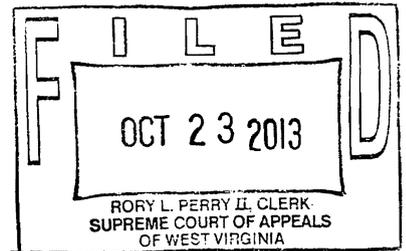


No.: 13-0601



**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 REPLY BRIEF**

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Respondent also refers generally to it’s previously cited Table of Authorities on pg. iv of Petitioner’s brief.

### III. ARGUMENT

This Memorandum is filed as a reply to the Respondents' Brief which was filed in response to the Petitioner's Brief. Petitioner will address the argument set forth by Respondents chronologically with regard to each of the previously identified Assignments of Error.

#### A. The Trial Court Erred in Refusing to Set Aside the Mediation Agreement

It is Respondents' position that the mediation notes "speak for themselves, and are clear and unambiguous." The fact of the matter is that upon review of the notes as well as the typed Agreement which was submitted two (2) days later, there is significant ambiguity, and a total lack of clarity with regard to the work that Respondents were required to perform under the terms of the mediation agreement to be entitled to a 15% working interest.

Petitioner is in agreement with Respondents' assertion of the law in West Virginia with regard to addressing contracts with ambiguous language. More particularly, an agreement is deemed ambiguous if the terms are inconsistent or the phraseology can support reasonable differences of opinions as to the meaning of words employed and obligations undertaken. *Haynes v. Daimler Chrysler Corp.*, 228 W.Va. 441, 720 S.E.2d 564, 568-69 (2011); *Estate of Tawney v. Columbia Natural Res., L.L.C.*, 219 W.Va. 266, 633 S.E.2d 22 (2006); *State ex. rel. Frazier & Oxley L.C. v. Cummings*, 212 W.Va. 275, 569 S.E.2d 796 (2002). In the case at bar, the language utilized by the mediator, in his notes and subsequently in the typed Agreement, is clearly subject to reasonable differences of opinion as to the meaning of the words employed. More particularly, the mediator used the terminology "pads built or improved" in the signed notes (App. at 890-892) and changed the terminology to "drill sites built or improved" in the typed Agreement. (App. at 888-892). As stated in Petitioner's brief, Petitioner did not have an understanding when the mediator stated what he believed to be the terms of the agreement that

Respondents would be entitled to a 15% working interest on wells whose pads they built “or improved.”

Petitioner also does not recall being asked to review over the notes before initially signing the notes, nor was Petitioner told nor do the notes state that the notes would be considered a binding contract. *See Messer v. Huntington Anesthesia Group*, 222 W.Va. 410, 414, 664 S.E.2d 751, 755 (2008).<sup>1</sup>

It is painfully obvious that there was a difference of opinion not only between the Petitioner and Respondents but also the mediator as to the meaning of “pads built or improved.” Petitioner did not realize that the language “or improved” was even a part of the agreement, as Petitioner’s position was always that the 15% working interest would be provided to Respondents only if all pre-production work on the well site was completed by Respondents. Alternatively, 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 well of the Petitioner, as long as the well site for said well, or the area surrounding the well site, was built or improved “to any extent whatsoever by Respondents.” (App. at 1232).

Adding further confusion to the determination of “built or improved” is the language in Paragraph 2 of the notes wherein the mediator is referencing “three well sites built but not drilled” by Respondents, which language evolved in the typed agreement to “four drill sites constructed” by Respondents.

Finally, to even further demonstrate that there was no meeting of the minds, between not only Petitioner and Respondents, but also the mediator, was the fact that the mediator stated what his interpretation of what “built or improved” meant in his proposed Supplement to the

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<sup>1</sup> This is a new legal authority, not identified in Petitioner’s brief.

Mediation Agreement. More particularly, the mediator stated that he believed that “built or improved” meant performing 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). While the mediator’s version of what “built or improved” meant involved a slightly lesser amount of preproduction work than did Petitioner’s understanding as to the work Respondents were required to perform to receive the 15% working interest, the mediator’s proposal as to the work that needed to be done was significantly more than Respondents’ belief that “improved” meant doing “any work whatsoever” on the well site and/or the area surrounding a well site.

Furthermore, Respondents point out that in *Burdette v. Burdette Realty Improvement, Inc.*, 214 W.Va. 448, 590 S.E.2d 641 (2003) the West Virginia Supreme Court was faced with the determination of whether there was a meeting of the minds of the parties when the agreement required further action before finalizing its confirmation, and that the Court held that because further acts contemplated under the mediation agreement had not been completed, there was no valid meeting of the minds and therefore the agreement was invalid and unenforceable. *Id.* at 453, 646. In the case at bar, the Mediation Agreement provides for a contingent allocation of a working interest in four wells thought by Petitioner to be Walker No. 1, Landis Nos. 4 and 5 and Hughes No. 2, and that the parties were to perform due diligence to determine whether or not Respondents had “constructed” any or all of those four sites. However, with regard to one of the wells, being Walker No. 1, the parties, following in their due diligence, were in total

disagreement as to whether Respondents had constructed that well site. The mediation agreement provides no remedy for the parties if the parties fail to come to an agreement on that issue. As was the case in *Burdette*, the Court should hold that because parties could not agree after reasonable due diligence as to whether Respondents had constructed Walker No. 1 well site, there was no valid meeting of the minds which should render the Mediation Agreement invalid.

*Id.*

Furthermore, the Mediation Agreement refers to the four wells which Respondents believed that they had constructed the wells sites for (which Petitioner had left the mediation believing were Walker No. 1, Landis Nos. 4 and 5, and Hughes No. 2 (App. at 0903), and Respondents agreed with the Petitioner that there were four wells which were in contention as to whether Respondents were entitled to a working interest (App at 0901), but advised Petitioner at the supplemental meeting with the mediator that it was three different wells which Respondents believed were the wells at issue (other than Walker No. 1); those being NRP No. 173, and PCT Nos. 149 and 145 (App. at 0991). The fact that the parties had differing beliefs as to the actual wells at issue also shows that the parties did not have a meeting of the minds.

To make matters more clouded, Respondents, in their proposed Final Order, which was later adopted by the trial court, included, in addition to the four wells it had always believed to be in contention for the 15% working interest, numerous other wells that were either drilled prior to the subject agreement between the parties in August of 2003, which forms the basis of the lawsuit, and/or which involved the construction of well sites by Respondents for which Respondents were compensated by Petitioner in a different manner pursuant to earlier well by well agreements. These wells were not in any way contemplated by Petitioner when entering into the mediation agreement, nor did Respondents suggest that there were potentially other

wells at issue at any time prior to presenting its proposed Final Order, much less at the mediation (App. at 0901). As such, there was no meeting of the minds between Petitioner and Respondent with regard to these various other wells first identified in the proposed Final Order. See *Haynes v. Daimler Chrysler Corp.* 228 W.Va. 441, 720 S.E.2d 564, 568-69 (2011); *Meyer v. Alpine Lake Property Owners Assn., Inc.* 2007WL 709304 (N.D.W.Va. 2007); Syl. Pt. 6, *State ex. rel. Frazier & Oxley L.C. v. Cummings*, 212 W.Va. 275, 569 S.E.2d 796 (2002).

Finally, the fact that the mediator wrote an email to each of the parties' counsel on the Monday following the mediation, asking the parties through counsel if the mediation agreement as typed was accurate (App. at 0897), and that counsel reviewed the "proposed" Mediation Agreement, and made various requested changes because of believed inaccuracies in the "proposed" Agreement (App. at 0896-0899), demonstrates that the notes were not meant to be a binding agreement and furthers Petitioner's argument that there was no meeting of the minds of the parties as to the specifics of the agreement.

B. 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

The Respondents put so much emphasis on the specific language of the mediation notes, when the notes themselves are obviously grammatically problematic, as notes typically are. As Respondents identify, the notes state, "Assign-15% all capable of producing wells located on pads built or improved by Webb" (App. at 0891). The sentence itself makes little if no sense and, in fact, suggests that it applies only to "pads built or improved" by Respondents. In trying to determine the intent of that sentence it is hard to imagine how there would not be differing interpretations of what that sentence actually means. Certainly, as there could be difference of opinion as to what "on pads" means, the mediator, in the typed Agreement, changed the language

“on pads” to “on wells which are located on drill sites” which are built or improved by Respondents. Once again, in responding to this particular Assignment of Error, Respondents are attempting to use the terminology “built or improved” as a sword to enable Respondents to a windfall which clearly was not contemplated by Petitioner when signing the mediation agreement.

Respondents make light of Petitioner’s description of the manner in which Petitioner came up with the concept of providing a 15% working interest to Respondents in exchange for Respondents doing all pre-production work on the well site. Obviously it is impossible for the Respondents to have known what was going on in the mind of Petitioner when the parties purportedly reached their agreement at 8:00 p.m. on a Friday night. However, as the wording of the Agreement was ambiguous and the terms of the Agreement are inconsistent, it is certainly appropriate and useful for Petitioner to be able to explain why Petitioner had determined that a 15% working interest in exchange for all pre-production work on the well site by Respondents was economically appropriate and, on the flip side, why the provision of a 15% working interest on a well site in which Respondents performed only a very minimal amount of work on would have made no sense even with what Respondents believed to be four wells, much less the dozens of wells contemplated by Respondents in their proposed Final Order which was adopted by the Trial Court.

C. The Circuit Court Erred in Granting Respondents an Independent 15% Working Interest in the Walker Number 1 Well

As stated previously, the mediation agreement provided a contingent provision of a working interest in four (which turned out to be 7) wells, and that the parties were to perform due diligence to determine whether any or all of these well sites on which these wells sat were constructed by Respondents. The parties were in agreement that on six of the wells, Respondents

had done all of the pre-drilling construction of the well site. The only question that remained was whether Respondents would be required to perform the remaining pre-production work if Petitioner decided to finish out the wells in the future so that they could be put into production. However, with regard to the Walker No. 1 well, there was a complete disagreement as to whether Respondents did any work whatsoever on the well site. The mediation agreement provided no remedy, though, if the parties continued to disagree on this issue. Respondents produced an Affidavit from the property owner, Raymond Walker, suggesting that some work had been done on the construction of the site by Respondents. Countering that evidence, Petitioner produced a timeline along with an Affidavit from Stanley West showing that the property owner was mistaken and that the Respondents did nothing more than clear off an access road so that the surveyors could get to a proposed site which was originally going to be used for the Walker No. 1 well, but for various reasons explained in the timeline and the Affidavit, did not come to fruition, and that the well site was built by Petitioner with the assistance of a company, Starlight Construction, at a completely different site in August of 2009, which was over 2 years after Respondents had stopped performing any work for the Petitioner.

Frankly, as the mediation agreement included a contingent allocation of a working interest in a specified number of wells with no remedy if the parties continued to disagree as to the issue of whether Respondents built or improved one or more of those sites, there was no valid meeting of the minds and therefore the mediation agreement should be considered invalid and unenforceable. *See Burdette v. Burdette Reality Improvement Inc.*, 214 W.Va. at 453, 590 S.E.2d at 646. At the very least, though, this issue should not have been resolved by the trial court's enforcement of the Mediation Agreement, as the appropriate manner of enforcement of this particular issue would be through allowance of the parties to the underlying lawsuit to proceed to

trial on this issue, or for the trial court to have advised the parties that this issue needs to be resolved through separate litigation.

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

The fallacy of Respondent's argument in support of the trial court's award of a 24% working interest in Walker No. 1 is several fold. Firstly, the mediation agreement does not in any way provide for the potential stacking of working interest in wells. There is no way that one can even remotely suggest that there was a meeting of the minds on the issue of stacking well interests. Secondly, the mediation agreement calls only for the provision of a 5% working interest in the Walker No. 1 well, along with the use of other working interests in other wells, to make up the \$6,000.00 revenue stream based on 2011 numbers. Even if the stacking of working interests on a particular well would have been clearly stated in the Mediation Agreement, that would have resulted in a maximum award by the trial court of 20%, as opposed to 24%. More particularly, Respondents, in furtherance of their efforts to present a completely over the top proposed Final Order, awarded to themselves not only the 15% working interest in the Walker No. 1 well (despite the fact that the trial court could not rightfully rule on this issue as there was a material issue of fact on this issue), but also stacked an additional 9% working interest on to the award. The justification for such was that Petitioner, in attempted compliance with the mediation agreement, over a year after the mediation was held, and in trying to tender the olive branch, offered an additional 3% interest in the Walker No. 1 well as a part of the mediation compliance. (i.e. an 8% working interest in Walker No. 1 was offered along with working interests in several other wells to come up with the \$6,000 in revenue.) (App. at 1135, 1221).<sup>2</sup>

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<sup>2</sup> Petitioner understands that Respondent apparently has a special interest in the Walker No. 1 well site, as when initially planned out it was going to be named after Danny Webb's daughter Whitney. For that reason and recognizing that Petitioner was adamant that the Walker No. 1 well was ultimately built on a well site at a different

Finally, Respondents explain the award of an additional 1% interest in the Walker No. 1 well as a penalty fee for Petitioner's non-compliance with the mediation agreement. This is obviously not only unconscionable but further evidence of Respondents' effort to obtain a windfall through its preservation of the proposed order.

The fact that Petitioner only had a 15.46% interest in the Walker No. 1 well also clearly demonstrates Petitioner's belief that in the worst of scenarios (i.e. if somehow through remand to the trial court or through subsequent litigation, a trial court judge or jury would determine that Respondents were entitled to a 15% interest in Walker No. 1, that at most Petitioner would be ordered to provide Respondents with all but .46% of Petitioner's 15.46% interest in the well.

E. The Trial Court Erred in Granting a 15% Working Interest in Certain Wells Identified in Respondents' proposed Filed Order

At the heart of the lawsuit from which this mediation arose was a disagreement over the terms of an August 2003 oral agreement, memorialized by an August 1, 2003 Joint Operating Agreement, through which the Respondents agreed to construct well sites and provide all support services on what was known as the Yukon Project in exchange for an assignment of a 15% working interest in each well for which Respondents had constructed the site. Respondents stopped doing any work for Petitioner in April of 2007. Petitioner was thus always of the understanding that any agreement reached at the mediation regarding the provision of a working interest in wells, pertained to well sites on which Respondents provided all construction and support services pursuant to the oral agreement between the parties in August of 2003, which ended in April of 2007.

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location, Petitioner thought that the offering of another 3% interest on Walker No. 1 would be a positive gesture to help with settling the case. Petitioner never anticipated, though, that the Respondents would in the proposed Final Order adopted by the trial court allow the stacking of the olive branch offer of the additional 3% on top of the 5% provided for in the mediation agreement, and the 15% working interest provided to Respondents based on Respondents clearing off of an access road that was not in any way associated with the Walker No. 1 well site.

For some reason Respondents continue to imply in their Response brief that Petitioner for whatever reason has/will stop paying the 15% interest to the Respondents on the 79 wells for which Respondents provided all construction and support services, as memorialized originally in the 2003 JOA, and in the proposed master JOA. The fact of the matter is that Petitioner has always paid Respondents the 15% working interest on all of these wells and will continue to do so pursuant the August 2003 JOA.

Respondents for the first time in the proposed Final Order now claim that pursuant to the Mediation Agreement, they are entitled to a 15% working interest on those well sites they built for Petitioner prior to August 2003 agreement, under a different payment arrangement, in which Respondents were provided something less than a 15% working interest or were paid cash, under a prior JOA, for their services. For instance, Harrah No. 1 and Harrah No. 2 were built by Respondents in 2002 under an agreement memorialized in a JOA in which Respondents were paid for a portion of the work done, and received a 10% working interest for the remaining portion of that work. Respondents claim that they are now entitled to an additional 5% interest in each well. (App. at 1234, 1274). Another example is with E Cline No. 2 in which Respondents received a 5% working interest from an agreement reached in 2002, and McGraw No. 1 in which Respondents were simply paid for their services to build the site in 2002. Both of these wells were drilled prior to the August 2003 agreement. Each of these wells were sold to Velocity Energy Corporation in 2009. (App. at 1234, 1236, 1274, 1276). As another example, H.C. Cline No. 1, Ellis No. 1, Bobo No. 1 and Meadows No. 1 are wells listed by Respondents in their proposed Final Order which were drilled by another operator (not Petitioner) and purchased by Petitioner several years prior to any involvement by Respondents on the construction of well

sites for Petitioner. These wells have been sold by Petitioner to Velocity Energy and are no longer owned by Petitioner (App. at 1236, 1276).

The provision of a 15% working interest in these wells was not contemplated by Petitioner, as the well sites for some of the above referenced wells were either constructed under a different JOA (i.e., a different contract between Petitioner and Respondents), with a different payment arrangement, or the wells were drilled by another operator and purchased by Petitioner, prior to the subject agreement, with some having been sold to another company, which means that Petitioner has no continuing control over these wells whatsoever. Despite all of the above, Respondents believe that they are entitled to 15% working interest in these wells, and amazingly, the trial court's Final Order provides a 15% working interest in each of these wells to Respondents! (See Petitioner's Brief, pgs. 23-27, for a full description of each listed well.)

Finally, Respondents assert that because they were able to produce affidavits from two individuals earlier this year which suggest that Respondents built or improved certain other well sites that they are entitled to a 15% interest on those wells. All of these wells, including the wells identified as "disputed non-paying wells," are individually described in Petitioner's Brief (pgs. 23 – 27). All involved well sites constructed by Respondents prior to the subject agreement of August 1, 2003, and all involved different methods of payment, including differing working interests provided on a well-to-well basis, with separate JOAs, for each well or involve a monetary payment to Respondents as consideration for the Respondents' construction of the well site or were well sites constructed by someone other than Respondents.

Certainly, when Petitioner agreed at the mediation to provide a 15% working interest to Respondents on those well sites constructed by Respondents it was certainly reasonable for Petitioner to believe that the agreement to provide a 15% working interest in those well sites

constructed by Respondents, meant those well sites constructed by Respondents pursuant to their August 2003 agreement from which the lawsuit arose, and that it would not involve the provision of working interests/additional working interests to Respondents for work they had done under a different contract, with a different manner of payment prior to the subject agreement being entered into, or that it would involve the provision of a working interest on wells for which the well sites were constructed by someone or the Respondents.

F. 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.

In the first instance (in what must be considered a continuing theme) Respondents initially identified their “lost business opportunities” together with a supporting affidavit in their proposed Final Order. The monetary award is for Respondent’s loss of the opportunity to rent out the service and swab rigs based on Respondent’s lack of a valid title for these pieces of equipment. Although the reasoning for the monetary award for lost business opportunities frankly is irrelevant, as the parties had a genuine disagreement over the terms of the mediation agreement, Petitioner in the weeks following the mediation, in an attempt to comply with the undisputed aspects of the Agreement, provided the Respondents with a service rig, swab rig, and ditch witch, with a replacement title for the swab rig, a bill of sale for the service rig, and all tools associated with the equipment which Petitioner had in its possession. Through counsel Respondents identified the need for a replacement title for the service rig. A replacement title was obtained and forwarded to what was provided as the appropriate address for Danny Webb. It was only at the hearing on Respondents’ Motion to Compel Enforcement of the settlement agreement on April 19, 2013, that Danny Webb stated that he had not received the replacement title yet (which was a surprise to Petitioner as the replacement title had not been returned as

undeliverable). Another replacement title was immediately obtained and provided to Respondents at the new address provided.

Respondents contend that they are entitled to damages for lost business opportunities as compensatory damages from what Respondents call a breach of contract by Petitioner and not sufficiently complying with the terms of the Mediation Agreement in timely fashion. More particularly, in the proposed Order prepared by Respondents, Respondents produce an Affidavit for the first time from a Ronald Dalrymple, in which he says that he would have paid for the use of the service rig on one occasion and a swab rig on another occasion but apparently could not without a title document available for each piece of equipment. Respondents cite *Kentucky Fried Chicken of Morgantown v. Sellaro*, 158 W.Va. 708, 716, 214 S.E.2d 823, 827-28 (1975) in support of their position. It certainly is understandable that in a breach of contract case an affidavit identifying lost business opportunities would be considered as evidence; however, the Defendant has the right and opportunity to confront Mr. Darymple and the Respondents for that matter, regarding the specifics of the allegations made in the Affidavit, as there are various issues of fact which could be disputed regarding the allegations in the Affidavit, and as such, with there being material issues of fact in dispute, the trial court should not make a unilateral decision to award a set sum of money based on an affidavit provided to the first time with the proposed Final Order.

G. The Trial Court Erred in Ordering that as Part of the Compliance with the Mediation Agreement that Petitioner Must Provide Certain Additional Tools to Respondents

This issue basically boils down to whether or not Petitioner, in providing all associated tools with the three pieces of equipment that were provided, included tools that Petitioner did not own or otherwise have in its possession when the mediation took place. Respondents suggest

that Petitioner did not say anything about the lost tools until after the mediation, which is incorrect, as Petitioner had clearly identified at the mediation that a two-inch string of tools had been lost down a hole in November, 2011. Respondents admit their knowledge of the lost tools at the mediation in their counsel's e-mail to Petitioner's counsel on March 16, 2012 (App. at 0902). Furthermore, Respondents' counsel, in the weeks following the Mediation Agreement, asked Petitioner to simply provide an affidavit identifying that the two-inch string of tools had been lost down a hole, which was immediately thereafter provided (App. at 1225, 1226). It was only after Respondents' counsel received an affidavit from a disgruntled former employee of Petitioner (Allen Arnold), which suggested that the two-inch string of tools was in Petitioner's possession as of January of 2012 (App. at 0937, 0938), that Respondents formally made the argument that Petitioner was required to provide the two-inch string of tools, whether or not Petitioner had these tools in its possession at the time of the mediation.

It should be noted that Respondents do not even address the issue of whether the "tool box," which Petitioner has had in its possession before and subsequent to its purchase of the three pieces of equipment (which were provided to Respondents as a part of the Mediation Agreement) comes within the purview of "all associated tools." As with anyone's "tool box" it contains hammers, screwdrivers, ratchets, and other tools that assist Petitioner with its general and specific needs at a work site. It, however, is not/does not contain tools that is/are specifically associated with any of the three pieces of equipment, and did not need to be provided to Respondents as a part of the Mediation Agreement.

Finally, Petitioner takes issue with Respondents' statement on Page 17 of their Response Brief that the replacement title for the service rig was never provided. This is simply incorrect. Petitioner identified at the mediation that it would have a hard time locating a title for the service

rig, but that it would make every effort to do so. However, the title could not be located and a bill of sale was provided. When that was considered not sufficient by Respondents, a replacement title was provided which was mailed to Danny Webb. It was only at the most recent hearing before the trial court that Danny Webb indicated that he had not received the replacement title and another replacement title was immediately provided at the address provided by Respondents at the hearing.

The bottom line is that the equipment was provided immediately; all the tools which Petitioner had in its possession at the time of the mediation were immediately provided; a bill of sale for all three pieces of equipment was provided along with the equipment. The certificate of title for the swab rig was signed over in a timely fashion to Respondents; while the title to the service rig was not provided for a period of months following the Mediation Agreement, as it was unable to be located, a replacement title was ultimately provided, at a monetary cost to the Petitioner, to the last known address for Danny Webb, only to be told months later at the most recent hearing before the trial court, that Danny Webb had never received it, and another replacement title was immediately then provided. Despite the fact that Petitioner has disputed various other components of the Mediation Agreement, Petitioner has made a reasonable effort to comply with this aspect of the Agreement.

H. The Trial Court Committed an Abuse of Discretion

The Respondents of course take the position that the Court carefully considered both proposed Orders as well as the evidence presented through memoranda and two hearings held regarding the Mediation Agreement, and that the Court simply decided to adopt the "Order" prepared by Petitioner. It is Petitioner's belief that there are so many red flags in this proposed Order identifying that the Order provides an exaggerated, unfair, windfall award, that the Court

obviously spent little if any time really digesting the terms of Respondents' proposed Order before the signing the same.

More particularly, the first red flag is the fact that the Respondents prepared an Order as opposed to a Findings of Fact and Conclusions of Law, which was what was requested by the Court.

Secondly, the Respondent's most exaggerated version of what "built or improved" meant surfaced in their proposed Order (i.e. "any improvement whatsoever to the area surrounding the well site") and is an over-the-top, self-serving description of what the term "built or improved" meant. Furthermore, it was an unconscionable act for the trial court to award a 15% working interest in the Walker No. 1 Well when the trial court knew, based on the memoranda provided, from Petitioner's proposed Findings of Fact and Conclusions of Law, and from the two hearings where the parties argued about the Walker No. 1 well, that there was a material issue of fact between the parties as to whether or not Respondents did any work at all on the Walker No. 1 well site, or the area surrounding that site.

Furthermore, the trial court's award of a large monetary sum to Respondents based on Respondents' lost business opportunities, was an abuse of discretion, as the trial court was aware from memoranda, and from the most recent hearing that the alleged reason for the alleged lost business opportunity was the alleged failure of Petitioner to provide a replacement title for the service rig, as the trial court knew that the replacement title had been mailed out months previously to Danny Webb's last known address, had never come back unclaimed, yet Danny Webb argued that he had never received the same.

Furthermore, the trial court was fully aware of the fact that the issue of whether or not Respondents had lost business opportunities was an issue of fact which had not been discovered

or put before the trial court for hearing at any point before the proposed Order submitted by the Petitioner.

Finally, the trial court, despite having been advised at the two hearings and through memoranda that there were no more than seven wells at issue, signed an Order permitting an award of 15% interest in dozens of additional wells, when a simple review of the memoranda previously submitted would have easily provided a red flag to the trial court that Respondents were trying to obtain a windfall on this issue through their proposed Order.

Petitioner thus asks the Court that should it not agree to set aside the Mediation Agreement, to at least rule that the trial court abused its discretion in signing the Order as prepared by Respondents, and remand the case back to the Circuit Court for re-hearing on Respondents' Motion to Compel Enforcement of the Mediation Agreement.

#### IV. CONCLUSION

For all the reasons stated above, Petitioner respectfully requests of the Court that it set aside the Mediation Agreement. Alternatively, should the Court not set aside the Mediation Agreement, that the Court remand the case back to the Circuit Court for re-hearing on the Motion to Set Aside the Mediation Agreement.

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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.

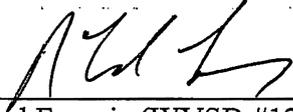
**CERTIFICATE OF SERVICE**

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

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