IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Case No. 24-ICA-115

ANTERO RESOURCES CORPORATION,

Petitioner, Plaintiff Below

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,

Respondents, Defendants Below

PIKE RESPONDENTS' BRIEF

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

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I. STATEMENT OF THE CASE

This case involves a dispute between Respondents and Defendants below, Rufus Fordyce Pike, John Kent Pike, Jr., and Daniel Edward Pike (collectively, the "Pike Respondents"), and Petitioner and Plaintiff below Antero Resources Corporation ("Antero"), as to the Pike Respondents' fractional interest in the surface and minerals of an eighty-nine (89) acre tract (the "First Tract") and a seven (7) acre tract (the "Second Tract" and, collectively with the First Tract, the "Subject Property") located in Tyler County, West Virginia. The Pike Respondents have a valid ownership claim in the Subject Property dating back to 1942, when their mother was deeded a fractional interest in the same from her parents. This valid ownership interest was continuously ignored by oil and gas operators, who had knowledge—or record notice, at minimum—of the Pike Respondents' interest. Antero, despite knowledge of the Pike Respondents' interest, made the business decision to not lease the Pike Respondent's interest and drill horizontal oil and gas wells on units which include the Subject Property. Antero—who does not claim any ownership of the oil and gas minerals in place—now attempts to invoke an adverse possession claim to wash their hands of a clear trespass on the Pike Respondents' interest. The trial court correctly found under the facts presented *infra* that Antero's claim fails under West Virginia law. In this appeal, Antero seeks to have this Court re-write long-standing West Virginia law that protects cotenants from needlessly defending adverse possession claims when there has been no actual knowledge of ouster. This Court should reject this invitation and uphold the trial court's finding that the Pike Respondents did not have actual knowledge of any adverse claim and therefore no adverse possession has occurred.

While the pertinent chain of title and the material facts of the case are not in dispute, Antero misstated certain facts in the chain of title in its Statement of the Case, and its citations to the appellate record supporting the chain of title were to recitations in pleadings and arguments in

court filings, rather than to the land records themselves. *See* W. Va. R. App. P. 10(c)(4) (requiring that the Statement of the Case be "[s]upported by appropriate and specific references to the appendix or designated record"). To be clear on the chain of title and for the Court's ease of access to the land records at issue, the Pike Respondents present here the chain of title pertinent to their Response.

A. Agreed Chain of Title of the First Tract

On February 23, 1895, Alexander J. Joseph conveyed by deed to Margaret Adaline Fordyce a tract of land containing 89 and 38/160 acres in fee—the First Tract. A.R. 423. Margaret A. Fordyce died in 1931, leaving her real estate to her husband, Ingram L. Fordyce, for his life, with the remainder to her children, Rufus G. Fordyce and Daisy G. Broadwater. A.R. 283. Rufus G. Fordyce and Daisy Broadwater were the sole heirs at law of I.L. Fordyce, who died in 1933, and together inherited I.L. Fordyce's real estate through intestate succession, including the First Tract in fee. *Id.* Rufus G. Fordyce, the Pike Respondents' grandfather, thus owned a one-half interest in the First Tract. A.R. 296.

By deed dated January 31, 1942, Rufus G. Fordyce conveyed to Gertrude Cavaness all his interest in the First Tract. A.R. 201. The same day, Gertrude Cavaness, acting as a straw buyer, conveyed by deed all her interest in the First Tract to Rufus G. Fordyce; his wife, Edna L. Fordyce; and their daughter, Margaret Fordyce Pike, as joint tenants with rights of survivorship. A.R. 201–02. Margaret Fordyce Pike is the Pike Respondents' mother, and the deed specifically noted that she resided in Hennepin County, Minnesota. A.R. 201, 208. At this time, the First Tract was held in fee by these four individuals: Ms. Pike, Rufus G. Fordyce, and Edna L. Fordyce collectively owned one-half of the Property as joint tenants, and Daisy Broadwater owned the other one-half interest.

By deed dated August 13, 1949 (the "1949 deed"), Rufus G. Fordyce, Edna L. Fordyce, and Daisy G. Everhart (formerly Daisy Broadwater) conveyed to Dora Jewell part of their interest in the Subject Property, reserving for themselves "all the mineral rights, other than the oil and gas royalty. . . ." A.R. 203–04. This conveyance severed the joint tenancy with right of survivorship and created a tenancy in common, in which Ms. Pike had a one-sixth interest.

Critically, Ms. Pike did not join or sign the 1949 deed conveying the interests of Rufus G. Fordyce, Edna L. Fordyce, and Daisy G. Everhart. *Id.* Thus, Ms. Pike retained her one-sixth interest in the First Tract as a tenant in common, or cotenant, with Dora Jewell. Antero identifies no subsequent conveyances that specifically affect that interest.

B. Agreed Chain of Title of the Second Tract

At Tyler County Deed Book 74, page 77, J.S. Warner and his wife conveyed a tract of land containing 7 acres and 139 poles—the Second Tract—unto I.L. Fordyce, reserving a one-half interest in the oil and gas royalties underlying the tract. A.R. 512. Rufus G. Fordyce and Daisy Broadwater, the sole heirs at law of I.L. Fordyce, together inherited the Second Tract and each held a one-half interest in the property, less the reserved one-half royalty interest. A.R. 283.

By deed dated September 2, 1941, and through the same procedure as with the First Tract, Rufus G. Fordyce and Edna L. Fordyce conveyed unto Gertrude C. Cavaness all their interest in and to the Second Tract. A.R. 200. On September 16, 1941, Gertrude C. Cavaness, acting as a straw buyer, conveyed unto Rufus G. Fordyce, Edna L. Fordyce, and Ms. Pike all her interest in the Second Tract as joint tenants with the right of survivorship. *Id.* The deed again specifically noted that Ms. Pike resided in Hennepin County, Minnesota. *Id.*

In the same August 13, 1949, deed that conveyed the First Tract, Rufus G. Fordyce, Edna L. Fordyce, and Daisy G. Everhart conveyed to Dora Jewell their interest in the Second Tract,

reserving for themselves "all the mineral rights, other than the oil and gas royalty. . . ." A.R. 203–04. This conveyance severed the joint tenancy with right of survivorship between Rufus G. Fordyce, Edna L. Fordyce, and Ms. Pike and created a tenancy in common.

Again, Ms. Pike did not join or sign the 1949 deed conveying the interests of Rufus G. Fordyce, Edna L. Fordyce, and Daisy G. Everhart. *Id.* Thus, Ms. Pike retained her interest in the Second Tract as a tenant in common with Dora Jewell, and no subsequent conveyances identified by Antero affected that interest.[1] Specifically, when tracing the chain of title, all subsequent conveyances of the Subject Property ultimately refer to the interest conveyed as "being the same" interest[2] as that conveyed by Rufus G. Fordyce, Edna L. Fordyce, and Daisy G. Everhart in the 1949 deed, which on its face *did not* convey or purport to convey Ms. Pike's interest.

C. The Parties' Interests and Antero and Diversified's Recognition of the Pike Respondents' Interest

Ms. Pike passed away in January 2005, and her interest in the Property passed to her heirs, the Pike Respondents. A.R. 208. Ms. Pike passed away as a resident of Hennepin County, Minnesota, the same county she resided in when she was deeded her interests in the Subject

[1] To the extent the trial court erred in its calculation of the Pike Respondents' fractional interests in the Subject Property, that error does not necessitate reversal of the trial court's summary judgment ruling. Rather, the trial court may revise its February 27, 2024, Order under West Virginia Rule of Civil Procedure 54(b) to remedy any inaccuracy because the Pike Respondents' counterclaims remain pending. *See* W. Va. R. Civ. P. 54(b) ("any order . . . which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."); *see also* Pike Resp'ts' Mot. Dismiss Appeal (filed Apr. 16, 2024).

[2] Antero points out that the trial court's Order was inaccurate in stating that subsequent conveyances of the Subject Property refer to the interest conveyed as "being the same interest" conveyed in the 1949 deed, but this is a nonissue. The point of that observation was to note that the interest subsequently conveyed always referred back through the chain of title to the interest conveyed to Dora Jewell in the 1949 deed, which did not include Ms. Pike's interest. *See, e.g.*, A.R. 206–07 (conveyance to Summers: "Being the same two tracts or parcels of land that were conveyed to the grantor, Dora Jewell, by Rufus G. Fordyce and others" and specifically reserving one-half interest in all the oil and gas royalty); A.R. 210–11 (conveyance to Ayres: "Being the same two tracts or parcels of land conveyed unto the said parties of the first part by Dora Jewell and Ada O. Jewell" and noting the conveyance is made subject to previous reservations); A.R. 212–13 (conveyance to Ritchie Petroleum "Being the same lots, tracts or parcels of real estate granted and conveyed to J. Victor Ayers, by William C. Summers and Etta V. Summers" and reserving all oil, gas, and minerals to the grantor and predecessors in title); A.R. 215–16 (conveyance of Jewell's reserved mineral interest to Borchers: "Being the same interest reserved by Dora Jewell and Ada O. Jewell" and reserving royalty interest).

Property. A.R. 208–09. Ms. Pike never lived in West Virginia. A.R. 296:23–297:1. The Pike Respondents similarly have always lived outside of West Virginia, and until Antero contacted them in 2014, the Pike Respondents were unaware of their interest in any West Virginia property. A.R. 297, 310, 313.

Through various conveyances, Respondents James P. Moffitt, Tanya L. Yoho, Ted Arthur McCullough, Robert A. Borchers, Ritchie Petroleum Corporation ("Ritchie Petroleum"), and AMP Fund III, LP, (collectively, "the Cotenants") are record title owners of the remaining interest in the Subject Property. Antero is a mineral lessee of the subject estate. It owns no part of either the mineral or the surface estate and has no claim of ownership. Respondent Diversified Production LLC ("Diversified") similarly owns no part of either the mineral or the surface estate and has no claim of ownership. Antero acquired its interest to drill and produce from oil and gas wells on the Subject Property by lease in 2014. A.R. 30.

In or about November 2014, Respondent Rufus Fordyce Pike received a letter on Antero Resources Corporation letterhead from Kelly Davis, a representative of Antero Resources Corporation, dated November 17, 2014. A.R. 310–11, 418. The letter was addressed to Mr. Pike's daughter, Holly Pike Klein, and stated that Antero was looking for descendants of Rufus Gilbert Fordyce. A.R. 501. Mr. Pike called Ms. Davis in response to the letter and thereafter had several telephone calls with Ms. Davis, wherein Ms. Davis took family ancestry information from him, confirmed the accuracy of the family information, and advised him that she would pass the information on to Antero's attorneys. A. R. 292, 311–12, 421. Although the Pike Respondents answered the letter and explained their family ancestry, which linked them unequivocally to the Subject Property through their mother, Antero did not contact them again. A.R. 301. Instead,

Antero commenced operations to drill horizontal wells underlying the Subject Property in 2016 and 2017 and has since produced gas from the wells. A.R. 262–63.

By letter dated July 17, 2019, from Britany Halter, Division Order Analyst for Diversified, Diversified observed:

> Upon researching the Deed dated August 13, 1949 on conveyance from Rufus G. Fordyce, Edna L. Fordyce, and Daisy Everhart, heirs at laws of the Estate of Margaret A. Fordyce to Dora Jewell, recorded in Tyler County on book 129 pg. 67, **it is apparent that neither Margaret A. Fordyce or her correct heirs had legally entered into a sale.** Based on this research, 1/3 of the interest that was transferred to Dora Jewell will be transferred to the rightful heirs of Margaret A. Fordyce Pike, thus being Daniel E. Pike, Fordyce Pike and John H. Kent Pike, Jr.

A.R.418 (emphasis added). An abstract report dated August 15, 2019, from R. Holt Poling, Professional Independent Landman & Consultant, to Diversified states that 50% of ownership of the oil and gas underlying the subject tracts is owned by Rufus G. Fordyce and Edna L. Fordyce or their heirs or assigns. A.R. 427.

D. Procedural History

On September 25, 2019, after learning about their interest in the Subject Property specifically and the extent of the drilling thereon, the Pike Respondents filed a Complaint in the United States District Court for the Northern District of West Virginia, Case No. 5:19-CV-276.[3] A.R. 55. The Complaint stated trespass and conversion claims against Antero for occupying the Subject Property, constructing and using a haul road over the Subject Property, and operating oil and gas wells thereon without the Pike Respondents' permission. *Id.* The next day, Antero brought this declaratory judgment action in Tyler County Circuit Court against the Pike Respondents. A.R. 20. Antero alleged that the Pike Respondents have no valid ownership interest in the surface or mineral estate, claiming on behalf of the Cotenants that the Cotenants have each acquired title

[3] On November 2, 2019, the U.S. District Court dismissed the case on jurisdictional grounds.

through adverse possession. A.R. 33. The Pike Respondents answered the Complaint and asserted counterclaims against Antero for trespass, conversion, and unjust enrichment. A.R. 54.

Both Antero and the Pike Respondents fully briefed motions for summary judgment and filed supplemental briefing in support of their motions on the issue of the ownership of the Subject Property and whether the Pike Respondents' interest was lost to the Cotenants via adverse possession. On November 3, 2022, the trial court[4] denied Antero's motion for summary judgment on its adverse possession claim, as well as the Pike Respondents' motion for summary judgment on Antero's adverse possession and declaratory judgment claims. A.R. 546–47.

Antero filed a Motion for Reconsideration of the November 3, 2022, Order, and the parties fully briefed the motion. A.R. 550. In their response, the Pike Respondents argued that the trial court should reconsider the Order only insofar as it denied the Pike Respondents' Motion for Summary Judgment on Antero's adverse possession claim. A.R. 567–68.

The trial court held a hearing on the motion on January 23, 2024. A.R. 630. On February 27, 2024, based on the parties' substantial briefing and the arguments of counsel at the motion hearing, the trial court vacated the November 3, 2022, Order that denied the parties' cross motions for summary judgment, denied Antero's motion for summary judgment on its adverse possession claim, and granted the Pike Respondents' motion for summary judgment on Antero's adverse possession and derivative declaratory judgment claims. A.R. 612. This appeal followed.

II. SUMMARY OF ARGUMENT

Antero's arguments on appeal seek to disrupt over a century of settled West Virginia adverse possession law, ignoring longstanding cases regarding the cotenant relationships at issue and the notice requirements for cotenant ouster. West Virginia law is clear that actual knowledge

[4] This case was assigned to Chief Circuit Judge David Hummel until his resignation on November 23, 2022. The case proceeded under Judge Charles Wilson after he was appointed to fill the vacancy on February 1, 2023.

is required for a cotenant to oust another cotenant and claim the whole of a property by adverse possession. *See Harrell v. Cain*, 242 W. Va. 194, 202 n.10, 832 S.E.2d 120, 128 n.10 (2019) ("'[M]ere silent possession' of land by one cotenant is insufficient to establish an adverse possession claim against another cotenant. Instead, there must be evidence that one cotenant openly sought to oust the other cotenant, and *that ouster was known by the other cotenant*.") (emphasis added) (citing Syl. Pt. 10, *Jarrett v. Osborne*, 84 W. Va. 559, 101 S.E. 162 (1919)). Antero points to various facts regarding the conveyance of the Subject Property after Ms. Pike gained her interests in 1941 and 1942 and subsequent actions thereon as being sufficient to oust her and the Pike Respondents. But Antero cannot point to the only fact that matters under West Virginia law regarding adverse possession between cotenants—whether the cotenant to be ousted is aware or has actual notice of the other cotenants' intent to dispossess them.

The parties agree that the facts here are undisputed, and those facts provide that neither the Pike Respondents nor their predecessor in interest had knowledge or notice of any adverse or hostile claim against their interest by the Cotenants within the statutory period, defeating Antero's adverse possession theory as a matter of law. The trial court did not err in its order granting the Pike Respondents' Motion for Summary Judgment on Antero's adverse possession claim in holding that constructive notice or knowledge is insufficient to oust a cotenant on the facts of this case.

Antero's assignments of error on appeal fail. First, the Pike Respondents are tenants in common with the other Cotenants. Ms. Pike was never ousted—not by the 1949 Deed or any subsequent conveyance—because her cotenants could not and never purported to convey more than their own interest in the Subject Property in any of the deeds Antero cites. Second, the trial court's explicit acknowledgement that a cotenant must prove actual notice or knowledge when

attempting to adversely possess the whole of a property it shares with another cotenant is anything but contrary to West Virginia law. The cases Antero cites are all readily distinguishable, each require either actual notice or a clear conveyance of the whole of the disputed property, and nowhere is there a requirement in West Virginia law that only cotenants who are family or in business relationships with one another have to provide actual notice of their intent to dispossess other cotenants. Finally, even if there was not the issue of the lack of notice of ouster to the Pike Respondents and their mother, Antero still cannot prove the remaining elements of adverse possession on behalf of the Cotenants.

Accordingly, under blackletter West Virginia law, the Pike Respondents have not been ousted, and Antero has not met its burden of proof on the essential elements of adverse possession between cotenants. The trial court properly granted summary judgment on Antero's adverse possession claim in the Pike Respondents' favor, and this Court should affirm the trial court's ruling.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This Court should hear oral argument under West Virginia Rules of Appellate Procedure 18 and 20(a) because this appeal involves issues of fundamental public importance regarding the elements of adverse possession and retention of real property among cotenants in the State of West Virginia. Moreover, oral argument will aid the decisional process. The Court should issue a published opinion. W. Va. R. App. P. 22.

IV. ARGUMENT

This Court reviews "a circuit court's summary judgment order *de novo*." *Gastar Expl. Inc. v. Rine*, 239 W. Va. 792, 798, 806 S.E.2d 448, 454 (2017) (citing Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994)). "Summary 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." *Burnworth v. George*, 231 W. Va. 711, 716–17, 749 S.E.2d 604, 609–10 (2013) (quoting Syl. Pt. 2, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995)).

A. The 1949 Deed Did Not Purport To Convey Ms. Pike's Interest Or The Entire Tract And Thus Does Not Provide A General Warranty Over Property Not Conveyed, Did Not Oust Ms. Pike, And Did Not Give Dora Jewell Color Of Title.

Antero's initial arguments that the trial court erred in granting summary judgment to the Pike Respondents fail. These initial arguments hinge on what was conveyed in the 1949 deed, which Ms. Pike did not join. The 1949 deed did not convey Ms. Pike's interest—rather, it only conveyed the interests of her parents, Rufus G. Fordyce and Edna L. Fordyce, and her aunt, Daisy G. Everhart. *See* A.R. 203. This Court should disregard Antero's baseless argument for expansion of the 1949 deed's conveyance to the entire Subject Property, as there is no language in the instrument supporting that interpretation. A plain reading of the deed defeats each of Antero's arguments that (1) the "covenants of general warranty" language in the 1949 deed somehow covers Ms. Pike's unconveyed and unmentioned interest or somehow inures as a legal obligation of the Pike Respondents, (2) the 1949 deed ousted Margaret Fordyce Pike because it conveyed the entire Subject Property, and (3) the 1949 deed gave the Cotenants and their predecessors color of title as to the whole of the Subject Property.

1. The 1949 deed provides a general warranty on the interest of the Grantors in the deed and does not warrant additional property not conveyed.

First, the idea that the Pike Respondents are responsible for warranting a deed that their predecessor in title did not sign and that did not convey the interest of their predecessor in title is plainly wrong—and would uproot settled West Virginia law. It is longstanding law in West Virginia that a "covenant of general warranty in a deed cannot enlarge the estate thereby conveyed." Syl. Pt. 1, *King v. Smith*, 88 W. Va. 312, 106 S.E. 704 (1921). "A covenant of general warranty in a

deed, which grants all of the right, title, and interest of the grantor, is restricted to the estate conveyed, and does not warrant the title to the land described in the deed." *Id.* at Syl. Pt. 2.

Ms. Pike was not a grantor in the 1949 deed, and thus she did not provide a general warranty over any interest it conveyed. It is true that grantors, Rufus G. Fordyce, Edna L. Fordyce, and Daisy G. Everhart, styled themselves as "the heirs at law of the estate of Margaret A. Fordyce and I.L. Fordyce, deceased" in the 1949 deed. But that language simply confirms their ownership interest in the Subject Property and does not expand the conveyance to cover the interests of individuals who are not mentioned in or signees to the deed. It also does not void the fact that Rufus G. Fordyce and Edna L. Fordyce conveyed part of their interest to their daughter, Ms. Pike. The 1949 deed language does not evidence an intent to divest their daughter and niece, Ms. Pike, of her interest in the Subject Property. This makes good sense. Ms. Pike's parents went out of their way to ensure their daughter had an ownership interest in the Subject Property via the 1941 and 1942 deeds. It makes no sense for them to turn around only seven years later and divest her of the same. Further, Rufus G. Fordyce, Edna L. Fordyce, and Daisy G. Everhart *were* the heirs at law of the estate of Margaret A. Fordyce and I.L. Fordyce, and they conveyed *their* interests with covenants of general warranty in the 1949 deed and nothing more. The 1949 deed supports the Pike Respondents' position on its face.

The excerpt from *Laing v. Gauley Coal Land Co.* that Antero quotes did not include the dispositive facts of the case, and *Laing* otherwise supports the Pike Respondents' position. Syl. Pts. 2 and 4, 109 W. Va. 263, 153 S.E. 577 (1930). There, the predecessor in title of the plaintiffs, who opposed the defendant's adverse possession claim, had executed a power of attorney authorizing sale of the disputed property (that was later found void) and had accepted purchase

money from the defendant's predecessor in title for the land their heirs later claimed to own. *Id.* 153 S.E. at 579. The plaintiffs' argument relied on the following case law:

> [T]he **conveyance of only a part of the common property**, or an individual interest therein, by [a] co–tenant, to a stranger and entry of the stranger thereon **is not an ouster of the grantor's co–tenants** as to the residue of the common property, nor, in the latter case, as to any of it, and do not constitute as to it, either an ouster or the beginning of adverse possession[]—citing Boggess v. Meredith, 16 W. Va. 1; Worthington v. Staunton, 16 W. Va. 208 . . . "There was **no express or actual notice** to the plaintiffs or those under whom they hold, of intent on the part of the defendants, to claim and hold exclusive title to the whole of the Skaggs tract, nor were the acts done thereon of such character as to constitute notice thereof, **an essential element in the law of ouster between co–tenants**" —citing Reed v. Bachman, 61 W. Va. 452, 57 S. E. 769, 123 Am. St. Rep. 996; Cooey v. Porter, 22 W. Va. 120, and Russell v. Tennant, 63 W. Va. 623, 60 S. E. 609, 129 Am. St. Rep. 1024.

Id. 153 S.E. at 579 (emphasis added). While the Court regarded the plaintiffs' authority, it preserved the actual notice requirement for cotenant ouster and held that the above-mentioned facts were dispositive because they constitute actual notice:

> [I]n the instant case the possession adverse to the plaintiffs and those under whom they claim was not started by a conveyance made by cotenants of Mrs. McClung and Mrs. Livesay, nor was it started by a mere adverse holding of a cotenant or his assigns without color of title, but was **started by the deed**, void as to them, **made by their attorney in fact**. . . .
> [T]he execution of the void power and the receipt by Mrs. Livesay and Mrs. McClung of their respective shares of the purchase money **cannot be construed as anything less than actual notice** to them of the adverse and hostile claim of the purchasers who paid the money. And in the second place, the many acts of open, notorious, adverse possession, particularly the cutting of the timber, were acts of which these women **were bound to take notice** as being hostile to them. . . . Both women **lived within a few miles of the land**.

Id. 153 S.E. at 579–80 (emphasis added). By observing that the dispossessed cotenants executed documents authorizing the conveyance of their interest and noting that the dispossessed cotenants lived near the disputed property such that they could observe their cotenants' actions, the *Laing* court preserved an actual notice requirement. Importantly, none of the facts the court found dispositive are present in this case. Ms. Pike did not live near the Subject Property and did not live

in West Virginia, and neither did her heirs. A.R. 296:23–297:1. Neither she nor her heirs ever executed a deed conveying their interest or received any payment pursuant to their interest in the property, which additionally distinguishes this case from *Custer v. Hall*, 71 W. Va. 119, 76 S.E. 183, 186 (1912). Finally, there has been no argument that the 1949 deed is void.

Similarly *Russell v. Tennant*, when read in context, supports the Pike Respondents' position, not Antero's. 63 W. Va. 623, 60 S.E. 609 (1908). There, the court ensured that the requirement for actual notice for ouster between cotenants was met by observing that the ousted cotenant had been given notice of the possessing cotenant's intent to claim the whole of the property and to disavow and repudiate the ousted cotenants' interest. *Id.* 60 S.E. at 613 (finding in favor of the adverse possessor in part because "[t]hey disavowed and repudiated the claim of title of [the ousted cotenant], and gave her notice of such repudiation and disavowal"). Again, the holding in *Russell* which found that the elements of adverse possession were satisfied between cotenants relied on facts establishing actual notice that are not present in this case.

Unlike the aforementioned cases, here, neither the Pike Respondents nor their mother ever had knowledge or notice to put them on inquiry of their cotenants' intent to dispossess them. Nor did the 1949 deed at issue purport to convey Ms. Pike's interest in the Subject Property. The trial court did not err in finding that the Pike Respondents' interest was not adversely possessed by the Cotenants.

2. The 1949 deed did not oust Ms. Pike because it did not convey to Dora Jewell the right to possess the whole property.

Next, Antero claims that the 1949 deed ousted Ms. Pike because it conveyed the Subject Property to a stranger to the original cotenancy. Not only did the 1949 deed not convey Ms. Pike's interest in the Subject Property, but grantors Rufus G. Fordyce, Edna L. Fordyce, and Daisy G. Everhart did not convey *their* entire interest in the Subject Property in the 1949 deed, either.

Rather, Rufus G. Fordyce, Edna L. Fordyce, and Daisy G. Everhart—and only these three individuals—conveyed to Dora Jewell part of their interest in the Subject Property, reserving for themselves "all the mineral rights, other than the oil and gas royalty" in the Subject Property. A.R. 203–04. In no way does the 1949 deed purport to convey the whole of the Subject Property in fee, nor does it purport to convey Ms. Pike's interest, again in stark contrast to each of the cases Antero cites in its argument. *Contra Lloyd v. Mills*, 68 W. Va. 241, 69 S.E. 1094, 1096 (1910) (stating that "[w]here one cotenant makes an executory contract to a stranger **for the whole tract**, and it is followed by possession, that is an ouster of the other tenant and confers title") (emphasis added).

Nor did any subsequent conveyance in the record by the Cotenants' predecessors in interest purport to transfer the whole of the Subject Property. As noted above, when tracing the chain of title, all subsequent conveyances of the Subject Property ultimately refer to the interest conveyed as "being the same" interest as that conveyed in the 1949 deed—which only conveyed the Grantors' two-thirds interest and not Ms. Pike's interest. *See* A.R. 206–07 (conveyance to Summers: "Being the same two tracts or parcels of land that were conveyed to the grantor, Dora Jewell, by Rufus G. Fordyce and others" and specifically reserving one-half interest in all the oil and gas royalty); A.R. 210–11 (conveyance to Ayres: "Being the same two tracts or parcels of land conveyed unto the said parties of the first part by Dora Jewell and Ada O. Jewell" and noting the conveyance is made subject to previous reservations); A.R. 212–13 (conveyance to Ritchie Petroleum "Being the same lots, tracts or parcels of real estate granted and conveyed to J. Victor Ayers, by William C. Summers and Etta V. Summers" and reserving all oil, gas, and minerals to the grantor and predecessors in title); A.R. 215–16 (conveyance of Jewell's reserved mineral interest to Borchers: "Being the same interest reserved by Dora Jewell and Ada O. Jewell" and

reserving royalty interest). No deed purported to give the Cotenants ownership of the whole property, and thus Margaret Fordyce Pike and her heirs were not ousted.

Antero's citations to out of state authority do not reflect West Virginia law or control the outcome of this appeal. In West Virginia, "[t]hat a grantee acquires nothing more than the grantor owns and can convey, particularly where the title of grantor appears in deeds of record, and grantor's intentions are expressed in his deed, avails ordinarily. . . ." *Wellman v. Tomblin*, 140 W. Va. 342, 344, 84 S.E.2d 617, 619 (1954). "To enable a deed to operate as an effectual conveyance there should be proper and sufficient words manifesting an intention to transfer an estate." *Erwin v. Bethlehem Steel Corp.*, 134 W. Va. 900, 914, 62 S.E.2d 337, 345 (1950). None of the deeds Antero presented on behalf of the Cotenants and their predecessors in title include sufficient words to manifest an intention to transfer Ms. Pike's interest, nor do the deeds otherwise purport to convey the First or Second Tract in fee or Ms. Pike's interest. Thus, Antero's arguments fail.

3. The 1949 deed did not give Dora Jewell color of title in Ms. Pike's interest.

Finally, for the same reasons, the 1949 deed did not give Dora Jewell or his successors in interest color of title over the entire Subject Property. A deed cannot constitute color to a greater estate than it purports to convey. *Custer*, 76 S.E. at 186. The trial court repeated this basic principle of property law during the hearing on Antero's motion to reconsider: "THE COURT: How -- how did Margaret lose her interest? I mean, in the 1949 deed, the signatories to the deed can only convey that which they have to convey." A.R. 642:14–16.

Because the 1949 deed plainly did not convey Ms. Pike's interest, the entire estate, or even the grantors' entire interest in the Subject Property, it did not constitute color of title for the entire Subject Property to Dora Jewell.

B. The Circuit Court Followed Longstanding West Virginia Precedent When It Held That Antero Must Prove That The Pike Respondents Had Actual Notice To Make Its Adverse Possession Claim On Behalf Of The Cotenants.

For over a century, West Virginia case law, including the cases Antero cites, stand for the proposition that a cotenant cannot claim ownership of the whole of a property without providing actual notice to other cotenants of the same, regardless of whether there is privity or some other relationship extant between the cotenants. Every case incorporates actual notice in some capacity. Moreover, cotenants making use of the whole of the jointly owned property—including entering leases, selling minerals, and conveying their interests to others—has never been sufficient to oust other cotenants unless the cotenants to be ousted were aware of or lived near enough to the property that they should have been aware of the hostile, adverse, and notorious actions occurring thereon. West Virginia law requires that Antero's claims fail because they have not and cannot show such notice on the part of Ms. Pike or the Pike Respondents.

1. Tenants in common must provide actual notice of their intent to dispossess their cotenants regardless of whether they are in privity or have some other relationship.

Antero's adverse possession claim contends that the Pike Respondents hold no valid ownership interest in the surface or mineral estate because they and their predecessors in title had constructive notice of the Cotenants' actions on the property. However, West Virginia law is "clear" that "mere silent possession" of land by a cotenant is insufficient to establish an adverse possession claim against another cotenant, and rather there must be evidence that "one cotenant openly sought to oust the other cotenant, and that ouster was **known** by the other cotenant." *See Harrell v. Cain*, 242 W. Va. 194, n.10, 832 S.E.2d 120, n.10 (2019) (emphasis added). "An actual ouster of one tenant in common cannot be presumed, except where the possession has become tortious and wrongful by the disloyal acts of the co-tenant. . . . [t]his conduct must amount to a clear, positive,

and continued disclaimer and disavowal of his co-tenant's title, and an assertion of an adverse right; and a **knowledge of this must be brought home to his co-tenant**." *Reed v. Bachman*, 61 W. Va. 452, 57 S.E. 769, 771 (1907) (emphasis added).

Antero cites *Custer v. Hall* for the proposition that constructive notice is sufficient—a case that was never argued below, has never been cited for that proposition, and which no West Virginia Court of Appeals' opinion has cited since 1960. In reaching that one-off statement of the law, which was not central to the court's holdings, the court in *Custer* relied on three cases. *See* 76 S.E. at 186 (citing *Parker v. Brast*, 45 W. Va. 399, 32 S.E. 269; *Justice v. Lawson*, 46 W. Va. 163, 33 S.E. 102; *Cooey v. Porter*, 22 W. Va. 120; 23 Cyc. 492). None of those cases stand for the proposition that constructive notice is sufficient for ouster between cotenants.

First *Parker v. Brast* plainly requires that cotenants must have "full knowledge" of the open and notorious acts of their cotenants for those cotenants to effect an ouster, or disseisin, of their cotenants. 45 W. Va. 399, 32 S.E. 269, 271 (1898). The only mention in *Parker* of constructive notice was in response to a defendant arguing he was a bona fide purchaser without knowledge of a competing deed when that deed was already recorded. *Id.* 32 S.E. at 270 ("These parties all had constructive notice of the condition of the title from the records, and they cannot claim to be innocent purchasers for value without notice.").[5] Next, *Justice v. Lawson* similarly supports the

[5] Contrary to Antero's arguments, it is the Cotenants and their predecessors in interest who were obligated to make inquiry into the Subject Property's chain of title and had constructive notice of Ms. Pike's interest. "Every one must look back, and notice things in the chain of title under which he acquires." *Reed*, 57 S.E. at 773. Antero, Diversified, and their predecessors in interest, as oil and gas producers, similarly "had an obligation to ascertain the proper owner of the mineral rights. . . ." *Drake v. Waco Oil & Gas Co.*, 223 W. Va. 568, 572 n.4, 678 S.E.2d 301, 305 n.4 (2009). Margaret Fordyce Pike's interest was recorded barely a decade before Dora Jewell entered into the first oil and gas leases for the Subject Property in 1953 and would have been found based on a standard title search. A.R. 514–17. *See* David McMahon, *The Marcellus Shale the Need to Change Real Estate Transaction Documents*, W. Va. Law., Apr./June 2010, at 26, 28 (noting that the standard practice for oil and gas companies is to trace mineral title back 60 years). Cotenant Ritchie Petroleum, which leased to Antero its interests, was deeded its interests and began subdividing the property in 1989, less than 60 years after Margaret Fordyce Pike became a record title owner. A.R. 262–63. Diversified's predecessor in interest, CNG Development Company, also drilled its first well on the Subject Property in 1989. *Id.* It is difficult to imagine that Ritchie Petroleum subdivided the property and CNG Development Company drilled a well on the property without completing a title search, finding Ms. Pike's interest, and choosing to ignore it.

Pike Respondents' statement of the law: "It is the intention of the tenant or parcener in possession to hold the common property in severalty, and exclusively as his own, **with notice or knowledge to his co-tenants of such intention**, that constitutes the disseisin." 46 W. Va. 163, 33 S.E. 102, 107–08 (1899) (emphasis added). Finally, actual notice was similarly central to the holding in *Cooey v. Porter*. *See* 22 W. Va. 120 (1883). In *Cooey*, defendant John Porter owned a seven-eighths interest in the disputed property, and the remaining interest was owned by his sister, Mary. *Id.* at 122. Both residents of Ohio County, Mary conveyed her interest to John, who subsequently lived on the property throughout the duration of Mary's life. *See id.* at 122–23. Mary's heirs sued claiming a one-eighth interest in the property, arguing the deed to John was defective. *See id.* The court found the deed, whether defective or not, showed Mary's intent to convey the property and forfeit her interest to John, and thus Mary had actual knowledge of John's claim to the entire property. *See id.* at 127. Because of this intent and knowledge, and because for decades after signing the deed, Mary was aware that John possessed the entire property, the court found that John ousted Mary. *See id.* at 127–28. Again, none of these operative facts are present here.

In case after case—including each case Antero cites—West Virginia law requires actual notice for ouster between cotenants. While Antero attempts to distinguish *Reed* on the basis that it was a case between "business partners" in privity, the Court was unequivocal in its restatement of the controlling law:

> There must be some overt, open, notorious act of a character to indicate an intention of adverse claim, so as to preclude all doubt of the character of his

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It was noted in both deeds conveying Ms. Pike's interests that she resided in Hennepin County, Minnesota, the same county where she died over 60 years later. Ms. Pike was not missing—any of the companies or cotenants could have located her to lease or buy her interest in the Subject Property. Indeed, the development companies' surreptitious actions seem to have been surreptitious to simplify the leasing and development process, to the companies' advantage. *See, e.g.*, *Boggess v. Meredith*, 16 W. Va. 1, 22 (1879). In any case, these actions were insufficient to establish adverse possession against Ms. Pike and her heirs because they never received notice of the adverse claims. If any one of these companies or any of the cotenants would have provided such notice, and it went ignored for the statutory period, Antero's argument in this case may hold water. Those facts are not present in the record, and the Court should not reward the drilling companies and cotenants for their underhanded tactics with the Pike Respondents' rightful interests.

> adverse holding, whereas taking profits by one co-tenant in possession is but the exercise of a legal right, subject to an accounting to another for his share. There must be clear, positive, continued disclaimer of his co-tenant's right and an assertion of his own adverse right. **And that is not enough. His co-tenant must know of such adverse claim and tortious acts.** He is not bound to inquire, because he can repose in confidence of his co-tenant's good faith. That co-tenant must notify him of his adverse claim, or, at any rate, he must know of it. . . .

Reed, 57 S.E. at 772.[6] Antero's argument that privity or common title between cotenants is necessary for the Court to require actual notice in an adverse possession claim between cotenants is defeated by the *Reed* court's emphasis that

> **No matter what the acts of one co-tenant may be, whether by taking a deed for the whole or by taking rents and profits, or what not. That will not do; for our decisions say with emphasis that such knowledge or notice of hostile claim on the part of the contestant must be shown**. There is not a particle of appearance on the face of this bill . . . that Reed, **living in a distant place**, had notice or knowledge of any adverse claim. The bill distinctly states that Reed had no such notice of any adverse claim by Bachman. That would be enough to repel the idea of ouster. . . .

Id. If a cotenant may "tak[e] a deed for the whole" of the property, yet another cotenant may not be dispossessed of their interest unless it is shown that they had actual notice of their cotenant's hostile claim, then privity is plainly not required to oppose cotenants' or their successors' in interest adverse possession claims on the basis of lack of notice or knowledge. *Cf. Cecil v. Clark*, 44 W. Va. 659, 30 S.E. 216, 225 (1898) ("[U]nity of title is not necessary to constitute persons tenants in common.").

Indeed, the court in *Jarrett v. Osborne* specifically noted that the cotenants claiming adverse possession *were not* in privity with the original cotenants. 84 W. Va. 559, 101 S.E. 162, 166 (1919) ("It is true that the claimants under the tax deeds do not hold in privity with the former

[6] Antero's block quote from *Reed* states, "Mere silent possession, ever so long, by 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." Pet'r's Br. 22–23. The quote from *Reed* actually states, "Mere silent possession, ever so long, by one taking rents and profits, without notice or knowledge of such adverse claim on the part of the other, will **not** be adverse possession under the statute." Syl. Pt. 1, 61 W. Va. 452, 57 S.E. 769 (emphasis added).

owners. . . ."). Yet the court still required "the knowledge and acquiescence of [the allegedly ousted] cotenant" before the defendants could begin to legally claim title to the whole of the property through adverse possession, even when the defendants claiming adverse possession had "been making sale of large parts of" the land at issue and "for many years the [defendant cotenants] and those claiming under them have been exercising acts of ownership upon this land inconsistent with the interest of joint owners therein." *Id.* at Syl. Pt. 11, 101 S.E. at 166. Because the allegedly ousted plaintiffs "were entirely ignorant of their interest in the land . . . lived in distant parts of the country, and as soon as they became possessed of information that they had interests in the land . . . immediately began proceedings to recover the same" the Court held that the defendants had not sufficiently shown adverse possession of the plaintiffs' interest. *Id.* 101 S.E. at 167 (finding that it did not appear "that the plaintiffs had actual knowledge of the deeds under which the defendants now claim, or that that they had knowledge of such a state of facts as was bound to disclose to them that the defendants were claiming the whole estate").

The court's holding in *Boggess v. Meredith* was the same. *See* 16 W. Va. 1, 2 (1879). There, a brother and sister owned a tract of land in Upshur County as tenants in common. *Id.* The brother conveyed by deed his interest in the tract to an unrelated person, Benjamin Dill, who treated the entirety of the tract as his own. *Id.* The deed was not signed by the sister, who lived in Delaware, and did not indicate that she had independent interest in the tract. *Id.* at 3. Her interest in the tract was conveyed to James Furbee, who initiated proceedings against the heirs of Benjamin Dill, who had at that point been in possession of the land and paid taxes on it for over 20 years. *Id.* Finding in favor of Mr. Furbee, the court held that:

> Under these circumstances [Dill] having of the lands taxed to him alone, the payment of the taxes by him, the making of the deeds in the form he made them, not admitting on their face her title as co-tenant, the recording of these deeds by the purchasers, the claim made by him in this distant State that he was the sole owner

> of the lands, are all, it seems to me, **entitled to no weight** as circumstances from which to presume [the sister] had made a conveyance to him of all her interest in these lands, or that he had made an **actual ouster** of her as his tenant in common. There is not the slightest probability that she ever had any **knowledge**, that in the **far distant State** of Virginia he and his agents had set up a pretence, that he was the sole owner of this tract of land, or that he was then acting in any manner in bad faith to her as his co-tenant. . . .
> She certainly never had **the equivalent of actual notice**, that her co-tenant disclaimed their common title and set up an adversary claim; and without this no length of time would convert his possession into a bar of her rights.

Boggess, 16 W. Va. at 22–23, 25 (emphasis added).

As in *Reed*, *Jarrett*, and *Boggess,* there can be no ouster here because the Pike Respondents lived in distant states and had no knowledge of their interest in the Subject Property, and thus it was impossible for them to have actual knowledge of any alleged hostile claim. The Pike Respondents and their mother never had notice of their cotenants claiming the Subject Property adversely, never executed any documents conveying their interest to their cotenants, and had no knowledge of the Cotenants' use of the Subject Property until 2014 at the earliest. Once the Pike Respondents learned that Antero moved forward with its operations on the Subject Property without their permission or paying them royalties, the Pike Respondents brought suit to protect their interests. None of the cases Antero cites specifically stand for the proposition that only related cotenants or those in privity have to adhere to binding West Virginia law requiring actual notice for adverse possession between cotenants.

Thus, the ruling of the trial court was not in error. Rather, the trial court followed West Virginia precedent and correctly granted summary judgment to the Pike Respondents when it ruled that Antero cannot prevail on an adverse possession claim as a matter of law, as West Virginia law dictates that a cotenant cannot oust, or adversely possess against, another cotenant without showing that the allegedly ousted cotenant had actual knowledge or notice of the other cotenants' clear repudiation and disavowal of their interest.

2. The Cotenants' use of the whole of the Subject Property constitutes ordinary acts of ownership that are insufficient to satisfy the notice requirement under West Virginia law without the Pike Respondents' knowledge.

Additionally, contrary to Antero's arguments, the performance of ordinary acts of ownership with respect to property held by a cotenant in possession do not establish that the possession is adverse to other cotenants. Antero claims the Pike Respondents were ousted because the recording of subsequent deeds, oil and gas leases, and the allegedly visible oil and gas drilling operations on the Subject Property put the Pike Respondents on notice of their cotenants' open, notorious, hostile, and exclusive claims. Similarly, Antero argues that the improvements to the Subject Property were sufficient to put the Pike Respondents on constructive notice, and thus ouster was established.

Again, long established West Virginia precedent on adverse possession between cotenants defeats Antero's arguments. "Any one of the joint owners of a tract of land is entitled to be in the possession of it," and "the possession of one cotenant is the possession of all." *Jarrett*, at Syl. Pt. 8; 101 S.E. at 166. The cotenant out of possession "is not bound to inquire, because he can repose in confidence of his co-tenant's good faith." *Reed*, 57 S.E. at 772.

West Virginia law is clear in that cotenants merely executing a lease without the Pike Respondents' knowledge, occupying the property, and not sharing oil royalties with the Pike Respondents is also insufficient to establish ouster. Like in *Reed*, collecting oil royalties "is but the exercise of a legal right" of a cotenant in possession and is insufficient to establish ouster against another cotenant. *Id*. These acts cannot be enough to oust a cotenant because they are typical acts of ownership. To adversely possess the property sufficient to oust a cotenant, the other cotenant must clearly dispossess the other cotenants' interest with other cotenants' knowledge. Even when a cotenant "openly treats" a property as their own by extracting and selling minerals or timber

therefrom and erecting structures to support such operations, such action is legally consistent with their ownership interest and will only amount to ouster when the non-possessing cotenant has "knowledge and acquiescence" of such extensive actions or of the possessing cotenant's intent to divest their interest. *See Jarrett* at Syl. Pt. 11. Mere constructive notice is not sufficient to establish ouster because "possession, however long, by one taking rents and profits, without notice or knowledge of such adverse claim on the part of the [allegedly ousted cotenant], will not render such possession adverse." *Id.* at Syl. Pt. 10.

The logic behind this blackletter West Virginia law is sound—cotenants are allowed to treat the land as if they own it, erect structures, and enter leases because they do own the property and have the rights to do so. Changing this rule and deferring to Antero's arguments jeopardizes the validity of thousands of West Virginia cotenants' property rights and would result in a deluge of adverse possession claims by silent cotenants attempting to lay claim to other cotenants' property interests. Such a ruling discharges the burden the law places on the ousting cotenant to prove an ouster and instead places the same obligation on a cotenant to ensure that he is not ousted by another cotenant that the law places upon an individual owner of land to see that his land is not taken by the adverse possession of a stranger to the title. *See Pickens v. Stout*, 67 W. Va. 422, 68 S.E. 354, 365–66 (1910). It also overthrows over a century of adverse possession jurisprudence that consistently mandates actual notice for an ouster or disseisin of a cotenant.

Here, taken separately or together, the Cotenants' acts with regard to the Subject Property do not "amount to a clear, positive, and continued disclaimer and disavowal" of the Pike Respondents' interest, as no cotenant or entity ever provided actual notice to the Pike Respondents that they were adversely claiming their interests. *Reed*, 57 S.E. at 771.

The case Antero cites, *Talbott v. Woodford*, is again readily distinguishable from these facts and otherwise supportive of the Pike Respondents' position. 48 W. Va. 449, 37 S.E. 580, 580 (1900) (noting that the dispossessed cotenant, before leaving West Virginia, explicitly agreed that the possessing cotenant should keep the land in full). Once more, the court preserved the actual notice requirement, as the predecessor in title to the plaintiff heir had disclaimed any interest in the property in controversy to the defendant, who argued he owned the property via adverse possession. *Id.* at 580. Pertinent here, the *Talbott* court observed that "[t]he possession of one tenant in common is the possession of both or all. Such possession, therefore, can never be adverse until there is an actual ouster of the co–tenants, or some act deemed by law equivalent thereto." *Id.* Just as the cases in Section IV.A.2., *supra*, held, the *Talbott* court also acknowledged that an act equivalent to actual notice may be "[a] conveyance by one co–tenant **of the entire estate** . . . if possession is taken under it, the grantee claiming title to the whole." *Id.* (emphasis added). Here, no deed ever purported to convey the whole Subject Property, including Ms. Pike's interest, and neither she nor her heirs ever otherwise disclaimed their interest to their cotenants.

Antero additionally implies that the Cotenants' payment of taxes on the Subject Property is evidence of adverse possession. Real estate taxes on the Subject Property, including the Pike Respondents' interests, have been assessed by the Assessor of Tyler County on the combined full interests of surface and oil and gas relating to the Subject Property pursuant to West Virginia Code § 11A-1-9 and have always been paid by Ms. Pike and the Pike Respondents' cotenants, resulting in no forfeiture of their interest. The fact that cotenants paid real estate taxes has no bearing on the Pike Respondents' ownership of the Subject Property. *See Boggess*, 16 W. Va. at 24.

Moreover, the Pike Respondents did not "feign ignorance" of notice as Antero offensively suggests. They were unaware of the cotenants' actions on the property because they were unaware

that they had rights to the subject property. *See, e.g.*, A.R. 313:12–15 ("[I]s it your testimony that you do pay taxes on the subject property? A. Well, we weren't even aware . . . the property was there, so it's kind of hard to pay taxes on it."). Similarly, neither Ms. Pike nor her heirs signed the agreements or easements Antero refers to because they were unaware of these actions on the property. In contrast, Antero was aware of the Pike Respondents' record ownership in various West Virginia mineral estates—otherwise, Antero would not have contacted them at the same time that Antero acquired its interest in leases of the Pike Respondents' property.[7] Like the previous oil and gas development companies operating on the Subject Property, it was more convenient for Antero, Dora Jewell, and the other cotenants and development companies to "feign ignorance," cut off all contact with the Pikes, and pretend that the Pikes' interest did not exist. *See Boggess*, 16 W. Va. at 22 (the allegedly dispossessing cotenant "knew that parties, who bought for homes for themselves, would be unwilling to purchase an undivided interest in these lands; and the deed, while it really conveyed only an undivided moiety of the lands, was so written that strangers would suppose it conveyed the whole of the lands").

However, ignoring the Pike Respondents' interest is not sufficient to have adversely possessed against Ms. Pike or her heirs. To oust a cotenant, it must be shown that the cotenant had knowledge of their intent to dispossess—and Antero cannot show that here. The trial court's grant of summary judgment to the Pike Respondents was not in error.

C. The Circuit Court Correctly Held That Antero Did Not Prove All Of The Essential Elements Of Adverse Possession Because The Record Does Not Support That Dora

[7] The trial court's bifurcation of discovery prevented the Pike Respondents' from procuring additional evidence of exactly what Antero knew about their interests in the Subject Property and when. *See* A.R. 149. Discovery on the Pike Respondents' counterclaims will ensue should this Court affirm and remand.

Jewell And His Successors Held The Subject Property Openly, Notoriously, And As If They Owned It Exclusively.

One who seeks to assert title to a tract of land under the doctrine of adverse possession must prove each of the following elements for the requisite statutory period: (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; (4) That possession has been exclusive; (5) That possession has been continuous; (6) That possession has been under claim of title or color of title. *Teubert Fam. Farms, LLC v. Bragg*, 242 W. Va. 445, 449–50, 836 S.E.2d 412, 416–17 (2019) (citing Syl. Pt. 3, *Somon v. Murphy Fabrication and Erection Co.,* 160 W. Va. 84, 232 S.E.2d 524 (1977)).“The burden is upon the party who claims title by adverse possession to prove by clear and convincing evidence all elements essential to such title.” Syl. Pt. 2, *Brown v. Gobble,* 196 W. Va. 559, 474 S.E.2d 489 (1996).

Antero is a mineral lessee of the Subject Property and it does not claim or seek to assert title to the Subject Property by adverse possession. Despite having no ownership interest or color of title in either the subject surface or subject minerals, and despite not having an adverse possession claim in its own right, Antero asks the Court to find that Antero has proven adverse possession on behalf of the Cotenants—as does Diversified. But neither Antero nor Diversified can properly assert the doctrine of adverse possession on behalf of any third party, as West Virginia law requires that the adverse possession claimant be the same individual claiming title. While Antero, as an interested party, may bring a declaratory judgment claim under the Uniform Declaratory Judgments Act, W. Va. Code § 55-13-2, its legal theory goes well beyond the authority of the statute. While the Declaratory Judgments Act allows any person with an affected interest to bring a claim, adverse possession law in West Virginia requires that *the party claiming title* bring

the adverse possession claim to protect their interest. That has not happened here, as the Cotenants never brought their own adverse possession claims.

Moreover, Antero's argument that the period of time that the Cotenants' predecessors-in-interest occupied the Subject Property should be tacked onto or included in any calculation of the Cotenants' exclusive possession of the Subject Property ignores well-settled West Virginia law holding that the duration of adverse possession of one cotenant only begins to run against a second cotenant when the second cotenant has actual knowledge or notice of the first cotenant's intent to dispossess them of their property. Although Antero claims that the Cotenants have occupied the Subject Property for the statutory period, West Virginia law uniformly states that an ousting cotenant's possession will only be regarded as adverse to his cotenants from the time the cotenants are shown to have knowledge of such acts and claims: "[T]he Statute of Limitations will not begin to run against such cotenant out of possession until such actual notice is conveyed to him, or he has notice of a state of facts inconsistent with any other conclusion than that he knew of such adverse claim." *Jarrett*, 101 S.E. at 167. Because a cotenant has no duty to monitor property held in common for dishonest actions by an ousting cotenant, non-possessing cotenants must have notice of the ouster's claim.

Here, the Pike Respondents had no knowledge or notice of their interest in the Property until 2014, and thus it was impossible for them to have sufficient information to put them on inquiry of potential adverse claims, to discover the Cotenants' or the development companies' allegedly visible use of the Subject Property, or to have actual knowledge of any alleged hostile claim. Nor did the Cotenants ever provide notice to the Pike Respondents regarding the Cotenants' adversely claiming the Pike Respondents' interest until after the Pike Respondents filed suit to secure their interest in and claim to the Subject Property. There is no evidence of the Pike

Respondents having knowledge of or being put on actual or reasonable notice of any alleged adverse or hostile acts against their interest that the Cotenants, or their predecessors in title, may have committed until 2014, at the earliest. After receiving notice or knowledge of the Cotenants' and Antero's actions on the Subject Property, the Pike Respondents began proceedings to assert their interest in the property in 2019, well within the statutory period.

Antero accordingly cannot establish ouster because the Pike Respondents were not actually aware and did not have notice of any hostile or adverse possession of the Cotenants for the statutory period. Additionally, none of the Cotenants ever conveyed, occupied, or used the whole of the Subject Property exclusively as the sole owner or with specific intent to oust their other cotenants. With no such evidence appearing in the record, Antero has failed to establish essential elements of its adverse possession claim as a matter of law. Thus, the trial court correctly found that Antero is precluded from bringing the claim before a jury and its grant of summary judgment to the Pike Respondents on the claim was not in error.

V. CONCLUSION

For the foregoing reasons, this Court should affirm the ruling of the trial court which granted summary judgment to the Pike Respondents on Antero's adverse possession and derivative declaratory judgment claims and denied Antero's cross motion for summary judgment.

Respectfully submitted this 12th day of August 2024.

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CERTIFICATE OF SERVICE

I, Brian R. Swiger, counsel for the Respondent, hereby certify that on the 12th day of August 2024, I filed the foregoing **Pike Respondents' Brief** via the File and ServeXpress system upon the following counsel of record:

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I further certify that on the 12th day of August 2024, I served the foregoing **Pike Respondents' Brief** upon the following parties, by depositing true copies thereof in the United States mail, postage pre-paid, in envelopes addressed as follows:

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