IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SCA EFiled: Feb 20 2024
06:15PM EST
Transaction ID 72096260

SWN Production Company, LLC and Statoil USA Onshore Properties Inc., now known as Equinor USA Onshore Properties Inc.,

Petitioners,

vs.) No. 23-547

Mason Louis Cottrell,

Respondent.

**Lower Court: Circuit Court of Ohio County, West Virginia
Case No. CC-35-2019-C-159**

REPLY BRIEF OF PETITIONERS SWN PRODUCTION COMPANY, LLC AND STATOIL USA ONSHORE PROPERTIES INC. N/K/A EQUINOR USA ONSHORE PROPERTIES INC.

**Ramonda C. Marling (W. Va Bar No 6927)
Lewis Gianola PLLC
Post Office Box 1746
Charleston, West Virginia 25326
rmarling@lewisgianola.com
(304) 345-2000**
Counsel for Petitioners

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A. Severability of the Delegation Clause

As noted in Petitioners' opening brief, upon remand, Respondent attempted to correct prior missteps to separately and distinctly challenge the severed arbitration clause, including the delegation provision, of the Lease. The Circuit Court acknowledged as much in its Order: "Plaintiff seeks to sever and challenge the arbitration clause, including the delegation provision therein, contained in the Chesapeake Lease, focusing specifically and particularly on them as opposed to attacking them through a challenge upon the entire contract." JA 968, IV. Discussion. In doing so, Respondent simply repackaged his arguments under West Virginia Code §37-1-2 as a pre-textual challenge to the arbitration provision and delegation clause.[1] Nonetheless, Respondent appears to revert to attacking the entire contract. Response, p. 10 - 12. Specifically, Respondent argues that the "'severability doctrine' has its nuances, and one of them is front and center in the instant case where Respondent has ceaselessly contended, from within the *Amended Complaint* until now, that both the arbitration provision and the contract housing it are void and non-existent due to lack of court authority pursuant to W. Va. Code §37-1-2." *Id*., p. 10.

This Court's 2019 decision in *Rent-A-Center, Inc. v. Ellis*, 241 W. Va. 660, 827 S.E.2d 605 (2019) is dispositive of Respondent's arguments under the severability doctrine. The delegation clause at issue in *Rent-A-Center* provided:

> The Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of this Agreement, including, but not limited to, any claim that all or part of this Agreement is void or voidable.

[1] Invoking W. Va. Code §37-1-2 necessarily amounts to an attack of the entire contract. Even *if* W. Va. Code §37-1-2 were mandatory (which it is not), it only applies to the lease sale or mortgage of real property. *Id*. There is absolutely no basis to apply that statute to a severed arbitration provision or delegation clause.

Rent-A-Center, 241 W. Va. at 664, 827 S.E.2d at 609. To revisit, the arbitration provision and a delegation clause of the Lease at issue in this matter similarly provides:

> ARBITRATION. In the event of a disagreement between Lessor and Lessee concerning this Lease or the associated Order of Payment, performance thereunder, or damages caused by Lessee's operations, the resolution of all such disputes shall be determined by arbitration in accordance with the rules of the American Arbitration Association. **Arbitration shall be the exclusive remedy and cover all disputes, including but not limited to, the formation, execution, validity and performance of the Lease and Order of Payment**. All fees and costs associated with the arbitration shall be borne equally by Lessor and Lessee.

See JA 93 (March 10, 2011 Lease, Deed Book 820, Page 256) (emphasis added). In *Rent-A-Center*, this Court reasoned that:

> . . . because a delegation provision is a mini-arbitration agreement divisible from both the broader arbitration clause and the even broader contract in which the delegation provision and arbitration clause are found, a party must specifically object to the delegation provision in order for a court to consider the challenge. A party resisting delegation to an arbitrator of any question about the enforceability of an arbitration agreement must specifically challenge the delegation provision first. . . . Under the Federal Arbitration Act, 9 U.S.C. § 2, and the doctrine of severability, where a delegation provision in a written arbitration agreement gives to an arbitrator the authority to determine whether the arbitration agreement is valid, irrevocable or enforceable under general principles of state contract law, a trial court is precluded from deciding a party's challenge to the arbitration agreement. When an arbitration agreement contains a delegation provision, the trial court must first consider a challenge, under general principles of state law applicable to all contracts, that is directed at the validity, revocability or enforceability of the delegation provision itself. . . . [u]nder this rule, if the trial court finds the delegation provision to be effective, then the case must be referred to the parties' arbitrator who can then decide if the arbitration agreement is invalid, revocable or unenforceable. Conversely, if the delegation provision is ineffective on a ground that exists at law or in equity for the

> revocation of any contract, then the trial court may examine a challenge to the arbitration agreement.

Rent-A-Center, Inc. v. Ellis, 241 W. Va. at 668, 827 S.E.2d at 613 (internal quotations) (quoting *Shumacher Homes of Circleville, Inc. v. Spencer*, 237 W. Va. 379, 787 S.E.2d 650 (2016). As an initial matter, Respondent failed to sufficiently challenge the delegation clause separately from the arbitration provision (or the contract as a whole for that matter). As such, Respondent waived any right to challenge the delegation clause and this matter should be remanded to the Circuit Court with instructions that the parties' disputes regarding the validity, revocability or enforceability of the arbitration agreement be referred to arbitration. *Shumacher Homes of Circleville, Inc. v. Spencer*, 237 W. Va. 379, 787 S.E.2d 650 (2016).

To the extent this Court finds that Respondent sufficiently challenged the delegation clause separately from the arbitration provision, the Circuit Court's Order must nonetheless be reversed under *Rent-A-Center*. There, Ellis challenged "the delegation clause as substantively unconscionable under West Virginia Code §23-2-7 because it results in an improper exemption from burdens and a waiver of benefits under our workers' compensation statute." *Rent-A-Center, Inc. v. Ellis*, 241 W. Va. at 674, 827 S.E.2d at 620. West Virginia Code §23-2-7 provides that:

> No employer or employee shall exempt himself from the burden or waive the benefits of this chapter by any contract, agreement, rule or regulation, and ***any such contract, agreement, rule or regulation shall be pro tanto void***.

W. Va. Code §23-2-7 (1974) (emphasis added). In reversing the circuit court's order denying arbitration, this Court reasoned noted that:

> . . . Petitioners maintain that because the delegation clause itself does not affect any burdens or benefits arising under the worker's compensation statute, Respondent's challenge under West Virginia Code § 23-2-7 is actually directed at the provision of the agreement

> requiring arbitration of her underlying worker's compensation discrimination claim.

Id., 241 W. Va. at 675, 827 S.E.2d at 620. This Court "agreed" and held that:

> Numerous courts have similarly rejected substantive unconscionability arguments directed at the arbitration agreement, itself, rather than the terms of the delegation provision. Thus, under the FAA and U.S. Supreme Court precedent, the question of whether the parties' arbitration agreement violates West Virginia Code § 23-2-7 is for an arbitrator to decide, not this Court.

Id. This reasoning applies with equal force and clarity to the delegation clause in the Lease. The delegation clause itself does not implicate the lease of real property under W. Va. Code §37-1-2. Rather, Respondent's challenge under W. Va. Code §37-1-2 goes to the arbitration provision or the contract as a whole, not the delegation clause. The Circuit Court clearly erred in denying Petitioners' *Motion to Compel Arbitration* and this matter must be remanded with instructions to refer the parties' dispute under the Lease to arbitration.

B. W. Va. Code §37-1-2 Is Permissive, Not Mandatory

The proposition that the severed arbitration provision and delegation clause are void for failure to obtain mandatory court approval pursuant to W. Va. Code §37-1-2 is the cornerstone of the Circuit Court's Order and Respondent's arguments in support thereof. *See* Order, JA 971 ("All of the contracts underlying Plaintiff's claims against Defendants, and separately and distinctly, the arbitration clause and delegation provision of the Chesapeake contract, fall squarely within the expressed reach of the statute."); Response, pp. 12-22. As set forth in Petitioners' opening brief, this issue should be decided in arbitration, not by the Circuit Court.

Notwithstanding the threshold issues discussed above, and in light of Respondent's argument that W. Va Code §37-1-2 somehow allows him to sidestep the severability doctrine, it is prudent to address the torture of the statute required to achieve Respondent's result. If, as Petitioners urge, the statute is only permissive, Respondent's entire argument under W. Va Code §37-1-2 necessarily fails as to both the Lease and Pipeline Agreement.

Less than nine months ago, this Court issued concrete guidance on statutory construction and the distinction between shall and may. *State ex rel. Devono v. Wilmoth*, 248 W. Va. 654, 889 S.E.736 (2023) at 663-664 and at 745-746. *Wilmoth* involved West Virginia's whistleblower statute, W. Va. Code §6C-1-3(a), that is designed to protect persons from workplace discrimination and retaliation for reporting wrongdoing. The statute provides "[a] person who alleges that he or she is a victim of a violation of this article ***may*** bring a civil action in a court of competent jurisdiction for appropriate injunctive relief or damages, or both, within two years after the occurrence of the alleged violation." W. Va. Code §6C-1-4 (a) (emphasis supplied).[2] The statute further provides that "[a]ny employee covered by the civil service system who has suffered a retaliatory action as a result of being a whistle-blower ***may*** pursue a grievance under the West Virginia Public Employees Grievance Procedure." W. Va. Code §6C-1-4(e) (emphasis supplied).

Petitioners there argued that plaintiff's failure to file a grievance and exhaust administrative remedies warranted dismissal of the civil action. This Court disagreed and provided a thorough discussion of permissive versus mandatory language used by the Legislature:

> . . . "[t]he primary rule of statutory construction is to ascertain and give effect to the intention of the Legislature." *Syl. Pt. 8, Vest v. Cobb*, 138 W. Va. 660, 76 S.E.2d 885 (1953). To that end, "[w]hen a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute." *Syl. Pt. 5, State v. Gen. Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W. Va. 137, 107 S.E.2d 353 (1959). West Virginia Code § 6C-1-4(a) clearly and unambiguously provides that

[2] The statute also employs the word "must" in Subsection (b) and "shall" in Subsection (c).

> a person claiming to be a victim of retaliatory action as a result of being a whistle-blower may institute a civil action in a court of competent jurisdiction.
>
> While the statute also provides for the filing of a grievance, it does not mandate that course of action. "[T]he Legislature routinely uses terms like 'shall' when it intends to give a mandatory direction." *In re R.S.*, 244 W. Va. 564, 571, 855 S.E.2d 355, 362 (2021); *see also syl. pt. 1, Nelson v. West Va. Pub. Employees Ins. Bd.*, 171 W. Va. 445, 300 S.E.2d 86 (1982) ("It is well established that the word 'shall,' in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation."). Conversely, when the word "may" is used, as it is in West Virginia Code § 6C-1-4(e), it "generally signifies permission and connotes discretion." *State v. Hedrick*, 204 W. Va. 547, 552, 514 S.E.2d 397, 402 (1999); *see also Weimer-Godwin v. Bd. of Educ. of Upshur Co.*, 179 W. Va. 423, 427, 369 S.E.2d 726, 730 (1988) ("The word 'may' generally should be read as conferring both permission and power, while the word 'shall' generally should be read as requiring action."). Therefore, we find that use of the word "may" in West Virginia Code § 6C-1-4(e) means that the filing of a grievance with respect to an alleged violation of the Whistle-blower Law is permissive and not mandatory.

State ex rel. Devono v. Wilmoth, 248 W. Va. 654, 664, 889 S.E.736, 746.

Whistle-blowers are susceptible to the same argument advanced by Respondent here regarding a statute enacted for the benefit of a class of persons. Yet, this Court had no difficulty in distinguishing "may" from "shall". Combine this with the fact that the Legislature used "may" in the face of multiple "shalls" in the same paragraph of W. Va. Code §37-1-2, and this Court would have to retreat from its recent decision in *Wilmoth* and torture the Legislature's chosen language in W. Va. Code §37-1-2 to find it to be mandatory. *See also State ex rel. Mylan, Inc. v. Zakaib*, 227 W. Va. 641, 649, 713 S.E.2d 356, 364 (2011) ("Here, the Legislature's use of the word 'shall' is clearly intentional, given that it used the permissive word 'may' in other contexts within this statute. Thus, the term must be afforded a mandatory connotation in this context.");

State ex rel. Johnson v. Robinson, 162 W. Va. 579, 582, 251 S.E.2d 505, 508 (1979) ("It is a well-known rule of statutory construction that the Legislature is presumed to intend that every word used in a statute has a specific purpose and meaning."); *Forst v. Rockingham Poultry Marketing Cooperative, Inc.*, 222 Va. 270, 278, 279 S.E.2d 400, 404 (1981) (When the General Assembly uses two different terms in the same act, it is presumed to mean two different things.); *Klarfeld v. Salsbury*, 233 Va. 277 (1987) at 284-285 (same); *Hopewell v. County of Prince George*, 239 Va. 287, 294, 389 S.E.2d 685, (1990) (same).

Affirming the position advanced by Respondent and accepted by the Circuit Court, would require this Court to completely disregard the fact that the Legislature intentionally used two different words in the same statute which, in their ordinary context, are polar opposites (mandatory versus permissive) and torture the statute to hold that the Legislature actually intended these two words to have the same meaning. This Court refused to do so in *Wilmoth* while the Circuit Court effectively did just like in its Order below. Petitioners respectfully submit "under the guise of interpretation" that the Circuit Court erroneously "modified, revised, amended, distorted, remodeled, or rewr[ote]" W. Va Code §37-1-2 in contravention of well-established rules of statutory construction. *State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W.Va. 137, 145, 107 S.E.2d 353, 358 (1959) ("[i]t is ***not*** the province of the courts to make or supervise legislation, and a statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled, or rewritten[.]") (emphasis added)). The more well-reasoned and consistent interpretation is that the Legislature used "may" on purpose to distinguish it from the mandatory connotation of "shall" used repeatedly in the same statute.

Indeed, review of a related statutory provision in W. Va. Code §37-1-11 is instructive:

> §37-1-11. Summary proceedings for sale, lease or mortgage; petition; notice.
>
> *In addition to the proceedings* ***authorized*** *by section two* of this article, the guardian of any minor, or the committee of any insane person or convict, *if he deem that the interests of his ward or insane person or convict will be promoted by a sale, lease or mortgage of, or trust deed upon, his estate*, or of any estate in which he with others, infants or adults, is interested, whether the estate of the minor, or insane person or convict, or of any of the other persons interested, be absolute or limited, and whether there be or be not limited thereon any other estate, vested or contingent, ***may*** *apply by petition*, in a summary way, to the circuit court, or to the judge thereof in vacation, or to any court of concurrent jurisdiction with the circuit court, or to the judge thereof in vacation, or to any juvenile court, or to the judge thereof in vacation, of the county in which the estate proposed to be sold, leased, or encumbered, or some part thereof may be, describing all the estate, real and personal, belonging to the minor, or insane person or convict and setting forth plainly all the facts calculated to show the propriety of the sale, lease, mortgage, or deed of trust.

Id. (emphasis added). Importantly, the Legislature notes that the proceedings in W. Va. Code §37-1-2 are "authorized." There is no indication that such proceedings are mandated or required. This lends logical and consistent support to the proposition that the Legislature's simultaneous use of the words "may" and "shall" in W. Va. Code §37-1-2 was purposeful and intended to convey different meanings.

Machado v. Shallbetter, Inc., 2006 Wisc. App. LEXIS 649, *1 (Wis. Ct. App. 2006) is also instructive. There, plaintiff stockholder sued corporate defendants for breach of a stock redemption agreement. The agreement stated that a shareholder "may" offer to sell shares to the corporation and proceeded to use the word shall multiple times thereafter:

> (A) A Shareholder ***may*** offer in writing to sell to the Corporation, all but not less than all of his Shares in the Corporation, and upon a majority vote of the Board of Directors of the Corporation said offer ***shall*** be accepted or denied within thirty (30)

> days from delivery of said offer. Any such offers ***shall*** be transmitted by the proposed selling Shareholder to all other Shareholders in writing and by certified mail. The transmission of said offers ***shall*** only be effective upon receipt by all other Shareholders…. In the event that the Corporation elects not to purchase the Shares offered hereunder then the Corporation ***shall*** issue a written notice by certified mail to all Shareholders of such decision. Following receipt of said notice the Shareholders other than the offering Shareholder ***shall*** be offered these Shares under the Purchase Price … for a period of thirty (30) days following the receipt of said notice. The other Shareholders ***shall*** have the option to purchase these Shares in the same proportion that their shareholdings bear to each other at the time of receipt of said notice…. Any Shares not opted to be purchased by Shareholder(s) within the aforedescribed period ***shall*** then be offered on a pro rata basis to those Shareholders who purchased the full number of Shares available to them after the initial offering …. Any Shares not purchased at the secondary offering ***shall*** be released from any restriction under the terms of this Agreement.

Id. at *3-4 (2006). Plaintiff argued that the purpose of the redemption agreement was to protect stockholders and that, as such, the word "may" must be read as "shall." *Id*. at *10. The Court disagreed, relying upon rules of statutory construction:

> the agreement shows that the parties were aware of the different denotations attached to the two words... ... (in the context of statutory construction, recognizing that where "may" and "shall" are used in the same section, we infer that the legislature was aware of the difference between the two words). Indeed, the parties used the word "shall" multiple times in the same section of the agreement in order to better protect the stockholders' interests. For example, the parties used the word "shall" to expressly protect stockholders in third-party transfer situations. Had the parties wanted to make the transfer restriction in question similarly mandatory, they could have done so by selecting the word "shall."

Id. at *10-11. Based upon the foregoing, and the arguments in Petitioners' opening brief, the Circuit Court erred in holding that W. Va. Code §37-1-2 is mandatory rather than permissive.

C. Even if W. Va. Code §37-1-2 is Mandatory (Which it is Not), Failure to Obtain Court Approval Does not Render the Delegation Clause Set Forth in Lease or the Pipeline Agreement Void *Ab Initio*.

The Circuit Court erroneously determined that "W. Va. Code §37-1-2 is undeniably mandatory and the consequence of Chesapeake's decision to forego court approval of the arbitration clause and delegation provision is the voidance of the arbitration clause and the delegation provision." JA 973. Respondent argues that "the Trial Court appropriately exercised its analytical powers, determining in the end that the failure to obtain §37-1-2 approval rendered the arbitration/delegation provision void." Response, p. 23. As an initial matter, it must be noted that the statute itself does not address the effect of failure to secure court approval of the underlying transaction (this makes sense as the statute is permissive rather than mandatory). Remarkably, Respondent fails to acknowledge *French v. Pocahontas Coal & Coke Co*., 87 W. Va. 226, 229-230, 104 S.E. 554 (1920) in which this Court addressed the effect of defects under 37-1-2's predecessor statute:[3]

> ***This defect, however, renders the sale voidable only, if not ratified or validated***, not absolutely void. . . . Notwithstanding the character of the proceeding, it is remedial and the statute authorizing it is liberally construed. The sale is impeachable for defects in procedure, and ***the infant may overthrow it and set it aside, unless the purchaser can show the circumstances obtaining at the time of the sale, though not fully shown in the proceeding, were such as then justified the sale. If he can do so, the court may ratify and validate the defective sale.***

French, 87 W. Va. at 229-230 (1920). In *French*, a petition for court approval of the sale of real estate owned by infants was filed but was not properly served upon the infants or their representative as required by Chapter 83 of the West Virginia Code. Plaintiffs (the infants) sought

[3] *French* cites to West Virginia Code Chapter 83, Section 12. Based upon annotations, it appears that Chapter 83, Section 12 was recodified under Chapter 37 in 1923.

to annul the sale alleging that they did not receive proper notice of proceedings. The trial court dismissed the petition; Plaintiffs appealed. This Court specifically held that failure to properly obtain court approval of the sale under W. Va. Code §37-1-2's predecessor statute did not render the transaction void *ab initio*. Rather, the purchase could be validated:

> . . . in as much as we can see that the purchaser may be able to validate the sale by filing a cross-bill praying ratification thereof, and that the cause has not been sufficiently developed to enable the court to arrive at the ultimate right and justice thereof, no final decree ought to be entered here in the present state of the record. Under such circumstances, it is our practice to remand the cause, with leave to the parties to fully develop it.

Id. at 230 . Further, "**[*a*]*s the court might have authorized the sale*, when made, *it might ratify and confirm what it could have ordered*** and attempted to order, but failed legally and validly to order, by reason of the mistake or oversight in procedure." *Id*. at 230 (emphasis supplied). The sale in *French* is akin to the Lease at issue here and the Circuit Court erred in holding that the Lease was void *ab initio*. JA, 974-975.

In the event this Court is inclined to find that W. Va. Code §37-1-2 is both mandatory and applies to the purportedly severed delegation clause, the reasoning set forth in *French* applies with equal force and clarity here and the severed delegation clause is, at best, voidable, not void *ab initio*. Respondent himself ratified the Lease in its entirety (including the arbitration provision and delegation clause) when he sought benefits thereunder, first by filing the Complaint to secure the return of "plaintiff's money" from Defendant Cotrell and, second by affirmatively accepting royalty ongoing payments from SWN under the Lease. JA 11. *See North Am. Coal & Coke v. O'Neal*, 82 W. Va. 186, 200, 95 S.E. 822, 823 (1918) ("by filing her joint answer after she reached her capacity, she ratified all previous contracts"). Notably, the Amended Complaint asserts the same claims and seeks the same relief against Defendant Cottrell for the return of "plaintiff's money". JA 46. Once he ratified the Lease, Respondent was powerless to later disaffirm the Lease, including the arbitration provision and delegation clause. *Id.*, *see also Gillespie v. Bailey*, 12 W. Va. 70 (1877).

Cases cited by Respondent and the Circuit Court in support of the proposition that the arbitration provision and delegation clause were void *ab initio* are inapplicable and distinguishable. First and foremost, none of the cited decisions involved a challenge to a severed arbitration provision or delegation clause. Rather, the cited decisions involved the entire underlying real estate transaction (*i.e.*, a lease or a deed). Nor did they involve a trustee's conveyance of real property without court approval.

Conrad v. Crouch, 68 W. Va. 378, 69 S.E. 888 (1910), involved a widow's right of dower, not a trustee's right to convey real property. The widow's right of dower did not include the power of conveyance: "a widow, having only a right to dower, cannot maintain a suit to sell the lands descended to the heirs." *Id* at 384. It was the lack of power to convey that rendered the transaction void, not the failure to seek Court approval (which could not have been granted). *Id*. 384-85.

Haskell v. Sutton, 53 W. Va. 206, 215, 44 S.E. 533 (1903) also involved dower rights of a widow. Again, the contract was void, not due to the failure to obtain Court approval but, rather, because Morrow lacked the legal ability to convey the interests conveyed in the first instance:

> Emma Morrow, therefore, could not and did not, in the legal sense, transfer or convey her dower interest in said land to McKeown by said lease of November 2, 1888. She had no other interest in the land. The said lease to McKeown was and is void, and is of no effect as to the Morrows, or either of them. It was not ratified by either Walden, or George Morrow. In order that a contract, made during infancy, may be ratified after full age, it must of necessity be

> a contract merely voidable. The lease under consideration being void, cannot be confirmed.

Haskell v. Sutton, 53 W. Va. 206, 215. Thus, if Morrow actually had the legal right to manage and use the property at issue (like a trustee), the Court would have treated the lease as voidable, rather than void.

The Circuit Court cites *State ex rel. Ware v. Henning*, 212 W. Va. 189, 569 S.E.2d 436 (2002), for the proposition that a conveyance in contravention of statutory requirements is void *ab initio*. JA 969. The statute at issue related to a church trustee's power to convey real estate owned by the church. W. Va. Code §35-1-6 provides:

> The trustee or trustees heretofore appointed by the circuit court of any county to hold the title to the real and personal property of any church, religious sect, society, or denomination, or of any individual church, parish, congregation or branch, within this State, and who may be acting as such at the time this Code goes into effect, or the proper authorities of such church, religious sect, society or denomination, or of any individual church, parish, congregation or branch, ***shall cause a certified copy of the order of appointment of such trustee or trustees to be recorded in the office of the clerk of the county court of the county*** where such appointment was made.

Id. (emphasis added). As a result, the church trustee lacked the power to enter into the transaction in the first instance.

The Circuit Court's citation to *W. Va. Inv. Mgmt. Bd. v. Variable Annuity Life Ins. Co.*, 241 W. Va. 148, 820 S.E.2d 416 (2018), actually undermines the proposition that the Lease in question was void *ab initio*. (JA 970). There, this Court cites *Dorr v. Chesapeake & O. Ry. Co.*, 78 W.Va. 150, 157, 88 S.E. 666 (1916) for the proposition that "[a]n illegal contract is as a rule void—not merely voidable—and can be the basis of no judicial proceeding." *Id.* W. Va. 148, 165, 820 S.E2d 433, FN 16. This is the critical distinction and reveals why the Lease at issue here is neither illegal nor void. Clearly, if a trustee has the power and authority as trustee to convey property, it could be the "basis of no judicial proceeding." Importantly, the Court in *Mgmt Bd*. found that the agreement was neither illegal nor void. *Id*.

The Circuit Court also cites *Williams v. Skeen*, 184 W. Va. 509 (1990). JA 973. This case is distinguishable from the case at bar in that it involved a statutory committee appointed over an incompetent. *Id*. Moreover, the Court in *Skeen* emphasized the summary proceedings in W. Va. Code §37-1-11, which does not list trustees as being subject to those summary proceeding obligations. Rather, it applies only to a guardian or committee. *Id*., Although the statute dealing with committees for insane persons (W. Va. Code §27-11-1 *et* seq.) was repealed in 1994, it nevertheless created express statutory obligations for a committee. More importantly, given the "guardian" cases discussed in this appeal, a guardian is obligated to appear before a Court pursuant to W. Va. Code §44-10-1. It certainly stands to reason that a guardian who is already essentially an arm of the Court carries heightened obligations beyond those of a trustee. This is underscored by the fact that W. Va. Code §37-1-11 contains separate and enhanced summary proceeding provisions for guardians and committees that do not apply to trustees.

The consistent thread in these cases is that contracts entered into with individuals imbued with the legal power and authority to convey a minor's interests in real property are voidable if court approval is required under the applicable statutory scheme, but such approval is not obtained, whereas contracts entered into with individuals that are not imbued with such power and authority are void *ab initio*. Thus, assuming *arguendo* that W. Va. Code §37-1-2 applies to severed delegation clause and is mandatory, the Lease is at best avoidable, not void *ab initio*. The Circuit

Court erred in holding that the Lease and Pipeline Agreement were void *ab initio* due to lack of court approval.

D. Minor Disaffirmance Case Law is Wholly Inapplicable to the Lease and Pipeline Agreement as They Were Executed by an Adult Trustee, Not a Minor.

Respondent's secondary argument, also adopted by the Circuit Court in its Order, is that Respondent, upon reaching the age of majority, could disaffirm a contract made by the Trustee. Response, p. 29 - 35; JA 46. Respondent makes no asserted effort to overcome the fact that the Trustee, being the maker of the contracts at issue, was not under the contractual disability of minority. *Fun Fitness* does not stand for the proposition advanced by Respondent. Extending *Fun Fitness* is this manner is not only contrary to the UTC, but would chill future transactions with trusts established for the benefit of minors in the state of West Virginia.

As an aside, Respondent argues that the issue of minor disaffirmance is a factual question to be determined later at trial. Response, p. 34. This is incorrect. The real question is clearly a legal question: "Can a minor beneficiary disaffirm a contract executed by a Trustee who was not under the disability of minority at the time of execution, as opposed to their own contract executed while under the contractual disability of minority?" This is necessarily a pure question of law. The common thread in the minor disaffirmance cases is that the minor was the *maker* of the contract at a time when the minor lacked contractual capacity. *See e.g. Fun Fitness.* Respondent makes no effort to overcome the fact that the disability present in those cases is missing here. Clearly, this Court can and should determine as a matter of law whether a minor can disaffirm a contract executed by an adult trustee dealing with trust property. The resounding to this legal question is resounding no under the UTC.

E. The UTC

As set forth above, W. Va. Code §37-1-2 is permissive. If that is the case, Respondent has no remaining argument that would require analysis of the whether the UTC superseded W. Va. Code §37-1-2 in the realm of trusts. However, as set forth *supra*, even if the Court somehow determines that W. Va. Code §37-1-2 created a mandatory obligation for court approval applicable to severed delegation clause, the severability doctrine applies to compel arbitration of the Lease. Respondent's UTC arguments are unavailing and unable to overcome the fact that the UTC controls Petitioners' Motion to Dismiss as to Pipeline Agreement (and Lease if this Court is not inclined to direct the Circuit Court to compel arbitration).

As set forth herein and in Petitioners' opening brief, the UTC is comprehensive and superseded W. Va Code §37-1-2 in the realm of trusts. It clearly applies to trusts created before July 1, 2011, and to judicial proceedings concerning trusts commenced on or after July 1, 2011. *See* W. Va. Code §44D-11-1105(a)(1) and (2). Respondent attempts to evade this result by pointing to §44D-11-1105(a)(5) which states: "An act done before July 1, 2011 is not affected by this chapter."

This argument is wholly inapplicable to the Pipeline Agreement as it was executed by the Trustee in 2017 – well after the UTC became effective in 2011. JA 55, ¶ 74. As to the Lease (if this Court is not inclined to direct the Circuit Court to compel arbitration and finds W. Va. Code §37-1-2 mandatory), the result is merely a voidable contract. *See French, supra* at 229-230. Accordingly, the only "act" as contemplated under W. Va. Code §44D-11-1005 (a)(5) was the creation of a voidable, rather than void or illegal, Lease. The true "act," if any, to be assessed under subsection (a)(5), is Respondent's post-July, 2011 effort to declare the Lease void or to disaffirm the Lease. Simply put, W. Va. Code §44D-11-1005(a)(5) is of no assistance to Respondent.

Respondent's arguments under W. Va. Code §44D-11-1005(b) fare no better. Again, it is axiomatic that Respondent did not and logically could not acquire or vest in any rights pertaining to the Pipeline Agreement prior to July 1, 2011 as that agreement did not exist at that time. As to the Lease (if this Court is not inclined to direct the Circuit Court to compel arbitration and finds W. Va. Code §37-1-2 mandatory), even if the disaffirmation case law applied to contracts executed by a Trustee, (which it does not), Respondent had no right of disaffirmance he could exercise until he reached the age of majority in 2019.[4] Like W. Va. Code §44D-11-1005(a)(5), 1005(b) is of no assistance to Respondent.

F. Respondent's Reliance Upon W. Va. Code §44-5A-3(w) is Unavailing.

The mere notion that the Trustee's execution of the Lease was a compromise of claims as contemplated by W. Va. Code §44-5A-3(w) is confounding. There is no viable argument that the Trustee here was compromising any claim held by Respondent in executing the Lease. Perhaps the only significance of Respondent's citation to the UTC is just that, acknowledgement that the UTC and its provisions apply in this matter.

Notwithstanding Respondent's assertion that the Circuit Court "implicitly" ruled on and rejected Petitioners' UTC argument (JA 706), the Circuit Court utterly failed to make conclusions of law pertaining thereto in contravention of this Court's clear mandate and Petitioners' request for more fulsome findings in their *Motion to Alter or Amend Order Denying Motion to Dismiss*

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[4] *See Gillespie v. Bailey*, 12 W. Va. 70 (1877) ("A deed or contract for the sale of land, executed by an infant, is not absolutely void, but may be either affirmed or avoided at his pleasure, ***after*** he attains his majority."). (emphasis applied).

and Compel. *See Certegy Check Servs. v. Fuller*, 241 W. Va. 701, 705, 828 S.E.2d 89, 93 (2019) (holding that "when a circuit court denies a motion to compel arbitration, [it] must contain the requisite findings of fact and conclusions of law that form the basis of its decision."). Further,

> The circuit court must apply the law to the facts to reach conclusions of law that explain the court's decision. It is not enough to provide an accurate summary of the law. The court must identify the particular doctrines of the law that guide its thinking; then it must connect these doctrines to the particular facts that warrant its decision. "Without factual or legal findings, this Court is greatly at sea without a chart or compass in making a determination as to whether the circuit court's decision was right or wrong." *Brown I*, 228 W. Va. at 689, 724 S.E.2d at 293.
>
> . . .
>
> The circuit court has provided a detailed statement of the law relating to the formation of a contract to compel arbitration and the circumstances in which such a contract may be procedurally and substantively unconscionable. However, the court's order does not contain sufficient findings of fact and application of the law to those facts to allow this Court to conduct a reasonable review of the circuit court's decision. Based on the foregoing, the decision of the Circuit Court of Mercer County denying the motion to compel arbitration is vacated, and we remand this matter to the circuit court for further proceedings.

Id. Like the Circuit Court of Mercer County in *Fuller*, the Circuit Court Order below does not contain sufficient analysis of Petitioners' UTC argument or Respondent's countervailing arguments, but rather left this Court "at sea without a chart or compass in making a determination as to whether the circuit court's decision was right or wrong". To the extent this Court does not reverse the Circuit Court's Order on other grounds set forth herein, Petitioners respectfully submit that the Circuit Court's Order should be vacated and remanded with instructions to "sufficient findings of fact and application of the law to those facts to allow this Court to conduct a reasonable review of the circuit court's decision".

G. Successorship and Ratification

As discussed above, neither W. Va. Code §37-1-2 nor the minor disaffirmance doctrine are applicable here. In the event this Court finds either (or both) to be applicable, the result under either analysis is a voidable, rather than void contract, capable of ratification, as also discussed above.

Respondent argues that it would be premature to consider undisputed facts that are part of this record on de novo review that go to the very heart of ratification and Respondent's position as successor to the Lease upon trust termination. In the event the Court declines to send the question of arbitrability to arbitration under the severability doctrine, then this Court can and should conduct a de novo analysis of the undisputed facts and law with respect to successorship and ratification.

Importantly, the Lease contains a successor clause: "[a]ll rights, duties, and liabilities herein benefit and bind Lessor and Lessee and their heirs, successors, and assigns." JA 93. Upon termination of the Trust, Respondent became the successor lessor subject to its contractual provisions.

Further, as set forth above, Respondent ratified the Lease in its entirety (including the arbitration provision and delegation clause) when he sought benefits thereunder by filing the Complaint to secure the return of "plaintiff's money" from Defendant Cotrell. JA. 46. In his Complaint, Respondent alleged that Defendant Contrell received "large sums of money from the mineral transactions", but "spent, wasted and/or depleted most of plaintiff's money". JA 45. Plaintiff prayed for "an Order . . . compelling the defendant to produce an accounting . . . and to turn over all of plaintiffs' money to plaintiff." JA. 46. Indisputably, the "money" was tendered to Defendant Cotrell as Trustee under the very contracts Respondent later purports to have disaffirmed. The filing of the original Complaint and seeking benefits of the contracts ratified the contracts. *See North Am. Coal & Coke v. O'Neal*, 82 W. Va. 186, 200, 95 S.E. 822, 823 (1918) ("by filing her joint answer after she reached her capacity, she ratified all previous contracts").

In addition, he affirmatively sought and demanded ongoing royalty payments from SWN under the Lease after the Trust was terminated. JA 492. It is undisputed that, in January of 2021, Megan Brogan, a tax advisor with The Highlands, contacted SWN's Owner Relations Support Team on behalf of Respondent to effectuate a transfer in ownership of the royalty account and provided the necessary documentation to SWN. JA 492, ¶ 7. Additionally, SWN began tendering royalty payments directly to Respondent as of June 25, 2021. *Id.*, ¶ 8. As of June 28, 2023, Respondent accepted and negotiated royalty payments tendered to him by SWN in the amount of $72,128.60. *Id.*, ¶ 9. As such, the Circuit Court erred in failing to find that Respondent affirmed that Lease and Pipeline Agreement.

CONCLUSION

For the reasons more fully set forth in Petitioners' opening brief and above, Petitioners respectfully submit that the Trial Court's Order of June 21, 2023 must be reversed and remanded with instructions to grant Petitioners' Motion to Dismiss and Compel Arbitration and for such other relief as the Court deems appropriate.

SWN PRODUCTION COMPANY, LLC and STATOIL USA ONSHORE PROPERTIES INC. N/K/A EQUINOR USA ONSHORE PROPERTIES INC.

By Counsel,

LEWIS GIANOLA PLLC

/s/ Ramonda C. Marling
Ramonda C. Marling (WVSB #6927)
Post Office Box 1746
Charleston, West Virginia 25326
Tel: (304)345-2000
Fax: (304) 343-7999
rmarling@lewisgianola.com

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SWN Production Company, LLC and
Statoil USA Onshore Properties, Inc.,
now known as Equinor USA Onshore Properties, Inc.,

Petitioners,

vs.) No. 23-547

Mason Louis Cottrell,

Respondent.

Lower Court: Circuit Court of Ohio County, West Virginia
Case No. CC-35-2019-C-159

Ramonda C. Marling (W. Va Bar No 6927)
Lewis Gianola PLLC
Post Office Box 1746
Charleston, West Virginia 25326
rmarling@lewisgianola.com
(304) 345-2000
Counsel for Petitioners

CERTIFICATE OF SERVICE

I, Ramonda C Marling, counsel for Petitioners, do hereby affirm that, on February 20, 2024, counsel for Respondent was served with a copy of the *Reply Brief of Petitioners SWN Production Company, LLC and Statoil USA Onshore Properties Inc. n/k/a Equinor USA Onshore Properties Inc.,* via electronic mail and through File and Serve Xpress to the following record of counsel:

Joseph J. John, Esquire
Anthony I. Werner, Esquire
John & Werner Law Office, PLLC
Board of Trade Building, Suite 200
80 – 12th Street
Wheeling, West Virginia 26003
Counsel for Respondent

/s/ Ramonda C. Marling
Ramonda C. Marling (W. Va Bar No 6927)