No. 33350 - *Hugh M. Caperton, Harman Development Corporation, Harman Mining Corporation, and Sovereign Coal Sales, Inc. v. A.T. Massey Coal Company, Inc., Elk Run Coal Company, Inc., Independence Coal Company, Inc., Marfork Coal Company, Inc., Performance Coal Company, Inc., and Massey Coal Sales Company, Inc.*

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Workman, Justice, dissenting.

Neither the sheer length of the majority's opinion, nor the large number of cases cited (but erroneously applied), nor even its expansive conclusory statements, can obfuscate its lack of sound legal reasoning and its result-driven approach.

In enunciating *eight* major new points of law and applying them retroactively (with no opportunity for the parties to make a record under the new law), scrapping mountains of prior precedent that give deference to the finders of fact below (and instead making new factual determinations at this level), rewarding the defendant (whose conduct is seemingly recognized by all as reprehensible) the spoils of its fraudulent acts, and then characterizing the result as "equitable," the majority has turned West Virginia jurisprudence on its ear.

Specifically, the majority holds that Massey, despite engaging in wide-ranging fraudulent conduct, both in connection with the 1997 Coal Supply Agreement ("the CSA"),

as well as separate and apart from it, is entitled to benefit from the forum-selection clause not only with regard to matters relating to the CSA, but even with respect to actions completely unconnected to that contract. The majority reaches this conclusion despite the fact that the forum-selection clause is contained in a contract to which Massey was not a party, with which Massey tortiously interfered, and under which Massey never acted in good faith. In so doing, the majority not only deprives the plaintiffs of the substantial damages awarded to them by the rightful finders of fact, a Boone County jury, but also leaves them with no legal recourse by which to address Massey's extensive pattern of fraudulent conduct. It similarly eliminates any recovery for the plaintiffs' numerous creditors in the three pending bankruptcy cases, to whom most of the judgment would have gone. Not least among those creditors are the Harman Companies' union miners who lost their jobs as a result of Massey's fraudulent conduct, and the Harman Companies' hundreds of retirees, to whom the Harman Companies previously paid pensions and medical benefits.[1]

Because the majority unjustly strips Massey's victims of their rightful verdict by creating extensive new law and manipulating the existing law to achieve the end result, I dissent on the following grounds:

[1]The Harman Companies' employees and retirees, the United Mine Workers of America ("UMWA"), and the UMWA Health and Retirement Funds are among the largest creditors in the Harman bankruptcy cases, with combined claims exceeding $15.8 million.

- **Forum Selection Clause** - Because much of Massey's *fraudulent* conduct bore no connection to the CSA, the tort claims asserted by the plaintiffs should NOT be governed by the forum-selection clause contained in that contract.

- **Standard of Review** - The new standard of review departs dramatically from extensive prior precedent requiring deference to a circuit court's findings of fact, and supplants this Court as a *de novo* finder of fact.

- **Retroactivity** - The new principles of law relating to the enforcement of forum-selection clauses should NOT be applied retroactively by this Court. Such retroactive application deprives the plaintiffs of any opportunity to present evidence to meet the burden placed on them by the majority's new test and, thus, violates the plaintiffs' due process rights. Moreover, in retroactively applying these new principles to the instant case, the majority makes its own findings of fact, an act which should be reserved for the circuit court. Finally, the majority's announcement of these new principles was not "clearly foreshadowed," and their enforcement produces a substantially inequitable result.

I. Facts

The plaintiffs in the underlying case, Harman Development Corporation, Harman Mining Corporation, and Sovereign Coal Sales, Inc. (collectively "the Harman Companies"), and Hugh M. Caperton ("Mr. Caperton"), sued A.T. Massey Coal Company, Inc. and several of its subsidiaries (collectively "Massey") in the Circuit Court of Boone County, West Virginia. The Harman Companies alleged, among other things, that Massey engaged in tortious interference with several of the Harman Companies' and Mr. Caperton's existing contracts,[2] and further that Massey engaged in fraudulent concealment and made

[2]In its March 15, 2005, Final Order denying Massey's post-trial motions, the circuit court found that

(continued...)

fraudulent misrepresentations in its dealings with the plaintiffs. After a lengthy trial, during which the plaintiffs produced overwhelming evidence of Massey's intentional fraudulent acts, a jury in Boone County awarded the plaintiffs more than fifty million dollars in damages.[3]

Early in the course of that litigation, Massey filed a motion to dismiss based on improper venue, arguing that a forum-selection clause contained in the CSA, a contract between two of the Harman Companies and Wellmore Coal Corporation ("Wellmore"), required that all actions brought in connection with the contract be litigated in Virginia. The

[2](...continued)

> [t]he evidence was clearly sufficient for the Jury to conclude that Defendants tortiously interfered with the Harman Plaintiffs' advantageous relationships with, among others, the United Mine Workers of America, with Penn Virginia Coal Company, with Terra Industries, Inc., with Grundy National Bank, and with Wellmore Coal Corporation. As for Plaintiff Caperton, the evidence was clearly sufficient for the Jury to conclude that Defendants tortiously interfered with, among others, his personal guaranty relationships with Grundy National Bank, his personal liability under the Terra reclamation bonds . . . and his personal relationship with United Bank. Further, the evidence was clearly sufficient for the Jury to conclude that Defendants engaged in this intentional interference for the specific purpose of financially destroying Plaintiffs, both corporately and personally.

[3]With interest, the award due to the plaintiffs would now exceed eighty-five million dollars.

Circuit Court of Boone County denied that motion.[4] The majority now reverses, holding that because *one* of Massey's alleged fraudulent acts–its fraudulent declaration of *force majeure*[5]–was performed "in connection with" the CSA, all of the plaintiffs' claims, even those completely unconnected to the CSA, should have been brought in Virginia. In reaching this conclusion, the majority ignores Massey's significant fraudulent acts that were unrelated to the CSA but that culminated in the financial destruction of the Harman Companies and Mr. Caperton. Instead the majority declares that the fraudulent declaration of *force majeure* was *the act* from which *all* of the plaintiffs' damages flowed. This is simply not true. As determined by the fact-finders and fully demonstrated by the record below, **Massey engaged in a web of deceit replete with fraudulent acts, many of which were separate and apart from the declaration of *force majeure*.**

Specifically, the evidence introduced at trial showed that Massey engaged in a wide-ranging scheme to expand the market for its own coal, obtain access to the Harman Companies' valuable coal reserves and eliminate the Harman Companies and Mr. Caperton

[4]Interestingly, no written order denying the motion to dismiss can be found in the Court record, nor was any oral ruling documented in this case. Because throughout the tortured history of this appeal, the parties have agreed that the motion was denied, we must conclude that the lower court at least implicitly denied the motion.

[5]The CSA included a "*force majeure*" provision, which permitted either party to suspend its obligations under the contract if one of several specific, uncontrollable events prevented that party from being able to meet its contractual obligations. For example, if either party was prevented from performing under the contract as a result of an act of God, act of public enemy, epidemic, insurrection, etc., then that party could avoid defaulting on its contractual obligations by declaring "*force majeure*."

as competitors from the metallurgical coal market. While aggressive competition and even sharp practice in business dealings is certainly not actionable in and of itself, it becomes actionable when a party engages in fraudulent misrepresentations and fraudulent concealment to achieve those goals.[6] Here, Massey developed a scheme in which it simultaneously disrupted the Harman Companies' existing coal supply contract with Wellmore, thus eliminating the Harman Companies' primary source of revenue, while engaging in fraudulent, bad-faith negotiations with Mr. Caperton for the sale of his interest in the Harman Companies' assets. Through these fraudulent negotiations, Massey lured Mr. Caperton and the Harman Companies into a false sense of security, thereby deterring them from seeking other buyers for their coal. Moreover, Massey actively dissuaded other potential buyers and took steps to ensure that the Harman Companies' reserves would be unattractive to anyone else. Ultimately, after ensuring that Mr. Caperton would be unable to find any other willing buyers, Massey collapsed the sale negotiations altogether, thereby forcing the Harman Companies and Mr. Caperton into bankruptcy.

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[6]The torts of fraudulent misrepresentation and fraudulent concealment each require that the plaintiff prove:

> (1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied on it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied on it.

Syl. Pt. 5, in part, *Kidd v. Mull*, 215 W. Va. 151, 595 S.E.2d 308 (2004) (*quoting Horton v. Tyree*, 104 W. Va. 238, 242, 139 S. E. 737 (1927); Syl. Pt. 1, *Lengyel v. Lint,* 167 W. Va. 272, 280 S.E.2d 66 (1981)).

In furtherance of this fraudulent scheme, Massey engaged in actions that cannot reasonably be considered to have any "connection with" the CSA. For example:

(1) After Massey expressed a desire to purchase Mr. Caperton's interest in the Harman Companies, *Mr. Caperton, at Massey's request, shared confidential information with Massey relating to his business plans.* Specifically, beginning at a meeting in late November 1997, and continuing through January 1998, Mr. Caperton provided Massey with confidential business information including mine maps, reserve studies, drill information, and, importantly, the Harman Companies' plans to expand into adjoining reserves owned by Pittston Coal Company ("Pittston"). Mr. Caperton also advised Massey of the Harman Companies' debt obligations, including debts for which Mr. Caperton was personally obligated, and advised Massey of the terms of the Harman Companies' lease with Penn Virginia Coal Company ("Penn Virginia"), the owner and lessor of the Harman Companies' coal reserves;

(2) As the negotiations for proposed sale of Mr. Caperton's interest in the Harman Companies continued, Massey represented that it intended to take over the Harman Companies' lease with Penn Virginia "as is," and the parties agreed to close the deal on January 31, 1998. *At Massey's request, Mr. Caperton shut down the Harman Companies' operations on January 19, 1998, in preparation for that closing date.* An internal memo circulated between Massey officers, however, indicated that, unbeknownst to Mr. Caperton, Massey had no

intention of closing on the agreed-upon date. Moreover, *Massey knowingly allowed the Harman Companies to continue to believe the January 31, 1998, date would be met,* and allowed Mr. Caperton to shut down operations as planned despite knowing, from the confidential information that it had previously obtained, that such action would have serious financial consequences for both the Harman Companies and for Mr. Caperton, due to his personal guarantees of certain of the Harman Companies' loans;

(3) After refusing to close the deal by the original deadline, Massey continued to intentionally mislead the Harman Companies and Mr. Caperton into believing that an agreement would be reached. Among other things, Massey executed several "letters of intent" to Mr. Caperton and several creditors of the Harman Companies.[7] For example, in a letter dated February 9, 1998, to Mr. Caperton, Massey promised to, among other things, "pursue good faith negotiations" to reach a deal permitting Massey to acquire Mr. Caperton's interest in the Harman Companies;

(4) Two days after this letter, on February 11, 1998, Massey announced that it had sold Wellmore to Black Diamond Company ("Black Diamond"). As part of that sale, *Massey directed Black Diamond not to pursue the acquisition of the*

[7]Mr. Caperton had personally guaranteed many of the Harman Companies' debts, and Massey had promised to assume these debts as part of the deal.

Harman Companies, a possibility in which Black Diamond had previously expressed an interest;

(5) With the plaintiffs still unaware of Massey's true intentions, the parties agreed to a new closing date of March 13, 1998. Hours before the transaction was set to close, and despite Massey's previous assertions that it would accept the Penn Virginia lease "as is," *Massey intentionally collapsed the deal by demanding unreasonable changes to the proposed lease with Penn Virginia.* Those demands included changing the term of the lease, the royalty rate, the mining provisions and the recoupment period. Although Penn Virginia agreed to certain further concessions, Massey refused to negotiate at all, and the deal crumbled;

(6) After collapsing the deal, *Massey, using the confidential information it had obtained through the sale negotiation process,* purchased a narrow band of coal surrounding the Harman Companies' reserves from Pittston, in order to create a barrier that would prevent any company other than Massey from being able to expand the Harman Companies' operations. Massey's own internal documents acknowledged that this purchase ensured that the Harman Companies' property would be unattractive to any potential buyer other than Massey, thus ensuring that Massey would be able to acquire the Harman property "in the long run," obviously implying after bankruptcy.

None of these acts bore any connection to the CSA. Yet the majority sweeps them under the CSA in a conclusory manner, with no attempt to offer any reasoning or explanation for doing so. Indeed, rather than acknowledge the gravity of Massey's foregoing conduct, the majority, using tunnel vision, focuses solely on the declaration of *force majeure*.

As a result of this conduct, the Harman Companies defaulted on the terms of their lease with Penn Virginia, violated the terms of their contractual obligations to their miners and the UMWA, defaulted on loans to creditors, and ultimately declared bankruptcy. Because Mr. Caperton had personally guaranteed certain loans on behalf of the Harman Companies, he was forced into personal bankruptcy. As a further consequence of Massey's scheme, Mr. Caperton defaulted on land reclamation liabilities under Federal and State environmental laws and, as a result, was entered into the Office of Surface Mining's Applicant Violator System, which effectively prevents him from obtaining any future coal mining permits or otherwise working in a position of authority in that industry.[8]

II. Enforceability of the Forum-Selection Clause

The majority announces that this case presents the first opportunity for this Court to address substantive issues relating to the enforcement of forum-selection clauses.

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[8]The circuit court noted in its Final Order denying Massey's post-trial motions that Mr. Caperton suffered additional mental anguish due to Massey's trespassing on his personal property and photographing his personal residence.

In so stating, it broadly asserts that this Court has "previously indicated our general approval of forum-selection clauses," because this Court has noted, in dicta contained in a footnote, that such clauses are not contrary to public policy. Specifically, in *General Electric Company v. Keyser*, 166 W. Va. 456, 275 S.E.2d 289 (1981), this Court stated in footnote two:

> We have had occasion, however, to discuss, indirectly, forum selection clauses. Although our law on this point is skeletal, it does indicate that contract clauses which affect matters such as jurisdiction and the like should be carefully analyzed.
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> Unquestionably, forum selection clauses are not contrary to public policy in and of themselves for they are sanctioned in commercial sales agreements under W. Va. Code s 46-1-105(2). Although an early case in our jurisprudence held void a clause in a stock certificate requiring that stockholders bring suit in New York, *Savage v. People's Building, Loan and Savings Association*, 45 W. Va. 275, 31 S.E. 991 (1898), later cases have sanctioned, at least implicitly, forum selection clauses. *Axelrod v. Premier Photo Service, Inc.*, 154 W. Va. 137, 173 S.E.2d 383 (1970). *Board of Education v. W. Harley Miller, Inc.*, W. Va., 221 S.E.2d 882 (1975). Both *Axelrod* and *Miller* involved contracts which contained arbitration clauses. In *Axelrod*, we gave full faith and credit to a New York Court decision which confirmed an arbitration award made pursuant to the contract terms requiring arbitration. In *Miller*, we held valid a contract provision which made arbitration a condition precedent to suit in the West Virginia courts. The writer of the *Miller* opinion noted that the common law rule preventing parties from ousting the court of jurisdiction by their agreement was "archaic." 221 S.E.2d at 885.
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> As the Federal court observed, West Virginia appears not to subscribe to the rule that choice of forum clauses are void per se. "Rather the rule of most jurisdictions and the rule that this Court believes that West Virginia should and would adopt is that

> such clauses will be enforced only when found to be reasonable and just". *Leasewell, Ltd. v. Jake Shelton Ford Inc.*, 423 F. Supp. 1011, 1015 (S.D.W. Va. 1976). *See also*, *Kolendo v. Jarell, Inc.*, 489 F. Supp. 983 (S.D.W. Va. 1980).
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> The factors to be weighed in determining the effectiveness of a forum selection clause are materially different from the factors a court will consider in determining the effectiveness of a choice of laws clause and speak to very different problems. *Leasewell*, *supra* at 1014. Choice of law clauses, however, are not automatically void either, as they too are sanctioned in commercial transactions by the West Virginia Code. W. Va. Code 46-1-105(1). Thus it appears that we should not per se invalidate a choice of law clause without analysis anymore than we should invalidate a choice of forum clause without careful scrutiny.

Id. at 461 n. 2, 275 S.E.2d at 292 n. 2. An objective reading of this footnote does not support the majority's sweeping conclusion that this Court's prior law indicates "general approval" of forum-selection clauses. Rather, the footnote indicates skepticism of such clauses by requiring that they be "carefully analyzed," and further implies that such clauses should only be enforced where they are "reasonable and just."

Nevertheless, the majority misstates that forum-selection clauses are viewed with favor in West Virginia, and proceeds to adopt a test for determining the enforceability of a forum-selection clause established in *Phillips v. Audio Active Limited*, 494 F.3d 378 (2d Cir. 2007). Specifically, the majority sets forth the following four factors for consideration: (1) whether the clause was reasonably communicated to the party resisting enforcement, (2) whether the clause is mandatory or permissive, (3) whether the claims and parties involved

in the suit are subject to the forum-selection clause, and (4) whether the resisting party has rebutted the presumption of enforceability by making a sufficiently strong showing that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching. Although at least two of these four new factors obviously require fact-driven determinations, the majority not only adopts these new principles of law out of the blue, it then refuses to give the plaintiffs a chance to present evidence on them and, incredibly, proceeds to make *de novo* findings of fact themselves!

A. Standard of Review for Forum-Selection Clauses

As an initial matter, I object to the majority's adoption of a completely new standard of review specifically for forum-selection clauses. The majority now holds, without providing any explanation, that "[o]ur review of the applicability and enforceability of a forum-selection clause is *de novo*." Given that this holding breaks from our existing precedent without justification, I cannot support this decision.

While motions to dismiss based on a plaintiff's failure to state a claim are generally reviewed *de novo*, *Sturm v. Board of Educ. of Kanawha County*, 223 W. Va. 277, 280, 672 S.E.2d 606, 609 (2008), this Court has held that motions to dismiss based on venue are reviewed for abuse of discretion. Syl. Pt. 1, *United Bank, Inc. v. Blosser*, 218 W. Va. 378, 624 S.E.2d 815 (2005) ("This Court's review of a trial court's decision on a motion to dismiss for improper venue is for abuse of discretion."). As recognized by the majority,

motions to dismiss based on forum-selection clauses are motions to dismiss based on venue. Accordingly, by assigning a *de novo* standard of review to motions to dismiss based on forum-selection clauses specifically, the majority breaks with this Court's prior precedent.

More importantly, this Court has long held as a general proposition that

> [i]n reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

Syl. Pt. 2, *Walker v. W. Va. Ethics Comm'n*, 201 W. Va. 108, 492 S.E.2d 167 (1997). The new test set forth by the majority for determining whether to dismiss a claim based on a forum-selection clause necessarily requires that courts applying the test make findings of fact as well as determinations of law. Specifically, the first inquiry under the majority's new test is whether "the clause was reasonably communicated to the party resisting enforcement." This element does not require a legal interpretation of the clause itself; rather, it turns solely on a question of fact specific to each individual case. Similarly, the fourth element of the new test requires a court to consider whether the party resisting enforcement of the forum-selection clause has made a sufficiently strong showing that such enforcement would be unreasonable and unjust. Such showing likewise turns on the facts of the particular case, and is not related to the legal interpretation of the contract at issue.

Faced with a similar question concerning what standard to use in reviewing the enforcement of a forum-selection clause, the Supreme Court of Washington acknowledged the nuances associated with reviewing such clauses, and concluded that:

> [G]enerally the abuse of discretion standard applies. Under this standard of review, a trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. If the trial court's ruling is based on an erroneous view of the law or involves application of an incorrect legal analysis it necessarily abuses its discretion. Thus, the abuse of discretion standard gives deference to a trial court's fact-specific determination on enforceability of a forum selection clause, while permitting reversal where an incorrect legal standard is applied. If, however, a pure question of law is presented, such as whether public policy precludes giving effect to a forum selection clause in particular circumstances, a de novo standard of review should be applied as to that question.

Dix v. ICT Group, Inc., 161 P.3d 1016, 1020 (Wash. 2007) (internal citations omitted). Thus, while affirming the basic tenet that questions of law are reviewed *de novo*, the Supreme Court of Washington recognized that, even in the context of forum-selection clauses, trial courts should be afforded the typical measure of deference generally granted to their factual findings. This approach is in keeping with this Court's prior precedent and there is no good reason to alter longstanding law to require *de novo* review of a circuit court's findings of fact merely because they relate to the applicability of a forum-selection clause. *See* Syl. Pt. 2, *Walker,* 201 W. Va. 108, 492 S.E.2d 167. Thus, I cannot support the majority's new holding on this issue, as its approach is too simplistic, not in conformity with our longstanding law, and seems designed to achieve an outcome for one specific case.

B. Scope of the Plaintiff's Claims

The broad language of the forum-selection clause in this case provides that it applies to "all actions brought *in connection with*" the CSA. The facts in this case, however, establish that it was Massey's actions relating to the sale of Mr. Caperton's interest in the Harman Companies–actions that were not related in any way to the CSA–that directly caused the Harman Companies' and Mr. Caperton's complete financial demise.[9] For example, had Massey merely directed Wellmore to fraudulently declare *force majeure*, but done nothing further, it is likely that Mr. Caperton would have found a buyer for the Harman Companies, which would have saved them from bankruptcy and saved Mr. Caperton from personal financial ruin. Indeed, Black Diamond, the company that ultimately purchased Wellmore from Massey, had previously expressed an interest in purchasing the Harman Companies. Massey, however, prevented any such deal by engaging Black Diamond as a buyer for Wellmore and then ordering Black Diamond not to communicate with representatives of Harman regarding its possible acquisition. Massey's directive to Black Diamond is just one example of an act by Massey that was wholly unrelated to the CSA and, in the absence of which, the Harman Companies may well have avoided bankruptcy.

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[9]By focusing on Massey's actions that were outside the scope of, or not done "in connection with," the CSA, I do not intend to diminish the importance of the fraudulent declaration of *force majeure*. There can be no doubt that Massey used that fraudulent declaration to place the Harman Companies in a financially vulnerable position which forced them to negotiate with Massey. That declaration, however, was not the proximate cause of the damages that occurred in this case, and by focusing solely on it, the majority ignores the importance of the other acts undertaken by Massey.

Similarly, had Mr. Caperton not shut down the Harman Companies' operations in mid-January, in reliance on Massey's fraudulent representations that it intended to close the deal by January 31, 1998, Mr. Caperton and the Harman Companies' financial distress would not have been as urgent or immediate as it was. With a little more time, they could have found another buyer for their extremely valuable coal.[10] As part of its scheme, however, starting in November 1997, Massey consistently led Mr. Caperton to believe that the parties would reach a deal for the sale of Mr. Caperton's interest in the Harman Companies' and, thus, Massey effectively prevented Mr. Caperton and the Harman Companies from seeking other buyers or pursuing other avenues for relief. Clearly, Massey's misrepresentations regarding its intent to reach a sale agreement, as well as its failure to follow through on the agreed-to closing date for this sale, bear no relation to the CSA. The actions did, however, directly lead to the Harman Companies' and Mr. Caperton's declarations of bankruptcy.

Finally, Massey's use of confidential information, obtained during the sale negotiations with Mr. Caperton, to purchase the narrow band of coal reserves surrounding the Harman Companies' mine, provides another example of conduct unrelated to any aspect of the CSA. As admitted by Massey in its own internal documents, this purchase ensured that the Harman Companies' property would be unattractive to all potential buyers other than

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[10]Massey documents acknowledged that the quality of the Harman Companies' coal exceeded the quality of Massey's own most valuable reserves.

Massey. Clearly, such action was yet another aspect of Massey's fraudulent scheme to ensure the Harman Companies' total collapse, and to further Massey's goal of gaining access to the Harman Companies' valuable coal reserves.

Accordingly, the majority is wrong when it concludes that, "in absence of the declaration of *force majeure*, the Harman Companies would not have been forced into bankruptcy and their prospective contractual relationships would not have been impeded by Massey." Rather, the facts indicate that Massey's fraudulent conduct neither began nor ended with that wrongful declaration and that it was Massey's misrepresentations and concealments made in connection with the proposed sale of Mr. Caperton's interest in the Harman Companies that directly caused their demise. The majority, however, makes no attempt to explain why all of Massey's conduct unrelated to the CSA can be characterized as flowing from the fraudulent declaration of *force majeure*. Like many of its other determinations, the majority simply makes conclusory statements without any support or reasoning.

C. A Better Approach

Importantly, this case involves *fraud*, rather than an act of negligence or straightforward breach of contract. Courts in many other jurisdictions have refused to enforce forum-selection clauses where the plaintiff has asserted claims of wide-ranging *fraudulent* conduct. In such cases, the court considering the forum-selection clause

concluded that the "gist" of the asserted claims exceeded the scope of the contract containing the forum-selection clause and, thus, the court refused to allow the defendant to benefit from the clause.

In *Farmland Industries, Inc. v. Frazier-Parrott Commodities, Inc.*, 806 F.2d 848 (8th Cir. 1986) (*abrogated on other grounds by Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495 (1989)), the United States Court of Appeals for the Eighth Circuit affirmed a district court decision that the enforcement of a forum-selection clause would be unreasonable given that not all of the plaintiff's claims arose directly or indirectly from the agreement containing the clause. In that case, plaintiff Farmland Industries, Inc. ("Farmland"), an agricultural cooperative corporation, contracted with the defendants, commodity brokerage firms, to open several commodity futures trading accounts. *Id.* at 849. The contract, which was signed in May 1985, contained a very broad forum-selection clause which bound Farmland to bring any judicial action "arising directly, indirectly, or otherwise in connection with, out of, related to or from this Agreement or any transaction covered hereby or otherwise arising in connection with the relationship between the parties . . . " in Cook County, Illinois. *Id.*

In its complaint, Farmland alleged that prior to entering into the May 1985 contract, the defendants had engaged in various fraudulent activities, including a kick-back scheme in which several of the defendants would receive money for every closed contract on Farmland's commodities account. Farmland further alleged that the defendants had

created a sham corporation to receive the kickbacks, and that some of Farmland's favorable commodities contracts had been transferred to an account set up for the sham corporation. *Id.* After discovering the fraudulent conduct, Farmland filed suit in the District Court for the Western District of Missouri, alleging fraud, breach of fiduciary duty, and violations of several federal statutes, including the Racketeer Influenced and Corrupt Organizations Act ("RICO"). *Id.* The defendants sought to dismiss the case based on improper venue pursuant to the forum-selection clause. *Id.*

In reviewing the case, the Eighth Circuit concluded that *the scope of the claims raised in the suit was broader than the scope of the forum-selection clause*. *Id.* at 852. It found that:

> Plaintiff has alleged an elaborate scheme of fraud involving not only Heinold [a party to the contract containing the clause] and individuals associated with Heinold, but also involving other individuals outside the securities brokerages, sham corporations, and other matters not subject to the agreement between plaintiff and Heinold.

Id. Thus, the Eighth Circuit agreed with the district court that not all of Farmland's claims arose directly or even indirectly from the contract, and "Farmland could not have anticipated having to litigate these claims in Illinois." *Id.* It further found that "Farmland's multiple claims were not intended to evade the forum selection clause," and that, although some of the claims were directly related to the contract containing the clause, it made no sense to

transfer just those claims to the designated forum, thereby mandating the "piecemeal" resolution of the case. *Id.* Consequently, it affirmed the district court's decision.

Similarly, in *Armco Inc. v. North Atlantic Insurance Company Limited*, 68 F. Supp. 2d 330 (S.D.N.Y. 1999), the district court for the Southern District of New York concluded that a forum-selection clause would not dictate venue in a case in which the plaintiff had alleged a fraudulent course of conduct by the defendants which pre-dated the signing of the clause-containing contract. In *Armco*, the plaintiff asserted common law fraud, conversion, breach of fiduciary duty, and violations of RICO, stemming from an alleged fraudulent scheme associated with the sale of several of its subsidiaries. *Id.* at 333. Prior to the sale, which was designed to be a management buy-out, several of the plaintiffs' employees entered into a secret agreement with the purchasers to eventually become joint-owners of the subsidiaries. *Id.* at 333-34. The plaintiffs alleged that, instead of being the product of an arms-length negotiation, the sale was "part of a wide-ranging conspiracy to defraud Armco and its affiliates out of millions of dollars." *Id.* at 334. They further asserted that the fraudulent conduct commenced before the contract was entered into, and continued after the sale had been completed. *Id.*

The sale contract in *Armco* included a forum-selection clause, stating that "the parties irrevocably submit themselves to the exclusive jurisdiction of the English Courts to settle any dispute which may arise out of or in connection with this Agreement." *Id.* at 338.

After the plaintiff initiated suit in the Southern District of New York, the defendant moved to dismiss asserting improper venue based on the clause. *Id.* at 333. The district court, however, concluded that the action did not "arise out of" or "in connection with" the sale contract. *Id.* at 338. It noted that the plaintiffs were not suing for breach of contract, alleging any lack of performance, or otherwise disputing either party's rights or obligations under the contract, but were instead alleging "a series of fraudulent activities that included the negotiation and execution of the subject Sale Contract." *Id.* Indeed, the action "arose out of the alleged wide ranging fraud, including numerous acts committed before the execution of the Sale Contract." *Id.* Thus, it concluded, "*the 'gist' of plaintiffs' claims is not the breach of a contractual relationship, but the series of acts by defendants resulting in the fraud*." *Id.* at 339 (emphasis added). Importantly, it noted that the signing of the sale contract was "merely one important aspect" of the defendant's fraudulent scheme. *Id.* at 340.

I find the reasoning of the courts in *Farmland* and *Armco* compelling and the better view for this Court to have adopted in the instant case. Similar to the defendants in those cases, Massey engaged in a wide-ranging, fraudulent course of conduct for the purposes of obtaining access to new sources of metallurgical coal and new purchasers for that coal, while eliminating one of its competitors, the Harman Companies, in the process. To that end, Massey engaged in a series of acts, of which the declaration of *force majeure* was "merely one important aspect." *See Armco,* 68 F. Supp. 2d at 340. Like the defendants in *Armco*, who initiated their fraudulent plan before the sale contract was signed, Massey

developed and initiated its fraudulent scheme prior to fraudulently declaring *force majeure*, and its fraudulent conduct continued after that declaration until it had financially ruined the Harman Companies and Mr. Caperton. Despite the clear evidence of the wide-ranging scope of Massey's fraudulent conduct, the majority concludes that Massey's conduct that was unrelated to the CSA did not, by itself, produce the ultimate injury, and thus it should be disregarded. Under *Farmland* and *Armco,* however, the entire course of conduct should be considered in determining the scope of the claims.

Underlying the holdings in these cases is the proposition that courts should not reward wrong-doers by allowing them to benefit from contracts with which they have fraudulently interfered. Indeed, it is an immense irony that Massey, in directing the fraudulent declaration of *force majeure*, treated the CSA like it was not worth the paper it was written on. Yet in its now successful effort to wreak corporate and personal financial ruin on the Harman Companies and Mr. Caperton, Massey embraces the contract and its forum-selection clause almost amorously. The majority encourages this behavior by callously allowing Massey to benefit from the contract it sought to destroy.

III. Retroactive Application of the New Principles of Law

Even if the majority was correct that, under its new law relating to the enforceability of forum-selection clauses, this suit should have been brought in Virginia, it is clearly unjust to enforce the new principles of law in this case, particularly by doing so

without remanding the case for application of the new test by the circuit court. Indeed, I am at a complete loss to understand how the majority can allow Massey to benefit–to the tune of more than fifty million dollars plus interest–from a forum-selection clause contained in a contract that Massey actively sought to destroy. That the majority considers the application of the forum-selection clause in this case to be an "equitable result" is beyond comprehension.

A. Due Process Violation

As previously discussed, the majority adopts a brand new legal test for determining the validity and applicability of a forum-selection clause, a test which necessarily requires findings of fact. The majority, however, refuses to remand the case for application of the test by the circuit court. Instead, flying in the face of clear precedent, the majority makes its own findings of fact in applying the test, without providing the plaintiffs any opportunity to establish an appropriate evidentiary record. Accordingly, because the plaintiffs did not have a crystal ball during the early stages of this case, they are precluded from even attempting to comport with the new legal principles set forth by the majority.

It is well-settled 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." *Brinkerhoff-Faris Trust & Savings v. Hill*, 281 U.S. 673, 682 (1930). Nevertheless, that is exactly what the majority has done

here. Indeed, by enunciating new principles of law and applying them to the case at hand, instead of remanding the case to the circuit court for further evidentiary analysis, the majority violates the plaintiffs' due process rights.

As stated by former West Virginia Supreme Court Justice Joseph P. Albright, Jr., in his dissenting opinion in this case following the majority's April 4, 2008, opinion:

> [w]hen a new burden is placed on a party as part of that new law and the party charged with carrying the burden is not permitted an opportunity to go forward with evidence to meet that burden, procedural due process guarantees are violated . . . There is absolutely no way that the corporate appellees or Mr. Caperton could have heretofore attempted to meet the burden the new standard imposes in order to overcome the presumption of validity. The majority affords no opportunity after announcing the new standard for the affected parties to meet the newly established burden. Obviously, Appellees' rights to due process have been abridged.

Caperton v. A.T. Massey Coal Co., Inc., 223 W. Va. 624, 679 S.E.2d 223, 278-79 (2008) (Albright, J., dissenting). I agree with Justice Albright's assessment that, by depriving the plaintiffs of the opportunity to prove, under the majority's new test, that enforcement of the forum-selection clause in this case is inappropriate, the majority deprives the plaintiffs of their opportunity to protect their rights and, thus, violates due process principles.

B. New Retroactive Application Test

The majority now concludes that the existing test for determining when to retroactively apply a newly established principle of law, set forth in *Bradley v. Appalachian*

Power Co., 163 W. Va. 332, 256 S.E.2d 879 (1979), is insufficient for the case at hand,[11] because "the *Bradley* test is narrowly confined to deciding whether to retroactively apply a new principle of law that was created in a case that overruled prior precedent." Thus, the majority, relying on the United States Supreme Court's decision in *Chevron Oil Company v. Huson*, 404 U.S. 97 (1971), *overruled by Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993), now sets forth a new test designed for situations in which the new principle of law addresses an issue of first impression, rather than overturning prior precedent:

> First, we will determine whether the new principle of law was an issue of first impression whose resolution was clearly foreshadowed. Second, we must determine whether or not the purpose and effect of the new rule will be enhanced or retarded by applying the rule retroactively. Finally, we will determine whether full retroactivity of the new rule would produce substantial inequitable results.

In applying this test to the instant case, the majority finds that its new principles of law relating to forum-selection clauses were "clearly foreshadowed," that the purpose of the new principles is furthered by applying them retroactively, and that retroactive application is not inequitable.

The majority's application of its new retroactivity test to the instant case, however, is arbitrary and unjust. Indeed, when applied to this case, even the new test clearly weighs *against* retroactive application. Not only are the majority's new principles of law

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[11] Remarkably, in every instance that existing law and longstanding precedent stood in the way of the result reached by the majority, it simply altered the law accordingly.

relating to forum-selection clauses not "clearly foreshadowed," enforcement of these new principles plainly produces a "substantially inequitable result."

1. Decision Not "Clearly Foreshadowed"

According to the majority, whether the *resolution* of a new principle of law has been "clearly foreshadowed" turns solely on whether a party should have known that the Court *might address* the issue of first impression. Thus, in the majority's view, the presence or absence of "clear foreshadowing" applies only to whether the Court may decide to resolve the issue at all and no foreshadowing is necessary of what the actual new law might be.[12]

To this end, the majority, quoting an intermediate appellate court from Michigan, holds that "[a]ll that is required is some indication by a prior decision of this Court or a national trend that would 'put persons on notice that [this Court] could resolve the issue either way[.]" *Collins v. Dept. of Corr.*, 421 N.W.2d 657, 659 (Mich. App. 1988). It then finds "clear foreshadowing" in this Court's prior pronouncement, made more than twenty-eight years ago, in the footnote in *Keyser* that indicated that "contract clauses which affect matters such as jurisdiction and the like should be carefully analyzed." 166 W. Va. at 461 n. 2, 275 S.E.2d at 291 n. 2.

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[12]Taken to its logical conclusion, under the majority's interpretation, *every* unresolved area of law would be "clearly foreshadowed" because the public should expect that issues of first impression will be, by there very nature, addressed by this Court when raised for the first time. Clearly, such interpretation renders the first element of this test superfluous and the concept of foreshadowing meaningless.

It is absurd for this Court to find that dicta contained in a nearly thirty-year-old footnote that merely advised courts considering contract clauses on "jurisdiction and the like" to analyze them carefully, *clearly foreshadows* the majority's complete overhaul of this Court's law relating to forum-selection clauses. This is particularly absurd given the context of this case, in which the party seeking to enforce the clause engaged in a wide-ranging fraudulent scheme resulting, in part, in the fraudulent breach of the contract containing that clause.[13] Moreover, this Court has specifically de-emphasized placing any importance on language contained in footnotes, stating that "language in a footnote generally should be considered obiter dicta which, by definition, is language 'unnecessary to the decision in the case and therefore not precedential.' Black's Law Dictionary 1100 (7th ed.1999)."[14] *State*

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[13]A more reasonable interpretation of *Keyser*'s footnote comes from a reading of its complete text, in which the Court indirectly indicates that courts in West Virginia will only enforce forum-selection clauses when such enforcement is "found to be reasonable and just." *Id.* at 461 n. 2, 275 S.E.2d at 292 n. 2. (*quoting Leasewell, Ltd. v. Jake Shelton Ford Inc.*, 423 F. Supp. 1011, 1015 (S.D.W. Va.1976)).

[14]As the Court further explained in *Doe*,

[d]icta is defined by Black's Law Dictionary as:

> Opinions of a judge which do not embody the resolution or determination of the specific case before the court. Expressions in court's opinions which go beyond the facts before court and therefore are individual views of author of opinion and not binding in subsequent cases. *State ex rel. Foster v. Naftalin*, 246 Minn. 181, 74 N.W.2d 249.

Black's Law Dictionary 454 (6th ed.1990); *see* 20 Am.Jur.2d *Courts* § 39 (defining dicta as "expressions of opinion which are not necessary to support the decision reached by the court"). The phrase, "obiter dicta,"which translates

(continued...)

ex rel. Medical Assurance of West Virginia, Inc., v. Recht, 213 W. Va. 457, 471, 583 S.E.2d 80, 94 (2003). Thus, the majority's finding that the *Keyser* footnote provides the "clear foreshadowing" necessary to retroactively apply the new legal principles announced in this case is simply another example of how the majority blatantly manipulates the law to achieve its desired outcome.

I additionally find no support for the majority's interpretation of foreshadowing in the case on which it primarily relies, *Professional Insurance Corp. v. Sutherland*, 700 So. 2d 347 (Ala. 1997). In *Southerland*, the Alabama Supreme Court *overruled prior precedent* holding that "outbound"[15] forum-selection clauses were *per se* void. In retroactively applying its new rule upholding such clauses to the case before it, the court stated that the parties should have been forewarned that it would re-consider this prior precedent because of an "overwhelming" national trend to enforce such clauses, initiated by the United States

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[14](...continued)
to "a remark by the way," is often shortened to just dicta and similarly references those comments or observations of a judge regarding a point that is incidental or collateral to the direct issue before the court or upon an analogous point introduced by way of illustration but not necessary to the determination of the instant case. *See* Black's Law Dictionary 1072 (6th ed.1990).

210 W. Va. at 494-95, 558 S.E.2d at 294-95 (footnote omitted).

[15]The Alabama Supreme Court in *Sutherland* defined an "outbound" forum selection as "one providing for trial outside of Alabama, while an 'inbound' clause provides for trial inside Alabama." *Id.* at 348 n. 1.

Supreme Court decision in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). *Id.* at 352. The Alabama Supreme Court concluded:

> That nationwide trend foreshadowed our adoption today of the rule that such clauses are not per se void, providing notice that Alabama might follow suit and thereby reducing the reliance these plaintiffs could reasonably have placed upon the continued viability of the traditional rule in Alabama.

Id.

Contrary to the majority's assertion, the "foreshadowing" that the Alabama Supreme Court relied on for applying the new rule retroactively did not merely alert the parties to the fact that the court may overrule prior precedent on the issue, but clearly pointed to the new rule that would be adopted. Indeed, as the Alabama Supreme Court noted, only three other states still held the view that "outbound" forum selection clauses are *per se* invalid and unenforceable, and two of those so held because of their interpretation of state statutes. *Id.* at 350. Thus, the national trend described in *Sutherland* not only foreshadowed the court's inclination to re-address prior precedent, but also provided a clear indication of what the new rule adopted by that court would be.

A second case cited by the majority, *Founder v. Cabinet for Human Resources*, 23 S.W.3d 221, 224 (Ky Ct. App. 1999), provides another good example of foreshadowing. In *Founder*, the Court of Appeals of Kentucky retroactively applied a decision of the Kentucky Supreme Court in *Vawzkoroni v. Domino's Pizza, Inc.*, Ky., 914 S.W.2d 341

(1995), to Founder's case, even though Founder had filed his suit prior to the decision in *Vaezkoroni*. *Id.* at 224. The court of appeals concluded that Founder should have been on notice that the law in this area would change, because the holding of *Vaezkoroni* had been clearly foreshadowed by a prior opinion of that court. *Id.* That prior opinion had narrowed the previously existing precedent, and pointed in the direction that the *Vaezkoroni* opinion then confirmed. *Id.* Thus, the court of appeals held that retroactive application was appropriate in that case. Once again, the foreshadowing that existed in Founder not only indicated that the Court would address a particular area of law, but further pointed in the direction the new law would go.

This Court has itself properly applied the foreshadowing test when previously addressing retroactivity under *Bradley,* 163 W. Va. 332, 256 S.E.2d 879. For example, in *Richmond v. Levin*, 219 W. Va. 512, 518, 637 S.E.2d 610, 616 (2006), this Court applied the *Bradley* test and concluded that a particular holding had been clearly foreshadowed because:

> The prior decisions of this Court clearly establish that we have not permitted the legislature to enact statutes that are inconsistent with and governed by rules promulgated under our Rule-Making authority. Consequently, it should have been reasonably foreshadowed that this Court would invalidate the jury requirements of W. Va. Code § 55-7B-6d, because those requirements conflicted with the Rules of Civil Procedure.

Thus, the new rule announced in *Richmond* was clearly foreshadowed because this Court's prior holdings "clearly" indicated the direction in which the Court was moving with regard to that particular area of law.

In the case at hand, however, no prior decisions of this Court provide any foreshadowing whatsoever that this Court would be adopting any new legal principles relating to forum-selection clauses, much less those that have been adopted in this case. To say that the majority's new test was "clearly foreshadowed" requires great poetic license and a true stretch of the imagination.

2. Application Creates Substantially Inequitable Results

I vehemently disagree with the majority's conclusion that no "inequitable result" ensues from applying its new principles of law to the suit at issue. A jury, after considering all the evidence relating to the *merits* of the case, found Massey guilty of tortiously interfering with the plaintiffs' existing contracts, as well as making fraudulent misrepresentations and engaging in fraudulent concealment. It awarded the plaintiffs more than fifty million dollars in damages. As previously stated, much of that verdict would have gone to repaying the Harman Companies' creditors, who were also victims of Massey's conduct. To reverse such a verdict on the basis of a circuit court's decision on *venue–an issue wholly unrelated to the merits of the case–*cannot be fair or equitable, particularly without having given the plaintiffs an opportunity to prove, under the new principles of law, that the forum-selection clause in this case should not have been enforced. This injustice is further exacerbated by the fact that the applicable statutes of limitations prohibit the Harman Companies and Mr. Caperton from bringing their claims in Virginia, where the majority now

holds they should have been brought. Thus, the plaintiffs are left without ***any*** recourse against Massey's illegal behavior.

In support of its conclusion that retroactive application of the new legal principles is equitable in this case, the majority merely states that "there is no evidence in the record to show that the forum-selection clause involved in this case was not freely bargained for by the actual signatories to the agreement." This incredibly narrow and result-oriented view of what makes the retroactive application of a new point of law "inequitable" is very troubling. The majority once again refuses to consider the fact that Massey was being sued because of its *fraudulent course of conduct*, one important element of which was its breach of the very contract that contained the forum-selection clause. *To allow a party that engages in such fraudulent behavior to then benefit from the contract that it sought to destroy is the very definition of inequitable.* Accordingly, "substantial inequitable results" are produced by the retroactive application of the majority's new legal principles and the new law should not be retroactively enforced in this case.

IV. Conclusion

In sum, because Massey engaged in a wide-ranging fraudulent scheme to destroy the Harman Companies and Mr. Caperton for its own financial gain, and because many of the acts engaged in by Massey to further that scheme bore absolutely no relation to the CSA, legal claims based on those acts should not be controlled by the forum-selection

clause. Furthermore, under *Farmland* and *Armco*, even claims that partially relate to the fraudulent declaration of *force majeure* should be exempt from the forum-selection clause, because, given the wide-ranging scope of Massey's conduct in furtherance of that scheme, the "gist" of the plaintiffs' suit exceeds the scope of the CSA. For these reasons, the forum-selection clause should not be enforced in this case.

Furthermore, the majority's new standard of review is inappropriate, given that its new test for determining the enforceability of forum-selection clauses requires findings of fact. Where a circuit is asked to make factual determinations, this Court should afford those determinations the deference traditionally given. Incredibly, the majority not only fails to give deference, but chooses to make those findings of fact itself by applying its new forum-selection clause test in this case and, in doing so, it deprives the plaintiffs of their due process right to present evidence to establish that the forum-selection clause should not be enforced.

Thus, I oppose the majority's decision to retroactively apply the new principles of law relating to forum-selection clauses, a decision that deprives the plaintiffs and other victims of Massey's conduct of any possible redress. Indeed, even under the majority's newly stated retroactivity test, retroactive application is inappropriate in the instant case because the majority's new principles of law were not "clearly foreshadowed," and applying

them to this case produces a "substantial inequitable result." For these reasons, I respectfully dissent.