

IN THE CIRCUIT COURT OF BRAXTON COUNTY, WEST VIRGINIA

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2008 JAN 30 PM 3 04

RICKEY DRAKE,

J.W. MORRIS, CLERK
BRAXTON CO CIR COURT

Plaintiff,

v.

Civil Action No.: 07-C-9
Richard A. Facemire, Judge

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

Defendant.

**ORDER CERTIFYING QUESTION TO
THE WEST VIRGINIA SUPREME COURT OF APPEALS**

On a prior day, came the plaintiff, Rickey Drake, by counsel, Larry O. Ford, and the defendant, Waco Oil & Gas Company, Inc., by counsel, Gregory H. Schillace, pursuant to the plaintiff's motion for summary judgment. Thereupon, the Court **FOUND** that the issue raised as articulated herein is one of statewide concern and determined that it is appropriate to certify this question to the West Virginia Supreme Court of Appeals pursuant to West Virginia Code § 58-5-2.

Accordingly, the Court certifies the following question of law to the West Virginia Supreme Court of Appeals:

Where an oil and gas producer entered a lease for oil and gas production with one of two co-tenants, unaware of the ownership interest of the non-leasing co-tenant, produces gas pursuant to the lease and is then called upon by the non-leasing co-tenant to account, in determining the amount to which the non-leasing co-tenant is entitled is the correct measure the value of gas produced less

reasonable costs of production or is the correct measure that portion of the royalty to which the non-leasing tenant would have been entitled had each tenant executed the lease.

Answer of the Circuit Court:

The correct measure of the accounting is the amount of royalty due pursuant to the lease.

In answering this question the Circuit Court has made the following findings and conclusions of law.

- (1) 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 co-tenant with respect to monies received regarding the production of oil and gas. Eagle Gas Company v. Doran & Associates, Inc., 182 W.Va. 194, 387 S.E.2d 99 (1989). Accordingly, the only cause of action available to the plaintiff is one for accounting against the co-tenant.
- (2) An action for an accounting is permitted by West Virginia Code § 55-8-13 (1923). This statutory section permits an action of account between tenants in common for "receiving more than his just share or proportion".
- (3) The West Virginia Supreme Court of Appeals in McConaha v. Rust, 219 W.Va. 112, 632 S.E.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 co-tenant, he is not accountable to him for rents and profits.

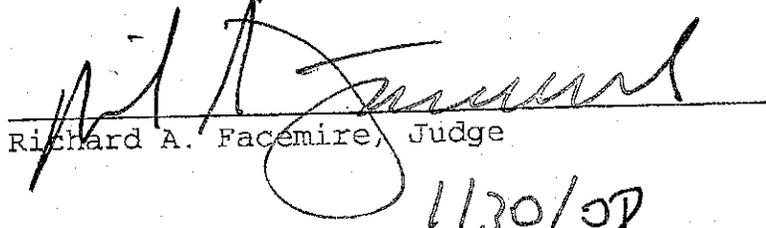
There is no evidence in this matter that the plaintiff was ever excluded from the property or that the co-tenant, Karen S. Drake, used more than her share of the property.

- (4) With respect to the plaintiff's claim for an accounting, the co-tenant, 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 S.E.2d 533 (1932).

(5) Likewise, the West Virginia Supreme Court of Appeals held in Sommers v. Bennett, 68 W.Va. 157, 69 S.E. 690 (1910), that an accounting between co-tenants should include all money received by the lessor/co-tenant from royalties accruing under the lease.

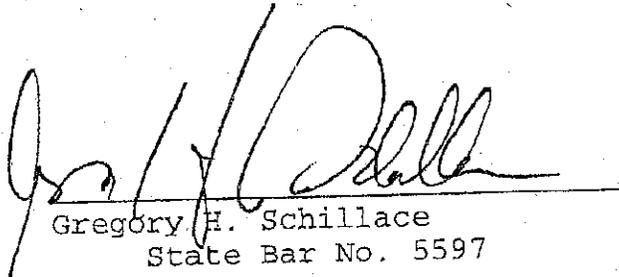
The Clerk is directed to send a certified copy of this Order to all counsel of record.

ENTER: 30 January 2008


Richard A. Facemire, Judge

1/30/08

Submitted by:


Gregory H. Schillace
State Bar No. 5597

Counsel for Defendant

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