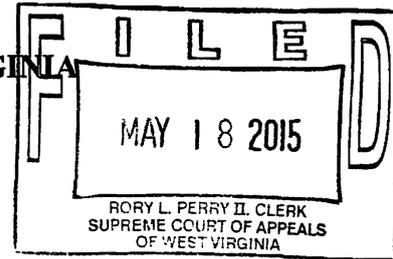


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 15-0124



SUGAR ROCK, INC., a West Virginia corporation,
GERALD D. HALL, IAMS GAS COMPANY, IAMS
OIL COMPANY, CUTRIGHT GAS COMPANY,
and KEITH OIL COMPANY,

Defendants-Petitioners,

v.

D. MICHAEL WASHBURN, LISA A. BUZZARD,
CLAIRE ROBINSON, EDWIN L. DEEM, REA
WEDEKAMM, MARY WAKEFIELD, KENNETH
A. TOWNSEND, ANNA LEE TOWNSEND WELLS,
CLYDE TOWNSEND, MICHAEL RUBEL, JEROME
RUBEL, KEITH WHITE, as Executor of the Estate of
Bertie C. Cox, and J.F. DEEM,

Plaintiffs-Respondents.

BRIEF OF PETITIONERS

W. Henry Lawrence (W. Va. Bar #2156)
Amy M. Smith (W. Va. Bar #6454)
William J. O'Brien (W. Va. Bar #10549)
STEPTOE & JOHNSON PLLC
400 White Oaks Boulevard
Bridgeport, WV 26330
Telephone (304) 933-8000
Facsimile (304) 933-8183

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

I. INTRODUCTION1

II. STATEMENT OF JURISDICTION.....2

III. ASSIGNMENTS OF ERROR.....4

IV. STATEMENT OF THE CASE.....5

 A. Procedural History5

 B. Statement of the Facts10

V. SUMMARY OF THE ARGUMENT14

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION15

VII. ARGUMENT15

 A. The Circuit Court Erred in Granting Partial Summary Judgment to Respondents without Applying the Summary Judgment Standard and without Identifying the Claims, the Facts, and in Some Instances the Law Upon Which it Based its Decision.....15

 B. The Circuit Court Erred in Holding as a Matter of Law that Iams Gas Company, Iams Oil Company, Cutright Gas Company, and Keith Oil Company Are West Virginia Partnerships, Whether Characterized as Mining Partnerships, General Partnerships, Partnerships in Mining, or Partnerships, and Further that Many, if not All, Respondents and Sugar Rock Are Partners.....19

 C. The Circuit Court Erred in Holding as a Matter of Law that the Assets of Iams Gas Company, Iams Oil Company, Cutright Gas Company, and Keith Oil Company Include Leases24

 D. The Circuit Court Erred in Holding as a Matter of Law that All Procedural Requirements to a Decree of Dissolution have been Met28

 E. The Circuit Court Erred in Holding as a Matter of Law that Iams Gas Company, Iams Oil Company, Cutright Gas Company, and Keith Oil Company Must be Wound up, and the Circuit Court Abused its Discretion in Appointing Rodney Windom as a Special Receiver and Further Appointing Hays and Company as a Distribution Company33

VII. CONCLUSION.....37

TABLE OF AUTHORITIES

CASES

<i>Arbaugh v. Raines</i> , 155 W. Va. 409, 184 S.E.2d 620 (1971).....	28
<i>Armor v. Lantz</i> , 207 W. Va. 672, 535 S.E.2d 737 (2000).....	22, 23
<i>Bartlett & Stancliff v. Boyles</i> , 66 W. Va. 327, 66 S.E. 474 (1909).....	31
<i>Conrad v. ARA Szabo</i> , 198 W. Va. 362, 480 S.E.2d 801 (1996).....	16
<i>Davidson v. Davidson</i> , 70 W. Va. 203, 73 S.E. 715 (1912).....	2
<i>Kennedy v. Burns</i> , 84 W. Va. 701, 101 S.E. 156 (1919).....	24
<i>King v. Meabon</i> , 128 W. Va. 263, 36 S.E.2d 211 (1945).....	22, 23
<i>Lantz v. Tumlin</i> , 74 W. Va. 196, 81 S.E. 820 (1914).....	7, 20
<i>Lawrence v. Montgomery Gas Co.</i> , 84 W. Va. 382, 99 S.E. 496 (1919).....	2
<i>Snodgrass v. Snodgrass</i> , 107 W. Va. 136, 147 S.E.2d 483 (1929).....	34
<i>State ex rel. Battle v. Hereford</i> , 148 W. Va. 97, 133 S.E.2d 86 (1963).....	2, 35, 36
<i>State ex rel. McGraw v. Telecheck Servs., Inc.</i> , 213 W. Va. 438, 582 S.E.2d 885 (2003).....	2
<i>Taylor v. United Fuel Gas Co.</i> , 100 W. Va. 644, 131 S.E.461 (1926).....	2
<i>Valentine v. Sugar Rock</i> , 782 F.3d 145 (4th Cir. 2015)	1

<i>Valentine v. Sugar Rock, Inc.</i> , No. 1:10CV193 (N.D.W. Va. filed Nov. 8, 2010).....	5, 6, 8
<i>Valentine v. Sugar Rock, Inc.</i> , 234 W. Va. 526, 766 S.E.2d 785 (2014).....	<i>passim</i>
<i>W. Va. Dep't of Transp. v. Robertson</i> , 217 W. Va. 497, 618 S.E.2d 506 (2005).....	16
<i>Whyel v. Jane Lew Coal & Coke Co.</i> , 67 W. Va. 651, 69 S.E. 192 (1910).....	2
<i>Williams v. Precision Coil, Inc.</i> , 194 W. Va. 52, 459 S.E.2d 329 (1995).....	15, 16

CONSTITUTIONS AND STATUTES

W. Va. Const. Art. VIII, § 3.....	3
28 U.S.C. § 1292.....	3
W. Va. Code § 36-1-1	24
W. Va. Code § 47B-1-1	7
W. Va. Code § 47B-2-2	22
W. Va. Code § 47B-2-4	24, 26
W. Va. Code § 47B-6-1	21, 29, 30
W. Va. Code § 47B-7-1	29, 30, 33
W. Va. Code § 47B-8-1	29, 30
W. Va. Code § 47B-8-3	33
W. Va. Code § 53-6-1	35

RULES

W. Va. R. App. P. 19	15
W. Va. R. App. P. 20	15
W. Va. R. App. P. 21	15
W. Va. R. Civ. P. 8	19
W. Va. R. Civ. P. 12	18
W. Va. R. Civ. P. 56	15, 16

I. INTRODUCTION

Petitioners Sugar Rock, Inc., Gerald D. Hall, Iams Gas Company, Iams Oil Company, Cutright Gas Company, and Keith Oil Company submit this brief on petition for appeal from the Circuit Court of Ritchie County's decision and judgment entry, granting Respondents' second motion for partial summary judgment on January 16, 2015. This action was identified as a similar lawsuit in this Court's opinion in *Valentine v. Sugar Rock, Inc.*, 234 W. Va. 526, 766 S.E.2d 785, 790 (2014). In *Valentine*, which involved an order of certification from the Fourth Circuit regarding application of the Statute of Frauds to a mining partnership, this Court stated:

We answer the question posed by the Court of Appeals, as reformulated, in two parts. We conclude that the Statute of Frauds requires the partners of a mining partnership to show their membership through a deed, will, or other written conveyance establishing they are co-owners of the mineral interest being mined. However, because the real property of a general partnership belongs to the partnership entity and not the individual partners, no such writing is required to establish a partnership interest in a general partnership.

Id., 766 S.E.2d at 802.

The Fourth Circuit adopted this Court's opinion in *Valentine*, vacated the District Court's judgment, and remanded the case for such other and further proceedings as may be appropriate. *Valentine v. Sugar Rock*, 782 F.3d 145, 148 (4th Cir. 2015). The District Court has not yet acted on remand. The Appellees in *Valentine* maintain that an issue regarding general partnerships was not raised in the Fourth Circuit and was expressly waived in the District Court.

Here, the Circuit Court erroneously concluded based on *Valentine* that West Virginia partnerships exist, however characterized, with unspecified partners, and that certain leases are included in the partnership property. The Circuit Court further erroneously ordered dissolution and winding up, and appointed a special receiver and distribution company. Petitioners will be irreparably harmed unless this Court reverses and remands this action for further proceedings.

II. STATEMENT OF JURISDICTION

This Court has jurisdiction over the Circuit Court's decision and judgment entry because it is an order appointing a receiver. This Court's longstanding jurisprudence recognizes that it possesses appellate jurisdiction to review interlocutory orders in cases in equity appointing receivers. *See, e.g., Whyel v. Jane Lew Coal & Coke Co.*, 67 W. Va. 651, 69 S.E. 192, Syl. Pt. 3 (1910) (holding "[a] decree or order made in a pending cause appointing a special receiver of defendant's coal mining plant, directing him to make a complete inventory, and report to the court the advisability of continuing the operation thereof, is by virtue of clause 7, § 1, c. 135, Code 1906, an appealable order, although such property be then in the possession of a special receiver appointed by another court"); *Davidson v. Davidson*, 70 W. Va. 203, 73 S.E. 715, Syl. Pt. 2 (1912) (holding "[a]n interlocutory decree appointing a receiver to take charge of and rent real estate is an appealable decree"); *Taylor v. United Fuel Gas Co.*, 100 W. Va. 644, 131 S.E. 461 (1926) (appeal from appointment of receiver sought for the purpose of drilling for and operating the oil and gas; decree reversed).

The Court has also on occasion reviewed orders appointing receivers in considering petitions for writs of prohibition and certified questions. *See, e.g., State ex rel. Battle v. Hereford*, 148 W. Va. 97, 133 S.E.2d 86 (1963) (granting writ of prohibition because circuit court lacked equitable jurisdiction to grant injunction or appoint receiver); *Lawrence v. Montgomery Gas Co.*, 84 W. Va. 382, 99 S.E. 496 (1919) (answering certified questions regarding whether circuit court properly appointed receiver to take charge of and operate oil well).

More recently, in *State ex rel. McGraw v. Telecheck Services, Inc.*, 213 W. Va. 438, 582 S.E.2d 885, 891-95 (2003), this Court concluded that it has jurisdiction to hear appeals from

interlocutory orders relating to preliminary or temporary injunctive relief. The Court held: “The Supreme Court of Appeals has original jurisdiction in cases of habeas corpus, mandamus and prohibition and appellate jurisdiction in all other cases mentioned in Article VIII, Section 3, of the Constitution of this State and in such additional cases as may be prescribed by law.” *Id.* at Syl. Pt. 1 (citations omitted). The West Virginia Constitution, Article VIII, § 3 provides that the Court shall have appellate jurisdiction “in civil cases in equity[.]”

The Court’s jurisprudence with regard to appeals from interlocutory orders regarding injunctive relief and appointing receivers is consistent with 28 U.S.C. § 1292(a). Section 1292(a) grants federal courts of appeals jurisdiction over the same interlocutory decisions, providing in relevant part as follows:

Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States . . . , or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property[.]

In this action, the Circuit Court’s decision and judgment entry appoints Rodney Windom as a special receiver to supervise the winding up of Iams Gas Company, Iams Oil Company, Cutright Gas Company, and Keith Oil Company. The decision and judgment entry grants Windom powers similar to those granted the receivers in the cases cited above. The decision and judgment entry also appoints Hays and Company to distribute the assets and for other purposes as the special receiver may direct. Therefore, the West Virginia Constitution, Article VIII, § 3 affords this Court appellate jurisdiction over an appeal from the decision and judgment entry.

III. ASSIGNMENTS OF ERROR

1. The Circuit Court erred in granting partial summary judgment to Respondents without applying the summary judgment standard and without identifying the claims, the facts, and in some instances the law upon which it based its decision.

2. The Circuit Court erred in holding as a matter of law that Iams Gas Company, Iams Oil Company, Cutright Gas Company, and Keith Oil Company are West Virginia partnerships, whether characterized as mining partnerships, general partnerships, partnerships in mining, or partnerships, and further that many, if not all, Respondents and Sugar Rock, are partners.

3. The Circuit Court erred in holding as a matter of law that the assets of Iams Gas Company, Iams Oil Company, Cutright Gas Company, and Keith Oil Company include leases.

4. The Circuit Court erred in holding as a matter of law that all procedural requirements to a decree of dissolution have been met.

5. The Circuit Court erred in holding as a matter of law that Iams Gas Company, Iams Oil Company, Cutright Gas Company, and Keith Oil Company must be wound up, and the Circuit Court abused its discretion in appointing Rodney Windom as a special receiver and further appointing Hays and Company as a distribution company.

IV. STATEMENT OF THE CASE

A. Procedural History

Respondents D. Michael Washburn, Lisa A. Buzzard, Claire Robinson, Edwin L. Deem, Rea Wedekamm, Mary Wakefield, Kenneth A. Townsend, Anna Lee Townsend Wells, Clyde Townsend, Michael Rubel, Jerome Rubel, and Keith White, as executor of the estate of Bertie C. Cox, filed their second amended complaint in the Circuit Court of Ritchie County on September 19, 2012. A.R. 88.¹ Respondent J.F. Deem joined by order entered October 28, 2013. A.R. 861. Respondents allege that Iams Gas Company, Iams Oil Company, Cutright Gas Company, and Keith Oil Company “are West Virginia mining partnerships” and collectively refer to those companies as “Ritchie County Mining Partnerships.” Washburn and Buzzard (brother and sister) allege to be “passive, non-controlling, minority partners in the Ritchie County Mining Partnerships” and they represent a class of others similarly situated including the remaining Respondents. A.R. 91.² Sugar Rock owns the majority interest in Iams Gas Company, Iams Oil Company, Cutright Gas Company, and Keith Oil Company. A.R. 92. Iams Gas Company, Iams Oil Company, Cutright Gas Company, and Keith Oil Company are alleged to own certain wells, which Respondents refer to collectively as the “Ritchie County Wells,” as well as certain oil and gas leases, which they refer to collectively as the “Ritchie County Base Leases.” A.R. 96-97. The five-count second amended complaint contains claims for class action, declaratory relief and

¹ This action was initiated as a putative class action with the filing of the complaint on November 14, 2011. A.R. 11. At that time, Clifton G. Valentine was the only named Plaintiff and class representative. The first amended complaint, which was filed on December 1, 2011, continued to name Valentine, but also named six additional Plaintiffs. A.R. 34. By order entered September 5, 2012, Valentine was dropped from the action and Washburn and Buzzard were substituted as representatives for purposes of the class action and the derivative action claims. At that time, leave was also granted to file the second amended complaint, which is the operative complaint for purposes of this appeal. A.R. 86. It should be noted, however, that a third amended complaint was filed on January 16, 2015. A.R. 1530. It should further be noted that the Circuit Court recently allowed Valentine to re-join this action although his federal case is still pending in the district court. *See Valentine v. Sugar Rock, Inc.*, No. 1:10CV193 (N.D.W. Va. filed Nov. 8, 2010).

² Respondents have not pursued class certification. Many Respondents are related to each other.

quiet title, derivative action, judgment on accounts and breach of fiduciary duties, and dissolution. Respondents demand in relevant part:

WHEREFORE, Plaintiffs, D. Michael Washburn and Lisa Buzzard, pray that they be declared to be the representative party of the class of passive, non-controlling, minority partners in the Ritchie County Mining Partnerships; that the Court declare that the Ritchie County Mining Partnerships own the Ritchie County Wells and the Ritchie County Base Leases in derogation to the rights of Defendant, Sugar Rock, Inc.; . . . that the Ritchie County Partnerships be declared dissolved, that a receiver be appointed, that the affairs of the Ritchie County Mining Partnerships be wound up, that all their assets be sold, that the accounts between Sugar Rock, Plaintiffs, and the members of the Minority Partner Class be settled, and that the net proceeds be distributed to Plaintiffs, the Minority Partner Class, and Sugar Rock, as the Court determines

A.R. 102-03.

On September 21, 2012, Petitioners filed an amended answer to Respondents' second amended complaint and counterclaim of Sugar Rock. A.R. 107. In the counterclaim, Sugar Rock seeks a declaration that Respondents have no ownership interests or, if Respondents or their predecessors ever had an interest that those interests reverted to Sugar Rock because Respondents or their predecessors refused and have failed to remit to Sugar Rock or its predecessor, as operator of the subject entities, their proportionate share of the expenses related to their claimed ownership interests. Alternatively, Sugar Rock demands that if Respondents are found to possess current ownership interests then Respondents be assessed for their proportionate share of the expenses plus interest for the ownership interests they claim. A.R. 121-22.

On October 10, 2012, Petitioners filed a motion for judgment on the pleadings, arguing that Respondents cannot establish mining partnerships because, among other reasons, some of the Respondents do not have written documents evidencing an ownership interest as required by the District Court in *Valentine v. Sugar Rock*, No. 1:10CV193, 2012 WL 4320850 (N.D.W. Va. Sept. 18, 2012). A.R. 128, 132.

On November 5, 2012, Respondents filed a motion for partial summary judgment, seeking, among other things, an order “[d]eclaring that Plaintiffs, Iams Gas Company, Iams Oil Company, Cutright Gas Company and Keith Oil Company, are mining partnerships under the common law of West Virginia,” and declaring each Respondents’ percentage of ownership interests in the so-called Ritchie County Mining Partnerships. A.R. 154, 163.

On November 14, 2012, the Circuit Court held a hearing on Petitioners’ motion for judgment on the pleadings. Thereafter, on January 4, 2013, the Circuit Court entered an order taking the motion for judgment on the pleadings under advisement and ordering the parties to brief the effect of the West Virginia Revised Uniform Partnership Act (“RUPA”), W. Va. Code § 47B-1-1, *et seq.*, on the issue regarding the legal requirements for establishing in the pleadings Respondents’ alleged status as partners in mining partnerships. A.R. 482-83.

Following an additional hearing on June 4, 2013, the Circuit Court entered an interlocutory order denying Petitioners’ motion for judgment on the pleadings and granting Respondents’ motion for partial summary judgment on July 19, 2013. A.R. 589. With regard to Petitioners’ motion for judgment on the pleadings, the Circuit Court held based on *Lantz v. Tumlin*, 74 W. Va. 196, 81 S.E. 820 (1914), that Petitioners “cannot assert the statute of frauds as a defense to Plaintiffs’ claims. The mines, leases, or lands of the Partnerships need not be titled in the name of each Plaintiff. Plaintiffs therefore need not produce a deed, will, or other written conveyance in order to prove that they are mining partners.” A.R. 595-96. With regard to Respondents’ motion for partial summary judgment, the Circuit Court held, among other things, that Iams Gas Company, Iams Oil Company, Cutright Gas Company, and Keith Oil Company are West Virginia common law mining partnerships, and that Respondents are successors in interest to the original mining partners. A.R. 600, 604.

Respondents filed their second motion for partial summary judgment on July 17, 2013, seeking a declaration dissolving the partnerships, winding up partnership affairs, appointing a special master/receiver, and declaring certain leases as partnership property. A.R. 579. Petitioners filed their initial response brief on August 30, 2013. A.R. 612. Respondents filed a reply brief on October 7, 2013. A.R. 750. On that same day, Petitioners also filed a supplemental brief. A.R. 824. Petitioners filed an additional supplemental brief on November 18, 2013. A.R. 907. Respondents filed a supplemental brief on December 16, 2014. A.R. 1355. Petitioners filed a response to Respondents' supplemental brief on that same day. A.R. 1451.

Following hearings on September 4, 2014, October 17, 2014, and December 17, 2014, the Circuit Court entered its decision and judgment entry, granting Respondents' second motion for partial summary judgment on January 16, 2015. A.R. 1510. The Circuit Court began by amending its order entered in July of 2013, which concluded that Iams Gas Company, Iams Oil Company, Cutright Gas Company, and Keith Oil Company are mining partnerships as opposed to general partnerships, "to reflect the preferred nomenclature expressed by the Supreme Court of Appeals in *Valentine*." A.R. 1514.³ The Circuit Court further determined that it was unclear whether these companies are mining partnerships or general partnerships in mining, but that it need not resolve the issue for the purpose of granting Respondents' second motion for partial summary judgment. The Circuit Court also determined that it is reasonable to conclude that the recognition of Respondents and their predecessors as participants in the operation of the wells and leases has some basis in fact. A.R. 1514-15. The Circuit Court concluded

that West Virginia partnerships exist, whether characterized as mining partnerships, general partnerships, partnerships in mining, or partnerships; that

³ The Court also amended its prior order to reflect that the partnership interests held by Edwin L. Deem were transferred to and now owned by J.F. "Frank" Deem. A.R. 1514. The purported assignment is dated May 1, 2008, and recorded February 13, 2013. A.R. 732. Edwin L. Deem has not been dismissed, and both Deems are Plaintiffs in the recently filed third amended complaint. A.R. 1535.

many, if not all, of the Plaintiffs in this action and Sugar Rock, Inc., are partners in the Partnerships; and that all the procedural requirements to a decree of dissolution have been satisfied.

A.R. 1518-19.

The Circuit Court further held that “no reasonable person could conclude other than that the Partnerships’ ‘economic purpose . . . is likely to be unreasonably frustrated’ and that ‘it is not otherwise reasonably practicable to carry on the Partnership business in conformity with the Partnership Agreement.’” A.R. 1521. The Circuit Court noted that “the Partnerships are hopeless of prosperity and that grounds exist, in equity, for a dissolution.” A.R. 1521. The Circuit Court rejected Petitioners’ arguments that Respondents have been dissociated and that their requests for dissolution should be deemed requests for dissociation. The Circuit Court held that the partnerships must be wound up, and also found that there is good cause for judicial supervision of the winding up. The Circuit Court therefore appointed Rodney Windom as special receiver to supervise the winding up of the partnerships, and further appointed Hays and Company as the distribution company and for such other purposes as the special receiver may direct. The Circuit Court gave Windom certain enumerated powers, and ordered the parties to fully cooperate with him and immediately provide any and all information and documentation as he may request in order to carry out his duties. A.R. 1521-24. Finally, the Circuit Court held that the partnerships’ assets include the so-called Ritchie County Base Leases. In response to Petitioners’ argument that lease expenses have never been attributed to the partnerships but instead have been borne by Sugar Rock and its predecessors, the Circuit Court granted Petitioners leave to amend their counterclaim to seek recovery for lease development, investigating, administrative, maintenance costs, and all other lease expense properly chargeable to the partnerships. A.R. 1528-29.

B. Statement of the Facts

Some Respondents have produced written evidence of assignments of working interests, but others have not. Washburn, Buzzard, Robinson, Edwin L. Deem, Wedekamm, Wakefield, and J.F. Deem have produced wills or other documents labeled as "Working Interest Oil and Gas Assignments" or simply "Assignments." A.R. 229-51, 346-47, 397-401, 437-43, 732-34. Kenneth A. Townsend, Anna Lee Townsend, Clyde Townsend, Michael Rubel, Jerome Rubel, and Keith White, as executor of the estate of Bertie C. Cox, have not produced any writing to support their alleged assignments.

The Working Interest Oil and Gas Assignments produced by certain Respondents provide that a predecessor paid \$250.00 for the assignment, which covered the expense of drilling one well. The assignments refer to stock rather than partnership interests, and provide that the stock will revert to F.A. Deem without further notice if the assignee does not pay bills for expenses of equipping and operating the well, and provide for the name of the group or mining partnership. Specifically, a typical Working Interest Oil and Gas Assignment states in part as follows:

It is further understood and agreed by and between the parties hereto that the party of the first part will drill or cause to be drilled upon said lease, One well . . . , unless oil or gas is found in paying quantities at a less depth, same to be determined by party of the first part; and the above consideration covers the expense of drilling said well and plugging the same, if dry.

It is further understood and agreed that the party of the second part will bear his proportionate share of the expense of equipping and operating said well, including casing, and also his proportionate share of all rentals after first well is completed, and his share of all expense hereafter incurred in developing and operating said lease. Equipment bill to be paid within 20 days from date of notice or stock reverts to assignor without further notice.

Reservation and Agreement in this lease and assignment as follows:

AND THAT, it is mutually agreed and assumed that the name of this group or mining partnership be known as the Cutright Gas Co.

Party of the first part reserves the right to execute any and all contracts, sale, division and transfer orders necessary and required to be made to sell the oil and gas produced from the above lease, to receive all payments, therefrom and to make disbursements of the proceeds of the same, and to do all acts necessary to properly conduct said business, the same as if parties of the second part were present and acting as such individuals; and the party of the first part further reserves and retains the right to surrender and release the aforesaid lease should the aforesaid well be non-productive of oil or gas, and the mining partnership elect to do no further drilling thereunder.

A.R. 437.

By Agreement dated April 1, 1999, F.A. Deem's son and daughter-in-law W.A. Deem and Betty L. Deem sold, among other things, the majority interest in the so-called Ritchie County Base Leases and Ritchie County Wells along with operating rights to Sugar Rock. The 1999 Agreement makes no reference to any mining partnerships but states a sale of working interests.

A.R. 185-92, 647.

Pursuant to the 1999 Agreement, Sugar Rock is the majority interest owner in Iams Gas Company, Iams Oil Company, Cutright Gas Company, and Keith Oil Company. A.R. 92, 185-92. Sugar Rock has been operating those companies and paying expenses to equip the wells and maintain production at a substantial cost to Sugar Rock since 1999, complying with local and state laws, rules and regulatory obligations without any violations and without any objections from Respondents until the filing of this action in 2011. A.R. 454-57, 639-51, 913-19.

In 1999, after Sugar Rock began operating the wells, Sugar Rock requested that Respondents or their predecessors cooperate in equipping, working on, and producing the subject wells through correspondence dated April 9, 1999, and April 17, 2000. The correspondence that Sugar Rock sent to Respondents or their predecessors refers to them as "Working Interest Owners" and makes no mention of partners or mining partnerships. A.R. 641, 914-15, 920, 922.

Sugar Rock immediately started paying expenses to equip, maintain, operate, and produce the wells, and invoiced Respondents or their predecessors for their share of expense, as set forth in the letter dated April 17, 2000, from Sugar Rock to “Working Interest Owners.” It is undisputed that since 1999 none of the Respondents or the Respondents’ predecessors aided or assisted Sugar Rock – either with their time, knowledge, skill, money, or any other resource – in equipping, producing, or operating the wells. Moreover, it also is undisputed that Respondents refused to participate and refused to pay their proportionate share of the losses and expenses charged to them by Sugar Rock for the equipment, expenses to produce, and expenses for the operation of the subject wells. It is further undisputed that Respondents and their predecessors have refused and failed to pay equipment bills since 1999. Sugar Rock has paid all expenses, including equipment costs. Respondents and their predecessors have refused to pay equipment bills or any costs associated with equipping, producing, or operating the wells. Moreover, it is undisputed that no Respondent ever requested to participate in any way or to be paid any money until the filing of this action. A.R. 641-48.

Respondents have received yearly Schedule K-1s that clearly identify their interests in these companies as “passive.” A.R. 763-806. Those documents as well as income and expense reports indicate that after Sugar Rock took over and made substantial investments, the wells operated at a net annual loss. A.R. 1473-76.

Sugar Rock has provided affidavits from three oil and gas experts. Mark Schumacher has opined that Sugar Rock’s investments are reasonable capital investments. Mr. Schumacher has further opined that the properties that Sugar Rock operates and manages can be profitable and successful even though they currently may not produce a net profit, and that additional investments may be necessary to render a return. A.R. 652-54. In addition, John T. Haskins has

opined that Sugar Rock is a prudent operator and further that the fees it charges for the services it provides are customary and reasonably necessary for prudent monthly maintenance and operation of oil and gas wells. A.R. 655-57. Moreover, Denny Harton concluded:

Based on my knowledge and experience in the oil and gas industry, even if a well does not always produce positive cash flow to its working interest owners, the wells often still have a bona-fide future if properly maintained. Consideration must be given to the future potential for further development, improved commodity prices and technology enhancements that result in greater efficiencies. In some situations, the cost avoidance of the necessity to plug and abandon a well that is underperforming can play a significant role in attempting to continue producing even if in a negative cash flow position. In that case, such things as future development, the ability to provide landowner gas, and commodity price structure all play a significant role in the investment and the commitment decisions that an operator such as Sugar Rock has made in the subject wells for many years. In my professional opinion, Sugar Rock maintained and serviced the oil and gas wells as a prudent operator and in doing so, expended a great deal of capital which preserved the potential for future development that would otherwise have been lost.

A.R. 660-61.

Finally, Petitioners retained an expert certified public accountant and certified valuation analyst Jon W. Cain, who had not previously had any affiliation or personal relationship with Petitioners, to review the records of the so-called Ritchie County Wells. Mr. Cain has opined that Petitioners have paid all of the expenses, that Petitioners have kept records of those transactions, and that the expenses are normal and customary. Mr. Cain has also opined that there is no evidence of objectionable expenditures and that all of the expenses and fees for services charged to the individual wells or companies are supported by appropriate records. A.R. 1143-51. Thus, all experts have opined that the net losses are not evidence of impropriety or mismanagement, because “many companies operate at a net loss for numerous years for numerous reasons, including the pre-existing condition of the properties when purchased, the costs for repairs and maintenance of assets, past and future potential profits.” A.R. 1146.

V. SUMMARY OF THE ARGUMENT

This Court should reverse the Circuit Court's decision and judgment entry, granting Respondents' second motion for partial summary judgment. The Circuit Court erred in granting partial summary judgment to Respondents without applying the summary judgment standard and without identifying the claims, the facts, and in some instances the law upon which it based its decision.

The Circuit Court erred in holding as a matter of law based on *Valentine v. Sugar Rock, Inc.*, 234 W. Va. 526, 766 S.E.2d 785, 790 (2014), that Iams Gas Company, Iams Oil Company, Cutright Gas Company, and Keith Oil Company are West Virginia partnerships, whether characterized as mining partnerships, general partnerships, partnerships in mining, or partnerships. Further, the Circuit Court erred in holding as a matter of law that many, if not all, Respondents and Sugar Rock, are partners in Iams Gas Company, Iams Oil Company, Cutright Gas Company and/or Keith Oil Company without specifying which Respondents are and are not partners of which companies. Moreover, the Circuit Court erred in holding as a matter of law that the assets of Iams Gas Company, Iams Oil Company, Cutright Gas Company, and Keith Oil Company include leases.

The Circuit Court erred in holding as a matter of law that all procedural requirements to a decree of dissolution have been met. The Circuit Court erred in holding as a matter of law that Iams Gas Company, Iams Oil Company, Cutright Gas Company, and Keith Oil Company must be wound up, appointing Rodney Windom as a special receiver to supervise the winding up, and further appointing Hays and Company to distribute their assets.

Petitioners will be irreparably harmed unless this Court reverses the Circuit Court's decision and judgment entry and remands this action for further proceedings.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This appeal is suitable for oral argument under West Virginia Rule of Appellate Procedure 19(a) because it involves assignments of error in the application of narrow issues of settled law. The appeal may also be suitable for argument under West Virginia Rule of Appellate Procedure 20(a) because it involves issues of fundamental importance and first impression regarding the use of receiverships. Because this Court should reverse the Circuit Court's decision and judgment entry, a memorandum decision may not be appropriate. *See W. Va. R. App. P. 21(d)*.

VII. ARGUMENT

A. The Circuit Court Erred in Granting Partial Summary Judgment to Respondents without Applying the Summary Judgment Standard and without Identifying the Claims, the Facts, and in Some Instances the Law Upon Which it Based its Decision.

As a threshold matter, the Circuit Court erred in granting partial summary judgment to Respondents without applying the standard in West Virginia Rule of Civil Procedure 56 and without setting forth the claims, the facts, or in some instances the law upon which it based its decision. A party is entitled to summary judgment pursuant to Rule 56 if the record shows there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *W. Va. R. Civ. P. 56 (c)*. *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995), held as follows:

Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.

If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional

evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.

Id., 459 S.E.2d at Syl. Pts. 2, 3.

Rule 56(d) further provides in pertinent part with regard to partial summary judgment:

If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just.

This Court applies a *de novo* standard of review to the entry of partial summary judgment just as it applies a *de novo* standard to a summary judgment. *W. Va. Dep't of Transp. v. Robertson*, 217 W. Va. 497, 618 S.E.2d 506, Syl. Pt. 1 (2005). The Court applies the same test that the circuit court should have applied initially. *See Conrad v. ARA Szabo*, 198 W. Va. 362, 480 S.E.2d 801 (1996).

In this action, the Circuit Court did not cite to Rule 56 in its decision and judgment entry, nor did it view the facts in the light most favorable to Petitioners and determine whether there are genuine issues of material fact, or in some instances even identify the law on which it relied. Instead, the Circuit Court improperly weighed the evidence and made broad – even contradictory – factual findings. For example, the Circuit Court improperly found:

What is clear is that Plaintiffs and their predecessors in interest have been continuously recognized by Defendants as participants in the operation of the subject leases and wells. This participation, as more specifically addressed in the Court's July 18, 2013, Order, involved the receipt of K-1s, billings for operational expenses, etc. It is *reasonable to conclude* that this recognition has some basis in fact and is not the product of the selection of the Plaintiffs' names randomly from a phonebook. Whether documented, undocumented, or dissociated, Plaintiffs

legally qualify as partners for purposes of these proceedings as a result of such continuous and ongoing recognition.

A.R. 1515 (emphasis added).⁴

Moreover, the Circuit Court did not disclose any basis for a finding that Respondents, or any of them, are partners in a general partnership. Indeed, Respondents submitted no evidence whatsoever with their second motion for partial summary judgment. Respondents' reply brief – like the decision and judgment entry – merely assumes that partnerships exist and argues only that they should be dissolved and wound up, that the Circuit Court should appoint a receiver, and that the leases identified in the second amended complaint should be included in partnership property. A.R. 750-61. In their final supplemental brief, Respondents erroneously argue that this Court held that the so-called Ritchie County Mining Partnerships are general partnerships with their primary business being the purchase, ownership, and operation of mineral interests, citing to *Valentine*, 766 S.E.2d 801 & n. 31. A.R. 1355-56. Neither the cited language nor any other portion of *Valentine* contains any such holding or even *dicta* beyond the issue of whether the Statute of Frauds may be used as a defense. Without any evidentiary support whatsoever supplied by Respondents for this finding, the Circuit Court erroneously bootstrapped its prior holding regarding mining partnerships as follows:

The facts supporting Plaintiffs' status as partners in a general partnership are virtually identical to the facts presented to establish an interest in a mining partnership. These facts have already been presented to this Court and made known to the parties during the over three (3) years in which discovery has been ongoing.

A.R. 1516.⁵

⁴ As discussed below, a dissociated Respondent – and all Respondents are dissociated – cannot legally qualify as a partner.

⁵ The Circuit Court modified its prior opinion because the motion for partial summary judgment did not support the finding of a mining partnership. Neither Respondents nor the Circuit Court have made an effort to apply any facts to the issues in Plaintiffs' second motion for partial summary judgment.

In any event, the decision and judgment entry is vague and indecisive about the proper characterization of the entities described in the second amended complaint as the Ritchie County Mining Partnerships, concluding – again without viewing the evidence in the light most favorable to Petitioners – only that “West Virginia partnerships exist, whether characterized as mining partnerships, general partnerships, partnerships in mining, or partnerships[.]” A.R. 1518. The Circuit Court’s determination on page 6 of the decision and judgment entry that it need not resolve this issue for purpose of considering Respondents’ second motion for partial summary judgment is in error. The Circuit Court compounds that error by further indecisively concluding “that many, if not all, of the Plaintiffs in this action and Sugar Rock, Inc., are partners in the Partnerships[.]” A.R. 1518-19. It is unimaginable that the Circuit Court could fashion relief – particularly the drastic relief it fashioned in this action – without determining the character of the entities labeled by Respondents as Ritchie County Mining Partnerships and the nature of each Respondents’ interest, if any, in these entities. Nonetheless, within the same sentence the Circuit Court erroneously concluded that all the procedural requirements to a decree of dissolution have been satisfied – despite the fact that those requirements differ depending on several factors, including whether a mining partnership, general partnership, or other entity is involved.

The fundamental flaw in the Circuit Court’s reasoning that led to this series of errors is contained on page three of the decision and judgment entry, where the Circuit Court credited Respondents’ argument that they “did not initiate this action simply to assert a legal theory; rather they initiated this action in order to obtain *relief*.” A.R. 1512 (emphasis in original). It is axiomatic under West Virginia Rule of Civil Procedure 12(b)(6) that in order to obtain relief a plaintiff must state a claim upon which relief may be granted. Thus, having a valid claim is a threshold prerequisite to the grant of any relief. It is further axiomatic that the specific claim

impacts not only the right to relief but also the nature and scope of relief available. Although West Virginia Rule of Civil Procedure 8(a) permits alternative pleading, Respondents do not plead in the alternative. Instead, their only claims are based on allegations of mining partnerships. Even if Respondents had pled in the alternative, the Circuit Court erred in holding on summary judgment that they are entitled to relief without identifying the controlling facts or law.

B. The Circuit Court Erred in Holding as a Matter of Law that Iams Gas Company, Iams Oil Company, Cutright Gas Company, and Keith Oil Company Are West Virginia Partnerships, Whether Characterized as Mining Partnerships, General Partnerships, Partnerships in Mining, or Partnerships, and Further that Many, if not All, Respondents and Sugar Rock are Partners.

More specifically, the Circuit Court erred in relying on this Court's opinion in *Valentine v. Sugar Rock, Inc.*, 234 W. Va. 526, 766 S.E.2d 785 (2014), to hold as a matter of law that Iams Gas Company, Iams Oil Company, Cutright Gas Company, and Keith Oil Company are partnerships, whether characterized as mining partnerships, general partnerships, partnerships in mining, or partnerships. In their second amended complaint, Respondents allege that Petitioners Iams Gas Company, Iams Oil Company, Cutright Gas Company and Keith Oil Company "are West Virginia mining partnerships" and collectively paint with a broad brush and refer to them as "Ritchie County Mining Partnerships." A.R. 91. In fact, Respondents repeatedly paint with a broad brush and refer to those Respondents as common law mining partnerships throughout their second amended complaint. A.R. 93-94, 97-102. There is no allegation of their status as general partnerships in the second amended complaint. Moreover, Respondents have failed to present any facts to establish general partnerships.

Valentine precludes a finding that Respondents are partners in mining partnerships. As this Court recognized in *Valentine*, the first element of a mining partnership is that the partners

be co-owners in the underlying mineral interest and, to establish such an ownership interest, the claimant must have a written conveyance showing that ownership interest. *Valentine*, 766 S.E.2d at 796-97.

Following this Court's opinion in *Valentine*, Respondents completely abandoned their assertion that, without such written conveyances, they are partners in a mining partnership. This is not surprising because it is undisputed that some Respondents in this action cannot produce a written conveyance to satisfy the Statute of Frauds as required by *Valentine*. Accordingly, Respondents' claims to be partners in mining partnerships and their requested relief based on that status fail as a matter of law.

In their supplemental brief in the Circuit Court, Respondents misrepresented that this Court in *Valentine* "held that the four partnerships in the case at bar are general partnerships with their primary business being the purchase, ownership and operation of mineral interests." J.A. 1355. Respondents actually cite to a footnote in *Valentine* that does not even discuss the issues in this case but rather discusses the opinion in *Lantz v. Tumlin*, 74 W. Va. 196, 81 S.E.2d 820 (1914). *Valentine* addressed only the Statute of Frauds issue, not whether partnerships existed,

In *Valentine* as in this action, there have been neither allegations nor facts to support an argument regarding general partnerships. For example, this Court in framing the question in *Valentine* merely assumed that a general partnership existed that owned and operated oil and gas wells. This Court merely asked the question: "[I]f Valentine is not a member of a mining partnership, but simply a member of a general partnership that owns and operates oil and gas wells under a mineral lease, then is Valentine required by the Statute of Frauds to produce a written instrument showing he is a partner in the general partnership?" *Id.*, 766 S.E.2d at 798 (emphasis added). Manifestly, the Court did not conclude that Valentine is a member of general

partnerships, and it certainly did not conclude that Respondents in this action are members of general partnerships, and there is no basis for the Circuit Court to base its holding that general partnerships exist on *Valentine*. For these reasons, the Circuit Court erred in holding as a matter of law without evidence submitted in the record that Iams Gas Company, Iams Oil Company, Cutright Gas Company, and Keith Oil Company are West Virginia partnerships, whether characterized as mining partnerships, general partnerships, partnerships in mining, or partnerships.

The Circuit Court further erred in holding as a matter of law that many, if not all, Respondents, and Sugar Rock are partners whether documented, undocumented, or dissociated without pointing to the absence of a genuine issue of material fact. Indeed, the Circuit Court's equivocation itself indicates a genuine issue of material fact. The Circuit Court did not even attempt to specify which Respondents are and are not partners in which companies.

Contrary to the Circuit Court's holding, Respondents cannot be partners because their predecessors would have been dissociated from any general partnerships years ago under RUPA. *See* W. Va. Code § 47B-6-1, *et seq.* All Respondents except Edwin L. Deem and J. F. Deem claim their status through inheritance following the death of an ancestor. A.R. 204-08, 326-27, 342-45, 392-95. Pursuant to West Virginia Code § 47B-6-1(7), an individual who is a partner in a general partnership is automatically dissociated upon the partner's death, but the partnership survives. As the operation of the wells continued after those Respondents' predecessors' deaths, those alleged partners would have become dissociated from the partnership. Those Respondents could never have become partners in a general partnership.

Respondents have been dissociated for a second reason. As discussed above, the assignments produced by those Respondents who have assignments refer to working interests

and expressly state that in the event that the equipment bill for an assignee's proportionate share of the expenses is not paid within 20 days from the date of notice, the assignee's stock automatically reverts to the assignor without notice or action of any party. A.R. 437. Although the Circuit Court noted that the Schedule K-1s indicate that Respondents have a share in the losses of the companies, in fact since 1999, Respondents have refused to pay their portion of the losses by paying expenses. Moreover, their predecessors and they have refused and would not participate in any of the wells or operations. A.R. 641-44. This is another basis for dissociation.

Respondents Edwin L. Deem and J. F. Deem recently have taken the position that Edwin L. Deem is no longer a partner because he transferred his interest to J. F. Deem by Assignment dated October 10, 2008. A.R. 732. The alleged transfer from Edwin L. Deem to Frank Deem is suspicious, suspect and flawed. A.R. 649-51. In any event, Edwin L. Deem had been dissociated for refusing to pay equipping expenses causing any claimed stock to revert to Sugar Rock under the terms of any assignment. Accordingly, Edwin L. Deem had no interest to transfer to J.F. Deem.

Respondents cannot prove partnership interests in the groups or mining partnerships known as Iams Gas Company, Iams Oil Company, Cutright Gas Company, and Keith Oil Company for the additional reason that they are at best merely passive stockholders with no control. In *Armor v. Lantz*, 207 W. Va. 672, 535 S.E.2d 737, 535 S.E.2d 737, 745 (2000), this Court noted that the sharing of gross returns does not by itself establish a partnership under RUPA, citing to West Virginia Code § 47B-2-2(c)(2). This is consistent with *King v. Meabon*, 128 W. Va. 263, 270, 36 S.E.2d 211, 214 (1945). In *King*, the West Virginia Supreme Court of Appeals held that although the assignments at issue in that case gave the plaintiff an interest in the net proceeds from sales of gas under contracts between the defendant and others, the interest

in the earnings did not create a partnership. Because there was no partnership, the plaintiff could not recover in equity. *Id.* The Court in *Armor* focused on the element of control necessary in partnerships as follows:

“An essential element of a partnership or joint venture is the right of joint participation in the management and control of the business. . . . Absent such right, the mere fact that one party is to receive benefits in consideration of services rendered or for capital contribution does not, as a matter of law, make him a partner or joint venture.”

Id., 535 S.E.2d at 745 (quoting *Bank of California v. Connolly*, 36 Cal. App. 3d 350, 111 Cal. Rptr. 468, 478 (1973)).

In this action, Respondents concede in the second amended complaint that their interests are passive and non-controlling. A.R. 81. Respondents have been described without objection as stockholders. A.R. 320. Moreover, the Schedule K-1s upon which the Circuit Court relied, identify Respondents as “passive” investors in the companies. A.R. 763-806. Again, although the Circuit Court noted that the Schedule K-1s indicate that Respondents have a share in the losses of the companies, in fact since 1999, Respondents have refused to pay their portion of the losses by paying expenses. Moreover, Respondents’ predecessors and they have refused and would not participate in any of the wells or operations. A.R. 641-44.

Because they are at most passive stockholders with no control, Respondents cannot be partners. Moreover, Respondents have been dissociated as a matter of law and contract. Therefore, the Circuit Court erred in holding as a matter of law that Iams Gas Company, Iams Oil Company, Cutright Gas Company, and Keith Oil Company are partnerships, however, characterized, and further erred in holding as a matter of law that many, if not all, Respondents are partners in these companies.

C. The Circuit Court Erred in Holding as a Matter of Law that the Assets of Iams Gas Company, Iams Oil Company, Cutright Gas Company, and Keith Oil Company Include Leases.

The Circuit Court further erred in holding as a matter of law that the so-called Ritchie County Mining Partnerships' assets include the leases identified in paragraphs 47, 49, 51, and 53 of the second amended complaint and referred to therein by Respondents as the Ritchie County Base Leases. Those leases do not include any of the indicia required to deem them partnership property by statute, and the practice of the parties contradicts any such interpretation. In addition, lease expenses have never been attributed to the so-called Ritchie County Mining Partnerships but born solely by Sugar Rock and its predecessors, and Sugar Rock has invested substantial resources into the leases that have never been declared on the Schedule K-1s.

In order for property to be deemed partnership property, the property must be acquired in the name of either "(1) the partnership; or (2) one or more partners with an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnerships but without an indication of the name of the partnership." W. Va. Code § 47B-2-4(a). Importantly, "[p]roperty acquired in the name of one or more of the partners, without an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership and without use of partnership assets, is presumed to be separate property, even if used for partnership purposes." W. Va. Code § 47B-2-4(d).

Both a lease and a working interest in a lease are interests in real property and, to convey either, a written conveyance is required under the West Virginia Statute of Frauds. *See* W. Va. Code § 36-1-1; *Kennedy v. Burns*, 84 W. Va. 701, 707, 101 S.E. 156, 159 (1919) ("an agreement to transfer or assign [an oil and gas lease, which is required to be in writing], or any interest in it,

must likewise be expressed in writing”). Accordingly, the Court should look to the actual instrument transferring title to the leases that Respondents claim are owned by the so-called Ritchie County Mining Partnerships.

The transferring Agreement between William Deem and Sugar Rock makes no reference to any partnership nor does it identify the transfer of a partnership interest. The Agreement actually expressly transfers working interests in certain leases as well as the operating, leasing and agency rights in those leases. A.R. 185-92. The documents whereby F.A. Deem acquired the leases themselves also do not reference any partnership much less a transfer of an interest in a partnership. A.R. 210-11, 215-16, 221-23, 227-28. References to groups or mining partnerships, in the alternative, appear only in the working interest oil and gas assignments from F.A. Deem to Respondents’ predecessors, which state for example that it is “mutually agreed and assumed that the name of this group or mining partnership be known as the Cutright Gas Company.” A.R. 437.

The Circuit Court erroneously relied on the assignments of working interests to some of Respondents’ predecessors to hold that the leases themselves are partnership property. The Working Interest Oil and Gas Assignments do not fit any of the categories of partnership property. The assignments convey working interests to individuals, not to partnerships. While the assignments may set forth the rights and responsibilities of the working interest owners in the Respondents’ broad brush painting of the so-called Ritchie County Mining Partnerships, those terms are separate from the conveyance language in the assignments. The conveyance language transfers working interests to individuals and not to persons in any partnership capacity. A.R. 437. Accordingly, the assignments also do not fit the indicia set forth in statute to establish them as partnership property.

In addition, given the facts in this case, the leases are presumed by statute to be separate property under Section 47B-2-4(d). As stated above, the documents conveying the leases to F.A. Deem do not indicate or reference any partnerships, or that F.A. Deem was acquiring the leases in any capacity as a partner. There is also no indication that the leases were acquired with partnership assets or by funds that a stockholder may have contributed. Moreover, and more importantly, the Working Interest Oil and Gas Assignments expressly state that the payment recited in the assignment “covers the expense of drilling said well and plugging the same, if dry” but makes no mention of the payment covering or contributing to the procurement of the underlying lease. Accordingly, the underlying leases are presumed under Section 47B-2-4(d) to be F.A. Deem’s separate property, even if the leases were used for drilling and operating oil and gas wells thereon.

The conclusion that the leases are separate property also is consistent with the actions of F.A. Deem and his successors. First, F.A. Deem transferred the leasing, operating and agency rights related to the leases without any authorization or consent of the mining partnerships. W.A. Deem did the same thing years later. A.R. 185-92. It is uncontested that neither Respondents nor their predecessors ever contributed to the operations of the leases, and Respondents only contend at most that their predecessors contributed a one-time passive monetary investment for the drilling of one well. F.A. Deem, W.A. Deem and Sugar Rock performed all of the management activities necessary for ensuring the proper maintenance and production of the subject wells. A.R. 454-57, 639-51, 913-19.

Furthermore, while W.A. Deem owned the leases, he conveyed farmout agreements and assigned production rights for a well on the Iams Gas Company lease, for two wells on the Iam Oil Company lease, and for a well or wells on the Keith Oil Company lease to third-party

operators for further development, but in which the alleged mining partnerships were not involved. F.A. Deem drilled two additional wells for his own benefit on the Cutright Gas Company lease, and no Respondent has ever evidenced a purchase of working interest in either of those wells. A.R. 185-92. Indeed, Respondents produced no evidence to refute the fact that neither they nor their predecessors were included in, or entitled to be apprised of those transactions. These operations by F.A. Deem and W.A. Deem were available and exercised by those individuals because they maintained the leases as separate property.

Since acquiring the conveyances from W.A. Deem in 1999, Sugar Rock has continued to operate the leases as separate property from the ownership interests of the so-called Ritchie County Mining Partnerships. Sugar Rock has spent substantial finances on investigating, maintaining and developing the leases. In particular, Sugar Rock has spent over \$200,000.00 on lease development, including but not limited to geology consulting, engineering and geophysical work, seismic surveying, and mapping. A.R. 648.

Moreover, the facts and course of dealings illustrate that no one believed that the parties had any interest other than a working interest in the wells drilled pursuant to the assignments. For instance, if the leases were partnership property, then F.A. Deem would not have had the unilateral authority (if he was to act as a partner) or legal authority (when he acted individually and not as a partner) to subsequently assign working interests in those leases to Respondents' predecessors. Moreover, F.A. Deem, W.A. Deem and Sugar Rock maintained and operated the leases, including the payment of royalties to the mineral owners and all other costs and expenses associated with the leases. No Respondent has presented any evidence of paying any expense towards any lease. Sugar Rock also has spent considerable capital and work on the leases to pursue further development and drilling of wells. The costs of such services related to the leases

were not passed on or charged to working interest owners, partners in mining partnerships, partners in general partnerships, or to Respondents; only well operating expenses, well service fees, equipping and production fees were assessed to Respondents. Even these, Respondents refused to pay. A.R. 648.

In the oil and gas industry, it is common to assign interests in wellbores in a lease. This common practice of selling shares in wells for development of wells to raise cash to cover drilling expenses has been recognized by this Court in *Arbaugh v. Raines*, 155 W. Va. 409, 184 S.E.2d 620 (1971):

The agreement between these parties reflects a practice common in the area of oil and gas development. A lessee obtains a lease which he retains as his own property. In order to get funds with which to produce oil or gas, he sells shares in a proposed well to be drilled on his leasehold estate. The money from the sale of such shares is pooled to pay for the costs of drilling the well, and, if the venture is successful, the shareholders divide the profits from the production of that well.

Id., 184 S.E.2d at 624.

In those agreements, if additional wells were drilled on the lease, the working interest owners were given an option to join in the drilling of additional wells. However, if they refused to participate, then they would not have an interest in the new well. This well established industry relationship is reflected in the assignments in this action. A.R. 660. For this additional reason, the Circuit Court erred in holding as a matter of law that the so-called Ritchie County Base Leases are partnership property.

D. The Circuit Court Erred in Holding as a Matter of Law that All Procedural Requirements to a Decree of Dissolution have been Met.

The Circuit Court further erred in holding that all the procedural requirements to a decree of dissolution have been satisfied. Again, Respondents have abandoned all of their prior arguments under the common law of mining partnerships and under equity, and argue incorrectly

that they are partners in general partnerships and are entitled to dissolve and wind up the general partnerships under RUPA. Assuming that Respondents are able to assert claims as partners in a general partnership, which they cannot, the Circuit Court erred in holding that dissolution under West Virginia Code § 47B-8-1(5) is appropriate.

Section 47B-8-1(5) provides:

A partnership is dissolved, and its business must be wound up, only upon the occurrence of any of the following events:

- (5) On application by a partner, a judicial determination that:
 - (i) The economic purpose of the partnership is likely to be unreasonably frustrated;
 - (ii) Another partner has engaged in conduct relating to the partnership business which makes it not reasonably practicable to carry on the business in partnership with that other partner; or
 - (iii) It is not otherwise reasonably practicable to carry on the partnership business in conformity with the partnership agreement[.]

First, as discussed above most of the Respondents by operation of RUPA could not have become partners in the general partnerships and, even assuming their predecessors may have been partners in the general partnerships, their predecessors would have been dissociated from those general partnerships years ago. *See* W. Va. Code § 47B-6-1, *et seq.*

As set forth under RUPA, the method of handling the dissociated partner's interest is governed by W. Va. Code § 47B-7-1, *et seq.*, which does not provide a right to dissolve the partnership. *See* Cmt. 8 to Uniform Partnership Act § 601 [W. Va. Code § 47B-6-1(7)(i)] ("RUPA Section 601(7)(i), on the other hand, provides for dissociation upon the death of a partner who is an individual, rather than dissolution of the partnership. That changes existing law Normally, under RUPA, the deceased partner's transferable interest in the partnership

will pass to his estate and be bought out under Article 7”). Accordingly, not only could Respondents never have become partners, they have no right to seek dissolution of the alleged general partnerships that are continuing to do business.

Similarly as discussed above, assuming that Edwin L. Deem had not been dissociated and that his interest was transferrable to F.A. Deem, the remedy for a transferee of a partner’s transferable interest is prescribed by W. Va. Code § 47B-8-1(6), which is limited initially by a judicial determination, in equity, that certain preliminary showings by the claimant are met. Respondents have never argued that those preliminary requirements have been met and Petitioners deny that Respondents would have such a right under the facts in this case.

Assuming that the so-called Ritchie County Mining Partnerships are partnerships under RUPA, and further assuming that Respondents are partners in such partnerships and have not been dissociated, contrary to the Circuit Court’s holding, the evidence presented shows that no facts exist to justify dissolution under Section 47B-8-1(5). The only evidence presented to the Circuit Court shows that the economic purpose of the so-called Ritchie County Mining Partnerships has not been nor is it likely to be unreasonably frustrated. In addition, Sugar Rock has not engaged in conduct that makes it unreasonably practicable to carry on the business with Petitioners in conformity with any partnership agreement.⁶

Petitioners have provided a complete accounting of all records for the oil and gas wells as part of this case, amounting to over 20 boxes of documents. Respondents have not identified a single unreasonable expenditure by Sugar Rock in the operation of the wells and there is no evidence of any kind or nature that Sugar Rock has mismanaged any well, well interest, or any particular business of the purported mining partnerships or that the assets are deteriorating. To the contrary, Petitioners alone shouldered equipping and operating expenses and maintained

⁶ It should be noted that there is no evidence of any partnership agreement.

responsible and prudent operations and care of the wells has maintained their value despite Respondents' refusal and failure to share in the expenses. A.R. 639-51.

Moreover, Respondents cannot simply remove Sugar Rock of its legal right to operate and manage the properties, because Sugar Rock is the majority owner and, as such, its decisions control management. *See Bartlett & Stancliff v. Boyles*, 66 W. Va. 327, 66 S.E. 474, Syl. Pt. 2 (1909).

Not only have Respondents failed to present any evidence to support dissolution, Petitioners have presented affirmative evidence that Sugar Rock's management has been prudent and reasonable. Petitioners, their accountants and bookkeepers have always provided accurate and complete information that Respondents have requested. Since 1999, a full accounting of the income and expenses has always been available for review. After Respondents filed this action, Petitioners provided over 20 boxes of documents, which include a full accounting of the income and expenses on each well and each of the companies' operations. A.R. 1473-76. Respondents offer no evidence to the contrary.

Petitioners have had well-known, independent experts in the oil and gas industry Messrs. Schumacher, Haskins, and Harton, review the accounting and operation records. Mr. Schumacher has opined that Sugar Rock's investments are reasonable capital investments. Mr. Schumacher has further opined that the properties that Sugar Rock operates and manages can be profitable and successful even though they currently may not produce a net profit and that additional investments may be necessary to render a return. A.R. 652-54. In addition, Mr. Haskins has opined that Sugar Rock is a prudent operator and further that the fees it charges for the services it provides are customary and reasonably necessary for prudent monthly maintenance and operation of oil and gas wells. A.R. 655-57. Moreover, Mr. Harton has

concluded that “even if a well does not always produce positive cash flow to its working interest owners, the wells often still have a bona-fide future if properly maintained. . . . In my professional opinion, Sugar Rock maintained and serviced the oil and gas wells as a prudent operator and in doing so, expended a great deal of capital which preserved the potential for future development that would otherwise have been lost.” A.R. 660-61.

Finally, certified public accountant and certified valuation analyst Mr. Cain has opined that Petitioners have paid all of the expenses, that Petitioners have kept records of those transactions, and that the expenses are normal and customary. Mr. Cain has also opined that there was no evidence of objectionable expenditures and that all of the expenses and fees for services charged to the individual well or company are supported by appropriate records. A.R. 1143-51. Thus, all experts have opined that the net losses are not evidence of impropriety or mismanagement, because “many companies operate at a net loss for numerous years for numerous reasons, including the pre-existing condition of the properties when purchased, the costs for repairs and maintenance of assets, past and future potential profits.” A.R. 1146.

It is not equitable to force a sale of the wells or leases as Respondents seek because Sugar Rock, as the majority owner, operator, and agent, has expended large sums of money to maintain and equip the wells for almost fifteen years. No Respondent or his predecessor has contributed any support or paid for any expenses over those years, despite the fact that some Respondents’ individual share of expenses for a particular well were as low as \$4.00 for a given year and only as high as \$1,793.00. Moreover, Sugar Rock has provided a complete accounting for the wells and leases at issue in this case, and none of the Respondents has identified any expenditure by Sugar Rock as inappropriate. A.R. 1473-76. Sugar Rock has expended large sums of money on the development of the leases, which it had always considered to belong to Sugar Rock.

Accordingly, Respondents have not born any of the lease development costs incurred by Sugar Rock and it is inequitable to allow Respondents, who refused to participate in any way in the operation and maintenance of the oil and gas well interests and to force a sale of the wells and leases that Sugar Rock has solely developed.

Additionally, because Respondents' predecessors refused to participate with Sugar Rock and automatically dissociated from any general partnerships, and because Sugar Rock, the majority interest owner, wishes to maintain the properties and continue to develop the leases, the Circuit Court should have employed the provisions of Section 47B-7-1, *et seq.*, to determine the purchase price of the dissociated interests to allow Sugar Rock to maintain the wells and leases. The Circuit Court erred in holding as a matter of law that all procedural requirements to a decree of dissolution have been met.

E. The Circuit Court Erred in Holding as a Matter of Law that Iams Gas Company, Iams Oil Company, Cutright Gas Company, and Keith Oil Company Must be Wound up, and the Circuit Court Abused its Discretion in Appointing Rodney Windom as a Special Receiver and Further Appointing Hays and Company as a Distribution Company.

Finally, the Circuit Court erred in holding as a matter of law that Iams Gas Company, Iams Oil Company, Cutright Gas Company, and Keith Oil Company must be wound up, and abused its discretion in appointing Rodney Windom as a special receiver to supervise the winding up, and further appointing Hays and Company as a distribution company. Under RUPA, the Court may order judicial supervision of the winding up of a partnership only for "good cause shown." W. Va. Code § 47B-8-3(a). The appointment of a receiver is reviewed for abuse of discretion. *See Snodgrass v. Snodgrass*, 107 W. Va. 136, 147 S.E.2d 483, 484 (1929). Although the Circuit Court cursorily found that good cause exists, it improperly failed to identify any undisputed facts that led to its conclusion. Moreover, the Circuit Court's finding is

unsupported because as discussed above the holding that dissolution and winding up is proper constitutes error as a matter of law.

In this matter, good cause has not been shown because it does not exist. Respondents' only arguments for appointment of a receiver are that there is no "harmony" among the parties and that it would "protect the Partnerships' assets from further deterioration." Sugar Rock has managed the wells at issue in this matter since 1999, without any violence or abuse, ill will or discord between the parties. A.R. 641.

Since 1999, Sugar Rock has sent notices to Respondents or their predecessors, setting forth their purported share of the profits, expenses and the net profits or losses. Since Sugar Rock took over operation and management of the wells, some Respondents and their predecessors have been guests at Petitioner Gerald Hall's home and at Sugar Rock's office. In 1999 and 2000, Gerald Hall spoke with Respondents or their predecessors and Sugar Rock offered to purchase Respondents' purported interests in lieu of their participation, but Respondents or their predecessors refused to be involved in any way. After that offer, the first instance of any of the Respondents objecting to Sugar Rock's management was when this suit was filed on November 14, 2011. Respondents and Petitioners have never had a disagreement of management, because Respondents have continuously refused to participate or be a part of equipping or producing the wells and Petitioners have continued to shoulder the expense of equipping the wells based on the belief that the properties are a prosperous investment. Finally, despite never receiving any support from Respondents, Petitioners continued to send them notice of net profits or losses as reported on a K-1 tax form and no Respondent responded (agreeing or disagreeing) with the information reported on those tax forms. A.R. 639-51.

Moreover, Respondents have failed to identify or offer up any unreasonable expenditure made by Sugar Rock in the equipping, production, and operation of the wells and there is no evidence of any kind or nature that Sugar Rock has mismanaged any well, well interest, or any particular business of the alleged partnerships or that its assets are deteriorating. As majority owner, Sugar Rock has the largest interest to protect from deterioration. Sugar Rock at all times has conducted itself and the business of the wells as a prudent operator. A.R. 639-61. In fact, Sugar Rock has not received a single violation for the equipping and operation of these wells, has continuously maintained the interests of the partnerships, the wells and the leases, including maintenance of roads and equipment, and paid all bills in a timely manner. A.R. 645, 921. Accordingly, there is no good cause for the appointment of a receiver.

Nor is a special receiver appropriate under West Virginia Code § 53-6-1 or by an injunction or some other means in equity. In considering the application of equity for appointing a receiver under W. Va. Code § 53-6-1, this Court has stated that “a court of equity should exercise extreme caution in the appointment of receivers on ex parte application and should be careful to determine that a proper case is presented before it adopts such extraordinary procedure.” *State ex rel. Battle v. Hereford*, 148 W. Va. 97, 104, 133 S.E.2d 86, 91 (1963) (granting a writ of prohibition against the circuit court to prohibit enforcement of an order appointing a receiver in equity).

In *Hereford*, the circuit court granted a request that it exercise its equity powers pursuant to Section 53-6-1 and appoint a receiver to inventory certain properties of the defendant and gave the receiver authority to use the property in conducting and continuing business operations. The petitioner sought a writ of prohibition against the order, arguing that such an action was outside the circuit court’s power because it inappropriately converted a proceeding at law into a

proceeding in equity. This Court agreed and issued the writ of prohibition. Importantly, the Court held that, before the appointment of a receiver, the movant must show (1) that the movant has a clear right to the property itself and (2) “that possession of the property by the possessor was obtained by fraud, or that the property itself, or the income arising from it, is in danger of loss from the neglect, waste, misconduct or insolvency of the possessor.” *Id.*, 133 S.E.2d at 91.

The Court emphasized:

A receivership is a harsh, drastic, and costly remedy, violently disturbing and interfering with the rights of the party whose possession is thereby ousted. Though the possession of the receiver may be, as it is sometimes said, the possession of the owner or on his behalf, and will be so treated in the ultimate disposition of the case, he who is in possession when the receiver is appointed must be regarded at the outset as *prima facie* the owner of the property. For this reason courts of equity should exercise extreme caution in the appointment of receivers, and always withhold the remedy until a proper case has been made therefor.

Id., 133 S.E.2d at 91 (citations omitted).

The Court in *Hereford* also held that the circuit court exceeded its power because the underlying cause of action provided “a plain, complete and adequate legal remedy to defend against [the claims] and to vindicate such rights as it may have in and to such property; and, in consequence, a court of equity is without jurisdiction to appoint such receiver.” *Id.*, 133 S.E.2d at 92.

In this action as well, the Circuit Court has erred as a matter of law and exceeded its power in equity. Manifestly, there is no good cause to appoint a special receiver and distribution company under the circumstances presented to the Circuit Court in Respondents’ second motion for partial summary judgment. Petitioners have been irreparably harmed by the Circuit Court’s decision and judgment entry.

VIII. CONCLUSION

For all of the foregoing reasons, this Court should reverse the Circuit Court's decision and judgment entry filed January 16, 2015, and remand this action for further proceedings.

Respectfully submitted this 18th day of May 2015.



W. Henry Lawrence (W. Va. Bar #2156)
Amy M. Smith (W. Va. Bar #6454)
William J. O'Brien (W. Va. Bar #10549)
STEPTOE & JOHNSON PLLC
400 White Oaks Boulevard
Bridgeport, WV 26330
Telephone (304) 933-8000
Facsimile (304) 933-8183

Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of May 2015, I caused the foregoing "Brief of Petitioners" to be served on counsel of record via U.S. Mail in postage-paid envelopes addressed as follows:

John E. Triplett, Jr., Esquire
Daniel P. Corcoran, Esquire
James S. Higgins, Esquire
THIESEN BROCK
424 Second Street
Marietta, Ohio 45750

Counsel for Respondents



W. Henry Lawrence (W. Va. Bar #2156)
Amy M. Smith (W. Va. Bar #6454)
William J. O'Brien (W. Va. Bar #10549)
STEPTOE & JOHNSON PLLC
400 White Oaks Boulevard
Bridgeport, WV 26330
Telephone (304) 933-8000
Facsimile (304) 933-8183

Counsel for Petitioners