NOTICE: On April 3, 2008 the Court granted a petition for rehearing in this matter. This opinion is therefore withdrawn and no longer effective.

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

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Benjamin, J., concurring:

Roscoe Pound offered the following pertinent comments as to a judge's responsibility when dissenting:

> The opinions of the judge of a highest court of a state are no place for intemperate denunciation of the judge's colleagues, violent invective, attributings of bad motives to the majority of the court, and insinuations of incompetence, negligence, prejudice, or obtuseness of fellow members of the court.

Roscoe Pound, *Cacoethes Dissentiendi*: The Heated Judicial Dissent, 39 A.B.A. J. 794, 795 (1953). There is an important difference between a thoughtful, well-reasoned separate opinion and one which is grounded in the political manipulation of legal doctrine; and in the case of ensuring a stable, predictable and fair judicial system, that difference matters. Judges who use their opinions simply as sensationalistic bombast by

which to convey partisan agendas or who pander to emotion rather than legal reason do a disservice to the rule of law and to the institution they serve.

It is a testament to the strength of our justice system that judges may disagree and do so openly in separate opinions. A well-reasoned and legally sound separate opinion carries with it the opportunity for pointing out differences with the opinions of the other members of the court without undermining public confidence in the judiciary. Hon. Ruth Bader Ginsburg, Speaking in a Judicial Voice, 67 N.Y.U. L.Rev. 1185, 1196 (1992). By furthering positive progress in the development of law, a well-honed opinion serves as an invaluable instructional tool to judges, lawyers, legal scholars, law students and even to a judge's colleagues. "[T]he effective judge . . . strives to persuade, and not to pontificate. [He] speaks in 'a moderate and restrained' voice, engaging in a dialogue with, not a diatribe against . . . [his] own colleagues." *Id*. at 1186 (internal quotations omitted). A separate opinion should never "generate more heat than light", but rather should "'stand on its own footing', . . . spell[ing] out differences without jeopardizing collegiality or public respect for and confidence in the judiciary." *Id*. at 1194, 1196 (internal quotations omitted).

It is difficult to respond to my colleague Justice Starcher's dissenting opinion with legal arguments since Justice Starcher identifies no legal support for his dissent. I would observe that emotion-laden verbiage which could easily be perceived as

showing an apparent grudge or personal animosity should never serve as the basis for a separate opinion at the appellate level.

Because the majority decision possesses such a deep strength of legal authority, I do not believe that either of the dissenting opinions in any way weaken the authority of the Court's decision. I believe the dissenting opinions lack logical rigor and legal support. By baiting emotions, the dissents adopt a "political voice" rather than a "judicial voice." Resorts to emotions and sensationalism generally betray the lack of a cogent legal basis for one's criticism.

With due respect to my dissenting colleagues, this case does not present a close call on the basis of the rule of law. It simply does not. In this regard, I will focus on two particular aspects of this case. First, Virginia law supports applying res judicata in circumstances where both tort and contract claims are asserted. Second, the majority opinion correctly establishes that the appellate standard of review for "the applicability and enforceability of a forum-selection clause is *de novo*." Syl. pt. 2, maj. op.

1. Virginia law supports applying res judicata to cases involving both tort and contract causes of action. In his dissenting opinion, Justice Albright asserts that the instant action is not barred by res judicata because, under Virginia law, a plaintiff is not required to bring contract and tort causes of action in the same law suit. This reasoning is

flawed. Virginia has traditionally applied the transactional approach to the identity of the "cause of action" element of the test for applying the doctrine of res judicata:

> The Virginia Supreme Court applies the. . . transactional analysis in considering the scope of a transaction for the application of res judicata . . . . In *Trout v. Commonwealth Transp. Commissioner*, 241 Va. 69, 73, 400 S.E.2d 172 (1991), the Supreme discussed this broad transactional concept:
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> > An "action" and a "cause of action" are quite different. "Action" is defined by Code § 8.01-2, as noted above.[1] We define "cause of action" in *Roller v. Basic Construction Co.*, 238 Va. 321, 327, 384 S.E.2d 323, 326 (1989), as "a set of operative facts which under the substantive law, may give rise to a right of action."
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> Virginia follows the transaction rule set forth in the Restatement of Judgments 2d, § 24 for purposes of defining "cause of action." One "cause of action" may give rise to myriad rights of action, *e.g.*, breach of contract, breach of warranty, negligence, and statutory claims; however, if the rights of action arise from the same operative set of facts and could legally be asserted therein, they are all the same "cause of action" for purposes of the application of the doctrine of res judicata.

Lake Holiday Country Club, Inc. v. Teets, Nos. 00-44, 00-46 & 00-47, 00-70, 2001 WL 34037926, at *7 (Va. Cir. Ct. 2001).

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[1]Pursuant to Va. Code Ann. § 8.01-2, "'Action' and 'suit' may be used interchangeably and shall include all civil proceedings whether upon claims at law, in equity, or statutory in nature and whether in circuit courts or district courts."

In the 2003 case of *Davis v. Marshall Homes, Inc.*, 265 Va. 159, 576 S.E.2d 504 (2003), the Supreme Court of Virginia departed from the transactional approach. In *Davis*, the court was asked to decide whether a contract claim was barred by the doctrine of res judicata due to an earlier tort action. The *Davis* court applied a "same evidence" test, stating that "'[t]he test to determine whether claims are part of a single cause of action is whether the same evidence is necessary to prove each claim.'" *Davis*, 265 Va. at 167, 576 S.E.2d at 507. Ultimately, the court concluded that because the contract claim required different proof than the earlier tort action, it was *not* barred by res judicata. Clearly, the *Davis* court had to reject the transactional approach, in favor of the "same evidence" test, in order to find the contract claim was not barred by res judicata. However, the significance of the *Davis* case lies not it its conclusions, but in the fact that its reasoning was subsequently rejected by the Supreme Court of Virginia when that court adopted Rule 1:6 of the Rules of the Supreme Court of Virginia and thereby returned to the transactional approach previously applied in Virginia.[2] Thus, the *Davis* opinion has

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[2]Indeed, Justice Albright's reasoning is undermined by the plain language of Rule 1:6, which bars a subsequent claim that arises from the same conduct that has been involved in an earlier litigation, regardless of whether the claim was actually asserted in the earlier suit:

> A party whose claim for relief arising from identified conduct, a transaction, or an occurrence, is decided on the merits by a final judgment, shall be forever barred from prosecuting any second or subsequent civil action against the same opposing party or parties *on any claim or cause of action that arises from that same conduct, transaction or occurrence, whether or not the legal theory or rights asserted in the second or subsequent action were raised in the prior lawsuit, and regardless of the*

been viewed as a departure from the traditional res judicata law of Virginia and has been superceded by judicial rule. *See Virginia Imps., Ltd. v. Kirin Brewery of Am., LLC*, 50 Va. App. 395, 410 n.6, 650 S.E.2d 554, 561 n.6 (2007) (declaring that Rule 1:6 was promulgated to supersede the holding in *Davis*). As the majority opinion correctly notes, under the transactional approach that is applied pursuant to Virginia law, because the claims asserted in the instant action arise from the same operative set of facts, the Boone County action is barred by res judicata.

2. The proper standard for appellate review of forum selection clauses is *de novo*. Justice Albright also finds fault with the de novo standard of review set out by the majority opinion. Again, he is simply wrong. To the extent that a determination of the applicability of a forum selection clause may require this Court to review factual determinations made by a circuit court, our review of those specific determinations would be for "plain error." *See* Syl. pt. 2, in part, *Walker v. West Virginia Ethics Comm'n*, 201 W. Va. 108, 492 S.E.2d 167 (1997) ("[W]e review the circuit court's underlying factual findings under a clearly erroneous standard."). Nevertheless, this Court often applies multi-faceted standards of review. Thus, while certain elements of an analysis, should they exist, might require deferential scrutiny, our overarching review of the general

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> *legal elements or the evidence upon which any claims in the prior proceeding depended, or the particular remedies sought. . . .*

"applicability and enforceability" of a forum-selection clause is *de novo*." Syl. pt. 2, maj. op. *See, also*, *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 384 (2d Cir. 2007) ("Where the district court has relied on pleadings and affidavits to grant a Rule 12(b)(3) motion to dismiss on the basis of a forum selection clause, our review is *de novo*. In analyzing whether the plaintiff has made the requisite prima facie showing that venue is proper, we view all the facts in a light most favorable to plaintiff. Contract interpretation as a question of law is also reviewed *de novo* on appeal." (internal citations omitted)); *Cowatch v. Sym-Tech Inc*., No. 07-2582, 2007 WL 3257238, at *1 (3d Cir. 2007) ("Our review of the District Court's construction of the forum selection clause is plenary." (quoting *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1216 (3d Cir.1991)); *Kochert v. Adagen Med. Int'l, Inc*., 491 F.3d 674, 677 (7th Cir. 2007) ("The district court's order granting Adagen's Rule 12(b)(3) motion for improper venue based on the contractual forum-selection clause is subject to de novo review." (citation omitted)); Calix-Chacon v. Global Int'l Marine, Inc., 493 F.3d 507, 510 (5th Cir. 2007) ("[T]he enforcement of a forum selection clause is an issue of law, and we review the district court's conclusions of law de novo." (quoting *MacPhail v. Oceaneering Int'l, Inc*., 302 F.3d 274, 278 (5th Cir.2002)); *Preferred Capital, Inc. v. Associates in Urology*, 453 F.3d 718, 721 (6th Cir. 2006) ("We also note that 'the enforceability of a forum selection clause is a question of law that we review de novo.'" (quoting *Baker v. LeBoeuf, Lamb, Leiby & Macrae*, 105 F.3d 1102, 1104 (6th Cir.1997)); *American Soda, LLP v. U.S. Filter Wastewater Group, Inc*., 428 F.3d 921, 925 (10th Cir. 2005) ("We review the enforceability of a forum

selection clause de novo.) (citing *K & V Scientific Co. v. BMW*, 314 F.3d 494, 497 (10th Cir.2002)); *Silva v. Encyclopedia Britannica, Inc*., 239 F.3d 385, 387 (1st Cir. 2001) ("We review a district court's dismissal based on a forum-selection clause de novo."); *Terra Int'l, Inc. v. Mississippi Chem. Corp*., 119 F.3d 688, 691-92 (8th Cir. 1997) ("In the case at hand, neither party challenges the validity of the forum selection clause; rather, they contest the specific meaning of the language used in the forum selection clause. . . . [W]e conclude that de novo review is the appropriate standard for reviewing a district court's interpretation of the specific terms contained in a forum selection clause. ."). In the instant case, the forum selection clause was reviewed in the context of a motion to dismiss. In this context, there simply were no factual determinations made by the circuit court that required deferential review.

For these reasons, I concur in the majority opinion.