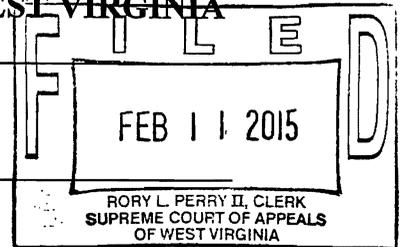


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-0923



GREAT LAKES ENERGY PARTNERS, LLC
N/K/A RANGE RESOURCES—APPALACHIA, LLC,

vs.

CECIL L. HICKMAN

Appeal of: RANGE RESOURCES—APPALACHIA, LLC

PETITIONER'S REPLY BRIEF

**Appeal from the Order of the Circuit Court of
Ohio County entered on August 7, 2014, at Civil Action No. 12-C-11**

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SUMMARY OF ARGUMENT

In its Order dated August 6, 2014 (the “Final Order”), the Circuit Court directed that “if any issues remain with regard to the Chesapeake lease [referred to in Petitioner’s Brief and in this Reply Brief as “the January 2011 Lease”¹], the Court grants Defendants’ various Motions to Compel Arbitration of the remaining issues and accordingly orders this matter stayed pending arbitration.” (Appeal Appendix (“AA”) 17 (Final Order, Conclusions of Law, ¶58) (emphasis added).) The Court further ordered that “[a]ll parties herein, including non-signatory Defendants, shall participate in the arbitration proceeding . . .” and that “all remaining claims involving all parties herein shall be arbitrated.” (AA 18 (Final Order, Conclusions of Law, ¶59) (emphasis added).)

As previously discussed and for the reasons set forth in Petitioner’s Brief, the Circuit Court committed clear error by requiring Range to participate in any future arbitration proceedings because: (i) Range is not a party to the January 2011 Lease and never agreed to arbitrate any claims under it; and (ii) the Circuit Court’s use of the “nonsignatory exception” was contrary to the law set forth in *State ex rel. United Asphalt Suppliers, Inc. v. Sanders*, 204 W.Va. 23, 511 S.E.2d 134 (1998).

Respondent argues that Range cannot object to its Court-ordered participation in arbitration proceedings under the January 2011 Lease because during the course of the proceedings Range sought to compel arbitration of Respondent’s claims against it under the

¹ The January 2011 Lease is an oil and gas lease dated January 5, 2011, between Defendant Chesapeake Appalachia, L.L.C. (“Chesapeake”), as lessee, and Respondent and his three siblings, John Mark Hickman, Lawrence Grant Hickman and Carol Sue Criswell (collectively, the “Siblings”), as lessors. (AA 38-43 (Complaint, Exh. 3).)

terms of a different oil and gas lease. That lease, which the Circuit Court held was “void as a matter of law,” was an oil and gas lease between Respondent and Range dated July 19, 2006 (the “2006 Lease”). (AA 12 (Final Order, Conclusions of Law, ¶¶29-30)). Not only does Respondent fail to cite any legal authority for his position that Range is precluded from objecting to arbitration under the January 2011 Lease, his argument is unconvincing. While Range sought arbitration as to the claims against it under the 2006 Lease, it never sought or assented to arbitration under the January 2011 Lease. Perhaps even more importantly, as discussed in detail below, the Final Order resolves all of Respondent’s claims against Range as a matter of law. Range cannot be a proper party to arbitration proceedings where no claims remain against it.

Respondent also argues that the Circuit Court’s application of the nonsignatory exception was proper under the legal theories of assumption and alternative estoppel. Neither theory applies here. Assumption only applies where a nonsignatory has manifested an intention to be bound by the arbitration agreement in question. Range has never manifested an intention to be bound by the arbitration provision in the January 2011 Lease—a lease to which it is not a party and in which it has no interest. Alternative estoppel is inapplicable because it may only be used by a nonsignatory to compel a signatory to arbitrate—it cannot be used to compel a nonsignatory to arbitrate. Additionally, because the Final Order resolved all claims against Range, the nonsignatory exception does not have any conceivable application to Range.

ARGUMENT

A. **There is No Arbitration Agreement Between Range and Respondent as to any Claims Under the January 2011 Lease**

While acknowledging that Range is not a party to the January 2011 Lease, *see* Respondent's Brief, at 7, Respondent nevertheless insists that because Range previously sought to compel arbitration under the 2006 Lease it somehow waived any objection to arbitration under the January 2011 Lease. *See, e.g.*, Respondent's Brief, at 15-19. According to Respondent, Range "is attempting to have this Court believe that it is against arbitration of Respondent's claims when, throughout the litigation, it has vehemently sought the lower court's referral to arbitration." Respondent's Brief, at 16.

However, the record is clear that Range never sought to compel arbitration under the January 2011 Lease and the Circuit Court refused to compel arbitration under the 2006 Lease. (AA 239 (Memorandum of Law in Support of Renewed Motion to Dismiss or, in the Alternative, to Compel Arbitration of Defendant Great Lakes Energy Partners, L.L.C., now known as Range Resources—Appalachia, LLC, Range ("Memorandum in Support of Motion to Dismiss"), at 2 ("Because the arbitration provision in the 2006 Great Lakes Lease [the 2006 Lease] is valid and enforceable, and the claims against Range are within its scope, the Federal Arbitration Act, 9 U.S.C. §§1-307 (2006) (the 'FAA') requires Plaintiff's claims against Range to be dismissed pending their submission to arbitration.") (emphasis added); AA 12-13 (Final Order, Conclusions of Law, ¶32) ("the Court grants summary judgment for Plaintiff in finding the July 19, 2006 lease void, and as a result, the arbitration clause therein is unenforceable").) Under these circumstances, the general rule against compelling parties who have not signed the

agreement at issue—in this case the January 2011 Lease—to participate in arbitration is
controlling. *See State ex rel. United Asphalt Suppliers, Inc. v. Sanders*, 204 W. Va. 23, 27, 511
S.E.2d 134, 138 (1998). Respondent cites no law to the contrary on this point.

Respondent also argues that arbitration is proper as to Range because the December 21,
2005 lease (the “2005 Lease”)—the “controlling” lease between Respondent and Range—
contained an arbitration provision. *See* Respondent’s Brief, at 16. This argument also lacks
merit. In ordering all parties to participate in any future arbitration, the Circuit Court relied
solely on the arbitration provision of the January 2011 Lease, which it held was the “controlling”
lease between Respondent and Chesapeake. (AA 14 (Final Order, Conclusions of Law, ¶45); *see*
also AA 17 (Final Order, Conclusions of Law, ¶56 (finding the arbitration clause in the January
2011 Lease to be “valid and enforceable”).) By contrast, the Circuit Court never considered
whether the arbitration provision in the 2005 Lease may have been “valid” or “enforceable.”
Indeed, there was no need, as Range never sought arbitration under the 2005 Lease. Further, the
Court did not rely on the 2005 Lease in ordering Range and the other “non-signatory
Defendants” to participate in arbitration.²

B. The Final Order Resolved All Claims Against Range

Respondent adamantly denies that “the lower court made findings that effectively
dismissed Respondent’s claims against Range.” Respondent’s Brief, at 16. However, that is

² In its Memorandum in Support of Motion to Dismiss, Range explained that even following its assignment of the 2006 Lease to Chesapeake in 2010, Range retained “a direct interest in the arbitration provision [in the 2006 Lease] to the extent a claim is made relating to any event in connection with the 2006 Great Lakes Lease [the 2006 Lease] occurring prior to July 1, 2010.” (AA 257). Respondent argues that Range’s point contradicts its current position. *See* Respondent’s Brief, at 18-19. Of course, Range’s point was only ever raised as to the 2006 Lease. It has no application to the January 2011 Lease, to which Range was never a party.

Great Lakes as to the terms of the July 2006 lease. Clearly, this lease lacked mutual assent to material terms, i.e., the parties thereto and the effective date.

(AA 12-13 (Final Order, Conclusions of Law, ¶¶28-30) (emphasis added).) Thus, as found by the Circuit Court, the 2006 Lease was mistakenly—as opposed to fraudulently—procured. (*Id.*)

It is well settled that a mere mistake cannot rise to the level of fraud. *See, e.g., Gerver v. Benavides*, 207 W. Va. 228, 232, 530 S.E.2d 701, 705 (1999) (“Actual fraud is intentional, and consists of an intentional deception or misrepresentation to induce another to part with property or to surrender some legal right, and which accomplishes the end designed.”) (quoting *Stanley v. Sewell Coal Co.*, 169 W. Va. 72, 76, 285 S.E.2d 679, 683 (1981)). Given the Circuit Court’s express finding that the 2006 Lease’s dating was the product of mistake, Respondent has no viable fraud claim against Range.

2. Respondent Has No Valid Claim Against Range for Improper Assignment

In his second claim against Range, Respondent avers that Range improperly sold or assigned its interests in the 2005 Lease and/or the 2006 Lease without having the right to do so. (*See* AA 30 (Complaint ¶87).) Although the nature of the claim is not specifically set forth in either the Complaint or Respondent’s Brief, presumably, it is for breach of contract. As to the 2006 Lease, which the Circuit Court found to be void, such a claim is impossible. Range could not have breached the 2006 Lease by attempting to assign its interest in it to Chesapeake because the 2006 Lease was a nullity. *See, e.g., King Lumber Co. v. Nat’l Bank of Summers*, 286 F. 906 (4th Cir. 1923) (breach of contract claim failed where no contract existed).

Neither the 2005 Lease nor the 2006 Lease contain a provision restricting assignments. (AA 162-171.)³ Absent such a provision, both leases were freely assignable and no cause of action for improper assignment may exist. See Syllabus Pt. 1, *Randolph v. The Koury Corp.*, 173 W.Va. 96, 97, 312 S.E.2d 759, 760 (1984) (“Being a restraint upon alienation, a condition against assignment by a lessee or an assignee of a lessee is governed by the rule of strict construction, and it does not exist unless it has been clearly and definitely provided in the lease or some other written instrument made collateral thereto.”) (quoting Syllabus Pt. 2, *Easley Coal Co. v. Brush Creek Coal Co.*, 91 W. Va. 291, 112 S.E. 512 (1922)). See also *Bank One, W. Va., N.A. v. U.S.*, Civ No. A. 3:93-1053, 1996 WL 303276, *4 (S.D. W. Va. March 29, 1996) (applying West Virginia law and recognizing that “[a]bsent a provision to the contrary, a lease may be freely assigned or sublet. Provisions restricting the right to do so are strictly construed, as restraints upon alienation are disfavored.”).

3. Respondent’s Estoppel Claim was Resolved in His Favor

Respondent’s third claim—seeking to estop Range from asserting any effective date for its lease with Respondent other than December 21, 2005 (AA 30 (Complaint, ¶88)), was resolved in Respondent’s favor in the Final Order. (See AA 12 (Final Order, Conclusions of Law, ¶29 (“the July 2006 lease [the 2006 Lease] is void as a matter of law ... and the Great Lakes lease [the 2005 Lease] is the controlling lease”)).)

³ The record on appeal does not include a copy of the 2005 Lease, but it is undisputed that it is materially identical to the 2006 Lease. (See AA 529 (Hickman Dep., p. 171, ln. 19 to p. 172, ln. 5) (counsel for Respondent, Gregory A. Gellner, Esquire: “And whatever the siblings signed, which I don’t know if any of us has a copy of that. It’s the same lease, yes.”).) See also Respondent’s Brief, at 10 (“...the lease executed by the Respondent in July 2006 should have mirrored the one signed by his siblings in December 2005”).

4. Respondent's Allegations of Economic Harm and Negative Title Impact Do Not Constitute Separate Claims Against Range

Respondent's fourth and fifth "claims" against Range broadly allege that Range's conduct "economically harmed plaintiff" and "affected the title of plaintiff to his property." (AA 30 (Complaint, ¶¶89-90).) These "claims" do not constitute stand-alone claims or causes of action, but are mere general assertions of damages.

5. Respondent Has No Valid Slander of Title Claim Against Range

Respondent's sixth claim against Range is that Range slandered his title by recording the 2005 Memorandum of Lease and/or the 2006 Memorandum of Lease. (AA 30 (Complaint, ¶¶91-92).) Because the Circuit Court found that the 2005 Lease was the controlling lease between Range and the Respondent, Range could not have slandered Respondent's title by recording the 2005 Memorandum of Lease. *See* Syllabus Pt. 3, *TXO Prod. Corp. v. Alliance Res. Corp.*, 187 W. Va. 457, 460, 419 S.E.2d 870, 873 (1992) (finding publication of "a false statement" to be an essential element of a slander of title claim). As to the 2006 Memorandum of Lease, because the Circuit Court found that it was mistakenly procured, Range's recording of the 2006 Memorandum of Lease could not have been done maliciously and Respondent's slander of title claim as to the 2006 Memorandum of Lease is, consequently, defective. *See id.* at 466-67, 419 S.E.2d at 879-80 (claim for slander of title requires a plaintiff to prove that the defendant acted with malice; "If ... an honest mistake had arisen ... the counterclaim for slander of title would never have arisen.").

6. Respondent's Declaratory Judgment Claim was Resolved in His Favor

Finally, Respondent's seventh claim, which sought a declaration that "the memorandum of lease filed in Ohio County" was binding and that the January 2011 lease was valid (*see* AA 26-27 (Complaint, ¶¶51-52)), was resolved in Respondent's favor in the Final Order. (*See* AA 12 (Final Order, Conclusions of Law, ¶¶29, 45 ("the Chesapeake lease [the January 2011 Lease] is the valid, enforceable and controlling lease with respect to the rights and obligations between [Respondent] and his siblings, as lessors, and Chesapeake, as lessee."))).

7. Respondent Never Raised any Negligence Claims Against Range

Finally, apparently attempting to create a new cause of action to justify Range's inclusion in future arbitration proceedings, Respondent appears to suggest that the Complaint avers a negligence claim against Range. *See, e.g.*, Respondent's Brief, at 18 ("The unfortunate circumstances giving rise to the July 2006 lease and the aftermath, particularly with regard to the Chesapeake lease problems, may be attributed to the actions of the Petitioner, negligent and otherwise. Therefore, those claims set forth in Respondent's complaint remain and have not been resolved."). However, it does not. In fact, the Complaint never once uses the word "negligence" or "negligent" in reference to Range. Nor does it allege that Range owed or breached a duty to Respondent—two essential elements of a negligence claim. *See Hersh v. E-T Enterprises, Ltd. Partnership*, 232 W. Va. 305, 310, 752 S.E.2d 336, 341 (2013). Having failed to include such basic and essential averments, Respondent may not now pursue a claim of negligence. *Highmark W. Va., Inc. v. Jamie*, 221 W. Va. 487, 491, 655 S.E.2d 509, 513 (2007) ("Under Rule 8 [of the West Virginia Rules of Civil Procedure], a complaint must be intelligibly

sufficient for a circuit court or an opposing party to understand whether a valid claim is alleged and, if so, what it is.”) (citation omitted). The period for bringing a negligence claim against Range for events occurring nearly ten years ago, in 2005 and 2006, has long since passed and Respondent may not do so now. See *Trafalgar House Const., Inc. v. ZMM, Inc.*, 211 W. Va. 578, 583, 567 S.E.2d 294, 299 (2002) (“Under West Virginia law, claims in tort for negligence ... are governed by a two-year statute of limitation. *W.Va.Code*, 55-2-12 [1959].”).

In short, Respondent’s claims against Range are incompatible with the findings of fact and conclusions of law set forth in the Final Order. Because Respondent has no valid claims against Range, the Circuit Court committed clear error in ordering Range to participate in future arbitration proceedings.

C. The Nonsignatory Exception Does Not Apply

Respondent also maintains that the Circuit Court properly applied the nonsignatory exception to compel Range to participate in any future arbitration proceedings. Respondent’s Brief, at 20. Of course, the nonsignatory exception does not apply because the Final Order resolved all of Respondent’s claims against Range. As such there is nothing to arbitrate. Further, even if that was not the case, as discussed below, the nonsignatory exception would not apply.

1. **“Common Law Principles of Contract Law and Agency” Do Not Support the Nonsignatory Exception’s Application Against Range**

In *United Asphalt Suppliers, Inc. v. Sanders*, 204 W. Va. 23, 27, 511 S.E.2d 134, 138 (1998), this Court expressly acknowledged the existence of the “nonsignatory exception.”⁴ In discussing the exception’s parameters, the Court cited favorably a decision from the United States Court of Appeals of the Second Circuit, *Thomson-CSF, S.A. v. Am. Arbitration Ass’n*, 64 F.3d 773 (2d Cir. 1995). Both Petitioner and Respondent believe that *Thomson-CSF*, which includes a comprehensive survey of case law addressing the common law basis for the nonsignatory exception, is “the most instructive case” on the topic. Petitioner’s Brief, at 11; Respondent’s Brief, at 22.

Respondent’s position is that the nonsignatory exception is applicable based on two of the five theories for binding nonsignatories to arbitration agreements identified in *Thomson-CSF*—assumption and estoppel. Respondent’s Brief, at 23. Under the assumption theory, a nonsignatory “may be bound by an arbitration clause if its subsequent conduct indicates that it is assuming the obligation to arbitrate.” *Thomson-CSF, supra*. at 777 (citation omitted). In *Thomson-CSF*, the Court declined to require the nonsignatory before it to arbitrate, where “at no time did [it] manifest an intention to be bound by the” agreement at issue. *Id.* at 777. Similarly, here, has Range never manifested an intention to be bound by the arbitration provision in the January 2011 Lease. Its attempts to secure arbitration under the 2006 Lease are irrelevant to the 2011 Lease and its provisions.

⁴This Court has never actually applied the nonsignatory exception to compel a nonsignatory to participate in arbitration. In *United Asphalt Suppliers*, the Court found that the record before it had not been sufficiently developed to allow meaningful consideration of the issue. *United Asphalt Suppliers, supra*. at 27, 511 S.E.2d at 138.

Respondent's argument under the estoppel theory relies on a form of estoppel referred to in *Thomson-CSF* as "alternative estoppel." Respondent's Brief, at 24 ("The Respondent's claims against the Petitioner fall within the alternative estoppel theory . . ."). As explained in *Thomson-CSF*, alternative estoppel may justify the compulsion of a signatory to "arbitrate with a nonsignatory at the nonsignatory's insistence because of the close relationship between the entities involved as well as the relationship of the alleged wrongs to the nonsignatory's obligations and duties in the contract . . . and [the fact that] the claims were intimately founded in and intertwined with the underlying contract obligations." *Thomson-CSF*, 64 F.3d at 779 (citations and internal quotations omitted).

A critical and unwavering aspect of the alternative estoppel theory is that it may only be used by a nonsignatory to compel a signatory to arbitrate. The court in *Thomson-CSF* expressly recognized this key aspect of the theory and refused to apply it to compel a nonsignatory to participate in arbitration in the case before it. It held:

[T]he circuits have been willing to estop a *signatory* from avoiding arbitration with a nonsignatory when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed. As the district court pointed out, however, "[t]he situation here is inverse: E & S, as signatory, seeks to compel Thomson, a non-signatory." While E & S suggests that this is a non-distinction, the nature of arbitration makes it important. Arbitration is strictly a matter of contract; if the parties have not agreed to arbitrate, the courts have no authority to mandate that they do so.

Id. (emphasis in original).

Respondent is a signatory who seeks to compel a nonsignatory, Range, to participate in arbitration. Clearly, the alternative estoppel theory has no application here.

2. Neither the “Relationship of the Parties” Nor the “Intertwined Nature of the Claims” Support the Nonsignatory Exception’s Application Against Range

Relying on *Caperton v. A.T. Massey Coal Co., Inc.*, 225 W.Va. 128, 690 S.E.2d 322 (2009), Respondent argues that “the relationship of the parties” and the “intertwined nature of the claims” support the Circuit Court’s application of the nonsignatory exception. As explained in Petitioner’s Brief, the Circuit Court’s reliance on *Caperton* was wholly improper as that case concerned a forum selection clause, not an arbitration clause, and, unlike here, involved nonsignatories with direct corporate relationships to signatories. Petitioner’s Brief, at 12, including n.4.⁵

D. As a Result of the Final Order, No Claims Remain to be Remanded to the Circuit Court

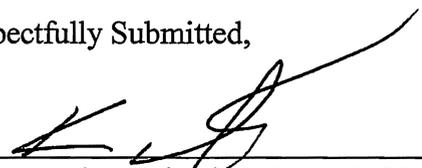
Respondent argues in his brief that if “Petitioner is not compelled to have the claims heard by arbitration, then those claims must be referred back to the circuit court. . . .” Respondent’s Brief, at 26-27. As discussed in Section 2 above, by virtue of the Final Order, none of Respondent’s claims against Range remain.

⁵Respondent’s reliance on the Texas case, *Compana LLC v. Mondial Assistance SAS*, No. 3:07-CV-1293-D, 2008 WL 190522, *4 (N.D. Tex. Jan. 23, 2008), and the “intertwined claims theory” discussed in it, *see* Respondent’s Brief, at 25, is also misplaced. In *Compana*, the court explained that as with the alternative estoppel theory, the “intertwined claims theory” may only “grant a non-signatory to a contract the right to enforce a provision of the contract against a signatory. *Id.* *4 (emphasis added). Because Respondent, a signatory to the 2011 Lease, is attempting to enforce the arbitration clause against Range, a non-signatory to the 2011 Lease, the “intertwined claims theory has no relevance to this case.” *Id.*

CONCLUSION

The Circuit Court committed clear error in ordering Petitioner Great Lakes Energy Partners, LLC n/k/a Range Resources—Appalachia, LLC, a nonsignatory to the January 2011 Lease, to participate in any future arbitrations proceedings that may be initiated by Respondent/Plaintiff Cecil L. Hickman. Range respectfully submits that this Honorable Court must overrule the Circuit Court's Order dated August 6, 2014 to the extent it requires Range to participate in any future arbitration proceedings.

Respectfully Submitted,

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Dated: February 10, 2015

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the foregoing Brief for Petitioner have been served by first class mail, postage prepaid, on this the 10th day of February, 2015 on the following:

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