

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

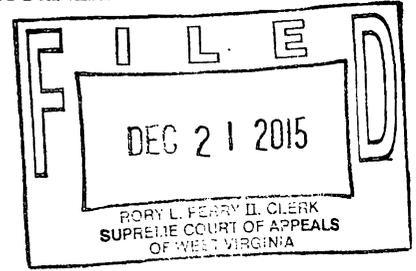
GREGORY G. POULOS, JASON G. POULOS,
PAMELA F. POULOS, SHAUN D. ROGERS,
KEVIN H. ROGERS, DEREK B. ROGERS, AND
T.G. ROGERS, III,

Petitioners,

v.

LBR HOLDINGS, LLC,

Respondent.



Docket No. 15-0907

PETITIONERS' BRIEF

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ASSIGNMENTS OF ERROR

1. The court erred in finding a latent ambiguity in the 1938 deed's unlimited and unqualified reservation of gas.
2. The court erred in denying the Poulos/Rogers Parties' Motion for Summary Judgment.
3. The court erred in disregarding evidence presented at trial, instead relying on evidentiary findings in *Energy Development Corp. v. Moss*, 214 W.Va. 577, 591 S.E.2d 135 (2003).
4. The court erred in finding that CBM must have been commercially produced in 1938 in order for it to have been reserved.
5. The court erred in relying on W.Va. Code § 22-21-1.
6. The court erred in relying on the testimony of Respondent's expert Dr. Nino Ripepi.
7. The court erred in disregarding the uncontroverted evidence that removed any latent ambiguity the court may have properly found.
8. The court erred in holding that there is "a distinct line between CBM and gas."
9. The court erred in rejecting the undisputed evidence that CBM was a known, valuable resource in 1938.
10. The court erred in holding that this case is analogous to *Energy Development Corp. v. Moss*, 214 W.Va. 577, 591 S.E.2d 135 (2003).
11. The court erred in dismissing the case and striking it from the docket.

STATEMENT OF THE CASE

Prior to 1938, three groups of individuals, T.G. and Martha F. Rogers ("the Talmage Rogers Group"), Lloyd and Anne F. Rogers ("the Lloyd Rogers Group"), and Lon B. Rogers ("the Lon Rogers Group") were affiliated with the Rogers Brothers Coal Company, which had accumulated property and mineral rights throughout Virginia, West Virginia, and Kentucky. In May of 1938, the Talmage Rogers Group and the Lloyd Rogers Group deeded all of their property interests in several parcels of property located in McDowell County, West Virginia ("the Property") to the Lon Rogers Group, except for "an undivided one-half interest in the oil and gas under said Property." This deed ("the 1938 Deed") described the Talmage Rogers and

Lloyd Rogers Groups as the “parties of the first part” and Lon B. Rogers as the “party of the second part,” and states as follows:

[T]he parties of the first part . . . do hereby grant and convey unto the party of the second part, . . . all of their right, title and interest, in and to all of the hereinafter described property, and being a two-thirds (2/3) undivided interest (the party of the second part owning the other one-third (1/3) undivided interest), said property being situated in McDowell County, West Virginia . . . including all lands, minerals, rights, interests, easements, rents, issues and profits therefrom But there is excepted from the above described property an undivided one-half interest in the oil and gas under said property and the same is reserved to T.G. Rogers and Lloyd Rogers, parties of the first part, their heirs and assigns, together with the usual and necessary rights of ingress and egress and drilling rights to explore, get and remove said oil and gas.

App. Vol. 3, p. 2 (emphasis added).

Through a series of transfers, Respondent LBR Holdings, LLC (“LBR”), became the record owner of all of the Lon Rogers Group’s interests in the Property and all of the Lloyd Rogers Group’s interests in the Property. As a result, LBR now owns a 75% interest in the oil and natural gas under the Property, 100% of the coal and all other mineral interests under the Property, and certain portions of the surface applicable to the Property. The Petitioners (Gregory G. Poulos, Jason G. Poulos, Pamela F. Poulos, Shaun D. Rogers, Kevin H. Rogers, Derek B. Rogers, and T. G. Rogers, III; hereinafter, “the Poulos/Rogers Parties”) are the record owners of the remaining 25% interest in the natural gas under the Property, which was formerly held by the Talmage Rogers Group.

Through certain leases and farmout agreements, EQT Production Company (“EQT”) and GeoMet, Inc. and GeoMet Operating Company, Inc. (collectively “GeoMet”) drilled and operated coalbed methane gas (“CBM”) wells on the property. These activities generated significant royalties. While there is no dispute that LBR is entitled to 75% of the CBM royalties, EQT and GeoMet have placed in escrow or

otherwise withheld payment of the remaining 25% of the CBM royalties based upon an uncertainty as to whether said CBM royalties are properly payable to the Poulos/Rogers Parties, as owners of a 25% interest in the natural gas estate in the Property, or to LBR, as the owner of all of the coal and other mineral interests in the Property.¹

The dispute centers on the 1938 Deed's reservation of "the oil and gas under said property." 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). LBR contends, on the other hand, that CBM was not being commercially produced in 1938 and, therefore, the reservation is a limited one and does not reserve coalbed methane gas under the property. In other words, LBR contends that the phrase "the gas under said property" should be read to say "the gas under said property other than coalbed methane gas under said property."

LBR filed its Complaint (App. Vol. 1, p. 5) on November 21, 2013 against the Poulos/Rogers Parties, GeoMet, and EQT. LBR sought a declaration of ownership of CBM as against the Poulos/Rogers Parties, and an accounting of the associated royalties from GeoMet and EQT. The Poulos/Rogers Parties filed an Answer, Counterclaims and Crossclaims (App. Vol 1, p. 11) seeking, *inter alia*, a declaration of CBM ownership as against LBR, and an accounting of the associated royalties from GeoMet and EQT. The trial court entered agreed orders

¹ The Poulos/Rogers Parties have prevailed on this very issue, concerning this very deed, before the Virginia Supreme Court. On April 24, 2015, the Supreme Court of Virginia in denying LBR's petition for rehearing, affirmed the Buchanan County, Virginia trial court's ruling in favor of the Poulos/Rogers Parties. App. Vol. 3, pp. 303-304. The McDowell County Circuit Court's Order effectively finds that the parties to the 1938 Deed intended their reservation of "the gas" estate to mean one thing in Virginia, and yet something else in West Virginia. It is clear upon review of the 1938 Deed that the parties intended no such result, but rather reserved a portion of "the gas" estate in all the property, lying in both Buchanan County, Virginia and McDowell County, West Virginia.

dismissing GeoMet from the case and bifurcating the CBM ownership claim from the parties' accounting claims, holding the latter in abeyance until resolution of the CBM ownership issue. App. Vol. 1, p. 41 and p. 53.

LBR and the Poulos/Rogers Parties filed competing motions for summary judgment. App. Vol. 1, p. 57 and 85. LBR's motion relied on *Energy Development Corp. v. Moss*, 214 W.Va. 577, 591 S.E.2d 135 (2003), where this Court held that a gas lease did not permit the operator to enter the lessor's coal seam for the production of CBM. LBR argued that CBM was not a commercially recoverable resource in 1938 and that "it would make no sense to hold that the term 'gas' in the 1986 leases at issue in *Moss* is ambiguous with respect to the inclusion of CBM, but that the term 'gas' unambiguously includes CBM when used in a reservation in a deed." App. Vol. 1, p. 138-139. In response, the Poulos/Rogers Parties made a cross motion for summary judgment and argued that the 1938 Deed's reservation of "the oil and gas under said property" was unambiguous and unlimited, that the Deed's reservation means exactly what it says ("the oil and gas under said property"), and that the reservation covers all gas under the property, including coalbed methane gas under the property. App. Vol. 1, p. 89. The Poulos/Rogers Parties also argued -- in response to LBR's *Moss*-based factual assertions -- that CBM was, indeed, a known and developed energy resource when the 1938 Deed was executed. In support of their argument, they submitted, *inter alia*, a 1937 official publication of the State of West Virginia which (1) analyzed West Virginia's gas producing fields and formations, (2) was prepared for the purpose of securing "accurate information on the composition and properties of the natural gas in West Virginia as an economic resource," and (3) contained a chapter specifically dedicated to discussing examples of wells in West Virginia that had been drilled into

and were producing considerable volumes of gas directly from coal seams. App. Vol. 1, pp. 97-99.

The trial court denied both parties' summary judgment motions, and held that "there are still genuine issues of fact in terms of a latent ambiguity as to whether the term 'gas' in the 1938 Deed includes CBM." App. Vol. 1, p. 191.

The trial court conducted a bench trial on November 12-13, 2014, and entered its Bench Trial Order on August 19, 2015, ruling in LBR's favor. The trial court held, *inter alia*, that:

- the 1938 Deed's reservation of "gas" was ambiguous;
- the ambiguity should be construed against the grantors;
- there is a distinction between CBM and gas;
- in 1938, CBM was considered a nuisance and hazard, and there had been no commercial production of CBM in West Virginia in or prior to 1938; and
- the grantors, therefore, would not have intended their reservation to include CBM.

App. Vol. 1, pp. 305-314.

The trial court's order dismissed the action in its entirety, notwithstanding the agreed order bifurcating the accounting claims from the CBM ownership issue and holding those claims in abeyance. The Poulos/Rogers Parties thereafter filed their notice of appeal. App. Vol. 1, p. 315.

SUMMARY OF ARGUMENT

This case concerns the ownership of methane and other gases produced from coal seams and associated formations (so-called "coalbed methane gas" or "CBM"). At the heart of the parties' dispute is the 1938 Deed which reserved to the Poulos/Rogers Parties' predecessors a one-half interest in "the oil and gas under said property." App. Vol. 3, p. 2. The question before

the trial court, and now this Court, is whether this unlimited reservation includes all gas or only some types of gas. This appeal presents straightforward and significant questions. What is included with an unlimited reservation or conveyance of a natural resource? Is it all types of the resource reserved or conveyed, or is it something less, depending upon the quantities of the natural resource that are being produced or production methods or technologies that are being used at the time of the conveyance or reservation?

The Poulos/Rogers Parties' position is a very simple, straightforward one: the reservation of "the gas under said property" means exactly what it says, and includes, *inter alia*, coalbed methane gas under the property. The trial court, however, found a latent ambiguity in the reservation and ruled in LBR's favor based on findings of fact that were clearly erroneous. There simply is no dispute that CBM is "gas." As such, the trial court should have done nothing more than apply, not construe, 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 reservation of the gas under said property. App. Vol. 1, p. 89. Such a conclusion is mandated by basic principles of deed construction and this Court's clear direction in *Faith United* to give terms of conveyance or reservation "some definite, certain meaning that the average person can rely upon[.]" *Faith United Methodist Church and Cemetery of Terra Alta v. Morgan*, 231 W. Va. 423, 467, 745 S.E.2d 461, 482 (2013).

The trial court's holding was premised upon factual findings that in 1938 CBM was considered to be a hazard and was not a "commercial" resource. Such findings are erroneous as discussed below, but regardless, under West Virginia law, whether the parties to the 1938 Deed knew the value or even existence of coalbed methane gas at the time they signed the deed is irrelevant. As *Faith United* held, "[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, 472, 137 S.E. 895, 897 (1927), and *Moser 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 the conveyance was executed has been found to be irrelevant to its inclusion or exclusion from a grant of minerals.")). *See also Hoffman v. Arcelormittal Pristine Resources, Inc.*, 2011 U.S. Dist. LEXIS 50170, at *14-15 (W.D. Pa. 2011) (applying Pennsylvania law, holding that a reservation of "all oil and gas" was not ambiguous and included shale gas even though shale gas was not commercially exploitable at the time of the reservation) .

Furthermore, the trial court's findings that CBM was not a "commercial" resource in 1938 are clearly erroneous. The record is replete with undisputed evidence establishing that CBM was, in fact, being produced commercially in West Virginia in and prior to 1938 when the deed at issue was entered. The trial court essentially ignored this evidence and relied instead on the factual record developed in *Moss*, speculations offered by LBR's "expert" witness, and events occurring decades after the 1938 Deed's execution.

This Court held in *Faith United* that "interminable confusion of land titles" should be avoided. 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 a particular natural resource was being "commercially exploited" at the time of the deed's execution. This kind of ownership standard is contrary to *Waugh, supra*, and is, as a practical matter, an unworkable one that will create "interminable confusion" because it is inherently related to and dependent upon factual inquiries into production histories, including production methods and/or quantities. If

affirmed, the ruling will wreak havoc on West Virginia deed interpretation law (looking at a deed will tell a title examiner nothing) and leave every single owner of gas and other natural resources in West Virginia vulnerable to lengthy, expensive litigation challenging their ownership. The ownership of gas and other natural resources in West Virginia will be mired in “interminable confusion of land titles.” *Faith United*, 745 S.E.2d at 469.

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.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Poulos/Rogers Parties represent that oral argument is necessary and appropriate under the criteria set forth in Rule 18(a) of the West Virginia Rules of Appellate Procedure and request oral argument under Rule 19. Like *Faith United*, “this case has great significance to the interpretation of many land titles in West Virginia.” 745 S.E.2d at 469. Due to the far-reaching implications of the trial court’s ruling and the significant issues of West Virginia property and natural resources law involved, this case is not appropriate for a memorandum decision. In light of the extensive evidence worthy of consideration and the significance of the issue, the Poulos/Rogers Parties request an additional five minutes for oral argument beyond the time cap established in Rule 19(e).

STANDARD OF REVIEW

Findings and conclusions of a circuit court are reviewed under a two-prong deferential standard of review. *See Bluestone Paving, Inc. v. Tax Comm’r*, 214 W. Va. 684, 687, 591 S.E.2d 242, 245 (2003). A final order and ultimate disposition of a circuit court are reviewed under an abuse of discretion standard. *Id.* The underlying factual findings of a circuit court are reviewed

under a clearly erroneous standard. *Id.* at 687-688. “Questions of law are subject to a *de novo* review.” *Id.* at 688.

ARGUMENT

1. The Trial Court’s Ruling Undermines This Court’s Stated Needs for Uniformity and Predictability.

“Unquestionably, uniformity and predictability are important in the formulation and application of our rules of property.” *Faith United*, 745 S.E.2d at 475. In ruling in LBR’s favor, the trial court ignored the principles enunciated in *Faith United*, ignored the plain language of the 1938 Deed, and effectively rewrote the 1938 Deed, parsing out methane and other types of gas that are stored in certain formations (coal seams) from the Deed’s unlimited reservation of “the gas under said property.” To do this, the trial court accepted LBR’s positions and found that there was no “commercial” production of gas from coal seams prior to the 1938 Deed’s execution and, therefore, the parties to the 1938 Deed would not have intended to reserve CBM.

LBR’s position, which the trial court adopted, was succinctly stated through the testimony of its proffered expert, Dr. Nino Ripepi. Dr. Ripepi acknowledged that wells had been drilled into and were producing from coal seams prior to 1938, but that the amount of CBM production was not significant enough, in his opinion, to be considered “commercial” production. App. Vol. 2, p. 154. In his report, Dr. Ripepi also wrote, “Coalbed methane is a gas, but it is my opinion that its production is very different than conventional natural gas reservoirs that were produced in the 1930s.” App. Vol. 3, p. 497. When asked, “And the distinction you’re making in that sentence, if I’m correct, is that the only difference [between conventional gas and coalbed methane gas] is the production method?” Dr. Ripepi responded, “Yes.” App. Vol. 2, pp. 254-255. The trial court thus determined that the reservation of a natural resource hinges on the

quantities of a natural resource that were being produced at the time of a deed's execution and the production methods that were being used to recover that resource.

One does not need a supernatural gift of clairvoyance to foresee the instability and chaos that will ensue in West Virginia property law should the trial court's holding be affirmed. The Poulos/Rogers Parties' expert witness, Dr. James Donald Rimstidt, testified, for example, that he knows of no substance that is defined by, or its ownership determined by, the manner in which it is produced, further stating:

[A]nd the reason for that, is that the value of the resource can change from time to time and place to place, depending on changing technology, changing economics, changing regulations and so forth; and if it were not – if mineral resources and mineral values, mineral rights, were not defined that way, there would be a constant fluctuation of ownership and definition that I think would be unacceptable.

App. Vol. 2, pp. 520-521.

2. The Trial Court's Decision Was Contrary to West Virginia Principles of Deed Construction.

In *Faith United*, this Court examined a deed conveying the "surface only." 745 S.E.2d 423. In overruling *Ramage v. South Penn Oil Co.*, 94 W.Va. 81, 118 S.E. 162 (1923), which held that the term "surface" is always ambiguous, this Court held that the term "surface" is not presumptively ambiguous and indeed does have a certain and definite meaning. 745 S.E.2d at 464. In so holding, this Court stated, "This Court's goal in the area of land ownership is to avoid bringing 'upon the people interminable confusion of land titles;' instead we must 'endeavor to prevent and eradicate uncertainty of such titles.'" *Id.* at 469 (quoting *Toothman v. Courtney*, 62 W.Va. 167, 183, 58 S.E. 915, 921 (1907) (internal citations omitted)).

The question before this Court is analogous to the question this Court answered in *Faith United*. "[I]s every deed of the [gas estate] presumed to be ambiguous and open to interpretation

using extrinsic evidence to contradict, alter or add to the deed's language? Or does the term [gas] have some definite, certain meaning that the average person can rely upon?" 745 S.E.2d at 467.

In considering the deed at issue in *Faith United*, this Court concluded: "The language of [the deed] is paramount as it is clear and unambiguous: it conveyed the surface only. To hold otherwise would be to alter the language of the deed and, by construction, enlarge the estate conveyed by the deed." *Id.* at 483. Likewise, the language of the 1938 Deed at issue in this case is paramount as it is clear and unambiguous: it reserved "the gas under said property."

"It is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them." *Id.* at 482, quoting Syl. pt. 3, *Cotiga Development Co. v. United Fuel Gas Co.*, 147 W.Va. 484, 128 S.E.2d 626 (1962). In holding that the 1938 Deed's unlimited reservation of "the gas" estate did not include CBM, the trial court effectively rewrote the 1938 Deed.

It is true that when a deed is ambiguous, reservations are construed against the grantor; but, "Where the terms of a contract are clear and unambiguous, they must be applied and not construed." Syl. pt. 3, *Waddy v. Riggleman*, 216 W. Va. 250, 606 S.E.2d 222 (2004). Further, "A deed is a written, contractual agreement reflecting the parties' intent. When the language used is plain and unambiguous, courts are required to apply, not construe, the contract." *Faith United*, 745 S.E.2d at 481.

"Extrinsic evidence will not be admitted to explain or alter the terms of a written contract which is clear and unambiguous." *Id.* at 481. Further, "[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." *Id.* The

terms of the 1938 Deed were clear and unambiguous, and extrinsic evidence was not needed to explain or construe it.

As this Court has made clear, terms must be given their ordinary and common sense meaning. “Parties are bound by general and ordinary meanings of words used in deeds.” *Id.* at 482. “In defining the intent of the parties to a deed, a court must rely on the general and ordinary meanings of words.” *Id.* In contravention of this principle, the trial court held that the phrase “the gas” only meant “some gas.”

“[C]ourts cannot rewrite a contract or deed that plainly expresses the parties’ intent” *Id.* Yet, this is precisely what the trial court did in both denying the Poulos/Rogers Parties’ Motion for Summary Judgment (App. Vol. 1, p. 187) and issuing its Order (App. Vol. 1, p. 305). Accordingly, the trial court erred in holding that the term “the gas” in the 1938 Deed constituted a latent ambiguity and erred in failing to rule in favor of the Poulos/Rogers Parties.

3. Assignments of Error 1 & 2; The 1938 Deed is Unambiguous.²

Whether or not the 1938 Deed is ambiguous is a question of law subject to *de novo* review. *See Bluestone Paving*, 214 W. Va. at 688.

Gas is gas -- and coalbed methane gas is gas. As such, the trial court, to apply West Virginia’s principles of deed construction outlined above, 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*.

² For each assignment of error, Petitioners incorporate and adopt arguments made in reference to the other assignments of error.

Rather than apply the plain language of the 1938 Deed, the trial court denied the Poulos/Rogers Parties' Motion for Summary Judgment and held that the reservation of "the gas under said property" constituted a latent ambiguity. App. Vol. 1, p. 191. Consequently, the trial court admitted extrinsic evidence at a bench trial to determine the intent of the parties to the 1938 Deed and again held "the gas" to be ambiguous. This was error.

Coalbed methane gas is gas, and court after court has so held. In *Harrison-Wyatt v. Ratliff*, 593 S.E.2d 234, 238 (Va. 2004), the Virginia Supreme Court acknowledged the obvious, concluding that CBM "is a gas." Likewise, this Court adopted the United States Supreme Court's description of coalbed methane gas from *Amoco Prod. Co. v. Southern Ute Indian Tribe*, 526 U.S. 865, 873 (1999): "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 (quoted in *Moss*, 591 S.E.2d at 138) (emphasis added).

LBR's own expert Dr. Ripepi conceded at trial that coalbed methane is gas. App. Vol. 2, p. 254. Accordingly, CBM is plainly and unambiguously included within the 1938 Deed's unlimited reservation of "the gas." 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.

In *Faith United*, this Court considered whether a conveyance of "the surface only" included oil and gas. 745 S.E.2d at 466. The trial court in *Faith United* -- relying on *Ramage v. South Penn Oil Co.*, 94 W. Va. 81, 118 S.E. 162 (1923), where the court held that the term "surface" is always ambiguous -- found the deed at issue was ambiguous. 745 S.E.2d at 466. The trial court thereupon determined that the grantor demonstrated no intent to retain an ownership

interest in the oil and gas and accordingly, found that the conveyance of “the surface only” included oil and gas.

This Court determined whether the term “surface” (like the term “gas” in the case at hand) has a “definite, certain meaning that the average person can rely upon[.]” *Id.* at 467. This Court recognized that “in drafting deeds or other instruments of conveyance, courts and practitioners want terms with definite meanings.” *Id.* at 480-81, 474. “The quest for uniformity and certainty is a major concern for the practitioner.” *Id.* at 474, quoting Myles E. Flint, *Meaning of Conveyances of the “Surface” Only*, 34 Rocky Mtn. L. Rev. 330, 335 (1961). This Court noted that “courts want to reach a result which the parties intended, and therefore attempt to confine themselves to the four corners of the document to divine the parties’ intent.” *Id.* This Court explained that its “goal in the area of land ownership is to avoid bringing ‘upon the people interminable confusion of land titles[;]’ instead, we must ‘endeavor[] to prevent and eradicate uncertainty of such titles.’” 745 S.E.2d at 470 (citations omitted).

In *Faith United*, this Court observed that under *Ramage*, which it was expressly overruling, “a court is to go beyond a deed in interpreting the word ‘surface’ to consider ‘not only the language of the deed in which it occurs, but also . . . the situation of the parties, the business in which they were engaged, and . . . the substance of the transaction.’” *Id.* quoting Syl. pt. 1, *Ramage*. This Court held that “*Ramage*, which deviated from certainty and uniformity in our property law when it was decided in 1923, is outmoded and is unjust.” *Faith United*, 745 S.E.2d at 476.

Faith United held that the term “surface” should be applied according to its common and ordinary meaning, and rejected the propriety, under *Ramage*, of resorting to parol or extrinsic

evidence to determine the parties' intent, stating: "Unquestionably, uniformity and predictability are important in the formulation and application of our rules of property." 745 S.E.2d at 475.

The trial court in *Moss* and the trial court in this case took a *Ramage*-like approach, *i.e.*, they ignored the common and ordinary meaning of the term "gas," finding ambiguity where none exists. The *Moss* trial court's holding was affirmed (on narrow grounds) by this Court in 2003, but this Court's 2013 *Faith United* opinion emphasized the importance of uniformity and predictability in the formulation and application of rules of property, and made it very clear that courts should return their attention to applying and enforcing deed language which, given its common and ordinary meaning, is plain and unambiguous.

The trial court below ignored this Court's clear directives in *Faith United*. Under the guidance of *Faith United*, the term "the gas" must be given its ordinary and common sense meaning. It would be untenable for an unlimited conveyance or reservation of "gas" to have one meaning in one deed and a different meaning in another deed. As this Court held in *Faith United*, it is not necessary or proper for a court to seek out ambiguity and consider parol and extrinsic evidence to determine the parties' intent where the language used, given its ordinary and common sense meaning, is plain and unambiguous. 475 S. E. 2d at 474 *quoting* Syl. pt. 1, 3, *Ramage*.

Coalbed methane gas, by definition, is gas. Thus, the term "the gas" when used without limitation, given its plain and ordinary meaning, includes all gas of every type, however produced, and whether known or unknown at the time of the conveyance. The trial court's holding to the contrary means that a party wishing to convey or reserve a gas estate must list each and every type of gas it intends to reserve or convey, including each and every formation from which it may be produced. An unlimited reservation of "the gas" must mean just that – gas

of every type, including coalbed methane gas. In the absence of such bright line rules, there will be a lack of the certainty, uniformity and finality which is highly favored in the law and there will be endless litigation over what is included within a deed's conveyance or reservation of "gas." See *Faith United*, 745 S.E.2d at 474.

4. Assignments of Error 3, 4 & 7: The Trial Court's Finding That CBM Was Not Being Commercially Recovered in 1938 Was Error.

Findings of fact are reviewed under a clearly erroneous standard. See *Bluestone Paving*, 214 W. Va. at 687-688. The trial court's finding that commercial production of CBM did not begin in West Virginia until the 1990's was clearly erroneous. See App. Vol. 1, p. 308.

Having denied summary judgment, the trial court admitted extrinsic evidence at the bench trial in an effort to discern the intent of the parties to the 1938 Deed. As discussed above, the trial court erred in denying summary judgment and so admitting extrinsic evidence. Nevertheless, the extrinsic evidence proved only that in and prior to 1938, CBM was known to be a valuable resource, even in light of its hazardous properties, and was being produced in significant quantities.

Under West Virginia law, whether the parties to the 1938 Deed knew the value or even existence of coalbed methane gas at the time they signed the deed is irrelevant. As *Faith United* held, "[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*, 137 S.E. at 897, and *Moser*, 676 S.W. 2d at 102 ("[t]he 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.")).

Nevertheless, the trial court ruled in LBR's favor after finding that the commercial production of CBM did not begin in West Virginia until the 1990's. Specifically, the trial court found that: "historically, CBM was regarded as a nuisance and significant hazard associated with underground coal-mining, rather than a commercial resource." (App. Vol. 1, p. 307); "The first commercial CBM well in the Central Appalachian Region including West Virginia and [s]outhern Virginia was in Dickenson County, Virginia in 1988 and production of CBM in southern West Virginia began in the 1990's" (*Id.* at 308); [T]he historical and scientific literature regarding four pre-1938 CBM wells in Wetzel County, West Virginia show that while these wells were together in the same area[,] this does not make a geographical area commercial and does not make the CBM industry commercial" (*Id.*); "Around 20 producing wells within the boundaries of a field are required to consider a specific field commercial" (*Id.*); in 1938 "gas in coal was . . . not a commercial resource" (*Id.*); and of the 62 wells identified in Defendants' Exhibit 1, 15 wells were completed after 1938 and, "[o]f the 47 remaining wells, 23 wells were drilled in shallow depths in the city of Welch [and] could not produce commercial quantities of CBM and was probably used for home usage." (*Id.* at 310)). These findings of fact were clearly erroneous.

First, there is no rule of deed construction which requires that a resource be a "commercial" one at the time of a deed's execution in order for the resource to be conveyed or reserved. Under the trial court's approach, every deed in West Virginia is subject to uncertainty and indefinite meaning because the effectiveness of a purported conveyance or reservation of a particular natural resource would depend upon whether an undefined "commercial" amount of the natural resource was being produced at the time of the deed's execution – which is a recipe for property title chaos.

Second, there was no testimony presented by LBR establishing what “commercial” was commonly understood to mean in 1938, and, therefore, the trial court’s findings are, with all due respect, vague speculations. For example, the trial court acknowledged that gas wells were being drilled into and producing from coal seams prior to 1938, but the trial court arbitrarily concluded that the volumes produced from those wells were not enough to be considered “commercial” volumes.

Third, the trial court swept aside undisputed evidence that CBM was, indeed, a known economic West Virginia resource in and prior to 1938. CBM was, of course, developed more extensively in the latter part of the twentieth century, but that does not mean that CBM was not a known, economic resource during the earlier part of the century. In fact, it was a known and developed economic resource when the 1938 Deed was executed, as established by an abundance of evidence in the record. *See Faith United*, 745 S.E.2d at 467 n. 11 (“A deed will be interpreted and construed as of the date of its execution.”) (*quoting* Syl. pt. 2, *Oresta v. Romano Bros., Inc.*, 137 W. Va. 633, 73, S.E.2d 622 (1952)).

A. Publications Confirming West Virginia CBM Production Prior to 1938

The Poulos/Rogers Parties put voluminous evidence of pre-1938 CBM production before the trial court. In 1937, the West Virginia Geological Survey published a report (“Report”) entitled “Physical and Chemical Properties of Natural Gas of West Virginia.” App. Vol. 3, p. 289. The Report 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, and was transmitted by Mr. Price to the Governor of West Virginia, the Honorable Homer A. Holt, on September 1, 1937.

Mr. Price’s transmittal letter to Governor Holt 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 the following common definition of the term “natural gas”:

“Natural gas” is defined by Webster as “a gas issuing from the earth’s crust through natural openings or bored wells and frequently accompanied by petroleum. It occurs especially in the Paleozoic rocks of the United States, and is of industrial importance in more than a dozen states; when combustible it consists chiefly of methane with small and variable amounts of ethane, propane, butane, hydrogen, oxides of carbon, nitrogen, helium, hydrogen sulfide, etc. When essentially of hydrocarbons, it is valuable as a fuel, 100 cubic feet being equal to 8 to 13 pounds of coal. About 10 per cent [of] the gasoline supply of the United States is obtained from natural gas by condensation and extraction processes.”

Id. at 297 (quoting Webster’s *New International Dictionary of the English Language*, J. & C. Merriam Co., 1935).

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. The authors observed:

Several wells near Hundred, Wetzel County, are producing considerable volumes of gas (as much as 380 M.C.F.) from Pittsburgh Coal at an approximate depth of 750 feet. Samples 1-6 were collected in this area from the Pittsburgh Coal. Two samples of gas were collected from well No. 3, 3-A being from the Pittsburgh

Coal and 3-B from Big Injun Sand. This well had just been completed, the gas having been turned into the line a few weeks previous to the date of collection of the samples. The original pressure on the Coal gas was 100 pounds per square inch. The gas from the coal contains the same constituents as that of a gas from the major producing horizons, but the ratio of the heavier hydrocarbons to the lighter fractions is greater than that indicated by the usual analyses. The ratio of the various hydrocarbons to each other is more similar to the shale gas than any other.

Sample No. 18 was collected 3 1/2 miles north of Morgantown, and the log of the well indicates the gas may be coming from the Brush Creek and/or Upper Kittanning Coal at a depth of 244 and 420 feet, respectively. The log of the well is listed on pp. 519-521 of the Monongalia County Report by the West Virginia Geological Survey.

Well No. 19 is producing gas from the Freeport Coal at a depth of 654 feet and is also making salt water. Certainly the salt water is foreign to the coal horizon regardless of the source of the gas. The analysis of this gas shows the lowest ethane and higher content of any of the coal gases.

The fact that these coal gases contain considerable quantities of ethane and higher indicates the supposition that mine gases contain methane as the only saturated hydrocarbon may not be a correct one, and that mine gases possibly are produced in the same manner and from the same type of source material as natural gas, the coal merely playing the role of a reservoir trap, just as the various sands do.

Id. at 308-310.

The 1904 edition of the West Virginia Geological Survey (App. Vol. 3, p. 325) reveals that gas was being produced from coal seams and captured for use in West Virginia as early as 1886. In discussing the production of gas from coal beds, the 1904 Survey stated:

Several examples are known in West Virginia as well as Pennsylvania, where valuable flows of gas have been obtained from coal beds. One of these was struck at Hundred, Wetzel County, W. Va., in 1886, by Messrs. Gibson and Giles, in the Pittsburg Coal, at 700 feet in depth. Enough gas was found therein according to Mr. Gibson, with which to finish drilling the well through the Gordon sand, and it still furnishes a portion of the supply for the village.

Id. at 327 (emphasis added).

Numerous other publications have documented the pre-1938 production of gas from coal seams in West Virginia. For example:

Natural gas companies operating in the Appalachian area have long noted the presence of gas in coal-bearing horizons, and have produced from those horizons that indicated a favorable return on the capital investment. An example is the Big Run Field located in Wetzel County, West Virginia. (See Figures 15.4 and 15.5.)

The discovery well was drilled in 1905 to a total depth of 3,112 and produced gas from the Big Injun and Gordon sands. The original drillers's [sic] log showed the Pittsburgh coal to lie from 1,025 and 1,034 but made no mention of gas. In **1931**, application was made to the Department of Mines to abandon the well. Plugging operations were started. When the 8 1/4 inch casing was cut at 1,078 to 1,080 and the well partially plugged to a depth of 1,118, gas issuing from the coal horizon was tested and found to have an open flow of 28,000 cubic feet per day with a developed rock pressure of 92 pounds per square inch in 16 hours. Consequently, the well was reinstated as a gas well on January 7, 1932, and remained productive until 1968, when bailing failed to correct a water problem. During this period the well produced in excess of 212,000,000 cubic feet of gas.

James G. Tilton, "Gas from Coal Deposits," *Natural Gas From Unconventional Geologic Sources*, Board on Mineral Resources Commission on Natural Resources, National Academy of Sciences, FE-2271-1, p. 214, 1976 (emphases added) (App. Vol. 3, p. 438).

In 1943, an article was published discussing "natural coal gas" in West Virginia and referencing several wells in Wetzel County that were producing "considerable volumes of gas (as much as 380 MCF per day) from Pittsburg coal at an approximate depth of 750 feet." A.J.W. Headlee and Paul H. Price, *Natural Coal Gas in West Virginia*, The Bulletin of the American Association of Petroleum Geologists, p. 533, Vol. 27, No. 4, April 1943 (emphasis added) (App. Vol. 3, p. 386). The article noted that "gas from the coal in this area contains the same constituents as those of the gases from the other producing formations in the area, but the ratio of the heavier hydrocarbons to the lighter fractions is greater than that indicated by the usual analyses. The ratio of the various hydrocarbons to one another is more similar to the shale gas than any other." *Id.* Explaining that there is little or no difference between gas found in coal seams and gas found in other formations, the authors continued by stating, "The fact that these

coal gases . . . contain considerable quantities of ethane and higher fractions indicates that the supposition that mine gases contain methane as the only saturated hydrocarbon may not always be correct, and that mine gases sometimes are produced in the same manner and from the same type of source material as natural gas, the coal merely playing the role of a reservoir trap, just as the various sands do.” *Id* at 387.

The article also stated that “Some of the more gassy mines are known to produce as much as 10 million cubic feet of methane each day and many of them 6 or more million so that it is readily seen that many billions of cubic feet of methane escape into the mine air each year.” *Id.* at 388. Additionally, the authors acknowledged fracturing as a production method, stating, “It may be possible to hasten the release of the gas by shooting to create a large fracture area about the well.” *Id.* at 389. The authors opined that “Natural coal gas occurs in the coals of West Virginia in sufficient quantity to meet a large part of the state’s fuel-gas requirements for many years if it can be successfully recovered.” *Id.* at 390.

Another article discussing the history of gas production from coal seams recognized the following:

In the United States, the potential for using boreholes (horizontal and vertical) to drain gas from coal in advance of mining was recognized in the early 1900’s (13).

* * * * *

The first attempt to remove gas produced from underground methane drainage systems to the surface by use of pipelines is reported to have occurred in Great Britain about 200 years ago, and the practice became widely used throughout the coalfields of Europe in the 1940’s (6).

* * * * *

Tilton (100) noted the production of gas from vertical wells penetrating the Pittsburgh Coalbed in West Virginia. The initial well was completed in 1905 to gas reservoirs below the Pittsburgh Coalbed. In 1931, prior to abandonment of the well, gas was “discovered” in the Pittsburgh Coalbed, and the well was

recompleted to that zone. In 1949, 22 additional wells were drilled to the coalbed, with 34 x 106 m3 (1,217 MMcf) of gas produced through 1984 (101).

* * * * *

The potential value of coalbed methane as a recoverable resource was recognized many years ago. In 1934, Lawall and Morris (56) calculated that two mines operating in the Pocahontas No.4 Coalbed, West Virginia, were liberating approximately $0.37 \times 10^6 \text{ m}^3/\text{d}$ (13 MMcfd) of gas; based on a price of \$0.10/28.3 m³ (1 Mcf), its value was \$1,300/d. Burke and Parry (7) in 1936 noted that the presence of gas in coal mines required the use of “costly ventilation,” but that the gas may have “considerable intrinsic value, and its recovery might conceivably be a profitable undertaking.”

William P. Diamond, *Methane Control for Underground Coal Mines*, Bureau of Mines Information Circular 9395, p. 2-3, 1994 (emphases added) (App. Vol. 3, p. 337-338).³

B. WVGES Gas Well Records Confirming CBM Production Prior to 1938.

The trial record also contains testimony and documents from the West Virginia Geological and Economic Survey (“WVGES”) establishing that more than 60 wells were producing gas from coal seams in West Virginia between 1865 and 1946. App. Vol. 3, p. 537-702. At trial, Ms. Mary Behling of the WVGES described the oil and gas database which obtains well data from the Department of Environmental Protection Office of Oil and Gas and is entered into the WVGES database by geologists. App. Vol. 2, p. 322. These records, Ms. Behling

³ See also *Coalbed Methane Production in the Appalachian Basin*, USGS Open-File Report 02-105, p. 6, March 1, 2002 (emphases added) (App. Vol. 3, p. 275); and Douglas G. Patchen, *Coalbed Gas Production, Big Run and Pine Grove Fields, Wetzel County, West Virginia*, West Virginia Geological and Economic Survey Publication C-44, 1991 (App. Vol. 3, p. 391).

It clearly was not unusual prior to 1938 for wells to be drilled directly into coal seams and for those coal seams to be “disturbed” for the purpose of producing gas. Further, while varying methods have developed over time, “fracking” as a production method is not a recent phenomenon. “Shooting a well” is a type of “fracturing” which involves “[e]xploding nitroglycerine or other high explosive in a hole, to shatter the rock and increase the flow of oil or gas.” *Williams & Myers Manual of Oil & Gas Terms*, at page 959. (“Shooting a Well”). Coal formation wells were, in fact, “shot” (fractured) many years ago as indicated in some of the well histories in App. Vol. 3, p. 537-702. See also App. Vol. 3, p. 398, which refers to the early “shooting” of Pittsburgh coal and Sewickley coal wells in the Big Run and Pine Grove fields.

explained, provide information on well completion, pays and shows of gas (indicating how much gas was produced from a well), stratigraphy and where, if at all, a well was perforated and/or stimulated for the production of gas. Petitioner's trial exhibit No. 1 included contemporaneous well drilling logs obtained from the WVGES showing wells which were producing gas from coal seams. App. Vol. 3, p. 537 - 702. For well after well, Ms. Behling testified that the contemporaneous well records indicated wells were "shot" and/or perforated specifically to target coal seams for the production of gas and which were producing in "pay" quantities. *See generally* App. Vol. 2, pp. 342-416. Ms. Behling explained that a "pay" of gas means the well was capable of producing gas and "it was presumed that it would be producing, moving forward." App. Vol. 2, p. 343.⁴

Ms. Behling further explained that the term "CBM" is a term of recent usage. When asked how wells are characterized as "methane pay gas well[,]" Ms. Behling stated "Because production was assumed by the geologist to come from a coal seam, and recently that has been interpreted as methane. We view gas from coal and methane as being semantically similar." App. Vol. 2, p. 469 (emphasis added). When asked, based on the records of the WVGES, whether CBM was being produced in and prior to 1938, Ms. Behling answered, "Yes." *Id.* at 481.

All parties agree that methane was known to exist in coal seams and known to have value in 1938. When asked if methane has value, LBR's expert, Dr. Ripepi responded, "Yes." And when asked "in 1938 and prior to that, were people looking in West Virginia for gas?" Dr. Ripepi again responded, "Yes." When asked if it was "certainly known at the time that coal seam gas was contained in coal seams," Dr. Ripepi responded, "Yes, it was known." *Id.* at 255.

⁴ As the WVGES records show, it was believed in 1865 that just one well had the potential to produce enough gas to heat the entire town. App. Vol. 3, p. 520. While this may not meet Dr. Ripepi's 20-well standard for current commercialization of a resource which was adopted by the trial court, App. Vol. 1, p. 308, it cannot be denied that a well heating an entire town would be considered "commercial" production in 1938.

When presented with the articles and well histories discussed above, LBR's expert, Dr. Ripepi's only response was that he believed the data and opinions to be incorrect. *Id.* at 243. He speculated that while the authors of these articles and the geologists who created the well logs indicated they were drilling into coal seams to produce these significant quantities of gas, they must have actually only been drilling into sands and other strata. *Id.* But his remarks were rank speculation; he was in no position to question or impeach the truth of these official West Virginia records and other historical records.

In fact, as Dr. Ripepi conceded when asked if the commercial viability of drilling projects included consideration of economics, "Yes... Because if you can't commercially produce something, you wouldn't drill a well." *Id.* at 232. The evidence undisputedly showed that wells were being drilled into coal seams in and prior to 1938. By Dr. Ripepi's own admission, no one would drill a well unless it was commercially viable to do so --and wells were being drilled into and producing gas from coal seams well before 1938 -- meaning, by Dr. Ripepi's reasoning, that CBM was being commercially produced prior to 1938. Dr. Ripepi's opinion of what constitutes commercial production today (App. Vol. 2, p. 281) is of no consequence to what the gas industry considered commercial production in 1938.

Significantly, "It is an old and familiar rule, when the ambiguity is thus raised by extrinsic evidence, it may be removed by the same means." *Snider v. Robinette*, 78 W. Va. 88, 93, 88 S.E. 599, 601 (1916). The uncontroverted evidence presented at trial removed any alleged ambiguity from the 1938 Deed's reservation of the "the gas."

The aforementioned official State of West Virginia records and other historical studies established that gas was being commercially produced from coal seams and associated formations prior to 1938, and that the common use of the term "gas" in 1938 included methane

gas and other gases produced or producible from coal seams (CBM). Although irrelevant to the interpretation of the unambiguous 1938 Deed, the historical evidence makes it clear that gas from coal seams (CBM) was being commercially produced long before 1938, and the trial court's findings to the contrary were clearly erroneous.

5. Assignments of Error 3 & 10: *Moss* is Distinguishable and Not Applicable.

The trial court relied heavily upon the *Moss* decision, both in its findings and fact and conclusions of law. The Court based several dispositive findings and conclusions upon *Moss*, including key questions concerning the extent of "commercial" production of CBM in 1938 and whether "gas" was an ambiguous term in the 1938 Deed. The trial court's reliance upon *Moss* in finding that "gas" is ambiguous and that CBM was not included in the unlimited reservation of "the gas" estate was an abuse of discretion and clearly erroneous. *See Bluestone Paving*, 214 W. Va. at 687 (holding that a final order and ultimate disposition of a circuit court are reviewed under an abuse of discretion standard).

A. *Moss* is a Narrowly Crafted, Fact-Specific Opinion Expressly Intended by this Court to be of Limited Precedential Value.

The only question this Court answered in *Moss* was whether a standard oil and gas lease permitted a particular lessee to enter the lessor's coal seams for the production of CBM. 591 S.E.2d at 138. This is not the question before this Court.

In *Moss*, the parties' dispute centered around two standard oil and gas leases entered by Hall Mining Company, Inc. and others, as lessors, and Energy Development Corporation, Inc. ("EDC"), as lessee. The leases were entered in 1986 and referred to "gas" but made no specific reference to coalbed methane, coalbed gas, or any other specific term. *Id.* at 139. The specific dispute was whether EDC had the right under the leases to drill into the lessors' coal formations in order to produce gas from those coal formations, including coalbed methane.

The trial court in *Moss* conducted a bench trial, considered extrinsic evidence, and concluded that the 1986 leases were ambiguous because, among other things, “the leases were executed before any coalbed methane development had commenced in West Virginia.” *Id.* at 141. Based primarily on this factual predicate, the trial court in *Moss* held that “[a]n oil and gas lease entered into before any commercial coalbed methane wells had been permitted and drilled in West Virginia and before West Virginia law provided for the drilling and fracking of coal seams to extract and market coalbed gas does not give the oil and gas lessee the right to produce gas from coal seams retained by the lessor, absent language specifically providing for or clearly indicating the intention of the parties to allow for that right.” *Id.* at 141.

The *Moss* trial court’s finding that the leases were executed before coalbed methane wells had been developed in West Virginia and were, therefore, ambiguous, was based on the record before it, was reviewed by this Court under a “clearly erroneous” standard, *id.*, was not disturbed by this Court, and served as the predicate of this Court’s statement in *Moss* that the 1986 leases were entered “before the wide-spread commercial production of coalbed methane in West Virginia.” *Id.* at 143.

Moss held that, “In the absence of specific language to the contrary or other indicia of the parties’ intent, an oil and gas lease does not give the oil and gas lessee the right to drill into the lessor’s coal seams to produce coalbed methane gas,” Syl. Pt. 8, *Moss*, 591 S.E.2d 135, but *Moss* did not establish facts that are binding on parties in other cases, did not assert a rule of general application, nor pronounce a legal principle that controls the interpretation of deeds which include the separation of interests in “oil and gas” from the remainder of a parcel of real property. Quite the contrary, *Moss* made it very clear that its affirmation of the lower court’s ruling was premised upon findings of fact made by the lower court, stating expressly that *Moss*

was of limited precedential value. 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 reiterated the limited precedential value of its ruling, 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.

B. *Moss* is Factually Distinguishable and Also Built on an Inaccurate History of CBM Production in West Virginia.

The trial court below relied on the factual findings in *Moss* that the leases at issue in *Moss* were entered “before the wide-spread commercial production of coalbed methane in West Virginia.” *Id.* at 141, App. Vol. 1, p. 308. The trial court in the instant case essentially determined that the findings of fact made by the trial court in *Moss* based on the record before the trial court in *Moss*, are binding upon the parties in this case. App. Vol. 1, p. 308. The findings of fact by the *Moss* trial court may have been proper based upon the evidence presented to it, but those facts are not binding here and it was clearly erroneous for the trial court here to adopt them. It is obvious that findings of fact made by a court in one case are not binding on different litigants in a different case.

Not only did the trial court below err in applying the facts presented in *Moss* and adopting them as facts here, but in doing so the trial court ignored the uncontroverted evidence, some of which is set forth above, of CBM production in and prior to 1938 presented to it. *See generally* App. Vol. 3, pp. 275-454, 537-702, and 793-807. The record in this case is replete with uncontroverted contemporaneous documents which show that *Moss* was built on an inaccurate

history of CBM production in West Virginia. Contrary to the trial court's finding in *Moss* and the trial court's findings here, the evidence in this record established, without dispute, that wells were being drilled into, and gas was being produced directly from, coal seams prior to 1938, and that CBM was a known and developed resource prior to 1938. *Id.* In other words, contrary to the trial court's conclusion in *Moss*, see *Moss* at 141, "coalbed methane" development had, in fact, commenced in West Virginia prior to 1938, and commercial wells producing gas directly from coal seams had been permitted and drilled in West Virginia prior to 1938. The historical factual predicate of *Moss* is simply incorrect, and is certainly not applicable to, nor binding, in this case. Moreover, the contemporaneous evidence presented to the trial court below shows that this case presents precisely a "different factual scenario" to which *Moss* expressly does not apply. See *Moss*, 591 S.E.2d at 146 ("We express no opinion as to what result may obtain in a different factual scenario . . ."). Accordingly, *Moss* has no application to this case and the trial court below clearly erred in relying on *Moss*.

6. Assignment of Error 6: The Trial Court Erred in Admitting Dr. Ripepi's Testimony

Admission of evidence, including expert testimony is reviewed under an abuse of discretion standard. See *Gentry v. Mangum*, 195 W. Va. 512, 519, 466 S.E.2d 171, 178 (1995). Findings of fact are reviewed under a clearly erroneous standard. *Bluestone Paving*, 214 W. Va. at 687-688. The trial court erred in admitting and adopting the testimony of Dr. Ripepi. The trial court's admission of Dr. Ripepi's testimony should be reviewed under an abuse of discretion standard and its adoption of his opinions was a question of fact to be reviewed under a clearly erroneous standard.

In order to offer expert testimony, "circuit courts must conduct a two-part inquiry under Rule 702 and ask: (1) is the witness [qualified as] an expert; and, if so, (2) is the expert's

testimony relevant and reliable?” *San Francisco v. Wendy’s Int’l, Inc.*, 221 W. Va. 734, 741, 656 S.E.2d 485, 492 (2007). Further, Rule 702 requires a witness to be “qualified as an expert by knowledge, skill, experience, training, or education” and may only testify to matters “thereto.” W. VA. R. EVID. 702. In admitting (and adopting) Dr. Ripepi’s testimony, the trial court abused its discretion and the trial court’s denial of the Poulos/Rogers Parties’ motion to exclude his testimony was not harmless error. Dr. Ripepi’s testimony was neither relevant nor reliable regarding gas production in 1938. The Poulos/Rogers Parties did not dispute that Dr. Ripepi may be qualified to testify to current CBM extraction methods and technologies; they challenged the relevance of this expertise to his speculative conclusion that CBM was not being commercially produced in West Virginia prior to 1938.

It is irrelevant whether Dr. Ripepi is an expert in CBM makeup and current production methods, a subject on which he may be qualified. However, Dr. Ripepi did not, and could not, testify to the intent of the parties to the 1938 Deed. Dr. Ripepi’s area of expertise, arguably including the technological advances made in CBM extraction in the 1980s and 1990s and the related rise in profitability of CBM production, are irrelevant to whether it was commonly understood in 1938 that the term “gas” included gas producible from coal seams (which it did), or to whether gas was being commercially extracted from coal seams in West Virginia prior to 1938 (which it was).

Dr. Ripepi’s testimony as to what constitutes “commercial” production, which the trial court adopted in its Bench Trial Order, was a reiteration of one modern production company’s definition. App. Vol. 2, p. 281 and App. Vol. 1, p. 308. His opinion and testimony had no relation to the practices in or prior to 1938 and thus, were irrelevant and improperly admitted into evidence and relied upon/adopted by the trial court. *Id.* “A deed will be interpreted and

construed as of the date of its execution.” *Faith United*, 745 S.E.2d at 467 (citing *Syl. Pt. 2, Oresta*, 137 W.Va. 633). Today’s standards of “commercial” production are irrelevant.

When asked at trial how many wells were required before a gas field is considered commercial, Dr. Ripepi responded, “That’s a good question.” App. Vol. 2, p. 281. Dr. Ripepi further explained that “there’s chapters in CBM books dedicated to this exact question. So if you look at Halliburton’s CBM book, they would – they give a number of at least 20 wells to decide if a field is – would be basically worthy of trying to drill more.” *Id.*

As Ms. Behling testified, “Standards may be different now” (*Id.* at 356), and are not relevant to the question of commercial production in 1938. As discussed above in Section 5, certainly the standard for “commercial” production was not the same in 1938 as Dr. Ripepi believes it to be today. When asked about WVGES records which indicate a gas well’s activity was “pay,” Ms. Behling explained that the term “pay” meant that the well produced more than 25,000 cubic feet of gas per day. *Id.* The contemporaneous WVGES records which showed that gas wells were being targeted specifically at coal seams and producing gas in “pay” quantities and the articles establishing the production of CBM in West Virginia before, during, and soon after 1938, were the only relevant evidence to the “commercial” standard presented at trial. Dr. Ripepi’s opinion of what the current standard is for commercial production is irrelevant, and the trial court erred in relying upon and adopting it.

A court should not allow an expert to pass off his “subjective belief or unsupported speculation” as knowledge. *Gentry v. Mangum*, 466 S.E.2d 171, 186 (W. Va. 1995) (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590 (1993)). Dr. Ripepi’s testimony constituted nothing more than unsupported speculation, including his subjective belief that official reports of the State of West Virginia documenting the production of gas from coal

seams prior to 1938 equate to an “anomaly” and his bare speculation that the findings of the West Virginia State Geologists in 1937 were erroneous. App. Vol. 2, p. 243. His opinions and testimony had no reliable basis in objectively verifiable documents or data.

The undisputed historical (contemporaneously prepared) evidence submitted by the Poulos/Rogers Parties confirms that gas producers prior to 1938 were targeting coal seams in West Virginia for the commercial production of gas from those seams and that CBM was in fact being commercially produced in West Virginia prior to 1938.

Faced with historical documents, Dr. Ripepi attempted to *change* history by speculating that the referenced wells producing CBM prior to 1938 may have been producing gas from multiple formations (including from coal seams). *Id.* Dr. Ripepi did not proffer historical documents or data to support these opinions; rather he offered post-hoc guesses.

Further, it remains undisputed that regardless of Dr. Ripepi’s attempts to explain away the contemporaneous and historical data and documents, the documents established that it was believed in and prior to 1938 that gas was being commercially produced from coal seams. Dr. Ripepi’s testimony about his belief that the gas was “potentially” coming from other strata than the coal is speculative and irrelevant. *Id.* The historical documents prove that it was understood and believed in 1938 that gas was being commercially produced directly from the coal seams. Whether or not the historical documents are factually correct is not on trial and is irrelevant to the commonly understood meaning of “gas” in 1938, when the deed at issue was executed.

7. Assignments of Error 8 & 9: The Trial Court Erred in Finding There is a “Distinct Line” Between Gas and CBM.

Findings of fact are reviewed under a clearly erroneous standard. *See Bluestone Paving*, 214 W. Va. at 687-688. The trial court’s finding that there is a “distinct line” between gas and CBM was clearly erroneous. *See App. Vol. 1, p. 312.*

Uncontroverted evidence presented at trial established that CBM is not chemically distinguishable from other gases. App. Vol. 2, pp. 254-255, 496. In fact, LBR's own expert only distinguished CBM from other gas based on the production method. *Id.* at 254-255. Yet, the trial court held that there is a "distinct line between CBM and gas." As discussed above, coalbed methane gas, by definition, is gas, and there is no "distinct line between CBM and gas." App. Vol. 1, p. 312.

CBM is created by the same geochemical process as gases created in shale, sandstone, and other strata. App. Vol. 2, pp. 505, 511. The coal, sandstone, shale, and other strata undergo a microbial degradation or a thermogenic process which breaks down the coal or other resource and releases methane, ethane, propane, and other types of gases. *Id.* CBM adsorbs to coal but it is not chemically bonded to the coal. *Id.* at 498-499. CBM is composed of the same range of chemical composition as natural gas produced from other strata. *Id.* at 495. When methane from within coal seams is produced, other types of gases may also be present and extracted. *Id.* at 492-493. Once CBM is commingled with other gases, it is not distinguishable or separable from other types of gases. *Id.* at 496.

While "CBM" is a term or phrase that has recently been used to refer to methane gas found in association with coal, CBM is not a chemically distinct substance. *See trans.* at 495 (stating coalbed methane consists of the same components which make up other gases found in other type of rocks); *see also* App. Vol. 2, p. 469 (indicating that the WVGES only recently began referring to gas from coal as methane/CBM, and previously referred to it simply as "gas"). It is natural gas (methane), has the same chemical composition as other methane gas, and exists in the same basic natural states as "conventional" methane gas. *See 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); *Carbon County v. Union Reserve Coal Co.*, 271 Mont. 459, 898 P.2d 680, 687 (Mont. 1995) (gas means all natural gases, including coal seam methane gas); *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”); *Cimarron Oil Corp. v. Howard Energy Corp.*, 909 N.E.2d 1115, 1116-17, 1119-20 (Ind. Ct. App. 2009) (chemically, gas molecule in a conventional gas well is essentially the same as the gas molecule present in a coalbed methane well). App. Vol. 2, p. 504.

In its Bench Trial Order, the trial court cited Ms. Behling’s testimony that “Coalbed methane was not on our radar until the early 1990’s” for its finding that the parties to the 1938 Deed would not have contemplated reserving CBM. App. Vol. 2, p. 361 and App. Vol. 1, p. 309. The trial court took Ms. Behling’s statement out of context. Ms. Behling was asked why some WVGES records which indicated gas was produced from coal seams identified “Type” as “gas” and others which indicated gas was produced from coal seams identified “Type” as “methane (CBM).” App. Vol. 2, p. 361. Ms. Behling explained, “Coaled methane was not on our radar until the early 1990s.” *Id.* When asked to clarify what she meant by “not on our radar,” Ms. Behling stated, “We weren’t paying attention to it as a designation until we did this study, and then we started to pay attention to it.” *Id.* Ms. Behling was then asked whether the terms “gas” and “methane” or “CBM” as used in the historic records of the WVGES indicated any difference in the substance or its origin. Ms. Behling responded, “In our work, in our database developed for our purposes, there’s no difference.” *Id.* at 362.

Ms. Behling's testimony importantly highlighted the fact that the term "coalbed methane gas" is a term of recent significance and that in and prior to 1938, gas produced from coal seams and gas produced from other strata was all identified as and referred to simply as "gas." Ms. Behling's uncontroverted testimony was that based on the historical records of the WVGES, gas was being produced from coal seams in and prior to 1938. *Id.* at 481.

8. Assignment of Error 5: West Virginia Code § 22-21-1 Has No Bearing On This Issue.

The trial court's reliance on West Virginia Code § 22-21-1, in both its findings of fact and conclusions of law, constituted error. A trial court's factual findings will be reviewed under a clearly erroneous standard, while legal determinations are subject to *de novo* review. *See Bluestone Paving*, 214 W. Va. at 687-688. As discussed above in Paragraph 7, the trial court's factual finding that W. Va. Code § 22-21-1 created a distinction between CBM and gas was clearly erroneous. *See App. Vol. 1*, p. 309. The trial court's interpretation of the statute as creating a distinction between CBM and natural gas presents a legal question subject to *de novo* review. *See Bluestone Paving*, 214 W. Va. at 688.

"A deed will be interpreted and construed as of the date of its execution." *Faith United*, 745 S.E.2d at 467 (*citing Syl. Pt. 2, Oresta*, 137 W.Va. 633); *see also Bruen v. Thaxton*, 126 W.Va. 330, 340, 28 S.E.2d 59, 64 (1943) ("It goes without saying that the intent of the parties sought to be reached is intent existing at the time the contract was made.").

The trial court relied on W.Va. Code § 22-21-1 in holding that the parties to the 1938 Deed would not have intended to include coalbed methane gas in the reservation of "the gas." However, W.Va. Code § 22-21-1 did not become the law until 1994 and therefore, could not have affected the parties' intent in 1938. Regardless, W.Va. Code § 22-21-1 speaks only to the production of CBM and not to its ownership. Production of CBM and ownership of CBM are not

one in the same and are in fact two very separate issues. The trial court's reliance on this statute was in plain error, both as an application of the facts and as an interpretation of law.

9. Assignment of Error 11: The Trial Court Erred in Dismissing the Case and Striking it From the Docket.

A final order and ultimate disposition of a circuit court are reviewed under an abuse of discretion standard. *See Bluestone Paving*, 214 W. Va. at 688. The trial court's dismissal of the case and striking it from the docket was an abuse of discretion because outstanding issues remained.

In spite of its order bifurcating the ownership and accounting issues, the trial court dismissed the case in its entirety, neglecting to resolve the outstanding accounting claims at the resolution of the ownership claim. The Poulos/Rogers Parties acknowledge that only the party prevailing on the ownership claim is entitled to an accounting, hence the parties' agreement to bifurcate the two issues. Should the Poulos/Rogers Parties be successful in this appeal, they ask this Court to direct the trial court to address their outstanding accounting claims.

CONCLUSION

For the foregoing reasons, the Poulos/Rogers Parties respectfully request that this Court reverse the trial court, render a judgment declaring that the Poulos/Rogers Parties are the owners of the CBM and associated royalties at issue, and direct the trial court, on remand, to conduct a trial and other necessary proceedings on the Poulos/Rogers Parties' outstanding accounting claims.

Respectfully submitted,

Dated: December 21, 2015

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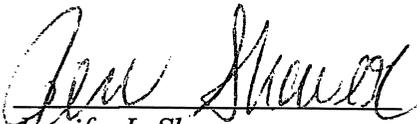
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