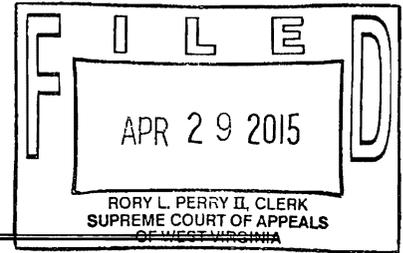


No. 14-1210



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

GEOLOGICAL ASSESSMENT & LEASING AND WILLIAM CAPOUILLEZ

Petitioners,

v.

MICHAEL C. O'HARA AND DEIRDRE J. O'HARA

Respondents.

From the Circuit Court of Ohio County, West Virginia
Civil Action No. 13-C-246

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

SUMMARY OF ARGUMENT1

ARGUMENT2

 A. Standard of Review2

 B. Argument in Opposition to Cross-Assignments of Error2

 1. Respondents’ claims are governed by the valid and enforceable
 arbitration provisions contained within the Lease2

 2. Petitioners are parties to the Lease and therefore have standing to
 enforce its arbitration provisions5

 C. Respondents failed to rebut the Circuit Court’s carving out an arbitration
 exception for civil claims alleging the unauthorized practice of law6

CONCLUSION.....8

TABLE OF AUTHORITIES

Cases	Page(s)
<u>AT&T Mobility LLC v. Concepcion</u> , 131 S.Ct. 1740, 179 L. Ed. 2d 742 (2011)	8
<u>American Recovery Corp. v. Computerized Thermal Imaging</u> , 96 F.3d 88 (4 th Cir. 1996).....	5
<u>Carter v. Monsanto Co.</u> , 575 S.E.2d 342 (W.Va. 2002)	1
<u>Grayiel v. Appalachian Energy Partners</u> , 736 S.E.2d 91 (W.Va. 2012).....	2
<u>J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.</u> , 863 F.3d 315 (4 th Cir. 1988)	3
<u>Lawson v. Life of the South Ins. Co.</u> , 648 F.3d 1166 (11 th Cir. 2011)	4
<u>Legalzoom.com, Inc., v. Jonathan McIllwain</u> , 2013 Ark. 370, 429 S.E. 2d 26 (2013)	8
<u>Long v. Silver</u> , 248 F.3d 309 (4 th Cir. 2001)	5
<u>McMahon v. Advanced Title Services Co. of WV</u> , 607 S.E.2d 519 (W.Va. 2004)	6,7
<u>Nitro-Lift Technologies, L.L.C. v. Eddie Lee Howard</u> , 133 S. Ct. 500, 184 L. Ed. 2d 328 (2012) 8	
<u>Painter v. Peavy</u> , 451 S.E.2d 755 (W.Va. 1994).....	2
<u>State ex rel. Frieson v. Isner</u> , 285 S.E.2d 641 (W.Va. 1981).....	7
<u>State ex rel. TD Ameritrade v. Kaufman</u> , 692 S.E.2d 293 (W. Va. 2010)	4
<u>United States Fidelity Guaranty Co. v. Eades</u> , 144 S.E. 2d 703 (W.Va. 1965).....	2
<u>United Steelworkers v. Warrior & Gulf Navigation Co.</u> , 363 U.S. 574 (1960)	3
<u>United Textile Workers of America v. Newberry Mills, Inc.</u> , 315 F.2d 217 (4 th Cir. 1963).....	3

SUMMARY OF ARGUMENT

Despite Respondents' attempts to characterize their Complaint as one arising solely from a *Landowner Representation Contract*, there is no evidence that the herein parties ever entered into that agreement.¹ Equally important is the fact that the parties, along with Great Lakes Energy Partners, LLC, nka Range Resources-Appalachia, LLC ("Range"), are all signatories to the oil and gas lease ("Lease") entered into on June 6, 2006. The underlying dispute unequivocally arises out of and is related to this Lease, which contains an enforceable arbitration provision.

Respondents filed the underlying action seeking civil monetary damages, alleging tortious conduct, i.e. the unauthorized practice of law, on the part of the Petitioners.² Thus, in order for Respondents' claim to proceed, *in any forum*, they must have been damaged or harmed in some way. See Carter v. Monsanto Co., 212 W.Va. 732, 737, 575 S.E.2d 342, 347 (2002) ("[B]efore one can recover under a tort theory of liability, he or she must prove each of the four elements of a tort: duty, breach, causation, and **damages.**") (emphasis added). Respondents' damages, to the extent any could possibly exist, are governed or dictated by the Lease. In fact, the underlying Complaint expressly requests a declaration that the money paid to Petitioners by Range, pursuant to the Lease, be disgorged. In other words, Respondents' claims cannot and do not stand independently from the Lease, as it is the Lease that resulted in the very payment to Petitioners that Respondents now seek to have revoked. The profits cannot be disgorged without an interpretation of the Lease, which the parties expressly agreed would only be performed by a panel of arbitrators.

¹ Exhibit B to *Plaintiffs' Response to Defendants' Motion to Compel*, Appendix, pp. A84-A86 is blank and not signed by Mr. Capouillez or any member of the O'Hara family.

² Respondents are seeking to recover money, to which they claim a right, which has been paid to Respondents pursuant to a contractual obligation within the lease.

ARGUMENT

A. Standard of Review

The parties appear to be in agreement that the review of the Order from the Circuit Court in this matter is *de novo*. See Syl. Pt. 1, Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994) (“A Circuit Court’s entry of Summary Judgment is reviewed *de novo*.”); see also Grayiel v. Appalachian Energy Partners 2001-D, LLP, 230 W. Va. 91, 736 S.E.2d 91 (2012) (citing Syl. Pt. 4, United States Fidelity & Guaranty Co. v. Eades, 150 W. Va. 238, 144 S.E.2d 703 (1965)).

B. Argument in Opposition to Cross-Assignments of Error

1. Respondents’ claims are governed by the valid and enforceable arbitration provisions contained within the Lease

Judge Gaughan’s finding that the arbitration clause in the Lease was valid and enforceable was not error. Respondents claim the entire Lease is not relevant to the underlying dispute, instead seeking to shift the Court’s focus to a representation contract between the herein parties. However, there is considerable factual dispute and an undeveloped record regarding the status and nature of any applicable landowner representation contract. After all, the very *Landowner Representation Contract* referenced in the Respondents’ brief is unsigned, seriously calling into question the relevance of *this* document. Either way, however, the underlying claims fall within the arbitration provision contained in the Lease and are thus subject to arbitration.

The Lease dictates the payment terms to both Respondents and Petitioners and contains a separate paragraph titled “ARBITRATION” which provides: “**any controversy or claim arising out of or relating to this Lease, or the breach thereof, shall be ascertained by three (3) disinterested arbitrators...**” (Appendix p. A40) (emphasis added). The Respondents’ claims simply could not exist absent the Lease and therefore clearly fall within the scope of the arbitration clause because they arise out of the Lease. Specifically, Respondents have alleged the

Petitioners have engaged in the unauthorized practice of law by negotiating and procuring a lucrative oil and gas contract for them and they somehow suffered financial harm as a result. (See generally, Plaintiff's Complaint, Appendix pp. A1-A9). Moreover, they specifically state as follows:

- ... Plaintiffs entered into an oral or written agreement (Agreement) with Defendants, wherein the Defendants were to act as Plaintiffs' "consultants" and representatives in matters related to the procurement, negotiation, execution, and performance of an oil and gas lease.
- On or about June 6, 2006, Michael C. O'Hara and Dierdre J. O'Hara signed an oil and gas lease (Lease) with Great Lakes Energy Partners, LLC...leasing their oil and gas interests in and to the subject 44.94 acre parcel of land. Defendant, Capouillez, signed the Lease as "Consultant" to Plaintiffs...
- During the course of their "consulting" activities performed pursuant to the Agreement, Defendants, *inter alia*, instructed and advised Plaintiffs regarding their rights and obligations **under the Lease...gave advice on various lease provisions...[and] engaged in oil and gas lease negotiations on Plaintiffs' behalf with Range...** (Emphasis added).

(Plaintiffs' Complaint at ¶¶ 8-10, Appendix pp. A2 - A3). Thus, Respondents' own pleading reveals just how intertwined their claims are with the Lease.³

To the extent that the Court has any hesitation as to whether the Respondents' claims against the Petitioners fall within the scope of the agreement, the law mandates that "parties are bound to arbitrate all matters, not explicitly excluded, that reasonably fit within the language used." United Textile Workers of America v. Newberry Mills, Inc., 315 F.2d 217, 219 (4th Cir. 1963), cert. denied, 375 U.S. 818, 84 S.Ct. 54, 11 L. Ed.2d 53 (1963). See also United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-583, 4 L. Ed.2d 1409, 80 S. Ct. 1347 (1960) (parties should be required to arbitrate "unless it may be said with positive

³ Respondents have attempted to frame the issue as being the *Landowner Representation Contract* versus the Lease. However, the test is not whether the claim arose under one agreement or the other, "but whether a significant relationship exists between the claim and **the agreement containing the arbitration clause.**" J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.3d 315, 321 (4th Cir. 1988) (emphasis added).

assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of [arbitration]”).

Therefore, regardless of the applicability or relevancy of the unsigned *Landowner Representation Contract*, this dispute exists solely because the parties entered into a contract containing an arbitration provision on June 6, 2006. Thus, pursuant to State ex rel. TD Ameritrade, Inc. v. Kaufman, 225 W.Va. 250, 692 S.E.2d 293 (2010), Respondents’ claim must be submitted to arbitration as the arbitration agreement is valid and the dispute falls within the scope of the arbitration agreement.

Respondents cite Lawson v. Life of the South Ins. Co., 648 F.3d 1166 (11th Cir. 2011) to support their argument that the dispute does not fall within the scope of the Lease. Lawson is easily distinguishable in that, unlike here, the party attempting to enforce an arbitration provision was merely a third-party beneficiary and not actually a signatory to the loan agreement containing the arbitration provision. Also unlike here, the dispute between the parties in Lawson was triggered by the plaintiff’s claim for a refund of unearned premiums due under a life insurance policy. Thus, the loan agreement from which the contractual relationship between the parties initially sprung, and that contained an arbitration clause, did not dictate the plaintiff’s damages. In other words, the dispute among the parties in Lawson could proceed in the absence of the contract containing the arbitration provision. Here, Respondents have no claim for damages in the absence of the Lease.

2. Petitioners are parties to the Lease and therefore have standing to enforce its arbitration provisions

Respondents' second cross-assignment of error is their claim that Petitioners lack standing to enforce the arbitration provisions within the Lease as they are not parties to the Lease. They argue that the Petitioner, William Capouillez, signed the lease as a "consultant" on the last page of the lease, but claim that he did so "solely to ensure that he would receive any monies owed to him directly from the gas company..." Respondents' argument either overlooks or simply chooses to ignore that the Lease, by its plain and unambiguous terms, makes Mr. Capouillez more than a mere signatory beneficiary.

Respondents' argument that the Petitioners are merely third-parties beneficiaries is misplaced. As noted in the Petitioners' Brief, in addition to the signature page, the lease referenced the consultant in Paragraphs 3.1, 3.4, 5.1, 5.2, 6.2, 13.1, 14.1, 15.1, 15.9, 17.1, 18.1 and 19.1 (Appendix pp. A33-A38). These Paragraphs reveal that, in fact, Petitioners have certain duties and obligations imposed upon them under the Lease.⁴ Moreover, "the intentions of parties to an arbitration agreement are generously construed in favor of arbitrability." American Recovery Corp. v. Computerized Thermal Imaging, 96 F.3d 88, 94 (4th Cir. 1996). *See also Long v. Silver*, 248 F.3d 309, 320 (4th Cir. 2001) (Because all the parties in the present litigation were signatories to the [] Agreement, the issues arising under and related to [it] are properly arbitrable.").

⁴ As demonstrated above, Petitioners were actual signatories and more than third-party beneficiaries to the Lease. The cases cited by Respondent to support their third-party beneficiary argument are all easily distinguishable as the courts in those cases were faced with the question of whether a non-signatory to a contract was a third-party beneficiary entitled to avail himself of an arbitration provision contained within the contract.

C. Respondents failed to rebut the Circuit Court's carving out an arbitration exception for civil claims alleging the unauthorized practice of law

Petitioners do not contest that the Courts of West Virginia have authority to define the practice of law and/or to provide the definition of the unauthorized practice of law. However, this inherent authority does not preclude private citizens from agreeing to arbitrate disputes, regardless of the nature of the claim.⁵ Rather, the body of law in West Virginia that has developed in this area and is cited by Respondents in their brief has been decided within the context of the Division of Powers Clause of the Constitution of West Virginia. Courts have consistently maintained that the power to define and regulate the practice of law is exclusive to the judiciary rather than the legislative or executive branches of government. Respondents have cited no West Virginia authority, nor is it believed that any exists, that limits whether disputes involving claims for the unauthorized practice of law may be submitted to arbitration.

In attempting to demonstrate that the lower court did not carve out an arbitration exception for claims alleging the unauthorized practice of law, Respondents seek to use McMahon v. Advanced Title Services Co. of West Virginia, 216 W.Va. 413, 607 S.E.2d 519 (2004) as both a sword and a shield in an attempt to maintain their action in the court below.⁶ The McMahon opinion does establish that a party may bring a private cause of action for damages based on the unauthorized practice of law. While they brought their claim in an

⁵ Individuals are free to resolve their disputes generally without court involvement. According to Respondents' logic, if the case were to be remanded to proceed before Judge Gaughan, the parties would be foreclosed from resolving the dispute, either informally or formally through the use of a private mediator. Taken one step further then, it stands to reason that if this were the case, there could be no civil cause of action alleging the unauthorized practice of law and Respondents' claims should be dismissed as a matter of law.

⁶ In McMahon, the plaintiff expected, and thus claimed, that she paid money to the defendants in exchange for certain services she expected would be completed under the supervisions of a properly licensed legal professional. In fact, the plaintiff plead that she wanted, expected and had a right to have her "legal work" done by a lawyer. The Respondents in the instant matter have made no such allegations and have offered no evidence that Mr. Capouillez held himself out as being a lawyer; that the Corbin family believed he was a lawyer; or that the services he agreed to perform on their behalf were "legal" in nature.

improper forum, Respondents no doubt have the right to pursue a private cause of action against the Petitioners under McMahon. However, in seeking civil money damages, as opposed to filing a formal complaint with the West Virginia State Bar or pursuing criminal charges against the Petitioners,⁷ Respondents have made the Lease, containing a valid and enforceable arbitration clause, instrumental to any recovery to which they may be entitled.

While McMahon provides the authority by which a private citizen may pursue a cause of action against another for the unauthorized practice of law, Respondents also use it as a shield to further support their misguided argument that the underlying dispute may not be sent to arbitration because of the judiciary's inherent authority to regulate the practice of law. The McMahon Court did hold, as the Respondents correctly point out, that "the judicial branch determines what is and is not the unauthorized practice of law." Id. at 418. Again, as noted above, this distinction in no way limits the ability of private citizens to resolve their civil disputes. To be clear, Justice Starcher stated:

...it cannot be questioned that the *Legislature* cannot restrict or impair the power of the judiciary to regulate the practice of law by enacting a statute or permitting or authorizing laymen to practice law. Where, however, the intrusion upon the judicial power is minimal and inoffensive, and is consistent with and intended to be in aid of the aims of the Court with respect to the regulation of the practice of law, such legislation may be upheld as being in aid of the judicial power.

Id. citing State ex rel. Frieson v. Isner, 168. W.Va. 758, 777, 285 S.E.2d 641, 654 (1981) (citations omitted).

Moreover, the temptation, as Respondent is advocating, for this Court to extrapolate that because it has authority to regulate the practice of law, it is thus empowered to reserve questions regarding the unauthorized practice of law in the context of an arbitration clause for courts of this state over which this Court has superintending authority, should be disregarded. The Supreme

⁷ Many cases cited by Respondents in their Brief involve the West Virginia State Bar as a party.

Court of Arkansas, when asked to carve out an exception to arbitration for the unauthorized practice of law, stated, “[W]e are chastened by the awareness of our duty to defer to the Supreme Court of the United States on matters of Federal statutory interpretation.” Legalzoom.com, Inc., v. Jonathan McIllwain, 2013 Ark. 370, 429 S.E. 2d 26 (2013). The Arkansas Court noted, “When State law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the Federal Arbitration Act.” Id. Citing AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740, 179 L. Ed. 2d 742 (2011); *see also Nitro-Lift Technologies, L.L.C. v. Eddie Lee Howard*, 133 S. Ct. 500, 184 L. Ed. 2d 328 (2012). Thus, to the extent West Virginia law provides an arbitration exception for cases alleging the unauthorized practice of law, the law is preempted by the Federal Arbitration Act.

Simply put, Respondents lack authority supporting carving out an exception to arbitration for the unauthorized practice of law, failed to offer adequate justification to create such an exception, and even if created, would be pre-exempted by federal law.

CONCLUSION

For the reasons detailed above, and in the original briefs, the Petitioners, Geological Assessment & Leasing and William Capouillez ask that this Court affirm in part and reverse in part the Order entered by the Circuit Court and remand with directions to **GRANT** the Motion to Compel Arbitration and refer claims against this Party to arbitration consistent with the voluntary and legally enforceable arbitration provisions contained within the Lease signed by all parties.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert C. James". The signature is written in a cursive style with a horizontal line underneath it.

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No. 14-1210

MICHAEL C. O'HARA and
DEIRDRE J. O'HARA, husband and wife,

Respondents.

CERTIFICATE OF SERVICE

Service of the foregoing *PETITIONERS' REPLY BRIEF* was had upon the parties herein by sending true and correct copies thereof via regular U.S. Mail, postage prepaid, to the following counsel of record the 29th day of April, 2015:

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