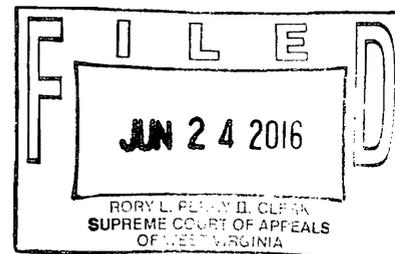


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 15-0907

**GREGORY G. POULOS, JASON G. POULOS,
PAMELA F. POULOS, SHAUN D. ROGERS,
KEVIN H. ROGERS, DEREK B. ROGERS,
and T.G. ROGERS, III,**



Petitioners/Appellants

v.

LBR HOLDINGS, LLC,

Respondent/Appellee

BRIEF OF *AMICUS CURIAE*

**THE WEST VIRGINIA ROYALTY OWNERS' ASSOCIATION
SUPPORTING THE PETITIONERS/APPELLANTS AND
ARGUING FOR REVERSAL OF THE LOWER COURT'S ORDER**

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Table of Contents

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

 A. This Court should stay true to its goal to “eradicate uncertainty,” espoused in *Faith United*. The lower court’s ruling runs contrary to this goal and should be overturned. 5

 B. This Court need not overrule *Moss*, which only held that a gas lease does not include a right to invade the coal estate unless such right is specifically mentioned. The lower court erred in its application of *Moss*. 7

 C. Because *Moss* is distinguishable from the present case, the Court need not be dragged into an analysis of when people first engaged in “commercial production” of gas from coal beds. 10

 D. This Court should take the next logical step in the evolution of gas law in this state and find that gas produced from any formation is gas. 11

 E. Finding that gas produced from a coal bed is “gas” is consistent with the West Virginia Code and decisions from other state courts. 12

CONCLUSION 15

Table of Authorities

| | |
|---|---------------|
| <i>Cotiga Dev. Co. v. United Fuel Gas Company</i> , 147 W. Va. 484, 128 S.E.2d 626 (1962) | 4 |
| <i>Energy Development Corp. v. Moss</i> , 214 W. Va. 577, 591 S.E.2d 135 (2003) | <i>passim</i> |
| <i>Faith United Methodist Church v. Morgan</i> , 231 W. Va. 423, 745 S.E.2d 461 (2013) | <i>passim</i> |
| <i>Harrison-Wyatt, LLC v. Ratliff</i> 267 Va. 549, 593 S.E.2d 234 (2004) | 13, 14 |
| <i>Newman v. RAG Wyoming Land Co.</i> 53 P.3rd 540 (Wyo 2002). | 13 |
| <i>Ramage v. South Penn Oil Co.</i> 94 W. Va. 81, 118 S.E. 162 (1923) | 6 |
| <i>Swords Creek Land Partnership v. Belcher</i> 762 S.E.2d 570, 574 (Va. 2014). | 13, 14 |
| <i>Union Reserve Coal Co.</i> 271 Mont. 459, 898 P.2d 680 (1995) | 13 |
| <i>Zimmerer v. Romano</i> 223 W. Va. 769, 777, 679 S.E.2d 601, 609 (2009) | 4 |
| <i>West Virginia Code</i> § 22-21-9 (1994) | 12 |

Statement of the Case

The issues and facts of the case are well briefed by able counsel. *Amicus Curiae* the West Virginia Royalty Owners Association¹ hopes to offer the Court a path to resolve this case, and respectfully argues that the Court should find for the Petitioners. The lower court and the parties all discuss this Court's decision in *Energy Development Corp. v. Moss*, 214 W. Va. 577, 591 S.E.2d 135 (2003), but fail to see that all *Moss* held was that a coal owner should be protected from unwanted invasion of the coal seam. That is not an issue in this case, where invasion of the coal estate has been welcomed by the coal owner.

As the Court is now aware, in 1938, various members of the Rogers family, who owned lands in West Virginia, Virginia, and Kentucky, divided the oil and gas estate for approximately 3800 acres in McDowell County, West Virginia (as well as other land in Virginia). Specifically, two couples, Talmage & Martha Rogers and Lloyd & Anne Rogers deeded the property to their relative Lon Rogers, but Talmage & Martha and Lloyd & Anne reserved 50% (or 25% per couple) of the oil and gas. The reservation in the deed read in pertinent part:

But there is excepted from the above described property an undivided one-half interest in the oil and gas under said property and the same is reserved....together with the usual and necessary rights of ingress and egress and drilling rights to explore, get and remove said gas.

Deed from parties Joint Stipulation of Facts filed November 12, 2014.

¹WVROA's mission is to inform West Virginia mineral owners about the state of the oil and gas industry, leasing, and their rights as real property owners, as well as promoting legislation that protects the rights of all property owners, whether fee, surface, or mineral owners, to ensure that oil and gas development in West Virginia is done responsibly and fairly. WVROA currently has 563 members, and is the only party that paid for the production of this brief. Undersigned counsel is the sole author of this brief.

The Petitioners/Appellants² are successors only to the Talmage & Martha interest, and thus own 25% of the gas estate. Sometime later the Lloyd & Anne interest was merged with the Lon interest (everything else). Respondent/Appellee LBR Holdings LLC (hereinafter “LBR”) is the successor to those interests, and LBR now owns 75% of the gas estate, along with all of the coal estate.³

LBR at some point started or permitted gas development on the property and specifically allowed the coal bed to be stimulated for the production of methane gas.⁴ The gas operator placed 25% of the royalties into escrow, pending a determination of ownership. The Petitioners filed suit to claim the 25% and ultimately the lower court held, in large part based upon a misapplication of this Court’s holding in *Energy Development Corp. v. Moss*, 214 W. Va. 577, 591 S.E.2d 135 (2003), that all of the gas and royalties belonged to LBR.

Specifically the lower court found that the reservation of “an undivided one-half interest in the oil and gas” did not reserve the methane gas contained in the coal beds underlying the property. The court found the term “gas” in the deed reservation to be ambiguous, and then took evidence about the development of CBM in the early 20th century and found that the parties had not contemplated reserving CBM, so the CBM was conveyed and not reserved, and is thus all the property of LBR. This appeal followed.

²Gregory G. Poulos, Jason G. Poulos, Pamela F. Poulos, Shaun D. Rogers, Kevin H. Rogers, Derek B. Rogers, and T.G. Rogers, III.

³See the parties’ Joint Stipulation of Facts filed November 12, 2014.

⁴*Amicus curiae* takes the position that the terms “gas” and “coalbed methane gas” and “CBM” are one and the same. Although the term CBM may be used at points for the sake of brevity, this should not be interpreted as an admission that CBM is anything other than “gas.”

Summary of Argument

Amicus curiae argues that the Court can still protect the coal owner and simultaneously (A) follow its recent holding in *Faith United*⁵ and create certainty for all mineral owners, (B) avoid expressly overruling *Moss*,⁶ (C) entirely avoid a protracted analysis of deed construction or the history of CBM, (D) take the next logical step in the evolution in the State's gas law, and hold that "gas" produced from any formation is "gas" that belongs to the gas owner, and (E) remain in harmony with the West Virginia Code and decisions in other states. If the Court is persuaded by this argument, this *amicus curiae* would respectfully suggest that the Court's holding could take a form somewhat like the following:

Although in *Moss* the Court held that "In the absence of specific language to the contrary or other indicia of the parties' intent, an oil and gas lease does not give the oil and gas lessee the right to drill into the lessor's coal seams to produce coalbed methane gas," once permission has been granted by a coal owner to invade the coal estate to produce the gas contained therein, the resulting gas is the property of the gas owner.

If the Court rules for the Petitioners it will reach the "uniformity and certainty" it sought in *Faith United* ; should it rule the other way, it will find only "interminable confusion."

⁵*Faith United Methodist Church v. Morgan*, 231 W. Va. 423, 745 S.E.2d 461 (2013).

⁶*Energy Development Corp. v. Moss*, 214 W. Va. 577, 591 S.E.2d 135 (2003).

ARGUMENT

The *amicus curiae* adopts the Petitioners' assignments of error, but finds that pure repetition of all those points, already well argued, would not be helpful to the Court. Instead this argument focuses on the five points stated above.

For the sake of brevity, *amicus curiae* also adopts Petitioners' discussion of the standard of review. Clearly, whether or not a deed is ambiguous is a question of law, and this Court has *de novo* review of such issues:

The facts of this case call upon this Court to interpret a written deed. Thus, we apply a *de novo* standard of review to the circuit court's interpretation of the contract.

Zimmerer v. Romano, 223 W. Va. 769, 777, 679 S.E.2d 601, 609 (2009); *Faith United Methodist Church v. Morgan*, footnote 10, 231 W. Va. 423, 428, 745 S.E.2d 461, 466 (2013). The lower court found it necessary to interpret the deed, but this Court may consider anew that reasoning, and find that the deed has no ambiguity. Because the deed in this case was *unambiguous*, the majority of the lower court's findings are for naught, and the Court need not consider them. The Court need only apply the clear language in the deed:

A valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent.

Syl. pt. 1, *Cotiga Development Company v. United Fuel Gas Company*, 147 W. Va. 484, 128 S.E.2d 626 (1962). Syl pt. 4. *Faith United Methodist Church v. Morgan*, 231 W. Va. 423, 745 S.E.2d 461 (2013).

A. This Court should stay true to its goal to “eradicate uncertainty,” espoused in *Faith United*. The lower court’s ruling runs contrary to this goal and should be overturned.

In the recent *Faith United* case, also cited exhaustively in other briefs, this Court stated a simple and laudable goal that is something that even the parties in this case could agree upon:

This Court’s goal in the area of land ownership is to avoid bringing upon the people interminable confusion of land titles; instead, we must endeavor to prevent and eradicate uncertainty of such titles.

Faith United Methodist Church v. Morgan, 231 W. Va. 423, 431, 745 S.E.2d 461, 469 (2013)(internal citations and quotations omitted). As the Court is well aware, that case concerned what parties intended the word “surface” to mean in a deed from 1907. If one were to read that opinion and replace the word “surface” with the word “gas” the Court would quickly come to a decision in favor of the Petitioner. For example, the Court states:

The legal question at the heart of this case is simple: is every deed of the “surface” [or “gas”] presumed to be ambiguous and open to interpretation using extrinsic evidence to contradict, alter or add to the deed’s language? Or does the term “surface” [or “gas”] have some definite, certain meaning that the average person can rely upon?

Faith United Methodist Church v. Morgan, 231 W. Va. 423, 429, 745 S.E.2d 461, 467 (2013)(bracketed language supplied). Explaining why it should overrule an earlier syllabus point that held that the term “surface” was always ambiguous, this Court pointed out all the problems caused by uncertain definitions of fundamental estates in real property:

As should now be obvious, Syllabus Point 1 of *Ramage*⁷ is not sound law because it violates two fundamental public policies. First, in drafting deeds or other instruments of conveyance, courts and petitioners want terms with definite meanings. The quest for uniformity and certainty is a major concern for the practitioner. By assuming that the term “surface” has no concrete meaning, *Ramage* has made the drafting of deeds, wills and other instruments of conveyance much more complex.

Second, courts want to reach a result which the parties intended, and therefore attempt to confine themselves to the four corners of the document to divine the parties’ intent. *Ramage* violates this fundamental policy by requiring a court to turn back the clock and go beyond the document to discern the parties’ intent from parol and other extrinsic evidence

Faith United Methodist Church v. Morgan, 231 W. Va. 423, 437, 745 S.E.2d 461, 475 (2013).

(footnote and internal quotations omitted). Again, simply replace “surface” with “gas” and the outcome of the instant case seems obvious. If “gas” does not include methane gas produced from a coalbed, like any other gas, then the drafting of any instrument of conveyance becomes much more complex.

Furthermore, the lower court’s decision did exactly what the *Faith* Court argued against. The only way that the lower court was able to reach its conclusion in favor of LBR was to “turn back the clock and go beyond the document to discern the parties intent.” Affirming the lower court in the instant case would go directly against the Court’s holding in *Faith United*. Overturning the lower court and finding that the gas owners own any gas produced is in harmony with *Faith United*, and, as discussed *infra*, does no violence to the Court’s holding in *Moss*.

⁷*Ramage v. South Penn Oil Co.*, 94 W. Va. 81, 118 S.E. 162 (1923).

B. This Court need not overrule *Moss*, which only held that a gas lease does not include a right to invade the coal estate unless such right is specifically mentioned. The lower court erred in its application of *Moss*.

As the Court is well aware from the parties lengthy discussion of *Moss* in other briefs, this Court in *Moss* held:

In the absence of specific language to the contrary or other indicia of the parties' intent, an oil and gas lease does not give the oil and gas lessee *the right to drill into the lessor's coal seams to produce coalbed methane gas.*

Syl. pt 8, *Energy Development Corp. v. Moss*, 214 W. Va. 577, 591 S.E.2d 135 (2003) (emphasis added).

At the risk of trying the Court's patience with excessive detail, the facts in *Moss* showed that the gas operator in that case, represented by counsel, and admittedly familiar with the value of CBM, failed to mention anything about CBM in the lease it prepared and presented to the coal owner (who was also the surface and oil and gas owner as well).

The gas operator drilled several conventional wells, but failed to conduct any tests for the commercial viability of the CBM, but some time later informed the coal owner that it intended to stimulate the coal seam to produce CBM, to which the coal owner objected. When asked if the gas lessor could do that, the *Moss* Court simply said, "No," the lease does not "grant the right to drill into the lessor's coal seams to produce coalbed methane gas." This is *ALL* that *Moss* stands for.

The Court did not reach the ultimate question of who "owned" the CBM. With all due respect to the wisdom and lengthy tenure of the lower Court, its final order shows a fatal misunderstanding of the *Moss* opinion. The lower court stated:

The Defendants also argue that *Moss* is distinguishable from the above-captioned case However, the two cases are analogous. If a lease conveying the right to produce “gas” does not include the right to produce CBM absent specific language to the contrary or other indicia of the parties’ intent, then deed language conveying or reserving “gas” *does not include ownership* of CBM absent specific language to the contrary or other indicia of the parties’ intent.”

Bench Trial Order (emphasis supplied). The lower court conflates the *protection from* unwanted invasion of the coal estate with *ownership* of the gas estate. *Moss* did not expressly hold that CBM was gas, but it most certainly did not hold that a coal owner owns the CBM. *Moss* merely held that a gas lease does not *give one the right* to invade the coal estate to produce CBM. That is to say, the Court found that the coal owner has a sort of veto power over another’s efforts to produce gas, if such production requires invasion of the coal estate, and the coal owner must clearly express its intention to allow this.

Again - the Court did not define ownership. Litigants pressed the *Moss* court to take a definitive position regarding ownership of CBM, and the court demurred, most likely because the fact of that case showed the gas operator in a bad light, and any other finding would have resulted in, from that Court’s perspective, an unjust outcome. Some of the facts stressed by the Court in *Moss* included: The gas operator drafted the leases with the help of counsel.⁸ The gas operator approached the owners about the lease - the owners did not solicit it.⁹ The gas operator testified about its knowledge of the production of CBM prior to the drafting of the lease.¹⁰ The lower

⁸*Moss* 214 W. Va. at 581, 591 S.E.2d at 139.

⁹*Moss* 214 W. Va. at 586, 591 S.E.2d at 144.

¹⁰*Moss* 214 W. Va. at 582, 591 S.E.2d at 140.

court appeared to doubt the veracity of the gas operator's witnesses who testified about discussion they had in the home of owner who died before the trial.¹¹

With entirely different fact in the instant case, with a coal owner that permitted invasion of the coal seam to produce gas, *amicus curiae* would ask that the court now take the next obvious step in the evolution of this area of law, and hold that the owner of the gas is also the owner of any CBM.

The way that one may distinguish *Moss* is that it was concerned about a gas lessee invading the coal estate without express permission to do so. In the instant case, LBR owns all of the coal and 75% of the gas, and LBR has obviously granted permission to invade the coal estate to produce paying quantities of gas.

As stated *supra*, the *amicus curiae* would respectfully suggest that the Court take the following position: Although in *Moss* the Court held that "In the absence of specific language to the contrary or other indicia of the parties' intent, an oil and gas lease does not give the oil and gas lessee the right to drill into the lessor's coal seams to produce coalbed methane gas," once permission has been granted by a coal owner to invade the coal estate to produce the gas contained therein, the resulting gas is the property of the gas owner.

¹¹*Moss*, footnote 9, 214 W. Va. at 582, 591 S.E.2d at 140.

C. Because *Moss* is distinguishable from the present case, the Court need not be dragged into an analysis of when people first engaged in “commercial production” of gas from coal beds.

The only reason the parties or the court entered into analysis of when people started drilling into coal beds to produce gas is because of this court’s discussion of the topic in *Moss*. However, the Court only discussed this subject because of the *question* being asked in *Moss* - namely, does my standard gas lease allow me to drill into your coal seam to get the gas out? The *Moss* court engaged in its historical inquiry to help answer that question, asking, “well does everybody with a gas lease drill into the coal and produce coal bed methane? Is this something that the lessor should have reasonably expected?”

But nobody is asking this question in the instant case. The coal owner has happily invaded the coal estate to produce gas. The entire investigation into when people first produced gas from coal seams is entirely unnecessary in this case. The oil and gas reservation in the deed in question stated:

But there is excepted from the above described property an undivided one-half interest in the oil and gas under said property and the same is reserved....*together with the usual and necessary rights of ingress and egress and drilling rights to explore, get and remove said gas.*

Deed from parties joint Stipulation of Fact filed November 12, 2014. So under this reservation, the reserving parties can clearly drill a well, and build a road to that well, and lay a pipeline to remove the gas from the property. Could the reserving parties drill into the coal seam and

stimulate it to get the gas? We don't know, but we don't need to know, because the coal owner has already allowed this.

If one can step back for a moment and realize that no party in this litigation is asking *if it is permissible to invade the coal estate and stimulate it to produce gas*, then one can see that the entire line of inquiry into *when* such a practice first started, and where, and how much, and all of that is entirely unnecessary to the outcome of this case.

**D. This Court should take the next logical step in
the evolution of gas law in this state
and find that gas produced from any formation is gas.**

Not only did the *Moss* court not find that CBM was part of the coal estate¹², it also left plenty of room to decide in a future case that gas produced from a coalbed is simply gas. As Justice Albright noted in his dissent:

It is clear that the majority intended its decision to apply only to the narrow issue the majority addressed in its opinion: Whether the lease at issue contemplated that the lessee might explore for and extract coalbed methane gas from the leased premises. Accordingly, this Court retains some ability to further examine the ramifications of its ruling in future cases.

Energy Development Corp. v. Moss, 214 W. Va. 577, 599, 591 S.E.2d 135, 157 (2003)(Albright J., Dissenting). The *Moss* court, faced with a lessee with superior knowledge of the value of CBM, attempting to use a lease it drafted to invade the coal estate against the wishes of the coal owner, came to a reasonable and narrow conclusion. The court stopped short of defining the

¹²*Amicus curiae* joins Petitioners/Appellants' argument that LBR did not argue before the lower court that CBM is part of the coal estate, and should be estopped from making that argument for the first time in its Response.

ownership because it found that step unnecessary to resolve the case before it at the time.

Today, however, the Court faces a different question. Namely: does a gas reservation in a deed also reserve any methane that might be produced from the coal seam? The Court must answer this question with a “yes” or a “no.” The only logical answer to this question is “yes” and it is the natural next step to take after the *Moss* opinion.

**E. Finding that “gas” produced from a coal bed
is “gas” is consistent with the West Virginia Code
and decisions from other state courts.**

Such a holding is also in harmony with the relevant statute, which the *Moss* Court also examined. The statute does not define ownership. The thrust of the statute is that all parties affected by the process of producing gas from the coal bed should have notice:

- (a) Prior to filing an application for a permit for a coalbed methane well under this article, the applicant shall deliver by personal service or by certified mail, return receipt requested, copies of the application, well plat and erosion and sediment control plan to the following:
 - (1) The owners of record of the surface of the tract on which the coalbed methane well is to be located;
 - (2) The owners of record of the surface of any tract which is to be utilized for roads or other land disturbance;
 - (3) Each coal owner and each coal operator (i) from whom a consent and agreement provided for in section seven of this article is required, or (ii) whose coal seam will be penetrated by the proposed coalbed methane well or is within seven hundred fifty feet of any portion of the well bore; and
 - (4) Each owner and lessee of record and each operator of natural gas surrounding the well bore and existing in formations above the top of the uppermost member of the “Onondaga Group” or at a depth less than six thousand feet, whichever is shallower. Notices to gas operators shall be sufficient if served upon the agent of record with the office of oil and gas.

W. Va. Code § 22-21-9 (1994). We find it noteworthy that the statute requires notice to all parties who might have some interest in the coalbed methane: surface

owners, coal owners, coal operators, and the owners, lessees, and operators of oil and gas wells.

Energy Development Corp. v. Moss, 214 W. Va. 577, 591, 593-94, S.E.2d 135, 151-52 (2003)(citing W. Va. Code § 22-21-9 (1994)). Again, insisting that affected parties have notice, and protecting a coal owner from any unwanted invasion of a workable coal seam are not the same as defining ownership or saying that gas produced from the coal is not “gas.”

As able counsel has pointed out in briefs, other Courts have taken this next logical step already and defined gas produced from a coal seam as gas, most importantly our neighbor Virginia, whose law we obviously shared up until 1863. In *Harrison-Wyatt, LLC v. Ratliff*, 267 Va. 549, 593 S.E.2d 234 (2004), the court was asked if a deed conveying “all the coal in, upon and underlying” the land also conveyed the methane in the coalbeds. The court held:

We do not believe the term “coal,” as it was used in the late 19th century, is ambiguous. As commonly understood at the time, the term “coal” meant a solid rock substance used as fuel, and nothing in the record indicates that CBM is a part of coal itself. . . . We hold, therefore, that title to the CBM did not pass to the Coal Owner, and the trial court did not err in holding that the CBM is owned by the Plaintiffs [who owed the surface, gas, and all other estates and interests] and that the Plaintiffs are entitled to distribution of the royalties held in escrow.

Harrison-Wyatt, LLC v. Ratliff, 267 Va. 549, 553, 593 S.E.2d 234, 238 (2004). Virginia joined Montana and Wyoming in holding that methane produced from the coal bed is “gas.” (See discussion of *Carbon County v. Union Reserve Coal Co.*, 271 Mont. 459, 898 P.2d 680 (1995) and *Newman v. RAG Wyoming Land Co.*, 53 P.3rd 540 (Wyo 2002). *Harrison-Wyatt, LLC v. Ratliff*, 267 Va. 549, 593, 596 S.E.2d 234, 237 (2004)).

The Virginia Court recently affirmed this decision in a very similar case, in which a deed from 1887 granted “all of the coal, in, upon or underlying a certain tract of land.” After

reviewing the holding in *Ratliff* the Virginia Court held:

We conclude that the Surface Owners [who also owned the gas] have at all times owned all mineral estates within their lands except coal, and are entitled to all royalties accrued from the production of CBM therefrom and those yet to accrue.

Swords Creek Land Partnership v. Belcher, 762 S.E.2d 570, 574 (Va. 2014). As the Court is aware, the parties in this case also owned property in Virginia subject to the same dispute, and the Virginia cases were decided in favor of the Petitioners because of *Ratliff* and *Swords Creek*. As much as we may celebrate our separation from Virginia in 1863, the gas under the ground in Virginia is no different than gas beneath our feet; a similar outcome should result in this case.

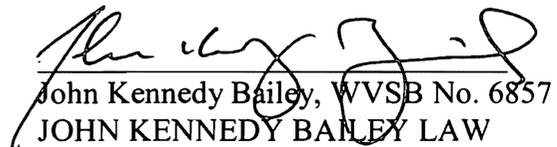
Conclusion

If the Court accepts this argument of this *amicus curiae* the Court can stay true to *Faith United's* goal of certainty for mineral owners, not have to overrule *Moss* (which only answered the question of whether a gas lease included the right to invade the coal seam), not descend into the quagmire of guessing parties' intent upon the history gas production, and take the next logical step in this area of the law by declaring that such gas is simply "gas." For the reasons set forth above, *Amicus Curiae* The West Virginia Royalty Owners' Association respectfully requests that this Court find that the Petitioners/Appellants are the owners of 25% of the methane produced from the parcels at issue, and that they are entitled to the royalties therefrom.

Respectfully Submitted

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CERTIFICATE OF SERVICE

I, John Kennedy Bailey, do hereby certify that on the 24th day of June, 2016, I have served the foregoing “**BRIEF OF AMICUS CURIAE**” upon the parties to this action, via United States Mail, postage pre-paid, addressed as follows:

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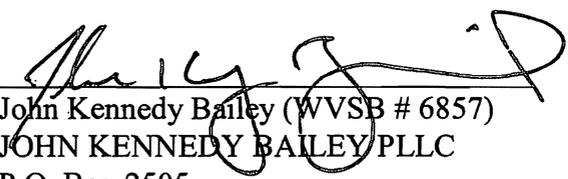
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