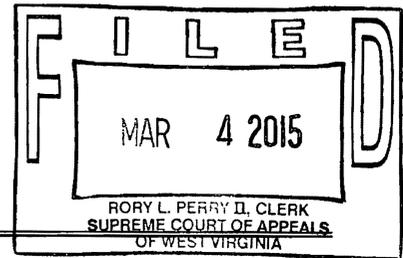


No. 14-1286



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

GEOLOGICAL ASSESSMENT & LEASING AND WILLIAM CAPOUILLEZ

Petitioners,

v.

**BETH NELSON FISH f/k/a BETH A. MARTIN NELSON, MICHAEL WAYNE MARTIN
AND WILLIAM D. MARTIN, SR.**

Respondents.

From the Circuit Court of Ohio County, West Virginia
Civil Action No. 13-C-248

PETITIONERS' BRIEF

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ASSIGNMENTS OF ERROR

The Circuit Court erred in denying the Motion to Compel Arbitration when the Respondents' cause of action stems from a valid and enforceable lease in which the Petitioners and Respondents are parties and which contains a valid and enforceable arbitration clause that covers only claims related to the lease and the Plaintiffs' cause of action is the unauthorized practice of law relating to the lease.

STATEMENT OF THE CASE

I. Statement of Facts

This case arose from a Complaint filed by the Respondents, Beth Nelson Fish f/k/a Beth A. Martin Nelson, Michael Wayne Martin and William D. Martin, Sr., alleging that the Petitioners engaged in the tort of unauthorized practice of law. The Respondents claim that on or about March of 2006, they sought to lease the mineral rights to their parcel of land and to achieve that end they entered into an oral or written agreement with the Petitioners wherein the Petitioners were to act as "consultants" in matters relative to the procurement, negotiation, execution, and performance of an oil and gas lease. On March 14, 2006, Respondents signed an oil and gas lease with Great Lakes Energy Partners, LLC, now known as Range Resources-Appalachia, LLC, to lease their oil and gas interests on their parcel of land. (See Complaint, ¶¶ 7, 8 and 9; Appendix pp. A 2 – A 3). The lease, signed by Petitioner, William Capouillez, included language that provided he be compensated for his consultant work. In addition the lease contained an arbitration clause that stated:

ARBITRATION.

29.1 Any controversy or claim arising out of or relating to this Lease, or the breach thereof, shall be ascertained and settled by three (3) disinterested arbitrators in accordance with the rules of the American Arbitration Association, one thereof to be appointed by the Lessor, one by the Lessee, and the third by the two (2) so appointed aforesaid, and judgment upon the award

rendered by the arbitrators may be entered in any court having jurisdiction thereof. Arbitration proceedings hereunder shall be conducted at the county seat or the county where the lease or action occurred which is cause for the arbitration, or such other place as the parties to such arbitration shall all mutually agreed upon. The cost of such arbitration will be borne equally by the parties.

(Appendix p. A 40) (emphasis added).

In the case at bar, the Respondents filed a lawsuit seeking to strike from the lease the provisions compensating the consultants on the grounds that they engaged in the unauthorized practice of law. (*See* Complaint, ¶ 19, Appendix pp. A 6 - A 7). Because the lease signed by the parties on March 14, 2006, contained an arbitration clause, the Petitioners sought to compel arbitration of this dispute which clearly “arises out of and relates to the lease.”

II. Procedural History

Respondents initiated this lawsuit with the filing of a Complaint on July 30, 2013. The Complaint alleges that the Petitioners engaged in the unauthorized practice of law in relationship to the lease and thus sought to strike payment provisions to the Petitioners relating to their work as consultants under the said lease. (Appendix pp. A 1 – A 8).

The Petitioners removed the case to the United States District Court for the Northern District of West Virginia on August 29, 2013, on the basis of diversity of citizenship pursuant to 28 U.S.C. Sections 1332, 1441, and 1446. While the case was pending in federal court, the Petitioners moved to compel arbitration. Senior U.S. District Judge Frederick P. Stamp, Jr. denied the motion to compel arbitration without prejudice and remanded the case to State Court. (Appendix pp. A 21 – A 31).

As such, on or about April 17, 2014, the Petitioners filed a Motion to Compel Arbitration and a Memorandum of Law in Support of Motion to Compel Arbitration. (Appendix pp. A 9 – A 60). The motion and supporting memorandum asserted that the matter was governed by an

arbitration agreement within the lease and thus should be dismissed and ordered to proceed in arbitration. A Response was filed on May 12, 2014, and a Reply was filed on June 16, 2014. (Appendix pp. A 61 – A 153).

Judge Martin J. Gaughan held a hearing on June 19, 2014, after which the Court issued an Order on November 20, 2014, denying the motion. (Appendix pp. A 217 – A 224). It is from this Order that the current Appeal has been filed.

SUMMARY OF ARGUMENT

The Circuit Court committed a reversible error by exercising jurisdiction over the case rather than transferring to arbitration. The Circuit Court correctly found that the Petitioners and Respondents were parties to an agreement containing an arbitration clause, but nonetheless committed a reversible error by exercising jurisdiction over this case rather than transferring to arbitration. The Court improperly carved out an exception based on the fact that the specific tort pled in this case was the unauthorized practice of law. However, this Court has expressly recognized that the unauthorized practice of law exists as a private cause of action and has further held that torts and matters of public policy are all matters that may be arbitrated. As such the trial court erred in failing to grant the Petitioners' Motion to Compel Arbitration.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary pursuant to the criteria in West Virginia Rule of Appellate Procedure 18(a). Petitioners respectfully submit this matter presents sufficiently unique and procedural issue to merit oral argument. Therefore, the Petitioners request that the case be set for Rule 19 oral argument.

ARGUMENT

I. Standard of Review

The Motion to Compel Arbitration filed below was filed under West Virginia Rules of Civil Procedure 12(b)(1) and 12(b)(6), thus making it in essence a motion to dismiss. With respect to motions to dismiss, this Court has held that:

When an appeal from an order denying a motion [to] dismiss is properly before this Court, our review is *de novo*. See, e.g. Syl. 4, Ewing v. Board of Educ. Of Cnty. of Summers, 202 W. Va. 228, 503 S.E.2d 541 (1998) (“When a party, as part of an appeal from final judgment, assigns as error a circuit court’s denial of a motion to dismiss, the circuit court’s disposition of the motion to dismiss will be reviewed *de novo*.”).

Credit Acceptance Corp., v. Robert J. Front, 231 W.Va. 518, 745 S.E.2d 556 (2013).

Furthermore, the motion to dismiss is properly before this Court, as this Court has found that, “[a]n order denying a motion to compel arbitration is an interlocutory ruling which is subject to immediate appeal under the collateral order doctrine. Syl. 1, Id.

II. The Circuit Court Erred by Carving out an Arbitration Exception for Claims Alleging the Unauthorized Practice of Law

When a trial court is required to rule upon a motion to compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. Sections 1-307 (2006), the authority of the trial court is limited to determining the threshold issues of (1) whether valid arbitration agreement exists between the parties and (2) whether the claims averred by the Plaintiff fall within the substantive scope of the arbitration agreement. Syl. Pt.2, State ex rel TD Ameritrade Inc. v. Kaufman, 692 S.E. 2d 293 (W.Va. 2010). The purpose of the Federal Arbitration Act, 9 U.S.C. Section 2, is for the courts to treat arbitration agreements like any other contract. The Act does not favor or elevate arbitration agreements to a level of importance above all other contracts; it simply ensures that

private agreements to arbitrate are enforced according to their terms. Syl. Pt. 2, State ex rel Richmond American Homes of West Virginia, Inc. v. Sanders, 717 S.E. 2d 909 (W.Va. 2011).

A. Petitioners are Parties to the Lease

As the existence of a valid, enforceable contract is not in dispute, the question is whether Mr. Capouillez was a party under the agreement. On this issue, the trial court reviewed the language of the lease and concluded that Mr. Capouillez was a party to the lease. After all, the lease included the following provisions:

- On the Signature Page (8 of 10), there are 3 parties identified. The parties identified are the Lessor, the herein Defendant Consultant, and Lessee. (Appendix p. A 40).
- Above the signatures, the lease provides: “IN WITNESS WHEREOF, Lessor, Consultant and Lessee have caused this Agreement to be duly executed and have caused their signatures to be hereto affixed and attached by their proper officers, all hereunto duly authorized, on the date first above written.” (Appendix p. A 40).
- The lease provides under the Royalty Section that royalties are to be paid to the Lessor and to the Consultant. (See paragraphs 3.1 and 3.4). (Appendix p. A 34).
- Under the Payment Section of the lease, there is reference to the Lessor and the Consultant receiving payments. (See paragraphs 5.1 and 5.2). (Appendix p. A 34).
- Under Operations, the lease provides, “Upon the written request of Lessor or Consultant. . .” (See paragraph 6.2). (Appendix p. A 35).
- Under Seismic Surveys, paragraph 13.1 references that, “Prior to conducting any seismic work, Lessee shall submit to the Lessor **and Consultant** a map. . .” (emphasis added) (Appendix p. A 37).
- Under Pipelines, paragraph 14.1 references “. . . a route map for each line shall be submitted to Lessor **and Consultant** . . .” (emphasis added). (Appendix p. A 37).
- Under Drilling, paragraph 15.1 references Lessor and Consultant. (Appendix p. A 37).
- References to Lessor and Consultant also appear in paragraphs 15.9, 17.1, and 18.1 regarding well records, logs and reports and audits. (Appendix p. A 38).

- Paragraph 19.1 regarding Lessee's termination provides that ". . . all revenues paid prior to the effective date of the surrender shall be deemed liquidated damages due Lessor and Consultant. . ." (emphasis added). (Appendix p. A 38).

Clearly the Consultant is intertwined throughout the lease as a party of interest having significant rights given to him throughout the lease. The Trial Court agreed and correctly noted that Mr. Capouillez was a signator and thus a party to the lease.

B. Tort of Unauthorized Practice of Law is Proper Subject of Arbitration

While the lower court correctly found the Petitioners under the lease to be parties, and found nothing inherently improper about the language of the arbitration provision, the Court nonetheless erroneously concluded that the tort alleged, i.e. the unauthorized practice of law, was somehow unique and declined to compel arbitration on this basis.

While this party does not dispute that the West Virginia Supreme Court has an inherent power to define, supervise, regulate and control the practice of law, it does not change the fact that this court also created a cause of action for private citizens to allege an individual has engaged in the unauthorized practice of law. In this case, this private cause of action is covered by an arbitration clause that is part of a contract between parties.

In McMullen v. Advance Title Service Company of West Virginia, this Court was confronted with a certified question of whether a non-lawyer Plaintiff has standing to bring a cause of action alleging the unlawful practice of law in the State of West Virginia. The Court answered in the affirmative and specifically authorized that private individuals could bring claims sounding in tort for the unauthorized practice of law. 216 W.Va. 413, 417, 607 S.E.2d 519, 523 (2004). *See also* Brammer v. Taylor, 175 W.Va. 728, 338 S.E.2d 207 (1985) (unauthorized practice of law would be *prima facie* negligence in the preparation of legal documents). The McMullen Court held that:

a party who has suffered or may likely suffer a legally cognizable injury, wrong, or other actionable violation of his or her personal legal rights and interests as a proximate result of the unlawful and unauthorized practice of law by another has standing to assert as claim alleging such actual or threatened unlawful and unauthorized practice and seeking relief appropriate to the injury, wrong, or violation.

216 W.Va. 413, 418.

Thus, this Court has clearly recognized the tort of unauthorized practice of law as a private cause of action and allows for two private citizens to also have standing between each other to bring such claims.

It is anticipated that Respondents will argue that due to the unique nature of the tort of the unauthorized practice of law, public policy dictates that an exemption be carved out for this tort. However, no such public policy exemption has ever been carved out with respect to the arbitrability of a specific tort. In fact, this court has held that tort claims, as well as public-policy claims, may be submitted to arbitration. See State ex rel. Clites v. Clawges, 685 S.E.2d 693 (W. Va. 2009); State ex rel. Wells v. Matish, 215 W.Va. 686, 600 S.E.2d 583 (2004) (finding employment law claims subject to arbitration clause).

Here, Respondents allege that they suffered damages as a result of these Petitioners (Defendants) stepping over the line of consultant/negotiator and instead allegedly engaging in the unauthorized practice of law during the course of the negotiation, procuring, and execution of the lease. (*See* Complaint, generally). They specifically state:

- “In or about said time, Plaintiffs entered into an oral or written agreement (Agreement) with Defendants wherein Defendants were to act as Plaintiffs’ “consultants” and representatives in matters relative to the procurement, negotiation, execution, and performance of an oil and gas lease.” (§ 8 of Complaint; Appendix p. A 3).
- “. . . Plaintiffs entered into an oil and gas lease (Lease) with Great Lakes Energy Partners, LLC . . . leasing their oil and gas interests in and to the subject 33.803

acre parcel of land. Defendant, Capouillez, signed the Lease as “Consultant” to Plaintiffs . . .” (§9 of Complaint; Appendix p. A 3).

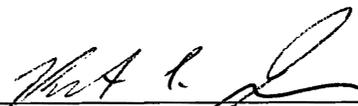
- “During the course of its “consulting” activities performed pursuant to the Agreement, Defendants, inter alia, instructed and advised Plaintiffs regarding their rights and obligations **under the Lease . . . and gave advice on various lease provisions, . . . engaged in oil and gas lease negotiations on Plaintiffs behalf with Range . . .**” (§10 of Plaintiffs’ Complaint, Appendix p. A 3). (emphasis added).

Thus, there can be no doubt that this claim involves the lease. Therefore, this matter should be arbitrated, as the arbitration provision contained within the lease expressly states that it applies to “Any controversy or claim arising out of or relating to this Lease.”

CONCLUSION

For the reasons detailed above, the Petitioners, Geological Assessment & Leasing and William Capouillez ask that this Court reverse the Order entered by the Circuit Court and remand with directions to grant the Motion to Compel Arbitration and refer the claims to arbitration without prejudice.

Respectfully submitted,


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Respondents.

CERTIFICATE OF SERVICE

Service of the foregoing *PETITIONERS' BRIEF and APPENDIX RECORD* was had upon the parties herein by sending true and correct copies thereof via regular U.S. Mail, postage prepaid, to the following counsel of record this 2nd day of March, 2015:

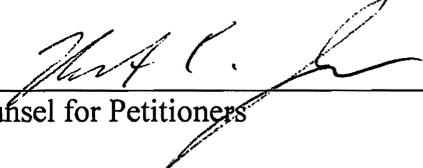
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