

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Clifton G. Valentine,	:	Case No.: 14-0246
	:	
Plaintiff Below, Petitioner,	:	
	:	
v.	:	
	:	
Sugar Rock, Inc., et al.,	:	
	:	
Defendants Below, Respondents.	:	

BRIEF OF PETITIONER

James S. Huggins (#1815)
 Daniel P. Corcoran (#10959)
THEISENBROCK,
a legal professional association
 424 Second Street
 Marietta, Ohio 45750
 Telephone: (740) 373-5455
 Telecopier: (740) 373-4409
huggins@theisenbrock.com
corcoran@theisenbrock.com
Counsel for Petitioner

W. Henry Lawrence (#2156)
 William J. O'Brien (#10549)
 Amy Marie Smith (#6454)
Steptoe & Johnson, PLLC
 400 White Oaks Blvd
 Bridgeport, WV 26330-4500
 Telephone: (304) 933-8000
hank.lawrence@steptoe-johnson.com
amy.smith@steptoe-johnson.com
william.obrien@steptoe-johnson.com
Counsel for Respondents

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CERTIFIED QUESTION

Whether the proponent of his working interest in a mineral lease¹ may prove his entitlement thereto and enforce his rights thereunder by demonstrating his inclusion within a mining partnership, or partnership in mining, without resort to proof that the lease interest has been conveyed to him by deed or will or otherwise in strict conformance with the Statute of Frauds.

STANDARD OF REVIEW

When this Court is called upon to resolve a certified question, it employs a plenary review. *King Coal Chevrolet Co. v. GM, LLC*, Case No. 13-0675, 2014 W.Va. LEXIS 453 (Apr. 24, 2014). “A *de novo* standard is applied by this Court in addressing the legal issues presented by a certified question from a federal district or appellate Court.” *Id.* (quoting *Light v. Allstate Ins. Co.*, 203 W.Va. 27 506 S.E. 2d 64, syllabus pt. 1 (1998)).

STATEMENT OF CASE

A. Procedural History

On November 8, 2010, Mr. Clifton G. Valentine (“Mr. Valentine”) filed this action (“Federal Action”) against Defendants in the United States District Court for

¹Although Mr. Valentine alleged that he owned an interest in the Leases, this Court need not determine whether Mr. Valentine owns an interest in the Leases, for purposes of this action, because his claim for an accounting is exclusively concerned with monies due for production from the Wells. “Leases” refers to the leases identified in paragraph 11 of Mr. Valentine’s Complaint. 4th Cir. Appx. pp. 14-16. In the record, the Leases are sometimes referred to as the “Ritchie County Base Leases.” “Wells” refers to the wells identified in Paragraph 11 of Mr. Valentine’s Complaint. 4th Cir. Appx. pp. 14-16. In the record, the Wells are sometimes referred to as the “Ritchie County Wells.”

the Northern District of West Virginia alleging that he is the owner of working interests in and to the Partnerships² that own the Wells. 4th Cir. Appx. pp. 14-16. Mr. Valentine demanded that Defendants account to him for all proceeds and expenses associated with production from the Wells for the last 10 years, to produce the Internal Revenue Service Form 1065s (U.S. Return of Partnership Income) and Schedule K-1s (Partner's Share of Income, Deductions, Credits, etc.) for the Partnerships for the last 10 years, to produce all bank account statements for Sugar Rock, Inc. (Sugar Rock), for the last 10 years, to produce copies of all checks sent to all working interest owners and royalty owners for the Wells for the last 10 years, to produce production records for the Wells for the last 10 years, and that the court enter judgment against Defendants, jointly and severally, for compensatory damages or for the amount Mr. Valentine is owed for net production for his share of the working interest in the Wells, plus interest and costs, plus punitive damages and attorney's fees arising from Defendants' breach of their fiduciary duties. 4th Cir. Appx. pp. 18-19.

On January 13, 2011, Defendants filed an Answer to Mr. Valentine's Complaint. 4th Cir. Appx. pp. 21-25. Defendants also filed a Counterclaim against Mr. Valentine alleging that he was liable to Sugar Rock for his portion of the working interest expenses for the Wells totaling \$14,191.00.³ 4th Cir. Appx. pp. 26-29. Mr. Valentine

²"Partnerships" refers to the mining partnerships identified in paragraph 11 of Mr. Valentine's Complaint. 4th Cir. Appx. pp. 14-16. In the record, the Partnerships are sometimes referred to as the "Ritchie County Mining Partnerships."

³The documents produced by Defendants purport to show that the Wells have been operating at a loss since 1999. 4th Cir. Appx. p. 737. Whether the Wells were actually operating at a loss is disputed.

filed a Reply to Defendants' Counterclaim on February 3, 2011. 4th Cir. Appx. pp. 30-32.

Prior to filing this action, Defendants had refused to provide Mr. Valentine with any of the information sought in the Complaint. Defendants continued to refuse to disclose any information to Mr. Valentine until they were compelled by court order to do so. See 4th Cir. Appx. pp. 228-229. From this information, Mr. Valentine finally learned the names and addresses of the other partners in the Partnerships. Mr. Valentine also discovered in October, through the deposition of Defendant, Mr. Gerald Hall ("Mr. Hall"), the President of Sugar Rock, that none of the other partners had ever received any distributions during Sugar Rock's operation of the Wells. 4th Cir. Appx. p. 559.

Shortly after the conclusion of the depositions, on November 14, 2011, Mr. Valentine initiated a new action in the Circuit Court of Ritchie County, West Virginia ("Circuit Court"), Case No. 11-C-61 ("2011 Ritchie County Action"). 4th Cir. Appx. p. 93. The 2011 Ritchie County Action sought additional relief on behalf of Mr. Valentine and on behalf of the other non-diverse minority partners. 4th Cir. Appx. pp. 107-120.

Sugar Rock wears two hats in these lawsuits: it is the majority managing partner of each of the Partnerships and the operator of each of the Wells. 4th Cir. Appx. p. 16. Mr. Valentine alleged in the 2011 Ritchie County Action that Defendants have schemed to usurp partnership property by depositing all the partnership income in Sugar Rock's account and by invoicing the Partnerships for unauthorized, unnecessary, and unreasonable expenses. 4th Cir. Appx. p. 114. This self-dealing constitutes a breach of Sugar Rock's fiduciary duties of loyalty and ultimate good faith to the other members of the Partnerships. Mr. Valentine also alleged in the 2011 Ritchie County Action that since

none of the Partnerships have earned a profit for or made a distribution to any of the minority partners in more than 10 years, the Partnerships have failed of their essential purpose and that they should be wound up and dissolved.⁴ 4th Cir. Appx. pp. 117-118.

On November 15, 2011, Defendants filed a Motion for Summary Judgment in the Federal Action. 4th Cir. Appx. pp. 121-199. Specifically, Defendants claimed that Mr. Valentine had provided no documentation which would verify his claim of ownership under the statute of frauds, W.Va. Code §36-1-1. 4th Cir. Appx. p. 126. Without such documentation evidencing a conveyance to him, Defendants argued that Mr. Valentine's claim for an accounting must fail as a matter of law. 4th Cir. Appx. p. 127.

On December 9, 2011, Mr. Valentine filed his Memorandum in Opposition to Defendants' Motion for Summary Judgment. 4th Cir. Appx. pp. 303-616. Mr. Valentine argued that Defendants could not assert the statute of frauds against a fellow partner under West Virginia law (4th Cir. Appx. pp. 307-308), that the undisputed evidence showed Mr. Valentine was a partner in the Partnerships (4th Cir. Appx. pp. 308-310), that the Wells were partnership property under West Virginia law (4th Cir. Appx. pp. 310-311), that Mr. Valentine had an interest in the Wells by virtue of being a partner in each of the Partnerships (4th Cir. Appx. pp. 311-313), that even if the statute of frauds applied, Defendants were estopped from asserting it by over 50 years of conduct between the parties and by their own prior judicial admissions (4th Cir. Appx. pp. 313-315), and

⁴Under West Virginia law, a partnership is an association of two or more persons to carry on as co-owners a business for "profit." W. Va. Code §47B-1-1(7).

that Defendants were attempting to use the statute of frauds to perpetrate fraud and forfeit Mr. Valentine's interest rather than to prevent fraud. 4th Cir. Appx. p. 315.

On March 3, 2012, the trial court announced at the Final Pretrial that it would grant Defendants' Motion for Summary Judgment. 4th Cir. Appx. pp. 696, 735. Construing all the facts in a light most favorable to Mr. Valentine, the trial court held that no reasonable person could find that Mr. Valentine was a partner in the Partnerships and that Defendants were entitled to a dismissal of Mr. Valentine's Complaint as a matter of law. 4th Cir. Appx. pp. 783-784. The trial court issued its written memorandum opinion and entered final judgment on September 18, 2012. 4th Cir. Appx. pp. 763-784. On October 12, 2012, Mr. Valentine timely filed a Notice of Appeal. 4th Cir. Appx. pp. 786-787.

Shortly after the decision by the trial court, Defendants filed a Motion for Judgment on the Pleadings in the 2011 Ritchie County Action, based on the trial court's ruling.⁵ Some of the plaintiffs in the 2011 Ritchie County Action, including the heirs of Cecil Townsend (Kenneth Townsend, Clyde Townsend, and Anna Lee Townsend Wells) were similarly situated to Mr. Valentine; that is, they could not produce a written assignment of an interest in the Wells. Those plaintiffs, however, were able to produce Cecil Townsend's tax records for the Partnerships from the 1990s, 1980s, 1970s, and 1960s. Supp. Appx. pp. 361-374.

⁵Following the trial court's September 18, 2012 ruling in the Federal Action, Mr. Valentine was dropped from the 2011 Ritchie County Action so that the other parties could proceed on their claims. If the trial court's decision is reversed and Mr. Valentine's partnership interest is recognized, Mr. Valentine will rejoin his fellow minority partners in the 2011 Ritchie County Action.

Another plaintiff in the 2011 Ritchie County Action, Keith White, executor of the estate of Bertie C. Cox, produced a copy of a written assignment in the Keith Oil Company that had never been recorded. Supp. Appx. p. 375. The other plaintiffs were able to document the provenance of their interests by recorded assignments and/or wills. In their Motion for Judgment on the Pleadings, Defendants argued that all the claims of all the minority partners in the 2011 Ritchie County Action were barred under principles of *res judicata* and collateral estoppel, even though none of them were parties to the Federal Action and none of the claims asserted in the 2011 Ritchie County Action (except the claim for an accounting) had ever before been pled.

On July 18, 2013, the Circuit Court issued an Order denying Defendants' Motion for Judgment on the Pleadings and granting the plaintiffs' Motion for Summary Judgment by declaring the existence of each of their interests in the Partnerships. Supp. Appx. 25-47. Defendants have not attempted to take an interlocutory appeal from the July 18, 2013 Order by the Circuit Court.

On March 12, 2014, the United States Court of Appeals for the Fourth Circuit issued its decision in Mr. Valentine's appeal in the Federal Action. The Fourth Circuit requested that this Court exercise its discretion to answer the following certified question of law:

Whether the proponent of his working interest in a mineral lease may prove his entitlement thereto and enforce his rights thereunder by demonstrating his inclusion within a mining partnership, or partnership in mining, without resort to proof that the lease interest has been conveyed to him by deed or will or otherwise in strict conformance with the Statute of Frauds.

On April 22, 2014, this Court accepted the certified question of law.

B. Statement of Facts

In the late 1950s, Mr. Valentine paid F.A. Deem, the original 100% owner of each of the Leases, his partnership contribution in the amount of approximately \$300.00 - \$350.00 for each 1/32 that he acquired in the Partnerships. 4th Cir. Appx. p. 606. F.A. Deem used these contributions, as well as contributions from other partners, to drill the Wells. The cost to drill and equip each well was about \$12,000.00 to \$13,000.00. 4th Cir. Appx. p. 603.

Mr. Valentine received his proportionate share of the net profits from the Partnerships from the late 1950s to 1999, thus sharing in the profits and the losses of the Partnerships during this period. 4th Cir. Appx. p. 610. When F.A. Deem operated the Wells, Mr. Valentine received statements showing the expenses and how much oil was sold, accompanied by a check for his net share. Supp. Appx. pp. 142-143. Mr. Valentine estimated that he received about \$100,000.00 from the Wells as a result of his investment. 4th Cir. Appx. pp. 600-601.

W. A. Deem took over operation of the Wells from his father, F.A. Deem, in 1974. 4th Cir. Appx. p. 612. Mr. Valentine continued to receive statements regarding expenses and sales about every ninety (90) days. Supp. Appx. pp. 142-143. From 1974 to 1999, W.A. Deem collected the proceeds from the sale of oil and gas and gave them to his bookkeeper. 4th Cir. Appx. p. 612. The bookkeeper issued checks to the partners based on their percentage of ownership interest as it appeared on the "stockholder list." 4th Cir. Appx. pp. 612-613. The information on the stockholder list came from W.A.

Deem's father, F.A. Deem. 4th Cir. Appx. p. 614. In 1986, Mr. Valentine received a letter containing the stockholder list from W.A. Deem's bookkeeper asking him to confirm his working interest in each of the Partnerships. 4th Cir. Appx. p. 320. W.A. Deem testified that there was no reason to believe that the records kept by his bookkeeper during this time were inaccurate. 4th Cir. Appx. p. 614.

When W.A. Deem sold all his interest to Sugar Rock in 1999, all the Wells were producing except the Iams Oil Well. Supp. Appx. p. 159. After the sale to Sugar Rock, however, Mr. Valentine stopped receiving regular statements showing oil and gas sales and expenses, despite his request for same. 4th Cir. Appx. p. 607. Mr. Valentine continued to receive IRS K-1s from Sugar Rock reflecting his interest in each of the Partnerships.⁶ 4th Cir. Appx. pp. 142-185. These K-1s were prepared by Sugar Rock's own accountant based on "historic accounting records" from W.A. Deem. 4th Cir. Appx. p. 138. By law, the tax returns to which the K-1s were attached must be signed and submitted to the IRS under penalty of perjury. Mr. Hall signed the returns. The tax returns accurately reflected Mr. Valentine's percentage ownership interest in each of the Partnerships; they were consistent with the "stockholder list" kept by W.A. Deem in the 1980s.

⁶Mr. Hall testified that at the time Sugar Rock purchased its interest in the Wells, Partnerships, and Leases from W.A. Deem in 1999, he knew he was receiving less than 100% of the total interest in the assets. 4th Cir. Appx. pp. 545-546. Sugar Rock's 1999 Assignment states the exact fractional interest in each Partnership that was being conveyed: 8.25/32nds plus 2.25/32nds in the Cutright Gas Company, 12.75/32nds plus 2.75/32nds in the Iams Gas Company, 7.5/32nds plus 2.5/32nds in the Iams Oil Company, and 9.5/32nds plus 1.5/32nds in the Keith Oil Company. Supp. Appx. pp. 305-313.

After 1999, Mr. Valentine also stopped receiving any payments for his proportionate share of the net profits from the Partnerships.⁷ According to Defendants, this is because all the Partnerships have operated at a loss for the last 15 years (and counting). This long history of losses is reflected in the tax returns and accounting statements for each of the Partnerships. 4th Cir. Appx. pp. 412-542; Supp. Appx. pp. 377-392. Of all the Partnerships, the Keith Oil Company has suffered the most serious losses. In April 1999, when Sugar Rock acquired its ownership interest in and the operating rights for the Keith Oil Company, it operated the Keith Oil No. 1 Well for \$250.00 per month. Supp. Appx. p. 378. For the remaining nine months of 1999, Sugar Rock charged this operating fee, totaling \$2,250.00, and additionally charged \$1,157.98 for “repairs and maintenance.” Supp. Appx. 377. Unfortunately, despite Sugar Rock’s efforts, the Keith Oil No. 1 Well produced \$0.00 in gross sales. Supp. Appx. p. 389 .

Sugar Rock raised its monthly operating fee to \$450.00 beginning January 1, 2000. 4th Cir. Appx. p. 458. Sugar Rock did not ask permission from Mr. Valentine or the other minority partners to do this; in fact, it did not even notify them. 4th Cir. Appx. 589-593. Over the course of the year, Sugar Rock’s total operating fee was \$5,400.00, and yet, the Keith Oil No. 1 Well produced exactly \$0.00 in gross sales. 4th Cir. Appx. p. 457. In 2001, 2002, and 2003, the results were almost identical; \$5,400.00 was charged by Sugar Rock each year in operating fees for a well that yielded \$0.00 in gross sales. 4th

⁷The disappearance of all profit from the Partnerships was immediate and dramatic. For example, in 1998 a 1/32 interest on the Cutright Gas Company earned \$135.00 in net profit (Supp. Appx. p. 359.), so the total profit on the entire working interest would have been \$4,320.00. The next year, in 1999, while under the management of Sugar Rock, the Cutright Gas Company suffered a net loss of \$27,860.00. Supp. Appx. pp. 383.

Cir. Appx. pp. 462-476.

In 2004, Sugar Rock again increased its monthly operating fee to \$550.00 per month, totaling \$6,600.00 per year.⁸ 4th Cir. Appx. p. 478. The year 2004 proved to be the peak year for production from the Keith Oil No. 1 Well, as it managed to produce \$692.00 in gross sales. 4th Cir. Appx. p. 477. Unfortunately, the Keith Oil Company was still left with a net operating loss that year of \$5,989.00, after payment of all of Sugar Rock's expenses. 4th Cir. Appx. p. 477.

In 2005, production from the Keith Oil No. 1 Well did not continue, as there was \$0.00 reported in gross sales. 4th Cir. Appx. p. 482. Still, Sugar Rock charged \$550.00 per month (\$6,600.00 per year) in operating fees. 4th Cir. Appx. p. 484. The results were virtually the same in 2006 and 2007. 4th Cir. Appx. pp. 486-492.

In 2008, rather than further increasing its monthly operating fee, Sugar Rock charged the Keith Oil Company an additional \$22,003.00 for "repairs and maintenance." 4th Cir. Appx. p. 493. Unfortunately, despite this tremendous alleged investment, production from the Keith Oil No. 1 Well did not improve. Gross sales reported for 2008 remained at \$0.00. 4th Cir. Appx. p. 493. Sugar Rock did not endeavor any further repairs or maintenance to the Keith Oil No. 1 Well in 2009, but it did continue to charge \$550.00 per month (\$6,600.00 per year) to operate the Well, which yielded to the Keith Oil Company \$0.00 in gross sales. 4th Cir. Appx. pp. 496-499. The result was virtually the same in 2010. Supp. Appx. p. 391.

⁸Again, this was without permission from or notice to Mr. Valentine or any of the other minority partners.

To summarize, from 1999 through 2010, Sugar Rock charged the Keith Oil Company \$94,606.27 to operate the Keith Oil No. 1 Well. During that same period of time, the Well purportedly generated only \$692.00 in gross production revenue. That amounts to a net operating loss over eleven years of \$93,914.27, an incredible negative 99% return on investment. Mr. Valentine's share of net loss is just a part of what Defendants are attempting to recover from him on their Counterclaim.

Although the other three Partnerships produced and sold more oil and gas than the Keith Oil Company, none have earned a profit over the last 15 years, according to Sugar Rock's own records.⁹ In fact, Sugar Rock filed a Complaint against Mr. Valentine in 2001 to recover his proportionate share of his alleged working interest expenses in the Ritchie County Circuit Court, Civil Action No. 01-C-44 ("2001 Complaint").¹⁰ 4th Cir. Appx. pp. 403-411. Sugar Rock, in the 2001 Complaint, alleged that Mr. Valentine was the "owner of an undivided . . . working interest" in and to each of the Partnership leaseholds and "the oil and gas wells thereon." 4th Cir. Appx. pp. 406-410. Sugar Rock alleged that Mr. Valentine had an ownership interest in each of the

⁹From 1999 to 2010, Sugar Rock allegedly spent \$983,820.55 on all four Partnerships against \$774,991.66 in total gross receipts, for a total loss of \$208,828.89. 4th Cir. Appx. pp. 412-542; Supp. Appx. pp. 377-392. For each of the Partnerships, the total losses are as follows: \$27,429.39 for the Cutright Gas Company, \$93,914.27 for the Keith Oil Company, \$51,753.39 for the Iams Oil Company, and \$35,731.84 for the Iams Gas Company. Despite this, Sugar Rock has argued in the 2011 Ritchie County Action that the Partnerships should not be wound up and dissolved because they still have potential for "prosperity and success." Sugar Rock has steadfastly refused to dissolve the Partnerships, even though there is not a single minority partner that would like for them to continue.

¹⁰In the record, the 2001 Complaint is sometimes referred to as the "2001 Ritchie County Action."

Wells and sought recovery for alleged expenses.¹¹ Mr. Valentine admitted the existence of his ownership interest but denied liability for the amount that Sugar Rock claimed.

Supp. Appx. pp. 351-356.

Construing all the facts in a light most favorable to Mr. Valentine, and despite the undisputed evidence of Mr. Valentine's investment and participation in the Partnerships for over 50 years, despite the documentation prepared over those years reflecting and acknowledging his ownership interest, including years of K-1s attached to the partnership tax returns, despite Sugar Rock's judicial admissions in the 2001 Complaint, despite the contradictory allegations in Defendants' own Counterclaim filed in this action, and despite the fact that **there was no evidence actually presented by Defendants in this action (such as, an affidavit or deposition testimony) suggesting that Mr. Valentine was not a partner**, the trial court held, as a matter of law, that no reasonable person could find that Mr. Valentine was a partner in the Partnerships. 4th Cir. Appx. pp. 783-784.

SUMMARY OF ARGUMENT

Under West Virginia state law, a partner in a mining partnership may not assert the statute of frauds to deny a co-partner's ownership interest in a mining partnership. In equity, and for partnership purposes, partnership realty is treated as personalty. The accounting that Mr. Valentine sought in this action is equitable in nature.

¹¹The 2001 Complaint was subsequently dismissed for Sugar Rock's failure to prosecute. Supp. Appx. pp. 349-350. Nevertheless, Sugar Rock continued to prepare yearly invoices from the Partnerships to Mr. Valentine for his alleged share of the expenses. Supp. Appx. pp. 213-236.

The property of the Partnerships, therefore, need not be titled in Mr. Valentine's name in order for him to maintain this action. The statute of frauds has no application.

All the evidence presented by Mr. Valentine supports the existence of his partnership interest, including the 50 years of sharing in the profits and the losses from the Wells, the documentation prepared by Defendants and their predecessors reflecting his ownership interest, and Sugar Rock's prior judicial admissions. Even assuming the statute of frauds applies, part performance may satisfy the statute of frauds, in lieu of a written instrument.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

None of the parties have waived oral argument. This appeal is not frivolous. The dispositive issue in this case has not been authoritatively decided, to the satisfaction of the Fourth Circuit. Although the facts and legal arguments are well presented in the briefs and record on appeal, the decisional process would be significantly aided by oral argument. Oral argument is therefore necessary under Rule of Appellate Procedure 18(a). Mr. Valentine agrees with this Court's April 22, 2014 Order that the matter should be scheduled for oral argument under Rule of Appellate Procedure 20. Mr. Valentine believes that the minimum time for argument set forth in Rule of Appellate Procedure 20 will be sufficient.

ARGUMENT

A. The nature of and the law governing West Virginia mining partnerships.

The trial court began its analysis by noting that:

Critically, in both the briefing and at oral argument, the parties have

agreed that the four partnerships in question in this case. . . are properly classified as “mining partnerships” under the common law of West Virginia.¹² 4th Cir. Appx. p. 776.

Since the trial court announced its decision in the Federal Action, Defendants have attempted to deny, in the 2011 Ritchie County Action, that this case involves mining partnerships.¹³

Notwithstanding Defendants’ change of position, the trial court clearly based its decision on what it believed to be the law governing mining partnerships. A mining partnership is governed by all the rules applicable to ordinary partnerships, except such as flow from the fundamental differences in the two associations. See *Manufacturers’ Light & Heat Co. v. Tenant*, 104 W. Va. 221, 225, 139 S.E. 706, 707 (1927) (quoting Mills and Willingham on Oil and Gas, Sec. 185). Under West Virginia law, to the extent a partnership agreement does not otherwise provide, Chapter 47B of the West Virginia Code, titled the Uniform Partnership Act, governs relations among partners and between the partners and a partnership. Chapter 47B of the West Virginia Code. In

¹²In the Federal Action, Defendants said that the existence of mining partnerships was “not an issue.” 4th Cir. Appx. p. 622. Sugar Rock identified the Partnerships as “mining partnerships” in the 2001 Complaint. 4th Cir. Appx. pp. 403-411. From 2000 through 2004, Sugar Rock received ten separate Assignments and Bills of Sale (“Bills of Sale”) from other, now former, minority partners, conveying their interests in the Wells, Leases, and “oil and gas mining partnerships.” 4th Cir. Appx. pp. 366-402. Despite the fact that these Bills of Sale were prepared by Sugar Rock, Mr. Hall could not seem to recall anything about them, which may explain why he failed to produce them in response to Mr. Valentine’s Request for Documents. 4th Cir. Appx. pp. 561-588.

¹³Defendants’ denial appears, among other places, in their Answer to the Second Amended Complaint in the Ritchie County Action, which was filed subsequent to the trial court’s final decision in the Federal Action. Supp. Appx. pp. 52, 67. The United States Court of Appeals for the Fourth Court granted Mr. Valentine’s motion to supplement the record with this document in its March 12, 2014 Order.

other words, the West Virginia Revised Uniform Partnership Act (“RUPA”) sets forth the law applicable to “ordinary partnerships.”

The trial court held that RUPA provides an appropriate general framework for analyzing mining partnerships, except insofar as the elements and structures of a mining partnership fundamentally differ from ordinary partnerships. 4th Cir. Appx. p. 780. As noted by the trial court, there is not a single reported West Virginia decision that has expressly refused to apply the 1953 Uniform Partnership Act, W. Va. Code §47-8A-1 *et seq.* (repealed), or the 1995 RUPA, W. Va. Code §47B-1-1, *et seq.*, to mining partnerships.¹⁴ 4th Cir. Appx. p. 780.

Under West Virginia law, “‘Partnership’ means an association of two or more persons to carry on as co owners a business for profit.” See W. Va. Code §47B-1-1(7). Generally, an association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership. W. Va. Code §47B-2-2(a). With some exceptions, a person who receives a share of the profits of a business is presumed to be a partner in the business. See W. Va. Code §47B-2-2(c)(3). None of these provisions conflict with the nature of mining partnerships.

Under West Virginia law, regardless of how property may be titled, partnership property does not belong to the partners individually. W. Va. Code §47B-2-3 states that “property acquired by a partnership is property of the partnership and not of the

¹⁴Other jurisdictions have expressly held that the Uniform Partnership Act applies to mining partnerships. See *Hall v. TWS, Inc.*, 113 P.3d 1207, 1211 (Alaska 2005) (“mining partnerships are governed by the Uniform Partnership Act (UPA).”).

partners individually.” W. Va. Code §47B-2-4 explains when property is considered “partnership property.” Importantly, property need not be acquired in the name of the partnership in order to be partnership property.

Property is partnership property if acquired in the name of one or more partners with an indication in the instrument transferring title to the property of the person’s capacity as a partner or of the existence of a partnership. W.Va. Code §47B-2-4(a)(2) (emphasis added). The instrument transferring title need not indicate the name of the partnership. Property is presumed to be partnership property if purchased with partnership assets. W.Va. Code §47B-2-4(c). None of these provisions conflict with the nature of mining partnerships. In fact, this Court has previously held that the equipment for the production from a well and the appliances purchased and provided for that purpose are property of the mining partnership. See *Greenlee v. Steelsmith*, 64 W. Va. 353, 362, 62 S.E. 459, 462 (1908).

Here, the evidence is clear and undisputed that the parties who contributed money to drilling the Wells in 1958 and 1959 intended to create “mining partnerships” and that the Wells and Leases would be partnership assets. Mr. Valentine’s ownership interest in the Wells is “indirect,” because the Wells are property of the Partnerships under West Virginia law. 4th Cir. Appx. p. 310.

Mr. Valentine presented numerous assignments of record to other partners from 1958 and 1959 (“Assignments”) transferring an interest in the Leases. 4th Cir. Appx. pp. 322-364. As expressly stated therein, each partner received, in exchange for his contribution, a fractional “working interest in and to a certain oil and gas lease and the

leasehold estates created thereby.” The consideration paid by each partner also covered “the expense of drilling” a well and “plugging the same if dry.” Each partner agreed to “bear his proportionate share of the expenses of equipping and operating said well, including casing, and also his proportionate share of all rentals” after the first well was completed and “his share of all expenses hereafter incurred in developing and operating said leases.” The partners further agreed on and specifically set forth in the Assignments the name of each “mining partnership.” 4th Cir. Appx. pp. 322-364.

According to the plain and ordinary language of the Assignments, the Wells and the Leases became partnership property upon the formation of the Partnerships. Consistent with W. Va. Code §47B-2-4(a)(2), the Assignments to the partners clearly indicate the existence of the Partnerships and specifically identify each one by name. Thus, every partner, including Sugar Rock, has an “indirect” ownership interest in the partnership property by virtue of his or her status as a partner. Under West Virginia law, “direct” ownership of the Wells is in the Partnerships, not in the partners individually.

There are some differences between mining partnerships and ordinary partnerships. The primary distinguishing feature of a mining partnership is the lack of the principle called *delectus personarum*. In an ordinary partnership, it is only by the unanimous consent of all the persons concerned that they become partners. *Blackmarr v. Williamson*, 57 W. Va. 249, 253, 50 S.E. 254, 255 (1905) (quoting 22 Am. & En. Enc. L. (2d Ed.) 15). A third person cannot be introduced into the concern as a partner without or against the consent of a single member. *Id.* This rule in no sense applies to mining partnerships. *Id.* One of the partners in a mining partnership may convey his interest in

the mine and business without dissolving the partnership. *Id.* (quoting *Duryea v. Burt*, 28 Cal. 569 (1865)). Also, unlike ordinary partnerships, the death of a mining partner will not operate as a dissolution of the partnership. *Id.*

Although mining partnerships are unique in that they lack *delectus personarum*, they are not unique from other ordinary partnerships that own real estate. The trial court discussed the “ownership” element of mining partnerships at great length, as if it were a unique feature. It repeatedly quoted from *Drake v. O’Brien*, 99 W.Va. 582, 592, 130 S.E. 276, 280 (1925), that “[o]wnership of shares and interests in the mine is an essential element of a mining partnership.” 4th Cir. Appx. pp. 780,783. Mr. Valentine does not disagree. Under West Virginia law, “ownership” is required to form any type of partnership. Thus, the “ownership” element of mining partnerships is not unique to mining partnerships. Rather, it is a requirement of all partnerships. See W. Va. Code §47B-2-2(a); W. Va. Code §47B-1-1(7).

The ownership element of mining partnerships is not satisfied, for example, when someone under contract with the owner of a mine “works a mine for a share in the profits or proceeds.” *Blackmarr v. Williamson*, 57 W. Va. 249, 252-54, 50 S.E. 254, 256 (1905) (quoting *Duryea v. Burt*, 28 Cal. 569 (1865)). Mere profit sharing will not create a mining partnership. *Id.* This is because the person sharing in the profits has no ownership interest in the mine. In the same way, an employee who is paid wages by sharing in the profits of an ordinary partnership business is not a partner in the business because he lacks any ownership interest. Such a situation is expressly referenced as one that will not give rise to an ordinary partnership under W. Va. Code

§47B-2-2(c)(3)(ii). The employee would not be a “co-owner” as required under W. Va. Code §47B-2-2(a) and W. Va. Code §47B-1-1(7).

Mr. Valentine wholeheartedly agrees with the three essential elements of mining partnerships described in *Childers v. Neely*, 47 W. Va. 70, 73, 34 S.E. 828, 829 (1899) including 1) co-ownership of the “mines or oil leases or lands,” 2) joint operation of the property interest, and 3) sharing of the “profit and loss.” Mr. Valentine strongly disagrees with the fourth element of mining partnership, advanced by Defendants, that, by deed or will, the partnership property must be titled in each of the partners’ individual names. This fourth element does not appear in any West Virginia case.

According to Defendants, there are no exceptions “under any circumstances” (Defendants’ Appellate Brief, p. 34), not even in equity, to this alleged fourth element; it cannot be satisfied by part performance, judicial admissions, estoppel, or other written memoranda. Defendants maintain that they have no duty, not even in equity, to account to anyone for their operations, absent strict compliance with this fourth element. Defendants then argue that the failure to recognize and strictly enforce this invented fourth element is tantamount to “eliminat[ing] . . . an essential element of the mining partnership.” Defendants’ Appellate Brief, p. 31. In fact, Defendants are attempting to rewrite well-established law regarding the essential elements of mining partnerships by imposing a new requirement for how the partnership property must be titled.

Many of the Bills of Sale that Sugar Rock acquired in 2000 were from partners that, like Mr. Valentine, lacked a recorded instrument of title in their name. 4th

Cir. Appx. pp. 366-402. In the 2011 Ritchie County Action, Sugar Rock has failed to produce, in response to specific discovery requests, any recorded documents evidencing the partnership interests it acquired from Ruby Payton (4th Cir. Appx. pp. 366-369), William Sherman, as attorney in fact for Donald J. Sherman (4th Cir. Appx. pp. 370-372), Charles E. and Ina D. Reed (4th Cir. Appx. pp. 373-375), Hilda H. Sweeney (4th Cir. Appx. pp. 380-382), Harold Fishman, as executor for Sophie P. Stier (4th Cir. Appx. pp. 389-392), or Sybil B. Cook (4th Cir. Appx. pp. 396-398).¹⁵ Thus, for a substantial portion of Sugar Rock's own interest in each of the Partnerships, it cannot even satisfy this alleged fourth element.

B. The statute of frauds has no application between partners in the conduct of a partnership business.

Defendants have argued, and the trial court held, that since mining partners must be “co-owners” of the partnership property, and that since a mine or well is considered real property under West Virginia law, for purposes of the statute of frauds, a

¹⁵Sugar Rock has been unable to provide ANY detail about the unrecorded partnership interests that it acquired in 2000. Mr. Hall could not recall at his deposition who was Harold Fishman, the circumstances of the June 28, 2000 transaction, who approached whom, or what other consideration was paid for the assignment. 4th Cir. Appx. p. 570. Mr. Hall could not recall anything about the May 19, 2000 assignment Sugar Rock received from Sybil B. Cook, how he came to deal with Ms. Cook, who initiated the discussions, or what other consideration was paid. 4th Cir. Appx. p. 574. Mr. Hall could not recall anything about Donald or William Sherman, who initiated the contact, or what other consideration was paid for the May 9, 2000 assignment to Sugar Rock. 4th Cir. Appx. p. 579. Mr. Hall could not recall who initiated the conversation with Charles E. Reed and Ina D. Reed related to the June 8, 2000 assignment to Sugar Rock or what other consideration was paid for it. 4th Cir. Appx. p. 584-585. Mr. Hall could not recall the circumstances of the May 20, 2000 assignment to Sugar Rock from Hilda Sweeney, who initiated the contact, or how he even would have gotten her name; Mr. Hall simply could not recall her. 4th Cir. Appx. p. 587-588. Mr. Hall could not explain why these assignments, which were prepared by Sugar Rock, were not produced in discovery, but he testified that they were all “legitimate” and that he signed every one of them. 4th Cir. Appx. p. 588.

minority mining partner is not entitled to any legal or equitable relief from a managing mining partner, such as an accounting, unless all the partnership's assets are titled in his individual name. If accepted, it would abrogate, by judicial fiat, the will of the West Virginia Legislature, as expressed in RUPA, and the prior rulings by this Court governing partnership property, fiduciary duties, judicial admissions, the statute of frauds, partnerships, mining or otherwise, and other principles of equity, such as, estoppel and part performance.

The central issue presented by this case is not whether a mining partner must have an ownership interest in the partnership property. Mr. Valentine has clearly alleged and argued that he has such an interest. The real issue is whether one person, who stands in a fiduciary relationship to another, can assert the statute of frauds to deny that an ownership interest/fiduciary relationship exists 50 years after the fact?! In other words, for purposes of Mr. Valentine's claim against a fellow partner, must the Partnership assets be titled in his individual name by way of a formal written conveyance?

Importantly, in the absence of the statute of frauds, there is no requirement that an ownership interest in real property be evidenced by a writing under West Virginia law. It is not a requirement at common law. Thus, this Court must determine whether the statute of frauds can be asserted by one partner against another to deny a claim seeking equitable relief. The trial court impliedly held that it could be. As this court has expressly held, however, in a case which is squarely on point, the statute of frauds has "no application" between partners in a mining partnership. See *Lantz v. Tumlin*, 74 W. Va. 196, 81 S.E. 820 (1914).

In *Lantz*, after entering into a partnership agreement, *Lantz* purchased partnership real estate, consisting of oil leases and other personal property thereon, in his name only, as *Tumlin* preferred not to be known in the purchase. *Id.* at 197. *Lantz* later sought a bill winding up and settling the mining partnership with *Tumlin*. *Id.* *Tumlin* demurred to the bill, denying the partnership, averring no contract in writing binding him, and pleading the statute of frauds in defense. *Id.*

Given the evidence of their prior business conduct together, this Court held there was “no room for doubt” that a “mining partnership” existed between *Lantz* and *Tumlin*. *Id.* This Court next addressed whether the statute of frauds was a good defense. It held:

Where persons engage in a joint enterprise for profit, by associating themselves together as partners or otherwise, a relationship of trust and confidence is thereby established, and that as between them in the conduct of the joint or partnership business the statute of frauds has no application.¹⁶

Id. (emphasis added) (citing *Bond v. Taylor*, 68 W. Va. 317, 69 S.E. 1000 (1910); *Floyd v. Duffy*, 68 W. Va. 339, 69 S.E. 993 (1910); *Currence v. Ward*, 43 W. Va. 367, 27 S.E. 329 (1897)).

The holding in *Lantz* regarding the applicability of the statute of frauds applies to any joint enterprise for profit, even if it is not a partnership. Since the overwhelming and undisputed evidence is that Mr. Valentine was engaged in a joint enterprise for profit with Defendants and their predecessors, it is irrelevant whether this Court identifies the enterprises as partnerships, joint ventures, or, as Defendants have

¹⁶The West Virginia statute of frauds has not been revised since *Lantz* was decided.

asserted, some type of amorphous “programs;” the statute of frauds has “no application.”

Here, as in *Lantz*, and given the abundant and undisputed evidence regarding the prior business conduct between Mr. Valentine, Sugar Rock, and Sugar Rock’s predecessors, there is no room for doubt that the parties have engaged in a joint venture enterprise for profit, by associating themselves together.¹⁷ Although the partnership assets are not titled in Mr. Valentine’s name, he is responsible for and has paid his portion of the expenses of drilling, equipping, and operating the Wells. The statute of frauds would not have been a valid defense to Sugar Rock’s claims asserted in the 2001 Complaint or in the Counterclaim asserted herein.¹⁸ Likewise, the statute of frauds is not a valid defense to Mr. Valentine’s claim for an accounting, since it concerns “the conduct of the . . . partnership business.”

Lantz is consistent with the law that applies to ordinary partnerships. Although legal title to partnership real estate remains in the partners, and thus can only be divested out of them by deed or will, partnership real estate may be converted into personalty, in equity, for partnership purposes. See *Brown v. Gray*, 68 W. Va. 555, 557-58, 70 S.E. 276, 277 (1911) (citing *Davis v. Christian*, 56 Va. 11 (1859); *Cunningham v. Ward*, 30 W. Va. 572, 5 S.E. 646 (1888); *Zane v. Sawtell*, 11 W. Va. 43 (1877)). An

¹⁷Defendants even admitted that, according to *Lantz*, a mining partnership may be formed between a property owner and a party that does not have a writing evidencing an ownership interest where the partnership is formed prior to the purchase of the property. 4th Cir. Appx. p. 621. Based on the clear and unambiguous language of the 1950s Assignments, it is undisputed that the Partnerships were formed before the Wells were drilled. Thus, even according to Defendants’ more limited interpretation of *Lantz*, Mr. Valentine is a partner.

¹⁸Mr. Valentine did not assert the statute of frauds as an affirmative defense in his Reply to Defendants’ Counterclaim. 4th Cir. Appx. pp. 30-31.

action for an accounting is equitable in nature. See *Fredeking v. Grimmett*, 140 W. Va. 745, 756-57, 86 S.E. 2d 554, 561 (1955). The statute of frauds does not require a written instrument to prove an ownership interest in personal property.

This action does not involve a transfer, sale, or divestment of partnership property. As in *Lantz*, it involves “the conduct of the . . . partnership business.” Thus, for purposes of Mr. Valentine’s equitable claim for an accounting from a fellow partner, the partnership real estate is treated as personalty and the statute of frauds does not apply.

The trial court said *Lantz* simply stood for the proposition that “oral trusts in property are enforceable in equity.” 4th Cir. Appx. p. 782. However, the words “equity” and “oral trust” appear nowhere in *Lantz*. This court did not hold that Tumlin was the beneficiary of an oral or resulting trust. Rather, it plainly recognized Tumlin as a “partner,” in a “mining partnership,” and held him accountable in the “winding up and settlement” because the statute of frauds had “no application.”

Even if the trial court is correct, however, in characterizing *Lantz* as simply creating an oral trust, the facts of this case, at a minimum, demonstrate the existence of an oral or resulting trust and thus a fiduciary relationship exists between Mr. Valentine and Defendants. Thus, regardless of the nature of Valentine’s ownership interest, whether it arises by virtue of a written assignment or in equity by virtue of an oral or resulting trust, at the end of the day, he still has an ownership interest in the partnership property. His ownership interest, whatever its nature or however it arises, satisfies what the trial court understood to be the “essential element” of a mining partnership. Thus, he is a partner.

The apparent problem with the trial court's decision, as compared to *Lantz*, is in the order of the analysis. In *Lantz*, this court first determined, based on the available evidence,¹⁹ whether a partnership existed and whether Tumlin was a partner. Having so found, it then turned to the applicability of the statute of frauds between partners. By contrast, the trial court's analysis starts and ends with the statute of frauds, refusing to consider any of the available evidence of Mr. Valentine's partnership interest and, having found Mr. Valentine not to be a partner, does not really analyze whether the statute of frauds should have been applied in the first place. Essentially, it ruled that Mr. Valentine was not a partner because, according to the statute of frauds, he was not a co-owner of the partnership property, whereas in *Lantz*, this court held that because Tumlin was a partner, he was by implication a co-owner of the partnership property, notwithstanding the absence of any written document.

In its March 12, 2014 opinion, the Fourth Circuit also attempted to discern another potential rationale supporting the *Lantz* decision. The court noted that, in *Lantz*, the plaintiff was constrained to stipulate to the plaintiff's property interest, so relieving the defendant of his partnership obligations for want of a confirming writing would not have served the purpose of the statute of frauds. Supp. Appx. pp. 13-14.

There are at least two problems with this alternative explanation. First, as in *Lantz*, Sugar Rock has stipulated to Mr. Valentine's property interest. Sugar Rock's

¹⁹This Court considered that a bank account had been opened in the partnership name, the checks that were drawn on the account, debts contracted in the partnership name, correspondence between the partners, and other evidence showing the existence of a partnership. *Lantz*, 74 W. Va. at 197-98, 81 S.E. at 820-21.

allegations in the 2001 Complaint concerning the existence of Mr. Valentine's ownership interest were admitted by Mr. Valentine (while denying liability for the amount claimed); the parties have already stipulated to the existence of Mr. Valentine's partnership interest.

The other problem with this alternative explanation is that it ignores everything this Court actually wrote in *Lantz*. The words "stipulation" and "judicial admission" appear nowhere in *Lantz*. Instead, this Court wrote that the statute of frauds was inapplicable because of the parties' "relationship of trust and confidence." The existence of such relationship was in no way made contingent upon a stipulation or admission by the one holding legal title. The basic principle in *Lantz* did not apply in just one direction; instead, this Court said that it applied "as between them." Thus, between Mr. Valentine and Sugar Rock, in the conduct of the partnership business, the statute of frauds can have no application.

Lantz had nothing to do with the existence of a written partnership agreement, to which the statute of frauds, by its own terms, does not even apply.²⁰ Rather, this Court held that Tumlin was a mining partner, notwithstanding the lack of any written document evidencing his interest in the partnership property.

Although Defendants based their Motion for Summary Judgment on the statute of frauds set forth in W. Va. Code §36-1-1 (4th Cir. Appx. pp. 127-128), on appeal to the Fourth Circuit they advanced an entirely new argument. Specifically, they asserted

²⁰W. Va. Code §36-1-1 applies only to transactions involving "land." West Virginia law is clear that a partnership agreement need not be in writing. See *Duffield v. Reed*, 84 W. Va. 284, 99 S.E. 481, 483, syllabus pt. 2 (1919). This includes mining partnerships. See *Kirchner v. Smith*, 61 W. Va. 434, 444, 58 S.E. 614, 618 (1907) (citing Bar & A. Mines & Mining, p. 750).

that *Lantz* was “abrogated”²¹ by W. Va. Code §36-1-4. Defendants’ Appellate Brief, p. 30.

Defendants’ new argument is simply a late attempt to reconstruct the trial court’s faulty reasoning. W. Va. Code §36-1-4, by its own terms, does not apply to “trusts arising by construction or operation of law.” In other words, courts are free to impose a constructive or resulting trust when the equities require, even though such trusts are not in writing.²² Mr. Valentine is not asserting a claim based on an express trust. He is not alleging that anyone intended to create an express trust in the late 1950s or that he is the beneficiary of an express trust. Therefore, this statute is irrelevant.

Moreover, W. Va. Code §36-1-4 applies only to claims arising out of a “trust of land.” Mr. Valentine’s claim for an accounting arises out of his status as a partner in a partnership, not as a beneficiary of an express trust in land. The interest in land (the Wells) are partnership assets belonging to the Partnerships. Thus, if the Partnerships asserted a claim against the land based on an express trust, such trust would be subject to W. Va. Code §36-1-4. The Partnerships, of course, are not parties to this action and they have not asserted any claims herein. No claim arising out of an express trust in land has been asserted by anyone.

The holding in *Lantz* was based on the “relationship” between the parties as persons engaged in a joint enterprise for profit. Under West Virginia law, both for

²¹There is not a single West Virginia case saying that *Lantz* was ever “abrogated.”

²²Thus W. Va. Code §36-1-4 would not preclude imposing a constructive trust with respect to the Wells and Leases for the benefit of the Partnerships.

ordinary as well as for mining partnerships, a fiduciary relationship exists between partners and, per *Lantz*, the statute of frauds has “no application” between them. W. Va. Code §36-1-4 did not purport to change partnership law or the fiduciary duties imposed thereby. There is no reason to believe that W. Va. Code §36-1-4, if it had been in effect at the time *Lantz* was decided, would have compelled this Court to rule differently.

Throughout the course of this case, Defendants have periodically dredged up *Arbaugh v. Raines*, 155 W. Va. 409, 184 S.E. 2d 620 (1971). The parties in *Arbaugh* were not partners. The well was not owned by a mining partnership; nobody alleged that a mining partnership even existed. Since the written agreement between the parties purported to convey shares of an interest in a well, and nothing more, this Court held that the agreement did not also convey an interest in the lease. *Arbaugh* simply stands for the proposition that a court will enforce the terms of a written agreement according to its plain and unambiguous language. It has nothing to do with the issue in this case.

C. Mr. Valentine satisfies the other elements of mining partnerships.

Sugar Rock fundamentally misunderstands the nature of mining partnerships and how they may arise. Defendants’ analysis regarding the “essential elements” of mining partnerships overlooks the fact that a mining partnership may be created by express contract and it may be created, without express contract, by joint ownership and joint operation with mining interests. See *Templeton v. Wolverton*, 142 Tex. 422, 428, 179 S.W. 2d 252, 254 (1944) (citing *Munsey v. Mills & Garrity*, 115 Texas 469, 483-84, 282 S.W. 754; *Boling v. Camp*, 6 S.W. 2d 94 (1928); Summers’ *The Law of Oil and Gas*, Vol. 4. pp. 144-45, Sec. 721; 12 Texas Law Review, pp. 410, 413-14).

In this lawsuit, Mr. Valentine is not simply claiming that the Partnerships arose by operation of law based on the conduct of the parties, although the facts certainly support such a claim. Rather, he is further asserting that the Partnerships were created by the express agreement of the parties.

The Assignments from the late 1950s are not irrelevant to this case, as Defendants claim. Defendants' Appellate Brief, p. 22. The Assignments unequivocally state that Sugar Rock's predecessor (F.A. Deem) intended to create "mining partnerships." 4th Cir. Appx. pp. 322-364. When F.A. Deem expressly used the "p" word (partnership) in the Assignments from the 1950s, a partnership, which is a separate legal entity from the partners under West Virginia law, was born. See W. Va. Code §47B-2-1. Defendants cannot abort this separate legal entity through clever ex-post facto analysis or by re-imaging events over 50 years later.

Based on the instruments of title of record, the Keith Oil Company has been expressly designated as a "mining partnership;" so is the Iams Gas Company, the Iams Oil Company, and the Cutright Gas Company. By law, the Partnerships continue until and unless they are dissolved and wound up. Defendants' arguments flip West Virginia law on its head: instead of recognizing that a mining partnership may arise, notwithstanding the lack of an express agreement, by the conduct of the parties, they propose that a mining partnership may not arise, even when it is expressly agreed in writing!

For 40 years, from the late 1950s to 1999, Mr. Valentine shared in all of the profits and losses of the Partnerships, to the tune of an estimated \$100,000.00. 4th Cir. Appx. pp. 600-601. Despite Mr. Valentine's refusal to advance the Partnerships additional funds since 1999, he has continued to bear at least a portion of his alleged share of expenses. Over the last 15 years, Sugar Rock has deducted alleged expenses from Mr. Valentine's share of the gross revenue. That is why Mr. Valentine has never received any money from the Partnerships, despite the fact that most of the Wells are producing.

Mr. Valentine's sharing in the profits and losses further demonstrates the error of the trial court's decision. Under West Virginia law, sharing in the profits and losses of a business creates a presumption in favor of a partnership. W. Va. Code §47B-2-2(c)(3). There is no reason why this presumption should not also be applied to mining partnerships. In the formation of ordinary, as well as mining partnerships, the sharing of profits is a necessary but not a sufficient condition. See W. Va. Code §47B-2-2(c)(3); *Blackmarr v. Williamson*, 57 W. Va. 249, 253, 50 S.E. 254, 256 (1905). Under this presumption, the burden is on Sugar Rock to prove that Mr. Valentine is not a partner. At no point in this case have Defendants ever presented any evidence to rebut this presumption.

Nonetheless, Defendants argued, for the first time in their Brief before the Fourth Circuit, that Mr. Valentine is not a partner because he has not contributed to cover

the losses that Sugar Rock generated since 1999.²³ Defendants' Appellate Brief, pp. 33-34. Defendants' argument is essentially a request to forfeit Mr. Valentine's partnership interest.²⁴ This argument, of course, has nothing to do with the statute of frauds.

Mr. Valentine humbly submits that it is patently absurd to charge \$6,600.00 per year to "operate" a well that is not producing, as Sugar Rock did with the Keith Oil No. 1 Well. The fundamental purpose of any partnership is to earn a "profit" for the partners. See W. Va. Code §47B-1-1(7). Sugar Rock has the right to manage the Partnerships for the benefit of the partners using its reasonable business judgment. As a result of Sugar Rock's "operations," however, no profit was made for any of the Partnerships in over 15 years. Of the \$774,991.66 in gross revenue generated by the Wells from 1999 through 2010, the money was distributed as follows:

Third Party Expenses:	\$149,590.30 ²⁵
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²³Defendants also argued, for the first time on appeal, that the Fourth Circuit could affirm the trial court's decision based on Mr. Valentine's alleged lack of involvement in the joint operation of the mining activities. Defendants' Appellant Brief, pp. 33-34. This argument has nothing to do with the statute of frauds. By refusing to affirm on this alternate basis, the Fourth Circuit impliedly rejected Defendants' argument. The Circuit Court expressly rejected this same argument in the 2011 Ritchie County Action. Supp. Appx. pp. 37-39.

²⁴ Under West Virginia law, equity abhors a forfeiture. See *Wheeling & E.G.R. Co. v. Tridelpia*, 58 W. Va. 487, 520, 52 S.E. 499 (1905).

²⁵Third party expenses include all landowner royalties (\$70,983.61), taxes (\$33,655.86), license fees (\$315.66), bank fees (\$56.45), meter expense (\$10.42), working interest expense (\$8,212.00), office expense (\$202.86), accounting fees (\$8,798.38), and costs of other third party vendors (\$27,355.06). Mr. Valentine uses the term "third party vendors" here rather loosely, since \$9,082.64 of the charges by "third party vendors" were from Trenton Energy, LLC, a company that is also owned by Mr. Hall. Supp. Appx. pp. 293-294.

Sugar Rock (as operator):	\$625,401.36 ²⁶
Minority Partners:	\$0.00

Given this distribution, it is plainly apparent that Sugar Rock is not operating the Wells for the benefit of the Partnerships or their partners; the Wells are being operated for the sole benefit of the operator (Sugar Rock).

Sugar Rock's right to manage the Partnerships does not in any way absolve it of the fiduciary duties of loyalty and utmost good faith that it has to the minority partners. If the expenses for the Wells were as large as Defendants claim, Sugar Rock had a duty to either plug the Wells or to at least stop operating them to prevent additional losses. It would have been far cheaper to do so. The only explanation for Sugar Rock's decision to continue operations is its own self interest: Sugar Rock benefitted by causing the Partnerships to suffer tremendous losses (on paper), since it allowed Sugar Rock to keep all of the production revenue for itself. This self-dealing benefit came at the expense of the fellow minority partners, including Mr. Valentine.

Mr. Valentine's partnership interest continues until the Partnerships are dissolved and wound up. A dissolution and winding up is exactly what the minority partners are attempting to accomplish in the 2011 Ritchie County Action. Absent such a dissolution and winding up, Mr. Valentine and the other minority partners retain their

²⁶This number represents the balance of the gross receipts, after payment of all Third Party Expenses, which was applied to Sugar Rock's monthly operating fee (between \$250.00 per month per well and \$550.00 per month per well, depending on the year) totaling \$420,300.000, as well as additional charges for "repairs and maintenance" and other expenses allegedly incurred by Sugar Rock, 4th Cir. Appx. pp. 412-542.

partnership interests; they are not simply forfeited to Sugar Rock.²⁷

D. Sugar Rock's prior judicial admissions satisfy the statute of frauds.

Assuming *arguendo* that the statute of frauds applies, the trial court failed to consider whether Sugar Rock's prior judicial admissions bar the assertion of the statute of frauds against Mr. Valentine. Under West Virginia law, a judicial admission is an exception to the statute of frauds. See *Heartland, L.L.C. v. McIntosh Racing Stable, L.L.C.*, 219 W.Va. 140, 149 n.11, 632 S.E. 2d 296, 305(2006) (quoting *Timberlake v. Heflin*, 180 W. Va. 644, 379 S.E. 2d 149, syllabus pt. 2 (1989)). This court has held that a pleading in a civil case may satisfy the requirement of a memorandum under W.Va. Code §36-1-3. *Timberlake v. Heflin*, 180 W.Va. 644, 379 S.E. 2d 149, syllabus pt.2 (1989).

In 2001, Sugar Rock filed the 2001 Complaint against Mr. Valentine. 4th Cir. Appx. p. 403-411. The 2001 Complaint is a pleading. In the 2001 Complaint, Sugar Rock alleged that Mr. Valentine was the "owner of an undivided . . . working interest" in and to each of the Partnership leaseholds and "the oil and gas wells thereon" (emphasis added). 4th Cir. Appx. pp. 406-410. Sugar Rock alleged that Mr. Valentine had an ownership interest in each of the Wells and sought recovery for alleged expenses. Mr. Valentine admitted his ownership interest but denied liability for the amount claimed. Thus, there was a stipulation between the parties in 2001 concerning the existence of Mr. Valentine's partnership interest.

²⁷Defendants asserted the same forfeiture argument regarding all the other minority partners in the 2011 Ritchie County Action, and it was rejected. By declining to affirm the trial court's decision on this alternative basis the Fourth Circuit impliedly did the same.

Contrary to the holding of this Court in *Timberlake*, the trial court impliedly held, as a matter of law, that Sugar Rock's judicial admissions had no legal significance.²⁸ It failed to address in its written decision whether a judicial admission may satisfy the requirement of a writing under W.Va. Code §36-1-1. 4th Cir. Appx. p. 710. At a minimum, these judicial admissions create a disputed issue of material fact concerning the existence of Mr. Valentine's partnership interest.

E. The documents presented by Mr. Valentine constitute a memorandum in writing, which satisfies the statute of frauds.

Assuming *arguendo* that the statute of frauds applies and assuming it has not been satisfied by Sugar Rock's prior judicial admissions, the trial court failed to consider whether the letter from W.A. Deem's accountant containing the "stockholder list" and the other available documents satisfy the statute of frauds. The letter asked Mr. Valentine to confirm his "W.I." (working interest) in the "Wells" for each of the Partnerships. 4th Cir. Appx. p. 320.

Under West Virginia law, a memorandum in writing may take a contract out of the operation of the statute of frauds which contains every essential element of the agreement, except the consideration given. See *Milton Bradley Co. v. Moore*, 91 W.Va. 77, 112 S.E. 236, syllabus pt. 2 (1922).

²⁸Even Defendants believe that the proceedings in connection with the 2001 Complaint are relevant to this action, since they raised it as an affirmative defense in their Answer. 4th Cir. Appx. p. 23.

Contrary to the holding of the this Court in *Milton Bradley*, the trial court impliedly held, as a matter of law, that none of the documents presented by Mr. Valentine evidencing his ownership interest had any legal significance. These documents, including the partnership tax returns prepared by Defendants and submitted to the IRS under penalties of perjury for over 10 years (4th Cir. Appx. pp. 142-185), and the invoices for Mr. Valentine generated by Sugar Rock on behalf of each of the Partnerships (Supp. Appx. pp. 213-236), directly contradict the position they have taken in this case. The trial court failed to examine the significance of these documents in its written decision. According to the trial court's ruling, these documents do not even create a disputed issue of material fact as to whether or not the statements contained within those documents, made by Defendants and their predecessors, are actually true.

F. The conduct and performance of the parties satisfies the statute of frauds.

Assuming arguendo that the statute of frauds applies, and further assuming that it has not been satisfied in this case by a written memorandum or Sugar Rock's prior judicial admissions, Defendants are estopped from raising the statute of frauds as a defense to Mr. Valentine's claim. A defendant may be estopped to assert the statute of frauds in defense of an action for enforcement in circumstances involving "part performance." *Bennett v. Charles Corp*, 159 W. Va. 705, 711, 226 S.E. 2d 559, 563 (1976).

It is undisputed that, for over 50 years, Mr. Valentine participated in the Partnerships. During that time, IRS Form K-1s, official governmental filings, which were attached to the Partnership tax returns, have been prepared by Defendants and their

predecessors and delivered to Mr. Valentine based on the income and expenses for the Wells. 4th Cir. Appx. pp. 142-185. It is difficult to imagine how over 50 years of conduct does not constitute at least “part” performance.²⁹ The trial court failed to address this possibility in its written decision. 4th Cir. App. p. 723.

It is undisputed that, in 1958 and 1959, Mr. Valentine paid F.A. Deem, the original 100% owner of each of the Leases, his partnership contributions, which were used to drill the Wells. 4th Cir. Appx. p. 606. It is undisputed that for approximately 40 years, Mr. Valentine regularly received payments for production revenue from the Wells based on the percentage of his ownership interest, thus sharing the profits of the Partnerships. 4th Cir. Appx. pp. 599-600. During that time, Mr. Valentine shared in the expenses of the Partnerships, which were usually deducted from the production revenue. In fact, it was only when Sugar Rock took over operations that the exorbitant expenses Sugar Rock paid itself turned the profits into losses. 4th Cir. Appx. p. 607.

It is undisputed that after W.A. Deem sold all his interest to Sugar Rock on April 1, 1999, Mr. Valentine continued to receive IRS Form K-1s reflecting his interest in each of the Partnerships. 4th Cir. Appx. pp. 142-185. The tax returns to which the K-1s were attached are required to be signed and submitted to the IRS by Sugar Rock under penalty of perjury. These returns reflect Mr. Valentine’s percentage of ownership

²⁹Under California law, the operation of a mining partnership for nearly four years is sufficient performance to take an oral contract of partnership out of the statute of frauds, even if it was a contract affecting real estate. See *Brown v. Fairbanks*, 121 Cal. App. 2d 432, 441, 263 P. 2d 355 (Cal. App. 1959). See also *Southmayd v. Southmayd*, 4 Mont 100, 5 P. 318 (1851)(finding possession and part payment sufficient to take a verbal contract related to a mining partnership out of the statute of frauds).

interest and are based on the Partnership records that Sugar Rock received in 1999. 4th Cir. Appx. p. 138. What Defendants attempt to dismiss as mere “historic accounting entries” (4th Cir. Appx. pp. 132, 138) are in fact hugely important, since they provide some of the best evidence regarding what actually happened over 50 years ago in the formation of this joint enterprise for profit. Thus, there is no question that Mr. Valentine is a partner in each of the Partnerships.

Defendants convinced the trial court to ignore their own sworn representations to the Internal Revenue Service, a prior lawsuit by Sugar Rock against Mr. Valentine, and over 50 years of conduct³⁰ in order to forfeit Mr. Valentine’s partnership interests and to declare that Mr. Valentine owns nothing. Defendants do not explain why Mr. Valentine received income from the Partnerships for approximately 40 years prior to 1999 or why Mr. Valentine received K-1s reflecting his partnership interests. Defendants do not explain why they filed the 2001 Complaint against Mr. Valentine or their Counterclaim in this action to recover his alleged share of operating expenses.

G. Dismissing Mr. Valentine’s claim is contrary to the purpose of the statute of frauds.

The statute of frauds is intended to prevent the fraudulent enforcement of unmade contracts, not legitimate enforcement of contracts that were, in fact, made.

Hoover v. Moran, 222 W. Va. 112, 120, 662 S.E. 2d 771, 719 (2008) (quoting

³⁰Not even Defendants believe that the parties’ conduct from 1999 to present is irrelevant. Defendants asserted in their Answer that Mr. Valentine’s claim is barred by virtue of his alleged acquiescence to Sugar Rock’s expenses for a period in excess of ten years. 4th Cir. Appx. p. 23.

Timberlake v. Heflin, 180 W. Va. 644, 648, 379 S.E. 2d 149, 153 (1989); *Fry Racing Enters., Inc. v. Chapman*, 201 W. Va. 391, 395, 497 S.E. 2d 541, 545 (1992); *Bennett v. Charles Corp*, 159 W. Va. 705, 711, 226 S.E. 2d 559, 563 (1976); *Ross v. Midelburg*, 129 W. Va. 851, 42 S.E. 2d 185, syllabus pt. 1 (1947)). The statute of frauds was not enacted to afford persons a means of evading just obligations; nor was it intended to supply a cloak of immunity to hedging litigants lacking integrity; nor was it adopted to enable defendants to interpose the Statute as a bar to a contract fairly, and admittedly, made. *Heartland, L.L.C. v. McIntosh Racing Stable, L.L.C.*, 219 W.Va. 140, 149, 632 S.E. 2d 296, 305 (2006) (quoting Richard A. Lord, 10 Williston on Contracts §29.4 at 437-38)).

If Defendants truly believed that Mr. Valentine is fraudulently claiming an ownership interest in the Partnerships, then why did it take them, and their predecessors in interest, more than 50 years to deny such claim?³¹ Clearly, Defendants are not attempting to prevent the enforcement of a contract that was never made. Rather, they are attempting to use the statute of frauds 50 years after the fact to forfeit Mr. Valentine's ownership interest in the assets at issue in this case, an abhorrent remedy in equity.

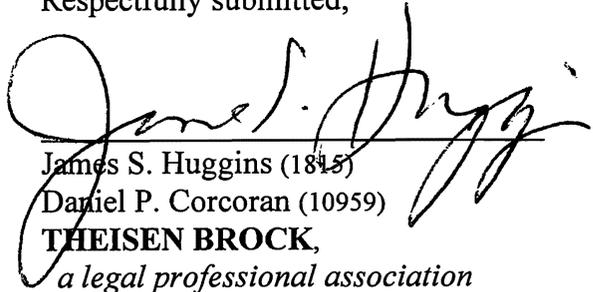
CONCLUSION

For all the foregoing reasons, this Court should hold that Mr. Valentine may prove his working interest in the Wells and enforce his rights thereunder by demonstrating his inclusion within the Partnerships, without resort to proof that the Wells

³¹The statute of limitations for fraud in West Virginia is two years. See W. Va. Code §55-2-12; *University of W.Va. Bd. of Trustees v. Van Voorkies*, 84 F. Supp. 2d 759,768 (N.D. W.Va. 2000).

were conveyed to him by deed or will or otherwise in strict conformance with the statute of frauds.

Respectfully submitted,



James S. Huggins (1845)

Daniel P. Corcoran (10959)

THEISEN BROCK,

a legal professional association

424 Second Street

Marietta, Ohio 45750

Telephone: 740.373.5455

Telecopier: 740.373.4409

e-mail: corcoran@theisenbrock.com

Counsel for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the **Brief of Petitioner** was served upon the following party by mailing a copy of same by ordinary U.S. Mail, postage prepaid, on this 6th day of June, 2014:

W. Henry Lawrence
William J. O'Brien
Amy Marie Smith
Steptoe & Johnson, PLLC
400 White Oaks Blvd.
Bridgeport, WV 26330-4500
Counsel for Respondents



Daniel P. Corcoran

Counsel for Petitioner

(344685)