IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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OF WEST VIRGINIA

GREGORY G. POULOS, JASON G. POULOS, PAMELA F. POULOS, SHAUN D. ROGERS, KEVIN H. ROGERS, DEREK B. ROGERS, AND T.G. ROGERS, III,

Petitioners,

v.

LBR HOLDINGS, LLC,

Respondent.

Docket No. 15-0907

REPLY BRIEF OF PETITIONERS

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STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners maintain that oral argument is appropriate pursuant to Rule 19, because this case involves errors in settled law; an unsustainable exercise of discretion; alleges a result inconsistent with the weight of the evidence; and involves a narrow issue of law. *See* Rule 19(a)(1)-(4). The Respondent states that to the extent that this case is suitable for argument, it is appropriate under Rule 20 because it involves an issue of fundamental public importance. (Resp't Br. at 5). Although this case will significantly impact West Virginia property and natural resources law, the issues presented are not public policy arguments within the meaning of Rule 20.

SUMMARY OF ARGUMENT

The predecessors-in-interest to the parties before the Court entered into a deed in 1938 ("1938 Deed") conveying various interests and expressly reserving to the Petitioners' ("Poulos/Rogers Parties") predecessors one-half of "the oil and gas under said property[.]" App. Vol. 3, at 2. The Poulos/Rogers Parties contend that the reservation is an unambiguous, unqualified, and unlimited reservation of all gas under the property, including, *inter alia*, methane and other gases stored in and produced from coal seams and associated formations (CBM), and that the trial court erred in finding otherwise.

Respondent, LBR Holdings, LLC ("LBR"), argues and the trial court held, that the term "gas" is ambiguous and that the grantors under the 1938 Deed would not have intended to reserve CBM because it was not being "commercially" produced at the time of the deed's execution and was known to be hazardous in coal mines. In other words, LBR contends and the trial court essentially held that the phrase "the gas under said property" should be read to mean "the gas under said property other than coalbed methane gas under said property."

The Poulos/Rogers Parties' response is simple. First, the parties to the 1938 Deed were very clear in reserving "the [] gas under said property." This is unambiguous, unqualified, and unlimited. The grantors did not reserve "some gas" or "gas commercially produced at this time," but rather reserved all "the [] gas under said property." The 1938 Deed must be applied as written.

Second, LBR's argument and the trial court's holding are directly contrary to *Faith United Methodist Church and Cemetery of Terra Alta v. Morgan*, 231 W. Va. 423, 745 S.E.2d 461 (2013), in which this Court recognized that "[i]t is immaterial what minerals were known to be under the land [at the time of conveyance], or were not known; the only question is whether it was the grantor's intention to convey or reserve those minerals." *Faith United*, 745 S.E.2d at 483 (*citing Waugh v. Thompson Land & Coal Co.*, 103 W. Va. 567, 572, 137 S.E. 895, 867 (1927), and *Moses v. U.S. Steel Corp.*, 676 S.W.2d 99, 102 (Tex. 1984) ("[t]he knowledge of the parties of the value, or even the existence of the substance at the time of the conveyances was executed has been found to be irrelevant to its inclusion or exclusion from the grant of minerals.")).

Third, LBR's argument and the trial court's finding that there was no "commercial" production of gas from coal seams prior to 1938 are clearly erroneous. The record is replete with undisputed evidence, including official West Virginia publications and documents, establishing that gas operators were drilling wells into and producing gas (CBM) directly from coal seams in and prior to 1938. CBM was, indeed, a known and developed economic resource when the 1938 Deed was executed.

Fourth, affirmance of the trial court's holding would create "interminable confusion of land titles." *Faith United*, 745 S.E.2d at 469. The trial court's holding essentially means that the reservation of any given natural resource in a deed will rise or fall depending upon whether an

undefined "commercial" amount of the natural resource was being produced at the time of the deed's execution. This kind of ownership standard is directly contrary to *Waugh*, *supra*, and is, as a practical matter, an unworkable one because ownership will be inherently related to and dependent upon a determination of what "commercial" means in a given industry, and further dependent upon detailed factual inquiries into production quantities and production methods. Under the trial court's standard, looking at a deed will tell a title examiner nothing. If affirmed, the ruling will wreak havoc on West Virginia deed interpretation law and leave every single owner of gas and other natural resources in West Virginia vulnerable to lengthy, expensive litigation challenging their ownership.

The trial court's rulings, findings, and conclusions should be reversed; judgment should be rendered for the Poulos/Rogers Parties on the ownership issue; and the case should be remanded for further proceedings on the accounting claims.

ARGUMENT

I. West Virginia Law Requires Uniformity and Predictability.

In the same breath that LBR suggests that this case is of "fundamental public importance," it relegates the sweeping implications the trial court's holding would have on West Virginia property and natural resources law to two footnotes. *See* Resp't Br. nn.3 & 9. The trial court's ruling, if affirmed, will inflict interminable instability upon West Virginia property law. As production technologies advance and economic factors fluctuate, ownership of natural resources will forever be called into question and challenged, thus eluding the uniformity and predictability favored by this Court. *See Faith United*, 745 S.E.2d 461 at 475 ("Unquestionably, uniformity and predictability are important in the formulation and application of our rules of property.").

The trial court's ruling means that the term "gas" is always ambiguous, precisely as the now overturned *Ramage* decision held that the term "surface" was always ambiguous. *See Faith United*, 735 S.E.2d at 476 (expressly overruling *Ramage v. South Penn Oil Co.*, 94 W. Va. 81, 118 S.E. 162 (1923)). The risk of chaos and confusion on West Virginia property law is real absent this Court applying the sound principles it set forth in *Faith United*, and "eradicat[ing] uncertainty of such titles." 745 S.E.2d at 469. The conveyance or reservation of a resource should not turn on a factual inquiry into production technologies being used or the quantities being produced at the time of conveyance or reservation, and it is impracticable and contrary to West Virginia law to hold otherwise.

II. The 1938 Deed is an Unambiguous Reservation of All Gas Under the Property.

The 1938 deed is a clear, unambiguous expression of the parties' intent to reserve all gas under the property. It is obvious that coalbed methane gas is gas.[1] LBR's own expert Dr. Ripepi conceded at trial, that coalbed methane is gas. App. Vol. 2, p. 254. As such, the trial court needed only to apply the plain and ordinary meaning of the phrase "the gas under said property," and hold that coalbed methane gas under said property is included within the unlimited reservation of "the gas." Such a conclusion is mandated by the principles of deed construction recently reiterated by this Court in *Faith United.* As *Faith United* similarly reasoned, "[t]o hold otherwise would be to alter the language of the deed and, by construction, enlarge the estate conveyed by the deed." 745 S.E.2d at 483.

LBR argues, however, that because this Court, in *Energy Dev. Corp. v. Moss*, 214 W. Va. 577, 600, 591 S.E.2d 135, 158 (2003), held the lease at issue in that case was ambiguous, the

[1] In *Harrison-Wyatt, LLC v. Ratliff*, 593 S.E.2d 234, 238 (Va. 2004), the Virginia Supreme Court acknowledged the obvious, concluding that CBM "is a gas." In *Amoco Prod. Co. v. Southern Ute Indian Tribe*, 526 U.S. 865, 873 (1999), the United Stated Supreme Court held: "CBM gas exists in the coal in three basic states: as free gas; as gas dissolved in the water in coal; and as gas 'adsorbed' on the solid surface of the coal . . . . These are the same three states or conditions in which gas is stored in other rock formations." 526 U.S. at 873 (emphasis added).

term "gas" is always ambiguous, and where there is ambiguity in a deed, it must be construed in favor of the grantee. Resp't Br. at 8. *Moss* is not controlling. First, *Moss* found the lease at issue in that case to be latently ambiguous based on extrinsic evidence presented in that case, including an inaccurate history of CBM production in West Virginia. *See* Pet'rs' Br. at §5(B). Such a holding does not mean that the term "gas" is always ambiguous. Further, the Court in *Moss* made it abundantly clear that its opinion was a narrowly crafted, fact-specific opinion of limited precedential value. *Moss*, 591 S.E.2d at 146 ("We express no opinion as to what result may obtain in a different factual scenario . . . .").

Nothing in the 1938 Deed suggests that the parties intended to reserve anything but all of "the [] gas under said property," and it should be applied as written under the principles of *Faith United*. In that regard, we note that in his *Moss* dissent, Justice Albright took an approach that foreshadowed the Court's pragmatic approach in *Faith United*. Justice Albright reasoned: "The majority found an ambiguity in the grant of a lease of 'all of the oil and gas and all of the constituents of either' where reasonable minds could not differ as to the true and intended meaning of that language. Moreover, it appears beyond cavil that coalbed methane is gas, that is natural gas. Each of the dictionary definitions clearly identify methane as the principal component of natural gas and both the federal and state definitions of 'coalbed methane' describe it as a gas. Consequently, the majority erred in finding ambiguity and, in the larger picture, in failing to clearly define coalbed methane as a gas, as natural gas." *Moss*, 591 S.E.2d at 164.

Moss also does not control because even if the 1938 Deed were properly found to contain a latent ambiguity, the undisputed contemporaneous extrinsic evidence in this case established that gas operators were drilling into and producing gas (CBM) from coal seams in and prior to 1938, and thereby any such ambiguity was removed, as Petitioners showed in their opening brief

(Pet'rs' Br. at § 4) and further discuss below. *See Snider v. Robinette*, 78 W. Va. 88, 88 S.E. 599 (1916) ("[W]hen the ambiguity is thus raised by extrinsic evidence, it may be removed by the same means."). Accordingly, the trial court erred in both finding an ambiguity and also in construing that ambiguity in favor of LBR.

As a practical matter, the trial court's ruling essentially means that a party cannot convey or reserve a group of minerals or resources without expressly naming each and every type of mineral or resource to be included. LBR states in a footnote that this is simply "not true" because methane found in coal seams, unlike other gases, is "intimately bound to the coal." Resp't Br. at 16 n.9. The evidence at trial was in direct contravention of LBR's position.

Both LBR's and the Poulos/Rogers Parties' experts testified that CBM is not chemically bound to coal; rather, it is adsorbed, like condensation on a window pane. App. Vol. 2, at 499. Additionally, other gases, such as gas found in shales, also adsorb and become trapped in the micropores in gas shales in the same manner as CBM adsorbs to coal. *Id.* at 497.[2] The trial court's reasoning simply runs afoul of the West Virginia principles of property law of uniformity, predictability and giving terms their general and ordinary meaning. *See Faith United*, 745 S.E.2d at 475, 482. Contrary to LBR's arguments, affirmance of the trial court will mean that conveyances and reservations will need to list each and every type of mineral or resource included in the instrument, a new and destabilizing rule in West Virginia law.

LBR implies that *Harrison-Wyatt, LLC v. Ratliff* supports its position. 593 S.E.2d 234 (Va. 2004). Resp't Br. at 36. It does not. LBR lost this very same issue regarding the Virginia properties under the 1938 Deed at the summary judgment phase based precisely on *Harrison-*

[2] *See also Central Natural Resources, Inc. v. Davis Operating Co.*, 288 Kan. 234, 201 P.3d 680, 683, 689 (Kan. 2009) (gas is stored in all rock formations in the same three states or conditions as found in coalbeds); *Newman v. RAG Wyo. Land Co.*, 53 P.3d 540, 544, 546 (Wyo. 2002) (natural gas or methane, whether located in a sandstone reservoir or in a coal seam, is similarly produced and exists in the same three basic states; coalbed methane "unquestionably has the chemical composition of gas").

Wyatt. *See* App. Vol. 3, at 713 (Order from the Circuit Court of Buchanan County, Virginia granting summary judgment in the Poulos/Rogers Parties' favor stating: "Coalbed methane gas is obviously 'gas,' *see Harrison-Wyatt, LLC v. Ratliff*, 593 at 234, 238 (Va. 2004) (coalbed methane "is a gas"); and there is nothing in the Deed that removes coalbed methane or any other type of gas from the scope of the reservation. The language at issue is unlimited, plain, and unambiguous.").[3] Indeed, the trial court's ruling would establish an incongruous situation in which the parties to the 1938 Deed intended to reserve all gas in Virginia but only some gas in West Virginia. Such a result is contrary to the plain language of the deed.

III. LBR Cannot Argue That It Owns CBM By Virtue of Its Coal Ownership.

For the first time in these proceedings, LBR seeks a sweeping determination that CBM belongs to the owner of the coal estate. *See* Resp't Br. at 16. Throughout the trial court proceedings, LBR argued that the term "gas" is ambiguous, gas was not being produced from coal seams in commercial quantities at the time of the deed's execution, and because gas in coal seams was known to be a hazard, the parties to the deed would not have intend to include CBM in the reservation of the gas estate. LBR never took the position that it owns the CBM at issue by virtue of its coal ownership. Accordingly, LBR's request for an all-encompassing determination that CBM belongs to the owner of the coal estate should be disregarded. *See Kronjaeger v. Buckeye Union Ins. Co.*, 200 W. Va. 570, 585, 490 S.E.2d 657, 672 (1997) ("We frequently have held that issues which do not relate to jurisdictional matters and which have not been raised before the circuit court will not be considered for the first time on appeal to this Court.").

In support of its newly declared position, LBR cites a number of non-contemporaneous court rulings and law review articles regarding CBM ownership disputes between gas owners

[3] On April 24, 2015, the Supreme Court of Virginia in denying LBR's petition for appeal affirmed the Buchanan County, Virginia Circuit Court's ruling in favor of the Poulos/Rogers Parties. App. Vol. 1, pp. 303-304.

and coal owners. Pet'rs. Br. at 13-16. These materials have absolutely nothing to do with the 1938 Deed at issue. As discussed herein, the best and only relevant evidence to the intent of the parties to the 1938 Deed are the deed itself, and/or the contemporaneous documents. *See Oresta v. Romano Bros.*, 137 W. Va. 633, 644 73 S.E.2d 622, 628 (1952) ("[A] deed will be interpreted and construed as of the date of its execution.").

Perhaps the most compelling and straight-forward contemporaneous document establishing the common understanding of the word "gas" in 1938 is the 1937 official report of the West Virginia Geological Survey ("Report"). App. Vol. 3, at 289-310. The Report was entitled "West Virginia Geological Survey, Physical and Chemical Properties of Natural Gas of West Virginia" and was co-authored by the State of West Virginia Geologist, Paul H. Price, and a West Virginia Geological Survey Chemist, A. J. W. Headlee. The Report was an official publication of the State, issued under the Seal of the State.

Mr. Price's transmittal letter to the Governor of West Virginia, the Honorable Homer A. Holt, on September 1, 1937, explained that the Report presented "analyses from each of [West Virginia's] gas producing fields and formations"; and the introduction to the Report states that "[t]he primary purpose of this investigation was to secure accurate information on the composition and properties of the natural gas in West Virginia as an economic resource." *Id.* at 292 (emphasis added).

In Chapter III of the Report, the authors provided a common definition of the term "natural gas" from the 1935 edition of Webster's New International Dictionary of the English Language, and the authors stated that: "'Natural gas' as used in this report includes any gas issuing from the earth's crust through wells drilled with intent of finding oil, gas, water, etc., in

the State of West Virginia." *Id.* The authors then presented various analyses of West Virginia's natural gas production based on samplings taken by the authors and their staff.

Chapter V of the Report is entitled "ANALYSES OF THE GAS FROM THE PENNSYLVANIAN PERIOD," and contains a section entitled "GAS FROM VARIOUS COAL HORIZONS," in which the authors discuss their sampling of some of the wells in West Virginia that had been drilled into and were producing **gas directly from coal seams**. *Id.* at 308-310 (emphasis added). This official report manifestly confirms that in 1938 the term "gas" was commonly understood to include, *inter alia*, gas produced directly from coal seams (now referred to as CBM). The non-contemporaneous materials relied upon by LBR prove nothing about the intent of the parties to the 1938 Deed.

IV. The Value or Known Existence of a Resource Does Not Determine Ownership.

The entirety of LBR's factual arguments are premised on the trial court's holding that the parties to the 1938 Deed would not have intended to reserve CBM because: 1) CBM was not being produced in commercial quantities at the time of the deed's execution; 2) the CBM production technologies used today were not used in 1938; and 3) in 1938, CBM was known to be hazardous in coal mines. Resp't Br. at 18. These considerations are irrelevant to whether CBM was reserved with the gas estate. As this Court held in *Faith United*, "The knowledge of the parties of the **value, or even the existence** of the substance at the time the conveyance was executed has been found to be irrelevant to its inclusion or exclusion from a grant of minerals." *Faith United*, 745 S.E.2d at 483, n.124 (quoting *Moser v. U.S. Steel Corp.*, 676 S.W.2d 99, 102 (Tex. 1984) (emphases added)).

A. Technological Advancements Do Not Repeal Ownership.

Whether CBM was profitable to produce at the time of the deed's execution in 1938 is of no consequence to whether the unlimited reservation of "the gas" included CBM. As Dr.

Rimstidt explained at trial, a resource is not defined by its value or extraction method. App. Vol. 2, at 520-521. A "reserve" is a resource which is economical to produce. *Id.* Economic factors alone will determine whether a resource is also a "reserve" at any given time *Id.* Thus, whether a resource is also a reserve or not is subject to change at any given time dependent upon economic factors. *Id.* However, once a resource, always a resource. *Id.* at 502. CBM is undisputedly a resource.

Nevertheless, LBR offered the testimony of Dr. Nino Ripepi regarding the economics and technology of CBM production. *Id.* at 291. Dr. Ripepi testified that the modern day technology used to produce CBM, hydraulic fracturing, was not used in 1938, *id.* at 202, and that in 1938 it would not have been economical to produce CBM. *Id.* at 154. Dr. Ripepi acknowledged, however, that CBM was, in fact, being produced prior to 1938, *id.*, and further acknowledged that in and prior to 1938, it was believed that gas was being captured from coal seams and that methane was known to be a substance of value. *Id.* at 255-256. In other words, LBR's position seems to be that CBM was being produced prior to 1938, but there have been advancements in technology and a lot more CBM is being produced now; and therefore, the 1938 Deed should not be construed to include CBM.

For the reasons stated in Petitioner's Brief at pages 29-32, the trial court erred in admitting Dr. Ripepi's testimony. However, having done so, the trial court further erred in relying on Dr. Ripepi's testimony in finding that because CBM production volumes have increased and production technology has advanced since 1938, the parties to the 1938 Deed did not intend to reserve it. As this Court acknowledged in *Faith United*, the value or even existence of a resource is irrelevant in determining its ownership. 745 S.E.2d at 483.

In a footnote, LBR admits that its ownership claim to CBM hinges on the technology used and the amount of the resource being produced. Resp't Br. at 23 n.14. LBR says that because "shooting a well" did not produce the quantities of CBM that current hydraulic fracturing (the technological advancement method of shooting a well) produces, the parties to the 1938 deed would not have intended to reserve any CBM. *Id.* Further, Dr. Ripepi admitted that his testimony exclusively pertained to the economics and technology of CBM production (App. Vol. 2, at 291), both of which this Court has held are not relevant considerations to the matter at hand. *See Faith United*, 745 S.E.2d at 483 ("It is immaterial what minerals were known to be under the land in 1907, or were not known; the only question is whether it was the grantor's intention to convey or to reserve those minerals."). The notion that because gas producers later used technological advancements, and are more efficient at producing gas from coal seams now than they were in 1938, dictates that a gas owner does not own CBM has no basis in law or practicality.[4]

B. There Is No "Commercial" Production Standard Regarding Ownership of a Resource.

The Poulos/Rogers Parties presented the trial court with uncontroverted evidence that CBM was being produced in and prior to 1938. *See* App. Vol. 2, at 281 (testimony of Mary Behling); *id.* at 154 (testimony of LBR's expert, Dr. Ripepi); *see generally* App. Vol. 3, at 537-702 (records of West Virginia Geological and Economic Survey) ("WVGES"), and *id.* at 289-330, 381-428, 793-807 (other historical contemporaneous documents entered into evidence).

[4] Just as with gas production, the technology used in coal production has progressed over the years. For example, longwall mining has not always been used as a method of coal production in Appalachia. The trial court's ruling suggests that coal which is produced through longwall mining techniques would not have been conveyed through a coal severance deed executed before the widespread use of longwall mining in Appalachia. This is just one of any number of absurd arguments that will find their way to this Court should the trial court's ruling stand.

LBR does not, and cannot dispute this. Instead, it is left to invent an unworkable "commercialization" standard that has no support in law.

LBR cites to a statement by this Court in *Moss*, that "[i]n order for a usage or custom to affect the meaning of a contract in writing because [it was] within the contemplation of the parties thereto, it must be shown that the usage or custom was one generally followed at the time and place of the contract's execution." 214 W. Va. at 587. Dr. Ripepi gave no opinion as to what would have been considered "commercial" production in 1938 but only that a modern-day energy giant currently considers "commercial production" to be 20 wells or more. App. Vol. 2, at 282.

This Court has not imposed a "commercialization" standard which LBR posits and the trial court adopted, and LBR does not offer support of this standard from any other authority. In a footnote, LBR is left to assert, without citation to any authority, that "it stands to reason that production would need to be commercial [] in order to cause a person to intend to reserve an interest in it." Resp't Br. at 34, n.22 (emphasis added). To the contrary, it stands to reason, and is the law in West Virginia, that resources are not defined by the quantities produced or the technology used to produce the resource at any given time.

Dr. Rimstidt testified that advancements in CBM production methods, such as that which Dr. Ripepi's research involves whereby carbon dioxide is injected into the coalbed for the purpose of recovering greater volumes of CBM, enhances the value of the resource due to the increased production volumes. App. Vol. 2, at 494-95. Will ownership of CBM be subject to challenge again once this production technology becomes commonplace? Under the trial court's ruling, would anyone ever know what they really own?[5]

[5]The trial court's ruling would lead to significant confusion. For example, do all deeds in West Virginia reserving "gas" reserve only those specific types of gas that were actually being produced in substantial volumes at the time of

Faith United rejected the same type of argument that LBR makes and the trial court adopted: "The respondent places much emphasis on evidence before the trial court that there was no oil or gas production in Preston County in 1907. He then argues that this lack of production establishes that Florence and Walter Forman could not have had oil and gas in mind when they drafted the 1907 deed, and Florence could not have intended to retain those minerals. We disagree. It is immaterial what minerals were known to be under the land in 1907, or were not known; the only question is whether it was the grantor's intention to convey or to reserve those minerals." *Faith United*, 745 S.E.2d at 482-483 (emphasis added). The commercialization standard that LBR advocated simply does not exist in law, and would be impractical to apply.

V. The Trial Court's Findings of Fact Were Clearly Erroneous.

A. Drilling Rights Are Not At Issue.

In its brief, LBR unnecessarily reminds the Court that a lease and a West Virginia statute recognize coal as the dominant estate as against the gas estate. Resp't Br. at 7 nn.2 & 19. The fact that the referenced lease and statute declare coal to be the dominant estate is not in dispute. This fact is, however, irrelevant. The right to access/enter/drill into the coal seams is not at issue. Ownership of the CBM is at issue.

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the deed's execution? Do all deeds in West Virginia reserving "gas" reserve only those types of gas or volumes of gas that are recovered using the production techniques that were being used at the time of the reservation, and not those types of gas or volumes of gas that are recoverable with advances in technology? Assume at the time of a gas reservation that gas was known to exist in a certain shallow formation, and no one knew or believed that gas could be found in or recovered from much deeper or different formations. Would a reservation of "the gas under said property" be interpreted to reserve all gas under the property or just the gas known to be recoverable from that certain shallow formation? The trial court's ruling could also lead to absurd results in other contexts. What if coal production in Appalachia ceases due to regulatory measures and other factors resulting in the inability to turn a profit in the coal industry? Has a person reserving his or her coal interest while it is not economical to produce coal not actually reserved his or her coal interest? Does a severance deed entered before the widespread commercialization of coal production sever all of the coal from the surface? Under the trial court's ruling, would a severance deed entered prior to the original coal boom in West Virginia sever only exposed coal, rather than all of the coal under the property? Some coal seams today are not mined because of inadequate thickness and/or other factors making mining the seam infeasible. Would such a severance deed include all of the coal seams or only the seams which were being actively mined at the time of the conveyance?

Moss did not address CBM ownership rights under a deed. *Moss* solely addressed what drilling rights were granted under a particular lease. As this Court stated, "The specific question asked in this case is whether a standard oil and gas lease executed in 1986 conveyed to the lessee the right to drill into the lessor's coal seams in order to produce the coalbed methane. This is the only question that we address in this opinion." 591 S.E.2d at 138 (emphasis added). This Court expressly said its opinion was of limited precedential value, stating: "We express no opinion as to what result may obtain in a different factual scenario. . . ." *Id.* at 146. Not only is the question answered in *Moss* not the question before this Court, but the facts of this case, likewise, present a different factual scenario.

Accordingly, W. Va. Code § 22-21-1, *Moss*, and the 1938 deed's reference to drilling rights are irrelevant to the issue of who owns the CBM at issue. LBR, as the owner of 100% of the coal estate and the only party with the authority to grant such rights, has given the gas operators permission to enter its coal seams. App. Vol. 2, at 50. Further, it is common knowledge that degasifying the coal seams is not only monetarily beneficial to the coal estate owner but also necessary in order to safely mine the coal. *Id.* at 159.

LBR asserts that the trial court properly found that the testimony of Fon Rogers, II supported LBR's theory of CBM ownership because he testified to the 1947 lease terms regarding the property at issue which state that coal is the dominate estate. As discussed above, this fact is irrelevant as to who owns the CBM. Consequently, the trial court's reliance on Mr. Rogers' testimony in determining whether the CBM was reserved with "the gas" estate was in error. App. Vol. 1, at 308.

B. Historical and Contemporaneous Documents Govern This Issue.

The Poulos/Rogers Parties presented uncontroverted, contemporaneous documents showing that CBM was being produced in and prior to 1938. *See generally* App. Vol. 3, at 537-

702 (records of the WVGES), and *id.* at 289-330, 381-428, 793-807 (contemporaneous articles and publications). The contemporaneous articles and publications show that CBM was known to exist in coal seams and to be a valuable resource when produced. *See* Pet'rs' Br., at 18-23.

LBR delves into the non-contemporaneous documents it relied on to show that CBM was not being "commercially" produced in 1938. These non-contemporaneous documents discussing the more recent development of CBM resources are irrelevant to the issue of who owns the CBM at issue and do not and cannot change the contemporaneous documents submitted by the Poulos/Rogers Parties. They do not change the fact that in and prior to 1938, CBM was known as "gas" and was known to have value as an energy source because gas producers were drilling into and producing gas (CBM) from coal seams.

LBR places great emphasis on an article from 1941 stating that anyone suggesting gas could be recovered from coal ahead of mining activity would be considered "visionary or crazy." App. Vol. 2, at 200-01. Resp't Br. at 26. Speculators and pioneers at the front of their field may have had their ideas questioned as "crazy" and likely pride themselves on being "visionaries." But the contemporaneous documents the Poulos/Rogers Parties provided as evidence speak for themselves, and undisputedly show that producing gas from coal seams was far from unheard of in 1938; in fact, was a common practice.[6]

The evidence of the WVGES presented at trial showed that it was common to drill into coal seams and produce gas from coal seams in and prior to 1938 when the deed at issue was executed. App. Vol. 2, at 481. LBR's attempt to discredit this uncontroverted evidence fails.

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[6] LBR argues that the findings of fact in *Moss* were not case-specific and that this Court may take judicial notice that CBM production was not a common practice prior to 1986. *See* Resp't Br. at 13, n.5. The findings of fact in *Moss* were indeed case-specific and based on the evidence presented in that case. It is not proper for a court to take judicial notice of disputed facts. "A judicially noticed fact must be one not subject to reasonable dispute..." W. Va. R. Evid. 201. *See Estate of Postlewait v. Ohio Valley Med. Ctr., Inc.*, 214 W. Va. 668, 675 (2003) (holding that "the lower court committed error in taking judicial notice of matters, such as causation, that clearly were subject to dispute, and therefore, not properly subject to judicial notice").

LBR's expert, Dr. Ripepi, simply offered his disagreement with the factual basis of the historical and contemporaneous documents, but he did not, and cannot, disagree that it was believed in 1938 that CBM (then simply known as "gas") was being produced from coal seams. *Id.* at 256.

Further, Dr. Ripepi's attempts to discredit the contemporaneous historical documents provided by the Poulos/Rogers Parties are irrelevant. Whether or not Dr. Ripepi's opinion is correct that the gas was likely coming from another source other than the coal does not change what the parties would have understood and believed to be true in 1938. All gases, including CBM, are produced by the same general concept of creating a pressure gradient between the rock and the well bore. *Id.* at 514.

Lastly, LBR's attempts, at pages 31-35 of its Brief, to discredit the records of the WVGES and the testimony of Ms. Behling fail. The contemporaneous and historical documents entered into evidence by the Poulos/Rogers Parties demonstrate that in and prior to 1938 it was known that gas was and could be produced from coal seams and that it was also known to have value (though as *Faith United* dictates, this is irrelevant).

The documents speak for themselves. Ms. Behling testified about one well record after another which showed that gas was being produced in "paying" quantities (meaning greater than 25,000 cubic feet per day) directly from coal seams and that many coal seams were "shot" and/or "perforated" for the purpose of producing gas from coal. App. Vol. 2, at 352-353, 356. For example, well record 30009 indicates it produced a "pay" of gas from the Upper Freeport Coal in 1925 (*id.* at 350); well record 30010 indicates it produced a "pay" of gas from the Upper Freeport Coal in 1925 (*id.* at 355); well record 30967 indicates that in 1925, gas was produced from the Mapleton Coal and Pittsburg Coal (*id.* at 360); *etc.* Each well record Ms. Behling

testified to shows the same result – in and prior to 1938, gas was intentionally sought in and produced from coal seams. This is undisputable.

LBR claims that Ms. Behling's testimony indicates that the WVGES did not recognize CBM as a commercially viable industry prior to 1990 when state geologists began identifying gas produced from coal seams as "CBM" rather than "gas" as had been indicated up until that point. Resp't Br. at 35, n.24. Contrary to LBR's assertion and the trial court's interpretation, Ms. Behling testified clearly that the designations of "CBM" and "gas" do not indicate any difference in the substance or the source of the gas, but rather that in reviewing well records in accordance with a project in the early 1990s, state geologists recognized the gas had been produced from coal and recoded the well record to indicate that it was CBM. App. Vol. 2, at 362, 365.

Ms. Behling's testimony, for example, regarding well record Wetzel 61, was that the record showed that the well had been completed in 1931 and the record indicated "Methane Pay" and "Methane (CBM)," which means that the well produced more than 25,000 cubic feet of gas per day from the Pittsburgh Coal. Ms. Behling testified that "[t]hirty years ago, it would probably say gas" rather than "Methane CBM." (emphasis added). *Id.* at 365-366. Additionally, Ms. Behling testified that the records of the WVGES specifically identify gas produced from coal seams as "'Coalbed Methane,' 'Methane CBM,' and others might have been coded as 'Gas.'" *Id.* at 417. The terms "Coalbed Methane" and "Methane CBM," Ms. Behling testified, were not used by the WVGES until the early 1990's. *Id.* at 361. This proves, as Ms. Behling testified, that historically CBM was simply considered to be "gas," not a different substance from "gas."

CONCLUSION

For the foregoing reasons, the Poulos/Rogers Parties respectfully request that this Court reverse the decision of the trial court, hold that they, as owners of the gas estate, are entitled to the CBM and royalties at issue, and direct the trial court to hear their accounting claims.

Respectfully submitted,

Dated: February 22, 2016

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CERTIFICATE OF SERVICE

The undersigned counsel does hereby certify that she has this day served a true and correct copy of the above and foregoing upon all counsel of record *via* commercial carrier overnight delivery, on this the 22nd day of February, 2016, to:

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