

NO. 14-0921

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

(Circuit Court Civil Action No. 12-C-11)

**CHESAPEAKE APPALACHIA, L.L.C.,  
RED SKY LAND, L.L.C., RED  
SKY-WEST VIRGINIA, L.L.C. and  
TERRY L. MURPHY,**

**Petitioner,**

**v.**

**CECIL L. HICKMAN,**

**Respondents.**

**ON APPEAL FROM THE CIRCUIT COURT OF  
OHIO COUNTY, WEST VIRGINIA**

---

**APPELLANT'S REPLY BRIEF**

---

Submitted by:

Timothy M. Miller (WVSB No. 2564)

[tmiller@babstcalland.com](mailto:tmiller@babstcalland.com)

Mychal S. Schulz (WVSB No. 6092)

[mschulz@babstcalland.com](mailto:mschulz@babstcalland.com)

Babst Calland Clements & Zomnir, P.C.

500 Virginia Street East, Suite 590

Charleston, West Virginia 25301

(681) 205-8888

(681) 205-8814 (fax)

*Counsel for Petitioners, Chesapeake  
Appalachia, L.L.C., Red Sky Land, LLC, Red  
Sky-West Virginia, LLC, and Terry L.  
Murphy*

**TABLE OF CONTENTS**

TABLE OF CONTENTS.....2

TABLE OF AUTHORITIES .....3

ARGUMENT .....4

    1.    The Circuit Court’s inquiry should have started and ended with its  
        determination that the arbitration provision in the Chesapeake Lease was  
        valid.....4

    2.    The Circuit Court’s findings violated the severability doctrine.....6

    3.    The Circuit Court erred in finding that the February 2011 Lease was  
        “procured due to a mistake in fact and misrepresentation on the part  
        of Chesapeake, Red Sky and Murphy, and is therefore, void and  
        unenforceable as a matter of law.”.....7

    4.    The Circuit Court mistakenly evaluated the 2005 Great Lakes Lease  
        and the 2006 Great Lakes Lease, and it further erred in concluding  
        that the 2005 Great Lakes Lease was the “controlling contract”  
        between Mr. Hickman, as lessor, and Great Lakes, as lessee .....9

CONCLUSION.....9

## TABLE OF AUTHORITIES

### *Cases:*

State ex rel. TD Ameritrade v. Kaufman, 225 W.Va. 250, 692 S.E.2d 293 (2010) .....5-7

## **APPELLANT'S REPLY BRIEF**

Appellants/Defendants Chesapeake Appalachia, L.L.C.; Redsky Land, L.L.C.; Red Sky-West Virginia, L.L.C.; and Terry L. Murphy (collectively, “the Chesapeake Defendants”) reply to the Brief of Respondent Cecil L. Hickman. Mr. Hickman’s arguments simply regurgitate the contents of the Order entered by the Circuit Court of Ohio County (“Circuit Court”). That Order should, however, be reversed and remanded, with instructions to send all of Mr. Hickman’s claims against the Chesapeake Defendants to arbitration.

### **ARGUMENT**

- 1. The Circuit Court’s inquiry should have started and ended with its determination that the arbitration provision in the Chesapeake Lease was valid.**

Critically, Mr. Hickman’s claims against the Chesapeake Defendants center on a lease signed in January 2011 by Mr. Hickman and his siblings (“the Chesapeake Lease”). Accordingly, the Circuit Court’s evaluation of the Chesapeake Defendants’ request to dismiss Mr. Hickman’s claims should have started and ended with an examination of the arbitration provision in the Chesapeake Lease. The Circuit Court found the arbitration provision to be both procedurally and substantively conscionable. Once the Circuit Court made that determination, it should have granted the Chesapeake Defendants’ Motion to Dismiss and sent all of Mr. Hickman’s claims against the Chesapeake Defendants to arbitration. Instead, the Circuit Court’s Order made wide-ranging findings of fact and conclusions of law, on a variety of other subjects, the result of which was a full determination of the merits of Mr. Hickman’s claims.

Significantly, the Circuit Court determined that (1) “Chesapeake entered into valid and enforceable lease with Plaintiff and his siblings on January 5, 2011 [*i.e.*, the Chesapeake Lease],” and (2) “the arbitration clause in the Chesapeake lease is neither procedurally nor substantively

unconscionable, and is, therefore, valid and enforceable.” App at 13 and 17. Therefore, the only other inquiry by the Circuit Court should have been whether Mr. Hickman’s claims fall within the scope of that arbitration provision. Because all of Mr. Hickman’s claims center on the Chesapeake Lease (App. at 25-38), the Circuit Court’s analysis of that lease, or other issues at hand, should have stopped. Instead, the Circuit Court made findings of fact and conclusions of law that went far beyond this limited inquiry. As a result, the Order must be reversed and remanded.

Instead of focusing on the limited issue before this Court, the bulk of Mr. Hickman’s Response attempts to justify the Circuit Court’s analysis and decisions of the merits of his claims. As with the Order from which this appeal arises, Mr. Hickman’s arguments are beyond the scope of the issue at hand. Specifically, under this Court’s directive in State ex rel. TD Ameritrade v. Kaufman, 225 W.Va. 250, 692 S.E.2d 293 (2010), once the Circuit Court determined that a valid and binding arbitration provision existed, all decisions on the merits of Mr. Hickman’s claim must be decided by the arbitration tribunal.

Mr. Hickman calls the Circuit Court’s consideration of the validity of contracts other than the Chesapeake Lease to be merely a “coincidence that results in a finding that certain leases are not valid contracts.” (Response at 14) This is not merely a “coincidence,” but an erroneous overreach by the Circuit Court. Because the Chesapeake Lease was the only lease under which Mr. Hickman was making a claim, the Circuit Court should have started, and ended, with an analysis of the arbitration provision in that document. Had it done so, the Circuit Court would have avoided making findings of fact and conclusions of law on the substance of Mr. Hickman’s claims. Instead, the Circuit Court’s Order reveals a far-reaching analysis of virtually all aspects of Mr. Hickman’s substantive claims. In fact, the Circuit Court implicitly acknowledged that it

considered, and decided, the merits of Mr. Hickman's claims when it noted that arbitration could proceed, but only "*if any issues remain with regard to the Chesapeake [L]ease . . .*" App. at 17 (emphasis added).

Even Mr. Hickman concedes that the Circuit Court -- *after* finding that the arbitration provision in the Chesapeake Lease was valid and binding -- "determined that there was a condition precedent to the contract and ordered [the Chesapeake Defendants] to pay consideration that was due and owing . . . ." Response at 25. This, more than anything, demonstrates that the Circuit Court went far beyond this Court's directive in State ex rel. TD Ameritrade, and it improperly addressed the merits of Mr. Hickman's claims after finding the existence of a valid arbitration provision.

## **2. The Circuit Court's findings violated the severability doctrine.**

Mr. Hickman posits that the Circuit Court "did what it should have done" when it considered the lease contracts, as a whole, instead of just the arbitration provisions. Under the severability doctrine, however, circuit courts are permitted to "address challenges to an arbitration clause but reserves to arbitrators challenges to the contract as a whole." State ex rel. TD Ameritrade, 225 W. Va. at 254, 692 S.E.2d at 297. Here, the Circuit Court should have determined only whether the arbitration provision in the Chesapeake Lease was valid. Instead, it went much further and examined the validity of the entirety of the 2005 Great Lakes Lease, the 2006 Great Lakes Lease, the Chesapeake Lease, and the February 2011 Lease, all of which should have been issues that were reserved to the arbitration panel. See State ex rel. TD Ameritrade, 225 W. Va. at 255, 692 S.E.2d at 298 ("The law is clear that the trial court had no authority to rule on any issue other than whether arbitration of Mr. Salamie's claims was required

under the applicable contracts. [citation omitted] By addressing issues that are expressly reserved for arbitration, the trial court exceeded the scope of its authority.”).

Mr. Hickman then asserts that this Court reversed the circuit court in State ex rel. TD Ameritrade “for reasons that are not germane to the issues contained herein.” Response at 24. This statement reveals that Mr. Hickman completely misses the point of this Court’s decision in State ex rel. TD Ameritrade, where this Court rejected the circuit court’s attempt to engage in a “semantic explanation” for deciding the merits of the plaintiff’s claim. See State ex rel. TD Ameritrade, 225 W. Va. at 255, 692 S.E.2d at 298, n. 11 (“Mr. Salamie argued that he was merely requesting a ruling that all parts of the contract, and not just a portion of it, would apply when the matter proceeded to arbitration. We find this semantical explanation to be unavailing. By seeking a pre-arbitral ruling on the validity of the entire contract, Mr. Salamie sought to sidestep the general requirement that issues addressing the validity of a contract are expressly reserved to the arbitrator.”) Here, Mr. Hickman attempts to justify the Circuit Court’s substantive examination of his claims and rulings on the leases at issue by calling them a “coincidence.” Response at 14. However it’s termed, the result is the same. The Circuit Court should have reserved all examination of the merits of Mr. Hickman’s claims for the arbitration tribunal, once it found the arbitration provision in the Chesapeake Lease to be valid.

**3. The Circuit Court erred in finding that the February 2011 Lease was “procured due to a mistake in fact and misrepresentation on the part of Chesapeake, Red Sky and Murphy, and is therefore, void and unenforceable as a matter of law.”**

Mr. Hickman argues that the February 2011 Lease was “procured due to a mistake in fact” because Chesapeake “wrongly believed” (1) that the July 2006 Lease was valid, and (2) that “it was the intention of Great Lakes” to include Mr. Hickman in the Great Lakes Lease, even

though he never signed it. Response at 27. Of course, this sort of evaluation goes to the merits of Mr. Hickman's claims, which should have been left to the arbitration tribunal.

Importantly, however, Mr. Hickman's argument is nonsensical because Chesapeake's discretionary decision cannot be a "fact" that is a "mistake" in any sense of the word. Under the terms of the Chesapeake Lease, the royalty payment to Mr. Hickman (which the Circuit Court erroneously stated had to be paid by Chesapeake) was "conditioned upon title to the property interests leased being confirmed satisfactorily to Chesapeake." App. at \_\_\_\_\_. Right, wrong, or indifferent, Chesapeake's opinion as to whether Mr. Hickman's title was "confirmed satisfactorily" is not, and cannot be, a "mistake in fact" that supports the Circuit Court's decision that Chesapeake's procurement of the February 2011 Lease was "due to a mistake in fact[.]" Mr. Hickman may feel that Chesapeake "wrongly believed" something, but that cannot be the basis for invalidating the February 2011 Lease.

Likewise, the alleged "mistake of fact" identified by the Circuit Court centers on Mr. Hickman's allegations that Mr. Murphy stated that the February 2011 Lease had to be executed in order for Hickman's siblings to receive bonus payments and future royalty payments. App. at 14. Far from being "ridiculous" (Response at 28), the Chesapeake Defendants' position rests upon the *fact* that Chesapeake was not satisfied with Mr. Hickman's title to the property and, therefore, it surrendered the Chesapeake Lease as to Mr. Hickman without paying the Order of Payment to him, which it unquestionably had a right to do under the terms of that lease. App. at 103. Given that Chesapeake was not satisfied with Mr. Hickman's title to the property, the *fact* was that the only way for Mr. Hickman's siblings to receive any future royalty payments from Chesapeake was for all the property interests to be under lease -- including Mr. Hickman's interest. As such, Mr. Hickman had to enter into a lease with Chesapeake for everyone,

including his siblings, to receive future royalties -- which he did when he signed the February 2011 Lease. Chesapeake's satisfaction as to Mr. Hickman's title in the property, and its requirement that Mr. Hickman sign another lease before it would be satisfied as to the title for any of his siblings, are all "facts" that are absolutely true. Mr. Hickman may call Chesapeake's position "ridiculous," but his argument reveals only a difference of opinion, which is of no significance to whether Chesapeake was within its right to exercise its discretion in deciding whether it was satisfied with Mr. Hickman's title.

**4. The Circuit Court mistakenly evaluated the 2005 Great Lakes Lease and the 2006 Great Lakes Lease, and it further erred in concluding that the 2005 Great Lakes Lease was the "controlling contract" between Mr. Hickman, as lessor, and Great Lakes, as lessee.**

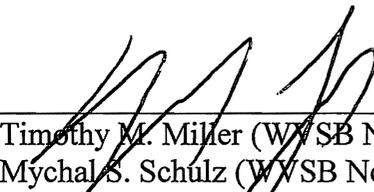
Mr. Hickman offers many excuses for signing the 2006 Great Lakes Lease that he now seeks to void in an effort to get more money. None of those excuses, however, belie the uncontroverted fact that he signed the 2006 Great Lakes Lease, and he does not contend that the language of that lease is ambiguous. In fact, he does argue that he ever raised any specific issues with the terms of that lease. Likewise, he does not contest that he acknowledged and ratified, in the February 2011 Lease, that the 2006 Great Lakes Lease remained in force and effect. App. at 172. None of these excuses or arguments, therefore, should stand.

Perhaps most importantly, however, the Circuit Court should never have evaluated the terms of the 2005 Great Lakes Lease, or the 2006 Great Lakes Lease, in deciding whether Mr. Hickman's claims against the Chesapeake Defendants should be compelled to arbitration, because that evaluation should have been left to the arbitration tribunal. Again, once the Circuit Court determined that the Chesapeake Lease contained a valid arbitration proceeding, its analysis of the other leases, which went to the merits of Mr. Hickman's claims against the Chesapeake Defendants, should have ceased.

## CONCLUSION

For the reasons detailed in its initial Appellants' Brief and above, the Chesapeake Defendants ask that this Court reverse the Order entered by the Circuit Court and remand, with directions to grant the Chesapeake Defendants' Motion for Summary Judgment and refer all of Mr. Hickman's claims against the Chesapeake Defendants to arbitration.

By Counsel



---

Timothy M. Miller (WVSB No. 2564)  
Mychal S. Schulz (WVSB No. 6092)  
Babst Calland Clements & Zomnir, P.C.  
500 Virginia Street East, Suite 590  
Charleston, West Virginia 25301  
(681) 205-8888  
(681) 205-8814 (fax)  
*Counsel for Petitioners, Chesapeake  
Appalachia, L.L.C., Red Sky Land, LLC,  
Red Sky-West Virginia, LLC, and Terry L. Murphy*

NO. 14-0921

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

(Circuit Court Civil Action No. 12-C-11)

CHESAPEAKE APPALACHIA, L.L.C.,  
RED SKY LAND, L.L.C., RED  
SKY-WEST VIRGINIA, L.L.C. and  
TERRY L. MURPHY,

Petitioner,

v.

CECIL L. HICKMAN,

Respondents.

**CERTIFICATE OF SERVICE**

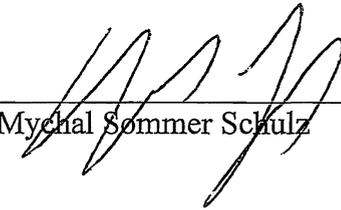
I, Mychal S. Schulz, one of counsel for Petitioners Chesapeake Appalachia, L.L.C.; Redsky Land, L.L.C; Red Sky-West Virginia, L.L.C.; and Terry L. Murphy, do hereby certify that on this day I served an original and ten copies of the following **APPELLANT'S REPLY BRIEF** via United States Postal Service, first class postage prepaid and addressed as follows:

Gregory A. Gellner, Esquire  
GELLNER LAW OFFICES  
1440 National Road  
Wheeling, West Virginia 26003  
*Counsel for Plaintiff Cecil L. Hickman*  
(304) 242-0200

Robert C. James, Esquire  
FLAHERTY SENSABAUGH BONASSO PLLC  
1225 Market Street  
P.O. Box 6564  
Wheeling, WV 26003  
*Counsel for Defendants Geological Assessment & Leasing and William A. Capouillez*  
(304) 230-6610

Kenneth J. Witzel  
BARNES DULAC WATKINS  
Two Gateway Center, 17 East  
603 Stanwix Street  
Pittsburgh, Pennsylvania 15222  
*Counsel for Defendant Range Resources – Appalachia, LLC*  
(412) 434-5554

Given under my hand February 11, 2015.

  
\_\_\_\_\_  
Mychal Sommer Schulz