IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Case No. 24-ICA-115

ANTERO RESOURCES CORPORATION,
Plaintiff Below, Petitioner,

v.

RUFUS FORDYCE PIKE, JOHN KENT PIKE, JR., DANIEL EDWARD PIKE, JAMES P. MOFFITT, TANYA L. YOHO, TED ARTHUR MCCULLOUGH, ROBERT A. BORCHERS, RITCHIE PETROLEUM CORPORATION, AMP FUND III, LP, AND DIVERSIFIED PRODUCTION LLC, SUCCESSOR IN INTEREST TO ALLIANCE PETROLEUM CO. LLC,
Defendants Below, Respondents.

BRIEF OF PETITIONER ANTERO RESOURCES CORPORATION

Civil Action No. 19-C-22
In the Circuit Court of Tyler County, West Virginia
(Honorable C. Richard Wilson)

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I. INTRODUCTION

Despite nearly 70 years of zero contact with the Subject Property, and the elements of adverse possession clearly shown by the undisputed evidence, the circuit court granted the Pike Respondents summary judgment that they still somehow own an interest in the Subject Property. There is a reason that statutes of limitation, including the adverse possession statute, exist—so that cases may be prosecuted in a timely manner. In this case, the circuit court granted summary judgment to the Pike Respondents despite the undisputed facts that for over seventy years, the Pike Respondents never even had a glancing relationship with the Subject Property. If the Pike Respondents or their mother, Margaret Fordyce Pike, had asserted ownership within the ten years provided by the adverse possession statute from when Margaret Fordyce Pike's father, mother, and aunt conveyed the Subject Property by general warranty deed, the circuit court may have been correct. Now, over seventy years later, this Court must accept the undisputed facts of those who have used and improved the Subject Property, and the case law that sets forth the Pike Respondents cannot hide in their purported ignorance of the fact that the subsequent owners have maintained exclusive and hostile ownership quite apart from the Pike Respondents' "Johnny-come-lately" claim.

Petitioner Antero Resources Corporation ("Antero") submits this opening brief in support of its petition for appeal. The circuit court erred in denying Antero's summary judgment motion and granting summary judgment to Respondents Rufus Fordyce Pike, John Kent Pike, Jr. and Daniel Edward Pike (collectively, the "Pike Respondents") on Antero's declaratory judgment and adverse possession claims brought in support of the ownership of Respondents James P. Moffitt, Tanya L. Yoho, Ted Arthur McCullough, Robert A. Borchers, Ritchie Petroleum Corporation ("Ritchie Petroleum"), AMP Fund III, LP ("AMP"), and Diversified Production LLC, successor

in interest to Alliance Petroleum Co. LLC ("Diversified") (collectively, the "Non-Pike Respondents"). The circuit court erred in holding that the Non-Pike Respondents are cotenants with the Pike Respondents because the Pike respondents' predecessor-in-interest Margaret Fordyce Pike's one-sixth (1/6) interest in the surface and the oil and gas underlying the Subject Property was lost well before the Pike Respondents asserted their claim. Second, the circuit court erred in holding, contrary to existing law, that Antero must show that the Pike Respondents had actual notice to prove its adverse possession claim because Antero's showing of constructive notice or knowledge is sufficient to establish adverse possession or ouster given 70 years of record title conveyances, leasing, and building structures and improvements. Third, the circuit court erred in holding that Antero did not show adverse possession of the Subject Property for at least ten years because the time of the adverse possession of the Non-Pike Respondents' predecessors-in-interests should be included in calculating the exclusive possession of the Subject Property per well-settled adverse possession case law.

Based on the law and record evidence the circuit court should have granted summary judgment to Antero. The circuit court should have declared that Ritchie Petroleum is the sole owner of the surface of the Subject Property parcel 6-13-22, that James P. Moffitt and Tanya I. Yoho are the sole owners of the surface of the Subject Property parcel 6-3-22.1, that Ted Arthur McCullough is the sole owner of the surface of the Subject Property parcel 6-13-22.2; and in reference to the oil and gas estate underlying the Subject Property that Robert A. Borchers is the sole owner of an undivided fifty percent (50%) of the oil and gas estate underlying the Subject Property, that AMP is the sole owner of an undivided fifty percent (50%), that Diversified has at all times operated within its lawful property rights as lessee and operator of the well identified as API Number 47-095-01334, and that Antero has at all times operated within its lawful property rights pursuant to

its surface use, easement, and road access agreements, and as a lessee of the oil and gas underlying the Subject Property as to certain depths. Therefore, this Court should reverse the grant of summary judgment to the Pike Respondents and remand this action with instructions to grant summary judgment to Antero on its adverse possession claim and to properly enter Antero's requested declaratory judgment.

II. ASSIGNMENTS OF ERROR

The circuit court erred in denying Antero's summary judgment motion and granting summary judgment to the Pike Respondents on Antero's adverse possession claim.

1. The circuit court erred in holding that the interest claimed by the Pike Respondents was not adversely possessed.[1]

   a. The 1949 conveyance to Dora Jewell created an ouster of Margaret Fordyce Pike.

   b. The 1949 deed gave Dora Jewell and his successors color of title.

2. The circuit court erred in holding that Antero must show that the Pike Respondents had actual notice to prove its adverse possession claim.

   a. Actual notice or knowledge is not required in cases where there is lack of privity and lack of familial or business relationships.

   b. Dora Jewell and his successors held the Subject Property openly, notoriously, and as if they owned it exclusively.

[1] The circuit court further erred in declaring that the three Pike Respondents "each own a one-twelfth (1/12) interest, collectively a one-sixth (1/6) interest" in the Subject Property. A.R. 628.. If the collective one-sixth (1/6) interest were split amongst the three Pike Respondents, each individual would have a one-eighteenth (1/18) interest.

3. The circuit court erred in holding that Antero did not show adverse possession of the Subject Property for at least ten years because the time of the adverse possession of the Non-Pike Respondents' predecessors-in-interests should be included.

III. STATEMENT OF THE CASE

The following statement of facts and use of the Subject Property was not disputed by any evidence produced during proceedings at the circuit court. At issue in this case is ownership to an undivided one-sixth (1/6) interest in the surface and oil and gas underlying a 97.10625 gross acre property situate in Tyler County, West Virginia, being referred to for tax purposes as Tax Map/Parcel 6-13-22, 22.1, 22.2 (the "Subject Property"). The Subject Property consists of two tracts of land containing 89 and 38/160 acres (the "First Tract") and an adjoining 7-acre and 139-pole tract (the "Second Tract"). A.R. 20. The First Tract was owned by Margaret A. Fordyce who, upon her death, devised all her property equally between her children, Daisy G. Broadwater and Rufus G. Fordyce. A.R. 22. Margaret A. Fordyce's husband, Ingram L. Fordyce, owned the Second Tract, which upon his death in 1933 was passed via intestate succession to his children, Daisy G. Broadwater and Rufus G. Fordyce, in equal shares. A.R. 22-23.

In 1941, Rufus G. Fordyce conveyed his one-half interest in the Second Tract through a straw party, Gertrude Cavaness, to himself, Edna L. Fordyce, his wife, and Margaret Fordyce Pike, his daughter, as joint tenants with the right of survivorship. A.R. 23. In 1942, Rufus G. Fordyce conveyed his one-half interest in the First Tract through a straw party, Gertrude Cavaness, to himself, Edna L. Fordyce, his wife, and Margaret Fordyce Pike, his daughter, as joint tenants with the right of survivorship. *Id.* Accordingly, as of 1942, the Subject Property was owned by Rufus G. Fordyce, Edna L. Fordyce, and Margaret Fordyce Pike, 1/6 interest each, and Daisy G. Broadwater, 1/2 interest.

On August 13, 1949, Rufus G. Fordyce and Edna L. Fordyce, and Daisy G. Everhart (f/k/a Daisy G. Broadwater), styling themselves as the "heirs at law of the estate of Margaret A. Fordyce and I.L. Fordyce, deceased," the Subject Property *with covenants of general warranty* to Dora Jewell. A.R. 23, 511-513.[2] Although she was the granddaughter of Margaret A. Fordyce and I.L. Fordyce, Margaret Fordyce Pike did not execute the 1949 deed to Dora Jewell. *Id.* Notably, Margaret Fordyce Pike has not paid any taxes for any interest in the Subject Property since 1950 when her name came off of the tax rolls. A.R. 283. The Pike Respondents have never paid taxes for any interest in the Subject Property. A.R. 300-301, 313-314, 366-367.

Dora Jewell and Ada Jewell, his wife, signed oil and gas leases for the Subject Property on June 29, 1953, and April 1, 1955, and a right-of-way agreement on December 28, 1956. A.R. 514-517. Margaret Fordyce Pike did not sign these agreements or apparently any other agreements for the Subject Property. Moreover, it is undisputed that Margaret Fordyce Pike did not pay a separate assessment for the Subject Property and that Dora Jewell and his successors-in-interest were the only parties who did pay assessments for the Subject Property. A.R. 617. It is further undisputed that no evidence was produced of an agreement between Margaret Fordyce Pike and Dora Jewell, or any other owner of the Subject Property, regarding the payment of taxes on the Pike Respondents' behalf. *Id*. In short, beginning with Dora Jewell and moving forward to present, the Non-Pike owners of the Subject Property held themselves out as the sole owners of the Subject Property apart from Margaret Fordyce Pike or the Pike Respondents.

On November 8, 1958, Dora Jewell and Ada O. Jewell, his wife, conveyed the Subject Property to William C. Summers and Etta V. Summers, "except[ing] and reserv[ing] from this conveyance the one-half (1/2) interest in all the royalty oil and gas in, under, and that may be

[2] Importantly, it is undisputed that all deeds and instruments referenced and applicable to the Subject Property were properly recorded with the Clerk of the County Commission of Tyler County, West Virginia.

produced from said tracts of land, but reserv[ing] nothing in any other minerals in, or underlying said real estate."[3] A.R. 24. Robert Borchers, via *mesne* conveyances, is now the owner of the oil and gas interest reserved by Dora Jewell. A.R. 25-26, 332.[4] Mr. Borchers and his predecessors have accepted royalties for mineral production from the Subject Property. A.R. 369–70.

On May 6, 1972, W.C. Summers and Etta Summers signed a distribution line easement. Margaret Fordyce Pike did not sign this easement. A.R. 519. By deed dated April 28, 1973, William C. Summers and Etta V. Summers conveyed their interest, being 100% of the surface and 50% of the oil and gas, in the Subject Property to J. Victor Ayres.[5] A.R. 24.

From April 28, 1973 to May 19, 1989, J. Victor and Virginia Ayres owned 100% of the surface and one-half (1/2) of the oil and gas underlying the Subject Property. A.R. 26, 372. During this time, they used the Subject Property as a family vacation destination. A.R. 372. On March 15, 1975, J. Victor Ayres and Virginia Ayres signed a right-of-way agreement. A.R. 520. They also signed an oil and gas lease for the Subject Property on June 11, 1976 ("Subject Lease"). A.R. 372. Neither Margaret Fordyce Pike nor the Pike Respondents signed the right-of-way agreement or the Subject Lease or any other lease for the Subject Property.

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[3] Notably, the circuit court erred in its Finding of Fact no. 20 and Conclusion of Law no. 45, wherein it found that "all subsequent conveyances of the Subject Property ultimately refer to the interest conveyed as 'being the same interest' as that conveyed by Rufus G. Fordyce, Edna L. Fordyce, and Daisy G. Everhart in the August 13, 1949, deed" and therefore held that Antero was on record notice of the Pike Respondents' interest. In fact, none of the deeds contain that language. Even the August 13, 1949, deed to Dora Jewell from the Pike Respondents' ancestors and the very next deed in the chain of title from Dora Jewell did not contain those words. The deed from Dora Jewell instead set forth, "[b]eing the same two tracts or parcels of land that were conveyed to the grantor, Dora Jewell, by Rufus G. Fordyce and others". Incredibly, this argument was not even presented in any briefing by the Pike Respondents prior to the February 27, 2024, Order. A.R. 616-617.

[4] Mr. Borchers signed a modification of the Subject Lease on January 3, 2015. A.R. 30, 370.

[5] Again, the deed does not contain the words the circuit court found, instead setting forth "[b]eing the same two tracts or parcels of land conveyed unto the said parties of the first by Dora Jewell and Ada O. Jewell, his wife".

By his Last Will and Testament probated on December 3, 1985, all of J. Victor Ayres's personal and real property, including the Subject Property, was devised unto Virginia Ayres. A.R. 24. On May 19, 1989, Virginia Ayres conveyed "the surface only" of the Subject Property to Ritchie Petroleum.[6] A.R. 24-25.

Virginia Ayres died on March 26, 1996, and devised any interest that she may own at the time of her death in the Subject Property to her daughter, Ann Bushfield. A.R. 26, 372.[7] On April 30, 1997, Ann Bushfield, widow, conveyed unto J. Victoria Eckenrod,[8] Mary C. Grinnell,[9] and C. Susan Strahl "three-fourths (3/4) of all of the mineral rights she may possess, including, but not limited to, oil, gas, coal, and any income derived from royalties, production or leases," in the Subject Property. A.R. 372. Ann Bushfield, J. Victoria Eckenrod, Mary C. Grinnell, and C. Susan Strahl accepted royalties for oil and gas produced from the Subject Lease from wells that were drilled on the Subject Property. *Id*. On March 24, 2017, Ann Bushfield, widow, J. Victoria Eckenrod and Mike A. Eckenrod, wife and husband, Mary C. Grinnell and Richard S. Grinnell, wife and husband, and Carol Susan Stahl and Fredrick R. Strahl, wife and husband, conveyed their interests in the Subject Property to AMP. A.R. 27, 373.[10]

As of May 19, 1989, Ritchie Petroleum owned the entirety of the surface of the Subject Property, with the entirety of the oil and gas having been excepted and reserved. As detailed below, Ritchie Petroleum subdivided the surface of the Subject Property. A.R. 25, 320-21. Ritchie Petroleum has erected structures and made improvements to the Subject Property. For example,

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[6] Again, the deed does not contain the words the circuit court found, instead setting forth, "[b]eing the same lots, tracts or parcels of real estate conveyed to J. Victor Ayres, by William C. Summers and Etta V. Summers, husband and wife".
[7] Ann Bushfield signed a modification of the Subject Lease on June 11, 2009. A.R. 29.
[8] J. Victoria Eckenrod signed a modification of the Subject Lease on July 13, 2009. A.R. 29.
[9] Mary C. Grinnell signed a modification of the Subject Lease on June 23, 2009. A.R. 29.
[10] AMP signed a modification of the Subject Lease on June 20, 2019. A.R. 385-386.

Ritchie Petroleum removed an old barn and built a large storage barn, which it uses to store equipment for personal and business use. A.R. 322-27. Ritchie Petroleum paid real property taxes for the tract. A.R. 322.

On March 21, 1990, Ritchie Petroleum conveyed 2.60 acres of the surface of the Subject Property to Daniel M. Shepherd, Jr., and Mylinda L. Shepherd. A.R. 25. By mesne conveyances, that 2.60 acres (Tax Map Parcel 6-13-22.1) was conveyed to Mr. Moffitt and Ms. Yoho, as joint tenants with right of survivorship, by deed dated August 5, 2009. *Id.* Mr. Moffitt and Ms. Yoho and their predecessors have paid real property taxes for the tract. A.R. 331. Mr. Moffitt and Ms. Yoho and their predecessors have erected multiple structures and made improvements to the tract, including a trailer used as a weekend home. *Id.*; *see also* A.R. 341-44.

On May 14, 1992, Ritchie Petroleum conveyed 11.03 acres of the Subject Property to Regena K. Hendrickson and James W. Hendrickson. A.R. 25. Ritchie Petroleum retained ownership of the remaining acreage, being Tax Map Parcel 6-13-22. *Id.* By mesne conveyances, the 11.03 acres of the Subject Property (Tax Map Parcel 6-13-22.2) was conveyed to Mr. McCullough by deed dated August 14, 2015. *Id.* Mr. McCullough's predecessors erected a trailer, a chicken coop, and a carport on the Subject Property. A.R. 351-53, 357-60. Mr. McCullough's predecessors, Louis A. Mowry and Lenet M. Mowry, also entered into an Access Road Agreement with Antero, dated April 21, 2012. A.R. 353. Mr. McCullough currently rents out the property to a full-time resident. A.R. 355. Mr. McCullough and his predecessors paid real property taxes for the tract. *Id.*

The Subject Lease, executed by the Ayres in 1976, was assigned numerous times. A.R. 27-30. In November 1989, CNG Development Company drilled and completed a well on the Subject Property, being API Number 47-095-01334 (the "CNG Well"), which remains in production today.

A.R. 262. CNG's 1989 drilling operations were visible, as residents of the adjacent property recall "seeing the lights" "when they brought in a rig and drilled" the well. A.R. 389. The CNG Well and tank remains visible on the Subject Property today. A.R. 374-79. Since 1989, the CNG Well has continued producing oil and gas from the Subject Property and the operators have paid royalties to the purported owners of the oil and gas, which did not include the Pike Respondents. A.R. 374-384. Between 1989 and now, the CNG Well and the Subject Lease have been assigned multiple times to various parties, with each assignment being of record in Ritchie County. *Id.*

In addition, Richie entered into various agreements with Antero and Antero Midstream LLC for use of the surface estate for roadways and gas and water pipelines connected to Antero's Ritchie Petroleum Well Pad. A.R. 30-31. These agreements include (1) Surface Use and Compensation Agreement, dated April 23, 2012; (2) Permanent Easement Agreement, dated November 16, 2012; (3) Permanent Easement Agreement, dated January 8, 2013; (4) Modification of the Permanent Easement Agreement, dated March 1, 2013; (5) Permanent Easement Agreement, dated May 16, 2016; and (6) Extension and Ratification of Surface Use and Compensation Agreement, dated February 2, 2017. A.R. 321-22. Since Antero acquired its interest in the Subject Lease in 2014, it drilled and completed five producing horizontal wells underlying the Subject Property in 2016 and 2017. A.R. 262–63. The CNG Well and Antero's wells remain in production. A.R. 334, 383-384.

The Pike Respondents are the sons of Margaret Fordyce Pike, who was last associated with the Subject Property before it was conveyed to Dora Jewell in 1949, although the Pike Respondents' testimony was that Margaret Fordyce Pike was born in Pittsburgh, Pennsylvania, and never lived in West Virginia. A.R. 296-297. The Pike Respondents have never been to the Subject Property prior to litigation, never paid taxes for the Subject Property, either to Tyler

County or to their alleged cotenants, never received any income or royalties from the wells on the Subject Property, nor have they inquired of the operators of said wells until notifying Antero of their purported interest on August 6, 2019. A.R. 282–85, 297-301, 313, 318, 334, 366-367, 376, 382.

A. Procedural History

Antero initiated this action on September 26, 2019, by filing a complaint in the Circuit Court of Tyler County, West Virginia. The two-count complaint has claims for declaratory judgment and adverse possession against the Pike Respondents and in support of the ownership of the Non-Pike Respondents regarding the Subject Property. The complaint seeks a declaration as to the rights, status and other legal relations vis-à-vis the parties with regard to ownership of the surface of and the oil and gas underlying the Subject Property, specifically, that Ritchie Petroleum is the sole owner of the surface of the Subject Property parcel 6-13-22, that Mr. Moffitt and Ms. Yoho are the sole owners of the surface of the Subject Property parcel 6-13-22.1, that Mr. McCullough is the sole owner of the surface of the Subject Property parcel 6-13-22.2, that Mr. Borchers is the sole owner of an undivided fifty percent (50%) of the oil and gas estate underlying the Subject Property, that AMP is the sole owner of an undivided fifty percent (50%) of the oil and gas estate underlying the Subject Property, that Diversified has at all times operated within its lawful property rights as lessee and operator of the well identified as API Number 47-095-01334, and that Antero has at all times operated within its lawful property rights pursuant to its surface use, easement, and road access agreements, and as lessee of the Subject Property for the depths from the top of the Burkett formation through the top of the Onondaga formation. A.R. 20–36.

The Pike Respondents answered the complaint and filed counterclaims against Antero for trespass, conversion, and unjust enrichment. The Pike Respondents also pled crossclaims against Diversified. The counterclaims and crossclaims are the only claims for damages. A.R. 54–86.

The circuit court entered an Order Following Hearing on October 13, 2020. Among other things, the October 13 Order bifurcated the claims and stayed discovery on the Pike Respondents' counterclaims against Antero and crossclaims against Diversified. Thus, discovery was conducted solely on the claims for declaratory judgment and adverse possession in Antero's complaint in support of the ownership of the Non-Pike Respondents. A.R. 148.

Following discovery on Antero's claims, Antero and the Pike Respondents filed cross motions for summary judgment on Antero's claims. A.R. 164, 255. The circuit court denied both cross motions for summary judgment in an Order entered on November 3, 2022. A.R. 546.

Antero filed a motion for reconsideration of the circuit court's November 3 Order insofar as it denied summary judgment to Antero. In their response, the Pike Respondents also requested reconsideration of the November 3 Order insofar as it denied their motion for summary judgment. On February 27, 2024, the circuit court entered an Order that granted in part and denied in party the motion for reconsideration. The circuit court vacated the November 3 Order, denied Antero's motion for summary judgment, and granted the Pike Respondents' motion for summary judgment on Antero's declaratory judgment and adverse possession claims, holding:

> The undisputed public records provide that the Pikes each have a one-twelfth (1/12) interest, collectively a one-sixth (1/6) interest, in the Subject Property[11]. Pursuant to the Uniform Declaratory Judgments Act, West Virginia Code §§ 55-13-1 to -16, it is hereby DECLARED and ORDERED that the Pikes, Rufus, Fordyce Pike, John Kent Pike, Jr., and Daniel Edward Pike, or, their successors in interest, each own a one-twelfth (1/12) interest, collectively a one-sixth (1/6) interest, in Subject Trat 1, as well as a one-twelfth (1/12) interest, collectively a one-sixth (1/6) interest, in Subject Tract 2.

A.R. 628.

[11] *See* fn. 1.

Antero filed its notice of appeal of the February 27 Order, which finally resolved Antero's complaint. The Pike Respondents moved to dismiss the appeal, which this Court has denied.

IV. SUMMARY OF THE ARGUMENT

The circuit court erred in denying Antero's summary judgment motion and granting summary judgment to the Pike Respondents on Antero's adverse possession claim. First, the circuit court erred in holding that the Non-Pike Respondents are cotenants with the Pike Respondents because the Pike Respondents' predecessor-in-interest Margaret Fordyce Pike lost her one-sixth (1/6) interest in the Subject Property long before the Pike Respondents ever made a claim to the Subject Property. Indeed, the Pike Respondents are bound to warrant and defend the Subject Property unto the Non-Pike Respondents. Second, the circuit court erred in finding that the clear and undisputed evidence of constructive notice or knowledge was not sufficient to show adverse possession and holding that Antero must show that the Pike Respondents had actual notice to prove its adverse possession claim and ouster. Third, the circuit court erred in holding that Antero did not show adverse possession of the Subject Property for at least ten years because the time of the adverse possession of the Non-Pike Respondents' predecessors-in-interests should be included.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This Court should hear oral argument under West Virginia Rule of Appellate Procedure 18 and 20(a) because oral argument will aid the decisional process and this appeal involves issues of fundamental public importance regarding the applicability of adverse possession and what notice is required. The Court should issue a published opinion. W. Va. R. App. P. 22.

VI. ARGUMENT

A. Standards of Review

This Court reviews a circuit court's entry of summary judgement *de novo*. Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 733 (1994). The West Virginia Supreme Court of Appeals has explained 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." *Id.* at Syl. Pt. 3. Furthermore, the Supreme Court of Appeals has indicated that "[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." *United Bank, Inc. v. Blosser*, 218 W. Va. 378, 383, 624 S.E.2d 815, 820 (2005) (citations omitted). *See also* Syl. Pt. 1, *Zaleski v. W. Va. Physicians' Mut. Ins. Co.*, 220 W. Va. 311, 647 S.E.2d 747 (2007) ("Appellate review of a partial summary judgment order is the same as that of a summary judgment order, which is *de novo*." (citation omitted)); *State Insurance Comm'r of W. Va. v. Blue Cross Blue Shield of W. Va., Inc.*, 219 W. Va. 541, 638 S.E.2d 144 (2006) (standard of review for appeal of cross motions for summary judgment is *de novo*)

This Court has recognized that "[a] circuit court's entry of a declaratory judgment is reviewed *de novo*." *Nicholson v. Severin POA Group, LLC*, 249 W. Va. 458, 895 S.E.2d 927 (2023) (citations omitted).

B. The Circuit Court Erred in Denying Antero's Summary Judgment Motion and Granting Summary Judgment to the Pike Respondents on Antero's Adverse Possession Claim.

The circuit court erred in denying Antero's summary judgment motion and granting summary judgment to the Pike Respondents on Antero's adverse possession claim. A party claiming adverse possession under West Virginia Code Section 55-2-1 must prove each of the following six elements for ten years: "(1) That he has held the tract adversely or hostilely; (2) That

the possession has been actual; (3) That it has been open and notorious (sometimes stated in the cases as visible and notorious); (4) That possession has been exclusive; (5) That possession has been continuous; [and] (6) That possession has been under claim of title or color of title." Syl. Pt. 3, *Somon v. Murphy Fabrication & Erection Co.*, 160 W. Va. 84, 232 S.E.2d 524 (1977). West Virginia case law supports that adverse possession applies to the oil and gas underlying the Subject Property, too. *See* Syl. Pt. 3, *Lloyd v. Mills*, 68 W. Va. 241, 69 S.E. 1094 (1910); *Thomas v. Young*, 93 W. Va. 555, 117 S.E. 909, 913 (1923); *Core v. Faupel*, 24 W. Va. 238, 245 (1884); *Cent. Tr. Co. v. Harless*, 108 W. Va. 618, 152 S.E. 209, 214 (1930).

In *Custer v. Hall*, 71 W. Va. 119, 76 S.E. 183 (1912), the West Virginia Supreme Court of Appeals held that "[p]ossession by one joint tenant, who asserts entire ownership, will not become adverse to his cotenant until he has knowledge, *actual or constructive*, of such claim." *Id.* at Syl. Pt. 6 (emphasis added).

In this action, the circuit court misconstrued cases whose syllabus points do not specify the level of notice or knowledge required for adverse possession by a cotenant, and erroneously applied them to hold that Antero failed to prove its claim for adverse possession because the Pike Respondents did not have actual notice or knowledge of their ouster. Moreover, as discussed below, the Non-Pike Respondents are not cotenants with the Pike Respondents because of the undisputed evidence of adverse possession and constructive knowledge, but also because of the general warranty deed from the Pike Respondents' ancestors. In any event, the undisputed facts demonstrate adverse possession through constructive notice or knowledge for at least ten years.

1. The circuit court erred in holding that the interest claimed by the Pike Respondents was not adversely possessed.

a. The 1949 conveyance to Dora Jewell created an ouster of Margaret Fordyce Pike.

The circuit court erred in holding that the Non-Pike Respondents are cotenants with the Pike Respondents because the Pike Respondents' predecessor-in-interest Margaret Fordyce Pike's one-sixth (1/6) interest in the Subject Property was lost well before the before the Pike Respondents claimed an interest in the Subject Property. More particularly, this is because Margaret Fordyce Pike's father, mother, and aunt conveyed the Subject Property "with covenants of general warranty," styling themselves as "the heirs at law of the estate of Margaret A. Fordyce and I.L. Fordyce, deceased". A.R. 511-513.

In *Laing v. Gauley Coal Land Co.*, 109 W. Va. 263, 153 S.E. 577 (1930), the West Virginia Supreme Court of Appeals held that cotenants' execution of a void power of attorney to sell to a purchaser who was a stranger to the co-tenancy and the cotenants' reception of a share of the selling price constituted notice of the purchaser's adverse claim where cotenants did not assert title to interests in in lands for over thirty years. *See id.* at Syl. Pts. 2, 3, 5. The Court further concluded that timber operations by the purchaser constituted conspicuous acts of open hostility to the cotenants, reasoning:

> **Every owner is deemed to be cognizant of what is done upon his land and of who is in possession of it. The law exacts this measure of diligence from him. He must know whether strangers are entering upon it, and, knowing that, must inquire by what right they do so. In every instance, such inquiry will presumptively lead to discovery of the hostile claim. Hence, the owner is bound to know, and is estopped from denying, all information to which such inquiry, prosecuted with reasonable diligence, would have led.**

Id., 153 S.E. at 580 (citation omitted) (emphasis added).

Laing relied in part on *Russell v. Tennant*, 63 W. Va. 623, 60 S.E.609 (1908), which held that a deed absolutely void on its face is nevertheless good as color of title, notorious, hostile, and exclusive possession under which, for the period of ten years, gives a good title. *See id.* at Syl. Pt. 1. *Russell* further held that a cotenant may adversely possess jointly owned property as follows:

> A tenant in common in sole possession of the land may make his possession adverse to his fellow tenant by repudiating or disavowing the relation of tenancy in common between them, and any act or conduct of his signifying intention to hold, occupy, and enjoy the premises exclusively of which the tenant out of possession has knowledge, **or of which he has sufficient information to put him upon inquiry**, amounts to an "ouster" of such tenant, and from the time when he has notice thereof the possession of the other party is adverse.

Id. at Syl. Pt. 4 (emphasis added).[12]

In addition, in *Custer v. Hall*, 71 W. Va. 119, 76 S.E. 183 (1912), the Supreme Court of Appeals held:

> The husband joins his wife in a deed conveying, in fee, her undivided interest in a tract of land, and joins in a covenant warranting generally the title thereto. The deed is void as to the wife, because of her defective acknowledgment, and she dies, in 1871, intestate and without issue, leaving her husband. *Held*:
>
> (1) That, under the statute then in force, the husband was her sole heir.
>
> (2) The husband is estopped by his covenant to claim title to such interest, and the effect of the estoppel is to invest the grantee with his title.

Id. at Syl. Pt. 1.

More recently, in *Harkleroad v. Linkous*, 281 Va. 12, 704 S.E.2d 381 (2011), the Virginia Supreme Court affirmed the circuit court's determination that a cotenant with an undivided one-half interest in property had established the necessary elements to prove adverse possession as against other cotenants. In that case, in 1992 one of the original cotenants conveyed her undivided one-half interest in the property to a purchaser outside the co-tenancy "in fee simple forever." *Id.*

[12] The circuit court erroneously discounted the holdings in the Syllabus Points in *Russell* on the basis that *Jarrett* is more recent precedent. *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995), the case the circuit court relied upon to justify discounting *Russell*, actually supports Antero's reliance on *Russell*. *Guthrie* merely stated in *dicta* that "[t]he more recent a precedent, the more authoritative it is because there is less likelihood of significantly changed circumstances that would provide a 'special justification' for reassessing the soundness of the precedent." *Id.* at 676, 461 S.E.2d at 182. Nonetheless, in *Guthrie* the Court overruled the recent precedent at issue in that case. *See id.*; *see also id.* at Syl. Pt. 6 (overruling *State v. Schrader*, 172 W. Va. 1, 302 S.E.2d 70 (1982)). *Russell* has never been overruled. Indeed, as discussed above, it has been relied upon by this Court in *Laing*, which was decided after *Jarrett*.

at 16, 704 S.E.2d at 382. Eventually, the IRS conveyed "all right, title, and interest" of that purchaser to David and Mary Linkous in a public sale in 1991. *Id.* The Linkouses took possession of the property, made renovations and rented the dwelling on the property until their ownership was questioned by prospective purchasers in 2007. The Linkouses filed an action for adverse possession to quiet title, and the heirs to the remaining original cotenants filed another action for an accounting and partition. The circuit court granted the plaintiffs' title to the property in fee simple and denied the request for accounting. *Id.* at 16, 704 S.E.2d at 382-83.

The Virginia Supreme Court affirmed the circuit court's judgment in *Harkleroad*. The Court rejected the appellants' argument that the circuit court erred in finding that the Linkouses' possession of the property was hostile for the period between 1991 and 2007 because the Linkouses were unaware that their title gave them only an undivided one-half interest in the property during that time, and neither the Linkouses nor the appellants were on notice that the appellants were being excluded from the property. The Court agreed with the appellants that when two parties acquire property as cotenants, one cotenant may not rely on adverse possession to obtain exclusive fee simple title to the property unless notice, *actual or constructive*, is given to the other cotenant of the intent to oust, thus making the occupying co-tenant's possession hostile. *Id.* At 18-19, 704 S.E.2d at 384.

Nonetheless, the Court held that rule does not apply when a *stranger to the original co-tenancy* takes possession of the property through a conveyance that on its face purports to give the new cotenant the right to possess the whole property, and he claims ownership of the whole. The Court explained: "This is so because **the stranger to the original co-tenancy is not in privity with the other co-tenants** and when he 'enters into the exclusive possession of the land, claiming title to the whole, **it is an ouster of the other co-tenants** and the grantee so entering and claiming

title may rely upon his adversary possession if continued [for] the statutory period.'" *Id.* at 19, 704 S.E.2d 384 (emphasis added). *See also Wright v. Wright*, 512 S.E.2d 618, 621 (Ga. 1999) ("A conveyance by one cotenant of a fee simple interest to a stranger in the commonly-held property is one of those exceptional state of facts as may constitute an ouster.").[13]

These cases are in accord with West Virginia case law. *See, e.g.,* Syl. Pt. 1, *Lloyd*, 68 W. Va. 241, 69 S.E. 1094 ("If one cotenant make an executory contract for sale to a stranger of the entire tract, not merely his interest, and the purchaser enter into actual possession, this is an ouster of the other cotenant, and such possession for the period of the statute of limitations will bar his rights, without other notice of adverse claim."). In *Lloyd*, the Court further explained, "[a] great deal of law is cited us to the effect that, where one cotenant is in possession, mere silent possession, it will not affect other cotenants, without notice of adverse claim. That is so where there is one cotenant in possession; his possession is that of all, until he bring home to his fellow notice of adverse claim. **But that is not the case where one conveys the tract as sole owner to a stranger and the grantee goes into possession. Other notice is not necessary**." *Id*. at 1097.

The determinative deed here is the August 13, 1949, deed wherein Rufus G. Fordyce and Edna L. Fordyce, and Daisy G. Everhart (f/k/a Daisy G. Broadwater), styling themselves as "**the heirs at law of the estate of Margaret A. Fordyce and I.L. Fordyce**," conveyed the surface and oil and gas of the Subject Property "**with covenants of general warranty**" to Dora Jewell (emphasis added). A.R. 511-513. A covenant by a grantor in a deed "that he will warrant generally

[13] "A quitclaim deed from one cotenant to a stranger, not describing the quantity of interest owned by the grantor, was similarly ruled sufficient for purposes of adverse possession by the grantee in *Watters v. Tucker* (1928 App) 6 Ohio L Abs 411, in which the evidence showed that subsequently to the conveyance the grantee went into immediate possession of all the property, tore down the house that was built thereon and erected another in its place, improved the property, paid special assessments on it and taxes, mortgaged it as sole owner, and, in general, exercised full and complete dominion and control over it." 32 A.L.R.2d 1214 (Originally published in 1953).

the property hereby conveyed," or a covenant of like import, or the use of the words "with general warranty" in a deed, shall have the same effect as if the grantor had covenanted that he, his heirs and personal representatives will forever warrant and defend the said property unto the grantee, his heirs, personal representatives and assigns, against the claims and demands of all persons whomsoever. W. Va. Code § 36-4-2.[14] Here we have Margaret Fordyce Pike's father, mother, and aunt conveying the Subject Property to a stranger to the cotenancy, Dora Jewell, who then proceeds to hold himself out as the sole owner, as do his successors-in-interest, as the facts clearly show. A.R. 23-24, 514-520.

b. <u>The 1949 deed gave Dora Jewell and his successors color of title.</u>

Even if the deed to Dora Jewell was void on its face as to Margaret Fordyce Pike, it was sufficient to give Dora Jewell and his successors-in-interest color of title. *See* Syl. Pt. 1, *Laing,* 153 S.E. 577. Because Dora Jewell was a stranger to the original co-tenancy when he purchased the Subject Property in 1949, Dora Jewell's possession of the Subject Property was hostile to any rights of Margaret Fordyce Pike regardless of whether Margaret Fordyce Pike had actual knowledge.[15] In addition, because Margaret Fordyce Pike was the daughter of Rufus G. Fordyce, his covenant that his heirs will forever warrant and defend the Subject Property bound Margaret

[14] In addition to being factually incorrect, the circuit court's conclusion that the fact that subsequent conveyances of the Subject Property refer to the interest conveyed as "being the same interest," which they do not, as that conveyed in the August 13, 1949 deed put Antero on record notice of the Pike Respondents' interests has it backwards. Because the 1949 deed was a general warranty deed, Dora Jewell had colorable title under that the 1949 deed, and subsequent conveyances passed that colorable title to his successors-in-interest. Thus, even if the circuit court's finding as to the language was correct, which it is not, Antero was not put on record notice of any interest in the Pike Respondents.

[15] The Pike Respondents produced no evidence of Margaret Fordyce Pike's relationship to the Subject Property. A reasonable person may wonder why Ms. Pike did not make inquiry into the Subject Property at least at the time of her parents' deaths, knowing she was a joint tenant with right of survivorship. At that point, at least, she had to have been aware of the 1949 deed conveying the Subject Property to Dora Jewell and therefore "sufficient information to put [her] upon inquiry" as to the acts and conduct of the tenants in possession who were holding themselves out as exclusive owners. *See* Syl. Pt. 4, *Russell*, 63 W. Va. 623, 60 S.E. 609.

Fordyce Pike's heirs, i.e., the Pike Respondents. Accordingly, beginning August 13, 1949, Dora Jewell held the Subject Property adversely and hostilely to the interests of the predecessor-in-interest to the Pike Respondents, and the Pike Respondents have a duty to defend and protect the interests of the Non-Pike Defendants. Therefore, the circuit court erred in holding that the Non-Pike Respondents are cotenants with the Pike Respondents.

2. The circuit court erred in holding that Antero must show that the Pike Respondents had actual notice to prove its adverse possession claim.

a. Actual notice or knowledge is not required in cases where there is lack of privity and lack of familial or business relationships.

The circuit court compounded its error by further holding that Antero must show that the Pike Respondents had actual notice to prove the adverse possession claim. Antero showed at least constructive notice or knowledge to establish adverse possession or ouster. Even assuming that the Non-Pike Respondents and Pike Respondents are cotenants, which they are not, actual notice of ouster is not required for a cotenant to claim adverse possession. Constructive notice of ouster is sufficient. Syl. Pt. 6, *Custer*, 71 W. Va. 119, 76 S.E. 183; Syl. Pt. 4, *Russell*, 63 W. Va. 623, 60 S.E.609.

Constructive notice "[arises] by presumption of law from the existence of facts and circumstances that a party had a duty to take notice of, . . . ; notice presumed by law to have been acquired by a person and thus imputed to that person." *Constructive Notice*, Black's Law Dictionary (9th ed). The Supreme Court of Appeals said as much in *Russell*, where it clarified that a cotenant may put his cotenant on notice of ouster by "any act or conduct of his signifying intention to hold, occupy, and enjoy the premises exclusively of which the tenant out of possession has knowledge, **or of which he has sufficient information to put him upon inquiry, amounts to an 'ouster' of such tenant.**" Syl. Pt. 4, *Russell*, 63 W. Va. 623, 60 S.E. 60 (emphasis added). This holding from *Russell* is consistent with the Court's previous holding in *Custer* that

"[p]ossession by one joint tenant, who asserts entire ownership, will not become adverse to his cotenant until he has knowledge, actual or constructive, of such claim." Syl. Pt. 6, *Custer*, and a subsequent holding in *Laing* that "[e]very owner is deemed to be cognizant of what is done upon his land and of who is in possession of it." *Laing*, 153 S.E. at 580.

The Court's holding in *Russell*, *Custer*, and *Laing* are consistent with opinions in other states, which have held that either constructive notice *or* actual knowledge is sufficient to satisfy adverse possession. See, e.g., *Linkous*, 281 Va. at 189, 704 S.E.2d at 384 (a cotenant cannot adversely possess against another cotenant "unless notice, actual or constructive, is given to the other cotenant of the intent to oust, thus making the occupying co-tenant's possession hostile"); *Williams v. Screven Wood Co., Inc.*, 279 Ga. 609, 610, 619 S.E.2d 641, 644 (2005) ("[t]o prove ouster, a tenant in possession must show acts inconsistent with, and exclusive of, the rights of a cotenant not in possession, and that cotenant must have actual or constructive knowledge of those acts"); *Glover v. Union Pacific R. Co.*, 187 S.W.3d 201 (Tex. App. 2006) (ouster can be shown by continuous possession or a change in the use of character of possession).

In this action, however, rather than relying on the holdings of the West Virginia Supreme Court of Appeals and other persuasive authority, the circuit court relied on *dicta* from *Reed v. Bachman*, 61 W. Va. 452, 57 S.E. 769 (1907), and *Jarrett v. Osborne*, 84 W. Va. 559, 101 S.E. 162 (1919), which were taken out of context, to support its conclusion that *actual* notice or knowledge was required. The circuit court also erroneously concluded that the ouster was not "brought home" to the Pike Respondents and their predecessors because they were not provided *actual* notice of the ouster. A.R. 625. This holding is inconsistent with West Virginia law, and upon review of the entire cases, actual notice and knowledge are not required for ouster.

The holdings in *Reed* and *Jarrett* refer only generally to notice or knowledge, and neither

opinion holds that constructive notice or knowledge is insufficient to prove ouster, under facts similar to the present case. Manifestly, *Reed* and *Jarrett* did not overrule the line of cases both before and after they were decided, *Custer*, *Russell*, and *Laing*, which expressly hold that constructive notice or knowledge is sufficient.[16]

In *Reed*, two individuals, Bachman and Reed, were cotenants and business partners who received ownership via common title. 61 W. Va. 452, 57 S.E. 769. Bachman sought a claim for adverse possession against Reed, but expressly told the cotenant that he had no adverse claims to the property and assured him that the purchases were made for both their benefits. To that fact, the Court responded that Bachman should have told Reed as much because of the prior statement that he was purchasing for both of their benefit—a situation not at issue in this action where neither Margaret Fordyce Pike nor the Pike Respondents had any relationship with the owners of the Subject Property. Moreover, the Court set forth the "knowledge" aspect for ouster stating: "The notice or knowledge required must be actual, as in the case of a disavowal or disclaimer of any right in his cotenants, **or the acts relied on, as in the case of expulsion, making costly improvements and exercising exclusive ownership, must be of such an open, notorious character as to be notice of themselves**." *Id.* at 771 (citation omitted)(emphasis added). Simply put, *Reed* does not require actual knowledge—but rather actual knowledge *or* constructive knowledge (where the acts are of such an open notorious character as to be notice of themselves). Accordingly, the West Virginia Supreme Court of Appeals held:

> To enable one joint tenant or tenant in common in the exclusive possession of land to effect an ouster against his cotenant, so as to defeat the right of such co-tenant by adverse possession under the statute of limitations, such cotenant must have had notice or knowledge of such hostile claim. Mere silent possession, ever so long, by

[16] The circuit court's reliance on footnote 10 in *Harrell v. Cain*, 242 W. Va. 194, 128, 832 S.E.2d 120, 202 n.10 (2019), is misplaced. The Supreme Court of Appeals did not reach the issue of adverse possession in *Harrell*, and the footnote referenced by the circuit court is *dicta*. Moreover, although *Jarrett* is mentioned in the footnote, the type of knowledge sufficient for ouster, actual or constructive, simply is not discussed.

> one taking rents and profits, without notice or knowledge of such adverse claim on the part of the other, will be adverse possession under the statute.

Id. at Syl. Pt. 1. Plainly, the circuit court in the present action erred in equating a business partner silently accepting rents to seventy years of strangers to the Pike Respondents openly and exclusively working the surface and oil and gas estate of the Subject Property.

In *Jarrett*, the cotenants were also in privity as they were all heirs of the same original owner, the West Virginia Supreme Court of Appeals repeated Syllabus Point 1 in *Reed*, again without addressing the level of notice or knowledge required for ouster. *See* Syl. Pt. 10, *Jarrett*, 84 W. Va. 559, 101 S.E. 162. Instead, the Court simply reasoned that a court should only sustain a demurrer in the clearest of cases because the exact relations of the parties of the parties is so important when the facts alleged make it clear that the plaintiff with full knowledge of the facts has slept thereon.

In the present case, the evidence is uncontroverted that the Non-Pike Respondents and their predecessors-in-interest held the Subject Property as if it were their own. They built structures and improvements, entered into oil and gas leases and right-of-way agreements, and subdivided the Subject Property – all things the case law recognizes as the indicators of exclusive and hostile ownership. Moreover, the Non-Pike Respondents and their predecessors-in-interest did not share privity of title with Margaret Fordyce Pike or the Pike Respondents because they did not acquire their interest via the same deed. Additionally, the Pike Respondents did not share a familial relationship, nor were they business partners, with the Non-Pike owners, unlike all of the examples in the cases cited by the Pike Respondents.

b. Dora Jewell and his successors held the Subject Property openly, notoriously, and as if they owned it exclusively.

The Pike Respondents can claim no such privity in the form of familial or business relationships here—or even common title with the Non-Pike owners. The record is clear that the neither Margaret Fordyce Pike nor the Pike Respondents were related to the Non-Pike owners of the Subject Property, were in business with the owners of the Subject Property, and, obviously, they did not receive an interest in the Subject Property from the same transaction. The circuit court's holding that "West Virginia law requires actual notice for ouster," is therefore erroneous under the facts of this case, and the circuit court should have found and concluded that the undisputed evidence set forth by Antero amounted to constructive knowledge.

Had the circuit court properly reviewed the undisputed facts, the circuit court would have held that, beginning with Dora Jewell in 1949, and continuing through the present, the adverse possessor's use of the Subject Property was actual, open, hostile, and exclusive, which included the entirety of the surface estate and the oil and gas estate. Further, the Pike Respondents could not feign ignorance of the ample amounts of notice provided to them. "For 'actual' possession, there must be an exercising of dominion over the property and the quality of the acts of dominion are governed by the location, condition and reasonable uses which can be made of the property." *Somon*, 160 W. Va. at 90, 232 S.E.2d at 528; *see also State v. Morgan*, 75 W. Va. 92, 83 S.E. 288, 290 (1914) ("It requires less notoriety, and the exercise of less frequent acts of ownership, to establish actual possession under color than under claim of title."). "Acts of exclusive ownership by one of two co–tenants, such as the open sale, conveyance, and delivery of possession thereunder of the whole subject-matter, amount to a complete ouster of the other co–tenant, and unless he brings suit within 10 years thereafter his right of recovery will be barred by the statute of limitations." Syl. Pt. 1, *Talbott v. Woodford*, 48 W. Va. 449, 37 S.E. 580 (1900) (emphasis added).

Activities such as selling the jointly owned property or extracting timber or minerals from the jointly held property with the knowledge and acquiescence of the cotenant constitute notice that an ouster has occurred. Syl. Pt. 11, *Jarrett*, 84 W. Va. 559, 101 S.E. 162. Activities such as these occurred as early as 1953. Specifically, Dora Jewell and Ada Jewell signed oil and gas leases for the Subject Property on June 29, 1953, and April 1, 1955, and a right-of-way agreement on December 28, 1956. A.R. 23. Beginning in 1958, the Subject Property was conveyed numerous times, including mineral reservations in 1958 and 1989, all without Margaret Fordyce Pike's or the Pike Respondents' participation. A.R. 24. Additional easements over the Subject Property were entered into in 1972 and 1975, again without the Pike Respondents' participation. A.R. 272, 372. The Subject Lease was entered into on June 11, 1976, and again the Pike Respondents were nowhere to be found. A.R. 372.

In 1989, CNG's drilling operations began and were visible, as residents of the adjacent property recall "seeing the lights" "when they brought in a rig and drilled" the well. A.R. 389. Beginning in 1989, CNG and its successors-in-interest have produced the mineral estate, paid royalties, and assigned rights associated with the oil and gas underlying the Subject Property via record instruments. A.R. 374-384. The Subject Property was subdivided in 1990 and 1992, again without the Pike Respondents' appearing. A.R. 25. Since Mr. Moffitt and Ms. Yoho purchased the parcel of land, they have installed a mobile home and erected a pump house on the property. A.R. 330-331. Mr. McCullough's predecessors erected a trailer, a chicken coop, and a carport on the Subject Property. A.R. 351-360. Mr. McCullough currently rents out the property to a full-time resident. A.R. 355. In 1990, Ritchie Petroleum removed an old barn and built a large storage barn, which it uses to store equipment. A.R. 320-327. Ritchie Petroleum, Mr. Moffitt, Ms. Yoho, and Mr. McCullough all paid real property taxes for their respective property. A.R. 322, 331, 355. In

addition, Antero and Antero Midstream LLC entered into agreements with the surface owners for the use of the surface estate for roadways and gas and water pipelines connected to Antero's Ritchie Petroleum Well Pad, located on the Subject Property. A.R. 321-322. All of these uses of the Subject Property directly contradict the circuit court's conclusion that the Non-Pike Respondents failed to occupy or use the Subject Property exclusively or with specific intent to oust the Pike Respondents. A.R. 625-626.

Moreover, the circuit court's assertion that Margaret Fordyce Pike and her successors' location alleviates their knowledge of the ouster is erroneous. A.R. 625. The Supreme Court of Appeals addressed this very issue in *Talbott*. 48 W. Va. 449, 37 S.E. 580. In *Talbott*, the Supreme Court found adverse possession occurred when one cotenant conveyed the property to a third-party who then conveyed it back to the cotenant. The other cotenant had left the country and was unaware of the ouster, but the Court held that this fact did not matter. The Court explained that "**[i]t matters not, he being out of the state, whether he received the notice or not; for they were not required to do anything off the land, or out of the county where it lay, to amount to such notice, but open, notorious, and exclusive possession on the land is all the law requires**." *Id.* at 581 (emphasis added). For the purposes of ouster and notice, the location of the cotenant was not relevant. Rather the open, notorious, and exclusive possession of the adverse possessors on the Subject Property is all that the law requires. The circuit court held the opposite in its February 29, 2024 Order, finding "the Pikes, living in a distant state, had no knowledge of the oil and gas operations of the Subject Property until 2014, at the earliest."[17] A.R. 625. Therefore, the circuit court erred in holding that Antero's showing of constrictive notice or knowledge was not sufficient to establish adverse possession or ouster.

[17] This is incorrect also as discovery showed the 2014 inquiry was related to a separate, unrelated property in Ritchie County, West Virginia, and not the Subject Property. A.R. 507.

3. The circuit court erred in holding that the Subject Property had not been adversely possessed for at least ten years.

The circuit court erred in holding that Antero did not show adverse possession of the subject property for at least ten years because the time of the adverse possession of the Non-Pike Respondents' predecessors-in-interest should be included and, alternatively, the adverse possession against Margaret Fordyce Pike's interest was complete before the Pike Respondents made a claim to the Subject Property. The statutory period for which the elements of adverse possession must be established is ten years. *See* W. Va. Code § 55-2-1 ("No person shall make an entry on, or bring an action to recover, any land, but within ten years next after the time at which the right to make such entry or to bring such action shall have first accrued to himself or to some person through whom he claims."). West Virginia has long recognized "tacking," which is a principle of calculating the time of adverse possession by considering successive adverse possessors' claims to the property.

In *Brown v. Gobble*, 196 W. Va. 559, 474 S.E.2d 489 (1996), the Supreme Court of Appeals reversed and remanded, in part, for the circuit court's failure to address defendant's tacking theory in connection with an adverse possession claim. "[T]acking periods of possession by successive possessors is permitted against the co-terminous owner seeking to defeat such [claim], unless there is a finding, supported by evidence, that the claimant's predecessor in title did not intend to convey the disputed strip." *Id.* at 566, 474 S.E.2d at 496. Accordingly, the Court held:

> In order to permit tacking of successive adverse possession claims, the ultimate fact to be established is the intended and actual transfer or delivery of possession to the grantee as successor in ownership of such area not within the premises, as described in the calls of a deed, but contiguous thereto. Privity means privity of possession. It is the transfer of possession, not title, which is the essential element.

Id. at Syl. Pt. 3. Cf. *Ho v. Rahman*, 79 Va. App. 677, 696, 896 S.E.2d 826, 835 & n.9 (2024) (recognizing that when ownership of an invaded property interest is transferred via sale the

currently running possessory period does not restart because someone else has continuously been in the position to defend the property right and eject the possessor, and describing the new doctrine as the mirror image of tacking).

The circuit court erred as a matter of law when it found that Non-Pike Respondents have "not continuously occupied the Subject Property for at least ten years," when "Ted McCullough received his interest in 2015; AMP received its interest in 2017; and Robert A. Borchers received his interest in 2014." A.R. at 621. The circuit court should have considered Antero's tacking theory and considered the preceding adverse possessors to calculate the statutory time period—rather than ignore this theory altogether.

The circuit court's reliance on when Mr. McCullough, AMP, or Mr. Borchers received their respective property interest disregards Antero's tacking theory, not to mention that Margaret Fordyce Pike's interest was lost to adverse possession as early as August 13, 1959. The undisputed record indicates that Ritchie Petroleum conveyed 11.03 acres of the Subject Property to Regena K. Hendrickson and James W. Hendrickson on May 14, 1992. A.R. 594. Then through mesne conveyances, Mr. McCullough obtained the 11.03 acres by deed on August 14, 2015. *Id.* Under Antero's tacking theory, the statutory time period does not commence on August 14, 2015, but rather the time period of the previous adverse possessors should be considered. The circuit court should have considered not only the time period that Mr. McCullough adversely possessed the property, but also his predecessors. A.R. at 621. The circuit court failed to do the same for AMP which obtained its interests on March 24, 2017, from predecessors who received their interest by deed on April 30, 1997. *Id.* at 595. Finally, the circuit court erred by failing to tack the statutory period of Mr. Borcher's predecessors going back to 1958. *Id.* at 594. Therefore, the circuit court erred in holding that the Subject Property was not adversely possessed for at least ten years.

VII. CONCLUSION

For all of the foregoing reasons, this Court should reverse the circuit court's grant of partial summary judgment to the Pike Respondents on Antero's claims for adverse possession and declaratory judgment and remand the action to the Circuit Court of Tyler County, West Virginia with instructions to enter summary judgment and declaratory judgment for Antero.

Respectfully submitted this 27th day of June, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of June, 2024, I filed the ***Brief of Petitioner Antero Resources Corporation*** via the File and ServeXpress system upon the following counsel of record:

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