

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 33350

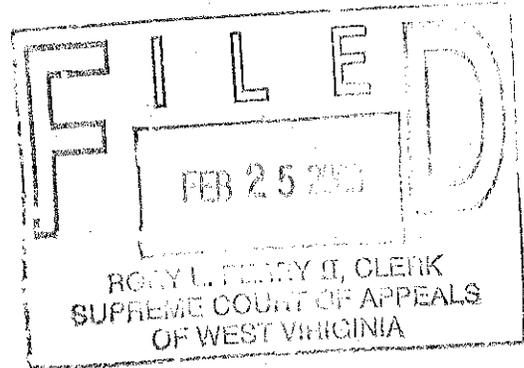
A.T. MASSEY COAL COMPANY, INC.,
ELK RUN COAL COMPANY, INC.,
INDEPENDENCE COAL COMPANY, INC.,
MARFORK COAL COMPANY, INC.,
PERFORMANCE COAL COMPANY, and
MASSEY COAL SALES COMPANY, INC.,

Appellants,

v.

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

Appellees.



APPELLANTS' OMNIBUS REPLY TO
APPELLEES' BRIEFS ON REHEARING

Respectfully submitted,

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I. INTRODUCTION

Appellants, 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. (hereinafter collectively "Massey"), hereby reassert, incorporate and adopt, as if fully set forth herein, all arguments, assertions and statements of fact previously set forth in Appellants' Petition for Appeal, Appellants' Appellate Brief, Appellants' Reply to Brief of Appellee, Hugh Caperton, Appellants' Reply to Brief of Appellee, Harman, and Appellants' Supplemental Brief. In addition, Appellants assert that the November 21, 2007 decision of this Court was wholly proper and that alteration of said decision is not warranted. Finally, Appellants are aware that this Court is intimately familiar with the facts and legal issues associated with this matter. Therefore, Appellants' Omnibus Reply responds only to those arguments which heretofore have not been addressed.

II. ARGUMENT

- I. **This Court Appropriately Determined that the Doctrine of *Res Judicata* Bars all of Appellees' Claims.**
 - A. **Virginia Law Requires All Claims Against the Same Parties or Parties in Privity Therewith, Which Arise Out of the Same Conduct, Transaction or Occurrence, be Brought in the Same Action.**

Appellees incorrectly attempt to use Virginia Law regarding joinder to address the issue of *res judicata*. The doctrines are separate and distinct. Joinder governs what claims may be brought in a single action. *Res judicata* governs what claims are barred if they are not brought in a prior action. Joinder doctrine has absolutely no

application to the issues before this Court.

Appellees' argument is based upon the misconception that joinder and *res judicata* are mutually inclusive in terms of application. Virginia law is clear that this is not the case. As one Virginia Circuit Court Judge explained:

A party may join contract and tort claims or rights of action in the same legal action. Virginia Code ' 8.01-272. However, while such joinder is not mandatory, if a claim or right of action is pursued to final judgment, that judgment may be asserted by either party as *res judicata* in any right of action arising out of the earlier cause of action or transaction. When remedies or rights of action arising from the same cause of action are concurrent, by pursuing one right of action to judgment the plaintiff has made a binding election of remedy, and he is bound by the result. *Pollard v. Thalheimer*, 169 Va. 529, 194 S.E. 701 (1938).

Cherokee Corp. of Linden, Va., Inc. v. Richardson, 1996 WL 1065553 at 9 (Va. Cir. Ct. 1996). Stated differently, while Appellees may choose which claims to join in a single action, that unilateral decision does not negate the application of *res judicata*. Appellees simply cannot escape the preclusive effect of *res judicata* by voluntarily dismissing some of the claims that arise out of the same conduct, transaction or occurrence in hopes of saving those claims to be litigated another day, in another jurisdiction.

After deciding to voluntarily forgo their tort claims in Virginia, Appellees pursued their contract claims to final judgment in that jurisdiction. Virginia Code § 8.01-272 clearly permits this course of action:

In any civil action, a party may plead as many matters, whether of law or fact, as he shall think necessary. A

party may join a claim in tort with one in contract provided that all claims so joined arise out of the same transaction or occurrence. The court, in its discretion, may order a separate trial for any claim.

Va. Code Ann. § 8.01-272. Once that course of action is chosen however, Virginia law is clear that once the claim or right of action is pursued to final judgment, the judgment may be asserted by either party as *res judicata* in any right of action arising out of the earlier cause of action or transaction. *Cherokee* at 7-8. As this Court stated, "both the tort claims asserted in the case *sub judice* and the earlier contract claims asserted in the Virginia proceeding arise from the same 'conduct, transaction or occurrence; namely the wrongful declaration of *force majeure* by Wellmore, which was carried out under the direction and control of the Massey Defendants." *Opinion* at 22. Therefore, under controlling Virginia law, the Virginia judgment may be asserted by Appellants as *res judicata* in the action *sub judice*. Without question, this Court correctly applied the law of the Commonwealth of Virginia in its initial analysis and the joinder argument presented by Appellees is nothing more than a red herring which has nothing to do with the issues in this case.

B. The Entire Controversy Doctrine, a New Jersey Rule, Does Not Reflect the Law of Virginia or West Virginia and Therefore, Is Irrelevant to the Matter *Sub Judice*.

Appellees cite to New Jersey law in an apparent attempt to support their position. New Jersey has adopted, by case law and statute, the Entire Controversy Doctrine, which requires mandatory joinder of all claims against all parties in one action regardless of party identity. The New Jersey standard is far broader than the

Virginia standard. In New Jersey, subsequent claims arising out of the same transaction are barred even if the claims are against completely different parties with absolutely no connection to the parties in the original suit. See *DiTrollo v. Antiles*, 142 N.J. 253, 662 A.2d 494 (1995). See also *Newmark v. Gimbel's, Inc.*, 54 N.J. 585, 258 A.2d 697 (1969); *Applestein v. United Bd. & Carton Corp.*, 35 N.J. 343, 356, 173 A.2d 225 (1961); *Vacca v. Stika*, 21 N.J. 471, 122 A.2d 619 (1956); *Ajamian v. Schlanger*, 14 N.J. 483, 103 A.2d 9, cert. denied, 348 U.S. 835, 75 S.Ct. 58, 99 L.Ed. 659 (1954).

As the above cited case law clearly demonstrates, the distinction between this Court's decision in the matter *sub judice* and the application of the Entire Controversy Doctrine in New Jersey is the presence of **completely different parties** rather than identical parties or parties in privity. This Court properly determined that Virginia law requires all claims against the same party or parties in privity which arise out of the same conduct, transaction or occurrence be brought in the same action. See *Opinion* at 23. See also *City of Virginia Beach v. Harris*, 259 Va. 220, 523 S.E.2d 239 (2000) ([t]he doctrine of *res judicata* applies not only to the actual parties in a case but also to those in privity with them.). This Court, after conducting a thorough analysis of the issue, properly concluded that the parties in the Virginia Action and the West Virginia Action were in privity. See *Opinion* 22-24. This Court did not hold that parties unconnected to the original parties are barred by the preclusive effect of the doctrine of *res judicata*. To the contrary, this Court determined that the preclusive effect of *res judicata* bars only the claims of the same parties or parties in privity with

the litigants.

C. *Powers v. Cherin*, 249 Va. 33, 452 S.E.2d 666 (1995) Has No Application or Relevance, to the Matter at Hand.

In *Powers v. Cherin*, 249 Va. 33, 452 S.E.2d 666 (1995), a Virginia motor vehicle accident victim brought a personal injury action against the driver of the other vehicle. The Plaintiff later amended her Motion for Judgment (Complaint) by adding the physician who subsequently treated her for her accident-related injuries. The Supreme Court of Virginia held that the claims set forth in the amended Motion for Judgment did not arise out of same transaction or occurrence such that they could be properly joined in same motion. Under the New Jersey Entire Controversy Doctrine, not only would the plaintiff in *Powers* have been allowed to bring a claim for malpractice against her subsequent treating physician in the same action she brought against the driver of the vehicle who caused her original injuries, she would have been required to do so. However, that is not the law of Virginia or West Virginia. Therefore, *Powers* has no application to the case *sub judice*. This Court correctly determined that both the tort claims asserted in the case *sub judice* and the earlier contract claims asserted in the Virginia proceeding arose from the same conduct, transaction or occurrence.

D. This Court Correctly Determined that the Virginia and West Virginia Causes of Action Are Identical for *Res Judicata* Purposes.

- 1. This Court Properly Applied the Transactional Approach to Determine that the Causes of Action are Identical and this Court Properly Determined that the Parties in both Actions Were the Same Parties or in Privity Therewith.**

Appellees again erroneously argue that Virginia courts would not apply the "Transactional Approach" to determine the applicability of *res judicata* in the case *sub judice*. Appellants thoroughly addressed this very issue in Section III, A of Appellants' Supplemental Brief and, therefore, reassert those arguments as if fully set forth herein.

In addition, Appellees argue that none of the cases cited by this Court in its Opinion stand for the proposition that a cause of action in contract is the same as a cause of action in tort against a **different party** for *res judicata* purposes. In light of this Court's proper determination that the parties involved in the Virginia action were the same or in privity with the parties in the case *sub judice* Appellees' "different party" argument is simply disingenuous, unpersuasive and ignores both obvious facts and the finding of this Court.

2. **This Court Properly Determined that All of the Appellees' Claims Arise from the Same Conduct, Transaction or Occurrence; as Such, Virginia Law Requires all Claims to be Brought in the Same Action, or be Barred by the Doctrine of *Res Judicata*.**

Appellees have continually attempted to dissect the concatenation of events that form the conduct, transaction or occurrence from which the alleged claims arise in both the case *sub judice* and in the Virginia action in an effort to escape the preclusive effect of the Doctrine of *Res Judicata*. Simply stated, Appellees filed two separate claims which arise out of a single transaction. The law of Virginia and the doctrine of *res judicata* require all claims arising from the same conduct, transaction or occurrence to

be presented in the initial suit to avoid preclusion. If the Plaintiff affirmatively decides to champion one cause of action to the detriment of others arising from a single transaction or occurrence, then he does so at his own peril. As the Court explained Virginia law in *Cherokee*:

The dimensions of the "claim" for purposes of the application of the bar of *res judicata* are well defined in the Restatement of Judgments 2d 24:

(1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger and bar the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

(2) What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Accord, *Bates v. Deevers*, 214 Va. 667. The comment in the Restatement to this section goes on to note that: "The present trend is to see a claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights."

Cherokee at 7.

From the inception of litigation in Virginia, Appellees have alleged a "plan"

undertaken by Appellants to totally and completely destroy Appellees' mining operation and bankrupt the companies. Such claims were reasserted in the West Virginia case. The alleged "plan" to destroy represents a single transaction or occurrence formed by multiple events from which all of Appellees' alleged damages flow. Those events allegedly include, but are not limited to, Massey's purchase of Wellmore and United on July 31, 1997; Wellmore's declaration of *force majeure* on December 1, 1997; Wellmore's alleged delay in declaring *force majeure*, Massey's negotiations with Appellees regarding the purchase of the Harman Mine after the declaration of *force majeure*; Massey's refusal to finalize the purchase of the Harman mine at a point in time when the Harman companies were on the financial ropes and had no other options other than bankruptcy and Massey's intervention in the Harman bankruptcy proceedings after they were filed. Without question, these events as a whole create the transaction or occurrence under which all of Appellees' alleged claims arise.

Appellees pursued their contract claims to final judgment in the Virginia Action. Under the holding of *Cherokee*, the claims extinguished by the Virginia Judgment include all claims against Appellants arising from the transaction. Virginia law requires that all alleged claims that arose out of the alleged "plan" be brought in the Virginia action or not at all. As such, Appellees' arguments are without merit and deserve no further consideration.

II. Appellants Are Entitled to Enforcement of the Forum Selection Clause Contained in the 1997 Coal Supply Agreement, as They are Closely Related to the Contract Containing Such Provision.

The Appellees next assert that Appellants lack the connectivity to the 1997 Coal Supply Agreement necessary to enforce the forum selection clause contained therein. In support of this proposition, the Appellees first submit that any connection Appellants possess to the contract is "tenuous, brief, and only for a tortious purpose." See Harman Brief at p. 28. Based upon that assertion, Appellees next contend that Appellants fail to meet the requisite status of "transaction participant," which prevents enforcement of the provision at issue. See Harman Brief at p. 36. These contentions will be addressed in turn, revealing a mistaken analysis of the current legal issues as applied to the facts at hand.

(A) Appellees' Assertions Concerning the Connection Between Appellants and the 1997 Coal Supply Agreement are Factually Immaterial and Legally Incorrect.

Appellees contend that Appellants' connection to the 1997 Coal Supply Agreement was "tenuous, brief, and only for a tortious purpose." In response, it must first be noted that the Appellees' allegations of tortious conduct have no bearing on the legal determination of whether Appellants may enforce the forum selection clause. In fact, such allegations fall squarely within the subject matter contemplated by the forum selection clause. Simply put, the broad language of the forum selection clause makes it equally applicable to contract claims, tort claims, and statutory claims, so long as these claims are "brought in connection with" the 1997 CSA. See *Heron v.*

Transportation Cas. Ins. Co., 650 S.E.2d 699 (Va. 2007); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S.Ct. 2449, 41 L. Ed. 2d 270 (1974); *Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1361 (2nd Cir. 1993). As such, this contention does not support the Appellees' current argument because it speaks to what *claims* are subject to the forum selection clause as opposed to what *parties* are subject to the forum selection clause.

Secondly, the Appellees contend that the Appellants' connection with the 1997 CSA is "brief and tenuous," which they submit to support the contention that Appellants are not closely related to the CSA. Not surprisingly, the Appellees took a different position when drafting the averments in their Complaint, which stated that the Massey Appellants exerted "dominion and control" over Wellmore directly related to the contract at issue. Moreover, Appellees apparently believed that a connection existed when they collected a large recovery from the Appellants in a *breach of contract* action in Virginia. In summary, the cornerstone of Appellees' current contention stems from immaterial factual argument and flawed legal analysis which evidences nothing more than another strained attempt to undermine the proper application of the law.

(B) Appellants are Closely Related to the Dispute Arising From the Forum Selection Clause, Which Allows Enforcement on Their Behalf.

Appellees next assert that Appellants fail to qualify as "transaction participants," which they claim precludes any attempt at enforcement of the forum selection clause by Appellants. Appellees cite *Clinton v. Janger*, 583 F. Supp. 284, 290 (D.C. Ill., 1984), which states that "a range of transaction participants, parties and

non-parties should benefit from and be subject to the forum selection clause.” *Id. citing Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F. 2d 190 (3rd Cir. 1983), *cert. denied*, 464 U.S. 938, 104 S. Ct. 349, 78 L. Ed.2d 315 (1983). Citing this language, the Appellees attempt to argue that Appellants can only possibly be classified as “transaction participants,” and, therefore, they are not entitled to enforce the forum selection clause. In response, it must be noted that the authority cited as support for Appellees’ contention expressly holds that “transaction participants” as well as parties and non-parties to the contract may enforce a forum selection clause. *Id.* The real issue is whether Appellants were so connected to the contract and transaction as to allow for enforcement of the provision at issue. This Court has already made that determination. Therefore, Appellees’ contention quickly fails because *Clinton* provides that even non-parties to any such contract may enforce the provision as well.

The true test in determining applicability of contract provisions to non-signatories is whether the non-parties were “closely related to the dispute arising from a forum selection clause.” *See Hugel c. Corporation of Lloyd’s* 999 F.2d 206 (7th Cir. 1993); *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509 (9th Cir. 1998); *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F. 2d 190 (3rd Cir. 1983). Massey was the parent company of Wellmore, a party to the 1997 CSA, at the time it declared *force majeure*. The Appellees have repeatedly claimed that the declaration of *force majeure* was an action directed and orchestrated by the Massey Appellants, and the allegations underlying this suit all arise from the allegedly improper declaration of *force majeure*.

Moreover, Appellees claim Appellants tortiously declared *force majeure* under the while at the same time arguing for a finding of non-connectivity to the contract itself. In summation, there can be no dispute that the Appellants are closely related to the "dispute arising from the forum selection clause," and the Appellees are hard-pressed to assert otherwise taking into consideration the allegations and averments they have brought before the Court. These contentions are misleading and nothing more than legal argument built upon a house of cards.

III. This Court Appropriately Applied Applicable Law to the Matter *Sub Judice*.

As set forth in Appellants' Supplement Brief, this Court properly applied its ruling in the case before this Court. While Appellees may not like the decision handed down in this matter, it is both the duty and prerogative of the Supreme Court of Appeals of West Virginia to determine the applicable rule of law and apply that rule to the facts of the dispute before the Court. Appellees erroneously argue that this Court's decision should be applied only to cases arising after this decision.

Courts have traditionally used a purely prospective application of the law only in cases of statutory construction or interpretation. Appellees' citation to *Kincaid v. Mangum*, 189 W. Va. 404, 432 S.E.2d 74 (1993), demonstrates this very point. *Kincaid* established that, "when this Court issues an interpretation of the *W. Va. Const.* which was clearly not foreshadowed, and when retroactive application of the new interpretation would excessively burden the government's ability to carry out its functions, then the new constitutional interpretation will apply prospectively." Syl. Pt.

5, *Kincaid*. A purely prospective application has no relevance to the common law issues at hand. In fact, Appellees cite no West Virginia case law that either mandates or even suggests that this Court should apply its rulings on the law prospectively, when presented as a matter of first impression.

In addition, Appellees cite three extra jurisdictional cases, *Crowe v. Bolduc*, 365 F.3d 86 (1st Cir. 2004) (interpretation of application of Maine civil rule 59(3)); *England v. La. Bd. Of Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461 (1964) (interpretation of application of 28 U.S.C.A. § 1253); and *SASCO v. Zudkewich*, 166 N.J. 579, 767 A.2d 469 (2001) (Interpretation of application of N.J.S.A. 25:2-31a, to determine when four year statute of limitations begins to run). These cases all follow the legal principle set forth in *Kincaid* and involve interpretation and application of statutes or civil rules, not a modification of common law. These cases do not stand for the principle that when a court modifies common law or addresses a matter of first impression under common law that purely prospective application is appropriate.

Finally, Appellees cite *Stein v. Alpine Sports, Inc*, 126 N.M. 258, 968 P.2d. 769 (1998). In *Stein*, the Supreme Court of New Mexico addressed the retroactive application of a separate decision, *First Financial Trust Co. v. Scott*, 122 N.M. 572, 929 P.2d 263 (1996), to the matter before the court. New Mexico considered whether the *Scott* decision should be applied retroactively in *Stein*. As such, this case is distinguishable factually and legally from the matter *sub judice*. The issue before this Court is whether the applicable rule of law should be applied to the matter *sub judice*.

Appellees have presented no authority whatsoever which would mandate or even suggest that this Court should refuse to apply applicable law to the matter *sub judice*. As such, Appellees' arguments in this regard are unsupported by law, unpersuasive and deserve no further consideration.

IV. CONCLUSION

Based upon the foregoing, including all arguments, assertions and statements of fact previously set forth in Appellants' Petition for Appeal, Appellants' Appellate Brief, Appellants' Reply to Brief of Appellee, Hugh Caperton, and Appellants' Reply to Brief of Appellee, Harman, Appellants respectfully request that this Court uphold its decision of November 21, 2007.

Respectfully submitted,



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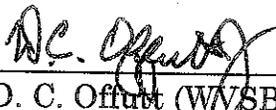
CERTIFICATE OF SERVICE

I, D. C. Offutt, Jr., Esquire, counsel for Petitioners, do hereby certify that I served the foregoing, "appellants' Omnibus Reply to Appellees' Briefs on Rehearing" upon the following counsel of record by depositing the same in the United States Mail, first class and postage pre-paid this 25th day of February, 2008:

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