

No. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

RICKEY DRAKE,

Petitioner,
Plaintiff Below,

v.

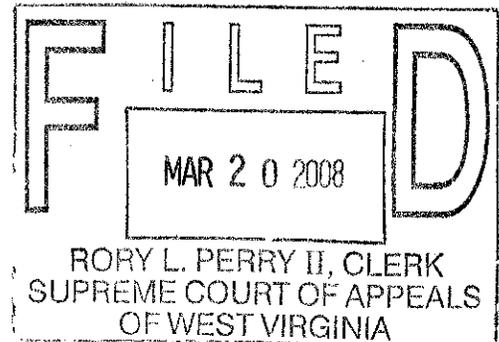
WACO OIL & GAS COMPANY, INC.,
a corporation,

Respondent,
Defendant Below.

Civil Action No.: 07-C-09
Circuit Court of Braxton County
Judge Facemire

PETITION ON BEHALF OF RICKEY DRAKE

LARRY O. FORD
WV Bar No. 1241
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Counsel for Petitioner,
Rickey Drake

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	THE CORRECT BASIS OF AN ACCOUNTING IN A CASE IN WHICH A GAS PRODUCER ENTERS INTO A LEASE WITH ONE OF TWO COTENANTS AND PRODUCES GAS AND THEN IS CALLED UPON TO ACCOUNT BY THE NONLEASING COTENANT FOR THE VALUE OF THE GAS TAKEN IS THE VALUE OF THE GAS TAKEN LESS REASONABLE COST OF PRODUCTION.	7
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Supreme Court of Appeals of West Virginia
DOCKETING STATEMENT

Style of Case (use style from final order)

Rickey Drake, Petitioner, Plaintiff Below

v.

Waco Oil & Gas Company, Inc., a corporation,
Respondent, Defendant Below

Type of Action:

Civil
Criminal

Petitioner(s):

Plaintiff(s)
Defendant(s)

Circuit Judge: Honorable Richard A. Facemire

County: Braxton

**Circuit
Number:** 14

TIMELINESS OF APPEAL

Date of entry of judgment or order appealed from: **January 30, 2008**

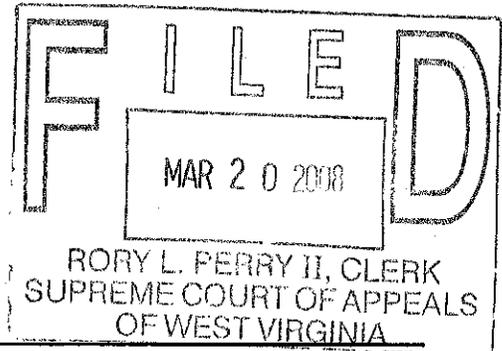
Filing date of any post-judgment motion filed by any party
pursuant to R. Civ. P. 50(b), 52(b), or 59:

Date of entry of order deciding post-judgment motion:

Date of filing of petition for appeal: **February 20, 2008**

Date of entry of order extending appeal period:

Time extended to:



FINALITY OF ORDER OR JUDGMENT

Is the order or judgment appealed from a final decision on the merits as to all issues and parties?

YES NO

If no, was the order or judgment entered pursuant to R. Civ. P. 54(b)?

YES NO N/A

Has the defendant been convicted? YES NO N/A

Has a sentence been imposed? YES NO N/A

Is the defendant incarcerated?

YES

NO

N/A

Has this case previously been appealed?

YES

NO

If yes, give the case name, docket number, and disposition of each prior appeal on a separate sheet.

Are there any related cases currently pending in the Supreme Court of Appeals or Circuit Court?

YES

NO

If yes, cite the case and the manner in which it is related on a separate sheet.

CASE INFORMATION

State generally the **nature of the suit**, the **relief sought**, and the **outcome below**. [Attach an additional sheet, if necessary.]

Petitioner seeks an accounting of the value of gas removed by the respondent pursuant to a lease executed by one of two cotenants to which petitioner was not a party. He is the other cotenant in the subject mineral estate. The circuit court, in considering petitioner's motion for summary judgment, concluded that the decisions concerning the correct method of accounting in these circumstances were conflicting and certified to the Supreme Court of Appeals the question:

"Where an oil and gas producer entered a lease for oil and gas production with one of two cotenants, unaware of the ownership interest of the nonleasing cotenant, produces gas pursuant to the lease and is then called upon by the nonleasing cotenant to account, in determining the amount to which the nonleasing cotenant is entitled is the correct measure of the value of the gas produced less reasonable costs of production or is the correct measure that portion of the royalty to which the nonleasing tenant would have been entitled had each tenant executed the lease?"

Answer by the Circuit Court: The correct measure of the accounting is the amount of royalty due pursuant to the lease.

State the **issues to be raised on appeal**. [Attach an additional sheet, if necessary. Use carriage returns to number the issues in a manner corresponding with the petition for appeal.]

"The correct measure is the value of the gas produced less reasonable cost of production."

List the Petitioner(s) name: Rickey Drake

If incarcerated, provide institutional address:

Name of attorney or pro se litigant filing Docketing Statement: Larry O. Ford

ATTORNEY PRO SE

Will you be handling the appeal? YES NO

If so, provide firm name, address, and telephone number:
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Charleston, WV 25339-1090
(304) 345-3900
(304) 345-3935

If this is a joint statement by multiple petitioners, add the names and addresses of the other petitioners and counsel joining in this Docketing Statement on an additional sheet, accompanied by a certification that all petitioners concur in this filing.

Signature: 

WV Bar No. 1241

Date: 2-20-08

Remember to Attach:

1. Additional pages, if any, containing extended answers to questions on this form.
2. A copy of the order or judgment from which the appeal is taken.
3. A Certificate of Service.

I. POINTS AND AUTHORITIES RELIED UPON

Devon Corporation, et al., v. Miller, et al., 167 W.Va. 362, 280 SE2d 108 (1981); 11

Eagle Gas Co., Inc. v. Doran & Associates, Inc., 182 W.Va. 194, 387 SE2d 99 (1989); 8,13

Freeman v. Egnor, 72 W.Va. 830, 834 SE 824 (1913); 11

Gallopas v. Wal-Mart Stores, Inc., 197 W.Va. 172, 475 SE2d 172 (1991); 7

McConaha v. Rust, 219 W.Va. 112, 632 SE2d 52 (2006); 14

McNeely v. South Penn Oil Company, 58 W.Va. 438, 52 SE 480 (1905); 10

Paxton v. Benedem Trees Oil Company, 80 W.Va. 87, 94 SE 472 (1917); ... 11

Prewett v. VanPelt, 118 Kan. 571, 235 P 1059 (1925); 10

Smith v. United Fuel Gas Company, 113 W.Va. 178, 166 SE 533 (1932); 10,15,16

Sommers v. Bennett, 68 W.Va. 157, 69 SE 690 (1910); 16,17

South Penn Oil Company v. Haught, 71 W.Va. 720, 78 SE 759 (1913); 8,10

Thaxton v. Beard, 157 W.Va. 381, 201 SE2d 298 (1978). 9

STATUTE

W.Va. Code § 55-18-13 13-14

MISCELLANEOUS

Donnally, The Law of Coal, Oil and Gas in West Virginia and Virginia, (1951) 12

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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Plaintiff Below,

v.

CIVIL ACTION NO.: 07-C-09
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Judge Facemire

WACO OIL & GAS COMPANY, INC.,
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Respondent,
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PETITION ON BEHALF OF RICKEY DRAKE

**II. THE KIND OF PROCEEDING AND NATURE
OF RULING IN THE LOWER TRIBUNAL**

This is an action for an accounting brought by the owner of one half of the minerals beneath a tract of land against the gas producer who produced pursuant to a lease taken from only one of the two cotenants. Plaintiff seeks an accounting of the value of the minerals removed. There being no factual dispute, the plaintiff filed a motion for summary judgment in consideration of which the circuit court concluded that it would be appropriate to certify to this court the question of the correct remedy to be used in determining the value of the minerals payable to the plaintiff. The

circuit court entered the order certifying the question on January 30, 2008. Plaintiff/petitioner seeks certification of the question.

III. FACTS OF THE CASE

This case concerns a certain oil and gas lease and a well drilled pursuant to that lease located on a tract of land located in Braxton County. The petitioner, Rickey Drake (Drake), is the owner of one half of the minerals beneath that tract of land by virtue of a certain deed dated August 2, 1994, and of record in the Office of the Clerk of the County Commission of Braxton County in Deed Book 495, at page 448. The owner of the other one half of the minerals is Drake's sister, Karen S. Drake. (Amended Complaint, paragraph I) The lease in question was dated January 25, 2002, and is recorded in the clerk's office in Deed Book 506, at Page 725. Pursuant to that lease, Karen S. Drake leased 100 acres to Waco Oil & Gas Company, Inc (Waco). Drake was not a party to the lease agreement. (Amended Complaint, paragraph II)

Although Drake was at the time of the execution of the lease owner of record of one half of the minerals within the subject tract he and Karen S. Drake were unaware of their respective ownership interests. Drake and his sister have for some time purchased and sold various interests in real estate and the acquisition of the subject oil and gas property was one of the

transactions in which they were involved. At the time that the subject tract was acquired the property was to be titled in the name of Karen S. Drake alone. The preparer of the deed erred and included Drake as a grantee. Although it is uncontroverted that Drake was owner of one half of the minerals at the time of the execution of the lease, neither he nor Karen Drake were aware of their respective ownership interests. At the time the belief was that Karen Drake was the sole owner of the minerals. (Affidavit of Rickey Drake attached to Motion for Summary Judgment)

After the execution of the lease Waco had an examination of title conducted by James V. Cann, a Clarksburg attorney. In his title report of April 24, 2002, Mr. Cann certified Karen S. Drake as owner of the subject minerals. (Defendant's Answers to Interrogatories)

Subsequently in 2002 Waco drilled a certain gas well on the subject lease, the well being identified as the "Drake No. 1" (AP147-7-2267). (Amended Complaint, Paragraph III) Drilling on the well began on October 28, 2002, and was completed on November 11, 2002. The well first produced natural gas on December 4, 2002. (Defendant's Answers to Interrogatories, nos. 10 and 11)

After the well was placed into production, Waco sold the lease and the well to Lynn Energy. Fifty acres of the minerals were transferred to Lynn

Energy with the well. At this point, another oil and gas producer, Excel Energy, desired to take a lease on the remaining fifty acres of minerals not held by Waco's well. A representative of Excel Energy conducted an examination of title to the property and concluded that Drake owned one half of the minerals. An Excel representative advised Drake that the subject well and others had been sold to Lynn Energy as a part of a package and that Waco would be required to take back any well about which it was subsequently determined that there were title problems. At this point, Lynn Energy approached Drake and asked him to release his interest in the subject well for a specified payment, which Drake refused. The lease was then transferred back to Waco. (Affidavit of Rickey Drake)

Up to this time, Karen Drake had been receiving royalty payments equal to one eighth of the value of the gas produced from the well. Upon the lease being transferred back to Waco, those checks were reduced to one sixteenth and Waco issued royalty checks to Drake for one sixteenth of the value of the gas produced. Drake was tendered a check by Waco accounting for one sixteenth of the value of the gas produced from the date the well first went into production and Drake has continued to receive those checks to date. The checks have not been negotiated by Drake who has refused to accept the lease. (Affidavit of Rickey Drake)

Plaintiff filed a motion for summary judgment and a motion for leave to file an amended complaint on September 24, 2007. As the action was originally filed, Drake alleged innocent trespass on the part of Waco in taking the minerals. While Drake has concluded that the remedy is the same in innocent trespass and wrongful taking cases, in order to clarify the issue presented the amendment was sought. The court subsequently granted the motion for leave to amend and ordered the amended complaint filed on January 16, 2008.

In considering the motion for summary judgment filed on behalf of Drake, the court concluded that the decisions from this court on the question of the correct remedy to be applied in an accounting for the amount to be paid to the nonleasing cotenant were conflicting and the issue was appropriate for certification. Consequently, by order entered on January 30, 2008, the circuit court certified the following question:

Where an oil and gas producer entered a lease for oil and gas production with one of two cotenants, unaware of the ownership interest of the nonleasing cotenant, produces gas pursuant to the lease and is then called upon by the nonleasing cotenant to account, in determining the amount to which the nonleasing cotenant is entitled is the correct measure of the value of the gas produced less reasonable costs of production or is the correct measure that portion of the royalty to which the nonleasing tenant would have been entitled had each

tenant executed the lease?

Circuit Court's Answer: The correct measure of the accounting is the amount of royalty due pursuant to the lease.

IV. ASSIGNMENT OF ERROR

The petitioner submits that the circuit court incorrectly answered the certified question, and that the answer should be, "The correct measure is the value of the gas produced less reasonable cost of production."

V. STANDARD OF REVIEW

The appellate standard of review of questions of law answered and certified by a circuit court in de novo. Syl. Pt 1, Gallopas v. Wal-Mart Stores, Inc., 197 W.Va. 172, 475 SE2d 172 (1991).

VI. ARGUMENT

THE CORRECT BASIS OF AN ACCOUNTING IN A CASE IN WHICH A GAS PRODUCER ENTERS INTO A LEASE WITH ONE OF TWO COTENANTS AND PRODUCES GAS AND THEN IS CALLED UPON TO ACCOUNT BY THE NONLEASING COTENANT FOR THE VALUE OF THE GAS TAKEN IS THE VALUE OF THE GAS TAKEN LESS REASONABLE COST OF PRODUCTION.

The undisputed facts in this case demonstrate that Waco mistakenly believed that it had a lease to all of the oil and gas within the subject tract and proceeded in reliance on that belief to produce gas. Given that Waco relied upon an examination of title performed by an attorney, the conclusion must be that the defendant was acting in good faith and it was an innocent

taker of the plaintiff's gas.

It should be noted that in the original complaint filed herein it was alleged that Waco committed innocent trespass. The complaint goes on to seek an accounting of the value of gas produced from the well and a determination made of the amount properly payable to Drake. It is generally held that cotenants cannot commit trespass against one another. Eagle Gas Co., Inc. v. Doran & Associates, Inc. 182, W.Va. 194, 387 S.E.2d 99 (1989). Karen Drake entered into an oil and gas lease with the defendant, and she undoubtedly had the legal ability to lease her interest in the minerals. The issue of whether Waco took Drake's gas without authority to do so is not strictly speaking one of trespass, a tort, but whether Drake is entitled to an accounting of the gas removed from the property and his being paid for the value of the gas, as will be discussed following. In other words, as was pointed out by this court in Eagle Gas Co. v. Doran & Associates, supra, "This is properly an action for an accounting, not a tort claim." 387 S.E.2d at 103. Although Drake does not dispute the generally held position that cotenants cannot trespass against one another, it should also be noted that in the reported cases there has been some casual usage of various terms applicable to the production of minerals from jointly owed property, including "waste" and "trespass." In South Penn Oil Company v. Haught, 71

W.Va. 720, 78 S.E. 759,761 this court stated:

“The extraction, by one joint tenant, of oil and gas without the consent of his cotenant constitutes waste, it is a trespass for which he is liable to account to his cotenant.”

As noted, in order to clarify the issue presented the complaint has been amended to delete the innocent trespass claim. The key is recognizing that what is to occur is for there to be a determination of the value of the gas removed from the property and for plaintiff to be paid for one half of that value. Whether the action is called innocent trespass, accounting or waste, the remedy is the same – a determination of the value of the gas produced less reasonable cost of production.¹ This position is supported by numerous cases decided in the West Virginia Supreme Court of Appeals going back for many years.

A fairly recent case (for oil and gas cases) on the subject is Thaxton v. Beard, 157 W.Va. 381, 201 S.E.2d 298 (1978). In this case, a cotenant claimed in good faith to be the only owner of the oil and gas interest within

¹ In the lower court the petitioner pointed out that no answer was filed on behalf of Waco and that, therefore, petitioner was entitled to have all allegations in the complaint deemed admitted and judgment in his favor on those grounds alone. Rule 8(d), RCP. The circuit court did not rule on this claim.

a tract of land and leased the property to an oil and gas producer. Subsequently, the cotenants who had not entered into the lease and who owned one eighth of the minerals learned of the situation. In discussing these facts, the court held that, "The (non-consenting cotenants) have the option of either recognizing the lease and receiving the proportional share under the terms of the lease... or of rejecting the lease and receiving 1/8 of the oil produced less 1/8 of the cost of discovery and production." 201 S.E.2d at 303. The court went on to discuss numerous cases in which this holding had been reached, including Smith v. United Fuel Gas Company, 113 W.Va. 178, 166 S.E. 533 (1932), Prewett v. Van Pelt, 118 Kan. 571, 235 P 1059 (1925) and noted with approval Syllabus Point 1 of McNeely v. South Penn Oil Company, 58 W.Va. 438, 52 S.E. 480 (1905) in which it was held:

"The basis of accounting, between tenants in common, joint tenants and coparceners, for waste, effected by the extraction of petroleum oil from common property under circumstances which make it reasonably certain that the party, so taking oil, acted without fraud and under the belief of good title in himself to the whole of the property, but not without notice of defect of title, is the value of all of the oil produced from the land, less the whole cost of its production, including the cost of drilling and producing well." 201 S.E.2d at 303

After considering the various cases and the facts, the court held at Syllabus Point 4:

“Where a tenant in common, claiming in good faith to be the sole owner of the oil and gas interest, leases the property to a third person, the non-consuming cotenant may recognize the lease and receive his fractional interest in the royalty or reject the lease and receive his fractional part of the oil or gas produced, less his proportionate part of the cost of discovery and production.” 201 S.E2d at 299

Another instructive case is Devon Corporation, et al. v. Miller, et al. 167 W.Va. 362, 280 S.E.2d 108 (1981). This case involves the need to obtain consent from surface owners prior to drilling a deep gas well. Although the facts of the case involve the surface, much of the discussion in the case is applicable to the issue in the case at hand. The court, for example, discussed the holding in Paxton v. Benedum-Trees Oil Company, 80 W.Va. 87, 94 S.E. 472 (1917), in which it was held that the owner of an undivided one half interest in oil and gas cannot grant a valid lease for all of the oil and gas. The court also discussed Freeman v. Egnor, 72 W.Va. 830, 834 S.E. 824,826 (1913), in which the court held that all cotenants must join in agreement before a lessee may enter upon the premises for the production of oil and gas. Quoting extensively from the case, the court noted:

“The leases should not have been cancelled upon the state of the pleadings. But are they void or voidable, solely because executed by some cotenants on their undivided interest in lands held in common with others not joining therein? We do not think they are... A lease by one only does not warrant such

entry and production. Those not joining may restrain the lessee from entering for the purpose of operating thereunder without their consent. Numerous cases so hold. One cotenant cannot authorize another to do what he himself cannot do; but he may authorize him to do, under any lease or other contract, what he may legally do on his own behalf. (Citation omitted)... 'An oil and gas lease executed by one or more joint tenants or tenants in common, while not binding on other joint tenants or tenants in common, is good between the parties, and is binding on their interest.'

The court also noted with approval Donnally's textbook "The Law of Coal, Oil and Gas in West Virginia and Virginia, (1951) which stated at Section 48:

"While a cotenant may not lease for oil and gas purposes the interests of his cotenants, he may lease his own interest. If a co-tenant takes exclusive possession of the land and leases it for oil purposes on a royalty basis the excluded co-tenant may permit the lessee to continue operations and require an accounting of his proportionate share of the royalties."

In its order of January 30, 2008, certifying the question to this court the circuit court made several "findings and conclusions of law" proposed by the respondent. These findings and conclusions are not consistent with the law applicable to this case.

The court's first finding and conclusion is as follows:

The Court finds that it is clear that it is "conceptually

impossible” for tenants in common to trespass against one another, this action has evolved into a claim by the plaintiff for an accounting from his cotenant with respect to monies received regarding the production of oil and gas. Eagle Gas Company v. Doran & Associates, Inc., 182 W.Va. 194, 387 SE 2d 99 (1989). Accordingly, the only cause of action available to the plaintiff is one for accounting against the cotenant.

Eagle Gas was addressed earlier in this petition and, as noted, the petitioner does not contend that trespass is an issue in this case. The petitioner agrees that the correct remedy is an accounting the only question being what form that accounting should take. Eagle Gas Company v. Doran & Associates, supra, concerned two owners of an undivided one half interest in a leasehold estate. The case concerned a rather complex series of events related to leasing the undivided interest in the minerals and whether subsequent lessors were on notice of prior leases. In resolving the issues the court concluded an accounting was the appropriate remedy, and that the basis of accounting would be the value of the gas sold less production costs. 387 SE 2d at 103. Thus, even though Eagle Gas is not similar factually to the instant case, the result is conceptually consistent with the remedy petitioner contends is appropriate.

The second finding and conclusion is:

“An action for an accounting is permitted by W.Va.

Code § 55-18-13 (1923). This statutory section permits an action of account between tenants in common for "receiving more than his just share of proportion."

This code section is inapplicable to the situation at hand as the question is not one of whether a tenant in common has received more than his or her fair share. As noted repeatedly, the question is one of whether the non-leasing cotenant has a right to be compensated by the producer of the oil and gas when the lease entered into by his cotenant is not ratified by him.

The third finding and conclusion is:

"The West Virginia Supreme Court of Appeals in McConaha v. Rust, 219 W.Va. 112, 632 SE 2d 52 (2006) held that:

If a tenant in common uses the land for purposes allowed by law to a tenant in common but uses no more than his share and does not exclude a cotenant, he is not accountable to him for rents and profits.

There is no evidence in this matter that the plaintiff was ever excluded from the property or that the cotenant, Karen S. Drake, used more than her share of the property. Thus, while this finding states the law, it has no applicability to the facts of this case. Again, the question is not one of the use made of the property by Karen Drake or whether Rickey Drake was excluded from the property. The issues discussed in McConaha concerned

claims based upon cotenants failing to account for rents owed to fellow cotenants when they were using more than their share of the common property. While it should be noted in this case that the court did not address the issue at hand as the accounting claim had been dismissed by the circuit court, which dismissal was not challenged on appeal, to the extent that the discussion is even germane it does not apply to the situation in which a lease has been taken from one cotenant only.

Finding and conclusion number four is:

“With respect to the plaintiff’s claim for an accounting, the cotenant, Karen S. Drake, should account to the plaintiff for his just proportion of the royalty, which is the proper measure of damages for the allegation of waste. Smith v. United Fuel Gas Company, 113 W.Va. 178, 166 SE 2d 533 (1932).

In Smith this court held that one cotenant who wrongfully produced his cotenant’s coal,

“Can be sued in trespass, or, if he sells,... can waive the tort, and sue for the money had and received, because the one has received money from the sale of property belonging to the other.... His act was wrong, a waste, in violation of the right of his cotenant; and this cotenant can follow up the property and base his demand on the wrongful taking and conversion.” (Citation omitted) 166 SE at 534.

Thus, Smith contains the same contradictory language as many of the others

in which it is stated that a cotenant can sue his cotenant in trespass when he takes his cotenant's minerals.

A careful reading of Smith reveals that it is consistent with the petitioner's position. In Smith, all of the oil and gas was leased, but on different terms in separate leases. The question was whether the cotenants had to account to one another. Certain cotenants claimed the right to an accounting of royalties under the leases. The lower court had concluded that the cotenants failed to opt to benefit from each other's leases. This court disagreed, finding that:

"We find no basis for the exercise of an option on the part of any of the litigants to treat either lease as for the benefit of all of the cotenants. The right to so treat these leases was accorded by law, and we find no waiver or estoppel of that right. The estoppel, waiver, or limitation is pleaded." 166 SE at 534.

Since the complaining cotenants had claimed the right to an accounting under the leases, it was decided that the leases had been ratified, to have been made and an accounting of royalties ordered.

Finding and conclusion number five is:

"Likewise, the West Virginia Supreme Court of Appeals held that in Sommers v. Bennett, 68 W.Va. 157, 69 SE 690 (1910), that an accounting between cotenants should include all money received by the lessor/cotenant from royalties accruing under the lease.

In Sommers, it was specifically held that the accounting discussed would be for the royalty to be paid as the lease was ratified by the coowner of the minerals who did not enter into the lease. Had the lease not been ratified by action of the nonleasing cotenant, the accounting would not have been only for the royalty.

There appears to be no doubt that in the situation at hand in which a leasee has entered upon property in a good faith belief that it had the right to produce all of the minerals it must account to the non-consenting cotenant for the value of the gas produced. The non-consenting cotenant has the right to accept the lease or to reject it. In the event that he rejects it he is entitled to the value of the gas removed less the reasonable cost of production. Waco has stipulated and, based upon that stipulation the circuit court ordered, that Waco is not to be entitled to offer any evidence of offset for cost of production other than that already calculated within the royalty purportedly paid.

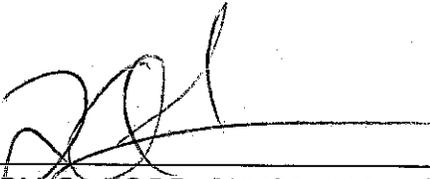
VII. CONCLUSION

Therefore, based on the authorities discussed above, petitioner, Rickey Drake, respectfully requests that the court answer the certified question as follows:

“The correct measure is the value of the gas

produced less reasonable cost of production.”

Respectfully submitted,



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RICKEY DRAKE,
By Counsel.

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Plaintiff,

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CIVIL ACTION NO.: 07-C-09

WACO OIL & GAS COMPANY, INC.,
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Defendant.

CERTIFICATE OF SERVICE

I, Larry O. Ford, do hereby certify that true and exact copies of the "Petition of Rickey Drake" has been served on counsel of record, at the address listed below, being the last address known to me, by first class mail, postage pre-paid, on this 20 day of February, 2008.

Gregory H. Schillace, Esquire
Schillace Law Office
P.O. Box 1526
Clarksburg, WV 26302-1526



LARRY O. FORD (WVSB # 1241)

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