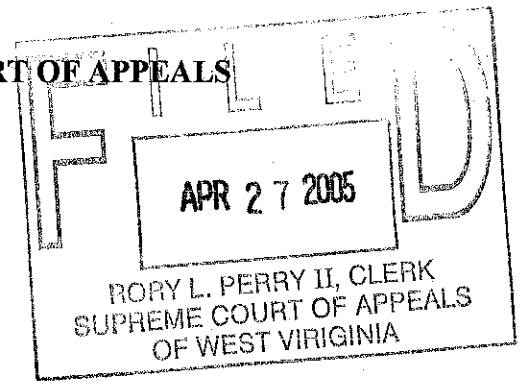


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

Case No. 32530



**WILLIAM M. KESTER and
ORIAN LEE NUTTER, II,**

Appellees,

vs.

**J. THOM SMALL, Appellant,
DIVERSIFIED RESOURCES, INC., a West Virginia
Corporation, J. CARL PALMER,
ELIZABETH A. DODD, and ADAM F.
WILSON, Beneficiary of the Estate of
NELMA M. WILSON, deceased.**

Appellants.

RESPONSE TO APPELLEE'S BRIEF

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Counsel for Appellants

INACCURACIES IN APPELLEE'S STATEMENT OF FACTS

The Statement of Facts by the Appellee contains basic misrepresentations of the Court Order entered by the Circuit Court of Harrison County on September 26, 1935. An examination of this Order will assist the Court in making a determination as to its "clear intent".

Specifically, in Paragraph No. 6a, the Appellee labels certain items as city lots. However, various lots as identified by the Appellee are not "city lots." Rather, they contain considerable acreage of land and are not what would commonly be referred to as "city lots." More importantly, however, is misrepresentations made in the Appellee's Statement of Facts, Paragraph No. 7. The Appellee quotes a part of the Order that says that the 1935 Order found that the mineral interests and the oil and gas interests were "not susceptible of partition in kind," implying that the Order referred to all the mineral interest and the oil and gas interest. However, the 1935 Order specifically referenced certain parcels. The oil and gas under the parcel at issue in this case was specifically not listed by the Court in its Order as being a parcel that was not susceptible to partition in kind. Therefore, Paragraph No. 7 of the Appellee's Statement of Facts is a misrepresentation of the Order of the Court.

Paragraph No. 8 of Appellee's Statement of Facts once again misinterprets the Order of the Court. In Paragraph No. 4 of the 1935 Order, the Court held that the property was subject to partition in kind, however, it excepted the parties interest in the mineral interest in certain parcels of land. The parcel at question in this particular proceeding was not included in that exception.

Further, the Court referred to Parcel No. 23 in that Court Order and then corrected that error, if you will, in the next paragraph of said Court Order without making any specific reference or

changes to the parcel of land in dispute in this case. This shows that the Court was aware of shortcomings in other areas of the Court Order and corrected these shortcomings while choosing not to make any changes to the parcel of land in dispute in this case.

Once again, in Paragraph No. 9 of Appellee's Statement of Facts, the Appellee attempts to persuade the Court that the only mineral interests not specifically held in common were those that were city lots. In actuality, there is no mention or classification in the Court Order of city lots. The finding of the Court was that the oil and gas interests under certain parcels of land were subject to being held in common and certain parcels of lands were not.

Further, in Paragraph No. 12 of Appellee's Statement of Facts the Appellee alleges that the Kester heirs have acted consistent with the Court Order. However, there was never any development of this property that would have resulted in any research or title examination done on this property to develop the oil and gas. As the Court is aware, the fact that some of the parties may have acted as if they had an interest in oil and gas property does not in any way give them an adverse claim against the true owner of the property as it pertains to the minerals underneath the same. Therefore, as set forth in their findings of facts attorney, James V. Cann, is absolutely correct that John M. Kester owned 100% oil and gas interest under Parcel No. 2, which is subject to this litigation, rather than an undivided 1/4 interest therein, because the September and December 1935 Orders of the Circuit Court of Harrison County failed to specifically exclude from partition the oil and gas under said parcel of land.

RESPONSE TO APPELLEE'S ARGUMENT

While the Appellant feels that any inaccuracies that the Appellee has drawn attention to in it's "Inaccuracies of Appellant's Statement of the Case" are purely argumentative, it nonetheless feels obligated to note inaccuracies in the Appellee's Statement of the Case and present its argument against said allegations.

The Appellee's argument is erroneous as it attempts to classify the rewriting of a seventy (70) year old Order as a correction of a clerical error. There is no evidence, whatsoever, that this was a *clerical error*. In fact, the Court's actions clearly show that it knew exactly what it was doing as it specifically excluded *particular* oil and gas interests under specific property and corrected specific entries prior to the Final Order. There is no evidence that the counsel of record in 1935 did not approve the Order, there is no mistakes, no omissions, and nothing to indicate any error.

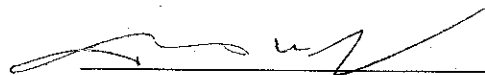
Further, the Rules of Civil Procedure were not in effect in 1935 and therefore clerical error had not yet been considered. A determination that the property in dispute was the subject of a clerical error would have a significant, unanticipated and totally different effect on the parties. The Appellees want to make claims of a mistake that somehow was "clerical" or "illogical", however the opposite is true. It is clear that the Judge in 1935, and the attorneys of record in the case, knew exactly what they were doing and the Order speaks exactly as they intended. There is no "record" otherwise and the argument that the income from this property would be used to pay some debt is totally beyond any determinations gleaned from the facts in this case.

There is no justification whatsoever for the Circuit Court to rewrite a seventy (70) year old Order.

RELIEF REQUESTED

This Court should determine that the 1935 Order was clear and correct in its pronouncement and that the Appellant herein, J. Thom Small is the owner of all the oil and gas under the 16.89 acres.

Respectfully Submitted:



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CERTIFICATE OF SERVICE

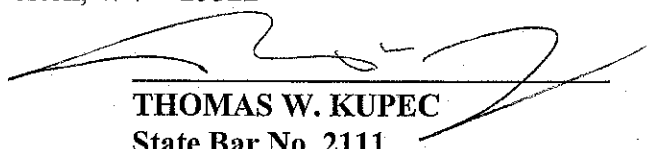
I hereby certify that on the 26 day of April, 2005, I served a true copy of the foregoing

Response to Appellee's Brief, upon the following person, by depositing a true copy thereof in the

United States mail, postage prepaid, in an envelope addressed to him as follows:

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