IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-0139
Docket No. 22-0140

Collingwood Appalachian Minerals III, LLC,
a Texas limited liability company,
Oxy USA Inc.,
a Delaware corporation,
Collingwood Appalachian Minerals I, LLC,
a Texas limited liability company, and
Waco Oil & Gas Co., Inc.,
a West Virginia corporation,
Defendants Below, Petitioners,

v.

Richard L. Erlewine,
Plaintiff Below, Respondent.

On Appeal from the Circuit Court of Wetzel County
Hon. David W. Hummel, Jr., Judge
Civil Action No. 20-C-54

RESPONDENT'S BRIEF

Counsel for Respondent Richard L. Erlewine

Andrew R. Cutright (WVSB #11652)
Roger L. Cutright (WVSB #7152)
Cutright Law PLLC
455 Suncrest Towne Centre, Suite 201
Morgantown, WV 26505
Phone: (304) 943-7933
Fax: (304) 212-5825
arcutright@cutrightlawwv.net
rlcutright@cutrightlawwv.net

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. ASSIGNMENTS OF ERROR

1. The Circuit Court erred in holding the 1991 tax sale deed void as a result of a duplicate assessment.
2. The Circuit Court erred in holding the 1995 tax sale deed void as a result of a fee simple conveyance in 1968.

II. STATEMENT OF THE CASE

Petitioners' Statement of the Case is largely uncited to the record and often makes unsupported legal arguments. Conversely, by Order dated January 21, 2022 (the "Order"), the Circuit Court granted Respondent, Richard L. Erlewine's ("Erlewine") Motion for Summary Judgment, holding and declaring that two tax deeds were void because both were based upon the sale of a duplicate and separate assessment not authorized by West Virginia statutory or case law. (APP. at 686). The Order's Findings of Fact provided the following statement of the facts and concise account of the procedural history relevant to the assignments of error.

A. Relevant Facts

The property at issue is an approximately 135-acre tract or parcel situate, lying, and being in Proctor District, Wetzel County, West Virginia ("Subject Property") (APP. at 008-009). The Subject Property is further identified by the Wetzel County Assessor by reference to tax map 06, parcel 46 (*Id.*). Other than matters raised in the second assignment of error, the relevant chain of title to the Subject Property is not in dispute until April 22, 1968. In early 1968, title to the Subject Property was vested in Osburn Dunham ("Dunham"), who owned 100% surface and 50% of the oil and gas, and J.E. Huff (and/or his heirs, successors, or assigns) who owned 50% of the oil and gas. (APP. at 664).

By deed dated April 22, 1968, and being of record in the Wetzel County Circuit Clerk's Office ("Clerk's Office") in Deed Book 248, at Page 20, Osburn Dunham conveyed his interest in the Subject Property to Russell F. Stiles ("Stiles") ("Dunham Deed"). (*Id.)*. After the Dunham Deed was executed, title to the Subject Property was vested in Stiles, who owned 100% surface and 50% of the oil and gas, and J.E. Huff (and/or his heirs, successors, or assigns) who owned 50% of the oil and gas. (*Id.)*

Starting in 1969, and through 1988, the Wetzel County Assessor properly charged Stiles in the land books a primary assessment for the Subject Property (the "Primary Assessment"). (APP. at 689). In 1988, after being properly assessed for twenty years, Stiles failed to pay the taxes charged under the Primary Assessment, thereby creating a tax lien that was sold to Erlewine on November 6, 1989. (*Id.)* Thereafter, a tax deed based on the Primary Assessment was issued to Erlewine on April 1, 1991 (the "Erlewine Deed"). (*Id.)*

Also in 1969, the Wetzel County Assessor improperly charged the land books with a separate and duplicate assessment in the name of Stiles for the oil and gas underlying the Subject Property (the "Stiles Duplicate Assessment"). (*Id.*). In 1988, after being improperly assessed for twenty years, the Stiles Duplicate Assessment went delinquent, thereby creating a tax lien that was sold to Petitioner Waco Oil & Gas, Inc. ("Waco") on November 6, 1989. (*Id.*). Thereafter, a tax deed based on the Stiles Duplicate Assessment was issued to Petitioner Waco on April 1, 1991 (the "1991 Tax Deed"). (*Id.*).

Finally, in 1969, the Wetzel County Assessor improperly charged the land books with a separate and duplicate assessment in the name of Dunham for the oil and gas underlying the Subject Property (the "Dunham Duplicate Assessment"). (APP. at 689). In 1992, after being improperly assessed for twenty-three years, the Dunham Duplicate Assessment went delinquent,

thereby creating a tax lien that was sold to Petitioner Waco on November 6, 1993. (APP. at 690). Thereafter, a tax deed based on the Stiles Duplicate Assessment was issued to Petitioner Waco on April 1, 1995 (the "1995 Tax Deed"). (*Id.*)

By various deeds of record in the Clerk's Office, the purported interest from the 1991 Tax Deed and 1995 Tax Deed were sold to the other Petitioners, Collingwood Appalachian Minerals III, LLC ("Collingwood III"), OXY USA, Inc. ("OXY"), and Collingwood Appalachian Minerals I, LLC ("Collingwood I"), with Petitioner Waco reserving some portion of the purported interest from both the 1991 Tax Deed and 1995 Tax Deed. (*Id.*).

B. Procedural History

On December 17, 2020, Erlewine filed a complaint seeking a declaration of the 1991 Tax Deed and the 1995 Tax Deed. (APP. at 007). On October 14, 2021, Petitioners and the Erlewine filed cross motions for summary judgment. (APP. at 080 – 482). On October 29, 2021, each party filed responses. (APP. 483 – 556). On November 4, 2021, each party filed replies. (APP. at 559 – 642). On December 7, 2021, the Circuit Court heard oral arguments by all parties as to each motion, response, and reply. On January 21, 2022, the Circuit Court entered the Order, which granted Erlewine's Motion for Summary Judgment. (APP. at 686). This appeal followed.

III. SUMMARY OF ARGUMENT

First, pursuant to W. Va. Code § 11-4-9 and *Orville Young, LLC et al. v. Bonacci et al.*, 866 S.E.2d 91 (W. Va. 2021), the Wetzel County Assessor did not have authority to charge Stiles a separate and duplicate assessment on the oil and gas underlying the Subject Property from 1969 through 1988. Each such separate and duplicate assessment was thus void *ab initio*. In 1988, the duplicate assessment went delinquent, with Petitioner Waco purchasing the tax lien in 1989. In 1991, a tax deed was issued to Petitioner Waco based on the 1988 tax lien. The Circuit Court

correctly declared the tax deed issued to Petitioner Waco based on the 1988 tax lien was void and conveyed no real property interest in the Subject Property.

Petitioners argue that W. Va. Code § 11-4-9 and *Bonacci* are inapplicable to this matter. This argument was not presented to the Circuit Court and should be disregarded by this Court. Notwithstanding this, Petitioners' argument is not supported by legal authority and is without merit.

Second, pursuant to black letter law, the Circuit Court found the Dunham Deed unambiguous and not containing a clear and definite exception or reservation, and therefore confirmed that Dunham conveyed all his interest in the Subject Property to Stiles. The Circuit Court relied on *Bennett v. Smith,* 136 W. Va. 903, 69 S.E.2d 42 (W. Va. 1952), to hold that a back reference to a document in the chain of title is not a certain and definite exception or reservation under West Virginia case law. Petitioners agree with the Circuit Court that the Dunham Deed was unambiguous but disagree with the Circuit Court's interpretation. Petitioners interpret the Dunham Deed to reserve 25% of the oil and gas to Dunham based on a back reference to a deed in the chain of title. Petitioners' argument is without merit. They do not address *Bennett* or otherwise cite to supporting legal authority.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to W. Va. R. App. P. 18(a)(3) and (4), Erlewine maintains that oral argument is unnecessary because the dispositive issues have been authoritatively decided, the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would be not significantly aided by oral argument.

The material facts and dispositive issues in the first assignment of error are aligned with the issues presented and argued in *Bonacci*. The material facts and dispositive issues in the second assignment of error are readily addressed by W. Va. Code § 36-1-11 and cited case law.

If the Court determines that oral argument is necessary, Erlewine recommends that argument under W. Va. R. App. P. 19 is appropriate because the appeal involves assignments of error in the application of settled law, and that the appeal is appropriate for disposition by memorandum decision under W. Va. R. App. 21.

V. ARGUMENT

A. Standards of Review

"It is well established that '[a] circuit court's entry of summary judgment is reviewed de novo.'" *Reynolds v. Hoke*, 226 W. Va. 497, 500, 702 S.E.2d 629, 632 (2010); *Mason v. Smith*, 233 W. Va. 673, 760 S.E.2d 487 (2014). This Court has held that the standard of review concerning summary judgment has been well settled: "'[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.'" *Mason*, 233 W. Va. at 678, 760 S.E. 2d at 492.

B. The Circuit Court correctly held that the 1991 Tax Deed was void under case law and governing statute relevant to duplicate assessments, which clearly state duplicate assessments on a single parcel are not permitted.

Petitioners' primary argument in the Circuit Court was that "there is a legally significant distinction between separate and duplicate assessments and that **the assessments in this case were separate and not duplicative**." (Pet'r's Br. at 5, footnote no. 2) (emphasis added). The Circuit Court correctly disagreed with this legal proposition. On appeal, Petitioners do not prosecute this

same argument. Petitioners now argue that W. Va. Code § 11-4-9 and *Bonacci* are inapplicable to the facts of this matter, an issue that was not argued in the Circuit Court.

Here, Erlewine is obligated to respond to an argument not properly raised in the case below, based on facts not disputed in the case below or cited in the appeal record. Had Petitioners properly raised this issue in the case below, Erlewine could have filed a dispositive motion as to this issue, thereby allowing the Circuit Court to refine, develop, and adjudicate[1] the matter to an ultimate resolution in a manner fair to the parties. It would be manifestly unfair to allow Petitioners a bite at this apple without the benefit of the Circuit Court's wisdom.[2]

The first assignment of error simply states "[t]he Circuit Court erred in holding the 1991 tax deed void as a result of a duplicate assessment." (Pet'r's Br. at 1). In support, the Petitioners set forth two main arguments. The first argument addresses the governing statute and case law relied upon by the Circuit Court, being W. Va. Code § 11-4-9, *Orville Young, LLC et al. v. Bonacci et al.,* 866 S.E.2d 91 (W. Va. 2021) and *Haynes v. Antero Resources Corp.,* No. 15-1203, 2016 WL 6542734 (W.Va. Oct. 28, 2016), and asserts such law is "inapplicable" to this matter. (Pet'r's Br. at 9). This argument is ultimately revealed to be nothing more than a policy argument based solely on an uncited and legally unsupported narrative.

The second argument discusses public policy considerations with the Circuit Court's holdings and thereafter urges this Court to rule that the "intent behind Section 11-4-9 of the Code is outweighed by the equally clear policy favoring security of land titles." (Pet'r's Br. at 12).

---

[1] *Whitlow v. Board of Educ. of Kanawha County*, 438 S.E.2d 15, 190 W.Va. 223 (W. Va. 1993) (Our general rule . . . is that, when nonjurisdictional questions have not been decided at the trial court level and are then first raised before this Court, they will not be considered on appeal. The rationale behind this rule is that when an issue has not been raised below, the facts underlying that issue will not have been developed in such a way so that a disposition can be made on appeal. Moreover, we consider the element of fairness. When a case has proceeded to its ultimate resolution below, it is manifestly unfair for a party to raise new issues on appeal. Finally, there is also a need to have the issue refined, developed, and adjudicated by the trial court, so that we may have the benefit of its wisdom. (citation omitted))

[2] *Id.*

1. The Circuit Court correctly interpreted and applied W. Va. Code § 11-4-9 and *Bonacci* and held that the 1991 Tax Deed was void because it was based on the Stiles Duplicate Assessment, a separate and duplicate assessment.

Because the Wetzel County Assessor did not have legal authority to charge Stiles two assessments for both his surface and his oil and gas underlying the surface in 1969, the separate and duplicate oil and gas assessment (defined herein as the "Stiles Duplicate Assessment") was erroneous, and thus void *ab initio*. For every year thereafter until 1988 when it was purchased by Petitioner Waco, the Wetzel County Assessor continued to charge the land books with this same erroneous, void *ab initio* assessment. Any argument as to how an otherwise void *ab initio* assessment can become valid, or merely voidable, is fatally flawed and without merit.

In the case below, the Circuit Court properly applied W. Va. Code § 11-4-9 and *Bonacci* to the undisputed facts and declared "the Stiles Duplicate Assessment was a duplicate and separate assessment of the oil and gas underlying the Subject Property not authorized by West Virginia statutory or case law and was therefore a void assessment." (APP. at 695). Accordingly, the Circuit Court further declared that the 1991 Tax Deed, which was based on the sale of the Stiles Duplicate Assessment, was void and did not convey a real property interest in the Subject Property. (*Id.*).

Bonacci is on all fours with the facts in this matter. In *Bonacci,* the subject property was described as a 500+-acre parcel owned in trust for the benefit of Albert M. Schenk. *Bonacci*, 866 S.E.2d at 95. In 1935, the Marshall County Assessor entered two assessments against the 500+-acre subject property, one for the 500+-acre parcel and another for an oil and gas interest. *Id.* In 1936, the second assessment went delinquent and was ultimately sold at a tax sale in 1949 and a tax deed was issued to Everett Moore. *Id.* Years later, the taxes assessed against the Everett Moore tax deed went delinquent and were eventually purchased in 1995 by Orville Young. *Id.* at 96. The

issue presented to the Circuit Court was whether the second assessment was a valid assessment authorized under the law, and if it assessed any real property interest in the 500+acre parcel. *Id.*

The Circuit Court determined that the second assessment was duplicative of the first assessment of the subject property and accordingly declared the 1949 tax deed void. *Id.* Acknowledging agreement with the Circuit Court, *Bonacci* stated

> [West Virginia] case law and the governing statute clearly state that duplicate assessments on a single parcel of property are not permitted. Moreover, when a single landowner owns both the surface and the subjacent mineral estate in a parcel of property and such mineral estate has not been severed from the surface, the property should be assessed as a single, whole unit and not as separate assessments for the surface estate and the mineral estate. Finally, given the invalidity of the duplicative assessment, the tax deeds issuing from the attempt to recoup the invalid, duplicative assessment are void. *Id.* at 98.

The *Bonacci* Court thereafter analyzed the legislative intent behind W. Va. Code § 11-4-9 and stated

> Based on the plain language of [section 11-4-9], then, it is clear that there exists a definite legislative intent that a sole owner's undivided interest in the surface estate and the associated, unsevered mineral estate of a single parcel of property is considered to be a single tract of land that is subject to one tax assessment and not separate tax assessments for each constituent component interest. *Id.* at 99.

Further, *Bonacci* extensively cited supporting caselaw.[3] *Bonacci's* review, reasoning, and citation to applicable West Virginia law allowed the Court to provide a bright-line rule for land

---

[3] The *Bonacci* Court provided a thorough review of duplicate assessment caselaw. Notable citations include

> "We long have held that '[t]he object of the [S]tate is to collect from every one who claims title to land the taxes thereon, at a fair cash valuation.' Syl. pt. 1, *State v. Low*, 46 W. Va. 451, 33 S.E. 271 (1899)." *Bonacci*, at 98.

> "In this regard, we succinctly have held that '[t]he State is not entitled to double taxes on the same land under the same title." Syl. pt. 1, *State v. Allen*, 65 W. Va. 335, 64 S.E. 140 (1909). Thus, '[i]n case of two assessments of the same land, under the same claim of title, for any year, one payment of taxes, under either assessment, is all the State can require.' Syl. pt. 2, *Allen*, 65 W. Va. 335, 64 S.E. 140 (1909)." *Bonacci*, at 98-99.

disputes involving an assessment duplicative of the primary assessment charged to an owner for his property. "[D]uplicate assessments [for one owner] on a single parcel of property are not permitted." *Id.* at 98.

Here, starting in 1969, and through 1988, the Wetzel County Assessor properly charged the land books with the Primary Assessment for Stiles' interest in the Subject Property. Also in 1969, the Wetzel County Assessor improperly charged the land books with the Stiles Duplicate Assessment and continued to do so through 1988. The Circuit Court declared the Stiles Duplicate Assessment was a separate and duplicate assessment, just as the second assessment was declared to be in *Bonacci*. (APP. at 695).

Bonacci, as well as W. Va. Code § 11-4-9, confirm that Stiles should have received only one assessment in the Subject Property, the Primary Assessment. The Stiles Duplicate Assessment was a separate and duplicate assessment and was therefore void *ab initio*. Petitioners failed to provide legal authority that would dispute this; in fact, the Petitioners are not challenging the legal conclusion made by the Circuit Court.[4]

Petitioners do not dispute that W. Va. Code § 11-4-9 and *Bonacci* are good law. Petitioners also do not argue that the Circuit Court misinterpreted W. Va. Code § 11-4-9 or *Bonacci*. In fact, the only error attributed to the Circuit Court in the first assignment of error is that it erred in applying W. Va. Code § 11-4-9 and *Bonacci*.

Petitioners now argue that W. Va. Code § 11-4-9 and *Bonacci* are "inapplicable" to this matter. (Pet'r's Br. at 9). Petitioners cite to only one case for support that *Bonacci* is inapplicable,

---

[4] *See* Pet'r's Br. at 5, footnote no. 2: "[O]n appeal [Petitioners] do not challenge the Court's holding that 'a sole owner's undivided interest in the surface estate and the associated, unsevered mineral estate of a single parcel of property is considered to be a single tract of land that is subject to one tax assessment and not separate tax assessments for each constituent component interest."

L&D Investments, Inc. v. Mike Ross, Inc., 241 W. Va. 46, 55, 818 S.E.2d 872, 881 (W. Va. 2018), which states that "forfeiture of land is harsh, even dreadful remedy, and courts lean from it and never apply it except where the law clearly warrants." (Pet'r's Br. at 11)

But *L&D Investments, Inc.* protects an **actual** owner of real property, such as Erlewine. Erlewine is a successor-in-interest to Stiles by virtue of the 1988 tax lien on the Primary Assessment he purchased in 1989, the past due property taxes associated with the Primary Assessment he paid in 1991, and the tax deed for the Subject Property issued to Erlewine in 1991. Unlike Erlewine, Petitioners never owned the oil and gas at issue in the first place, and certainly do not need forfeiture protection for something they never owned. Notwithstanding Petitioners' argument, both W. Va. Code § 11-4-9 and *Bonacci* provide clear guidance on this matter.

Moreover, Petitioners' argument relies on an unsound storyline. Petitioners want this Court to believe that the 1988 void Stiles Duplicate Assessment was somehow different in character than prior years because the Primary Assessment also went delinquent in 1988. The essence of this argument being that once an assessment properly charged on the land books, such as the Primary Assessment, goes delinquent, W. Va. Code § 11-4-9 and *Bonacci* are suddenly inapplicable and do not instruct the circuit court how to construe a separate and duplicate assessment that was improperly charged on the land books to the same owner, such as the Stiles Duplicate Assessment.[5]

Petitioners' plea to this Court is revealing, "the Court should hold the assessor's error in **separately assessing** the surface and the oil and gas interest was either harmless . . . or merely voidable as a result of the assessor's error." (Pet'r's Br. at 11, emphasis added).[6] Petitioners

---

[5] *See* Pet'r's Br. at 9: "The law of duplicate assessments is inapplicable because the taxes on the Subject Property were in fact delinquent."

[6] Petitioners additionally argue that the 1991 Tax Deed is not void, but merely voidable, and therefore, should be afforded protection under W. Va. Code § 11A-4-2, 3, and 4. (Pet'r's Br. at 11). Petitioners again cite no authority as to why tax sales on separate and duplicate assessments would render the tax deed voidable as opposed to being void ab initio. The Petitioners merely ask the Court to come to this conclusion to suit their needs without any citation to legal authority. Clearly, the code sections referenced by the Petitioners are not applicable to a tax deed that was based

misstate the facts of this case. The Wetzel County Assessor did not make a "separate assessment" of the oil and gas, they made a "separate and duplicate assessment" of the oil and gas. Petitioners' plea is in direct conflict with W. Va. Code § 11-4-9 and *Bonacci* and should be disregarded. "[D]uplicate assessments [for one owner] on a single parcel of property are not permitted." *Bonacci,* 866 S.E.2d at 98.

Ultimately, Petitioners fail to cite authority or explain how an otherwise void *ab initio* assessment can magically change from being void *ab initio* in 1987 to "[not void] ... [or] merely voidable" in 1988 when the Primary Assessment went delinquent. (Pet'r's Br. at 11). Petitioners' argument that W. Va. Code § 11-4-9 and *Bonacci* are "inapplicable" is shown to be merely an introduction to Petitioners' policy argument below.

2. The Circuit Court's application of duplicate assessment law promotes confidence in one's title to land.

In framing its policy argument, Petitioners state that "[this] Court must decide the proper course where oil and gas interests were assessed separately from surface interests ...." (Pet'r's Br. at 11). Simply, Petitioners again misstate the facts of this case. This appeal does not involve a separate assessment of the oil and gas, it involves a duplicate assessment. The Circuit Court ruled, and the Petitioners conceded that the Stiles Duplicate Assessment was a separate and duplicative assessment. (*See* Pet'r's Br. at 5, footnote no. 2). Petitioners' policy argument is deeply flawed.

In *Bonacci*, the Court reviewed the intent behind W. Va. Code § 11-4-9 to announce a bright-line rule to provide clarity and certainty to land disputes involving a duplicate assessment.[7]

---

upon the sale of a separate and duplicate assessment. *Bonacci* is clear, "[a] deed made pursuant to a tax sale under a void assessment is void." *Bonacci*, 866 S.E.2d at 100-101.

[7] *Bonacci*, 866 S.E.2d at 99 ("Based on the plain language of [§ 11-4-9], then, it is clear that there exists a definite legislative intent that a sole owner's undivided interest in the surface estate and the associated, unsevered mineral estate of a single parcel of property is considered to be a single tract of land that is subject to one tax assessment and not separate tax assessments for each constituent component interest.").

Petitioners seek equitable relief from this bright-line rule, asking this Court to find an exception to *Bonacci* that allows a duplicate assessment, otherwise void, to change into a voidable assessment, subject to the three-year statute of limitations. (Pet'r's Br. at 16). The exception sought is obviously tailored to give Petitioners the results denied them by the Circuit Court. Petitioners ask this Court to carve out an exception to *Bonacci* when a properly charged primarily assessment goes delinquent that allows an improperly charged duplicate assessment to change from void to voidable.

In support, Petitioners rely on, ironically, policy considerations associated with this Court's long-held concern for certainty of land title.[8] After citing *Mingo County Redevelopment Auth. v. Green*, 534 S.E.2d 40, 207 W.Va. 486 (W. Va. 2000), Petitioners do not explain how their proposed exception to the bright-line rule in *Bonacci* could provide more title certainty.

Applying a *Bonacci* carve-out to this matter would cause the Stiles Duplicate Assessment to have greater or equal footing with the Primary Assessment as to the oil and gas estate once the Primary Assessment went delinquent in 1988. No case law or governing statutes are cited by Petitioners to support why this exception is appropriate or how it would be enacted. More on point, Petitioners ask this Court to convert the Stile Duplicate Assessment, a duplicate assessment in which "the State had no tax lien to enforce when the invalid taxes were not paid, and, thus, the State had no interest in the subject oil and gas interests to sell at the ensuing tax sales," to an assessment that was merely voidable. *Bonacci*, 866 S.E.2d at 100.

---

[8] *Bailey v. Baker*, 137 W.Va. 85, 70 S.E.2d 645 (W. Va. 1952); *Shaffer v. Mareve*, 157 W.Va. 816,204 S.E.2d 404 (W. Va. 1974); *Hock v. City of Morgantown*, 162 W.Va. 853, 856, 253 S.E.2d 386, 388 (W. Va. 1979); *Geibel v. Clark*, 185 W.Va. 505, 408 S.E.2d 84 (W. Va. 1991); *Mingo County Redevelopment Auth. v. Green*, 207 W.Va. 486, 534 S.E.2d 40 (W. Va. 2000); *Lexington Land Co., LLC v. Howell.* 211 W. Va. 644, 567 S.E.2d 654 (W. Va. 2002); *Faith United Methodist Church v. Morgan,* 231 W.Va. 423, 745 S.E.2d 461 (W. Va. 2013); *Poulos v. LBR Holdings, LLC*, 238 W. Va. 89, 792 S.E.2d 588 (W. Va. 2016); *W.Va. Dep' of Transp. v. Veach*, 799 S.E.2d 78 (W. Va. 2017) (concurring opinion of Justice Ketchum).

Petitioners' policy discussion is based on the following incredible assertion: "[The legislative] intent behind 11-4-9 of the Code is **outweighed** by the equally clear policy favoring [certainty] of land titles." (Pet'r's Br. at 12) (emphasis added). Once again, Petitioners fail to explain this assertion. Instead, Petitioners simply cite to West Virginia Code Chapter 11A, urging its application to the void tax deed (the 1991 Tax Deed). Chapter 11A is, of course, inapplicable to the 1991 Tax Deed. The Court addressed this exact issue in *L&D Investments, Inc. v. Mike Ross, Inc.*, 241 W. Va. at 55, 818 S.E.2d at 881 (2018), when it stated

> Petitioner appears to be conflating the law governing *void* tax deeds (*Allen, Low*) with the remedies available for setting aside *voidable* tax sale deeds (Section § 11A-4-1[,] *et seq* .). Voidable tax sale deeds are protected by a three-year statute of limitations for setting aside the tax sale deed by the defaulting landowner. Section 11A-4-2, 11A-4-3, 11A-4-4. In contrast, tax sale deeds that are the result of duplicate assessments are void ab initio and cannot be "saved" by a statute of limitations that never applied in the first instance. Unlike voidable tax sale deeds, void tax sale deeds do not have a statute of limitations. *MZRP, LLC v. Huntington Realty Corp.*, No. 35692, 2011 WV 12455342, at *4 (W.Va. March 10, 2011) ("While W.Va. Cod[e] 11A–4–1, et seq., enacted a three-year statute of limitations on voidable deeds created by procedural irregularities, there is no statute of limitations regarding void deeds.").

Petitioners' policy argument is ultimately revealed as nothing more than a plea to overturn the bright-line rule of *Bonacci*. In fact, any exception to *Bonacci* would create yet another cycle of "interminable confusion of land titles." *Faith United Methodist Church v. Morgan*, 231 W.Va. 423, 745 S.E.2d 461 (W. Va. 2013) (citing *Toothman v. Courtney*, 62 W.Va. 167, 183, 58 S.E. 915, 921 (W. Va. 1907)).[9] Accordingly, it should be disregarded by this Court.

---

[9] *Accord, Bailey v. Baker*, 137 W.Va. 85, 70 S.E.2d 645 (W. Va. 1952); *Shaffer v. Mareve*, 157 W.Va. 816,204 S.E.2d 404 (W. Va. 1974); *Hock v. City of Morgantown*, 162 W.Va. 853, 856, 253 S.E.2d 386, 388 (W. Va. 1979); *Geibel v. Clark*, 185 W.Va. 505, 408 S.E.2d 84 (W. Va. 1991); *Mingo County Redevelopment Auth. v. Green*, 207 W.Va. 486, 534 S.E.2d 40 (W. Va. 2000); *Lexington Land Co., LLC v. Howell.* 211 W. Va. 644, 567 S.E.2d 654 (W. Va. 2002); *Poulos v. LBR Holdings, LLC*, 238 W. Va. 89, 792 S.E.2d 588 (W. Va. 2016); *W.Va. Dep' of Transp. v. Veach*, 799 S.E.2d 78 (W. Va. 2017) (concurring opinion of Justice Ketchum).

Petitioners' request for equitable relief must be viewed in light of Petitioners' role in this matter. In 1988, the land books had two assessments in the name of Stiles, one proper, one improper. When Petitioner Waco conducted its statutorily required due diligence after purchasing the tax lien, it accordingly had either actual or constructive notice that Stiles had a second, duplicate assessment associated with his primary assessment. Petitioners Collingwood I, OXY, and Collingwood III each had the same opportunity to review the land books prior to closing the transaction with Petitioner Waco. Had they looked, they would have found a second, duplicate assessment under the name of Stiles. As with Petitioner Waco, they had either actual or constructive notice that they are each successor in interest to a tax deed based on a duplicate assessment. Petitioner Waco knew, as did Petitioners Collingwood I, OXY, and Collingwood III, that each "receives no better title than that held by the State as the time of the execution and delivery of the [tax deed in 1991]." *Bonacci*, n.12 (citing Syl. pt. 2, *Blair v. Freeburn Coal Corp.*, 163 W. Va. 23, 253 S.E.2d 547 (1979) ("One who purchases property from a Deputy Commissioner of Forfeited and Delinquent Lands, receives no better title than that held by the State at the time of the execution and delivery of the deed.")). Here, Petitioner Waco was granted nothing in the 1991 Tax Deed because the State had nothing to grant.

Lastly, Petitioners quote Circuit Court Judge David W. Hummel, Jr. in support of their request to the Court: "As a land owner myself, I find it disturbing that an assessor could change the characteristics of my ownership of real property, whether it be the surface or below." (APP. at 751). This quote does not support Petitioners' policy argument. In fact, Judge Hummel's comment was spot on and is the embodiment of the Court's holding in *Bonacci*. Allowing an assessor to unilaterally assess one owner with multiple real property assessments on the same parcel of land

would be the true creation of a "wave of uncertainty." (Pet'r's Br. at 15). The bright-line rule of *Bonacci* resolves this issue.

In conclusion, the only clear issue presented by the first assignment of error is as follows: "[Did the] Circuit Court [err] in holding that the 1991 tax sale deed void as a result of a duplicate assessment[?]" (Pet'r's Br. at 1). "The answer to that query is an emphatic and undeniable 'no!'"[10] *Bonacci* is clear and dispositive of this question. The Circuit Court did not err, it correctly applied *Bonacci* and held that the Stiles Duplicate Assessment, a separate and duplicate assessment, void, and that the 1991 Tax Deed, which was based on the Stiles Duplicate Assessment, was void *ab initio*. "Unlike voidable tax sale deeds, void tax sale deeds do not have a statute of limitations." *Haynes*, at 6. "Once void, always void." *Id.*[11]

C. The Circuit Court correctly held that the 1995 Tax Deed did not convey an interest in the Subject Property oil and gas.

The second assignment of error simply states "[t]he Circuit Court erred in holding the 1995 tax sale void as a result of a fee simple conveyance in 1968." (Pet'r's Br. at 1). In support, Petitioners set forth two arguments, one based in law, one based in equity. Petitioners' arguments are unsupported by legal authority, uncited to the record, and deeply flawed.

The deed at issue was described above as the Dunham Deed. (APP. 113-114.). The Dunham Deed was executed on April 22, 1968, and was by and between Osburn Dunham, as grantor, and Russell Stiles, as grantee. Prior to the execution of the Dunham Deed, Osburn Dunham

---

[10] *Bluestone Paving, Inc. v. Tax Commissioner of the State of West Virginia*, 591, S.E.2d 242, 251, 214 W. Va. 684 (W. Va. 2003) (dissenting opinion, Justice Albright) (The question that remains is whether that judicially crafted limitation, urged on the majority by the Tax Commissioner, is fair to the taxpayers and justified by law. The answer to that query is an emphatic and undeniable "no!")

[11] Erlewine notes that this quote originated from a concurring opinion by Justice Ketchum in *Leslie Equip. Co. v. Wood Res. Co.*, 224 W. Va. 530, 543, 687 S.E.2d 109, 122 (2009), and was in reference to a void judgment, not a void tax deed. However, the *Haynes* Court found it equally applicable to a void tax deed.

was the owner of 100% of the surface and 50% of the oil and gas within and underlying the Subject Property. (APP. at 688). At issue in the second assignment of error is the interpretation of the Dunham Deed.

"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." Syllabus Point 4, *Faith United Methodist Church v. Morgan*, 231 W.Va. 423, 745 S.E.2d 461 (W. Va. 2013). "In construing a deed, will, or other written instrument, it is the duty of the court to construe it as a whole, taking and considering all the parts together, and giving effect to the intention of the parties wherever that is reasonably clear and free from doubt, unless to do so will violate some principle of law inconsistent therewith." *Id.* at Syl. pt. 5. Further, "[e]xtrinsic evidence will not be admitted to explain or alter the terms of a written contract which is clear and unambiguous." *Id.* at Syl. pt. 6. "It is not the right or province of the Court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them." *Id.* at Syl. pt. 7. Finally, "[p]arties are bound by general and ordinary meanings of words used in deeds." *Id.* at Syl. pt. 8.

"When a deed expresses the intent of the parties in clear and unambiguous language, a court will apply that language without resort to rules of interpretation or extrinsic evidence." *Gastar Exploration, Inc. v. Rine,* 239 W.Va. 792, 798 (2017).

"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." W.Va. Code § 36-1-11.[12]

If a grantor does attempt to reserve an interest in real property in a deed, "such exception or reservation must be expressed in certain and definite language." Syllabus Point 2 of *Hall v. Hartley*, 119 S.E.2d 759, 146 W. Va. 328 (1961).

The Dunham Deed does not contain such certain and definite language excepting and reserving an oil and gas interest to Dunham. The Circuit Court was correct in concluding, "[p]ursuant to W. Va. Code [§] 36-1-11, Dunham's entire interest in the Subject Property, including all of his interest in the oil and gas, was conveyed to Stiles in the Dunham Deed." (APP. at 696.).

Petitioners also interpret the Dunham Deed as being unambiguous, but not in the same way as the Circuit Court. In full opposition to the Circuit Court's interpretation, Petitioners argue the Dunham Deed unambiguously excepted and reserved 25% of the oil and gas in the Subject Property. In support of this interpretation, Petitioners first state "the language of the deed itself and the conduct of the parties to the conveyance confirms the clear intent of the parties." (Pet'r's Br. at 18). Petitioners thereafter cite to APP. at 636 and argue "[t]he 1968 deed from Dunham to Stiles conveyed that which was conveyed to the said Osburn Dunham by Joseph E. Rogers and Myrtle Rogers, his wife, by deed bearing date the 8th day of September, 1945, and recorded in . . . Deed Book 165, at page 327." (Pet'r's Br. at 17).

Of note, Petitioners do not cite to the Dunham Deed in the appeal record, being located at APP. at 113-114, to prove that the Dunham Deed is unambiguous in the manner they argue. Instead, Petitioners cite to an affidavit executed by Sarah Green, an abstractor employed by Bowles

[12] In Syllabus Point 1 of *Freudenberger Oil Co. v. Gardner*, 79 W.Va. 46 (1916), the Court said a "deed conveying lands, unless an exception is made therein, conveys all the estate, right, title, and interest whatever, both at law and in equity, of the grantor in and to such lands."

Rice, LLP, being located at APP. at 635-638, to support their interpretation. The affiant statements cited by Petitioners should be disregarded by the Court to the extent they purport to state a legal conclusion that is the core issue to the second assignment of error, being what property interest Osburn Dunham conveyed to Russell Stiles in 1968. Clearly, the affiant is not qualified to opine on that issue in this appeal.

Further, Petitioners cite to the "language of the deed" (being "the same land conveyed to the said Osburn Dunham by Joseph E. Rogers and Myrtle Rogers, his wife...,") as evidence of a certain and definite reservation of 25% of the oil and gas underlying the Subject Property. (Pet'r's Br. at 17). However, this so-called "language of the deed" is a back reference to a prior deed in the chain of title.

In the case below, Petitioners argued the back reference in the Dunham Deed was the certain and definite language that "limit[ed] the conveyance" to Stiles. (Pet'r's Br. at 18). The Circuit Court found this argument without merit, relying on *Bennett v. Smith,* 136 W.Va. 903, 69 S.E.2d 42 (W. Va. 1952).

In *Bennett*, the Court was asked to determine whether a back reference to a prior deed in the chain of title was a sufficient reservation of a coal interest. The defendant in *Bennett* argued the deed at issue excepted and reserved the coal from the conveyance because the deed referenced a prior deed in the chain of title, which did contain a coal reservation. *Id.* at 45. The *Bennett* Court disagreed with defendant's argument.

> A deed which grants a tract of land, described by metes and bounds, which contains no exception or reservation of the coal underlying the land conveyed, but which refers, by way of further description, to a prior deed in which the same land is identically described by metes and bounds and in which the coal is expressly excepted and reserved, does not, by such reference, incorporate in such deed the exception and the reservation of the coal contained in the prior deed, and does not except or reserve the coal from its operation but passes the title of the grantor to such coal to the grantee in such deed." *Id.* at Syllabus Point 1.

The *Bennett* Court further stated

> If the grantor in each deed had intended to except or reserve the coal, he or she could, and presumably would, have done so by an apt provision to that effect. The rule is firmly established in this jurisdiction that an exception or a reservation, to be effective, must be as certain and as definite in its terms as a grant." *Id.* at 47.

Bennett is directly on point to confirm the back reference in the Dunham Deed is not a certain and definite reservation of a 25% oil and gas interest in the Subject Property. Had Osburn Dunham intended to reserve any portion of the oil and gas underlying the property, he could have done so with certain and definite language. The Dunham Deed contains no such language. Notwithstanding that the Circuit Court cites *Bennett* in the Order to address the back reference at issue, Petitioners do not address or reference *Bennett* in the second assignment of error.

Petitioners also cite several examples of purported extrinsic evidence for the Court to consider "to the extent the language of the deed is ambiguous." (Pet'r's Br. at 17). The Court should disregard all references to such purported extrinsic evidence, given that the Circuit Court found the language of the Dunham Deed unambiguous.[13]

Next, Petitioners argue that "the Circuit Court should have considered the conduct of the parties before concluding there was no ambiguity in the language of the deed." (Pet'r's Br. at 18). In support, Petitioners cite to language in footnote 8 of *Fraternal Order of Police, Lodge No. 69 v. City of Fairmont*, 468 S.E.2d 712, 718 (W. Va. 1996), and state "[c]ourts sometimes may ponder extrinsic evidence to determine whether an apparently clear term actually is uncertain." (*Id.*).

---

[13] Further, the appeal record cited does not support Petitioners' narrative. Petitioners cite to the affidavit (APP. at 635-37) and state that Dunham paid "taxes assessed for the 25% oil and gas interest he received from [the] **Palmer well** after Dunham's conveyance to Stiles." (Pet'r's Br. at 17) (emphasis added). The affidavit does not reference a "Palmer well." This statement should be disregarded.

Also, Petitioners cite to the affidavit (APP. at 635-37) and state that "Stiles paid taxes assessed for a '1/4' [25%] oil and gas interest, not a 50% interest, for over 10 years until becoming delinquent." (Pet'r's Br. at 17). The affidavit does not support this statement. In fact, the affidavit states "the undersigned only checked the land books in five-year increments." This statement should be disregarded.

Fraternal Order of Police involved a dispute between parties to a labor agreement over the interpretation of a single, but material, paragraph of the agreement. *Fraternal Order of Police, Lodge No. 69*, 468 S.E.2d at 714. The quoted language does not support Petitioners' argument and ignores the black letter law announced by *Fraternal Order of Police*,[14] citing only a portion of a "narrow at best" exception. The language cited by Petitioners is best reviewed in the full context stated by the Court in footnote 8.

> Our holding is buttressed by the fact that the interpretation the defendants argue for was rejected earlier in negotiations by the plaintiff. Of course, at oral argument, the defendants contended this information is extrinsic to the agreement and should not be considered in interpreting an unambiguous contract. Even here, we do not agree entirely with the defendants. **As a general rule, a court should not consider extrinsic evidence to give meaning to a contract unless the contract terms are vague and ambiguous.**
>
> **However, if the evidence is not offered to infuse the contract with meaning, but only to demonstrate that a term is (or is not) vague or ambiguous in the first place, then the situation may be different. Courts sometimes may ponder extrinsic evidence to determine whether an apparently clear term actually is uncertain.**
>
> Of course, **this exception is narrow at best**, and it only may be employed for the purpose of determining whether an ambiguity exists if it suggests a meaning to which the challenged language reasonably is susceptible. We do not use it here to contradict contract language or to drain an agreement's text of all content save ink and paper.

Fraternal Order of Police, Lodge No. 69 v. City of Fairmont, 468 S.E.2d 712, 718 n.8 (W. Va. 1996) (emphasis added). This narrow exception does not apply in this matter. The black letter law of *Fraternal Order of Police* confirms the Circuit Court was correct in disregarding the extrinsic evidence when analyzing the plain and clear language of the Dunham Deed.

---

[14] *See Fraternal Order of Police*, at 716, 101 ("In construing the terms of a contract, we are guided by the common-sense canons of contract interpretation. One such canon teaches that contracts containing unambiguous language must be construed according to their plain and natural meaning...thus, we are to ascertain the meaning of the agreement as manifested by its language. Our task is not to rewrite the terms of contact between the parties; instead, we are to enforce it as written.")

Finally, Petitioners seek equitable relief from the governing case law.[15] Petitioners again rely on policy considerations associated with this Court's long-held concern for certainty of land title.[16] After citing *Mingo County Redevelopment Auth. v. Green*, 534 S.E.2d 40, 207 W.Va. 486 (W. Va. 2000), Petitioners do not explain how an equitable exception to the black letter law could provide more title certainty. Petitioners' policy argument is ultimately revealed as nothing more than a plea to overturn the Circuit Court's correct interpretation of the Dunham Deed. In fact, any exception to the Circuit Court's analysis and findings on the Dunham Deed would create a cycle of "interminable confusion of land titles"[17] by putting into question whether a mere back reference can reserve a real property interest. Accordingly, Petitioners' plea should be disregarded by the Court.

In conclusion, the Circuit Court properly confirmed the Dunham Deed was unambiguous and did not contain an exception or reservation of an oil and gas interest on the Subject Property. The Osburn Duplicate Assessment, which was the basis for the 1995 Tax Deed, was a separate and duplicate assessment of the oil and gas owned by Russell Stiles and properly assessed in the Primary Assessment. The 1995 Tax Deed was thus void *ab initio* and conveyed no real property interest in the Subject Property.

---

[15] "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." Syllabus Point 4, *Faith United Methodist Church v. Morgan*, 231 W.Va. 423, 745 S.E.2d 461 (W. Va. 2013).

[16] *Bailey v. Baker*, 137 W.Va. 85, 70 S.E.2d 645 (W. Va. 1952); *Shaffer v. Mareve*, 157 W.Va. 816,204 S.E.2d 404 (W. Va. 1974); *Hock v. City of Morgantown*, 162 W.Va. 853, 856, 253 S.E.2d 386, 388 (W. Va. 1979); *Geibel v. Clark*, 185 W.Va. 505, 408 S.E.2d 84 (W. Va. 1991); *Mingo County Redevelopment Auth. v. Green*, 207 W.Va. 486, 534 S.E.2d 40 (W. Va. 2000); *Lexington Land Co., LLC v. Howell.* 211 W.Va. 644, 567 S.E.2d 654 (W. Va. 2002); *Faith United Methodist Church v. Morgan,* 231 W.Va. 423, 745 S.E.2d 461 (W. Va. 2013); *Poulos v. LBR Holdings, LLC*, 238 W.Va. 89, 792 S.E.2d 588 (W. Va. 2016); *W.Va. Dep' of Transp. v. Veach*, 799 S.E.2d 78 (W. Va. 2017) (concurring opinion of Justice Ketchum).

[17] *Faith United Methodist Church v. Morgan*, 231 W.Va. 423, 745 S.E.2d 461 (W. Va. 2013) (citing *Toothman v. Courtney*, 62 W.Va. 167, 183, 58 S.E. 915, 921 (W. Va. 1907)).

VI. CONCLUSION

Petitioners' two assignments of error are without merit. The Petitioners' have provided the Court no valid reason to disturb the Circuit Court's judgment, which was imposed after all the legal issues were fully briefed by the parties, and oral arguments presented to the Circuit Court. Accordingly, the Circuit Court Order should be affirmed.

Counsel for Respondent Richard L. Erlewine

Andrew R. Cutright (WVSB #11652)
Roger L. Cutright (WVSB #7152)
Cutright Law PLLC
455 Suncrest Towne Centre, Suite 201
Morgantown, WV 26505
Phone: (304) 943-7933
Fax: (304) 212-5825
arcutright@cutrightlawwv.net
rlcutright@cutrightlawwv.net

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-0139
Docket No. 22-0140

Collingwood Appalachian Minerals III, LLC,
a Texas limited liability company,
Oxy USA Inc.,
a Delaware corporation,
Collingwood Appalachian Minerals I, LLC,
a Texas limited liability company, and
Waco Oil & Gas Co., Inc.,
a West Virginia corporation,
Defendants Below, Petitioners,

v.

Richard L. Erlewine,
Plaintiff Below, Respondent.

CERTIFICATE OF SERVICE

I certify that on July 7, 2022, I have served a true and exact copy of the foregoing **RESPONDENT'S BRIEF** by U.S. Mail, fax, and/or electronic mail to the following counsel:

Michael C. Cardi
Bowles Rice LLP
125 Granville Square, Suite 400
Morgantown, WV 26501
mcardi@bowlesrice.com
F: 304-285-2575
Counsel for Collingwood Appalachian Minerals III, LLC and Collingwood Appalachian I, LLC

April Morgan Hincy
Bowles Rice LLP
Southpointe Town Center
1800 Main Street, Suite 200
Canonsburg, PA 15317
ahincy@bowlesrice.com

Counsel for Oxy USA Inc.

Richard W. Gallagher
Robinson & McElwee PLLC
140 West Main Street, Suite 300
Clarksburg, WV 26302-0128
rwg@ramlaw.com
Counsel for Waco Oil & Gas Co., Inc.

Andrew R. Cutright
Cutright Law PLLC