INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
No. 22-ICA-207

Earl J. Nicholson and
Joyce A. Nicholson,

Plaintiffs Below, Petitioners,

v.

Antero Resources Corporation,
Severin POA Group LLC,
Mark A. Koelzer, Shelley A. Chase, Patty L. Sayler,
Rick Koelzer, Robert J. Koelzer, Jean L. Nyquist,
Sally Lauer, Michael Lauer, Andrea Lauer,
Timothy Lauer, Donald K. Lauer, James E. Lauer,
Barbara L. Bochsler, Brixey Maizano,
Leah Severin, Angela J. Counsilman, Theresa L. Severin,
Charlotte L. McClow, Gary Frederick Severin,
John Patrick Severin, Jane Marie Severin,
Donna Laha, David Joseph Severin, Mary Coleen Bracket,
Betty Ann Severin, Sally Jean Urie, Mary Joanne Perry,
Susan L. Dahl, Rebecca Severin, Carole Mize,
Robert K. Gruetze, Mark Gruetze, and Gerald Francis Severin,
Rockwell Resources LLC, JEC Production LLC, and Robert R. Jones,

Defendants Below, Respondents.

On Appeal from the Circuit Court of Doddridge County
Honorable Timothy L. Sweeney, Judge
Civil Action No. 20-C-25

PETITIONERS' BRIEF

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I. ASSIGNMENT OF ERROR

The Circuit Court erred as a matter of law in refusing to apply the unambiguous language of the deed and declare that the reservation of "one sixteenth of all the oil and gas in and under said land" reserved only one-sixteenth of the oil and gas in place. Instead, and despite expressly finding that the deed was unambiguous, the Circuit Court nevertheless judicially constructed the deed, altered the intent of the parties and held that the deed reserved one-half of the oil and gas in place.

II. STATEMENT OF THE CASE

A. Relevant Facts

The subject property in this matter is a 117.55-acre tract in New Milton District, Doddridge County, West Virginia ("Subject Property"). By deed dated April 1, 1902, and of record in the Clerk's Office in Deed Book 34, at Page 335, J.W. Severin conveyed the Subject Property to L.D. Nicholson (the "Severin Deed"). (APP. 227). The Severin Deed contained the following reservation that is the subject matter of this Petition: "The parties of the first part also reserve the one sixteenth of all the oil and gas in and under said land . . . " (the "Severin Reservation"). (APP. 228). By subsequent conveyances, all of which are of record in the Clerk's Office, title to L. D. Nicholson's interest was conveyed to John and Joyce Nicholson, the Petitioners, by deed dated November 4, 1999, and of record in the Clerk's Office in Deed Book 244, at Page 28. (APP. 022).

On October 14, 1977, the Nicholsons' predecessor in title leased their interest in the oil and gas underlying the Subject Property to Rockwell Petroleum Co. ("Rockwell"). (*Id.*). Rockwell later assigned a portion of the lease rights to Respondent Antero Resources Corporation, a defendant below ("Antero"). (APP 024). Starting in 2017, Antero produced and sold a portion of oil and gas underlying the Subject Property. (APP. 105). In 2018, Antero commenced sending

monthly payments to the Nicholsons. (*Id.*). However, the Nicholsons disagreed with the amount of oil and gas interest reflected in the payments issued by Antero, and this underlying action commenced.

B. Procedural History

On October 5, 2020, the Nicholsons filed a Complaint with the Circuit Court of Doddridge County, West Virginia ("Circuit Court"). Thereafter, on March 29, 2021, the Nicholsons filed an Amended Complaint with the Circuit Court, seeking clarification and confirmation on the interpretation of the Severin Reservation.[1] (APP. 017). The Nicholsons and Respondents, JEC Production, LLC, Rockwell Resources LLC, and Robert Jones (collectively, "JEC"), defendants below, asserted that the Severin Reservation for one-sixteenth of the oil and gas reserved exactly that— one-sixteenth of the oil and gas to J.W. Severin. Conversely, Respondent, the Severin Group LLC ("Severin Group"), defendant below, argued that the Severin Reservation should be construed to reserve one-half of the oil and gas to J.W. Severin. (APP. 121).

After briefings were filed by the Nicholsons, JEC, and Severin Group,[2] the Circuit Court declined to have oral arguments on this issue. On September 28, 2022, the Circuit Court entered a Declaratory Judgment Order ("Order"). (APP. 564) The Circuit Court correctly held that the

[1] The Nicholsons made a good faith effort to notice all interested parties to the Amended Complaint. (APP. 026-099). JEC, the Severin Group, and Antero answered the Amended Complaint. (APP. 137, 121, 100). No other party answered the Amended Complaint or made an appearance before the Circuit Court.

[2] On March 3, 2022, the Nicholsons filed its Motion for Summary Judgment as to the Declaratory Request (APP. 209) and the Severin Group filed its Opening Brief Concerning Declaratory Judgment Claims. (APP. 357). On March 16, 2022, the Nicholsons (APP. 447), JEC (APP. 479), and Severin Group filed responses. (APP. 458). On March 23, 2022, Severin Group replied to the Nicholsons' motion. (APP. 491). On July 28, 2022, pursuant to a Circuit Court order (APP. 534), the Nicholsons (APP. 537) and JEC filed supplementations to their Motion for Summary Judgment. (APP. 548). On August 9, 2022, Severin Group responded to the Nicholsons' and JEC's supplementation. (APP. 560).

Severin Deed is "unambiguous such that extrinsic evidence should not be considered...."[3] (*Id.*). Inexplicably, the Circuit Court went on to judicially construe the Severin Deed, and declared that it reserved one-half of the oil and gas mineral estate in the Subject Property, despite the fact that the word "one-half" is unquestionably not contained in the Severin Deed. (*Id.*)

III. SUMMARY OF ARGUMENT

The Circuit Court correctly held that the Severin Deed was unambiguous; however, it erred in then judicially construing the Severin Deed and altering the intent of the parties to an absurd result. Despite finding that the Severin Deed was unambiguous, the Circuit Court improperly and explicitly construed the Severin Deed against the grantee and to include a reservation of one-half of the oil and gas. This was a clear violation of West Virginia law in two respects.

First, when a court is asked to interpret a deed, that court must initiate its review based upon the directives and rules set forth in *Faith United Methodist Church v. Morgan*, 231 W.Va. 423, 745 S.E.2d 461 (2013). In violation of *Faith United*, the Circuit Court judicially construed the unambiguous Severin Reservation to find that a reservation of one-sixteenth of the oil and gas means to reserve one-half of the oil and gas in place. However, West Virginia law does not support judicially altering the word one-sixteenth to mean one-half. Application of *Faith United* required

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[3] While the Severin Group argued that the Severin Deed was plain and clear, it also argued, in the alternative, that the Severin Deed was ambiguous. (APP. 371). The Circuit Court specifically addressed this point in the Order, stating "the [Severin Deed] is unambiguous such that extrinsic evidence should not be considered in ruling on the merits of the [Severin Deed] reservation...." (APP. 567).

The Nicholsons are not appealing the Circuit Court's determination that the Severin Deed is "unambiguous;" the Nicholsons agree with this legal conclusion. The Nicholsons are appealing the Circuit Court's interpretation of the unambiguous Severin Deed including a reservation of one-half oil and gas interest. If any party responds to Nicholsons' appeal brief by presenting extrinsic evidence when attempting to argue the Severin Deed's interpretation and meaning, it should be considered irrelevant and disregarded ("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 (W.Va. 2017). "[A] court should not consider extrinsic evidence to give meaning to a contract unless the contract terms are vague and ambiguous." *Fraternal Order of Police, Lodge No. 69 v. City of Fairmont*, 468 S.E.2d 712, 718 n.8 (1996))

the Circuit Court to hold that one-sixteenth means one-sixteenth. Although not cited by the Circuit Court, since at least 1907, the Supreme Court of Appeals of West Virginia, (the "Court"), without judicial construction, has ruled that a grant or reservation of one-sixteen **only** grants or reserves one-sixteenth of the oil and gas in place.

Instead of applying *Faith United*, the Circuit Court cited to four distinguishable cases as its authority for why it ruled the Severin Deed included a reservation for "1/2 of the oil and gas mineral estate." (APP. 564). However, these cases are not relevant to applying the clear terms of the Severin Deed because each case interpreted deeds containing the word "royalty," and/or included a provision that had conflicting, repugnant fractions.

Second, the Circuit Court failed to account for the certainty of title principles that would be destroyed if the Severin Deed was declared to include a reservation of a one-half interest. The Circuit Court declared that a deed with reservation language of one-sixteenth equals one-half. Affirming the Order would make uncertain title to hundreds, if not thousands of deeds for undivided interests in land, as well as put into question the ability to convey or reserve undivided interests in land going forward.

Accordingly, the Circuit Court erred in declaring the Severin Reservation of "one sixteenth of all the oil and gas in and under said land" was for one-half of the oil and gas within and underlying the Subject Property. This Court should overrule the Circuit Court's Order, and declare the Severin Deed was plain, clear, unambiguous, and included a reservation for one-sixteenth of the oil and gas within and underlying the Subject Property.

IV. 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).

The Circuit Court declined to allow the parties to have oral arguments on the issues presented. Petitioners recommend that this matter is appropriate for a Rule 20 argument because this appeal presents an issue of fundamental public importance as the decision of the Circuit Court below would jeopardize the stability of countless real property titles. *See* W. Va. R. App. P. 20(a).

V. STANDARD 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*, 760 S.E.2d 487, 233 W. Va. 673 (2014).

VI. ARGUMENT

A. The Circuit Court Erred in Judicially Altering an Unambiguous Deed and Changing the Plain Meaning of the Deed to Declare that the One-Sixteenth Reservation of All the Oil and Gas in Place Reserved a One-Half Interest in the Oil and Gas Royalties.

The Circuit Court held that the Severin Reservation, which reserved "one sixteenth of all the oil and gas in and under said land" was clear and unambiguous. (APP. 564). In West Virginia, the law regarding applying the terms of an unambiguous deed is equally clear: "When the language used is plain and unambiguous, courts are required to apply, not construe, the contract." *Faith United Methodist Church v. Morgan*, 231 W.Va. 423, 745 S.E.2d 461 (2013).[4] "A valid written instrument which expresses the intent of the parties in plain and unambiguous language is not

[4] "Deeds are subject to the principles of interpretation and construction that govern contracts generally." Syllabus Point 7, *Faith United Methodist Church v. Morgan*, 231 W.Va. 423, 745 S.E.2d 461 (2013).

subject to judicial construction or interpretation but will be applied and enforced according to such intent." Syllabus Point 4, *Id.*[5] "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." Syllabus Point 7, *Id.* (citing Syllabus Point 3, *Cotiga Development Company v. United Fuel Gas Company*, 147 W.Va. 484, 128 S.E.2d 626 (1962)). Furthermore, "extrinsic evidence will not be admitted to explain or alter the terms of a written contract which is clear and unambiguous." Syllabus Point 4, *Id.* (*citing* Syllabus Point 9, *Paxton v. Benedum–Trees Oil Co.*, 80 W. Va. 187, 94 S.E. 472 (1917)).[6]

The Circuit Court correctly held that the Severin Deed was unambiguous. However, instead of applying the reservation of "one sixteenth of all the oil and gas in and under said land" to be reservation of only one-sixteenth of the oil and gas in place, the Circuit Court altered the phrase "one-sixteenth" to mean "one-half." There is no support for the Circuit Court's decision to alter the clear meaning of the deed and create a new agreement between the parties.

With regard to the specific words that are used in a deed, "parties are bound by general and ordinary meanings of words used in deeds." Syllabus Point 1, *McDonough Co. v. E.I. Dupont DeNemours & Co., Inc.,* 167 W.Va. 611, 280 S.E.2d at 97 (1981). The *McDonough* Court wisely noted that "a clear definition [of words] shields the courts from unnecessary litigation." *Id.* In W. *Va. Dep't of Transp. v. Veach*, 799 S.E.2d 78 (2017), the Court discussed how having "clear and

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[5] Moreover, "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." Syllabus Point 5, *Id.* (*citing* Syllabus Point 1, *Maddy v. Maddy*, 87 W.Va. 581 (1921)).

[6] *See also, Gastar Exploration, Inc. v. Rine,* 806 S.E.2d 448, 239 W. Va. 792 (2017) ("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.").

broad definition[s]...encourages stability and certainty of land titles...." *Id.* By applying the plain and clear definition of words, courts are able to promote confidence in the drafting of deeds, as well as avoid unnecessary litigation being brought to define every single word, phrase, or clause within a deed.

To be clear, the phrase "one-sixteenth" in the Severin Deed is not ambiguous; and the Court has repeatedly found that the general and ordinary meaning of one-sixteenth is one-sixteenth, unless expressly modified by the language of the deed. For example, in *Manufacturers' Light & Heat Co. v. Knapp*, 102 W. Va. 308, 135 S.E. 1 (1926) the Court posed a simple question. "How can one-sixteenth equal one-half?" *Id.* At issue in *Knapp* was whether a conveyance of a "one sixteenth" interest of the oil in place granted a "one-half interest" in the oil royalty from production on a well. *Id.* at 2. In ruling the grant was for a "one sixteenth" interest in the oil in place, the Court stated: "The language of the [deed], transferring one-sixteenth of the oil in place . . . does not require interpretation. How can one-sixteenth equal one-half?" *Id.*

Likewise, in *Lockhart v. United Fuel Gas Co.*, 105 W.Va. 69, 141 S.E. 521 (1928), the Court interpreted a grant of both oil in place and a royalty on existing production. The granting language provided:

> "**The said party of the first part grants unto the said party of the second part a one undivided sixteenth interest in and to all the oil in and under that certain tract of land hereinafter described**, as well as the one undivided half interest in and to the royalty reserved, or to be reserved, in any gas well that may be drilled on said tract of land. It being the true intention of the grantor herein to convey to the said party of the second part the one-half of the one-eighth of the oil reserved, or to be reserved, in any oil or gas lease that has been executed, and which may be executed on said tract of land, as well as the undivided half interest into the royalty reserved, or to be reserved in any such lease, for each and every gas well to be drilled on said tract. (Emphasis added). *Id.* 521-522.

Relevant to this matter, *Lockhart* affirmed that the words "one undivided sixteenth in and to all the oil" **standing alone**, would convey only one-sixteenth of the oil in place.

> In this clause there is expressly granted 'one undivided sixteenth interest in and to all the oil in and under' said tract of land. **Standing alone it seems plain that the grantors conveyed one-sixteenth of the oil in place.** . . . . Not content, however, the grantors explained the grant as follows: 'It being the true intention of the grantor herein to convey to the said party of the second part the one-half of the one-eighth of the oil reserved . . . .'

Id. at 522. (Emphasis added). The grantor in *Lockhart*, unlike in the Severin Deed, explained an intent beyond the grant of an undivided interest of one sixteenth in the oil and gas in place, which is why they ruled the conveyance to be for one-half. *Id.* There are no such words in the Severin Deed.

Moreover, in *Kilcoyne v. Southern Oil Co.*, 56 S.E. 888, 61 W.Va. 538 (1907), S. B. McDougal conveyed to T. J. Conaway on August 24, 1899, a "one-sixteenth of all the oil and gas within and underlying" the property. Thereafter, on January 26, 1903, McDougal executed an oil and gas lease with an operator. *Id.* at 540. The Court was asked to resolve a dispute between McDougal's successor in interest and the company producing the oil and gas lease. *Id.* The Court's ruling is relevant to this matter because it required a determination of the state of title after the August 24, 1899, deed. "The conveyance from McDougal to Conaway passed to him a one-sixteenth of the oil and gas, whether in place or royalty is immaterial in the determination of this cause, which was not affected in any way by any of the subsequent conveyances or lease." *Id.* at 541. Clearly, in 1899, the grant of "one-sixteenth of the oil and gas" did not convey one-half.

Finally, in the seminal royalty case *Toothman v. Courtney*, 56 S.E. 888, 61 W. Va. 538 (1907), by deed dated May 1, 1894, J. Daniel Toothman conveyed to Joseph McDermott "the 1-16 one sixteenth part of all the oil and gas in and under" a 143-acre tract of land. *Id.* at 916. Thereafter, "Toothman . . . executed to one C. J. Ford an instrument, the true character of which is a matter of controversy . . . but which designates itself 'oil lease.'" *Id.* at 915. C. J. Ford argued the instrument a deed, conveying oil and gas in place. *Id.* Toothman argued it to be a lease. *Id.*

The Court agreed with Toothman, and declared the property interest at issue "is a lease...of this [Toothman] conveyed to Joseph H. McDermott one-sixteenth, retaining the title to fifteen-sixteenths." *Id.* at 918. The Court held "[w]e agree that Toothman had title to at least one-sixteenth of the oil in place and that he did not have title to the whole of it, for he had, by his deed, conveyed one-sixteenth to McDermott. *Id.* at 918

Here, J.W. Severin used the identical language reserving his interest from L.D. Nicholson that Toothman used to convey to McDermott in 1894 being "the...one sixteenth part of all the oil and gas in and under" the land." *Id.* In 1907, neither the *Kilcoyne* nor *Toothman* Court found one-sixteenth ambiguous. More on point, neither *Kilcoyne* nor *Toothman* found one-sixteenth to mean one-half. Had J. W. Severin and L. D. Nicholson intended for J. W. Severin to reserve one-half of the oil and gas, they would have used the reservation language "one [half] of all the oil and gas in and under said land." They unquestionably also did not use any such altering language; and yet, the Circuit Court constructed a new deed for them one-hundred and twenty years later. *Knapp, Lockhart, Kilcoyne,* and *Toothman*[7] all stand for the proposition that, unless a contrary intent is shown in a deed, "one sixteenth" means what it says— one-sixteenth; not one-half.

Indeed, the only cases cited by the Circuit Court in the Order actually reinforce the proposition that a deed must contain an additional word, term, or phrase to alter the meaning of

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[7] See also *Swearingen v. Oldham,* 159 P.2d 247, 195 Okla. 532 (Okla. 1945), the Court was asked to interpret the following reservation: "**the grantors reserve to themselves one-sixteenth (1/16) of all oil, gas, or other minerals in or under this land....**"(emphasis added). *Id.* at 0. The Court referenced and relied on *Manley*, and then went onto state that this reservation was "free from ambiguity...."(emphasis added). *Id. at 17.* The Court concluded "that the grantors in such deed retained and reserved unto themselves an undivided one-sixteenth of the oil, gas, and other minerals under the land conveyed when and as produced."[7] The reservation in *Swearingen* is almost identical to the reservation language in the Severin Deed.

In *Watkins v. Slaughter*, 189 S.W.2d 699, 144 Tex. 179 (Tex. 1945), the grantor of a deed reserved a "**1/16th interest in all oil, gas and other minerals produced therefrom**" (emphasis added). *Id.* at 699. At issue was whether the grantor reserved a "1/16 royalty interest, or did it reserve to him merely a 1/16 mineral fee interest?" *Id.* The Court ruled that "1/16th" meant "one sixteenth." *Id.* at 700.

one-sixteenth to mean anything other than one-sixteenth—none of which are contained in the Severin Deed.

Specifically, the Circuit Court first cited *United Carbon Co. v. Presley*, 29 S.E.2d 446, 126 W. Va. 636 (1944) for the legal conclusion that "the reservation of 1/16th of the oil and gas operates to reserve 1/2 of the oil and gas estate under West Virginia law in 1902 and the early 1900s." (APP 565). But *United Carbon* does not support this conclusion of law and is inapplicable to the analysis of the Severin Deed. In *United Carbon*, the dispute involved the following oil and gas reservation:

> It is expressly understood that there is excepted and reserved from the operation of this conveyance and the same does not convey the **one half of the oil and gas royalty** upon and as to said two tracts of land, containing 20 acres, more or less, and 38 acres more or less, **that is to say** the said Shatto reserves **the undivided one sixteenth of the oil and gas** underlaying said two small parcels of land; . . . .

Id. 638 (emphasis added). Given the ambiguity created by the word "royalty" used in conjunction with the word "one-sixteenth", as well as the "repugnancy" between the two clauses of the reservation, the Court cited *Paxton* and *Toothman,* and restated long-held rules of construction for oil and gas reservations containing the ambiguous word "royalty." *Id.* After the Court constructed the entire provision, considering and interpreting each word and phrase within it, it determined the word "royalty" in the deed was "defined...in the sense of beneficial yield rather than ownership of the minerals in place and made specific what was meant by one-half of the royalty." *Id.*

United Carbon Co. did not create law where "one-sixteenth" should automatically be interpreted as "one-half." Unlike the reservation at issue in *United Carbon*, the Severin Reservation does not contain the word "royalty." Therefore, it was improper for the Circuit Court to judicially construe the Severin Deed and alter the clear language contained therein absent such ambiguity.

The Circuit Court next cited *McCoy v. Ash,* 63 S.E. 361, 64 W. Va. 655 (1908), for the legal conclusion that "in the early 1900s in West Virginia, a statement in a deed of a conveyance of 1/16th was a plain declaration that the parties were facilitating the sale of half of the underlying mineral asset." (APP. 566). But *McCoy* does not support this conclusion of law. At issue in *McCoy* was whether the subject deed conveyed a property interest in an adjacent tract. *Id.* The *McCoy* Court was **not** asked to interpret a reservation provision to determine whether it was for "one-half" or "one-sixteenth." In fact, *McCoy* does not find it necessary to cite the words of a reservation provision because there was no dispute that the parties were dealing with royalties, not oil and gas in place. To the extent the *McCoy* Court used the word "one-sixteenth" . . . the reference was only to oil "coming from the well," not oil and gas in place. *Id* at 655, 656. *McCoy* is not applicable to the facts here. [8]

The Circuit Court then referenced and relied on *Horner v. Gas Co.,* 76 S.E. 662, 71 W.Va. 345 (1912), where the deed at issue granted "all of the **one half** of the **royalty**, being **one sixteenth**, of all the oil and one half of the gas within...." (emphasis added). *Id.* at 346. The *Horner* Court was asked to interpret the meaning of the word "royalty" in the context of the granting language in the deed and the existence of an oil and gas lease on the property granted. *Id.* The Court noted the word "royalty" was ambiguous, and therefore, used extrinsic evidence (being the existence of an oil and gas lease) in constructing the deed to ascertain the intent of the parties. *Id.* at 348. After extensive analysis of the oil and gas lease on the property in relation to the language of the deed,

[8] In a footnote in the Order, the Circuit Court stated that *McCoy* "demonstrates the custom and understanding of one-sixteenth fractional language in the early 1900's within West Virginia jurisprudence/abstracting practices." (APP. 566). This statement is clearly and easily disproven by *Knapp, Lockhart, Kilcoyne, and Toothman* (all discussed above). These cases were all decided in the early 1900's, and all had grantors conveying or reserving one-sixteenth interests, not one-half interest.

the Court ruled "the parties contracted with a view to the [oil and gas] lease, meaning to pass Horner and Sands one half of what that lease gave...." *Id.* at 348.

Similar to the other two cases relied on by the Circuit Court, *Horner* did not create law that states one-sixteenth in a deed plainly and clearly means one-half. Unlike the deed in *Horner*, the Severin Reservation does not contain the word "royalty." Simply, *Horner* does not stand for the legal conclusion stated in the Order, and it is not relevant to interpreting the Severin Deed.

Finally, the Circuit Court cited Syllabus Point 2 in *Koen v. Bartlett*, 23 S.E. 664, 41 W. Va. 559 (1895), and ruled that "in 1902 the general rule in West Virginia was not to construe documents against a grantor." (APP. 566). But neither Syllabus Point 2[9] nor *Koen*[10] support this legal conclusion. In fact, in 1902, in *Isner v. Kelley*, 41 S.E. 158, 51 W. Va. 82, (1902), the Court held just the opposite, stating "[a] covenant in a deed must be construed most strongly against the grantor." *Id.* at 160. In fact, it has been black letter law from 1871[11] through 2019,[12] that a deed or lease is to be construed most strongly against the grantor. If a court is required to construe an ambiguous deed, which the Severin Deed was not, the law in West Virginia is clear: "the interpretation of deeds in cases of doubt or ambiguity will be construed most strongly against the

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[9] Syllabus Point 2, *Koen*, provides:

> The tenant of an estate for life, unless restrained by covenant or agreement, has a right to the full enjoyment and use of the land and all its profits during his estate therein, including mines of oil or gas open when his life estate begins, or lawfully opened and worked during the existence of such estate.

[10] *Koen* does not address this rule of construction, failing to use the words "construed most strongly against the grantor" in any manner.

[11] *List v. Cotts*, 4 W. Va. 543 (1871) (A deed, especially a deed poll, is always **construed most strongly** against the grantor.).

[12] *Bruce McDonald Holding Co. v. Addington, Inc.*, 825 S.E.2d 779, 241 W.Va. 451 (2019) (ambiguous or doubtful provisions of a lease agreement should be **construed most strongly** against the party who prepared the instrument.).

grantor and in favor of the grantee." *Wellman v. Tomblin*, 84 S.E.2d 617, 140 W. Va. 342 (1954). Here, the Circuit Court not only erred in judicially altering the intent of the parties to an unambiguous deed, but did so in abrogation of the general rule for interpreting deeds in favor of the grantee. To the extent that the Circuit Court construed the unambiguous Severin Deed, it should have been construed against the grantor, F. W. Severin.

Had the parties to the Severin Deed intended for the grantor to reserve one-half of the oil and gas they would have clearly and plainly used the language "one [half] of all the oil and gas in and under said land," or used additional, modifying, or altering language within the deed to clarify their intent (as was done in deeds from *United Carbon*, *McCoy*, and *Horner*). They did not. Instead, the parties clearly reserved "one sixteenth of all the oil and gas in and under said land." Accordingly, nothing within the Severin Deed requires judicial construction, and the Circuit Court was required by West Virginia law to interpret "one sixteenth" to mean one-sixteenth. However, the Circuit Court misapplied the applicable law and altered the Severin Reservation to substitute "one-half" for "one-sixteenth" and apply a meaning not set forth in the Severin Deed. The result, of course, is that the Circuit Court destroyed the clear meaning and intent of the parties as expressed in unambiguous language in their written deed and made an entirely different deed for them. (APP. 568). Application of *Faith United* to the plain language of the Severin Reservation has only one result: the Severin Reservation reserved one-sixteenth of the oil and gas in place to J.W. Severin, not one-half.

B. Overruling the Order and Declaring that the Severin Deed Reserved Only a One-Sixteenth Interest in the Oil and Gas in Place Would Maintain Confidence in and Certainty of Title to Land for All Deeds that Include a Grant or a Reservation of an Undivided Interest.

The Circuit Court declared that the phrase "one sixteenth" referenced in the Severin Deed "plainly . . . on its face" equals one-half. (APP. 567). If the Circuit Court's decision is upheld, it

will immediately create uncertainty in any chain of title containing a grant or reservation of an undivided interest of one-sixteenth.

West Virginia law favors certainty of title.[13] "This Court's goal in the area of land ownership is to avoid bringing 'upon the people interminable confusion of land titles[;]' instead, the Court must 'endeavor to prevent and eradicate uncertainty of such titles.'" *Faith United Methodist Church v. Morgan*, 231 W.Va. 423, 745 S.E.2d 461 (2013) (citing *Toothman v. Courtney*, 62 W.Va. 167, 183, 58 S.E. 915, 921 (1907)).

The Circuit Court's ruling creates a dilemma: What unambiguous language can be used by a party who intends to reserve **only** a one-sixteenth interest in the oil and gas in place? This question is not rhetorical, and will be left unanswered if the Circuit Court's ruling is upheld. If the Severin Deed is declared to include a reservation of one-half, absent litigation, it is impossible for a grantor to plainly and clearly grant or reserve a one-sixteenth interest in real property. How much plainer and clearer could the words of a deed be in granting "one sixteenth" interest other than the words used in the Severin Deed? This example confirms the immense ramifications that would ensue by ruling the Severin Deed's plain language reserved a one-half interest instead of the actual "one sixteenth" it actually stated. If "one sixteenth" does not mean one-sixteenth (as clearly set forth in the Severin Deed), no party to a deed can be confident in what undivided interest they are conveying or receiving.

Declaring that "one sixteenth" does not mean one-sixteenth would inundate the courts with

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

declaration requests for all kinds of undivided interest amounts from deeds. Affirming the Order could put into question hundreds, if not thousands of titles of land in West Virginia, as well cast doubt for parties to future conveyances or reservations, ultimately destroying the Court's goal of creating certainty of land title. This rule of law will open the doors to litigate **any** chain of title containing a grant or reservation of any denomination of an undivided interest. For example, if one-sixteenth (1/16) plainly on its face equals one-half, would it not logically follow that a reservation of one-thirty-second (1/32) plainly on its face equals one-quarter? More absurd, would it not logically follow that a reservation of one-eight (1/8) plainly on its face equals all? These questions run counter to the certainty of title principles articulated by our Court.

Reversing the Circuit Court's Order and declaring the Severin Deed to plainly include a reservation of one-sixteenth of the oil and gas is critically important to certainty of title in West Virginia, and would allow parties to deeds to confidently convey real property interests. Having "clear and broad definition[s]...encourages stability and certainty of land titles...," and having clear definitions of words "shields the courts from unnecessary litigation." W. *Va. Dep't of Transp. v. Veach*, 799 S.E.2d 78 (2017). There is no clearer definition for "one sixteenth" then one-sixteenth.

Application of and adherence to *Faith United* when interpreting the Severin Deed, as well as using *Knapp, Lockhart, Kilcoyne,* and *Toothman* as guidance, "shields the courts from unnecessary litigation." The plain, clear, and unambiguous language of the Severin Deed has but only one interpretation: the grantor reserved a "one sixteenth of all the oil and gas in and under said land." To promote the long-standing goal of the Court on certainty of title in West Virginia, this Court should overrule the Order, and confirm and declare that the Severin Deed reserved a one-sixteenth oil and gas interest in the Subject Property.

VI. CONCLUSION

The Circuit Court failed to apply the appropriate law when interpreting the unambiguous Severin Deed, instead relying on case law for ambiguous oil and gas reservations containing the word "royalty." The Circuit Court's ruling creates uncertainty of title for any reservation (or grant) of an undivided interest in oil and gas in place. For the foregoing reasons, the Circuit Court erred in holding that the Severin Deed reserved one-half of the oil and gas within and underlying the Subject Property.

WHEREFORE Petitioners respectfully request that this Honorable Court overrule the Order entered September 28, 2022, by the Circuit Court of Doddridge County, West Virginia, and pursuant to W.Va. Code 55-13-1 *et. seq.*, declare the Severin Deed plainly and clearly reserved a one-sixteenth interest in the oil and gas within and underlying the Subject Property.

DATED January 30, 2023.

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INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 22-ICA-207

Earl J. Nicholson and
Joyce A. Nicholson,

Plaintiffs Below, Petitioners,

v.

Antero Resources Corporation,
Severin POA Group LLC,
Mark A. Koelzer, Shelley A. Chase, Patty L. Sayler,
Rick Koelzer, Robert J. Koelzer, Jean L. Nyquist,
Sally Lauer, Michael Lauer, Andrea Lauer,
Timothy Lauer, Donald K. Lauer, James E. Lauer,
Barbara L. Bochsler, Brixey Maizano,
Leah Severin, Angela J. Counsilman, Theresa L. Severin,
Charlotte L. McClow, Gary Frederick Severin,
John Patrick Severin, Jane Marie Severin,
Donna Laha, David Joseph Severin, Mary Coleen Bracket,
Betty Ann Severin, Sally Jean Urie, Mary Joanne Perry,
Susan L. Dahl, Rebecca Severin, Carole Mize,
Robert K. Gruetze, Mark Gruetze, and Gerald Francis Severin,
Rockwell Resources LLC, JEC Production LLC, and Robert R. Jones,

Defendants Below, Respondents.

CERTIFICATE OF SERVICE

I certify that on January 30, 2023, I have served a true and exact copy of the foregoing **PETITIONERS' BRIEF** by U.S. Mail, fax, E-file, and/or electronic mail to the following counsel:

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