IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

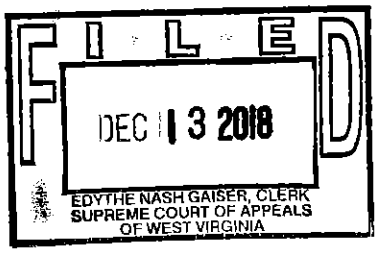
KRP MARCELLUS I, LLC, RIVERCREST ROYALTIES II, LLC, DIVERSIFIED ROX MINERALS, LLC, BRD ROYALTY HOLDINGS, LLC, and AMON G. CARTER FOUNDATION, collectively known as KIMBELL GROUP,

Plaintiffs,

vs.

CHEVRON U.S.A. INC., a Pennsylvania corporation, TH EXPLORATION, LLC, a Texas limited liability company, and DOE CORPORATIONS 1-20,

Defendants.



Circuit Court of Marshall County
Civil Action No. 18-C-215
Honorable Jeffrey D. Cramer

PLAINTIFFS' REPLY MEMORANDUM IN OPPOSITION TO DEFENDANT CHEVRON U.S.A. INC.'S MOTION TO REFER CASE TO THE BUSINESS COURT DIVISION

Come now, Plaintiffs, KRP Marcellus I, LLC, Rivercrest Royalties II, LLC, Diversified Rox Minerals, LLC, BRD Royalty Holdings, LLC, and Amon G. Carter Foundation, collectively known as Kimbell Group, by and through the undersigned counsel and pursuant to Rule 29.06 (a)(4) of the West Virginia Trial Court Rules, submit their Reply Memorandum in Opposition to Defendant Chevron U.S.A. Inc's ("Chevron") Motion to Refer Case to the Business Court Division.

I. SUMMARY

The present case does not warrant referral to the Business Court Division and should remain in the Circuit Court of Marshall County. Referrals to the Business Court Division are reserved for cases involving "matters of significance to the transactions, operations, or governance between business entities" and for cases in which the dispute presents "commercial

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and/or technology issues in **which specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy**..." W. Va. T.C.R. 29.04(a)(1)-(2). (Emphasis added). While this case involves transactions between businesses, those types of transactions are not unique to these business entities. In fact, the interests and issues which gave rise to the Complaint are ubiquitous and commonly disputed between individuals as well as businesses. The matters in dispute between the parties are, perhaps, best described in the Preliminary Statement of Plaintiffs' Complaint: "The Kimbell Group brings this action to enforce the payment of its overriding royalty interests ("ORRIs") in oil and gas leases covering approximately 53,000 gross acres located in Marshall County, West Virginia." Pls.' Complaint at 1. Not only are ORRIs frequently held by individuals, the Judge to whom the case was assigned, the Honorable Jeffrey D. Cramer, is notably qualified to rule upon the underlying legal issues in this case and he has experience analyzing those legal issues. Therefore, referral to the W. Va. Business Court Division is not necessary and Defendant Chevron's Motion to Refer Case for Referral to Business Court should be denied.

The rules governing referral to the Business Court Division require "the need for specialized knowledge or expertise in the subject matter or familiarity with some specific law or legal principles that may be applicable." W. Va. T.C.R. 29.04(a)(2). Defendant Chevron asserts that this matter presents novel issues for which specialized treatment (knowledge of the issues) would be helpful. *See* Def.'s Motion to Refer at 2. Because oil and gas is produced from land, disputes concerning rights under oil and gas leases are commonly determined under the jurisdiction of the county where the oil and gas is produced. As this Court may be aware, and as evidenced by the pleadings associated with this lawsuit, Marshall County has been the site of significant oil and gas development in recent years.

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As noted above, the Marshall County Circuit Court Judge assigned to this case has the knowledge and familiarity with the issues to resolve the underlying legal issues in this case. Judge Cramer has analyzed ORRIs in oil and gas leases in prior cases. *See Contraguerro v. Gastar Exploration, Inc.*, 2016 W. Va. Cir. LEXIS 30 (W. Va. 2016).[1] Because Judge Cramer is one of only a handful of West Virginia circuit judges to engage in the analysis of ORRIs, Plaintiffs assert referral to the West Virginia Business Court Division is neither necessary, nor justified.

II. JUDGE CRAMER IS BEST POSITIONED TO DECIDE THE LEGAL ISSUES REGARDING OVERRIDING ROYALTY INTERESTS IN THIS LAWSUIT

The Honorable Jeffrey D. Cramer possesses the knowledge and familiarity involving oil and gas matters, including knowledge of overriding royalty interests, to decide whether or not the Plaintiffs are owed and entitled to an ORRI on production from the Chevron leases subject to this dispute in Marshall County, West Virginia. Recently, Judge Cramer presided over a lawsuit in which he analyzed the rights of different parties owning interests under an oil and gas lease, including owners of ORRIs. Although the principal dispute concerned the relationship between executive and non-participating interest holders with regard to the necessity for a non-participating interest owner to ratify a pooling and unitization lease provision, Judge Cramer conducted the following analysis of ORRI issues in his April 2016 Order:

> 73. Particularly, Gastar cites *Rice Bros. Mineral Corp. v. Talbott*, 717 S.W.2d 515 (Ky. 1986) which held that a lessor had the right to pool over the express objection of the holder of a 1/8 overriding royalty in a tract comprising 60% of the pooled unit, and that the non-consenting royalty owner's payment was properly calculated to be 7.5% (or 60% of 1/8) of the entire production of the pool.

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[1] Plaintiffs acknowledge that Judge Cramer's Order Granting Plaintiff's Motion for Summary Judgment was reversed by this Court in *Gastar Exploration, Inc. v. Contraguerro*, 239 W. Va. 305 (W. Va. 2017), but note that reversal was unrelated to Judge Cramer's analysis of overriding royalty interests at paragraphs 73 through 75. A copy of the above-referenced Order has been attached hereto as "Exhibit A".

74. However, regarding requiring the overriding royalty interest holder's consent to pool said Interest, the *Rice* Court went on to state:

"Here, appellant assigned its rights as lessee under the Baker lease as consideration for the appellee. Although appellant retained a one-eighth overriding royalty interest in the Baker lease as consideration for the assignment, it retained no ownership interest in any oil and gas which is in place on the leasehold. Appellant's consent to the disputed voluntary pooling agreement, therefore, was not required by KRS 353.620, as it was not an 'owner' of any 'oil and gas interest/within the statutory meaning of those terms." *Rice* at 517.

75. The Court disagrees with Gastar's application of *Rice* to the present facts. First, the *Rice* Court was tasked with interpreting the application of a Kentucky Revised Statute (Chapter 353.630), West Virginia does not have a similar applicable pooling statute upon which the present Court can rely.

Further, the *Rice* Court's Opinion was based upon the appellant therein not being an "owner" of any "oil and gas interest." Plaintiffs herein are indeed "owners" of an oil and gas interest, and not simply holders of an overriding royalty interest. As such, the present Court believes the *Rice* Court, applying the facts herein, would have reached an opposite result.

Contraguerro v. Gastar Exploration, Inc., 2016 W. Va. Cir. LEXIS 30 (W. Va. 2016). Not only did Judge Cramer utilize Kentucky law, but in the same Order, he analyzed and applied Texas law as persuasive authority. His analysis of ORRIs demonstrates his knowledge and experience in this area of the law in such a manner as to make the referral to the West Virginia Business Court Division unnecessary.

III. TO DATE, THE BUSINESS COURT DIVISION HAS NO SPECIALIZED KNOWLEDGE OR EXPERIENCE IN RESOLVING OVERRIDING ROYALTY INTEREST DISPUTES

Although they are not, even if ORRIs were "novel," as Defendant Chevron suggests in its Motion to Refer, the Business Court Division would have no more specialized knowledge or expertise in the subject matter, or familiarity with the applicable law or legal principles than a West Virginia Circuit Judge, particularly Judge Cramer.[2] This claim of Defendant Chevron

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[2] Counsel for Plaintiffs conducted a focused Lexis Advance search using the particular terms "overriding royalty." The search revealed seven (7) cases, **none of which were referred to the Business Court Division.** The cases are

actually undermines its contention that the West Virginia Business Court Division would have more specialized knowledge or expertise regarding the underlying issues to be litigated than the assigned Circuit Court Judge. It is apparent that Judge Cramer is best positioned to decide the legal issues in this lawsuit, given his experience in analyzing overriding royalty interests. As such, Defendant Chevron's Motion to Refer Case to the Business Court Division should be denied.

IV. THE ISSUES WITHIN PLAINTIFFS' COMPLAINT ARE LESS COMPLEX THAN DEFENDANT CHEVRON CLAIMS

Rule 29.04 of the West Virginia Trial Court Rules defines "business litigation" as, contemplated for referral to West Virginia Business Court Division, as 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.

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listed in descending, chronological order: *Gastar Exploration, Inc. v. Contraguerro*, 239 W. Va. 305 (W. Va. 2017); *Contraguerro v. Gastar Exploration, Inc.*, 2016 W. V. Cir. LEXIS 30 (April 1, 2016) (Order Regarding Motions for Summary Judgment); *Rubin Res. Inc., v. Morris*, 237 W. Va. 370 (W. Va. 2016); *Bartlett v. Lipscomb*, No. 14-0278 (W. Va. Supreme Court, April 9, 2015); *Pocahontas Mining Co. Ltd. Pshp. v. Oxy USA, Inc.*, 202 W. Va. 169 (W. Va. 1998); *TXO Prod. Corp. v. Alliance Resources Corp.*, 187 W. Va. 457 (W. Va. 1992); *Shearer v. United Carbon Co.*, 143 W. Va. 482 (W. Va. 1958).

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In its efforts to have this matter referred out of the Circuit Court of Marshall County, Defendant Chevron attempts to paint the issues at hand to be more complex commercial issues than they actually are. In doing so, Defendant Chevron appears to be asking the Court to ignore the plain language of the above-stated rule. First, Plaintiffs disagree that ORRIs are matters of significance between only businesses. Plaintiffs also disagree that ORRIs are unique to businesses in general. Individuals frequently reserve or acquire ORRIs in production under oil and gas leases. An overriding royalty interest can be as small as the right to production from one acre under one oil and gas lease, or as large as an interest in production from 53,000 acres in hundreds of oil and gas leases, as present in this case. The complexity, if any, of Plaintiffs' claims, is rooted in the chain of title and/or the transfer of title in the leases subject to this dispute, not the nature of an ORRI. Chain of title and/or transfer of title issues are not issues unique to businesses.

Defendant Chevron's assertion that the "scope of TKG's claims in this action is immense" is irrelevant in the referral rules or the analysis of its application to the present issues. Def.'s Motion to Refer at 3. The applicable rules governing referral to the Business Court Division strictly address the subject matter of the litigation and whether the Business Court Division's knowledge or experience would be beneficial. *See* W. Va. T.C.R. 29.04 (a)(2). The rules are silent as to the "scope" of either party's claims. Even if this Court were to weigh the scope of Plaintiffs' claims in its decision, the mere volume of acreage in question does not complicate the issues regarding ORRIs. The underlying fact pattern with respect to many leases relative to this matter is largely repetitive.

V. THE OVERRIDING ROYALTY INTEREST ISSUES WITHIN PLAINTIFFS' COMPLAINT ARE NOT NOVEL ISSUES, AS DEFENDANT CHEVRON CLAIMS

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Overriding royalty interests are omnipresent in the oil and gas industry. In fact, **Defendant Chevron reserved an overriding royalty interest in its transactions with the other defendant in this case, TH Exploration, LLC.** As noted hereinbefore, any person, including any individual or corporation, may reserve or acquire an ORRI in production from oil and gas leases. Often times, independently contracted landman that negotiate and enter into an oil and gas lease with a mineral owner retain an overriding royalty interest in such lease when conveying the lease to operators or subsequent lessees. ORRIs of this nature are commonly involved in leases being litigated in the Circuit Courts of the State of West Virginia, including the leases litigated in the *Contraguerro* case involving Judge Cramer, as noted herein. Plaintiffs can find no previous referrals from any Circuit Court judge to the West Virginia Business Court Division regarding the enforcement of ORRIs or the interpretation of the instruments by which such interests are created. Additionally, Plaintiffs are aware of no legal authority mandating, or even suggesting, that the Business Court Division should handle overriding royalty interest cases because they present novel legal issues, as claimed by Defendant Chevron.

VI. CONCLUSION

For the reasons stated more fully herein, Plaintiffs respectfully request that the Court deny Defendant's Motion to Refer Case to the Business Court Division.

Respectfully submitted,

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16-0429

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

JOYCE CONTRAGUERRO, et al.

Plaintiffs,

vs. **CASE #: 14-C-89**
Judge Jeffrey D. Cramer

GASTAR EXPLORATION, INC., et al.,

Defendants.

ORDER REGARDING MOTIONS FOR SUMMARY JUDGMENT

On prior days came the Parties, by and through counsel, and submitted various competing motions for summary judgment. The Court has conducted two hearings on the filings. The Court has reviewed the filings submitted by the Parties and has considered the arguments presented by Counsel at the hearings. The Court has conducted its own legal research into the issues. After careful consideration of the issues, the Court hereby GRANTS the Defendant's Motion regarding Plaintiffs' interest in the mineral rights of Ada Parsons and her heirs, and further DENIES the remainder of the Defendants' Motions, GRANTS in part the Plaintiffs' Motion and makes the following findings of fact and conclusions of law.

Findings of Fact

1. The Plaintiffs collectively hold a ¼ ownership interest and a ¼ non-participating royalty interest in a 105.9 acre mineral estate located in Franklin District, Marshall County, West Virginia.
2. The Plaintiffs all trace their individual interests back to Mabel Theiss Simms. Mabel Theiss Simms is either the grandmother or great-grandmother of the Plaintiffs.

PLAINTIFF'S EXHIBIT
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Mabel Theiss Simms had one daughter, Eva Minor, and all of the Plaintiffs are either the children or the grand-children of Ms. Minor.

3. The Defendants allege that the Plaintiffs herein are not heirs of, and have no mineral or royalty interest derived from, Ada Parsons. The Plaintiffs appear to have conceded the same.

4. PPG acquired the surface acreage associated with the 105.9 acre mineral estate and holds an "executive right" to lease certain mineral interests underlying that tract of land.

5. Defendant PPG does not own any royalty interest in the 105.9 acre mineral estate.

6. Defendant PPG and Defendant Gastar Exploration, Inc. (hereinafter "Gastar") entered into negotiations which resulted in the execution of an Oil and Gas Lease and Operations Agreement on or about February 25, 2011 (hereinafter PPG/Gastar Lease). Said agreement covered 3,285.6874 acres of land.

7. The 105.9 acre tract in which the Plaintiffs own their ¼ non-participating royalty interest is included within the terms of the PPG/Gastar Lease.

8. After the execution of the PPG/Gastar Lease, Defendant Gastar drilled and began to operate eight (8) oil and gas wells some of which have a connection to the 105.9 acre tract at issue in this case.

9. Thereafter, Defendant Gastar designated and operated the Wayne/Lilly drilling unit and the entire 105.9 acre mineral tract at issue is contained within the Wayne/Lilly drilling unit.

10. Five of the eight oil and gas wells in the Wayne/Lilly Unit have horizontal well bores which penetrate the mineral interest underlying the 105.9 acre mineral tract.

11. Oil and gas production operations have occurred from the wells in the Wayne/Lilly drilling unit.

12. Royalty payments which are attributable to the mineral royalty interests reserved by Mabel Thiess Sims have not yet been paid to the Plaintiffs, but have been placed in Gastar's internal suspense accounts.

13. Gastar has admitted that no interest has accrued to any of the monies held in the suspense accounts.

14. The Plaintiffs herein were not asked to provide consent to the pooling or unification of their royalty interests prior to the time that Gastar declared the Wayne/Lilly drilling unit or before production operations were undertaken in the Wayne/Lilly drilling unit.

15. Following the time that pooling and oil and gas production had already occurred, Defendant Gastar began to reach out to the Plaintiffs, individually, to ask them to "ratify" and approve the PPG/Gastar lease agreement which had already been entered into and which had already yielded oil and gas production related to the Plaintiffs' royalty interest.

16. The Plaintiffs were advised that they would be paid their royalty interest only after they executed the ratification agreement approving the PPG/Gastar Lease.

17. The Plaintiffs requested Defendant Gastar provide them with a copy of the PPG/Gastar Lease agreement before they would agree to "ratify" said agreement.

18. Defendant Gastar refused to provide the Plaintiffs with a copy of the lease agreement that it was asking the Plaintiffs to "ratify."

19. The Plaintiffs filed this litigation initially asking, in part, for a declaratory judgment as to "their rights, status and/or other legal relations with or in relation to the Defendants under the 'Oil and Gas Lease and Operations Agreement' entered into between Gastar and PPG."

20. Through discovery, the Plaintiffs have been able to review the terms of the PPG/Gastar Lease agreement.

21. The Plaintiffs complain of several provisions included within the PPG/Gastar lease agreement.

22. Section 10.6 (Shut-In Royalty) of the subject lease provides that:

> If at any time, whether before or after the expiration of the Primary Term, there is located in a Horizontal or Vertical Well Tract, a Well or Wells proven capable by actual tests (or other satisfactory data, including, without limitation connection to a pipeline which permits the transportation of Gas to an end user) of producing Gas in Paying Quantities and such Well or Wells are shut-in because of the unavailability of a reasonable opportunity to market, then Lessee may maintain this Lease in force and effect as to that Horizontal or Vertical Well Tract for one year from the date on which the Well or Wells were shut-in, by paying PPG for such one year period, as shut-in royalty, the sum of One thousand ($1,000) Dollars per Well within sixty (60) days after the date on which such Well was first shut-in. If such unavailability of a market persists, then Lessee may extend this Lease as to that Horizontal or Vertical Well Tract or Pooled Horizontal Well Tract for one additional six (6) month period by making another shut-in royalty payment in the sum of Five Hundred ($500) Dollars per Well on or prior to the anniversary of the date on which the Well or Wells were shut-in. Lessee shall not be entitled to maintain this Lease as to a Horizontal or Vertical Well Tract by such payments for any period in excess of eighteen (18) consecutive months, or a cumulative total of thirty-six (36) months total during the Term of this Agreement.

23. Section 10.8 (In-Kind Royalty) of the subject lease provides that:

> If Lessee is marketing hydrocarbons from Gas Well(s) located on the Leased Premises or acreage pooled or unitized therewith, then at any time and from time to time, at the request of PPG, in lieu of Lessee paying PPG all or a designated portion of the Royalty in cash, Lessee shall supply PPG with a percentage of the volume of the total hydrocarbons produced that PPG designates it wants to receive in-kind, not to exceed twenty-one percent (21%). If the in-kind percentage is less than 21.0% then the balance of the Royalty will be paid in cash. The hydrocarbons delivered for this in-kind royalty shall be determined by meter readings at the Point of Sale. The in-kind royalty delivered to PPG shall be delivered at the Point of Sale.

24. Section 12.1 of the subject lease provides that:

> In addition to any royalty set forth in this Agreement, PPG reserves gas for use by PPG, free of cost and not to exceed 300,000 cubic feet per Gas Well per annum (while the pressure is high enough), by making connection to any Gas Well or Wells on the Leased Premises and agrees that such use shall be at the sole risk and liability of PPG and any PPG Party so using the gas, that PPG shall indemnify, defend and hold harmless Lessee and the Lessee Parties from and against any and all such damage and losses including loss of value, and that any damage, including but not limited to the loss of the well, resulting from such use shall be borne by PPG and any PPG Party so using the gas. If PPG elects to not take the "free gas" from a Gas Well, then in lieu of supplying "free gas" to PPG, Lessee shall pay to PPG annually for each one year period in which gas is being marketing from such Gas Well, an amount equal to the prevailing average well head value of such gas for the period of such payment for 300,000 cubic feet of gas, such payment is to be made within ninety (90) days after the end of each Lease Year.

25. Section 9 (Pooling/Unitization) of the subject lease further authorized Defendant Gastar to create pooled oil and gas production units containing the tracts of land affected by the PPG/Gastar lease agreement, including the Plaintiffs' interests.

26. After discovering the terms of the PPG/Gastar lease agreement, the Plaintiffs were granted leave to file an Amended Complaint which, in addition to the previously requested declaratory judgment relief, asserted affirmative damages claims related to the relationships which existed between the parties to the PPG/Gastar lease agreement and the Plaintiffs.

27. The Plaintiffs assert that Section 10.6 improperly provides that "Shut-in Royalties", which are typically paid in lieu of production royalties, are payable to Defendant PPG rather than the oil and gas royalty owners who are entitled to the production royalties and whom will be harmed if oil and gas production does not occur.

28. The Plaintiffs assert that Section 10.8 (In-Kind Royalty) improperly takes oil and gas production products away from market for sales purposes and authorizes Defendant PPG to take possession oil and gas production to which it has no royalty interest ownership in.

29. The Plaintiffs assert that Section 12.1 improperly permits Defendant PPG to obtain free gas from all wells drilled in the Wayne/Lilly Unit and that taking such free gas will result in less oil and gas production being sold and less royalties ultimately payable to the royalty interest holders.

30. The Plaintiffs further assert that Section 12.1 further improperly permits Defendant PPG to profit from oil and gas rights by allowing it to take monetary payments instead of "free gas" from the wells in the Wayne/Lilly unit.

31. The Plaintiffs assert that Defendant PPG, as an "executive rights" holder, owed to them, as non-participating royalty interest owners, fiduciary duties and

that the negotiation and execution of the PPG/Gastar lease agreement breached those fiduciary duties.

32. The Plaintiffs assert that any PPG/Gastar lease terms which violate the fiduciary duties they were owed are not enforceable against their mineral royalty interest.

33. The Plaintiffs assert that the pooling and unitization of their mineral royalty interests into the Wayne/Lilly unit could not have been legally conducted without the Plaintiffs' prior consent.

34. Defendant PPG has admitted, for the purpose of its motion, that a fiduciary relationship exists between "executive rights" holders and "non-participating royalty interest holders."

35. Defendant PPG asserts that it has not exercised its rights to obtain "free gas" or payments in lieu of free gas and has further offered to stipulate that it would not exercise said rights in the future.

36. Defendant PPG asserts that it did not need any form of "consent" from the Plaintiffs to permit Defendant Gastar to pool and unitize the Plaintiffs' mineral royalty interest.

Summary Judgment & Declaratory Judgment

37. Rule 56 of the West Virginia Rules of Civil Procedure provides that summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a

matter of law." W.Va. R. Civ. P. 56(c) (West. 2014); *see also e.g., George v. Blosser*, 157 W.Va. 811, 204 S.E.2d 567 (1974); *Hines v. Hoover*, 156 W.Va. 242, 192 S.E.2d 485 (1972) (a summary judgment proceeding is not a substitute for a trial of an issue of fact, but is a determination that, as a matter of law, there is no issue of fact to be tried).

38. When analyzing evidence under this standard, the court must draw any permissible inferences in the light most favorable to the non-moving party and, in assessing the factual record, the court must grant the non-moving party the benefit of inferences, as credibility determination, the weight of evidence, and the drawing of legitimate inferences from facts are jury functions, not those of the judge. *McKenzie v. Cherry River Coal & Coke Co.*, 195 W.Va. 742, 746, 466 S.E.2d 810, 814 (1995).

39. The question on a motion for summary judgment is not whether the plaintiff has met the burden of proof on the material aspects of his claim, but whether a material issue of fact exists on the basis of the factual record developed to that date. See *Lengyel v. Lint*, 167 W.Va. 272, 280 S.E.2d 66 (1981). The Circuit Court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial. See *Law v. Monongahela Power Co.*, 210 W.Va. 549, 558 S.E.2d 349 (2001); *Cavender v. Fouty*, 195 W.Va. 94, 464 S.E.2d 736 (1995); *Poling v. Bellington Bank, Inc.*, 207 W.Va. 145, 529 S.E.2d 856 (1999); *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995); *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

40. W.Va. Code §55-13-1 provides that "Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed."

41. "Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder." W.Va. Code §55-13-2

Conclusions of Law

42. Plaintiffs' Declaratory Judgment action as well as their Amended Complaint involve their rights as non-participating royalty interest owners versus the rights of Defendant, PPG, as "executive rights" holder over the Plaintiffs' oil and gas interests. West Virginia Jurisprudence is very limited regarding the ancient device known as the "executive right." The present Court has been presented with no West Virginia precedent from any party herein regarding the specific issue of requiring an executive rights holder to obtain the consent of a non-participating royalty interest owner to pool or unitize their oil and gas interests. It would appear that said specific issue is one of first impression in the State of West Virginia.

43. The Court concludes that the Plaintiffs herein are not entitled to any interest formerly held by Ada Parsons. Plaintiffs' interests are derived solely through Mabell Theiss.

44. West Virginia law acknowledges, and the Plaintiffs do not dispute, that the "executive right" to lease oil and gas rights is a valid and enforceable right. *Bills v. Donahue*, 172 W.Va. 354 (1983).

45. West Virginia law has, however, specifically stated that an executive rights holder shall be held to "strict fiduciary standards" in the exercise of their executive right. *Id.* at 356.

46. The West Virginia Supreme Court of Appeals has stated that "[t]he fiduciary duty is '[a] duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person. It is the highest standard of duty implied by law [.]' " *Elmore v. State Farm Mut. Auto. Ins. Co.*, 202 W.Va. 430, 435, 504 S.E.2d 893, 898 (1998) (quoting Black's Law Dictionary 625 (6th ed.1990)).

47. West Virginia has long recognized the existence of fiduciary duties in a myriad of situations involving both direct contractual relationships as well as implied relationships. The Restatement (Second) of Torts 874 explains that a fiduciary relationship "exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation" and that one who breaches such a duty "is guilty of tortious conduct to the person for whom he should act." Our Supreme Court has confirmed that "[t]he fiduciary duty is '[a] duty to act for someone else's benefit, while subordinating one's personal interests to that of the other

person." *Elmore v. State Farm Mut. Auto. Ins. Co.*, 202 W.Va. 430 (1998). A fiduciary relationship exists "whenever a trust, continuous or temporary, is specially reposed in the skill or integrity of another." *McKinley v. Lyncy*, 58 W.Va. 44 (1905).

48. West Virginia is not alone in recognizing the existence of a strict fiduciary duty in favor or non-participating royalty interest holders. Common law from Texas, which this Court does find instructive and persuasive, agrees that such duties exist.

49. "The fiduciary duty arises from the relationship of the parties and not from the contract . . . While a contract or deed may create the relationship, the duty of the executive arises from the relationship and not from the express or implied terms of the contract or deed. That duty requires the holder of the executive right . . . to acquire for the non-executive every benefit that he exacts for himself." *Magnes v. Guerra*, 673 S.W.2d 180, 183-184 (TX 1984)

50. While Defendant PPG has agreed, for the purposes of its motion that a fiduciary relationship exists, the Plaintiffs have asked the Court for judicial declarations related to the "rights, status and/or other legal relations [the Plaintiffs have] with or in relation to the Defendants under the 'Oil and Gas Lease and Operations Agreement' entered into between Gastar and PPG."

51. The Court finds that West Virginia does recognize the existence of a fiduciary relationship between executive rights holders and non-participating royalty interest holders and that executive rights holders will be held to "strict fiduciary standards."

52. The parties dispute whether or not the negotiation and execution of certain aspects of the PPG/Gastar lease agreement constitutes any breaches of the fiduciary duty PPG owed to the Plaintiffs.

53. The Court finds the negotiation of lease terms by an executive which result in terms which benefit the executive while subordinating the rights and interests of the non-participating royalty interest holder, could be determined by a finder of fact to be a breach of the executive's fiduciary duty.

54. The Court finds that questions of fact exist as to whether Defendant PPG's actions in the negotiation and execution of the lease terms which the Plaintiffs complain of constitute breaches of the "strict fiduciary standards" that it owed to the Plaintiffs.

55. PPG has asserted that the Plaintiffs cannot demonstrate damages related to the alleged fiduciary breaches asserted by the Plaintiffs, in part, because it has asserted that it has not taken any free gas or payments in lieu of free gas under the terms of the PPG/Gastar lease agreement

56. PPG has asserted that the Plaintiffs have benefited from the lease agreement as a whole and the pooling and unitization of their interests by Gastar.

57. "Each word in a contract is presumed to have a unique meaning. As stated in *Carnegie Natural Gas Co. v. South Penn Oil Co.*, 56 W.Va. 402, 49 S.E. 548 (1904), (n)o word or clause in a contract is to be treated as a redundancy, if any meaning reasonable and consistent with other parts can be given to it.' *Id.*, Syllabus Point 3. To the same effect is *Henderson Development Co. v. United Fuel Gas Co.*, 121 W.Va. 284, 3 S.E.2d 217 (1939), wherein the Court explained that in construing a contract,

'(f)orce and effect must be given to every word, phrase and clause employed, if possible.'" *Columbia Gas Transmission Corp. v. E. I. du Pont de Nemours & Co.*, 159 W. Va. 1, 13-14, 217 S.E.2d 919, 926-27 (1975)

58. The Court is not convinced, at this time, that the Plaintiffs cannot, as a matter of law, demonstrate specific damages occasioned by the alleged breaches of fiduciary duties.

59. Even if the Plaintiffs are not able to demonstrate the specific damages experienced, nominal damage awards may be appropriate. "Nominal damages arise where there is breach of a duty owed the plaintiff or an infraction of his right, though the amount of actual damages is not shown. *Maher v. Wilson*, 139 Cal. 514, 73 P. 418. Damages are inferred from the fact of a wrong done. 1 Sedgwick on Damages (9th Ed.) § 97. The violation of a legal right affords basis for damages, though nominal in amount. 17 Corpus Juris. p. 714. "Where an actionable wrong by the defendant is shown, the plaintiff may recover nominal damages from the mere fact of such wrong." *Watts v. Norfolk & W. R. Co.*, 39 W.Va. 196, 19 S.E. 521, 23 L.R.A. 674, 45 Am.St.Rep. 894" *Harper v. Consol. Bus Lines*, 117 W. Va. 228, 185 S.E. 225, 226 (1936). " 'Proof of the violation of any legal right entitles the injured party to some damages. If no actual damages appear, nominal damages are given for the technical injury.' And the authorities go so far as to hold that, even though the injury result in an actual benefit to the plaintiff, he is entitled to nominal damages." *Fleming v. Baltimore & O.R. Co.*, 51 W. Va. 54, 41 S.E. 168, 169 (1902).

60. The Plaintiffs assert that Defendant PPG lacked the authority to permit the pooling of the Plaintiffs' royalty interest without first receiving the Plaintiffs' consent to do so.

61. West Virginia courts have not been tasked with resolving the issue of consent to pool in this context. Other State Courts which have had the need to address these issues of oil and gas production for longer periods of time have developed case law which is directly on point.

62. "It has generally been held that the holder of the power to lease does not have the right to pool or unitize the interest of the non-participating interest owner with owners of other mineral interests in the same area, for this would dilute the share of the non-participating owner in production while removing his interest from the market for the indefinite future." Hemingway Oil and Gas Law and Taxation 2.2 (Citing *Brown v. Smith*, 174 S.W.2d 43 (TX 1943); *Brown v. Getty Reserve Oil, Inc.*, 626 S.W.2d 810 (Tex. App. 1981)).

63. Texas Courts have held: "[P]ooling on the part of the holder of the executive rights cannot be binding upon the non-participating royalty owner in the absence of his consent." *Brown v. Getty Reserve Oil, Inc.* at 814 (Citing *Montgomery v. Rittenbach*, 424 S.W.2d 210 (Tex. 1968)).

64. "[T]he reason of the rule is that where mere executive rights are conferred or reserved, there is no intention evidenced to vest authority to convey a royalty interest reserved or the royalty interest attributable to the minerals leased and to hold that such holder can unitize or pool the interest would allow him to convey such royalty interest

because a unitization of the royalty and minerals under different tracts effects a cross-conveyance to the owners of minerals under the various tracts of royalty or minerals so that they all own undivided interests under the unitized tract in the proportion their contribution bears to the unitized tract." *Minchen v. Fields*, 345 S.W.2d 282, 286 (Tex 1961).

65. "As stated, the rule in Texas is that the holder of the executive right has the power to execute oil and gas leases, but cannot pool or unitize an outstanding non-participating royalty interest absent joinder or ratification by the non-participating royalty interest owner. In situations where a royalty reservation predates an oil and gas lease that contains a pooling clause, the lease amounts to a proposal or offer by the lessor to the outstanding non-participating royalty interest owner to effect or create a community lease and to pool or unitize all of the royalties in all of the tracts described in the lease. To successfully ratify the lease, all non-participating royalty owners must ratify. The following case illustrates these principles. *Ruiz v. Martin*, 559 S.W.2d 839 (Tex. Civ. App.--San Antonio 1977, writ ref'd n.r.e.).

The *Ruiz* case stands for two propositions: (I) the holder of the executive interest does not have the power to pool the interest of a non-participating royalty interest owner absent consent or acquiescence, and (II) a lease by the executive that contains a pooling provision constitutes an offer to lease that the non-participating royalty interest owner can reject or accept by timely ratification.

The oil and gas lease in *Ruiz* involved three separate tracts totaling 600 acres owned by Ruiz. Martin owned an undivided 1/2 interest in the oil royalties, gas royalties,

and royalties in other minerals in a 463.8 acre tract, described as Tract 1 in the lease. The royalty was a perpetual, non-participating royalty interest, and it was outstanding at the time that the oil and gas lease was taken. During the lease term, a producing well was drilled on Tract 2. Ruiz asserted that he was entitled to 100% of the royalty from the producing well on Tract 2. Martin asserted that he was entitled to a share of the royalty from Tract 2. The trial court entered judgment that Martin was entitled to .38 (1/2 x 463.8/600) of the royalty on all oil, gas, and other minerals produced from the well from and after December 9, 1974, which was the date that Martin alleged to have ratified the lease.

The Texas Court of Appeals affirmed. In support of its holding, the Court of Appeals noted that an ordinary oil and gas lease, when executed by all the owners of different mineral interests in two or more tracts, effectively pools the royalties payable under the lease. The court then stated that the executive holder had the right to execute an oil and gas lease to burden the mineral interest, but did not have the authority or power to pool or unitize the royalty interest of the non-participating royalty interest holder without their joinder or ratification. In essence, the oil and gas lease amounted to a proposal or offer by the executive holder/lessor to the lessee and the non-participating royalty interest owners to pool or unitize all of the royalties in the tracts subject to the lease. Because the non-participating royalty owners timely ratified the lease, they were entitled to receive their proportionate share of the royalty produced from the leased premises." The Right to Royalty: Pooling and the Capture of Unburdened Interests, 17 Tex. Wesleyan L. Rev. 69 (Fall 2010).

66. Courts beyond Texas have agreed with that line of reasoning and held that executive rights holders may not pool non-participating royalty interest holders' interests without their consent. The cases which reach the conclusion that such pooling arrangements constitute a cross-conveyance of property do so because of the "provisions of the pooling which grant each participant a right to production from any well within the unitized area, whether or not situated on a tract contributed to that party." Property Provisions of the Operating Agreement, Gary B. Conine, 19 Tex. Tech L. Rev. 1263, 1280 (1988)

67. The Supreme Court of Illinois explained as follows:

"A unitization of separate tracts for the purpose of sharing in the production of oil creates a single ownership of the entire unit by the owners of the several tracts making up the unit, subject to the terms of the oil and gas leases. Similarly, when the lessees of the separate leasehold tracts making up the unit join in the unitization for the purpose of operation and production of oil, a single leasehold ownership is created of the unitized tract. The oil produced is pooled, regardless of the separate tract or tracts upon which the wells are located and from which the oil is produced. They all share in the oil produced, saved and sold in the proportion which each owner's tract bears to the entire unitized tract. For all practical purposes the same situation exists as though there was a single owner-lessor and a single lessee." *Ragsdale v. Superior Oil Co.*, 40 Ill. 2d 68, 70, 237 N.E.2d 492, 494 (1968).

68. In the present case, Defendants PPG and Gastar entered into an oil and gas lease agreement which permits Gastar to pool the covered mineral acreage into oil and gas

production units and to measure and pay oil and gas production royalties from the entire unit proportionately to the owners of the mineral interests based upon the amount of the different acreages which make up the unit has a whole.

Five oil and gas well drilling legs actually penetrate into the 105.9 acre tract of land which includes the Plaintiffs' non-participating royalty interest. Properties included within the Wayne-Lilly Unit include properties upon which there is no oil and gas well surface location and under which none of the 5 oil and gas horizontal drilling legs which penetrate the Plaintiffs' interest are located. Those properties which are not touched by the drilling site and/or the drilling legs still share in the oil and gas production from those 5 wells. This is exactly the situation contemplated by the cases which have found that non-participating royalty interests may not be pooled without consent.

69. Defendant, Gastar asserts that *Boggess v. Milam,* 127 W.Va. 654 (1945) stands for the proposition that West Virginia views pooling in solely a contractual sense rather than a cross-conveyance of property interests. The Court finds that the *Boggess* decision does not stand for that general proposition and did not directly address the issues presented in this case.

70. The *Boggess* case is distinguishable. *Boggess* did not involve the operation of "executive rights." All the parties were themselves, mineral interest participating owners in the subject parcels. Further, *Boggess* did not include the execution of oil and gas lease agreements which provided for pooling and/or unitization. After the subject oil and gas lease agreements were executed, some of the parties entered into a subsequent "so-called unitization agreement[.]" W.W. Boggess, who owned a 1/10th mineral

interest in a 116 acre tract, did not enter into a lease agreement and did not enter into the "so-called unitization agreement[.]" No wells were drilled on or penetrated the 116 acre tract, but a well was drilled on a 53 acre adjacent tract included in the "unitization agreement." W.W. Boggess was offered the opportunity to join in the unitization agreement, but declined to do so. W.W. Boggess, despite not owning any interest in the 53 acre tract, claimed that production from that property violated his property interests through the unitization agreement.

Upon the facts of that case, the Court determined that the rights at issue were contractual in nature and that Mr. Boggess had no contractual relationship with the 53 acre tract and was not affected, or to be included, in the subsequent unitization of that property with the 116 acre tract. Boggess had no legal or equitable right to the production from the 53 acres. The decision very well may have been different had the oil and gas well actually been drilled upon the 116 acre tract in which Mr. Boggess did have an interest. On these limited facts, the *Boggess* Court held that, "the so-called unitization agreement [did] not affect a merger of title."

71. The present facts are different. The present case involves the exercise of executive rights which are subject to strict fiduciary duties. Also, here there is no separate and subsequent unitization contract. The pooling and unitization language is included in the original lease agreement, which provides Defendant, Gastar its interest in the properties, and serves to create, as in the Illinois and Texas cases, a shared ownership in the oil and gas produced from the production unit.

72. Defendant Gastar cites cases from Louisiana and Kentucky in support of their argument that the pooling and unitization of mineral interests is a matter of contract and not a cross-conveyance.

73. Particularly, Gastar cites *Rice Bros. Mineral Corp. v. Talbott, 717 S.W.2d 515 (Ky. 1986)* which held that a lessor had the right to pool over the express objection of the holder of a 1/8 overriding royalty in a tract comprising 60% of the pooled unit, and that the non-consenting royalty owner's payment was properly calculated to be 7.5% (or 60% of 1/8) of the entire production of the pool.

74. However, regarding requiring the overriding royalty interest holder's consent to pool said interest, the *Rice* Court went on to state:

"Here, appellant assigned its rights as lessee under the Baker lease as consideration for the appellee. Although appellant retained a one-eighth overriding royalty interest in the Baker lease as consideration for the assignment, it retained no ownership interest in any oil and gas which is in place on the leasehold. Appellant's consent to the disputed voluntary pooling agreement, therefore, was not required by KRS 353.620, as it was not an 'owner' of any 'oil and gas interest' within the statutory meaning of those terms." *Rice* at 517.

75. The Court disagrees with Gastar's application of *Rice* to the present facts. First, the *Rice* Court was tasked with interpreting the application of a Kentucky Revised Statute (Chapter 353.630), West Virginia does not have a similar applicable pooling statute upon which the present Court can rely.

Further, the *Rice* Court's Opinion was based upon the appellant therein not being an "owner" of any "oil and gas interest." Plaintiffs herein are indeed "owners" of an oil and gas interest, and not simply holders of an overriding royalty interest. As such, the present Court believes the *Rice* Court, applying the facts herein, would have reached an opposite result.

76. Gastar argues to the Court that requiring executive rights owner to secure the consent of non-participating royalty interest owners to pooling and unitization of their interests would result in economic catastrophe in the oil and gas industry, bringing the development of oil and gas property to a screeching halt. The Court disagrees with such apocalyptic prophesies.

First, the Court does not believe that situations such as the limited one presented to the Court are so common that simply requiring the consent of non-participating mineral interests owners before their mineral interests are pooled would bring a billion dollar industry to a standstill. Again, this specific issue is so rare in West Virginia that no legal precedent has been set regarding the same.

Second, negotiation between executive rights holders, known non-participating royalty interest owners and companies wishing to develop the mineral interests is of course available to obtain their consent. As are other provisions of West Virginia Code such as Partition of co-tenancies (37-4-1, et seq) and Court approved Leasing of Missing or Unknown Owners or Abandoning Owners (55-12a-1, et seq).

77. The Plaintiffs have sought declarations as to their rights, status and other legal relations among the defendants and under the PPG/Gastar lease.

78. The Plaintiffs are seeking a determination as to the construction and validity of the PPG/Gastar lease agreement as it relates to the Plaintiffs' rights affected by that agreement.

79. The issue regarding the right to pool and unitize the Plaintiffs' interests in the property are proper subject for declaratory judgment.

80. The Court finds that Defendant PPG, while having certain leasing rights as an executive rights holder, did not have unfettered rights.

81. Defendant PPG did not have the authority to permit the pooling of the Plaintiffs' mineral interests without first receiving consent from the Plaintiffs to do so.

82. Defendants PPG and Gastar have not established that they are entitled to summary judgment as a matter of law on the Plaintiffs' claims for damages at this time. Regardless, the Plaintiffs' claims include declaratory requests which are not tied to any particular issue of damage.

83. The Plaintiffs have, however, met their burdens in establishing that they were owed fiduciary duties by Defendant PPG and that Defendant PPG did not have the authority to authorize Defendant Gastar to pool the Plaintiffs' mineral interests with other unrelated peoples interests into a pooling and production unit.

Therefore, the pooling and unitization clause contained in the PPG/Gastar lease agreement and the Wayne/Lilly Production unit created under the authority thereof, is invalid and void until such time as the Plaintiffs' consent to and authorize those operations.

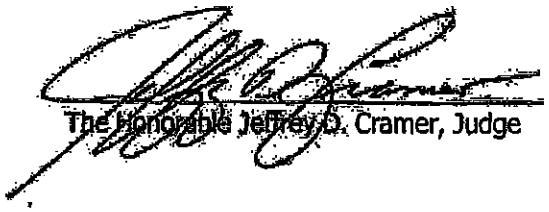
THEREFORE, the Defendants' Motions for Summary Judgment are DENIED with the exception of the Issue of the Plaintiffs' interest in the Ada Parsons property, which is GRANTED.

FURTHER, the Plaintiffs Motion for Summary Judgment is GRANTED with regard to the existence of fiduciary duties and the issue of pooling without consent. The Court cannot rule, as a matter of law, that all of the duties owed to the Plaintiffs have been violated by the actions of the Defendants, and cannot rule that Defendant, Gastar, owed a duty to the Plaintiffs and/or violated any such duty in this matter. Proceedings shall continue as to those issues.

It is so ORDERED.

The Clerk shall transmit a copy of this Order to all counsel of record.

Dated this 1st day of April, 2016.



The Honorable Jeffrey D. Cramer, Judge

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED
April 9, 2015
released at 3:00 p.m.
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

G. Thomas Bartlett, III,
Plaintiff Below, Petitioner

vs) No. 14-0278 (Taylor County 12-C-27)

Mary Louise Lipscomb,
Defendant Below, Respondent

MEMORANDUM DECISION

Petitioner G. Thomas Bartlett, III, by counsel Hunter B. Mullens, appeals the March 6, 2014, order of the Circuit Court of Taylor County, West Virginia, wherein the court ruled the parties reached a binding oral settlement agreement during court-ordered mediation. Mr. Bartlett argues that the parties did not reach an agreement during mediation and even if they did, the agreement cannot be enforced as a matter of law. Respondent Mary Louise Lipscomb appears by counsel Charles G. Johnson.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the appendix record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the West Virginia Rules of Appellate Procedure.

Factual and Procedural History

Mr. Bartlett is the nephew of Mildred B. Tucker who died testate in 2002. Ms. Tucker bequeathed her entire estate to four individuals: Mr. Bartlett, another nephew (Mr. Bartlett's brother), a niece (Mr. Bartlett's sister), and Ms. Lipscomb, who was her caretaker. The estate included oil and gas mineral interests underlying several tracts of land in Taylor County. Mr. Bartlett, Ms. Lipscomb, and other family heirs arrived at an agreement on the distribution of Ms. Tucker's assets, which included the mineral interests. Mr. Bartlett acquired deeds for a one-half interest from his siblings. Because Ms. Lipscomb never executed a deed to Mr. Bartlett conveying her mineral interests, she still owns an undivided one-fourth of the oil and gas rights.

On April 2, 2012, Mr. Bartlett filed a "Complaint for Declaratory Relief," in which he sought a ruling from the circuit court that Lipscomb had agreed to transfer ownership of her mineral interests to him. In his complaint, Mr. Bartlett relied upon a contract, an "Acknowledgment of Distribution Agreement," signed by the parties on March 5, 2011. The contract provided that in exchange for Mr. Bartlett assigning his claim of right to the liquidated assets (personal property and stock) of Ms. Tucker's estate, Ms. Lipscomb would transfer her

mineral interests to him. The contract called for the parties to execute all documents necessary to effectuate the transfer. Mr. Bartlett alleged that Ms. Lipscomb had not fulfilled the terms of the contract.

In her Answer to the Complaint, Ms. Lipscomb raised several defenses, including that the contract "fail[ed] for lack of consideration" and that "it was obtained by fraud and illegality[.]" Ms. Lipscomb alleged that Mr. Bartlett misrepresented the value of the assets he gave up in exchange for her oil and gas mineral interests to the properties at issue.

Subsequent to denying Mr. Bartlett's motion for summary judgment,[1] the circuit court ordered that the parties engage in mediation. Attorney James Wilson served as the mediator on June 6, 2013. Mr. Bartlett appeared in person and with his then-attorney, James Christie. Ms. Lipscomb appeared in person and with her attorney, Charles Johnson. According to the mediator, the parties reached a settlement. The mediator directed Attorney Christie to prepare a settlement agreement and the deeds necessary to vest title to the mineral interests to Mr. Bartlett, retaining for Ms. Lipscomb some overriding royalty rights.[2]

By letter dated July 26, 2013, Attorney Christie asked Mr. Bartlett to sign the documents necessary to effectuate the settlement agreement. Mr. Bartlett refused and subsequently discharged Attorney Christie. Mr. Bartlett then hired Attorney Hunter Mullens, his current counsel, who filed an amended complaint.[3] Ms. Lipscomb responded to the amended complaint alleging the dispute between the parties was settled and resolved at the mediation.

The circuit court held a hearing on February 10, 2014, to determine whether the parties reached a binding oral settlement at the June 6, 2013, mediation. Neither party called witnesses to testify at the hearing. The mediator was not present for the hearing. The circuit court accepted and read into the record the mediator's letter, which provided, in pertinent part:

> [b]oth parties actively engaged in the mediation and, after three hours, reached an agreement to resolve the case. Because the settlement required the exchange of deeds, rather than prepare a document memorializing the settlement, the parties indicated that Mr. Christie would promptly prepare the necessary documents and deliver them to Mr. Johnson.

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[1] The parties did not provide a copy of this motion in the appendix record submitted to this Court.

[2] The mediator failed to have the parties execute a written agreement as required by West Virginia Trial Court Rule 25.14. The mediator further failed to file a written report to the circuit court within ten days after mediation was completed, in accordance with West Virginia Trial Court Rule 25.15.

[3] The parties did not provide a copy of the amended complaint in the appendix record submitted to this Court.

At this hearing, Attorney Christie and Attorney Johnson proffered to the circuit court their belief that the parties reached an agreement to settle their differences. Attorney Christie stated that Ms. Lipscomb made the following proposal that he believed Mr. Bartlett had accepted:

> Ultimately [Ms. Lipscomb] came back with a proposal that for one tract, which is twelve acres, a little over twelve acres, that . . . [Ms.] Lipscomb would give up all of her interest with no royalty override. There was a 125 acre tract which . . . [Mr.] Bartlett owns one-half interest in. And that tract she would reserve a one-eight interest. And then there was a – excuse me, a one-fourth interest. And then there was a 41.6 acre tract, somewhere in that area, that she would retain a one-fourth.

The circuit court then presented Attorney Christie the settlement agreement and deeds that Attorney Johnson had submitted.[4] The court asked Attorney Christie if he had prepared these documents and whether they accurately reflected the agreement reached. Attorney Christie answered in the affirmative.

In response, Attorney Mullens, Mr. Bartlett's current counsel, disagreed with Attorney Christie's assessment that the parties reached an agreement at mediation. Attorney Mullens stated that Mr. Bartlett told him they simply agreed to resolve the dispute and Mr. Bartlett wanted an opportunity to review the proposed documents. Attorney Mullens argued there was no meeting of the minds on the specific terms; therefore, before giving his final assent, no agreement was reached. He also argued that the oral settlement agreement failed to meet this Court's four-part test set forth in *Riner v. Newbraugh*, 221 W.Va. 137, 563 S.E.2d 802 (2002), and violated the Statute of Frauds, West Virginia Code § 36-1-3 (2011), because there was no signed document to effectuate the property transfer.

Following oral argument, the circuit court stated that the Statute of Frauds would not apply to the oral settlement agreement reached in mediation. The circuit court entered an order finding "the parties settled the matters in controversy at mediation" and that the draft "Settlement Agreement and Deeds accurately represented that settlement."

Mr. Bartlett appeals the circuit court's enforcement of the oral settlement purportedly reached at the mediation session and the consequent dismissal of his claims. Mr. Bartlett argues on two separate grounds that the circuit court erred in enforcing the oral settlement agreement: (1) the agreement violated the Statute of Frauds because there was no written settlement agreement signed by the parties when the agreement involved the transfer of real property; and (2) the *Riner* factors were not met.

Standard of Review

[4] We cannot determine from the appendix record how Attorney Johnson received a copy of these documents. At oral argument before this Court, Attorney Mullens stated that Mr. Bartlett did not authorize Attorney Christie to release the documents to Attorney Johnson.

Mr. Bartlett has asserted two assignments of error which are subject to different standards of review. Whether an agreement falls within the Statute of Frauds is a question of law to which we apply a de novo standard of review. Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995). "This Court employs an abuse of discretion standard when reviewing a circuit court order enforcing a settlement agreement reached as a result of court-ordered mediation." Syl. Pt. 1, *Riner*, 221 W.Va. at 137, 563 S.E.2d at 802.

Discussion

Our West Virginia Trial Court Rules regarding mediation provide that "[i]f the parties reach a settlement or resolution and execute a written agreement, the agreement is enforceable in the same manner as any other written contract." W.Va. Trial Court Rule 25.14. As explained below, the parties may still be held to the terms of an oral agreement reached at mediation if certain conditions are met. However, this Court cautions all parties involved in mediation to be aware of the potential for disconnect between oral agreements reached at mediation and the promised delivery by lawyers of formal settlement documents at some future point. "The best option is to finalize settlement documents in their entirety at the mediation table. If that is not possible, at the very least, parties should reach agreement on the consequences for failure to generate formal documents (e.g., no agreement . . . [or] a return to mediation)." James R. Coben, Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 Harv. Negot. L. Rev. 43, 142 (2006).

In the instant case, Mr. Bartlett advances two arguments to challenge the enforceability of the oral settlement agreement reached at mediation. Mr. Bartlett's first contention is the purported oral settlement agreement is unenforceable because it violates the Statute of Frauds. He argues that settlement agreements are to be construed as any other contract under West Virginia law. *See Burdette v. Burdette Realty Improvement, Inc.*, 214 W.Va. 448, 452, 590 S.E.2d 641, 645 (2003). Because the oral settlement agreement involved the transfer of real property, Mr. Bartlett argues the Statute of Frauds is necessarily implicated.

Given that he never signed a document evidencing the purported oral settlement agreement, Mr. Bartlett maintains it is unenforceable. Ms. Lipscomb responds that Mr. Bartlett misapplies the Statute of Frauds because the agreement at issue was not for the sale of land, but was an agreement to settle a lawsuit. Furthermore, Ms. Lipscomb argues the Statute of Frauds does not require that everyone involved in a contract endorse it, only the party charged by it. The only party required to execute the agreement would be Ms. Lipscomb as she is conveying her real property interests to Mr. Bartlett.

Our Statute of Frauds, codified in West Virginia Code § 36-1-3, provides:

> No contract for the sale of land, or the lease thereof for more than one year, shall be enforceable unless the contract or some note or memorandum thereof be in writing and assigned by the party to be charged thereby, or by his agent. But the

> consideration need not be set forth or expressed in the writing, and it may be proved by other evidence.

By its express terms, the Statute of Frauds applies to a contract for the sale of real property. *Id.* This Court has held that the Statute of Frauds requires a signed, written contract for transfers of oil and gas interests. *See* Syl. Pt. 4, *Kennedy v. Burns*, 84 W.Va. 701, 101 S.E. 156 (1919). "The statute of frauds was as much designed to protect the vendee as the vendor of land; and its primary effect is to prohibit an action for the breach of an oral contract falling within its terms either against vendor or vendee." Syl. Pt. 5, *Brown v. Gray*, 68 W.Va. 555, 70 S.E. 276 (1911).

We find that Mr. Bartlett's first assignment of error lacks merit in view of the fact that he instituted this action to enforce a *written contract* requiring Ms. Lipscomb to convey her real property interests to him.[5] At mediation, the parties reached an oral settlement agreement to resolve this contractual dispute. In exchange for certain royalties, Ms. Lipscomb agreed, in effect, to waive her defenses that the contract was unenforceable. Likewise, Mr. Bartlett decided to exchange certain royalties to Ms. Lipsomb, in effect, for the benefit of having this matter resolved. This case was never an action for the breach of an oral contract for the sale of land, or even a property dispute. Instead, it was a suit instituted to enforce a compromise. Therefore, we find the Statute of Frauds inapplicable to this case.[6]

We now address Mr. Bartlett's second argument that the *Riner* factors were not met. In *Riner*, this Court held that West Virginia Trial Court Rule 25.14 was not intended to prevent the enforcement of settlement agreements reached through mediation that were not reduced to writing and signed by all the parties. "In those instances where a settlement agreement was reached but not signed by the parties, the agreement may still be enforced provided the parties produce sufficient evidence concerning the attainment of an agreement and the mutually agreed upon terms of the agreement." *Riner*, 221 W.Va. at 141, 563 S.E.2d at 806. We articulated the pertinent factors of our analysis in syllabus point three of *Riner*:

> A settlement agreement reached during, or as the result of court-ordered mediation, which does not fully comply with West Virginia Trial Court Rule 25.14, may be enforced by the circuit court where (1) the parties to the mediation reached an agreement; (2) a memorandum of that agreement was prepared by the mediator, or at his direction, incident to the agreement; (3) the circuit court finds, after a properly noticed hearing, that the

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[5] The underlying lawsuit is a breach of contract action brought by Mr. Bartlett to enforce the March 5, 2011, "Acknowledgement of Distribution Agreement." However, in his brief before this Court, Attorney Johnson does not reference this contract. We find this omission to be perplexing and misleading.

[6] A "majority of jurisdictions" holds that the Statute of Frauds applies to settlement agreements requiring the transfer of an interest in real property. *Waddle v. Elrod*, 367 S.W.3d 217, 225 (Tenn. 2012). This Court has never squarely addressed the issue and it is unnecessary to do so under the facts presented in this case.

> agreement was reached by the parties free of coercion, mistake, or other unlawful conduct; and (4) the circuit court makes findings of fact and conclusions of law sufficient to enable appellate review of an order enforcing the agreement.

Riner, at 141, 563 S.E.2d at 806.

Addressing the first *Riner* factor, Mr. Bartlett argues that an agreement was not reached at mediation. Mr. Bartlett maintains that Ms. Lipscomb failed to show that a meeting of the minds occurred between the parties because she produced no evidence or testimony to support the existence of a mutual agreement. Conversely, Ms. Lipscomb argues that Mr. Bartlett failed to rebut the proffer of two attorneys and the mediator that an agreement was in fact reached.

Upon our careful review of the record in this case, we find the circuit court did not abuse its discretion in finding that the parties reached an agreement at mediation. This finding is supported by the representations from the parties' attorneys who participated in the mediation as well as the mediator. A fair reading of the appendix record reflects that Mr. Bartlett manifested agreement at the mediation session but later had a change of heart; he therefore has no recognized contract defense to an enforcement claim.[7]

Turning to the second *Riner* factor, Mr. Bartlett asserts the purported agreement fails because the mediator did not prepare a memorandum evidencing the terms of the purported agreement. We find this factor is satisfied, however, because the mediator directed Attorney Christie to prepare the settlement agreement and the accompanying deeds, which counsel did.

Having determined the parties reached an agreement at mediation and the settlement agreement and deeds prepared by Attorney Christie reflect that agreement, we now turn to the third factor of *Riner* to determine if "the agreement was reached by the parties free of coercion, mistake, or other unlawful conduct." *Riner*, 221 W.Va. at 141, 563 S.E.2d at 806. At the hearing held before the circuit court, Attorney Christie stated that after the parties reached the agreement, the mediator had the parties assemble in the same room. The mediator then asked questions of Ms. Lipscomb, "went through the proposal, asked her if she agreed to those terms. She said yes." The mediator proceeded to ask the same questions of Mr. Bartlett, "asked if he agreed to those terms and he said yes." At no time did Mr. Bartlett or his then-counsel Christie express any concerns involving coercion, mistake or unlawful conduct. Accordingly, this Court finds the third *Riner* factor is met.

Under the fourth, and final, factor of *Riner* we examine whether the circuit court made "findings of fact and conclusions of law sufficient to enable appellate review of an order enforcing the agreement." Mr. Bartlett argues the three-page order lacks sufficient findings of fact to enable appellate review. The order provides, in pertinent part:

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[7] We are not persuaded by Mr. Bartlett's assertion that the subsequent dispute between the parties concerning the royalty terms, as evidenced in Attorney Christie's letter to Mr. Bartlett, "shows that the parties could not have had a true meeting of the minds." There clearly was a meeting of the minds at the mediation session; Mr. Bartlett later changed his mind.

> On the basis of the representations of the mediator and counsel, and for the reasons set forth on the record, the Court is of opinion that the parties settled the matters in controversy at mediation on June 6, 2013, and that the Settlement Agreement and Deeds accurately represented that settlement.

We find the circuit court's order meets the intent of the fourth of *Riner*. The order incorporates the terms of the seven-page settlement agreement and deeds prepared based on the terms of that settlement agreement; it is sufficient to enable this Court's appellate review.

Conclusion

For the foregoing reasons, we find that the parties entered into a binding oral settlement agreement at court-ordered mediation. We therefore affirm the circuit court's March 6, 2014, order.

Affirmed.

ISSUED: April 9, 2015

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Allen H. Loughry II

CERTIFICATE OF SERVICE

I, Joseph G. Nogay, do hereby certify that on this 12th day of December, I have served the foregoing **Plaintiff's Reply Memorandum in Opposition to Defendant Chevron U.S.A. Inc.'s Motion to Refer Case to the Business Court Division**, via electronic mail and first class mail to the following:

Business Court Division Central Office
Berkeley County Judicial Center
380 West South Street, Suite 2100
Martinsburg, WV 25401

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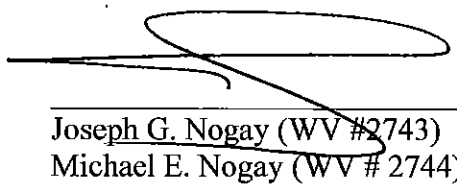

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