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IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

IN RE: MARCELLUS SHALE LITIGATION Civil Action No. 14-C-3000

THIS DOCUMENT APPLIES TO:

ROBERT L. ANDREWS, et al, v. ANTERO RESOURCES CORP., et al.	Civil Action No. 13-C-434 HRR ANDREWS R L
RODNEY ASHCRAFT, et al, v. ANTERO RESOURCES CORP., et al.	Civil Action No. 13-C-434 HRR ASHCRAFT R
LINDSEY N. FEATHERS v. ANTERO RESOURCES CORP., et al.	Civil Action No. 13-C-434 HRR FEATHERS L N
ROBERT GOLDEN, et al, v. ANTERO RESOURCES CORP., et al.	Civil Action No. 13-C-434 HRR GOLDEN R
DANIEL L. KINNEY, et al, v. ANTERO RESOURCES CORP., et al.	Civil Action No. 13-C-434 HRR KINNEY D L
CHARLES A. MAZER, et al, v. ANTERO RESOURCES CORP., et al.	Civil Action No. 13-C-434 HRR MAZER C A
DOUGLAS A. MAZER, et al, v. ANTERO RESOURCES CORP., et al.	Civil Action No. 13-C-434 HRR MAZER D A
SHAWN A. MAZER, et al, v. ANTERO RESOURCES CORP., et al.	Civil Action No. 13-C-434 HRR MAZER S A
SUSAN J. MAZER, et al, v. ANTERO RESOURCES CORP., et al.	Civil Action No. 13-C-434 HRR MAZER S J
GREG G. MCWILLIAMS, et al, v. ANTERO RESOURCES CORP., et al.	Civil Action No. 13-C-434 HRR MCWILLIAMS
DAVID SCOTT NUTT v. ANTERO RESOURCES CORP., et al.	Civil Action No. 13-C-434 HRR NUTT D S
ROBERT SIDERS, et al, v. ANTERO RESOURCES CORP., et al.	Civil Action No. 13-C-434 HRR SIDERS R
CHARLES T. MAZER v. ANTERO RESOURCES CORP., et al.	Civil Action No. 13-C-434 HRR MAZER C T

ORDER

The Presiding Judges assigned to the Marcellus Shale Litigation have reviewed and considered *Plaintiffs' Motion to Amend or Alter Final Order Granting Defendants' Motions for Summary Judgment, or in the Alternative, to Reargue Defendants' Motions for Summary Judgment* (Transaction ID 59744226) filed in the above-captioned cases (sometimes collectively referred to as the "Harrison County Cherry Camp Trial Group"). [1] The Presiding Judges have also reviewed and considered Defendants Antero Resources Corporation's and Hall Drilling, LLC's *Joint Response in Opposition* (Transaction ID 59809399), and Plaintiffs' *Reply* (Transaction ID 59863549). Having conferred with one another to insure uniformity of their decision, as contemplated by Rule 26.07(a) of the West Virginia Trial Court Rules, the Presiding Judges unanimously DENY Plaintiffs' motion to amend, alter or reargue for the reasons that follow.

PROCEDURAL HISTORY

The Harrison County Cherry Camp Trial Group are actions "by residents and/or owners of property in Harrison County, West Virginia for private temporary continuing abatable nuisance and negligence/recklessness against Defendants Antero Resources Corporation, Antero Resources Bluestone, LLC, and Hall Drilling, LLC for damages arising from Defendants' oil and/or natural gas drilling, exploration, extraction, pipeline construction, water processing, and related acts and/or omissions. . . ." Complaint, ¶ 1. Plaintiffs allege their quality of life has been negatively impacted and they "are no longer able to enjoy their lives and use and enjoy their

[1] The Honorable David W. Hummel, Jr. was assigned as a Presiding Judge in the Marcellus Shale Litigation on November 13, 2014. See *Order Assigning Judges and Scheduling Status Conference*. Judge Hummel resigned from the Mass Litigation Panel on October 7, 2016. On October 11, 2016, the Supreme Court appointed the Honorable Jack Alsop to serve on the Mass Litigation Panel for the duration of Judge Hummel's unexpired term. On October 26, 2016, Judge Alsop was assigned to serve as a Presiding Judge in the Marcellus Shale Litigation. See *Second Order Assigning Judges* (Transaction ID 59751111).

homes and properties in the way they previously enjoyed prior to Defendants' acts and/or omissions . . . ." *Id.*, ¶ 2.

After reviewing extensive briefing, including voluminous memoranda and exhibits from all parties, the Presiding Judges heard *Antero Resources Corporation's Motion for Summary Judgment* and *Hall Drilling, LLC's Motions for Full or Partial Summary Judgment* filed in the Harrison County Cherry Camp Trial Group cases on February 26, 2016 (Transaction IDs 58437476 and 58439674).[2] At the conclusion of the hearing, the Court agreed to withhold its rulings on these motions in order to give the parties time to engage in a second round of mediation with the Resolution Judges to try and resolve these cases.[3] See February 26, 2016 Hearing Trans., pp. 57-59. On February 29, 2016, Lead Resolution Judge Booker T. Stephens entered an order reconvening mediation on April 7 and 8, 2016. See *Order Reconvening Mediation* (Transaction ID 58643558). The mediation did not result in settlement.

On April 13, 2016, over ten (10) weeks after the January 29, 2016, deadline for responses to dispositive motions, and over six (6) weeks after the Court had conducted its February 26, 2016, hearing on dispositive motions, Plaintiffs filed a *Motion to Supplement Response in Opposition to Defendants Antero Resources Corporation's and Hall Drilling, LLC's Motions for Summary Judgment* (Transaction ID 58857554). Two days later, Defendants Antero Resources ("Antero") and Hall Drilling, LLC ("Hall") filed a *Joint Response in Opposition to Plaintiffs'*

[2]Throughout briefing of dispositive motions, the parties repeatedly filed motions requesting leave to exceed the twenty page limit on their supporting memoranda. All of their motions were granted. See December 28, 2015, *Order Granting Antero Resources Corporation's Motion to Exceed Page Limit* (Transaction ID 58346294); January 11, 2016, *Order Granting Hall Drilling, LLC's Motion to Exceed the Page Limit for its Memorandum of Law in Support of its Motion for Summary Judgment* (Transaction ID 58409238); January 28, 2016, *Order Granting Plaintiffs' Motion to Exceed Page Limit* (Transaction ID 58492543); February 02, 2016, *Order Granting Antero Resources Corporation's Motion to Exceed Page Limit* (Transaction ID 58507048); and February 02, 2016, *Order Granting Hall Drilling, LLC's Motion to Exceed the Page Limit for its Reply in Support of its Motion for Summary Judgment* (Transaction ID 58514362).

[3] The Harrison County Cherry Camp Trial Group cases were first mediated by the Resolution Judges on August 26, 27 and 28, 2015. See *Order Governing Mediation and Mediation Statements* (Transaction ID 57113741).

Motion to Supplement Response in Opposition to Defendants' Motions for Summary Judgment or, in the Alternative, Motion for Leave to File Supplemental Reply to Plaintiffs' Supplemental Response in Opposition to Defendants' Motions for Summary Judgment (Transaction ID 58872071).

On April 18, 2016, the Presiding Judges denied both parties' motions as untimely filed, and unanimously granted Defendants' motions for summary judgment "on the ground that Defendants were operating within the scope of Antero's leasehold rights to develop oil and gas underlying the properties that are the subject of Plaintiffs' complaint, as well as various surface-use and right of way agreements Antero executed with several Plaintiffs, or the owners of the properties on which Plaintiffs reside, which agreements entitled Antero to conduct oil and gas-related activities on Plaintiffs' properties." See *Order* entered April 18, 2016 (Transaction ID 58876663). The Court ordered Defendants Antero and Hall to prepare a proposed order, including detailed findings of fact and conclusions of law, for submission to the Court on or before May 2, 2016. *Id.*

By separate order entered on April 20, 2016, the Court notified the parties that its April 18 order was to advise the parties of the Court's ruling on the dispositive motions, but was not intended to be a final judgment pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure, as a final judgment order for appellate purposes, with findings of fact and conclusions of law, would be forthcoming. See *Order* (Transaction ID 58890543).

On May 2, 2016, Defendants Antero and Hall filed a joint proposed final order with findings of fact and conclusions of law (Transaction ID 58941616). On May 4, 2016, Plaintiffs' filed a notice of objections to Defendants' proposed final order, as well as their own proposed final order, including findings of fact and conclusions of law (Transaction ID 58955799). On

May 6, 2016, Defendants Antero and Hall filed a joint response to Plaintiffs' notice and proposed order (Transaction ID 58967116). The Presiding Judges reviewed and carefully considered each of the parties' proposed final orders, as well as the objections and response.

On July 11, 2016, Lead Resolution Judge Booker T. Stephens entered an order reconvening mediation in all Marcellus Shale Litigation cases, except those cases filed against Defendant Williams Ohio Valley Midstream, LLC, on October 6 and 7, 2016. See *Order Reconvening Mediation* (Transaction ID 59259111). Having been advised that the Resolution Judges were reconvening mediation, Lead Presiding Judge Alan D. Moats ordered the Court's final order granting summary judgment in favor of Defendants in the Harrison County Cherry Camp Trial Group cases held in abeyance pending the outcome of mediation. The Court also ordered all deadlines for the Oxford Road Trial Group and the Halls Run Road Trial Group stayed pending the outcome of mediation. See, July 11, 2016 *Order* (Transaction ID 59259366).

Upon being advised that the third round of mediation was unsuccessful, the Court entered its *Final Order Granting Defendants' Motions for Summary Judgment* on October 11, 2016 (Transaction ID 59683172)("Final Order").[4] The Court found, among other things, that:

> Antero has leasehold rights to develop the oil and gas underlying the properties that are the subject of Plaintiffs' complaint. Those development rights were retained by the oil and gas mineral owners in the severance deeds separating the surface estates from the mineral estates.

Final Order ¶ 9

> In addition to the foregoing leases and severance deeds, Antero executed various other agreements with several Plaintiffs, or the owners of the properties on which Plaintiffs reside, entitling Antero to use Plaintiffs' properties in the course of its mineral development. These various agreements include right of way agreements, an oil and gas lease, road use agreements, surface use agreements, tank pad agreements, and pipeline easements.

[4] By October 7, 2016, the three Resolution Judges assigned to the Marcellus Shale Litigation had conducted seven days of mediation regarding the Harrison County Cherry Camp Trial Group cases, as well as other cases pending against Defendants Antero and Hall.

Final Order ¶ 10

> Plaintiffs have not offered any admissible evidence of record to establish that Defendants' use of Plaintiffs' property has exceeded the scope of Antero's agreements with Plaintiffs, or what is reasonable and necessary to develop the underlying minerals, other than self-serving assertions that Defendants' activities, although within the scope of the agreements, are excessive.

Final Order ¶ 18

> Based on its review of the record, the Court concluded, among other things, that:
>
> Antero and Plaintiffs, or the owners of the properties on which Plaintiffs reside or their predecessors in title, have entered into unambiguous agreements granting Antero the right to use Plaintiffs' properties in the course of its mineral development. These agreements include mineral severance deeds, oil and gas leases, right of way agreements, road use agreements, surface use agreements, tank pad agreements, and pipeline easements. As lessee of the minerals underlying Plaintiffs' properties, Antero has the full benefit of express surface use rights for mineral development and extraction. See Syl. Pt. 1, *Squires v. Lafferty*, 95 W. Va. 307, 121 S.E. 90, 91 (1924) ("The owner of the mineral underlying land possesses, as incident to this ownership, the right to use the surface in such manner and with such means as would be fairly necessary for the enjoyment of the mineral estate.") and *Montgomery v. Economy Fuel Co.*, 61 W. Va. 620, 57 S.E. 137, 138 (1907) ("A lease granting minerals carries with it, by necessary implication, the right to enter upon the property and do all things necessary for the purpose of acquiring and enjoying the estate granted.")

Final Order ¶ 26

> Defendants Antero and Hall were operating within the scope of Antero's leasehold rights to develop oil and gas underlying the properties that are the subject of Plaintiffs' complaint, as well as various subsurface-use and right-of-way agreements Antero executed with several Plaintiffs (or the owners of the properties on which Plaintiffs reside), which agreements entitled Defendants to conduct their oil and gas-related activities. See Syl. Pt. 5, Quintain, 210 W. Va. 128, 556 S.E.2d 95 (2001).

Final Order ¶ 29

> Antero, as the owner of the mineral estate, and its contractors have the right to use the Plaintiffs' surface estates for the production of its mineral rights. The Court further concludes that Antero and its contractors have the legal right to develop the mineral estate. The Court finds that the activities complained of were reasonably necessary to the production of the mineral estate and did not exceed the fairly necessary use thereof or invade the rights of the surface owner under the

> standards outlined in *Adkins v. United Fuel Gas Co.*, 134 W. Va. 719, 61 S.E.2d 633 (1950).

Final Order ¶ 47.

Thereafter, instead of appealing the Court's Final Order, Plaintiffs filed the instant *Motion to Amend or Alter Final Order Granting Defendants' Motions for Summary Judgment, or in the Alternative, to Reargue Defendants' Motions for Summary Judgment* (Transaction ID 59744226) on October 25, 2016.

Rule 52(b) Does Not Apply To Plaintiffs' Motion

Plaintiffs have filed their motion to amend or alter the Court's Final Order or, in the alternative, to reargue Defendants' motions for summary judgment pursuant to Rule 52(b) of the West Virginia Rules of Civil Procedure. However, Rule 52 applies only to "actions tried upon the facts without a jury or with an advisory jury" W. Va. R.C.P., 52 (a).

In *James M.B. v. Carolyn M.,* 193 W.Va. 289, 293-294, 456 S.E.2d 16, 20-21 (1995), the Supreme Court of Appeals of West Virginia discussed the various post-trial or post-judgment motions authorized by the West Virginia Rules of Civil Procedure, and concluded that "Rule 59(e) is applicable to situations where a party seeks to alter, amend, or revise a judgment that was entered as a result of a pretrial motion. More specifically, Rule 59(e) provides the procedure for a party who seeks to change or revise a judgment entered as a result of a motion to dismiss or a motion for summary judgment." Accordingly,

> A motion to amend or alter judgment, even though it is incorrectly denominated as a motion to 'reconsider', 'vacate', 'set aside', or 'reargue' is a Rule 59(e) motion if filed and served within ten days of entry of judgment.

Id., Syllabus Point 2. See also, Syllabus Point 1, *Lieving v. Hadley,* 188 W.Va. 197, 423 S.E.2d 600 (1992).

Commentators have also recognized that, "Rule 52(b) was intended to apply only to cases in which a trial court issues factual findings following a trial on the merits. The rule was not intended to apply to a trial court's ruling on dispositive motions such as summary judgment." Franklin D. Cleckley, Robin J. Davis and Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure,* § 52(b)[2] at 1147 (4th ed. 2012). Because Plaintiffs' motion to alter, amend or reargue was filed within 10 days of entry of the Court's *Final Order Granting Defendants' Motions for Summary Judgment*, the Court will treat Plaintiffs' erroneously filed Rule 52(b) motion as a Rule 59(e) motion to alter or amend a judgment.

Plaintiffs' Motion Fails Under Rule 59(e)

"A motion under Rule 59(e) of the West Virginia Rules of Civil Procedure should be granted where: (1) there is an intervening change in controlling law; (2) new evidence not previously available comes to light; (3) it becomes necessary to remedy a clear error of law or (4) to prevent obvious injustice." Syllabus Point 2, *Mey v. Pep Boys-Manny, Moe & Jack,* 228 W.Va. 48, 717 S.E.2d 235 (2011). See also *Litigation Handbook on West Virginia Rules of Civil Procedure,* § 59(e)[2] at 1285. However, a Rule 59(e) motion "is not appropriate for presenting new legal arguments, factual contentions, or claims that could have previously been argued." *Mey*, 228 W.Va. at 56, 717 S.E. 2d at 243, citing numerous cases, including: *Freeman v. Busch,* 349 F.3d 582 (8th Cir. 2003)(arguments or evidence that could have been raised at an earlier time cannot be presented in Rule 59(e) motion); *Holland v. Big River Minerals Corp.*, 181 F.3d 597, 605-606 (4th Cir. 1999)(issue presented for first time in Rule 59(e) motion is not timely raised); *Sault Ste. Marie Tribe of Chippewa Indians v. Engler,* 146 F.3d 367, 374 (6th Cir. 1998)(Rule 59(e) motion cannot raise arguments not raised prior to judgment); and *Santiago v. Canon*

U.S.A., Inc., 138 F.3d 1, 3-4 (1st Cir. 1998)(new legal theory as to liability may not be raised in motion for reconsideration).

Plaintiffs' motion fails because Plaintiffs do not argue that any new evidence previously not available to them has come to light. Instead, Plaintiffs rely on evidence that was readily available to them to argue for the first time that,

> . . . Defendants do not have the legal or contractual right to use the surface of Plaintiffs' properties, or to burden same, through activities undertaken by Defendants to enjoy mineral estates beyond the boundaries of the leases encompassing Plaintiffs' properties. *** Therefore, even if Plaintiffs are not able to bring nuisance claims related to Defendants' activities in developing natural gas underlying their surface estate, which Plaintiffs' dispute, Plaintiffs should certainly be able to maintain the portions of their nuisance claims that related to Defendants' activities in developing natural gas underlying other properties, which comprise the vast majority of Plaintiffs' claims.

Motion, pp. 2-3. This argument could have been made by Plaintiffs during the extensive briefing and argument of dispositive motions, yet Plaintiffs chose not to make it. As amply demonstrated in the authorities cited above, argument or evidence that could and should have been presented cannot be raised for the first time in a Rule 59(e) motion.

Plaintiffs' argue that "the effect of the Court's order was tantamount to ratifying a taking of Plaintiffs' private property for private use." Motion p. 15. However, their reliance on *Mountain Valley Pipeline, LLC v. McCurdy,* No. 15-0919 (W.Va. Nov. 15, 2016) is wholly inapposite. The *Mountain Valley* opinion addresses the public use requirement in the context of a taking under West Virginia's eminent domain statutes, i.e., that a private corporation must establish a prospective taking is for a "public use" in order to avail itself of West Virginia's eminent domain laws. [5] Neither eminent domain, nor the public use requirement is at issue in these cases.

[5] Syllabus Point 1 of *McCurdy* states, "Pursuant to W.Va. Code § 54-1-3 (1923)(Repl. Vol. 2016), a company may enter private land it desires to appropriate for the purpose of surveying said property only when that company is

For the foregoing reasons, Plaintiffs' motion is DENIED. Syllabus Point 7 of *James M.B. v. Carolyn M.*, 193 W.Va. 289, 293-294, 456 S.E.2d 16, 20-21 (1995) provides that:

> A motion for reconsideration filed within ten days of judgment being entered suspends the finality of the judgment and makes the judgment unripe for appeal. When the time for appeal is so extended, its full length begins to run from the date of entry of the order disposing of the motion.

Having ruled on Plaintiffs' *Motion to Amend or Alter Final Order Granting Defendants' Motions for Summary Judgment, or in the Alternative, to Reargue Defendants' Motions for Summary Judgment* (Transaction ID 59744226), the parties are hereby advised that: (1) this is a final order; (2) any party aggrieved by this order may file an appeal directly to the Supreme Court of Appeals of West Virginia; and (3) a notice of appeal and the attachments required in the notice of appeal must be filed within thirty (30) days after the entry of this Order, as required by Rule 5(b) of the West Virginia Rules of Appellate Procedure.

It is so **ORDERED.**

ENTER: January 11, 2017.

/s/ Alan D. Moats
Lead Presiding Judge
Marcellus Shale Litigation

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invested with the power of eminent domain." Likewise, Syllabus Point 2 provides, "Under W. Va. Code § 54-1-1 (1931) (Repl. Vol. 2016), a company is invested with the power of eminent domain only when: (1) it is organized under the laws of, or is authorized to transact business in, West Virginia, and (2) the purpose for which said company desires to appropriate land is *for a public use* as authorized by W.Va. Code § 54-1-2 (2006) (Repl. Vol. 2016)." (emphasis in original)