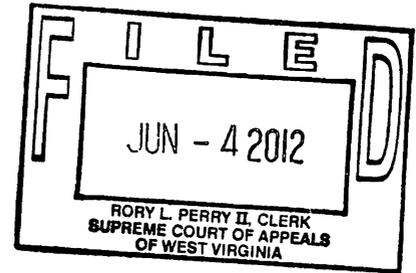


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 12-0080



**FAITH UNITED METHODIST CHURCH
AND CEMETERY OF TERRA ALTA,
WEST VIRGINIA AND TRINITY
METHODIST CHURCH OF TERRA
ALTA, WEST VIRGINIA,**
Petitioner,

V.)

Appeal from a final order of the
Circuit Court of Preston County
(11-C-27)

MARVIN D. MORGAN,
Respondent.

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

The Petitioner has appealed the Preston County Circuit Court's November 9, 2012, final order, wherein the Court examined a 1907 deed, deemed it ambiguous and then analyzed the subsequent actions (and inactions) of the parties in the chain of title to determine whether the grantor intended to convey or reserve certain mineral interests. After reviewing the testimony, the documentary evidence and the arguments put forth by the parties, the Circuit Court declared the Respondent the exclusive owner of the disputed oil and gas interest. (A.R. 208). The underlying facts are not in dispute.

The Respondent is the owner of a 225 acre tract of land situate in Portland District, Preston County, West Virginia (the "Subject Tract"). (A.R. 198). The Respondent acquired the Subject Tract as a joint tenant with H. E. "Pete" Morgan by deed dated February 7, 1967 (the "Vesting Deed"). (A.R. 198). The Vesting Deed excepted all the coal underlying the Subject Tract, but contained no other reference to oil, natural gas or any other minerals associated with the Subject Tract. (A.R. 198). H. E. "Pete" Morgan died on September 18, 1969, and sole ownership of the Subject Tract vested in the Respondent pursuant to the survivorship provision contained in the Vesting Deed. (A.R. 198).

A title search revealed the following pertinent facts related to the chain of title. Fee simple title to the Subject Tract vested in Calvin C. Forman by virtue of two deeds: one dated January 12, 1869, conveying an undivided 1/2 interest to the Subject Tract, and one dated May 1, 1869, conveying the remaining undivided 1/2 interest to the same. (A.R. 198). Sometime prior to April 1, 1893, Calvin C. Forman died intestate survived by the following seven children as his only heirs at law: Charles Forman, Olive B. Jones, Margaret S. Wolfe, Lillie M. Forman, Walter S. Forman, Ruth Cuppett, and Florence A. Forman. (A.R. 198-199). Accordingly, each

heir inherited an undivided 1/7 fee simple interest in the Subject Tract. (A.R. 199). By various deeds prior to February 22, 1902, Walter S. Forman acquired and became vested with an undivided 6/7 interest in fee simple in the Subject Tract. (A.R. 199). His sister, Florence A. Forman, owned the remaining undivided 1/7 interest. (A.R. 199).

By deed dated February 22, 1902, Walter S. Forman and Zoura A. Forman, his wife, and Florence A. Forman conveyed "all the coal upon and under" the Subject Tract to W. G. Brown and F. C. Todd (the "Coal Severance Deed"). (A.R. 199). Nowhere in the February 22, 1902 Coal Severance Deed is there mention of, or any language purporting to convey, any oil, natural gas or other minerals. (A.R. 199-200). On November 14, 1907, Florence A. Forman executed a deed conveying her undivided 1/7 interest in the Subject Tract to her brother, Walter S. Forman (the "Forman Deed"). (A.R. 200). The Forman Deed contained the following granting language:

Witnesseth: That in consideration of the sum of Three Hundred Dollars, the receipt of which is hereby acknowledged, the said party of the first part does grant unto the said party of the second part, the following described property, that is to say: Her one-seventh interest in the *surface only* with the hereditaments and appurtenances thereto belonging, *(the coal and mining privileges having been previously sold)* in the two hundred and twenty-five acre tract of land, situate in Portland District, County of Preston, and State of West Virginia, of which Calvin C. Forman died seized.

(A.R. 49, 200). (Emphasis supplied by author).

The Forman Deed did not contain any express exception or reservation of the oil and gas. (A.R. 49, 200). As a result of the Forman Deed, Walter Forman became the sole owner

of the Subject Tract. (A.R. 200). The Subject Tract was conveyed several more times, and title is currently vested in the Respondent. (A.R. 200).

After setting forth the foregoing in briefings to the Court and in arguments presented during a dispositive motion hearing on August 5, 2011, the Circuit Court ordered the parties to prepare for a bench trial that would present evidence on the issue of whether Florence Forman intended to convey all of her interest in the Subject Tract or whether she intended to reserve unto herself, her heirs and assigns, a 1/7 interest in any previously unsevered minerals associated with the Subject Tract. (See A.R. 125). The Circuit Court set September 19, 2011, as the trial date. (A.R. 125).

At the bench trial, the parties had the opportunity to present documentary evidence and testimony to the Court to support their respective arguments. During the bench trial, the Respondent called two witnesses: J. Morgan Haymond, a Land Man familiar with the chain of title for the Subject Tract; and Terri Funk, the Preston County Assessor. (A.R. 201-203). The Petitioner did not present any documentary evidence or testimony that Florence Forman, or any of her heirs or assigns, took any actions consistent with ownership of the disputed oil and gas interest. (A.R. 203).

J. Morgan Haymond, a Land Man with over 30 years of experience in abstracting real estate property records in and around Preston County, West Virginia, testified that he abstracted the title for the Subject Tract in the office of the County Clerk of Preston County. (A.R. 201). Mr. Haymond testified that the oil and gas had never been specifically reserved or severed from the surface estate of the Subject Tract. (A.R. 201). He further testified that he found no evidence that Florence Forman, or any of her heirs or assigns, ever conveyed, leased,

devised, or mortgaged a 1/7 interest in and to the oil and gas underlying the Subject Tract, apart from certain recent lease agreements executed in favor of Novus Explorations, LLC, in 2009. (See A.R. 201). In addition, he testified that he found no estate records for Florence Forman, or any for her heirs or assigns, that ever recognized or contained any mention of a 1/7 interest in the oil and gas underlying the Subject Tract. (A.R. 201). Finally, he testified that he found no evidence that Florence Forman, or any of her heirs, successors, or assigns, ever entered a 1/7 interest in the oil and gas on the Preston County land books for property tax assessment purposes. (A.R. 201). The Petitioner offered no evidence to contravene Mr. Haymond's testimony.

Terri Funk is the Preston County Assessor and is responsible for administering property tax assessments in Preston County, West Virginia. (A.R. 202). Ms. Funk testified that she and/or her staff examined property tax assessments related to the Subject Tract from the late 1800's through present day, and that property taxes for the Subject Tract had never been delinquent. (A.R. 202). Ms. Funk clarified for the Court that it was common practice in Preston County for the Assessor to identify an interest in real property as "fee" prior to the severance of the coal during the late 1800's and early 1900's; that upon severance of the coal, the Preston County Assessor's Office would create separate entries for the same tract of land on the land books to ensure that both the "surface" estate and the "coal" estate were properly assessed for property tax purposes, and that, historically, the Assessor's office did not separately assess oil and gas for real estate tax purposes unless and until such oil and gas was specifically and expressly severed from the overlying surface estate. (A.R. 202). Ms. Funk further testified that in instances in which oil and gas minerals were not specifically and expressly severed from the surface estate, then the oil and gas associated with that tract of land would be properly assessed

as part of the “fee” (if the coal had not been severed) or as part of the “surface” (if the coal had been severed.) (A.R. 202).

Based upon her review of the land books, Ms. Funk testified that the Subject Tract was assessed in “fee” prior to 1902, the year in which the coal estate was severed from the Subject Tract; that the Subject Tract has been assessed as “surface” or “fee” since 1903 through 2010; and that no portion of the oil and gas underlying the Subject Tract had ever been separately assessed and entered on the Preston County land books. (A.R. 203). Finally, Ms. Funk testified that the Preston County Assessor’s office had recently revised the Respondent’s tax assessment for the Subject Tract to read “Fee (Less Coal),” clarifying that the oil and gas was part of his property tax assessment. (A.R. 203).

The Circuit Court took the foregoing under advisement and requested proposed findings of fact and conclusions of law from the parties. (A.R. 197). Based upon evidence available to the Court and well-recognized rules of construction, the Circuit Court entered its final order of November 9, 2011, declaring the Respondent the sole owner of the disputed oil and gas interest. (A.R. 208). It is from this Order that Petitioner appealed. As will become clear, none of the findings and conclusions made by the Circuit Court in its final order were in error. Accordingly, this Court should affirm the Circuit Court and dismiss the Petitioner’s appeal.

SUMMARY OF ARGUMENT

This case involves the interpretation of the Forman Deed to determine whether the grantor intended to convey or reserve an undivided 1/7 oil and gas interest in the Subject Tract. The thrust of the Petitioner’s appeal is that the Circuit Court erred in finding the Forman Deed ambiguous and in examining evidence outside of the four corners of the deed to determine the

intent of the grantor. Under West Virginia property law, a grantor is presumed to convey their entire interest in the subject property unless there is clear evidence from the instrument to suggest otherwise. Furthermore, while it is true that in interpreting deeds the court is generally limited to the content of the deed itself, it is equally true that in circumstances where the meaning of a deed is susceptible to more than one meaning, the courts have long held it permissible to examine extrinsic evidence in order to identify and determine the grantor's intent. By finding the Forman Deed to be ambiguous, the Circuit Court permitted the parties to submit documentary evidence (or the lack thereof) and testimony to determine the grantor's intent.

In this vein, the Respondent presented testimony from an experienced Land Man to testify about the behavior of Florence Forman and her heirs or assigns after executing the Forman Deed. Based on his testimony, it was clear that neither Florence Forman, nor any of her heirs or assigns, took any action consistent with ownership of the disputed oil and gas interest for more than a century. Moreover, the Respondent presented testimony from the Preston County Assessor, who testified that neither Florence Forman, nor any of her heirs or assigns, ever entered a 1/7 interest in the disputed oil and gas on the land books in Preston County for property tax purposes or paid taxes on the disputed oil and gas interest. The Preston County assessor also testified that the oil and gas mineral estate had been properly taxed throughout time as part of the Subject Tract's "fee" or "surface" entry on the Preston County land books. Conversely, the Petitioner presented no testimony, nor any documentary evidence, to contravene the obvious implication of these facts: Florence Forman did not intend to reserve an interest in the oil and gas.

In addition to this testimony, the Circuit Court's conclusion is bolstered by the bedrock principle that ambiguous language in a deed is to be construed against the grantor,

because the grantor is the party responsible for creating the ambiguity. However, even if the Circuit Court erred in examining extrinsic evidence to resolve the ambiguous conveyance language, it still reached to the correct conclusion in finding the Respondent as the sole owner of the disputed oil and gas interest, because the only way to give meaning to the Coal Severance Parenthetical is by finding that it modifies and clarifies the “surface only” granting language; otherwise, its presence is superfluous and that cannot be under well-established real property jurisprudence in West Virginia. In essence, had Florence Forman truly intended to sever her interest in the oil and gas from the surface estate in the Forman Deed, she would have simply conveyed the “surface only” and never even mentioned the prior coal severance, or she would have set out in explicit terms that she reserved all previously unsevered minerals to herself, which she did not do.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This appeal involves interpreting language contained in a 1907 deed in light of well-established West Virginia law and is capable of being decided solely on the briefings of the parties and record on appeal. Therefore, the Respondent does not believe that oral argument is necessary. However, if the Court desires oral argument on this matter, this case is appropriate for a Rule 19 argument and disposition by memorandum decision because it involves an assignment of error in the application of settled law.

ARGUMENT

1. Standard of Review.

This Court has set forth a two-pronged standard of review for decisions made by a Circuit Court after a bench trial. Specifically, this Court has stated:

In reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a de novo review.

Energy Dev. Corp. v. Moss, 214 W. Va. 577, 583, 591 S.E.2d 135, 141 (2003) (citing syl. pt. 1, Public Citizen, Inc. v. First Nat'l Bank in Fairmont, 198 W. Va. 329, 480 S.E.2d 538 (1996)). The Court has further explained this standard of review in the context of a Circuit Court's decision to interpret and construe an ambiguous instrument:

Since our decision in Williams v. Precision Coil, Inc., 194 W. Va. 52, 459 S.E.2d 329 (1995), there can be no doubt that it is for a trial court to determine whether the terms of an integrated agreement are unambiguous and, if so, to construe the contract according to its plain meaning. In this sense, questions about the meaning of contractual provisions are questions of law, and we review a trial court's answers to them de novo. 194 W. Va. at 65 n. 23, 459 S.E.2d at 342 n. 23, citing Thrift v. Estate of Hubbard, 44 F.3d 348, 357-58 (5th Cir. 1995). However, when a trial court's answers rest not on plain meaning but on differential findings by a trier of fact, derived from extrinsic evidence as to the parties' intent with regard to an uncertain contractual provision, appellate review proceeds under the "clearly erroneous" standard. The same standard pertains whenever a trial court decides factual matters that are essential to ascertaining the parties' rights in a particular situation (though not dependent on the meaning of the contractual terms per se). In these types of cases, the issues are ordinarily fact-dominated rather than law-dominated and, to that extent, the trial court's resolution of them is entitled to deference.

Id. at 584, 142 (citing Fraternal Order of Police v. City of Fairmont, 196 W. Va. 97, 468 S.E.2d 712, 715 (1996) (footnote omitted)). Finally, the Court has stated that "[t]he finding of a trial court upon facts submitted to it in lieu of a jury will be given the same weight as the verdict of a jury and will not be disturbed by an appellate court unless the evidence plainly and decidedly preponderates against such finding." Id. (citing Daugherty v. Ellis, syl. pt. 6, 142 W. Va. 340, 97

S.E.2d 33 (1956); Syl. pt. 6, Cotiga Development Co. v. United Fuel Gas Co., 147 W. Va. 484, 128 S.E.2d 626 (1962).

Thus, the Circuit Court's decision in finding the Forman Deed ambiguous is reviewed de novo, and any decisions based upon extrinsic evidence to help in ascertaining the grantor's intent are entitled to deference under the clearly erroneous standard of review.

2. The Circuit Court correctly found the Forman Deed ambiguous and, therefore, did not err by relying on extrinsic evidence to conclude that the grantor intended to convey her entire interest in the Subject Tract.

This Court should dismiss the Petitioner's appeal because the Forman Deed can clearly be interpreted in multiple ways, rendering it ambiguous, and therefore the Circuit Court's decision to rely on extrinsic evidence to conclude that Florence Forman intended to convey her entire interest in the Subject Tract is entitled to deference.

A. A deed is ambiguous if it is reasonably susceptible to more than one meaning.

The Circuit Court correctly determined that the Forman Deed was ambiguous because it can be interpreted in multiple ways. Determining whether a deed is ambiguous is a threshold question to be decided by the Court. Estate of Tawney v. Columbia Natural Res., L.L.C., 219 W. Va. 266, 272, 633 S.E.2d 22, 28 (2006) (internal quotations omitted) (“[t]he question as to whether a contract is ambiguous is a question of law to be determined by the court.”); see, also, syl. pt. 3, Energy Dev. Corp. v. Moss, 214 W. Va. 577, 591 S.E.2d 135 (2003) (“[t]he mere fact that parties do not agree to the construction of a contract does not render it ambiguous. The question as to whether a contract is ambiguous is a question of law to be determined by the court.”).

The general rule is that if the Court finds the Forman Deed clear on its face, then it is not subject to construction. Syl. pt. 1, Cotiga Development Co. v. United Fuel Gas Co., 147 W. Va. 484, 128 S.E.2d 626 (1962) (“[a] valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent.”). However, when a deed or contract is ambiguous, it is subject to construction. See id. Thus, the pertinent question is how to recognize the presence of an ambiguity.

In determining whether a deed is ambiguous and therefore subject to construction, this Court has set forth the following standard:

The term ‘ambiguity’ is defined as language ‘reasonably susceptible of two different meanings’ or language ‘of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning.’

Payne v. Weston, 195 W. Va. 502, 507, 466 S.E.2d 161, 166 (1995), quoting Syl. Pt. 1, in part, Shamblin v. Nationwide Mut. Ins. Co., 175 W. Va. 337, 332 S.E.2d 639 (1985).

It is readily apparent from a plain reading of the instrument and the posture of this case that the Forman Deed is reasonably susceptible to more than one interpretation, or that reasonable minds could disagree as to its meaning, thereby rendering it ambiguous. Specifically, the Forman Deed stated that the grantor conveyed:

Her one-seventh interest in the *surface only* with the hereditaments and appurtenances thereto belonging, (*the coal and mining privileges having been previously sold*) in the two hundred and twenty-five acre tract of land . . . of which Calvin C. Forman died seized.

(A.R. 49). (Emphasis supplied by author). As stated by the Circuit Court, this language could mean that Florence Forman intended to sever the surface from the remaining estate, thereby retaining unto herself and her heirs all unsevered minerals. (A.R. 205). Alternatively, it could

also mean that she included the Coal Severance Parenthetical to qualify “surface only” and clarify to the grantee that she intended to convey her entire interest, being an undivided 1/7 interest in the Subject Tract except for the coal previously sold under the Coal Severance Deed. (A.R. 205).

Thus, because the Forman Deed has at least two meanings, the Circuit Court correctly found it ambiguous.

B. The Circuit Court correctly relied on extrinsic evidence to determine the grantor’s intent under the Forman Deed.

The Circuit Court’s decision to rely on extrinsic evidence to ascertain whether Florence Forman intended to convey her entire interest in the Subject Tract or to reserve an interest in previously unsevered minerals is entitled to deference under a clearly erroneous standard of review because the Forman Deed is ambiguous.

In concluding that the Respondent was the 100 percent owner of all the oil and gas underlying the Subject Tract, the Circuit Court began its analysis by recognizing that a grantor is presumed to dispose of their entire interest in a conveyance, unless words of limitation are included in that conveyance clarifying a contrary intent on the part of the grantor. (A.R. 203) (citing W. Va. Code § 36-1-11 (1923) (Repl. Vol. 2005) (establishing policy that conveyances of real property in West Virginia, with no words of limitation, must be construed to pass the whole estate or interest which the grantor had power to dispose of unless a contrary intention appears in the conveyance). However, because the Forman Deed was ambiguous, the Circuit Court needed additional information to determine the intended ownership of the disputed oil and gas and proceeded to examine settled precedent to obtain that additional information.

In doing so, the Circuit Court recognized that the West Virginia Supreme Court of Appeals (the “Court”) has held that the meaning of the term “surface” can vary, depending on

the circumstances. (A.R. 204). As the Petitioner notes, the ordinary use of the word “surface” evidences a grantor’s intent to sever the surface estate from the mineral estate. Drummond v. White Oak Fuel Co., 104 W. Va. 368, 140 S.E. 57, 58 (W. Va. 1927) (when the word “surface” is used as the granting language, “the layman in casual conversation, as well as the judge in a considered opinion, ordinarily refers merely to the superficial part of land.”). The Drummond Court went on, however, to clarify that the word “surface,” when used with qualifying phrases in a deed does not have a definite legal meaning but, rather, must be interpreted within the context in which it is used. See syl. pt. 1, Drummond (“[t]he word ‘surface,’ *when used without any qualifying phrase in a deed*, ordinarily signifies only the superficial part of land”) (emphasis¹ supplied by author).

In Drummond, the Court examined a landowner’s common law right to subjacent support in the context of a deed which conveyed “all the surface and only the surface,” but reserved the right to use parts of the surface to mine and transport coal underlying that tract. Drummond, 104 W. Va. 368, 140 S.E. 57, 57. The Drummond court noted that there was a reservation affecting the surface itself but emphasized that there was no reservation of any other portion of the land and, therefore, nothing in the deed to give the word “surface” a secondary meaning. Id. at 58-59. The Drummond court went on to acknowledge that the word “surface,” if used as the subject of a conveyance with no reservation or exception made, would carry the definition the Petitioner desires to place upon it. Drummond, 104 W. Va. 368, 140 S.E. 57, 58 (referencing Ramage v. S. Penn Oil Co., 94 W. Va. 81, 118 S.E. 162 (1923)). Thus, the Drummond case is irrelevant the case at bar because the Forman Deed contained a qualifying phrase.

¹ The Petitioner consistently omits this emphasized language from its citations of the Drummond case.

Instead, the Circuit Court focused on resolving the ambiguity in the Forman Deed by relying on the Ramage decision. In Ramage, the Court examined an ambiguous deed that conveyed the “surface” and reserved and excepted the oil and gas rights. Ramage, 94 W. Va. 81, 118 S.E. 162. The question before the Court was who owned the coal estate. Id. In determining that the coal passed to the grantee, the Court adopted the position that the word “surface” when used as the subject of a conveyance, is inherently ambiguous, requiring exploration into the surrounding circumstances of the transaction to find its meaning.

And so, too, we think the term “surface” does not have a well-defined legal meaning when used as the subject of conveyance, *but its meaning may be limited and defined by the exception or reservation in the deed.* If the deed grants the “surface” but contains a reservation of all the mines and minerals, the grant includes all the land except the reservation; *but, on the other hand, if it grants the “surface” but contains a reservation of a specified mineral or minerals, then the grant includes all the land except the mineral or minerals specified.* If the grant be of the “surface,” without any qualifying exception or reservation, it may include everything but the minerals, *though that would not necessarily follow* from the use of the word “surface,” as it might be limited by the nature of the transaction, the object of the instrument, the situation of the parties, and the surrounding circumstances. For example, suppose there were no minerals. Clearly, according to this contention, a grant of the surface would carry a fee in the whole of the lands; hence the meaning of the term “surface” would be controlled by the circumstance whether there were minerals under it.

Id. at 170 (emphasis supplied by author).

The Ramage court emphasized that certain contextual factors should be considered to ascertain the intent of a grantor who crafted an ambiguous deed by using the “surface” as the subject of the conveyance.

We repeat that where the term “surface” is used as the subject of a grant, the grantor and the grantee have in mind a severance of the

land into two parts, and while if but one part be designated, to wit, the surface, the grant may include all the land except the minerals, though that does not necessarily follow; but if the other be also expressed by reservation or exception, it appears to us that this clearly shows the intention of the parties, *and the exception or reservation, as in the instant case, controls, limits, and defines the subject of the grant.*

....

But if the meaning of the term “surface” be ambiguous in a conveyance as last described, then the court should inquire into the nature of the transaction, the situation of the parties, the purpose sought to be accomplished, and the interpretation, if any, placed thereon, as shown by the acts of the parties.

Id. 171 (emphasis supplied by author).

After reviewing the surrounding circumstances and external factors, the Court held that the grantors intended to convey the coal estate as part of the “surface” granting language. Id. Specifically, the Court considered that the grantors purchased the land in fee as partners, but immediately conveyed the “surface,” except the oil and gas rights in the land, to neighboring farmers; the grantors were in the oil and gas business, leasing, purchasing, selling, and developing properties for the oil and gas minerals; and the grantors drilled an oil and gas well on a neighboring tract shortly after the conveyance, drilling through coal that reasonably could be inferred to have extended below the “surface” previously conveyed to the farmers. Id.

The fact that the grantors had drilled a well through the coal and never claimed it as their own, as evidenced by the grantors’ failure to have the coal entered on the land books for taxation purposes, were critical factors to the Ramage court. Id. Considering the language of the deed and surrounding circumstances, the Court found nothing in the record to indicate an intent to sever or reserve the coal; therefore, the Court concluded that the grant of the “surface” carried with it all of the land, except the oil and gas rights specifically reserved. Id.

Applying the Ramage analysis to the case at hand, it is clear that Florence Forman intended to convey the oil and gas to her brother, Walter Forman. As in Ramage, where the Court held that the word “surface,”² can be construed to include or exclude minerals, depending on the circumstances, here, the circumstances demonstrate that Florence Forman intended to convey her entire interest in the Subject Tract, including the oil and gas.

First, the parties executed the Forman Deed five years after severing the coal from the Subject Tract, thereby evidencing their appreciation for the independent value of separate mineral estates in land. (A.R. 57, 199). The Court should infer that Florence Forman would have explicitly reserved her undivided interest in the oil and gas, had she intended to do so in light of her obvious appreciation of the value of separate mineral estates.

Second, just like in Ramage, where the grantors failed to enter the disputed coal on the land books and pay taxes, neither Florence Forman, nor any of her heirs or assigns, were ever assessed with an interest in the oil and gas and never paid real estate taxes on the oil and gas. (A.R. 202-203). However, the Respondent and his predecessors in title *did* pay real estate property taxes on the Subject Tract, including the oil and gas minerals, whether it was assessed as “fee” or “surface.” (A. R. 202, 206); see State v. Guffey, 82 W. Va. 462, 95 S.E. 1048, 1049 (1918) (“[T]he owners of these tracts, entered as ‘surface,’ for all the years for which forfeiture is claimed, continued to own undivided interest in the oil and gas, and presumptively the value of their interest therein was included in the valuation of the land entered as ‘surface,’ and certainly the general allegation that these oil and gas interests or estates were not subsequently taxed will

² The Petitioner emphasizes that Florence Forman employed the phrase “surface only” rather than simply the term “surface” in the Forman Deed and is, therefore, more clear. See Petitioner’s Brief 24. In this regard, it bears noting that a grant of the “surface” is indistinguishable from a grant of the “surface only,” as both expressions carry identical meaning in terms of interpreting the subject of the conveyance. Any deed which purports to convey the surface, without any qualifying language or circumstances, necessarily conveys the “surface only,” and vice versa. Here, we have qualifying language and circumstances.

not overcome the presumption that said undivided interests continued charged to the owners of the estates entered as ‘surface.’”).

Finally, neither Florence Forman, nor any of her heirs or assigns, ever leased, mortgaged or otherwise conveyed the oil and gas, thereby demonstrating, through subsequent actions (or omissions), that she did not intend to reserve the oil and gas. (A.R. 201-202). Nor did Florence Forman, or any of her heirs, successors, or assigns ever identify an interest in the oil and gas underlying the Subject Tract in any settlements or appraisements of their respective estates. (A.R. 201-202). Indeed, apart from recent oil and gas leases executed by distant heirs of Florence Forman within the past two to three years³, at no time since execution of the Forman Deed has Florence Forman, or any of her heirs, successors, or assigns taken any action that could even loosely be considered consistent with ownership of an interest in the oil and gas underlying the Subject Tract. (A. R. 206).

The Circuit Court examined all these facts and concluded that the inactions of Florence Forman and her heirs evidenced Florence Forman’s intent to dispose of her entire interest in the Subject Tract. (A.R. 205) (stating that failure to enter and pay taxes on a separate mineral estate and failure to convey, devise, lease, or mortgage a separate mineral estate evidences a lack of intent to retain an interest in the property). Thus, the Circuit Court relied on Ramage in holding that the other minerals not specifically excepted conveyed to the grantee.

The context in which the deed was made, all available extrinsic evidence, and subsequent actions and omissions of the parties make clear that Florence Forman intended to

³ Novus Exploration, LLC, executed numerous leases with substantially all of the known and locatable heirs of Florence Forman to protect its interest in the Respondent’s lease pursuant to recommendations and findings set forth in a title opinion issued by Claire Sergent Walls, Attorney at Law, PLLC, dated September 15, 2010. Said title opinion is attached as Exhibit A, to Petitioner’s original complaint. See A. R. 27, 41.

convey her entire undivided interest in the Subject Tract, including the oil and gas. Therefore, this Court should dismiss the Petitioner's appeal and defer to the judgment of the Circuit Court.

C. Williams v. South Penn Oil Co. does not control the Court's decision, but informs it.

The Petitioner argues that the Circuit Court erred by relying on Ramage rather than Williams v. South Penn Oil Co., 52 W. Va. 181, 43 S.E. 214 (1902), because the Forman Deed was executed before the Ramage case was heard by the Court. In declaring the Forman Deed ambiguous, however, the Circuit Court correctly relied on Ramage instead of Williams, because in overruling Williams, the Ramage court informed and expanded the way in which the Court analyzes ambiguities in deeds related to a grant of the "surface."

As the Petitioner notes, the timeframe in which a deed is executed is an important part of the Court's calculus. Syl. Pt. 4, Energy Dev. Corp. v. Moss, 214 W. Va. 577, 586, 591 S.E.2d 135, 144 (2003) (internal citations omitted) ("[a] deed will be interpreted and construed as of the date of its execution."). However, the issue before the Court is not whether the Circuit Court cited the correct case in its analysis, but whether it erred in finding the Forman Deed ambiguous and, thereby, in examining parol, explanatory evidence to ascertain the parties' intent.

The Court has long recognized its ability to venture outside the four corners of an instrument to identify the parties' intent where that instrument contains an unresolvable ambiguity, as we have here. See, e.g., Hurst v. Hurst, 7 W. Va. 289, 299 (1874) ("[W]hen the language used is susceptible of more than one interpretation, it has been held that courts will look at the surrounding circumstances, existing when the contract was entered into, the situation of the parties and of the subject matter of the instrument; and sometimes when the words are ambiguous the courts will call in aid the acts done under it, as a clue to the intention of the

parties;” Camden v. McCoy, 48 W. Va. 377, 37 S.E. 637, 638 (1900) (“[w]here the agreement, as reduced to writing, does not express the real contract of the parties, because of want of skill in the draftsman, or any other reason, it may be reformed by a court of equity.” (Internal citations omitted)).

The Williams case addressed the issue of oil and gas ownership where the grantor conveyed “all the surface” but provided that the grantor retained “the right to maintain on said tract of land such openings as may be necessary for ventilation, for drainage, and for taking out of all the coal.” Williams v. South Penn Oil Co., 52 W. Va. 181, 43 S.E. 214, 215. In essence, the deed only addressed the “surface” and coal mining rights. When the property later became valuable for oil and gas development, the question arose as to whether the reservation of the coal mining rights also included the oil and gas. Id. In construing the deed, the Williams court adopted a hard and fast definition for the term “surface,” declaring that surface meant the upper or superficial part of the land. Id. at 217. By granting only the surface, therefore, the Court held that the original owner retained all other interests in the land, including the oil and gas. Id.

The Ramage court overruled this portion of Williams, concluding that the term “surface,” when used as the subject of a conveyance, will not always have the same meaning, but, rather, must be interpreted within the context in which it is used. See Ramage, 94 W. Va. 81, 118 S.E. 162, 171. As stated *supra*, after finding the “surface” language ambiguous, the Ramage Court examined extrinsic evidence and the subsequent actions of the parties to determine that the term “surface” included everything except the oil and gas minerals that were specifically reserved; thus even though the grantor conveyed the “surface” only, the coal estate nonetheless conveyed to the grantee.

This is the correct analysis. In adopting this reasoning, the Ramage court simply applied long-standing rules of interpretation that pre-date the Williams case to deed language which grants the “surface” but contains additional words or phrases which render that instrument ambiguous. Thus, while it is true that the timeframe in which a deed is executed is important to the Court’s analysis, the Court has long recognized that ambiguities may be resolved by resorting to extrinsic evidence to help explain the intent of the parties to the transaction.

3. Even if the Circuit Court erred in its reasoning, it still reached the correct conclusion because Florence Forman intended to convey her entire interest in the oil and gas underlying the Subject Tract.

If Florence Forman intended to sever and reserve to herself any remaining minerals underlying the Subject Tract, she would have done so (1) by granting the “surface only” without the parenthetical referencing the prior coal severance, or (2) by explicit language. Because she did neither, the Forman Deed clearly and unambiguously demonstrates her intention to convey her entire interest in the Subject Tract, including the oil and gas, to Walter Forman.

A. If the Coal Severance Parenthetical has any purpose, it is to modify and clarify the “surface only” granting language; otherwise, it is meaningless.

The Forman Deed unambiguously evidences Florence Forman’s intent to convey her entire interest in the Subject Tract because she included the Coal Severance Parenthetical to modify and clarify the phrase “surface only.” The parenthetical explains and clarifies that “surface only” was inserted merely to protect the grantor from an accusation that she was purporting to convey an estate she did not own: the previously severed coal. To accept the opposite view, that the phrase “surface only” actually intended to sever any remaining unsevered minerals, requires the Court to ignore the parenthetical entirely, which it cannot do.

Ascertaining the intent of the parties is the controlling guide when attempting to interpret conveyance language in a deed. Hall v. Hartley, 146 W. Va. 328, 333, 119 S.E.2d 759,

763 (1961) (“[i]n the construction of a deed or other legal instrument, the function of a court is to ascertain the intent of the parties as expressed in the language used by them”); see, also, Syl. Pt. 1, Cotiga Dev. Co. v. United Fuel Gas Co., 147 W. Va. 484, 128 S.E.2d 626 (1962) (“[a] valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent”).

Likewise, it has long been held that the Court has a duty to give to every word contained within a deed its usual meaning to identify the intent of the parties. Syl. Pt. 1, Maddy v. Maddy, 87 W. Va. 581, 105 S.E. 803 (1921) (“[i]n construing a deed, will, or other written instrument, it is the duty of the court to construe it as a whole, taking and considering all the parts together, and giving effect to the intention of the parties wherever that is reasonably clear and free from doubt”); see, also, Syl. Pt. 6, Uhl v. Ohio River R. Co., 51 W. Va. 106, 41 S.E. 340 (1902) (“when asked to construe a deed, courts are required to examine “the whole instrument, not merely and separately disjointed parts”); Wellman v. Tomblin, 140 W. Va. 342, 346, 84 S.E.2d 617, 620 (1954) (“[i]n determining the quantum of interest conveyed by deed, the intent of the parties, if ascertainable, prevails, and, generally, it is necessary to consider the entire instrument in order to ascertain what interest is conveyed”).

In 1907, Florence Forman owned an undivided 1/7 interest in the Subject Tract in fee simple, except for the coal which had been previously sold under the 1902 coal severance. (A.R. 199). The Forman Deed is a briefly worded instrument. (A.R. 49). It does not contain an express exception or reservation of any minerals; it simply contains the following granting language which is modified and clarified by the qualifying reference to the coal estate:

[T]he party of the first part does grant . . . [h]er one-seventh undivided interest in the surface only with the hereditaments and appurtenances thereto belonging, (the coal and mining privileges

having been previously sold) in the two hundred and twenty-five acre tract of land.

(A.R. 49).

If every word is given meaning and read together, as the Court must do in reading the Forman Deed, then the presence of the Coal Severance Parenthetical can only be explained if it was meant to modify and clarify the term “surface only,” which precedes it. Indeed, if Florence Forman truly intended to sever the surface and retain an interest in unsevered minerals, she never would have mentioned the prior coal severance. However, by including the Coal Severance Parenthetical, Florence Forman clearly intended to grant the “surface only,” together with all minerals other than the coal, because she believed that the parenthetical was necessary to except the coal from the conveyance.

To accept the Petitioner’s argument that the phrase “surface only” intended to sever the oil and gas would impermissibly render the Coal Severance Parenthetical meaningless. By giving meaning to every word in the Forman Deed, however, it becomes clear that Florence Forman intended to convey her entire undivided interest in the Subject Tract, including any unsevered minerals. To rule otherwise would require the Court to wholly ignore critical words in the deed.

B. A reservation of the oil and gas minerals must be set out in explicit, unequivocal terms.

Florence Forman’s failure to explicitly except or reserve the oil and gas within and underlying the Subject Tract clearly evidences her lack of intent to except or reserve the oil and gas minerals.

To be effective, an exception or reservation must be as certain and as definite in its terms as a grant. Bennett v. Smith, 136 W. Va. 903, 69 S.E.2d 42 (1952) (internal citations

omitted); see, also, Syl. Pt. 2, Harding v. Jennings, 68 W. Va. 354, 70 S.E. 1, 1 (1910) (“[a]n exception in a deed conveying land must describe the thing excepted with legal certainty, so as to be ascertained, else the thing sought to be excepted will pass to the grantee”); Miller v. Nixon, 90 W. Va. 115, 110 S.E. 541, 544 (1922) (“to except or reserve any part of, or any estate in, land granted by a deed, a provision in the deed for that purpose must be as certain and as definite as an effective granting clause in such deed”).

Bennett v. Smith, 136 W. Va. 903, 69 S.E.2d 42 (1952), established that a grantor must set forth a reservation of minerals in clear and explicit terms. In Bennett, the defendant inherited an interest in land along with his mother and sister by intestate succession. Id. at 43. By interparties deed, the defendant was assigned and granted the interests of his mother and sister in two tracts of land containing 36.9 acres and 44.56 acres, except that all the coal, oil, and gas were reserved to grantors to be held in common with the defendant. Id. The defendant then conveyed these two tracts of land to his wife,⁴ describing the property in metes and bounds, but merely referencing the interparties deed; he made no express exception or reservation of his undivided interest in the coal. Id. at 44. The defendant’s wife then conveyed the same property to the plaintiff in a deed which contained the same property description and which referred to the preceding deed from the defendant. Id. No explicit exception or reservation of the coal appeared in that deed either. Id.

The plaintiff sought a declaratory judgment to determine ownership of the coal. Id. at 43. The issue before the Court was whether the defendant manifested an intent to reserve his interest in the coal merely by referencing the interparties deed, which created his interest. The Court held that the defendant’s failure to explicitly incorporate an exception or reservation

⁴ From the opinion, it appears that the defendant and his wife had recently divorced.

of the coal in the subsequent deed to his wife evidenced his lack of intention do so. Id. at 47. The Court noted that had the grantor intended to reserve the coal, then he “could, or presumably would, have done so *by an apt provision to that effect.*” Id. (emphasis added by author). The Court held that reference to a prior deed is insufficient to except or reserve an estate in land, adhering to the firmly established rule “that an exception or reservation, to be effective, must be as certain and as definite in its terms as a grant.” Id.

If Florence Forman intended to except or reserve the oil and gas minerals, she should and presumably would have done so by “an apt provision to that effect.” Id. at 47. As in Bennett, where the defendant failed to explicitly reserve certain minerals, and the court held that the defendant’s entire mineral interest passed to the grantee, Florence Forman also failed to explicitly reserve her oil and gas interest. This conclusion is bolstered by the fact that Florence Forman appreciated the separate value of mineral estates associated with her interest in the Subject Tract because she clearly and unequivocally excepted the coal estate from the conveyance. Thus, because Florence Forman failed to explicitly reserve the oil and gas and appreciated separate mineral estates, any oil and gas mineral interests owned by Florence Forman passed to the grantee under the Forman Deed.

4. If the Court deems the plain language of the Forman Deed and extrinsic evidence insufficient to determine Florence Forman’s intent, common law rules of construction establish that Florence Forman intended to convey the oil and gas.

When a deed is ambiguous on its face and extrinsic evidence is insufficient to resolve the issue, a court may employ common law rules of construction to determine the intent of the parties because it prefers to give effect to instruments rather than declare them void. Paxton v. Benedum-Trees Oil Co., 80 W. Va. 187, 94 S.E. 472, 473 (1917) (“[w]here a writing is ambiguous upon its face, it must be given effect, if possible, by the application of the well-

recognized canons of construction. If, after the application of such rules of construction, the meaning of the writing remains doubtful, it will be declared void for uncertainty”).

Courts have adopted common law rules of construction that can be applied to the Forman Deed if the Court finds the plain language of the deed and available extrinsic evidence insufficient to determine the grantor’s intent. First, courts tend to construe ambiguous deed language in favor of the grantee. See Syl. Pt. 3, Hall v. Hartley, 146 W. Va. 328, 333, 119 S.E.2d 759, 763 (1961) (“[w]here there is ambiguity in a deed, or where it admits of two constructions, that one will be adopted which is most favorable to the grantee”).

Hall presented similar facts to the case at bar, but unlike the Forman Deed, the deed in question contained contradictory granting clauses. In Hall, a landowner conveyed three tracts of land in fee, subject to certain exceptions and reservations, but also conveyed,⁵ in the last paragraph, an undivided 1/8 interest in the oil and gas underlying the same. Hall, 146 W. Va. 328, 119 S.E.2d 759, 760-761. The Court found the two clauses repugnant to one another, making it impossible to determine the grantor’s intent from the face of the instrument. Id. at 764. Consequently, the Court resorted to the common law rule to construe the ambiguous deed most favorably to the grantee. Giving full effect to the first granting clause that conveyed the three tracts of land in fee, the Court awarded all the oil and gas to the grantee. Id. at 765.

Under Hall, deed ambiguities will be resolved in favor of the grantee where the intent of the parties cannot be ascertained from the face of the instrument. Because Florence Forman rendered her granting language ambiguous by modifying the term “surface only” with

⁵ The language of the second granting clause in *Hall* stated that the grantor “assign[ed] and transfer[ed]” the 1/8 interest in the oil and gas, but the Court found this language was “purely a conveying or granting clause,” since no particular words are necessary to create a conveyance if the language used indicated that that was the intention. Hall, 119 S.E.2d at 763 (additional citations omitted).

the Coal Severance Parenthetical, the Court should read the Forman Deed most favorably to the grantee and conclude that she must have intended to convey her entire undivided interest in the Subject Tract, including the oil and gas, to Walter Forman.

The second common law rule of construction available to the Court is the maxim of *expressio unius est exclusio alterius*, or “the express mention of one thing implies the exclusion of another.” See Ramage, 94 W. Va. 81, 118 S.E. 162, 169. The Ramage court relied, in part, on this maxim in reaching its holding that the rights to the coal estate passed to the grantee where the grantor conveyed the “surface” but expressly reserved the oil and gas and never mentioned the coal. Id. The Court stated that “where the conveyance of the ‘surface’ is followed by an express reservation, we think the effect of the reservation is to limit it to those things which are so expressed.” Id.

The maxim is directly on point to the case at bar. When Florence Forman executed the Forman Deed, she clearly contemplated separate estates in land underlying the Subject Tract because she mentioned both the surface and the coal. By specifying one mineral estate (the coal), however, she implied that all others (the oil and gas minerals) were included in the “surface only” granting language and, therefore, that she intended to convey her undivided interest in every estate that was not specifically excepted to Walter Forman.

CONCLUSION

Florence Forman executed and delivered an ambiguous deed. Consequently, the Circuit Court correctly examined extrinsic evidence to determine whether she intended to reserve the disputed oil and gas mineral interest or to convey it forward and its resulting decision is entitled to deference. However, even if Florence Forman executed and delivered an

unambiguous deed, she intended to convey her entire undivided interest in the Subject Tract to Walter Forman because the only way to read every word in the Forman Deed that provides meaning to every term, as the Court must do, is to conclude that the Coal Severance Parenthetical modifies the “surface only” granting language; otherwise, its presence is superfluous, and this cannot be. Furthermore, Florence Forman understood and appreciated the value of separate mineral estates in land as evidenced by her explicit exception of the underlying coal estate in the Forman Deed. Had Florence Forman intended to reserve the disputed oil and gas interest, she would have presumably done so apt provision to that effect and explicitly reserved or mentioned the oil and gas, which she did not do. Finally, well-established rules of construction dictate that the Forman Deed should be construed against Florence Forman, and in favor of the grantee, because Florence Forman crafted the ambiguous instrument.

Accordingly, the Forman Deed should be given its intended effect to convey Florence Forman’s entire undivided interest to the Subject Tract to Walter Forman. In light of the foregoing, and because the law is clear regarding the proper interpretation of the Forman Deed, the Respondent respectfully asks the Court to dismiss the Petitioner’s appeal and AFFIRM the decision of the Circuit Court of Preston County declaring him the rightful owner of the disputed oil and gas interest.

Respectfully submitted,
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 12-0080

**FAITH UNITED METHODIST CHURCH
AND CEMETERY OF TERRA ALTA,
WEST VIRGINIA AND TRINITY
METHODIST CHURCH OF TERRA
ALTA, WEST VIRGINIA,**
Petitioner

V.)

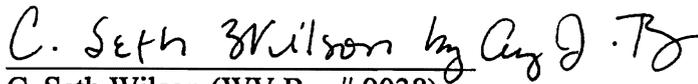
Appeal from a final order of the
Circuit Court of Preston County
(11-C-27)

MARVIN D. MORGAN,
Respondent,

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 4, 2012, he served the foregoing *RESPONDENT'S BRIEF* on counsel for the Petitioner by facsimile and by depositing a true copy thereof in the United States Mail, postage prepaid, addressed as follows:

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