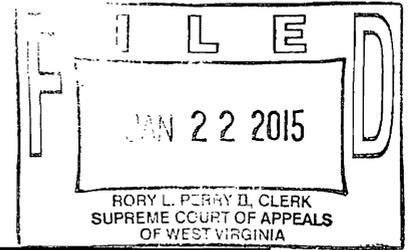


No. 14-0922



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

**At Charleston**

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**GEOLOGICAL ASSESMENT & LEASING AND WILLIAM CAPOUILLEZ**

*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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## STATEMENT OF THE CASE

### I. STATEMENT OF FACTS

Although the Respondent agrees that this is an appeal from the August 7, 2014, Order of the Circuit Court of Ohio County, the Honorable David J. Sims presiding, he disagrees with the Petitioners' statement that while addressing whether arbitration clauses contained within several oil and gas leases should be referred to arbitration, the lower court "ultimately concluded that the Court was without jurisdiction." The lower court did order, based upon a finding that one lease was controlling, that the case be transferred to arbitration; albeit only after having determined which leases, if any, were valid contracts and thus, made a finding that a valid arbitration clause existed. (*Order of Court, Conclusions of Law, Paragraphs 1-61, Appendix, pages 826-837*). Nowhere in the order is there a finding or conclusion that the court lacked jurisdiction to make the rulings that it did.

Moreover, the Petitioners fail to inform this Court of several material findings of fact made by the lower court in reaching its conclusion. The following sets forth such findings.

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 lease of this tract with Canton Oil and Gas Company (hereinafter referred to as "Canton lease") for oil and gas exploration for a term of 5 years. (*See Order of Court, Findings of Fact, Paragraph 2, Appendix, page 820 and Canton Lease, Appendix, pages 284-299*).

Respondent and his siblings, were assisted through a consulting agreement with the

Petitioners, regarding this lease that was not executed in person by Respondent, but rather, was received by mail and returned to Canton. (*Order of Court, Findings of Fact, Paragraphs 3-4, Appendix, page 821, deposition transcript of Cecil Hickman, pages 17-25, Appendix, pages 304-307*). Nonetheless, Respondent was a party to the Canton lease under the identical terms and dates as his siblings and stated that all four signed the same document. (*See Order of Court, Findings of Fact, Paragraphs 4, Appendix, page 821 and deposition transcript of Cecil Hickman, page 22, Appendix, page 306, and page 164, Appendix, page 341*).

In December 2005, prior to the expiration of the Canton lease, the Petitioners acting under a subsequent consulting agreement with the Respondent and his siblings, obtained an offer from Great Lakes (now known as Range Resources) for a subsequent joint lease (hereinafter referred to as "Great Lakes lease"). (*Order of Court, Findings of Fact, Paragraph 5-6, Appendix, page 821 and Deposition Transcript of William A. Capouillez, page 15-16, Appendix, page 223*). 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 of Court, Findings of Fact, Paragraph 7, Appendix, page 821, deposition transcript of Cecil Hickman, page 62, Appendix, page 316 and affidavits of John Mark Hickman, Carol Sue Criswell and Lawrence Grant Hickman, Appendix, pages 350-358*). Respondent thought that the 2005 lease was merely a renewal of the 2001 lease. (*Deposition transcript of Cecil Hickman, page 99, Appendix, page 325*).

Prior to December 21, 2005, the Petitioners procured an offer on behalf of the Respondent and his siblings and received a form contract with provisions for certain bonus payments and future royalties to be completed. (*Order of Court, Findings of Fact, Paragraphs, 6, 8, Appendix, page 821, and deposition transcript of William Capouillez, page 16, Appendix, page 223*). On December 21, 2005, the Petitioners tendered the Great Lakes lease to Respondent's siblings during a meeting at the Bethany (West Virginia) Fire Department at which time said siblings executed the lease. (*Order of Court, Findings of Fact, Paragraph 9, Appendix, page 821 and Deposition Transcript of William Capouillez, page 22-23, Appendix, page 235*).<sup>1</sup> Respondent did not attend this meeting as he was residing in Columbus, Ohio, at the time but knew generally the terms and conditions of the Great Lakes lease and intended to sign the lease jointly with his siblings as he had on the Canton lease. (*Order of Court, Findings of Fact, Paragraph 10, Appendix, page 821, and deposition transcript of Cecil Hickman, pages 32-35, Appendix, pages 308-309, page 62, Appendix, page 316*).

Petitioners admitted that Great Lakes had the authority to permit Respondent and his siblings to be included on one lease. (*Order of Court, Findings of Fact, Paragraph 12, Appendix, page 822, and deposition transcript of William Capouillez, pages 62-63, Appendix, page 245*). The Petitioners admit that if

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<sup>1</sup> *The Petitioners as well as Great Lakes and Chesapeake, defendants below, all failed or refused to provide a copy of the December 21, 2005, lease despite Respondent's formal discovery requests to procure the same. Interestingly, the Petitioners requested that the lower court compel arbitration on a lease that they have never produced to the parties or the court.*

landowners wanted to have the terms to a lease coordinated, they would all sign the same lease dated the same versus signing individual leases. (*Deposition Transcript of William Capouillez, page 62, Appendix, page 245*).

At the time of the negotiation process and thereafter, Great Lakes knew through discussions with Petitioners 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 of Court, Findings of Fact, Paragraph 11, Appendix, page 822, and affidavits of John Mark Hickman, Carol Sue Criswell and Lawrence Grant Hickman, Appendix pages 350-358*). The Petitioners were present during the meeting of December 21, 2005, whereby the Respondent's siblings executed the Great Lakes lease. (*Order of Court, Findings of Fact, Paragraph 13, Appendix, page 822 and deposition transcript of William A. Capouillez, page 22, Appendix, page 235*). Petitioners knew or should have been aware, at that time and during the time of his consultation with the Hickmans, they all wanted to be on the same lease with identical terms. (*Order of Court, Findings of Fact, Paragraph 13, Appendix, page 822 and affidavits of John Mark Hickman, Carol Sue Criswell and Lawrence Grant Hickman, Appendix pages 350-358*).

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 of Court, Findings of Fact, Paragraph 14, Appendix, page 822, deposition transcript of Cecil Hickman, page 32, Appendix, page 308 and affidavits of John Mark Hickman, Carol Sue Criswell and Lawrence Grant*

*Hickman, Appendix pages 350-358*). As noted above, this is exactly how the 2001 lease was handled.

The Respondent attempted to contact the Petitioners, specifically Capouillez, in January 2006 because 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 of Court, Findings of Fact, Paragraph 15, Appendix, page 822, and deposition transcript of Cecil Hickman, page 47, Appendix, page 313*). The Respondent made inquiries regarding the lease but it was not until July 2006 that he received a lease to sign. (*Order of Court, Findings of Fact, Paragraph 18, Appendix, page 822 and deposition transcript of Cecil Hickman, pages 42-43, Appendix, page 311*).

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 joint oil and gas lease executed in favor of the defendant, Great Lakes, dated December 21, 2005, and extending for a period of five (5) years. (*Memorandum of Lease, Appendix, pages 15-17 and Order of Court, Findings of Fact, Paragraphs 16-17, Appendix, page 822*).

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 of Court, Findings of Fact, Paragraph 18, Appendix page 822 and deposition transcript of Cecil Hickman, pages 42-45, Appendix,*

*page 311, pages 46-47, Appendix page 313*). After receiving the separate, undated lease, Respondent executed the lease, did not date it, and returned it to Great Lakes. *(Order of Court, Findings of Fact, Paragraph 21, Appendix, page 823 and deposition transcript of Cecil Hickman, page 43-44 appendix page 311)*. Upon receipt of the lease executed by the Respondent, Great Lakes, through its representative, altered the lease by affixing the date of July 19, 2006. Petitioners presented no evidence contrary to this fact. *(Order of Court, Findings of Fact, Paragraph 22, Appendix page 823, Great Lakes lease executed by Cecil Hickman, Appendix, pages 362-373)*. The Petitioners, although not named as parties to any lease, signed as consultants on both the December 2005 and July 2006 Great Lakes leases. *(Order of Court, Findings of Fact, Paragraph 44, Appendix, page 825, and Deposition transcript of William Capouillez, page 94, Appendix, page 253)*.

It is undisputed that despite a consulting agreement, the Petitioners, as agents for Respondent and his siblings, failed to ensure that the Great Lakes lease was the same for Respondent and all of his siblings who were equal co-owners of the tract in question. *(Order of Court, Findings of Fact, Paragraph 19, Appendix, page 822)*.

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 of Court, Findings of Fact, Paragraph 23, Appendix, page 823 and Complaint, Appendix, pages 1-27)*. 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. (*See affidavits of John Mark Hickman, Carol Sue Criswell and Lawrence Grant Hickman, Appendix, pages 350-358*). The Respondent's understanding also comports with the manner in which the prior joint lease was executed in 2001, one also obtained through a consultation agreement with the Petitioners. (*See Canton Lease, Appendix, pages 284-299*).

At no time was the lease of July 19, 2006, subject to negotiation or bargaining of any kind by and between Respondent and Great Lakes after the meeting of December 21, 2005. (*Order of Court, Findings of Fact, Paragraph 24, Appendix, page 823*).

Thereafter, Great Lakes assigned both the December 21, 2005, and July 19, 2006, leases to Chesapeake Appalachia, L.L.C.<sup>2</sup> The circumstances surrounding and issues related to these Great Lakes' leases culminated in the filing of Respondent's complaint. (*Complaint, Appendix, pages 1-27*). Specifically, with respect to the Petitioners, the Respondent has alleged that said Petitioners, under the consulting agreement, owed a duty to the Respondent to see that there was a joint lease executed by the Hickmans as tenants in common and the terms for each sibling would be identical. The Respondent contends that these duties were breached.

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<sup>2</sup> Issues related to this assignment and subsequent Chesapeake leases are the subject of another appeal to this court, specifically *Chesapeake Appalachia, L.L.C., et al v. Hickman, Appeal No. 14-0921*.

The manner in which Great Lakes and the Petitioners handled the original lease cascaded into a myriad of errors that greatly harmed the Respondent in his ¼ ownership in the tract in question as such related to his mineral rights. For a more complete rendition of the timeline of events following the assignment of the leases to Chesapeake Appalachia, L.L.C., the Respondent refers this Court to the Order from which Petitioners appeal is being taken. *(See Order, Findings of Fact, Paragraphs 25-40, Appendix, pages 823-825).*

Both Great Lakes' leases contained arbitration provisions as did the subsequent Chesapeake leases. 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.

## **II. PROCEDURAL HISTORY**

The Respondent does not take issue with the Petitioners' statement of Procedural History.

### **SUMMARY OF ARGUMENT**

The lower court appropriately determined that the lease of July 2006 was invalid in that it did not meet the requisite requirements for the formation of a contract under West Virginia law. It is within the purview of the circuit court to determine whether or not a valid contract exists.

Specifically, in this case, inasmuch as the Respondent and his siblings believed that they had, and intended to assign their rights to a lessor simultaneously and under the same terms and conditions, the court found based upon the above facts that the July 2006 lease agreement lacked the requisite mutual assent, i.e., meeting of the minds, that is necessary in order for a contract to be formed. There exists not one shred of evidence on the record proffered by the Petitioners that disputes this intent.

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. The facts of the *TD Ameritrade* case are vastly different than those in the case *sub judice* as the plaintiff below in that matter agreed to arbitration but wanted the court to determine the factual issue of the agency relationship between co-defendants pursuant to contract language. The formation of the contract and mutual assent were not at issue therein.

Further, the Memorandum of Lease duly filed by Great Lakes with the Clerk of the County Commission of Ohio County, West Virginia, supports the Respondent's position that Great Lakes, and all parties concerned, intended for the Respondent and his siblings to be privy to the same lease date and terms on the tract in question.

Great Lakes themselves recorded a public record giving notice that Respondent was bound by the December 21, 2005 lease.

Finally, under the consulting agreement between the Petitioners and Respondent, the court was correct in holding that the Petitioners knew or should have known that the Respondent and his siblings wanted to be on the same lease with identical terms, including the date of execution of the agreement. The record is devoid of anything to the contrary.

#### **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 look to the merits of the Respondent's claims against the Petitioners but rather found that the Great Lakes lease in question was not a valid contract which is appropriate for the lower court to decide as a matter of law and necessary in order to determine if a valid arbitration clause existed**

The Petitioners mischaracterize the actions of the lower court in that it did not decide the Respondent's claims on the merits. The lower court had the inherent power to determine first whether a valid contract existed in order to decide if a clause therein, in this case the arbitration clause, was enforceable. It is only by coincidence that this results in a finding of no contract, one of the allegations made

by the Respondent in his complaint. As noted, the Petitioners moved to compel arbitration and they were granted arbitration under a subsequent lease. Their appeal complains only because they want arbitration under a different lease than that found valid by the circuit court.

The Petitioners sought an order compelling arbitration based upon the Great Lakes leases, both of which purportedly contained identical arbitration clauses. (*See FN1 herein*). Petitioners also sought summary judgment on the merits, seeking to have the court decide Respondent's claims even though they allege in their brief that discovery had only been completed on the issue of arbitration. (*Defendant, William Capouillez and GAL's Renewed Motion to Compel, Motion to Dismiss, or In the Alternative, Motion for Summary Judgment, Appendix, pages 38-64*). In response, in the lower court, the Respondent contended that the entire lease dated July 19, 2006, was void as a matter of law inasmuch no valid contract was ever formed on that date. Obviously, if there never was a contract, the Petitioners cannot inure to the benefits therein, including the arbitration clause.

In reaching its conclusions, the lower court correctly applied the law and held that the July 19, 2006, lease lacked mutual assent and meeting of the minds, and was therefore invalid. Naturally, if the contract lacks mutual assent so do the terms therein.

During the proceedings below, at no time, did Petitioners assert that they should be made a part of the arbitration provision contained within the Chesapeake lease. In fact, it based all of its motions and arguments on facts and law related to its

involvement in the Great Lakes leases. The Petitioners have consistently taken the position that the arbitration clause in the Great Lakes leases are the applicable ones that the lower court needed to consider.

**1. The lower court did not exceed its authority and was within its jurisdiction when it determined the validity of the July 2006 Great Lakes lease as part of its analysis in determining the validity of the arbitration clause relied upon by the Petitioners**

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, including the same effective date of December 21, 2005. 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 the Petitioners that they were unaware that the Respondent and his siblings wanted identical terms on the same joint lease. As consultants, it is reasonable to believe that the Petitioners would be aware of their client's desire and understanding of the lease of December 2005.

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 Mr. Hickman signed. The blank lease sent to Great Lakes 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 lease of December 2001, orchestrated through the efforts of the Petitioners, involved the Respondent signing a lease on a separate date and at a separate location from his siblings but a joint one 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 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.

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 Kirby, 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.* Therefore, the lower court correctly stated that law and found that the “arbitration clauses contained in the leases in question must be analyzed first according to basic contract law in order for the court to determine whether, in fact, a valid contract exists at the outset. If no contract exists, then the entire agreement will be voided as a matter of law, including its arbitration provision.” (*Order of Court, Conclusions of Law, Paragraph 13, Appendix, page 829*).

The Petitioners' argument that the court cannot determine the validity of a contract under these circumstances does not comport with the relevant case law. 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).

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.

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)(citing *Webb v. Webb, Syl. Pt. 1, in part*, 171 W.Va. 614, 301 S.E.2d 570 (1983)). 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 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 did not offer one shred of evidence to dispute this fact.

Second, when Respondent received the **undated** lease, he would have had no idea that the co-defendant below, 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. Interestingly, the Petitioners in their motion filed before the lower court cited to the arbitration clause from the old Canton lease, the 2001 joint lease that was executed by the Hickman siblings and the Respondent, to support its contention that it was nearly identical to the one contained in its July 2006 lease. However Petitioner does not want to concede the obvious conclusion that the Respondent would have been under the reasonable impression that his lease with Great Lakes, executed in the same fashion, would be the same type of joint lease with his siblings and with the same effective dates.

Because the Respondent believed that he would be a party to an identical agreement with his siblings, it is inescapable that had Great Lakes or the Petitioners, or any of them, informed the Respondent that he would be signing a **separate** agreement that would have the date affixed after he signed and with a date six months past his siblings, he would have unequivocally refused that offer.

Respondent believed he was merely accommodating the December 21, 2005 lease with his signature. The Petitioners are attempting to stand on the July 2006 lease that was altered and unilaterally dated more than six months past the one executed by the Hickman siblings on December 21, 2010. Clearly, there was no valid offer and acceptance nor meeting of the minds on the July 2006 lease agreement effective date, and it was up to the trial court to make this determination.

**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 of Court, Findings of Fact, Paragraph 43, Appendix, page 825, Order of Court, Conclusions of Law, Paragraph 11, Appendix, page 828*).

The Petitioners claim that the court “*sua sponte* raised a Motion for Summary Judgment for the Plaintiff then proceeded to make a number of findings that directly affect the very issues that are subject to arbitration.” Once again, the Petitioners did not appropriately characterize the actions of the lower court. As has been previously stated, the Petitioners filed motions to dismiss then submitted evidence outside of the pleadings, thus converting a 12(b)(6) motion into a Rule 56 motion for summary judgment. In doing so, the Petitioners subjected themselves to the possibility that the circuit could may, in accordance with West Virginia law, enter judgment in favor of the Respondent without the Respondent, himself, having to file a motion for summary judgment. Once the court decided that there were no material facts in dispute it was authorized to decide the legal conclusions that followed as related to the leases and arbitration clauses.

“As the purpose of the summary judgment proceeding is to expedite the disposition of the case a summary judgment may be rendered against the party moving for judgment and in favor of the opposing party even though such party has made no motion for judgment.” *National Union Fire Ins. Co. of Pittsburgh v. Miller*, 228 W.Va. 739, 724 S.E.2d 343 (2012)(citing, Syl. Pt. 4, *Employers’ Liability Assurance*

*Corp. v. Hartford Accident & Indemnity Co.*, 151 W.Va. 1062, 158 S.E.2d 212 (1967));  
Syl. Pt. 2, *Arnold v. Palmer*, 224 W.Va. 495, 686 S.E.2d 725 (2009).

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 referral of the case to arbitration was not opposed 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 for lack of mutual assent.

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 whether there was assent to the contract, the circuit court did as it was required when faced with evidence that there was no meeting of the minds with respect to the agreement.

**3. The circuit court did, in fact refer Respondent's claims to arbitration albeit not under the arbitration clause in the July 2006 Great Lakes lease inasmuch as that lease was invalid**

Incredibly, the Petitioners are seeking to reverse the lower court's ruling when, in fact, it succeeded in getting the case referred to arbitration and states in their brief that the court made "extraneous" findings of fact and conclusions of law. As is evidenced below, this could be no further from the truth.

To clarify, it appears that the only issue to which the Petitioners seek reversal of the circuit court is which of the Great Lakes leases are valid; they proffer that they both are valid and the Respondent, accurately, contends that only the lease with mutual assent can be valid.

The lower court found that the July 2006 lease lacked a meeting of the minds and that "it is clear that it was the intention of the Plaintiff and his siblings that the Great Lakes lease was to have identical terms for all of the lessors, including the date of execution." Further, the circuit court correctly held that "Defendants [Petitioners] have offered no evidence to suggest that the Great Lakes lease (of December 2005)

was not to include all the owners of the property in question, that being Plaintiff [Respondent] and his siblings.” (*Order of Court, Conclusions of Law, Paragraph 23, Appendix, page 831*).

Respondent’s claims against the Petitioners deal with whether or not they breached their duty to him in not assuring that he was on the same lease as his siblings. They will have ample opportunity to present evidence at arbitration on the issue of whether they breached such a duty resulting in damages.

The lower court was correct in the manner in which it referred the Petitioners’ claims to arbitration. Since the July 2006 lease was invalidated and the December 2005 lease was valid but expired, the court accurately applied the law in stating that the claims Respondent has against the Petitioners could be litigated before an arbitrator after finding that Chesapeake’s arbitration clause was valid. The court ruled that the claims were inextricably intertwined so as to make a joint trial legally and logically reasonable. The Petitioners’ argument in this regard is simply nonsensical. They want both leases to be valid and subject to arbitration, but complain that they have to now arbitrate.

**C. The circuit court did not err in finding that the Petitioners knew or should have known that the Respondent wanted to be on the same lease as his siblings inasmuch as the facts on the record support such conclusion without any credible evidence proffered by the Petitioners that would contradict this fact**

The facts on the record below support the circuit court’s ruling. First, as stated by the court, the Petitioners did nothing to counter the Respondent’s

evidence that he, along with his siblings, understood that the Great Lakes lease was to be a joint lease among all co-tenants with identical terms, including date. (*Order of Court, Conclusions of Law, Paragraphs 22-23, Appendix, page 831, deposition transcript of Cecil Hickman, page 32, Appendix, page 308 and affidavits of John Mark Hickman, Carol Sue Criswell and Lawrence Grant Hickman, Appendix pages 350-358*).

Second, the Petitioners did not proffer evidence that would dispute the Respondent's understanding that he would receive the same rights and obligations under the Great Lakes lease as would his siblings especially since the previous Canton lease was executed by mail by the Respondent and its terms would be identical to his siblings. (*Order of Court, Conclusions of Law, Paragraphs 26, Appendix, page 831 and deposition transcript of Cecil Hickman, page 22, Appendix, page 306, and page 164, Appendix, page 341*).

Third, it is simply not credible to believe that the Respondent, under the circumstances as they existed at the time of the execution of the lease, believed that he would have a separate lease from his siblings on the same tract of land with the same lessor with different terms, conditions and date of execution. The Petitioners would have this Court believe a bizarre scenario that is not supported by the evidence.

The Petitioners set forth facts on pages 13 and 14 of its argument that are not relevant to the issues presented. The fact that the Respondent never spoke to Petitioner Capouillez is of no consequence when all the dealings between the latter and the Hickman siblings were enough to substantiate the fact that the Canton lease

was to be “renewed”. After all, Petitioners had no problem acting on behalf of the Respondent in negotiating the lease, seeing that he received a lease in July of 2006 and accepting funds from the Respondent’s lease with Great Lakes.

Moreover the fact that the Respondent did not attend the December 2005 meeting is equally inconsequential. The Petitioners represented the Respondent and his siblings on the 2001 Canton lease where the Respondent also did not attend and it had no ill effect on the execution of that lease.

As for a power of attorney, it was not necessary on the first lease with Canton and was not necessary on this one. Great Lakes sent a lease to Respondent on the advice of Petitioners with certain terms and conditions without requiring a power of attorney. It is obvious that one of his siblings, presumably John Mark Hickman, took the lead in dealing with the Petitioners who did not require a power of attorney.

The fact that the Respondent did not believe that his siblings could sign the lease on his behalf only serves to show that he believed that he would sign under the same process as with the Canton lease.

Finally, the lack of conversation or communication between the Respondent and anyone else prior to the execution of the July 2006 lease serves only to bolster Respondent’s argument that he was operating under the intention and belief that he would be signing the lease the same as he had done with the prior Canton one and would have a joint lease with identical terms with that of his siblings. The failure of the Respondent to have anything explained to him favors the position that Respondent did not understand, as the Petitioners suggest, that he would be signing

an individual lease. The Petitioners cannot use this negative evidence to prove anything.

Because the Petitioners cannot prove that there is a dispute with respect to the Respondent and his siblings' understanding and direction that they would be on a joint lease, summary judgment is appropriate. If the Petitioners had any evidence disputing these facts they were required to provide it at the lower court stage of this proceeding.

**D. The circuit court did not err in finding that the December 21, 2005 lease, was the controlling contract between the Respondent and Great Lakes inasmuch as Great Lakes included the Respondent along with his siblings on a Memorandum of Lease filed with the County Clerk of the Ohio County Commission putting the public on notice that the December 2005 lease was in full force and effect, that being the only valid lease since the July 2006 was an invalid one.**

The Respondent in his complaint, Count II, sought declaratory relief that, in part, requested that the lower court find that the Memorandum of Lease filed by Great Lakes in the Ohio County Clerk's Office is binding on Great Lakes and Chesapeake. (*Complaint, Appendix, pages 1-27*). Specifically, the Respondent asked that the court determine that Exhibit 1 of the Complaint, the Memorandum of Lease as aforesaid, is binding as to Great Lakes and Chesapeake and all persons or corporations reviewing the land books in Ohio County, such that the beginning date of the Respondent's lease with Great Lakes would be established as December 21, 2005, the actual date stated in said Memorandum. This comports with the evidence on the record that Respondent and his siblings understood that they would all be on the same, joint lease with identical terms and conditions.

While the court did not reach the merits of the declaratory judgment count due to the referral to arbitration, the court did reach the inescapable conclusion that the Memorandum of Lease, that was filed in the public records of Ohio County, placed co-defendant below Chesapeake on notice as to respondent being a party to the December 21, 2005 lease.

Clearly, 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, pages 13-14*).

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>

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, when mutual assent is challenged, prior to entertaining the validity of a clause therein - - in this case, an arbitration clause.

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<sup>3</sup> It is clear that Chesapeake knew of this Memorandum of Lease, and relied on it, 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).

**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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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

GEOLOGICAL ASSESSMENT & LEASING  
AND WILLIAM CAPOUILLEZ,

Petitioners,

v.

No. 14-0922

CECIL L. HICKMAN,

Respondent.

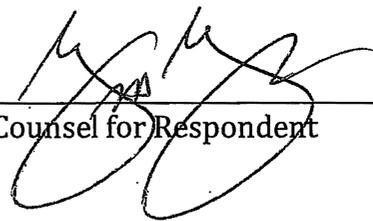
**CERTIFICATE OF SERVICE**

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:

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