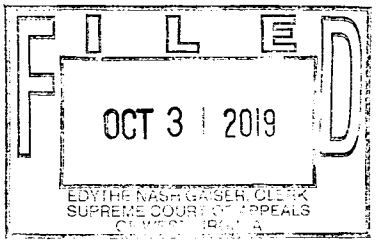
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 19-0527



BISON INTERESTS, LLC,

Defendant Below, Petitioner,

v.

ANTERO RESOURCES CORPORATION and
CGAS PROPERTIES, LP,

Plaintiffs Below,[1] *Respondents.*

BRIEF OF RESPONDENT ANTERO RESOURCES CORPORATION

W. Henry Lawrence (W. Va. Bar #2156)
Ancil G. Ramey (W. Va. Bar #3013)
Justin A. Rubenstein (W. Va. Bar #9974)
Shaina L. Richardson (W. Va. Bar #12685)
STEPTOE & JOHNSON PLLC
400 White Oaks Boulevard
Bridgeport, WV 26330
Telephone (304) 933-8000
Facsimile (304) 933-8183
hank.lawrence@steptoe-johnson.com
ancil.ramey@steptoe-johnson.com
justin.rubenstein@steptoe-johnson.com
shaina.richardson@steptoe-johnson.com

Counsel for Antero Resources Corporation

[1] CGAS Properties, LP, although a respondent on appeal, was named as a defendant below. App. 5.

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I. INTRODUCTION

In the law, as in life, the simplest answer is often correct. Petitioner Bison Interests, LLC ("Bison"), by misstating the law and obfuscating the facts, repaints the ruling below as needlessly relitigating an issue that had been resolved in prior litigation. But the Court in the prior litigation expressly declined to rule on the issue Antero had raised, making this lawsuit necessary.

In 2015, Bison sued Antero Resources Corporation ("Antero") over a royalty dispute (the "Prior Litigation"). After a jury trial, Bison prevailed on only one of its six claims. Antero then sought a declaratory judgment that Bison was not entitled to overriding royalty payments for gas produced by Antero from the Marcellus Shale formation underlying the 900-foot radii of two particular shallow vertical wells, the Ash and Clark Wells.[2] The Circuit Court declined to rule on the issue, explaining that it would be unfair to do without a necessary party, CGAS Properties, L.P. ("CGAS").

Antero was left with no choice but to file suit, naming both Bison and CGAS as defendants. The Circuit Court ruled in Antero's favor, declaring as a matter of law that Bison is not entitled to overriding royalties below the Benson Sand Horizons underlying the 900-foot radii of the Ash and Clark Wells. Bison now seeks to negate Antero's victory on the merits by relying on several estoppel doctrines, claiming that the Circuit Court in the Prior Litigation had already ruled on the same issue—notwithstanding its express statement to the contrary. Bison's contention is meritless.

The instant lawsuit is not barred by *res judicata* or collateral estoppel because there was never a final adjudication in the Prior Litigation of the issue presented here. Bison is not

[2] Ash Well No. 1 (API No. 4703302090) on the Ash Lease; Clark Well No. 1 (API No. 4701702357) on the Clark Lease.

entitled to judicial estoppel because Antero did not take a clearly inconsistent position in the Prior Litigation. On the merits, the Circuit Court correctly ruled that Bison's interest in overriding royalties from the Ash and Clark Wells is depth limited. This Court should therefore uphold the thorough, well-reasoned opinion of the Circuit Court.

II. STATEMENT OF THE CASE

A. The 2012 Assignment and Bison's Chain of Title.

The Prior Litigation stemmed from a 2012 Assignment from Bison to Antero.[3] Beginning in 2010, Antero negotiated with Bison's Manager, Mark Harison, to purchase certain leasehold rights. App. 358–59, 375–76. Those negotiations bore fruit in March 2012, when Bison and Antero agreed to an Assignment, Bill of Sale and Conveyance (the "2012 Assignment").[4] App. 491. In the 2012 Assignment, Antero received Bison's right, title, and interest in thirteen leases, including the Clark and Ash Leases.[5] App. 491–98. Bison retained certain wellbore interests and an overriding royalty interest. App. 491–92. Bison's leasehold interests were limited to a 900-foot radius around the wellbores, including the Ash and Clark Wells. App. 498.[6] Antero entered the properties conveyed in the 2012 Assignment, drilled horizontal wells into the

[3] The crux of the Prior Litigation was Antero's method of calculating Bison's overriding royalties. Bison alleged that its overriding royalties should be based on the price realized after Antero had engaged in hedging activities. App. 454–55. Antero argued—and the Circuit Court ultimately ruled—that Bison's overriding royalty was to be calculated on the MMBtu value of the unprocessed gas at the wellhead. App. 452, 455.

[4] The 2012 Assignment was between Antero and Bison Associates, L.L.C., another Bison entity controlled by Harison. *See* App. 491. Bison Associates, L.L.C. subsequently assigned its rights to overriding royalties under the 2012 Assignment to petitioner Bison. *Cf.* App. 358.

[5] The Ash Lease is dated December 21, 1978, and is of record with the Clerk of the County Commission of Harrison County at Deed Book 1075, Page 203. *See* App. 500. The Clark Lease is dated October 25, 1978, and is of record with the Clerk of the County Commission of Doddridge County at Lease Book 105, Page 536. *See* App. 505.

[6] In addition to the assignment of the Ash and Clark Leases from Bison, Antero took assignments of the right to produce the Marcellus Shale for the Ash Lease from CGAS and for the Clark Lease from CNX Gas Company LLC, because at most Bison only had interests in the 900-foot radii of the Ash and Clark Wells. App. 10, ¶¶ 27–28.

Marcellus Shale formation located below the Ash and Clark wellbores, and began producing natural gas. App. 476. If Bison's interest were depth limited to the oil and gas formations above the Marcellus Shale formation, Bison had no right to an overriding royalty payment for gas produced by Antero's wells in the Marcellus Shale formation.

Bison had acquired its interest in the Ash and Clark Leases through a series of conveyances. In 1978, Hazel and Opal Ash and Okey and Clara Clark executed oil and gas leases with Doran & Associates ("Doran"). App. 500, 505. In 1979, Doran conveyed to LaMaur Development Corporation ("LaMaur"), through a series of warranty deeds of assignment, working interests in previously drilled boreholes on mineral leases, including the Ash and Clark Leases.[7] App. 510, 515. LaMaur then conveyed its interest in the Ash and Clark Leases to certain limited partnerships in order to drill wells. App. 590, 595, 725. In 1995, those limited partnerships assigned their right, title, and interest in the Ash and Clark Leases to Bison Resources Corporation. App. 9. In 1996, Bison Resources Corporation assigned its right, title, and interest in the Ash and Clark Leases to several people, including Harison, who then assigned the same to Bison Associates, L.L.C. App. 9. Bison Associates, L.L.C. then assigned its right, title, and interest in the Ash and Clark Leases to Antero. App. 491.

Initially unbeknownst to Antero, Bison's interest in the Ash and Clark Leases was defined by unrecorded operating agreements, turnkey drilling agreements, and farm-out agreements, at least some of which contained depth-limiting language. Prior to entering into the 2012 Assignment, Harison had provided a sample turnkey drilling agreement to Antero as representative of all such turnkey drilling agreements. *See* App. 561–82, 585. But the sample agreement did not include a depth limitation. App. 563–82, 587–88.

[7] As discussed *infra*, these warranty deeds of assignment incorporated by reference certain turnkey drilling agreements and operating agreements between Doran and LaMaur. App. 765–66.

During the Prior Litigation, Antero discovered that certain of the Doran–LaMaur conveyances, including the Ash and Clark Leases, were subject to unrecorded turnkey drilling agreements that contained depth limitations. App. 585–88, 800. These turnkey drilling agreements for the Ash and Clark Leases specified, *inter alia*, that LaMaur (and hence Bison) was only entitled to oil and gas reserves "to a depth through the Benson Sand Horizons." App. 522; *see also* App. 542.

B. The Prior Litigation.[8]

Over four years ago, on March 23, 2015, Bison commenced the Prior Litigation, No. 15-C-124-1, in the Circuit Court of Harrison County.[9] App. 47. Bison alleged that Antero had failed to pay Bison a 6.25% overriding royalty interest to which Bison was entitled under the 2012 Assignment. App. 49. The original complaint alleged claims for breach of contract, breach of fiduciary duty, unjust enrichment, an accounting, and declaratory relief.[10] App. 50–53.

Less than two months later, Antero filed its answer and counterclaim. App. 67. Antero advised that CGAS may hold a competing interest in the royalties claimed by Bison and requested the Court to declare title to the leases. *See, e.g.*, App. 69, 73. Antero had no reason to believe that it had any interest in the ownership of Bison's overriding royalty. App. 794; *see* App. 75–76, ¶ 12. Antero advised CGAS of the possibility that it and Bison had competing interests in overriding royalties. App. 80–83. As discussed *supra*, during discovery Bison turned over all of

[8] In addition to the relevant Prior Litigation, Bison repeatedly references federal-court litigation that another Bison entity, Bison Resources Corporation, filed against Antero regarding rights of first refusal on, *inter alia*, the Ash and Clark Leases. App. 473, 476. The legal issues in the federal litigation are largely irrelevant to the instant case. The district court ultimately granted Antero's motion for summary judgment, dismissed Bison Resources' claims, granted Antero's counterclaim for declaratory judgment, and declared that Antero owns the rights to the Marcellus depths in the Ash and Clark Leases free and clear of the rights of first refusal asserted by Bison Resources. App. 488.

[9] The Honorable John Lewis Marks, Jr. presided over the Prior Litigation until his retirement, at which point the Honorable Christopher J. McCarthy was assigned the case. App. 107, 452.

[10] In March 2016, Bison filed an amended complaint that added a claim for constructive fraud. App. 139. This was the operative pleading at the time of trial.

the turnkey drilling agreements relevant to the Ash and Clark Leases, which revealed the depth limitation. App. 585–88, 800.

CGAS moved to intervene in the Prior Litigation and, in September 2015, the Circuit Court granted the motion to intervene. App. 106–07. Bison then moved for partial summary judgment against CGAS, seeking a judicial declaration that CGAS had no overriding royalty interest below the Benson Sand depths of the Ash and Clark Wells. App. 185, 190. Instead of continuing to litigate these issues, Bison and CGAS reached a series of agreements; they agreed that CGAS has no right to overriding royalty payments on production below the Benson Sand on and under the 900-foot radii of the Ash and Clark Wells. App. 185, 190. Bison and CGAS also agreed that Bison has no right to overriding royalty payments for gas produced from minerals located outside of the 900-foot radii of the Ash and Clark Wells. App. 186, 191. The agreed orders did not establish either party's entitlement to an overriding royalty payment; instead, the orders provided that neither Bison nor CGAS claimed a competing interest to the other's claimed acreage. App. 768, ¶ 15. In November 2017, Bison and CGAS resolved all issues between them and entered into an agreed consent order memorializing their settlement. App. 464–68. That same day, the Court dismissed CGAS from the case. App. 768, ¶ 16.

Bison abandoned its unjust enrichment and accounting claims at the summary judgment stage and reserved the issue of whether it was entitled to a declaratory judgment until after trial. App. 289 n.1. In March 2018, the case proceeded to a jury trial on Bison's remaining claims against Antero: breach of contract, breach of fiduciary duty, and constructive fraud. App. 769, ¶ 19. The jury returned a verdict in favor of Bison as to the breach of contract claim and in favor of Antero as to the breach of fiduciary duty and constructive fraud claims. App. 297–99; App. 769, ¶ 19. The jury awarded Bison limited damages in the amount of $55,375.63. App. 298.

Bison filed two post-trial motions, both of which were denied. App. 452–61. Antero also filed a post-trial motion for declaratory judgment, asking the Court to determine Bison's lack of entitlement to overriding royalties for gas produced by Antero from the Marcellus Shale formation underlying the 900-foot radii of the Ash and Clark Wells. App. 455 n.2. The Court declined to address Antero's request for declaratory relief, explaining that it could not do so because CGAS was no longer a defendant:

> [I]n the instant case, one of the parties, CGAS Properties, L.P., whose entitlement under the agreements would be directly affected, is no longer a party to this case and, thus, would not have the opportunity to be heard on the issue. The Court, therefore, declines to address this issue in the instant action.

App. 455 n.2. Antero was thus forced to seek relief in a separate suit.

C. The Instant Litigation.

In November 2018, Antero filed the instant litigation, No. 18-C-271-2, in the Circuit Court of Harrison County.[11] App. 5. Antero sought a declaratory judgment to resolve the question left open in the Prior Litigation—was Bison's interest in overriding royalties in the Ash and Clark Leases limited to production from formations above the Marcellus Shale formation? *See* App. 5. Antero named both Bison and CGAS as defendants. App. 5.

Bison immediately moved to dismiss or for summary judgment. App. 15. Bison claimed that Antero's declaratory judgment action was barred by the doctrines of *res judicata*, collateral estoppel, and judicial estoppel because it had previously conceded that Bison owned the rights to the Marcellus Shale formation underlying the 900-foot radii of the Ash and Clark Wells. App. 19.

[11] The Honorable Thomas A. Bedell presided over the instant litigation. App. 752.

CGAS answered the complaint, reiterating that it had previously agreed that it was not entitled to overriding royalties for mineral production from formations below the Benson Sand underlying the 900-foot radii of the Ash and Clark Wells. App. 350–51. CGAS explained that it took no position as to whether Bison was entitled to such royalties. App. 350–51.

Antero moved for summary judgment, seeking a declaration that Bison is not entitled to overriding royalties on production from the Marcellus Shale formation of the Ash and Clark Leases. App. 427. Antero contended that the turnkey drilling agreements—which were incorporated by reference into the warranty deeds of assignment—clearly limited Bison's interest to the Benson Sand. App. 437–42. Antero also opposed Bison's motion, arguing that *res judicata*, collateral estoppel, and judicial estoppel were inapplicable because the Circuit Court in the Prior Litigation had expressly declined to rule on Antero's request for a declaratory judgment limiting Bison's interest in overriding royalties to shallow depths. App. 442–48. Bison opposed Antero's motion for summary judgment, arguing that the language in the turnkey drilling agreements referred to a minimum interest conveyed by Doran to LaMaur, not a depth limitation. App. 621.

CGAS responded to both Bison and Antero's motions. App. 612. CGAS explained that it had executed the agreed orders with Bison in the Prior Litigation as a matter of cost avoidance. App. 614–15. As it had in its answer to Antero's complaint, CGAS reiterated that it made no representations as to whether Bison was entitled to overriding royalties in production from the Marcellus Shale depths underlying the 900-foot radii of the Ash and Clark Wells. App. 615. CGAS again disclaimed any interest in such royalties and asked to be dismissed from the case. App. 615.

On May 8, 2019, the Circuit Court entered a final order granting Antero's motion for summary judgment, denying Bison's motion to dismiss or for summary judgment, and

dismissing CGAS from the case. App. 752. The Circuit Court ruled in Antero's favor, declaring as a matter of law that Bison has no overriding royalty interest in Antero's production from the Marcellus Shale formation underlying the 900-foot radii of the Ash and Clark Wells. App. 772, ¶ 31. The Circuit Court reasoned that the warranty deeds of assignment between Doran and LaMaur were subject to the turnkey drilling agreements. App. 765–66, ¶¶ 4–8. The turnkey drilling agreements unambiguously limited Bison's interests to the Benson Sand Horizons and not into the lower Marcellus Shale formation. App. 766, ¶¶ 9–10; App. 772–73, ¶ 33.

The Circuit Court rejected Bison's claim that its entitlement to overriding royalties for production from formations below the Benson Sand had been adjudicated in the Prior Litigation. App. 773–74, ¶ 35. The Circuit Court found that the court in the Prior Litigation had "expressly declined to rule on Antero's motion for declaratory action without having CGAS a present party litigant for purposes of stating any interest and/or position as to overriding royalty interests, if any, pertaining to Antero's production from Marcellus Shale depths below the 900-foot radii of the well borehole for Clark #1 Well and Ash #1 Well respectively under the Ash and Clark Leases as presently assigned to Antero." App. 770, ¶ 22. The Circuit Court thus held that *res judicata*, collateral estoppel, and judicial estoppel did not bar Antero's suit. App. 776–77, ¶¶ 42, 44.

Bison timely appealed on June 5, 2019.[12]

[12] On May 24, 2019, Bison moved for relief from the judgment pursuant to West Virginia Rule of Civil Procedure 60(b). App. 782. That motion remains pending in the Circuit Court. A Rule 60(b) motion "exist[s] concurrently with and independently of the remedy of appeal" and thus "does not affect the appealability of a final judgment." Syl. Pt. 2, *Parkway Fuel Serv., Inc. v. Pauley*, 159 W. Va. 216, 216, 220 S.E.2d 439, 440 (1975).

III. SUMMARY OF THE ARGUMENT

This Court should reject Bison's attempt to invoke *res judicata* and collateral estoppel because the Court in the Prior Litigation expressly declined to rule on the issue Antero raises here. *See* Syl. Pt. 2, *Nickey v. Grittner*, 171 W. Va. 35, 36, 297 S.E.2d 441, 442 (1982) (per curiam) ("An issue held to be not properly before the court and left expressly undetermined, may be raised in further proceedings between the parties."). Bison is not entitled to judicial estoppel because Antero's position here is not clearly inconsistent with the position it assumed in the Prior Litigation. To the extent Antero shifted positions during the Prior Litigation, it was in response to Bison representing that the turnkey drilling agreements did not contain depth limitations—only to later admit that the agreements did contain such limitations.

Procedural obstacles aside, Bison also loses on the merits. As the Circuit Court properly held, the warranty deeds of assignment incorporate by reference the turnkey drilling agreements, which contain an unambiguous depth limitation. App. 772–73, ¶¶ 31–34. Bison is thus not entitled to overriding royalties for Antero's production of gas from the Marcellus Shale formation underlying the 900-foot radii of the Ash and Clark Wells.

Bison's arguments to the contrary—the four corners doctrine, the certain and definite reservation doctrine, the greatest estate doctrine, and the parol evidence rule—either support Antero's position or are inapposite. The Circuit Court did not violate the four corners doctrine by considering the turnkey drilling agreements. It is axiomatic that recorded instruments, such as the warranty deeds of assignment, may incorporate by reference unrecorded instruments, such as the turnkey drilling agreements. *See Roane Cty. Bank v. Phillips*, 124 W. Va. 720, 22 S.E.2d 291, 293 (1942). The Circuit Court's ruling also did not run afoul of the certain and definite reservation doctrine because "the required certainty and definition is not derived solely from the face of the deed." *Belcher v. Powers*, 212 W. Va. 418, 425, 573 S.E.2d 12, 19 (2002) (per curiam).

As such, the undoubtedly certain and definite reservation contained in the turnkey drilling agreements is binding on Bison. Similarly, the Circuit Court's ruling did not violate the greatest estate doctrine because the relevant documents contain "words of limitation" evidencing the intent to include a depth limitation. *See* W. Va. Code § 36-1-11. Finally, Bison has waived its parol-evidence argument. Even if this Court considers the issue, Bison is not entitled to relief because the Circuit Court did not rely on parol evidence. This Court should therefore uphold the well-reasoned opinion of the Circuit Court.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary because Bison's appeal lacks merit. *See* W. Va. R. App. P. 18(a)(2). Moreover, as Bison readily admits, the facts and legal arguments in this appeal are adequately presented in the briefs and record, *see* Pet'r's Br. 17, and the decisional process would not be significantly aided by oral argument. *See* W. Va. R. App. P. 18(a)(4). If the Court deems oral argument to be necessary, a Rule 19 argument is appropriate because Bison's appeal involves assignments of error in the application of settled law. W. Va. R. App. P. 19(a). If the Court holds a Rule 19 argument, a memorandum decision is appropriate.

V. STANDARDS OF DECISION AND REVIEW

A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W. Va. R. Civ. P. 56(c). Summary judgment is appropriate when, based on "the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. Pt. 2, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 56, 459 S.E.2d 329, 333 (1995).

When the movant "makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party." *Id.* at Syl. Pt. 3, 194 W. Va. at 56, 459 S.E.2d at 333. At that point, the nonmovant "must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary. . . ." *Id.* The nonmoving party must offer "more than a mere scintilla of evidence and must produce evidence sufficient for a reasonable jury to find in [the] nonmoving party's favor." *Id.* at 60, 459 S.E.2d at 337 (internal quotation marks omitted). "Summary judgment cannot be defeated on the basis of factual assertions contained in the brief of" the nonmoving party. Syl. Pt. 3, *Guthrie v. Nw. Mut. Life Ins. Co.*, 158 W. Va. 1, 1, 208 S.E.2d 60, 61 (1974).

This Court reviews the circuit court's entry of summary judgment *de novo*. *Williams*, 194 W. Va. at 58, 459 S.E.2d at 335. As such, this Court "appl[ies] the same standard as a circuit court." *Id.* This Court is "not wed . . . to the lower court's rationale, but may rule on any alternate ground manifest in the record." *Conrad v. ARA Szabo*, 198 W. Va. 362, 369, 480 S.E.2d 801, 808 (1996).

VI. ARGUMENT

A. The Circuit Court Properly Held that Bison Is Not Entitled to *Res Judicata* Because the Court in the Prior Litigation Expressly Declined to Rule on the Overriding Royalties Issue.

Bison is not entitled to *res judicata* because it has failed to establish a critical element—that Antero's claim in the instant litigation is identical to the claim resolved on the merits in the Prior Litigation. Although Antero raised the same claim in the Prior Litigation, the Circuit Court expressly declined to rule on it. App. 455 n.2. As such, Antero had no choice but to bring another lawsuit.

The doctrine of *res judicata*, or claim preclusion, prohibits "relitigation of the same cause of action." *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W. Va. 469, 476, 498 S.E.2d 41, 48 (1997) (internal quotation marks omitted). The rationale behind *res judicata* is to protect parties "from the expense and vexation attending multiple lawsuits," "to conserve judicial resources," and to "foster[] reliance on judicial action by minimizing the possibility of inconsistent decisions." *Beahm v. 7–Eleven, Inc.*, 223 W. Va. 269, 273, 672 S.E.2d 598, 602 (2008) (per curiam) (internal quotation marks omitted).

Before this Court will bar a lawsuit based on *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.

Syl. Pt. 4, *Blake*, 201 W. Va. at 471, 498 S.E.2d at 43. This Court does "not rigidly enforce [the doctrine of *res judicata*] where to do so would plainly defeat the ends of Justice." *Id.* at 478, 498 S.E.2d at 50 (internal quotation marks omitted).

Bison is not entitled to *res judicata* because the cause of action here—declaratory judgment to resolve Bison's interest in overriding royalties to Marcellus Shale production underlying the 900-foot radii of the Ash and Clark Wells—was clearly not resolved in the Prior Litigation. *See Montana v. United States*, 440 U.S. 147, 153 (1979) ("A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata,

is that a right, question or fact distinctly put in issue *and directly determined by* a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies. . . ." (emphasis added, internal quotation marks omitted)); *Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*, 239 W. Va. 549, 560, 803 S.E.2d 519, 530 (2017) ("Res judicata or claim preclusion bars a party from suing on a claim *that has already been litigated to a final judgment* . . . ." (emphasis added, internal quotation marks omitted)).

Although the Prior Litigation resulted in a final adjudication on the merits of the case at large in that there was a jury verdict and a judgment entered, the Court declined to resolve Antero's declaratory judgment claim.[13] App. 455 n.2 ("The Court, therefore, declines to address this issue in the instant action."); *see* Syl. Pt. 2, *Nickey*, 171 W. Va. at 36, 297 S.E.2d at 442 ("An issue held to be not properly before the court and left expressly undetermined, may be raised in further proceedings between the parties."). Thus, Bison cannot satisfy the third *res judicata* requirement: the cause of action Bison identifies here is not "identical to the cause of action determined in the prior action" because the Court in the Prior Litigation declined to rule on that claim.[14] Syl. Pt. 4, *Blake*, 201 W. Va. at 471, 498 S.E.2d at 43; *see Montana*, 440 U.S. at 153; *Dan Ryan Builders, Inc.*, 239 W. Va. at 560, 803 S.E.2d at 530. The Circuit Court properly held that Bison is not entitled to *res judicata* because Antero never received a final ruling on its

[13] Bison wastes much space quoting from a transcript of a hearing during the Prior Litigation involving a motion to compel, presumptively to show that Antero admitted Bison was entitled to overriding royalties. *See, e.g.*, Pet'r's Br. 21–22 (quoting App. 224–29). First, as discussed *supra*, Antero only became aware during the Prior Litigation that the turnkey drilling agreements contained a depth limitation. Before that, based on representations made by Harison, Antero believed Bison *was* entitled to overriding royalties from Marcellus Shale production. Second, Antero's statements at the motion to compel hearing refer to the agreement between Bison and CGAS as to entitlement to the royalties—not to any agreement between Antero and Bison. Try as it might, Bison cannot avoid the Circuit Court's unequivocal statement that it did *not* resolve this issue in the prior litigation. App. 455 n.2.

[14] Antero does not dispute that this lawsuit and the Prior Litigation involve the same parties. Antero also does not dispute that the claim here is identical to a claim in the Prior Litigation—only that the claim was not resolved by the Court in the Prior Litigation. The "same evidence" test cited by Bison, which is used to determine whether two causes of action are identical, is thus inapposite. *See* Pet'r's Br. 21.

declaratory judgment claim in the Prior Litigation. App. 776, ¶ 42. This Court should uphold that ruling.

B. The Circuit Court Properly Held that Bison Is Not Entitled to Collateral Estoppel Because the Issue Raised Here Was Not Decided in the Prior Litigation.

As with *res judicata*, Bison is not entitled to collateral estoppel because the issue presented here was unresolved in the Prior Litigation. The doctrine of collateral estoppel is meant to preclude "relitigation of issues in a second suit which have actually been litigated in [an] 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. 2, *Conley v. Spillers*, 171 W. Va. 584, 586, 301 S.E.2d 216, 217 (1983). Like *res judicata*, collateral estoppel requires a final judgment on the merits in the prior action by a court with competent jurisdiction, and the same parties or persons in privity with those same parties. *Id.* at Syl Pts. 3–4, 171 W. Va. at 586, 201 S.E.2d at 218. Unlike *res judicata*, collateral estoppel "extends to only those matters which were actually litigated in the former proceeding, as distinguished from those matters that might or could have been litigated therein . . . ." *Id.* at 588, 301 S.E.2d at 220 (internal quotation marks omitted). A party must establish four elements to entitle it to collateral estoppel:

> (1) [t]he issue previously decided is identical to the one presented in the action in question;
>
> (2) there is a 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. 1, *State v. Miller*, 194 W. Va. 3, 6, 459 S.E.2d 114, 117 (1995).

Bison's collateral estoppel claim fails on the very first element.[15] In the instant litigation, the Circuit Court declared that "Bison's leasehold rights in the Clark Lease and Ash Lease, particularly as to overriding royalties, did not and do not include any such royalties from Antero's production of the Marcellus Shale depths within and underlying the 900-foot radius of either the Clark #1 Well or the Ash #1 Well." App. 772, ¶ 32. The Circuit Court in the Prior Litigation expressly declined to rule on this very issue, explaining that it could not "determine Bison's entitlement to royalties on Marcellus Shale production by Antero from the Ash and Clark Leases" because CGAS was no longer a party.[16] App. 455 n.2. As such, the issue presented in the instant litigation was *not* decided in the Prior Litigation, and, as the Circuit Court correctly decided, Bison is not entitled to collateral estoppel. App. 776, ¶ 42.

C. The Circuit Court Properly Held that Bison Is Not Entitled to Judicial Estoppel Because Antero's Position is Not Clearly Inconsistent with Its Position in the Prior Litigation.

Bison is not entitled to judicial estoppel because Antero did not assume a position in the instant litigation that is clearly inconsistent with its position in the Prior Litigation. App. 777, ¶ 44. The doctrine of judicial estoppel "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

[15] As to the second element, the Prior Litigation resulted in a final judgment after a jury trial, but this specific issue did not receive a final adjudication on the merits. Again, Antero does not dispute that this litigation involves the same parties as the Prior Litigation. Antero also does not dispute that it had a full and fair opportunity to litigate the issue in the Prior Litigation.

[16] Bison claims that the jury conclusively determined this issue in the Prior Litigation and that the instant litigation is thus a "collateral attack upon the jury's decision." Pet'r's Br. 25. Bison is incorrect. The jury found that Antero had breached its contract with Bison and thus owed it overriding royalties in general. App. 297–98. As shown by the Circuit Court's post-trial order expressly reserving the issue, the jury did *not* determine whether Bison was entitled to overriding royalties from Marcellus Shale production underlying the 900-foot radii of the Ash and Clark Wells. App. 455 n.2. That issue was left unresolved until the instant litigation.

moment." *State ex rel. Universal Underwriters Ins. Co. v. Wilson*, 241 W. Va. 335, 825 S.E.2d 95, 106 (2019) (internal quotation marks omitted). Although "the circumstances under which judicial estoppel may appropriately be invoked are not reducible to any general formulation," *id.* at __, 825 S.E.2d at 108 (internal quotation marks omitted), this Court has established a four-part test for determining when judicial estoppel bars a party from relitigating an issue:

> (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. 2, *W. Va. Dep't of Transp. v. Robertson*, 217 W. Va. 497, 499, 618 S.E.2d 506, 508 (2005). Bison cannot satisfy three of these four criteria.[17]

Bison's bid to use judicial estoppel to avoid the merits of Antero's suit fails on the first element; Bison cannot show that Antero assumed a position "that is clearly inconsistent with a position taken in a previous case, or with a position taken earlier in the same case." *Id.* As discussed *supra*, at the beginning of the Prior Litigation Antero believed Bison may have been entitled to the entirety of the overriding royalty payments underlying the 900-foot radii of the Ash and Clark Wells. Bison's Manager, Harison, produced a sample turnkey drilling agreement—

[17] Antero does not dispute the second *Robertson* element, that it asserted a position in proceedings involving the same adverse party. *See Robertson*, 217 W. Va. at 499, 618 S.E.2d at 508.

which was purportedly representative of similar agreements referenced in the Ash and Clark Leases—without any depth limitation. *See* App. 561, 563–82, 585, 587–88. Bison and CGAS agreed among themselves that CGAS would not assert any entitlement to such payments. App. 185–86, 190–91. Antero thus put Bison in pay status and began paying it overriding royalties for Antero's wells in the Marcellus formation underlying the Ash and Clark Wells.[18]

As the case progressed, however, Antero discovered that the sample turnkey drilling agreement produced by Harison was anything but representative, and that the applicable turnkey drilling agreements contained language limiting Bison's interests to the Benson Sand Horizons. App. 522, 542, 585–88, 800. At that point, Antero realized that Bison was entitled to fewer royalties than Antero had originally thought, and it began asserting the claim at issue here—that Bison is not entitled to overriding royalties in Marcellus Shale production underlying the 900-foot radii of the Ash and Clark Wells. Antero thus did not "deliberately chang[e] positions according to the exigencies of the moment"; it refined and narrowed its position after finally receiving information that Bison had originally withheld. *Wilson*, 241 W. Va. at __, 825 S.E.2d at 106 (internal quotation marks omitted); *see also* App. 724–25 (testimony of Harison that the sample turnkey drilling agreement provided to Antero during negotiation of the 2012 Assignment did not contain the "critical" depth limitation that exists in the agreements pertaining to the Ash and Clark Wells).

Bison's reliance on *Wilson* to show Antero's purported change in position bears little fruit. *See* Pet'r's Br. 28. *Wilson* involved an insurance coverage dispute arising out of an

[18] During much of the Prior Litigation, Antero made royalty payments to Bison. App. 733; *see, e.g.*, App. 110–11. Antero's practice is to hold payments in suspense when two other entities (such as Bison and CGAS) have a dispute over entitlement to royalties. App. 733. When a dispute over royalties is between Antero and another party, however, Antero's practice is to release the payments "until [it] can get to the bottom of really who owns those particular interests that are in question." App. 733; App. 822–27.

automobile accident. *Wilson*, 241 W. Va. at __, 825 S.E.2d at 98. Salvatore Cava pulled out of a McDonalds parking lot and collided with a motorcyclist. *Id.* At the time, Salvatore was driving a car owned by his father's car dealership. *Id.* The motorcyclist died and his estate brought suit, initially against Salvatore and the dealership. *Id.* One of the primary issues in the underlying case was whether Salvatore was covered under the dealership's insurance. *Id.*

The dealership produced a corporate representative for deposition pursuant to West Virginia Rule of Civil Procedure 30(b)(7). *Id.* at __, 825 S.E.2d at 102–03. At that point, Salvatore's father and the car dealership's owner, Dan Cava, was not a party defendant. *Id.* The dealership's Rule 30(b)(7) representative was asked about any conversations between the dealership and its insurer that could be considered a request for insurance coverage. *Id.* The deponent was aware of a conversation between Dan and the insurer but did not know the contents of that conversation. *Id.* at __, 825 S.E.2d at 103–04. The dealership resisted a motion to compel it to produce a Rule 30(b)(7) witness who could testify as to what was said during the conversation. *Id.* at __, 825 S.E.2d at 104. Years later, after Dan became a defendant, he testified during a deposition that the insurer had told him Salvatore was already covered under the dealership's insurance. *Id.*

This Court held that judicial estoppel barred Dan from testifying about his conversation with the insurer. 241 W. Va. at __, 825 S.E.2d at 111. The Court reasoned that the dealership had previously produced a Rule 30(b)(7) witness who refused to testify as to whether the insurer had made any representations about coverage, "but later, when it was convenient, [Dan] decided to provide the information that his company said was not available and also had agreed to be bound by that assertion." *Id.* The Court held that a deponent may not testify "that he or she has no information on a matter that comes within the scope of the areas designated for the

deposition," and then turn around at summary judgment and "proffer new or different information that could have been provided at the time of the Rule 30(b)(7) deposition." *Id.* at Syl. Pt. 3, 241 W. Va. at __, 825 S.E.2d at 96.

Bison argues that *Wilson* cuts in its favor because, like the insurer there, it moved to compel certain information—here, privileged and protected title opinions. Pet'r's Br. 28. According to Bison, Antero, in opposing the motion to compel, advised the Court that there was no dispute as to Bison's ownership of the overriding royalties at issue in the instant litigation. *Id.* at 28–29. Bison insists that now, Antero is assuming an inconsistent position by claiming that Bison is not entitled to overriding royalties in Marcellus Shale production. *Id.* at 30. Bison's version of the facts is demonstrably untrue.

First, Antero believed at the beginning of the Prior Litigation that Bison *was* entitled to overriding royalties as to the entirety of the Ash and Clark Leases; it was only after Bison finally produced the additional turnkey drilling agreements—and Harison admitted at trial the existence of such "critical" depth limitations for the Ash and Clark Leases—that Antero determined that Bison was not entitled to overriding royalties for production from the Marcellus Shale formation underlying the 900-foot radii of the Ash and Clark Leases. *See* App. 561, 585–88, 724–25. Second, Antero's comments at the motion to compel hearing reflect the agreement between Bison and CGAS that each would not challenge the other's entitlement to royalties—not any agreement on the part of Antero that Bison was entitled to such royalties. *See* App. 224–29 (referencing the agreed order between Bison and CGAS). Because Antero did not assume a position in the instant litigation "that is clearly inconsistent with a position taken in a previous case," Bison is not entitled to judicial estoppel. *Robertson*, 217 W. Va. at 499, 618 S.E.2d at 508.

Bison also cannot satisfy the third requirement for judicial estoppel—that the party taking an inconsistent position have received some benefit from its original position. *Robertson*, 217 W. Va. at 499, 618 S.E.2d at 508. As discussed *supra*, Antero does not believe it took inconsistent positions. But, even if it did, Antero received absolutely no benefit from its original position. According to Bison, Antero originally represented to the Court in the Prior Litigation that the overriding royalty issues as to the Ash and Clark Leases were resolved in Bison's favor. *See* Pet'r's Br. 29. It is difficult to fathom how Antero could have benefitted from this position, which indisputably favored Bison.

Finally, Bison cannot satisfy the fourth requirement for judicial estoppel because Antero's original position did not mislead Bison. *See Robertson*, 217 W. Va. at 499, 618 S.E.2d at 508 (requiring that "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"). Bison possessed the unrecorded turnkey drilling agreements that contained depth limitations. If anything, Bison's failure to timely produce the relevant turnkey drilling agreements misled Antero. Certainly, Antero's purported "change of position" after it discovered the correct turnkey drilling agreements would not injure the party that withheld them in the first instance.

The Circuit Court correctly held that Bison is not entitled to judicial estoppel because "Antero did not assume a position clearly inconsistent with its position in" the Prior Litigation. App. 777, ¶ 44. This Court should likewise decline Bison's request to apply judicial estoppel because Bison has failed to satisfy three of the four requirements and because it would be unjust to bar Antero's claim under these circumstances. *Cf. Robertson*, 217 W. Va. at 504, 618 S.E.2d at 513 ("Judicial estoppel is an extraordinary remedy that should be invoked only when a

party's assertion of a contrary position will result in a miscarriage of justice and only in those circumstances where invocation of the doctrine will serve its stated purpose." (internal quotation marks and alteration omitted)).

D. The Circuit Court Properly Held that Bison Is Not Entitled to Overriding Royalties for Marcellus Shale Production on the Ash and Clark Leases Because Bison's Interests are Depth Limited.

Having failed to show that Antero's claim is barred on estoppel grounds, Bison also loses on the merits. As the Circuit Court properly held, Bison is not entitled to overriding royalties for production from the Marcellus Shale formation underlying the 900-foot radii of the Ash and Clark Wells because Bison's interests are depth-limited. App. 772–73, ¶¶ 31–34. Each of Bison's arguments to the contrary—the four corners doctrine, the certain and definite reservation doctrine, the greatest estate doctrine, and the parol evidence rule—either support Antero's position or are inapposite.

1. The Circuit Court Properly Based Its Ruling on the Unambiguous Language of the Warranty Deeds of Assignment and the Turnkey Drilling Agreements Incorporated by Reference Therein.

The Circuit Court did not violate any principles of mineral deed interpretation—including the four corners doctrine—by ruling in Antero's favor. Rather, the Court thoroughly described why Bison's interests in overriding royalties for Marcellus Shale production underlying the 900-foot radii of the Ash and Clark Wells are depth limited. As the Court explained, Bison's predecessor-in-interest, LaMaur, received its right, title, and interest in the Ash and Clark Leases from Doran. App. 772–73, ¶ 33; *see also* App. 510, 515. The warranty deeds of assignment from Doran to LaMaur plainly incorporated the turnkey drilling agreements:

> [Doran] does hereby sell, transfer, assign and set over unto [LaMaur], under and subject to the exceptions and reservations set forth below, all of [Doran's] right, title and interest, which constitutes 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 of such well, *together with such protective acreage as is described in the Turnkey Drilling Agreement, dated June 21, 1979,* and the Operating Agreement, of even date therewith, between [Doran] and [LaMaur.]
>
> ...
>
> *[Doran] hereby expressly makes this Assignment under and subject to all of the terms and provisions of, and all of the royalties and other payments reserved in, the instruments identified in Exhibit B hereto* [including the turnkey drilling agreement], insofar as such terms, provisions, royalties and other payments affect the interests herein assigned, transferred, and conveyed.

App. 510–11 (emphasis added); *see also* App. 515–16 (warranty deed of assignment for the Clark Lease, containing nearly identical language). Exhibit B lists, *inter alia*, the turnkey drilling agreement. App. 513; *see also* App. 518.

In turn, the turnkey drilling agreements clearly limit Bison's interest to shallow depths. The agreement pertinent to the Ash Lease provides:

> 1.3 [Doran] agrees that any well site or location, drilling and producing right, farm-out agreement or lease acquired for or on behalf of [LaMaur] for the purpose of this Agreement shall provide that [LaMaur] 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 Sand Horizons,* on the subject acreage and produced by any well drilled on such location or site.

App. 522 (emphasis added). The turnkey drilling agreement pertaining to the Clark Lease contains similar language:

> 1.3 [Doran] agrees that any well site or location, drilling and producing right, farm-out agreement or lease acquired for or on behalf of [LaMaur] for the purpose of this Agreement shall provide that

> [LaMaur] 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 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.

App. 542 (emphasis added). Thus, both turnkey drilling agreements limit Bison's interest to the Benson Sand and do not extend to the lower Marcellus Shale formation.

The turnkey drilling agreements are incorporated by reference into the warranty deeds of assignment. *See Thomas v. Young*, 93 W. Va. 555, 117 S.E. 909, 911 (1923) (describing the practice of incorporating by reference in a deed as "common and unobjectionable"); *Snooks v. Wingfield*, 52 W. Va. 441, 44 S.E. 277, 278 (1903) ("When a plat of premises is referred to in the grant or deed, it becomes, by legal construction, a part of the grant ordered, and is not explainable by evidence aliunde any further than if inserted in the deed or grant."). In West Virginia, a document is incorporated by reference when (1) the original document "make[s] a clear reference to the other document so that the parties' assent to the reference is unmistakable"; (2) the original document "describe[s] the other document in such terms that its identity may be ascertained beyond doubt"; and (3) it is "certain that the parties to the agreement had knowledge of and assented to the incorporated document so that the incorporation will not result in surprise or hardship." Syl. Pt. 2, *State ex rel. U-Haul Co. of W. Va. v. Zakaib*, 232 W. Va. 432, 434, 752 S.E.2d 586, 589 (2013).

These three requirements are satisfied here. As discussed *supra*, the warranty deeds of assignment make clear that they are "under and subject to all of the terms and provisions of" the turnkey drilling agreements. App. 511, 516. Moreover, the warranty deeds of assignment describe the "the Turnkey Drilling Agreement, dated June 21, 1979" and "June 7, 1979" with some

specificity—certainly enough to ascertain the identity of those documents. App. 510, 515. Finally, the parties to the warranty deeds of assignment are the same parties that assented to and incorporated the turnkey drilling agreements, making it clear that they had the requisite knowledge.

Bison attempts to resist this straightforward conclusion, first by arguing that the turnkey drilling agreements are unrecorded. This is true—and irrelevant. The warranty deeds of assignment are indisputably recorded. App. 510, 515. It is enough that those recorded instruments incorporate by reference the unrecorded turnkey drilling agreements. *See Roane Cty. Bank*, 124 W. Va. at __, 22 S.E.2d at 293 ("It is true that another instrument or document, under some circumstances, may be legally embodied in a deed or mortgage by appropriate words of reference, and such instrument need not be recorded.").

Bison also contends that the language in the turnkey drilling agreements reflects a minimum interest, not a depth limitation. Pet'r's Br. 32–33. The Circuit Court rejected this argument and this Court should too. App. 773, ¶ 34. The plain language of the agreements belies any notion that LaMaur was receiving a minimum interest.[19] The turnkey drilling agreements clearly state that LaMaur was entitled to a certain percentage of oil and gas reserves "to a depth through the Benson Sand Horizons"—and no farther. App. 522; *see* also App. 542. As if the parties' intentions were not sufficiently clear, the same agreements later explain that Doran would "drill the said well to a depth sufficient to thoroughly test through the Benson Sand Horizons expected to be encountered at a depth of approximately 4,700 feet." App. 528; *see also* App. 548–

[19] Bison cherry-picks certain provisions of the turnkey drilling agreements that purportedly show Doran conveyed an unrestricted mineral estate to LaMaur, Pet'r's Br. 34–35, but these provisions are entirely consistent with the depth limitation: Doran conveyed all of its right, title, and interest to LaMaur up to the Benson Sand Horizons. Ironically, the cited provisions undercut Bison's contention that Doran conveyed to LaMaur an unrestricted mineral estate. *See, e.g.*, Pet'r's Br. 34. If that were the case and LaMaur's interest extended to the center of the earth, as Bison claims, the parties would have no need to insert a minimum interest provision. The most straightforward conclusion is again the correct one—the quoted language refers to a depth limitation, not a minimum interest.

49. As the Circuit Court concluded, "Bison's argument regarding a minimum burden is simply not tenable given the plain and unambiguous language in the referenced Turnkey Drilling Agreements."[20] App. 773, ¶ 34.

Throughout, Bison implies that the Circuit Court's interpretation violates the four corners doctrine. *See, e.g.*, Pet'r's Br. 31. It does no such thing. The Circuit Court considered the entirety of the warranty deeds of assignment and the turnkey drilling agreements before reaching the only reasonable conclusion—the warranty deeds of assignment unambiguously incorporate the depth limitation contained in the turnkey drilling agreements. As Bison itself acknowledges, it is improper to apply a canon of construction or interpretation when "[a] valid written instrument . . . expresses the intent of the parties in plain and unambiguous language." Pet'r's Br. 31 (quoting Syl. Pt. 1, *Cotiga Dev. Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 484, 128 S.E.2d 626, 628 (1962)). Instead, a court must simply "appl[y] and enforce[]" such a document according to the parties' intent. *Id.* That is exactly what the Circuit Court did here.

2. The Circuit Court's Ruling Does Not Violate the Certain and Definite Reservation Doctrine Because the Turnkey Drilling Agreements Except Bison's Interests in Mineral Rights Deeper than the Benson Sand.

Next, Bison claims that the Circuit Court's ruling that the turnkey drilling agreements contain a depth limitation violates the certain and definite reservation doctrine. Pet'r's Br. 35. Generally, a party wishing "to create an exception or reservation in a deed which would reduce a grant in a conveyance clause which is clear, correct and conventional" must express that exception or reservation "in certain and definite language." Syl. Pt. 2, *G&W Auto Ctr., Inc. v. Yoursco*, 167 W. Va. 648, 648, 280 S.E.2d 327, 328 (1981) (per curiam). For a reservation of

[20] Bison directs the Court to several decisions interpreting criminal sentencing statutes to support its position that certain language in the turnkey drilling agreements fix a minimum interest. Pet'r's Br. 33–34. These cases have no applicability to the interpretation of mineral deeds.

mineral rights to be effective, it "must be by clear language. Courts do not favor reservations by implication." *Sharp v. Fowler*, 151 Tex. 490, 494, 252 S.W.3d 153, 154 (1952).

Although an exception or a reservation in a deed must be certain and definite, "the required certainty and definition is not derived solely from the face of the deed." *Belcher*, 212 W. Va. at 425, 573 S.E.2d at 19. To that end, a deed or lease may refer to, or incorporate by reference, another document in order to create an exception or a reservation. *See, e.g.*, *id.* ("We find that the language in the initial 1959 deed to lot six adequately describes the reservations intended by specifically referencing the map which identifies the size and location of those reservations."); *Hope Nat. Gas Co. v. Reynolds*, 126 W. Va. 580, 30 S.E.2d 336, 340–41 (1944) (explaining that a reservation in a deed incorporated by reference acts as a valid reservation of oil and gas rights); *Rock House Fork Land Co. v. Gray*, 73 W. Va. 503, 80 S.E. 821, 823 (1914) ("The general rule is that a plat or survey or other writing referred to in another deed or grant as descriptive of the thing granted, or for the purpose of any limitation or reservation, becomes as much a part of such deed or grant [with respect to] that purpose as if incorporated therein and should be read in connection therewith.").

As discussed *supra*, the warranty deeds of assignment incorporate by reference the turnkey drilling agreements. As such, Bison was on notice of the need to locate and examine the turnkey drilling agreements for any limitations or restrictions. *Belcher*, 212 W. Va. at 425, 573 S.E.2d at 19; *see also Highway Props. v. Dollar Savings Bank*, 189 W. Va. 301, 306, 431 S.E.2d 95, 100 (1993) (per curiam) (explaining that a purchaser is on notice of matters contained in the chain of title "or to the knowledge of which anything there appearing will conduct him" (internal quotation marks omitted)). Here, the turnkey drilling agreements unambiguously limit Bison's interest down to the Benson Sand Horizons. App. 522 (providing that LaMaur "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 Sand Horizons" as to the Ash Lease); App. 542 (providing that LaMaur "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 Pennsylvania wells, and through the Benson Sand Horizons with regard to West Virginia wells" as to the Clark Lease). This Court should thus reject Bison's argument that the Circuit Court violated the certain and definite reservation doctrine.[21]

3. The Circuit Court's Ruling Does Not Violate the Greatest Estate Doctrine Because the Turnkey Drilling Agreements Limit Bison's Interest in the Ash and Clark Leases.

Bison argues that the Circuit Court's ruling violates W. Va. Code § 36-1-11, commonly referred to as the greatest estate doctrine. W. Va. Code § 36-1-11 provides that

> [w]hen 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.*

W. Va. Code § 36-1-11 (emphasis added). In other words, "[i]n case of doubt, the creation of a fee estate rather than a lesser estate is clearly favored." *Seifert v. Sanders*, 178 W. Va. 214, 216,

[21] Bison also implies that this Court should reverse because a deed reservation should be construed against the grantor. Pet'r's Br. 36. Although the general rule is that "[d]eed reservations are strictly construed against a grantor and in favor of a grantee," Syl. Pt. 4, *Poulos v. LBR Holdings, LLC*, 238 W. Va. 89, 90, 792 S.E.2d 588, 590 (2016), this principle is not unlimited. "[I]t is only in cases where the intent of the parties to a deed is unclear and no other rule of construction can resolve the ambiguity that doubt is resolved in favor of the grantee." *Belcher*, 212 W. Va. at 424, 573 S.E.2d at 18. Generally, "the polar star which should guide courts in the construction of deeds is the intention of the parties making the instrument." *Id.* As discussed *supra*, the Circuit Court followed this guidance.

358 S.E.2d 775, 777 (1987). "The burden of proving the lesser estate is cast on the party asserting that the estate is less than a fee simple." *Id.*

According to Bison, the warranty deeds of assignment and turnkey drilling agreements reflect a minimum interest—not a depth limitation. As such, Bison argues, it is entitled to "unlimited depth mineral rights and assets." Pet'r's Br. 39. Bison is incorrect. Section 36-1-11 itself reflects that the greatest estate rule only kicks in when "no words of limitation are used in the conveyance or devise." Here, as discussed *supra*, the warranty deeds of assignment unambiguously provide that the Doran–LaMaur conveyance was "under and subject to all of the terms and provisions of, and all of the royalties and other payments reserved in, the instruments identified in Exhibit B hereto," which indisputably includes the turnkey drilling agreements. App. 511, 516. The turnkey drilling agreements in turn limit Bison's interest to a depth "through the Benson Sand Horizons." App. 522, 542. This clear depth limitation does not run afoul of W. Va. Code § 36-1-11.

4. Bison Waived Its Parol Evidence Argument. Alternatively, the Circuit Court Did Not Err Because It Did Not Rely on Parol Evidence.

Finally, Bison advances on appeal an argument it never made below—that the Circuit Court erred by relying on parol evidence to construe the warranty deeds of assignment and turnkey drilling agreements. *Compare* Pet'r's Br. 39–40 (raising the parol evidence argument), *with* App. 627–30 (failing to mention such an argument). Bison has waived this argument. "One of the most familiar procedural rubrics in the administration of justice is the rule that the failure of a litigant to assert a right in the trial court likely will result in the imposition of a procedural bar to an appeal of that issue." *State v. LaRock*, 196 W. Va. 294, 316, 470 S.E.2d 613, 635 (1996) (internal quotation marks omitted). To that end, West Virginia has adopted the raise-or-waive rule: "The rule in West Virginia is that parties must speak clearly in the circuit court, on pain that,

if they forget their lines, they will likely be bound forever to hold their peace." *Id.* (internal quotation marks omitted). Because Bison failed to raise its parol evidence argument in the Circuit Court, this Court need not consider it now.[22] *See Boggess v. Workers' Comp. Div.*, 208 W. Va. 448, 453, 541 S.E.2d 326, 331 (2000) (declining to consider an argument that was not raised below).

Even if this Court sets aside Bison's waiver, it is not entitled to relief because the Circuit Court did not rely on parol or extrinsic evidence when ruling in Antero's favor. The parol evidence rule generally bars a court from considering extrinsic evidence when interpreting an unambiguous deed or lease. *See Paxton v. Benedum-Trees Oil Co.*, 80 W. Va. 187, 94 S.E. 472, 476 (1917); *see also* Syl. Pt. 3, *Kanawha Banking & Tr. Co. v. Gilbert*, 131 W. Va. 88, 89, 46 S.E.2d 225, 227 (1947) ("When a written contract is clear and unambiguous its meaning and legal effect must be determined solely from its contents and it will be given full force and effect according to its plain terms and provisions. Extrinsic evidence of the parties to such contract, or of other persons, as to its meaning and effect will not be considered."). Absent fraud, accident, or mistake in the procurement of the contract, "where the terms of a written instrument are unambiguous, clear and explicit, extrinsic evidence of statements of any of the parties to it made contemporaneously with or prior to its execution is inadmissible to contradict, add to, detract from, vary or explain its terms." *Kanawha Banking & Tr. Co.*, 131 W. Va. at 101, 46 S.E.2d at 232–33.

[22] "[T]he raise or waive rule is not absolute." *LaRock*, 196 W. Va. at 316, 470 S.E.2d at 635. "[I]n the most egregious circumstances" this Court will notice unpreserved errors using the plain error doctrine. *Id.* To satisfy plain error, Bison must show (1) "error in the trial court's determination," (2) that "the error was plain or obvious," and (3) that "the error affected substantial rights," which means that "the error was prejudicial and not harmless." *Id.* (internal quotation marks omitted). Even if these criteria are met, the Court has discretion to correct the plain error only "if it seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* at 316–17, 470 S.E.2d 635–36 (internal quotation marks omitted). For the reasons discussed above, Bison cannot satisfy any of these requirements.

As Bison itself admits, the Circuit Court found that Bison's overriding royalties were depth limited by examining the unambiguous language of the warranty deeds of assignment and the turnkey drilling agreements. Pet'r's Br. 39; App. 772–73, ¶ 33. Because the Circuit Court ruled that the relevant documents were unambiguous, it did *not* need to construe those documents. *See Kanawha Banking & Tr. Co.*, 131 W. Va. at 109, 46 S.E.2d at 236 ("When a written contract expresses the intent of the parties in clear and unambiguous language, the courts will not resort to construction but will give force and effect to the instrument according to its provisions, in the absence of fraud or other grounds which affect its enforcement as provided by its terms."). Bison claims that the Circuit Court erred by relying upon the testimony given by Harison, a Bison executive, in the Prior Litigation. Pet'r's Br. 39. A close review of the Circuit Court's opinion reveals that it did no such thing.

The Circuit Court found that Bison's overriding royalty interest in the Ash and Clark Leases is depth limited due to "the unambiguous (i.e. plain) language" of the turnkey drilling agreements and the warranty deeds of assignment. App. 772, ¶ 33. The Circuit Court also rejected Bison's minimum burden argument, explaining that it "is simply not tenable given the plain and unambiguous language in the referenced Turnkey Drilling Agreements." App. 773, ¶ 34. In a footnote immediately thereafter, the Circuit Court explained that Harison, at the trial in the Prior Litigation, admitted that a depth limitation applied to Bison's interests in the Ash and Clark Leases, notwithstanding his prior representations to an Antero landman that no such limitation existed. App. 773 n.8.

It is clear—both from the context of the Circuit Court's Harison discussion and from its placement of that discussion in a footnote—that the Court considered this information to be extraneous to its discussion of the relevant contract language. In other words, the Circuit Court

properly ruled that Bison's interests in the Ash and Clark Leases were depth limited based only on the language of the turnkey drilling agreements and the warranty deeds of assignment. The Circuit Court merely deemed Harison's statements to be consistent with its previously-announced ruling—not a separate basis for that ruling. The Circuit Court's limited mention thus does not run afoul of the parol evidence rule. *See Kanawha Banking & Tr. Co.*, 131 W. Va. at 101, 46 S.E.2d at 233 (explaining that parol evidence cannot be used "to contradict, add to, detract from, vary or explain [the] terms" of a written instrument).

VII. CONCLUSION

For all of the foregoing reasons, this Court should affirm the judgment of the Circuit Court in all respects.

Respectfully submitted this 31st day of October 2019.

W. Henry Lawrence (W. Va. Bar #2156)
Ancil G. Ramey (W. Va. Bar #3013)
Justin A. Rubenstein (W. Va. Bar #9974)
Shaina L. Richardson (W. Va. Bar #12685)
STEPTOE & JOHNSON PLLC
400 White Oaks Boulevard
Bridgeport, WV 26330
Telephone (304) 933-8000
Facsimile (304) 933-8183

Counsel for Antero Resources Corporation