IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ALEX ENERGY, INC., et al.,

Plaintiffs/Respondents,

v.

Appeal No. _______
Raleigh Co. Civil Action Nos. 09-C-187
09-C-188
09-C-189
09-C-209
09-C-210

ANTRIM LAURA CASKEY, et al.,

Defendants/Petitioners.

PETITION FOR APPEAL

Roger D. Forman (WV Bar #1249)
Thomas A. Rist (WV Bar# 9100)
FORMAN & RIST, L.C.
100 Capitol Street, Suite 400
Charleston, WV 25301
304-346-6300
Counsel for all Petitioners except Chad Stevens

Robert M. Bastress, Esquire
P.O. Box 1295
Morgantown, WV 26507-1295
304-293-5308
Counsel for Chad Stevens

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KIND OF PROCEEDINGS AND NATURE OF RULINGS BELOW

This appeal is brought from a number of rulings issued by the Honorable Robert Burnside, Judge, regarding civil disobedience activities (trespasses) which have occurred in Raleigh County, West Virginia. These non-violent actions have been in an effort to halt the irreparable damage caused by mountain top removal.

The rulings which are challenged are as follows:

(1) the July 16, 2009 ruling granting a preliminary injunction;

(2) the September 24, 2009 rulings which:

- a. find Alex Energy respondents in contempt of court;
- b. deny defendants'/respondents' motion to vacate the findings of contempt;
- c. deny defendants' motion to vacate the temporary restraining orders;
- d. deny defendants' motion for attorney fees and costs;
- e. deny defendants' motion for increase of or forfeiture of bond;
- f. award fees and costs to plaintiffs;
- g. deny defendants' motion to vacate the temporary restraining orders.

All of these rulings are erroneous and narrowly premised upon Judge Burnside's limited view of the balance of harm. All erroneous rulings are tied to the two temporary restraining orders [hereinafter "TROs"] which were issued before the appellants were represented by

counsel.[1]

These TROs are overbroad in scope as they apply to parties who were not plaintiffs, parties who were not on notice of the TROs nor subject to them and restrain activities outside of Raleigh County and West Virginia.

It is based upon these clearly overbroad TROs that all other Court Order are premised. Because of the overbreadth and because of the lack of evidentiary support for the Court's rulings we seek reversal of the Orders which were entered below.

FACTS

All of the circumstances and orders below from which defendants appeal related to trespasses which have been alleged against defendants.[2]

On March 6, 2009, plaintiffs, Goals Coal Company and Alex Energy - d/b/a Edwight Mining Company - brought on and was granted a temporary restraining order against Joseph Gorman, Cassandra Jo Rice, Nicle Motson, Andrew Munn, Chad Stevens, and Matthew Louis-Rosenberg. This TRO was directed against defendants for a trespass which allegedly occurred on plaintiffs' coal mine property in Raleigh County.

On February 27, 2009, plaintiffs, Alex Energy - d/b/a Edwight Mining Company, Independence Coal Co., and Marfork Coal Co. brought and obtained a TRO against Antrim

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[1]There are two TROs at issue on this appeal; one in 09-C-209B and 09-C-210B, entered by Judge Burnside on March 6, 2009, against Joseph A. Gorman, Cassandra J. Rice, Andrew R. Munn, Nicole R. Motson, and Matthew S. Louis-Rosenberg and another entered on February 27, 2009 by the Hon. John Hutchinson, Judge, in case No. 09-C-189B against Antrim L. Caskey, Glen Collins, James Gerard McGuiness, Rory McIlmoil, Michael Lee Roselle, and Chad Stevens. The cases were subsequently consolidated and heard by Judge Burnside.

[2]And respondents as well.

Laura Caskey, Glen Collins, James Gerard McGuiness, Rory McIlmoil, Michael Roselle, and Chad Stevens.

All defendants were unrepresented at the time of the issuance of the TROs.

Defendants were able to obtain counsel before May 1, 2009, and on April 23, 2009, defendants, by counsel, brought a motion to vacate the TROs. The grounds asserted were:

1. The TROs were overbroad and arguably enjoined the entire world from taking actions against a non party, Massey Coal Company;

2. The TROs ordered the State Police to remove defendants from all Massey property and are defective as to notice provisions;

3. The TROs were vague in that they enjoin unknown others from taking action.

On May 1, 2009, a hearing was held on an order to show cause why defendants and others should not be held in contempt of the TROs. Said action was brought against the defendants and also against 4 respondents who were not previously named in any of the TROs, but were alleged to have trespassed on April 16, 2009, those persons are William Wickham, Charles Suggs, Jordan Freeman, and Madeline Gardner.[3]

The Court held a hearing on contempt on May 1, 2009. It did not at that time consider the motion to vacate the TROs.

At the conclusion of the contempt hearing, plaintiffs admitted that they had no evidence to find the March 5, 2009 protesters in contempt. Those are Joseph Gorman, Cassandra Jo Rice, Nicole Motson, and Matthew Louis-Rosenberg. (May 1, 2009 Hearing Transcript, pg. 253-254).

Those who were held in contempt were Antrim Laura Caskey, Jordan Freeman, William

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[3]Antrim Laura Caskey was also named as a participant in the April 16, 2009 action.

Wickham, Charles Suggs, and Madeline Gardner. The finding of contempt was announced from the bench by Judge Burnside at the conclusion of the May 1, 2009 hearing. It was further confirmed in writing by Judge Burnside in an Order entered on September 24, 2009, wherein the "contemnors" were each fined $500.00 payable to Alex Energy and also found liable for attorney's fees and expenses of $18,827.10 to be payed to plaintiffs' counsel.[4]

A hearing was held before Judge Burnside on June 1 and June 2, 2009. After the hearing the Court issued a preliminary injunction on July 17, 2009 and as noted above, issued another series of orders on September 24, 2009. It is from all of these orders which defendants appeal.

ASSIGNMENTS OF ERROR

1. The temporary restraining orders which were issued in this case were clearly overbroad and unconstitutional. They should have been set aside.

2. The contempt finding and the associated penalties were contrary to established law and precedent. Persons not even legally subject to the TROs were punished.

    a. Ms. Caskey, as photojournalist, and Mr. Stevens, as a documentary film maker, are also not subject to contempt as they were not participating in any illegal action and should not be punished because the TRO was overbroad.

3. The preliminary injunction should never have been issued. It is void or voidable.

[4]These punitive sanctions have been stayed by the Court pending further ruling.

POINTS AND AUTHORITIES

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DISCUSSION OF THE LAW

1. The TROs which were issued in this case were clearly overbroad and unconstitutional. They should have been set aside.

It is well established that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." Califano v. Yamasaki, 442 U.S. 682, 702, 99 S.Ct. 2545. Here, the plaintiff(s) went and got temporary restraining orders which were clearly overbroad and therefore unenforceable.

A review of the language of the TROs in these combined cases makes the issue of overbreadth quite obvious. They enjoin defendants and others from all Massey mines. Massey is not a plaintiff. It is a parent corporation of plaintiff mining companies. Massey has mines in counties other than Raleigh and in other states besides West Virginia. This Court's ruling in Meadows v. Hey, 399 S.E.2d 657 (1990) makes it unmistakably clear that courts cannot enjoin activity but in the county were they sit. See also State ex rel. Chafin v. England, 97 W.Va. 679, 125 S.E.2d 813 (1924); First National Bank v. McGraw, 87 W.Va. 74, 104 S.E.2d 91 (1920). These TROs are incredible in the illegality of their scope. They enjoin non-parties from trespassing and doing other acts on property of non-parties wherever in the world they may be located.

The TROs were also utilized to find contempt and the record does not establish that proper service was made upon Madeline Gardner, Jordan Freeman, William Wickham, or Charles Suggs as they were "served" by leaving a copy with Antrim Caskey.

Gardner, Jordan, Freeman, and Wickham were not named defendants and they were not properly served pursuant to Rule 4 of the West Virginia Rules of Civil Procedure.

Since the TROs were overbroad, and not properly served, they should have been vacated and should not have served as the source of a contempt finding. It is inconceivable that parties who were not restrained could be held in contempt of a restraining order. That is not fair or just.

A. Defendants-Appellants Gardner, Freeman, Wickham and Suggs did not receive notice or opportunity to be heard on the TROs issued by Judge Burnside and Judge Hutchinson, which invalidates that TRO's injunction against them.

The West Virginia Supreme Court held in United Mine Workers v. Waters, 489 S.E.2d

266, 274 (1997) that when ex parte preliminary injunctive relief is granted without notice or opportunity to be heard, it is an invalid from of injunctive relief that should not be enforced and should be vacated. The petitioner in Waters claimed in defense of its application that it knew only the names of picketers who should be enjoined. The trial court granted the injunction accordingly. This Court determined the petitioner's self-imposed limitation on knowledge and the trial court's subsequent ex parte issuance of injunctive relief was unreasonable, because the petitioner knew the identity of the union local, and was fully aware of contact telephone numbers for the union and its local, and therefore should have used the telephone to discern the identities and addresses for each picketer, from which legally effective service could have been made. Waters, 489 S.E.2d at 274.

Here, Madeline Gardner, Jordan Freeman, William Wickham and Charles Suggs were never "served" with the temporary restraining orders and were served with notice of the contempt hearing merely by leaving copies of the moving papers with Antrim Caskey. See Transcript of June 2, 2009 proceedings ("June 2, 2009 Tr.") at page 428 lines 17-23, and at page 430 line 20 through page 434 line 9. Ms. Gardner and Messrs. Freeman, Wickham and Suggs were not presented with service by mail at their own domiciles, nor were they personally served.

The Respondents' refusal to investigate where Ms. Gardner and Messrs. Freeman, Wickham and Suggs were located for proper personal services is not significantly different than the situation presented in Waters, where the petitioner lazily refused to investigate the locations of the respondents for services, and instead simply named them as defendants in the injunction moving papers and proceeded ex parte. Just as this Court struck down the injunction in Waters, it should do so here with respect to the TROs and contempt finding issued against Ms. Gardner

and Messrs. Freeman, Wickham and Suggs.

During the June 1-2, 2009 hearing, counsel for Plaintiffs/Respondents argued that Defendants/Appellants should not be heard to contest the TRO's service or its substance because they had permitted an extension of the expiration date on the TRO. See June 2, 2009 Tr. at p 442, line 5 through p 443 line 9; and again at p 449 line 18 through p 450 line 8. Counsel's argument is specious, because this Court already had held that such arguments carry no weight. As stated by this Court in Camden-Clark Memorial Hospital v. Turner:

> Turning to the facts of this case, first we note that this Court does not agree with the earlier ruling of the circuit court, since mooted by subsequent decision, that Ms. Turner somehow waived her right to object to the temporary restraining order when she agreed to extend it beyond the deadline. As noted, Rule 65 states that temporary restraining order will expire no later than ten days after issue, unless, before its expirations, the court extends it for another ten days, or unless "the party against whom the order is directed consents that it may be extended for a longer period." Id. In the instant matter, the court granted the temporary restraining order on May 10, 2001. Ms. Turner sought a hearing within ten days, but could not get one. Although she was under no obligation to do so, she agreed to extend that temporary restraining order. Clearly, agreeing to extend the term of the temporary restraining order does not waive the subject party's right to contest the temporary restraining order, or any subsequent injunction.

Camden-Clark Memorial Hospital v. Turner, 575 S.E.2d 362 (2002) (emphasis added). The Camden-Clark case makes it clear that agreeing to extend the deadline of a TRO does not constitute a waiver of objections to the TRO's substantive provisions.

The trial court appears to have grounded its June 2, 2009 decisions upholding the TROs and granting a preliminary injunction at least partly on the Plaintiffs' counsel's argument related to the TRO deadline extension. See June 2, 2009 Tr. At p 451 line 8 through 452 line 14. To that extent, the trial court's decision was erroneous, and should be vacated or reversed.

B. The scope of the TROs was over-broad, which renders them invalid as to all

parties named therein.

In United Maintenance & Mfg. v. United Steelworkers of America, 204 S.E.2d 76 (1974), this Court held that an injunction can be issued to prevent disorder, but it must be specifically directed to acts or conduct designed to accomplish an illegal purpose, and cannot extend to or prohibit free speech.

The March 9 and February 27, 2009 TROs at issue here were overbroad in their scope, and were not sufficiently tailored to allow free speech by any of the named affected parties. As stated in the TROs, the affected parties were prohibited from:

> (a) Trespassing or otherwise congregating on any of the mining properties of corporate entities affiliated with A.T. Massey Coal Company, Inc. and Massey Energy Company, including but not limited to the Beetree Surface Mine and Edwight Surface mine properties in Raleigh County, West Virginia.
>
> (b) Interfering, obstructing, blocking, impeding or tampering with any coal operating equipment, trucks or other vehicles of any of the corporate entities affiliated with A.T. Massey Coal Company, Inc. and Massey Energy Company, including but not limited to Plaintiffs, no matter where such equipment, trucks or other vehicle may be located; and
>
> (c) Doing any other unlawful act of any kind to interfere with or prevent Plaintiffs from conducting their businesses in a lawful manner.

The provisions of paragraphs (a) and (b) are overbroad in scope because they relate to "any of the mining properties" owned by the Plaintiffs and others, "no matter where [they] may be located." They trial court did not explain the justification for making the TRO extend outside

West Virginia's state boundary, and this is a live issue because the Plaintiffs own mining properties in the adjacent state of Virginia and in other nearby states. Plaintiffs did not present evidence showing a need for extraordinary, extra-territorial scope, nor does the record contain evidence of the court's independent analysis concluding that such extra-territorial scope is desirable or permissible here.

Additionally, the TROs' scope includes protections for entities that are somehow affiliated with the Plaintiffs - but yet none of these additionally protected entities is among the named plaintiffs. These affiliated entities did not appear in application of the TRO, nor did Plaintiffs produce evidence that the affiliated entities had been harmed to date by the Defendants' activity. West Virginia law clearly requires that temporary injunctive relief be tailored narrowly to the specific harms in play. United Maintenance & Mfg., supra; see also Powhatan Coal and Coke v. Ritz, 56 S.E. 257 (1906). In so far as the TROs' scope extended to entities who had not suffered any alleged trespassing by any of the Defendants named in the TROs, they were overbroad and improperly issued. The overbroad TROs should have been nullified, and the preliminary injunction should have been tailored not to cover entities that were not affected at all by Defendants' conduct.

2. The contempt finding and the associated penalties were contrary to established law and precedent. Persons not even legally subject to the TROs were punished.

The contempt finding is offensive to justice. It holds 4 people who were not subject to or notified of the TROs in contempt of court for violation of said TROs.

There is no proof that Freeman, Gardner, Suggs, or Wickham had notice of the TROs or acted in concert with Caskey. The testimony that was presented to the circuit court supports our

arugments. It at best shows that Freeman, Suggs, Gardner, and Wickham were independent actors who simply told Ms. Caskey of their plans after they were made because Caskey is a photojournalist . There is no evidence that Caskey participated in any of the planning for the protest of April 16, 2009. The evidence is that Ms. Caskey was tipped off on a story because she has been covering the news of the devastation caused by mountain top removal for years. If there was trespass, nothing Caskey did contributed to said act. Her actions caused no harm.

In Chase National Bank v. City of Norwalk, 291 U.S. 431, 437 (1934), the U.S. Supreme Court ruled that it would be error ". . .to make punishable as a contempt the conduct of persons who act independently and whose rights have not been adjudged according to law." Obviously, this ruling suggests that Freeman, Gardner, Suggs and Wickham should not be held in contempt.

In further support of appellants' position is the case of Alemite Manufacturing Corp. v. Staff, 42 F.2d 832, 833 (2d Cir. 1930), where the Court held that the mere doing of an act which is prohibited is not grounds for contempt. "It is not the act described which the decree may forbid, but that act when the defendant does it."

Hendershot v. Handlon, 248 S.E.2d 273 (W.Va. 1978), the case cited to the circuit court by plaintiffs and relied upon by Judge Burnside, is a domestic relations case and not on point. In Hendershot this Court held as to the contempt at page 274, ". . . he had actual notice of the Court's decision . . . . It seems apparent that because of his relationship to his son and, having physical custody of the child, he was acting in concert with him to frustrate the Court's Order."

Appellants understand that they were charged with a trespass and that they must respond to that charge. That is the way to deal with them. They cannot be held in contempt of any order which did not involve or name them. Said order is void as to them, and this Court should reverse

the circuit court. Wickham, Gardner, Suggs and Freeman's actions did not reach the level of involvement found in Hendershot. They did not have notice as required of the temporary restraining orders. They may have known vaguely about the orders relating to others, not about them.

The Hendershot ruling requires more in order to find a non-party in contempt. Hendershot had actual notice of the Court's decision on custody and had physical custody of the child and secreted the child. He was acting with knowledge and in concert to frustrate the Court's Order.

Contrast that to the fact that Ms. Caskey was named in one of the injunctions. The evidence here is not that they acted with her in any way but to tip her off because they knew she was reporting on mountain top removal.

Mr. Noerpel, not a person restrained, picked the four planners up and drove them with Caskey to the vicinity of the mine. Ms. Caskey did not protest. The best evidence is that she as a photojournalist testified:

> "A. No, I was not planning on going to the dam to protest. I'm an independent photojournalist and I'm a reporter and I'm covering the events. I'm not a protester, I'm not an activist. I'm a reporter."

and

> "A. No, that's still incorrect. I was not invited to go protest. I was alerted of a protest because it's germane to my work, to a body of work that's been going on for over four years. I was invited to cover the protest, which I did." (Transcript of hearing on Plaintiffs' Motion for Issuance of Order to Show Cause, May 1, 2009, pp. 74, 75.)

There is no evidence from any other witness to the contrary.

In conjunction with the finding of contempt, there were oppressive fines and attorney fees which could be financially ruinous to defendants.

The court entered an order on September 24, 2009, saddling defendants with plaintiffs' attorney fees and costs totaling $19,266.30 against Ms. Caskey, Mr. Freeman, Ms. Gardner, Mr. Suggs, and Mr. Wickham. They were also fined a civil penalty of $500.00 each for contempt by order of September 24, 2009. They did not result from a jury trial, which was requested. The court refused said jury trial and acted as judge, jury and executioner.

Considering all of the circumstances surrounding the overbreadth of the temporary restraining orders and the nature of the activity of the defendants, the defective service on the defendants, these fines and fee awards to plaintiffs are not sustainable as a matter of law.

A. Ms. Caskey, as photojournalist, and Mr. Stevens as a documentary film maker, are also not subject to contempt as they were not participating in any illegal action and should not be punished because the TRO was overbroad.

Ms. Caskey should be absolved from any contempt because of the overbreadth of the TRO, which was alleged to have been violated on April 16, 2009.

As noted above, Ms. Caskey was not a part of the action, but a photojournalist.

Ms. Caskey has an important 1st Amendment job to perform. She is putting out the truth about the evils and dangers of mountain top removal. Said practice is a crime against the Earth. As long as the coal companies remain powerful, the truth will be hindered without Ms. Caskey's heroic, self-sacrificing investigative photo journalism.

There is a moral imperative and a historical perspective that goes far beyond the narrow view that makes property rights "supreme" as was perceived by Judge Burnside. Court's, when considering constitutional rights, often engage in balancing tests. If we recognize that property

rights are not absolute and balance the interests herein, it is obvious that the press interests outweigh plaintiffs' property rights since Ms. Caskey's presence did nothing to forward anyone else's trespass. Ms. Caskey's presence merely documented a critical situation which would otherwise have gone unreported.

Ms. Caskey testified that she got a call the day before the protest of April 16, 2009. She was invited to cover the protest (May 1, 2009 Tr. p 58). She is an independent photo journalist and covers events as a servant. (May 1, 2009 Tr. p 74).

Ms. Caskey is involved solely as a reporter. She's documented the harm and environmental costs of mountain top removal. (May 1, 2009 Tr. p 175-176).

There are even ethical underpinnings that allowed photo journalist Elizabeth Rubin to report on and become embedded with the Taliban (May 1, 2009 Tr. p 179). Ms. Caskey eloquently testified, "we give voice to the voiceless. We pay attention to social and community justice issues, and that's where my work is focused." (May 1, 2009 Tr. p 181)

There are many other important issue that can be raised in defense of Ms. Caskey and others. They are acting out of the biblical imperative to protect the Earth as plaintiff continues to destroy it.

In light of the horrible acts of plaintiffs in destroying planet Earth for their own profit, it is imperative that Ms. Caskey be applauded not punished for documenting the horrors of mountain top removal mining.

Ms. Caskey's only involvement with plaintiffs has been in the process of documenting for others the realities of mountain top mining and the destruction it causes. She is also the primary photo journalist who is documenting the protest movement. Ms. Caskey's work in that regard was clearly protected by the First Amendment to the United States Constitution and by article III,

section 7 of the West Virginia Constitution, see Branzburg v. Hayes, 408 U.S. 665 (1972); State ex rel. Hudok v. Henry, 182 W.Va. 500, 389 U.S.2d 188 (1989). Ms. Caskey has not interfered with any operations of the plaintiff, has not engaged in any tortious activity, and should not be enjoined. Ms. Caskey's work is documented in Dragline, copy attached as addendum.[5]

3. The preliminary injunction should never have been issued. It is void or voidable.

It is plaintiffs' burden to show that they are entitled to a preliminary injunction, Camden-Clark Memorial Hospital v. Turner, 212 W.Va 752, 575 S.E.2d 362 (2002).

I. Plaintiffs cannot establish that they are threatened with any irreparable injury that would justify the issuance of any injunctive relief.

A "central limiting principle[] of equity [is] that equity will act only when there is no adequate remedy at law. The injunction is an equitable remedy, and [thus] is available only once it is shown that the legal remedies are inadequate[.]" OWEN M. FISS, INJUNCTIONS 9 (1972). Such is the case in West Virginia, e.g., Camden-Clark Memorial Hospital, supra, 212 W.Va. 366, 575 S.E.2d at 757; Moore v. Hamilton, 93 W.Va. 529, 117 S.E. 229 (1923); Hurvitz v. Lopinsky, 92 W.Va. 21, 114 S.E. 439 (1922), as it is throughout Anglo-American jurisdictions. E.g., JOHN F. DOBBYN, INJUNCTIONS IN A NUTSHELL 34-38 (1974); FISS, supra at 9-27. Were it otherwise, plaintiffs could manipulate the civil system to deprive defendants of their constitutional right to trial by a jury of their peers. West Virginia Constitution, Article III, § § 10 & 13; DOBBYN, supra at 35.

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[5]Dragline was published in 2010 and was not available for inclusion in the record. Petitioners have requested permission of the Court to add Dragline as an addendum to this Petition for Appeal.

In this case, plaintiffs clearly have an adequate remedy at law for any trespass violations. Plaintiffs can bring a tort action to recover damages for any injury that may have been caused by the actions of trespassers to plaintiffs' property and for any losses suffered because of trespassers' obstructions. "Viewed as a mere trespass . . ., the wrong is remedial by the ordinary legal possessory actions. There is no element of irreparable injury." Briar Creek Railway Company v. The Kanawha Central Railway Company, 70 W.Va. 226, 232, 73 S.E. 726, 728 (1912); accord, Huffman v. Chedester, 126 W.Va. 73, 27 S.E.2d 272 (1943). Plaintiffs cannot only be made whole through such a civil action – and it should be noted that the plaintiffs do seek damages in this case – but that would also permit the court and jury to focus liability on those who actually caused injury (if there be any) to the plaintiffs. That measure would be far preferable to the imposition of the blunderbuss injunction obtained by the plaintiffs in this case, which could ensnare unsuspecting and innocent persons in its reach.

II. Equity will not ordinarily enjoin criminal conduct.

As a general proposition, injunctions do not issue against criminal law violations. E.g., Diamond v. Diamond, 372 Pa. 562, 94 S.2d 569 (1953); DOBBYN, supra at 57. While there are exceptions to deal with exceptional circumstances (such as when the targeted criminal conduct constitutes a nuisance or endangers life), no such circumstances exist in this case. And they certainly do not apply to defendants Caskey and Stevens, who engaged in no conduct injurious to the plaintiffs and did not threaten to engage in any such conduct.

Rather than rely on the adequate alternative remedy provided by the criminal process – which has been invoked against the defendants – plaintiffs seek a forum that does not provide the protections afforded by the criminal courts. Those protections include the rights to counsel, to have counsel provided by the State if a defendant cannot afford one, to a trial by jury, and to the

reasonable doubt standard of proof. The absence of those rights in a court of equity preclude it form issuing injunctive relief, absent some overriding and specifically proved circumstances.

III. In deciding whether to grant plaintiffs' motion for a preliminary injunction, the court should balance any irreparable injury that plaintiffs will suffer if the motion is denied against any harm that defendants will endure if it is granted, while taking into account the substantiality of plaintiffs' claim on the merits and the public interest.

In Jefferson County Board of Education v. Jefferson County Education Association, 183 W.Va. 15, 24, 393 S.E.2d 653, 662 (1990), this Court "recognized the necessity of a balancing of hardship test" to determine whether to issue a preliminary injunction. That test was set forth in Syllabus Point 4 of State ex rel. Donley v. Baker, 112 W.Va. 263, 164 S.E. 154 (1932); "The granting or refusal of an injunction, whether mandatory or preventive, calls for the exercise of sound judicial discretion in view of all the circumstances of the particular case; regard being had to the nature of the controversy, the object for which the injunction is being sought, and the comparative hardship or convenience to the respective parties involved in the award or denial of the writ." Accord, Camden-Clark Memorial Hospital v. Turner, supra, 212 W.Va. at 366,, 575 S.E.2d at 757. The Jefferson County Court elaborated that this approach was "similar" to that which "has evolved in the federal courts," 183 W.Va. at 24, 393 S.E.2d at 662, and which provides:

> Under the balance of hardship test the [trial] court must consider, in "flexible interplay," the following four factors in determining whether to issue a preliminary injunction: (1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest."

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley, 756 F.2d 1048, 1054 (4th Cir. 1985), citing Blackwelder Furniture Co. v. Seilig Mfg. Co., 550 F.2d 189, 193-96 (4th Cir. 1977);

accord, State ex rel. McGraw v. Imperial Marketing, 196 W.Va. 346, 352 n.8, 472 S.E.2d 792, 798 n.8 (1996).

IV. Plaintiffs were not entitled to a preliminary injunction.

A. The speculative and reparable injury that plaintiffs might suffer upon denial of their motion pales in comparison to the harm to defendants and to the public if granted.

If the Court had declined to enjoin the defendants from "trespassing . . . on any of the mining properties" of Massey Coal Company or it affiliates or from "obstructing" their operations, Plaintiffs' Prayer for Relief, Complaint at 17, plaintiffs would in all likelihood have suffered no injury at all.

The broad and sweeping injunction entered by the court chills Ms. Caskey, Mr. Stevens, and others from engaging in legitimate and constitutionally protected newsgathering activity. Branzburg, supra, Hudok, supra. To the extent that that occurs, the public will be deprived of information that it might otherwise have attained – and will be the worse for it.

The issuance of the injunction in this case accomplished no useful purpose, but encourages the plaintiffs to continue to harass the defendants with costly, time consuming, and unfounded litigation. Plaintiffs have every right to seek compensation for any actual losses they might have incurred from unlawful trespasses, but they have no right to use a court of equity to harass and intimidate individuals who protest against plaintiffs' highly controversial mining methods or who document such protests. Massey Coal Company and its affiliates face no irreparable harm from any of the defendants.

The balance of harms in this case clearly weighed in on the side of denying the motion for a preliminary injunction.

B. Plaintiffs are not likely to prevail on the merits against defendants.

For the reasons stated in Parts I and II, supra, the plaintiffs will not, as a matter of law, be entitled to permanent injunctive relief against defendants.

C. The public interest is best advanced by reversing the preliminary injunction order.

Coal mining and energy production, and their interaction with the environment, are matters of pressing public concern in West Virginia and in this country. Citizens need to know the facts about those issues; they need to see what are the costs and consequences of energy production and what are the alternatives. Defendants Caskey and Stevens' journalistic work regarding mountain top removal will promote public awareness about the issue and, hence, will serve the public interest. Her work illustrates why we accord protection through the First Amendment to the United States Constitution and Article III, § 7 of the West Virginia Constitution to journalists engaged in newsgathering and publishing. E.g., New York Times v. Sullivan, 376 U.S. 254 (1964); State ex rel. Hudok v. Henry, supra. A court of equity must ensure, as this Court requires, that an "injunction must be specifically directed to acts or conduct which are designed to accomplish an illegal purpose, and not include those which keep within the area of free speech." Wheeling Park Commission v. Hotel and Restaurant Employees International Union, 198 W.Va. 215, 226, 479 S.E.2d 876, 887 (1996).

The public interest is served by reversing Judge Burnside's Order.

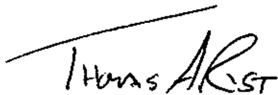
D. The preliminary injunction has been in place since July 17, 2009 and no other action has taken place by plaintiffs to schedule this matter for further proceedings. As a matter of law, the delay which has occurred in moving these cases to resolution warrants dismissal of the preliminary injunction.

CONCLUSION

The appellants hereby requests that this Court hear their case, and upon so doing reverse

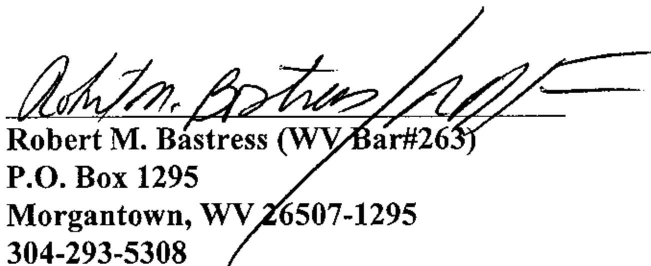
the decisions of Judge Burnside and Judge Hutchinson in awarding temporary restraining orders, reverse the decision of Judge Burnside finding appellants in contempt, reverse the decisions awarding plaintiffs fees and fines and do justice as is required.

Antrim Laura Caskey, Glenn Collins, James Gerard McGuiness, Rory McIlmoil, Michael Lee Roselle, Joseph Andrew Gorman, Casandra Jo Rice, Andrew R. Munn, Nicole Ruth Motson, <u>and Matthew Solomon Louis-Rosenberg</u>
By counsel



Roger D. Forman (WV Bar #1249)
Thomas A. Rist (WV Bar#9100)
FORMAN & RIST, L.C.
100 Capitol Street, Ste. 400
Charleston, WV 25301
304-346-6300

<u>Chad Stevens</u>
By counsel



Robert M. Bastress (WV Bar#263)
P.O. Box 1295
Morgantown, WV 26507-1295
304-293-5308

IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

ALEX ENERGY, INC., et al.

Plaintiffs

v. **Civil Action No. 09-C-187, 188, 189, 209, 210**

ANTRIM LAURA CASKEY, et al.,

Defendants.

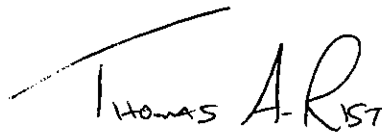
CERTIFICATE OF SERVICE

I, Roger D. Forman, do hereby certify that service of the foregoing Petition for Appeal has been made this 2nd day of March, 2010, by first class mail, postage prepaid, on the following:

Samuel M. Brock, Esquire
Spilman Thomas & Battle
300 Kanawha Blvd., East
Charleston, WV 25301

Robert M. Bastress, Esquire
P.O. Box 1295
Morgantown, WV 26507-1295

John David Wooton, Jr., Esquire
The Wooton Law Firm
201 Kanawha Street
Beckley, WV 25801



Roger D. Forman (WV Bar #1249)
Thomas A. Rist (WV Bar#9100)
FORMAN & RIST, L.C.
100 Capitol Street, Suite 400
Charleston, WV 25301
304-346-6300