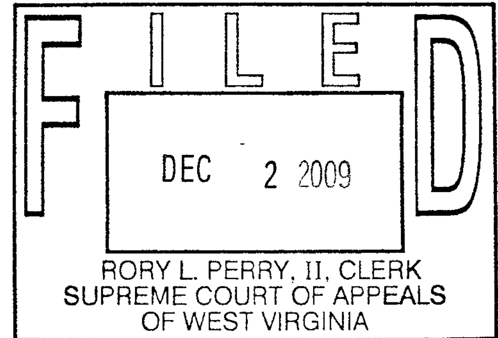
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



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.

PETITION FOR REHEARING OF APPELLEE HUGH M. CAPERTON

Counsel for Appellants:

D.C. Offutt, Jr., Esq. (W.Va. Bar 2773)
Stephen S. Burchett, Esq. (W.Va. Bar 9228)
Offutt Nord PLLC
949 Third Avenue, Suite 300
P.O. Box 2868
Huntington, WV 25728-2868
(304) 529-2868

Counsel for Appellee Hugh M. Caperton:

Bruce E. Stanley, Esq. (W.Va. Bar 5434)
Tarek F. Abdalla, Esq. (W.Va. Bar 5661)
Reed Smith LLP
Reed Smith Centre
225 Fifth Avenue
Pittsburgh, PA 15222
(412) 288-7254

Counsel for Corporate Appellees:

Robert V. Berthold, Jr., Esq. (W.Va. Bar 326)
Berthold, Tiano & O'Dell
P.O. Box 3508
Charleston, WV 25335
(304) 345-5700

David B. Fawcett, Esq. (*pro hac vice*)
Buchanan Ingersoll & Rooney
One Oxford Centre, 20th Floor
301 Grant Street
Pittsburgh, PA 15219

Appellee Hugh M. Caperton ("Caperton"), by his undersigned counsel, respectfully petitions this Court pursuant to Rule 24 of the West Virginia Rules of Appellate Procedure to grant a rehearing in this matter in order to correct numerous significant errors of law and fact.

INTRODUCTION

In its zeal and determination to deliver a complete, total and final victory to Massey, this Court, by adopting the written opinion of acting Chief Justice Robin Jean Davis, has violated Hugh Caperton's right to due process 1) by overturning settled West Virginia law and creating a new and drastically different test for the applicability of forum selection clauses, and then applying that test retroactively; 2) by refusing to follow the mandate of the Supreme Court of the United States by relying improperly upon the constitutionally-tainted previous opinions of this Court rather than reviewing the case anew; 3) by entirely ignoring the West Virginia Legislature's statutory enactments and policy pronouncements regarding venue and other procedural dismissals of cases; and 4) by granting the dismissal of Caperton's claims *with prejudice* even though improper venue serves as the sole basis for this Court's decision to overturn a fully justified jury verdict returned against Massey. The consequences of this Court's erroneous ruling are neither fair nor just.

In overturning settled West Virginia law and creating a new and drastically different test for the applicability of forum selection clauses, and then applying that test retroactively to Caperton so as to deprive him of any meaningful opportunity to have his claims heard, this Court now says that Caperton failed to account for how he was prejudiced by application of the Court's newly adopted test *at the time* Massey's motion to dismiss on forum *non coveniens* grounds was taken up by the trial court. Yet the Court specifically refused to entertain further briefing by the parties that would have allowed Caperton to address such issues.

Indeed, the Court refused to allow further briefing after remand from the Supreme Court, despite the fact that the prior two opinions of this Court were unconstitutionally tainted by Chief Justice Benjamin's participation. Rather than start anew, as did the Alabama Supreme Court in

Aetna Life Ins. Co. v. Lavoie, 505 So.2d 1050 (Ala. 1987), which remand the Court cites as the sole precedent governing its procedures on remand here, the Court's starting point was the two opinions which Justice Benjamin participated in, commented upon and voted for Massey and against Caperton. Similarly, the Court's refusal to allow additional briefing ensured that Caperton could not prevail, and sealed his fate under the new test which the Court adopted but which was not the law at the time Caperton's counsel argued the motion to dismiss as it was originally filed by Massey. That is, the new test adopted by the Court required Caperton to submit proof of the inequities of applying the forum selection clause when this was not a requirement under the law as it existed at the time Caperton originally argued Massey's motion to dismiss. Absent giving Caperton the opportunity to make such a showing now, this inherent conflict can not be squared with his constitutional right to due process.

The refusal to allow further briefing also ensured that Caperton could not address the 80-plus decisions cited by acting Chief Justice Davis for the proposition that a contracting party should anticipate that a third party, with no connection whatsoever to the parties at the time of contracting, might someday come along and destroy the contract, interfere with the parties in many ways unrelated to the contract, commit frauds to ensure that not only is the contracting party ruined financially, but also its chief officer, and then receive the benefit of a forum selection provision within the contract it destroyed, when none of the cases cited even remotely stands for that direct proposition. Such a result simply cannot be deemed a just one.

The refusal to allow further briefing also deprived Caperton of the opportunity to demonstrate that his personal injuries arose not from Wellmore's breach of the Coal Supply Agreement, but from Massey's decision to torpedo a subsequent transaction that would have relieved Caperton of his personal obligations, a transaction that Massey sank *after* it had divested itself of Wellmore and a transaction which its highest officers described as having nothing to do with the earlier breach of contract.

Finally, the refusal to allow additional briefing deprived the parties and the Court the opportunity to consider the impact of the Legislature's enactments and pronouncements regarding venue.

The Court's conclusion that somehow, by deciding that West Virginia was the wrong venue for Caperton to bring his personal injury claims, Massey is entitled to dismissal *with prejudice* is not supported by this Court's precedent, by statute, or even by the majority's opinion. Such unjust and overreaching relief risks bringing this honorable Court's judgment into serious disrepute.

Because of all these issues and more, as will be described below, the application of this Court's decision to Caperton cannot be squared with the mandates of the Constitution of the United States, the Mandate of the Supreme Court of the United States, principles of appellate review, West Virginia law, and the most fundamental rights of a citizen of this state and nation to receive a fair hearing and just redress for the substantial harm that has been illegally inflicted upon him. As such, the integrity of this state's judicial system hangs in the balance.

I. ARGUMENT

A. Retroactive Application Of The Court's Newly-Announced Forum Selection Clause Test Was Unconstitutional And Inappropriate Under West Virginia Law, And Unjust Under The Terms Of The Test Itself.

The Court announced in this case a new four-part test intended to determine under what circumstances a claim should be dismissed as having been filed in the wrong venue based upon a contractual forum selection clause. The Court ruled that *non-signatory plaintiffs* may be bound to a contract by *non-signatory tortfeasors*, if the claims are in some way related to the contract. This Court then applied those new statements of law retroactively to Caperton. Such application was unconstitutional.[1]

[1] The Court took these extraordinary steps by reversing the circuit court's denial of Massey's Motion to Dismiss. This, in itself, is also an extraordinarily rare act. "[M]otions to dismiss are viewed with disfavor, and we counsel lower courts to rarely grant such motions." *Ewing v. Board of Educ.*, 202 W. Va. 228, 503 S.E.2d 541 (1998). This same disfavor should be applied

Continued on following page

This Court rejected Caperton's contentions regarding the application of *Bradley v. Appalachian Power Co.*, 163 W. Va. 332, 256 S.E.2d 879 (1979), to the present case. Be that as it may, Caperton cannot ignore the constitutional implications of the Court's reasoning for doing so. The Court's new test sweepingly and immediately broadens the meaning and effect of forum selection clauses. Thus, in applying part of the third prong of the test, considering whether the claims in this case are covered by the forum selection clause, the Court staked out a position which bestows greater reach by forum selection clauses than the reach of proximate causation in tort. As a consequence, although the judge and jury below emphatically held that Caperton's injuries were *not* caused by Wellmore's breach of the 1997 CSA, but rather by the separate and additional actions of Massey after that breach, as admitted in documents produced by Massey[2], the Court concluded that Caperton's injuries may not have existed *but for* Wellmore's breach, and were therefore sufficiently "in connection with" the 1997 CSA's forum selection clause to be governed by it.

In addition to setting forth this new and unforeseeable change in the law, this Court also overturned well-settled West Virginia precedent regarding the applicability of contract clauses to non-signatories. The prevailing law up to the time of this Opinion was that

> even where the right [of a non-signatory to enforce a contract] is most liberally granted it is recognized as an exception to the general principle, which proceeds on the legal and natural presumption that a contract is only intended for the benefit of those who made it. 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, 122 S.E.2d 553, 557 (1961). This doctrine has withstood the test of time, and has been recently repeated, both in West Virginia and

---

Continued from previous page
by this Court on review. *See also Zaleski v. W. Va. Physicians' Mut. Ins. Co.*, 220 W.Va. 311, 647 S.E.2d 747 (2007).

2 *See, e.g.*, Plaintiffs' Exhibit 334 (an internal memorandum from Ben Hatfield to Don Blankenship), Plaintiffs' Exhibit 350A (Ben Hatfield's handwritten notes), and Ben Hatfield's trial testimony of July 30, 2002, each of which demonstrate Massey's position that the proposed buyout of Harman was unrelated to the Coal Supply Agreement or Wellmore's breach.

Virginia. *See, e.g., Robinson v. Cabell Huntington Hosp.*, 201 W. Va. 455, 460, 498 S.E.2d 27, 32 (1997) ("in order for a contract concerning a third party to give rise to an independent cause of action in the third party, it must have been made for the third party's sole benefit."); *Elmore v. State Farm Mut. Auto. Ins. Co.*, 202 W. Va. 430, 504 S.E.2d 893 (1998) (same); *Casto v. Dupuy*, 204 W. Va. 619, 515 S.E.2d 364 (1999) (same); *Eastern Steel Constructors, Inc. v. City of Salem*, 209 W. Va. 392, 549 S.E.2d 266 (2001) (same); *Verosol B.V. v. Hunter Douglas, Inc.*, 806 F. Supp. 582, 586 (E.D. Va. 1992) ("Under well-settled principles of contract law, a stranger to a contract ordinarily has no rights under the contract and cannot sue to enforce it."). This Court did not address this clear and undisputed line of West Virginia cases in making its decision to allow non-signatories, for whose benefit the contract was *not* made, to enforce the terms of that contract against persons who were *also* not parties to the contract. Instead, the Court found only cases from foreign jurisdictions—all with facts entirely distinguishable from those presented in this case—to support its new and contrary rule of law.

The Court also failed to apply the mandates of the United States Supreme Court and its own tests in determining whether to enforce a forum selection clause. In *M/S Bremen*, relied upon by this Court, the United States Supreme Court found forum selection clauses to be valid unless, *inter alia*, "enforcement would be unreasonable and unjust." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972). Here, this Court has acknowledged previously that "the facts of this case demonstrate that Massey's conduct warranted the type of judgment rendered in this case" and that the jury's verdict "clearly appears to be justified." Moreover, not one of the cases cited by this Court applied a forum selection clause to reverse an otherwise valid jury verdict, and for good reason. This Court and others have recognized that there are proper procedural mechanisms which should be used to make a final determination as to forum *before* trial on the merits. Disrupting the judgment is particularly egregious where, as here, Massey failed to utilize those appropriate procedural remedies—namely, petitioning for a writ of prohibition or mandamus. As Justice Cleckley observed in *State ex rel. Riffle v. Ranson*, 195 W.Va. 121, 464 S.E.2d 763 (1995),

> Considering the inadequacy of the relief permitted by appeal, we believe this issue should be settled in this original action [i.e., petition for writ stage] if it is to be settled at all. In recent times in every case that has had a substantial legal issue regarding venue, we have recognized the importance of resolving the issue in an original action. Accordingly, we find the exercise of original jurisdiction is appropriate under these extraordinary circumstances.

Riffle, 195 W.Va. at 124, 464 S.E. 2d at 766. *See, e.g., State ex. rel. Stewart v. Alsop*, 207 W. Va. 430 (2000) (court found that writ of prohibition is appropriate remedy for challenging denial of motion for *improper venue*); *Smith v. Maynard*, 186 W. Va. 421, 412 S.E.2d 822 (1991) (writ of prohibition granted against the respondent where improper ruling as to *venue* was made); *Bad Toys Holdings, Inc. v. Emergystat of Sulligent, Inc.*, 958 So.2d 852, 855 (Ala. 2006) (cited by the majority) ("A petition for writ of mandamus is the proper vehicle for obtaining review of an order denying enforcement of an 'outbound' forum-selection clause when it is presented in a motion to dismiss."). As Massey was represented at the time by one of this Court's longest serving clerks, it is untenable to suggest that Massey was not fully informed regarding the accepted procedure for seeking the relief that this Court now bestows upon it.

Prospective application of the Court's new law is not only warranted under West Virginia precedent, but it is also mandated by the Fourteenth Amendment of the Federal Constitution. Although retroactive application of new common law is constitutionally permitted under general circumstances, the facts in this case require a different result. When the practical effect of a judgment is to deprive a plaintiff of property without allowing the plaintiff any opportunity to defend against the deprivation, that judgment violates the Due Process Clause of the Fourteenth Amendment. *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673 (1930). In *Brinkerhoff*, the plaintiff sued to protest the collection of a tax. The taxpayer followed the state's recognized means of protesting the tax at the time, but on appeal in the Missouri Supreme Court, it was newly informed that it should have brought its action in the State Tax Commission, and that action below was therefore invalid. At the time of the Missouri Supreme Court's decision, the allowed time for making a claim before the Tax Commission had passed. The United States Supreme Court overturned the Missouri decision, holding that "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." *Id.* at 682.

This decision was applied in *Bouie v. City of Columbia*, 378 U.S. 347 (1964), which held that "when a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law in its primary sense of an opportunity to be heard and to defend his substantive right." *Id.* at 354. Again, in *Boddie v. Connecticut*, 401 U.S. 371 (1971), the Supreme Court held that "a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question." *Id.* at 379. Further, "[t]he State's obligations under the Fourteenth Amendment are not simply generalized ones; rather, the State owes to each individual that process which, in light of the values of a free society, can be characterized as due." *Id.* at 380. *See also Williams v. United States*, 470 A.2d 302, 308-09 (D.C. 1983) (even where a litigant may have had the opportunity to comply with new procedural requirement, due process was nevertheless denied --"[F]or all practical purposes, appellant—encouraged by decisions of this court and the federal courts—found himself in the same position as the petitioner in *Brinkerhoff-Faris*, ousted from court by a newly-announced rule after he had reasonably relied on a different, generally followed and approved practice.").

This line of cases is squarely applicable to the case at hand. As a West Virginia citizen who suffered personal injuries at the hand of the Massey entities operating in West Virginia, Caperton followed all of the appropriate procedural rules for choosing a forum and bringing his claims. Caperton has the right, and must at least be granted the opportunity, to address the factual and legal issues raised by this Court's new four-part test before that new law may be applied retroactively to him. Had Caperton been given a legitimate opportunity to brief the Court's conclusion that the prejudice to be measured in enforcing the clause is limited to the time period surrounding the filing of the motion (rather than the post-verdict ramifications to all involved, including the considerable drain upon the state's legal system), he would have been

able to point out, for example, how far along the Virginia contract action had advanced by the time the trial court entertained Massey's motion. Of course Caperton has not yet made such arguments inasmuch as this Court precluded the parties from rebriefing the case despite the clear precedent set by the Alabama Supreme Court in *Aetna* and despite the clear unconstitutional taint upon the Court's previous opinions which came to the same erroneous conclusion regarding enforcement of the forum selection clause against Caperton.

B. By Ignoring The Legislature's Public Policy Pronouncements Regarding Venue, The Court Has Overstepped Its Authority.

Justice Cleckley offered the following observation when addressing this Court's role regarding venue in the face of legislative enactments about the subject: "To be clear, the West Virginia Legislature is the paramount authority for deciding and resolving *policy issues* pertaining to venue matters." *State ex rel. Riffle v. Ranson*, 195 W. Va. 121, 126, 464 S.E.2d 763, 768 (1995) (emphasis supplied). Knowledgeable of the statutory scheme in place as of the filing of its motion, Massey framed its motion as one for dismissal on the basis of forum *non conveniens*, citing the forum selection clause of the Coal Supply Agreement in support of its position.

The Legislature has spoken authoritatively on the issue of dismissal in favor of an out-of-state forum:

> If the statute of limitations in the alternative forum expires while the claim is pending in a court of this state, the court *shall grant a dismissal* under this section *only if* each defendant waives the right to assert a statute of limitation defense in the alternative forum. The court may further condition a dismissal under this section to allow for the reinstatement of the same cause of action in the same forum in the event a suit on the same cause of action or on any cause of action arising out of the same transaction or occurrence is commenced in an appropriate alternative forum within sixty days after the dismissal under this section and such alternative forum declines jurisdiction.

W. Va. Code § 56-1-1a(c) (2007) (emphasis supplied).

In other words, if this Court is intent on carrying out its decision to dismiss this case on the basis of venue, the Legislature has limited its options for doing so. At a minimum, the Court

must condition its order of dismissal upon Massey waiving any statute of limitations defense should Caperton choose to reassert his claims in the allegedly appropriate Virginia forum. Moreover, if the Virginia court refuses to accept jurisdiction, then good conscience and fundamental principles of justice require that this Court be prepared to reinstate the Boone County jury's verdict.

C. By Dismissing Caperton's Claims With Prejudice, The Court Has Violated Caperton's Constitutional Rights To Substantive And Procedural Due Process.

In any event, this Court's *unfathomable* decision to dismiss Caperton's claims with prejudice raises serious constitutional concerns. Clearly, any dismissal based upon venue is not a decision on the substantive merits. Indeed, this Court previously acknowledged that the jury's verdict was justified and warranted. Rather than uphold that verdict—obtained by a West Virginia citizen against Massey entities doing significant business in West Virginia generally and in Boone County particularly, and where Massey senior officers have affirmatively declared the lack of any connection between Wellmore's contract breach and the later deal that Massey torpedoed -- the Court has dismissed Caperton's claims *with prejudice*. Obviously, such a decision cannot stand.

As this Court noted in *Rowe v. Grapevine Corp.*, 206 W.Va. 703, 527 S.E.2d 814 (1999), "Under Federal Rule 41(b)—the rule upon which federal cases dealing with the *res judicata* effect of dismissals are based—there are three clear exceptions to dismissals having the automatic effect of an adjudication on the merits. Those delineated exceptions are dismissals for lack of jurisdiction, *for improper venue*, or failure to join a party under Rule 19." *Rowe*, 206 W.Va. at 712, 527 S.E.2d at 823. Prior to the present case, dismissal as a result of venue considerations has *always* been without prejudice in West Virginia. As recently as November 2, 2009, the Court affirmed in *Chance v. Hill*, No. 34627, 2009 WL 3643999 (W.Va Nov. 2, 2009), a dismissal *without prejudice*. The precedent for doing so is both broad and deep. Thus, in *Savarese v. Allstate Ins. Co.*, 223 W.Va. 119, 672 S.E.2d 255 (2008), Chief Justice Benjamin

wrote for the Court in order to affirm "the circuit court's decision to dismiss the underlying action, *without prejudice to refile in another jurisdiction.*" *Savarese*, 223 W.Va. 119, 672 S.E.2d at 260 (emphasis supplied). *See also, Pethel v. McBride*, 219 W.Va. 578, 638 S.E.2d 727 (2006); *Belcher v. Greer*, 181 W.Va. 196, 382 S.E.2d 33 (1989); *Charter v. Doddridge County Bank*, 119 W.Va. 735, 196 S.E.2d 158 (1938) (affirming dismissal for improper venue without prejudice). *See also*, Rule 41 of the West Virginia Rules of Civil Procedure; *Costello v. U.S.*, 365 U.S. 265 (1961).

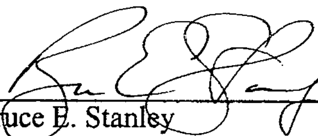
In short, the attempt to grant Massey complete, total and final victory by way of a dismissal *with prejudice* solely on the basis of a venue motion, sadly, creates the appearance of the purposeful deprivation of Caperton's constitutional rights to both procedural and substantive due process.

II. CONCLUSION

In consideration of the above, Caperton respectfully submits that this Court made numerous errors in interpreting and applying the relevant law to the facts in this case, resulting in grave injustice to Caperton, and in violations of his federal constitutional rights. Cumulatively, the errors in the majority's Opinion strain the very integrity of this Court, and absolutely demand a complete reversal of the Court's decision, and a reinstatement of the verdict below. Accordingly, it is essential that rehearing be granted.

WHEREFORE, Hugh M. Caperton respectfully requests that this Honorable Court grant his Petition for Rehearing.

Respectfully submitted,



Bruce E. Stanley
W.Va. Bar 5434
Tarek F. Abdalla
W.Va. Bar 5661
REED SMITH LLP
225 Fifth Avenue
Pittsburgh, PA 15222

Counsel for Hugh M. Caperton

Dated: December 2, 2009

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 Petition for Rehearing of Appellee Hugh M. Caperton upon the following by United States Mail, first class and postage prepaid, this 2nd day of December, 2009, addressed as follows:

D. C. Offutt, Jr., Esq.
Stephen S. Burchett, Esq.
Offutt Nord PLLC
949 Third Avenue, Suite 300
Post Office Box 2868
Huntington, WV 25728-2868

David B. Fawcett, Esq.
Buchanan Ingersoll & Rooney
One Oxford Centre, 20th Floor
301 Grant Street
Pittsburgh, PA 15219

Robert V. Berthold, Jr., Esq.
Berthold, Tiano & O'Dell
P.O. Box 3508
Charleston, WV 25335

Bruce E. Stanley (W.Va. Bar 5434)