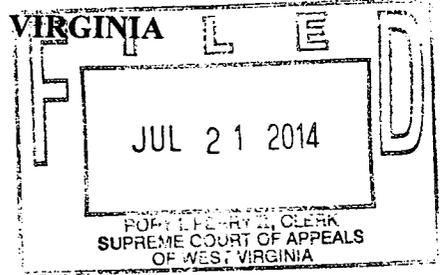


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Record No. 14-0246



CLIFTON G. VALENTINE,

*Plaintiff-Petitioner,*

v.

SUGAR ROCK, INC., *et al.*,

*Defendants-Respondents.*

ON APPEAL FROM AN ORDER CERTIFYING QUESTION  
FROM THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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**BRIEF OF RESPONDENTS**

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## I. CERTIFIED QUESTION<sup>1</sup>

Whether the proponent of his own 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.

## II. SUMMARY OF THE ARGUMENT

The Court should answer the certified question in the negative and hold that a proponent of his own working interest in a mineral lease must prove his entitlement thereto and enforce his rights thereunder by demonstrating his inclusion within a mining partnership or partnership in mining, through proof that the lease interest has been conveyed to him by deed or will or otherwise in strict conformance with the Statute of Frauds. Valentine concedes that in order to prevail on a claim for relief as a partner in a mining partnership under West Virginia law an alleged mining partner must establish his status as such by proving the following three essential elements: (1) co-ownership of the lands or leases constituting a property interest; (2) joint operation thereof; and (3) sharing of profits and losses. Also under West Virginia law, ownership in lands or leases constituting a property interest must be expressed in a writing that satisfies the Statute of Frauds. *See* W. Va. Code § 36-1-1, *et seq.* In this action, Valentine cannot meet even the first element of a mining partnership because he concededly does not have direct ownership in the leases that satisfies the Statute of Frauds. Valentine's alleged "indirect interest" is insufficient as a matter of law to render him a partner in a mining partnership.

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<sup>1</sup> The certified question is copied from the Fourth Circuit's Order of Certification, which was entered on March 12, 2014. The certified question in the brief of Petitioner is not a verbatim recitation from the Order of Certification. Moreover, Petitioner Clifton G. Valentine's certified question contains a baffling footnote, which seems to suggest that the certified question may not be determinative of the cause pending in the Fourth Circuit. Respondents Sugar Rock, Inc., Gerald D. Hall, and Teresa D. Hall (collectively, "Sugar Rock") agree with the Fourth Circuit that the certified question may be determinative of the cause pending in that Court as required for this Court to exercise its power under the Uniform Certification of Questions of Law Act. W. Va. Code § 51-1A-3. Moreover, the certified question is similar to the question answered in the negative by the district court in granting Sugar Rock's motion for summary judgment: "Whether, under West Virginia law, a party can be a partner in a common law 'mining partnership' without possessing a direct ownership interest in the partnership property." J.A. 776, 783-84.

### III. STATEMENT OF THE CASE<sup>2</sup>

Clifton G. Valentine filed this diversity action on November 8, 2010, in the Northern District of West Virginia, alleging that he is the owner of certain fractional working interests in four Ritchie County mining partnerships: Cuthright Oil & Gas Co. (stated working interest of 3/32), Iams Gas Co. (2/32), Iams Oil Co. (5/32), and Keith Gas Co. (1/32). Three wells produce oil and gas on Cuthright's leasehold, with single wells in production for each of the other three partnerships on their respective, discrete leaseholds.

Named as defendants in Valentine's lawsuit are Sugar Rock, Inc., which is the operator of the wells, and two of its officers, Gerald D. Hall and Teresa D. Hall (collectively, "Sugar Rock"). Valentine demands an accounting and seeks compensatory and punitive damages, together with reimbursement of his attorney fees and litigation costs. On January 13, 2011, Sugar Rock answered the complaint and filed a counterclaim "in excess of \$14,191.00," representing the cumulative operating expenses attributable to Valentine's asserted working interests in the six wells. *See* J.A. 27.

Valentine maintains that he purchased the working interests from Frank "F.A." Deem, the original owner of the leaseholds, in the late 1950s. For about forty years, Valentine received his proportionate share of the net proceeds generated by the well operations. Those payments stopped in 1999, however, when Frank Deem's son and successor in interest, William "W.A." Deem, sold the majority interest in the partnerships to Sugar Rock. After Sugar Rock became

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<sup>2</sup> Again, the statement of the case presented to this Court is copied from the Fourth Circuit's Order of Certification. This Court is bound by the facts contained in the Order of Certification. *See L.H. Jones Equip. Co. v. Swenson Spreader LLC*, 224 W. Va. 570, 687 S.E.2d 353, 356 n.3 (2009) (holding that facts in district court's certification order were binding on this Court). *See also Barefield v. DPIC Cos.*, 215 W. Va. 544, 600 S.E.2d 256, 262 (2004) (stating that "this Court will assume that the findings of fact by the certifying court are correct"). On the other hand, the statement of the case in the brief of Petitioner is not taken from the Order of Certification and should be stricken by this Court. *See Preussag Int'l Steel Corp. v. March-Westin Co.*, 221 W. Va. 472, 655 S.E.2d 494, 498 n.2 (2007) (refusing to consider new affidavit that asserted facts and characterizations that were not presented to or ruled upon by certifying district court and proceeding upon facts in district court's order). This issue is discussed further in the response to Valentine's motion for leave to supplement the record and for leave to file a supplemental appendix.

the operator and managing partner of the partnerships, the wells began to operate at a net annual loss, in amounts reflected on the tax documents (IRS Schedule K-1 to Form 1065) that each partnership has continued to deliver annually to Valentine. Sugar Rock billed Valentine for his share of the deficiencies, but he refused to remit payment. In 2001, Sugar Rock filed suit in state court against Valentine to recover the costs incurred to that point; the action was dismissed in 2004 for failure to prosecute.

The parties engaged in discovery in the district court, after which Sugar Rock moved for summary judgment on the ground that Valentine could produce no written instrument conveying him ownership of the working interests in dispute. In support of its position, Sugar Rock observed at the outset that, in accordance with West Virginia law, the creation of the four leaseholds transferred interests in real property. *See* J.A. 127 (citing Syl. Pt. 1, *McCullough Oil, Inc. v. Rezek*, 346 S.E.2d 788 (W. Va. 1986)); *cf. Miller v. Schwartz*, 354 N.W.2d 685, 689 (N.D. 1984) (explaining that “[t]he interest acquired by the lessee under an ordinary oil and gas lease is known as a working interest and is an interest in real property” (citation and internal quotation marks omitted)).

Next, Sugar Rock advanced the uncontroversial corollary that any subsequent assignment by the lessee of a portion of its working interest in an oil and gas lease similarly conveys an interest in real property. *See* J.A. 127 (citing 37 C.J.S. *Statute of Frauds* § 77 (2011)); *see also Exxon Corp. v. Breezevale Ltd.*, 82 S.W.3d 429, 436 (Tex. App. 2002) (instructing that, “[u]nder Texas law, a conveyance of a working interest in oil and gas is a real property interest”); *Fry v. Farm Bureau Oil Co.*, 119 N.E.2d 749, 750 (Ill. 1954) (same, applying Illinois law). Given that the working interests asserted by Valentine are real property interests, Sugar Rock maintained

that their purported transfer could only be effected by a writing contemplated by the West Virginia Statute of Frauds:

No estate of inheritance or freehold, or for a term of more than five years, in lands, or any other interest or term therein of any duration under which the whole or any part of the corpus of the estate may be taken, destroyed, or consumed, except for domestic use, shall be created or conveyed unless by deed or will.

W. Va. Code § 36-1-1. Thus, Sugar Rock reasoned, Valentine's want of proper documentation evidencing ownership of the working interests in question doomed his claim. *See* J.A. 128 (citing *Arbaugh v. Raines*, 184 S.E.2d 620, 623 (W. Va. 1971), which held that a written agreement between the lessee and investors conveying shares in a gas well enterprise and providing for the distribution of proceeds was "neither a deed nor a will" transferring to the investors any interest in the minerals in place).

In response, Valentine disavowed the "direct ownership interest in real estate" that might have been transferred via a conforming writing indicating the conveyance of the subject working interests. J.A. 307. Valentine contended instead that he possessed "an ownership interest in a partnership" arising under operation of law, and thus an indirect ownership interest in the four oil and gas leases. *Id.* The specific portion of each working interest to which he is entitled need not, according to Valentine, be established in strict conformance with the Statute of Frauds, but can be proved by parol evidence and by the parties' course of conduct.

A "mining partnership" of the sort Valentine posits, may be formed "where tenants in common of mines or oil leases . . . actually engage in working the same, and share, according to the interest of each, the profit and loss." *Childers v. Neely*, 34 S.E. 828, 829 (W. Va. 1899) (citation and internal quotation marks omitted). In such instances, "the partnership relation subsists . . . though there is no express agreement . . . to be partners or to share profits and loss." *Id.* (citation and internal quotation marks omitted). From *Childers* and the learned legal

literature, the district court distilled three essential elements of a mining partnership: (1) co-ownership of lands or leases constituting a property interest; (2) joint operation thereof; and (3) sharing of profits and losses. *See* J.A. 777; *see also* *Drake v. O'Brien*, 130 S.E. 276, 280 (W. Va. 1925) (confirming that “[a] mining partnership exists between the tenants in common of a mine who work it together and divide the profits in proportion to their several interests”).

The district court, by its Memorandum Opinion and Order (the “Opinion”), determined that Valentine’s assertion of an interest in the Sugar Rock mining partnerships failed at the threshold, in that he had not satisfied the first essential element. *See Valentine v. Sugar Rock, Inc.*, No. 1:10-cv-00193, 2012 WL 4320850 (N.D. W. Va. Sept. 18, 2012). In *Childers*, there was no dispute that the prospective partners each owned a properly documented share of the subject property prior to joint development of the minerals in place. By contrast, Valentine was unable to produce a writing in conformance with the Statute of Frauds. The district court concluded, therefore, that Valentine could not properly evidence receipt of the disputed working interests, which in turn precluded him from demonstrating the requisite ownership interest in any of the subject leases. *See* Opinion 13, 20-21. The court consequently granted Sugar Rock’s motion and entered summary judgment on its behalf. Valentine timely appealed by notice filed on October 12, 2012. We possess jurisdiction over Valentine’s appeal pursuant to 12 U.S.C. § 1291.

During the pendency of this appeal, on April 8, 2013, Valentine filed a contested motion to supplement the record with pleadings and additional materials filed in a putative class action in state court against the defendants herein by nine other purported owners of working interests in the four mining partnerships. *See Washburn v. Sugar Rock, Inc.*, No. 11-C-61 (Cir. Ct. Ritchie Cnty.). Valentine’s motion was deferred pending oral argument.

In the meantime, by its memorandum Order of July 19, 2013 (the “*Washburn* Order”), the state circuit court denied the defendants’ motions for judgment on the pleadings and for summary judgment, and it granted the plaintiffs’ motion for partial summary judgment. In so ruling, the court declared that the plaintiffs were partners in the mining partnerships and owned the claimed working interests, notwithstanding that such assertions could not be corroborated by deed or will. Valentine submitted the *Washburn* Order in accordance with the rule permitting us to be notified of “pertinent and significant authorities [that] come to a party’s attention” while the appeal is yet pending. *See* Fed. R. App. P. 28(j). Inasmuch as the state court materials previously offered for our consideration will likely be useful in understanding the *Washburn* Order, we are satisfied to grant Valentine’s motion to supplement the record.<sup>3</sup>

In considering the motions before it, the circuit court acknowledged that *Childers* requires each partner in a mining partnership to possess an ownership interest in the land or lease being exploited, but also observed the opinion’s silence as to whether such an interest may arise and be evidenced through some writing other than a deed or will, or, indeed, through no writing at all. *See Washburn* Order 5 (recognizing that *Childers* “does not say that the mines, leases, or lands of a mining partnership must be titled in the name of each of the individual mining partners”). The circuit court instead regarded the Supreme Court’s post-*Childers* opinion in *Lantz v. Tumlin*, 81 S.E. 820 (W. Va. 1914), as more helpful to its analysis.

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<sup>3</sup> The district court’s summary judgment order in favor of Sugar Rock, entered in September 2012, concomitantly denied Valentine’s motion to voluntarily dismiss his complaint without prejudice, *see* Fed. R. Civ. P. 41(a) (2), so that he could join the putative class action in Ritchie County. Valentine contends on appeal that the court should have granted his dismissal motion or, failing that, stayed further action – including consideration of Sugar Rock’s motion for summary judgment – to await developments in the state court proceedings. We reject Valentine’s assertions of error in this regard, and, with respect to the dismissal issue, adopt the analysis set forth by the district court in its unpublished Opinion. Our disposition of the above-described aspect of Valentine’s appeal removes any alternative basis to disturb the judgment below and leaves for resolution solely the question that we certify today, thereby ensuring that we do not ask the Supreme Court of Appeals of West Virginia for an advisory opinion. *See State ex rel. Advance Stores Co. v. Recht*, 740 S.E.2d 59, 64 (W. Va. 2013) (reinforcing Court’s determination that it “will not answer a certified question if, in doing so, [it] would have to render a non-controlling, advisory answer”).

In *Lantz*, one of two participants in an alleged mining partnership brought a bill in equity to dissolve the entity and settle accounts. The defendant demurred on the grounds that there was no written partnership agreement and that only the plaintiff's name appeared on the property deed. The Supreme Court of Appeals affirmed, in pertinent part, the circuit court's entry of judgment in favor of the plaintiff, concluding that the evidence left "no room for doubt" that the purported partnership had in fact existed. *Lantz*, 81 S.E. at 820. The evidence to which the Court referred consisted of interactions and correspondence between the parties, buttressed by the use of the partnership name on financial records and on contracts undertaken. *See id.* at 820-21. The Court rejected the defendant's invocation of the Statute of Frauds in defense, instructing that "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." *Id.* at 821 (citations omitted).

Persuaded by *Lantz*, the Circuit Court of Ritchie County in *Washburn* denied Sugar Rock's motion for judgment on the pleadings. The circuit court perceived that the result in *Lantz* was consistent with West Virginia authorities permitting partnership real estate to be treated as personalty for purposes of implementing equitable remedies such as dissolution and settlement. *See Washburn* Order 8 (citing, inter alia, *Brown v. Gray*, 70 S.E. 276, 277 (W. Va. 1911)). Further, according to the court, the plaintiffs were entitled to partial summary judgment regarding their claims to the working interests in dispute. The court ruled that – in the absence of any evidence to the contrary – ownership has been sufficiently demonstrated by the plaintiffs' affidavits, appended with documents of record establishing each partnership, detailing the various interests therein, and subsequently assigning those interests. *See id.* at 10-12. The

affidavits additionally incorporated the Schedule K-1s that Sugar Rock had, from 1999 through 2011, delivered each year to the plaintiffs. *See id.* at 12.

The district court in the case at bar was likewise presented with the opportunity to consider the import and applicability of *Lantz*. The court concluded that *Lantz* supported the proposition made apparent in *Childers* that a mining partnership may arise through words and by conduct. *See* Opinion 21 (recognizing that “there is, manifestly, no dispute that a written partnership agreement is not required for individuals to form a common law mining partnership” (citation omitted)). According to the court, however, *Lantz* cannot be interpreted as permitting, in derogation of the Statute of Frauds, the conveyance of the property interest necessary to form a mining partnership: “What is required, however, is an interest in property, an interest which [Valentine] does not purport to have.” *Id.*

True enough, Valentine abandoned all pretense that he had been directly conveyed by deed or will any property interest in the leases; he maintained that his working interest instead derived indirectly from his proportional participation in the partnership, which owns the leases. Though the district court indicated that the absence of a preexisting property interest documented by deed or will forecloses, *ab initio*, the creation of a “mining partnership,” it did not consider the possibility that its chicken-or-the-egg conundrum might be avoided if West Virginia law were construed to recognize a “partnership in mining,” that is, the formation of an ordinary partnership that happens to have as its primary purpose the exploitation of minerals. Such an approach could help to explain the result in *Lantz*, where a partnership was deemed to exist notwithstanding that one of the partner’s names was nowhere to be found on the subject lease.

We discern, however, another rationale potentially supporting the *Lantz* decision. In that dispute, the real estate owner of record sued to hold his partner – whose alleged interest in the

same real estate was undocumented – liable for the indebtedness of the partnership. In order to prevail, then, the plaintiff was constrained to stipulate to the defendant’s property interest. A stipulation, as the Supreme Court of Appeals has explained, “is a judicial admission. As such, it is binding in every sense, preventing the party who makes it from introducing evidence to dispute it, and relieving the opponent from the necessity of producing evidence to establish the admitted fact.” *Lawyer Disciplinary Bd. v. Morgan*, 717 S.E.2d 898, 906 (W. Va. 2011) (citation and internal quotation marks omitted).

Given the plaintiffs’ admission in *Lantz*, consistent with the entirety of the supporting evidence, it can hardly be said that relieving the defendant therein of his partnership obligations for want of a conforming writing would have served the purpose of the State of Frauds, which is “to prevent the fraudulent enforcement of unmade contracts, not the legitimate enforcement of contracts that were in fact made.” *Hoover v. Moran*, 662 S.E.2d 711, 719 (W. Va. 2008) (citations and internal quotation marks omitted); *see also Timberlake v. Heflin*, 379 S.E.2d 149, 153 (W. Va. 1989) (instructing that “a pleading in a civil case may satisfy the requirement of a memorandum” evidencing a contract for the sale or lease of land).

In the matter before us, however, we face perhaps a more typical situation, in that the plaintiff urges a declaration of his ownership interest in realty not evidenced by deed or will, such declaration being vigorously opposed by the owner of record. The particular facts underlying the case at bar persuade us that we may appropriately certify the question we now confront.<sup>4</sup>

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<sup>4</sup> Even if the difference in procedural posture that potentially distinguishes this matter from *Lantz* is deemed to be of no legal significance, our resort to the certification process is nonetheless reasonable and appropriate. In that instance, the district court’s Opinion and the *Washburn* Order entered by the Circuit Court of Ritchie County manifest irreconcilable outcomes though both courts have sought to apply the same precepts of West Virginia law to the identical Ritchie County properties. As our distinguished colleague Judge Widener reminded us in *Denny v. Seaboard Lacquer, Inc.*, 487 F.2d 485, 489 (4th Cir. 1973), the principles of federalism first identified by the Supreme Court of the United States in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), impose upon us the duty

#### IV. ARGUMENT

##### A. Standard of Review.

This Court explained its limited role under the Uniform Certification of Questions of Law Act, W. Va. Code, § 51-1A-1, *et seq.*, in *Barefield v. DPIC Companies*, 215 W. Va. 544, 600 S.E.2d 256 (2004), as follows:

Before answering the questions certified by the district court, it is important to point out that we are not sitting as an appellate court; rather, pursuant to the Uniform Certification of Questions of Law Act, W. Va. Code, 51-1A-1 to -13 [1996], we are simply asked to answer questions of law. Accordingly, the factual record regarding the legal issue in dispute must be sufficiently precise and undisputed, and this Court will assume that the findings of fact by the certifying court are correct. Further, the legal issue must substantially control the case. *See* Syllabus Point 5, *Bass v. Coltelli*, 192 W. Va. 516[,] 453 S.E.2d 350 (1994); *Mutafis v. Erie Ins. Exchange*, 174 W. Va. 660, 663, 328 S.E.2d 675, 678 (1985).

This Court employs a plenary standard of review when we answer certified questions from a federal district court. In Syllabus Point 1 of *Light v. Allstate Ins. Co.*, 203 W. Va. 27, 506 S.E.2d 64 (1998), we held that “[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.” *Accord*, Syllabus Point 1, *Bower v. Westinghouse Elec. Corp.*, 206 W. Va. 133, 522 S.E.2d 424 (1999) (“This Court undertakes plenary review of legal issues presented by certified question from a federal district or appellate court.”). However, when a certified question is framed so that this Court is not able to fully address the law which is involved in the question, then this Court retains the power to reformulate the questions certified to it. Syllabus Point 3, *Kincaid v. Mangum*, 189 W. Va. 404, 432 S.E.2d 74 (1993).

*Id.*, 600 S.E.2d at 262 (2004). *See also* *L.H. Jones Equip. Co. v. Swenson Spreader LLC*, 224 W. Va. 570, 687 S.E.2d 353, 356 & n.3 (2009) (holding “[t]his Court is bound by the facts contained in the district court’s certification order[,]” but it has consistently applied a de novo standard of review in addressing legal issues presented by a certified question from federal court).

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to decide diversity actions through the faithful application of state law, as we discern it to the best of our ability. The parties before us on appeal, as well as the additional, non-diverse plaintiffs involved in the Ritchie County litigation, are each entitled to have the controlling question of West Virginia law properly decided. In view of the importance of the question and the significant likelihood that it will recur as oil and gas exploration and development continues on the upswing in West Virginia, we are of the opinion that the state’s Supreme Court of Appeals ought to be afforded the opportunity to resolve it.

**B. A Proponent Of His Own Working Interest In A Mineral Lease Must Prove His Entitlement Thereto And Enforce His Rights Thereunder By Demonstrating His Inclusion Within A Mining Partnership Or Partnership In Mining, Through Proof That The Lease Interest Has Been Conveyed To Him By Deed Or Will Or Otherwise In Strict Conformance With The Statute Of Frauds.**

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Valentine cannot be a partner in a mining partnership as a matter of law because he cannot prove possession of a direct ownership interest in the leases or other property interest in strict conformance with the Statute of Frauds. In *Kahn v. Central Smelting Co.*, 102 U.S. 641 (1880), the United States Supreme Court recognized:

Mining partnerships as distince [sic] associations, with different rights and liabilities attaching to their members from those attaching to members of ordinary trading partnerships, exist in all mining communities; indeed, without them successful mining would be attended with difficulties and embarrassments, much greater than at present. In *Skillman v. Lockman*, the question of the relation existing between parties owning several interests in a mine came before the Supreme Court of California, and that court said that ‘. . . it is clear that where the several owners unite and co-operate in working the mine, then a new relation exists between them; and, to a certain extent, they are governed by the rules relating to partnerships. They form what is termed a mining partnership, which is governed by many of the rules relating to ordinary partnerships, but also by some rules peculiar to itself[.]’

*Id.* at 645 (emphasis added). See also, e.g., *Bissell v. Foss*, 114 U.S. 252, 261 (1885) (holding that members of mining partnership cannot object to admission of stranger, and that sale and assignment of interest by partner does not dissolve mining partnership).

In *Kimberly v. Arms*, 129 U.S. 512, 530 (1889), the United States Supreme Court made it clear that not all partnerships involving the mining or oil and gas industries are mining partnerships. In that case, the parties were involved in a partnership that engaged in the purchase and sale of mining properties, including stock in the Grand Central Mining Company. The Court held that the partnership was not a mining partnership in the proper sense of that term because it was not a partnership for developing and working mines, but for purchase and sale of minerals

and mining lands, reasoning as follows:

It can no more be called a mining partnership than a partnership for the purchase of the products of a farm, and the lands upon which those products are raised, can be called a partnership to farm the lands.

*Id.*

Similarly, this Court held in Syllabus Point 1 of *Childers v. Neely*, 47 W. Va. 70, 34 S.E. 828 (1899): “Where tenants in common or joint tenants of an oil lease or mine unite and co-operate in working it, they constitute a mining partnership.” The Court explained as follows:

*There is a peculiar partnership, called a “mining partnership,” partaking partly of the nature of an ordinary trading or general partnership, on the one hand, and partly of a tenancy in common, on the other. . . . What is a mining partnership? 15 Am. & Eng. Enc. Law, p. 609, says: “When tenants in common of a mine unite and co-operate in working it, they constitute a mining partnership.” Many authorities there cited thus define it. . . . “[W]here tenants in common of mines or oil leases or lands actually engage in working the same, and share, according to the interest of each, the profit and loss, the partnership relation subsists between them, though there is no express agreement between them to be partners or to share in profits and loss.”*

*Id.*, 34 S.E. at 829 (emphasis added).

This Court further explained the difference between an ordinary partnership and a mining partnership in *Blackmarr v. Williamson*, 57 W. Va. 249, 50 S.E. 254 (1905), as follows:

There are many definitions of what is required to constitute a partnership. In 22 Am. & En. Enc. L. (2d Ed.) 13, it is given thus: “Partnership is the relation existing between two or more persons who have contracted together to share, as common owners, the profits of a business carried on by all or any of them on behalf of all of them.” And at page 15, *Id.*, it is stated as a rule: “In an ordinary partnership the contract creating it must have been entered into by all the partners. It is only by the unanimous consent of all the persons concerned that they become partners. A third person cannot be introduced into the concern as a partner without or against the consent of a single member. This principle is what is called *delectus personarum*, and it is a fundamental principle of partnership law. This rule in no sense applies to mining partnerships.” At page 226, *Id.*, the definition and nature of the last-named partnership is stated as follows: “*A mining partnership exists between the tenants in common of a mine who work it together and divide the profits in proportion to their several interests. Ownership of shares or interests in the mine is an essential element of a mining partnership.*”

The relation does not exist between the owners of a mine and one who, under a contract with them, works a mine for a share in the profits or proceeds. Mere profit-sharing will not create a mining partnership. \* \* \* A mining partnership differs from an ordinary partnership in the fact that no contract between the partners is necessary to create it; that there is no *delectus personarum*, so that the death of a member or the transfer of his interest does not operate as a dissolution, and that there are no rights of survivorship. *Because of the absence of these features, mining partnerships have been said not to be true partnerships, but rather a cross between tenancies in common and partnerships proper.*”

*Id.*, 50 S.E. at 255-56 (emphasis added).

This Court further held in *Kirchner v. Smith*, 61 W. Va. 434, 58 S.E. 614, Syl. (1907): “If two or more owners of a mine unite in working it, without any partnership agreement, the act of working it together creates a mining partnership; and the same is true of two or more holding interests in a lease of mining property.” In that case, the Court discussed the evidence establishing the existence of a mining partnership, holding that the circuit court properly admitted into evidence a written contract of sale describing and assigning a lease to prove a mining partnership. The Court concluded:

The evidence establishes the fact that the parties bought the . . . lease, that the title thereto was perfected by their counsel . . . under the direction of all the members of the company who were present, the defendant L. E. Smith being the principal spokesman for the company, and the attorneys were instructed to get such title from the infants as would not be forfeited in case the rentals should not be paid strictly on time. While there is some conflict in the evidence, there is a strong preponderance thereof establishing the mining partnership as alleged in the bill[.]

*See also, e.g., Wetzel v. Jones*, 75 W. Va. 271, 84 S.E. 951, Syl. Pt. 1 (1914) (“[w]here joint owners of an oil and gas lease unite in operating the demised premises thereunder, without any special agreement as to the character of their relation to each other, they constitute a mining partnership”).

In *Drake v. O'Brien*, 99 W. Va. 582, 130 S.E. 276, 280 (1925), this Court held that the plaintiffs did not sustain the position of mining partners to the defendants. In so holding, *Drake*

further explained the essential elements of a mining partnership as follows:

*A mining partnership exists between tenants in common of a mine who work it together and divide the profits in the proportion of their several interests. Ownership of shares or interests in the mine is an essential element of a mining partnership. Mere profit sharing, however, will not create a mining partnership.* No such partnership arises between the grantor and grantees in a deed where the owner of mineral and timber lands, conveys an undivided interest therein to others, together with the right and power to said grantees to operate the entire property for mineral and timber products and to account to the grantor for a certain portion of the net proceeds or profits arising from said operations.

*Id.* at Syl. Pt. 5 (emphasis added).

Moreover, in *Manufacturers' Light & Heat Co. v. Tenant*, 104 W. Va. 221, 139 S.E. 706, Syl. Pt. 1 (1927), this Court recognized that “[w]hile co-owners or joint owners of a mining lease, before they operate for oil or gas, are tenants in common or joint tenants, when they unite and co-operate in working the lease, they constitute a ‘mining partnership’”. In that case, the Court recognized as well that peculiar laws govern a mining partnership:

*It is true there is a difference between an ordinary partnership and a mining partnership: the first result from the intent of the parties; the other from the fact of the co-tenants undertaking to operate their lease or property. “A mining partnership is governed by all the rules applicable to ordinary partnerships, except such as flow from this fundamental difference in the two associations.”* Mills & Willingham on Oil and Gas, sec. 185.

*Mfrs.' Light & Heat Co.*, 139 S.E. at 707 (emphasis added).

As explained in 53A Am. Jur. 2d *Mines & Minerals* § 216:

*A mining partnership is characterized by joint ownership of the mineral estate or interest, joint operation of the mining activities, and an agreement, express or implied, to share in the profits and losses of the mining operation.*

Mining partnerships have sometimes been characterized as a cross between tenancies in common and partnerships proper. Parties may, however, be joint owners or tenants in common of mining property without being mining partners.

*A partnership for the purchase and sale of minerals and mineral lands is not a mining partnership.*

(Footnotes omitted) (emphasis added).

On page 19 of his opening brief, Valentine “wholeheartedly agrees” with the following three essential elements of mining partnership that the Fourth Circuit found the district court distilled from the relevant authorities: (1) co-ownership of lands or leases constituting a property interest; (2) joint operation thereof; and (3) sharing of profits and losses. *See also Blocker Exploration Co. v. Frontier Exploration, Inc.*, 740 P.2d 983, 985 (Colo. 1987) (collecting cases and explaining that “[t]his [three-part] mining partnership test has been adopted in the jurisdictions which have addressed this issue”); Frank Erisman & Elizabeth Jennings Dalton, *Multi-Party Ownership of Minerals – Real Property Consequences of Joint Mineral Development*, 25 R. Mt. Min. L. Inst. 7 (1979) (stating “[t]here are the three essential elements of a non-statutory mining partnership: (a) present co-ownership of the mineral interest; (b) joint operation of the property; (c) and an express or implied agreement to share in the profits and losses of the mining operation”).<sup>5</sup>

In this action as in *Kimberly*, Valentine is not a partner in a mining partnership because what he calls the Ritchie County mining partnerships are not mining partnerships in the proper sense of that term. Valentine concedes that he does not possess a direct ownership interest in the leases or other property interests, i.e., he is not a tenant in common or joint tenant. Instead, Valentine argues that he possesses interests in mining partnerships that own the leases. Under *Kimberly*, however, an interest in a partnership that owns a lease or other property interest is not sufficient to satisfy the element of co-ownership of the lease or other mineral interest itself. Accordingly, Valentine’s alleged interest in the four mining partnerships, which is that of a passive stockholder at best, does not satisfy the first essential element of co-ownership.

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<sup>5</sup> Contrary to Valentine’s argument on page 19 of his opening brief, Sugar Rock does not advance a fourth element of a mining partnership. Instead, Valentine fails to appreciate that satisfaction of the first element – co-ownership of lands or leases constituting a property interest – requires a writing that satisfies the Statute of Frauds.

Moreover, West Virginia law has long provided that an interest in a lease must be evidenced by a written conveyance. Oil and gas situated in the ground is considered real property. *See Carter v. Tyler Cnty. Court*, 45 W. Va. 806, 32 S.E. 216, Syl. Pt. 1 (1899). An oil and gas lease conveys an interest in real property. *See McCullough Oil, Inc. v. Rezek*, 176 W. Va. 638, 346 S.E.2d 788, Syl. Pt. 1 (1986) (“An oil and gas lease (or other mineral lease) is both a conveyance and a contract.”). “[A] ‘working interest’ is the operating interest under an oil and gas lease.” 58 C.J.S. *Mines and Minerals* § 286. As such, a working interest in an oil and gas lease is an interest in real property and a conveyance of a working interest is a conveyance of an interest in real property. *See* 37 C.J.S. *Statute of Frauds* § 77. Moreover, this Court has expressly held that “an agreement to transfer or assign [an oil and gas lease, which is required to be in writing], or any interest in it, must likewise be expressed in writing.” *Kennedy v. Burns*, 84 W. Va. 701, 707, 101 S.E. 156, 159 (1919). *See also* Robert Tucker Donley, *The Law of Coal, Oil and Gas in West Virginia & Virginia* § 133 (“[A]n assignment of a mineral lease, however short its unexpired term may be, must be made by such an instrument”) (citing W. Va. Code § 36-1-1).

In *Arbaugh v. Raines*, 155 W. Va. 409, 184 S.E.2d 620 (1971), the Court held in Syllabus Point 1 that “[a] purchaser of a share in an oil or gas well to be drilled by the owner of the oil and gas lease does not receive an interest in the leasehold estate unless the contract under which he purchased his share in the well so specifies.” The Court explained that the only means by which to obtain an interest in the oil and gas lease is by written agreement, rejecting the plaintiffs’ argument that they were proportional owners of the oil and gas in place based upon their status as well owners. The Court relied on the West Virginia Statute of Frauds, W. Va. Code § 36-1-1, as follows:

First, and aside from the agreement, the language of Code, 1931, 36-1-1, dictates the manner in which such transfer or conveyance must be made. It directs that “No estate of inheritance or freehold, or for a term of more than five years, in lands, or any other interest or term therein of any duration under which the whole or any part of the corpus of the estate may be taken, destroyed, or consumed . . . , shall be created or conveyed unless by deed or will.” Suffice to say that the agreement referred to above is neither a deed nor a will. No words of transfer or conveyance are contained therein. It could not, therefore, convey an interest in the lessee’s estate.

*Id.*, 184 S.E.2d at 623.

*Arbaugh* described the relationship between the parties and the terms of their written agreement:

Basically, [defendant] C. D. Raines agreed to drill a well; provide materials; upon production of gas, obtain sales contracts; collect for the sale of gas; and make proper distribution of the proceeds of the sales to the plaintiffs. So far as the plaintiffs are concerned, the agreement provides for payment by them for shares; payment to the lessors and Raines, and that the remainder of the “proceeds” be divided into 32/32nds and distributed in proportion to their respective interests.

*Id.*

This common practice of selling shares in wells for development of wells to raise cash to cover drilling expenses was addressed by the Court as follows:

The agreement between these parties reflects a practice common in the area of oil and gas development. A lessee obtains a lease which he retains as his own property. In order to get funds with which to produce oil or gas, he sells shares in a proposed well to be drilled on his leasehold estate. The money from the sale of such shares is pooled to pay for the costs of drilling the well, and, if the venture is successful, the shareholders divide the profits from the production of that well.

*Id.*, 184 S.E.2d at 624.

After reviewing the relationship between the parties, the Court rejected the plaintiffs’ claim to ownership in the lease in the absence of specific conveyance terms in the parties’ agreement. The Court summarized its conclusion:

However, neither agreement with Mr. Raines nor any other matter in the record [sic] of this case gave to the plaintiffs these rights in relation to the oil and gas

underlying the subject land. Clearly they had no claim to the ownership of the oil and gas in place.

*Id.*, 184 S.E.2d at 624.

Based upon the holding in *Arbaugh*, without a writing that satisfies the Statute of Frauds, Valentine lacks any claim to a lease or other property interest in this action. Accordingly, to the extent that Valentine argues on page 16 of his opening brief that he has an “indirect” interest in the wells (and presumably the leases or other mineral interest), that argument is wholly without merit.

Valentine’s reliance on *Lantz v. Tumlin*, 74 W. Va. 196, 81 S.E. 820 (1914), is misplaced. In that case, this Court held in Syllabus Point 2 as follows: “Where persons associate themselves together in a joint enterprise for profit, either as partners or otherwise, a relationship of trust and confidence is thereby established, and thereafter as between them in the conduct of the joint or partnership business the statute of frauds is inapplicable.” In that case, the plaintiff alleged that in accordance with his partnership agreement with the defendant, the defendant concluded the purchase of oil leases and other property interests, taking the deed for the property in his individual name because the plaintiff did not want to be disclosed in the purchase. In holding that the Statute of Frauds did not apply under the circumstances, the Court explained as follows:

*In some jurisdictions, which have adopted into their statutes the seventh section of the English statute of frauds, requiring all declarations or creations of trust and confidence in any land, tenements or hereditaments to be proved by some writing, the rule may be different. In this State and Virginia that section of the English statute of frauds never became a law.*

*Id.*, 81 S.E. at 821 (emphasis added).

*Lantz* is readily distinguishable from this action. Valentine does not argue that he owns a direct interest in the leases or other property interest by virtue of oral trusts established to keep his interests undisclosed as in *Lantz*. Instead, Valentine argues that he has an indirect interest in

the leases and other property interests by virtue of his interest in mining partnerships. As discussed above, however, an essential element of a mining partnership is co-ownership in a lease or other property interest. *Lantz* does not support Valentine's argument that he can meet this requirement with only an indirect property interest. Valentine has the burden to prove co-ownership in a lease or other property interest. As the Fourth Circuit noted in the statement of the case, above, this action is distinguishable from *Lantz* because unlike in that case Sugar Rock – which is the owner of record – vigorously opposes any asserted interest by Valentine.

In any event, *Lantz*, which has not been cited with approval by a court since 1929, was effectively abrogated in 1931. At that time, the West Virginia Legislature enacted West Virginia Code § 36-1-4, which stated:<sup>6</sup>

No declaration of trust of land shall be enforceable, unless it be made in writing, signed by the person who declares such trust or by his agent. If a conveyance of land, not fraudulent, is made to one in trust either for the grantor or a third person, such trust may be enforced, though it be not disclosed on the face of the conveyance, nor evidenced by a writing: Provided, however, that trusts arising by construction or operation of law shall not be subject to the provisions of this section.

Accordingly, this Court in *Dye v. Dye*, 128 W. Va. 754, 39 S.E.2d 98 (1946), held as follows:

Where a person acquires and retains the legal title to land and chooses to hold the same in trust for another, he can make his purpose legally effective only by a declaration of trust, which, under Code, 36-1-4, must be in writing.

Under Code, 36-1-4, an oral express trust in land can only be created where the grantor makes a conveyance of the legal title to such land to another, to be held by him in trust for the grantor or a third person.

*Id.* at Syl. Pts. 2-3.

The Court explained as follows:

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<sup>6</sup> The West Virginia Legislature repealed Section 36-1-4 in 2011. *But see* W. Va. Code § 36-1-4a (1998) (governing memorandum of trust; requirements of recordation).

*When the Legislature enacted Code, 36-1-4, it, in effect, adopted Section 7 of the original English statute of frauds. The Legislature also did more by that section. . . . We have, therefore, this situation: If a person acquires and retains title to land, but chooses to hold the same in trust for another, he must declare in writing his intention to do so; but if he transfers his title to another, to be held in trust either for himself or a third person, he may do so by parol, and no writing is required to make the same effective. Here there was no conveyance by plaintiff to defendant of the title to the land involved. The legal title was vested in and was retained by defendant. Therefore, the right to create a trust by parol, as provided for in the enactment quoted above, does not exist. *If there was any trust created, it must be based upon the agreement of the defendant that he would hold the land for the benefit of plaintiff; and we think, necessarily, that was a declaration of trust, and comes within the first sentence of the statute quoted above, requiring such a declaration to be in writing.**

*Id.*, 39 S.E.2d at 102 (emphasis added).

Thus, the West Virginia Legislature abrogated *Lantz* when it enacted Section 36-1-4 because the holding in *Lantz* was premised on the fact that at that time West Virginia had not adopted Section 7 of the original English Statute of Frauds.

Thus, *Lantz* never eliminated co-ownership of a lease or other property interest – which Valentine does not even purport to have – as an essential element of a mining partnership. To the extent that *Lantz* may have stood for the proposition that a mining partner may establish his ownership interest in property through an oral trust as opposed to a writing in satisfaction of Section 36-1-1, Valentine has made no such argument. Indeed, since 1931, Section 36-1-4 and now Section 36-1-4a would preclude any such argument. Accordingly, Valentine is not a partner in any mining partnerships within the proper definition of that term.

Valentine's reliance on the West Virginia Revised Uniform Partnership Act ("RUPA"), W. Va. Code § 47B-1-1, *et seq.*, is likewise misplaced. Although RUPA may apply to some aspects of mining partnership law, particularly where there is no separate and distinct common law of mining partnerships, in this action the certified question indisputably turns on the essential elements of a mining partnership. The nature of the certified question quite simply precludes

reference to RUPA. *See* Rev. Unif. P’ship Act § 202 cmt. (“[i]t is not intended that RUPA change any common law rules concerning special types of associations, such as mining partnerships”). Valentine cites to no case where RUPA has been applied to determine whether the essential elements of a mining partnership exist.

Valentine’s argument regarding the assignment of working interests is also contrary to *King v. Meabon*, 128 W. Va. 263, 270, 36 S.E.2d 211, 214 (1945). In *King*, this Court held that although the assignments at issue in that case gave the plaintiff an interest in the net proceeds from sales of gas under contracts between the defendant and others, the interest in the earnings did not create a partnership. Because there was no partnership, the plaintiff could not recover in equity. *Id.*

In this action, Valentine concedes on page 23 of his opening brief that no partnership assets are titled in his name. Valentine has failed to produce any written assignment of any working interest in any of the partnerships, leaseholds or wells identified in his complaint.<sup>7</sup> Not only is Valentine unable to point to any written conveyance of any interest, he also fails to produce any written agreement creating any interest in the proceeds from the sale of oil and gas by the partnerships from the wells located on the leases identified in his complaint.

As set forth above, the only written documents that Valentine has produced relating to his interest are Schedule K-1s, which identify him as a “passive” investor in the companies, and a list, which at most asks if he is a “stockholder” in the companies. J.A. at 142-85, 320. Indeed, Valentine has never argued that his alleged interest was anything other than passive stockholder in the so-called mining partnerships. Accordingly, he cannot be a partner in a mining partnership

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<sup>7</sup> Although Valentine has submitted several written assignments to the Court for others, he does not purport to hold an interest in any of these written assignments. As such, they are completely irrelevant to the issue in this action.

both because he cannot prove co-ownership in the leases or other property interest *and* for the additional reason that he is not involved in the joint operation actively working on the property.

Moreover, although the Schedule K-1s report that Valentine may have a share in partnership losses, in fact Valentine has refused to pay his portion of the losses by paying expenses. Valentine has not paid any expense that exceeds income on any K-1. J.A. at 138-41. Accordingly, Valentine cannot be a partner in a mining partnership for the additional reason that he did not share in the profits and losses.<sup>8</sup>

Valentine cannot be a partner in any mining partnership because he is not a co-owner of a lease or other property interest, which is the first essential element of any such partnership. In addition, Valentine does not meet either of the remaining two essential elements of a mining partnership because he is at best only a passive stockholder, who is not involved in any joint operation of the mining activities, and he has not shared in the expenses or losses in the so-called mining partnerships by paying his share of the operating expenses.

Finally, it should be emphasized that Valentine has stubbornly maintained that he is a partner in mining partnerships to the exclusion of any other possible theory of recovery. After ruling from the bench at the close of the first hearing that Valentine is not a partner in any mining partnerships, the district court invited his counsel to argue any alternative theory of recovery at the second hearing on the summary judgment motion, but he expressly declined to advance any additional theory. J.A. at 736-40, 759-61. Thus, Valentine waived any additional theories.

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<sup>8</sup> Further, it should be noted that Valentine cannot avoid the Statute of Frauds based on either part performance or judicial admission. As is apparent from the record discussed above, neither the parties' conduct nor the claimed admissions establish the essential elements of a mining partnership under any circumstances.

V. **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The Court has scheduled this case for argument pursuant to West Virginia Rule of Civil Procedure 20. Currently, it is the first case on the Court's docket on September 3, 2014.

VI. **CONCLUSION**

For all of the foregoing reasons, this Court should strike Petitioner Clifton G. Valentine's statement of the case. The Court should further answer the certified question in the negative and hold that a proponent of his own working interest in a mineral lease must prove his entitlement thereto and enforce his rights thereunder by demonstrating his inclusion within a mining partnership or partnership in mining, through proof that the lease interest has been conveyed to him by deed or will or otherwise in strict conformance with the Statute of Frauds.

Respectfully submitted this 18th day of July 2014.

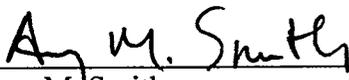
  
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**CERTIFICATE OF SERVICE**

I hereby certify that, on the 18th day of July 2014, I caused to be served a true and accurate copy of the foregoing Brief of Respondent upon the following counsel by U.S. Mail, postage prepaid, in an envelope addressed as follows:

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