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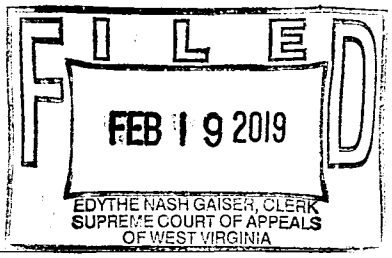

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

U.S. EXPLORATION, LLC, and
HARRY SLACK, Individually,

Petitioners/Defendants Below,

v.

GRIFFIN PRODUCING COMPANY,

Respondent/Plaintiff Below.

(Ritchie County Circuit Court Civil Action Nos. 14-C-38 and 39)

RESPONDENT'S BRIEF

Counsel for Respondent:

Rodney C. Windom (WVSB No. 4091)
Scott A. Windom (WVSB No. 7812)
WINDOM LAW OFFICES, PLLC
101 East Main Street
Harrisville, WV 26362
Telephone: (304) 643-4440
Facsimile: (304) 643-2947
Email: rwindom@windomlawoffices.com
swindom@windomlawoffices.com

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I. RESPONSE TO ASSIGNMENTS OF ERROR

Contrary to the assignments of error set forth by the Petitioners, the Circuit Court of Ritchie County correctly found for the Respondent/Plaintiff below and properly granted summary judgment on the limited issue of the superiority of the Respondent's oil and gas assignment and surrender and that the Petitioner's subsequently recorded assignment was insufficient to vest title in the leasehold estate for lack of actual or constructive notice of the existence of the same during a delay of nearly eleven (11) months between execution and recordation of the assignment in the proper indices of the office of the Clerk of the County Commission of Ritchie County, West Virginia.

II. STANDARD OF REVIEW

A circuit court's entry of summary judgment is reviewed *de novo.* Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

III. STATEMENT OF THE CASE

Griffin Producing Company ("Griffin"), the Respondent and Plaintiff below, is the owner of the oil, gas and minerals within and underlying approximately 4000 contiguous acres of oil, gas and minerals situate on the waters of Buky Run and Goose Creek in Grant District of Ritchie County, West Virginia [JA 025 and 064]. The tracts were originally conveyed to Griffin by deeds dated December 31, 1915, of record in the Office of the Clerk of the County Commission of Ritchie

County, West Virginia, in Deed Book 74 at pages 227 and 229. The acreage is divided into 40 separate tracts that are commonly referred to as the "Kennedy Tracts" [JA 025].

A number of the Kennedy Tracts are leased for the development of oil and gas. Magnum Oil Corporation ("Magnum") held some leasehold interests and overriding royalty interests in various depths on several of the leased Kennedy Tracts [JA 026]. Some of the "Kennedy Tracts" were held by other oil and gas production companies[1] while still other tracts were not under lease and considered to be "open" in the parlance of the oil and gas industry.

At the time of the filing of this particular declaratory judgment action, Kathleen Fitzpatrick was the President of Magnum. Ms. Fitzpatrick and her then-estranged husband, Harry Slack, had been involved in contested divorce proceedings spanning a number of years and at least two states[2]. Mr. Slack owned his own oil gas company, U.S. Exploration, LLC ("USE"), the Petitioner and Defendant below. However, USE did not own any interests in the leasehold estates for any of the Kennedy Tracts.

By ***Modification and Partial Surrender of Overriding Royalty*** dated July 12, 2013, Magnum modified its interest in the subject leasehold estates by surrendering its overriding royalty interest in all formations from the top of the Rhinestreet to the base of the Marcellus Shale. That document was recorded in the office of the Clerk of the County Commission of Ritchie County, West Virginia, on August 20, 2013, in Lease Book No. 266 at page 582 [JA 007-008 and 029-030].

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[1] Some tracts have different lessees for different depths.

[2] Vermont and North Carolina.

In addition, by ***Surrender of Oil and Gas Lease*** dated July 12, 2013, Magnum also surrendered its right to produce and market oil and gas from the subject leasehold estates[3]. That document was likewise recorded in the office of the said Clerk's office on August 20, 2013, in Lease Book No. 266 at page 584 [JA 009 and 031].

Unbeknownst to either Ms. Fitzpatrick or Griffin, a competing ***Assignment*** dated December 28, 2012, was purportedly created wherein Magnum Oil Company[4] assigned all of its right title and interest in the subject overriding royalties and leasehold estates to USE. However, that particular document was not recorded by USE until July 15, 2014—nearly 19 months after it was supposedly created. That assignment is of record in the said Clerk's office in Lease Book No. 274 at page 571. Interestingly, this earlier dated but later recorded assignment was executed by Harry Slack as Vic (sic.) President of "Magnum Oil Company" [JA 10 and 032].

During his deposition, Mr. Slack testified about the December 28, 2012, assignment as follows:

> *Q. Mr. Slack, it's your testimony here this morning, as the corporate representative of U.S. Exploration, that U.S. Exploration, LLC, owns the leasehold on 30 of the 40 Griffin tracts?*
>
> *A. Correct.*
>
> *Q. What is the source of title, or sources of title, for those 30 leaseholds?*
>
> *A. The assignment from Magnum to U.S. Exploration.*

[3] The leases contained language that stated if the leases become void for failure to produce, the leases must be promptly surrendered [JA 046, lines 6-10; JA 066 para. 8].

[4] The assignment is from Magnum Oil Company, not Magnum Oil Corporation. There is no business entity named Magnum Oil Company that is licensed to conduct business in the State of West Virginia and Magnum Oil Company did not own any leasehold interests in the Kennedy Tracts.

Q. When is that assignment dated?

A. 12/28/12.

Q. When was that assignment recorded?

A. I don't know. It was recorded a year afterwards, or something.

Q. Why did you wait a year afterwards to record that assignment?

A. I was holding it as a so-called nuclear option for our divorce.

Q. Explain to me how that document came about.

A. What do you mean?

Q. How was it generated?

A. I generated it.

Q. For what purpose?

A. To protect the leasehold estate.

Q. From whom?

A. From her giving it away to somebody else, third party, to get the money on the backside.

Q. Is that the only vesting document for U.S. Exploration?

A. Concerning the --

Q. I'm sorry. For the Griffin acreage.

A. Correct.

Q. Did you tell Ms. Fitzpatrick that you had that nuclear option available?

A. Oh, yeah, I let her know later.

Q. You let her know after you recorded it?

A. No, she was -- she was aware -- she was somewhat aware that I was having -- had something in my hand that I was going to be able to use.

Q. When did she become aware that there was an assignment --

A. I don't know.

Q. -- to U.S. Exploration for the Griffin acreage?

A. I don't know exactly when.

Q. Do you know whether or not that was before, or after the date it was recorded?

A. I don't know that either.

Q. Well, it's fair to say you did not give it to her prior to recording it, did you?

A. No.

See relevant portion of Harry Slack's Deposition Transcript, 22:2 to 24:3. [JA 011-013].

On April 5, 2017, the Respondent moved the Circuit Court for partial summary judgment on the limited issue of the validity of the partial surrender and modification from Magnum to Griffin and to find that that the assignment to USE was invalid insofar as there was no actual or constructive notice to any party that the same existed prior its later recording [J.A. 001-016]. After a hearing on May 17, 2017, the Circuit Court granted the Respondent's motion for partial summary judgment[5] on the issue of the validity of the documents between Magnum and Griffin and found that "[t]here was no constructive notice of U.S. Exploration's assignment when Griffin Producing Company acquired its rights in the subject leasehold and overriding royalties insofar as the U.S. Exploration assignment was not of record" [JA 069, para. 11] and that "it was void, without notice to subsequent creditors or purchasers until such time as it was actually admitted to record on July, 15, 2014, at which time it provided constructive notice to all other persons or entities." Thereafter, on September 6, 2018, the Circuit Court entered an order declaring Griffin to be the record owner

[5] See ***Order Granting Griffin Producing Company's Motion for Partial Summary Judgment***, JA 064-070.

of the leasehold interests purportedly assigned to USE on December 28, 2012 and entered final judgment in the matter [JA 071-073][6].

IV. SUMMARY OF THE ARGUMENT

This Court should deny the Petitioner's requested relief and affirm the Summary Judgment Order and Declaratory Judgment Order from the Circuit Court of Ritchie County. The overwhelming evidence in this matter established the superior rights of the Respondent as a matter of law. Therefore, the Court properly evaluated the relevant, admissible evidence and correctly granted summary judgment on that issue and likewise properly declared, pursuant to West Virginia Code § 55-3-1, *et seq.*, that Griffin was the owner of the leasehold interests purportedly assigned to USE.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is not necessary for this Court to affirm the discretionary decision of the Circuit Court of Ritchie County in this appeal. Pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, oral argument is unnecessary where the appeal is frivolous, the dispositive issues have been authoritatively decided or the facts and legal arguments are adequately presented in the briefs and record on appeal and the decisional process would not be significantly aided by the oral argument. Moreover, the Petitioners have raised nothing novel in their assignments of

[6] The Plaintiffs had also alleged a count of Fraud against Harry Slack but voluntarily dismissed that count, without prejudice.

error. Therefore, Griffin Producing Company respectfully submits that this matter meets the criteria of Rule 18(a) and oral argument is not necessary.

VI. ARGUMENT

A. THE CIRCUIT COURT DID NOT ERR WHEN IT GRANTED SUMMARY JUDGMENT ON THE LIMITED ISSUE OF THE VALIDITY OF THE DOCUMENTS BETWEEN MAGNUM AND GRIFFIN AND THAT THERE WAS NO ACTUAL OR CONSTRUCTIVE NOTICE OF THE PURPORTED ASSIGNMENT TO U.S. EXPLORATION THAT WAS RECORDED NEARLY ELEVEN (11) MONTHS LATER.

(i) There was no constructive notice of the purported assignment from "Magnum Oil Company" to USE prior to the execution and recording of the documents between Magnum and Griffin.

Constructive notice is defined as "[s]uch notice as is implied or imputed by law, usually on the basis that the information is part of a public record or file, as in the case of notice of documents which have been recorded in the appropriate registry of deeds or probate...." *Blacks Law Dictionary*, citing *In re: Fahle's Estate,* 90 Ohio App. 195, 105 N.E.2d 429, 431. In West Virginia, "any contract in writing made in respect to real estate or goods and chattels in consideration of marriage; or any contract in writing made for the conveyance or sale of real estate, or an interest or term therein of more than five years, or any other interest or term therein, of any duration, under which the whole or any part of the corpus of the estate may be taken, destroyed, or consumed, except for domestic use, shall, from the time it is duly admitted to record, be, as against creditors and purchasers, as valid as if the contract were a deed conveying the estate or interest embraced in the contract...." W. Va. Code § 40-1-8.

In this particular matter, there is no dispute that the purported assignment from "Magnum Oil Company" to USE was not recorded until approximately eleven (11) months after the surrender and assignment from Magnum to Griffin were recorded. In fact, Harry Slack testified in his deposition that even though the assignment to USE was dated December 28, 2012, "It was recorded a year afterwards, or something"[7] and that he "was holding it as a so-called nuclear option" in their multi-state divorce proceedings. [*See* Harry Slack depo. tr., JA 011-013].

Mr. Slack did not promptly make the information part of the public record. In fact, it was not part of the records in the Office of the Clerk of the County Commission of Ritchie County until almost 19 months later. Thus, because Mr. Slack held the assignment and did not record it, he failed to provide constructive notice to any other party that USE had any interest in the Kennedy Tracts.

(ii) <u>There was no actual notice of the purported assignment from "Magnum Oil Company" to USE prior to the execution and recording of the documents between Magnum and Griffin.</u>

"Proof of actual notice of the existence of an unrecorded deed, by a subsequent purchaser, or facts sufficient to put him upon inquiry, must be clear. Creation of a mere suspicion of such notice does not suffice." Syllabus, *Ihrig v. Ihrig, et al.,* 78 W.Va. 360, 88 S.E.2d 1010 (1916). Although the transactions in the case *sub judice* involve a surrender and assignment of oil and gas leasehold interests, the notice requirements for the existence of an unrecorded document purportedly vesting title in the assignee would be the same as in the *Ihrig* case. That is to say, proof of actual notice of the existence of an unrecorded oil and gas

[7] It was recorded nearly 19 months later.

leasehold assignment, by a subsequent assignee, or facts sufficient to put the assignee on inquiry must be clear and the creation of a "mere suspicion of such notice" is not sufficient.

In this matter USE is trying to argue that because Harry Slack told Griffin's agent, James Eliopulos, that "[Slack] would never allow [Eliopulos], or Griffin Producing Company, to acquire the Griffin Leasehold" [JA 039, para. 10] that was sufficient to provide actual notice of the purported assignment—that had not yet been created or executed[8]. However, that statement by Harry Slack does not say that an assignment had been made to USE. Harry Slack did not even say that an assignment was being prepared between Magnum and USE. In short, the vague statement provides no notice, whatsoever, of the existence of any unrecorded document that would have superior title to the documents that were executed between Magnum and Griffin, especially since Harry Slack was not known to be an officer of Magnum[9].

In fact, Harry Slack and Kathleen Fitzpatrick had been involved in another lease cancellation action in the same Circuit Court [JA 045-046 and 048]. In that matter, Harry Slack did not appear on behalf of Magnum, he appeared on behalf of USE with counsel Jay Leon [JA 045]. Kathleen Fitzpatrick appeared for Magnum and its counsel, Matthew Graves [*Id.*]. The two entities, USE and Magnum were never appearing by the same officers or management in that civil action and, in fact, were often adverse to one another. Likewise, in this matter, Magnum was a Plaintiff and represented by its own counsel. Harry Slack and USE

[8] Harry Slack's self-serving affidavit stated that his comment to Mr. Eliopulos was after a divorce hearing in December 2012 [JA 038-040, at p. 039, para. 10] but Mr. Slack did not execute his purported assignment from Magnum Oil Company to USE until December 28, 2012.

[9] Although Harry Slack claimed Court orders from Vermont prevented any transfers of assets [JA 039], no *lis pendens* was filed regarding any leasehold interests held by either USE or Magnum. Moreover, Mr. Slack's own purported assignment would have likewise violated the court order preventing the transfer of assets. He would have "unclean hands" in that regard.

were Defendants, represented by Mr. Wagoner. They again never acted by the same officers, management or counsel and were adverse to one another[10]. There simply was no indication, at all, that Harry Slack would be executing a document on behalf of Magnum given the past conduct of Mr. Slack and Ms. Fitzpatrick and their respective companies[11].

(iii) <u>The Trial Court properly found that the assignment to U.S. Exploration, LLC, made on December 28, 2012, was void, without notice, to subsequent creditors or purchasers until such time as it was duly admitted to record on July 15, 2014, at which time it provided constructive notice to all other persons or entities.</u>

In its summary judgment order, the Circuit Court found as follows:

"5. Any contract in writing made in respect to real estate or goods and chattels in consideration of marriage; or any contract in writing made for the conveyance or sale of real estate, or an interest or term therein of more than five years, or any other interest or term therein, of any duration, under which the whole or any part of the corpus of the estate may be taken, destroyed, or consumed, except for domestic use, shall, from the time it is duly admitted to record, be, as against creditors and purchasers, as valid as if the contract were a deed conveying the estate or interest embraced in the contract.... W.Va. Code § 40-1-8.

6. Every such contract, every deed conveying any such estate or term, and every deed of gift, or deed of trust or memorandum of deed of trust pursuant to section two, article one, chapter thirty-eight of this code, or mortgage, conveying real estate shall be void, as to creditors, and subsequent purchasers for valuable consideration without notice, until and except from the time that it is duly

[10] Magnum agreed with Griffin [JA 054-057] that the Mr. Slack was not an officer of Magnum in 2012– note the transcript has a period after the word "that" on page JA 054 at line 20. It should read, "...Ms. Fitzpatrick would likewise dispute that Mr. Slack was an officer in 2012...."

[11] Ms. Fitzpatrick, President of Magnum, was unaware of the purported assignment from her company to USE and when she executed the documents for Griffin she was acting within her authority as the President of Magnum.

admitted to record in the county wherein the property embraced in such contract, deed, deed of trust or memorandum of deed of trust or mortgage may be. W. Va. Code § 40-1-9.

7. *There is no factual dispute that the subject assignments and surrenders to the Plaintiff, Griffin Producing Company, were recorded nearly eleven (11) months before the subject assignment to U.S. Exploration, LLC.*

8. *Based upon applicable West Virginia law, even if the assignment to U.S. Exploration, LLC, was made on December 28, 2012, it was void, without notice, to subsequent creditors or purchasers until such time as it was duly admitted to record on July 15, 2014, at which time it provided constructive notice to all other persons or entities.*

9. *The modification and surrender of the subject oil and gas leases were not 'conveyances' or 'sales of interests in real estate' and therefore are not subject to the requirements of the recording statues, West Virginia Code §40-1-8 and 40-1-9. See Shearer v. United Carbon Co., 143 W.Va. 482, 488, 103 S.E.2d 883, 887 (1958).*

10. *Therefore, the prior assignments and surrenders from Magnum Oil Corporation to Griffin Producing Company were valid documents that transferred title in the subject overriding royalty interests and surrendered the subject leasehold estates as of the time of their recording on August 20, 2013.*

11. *There was no constructive notice of U.S. Exploration's assignment when Griffin Producing Company acquired its rights in the subject leasehold and overriding royalties insofar as the U.S. Exploration assignment was not of record.*

12. *Therefore, summary judgment in this matter is appropriate insofar as there are no issues of material fact for trial and the totality of this evidence could not lead a rational trier of fact to find for the Defendant.*

13. *Moreover, there is no issue that would need to be developed to clarify the application of the well-settled law regarding the effect of the recording to provide notice to subsequent purchasers or creditors."*

[JA 064-070, at pp. 067-069].

The Circuit Court properly found that "[t]here is no factual dispute that the subject assignments and surrenders to the Plaintiff, Griffin Producing Company, were recorded nearly eleven (11) months before the subject assignment to U.S. Exploration, LLC" [JA 064-070 at p. 068, para. 7]. The Court further properly found that "[b]ased upon applicable West Virginia law, even if the assignment to U.S. Exploration, LLC, was made on December 28, 2012, it was void, without notice, to subsequent creditors or purchasers until such time as it was duly admitted to record on July 15, 2014, at which time it provided constructive notice to all other persons or entities." [*Id.* at para. 8].

(iv) Griffin does not need to be a bona fide purchaser for value for a surrender.

Contrary to the allegations of the Petitioner, the Court did err by finding that the "surrenders" and "modifications" in issue were not subject to West Virginia Recording Acts. The oil and gas leases which governed the relevant leasehold estates contained language that required the Lessee to surrender the leasehold estates which were no longer producing oil and/or gas [JA 046, lines 6-10; and, JA 066, para. 8). That is exactly what happened in this matter when Magnum surrendered the subject oil and gas leases.

The Trial Court properly found "[t]he modification and surrender of the subject oil and gas leases were not 'conveyances' or 'sales of interests in real estate' and therefore are not subject to the requirements of the recording statues, West Virginia Code §40-1-8 and 40-1-9. See *Shearer v. United Carbon Co.,* 143 W.Va. 482, 488, 103 S.E.2d 883, 887 (1958)." There simply is no purchase or sale of the lease when it is surrendered. The oil and gas lease is simply surrendered by the Lessee as required under the lease agreements. To say that one must be a bona fide purchaser for value to obtain a surrender flies in the face of the equitable nature of the surrender itself.

Moreover, the Circuit Court found:

> *"Based upon applicable West Virginia law, even if the assignment to U.S. Exploration, LLC, was made on December 28, 2012, it was void, without notice, to subsequent creditors or purchasers until such time as it was duly admitted to record on July 15, 2014, at which time it provided constructive notice to all other persons or entities."* [JA 064-070, at p. 068, para. 8] (Emphasis added).

Contrary to the Petitioner's erroneous assertion that the Circuit Court created a "Race Statute" for assignments, the Circuit Court properly reasoned that there was no actual notice of the unrecorded USE assignment. The Petitioner wrongly presumes that there was some sort of actual notice given to Griffin but the Circuit Court found that was not the case. The record is clear that the Circuit Court properly evaluated the facts under the applicable "race-notice" provisions of West Virginia law and found that there was never any actual notice of the "nuclear option" USE assignment prior to its recording nearly 19 months after it was purportedly created.

VII. CONCLUSION

The record in the case before this Court accurately sets forth the questionable conduct of Harry Slack and USE wherein Harry Slack's own use of a purported assignment as a "nuclear option" in his divorce was held by him in secret against his estranged spouse. He acted to his own detriment by not recording the assignment **for nearly 19 months**!

The Trial Court did not err when it granted partial summary judgment on the limited issue of the validity of the documents between Magnum and Griffin and finding that there was no constructive or actual notice of the purported assignment to USE that was not recorded until eleven (11) months later. There was no issue of material fact for the Court to determine with regard to the same. This Court has held that "[t]he 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." Syl. Pt. 3, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). This Court has also noted that "[s]ummary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. Pt. 2, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995).

Accordingly, the Respondent respectfully requests that the Court's entry of partial summary judgment herein be affirmed, and that the Petitioners' requests for relief be denied.

Respectfully submitted,

GRIFFIN PRODUCING COMPANY,
Plaintiff/Respondent,
By Counsel.

SCOTT A. WINDOM, ESQ.
WVSB 7812
RODNEY C. WINDOM, ESQ.
WVSB 4091
WINDOM LAW OFFICES, PLLC
101 East Main Street
Harrisville, WV 26362
Telephone: (304) 643-4440
Facsimile: (304) 643-2947
COUNSEL FOR THE RESPONDENT