IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

DOCKET NO. 13-1087

CNX GAS COMPANY LLC, as successor in interest to DOMINION EXPLORATION & PRODUCTION, INC. and CNG DEVELOPMENT COMPANY, Defendant Below,

Petitioner,

v.

MARY MAXINE WELCH, Plaintiff Below,

Respondent.

Appeal from the order certified under W. Va. R. Civ. P. 54(b) of the Circuit Court of Ritchie County (03-C-65)

BRIEF OF PETITIONER

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I. ASSIGMENTS OF ERROR

A. **THE CIRCUIT COURT ERRED IN FAILING TO COMPLY WITH THE MANDATE IN A PRIOR APPEAL STYLED *ST. LUKE'S UNITED METHODIST CHURCH V. CNG DEVELOPMENT CO.*, 222 W. VA. 185, 663 S.E.2D 639 (2008), BECAUSE THE CIRCUIT COURT EXCEEDED THE SCOPE OF THIS COURT'S DIRECTIONS ON A LIMITED REMAND BY ALLOWING RESPONDENT MARY MAXINE WELCH IMPROPERLY TO PLEAD ADDITIONAL CLAIMS AND BY DETERMINING ISSUES OUTSIDE THE SCOPE OF THE MANDATE.**

B. **THE CIRCUIT COURT ERRED IN GRANTING MRS. WELCH'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF BREACH OF A DRILLING AGREEMENT.**

1. **CNX DID NOT BREACH THE AGREED ORDER APPROVING A PROPOSED DRILLING PLAN FOR THE FLANAGHAN LEASE BECAUSE CNX MERELY FILED A NOTICE OF MODIFICATION OF THE DRILLING PLAN IN ACCORDANCE WITH ITS EXPRESS TERMS.**

2. **THE AGREED ORDER APPROVING A PROPOSED DRILLING PLAN FOR THE FLANAGHAN LEASE ENTERED MARCH 30, 2009, IS NOT A COMPROMISE, SETTLEMENT, OR OTHER CONTRACTUAL AGREEMENT THAT SUPPLANTED PETITIONER CNX GAS COMPANY LLC'S OBLIGATION TO DEVELOP THE FLANAGHAN LEASE AS A REASONABLY PRUDENT OPERATOR BECAUSE THERE WAS NO MEETING OF THE MINDS AND NO CONSIDERATION.**

3. **CNX DID NOT EXERCISE ITS OPTION TO FOREGO ANY ADDITIONAL DEVELOPMENT OF THE FLANAGHAN LEASE UNDER FOOTNOTE 18 OF *ST. LUKE'S UNITED METHODIST CHURCH* BY FILING A NOTICE OF MODIFICATION OF THE DRILLING PLAN BECAUSE IT ONLY SOUGHT TO SUSPEND DRILLING.**

C. **THE CIRCUIT COURT ERRED IN GRANTING MRS. WELCH THE EQUITABLE REMEDY OF PARTIAL RESCISSION BECAUSE THERE IS NOT PROOF SUFFICIENT TO ESTABLISH THAT CNX BREACHED THE IMPLIED COVENANT OF DEVELOPMENT IN CONNECTION WITH THE FLANAGHAN LEASE IN ACCORDANCE WITH THE MANDATE AND SYLLABUS POINT 4 OF *ST. LUKE'S UNITED METHODIST CHURCH.***

II. SUMMARY OF THE ARGUMENT

This Court should reverse the circuit court's orders entered May 2 and September 16, 2013, and remand this action for further proceedings because the circuit court erred in failing to comply with the mandate in *St. Luke's United Methodist Church v. CNG Development Co.*, 222 W. Va. 185, 663 S.E.2d 639 (2008). The circuit court failed to follow the express directions of this Court on the limited remand by improperly allowing Mrs. Welch to plead additional claims and by determining issues outside the scope of the mandate.

The circuit court further erred in granting Mrs. Welch's motion for partial summary judgment on the issue of breach of a drilling agreement. First, CNX did not breach the agreed order approving a proposed drilling plan because CNX merely filed a notice of modification of the drilling plan in accordance with its express terms. Second, in any event the agreed order approving a proposed drilling plan for the Flanaghan Lease is not a compromise, settlement, or other contractual agreement that supplanted CNX's obligation to develop the Flanaghan Lease as a reasonably prudent operator because there was no meeting of the minds or consideration. Third, CNX did not exercise its option to forego any additional development of the Flanaghan Lease under footnote 18 of *St. Luke's United Methodist Church* by filing a notice of modification of the drilling plan because it only sought to suspend drilling of the final three of eleven wells.

Finally, the circuit court erred in holding that Mrs. Welch is entitled to the equitable remedy of partial rescission because there is not proof sufficient to establish that CNX breached the implied covenant of development in connection with the Flanaghan Lease in accordance with the mandate and as required in Syllabus Point 4 of *St. Luke's United Methodist Church* Therefore, this Court should reverse the circuit court's grant of partial summary judgment to Ms. Welch and remand this action for further proceedings consistent with its opinion.

III. STATEMENT OF THE CASE

Mrs. Welch and others initiated this action involving an oil and gas lease dispute in the Circuit Court of Ritchie County in 2003. This is the second appeal pursuant to West Virginia Rule of Civil Procedure 54(b). The first appeal was from an order entered on November 15, 2006, by the late Honorable Robert L. Holland, Jr. dismissing those portions of the amended complaint relating to partial rescission. The factual and procedural background leading to the first appeal may be found in the Court's opinion in *St. Luke's United Methodist Church v. CNG Development Co.*, 222 W. Va. 185, 663 S.E.2d 639, 641-42 (2008).

In the first appeal decided on June 12, 2008, this Court reversed the ruling of the circuit court on partial rescission and remanded this action for further proceedings consistent with its opinion. The Court held:

> A trial court may consider the equitable remedy of partial rescission in fashioning the relief to be awarded *upon proof sufficient to establish a breach of the implied covenant of development in connection with an oil and gas lease dispute.*

Id. at Syl. Pt. 4 (emphasis added).

The Court concluded with directions to the circuit court as follows:

> In this case, it is clear that Dominion [Exploration & Production, Inc.] has expressed a willingness to develop additional drilling sites on the leased tract. Given the fact that Dominion already has a vested interest in that portion of the tract which is currently producing based on the three existing wells as well as a valid lease arrangement, it stands to reason that Dominion should be given an opportunity to further develop the property. *On remand to the trial court, a reasonable period of time should be established to provide for such additional development efforts on the part of Dominion. If the trial court finds that no significant additional development efforts have been pursued by Dominion at the conclusion of such reasonable period of time, then the trial court should proceed to take evidence on the issue of whether Dominion has breached the implied covenant of further development or whether evidence can be produced on the issue of undue hardship. We agree with the trial court's ruling that the record, as developed, does not suggest any evidence of undue hardship. Depending on the evidence that may be produced in the event of such proceedings, the equitable remedy of partial rescission is an appropriate remedy to be considered if either a*

breach of the implied covenant of further development or undue hardship can be established and the trial court is convinced that monetary damages alone are an insufficient remedy.

Id., 663 S.E.2d at 647-8 (footnote omitted) (emphasis added).[1]

The Court noted:

Obviously, Dominion has the option of foregoing any additional development of the leased tract should it no longer be interested in pursuing the same. In such event, however, it should give up the leased area that is not currently producing oil or gas to allow another entity to engage in exploration and development efforts on the currently undeveloped portion of the leased tract.

Id., 663 S.E.2d 639, 647 n.18.

The mandate issued by this Court thereafter on July 14, 2008, stated:

The Court, having maturely considered the record, and the oral argument and briefs of counsel thereon, is of the opinion for reasons stated in writing and filed with the record that there is error in the ruling of the Circuit Court of Ritchie County, rendered on the 15th day of November, 2006. It is therefore considered and ordered by the Court that said ruling be, and it hereby is reversed. *AND this action is remanded to the Circuit Court of Ritchie County for further proceedings in accordance with the principles stated and directions given in the written opinion aforesaid and further according to law*; all of which is ordered to be certified to the Circuit Court of Ritchie County.

A.R. at 36.

Shortly after the Court's issuance of its mandate, Dominion Exploration & Production Inc. ("Dominion" or "DEPI") served a motion for approval of a proposed drilling plan on August

[1] The conclusion paragraph essentially reiterated an introductory paragraph of the opinion, which stated:

Upon our careful review of the law in this area in conjunction with the actions taken by the parties, we conclude that the trial court should impose a reasonable time period during which Dominion may undertake efforts to further develop the leased property. If at the conclusion of that time period, Dominion has failed to commence additional drilling operations on the property, the trial court should proceed to take evidence to determine whether Appellant can prove either a breach of the implied duty of further development or that she has suffered extreme hardship due to the alleged underdevelopment of the leased property. If either breach of an implied covenant to develop or extreme hardship can be established, then the remedy of partial rescission may be utilized to prevent Dominion from continuing to hold onto the lease without meeting its obligation to explore, exploit, and develop.

Id., 663 S.E.2d at 641.

19, 2008. A.R. at 37-40. The proposed drilling plan was originally outlined in an expired offer of judgment dated February 13, 2006, that Mrs. Welch had not accepted.[2] The motion described DEPI's proposed drilling plan in numbered paragraph 11 as follows:

> DEPI plans to proceed with the drilling plan outlined in its Offer of Judgment, whereby DEPI will drill, or cause to be drilled, two wells during 2008, and two additional wells per year thereafter until a total of eleven (11) wells have been drilled on the Flanaghan Lease, at the tentative locations identified in "Defendant's Ex. No. 12." *DEPI will reevaluate its site locations and drilling plans following completion of each well based upon the completion reports, production history, and other factors. DEPI reserves the right to modify the drilling plan based upon this review procedure.*

A.R. at 38 (emphasis added).

The plaintiffs did not file a response to the motion for approval of a proposed drilling plan, and the circuit court held a hearing on October 7, 2008. During the hearing, counsel for Mrs. Welch advised the Court that she would take no position on DEPI's motion and would neither approve nor oppose the motion. A.R. at 42, 77-86.

On March 30, 2009, the circuit court entered an agreed order, which approved the proposed drilling plan. A.R. at 44-47. Again, the plaintiffs, including Mrs. Welch, did not affirmatively agree to or accept the drilling plan but as stated on page 1 of the agreed order merely "[did] not object to the entry of [the] Agreed Order approving the Drilling Motion subject to their right to ask the Court to reopen the matter and to review prospective drilling plans by DEPI in the event of changed circumstances." A.R. at 44. As further stated in the agreed order:

> DEPI will reevaluate its site locations and drilling plans following completion of each well based upon the completion reports, production history, and other factors. DEPI reserves the right to modify the drilling plan based upon this review procedure and agrees to notify the Court and plaintiffs of any proposed changes to its future drilling plans. . . .

[2] Mrs. Welch not only failed to accept the offer of judgment, she filed a motion to strike. A.R. at 4. The circuit court denied the motion to strike the offer of judgment in its order entered November 15, 2006, which formed the basis for the first appeal although that issue was not raised. A.R. at 29-35.

> The parties submit this Agreed Order advising the Court that no party opposes DEPI's proposed drilling plan; subject to the right of any party to reopen this matter for future drilling in the event of changed circumstances; provided that any such motion would not affect any rights to wells drilled prior to the action for reopening.
>
> *Based upon the foregoing, it is hereby ORDERED that the Motion of Dominion Exploration & Production, Inc. for Approval of Proposed Drilling Plan dated August 19, 2008 is approved by the Court subject to the right of any party to petition the Court to reopen the drilling plan for future drilling in the event of changed circumstances, provided that any and all rights to wells drilled prior to the date any petition is filed shall not be affected.*

A.R. at 45-46 (emphasis added).

The agreed order was only "prepared and submitted" by counsel for CNX and "Approved for Entry" by counsel for Mrs. Welch. The agreed order noted that CNX Gas Company LLC ("CNX"), which is the successor in interest to DEPI, had already drilled the two wells planned for 2008. A.R. at 45.[3] The agreed order provided that either CNX or Mrs. Welch could modify the drilling plan in the future. Accordingly, if gas prices increased or the new wells were high producers, Mrs. Welch retained the right to seek additional drilling. Likewise, CNX had the right to modify the drilling plan if, for example, gas prices decreased or the wells were low producers. As a result of both events, CNX modified the drilling plan after completing eight of the eleven proposed wells.

CNX drilled eight wells on the Flanaghan Lease before it served a notice of modification of its drilling plan to suspend drilling on November 2, 2012. In support of its notice, CNX

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[3] Significantly, in the process of negotiating the terms of the agreed order counsel for Mrs. Welch sent a memorandum to counsel for CNX dated February 2, 2009, which stated in pertinent part:

> ¶2: I prefer to characterize my clients' position *as not objecting to entry of the order* (and the draft uses that terminology later). I would also prefer neutral terminology regarding what circumstances might warrant reopening the issue in the future. Our teleconference with Judge Holland was not recorded, of course, *but I don't think that conversation provides a basis to restrict reopening to "changed economic circumstances"* (nor do I know what that means). . . .

A.R. at 117 (emphasis added).

submitted an affidavit of Michael Williams, Senior Financial Analyst for CNX. Mr. Williams provided a well economic analysis that reflected a substantial negative return on the three proposed wells and testified that at the current low gas price and well economics, the three remaining proposed wells could not be economically developed under then-current circumstances. A.R. at 48-55.

Following a status conference, the Honorable Timothy L. Sweeney, who had replaced the late Judge Holland on the circuit court, entered an order on December 3, 2012, which noted that CNX had modified its drilling plan and further provided that Mrs. Welch should serve any petition to modify the drilling plan on or before January 15, 2013. The court set a briefing schedule for any petition to modify the drilling plan and set an evidentiary hearing on Mrs. Welch's anticipated petition to modify the drilling plan for March 1, 2013. A.R. at 56-58.

Instead of filing the anticipated petition to modify the drilling plan, Mrs. Welch filed a renewed petition for partial rescission and other relief. The renewed petition, which is an unauthorized amended pleading, contains two counts with the first count claiming partial rescission and the second claiming breach of a drilling agreement (the drilling plan outlined in the agreed order). Mrs. Welch alleges that CNX's suspension of drilling on the Flanaghan Lease was not reasonable and its development thereof is not sufficient. In addition, Mrs. Welch alleges for the first time that CNX has failed to undertake development of the Marcellus formation underlying the Flanaghan Lease. The renewed petition also prays for the partial rescission on the first count and damages on the second count for breach of a drilling agreement. A.R. at 59-69.

CNX responded to the renewed petition on February 8, 2013, noting that Mrs. Welch offered no basis for challenging CNX's modification of the drilling plan. Moreover, CNX argued that it is prepared to outline and defend its ongoing and continued plans to develop the

Marcellus formation under the Flanaghan Lease. Finally, CNX argued that Mrs. Welch is not entitled to equitable relief on her claim for breach of a drilling agreement. A.R. at 90-94.

On February 19, 2013, Mrs. Welch served a reply and motion for partial summary judgment on the issue of breach of drilling agreement.[4] Mrs. Welch argued that the drilling plan is a "contractual drilling commitment," that the parties specifically agreed that economic circumstances would not be a basis for modification of the drilling plan, and that partial rescission is appropriate. A.R. at 95-105.

CNX served a response to the motion for partial summary judgment on February 26, 2013. CNX noted that Mrs. Welch's motion was untimely both because it was not filed within the timeframe in West Virginia Rule of Civil Procedure 56(c) and because it was not in conformity with the December 3rd order. CNX further supplied proof that Mrs. Welch's request, through counsel, that the word "economic" be removed from the phrase "changed economic circumstances" was only to provide that the changed circumstances that could form the basis for a modification of the drilling plan would not be restricted to economic changes – not to preclude economic changes from being the basis for modification of the drilling plan. A.R. at 113-16.

The circuit court held a hearing as scheduled on March 1, 2013, and entered an order thereafter on May 2, 2013. The circuit court concluded in relevant part as follows:

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[4] Also on February 19, 2013, Mrs. Welch's counsel sent a letter to the Court in which she waived any right to present evidence in opposition to CNX's modification of the drilling plan. The letter stated:

> As you will find, Plaintiff, Mrs. Welch, does not believe there are any factual issues upon which the Court will need to make findings in order to rule upon CNG's *Notice of Modification of Drilling Plan* or Mrs. Welch's *Petition for Partial Rescission and Other Relief.*
>
> Rather, Plaintiff contends that CNG has breached its drilling commitment as a matter of law. To this end, we provide you with this *Motion for Summary Judgment* which we intend to bring on for hearing on March 1, 2013 at 9:00 a.m. The Court has set this hearing down on its calendar for an evidentiary hearing. We will appear to offer argument with respect to our *Motion for Summary Judgment* but do not intend to put on any evidence.

A.R. at 213 (emphasis in original).

3. By virtue of the *Agreed Order* of March 30, 2009, the parties entered into a contractual agreement to address the West Virginia Supreme Court's instructions that CNX should be provided an opportunity for additional development of the Flanaghan Lease. The drilling program set forth in the *Agreed Order* established CNX's obligation as to further development of the Flanaghan Lease.

4. CNX's contractual development obligation, as contained in the Agreed Order of March 30, 2009, supplanted CNX's implied obligation to develop the Flanaghan Lease as a reasonably prudent operator.

5. By electing, in its discretion, not to further develop the Flanaghan Lease pursuant to the *Agreed Order*, CNX has exercised its option to forego any additional development of the leased tract as specifically provided for at Syl. Pt. 18 of *St. Luke's United Methodist Church v. CNG, et al.*, 663 S.E.2d 639, 222 W. Va. 185 (2008).[5]

6. Accordingly, CNX should give up the leased area that is not currently producing oil or gas to allow another entity to engage in exploration and development efforts on the currently undeveloped portion of the Flanaghan Lease. *See Id.*

It is therefore ORDERED that Mrs. Welch's *Renewed Petition for Partial Rescission and Other Relief* is GRANTED in part, consistent with such Findings of Fact and Conclusions of Law set forth above.

Accordingly, it is further ORDERED that partial rescission be and is effected as to the Defendants' [sic] leasehold rights in the natural gas reserves underlying that certain tract of real estate situate in Union District, Ritchie County, West Virginia, comprising a total of 850 acres, referred to herein as the Flanaghan Lease and more particularly described or referenced in the Complaint, as to all formations below those that have been heretofore developed by Defendants provided, however, that Defendants shall retain their leasehold rights to the formations underlying the Flanaghan Lease through which Defendants have currently developed.

A.R. at 162-67 (emphasis in original).

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[5] *St. Luke's United Methodist Church* does not have a Syllabus Point 18. Footnote 18 reads in full as follows:

> Obviously, Dominion has the option of foregoing any additional development of the leased tract should it no longer be interested in pursuing the same. In such event, however, it should give up the leased area that is not currently producing oil or gas to allow another entity to engage in exploration and development efforts on the currently undeveloped portion of the leased tract.

St. Luke's United Methodist Church, 663 S.E.2d at 648 n.18.

CNX served a motion for reconsideration of the circuit court's May 2nd order, or in the alternative, for a stay pending this Court's review. In addition, CNX served a memorandum in support of its motion. CNX argued that the circuit court's May 2nd order should be reversed because it failed to comply with the mandate in *St. Luke's United Methodist Church*. The circuit court failed to follow the express directions of this Court on the limited remand by improperly allowing Mrs. Welch to plead additional claims and determining issues outside the scope of the mandate. CNX further argued that in any event the agreed order approving a proposed drilling plan is not a compromise, settlement, or other contractual agreement that supplanted CNX's implied obligation to develop the Flanaghan Lease as a reasonably prudent operator as the circuit court concluded. Moreover, CNX argued that it did not breach the agreed order, but merely gave notice of modification in conformity with its express terms. Finally, CNX argued that Mrs. Welch is not entitled to the equitable remedy of partial rescission on her claim for breach of a drilling agreement in any event. A.R. at 187-212.

Mrs. Welch served a response to CNX's motion for reconsideration and other relief. Mrs. Welch argued that CNX's motion for reconsideration and other relief was untimely under West Virginia Rule of Civil Procedure 59(e) and otherwise without merit. Mrs. Welch, however, stated that she was amenable to a stay of proceedings in the circuit court to allow CNX a reasonable amount of time to seek appellate review. A.R. at 214-19.

The circuit court held a hearing on June 19, 2013, and entered an order thereafter on September 16, 2013. The court held in pertinent part that because the May 2nd order was neither final as to all claims and parties nor was it certified under West Virginia Rule of Civil Procedure 54(b), CNX properly brought the motion for reconsideration pursuant to the court's inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to

be sufficient. The court further denied the motion for reconsideration upon finding insufficient cause. The court certified the claims adjudicated in the May 2nd order under Rule 54(b) and stayed the remaining proceedings in that court pending review by this Court. A.R. at 220-22.

CNX timely filed a notice of appeal in this Court on October 11, 2013.

IV. ARGUMENT

A. Standards of Review

This Court held in Syllabus Point 4 of *State ex rel. Frazier & Oxley v. Cummings*, 214 W. Va. 802, 591 S.E.2d 728 (2003) ("*Frazier & Oxley II*"), that "[a] circuit court's interpretation of a mandate of this Court and whether the circuit court complied with such mandate are questions of law that are reviewed *de novo*." The Court reasoned as follows:

> Like the interpretation of other legal documents, such as constitutions, statutes and procedural rules, we believe that the interpretation of one of our mandates, and the corresponding question of whether the circuit court complied with the mandate, are questions of law that should be reviewed *de novo*. Other courts examining this issue have reached similar conclusions. . . . Indeed, it would be contrary to common sense "to suggest that we must defer to what a trial judge inferred about our intent in what we wrote [in our mandate]."

Id., 591 S.E.2d at 736 (footnotes and citations omitted).

In addition, this Court held in Syllabus Point 1 of *West Virginia Department of Transportation v. Robertson*, 217 W. Va. 497, 618 S.E.2d 506 (2005), that "[a]ppellate review of a partial summary judgment order is the same as that of a summary judgment order, which is *de novo*." *See Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994) (holding that circuit court's entry of summary judgment is reviewed *de novo*).

B. The Circuit Court Erred in Failing to Comply with the Mandate in *St. Luke's United Methodist Church v. CNG Development Co.*, 222 W. Va. 185, 663 S.E.2d 639 (2008).

This Court should reverse the circuit court's May 2nd and September 16th orders and remand this action for further proceedings because the circuit court erred in failing to comply with the mandate in *St. Luke's United Methodist Church v. CNG Development Co.*, 222 W. Va. 185, 663 S.E.2d 639 (2008). The circuit court failed to follow the directions of this Court on the limited remand by improperly allowing Mrs. Welch to plead additional claims and by determining issues outside the scope of the mandate.

In *State ex rel. Frazier & Oxley v. Cummings*, 214 W. Va. 802, 591 S.E.2d 728 (2003) ("*Frazier & Oxley II*"), the Court held in pertinent part as follows:

> 2. When this Court remands a case to the circuit court, the remand can be either general or limited in scope. Limited remands explicitly outline the issues to be addressed by the circuit court and create a narrow framework within which the circuit court must operate. General remands, in contrast, give circuit courts authority to address all matters as long as remaining consistent with the remand.
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> 3. Upon remand of a case for further proceedings after a decision by this Court, the circuit court must proceed in accordance with the mandate and the law of the case as established on appeal. The trial court must implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces.
>
> 4. A circuit court's interpretation of a mandate of this Court and whether the circuit court complied with such mandate are questions of law that are reviewed *de novo*.
>
> 5. When a circuit court fails or refuses to obey or give effect to the mandate of this Court, misconstrues it, or acts beyond its province in carrying it out, the writ of prohibition is an appropriate means of enforcing compliance with the mandate.

Id. at Syl. Pts. 2-5.

In *State ex rel. Frazier & Oxley v. Cummings*, 212 W. Va. 275, 569 S.E.2d 796 (2002) ("*Frazier & Oxley I*"), this Court granted a writ of prohibition to prevent enforcement of the

circuit court's order granting partial summary judgment to the plaintiffs and requiring the defendants to vacate an office that they were subleasing from the plaintiffs. The Court remanded the case to the circuit court to conduct proceedings for a factual determination of whether a surrender of the lease had occurred. Following remand, the circuit court allowed one of the plaintiffs to amend the complaint to assert a different theory for voiding the lease. In *Frazier & Oxley II*, the defendants filed a second petition for a writ of prohibition to prevent enforcement of the circuit court's order allowing the plaintiff to amend the complaint. This Court agreed that the decision to allow the plaintiff to amend the complaint exceeded the mandate in *Frazier & Oxley I*. The Court in *Frazier & Oxley II* noted that the remand was limited even though *Frazier & Oxley I* contained no language that expressly limited what could occur on remand.

Similarly, in *State ex rel. Advance Stores Co. v. Recht*, 230 W. Va. 464, 740 S.E.2d 59 (2013), this Court granted a petition for writ of prohibition and held that the circuit court had exceeded the scope of the mandate on a limited remand. In that case as well, following a proceeding on certified question in *McMahon v. Advance Stores Co.*, 227 W. Va. 21, 705 S.E.2d 131 (2010), the circuit court erred by allowing the plaintiffs to amend their complaint to add a new theory of recovery.

When this action was first appealed in *St. Luke's United Methodist Church*, the West Virginia Supreme Court of Appeals held in Syllabus Point 4:

> A trial court may consider the equitable remedy of partial rescission in fashioning the relief to be awarded upon proof sufficient to establish a breach of the implied covenant of development in connection with an oil and gas lease dispute.

The Court concluded as follows:

> In this case, it is clear that Dominion has expressed a willingness to develop additional drilling sites on the leased tract. Given the fact that Dominion already has a vested interest in that portion of the tract which is currently producing based on the three existing wells as well as a valid lease arrangement, it stands to reason

> that Dominion should be given an opportunity to further develop the property. *On remand to the trial court, a reasonable period of time should be established to provide for such additional development efforts on the part of Dominion. If the trial court finds that no significant additional development efforts have been pursued by Dominion at the conclusion of such reasonable period of time, then the trial court should proceed to take evidence on the issue of whether Dominion has breached the implied covenant of further development or whether evidence can be produced on the issue of undue hardship. We agree with the trial court's ruling that the record, as developed, does not suggest any evidence of undue hardship. Depending on the evidence that may be produced in the event of such proceedings, the equitable remedy of partial rescission is an appropriate remedy to be considered if either a breach of the implied covenant of further development or undue hardship can be established and the trial court is convinced that monetary damages alone are an insufficient remedy.*

Id., 663 S.E.2d at 647-8 (footnote omitted) (emphasis added).

Upon remand, CNX submitted a proposed drilling plan, which was approved by the circuit court in the agreed order without objection from Mrs. Welch. CNX expended substantial sums of money and engaged in significant additional development of the Flanaghan Lease, drilling a total of eight wells from 2008 to 2011, under the circuit court approved drilling plan. Ms. Welch produced no evidence to support a finding that CNX breached the implied covenant of further development or undue hardship, and the circuit court made no such finding in its May 2nd or September 16th orders. In any event, the circuit court never considered whether money damages are a sufficient remedy.

The circuit court's failure to effectuate the mandate of *St. Luke's United Methodist Church* was encouraged by Mrs. Welch, who improperly pled additional claims based on new theories and moved for summary judgment on those claims. Specifically, Mrs. Welch's renewed petition for partial rescission and other relief contains two counts previously not pled in the circuit court. The first count contains a claim for partial rescission, and the second count contains a claims for breach of a drilling agreement (the drilling plan outlined in the agreed order). Significantly, Mrs. Welch alleges for the first time that CNX has failed to undertake

development of the Marcellus formation underlying the Flanaghan Lease even though development of that formation was not addressed in the drilling plan. The renewed petition prays for the equitable remedy of partial rescission on the first count and damages on the second count for breach of a drilling agreement. A.R. at 59-69.

Once the new claims were pled and a summary judgment motion filed in rapid succession, Mrs. Welch's counsel advised the circuit court in the February 19th letter as follows:

> As you will find, Plaintiff, Mrs. Welch, does not believe there are any factual issues upon which the Court will need to make findings in order to rule upon CNG's *Notice of Modification of Drilling Plan* or Mrs. Welch's *Petition for Partial Rescission and Other Relief.*
>
> Rather, Plaintiff contends that CNG has breached its drilling commitment as a matter of law. To this end, we provide you with this *Motion for Summary Judgment* which we intend to bring on for hearing on March 1, 2013 at 9:00 a.m. The Court has set this hearing down on its calendar for an evidentiary hearing. We will appear to offer argument with respect to our *Motion for Summary Judgment* but do not intend to put on any evidence.

A.R. at 213 (emphasis in original).

The circuit court failed to effectuate the mandate and exceeded the scope of this Court's directions on the limited remand by ignoring the undisputed facts that CNX has engaged in significant additional development of the Flanaghan Lease, drilling a total of eight wells from 2008 to 2011, under the circuit court approved drilling plan, that Mrs. Welch produced no evidence to support a finding that CNX breached the implied covenant of further development or undue hardship, and that the only remedy prayed for in the second count of Mrs. Welch's petition alleging breach of a drilling agreement is money damages. More fundamentally, however, the circuit court failed to comply with the mandate by allowing the filing of new claims based on new theories in the renewed petition for partial rescission and other relief and by making determinations on issues outside the scope of the mandate. This Court should reverse.

C. The Circuit Court Erred in Granting Mrs. Welch's Motion for Partial Summary Judgment on the Issue of Breach of a Drilling Agreement.

Not only was the circuit court's grant of Mrs. Welch's motion for partial summary judgment on the issue of breach of a drilling agreement outside the scope of the mandate in *St. Luke's United Methodist Church v. CNG Development Co.*, 222 W. Va. 185, 663 S.E.2d 639 (2008), as discussed above, the decision also constitutes independent error. In *State ex rel. Advance Stores Co. v. Recht*, 230 W. Va. 464, 740 S.E.2d 59 (2013), in addition to arguing that the circuit court did not comply with the mandate the petitioner argued that the circuit court committed independent error in allowing the plaintiffs to amendment their complaint based on invalid legal theories. The Court found the petitioner's first argument dispositive and did not reach the question of whether the circuit court committed independent error aside from its failure to comply with the mandate. *Id.*, 740 S.E.2d at 62. If, however, the Court does not find the first issue dispositive in this appeal, it should reverse the May 2nd and September 16th orders on an independent basis because the circuit court erred as a matter of law.

1. CNX did not breach the agreed order by modifying the drilling plan.

Even if the agreed order approving a proposed drilling plan were a contract, which as discussed below it is not, CNX did not breach the agreed order, but merely filed a notice of modification of the drilling plan in accordance with its express terms. Moreover, the circuit court erred in holding that the agreed order supplanted CNX's implied obligation to develop the Flanaghan Lease as a reasonably prudent operator.

The plain and unambiguous language of the agreed order authorized CNX to file the notice of modification of the drilling plan. This reading of the agreed order is corroborated by parol evidence. As discussed above, in his February 2nd memorandum to CNX's counsel, Mrs. Welch's counsel stated in pertinent part:

> ¶2: I prefer to characterize my clients' position as not objecting to entry of the order (and the draft uses that terminology later). *I would also prefer neutral terminology regarding what circumstances might warrant reopening the issue in the future. Our teleconference with Judge Holland was not recorded, of course, but I don't think that conversation provides a basis to restrict reopening to "changed economic circumstances" (nor do I know what that means)....*

A.R. at 117 (emphasis added).

In this action as discussed above and consistent with the February 2nd memorandum, the agreed order expressly provides for lease modification as follows:

> DEPI will reevaluate its site locations and drilling plans following completion of each well based upon the completion reports, production history, and other factors. *DEPI reserves the right to modify the drilling plan based upon this review procedure and agrees to notify the Court and plaintiffs of any proposed changes to its future drilling plans....*
>
> The parties submit this Agreed Order advising the Court that no party opposes DEPI's proposed drilling plan; *subject to the right of any party to reopen this matter for future drilling in the event of changed circumstances; provided that any such motion would not affect any rights to wells drilled prior to the action for reopening.*
>
> *Based upon the foregoing, it is hereby ORDERED that the Motion of Dominion Exploration & Production, Inc. for Approval of Proposed Drilling Plan dated August 19, 2008 is approved by the Court subject to the right of any party to petition the Court to reopen the drilling plan for future drilling in the event of changed circumstances, provided that any and all rights to wells drilled prior to the date any petition is filed shall not be affected.*

A.R. at 45-46.

In accordance with these provisions and the agreed order construed as a whole, CNX filed the notice of modification of its drilling plan to suspend drilling. In support of its notice, CNX submitted the affidavit of Mr. Williams, which provided an economic analysis that reflected a substantial negative return on the three proposed wells and testified that at the current low gas price and well economics, the three remaining proposed wells could not be economically developed under then-current circumstances. Thus, CNX notified the circuit court and Mrs.

Welch that it was exercising its right under the plain and unambiguous language of the agreed order.

In addition the notice of modification of the drilling plan as supported by Mr. Williams's affidavit was justified because CNX had complied with the implied covenant of further development and/or prudent operator standard which this Court recognized applied to this action. In Syllabus Point 4 of *St. Luke's United Methodist Church*, 663 S.E.2d at 643, the Court held:

> A trial court may consider the equitable remedy of partial rescission in fashioning the relief to be awarded upon proof sufficient to establish *a breach of the implied covenant of development* in connection with an oil and gas lease dispute.

(Emphasis added.)

The Court explained the implied covenant of further development in relevant part:

> In discussing the implied covenant or duty of development in *Adkins* [*v. Huntington Development & Gas Co.*, 113 W. Va. 490, 168 S.E. 366 (1932)], we stated:
>
> > As already indicated, a lessor cannot require further development of the premises, after the lessee has acquired a vested interest in the minerals by the completion of a paying well, *except upon proof to the effect that operators for oil and gas of ordinary prudence and experience in the same neighborhood under similar conditions have been proceeding successfully with the further development of their lands or leases, and the further fact that additional wells would likely inure to the mutual profit of both lessors and lessee.*

Id. (citing *Adkins*, 168 S.E. at 369) (emphasis in original).

In *St. Luke's United Methodist Church*, the Court also explained the complementary prudent operator standard. The Court articulated this standard as follows:

> This oft-cited standard frames the issue in terms of objectively considering whether further development would mutually benefit the parties:
>
> > The object of the operations being to obtain a benefit or profit for both lessor and lessee, it seems obvious . . . that both are bound by the standard of what is reasonable.

> . . . . . *The large expense incident to the work of exploration and development, and the fact that the lessee must bear the loss if the operations are not successful, require that he proceed with due regard to his own interests, as well as those of the lessor. No obligation rests on him to carry the operations beyond the point where they will be profitable to him, even if some benefit to the lessor will result from them. It is only to the end that the oil and gas shall be extracted with benefit or profit to both that reasonable diligence is required.* Whether or not in any particular instance such diligence is exercised depends on a variety of circumstances. . . . Whatever, in the circumstances, would be reasonably expected of operators of ordinary prudence, having regard to the interests of both lessor and lessee, is what is required.

Id., 663 S.E.2d at 645 (citing *Brewster v. Lanyon Zinc Co.*, 140 F. 801, 814 (8th Cir. 1905) (emphasis added).

In West Virginia, to prevail on a claim for breach of contract a plaintiff must prove "facts sufficient to support the following elements: the existence of a valid, enforceable contract; that the plaintiff has performed under the contract; that the defendant has breached or violated its duties or obligations under the contract; and that the plaintiff has been injured as a result." *Exec. Risk Indem., Inc. v. Charleston Area Med. Ctr., Inc.*, 681 F. Supp. 2d 694, 714 (S.D.W. Va. 2009). *See Charleston Nat'l Bank of Charleston v. Sims*, 137 W. Va. 222, 70 S.E.2d 809, 813 (1952) (explaining that plaintiff must show that it complied with terms of contract in order to allege breach of contract claim); *Harper v. Consolidated Bus Lines*, 117 W. Va. 228, 185 S.E. 225, 225-26 (1936) (finding that complaint alleging existence of contract, satisfaction of conditions precedent, defendant's conduct constituting breach, and resulting damages is sufficient to state claim for breach of contract); *White v. Romans*, 29 W. Va. 571, 3 S.E. 14, 16 (1887) (holding that plaintiff must allege breach and in addition to facts and circumstances entitling plaintiff to damages).

In *Wittenberg v. Wells Fargo Bank, N.A.*, 852 F. Supp. 2d 731 (N.D.W. Va. 2012), *aff'd sub nom. Wittenberg v. First Indep. Mortg. Co.*, Nos. 12-1323, 13-1366, 2013 WL 3929082 (4th Cir. July 31, 2013), the court held:

> When determining whether a defendant failed to comply with a term in the contract, a court is required to construe the contract in question according to the plain and unambiguous language used. *See Fifth Third Bank v. McClure Properties, Inc.*, 724 F. Supp. 2d 598, 605 (S.D.W. Va. 2010). In making this determination, a court should find language ambiguous only when "it is reasonably susceptible to more than one meaning in light of the surrounding circumstances and after apply [sic] the established rules of construction." *FOP, Lodge No. 69 v. City of Fairmont*, 196 W. Va. 97, 468 S.E.2d 712, 716 (1996).

Id. at 749. *See also HN Corp. v. Cyprus Kanawha Corp.*, 195 W. Va. 289, 465 S.E.2d 391, Syl. Pt. 3 (1995) (holding that "[a] valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent") (citations omitted).

In *Wittenberg*, the court granted the defendant's motion for summary judgment on a breach of contract claim. The plaintiff in that case alleged that the defendant had denied a permanent loan modification even though it had promised one if the plaintiff paid three trial payments. The court held that based upon the plain and unambiguous terms of a special forbearance agreement ("SFA") the plaintiff failed to present a genuine issue of material fact that the defendant breached the agreement when it decided not to give her a permanent loan modification upon successful completion of the trial period. The Court reasoned as follows:

> Here, the SFA plainly and unambiguously stated that the purpose of the agreement was exclusively to "*temporarily* accept reduced payments or maintain regular monthly payments." (SFA at § 2) (emphasis added). In addition, Wells Fargo was careful to explain in the SFA that it was only upon "investor approval" that successful completion of the trial plan "*may* satisfy the remaining past due amount" on Wittenberg's loan. (*Id.*) (emphasis added). Similarly, Wells Fargo cautioned that, "at its option, [it] may institute foreclosure proceedings according to the terms of the note and security instrument *without regard to* this agreement." (*Id.* at § 4) (emphasis added). Finally, and perhaps most importantly, the SFA

> provided in plain and unambiguous terms that Wells Fargo was "*under no obligation* to enter into any further agreement, and [that] this forbearance *shall not constitute a waiver* of [Wells Fargo's] right to insist upon strict performance in the future." (*Id.* at § 3) (emphasis added).

Wittenberg, 852 F. Supp. 2d at 749.

Similar to *Wittenberg*, CNX did not breach or violate its duties or obligations under the agreed order, but rather acted in full compliance with its express terms.

2. The agreed order approving a proposed drilling plan is not a compromise, settlement, or other contractual agreement that supplanted CNX's obligation to develop the Flanaghan Lease as a reasonably prudent operator.

The circuit court erred in holding that the agreed order approving a proposed drilling plan for the Flanaghan Lease is a compromise, settlement, or other contractual agreement that supplanted CNX's obligation to develop the Flanaghan Lease as a reasonably prudent operator because there was no meeting of the minds and no consideration. Both of these elements are necessary for a valid contract.

This Court has held: "A meeting of the minds of the parties is a sine qua non of all contracts." *EurEnergy Res. Corp. v. S & A Prop. Research, LLC*, 228 W. Va. 434, 720 S.E.2d 163, Syl. Pt. 1 (2011) (citations omitted).[6] The elements of a contract are an offer and an acceptance supported by consideration. *First Nat'l Bank of Gallipolis v. Marietta Mfg. Co.*, 151 W. Va. 636, 642, 153 S.E.2d 172, 177 (1967). Consideration is "some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by another." *Id.* Consideration is "an essential element of, and is

[6] The meeting of the minds requirement has been recognized by this Court as specifically applicable to settlement agreements. *See, e.g., Triad Energy Corp. of W. Va., Inc. v. Renner*, 215 W. Va. 573, 600 S.E.2d 285 (2004). "'It is well understood that "[s]ince a compromise and settlement is contractual in nature, a definite meeting of the minds of the parties is essential to a valid compromise, since a settlement cannot be predicated on equivocal actions of the parties." 15A C.J.S. *Compromise & Settlement*, sec. 7(1) (1967)[.]'" *O'Connor v. GCC Beverages*, 182 W. Va. 689, 391 S.E.2d 379, 381 (1990) (citations omitted).

necessary to the enforceability or validity of a contract." *Id.* A "promise or contract where there is no valuable consideration, and where there is no benefit moving to the promisor or damage or injury to the promisee, is void." *Sturm v. Parish*, 1 W. Va. 125, Syl. Pt. 2 (1865).

In this action, the agreed order by which the circuit court approved the proposed drilling plan is not a contractual agreement. Manifestly, the agreed order is not a compromise or settlement agreement as the circuit court concluded. Although the proposed drilling plan was originally outlined in an offer of judgment, Mrs. Welch not only failed to accept the offer of judgment within the time allowed, she filed a motion to strike. In addition, the plaintiffs, including Mrs. Welch, did not affirmatively agree to or accept the drilling plan but as stated on page 1 of the agreed order merely "[did] not object to the entry of [the] Agreed Order approving the Drilling Motion subject to their right to ask the Court to reopen the matter and to review prospective drilling plans by DEPI in the event of changed circumstances."[7]

The agreed order was only "Approved for Entry" by Mrs. Welch's counsel. A.R. at 46.

That Mrs. Welch did not even affirmatively agree to or accept the agreed order is clear from the language of the agreed order and also the memorandum from Mrs. Welch's counsel to CNX's counsel dated February 2, 2009. As set forth in Exhibit A to CNXs response to Mrs. Welch's motion for partial summary judgment, Mrs. Welch's counsel stated in pertinent part:

> ¶2: I prefer to characterize my clients' position as not objecting to entry of the order (and the draft uses that terminology later). I would also prefer neutral terminology regarding what circumstances might warrant reopening the issue in the future. Our teleconference with Judge Holland was not recorded, of course, but I don't think that conversation provides a basis to restrict reopening to "changed economic circumstances" (nor do I know what that means). . . .

[7] It is important to note that pursuant to the agreed order *any party* had the right to reopen the drilling plan. Thus, Mrs. Welch could have petitioned the circuit court for modification of the drilling plan if she were affected by changed circumstances such as an opportunity to develop her property by building a subdivision or business park.

A.R. at 117.[8]

The agreed order is not a contract for the additional reason that it is not supported by consideration. The usual consideration for a compromise and settlement – a promise by Mrs. Welch of forbearance or dismissal of the action – is conspicuously absent from the agreed order. Mrs. Welch has never identified some right, interest, profit, or benefit accruing to CNX, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by her under the agreed order. The circuit court's conclusion that the agreed order is a contractual agreement to address the West Virginia Supreme Court of Appeals' instructions in *St. Luke's United Methodist Church* that supplanted CNX's implied obligation to develop the Flanaghan Lease as a reasonably prudent operator completely ignores the nature of the agreed order and the basic elements required for contract formation in addition to ignoring the mandate.

3. CNX did not exercise its option to forego any additional development of the Flanaghan Lease by modifying the drilling plan.

The circuit court further erred in concluding that by electing not to further develop the Flanaghan Lease pursuant to the agreed order CNX has exercised its option to forego any additional development of the leased tract as specifically provided for in footnote 18 of *St. Luke's United Methodist Church.* The circuit court completely misconstrued footnote 18, and ignored the facts that CNX expressly reserved the right to modify the drilling plan in the agreed order and that the notice of modification of the drilling plan provided notice of suspension – not abandonment – of the plan to drill the final three of the eleven proposed wells. The circuit court's reliance on footnote 18 of *St. Luke's United Methodist Church* in support for its

[8] As noted above, *any party* had the right to reopen the drilling plan. Thus, counsel for Mrs. Welch insisted on *neutral terminology* regarding what circumstances might warrant reopening. Under this neutral terminology, Mrs. Welch not only had the same right as CNX to file a notice of modification of the drilling plan she could have sought either to increase or to accelerate drilling, depending on the change of circumstances. Importantly, Mrs. Welch could have sought to modify the drilling plan to develop the Marcellus formation. Mrs. Welch, however, never sought modification of the drilling plan. Instead, she filed the unauthorized renewed petition for partial recission and other relief.

conclusion that CNX breached the agreed order is baffling in light of its previous *albeit* incorrect conclusion that the agreed order supplanted CNX's implied obligation to develop the Flanaghan Lease. Logically, if the circuit court held that the agreed order supplanted CNX's implied obligation to develop the Flanaghan Lease, then it could not consistently rely on footnote 18, which is based on CNX's implied obligation to develop the leased tract, to find a breach. The circuit court could not find a breach by evaluating CNX's conduct under the agreed order because there is no breach. CNX's notice of modification of its drilling plan is consistent with the express terms of the agreed order.

In any event, footnote 18 is inapplicable because CNX did not forego any additional development of the Flanaghan Lease. As discussed above, CNX drilled a total of eight wells on the Flanaghan Lease under the agreed order before it served the notice of modification to suspend drilling. CNX's drilling of eight wells under the agreed order undeniably represents significant additional development efforts. Moreover, CNX has made a proffer of ongoing and continued plans to develop the Marcellus formation under the Flanaghan Lease.

D. The Circuit Court Erred in Holding that Mrs. Welch is Entitled to Partial Rescission.

In any event, the circuit court erred in holding that Mrs. Welch is entitled to partial rescission on her claim for a breach of a drilling agreement. Even if CNX breached a drilling agreement, which it did not, Mrs. Welch did not seek the equitable remedy of partial rescission on this claim. Moreover, Mrs. Welch has presented no evidence of undue hardship as required by Syllabus point 4 and the mandate in *St. Luke's United Methodist Church v. CNG Development Co.*, 222 W. Va. 185, 663 S.E.2d 639 (2008).

This Court has defined rescission as follows:

To "rescind" is "[t]o abrogate or cancel (a contract) unilaterally or by agreement" or "[t]o make void; to repeal or annul[.]" Black's Law Dictionary 1308 (7th ed. 1999). More specifically, it has been said that:

> "To rescind a contract is not merely to terminate it but to abrogate and undo it from the beginning; that is, not merely to release the parties from further obligation to each other in respect to the subject of the contract, but to annul the contract, and to restore the parties to the relative positions which they would have occupied if no such contract had ever been made."

Stated another way,

> Generally speaking, the effect of a rescission is to extinguish the contract and to annihilate it so effectually that in contemplation of law it has never had any existence, even for the purpose of being broken.
>
> The effect of a rescission of an agreement is to put the parties back in the same position they were in prior to the making of the contract.

Bossie v. Boone Cnty. Bd of Educ., 211 W. Va. 694, 568 S.E.2d 1, 4-5 (2002) (citations omitted).

Rescission is an equitable remedy, which is only available when monetary damages alone are insufficient. Thus, in the mandate in *St. Luke's United Methodist Church* the Court concluded as follows:

> In this case, it is clear that Dominion has expressed a willingness to develop additional drilling sites on the leased tract. Given the fact that Dominion already has a vested interest in that portion of the tract which is currently producing based on the three existing wells as well as a valid lease arrangement, it stands to reason that Dominion should be given an opportunity to further develop the property. On remand to the trial court, a reasonable period of time should be established to provide for such additional development efforts on the part of Dominion. If the trial court finds that no significant additional development efforts have been pursued by Dominion at the conclusion of such reasonable period of time, then the trial court should proceed to take evidence on the issue of whether Dominion has breached the implied covenant of further development or whether evidence can be produced on the issue of undue hardship. We agree with the trial court's ruling that the record, as developed, does not suggest any evidence of undue hardship. Depending on the evidence that may be produced in the event of such proceedings, *the equitable remedy of partial rescission is an appropriate remedy to be considered if either a breach of the implied covenant of further development*

> *or undue hardship can be established and the trial court is convinced that monetary damages alone are an insufficient remedy.*

Id., 663 S.E.2d at 647-8 (emphasis added) (footnote omitted).

In this action, Mrs. Welch did not even request partial rescission as a remedy for the claimed breach of a drilling agreement in the second count of the unauthorized renewed petition for partial rescission and other relief. Instead, in numbered paragraph 38 of the renewed petition for partial rescission and other relief, Mrs. Welch alleges only damages for the alleged breach of a drilling agreement. Thus, it is undisputed that damages are an adequate remedy for Mrs. Welch's claim for breach of a drilling agreement. Accordingly, the circuit court erred in granting partial rescission, which was not even requested, as a remedy for the alleged breach of a drilling agreement.

Even if partial rescission were an appropriate remedy for Mrs. Welch's claim for breach of a drilling agreement, the circuit court's remedy would have to be limited to partial rescission of the alleged drilling agreement claimed to have been breached, not the Flanaghan Lease. The circuit court gives no rationale in its May 2nd or September 16th orders for declaring a breach of a drilling agreement and awarding Mrs. Welch partial rescission of a separate lease agreement. Assuming that damages were an inadequate remedy for breach of a drilling agreement, which is not supported by Mrs. Welch's pleadings or proofs, the appropriate remedy would be limited to partial rescission of the agreed order approving a drilling plan, which is the alleged drilling agreement claimed to have been breached.

The circuit court utterly failed to follow the only procedure that would have allowed it to award the remedy of partial rescission of the Flanaghan Lease when it failed to comply with the mandate in *St. Luke's United Methodist Church* by improperly allowing Mrs. Welch to plead additional claims determining issues outside the scope of the mandate. It is undisputed that CNX

engaged in significant additional development of the Flanaghan Lease, drilling a total of eight wells from 2008 to 2011, under the circuit court approved drilling plan. Mrs. Welch produced no evidence to support a finding that CNX breached the implied covenant of further development or undue hardship, and the circuit court made no such finding in either its May 2nd or September 16th orders. Indeed, Mrs. Welch expressly waived any right to produce evidence on this issue in the February 19th letter. Moreover, the circuit court never considered whether money damages are a sufficient remedy.

For all of these reasons independently and in combination, the circuit court erred in granting partial summary judgment to Mrs. Welch on her claim for breach of a drilling agreement and holding that she is entitled to partial rescission of the Flanaghan Lease.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

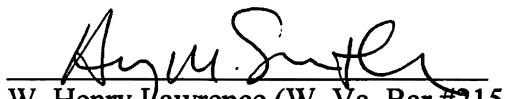
This appeal is suitable for oral argument under West Virginia Rule of Appellate Procedure 19(a) because it involves assignments of error in the application of narrow issues of settled law and insufficient evidence. The appeal may also be suitable for argument under West Virginia Rule of Appellate Procedure 20(a) because it involves issues of fundamental public importance regarding compliance with this Court's mandate and issues of first impression regarding contract formation and breach. Because this Court should reverse the circuit court's orders, a memorandum decision may not be appropriate. *See* W. Va. R. App. P. 21(d).

VI. CONCLUSION

For all of the foregoing reasons, this Court should reverse the circuit court's grant of partial summary judgment to Mary Maxine Welch on the issue of breach of a drilling agreement and remand this action for further proceedings. The Court should further order that on remand

the circuit court strike Mrs. Welch's renewed petition for partial rescission and other relief and approve CNX Gas Company LLC's notice of modification of the drilling plan.

Dated this 17th day of January, 2014.



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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of January, 2014, I caused true and accurate copies of the foregoing "Brief of Petitioner" as well as the "Appendix Record" to be deposited in the U.S. Mail contained in postage-paid envelopes addressed to all other parties to this appeal as follows:

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