IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 19-0527

Bison Interests, LLC,
Defendant Below, Petitioner,

vs.

Appeal from a final order of the
Circuit Court of Harrison County
(Case No. 18-C-271-2)

Antero Resources Corporation,
Plaintiff Below, Respondent,

and

CGAS Properties, L.P.,
Plaintiff Below, Respondent.

BRIEF OF PETITIONER BISON INTERESTS, L.L.C.

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II. STATEMENT OF THE CASE

A. The Litigation of Ownership of the Ash/Clark Leasehold Estates, and Entitlement to the Ash/Clark Overriding Royalty Interests, in Civil Action No. 15-C-124-1 – The 2015 Royalty Case.

March 18, 2015, Bison Interests, LLC, ("Bison"), filed a Complaint, ("the 2015 Royalty Case"), in the Circuit Court of Harrison County, West Virginia seeking, among others, a declaration of Bison and Antero Resources Corporation's, ("AR"), respective rights and obligations with respect to the Clark and Ash Leases/overriding royalty interests. (Appx. 47-54). This case was originally assigned to the Honorable John Lewis Marks, Jr., with the Honorable Christopher J. McCarthy ultimately presiding upon Judge Marks' retirement.

Stepping back, in 2012 AR purchased certain mineral estates, primarily Marcellus shale estates, vested in Bison – including the Clark and Ash Marcellus shale leasehold estates. (Appx. 55-62). Pursuant to this Agreement, in exchange for, among others, the Clark and Ash leases estates, AR was to pay Bison a 6.25% overriding royalty interest in "the oil, gas and hydrocarbons produced and saved under the terms of the Leases [for example the Clark and Ash Leases]. (Id.). Put concisely, Bison conveyed certain mineral assets to AR, mineral assets held by current shallow well production, and AR was to pay Bison substantial up front money ("bonus money") and a percentage, 6.25% gross, from its Marcellus shale operations on the conveyed assets, such as the Ash/Clark interests. (Id.). Part of this process involved AR performing due diligence on the Ash/Clark assets – and the confirmation of Bison's title. (Id.,709, 818, 822). After AR confirmed Bison's title and ownership of, among others, the Ash/Clark leases, to Marcellus shale depths, Bison was paid, in 2012, two-thousand dollars ($2,000.00) per acre for these assets – a total payment of eighty-five thousand dollars ($85,000.00) for the Ash/Clark assets. (Appx. 56-62, 728).

AR's failure to pay the overriding royalties, the 6.25% gross, on, among others, production from the Clark and Ash leases was the genesis of the 2015 Royalty Case. In the 2015 Royalty

Case Bison sought: (1) payment of its overriding royalty; and (2) "a declaration of the parties' respective rights and obligations, historically and prospectively, with respect to the foregoing [the parties contractual relationship and the leases – including the Clark and Ash leases]." (Appx. 53-54). To expand, Bison discovered in late 2014 that AR had drilled certain mineral acreage in early 2012, that AR had failed to disclose this drilling and production activity to Bison, and that AR was holding substantial sums of money from production, the 6.25% gross, owed to Bison. (Appx. 48-49, 208, 209).

May 15, 2015, AR filed its Answer and Counterclaim in the 2015 Royalty Case, pleading: that AR "**has no interest in the ownership of the overriding royalty interest**"; and requesting that the Court "declare the rightful owner of the overriding royalty interest so that Antero can pay future royalties, if any, to said party . . . ." (emphasis added) (Appx. 67-78). Consistent with its judicial representations, AR invited a third party, CGAS Properties, L.P., into the 2015 Royalty Case. (Appx. 80-83). As made clear by AR, CGAS Properties, L.P. was invited into the 2015 Royalty Case because "Antero believes that there is a possibility of a competing overriding royalty interest on one of the leases – being the lease executed by Okey and Clara Clark [the Clark Lease]." (Id.). By its own declaration, AR was fully aware, and in fact desired to, and did, resolve all title issues in the 2015 Royalty Case. (Id.).

Obliging AR's request to litigate all title and payment issues in the 2015 Royalty Case, by Order entered September 2, 2015, CGAS Properties, L.P. became a party – so that all parties could litigate ownership of the Ash/Clark assets in the 2015 Royalty Case. (Appx. 106-107).

Bison's litigation was immediately productive as by September 10, 2015, roughly five (5) months after the filing of the 2015 Royalty Case, AR conceded that Bison was entitled to the Ash overriding royalty payment – and AR paid Bison $104,257.55 of Ash overriding royalty monies.

(Appx. 110-126). It should be noted that a period of forty-five (45) months transpired between initial production on the Ash lease, and eventual payment to Bison – and that AR had no intent to pay Bison, or any other entity such as CGAS Properties, L.P., these owed royalty proceeds without litigation. (Id.).

Given that other assets, for example the Clark overriding royalty, remained in dispute the 2015 Royalty Case continued towards trial. Indeed, by February 12, 2016, AR still had not paid Bison for the Clark acreage – as AR contended, different from the Ash overriding royalty, that a dispute existed with CGAS Properties, L.P. as to the Clark monies – a dispute which would be "resolved" in the 2015 Royalty Case. (Appx. 128).

March 22, 2016, Bison filed its First Amended Complaint in the 2015 Royalty Case – challenging AR's calculation of Bison's overriding royalty payments. (Appx. 130-142). Most basically, Bison's First Amended Complaint alleged that AR was paying itself a higher price than it was paying Bison – as AR had developed a complex hedging scheme whereby AR was depriving royalty owners and overriding royalty owners such as Bison from the true value of their mineral assets and interests. (Id.). AR's position, in actively asserting a Counterclaim in the 2015 Royalty Case, remained consistent: **AR again stated that it was an impartial and unbiased stakeholder in requesting that the Court "declare the rightful owner of the overriding royalty interest so that Antero can pay future royalties . . . .**" (emphasis added) (Appx. 166-167).

August 18, 2016, Mark F. Harison, the principal manager of Bison, was deposed in the 2015 Royalty Case – and AR and CGAS Properties, L.P. asked Mr. Harison various questions about depth limitations and the overriding royalty interests on the Ash and Clark. (Appx. 170-183).

By Agreed Orders entered August 22, 2016 and May 1, 2017, respectively, the parties declared and confirmed that "CGAS Properties, L.P. "**has no rights in and to overriding royalty**

interest payments from deep mineral right production by Antero Resources Corporation on and under the 900-foot radius of [the Clark and Ash leases]." (emphasis added) (Appx. 185-193).

With ownership of the Ash and Clark assets, and payment of the owing overriding royalty interests, having been litigated, stipulated to and resolved by May 1, 2017, AR and Bison proceeded to litigate claims sounding in breach of contract, breach of fiduciary duty and constructive fraud – associated with AR's hedging royalty price scheme – in the 2015 Royalty Case. (See e.g. Appx. 195-203).

In the 2015 Royalty Case, AR filed various pleadings and made continual and repeated representations to the Court that ownership and overriding royalty issues were fully and finally resolved prior to trial of the 2015 Royalty Case.

For example, on August 15, 2017, AR, in objecting to Bison's Motion to Compel wherein Bison sought to discover certain documents related to the Ash lease title opinion, argued as follows to Judge McCarthy's Court:

> Plaintiff's Motion should be denied because it seeks disclosure of privileged and protected title opinions. **Further, the subject matter of Plaintiff's Motion is moot where the documents requested by Bison involve issues already resolved in this litigation** by entry of the Agreed Order Granting Bison Interests, L.L.C.'s Motion for Partial Summary Judgment as to Certain Relief Sought via Bison Interests, L.L.C.'s Counterclaim regarding the Ash Lease, entered by the Court on May 1, 2017.
>
> Bison's request for all communications between Antero and its counsel regarding the Ash Lease title opinions **is irrelevant to the remaining claims in this litigation**.
>
> The Ash Lease title opinions **go to the point of ownership of the Ash Lease acreage, which was already settled by Agreed Order Granting Bison Interests, L.L.C.'s Motion for Partial Summary Judgment** as to Certain Relief Sought via Bison Interests, L.L.C.'s Counterclaim regarding the Ash Lease, entered by the Court on May 1, 2017.

(emphasis added) (Appx. 195-204).

AR also made it clear to the Court in oral argument on August 17, 2017, that all issues associated with the ownership of the Ash lease, and entitlement to the Ash overriding royalty, were resolved in the 2015 Royalty Case:

> Mr. Lawrence [counsel for AR, stated as follows]:
>
> If we go back to the filing of the complaint then, in March 2015, Cabot intervened -- when I spoke to Mr. Miller, he indicated he thought that with Cabot relinquishing any claims that it had, or CGAS, that Cabot, CGAS were no longer parties. That's why they're not here. **He believes their claims had been resolved through these agreed orders. But back in March 2015, there was a question as to who had priority in interest as to the Marcellus rights that Bison now claims**.
>
> And it's not disputed by the parties, at least with respect to Ash. There was an agreed order submitted to the Court and entered by the Court, on May 1, 2017, where **CGAS acknowledged that Bison did in fact own the Marcellus rights at the bottom of their drill boreholes. So that issue was clarified**. And that was the second order. There was an earlier order [as to Clark] entered with respect to one of the other leases. **Payments were released upon entry of that order**.
>
> **And I liken the first issue that was presented in Bison's complaint, the original complaint, not the amended complaint, but the original complaint, in March 2015, was quiet title declare that Bison has superior right and interest in the Marcellus at the bottom of this borehole**.
>
> So I liken it to a block of Swiss cheese. The cheese not the hole, the cheese was Doran's. That's now Cabot's. So Cabot has an interest in the Marcellus in that block of cheese. **The issue that was presented originally to the Judge, to you, to the Court, was the hole, that what we refer to as a borehole assignment, who owns the Marcellus at the bottom of the borehole**? Does that borehole go all the way through the cheese, through the Marcellus? Such that Bison has an interest in that mineral, or is it depth limited?
>
> **The parties now agree that Bison owns the entire hole in the block of cheese**.
>
> **This case started out as a dispute as to who owns the Marcellus in that hole. That dispute's been resolved. And we assert in the response that the title issues surrounding Ash are moot**.
>
> **I'm not sure how the titles or any of those issues are even relevant to the instant dispute, because that -- that title is no longer at issue**.

(emphasis added) (Appx. 224-229).

Consistent with AR's unlimited and unrestricted judicial admissions of resolution of the Ash/Clark title dispute, on or about August 29, 2017, AR issued a check to Bison in the amount of $206,221.37 for funds from production, in part, on the Ash/Clark assets. (Appx. 227).

As trial approached in the 2015 Royalty Case, AR encouraged Bison to deposit checks related to production from the Ash and Clark acreage, with Alvyn A. Schopp, AR's Chief Administrative Office, admitting that such checks "represent Antero's payment of overriding royalty amounts not disputed by either party." (emphasis added) (Appx. 279). To be clear, these payments were for production from, among others, the Ash and Clark tracts. (Appx. 284-285).

B. Trial of the 2015 Royalty Case – and Notable Post-Trial Events.

March 26, 2018, the 2015 Royalty Case came on for trial before the jury and the Honorable Christopher J. McCarthy. (Appx. 294). As noted in AR's Pre-Trial Memorandum, the issues tried were: [1] whether AR breached its contract with Bison by paying Bison overriding royalty payments based on amounts received from production, rather than amounts realized from Antero's financial hedging strategies; [2] whether AR breached its contract with Bison by inadvertently omitting Bison from its weekly drilling report circulation; [3] whether AR breached any fiduciary duties owed to Bison; [4] whether AR's representation constituted constructive fraud; and [5] damages, if any. (Appx. 290). **Unequivocally, AR knew, as it had in fact admitted, that ownership and undisputed payment issues associated with the Ash/Clark mineral estates were resolved prior to trial in the 2015 Royalty Case**.

At trial, in the opening statements, the very issue now before this Court was discussed. During the opening statement AR, through counsel and after an initial objection from Bison, admitted and conceded, yet again, to the Court that AR "completely agree[d]" that: (1) the court had ruled on this issue [the issue of ownership of the Ash/Clark deep mineral interests]; and (2)

that it was improper to suggest to the jury in Civil Action No. 15-C-124-1 that there's a question as to who owns the Ash/Clark deep mineral interests. (Appx. 843-844). Indeed, the court even noted in the 2015 Royalty Case, at trial, that the question as to ownership of the deep mineral rights had been resolved. (Appx. 844).

Nonetheless, during the 2015 Royalty Case trial AR repeatedly, over objection from Bison, attempted to inject the Ash/Clark ownership issues to confuse the jury. For example, in AR's cross-examination of Mr. Harison, Bison's managing member, AR repeatedly badgered Mr. Harison with out of context questions about the Ash/Clark interests and potential depth limitations – despite AR's prior knowledge and admission(s) that Bison owned and was entitled to payment of the Ash/Clark overriding royalty. (Appx. 584-588). AR's primary defense at trial was an attempt to confuse the jury with previously resolved title issues. (Id.). Specifically, AR asked Mr. Harison, at trial in the 2015 Royalty Case, just as AR had in Mr. Harison's deposition in the 2015 Royalty Case, questions about depth limitations, and Mr. Harison answered honestly – acknowledging that one of the drilling agreements does in fact contain a depth limitation for Pennsylvania wells – no specific question was asked as to West Virginia depth limitations. (Id.).

At the conclusion of a five-day trial, which involved the admission of over one hundred (100) exhibits and multiple witnesses presented by both sides, the jury found that AR breached its contract with Bison – a contract which plainly included the Ash and Clark assets. (Appx. 297-299, 143-150). Put bluntly, the jury concluded that Bison was entitled to payment on the Ash and Clark overriding royalty/interests – otherwise the jury would have returned a defense verdict. (Id.).

AR ultimately satisfied the jury's verdict by payment of $55,375.63, plus post-judgment interest, again confirming, just as the jury had, Bison's entitlement to payment of an overriding royalty on the Ash and Clark mineral acreage – and neither party filed an appeal. (Appx. 302).

Moreover, as the Partial Judgment Order accurately notes, AR solely presented defenses, not claims, in the 2015 Royalty Case. (Appx. 294).

On two occasions after the verdict was rendered in the 2015 Royalty Case, AR filed pleadings in the Northern District of West Virginia, in separate and distinct litigation wherein both Bison and AR were parties, confirming that the jury acknowledged and accepted that Bison possessed valid overriding royalty interests in AR's Marcellus Shale production on the Ash and Clark radius lease acreage. To clarify, Bison Resources Corporation, a separate entity from Bison, filed a separate suit against AR, which was ultimately removed to the Northern District of West Virginia, wherein rights of first refusal to drill were litigated relative to, among others, the Ash/Clark assets.

In AR's own federal judicial filings describing the verdict in the 2015 Royalty Case,

> Simply put, BILLC **represented and the Court in the State Court Action** [the 2015 Royalty Case] **accepted that BILLC has an overriding royalty interest in Antero's production on the Subject Leases** [which include Ash/Clark], which allowed BILLC to recover damages from Antero based on a breach of contract claim under the Assignment, Bill of Sale and Conveyance.

(emphasis added) (Appx. 320). Again, on May 11, 2018, AR accurately summarized the verdict in the 2015 Royalty Case, in a federal pleading, as follows:

> Stated another way, the jury [in the 2015 Royalty Case] **accepted BILLC's . . . position that it is entitled to an overriding royalty interest by virtue of the Assignment, Bill of Sale and Conveyance of Marcellus rights to Antero as part of its disposition of the breach of contract claim as well**.

(emphasis added) (Appx. 335).

Post-trial of the 2015 Royalty Case, specifically on May 15, 2018, AR filed a Combined Motion for Declaratory Judgment – seeking to contradict AR's prior admissions and the jury's finding in the 2015 Royalty Case. (Appx. 452). To be clear, dissatisfied with the jury's affirmation of Bison's entitlement to proceeds of the Ash/Clark production and the outcome of the 2015

Royalty Case AR sought to undo its prior admissions, and the jury's finding of breach of contract/affirmation of Bison's entitlement to an overriding royalty interest from the Ash/Clark mineral acreage, by requesting that the Court define the parties' rights in relation to the Ash and Clark overriding royalties. (Id.).

Incredulously, AR's filing as to this issue was made less than five (5) days after AR represented in the Northern District of West Virginia that the jury "accepted BILLC's . . . position that it is entitled to an overriding royalty interest by virtue of the Assignment, Bill of Sale and Conveyance of Marcellus rights to Antero." (Appx. 335). Very simply, AR injected a post-trial red herring in conflict with AR's prior admissions and concessions into the 2015 Royalty Case.

By Order entered July 20, 2018, Judge McCarthy issued a ten (10) page Memorandum Opinion and Order thoroughly addressing the proper (and plead/tried) post-trial issues which were before the Court. (Appx. 452-461). Contained within the Order, as an afterthought, is Footnote 2, which is a summary denial of AR's improper attempt to relitigate an issue previously adjudicated in the 2015 Royalty Case – an issue which the Court acknowledged was resolved prior to trial during opening statements in the 2015 Royalty Case. Footnote 2 of the Memorandum Opinion and Order is the lone provision which addresses this issue:

> Antero also urges this Court to interpret the terms of the agreements between Bison and CGAS Properties, L.P., and their respective predecessors in interest, to determine Bison's entitlement to royalties on Marcellus Shale production by Antero from the Ash and Clark Leases. Third parties to a contract between two private citizens generally cannot sue to obtain a declaration as to validity of such a contract or to raise questions as to its construction. See 55-13-2, but see Shobe v. Latimer, 1979, 253 S.E.2d 54, 162 W.Va. 779. Further, in the instant case, one of the parties, CGAS Properties, L.P., whose entitlement under the agreement would be directly affected, is no longer a party to this case and, thus, would not have the opportunity to be heard on this issue. The Court, therefore, declines to address this issue in the instant action.

(Appx. 456, 843-844).

C. The 2018 Royalty Case – AR's Attempt to Relitigate the Ash/Clark Overriding Royalty Interests.

November 5, 2018, AR filed the instant civil action, ("the 2018 Royalty Case"), in the Circuit Court of Harrison County, West Virginia. The 2018 Royalty Case Complaint is the pleading at the heart of this appeal. (Appx. 1-14).

The 2018 Royalty Case was assigned to the Honorable Thomas A. Bedell. In its Complaint, AR raised one (1) count for declaratory judgment and seeks a declaration that "Bison is not entitled to overriding royalties arising from the 2012 Assignment in Antero's production of the Marcellus shale depths from the Clark Lease and Ash Lease within the 900 foot radii of the Clark Well and Ash Well because Bison's leasehold rights in the Clark Lease and Ash Lease do not, and never did, include the Marcellus Shale." (Appx. 13-14).

In response to AR's incredulous filing and allegations and in light of the admissions set forth above, Bison promptly moved to dismiss the action, or alternatively for summary judgment, based upon the doctrines of *res judicata*, collateral estoppel and judicial estoppel. (Appx. 15-36). Following additional briefing of the parties, and without oral argument, the trial court erroneously entered an Order Granting Antero Resources Corporation's Motion for Summary Judgment. (Appx. 752-781).

Bison timely filed a Notice of Appeal concerning the Circuit Court's summary judgment order.

D. The Substantive Issue – The Ash/Clark Lease Language, the Governing Turnkey Drilling Agreement Language – and the Absence of a Depth Limitation/Grant of "All" Depths to Bison's Predecessor in Title.

On or about October 25, 1978, Okey Clark, Clara B. Clark (his wife) and Ruby V. Sadler leased their interest in approximately one-hundred (100) acres of oil and gas to Doran & Associates, Inc. (Appx. 692-700). Similarly, on or about December 21, 1978, Hazel D. Ash and

Opal Ash (his wife) leased approximately twenty-six (26) acres of oil and gas to Doran & Associates, Inc. (Appx. 692-700). **The underlying Clark and Ash Leases do not contain depth limitations or restrictions – and this issue is undisputed**. (emphasis added) (Appx. 634-637).

Near the time of acquisition of the Ash/Clark leases from the mineral owners, Doran & Associates, Inc. and LaMaur Development Corporation (LaMaur Development Corporation is a predecessor in title to Bison) were actively entering into Turnkey Drilling Agreements for the development/drilling of oil and gas assets throughout West Virginia and Pennsylvania. (Appx. 639-678). The drilling prospects and programs were designed so that Bison's predecessor would be vested with the entire mineral leasehold, to the center of the earth, under each well drilled, for a 900-foot radius of the borehole of each shallow West Virginia well – the acreage which Bison ultimately conveyed to AR in 2012. (Id.).

Bison's predecessor was assigned the mineral leasehold estates for the Ash and Clark assets by Warranty Deeds of Assignment. (Appx. 680-683, 702-705). The Warranty Deeds of Assignment for the Ash/Clark leasehold conveyances to Bison's predecessor do not contain: (1) a depth limitation; or (2) a depth restriction. (Id.). Stated differently, the lone documents which were recorded to put the world on notice, in 1979, of the nature of the leasehold estate vested in Bison's predecessor were: (1) unlimited; (2) unrestricted; and (3) were grants of record which vested in Bison's predecessor the leasehold estates to the center of the earth. (Appx. 680-683, 702-705).

Returning to Turnkey Drilling Agreements, as to both the Ash and Clark interests, the Operator (Doran & Associates, Inc.), was to procure "drilling sites" for the benefit of Bison's predecessor in title, LaMaur Development Corporation. (Appx. 639, 660).

Per the Turnkey Drilling Agreements, the terms "drilling site" or "drilling location" are defined terms that "shall include the right to the oil and gas in place, reserves in ground, as well as

the right to all oil and gas production from such drilling site or location, together with location of well site to be drilled and to develop this well site for and on behalf of developer . . . ." (Appx. 639, 660).

As made clear above, as part of this working relationship Bison's predecessor was assigned the "entire interest in such well site or well location and the surrounding protective acreage." (Appx. 640, 661).

More specifically, Clause 1.3 of the Turnkey Drilling Agreements sets a minimum interest that was required to be conveyed by the Operator (Doran & Associates, Inc.) to Bison's predecessor in interest as to the Ash/Clark mineral assets:

> Operator [Doran & Associates, Inc.] agrees that any well site or location, drilling and producing right, farm-out agreement or lease acquired for or on behalf of Developer [LaMaur Development Corporation] for the purpose of this Agreement shall provide that Developer shall be entitled to be assigned and **shall be assigned not less than 81.25% of all oil and gas reserves in place**, **to a depth through the Benson Sands Horizon**, on the subject acreage and produced by any well drilled on such location or site.
>
> Operator agrees that any well site or location, drilling and producing right, farm-out agreement or lease acquired for or on behalf of Developer for the purpose of this Agreement shall provide that Developer shall be entitled to be assigned and **shall be assigned not less than 81.25% of all oil and gas reserves in place**, to a depth through the Bradford Kane sand, **but not to exceed 4,000 feet with regard to the Pennsylvania wells**[1], and **through the Benson Sand Horizons with regard to West Virginia wells**, on the subject acreage and produced by any well drilled on such location or site.

(emphasis added) (Appx. 641, 662).[2]

Speaking further, Clause 2.1 of the Turnkey Drilling Agreements provides that "Operator [Doran & Associates, Inc.] agrees to assign and transfer by general warranty deed to Developer

[1] Perhaps the depth limitation as to the Pennsylvania wells was the source of the Circuit Court of Harrison County's confusion.

[2] These provisions are contained in the Article titled "Acquisition of Properties" within the Turnkey Drilling Agreement. Article IV of each Turnkey Drilling Agreement is the "Assignment" Article and does not contain a depth limitation or restriction.

[LaMaur Development Corporation] **all right, title and interest it has to any and all oil and gas reserves and production as to any locations upon which a well is to be drilled . . . .**" (emphasis added) (Appx. 642, 663).

Again, to be clear, at this time Doran & Associates, Inc., by virtue of the Ash/Clark leases, was vested with the entire working/leasehold interest in the Ash Lease – without depth restriction or limitation – and this is not disputed.

Perhaps most telling, Article IV, Section 4.2 of the Turnkey Drilling Agreement is titled "**Assignment**" and provides that "Operator [Doran & Associates, Inc.] agrees that it shall assign and transfer to Developer [LaMaur Development Corporation – Bison's predecessor] by written instrument of reconveyance **all right, title and interest to the drilling site under an agreement of general warranty.**" (emphasis added) (Appx. 650-651, 671).

Consistent with the foregoing, by Warranty Deeds of Assignment dated June 21, 1979, and October 25, 1978, respectively, Doran & Associates, Inc. assigned unto LaMaur Development Corporation the "entire working interest, to the oil and gas reserves in, and production from, that portion of the oil and gas lease to be used for the well site, and within a radius of 900 feet of the borehole, together with such protective acreage as is described in the Turnkey Drilling Agreement" as to the Ash/Clark Leases. (Appx. 680-683, 702-705).

Ultimately, as indicated above, the Ash Lease acreage was contained in Drilling Prospect 1979 – No. 2 and the Clark Lease was contained in Drilling Prospect 1979 – No. 3 – which were intentionally created for the purpose of developing shallow mineral rights in West Virginia. (Appx. 639-678).

More specifically, Bison's predecessor farmed out those portions of the Ash and Clark mineral leasehold estate(s) which were being developed in 1979, after Bison's

predecessor in title was vested with the entire mineral leasehold estate to the center of the earth by Doran & Associates, Inc. unlimited leasehold assignment, through depth limited assignments to the drilling partnerships – Drilling Prospect 1979 – No. 2 & No. 3. (Appx. 264-271).

Unequivocally, the subsequent assignments of assets into the drilling partnerships contained depth limitations which provided that the assignments into the drilling partnerships were only for assets "down to and including a depth of 4,0000 feet or the base of the Benson Sand, whichever shall be deeper, and within a radius of 900 feet of the borehole of such well . . . ." (Appx. 590-598). Stated differently, Bison's predecessor reserved the deep rights and only assigned the working interest of the wellbore after acquiring the Ash/Clark assets to the earth's center. Indeed, such a reservation and depth limitation would have been unnecessary if Bison's predecessor had merely obtained a depth limited conveyance of the Ash and Clark leasehold estates. (Appx. 264-271).[3]

III. SUMMARY OF ARGUMENT

Each year, this Court faces difficult legal questions that require it to review complex issues and decide between two reasonably plausible interpretations of West Virginia law in rendering its decision. Often this Court must balance powerful interests and legal theories and analysis in doing so. The matter at bar before the Court, however, does not present such a challenge.

First, in this action AR is without question seeking a second bite at the litigation apple. AR is asserting claims in its Complaint which were previously litigated, or which AR could have litigated, in the 2015 Royalty Case – a case fully adjudicated to a jury. Clearly, AR's attempt to re-litigate the 2015 Royalty Case is prohibited by *res judicata*.

[3] Bison provides these facts for completeness and calls the Court's attention to Syl. Pt. 2, Gwinn v. Rogers, 92 W.Va. 533 (1922) (stating that "parol evidence [for example subsequent, extrinsic assignments in the chain of title] cannot be admitted to vary, contradict, add to or explain the terms of a complete and unambiguous written lease, by proving that the agreement of the parties was different from what it appears upon the face of the lease.").

Under West Virginia law, three (3) elements are required to establish res judicata: (1) a final adjudication on the merits in the prior action by a court having jurisdiction; (2) the two actions must involve either the same parties or persons in privity with those same parties; and (3) the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved in the prior action.

All three (3) elements required to establish *res judicata* are satisfied in this action. The 2015 Royalty Case, litigated for three (3) years and tried as a five (5) day jury trial, constitutes an adjudication on the merits. As to the second element, the claims brought herein involve the same parties involved in the 2015 Royalty Case. And, with respect to the third element, the 2018 Royalty Case is based on the same cause of action and underlying facts as the 2015 Royalty Case. Indeed, Bison and AR fully litigated and resolved the Ash and Clark lease issues, and overriding royalty interest dispute, in the 2015 Royalty Case – and this reality was repeatedly affirmed by AR's admissions, declarations, and post-verdict filings in the Northern District of West Virginia.

Second, the elements of collateral estoppel are firmly established in this matter. AR admits and concedes that the Ash/Clark ownership, and overriding royalty issues were resolved in the 2015 Royalty Case; substantial funds and resources were used to finally adjudicate the 2015 Royalty Case in a trial in the Circuit Court of Harrison County, West Virginia; the parties, as well as the substantive issues, were identical in the 2015 Royalty Case; and all parties fully and finally litigated the Ash and Clark overriding royalty dispute in the 2015 Royalty Case – a point repeatedly admitted and conceded by AR both within the active litigation of 2015 Royalty Case and after the jury's verdict in the 2015 Royalty Case. Third, judicial estoppel bars AR from relitigating the issues expressly raised, and resolved, in the 2015 Royalty Case in this action. AR's attempt to play

fast and loose with cavalier descriptions of the 2015 Royalty Case, descriptions contrary to AR's express positions accepted by the Court in the 2015 Royalty Case, should be seen for what they are – footloose litigation tactics not founded in justice or truth-seeking – and this Court should firmly, and swiftly, apply the doctrine of judicial estoppel.

Finally, the Circuit Court's Order should be reversed as application of the four corners doctrine/the plain language doctrine, the certain and definite reservation doctrine, the greatest estate doctrine and the prohibition on extrinsic evidence doctrine lead to the inescapable conclusion that the Ash and Clark Warranty Deeds of Assignment and Turnkey Drillings agreement do not contain a depth limitation or restriction – in fact "all" interests were conveyed to Bison's predecessor – thus Bison is entitled to overriding royalties from AR's Ash/Clark production.

The foregoing, as will be discussed in more detail below, amply demonstrates that the Circuit Court committed error in granting AR's Motion for Summary Judgment and in denying Bison's Motion for Summary Judgment. Accordingly, this Court should reverse the Circuit Court's grant of summary judgment to AR and declare that Bison is entitled to overriding royalties from the Ash and Clark production.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to the criteria set forth in West Virginia Rule of Appellate Procedure 18(a), oral argument is necessary in this case.

Although the facts and arguments are adequately presented in this Brief, the decisional process will be significantly aided by oral argument. Specifically, this case is suitable for Rule 20 oral argument because it involves an issue of fundamental public importance, to wit, the preclusion of claims based upon theories of *res judicata*, collateral estoppel and judicial estoppel when the claims were substantively litigated in prior litigation. Moreover, this case involves fundamental

issues of oil and natural gas instrument construction and application related to mineral depth limitations and restrictions in the Marcellus shale setting, which are issues of first impression.

V. STANDARD OF REVIEW

"Where the issue on an appeal from the circuit court's ruling is clearly a question of law. . . we apply a *de novo* standard of review." Syl. Pt. 1 Chrystal R.M. v. Charlie A.L., 194 W. Va. 138, 459 S.E.2d 415 (1995). Additionally, this Court's review of a summary judgment order is *de novo*. Powderidge Unit Owners Ass'n v. Highland Props., 196 W. Va. 692, 700, 474 S.E.2d 872, 880 (1996).

When reviewing a lower court's decision under a *de novo* standard, no deference is afforded to the lower court's ruling. As stated by this Honorable Court: "[w]hen employing the *de novo* standard of review, we review anew the findings and conclusions of the circuit court, affording no deference to the lower court's ruling." Blake v. Charleston Area Med. Ctr., Inc., 201 W.Va. 469, 475, 498 S.E.2d 41, 47 (1997), citing West Virginia Div. of Env. Protection v. Kingwood Coal Co., 200 W.Va. 734, 745, 490 S.E.2d 823, 834 (1997).

VI. ARGUMENT

A. The Circuit Court Committed Error in Granting AR's Motion for Summary Judgment as the Three (3) Elements Required for Application of *Res Judicata* are Present in this Case.

The doctrine of *res judicata* precludes claims that were or could have been resolved in prior litigation. This Court has observed that the rationale behind *res judicata*:

> preclude[s] parties from contesting matters that they have had a full and fair opportunity to litigate, protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

Conley v. Spillers, 171 W.Va. 584, 588 (1983), quoting Montana v. U.S., 440 U.S. 147, 153-54 (1979); see also, State ex rel. Connellsville By-Product Coal Co. v. Continental Coal Co., 117

W.Va. 447, 449 (1936) (res judicata doctrine intended to prevent a person from being "twice vexed for one and the same cause").

Federal Courts have echoed these sentiments, recognizing that *res judicata* operates "to promote judicial efficiency and foster reliance on adjudications by putting an end to a cause of action once litigated," U.S. v. Tatum, 943 F.2d 370, 381 (4th Cir. 1991), and further, that the preclusive effect of *res judicata* "reflects a variety of concerns, including notions of comity, the need to prevent vexatious litigation, and a desire to conserve judicial resources." Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 84 (1984).

This Court has further explained,

> An adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive not only as to the matters actually determined, but as to every other matter which the parties might have litigated as incident thereto and coming within the legitimate purview of the subject-matter of the action. It is not essential that the matter should have been formally put in issue in the former litigation, but it is sufficient that the status of the suit was such that the parties might have had the matter disposed of on its merits . . . . The same principles apply in case of a court order which records a compromise settlement of a pending action.

(emphasis added) State ex rel. Queen v. Sawyers, 148 W. Va. 130, 135–136, 133 S.E.2d 257, 261 (1963) (emphasis added); see also, Syl. Pt. 1, Conley v. Spillers, 171 W.Va. 584 (1983); Syl. Pt. 3 of Slider v. State Farm Mut. Auto. Ins. Co., 210 W.Va. 476 (2001).

Under West Virginia law,

> Before the prosecution of a lawsuit may be barred on the basis of *res judicata*, three elements must be satisfied. First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.

See Syl. Pt. 3, Beahm v. 7-Eleven, Inc., 223 W. Va. 269, 273, 672 S.E.2d 598, 602 (2008); Syl. Pt. 4, Blake v. Charleston Area Med. Ctr., Inc., 201 W.Va. 469, 498 S.E.2d 41 (1997).

In the context of the third element, "for purposes of *res judicata* or claim preclusion, 'a cause of action' is the fact or facts which establish or give rise to a right of action, the existence of which affords a party a right to judicial relief. The test to determine if the issue or cause of action involved in the two suits is identical is to inquire whether the same evidence would support both actions or issues." Syl. Pt. 3, in part, Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc., 239 W. Va. 549, 803 S.E.2d 519 (2017).

1. The 2015 Royalty Case resulted in a final judgment on the merits.

As outlined above, the 2015 Royalty Case was concluded after a five-day trial, and an appeal was not taken. Accordingly, the first *res judicata* element is unquestionably satisfied as there is no reasonable question but that a final adjudication on the merits occurred. Indeed, as admitted by AR in post-verdict filings in the Northern District of West Virginia wherein AR vividly describes the preclusive effect of the jury's verdict in the 2015 Royalty Case:

> Simply put, BILLC represented and the Court in the State Court Action [the 2015 Royalty Case] **accepted that BILLC has an overriding royalty interest in Antero's production on the Subject Leases** [which include the Ash/Clark lease – the subject of the 2018 Royalty Case], **which allowed BILLC to recover damages from Antero based on a breach of contract claim** under the Assignment, Bill of Sale and Conveyance.

(emphasis added) (Appx. 320).

2. The 2015 Royalty Case and the 2018 Royalty Case involve the same parties.

As reflected by the style of the case, the exact same parties present in the 2015 Royalty Case are present in the 2018 Royalty Case – thus there is no reasonable question but that the second element is satisfied.

3. AR's claims in the 2018 Royalty Case are based upon the same evidence as the claims resolved by the 2015 Royalty Case.

When considering *res judicata* or claim preclusion, West Virginia applies the "same evidence" test which examines whether "the same evidence would support both actions or issues." Syl. Pt. 4, Slider v. State Farm Mut. Auto. Ins. Co., 210 W.Va. 476, 557 S.E.2d 883 (2001).

Unquestionably, the 2015 Royalty Case involved the same evidence which is the subject of the 2018 Royalty Case; namely, ownership of the Ash and Clark radius acreage and entitlement to overriding royalties from production on the Ash and Clark leases.

The subject matter of the 2015 Case is plainly evident from the Complaints filed in the 2015 Royalty Case and the 2018 Royalty Case. Both cases relate to the Ash and Clark mineral estates, and to entitlement to an overriding royalty from production from the Ash/Clark mineral estate. (Appx. 1-14, 47-54). This is further made apparent by a review of AR's admissions and declarations contained in the 2015 Royalty Case record.

As described by AR, the 2015 Royalty Case started as a matter wherein the entitlement to overriding royalties from the Ash/Clark acreage was disputed, and this issue was definitely resolved in the 2015 Royalty Case:

> If we go back to the filing of the complaint then, in March 2015, Cabot intervened -- when I spoke to Mr. Miller, he indicated he thought that with Cabot relinquishing any claims that it had, or CGAS, that Cabot, CGAS were no longer parties. That's why they're not here. He believes their claims had been resolved through these agreed orders. But back in March 2015, there was a question as to who had priority in interest as to the Marcellus rights that Bison now claims.
>
> And it's not disputed by the parties, at least with respect to Ash. There was an agreed order submitted to the Court and entered by the Court, on May 1, 2017, where CGAS acknowledged that Bison did in fact own the Marcellus rights at the bottom of their drill boreholes. So that issue was clarified. And that was the second order. There was an earlier order [as to Clark] entered with respect to one of the other leases. Payments were released upon entry of that order.

> And I liken the first issue that was presented in Bison's complaint, the original complaint, not the amended complaint, but the original complaint, in March 2015, was quiet title declare that Bison has superior right and interest in the Marcellus at the bottom of this borehole.
>
> So I liken it to a block of Swiss cheese. The cheese not the hole, the cheese was Doran's. That's now Cabot's. So Cabot has an interest in the Marcellus in that block of cheese. The issue that was presented originally to the Judge, to you, to the Court, was the hole, that what we refer to as a borehole assignment, who owns the Marcellus at the bottom of the borehole? **Does that borehole go all the way through the cheese, through the Marcellus? Such that Bison has an interest in that mineral, or is it depth limited**?
>
> **The parties now agree that Bison owns the entire hole in the block of cheese**.
>
> **This case started out as a dispute as to who owns the Marcellus in that hole. That dispute's been resolved. And we assert in the response that the title issues surrounding Ash are moot**.
>
> **I'm not sure how the titles or any of those issues are even relevant to the instant dispute, because that -- that title is no longer at issue**.

(emphasis added) (Appx. 224-229).

Moreover, even AR's post-verdict description of the 2015 Royalty Case confirms Bison's position, and satisfaction of the third element of the *res judicata* test:

> Simply put, BILLC represented and **the Court in the State Court Action [the 2015 Royalty Case] accepted that BILLC has an overriding royalty interest in Antero's production on the Subject Leases** [which include the Ash/Clark lease – the subject of the 2018 Royalty Case], **which allowed BILLC to recover damages from Antero based on a breach of contract claim** under the Assignment, Bill of Sale and Conveyance.

(emphasis added) (Appx. 320).

AR has contended that the Court, notwithstanding the jury's verdict in the 2015 Royalty Case, carved out the Ash/Clark dispute via a post-verdict footnote, in the Court's ten (10) page Memorandum Opinion and Order. This assertion is easily disproved by a cursory examination of AR's admissions, and the jury's verdict in the 2015 Royalty Case. Indeed, there is no mystery present here. As admitted by AR, the jury in the 2015 Royalty Case definitively and conclusively

established and accepted that Bison has an overriding royalty interest in Antero's production on the Ash and Clark leases. (Appx. 320, 335).

For whatever perceived strategic reason, AR elected not to appeal the jury's verdict in the 2015 Royalty Case – and AR's omission is not an excuse or justification for this Court to permit such blatant procedural gamesmanship and an attempt to sidestep and undermine the jury's verdict in the 2015 Royalty Case – procedural gamesmanship which directly conflicts with AR's admissions and concessions in the 2015 Royalty Case. Moreover, this Court should uphold the doctrine of *res judicata*, as such action "furthers one of the goals of any system of justice – to avoid piecemeal litigation which cultivates a multiplicity of suits and often results in disparate and unjust verdicts." Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc., 239 W. Va. 549, 562 (2017), citing Charleston Area Medical Ctr., Inc. v. Parke-Davis, 217 W.Va. 15, 21, 614 S.E.2d 15, 22 (2005).

For all of these reasons, the Circuit Court committed error, and this Court should reverse the Circuit Court's grant of summary judgment to AR, and find that *res judicata* clearly bars AR's declaratory judgment claim in the 2018 Royalty Case, as the 2018 Royalty Case is precisely what the doctrine of *res judicata* was designed to preclude.

B. The Circuit Court Committed Error in Granting AR's Motion for Summary Judgment as the Elements Required for Application of Collateral Estoppel are Present in this Case.

"Collateral estoppel is designed to foreclose re-litigation of issues in a second suit which have actually been litigated in the earlier suit even though there may be a difference in the cause of action between the parties of the first and second suit." Syl. Pt. 8 W.Va. DOT v. Veach, 239 W.Va. 1 (2017) citing Syl. Pt. 2, in part, Conley v. Spillers, 171 W. Va. 584, 301 S.E.2d 216 (1983).

As recently summarized by this Court in a Memorandum Decision: "[o]rdinarily, collateral estoppel is relied upon by a defendant to preclude a plaintiff from relitigating an issue that has previously been decided adversely to the plaintiff. 'When the defendant asserts collateral estoppel against the plaintiff, it is termed 'defensive' because the defendant seeks to defend and bar the plaintiff's cause of action by a prior adverse judgment rendered against the plaintiff.' Tri-State Pipeline, Inc. v. Steorts Homebuilders, LLC, 2019 W. Va. LEXIS 214 *6 (2019) (memorandum decision), citing Conley at 591.

Fundamentally, "[c]ollateral estoppel will bar a claim if four conditions are met: (1) The issue previously decided is identical to the one presented in the action in question; (2) there is final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action." Syl. Pt. 9 W.Va. DOT v. Veach, 239 W.Va. 1 (2017) citing Syl. Pt. 1, State v. Miller,194 W. Va. 3, 459 S.E.2d 114 (1995).

1. The issues litigated in the 2015 Royalty Case are identical to the issues presented in the 2018 Royalty Case.

Unquestionably, the 2015 Royalty Case involved the same issues which are the subject of the 2018 Royalty Case; namely, Bison's entitlement to payment of the overriding royalty on the Ash/Clark mineral acreage.

As noted by AR, in the 2015 Royalty Case:

> Simply put, BILLC represented and **the Court in the State Court Action [the 2015 Royalty Case] accepted that BILLC has an overriding royalty interest in Antero's production on the Subject Leases** [which include the Ash/Clark lease – the subject of the 2018 Royalty Case], **which allowed BILLC to recover damages from Antero based on a breach of contract claim under the Assignment, Bill of Sale and Conveyance**.

(emphasis added) (Appx. 320).

Bison was successful in its prosecution of the 2015 Royalty Case as the jury affirmatively, and finally, confirmed that Bison is entitled to overriding royalties from production on the Ash and Clark leases. Fundamentally, the 2018 Royalty Case, and AR's post-trial attempt to resurrect and reverse its admissions and concessions – admissions and concessions confirmed by the jury in the 2015 Royalty case – is disingenuous and is a collateral attack upon the jury's decision – an attack which is wholly inconsistent with the first prong of collateral estoppel.

2. There was a final adjudication on the merits in the 2015 Case concerning ownership and entitlement to the Ash and Clark overriding royalty payments.

Turning to the second element, as outlined above, the 2015 Royalty Case was concluded after a five-day trial, and an appeal was not taken. Further, AR has stated, in post-verdict federal filings, that this issue was resolved on the merits in the 2015 Case. Accordingly, the second element is unquestionably satisfied.

3. The parties in the 2018 Royalty Case are the same as those in the 2015 Royalty Case.

As reflected by the style of the case, the exact same parties present in the 2015 Royalty Case are present in this case. Accordingly, the third collateral estoppel element is clearly satisfied.

4. AR had a full and fair opportunity to litigate, and did litigate, the issues now before this Court in the 2015 Royalty Case.

Unequivocally, the issues asserted in the 2018 Royalty Case were litigated in the 2015 Royalty Case. As admitted by AR, Bison established its entitlement to the overriding royalty interests at issue in the 2015 Royalty Case, as AR itself stated, post-verdict in the 2015 Royalty Case in filings before the Honorable Judge Stamp that the Court in the 2015 Royalty Case:

> **[A]ccepted that BILLC has an overriding royalty interest in Antero's production on the Subject Leases** [which include the Ash/Clark lease – the

> subject of the 2018 Royalty Case], **which allowed BILLC to recover damages from Antero based on a breach of contract claim** under the Assignment, Bill of Sale and Conveyance.

(emphasis added) (Appx. 320).

Second, the parties spent substantial resources, both private and judicial, litigating these issues to conclusion in the 2015 Royalty Case. The trial was five (5) days, the witnesses were numerous, and the issues were fully and fairly presented to the jury – with the jury confirming Bison's entitlement to payment of the Ash and Clark overriding royalty monies. AR cannot legitimately contend that these issues were not fully addressed in the 2015 Royalty Case when the jury rendered its decision – and any such presentation is self-defeating based upon AR's admissions to the Court prior to trial in the 2015 Royalty Case, admissions to the Court during the opening statements of the 2015 Royalty Case, and based upon AR's own post-trial description of the impact of the jury's verdict in the 2015 Royalty Case, as affirming Bison's entitlement to payment of overriding royalties from the Ash and Clark Marcellus shale production.

For all of these reasons, the Circuit Court committed error, and this Court should reverse the Circuit Court's grant of summary judgment to AR, and find that collateral estoppel clearly bars AR's declaratory judgment claim in the 2018 Royalty Case, as the issues raised in the 2018 Royalty Case were actually litigated to conclusion in the 2015 Royalty Case.

C. The Circuit Court Committed Error in Failing to Apply the Doctrine of Judicial Estoppel to Bar the 2018 Royalty Case.

The doctrine of "judicial estoppel is a common law principle which precludes a party from asserting a position in a legal proceeding inconsistent with a position taken by that party in the same or a prior litigation." W.Va. DOH v. Robertson, 217 W.Va. 497, 504-505 (2005); citing In re C.Z.B., 151 S.W.3d 627, 633 (Tex. Ct. App. 2004). Indeed, this Court recognized long ago that:

the doctrine pf judicial estoppel is applied on a case by case basis with the "dual goals [of the doctrine] are to maintain the integrity of the judicial system and to protect parties from opponents' unfair strategies." Id., citing People ex rel. Sneddon v. Torch Energy Servs., Inc., 102 Cal. App. 4th 181, 125 Cal.Rptr.2d 365, 370 (2002).

Stated differently, "the judicial estoppel doctrine generally prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding or the same proceeding. The purpose of the doctrine is to protect the integrity of the judicial process, by prohibiting a party from deliberately changing positions according to the exigencies of the moment. Palmer, et al., Litigation Handbook, § 8(c), at 235; see also Monterey Dev. Corp. v. Lawyer's Title Ins. Corp., 4 F.3d 605, 609 (8th Cir. 1993)

The doctrine of judicial estoppel fulfills its goals by "binding a party to his or her judicial declarations, and precludes [that] party from taking a position inconsistent with previously made declarations in a subsequent action or proceeding." Id., pg. 505, citing Kauffman-Harmon v. Kauffman, 2001 MT 238, 307 Mont. 45, 36 P.3d 408, 412 (Mont. 2001). Importantly, judicial estoppel precludes parties from abandoning admissions and representations previously made to a court. See Monterey Dev. Corp. v. Lawyer's Title Ins. Corp., 4 F.3d 605, 609 (8th Cir.1993) ("Judicial estoppel prevents a person who states facts under oath during the course of a trial from denying those facts in a second suit, even though the parties in the second suit may not be the same as those in the first.")

Under West Virginia law, "judicial estoppel bars a party from re-litigating an issue when: (1) the party assumed a position on the issue that is clearly inconsistent with a position taken in a previous case, or with a position taken earlier in the same case; (2) the positions were taken in proceedings involving the same adverse party; (3) the party taking the inconsistent positions

received some benefit from his/her original position; and (4) the original position misled the adverse party so that allowing the estopped party to change his/her position would injuriously affect the adverse party and the integrity of the judicial process." Syl. Pt. 4, State ex rel. Universal Underwriters Inc. Co. v. Wilson, 825 S.E.2d 95, 2019 W.Va. LEXIS 66 (2019); citing Syl Pt. 2, W.Va. DOH v. Robertson, 217 W.Va. 497 (2005).

Initially, Bison notes that the current matter before this Court is analogous to this Court's recent decision in State ex rel. Universal Underwriters Inc. Co. v. Wilson, 825 S.E.2d 95, 2019 W.Va. LEXIS 66 (2019). In Wilson, the Respondent attempted to utilize deposition testimony of the owner of Dan's Car World, Dan Cava, when Dan's Car World had previously resisted a motion to compel to obtain information, but later Mr. Cava, when it was convenient, decided to provide the previously requested information in the course of litigation – when it benefitted Dan's Car World. Id., pg. 111-112. As noted by this Court in Wilson, in enforcing judicial estoppel, "the judicial process is designed for seeking the truth, not rewarding gamesmanship." Id.

Similar to Wilson, in the 2015 Royalty Case, Bison sought title opinion discovery related to the Ash and Clark mineral interests and overriding royalty payments. AR strongly resisted Bison's attempt to discover this information, arguing as follows:

> Plaintiff's Motion should be denied because it seeks disclosure of privileged and protected title opinions. **Further, the subject matter of Plaintiff's Motion is moot where the documents requested by Bison involve issues already resolved in this litigation by entry of the Agreed Order Granting Bison Interests, L.L.C.'s Motion for Partial Summary Judgment** as to Certain Relief Sought via Bison Interests, L.L.C.'s Counterclaim regarding the Ash Lease, entered by the Court on May 1, 2017. (emphasis added).
>
> Bison's request for all communications between Antero and **its counsel regarding the Ash Lease title opinions is irrelevant** to the remaining claims in this litigation.
>
> The Ash Lease title opinions **go to the point of ownership of the Ash Lease acreage, which was already settled by Agreed Order Granting Bison Interests, L.L.C.'s Motion for Partial Summary Judgment** as to Certain Relief Sought via

> Bison Interests, L.L.C.'s Counterclaim regarding the Ash Lease, entered by the Court on May 1, 2017. (emphasis added).

(emphasis added) (Appx. 224-229).

To sum it up, in the 2015 Royalty Case AR argued to the Court that the title documents, which AR now seeks to have the court construct and interpret in the 2018 Royalty Case were: (1) rendered moot by resolution of the very issue now asserted by AR in the 2018 royalty case; (2) irrelevant to the claims in the 2015 Royalty Case – as the claims as to the Ash and Clark overriding royalty interest were resolved in the 2015 Royalty Case; and (3) that these issues were settled among all parties, including CGAS Properties, L.P., in the 2015 Royalty Case. (Appx. 195-204, 224-229, 320, 335).

Further, AR admitted and conceded as follows to the Court in the 2015 Royalty Action:

> **There was an agreed order submitted to the Court and entered by the Court, on May 1, 2017, where CGAS acknowledged that Bison did in fact own the Marcellus rights at the bottom of their drill boreholes. So that issue was clarified. And that was the second order**. There was an earlier order [as to Clark] entered with respect to one of the other leases. Payments were released upon entry of that order.
>
> And I liken the first issue that was presented in Bison's complaint, the original complaint, not the amended complaint, but the original complaint, in March 2015, was quiet title declare that Bison has superior right and interest in the Marcellus at the bottom of this borehole.
>
> So I liken it to a block of Swiss cheese. The cheese not the hole, the cheese was Doran's. That's now Cabot's. So Cabot has an interest in the Marcellus in that block of cheese. The issue that was presented originally to the Judge, to you, to the Court, was the hole, that what we refer to as a borehole assignment, who owns the Marcellus at the bottom of the borehole? Does that borehole go all the way through the cheese, through the Marcellus? Such that Bison has an interest in that mineral, or is it depth limited?
>
> **The parties now agree that Bison owns the entire hole in the block of cheese**.
>
> **This case started out as a dispute as to who owns the Marcellus in that hole. That dispute's been resolved. And we assert in the response that the title issues surrounding Ash are moot**.

> **I'm not sure how the titles or any of those issues are even relevant to the instant dispute, because that -- that title is no longer at issue**.

(emphasis added) (Appx. 224-229).

Here, just as in Wilson, AR is attempting assume a position inconsistent with its declarations and admissions – admissions well documented in the 2015 Royalty Case. Unequivocally, AR received an obvious benefit from its position – as Bison's Motion to Compel was denied; and AR's one-hundred-eighty-degree change in position in the 2018 Royalty Case injures Bison and undermines the integrity of the judicial process. AR argued, during the 2015 Royalty Case, that it was a good actor as AR ultimately and undisputedly paid Bison the Ash and Clark overriding royalties, and as AR did not dispute these payments and Bison's ownership of the Ash and Clark overriding royalties. Stated succinctly AR represented to the Court in the 2015 Royalty Action that the Ash and Clark overriding royalty issues were resolved. (Id.). Only in hindsight has AR assumed the inconsistent position that the Ash and Clark overriding royalty issue remains in dispute.

Also, of note, AR's attempt to undermine the integrity of the judicial process is further evidenced by its own post-verdict description of the 2015 Royalty Case:

> Simply put, BILLC represented **and the Court in the State Court Action [the 2015 Royalty Case] accepted that BILLC has an overriding royalty interest in Antero's production on the Subject Leases** [which include the Ash/Clark lease – the subject of the 2018 Royalty Case], which allowed BILLC to recover damages from Antero based on a breach of contract claim under the Assignment, Bill of Sale and Conveyance.

(emphasis added) (Appx. 320, 335).

For all of these reasons, the Circuit Court committed error, and this Court should reverse the Circuit Court's grant of summary judgment to AR and find that judicial estoppel clearly bars AR's declaratory judgment claim in the 2018 Royalty Case. The 2018 Royalty Case challenges

the integrity of the judicial process wherein AR has deliberately reversed its position from the 2015 Royalty Case to the 2018 Royalty Case – in an ill-advised attempt to challenge the resolution of the Ash and Clark royalty dispute in the 2015 Royalty Case. See also W.Va. DOH v. Robertson, 217 W.Va. at 507, citing In re Estate of Law, 869 So. 2d 1027, 1030 (Miss. 2004) (stating that "[t]he judicial system of this State is not designed to promote "footloose" tactics by litigants that lead to "gotcha" justice. . . Truth is the foundation of our system. 'Without [it], our system would be a complete farce and cease to dispense justice.' ").

D. The Circuit Court Committed Error as the Circuit Court Violated Multiple Principles of Mineral Deed Interpretation and Construction – and in so doing Created a Depth Limitation or Restriction in the Ash and Clark Warranty Deeds of Assignments and Turnkey Drilling Agreements – When No Such Depth Limitations or Restrictions are Present.

i. A Fair Application of the Four Corners Doctrine Leads to the Conclusion That Bison is Entitled to an Overriding Royalty from the Ash and Clark Production – Consistent with the Past, Undisputed Payments made by AR to Bison and the Plain Language of the Ash/Clark Turnkey Drilling Agreements and Warranty Deeds of Assignments.

As noted by this Court, "[i]n construing a deed, will, or other written instrument, it is the duty of the court to construe it as a whole, taking and considering all parts together, and giving effect to the intention of the parties wherever that is reasonably clear and free from doubt; unless to do so will violate some principle of law inconsistent therewith. Syl. Pt. 1, Maddy v. Maddy, 87 W. Va. 581, 105 S.E. 803 (1921); accord, Syl. Pt. 5, Faith United Methodist Church and Cemetery v. Morgan, 231 W. Va. 423, 745 S.E.2d 461 (2013). Indeed, "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. 1, Cotiga Development Co. v. United Fuel Gas Co., 147 W. Va. 484, 128 S.E.2d 626 (1962); see also Syl. Pt. 1, Bennett v. Dove, 166 W. Va. 772, 277 S.E.2d 617 (1981).

Here, the Warranty Deeds of Assignment[4] for the Ash and Clark leasehold mineral interests do not contain a depth limitation or restriction. (Appx. 680-683, 702-705). Indeed, the record is clear (and it is undisputed) that no document was ever recorded which contained an express depth limitation or reservation. (Appx. 680-683, 692-700, 702-705). The Circuit Court held that the following, unrecorded language creates a depth limitation or reservation as to the Ash/Clark 1979 Warranty Deeds of Assignment, respectively, language which is found in the Ash and Clark Turnkey Drilling Agreements:

> Operator [Doran & Associates, Inc.] agrees that any well site or location, drilling and producing right, farm-out agreement or lease acquired for or on behalf of Developer [LaMaur Development Corporation] for the purpose of this Agreement shall provide that Developer **shall be entitled to be assigned and shall be assigned not less than 81.25% of all oil and gas reserves in place, to a depth through the Benson Sands Horizon**, on the subject acreage and produced by any well drilled on such location or site.[5]
>
> Operator agrees that any well site or location, drilling and producing right, farm-out agreement or lease acquired for or on behalf of Developer for the purpose of this Agreement shall provide that Developer **shall be entitled to be assigned and shall be assigned not less than 81.25% of all oil and gas reserves in place, to a depth through the Bradford Kane sand, but not to exceed 4,000 feet with regard to the Pennsylvania wells, and through the Benson Sand Horizons with regard to West Virginia wells**, on the subject acreage and produced by any well drilled on such location or site."

(emphasis added) (Appx. 641, 662).

Initially, it is clear that the Circuit Court misconstrued the plain language set forth in the afore-noted provisions. Fundamentally, the clauses set forth above do not contain words of limitation as to the West Virginia mineral leasehold assets. Instead, the Turnkey Drilling

[4] Notably, these are not Partial Assignments, or Warranty Deeds of Partial Assignments of the Ash/Clark assets.
[5] Bison submits that if such language is confirmed by this Court as a valid depth limitation it will cause an immediate and substantial/negative impact on mineral title – given that common sense, and the plain language, indicates that this is clearly not a depth limitation or restriction.

Agreements plainly provide that Bison's predecessor, as to West Virginia acreage, was to be assigned not less than a minimum mineral interest through the Bensons Sand Horizons horizon.

Indeed, the Turnkey Drilling Agreements as to the Ash and Clark acreage are clear: Bison's predecessor was to be assigned, per the Article of the Turnkey Drilling Agreements titled "Assignment": "**all right, title and interest to the drilling site under an agreement of general warranty**" – not a depth limited or restricted Ash/Clark mineral asset. (emphasis added) (Appx. 650-651, 671). Further, the following language "**not less than 81.25% of the working interest . . . to a depth . . . through the Benson Sands Horizons**" is self-defining. (Appx. 641, 662). Put plainly, this language is not a vertical depth restriction or limitation – but is rather a minimum guarantee of leasehold acreage to be conveyed to Bison's predecessor. One need only look at the Pennsylvania well restriction – which provides that Bison's predecessor was not to be conveyed depth beyond 4,000 feet, to draw this meaningful distinction.

Indeed, "[t]he words 'not less than' mean 'at least ' " – and are not words of limitation as mistakenly held by the Circuit Court. Miller v. Rodd, 285 Pa. 16, 21 (1925) citing Commonwealth ex rel. Miller & Sons v. Brown, 210 Pa. 29, 34 (1904). Thus, the language contained in the Turnkey Drilling Agreements, expressly, cannot be applied as a certain and definite restriction to bar Bison's entitlement to the Ash and Clark overriding royalties – as such a construction flies in the face of the express language of the Turnkey Drilling Agreements, which clearly expresses an intent that Bison's predecessor be vested with the entire ("all"), unlimited West Virginia radius leasehold estates.

Bison directs the Court's attention to multiple decisions which interpret criminal sentencing statutes – which read to the effect that a party shall be sentenced to "not less than" a fixed penal term. As repeatedly noted by criminal courts, the clear meaning of the words "not less

than" "fix a minimum but clearly imply that more may be imposed." United States v. Greene, 510 F.Supp. 128 (E.D. Pa. 1981); see also McCutcheon v. Cox, 71 N.M. 274, 377P.2d 6783(1962) (stating "[s]uch a construction is contrary to the clear meaning of the words 'not less than'. These words fix a minimum but clearly imply that more may be imposed. If ten years was intended to be the maximum sentence, the words 'not less than' would have no meaning and no doubt would not have been included.").

This Court, as the Circuit Court did not do, must examine the foregoing "not less than" language in the entire context of the Ash and Clark Turnkey Drilling Agreements. Stated succinctly, Bison's predecessor was to be conveyed all of the mineral estate, as to West Virginia mineral acreage, which Doran & Associates, Inc. acquired from the original lessors – the Ash family and the Clark Family. Speaking further, Doran & Associates, Inc. acquired unrestricted mineral leases from the Ash and Clark families – for Bison's predecessor to drill and develop.

Per express provisions of the Turnkey Drilling Agreements, Doran & Associates, Inc. was required to, and did, convey a non-depth limited or restricted mineral estate to Bison's predecessor consistent with the following language contained in the Turnkey Drilling Agreements as to the Ash/Clark acreage:

- Operator agrees to assign unto Bison's predecessor "**Operator's entire interest in such well site or well location and the surrounding protective acreage**." (Appx. 642, 663).[6]

- "Operator [Doran & Associates, Inc.] agrees to assign and transfer by general warranty deed to Developer [LaMaur Development Corporation – Bison's predecessor] **all right, title and interest it has to any and all oil and gas reserves and production as to any locations upon which a well is to be drilled** . . . ." (emphasis added) (Appx. 640, 661).

[6] Notably, Doran & Associates, Inc. does not retain any rights to drill or operate through the absolute and unlimited mineral acreage assigned to Bison's predecessor – which would be customary if the Warranty Deeds of Assignment were in fact partial assignments or depth restricted assignments as any subsequent Operator would need such rights to develop deep mineral rights/assets.

- Article IV of the Drilling Prospect 1979 – No. 2 Turnkey Drilling Agreement is titled "Assignment" and provides that "Operator [Doran & Associates, Inc.] agrees that it shall, within the time provided in Paragraph 2.1, assign and transfer to Developer [LaMaur Development Corporation – Bison's predecessor] by written instrument of reconveyance **all right, title and interest to the drilling site under an agreement of general warranty**." (emphasis added) (Appx. 650-651, 671).

- Finally, per the Warranty Deeds of Assignment, Bison's predecessor was conveyed: [the] "**entire working interest, to the oil and gas reserves in, and production from, that portion of the oil and gas lease to be used for the well site, and within a radius of 900 feet of the borehole**, together with such protective acreage as is described in the Turnkey Drilling Agreement" as to the Ash/Clark Leases. (Appx. 680-683, 702-705).

The Circuit Court's analysis and conclusions are wholly devoid of any explanation or rationalization of the foregoing language, fail to harmonize the language "entire working interest" and "all right, title and interest" with the "not less than" express language above, and further simply ignore AR's past, undisputed payments to Bison.

For these reasons, the Circuit Court committed error, and this Court should reverse the Circuit Court's grant of summary judgment to AR, and declare that Bison is entitled to overriding royalties from the Ash and Clark production as no depth limitation or restriction exists within the Turnkey Drilling Agreements and Warranty Deeds of Assignments for the Ash/Clark assets.

ii. A Fair Application of the Certain and Definite Reservation Doctrine Leads to the Conclusion That Bison is Entitled to an Overriding Royalty from the Ash and Clark Production – Consistent with the Plain Language of the Ash/Clark Turnkey Drilling Agreements and Warranty Deeds of Assignments.

Per this Court, "in order to create an exception or reservation in a deed which would reduce a grant in a conveyance clause which is clear, correct and conventional, such exception or reservation must be expressed in certain and definite language." (emphasis added) Syl. Pt. 2, DWG Oil & Gas Acquisitions, LLC v. Southern County Farms, Inc., 238 W.Va. 414, 796 S.E.2d 201 (2017); citing Syl. Pt. 2 Hall v. Hartley, 146 W. Va. 328, 119 S.E.2d 759 (1961). Stated differently,

"[a]n exception in a deed conveying land must describe the thing excepted with legal certainty, so as to be ascertained, else the thing sought to be excepted will pass to the grantee." Syl. Pt. 2 of Harding v. Jennings, 68 W.Va. 354, 70 S.E. 1 (1910).

In the mineral rights context, "[a] reservation of minerals to be effective must be by clear language. Courts do not favor reservations by implication." Sharp v. Fowler, 151 Tex. 490, 252 S.W.2d 153, 154 (Tex. 1952); see also Monroe v. Scott, 707 S.W.2d 132, 133 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.); see also Ladd v. Dubose, 344 S.W.2d 476, 479 (Tex. Civ. App.—Amarillo 1961, no writ) (stating that a reservation of mineral interests must be in clear language); see also Commerce Trust Co. v. Lyon, 284 S.W.2d 920, 921 (Tex. Civ. App.—Fort Worth 1955, no writ) (stating that to be effective reservation of minerals "must be by clear language").

Perhaps more importantly, "[d]eed reservations are strictly construed against a grantor and in favor of a grantee." Syl. Pt. 4, Poulos v. LBR Holdings, 238 W.Va. 89, 792 S.E.2d 588 (2016); citing Syl. Pt. 2, McDonough Co. v. E.I. DuPont DeNemours & Co., Inc., 167 W. Va. 611, 280 S.E. 2d 246 (1981).

Here, the plain language contained in the Warranty Deeds of Assignment and the Turnkey Drilling Agreements does not contain a depth limitation or restriction as to the Ash and Clark assets, as the Circuit Court erroneously concluded and as Bison notes above the language clearly provides that Bison was to be assigned "**not less than 81.25% of the working interest . . . to a depth . . . through the Benson Sands Horizons**" and the Assignment language provides that Bison's predecessor was vested with "**all right, title and interest to the drilling site under an agreement of general warranty**." (emphasis added) (Appx. 641, 662, 650-651, 671). This is clear error.

The language contained in the Turnkey Drilling Agreements cannot be applied as a certain and definite restriction to bar Bison's entitlement to "all" the Ash and Clark assets. West Virginia law requires that this language be construed against the grantor [Doran & Associates, Inc] and in favor of Bison – and the generally accepted standard is that depth reservations must be clear, concise and definite. See e.g. Fowler, 151 Tex. 490. Viewed through this lens, the language in the Ash/Clark Turnkey Drilling Agreements utterly fails as a depth limitation or restriction. The language does not contain, as to West Virginia mineral acreage such as Ash/Clark: (1) a well log reference which limits depth; (2) reference to a mineral formation base which limits depth; (3) a wellbore limitation or restriction, which limits depths conveyed to the bottom or total depth of a drilled well or series of wells. Stated differently, the language "**not less than 81.25% of the working interest . . . to a depth . . . through the Benson Sands Horizons**" cannot be a limitation or depth restriction as it lacks certainty and definiteness – requirements for a mineral reservation such as a depth limitation – especially where the Assignment language provides for a conveyance of "all" of the drilling site assets (without limitation or restriction) to Bison's predecessor.[7]

For these reasons, the Circuit Court committed error, and this Court should reverse the Circuit Court's grant of summary judgment to AR, and declare that Bison is entitled to overriding royalties from the Ash and Clark production as no depth limitation or restriction exists within the Turnkey Drilling Agreements and Warranty Deeds of Assignments for the Ash/Clark assets.

iii. Application of the Greatest Estate Doctrine Leads to the Conclusion That Bison is Entitled to an Overriding Royalty from the Ash and Clark Production.

In West Virginia, an assignment of a mineral interest passes the whole mineral estate or

[7] For the Court's reference, an example of an actual deepest producing formation limitation/restriction, taken from American Association Petroleum Landman Form 635 is as follows: mineral rights assigned are "limited to the interval from the surface down to and including, but not below, the base of the deepest producing formation in the earning well." AAPL Form 635. No such certain restrictions or limitations are present in the instant case.

interest of the grantor unless a deed of assignment shows a contrary intention. West Virginia Code § 36-1-11 embodies this theory, commonly called the greatest estate doctrine:

> When any real property is conveyed or devised to any person, and no words of limitation are used in the conveyance or devise, such conveyance or devise shall be construed to pass the fee simple, or the whole estate or interest, legal or equitable, which the testator or grantor had power to dispose of, in such real property, unless a contrary intention shall appear in the conveyance or will.

Avery v. Moore, 150 W. Va. 136, 144 S.E.2d 434 (1965). Additionally, the burden of proving that a lesser estate was conveyed or devised is placed upon the party, in this case AR, asserting that the mineral estates, the Ash/Clark assignments, were less than fee simple assignments. Seifert v. Sanders, 178 W.Va. 214, 217, 358 S.E.2d 775 (1987).

As summarized by Bruce M. Kramer, a noted oil and gas scholar: "[t]he canon of conveyance of the greatest estate provides that the instrument should be construed to confer to the grantee the largest estate that the terms of the instrument will permit. Bruce M. Kramer, The Sisyphean Task of Interpreting Mineral Deeds and Leases: An Encyclopedia of Canons of Construction, 24 Tex. Tech L. Rev. 1, 117-24 (1993).

In the context of mineral rights litigation, courts have often used the greatest estate canon to support findings that when the grantor refers to "phantom" reserved interests, the grantee receives the largest estate possible under the terms of the deed or mineral assignment. See, e.g., Sharp v. Fowler, 248 S.W.2d 322, 324 (Tex. Civ. App.—Texarkana), aff'd, 151 Tex. 490, 252 S.W.2d 153 (1952).

Viewed through this lens, the Ash/Clark Turnkey Drilling Agreements and Warranty Deeds of Assignment do not independently create a mineral depth limitations or restrictions which impacts Bison's entitlement to overriding royalty interests. Rather, West Virginia law is clear that the creation of a fee estate via the assignments at issue is clearly favored – and the Turnkey Drilling

Agreements must be analyzed within this existing, statutory mandate. Once this required statutory analysis is completed, the inescapable conclusion is that Bison obtained what was originally leased from the Ashes and Clarks – all, unlimited depth mineral rights and assets.

Again, any suggestion that words of limitation are present also fails, as the words "not less than" are simply not words of limitation, but are rather simply words setting a minimum, not a maximum of the actual depths conveyed to Bison. See supra United States v. Greene, 510 F.Supp. 128 (E.D. Pa. 1981); see also McCutcheon v. Cox, 71 N.M. 274, 377P.2d 6783(1962). For these reasons, the Circuit Court committed error, and this Court should reverse the Circuit Court's grant of summary judgment to AR, and declare that Bison is entitled to overriding royalties from the Ash and Clark production as no depth limitation or restriction exists within the Turnkey Drilling Agreements and Warranty Deeds of Assignments for the Ash/Clark assets.

iv. The Circuit Court Erred by Relying on Parol or Extrinsic Evidence to Construe the Warranty Deeds of Assignments and Turnkey Drilling Agreements – as a Circuit Court Cannot Expressly Rely on Extrinsic Evidence to Construe a Document Once a Court Declares Contracts to be Unambiguous.

The Circuit Court found that Bison's entitlement to overriding royalties on the Ash and Clark acreage "are depth limited by the unambiguous (i.e. plain) language contained in both the referenced and incorporated Turnkey Drilling Agreements with each Warranty Deed of Assignment by and between Doran and LaMaur that respectively included the Clark Lease and Ash Lease and which were further appurtenant to such Leases' subsequent conveyances and assignments in their respective chain of title that ultimately included Antero." (Appx. 772-774). In making this ruling, the Circuit Court expressly relied upon evidence extrinsic to the Turnkey Drilling Agreements and the Warranty Deeds of Assignment. Specifically, the Circuit Court stated that it relied upon the selected testimony of Mr. Harison from the 2015 Royalty Action – and on the Circuit Court's analysis of subsequent conveyances and assignments made by Bison's

predecessors in interest, which were intentionally depth limited predicated upon the drilling program, as set forth in the Statement of the Case. (Id.).

As this Court has stated, "[e]xtrinsic evidence will not be admitted to explain or alter the terms of a written contract which is clear and unambiguous." Syl. Pt. 6, Faith United, citing Syl. Pt. 9, Paxton v. Benedum-Trees Oil Co., 80 W.Va. 187, 94 S.E. 472 (1917). The Circuit Court's finding is fundamentally flawed. To expand, West Virginia law simply does not allow a court to declare a document unambiguous and plain, (in this case the Circuit Court declared two series of documents unambiguous), and then allow a court to reach a conclusion which relies, expressly, on documents and testimony extrinsic to the contracts being examined by the Court. For these reasons, the Circuit Court committed error, and this Court should reverse the Circuit Court's grant of summary judgment to AR, and declare that Bison is entitled to overriding royalties from the Ash and Clark production as no depth limitation or restriction exists within the Turnkey Drilling Agreements and Warranty Deeds of Assignments for the Ash/Clark assets.[8]

VII. CONCLUSION

Petitioner respectfully requests that this Court reverse the grant of summary judgment entered by the Circuit Court of Harrison County and in so doing; confirm and declare that Bison is entitled (as it historically has been) to be paid a 6.25% overriding royalty interest from all mineral production by AR, or its successors/assigns, on the Ash/Clark mineral acreage conveyed by Bison to AR in 2012; confirm and declare that the Turnkey Drilling Agreements and Warranty Deeds of Assignments for the Ash/Clark assets do not contain a depth limitation or restriction; and award Bison such further relief which the Court deems appropriate.

[8] Alternatively, this Court should remand this issue to the Circuit Court with the directive that the Turnkey Drilling Agreements and Warranty Deeds of Assignment are ambiguous, and the parties should actively litigate these issues.