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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 15-1139

DAVID EARL BOWYER,

Defendant Below, Petitioner

v.

Civil Action No.: 10-C-40
Honorable Timothy L. Sweeney

DEBORAH L. WYCKOFF, ET AL.,

Plaintiffs Below, Respondents.

PETITIONER'S BRIEF ON APPEAL

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PETITIONER'S BRIEF ON APPEAL

Comes now, Petitioner, David E. Bowyer, by counsel, Thomas J. O'Neill, III, Esquire and Scott L. Summers, Esquire, pursuant to the West Virginia Rules of Appellate Procedure and respectfully files Petitioner's Brief on Appeal.

ASSIGNMENTS OF ERROR

1. The circuit court erred in relying upon dicta in the memorandum decision of this Court in the matter of Cawthon, et al. v. CNX Gas Company, LLC, No. 11-1231, November 16, 2012 (memorandum decision); 2012 WL 5835068 to rule that "[i]t is a predicate to the partition of an oil and gas mineral interest that there be an inability of the mineral owners to agree on how to develop the mineral estate." "In the absence of proof of showing an unwillingness or inability to agree on the development of the mineral estate, a partition by sale or allotment is inappropriate." No such predicate exists.

2. Assuming arguendo that it is predicate to the partition of an oil and gas mineral interest that there be an inability of the mineral owners to agree on how to develop the mineral estate, the circuit court erred in its implicit finding and conclusion that the mineral owners agreed on how to develop the mineral estate. An agreement on how to develop the mineral estate cannot be found simply based upon the willingness of co-tenants to sign oil and gas leases. Further, in light of the fact that there are unknown owners of the mineral interest at issue in this case, it is simply not possible to reach an agreement between the mineral interest owners as to how to develop the mineral estate.

3. The circuit court erred in denying Petitioner's "Motion for Leave to Amend and Refile Counterclaim and Third-Party Complaint." The proposed amendment would not have resulted in any prejudice to the other parties and should have been freely granted pursuant to Rule 15 of the

West Virginia Rules of Civil Procedure. As the circuit court noted in its "Order Granting Summary Judgment to Plaintiff and Third-Party Defendants and Denying Defendant's Motion to Amend," the amendment "is nearly identical to the July 2013 amended third-party complaint, save two paragraphs, 111 and 112. In paragraph 111, Bowyer alleges that the parties are unable to arrive at a 'common plan of development.' In paragraph 112, Bowyer alleges that the partition or allotment would promote *his* interest by allowing *him* to personally develop the oil and natural gas resources within and underlying Subject Lands." (emphasis in original) (See Finding of Fact 13 in the "Order Granting Summary Judgment to Plaintiff and Third-Party Defendants and Denying Defendant's Motion to Amend") (Appendix at 9)

STATEMENT OF CASE

Bowyer's appeal is taken from an Order of the circuit court of Doddridge County, West Virginia, entered on October 18, 2015. Said Order granted a Motion for Summary Judgment filed by Deborah Wyckoff, Thomas Swiger, Joyce Swiger, Patricia Ann Swiger, Ralph Dewayne Swiger, Geroge J. Buff, III, John Charles Buff, the Estate of Helen Buff, Alex Semenik, Erin Brown, Maribel Pontious, Nelson Swiger, The Seventh Day Baptist Memorial Fund, Janice Hurst and Ron Cumberledge, Respondents herein and Plaintiff and Third-Party Defendants below. Said Order also denied Third-Party Plaintiff, David Bowyer's Motion for Leave to Amend.

"The parties to this proceeding are the owners of undivided interest in the oil, gas and minerals underlying the parcels, the surface of which is assessed in New Milton district, Doddridge County, West Virginia as the New Milton map No.: 8 parcel 13 (96.25 acres); and map 18, parcels 3, 9, 10, 13, 14, 15 and 16 (433.5 acres) (hereinafter referred to as the "Subject Lands")." (See Finding

of Fact 1 in the "Order Granting Summary Judgment to Plaintiff and Third-Party Defendants and Denying Defendant's Motion to Amend") (Appendix at 7)

"The third-party defendants, Erin Brown, Alex Semenik, Patricia Ann Swiger, Thomas Swiger, Joyce Swiger, Ralph Dewayne Swiger, and the Heirs of Maribel Pontious, as well as plaintiff and counterclaim defendant, Deborah Lynn Wyckoff, have all leased their oil and gas interest to Antero Resources Corporation." (See Finding of Fact 7 in the "Order Granting Summary Judgment to Plaintiff and Third-Party Defendants and Denying Defendant's Motion to Amend") (Appendix at 8)

"The third-party defendants, Ronald Cumberledge, Janice Hurst, George J. Buff, III, John Charles Buff, the Estate of Helen Buff, and the Seventh Day Baptist Memorial Fund are all interested in leasing to Antero Resources Corporation, but have been unable to do so due to the pendency of this litigation." (See Finding of Fact 8 in the "Order Granting Summary Judgment to Plaintiff and Third-Party Defendants and Denying Defendant's Motion to Amend") (Appendix at 8)

"Likewise, the third-party plaintiff, David Bowyer, would like to lease his oil and gas interest in the subject properties, has indicated a preference for dealing with Antero, and has negotiated other agreements in the past with Antero, but has not yet leased his interest to date." (See Finding of Fact 9 in the "Order Granting Summary Judgment to Plaintiff and Third-Party Defendants and Denying Defendant's Motion to Amend") (Appendix at 8)

"This action was initially filed in 2010 as a claim for a surface partition between the plaintiff and counterclaim defendant, Deborah Wyckoff, and the defendant and counterclaim and a third-party plaintiff, David Bowyer." (See Finding of Fact 2 in the "Order Granting Summary Judgment to Plaintiff and Third-Party Defendants and Denying Defendant's Motion to Amend") (Appendix at 7)

In her Amended Complaint, Wyckoff sought the following relief:

> 1. That the Defendant be cited to appear and answer this Amended Complaint;
>
> 2. That the parties be given an opportunity to determine a fair and equitable division of the subject real estate;
>
> 3. That Special Commissioners be appointed to determine the value of the subject real estate and divide said real estate according to the laws of the State of West Virginia;
>
> 4. That this Court award reasonable attorneys fees incurred by the Plaintiff in this Civil Action and also award other reasonable expenses, necessarily incurred by the Plaintiff for the benefit of the parties hereto for the protection, confirmation and perfection of title to this real estate;
>
> 5. That the Court determine the ownership of said real estate and the interest of each owner thereof;
>
> 6. That the minerals and timber be reserved from any sale of the subject real estate;
>
> 7. That Plaintiff be reimbursed for the Defendant's share of the real estate taxes and maintenance; and
>
> 8. For such other relief as this Court deems necessary and proper.

(See Amended Complaint) (Appendix at 23)

Petitioner David Bowyer filed a counterclaim and third-party complaint, seeking a partition by sale or allotment to him, of the minerals underlying the Subject Lands.

In paragraph 108 of his counterclaim and cross-claim, Petitioner David Bowyer alleged that "[p]artition in kind cannot be conveniently made for the reason that there are too many interest holders to allow for convenient partition in kind and will likely result in waste or non-development of the real estate. Accordingly, the relief or allotment and/or sale of the Subject Property and all real

estate interest further described in the Amended Complaint filed by the Plaintiff in paragraph 2(a) through 2(e) is reasonable, necessary, and in the best interest of all concerned." (Appendix at 49)

In his counterclaim and cross-claim, Petitioner David Bowyer sought the following relief:

> 1. Declaratory Relief as to the ownership of the real estate owned by the Defendant/Third-Party Plaintiff and Plaintiff/Cross-Claim Defendant and Third-Party Defendants to quiet title in the real estate owned by the Defendant/Third-Party Plaintiff.
>
> 2. That the property be partitioned pursuant to West Virginia Code §37-4-1, et seq., as requested above;
>
> 3. That the Defendant/Third-Party Plaintiff, David E. Bowyer, be allotted the entire property at a fair market value agreed upon by the parties and/or pursuant to West Virginia Code §37-4-3;
>
> 4. Determination as to the amount of any damages, rents, and profits owed by Deborah Lynn Wyckoff for her exclusive occupation of the real estate, failure to maintain the real estate during her sole occupancy, and her exclusion of David E. Bowyer, his predecessors and assigns from the real estate; and
>
> 5. Any other relief that this honorable Court may deem just and equitable.

(Appendix at 51)

"On March 10, 2015, counsel for George J Buff, II, Jon Charles Buff, and the Estate of Helen Buff filed a motion for summary judgment. Third-party defendants, Erin Brown, Alex Semenik, Ronald Cumberledge, Janice Hurst, Patricia Ann Swiger, Ralph DeWayne Swiger, Thomas Swiger, Joyce Swiger, Nelson Swiger, The Seventh Day Baptist Memorial Fund, the Heirs of Maribel Pontious and the plaintiff and counterclaim defendant Deborah Wyckoff all joined in that motion or filed a similar one. (See Finding of Fact 10 in the "Order Granting Summary Judgment to Plaintiff and Third-Party Defendants and Denying Defendant's Motion to Amend") (Appendix at 8)

At a hearing on March 31, 2015 the circuit court "indicated that, in the event that the parties were unsuccessful in resolving the matter at mediation, it was inclined to grant the third-party defendants' summary judgment motion absent some showing that the parties cannot agree to a plan to develop the minerals." (See Finding of Fact 6 in the "Order Granting Summary Judgment to Plaintiff and Third-Party Defendants and Denying Defendant's Motion to Amend") (Appendix at 7)

"The parties mediated this case on April 8, 2015 and were unable to reach a resolution, although all parties are in agreement that they desire the minerals to be developed and further that the Marcellus strata that has not already been leased to Antero Resources should be leased to and developed by Antero Resources. (See Finding of Fact 11 in the "Order Granting Summary Judgment to Plaintiff and Third-Party Defendants and Denying Defendant's Motion to Amend") (Appendix at 9)

"On May 8, 2015, David Bowyer filed his 'Motion for Leave to Amend and Refile Counterclaim and Third-Party Complaint' along with an attached proposed amended counterclaim and complaint." (See Finding of Fact 12 in the "Order Granting Summary Judgment to Plaintiff and Third-Party Defendants and Denying Defendant's Motion to Amend") (Appendix at 9)

The Circuit Court of Doddridge County denied the Petitioner's motion seeking leave to amend his complaint. In denying the motion, the circuit court concluded that the filing of the motion to amend was not timely and the delay in filing the motion was unreasonable. Further, the circuit court found that the "proffered amendment is futile in light of the Court's conclusions set forth below with respect to the pending motion for summary judgment. Specifically, there exists no dispute as to the development of the collectively held mineral interests." (See Conclusions of Law 7,

8 and 9 in the "Order Granting Summary Judgment to Plaintiff and Third-Party Defendants and Denying Defendant's Motion to Amend") (Appendix at 11-12)

Finally, in relation to the motion to amend, the circuit court concluded that:

> this case has matured well past the pleadings stage, past the discovery stage and into the dispositive motions and pre-trial stage and the parties have expended significant sums of time and expense in preparing the case for mediation, dispositive motions and trial. To allow Bowyer's proposed amendment at this time would result in a great deal of prejudice to the third-party and counterclaim defendants and indeed all parties to this action aside from Bowyer.

(See Conclusions of Law 10 in the "Order Granting Summary Judgment to Plaintiff and Third-Party Defendants and Denying Defendant's Motion to Amend") (Appendix at 12)

The circuit court concluded that "Prejudice to the adverse party is the paramount consideration in motions to amend." Citing Syllabus point 3, State ex rel. Bd. of Ed of Ohio County v. Spillers 164 W.Va. 453, 259 S.E.2d 417 (1979).

Importantly, the circuit court found that the proposed amended counterclaim and complaint "is nearly identical to the July 2013 amended third-party complaint, save two paragraphs, 111 and 112. In paragraph 111, Bowyer alleges that the parties are unable to arrive at a 'common plan of development.' In paragraph 112, Bowyer alleges that the partition or allotment would promote *his* interest by allowing *him* to personally develop the oil and natural gas resources within and underlying Subject Lands." (emphasis in original) (See Finding of Fact 13 in the "Order Granting Summary Judgment to Plaintiff and Third-Party Defendants and Denying Defendant's Motion to Amend") (Appendix at 9)

In its "Order Granting Summary Judgment to Plaintiff and Third-Party Defendants and Denying Defendant's Motion to Amend" the circuit court granted Plaintiff and Third-Party

Defendants' motion for summary judgment. In granting the motion for summary judgment, the circuit court relied upon the fact that some parties had executed oil and gas leases and other parties had expressed their willingness to lease their interest. The circuit court thereby concluded that all parties possessed a common plan of development of the mineral estate.

Petitioner brings this appeal asking the Court to reverse the circuit court's grant of summary judgment, and the denial of Petitioner's Motion for Leave to Amend and Refile Counterclaim and Third-Party Complaint.

SUMMARY OF ARGUMENT

Relying on dicta in this Court's memorandum opinion in Cawthon, et al. v. CNX Gas Company, LLC, No. 11-1231, November 16, 2012 (memorandum decision); 2012 WL 5835068 the circuit court improperly created a new burden of proof for those seeking partition of an oil and gas mineral interest by ruling that "[i]t is a predicate to the partition of an oil and gas mineral interest that there be an inability of the mineral owners to agree on how to develop the mineral estate." "In the absence of proof of showing an unwillingness or inability to agree on the development of the mineral estate, a partition by sale or allotment is inappropriate." (See "Order Granting Summary Judgment to Plaintiff and Third-Party Defendants and Denying Defendant's Motion to Amend") (Appendix at 14)

Then, applying this new "predicate" to the case at bar, the circuit court improperly granted summary judgment against Petitioner on the basis that the Petitioner had failed to carry his burden of proof with regard to this newly created "predicate."

"This Court reviews a circuit court's entry of summary judgment de novo. See, Syl. Pt. 1, Painter v. Peavy, 451 S.E.2d 755 (W.Va. 1994). Moreover, '[w]here the issue on appeal is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review.'

Syl. Pt. 1, Chrystal R.M. v. Charlie A.L., 459 S.E.2d 415 (W.Va. 1995). Syl. Pt. 2, Dunlap v. Friedman's, Inc., 582 S.E.2d 841 (2003)." Kester v. Small, 618 S.E.2d 380 (WV, 2005).

Finally, in an effort to properly plead his case in order to meet this newly created "predicate," Petitioner filed a "Motion for Leave to Amend and Refile Counterclaim and Third-Party Complaint." The circuit court improperly denied Petitioner's motion to amend pursuant to Rule 15 of the West Virginia Rules of Civil Procedures.

In light of the errors committed by the circuit court, Petitioner is requesting that this Court reverse the "Order Granting Summary Judgment to Plaintiff and Third-Party Defendants and Denying Defendant's Motion to Amend" entered by the circuit court of Doddridge County.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The issue before the Court in this appeal involves assignments of error in the application of settled law arising out of a narrow issue of law. Specifically, what are the requirements for obtaining a partition of a mineral estate via sale?

Therefore, a memorandum decision is not appropriate and oral argument under Rule 19 of the West Virginia Rules of Appellate Procedure is appropriate.

ARGUMENT

1. The Circuit Court Erred In Creating A Predicate To The Partition Of An Oil And Gas Mineral Interest Which Required a Showing That There Is An Inability Of The Mineral Owners To Agree On How To Develop The Mineral Estate.

The circuit court erred in relying upon dicta in the memorandum decision of this Court in the matter of Cawthon, et al. v. CNX Gas Company, LLC, No. 11-1231, November 16, 2012 (memorandum decision); 2012 WL 5835068. The circuit court ruled that "[i]t is a predicate to the partition of an oil and gas mineral interest that there be an inability of the mineral owners to agree on

how to develop the mineral estate." "In the absence of proof of showing an unwillingness or inability to agree on the development of the mineral estate, a partition by sale or allotment is inappropriate."

The memorandum decision in Cawthon does not establish the requirement set forth by the circuit court in this matter. Simply put, the "predict" the circuit court requires, does not exist and was not established in Cawthon. As discussed below, the requirements for partition by sale are well established and do not include proof that the mineral interest owners are not able to agree on how to develop the mineral estate.

Interestingly, the Cawthon memorandum decision does state that:

> While petitioners argue that partition would not be feasible, essentially due to the complications associated with the fluid nature of oil and gas, a partition can be achieved through a sale. *See* Syl. Pt 3, *Renner v. Bonner*, 227 W.Va.378,709 S.E.2d 733 (2011) citing Syllabus point 3, *Consolidated Gas Supply Corp. v. Riley,* 161 W.Va. 782, 247 S.E.2d 712 (1978) ("By virtue of W.Va. Code 37-4-3, a party desiring to compel partition through sale is required to demonstrate that the property cannot be conveniently partitioned in kind, that the interests of one or more of the parties will be promoted by the sale, and that the interests of the other parties will not be prejudiced by the sale.")

Id. at page 4.

Petitioner herein argues that partition in kind in this case cannot be conveniently made due to the fact that there are too many interest holders to allow for convenient partition in kind which will likely result in waste or non-development of the mineral estate.

The circuit court was simply not in favor of partition by sale. That is made clear by the circuit court's conclusion that: "The forced sale of oil and gas minerals precludes the owner the benefit of lease considerations and the prospect of production proceeds, which represent the primary and perhaps the exclusive value which such ownership vests. Therefore, the public interests will not be promoted by sale." (See "Order Granting Summary Judgment to Plaintiff and Third-Party

Defendants and Denying Defendant's Motion to Amend") (Appendix at 14)

The circuit court also found that: "To force a sale, whether by allotment or public sale, violates basic tenets of individual property rights and, in this particular case, forces the exchange of an interest in real property for a sum of personal property in violation of the unqualified owner's right to have such interest remain in such condition as he sees fit. The remedy of allotment is simply a more narrow and limited version of public sale." (See "Order Granting Summary Judgment to Plaintiff and Third-Party Defendants and Denying Defendant's Motion to Amend") (Appendix at 13)

Based upon these finding, it appears as though the circuit court is holding that a joint owner can never force the partition of mineral interests by sale or allotment. This is clearly contrary to the law.

In making these broad statements, the circuit court has given no effect to the statutory language of West Virginia Code§ 37-4-3 which specifically provides for the allotment and sale of mineral interests.

> When partition cannot be conveniently made, the entire subject may be allotted to any party or parties who will accept it, and pay therefor to the other party or parties such sum of money as his or their interest therein may entitle him or them to; or in any case in which partition cannot be conveniently made, if the interests of one or more of those who are entitled to the subject, or its proceeds, will be promoted by a sale of the entire subject, or allotment of part and sale of the residue, and the interest of the other person or persons so entitled will not be prejudiced thereby, the court, notwithstanding the fact that any of those entitled may be an infant, insane person, or convict, may order such sale, or such sale and allotment, and make distribution of the proceeds of sale, according to the respective rights of those entitled, taking care, when there are creditors of any deceased person who was a tenant in common, joint tenant, or coparcener, to have the proceeds of such deceased person's part applied according to the rights of such creditors. Where it clearly appears to the court that partition cannot be conveniently made, the court may order sale without appointing commissioners. The court making an order for sale shall, when the dividend of a party exceeds the value of three hundred dollars, if such party be an infant, insane person, or convict, require security for the faithful application of the proceeds of his

> interest, in like manner as if the sale were made under article one of this chapter. In the event that allotment shall be made as aforesaid and the person or persons entitled to the proceeds, for any reason, cannot agree upon the value of the subject, the court, or the judge thereof in vacation, shall appoint three disinterested and qualified persons to fix the value of the whole subject who, after being duly sworn to make an appraisal of the fair market value of the subject, shall within thirty days from the taking of such oath, appraise the subject and make and file a written report of their findings in the office of the clerk of the court in which the suit is pending. If such appraisers report their disagreement, or fail to file such report within thirty days, other appraisers may in like manner be appointed, and so again, from time to time, as often as may be necessary. The report of the appraisers when filed, shall be conclusive and binding upon all persons having any interest in the subject, unless an objection is filed thereto in said clerk's office within thirty days after the date of such report by the appraiser. If objection is made to such report, the court, or the judge thereof in vacation, shall take evidence upon the value of the subject in the same manner as in other chancery matters, shall find the fair market value of the subject and shall decree payment therefor according to the respective rights of those entitled thereto as their interest may appear, taking care to protect the rights of creditors as aforesaid in this section. If any party to the suit refuses or is unable because of any disability, including but not limited to infancy, insanity and conviction of crime, to make, execute and deliver a deed or other instrument transferring title to the subject to the person or persons to whom the subject has been allotted, the court, or the judge thereof in vacation, shall appoint a special commissioner for the purposes of accepting the purchase money from the person or persons to whom the subject has been allotted, making, executing and delivering thereto a deed or other instrument therefor and distributing such purchase money according to the respective rights of those persons entitled thereto. The special commissioner so appointed shall give bond and be governed in all respects as provided in section one, article twelve, chapter fifty-five of this code.

Further, this Court in Consolidated Gas Supply Corp. v. Riley, 247 S.E.2d 712 (W.Va., 1978) has affirmed the ability to partition mineral interest via sale. "The common law right to compel partition has been expanded by statutes to include partition by sale. W.Va.Code, 37-4-1, et seq." Id. Syllabus 2. "By virtue of W.Va.Code, 37-4-3, a party desiring to compel partition through sale is required to demonstrate that the property cannot be conveniently partitioned in kind, that the interests of one or more of the parties will be promoted by the sale, and that the interests of the other parties will not be prejudiced by the sale." Id. Syllabus 3.

Again, there is simply no requirement that "[i]t is a predicate to the partition of an oil and gas mineral interest that there be an inability of the mineral owners to agree on how to develop the mineral estate." Finding that such a requirement exists, and then granting summary judgment on the basis of Petitioner's alleged failure to meet that requirement, constitutes error by the circuit court.

This error by the circuit court requires reversal of the circuit court's "Order Granting Summary Judgment to Plaintiff and Third-Party Defendants and Denying Defendant's Motion to Amend."

2. The Circuit Court Erred In Granting Summary Judgment On the Basis That There Was An Agreement Between the Parties As To The Development of the Mineral Interests, Therefore, Petitioner Failed to Meet The Strict Requirements Permitting a Partition Sale.

Summary judgment is only proper where the moving party demonstrates that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Mack-Evans v. Hilltop Healthcare Ctr., 700 S.E.2d 317 (W.Va. 2010); Shaffer v. Acme Limestone Company, Inc., 524 S.E.2d 688 (W.Va. 1999); Williams v. Precision Coil, Inc., 459 S.E.2d 329 (W.Va. 1996); Painter v. Peavy, 451 S.E.2d 755 (W.Va.1994); Andrick v. Town of Buckhannon, 421 S.E.2d 247 (W.Va.1992); Aetna Casualty & Surety Company 133 S.E.2d 770 (W.Va.1963).

This Court has further instructed that "[t]he circuit court's function at the summary judgment stage is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" Painter at 758 (*quoting* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)).

As stated above, the alleged failure of Petitioner to meet a burden of proof that does not exist cannot be the basis for a grant of summary judgment. However, assuming arguendo that it is

predicate to the partition of an oil and gas mineral interest that there be an inability of the mineral owners to agree on how to develop the mineral estate, the circuit court erred in its implicit finding and conclusion that the mineral owners agreed on how to develop the mineral estate.

An agreement on how to develop the mineral estate cannot be found simply based upon the willingness of co-tenants to sign oil and gas leases. Further, in light of the fact that there are numerous unknown owners of the mineral interest at issue in this case, it is simply not possible to reach an agreement between the mineral interest owners as to how to develop the mineral estate.

A common plan of development is not simply met if all co-tenants agree that the subject mineral properties should be developed; they must agree upon the terms of such development, otherwise, no agreement exists.

As is evidenced by the failed mediation there is certainly no agreement on the development of the mineral estate in this matter. The "predicate," if it is deemed to exist, has been met by the Petitioner.

This Court's opinion in Consolidated Gas Supply Corp. v. Riley, 247 S.E.2d 712, 716 (W.Va., 1978) further highlights the numerous questions of fact which must be addressed in these matters. "We decide that as a result of the 1939 amendment to W.Va. Code, 37-4-1, there is a statutory right to have partition in kind considered. This is an issue of fact since if the property cannot feasibly be partitioned in kind it is only then partition by sale can be considered."

Further, in footnote 7 of Consolidated Gas, the Court stated: "Another obvious factual issue arises by virtue of the 1957 amendments to W.Va. Code, 37-4-3, wherein the second paragraph was added to provide a mechanism for determining the value of the property in the event of disagreement of the parties."

"Our cases demonstrate that the right to partition is ultimately determined on the particular facts of each case." Id. at 717.

This Court's opinion in Consolidated Gas illustrates the numerous factual issues to be considered when a request for partition is being made, especially when it involves a partition via sale. The circuit court's "Order Granting Summary Judgment to Plaintiff and Third-Party Defendants and Denying Defendant's Motion to Amend" does not indicate factual findings to support its grant of summary judgment.

This error by the circuit court requires reversal of the circuit court's "Order Granting Summary Judgment to Plaintiff and Third-Party Defendants and Denying Defendant's Motion to Amend"

3. The Circuit Court Erred In Denying Petitioner David Bowyer's "Motion for Leave to Amend and Refile Counterclaim and Third-Party Complaint."

At a hearing on March 31, 2015 the circuit court "indicated that, in the event that the parties were unsuccessful in resolving the matter at mediation, it was inclined to grant the third-party defendants' summary judgment motion absent some showing that the parties cannot agree to a plan to develop the minerals." (See Finding of Fact 6 in the "Order Granting Summary Judgment to Plaintiff and Third-Party Defendants and Denying Defendant's Motion to Amend") (Appendix at 7)

"The parties mediated this case on April 8, 2015 and were unable to reach a resolution, although all parties are in agreement that they desire the minerals to be developed and further that the Marcellus strata that has not already been leased to Antero Resources should be leased to and developed by Antero Resources." (See Finding of Fact 11 in the "Order Granting Summary

Judgment to Plaintiff and Third-Party Defendants and Denying Defendant's Motion to Amend") (Appendix at 9)

"On May 8, 2015, David Bowyer filed his 'Motion for Leave to Amend and Refile Counterclaim and Third-Party Complaint' along with an attached proposed amended counterclaim and complaint." (See Finding of Fact 12 in the "Order Granting Summary Judgment to Plaintiff and Third-Party Defendants and Denying Defendant's Motion to Amend") (Appendix at 9)

Rule 15 (a) of the West Virginia Rules of Civil Procedure provides, in pertinent part, that, "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." (emphasis added)

In Syllabus Point 5 of Lloyd's, Inc. v. Lloyd, 693 S.E.2d 451 (W.Va., 2010) this Court has held that:

> The purpose of the words "and leave [to amend] shall be freely given when justice so requires" in Rule 15(a) W. Va. R. Civ. P., is to secure an adjudication on the merits of the controversy as would be secured under identical factual situations in the absence of procedural impediments; therefore, motions to amend should always be granted under Rule 15 when: (1) the amendment permits the presentation of the merits of the action; (2) the adverse party is not prejudiced by the sudden assertion of the subject of the amendment; and (3) the adverse party can be given ample opportunity to meet the issue. Syllabus Point 3, Rosier v. Garron, Inc., 199 S.E.2d 50 (W.Va. 1973) and Syllabus point 2, State ex rel. Vedder v. Zakaib, 618 S.E.2d 537 (W.Va. 2005).

Contrary to the circuit court's findings, the proposed amendment permitted presentation of the merits of the action. The proposed amendment would not have resulted in prejudice to the other parties and the proposed amendment simply addressed a new "predicate" introduced by the circuit court. In so much as this new predicate was first raised by the adverse party, the adverse party clearly had ample opportunity to meet the issue.

As the circuit court noted, the proposed amendment only inserted two additional paragraphs.

The circuit court noted that the proposed amendment "is nearly identical to the July 2013 amended third-party complaint, save two paragraphs, 111 and 112. In paragraph 111, Bowyer alleges that the parties are unable to arrive at a 'common plan of development.' In paragraph 112, Bowyer alleges that the partition or allotment would promote *his* interest by allowing *him* to personally develop the oil and natural gas resources within and underlying Subject Lands." (emphasis in original) (See Finding of Fact 13 in the "Order Granting Summary Judgment to Plaintiff and Third-Party Defendants and Denying Defendant's Motion to Amend") (Appendix at 9) It is not clear why the circuit court placed emphasis on the words "his" and "him." West Virginia Code §37-4-3 provides that partition may occur "...if the interests of one or more of those who are entitled to the subject, or its proceeds, will be promoted by a sale of the entire subject, or allotment of part and sale of the residue..." It should not matter in the analysis that Petitioner is seeking to promote his interests.

Paragraph 111 stated:

> With respect to the oil and natural gas within and underlying the Subject Property, the parties to this action have been unable to arrive at a common plan of development thereof. While the known Third-Party Defendants claim to have a desire to develop the mineral resources of the Subject Property, several of them are holding out from granting their consent for what can only be described as unreasonable terms. In the face of such intransigence, partition by sale is altogether proper in order to protect the correlative rights of other coparceners of the Subject Property.

Paragraph 112 stated:

> Allotment or partition by sale of the Subject Property would promote the interest of Defendant David E. Bowyer, as it would permit him to personally develop the oil and natural gas resources within and underlying the Subject Property. No other parties to this proceeding have expressed an interest, or have the ability, to personally develop these resources.

The proposed amendment would not have changed the tenor of the case nor would it have created any additional burden for any party. Paragraph 111 merely recited the undisputed fact that the parties could not agree on a plan of development in light of the failed mediation. Paragraph 112 merely reasserted Petitioner's continued argument that a partition by sale was necessary.

In short, Petitioner's "Motion for Leave to Amend and Refile Counterclaim and Third-Party Complaint" was an effort to address the circuit court's unfounded and newly announced "predicate." And the fact that the circuit court announced that, based upon the predict, the circuit court "was inclined to grant the third-party defendants' summary judgment motion absent some showing that the parties cannot agree to a plan to develop the minerals."

This error by the circuit court requires reversal of the circuit court's "Order Granting Summary Judgment to Plaintiff and Third-Party Defendants and Denying Defendant's Motion to Amend"

CONCLUSION

WHEREFORE, based upon the foregoing, Petitioner David E. Bowyer respectfully prays that the Supreme Court of Appeals of West Virginia enter an order reversing the Order Granting Summary Judgment to Plaintiff and Third-Party Defendants and Denying Defendant's Motion to Amend entered by the Circuit Court of Doddridge County, West Virginia on October 18, 2015.

RESPECTFULLY SUBMITTED

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 15-1139

DAVID EARL BOWYER,

Defendant Below, Petitioner

v.

Civil Action No.: 10-C-40
Honorable Timothy L. Sweeney

DEBORAH L. WYCKOFF, ET AL.,

Plaintiffs Below, Respondents.

CERTIFICATE OF SERVICE

I, Scott L. Summers, Esquire, counsel for Petitioner, David Earl Bowyer, certify that I have served the foregoing, **"PETITIONER'S BRIEF ON APPEAL"** on the following by depositing same into the United States Mail, First Class, postage pre-paid this **19th** day of **February, 2016**, addressed to the following:

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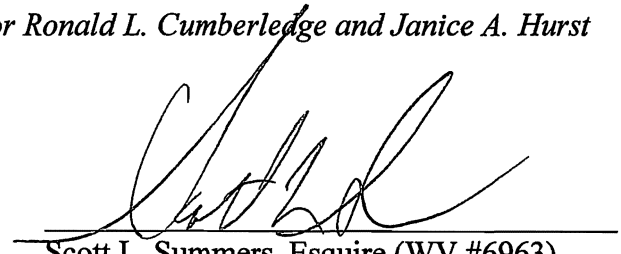

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