IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

COLLINGWOOD APPALACHIAN MINERALS III, LLC, formerly known as Somerset Minerals LP, a Texas limited liability company,

OXY USA, INC., a Delaware corporation,

COLLINGWOOD APPALACHIAN MINERALS I, LLC, formerly known as BP Minerals II, 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.

CASE NO. 22-0139
CASE NO. 22-0140

PETITIONERS' REPLY BRIEF

Appeal Arising from Order Entered on
January 21, 2022, in Civil Action No. 20-C-54 in
the Circuit Court of Wetzel County, West Virginia

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STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary under Rule 18(a) of the West Virginia Rules of Appellate Procedure because: 1) all parties have not waived oral argument; 2) this appeal is not frivolous; and 3) the dispositive issues have not been authoritatively decided. W. Va. R. App. P. 18(a).

This matter is appropriate for a Rule 20 argument because the matter concerns an issue of first impression for this Court, to wit, whether this Court's duplicate assessment jurisprudence applies where no tax was in fact paid. Moreover, the matter presents an issue of fundamental public importance because the decision of the Circuit Court below would jeopardize the stability of countless real property titles. *See* W. Va. R. App. P. 20(a).

ARGUMENT

Respondent asserts the presence of multiple flaws in Petitioners' arguments, all while failing to truly grapple with the substance of those arguments. For starters, Petitioners have consistently demonstrated that the law of duplicative assessments is inapplicable where, as here, the tax sale is a result of "actual delinquency." *State v. Allen*, 65 W. Va. 335, 64 S.E. 140, 142 (1909) (explaining that when "the taxes have in fact been received by the state . . . the lien has been relinquished [and] where there is no lien there can be no valid sale"). Respondent's fundamental misunderstanding of Petitioners' argument regarding the inapplicability of duplicative assessment law where there is actual delinquency leads to his inconsistent assertions that the State had no tax lien to enforce with respect to the oil and gas but that he also possesses the only valid interest in the same, allegedly nonexistent, tax lien. *See* Resp't's Br. 14 (claiming "Petitioner Waco had was granted nothing in the 1991 Tax Deed because the State had nothing to grant"). Additionally, Respondent fails to analyze or even adequately acknowledge the nature of his status as a tax sale purchaser and insists on being treated as an allegedly delinquent land owner instead. This leads to the incredible, and false, assertion that a holding in his favor would

somehow promote certainty in title, even though the holding would void a title that has been in the land records for over thirty years. A close look at the law of duplicative assessments, and the policy surrounding assessments generally, reveals that Petitioners' arguments have been consistent with both throughout the briefing to this Court, as well as the Circuit Court.

Finally, Respondent's arguments regarding the 1995 tax deed miss the mark. Failing to find evidence in the record that would rebut Petitioners' statements regarding the clear intent of Dunham and Stiles to convey and receive only a 25% oil and gas interest, Respondent resorts to misstatements and misapplications of law in an attempt to convince this Court to ignore the remarkably strong extrinsic evidence in the record. But ignoring the extrinsic evidence, and ultimately the intent of the parties, is not required by the law. Indeed, the intent of the parties is the *sine qua non* of all contracts. Upon review, this Court should find and hold that the 1995 tax deed was valid because Dunham did in fact have a 25% oil and gas interest when his assessment for the same was returned delinquent.

1. THE COMMON LAW OF DUPLICATIVE ASSESSMENTS DOES NOT APPLY BECAUSE BOTH OF THE UNDERLYING ASSESSMENTS WERE IN FACT DELINQUENT.

Respondent does not dispute the delinquency of the underlying assessments, and therefore cannot benefit from the common law of duplicative assessments. This Court's sound reasoning for holding tax sales that result from duplicative assessments void has been clear for over 100 hundred years. And it is equally clear that such reasoning does not apply to the facts of this case because, here, both of the underlying assessments were in fact delinquent. "Actual delinquency is a condition precedent to the right to sell land under a tax assessment. There is no such delinquency when the taxes have in fact been paid . . . ." *State v. Allen*, 65 W. Va. 335, 64 S.E. 140, 142 (1909). Accordingly, "[p]ayment of taxes, upon an assessment of a tract of land as a whole, nullifies a tax sale of a parcel which has been conveyed therefrom and separately

assessed for the same year." *Id.* at Syl. Pt. 3. Since Petitioners Collingwood I and III's Motion for Summary Judgement, Petitioners have consistently argued that duplicative assessment cases are inapplicable because "the common thread woven throughout the double assessment line of cases is payment of the underlying tax," and here, there was no payment of the underlying tax, which renders the reasoning and holdings of duplicative assessment cases inapplicable. APP 403.

Respondent does not dispute that both the surface and oil and gas assessments were in fact delinquent in this case. *See* Resp't's Br. 10. Rather, Respondent asserts that the actual delinquency of the oil and gas assessment in this case is irrelevant with regard to the applicability of *Bonacci* and the common law of duplicative assessments generally. *See id.* But this assertion entirely ignores the crucially important payment of the underlying tax throughout this Court's line of duplicative assessment cases. *See State v. Low*, 46 W. Va. 451, 33 S.E. 271, 274 (1899) ("Payment of the taxes by the owner, or by any one entitled to make it, is an absolute defeat and termination of any statutory power to sell."); *Allen*, 65 W. Va. 335, 64 S.E. at 142 ("Actual delinquency is a condition precedent to the right to sell land under a tax assessment."); *L&D Investments, Inc. v. Mike Ross, Inc.*, 241 W. Va. 46, 55, 818 S.E.2d 872, 881 (2018) ("Because of the double assessments *and the payment of the taxes* by the petitioners, we find that the mineral interests *were never delinquent. Therefore*, the sale of the subject mineral interests for delinquent taxes was void as a matter of law.") (emphasis added); *Orville Young, LLC v. Bonacci*, 246 W. Va. 26, 866 S.E.2d 91, 100 (2021) ("[B]ecause the taxes on the entirety of the surface under which the separately assessed oil and gas interests lie were paid, remained current, and never were delinquent, full payment of the taxes on the 500+-acre estate satisfied the property's tax obligation, and the separate assessment, had it been proper, was void as duplicative.").

Indeed, Respondent's own illustration of *Bonacci* demonstrates the distinction between the facts of that case and the one at bar. As recited by Respondent, in *Bonacci*, "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." Resp't's Br. 7 (citing *Bonacci*, 866 S.E.2d at 95). Thereafter, it was only "*the second [oil and gas] assessment* [that] went delinquent and was ultimately sold at a tax sale in 1949." *Id.* (emphasis added). In the end, the *Bonacci* Court held that "because the taxes on the entirety of the surface under which the separately assessed oil and gas interests lie were paid, remained current, and never were delinquent, . . . the State had no interest in the subject oil and gas interests to sell at the ensuing tax sales." *Bonacci*, 866 S.E.2d at 100. Thus, the distinction between *Bonacci* and the case at bar is clear given the fact that Respondent does not dispute that both of the underlying assessments were in fact delinquent. And this distinction is significant. Without payment of either underlying assessment, the State absolutely possessed an enforceable tax lien on the oil and gas. As observed by Petitioners in their Opening Brief, Respondent's entire case is premised on this fact as he was a purchaser at the tax sale and is now attempting to collect on that enforceable oil and gas tax lien by claiming it for himself. To that end, Respondent's argument that "the State had nothing to grant" with respect to the oil and gas interest is inconsistent with Respondent's ultimate conclusion that he has the only valid oil and gas interest, which in his view was, ironically, granted to him by the State. Resp't's Br. 14.

Respondent further claims that Petitioners have simply asserted the inapplicability of the law of duplicative assessments that stems from *State v. Low*, while leaving this Court without an avenue for resolution. Not so. In their Opening Brief and in the briefing on Summary Judgment in Circuit Court, Petitioners have consistently asserted that where the tax deed was not void

because the underlying tax was in fact delinquent, the statute of limitations on voidable deeds must apply. *See* APP 406 (Petitioner Collingwood I and III's Motion for Summary Judgment asserting that "because [Respondent] cannot argue pursuant to double assessment law as established in *Low* and its progeny, he must turn to the Code's remedies for voidable deeds created by procedural irregularities"). Critically, although *Bonacci* holds separate assessments are improper pursuant to West Virginia Code § 11-4-9, it does not explain the proper outcome where a separate duplicative assessment is in fact delinquent. *Bonacci* observed "the governing statute explicitly provides that separate assessments may not be made on undivided interests in property." 866 S.E.2d at 99. And yet, when analyzed without regard to whether such assessment was paid or in fact delinquent, *Bonacci* characterized such separate assessment as merely "erroneous" as opposed to void. *See id.* ("By contrast, the interest that the Petitioners' predecessors allegedly acquired was attributable to the separate, *erroneous* assessment that the Assessor levied on the oil and gas leasehold interests . . . .") (emphasis added). Analyzing the separate assessment under Section 11-4-9 alone, the Court observed

> Because the oil and gas estate was never severed from the surface estate, there was no separate property interest upon which the Assessor could assess taxes; therefore, the Assessor's assessment of taxes on property described as "202 Royalty Wells #629-630 Nat Gas Co. W. Va." was *erroneous* because the assessment did not relate to a separate interest in real property upon which the subject taxes could be assessed.

Id. (emphasis added). The *Bonacci* Court did not hold the separate assessment "void as duplicative" until it noted that "the taxes on the entirety of the surface under which the separately assessed oil and gas interests lie were paid, remained current, and never were delinquent." *Id.* It was at that point that the Court concluded because "full payment of the taxes on the 500+-acre estate satisfied the property's tax obligation, . . . the separate assessment, had it been proper, was

void as duplicative." *Id.* (emphasis added). Indeed, the opening paragraph of Justice Jenkins' opinion confirms that the Court held the "underlying tax deeds were *void because the Bonacci brothers' predecessors in interest had paid the property taxes* assessed on the subject, undivided oil and gas estate; *the taxes thereon were not delinquent*; and no tax lien attached to the mineral estate that could be sold at a tax sale." *Id.* at 94 (emphasis added). In sum, the *Bonacci* Court was careful to distinguish between assessments that are *erroneous* pursuant to W. Va. § 11-4-9 and assessments that are *void* as duplicative pursuant to the common law of duplicative assessments stemming from *State v. Low*. Petitioners' argument has recognized and been consistent with this critical distinction throughout the briefing.[1] Thus, Petitioners do not seek an exception to *Bonacci*, as Respondent claims; rather, they seek a holding that is consistent with *Bonacci's* clear and careful terms.

In conclusion, because Respondent does not dispute the actual delinquency of the underlying tax, this Court should hold the oil and gas assessment merely erroneous and voidable, subject to the three-year statute of limitations in Chapter 11A of the Code, pursuant to the distinction between erroneous and void assessments recognized by this Court in *Bonacci*. *See also L&D Investments, Inc.*, 241 W. Va. at 55, 818 S.E.2d at 881 ("Voidable tax sale deeds are protected by a three-year statute of limitations for setting aside the tax sale deed by the defaulting

[1] *See* App 515 (Petitioner Oxy, USA, Inc.'s Opposition to Plaintiff's Motion for Summary Judgment., arguing "[i]n the absence of any payment, tax deeds are not void. At best Plaintiff's Motion argues that the procedure used by the Wetzel County Assessor could have been in error. However, West Virginia Code Section 11A-3-31, provides in pertinent part that 'no irregularity, error or mistake in respect to any step in the procedure leading up to and including delivery of the tax deed by the State Auditor shall invalidate the title acquired by the purchaser.'"); *Id.* at 615 (Petitioners Collingwood Appalachian Minerals I and III's Reply to Plaintiff's Opposition, arguing that because "Stiles paid neither the surface nor the oil and gas assessments . . . the resulting lien for failure to pay was valid because it was not based on the nonpayment of a duplicative tax where the corresponding duplication assessment was in fact paid"). In sum, Petitioners have consistently argued that the law of duplicative assessments stemming from *Low* is "inapplicable, and in its stead, Chapter 11A of the West Virginia Code is controlling." APP 613. Thus, this Court should disregard Respondent's unsupported claim that these arguments were not presented to the Circuit Court. *See* Resp't's Br. 4. Moreover, to the extent Respondent suggests that Petitioners should have argued pursuant to *Bonacci* directly in Circuit Court, the suggestion is meritless given the fact that Petitioners' Reply briefing was submitted to the Circuit Court on November 5, 2021 and *Bonacci* was decided on November 18, 2021. *Compare* APP 619 *with* 866 S.E.2d at 91.

land owner. Section 11A-4-2, 11A-4-3, 11A-4-4."). This conclusion is especially compelling when analyzed alongside the policy considerations at stake where, as here, a tax sale purchaser, rather than an allegedly delinquent land owner, is attempting to claim an interest in the property sold at the tax sale thirty years after the fact.

2. THE POLICY CONSIDERATIONS AT STAKE WEIGH HEAVILY IN PETITIONERS' FAVOR.

Petitioners' policy argument relies heavily if not entirely on the fact that Respondent was a fellow purchaser at the tax sale and not an allegedly delinquent land owner or such land owner's predecessor in interest. Yet, in response to Petitioners' argument, Respondent fails to acknowledge his position as a tax sale purchaser and insists on framing the policy discussion as though he were delinquent landowner. Illustrative of the point is Respondent's reliance on Circuit Court Judge Hummels's concern that "[a]s a land owner [himself] an assessor could change the characteristics of [his] of real property" when discussing whether an assessor could legally assess unsevered surface and mineral interests separately. Resp't's Br. 14. Respondent was not the land owner at the time of the separate assessments, so the assessor was not changing the characteristics of his real property. Stiles was the land owner who was in a position to share Judge Hummel's concern. And as the land owner, Stiles would have recourse for any land that the state improperly sold out from under him in perpetuity, as demonstrated by the Petitioners' duplicative assessment analysis. Moreover, Petitioners did not simply quote Judge Hummel's concern and assert that it supports Petitioners' argument standing alone, as implied by the response. *See* Resp't's Br. 14–15. Rather, Petitioners explained that the "compelling concern" is in fact "alleviated by the law of duplicative assessments" and further, it is not a concern that "Respondent, as a purchase at the tax sale, shares." Pet'rs' Opening Br. 14.

Despite Respondent's attempt to minimize the distinction between a delinquent land owner and a tax sale purchaser, the distinction is significant, as the Legislature has explicitly recognized. In the unpublished opinion of *MZRP, LLC v. Huntington Realty Corp.*, No. 35692, 2011 WL 12455342, *3–4 (March 10, 2011) this Court observed that West Virginia Code § 11A-3-73 prevents erroneously assessed real property from being sold at a tax sale, but only with respect to land owners. "It does not provide relief for 'tax sale' purchasers." *MZRP, LLC*, 2011 WL at *3–4. This affirms that the Legislature considers the distinction between an allegedly delinquent land owner and a tax sale purchaser significant. It further affirms Petitioners' Opening Brief assertions that a tax sale purchaser standing in Respondent's shoes has no position among the hierarchy of policy interests with regard to allegedly delinquent land owners, the State's interest in collecting taxes, and certainty of title.

Respondent counters Petitioners' policy arguments by attempting to fault Petitioner Waco's "statutorily required due diligence after purchasing the tax lien." Resp't's Br. 14. According to Respondent, Petitioner Waco "had either actual or constructive notice that Stiles had a second, duplicate assessment associated with his primary assessment." *Id.* This point has no merit because, in Respondent's own words, *Bonacci*, which was decided in November of 2021, "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." *Id.* at 11 (emphasis added). Thus, even if *Bonacci* did hold that assessments made in violation of Section 11-4-9 are void as opposed to merely erroneous (it didn't), *Bonacci's* analysis of Section 11-4-9 could not have guided Petitioners' due diligence that was conducted thirty years prior. And, as Petitioners have consistently demonstrated, the fact that the underlying taxes where in fact delinquent removes this case from the purview of duplicative assessment case law.

Furthermore, Respondent's bold, yet half-hearted, assertion that the Circuit Court's holding promotes certainty in land titles fares no better than his due diligence point. The Circuit Court's holding invalidates a thirty-year-old tax deed that is premised on actual delinquency, in favor of a fellow purchaser at a parallel tax sale. Such a holding in no way promotes certainty in land titles. If the Circuit Court's holding lies, tax sale purchasers throughout the State would have their property subjected to challenge by fellow tax sale purchasers, even where the underlying taxes where not paid by the original land owner. Simply put, certainty in land titles is promoted by enforcing a three-year statute of limitations.

Respondent attempts to justify the outcome below by claiming Petitioners have no interest in avoiding the harsh "forfeiture of land" described by *L&D Investments, Inc. v. Mike Ross, Inc.* because, in his view, Petitioners were never the actual owner of the subject property. 241 W. Va. 46, 55, 818 S.E.2d 872, 881 (W. Va. 2018). The hierarchy of policies observed by Petitioners in their Opening Brief entirely neutralizes Respondent's claim. *See* Pet'rs' Br. 12–14. Tax sale purchasers undoubtedly have a legitimate interest in "secur[ing] . . . the full benefit of [their] purchase," which the Legislature expressly recognized as "further[ing] . . . the policy favoring the security of land titles" when it enacted Chapter 11A. *Shaffer v. Mareve Oil Corp.*, 157 W. Va. 816, 825, 204 S.E.2d 404, 410 (1974). And rightfully so, given the fact that Petitioners have acted as the de facto owner of the subject property for thirty years by paying assessments, executing transactions, and excluding others, all despite Respondent's rigid adherence to the legal fiction of his own alleged ownership of the oil and gas. Indeed, such rigid adherence once again belies Respondent's insistence on framing himself as a delinquent land

owner, as it is only the delinquent land owner's interest that may trump the tax sale purchaser's legitimate interest in the security of their title.[2]

Also, in support of his certainty claim, Respondent asserts that "[a]llowing 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.'" Respondent's Br. 14–15. But Petitioners' theory of the case does not allow such action by assessors. Petitioners acknowledge that *Bonacci* holds such assessments erroneous because they are in violation of Section 11-4-9 and further, that erroneous assessments are voidable subject to the three-year statute of limitations. Moreover, an allegedly delinquent land owner who has in fact paid their taxes pursuant to a proper assessment will always have recourse where their property is sold pursuant to an erroneous assessment because payment of the proper assessment renders the erroneous assessment void as duplicative. The facts and outcome of *Bonacci* illustrate this point perfectly. *See* 866 S.E.2d at 100 (concluding "that the Assessor improperly levied a separate assessment on the oil and gas interests and compounded this error by finding such taxes to be delinquent when the erroneous, separate assessment was not timely paid"). Here, there is no reason to elevate Respondent's position to that of a land owner prior to tax sale.

In short, Respondent represents to this Court that a holding invaliding a thirty-year-old deed, which would place countless other deeds like it in jeopardy, actually promotes certainty in

[2] Notably, the Legislature apparently did not even contemplate that a parallel tax sale purchaser such as Respondent would or could have a claim against a fellow tax sale purchaser when it enacted Chapter 11A. *See Shaffer*, 157 W. Va. at 825, 204 S.E.2d at 410 (explaining the policy behind enacting Chapter 11A "in furtherance of the policy favoring the security of land titles, to establish an efficient procedure that will quickly and finally dispose of all *claims of the delinquent former owner* and secure to the new owner the full benefit of his purchase") (emphasis added). Accordingly, the Court should be cautious of the Respondent's attempt assert that his interests in the case are consistent with that of the public policy of the State.

Additionally, Petitioners acknowledge that Chapter 11A was amended in the years following the *Shaffer* decision to reflect a greater emphasis on respecting the fundamental due process rights of allegedly delinquent land owners, but because Respondent was a purchaser at the tax sale, these amendments do nothing to heighten his footing with respect to the applicable policy concerns. *See* Pet'rs' Opening Br. 13–14 (citing W. Va. Code § 11A-3-1; *Mingo Cty. Redevelopment Auth. v. Green*, 207 W. Va. 486, 491, 534 S.E.2d 40, 45 (2000)).

title. But this incredible assertion is easily disregarded. A holding in favor of Petitioners would not impact the State's land records in any way—separate assessments would still be erroneous and voidable for three years following the delivery of the deed pursuant to *Bonacci* and Chapter 11A; land owners who have in fact paid their taxes would still have recourse against void duplicative assessments without regard to the statute of limitations; and tax sale purchasers can rest easy knowing their title is not subject to challenge by fellow tax purchasers thirty years after the tax sale, based on procedural errors that do not impact the due process rights of the prior land owner whatsoever. By contrast, a holding in favor of Respondent would encourage every tax sale purchaser in the State to review the land records to determine whether they have a windfall or an unanticipated loss in their future because of the frequency with which separate assessments were made throughout the history of the State. *See, e.g.*, *L&D Investments, Inc.*, 241 W. Va. at 52, 818 S.E.2d at 878 ("This is the third appeal to this Court from Harrison County stemming from the creation of duplicate assessments of certain mineral estates by the Harrison County Assessor beginning in the 1980s.") (citing *Haynes v. Antero Resources Corp.*, No. 15-1203, 2016 WL 6542734 (W.Va. Oct. 28, 2016) (memorandum decision); *Hill v. Lone Pine Operating Co.*, No. 16-0219, 2016 WL 6819878 (W. Va. Nov. 18, 2016) (memorandum decision)). The Circuit Court explicitly agreed with this observation. *See* App 752. And, as explained in detail in Petitioners' Opening Brief, such uncertainty offers no articulable benefit to the concomitant public policies of providing fundamental due process protections for delinquent land owners, the State's interest in collecting tax, and certainty of land titles. Finally, such an outcome would directly contravene the Legislature's express intent in enacting Chapter 11A of the Code. *See Shaffer*, 157 W. Va. at 825, 204 S.E.2d at 409–10 (analyzing the Legislature's express policy statement in favor of providing "speedy and expeditious enforcement of the tax claims of the

State" and securing tax sale purchasers "the full benefit of his purchaser" in "furtherance of the policy favoring the security of land titles"). Therefore, this Court should reverse the decision of the Circuit Court and hold Petitioners' 1991 tax deed valid in light of the expired statute of limitations for challenging voidable deeds.

3. THE 1995 TAX DEED IS VALID BECAUSE DUNHAM POSSESSED A 25% INTEREST IN THE OIL AND GAS WHEN THE ASSESSMENT FOR THE SAME WAS RETURNED DELINQUENT.

Respondent correctly asserts that in Petitioners' view, the deed by which Dunham conveyed his interest to Stiles unambiguously conveyed "the same land conveyed to the said Osburn Dunham, by Joseph E. Rogers and Myrtle Rogers." APP 114. Because the Rogerses conveyed only the surface plus a 25% oil and gas interest to Dunham in 1945, *see* APP 106–07, that is all that was conveyed in Dunham's subsequent conveyance to Stiles by the express language of the conveyance. Dunham's conveyance to Stiles contained no language that granted, or intended to grant, the 25% oil and gas interest that Dunham received from Joseph and Amanda Palmer in 1949. *See* APP 111–12. Therefore, the 1995 tax deed is valid because Dunham did in fact have a 25% oil and gas interest when his assessment for the same was returned delinquent.

However, Petitioners also submit that, in the alternative, the deed by which Dunham conveyed his interest to Stiles was ambiguous in light of the surrounding circumstances, and that a review of the extrinsic evidence conclusive reveals the parties' intent to convey and receive only a 25% interest in the oil and gas.

A. The deed by which Dunham conveyed his interest to Stiles unambiguously conveyed only a 25% oil and gas interest.

Because the conveyance was limited by the plain language of the deed, there was no need for an express reservation of the 25% oil and gas interest that Dunham received from the

Palmers. Therefore, the Circuit Court erred in applying *Bennett* v. *Smith* and holding that the deed did not sufficiently state a reservation of the 25% oil and gas interest received from the Palmers. 136 W. Va. 903, 69 S.E.2d 42 (W. Va. 1952). The language of the conveyance never contemplated the 25% oil and gas interest from the Palmers from the beginning, so reserving the same was unnecessary. The significant distance between the facts of *Bennett* and the present case illustrates the point. In *Bennett*, the defendant argued that the deed in question reserved an interest in coal, even though the deed contained no express exception or reservation of coal. *See id.* at 912, 47. According to the defendant in *Bennett*, the deed's reference to prior deeds in the chain of title thereby incorporated the prior deeds' reservations of coal. *Id.* Here, by contrast, Petitioners are not arguing that the subject deed reserved an interest in oil and gas by incorporating the reservations of a prior deed or deeds. Instead, they have observed that the plain language of the deed limited the conveyance to that which was conveyed to "Dunham by Joseph E. Rogers and Myrtle Rogers," or in other words, the surface plus a 25% oil and gas interest. APP 114. As a result, there was no need for a reservation, and the Circuit Court erred accordingly when it applied *Bennett* and concluded that the deed failed to reserve the 25% oil and gas interest that was never conveyed to Stiles in the first place.

B. To the extent the deed was ambiguous, the undisputed extrinsic evidence confirms that the parties' intended to convey and receive only a 25% oil and gas interest.

In the alternative, Petitioners assert that the Circuit Court erred in declaring the deed unambiguous. Respondent mistakenly asserts that Petitioners are precluded from challenging the Circuit Court's conclusion regarding the ambiguity of the deed. *See* Resp't's Br. 19. "The question as to whether a contract is ambiguous is a question of law to be determined by the court." Syl. Pt. 1, *Berkeley Cty. Public Service Dist. v. Vitro Corp. of America*, 152 W. Va. 252, 162 S.E.2d 189 (1968). Because the Circuit Court declared the deed unambiguous, it made no

factual findings with respect to the intent of the parties as indicated by their conduct. *See* APP 695. But here, the extrinsic evidence in the record is so one-sided that there is no need to remand to the Circuit Court for factual findings regarding the intent of the parties. *See Fayette Cty. Nat'l Bank v. Lilly*, 199 W. Va. 349, 355 484 S.E.2d 232, 237 (1997) (declining to remand despite the lack of factual findings below)[3]; *Ratliff v. Tyson*, No. 15-0309, 2015 WL 823139, *3 (Dec. 7, 2015) ("Having reviewed the record on appeal, we find that it permits us to decide this case without the necessity of a remand for additional findings."). All of the evidence points toward Dunham's intent to convey, and Stiles' intent to receive, only a 25% oil and gas interest in the subject property. Indeed, Respondent does not rebut the nature of the extrinsic evidence regarding the parties' intent; instead, Respondent relies on misapplications of law to attempt to keep this Court from considering the extrinsic evidence at all. *See* Resp't's Br. 19-20.[4] This is a powerful indicator of the strength of the extrinsic evidence.

Simply put, Respondent's assertions regarding the applicability of extrinsic evidence in this case are wrong. This Court has observed that a "contract is ambiguous when it is reasonably susceptible to more than one meaning *in light of the surrounding circumstances*." *Fraternal*

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[3] *Fayette Cty. Nat'l Bank* was overruled on other grounds by *Sostaric v. Marshall*, 234 W. Va. 449, 766 S.E.2d 396 (2014).

[4] Respondent challenges Petitioners' statement regarding Dunham's payment of taxes on his 25% oil and gas interest after his conveyance to Stiles. *See* Resp't's Br. 19 n.13. Respondent claims Petitioners were referencing a "Palmer well" in their Opening Brief argument. But this is not the case. Petitioners were observing that Dunham paid taxes on the 25% oil and gas interest that he received from Palmer for years after Dunham's conveyance to Stiles. This fact is expressly supported in the record, and in fact, Respondent's uncharitable interpretation of Petitioners' statement required Respondent to editorially insert the word "the" in front of Palmer well when quoting Petitioners.

Further, Respondent challenges Petitioners' statement regarding the number of years for which Stiles paid taxes on his 25% oil and gas interest following the conveyance from Dunham. *See* Resp't's Br. 19 n.13. But critically, Respondent does not challenge the fact that Stiles did pay assessments; instead he observes that the record is unclear on for how long Stiles paid the assessments. *See id.* Petitioners' point stands regardless of how long Stiles paid the assessments. If, as Respondent submits, Stiles intended to receive a 50% oil and gas interest from Dunham, then he had a duty to correct the insufficient 25% oil and gas assessments that appeared in the records for years after the conveyance. And failing to pay the 25% oil and gas assessment does not indicate that Stiles actually intended to receive a 50% interest from Dunham, regardless of when Stiles stopped paying the assessment.

Order of Police, Lodge No. 69 v. City of Fairmont, 196 W. Va. 97, 101, 468 S.E.2d 712, 716 (1996) (emphasis added); *see also* Restatement (Second) of Contracts, § 212 cmt. b (suggesting that determinations of ambiguity are best "made in light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties"). Accordingly, this Court has indicated that while "a court should not consider extrinsic evidence to give meaning to a contract unless the contract terms are vague and ambiguous[,] . . . [c]ourts sometimes may ponder extrinsic evidence to determine whether an apparently clear term is actually uncertain." *See id.* at 103, 718 n.8 (citing 2 E. Allan Farnsworth, Farnsworth on Contracts § 7.12 at 277–78 (1990); 3 Arthur L. Corbin, Contracts § 579 (1960)). "Of course, this exception is narrow[,]" but Petitioners' extrinsic-evidence contentions fit perfectly within the exception nonetheless because they have been "employed for the purpose of determining whether an ambiguity exists if it suggests a meaning to which the challenged language reasonable is susceptible." *Id.*

Here, Petitioners have invariably argued that the scope of the conveyance was defined by the reference to the deed from the Rogerses. Consistent with *Fraternal Order of Police*, the Circuit Court should have considered Petitioners' interpretation "in light of the surrounding circumstances" to determine whether the challenged language was "reasonably susceptible" to such interpretation. 196 W. Va. at 101, 468 S.E.2d at 716. In doing so, the Circuit Court would have been greeted with clear evidence not only indicating the viability of such interpretation, but also confirming the intent of both parties to the conveyance. Dunham's oil and gas assessment was changed from 50% to 25% after the conveyance. *Compare* APP 287 *with* APP 288. Dunham paid subsequent assessments, each for a 25% oil and gas interest. *See* APP 350–57.

Stiles was assessed for a 25% oil and gas interest in the years following the conveyance, and not a 50% interest. *See* APP 359–75. Stiles executed a subsequent oil and gas lease for only a 25% oil and gas interest. *See* APP 632. Dunham extended an existing oil and gas lease in 1985. *See* APP 547. This evidence simultaneously demonstrates that the deed in question is reasonably susceptible to Petitioners' interpretation and confirms that such interpretation is consistent with the intent of the parties. "In construing a deed, . . . 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 reasonable clear and free from doubt, unless to do so will violate some principle of law inconsistent therewith." Syl. Pt. 5, *Hall v. Hartley*, 146 W. Va. 328, 119 S.E.2d 759 (1961). Here, there can be no doubt as to the intent of the parties when the deed is construed as a whole and "in light of the surrounding circumstances. *Fraternal Order of Police*, 196 W. Va. at 101, 468 S.E.2d at 716. Accordingly, this Court should hold that the Circuit Court erred as a matter of law by concluding the deed in question was unambiguous, and should further hold that, in light of the remarkably one-sided extrinsic evidence, and consistent with the parties' intent, the deed conveyed only 25% of Dunham's oil and gas interest.

CONCLUSION

For the foregoing reasons as discussed herein, this Court should reverse the Circuit Court's decisions and hold both the 1991 and the 1995 tax deeds valid.

WHEREFORE, Petitioners respectfully request that this Honorable Court reverse that Order entered January 21, 2022, by the Circuit Court of Wetzel County, West Virginia.

DATED the 27th day of July 2022.

PETITIONERS

COLLINGWOOD APPALACHIAN
MINERALS III, LLC, formerly known as

Somerset Minerals LP, a Texas limited liability company,

OXY USA, INC., a Delaware corporation,

COLLINGWOOD APPALACHIAN MINERALS I, LLC, formerly known as BP Minerals II, LLC, a Texas limited liability company, and

WACO OIL & GAS CO., INC., a West Virginia corporation

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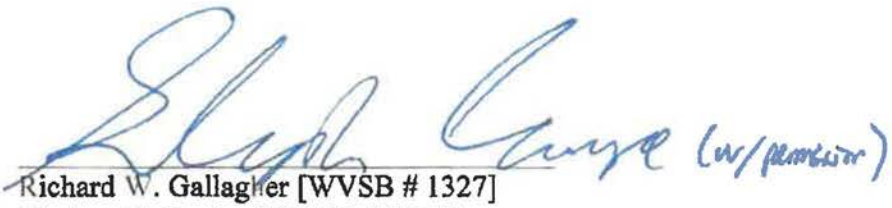

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I certify that a true and accurate copy of the PETITIONERS' REPLY BRIEF was served upon counsel listed below by Email on the 27th day of July 2022.

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