

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Sugar Rock, Inc., et al., : **Case No.: 15-0124**
:
Defendants-Petitioners, :
:
v. :
:
D. Michael Washburn, et al., :
:
Plaintiffs-Respondents. :

BRIEF OF RESPONDENTS

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 Plaintiffs-Respondents

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	6
STATEMENT REGARDING ORAL ARGUMENT AND DECISION	8
ARGUMENT	8
Assignment of Error No. 1	8
Assignment of Error No. 2	22
Assignment of Error No. 3	27
Assignment of Error No. 4	35
Assignment of Error No. 5	38
CONCLUSION	39
CERTIFICATE OF SERVICE	40

TABLE OF AUTHORITIES

	Page
I. <u>Cases</u>	
<i>Arbaugh v. Raines</i> , 155 W. Va. 409 (1971)	34, 35
<i>Daniels v. Arcade, L.P.</i> 477 Fed. Appx. 125 (4 th Cir. 2012)	18
<i>Fraleay v. Family Dollar Store</i> , 188 W. Va. 35 (1992)	24
<i>Gorbey v. Monongalia County</i> , Case No. 13-1131, 2014 W. Va. LEXIS 887 (2014)	37
<i>Kincaid v. Patterson</i> , 129 W. Va. 234 (1946)	24
<i>King v. Meabon</i> , 128 W. Va. 263 (1945)	10
<i>Lantz v. Tumlin</i> , 74 W. Va. 196 (1914)	19, 21
<i>Meadows v. Belknap</i> , 199 W. Va. 243 (1997)	28
<i>Peerless Carbon Black Co. v. Gillespie</i> , 87 W. Va. 441 (1920)	24
<i>Sport Mart, Inc. v. Knell</i> , Case No. 11-0048, 2011 W. Va. LEXIS 491 (Nov. 28, 2011)	9
<i>State ex. rel. Battle v. Hereford</i> , 148 W. Va. 97 (1963)	39
<i>Valentine v. Sugar Rock, Inc.</i> , 766 S.E. 2d 785 (2014)	19, 21
<i>Wheeling & E.G.R. Co. v. Triadelphia</i> , 58 W. Va. 487 (1905)	24
<i>Williams v. Precision Coil, Inc.</i> , 194 W. Va. 52 (1995)	37
<i>Williams v. South Penn Oil Co.</i> , 52 W. Va. 181 (1903)	28
<i>Young v. City of Mt. Rainier</i> , 238 F.3d 567 (4 th Cir. 2001)	19
II. <u>Statutes, Regulations, and Rules</u>	
West Virginia Code § 47B-1-1(7)	36

West Virginia Code § 47B-1-3(a)	26
West Virginia Code § 47B-1-3(b)(8)	36
West Virginia Code § 47B 2-2(c)(3)	17
West Virginia Code § 47B-2-4	30
West Virginia Code § 47B-2-4(a)(1)	31
West Virginia Code § 47B-2-4(a)(2)	31
West Virginia Code § 47B-4-4(b)(1)	34
West Virginia Code § 47B-8-1(5)	9, 10, 22, 36, 37
West Virginia Code § 47B-8-3(a)	38
West Virginia Code § 47B-8-7(b)	38

III. Secondary Sources

STATEMENT OF THE CASE

On November 8, 2010, Clifton G. Valentine (“Mr. Valentine”) filed an action in federal court (“Federal Action”) against Sugar Rock, Inc. (“Sugar Rock”) and Gerald D. Hall (“Mr. Hall”). Mr. Valentine sought information and other relief relating to Sugar Rock’s operation of six (6) oil and gas wells (“Wells”) on four (4) separate leases (“Leases”) owned by the Cutright Gas Company, the Iams Oil Company, the Iams Gas Company, and the Keith Oil Company (“Partnerships”). Although Defendants resisted making any disclosures, the district court ordered Defendants to produce the Partnership tax returns (A.R. 1348) and denied Defendants’ motion for a protective order so that Mr. Valentine could take Mr. Hall’s deposition.

The information contained in the tax returns and obtained during the course of the deposition showed the names and addresses of all of the other minority partners and revealed that none of the Partnerships had earned a profit since Sugar Rock began operating the Wells in 1999. Believing that this gave rise to grounds for a judicial dissolution of the Partnerships, Mr. Valentine filed this action on November 14, 2011 in order to obtain full, plenary relief.¹ A.R. 11.

Prior to filing and during the course of this case, Mr. Valentine reached out to the other minority partners, who were similarly dissatisfied with Sugar Rock and agreed to join Mr. Valentine as additional plaintiffs. On December 1, 2011, Claire Robinson, Edwin L. Deem, Rea Wedekamm, Mary Wakefield, D. Michael Washburn,

¹Mr. Valentine could not obtain full relief in the Federal Action due to the necessary presence of the other non-diverse minority partners.

and Lisa Buzzard were joined upon the filing of the First Amended Complaint. A.R. 34. On September 5, 2012, Anna Lee Townsend Wells, Clyde Townsend, and Kenneth Townsend were added upon the filing of the Second Amended Complaint. A.R. 88. On October 7, 2013, Plaintiffs moved to join the remaining minority partners, including Michael Rubel, Jerome Rubel, and Keith White, as executor of the estate of Bertie Cox, and to substitute J.F. Deem, a.k.a. Frank Deem, for Edwin L. Deem, based on an assignment of Edwin L. Deem's interest that was recorded on February 15, 2012. A.R. 724. The trial court approved the joinder of the remaining minority partners in an order entered on October 28, 2013. A.R. 861.

Meanwhile, Mr. Valentine requested leave to dismiss his claims in the Federal Action without prejudice, but Defendants objected. Instead, they moved the district court to dismiss Mr. Valentine's claims as a matter of law based on the statute of frauds. The district court granted Defendants' motion and Mr. Valentine was temporarily dropped from this action while he pursued an appeal. A.R. 87. On April 2, 2015, based on this Court's answer to a certified question, the United States Court of Appeals for the Fourth Circuit vacated the district court's dismissal of Mr. Valentine's claims and remanded the case for further proceedings. The trial court in this action has since entered an order re-joining Mr. Valentine.

Defendants' Statement of the Case contains a number of inaccuracies and omissions. First, Defendants say that the Second Amended Complaint "is the operative complaint for purposes of this appeal." Brief, p. 5. This is false. In fact, Plaintiffs moved for leave to file a Third Amended Complaint on December 17, 2014 (which

Defendants opposed). A.R. 1484. The Third Amended Complaint was served on Defendants that same day. A.R. 1552. Concurrent with its January 16, 2015 Decision and Judgment Entry (“Decision and Judgment Entry”) granting Plaintiffs’ Second Motion for Partial Summary Judgment, the trial court granted Plaintiffs leave and the Third Amended Complaint was filed. A.R. 1946. The trial court even referenced the Third Amended Complaint in its Decision and Judgment Entry. A.R. 1516. Thus, the Second Amended Complaint is not the “operative complaint.”

Defendants say that Keith White, as executor of the Estate of Bertie C. Cox, has not produced any writing showing an assignment of his interest. Brief, p. 10. This is false. On December 17 2013, Plaintiffs filed discovery documents, including an “unrecorded working interest oil and gas assignment dated February 11, 1958 from F.A. Deem to Earl Keith.” A.R. 1091. The actual assignment is available at A.R. 1014. The trial court recognized the potential significance of this document in its Decision and Judgment Entry. Specifically, it said:

It appears that not all of the assignments to the Documented Plaintiffs’ predecessors were recorded. It certainly seems plausible that the Undocumented Plaintiffs’ predecessors might also have received an assignment over 50 years ago and failed to record it, which would explain their inability to produce documentation today. Although not pled, the Doctrine of Lost Instruments recognizes such a possibility and provides relief therefor under certain circumstances. A.R. 1514.

Defendants assert that, by agreement dated April 1, 1999 (“1999 Agreement”), Sugar Rock acquired “the majority interest” in the Partnerships. This is false. In fact, Sugar Rock acquired 10.5/32nds in the Cutright Gas Company (32.8125%), 10/32nds in the Iams Oil Company (31.25%), 15.5/32nds in Iams Gas Company

(48.4375%), and 11/32nds in Keith Oil Company (34.375%).² A.R. 79-82. Sugar Rock did not receive a “majority interest” in the Partnerships from W.A. Deem under the 1999 Agreement. It did not acquire a majority interest in the Partnerships until later, based on the assignments from Ruby P. Paton, Donald J. Sherman, Charles E. and Ina D. Reed, Hilda H. Sweeney, Sophie P. Stier, Emil and Yolanda Costanza, Sybil B. Cook, Margueritte Nutt, and Opal and Wilmer Hanne. A.R. 1667-1700, 1619-1623.

Defendants assert that “Sugar Rock has been operating those companies and paying expenses to equip the wells and maintain production . . . without any objections from Respondents until the filing of this action in 2011.” Brief, p. 11. They later say that “the first instance of with any of the Respondents objecting to Sugar Rock’s management was when this suit was filed on November 14, 2011.” Brief, p. 34.

Although it was immaterial to the trial court’s decision whether any of Plaintiffs objected, objections were, in fact, made. See Plaintiffs’ Response to Interrogatory No. 15 and Requests for Admission Nos. 2 and 4. A.R. 710, 700, 701. There was even a prior lawsuit regarding Sugar Rock’s expenses. A.R. 195-203.

Defendants assert that “Respondents refused to participate and refused to pay their proportionate share of the losses and expenses charged to them by Sugar Rock for the equipment, expenses to produce, and expenses for the operation of the subject wells.” Brief, p. 12. Although Defendants say that “a full accounting of the income and expenses has always been available for review” (Brief, p. 31), the truth is that Sugar Rock

²Gerald Hall testified in his deposition that he got a greater percentage in the Partnerships than what is set forth in the 1999 Agreement.

immediately cut off Plaintiffs' access to information when it began operating the Wells in 1999. When F.A. Deem operated the Wells, Plaintiffs and their predecessors received statements showing the expenses and how much oil and gas was sold, accompanied by a check for their net share. A.R. 1260-1261. When W.A. Deem took over the operation of the Wells in 1974 from his father, F.A. Deem, Plaintiffs and their predecessors continued to receive statements regarding expenses and sales about every ninety (90) days. A.R. 1261. After the transfer to Sugar Rock, however, Plaintiffs stopped receiving regular statements showing oil and gas sales and expenses, despite requests for same. A.R. 1276. The Partnerships' tax returns and income and expense reports were not made available to Plaintiffs at any time prior to the initiation of the Federal Action.³

The only financial information Plaintiffs continued to receive from Defendants was an annual IRS schedule K-1 setting forth each partner's percentage interest in the Partnerships and showing each partner's share of the annual operating loss. The K-1s did not report gross production revenue or how much Sugar Rock was charging to operate the Wells. Sugar Rock's refusal to share information with Plaintiffs is, in part, why they refused to make additional Partnership contributions.

Defendants assert that "all experts have opined that the net losses are not evidence of impropriety or more mismanagement." Brief, p. 13. Defendants later assert that Plaintiffs "have not identified a single unreasonable expenditure by Sugar Rock" and that "there is no evidence of any kind or nature that Sugar Rock has mismanaged any

³Even then, Defendants produced the requested information only after the federal court entered on an order compelling disclosures. A.R. 1348.

well.” Brief, pp. 30, 35. Once again, although the expert testimony on this issue was immaterial to the trial court’s ruling, it is false to say that “all” the experts have expressed the same opinion and that there is “no evidence of mismanagement.”

Plaintiffs have presented the Affidavit of James S. Vuksic, who, among other things, said that Sugar Rock’s charges to operate the Keith Oil Well when it was not producing “cannot be reasonably justified and is unfair to the Partnerships,” that Sugar Rock’s monthly operating fee for the Cutright No. 2 Well is “grossly excessive,” that Sugar Rock’s charges to operate the Cutright No. 1 Well, Cutright No. 3 Well, Iams Oil Well, and Iams Gas Well are “excessive and unreasonable,” that Sugar Rock undertook work on the Wells that was “not in the best interest of the Partnerships,” that “absent specific proof of extraordinary and ongoing circumstances for each of the Wells,” the vast majority of Sugar Rock’s charges should be presumed “excessive and/or inappropriate,” that Sugar Rock’s failure to provide periodic and itemized statements to Plaintiffs regarding the total revenues and expenses is “clearly against accepted industry custom and practice,” and that Sugar Rock’s decision to secretly increase its monthly operating fee from \$250.00 per month per well to \$450.00 per month per well in the year 2000 and then again to \$550.00 per month per well in 2004 is “against every known industry custom and practice.” A.R. 1328-1339. The reasonableness of Defendants’ expenses and the propriety of its management has not yet been determined by the trial court.

SUMMARY OF ARGUMENT

The trial court correctly applied the summary judgment standard. It did not weigh the evidence or disbelieve any of the evidence that was presented by

Defendants, including the testimony set forth in Defendant's expert affidavits. Instead, the trial court correctly found that the evidence Defendants presented did not create a dispute as to any issue that was material to the relief that Plaintiffs had requested. The purpose of any partnership is to earn a profit for the partners. Even if everything set forth in Defendants' affidavits is true, it remains undisputed that none of the Partnerships have earned any profit since Sugar Rock began operations in 1999. The evidence that Sugar Rock presented all relates to disputed issues that still need to be tried, including the reasonableness of its charges and its observance of the fiduciary duties set forth under the Revised Uniform Partnership Act ("RUPA"). That is why Defendants' appeal is interlocutory in nature.

The undisputed evidence supports that the Partnerships exist and that Plaintiffs have an ownership interest in the Partnerships. Defendants' arguments to the contrary, if accepted, would result in Sugar Rock and its predecessor being disassociated from the Partnerships. Plaintiffs presented extensive evidence, most of which was produced and kept by Defendants, that supported the trial court's July 18, 2013 Order. Having already recognized the existence of Plaintiffs' interests, the January 16, 2015 Decision and Judgment Entry granted Plaintiffs' additional relief, including a judicial dissolution and winding-up. The trial court found that, after combined losses of \$332,446.89 over a period of fourteen years, no reasonable trier of fact could conclude that the Partnerships were profitable, notwithstanding Defendants' self-serving assertions to the contrary.

The trial court correctly concluded that the Leases are Partnership

assets. The words of conveyance set forth in the assignments from F.A. Deem in the late 1950s to Plaintiffs' predecessors ("Partnership Assignments"),⁴ must be given their plain and ordinary meaning. The Partnership Assignments did not merely convey an interest in the proceeds of a single well; instead they conveyed an interest in the "lease" and in the "leasehold" created thereby. The Partnership Assignments say that the Partnerships may elect to do further drilling on the Leases. Indeed, two additional wells were drilled and operated by the Cutright Gas Company. The Partnerships were also involved in a number of assignments for farmout wells that were drilled on the Leases, and overriding royalties from those farmout wells have always been paid to and accounted for as income to the Partnerships, even by Defendants.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This appeal is suitable for oral argument under West Virginia Rule of Appellate Procedure 19(a) because Defendants' Assignments of Error involve the application of law that has been soundly settled in a manner that is adverse to Defendants.

ARGUMENT

Assignment of Error No. 1

Defendants begin with perhaps their most trivial criticism of the trial court's ruling. Specifically, they assert that "the Circuit Court did not cite to Rule 56 in its decision and judgment entry." Brief, p. 16. So long as the trial court correctly applied the law to the facts, in accordance with the standard for summary judgment, it is immaterial whether the Decision and Judgment Entry specifically cited to the rule. *See*

⁴A complete copy of the Partnership Assignments is available at A.P. 1406-1433.

Sport Mart, Inc. v. Knell, Case No. 11-0048, 2011 W. Va. LEXIS 491, at 4-5 (Nov. 28, 2011).

Defendants also say that the trial court did not “view the facts in the light most favorable to Petitioners and determine whether there are genuine issues of material fact.” Brief, p. 16. In fact, the trial court expressly applied the appropriate standard in its Decision and Judgment Entry, including on p. 12 where it said that “no reasonable person” could find in favor of Defendants. A.R. 1521. The trial court based its conclusion on the “unrebutted evidence” and specifically noted Defendants’ failure to dispute that Plaintiffs had not received any distributions from the Partnerships since Sugar Rock took over well operations in April, 1999. A.R. 1519.

The trial court viewed all the facts presented in the light most favorable to Defendants. Most of the evidence Defendants presented, however, was immaterial to the legal questions before the court. For example, Defendants repeatedly cited to their expert affidavits, which assert that there had been no misconduct or mismanagement on the part of Sugar Rock. The trial court did not weigh the evidence or disbelieve any of their testimony. Instead, it explained:

Although W. Va. Code § 47B-8-1(5)(ii) does provide for a judicial dissolution when “another partner has engaged in conduct related to the partnership business which makes it not reasonably practicable to carry on the business in partnership with that partner”; this court need not decide that issue if independent grounds exist under subpart (i) or (iii). A.R. 1520.

In other words, the trial court recognized that the testimony of Defendants’ experts did not bear on whether Plaintiffs were entitled to a judicial dissolution under W. Va. Code

§ 47B-8-1(5)(i) or (iii). Thus, what Defendants assert was a failure to construe the evidence in their favor was in fact a failure by Defendants to present any evidence creating a disputed issue on matters pertaining to the trial court's ruling. All of Defendants' evidence relates to issues that still have to be tried.

Defendants assert that "the trial court did not disclose any basis for a finding that Respondents, or any of them, were partners in a general partnership," that the Decision and Judgment Entry "merely assumes that partnerships exist," that Plaintiffs "submitted no evidence whatsoever with their Second Motion for Partial Summary Judgment," and that the trial court's Decision and Judgment Entry was made "[w]ithout any evidentiary support whatsoever." Brief, p. 17.

Defendants either do not understand or are refusing to recognize the basis for the trial court's ruling. The trial court said that Plaintiffs' participation in the Partnerships was "more specifically addressed in the Court's July 18, 2013 Order." A.R. 1515. The July 18, 2013 Order specifically noted that Plaintiffs' First Motion for Partial Summary Judgment was supported by "Affidavits from Edwin L. Deem, D. Michael Washburn, Mary Wakefield, Rea Wedekamm, and Kenneth Townsend" (A.R. 597) by "documents of record in the chain of title from the late 1950s,"⁵ (A.R. 598) and by "IRS Schedule K-1s for each year from 1999 through 2011 reflecting their ownership interest

⁵The Partnership Assignments show the existence of the Partnerships. This distinguishes the Partnerships from the net profits interest assigned in *King v. Meabon*, 128 W. Va. 263 (1945).

in the Partnerships.”⁶ A.R. 600. The ownership interests, as set forth on the K-1s, were given to Sugar Rock by W.A. Deem, who in turn had received them upon the death of his father, F.A. Deem. The trial court found that these facts supported “Plaintiffs’ status as partners.” A.R. 1516.

The January 15, 2015 Decision and Judgment Entry was built upon the conclusion set forth in the trial court’s July 18, 2013 Order. The trial court did not find any need to revisit whether Plaintiffs were partners in its January 15, 2015 Decision and Judgment Entry. It specifically noted that “the evidence on which this court’s July 18, 2013 Order was based has not changed.” A.R. 1514. Although the trial court modified its July 18, 2013 Order to the extent it concluded that the Partnerships were mining partnerships as opposed to general partnerships in mining, it did not otherwise reverse or vacate its prior order. A.R. 1514.

The trial court entered the July 18, 2013 Order based on the extensive evidence presented by Plaintiffs including:

1. Affidavit of D. Michael Washburn, A.R. 204-208.
2. Cutright Lease, A.R. 212.
3. Assignment of the Cutright Lease to F.A. Deem, A.R. 210.
4. Iams Gas Lease, A.R. 217.
5. Prior assignment of the Iams Gas lease, A.R. 220.
6. Assignment of Iams Gas Lease to F.A. Deem, A.R. 213.
7. Keith Oil Lease to F.A. Deem, A.R. 221.

⁶Defendants repeatedly say that the partners are “unspecified” by the trial court and that the trial court “did not even attempt to specify which Respondents are and are not partners in which companies. Brief, pp. 1, 1421. But the trial court clearly relied on the Schedule K-1s, which identity each partner and his or her percentage of ownership in each Partnership. Moreover, the trial court’s July 18, 2013 Order specifically set forth the ownership interest of each minority partner who had, at the time of Plaintiffs’ First Motion for Partial Summary Judgment, been made a party to the case. A.R. 604-606.

8. Iams Oil Lease, A.R. 227.
9. Assignment of the Iams Oil Lease to F.A. Deem, A.R. 224.
10. Last Will and Testament of F.A. Deem, A.R. 229.
11. Inventory for the Estate of F.A. Deem, A.R. 236.
12. Last Will and Testament of Mary Ellen Washburn, a.k.a. Mary Ellen Ginanni, A.R. 248.
13. 1999 K-1 to Mary Ellen Washburn for Cutright Gas Company, A.R. 252.
14. 2000 K-1 to Mary Ellen Washburn for Cutright Gas Company, A.R. 253.
15. 2001 K-1 to Mary Ellen Washburn for Cutright Gas Company, A.R. 254.
16. 2002 K-1 to Mary Ellen Washburn for Cutright Gas Company, A.R. 255.
17. 2003 K-1 to Mary E. Washburn for Cutright Gas Company, A.R. 256.
18. 2004 K-1 to Mary E. Washburn for Cutright Gas Company, A.R. 257.
19. 2005 K-1 to Mary E. Washburn for Cutright Gas Company, A.R. 258.
20. 2006 K-1 to Lisa A. Buzzard for Cutright Gas Company, A.R. 259.
30. 2006 K-1 to D. Michael Washburn for Cutright Gas Company, A.R. 260.
31. 2007 K-1 to Lisa A. Buzzard for Cutright Gas Company, A.R. 261.
32. 2007 K-1 to D. Michael Washburn for Cutright Gas Company, A.R. 262.
33. 2008 K-1 to Lisa A. Buzzard for Cutright Gas Company, A.R. 263.
34. 2008 K-1 to D. Michael Washburn for Cutright Gas Company, A.R. 264.
35. 2009 K-1 to Lisa A. Buzzard for Cutright Gas Company, A.R. 265.
36. 2009 K-1 to D. Michael Washburn for Cutright Gas Company, A.R. 266.
37. 2010 K-1 to Lisa A. Buzzard for Cutright Gas Company, A.R. 267.
38. 2010 K-1 to D. Michael Washburn for Cutright Gas Company, A.R. 268.
39. 2011 K-1 to D. Michael Washburn for Cutright Gas Company, A.R. 269.
40. 1999 K-1 to Mary Ellen Washburn for Iams Gas Company, A.R. 270.
41. 2000 K-1 to Mary Ellen Washburn for Iams Gas Company, A.R. 271.
42. 2001 K-1 to Mary Ellen Washburn for Iams Gas Company, A.R. 272.
43. 2002 K-1 to Mary Ellen Washburn for Iams Gas Company, A.R. 273.
44. 2003 K-1 to Mary E. Washburn for Iams Gas Company, A.R. 274.
45. 2004 K-1 to Mary E. Washburn for Iams Gas Company, A.R. 275.
46. 2005 K-1 to Mary E. Washburn for Iams Gas Company, A.R. 276.
47. 2006 K-1 to Lisa A. Buzzard for Iams Gas Company, A.R. 277.
48. 2006 K-1 to D. Michael Washburn for Iams Gas Company, A.R. 278.
49. 2007 K-1 to Lisa A. Buzzard for Iams Gas Company, A.R. 279.
50. 2007 K-1 to D. Michael Washburn for Iams Gas Company, A.R. 280.
51. 2008 K-1 to Lisa A. Buzzard for Iams Gas Company, A.R. 281.
52. 2008 K-1 to D. Michael Washburn for Iams Gas Company, A.R. 282.
53. 2009 K-1 to Lisa A. Buzzard for Iams Gas Company, A.R. 283.
54. 2009 K-1 to D. Michael Washburn for Iams Gas Company, A.R. 284.
55. 2010 K-1 to D. Michael Washburn for Iams Gas Company, A.R. 285.
56. 2010 K-1 to Lisa A. Buzzard for Iams Gas Company, A.R. 286.
57. 2011 K-1 to D. Michael Washburn for Iams Gas Company, A.R. 287.
58. 2011 K-1 to Lisa Buzzard for Iams Gas Company, A.R. 288.

59. 1999 K-1 to Mary Ellen Washburn for Iams Oil Company, A.R. 289.
60. 2000 K-1 to Mary Ellen Washburn for Iams Oil Company, A.R. 290.
61. 2001 K-1 to Mary Ellen Washburn for Iams Oil Company, A.R. 291.
62. 2002 K-1 to Mary Ellen Washburn for Iams Oil Company, A.R. 292.
63. 2003 K-1 to Mary E. Washburn for Iams Oil Company, A.R. 293.
64. 2004 K-1 to Mary E. Washburn for Iams Oil Company, A.R. 294.
65. 2005 K-1 to Mary E. Washburn for Iams Oil Company, A.R. 295.
66. 2006 K-1 to Lisa A. Buzzard for Iams Oil Company, A.R. 296.
67. 2006 K-1 to D. Michael Washburn for Iams Oil Company, A.R. 297.
68. 2007 K-1 to Lisa A. Buzzard for Iams Oil Company, A.R. 298.
69. 2007 K-1 to D. Michael Washburn for Iams Oil Company, A.R. 299.
70. 2008 K-1 to Lisa A. Buzzard for Iams Oil Company, A.R. 300.
71. 2008 K-1 to D. Michael Washburn for Iams Oil Company, A.R. 301.
72. 2009 K-1 to Lisa A. Buzzard for Iams Oil Company, A.R. 302.
73. 2009 K-1 to D. Michael Washburn for Iams Oil Company, A.R. 303.
74. 2010 K-1 to Lisa A. Buzzard for Iams Oil Company, A.R. 304.
75. 2010 K-1 to D. Michael Washburn for Iams Oil Company, A.R. 305.
76. 2011 K-1 to D. Michael Washburn for Iams Oil Company, A.R. 306.
77. 2011 K-1 to Lis Buzzard for Iams Oil Company, A.R. 307.
78. 1999 K-1 to Mary Ellen Washburn for Keith Oil Company, A.R. 308.
79. 2000 K-1 to Mary Ellen Washburn for Keith Oil Company, A.R. 309.
80. 2001 K-1 to Mary Ellen Washburn for Keith Oil Company, A.R. 310.
81. 2002 K-1 to Mary Ellen Washburn for Keith Oil Company, A.R. 311.
82. 2003 K-1 to Mary E. Washburn for Keith Oil Company, A.R. 312.
83. 2004 K-1 to Mary E. Washburn for Keith Oil Company, A.R. 313.
84. 2005 K-1 to Mary E. Washburn for Keith Oil Company, A.R. 314.
85. 2006 K-1 to Lisa A. Buzzard for Keith Oil Company, A.R. 315.
86. 2006 K-1 to D. Michael Washburn for Keith Oil Company, A.R. 316.
87. 2007 K-1 to D. Michael Washburn for Keith Oil Company, A.R. 317.
88. 2007 K-1 to Lisa A. Buzzard for Keith Oil Company, A.R. 318.
89. 2008 K-1 to Lisa A. Buzzard for Keith Oil Company, A.R. 319.
91. 2009 K-1 to Lisa A. Buzzard for Keith Oil Company, A.R. 320.
92. 2009 K-1 to D. Michael Washburn for Keith Oil Company, A.R. 321.
93. 2010 K-1 to Lisa A. Buzzard for Keith Oil Company, A.R. 322.
94. 2010 K-1 to D. Michael Washburn for Keith Oil Company, A.R. 323.
96. 2011 K-1 to D. Michael Washburn for Keith Oil Company, A.R. 324.
96. 2011 K-1 to Lisa Buzzard for Keith Oil Company, A.R. 325.
97. Affidavit of Kenneth A. Townsend, A.R. 326-327.
98. Last Will and Testament of Cecil B. Townsend, A.R. 328-331.
99. 2000 K-1 to Cecil B. Townsend for Iams Oil Company, A.R. 332.
100. 2001 K-1 to Cecil B. Townsend for Iams Oil Company, A.R. 333.
101. 2002 K-1 to Cecil B. Townsend for Iams Oil Company, A.R. 334.
102. 2003 K-1 to Cecil B. Townsend for Iams Oil Company, A.R. 335.

103. 2004 K-1 to Cecil B. Townsend for Iams Oil Company, A.R. 336.
104. 2005 K-1 to Cecil B. Townsend for Iams Oil Company, A.R. 337.
105. 2006 K-1 to Cecil B. Townsend for Iams Oil Company, A.R. 338.
106. 2008 K-1 to Cecil B. Townsend for Iams Oil Company, A.R. 339.
107. 2009 K-1 to Cecil B. Townsend for Iams Oil Company, A.R. 340.
108. 2010 K-1 to Cecil B. Townsend for Iams Oil Company, A.R. 341.
109. Affidavit of Rea Weddekam, A.R. 342-345.
110. Working Interest Oil and Gas Assignment from F.A. Deem to Claron Dawson for the Cutright Lease, A.R. 346.
111. Working Interest Oil and Gas Assignment from F.A. Deem to Claron Dawson for the Iams Gas Lease, A.R. 347.
112. Last Will and Testament of Claron Dawson, A.R. 348-354.
113. 2000 K-1 to Claron Dawson for Iams Gas Company, A.R. 355.
114. 2001 K-1 to Claron Dawson for Iams Gas Company, A.R. 356.
115. 2002 K-1 to Claron Dawson for Iams Gas Company, A.R. 357.
116. 2003 K-1 to Claire Robinson for Iams Gas Company, A.R. 358.
117. 2003 K-1 to Rea Wedekamm for Iams Gas Company, A.R. 359.
118. 2004 K-1 to Rea Wedekamm for Iams Gas Company, A.R. 360.
119. 2004 K-1 to Claire Robinson for Iams Gas Company, A.R. 360.
120. 2005 K-1 to Claire Robinson for Iams Gas Company, A.R. 362.
121. 2005 K-1 to Rea Wedekamm for Iams Gas Company, A.R. 363.
122. 2006 K-1 to Claire Robinson for Iams Gas Company, A.R. 364.
123. 2006 K-1 to Rea Wedekamm for Iams Gas Company, A.R. 365.
124. 2007 K-1 to Claire Robinson for Iams Gas Company, A.R. 366.
125. 2007 K-1 to Rea Wedekamm for Iams Gas Company, A.R. 367.
126. 2008 K-1 to Claire Robinson for Iams Gas Company, A.R. 368.
127. 2008 K-1 to Rea Wedekamm for Iams Gas Company, A.R. 369.
128. 2009 K-1 to Claire Robinson for Iams Gas Company, A.R. 370.
129. 2009 K-1 to Rea Wedekamm for Iams Gas Company, A.R. 371.
130. 2010 K-1 to Claire Robinson for Iams Gas Company, A.R. 372.
131. 2010 K-1 to Rea Wedekamm for Iams Gas Company, A.R. 373.
132. 2000 K-1 to Claron Dawson for Cutright Gas Company, A.R. 374.
133. 2001 K-1 to Claron Dawson for Cutright Gas Company, A.R. 375.
134. 2002 K-1 to Claron Dawson for Cutright Gas Company, A.R. 376.
135. 2003 K-1 to Claire Robinson for Cutright Gas Company, A.R. 377.
136. 2003 K-1 to Rea Wedekamm for Cutright Gas Company, A.R. 378.
137. 2004 K-1 to Claire Robinson for Cutright Gas Company, A.R. 379.
138. 2004 K-1 to Rea Wedekamm for Cutright Gas Company, A.R. 380.
139. 2005 K-1 to Rea Wedekamm for Cutright Gas Company, A.R. 381.
140. 2005 K-1 to Claire Robinson for Cutright Gas Company, A.R. 382.
141. 2006 K-1 to Rea Wedekamm for Cutright Gas Company, A.R. 383.
142. 2006 K-1 to Claire Robinson for Cutright Gas Company, A.R. 384.
143. 2007 K-1 to Rea Wedekamm for Cutright Gas Company, A.R. 385.

144. 2007 K-1 to Claire Robinson for Cutright Gas Company, A.R. 386.
145. 2008 K-1 to Rea Wedekamm for Cutright Gas Company, A.R. 387.
146. 2008 K-1 to Claire Robinson for Cutright Gas Company, A.R. 388.
147. 2009 K-1 to Claire Robinson for Cutright Gas Company, A.R. 389.
148. 2009 K-1 to Rea Wedekamm for Cutright Gas Company, A.R. 390.
149. 2010 K-1 to Claire Robinson for Cutright Gas Company, A.R. 391.
150. 2010 K-1 to Rea Wedekamm for Cutright Gas Company, A.R. 392.
151. Affidavit of Edwin Lee Deem, A.R. 392-395.
152. Working Interest Oil and Gas Assignment from F.A. Deem to E.F. Deem for the Cutright Gas Lease, A.R. 397.
153. Working Interest Oil and Gas Assignment from F.A. Deem to E.F. Deem for the Iams Gas Lease, A.R. 398.
154. Working Interest Oil and Gas Assignment from F.A. Deem to E.F. Deem for the Keith Oil Lease, A.R. 399.
155. Assignment of the Cutright Lease from E.F. Deem to Edwin L. Deem, A.R. 400.
156. Assignment of the Keith Oil Lease from E.F. Deem to Edwin L. Deem, A.R. 401.
157. 2000 K-1 to Edwin L. Deem for Iams Gas Company, A.R. 402.
158. 2001 K-1 to Edwin L. Deem for Iams Gas Company, A.R. 403.
159. 2002 K-a to Edwin L. Deem for Iams Gas Company, A.R. 404.
160. 2003 K-1 to Edwin L. Deem for Iams Gas Company, A.R. 405.
161. 2004 K-1 to Edwin L. Deem for the Iams Gas Company, A.R. 406.
162. 2005 K-1 to Edwin L. Deem for the Iams Gas Company, A.R. 407.
163. 2006 K-1 to Edwin L. Deem for the Iams Gas Company, A.R. 408.
164. 2007 K-1 to Edwin L. Deem for the Iams Gas Company, A.R. 409.
165. 2008 K-1 to Edwin L. Deem for the Iams Gas Company, A.R. 410.
166. 2009 K-1 to Edwin L. Deem for the Iams Gas Company, A.R. 411.
167. 2010 K-1 to Edwin L. Deem for the Iams Gas Company, A.R. 412.
168. 2000 K-1 to Edwin L. Deem for Cutright Gas Company, A.R. 413.
169. 2001 K-1 to Edwin L. Deem for Cutright Gas Company, A.R. 414.
170. 2002 K-1 to Edwin L. Deem for Cutright Gas Company, A.R. 415.
171. 2003 K-1 to Edwin L. Deem for Cutright Gas Company, A.R. 416.
172. 2004 K-1 to Edwin L. Deem for the Cutright Gas Company, A.R. 417.
173. 2005 K-1 to Edwin L. Deem for the Cutright Gas Company, A.R. 418.
174. 2006 K-1 to Edwin L. Deem for the Cutright Gas Company, A.R. 419.
175. 2007 K-1 to Edwin L. Deem for the Cutright Gas Company, A.R. 420.
176. 2008 K-1 to Edwin L. Deem for the Cutright Gas Company, A.R. 421.
177. 2009 K-1 to Edwin L. Deem for the Cutright Gas Company, A.R. 422.
178. 2000 K-1 to Edwin L. Deem for the Keith Oil Company, A.R. 423.
179. 2001 K-1 to Edwin L. Deem for the Keith Oil Company, A.R. 424.
180. 2002 K-1 to Edwin L. Deem for the Keith Oil Company, A.R. 425.
181. 2003 K-1 to Edwin L. Deem for the Keith Oil Company, A.R. 426.

182. 2004 K-1 to Edwin L. Deem for the Keith Oil Company, A.R. 427.
183. 2005 K-1 to Edwin L. Deem for the Keith Oil Company, A.R. 428.
184. 2006 K-1 to Edwin L. Deem for the Keith Oil Company, A.R. 429.
185. 2007 K-1 to Edwin L. Deem for the Keith Oil Company, A.R. 430.
186. 2008 K-1 to Edwin L. Deem for the Keith Oil Company, A.R. 431.
187. 2009 K-1 to Edwin L. Deem for the Keith Oil Company, A.R. 432.
188. 2010 K-1 to Edwin L. Deem for the Keith Oil Company, A.R. 433.
189. Affidavit of Mary Wakefield, A.R. 434-436.
190. Working Interest Oil and Gas Assignment from F.A. Deem to George Haugh for the Cutright Lease, A.R. 437.
191. Last Will and Testament of George Haugh and Miriam Haugh, A.R. 439-443.
192. 2000 K-1 to Miriam Haugh from Cutright Gas Company, A.R. 444.
193. 2001 K-1 to Miriam Haugh from Cutright Gas Company, A.R. 445.
194. 2002 K-1 to Miriam Haugh from Cutright Gas Company, A.R. 446.
195. 2003 K-1 to Miriam Haugh from Cutright Gas Company, A.R. 447.
196. 2004 K-1 to Miriam Haugh from Cutright Gas Company, A.R. 448.
197. 2006 K-1 to Miriam Haugh from Cutright Gas Company, A.R. 449.
198. 2007 K-1 to Miriam Haugh from Cutright Gas Company, A.R. 450.
199. 2008 K-1 to Miriam Haugh from Cutright Gas Company, A.R. 451.
200. 2009 K-1 to Miriam Haugh from Cutright Gas Company, A.R. 452.
201. 2010 K-1 to Mary Wakefield from Cutright Gas Company, A.R. 453.
202. Assignment from Edwin L. Deem to J.F. Deem, A.R. 732-734.
203. 2010 K-1 to Michael Sybil and Jerome Ruble from Cutright Gas Company, A.R. 735.
204. 2010 K-1 to Michael, Sybil & Jerome Ruble from Keith Oil Company, A.R. 736.
205. 2009 K-1 to Bertie C. Cox from Keith Oil Company, A.R. 1012.
206. 2010 K-1 to Bertie C. Cox from Keith Oil Company, A.R. 737.
207. 2011 K-1 to Bertie C. Cox from Keith Oil Company, A.R. 1013.
208. Assignment of all interests from Larry Townsend to Kenneth Townsend, A.R. 738-739.
209. 2010 K-1 to A.B. Conway from Keith Oil Company, A.R. 740.
210. E-mail from counsel for Defendants stating that A.B. Conway, a.k.a. Bertram Conway, conveyed his interest to Sugar Rock, Inc. in 2011, A.R. 741-742.⁷
211. 2010 K-1 to Clifton G. Valentine from Keith Oil Company, A.R. 743.
212. 2010 K-1 to Clifton G. Valentine from Cutright Gas Company, A.R. 744.
213. 2010 K-1 to Clifton G. Valentine from Iams Gas Company, A.R. 745.
214. 2010 K-1 to Clifton G. Valentine from Iams Oil Company, A.R. 746.

⁷Although Defendants did not introduce this Assignment into the record, it was recorded on April 11, 2014 at Volume 271, Page 788 and is available online from the Clerk of the Ritchie County Commission at www.landaccess.com.

215. Last Will and Testament of Edmund Ruble, A.R. 837-853.
216. Unrecorded Working Interest Oil and Gas Assignment from F.A. Deem to Earl Keith for the Keith Oil Lease, A.R. 1014.

At Defendants' insistence, Plaintiffs also searched their records for any other documents related to their Partnership interests, including documents from prior to 1999, when Sugar Rock initiated operations. Plaintiffs found, produced, and filed with the court the following additional evidence, including:

1. 1998 K-1 to Miriam Haugh from Cutright Gas Company, A.R. 1095.
2. 1964 Partnership Report from F.A. Deem to Cecil B. Townsend, A.R. 1096.
3. 1974 K-1 to Cecil B. Townsend from Iams Oil Company, A.R. 1098.
4. 1976 K-1 to Cecil B. Townsend from Iams Oil Company, A.R. 1099.
5. 1977 K-1 to Cecil B. Townsend from Iams Oil Company, A.R. 1100.
6. 1978 K-1 to Cecil B. Townsend from Iams Oil Company, A.R. 1101.
7. 1978 K-1 to Cecil B. Townsend from Iams Oil Company, A.R. 1102.
8. 1980 K-1 to Cecil B. Townsend from Iams Oil Company, A.R. 1103.
9. 1981 K-1 to Cecil B. Townsend from Iams Oil Company, A.R. 1104.
10. 1982 K-1 to Cecil B. Townsend from Iams Oil Company, A.R. 1105.
11. 1983 K-1 to Cecil B. Townsend from Iams Oil Company, A.R. 1106.
12. 1985 K-1 to Cecil B. Townsend from Iams Oil Company, A.R. 1107.
13. 1986 K-1 to Cecil B. Townsend from Iams Oil Company, A.R. 1108.
14. 1988 K-1 to Cecil B. Townsend from Iams Oil Company, A.R. 1109.
15. 1995 K-1 to Cecil B. Townsend from Iams Oil Company, A.R. 1110.

Thus, even though Kenneth Townsend, Clyde Townsend, and Anna Townsend-Wells cannot identify or produce a written assignment from F.A. Deem to their father, Cecil B. Townsend, they produced records relating to their father's participation in the Partnerships going back more than fifty (50) years to 1964. There is no reason to believe the information on the K-1s is inaccurate. Moreover, under RUPA, specifically W. Va. Code § 47B-2-2(c)(3), Plaintiffs' history of sharing in the profits of the Partnerships creates a presumption that they are partners. Defendants failed to present any evidence that would rebut this presumption.

The only way Defendants can say that the trial court's conclusions lack evidence is to hide or ignore the evidence that has been presented. Indeed, that seems to be their primary strategy on appeal. In assembling the Appendix Record, Defendants tried to exclude all of the documents listed above. In an April 6, 2015 email from counsel for Defendants, which is attached to Plaintiffs' Appendix Record Designation as Exhibit B, they said that the additional documents Plaintiffs designated were "irrelevant," had "no independent relevance to Plaintiffs' second motion for partial summary judgment," and were not "appropriate for the appendix record." The trial court had overwhelming, undisputed, un rebutted evidence to support its ruling. Defendants' argument to the contrary is specious.

Defendants say that Plaintiffs' "only claims are based on allegations of mining partnerships,"⁸ and that "Respondents do not plead in the alternative." Brief, p. 19. They assert that "there is no allegation of their status as general partners," (Brief, p. 19) and that "there have been neither allegations nor facts to support an argument regarding general partnerships." Brief, p. 20. Defendants are simply ignoring Plaintiffs' Third Amended Complaint, which does plead in the alternative. Specifically, paragraph 17 alleges that the Partnerships "are West Virginia mining partnerships or general partnerships in mining" (emphasis added). A.R. 1539. Defendants' focus on the allegations in the Second Amended Complaint is completely misplaced. An amended pleading ordinarily supercedes the original and renders it of no legal effect. *Daniels v.*

⁸At the same time, and in seeming contradiction, Defendants say that Plaintiffs have abandoned all their prior arguments under the common law of mining partnerships. Brief, p. 28.

Arcade, L.P. 477 Fed. Appx. 125, 130 (4th Cir. 2012) (quoting *Young v. City of Mt. Rainier*, 238 F. 3d 567, 572 (4th Cir. 2001)). The Second Amended Complaint has been superceded and is of no legal effect. This Court should therefore disregard all of Defendants' arguments that relate to the allegations set forth in the Second Amended Complaint.

Even if Plaintiffs had not pled in the alternative, they would still be entitled to relief. In *Lantz v. Tumlin*, 74 W. Va. 196, 196-197 (1914), the plaintiff filed an action alleging the existence of a "mining partnership." In *Valentine v. Sugar Rock, Inc.*, 766 S.E.2d 785, 805 (2014), this Court explained that the parties in *Lantz* "did not form a 'mining partnership,' but rather a general partnership." Yet, despite the nomenclature used in the complaint, this Court declined to dismiss claims in *Lantz* based on the statute of frauds, even though, as this Court recently made clear, the statute of frauds applies to an ownership interest in a mining partnership. See *Valentine*, 766 S.E.2d at 798. Thus, even if Plaintiffs had not pled in the alternative (and they have), there is no reason to deny them relief based on their allegation of "mining partnerships." Defendants are asking this Court to revisit legal issues that have already been settled.

Defendants demand that, as a prerequisite to obtaining any relief, Plaintiffs must establish whether the Partnerships are mining partnerships or general partnerships. Brief, p. 18. In fact, regardless of which form of partnership may be at issue, the same rules apply and Plaintiffs are entitled to the same remedies. As this Court recognized in *Valentine v. Sugar Rock, Inc.*, 766 S.E.2d at 799, RUPA "governs all partnerships." *Id.* at 43. After considering Defendants' arguments and the undisputed facts that had been

presented, the trial court correctly determined that, for purposes of Plaintiffs' Motion, it did not make any legal difference whether the Partnerships were mining or general.

Defendants say that the trial court's ruling is "unimaginable" and accuse the trial court of having committed a "fundamental flaw." Brief, p. 18. Defendants insist that "in order to obtain relief a plaintiff must state a claim upon which relief can be granted," that "having a valid claim is a threshold prerequisite for a grant of any relief," and that "the specific claim impacts not only the right to relief but also the nature and scope of the relief available." Brief, pp. 18-19. True enough, but none of Defendants' criticisms established that the trial court committed any error. Although they argue that "the procedural requirements to a decree of dissolution . . . differ depending on . . . whether a mining partnership, general partnership, or other entity is involved" (Brief, p. 18), they do not explain how the requirements differ.

Defendants do not identify a single instance where, if the Partnerships are classified as one type versus another, it would make any difference to the legal relief to which Plaintiffs would be entitled. General partners, just like mining partners, have an obligation to account to each other. General partners, just like mining partners, have fiduciary duties to each other, including the fiduciary duty of loyalty. General partnerships, just like mining partnerships, are supposed to earn a profit. General partnerships, just like mining partnerships, can be dissolved judicially and wound up. Most Plaintiffs in this action have presented documentation sufficient to satisfy the statute of frauds, even if it did apply. Thus, there was no need for the trial court to determine at this juncture whether the Partnerships were mining partnerships or general partnerships in

order to grant Plaintiffs' Second Motion for Partial Summary Judgment. Its deferral on this issue does not constitute prejudicial, reversible error.

Finally, Defendants say that, even if Plaintiffs had pled in the alternative, the Circuit Court "erred in holding on summary judgment that they are entitled to relief without identifying the controlling facts or law." Brief, p. 19. This simply ignores what the trial court said. The trial court held, consistent with this Court's answer to the certified question in *Valentine*, that the statute of frauds did not bar Plaintiffs' claims as a matter of law. A.R. 595. It then found that the Partnership Assignments "evidenced the establishment and existence of each Partnership." A.R. 598. The trial court recognized Plaintiffs' status as partners based on the "IRS Schedule K-1s for each year from 1999 through 2011 reflecting their [Plaintiffs'] ownership interest in the partnerships." A.R. 600. The parties have presented evidence of correspondence to Plaintiffs from Sugar Rock and from W.A. Deem. A.R. 662, 920, 922, 928, 1637. This is the same sort of evidence considered in *Lantz*, where this Court held there was "no room for doubt" that a partnership existed.⁹ *Lantz*, 74 W. Va. at 197-198.

The record before the trial court included a complete set of Sugar Rock's K-1s from 2000-2010 and all the Partnership tax returns from 1999-2013. A.R. 1639-1661, 1702-1772, 763-806, 1310-1326. Plaintiffs' summary (A.R. 1405) and even Defendants' summaries (A.R. 1473-1476) of the Partnerships' income and expense show

⁹In *Lantz*, "[t]he transactions between the partners after the alleged contract, in relation to the partnership business, the bank account opened by defendant in the partnership name, checks drawn, debts contracted in the partnership name, the correspondence between the partners, and other evidence, all show the existence of a partnership."

the ongoing losses. The trial court found, based on “the business records kept by Sugar Rock,” that a dissolution was appropriate under W. Va. Code § 47B-8-1(5)(i) and (iii). Based on the evidence, the trial court found “the Partnerships’ ‘economic purpose . . . is likely to be unreasonably frustrated’ and that ‘it is not otherwise reasonably practicable to carry on the partnership business in conformity with the Partnership Agreement.’” A.R. 1520-1521. Thus, the trial court very specifically identified the controlling facts and law that entitled Plaintiffs to relief.

Assignment of Error No. 2

Defendants say that Plaintiffs “cannot be partners because their predecessors would have been dissociated from any general partnerships years ago under RUPA.” Brief, p. 21. The trial court specifically addressed Defendants’ arguments concerning dissociation in the Decision and Judgment Entry. A.R. 1516-1518. It noted that “[i]n every instance where a partner died, the interest passed to his or her heirs and the partnerships continued.” A.R. 1517. This was the case even for Sugar Rock’s predecessor in title, W.A. Deem, who, as pointed out by the trial court, acquired his interest in the Partnerships upon the death of his father, F.A. Deem. A.R. 1517. Since there is absolutely no evidence in this case that a dissociated partners’ interest had ever been purchased for a buy-out price in more than fifty (50) years, the trial court concluded that “it was a term of the Partnership Agreement, although not expressed and which need not be expressed in writing, that death was not an event of dissociation.” A.R. 1517.

Even if death was an event of dissociation under the Partnership Agreement, Defendants recognize that it would have no effect on the interest of J.F.

Deem, who received an *inter vivos* assignment from Edwin L. Deem (A.R. 732-734), who received *inter vivos* assignments from E.F. Deem (A.R. 400-401), who received *inter vivos* assignments from F.A. Deem (A.R. 397-399). Still, Defendants take exception to J.F. Deem's status as a partner by saying that he must first meet "certain preliminary showings." Brief, p. 30. Defendants do not actually identify what these "preliminary showings" are or explain why they have not already been met. The evidence concerning the existence of J.F. Deem's Partnership interest is clearly set forth in the record. Any "preliminary showings" have already been met and there is no reason why he would not have standing to request a judicial dissolution, even if death was an event of dissociation.

Defendants also argue that Plaintiffs have been dissociated by refusing to pay for alleged Partnership expenses. Brief, p. 22. Defendants point to a provision in the Partnership Assignments which states that, in the event the equipment bill was not paid within twenty (20) days from the date of notice, the assignee's stock would revert to the assignor without notice. Brief, pp. 21-22. Thus, what Defendants in fact urge is not that the failure to pay expenses resulted in a dissociation, but that Plaintiffs' Partnerships interests should be outright forfeited.

There are a number of problems with Defendants' attempt to forfeit Plaintiffs' interests. First, as alleged in Plaintiffs' Original (A.R. 11), First (A.R. 34), Second (A.R. 88), and Third Amended Complaints (A.R. 1535), and as evidenced by the Affidavit of James S. Vuksic (A.R. 1328), the expenses to which Defendants refer were not properly authorized or disclosed, are unreasonable, and have been incurred based on Sugar Rock's self-dealing. Many of these expenses are facially unreasonable, including

Sugar Rock's charges of \$550.00 per month to operate the Keith Well, even though the Keith Well produced absolutely nothing in 1999, 2000, 2001, 2002, 2003, 2005, 2006, 2007, 2008, 2009, 2010, 2011, and 2012. A.R. 1405.

Even if Sugar Rock's expenses are not facially unreasonable, there is no legal or equitable basis for giving Sugar Rock the abhorrent remedy that it requests. Under West Virginia law, equity abhors a forfeiture. *See Wheeling & E.G.R. Co. v. Triadelphia*, 58 W. Va. 487, 520 (1905). RUPA does not give one partner the right to forfeit another partner's interest. Provisions of a contract effecting a forfeiture are strictly construed against the party for whose benefit they were incorporated in the instrument. *Fraley v. Family Dollar Store*, 188 W. Va. 35, 38-39 (1992) (citing *Peerless Carbon Black Co. v. Gillespie*, 87 W. Va. 441, Syllabus Pt. 1 (1920)). Moreover, an unreasonable delay in declaring a forfeiture will result in a forfeiture being deemed waived. *See Kincaid v. Patterson*, 129 W. Va. 234, 246 (1946).

The provision Defendants identify in the Partnership Assignments refers only to the "equipment bill." It does not apply to bills for operating fees. When Sugar Rock began operations in 1999, the Wells had already been equipped and were capable of producing. Of the total amount that Sugar Rock invoiced Plaintiffs for alleged expenses, Defendants fail to identify what portion is attributable to any additional equipping expenses.¹⁰ There is absolutely no evidence in this case that Defendants ever submitted a separate equipment bill to Plaintiffs for payment. Defendants have not produced a single

¹⁰On the Partnerships' tax returns from 1999 to 2013, there is nothing listed for "equipment rent" or for "depreciation."

equipment bill that is currently unpaid.

From 1999 through 2010, the Partnerships' gross receipts were \$774,991.66.¹¹ A.R. 1405. There is no evidence that the Partnerships have had equipping costs anywhere near this amount. Since the gross receipts generated by the Partnerships from 1999 through 2010 were more than sufficient to cover any additional cost associated with equipping the Wells, there is no basis for any forfeiture.

Even if the facts supported a forfeiture based on the terms of the Partnership Assignments, there is no evidence that Sugar Rock ever asserted a forfeiture prior to the initiation of this action. To the contrary, it has at all times continued to prepare and send Schedule K-1s reflecting each Plaintiffs' percentage of ownership interest in each of the Partnerships. These K-1s are an admission by Sugar Rock. Moreover, as recently as June 2010, just prior to when Mr. Valentine initiated the Federal Action, Sugar Rock continued to prepare invoices to all the minority partners, including the Plaintiffs herein. Waiting more than ten (10) years to declare a forfeiture, until after the filing of a lawsuit, is unreasonable and results in the waiver of any such right.

Finally, Defendants' forfeiture argument, if accepted, would actually result in the forfeiture of Sugar Rock's own interest. Based on the invoices that Sugar Rock prepared in June 2010, it owed Cutright Gas Company \$15,304.00, Iams Gas Company \$24,093.00, Iams Oil Company \$24,079.00, and Keith Oil Company \$57,750.00, which is

¹¹Of the total gross receipts, \$149,590.30 was paid to third parties, \$625,401.36 was paid to Sugar Rock, and nothing was paid to Plaintiffs. Plaintiffs' share of the gross revenues was transferred to Sugar Rock, as operator, and to the third parties; the Plaintiffs did pay Partnership bills.

far more than any of the Plaintiffs herein owe. In fact, it is more than the amount that Plaintiffs supposedly owe the Partnerships, combined! Sugar Rock likes to say that it has “shouldered equipping and operating expenses” for the Wells (Brief, p. 30), but not even Sugar Rock has timely made “catch-up contributions” to the Partnerships in an amount sufficient to cover its share of its own phony baloney expenses. The biggest delinquent partner (Sugar Rock) should be estopped from asserting a forfeiture against Plaintiffs.

Defendants further attack Plaintiffs’ status as partners, claiming that “they are at best merely passive stock holders with no control.” Brief, p. 22. The trial court expressly addressed this argument in its July 18, 2013 Order. A.R. 601-603. Under West Virginia law, it is not necessary for each partners’ control of the activities to be equal. Instead, the relations among the partners and between the partners and the Partnership are governed by the partnership agreement. See W. Va. Code § 47B-1-3(a). To the extent the partnership agreement does not otherwise provide, RUPA governs the relations among the partners and between the partners and the Partnerships. *See id.* There is nothing in RUPA that prevents the partners from agreeing to a division of duties and responsibilities insofar as management and control are concerned. Thus, when such an agreement exists, it is not essential that each of the partners have equal control of the activities.

Here, it is not necessary that each Plaintiff actually engage in physical work on the Wells in order to maintain their status as partners. In fact, the partners expressly agreed in the Partnership Assignments that this was unnecessary. In the Partnership Assignments, Sugar Rock’s predecessor, F.A. Deem, reserved to himself all

the operating rights, including:

The right to execute any and all contracts, sale, division and transfer orders necessary and required to be made to sell the oil and gas produced from the above leases, to receive all payments therefrom and to make disbursements of the proceeds of the same, and to do all acts necessary to properly conduct said business, the same as if parties of the second part [Plaintiffs' predecessors] were present and acting as such individuals A.R. 1406-1433.

Contractually, the minority partners do not have the right to take acts necessary to operate the Partnerships, because those rights were expressly reserved by the original operator.

Today, Sugar Rock is the managing partner and the designated operator of the Wells. W.A. Deem told the minority partners in 1999 that he was assigning the "Agency and Operation" of the Wells to Sugar Rock. A.R. 1637. On p. 1 of the 1999 Agreement, pursuant to which Sugar Rock initially acquired its ownership interest, it expressly states that Sugar Rock acquired all of W.A. Deem's "rights as operator and agent." A.R. 185. Sugar Rock notified the partners that it would continue to operate the wells for \$250.00 per month per well. A.R. 920. It was and is Sugar Rock's contractual obligation to operate the Wells, and it receives compensation for its services. Thus, there is no basis for claiming that Plaintiffs and their predecessors have somehow failed to sufficiently cooperate or participate in working the Wells.

Assignment of Error No. 3

Defendants argue that the Leases are not Partnership assets. They say that this Court "should look at the actual instrument transferring title." Brief, p. 25. In ascertaining the intent from the instrument, the language of the agreement must be afforded its plain and ordinary meaning without resort to judicial construction. *See*

Meadows v. Belknap, 199 W. Va. 243, 246 (1997) (citing *Williams v. South Penn Oil Co.*, 52 W. Va. 181, Syllabus Pt. 4 (1903)). Yet, Defendants spend most of their time describing and referring to documents that have no relevance.

First, Defendants say that the Leases “do not include any indicia required to deem them partnership property.” Brief, p. 24. This is irrelevant, because the Leases were all executed before the Partnerships were even created. The Cutright Lease was executed in 1934 (A.R. 212), the Iams Gas lease was executed in 1937 (A.R. 217), the Keith Lease was executed in 1957 (A.R. 221), and the Iams Oil Lease was executed in 1947 (A.R. 227). The Leases did not become Partnership property until later, when the Partnerships were created. Cutright Gas Company was created in 1958, the Iams Gas Company was created in 1958, the Keith Oil Company was created in 1958, and the Iams Oil Company was created in 1959. A.R. 1406-1433.

Defendants also ask the court to consider the 1999 Agreement between W.A. Deem to Sugar Rock. Although this agreement makes express reference to the “Cutright Gas Company” the “Iams Gas Company” the “Iams Oil Company” and the “Keith Oil Company” (A.R. 187-189), Defendants say that it “makes no reference to any partnership nor does it identify the transfer of a partnership interest.” Brief, p. 25. The reference is clearly there, notwithstanding Defendants’ assertion to the contrary. Moreover, it is irrelevant whether the Leases were described as Partnership property in the 1999 Agreement. The Partnerships were created, and the Leases became Partnership assets, more than forty (40) years prior to 1999. The Leases do not somehow lose their status as Partnership property based on an assignment to Sugar Rock that occurred

decades later.

The issue is not what the Leases to F.A. Deem or the assignments of the Leases to F.A. Deem or to Sugar Rock say; rather, it is what the chain of title for the Leases indicate at the time the Partnerships were created. The Partnership Assignments say, in very plain language, that the minority partners received a “working interest” in the “lease” and the “leasehold” created thereby. A.R. 1406-1433. Any person examining the records of the Ritchie County Commission would be on notice of the existence of the Partnerships and of the assignment to Plaintiffs and their predecessors, in their capacity as partners, of a working interest in the Leases.

The Partnership Assignments further state that the Partnerships may undertake further drilling and development of the Leases. They obligate each partner to “bear his proportionate share of the expenses of equipping and operating said well, including casing, and also his proportionate share of rentals” after the first well was completed and “his share of all expenses hereinafter incurred in developing and operating said leases” (emphasis added). The Partnership Assignments permit the assignor, F.A. Deem, to surrender and release the Leases if the initial well is nonproductive “and the mining partnership elects to do no further drilling hereunder” (emphasis added).

Although the Partnerships drilled just one well on the Keith Lease, the Iams Oil Lease, and the Iams Gas Lease, the Cutright Gas Company drilled three (3) wells on the Cutright Lease. At one point, Defendants suggest that the Cutright No. 2 and the Cutright No. 3 were drilled by F.A. Deem “for his own benefit” (Brief, p. 27), but in fact, the Cutright No. 2 and the Cutright No. 3 have always been treated as belonging to

the Cutright Gas Company. The 1999 Agreement between Sugar Rock and W.A. Deem lists the Cutright Gas Company as owning all three (3) wells. A.R. 187. When Sugar Rock sued Mr. Valentine in 2001, he alleged that the Cutright Gas Company owned all three (3) wells. A.R. 196-197. The income from the Cutright No. 2 and Cutright No. 3 has always been included on the Cutright Gas Company's tax returns. A.R. 1749-1772. Sugar Rock has always charged the Cutright Gas Company for operating the Cutright No. 2 and the Cutright No. 3. Its suggestion that they were ever considered F.A. Deem's separate property is a false and an unsupported attempt at revisionist history.

Despite the clear language of the Partnership Assignments, Defendants say that the Leases are not Partnership property because "the assignments conveyed working interest to individuals, not to partnerships." Brief, p. 25. This ignores the provisions of RUPA, which say that partnership property need not be titled in the name of the partnership. West Virginia Code § 47B-2-4 explains when property is partnership property. Specifically, it says:

- (a) Property is partnership property if acquired in the name of:
 - (1) The partnership; or
 - (2) 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 but without an indication of the name of the partnership.
- (b) Property is acquired in the name of the partnership by a transfer to:
 - (1) The partnership in its name; or
 - (2) One or more partners in their capacity as partners in the partnership, if the name of the partnership is indicated in the

instrument transferring title to the property.

Here, even though the Leases were not titled in the name of the Partnerships, they were “acquired in the name of the partnership” because they were transferred to one or more partners in their capacity as partners in the Partnerships. The names of the Partnerships are indicated in the Partnership Assignments, thus satisfying W. Va. Code § 47B-2-4(a)(1), pursuant to (b)(2). Furthermore, under § 47B-2-4(a)(2), there is an indication on the Partnership Assignments that the assignee is a partner, and that there exists a Partnership (and, though not required, an indication of the name of the Partnership).

The Partnership Assignments say that the assignment of the Leases was “for an in consideration of Two Hundred Fifty Dollars (\$250.00) and other valuable consideration, the receipt of which is hereby acknowledged.” A.R. 1406-1433. In a subsequent paragraph, the Partnership Assignments say that “the above consideration covers the expense of drilling said well and plugging the same, if dry.” Based on this provision, Sugar Rock says that the Partnership Assignments made “no mention of the payment covering or contributing to the procurement of the underlying lease.” Brief, p. 26. Yet, the assignment of the “lease” and of the “leasehold” occurs in the same sentence in which the consideration is identified. There is absolutely no requirement that the Partnership Assignments separately identify the portion of the consideration attributable to drilling a well and the portion of the consideration attributable to acquiring the Lease and, even if there was, the Partnership Assignments make clear that, in addition to the “Two Hundred Fifty Dollars (\$250.00),” they were also supported by “other valuable

consideration.” The fact that the consideration supporting the assignment of the Lease also covered the expense of drilling a well does not mean that there was no consideration for the assignment of the Lease.

Defendants ask the court to consider “the actions of F.A. Deem and his successors.” Brief, p. 26. Defendants say that “F.A. Deem transferred the leasing, operating and agency rights related to the leases.” Brief, p. 26. This has no bearing on whether the Leases are Partnership property. As already explained, F.A. Deem had expressly reserved the operating and agency rights to himself in the Partnership Assignments, and there was no restriction on his ability to transfer these rights. The fact that he transferred the operating rights for the Wells does not transform the Leases into his separate property.

Defendants also say that while W.A. Deem owned the Leases, he conveyed farmout agreements, pursuant to which a number of additional wells were drilled. Brief, p. 26. Defendants say that the “Partnerships were not involved” in the farmout agreements. Brief, p. 27. Their assertion lacks any citation because neither party ever filed or presented the farmout assignments to the trial court for its consideration. They are not part of the record.

If Defendants had produced and filed the farmout assignments, the trial court would have seen that the Leases were not treated as W.A. Deem’s separate property and that the Partnerships were involved in them. The December 6, 1989 Assignment to Rare Earth Energy, recorded at Volume 206, Page 384, was executed by W.A. Deem “as

attorney-in-fact for . . . Keith Oil & Gas Company.”¹² The November 27, 1990 Assignment to Allstate Energy Corp., recorded at Volume 209, Page 89, was executed by W.A. Deem “as attorney-in-fact for . . . Iams Gas Company, the Iams Oil Company.” The August 23, 1996 Assignment to Murvin & Meier Oil Co., recorded at Volume 223, Page 563, was executed by W.A. Deem as “attorney-in-fact for . . . Iams Oil Company.” The October 1, 1997 Assignment to Murvin & Meier Oil Co., recorded at Volume 225, Page 167, was executed by W.A. Deem as “attorney-in-fact for . . . Iams Oil Company.” The October 1, 1996 Assignment to Murvin & Meier Oil Co., recorded at Volume 223, Page 330, was executed by W.A. Deem as “attorney-in-fact for . . . Iams Oil Company. The January 7, 1998 Assignment to Murvin & Meier Oil Co., recorded at Volume 225, Page 464, was executed by W.A. Deem as “attorney-in-fact for . . . Iams Oil Company.” Finally, the December 31, 1998 Assignment to Murvin & Meier Oil Co., recorded at Volume 227, Page 593, was executed by W.A. Deem as “attorney-in-fact for . . . Iams Oil Company.”

Under the farmout assignments, the Partnerships received an overriding royalty on the production from the farmout wells. These overriding royalties were paid to the Partnerships and accounted for as “Royalty Income” to the Partnerships on the income statements. A.R. 807-823. Thus, the Partnerships were involved in all the farmout assignments. The Leases were never treated as W.A. Deem’s separate property; the evidence is undisputed that they are Partnership assets.

¹²All these assignments are available online from the Clerk of the Ritchie County Commission at www.landaccess.com.

Defendants say that, since they acquired their interests in 1999, “Sugar Rock has spent substantial finances on investigating, maintaining and developing the leases.” Brief, p. 27. It remains disputed whether these expenses were properly incurred and should be attributable to the Partnerships. Discovery indicates that Sugar Rock never notified the minority partners about these expenses or requested their authorization. It appears that Sugar Rock attempted to undertake further development of the Leases on its own, without the knowledge of Plaintiffs. If true, then Sugar Rock has appropriated or attempted to appropriate a Partnership opportunity, which would be an additional violation of Sugar Rock’s fiduciary duties to Plaintiffs. See W. Va. Code § 47B-4-4(b)(1). That issue still needs to be tried; it was immaterial to the trial court’s Decision and Judgment Entry. Regardless of whether Sugar Rock appropriated or attempted to appropriate a Partnership opportunity, and regardless of whether or not its secret lease development expenses should have been charged to the Partnerships, they do not transform partnership property into separate property almost fifty (50) years after the Partnerships were created.

Finally, Defendants cite to *Arbaugh v. Raines*, 155 W. Va. 409 (1971). Brief, p. 28. Defendants argue that there is an industry practice in which those who invest in the drilling of a well acquire an interest in the well itself but not in the entire leasehold. Of course, there are a number of material differences between *Arbaugh* and this case. The parties in *Arbaugh* were not partners. Neither the well nor the lease were owned by a partnership; no one even alleged that a partnership existed. Also, the Partnership Assignments here differ from the assignment at issue in *Arbaugh*. In *Arbaugh*, the

agreement disclosed that “Plaintiffs were to receive their proportionate share of the remainder of the undivided *proceeds* from the sale of gas and oil from said well” (emphasis and original). *Arbaugh*, 155 W. Va. at 414. Here, the Partnership Assignments conveyed a “working interest” in the “lease” and the “leasehold” created thereby. Thus, to the extent this Court described the arrangement in *Arbaugh* as a “practice common in the area of oil and gas development,” is dissimilar from the facts in this case where Partnership Assignments expressly conveyed an interest in the Leases and the Leases became Partnership assets.

Arbaugh stands for a sound but rather unremarkable proposition of law: since the written agreement in *Arbaugh* purported to convey shares of an interest in a well and nothing more, it did not also convey an interest in the lease. The trial court applied that same principle in this case. It enforced the terms of the Partnership Assignments according to their plain and unambiguous language. The trial court was correct in concluding that the Partnership Assignments here are unlike the agreement in *Arbaugh* and that, based on the Partnership Assignments, the Leases are Partnership assets.

Assignment of Error No. 4

Defendants say that Plaintiffs “cannot simply remove Sugar Rock of its legal right to operate and manage the properties, because Sugar Rock is the majority owner and, as such, its decisions control management.” Brief. p. 31. This is a serious misstatement of the law. Under RUPA, any partner can request judicial dissolution for the grounds set forth under the statute. Not all of the partners need be in agreement. Not even all of the minority partners need be in agreement (although in this case, they are).

Although Sugar Rock, as a majority partner, is entitled to make management decisions, the Partnerships remain governed by the provisions of the Partnership Assignments and RUPA. Neither the Partnership Assignments nor RUPA give the majority partner a veto over a partner's right to request a judicial dissolution. In fact, W. Va. Code § 47B-1-3(b)(8) says that a partnership agreement may not vary the requirement to wind up the partnership business in cases of a judicial dissolution under in W. Va. Code § 47B-8-1(5).

Defendants say that Plaintiffs "fail to present any evidence to support dissolution" and that Defendants have presented "affirmative evidence that Sugar Rock's management has been prudent and reasonable." Brief, p. 31. Under West Virginia law, a partnership, by definition, is a "business for profit."¹³ W. Va. Code § 47B-1-1(7). Even if the trial court assumes all the testimony set forth in Sugar Rock's affidavits and in the affidavits of its experts to be true, it does not change the fact that the Partnerships have earned ZERO profit since 1999. A.R. 1405. Reasonably prudent well operations are not enough to earn a profit.

The evidence Sugar Rock presented touting its reputation as a prudent operator and defending the reasonableness of its operations do not create a disputed issue of fact as to whether the economic purpose of the Partnerships (to earn a profit) is likely to be unreasonably frustrated or whether it is reasonably practicable to carry on the partnership business in conformity with the partnership agreement. Even if Sugar Rock was the most reasonable, the most prudent, and the most highly skilled and well respected

¹³Even Mr. Hall admitted that he would not enter into a business partnership without the expectation of making money. A.R. 1214.

operator in the entire state of West Virginia (which Plaintiffs obviously dispute), the fact remains undisputed that none of the Partnerships have realized any profit. In fact, from 1999 through 2013, the Partnership have suffered a net loss of \$332,446.89. A.R. 1450.

Despite the regular losses that the Partnerships suffered under Sugar Rock's management, Sugar Rock attempted to avoid a judicial dissolution by telling the trial court that "the wells at issue are a profitable undertaking, even if they are currently not returning net profits." A.R. 627. The trial court found Sugar Rock's subjective, self-serving beliefs regarding potential profitability to be insufficient. In its Decision and Judgment Entry, it pointed out that "[t]here must . . . be a reasonable basis for believing in such potential." A.R. 1520. Self-serving assertions without factual support in the record will not defeat a motion for summary judgment. *Gorbey v. Monongalia County*, Case No. 13-1131, 2014 W. Va. LEXIS 887, at 8 (2014) ("quoting *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 61 n. 14 (1995)). As even Defendants concede, summary judgment is appropriate if "from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party." Brief, p. 15. Based on the lack of any profit in over 14 years, the trial court concluded that "[t]here is no reasonable basis to believe that they are on the verge of becoming profitable" and that "no reasonable person could conclude" other than that a dissolution was appropriate under the alternative grounds set forth in W. Va. Code § 47B-8-1(5)(i) and (iii).

Defendants say that "[i]t is not equitable to force a sale of the wells or leases as Respondents seek because Sugar Rock, as the majority owner, operator, and agent, has expended large sums of money to maintain and equip the wells for almost

fifteen years.” Brief, p. 32. The winding up of the Partnerships includes an adjustment of the accounts among all the partners. See W. Va. Code § 47B-8-7(b). If all the expenses that Sugar Rock incurred are truly reasonable, authorized, and not in violation of its fiduciary duties to Plaintiffs, then Sugar Rock will be entitled to recover from the Partnerships and, if necessary, Plaintiffs, in the course of the winding up. Sugar Rock already has a remedy to recover the expenditures that it is claiming. The existence of its Counterclaim does not provide any equitable basis to deny Plaintiffs’ right to a dissolution.

Assignment of Error No. 5

Finally, Defendants object to the trial court’s appointment of Rodney Windom as a special receiver to supervise the winding up and further appointing Hays and Company as a distribution company. Brief, p. 33. As Defendants correctly point out, the appointment of a receiver is reviewed for abuse of discretion. Brief, p. 33.

West Virginia Code § 47B-8-3(a) says that the circuit court “may order judicial supervision of the winding up.” Defendants say that the appointment of the special receiver and distribution company was “unsupported” because it “failed to identify any undisputed facts that led to its conclusion.” Brief, pp. 33-34. This ignores the rest of the trial court’s Decision and Judgment Entry, which found specific grounds for dissolution. Because Defendants have objected to the dissolution and winding up, the trial court appointed the special master and distribution company to implement its order by taking charge of and overseeing the liquidation of the Partnerships’ assets and the operation of the Wells until a sale had been completed.

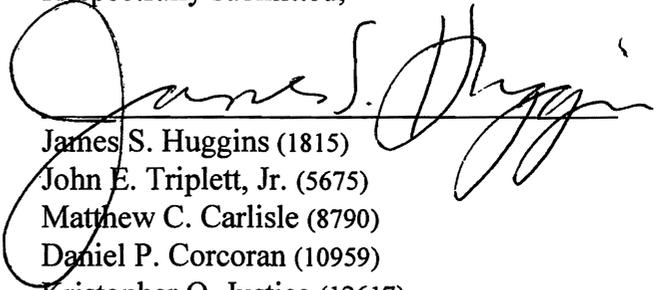
In order to liquidate the Partnerships' assets and to wind up the affairs of the Partnerships, the trial court correctly realized that it needed a neutral third party who would be capable of performing these tasks and who would be accountable to the court. The trial court found Mr. Windom to be "experienced in oil and gas matters in Ritchie County." A.R. 1523. Defendants failed to present any evidence that Mr. Windom or Hays and Company are incapable of fulfilling their court-appointed obligations. The trial court therefore did not abuse its discretion.

Defendants cite to *State ex. rel. Battle v. Hereford*, 148 W. Va. 97 (1963), where this Court warned that the appointment of a receiver on an *ex parte* application should be done with "extreme caution." Here, the receiver was appointed only upon a motion by Plaintiffs, to which Defendants had the opportunity to and did respond, and after which multiple hearings were held. Indeed, nearly eighteen (18) months elapsed and no fewer than five (5) hearings were held between the time Plaintiffs initially requested the appointment of the receiver and the time the order was made. *Hereford* has absolutely no relevance to this case.

CONCLUSION

For all the foregoing reasons, this Court should affirm the entries and orders of the trial court *in toto* and remand this case for further proceedings.

Respectfully submitted,



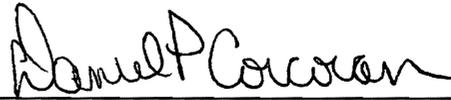
James S. Huggins (1815)
John E. Triplett, Jr. (5675)
Matthew C. Carlisle (8790)
Daniel P. Corcoran (10959)
Kristopher O. Justice (12617)

THEISEN BROCK, a legal professional association
424 Second Street
Marietta, Ohio 45750
Telephone: 740.373.5455
Telecopier: 740.373.4409
corcoran@theisenbrock.com
Counsel for Plaintiffs-Respondents

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the **Brief of Respondent** was served upon the following party by mailing a copy of same by ordinary U.S. Mail, postage prepaid, on this 30th day of June, 2015:

Attorney W. Henry Lawrence
Attorney William J. O'Brien
Step toe & Johnson, PLLC
400 White Oaks Blvd.
Bridgeport, WV 26330-4500
Counsel for Defendants-Petitioners



Daniel P. Corcoran
Counsel for Plaintiffs-Respondents

(364396)