

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 15-0460

AUG 21 2015

ROY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**Harold Rex Anderson, Jr. and Harold Rex Anderson, III,
Plaintiffs Below, Petitioners**

vs.)

**Appeal from Partial Summary Judgment
Order of the Circuit Court of Pleasants
County, West Virginia (11-C-39)**

**Cordelia J. Jones, Heirs, et al.,
Defendants Below, Respondents**

PETITIONERS' AMENDED BRIEF

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ASSIGNMENTS OF ERROR

1. THE CIRCUIT COURT ERRED IN HOLDING THAT THE CLAUSE PERTAINING TO THE HEIRS OF THE GRANTOR WAS NOT A RESERVATION OR EXCEPTION BUT RATHER A CONVEYANCE.
2. THE CIRCUIT COURT ERRED IN HOLDING THAT AN INTEREST IN REAL PROPERTY COULD PASS TO A STRANGER TO THE DEED.
3. THE CIRCUIT COURT PLAINLY ERRED IN HOLDING THAT THE NAMING OF THE PREDOMINANT MINERAL IN A REGION MEANT ALL MINERALS.
4. THE CIRCUIT COURT ERRED IN HOLDING THAT THE LANGUAGE PERTAINING TO OIL ROYALTY MEANT THE OIL AND GAS IN PLACE.

STATEMENT OF THE CASE

The object of this case is to obtain judicial determination of the ownership of the oil and gas within, upon, and underlying that certain tract of land said to contain seventy-five (75) acres, more or less, situate in Lafayette District, Pleasants County, West Virginia, identified on the tax maps of the county assessor of Pleasants County, West Virginia as Tax Map 9, Parcel 11, and more fully set forth and described in that certain deed of record in the Office of the Clerk of the County Commission of Pleasants County, West Virginia, in Deed Book 51, at Page 7. (A.R. 55-56).

STATEMENT OF FACTS

Z. T. Jones, by the terms of his Last Will and Testament, of record in the Office of the Clerk of the County Commission in Will Book 1, at Page 346, provided that "I give and bequeath to my wife, Cordelia A. Jones, all my property real personal or mixed of which I shall die seized and possessed or to which I shall be entitled at the time of my decease...." (A.R. 8-18 & 8-19). The aforementioned devise and bequest encompassed the 75 acre tract of land which, at the time, was comprised of two tracts of land containing fifty (50) acres, more or less, and twenty-five (25) acres, more or less, respectively. (A.R. 53-54).

By deed bearing date the 1st day of August, 1912, of record in Deed Book 51, at Page 7, in the aforesaid County Clerk's Office, Cordelia A. Jones conveyed the two tracts of land, totaling 75 acres, more or less, unto L. Oliver Jones purporting to reserve the oil royalty for the benefit of certain strangers to title, i.e. Flora B. Lamp, A. Fulton Jones, Emma C. McCullough, Mary D. Jones, William P. Jones, and Vesta Nichols. (A. R. 55-56).

By deed of trust bearing date the 15th day of February, 1934, of record in Trust Deed Book S, at Page 194A, in the aforesaid County Clerk's Office, L. Oliver Jones and Zula Jones, his wife, conveyed the two tracts of land, totaling 75 acres, more or less, without reservation, unto John Clay Hoover, Trustee, to secure the Land Bank Commissioner for the payment of a certain debt owed to the Land Bank Commissioner. (A.R. 57-58).

Subsequently, L. Oliver Jones and Zula Jones, his wife, defaulted on their obligation under the note and deed of trust securing said note, and by deed bearing date the 2nd day of August, 1939, of record in Deed Book 78, at Page 356, in the aforesaid County Clerk's Office, John Clay Hoover, Trustee, conveyed the two tracts of land, totaling 75 acres, more or less, unto the First National Bank of St. Marys and the Pleasants County Bank of St. Marys, subject to "any or all conveyances and reservations, ***if any there be of record*** at the time of execution of the deed of trust to said Trustee...." (emphasis added) (A.R. 59-60).

By deed bearing date the 17th day of April, 1940, of record in Deed Book 78, at Page 411, in the aforesaid County Clerk's Office, the Pleasants County Bank of St. Marys conveyed its interest in the two tracts of land, totaling 75 acres, more or less, without reservation, unto the First National Bank of St. Marys. (A.R. 61-62).

By deed bearing date the 26th day of January, 1945, of record in Deed Book 84, at Page 351, in the aforesaid County Clerk's Office, the First National Bank of St. Marys

conveyed its interest in the two tracts of land, totaling 75 acres, more or less, unto Charles W. McHenry purporting to reserve “all of the interest in the oil in and underlying the above tract of land formerly belonging to L. Oliver Jones, and also a one-half of all the gas formerly owned by said L. Oliver Jones” as well as the right to join in any lease for oil and gas or other minerals and to collect one-half of any rentals or royalties for the benefit of a certain stranger to title, i.e. Phillip H. Jones. (A.R. 63).

Charles W. McHenry, pursuant to the terms and provisions of his Last Will and Testament of record in Will Book 20, at Page 149, in the aforesaid County Clerk’s Office, devised and bequeathed all of his estate, real, personal and mixed, unto Lucille Higgins, to be hers absolutely and in fee simple. (A.R. 64-67).

By deed bearing date the 2nd day of August, 2007, of record in Deed Book 266, at Page 569, in the aforesaid County Clerk’s Office, Lucille Higgins, by Marsha H. Dearth attorney-in-fact for Lucille Higgins, conveyed her interest in the two tracts of land, totaling 75 acres, more or less, unto Harold Rex Anderson, Jr. and Harold Rex Anderson, III, Petitioners herein, subject to any prior reservations as set forth of record in prior instruments thereto. (A.R. 68-70).

PROCEDURAL HISTORY

The complaint to quiet title in the Plaintiffs was filed on the 12th day of December, 2011, in the Circuit Court of Pleasants County, West Virginia as Civil Action 11-C-39. (A.R. 1-10).

The Respondent, Rowena F. Sellers, filed her answer to the complaint on the 20th day of January, 2012. (A.R. 11).

The Administrative Order appointing Judge Starcher to preside over the case in place of Judge Sweeney was entered in Administrative Order Book 10, at Page 98, on the 23rd day of January, 2012. (A.R. 12-13).

Union Bank, Inc. filed its answer to the complaint on the 24th day of January, 2012. (A.R. 14-18).

The Respondents, Cordelia A. Jones Heirs, filed their response to the complaint on the 1st day of May, 2012. (A.R. 19-25).

Plaintiffs, Petitioners herein, filed their Motion for Summary Judgment on the 13th day of December, 2013. (A.R. 26-33).

The order substituting Matthew F. Graves as counsel for the Plaintiffs, Petitioners herein, was filed on the 23rd day of December, 2013. (A.R. 34-35).

The Response of the Cordelia A. Jones Heirs, Respondents herein, was filed on the 12th day of March, 2014. (A.R. 36-105).

The order substituting John McGhee as counsel for the Cordelia A. Jones Heirs, Respondents herein, was filed on the 12th day of March, 2014. (A.R. 106).

By deed bearing date the 19th day of February, 2014, of record in Deed Book 295, at Page 124, in the aforesaid County Clerk's Office, Defendant in the underlying Circuit Court Action, Union Bank, Inc., conveyed its interest in the two tracts of land, totaling 75 acres, more or less, unto Harold Rex Anderson, Jr. and Harold Rex Anderson, III, petitioners, herein. Subsequently, on the 19th day of March, 2014, the Plaintiffs' Order for Nonsuit and Dismissal of Defendant, Union Bank, Inc., was entered, thereby dismissing Union Bank, Inc. from all further proceedings. (A.R. 203).

The Plaintiffs brought forth for hearing their Motion for Summary Judgment on the 19th day of March, 2014. (A.R. 26-33).

The Cordelia A. Jones Heirs, Respondents herein, filed their Motion for Summary Judgment on the 23rd day of March, 2015. (A.R. 204-207).

The Partial Summary Judgment Order, denying Plaintiffs' Motion for Summary Judgment and partially granting the Cordelia A. Jones Heirs' Motion for Summary Judgment, was entered on the 20th day of April, 2015, and filed on the 22nd day of April, 2015. The Partial Summary Judgment Order asserted that "historically the naming of predominant mineral(s) of a given region in a deed by reservation or exception has been often considered to mean *all mineral interests*." (A.R. 208-220, *see*, F.N. 3 at page A.R. 211). However, the Partial Summary Judgment Order, in contradiction thereto, held that the language dealing with the oil royalty, and the strangers to title, was in fact not a reservation or exception but part of the conveyance. (A.R. 215-216). Finally, the Partial Summary Judgment Order held that the strangers to title acquired an interest in all the oil and gas interest which may lie under the two tracts of land, totaling 75 acres, more or less. (A.R. 219).

The Plaintiffs filed a Motion for Corrected Order on the 1st day of May, 2015, and subsequently withdrew the same. (A.R. 221).

Counsel for the Cordelia A. Jones Heirs served his Motion to Withdraw as counsel on the 29th day of June, 2015 and supplemented the same on the 9th day of July, 2015. (A.R. 223).

The Plaintiffs presented a timely and complete notice of appeal from an order of the Circuit Court of Pleasants County, West Virginia (Civil Action No. 11-C-39) on the 19th day of May, 2015.

A circuit court's entry of Summary Judgment shall be reviewed *de novo*. Painter v. Peavy, 451 S.E.2d 755 (W.Va. 1994).

SUMMARY OF ARGUMENT

1. The Circuit Court erred in holding that the language in Deed Book 51, at Page 7, dealing with the oil royalty, amounted to words of grant, or conveyance, and therefore was not an attempt to reserve the oil royalty for the heirs of the Grantor.

The language dealing with the oil royalty was merely an understanding, or request, between the parties to the deed, who consequently were mother and son, as to how the monies from oil production, “in case oil was found in paying quantities”, should be distributed. There were not words of grant in this understanding or request, as required by well-established West Virginia Law. Therefore, the language dealing with the oil royalty is an attempted reservation or exception of the oil royalty interest, in favor of a stranger in title to the deed, and therefore is void *ab initio*.

Further, the language dealing with the oil royalty amounts to an attempted testamentary disposition of an interest in real property. However, the requirements for a testamentary disposition of real property, pursuant to West Virginia law, do not exist. The deed in question, of record in Deed Book 51, at Page 7, cannot be treated as a holographic will since it is not wholly in the handwriting of the testator. (A.R. 55-56). Also, the document was not acknowledged by the drafter in the presence of at least two competent witnesses, and the witnesses did not subscribe the document in the presence of the drafter. (A.R. 55-56). Finally, with regard to the mineral interests in question, the document is intended to take effect immediately upon its execution rather than at the death of the drafter. (A.R. 55-56).

Therefore, the document must be determined to be a deed and the language dealing with the oil royalty is an attempted reservation or exception of the oil royalty interest, in favor of a stranger in title to the deed, and therefore is void *ab initio*.

2. The Circuit Court erred in holding that an interest in real property could pass to a stranger to the deed.

As previously stated, the language dealing with the oil royalty does not amount to words of conveyance as there were not words of grant, as required by well-established West Virginia Law. Therefore, the language dealing with the oil royalty is an attempted reservation or exception of the oil royalty interest, in favor of a stranger in title to the deed, and therefore is void *ab initio*.

A reservation is the creation of a new interest in property from the thing transferred. BLACK'S LAW DICTIONARY 616-17 (7th ed. 1999).

An exception is the retention of an interest already in existence. BLACK'S LAW DICTIONARY 261-62 (7th ed. 1999).

At the time of the conveyance in Deed Book 51, at Page 7, the two tracts of land, totaling 75 acres, more or less, were owned in fee simple by Cordelia A. Jones. (A.R. 55-56). The language, void of any grant provision in favor of the Grantor's heirs, would have to be treated as an attempt to create a reservation or a new interest in the property conveyed. However, the distinction between a reservation and exception is not relevant in the case at hand as West Virginia law has clearly established that an attempt to reserve an interest in real property, or except the same, for the benefit of a stranger in title is void *ab initio*.

Therefore, the attempt to reserve, or except, the interest in the oil royalty for the benefit of the heirs of Cordelia A. Jones is void *ab initio* and must fail as a matter of law. A ruling to the contrary would upset decades of well-established property law in the State of West Virginia.

3. The Circuit Court plainly erred in holding that the naming of the predominant mineral in a region meant all minerals within and underlying the surface estate.

There is no authority, provided by the Defendants in the underlying Civil Action or the Circuit Court, to support a finding that the mere naming of the predominant mineral in a given region encompasses all minerals within and underlying the surface estate. Further, it is common practice, recognized for decades, that each mineral estate can be severed, and retained, separate from all other mineral estates. A ruling to the contrary would create chaos and uncertainty in the area of property law, overturning more than a century of settled jurisprudence on the subject.

4. The Circuit Court erred in holding that the language dealing with the oil royalty was an interest in real property, being an interest in the minerals in place, rather than an interest in the personal property, being only a royalty interest.

Assuming the Court is inclined to hold that the language dealing with the oil royalty was a valid conveyance, reservation, or exception of the same, the interest must be classified as an interest in the oil royalty and not minerals in place. The language in Deed Book 51, at Page 7, clearly provides for an oil royalty interest, not an interest in the minerals in place. The language expressly limits the interest attempted to be set out for the heirs of Z.T. Jones to royalty. (A.R. 55-56). Further, the deed specifically states that the grantee, L. Oliver Jones, has the exclusive right to make all oil and gas leases and receive all of the rentals and bonuses from said leases without having to “account in any manner to his co-owners in said royalty”. (A.R. 56).

The language contained in Deed Book 51, at Page 7, is not ambiguous and therefore is not subject to Judicial Interpretation. The grantor had every available opportunity to

classify the interest as minerals in place, but clearly chose to specifically limit the interest to oil royalty. (A.R. 55-56). The deed in Deed Book 51, at Page 7, is completely void of any language that could result in the interest being classified as minerals in place. Therefore, should the Court be inclined to rule that the grantor did create a valid conveyance, reservation, or exception in favor of the strangers in title, being the heirs of Z.T. Jones, the interest must be classified as an oil royalty interest only.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is appropriate for Rule 19 argument as this appeal is a case involving assignments of error in the application of settled law and claiming an unsustainable exercise of discretion where the law governing that discretion is settled. This case is appropriate for disposition by memorandum decision.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN HOLDING THAT THE CLAUSE PERTAINING TO THE HEIRS OF THE GRANTOR WAS NOT A RESERVATION OR EXCEPTION BUT RATHER A CONVEYANCE

A circuit court's entry of Summary Judgment shall be reviewed de novo. Painter v. Peavy, 451 S.E.2d 755 (W.Va. 1994).

The formalities for passing title, or an interest in title, through a conveyance, reservation, or exception under West Virginia Law are necessary to provide protection to bona fide good-faith purchasers and clarity in title searches provided as support for transfers of interests in real property. If a party fails to comply with the formalities for passing title to real property in West Virginia, the party cannot benefit from such failure to the detriment of a bona fide good-faith purchaser. The position is set forth by this Court in Webb v. Webb, 301 S.E.2d 570 (W.Va. 1983), which held, “[i]t is recognized that a party

may not avoid the legal consequences on the ground of mistake, even a mistake of fact, where such mistake is the result of the negligence of the complaining party”.

The appellants are bona fide good-faith purchasers as they acquired their interest in the two tracts of land, totaling 75 acres, more or less, through an arms-length transaction from Lucille Higgins, by Marsha H. Dearth attorney-in-fact for Lucille Higgins, on the 2nd day of August, 2007, in Deed Book 266, at Page 569, of record in the Office of the Clerk of the County Commission of Pleasants County, West Virginia. (A.R. 68-70).

The Respondents, being heirs-at-law of a party who failed to comply with the necessary formalities to affect a valid conveyance of the oil, gas, and minerals, within and underlying, the two tracts of land, totaling 75 acres, more or less, seek to avail themselves of equitable remedies through the application of treatises and secondary sources to the detriment of the appellants. However, if a legal remedy exists, a party may not avail themselves of an equitable remedy. Railway Co. v. Ryan, 6 S.E. 924 (W.Va. 1888). In the present matter, legal remedies exists, being compliance with well-established law, although said legal remedies are not in favor of the Respondents’ position.

The deed in question, (hereinafter, “Subject Deed”) being that certain deed dated August 1, 1912, of record in the Office of the Clerk of the County Commission of Pleasants County, West Virginia, in Deed Book 51, at Page 7 conveyed an interest in two (2) tracts of land, one said to contain twenty-five (25) acres, more or less, and the other fifty (50) acres, more or less, situate in Lafayette District, Pleasants County, West Virginia. (A.R. 55-56).

The Subject Deed was a grant from Cordelia A. Jones unto L. Oliver Jones. Said conveyance was from mother to son. (A.R. 55-56).

In the underlying court action, the Plaintiffs, Petitioners herein, did not specifically address the issue in this assignment of error concerning whether the language dealing with the oil royalties and the heirs of Z.T. Jones was a reservation or conveyance because said language was not part of the grant clause and therefore interpreted to be a reservation or exception. (See, A.R. 26-33). However, the Defendants, Respondents herein, did specifically address this issue and the lower court did make a determination as to the classification of the language dealing with the oil royalty and the heirs of Z.T. Jones. (A.R. 36-48, & A.R. 208-220).

A. The Existence of an Ambiguity Must Exist Prior to Judicial Interpretation

The majority of disputes resulting from conveyances of property interests revolve around the meaning of the conveyance or the words used to affect the conveyance. Ostensibly, the Court's role in interpreting conveyances is to determine the parties' intent when creating the document. The process through which the intent of the parties is ascertained, frequently determines the meaning of the conveyance. See, David E. Pierce, INTERPRETING OIL AND GAS INSTRUMENTS, 1 TEX. J. OIL, GAS & ENERGY L., 2 (2006). This has been aptly noted in Professor Kramer's revealing and influential work on canons of construction used to interpret mineral deeds and oil and gas leases. *Id.*, at FN 2. (Bruce M. Kramer, THE SISYPHEAN TASK OF INTERPRETING MINERAL DEEDS AND LEASES: AN ENCYCLOPEDIA OF CANNONS OF CONSTRUCTION, 24 TEX. TECH L. REV. 1, 6 (1993)("There may be an inverse relationship between the liberality of a court's acceptance of extrinsic or parole evidence and a court's use of canons of construction in cases involving the interpretation of a written instrument."))

However, prior to application of any of the canons of construction, the language contained in the conveyance or reservation must first be determined to be ambiguous and

not susceptible to clear interpretation without the aid of the Judicial System. See generally, INTERPRETING OIL AND GAS INSTRUMENTS.

“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.” Syl. Pt. 4, Zimmerer, et. al. v. Romano, et. al., 679 S.E.2d 601 (W. Va. 2009)(quoting, Syl. Pt. 1, Sally-Mike Properties v. Yokum, 332 S.E.2d 597 (W.Va. 1985)(quoting, Syl. Pt. 1, Cotiga Develop. Co. v. United Fuel Gas Co., 128 S.E.2d 626 (W.Va. 1963). Therefore, before judicial action or interpretation is applied to the document in question, it must first be established that the language of the conveyance is ambiguous.

The language is not ambiguous and therefore only one determination can be made in the appeal at are and further, as there are not words of grant or conveyance in the language, the only determination available is that the language is not a grant clause. (See, A.R. 55-56).

B. Grant Clause versus Habendum Clause versus Reddendum Clause

A granting clause are the words that transfer an interest in a deed or other instrument. BLACK’S LAW DICTIONARY 318 (7th ed. 1999).

A habendum clause is the part of an instrument that defines the extent of the interest being granted and any conditions affecting the grant. BLACK’S LAW DICTIONARY 322 (7th ed. 1999).

A reddendum clause is a clause in a deed by which the grantor reserves some new thing out of what had been previously conveyed. BLACK’S LAW DICTIONARY 600 (7th ed. 1999).

This Court has long recognized that a clear distinction exists between a grant clause, habendum clause, and reddendum clause. *See, Erwin v. Bethlehem Steel Corp.*, 62 S.E.2d 337 (W.Va. 1950); *see also, Collins v. Stalnaker*, 48 S.E.2d 430 (W.Va. 1948).

The language in the Subject Deed, “[I]t is expressly understood and agreed, that in the case oil is found and produced...from said land hereby conveyed that the following named children...of Z.T. Jones, now deceased, shall own and possess...and that said royalty shall be owned and held in common by said heirs...” (A.R. 55-56) must be classified as either a grant clause, habendum clause, or reddendum clause.

The above-language does not contain words of grant or conveyance. The language is merely included to provide an understanding, or request, between the Grantor and Grantee, who consequently are mother and son, as to how the monies from oil production should be divided and distributed. It is abundantly clear from the Subject Deed that there is only one grantee, L. Oliver Jones. If the grantor, Cordelia A. Jones, had intended to convey an interest in the two tracts of land, totaling 75 acres, more or less, to more than one grantee, she would have, and need only have, listed them in the initial paragraph to the deed setting forth the parties to the transaction. The fact that L. Oliver Jones is the only grantee in the conveyance is further supported by two distinct facts. First, the Subject Deed is only indexed in the indices of the Clerk of the County Commission of Pleasants County, West Virginia under Cordelia A. Jones, Grantor, and L. Oliver Jones, Grantee. Second, from the following language:

It is expressly understood and agreed, that in case oil is found and produced in paying quantities from said land hereby conveyed that the following named children and heirs at law of Z.T. Jones, now deceased shall have own and possess the usual one-eighth (1/8) thereof or what is commonly known as royalty, jointly and in common, and that said royalty shall be owned and held in common by said heirs, to-wit:

Flora B. Lamp, A. Fulton Jones, Emma C. McCullough, Mary D. Jones, William P. Jones, Vesta Nichols **and L. Oliver Jones, grantee herein**, share and share alike to them their heirs and assigns; But the said L. Oliver Jones shall have the exclusive right to make execute and deliver all such oil and gas leases upon said lands and to receive all rentals and bonuses on account of said leasing in his own right without having to account in any manner to his co-owners in said royalty. (A.R. 8-21)(emphasis added).

Cordelia A. Jones, grantor, made it a point to reiterate that only grantee in the deed was L. Oliver Jones.

Therefore, the language cannot be classified as a grant clause and must be either a habendum or a reddendum. Regardless of the classification between a habendum and a reddendum, the language cannot operate to vest an interest in real property in the heirs of Z.T. Jones since they are strangers in title. *See generally, Erwin and Collins.*

The Defendants, Respondents herein, cite to Erwin and Collins stating that they stand for the position that language of reservation or exception is often interchangeable and the courts have discretion in interpreting the true effect of said language. However, this reliance is misapplied as the purpose of the reservation versus exception distinction is to provide that a court may interpret a reservation as an exception or an exception as a reservation in order to carry out the intent of the grantor.

While a clause in a deed of conveyance which is phrased as a reservation may be treated as an exception where it is necessary to do so in order to carry out the plain purpose of the parties to the instrument, even when so construed, it cannot operate actually to vest rights to the property excepted in persons who are strangers to the instrument. Collins, at Syl. Pt. 3.

Without words of grant or conveyance, an interest in real property cannot pass to a stranger in title. *See generally, Erwin.*

The respondents attempt to circumvent this steadfast rule by attempting to classify the language pertaining to the oil royalty and heirs of Z.T. Jones as a grant clause.

Further, the only authorities provided by the Defendants in the lower court, Respondents herein, to the contrary are treatises and secondary sources which this Court has declined to follow as of the date of this appeal. (*See*, A.R. 36-105). Even the Circuit Court was unable to provide authority accepted and adopted by this Court to show that the language in question amounted to words of grant or conveyance. (*See*, A.R. 208-220).

Additionally, the language “[I]t is expressly understood and agreed, that in the case oil is found and produced...from said land hereby conveyed that the following named children...of Z.T. Jones, now deceased, shall own and possess...and that said royalty shall be owned and held in common by said heirs....” is inconsistent with the true grant clause in the Subject Deed. Inconsistencies must be construed against the drafter of the deed, and where two clauses in a deed are repugnant, the first clause will be given effect and the second one will be rejected. Paxton v. Benedum-Trees Oil Co., 94 S.E. 472 (1917).

Therefore, the only determination regarding the oil royalty language and heirs of Z.T. Jones must be one that classifies the language as a habendum, specifically a limitation on the monies that the Grantee may retain from oil production, or a reddendum, which is not for the benefit of the Grantor and therefore must be read as invalid.

The only other interpretation of the language in the Subject Deed dealing with the oil royalty and the Z.T. Jones heirs would be that the grantor, Cordelia A. Jones, made a testamentary disposition of the interest. However, this would result in the attempted disposition being void *ab initio* and of no force or effect as it is an attempted testamentary disposition without the legal prerequisites. West Virginia Code §41-1-3 states:

No will shall be valid unless it be in writing and signed by the testator, or by some other person in his presence and by his direction, in such manner as to make it manifest that the name is intended as a signature; and moreover, unless it be wholly in the handwriting of the testator, the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses, present at the same time; and such witnesses shall subscribe the will in the presence of the testator, and of each other, but no form of attestation shall be necessary.

The Subject Deed is not wholly in the testator's handwriting and does not contain the signatures of at least two attesting witnesses. (A.R. 55-56). Therefore, it must fail for lack of the necessary prerequisites.

Each and every alternative theory attempting to classify the language dealing with the oil royalty and the Z.T. Jones Heirs is defective leaving the only viable conclusion, said language was an attempt to except or reserve the interest in the oil royalty for the heirs of Z.T. Jones.

II. THE CIRCUIT COURT ERRED IN HOLDING THAT AN INTEREST IN REAL PROPERTY COULD PASS TO A STRANGER TO THE DEED

A circuit court's entry of Summary Judgment shall be reviewed de novo. Painter v. Peavy, 451 S.E.2d 755 (W.Va. 1994).

The issue in this assignment of error was specifically presented to the Circuit Court in the Plaintiffs' Motion for Summary Judgment. (A.R. 27-29).

As stated in the Argument Section, subpart I, *supra*, the language in Deed Book 51, at Page 7, does not contain words of grant or convey, and therefore, must be classified as either a habendum clause or a reddendum clause. (A.R. 55-56). Without words of grant or conveyance, an interest in real property cannot pass to a stranger in title. *See generally, Erwin*. To that effect, the Petitioners hereby restate their argument in Section I., *supra*,

and incorporate the same herein as if fully restated for purposes of supporting their argument in this Section II.

Except for L. Oliver Jones, each of the named beneficiaries of the attempted reservation of oil royalty are strangers in title to the Subject Property. It is abundantly clear from the Subject Deed that there is only one grantee, L. Oliver Jones. (A.R. 55-56). If the grantor, Cordelia A. Jones, had intended to make the remaining heirs parties to the transaction, she would have, and easily could have, listed them in the initial paragraph to the deed which sets forth the parties thereto.

It is a well-recognized principal of West Virginia property law that exceptions or reservations, to be legally effective, must be for the benefit of a person in the chain of title. *See, Erwin*; *see also, Collins*. A reservation or exception in favor of a stranger to a conveyance conveys no title and is void and of no effect. *Stowers v. Huntington Develop. Corp.*, 72 F. 2d 969 (4th Cir. 1934); *see also, Moore v. Henderson*, 105 S.E.2d 903 (W.Va. 1924). This is true regardless of whether the language in the instrument refers to a reservation or an exception. *See, Gwinn v. Gwinn*, 87 S.E. 371 (W.Va. 1915).

The defendants at the lower court level, respondents herein, attempt to circumvent this steadfast rule by classifying the language pertaining to the oil royalty and Z.T. Jones Heirs as words of conveyance, which as addressed in Section I., *supra*, is simply not the case.

Further, the Defendants, Respondents herein, relied upon *Michael J. Uhes, PHD., P.C. v. Blake*, 892 P.2d 439 (Colo.App. 1995) for the position that the modern trend is to deviate from the long standing rule that a reservation or exception cannot be made to vest an interest in a stranger in title. (A.R. 44-45). This argument is not applicable to the current matter for multiple reasons. First, this is a case from Colorado, which is not

controlling in this Jurisdiction. Second, the Uhes case can be distinguished from the facts presently before this Court. The Uhes case dealt with the ability of the grantor to create an estate in one person, being the grantee, and an easement in another, being the party benefiting from the reservation. An easement is a burden on the estate and does not operate to actually vest an ownership interest in a party while the language in the Subject Deed would operate to vest an interest in the estate in the party benefiting from the language. Therefore, the Uhes case is not applicable to the present factual scenario.

The words of grant and conveyance only apply to L. Oliver Jones, the sole grantee, which is further supported by the grantor's own language in naming her children and heirs at law, "Flora B. Lamp, A. Fulton Jones, Emma C. McCullough, Mary D. Jones, William P. Jones, Vesta Nichols and L. Oliver Jones, **grantee herein....**" (A.R. 55-56)(emphasis added). The grantor specifically indicated that L. Oliver Jones was the only grantee to the deed. This clearly shows that the grantor, Cordelia A. Jones, did not intend for her remaining six children to be grantees under the Subject Deed. Therefore, any remaining individuals mentioned by name in the Subject Deed are strangers in title and cannot obtain a vested interest in the two tracts of land, totaling 75 acres, more or less, in question through a reservation or exception.

III. THE CIRCUIT COURT PLAINLY ERRED IN HOLDING THAT THE NAMING OF THE PREDOMINANT MINERAL IN A REGION MEANT ALL MINERALS

A circuit court's entry of Summary Judgment shall be reviewed de novo. Painter v. Peavy, 451 S.E.2d 755 (W.Va. 1994).

The issues in this assignment of error were brought before the Circuit Court by the Defendants, Respondents herein, in their oral argument during the hearing on Plaintiffs', Petitioners herein, Motion for Summary Judgment and addressed by the Circuit Court,

briefly, in the Circuit Court's Order for Partial Summary Judgment in footnote 3, on page 4. (A.R. 211).

The determination that the naming of the predominant mineral in a given region in a deed by reservation or exception constitutes all minerals is simply unfounded and incorrect. There is not authority provided to support this position, and in fact, this Court has specifically held that each mineral existing beneath the surface is subject to separate disposition. *See, Burdette v. Bruen*, 191 S.E 360 (W.Va. 1937); *cf Bruen v. Thaxton*, 28 S.E.2d 59 (W. Va. 1943).

In *Burdette*, the pertinent part of the reservation read, “[E]xcepting and reserving from this grant all coal, iron, and minerals.” See generally, Andrew S. Graham, Esquire, *The Title Examination*, in WEST VIRGINIA CONTINUING LEGAL EDUCATION PRESENTS: MARCELLUS SHALE IN WEST VIRGINIA 26-27 (2011). The Court in *Burdette* held that, the use of the words “coal” and “iron” were not adjectives used to describe or limit the term “minerals”, but rather were examples of minerals with no qualification thereof. The decision of the Court hinged on the use of punctuation and sentence structure. The grantor in *Burdette* followed the terms “coal” and “iron” with commas to indicate that they were used as examples rather than limiting terms. See, Graham, at 27.

In *Bruen*, the Court reached a different conclusion, while still basing the analysis on the syntax, or placement of the punctuation. The pertinent portion of the reservation in *Bruen* contained the language, “all the coal and iron minerals.” The grantor omitted any punctuation after the terms “coal” and “iron” in the reservation clause. The Court held that the reservation was effective only in regard to the “coal and iron minerals”. The Court based their holding on the fact the terms “coal” and “iron” were not separated from the

term “minerals” in any way, and therefore were used as adjectives to describe the type of minerals reserved, rather than as examples of minerals.

From this Court’s holdings in Burdette and Bruen it is well-established law that naming one mineral does not lead to the conclusion that all minerals are included when dealing with conveyances, reservations, or exceptions. Therefore, the limiting language of “oil” or “oil royalty” must be applied and the outcome being a minimum conveyance or reservation of an interest in the oil only, specifically the oil royalty. (A.R. 55-56).

IV. THE CIRCUIT COURT ERRED IN HOLDING THAT THE LANGUAGE PERTAINING TO OIL ROYALTY MEANT THE OIL AND GAS IN PLACE

A circuit court’s entry of Summary Judgment shall be reviewed de novo. Painter v. Peavy, 451 S.E.2d 755 (W.Va. 1994).

The issue addressed in this assignment of error was not directly before the circuit court as the underlying civil action dealt with the validity of an attempt to vest an interest in real property in strangers in title. However, the Defendants, Respondents herein, briefly addressed this issue through their position that the deed mentioned oil and gas, and the Circuit Court briefly addressed the position in the Circuit Court’s Order for Partial Summary Judgment in footnote 3, on page 4 as well as page 11. (A.R. 211, 218).

The language in question reads as follows:

It is expressly understood and agreed, that in case oil is found and produced in paying quantities from said land hereby conveyed that the following named children and heirs at law of Z.T. Jones, now deceased shall have own and possess the usual one-eighth (1/8) thereof or what is commonly known as royalty, jointly and in common, and that said royalty shall be owned and held in common by said heirs, to-wit:

Flora B. Lamp, A. Fulton Jones, Emma C. McCullough, Mary D. Jones, William P. Jones, Vesta Nichols and L. Oliver Jones, grantee herein, share and share alike to them their heirs and

assigns; But the said L. Oliver Jones shall have the exclusive right to make execute and deliver all such oil and gas leases upon said lands and to receive all rentals and bonuses on account of said leasing in his own right without having to account in any manner to his co-owners in said royalty.

And it is further expressly agreed by and between the said first and second part hereto that the said Cordelia A. Jones grantee, shall have the right to occupy use and enjoy said premises hereby conveyed for herself only for and during the term of her natural life, is she elects so to do, or such portions thereof as she may wish, but when not so used and occupied by said Cordelia A. Jones the said L. Oliver Jones, shall have the exclusive right to full and complete possession thereof, or such parts of the same as may not be at any time occupied by said Cordelia A. Jones, but all the rents, issues and profits of the same shall belong to the said L. Oliver Jones, except such portions thereof as produced and consumed by said party of the first part, while occupying the same as aforesaid, but all the rest and residue of the proceeds of said farm, except the oil production as hereinbefore provided for shall be the property of the said L. Oliver Jones in his own individual right. (A.R. 8-56).

In WILLIAMS AND MEYERS OIL AND GAS LAW (3rd ed. Abridged 2007), the leading commentators on oil and gas law present three categories of interests in oil and gas: (1) the “mineral interest”; (2) the “royalty interest”; and (3) the “nonexecutive mineral interest.” The owner of the mineral interest has the right to sell all or part of his interest, the right to explore for and develop the minerals himself, the right to execute oil and gas leases to third parties who will, in turn, explore for and develop the minerals and the right to receive bonus, rentals and royalties from such development. The distinction between the “royalty interest” and the “nonexecutive mineral interest” is determined by the right that the individual has to receive bonuses or rentals under a valid lease. The royalty interest owner only has the right to production royalty. Royalty is defined as, “a share of the product or the proceeds therefrom, reserved to the owner for permitting another to use the property.” *Id.*

Although the Court has discretion in interpreting deeds of conveyance, specifically regarding the distinction between royalty and minerals in place, “[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.” *Syl. Pt. 4, Zimmerer, et. al. v. Romano, et. al.*, 679 S.E.2d 601, (W.Va. 2009)(quoting, *Syl. Pt. 1, Sally-Mike Properties v. Yokum*, 332 S.E.2d 597 (W.Va. 1985)(quoting, *Syl. Pt. 1, Cotiga Develop. Co. v. United Fuel Gas Co.*, 128 S.E.2d 626 (W.Va. 1963). “Courts uniformly determine that process should override intent when evidence of intent concerns conflicting terms revealed by...an integrated unambiguous contract.” *Id.* The public interest issue in interpreting ambiguous terms to a conveyance or contract is encompassed by the desire to balance the right of freedom of contract with a well-established and maintained policy of interpretation. Creating a bright-line rule for the interpretation of contracts and conveyances serves to prejudice society by requiring them to conform to a court mandated process or structure that encroaches on a grantor’s Constitutional right to alienability of property and freedom of contract. *See generally*, INTERPRETING OIL AND GAS INSTRUMENTS, at 2.

The false analytical tool of ‘ambiguity’ is...one of the many tautological platitudes that masquerade as analysis in the interpretive process. The use of surrounding circumstances evidence, as it relates to the historical context of the transaction in which the instrument was created, is...frequently overlooked, but potentially determinative, adjunct to any interpretive process that seeks the intent of the parties at the time the conveyance or contract was created. *Id.*, at 3.

There is no room for the judicial interpretation in the present case as the Subject Deed is a valid written instrument which expresses the intent of the parties in plain and unambiguous language. The grantor, Cordelia A. Jones, specifically provided that L.

Oliver Jones shall have the exclusive right to make execute and deliver all such oil and gas leases upon said lands and to receive all rentals and bonuses on account of said leasing in his own right without having to account in any manner to his co-owners in said royalty. The remaining children of Cordelia A. Jones were not to have any ownership interest in the rentals or bonuses, nor were they permitted to participate in the execution of any oil and gas leases encumbering the property. The grantor took great care to clearly provide that L. Oliver Jones was the only party to acquire an interest in the executive interests pertaining to the oil, gas, and minerals or the oil and gas in place. Further, the grantor took steps to limit the interest from which her remaining children were to benefit to the oil only. This is evidenced by the fact that Cordelia A. Jones provided the right to lease for oil and gas to L. Oliver Jones, but went on to state that the remaining were only to share in the monies obtained from oil production. Therefore, the interest, if any, acquired by the children of Cordelia A. Jones, excluding L. Oliver Jones, was specifically limited to the oil royalty.

CONCLUSION

The Circuit Court committed plain error in: (1) holding that the clause pertaining to the heirs of the grantor was not a reservation or exception but rather a conveyance; (2) holding that an interest in real property could pass to a stranger to the deed; (3) holding that the naming of the predominant mineral in a region meant all minerals; and (4) holding that the language pertaining to oil royalty meant the oil and gas in place.

The Circuit Court's order granting partial summary judgment should be reversed and judgment ordered for the Petitioners herein providing that the language dealing with the oil royalty was a reservation, said reservation is void *ab initio* as an invalid reservation

for strangers in title, the mention of oil does not encompass all minerals, and the language pertaining to oil royalty is specifically limited to the oil royalty.

Alternatively, the Circuit Court's order granting partial summary judgment should be reversed, and this matter should be remanded for further proceedings.

Respectfully Submitted:

A handwritten signature in black ink, appearing to read 'M2' followed by a stylized flourish.

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CERTIFICATE OF SERVICE

I, Matthew F. Graves, hereby certify that on the 21st day of August, 2015, true and accurate copies of the foregoing **Petitioner's Amended Brief** were deposited in the United States Mail contained in postage-paid envelopes addressed to all parties to this appeal as follows:

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