

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-S)

CABOT OIL & GAS CORPORATION,

Defendant below, Respondent.

RESPONDENT'S BRIEF

COUNSEL FOR RESPONDENT,  
Cabot Oil & Gas Corporation

---

Timothy M. Miller (WV Bar No. 2564)  
Christopher L. Hamb (WV Bar No. 6902)  
Post Office Box 1791  
Charleston, West Virginia 25326  
(304) 344-5800  
[tmm@ramlaw.com](mailto:tmm@ramlaw.com)  
[clh@ramlaw.com](mailto:clh@ramlaw.com)

TABLE OF CONTENTS

TABLE OF AUTHORITIES .....ii

ISSUES PRESENTED .....iii

STATEMENT OF THE CASE .....1-7

SUMMARY OF ARGUMENT .....7-8

STATEMENT REGARDING ORAL ARGUMENT AND DECISION .....8

ARGUMENT .....9-23

    I.    The Trial Court Correctly Considered And Relied Upon The 1941 Severance Deed To Determine The Respective Property Rights Of The Parties. The Consideration Of The Severance Deed At The Summary Judgment Stage Was Proper And There Was No Surprise Or Prejudice To Plaintiffs.....9-11

    II.   The Trial Court Was Right In Finding That The Mineral Reservation In The 1941 Severance Deed Was Clear And Unambiguous And Was Not Unconscionable, Or Against Public Policy. ....12-17

    III.  The Trial Court Was Right In Finding That The Mineral Reservation In The 1941 Severance Deed Granted Cabot Certain Property Rights Separate And Distinct From The 2006 Right-Of-Way Agreement, Which Was Applicable To Only 200 Feet Of Roadway. ....17

    IV.  The Trial Court Was Right In Finding That Any Common Law Claims For Surface Damage Had Been Waived And Relinquished By The Thornsbury's Predecessors In Interest. ....17-20

    V.   The Trial Court Was Right In Finding That The Owners Of The Oil, Gas And Coal And Other Mineral Interests Were Necessary And Indispensable Parties To Any Dispute Related To Property Rights And Due To The Failure To Join Necessary And Indispensable Parties, The Trial Court Lacked *In Rem* Jurisdiction To Hear A Challenge To The Validity Of The Mineral Reservation And Covenant Against Liability In The 1941 Severance Deed And Dismissal Was Proper. ....20-22

CONCLUSION .....22-23

## TABLE OF AUTHORITIES

### STATUTES:

<i>West Virginia Code</i> Chapter 22, Article 6	14
<i>West Virginia Code</i> § 22-7-1, <i>et sequens</i> ,	14, 16, 18
<i>West Virginia Code</i> § 22-7-1(c)	15, 16
<i>West Virginia Code</i> § 40-1-9.	10, 13
<i>West Virginia Code</i> § 61-3-48a	19

### CASE LAW:

<i>Adkins v. United Fuel Gas Co.</i> , 134 W.Va. 719, 61 S.E.2d 633 (1950).	18
<i>Bonafede v. Grafton Feed &amp; Storage Co.</i> , 81 W. Va. 313, 94 S.E. 471 (1971)	21
<i>Ison v. Daniel Crisp Corp.</i> , 146 W.Va. 786, 122 S.E.2d 553 (1961)	14, 15
<i>McIntyre v. Zara</i> , 183 W.Va. 202, 394 S.E. 2d. 897 (1990).	13
<i>Maynard v. Shein</i> , 98 S.E. 618 (1919)	21
<i>O'Daniels v. City of Charleston</i> , 200 W. Va. 711, 490 S.E. 2d 800 (1997)	21
<i>Prager v. Meckling</i> , 172 W.Va. 875, 310 S.E 2d 852 (1983).	9
<i>Preston County Coke Co. v. Elkins Coal &amp; Coke Co.</i> , 82 W.Va. 590, 96 S.E. 973 (1918)	14, 15, 20
<i>Squires v. Lafferty</i> , 95 W.Va. 307, 121 S.E. 90 (1924)	18
<i>W.L. Thaxton Construction Co. v. O.K. Construction Co.</i> , 170 W.Va. 657, 295 S.E.2d 822 (1982)	9, 10
<i>West Virginia-Pittsburgh Coal Co. v. Strong</i> , 129 W.Va. 832, 42 S.E.2d 46 (1947).	14, 16

### PROCEDURAL RULES:

W.Va.R.App.P. 18(a)	8
---------------------	---

## ISSUES PRESENTED

- I. THE TRIAL COURT CORRECTLY CONSIDERED AND RELIED UPON THE 1941 SEVERANCE DEED TO DETERMINE THE RESPECTIVE PROPERTY RIGHTS OF THE PARTIES. THE CONSIDERATION OF THE SEVERANCE DEED AT THE SUMMARY JUDGMENT STAGE WAS PROPER AND THERE WAS NO SURPRISE OR PREJUDICE TO PLAINTIFFS.
- II. THE TRIAL COURT WAS RIGHT IN FINDING THAT THE MINERAL RESERVATION IN THE 1941 SEVERANCE DEED WAS CLEAR AND UNAMBIGUOUS AND WAS NOT UNCONSCIONABLE, OR AGAINST PUBLIC POLICY.
- III. THE TRIAL COURT WAS RIGHT IN FINDING THAT THE MINERAL RESERVATION IN THE 1941 SEVERANCE DEED GRANTED CABOT CERTAIN PROPERTY RIGHTS SEPARATE AND DISTINCT FROM THE 2006 RIGHT-OF-WAY AGREEMENT, WHICH WAS APPLICABLE TO ONLY 200 FEET OF ROADWAY.
- IV. THE TRIAL COURT WAS RIGHT IN FINDING THAT ANY COMMON LAW CLAIMS FOR SURFACE DAMAGE HAD BEEN WAIVED AND RELINQUISHED BY THE THORNSBURYS' PREDECESSORS IN INTEREST.
- V. THE TRIAL COURT WAS RIGHT IN FINDING THAT THE OWNERS OF THE OIL, GAS AND COAL AND OTHER MINERAL INTERESTS WERE NECESSARY AND INDISPENSABLE PARTIES TO ANY DISPUTE RELATED TO PROPERTY RIGHTS AND DUE TO THE FAILURE TO JOIN NECESSARY AND INDISPENSABLE PARTIES, THE TRIAL COURT LACKED *IN REM* JURISDICTION TO HEAR A CHALLENGE TO THE VALIDITY OF THE MINERAL RESERVATION AND COVENANT AGAINST LIABILITY IN THE 1941 SEVERANCE DEED AND DISMISSAL WAS PROPER.

## STATEMENT OF THE CASE

This appeal involves a property damage and property rights dispute between Arthur Thornsby and Virginia Thornsby (“Petitioners”) and Cabot Oil & Gas Corporation (“Respondent” or “Cabot”) related to approximately 30 acres, more or less, surface estate located in McDowell County, West Virginia. (This real estate is hereinafter referred to as the “Property”). On or about October 22, 2001, Plaintiffs purchased the Property from Drenda Carol Coleman, aka Drenda Carol Auvil, for the purchase price of \$4,350.00. Said deed is of record in the Office of the Clerk of the McDowell County Commission in Deed Book 470 at page 746. A.R. 38-41.

Petitioners’ deed of conveyance also makes the conveyance to Petitioners “subject to any and all rights, reservations, covenants, conditions and restrictions heretofore granted or reserved by all predecessors in title to the property, the same as if set out herein in extenso. (Emphasis in original).

Petitioners’ chain of title is as follows<sup>1</sup>:

- a) Deed dated October 22, 2001, Deed Book 470 at page 746, Drenda Carol Coleman a/k/a Drenda Carol Auvil to Arthur Thornsby (Surface Only, and all reservations and exceptions of record);
- b) Deed dated April 10, 1992, Deed Book 415 at page 122, Robert R. Coleman to Drenda Carol Coleman a/k/a Drenda Carol Auvil (pursuant to equitable distribution in family court matter);
- c) Deed dated July 17, 1980, Deed Book 354 at page 662, Lucille Coleman and John R. Coleman to Robert R. Coleman;
- d) Deed dated May 29, 1964, Deed Book 258 at page 564, Mona M. Belcher (widow of William H. Belcher), Boyd and Mary Belcher (heirs of William H. Belcher) to Lucille Coleman;

---

<sup>1</sup> While deeds establishing this chain of title are not contained within the Appendix Record or the record below, in response to Respondent’s counsel’s offer to provide copies of said deeds to counsel for Petitioners and the court, Petitioners’ counsel candidly admitted during the untranscribed hearing on November 28, 2011 that he had no knowledge or evidence that the proffered chain of title was incorrect and waived objection to it.

e) Deed dated July 26, 1963, Deed Book 255 at page 456, Harrison & Viola Muncy to William H. Belcher;

f) Deed dated September 24, 1957, Deed Book 234 at page 94, Mary A. and Boyd Belcher and Bill Belcher (son) to Harrison & Viola Muncy;

g) Deed dated September 24, 1951, Deed Book 197 at page 409, Green & America Blankenship to Mary A. and Boyd Belcher and Bill Belcher (son);

h) Deed dated July 14, 1951, Deed Book 196 at page 265, Arnold S. & Cora E. Blankenship to Green & American Blankenship (30 acres more or less, part of Deed Book 194 at page 290 50 acres;

i) Deed dated January 26, 1951, Deed Book 194 at page 290, Harrison & Viola Muncy to Arnold S. & Cora E. Blankenship (50 acres, more or less);

j) Deed dated January 26, 1951, Deed Book 194 at page 292, Florence Vance (widow of F.J. Vance), S.R. Vance, Rosemary Vance, Naomi Gibson and Ezra Gibson (heirs of F.J. Vance to Harrison & Viola Muncy (50 acres more or less, being part of Deed Book 150 at page 218);

k) Deed dated May 19, 1941, Deed Book 150 at page 218, McDowell-Wyoming Land Co. to F.J. & Florence Vance (all real estate owned on watersheds on left and right hand sides of Negro Branch) (Severance Deed, see reservation of minerals and rights to use surface). [A.R. 157-158].

On or about May 19, 1941, McDowell-Wyoming Land Company, the Petitioners' and Respondent's common predecessor in interest, conveyed unto F.J. Vance and Florence Vance, his wife, the Petitioners' predecessors in interest to the surface estate, the surface and surface only of the lands then owned by it in McDowell County, West Virginia, by virtue of that certain deed of record in the Office of the Clerk of the McDowell County Commission in Deed Book 87 at page 248. (This deed is sometimes hereinafter referred to as the "1941 Severance Deed"). [A.R. 21-22].

The deed between McDowell-Wyoming Land Company as grantor and F.J. Vance and Florence Vance as grantees is a severance deed in that the grantor McDowell-Wyoming Land Company reserved unto itself all the minerals, oil and gas underlying the real estate conveyed

thereby along with expansive rights for itself, its successors and assigns (including lessees) to go upon and use the surface conveyed by said deed to explore for and exploit the minerals, oil and gas so reserved. [A.R. 21-22]. The reservation of minerals, oil and gas and covenant against liability contained in the 1941 Severance Deed is expressed in the following language:

**EXCEPTING and RESERVING from the operation of this deed all the coal, oil, gas, stone, water and other minerals of every kind and character in, on, and underlying said land, together with the right on the part of the grantor, its successors, lessees and assigns, at any time or times hereafter to mine and remove any and all of said coal and other minerals and to engage in any and all undertakings in, upon, under and across said land which the grantor, its successors, lessees, and assigns may at any time deem expedient, all without liability on the part of the grantor, its successors, lessees and assigns, to the grantees, or to any person or persons claiming or to claim through or under the grantee for any injury to the surface of said land or to any structure or other property thereon by reason of such mining or removing of such coal and other minerals or by reason of caving or pumping out or the escape of water on said land, or by placing thereon refuse from any mine or mines; the right to drill, sink, construct and operate in, and upon said land all such prospect holes, prospect shafts or water and hoisting shafts, and all such slopes as the grantor, its successors, lessees and assigns shall at any time deem expedient, and to have and use sufficient right of way to and from the same; the right to appropriate and use the surface of said land at or about any prospect, air, water or hoisting shafts; the right to transport upon, under and across said land coal and other minerals to and from any other lands that are now or that any time hereafter may be owned or leased by the grantor, its successors, lessees and assigns; the right to transport upon, under and across said land to and from any other lands that are now or that at any time hereafter may be owned or leased by the grantor, its successors, lessees and assigns, workmen, material and supplies; the right to use, operate, maintain, replace, change the location of, and remove any wells, pumps, pipe lines, tanks and filter plants now upon said land.**

Every right, title and interest in and to the land hereby conveyed and the use thereof not expressly by this deed conveyed to the grantees is reserved to the grantor, its successors, lessees and assigns. *Emphasis added.*

[A.R. 21-22].

At all times material to the matters complained of in this civil action, Tug Fork Land Company has owned all the oil and gas underlying approximately 2,129 acres (of which the Petitioners' approximately 30 acres surface estate makes up a small portion). Respondent Cabot

has been the lessee of the oil and gas underlying the said 2,129 acres by virtue of a lease from Tug Fork Land Company. Said lease is of record in the Office of the Clerk of the McDowell County Commission in Deed Book 188 at page 561, as extended by a document of record in the Office of the Clerk of the McDowell County Commission in Deed Book 246 at page 488, as assigned by assignment of record in the Office of the Clerk of the McDowell County Commission in Deed Book 259 at page 684, as assigned by assignment of record in the Office of the Clerk of the McDowell County Commission in Deed Book 364 at page 289, as assigned by assignment of record in the Office of the Clerk of the McDowell County Commission in Deed Book 393 at page 265. While Petitioners assert that a production log showing that the well on their Property didn't go in to production until 2007 is evidence that the 1949 lease has been terminated for nonproduction on their 30 acre surface estate, the lease by its terms have production requirements pertaining to the entire 2,129 acre leasehold, and not merely the Petitioners' 30 acre surface estate. There is no material evidence of record in this civil action but that the 1949 lease has been in full force and effect since its inception. [A.R. 23-37]. Moreover, the owner of the oil and gas estate, Tug Fork Land Company, was not a party to this action and has never made a claim that the lease from Tug Fork Land Company to Cabot is invalid.

On or about May 24, 2006, Petitioners and the Respondent Cabot executed a Right-of-Way Grant which document is of record in the Office of the Clerk of the McDowell County Commission in Deed Book 505 at page 399 (sometimes referred to herein as the "Right-of-Way" or the "Right-of-Way Grant" or the "2006 Right-of-Way Agreement"). [A.R. 42-43]. Nothing contained in this document 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. [A.R. 42-43.]. The Right-of-

Way on its face applies only to access road right-of-way for 200 feet, and has no relevance to the remainder of the 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. [A.R. 44]. As was explained in Cabot's verified answers to interrogatories, the lease to Cabot from Tug Fork Land Company granted Cabot the right to construct roads, pipelines and structures anywhere on the surface of the entire Property. The 2006 road right-of-way was obtained from Petitioners only for purposes of avoiding any dispute about who owned the surface property at the beginning point where the road was located, due to the vague boundary descriptions applicable to the Petitioners' estate and the adjoining surface estate owned by the Vance family. Given the potential dispute between the adjoining surface owners as to the property boundary description, Cabot obtained the right-of-way so that there could be no dispute about Cabot's right to access the property at the road starting point. See Cabot's Answers to Interrogatory, No. 6. [A.R. 101-102].

On or about September 27, 2006, one of the Petitioners, Arthur Thornsby, had notarized a document which he subsequently delivered to Respondent entitled Affidavit of Person in Possession. This document includes Mr. Thornsby's lawfully sworn statement that, among other things: (1) he is in possession of the Property; (2) he recognizes Tug Fork Land Company, its successors and assigns as the owner of the oil and gas and the oil and gas interests in and under the Property; (3) he recognizes the right of the owner of the oil and gas to lease said oil and gas and the right of any lessee to "go upon the land and explore, prospect, drill, produce, use, and develop" said oil and gas; and (4) he recognizes Respondent as the oil and gas leaseholder in and to the Property. The rights of Respondent that Petitioner, Arthur Thornsby, recognizes under oath in the Affidavit of Person in Possession 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. [A.R. 75-76].

On or about October 30, 2006, Respondent filed with the West Virginia Division of Environmental Protection, Office of Oil and Gas, an application for Well Work Permit and associated documentation. As required by *West Virginia Code* § 22B-1-9, Respondent forwarded a copy of the application for Well Work Permit and associated documentation to Petitioners via certified mail. The Well Work Permit was issued by James Martin, Chief, Office of Oil and Gas on November 20, 2006. [A.R. 46-74]. Petitioners made no comments or objections to the permit application, nor is there any evidence of record that Petitioners made any objection to the scope or extent of the use of their surface estate as set forth on the application for Well Work Permit.

Thereafter, 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 Thornsbury's Affidavit of Person in Possession, Respondent cleared a 1300 foot right-of-way and constructed a road way to the duly permitted gas well site located on the Property. Respondent constructed a gas well site and drilled a gas well on said site. Respondent also constructed a surface pipeline to transport the gas away from the gas well to a trunk line.

Thereafter, Petitioners filed this civil action asserting causes of action for: (1) a breach of contract claim alleging Respondent's use of the surface of the Property exceeded the terms of the Right-of-Way Grant (see Count I of Plaintiffs' Complaint); and (2) tort claims based on damage to real and personal property and timber alleging destruction of timber and taking surface property exceeding the right-of-way agreement as well as conversion (see Count II of Plaintiffs'

Complaint). [A.R. 3-9]. Notably, Petitioners made no claim based on the West Virginia Surface Damage Compensation Act, W. Va. Code §22-7-1, et seq.

After significant discovery, Respondent filed its Consolidated Motion For Summary Judgment And Memorandum Of Law In Support Thereof to have the court declare the property rights as between the parties. [A.R. 133-140]. Petitioners then filed their Response to Defendant's Consolidated Motion for Summary Judgment. [A.R. 141-155]. Respondent then filed its Reply to Plaintiffs' Response to Defendant's Consolidated Motion for Summary Judgment and Memorandum of Law in Support Thereof. (A.R. 156-166]. On November 28, 2011, pursuant to proper notice, a hearing was conducted by Judge Stephens on the Motion for Summary Judgment. On November 29, 2011, Judge Stephens transmitted a letter to counsel of record requesting Respondent's counsel to prepare and submit an Order Granting the Motion for Summary Judgment. [A.R. 167]. On or about January 4, 2012, Judge Stephens entered his Order Granting The Motion For Summary Judgment Of Cabot Oil & Gas Corporation. [A.R. 168-179].

This appeal followed.

#### SUMMARY OF ARGUMENT

Respondent asserts that the admission in to evidence and reliance thereon by the trial court in granting the Motion for Summary Judgment was proper in all respects and was not an abuse of discretion as set forth in this Court's decisional law.

Respondent further asserts that mineral reservations and covenants against liability associated therewith are fully enforceable in accordance with their terms and conditions as established by this Court's precedents. Furthermore, the mineral reservation and covenant

against liability in favor of Respondent with respect to the Property is clear and unambiguous, not unconscionable and not against the public policy of the State of West Virginia.

Respondent further asserts that the 1941 Severance Deed grants substantial rights to the use of the surface estate by the mineral owner, its successors, assigns and lessees which exceed the nature, extent and scope of the rights described in the Right-of-Way Grant. These rights include the right to go upon the surface, construct road ways, construct gas wells and lay pipelines to transport the gas and oil off the Property without further liability to the owners of the surface estate.

Respondent further asserts that the language contained in the mineral reservations and covenants against liability fully and effectively waived and relinquished all claims for subsequent damages based on Respondent's use of the surface estate in furtherance of its interest in the oil and gas thereunder.

Respondent further asserts that all individuals and entities claiming any right title or interest in or to any of the real estate conveyed by the 1941 Severance Deed all necessary and indispensable parties to any litigation in which a party seeks a determination of the validity or invalidity of any of the terms or conditions set forth in the 1941 Severance Deed. In the absence of all stakeholders in and to the real estate conveyed by the 1941 Severance Deed, the Circuit Court of McDowell County, West Virginia lacks *in rem* jurisdiction over the real estate and dismissal is proper.

#### STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent asserts that oral argument in this case is not necessary in that: (1) the dispositive issues have been authoritatively decided in decisional cases, and (2) the decisional process would not be aided by oral argument. W.Va.R.App.P. 18(a).

## ARGUMENT

- I. THE TRIAL COURT CORRECTLY CONSIDERED AND RELIED UPON THE 1941 SEVERANCE DEED TO DETERMINE THE RESPECTIVE PROPERTY RIGHTS OF THE PARTIES. THE CONSIDERATION OF THE SEVERANCE DEED AT THE SUMMARY JUDGMENT STAGE WAS PROPER AND THERE WAS NO SURPRISE OR PREJUDICE TO PLAINTIFFS.

Petitioners claim that the trial court should not have considered the 1941 Severance Deed at the summary judgment stage because it was not separately produced in response to discovery requests. The trial court properly considered the Severance Deed and did not abuse his discretion in so doing. Moreover, Petitioners could not reasonably claim surprise or undue prejudice since the case was not even close to trial, and the Severance Deed was in the Plaintiffs own chain of title and they had record notice of it. [A.R. 21-22].

The only case Petitioners cite for the proposition that the judge abused his discretion in refusing to exclude the 1941 Severance Deed from evidence is *Prager v. Meckling*, 172 W.Va. 875, 310 S.E 2d 852 (1983). *Prager* is a case in which plaintiff objected to the admission in evidence of a document not previously produced during the course of discovery. The West Virginia Supreme Court of Appeals affirmed the circuit court's ruling admitting the document in evidence at trial despite the non-production. The test adopted and applied in *Prager* to determine whether a circuit court judge has properly exercised his discretion in including or excluding evidence *during trial* is as follows: (1) the prejudice or surprise in fact of the party against whom the excluded document would have testified; (2) the ability of that party to cure the prejudice; (3) the extent to which waiver of the rule against uncalled witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court; and (4) bad faith or willfulness in failing to comply with the court's order. *Id.* at 856. The West Virginia Supreme Court of Appeals went on to affirm the holding of *W.L. Thaxton Construction Co. v. O.K. Construction Co.*, 170 W.Va.

657, 295 S.E.2d 822 (1982) that a trial court judge that excluded evidence on the basis of non-production during discovery abused its discretion in doing so in the absence of surprise to the other party.

In this case there can be no surprise or prejudice to Petitioners caused by the trial court's review and consideration of the 1941 Severance Deed because: (a) at the time of disclosure, trial was more than two (2) months away; (b) Petitioners were provided a copy of the 1941 Severance Deed on October 17, 2011 and have not yet come forward with any evidence that it is not properly within their chain of title; (c) pursuant to the provisions of the Record Notice Statute, *West Virginia Code* § 40-1-9, Petitioners have been on notice of the 1941 Severance Deed since the date it was recorded more than seventy (70) years ago; (d) the rights, reservations, covenants, conditions and restrictions heretofore granted or reserved by all predecessors in title to the Property were expressly referred to and incorporated by reference in Petitioners' vesting deed; (e) the nature of the rights conveyed to Petitioners by their vesting deed (or not conveyed as the case may be) are essential elements of Petitioners' case in chief in this civil action and accordingly Petitioners' claims herein rely directly on Petitioners' chain of title; and (f) the Property was burdened with the provisions of the 1941 Severance Deed of record at the time the Petitioners purchased the Property and Petitioners had record notice of the provisions of the 1941 Severance Deed prior to their purchase of the Property pursuant to the Record Notice Statute, *West Virginia Code* § 40-1-9.

In fact, it can properly be said that Petitioners and their counsel, being on record notice of Petitioners' chain of title, should be estopped from denying the documents contained within Petitioners' chain of title.

Petitioners have now had eight (8) months to produce or come forward with any evidence tending to demonstrate that the 1941 Severance Deed is not properly in their chain of title and have failed to do so. In fact, during the untranscribed hearing held on the Motion for Summary Judgment of Cabot Oil & Gas Corporation on November 28, 2011, Petitioners' counsel candidly admitted he knew of no reason the chain of title proffered by Respondent in its Reply to Plaintiffs' Response to Defendant's Consolidated Motion for Summary Judgment and Memorandum of Law in Support Thereof was not a correct statement of the chain of title to Petitioners' Property.

There is no admissible evidence of record in this appeal or below that the admission in to evidence of the 1941 Severance Deed despite its non-production in discovery would disrupt the orderly and efficient trial of the case as the 1941 Severance Deed was admitted in to evidence during a hearing on a Motion for Summary Judgment. There was no trial. In fact, Petitioners may well have sought a continuance of the hearing in order to have sufficient time to investigate the 1941 Severance Deed, to further investigate the chain of title to the Property, or to conduct further discovery as to issues relevant to the 1941 Severance Deed. Petitioners did not do so; Petitioners only sought the most extreme remedy, and a remedy to which they were not entitled: to prohibit the trial court from considering the 1941 Severance Deed in deciding the respective property rights of the parties.

Petitioners were not entitled to prohibit the trial judge from considering the 1941 Severance Deed at the summary judgment stage and the judge of the Circuit Court of McDowell County, West Virginia did not abuse his discretion.

II. THE TRIAL COURT WAS RIGHT IN FINDING THAT THE MINERAL RESERVATION IN THE 1941 SEVERANCE DEED WAS CLEAR AND UNAMBIGUOUS AND WAS NOT UNCONSCIONABLE, OR AGAINST PUBLIC POLICY.

The reservation of minerals and covenant against liability are not unconscionable nor are they against West Virginia public policy, and the reservation of minerals and covenant against liability are fully enforceable in accordance with its terms.

There is no evidence in this civil action that the 1941 Severance Deed was a contract of adhesion. There is no evidence in this civil action as to the situation or conditions of the transaction or negotiations which resulted in the execution, delivery or recordation of the 1941 Severance Deed. There is no evidence in this civil action that the grantor in the 1941 Severance Deed utilized a "form deed" to impose its will on a multitude of purchasers of surface interests from it. The only evidence of the circumstance of the 1941 Severance Deed is contained within the four (4) corners of the 1941 Severance Deed. The 1941 Severance Deed provides that rights conveyed thereby were purchased in exchange for sufficient consideration the receipt of which is acknowledged therein. The 1941 Severance Deed is a one and one half page document and the restrictions on the surface owners' use of the surface and the reservation of substantial rights to use and occupy the surface by the mineral, oil and gas owners, their successors assigns and lessees are set forth in plain, clear and unambiguous language on the first page thereof. [A.R. 21-22].

The rights, restrictions and covenants in favor of the grantor, its successors, assigns and lessees in the 1941 Severance Deed are not exculpatory clauses at all, but covenants which reserved affirmative rights to use and occupy the surface of the property so conveyed in the furtherance of its rights in and to the minerals, oil and gas lying thereunder without the payment of additional consideration. This language is a restrictive covenant restricting the surface

owners' right to use the surface interest so conveyed and restrictive covenants contained in deeds of conveyance are enforceable in West Virginia. *McIntyre v. Zara*, 183 W.Va. 202, 394 S.E. 2d. 897 (1990). Contrary to Petitioners' arguments, this restrictive covenant does not permit the Respondent to act unlawfully with impunity; rather, this restrictive covenant sets forth and describes in detail the uses the grantor, its successors and assigns (including lessees) may lawfully make of the surface in exploiting their mineral, oil and gas interest without paying further consideration to the grantee. In other words, the restrictive covenant at issue here sets forth limitations on the grantee's lawful use of the surface despite the conveyance. The language of the reservation of minerals and covenant against liability struck the balance between the reasonable uses and expectations of the mineral owner, its successors, assigns and lessees on the one hand and the surface owner on the other hand. That the restrictive covenant is reasonable is evidenced by the fact that it has been of record for over seventy (70) years and is just now being challenged by Petitioners, who are the tenth successor of the original grantees.

The 30 acre surface estate Petitioners purchased in 2001 for the price of \$4,350.00 was burdened with the mineral reservation and covenant against liability contained in the 1941 Severance Deed duly recorded in 1941, and Petitioners had record notice of said mineral reservation and the burden it placed on their surface estate at the time they purchased said surface estate. *West Virginia Code* § 40-1-9. Notwithstanding having had record notice of the reservation of minerals and covenant against liability, Petitioners chose to purchase the Property anyway. Petitioners assert that the broad language contained in the 1941 Severance Deed would allow the mineral, oil and gas owner, its successors, assigns and lessees to damage or destroy their house, but such a claim is an absurd over-simplification and Respondent would never be

able to obtain a permit to drill a well pursuant to Chapter 22, Article 6 of the *West Virginia Code* if it involved destruction of a house.

Properly understood, the 1941 Severance Deed contains a reservation of minerals, oil and gas coupled with a covenant against liability on the part of the mineral, oil and gas owner, its successors or assigns (including lessees) for damages to the surface estate caused by its activities in exploiting its mineral, oil and gas interests as more fully set forth therein. This reservation and covenant against liability are clear, unambiguous and run with the land. This reservation and covenant are both fully enforceable in accordance with all of the terms and conditions thereof and the West Virginia Supreme Court of Appeals has so held repeatedly. *Preston County Coke Co. v. Elkins Coal & Coke Co.*, 82 W.Va. 590, 96 S.E. 973 (1918); *Ison v. Daniel Crisp Corp.*, 146 W.Va. 786, 122 S.E.2d 553 (1961); *West Virginia-Pittsburgh Coal Co. v. Strong*, 129 W.Va. 832, 42 S.E.2d 46 (1947). The covenant against liability or waiver of surface damages at issue in this civil action is not at all unlike the waiver contained in the deed which was at issue in *West Virginia-Pittsburgh Coal Co. v. Strong*, *supra*. To the extent the covenant against liability contained in the 1941 Severance Deed is construed as an exculpatory clause, it is still fully enforceable in accordance with all of the terms and conditions set forth therein. *Preston County Coke Co. v. Elkins Coal & Coke Co.*, *supra*; *Ison v. Daniel Crisp Corp.*, *supra*; *West Virginia-Pittsburgh Coal Co. v. Strong*, *supra*. To the extent the covenant against liability contained in the 1941 Severance Deed is construed as a provision in a deed diminishing the compensation and damages provided for by *West Virginia Code* § 22-7-1, *et sequens*, said covenant is not in violation of the stated public policy of West Virginia in that it was executed prior to the ninth day of June, 1983, and therefore it is fully enforceable in accordance with all of the terms and conditions set forth therein. *West Virginia Code* § 22-7-1(c). Moreover, Petitioners never

asserted a claim pursuant to the West Virginia Surface Damage Compensation Act and instead attempted to claim common law trespass claims which the trial court properly rejected as a matter of property law.

In *Ison, supra*, the West Virginia Supreme Court of Appeals upheld a mineral reservation and covenant against liability which contained the following language contained in severance deeds:

And said parties of the second party (grantees of surface estate) for themselves and their successors in title as to the surface of said lot *hereby waive and relinquish all claims for damages which they \* \* \* may now or hereafter have by reason of any such coal mining operations and incidental activities, including, but not restricted to, all claims or demands for damages arising from noise, vibrations, the pollution or diversion or obstruction of streams, the pollution of air, or the emission of dust, smoke, fumes or noxious gases.* (Emphasis added by Court). *Id. at 554.*

This mineral reservation and covenant against damages was upheld in favor of a lessee/successor to the mineral owner as against the surface estate owner despite language set forth in the coal lease requiring the lessee to indemnify the mineral owner for surface damages. The Court noted in its opinion that “it is obvious, and apparently conceded by counsel for plaintiffs, that the defendant is immune from this action, by virtue of being ‘successors, lessees, licensees and assigns’ of the (grantor in the severance deed)”. *Id at 556.*

In *Preston County Coke Co., supra*, the West Virginia Supreme Court of Appeals upheld a covenant in a deed granting mining rights which absolves the grantee from liability for injury to springs in the surface or destruction thereof, as an incident to the removal of the coal, justifies such injury or destruction at such time as the mine owner may see fit to take out the coal, and injury to a spring constitutes no ground for restraint of the mining operation. *Preston County Coke Co., supra*, Syllabus Point 7.

In *West Virginia-Pittsburgh Coal Co. v. Strong, supra*, while the Court struck down a provision in a mineral reservation in the nature of an option to purchase for violating the Rule Against Perpetuities, the Court quoted the following language, and was apparently not asked to invalidate it:

Together with the right to enter upon and under said land with employees, animals and machinery at convenient point and points, and to mine, dig, excavate and remove all said coal, and to remove and convey from, upon, under and through, said land all said coal and the coal from other land and lands and to make and maintain on said land all necessary and convenient structures, roads, ways, and tramways, railroads, switches, excavations, air-shafts, drains and openings, for such mining, removal and conveying of all coal aforesaid, with the exclusive use of all such rights of way and privileges aforesaid, including right to deposit mine refuse on said land and waiving all claims for injury or damage done by such mining and removal of coal aforesaid and use of such privileges.

*Id at 48.* Clearly, the history of the conveyance and reservation of mineral, oil and gas interest in West Virginia has many examples of covenants against liability such as the covenant against liability contained in the 1941 Severance Deed and at issue in this appeal.

Counsel for Respondents is unaware of any decision from this Court invalidating such a covenant as being unconscionable of against public policy and when the West Virginia Legislature determined to make a provision in a deed diminishing the compensation and damages provided for by *West Virginia Code § 22-7-1, et sequens* unenforceable, they excluded from the operation of that statute such provisions executed before to the ninth day of June, 1983. *West Virginia Code § 22-7-1(c).*

Accordingly, whether the language at issue in the deed is construed as a reservation of minerals and covenant against liability or as an exculpatory clause, that provision is neither unconscionable nor against West Virginia public policy, and is fully enforceable in accordance with its terms and the Circuit Court of McDowell County, West Virginia was right to so hold.

III. THE TRIAL COURT WAS RIGHT IN FINDING THAT THE MINERAL RESERVATION IN THE 1941 SEVERANCE DEED GRANTED CABOT CERTAIN PROPERTY RIGHTS SEPARATE AND DISTINCT FROM THE 2006 RIGHT-OF-WAY AGREEMENT, WHICH WAS APPLICABLE TO ONLY 200 FEET OF ROADWAY.

Respondent's rights in and to the use of the surface of the Property is defined by the mineral reservation and limitation on liability contained in the 1941 Severance Deed. Moreover, the 2006 Right-of-Way Grant relied upon by Petitioners expressly states it is applicable to only 200 feet of the road, and as explained in Interrogatory answers Cabot obtained this document only to protect itself from Petitioners and their neighbor due to the vague language used to describe the boundary line between the two properties. [A.R.101]. The Right-of-Way does not even apply to the remainder of the Property. Petitioners have no proper claim against Respondent for breach of contract for exceeding the terms of the Right-of-Way Grant (Count I of Plaintiffs' Complaint) because Respondent's use of the surface of the Property does not exceed the rights in and to the use of the surface of the Property as defined by the mineral reservation and covenant against liability contained in the 1941 Severance Deed. Furthermore, Petitioners' predecessors in interest in and to the surface of the Property waived and relinquished all such claims by acceptance of the 1941 Severance Deed.

Based on its very terms, nothing contained in the Right-of-Way Grant had any legal effect on residue of the property or the preexisting rights the owner of the oil and gas and Respondent possessed pursuant to the Severance Deed and Lease.

IV. THE TRIAL COURT WAS RIGHT IN FINDING THAT ANY COMMON LAW CLAIMS FOR SURFACE DAMAGE HAD BEEN WAIVED AND RELINQUISHED BY THE THORNSBURYS' PREDECESSORS IN INTEREST.

On or about September 27, 2006, Arthur Thornsbury, one of the Petitioners herein, had notarized a document which he subsequently delivered to Respondent entitled Affidavit of

Person in Possession. This document provides Mr. Thornsbury's lawfully sworn statement that, among other things: (1) he is in possession of the Property; (2) he recognizes Tug Fork Land Company, its successors and assigns as the owners of the oil and gas and the oil and gas interests in and under the Property; (3) he recognizes the right of the owner of the oil and gas to lease said oil and gas and the right of any lessee to "go upon the land and explore, prospect, drill, produce, use, and develop" said oil and gas; and (4) he recognizes Respondent as the oil and gas leaseholder in and to the Property. The rights of Respondent Mr. Thornsbury recognizes under oath in the Affidavit of Person in Possession obviously 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. [A.R. 75-76].

Petitioners' claims in this civil action are for: (1) a breach of contract claim alleging Respondent's use of the surface of the Property exceeded the terms of the Right-of-Way Grant (see Count I of Plaintiffs' Complaint); and (2) tort claims based on damage to real and personal property and timber alleging destruction of timber and taking surface property exceeding the Right-of-Way Grant as well as conversion (see Count II of Plaintiffs' Complaint). [A.R. 3-9].

Under long-standing West Virginia law, the mineral owner has a right to use the surface of the land in such manner and with such means as would be "fairly necessary" for the enjoyment of the mineral estate. *Squires v. Lafferty*, 95 W.Va. 307, 121 S.E. 90 (1924); *Adkins v. United Fuel Gas Co.*, 134 W.Va. 719, 61 S.E.2d 633 (1950). However, Petitioners in this civil action do not and never have asserted a claim that Respondent is a bona fide mineral owner that was unreasonable in its use of the Property in furtherance of its enjoyment of its mineral estate. Petitioners in this civil action have never asserted any claims pursuant to *West Virginia Code* § 22-7-1, *et sequens*, and in fact deny seeking such recovery in their Response to Defendant's

Consolidated Motion for Summary Judgment and Memorandum of Law in Support Thereof. [A.R. 144-155]. Petitioners have always only claimed that Respondent had no right to come upon and use the Property at all and that Defendant is liable for wrongful acts as a trespasser. Plaintiffs' position is invalid as a matter of law and they have no claim for damages as such.

Particularly illustrative of this point are Petitioners' claims against Respondent pursuant to *West Virginia Code* § 61-3-48a for treble damages for cutting and destroying timber. *West Virginia Code* § 61-3-48a provides a remedy against:

Any person who enters upon the land of another without written permission from the owner of the land or premises in order to cut, damage or carry away or cause to be cut, damaged or carried away, any timber, logs, posts, fruit, nuts, growing plant or product of any growing plant, shall be liable to the owner in the amount of three times the value of the timber, trees, growing plants or products thereof, which shall be in addition to and notwithstanding any other penalties by law provided.

Respondent cannot be liable to Petitioners under this statutory provision because it pertains to liability of one who enters upon the land of another. Respondent entered on the Property because it has a valid and bona fide interest in the Property and the lawful right to go upon it in furtherance of its oil and gas interest thereunder. Furthermore, Respondent has the right to go on the Property and do what it deems expedient in the furtherance of its oil and gas interest, including cut timber, construct the road-way and well site without liability to the Petitioners pursuant to the 1941 Severance Deed and the mineral reservation and covenant against liability set forth therein. [A.R. 75-76].

Finally, Petitioners assert their own testimony to the effect that they don't like the location of the road, the well site or the above ground pipeline used to connect the well to a trunk line creates an issue of fact whether Respondent has been unreasonable in its use of the surface in furtherance of its oil and gas interest and has unduly burdened the Petitioners surface estate. And it is true enough that the Petitioners have so stated in interrogatory answers. However, that

is not enough to create such an issue of fact when a trial court is determining legal property rights. There has been no admissible evidence of record produced by Petitioners that there is any reasonable alternative to the present location of the road, the well site, or the use of surface piping to transmit the gas to the trunk line. In the absence of evidence of that sort, there has been no issue of fact created regarding the reasonableness of Respondent's use of the surface in furtherance of its oil and gas interest. This is particularly true where, as here, Petitioners were provided the Well Work Permit Application and related documentation outlining Respondent's plan to use the surface in furtherance of its oil and gas interest, there is no evidence of record that Petitioners made any comment or response to the Well Work Application. Furthermore, "mere inconvenience to the owner of the servient estate, wrought by the exercise of mining rights, does not constitute a limitation upon them." *Preston County Coke Co., supra*, Syllabus Point 5.

There is no admissible evidence of record from which a reasonable trier of fact could determine but that Respondent was at all times lawfully engaged in pursuing its rights in and to the Property pursuant to the 1941 Severance Deed, Lease and Affidavit of Person in Possession at all times relevant to the matters complained of in this civil action and the trial court properly so held.

V. THE TRIAL COURT WAS RIGHT IN FINDING THAT THE OWNERS OF THE OIL, GAS AND COAL AND OTHER MINERAL INTERESTS WERE NECESSARY AND INDISPENSABLE PARTIES TO ANY DISPUTE RELATED TO PROPERTY RIGHTS AND DUE TO THE FAILURE TO JOIN NECESSARY AND INDISPENSABLE PARTIES, THE TRIAL COURT LACKED *IN REM* JURISDICTION TO HEAR A CHALLENGE TO THE VALIDITY OF THE MINERAL RESERVATION AND COVENANT AGAINST LIABILITY IN THE 1941 SEVERANCE DEED AND DISMISSAL WAS PROPER.

Had the Petitioners desired to attack the mineral reservation and covenant against liability contained in the 1941 Severance Deed, they had an obligation to do so in a properly pled case. Because Petitioners failed to make all "stakeholders" in the property subject to the challenged

1941 Severance Deed parties to their challenge, the Circuit Court of McDowell County West Virginia lacked *in rem* jurisdiction over the property subject to the 1941 Severance Deed sufficient to make a finding of invalidity.

It is the general rule that all persons materially interested either legally or beneficially in the subject-matter involved in a suit, who are to be affected thereby, should be made parties thereto, either as plaintiffs or defendants. Syllabus, *Maynard v. Shein*, 98 S.E. 618 (1919) (holding that where an interest in real estate pursuant to a deed was at issue, the lender secured by a deed of trust on the subject real estate was a necessary and indispensable party). “When a court proceeding directly affects or determines the scope of rights or interests in real property, any persons who claim an interest in the real property at issue are indispensable parties to the proceeding. Any order or decree issued in the absence of those parties is null and void.” Syllabus Point 2, *O’Daniels v. City of Charleston*, 200 W. Va. 711, 490 S.E. 2d 800 (1997). Moreover, “[i]n a suit to cancel a cloud upon the title to real estate, all parties who have or claim any interest, right, or title under the instrument, or instruments, of writing sought to be cancelled, should be made parties defendant. Syllabus Point 1, *Bonafede v. Grafton Feed & Storage Co.*, 81 W. Va. 313, 94 S.E. 471 (1971).

Accordingly, all “stakeholders,” including, but not necessarily limited to, the owners of the oil and gas, the coal and other mineral owners, as well as all lessees and surface owners with respect to each of the tracts of land conveyed by the 1941 Severance Deed, are necessary and indispensable parties to any civil action seeking to set aside or deem unenforceable the mineral reservation and covenant against liability contained in the 1941 Severance Deed as Petitioners have asked the Circuit Court of McDowell County, West Virginia to do in their Response to Defendant’s Consolidated Motion for Summary Judgment and Memorandum of Law in Support

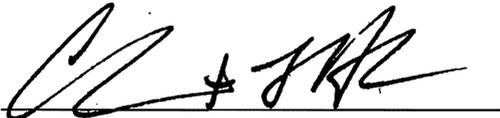
Thereof. Petitioners never have sought to bring each of the necessary and indispensable parties in this case and thereby establish *in rem* jurisdiction of the Circuit Court of McDowell County, West Virginia over the property subject to the terms of the 1941 Severance Deed, and accordingly, dismissal was proper.

### CONCLUSION

WHEREFORE, Respondent respectfully requests the West Virginia Supreme Court of Appeals find in this appeal as follows: (1) the trial court was right considering and relying upon the 1941 Severance Deed which was attached to Cabot Oil & Gas Corporation's Motion for Summary Judgment, given there was no surprise or prejudice to plaintiffs; (2) the trial court was right in finding that the mineral reservation in the 1941 Severance Deed is not unconscionable, is not against West Virginia public policy, and is fully enforceable in accordance with its terms; (3) the trial court was right in finding that the mineral reservation relieved Respondent from any common law liability to the Petitioners arising from Respondent's alleged breach of its 2006 Right-of-Way Grant; (4) the trial court was right in finding that any common law surface damage or property rights had been waived and relinquished by the Petitioners' predecessors in interest; (5) the trial court was right in finding that the owners of the oil, gas, coal and other mineral interests and others were necessary and indispensable parties to the dispute between the Petitioners and Respondent to the extent the Petitioners sought to have any provision of the 1941 Severance Deed declared unenforceable and the trial court was also right in finding that, as a result of the failure to join necessary and indispensable parties, the trial court lacked *in rem* jurisdiction to hear a challenge to the validity of the mineral reservation and covenant against liability in the 1941 Severance Deed and dismissal was proper; and accordingly enter an Order herein affirming in all respects the Order Granting the Motion for Summary Judgment of Cabot

Oil & Gas Corporation entered herein on January 4, 2012 by the Circuit Court of McDowell County, West Virginia.

CABOT OIL & GAS CORPORATION  
by Counsel

Handwritten signatures of Timothy M. Miller and Christopher L. Hamb, written in black ink over a horizontal line.

Timothy M. Miller (WV Bar No. 2564)  
Christopher L. Hamb (WV Bar No. 6902)  
Post Office Box 1791  
Charleston, West Virginia 25326  
(304) 344-5800  
(Counsel for Cabot Oil & Gas Corporation)

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-S)

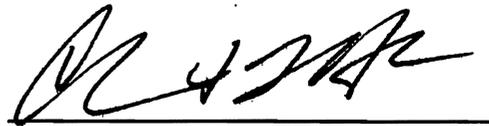
CABOT OIL & GAS CORPORATION,

Defendant below, Respondent.

CERTIFICATE OF SERVICE

I, Christopher L. Hamb, one of counsel for Cabot Oil & Gas Corporation, hereby certify that on June 21, 2012 true and exact copies of RESPONDENT'S BRIEF; and CERTIFICATE OF SERVICE have been served upon counsel of record by United States Postal Service, first class postage prepaid, in envelopes addressed as follows:

Marvin W. Masters, Esquire  
Christopher L. Brinkley, Esquire  
The Masters Law Firm, LC  
181 Summers Street  
Charleston, West Virginia 25301  
Counsel for Plaintiffs



Christopher L. Hamb