gazette* ("Only political favors will come from Brent Benjamin being that [Mr. Blankenship] donated almost \$3 million dollars in order to get him elected to the West Virginia Supreme Court."); 1/24/08 Reader's Voice, *The Charleston Gazette* ("Benjamin should realize that many of us supported him despite his connection with Massey. ... the appearance is Massey is his friend. The Supreme Court of West Virginia should avoid the appearance of impropriety. Right now, it stinks."); *Christian Science Monitor*, C. Corliss ("Merit, not money, should sway judicial elections"); National Public Radio's "All Things Considered" broadcast of Friday, February 8, 2008 (comments given by respected ethics scholar Deborah Rhode, of Stanford University). Even the West Virginia Legislature has been spurred to action, enacting a law which prohibits political action committees from accepting contributions from individuals in excess of \$1,000 before the primary and general elections. See also, O'Connor, Sandra Day, "How to Save Our Courts," *Parade Magazine*, February 24, 2008.

effect on the administration of justice, in that it has become a pernicious and evil influence on that administration.” *Id.* at 3. More specifically, Justice Starcher noted with dismay that Justice Benjamin, after accepting “somewhere around \$4,000,000 from Mr. Blankenship and/or Massey associates,” has been unwilling to recognize even issues of *perceived* bias, and continues to appoint replacement judges in this case. *Id.* at 4.

Justice Starcher also raised a past example when he stepped aside from a case involving lawyers who had contributed a total of \$36,500 to his campaign. The motion to disqualify him in that case was written by Justice Benjamin’s current law clerk, who argued that a “reasonable and objective person knowing the timing and amounts of such large campaign contributions would indeed harbor doubts about the judge’s impartiality.” *Id.* at 6 (internal citations omitted). Justice Starcher summarized his concerns by saying that “the simple fact of the matter is that the pernicious effects of Mr. Blankenship’s bestowal of his personal wealth, political tactics, and ‘friendship’ have created a cancer in the affairs of the Court.” *Id.* at 8. Given these facts and more, Justice Starcher rightly called upon Justice Benjamin to join him in stepping aside from this case.

Finally, the Appellants display great audacity and hypocrisy in supporting Justice Benjamin’s exercise of discretion to remain on this case, when they currently have an action pending in federal court against the Supreme Court of Appeals of West Virginia on the basis of Justice Starcher exercising the same discretion. In that action, the Appellants argue that West Virginia’s entire discretionary recusal system is fundamentally unfair: “Rule 29 of the West Virginia Rules of Appellate Procedure violates Plaintiffs’ Fourteenth Amendment due process right to a fair hearing before an impartial tribunal and to the appearance of justice insofar as the rule, as promulgated and applied, permits a single justice of the West Virginia Supreme Court of Appeals [sic] who is the subject of a disqualification motion exclusively to determine the merits of that motion and does not provide for review or determination of such motion by an impartial judicial officer.” *Massey Energy Co. and Marfork Coal Co., Inc. v. West Virginia Supreme*

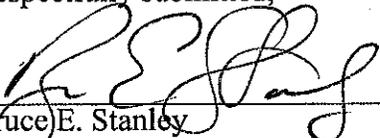
*Court of Appeals*, Civ. Act. No. 2:06-0614, S.D.W.Va., para. 1. Apparently, the Appellants only believe that the system is flawed when they perceive that it disadvantages them, but where the same system works in their favor, it is entirely acceptable and proper.

The Appellees submit that so long as Justice Benjamin continues to sit on this case, in possession of the power appointment obtained after a 3-0 vote (Justice Starcher absent and Justice Albright not participating) apparently taken on the same day the Vacated Opinion issued, the current configuration of the Court *is* unconstitutionally unfair. To be clear, the Appellees are not now questioning the integrity or impartiality of the two individuals who Justice Benjamin selected to sit in place of Justice Maynard and Justice Starcher. Rather, Appellees note that such a strong appearance of bias in conjunction with the power of appointment clearly flies in the face of the Constitution's guarantee of a fair and impartial tribunal and at least the appearance of justice.

### III. CONCLUSION

In consideration of the foregoing, and incorporating Appellees' prior pleadings as though restated fully herein, Appellee Hugh M. Caperton respectfully requests that this Honorable Court AFFIRM the Orders and Rulings of the Circuit Court of Boone County appealed from, and assess the costs of this Appeal to Appellants.

Respectfully submitted,



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Dated: February 25, 2008

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**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.,**

**Appellants,**

**v.**

**Appeal No. 33350**

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

**Appellees.**

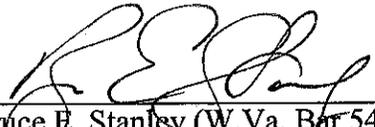
**CERTIFICATE OF SERVICE**

I, Bruce E. Stanley, do hereby certify that I have served the foregoing Appellee Hugh M. Caperton's Response to Supplemental Brief of Appellants upon the following by United States Mail, first class and postage prepaid, this 25th day of February, 2008, addressed as follows:

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