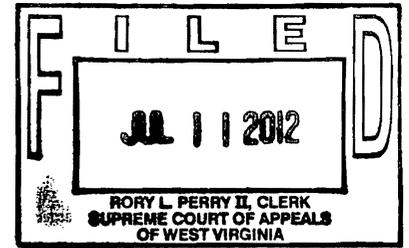


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

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' REPLY BRIEF**

**COUNSEL FOR PETITIONERS,  
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Thornsby,**

A handwritten signature in black ink, appearing to read "C. Brinkley", written over a horizontal line.

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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

Petitioners, Arthur and Virginia Thornsburgy, believe that the "Statement of the Case" in "Petitioner's Brief" adequately sets forth the relevant facts. However, the

Petitioners make the following brief responses to some of the facts alleged in "Respondent's Brief."

As an initial matter, Respondent Cabot Oil & Gas' "Statement of the Case," and in fact its entire brief, is replete with factual references without support in the Appendix Record in violation of W.Va.R.App.P. 10(d); W.Va.R.App.P. 10(c)(4); and W.Va.R.App.P. 10(c)(7). Similarly, Cabot Oil & Gas' "Statement of the Case" contains numerous arguments, interpretations of fact, and legal conclusions which are also inappropriate for inclusion in the "Statement of the Case." However, the Thornsburys address these issues only to the extent that they are relevant to the disposition of this case.

Cabot Oil & Gas' "Statement of the Case" alleges that "Nothing contained in [the May 24, 2006 "Right-of-Way Grant"] had any legal effect on the rights the owner of the oil and gas (Tug Fork Land Company) and Respondent already possessed rights in and to the use of the Property pursuant to the Severance Deed and lease described hereinabove." [Respondent's Brief (hereinafter "Resp.Br.") 4]. This is, of course, not a fact, but an argument and one of the key issues in this appeal.

Cabot Oil & Gas alleges that May 24, 2006 "Right-of-Way Grant (Roadway)" [Appendix Record (hereinafter "A.R.") 42-43] was only intended to apply to the first two hundred feet (200') of the thirteen hundred foot (1300') road, that it has no relevance to the remainder of the Thornsburys' property or "Cabot's rights pursuant to its status as lessee of the oil and gas estate and the rights granted to it pursuant to the 1941 Severance Deed", and that it was obtained only for the purposes of avoiding a dispute about who owned the surface property at the beginning of the road. [Resp.Br.

4-5]. This characterization is inaccurate in a number of respects. First, the Right-of-Way Grant contains no limitation to two hundred feet (200') of road, but rather applies to all Parcel 144-028 owned by the Thornsburys. [A.R. 42-43]. Second, the Right-of-Way Grant also includes a provision about the preservation of "all timber ten (10) inches and larger." [A.R. 42-43]. Third, separately executed documents indicate that Cabot Oil & Gas paid the Thornsburys five hundred dollars (\$500.00) for the first two hundred feet (200') of access road [A.R. 44-45] and that Cabot Oil & Gas specifically contemplated paying the Thornsburys additional compensation for the additional eleven hundred (1100') feet of road and the placement of the well and a pipeline on the Thornsburys' property [A.R. 102-103 (Int.Nos. 9-11)]. Finally, the reference to the relevance of the Right-of-Way Grant to Cabot Oil & Gas' rights as lessee and pursuant to the 1941 severance deed is not a fact, but rather is an argument regarding one of the key issues in this appeal.

Cabot Oil & Gas contends that in the September 27, 2006 "Affidavit of Person in Possession" [A.R. 75] that Arthur Thornsbury recognized that Cabot Oil & Gas' rights in the property "far exceed the rights Petitioners now claim Respondent had in and the use of the Property or as set forth on the Right-of-Way Grant." [Resp.Br. 5-6]. This is not a fact, but rather is an argument by Cabot Oil & Gas and, in fact, is one of the key points of dispute in this appeal.

Finally, Cabot Oil & Gas alleges that the company undertook its actions on the Thornsburys' surface estate "pursuant to its rights under the Severance Deed and Lease and in conformity with the Well Work Permit described hereinabove, and further in

reliance on the statements contained in Arthur Thornsburys' Affidavit of Person in Possession[.]” [Resp.Br. 6]. This allegation lacks citation to the Appendix Record and is inconsistent with Cabot Oil & Gas' Answer and discovery responses, both of which state that its actions were undertaken pursuant to the October 22, 1949 lease and the 2006 Right-of-Way Grant [A.R. 10-20; 81-83 (Int.No. 7); 84-85 (Int.Nos. 12-13, 15-16); 92 (Req.Nos. 7-8); 94 (Req.Nos. 16-17); 99].

### 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 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 stand by their assertion that oral argument of this case under W.Va.R.App.P 20 is necessary pursuant to W.Va.R.App.P. 18(a) as set forth in detail in "Petitioner's Brief." [Pet.Br.10].

## 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.**

The Thornsburys allege that the trial court erred in allowing Cabot Oil & Gas to rely on the 1941 severance deed as the basis for its motion for summary judgment, given that the 1941 severance deed was produced for the first time as an attachment to the company's motion for summary judgment and given that Cabot Oil & Gas had not identified the 1941 severance deed in its Answer or in its response to the Thornsburys' discovery. [Pet.Br. 11-14]. To the extent not previously address in "Petitioner's Brief," the Thornsburys reply to Cabot Oil & Gas' counter-arguments as follows.

As a threshold matter and as detailed in "Petitioner's Brief," Cabot Oil & Gas does not dispute that in its Answer and its responses to the Thornsburys' discovery, the company indicated that it intended to rely upon the October 22, 1949 lease and the 2006 Right-of-Way Grant to justify its actions on the Thornsburys' surface estate; that the 1941 severance deed was never identified by the company prior to Cabot Oil & Gas' motion for summary judgment; and that the 1941 severance deed formed the basis of Cabot Oil & Gas' motion for summary judgment. [Pet.Br. 11-14].

Given these facts, it is readily apparent that Cabot Oil & Gas' Answer and discovery responses were at best incomplete and, at worst, were simply untrue.

“Respondent’s Brief” never offers any sort of explanation for why the 1941 severance deed was not identified or produced in response to the Thornsbury’s discovery. Rather, Cabot Oil & Gas’ response brief alleges that the Thornsbury’s were on record notice of the 1941 severance deed anyway pursuant to W.Va.Code §40-1-9; that the Thornsbury’s were not prejudiced because there was no imminent trial and because a trial was not ultimately held; and that the Thornsbury’s are at fault for failing to secure additional time to research the untimely produced 1941 severance deed. [Resp.Br. 9-11].

Cabot Oil & Gas’ reliance on W.Va.Code §40-1-9, in response to this assignment of error and others, is inappropriate. [Resp.Br. 9-10]. That code section states that until a deed is recorded in the county where the property is situated, the deed is void as against creditors and subsequent purchasers for value without notice. W.Va.Code §40-1-9. In other words, recording of the deed provides constructive notice to creditors and subsequent purchasers. Alexander v. Andrews, 135 W.Va. 403, 408, 64 S.E.2d 487, 490 (1951). The purpose of this statute is to resolve disputes where two different parties claim ownership over a single piece of property. *See generally, Alexander*, 135 W.Va. 403, 64 S.E.2d 487. However, that is not an issue in this case and accordingly, the statute is inapplicable. Therefore, the Thornsbury’s cannot be charged with record notice of the 1941 severance deed under W.Va.Code §40-1-9.

Furthermore, Cabot Oil & Gas cites to no authority whatsoever holding that W.Va.Code §40-1-9 eliminates a party’s obligation to respond to discovery under W.Va.R.Civ.P. 26(b)(1); W.Va.R.Civ.P. 26(e); W.Va.R.Civ.P. 33; and W.Va.R.Civ.P. 34.

Cabot Oil & Gas also contends that the failure to produce the 1941 severance deed in response to discovery presented no surprise or prejudice to the Thornsburys under the test set forth in Syl.Pt.5, Prager v. Meckling, 172 W.Va. 785, 310 S.E.2d 852 (1983), because “the case was not even close to trial” and because “There was no trial.” [Resp.Br. 9, 11]. Succinctly put, under the facts of this case, Cabot Oil & Gas asks this Court to adopt a rule that it is acceptable to fail to disclose a potentially dispositive document in a party’s answer and in response to discovery, and for the party to then produce the document for the first time concurrent with the filing of a summary judgment motion. However, a dispositive motion carries with it the same potential for finality as does a trial. Just as trial by ambush is not permitted under the West Virginia Rules of Civil Procedure, McDougal v. McCammon, 193 W.Va. 229, 237, 455 S.E.2d 788, 796 (1995), dispositive motion by ambush should likewise not be tolerated.

Finally, Cabot Oil & Gas asserts that, upon the company’s dilatory production of the 1941 severance deed, the Thornsburys bore the burden of asking for a continuance of the summary judgment hearing in order to have time to investigate the circumstances surrounding the deed. [Resp.Br. 11]. In other words, Cabot Oil & Gas seeks to put the onus of remedying on the company’s failure to identify or produce the 1941 severance deed, on the Thornsburys. Not only is this argument contrary to the obligations imposed on a party under discovery rules in the West Virginia Rules of Civil Procedure identified above, adoption of this argument would eviscerate the liberal thrust of the discovery rules in the West Virginia Rules of Civil Procedure, State ex rel.

West Virginia State Police v. Taylor, 201 W.Va. 554, 565 fn. 16, 499 S.E.2d 283, 294 fn. 16 (1997), and result in discovery abuses on an unprecedented scale.

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.**

The Thornsburys assert that the clause in the 1941 severance deed which allows a mineral developer to take any action it deems expedient in furtherance of exploitation of the minerals underlying the Thornsburys' surface estate "all without liability on the part of the grantor, its successors, lessees, and assigns," [A.R. 21-22], is an exculpatory clause which is unconscionable, against West Virginia public policy, and unenforceable. [Pet.Br. 14-18]. To the extent not previously address in "Petitioner's Brief," the Thornsburys respond to Cabot Oil & Gas' counter-arguments as follows.

Cabot Oil & Gas asserts that the above referenced clause is "not an exculpatory [clause] at all," but rather is an enforceable restrictive covenant on the Thornsburys' right to use their surface estate which allows the company to make lawful use of the surface estate without paying further compensation. [Resp.Br. 12-14]. Exculpatory clauses attempt to insulate a mineral developer from tort liability for damages to the surface estate. See Syl.Pt. 2, Johnson v. Junior Pocahontas Coal Co., Inc., 160 W.Va. 261, 234 S.E.2d 309 (1977). The phrase "all without liability" is clearly exculpatory in nature.

Furthermore, despite its best efforts to disguise the clause as a restrictive covenant in “Respondent’s Brief,” Cabot Oil & Gas eventually slips up and admits that the clause is a “limitation on liability” which allows the company to take whatever actions it deems expedient “without liability.” [Resp.Br. 17, 19]. Accordingly, contrary to Cabot Oil & Gas’ argument, the above referenced clause is an exculpatory clause, particularly given that the company seeks to utilize this clause to escape not only tort liability, but contractual liability as well. [Resp.Br. 12-20].

The Thornsburys addressed Cabot Oil & Gas’ erroneous arguments regarding record notice pursuant to W.Va.Code §40-1-9, [Resp.Br. 13], in Assignment of Error I above.

Finally, Cabot Oil & Gas cites a number of cases from 1918 to 1961 for the proposition that exculpatory clauses have been held enforceable by this Court. [Resp.Br. 14-16]. However, each of those cases predates the authority cited in the “Petitioner’s Brief” calling the continuing validity of exculpatory clauses in oil and gas leases into question. [Pet.Br. 15-17].

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.**

The Thornsburys assert that the trial court erred in holding that the exculpatory clause in the 1941 severance deed relieved Cabot Oil & Gas of its contractual liability to the Thornsburys under the May 24, 2006 Right-of-Way Grant. [Pet.Br. 18-21]. To the extent not previously addressed in "Petitioner's Brief," the Thornsburys respond to the company's counter-arguments as follows.

Cabot Oil & Gas alleges that "the 2006 Right-of-Way Grant relied upon by Petitioners expressly states that it is applicable to only 200 feet of the road" and "does not even apply to the remainder of the Property." [Resp.Br. 17]. This is simply untrue. The May 24, 2006 Right-of-Way Grant contains no reference to two hundred feet (200') of road whatsoever. [A.R. 42-43]. Rather, the Right-of-Way Grant applies, without limitation, to "Tax Map / Parcel No.: 144-028." [A.R. 42-43]. Furthermore, the record indicates that Cabot Oil & Gas specifically contemplated paying the Thornsburys additional compensation for the additional eleven hundred (1100') feet of road and the placement of the well and a pipeline on the Thornsburys' property [A.R. 102-103 (Int.Nos. 9-11)]. In other words, Cabot Oil & Gas' arguments in its "Respondent's Brief" are contrary to the language of the Right-of-Way Grant and the company's own discovery responses.

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.**

The Thornsburys assert that 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. [Pet.Br. 21-22]. To the extent that they were not previously addressed in "Petitioner's Brief," the Thornsburys respond to Cabot Oil & Gas' counter-arguments as follows:

Cabot Oil & Gas alleges that in the September 27, 2006 "Affidavit of Person in Possession" [A.R. 75-76], Arthur Thornsburys recognized that the company had rights "which far exceed the rights Petitioners now claim Respondent had in and to the use of the Property or as set forth on the right-of-way grant." [Resp.Br. 18]. This argument is unsupported. While Mr. Thornsburys recognizes in the affidavit that Cabot Oil & Gas has certain rights, nothing in the affidavit negates Cabot Oil & Gas' contractual obligations to Thornsburys under the "Right-of-Way Grant" and nothing in the affidavit negates Cabot Oil & Gas' common law liabilities for damage to the Thornsburys' surface estate. [A.R. 75-76]. Therefore, the "Affidavit of Person in Possession" has no effect on the rights and obligations of the parties in this case.

Cabot Oil & Gas argues that the Thornsburys have never alleged that the company used the surface estate in an unreasonable manner. [Resp.Br. 18]. Admittedly, although the Thornsburys' Complaint alleges that their surface estate has been damaged, the word "unreasonable" does not appear in the Complaint. [A.R. 3-9]. However, the Thornsburys made it clear in their response to Cabot Oil & Gas' motion for summary judgment that they thought the company's use of the surface estate was unreasonable [A.R. 147-148, 154]; counsel for the Thornsburys made an oral motion at the unreported November 28, 2011 hearing on Cabot Oil & Gas' motion for summary judgment, which should have been granted in accordance with either W.Va.R.Civ.P. 15(a) or 15(b), to amend the complaint to clarify that the Thornsburys believed the company's use of the surface estate to be unreasonable; and Cabot Oil & Gas' own discovery responses indicate that the company was aware that it owed the Thornsburys additional compensation for damage done to their surface estate [A.R. 102-104, Int.Nos. 9-11]. Accordingly, the reasonableness of Cabot Oil & Gas' use of the Thornsburys' surface estate was clearly at issue in this case.

Cabot Oil & Gas justifies its destruction of timber on the Thornsburys' surface estate based upon the 1941 severance deed and its exculpatory clause. [Resp.Br. 19]. The Thornsburys have addressed this issue in Assignments of Error II-III above.

Cabot Oil & Gas further alleges that it cannot be held liable for treble damages to timber pursuant to W.Va.Code §61-3-48a because the company had a right to enter the Thornsburys' property to develop the minerals. [Resp.Br. 19]. Under W.Va.Code §61-3-48a, a person who enters the property of another without written permission and

causes damage to timber shall be held liable for three times the value of the timber. While Cabot Oil & Gas had the right to enter the property to develop the minerals, it also had a contractual obligation to preserve any timber ten inches (10') and larger. [A.R. 42-43, 45]. It is undisputed that the company did not preserve the timber. [A.R. 85-86, Int.No. 17]. In other words, the company did not have written permission to enter the property and damage timber in excess of ten inches (10') in diameter. In fact, it had a written contractual obligation to the contrary. [A.R. 42-43]. Therefore, Cabot Oil & Gas is liable to the Thornsburys for treble damages pursuant to W.Va.Code. §61-3-48a.

Finally, Cabot Oil & Gas alleges that the Thornsburys are not entitled to recover for damages to their surface estate because they have offered no evidence of a reasonable alternative for the placement of the road, the well site, or the pipeline. [Resp.Br. 20]. However, Cabot Oil & Gas cites no authority whatsoever requiring that the Thornsburys propose such alternatives in order to be able to recover damages. [Resp.Br. 20]. Furthermore, the Thornsburys claim with respect to the road relates primarily to compensation for the eleven hundred feet of road beyond the original two hundred feet contemplated by the parties. [A.R. 44-45; 102-104, Int.Nos. 9-11]. The Thornsburys claim with respect to the pipeline is that it bisects their property making large portions of it inaccessible to a whole variety of uses including timbering and a four-wheeler trail. [A.R. 103 (Int. No. 10); 118-119 (Int. No. 6(c))]. Of course, the easy solution for the pipeline problem is to bury the pipeline. Finally, in Cabot Oil & Gas' discovery responses, even the company admitted that it owed the Thornsburys

additional compensation for the damages to the surface estate. [A.R. 102-104, Int.Nos. 9-11]. Accordingly, there is a genuine issue of fact as to the reasonableness of Cabot Oil & Gas' use of the Thornsburys' surface estate.

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 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.**

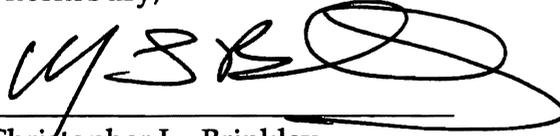
The Thornsburys fully and adequately addressed this assignment of error in "Petitioner's Brief." [Pet.Br. 23-25].

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 alternatively erred in dismissing the Thornsburys' 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 Thornsburys 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 Thornsburys' surface estate by Cabot Oil & Gas; find that the trial court erred in finding that it lacked jurisdiction to rule on this issues in this case since the mineral rights owners other than Cabot Oil & Gas were indispensable parties to this action or alternatively erred in dismissing the Thornsburys' case rather than having the additional mineral owners made parties to the case; 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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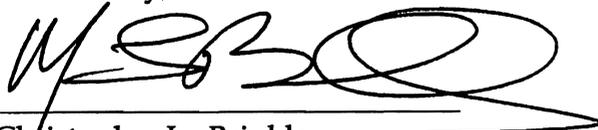
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**CERTIFICATE OF SERVICE**

I, Christopher L. Brinkley, hereby certify that on July 11, 2012, I hand-delivered a true and accurate copy of the foregoing Petitioners' Reply Brief on the following individuals:

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