No. 22-0400

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston

STATE OF WEST VIRGINIA, *et al*
ANTERO RESOURCES CORPORATION,

Petitioner,

v.

THE HONORABLE CHRISTOPHER McCARTHY,
Judge of the Circuit Court of Harrison County, West Virginia,
SCOTT A. WINDOM, TRUSTEE OF THE CAROLYN E. FARR TRUST,
and its Beneficiaries, and
EMPIRE OIL & GAS, INC., a West Virginia Corporation,

Respondents.

From the Circuit Court of Harrison County, West Virginia
Civil Action No. 20-C-163-1

RESPONDENTS' RESPONSE BRIEF

DAVID J. ROMANO
W.Va. State Bar ID No. 3166
ROMANO LAW OFFICE, LC
363 Washington Avenue
Clarksburg, West Virginia 26301
(304) 624-5600
rlo@romanolawwv.com

Counsel for Respondents, Scott A. Windom, Trustee of the Carolyn E. Farr Trust, and its Beneficiaries, and Empire Oil & Gas, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

West Virginia Cases

Cases from Other Jurisdictions

Constitutional Provisions, Rules & Statutes

Other Sources

No. 22-0400

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston

STATE OF WEST VIRGINIA, *et al*
ANTERO RESOURCES CORPORATION,

Petitioner,

v.

THE HONORABLE CHRISTOPHER McCARTHY,
Judge of the Circuit Court of Harrison County, West Virginia,
SCOTT A. WINDOM, TRUSTEE OF THE CAROLYN E. FARR TRUST,
and its Beneficiaries, and
EMPIRE OIL & GAS, INC., a West Virginia Corporation,

Respondents.

From the Circuit Court of Harrison County, West Virginia
Civil Action No. 20-C-163-1

RESPONDENTS' RESPONSE BRIEF

I. RESPONSES TO QUESTIONS PRESENTED:

1. The Trial Court's factual findings supporting the application of the crime/fraud doctrine were within the Trial Court's sound discretion as the evidence clearly demonstrated that Antero knowingly aided and abetted the former Trustee of the Farr Trust to steal millions of dollars belonging to the Trust by breaching his fiduciary duty not to engage in self-dealing; also whether such factual findings that Antero's landman Kevin Ellis's interactions with the Trustee, and his communications within Antero, were in furtherance of such fraud, thus, triggering the crime/fraud

exception, and that the Trial Court was not required to search for, and review "each [alleged] question or topic" to which the crime/fraud exception may impact; whether Antero carried its burden to demonstrate that a *bona fide* attorney/client relationship existed with Mr. Ellis before any analysis is necessary to challenge any claimed confidential communications that would be subject to the crime/fraud finding.

a) The Trial Court's findings regarding Antero's knowledge of the fraud were sufficiently demonstrated by Antero's own documents including the 2012 Offer to Purchase, the "split leases" where the Trustee leased Farr Trust properties to himself and then immediately assigned such Farr Trust mineral properties to Antero so that Antero could pay the Trustee personally with monies that Antero knew belonged to the Farr Trust, among other evidence, clearly indicated Antero's complicity in the Trustee's fraud.

2. Antero failed to provide the Trial Court with any probative evidence to support its claims that communications between Mr. Ellis and other Antero personnel were "work product" protected whether, factual work product or opinion work product, and such was Antero's burden to demonstrate.

3. The Trial Court was within its sound discretion in finding that Antero failed to establish the requirements of an attorney/client relationship between Antero and Mr. Ellis, as the evidence demonstrated that Mr. Ellis was acting as a land agent in acquiring the Farr Trust mineral properties for Antero, which included assisting the Trustee in fraudulently converting Trust funds to himself; also, there was no credible evidence that Mr. Ellis had been requested by any Antero corporate control group to provide legal advice during the fraud instead of having been directed to assist the errant Trustee in his fraudulent scheme which damaged the Trust.

II. STATEMENT OF THE CASE:

Antero's Writ challenges the Circuit Court's [Trial Court] factual findings and application of the crime/fraud exception to the attorney/client privilege and work product doctrine. Whether the crime/fraud exception is to be applied is primarily a fact based decision and the Trial Court is given broad discretion in deciding such matters as the Trial Court is in the best position to ascertain such facts. Also, before the crime/fraud exception can be challenged or its need to be applied, the proponent of the privilege, here Antero, must carry their burden of proof to demonstrate a *bona fide* attorney/client relationship necessary to be protected, as without such a confidential relationship, there is no privilege to assert. The Trial Court has presided in this Civil Action for two years of very active litigation since its filing, including a significant evidentiary hearing resulting in the granting of a Constructive Trust Order against all of the Defendants. [App II - 0412-416]. The Trial Court has had ample time to absorb the thousands of discovery documents produced in this case as there have been numerous motions which the Trial Court had to review the evidence and make finding of facts, including a Motion to Disqualify original counsel for Antero, Steptoe & Johnson.[1] [see generally Docket Sheet, App II - 005, Pg. 193-194; App II - 006, Pg. 217-219 & 231-232; App II - 007, Pg. 259-260; App II - 010, Pg. 383-385, 409-411 & 450-451; App II - 015, Pg. 600-601; App II - 016, Pg. 637-639 & 643-645 & App II - 017, Pg. 687-689; App II - 016, Pg. 656-658; App II - 018, Pg. 719-722 & 742-744].

---

[1] S&J was counsel for Antero since this case was filed on June 22, 2020, until disqualified for a conflict of interest as set forth in the Trial Court's Order [App II - 0789-814]; S&J was counsel for Clarence E. Sigley, Sr. [CES] as Trustee, and the Farr Trust itself, prior to CES's death, including CES's attempt to "cover up" his fraudulent scheme, which included review and preparing documents; See fn 29, *infra*.; S&J after CES's death also represented CES's Estate, his wife Defendant Barbara Sigley individually, and consulted with Defendant Zannino, CES's daughter and the bookkeeper for the Trust. [App II - 1563-1577].

The former Trustee's'[2] fraudulent scheme was only revealed to the Beneficiaries after the Trustee's death when the Beneficiaries sought legal advice in October 2019, from Plaintiff, Scott A. Windom, a licensed Attorney in West Virginia. Attorney Windom, upon review of various documents produced by the Trustee's Attorneys, Steptoe & Johnson, uncovered irregular financial transactions which caused him to investigate additional matters. After such review, Windom asserted a claim against the CES's Estate. [App II - 0665-672]. Thereafter, additional information was disclosed revealing Antero's participation in CES's fraudulent scheme resulting in the filing of a Complaint in the Circuit Court of Harrison County where the Estate was being administered and the Sigley Defendants resided. [App II - 0628-673].

The facts of this case are rather straight forward. Prior to 2011 when Antero approached CES to lease the Farr Trust mineral properties, Antero was attempting to acquire vast acreages of mineral properties for development of the Marcellus gas zone in the Appalachian Basin which included certain Counties in West Virginia. It so happened that the Farr Family had amassed a considerable amount of natural gas mineral property in their more than 100 years residing in Doddridge County. Eventually, much of this mineral property was transferred to the Carolyn Elizabeth Farr Trust ["Farr Trust" or "Trust"] by Carolyn Elizabeth Farr.[3] The Trust Agreement was dated May 24, 1991 and Mrs. Farr appointed Clarence E. Sigley, Sr. as its Trustee. For many years after Mrs. Farr's death, the Trust generated modest income, but when the "Marcellus gas rush" began in the mid 2000's almost any mineral properties situated in certain Marcellus gas rich Counties were

---

[2] As indicated the former Trustee was Clarence E. Sigley, Sr, [hereinafter "CES"] who died on September 22, 2019.

[3] Mrs. Farr died in 1993.

prime targets for acquisition by gas producing companies like Antero. Antero's goal at that time was to acquire as much Marcellus gas acreage as possible as soon as it could for both development and/or trading. During this time period, Antero approached CES to lease the Farr Trust mineral properties. Antero assigned Kevin Ellis[4] to acquire the Farr Trust mineral properties as they were a "high priority" acquisition for Antero. [App II - 100-101, 0275, 0281 & 1633]. The Farr Trust mineral properties were primarily situated in Doddridge and Ritchie Counties. Such acquisition being a "high priority" for Antero, that originally Antero was willing to offer the Trust significantly more bonus money and royalty percentage just to secure the Farr Trust properties. [App II - 1632-1636]. Antero's need to acquire the Farr Trust mineral property and the cooperation of CES, pushed Antero to aid and abet CES in his fraudulent scheme.

The Trust mineral properties, along with some other properties encompassed "approximately 3,692 acres" which ultimately amounted to a bonus/purchase payment of over $8 million dollars from Antero to all of the owners.[5] [App II - 0107-111 at ¶ 2]. This Offer to Purchase, i.e. leasing the Farr Trust mineral properties, being of "high priority" required immediate action. Mr. Ellis's job was to convince CES, as the Trustee, to accept the leasing terms which eventually called for Antero to pay the Farr Trust a "Purchase Price" [signing bonus] of $2,200.00/net acre and for the Trust to receive a 18.75% royalty from the sale of any natural gas from the Farr Trust mineral

---

[4] Mr. Ellis worked for Antero and during part of this time had the title "Manager, Administrative and Legal-WV": Mr. Ellis was a lawyer and licensed in West Virginia; he also had been an attorney at Steptoe & Johnson which Firm was disqualified for different reasons by Order of the Trial Court; [App II - 0789-0814].

[5] Antero also sought Pete Farr's personally owned mineral properties in the same general area, separate from the Farr Trust properties; Pete Farr is a Beneficiary of the Farr Trust; also CES asserted he owned acreage from B.H Hickman Heirs, for whom he was a power of attorney, but CES fraudulently acquired such mineral property in the same manner he defrauded the Farr Trust. [See fn. 17, 33 & 35, *infra*]

properties. This Offer to Purchase was signed on February 28, 2012. [App II - 0282-286]. This date is significant, as the closings were not set until the first closing on May 25, 2012 at which time the Farr Trust would be paid a total of $3,249,125.00 in bonus monies if the title ownership/due diligence was favorably completed. The significance being that during the interim from February 28, 2012 until the second closing on June 25, 2012, CES decided that he would engage in self dealing with the Farr Trust assets. During this time period, CES began leasing Farr Trust mineral properties to himself, and then simultaneously assigned such leases to Antero. Such self dealing was done so that Antero could pay CES personally all the bonus/purchase monies when the leases were assigned to Antero. This resulted in CES receiving over $1 million dollars in bonus/purchase monies that belonged to the Trust in the Second and Third Closings held on June 25 and September 26, 2012. Such is shown on such the Closings spreadsheets. [App II - 0306 & 420]. The master compilation shows all bonus monies paid to CES by Antero that belonged to the Farr Trust, from 2012 until October 2016. [App II - 0313]. These amount to $1,555,500.00 which Antero well knew at the time it made such payments to CES personally, were derived from his blatant fraudulent self dealing. Such evidence known to Antero in 2012 alone was sufficient evidence for the Trial Court to find that the crime/fraud exception was applicable.

However, there was more, as the self dealing continued after 2012 again with Antero's complicity until 2016 by which time another $555,000.00 in bonus/purchase money was paid by Antero to CES personally with Farr Trust monies diverted by CES's self dealing, again with Antero knowingly assisting CES in his fraudulent scheme. Antero also agreed to divert to CES 6.25% of royalty monies belonging to the Farr Trust and which CES was not entitled, as the February 28, 2012. Offer to Purchase contract provided an 18.75% royalty to the Farr Trust but later Antero

agreed to pay CES personally 6.25% of the royalty [ORRI] to CES. [App II - 0107-111 at ¶ 4]. Such terms were not part of the February 28, 2012, Offer to Purchase, but Antero agreed to this fraudulent scheme and assisted CES by paying him personally both the bonus/purchase money and the ORRI of 6.25% for production from numerous Farr Trust mineral properties that had been transferred to CES by himself as Trustee. Hence, the fraudulent self dealing by CES which was fully condoned by Antero. At the heart of this scam was Kevin Ellis with the blessing and consent of Antero. **There could be no more cogent evidence to trigger the crime/fraud exception than the facts before the Trial Court and as found by the Trial Court in this case. If the crime/fraud exception is ever going to be applicable it must be confirmed here.**

III. SUMMARY OF ARGUMENT:

To receive the protection of the attorney/client privilege, the party asserting such claim has the burden to demonstrate entitlement to it by first proving a *bona fide* confidential attorney/client relationship.[6] Our case law requires that the attorney/client privilege be "strictly construed" because it results in the suppression of the truth.[7] Under a strict construction standard, it is clear that Antero did not prove the three *Burton* factors necessary to establish a confidential attorney/client relationship among Kevin Ellis and Antero's control group during the relevant time period of CES's fraudulent scheme and Antero's complicity which spanned from 2012 until 2016. Both the *Canady* and the *Burton* cases clearly require the proponent of privilege to prove that, **(1)** that "both parties

---

[6] *State v Burton*, 254 S.E.2d 129 (WV 1979); **all West Virginia Supreme Court citations will be referenced to West's South Eastern Reporter.**

[7] *State ex rel USF &G v. Canady*, 460 S.E.2d 677, 683-84 (WV 1995).

must contemplate that an *attorney-client relationship does or will exist*"; **(2)** that "the advice must *be sought by the client* [not the attorney] from the attorney in his capacity as a legal adviser"; and **(3)** "the communication between the attorney and the client *must be intended to be confidential.*" not part of routine work as a Manager of land as was Ellis. (emphasis added). These criteria are critical in carrying the burden of proof that there was an attorney/client relationship meant to be confidential for the purpose of seeking legal advice. Otherwise, the attorney/client privilege could be asserted at any time when it becomes convenient, especially by corporations, as the client being a corporate entity, and not an individual, could invoke such privileges at anytime whether there was a confidential relationship or not. [see fn 9, *infra*]. Antero did not provide any evidence that there was a *bona fide* attorney/client relationship to seek legal advice, when the attorney/client relationship was created and such advice was sought and, how the client and the attorney were to know when communications were privileged and when not, unless of course, such advice was how to navigate aiding CES in his fraudulent conduct which will be discussed *infra*. Without evidence to support each of the three factors required by *Burton* and *Canady*, Antero's claim of an attorney/client relationship must fail as Antero's bald unsupported statements in a 2021 deposition suggesting that Brian Kuhn and William Pierini were the control group, is not sufficient to carry the required burden of proof to successfully invoke the attorney/client privilege. Antero provided no documentation or other evidence prepared contemporaneous with the alleged attorney/client relationship, and if such exists and was done during CES's fraudulent scheme, such is proof of the crime/fraud exception itself as Antero would be asserting that it had an attorney/client relationship with the employee, Kevin Ellis, who was participating in the fraud itself! Such shows that Antero has tremendous audacity otherwise known as arrogance among other descriptions.

If one could retain an attorney to participate in a crime or fraud and still maintain the privilege, then any corporate employee with a law license could be assigned to any task, even a unlawful task, and then shield all communications relating thereto. The attorney/client privilege was not designed for such scenarios. If Antero wanted to have confidential communications to obtain legal advice, Antero should not have engaged as its counsel, if it did so engage Ellis which is doubtful, the same person, here Ellis, to participate day to day in the same unlawful matter for which Antero sought legal advice. There is no way to separate such actions and if allowed it would permit a wrongdoer to "pick and choose" that which is prejudicial to its case and withhold it under a claim of privilege, while at the same time also allow that which is helpful to be used as evidence. Such cannot be condoned. But in this matter, Antero did not prove it had an attorney/client relationship with Kevin Ellis to begin with as required by *Canady* and *Burton*.[8] Antero also failed to establish who was the control group that sought legal advice from Mr. Ellis, when that occurred, how such confidential communications were identified as legal advice as opposed to other land acquisition activities, or how the communications were handled as confidential attorney communications, all of which was necessary to establish a confidential attorney/client relationship. More importantly, both Kuhn and Pierini were both involved in CES's fraudulent scheme and both assisted and encouraged CES to defraud the Farr Trust. [see fn 14, *infra*]. At best, Antero's evidence only proved that Mr. Ellis acted as the Manager of land in acquiring the "high priority" Farr Trust mineral

---

[8] Additionally, *Canady* held that: "The client cannot be compelled to answer the question, 'What did you say or write to your attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.'" (citations omitted) *Id.* at 688; the Farr Trust is entitled to know what Ellis knew and said as a participant in Antero's aiding and abetting CES's fraudulent scheme, and neither Ellis nor Antero can decide **after the fact** what is shielded and what is not under the guise of privilege; such would suppress the truth and be a mockery of the judicial process.

properties from CES and at the same time happened to have a law license. Such assertions do not demonstrate an attorney/client relationship.[9] Even assuming *arguendo* that Antero did establish an attorney/client relationship between Kevin Ellis and Antero's control group, there was ample evidence for the Trial Court's factual findings that Antero aided or abetted CES in his defrauding of the Farr Trust. That finding was amply supported by the Record and should only be reversed for gross abuse of discretion and clear error.[10] The Trial Court's conclusion that the crime/fraud exception applies, strips Antero of any claim of attorney/client privilege or work product protection and the Trial Court, in its discretion, was not required to conduct an *in camera* review if the "prima facie evidence is sufficient to establish the existence of a crime or fraud so as to render the exception operable".[11] The definition of a "fraud" is adequately discussed in the *Medical Assurance* case and Antero's conduct in assisting and encouraging CES's fraudulent self dealing scheme clearly fits the

---

[9] In a corporate setting, regardless of the application of the crime/fraud exception, mere discussions with counsel without a showing that corporate superiors expressly requested personnel in the field to communicate with counsel for legal advice so that such counsel could render legal opinions to the corporate superiors are not privileged. Antero has not provided any documents or other proof of such express requests by the corporate superiors. Otherwise, any communications whatsoever could be claimed as privileged at the discretion of the company at any time, just as it is being claimed now years after the fraud, all of which would have dire consequences for finding the truth. ***"Without showing that such communications are a part of the control group's [corporate superiors] effort to secure legal advice, every memorandum and conversation between a corporate employee and corporate counsel could be confidential, which would expand the privilege far beyond its bounds and unnecessarily frustrate the efforts of others to discover corporate activity."*** (emphasis added) See *Independent Petrochemical Corp. v. Aetna Cas.*. 654 F. Supp. 1334,1365, (D.DC 1986), affd in part, rev'd in part on other grounds, 944 F.2d 940 (D.C. Cir. 1991); this is what Antero seeks to do and which it cannot do under the law of privilege.; see also, *In re Grand Jury*, 13 F.4th 710 (9th Cir 2021)[holding that in alleged "dual purpose communications" between an attorney and client, the "primary purpose" for the communication must be to seek legal advice and if not proved by the proponent there is no attorney/client privilege], accord, *Madden*, at 35,["the primary motivating purpose behind the creation of the document must have been to assist in pending or probable future litigation."[internal citations omitted]; not an ongoing fraud in which one is participating.

[10] *Madden* at 32; see also, *In re Grand Jury* at 713

[11] *Madden* at 38-39.

definition and it further establishes Antero's participation sufficient to trigger the crime/fraud exception.[12]

Antero also failed to provide any evidence that the work product doctrine was applicable as Antero did not identify any litigation "in the course of, or in preparation for" [13] that would support work product protection. Antero's only anticipation of litigation that involved Kevin Ellis had to be based on Antero's aiding or abetting CES's fraud on the Farr Trust. If so, then the Trial Court was well within its discretion to so find, and then *a fortiori* such was clearly subject to the crime/fraud exception and appropriately concluded by the Trial Court.

The attorney/client privilege, or entitlement to work product protection, cannot be generated during the same time as when the client is participating in a fraudulent scheme as Antero did in this case. End of story.

IV. STATEMENT REGARDING ORAL ARGUMENT:

Respondents, Plaintiffs below, do not believe that there are any new issues to be decided in this extraordinary proceeding as it is primarily a factual determination relegated to the Trial Court's discretion, to be reviewed for clear error. Accordingly, Respondents believe that a Rule 19 argument is the appropriate oral argument considering that the law regarding the application of the crime/fraud exception is settled in our State and only the determination of the facts, and the inferences to be

---

[12] *In re Medical Assurance of West Virginia v. Recht*, 583 S.E.2d 80 (WV 2003)["Thus, "[t]he determining factor is not the attorney's intention or actions; for purposes of analyzing the crime-fraud exception, the attorney's conduct and motive is irrelevant."; "The dispositive question is whether the attorney-client communications are part of the client's effort to commit a crime or perpetrate a fraud." [internal citations omitted.]

[13] *Madden* at 35.

drawn therefrom, are relevant in this matter.

V. ARGUMENT:

1) The Trial Court's Findings That Antero Encouraged the Trustee's Fraudulent Conduct by Assisting the Trustee in Converting Trust Funds was Overwhelmingly Supported by the Facts.

a) The Law in Our State Regarding Aiding and Abetting a Breach of Fiduciary Duty is Well Settled.

The Trustee's defrauding of the Farr Trust using the "split leases" spanned from 2012 through 2016. During this time, while Antero was aiding and abetting the Trustee in his fraudulent conduct, Antero now asserts that it was seeking legal advice from Kevin Ellis who was the Antero employee that orchestrated with CES, Antero's acquisition of the Farr Trust mineral properties which resulted in Antero paying the Trustee personally over a million dollars in 2012 in bonus monies alone that belonged to the Trust. Respondents seek discoverable information regarding what occurred during the fraud that includes Antero's aiding and abetting CES in his self dealing fraud of the Trust. Antero provided no evidence whatsoever that it had sought legal advice during this time period, who sought such legal advice as opposed to merely engaging in the fraud with CES. Importantly, it was Antero's burden to establish these facts to even get to "first base" in asserting the attorney/client privilege.

The Trial Court was well within its discretion in finding that no such attorney/client relationship was ever formed during the fraudulent scheme with CES. Antero made a half hearted stab asserting that Brian Kuhn and William Pierini were Antero's "control group" that was receiving the "legal advice" from Ellis but such was not supported with any evidence and was rejected by the

Trial Court.[14] In fact, the Trial Court was well aware that the evidence clearly showed that Kuhn and Pierini were involved in the fraud as they assisted in acquiring the "high importance." Both Kuhn and Pierini both signed numerous Partial Assignments of Farr Trust mineral properties which CES had deeded to himself that Antero well knew were a result of CES's continuous fraudulent self dealing. [App II - 1332-1338, 1353-1357, 1361-1366, 1376-1381, 1384-1389, 1392-1403, 1406-1419, 1423-1428, 1432-1437, 1441-1446, 1450-1455, 1470-1475, 1479-1484, 1488-1493, 1497-1502 (signed by Kuhn) & App II - 1459-1464 (signed by Pierini)]. No evidence was provided to demonstrate that these Antero personnel were seeking legal advice. [see also fn 16, *infra*]. So how could Kuhn and Pierini be the control group seeking legal advice while simultaneously be participating in a fraudulent scheme? The answer is clear, they cannot be both and still maintain a attorney/client relationship as such is the quintessential definition of crime/fraud which triggers the exception.

The law in our State is clear regarding both the presumption of fraud when a fiduciary breaches his or her duty of loyalty by self dealing, and the culpability of those who aid or abet such fraudulent conduct. Our case law imposes a presumption of fraud when a fiduciary self deals and

---

[14] Such evidence could be an engagement letter to the attorney from the Antero control group, or other directive, demonstrating the creation of an attorney/client relationship with outside counsel or any writing supporting an investigation by in house counsel which usually occurs **after** suspicious conduct has discovered but not while it is ongoing as in this matter; no written criteria outlining as to who was within the attorney client "need to know" confidential information and restrictions on disclosure such as emails etc: Antero provided nothing to the Court to demonstrate there ever was a conscious establish of an attorney/client relationship with Ellis; no instructions whatsoever on how to keep privileged communications confidential and who was the "clients" to received such confidential information; nor did Antero provide any such documents to the Trial Court *in camera* as there were none to provide as Antero did not use Mr. Ellis as an attorney but rather he was Antero's main contact "shepherding" CES's self dealing fraud; such failure to produce any writing supporting an attorney/client relationship with procedures for an in house counsel to follow are telling evidence and its absence alone is sufficient to support the Trial Court's findings; it confirms Antero's attempted ruse on the Trial Court.

benefits him or herself and persons complicit with the Trustee, rather than the trust to whom the trustee owes a high duty of loyalty. *Kanawha Valley Bank v. Friend*.[15] See also, WV Code §44D-8-802. Once the presumption of fraud is invoked, and the burden shifts to the fiduciary, such fiduciary must "establish the honesty of the transaction." and as the evidence indicates, Antero was aiding and abetting CES. then Antero also had the burden to "establish the honesty of the transaction." to avoid a preliminary finding of crime/fraud. There was no credible evidence to rebut the presumption of fraud in this case regarding CES's breach of trust and Antero's aiding and abetting such unlawful conduct. *Id.* The law in our State puts Antero in the same position as CES because Antero, with knowledge, proceeded to provide substantial encouragement to CES in his fraudulent scheme to defraud the Trust. By doing so, Antero not only breached its February 28, 2012 Offer to Purchase contract with the Trust, but Antero knowingly continued to enable CES to receive Farr Trust funds until October 11, 2016 when the last "split lease" bonus payment of $38,000.00 was paid by Antero to CES personally. [App II - 0313 & 0129]. Such intentional actions by Antero constitute intentional torts of aiding and abetting, joint venture, and civil conspiracy, among others. *State v. Morgan Stanley & Co. Inc.*, 459 S.E.2d 906 (WV 1995).[16] Under the law established in *Morgan Stanley*, *Courtney* and its progeny, Antero was clearly a willful violator of aiding and abetting a

---

[15] 253 S.E.2d 528, 530-31 (WV 1979)["...a presumption of fraud arises where the fiduciary is shown to have obtained any benefit from the fiduciary relationship"]..

[16] The holding that a non-fiduciary is liable as an aider and abetter achieves "the object of prohibiting third parties from knowingly aiding and abetting fiduciaries in breaches of trust is to prevent *all* third parties from aiding and abetting, and to achieve this desirable result, no cavil about proximate cause may be allowed. *Morgan Stanley* at syl. pt. 7; accord, *Courtney v Courtney*, 413 S.E.2d 418 (WV 1991)[Syl. 5, "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself."]; see also *Clark v Milam*, 847 F.Supp 409, 419 (SDWV 1994), citing *Courtney* and *Boone v Activate Healthcare, LLC*, 859 S.E.2d 419 (WV 2021)[adopting §876(b) of the Restatement of Torts 2d citing *Courtney*.

fiduciary, i.e. CES, and his fraud on the Farr Trust. Clearly, Antero's conduct, by its own documents and testimony, provided the necessary undisputed evidence for the Trial Court to find that Antero was participating in a fraud with CES such that any communications during the execution of such fraud were not protected by any attorney/client privilege or work product doctrine. *See Medical Assurance* at p. 95 (Davis concurring).[17]

The Trial Court's Order determined that the crime/fraud exception was sufficiently proved by Antero's having knowledge of the "split leases" and CES's request to be paid personally significant amounts of Farr Trust money[18] that was generated from Farr Trust mineral properties that Antero knew did not belong to CES. Such was an unlawful breach of CES's fiduciary duty to the Trust, with substantial assistance from Antero which also was unlawful which the Trial Court recognized. [App II - 0538-539- ¶19-23]; The Trial Court specifically found that:

> "Given both the sophistication of Defendant Antero as to property rights and the ***unmistakable paper trail***, it can be concluded that Defendant Antero consulted Deponent Kevin Ellis, who served as in-house counsel for Defendant Antero, for the purposes of obtaining the Farr Trust property. Defendant Antero's participation in the fraudulent scheme can be inferred by its inspection of property records and its continued payment to Clarence E. Sigley, Sr., as an individual without taking any action to verify the propriety of the actions of Clarence E. Sigley, Sr." (emphasis added).

While the Trial Court did not specifically state that Antero was aiding and abetting CES in

---

[17] "In the context 'the crime/fraud exception to the lawyer-client privilege, 'fraud' would include the commission and/or attempted commission of fraud on the court or on a third person, as well as common law fraud and criminal fraud. The crime/ fraud exception comes into play when a prospective client seeks the assistance of an attorney in order to make a false statement or statements of material fact or law to a third person or the court for personal advantage." *State ex rel Allstate v Madden*, 601 S.E.2d 25, 37 (WV 2004), citing *Medical Assurance*, 583 S.E.2d at 96.

[18] See Antero IRS Form 1099 to CES for 2012 amounting to $2,095,594.53 [App II - 1578-1579], of which more than $1 million belonged to the Farr Trust and some of which funds were from the B.H. Hickman Heirs converted by CES's similar self dealing fraud using his power of attorney from the Hickman Heirs; see fn 34 *infra*.

his fraudulent scheme as such would be a pronouncement of guilt, it is clear that the Trial Court's findings concluded that Antero knew that CES's fraudulent scheme was a breach of CES's fiduciary duty to the Trust, i.e. Antero knew that CES was the Trustee of the Farr Trust, that he was transferring Trust property to himself without consideration or consent of the Beneficiaries (self dealing), that CES demanded to be paid personally with Farr Trust monies and that CES did not want his wrongful conduct discovered by the Beneficiaries. [App II - 0537-0539- ¶'s 16-22]. It is beyond cavil that Antero "is subject to liability if he [Antero] knows that the other's [CES] conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other [CES] so to conduct himself." *Boone, supra,* and fn 16, *supra.* Under the law as cited in this Response, Antero stands in the shoes of CES, and is as much a part of the fraudulent scheme as was CES, which supports the Trial Court's findings regarding the crime/fraud exception.

Curiously, and not by accident, Antero in its Writ to this Court, did not address any aspect of its conduct that clearly triggered Antero's liability as an aider and abetter, or regarding any other evidence of wrongdoing, such as conspiracy, conversion, joint venture, or breach of contract. The Record is amply supported by multiple examples of Antero's providing "substantial assistance or encouragement"[19] to CES which assisted his fraudulent scheme to defraud the Farr Trust. Why would Antero ignore such settled law regarding the aiding and abetting a breach of fiduciary duty? Especially when the main actor was an attorney? The simple answer is that such settled law eliminates entirely any argument whatsoever by Antero as asserted in its Argument: B.2 (c) i, ii, & iii, that Antero did not engage in fraud. Antero's Writ did not want to analyze our law and its conduct in this case for fear what it would conclude. Such failure to address such a significant issue

---

[19] See fn 16 *supra.*

calls into question Antero's entire Writ filed with this Honorable Court and further supports the Trial Court's decision.

2) **The Application of the Crime/Fraud Exception is Primarily a Factual Finding Which the Trial Court is Uniquely Positioned to Determine as the Trial Court is Acutely Aware of the Facts of this Case.**

a) **The Law Regarding the Crime/Fraud Exception Only Requires the Trial Court to Determine the Salient Facts as in Any Other Evidentiary or Discovery Issue.**

Antero asserts that the Trial Court did not have sufficient facts to support a finding that the crime/fraud exception was triggered. Antero also asserts that the Trial Court cannot draw inferences from facts which the Trial Court finds to be credible. Such assertions are totally without any case law support and sophomoric. Antero claims the Trial Court's findings did not cite any "evidence" but the Record is replete with the aiding, abetting and substantial encouragement Antero provided CES in his self dealing fraud of the Trust. Antero uses phrases to denigrate the Trial Court's findings such as "magically convert an inference into a "finding." [Antero Writ p.3 & 14]. Such statements are insulting to the Trial Court and this Court. In determining the facts necessary to invoke the crime/fraud exception is no different than any other pretrial evidentiary or discovery issue such as whether a confession is voluntary, whether there is a conflict of interest requiring disqualification of counsel, whether a party has engaged in bad faith discovery practices or any of the other myriad issues a trial judge must make when managing a complex case as this case at Bar. Because the Trial Court in this case has had to analyze and rule on many issues, such allows the Trial Court to be extremely informed as to the facts of the case and any reasonable inferences drawn therefrom.

Our case law whether in the criminal or civil arena, permits the fact finder to draw reasonable inferences sufficient to resolve the most import matters. See generally, *State v Guthrie*, 461 S.E.2d 163 (WV 1995), rev'd on other grounds. Even a capital conviction may rely upon reasonable inferences drawn from circumstantial evidence. "There is no doubt what inferences and findings of fact the jury had to draw in order to convict the defendant of first degree murder." *Id.* at 176. Just as a jury must make decisions based on facts and reasonable inferences therefrom, so doesn't a trial judge who must determine those evidentiary issues that rarely present themselves by admissions. Antero did not confess to aiding and abetting a fraud with CES as to do so would end the entire case. The Trial Court sitting in equity in this case, and/or the jury in weighing the evidence and credibility of Antero's witnesses will have to draw reasonable inferences. Antero and Ellis were bound by law to know that CES's conduct, which Antero abetted, was fraudulent and unlawful. West Virginia Code §44D-8-802(a), states that "A trustee shall administer the trust solely in the interests of the beneficiaries." Similarly the Trial Court as the fact finder in a discovery issue is empowered to make "reasonable inferences" based on the facts and the relevant law [20] from the facts that are apparent as in this case and which have been described herein and will be further elucidated in this Response Brief. See *Gable v Gable*, 858 S.E.2d 838 (WV 2021)[stating that "A circuit court weighing the sufficiency of a complaint should view the motion to dismiss with disfavor, should presume that all of the plaintiff's factual allegations are true, and should construe those facts and the inferences arising from those facts in the light most favorable to the plaintiff."]. Accordingly, Antero's

---

[20] See generally, *U.S. v Russell*, 971 F.2d 1098, 1109 (4th Cir. 1992); a fact finder is always entitled to deduce reasonable inferences generated from the facts; it is "Hornbook" law ["hornbook law. n. lawyer lingo for a fundamental and well-accepted legal principle that does not require any further explanation, since a hornbook is a primer of basics." [dictionary.law.com retrieved 6/20/22].

assertion that the Trial Court "magically converted" reasonable inferences into facts is wholly without substance as Antero has provided no facts or inferences that it did not participate in a fraud with CES.

In this matter, CES's fraud with Antero's support operated continuously for five years, from 2012 until 2016. During this time period, Antero aided and abetted CES which clearly triggers the crime/fraud exception, as the most important factor in determining the application of the exception is whether such conduct involving an attorney occurred during the fraudulent conduct or after such fraud. While everyone is entitled to seek confidential legal advice once a matter has occurred, including criminal conduct, regardless of the charge, one cannot seek legal advice on "how to accomplish or perpetuate an ongoing or future fraud or to continue to cover up a past one."[21] The "time when the communication occurred is of the essence." *Id.* The reason is that once a client involves an attorney while the fraud is being formulated or perpetrated, as here, then there is no public policy to support attorney/client confidentiality. *Clark v United States*, 289 US 1, 15, (1933) ["The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told."]. As the Fourth Circuit stated "The attorney-client and work-product privileges are lost, however, when a client gives information to the attorneys for the purpose of committing or furthering a crime or fraud." *see also, In re Grand Jury Proceedings*, 102 F.3d 748, 749-51 (4th Cir. 1996). Nor does the "attorney need know nothing about the client's ongoing or planned illicit activity for the exception to apply" *Id.* However, in this case, the attorney who Antero seeks to silence was the primary Antero employee who handled the Farr Trust acquisition during the fraud

[21] The Attorney Client Privilege, Vol. I, p. 677 (Epstein, 5th Ed. 2007 ABA).

involving CES's self dealing fraudulent scheme converting Farr Trust assets. Mr. Ellis acted not as an attorney in his acquisition quest, but rather as a land manger. The case law reveals that the showing necessary to trigger the crime/fraud exception is " 'not a particularly heavy' burden'." *Micron Tech, Inc v. Rambus, Inc.* 645 F.3d 1311 (Fed. Cir. 2011)(citations omitted). Nor does the evidence need to be admissible at trial. Nor does the party seeking to utilize the exception have to "know exactly what the material will show." [22] Such is also the law in our State as established in *Madden,* and likely the law in every other jurisdiction where this issue has been decided as such conduct is against public policy when a client seeks to use an attorney to further a fraud. Here, Antero seeks to shield communications which were part of an ongoing fraud by its employee who happened to be an attorney, and thus, any communications during the fraudulent conduct is not privileged. *Id.*

Such conduct cannot be condoned or ignored, and if allowed, such will denigrate the very truth finding aspect of our judicial system. Hence, the necessity for the crime/fraud exception to the attorney/client privilege and work product doctrine.

i) Antero Did Not Prove that Mr. Ellis Was Acting as an Attorney During the Fraudulent Scheme and Antero Sought to Silence His Communications and Facts

Importantly, Antero did not offer any evidence that would demonstrate that Mr. Ellis was acting as an attorney when he communicated with Antero personnel and while he was aiding and abetting CES in the fraudulent scheme. Who was the client seeking consultation and from what

---

[22] *In re Grand Jury Investigation*, 352 Fed. Appx. 805, 809 (4th Cir. 2009).

attorney? Was Kevin Ellis both the attorney and the client? Antero's position that an employee could wear "two hats" and decide which one he was wearing at any given time is absurd. Such a policy would be completely unworkable and is not the law, as if such is condoned, then corporations could shield any and all communications as long as someone involved had a law degree.[23] Also, in a corporate setting, regardless of the application of the crime/fraud exception, mere discussions with counsel without a showing that corporate superiors expressly requested personnel in the field to communicate with such counsel on a particular subject so that such counsel could render legal advice are not privileged especially when the corporation took no action to assure that such communications were maintained as confidential. Otherwise, any communication whatsoever could be claimed as privileged at the discretion of the company with dire consequences to finding the truth.[24] Antero has not met this burden as it has not identified any "...communications [that] were made by corporate employees in confidence, to counsel for the corporation, at the direction of corporate superiors in order to secure confidential legal advice from that counsel, and the employees were aware that they were being questioned so that the corporation could obtain legal advice..." and such communications were not part of a fraud. Handbook on Evidence for West Virginia Lawyers, §501.07[4], pg. 695 Palmer, Davis & Cleckley, 6th Ed. [hereafter "Cleckley"]. Antero also failed to distinguish whether the communications were solicited advice and consultation from Ellis as an attorney, or mere observations from Ellis as part of his management of land duties which Ellis was both a participant and witness to the self dealing fraud by CES which was enabled by Antero. Antero's argument is

---

[23] Antero had many land personnel who had law degrees including Roger S. Christenson II, Esq., Carter Hardesty, Haley West and many others; not every statement by these land persons who happen to have a law degree are entitled to claim the attorney/client privilege without satisfying the required *Burton* factors . [App II 1590]; see also, Schopp 30(b)(7) depo [App II - 0708-712].

[24] See fn. 9, *supra*.

without substance.

Some examples of Antero's obstructing Ellis's testimony, he was asked whether he understood that CES's self dealing conduct was a fraud on the Trust and that Antero's assistance and encouragement was improper.[25]

[Ellis Depo. App. II - 088-89]
Pg. 241
Q. Okay. So when you did see the split leases -- and you've told me you did see them at some point, right?
A. Yes.
Q. Okay. Again, I asked you whether that was something that would cause you to pause and wonder if that was going to be appropriate, considering it was a transfer from a trustee himself.
MR. LAWRENCE: And I objected to that question before based upon attorney/client and foundation. Instruct him not to answer based upon attorney/client privilege.
BY MR. ROMANO:
Q. Are you aware of the -- I'm sure you are, being a lawyer -- the doctrine that when a trustee benefits from his own acts, as a trustee from the trustee property, that there's a presumption of fraud? Are you aware of that?
MR. LAWRENCE: Object on the basis of attorney/client. Instruct him not to answer.
BY MR. ROMANO:
Q. I'm talking about your knowledge as what you
Pg. 243
went through school for and you keep a license for. You

---

[25] *Antidote Intern. Films v. Bloomsbury Publishing*, PLC, 242 FRD 248 (S.D. NY 2007)["...the email fits squarely within the crime-fraud exception...[it] effectively asked the attorney for assistance in procuring fraudulent corporate documents."] *Id.* at 250; in this case at Bar, Antero "effectively" encouraged and accepted known fraudulent assignments which CES transferred Farr Trust mineral properties to himself which Antero knew, and which Antero accepted, and then knowingly paid CES monies that Antero knew belonged to the Farr Trust; such furthered CES's fraud; for example Antero cannot knowingly accept property [Farr Trust mineral properties] that was stolen as such conduct is larceny [fraud]: *State v. Anderson*, 575 S.E.2d 371 (WV 2002); essentially that is what Antero did in this case.

knew that; didn't you?
MR. LAWRENCE: Same objection, same instruction.
BY MR. ROMANO:
Q. Did you -- I'm going to assume you knew it, because it's first-year law school information. Did that enter your mind, that there was a presumption of fraud here?
MR. LAWRENCE: Same objection, same instruction.
BY MR. ROMANO:
Q. Did you -- did you indicate to anyone in Antero that there was a presumption of fraud here?
MR. LAWRENCE: Same objection, same instruction.
BY MR. ROMANO:
Q. Do you -- did you have any evidence that there was not a presumption of fraud?
MR. LAWRENCE: Same objection, same instruction."

Counsel at the Ellis deposition did not have any valid bases to instruct Mr. Ellis to not answer by asserting the attorney/client privilege and/or work product doctrine as Ellis's knowledge was acquired by his own actions while he participated in CES's scheme to defraud the Farr Trust for the benefit of Antero and himself. An attorney cannot have a confidential communication with him or herself, as established in the *Canady* case [26] facts known to a witness, as Ellis was, even if such facts are later communicated to their attorney in a confidential attorney/client setting, such are not cloaked with any privilege.[27] Justice Cleckley in *Canady* held that the protecting of the privilege extends

[26] *State ex rel. USF&G v. Canady*, 460 S.E.2d 677, 688 (WV 1995)

[27] Of course, Plaintiffs do not concede that there was ever any confidential attorney/client relationship with any Antero personnel, including Mr. Ellis, or any other attorney as Antero has not proved any such relationship under the law; all Antero has done is "shotgun" its claim of privilege without proving that it complied with the *Burton* factors to create an attorney relationship between an identified client and a specific attorney acting as counsel for such identified client resulting in confidential communications; the Record is devoid of any such evidence.

only to confidential communications and not to facts. *Id.* at 688. A fact is one thing and a communication concerning that fact is an entirely different thing. Mr. Ellis did not uncover any facts during an after a legal matter was complete, he was part of the unlawful legal matter!

When Mr. Ellis was asked if he understood that at the time Antero was enabling CES to personally obtain monies from the Trust (which Ellis approved), was inappropriate and created a presumption of fraud, he was required to respond as it was a fact he observed and knowledge he had, not a confidential attorney/client communication. Also, when Mr. Ellis was asked what he did, if anything, about such fraudulent conduct by CES, such also required a response as such fact cannot be privileged even without the application of the crime/fraud exception as such is a fact known to Ellis outside of any asserted attorney/client relationship.[28] An attorney who observes his client commit a crime has no privilege as it is a fact observed not a communication.

Mr. Ellis' capacity as Manager of land required him to deal directly with CES. CES was not a Beneficiary of the Trust, nor did he own any of the Trust assets and Antero was well aware of this and the Trial Court recognized this fact.[29] Antero also was aware that CES was limited by the Trust to compensation that was "a reasonable compensation comparable to that by national banks having trust powers in West Virginia"; [App. II - 0645 - Trust Paragraph Fifth (l)];[30] Contrary to Antero's

---

[28] Of course, if Antero asserts that Ellis was in an attorney/client relationship with Antero at the time he was aiding CES's fraudulent conduct then such would be an admission triggering the crime/fraud exception.

[29] Order Granting Plaintiffs' Motion to Compel [App II - 0530, ¶13-22].

[30] The original Farr Trust Agreement was executed on May 24, 1991 [App II - 0641-655]; however, there was a revised Trust Agreement which altered the "Schedule A" and it was filed in Doddridge County in Book 443 at pg. 591 on August 16, 2019 approximately one month before CES died and while he was being represented by Steptoe & Johnson [App. II - 0822-838]; an unrecorded copy of the revised Trust Agreement including "Schedule A" was produced by S&J from their Office files along with a document titled "Appointment of successor trustees to the Carolyn E. Farr Irrevocable Trust"

assertions, the Trust Agreement did not permit CES to steal Farr Trust assets. The Trial Court rightly rejected Antero's argument that its participation in accepting CES's "split leases" and paying CES personally with Farr Trust monies was appropriate. [Petitioner's Writ pg. 7-9]. Antero also "cherry picked" the Beneficiaries' deposition testimony in hopes that their understanding of the Trust terms would support Antero's complicity in CES's fraud.[31] It did not and the Trial Court recognized such tactics for what it was—a desperate attempt by Antero to deflect its aiding and abetting CES throughout his fraudulent scheme. Trust provision Fifth (e) stated that the Trustee could, "... cause the securities or other property which may comprise the Trust Estate to be registered in its name as Trustee hereunder or in its name or in the name of its nominee without disclosing the trust." This provision allowed the Trustee to place assets in the name of the Trust, the name of the Trustee or a nominee so not to disclose the Trust itself. This a standard trust clause as it allows a trust to perhaps acquire assets without disclosing that it is being purchased by the trust. It is similar to an undisclosed agent. However, CES was clearly not permitted to "take ownership" of Farr Trust assets by transferring such assets to himself, and Antero, and especially Mr. Ellis, knew that. [App II - 0644].[32] Nothing in the Trust document provided CES the authority to self deal, and the Trial Court

---

[App. II - 1507], but deposition testimony revealed that no one at S&J knew who prepared it or how it got into S&J's official file; [App. II - 1560-1561]; Defendant Zannino, who was the Daughter of CES and the Farr Trust bookkeeper testified that CES requested her to file the revised Trust Agreement in August 2019 [App II - 1629-1631] as indicated on the time stamp at App II - 0838; the revised Trust Agreement's only change pertained to "Schedule A"; Antero had the Farr Trust document well before it began assisting CES's fraudulent scheme [App II - 1633-1634].

[31] Also, each of the Beneficiaries testified that they had no idea that CES was stealing Farr Trust funds with his self dealing nor did they consent to such conduct. [App II - 0854 -Ann Farr, pg. 61; App II - 0930-Pete Farr, pg 191; App II - 0957-John Farr, pg.81 & App II - 1013-William Farr, pg 155].

[32] The Trust stated in Paragraph Fifth, "(k) Notwithstanding the foregoing, none of the powers enumerated herein nor any power accorded to trustees generally pursuant to law shall be construed (1) to enable the Grantor or the Trustee, or any other person, to purchase, exchange or ***otherwise deal***

was clearly permitted to infer that Antero, and Mr. Ellis as an attorney, were aware that aiding CES's self dealing conduct was unlawful. Accordingly, the Trial Court was well within its discretion to find that the crime/fraud exception was invoked by Antero's complicit conduct as described above. Such was awkwardly admitted by Mr. Ellis and by Antero in separate depositions.

[Ellis Depo App. II - 055]
Pg. 107
"You testified -- I mean, you told us that you realized that by splitting the lease, Clarence Sigley was going to receive money generated from Farr Trust
Pg. 108
properties; he was going to receive it himself?
A. Yes.
Q. Is that correct?
All right. I'm just asking you, what -- let me put it this way. What did you do when you realized it?
MR. LAWRENCE: Again, to the extent any of it involves what would be an attorney/client communication or formed the basis later for an attorney/client communication, instruct the witness not to answer.
BY MR. ROMANO:
Q. You can answer, because it's not -- I'm not asking what you did with an attorney or anybody. I'm asking, what did you do personally, if you did anything?
MR. LAWRENCE: Again, same objection, same instruction.
A. I'm going to follow instructions of counsel."

When asked if Antero ever disclosed the fraud to the Farr Beneficiaries that Antero was paying CES personally with funds belonging to the Trust, Antero's designated 30(b)(7) witness, Vice President Al Schopp stated:

[Schopp Depo. App. II - 0343]

---

with or dispose of the principal or income of this Trust for less than adequate, or full consideration in money or money's worth..." (emphasis added).

Pg. 115
23 "Q. But how would Pete Farr know that Antero
24 was going to pay Mr. Sigley personally instead of
Pg. 116
1 the trust?
2 A. That -- he's a beneficiary of that trust.
3 Q. Is that it?
4 A. Yeah.
5 Q. Did -- did Antero ever advise any of the
6 beneficiaries they were paying Mr. Sigley
7 personally for part of the proceeds from leasing
8 Farr Trust properties?
9 A. Not to my knowledge.
10 Q. Obviously -- and this is one of the areas
11 of inquiry -- Antero made checks separate to
12 Mr. Sigley personally, didn't they?
13 A. They did.
14 Q. And they also made checks payable to the
15 Farr Trust?
16 A. They did."

Then as ususal, Antero tried to "puff" the record with deceptive testimony by referencing Division Orders that ***may*** have contained some payment information and were allegedly sent to the Beneficiaries in 2015. While such documents would not absolve CES's theft of Farr Trust monies or Antero's aiding and abetting CES in his fraudulent scheme, such testimony was totally without any substance as Schopp had no knowledge what the Division Orders contained.

[Schopp Depo App. II - 0343]
Pg. 116
17 "Q. Did Antero in any manner send copies or
18 anything to the beneficiaries of how those were
19 being paid?
20 A. Yes.
21 Q. How did they do that?
22 A. The division interest would have been sent
23 to them that would have, you know, basically,
24 information on them of how many acres, here's your
Pg. 117
1 percentage, here's the -- I believe the net revenue
2 interest is on there for them. And that's what

they would have -- that's what they would have received.

Those were sent to the beneficiaries individually, and they said, "Deal with Mr. Sigley."

Q. You lost me there.

What did you -- is this before or after this option was –

A. This was --

Q. -- executed?

A. -- after.

Q. After?

So what would -- what would have been sent to them?

A. The division of interest orders.

Q. And are those in the documents you saw?

A. I did not see those individually."

*****

[Schopp Depo. App. II - 0344]

Pg. 119

" Q. But you're saying there were other division orders that were sent to all the beneficiaries after February of 2012?

A. Yes.

Q. And you think that had information that showed the royalty that was being paid?

A. I -- you know, I would have to look at one of them. Some of them have that. I don't know if theirs particularly had that on there or not.

Q. If it did, would it have had the 18.75 percent?

A. If it was one that there was an override on that they got paid, yes. If it wasn't, it would have been 12 ½ percent.

Q. Okay. And would it have the bonus amount on there?

Or it doesn't have that, does it?

A. I don't -- I don't believe it does.

Q. So what is it that you think was on there that would have -- would have alerted them that Antero had agreed with Mr. Sigley to pay him

Pg. 120

separately from Farr Trust properties?

A. I mean, "Here's" -- "Here's a notice of what your interest is in this well." And, you know, the response we got is "Deal with Mr. Sigley."

Q. And is there anything in writing that you have on that?

A. I -- Mr. -- he did not indicate that he had.

Q. Who?

A. John Samudovsky did not indicate -- I didn't ask him that exact question, but he certainly did not indicate that he had anything in writing on that."

The Trial Court was aware of this testimony which was in the Record. However, by not producing any Division Orders in its Appendix and not clarifying that Mr. Schopp had never even seen the Division Orders that he was testifying about, such is tantamount to an admission that such documents were of no relevance regarding this crime/fraud exception issue.[33] The Trial Court was well within its discretion to characterize such testimony "hide the ball" causing the Trial Court to give less credibility to other of Antero's statements about an attorney/client relationship. A fact finder must always evaluate the veracity of the evidence. Such findings should not be lightly rejected by this Court.

The Trial Court was aware of Antero's complicity and such evidence alone was sufficient for the Trial Court to invoke the crime/fraud exception.[34] However, Antero also admitted that

---

[33] The Division Orders were later produced but they did not provide any of the information that Mr. Schopp mumbled about and Antero after referencing them in its Writ did not include them in its Appendix; such is tantamount to admitting that Antero's statement was incorrect.

[34] The Trial Court had before it, the Antero 1099's which corroborated the significant monies paid to CES personally from bonus payments that should have been paid to the Farr Trust [App II - 01578-01582]; the Trial Court also had CES and his spouse's Federal tax returns that showed a dramatic increase in their income once the "split leases" were executed and accepted by Antero; in 2010 & 2011 CES and Defendant Barbara Sigley's Taxable Income (Line 43) were a little over $100,000.00; in 2012 it

Antero knew that CES was being paid personally from his self dealing with Farr Trust assets. Mr. Ellis so testified at his deposition.

[Ellis Depo App. II - 087-88]

Pg. 237

"Q. Okay. And that would've been the middle one, the second one?
A. Maybe.
Q. Was there any documentation that you've seen or that you remember preparing with regard to this situation of the trustee wanting to be paid from his own transfer of trust property to himself?

Pg. 238

A. Yes.
Q. What was it?
A. The closing documents.
Q. Okay. And you said you -- what closing document are you thinking of?
A. Well, the closing documents that you showed me today.
Q. Oh, well, let me see which one you're talking about. Which exhibit?
A. The --
Q. And just take your time, but tell me which exhibit number it is and what you're referring to.
A. I'm collectively referring to Exhibit No. 1, Exhibit No. 2, Exhibit No. 3, Exhibit No. 4, and Exhibit No. 5."

These Exhibits referenced in Mr. Ellis's deposition were compilations of Antero's payments to both the Farr Trust and CES individually, which included the composite spreadsheet of all bonus payments made to CES by Antero from Farr Trust mineral properties.[App II - 0112-36] That was

---

was **$2,441,438.00**: [App II - 1318-1323]: the Trial Court also had in addition to the " split leases", the Closing documents which cataloged Antero's payments to CES in the total amount of $1,555,000.00 in bonus payments that came from Farr Trust property pursuant to CES's fraudulent scheme; [App II - 0113-129].

the **$1,555,500.00.**[35] When some Antero land personnel inquired why CES was being paid personally for Farr Trust mineral properties, their inquiries were not answered unless those are some of the communications that have been withheld pursuant to the bogus claim of attorney/client privilege. Most likely, they were instructed to drop the subject, along with other instructions to support CES's fraud on the Trust and that is evidence the Respondents are entitled to receive, but was improperly shielded under the guise of privilege. [App II - 01595-01596; 01586]. Such will be disclosed by the Trial Court's imposing the crime/fraud exception and such should not be disturbed by this Court, as otherwise, there most likely will be a miscarriage of justice in this matter.

The evidence before the Trial Court clearly demonstrated Antero's complicity in CES's continued fraud of the Farr Trust and the B.H. Hickman Heirs as well, which led the Trial Court to the ineluctable conclusion that Antero was participating in CES's self dealing fraudulent schemes. Antero's communications with their "point man" Mr. Ellis were not seeking legal advice for a past problem, but were communicating to assist and further CES's fraudulent scheme and keep it unknown from the Farr Trust Beneficiaries. Such is a classic scenario for application of the crime/fraud exception and the law in this State.[36]

---

[35] This compilation [App II - 0113] also shows monies paid to CES from non Farr Trust mineral properties amounting to ($1,213,726.00); these were primarily from the B.H. Hickman Heirs mineral properties which CES unlawfully diverted from them; see fn 5 & 18, *infra*; Antero essentially admitted such was self dealing in its deposition and these funds are now subject to the Trial Court's Constructive Trust Order. [App II - 0786-787, pgs. 741-42; App II - 0405, pgs. 362-363; App II - 0361-373, pgs. 186-234; App II - 0374-375, pgs. 239-45]; Antero paid CES a total of $1,555,500.39 in Farr Trust bonus money which did not belong to CES and Antero knew it.

[36] In addition to the Trial Court's Constructive Trust Order [App II - 0412-417], based on equity and the Uniform Trust Act (§44D-8-802(b), 44D-10-1001(b)(9), and the accompanying evidence in the Constructive Trust Hearing Transcripts [App II - 1039-1184 &-1185 - 1317 [undersigned counsel could not locate this Transcript in the Clerk's file as it was transcribed in sections at different times by different Official Court Reporters; however, Antero has both Transcripts and the Trial Judge was present at the Hearing where the testimony was recorded], these provide additional support for the Trial Court's

The crime/fraud exception was adequately proven in this case as determined by the Trial Court and its application should require disclosure of all communications among or between Mr. Ellis and any other Antero personnel during the fraud which spanned from 2012 thru 2016. *Madden*, at Syl. 7.

Clearly, all communications between Ellis and any other Antero employee, or any contractor such as Texhoma, or anyone else, with whom Ellis communicated must be disclosed including production of relevant documents for two reasons: First, Antero has not proved the *Burton* factors to establish an attorney/client relationship with Kevin Ellis. Second, because the crime/fraud exception is applicable, all communications, including documents, between or among Ellis and any other Antero personnel or anyone at Texhoma or anyone else, including any attorney such as Steptoe & Johnson, such must be produced as such communications and documents were part of an ongoing fraud on the Trust which Antero fully participated.

In sum, the relevant facts and reasonable inferences derived therefrom, found by the Trial Court, more than adequately supported the Trial Court's application of the crime/fraud exception are as follows:

1) The Trial Court reviewed Antero's Offer to Purchase to lease the Farr Trust mineral

---

findings and the application of the crime/fraud exception; the Constructive Trust Order found that CES engaged in a "fraudulent scheme by which CES as Trustee at the time, assigned Farr Trust mineral property to himself and then leased such Trust mineral property to Defendant Antero" receiving Farr Trust monies from Antero that did not belong to CES and "without any consent from the Beneficiaries" [App II - 0414-415]; the Trial Court then "DIRECTED" the Defendants, including Antero, "to account for, and forthwith produce, any and all Trust assets which are in their possession ...[and be] obtained and returned to the Trust...including a complete accounting..." [App II - 0415]; the Constructive Trust Hearing Transcript shows that Antero did not present any testimony to contradict the Trial Court's finding that Antero was complicit with CES's fraudulent scheme [App II - 1187; 1264-1273]; also, at that Hearing Defendant Amy Zannino, the bookkeeper for CES, asserted her 5th Amendment multiple times not to testify to certain questions so she would not incriminate herself [App II - 1049-1102].

properties which was a binding contract [App II - 0107 & 0535 ¶13], that was knowingly breached by Antero in order to assist CES's fraudulent scheme to defraud the Trust; this document was negotiated and signed by Kevin Ellis on behalf of Antero and by CES as Trustee of the Farr Trust;[37]

2) The Trial Court also knew that the Farr Trust mineral properties were owned by the Trust and had been fraudulently transferred by CES as Trustee to himself, constituting self dealing after the Offer to Purchase was signed on February 28, 2012; the Trial Court had before it a list of "split leases" from CES as Trustee to CES personally, and the partial assignments of those "split leases" to Antero; [App. II - 1324-1325 list; 1326-1506 split leases & partial assignments];

3) The Trial Court also knew that Antero accepted the "split leases" with knowledge that such was fraudulent. The Trial Court could reasonably infer that Kevin Ellis, an attorney, knew that CES's conduct was presumptively fraudulent under equity and statutory law at that time, and therefore. Antero knew it was fraudulent as well; [App II - 0537 at ¶15-18];

4) The Trial Court was also aware that Antero regularly prepared the "split leases" for CES to sign and Antero always prepared the "Partial Assignment of Oil and Gas Lease(s)" and many times Antero personnel notarized CES signature on both the self dealing lease and the partial assignment to Antero. [App II - 1361-1366, 1432-1437, 1441-1446, 1450-1455. 1459-1464,1470-1475, 1479-1484, 1488-1493, 1497-1502]; this was corroborated by Sherly Shetley's emails [App II - 1583-1586];

---

[37] The Offer to Purchase was also signed by P.D. Farr and CES personally as both had ownership in other non-Farr Trust mineral properties; the mineral properties allegedly owned by CES individually, was actually stolen property known as the B. H. Hickman lease by CES in breach of his fiduciary duty as a power of attorney for the owners of such mineral interests, which mineral properties were leased to CES by himself and his co-power of attorney, John M. Pratt; [App. II - 0374]; Antero knew this but as with the Farr Trust mineral properties aided CES in defrauding the Hickman Heirs as well; [Ellis App II - 0363 & Schopp App II - 0405; see also ¶ 9 below];

5) The Trial Court well knew that Antero's Vice President, Brian A. Kuhn, signed almost all of the Partial Assignments from CES [App II - 1332-1338, 1353-1357, 1361-1366, 1376-1381, 1384-1389, 1392-1403, 1406-1419, 1423-1428, 1432-1437, 1441-1446, 1450-1455, 1470-1475, 1479-1484, 1488-1493, 1497-1502], with William J. Pierini, the Land Manager signing one [App II - 1459-1464]; these are the executives that Antero asserted had the attorney/client relationship with Ellis; the Trial Court rejected such assertion; [App II - 0538-539 at ¶21 & 22];

6) The Trial Court was well aware that CES had received significant amounts of bonus money paid to him by Antero, $1,555,500.00, which monies belonged to the Farr Trust which Antero well knew; the Trial Court also heard testimony at the Hearing on Plaintiffs Below's Motion for entry of a Constructive Trust Order, from which the Trial Court made findings and conclusions which further persuaded the Trial Court of Antero being a knowing participant in CES's fraud; [see fn 15, *supra* "the [Constructive Trust] Order found that CES engaged in a "fraudulent scheme by which CES as Trustee at the time, assigned Farr Trust mineral property to himself, and then leased such Trust mineral property to Defendant Antero" with Antero paying CES with Farr Trust monies that did not belong to CES; [App II - 0414-15]; the Trial Court in its Constructive Trust Order also directed that all Farr Trust assets that had been diverted "be declared subject to the constructive trust and must be held in trust without any sale, transfer or dissipation of the asset's value, by any person or entity which receives notice of this Court's imposition of such constructive trust, and that all such Trust property or assets is subject to *"recovery by the Trust from any of the Defendants, their confederates in concert with them or anyone else who with knowledge knew or should have known that such property or assets belonged to the Farr Trust* " (emphasis added); [App II - 0415]; such previous findings were not forgotten by the Trial Court in holding that the crime/fraud exception was

applicable here:

7) The Trial Court recognized that Antero had a economic motive to engage in CES's fraudulent scheme as Antero's conduct was motivated "In this case, it can be concluded that Defendant Antero, a sophisticated client as to oil and gas property rights, ***consulted Deponent Kevin Ellis in order to obtain valuable gas leases that were***, when Defendant Antero began negotiations, owned by the Farr Trust." (emphasis added); [App II - 0538, ¶ 21];

8) The Trial Court was aware that Antero had allowed CES to engage in self dealing with the Hickman Heirs' monies by paying such monies to CES personally while Antero knew that such did not belong to CES as he had received a Deed to the Hickman Heirs mineral properties from himself and his co-power of attorney; [App II - 0780, pg. 717];

9) The Trial Court also had in the Record Antero's testimony that it was aware of CES's self dealing both in the Farr Trust and the Hickman Heirs as in both CES received mineral properties not from the owners but from himself; Antero testified that:

[Schopp Depo. - App II - 0405-406]
Pg. 363
"But if I'm understanding you correctly, and correct me if I'm wrong, you made a diligent search of what I was asking for. And the only ones that you could find that were similar to what Clarence Sigley did with the Farr Trust were what
Pg. 364
he did with BH Hickman was Clarence Sigley?
A. Those were -- those were the only two that kind of fit your description --
Q. Right.
A. -- that I know of.
Q. You never found any other fiduciary self-dealing like that?
A. I never found any fiduciary of a trust that didn't [sic: did] assign themselves leases."

10) The Trial Court had many examples of Antero's improper use of the attorney/client privilege, which does not apply when the crime/fraud exception is triggered, is the multiple times that Antero interposed objections to hide the complicit conduct of Antero in CES's fraud; for instance. a review of Antero's designated 30(b)(7) witness, Vice President Al Schopp, answered those questions he desired about fiduciary self dealing, but was instructed not to answer any similar questions whether CES was engaged in self dealing fraud as the Trustee of the Farr Trust. Antero clearly sought to use the privilege to improperly shield Antero from disclosing its complicity in the Farr Trust fraud. Antero could not seek legal advice during its participation in a fraud and then hide behind the attorney/client privilege or work product; such tactics are exactly why the crime/fraud exception to the attorney/client privilege was judicially created as to condone such conduct would jeopardize the integrity of the judicial process. See *Clark*, *supra*, "The privilege takes flight if the relation is abused." [APP II - 0776-780].

VI. ISSUANCE OF A RULE TO SHOW CAUSE IS NOT WARRANTED:

It is not clear if Antero seeks a Rule to Show Cause (RSC) which will stay all proceedings in the Trial Court, as Antero's Footnote 5 is unclear when their Writ is reviewed. If however this Court interprets Antero to be seeking a RSC such should be denied as it is not necessary or appropriate. Antero's objection regarding the Trial Court applying the crime/fraud exception is a narrow issue and only relates to those communications that have been claimed to be privileged and not yet disclosed. The Trial Court has already stayed any further depositions of Mr. Ellis or any other persons that relate to this issue. Such is significant as all other matters for final Trial preparation do not involve or trigger the implementation of the crime/fraud exception

The Trial Court in responding to Antero's request for a Stay, granted a partial stay by Order entered on May 25, 2022 staying the depositions relating to the crime/fraud issue. [App II - 1637-1639]. The Order stated that "Until such time as the Court submits an Order as to **the Motions for Protective Order**, any and all Depositions shall be **STAYED**." The Trial Court entered a limited stay order because this case is set for Trial on September 22, 2022 and there are preliminary matters to be completed before Trial such as final witness and exhibit lists, motions *in limine* and other routine pre-trial issues so as not to "hamstring" the Trial Court. Also pending for decision before the Trial Court are cross Motions for Summary Judgment by all Parties which could change the issues for Trial and are not dependent on the application of the crime/fraud exception. Additionally, the Trial Court has set a status conference set by the Trial Court for July 14, 2022, to discuss these matters. If at anytime Antero believes that it needs a stay from this Court such can be sought from the Trial Court and/or from this Court pursuant to Rule (j) of our Rules of Appellate Procedure.

Accordingly, if this Court decides to accept Antero's Writ, it should do so while also declining a Rule to Show Cause and do so without prejudice.

VII. CONCLUSION:

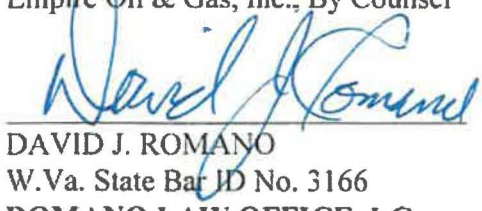
The Trial Court has diligently managed this case and developed a full Record which allowed the Trial Court to ascertain the facts and draw all reasonable inferences that informed and guided the Trial Court to the conclusion that Antero aided and encouraged CES in his fraudulent scheme that seriously harmed the Trust and its Beneficiaries. The Trial Court properly applied the law regarding the crime/fraud exception and supported such decision by its Order which was also buttressed by the ample Record which the Trial Court was also intimately familiar due to the multiple proceedings in

this matter.

The Trial Court's decision to apply the crime/fraud exception should be confirmed by this Court based on all of the above and also because the Trial Court also has a duty to exercise equity to assure that a beneficiary who has been defrauded by a fiduciary and any accomplices, recovers all any asset fraudulently converted by them. *Dunn v. Rockwell*, 689 S.E.2d 255 (WV 2009). The evidence is overwhelming that Antero aided and abetted CES in a fraud, and therefore, any communications that further such fraudulent scheme are not protected by the attorney/client privilege or work product protection even if a confidential attorney/client relationship was established and proved with Mr. Ellis, which it was not to the Trial Court's satisfaction nor by any other standard.

Accordingly, the Trial Court's Order should be confirmed by this Honorable Court as there is no evidence demonstrating that the Trial Court committed gross abuse of discretion and clear error as required by *Madden*.

Respectfully submitted,
Respondents, Scott A. Windom, Trustee of the Carolyn E. Farr Trust, and its Beneficiaries, and Empire Oil & Gas, Inc., By Counsel



DAVID J. ROMANO
W.Va. State Bar ID No. 3166
ROMANO LAW OFFICE, LC
363 Washington Avenue
Clarksburg, West Virginia 26301
(304) 624-5600
rlo@romanolawwv.com

VERIFICATION

To the extent necessary, the undersigned counsel for the Respondents, hereby certify that the facts contained in the Respondents' Response Brief and Appendix II are true and correct to the best of my belief and knowledge.

Dated: June 27, 2022

David J. Romano
W.Va. State Bar ID No. 3166

CERTIFICATE OF SERVICE

I, David J. Romano, do hereby certify that on the 27th day of June, 2022, I served the foregoing "RESPONDENTS' RESPONSE BRIEF" upon the below listed counsel of record by depositing true copies thereof in the United States Mail, postage prepaid, in envelopes addressed to them at their office addresses as follows and also served the "RESPONDENTS' APPENDIX II - VOLUME I and VOLUME II" via electronic mail only upon the below listed counsel as agreed by all counsel of record:

Timothy M. Miller, Esquire
W.Va. State Bar ID No. 2564
tmiller@babstcalland.com
Mychal S. Schulz, Esquire
W.Va. State Bar ID No. 6092
mschulz@babstcalland.com
Katrina N. Bowers, Esquire
W.Va. State Bar ID No. 12337
KBowers@babstcalland.com
Babst, Calland, Clements & Zomnir, P.C.
300 Summers Street, Suite 1000
Charleston, WV 25301

and

Joseph V. Schaeffer, Esquire
W.Va. State Bar ID No. 12088
JSchaeffer@babstcalland.com
Babst, Calland, Clements & Zomnir, P.C.
603 Stanwix Street
Pittsburgh, PA 15222
Counsel for Antero Resources Corporation

John F. Hussell, IV, Esquire
W.Va. State Bar ID No. 6610
john.hussell@wdhjlaw.com
Wooton, Davis, Hussell & Johnson, PLLC
P.O. Box 3971
Charleston, WV 25339
Counsel for Barbara L. Sigley, Individually and as Executrix of the Estate of Clarence E. Sigley, Sr.

Bader C. Giggenbach, Esquire
W.Va. State Bar ID No. 6596
bader@giggenbachlegal.com
Giggenbach Legal, PLLC
P.O. Box 764
Morgantown, WV 26507
Counsel for Amy Zannino

David J. Romano