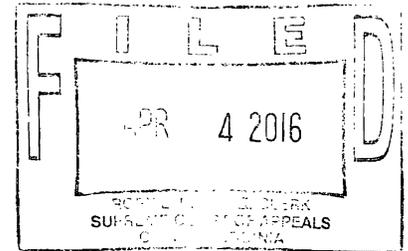


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
Docket No. 15-1139

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.

JOINT RESPONSE BRIEF

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I. STATEMENT OF THE CASE

This action was initially instituted in the Circuit Court of Doddridge County in 2010, as a partition suit regarding the surface of several tracts owned jointly by the Plaintiff and Counterclaim Defendant, Deborah L. Wyckoff, and the Defendant and Third-Party Plaintiff, David E. Bowyer. An amended complaint between these two parties was filed by Ms. Wyckoff in July 2012. (Appendix at p. 18.) In August 2012, Petitioner Bowyer filed an answer and counterclaim, as well as a third-party complaint. An amended counterclaim and third-party complaint was filed in July 2013. (Appendix at p. 27.) In his third-party action, Petitioner Bowyer sought to compel the partition, by allotment to him or by partition sale, of three Doddridge County properties, all in the New Milton tax district: 1) the surface of a 64-acre tract ("Batton Property"); 2) the surface and minerals of a tract of 433.5 acres ("Maxwell Tract"); and 3) the surface and minerals of a tract containing 96.25 acres ("Keister Tract").¹

Although fractional amounts of ownership vary, the Petitioner and Respondents in this appeal proceeding own undivided interests in the oil and gas underlying the Maxwell and Keister Tracts, as well as the surface of all three properties. With regard to the central focus of this appeal, the oil and gas interests, all of the Respondents either have leased or are interested in leasing their oil and gas interests to Antero Resources Corporation (hereinafter "Antero"). Respondents Deborah Lynn Wyckoff, Erin Brown, Alex Semenik, Patricia Ann Swiger, Ralph Dewayne Swiger, Thomas Swiger, Joyce

¹ There are some common properties in the amended complaint and the amended third-party complaint. Specifically, a 20-acre surface portion of the 433.5-acre Maxwell Tract and all of the surface of the Keister Tract are included in both pleadings. Since the order now under appeal involves only the partition claims of the third-party action, other surface properties included in the original action between Ms. Wyckoff and Petitioner are not part of this appeal.

Swiger, and the heirs of Maribel Pontious have leased their interests to Antero. (Order Granting Summary Judgment to Plaintiff and Third-Party Defendants' and Denying Defendant's Motion to Amend, at Appendix p. 8, ¶ 7) (hereinafter "Order"). Respondents Ronald Cumberledge, Janice Hurst, George J. Buff, III, J. Charles Buff, the Estate of Helen Buff, and the Seventh Day Baptist Memorial Fund have all expressed an interest in leasing with Antero, but have been unable to do so because of this pending litigation. (Order, at Appendix p. 3, ¶ 8.)

As noted above, in his amended third-party complaint Petitioner sought the partition by allotment to him or by partition sale of the Doddridge County properties. Petitioner alleged that partition in kind could not be made because there were too many interest holders. (Amended Third Party Complaint, at Appendix p. 49, ¶ 108.) He further alleged that the parties' interests would not be prejudiced by allotment or sale of the property. (*Id.*, at Appendix p. 50, ¶ 110.) He did not assert anywhere in his amended third-party complaint that partition by allotment or sale was necessary because the parties disagreed as to the development of minerals on the property.

On March 10, 2015, the Respondents George J. Buff II, J. Charles Buff, and the Estate of Helen Buff filed a Joint Motion for Summary Judgment and the other remaining Respondents either joined in that motion or filed a similar motion. (Order, at Appendix pp. 8-9, ¶ 10.) In the motion for summary judgment, the Respondents asserted that the cotenants were in agreement regarding the development of minerals and Petitioner failed to satisfy the three requirements for the court to order partition. (Third Party Defendants' Joint Motion For Summary Judgment, at Appendix pp. 56-57.)

During a hearing held on March 31, 2015, the circuit court indicated that in the event the parties were unsuccessful in an upcoming mediation, it was inclined to grant the Respondents' motion for summary judgment absent some showing that the parties could not agree on a plan to develop the minerals.² (Order, at Appendix pp. 7-8, ¶ 6.) On April 8, 2015, the parties participated in mediation. They were unable to reach a settlement even though they were all in agreement to develop the minerals and that the Marcellus strata that has not already been leased should be leased to and developed by Antero. (Order, at Appendix p. 9, ¶ 11.)

On May 8, 2015, Petitioner filed a motion for leave to file a second amended counterclaim and third-party complaint. In this motion, Petitioner requested leave to again amend his third-party complaint and attached a proposed amended pleading. The proposed second amended counterclaim and third-party complaint was nearly identical to the previously filed amended third-party complaint except for two additional paragraphs. (Order, at Appendix p. 9, ¶¶ 12-13.) In paragraph 111, Petitioner alleged that the parties are unable to reach a common plan of development, and in paragraph 112, he asserted that partition or allotment would promote his interests by allowing him to personally develop the oil and gas resources under the subject properties. (Order, at Appendix p. 9, ¶ 13.)

Also on May 8, 2015, Petitioner filed a response to the joint motion for summary judgment. In his response, Petitioner acknowledged that a disagreement among cotenants was a predicate to partition by sale. He argued, however, that the predicate

² Under the scheduling order, this hearing was to be the final pretrial conference. Due to the Petitioner's recent change of counsel, matters were delayed to afford new counsel the opportunity to respond to the pending motions for summary judgment, and for completion of mediation.

was fulfilled because the cotenants did not have a specific plan of development for the minerals, further alleging (without proof) that at least two potential lessees were holding out for unreasonable financial terms. He also asserted that the cotenants would not be prejudiced by an allotment or sale of the property. (Combined Response of Defendant Bowyer, at Appendix pp. 69-72.)

On July 24, 2015, the Respondents filed a reply to Petitioner's response to the motion for summary judgment. (Reply, at Appendix pp. 73-83.) On August 31, 2015, the circuit court heard arguments regarding the pending motions. On October 18, 2015, the circuit court entered an order denying Petitioner's motion to amend and granting the Respondents' motion for summary judgment.

In granting the motion for summary judgment, the circuit court noted that the Petitioner wholly failed to meet his burden in responding to the Respondents' joint motion for summary judgment as required under Rule 56. In this regard, the court noted that partition by sale was unknown at common law and, therefore, absent strict compliance with the statutory requirements a forced sale is to be denied. (Order, at Appendix p. 14, ¶ 5.) The court further concluded that because a forced sale of oil and gas interests precludes the owners of lease and production proceeds, without a clear showing of an inability of the mineral owners to agree on how to develop the mineral estate, a forced partition by sale or allotment is inappropriate. (Order, at Appendix pp. 14-15, ¶¶ 7-8.) Ultimately, the circuit court concluded that, contrary to Bowyer's unsupported allegations, there was no dispute as to the development of the jointly owned mineral interests and consequently, no issue of material fact was presented and summary judgment was proper. (Order, at Appendix pp. 15-16, ¶ 10.)

In denying Petitioner's motion to again amend his counterclaim and third-party claim, the circuit court noted that the case was well past the pleading and discovery stages, as the action was originally instituted over five years ago and Petitioner filed his third-party claim over three years ago. (Order, at Appendix p. 12, ¶ 10.) The original scheduling order for this matter was entered on October 10, 2014, and an amended scheduling order was entered on February 9, 2015. Under the amended scheduling order, discovery closed on January 16, 2015. The final pretrial hearing was originally scheduled for March 31, 2015, but was postponed because Petitioner retained new counsel. (Order, at Appendix p. 10, ¶ 14.) The circuit court further found that Petitioner's motion seeking leave to amend was unreasonable because no novel facts or legal arguments have been introduced to justify the delay. (Order, at Appendix p. 11, ¶¶ 7-8.) The court also concluded that Petitioner's proposed amendments were futile because there was no genuine dispute as to development of the mineral interests that would support a forced sale or allotment. (Order, at Appendix p. 12, ¶ 9.) Finally regarding this motion to amend, the court found that the case had progressed well past the pleadings and discovery stages, was at the pre-trial stage, and would result in substantial prejudice to other parties if amendment was again permitted. (Order, at Appendix p. 12, ¶ 10.) Accordingly, the circuit court denied Petitioner's motion to amend.

On February 19, 2016, Petitioner filed an appeal with this Court.³ In his brief, Petitioner asserts that the circuit court (1) erred in concluding that the parties'

³ The October 18, 2015 order that is the subject of this appeal resolved all of the third-party claims. Accordingly, the trial court made the express findings pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure to certify the order as final. (Order, at Appendix p. 16, ¶ 11.)

disagreement as to the development of minerals was a predicate to partition; (2) erred in granting summary judgment on the basis of an agreement between the cotenants regarding the development of the minerals; and (3) erred in denying his motion for leave to file a second amended counterclaim and third-party complaint.⁴

II. SUMMARY OF ARGUMENT

The circuit court did not create a new predicate to partition of oil and gas mineral interests. Instead, the court simply applied well-established partition law to the case at hand. Forced sale or allotment in a partition suit is an extraordinary measure, and a sale will not be forced "for light or trivial cause." *Croston v. Male*, 56 W. Va. 205, 49 S.E. 136 (1904). There are three statutory requirements that must be met before a court can order partition by sale: (1) the property cannot be conveniently partitioned in kind; (2) the interests of one or more parties will be promoted by the sale; and (3) the other parties will not be prejudiced by the sale. *Consolidated Gas Supply Corp. v. Riley*, 161 W. Va. 782, 787-88, 247 S.E.2d 712, 715 (1978). A party seeking partition by sale has the burden of proving that these three elements are satisfied. In the present case, the circuit court properly concluded that forced sale or allotment to the Petitioner was unjustified because there was no legitimate reason to force a sale and the Petitioner failed to present any evidence showing that the cotenants were not in agreement regarding the development of minerals. Furthermore, the Petitioner is barred from

⁴ Although the Petitioner appeals the trial court's denial of his motion for leave, he does not include his motion and the accompanying proposed second amended counterclaim and third-party complaint in the appendix for this appeal. The Respondents' counsel further note on this point that Petitioner's counsel failed to follow Rule 7(e) of the West Virginia Rules of Appellate Procedure, inasmuch as they were never served with a list of what parts of the record the Petitioner intended to include in the appendix, nor were they otherwise consulted regarding the appendix contents. In similar disregard of the rules, the Petitioner also failed to comply with Rule 37 of the West Virginia Rules of Appellate Procedure regarding service. Although the Petitioner's attached certificate of service states that service by First Class United States Mail was completed on February 19, 2016, service was in fact not made until February 23, 2016. (USPS Tracking Reports, at Supplemental Appendix pp. 47-53.)

asserting that the circuit court created a new predicate to partition because he previously agreed to the legal standard that was enunciated and applied by the circuit court.

The circuit court properly granted Respondents' motion for summary judgment because the Petitioner failed to provide any evidence establishing the existence of a genuine dispute of material fact. Pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, summary judgment is appropriate if the record shows that there is no genuine dispute of material fact. Once a party moves for summary judgment, the burden shifts to the nonmoving party to provide evidence establishing the presence of a trialworthy issue. *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W. Va. 692, 699, 474 S.E.2d 872, 879 (1996). Here, the Respondents properly moved for summary judgment and, in response, the Petitioner made a general assertion that there was a disagreement among the cotenants regarding the development of minerals without providing any supporting facts. In his brief, the Petitioner simply reiterates this unsupported argument. He asserts that the cotenants must agree to the specific terms of mineral development. However, he wholly fails to establish that the necessary requirements to partition are present. Therefore, summary judgment was appropriate.

The circuit court also properly denied the Petitioner's motion to amend because the Petitioner's motion was untimely and would be prejudicial to the Respondents. According to Rule 15(a) of the West Virginia Rules of Civil Procedure, leave to amend shall be freely given when justice so requires. However, this rule does not allow parties "to be dilatory in asserting claims or to neglect his or her case for a long period of time." Syl. Pt. 3, *State ex rel. Vedder v. Zakaib*, 217 W. Va. 528, 618 S.E.2d 537 (2005).

Further, "[p]rejudice to the adverse party is the paramount consideration in motions to amend." *State ex rel. Bd. of Ed. of Ohio Cnty. v. Spillers*, 164 W. Va. 453, 455, 259 S.E.2d 417, 419 (1979). In the present matter, the Petitioner sought leave to amend more than five years after the action was initiated and more than three years since the Petitioner commenced his third-party claims. The Petitioner's motion for leave to amend was filed after discovery was completed, experts were named, and the parties completed mediation. Amendment would clearly prejudice the parties in that it would force them to relitigate a case that has already been fully and fairly litigated. Therefore, the circuit court properly denied Petitioner's motion to amend.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure oral argument is not required nor necessary in this case. The issues raised in the Petitioner's appeal involve the routine application of well-established law and the facts and arguments are adequately set forth in the record and briefs. Thus, oral argument would not significantly aid this Court's resolution of this appellate matter.

IV. ARGUMENT OF LAW

A. The Circuit Court Created No New Predicate to Partition and Properly Applied the Existing Requirements that Permit a Forced Partition Sale Only in Narrow Circumstances.

The trial court's October 18, 2015 12-page order contains 36 paragraphs of detailed findings of fact and conclusions of law. In his first assignment of error, the Petitioner narrowly focuses on a single paragraph of the order. The trial court order, in paragraph 8 on page 9, cites this Court's memorandum opinion in *Cawthon v. CNX Gas*

Co., LLC, No. 11-1231, 2012 WL 5835068 (W. Va. Nov. 16, 2002) for the established precept that:

It 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 showing an unwillingness or inability to agree on the development of the mineral estate, a partition sale or allotment is inappropriate. (Order, at Appendix pp. 14-15, ¶ 8.)

The Petitioner argues that in this paragraph the trial court created a new requirement for partition from dicta in the *Cawthon* opinion. The Petitioner is plainly wrong. The trial court's statement, like this Court's similar observation in *Cawthon*, reflects a well-settled prerequisite to the extraordinary measure of ordering a forced sale or allotment in a partition suit.

Partition arose under the common law and allowed only for an in-kind division of jointly held land. Originally, the right to in-kind partition was limited to coparceners who acquired their joint interests by descent; but later the right to compel in-kind partition was extended to tenants in common and joint tenants. *Loudin v. Cunningham*, 82 W. Va. 453, 96 S.E. 59, 60 (1918). The compulsory sale of land in a partition suit was never authorized under common law.

A limited statutory authorization for a sale was eventually added; but only when in-kind partition could not be made and the interests of all cotenants would be promoted by a sale. *Id.* "But for the statute authorizing it, a sale of real estate could not be decreed in a suit for partition thereof." Syl. Pt. 1, *Croston v. Male*, 56 W. Va. 205, 49 S.E. 136 (1904). In Syllabus Point 2 in *Croston*, this Court expounded upon the essential limitations of a forced sale: "This statute is an innovation upon fundamental

principles of the common law and American jurisprudence, and cannot become a license to the courts to take from the citizen, for light or trivial cause, his freehold on payment of compensation, though full and adequate." Thus, a sale cannot be forced upon cotenants unless there is a reason -- a good reason, not some "light or trivial cause."

With regard to mineral property as in the case here, partition law treats it no differently than surface tracts. If there cannot be an in-kind partition, there has to be a substantial reason to compel a sale. Whether you call it a requirement, prerequisite, predicate, or by similar nomenclature, it is fundamental to this remedy of last resort in a partition case -- a compulsory sale -- that the parties cannot agree on the use or exploitation of the mineral interests. In the specific context of oil and gas properties, which are less amenable to in-kind partition, the reason justifying a compulsory sale is a substantial disagreement among joint owners regarding leasing and development. "At least in the absence of a severance, a cotenant who desires to exploit the common property for gas or oil, but cannot obtain the assent of his or her fellow cotenants, may have a partition" 38 Am. Jur. 2d, Gas and Oil § 16 (2016).

This Court's decision in *Consolidated Gas Supply Corp. v. Riley*, 161 W. Va. 782, 247 S.E.2d 712 (1978) is instructive on this issue. Similar to Petitioner Bowyer in the present case, Consolidated Gas was a cotenant owner of an undivided interest of oil and gas underlying several tracts of land. Consolidated Gas filed a partition suit against the other co-owners of the oil and gas and, like Petitioner, did not seek partition in kind, and only sought to compel a sale of the mineral properties. To begin, the Court rejected the assertion by Consolidated Gas that it had an absolute right to partition the property

by sale. Consistent with the equitable nature of partition law, it was noted that "this Court has never interpreted the statutory right to partition by sale as absolute." 161 W. Va. at 786, 247 S.E.2d at 714. Similarly, the trial court in the instant case concluded that partition by sale may be *considered* as a remedy but there is no entitlement if there is no demonstration that the requirements are satisfied. (Order, at Appendix p. 13, ¶ 4.)

In *Consolidated Gas*, the Court reiterated the statutory elements for consideration of a partition by sale. "[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 interest of the other parties will not be prejudiced by the sale." 161 W. Va. at 787-88, 247 S.E.2d at 715. The Court in *Consolidated Gas* also aptly observed that "[t]he question of what promotes or prejudices a party's interest when a partition through sale is sought must necessarily turn on the particular facts of each case." 161 W. Va. at 788, 247 S.E.2d at 715.

The purpose of the partition common law and augmenting statutes is to resolve any impasse associated with cotenancy when one owner interferes with another cotenant's desire to derive a rightful share of benefit from the property. "The usual problem attendant to divided ownership is that the parties are unable to agree on a common plan for the utilization of the property and as a result nothing is done to benefit their interests." *Consolidated Gas*, 161 W. Va. at 792, 247 S.E.2d at 717. Here, Petitioner Bowyer stands the purpose of partition law on its head -- attempting to deprive his cotenants of their due share of the profits anticipated from the Marcellus and other deep-strata reserves reached by enhanced drilling methods. In his amended

third-party complaint, the Petitioner sought an allotment to him of others' mineral interests or a forced sale on the courthouse steps.⁵ Yet, no allegation is made in his pleading that any other cotenant holding mineral interests in the subject properties has done anything to prevent him from leasing or otherwise reaping the benefits of his currently held mineral interests. It is indeed apparent from every answer and dispositive motion filed in response to his third-party complaint that all of his cotenants want the same opportunity.

The Petitioner's partition suit can only be described as a private condemnation solely for his benefit, much like the circumstances of the *Consolidated Gas* decision.⁶ The Petitioner has incorrectly characterized a single paragraph of the trial court's order as creating a "new" predicate for a partition. To the contrary, a full reading of the trial court order evidences a well-reasoned application of established partition law in the context of a suit to force a sale. "Our jurisprudence has long recognized that a partition sale, rather than a division in kind, is something that must be supported by sound facts and evidence because the court is being asked to adjudicate an individual's sacred right of property." *Renner v. Bonner*, 227 W. Va. 378, 386, 709 S.E.2d 733, 741 (2011). In *Renner*, this Court further reiterated the long-standing requirement that a sale may not

⁵ Allotment to one or more cotenants or a public sale are the two methods of partition accomplished by a forced sale, and both methods are covered by West Virginia Code § 37-4-3. Unless the context requires otherwise, both methods are generally referenced as a partition sale in this brief.

⁶ In his separate opinion, Justice Neely best describes this improper use by Consolidated Gas of a partition suit as a private condemnation devoid of "any rational reason [for partition] other than efforts for its own unjust enrichment." 161 W. Va. at 794-95, 247 S.E.2d at 718-19 (Neely, J., dissenting). Although denominated a dissenting opinion, Judge Neely actually concurred with the Court's majority decision to reverse the trial court's summary judgment approving a partition sale of the oil and gas interests. His dissent was only to point out that the majority did not go far enough, and should have directed entry of summary judgment in favor of the cotenants opposing a forced sale.

be compelled "for any light or trivial cause,"⁷ and that "partitioning sale statutes should be construed narrowly and used sparingly because they interfere with property rights." 227 W. Va. at 386-87, 709 S.E.2d 741-42 (quoting Casagrande, *Acquiring Property Through Forced Partitioning Sales: Abuses and Remedies*, 27 Boston C.L. Rev. 755, 775 (1986)).

Although partition suits are now primarily guided by statutory provisions, the common law principles regarding partition developed before and after the statutes still play an important role. In particular, protection of individual property rights is fundamental to the partition process since courts are sitting in equity in such cases. *Renner v. Bonner*, 227 W. Va. at 386, 709 S.E.2d at 741. In *Renner v. Bonner*, for example, this Court reversed the trial court's partition sale order. The suit was remanded for a determination whether the parties seeking the partition sale had acted in bad faith by conveying miniscule interests to family members to defeat any in-kind partition. The Court aptly observed that, sitting as a court of equity in a partition action, the trial court was required to determine if a legitimate reason supported a partition sale.

In the present action, the trial court properly concluded under equitable principles that a forced sale or allotment to the Petitioner was unjustified. That conclusion was not, as the Petitioner argues, based on a new predicate. Rather, this conclusion is rooted in the absence of a legitimate reason to force a sale. There was no proof offered by the Petitioner showing an unwillingness or inability of the cotenants on going forward with leasing and development of the mineral interests. Stated another way, to force a sale would have prejudiced the other parties who all wish to reap the expected significant monetary benefit of leasing and production. This is not a new predicate -- the

⁷ Quoting *Croston v. Male*, 56 W. Va. 205, 210, 49 S.E. 136, 138 (1904).

absence of prejudice to other parties is a statutory requirement. Sitting as a court of equity, the divesting of individuals' property cannot be compelled unless there is no other choice. The Petitioner's attempt to force a sale or an allotment to himself was purely opportunistic and rapacious. He provided no proof otherwise that would support an order depriving other cotenants of their property interests.

Petitioner's sought-after relief, a forced partition sale, triggers three statutory requirements. "By virtue of W. Va. Code, 37-4-3, a party desiring to compel partition through a 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." Syl. Pt. 3, *Consolidated Gas Supply Corp. v. Riley, supra*; Syl. Pt. 1, *Ark Land Co. v. Harper*, 215 W. Va. 331, 599 S.E.2d 754 (2004); Syl. Pt. 3, *Renner v. Bonner, supra*. The party seeking to compel a partition sale has the burden to prove that all three of the statutory requirements are satisfied. *Consolidated Gas*, 161 W. Va. at 786-87, 247 S.E.2d at 714-15.

The trial court's ruling on the Respondents' Joint Motion for Summary Judgment centered on the third requirement -- absence of prejudice to other parties. In this regard, the court acknowledged that, "[t]he question of what promotes or prejudices a party's interest when a partition sale is sought must necessarily turn on the particular facts of each case." (Order, at Appendix p. 14, ¶ 16.) (quoting *Consolidated Gas*, 161 W. Va. at 788, 247 S.E.2d at 715.) In its findings of fact, the trial court noted that the Respondents had either already leased their oil and gas interests or were interested in

doing so.⁸ (Order, at Appendix p. 8, ¶¶ 7-9.) As also found by the trial court, in response to the summary judgment motion Petitioner Bowyer "has put forth no evidence that any of the parties do not wish to develop the property or of any disagreement between the parties as to the development of the property." (*Id.*, at Appendix p. 10, ¶ 15.)

With these findings, the trial court applied fundamental partition principles to conclude as a matter of law that there was no proof showing an unwillingness or inability to agree to the development of the mineral estate and, therefore, a forced sale was inappropriate. In other words, what the Petitioner is now characterizing as a "new" requirement is nothing new. The trial court properly concluded that the Respondents were all interested in development of the mineral estate and, more importantly, that the Petitioner failed to prove any specific disagreement among cotenants that would preclude development. Ultimately then, summary judgment was proper because the Petitioner failed to demonstrate the statutory requirement that other cotenants would not be prejudiced by a compulsory sale.

Furthermore, the Petitioner is barred from asserting the "new predicate" proposition as grounds for appeal in the case at bar. "[O]bjections on non-jurisdictional issues, must be made in the circuit court to preserve such issues for appeal." *Loar v. Massey*, 164 W. Va. 155, 159, 261 S.E.2d 83, 86 (1979). "Where objections were not shown to have been made in the trial court, and the matters concerned were not jurisdictional in character, such objections will not be considered on appeal." Syl. Pt. 1, *State Road Comm'n v. Ferguson*, 148 W. Va. 742, 137 S.E.2d 206 (1964); Syl. Pt.

⁸ As found by the court below, some of the Respondents have been stymied in their efforts to lease due to the pendency of the Petitioner's partition claim in the present action.

2, *Maples v. West Virginia Dep't of Commerce*, 197 W. Va. 318, 475 S.E.2d 410 (1996). In the instant matter, the Petitioner failed to object to the legal standard applied by the circuit court and even applied the same in the Petitioner's combined response to the Respondents' motion for summary judgment. Therefore, he is barred from now asserting the same as grounds for reversal of the circuit court's ruling.

As previously stated herein, during the hearing held on March 31, 2015, the circuit court indicated that in the event the parties were unsuccessful in an upcoming mediation, the circuit court was inclined to grant the Respondents' motion for summary judgment absent some showing that the parties could not agree on a plan to develop the minerals, to which no objection was made by the Petitioner. (Order, at Appendix pp. 7-8, ¶ 6.) Not only did the Petitioner agree to the legal standard enunciated by the circuit court and apply the same in Petitioner's combined response to the Respondents' motion for summary judgment, the Petitioner went so far as to directly cite the *Cawthon* case as support for the Petitioner's position in the circuit court, the same case identified as establishing the legal standard the Petitioner now seeks, in the first instance, to dispute as having been applicable to the case at bar. (Combined Response of Defendant Bowyer, at Appendix p. 70.) In the Petitioner's aforementioned combined response, the Petitioner stated,

Movants misstate the standard for failure to agree on development in their motion. See *Buff Joint Motion* at 7. 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. See *Cawthon, et. al. v. CNX Gas Company, LLC*, No. 11-1231 W.Va. Supreme Court of Appeals, November 16, 2012 (memorandum decision); 2012 WL 5835068. (*Id.*)

The Petitioner in the very least acquiesced, if not actively agreed, that the legal standard acknowledged by the *Cawthon* Court, and identified as being applicable by the circuit court at the March 31, 2015 hearing, applied to the circumstances presented. To this point, in the Petitioner's own response to summary judgment, he argued that the failure-to-agree standard was applicable to the case at bar.

"A litigant may not silently acquiesce to [an alleged] error, or actively contribute to such error, and then raise that error as a reason for reversal on appeal." *In Interest of S.C.*, 168 W. Va. 366, 374, 284 S.E.2d 867, 872 (1981) (discussing Court's refusal to consider upon appeal grounds that circuit court did not include specific findings of fact and conclusions of law in the circuit court's order when counsel failed to object to circuit court's order and even signed the order prior to entry). The Petitioner seeks to have the circuit court's ruling overturned upon grounds for which the Petitioner directly asserted below. No formal objection or other exception was made by Petitioner to the legal standard identified by the circuit court until after the circuit court ruled against the Petitioner. At the March 31, 2015 hearing, the Petitioner was expressly placed on notice regarding the specific legal standard that the circuit court intended to apply to the pending motion for summary judgment. At that time and at all times subsequent thereto, the Petitioner was afforded sufficient opportunity to object to or seek correction of the identified legal standard. However, the Petitioner did not object to the legal standard enunciated by the circuit court or attempt to correct the circuit court as to what the Petitioner believed the applicable law to be. Instead, the circuit court *applied the law as argued by both the Petitioner and Respondents in their respective briefs*. Yet the

Petitioner now attempts, in the first instance, to object to the legal standard applied by the circuit court.

Similar to the "raise or waive" rule regarding evidentiary objections, but stated here in reference to the application of law *as identified by a circuit court and applied without objection or attempted correction thereto by the litigants before the circuit court*, a party should be prevented "from making a tactical decision to refrain from objecting and, subsequently, should the case turn sour, assigning error (or even worse, planting an error and nurturing the seed as a guarantee against a bad result)." *State v. LaRock*, 196 W. Va. 294, 316, 470 S.E.2d 613, 635 (1996). Furthermore, should this Honorable Court determine that the circuit court's ruling was correct, but upon application of an erroneous legal standard, "[t]his Court may, on appeal, affirm the judgment of the circuit court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the circuit court as the basis for its judgment." *Barnett v. Wolfolk*, 149 W. Va. 246, 253-54, 140 S.E.2d 466, 471 (1965).

B. Summary Judgment Was Clearly Warranted Because the Petitioner Failed to Meet his Burden of Production.

In the present action, the circuit court granted the Respondents' joint motion for summary judgment because Petitioner failed to provide sufficient evidence in his response establishing a genuine issue of material fact. (Order, at Appendix pp. 15-16, ¶ 10.) In his brief on appeal, Petitioner asserts that the circuit court erred in granting summary judgment since he contends there was no specific and detailed agreement between the parties regarding development of the minerals. (Petitioner's Brief, pp. 13-15.) This is a meaningless distraction that has no bearing on the merits of the trial

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court's ruling. In his response to the Respondents' joint motion for summary judgment, Petitioner utterly failed to provide any evidence establishing the existence of an issue of material fact and therefore, summary judgment was warranted. (Combined Response of Defendant Bowyer, at Appendix p. 69.) In short, it was his burden to produce evidence of a material factual dispute, and he failed to do so.

Pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, summary judgment is required when the record shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. For purposes of summary judgment, a fact is "material" if it has the capacity to sway the outcome of litigation. Syl. Pt. 5, in part, *Gray v. Boyd*, 233 W. Va. 243, 757 S.E.2d 773, 775 (2014) (quoting Syl. Pt. 5, *Jividen v. Law*, 194 W. Va. 705, 461 S.E.2d 451 (1995)). Accordingly, "[s]ummary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." *Allstate Wrecker Serv. v. Kanawha Cnty. Sheriff's Dept.*, 212 W. Va. 226, 230, 569 S.E.2d 473, 477 (2002) (quoting Syl. Pt. 2, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995)).

Initially, the moving party bears the initial burden of demonstrating that there is no genuine issue of material fact and summary judgment is warranted. After the moving party shows the absence of an issue of material fact, the burden of production shifts to the nonmoving party to establish the existence of a trialworthy issue. *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W. Va. 692, 699, 474 S.E.2d 872, 879

(1996). To meet this burden, the nonmoving party must "go beyond the pleadings" to "identify specific facts in the record and articulate the precise manner in which that evidence supports its claims." *Id.* See also *Stewart v. SMC, Inc.*, 192 W. Va. 441, 452 S.E.2d 899 (1994). In this regard, Rule 56(e) of the West Virginia Rules of Civil Procedure provides, in relevant part:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

In response to the summary judgment motion below, it was Petitioner's obligation to offer concrete evidence that could lead a reasonable finder of fact to return a verdict in his favor. *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 60, 459 S.E.2d 329, 337 (1995). See also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S. Ct. 2505, 2514 (1986). The evidence establishing an issue of fact "cannot be conjectural or problematic." 194 W. Va. at 60, 459 S.E.2d at 337. Further, "[u]nsupported speculation is not sufficient to defeat a summary judgment motion." *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987). Moreover, "[t]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." 194 W. Va. at 61, 459 S.E.2d at 337 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 2510 (1986)).

There are three statutory requirements to a forced partition sale. Pursuant to West Virginia Code § 37-4-3, "a party desiring to compel partition through a sale is required to demonstrate [1] that the property cannot be conveniently partitioned in kind, [2] that the interests of one or more of the parties will be promoted by the sale, and [3] that the interests of the other parties will not be prejudiced by the sale." Syl. Pt. 3, *Consolidated Gas Supply Corp. v. Riley*, 161 W. Va. 782, 247 S.E.2d 712 (1978). See also Syl. Pt. 1, *Ark Land Co. v. Harper*, 215 W. Va. 331, 599 S.E.2d 754 (2004). The partitioning statutes "should be construed narrowly and used sparingly because they interfere with property rights." *Renner v. Bonner*, 227 W. Va. 378, 387, 709 S.E.2d 733, 742 (2011) (quoting *Casagrande, Acquiring Property Through Forced Partitioning Sales: Abuses and Remedies*, 27 Boston C.L. Rev. 755, 775 (1986)). The party seeking to compel partition bears the burden of proving all three of these requirements. *Consolidated Gas Supply Corp. v. Riley, supra*.

In the proceedings below, the Respondents filed a joint motion for summary judgment establishing that there was no genuine issue of material fact. In this motion, the Respondents presented evidence that the cotenants were in agreement to develop the minerals and that Petitioner failed to satisfy the necessary requirements for the court to order partition. (Joint Motion for Summary Judgment, at Appendix p. 57.)

In his response, Petitioner generally asserted that there was a disagreement between the cotenants regarding development of minerals and that the cotenants would not be prejudiced by an allotment or sale of the land. (Combined Response of Defendant Bowyer, at Appendix p. 69.) With regard to his assertion that the cotenants were in disagreement, Petitioner referenced the unsuccessful mediation that the parties

participated in on April 8, 2015. (*Id.*, at Appendix p. 70.) However, the fact that the parties did not reach a settlement at this mediation does not establish that the parties were in disagreement. In his response below, Petitioner misrepresented what occurred at the mediation. In fact, all parties were in agreement to develop the minerals and the mediation was only unsuccessful because Petitioner continued making one-sided and unreasonable demands to acquire the mineral interests of other parties.⁹ More importantly, as required in response to the motion for summary judgment he offered no affidavits, depositions, answers to interrogatories, or other evidence to support this conclusory allegation of a disagreement.

The Petitioner reiterates this unsupported argument in his brief. He contends, without supporting authority, that all cotenants must agree to the specific terms of mineral development, rather than be willing to move forward in reasonable fashion to develop the mineral interests. In effect, the Petitioner is saying, "Take what I offer or I will compel a sale and force you out."

Moreover, Petitioner Bowyer cannot simply point to the fact that some parties have not yet leased their mineral interests and characterize this as a *bona fide* disagreement. As the trial court found, these unleased cotenants are interested in leasing to Antero Resources but Petitioner Bowyer's partition suit has imposed a

⁹ At the mediation on April 8, 2015, Bowyer made one settlement demand, directed only at the responding parties who had not signed leases with Antero -- Ron Cumberledge, Janice Hurst, Maribel Pontious, Nelson Swiger, The Seventh Day Baptist Memorial Fund, George J. Buff, III, J. Charles Buff, and the Estate of Helen Buff. While these third-party defendants are not presently leased with Antero, they have shown their willingness to sign with Antero, or any other party capable of developing the minerals or assigning the lease to someone who could. Hence, at mediation, Bowyer's settlement "offer" was to lease to him at a set percentage and for a set bonus. Understanding that Bowyer's patent objective was to lease them at a lower rate and assign the lease to Antero for an override, the third-party defendants reluctantly agreed to discuss the possibility. The third-party defendants agreed to discuss this possibility only in an effort to stop the bleeding caused by Bowyer's litigation -- even though Bowyer's attempts at a forced sale are a clear misuse of the partition process. Bowyer refused, however, to increase either the bonus or royalty figures from his original offer and negotiations ceased thereafter.

roadblock. (Order, at Appendix p. 8, ¶ 8.) Significantly, the Petitioner himself acknowledges in his brief that he would like to lease his oil and gas interest in the subject properties to Antero, "but has not yet leased his interest to date." (Petitioner's Brief, at p. 3, quoting Order, at Appendix p. 8, ¶ 9.)

In his response to the motion for summary judgment below, Petitioner Bowyer failed to meet his burden to show that the necessary requirements compel partition through sale were present. With respect to the first requirement -- that the property cannot be conveniently partitioned in kind -- the Petitioner pointed to the allegation that there were "unknown parties" who hold undivided interests in the oil and gas interests at issue. However, this fact alone is insufficient to support a forced sale. (*Id.*, at Appendix p. 70.) There is a statutory process to remedy that circumstance, if it even exists in this case; but again, Petitioner Bowyer provided no proof. See W. Va. Code §§ 55-12A-1, *et seq.*, -- *Lease and Conveyance of Mineral Interests Owned by Missing or Unknown Owners or Abandoning Owners*.

To fulfill the second requirement -- that the interests of one or more of the parties will be promoted by sale -- Petitioner apparently relies on his conclusory statement in his amended third-party complaint that a sale is in the parties' best interests. Again, he failed to provide any evidence to support this assertion. Finally, in relation to the third requirement that the interests of other parties will not be prejudiced by the sale, Petitioner simply stated that the parties will receive "fair market value" of the shares as required by statute. (Combined Response of Defendant Bowyer, at Appendix pp. 70-71.) However, in typical fashion, Petitioner again failed to put forth any facts in support of this allegation. Moreover, as discussed in the preceding section of this brief, the

Respondents wish to retain their oil and gas interest and reap the anticipated benefits. Under the applicable equity principles earlier discussed, the Petitioner cannot simply justify his private condemnation by asserting no one will be prejudiced because they will get fair market value in the forced sale.

For these reasons, summary judgment was also proper in relation to the surface tracts for the property in dispute. The trial court properly concluded that Petitioner Bowyer provided no proof that he has met the statutory requirements to compel partition by sale of the surface tracts. (Order, at Appendix p. 15, ¶ 9.)

Furthermore, in reference to his assertion that the circuit court erred in granting summary judgment, the Petitioner's reliance on *Consolidated Gas Supply Corporation v. Riley*, 161 W. Va. 782, 247 S.E.2d 712 (1978) is misplaced. In *Consolidated Gas*, the owner of an undivided interest and lessee of all oil and gas sought partition of the mineral interests by sale. In its complaint, Consolidated Gas alleged that the oil and gas property could not be partitioned in kind and all of the parties' interests would be promoted by the sale. Consolidated Gas then filed a motion seeking summary judgment that stated, without supporting evidence, that there was no genuine issue of material fact. Neither Consolidated Gas nor the opposing party cotenants provided any supporting affidavits, answers to interrogatories, or other evidence in the motion or the response in opposition. 161 W. Va. at 784, 247 S.E.2d at 713. The circuit court nevertheless granted summary judgment and made a conclusory finding that "no genuine issue as to any material fact in this action (exists) between the parties hereto and that said motion should be sustained." *Id.* The order granting summary judgment provided no other finding or basis for the court's decision.

Here, the Petitioner quotes *Consolidated Gas* in support of his assertion that the circuit court erred in granting summary judgment and asserts that the court's order "does not indicate factual findings to support its grant of summary judgment." (Petitioner's Brief, at p. 15.) However, the Petitioner is simply referencing fragments of the earlier opinion that are inapplicable here. In *Consolidated Gas*, the circuit court issued an order granting summary judgment that listed one unsupported reason for its order without providing any detailed findings of fact. Ultimately, this Court determined that there were possible issues of material fact that precluded the lower court's entry of summary judgment, and reversed and remanded for that reason. The present case is quite different. The circuit court entered a 12-page order containing 36 paragraphs of detailed findings and conclusions of law. These findings and conclusions were supported by the proof offered by the Respondents, and unchallenged by any evidence by Petitioner Bowyer since he offered none. Although the Court's emphasis on following a fact-specific analysis is useful to this case, it is not useful for the reasons asserted by the Petitioner. Instead, *Consolidated Gas* provides a framework to uphold the trial court's order of summary judgment in the instant case because the court indeed made specific findings of fact and determined that there was no dispute of material fact before granting summary judgment to the Respondents.

Petitioner failed to meet the three statutory requirements to compel partition by sale or allotment. Further, he failed to meet his burden of production in response to the Respondents' motion for summary judgment. Accordingly, the circuit court's order of summary judgment in favor of the Respondents was appropriate and should be affirmed.

C. The Circuit Court Correctly Denied Petitioner's Motion to Amend.

Rule 15(a) of the West Virginia Rules of Civil Procedure provides that a party may amend its pleading within 20 days after it is served and thereafter "only by leave of court . . ." The rule provides for the liberal, but not limitless, amendment of pleadings. While the rule indicates that leave shall be freely given, this Court has "recognized that 'the liberality allowed in amendment of pleadings does not entitle a party to be dilatory in asserting claims or to neglect the case for a long period of time.'" *Consolidation Coal Co. v. Boston Old Colony Ins. Co.*, 203 W. Va. 385, 393, 508 S.E.2d 102, 110 (1998) (quoting *Mauck v. City of Martinsburg*, 178 W. Va. 93, 95, 357 S.E.2d 775, 777 (1987)). Likewise, pleadings may not be amended when the proposed amendment is futile or will prejudice the opposing parties. Here, all of these factors are present and the circuit court correctly denied the Petitioner's motion to amend. Furthermore, "[r]efusing to grant leave to amend a pleading will not be regarded as reversible error in the absence of a showing of an abuse of the trial court's discretion in ruling upon a motion for leave to amend." Syl. Pt. 2, in part, *Lloyd's, Inc. v. Lloyd*, 225 W. Va. 377, 693 S.E.2d 451 (2010) (quoting Syl. Pt. 6, *Perdue v. S.J. Groves and Sons Co.*, 152 W. Va. 222, 161 S.E.2d 250 (1968)). Hence, this Court should not alter the trial court's decision.

1. Petitioner's Proposed Amendment is Untimely.

Rule 15(a) does not permit the limitless amendment of pleadings and the rule does not permit a party to be inexcusably and unreasonably dilatory in seeking to amend. In the instant matter, the Petitioner sought leave, without excuse, to amend five years after the institution of this action and in so doing, provided not only no valid

reason, but no reason at all. Accordingly, the circuit court did not err in denying that motion and this Court must uphold its decision.

West Virginia Rule of Civil Procedure 15(a) provides that "leave [to amend] shall be freely given when justice so requires." "The liberality allowed [under Rule 15] . . . does not entitle a party to be dilatory in asserting claims or to neglect his case for a long period of time." Syl. Pt. 6, *State ex rel. Vedder v. Zakaib*, 217 W. Va. 528, 618 S.E.2d 537 (2005). It is not an abuse of discretion to deny leave where "there has been a delay in seeking an amendment even though the facts on which the amendment would be based have been long known by the party." *State ex rel. Packard v. Perry*, 221 W. Va. 526, 540, 655 S.E.2d 548, 562 (2007) (quoting Lugar & Silverstein, *West Virginia Rules of Civil Procedure*, Rule 15(a), pp. 136-37 (1960)). "[W]here the delay is unreasonable" the burden is "on the moving party to demonstrate some valid reason for his or her neglect or delay." Syl. Pt. 3, in part, *State ex rel. Vedder v. Zakaib*, 217 W. Va. 528, 618 S.E.2d 537 (2005).

In the instant matter, Petitioner sought leave to amend on May 8, 2015, which is five years after the filing of this action, three years after his original third-party claim, and nearly one year after the argument which the Petitioner sought to circumvent was first brought to his attention. Significantly, in that time period: (1) no new facts have been discovered or presented; and (2) the applicable legal arguments remain unchanged. In support of his proposed amendment, Petitioner offered a single paragraph reading:

COMES NOW the Defendant, David Earl Bowyer, by counsel, Thomas J. O'Neill, and moves this Honorable Court to grant leave to amend the Amended Verified Petition in this matter, and refile the same, pursuant to Rule 15(a) of the West Virginia Rules of Civil Procedure. (Bowyer Motion to Amend, at Supplemental Appendix p. 27.)

Absent from the paragraph is "some valid reason for his or her neglect or delay" as required by this Court in *Vedder*, and Petitioner's proposed amended complaint is identical to his amended counterclaim and third-party complaint save two paragraphs. In Paragraph 111, Petitioner alleges that the parties failed to reach a common plan of development for the minerals, and in Paragraph 112, he alleges that the Respondents stand in the way of Petitioner's ability to develop the minerals personally. Both proposed amendments were raised, as stated by the Petitioner in his brief, in "an effort to address the circuit court's unfounded and newly announced 'predicate.'" This argument misstates the status of the case and portrays the Petitioner's fundamental misunderstanding of the nature of the circuit court's ruling.

First, the Petitioner's argument misstates the status of the case as his motion to amend did not come at some point wherein the facts or law were subject to development or new information was recently acquired. Rather, the motion to amend came on May 8, 2015, after the close of discovery on January 16, 2015, after the Respondents disclosed their experts over a year prior, after the parties mediated the case on April 8, 2015, and most significantly, over a year after many of the Respondents filed their initial motions for summary judgment or dismissal in Spring of 2014. Discovery was ongoing and those motions were not granted, but the issues raised therein are the same, or extremely similar to those adjudicated by the circuit court in the motion for summary judgment argued before the court on March 31, 2015 that is the subject of the instant appeal. Specifically, Respondents Cumberledge and Hurst argued in their May 2, 2014 motion for summary judgment that, "in this case, Bowyer has not and cannot allege or demonstrate that any of the Movants will hinder

his ability to develop or profit from his interest. He has not and cannot demonstrate that any of the Movants are unwilling to sign a lease enabling the development of the property" and accordingly, partition, as Petitioner sought, was improper. (Cumberledge and Hurst Motion, at Supplemental Appendix p. 5.) Thus, the underlying facts and law behind the Respondents' defenses were known to the Petitioner for over a year prior to Petitioner filing his motion to amend. Again, Petitioner provided no reason for his delay.

Secondly, Petitioner's brief demonstrates his fundamental misunderstanding of the lower court's ruling in that the court ruled on the facts before the court, including the existence or non-existence of a common plan of development. As the court correctly concluded, all of the parties either have signed a lease with Antero, or are agreeable to doing so. (Order, at Appendix p. 8, ¶¶ 7-9.) The circuit court, in reaching its decision, did not decide the case under Rule 12(b)(6)'s "failure to state a claim" standard. Rather, the court implicitly applied Rule 15(b), assumed that Bowyer's complaint included all necessary elements of a partition action, and determined that there was no issue of material fact after applying the law (as though properly pleaded) to the facts under Rule 56. In essence, what Petitioner Bowyer seeks, five years after the institution of this action, is not to amend the pleadings to conform to newly developed facts or law but rather to seek a "do over" to allow him to reset the clock and go back and fabricate a dispute among the parties. To allow him to do so at this time would not only be improper and prejudicial (see below) but futile as the court has already decided that there is no issue of material fact under the revised pleading. See *Equal Rights Ctr. v. Niles Bolton Associates*, 602 F.3d 597, 603 (4th Cir. 2010) (addressing the nearly

identical Federal Rule 15) (holding a "court may deny a motion to amend when the amendment would . . . be futile.").

2. *Petitioner's Proposed Amendment Would Prejudice Respondents.*

Conspicuously absent from Petitioner's single paragraph "Motion to Amend" is any analysis of prejudice. "Prejudice to the adverse party is the paramount consideration in motions to amend." *State ex rel. Bd. of Ed. of Ohio Cnty. v. Spillers*, 164 W. Va. 453, 455, 259 S.E.2d 417, 419 (1979). It therefore follows that if the adverse party will be prejudiced, the amendment shall not be allowed.

In this case, the parties had already completed discovery, named experts, and mediated the case when Petitioner sought to amend. All of these activities required the expenditure of time and money. Furthermore, the parties have already lost the opportunity to profit from the latest gas boom as prices have halved since this action was commenced and activity significantly diminished in that time. Plainly, if the Petitioner has his way, the parties will be forced to relitigate what has already been litigated resulting in additional expense as well as further lost time and profit. This is essentially the definition of prejudice.

V. CONCLUSION

The circuit court did not create a new predicate to partition by sale. Instead, it applied well-established partition law to find that the Petitioner had not fulfilled the requirements needed to warrant partition by sale. The circuit court's grant of summary judgment was proper because the Petitioner wholly failed to meet his burden of production and has not established the existence of a genuine issue of material fact. Finally, the circuit court's denial of Petitioner's motion for leave to amend was correct

because the Petitioner's motion was untimely in that it was filed nearly five years after this matter was initiated and the Petitioner's proposed amendment would be prejudicial to Respondents.

The circuit court's decision granting summary judgment in the Respondents' favor and denying the Petitioner's motion for leave to amend should be affirmed.



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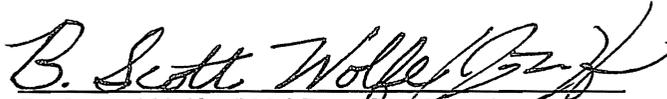
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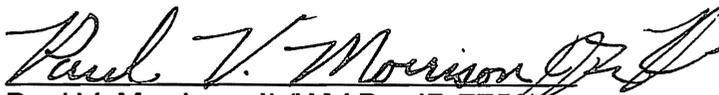
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CERTIFICATE OF SERVICE

I, John M. Hedges, hereby certify that on the 1st day of April 2016, I served the foregoing *Joint Response Brief* via U.S. Mail, postage prepaid, upon the following:

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