

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 12-0152

ARTHUR THORNSBURY and  
VIRGINIA THORNSBURY,

Plaintiffs Below, Petitioners,

VS.

Appeal from a Final Order of the Circuit  
Court of McDowell County  
(No. 08-C-255)

CABOT OIL & GAS CORPORATION,

Defendant Below, Respondent.

**PETITIONERS' BRIEF**

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### ASSIGNMENTS OF ERROR

- I. THE TRIAL COURT ERRED IN ALLOWING CABOT OIL & GAS TO RELY UPON THE 1941 SEVERANCE DEED WHICH WAS ATTACHED TO ITS MOTION FOR SUMMARY JUDGMENT, GIVEN THAT THE DEED HAD NOT BEEN IDENTIFIED IN CABOT OIL & GAS' ANSWER TO THE THORNSBURYS' COMPLAINT AND HAD NOT BEEN PRODUCED IN RESPONSE TO THE THORNSBURYS' DISCOVERY SEEKING ALL INFORMATION OR DOCUMENTS SUPPORTING CABOT OIL & GAS' DEFENSES TO THE THORNSBURYS' COMPLAINT.
- II. THE TRIAL COURT ERRED IN FAILING TO FIND THAT THE EXCULPATORY CLAUSE IN THE 1941 SEVERANCE DEED WAS UNCONSCIONABLE, AGAINST WEST VIRGINIA PUBLIC POLICY, AND UNENFORCEABLE.
- III. THE TRIAL COURT ERRED IN FINDING THAT THE EXCULPATORY CLAUSE IN THE 1941 SEVERANCE DEED RELIEVED CABOT OIL & GAS FROM ITS CONTRACTUAL LIABILITY TO THE THORNSBURYS ARISING FROM CABOT OIL & GAS' BREACH OF ITS 2006 RIGHT-OF-WAY GRANT CONTRACT (AND ASSOCIATED DOCUMENTATION) WITH THE THORNSBURYS.
- IV. THE TRIAL COURT ERRED IN FAILING TO FIND THAT WEST VIRGINIA COMMON LAW PROVIDES A REMEDY FOR CABOT OIL & GAS' UNREASONABLE AND UNNECESSARY USE OF THE THORNSBURYS' SURFACE ESTATE AND THAT CABOT OIL & GAS HAD UNDULY BURDENED AND DAMAGED THE THORNSBURYS' SURFACE ESTATE.
- V. THE TRIAL COURT ERRED IN FINDING THAT THE OWNERS OF THE OIL, GAS, AND COAL MINERAL INTERESTS WERE NECESSARY AND INDISPENSIBLE PARTIES TO THIS DISPUTE BETWEEN THE THORNSBURYS AND CABOT OIL & GAS AND FURTHER ERRED IN FINDING THAT, AS A RESULT OF THE FAILURE TO JOIN INDISPENSIBLE PARTIES, THE TRIAL COURT LACKED AUTHORITY TO HEAR A CHALLENGE TO THE VALIDITY OF THE EXCULPATORY CLAUSE IN THE 1941 SEVERANCE DEED AS APPLIED BETWEEN CABOT OIL & GAS AND THE THORNSBURYS.

### STATEMENT OF THE CASE

On October 22, 2001, Arthur and Virginia Thornsbury purchased the surface estate of a tract of property located along the waters of the Negro Branch Creek in

McDowell County, West Virginia. [A.R. 38-42]. The Thornsburys do not dispute that they do not own the mineral interests underlying the surface estate of this tract of land. [A.R. 75, 126].

On May 24, 2006, Cabot Oil & Gas approached the Thornsburys and the parties entered into a contractual "Right-of-Way Grant (Roadway)." [A.R. 42-43]. The Right-of-Way Grant identifies the Thornsburys' property, referenced above, as "Tax Map / Parcel No. 144-028." [A.R. 42]. The terms of the Right-of-Way Grant contract included:

- (1) recital consideration of ten dollars (\$10), as well as further consideration in the amount of five hundred dollars (\$500), paid by Cabot Oil & Gas to the Thornsburys<sup>1</sup>;
- (2) Cabot Oil & Gas would be permitted to build a road across the Thornsburys' property;
- (3) Cabot Oil & Gas would provide a gate across the access road; and
- (4) Cabot Oil & Gas would "stack all timber ten (10) inches and larger."<sup>2</sup>

[A.R. 42-43].

A consideration document, which was executed contemporaneously with the Right-of-Way Grant, indicates that the five hundred dollars (\$500) Cabot Oil & Gas

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<sup>1</sup> The Thornsburys do not dispute that they received the five hundred dollars. [A.R. 84].

<sup>2</sup> Further evidence of Cabot Oil & Gas' agreement to preserve the timber are found in an October 30, 2006 Cabot Oil & Gas letter to the Thornsburys [A.R. 57, ¶8] and in the November 30, 2006 Well Work Permit [A.R. 69, ¶8], both of which state that all salvageable timber will be cut and stacked by the roadway or removed to a stockpile area.

agreed to pay the Thornsburys, was in consideration for a two hundred foot (200') access road. [A.R. 44].

Subsequently, on June 7, 2006, Cabot Oil & Gas' prepared an "Access Road Right-of-Way Acquisition Report" confirming that on May 24, 2006, Cabot Oil & Gas had purchased a two-hundred foot right-of-way for an access road across the Thornsburys' property, Parcel No. 144-028, for five hundred dollars (\$500). [A.R. 45]. The Access Road Right-of-Way Acquisition Report further indicated that Cabot Oil & Gas would install a gate across the access road and "[s]tack timber ten inches and larger[.]" [A.R. 45].

On September 27, 2006, four months after the parties entered into the contractual Right-of-Way Grant, Arthur Thornsbury executed an "Affidavit of Person in Possession" in which he acknowledged that he did not own the minerals underlying Parcel No. 144-028 and further acknowledging Cabot Oil & Gas' right to come onto the property to develop the minerals. [A.R. 75].

Cabot Oil & Gas then did, in fact, come onto the Thornsburys' surface estate in furtherance of exercising its mineral rights. Cabot Oil & Gas placed a gas well and an above ground pipeline across the Thornsburys' property, something which had not been covered by the contractual Right-of-Way Grant. [A.R. 78; 84-85 (Int. Nos. 12-13, 15-16); 129-130 (Req. Nos. 2-3)]. The pipeline bisects the Thornsburys' property, making a significant portion thereof inaccessible. [A.R. 78; 118-119 (Int. No. 6(c))]. In addition, rather than building the two hundred foot road identified in the Right-of-Way Grant and associated documents, Cabot Oil & Gas actually built a roadway approximately

1300 feet long. [A.R. 101-102 (Int. No. 6)]. Finally, Cabot Oil & Gas breached the Right-of-Way Grant by failing to stack the timber which was ten inches and greater in diameter; rather, Cabot Oil & Gas unilaterally decided that the timber was of generally "poor condition" and that "the steep nature of the terrain made it unsafe and impractical to stack the timber above the roadway. The only other way to have stacked any timber over 10" in diameter would have been to build a landing on the Thornsburys surface, which would have required the taking of a substantial area." [A.R. 86 (Int. No. 17); 100 (Int. No. 4); 102 (Int. No. 8); 130-131 (Req. Nos. 5-6)].

Cabot Oil & Gas was aware that its activities on the Thornsburys' surface estate warranted additional compensation to the Thornsburys for placement of the well and pipeline, as well as the additional length of the road, [A.R. 102-103 (Int. Nos. 9-10)], however, it never paid such compensation.

On October 10, 2008, the Thornsburys sued Cabot Oil & Gas in the Circuit Court of McDowell County, West Virginia. [A.R. 3-9]. The Complaint alleged that Cabot Oil & Gas had breached the May 24, 2006 Right-of-Way Grant contract with the Thornsburys and that Cabot Oil & Gas had converted and damaged the timber and surface estate of the Thornsburys' property. [A.R. 6-8]. The Thornsburys sought damages for the value of the timber which was not preserved as required by the Right-of-Way Grant, including treble damages under W.Va.Code §61-3-48a; for the portion of the surface estate used by Cabot Oil & Gas for the placement of the well and above ground pipeline, neither of which was contemplated in the Right-of-Way Grant; and for

overall damages and diminishment in the value of the Thornsburys' property, including the lost use of a planned four-wheeler trail.<sup>3</sup> [A.R. 7-8].

Cabot Oil & Gas filed an Answer in which the company asserted that it had the right to engage in mineral development upon the Thornsburys' surface estate pursuant to "that certain lease dated October 22, 1949"<sup>4</sup> and that the 2006 Right-of-Way Grant was merely executed out of an abundance of caution. [See generally A.R. 10-20].

During discovery, the Thornsburys sought all bases upon which Cabot Oil & Gas asserted that it had authority to conduct operations on the Thornsburys' surface estate. Consistent with its Answer, Cabot Oil & Gas repeatedly stated that its actions were justified under "that certain lease dated October 22, 1949" and the 2006 Right-of-Way Grant. [A.R. 81-83 (Int. No. 7); 84-85 (Int. Nos. 12-13, 15-16); 92 (Req. Nos. 7-8); 94 (Req. Nos. 16-17); 99].

In late 2011, Cabot Oil & Gas filed a motion for summary judgment predicated on a May 19, 1941 mineral severance deed which was attached to the motion for summary judgment as Exhibit B. [A.R. 133-140]. Cabot Oil & Gas asserted that language in the 1941 severance deed (allowing a mineral lessee to come onto the surface

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<sup>3</sup> The Thornsburys provided further detail about the nature of their damages in their discovery responses noting that the "placement of the pipeline renders large tracts of the property essentially worthless as it interferes with the Plaintiffs' use thereof (for example, as a four wheeler train, for timbering, as access to the timber, as access to the remaining property, etc.)." [A.R. 118-119 (Int. No. 6(c))]. Put another way, the pipeline bisects the Thornsburys' property into two pieces. The Thornsburys estimated the value of the timber cut and discarded by Cabot Oil & Gas at \$10,000, based, in part, upon an offer they had received from a timber cutter several years earlier. [A.R. 118-119 (Int. No. 6(c)); A.R. 119-120 (Int. No. 7); A.R. 125 (Int. No. 15)].

<sup>4</sup> [A.R. 23-35].

estate to “engage in any and all undertakings...its...[lessee]...may at any time deem expedient, all without liability”) gave Cabot Oil & Gas the right to take any actions it deemed appropriate on the surface estate without liability to the Thornsburys; notwithstanding Cabot Oil & Gas’ May 24, 2006 Right-of-Way Grant contractual agreement with the Thornsburys. [A.R. 134-138, ¶¶4-9, 13]. Cabot Oil & Gas further asserted that its use of the Thornsburys’ surface estate had been “fairly necessary” as permitted by West Virginia law. [A.R. 138-139, ¶16)].

The Thornsburys’ responded to Cabot Oil & Gas’ motion. [A.R. 141-155]. The Thornsburys objected to Cabot Oil & Gas’ reliance upon the 1941 severance deed given that it had not been identified in Cabot Oil & Gas’ Answer and had not been produced in response to the Thornsburys’ discovery requests. [A.R. 142-143]. The Thornsburys further noted that the 1949 lease which Cabot Oil & Gas had previously referenced in its Answer and discovery responses, had lapsed by its own terms for lack of production,<sup>5</sup> but that if the lease was still valid, as successors in interest to the surface estate, the Thornsburys should be able to invoke the 1949 lease’s protections for the surface owner including the burying of pipelines and payment of damages to the surface and to timber

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<sup>5</sup> The 1949 lease was for a term of five years or for so long as operations for oil and gas are conducted. [A.R. 27]. An extension of the lease was executed in 1964 which stated that it was to be construed as though the 1949 lease had been for a term of twenty years, and provided for a future term of five years or for so long as oil and gas are produced. [A.R. 36-37]. According to the West Virginia Department of Environmental Protection, no oil or gas had been produced from the property prior to 2007. [A.R. 77]. Therefore, the 1949 lease and the 1964 extension lapsed by their own terms due to a lack of production by 1969.

as a result of mineral development.<sup>6</sup> [A.R. 144-146]. The Thornsburys also argued that the exculpatory clause in the 1941 severance deed was unconscionable and contrary to West Virginia public policy [A.R. 148-153]; that Cabot Oil & Gas' motion had offered no authority supporting its argument that the exculpatory clause in the 1941 severance deed "pre-empted" Cabot Oil & Gas' obligations under its May 24, 2006 Right-of-Way Grant contract with the Thornsburys [A.R. 153]; that Cabot Oil & Gas had breached its obligations under its May 24, 2006 Right-of-Way Grant contract (and associated documents) with the Thornsburys [A.R. 153]; and that Cabot Oil & Gas had used the Thornsburys' surface estate in a manner which was not reasonably necessary and which substantially burdened the surface estate [A.R. 154].

Cabot Oil & Gas filed a reply brief in which it sought to excuse its failure to comply with its discovery obligation to produce the 1941 severance deed, by arguing that the deed was in the Thornsburys' chain of title [A.R. 156-159] and further argued that the exculpatory language of the 1941 severance deed was enforceable [A.R. 159-161]. Cabot Oil & Gas also asserted that if the Thornsburys sought to challenge the validity of the exculpatory clause in the 1941 severance deed, then the Thornsburys had failed to join indispensable parties in their lawsuit, namely other mineral interest owners. [A.R. 161-162]. The company further argued that the Thornsburys lacked standing to assert any invalidity of the 1949 lease, since the Thornsburys were not

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<sup>6</sup> The 1949 lease provided that its terms were for the benefit of and were binding on the successors and assigns of the lessor and lessee. [A.R. 34]. Among the benefits retained by the lessor were the ability to request that any permanent pipelines be buried and

parties to the lease. [A.R. 162-163]. Finally, Cabot Oil & Gas' reply again asserted that its use of the Thornsburys' surface estate had been "fairly necessary" as permitted by West Virginia law. [A.R. 163-164].

The Honorable Booker Stephens heard argument on Cabot Oil & Gas' motion for summary judgment on November 28, 2011. [A.R. 168]. The hearing was not transcribed.

On November 29, 2011, Judge Stephens sent a letter to the parties directing counsel for Cabot Oil & Gas to prepare an order granting summary judgment based upon: (a) "the 1941 severance deed, the Cabot Lease, and affidavit of Plaintiff Thornsbury"; (b) "Exculpatory clauses were outlawed after June of 1983 but are enforceable prior to that date"; (c) "Necessary parties and indispensable parties"; and (d) "The standing issue." [A.R. 167].

That "Order Granting the Motion for Summary Judgment of Cabot Oil & Gas Corporation" was entered on January 4, 2012. [A.R. 168-179].

#### SUMMARY OF ARGUMENT

The Thornsburys assert that Cabot Oil & Gas' failure to identify the 1941 severance deed in its Answer or in response to the Thornsburys' discovery requests for all bases upon which Cabot Oil & Gas justified its activities on the Thornsburys' surface estate, until the company attached the deed to its motion for summary judgment, prevented the Thornsburys from conducting appropriate discovery with respect to the

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compensation for damages to timber and other aspects of the surface estate. [A.R. 29, 32]

deed, unfairly prejudiced the Thornsburys' ability to respond to Cabot Oil & Gas' motion, and otherwise improperly altered the course of this litigation.

The Thornsburys further assert that the exculpatory clause in the 1941 severance deed is unconscionable, against West Virginia public policy, and unenforceable because it is wholly devoid of fairness and could lead to absurdly one-sided results, such as Cabot Oil & Gas using the entire surface estate in furtherance of development of the minerals, thereby making the Thornsburys' surface estate entirely worthless.

The Thornsburys further assert that there is no legal authority for the conclusion that Cabot Oil & Gas' obligations under the May 24, 2006 Right-of-Way Grant and associated documentation were "pre-empted" by the exculpatory clause of the 1941 deed. Further, the Thornsburys allege that the May 24, 2006 Right-of-Way Grant and associated documentation were, in fact, a partial novation of the 1941 deed, particularly the exculpatory clause.

The Thornsburys further assert that West Virginia common law provides a remedy for the unreasonable and unnecessary use of the Thornsburys' surface estate by Cabot Oil & Gas in furtherance of its mineral development and that Cabot Oil & Gas has unduly burdened and damaged the Thornsburys' surface estate.

Finally, the Thornsburys assert that complete resolution of the issues raised in the Thornsburys' lawsuit against Cabot Oil & Gas can be obtained between those two parties, and that any other mineral rights owners were not indispensable parties to this action. The Thornsburys further argue that even if the other mineral rights owners

were indispensable parties, the appropriate remedy was joinder of those parties, not dismissal of this action.

**STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The Thornsburys assert that oral argument of this case is necessary pursuant to W.Va.R.App.P. 18(a), given that: (1) Petitioners have not waived oral argument; (2) this appeal is not frivolous; (3) the dispositive issues have not been authoritatively decided; and (4) the decisional process would be significantly aided by oral argument.

Petitioners assert that oral argument under W.Va.R.App.P. 20 is most appropriate for this case. Although some of the issues raised in this appeal meet the criteria set forth in W.Va.R.App.P. 19(a), the Petitioners believe that oral argument under Rule 20 is more appropriate given the criteria in W.Va.R.App.P. 20(a) because the trial court's January 4, 2012 decision involves issues of first impression and fundamental public importance. In particular, this case revolves around questions as to whether a party's contractual obligations can be "pre-empted" by an exculpatory clause in a mineral severance deed which was executed sixty-five years before the contract between the parties and whether an exculpatory clause in a mineral severance deed is valid and enforceable, notwithstanding the fact that the clause be interpreted so broadly as to potentially make the surface estate entirely worthless to its owner.

## ARGUMENT

I. THE TRIAL COURT ERRED IN ALLOWING CABOT OIL & GAS TO RELY UPON THE 1941 SEVERANCE DEED WHICH WAS ATTACHED TO ITS MOTION FOR SUMMARY JUDGMENT, GIVEN THAT THE DEED HAD NOT BEEN IDENTIFIED IN CABOT OIL & GAS' ANSWER TO THE THORNSBURYS' COMPLAINT AND HAD NOT BEEN PRODUCED IN RESPONSE TO THE THORNSBURYS' DISCOVERY SEEKING ALL INFORMATION OR DOCUMENTS SUPPORTING CABOT OIL & GAS' DEFENSES TO THE THORNSBURYS' COMPLAINT.

### A. Standard of Review

The West Virginia Supreme Court of Appeals reviews a trial court's determination as to whether a document may be utilized by a party despite the party's failure to produce the document in discovery under the abuse of discretion standard.

Prager v. Meckling, 172 W.Va. 785, 790-791, 310 S.E.2d 852, 856-857 (1983).

### B. Argument

In Prager, a contractor testified about his estimate of damages to the interior of a building and then offered a written copy of that estimate. Prager, 172 W.Va. at 788, 310 S.E.2d at 854. The opposing party objection to the introduction of the written estimate since it had not been produced in discovery. Id. The West Virginia Supreme Court held that:

Factors to be considered in determining whether the failure to supplement discovery requests under Rule 26(e)(2) of the Rules of Civil Procedure should require exclusion of evidence related to the supplementary material include: (1) the prejudice or surprise in fact of the party against whom the evidence is to be admitted; (2) the ability of that party to cure the prejudice; (3) the bad faith or willfulness of the party who failed to supplement discovery requests; and (4) the practical importance of the evidence excluded.

Syl.Pt. 5, Prager, 172 W.Va. 785, 310 S.E.2d 852. The Supreme Court found no error in the trial court's admission of the written estimate given that it was merely corroborative of other previously admitted evidence and given the fact that there was no showing that the lack of production was the result of willfulness or bad faith. Prager, 172 W.Va. at 790-791, 310 S.E.2d at 857.

In the present case, the Thornsburys assert that Judge Stephens abused his discretion in allowing Cabot Oil & Gas to rely upon the 1941 severance deed in support of its motion for summary judgment. [A.R. 172-174].

Although the Thornsburys had tendered numerous discovery requests to Cabot Oil & Gas seeking the bases upon which the company asserted its right to take actions on the Thornsburys' surface estate, Cabot Oil & Gas failed to identify the 1941 severance deed until it was attached to Cabot Oil & Gas' motion for summary judgment. [A.R. 81-83 (Int. No. 7); 84-85 (Int. Nos. 12-13, 15-16); 92 (Req. Nos. 7-8); 94 (Req. Nos. 16-17); 99; 133-140]. Rather, throughout discovery, Cabot Oil & Gas had repeatedly stated that its authority was derived from the 1949 lease and the 2006 Right-of-Way Grant. [A.R. 81-83 (Int. No. 7); 84-85 (Int. Nos. 12-13, 15-16); 92 (Req. Nos. 7-8); 94 (Req. Nos. 16-17); 99]. In short, Cabot Oil & Gas effectively ambushed the Thornsburys with the 1941 severance deed at the summary judgment stage of the litigation.

Turning to the Prager analysis, there can be no doubt about the practical importance of the 1941 severance deed, or the prejudice to the Thornsburys, as it formed both the cornerstone of Cabot Oil & Gas' defense against the Thornsburys' claims and the principal basis upon which the trial court relieved Cabot Oil & Gas of its

contractual obligations to the Thornsburys under the May 24, 2006 Right-of-Way Grant between the parties.

W.Va.R.Civ.P. 26(b)(1) allows a party to obtain discovery regarding any matter which is relevant to any claim or defense and W.Va.R.Civ.P. 26(e) requires a party to supplement its discovery responses if they are found to be incomplete. There is no dispute that the Thornsburys did not actually know about the 1941 severance deed prior to the filing of Cabot Oil & Gas' motion for summary judgment, however, Cabot Oil & Gas asserts that the Thornsburys should be charged with record notice of the seventy year old deed. However, there is absolutely no authority holding that a party is relieved of its obligations to respond to discovery under the West Virginia Rules of Civil Procedure, merely because a document can be found in the chain-of-title some seventy years back. Cabot Oil & Gas wrongfully, and perhaps willfully and in bad faith<sup>7</sup>, failed to produce what turned out to be the most important document in this litigation.

Had Cabot Oil & Gas complied with its discovery obligations and the Thornsburys been aware of the 1941 severance deed, the Thornsburys would have been better prepared to respond to Cabot Oil & Gas' motion for summary judgment, would have conducted additional discovery, and, in fact, might have altered their litigation strategy entirely.

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<sup>7</sup> In Cabot Oil & Gas' reply brief in the trial court, the company outlined the Thornsburys' chain-of-title back to the 1941 severance deed. [A.R. 157-158]. This certainly suggests that Cabot Oil & Gas has long been aware of the 1941 severance deed and intentionally failed to produce it.

Therefore, the trial court abused its discretion and erred in allowing Cabot Oil & Gas to rely upon the 1941 severance deed in support of the company's motion for summary judgment.

**II. THE TRIAL COURT ERRED IN FAILING TO FIND THAT THE EXCULPATORY CLAUSE IN THE 1941 SEVERANCE DEED WAS UNCONSCIONABLE, AGAINST WEST VIRGINIA PUBLIC POLICY, AND UNENFORCEABLE.**

**A. Standard of Review**

The West Virginia Supreme Court of Appeals reviews a trial court's determination as to whether a contract provision is unconscionable under a *de novo* standard of review. State ex rel. Dunlap v. Berger, 211 W.Va. 549, 555-556, 567 S.E.2d 265, 271-272 (2002).

**B. Argument**

West Virginia law has long held that a where a mineral rights owner unreasonably and unnecessarily damages the surface estate in the production of the minerals, the company may be held liable for damages to the surface owner. *See e.g., Adkins v. United Fuel Gas Co.*, 134 W.Va. 719, 723-725, 61 S.E.2d 633, 635-636 (1950). Similarly, the mineral rights owner is limited to those actions which are "fairly necessary" for the exploitation of the mineral estate. *Syl., Squires v. Lafferty*, 95 W.Va. 307, 121 S.E. 90 (1924). Finally, "any use of the surface by virtue of rights granted by a mining deed must be exercised reasonably so as not to unduly burden the surface owner's use." Buffalo Mining Co. v. Martin, 165 W.Va. 10, 18, 267 S.E.2d 721, 725 (1980); *see also Flying Diamond Corp. v. Rust*, 551 P.2d 509, 511 (Utah 1976)(a mineral owner's use of the surface estate should be consistent with the surface owner's greatest possible

use of his own property)(cited with approval in Buffalo Mining Co., 165 W.Va. at 18, 267 S.E.2d at 725).

Furthermore, the West Virginia Legislature has enacted legislation finding that the development of oil and gas reserves must coexist with the use of the property's surface and "that each constitutes a right equal to each other."<sup>8</sup> W.Va.Code. §22-7-1(a)(1). In fact, the West Virginia Legislature banned exculpatory clauses outright in leases entered after June 9, 1983. W.Va.Code. §22-7-1(c). Finally, the West Virginia Legislature set up a statutory scheme for compensation of surface estate owners due to damages arising from the production of oil and gas, W.Va.Code §22-7-3, while simultaneously preserving the common law rights of a surface owner to recover for the unreasonable, negligent, or otherwise wrongful use of the surface estate in the development of the mineral interests, W.Va.Code §22-7-4.

Although the Thornsburys do not argue that W.Va.Code §22-7-1, *et seq.* directly apply to this case, that statutory scheme and the long history of a common law right of recovery for unreasonable and unnecessary damage to the surface estate as a result of mineral production, proves that the public policy of the State of West Virginia is to protect surface owners from unreasonable interference with a surface owner's use and enjoyment of his property. See Welling Power Corp. v. CNA Surety Corp., 217 W.Va. 33, 39, 614 S.E.2d 680, 686 (2005).

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<sup>8</sup> The Thornsburys do not contend that the West Virginia Oil and Gas Production Damage Compensation Act, W.Va.Code §22-7-1, *et seq.*, provides a remedy for the Thornsburys in this case. However, it is a strong statement regarding the public policy of the State of West Virginia with respect to the rights of surface estate owners.

Accordingly, the Thornsburys allege that the exculpatory clause in the 1941 deed, [A.R. 21], is unconscionable, against West Virginia public policy, and should not be enforced. The Thornsburys further assert that enforcement of the exculpatory clause in 1941 deed would be oppressive to their surface estate, depriving it of virtually all value; would prevent the Thornsburys from enforcing and vindicating their common law rights; and would defeat their just claims against Cabot Oil & Gas.

In evaluating a claim that a contract provision is unconscionable, the West Virginia Supreme Court of Appeals has held that:

1. Unconscionability is an equitable principle, and the determination of whether a contract or a provision therein is unconscionable should be made by the court.

3. An analysis of whether a contract term is unconscionable necessarily involves an inquiry into the circumstances surrounding the execution of the contract and the fairness of the contract as a whole.

Syl.Pts. 1, 3, Troy Mining Corp. v. Itmann Coal Co., 176 W.Va. 599, 346 S.E.2d 749 (1986). A contract term which is “so one-sided as to lead to absurd result, will be declared unconscionable.” Syl.Pt. 2, Troy Mining Corp., 176 W.Va. 599, 346 S.E.2d 749.

The exculpatory clause in the 1941 deed is the perfect example of an unconscionable contract provision which is wholly devoid of fairness and absurdly one-sided. If allowed to stand, the exculpatory clause in the 1941 deed would allow Cabot Oil & Gas to drill a new well right in the middle of the Thornsburys’ house or to utilize the entire surface estate to build a processing, transmission, or storage facility. Put another way, Cabot Oil & Gas could literally take the Thornsburys’ entire surface estate for its own purposes and leave the Thornsburys with nothing but the paper upon which

their surface estate deed is written.<sup>9</sup>

The West Virginia Supreme Court of Appeals has questioned the validity of exculpatory clauses associated with mineral development, at least since 1977. Johnson v. Junior Pocahontas Coal, Inc., 160 W.Va. 261, 270-271, 234 S.E.2d 309, 314 (1977) (“While exculpatory clauses...may conceivably insulate defendant from some tort liabilities, the clauses may not be raised as a complete shield from all liabilities which may be indicated by evidence showing defendant’s...willful, wanton, and reckless actions and conduct, or its creation of hazardous or nuisance conditions incident to its...operations causing the injuries and damages set forth in plaintiffs’ complaint.”).

In recent years, exculpatory clauses have received particular scrutiny where they “would prohibit or substantially limit a person from enforcing and vindicating rights and protections or from seeking and obtaining statutory or common-law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public are unconscionable; unless the court determines that exceptional circumstances exist that make the provisions conscionable.” Syl.Pt. 2, State ex rel. Dunlap, 211 W.Va. 549, 567 S.E.2d 265.

That is precisely what the exculpatory clause in the 1941 deed does, it strips the Thornsburys of their common law rights which exist for the benefit and protection of the public. Accordingly, the exculpatory clause in the 1941 deed is unconscionable, against West Virginia public policy, and unenforceable.

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<sup>9</sup> In fact, counsel for Cabot Oil & Gas made this very argument at the untranscribed November 28, 2011 hearing.

Therefore, the trial court erred in failing to find that the exculpatory clause in the 1941 deed is unconscionable, against West Virginia public policy, and unenforceable because it would allow Cabot Oil & Gas to perform acts on the Thornsburys' surface estate which are neither reasonable nor necessary to the exercise of Cabot Oil & Gas' mineral interest.

**III. THE TRIAL COURT ERRED IN FINDING THAT THE EXCULPATORY CLAUSE IN THE 1941 SEVERANCE DEED RELIEVED CABOT OIL & GAS FROM ITS CONTRACTUAL LIABILITY TO THE THORNSBURYS ARISING FROM CABOT OIL & GAS' BREACH OF ITS 2006 RIGHT-OF-WAY GRANT CONTRACT (AND ASSOCIATED DOCUMENTATION) WITH THE THORNSBURYS.**

**A. Standard of Review**

The West Virginia Supreme Court of Appeals reviews a trial court's determinations of law under a *de novo* standard of review. Syl.Pt. 1, Chrystal R.M. v. Charlie A.L., 194 W.Va. 138, 459 S.E.2d 415 (1995). Similarly, the West Virginia Supreme of Appeals reviews a trial court's entry of summary judgment under a *de novo* standard of review. Syl.Pt. 1, Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994).

**B. Argument**

Cabot Oil & Gas's motion for summary judgment cited absolutely no authority to the trial court in support of the company's allegation that the terms of the 1941 severance deed somehow "pre-empted" the terms of the 2006 Right-of-Way Grant contract (and associated documents) between Cabot Oil & Gas and the Thornsburys. [A.R. 136, ¶9; A.R. 137-138, ¶13]. Nor did the trial court's summary judgment order provide any such authority. [A.R. 175, ¶6-7].

Rather, it is undisputed that Cabot Oil & Gas entered in the May 24, 2006 contractual Right-of-Way Grant with the Thornsburys under the terms set forth above. [A.R. 42-43]. Had Cabot Oil & Gas intended to preserve any rights it might have possessed under the exculpatory clause in the 1941 severance deed, Cabot Oil & Gas certainly could have done so in the 2006 Right-of-Way Grant.

However, what Cabot Oil & Gas did in the 2006 Right-of-Way Grant and the associated documents was the exact opposite. Cabot Oil & Gas assumed contractual obligations to the Thornsburys including: (1) to pay both the recital and further considerations of ten dollars (\$10) and five hundred dollars (\$500) respectively; (2) to build a road limited to a total of two hundred feet in length; and (3) to stack all timber ten (10) inches and larger. [A.R. 42-45].

In effect, assuming the exculpatory clause of the 1941 severance deed is valid, the 2006 Right-of-Way Grant was nevertheless a partial novation of that clause. Syl.Pt. 1, Ray v. Donohew, 177 W.Va. 441, 352 S.E.2d 729 (1986). Accordingly, Cabot Oil & Gas is liable for breach of the terms of the Right-of-Way Grant and associated documents.

Therefore, the question becomes whether the Thornsburys have offered a genuine issue of material fact to be tried by the jury in accordance with W.Va.R.Civ.P. 56(c) with respect to Cabot Oil & Gas' breach of the terms of the Right-of-Way Grant and associated documents.

Summary judgment should not be granted unless it is clear that there are no genuine issues of fact to be tried and further inquiry concerning the facts will not clarify the application of the law. Syl.Pts. 3-5, Aetna Casualty and Surety Co. v. Federal

Insurance Co. of New York, 148 W.Va. 160, 133 S.E.2d 770 (1963). In ruling on the motion, the court is to consider the pleadings, depositions, answers to interrogatories, and admissions on file in the case. W.Va.R.Civ.P. 56(c). In addition, all permissible inferences from the facts are to be drawn in the light most favorable to the party opposing the motion. Painter, 192 W.Va. at 193, 451 S.E.2d at 759.

Applying the foregoing analytical framework to this case, Cabot Oil & Gas breached the Right-of-Way Grant and damaged the Thornsburys as follows: (1) failing to compensate the Thornsburys for the additional 1100 feet of road beyond the two hundred feet contemplated by the Right-of-Way Grant and associated documentation [A.R. 42-45; 101-102 (Int. No. 6); 102-103 (Int. Nos. 9-10)]; (2) failing to preserve all timber ten inches in diameter and greater as required by the Right-of-Way Grant [A.R. 42-43; 86 (Int. No. 17); 100 (Int. No. 4); 102 (Int. No. 8); 130-131 (Req. Nos. 5-6)]; (3) failing to compensate the Thornsburys for the placement of the well site, which was not contemplated by the Right-of-Way Grant [A.R. 42-43; 102-103 (Int. No. 9)]; and (4) failing to compensate the Thornsburys for the placement of the above ground pipeline, which was not contemplated by the Right-of-Way Grant, and which bisected the Thornsburys' property making it unusable for a planned four wheeler trail, cutting off access to a large portion of the property, cutting off access to the timber on that portion of the property, and otherwise rendering that portion of the property essentially worthless [A.R. 42-43; 103 (Int. No. 10); 118-119 (Int. No. 6(c))].

Therefore, the trial court erred in failing to find that Cabot Oil & Gas was bound by the terms of its May 24, 2006 contractual Right-of-Way Grant (and associated

documents) with the Thornsburys and, further, that there was a genuine issue of material fact to be tried as to whether the Thornsburys were damaged by Cabot Oil & Gas' breach of those terms.

**IV. THE TRIAL COURT ERRED IN FAILING TO FIND THAT WEST VIRGINIA COMMON LAW PROVIDES A REMEDY FOR CABOT OIL & GAS' UNREASONABLE AND UNNECESSARY USE OF THE THORNSBURYS' SURFACE ESTATE AND THAT CABOT OIL & GAS HAD UNDULY BURDENED AND DAMAGED THE THORNSBURYS' SURFACE ESTATE.**

**A. Standard of Review**

The West Virginia Supreme Court of Appeals reviews a trial court's determinations of law under a *de novo* standard of review. Syl.Pt. 1, Chrystal R.M., 194 W.Va. 138, 459 S.E.2d 415. Similarly, the West Virginia Supreme of Appeals reviews a trial court's entry of summary judgment under a *de novo* standard of review. Syl.Pt. 1, Painter, 192 W.Va. 189, 451 S.E.2d 755.

**B. Argument**

As discussed above, West Virginia law has long held that a where a mineral rights owner unreasonably and unnecessarily damages the surface estate in the production of the minerals, the company may be held liable for damages to the surface owner. See e.g., Adkins, 134 W.Va. at 723-725, 61 S.E.2d at 635-636. Similarly, the mineral rights owner is limited to those actions which are "fairly necessary" for the exploitation of the mineral estate. Syl., Squires, 95 W.Va. 307, 121 S.E. 90. Finally, "any use of the surface by virtue of rights granted by a mining deed must be exercised reasonably so as not to unduly burden the surface owner's use." Buffalo Mining Co., 165 W.Va. at 18, 267 S.E.2d at 725; see also Flying Diamond Corp., 551 P.2d at 511 (a

mineral owner's use of the surface estate should be consistent with the surface owner's greatest possible use of his own property)(*cited with approval in Buffalo Mining Co.*, 165 W.Va. at 18, 267 S.E.2d at 725).

Furthermore, there is a genuine issue of material fact to be determined by the jury as to whether Cabot Oil & Gas has unreasonably and unnecessarily damaged the Thornsburys' surface estate in the following respects: (1) failing to preserve all timber ten inches in diameter and greater which was cut as Cabot Oil & Gas built the access road [A.R. 86 (Int. No. 17); 100 (Int. No. 4); 102 (Int. No. 8); 130-131 (Req. Nos. 5-6)]; (2) failing to place the pipeline so that it did not bisect the Thornsburys' property making a large portion of the property unusable for a planned four wheeler trail, cutting off access to that portion of the property, cutting off access to the timber on that portion of the property, and otherwise rendering that portion of the property essentially worthless [A.R. 103 (Int. No. 10); 118-119 (Int. No. 6(c))]; and (3) failing to reasonably place the well site and limit the amount of access road necessary to reach it [A.R. 101-102 (Int. No. 6); 102-103 (Int. Nos. 9-10)].

Therefore, the trial court erred in failing to find that West Virginia common law provides the Thornsburys with a remedy for Cabot Oil & Gas' unreasonable and unnecessary use of the Thornsburys' surface estate in furtherance of Cabot Oil & Gas' mineral development activities and also erred in failing to find that there was a genuine question of material fact to be tried as to the extent of the damages to the Thornsburys' property.

V. THE TRIAL COURT ERRED IN FINDING THAT THE OWNERS OF THE OIL, GAS, AND COAL MINERAL INTERESTS WERE NECESSARY AND INDISPENSIBLE PARTIES TO THIS DISPUTE BETWEEN THE THORNSBURYS AND CABOT OIL & GAS AND FURTHER ERRED IN FINDING THAT, AS A RESULT OF THE FAILURE TO JOIN INDISPENSIBLE PARTIES, THE TRIAL COURT LACKED AUTHORITY TO HEAR A CHALLENGE TO THE VALIDITY OF THE EXCULPATORY CLAUSE IN THE 1941 SEVERANCE DEED AS APPLIED BETWEEN CABOT OIL & GAS AND THE THORNSBURYS.

**A. Standard of Review**

The West Virginia Supreme of Appeals reviews a trial court's entry of summary judgment under a *de novo* standard of review. Syl.Pt. 1, Painter, 192 W.Va. 189, 451 S.E.2d 755. Furthermore, while the West Virginia Supreme Court of Appeals reviews the failure to join an indispensable party pursuant to W.Va.R.Civ.P. 19 under an abuse of discretion standard, to the extent that the trial court's decision was based upon a question of law, it is reviewed *de novo*. C&O Motors, Inc. v. West Virginia Paving, Inc., 223 W.Va. 469, 472, 677 S.E.2d 905, 908 (2009).

**B. Argument**

Under W.Va.R.Civ.P. 19(a), a person shall be joined as a party if: (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest, or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. Furthermore, the remedy for failing to join an indispensable party is that "the court shall order that the person be

made a [party].” W.Va.R.Civ.P. 19(a). Dismissal is appropriate only if the joined party objects to venue or joinder of that party would render venue improper, W.Va.R.Civ.P. 19(a), or if the proposed party cannot be joined, W.Va.R.Civ.P. 19(b).

First, as argued above, if the May 24, 2006 Right-of-Way Grant contract between Cabot Oil & Gas and the Thornsburys (and associated documents) [A.R. 42-45], constitute a partial novation of the 1941 deed, as relates to the exculpatory clause [A.R. 21], there are no additional parties which are necessary to determine the respective rights between Cabot Oil & Gas and the Thornsburys under the 2006 Right-of-Way Grant and associated documents, and complete relief can be provided between the parties.

Second, Cabot Oil & Gas is the only mineral rights owner conducting operations on the Thornsburys’ surface estate and is the only mineral rights owner which has damaged the surface estate. Accordingly, the Thornsburys have not sued the other mineral rights owners, because there is no basis in fact, as required by W.Va.R.Civ.P. 11(b)(3), upon which the Thornsburys could have sued the other mineral rights owners. Therefore, the Thornsburys have never asserted that the exculpatory clause in the 1941 deed should be found unconscionable, against West Virginia public policy, and unenforceable with respect to any mineral rights owner, except to the extent that Cabot Oil & Gas has offered the clause as a defense in this action.

In other words, should the issue of the validity of the exculpatory clause in the 1941 deed ever arise in the future with respect to the other mineral rights owners, any relief afforded in this case would not impair such other owners’ ability to protect their

interests nor would it subject any person or entity to multiple or inconsistent obligations.

Third, even if the trial court was correct in finding that the other mineral rights owners were indispensable parties under W.Va.R.Civ.P. 19(a), that Rule states that the appropriate remedy was to have the other mineral rights owners made parties to this action<sup>10</sup>, rather than dismissal of the Thornsbury's claims against Cabot Oil & Gas.

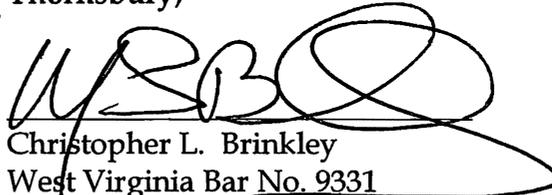
Therefore, the trial court erred in determining that the mineral rights owners, other than Cabot Oil & Gas, were necessary and indispensable parties to this action and further erred in dismissing the Thornsbury's case rather than having the other mineral rights owners made parties to this action.

#### CONCLUSION

Wherefore, Arthur and Virginia Thornsbury respectfully request that the West Virginia Supreme Court of Appeals review the Circuit Court of McDowell County's January 4, 2012 "Order Granting the Motion for Summary Judgment of Cabot Oil & Gas Corporation"; find that the trial court erred in allowing Defendant Cabot Oil & Gas to rely upon the 1941 severance deed despite the company's failure to produce that document in discovery; find that the trial court erred in failing to find that the exculpatory clause in the 1941 severance deed was unconscionable, against West Virginia public policy, and unenforceable; find that the trial court erred in finding that the exculpatory clause in the 1941 severance deed relieved Cabot Oil & Gas from

complying with its contractual obligations to the Thornsbury as set forth in the May 24, 2006 contractual Right-of-Way Grant and associated documents; find that the trial court erred in failing to find that West Virginia common law provided a remedy for the damages done to the Thornsbury's surface estate by Cabot Oil & Gas; find that the trial court erred in finding that mineral rights owners other than Cabot Oil & Gas were indispensable parties to this action and further erred in finding that it lacked jurisdiction to determine whether the exculpatory clause of the 1941 severance deed was unconscionable, against West Virginia public policy, and unenforceable due to the failure to join indispensable parties; reverse the trial court's January 4, 2012 Order; and remand this case for further proceedings consistent with the rulings of the West Virginia Supreme Court of Appeals.

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<sup>10</sup> As owners of interests in the real property, the other mineral interest owners would have been subject to the *in rem* jurisdiction of the Circuit Court of McDowell County. Syl., Tenant's Heirs v. Fretts, 67 W.Va. 569, 68 S.E. 387 (1910).

**CERTIFICATE OF SERVICE**

I, Christopher L. Brinkley, hereby certify that on May 7, 2012, I hand-delivered a true and accurate copy of the foregoing Petitioners' Brief on the following individuals:

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