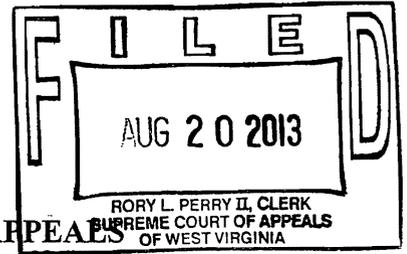


No.: 13-0601



IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

CLASSIC OIL AND GAS RESOURCES, INC.,  
A Kentucky Corporation Licensed to do Business  
in West Virginia,

Defendant Below, Petitioner,

On Appeal  
WEST VIRGINIA SUPREME  
COURT OF APPEALS  
(Case No. 13-0601)

v.

WHITNEY WELL SERVICE, INC., a West  
Virginia Corporation; DANNY WEBB  
CONSTRUCTION CO., INC., a West Virginia  
Corporation; and VELMA WEBB, an Individual,

Plaintiffs Below, Respondents.

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**PETITIONER'S BRIEF**

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Kentucky Corporation Licensed to do  
Business in West Virginia

**I. TABLE OF CONTENTS**

1.

I.	Table of Contents.....	i
II.	Table of Authorities.....	ii
III.	Assignments of Error.....	v
IV.	Statement of the Case.....	1-6
V.	Summary of the Argument.....	6-8
VI.	Statement Regarding Oral Argument.....	8
VII.	Argument.....	8
A.	Statement of Applicable Law.....	9-11
B.	The Trial Court Erred in Refusing to Set Aside the Mediation Agreement....	12-19
C.	The Trial Court Erred in Ruling That Respondents Were Entitled to a 15% Working Interest on Well Sites in Which Respondents Performed Any Work Whatsoever.....	19-21
D.	The Circuit Court Erred in Granting Whitney/Webb an Independent 15% Working Interest in the Walker Number 1 Well.....	21-22
E.	The Trial Court Erred in Granting to Whitney/Webb an Overall 24% Working Interest in the Walker Number 1 Well.....	22-23
F.	The Trial Court Erred in Granting a 15% Working Interest in Certain Wells First Identified in the Respondent’s Proposed Final Order.....	23-26
G.	The Trial Court Erred in Awarding \$35,150.00 to Whitney/Webb for Lost Business Opportunities Related to Not Receiving a Replacement Title to The Service Rig Provided to Respondent by Petitioners as a Part of the Mediation Agreement.....	26-28
H.	The Trial Court Erred in Ordering as a Part of the Compliance With the Mediation Agreement That Petitioner Must Provide Certain Additional Tools to Respondent.....	28-29
I.	The Trial Court’s Errors Are an Abuse of Discretion.....	29-30

VIII. Conclusion.....30-32

## II. TABLE OF AUTHORITIES

### Cases:

<i>Burdette v. Burdette Realty Improvement, Inc.</i> , 214 W.Va. 448, 590 S.E.2d 641 (2003).....	11, 18
<i>Craft v. Inland Mut. Ins. Co.</i> , 145 W.Va. 670, 116 S.E.2d 385 (1960) .....	11
<i>Dallas Racing Assoc. v. West Virginia Sports Service, Inc.</i> , 199 S.E.2d 308, 311 (W.Va. 1973)..	9
<i>Estate of Tawney v. Columbia Natural Res., L.L.C.</i> , 219 W.Va. 266, 633 S.E.2d 22 (2006) .....	9
<i>State ex. rel. Evans v. Robinson</i> , 197 W.Va. 428, 475 S.E.2d 858 (1996) .....	11
<i>Haynes v. Daimler Chrysler Corp.</i> , 228 W.Va. 441, 720 S.E.2d 564 (2011) .....	9, 17, 18
<i>Martin v. Ewing</i> , 112 W.Va. 332, 164 S.E. 859 (1932) .....	9
<i>Meyer v. Alpine Lake Property Owner’s Assn., Inc.</i> , 2007 WL 709304 (N.D.W.Va. 2007).....	10
<i>Riner v. Newbraugh</i> , 211 W.Va. 137, 563 S.E.2d 802 (2002) .....	9, 10, 17
<i>Sprout v. Board of Education of County of Harrison</i> , 215 W.Va. 341, 599 S.E.2d 754 (2004).....	9, 17
<i>State ex. rel. Frazier v. Oxley L.C. v. Cummings</i> , 212 W.Va. 275, 569 S.E.2d 796 (2002) ....	9, 18
<i>Triad Energy Corp. v. Renner</i> , 215 W.Va. 573, 600 S.E.2d 285 (2004) .....	11, 18

### Statues and Other Authorities:

15A C.J.S. Compromise and Settlement (1967) .....	9
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### **III. ASSIGNMENTS OF ERROR**

1. The Trial Court Erred in Refusing to Set Aside the Mediation Agreement
2. The Trial Court Erred in Ruling That Respondents Were Entitled to a 15% Working Interest on Well Sites in Which Respondents Performed Any Work Whatsoever
3. The Trial Court Erred in Granting Whitney/Webb an Independent 15% Working Interest in the Walker No. 1 Well
4. The Trial Court Erred in Granting to Whitney/Webb an Overall 24% Working Interest in the Walker No. 1 Well
5. The Trial Court Erred in Granting a 15% Working Interest in Certain Wells First Identified in Respondent's Proposed Final Order
6. The Trial Court Erred in Awarding \$35,150.00 to Whitney/Webb for Lost Business Opportunities Related to Not Receiving a Replacement Title to the Service Rig Provided to Respondent by Petitioner as a Part of the Mediation Agreement
7. The Trial Court Erred in Ordering That as a Part of the Compliance With the Mediation Agreement that Petitioner Must Provide Certain Additional Tools to The Respondent
8. The Trial Court's Errors Are an Abuse of Discretion

#### IV. STATEMENT OF THE CASE

This action arises out of an allegedly breached agreement between a natural gas developer, Classic Oil and Gas Resources, Inc. (hereinafter referred to as “Petitioner” or “Classic”) and a well site construction company, Whitney Well Services, and its owner, Danny Webb (hereinafter referred to as “Whitney/Webb” or “Respondents”).

Plaintiffs originally filed suit against Classic on July 17, 2007, alleging that Classic breached an agreement with Plaintiffs regarding the manner of payment by Classic to the Plaintiffs for Plaintiffs’ work in building well sites for Classic. Classic answered the Plaintiffs’ Complaint and also filed a counterclaim against the Plaintiffs alleging that Plaintiffs had breached their agreement with Classic by failing to perform certain required tasks pertinent to Plaintiffs’ building of well sites for Classic.

At the heart of the Complaint and the counterclaim was an oral agreement between Whitney/Webb and Classic. Whitney/Webb would build well sites for Classic in exchange for Whitney/Webb being provided with the 15% working interest in each of the well sites built by Respondents. A primary issue in dispute, though, which quite frankly was at the heart of the case from both sides, was the extent of the work under the agreement that the Respondents were required to perform as a part of the “constructing the well site” so as to enable Respondents to the 15% working interest in said well. It was/is Petitioners understanding the Respondents were to provide all construction and support services during the drilling and completion of the wells, including building and maintaining all well locations and access roads, hauling pipe, hauling water, dozer services or pulling trucks, rigs and other equipment, pipeline construction, well hookups and reclamation of all disturbed areas as well as other miscellaneous support services

including providing all necessary equipment and labor services from the time the well was permitted until the time the well went into production (Appendix, at 0167-0169).

Petitioner contends that Respondents performed all of the aforereferenced services for the first several years after the agreement went into effect, as memorialized by a Joint Operating Agreement dated August 1, 2003 (App., pp. 0118 at 0142). Petitioner further contends that after several years Respondents started cutting back on the amount of work they were performing on the well sites and Petitioner was required to retain other contractors to complete the work the Respondents failed to provide. (App. at 0583 – 0789)

Conversely, Respondents contended that they were not responsible for all of the work (particularly post-drilling-related work) that Petitioner claims they were required to perform and that Petitioner has not abided by the Agreement (by not providing the 15% working interest) in a number of the wells which Respondents had done significant work on.

A mediation was held on March 2, 2010. The mediation lasted 10 hours, and at approximately 8:00 p.m., the parties purportedly reached a settlement agreement, but it was not the typical settlement agreement, wherein a party agrees to provide a monetary sum to the other party in exchange for a release of liability. This mediation agreement was decidedly different in that it did not simply involve the payment of a monetary sum from one party to another. Rather, there were various components to the mediation agreement, including the provision of construction equipment from Petitioner to Respondents; agreements by each of the parties to sign certain documents and sign/provide documents to the other party, and more importantly the provision of a working interest in certain wells; the promise to pay a working interest on other wells in exchange for future work performed on well sites, and a contingent working interest provided to Respondents based in four unidentified wells, if the due diligence of both parties

resulted in a determination that Respondents actually built any or all of said four well sites. When the agreement was reached, the mediator read his rough notes concerning what he believed to be the settlement agreement. Petitioner does not recall the mediator using the language, “on pads built or improved”, as the recognition of such language would have been a red flag to Petitioner as the language suggests that something less than all pre-production work needed to be performed on the wells in order for Respondents to be entitled to a 15% working interest.

The mediator advised the parties that as his secretary was gone for the evening he would have a formal agreement typed up on the following Monday. The mediator asked if it was okay for the parties to sign/initial the notes that he had prepared regarding the agreement. Neither party reviewed over the notes nor did either counsel review the notes before each of the parties signed the notes. (app. at. 0891 – 0892)

On the following Monday, Petitioner’s counsel received the typed mediation agreement and immediately noticed use of the language that Respondents were entitled to a 15% working interest on well sites “built or improved” by Respondents. Petitioner’s counsel took issue with that language as well as other minor issues regarding the agreement. The parties tried through subsequent phone calls and e-mails (App., at 0896 - 0904, 0917 - 0918) to come to a meeting of the minds as to the intent of the settlement agreement. The parties also met with the mediator a second time for several hours, and the mediator actually drew up a supplement to the settlement agreement, which was partly clarifying and partly independent of what was stated and/or intended by the original mediation agreement, without any success. (See App., at 0990 - 0993.)

After further telephonic and e-mail correspondence over an approximate five-week period the parties were not able to reach a settlement agreement (again, partly independent of the

original mediation agreement), and Respondents filed a motion and supporting memoranda to have the mediation agreement enforced, and Respondents filed a memorandum asking the Court to set aside the mediation agreement. It was/is Respondents' contention that pursuant to paragraph 2 of the mediation agreement Petitioner agreed to provide a 15% working interest upon all wells capable of producing oil and gas, which were located on drill sites which Respondents performed all of the pre-production work on. Additionally, it was Petitioner's understanding there were supposedly four well sites which Respondents had performed all of the pre-production work on but that Classic had stopped work on either pre or post drilling for various reasons. Presuming that Classic at some point in the future drilled those wells, and they went into production, if Respondents (who would have the first right of refusal) performed all the necessary additional pre-production work on those wells, Respondents would be entitled to a 15% working interest on those wells. However, Respondents believed that pursuant to the mediation agreement they were/are entitled to a 15% working interest on all wells which Respondents did any work whatsoever on (i.e., their definition of "improved"). The Petitioner thus contended that there was obviously no meeting of the minds of the parties insofar as what this very important section of the mediation agreement meant. On July 25, 2012, a hearing was held on the motion and ultimately the Court granted Respondents' Motion to Enforce the Mediation Agreement. (See App., at 0994 - 0998.)

After the Court made its ruling, the Petitioner determined that it would make every effort to comply with the mediation agreement. As such, Petitioner on two separate occasions tried to provide all of the information that it was physically capable of providing to Respondents. More particularly, on August 24, 2012 Petitioner made its first attempt to completely and totally comply with the mediation agreement (App. at 1124 - 1131). Amazingly to Petitioner,

Respondents refused this tender of the olive branch and intended compliance by Petitioner. On September 28, 2012, in a further effort to explain how Petitioner was indeed making every effort to comply with the terms of the mediation agreement, Petitioner sent another letter clarifying the previous e-mail and what was being provided, to the extent that it was in any way previously ambiguous (see App. at 1132 - 1223). Petitioner was convinced that Respondents would have no reason whatsoever to disagree with this second, more specifically spelled out compliance with the mediation agreement, and remained under the impression that Respondents had accepted Petitioner's compliance, as six weeks passed before Petitioner received any response. Unfortunately, and very disappointingly to Petitioner, on November 13, 2012, Respondents' counsel e-mailed Petitioner's counsel and identified that Respondents did not agree with Petitioner's attempted compliance with the mediation agreement, and that Respondents were going to move the Court to compel Petitioner to otherwise comply with the mediation agreement.

Respondents thereafter filed another Motion to Compel Petitioner to comply with the terms of the Court's Order granting the mediation agreement, with supporting memorandum of law (App. at 0999 - 1011). Petitioner filed a Memorandum in response to Respondents' motion and memorandum (App. at 1112 - 1227). A hearing was held on or about January 30, 2013, at which parties by counsel argued in favor of and against said motion. The Court withheld making a ruling and asked the parties to provide proposed findings of fact and conclusions of law.

Despite the fact that the Respondents, who simply prepared an Order as opposing to findings of fact and conclusions of law, put in evidence of their rights to the 15% working interest in a number of wells which had never been contemplated, much less mentioned at the mediation agreement, as well as an award of \$35,150.00 for lost business opportunities, again

never contemplated much less mentioned at the mediation or in the mediation agreement. The Court adopted Respondent's proposed order without exception.

It is Petitioner's belief that Respondent's ever broadening belief of what they are entitled to by the terms of the mediation agreement and particularly with regard to their translation of "pads built or improved" clearly demonstrates that there was never a meeting of the minds of the parties with regard to the terms of the mediation agreement, and particularly with regard to the definition of "on pads built or improved" and as such, the mediation agreement should be set aside.

#### V. SUMMARY OF ARGUMENT

It is Petitioner's belief that the trial court erred in refusing to set aside the mediation agreement. It has always been Petitioner's position, as stated originally in its counterclaim against Respondents, and through mediation and various subsequent hearings, that the Respondents were only entitled to a 15% working interest on well sites which the Respondents completed all pre-production services necessitated on each well. When Petitioner noticed the language in the typed mediation agreement identifying that Respondents would receive a 15% working interest on all well sites "built or improved" by Respondents, Petitioner took issue with that language for the reason that while Petitioner had agreed to give up its counterclaim as a part of the mediation agreement (which sought reimbursement of the various expenses incurred by Petitioner for paying other contractors to perform the various pre-production work not performed by Respondents in the last few years that Respondents were performing any work whatsoever on Petitioner's wells), Petitioner had never agreed to alter the terms of its contract with Respondents with regard to Respondent's obligations to obtain a 15% working interest on each well (i.e., that

for Respondents to obtain a 15% working interest in a particular well, Respondents had to do all of the pre-production work on each particular well).

As the case has proceeded since the mediation through attempted resolution between counsel and with the assistance of the mediator, without success, and through two subsequent motions, supporting memoranda and argument at two separate hearings, it has become more and more apparent that there was an obvious ambiguity with regard to the language of the mediation agreement; a contingent allocation of a 15% working interest in a particular well (Walker No. 1) without a remedy if, after due diligence was provided by each party that the parties still disagreed as to whether the particular well site was “built or improved” by Respondents, and a complete and utter disagreement as to the meaning of well sites “built or improved” in the mediator’s notes/mediation agreement. Petitioner thus believes that there was not a meeting of the minds of the parties as to the terms of the mediation agreement and that the mediation agreement should be set aside.

Alternatively, should the Court determine that the mediation agreement should be enforced, the Petitioner believes that the trial court not only erred but abused its discretion in adopting Respondents’ proposed Order, which granted Respondents a 15% working interest in wells which were not identified in the mediation agreement and first identified in Respondents proposed Order; which granted Respondents a 15% working interest in the Walker No. 1 well, despite the fact that the mediator provided only a contingent allocation of the 15% working interest based on an agreement by the parties after due diligence that Respondents “built or improved” the Walker No. 1 well site, when the trial court knew that there was no agreement between the parties.

Petitioner further believes that the trial court committed error and/or abused its discretion in granting Respondents a monetary sum of \$35,150.00 as compensation for lost business opportunities, which presented multiple material issues of fact in dispute, had nothing to do with the enforcement of the mediation agreement, and have never been mentioned prior to the Respondent's submission of the proposed Final Order.

Finally, Petitioner believes that the Trial Court erred in ordering that as a part of the compliance with the mediation agreement that Petitioner must provide additional tools to the Respondents for use with the construction equipment provided by Petitioner to Respondents as a part of the mediation agreement, when this equipment was not a component of the equipment bought previously by the Petitioner and which Petitioner did not have possession of for months preceding the mediation.

#### **VI. STATEMENT REGARDING ORAL ARGUMENT**

Pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, this matter should be scheduled for a Rule 19 hearing. Petitioner asserts that the parties to this appeal have not waived oral argument, the appeal is not frivolous, the issues have not been authoritatively decided and Petitioner asserts that oral argument will aid the Court in making a correct decision. A Rule 19 hearing is appropriate in this matter because the issues presented to the Court involve assignments of error in the application of settled law; error by the trial court in ruling in a manner contrary to the weight of the evidence; and the involvement of narrow issues of law. Therefore, a Rule 19 hearing is appropriate.

#### **VII. ARGUMENT**

Petitioner believes that the Trial Court erred in refusing to set aside the mediation agreement, as there was never a meeting of the minds between the parties as to the terms of the

mediation agreement and particularly with regard to the Respondents' alleged right to a 15% working interest in all well "pads built or improved" by Whitney/Webb.

**A. Statement of Applicable Law**

Under West Virginia law to constitute a binding contract, the minds of the parties must meet. "It is elemental that all contracts must be made by mutual agreement or a meeting of the minds of the parties involved". See *Dallas Racing Assoc. v. West Virginia Sports Service, Inc.*, 199 S.E.2d 308, 311 (W.Va. 1973). Furthermore, since the compromise and settlement of the lawsuit is contractual in nature, a definite meeting of the minds is essential to a valid compromise, since the settlement cannot be predicated on equivocal actions of the parties. *Sprout v. Board of Education of County of Harrison*, 215 W.Va. 341, 599 S.E.2d 764 (2004), quoting 15A C.J.S. Compromise and Settlement, §7(1) (1967). In *Sprout*, the West Virginia Court, in reaching its decision that there was not a binding settlement agreement between the President of the County Board of Education and a secretary/accountant, held that [a] meeting of the minds of the parties in a *sin qua non* of all contracts. *Id.* at 768, 345 *Martin v. Ewing*, 112 W.Va. 332, 164 S.E. 859 (1932); Syl. Pt. 4, *Riner v. Newbraugh*, 211 W.Va. 137, 563 S.E.2d 802 (2002).

If the contractual language of a settlement agreement is in any way ambiguous, it must be construed before it can be applied. See *Estate of Tawney v. Columbia Natural Res. L.L.C.*, 219 W.Va. 266, 272 633 S.E.2d 222, 28 (2006). ("W[hen] a contract is ambiguous, it is subject to construction.") An agreement is deemed ambiguous if the terms are inconsistent on their face or the phraseology can support reasonable differences of opinion as to the meaning of words employed and obligations undertaken. (See *Haynes v. Daimler Chrysler Corp.*, 228 W.Va. 441 720 S.E.2d 564, 568-69 (2011). Syl. Pt. 6, *State ex. rel. Frazier and Oxley v. Cummings*, 212

W.Va. 275, 569 S.E.2d 796 (2002). (“The term ambiguity is defined as language reasonably susceptible to two different meanings or language with such doubtful meaning that reasonable minds may be uncertain or disagree as to its meaning”.)

In *Meyer v. Alpine Lake Property Owners Assn., Inc.*, 2007 WL 709304 (N.D.W.Va. 2007), the United States Federal District Court, interpreting West Virginia law, was asked to determine whether a mediation agreement was enforceable. The parties to the case had mediated their differences and believed to have reached an agreement. Subsequent to the parties’ announcement to the Court that a settlement had been reached a dispute arose between the parties with respect to their respective understanding of the terms of the agreement. Particularly there was an issue as to whether plaintiff had continuing rights to a development and sales classification beyond a certain date or whether those rights would terminate. In reaching its decision, the Federal District Court stated that public policy did not compel the enforcement of a settlement agreement and release prepared by defendants after the mediator prepared a settlement agreement and defendants’ document included terms that differed in substance from those set forth in the mediation agreement. The Court determined that in the absence of a clearly defined agreement of settlement containing undisputed specific terms there was no settlement agreement to enforce. *Id.* at 3.

In *Riner v. Newbraugh, Supra*, the Riners agreed to settle their claim against certain land developers and builders concerning a subdivision of their farm. A settlement agreement was reached as a result of the Court-ordered mediated. The Riners refused to sign the final settlement agreement and release prepared by the developers and builders because the agreement included provisions which the Riners believed had never been addressed at the mediation conference.

Nevertheless, the Circuit Court granted the motion of the developers and builders to enforce the settlement agreement and release.

On appeal, the West Virginia Supreme Court reversed and held that the Circuit Court had committed error by requiring the Riners to sign an agreement different in substance from the agreement reached as a result of the mediation conference. *Id.* at 211 W.Va. at 139, 563 S.E. 2d at 804. [There was not a meeting of the minds with regard to terms that are specified in paragraphs 5, 6 and 7 of the settlement agreement and release.] Absent this critical necessary contractual element we cannot require the Riners to sign a document that contains terms that were not part of the settlement agreement. *Id.* 211 W.Va. at 144, 563 S.E.2d at 809.

In like manner, in *Burdette v. Burdette Reality Improvement*, 214 W.Va. 454 590 S.E.2d 640 (2003), the West Virginia Supreme Court reversed the Circuit Court's decision compelling the enforcement of settlement and in doing stated that there was "an inability of the parties in this action to reach a true meeting of the minds which has probated the entire settlement process from beginning to end". "214 W.Va. 454, 590 S.E.2d at 647," citing *Craft v. Inland Mut. Ins. Co.*, 145 W.Va. 670, 116 S.E. 2d 385 (1960).

Finally, the West Virginia Supreme Court and *Triad Energy Corp v. Renner*, 215 W.Va. 573, 576, 600 S.E.2d 285, 288 (2004), the West Virginia Supreme Court, in reversing the lower Court's enforcement of the settlement agreement to the land owner and natural gas producer, stated that the meeting of the minds or mutual requirement has been recognized by this Court as being specifically applicable to settlement agreements, and that a court may only enforce the settlement when there is a definite meeting of the minds. *Id.*, citing *State ex. rel. Evans v. Robinson*, 197 W.Va. 482, 485, 475 S.E. 2d 858, 861 (1996).

**B. The Trial Court erred in refusing to set aside the mediation agreement**

At the heart of the dispute between Petitioner and Respondents was the issue of the amount of pre-production work that Respondents were required to perform in building the well sites to enable Respondents to a 15% working interest in each particular site. Petitioner contended that it had paid other contractors approximately \$240,000.00 for work that Petitioner should have performed on the well sites. Petitioner further contends that Respondent was required to perform **all** pre-production work on each particular site to enable Respondents to a 15% working interest in each particular well. Petitioner's definition of all pre-production work includes all construction and support services during the drilling and completion of the wells, including building, maintaining the well location and access roads, hauling pipe, hauling water, dozer services, or pulling trucks, rigs and other equipment, pipeline construction, well hookups and reclamation of all disturbed areas as well as all other miscellaneous support services including providing necessary equipment and labor services from the time the well is permitted until the time the well went into production. (App. at 0168.)

Petitioner contends that after several years of complying with the agreement Respondents decided they were not getting enough money out of the 15% working interest to justify all the work they were doing on each of the wells and started cutting back on the work they were doing on the wells.

Petitioner further contends that as a result of the Respondent not performing the work, Petitioner was required to retain the services of other contractors to perform the work that it believed that Respondents were supposed to be doing to entitle Respondents to the 15% working interest. (App. at 0712, 0582-0784).

The parties agreed to mediate the case, which took place on a Friday and lasted ten hours. In an effort to try to break the ice and bring the matter to conclusion Petitioner offered to drop its Counterclaim if Respondents in turn would drop their Complaint. Petitioner further agreed to sell three pieces of drilling equipment which it had previously bought from Respondents (a ditch witch, a service rig and a swab rig), along with whatever tools it possessed accompanying those pieces of equipment. Furthermore, Petitioner also agreed to provide an additional working interest in one of its better wells (the Walker No. 1 well) and a working interest in whatever other wells of Petitioner's choice to equal an income stream to Respondents of \$6,000.00 based on 2011 revenue. There were several other requirements, including that Respondents sign the master Joint Operating Agreement, and that Petitioner allow Respondents to perform an accounting of all production and payments due for wells which Respondent has a reasonable entitlement to a working interest.

The primary issue which the parties had disagreed on throughout the entirety of the mediation was the amount of work which the Respondent was required to perform to be entitled to a 15% working interest. Petitioner continually held firm throughout the day and evening that in order for Respondents to be entitled to a 15% working interest Respondents had to perform all of the pre-production work on the wells. When the parties finally obtained what they thought was an agreement, Petitioner was of the opinion that there were three wells at issue in which Respondents had performed all the pre-production work to date, but that these three wells (Landis Nos. 4 and Hughes No. 2) had not been drilled or otherwise put into production. Petitioner's belief was that the agreement in regard to these three wells was that when they were ultimately drilled, if Respondents completed all of the remaining work on the wells that they would be entitled to a 15% working interest in these wells. With regard to the fourth well, that

being Walker No. 1, it was (and still very much is) the position of the Petitioner that Respondents had not done any work on that well site, and that the only work they had done was to build a rough access road to a site on which Petitioner was confident no well had ever been built, and that Respondents had nothing to do with the construction of what was ultimately the Walker No. 1 well site. With those thoughts in mind Petitioner agreed to the contingency of the parties doing due diligence to determine whether Respondent actually built and performed all pre-production work on the Walker No. 1 site, as a part of the mediation agreement.

At the close of the mediation, the mediator read over his notes of what he believed to be the mediation agreement (which Petitioner believes was the same as how it has been explained above), and the parties each signed the notes of the mediator (App. at 891).

On Monday, when the formal mediation agreement was provided to the parties, the Petitioner's counsel immediately noted the red flag language "built or improved" and was concerned that because the Respondent had been so adamant at the mediation that they were only required to perform pre-drilling work on the wells (which was the case with three of the four well identified in the mediator's notes) Petitioner was concerned that Respondents may use this language to contend that no other work needed to be performed by Respondents on these three wells after they were drilled, and they would still be entitled to the 15% working interest. After meeting with Respondents' counsel, Petitioner through counsel verified its concerns in this regard. A meeting was set up with the mediator who proposed various solutions, some of which were in further explanation of the mediation agreement, and some of the proposals being newly conceived. The mediator's responses in this regard were drawn up by the mediator in a proposed addendum to the mediation agreement. (App. at 0990-0993). Of importance to the Petitioner is the fact that the mediator identified what he understood to be the work required by Respondents

to enable Respondents to a 15% working interest in a particular well. Particularly the mediator believed that a pre-drilling site preparation to include improvement or construction of an access road, preparation of the drill site, construction of a pit for drilling fluids, and construction of drainage facilities; assistance during drilling, including moving equipment to the location such as the drilling rig, mortar trucks plus drilling activity to including disposal of fracking fluids, installing gathering lines, preparing damage to access roads, claiming the well site and seeding. (App. at 0991).

Furthermore, when the parties met for the second time with the mediator, Respondents identified three additional wells which they believed were wells in which they had “built or improved” the well sites, but which wells were not for whatever reason not been put into production. (App at 0991). Petitioner had left the mediation with the understanding that the “four wells” identified in the Mediation Agreement were Walker No. 1, and Landis No. 4 and 5 Hughes No. 2 (App. at 0903), but was advised at the supplemental meeting with the mediator that the wells at issue were NRP No. 173, and PCT Nos. 149, 145 (App. at 0991).

Although neither party was comfortable with the mediator’s proposed supplement to the mediation agreement (based on the mediator’s suggestion that as to how to deal with the timing of Petitioner completing the wells so that they could be put into production, and/or Respondents taking over responsibility completely for having the wells drilled (App at 0992), the suggested supplement at the very least identifies that the mediator believed that on pads (mediator notes)/well site (typed agreement) “built or improved” meant, and further identifies that there was not a meeting of the minds of the parties on that very important issue, or as to which wells were the “four wells” identified in the mediation agreement.

In the Respondent's Memorandum of Law in Support of their Motion to Enforce the Agreement, Respondents admit that prior to the mediation, their understanding of the August 11, 2003, agreement was that they were required to provide a pre-drilling construction work to the entitled to a 15% working interest of that well. Petitioner was not willing to provide a 15% interest in those wells in which Respondents (which is also not correct but at least demonstrates Respondents' mindset), and that their understanding of "built or improved" meant something less than pre-drilling construction work on the wells, and that they were able to slip the language of "built or improved" into the agreement and that it was the Petitioner's responsibility to catch it before signing or initialing the same. (App. at p. 0885.)

After the Court had ruled in favor of the Respondents to enforce the mediation agreement, and after Defendants had made every effort to comply with enforcement of the mediation agreement, but amazingly still not to the satisfaction of Respondents, Respondents commented in their Memorandum in Support of their Motion to Compel Compliance with the Mediation Agreement, that the Court should order Defendant to assign Plaintiffs a 15% working interest for "all wells improved by the Respondents no matter how much improvement occurred as long as some improvement occurred . . .". (App. 19-1010). Finally, in Respondent's proposed Order, Respondent's define "pads built or improved" to include, not only the well site or "pad" but also the area surrounding the well site, if the well site was improved "to any extent whatsoever." (App. at 1272).

As can be seen from the above recitation of facts, the meaning of, on "all well sites, built or improved," there is not only a failure of the parties to have a meeting of the minds as to what that language actually meant and/or to what wells that language applied between the Petitioner, the Respondent **and** mediator. (App at 0991). The meaning of built or improved to the Plaintiff

became broader and broader to such an extent that ultimately the Respondents held the position that they are entitled to a 15% working interest on well sites in which they performed any work whatsoever. See *Sprout v. Board of Education of County of Harrison*, 215 W.Va. 341, 599 S.E.2d 754 (2004); *Riner v. Newbraugh*, 211 W.Va. 137, 563 S.E.2d 802 (2002). The fact of the matter is that the language is quite ambiguous in that there was such a disagreement between each of the parties and the mediator as to the meaning of “all pads built or improved.” Interestingly, the mediator’s notes state on all “pads” built or improved, whereas the mediator’s subsequent typed agreement says on all “well sites” built or improved. Additionally, if one looks at numbered paragraph two of the typed mediation agreement, it identifies that the parties had a question about whether the wells capable of production are located on four drill sites “constructed by “Whitney or Webb Construction, . . . and that the parties were to determine if wells capable of production or located on “drill sites constructed by Whitney or Webb Construction.” Not only was there no meeting of the minds as to which four wells were at issue, that language suggests that Respondents only obtained a 15% working interest if Respondents “constructed the well site.” Thus, one has to consider when reading the typed agreement that the language “built or improved” could mean the same thing as “constructing” the well site. Certainly to “construct a well site” at the very least means something more than improving “the area around a well site” or “some improvement to the well site” (App. 1010, 1232). The notes prepared by the mediator clearly present numerous ambiguities as to their meaning, and the typed agreement was ambiguous as well in that there is no meeting of the minds as to what constituted all well sites “built or improved”, especially when compared with the language in the subsequent paragraph referring to well sites “constructed” by the Respondents. See *Haynes v.*

*Daimler Chrysler Corp.*, 228 W.Va. 441, 720 S.E.2d 564, 568-69 (2011). Syl. Pt. 6. *State ex. rel. Frazier and Oxley v. Cummings*, 212 W.Va. 275, 569 S.E.2d 796 (2002).

Furthermore, in the follow-up meeting with the mediator, from which the mediator prepared the above-referenced proposed settlement, an issue was raised for the first time about whether Defendant had a responsibility to proceed with drilling these three well sites, which had never previously even been brought up at the mediation, and which Respondents were then stating that under the initial agreement Petitioner had a responsibility to do despite the fact that Petitioner did/does not believe it was/is economically prudent or in the best interests of the investors to build out/complete these wells at this time or any other time in the near future given the drop in gas prices. What the first supplement to the mediation agreement also brings to light is the realization that the original mediation agreement should have spelled out the specifics of the work that the Respondents needed to perform on a particular well site so as to entitle them to a 15% working interest in that well site. Furthermore, the mediation agreement should have identified the specific wells in question and whether there would be a requirement as part of the mediation agreement that the wells be drilled and put into production within a specific time frame. Without this specific information the parties were left to speculate as to their intent in reaching settlement agreement.

As the West Virginia Supreme Court has stated on many occasions, the Court may only enforce a settlement when there is a definite meeting of minds. See *Triad Energy Corp. v. Renner*, 215 W.Va. 573, 600 S.E.2d 285 (2004); *Burdette v. Burdette Realty Improvement*, 214 W.Va. 454, S.E.2d 640 (2003). It is obvious that there is no meeting of the minds of the parties and the Respondents are simply trying to take advantage of the language of the notes to create a windfall for them that is clearly not deserved.

Finally, Respondents suggest in their Memorandum in support of their Motion to enforce the mediation agreement that they believe that Defendant was trying to claim mistake by signing the notes at the close of the mediation, as they did not intend to sign the agreement memorializing the intent of the parties. Petitioner certainly agrees that had it realized there was language in the mediator's notes regarding the mediation agreement which could have been interpreted in a way that would allow Respondents to obtain a 15% working interest in wells that Respondent did only minimal work on, and which would subsequently be put into a formal agreement and serve as a sword for Plaintiffs to wield to try to force unconscionable settlement agreement, that Petitioner would have immediately pointed out the fallacy of that language and "made a mistake" in not looking more carefully at the notes before signing them at the end of the ten (10) hours of mediation. However, as stated above, in order for contract to be enforced, there has to be a meeting of the minds in regards to the contract. Furthermore, and also previously stated, Petitioner asserts that it was never the mediator's intent that the use of the word "built or improved" would be interpreted so as to allow Respondents to perform a minimal amount of work on a well site and still be entitled to a 15% working interest.

Petitioner thus seeks a ruling by the Court that there was no meeting of the minds of the parties and that the mediation agreement should be set aside.

**C. The Trial Court Erred In Ruling That Respondents Were Entitled To A 15% Working Interest in Wells In Which Respondents Performed Any Work on the Well Sites**

When the mediator, in his notes at the close of the mediation, indicated that Respondents were entitled pursuant to the agreement to a 15% working interest on "pads built or improved by Plaintiff," and later in the typed mediation agreement when the mediator used the language "on well sites built or improved by Plaintiff", the mediator clearly did not intend for the use of the

word “improved” to mean any work whatsoever done on a well site or to the area in and around a well site, no matter how menial in nature. As the case has progressed from the original mediation to the present time, the Respondents’ interpretation of “improved” has gone from initially meaning that Respondents only had to perform pre-drilling work in building a well site (App. at 0885) to Respondents’ language in their proposed Final Order that they are entitled to a 15% working interest in any gas well of the Petitioner, as long as the well site, or the area surrounding the well site was built or improved “to any extent whatsoever by Respondent.” It is with that mindset that Respondents suggest they are entitled to an independent 15% working interest in the Walker No. 1 well, despite Respondents’ admission that at best their only work was to clear off an access road to a potential site for Walker No. 1 well, which was never ultimately even utilized by Classic due to the lack of a valid lease or permit (i.e. the Walker No. 1 well site was ultimately built on another location over two (2) years after the agreement with Whitney/Webb had ended (App. at 1262, 1266).

When Petitioner initially spoke with Respondents about being paid by way of a working interest as opposed to a specific monetary amount for the work performed, Petitioner made a calculated determination as to the costs involved with doing all of the pre-production work on a particular well site in comparison to the value of working interest over time provided on a particular well site to come up with a way in which Respondents would actually receive more money over time through the payment of a working interest in the well as opposed to being paid a monetary sum for performing all of the pre-production work on the well site. However, Petitioner never anticipated providing a 15% working interest to Respondents in exchange for Respondents doing some menial amount of work on a well site or the area surrounding a well

site, particularly when Petitioner would be faced with the responsibility of hiring other contractors to do all the other necessary work not performed by the Respondents on the site.

It is thus illogical to suggest that Petitioner would have ever agreed to give Respondents a 15% working interest in wells if Respondents only needed to perform some menial amount of work “to improve” the well site, or the area surrounding a well site, as it would have made no financial sense to do so.

Thus, if the Court rules that the Mediation Agreement is enforceable, the Petitioner asks the Court to rule that Respondents be awarded a 15% working interest only in those wells in which Respondents have built the well site and completed all of the other pre-production work on the site.

**D. The Trial Court Erred in Granting Whitney/Webb an Independent 15% Working Interest in the Walker Number 1 Well**

Obviously it is Petitioner’s belief that the mediation as a whole should be set aside. However, should the Court determine that the mediation agreement be enforced, Petitioner believes that the trial court committed error in assigning a 15% working interest in the Walker No. 1 well to the Respondents. Specifically, Respondents contend that they are entitled to a 15% working interest in Walker No. 1 well based on the Court’s ruling that a 15% working interest be provided to the Respondents on all wells capable of producing oil and gas, which were located on drill sites built or improved by the Respondents. In fact, in its proposed Final Order, Respondents make a point of identifying that this 15% working interest specifically applies to the Walker No. 1 well. Respondents fail to mention, though, that in Petitioner’s second attempt to completely comply with the mediation agreement (App. at 1132 – 1223). Petitioner provided Respondents with a chronology which clearly demonstrates that Respondents did nothing more than clear out some brush on an existing rough access road so that surveyors could get access but

which was never built. This chronology was later memorialized by the affidavit of Stanley West, Classic's field operation manager (App. pp. 1262, 1266).

The Respondents have continued to dispute the fact that the access road was cleared out to a location where no well site was ever built, and have produced an affidavit from the landowner, which suggested that Respondents had done work on the subject well site, but the timeline and affidavit of Stanley West clearly show that the landowner is mistaken.

As stated previously, one of the many fallacies of the mediation agreement (which Petitioner has alleged in its efforts to have the mediation agreement set aside), was that the agreement provided for a contingent allocation of a working interest in four wells (it was actually seven), but provided no remedy if, after the due diligence was provided by each party, the parties still disagreed as to whether the particular well site was built by the Respondents. As it turned out, based on the Court's determination that pursuant to the mediation agreement, Respondents were entitled to a 15% working interest on any well site built or improved by the Respondents, that there was only one of the four (actually seven) well sites which remained at issue, that being Walker No. 1. The parties still disagree on the issue of whether the Respondents built or improved that particular site. It is Petitioner's position that while the evidence clearly shows that the Respondents did not build or improve this well site, as Respondents still refuse to agree with Petitioner's position, this issue should not have been resolved by the Court through enforcement of the mediation agreement, and that the only manner of enforcement of this particular issue would be through allowance of the parties through the underlying lawsuit to proceed with the issue to trial or for the Court to have advised the parties that this issue needs to be resolved through separate litigation.

**E. The Trial Court Also Erred in Granting to Whitney/Webb an Overall 24% Working Interest in the Walker Number 1 Well**

As a part of the mediation agreement, Petitioner was obligated to provide a 15% working interest in the Walker No. 1 well, and, if necessary, an interest in whatever other well(s) was necessary to create a revenue stream of \$6,000.00 based on 2011 production data (App. at 0888 – 0889). The Court, in adopting Respondents’ proposed Final Order, held that Respondents are entitled to a 24% working interest in Walker No. 1 well based on their stacking of the independent 15% working interest in Walker No. 1 (see above) and the agreed to 8% working interest in Walker provided by Petitioner (see immediately above). Petitioner is not sure how Respondents came up with the additional 1%, but the stacking of well sites is not only inappropriate, and not provided for in the mediation agreement, but is also impossible to perform based on the fact that Classic only has a 15.46% working interest in Walker No. 1, and has assigned all of the working interest to individuals who are not a part of the lawsuit. Thus, Classic only has a 15.46% available interest in Walker No. 1 to assign to Whitney/Webb. Petitioner thus asks the Court to rule that Respondents cannot stack these working interests in the Walker Number 1 well site as that was not contemplated a part of the mediation agreement nor is it possible to accomplish.

**F. The Trial Court erred in granting a 15% working interest in certain wells first identified by the respondents in their proposed a Final Order.**

As a part of their proposed Final Order (which was adopted by the Court without exception), Respondents identified a number of wells which involved separate, earlier agreements between Danny Webb Construction and Classic Oil and Gas in which Classic paid a monetary sum to Danny Webb Construction for some of the services and provided a working interest to Webb for the remainder of his services. The agreement for the work done on these

wells and the work itself on the wells were subject to separate joint operating agreements executed by Respondent Danny Webb on each of the below referenced dates for each well, and as such preexisted, and were not subject to the August 1, 2003 oral agreement (as memorialized in the August 1, 2003 Joint Operating Agreement) (App. at 019-0142). Danny Webb Construction received a recordable assignment on these wells and has received the working interest as agreed to on each of these wells. These wells are as follows:

Harrah No. 1 and Harrah No. 2 --- 10% working interest --- 01/01/02.

Janet Wright No. 1 --- 5% working interest --- 01/01/02.

Spurlock No. 1 --- 17% working interest --- 06/01/02.

Yawke No. 1 --- 15% working interest --- 06/01/02.

H West No. 1 --- 10% working interest --- 09/01/02.

S West No. 1 --- 15% working interest --- 12/01/02.

D Toller No. 1 --- 15% working interest --- 12/01/02.

Furthermore, in the list of undisputed non-paying wells, the J. Wright No. 1 well is incorrectly identified as an undisputed non-paying well. Danny Webb has received a recordable interest on this well and has been receiving his 15% working interest on that well since it has gone into production. Furthermore, also on the "undisputed non-paying list" in the Final Order is Harrah No. 1 and 2; H West No. 1; Yawkey No. 1; Lester No. 1; Spurlock No. 1 and J. Wright No. 1. These wells are all covered by separate joint operating agreements executed by Danny Webb Construction, prior to the 2003 oral agreement and recordable assignments have also been provided for these wells. Also listed on the alleged "undisputed non-paying list" are E. Cline No. 2 in which Danny Webb Construction received a 5% working interest from an agreement reached in 2002, and McGraw No. 1 in which Webb was never granted a working interest

because he was paid for all of his services to build that well site in 2002. Both of these wells were drilled prior to the August 1, 2003 agreement, memorialized in the August 1, 2003 Joint Operating Agreement, which is the subject of the lawsuit. Finally, both of these wells were sold to Velocity Energy Corporation in 2009 and are currently being operated by Velocity.

It is thus important to point out that the above referenced wells are identified for the first time in the Respondent's proposed order, along with the seven wells which were identified in the mediation or at the subsequent meeting with the mediator.<sup>1</sup>

Furthermore, the undisputed non-paying wells incorrectly include well PCT No. 133, in that it is a well in which Respondents performed the necessary work on and have since the well went into production been receiving a 15% working interest in said well. Respondents have admittedly not received a recordable assignment and has only received a provisional assignment because Petitioner has not received its assignment of earned acreage for that well from R & B Petroleum, the owner of the lease and the farmor of the Farmout. (Id. at 1114-1116).

Finally, while Respondent correctly identified in their proposed Final Order the list of "paying wells", Respondents suggest that there has been something not done that should have been done with regard to these wells. Particularly, on Page 6, the Respondents state "**after Plaintiffs moved this Court to compel Defendant to perform under the settlement agreement, Defendant conceded that he had paid and will continue to pay the Plaintiffs their amounts under the 15% working interest in the list of wells identified below.**" (App. pgs 1232 – 1235).

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<sup>1</sup> As was stated above, it was Petitioner's belief at the mediation that the wells at issue (i.e. the dispute between the parties as to whether Respondents had done sufficient work in constructing certain well sites to be entitled to a 15% working interest) involved 4 wells; that being Landis No. 4 and 5 and Hughes No. 2, as well as the Walker No. 1 well. Landis No. 4 and 5 and Hughes No. 2 were locations built by Respondents, but not drilled or drilled to completion. (App. pg. 0907). In the subsequent meeting with the mediator to try and resolve the existing disputes regarding the language in mediation agreement, Respondents identified that the Landis and Hughes wells were not the wells at issue; rather it was NRP No. 173, PCT No. 149 and PCT No. 145. These were also wells which had been either not drilled or partially drilled, but not completed, and a question existed as to what additional work Webb Construction needed to do to perform to be entitled to the 15% working interest in these wells. The mediator spelled out what he believed needed to be done by Respondents once those wells were completed (App. 0991).

(emphasis added). It is important for the Court to note that these are all well sites, in which Danny Webb did all of the necessary construction work, and has as a result been paid from the date each of the wells went into production to the present time, a 15% working interest in said wells and has received recordable assignments for all of said wells.

Finally, the Order reflects that Respondents have provided evidence of other wells identified for the first time in the order, characterized as “disputed non-paying wells,” in which they also believe they are entitled to a 15% working interest. These wells include however, the McDonald No. 1 well and McDonald No. 2 well which were drilled in March 2003, prior to the agreement which is subject to the lawsuit. Petitioner paid Respondents for the work that was done on these wells and Respondents did not have a working interest in these wells. The J. Wright No. 1 well was previously listed in the “undisputed non-paying list” and is a well in which Danny Webb has a 15% working interest, and has a recordable assignment for the said well. The well identified as R West No. 1 to the Petitioner’s knowledge does not exist. Finally, the Walker No. 1 well site was built subsequent to the time that Respondents stopped performing any work for Petitioner. (See page 20 above for further description of this well). The J. Cooke No. 1 well was an old well drilled by another operator which was abandoned and later located on a lease acquired by Classic but never operated by Classic. The H.C. Cline No. 1, Ellis No. 1, Bobo No. 1, and Meadows No. 1 wells were bought by Petitioner when the company was initially started. These wells were previously drilled and put into production by another operator, and capped and later bought by Petitioner and put back into production. The Ellis No. 2, , Smith No. 1, E Cline No. 2, Atkins No. 1, Owens, No. 1 are all old wells drilled prior to the August 2003 agreement with Webb, and Webb constructed the well sites and was paid for his work and did not have a working interest in these wells. These wells were sold to Velocity Energy in 2009

and are now operated by that company. The exception was E Cline No. 2, which as explained above was listed in the “undisputed non-paying wells,” and Danny Webb Construction was paid for some of his work in constructing the well, and received a 5% working interest for the remainder of his work on that well, which was also sold to Velocity Energy in 2009, and is now operated by that company.

**G. The Trial Court Erred in Awarding \$35,150.00 to Whitney/Webb for Lost Business Opportunities Related to Not Receiving a Replacement Title to The Service Rig Provided to Respondents by Petitioners as a Part of the Mediation Agreement**

Respondents first raised the issue of lost business opportunities with a particular monetary amount (that being \$35,150.00) as a part of its proposed Final Order (which the Court ultimately adopted without exception). An affidavit from Ronald D. Dulrymple supporting the allegation was attached as an exhibit, explaining how he had approached Respondent about two jobs; one involving the use of a swab rig, and the other involving the use of a service rig, neither job of which Respondent allegedly could pursue because of not having valid title to the rigs.

At the mediation, when Petitioner advised the mediator, when discussing the proposed agreement to provide a service rig, a swab rig and a ditch witch to Respondents, that Classic identified that it believed that the title to the service rig was lost, but that it would provide a bill of sale with the service rig and a replacement title for the swab rig, which it did provide in an attempt to comply with the mediation agreement. When Respondents identified why they believed the bill of sale for the service rig was insufficient, Petitioner obtained a replacement title for the service rig and had it mailed to Respondents. At the hearing on Respondents’ Motion to Compel Enforcement Performance under the Settlement Agreement on April 19, 2013, Respondents claimed that they never received the replacement title, so Petitioner had the title re-mailed to the new address that had been provided at the hearing.

Insofar as lost business opportunities are concerned, there is obviously a factual issue as to the nature of Respondents' lost business opportunities; whether Respondents were adequately equipped to handle the lost business opportunities; whether Respondents tried to mitigate their damages; whether Petitioner was dilatory about providing the title, and various other questions about the actual specifics of the money allegedly lost. These are all material issues of fact which should have prohibited the trial court from making a ruling as to the entitlement of Respondents to a monetary award of \$31,500.00. Furthermore, the issues presented were not in any way a component of the mediation agreement, which provides further reasoning for why the trial court should not have included this award of damages in the Order.

Thus, if the Court rules that the mediation agreement should be enforced, Petitioner requests that the Court that the Trial Court wrongfully ordered that Classic pay Whitney/Webb \$35,500.00 for alleged lost business opportunities.

**H. The Trial Court Erred in Ordering that as a Part of the Compliance With the Mediation Agreement That Petitioner Must Provide Certain Additional Tools to Respondents**

As a part of the mediation agreement, Petitioner agreed to provide a swab rig, a ditch witch and a service rig to the Respondents with various other accompanying tools that Petitioner still had possession of which were associated with each particular piece of equipment. Among those items provided in addition to the equipment provided to the Respondents, Petitioner provided a swab bailer, a set of 4" jars, a sand pump and four-inch bit. In Respondents' proposed Order (which the Court adopted), Respondents also included a 2" string of tools for the service rig. As the parties had argued back and forth before then, though, the two-inch string of tools was not even a component of the service rig when purchased by the Petitioner (i.e. they were purchased independently of the service rig) and were lost down a well when Classic was

using the swab rig several months preceding the mediation. Petitioner would thus have to purchase a new 2" string of tools to comply with the trial court's ruling (at a cost of approximately \$2,500.00).

Pursuant to the Final Order, the trial court also ordered that Petitioner provide Respondents with a tool box which has been in Petitioner's possession for years, and which in no way accompanies either of the rigs as "associated tools"; rather, it is used by Classic's employees for a variety of reasons just as one would use a tool box in doing chores in the garage of one's house. Should the Court not set aside the mediation agreement, Petitioner would ask the Court to rule that the provision of the 2" string of tools and tool box were not a component of the mediation agreement and need not be provided by Petitioner.

#### **I. The Trial Court's Errors Are an Abuse of Discretion**

It is Petitioner's belief that the Trial Court gave only a cursory review of the Defendant's proposed findings of fact and conclusions of law and Plaintiff's proposed Final Order, as Judge McGraw adopted and signed the Respondents' proposed Final Order without making a single addition or deletion. Petitioner believes this to have clearly been an abuse of discretion by the trial court as the Respondent's order provided monetary award, and the assignment of working interest in wells which were clearly not a component of the mediation agreement, or were otherwise inappropriate, given the trial court's knowledge of the material issues of fact as to whether Respondents were entitled to an assignment of a working interest in that/those wells.

More particularly, the trial court's award of a 15% working interest in wells which had never even been mentioned in the mediation agreement, and which pre-dated the original agreement with the Respondents was an abuse of discretion. Furthermore, the trial court abused its discretion by providing Respondents with a specific monetary award for lost business

opportunities allegedly incurred by the Respondents. The trial court also abused its discretion in awarding Respondents an independent 15% working interest and a combined 24% working interest in the Walker No. 1 well, when the trial court was well aware of the fact that there was a serious factual dispute between the parties as to whether Whitney/Webb made any improvements whatsoever to the Walker No. 1 well site, and that Classic did not have sufficient interest itself in Walker No. 1 to provide a 24% working interest to the Respondents in said well.

In summary, the trial court should have recognized that the Respondents' proposed Order (which should have been formatted as Findings of Fact and Conclusions of Law) was an attempt to obtain a windfall, particularly with regard to the monetary award for lost business opportunities, which was obviously disputed and was never contemplated, much less discussed, at the mediation. Therefore, should the Court not set aside the mediation agreement, the Petitioner respectfully requests of the Court that it rule that the trial court abused its discretion in adopting without exception the Order as prepared by Respondents and remand the case back to the Circuit Court for rehearing on the Respondents' Motion to Compel Enforcement of the Mediation Agreement.

### **VIII. CONCLUSION**

As can be seen from a comparison of the mediation notes, the typed mediation agreement, and the Final Order prepared by the Respondents and adopted without exception by the Court, demonstrates not only that there was clearly not a meeting of the minds of the parties as to what was being provided to the mediation agreement. The comparison of these documents also shows the ever expanding position of the Respondents regarding the intent of the parties as to the construction work that needed to be done on a particular well for Respondents to be entitled to a 15% working interest in that well. More particularly, the Respondent's

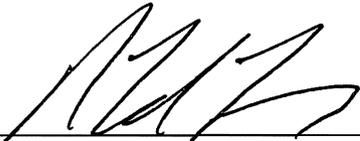
interpretation of what “pads built or improved” evolved from an original belief that it meant that Plaintiffs would perform all of the pre-drilling work in exchange for a 15% working interest in the well (App. Page 1007), to Respondent’s ultimate interpretation in the Final Order being the need only to improve the well site or the area surrounding a well site to any extent whatsoever (with the language obviously intending to encompass the Walker No. 1 site). The original mediation agreement described a dispute of over four wells, while the Final Order prepared by the Plaintiffs and adopted by the Court without exception describes a multitude of additional wells which were never contemplated much less discussed in the mediation. Finally, the Final Order prepared by Plaintiffs and adopted by the Court includes payment of a monetary sum for lost business opportunities since the mediation, which was obviously not a component of the mediation agreement.

It is thus painfully obvious that there was never meeting in the minds of the parties with regard to the mediation agreement. The mediation notes which were signed by the parties did not even come close to adequately explaining a very complicated agreement between the parties, and the mediation agreement should thus be set aside.

Alternatively, should the Court for whatever reason determine that the mediation agreement be enforced, Petitioner asks that the Court’s ruling as to the required compliance with the mediation agreement be fair and not overstated, and that the Petitioner not be required under the terms of the mediation agreement to provide a 15% working interest to Respondents unless they have constructed the well site; that Petitioner not be required to pay a monetary sum for Respondent’s “lost business opportunities”; that Petitioner not be required to provide a new/additional 15% working interest to any well constructed by Webb prior to the August 1, 2003 agreement between the parties; that Petitioner not be required to provide tools to

Respondents which Petitioner did not own at the time of the mediation; and should the Court not set aside the mediation agreement, that the case be at the very least remanded by the trial court for further determination by the trial court or by a jury, through production of evidence, whether Respondents actually constructed the Walker No. 1 well site, so as to fairly determine whether they are entitled to a 15% working interest in that well; and similarly to determine whether Respondent's have a valid claim for lost business opportunities, and for such other and further relief as the Court deems appropriate.

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NO.: 13-0601  
IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

WHITNEY WELL SERVICES, INC, A  
West Virginia Corporation, DANNY WEBB  
CONSTRUCTION CO., INC., A West Virginia  
Corporation, and VELMA WEBB, and Individual,  
Plaintiffs,

v.

Upon Appeal West Virginia  
Supreme Court of Appeals  
(Case No.: 13-06-01)

CLASSIC OIL & GAS RESOURCES, INC.,  
A Kentucky Corporation Licensed to do Business  
in West Virginia.

Defendant.

CERTIFICATE OF SERVICE

I, R. Ford Francis, do hereby certify that I served the following: a true copy of the foregoing *Petitioner's Brief and Appendix* via First Class United States Mail, with postage prepaid, this 20<sup>th</sup> day of August, 2013:

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