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' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Circuit Court did not have oral arguments on the issue presented. The present issue is one of fundamental public importance as the decision of the Circuit Court would jeopardize the stability of countless real property titles in West Virginia. Therefore, Petitioners reassert their request for oral argument.

ARGUMENT

On March 16, 2023, Respondent Severin POA Group, LLC ("Severin Group", "Respondent") filed a BRIEF OF RESPONDENT SEVERIN POA GROUP, LLC ("Respondent Brief"), in response to Petitioners' Brief ("Petitioners' Brief"). Respondent argues that the relevant law in 1902 supported that a reservation of "one sixteenth of the oil and gas" reserved one-half of the oil and gas in place, while seemingly conceding that the relevant law today does not support such an interpretation. The threshold issue thus presented for this Court is narrow. Was the law different in 1902 than today? The answer is plain and simple: The relevant law was not different in 1902 than today. All relevant laws confirm the Severin Deed was plain and clear, and reserved a one-sixteenth oil and gas interest. The Circuit Court did not apply the correct law, and altered and construed the phrase "one sixteenth" to mean one-half. Petitioners, Earl J. Nicholson and Joyce A. Nicholson ("Nicholsons", "Petitioners"), by and through counsel, hereby reply to the Respondent Brief as follows.

1. **While deeds are interpreted and construed as of the date of execution, the status of the law in West Virginia for analyzing and interpreting deeds is exactly what Petitioners set forth in the Petitioners' Brief.**

In Section A. of the Respondent's Brief, Respondent cited three cases for the conclusion that the "status of [the] law" at the time the Severin Deed was executed must be used by this Court when analyzing and interpreting it. (Respondent Br. at 11). The Respondent concludes by stating

that the "majority" of case law cited by Petitioners should be "ignored" because the cases were decided several years after the execution of the Severin Deed. (*Id.*). While the three cases cited by Respondent are certainly correct statements of law, their legal propositions and conclusions are not relevant to this matter. This is because the status of law relevant to this matter has never changed. Further, the request to ignore the cases cited by Petitioners is unfounded in the law, and not warranted.

First and foremost, Respondent failed to cite any law from 1902 (or any other time) where "one sixteenth of the oil and gas" plainly and clearly means one-half, as was declared by the Circuit Court. This is because such a law does not exist.

More on point, Respondent put forth no evidence that the "status of law" regarding the interpretation of deeds was different in 1902 than it is currently. (*Id.*). The Respondent did not cite to any specific statutory or case law from the time the Severin Deed was executed on how to "give meaning to the reservation...." (*Id.*). All law discussed in Petitioners' Brief regarding how to interpret the Severin Deed was good law, and relevant to present matter.

In *Griffin v. Fairmont Coal Co.,* 59 W.Va. 480 (1905),which was decided around the same time the Severin Deed was executed, the Court stated that "it is the duty of the court to construe [deeds] as they are made by the parties there, and to give full force and effect to the language used, when it is clear, plain, simple, and unambiguous." *Griffin* was cited to and referenced in *Cotiga Development Co. v. United Fuel Gas Co.*, 128 S.E.2d 626, 148 W.Va. 484 (W.Va. 1963), which further stated that "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." *Id.* at Syllabus Pt. 1. *Cotiga* was specifically cited to,

referenced, and relied upon in *Faith United Methodist Church v. Morgan*, 231 W.Va. 423, 745 S.E.2d 461 (2013), the primary authority referenced by Petitioners in the Petitioners' Brief.

The guidelines and rules for how a court is supposed to interpret a deed has never changed. *Faith United Methodist Church* instructs this Court on how to interpret any deed in West Virginia that was executed at any time. The "status of law" for interpreting the Severin Deed is the exact legal authorities and principles cited by Petitioners in the Petitioners' Brief.[1] Application of *Faith United Methodist Church* to the plain language of the Severin Deed has only one result: a reservation of one-sixteenth of the oil and gas in place.

Moreover, Respondent's request to ignore the cases cited by Petitioners should be disregarded. (Respondent Br. at 11). Since the law on interpreting deeds has never changed, all the cases cited by Petitioners are proper guidance for the Court when analyzing the Severin Deed, as well as confirmation that the language of the Severin Deed is in fact plain and clear. Petitioners' cases about grants and reservations of a "one sixteenth" interest prove and confirm that West Virginia Courts have consistently held that the general and ordinary meaning of one-sixteenth is one-sixteenth.

For example, in *Toothman v. Courtney*, 56 S.E. 888, 61 W. Va. 538 (1907), which was discussed at length in Petitioners' Brief, the Court was asked to analyze a grant of "the 1-16 one sixteenth part of all the oil and gas in and under...." *Id.* at 916. *Toothman* was cited by Petitioners to give guidance on how a previous Court analyzed and interpreted a conveyance with nearly identical language to that in the Severin Deed. The Court in *Toothman* confirmed that the

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[1] See also *Williams v. South Penn Oil Co.*, 52 W.Va. 181, 43 S.E. 214 (W. Va. 1902), which stated that "It is the... safest and best mode of construction to give words, free from ambiguity, their plain and ordinary meaning." *Williams* was cited by *McDonough Co. v. E.I. Dupont DeNemours & Co., Inc.*, 167 W.Va. 611 (1981), which was referenced in Petitioners' Brief, and stated that "parties are bound by general and ordinary meanings of words used in deeds."

conveyance at issue was for "one sixteenth of the oil in place." Id. at 918. The Severin Deed used identical language to the deed at issue in *Toothman*. *Toothman* gives this Court a virtual real-time analysis of how this matter would have been decided by the Court in 1902 and how it should be decided by this Court at present.

The controlling authority for analyzing and interpreting the Severin Deed is *Faith United Methodist Church*; cases such as *Toothman, Manufacturers' Light & Heat Co. v. Knapp*, 102 W. Va. 308, 135 S.E. 1 (1926), *Lockhart v. United Fuel Gas Co.,* 105 W.Va. 69, 141 S.E. 521 (1928), and *Kilcoyne v. Southern Oil Co.,* 56 S.E. 888, 61 W.Va. 538 (1907), all discussed in Petitioners' Brief, confirm that the "one sixteenth" in the Severin Deed should be interpreted to mean one-sixteenth.

2. Respondent failed to cite authority supporting that a reservation of "one sixteenth the oil and gas" should be declared as a reservation of ½ of the oil and gas estate.

In Section B., Respondent cites to specific cases to support its argument that the "construction [of the Severin Deed]...vested ½ of the mineral estate in F.W. Severin...."[2] (Respondent Br. at 15). However, Respondent's cited cases do not stand for the proposition that "one sixteenth" in the Severin Deed should be interpreted to mean one-half.

In the Petitioners' Brief, Petitioners addressed every case referenced by the Respondent. These cases were also cited to by the Circuit Court in the Circuit Court Order. Each of these cases analyzed, interpreted, and **judicially constructed** a deed that was not similar to the language of the Severin Deed. Each deed within these cases contained an additional word, term, or phrase to alter the meaning of one-sixteenth to mean something else. The factors that altered the meaning

[2] The Circuit Court correctly held that the Severin Deed was unambiguous, and also ruled that it constructed the deed to include a reservation for one-half. "A valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction...." Syllabus Point 4, *Faith United Methodist Church v. Morgan*, 231 W.Va. 423, 745 S.E.2d 461 (2013) It was an error to "construct" the Severin Deed when it was plain and clear.

of one-sixteenth in these cases are not found in the Severin Deed. Interestingly, the Respondent notes that two of the cases it cites involves a "royalty interest," which was a contributing factor for those Courts to declare the deed ambiguous and judicially construct it. (*Id*). The word "royalty" is nowhere to be found in the Severin Deed.

The Circuit Court relied on *United Carbon Co. v. Presley*, 29 S.E.2d 446, 126 W. Va. 636 (1944), *McCoy v. Ash,* 63 S.E. 361, 64 W. Va. 655 (1908), *Horner v. Gas Co.,* 76 S.E. 662, 71 W.Va. 345 (1912), and *Koen v. Bartlett*, 23 S.E. 664, 41 W. Va. 559 (1895) in making it declaration. These are the same cases Respondent cited in its response brief. In the Petitioners' Brief, Petitioners raised several specific issues with these cases, pointing out why they were not appropriate or instructive in analyzing the Severin Deed. Respondent failed to address Petitioners' criticism of these cases.

The Severin Deed does not require 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 Deed to substitute one-half for one-sixteenth. It is worth noting that the Petitioners cited to several cases in the Petitioners' Brief where the Court confirmed that a grant or reservation of "one sixteenth" meant one-sixteenth (*Knapp, Lockhart, Kilcoyne,* and *Toothman)*. Respondent failed to address how these cases are not proper guidance in the Respondent Brief. The cases cited to by Petitioners analyzed deeds with nearly identical language to that of the Severin Deed. Application of and adherence to *Faith United Methodist Church* when interpreting the Severin Deed, as well as using *Knapp, Lockhart, Kilcoyne,* and *Toothman* as guidance can only lead this Court to overruling the Circuit Court's Order, and declaring the Severin Deed was included a reservation of one-sixteenth oil and gas interest.

3. Neither statutory nor case law support that custom/usage of "one sixteenth" should be interpreted as one-half.

In Section C., Respondent states that evidence of "custom/usage are relevant in defining terms...." (Respondent Br. at 15). The Respondent cited two examples[3] and specific cases of an alleged "custom," and then stated that "the term 'one-sixteenth' was used synonymously with the term 'one-half' in early 1900's...." (*Id.* at 16). **This statement is uncited to any statute, case law, or legal authority.** There is no evidence of one-sixteenth ever being synonymous with one-half, and therefore, it should be entirely disregarded.

Respondent's argument further fails because there are actual examples of conveyances and reservations of a one-sixteenth interest being analyzed and interpreted as one-sixteenth. Plaintiffs cited to several instances in the Petitioners' Brief. For example, in *Kilcoyne v. Southern Oil Co.*, 56 S.E. 888, 61 W.Va. 538 (1907), the Court ruled that an 1899 deed that granted a "one-sixteenth of all the oil and gas within and underlying" the property conveyed "one-sixteenth of the oil and gas." *Id.* at 540. In 1899, the grant of "one-sixteenth of the oil and gas" did not convey one-half.[4]

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[3] As its evidence of the alleged "custom" of using one-sixteenth in deeds in the early 1900's, Respondent cited to specific land book entries, as well as an expert witness disclosure that was filed in the Circuit Court for the present matter. Neither of these prove any "custom" regarding the use of "one sixteenth" in a deed.

[4] On Page 11-12 of the Respondent Brief, Respondent attempts to characterize Petitioners' analysis of *Kilcoyne* in the Petitioners' Brief as incorrect by citing a specific statement from *Paxton v. Benedum–Trees Oil Co.*, 80 W. Va. 187, 94 S.E. 472 (1917). However, the statement from *Paxton* cited in the Respondent Brief was taken out of context with regard to the present matter.

Petitioners' purpose of citing *Kilcoyne* was to note the usage of "one sixteenth of the oil and gas" in an 1899 deed, and how the court interpreted it to be for "one sixteenth." *Kilcoyne v. Southern Oil Co.*, 61 W.Va. at 539. However, there were other issues being analyzed by the Court in *Kilcoyne* beyond the 1899 deed. For example, at issue in *Kilcoyne* was what an oil and gas company was required to pay to an owner after an oil and gas lease was executed on the property **and** another deed with completely different language (a grant of "one sixteenth of all the oil...and one-half of all gas royalties....") had been executed. *Paxton's* citation to *Kilcoyne* was discussing the final holding of the case, which was not directly related to or relevant to the 1899 deed for "one-sixteenth of all the oil and gas within and underlying" the property. *Kilcoyne* confirms that during the same time period that the Severin Deed was executed, a court declared a deed for a "one sixteenth of the oil and gas" interest was for one-sixteenth.

Clearly, by not citing to any statutory or case law, Respondent failed to adequately prove that the "custom" in 1902 was for one-sixteenth to automatically be interpreted to mean one-half. Moreover, Petitioners cited *Knapp, Lockhart,* and *Toothman,* all cases with near identical language to the Severin Deed that were grants or reservations of "one sixteenth," and were interpreted to be for one-sixteenth.

Finally, with regard to the examples of the "custom" alleged by the Respondent, being land book entries and an expert witness disclosure,[5] the Circuit Court correctly held that the Severin Deed is "unambiguous such that extrinsic evidence should not be considered...." (APP. 564). "[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 (W.Va. 1996)) The examples of the "custom" cited by the Respondent are extrinsic evidence and should be disregarded when analyzing and interpreting the plain language of the Severin Deed. The Circuit Court ruled the Severin Deed was "unambiguous." (APP. 564). Petitioners agree with this legal conclusion; what is ambiguous about "one sixteenth?" Notwithstanding the plain and clear language of the Severin Deed, the land book entries and expert

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[5]On January 14, 2022, Antero Resources Corporation filed an "Expert Witness Disclosure" with the Circuit Court in the present matter, naming Robert Starkey as a possible expert to testify. No discovery, depositions, evidence, or otherwise was conducted by any party relevant to or related to Mr. Starkey's potential expert testimony. On January 19, 2022, Petitioners filed a motion to strike Mr. Starkey as an expert witness. On March 2, 2022, Antero withdrew Mr. Starkey as an expert in the present matter. Respondent did not name any expert, nor did they provide any further evidence related to Mr. Starkey's expert disclosure.

"As a general rule, an expert witness may not testify as to questions of law such as the principles of law applicable to the case, the interpretation of a statute, the meaning of terms in a statute, the interpretation of case law, or the legality conduct. It is the role of the trial judge to determine, interpret, and apply the law applicable to a case." *Gen. Pipeline Constru., Inc. v. Hariston*, 234 W. Va. 274, 765 S.E.2d 163 (W. Va. 2014)(citing Syllabus Point 10, *France v. Southern* Equip. Co., 225 W.Va. 1, 689 S.E.2d 1 (2010)). Any reference to the expert disclosure is irrelevant, unfounded, and should be disregarded.

witness disclosure certainly do not prove that the "title custom and practice" was automatically interpreting "one sixteenth" to mean one-half.

4. The out of jurisdiction cases referenced by the Respondent analyzed deeds that are entirely distinguishable from the Severin Deed, and are not persuasive.

The Respondent argued that specific foreign cases support a reservation of one-sixteenth of the oil and gas reserves one-half of the oil and gas. (Respondent Br. at 17-20). Notwithstanding the fact that the cases referenced are out of jurisdiction decisions and not binding on this Court, these specific cases do not support Respondent's interpretation of the Severin Deed. The cases cited merely set forth the form of **judicial construction** employed by Kansas and Texas for an **ambiguous** provision.

First, in *Heyen v. Harnett,* 235 Kan. 117 (1984), the Kansas Supreme Court was charged with construing the following granting language

> an undivided **1/16** interest in and to all of the oil, gas, and other minerals . . . . **If** such land is covered by a valid oil and gas lease or other mineral lease, the party of the second party . . . shall have an undivided **1/2** interest in the **Royalties, Rentals, and Proceeds** therefrom, or whatsoever nature.... *Id.* at 118. (emphasis added).

The *Heyan* Court determined that the use of two different fractions in the granting language (being 1/16 and 1/2), the reference to royalty, and the use of the word "if" created an ambiguity that required the Court to construe the intent of the parties. *Id.* Unlike the deed in *Heyan*, the Severin Deed did not contain two different fractions, a reference to royalty, or the use of the word "if." The Respondent neglected to put the entire granting language of the deed at issue in *Heyan* in the Respondent's Brief. When the entirety of the granting provision is reviewed, clearly it is not similar to the language of the Severin Deed.

Next, in *Hysaw v. Dawkins*, 483 S.W. 3d 1 (Sup. Ct. Tex. 2016), the Court was charged with construing the meaning of "an undivided **one-third (1/3)** of an undivided **one-eighth (1/8)** of all

oil, gas, or other minerals . . . [and each child] shall receive one-third of one-eighth **royalty**." *Id.* at 4. (emphasis added). The *Hysaw* Court explained the inherent ambiguity caused using "double fractions" in grants or reservations of royalty. *Id.* This case is not relevant to the present matter. Unlike the deed in *Hysaw*, the Severin Deed did not contain two different fractions or reference to royalty.

These cases are not relevant to the present matter. Each case analyzed a deed that is completely different than the Severin Deed. Neither *Heyan* nor *Hysaw* support Respondent's request to this Court.

5. The Severin Deed is plain, clear, and unambiguous. Therefore, all extrinsic evidence should be disregarded. Notwithstanding this, the one piece of extrinsic evidence referenced by Respondent is not dispositive or persuasive to the parties' intent.

The Respondent does not argue the Severin Deed is ambiguous; it cites no word, phrase, or clause that it believes is actually ambiguous. Having said that, the Respondent requests that if this Court were to unilaterally, without prompt or request from any party, declare that the Severin Deed was ambiguous, it should judicially construct the Severin Deed to still include a reservation of one-half interest. (Respondent Br. at 24). The Respondent provided one piece of extrinsic evidence to try to assist the Court in judicially constructing the deed to ascertain the intent of the parties. (*Id.*).

First and foremost, since the Severin Deed is plain, clear, and unambiguous, any extrinsic evidence referenced by Respondent should be disregarded by this Court, just as it was done by the Circuit Court. In *Fraternal Order of Police, Lodge No. 69 v. City of Fairmont*, 468 S.E.2d 712, 718 n.8 (1996)), the Court stated "[e]xtrinsic evidence will not be admitted to explain or alter the terms of a written contract which is clear and unambiguous." The plain and ordinary words of the Severin Deed are clear and unambiguous; the Severin Deed does not need the assistance of

extrinsic evidence to judicially construct the document. The Circuit Court correctly determined the Severin Deed to be unambiguous, however, it did mis-interpret the plain and clear words within the deed. It should be noted that just because the Respondent and the Petitioners do not agree on the meaning and interpretation of the Severin Deed does not warrant the use of extrinsic evidence. "The mere fact that parties do not agree to the construction of a contract does not render it ambiguous." Syllabus Point 3, *Id.*

Notwithstanding this, Respondent cites to only **one** piece of extrinsic evidence that is "dispositive as to the issue of ownership." (Respondent Br. at 23). Respondent references specific land book entries as evidence to the parties' intent. However, at no point during the proceedings in the Circuit Court, or even in Respondent's Brief, was a proper foundation laid on these land book entries. First, it is unclear whether these assessments are even related to the Subject Property (the assessments cited are for "224 Acres," and yet the Subject Property is for "117 acres"). Second, these assessments have no mention or reference to L.D. Nicholson, the grantee of the Severin Deed, or even the actual Severin Deed itself. The assessments provide no evidence as to the parties' intent when the Severin Deed was executed. Third, the assessments cited by Respondent were from 1912-1925, ten years after the execution of the Severin Deed. Finally, it is unclear whether or not these assessments are even valid real property assessments.[6] Determining

[6] During the period in which these specific land book entries were entered, F.W. Severin owned an undivided interest in some portion of the oil and gas within and underlying the Subject Property. In *Caretta Ry. Co. v. Fisher et. al,* 74 W.Va. 115 (1914), the Court stated that "a tract of land owned by cotenants cannot lawfully be assessed to them separately by undivided interests, or separately...." This specific law was not overturned until 1933 by W.Va. Code Section 11-4-9, as well as *Lafollett v. Nelson,* 133 W.Va. 906 (1933).

Thus, the specific assessments cited by Respondent are likely personal property assessment on production from coal, oil, or gas production, and not assessments on real property interests. Additionally, there is no notation, reference, or otherwise that the assessments are supposed to assess an interest reserved by the grantor of the Severin Deed. These assessments have no relevance to confirming ownership, nor do they prove the intent of the parties of the Severin Deed.

what an assessment actually assesses, as well as whether or not an assessment is valid is incredibly complicated, and involves a meticulous analysis of records spanning across many years; not merely citing to a few land book entries from various years. It is unclear exactly what these specific land books are, and how they could possibly be relevant to judicially constructing the Severin Deed. These land book assessments are not dispositive, nor are they persuasive to the issue presented.

Due to the Circuit Court not having oral arguments, as well as declaring the Severin Deed was unambiguous, no extrinsic evidence was presented, argued, or confirmed. If this Court were to determine some word, phrase or clause of the Severin Deed is in fact ambiguous, the case should be remanded back to the Circuit Court so that the Petitioners have the opportunity to present any and all extrinsic evidence that would prove the parties' intent.[7] Having said that, the Severin Deed is plain and clear, and thus, there is no need for extrinsic evidence to ascertain the intent of the parties.

CONCLUSION

For the foregoing reasons as discussed herein, 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.

[7] See Sylabus Point 6 of *Paxton v. Benedum–Trees Oil Co.*, 80 W. Va. 187, 94 S.E. 472 (1917): "Where there is ambiguity in a deed…that one will be adopted which is most favorable to the grantee." The Petitioners are the successors in interest to the grantee of the Severin Deed.

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CERTIFICATE OF SERVICE

I certify that on April 5, 2023, I have served a true and exact copy of the foregoing **PETITIONERS' REPLY BRIEF** by U.S. Mail, fax, E-file, and/or electronic mail to the following counsel:

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