

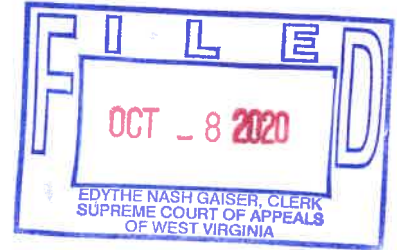
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ANTERO RESOURCES CORPORATION,
Petitioner,

v.

Harrison County Circuit Court
Civil Action No. 18-P-235-3
Judge Matish

THE HONORABLE DALE W. STEAGER,
West Virginia State Tax Commissioner,
THE HONORABLE JOSEPH R. ROMANO,
Assessor of Harrison County, and
THE COUNTY COMMISSION OF HARRISON COUNTY,
Sitting as a Board of Assessment Appeals,



Respondents.

**REPLY MEMORANDUM OF
THE COUNTY COMMISSION OF HARRISON COUNTY
IN OPPOSITION TO ANTERO RESOURCES CORPORATION'S
MOTION TO REFER CASE TO THE BUSINESS COURT DIVISION**

COMES NOW the County Commission of Harrison County, sitting as a Board of Assessment Appeals (the "Commission"), by and through its counsel, Kay Casto & Chaney PLLC, by Jonathan Nicol and R. Terrance Rodgers, and files this reply memorandum in opposition to Antero Resources Corporation's Motion to Refer Case to the Business Court Division (the "Motion"). The Motion should be denied for the reasons set forth below.

FACTS AND PROCEDURAL HISTORY

On or around December 17, 2018, Antero Resources Corporation ("Antero") filed its petition in the Circuit Court of Harrison County seeking to lower the assessment of its natural gas wells in Harrison County for tax year 2018. All of the issues raised in aforesaid petition were addressed and decided by the West Virginia Supreme Court's decision in *Steager v. Consol*, 242

W.Va. 209, 832 S.E.2d 135 (2019), which decision issued on June 5, 2019. The Tax Department valued by the subject wells before the decision in *Steager, supra*, was issued.

All that is left to be done in this civil action is for the Tax Department to revalue Antero's natural gas wells using a "singular monetary average" of operating expenses as required by the holding in *Steager*, and for the Harrison County Circuit Court to issue an order fixing the assessment of Antero's natural gas wells using the Tax Department's revaluations.

APPLICABLE LAW

The Business Court Division was created by W.Va. Code § 51-2-15, which provides as follows:

§51-2-15. Business Court Division.

(a) The West Virginia Legislature finds that, due to the complex nature of litigation involving highly technical commercial issues, there is a need for a separate and specialized court docket to be maintained in West Virginia's most populated circuit court districts with specific jurisdiction over actions involving such commercial issues and disputes between businesses.

(b) The West Virginia Supreme Court of Appeals is authorized to designate a business court division within the circuit court of any judicial district with a population in excess of sixty thousand according to the 2000 Federal Decennial Census.

(c) Upon the determination to designate business court divisions, the West Virginia Supreme Court of Appeals shall promulgate rules for the establishment and jurisdiction of the business court divisions within its circuit court system.

The Business Court Division is governed by the rules set forth in Trial Court Rule 29.

"Business Litigation" is defined in Rule 29.04 of the Trial Court Rules as follows:

(a) "Business Litigation" — one or more pending actions in circuit court in which:

(1) the principal claim or claims involve matters of significance to the transactions, operations, or governance between business entities; and

(2) the dispute presents commercial and/or technology issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy because of the need for specialized knowledge or expertise in the subject matter or familiarity with some specific law or legal principles that may be applicable; and

(3) the principal claim or claims do not involve: consumer litigation, such as products liability, personal injury, wrongful death, consumer class actions, actions arising under the West Virginia Consumer Credit Act and consumer insurance coverage disputes; non-commercial insurance disputes relating to bad faith, or disputes in which an individual may be covered under a commercial policy, but is involved in the dispute in an individual capacity; employee suits; consumer environmental actions; consumer malpractice actions; consumer and residential real estate, such as landlord-tenant disputes; domestic relations; criminal cases; eminent domain or condemnation; and administrative disputes with government organizations and regulatory agencies, provided, however, that complex tax appeals are eligible to be referred to the Business Court Division.

ARGUMENT

I. This Civil Action is Not Complex

In *Steager, supra*, this Court had before it and decided Antero's tax appeals for tax year 2016 and tax year 2017. This Court analyzed those appeals and ultimately decided Antero's "complex" arguments raised therein. The decision resulted in a new syllabus point that the deduction of the average annual industry operating expense for valuing natural gas wells requires the use of a singular monetary average deduction.

On Page 3 of its Motion, Antero makes the following admission:

Antero previously appealed the West Virginia Department of Revenue, State Tax Department, Property Tax Division's assessment of its wells in Tyler, Harrison, Harrison, and Ritchie Counties for tax years 2016 in 2017. This matter **involves the same arguments** for tax year 2019 in Harrison County, and the above-listed matters **involve the same arguments** for tax years 2018 and 2019 in Tyler, Harrison, Harrison, and Ritchie Counties.

(Emphasis added.)

By Antero's own admission, this Court has already heard and ruled on Antero's "complex" arguments when it issued its decision in *Steager*. Since Antero's current appeal "involves the same arguments" as its appeals for tax years 2016 and 2017, which arguments have already been decided by this Court, Antero's current appeal is no longer a "complex tax appeal."

Since this is an administrative appeal where the appeal record is already established, there will be no need for discovery or no reason for Judge Matish to hear or decide discovery disputes.

Judge Matish has at his disposal the directives provided in this Court's decision in *Steager*. All that remains to be done in this civil action is for the Tax Department to revalue Antero's natural gas wells using a "singular monetary average" of operating expenses as required by the holding in *Steager*, and for Judge Matish to issue an order fixing the assessment of Antero's natural gas wells using the Tax Department's revaluations. If the parties cannot agree on the Tax Department's revaluations, this matter will be decided on motions for summary judgment. Simply stated, this civil action is no longer "complex".

II. This Civil Action Does Not Involve Highly Technical Commercial Issues and Disputes "Between Businesses"

As provided above, W.Va. Code § 51-2-15, the Business Court Division is to have "specific jurisdiction over actions involving such [highly technical] **commercial issues and disputes between businesses.**" (Emphasis added.)

The Commission is clearly not a business by any definition. The civil action is not a dispute between inanimate private businesses as required by W.Va. Code § 51-2-15. Instead, this civil action is a dispute between a business and the taxing authorities of the State of West

Virginia and Harrison County. Antero cites no case that recognizes the State of West Virginia, any county or local government, or any agency or department of any of them, as “businesses.” or any disputes involving taxes as “commercial” disputes. W.Va. Code § 51-2-15, having been adopted specifically for the purpose of relieving certain circuit courts of the burdensome litigation of “complex” and “highly technical” commercial litigation between “businesses,” simply does not grant the Business Court Division the jurisdiction to hear litigation involving government agencies for the simple reason that governmental agencies are not businesses. W.Va. Code § 51-2-15 plainly refers only to disputes between businesses. The West Virginia Legislature could have specifically included complex tax disputes, but did not. As held in *Harbert v. Harrison County Court*, 129 W.Va. 54, 39 S.E.2d 177 (1946) and its progeny, it is a “well recognized and long established principle of interpretation of written instruments that the express mention of one thing implies the exclusion of another, *expressio unius est exclusio alterius*.” *Harbert*, 129 W.Va. at 64. Thus, as in *Harbert*, the language of the statute “indicates the plain legislative purpose to limit the scope” of what is included in the enactment, and jurisdiction over disputes involving governmental agencies are not part of the jurisdiction granted to the Business Court Division.

Moreover, the real stakeholders or parties in interest in the civil action are every single citizen of Harrison County who would be negatively affected if Antero succeeds in lowering the assessments on its natural gas wells. Given the clear language of W.Va. Code § 51-2-15, it is difficult to imagine that the West Virginia Legislature intended that all the individual citizens of Harrison County could have their interests be referred to the Business Court Division and have their fates decided by a judge from a judicial circuit outside of Harrison County. As recognized by this Court in *Howard v. Ferguson*, 116 W.Va. 362, 365, 180 S.E. 529, 530, (1935), “There is

no governmental instrumentality more vital to the ordinary administration of public affairs of a county than the Circuit Court."

III. The Statute Creating the Business Court Division Does Not Grant It Jurisdiction To Hear Tax Appeals

W.Va. Code §51-2-15, which created the Business Court Division, does not grant jurisdiction to it to hear tax appeals. The statute limits the Business Court Division to jurisdiction over highly technical commercial disputes "between businesses."¹ The plain and unambiguous language of W.Va. Code §51-2-15 reveals there is absolutely no grant or authorization of jurisdiction to the Business Court Division over tax appeals between governmental entities and businesses. The purported authorization comes from Trial Court Rule 29. However, Trial Court Rule 29 is inconsistent with the plain dictates of W.Va. Code §11-3-25, which requires Antero's tax appeal to be heard in "the circuit court of the county in which the property books are made out." That circuit court, in this instance, is the Circuit Court of Harrison County presided over by a judge duly elected by the citizens of Harrison County. Plainly, the West Virginia Legislature, in enacting W.Va. Code §11-3-25, intended for tax appeals affecting property in a particular county to be heard by a judge elected from that county, and not a judge elected in another county or judicial circuit. By attempting to grant the Business Court Division jurisdiction over tax appeals, which courts may or may not include a judge from the county "in which the property books are made out," Trial Court Rule 29 flatly contradicts W.Va. Code §11-3-25.

¹ Indeed, the West Virginia Legislature specifically stated in W.Va. Code §51-2-15 that it was creating the Business Court Division to relieve the circuit courts in highly populated countries from the burden of handling "complex . . . litigation involving highly technical commercial issues." No mention is made of tax issues.

In *Cruikshank v. Duffield*, 138 W.Va. 726, 77 S.E.2d 600 (1953), this Court held that the circuit court exceeded its statutory jurisdiction when it entered judgment against a surety signing a bond for an amount in excess of the aggregate amount of support payments ordered by the court for the period between the date of the judgment of the justice and the date of the judgment of the circuit court. In so ruling, this Court held as follows:

The court, in its discretion, may enforce either the criminal or civil liability, or both, as to a defendant convicted thereunder. No such liability, however, exists as to sureties who execute an appeal bond, unless such liability is created by the provisions of the statute quoted above. Any such liability, or any power vested in the court to enter an order making the sureties liable for support payments, must be found in the statute. Undoubtedly the statute does vest in the court power to enter some kind of judgment against the sureties. If the power granted, however, has been exceeded in the entry of the judgment complained of, it is quite clear from the authorities that, to the extent the power has been exceeded, the judgment is void. 'Where a court is without jurisdiction in the particular case, its acts and proceedings can be of no force or validity, and are a mere nullity and void, not voidable, even prior to reversal, whether the lack of jurisdiction appears on the face of the record or by proof out-side of it; likewise, a court's acts in excess of its jurisdiction are void, even if it has jurisdiction of the subject matter of the action and of the parties, as where a court of special or limited jurisdiction exceeds its powers. * * *' 21 C.J.S., Courts, § 116. In *Barnes v. American Fertilizer Co.*, 144 Va. 692, 130 S.E. 902, 906, we find this statement: 'Upon this record the first question presented for the consideration of this court is the extent of the court's authority to pass the decrees of August 29th and October 4th hereinbefore set out. In other words, the decrees in question are valid and effective only in so far as the court had jurisdiction of the subject-matter therein attempted to be adjudicated; and it is fundamental doctrine that **'jurisdiction of the subject-matter can only be acquired by virtue of the Constitution or of some statute.'** Shelton [& Luck] v. Sydnor, 126 Va. 625, 102 S.E. 83. **To the extent, therefore, that the court exceeded its authority, or its jurisdiction, over the subject-matter embraced in the decrees, they are absolute nullities, and may be impeached directly or collaterally by all persons, anywhere, at any time, or in any manner, and may be declared void by every court in which they are called in question.** (citations omitted)

While jurisdiction of courts of general jurisdiction is generally presumed, when acting only by virtue of a statute, as in the instant case, such courts are limited in power to that granted by the statute. ‘Courts of general jurisdiction stand upon the same footing with courts of limited powers, when not acting within the scope of statutory authority. Where the jurisdiction invoked is not inherent in the court, but conferred by special statute, and is to be exercised only under the prescribed statutory conditions of fact, the plaintiff must allege and prove the required jurisdictional facts. Even though a court is a superior one of general jurisdiction, still, when the particular proceedings are not according to the course of common law but under a statute giving a summary remedy, the record on its face should generally show that the particular case comes within the statute and that the statute has been followed * * *’. 11 M.J., Jurisdiction, Section 26. *Cruikshank*, 77 S.E.2d at 604, 138 W.Va. at 733.

(Emphasis added.)

By statute, the Business Court Division is a court of limited jurisdiction. Its jurisdiction is strictly limited to highly technical "commercial issues and disputes **between businesses.**"

(Emphasis added.) Simply stated, W.Va. Code §51-2-15 does not grant jurisdiction to the Business Court Division to hear and decide tax appeals.

In Syllabus Pt. 1 of *State ex rel. Barker v. Manchin*, 279 S.E.2d 622, 167 W.Va. 155 (1981), this Court held as follows:

1. Article V, section 1 of the Constitution of West Virginia which prohibits any one department of our state government from exercising the powers of the others, is not merely a suggestion; it is part of the fundamental law of our State and, as such, it must be strictly construed and closely followed.

By adding "complex tax appeals" to the jurisdiction of the Business Court Division in the Trial Court Rules, Trial Court Rule 29 exceeded the mandate of the West Virginia Legislature. According to *State ex rel. Barker, supra*, the authority to define what is included in the disputes which may be referred to the Business Courts is limited by the express language of W.Va. Code

§ 55-2-15, which must be "strictly construed and closely followed." Adding complex tax appeals to Trial Court Rule 29 violates that requirement.²

IV. Article VIII, Section 5 of The West Virginia Constitution Entitles The Commission And The Citizens of Harrison County, Which It Represents, The Right To Have This Civil Action Presided Over By A Judge Elected By The Voters Of The Circuit

The very first sentence of Article VIII, Section 5 of the West Virginia Constitution entitled "Circuit courts" provides in relevant part as follows: "The judge or judges of each circuit court **shall be elected by the voters of the circuit** for a term of eight years..." (Emphasis added.) The use of the word "shall" makes it mandatory that circuit judges of a particular circuit be elected by the voters of that circuit. Article VIII, Section 5 of the West Virginia Constitution requires that each circuit court be presided over by a judge or judges elected by the voters of the circuit.³ Article VIII, Section 5 of the West Virginia Constitution does not contemplate, mention, or authorize a "Business Court Division" or any other division of Harrison County Circuit Court that would replace the duly elected Circuit Judge of Harrison County with a judge elected from another judicial circuit. Merely having litigants continue to style matters "In the Circuit Court of Harrison County" after they have been referred to the Business Court Division and merely having litigants appear in a Harrison County courtroom before a circuit judge appointed from another judicial circuit in lieu of the constitutionally elected judge of Harrison

² This Court recognized, in *State ex rel. Chemical Tank Lines, Inc. v. Davis*, 141 W.Va. 488, 93 S.E.2d 28 (1956) that its authority to promulgate rules governing the conduct of judicial business so long as they are "not inconsistent with . . . statutory law." *Chemical Tank*, 141 W.Va. at 493. As the Supreme Court of California, which agreed that the authority to adopt rules did not extend to rules inconsistent with governing statutes, noted, "a rule is inconsistent with a statute if it conflicts with either the statute's express language or its underlying legislative intent." *In Re Abbigail A.*, 204 Cal.Rptr. 3d 760, 375 P.3d 879, 884 (2016). Here, Trial Court Rule 29 conflicts with both the express language of W.Va. Code §55-2-15 as well as with the Legislative intent expressed in the statute itself. Moreover, Trial Court Rule 29 unquestionably conflicts with W.Va. Code §11-3-25, which establishes where tax appeals may be heard.

³ The only exceptions to this requirement is if the elected judge(s) has a conflict of interest or is otherwise unable to serve. Neither of these exceptions are present here.

County does not place the litigants or a matter in the actual, legitimate and Constitutionally required Circuit Court of Harrison County. What legitimizes being "In the Circuit Court of Harrison County" is being in front of and being presided over by the constitutionally elected judge of Harrison County.

The controversy in *Howard, supra*, involved a proceeding in prohibition challenging the authority of a circuit judge elected from another judicial circuit to discharge the duties of judge of the circuit court in place of the regularly elected judge thereof, who was qualified and was able to serve. The controversy arose when the West Virginia Legislature passed a statute that removed Mingo County from the Eighth Judicial Circuit, composed of the Counties of McDowell and Mingo, and transferred Mingo County to the Twenty-Fourth Circuit, which consisted of only Wayne County. The objection the petitioners maintained in *Howard* was that the term for which the duly elected Judge of the Circuit Court of McDowell and Mingo Counties (Judge Howard) would not expire until December 31, 1936, but the statute passed by the West Virginia Legislature transferred Mingo County to the Twenty-Fourth Circuit on March 1, 1935, when there was still 22 months remaining on Judge Howard's term. The Court in *Howard*, ultimately ruled that the provision of the statute making the transfer of Mingo County from the Eighth circuit to the Twenty-Fourth circuit effective March 1, 1935, was unconstitutional, null and void.

In granting the writ of prohibition, the *Howard* court held, in relevant part, as follows:

...Circuit judges are constitutional officers. When they have been duly elected and qualified, they cannot be legislated out of office, directly or indirectly.

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...[B]y the Constitution, framed and promulgated by the people themselves, there is vested in the circuits the right to elect their judges for eight-year terms. In no other manner may men be clothed with authority as circuit judges, except that a vacancy may be filled by gubernatorial appointment until the next general election.

The immediate transfer of Mingo from the Eighth to the Twenty-Fourth circuit would result in placing in the circuit judgeship of that county a man for whom the people thereof had not voted, and would deprive them of the services of the judge whom they duly elected for a definite term. This would involve, in the first instance, a legislative destruction of a constitutional right of the people of Mingo County, and, in the second instance, it would involve the appointment by the Legislature of a judge to serve in Mingo County in lieu of the constitutionally elected judge of that county.

... Circuits must be served by the duly elected judges thereof for the period of their terms of office.

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The authority of a state legislature is of the essence of sovereignty; it would be absolute but for constitutional limitations. It must stop short when in conflict with a power vested by the states in the Federal government and set forth in the Federal Constitution. Likewise, when in conflict with a restriction of the State Constitution, legislative authority reaches an impasse—a wall of adamant. When thus confronted, legislative action is fruitless. The representatives of the people may not do through legislation that which the people themselves have said in their Constitution may not be done. If there be conflict between constitutional inhibition and legislative enactment, the courts must adhere to the former and disregard the latter. Both cannot be law. The Constitution must stand; such enactment cannot.

Howard, at 180 S.E. 531-532, 116 W.Va. 366-368.

Applying the holding in *Howard*, whenever there is a conflict between a statute (and a rule implementing that statute) and the West Virginia Constitution, both cannot be law. The West Virginia Constitution must stand; such enactment cannot. The Motion must be denied because to refer this civil action to the Business Court Division would violate the West Virginia Constitution.

CONCLUSION

Based on the foregoing, Antero Resources Corporation's Motion to Refer Case to the Business Court Division must be denied.

Respectfully submitted,

THE COUNTY COMMISSION OF
HARRISON COUNTY, Sitting as
A Board of Assessment Appeals

By Counsel,



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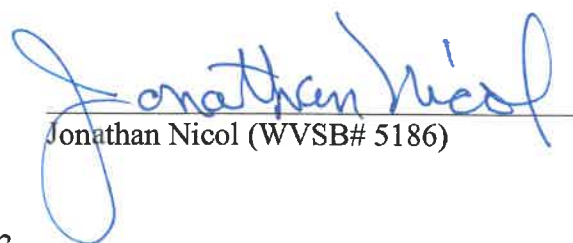
Respondents.

CERTIFICATE OF SERVICE

I, Jonathan Nicol, counsel for Respondent, The County Commission of Harrison County, sitting as a Board of Assessment Appeals, do hereby certify that the REPLY MEMORANDUM OF THE COUNTY COMMISSION OF HARRISON COUNTY IN OPPOSITION TO ANTERO RESOURCES CORPORATION'S MOTION TO REFER CASE TO THE BUSINESS COURT DIVISION was served by first class mail, postage pre-paid on the following on this 8th day of October, 2020, to-wit:

Craig A. Griffith
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Counsel for the Petitioner
Steptoe & Johnson
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Jonathan Nicol (WVSB# 5186)