

No. 14-0921

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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**At Charleston**

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**CHESAPEAKE APPALACHIA, LLC, RED SKY LAND, LLC,  
RED SKY-WEST VIRGINIA, LLC, AND TERRY L. MURPHY**

*Petitioners,*

*v.*

**CECIL L. HICKMAN**

*Respondent.*

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*From the Circuit Court of Ohio County, West Virginia*  
**Civil Action No. 12-C-11**

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**RESPONDENT'S BRIEF**

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**Gregory A. Gellner, Esquire (WV Bar #4641)**  
**GELLNER LAW OFFICES**  
**1440 National Road**  
**Wheeling, WV 26003**  
**T: (304) 242-2900**  
**F: (304) 242-0200**  
**[ggellner@gellnerlaw.com](mailto:ggellner@gellnerlaw.com)**

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....	iii
STATEMENT OF THE CASE .....	1
I. STATEMENT OF FACTS .....	1
II. PROCEDURAL HISTORY .....	10
SUMMARY OF ARGUMENT .....	11
STATEMENT REGARDING ORAL ARGUMENT AND DECISION .....	12
ARGUMENT .....	13
A. Standard of Review .....	13
B. The circuit court did not err inasmuch as it did not examine the merits of Respondent’s claims against the Petitioners but rather followed legal mandates and analyzed the validity of all relevant leases to determine if a valid arbitration agreement existed .....	14
1. The rulings by the court holding the January 2011 lease was valid and the February 2011 lease invalid was not a ruling on the merits of Respondent’s claims but was necessary in order to determine which, if any, arbitration clause applied to Respondent’s claims .....	15
2. The circuit court’s findings do not violate the severability doctrine .....	22
3. Upon finding that a lease and valid arbitration clause existed, the court determined that there was a condition precedent to the contract and ordered the Petitioner to pay consideration that was due and owing in order for the contract to be enforceable .....	25
C. The circuit court did not err in finding that the February 2011 lease was procured due to a mistake in fact and misrepresentation on the part of Chesapeake in that there existed on the record undisputed facts as to the formation of the February 2011 contract thus rendering summary judgment in favor of the plaintiff	

appropriate in light of the court’s mandate to determine if a valid arbitration agreement existed between the parties .....	27
1. The circuit court was required to address the validity of the February 2011 lease in order to determine if a valid arbitration agreement existed .....	27
2. The circuit court’s finding of a “mistake in fact” was not erroneous as there was a mistake as to the validity of the July 2006 Great Lakes’ lease that directly affected the manner in which the Petitioner handled the January 2011 lease as well as the February 2011 lease .....	28
3. The circuit court’s finding of misrepresentation was accurate in that there were no facts existing on the record to dispute the finding .....	29
D. The circuit court did not err in concluding that the 2005 Great Lakes lease signed on December 21, 2005, was the controlling contract between Respondent and Great Lakes .....	31
CONCLUSION .....	35

## TABLE OF AUTHORITIES

### CASE LAW

<i>Brannon v. Riffle</i> , 197 W.Va. 97, 475 S.E.2d 97 (1996) .....	19, 28
<i>Brown v. Genesis Healthcare Corp.</i> , 228 W.Va. 646, 724 S.E.2d 250 (2011) (overruled on other grounds, ___ U.S. ___, 132 S.Ct. 1201, 182 L.Ed.2d 42 (2012)(per curiam)) .....	17, 18
<i>Dan Ryan Builders, Inc. v. Nelson</i> , 230 W.Va. 281, 737 S.E.2d 550 (2012) .....	32, 33
<i>Employer's Liability Assurance Corp. v. Hartford Accident and Indemnity Co.</i> , 151 W.Va. 1062, 158 S.E.2d 212 (1967) .....	13
<i>Fayette County National Bank v. Lilly</i> , 199 W.Va. 349, 484 S.E.2d 232 (1997) .....	14
<i>First Nat'l Bank of Gallipolis v. Marietta Mfg. Co.</i> , 151 W.Va. 636, 153 S.E.2d 172 (1967) .....	32, 33
<i>Grayiel v. Appalachian Energy Partners 2001-D, LLP</i> , 230 W.Va. 91, 736 S.E.2d 91 (2012) .....	13, 14, 23
<i>Herrod v. First Republic Mortg. Corp., Inc.</i> , 218 W.Va. 611, 625 S.E.2d 373, (2005) ....	18
<i>In Re Joseph G.</i> , 214 W.Va. 365, 589 S.E.2d 507 (2003) .....	18
<i>Keesecker v. Bird</i> , 200 W.Va. 667, 490 S.E.2d 754 (1997) .....	14
<i>Kirby v. Lion Enterprises</i> , 233 W.Va. 159, 756 S.E.2d 493 (2014) .....	16, 17, 28, 32, 33
<i>McGraw v. American Tobacco Company</i> , 224 W.Va. 211, 681 S.E.2d 96 (2009) .....	14
<i>Miners and Merchants v. Gidley</i> , 150 W.Va. 229, 144 S.E.2d 711 (1965) .....	22
<i>New v. Gamestop, Inc.</i> , 232 W.Va. 564, 753 S.E.2d 62 (2013) .....	33
<i>Painter v. Peavy</i> , 192 W.Va. 189, 451 S.E.2d 755 (1994) .....	14
<i>Ruckdeschel v. Falcon Drilling Co., LLC</i> , 225 W.Va. 450, 693 S.E.2d 815 (2010) .....	16
<i>Snowden v. CheckPoint Check Cashing</i> , 290 F.3d 631, 637 (4 <sup>th</sup> Cir. 2002) .....	25

<i>Southland Corporation v. Keating</i> , 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984) .....	18
<i>State ex rel Clites v. Clawges</i> , 224 W.Va. 299, 685 S.E.2d 693 (2009) .....	18
<i>State ex rel. Johnson Controls, Inc. v. Tucker</i> , 229 W.Va. 486, 729 S.E.2d 808 (2012) .....	17, 28
<i>State ex rel Ocwen Loan Servicing, LLC v. Webster</i> , 232 W.Va. 341, 752 S.E.2d 372 (2013) .....	18
<i>State ex rel Richmond American Homes of West Virginia, Inc. v. Sanders</i> , 228 W.Va. 125, 717 S.E.2d 909 (2011).....	17, 18
<i>State ex rel TD Ameritrade v. Kaufman</i> , 225 W.Va. 250, 692 S.E.2d 293 (W.Va. 2010) .....	11, 16, 23, 24, 25
<i>Toppings v. Meritech Mortgage Sys., Inc.</i> , 140 F.Supp.2d 683, 685 (S.D.W.Va. 2001) .....	25
<i>Triad Energy Corp. v. Renner, et al</i> , 215 W.Va. 573, 600 S.E.2d 285 (W.Va. 2004) .....	33
<i>United States Fidelity &amp; Guaranty Co. v. Eades</i> , 150 W.Va. 238, 144 S.E.2d 703 (1965) .....	13
<i>Virginia Export Coal Co. v. Rowland Land Co.</i> , 100 W.Va. 559, 131 S.E. 253 (1926) ....	33
<i>West Virginia Dept. of Health and Human Resources v. Payne</i> , 231 W.Va. 563, 746 S.E.2d 554 (2013) .....	14

**STATUTES**

Federal Arbitration Act, 9 U.S.C. §§1-307 (2006) .....	16
--	----

**OTHER SOURCES**

<i>Restatement (Second) Contracts</i> , ch. 7, §§163 (1981) .....	19
17 <i>Am.Jur.2d, Contracts</i> , Section 24 .....	22

## STATEMENT OF THE CASE

### I. STATEMENT OF FACTS

In Petitioner's Statement of Facts, they have provided only a fraction of those facts relied upon by the circuit court in making the rulings contained within the Order of August 16, 2014. Therefore, Respondent submits the following facts.

In 2001, the Respondent and his siblings, joint tenants with  $\frac{1}{4}$  equal shares in a 143.77-acre tract in Ohio County, West Virginia, executed a 5-year lease of this property with Canton Oil and Gas Company (hereinafter referred to as "Canton lease") for oil and gas exploration. (*Order, Findings of Fact, ¶ 2, Appendix, p 1 and Canton Lease, Appendix, pp. 123-137*). This lease was executed in person by Respondent's siblings but not by Respondent who received the lease by mail, after his siblings signed, executed it and returned it to Canton. (*Order, Findings of Fact, ¶¶3-4, Appendix, p 2, deposition transcript of Cecil Hickman, p 25, Appendix, p 425*). Despite not signing the Canton lease at the same time as his siblings, Respondent was a party to this lease under the identical terms and dates as his siblings and testified that all four signed the same document. (*Order, Findings of Fact, ¶ 4, Appendix, p 2 and deposition transcript of Cecil Hickman, p 22, Appendix, p 425, and p 164, Appendix, p 460, Canton Lease, Appendix, pp 123-137*).

In December 2005, prior to the expiration of the Canton lease, Great Lakes, acting through William Capouillez and Geological Assessment & Leasing (*hereinafter referred to as "GAL"*) made an offer to Respondent and his siblings for a joint lease (*hereinafter referred to as "Great Lakes lease"*). (*Order, Findings of Fact, ¶¶5-6, Appendix, p 2 and deposition transcript of William A. Capouillez, pp 15-16, Appendix, p*

532). Respondent and his siblings intended to, and were, leasing the property together and reasonably expected that their lease terms and time frames would be identical. (*Order, Findings of Fact, ¶7, Appendix, p 2, deposition transcript of Cecil Hickman, p 62, Appendix, p 435 and affidavits of John Mark, Carol Sue Criswell and Lawrence Grant Hickman, Appendix, pp 469-477*). Respondent thought that the 2005 lease was merely a renewal of the 2001 lease. (*Deposition transcript of Cecil Hickman, p 99, Appendix, p 444*).

On December 21, 2005, Great Lakes offered the lease to Respondent's siblings during a meeting at the Bethany (West Virginia) Fire Department that they, in turn, executed. (*Order, Findings of Fact, ¶9, Appendix, p 2 and deposition transcript of William Capouillez, pp 22-23, Appendix, pp 140-141*).<sup>1</sup> Respondent did not attend this meeting as he resided in Columbus, Ohio but knew generally the terms and conditions of the Great Lakes lease and intended to sign the lease jointly with his siblings exactly as he had on the Canton lease. (*Order, Findings of Fact, ¶10, Appendix, p 2, and deposition transcript of Cecil Hickman, pp 32-35, Appendix, p 427-428, p 62, Appendix, p 435*).

GAL through William Capouillez admitted that Great Lakes had the authority to permit Respondent and his siblings to be included on one lease. (*Order, Findings of Fact, ¶ 12, Appendix, p 3, and deposition transcript of William Capouillez, pp 62-63, Appendix, p 364*). Capouillez testified that if landowners wanted to have the terms to a lease coordinated, they would all sign the same lease dated the same versus

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<sup>1</sup> The Petitioners as well as GAL and Great Lakes, defendants below, all failed and/or refused to provide a copy of the December 21, 2005, lease despite Respondent's formal discovery requests to procure the same.

signing individual leases. (*Deposition transcript of William Capouillez, p 62, Appendix, p 364*).

At the time of the negotiation process and thereafter, Great Lakes knew through discussions with GAL and Respondent's siblings that there was to be a joint lease of the entire parcel with the same lease terms for each of the siblings. (*Order, Findings of Fact, ¶ 11, Appendix, p 3, and affidavits of John Mark Hickman, Carol Sue Criswell and Lawrence Grant Hickman, Appendix pp 469-477*).

It was the understanding of the Respondent and his siblings that Great Lakes would immediately forward to Respondent the Great Lakes lease for him to sign and return and that each of the Hickman siblings, including the Respondent, would be on the same lease with the same terms. (*Order, Findings of Fact, ¶14, Appendix, p 3, deposition transcript of Cecil Hickman, p 32, Appendix, p 180 and affidavits of John Mark, Carol Sue Criswell and Lawrence Grant Hickman, Appendix pages 469-477*).

In January 2006, Respondent contacted Capouillez to tell him that he had not received the lease or bonus payment that his siblings had already been provided but did not speak to Capouillez nor did Capouillez return his call. (*Order, Findings of Fact, ¶15, Appendix, p 3, and deposition transcript of Cecil Hickman, p 47, Appendix, p 431*). Respondent made inquiries regarding the lease but it was not until July 2006 that he received a lease from Great Lakes to sign. (*Order, Findings of Fact, ¶18, Appendix, p 3 and deposition transcript of Cecil Hickman, pp 42-43, Appendix, p 430*).

Prior to that time, on June 2, 2006, Great Lakes recorded a Memorandum of Lease in the Office of the Clerk of the County Commission for Ohio County in Deed book 768, at page 790, giving notice that the Respondent and his siblings were

bound by the terms of a lease executed in favor of the defendant, Great Lakes, dated December 21, 2005, and extending for a period of five (5) years. (*Order, Findings of Fact, ¶¶16-17, Appendix, p 3 and Memorandum of Lease, Appendix, pp 39-44*).

Thereafter, in July 2006, Great Lakes sent to the Respondent a separate, undated lease, after Respondent made several inquiries as to why he had not received his bonus payment. (*Order, Findings of Fact, ¶18, Appendix, p 3 and deposition transcript of Cecil Hickman, pp 42-47, Appendix, pp 430-431*). After receiving this lease, Respondent executed it, did not date it, and returned it to Great Lakes. (*Order, Findings of Fact, ¶21, Appendix, p 4 and deposition transcript of Cecil Hickman, pp 43-44, Appendix pp 430*). Upon receipt of the lease executed by the Respondent, Great Lakes altered the lease by affixing the date of July 19, 2006. No party presented evidence contrary to this fact. (*Order, Findings of Fact, ¶22, Appendix p 4, Great Lakes lease executed by Respondent, Appendix, pp 147-158*).

At no time was the lease of July 19, 2006, subject to negotiation or bargaining of any kind between the Great Lakes and Respondent after December 21, 2005. (*Order, Findings of Fact, ¶24, Appendix, p 4 and deposition transcript of Cecil Hickman, pp 41-42, Appendix, p 429-430*). Respondent believed that by executing the lease in July of 2006, he was agreeing to the same lease terms that his siblings had agreed to and that the effective date would be the same as the Great Lakes lease executed on December 21, 2005. (*Order, Findings of Fact, ¶23, Appendix, p 4 and Complaint, Appendix, pp 25-38*). Further, the Hickman siblings advised the Respondent that Great Lakes had agreed to a joint lease and had agreed to forward him the lease following the meeting of December 21, 2005. (*Affidavits of John Mark Hickman,*

*Carol Sue Criswell and Lawrence Grant Hickman, Appendix, pp 469-477*). The Respondent's understanding also comports with the manner in which the prior joint lease was executed in 2001. (*Canton Lease, Appendix, pp 123-137*). And, it also agrees with the clear intention of Great Lakes to have all the parties on a single, joint lease as is evidenced by Great Lakes' filing of the aforesaid Memorandum of Lease.

Thereafter, it is undisputed that Great Lakes assigned both the December 21, 2005, and July 19, 2006, leases to Chesapeake Appalachia, L.L.C. (*Order, Findings of Fact, ¶25, Appendix, p 4*). The assignment was made on October 19, 2010, but was backdated to July 1, 2010. (*Order, Findings of Fact, ¶26, Appendix, p 4*). Again, this offers credible evidence that Great Lakes believed that the effective date of an agreement can be made on one date with the instrument being signed months later.

The Great Lakes lease expired on December 21, 2010, without oil or gas production taking place on the tract of land. (*Order, Findings of Fact, ¶27, Appendix, p 4*). At the time Petitioner Chesapeake took the assignment of the Hickman leases, it knew or should have known that Respondent's lease expired on December 21, 2010, as the Memorandum of Lease was recorded in the Ohio County Clerk's Office on June 2, 2006. (*Order, Conclusions of Law, ¶34, Appendix, p 13, Memorandum of Lease, Appendix, pp 39-41*).

Because the lease of December 21, 2005, was expiring, Respondent and his siblings were part of a group of landowners being sought out by Chesapeake and being offered leases in late December 2010 from the Petitioner, Terry Murphy (*hereinafter referred to as "Murphy"*) acting on behalf of the Petitioners, Chesapeake, Red Sky Land, LLC and Red Sky-West Virginia, LLC (*hereinafter referred to as "Red*

Sky"). (*Order, Findings of Fact, ¶29, Appendix, p 4; deposition transcript of Cecil Hickman, p 51, Appendix, p 432; deposition transcript Terry Murphy, p 13-14, Appendix, p 484-485*). In fact, it was the Petitioner Chesapeake, who solicited the Respondent and his siblings through the Petitioner Murphy, upon recognition that the December 2005 lease was due to expire. (*Order, Findings of Fact, ¶30, Appendix, p 4, deposition transcript of Terry Murphy, p 21, Appendix, p 486*).

Consequently, Petitioner Chesapeake, prepared the terms of a new lease with Respondent and his siblings that was a joint lease. (*Deposition transcript of Terry Murphy, p 17, Appendix, p 485*). The signing of the joint lease with Petitioner Chesapeake took place on January 5, 2011, at the Spring Hill Suites in Wheeling with all four Hickman siblings, including the Respondent present to sign the lease in person with the Petitioner Murphy acting as an agent of both Redsky and Chesapeake. (*Order, Findings of Fact, ¶31, Appendix, p 5, deposition transcript of Cecil Hickman, pp 50, 53, Appendix p 432 and deposition of Terry Murphy, p 14-16, Appendix, p 485*). The lease was a joint lease with a 5-year term. (*Order, Findings of Fact, ¶32, Appendix, p 5, Lease dated January 5, 2011, Appendix, pp 160-166*). At the time of this signing, having been assigned the December 21, 2005, lease, the Petitioner, Chesapeake, as the then owner of the lease from Great Lakes, obviously knew what they had purchased, and knew that it expired as to Respondent and his siblings.

As part of the consideration for the execution of the lease, Respondent received the sum of \$10 from Petitioner Chesapeake. (*Order, Findings of Fact, ¶33, Appendix, p 5, deposition transcript of Cecil Hickman, p 54, Appendix p 433*).

Additionally, Respondent was provided an "Order of Payment" for the sum of \$179,710.00 for his share of the up front lease bonus as per the terms of the lease. (*Order, Findings of Fact, ¶34, Appendix, p 5, Order of Payment, Appendix, p 51*). It is undisputed that this sum was never paid by the Petitioner Chesapeake despite its legal obligation to do so in consummation of the contract. (*Order, Findings of Fact, ¶35, Appendix, p 5, Complaint, Appendix, pp 25-38*).

Following the execution of the lease on January 5, 2011, Petitioner Murphy, acting as an agent of the Petitioners, Redsky and Chesapeake, contacted the Respondent and his siblings advising them that Chesapeake would not pay them the promised \$179,710.00 due to each of them unless they all agreed to amend the January 5, 2011, lease to remove Respondent as a party to thereto (*Order, Findings of Fact, ¶¶36-37, Appendix, p 5, deposition transcript of Cecil Hickman, p 57, Appendix, p 433, affidavits of John Mark Hickman, Carol Sue Criswell and Lawrence Hickman, Appendix, pp 469-477 and deposition transcript of Terry Murphy, p. 42, Appendix, p 492*). Petitioners were then claiming that the July 19, 2006 lease applied to Respondent. Additionally, the Hickman siblings were advised that Petitioner Chesapeake would move forward with production even if they declined to execute the "amended" lease because they could do so without Cecil Hickman since they had over 2/3 of the ownership leased (*Order, Findings of Fact, ¶37, Appendix p 5 and Affidavits of John Mark Hickman, Carol Sue Criswell and Lawrence Hickman, Appendix, pp 469-477*), a statement Respondent now knows to have been false and misleading.

Because of the significant duress caused the plaintiff in believing that he would cost his siblings their share of the bonus as well as royalties on the contract if

he failed to execute a new lease, he felt that he had no choice but to acquiesce to the demands of the Petitioners Chesapeake, Redsky and Murphy and execute a new "top lease" on February 15, 2011. (*Order, Findings of Fact, ¶¶38-39, Appendix, pp 5-6, deposition transcript of Cecil Hickman, p 57, 59 and p 97, Appendix, pp 433-434 and p 443, and Chesapeake lease dated February 15, 2011, Appendix, pp 169-174*).

Respondent was provided no consideration for the execution of the top lease or for being removed from the first lease, not even the \$10 nominal amount that the contract references. (*Order, Findings of Fact, ¶40, p 6 and deposition transcript of Cecil Hickman, p 167, Appendix p 461*). Petitioner Murphy admits that he was the person responsible, on behalf of Petitioner Chesapeake to have Respondent execute the new lease. (*Deposition transcript of Terry Murphy, p 28, Appendix, p 488*).

According to Petitioner Murphy, if the plaintiff failed to receive the nominal consideration on the new lease that would have been an oversight. (*Deposition transcript of Terry Murphy, pp 13-16, Appendix, pp 484-485*).

According to Petitioner Murphy, in January 2011, Chesapeake already owned the prior Great Lakes leases with the Hickmans. (*Deposition transcript of Terry Murphy, p 23, Appendix p 487*). Murphy went further to state that if Chesapeake owned the leases, one would believe that Chesapeake knew or certainly should have known what leases existed for the Hickmans since they already owned them. (*Deposition transcript of Terry Murphy, p 23, Appendix p 487*). Strangely, Chesapeake, a sophisticated corporation claims it did no title verification prior to buying the leases. (*Supplemental answers and Responses of Defendant, Chesapeake Appalachia, L.L.C. to Plaintiff's Interrogatories and Requests for Production (First Set)*),

*Interrogatory No. 31, Appendix, p 530*). Naturally this does not relieve them of being bound by the information that was of public record.

Both the January 5, 2011, lease and the February 5, 2011, lease (upon which Chesapeake relies and the Respondent disputes as being controlling), contain an arbitration clause. (*Order, Findings of Fact, ¶46, Appendix, p 6, January 5, 2011 lease, Appendix pp 160-166 and February 2011 lease, Appendix, pp 169-174*). This clause reads:

**ARBITRATION.** In the event of a disagreement between Lessor and Lessee concerning this Lease or this associated Order of Payment, performance thereunder, or damages caused by Lessee's Operations, the resolution of all such disputes shall be determined by arbitration in accordance with the rules of the American Arbitration Association. Arbitration shall be the exclusive remedy and cover all disputes, including but not limited to, the formation execution, validity and performance of the Lease and Order of Payment. All fees and costs associated with the arbitration shall be borne equally by Lessor and Lessee. <sup>2</sup>

All of the defendants below, including the Petitioners, filed motions to compel arbitration along with motions to dismiss (converted to motions for summary judgment) seeking to have the lower court order the case to arbitration.

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<sup>2</sup> Interestingly, both leases contain an addendum that the plaintiff contended, at the trial court, was inconsistent and contradictory and which overrides the above provision, that being one entitled "Venue and Choice of Law" which reads as follows,

The venue for all actions and proceedings arising from this Lease shall be in the county in which the real property is located. The law of the state in which the real property is located shall apply.

(*Order, Findings of Fact, ¶47, Appendix, p 6, January 2011 lease, Appendix, p 165 and February 2011 lease, Appendix, p 173*).

## II. PROCEDURAL HISTORY

Inasmuch as Petitioners have failed to provide to the court a summary of the Procedural History, the Respondent offers the following.

Respondent filed his complaint in the Circuit Court of Ohio County on or about January 5, 2012, against the Petitioners as well as Geological Assessment & Leasing, William A. Capouillez and Great Lakes Energy Partners, LLC now known as Range Resources. (*Complaint, Appendix, pp 25-54*). The Complaint alleges various causes of actions against the Petitioners including breach of contract, fraud, misrepresentation, negligence, breach of implied covenant of good faith and fair dealing, slander of title, tort of outrage and a declaratory judgment count regarding the validity of the Memorandum of Lease as aforesaid.

Thereafter, the Petitioners as well as the other defendants below, filed motions to compel, or in the alternative, motions to dismiss the case due to the fact that arbitration clauses existed in all the leases in question. A hearing was held on June 7, 2012, with respect to said motions and an Order was entered allowing the parties to engage in formal discovery on the issue of arbitration prior to the judge entertaining the aforementioned motions. (*Order, Appendix, pp 94-97*).

As a result of such discovery, the defendants below, including the Petitioners, renewed their motions, albeit converting the motions to dismiss to motions for summary judgment, to which the circuit court entered a Order with Findings of Fact and Conclusions of Law on August 16, 2014, to which the Petitioners take this appeal. (*Order, Appendix, pp 1-18*).

## SUMMARY OF ARGUMENT

The rulings by the court holding the January 2011 lease was valid and the February 2011 lease invalid was not a ruling on the merits of Respondent's claims but was necessary in order to determine which, if any, arbitration clause applied to Respondent's claims. Based upon undisputed facts, the court found that the February 2011 lease was procured due to a mistake of fact, fraudulent inducement and duress, all of which are defenses to contest the validity of a contract. It is within the purview of the circuit court to determine whether or not a valid contract exists. Additionally, the February 2011 lease was a "top lease" that required Chesapeake to pay the agreed up-front bonus by a date certain or the contract would never be in effect. Chesapeake did not pay so the contract was never completed and they therefore could not claim a right to arbitrate under a contract that was never consummated.

Moreover, the court's actions did not violate the severability doctrine and the Petitioners' reliance upon *State ex rel TD Ameritrade v. Kaufman*, 225 W.Va. 250, 692 S.E.2d 293 (W.Va. 2010), is misplaced at best. The Petitioners fail to inform this court of the exception to the severability rule, which allows the court to address the contract as a whole where a party asserts there was no assent to the underlying agreement in which the arbitration language is contained.

Upon finding that a lease and valid arbitration clause existed with respect to a January 2011 Chesapeake lease executed by the Respondent and his siblings, the court determined that there was a condition precedent on the contract, i.e., the payment of the sum of \$179,710.00, and correctly ordered the Petitioner to pay

consideration that was due and owing in order for the contract to be enforceable. Because the contract required that amount to be paid within ninety (90) days, acceptance of such amount would now be at the option of Respondent.

The circuit court did not err in concluding that the 2005 Great Lakes lease signed on December 21, 2005, was the controlling contract between Respondent and Great Lakes in that the July 2006 lease lacked mutual assent.

Therefore, the court's order should be affirmed.

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Oral argument is warranted pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure. The Respondent, Cecil Hickman, respectfully submits that the decisional process would be significantly aided by oral argument in that this appeal involves significant and complex issues affecting the manner in which oil and gas companies deal with landowners in West Virginia at a time when the industry is experiencing tremendous growth in our state.

Further, under Rule 18(c), the Respondent has filed a separate motion asking that this argument be consolidated with the appeals of Great Lakes Energy Partners, LLC, N/K/A Range Resources-Appalachia, LLC v. Hickman, Appeal No. 14-0923 and Chesapeake Appalachia, LLC, et al v. Hickman, Appeal No. 14-0921, due to the fact that these cases involve the same or related assignments of error and/or questions of law.

Finally, the Respondent requests that oral argument be set under Rule 19 of the West Virginia Rules of Appellate Procedure.

## ARGUMENT

### A. Standard of Review

The lower court's Order reflects rulings on motions to dismiss that were converted to motions for summary judgment inasmuch as "only matters contained in the pleadings can be considered on a motion to dismiss under Rule 12(b) R.C.P., and if matters outside the pleading are presented to the court and are not excluded by it, the motion should be treated as one for summary judgment and disposed of under Rule 56 R.C.P., if there is no genuine issue of material fact in connection therewith." *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)).

On a hearing of a motion of one party for summary judgment, after due notice, when it is found that there is no genuine issue as to any material fact and that the adverse party is entitled to judgment as a matter of law, failure of an adverse party to file a motion for summary judgment does not preclude entry of judgment in his favor. *Employer's Liability Assurance Corp. v. Hartford Accident and Indemnity Co.*, 151 W.Va. 1062, 158 S.E.2d 212 (1967).

This appeal deals with the lower court's determination as to whether arbitration should be compelled. As stated in *Grayiel, supra*, "this Court will preclude enforcement of a circuit court's order compelling arbitration only after a *de novo* review of the circuit court's legal determinations leads to the inescapable conclusion that the circuit court clearly erred; as a matter of law, in directing that a

matter be arbitrated or that the circuit court's order constitutes a clear-cut, legal error plainly in contravention of a clear statutory, constitutional, or common law mandate." *Grayiel*, Syl. Pt. 1 (citing Syl. Pt. 4, *McGraw v. American Tobacco Company*, 224 W.Va. 211, 681 S.E.2d 96 (2009)).

The circuit court's entry of summary judgment is reviewed *de novo*. Syl. Pt. 4, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). In doing so, "a circuit court's order granting summary judgment must set out factual findings sufficient to permit meaningful appellate review. Findings of fact, by necessity, include those facts which the circuit court finds relevant, determinative of the issues and undisputed." *West Virginia Dept. of Health and Human Resources v. Payne*, 231 W.Va. 563, 746 S.E.2d 554 (2013)(citing Syllabus Pt. 3, *Fayette County National Bank v. Lilly*, 199 W.Va. 349, 484 S.E.2d 232 (1997)). See also, Syllabus Pt. 3, *Keesecker v. Bird*, 200 W.Va. 667, 490 S.E.2d 754 (1997).

**B. The circuit court did not err inasmuch as it did not examine the merits of Respondent's claims against the Petitioners but rather followed legal mandates and analyzed the validity of all relevant leases to determine if a valid arbitration agreement existed**

The Petitioners mischaracterize the actions of the lower court in that it did not decide the Respondent's claims on the merits. Rather, the lower court was mandated by the relevant case law to determine first whether a valid contract existed in order to decide whether a clause therein, in this case the arbitration clause, was enforceable. It is only by coincidence that this results in a finding that certain leases were not valid contracts. As noted, the Petitioners moved to compel arbitration and they were granted arbitration under the January 2011 lease that the court held to be a valid lease agreement executed between the parties.

In reaching its conclusions, the lower court correctly applied the law and held that the February 2011, lease was executed under duress and fraudulent inducement, and therefore, was invalid. That left only the January 2011 lease as a possible contract between the parties. Of course, by its terms the Petitioner must avail itself to the benefits and rights under that contract by paying the bonus payment in the sum of \$179,710.00 that the Respondent contends is a condition precedent to the contract itself. Without this payment, the Petitioners are left without any lease with respect to Respondent's  $\frac{1}{4}$  interest in the mineral rights of the tract in question.

- 1. The rulings by the court holding the January 2011 lease was valid and the February 2011 lease invalid was not a ruling on the merits of Respondent's claims but was necessary in order to determine which, if any, arbitration clause applied to Respondent's claims**

It is undisputed on the record below that the Respondent executed the January 2011 Chesapeake joint lease with his siblings. It is further undisputed that the Petitioners forced the Hickman's to amend the lease to omit Respondent as a party herein and forced the Respondent to execute a new lease (known as a "top lease") in February 2011.

Based upon the evidence on the record, it is clear that the Respondent was under a great deal of distress when he executed the February 2011 lease and had endured fraudulent inducement in doing so.

Petitioners' excuse for Respondent's forced abandonment of the January 2011 lease was that it did not know that there existed a July 2006 lease at the time the January lease was executed. However, as is evidenced by the lower court's order

herein, the July 2006 was invalid and the Memorandum of Lease filed in June 2006, listing Respondent as a party to the December 2005 lease was binding. (*Order, Conclusions of Law, ¶¶25-32, Appendix, pp 12-13*). As previously stated, the Petitioner Chesapeake had taken an assignment of the Chesapeake leases in July of 2010 and knew or should have known of the existence of the Memorandum of Lease at the time of the execution of its January 2011 lease with the Respondent.

In *Kirby v. Lion Enterprises*, 233 W.Va. 159, 756 S.E.2d 493 (2014), this Court dealt with an appeal from a lower court order granting a motion to dismiss and compelling arbitration. In that opinion, the Court set forth the parameters necessary for a motion to compel arbitration to be granted.

When a trial court is required to rule upon a motion to compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. §§1-307 (2006), the authority of the trial court is limited to determining the threshold issues of (1) whether a valid arbitration agreement exists between the parties; and (2) whether the claims averred by the plaintiff falls within the substantive scope of that arbitration agreement. *Kirby, supra*, 756 S.E.2d at 497 (citing *Syl. Pt. 2, State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W.Va. 250, 692 S.E.2d 293 (2010)). See also *Syl. Pt. 5, Rukdeschel v. Falcon Drilling Co., LLC*, 225 W.Va. 450, 693 S.E.2d 815 (2010). Therefore, in order to uphold an arbitration clause, there has to be an agreement in existence between the parties to arbitrate, and most importantly, an agreement or contract in general.

In discussing the applicable law relating to the FAA, this Court noted that the “primary substantive provision” of the FAA is Section 2 and interpreted Section 2 as

saying that “a written provision to settle by arbitration a controversy arising out of a contract that evidences a transaction affecting interstate commerce is valid, irrevocable, and enforceable, unless the provision is found to be invalid, revocable or unenforceable upon a ground that exists at law or in equity for revocation of any contract.” In other words, Section 2 contains two parts: “the first part holds that written arbitration agreements affecting interstate commerce are ‘valid, irrevocable, and enforceable,’ but the second part is a ‘savings clause’ that allows courts to invalidate those arbitration agreements using general contract principles.” *Id.*, at 498. [Emphasis added].

As this court has held, the purpose of the FAA is to compel courts to treat arbitration agreements like any other contract. The Act does not favor or elevate arbitration agreements to a level of importance above all other contracts; it simply ensures that private agreements to arbitrate are enforced according to their terms.” *Id.*, (citing *State ex rel Richmond American Homes of West Virginia, Inc. v. Sanders*, 228 W.Va. 125, 717 S.E.2d 909 (2011)). See also, *State ex rel Ocwen Loan Servicing, LLC v. Webster*, 232 W.Va. 341, 752 S.E.2d 372 (2013)(citing Syl. Pt. 7, *Brown v. Genesis Healthcare Corp.*, 228 W.Va. 646, 724 S.E.2d 250 (2011)(overruled on other grounds by *Marmet Health Care Center, Inc. v. Brown*, \_\_\_\_ U.S. \_\_\_\_, 132 S.Ct. 1201, 182 L.Ed.2d 42 (2012)(per curiam)).

In *State ex rel. Johnson Controls, Inc. v. Tucker*, 229 W.Va. 486, 729 S.E.2d 808 (2012), this Court explained that:

Under the Federal Arbitration Act, 9 U.S.C. §2, a written provision to settle by arbitration a controversy arising out of a contract that evidences a transaction affecting interstate commerce is valid, irrevocable, and enforceable,

unless the provision is found to be invalid, revocable or unenforceable upon a ground that exists at law or in equity for the revocation of any contract.

Id., at Syl. Pt. 1, 229 W.Va. at 489, 729 S.E.2d at 811 (citing Syl. Pt. 6, Brown v. Genesis Healthcare Corp., *supra*).

Moreover, “nothing in the Federal Arbitration Act (citation omitted) overrides normal rules of contract interpretation. Generally applicable contract defenses – such as laches, estoppel, waiver, fraud, duress, or unconscionability – may be applied to invalidate an arbitration agreement.” Id., at Syl. Pt. 2 (citing Syl. Pt. 9, Brown v. Genesis Healthcare Corp., *supra*).

And, “while it is clear that the Federal Arbitration Act preempts state law that would invalidate or undercut the enforcement of arbitration agreements, the issue of whether an arbitration agreement is a valid contract is a matter of state contract law and capable of state judicial review.” State ex rel Clites v. Clawges, 224 W.Va. 299, 305, 685 S.E.2d 693, 695 (2009)(quoting Southland Corporation v. Keating, 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984)).

It is the province of the court and not of the jury to interpret a written contract because the determination of what constitutes a contract is a question of law. In re Joseph G., 214 W.Va. 365, 589 S.E.2d 507 (2003). Further, whether an arbitration agreement was validly formed, and whether the claims maintained by a plaintiff fall within the scope of the agreement are evaluated under state principles of contract formation. State ex rel Richmond American Homes of West Virginia, Inc. v. Sanders, 228 W.Va. 125, 134, 717 S.E.2d 909, 918 (2011).

The question of whether a party was fraudulently induced into a contract may go to the formation of a contract. Herrod v. First Republic Mortg. Corp., Inc., 218

*W.Va. 611, 625, 625 S.E.2d 373, 388 (2005)*. A party that is misled as to the essential terms of a contract does not technically agree to the contract as no assent to its terms has been formulated due to the misrepresentation. *Id.*, 218 *W.Va. at 626, 625 S.E.2d at 388*. In this situation, it is irrelevant whether the misrepresentation was made by the other party to the contract or by a third person. *Id.* (citing *Restatement (Second) Contracts, ch. 7, §§163 (1981)*).

One who enters into a contract or performs some act while laboring under a mistake of material fact is entitled to have the transaction set aside in a court of equity. *Brannon v. Riffle*, 197 *W.Va. 97, 475 S.E.2d 97 (1996)*.

In analyzing the Chesapeake leases, the court found that the Petitioner Chesapeake and the Respondent entered into a valid lease on January 5, 2011. (*Order, Conclusions of Law, ¶35, Appendix, p 13*). Further, the circuit court held that Chesapeake knew or should have known, that Respondent was listed as a party on the December 2005 Great Lakes lease as evidenced by the Memorandum of Lease recorded June 2, 2006 in the public records of Ohio County. (*Order, Conclusions of Law, ¶34, Appendix, p 13*). The December 2005 lease expired without production. Therefore, the court deemed the January 5, 2011, lease the controlling contract between the parties. (*Order, Conclusions of Law, ¶36, Appendix, p 13*). The Court then assessed whether arbitration was required.

During the lease negotiation process on January 5, 2011, it was obvious that the Respondent and his siblings intended to be on the same joint lease with identical terms and conditions as it is undisputed that they all signed a single, joint lease on that dated. It is clear that it was the intention of all of the parties to the January 5,

2011, Chesapeake lease that it was to be a joint lease with Respondent and his siblings for the tract in question, and there existed a meeting of the minds in that regard. (*Order, ¶37, Appendix, p 13*).

As for the February 2011 lease, the court found that it was procured due to a mistake in fact and misrepresentation on the part of the Petitioners, and is therefore, void and unenforceable as a matter of law. Specifically, the Petitioners knew or should have known that the Great Lakes lease of December 21, 2005, was the controlling lease between the Respondent and his siblings as lessors and Great Lakes as lessee and that said lease expired on December 21, 2010, due, in part to the fact that there was a recorded Memorandum of Lease showing that Respondent was a party to the December 2005 Great Lakes lease and that there is no evidence that said Memorandum was not valid or not properly recorded. (*Order, Conclusions of Law, ¶¶38-40, Appendix, pp 13-14*).

With respect to the issue of misrepresentation, the court concluded and rightfully so that the Petitioners misrepresented certain facts to Respondent and his siblings as an inducement for Respondent to execute the February 15, 2011, top lease as was evidenced by the fact that Petitioners Murphy and Red Sky advised Respondent and his siblings that it was necessary for an “amended” lease to be executed in order that each of Respondent’s siblings receive the bonus payment and their future royalty payments. (*Order, Conclusions of Law, ¶41, Appendix, p 14, deposition transcript of Cecil Hickman, p 57, 59 and p 97, Appendix, pp 433-434 and p 443*). Consequently, Respondent executed the February 2011 Chesapeake top lease under significant duress. (*Order, Conclusions of Law, ¶42, Appendix, p 14, deposition*

*transcript of Cecil Hickman, p 59, Appendix, p 434).*

Significantly, the Court concluded that the February 2011 top lease was void as a matter of law and the arbitration clause contained therein is, likewise, void and unenforceable, thus granting summary judgment in favor of Respondent. (*Order, Conclusions of Law, ¶43, Appendix, p 14*). Petitioners have not addressed the fact that the February 2011 lease also contained condition precedent before it became effective, namely the paying of an agreed amount by a date certain. The failure to do so is further reason that the contract is invalid.

The Petitioners would have this court believe that the February 2011 lease is merely a product of their diligent effort in determining that “Mr. Hickman’s title was not confirmed to their satisfaction.” In reality, there was nothing deficient in the Respondent’s title to cause the Petitioners to strong arm him into giving up his rights in the January 2011 joint lease. Petitioner Murphy admitted that Chesapeake knew or should have known that Respondent was a party to the joint lease of December 2005, based upon the Memorandum of Lease filed in June 2006. Even if directly in conflict with the July 2006 lease, Petitioners should have conducted an inquiry into this date conflict and should not have placed the Respondent under duress. Interestingly, it appears that Petitioner Chesapeake used its strength of position to cheat the Respondent out of sums owing to him under the January 2011 lease and used the invalid July 2006 lease as a means to increase its profits on the well in question.

Although it is clear that the January 2011 lease was legally formed and could be considered valid, until the bonus money is paid, it is not enforceable by its own

terms. As for the court's order of the \$179,710, it is the position of the Respondent that since this sum, a condition precedent to the contract, was never paid, there is currently no enforceable lease agreement between the parties and therefore, no arbitration provision at all. Should the Petitioner Chesapeake tender this sum now, it appears that the Respondent would have the option to accept it or refuse it since the time period for providing this bonus sum has long passed (90 days from January 5, 2011). The Respondent believes that the lower court acted prudently in ruling that the bonus had to be paid in order for the valid lease of January 2011, including the arbitration provision, to take effect.

In negotiating a contract, the parties may impose any condition precedent, the performance of which is essential before they become bound by the agreement; in other words, there may be a condition precedent to the existence of a contract.

*Miners and Merchants v. Gidley*, 150 W.Va. 229, 234, 144 S.E.2d 711, 715 (1965)(quoting 17 Am.Jur.2d, Contracts, Section 24).

The ruling regarding the bonus payment is not a ruling of the merits of Respondent's claims but rather a device that triggers the enforceability of the contract and the arbitration clause.

## **2. The circuit court's findings do not violate the severability doctrine**

Under the FAA and the doctrine of severability, only if a party to a contract explicitly challenges the enforceability of the arbitration clause within the contract, as opposed to generally challenging the contract as a whole, is a trial court permitted to consider the challenge to the arbitration clause; however, the trial court may rely on general principles of state contract law in determining the

enforceability of the arbitration clause, and, if necessary, the trial court may consider the context of the arbitration clause within the four corners of the contract or consider extrinsic evidence detailing the formation and use of the contract.

Grayiel v. Appalachian Energy Partners 2001-D, 230 W.Va. 91 at 99, 736 S.E.2d at 99 (2012).

It is undisputed that the Respondent challenged all of the arbitration clauses relevant to the underlying case. (*Order, Findings of Fact, ¶43, Appendix, p 6, Conclusions of Law, ¶11, Appendix, p 9*).

The Petitioners rely heavily upon the case of State ex rel TD Ameritrade v. Kaufman, 225 W.Va. 250, 692 S.E.2d 293 (2010), but a careful review of this case shows that it does not support the Petitioners' argument and, in fact, its legal precedent actually supports the Respondent.

In the State ex rel TD Ameritrade case, the plaintiff below, Mr. Salamie, filed a civil action against Mr. Conrad, an independent financial advisor, and TD Ameritrade alleging that he sustained financial losses due to the defendants' disregard of specific instructions regarding various investment holdings in four TD Ameritrade accounts. State ex rel TD Ameritrade, 225 W.Va. at 252, 692 S.E.2d at 295. Mr. Salamie alleged that TD Ameritrade was responsible under a theory of vicarious liability for Conrad's actions contending that Conrad was an account officer or registered representative of TD Ameritrade. During the proceedings TD Ameritrade filed a motion to compel arbitration citing provisions in the account agreements along with a motion for summary judgment seeking to have the court determine it was not responsible for Conrad's actions. The parties attempted to resolve the

arbitration issue and Salamie took the position that if TD Ameritrade agreed that Conrad was under the control of TD Ameritrade (thus rendering the company liable for his actions), he would be amenable to arbitrate the matter. When TD Ameritrade refused, Salamie filed its response to the motions and although not opposed to arbitration sought a ruling that Conrad was a “controlled person” under Federal law so as to trigger vicarious liability. *Id.*

In the *TD Ameritrade* case, the lower court made certain findings of fact and conclusions of law eventually holding that Conrad was a “controlled person” and that, therefore, Ameritrade would be liable for his actions. The trial court expressly ordered that the arbitrator follow this directive. The case was referred to arbitration as it was unopposed by the plaintiff. TD Ameritrade filed a writ of prohibition seeking to have the lower court’s ruling regarding Conrad’s status of a “controlled person” reversed. *Id.*, 225 W.Va. at 253, 692 S.E.2d at 296.

This Court did, in fact, reverse the lower court in the *TD Ameritrade* case for reasons that are not germane to the issues contained herein. That case dealt with parties who had already agreed to arbitrate the issues in dispute. Here, the Respondent opposed arbitration and challenged the arbitration clause in addition to challenging the formation of the contract based upon fraudulent inducement and duress.

In the *TD Ameritrade* case, this court recognized the severability doctrine as is stated by the Petitioners herein, but recognized an exception that the Petitioners fail to disclose in its brief. Specifically, footnote 9 of the case states that:

A recognized exception to the severability rule that allows courts to address the contract as a whole exists

where a party asserts there was no assent to the underlying agreement in which the arbitration language is contained. *See Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 637 (4<sup>th</sup> Cir. 2002); see also *Toppings v. Meritech Mortgage Sys., Inc.*, 140 F.Supp.2d 683, 685 (S.D.W.Va. 2001)(recognizing that contractual defenses of fraud, duress, or unconscionability fall within “limited review” granted to trial courts under severability doctrine).

*Id.*, 225 W.Va. at 255, 692 S.E.2d at 298, Fn. 9.

The Petitioners argue that the rulings of the lower court should be reversed in accordance with the *TD Ameritrade* case but, in reality, the court did what it should have done. When faced with a challenge to the arbitration clause as well as to the contract as a whole based upon the Respondent’s contention that it was a product of fraudulent inducement and duress, the circuit court did exactly as it was required when faced with evidence that there was no formation of the February 2011 contract. This leaves the court with the task of deciding if the January 2011 lease was valid, which it did, and as a basis, referred the case to arbitration.

The rulings the court made with respect to the bonus sum owed to Respondent was a condition precedent to the contract and thus will render the lease of January 2011 enforceable. Otherwise, as stated in the above section, there can be no arbitration.

- 3. Upon finding that a lease and valid arbitration clause existed, the court determined that there was a condition precedent to the contract and ordered the Petitioner to pay consideration that was due and owing in order for the contract to be enforceable**

As stated above, the court had the right and obligation to determine which leases, if any, were valid prior to ruling on the validity of the arbitration clauses

contained therein. Respondent challenged the validity of both the July 2006 lease and the February 2011 lease so naturally the court tested the parameters of the formation of those contracts first. Finding that both of those leases were not valid, the court then turned to the January 2011 Chesapeake lease. The Petitioners never alleged that the January 2011 lease was improperly formed or that it was not a product of the parties' meeting of the minds. Rather, it chose to force the Respondent to execute a different lease and required he and his siblings to amend the January 5, 2011 lease to remove Respondent as a party based upon their "finding" of the July 2006 lease. They did this despite the Memorandum of Lease filed June 2, 2006, clearly indicating that Respondent was a party to the December 21, 2005, lease and was situated the same as his siblings. This Memorandum, as stated previously, conclusively showed the intent of Great Lakes in seeing that the Respondent and his siblings were on the same joint lease. The dating of the lease sent to Respondent in July was the crucial factor in causing the confusion initially. But Petitioner Chesapeake added insult to injury when forcing the Respondent to execute a new lease by the use of fraudulent inducement and duress.

Subsequent to finding the February 2011 to be invalid and the January 2011 lease to be valid, the court ordered the Petitioner Chesapeake to pay the bonus money necessary to see that the lease was effectuated. Because this is a condition precedent to the contract this is a proper ruling. However, Respondent, agrees that any amounts owed regarding royalties and any other monies owed to the Respondent are to left to the decision of the arbitrator.

To be clear, Respondent believes that the ordering of the \$179,710.00 to be paid to the Respondent to be within the purview of the court in order to see that the contract is enforceable. Respondent does not take issue with Petitioners' argument that the court's ruling stating "royalty payments due to Plaintiff under the terms of the Chesapeake lease, together with interest at the legal rate from the date said payments were due until paid." (*Order, Conclusions of Law, ¶60, Appendix, p 18*) should be left for arbitration as they require rulings beyond that necessary to order arbitration.

- C. The circuit court did not err in finding that the February 2011 lease was procured due to a mistake in fact and misrepresentation on the part of Chesapeake in that there existed on the record undisputed facts as to the formation of the February 2011 contract thus rendering summary judgment in favor of the plaintiff appropriate in light of the court's mandate to determine if a valid arbitration agreement existed between the parties.**

The court did not err when it found that the February 2011 lease was "procured due to a mistake in fact" inasmuch as Petitioners wrongly believed, (or at least asserted) that the July 2006 lease was valid. Petitioners ignore the clear intention of Great Lakes in its filing of the Memorandum of Lease that confirmed Respondent was a party to the December 21, 2005 Great Lakes lease, in June 2006 prior to the lease of July 2006 with the altered date. Nonetheless, the February lease was merely a "top lease" that only became effective if consideration were paid by a date certain, which never occurred.

- 1. The circuit court was required to address the validity of the February 2011 lease in order to determine if a valid arbitration agreement existed.**

Respondent adopts and incorporates the case law, facts and arguments contained within Section B (1) above. In summary, pursuant to the mandates of this court, the circuit court must have analyzed the February 2011 lease to determine its validity prior to determining if it contained a valid arbitration clause. Said clauses can be invalidated under general contract principles. *Kirby v. Lion Enterprises*, 233 W.Va. 159, 756 S.E.2d 493 (2014). This includes the principles of fraudulent inducement and duress. *State ex rel. Johnson Controls, Inc. v. Tucker*, 229 W.Va. 486, 729 S.E.2d 808 (2012), Syl. Pt. 2. And, one who enters into a contract or performs some act while laboring under a mistake of material fact is entitled to have the transaction set aside in a court of equity. *Brannon v. Riffle*, 197 W.Va. 97, 475 S.E.2d 97 (1996).

2. **The circuit court's finding of a "mistake in fact" was not erroneous as there was a mistake as to the validity of the July 2006 Great Lakes' lease that directly affected the manner in which the Petitioners handled the January 2011 lease as well as the February 2011 lease**

Petitioners' argument in this regard borders on the ridiculous. According to them, Chesapeake gets to decide what "mistake of fact" means. Petitioners have misidentified the misrepresentation(s) and mistake of fact. In reality, there are a multitude of facts existing on the record supporting the conclusion that the February 2011 was invalid based upon a mistake in fact. The following represent some of those undisputed facts:

- (1) There existed a Memorandum of Lease filed by Great Lakes indicating that Respondent was a party to a joint lease dated December 21, 2005;

- (2) Respondent and his siblings wanted to be on a joint lease with identical terms and date;
- (3) Great Lakes sent a lease to Respondent in July 2006 after having filed the Memorandum of Lease which indicates that the intention for the lease to have an effective date of December 21, 2005;
- (4) The affixation of the July 19, 2006, date to the July Great Lakes lease executed by Respondent without his assent;
- (5) Great Lakes assigned the December 2005 lease to Chesapeake along with the lease sent to Respondent in July 2006;
- (6) Chesapeake negotiated the lease in January 2011 itself believing that the Great Lakes lease expired in December 2010;
- (7) Chesapeake forced the Respondent into executing a new lease based upon the July 2006 lease signed by the Respondent, who believed that it would have an effective date of December 2010 and signed it with a blank for the date.

There is ample evidence on the record to support the fact that Chesapeake's actions in forcing the Respondent to execute the February 2011 lease was based upon a mistake or mistakes of fact. The lower court was justified in voiding the February 2011 lease based upon said mistake(s) in fact. As previously noted herein, the February 2011 lease was a "top lease" that was never exercised. Ultimately, its role in the dispute is limited.

**3. The circuit court's finding of misrepresentation was accurate in that there were no facts existing on the record to dispute the finding.**

The Petitioners have failed to proffer any evidence to dispute that they misrepresented facts to the Respondent in getting him to execute the February 2011 lease. Specifically, with respect to this lease, the Petitioners advised the Respondent and his siblings that it was necessary for an amended lease (for no consideration) to

be executed in order that each of Respondent's siblings receive the bonus payment of \$179,710.00 and their future royalty payments. (*Order, Conclusions of Law, ¶41, Appendix, p 14, deposition transcript of Cecil Hickman, p 59, Appendix, p 434, as well as affidavits of Respondent's siblings, Appendix, pp 469-477*). This was a mistake of fact and was simply not true given the invalidity of the July 2006 lease. Respondent testified that Murphy told him that as long as 2/3 of the property was under lease, Petitioner Chesapeake could drill. With the siblings having signed a lease, that being 75% of the property well over the 66.66% required, they would have been entitled to the bonus and royalty payment even without Respondent executing a new lease. (*Deposition transcript of Cecil Hickman, p 57, Appendix, p. 433*). This representation was false. As the Circuit Court correctly decided, the July 2006 lease was not valid as Chesapeake asserted when forcing Respondent to sign a top lease, the effect of which was to cheat him out of \$179,710 in bonus payment and higher royalty rates, all under the threat of refusing to also pay each of his three siblings like amounts.

Petitioner's brief incorrectly advises the Court as to what the misrepresentations and mistake of facts are at issue. Instead they skip past them and do just as they did to Respondent in 2011. The Trial Court identified multiple misrepresentations and the mistake of fact(s) regarding the validity of the 2006 lease.

Consequently, Respondent executed the top lease under significant distress in that the Respondent did not **want** to sign the new lease but felt that he had to in order to assure that his siblings got the monies Chesapeake promised to all of them

in the January 2011 lease. (*Order, Conclusions of Law, ¶42, Appendix, p 14, deposition transcript of Cecil Hickman, p 59, Appendix, p 434*).

Clearly, the lease of February 2011 was a product of misrepresentation, i.e., fraudulent inducement, and duress. Petitioner in its brief on page 17 make the argument that “the only way for Mr. Hickman’s siblings to receive any future royalty payments from Chesapeake was for all the property interests to be under lease – including Mr. Hickman’s interest” and assert that this was the “mistake of fact”, when it never was even the issue. In fact, Petitioner misstates the record found at p 14 of the appendix. The Court clearly stated that it was a misrepresentation to state that Respondent and his siblings had to sign an “amended lease” for no consideration. The court prudently examined the evidence existing on the record and finding no question of material fact regarding misrepresentation and mistake of fact correctly granted summary judgment in that regard and ruled the February 2011 lease invalid. As pointed out elsewhere, the February 2011 lease purported to be a top-lease, which was never exercised, in any event.

**D. The circuit court did not err in concluding that the 2005 Great Lakes lease signed on December 21, 2005, was the controlling contract between Respondent and Great Lakes**

The Petitioners assert that there was no ambiguity on the July 2006 lease despite numerous facts on the record supporting Respondent’s assertion that he was merely signing to accommodate the negotiated terms of a joint lease along with his siblings executed by them in December 2005. It is undisputed on the record below that the Respondent executed the lease in July of 2006 with the understanding that he was a party to a joint lease whereby he and his siblings would

have identical rights and terms thereunder. Additionally, based upon the affidavits of the Hickman siblings, this was also their understanding - - that the plaintiff would be a party with them on a joint lease whereby 100% of the undivided property would be subject to the same lease terms. Additionally, the record is devoid of any evidence proffered by any party that Great Lakes was unaware that the Respondent and his siblings wanted identical terms on the same joint lease.

Moreover, when signing the lease in July 2006, the Respondent was operating under the mistaken belief that he would be a party to a joint lease as aforesaid. The dating of the lease by Great Lakes after receiving it back from the Respondent is of no consequence to what was in the mind of the Respondent when he executed the same. Obviously, Great Lakes had no right to alter the date after Respondent signed. The blank lease sent to Great Lakes that Respondent signed cannot now be used to support the argument that the Respondent knew that he was going to be singled out with a separate, individual lease, with terms different than that of his siblings. This is especially evident in that the prior Canton lease of December 2001, involved the Respondent signing a lease separate and apart from his siblings but the result was still a joint lease with identical terms for all the Hickman siblings who all held undivided  $\frac{1}{4}$  interests in the tract in question.

All of the above serve as clear indications that there was no meeting of the minds on the lease dated July 19, 2006; therefore, it is not a valid lease.

In Kirby, supra the court recognized that “the elements of a contract are an offer and an acceptance supported by consideration.” *Id.*, (citing Dan Ryan Builders, Inc. v. Nelson, 230 W.Va. 281 at 287, 737 S.E.2d 550, at 556 (2012)(quoting First Nat'l

Bank of Gallipolis v. Marietta Mfg. Co., 151 W.Va. 636, 153 S.E.2d 172 (1967)); see also New v. Gamestop, Inc., 232 W.Va. 564, 753 S.E.2d 62, 71 (2013) (“West Virginia contract law requires mutual assent to form a valid contract . . . “In order for this mutuality to exist, it is necessary that there be a proposal or offer on the part of one party and an acceptance of the part of the other. Both the offer and acceptance may be by word, act or conduct that evince the intention of the parties to contract. That their minds have met may be shown by direct evidence of an actual agreement . . .”) (citations and footnotes omitted).

It is clear from the Kirby decision that an arbitration clause may be validated only upon a showing that the contract in its entirety is well supported by an offer, acceptance and sufficient consideration, thus making it a legitimate contract. *Id.*

In Dan Ryan Builders, supra, when dealing with the arbitration issue as it relates to the formation of the contract as a whole, this Court reiterated its long held position and stated that:

“The elements of a contract are an offer and an acceptance supported by consideration.” *Syl. Pt. 1, First Nat. Bank of Gallipolis v. Marietta Mfg. Co.*, 151 W.Va. 636, 153 S.E.2d 172 (1967). *Syl. Pt. 5, Virginia Export Coal Co. v. Rowland Land Co.*, 100 W.Va. 559, 131 S.E. 253 (1926). (“The fundamentals of a legal contract are competent parties, legal subject matter, valuable consideration and mutual assent. There can be no contract if there is one of these essential elements upon which the minds of the parties are not in agreement.”).

Dan Ryan Builders, supra, 230 W.Va. at 287, 737 S.E.2d at 556.

Moreover, “a meeting of the minds of the parties is the *sine qua non* of all contracts.” *Syl. Pt. 2, Triad Energy Corp. v. Renner, et al*, 215 W.Va. 573, 600 S.E.2d 285 (W.Va. 2004). The lower court held that without a meeting of the minds as to a

material and crucial term such as the effective date of the contract, there can be no contract. (*Order of Court, Conclusions of Law, Paragraph 16, Appendix, page 829*).

In the instant case, it is obvious that there was no meeting of the minds on the July 2006 contract. First, it was the understanding of the Respondent and his siblings that there would be a joint lease for all four of them dated December 21, 2010. As per the testimony and the affidavits of the siblings, it was the understanding of all of the Hickmans that Great Lakes would send a lease to the Respondent that would afford the Respondent identical terms, dates and conditions contained in their lease. The Petitioners offer not one shred of evidence to dispute these facts.

Second, when Respondent received the **undated** lease, he would have had no idea that Great Lakes would alter it and date it in the July 2006 time frame and later try to force him to be on a separate lease from his siblings. Clearly, there was no valid offer and acceptance nor meeting of the minds on the July 2006 lease agreement.

Additionally, the lower court correctly applied the law and had the authority to determine that the Memorandum of Lease was valid and properly recorded. (*Order of Court, Conclusions of Law, Paragraph 34-40, Appendix , pp 13-14*). This Memorandum of Lease is a clear indication of the intent of Great Lakes to contract with all four Hickman siblings on the same, joint lease with identical terms.

As is evidenced by the Memorandum of Lease, the Respondent is listed as a contracting party to a lease dated December 21, 2005. This document was of record **before** the date placed in Respondent's Great Lakes lease and at the time the

Chesapeake assignment was executed as it had been recorded on June 2, 2006 and made a part of the land books at book 768, page 790.<sup>3</sup> (*Memorandum of Lease, Appendix, pp 39-44*).

The Petitioners once again cite to the severability doctrine that the Respondent has adequately refuted herein. The lower court had the authority and obligation to determine whether a valid contract existed prior to entertaining the validity of a clause therein - - in this case, an arbitration clause, given Respondent's challenge to assent.

### **CONCLUSION**

For the reasons stated above, the Respondent, Cecil Hickman, respectfully requests that this Honorable Court affirm the Order entered by the Circuit Court of Ohio County, West Virginia.

Respectfully submitted,



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Gregory A. Gellner (WV Bar ID 4641)  
GELLNER LAW OFFICES  
1440 National Road  
Wheeling, WV 26003  
Phone: (304) 242-2900  
Fax: (304) 242-0200  
[ggellner@gellnerlaw.com](mailto:ggellner@gellnerlaw.com)

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<sup>3</sup> It is clear that Petitioner Chesapeake knew of this Memorandum of Lease as it negotiated a new lease with the plaintiff within days of the expiration of the December 21, 2005 lease (that expired on December 21, 2010).

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHESAPEAKE APPALACHIA, LLC,  
RED SKY LAND, LLC, RED SKY-  
WEST VIRGINIA, LLC, AND  
TERRY L. MURPHY,

Petitioners,

v.

No. 14-0921

CECIL L. HICKMAN,

Respondent.

**CERTIFICATE OF SERVICE**

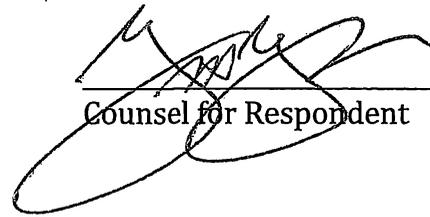
Service of the **RESPONDENT'S BRIEF** was had upon the following by sending true and correct copies thereof by regular U.S. Mail, postage prepaid, at their last known addresses this 22 day of January, 2015, as follows:

Robert C. James, Esq.  
FLAHERTY SENSABAUGH BONASSO PLLC  
1225 Market Street  
P.O. Box 6564  
Wheeling, WV 26003  
*Counsel for Defendants Geological Assessment & Leasing  
and William A. Capouillez*

Kenneth J. Witzel, Esq.  
BARNES DULAC WATKINS  
Two Gateway Center, 17 East  
603 Stanwix Street  
Pittsburgh, PA 15222  
*Counsel for Defendant Great Lakes Energy Partners, LLC  
N/K/A Range Resources -Appalachia, LLC*

Timothy M. Miller, Esq.  
BABST CALLAND CLEMENTS & ZOMNIR, P.C.  
500 Virginia Street East, Suite 590  
Charleston, WV 25301  
*Counsel for Defendant Chesapeake Appalachia, LLC, Red Sky Land, LLC, Red Sky-West  
Virginia, LLC, and Terry L. Murphy*

Gregory A. Gellner (WV Bar ID 4641)  
GELLNER LAW OFFICES  
1440 National Road  
Wheeling, WV 26003  
Phone: (304) 242-2900  
Fax: (304) 242-0200  
[ggellner@gellnerlaw.com](mailto:ggellner@gellnerlaw.com)



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Counsel for Respondent