

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 15-0124

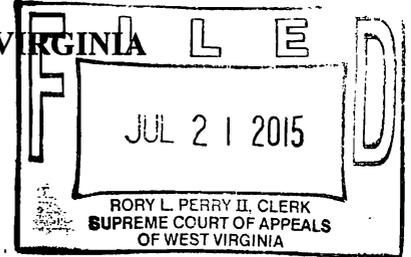
SUGAR ROCK, INC., a West Virginia corporation,  
GERALD D. HALL, IAMS GAS COMPANY, IAMS  
OIL COMPANY, CUTRIGHT GAS COMPANY,  
and KEITH OIL COMPANY,

*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.*



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**REPLY BRIEF OF PETITIONERS**

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**I. INTRODUCTION**

Petitioners Sugar Rock, Inc., Gerald D. Hall, Iams Gas Company, Iams Oil Company, Cutright Gas Company, and Keith Oil Company submit this reply in support of their 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. 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, Keith White, as executor of the estate of Bertie C. Cox, and J.F. Deem do not contest this Court’s jurisdiction because the decision and judgment entry appoints a receiver.

Respondents make several misstatements in their statement of the case, which need further explanation. For example, Respondents state in footnote 1 on page 1 of their brief that Clifton G. Valentine could not obtain full relief in *Valentine v. Sugar Rock, Inc.*, No. 1:10CV193 (N.D.W. Va. filed Nov. 8, 2010), but the District Court soundly rejected that argument in denying Valentine’s motion to dismiss a counterclaim and for leave to voluntarily dismiss the complaint without prejudice or, alternatively, to stay the case he filed in federal court as follows:

[T]he defendants have expended considerable time, effort, and expense to prepare for the trial of this matter. Valentine filed the instant motion to dismiss more than one year after he initially filed this suit, two weeks after the close of discovery, and exactly one day prior to the summary judgment deadline. The defendants’ summary judgment motion and the plaintiff’s motion to dismiss were, accordingly, briefed in tandem, and the defendants continued to engage in extensive trial preparations while the motions were pending.

...

... As already noted above, Valentine did not move to dismiss this case until more than a year after it was first filed and several weeks after discovery had closed. The plaintiff blames the delayed nature of his motion on the defendants’ dilatory conduct in the discovery phase of this case. Nevertheless, it appears undisputed that Valentine had all of the information giving rise to his new claims, i.e., K-1s, invoices for operating expenses, and the names of the non-diverse

partners he now wishes to join in his state suit, since April 29, 2011. (Dkt. No. 27). The plaintiff's explanation, that he essentially failed to "put it all together" until the deposition of Gerald Hall several weeks before he filed the motion, does not demonstrate the necessary diligence given the information that was in his possession. . . .

. . . [T]he Court finds that the plaintiff's explanation for seeking dismissal is insufficient. Although Valentine argues that he needs to be in state court to get "complete relief," it appears more likely that his primary purpose in seeking to re-file this case is to avoid an adverse summary judgment ruling by this Court. Notably, the defendants filed a motion to amend the scheduling order in this case on September 13, 2011, (dkt. no. 31), seeking permission to file an early dispositive motion and attaching as an exhibit the same summary judgment motion they later filed in this case. Although the Court denied the motion to file out of time during a hearing held on October 7, 2011, the plaintiff was nonetheless made aware of the defendant's arguments and, by virtue of the hearing, the Court's concerns regarding the merits of his claims.

*Valentine v. Sugar Rock, Inc.*, No. 1:10CV193, 2012 WL 4320850, \*\*3-4 (N.D.W. Va. Sept. 18, 2012), *aff'd in part*, 745 F.3d 729, 733 n.2 (4th Cir. 2014) (adopting District Court's analysis in denying Valentine's motion for leave to voluntarily dismiss complaint), *aff'd in part*, 782 F.3d 145, 148 (4th Cir. 2015) (affirming District Court's denial of Valentine's motion to voluntarily dismiss complaint without prejudice, vacating grant of summary judgment to Appellees in *Valentine* and remanding case for such other and further proceedings as may be appropriate).

Contrary to Respondents' statement on page 2 of their brief, the second amended complaint is the operative complaint for purposes of this appeal because the second amended complaint was operative on January 16, 2015, when the Circuit Court entered its decision and judgment entry. Moreover, the decision and judgment entry refers to the second amended complaint and expressly holds that the leases identified in the second amended complaint are partnership property. A.R. 1512, 1520. The decision and judgment entry erroneously indicates that leave had been granted and that Respondents had filed the third amended complaint. A.R. 1516. In fact, the docket sheet reflects that the order granting Respondents' motion for leave to

file the third amended complaint was granted and the third amended complaint, which for the first time refers alternatively to “mining partnerships or general partnerships in mining”, was filed after the decision and judgment entry on January 16, 2015. A.R. 9, 1946, 1950, 1954.

Respondents apparently concede that Kenneth A. Townsend, Anna Lee Townsend, Clyde Townsend, Michael Rubel, and Jerome Rubel have not produced any writing to support their alleged assignments. Respondents’ suggest on page 3 of their brief that Keith White, as executor of the Estate of Bertie C. Cox, has produced a writing, but Mr. White has fallen short. Although Respondents refer to an unrecorded working interest oil and gas assignment dated February 11, 1958, from F.A. Deem to Earl Keith, no connection is made between that unrecorded document and Ms. Cox or Keith White. A.R. 1014. Indeed, Respondents seemingly realize their shortcoming because they quote the portion of the decision and judgment entry that discusses the doctrine of lost instruments, which the Circuit Court notes was not pled. A.R. 1514.

Respondents observe beginning on the bottom of page 3 of their brief that there is some dispute as to whether Sugar Rock acquired the majority interest in the alleged mining partnerships by agreement dated April 1, 1999. It is undisputed, however, that Sugar Rock obtained all rights of operator and agent under the 1999 Agreement. A.R. 185. Respondents admit this on page 27 of their brief. Moreover, Sugar Rock has obtained additional interests sufficient to make it the undisputed majority interest owner in Iams Gas Company, Iams Oil Company, Cutright Gas Company, and Keith Oil Company. A.R. 92, 1619-23, 1667-1700.

Respondents’ citation to discovery responses on page 4 of their brief in support of the contention that Respondents objected to Sugar Rock’s management prior to filing this action on November 14, 2011, is improper. The cited discovery responses, which were served on August 28, 2013, were not filed with the Circuit Court in connection with Respondents’ second motion

for partial summary judgment or any other motion, but were simply included in a notice of filing. A.R. 694. In addition, the interrogatory responses in the notice of filing are not evidence that can be considered on summary judgment because they do not contain signatures and verifications in accordance with West Virginia Rule of Civil Procedure 33(b)(2).<sup>1</sup> Moreover, the prior lawsuit to which Respondents refer was actually filed by Sugar Rock against Valentine. A.R. 195.

Respondents point out on page 5 of their brief that Valentine testified in deposition that he remembers asking once in 1999, 2000, or 2001 for the expenses, but that he did not receive anything. The transcript further reveals, however, that Valentine never followed up and asked again – he just gave up. A.R. 1276. Valentine’s deposition transcript was not filed with the Circuit Court in connection with Respondents’ second motion for partial summary judgment or any other motion, but was simply included in a notice of filing depositions. A.R. 1774.

Similarly, the affidavit of James S. Vuksic could not be properly considered because it was filed as a stand-alone document, not in connection with Respondents’ second motion for partial summary judgment. In contrast, the affidavits of Petitioners’ expert witnesses were submitted with Petitioners’ response to Respondents’ second motion for partial summary judgment. A.R. 652-66. The Circuit Court should have considered Petitioners’ properly submitted evidence and denied Respondents’ second motion for partial summary judgment.

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<sup>1</sup> See *Saria v. Mass. Mut. Life Ins. Co.*, 228 F.R.D. 536, 539 (S.D.W. Va. 2005) (“failure to provide client verification [to interrogatory responses] undermines the dispositive motion process”). See also *Fowler v. S. Bell Tel. & Tel. Co.*, 343 F.2d 150, 154 (5th Cir. 1965) (unverified answers to interrogatories and interrogatories not based on personal knowledge are not competent summary judgment evidence). It should be further noted that the discovery responses to which Respondents cite were served on behalf of certain Respondents only. Discovery responses served on behalf of other Respondents were later improperly filed as a stand-alone document with no signatures or verifications on December 17, 2013. Respondents in this second group admitted that they did not contest any capital expenditures. A.R. 987, 990, 998-99. Mr. Hall’s affidavit submitted with Petitioners’ response to Respondents’ second motion for partial summary judgment describes Respondents’ contacts with Sugar Rock, including refusals to pay expenses and statements that they would not participate in any oil and gas well operations or activities. A.R. 639, 642-43. Mr. Hall’s testimony is the only competent evidence submitted on this issue.

## II. DISCUSSION

### 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.

Respondents attempt to trivialize the obvious fact that the Circuit Court did not apply the summary judgment standard properly in this case, but this legal error permeates the decision and judgment entry. 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 did not disclose any basis for a finding that Respondents, or any of them, are partners in general partnerships. Contrary to Respondents’ argument on page 11 of their brief, the decision and judgment entry did not build on the Circuit Court’s prior holding regarding mining partnerships – it simply bootstrapped the admittedly erroneous holding regarding mining partnerships – without any new evidence or analysis. A.R. 1516. The Circuit Court was required to modify its prior opinion because the original motion for partial summary judgment did not support the finding of a mining partnership under this Court’s decision in *Valentine v. Sugar Rock, Inc.*, 234 W. Va. 526, 766 S.E.2d 785 (2014). The Circuit Court made no effort to apply undisputed facts to the correct law in deciding the second motion for partial summary judgment.

Respondents’ belated attempt to provide support for the Circuit Court’s finding that Respondents are partners in general partnerships beginning on page 11 of their brief fails. This evidence was submitted and argued solely in support of mining partnerships – an argument that Respondents essentially abandoned following this Court’s decision in *Valentine*. In addition,

Respondents' argument that they are presumed to be partners under West Virginia Code § 47B-2-2(c)(3) because they received a share of the profits lacks merit. Respondents contradict this argument themselves, claiming on page 1 of their response brief that the information contained in the K-1s, among other things, "revealed that none of the Partnerships had earned a profit since Sugar Rock began operating the wells in 1999." *See* A.R. 204-453. Accordingly, there is no presumption that Respondents are partners in any partnerships under Section 47B-2-2(c)(3).

In any event, the decision and judgment entry is vague and indecisive on 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. Although Respondents correctly point out that the Circuit Court's prior order declared each of the then-current parties' interest in what the Circuit Court erroneously found to be mining partnerships, the parties have changed since that order was entered on July 19, 2013. For example, Respondents Michael Rubel, Jerome Rubel, Keith White, as executor of the Estate of Bertie C. Cox, and J.F. Deem joined this action by order entered October 28, 2013. A.R. 724,

861.<sup>2</sup> Other parties were dismissed from the action at that time. A.R. 725, 861. The Circuit Court simply never explains which Respondents are partners in what kind of partnerships.

Importantly, Respondents alleged in the second amended complaint only that they are partners in mining partnerships, and the Circuit Court based its decision and judgment entry on the second amended complaint. Although Respondents were granted leave to file and did file a third amended complaint following the decision and judgment entry on January 16, 2015, as discussed above, the second amended complaint is the operative complaint for purposes of this appeal. The order granting Respondents leave to file the third amended complaint was not entered *nunc pro tunc* nor otherwise retroactive. Instead, the Circuit Court stated:

Defendants have ample opportunity to meet the issue and will not be prejudiced. This Court therefore believes that there is good cause to grant Plaintiffs leave to amend. It is hereby ORDERED that Plaintiffs' Third Amended Complaint, attached to the Order as Exhibit A, is deemed filed instanter and that Defendants shall have ten (10) days to file a responsive pleading.

A.R. 1948.

The third amended complaint alleged for the first time that Iams Gas Company, Iams Oil Company, Cutright Gas Company, and Keith Oil Company are “mining partnerships or general partnerships in mining.” A.R. 1954. Petitioners timely filed their answer to the third amended complaint and amended counterclaim on February 4, 2015. A.R. 1553. Petitioners did not have an opportunity to respond to the allegations in the third amended complaint until after the ink had dried on the Circuit Court’s decision and judgment entry, and they would be unfairly prejudiced if the Court gives the third amended complaint retroactive effect contrary to the Circuit Court’s order.

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<sup>2</sup> The Circuit Court’s decision and judgment entry amends its prior order to reflect that the partnership interests held by Edwin L. Deem were transferred to and now owned by J.F. Deem, but does not mention the other changes to the parties. A.R. 1514. Edwin L. Deem has not been dismissed, and both Deems are Plaintiffs in the recently filed third amended complaint. AR 1535.

**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.**

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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". A.R. 91, 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.

Contrary to Respondents' argument, *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* addressed only the Statute of Frauds issue, not whether general partnerships existed. *Valentine*, 766 S.E.2d at 796-97.

Respondents cite to a footnote in *Valentine* that discusses in *dicta* the opinion in *Lantz v. Tumlin*, 74 W. Va. 196, 81 S.E. 820 (1914). The Court, however, reminded the parties in *Valentine* that "[t]his Court has consistently held . . . that 'language in a footnote generally should be considered obiter dicta' and that if this Court is to create a new point of law, it will do 'so in a syllabus point and not in a footnote.'" *Valentine*, 766 S.E.2d at 791 (citations omitted).

Respondents' reliance on *Lantz* is misplaced. In that case, the Court of Appeals held in Syllabus Point 2: "Where persons associate themselves together in a joint enterprise for profit, either as partners or otherwise, a relationship of trust and confidence is thereby established, and thereafter as between them in the conduct of the joint or partnership business the statute of frauds is inapplicable." The plaintiff in *Lantz* had alleged that, in accordance with their partnership agreement, the defendant concluded the purchase of oil leases and other property interests, taking the deed for the property in his individual name because the plaintiff did not want to be disclosed in the purchase. In holding that the statute of frauds did not apply, the Court explained as follows:

*In some jurisdictions, which have adopted into their statutes the seventh section of the English statute of frauds, requiring all declarations or creations of trust and confidence in any land, tenements or hereditaments to be proved by some writing, the rule may be different. In this State and Virginia that section of the English statute of frauds never became a law.*

*Id.*, 81 S.E. at 821 (emphasis added).

*Lantz* is readily distinguishable from this action. Respondents do not argue that they own a direct interest in the leases or other property interest by virtue of oral trusts established to keep their interests undisclosed as in *Lantz*. Instead, Respondents argue that they have an indirect interest in the leases and other property interests by virtue of an interest in the alleged Ritchie County Mining Partnerships. The law is clear under *Valentine*, however, that an essential element of a mining partnership is co-ownership in a lease or other property interest.

In any event, *Lantz* was effectively abrogated in 1931. At that time, the West Virginia Legislature adopted West Virginia Code § 36-1-4, which stated:<sup>3</sup>

No declaration of trust of land shall be enforceable, unless it be made in writing,

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<sup>3</sup> The West Virginia Legislature repealed Section 36-1-4 in 2011. *But see* W. Va. Code § 36-1-4a (1998) (governing memorandum of trust; requirements of recordation).

signed by the person who declares such trust or by his agent. If a conveyance of land, not fraudulent, is made to one in trust either for the grantor or a third person, such trust may be enforced, though it be not disclosed on the face of the conveyance, nor evidenced by a writing: Provided, however, that trusts arising by construction or operation of law shall not be subject to the provisions of this section.

*Lantz* did not eliminate co-ownership of a lease or other property interest – which Respondents do not even purport to have – as an essential element of a mining partnership. To the extent that *Lantz* may stand for the proposition that a mining partner may establish his ownership interest in property through an oral trust as opposed to a writing in satisfaction of Section 36-1-1, it has been abrogated by Section 36-1-4 and now Section 36-1-4a.

Moreover, Respondents are simply wrong in arguing beginning on page 19 of their brief that the differences between mining partnerships and general partnerships do not matter in determining whether or not Respondents are entitled to the dissolution and other remedies they demand. It is axiomatic that in order to assert any claims, a plaintiff must have a valid basis to do so, irrespective of the type of relief he is seeking. 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, including dissolution. This Court recognized as much in *Valentine*, explaining in relevant part:

Generally speaking, a “mining partnership is governed by all the rules applicable to ordinary partnerships, *except such as flow from [the] fundamental difference[s] in the two associations.*” *Manufacturers Light & Heat Co. v. Tenant*, 104 W. Va. 221, 225, 139 S.E. 706, 707 (1927) (citation omitted). . . .

...

. . . [There] are three characteristics of mining partnerships which differentiate them from general partnerships. The first and most obvious, difference is the absence of *delectus personae*. The members of a mining partnership lack any control over the individuals who are associated with the enterprise; “any person may become a member by virtue of an inter vivos conveyance or even inheritance, against the other members’ consent.” Bob Kiesling, “Mining

Partnerships,” 12 Baylor L. Rev. 103, 105 (1960). “*If death, insolvency, or sale were to close up vast mining enterprises, in which many persons and large interests participate, it would entail disastrous consequences.*” *Childers v. Neely*, 47 W. Va. at 74, 34 S.E. at 829.

Hence, *members of a mining partnership may come and go without forcing the dissolution of the partnership and the interruption of the mining business. Unlike a common-law general partnership, a mining partnership “is not terminated by the death, lunacy, or bankruptcy of a partner, nor by the transfer of his interest to a stranger.”* Stephen Ailes, “Student Note: Mining Partnerships in West Virginia,” 41 W. Va. L. Q. 144, 145 (1934). Put concisely, “*a mining partner relationship continues until the time the mine or the lease ceases its existence, since this relationship’s very nature involves the existence of a mine.*” Kiesling, 12 Baylor L. Rev. at 106.

*Valentine*, 766 S.E.2d at 796-797 (emphasis added).<sup>4</sup>

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. As discussed above, the Circuit Court did not even attempt to specify which Respondents are and are not partners in which companies.

Contrary to Respondents’ argument beginning on page 22 of their brief, Respondents cannot be partners because their predecessors would have been dissociated from any general partnerships years ago under RUPA.<sup>5</sup> Respondents do not deny that 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. Thus, most Respondents, who claim interests by inheritance, could not have become partners in a general partnership.<sup>6</sup>

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<sup>4</sup> There are also differing standards for appointment of a receiver, which are discussed *infra* beginning on page 19.

<sup>5</sup> Dissociation under RUPA is readily distinguishable from forfeiture, which Respondents reference on page 24 of their brief.

<sup>6</sup> Assuming that Edwin L. Deem had not been dissociated and that his interest was transferrable to F.A. Deem, a transferee of a partner’s transferable interest must obtain dissolution under West Virginia Code § 47B-8-1(6), which is limited by a judicial determination, in equity, that certain preliminary showings set forth in Section 47B-8-1(6)(i) and (ii) are met. Respondents have never argued that those preliminary requirements, which include expiration of

In addition, the assignments produced by some Respondents 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. Respondents do not deny that they have refused to pay their portion of the losses. 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 also cannot be partners because they concededly are merely passive stockholders with no control. Respondents fail to distinguish *Armor v. Lantz*, 207 W. Va. 672, 535 S.E.2d 737, 745 (2000), where 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). *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.”

*Armor*, 535 S.E.2d at 745 (citations omitted).

Because they (or their predecessors) 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 that many, if not all, Respondents are partners in these companies.

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the partnership term or undertaking at the time of the transfer or that the partnership was at will, have been met and Petitioners deny that Respondents would have any right to such a dissolution under Section 47B-8-1(6).

**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. Respondents do not dispute that the leases themselves do not include any of the indicia required to deem them partnership property by statute, but argue instead that the Court should look to other documents.

Contrary to Respondents' argument on page 28 of their brief, 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 to drill one well, 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. Respondents do not dispute, however, that the conveyance language in the assignments 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. Moreover, 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.

It is undisputed that neither Respondents nor their predecessors ever contributed to the operations of the leases, and Respondents contend at most that their predecessors contributed a one-time passive monetary investment for the drilling of one well. Respondents even refused to pay well operating expenses, well service fees, equipping and production fees that were assessed to Respondents. A.R. 648. Instead, 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 wells. Since acquiring the conveyances from W.A. Deem in 1999, Sugar Rock has continued to operate the leases as separate property from Respondents’ alleged ownership interests in the so-called Ritchie County Mining Partnerships. Sugar Rock has spent substantial finances on investigating, maintaining and developing the leases. Specifically, 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. 454-57, 639-51, 913-19.

Respondents’ attempt to distinguish *Arbaugh v. Raines*, 155 W. Va. 409, 184 S.E.2d 620 (1971), is specious. In the agreements at issue in *Arbaugh*, 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 their prior arguments under the common law of mining partnerships and 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. Applying Maryland's RUPA, the Court of Appeals of Maryland explained in *Creel v. Lilly*, 354 Md. 77, 729 A.2d 385 (1999), as follows:

RUPA's underlying philosophy differs radically from UPA's, thus laying the foundation for many of its innovative measures. RUPA adopts the "entity" theory of partnership as opposed to the "aggregate" theory that the UPA espouses. Thomas R. Hurst, *Will the Revised Uniform Partnership Act (1994) Ever Be Uniformly Adopted?*, 48 FLA. L. REV. 575, 579 (1996). Under the aggregate theory, a partnership is characterized by the collection of its individual members, with the result being that if one of the partners dies or withdraws, the partnership ceases to exist. See Joan E. Branch, Note, *The Revised Uniform Partnership Act Breakup Provisions: Should They Be Adopted?*, 25 Creighton L. Rev. 701, 701 (1992). On the other hand, RUPA's entity theory allows for the partnership to continue even with the departure of a member because it views the partnership as "an entity distinct from its partners." Section 9A-201.

This adoption of the entity theory, which permits continuity of the partnership upon changes in partner identity, allows for several significant changes in RUPA. Of particular importance to the instant case is that under RUPA "a partnership no longer automatically dissolves due to a change in its membership, but rather the existing partnership may be continued if the remaining partners elect to buy out the dissociating partner." *Will the Revised Uniform Partnership Act (1994) Ever Be Uniformly Adopted?*, 48 FLA. L. REV. at 579-80 (footnote omitted). This major RUPA innovation therefore delineates two possible paths for a partnership to follow when a partner dies or withdraws: "[o]ne leads to the winding up and termination of the partnership and the other to continuation of the partnership and purchase of the departing partner's share." *Will the Revised Uniform Partnership Act (1994) Ever Be Uniformly Adopted?*, 48 FLA. L. REV. at 583 (footnote omitted).

*Id.*, 729 A.2d at 392-93 (footnote omitted).

The court continued in *Creel*:

In applying the law . . . to the facts of this case, we want to clarify that while UPA is the governing act, our holding is also consistent with RUPA and its underlying policies. The legislature's recent adoption of RUPA indicates that it views with disfavor the compelled liquidation of businesses and that it has elected to follow the trend in partnership law to allow the continuation of business without disruption, in either the original or successor form, if the surviving partners choose to do so through buying out the deceased partner's share.

*Id.*, 729 A.2d at 396-97. *See also, e.g., Shoemaker v. Shoemaker*, 275 Neb. 112, 745 N.W.2d 299, 311 (2008) (rejecting argument that partnership dissolved upon voluntary withdrawal under RUPA); *Horne v. Aune*, 130 Wash. App. 183, 121 P.3d 1227, 1233 (2005) (expressly adopting approach in *Creel*); *Warnick v. Warnick*, 2003 WY 113, 76 P.3d 316, 321 (2003) (explaining that RUPA contains significant change from prior partnership law to avoid unnecessary dissolutions).

As discussed in the comments to RUPA § 601 regarding dissociation:

RUPA dramatically changes the law governing partnership breakups and dissolution. An entirely new concept, "dissociation," is used in lieu of the UPA term "dissolution" to denote the change in relationship caused by a partner's ceasing to be associated in the carrying on of the business. "Dissolution" is retained but with a different meaning. *See* Section 802. The entity theory of partnership provides a conceptual basis for continuing the firm itself despite a partner's withdrawal from the firm.

Under RUPA, unlike the UPA, the dissociation of a partner does not necessarily cause a dissolution and winding up of the business of the partnership. Section 801 identifies the situations in which the dissociation of a partner causes a winding up of the business. Section 701 provides that in all other situations there is a buyout of the partner's interest in the partnership, rather than a windup of the partnership business. In those other situations, the partnership entity continues, unaffected by the partner's dissociation.

RUPA § 601, cmt. 1, 6 U.L.A. 164 (2001).

The comments to RUPA § 801 regarding dissolution further explain that dissolution is not appropriate simply because a partnership is not operating at a profit as follows:

Section 801(5) provides for judicial dissolution on application by a partner. . . . A court may order a partnership dissolved upon 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 partner; or (iii) it is not otherwise reasonably practicable to carry on the partnership business in conformity with the partnership agreement. The court's power to wind up the partnership under Section 801(5) cannot be varied in the partnership agreement. *See* Section 103(b)(8).

RUPA also deletes Section 32(1)(e) which provides for dissolution when the business can only be carried on at a loss. That provision might result in a dissolution contrary to the partners' expectations in a start-up or tax shelter situation, in which case "book" or "tax" losses do not signify business failure.

RUPA § 801, cmt. 8, 6 U.L.A. 192 (2001).

Assuming that the so-called Ritchie County Mining Partnerships are partnerships under RUPA, and further assuming that Respondents are partners and have not been dissociated, the evidence viewed in the light most favorable to Petitioners does not justify dissolution under Section 47B-8-1(5). In fact, 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.<sup>7</sup>

Respondents do not seriously contest that 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.

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<sup>7</sup> Respondents do not contend that there is evidence of a partnership agreement, nor do Respondents even refer to any such agreement.

Respondents do not refute the testimony of Petitioners' well-known, independent experts in the oil and gas industry Messrs. Schumacher, Haskins, and Harton, as well as a certified public accountant and certified valuation analyst Mr. Cain, who reviewed 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. All experts, including Mr. Cain 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.

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. Respondents do not acknowledge that the standard under RUPA requires that 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). Nor do Respondents argue that this standard is met. Although the Circuit Court cursorily found good cause, it improperly failed to identify 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. The question is not whether Rodney Windom and Hays and Company are qualified or capable of performing – the question is whether there is good cause to appoint them. There is not.

Nor is a special receiver appropriate under West Virginia Code § 53-6-1 or by an injunction or other means in equity. Respondents’ attempt to distinguish *State ex rel. Battle v. Hereford*, 148 W. Va. 97, 133 S.E.2d 86, 91 (1963), is to no avail. In *Hereford*, the Court held that, before the appointment of a receiver, a 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.

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).

Respondents also ignore the holding in *Hereford* that the circuit court exceeded its power because the case provided an adequate legal remedy such that a court of equity was without jurisdiction to appoint such receiver. *Id.*, 133 S.E.2d at 92. *See also, e.g., Taylor v. United Fuel Gas Co.*, 100 W. Va. 644, 131 S.E. 461 (1926) (vacating appointment of receiver); *Davidson v. Davidson*, 70 W. Va. 203, 73 S.E. 715 (1912) (no equitable grounds to appoint receiver).

The Circuit Court erred as a matter of law and exceeded its power in equity. There is no good cause to appoint a special receiver and distribution company. Petitioners have been irreparably harmed by the Circuit Court's decision and judgment entry.

### III. 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 21st day of July 2015.

  
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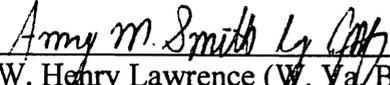
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 21st day of July 2015, I caused the foregoing "Reply Brief of Petitioners" to be served on counsel of record via U.S. Mail in a postage-paid envelope addressed as follows:

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