IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-ICA-351

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Venable Royalty, LTD,
and V14, LP,

Plaintiffs Below, Petitioners,

v.

EQT Production Company, ET Blue Grass, LLC,
and AMP IV, L.P., et al.,

Defendants Below, Respondents.

Appeal from the final order
of the Circuit Court of Wetzel
County, West Virginia (21-C-19)

REPLY BRIEF OF PETITIONERS, VENABLE ROYALTY, LTD, and V14, LP

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I. ARGUMENT

None of the respondents have offered a sound basis for this court to hold that a royalty interest in oil and gas is not real property. Interestingly, one of respondents suggests that this court remand so that the lower court can determine their respective ownership interests, a job that will be nearly impossible if this court also holds that the interests are personal property and do not have the protection of the Recording Act. Another respondent suggests that the case is governed by the statutes providing for the ad valorem assessment of property but does not recognize that those statutes do not specify or define whether property is personal or real. Rather, the character of property, either real or personal, is controlled by common law.

A. A Royalty Interest in Oil and Gas in the Ground is an Interest in Real Property.

The Snodgrass Response asserts that after minerals are extracted and separated from the land, "[they lose their] character of real property . . . and assume[] the quality of personal property." Snodgrass Resp. 7 (citing *McIntosh v. Vail*, 28 S.E.2d 607, 610 (W. Va. 1943)). From this they assert that the right to royalty arises "only *if* and *when* the oil and gas loses its status as real property and becomes personal property." Venable agrees with the well-established proposition that minerals once extracted become personal property, however, it is a faulty foundation for Respondents' position that a presently-vested royalty interest in the oil and gas that remains in the ground and has not yet been produced must also be personal property. Certainly, no West Virginia authority supports this position. The royalty interest in the oil and gas owned by Petitioners is just like the right to receive rents, the right to develop, the right to lease and the right to bonuses. It pertains to the oil and gas in the ground, and obviously, any benefit from the interest will depend on future production, just like the right to receive rent will depend on a future lease, or the right to a bonus will depend on the executive owner entering a lease. All rights are simply part of the bundle of rights associated with real estate.

All parties appear to agree that this bundle of rights can be separated, so that the royalty interest can be severed from the executive and other interests, however, Respondents avoid the illogical conclusion that all five of the commonly recognized attributes of oil and gas ownership should be treated as real estate *except one.*[1] And, as to that one, it is only a one-half interest, so one-half would be personal property and the other one half real property. That is not how mineral estates or any interest in real estate works. The right to receive royalties is treated exactly like the other attributes of real estate and can be transferred, severed, or bundled with other rights and conveyed, taxed, and sold as real property.

This case is not about barrels of oil or cubic feet of gas "brought to the surface and reduced to possession." *Warren v. Boggs,* 97 S.E. 589, 592 (W. Va. 1918). This case is about an interest in the oil and gas that remains in the ground as a real estate interest. A nonparticipating royalty interest, like the right to receive rent, or bonus or the right to develop in the future is a present interest in real property and has present value like any of the other attributes of a mineral estate. As explained in *Verde Mins., LLC v. Burlington Res. Oil & Gas Co., LP*,,

> By definition, a royalty interest is an interest in a share of the future product or profit from an oil and gas lease. As such, neither oil and gas production nor the existence of an oil and gas lease are necessary for a royalty interest to be a vested, present interest (i.e., a fee simple interest in royalties).

360 F. Supp. 3d 600, 619 (S.D. Tex. 2019) (quoting *Luecke v. Wallace,* 951 S.W.2d 267, 273 (Tex. App. 1997) (internal quotation marks and citations omitted); *see also Gastar Expl.* at 894 (an NPRI

[1] The Court in *Gastar Exploration v. Contraguerro,* , recognized that a nonparticipating royalty interest is one severable interest in oil and gas among a bundle of others. 800 S.E.2d 891, 894 (W. Va. 2017) ("Generally, a nonparticipating royalty interest ('NPRI') describes a right to share in royalties from oil and gas drilling and production operations where the holder thereof has conveyed away all other interests in the oil and gas he or she may have had, including any possessory interest and the right to lease the minerals.").

is "'a presently vested right to a stated fraction of production from any and all minerals produced.'") (quoting Benjamin Holliday, *New Oil and Old Laws: Problems in Allocation of Production to Owners of Non-Participating Royalty Interests in the Era of Horizontal Drilling,* 44 SAINT MARY'S L. J. 771, 799 (2013)).

This characterization of a nonparticipating royalty interest as real estate is supported by the recognition in *Davis v. Hardman*, 133 S.E.2d 77, 82 (W. Va. 1963), that attributes of an oil and gas estate, including the right to receive royalties, may be severed and separately conveyed or reserved **by deed**, just like any other interest in real estate, and is also supported by the core premise for the holding in *Collingwood Appalachian Mins. III, LLC v. Erlewine*, 889 S.E.2d 697, 700-701 (W. Va. 2023), that royalty interests in a mineral estate can be assessed and sold as real estate at a tax sale.

Respondents' argument that oil and gas, or any mineral, once extracted from the ground and reduced to possession, becomes personal property, simply does not support the proposition that minerals and interests in minerals in the ground are somehow personal property.

The Snodgrass Response also asserts that West Virginia has treated royalty interests as personal property for "over half a century", but only cites to the *Davis* case and *Warren v. Boggs*, 83 W. Va. 89, 97 S.E. 589 (1918), in support. *Davis* clarifies that nonparticipating royalty interests can be severed from other interests in mineral estates, but only impliedly suggests the interests remain interest in real estate. *Davis* certainly does not support a proposition that a royalty interest is personal property. *Warren* by contrast appears to involve a dispute over an oil producing well and holds that "royalty oil that is brought to the surface" is "personal property" (Syllabus Point 5). *Warren* has no bearing on this case.

The historical treatment of interests in mineral estates, the practical impact of reserving a nonparticipating royalty interest, and persuasive reasoning from other jurisdictions weigh in favor of reversing the circuit court's decision. *See Terry v. Conway Land, Inc.*, 508 So. 2d 401, 404 (Fla. Dist. Ct. App. 1987), opinion approved of, 542 So. 2d 362 (Fla. 1989) ("The overwhelming majority of the courts in this country which have been faced with this problem have held that a perpetual non-participating royalty interest in unsevered oil is real property and an interest in land.").[2]

B. The Premise for the *Collingwood* Decision is that a Royalty Interest in Oil and Gas is a Real Property Interest.

The AMP Response looks to a footnote in *Collingwood* where the Court deferred to the parties' terminology describing the interests at stake as "oil and gas" rather than explicitly calling the interest a "royalty interest in oil and gas." From this they assert that Collingwood "did not involve an oil and gas royalty interest, but rather an interest in the oil and gas <u>in place</u>." The Venable Parties disagree with this conclusion and assert that the nomenclature used by the parties and adopted by the court does not change the reservation that was made – a royalty interest. About the only reasonable conclusion that can be drawn is that both the parties and the court treated the oil and gas royalty the same as the oil and gas, and that it was an interest in real estate.

[2] *See Siana Oil & Gas Co. v. Dublin Co.*, 915 N.W.2d 134, 144 (N.D. 2018) ("[P]rior to extraction of the minerals royalty interests are interests in real property."); *Price v. Atl. Ref. Co.*, 630, 447 P.2d 509, 510 (N.M. 1968) ("[T]he royalty retained is real property, a present interest in the minerals in and under the land described."); *Mark v. Bradford*, 315 Mich. 50, 58, 23 N.W.2d 201, 204 (Mi. 1946) ("[U]naccrued royalties are of the nature of incorporeal hereditaments and as such are an interest in land."); *Denver Joint Stock Land Bank of Denver v. Dixon*, 122 P.2d 842, 848 (Wy. 1942) ("And by the great weight of authority, especially as clarified by the decisions in the last decade, a royalty interest, at least if of a permanent nature, has been held to be real and not personal property."); *J.M. Huber Corp. v. Square Enters., Inc.*, 645 S.W.2d 410, 413 (Tenn. Ct. App. 1982); 58 C.J.S. Mines and Minerals § 214 ("It has been held that royalty interest is part of the mineral estate or mineral interest . . . and constitutes an interest in land and an interest in the mineral fee . . .") (citations omitted).

Interestingly, AMP also asserts that the *Collingwood* severance of "one-half of all the oil and gas royalty" constituted "under well-settled case law … a reservation of the oil and gas in place." Venable agrees with this conclusion, at least to the extent that the *Collingwood* reservation was a reservation of the oil and gas **royalty** in place, and thus, a real property interest. AMG contrasts the *Collingwood* severance with the severance in this case where McGary reserved "one sixteenth of all the oil and one half of the royalty of gas produced from … the premises." The Venable Parties agree that, as to the oil, the severances are different. Unlike *Collingwood* McGary reserved an outright interest in the oil and oil is real estate. As to the gas, however, both the reservation in *Collingwood* and the reservation in this case were for an interest in the gas royalty. The clear factual basis for the decision in *Collingwood*, therefore, was that the oil and gas royalty interest was entered in the land books as real estate and ultimately sold in a tax deed, just like this case, and the *Collingwood* Court recognized the validity of the sale.

Contrary to AMP's assertions, Petitioners were careful to state that the *Collingwood* opinion does not specifically rule on the issue of whether a royalty interest is an interest in real estate or whether it may be taxed and sold as real estate, but, the premise for the fourteen-page opinion rested on those very facts, and the outcome of the case clearly depended on the assessment of the oil and gas royalty interest as real estate being valid and the subsequent sale and tax deeds being valid.[3] The Venable Parties disagree with Respondents' claim that *Collingwood* bears no

[3] AMP respondents accuse Petitioners of violating their duty of candor to the Court based on their illustration of the *Collingwood* opinion in their Opening Brief. AMP Br. 14. This is a serious allegation reserved for conduct such as when a lawyer has utterly failed to represent clients' interests, failed to disclose conflicts of interests; failed to file petitions and appeals for which the lawyer was retained; and failed to disclose settlement agreements among defendants. *See, e.g.*, *Law. Disciplinary Bd. v. Schillace*, 684, 885 S.E.2d 611, 622 (W. Va. 2022); *Law. Disciplinary Bd. v. Ryan*, S.E.2d 702, 710 (W. Va. 2019); *Law. Disciplinary Bd. v. Sturm*, 785 S.E.2d 821, 831 (W. Va. 2016); *Gum v. Dudley*, 505 S.E.2d 391, 404 (W. Va. 1997). Here, Respondents disagree with Petitioners' interpretation and assignment of weight of an opinion. Petitioners argue that both

relation to the issue in the present case, and submit that the *Collingwood* opinion should strongly influence the result in this case.

C. The West Virginia Tax Code Does Not Prohibit Taxation of Nonparticipating Royalty Interests as Real Estate.

The AMP Response argues that the treatment of a nonparticipating royalty interest as property violates this State's tax laws and the suggest that the Venable Parties failed to "cite to the relevant statute." AMP Resp. 6. Their argument is tautological and assumes as true Respondents' position: *The tax assessment and sale of the nonparticipating royalty interest must be void because West Virginia tax laws only permit taxation of interests in real property, and a nonparticipating royalty interest is not real property.* This tax code argument is not the smoking gun AMP wants it to be.

In essence the statutes providing for the assessment and taxation of real estate are found in Chapter 11, Article 4 of the West Virginia Code, and those providing for the assessment and taxation of personal property are found in Chapter 11, Article 5. These statutes simply provide that an owner of any interest in real estate, including "any interest" in the "oil, gas … or other estate", "shall" have the interest assessed in the "land books of the county." W. VA. CODE § 11-4-9. If the interest is personal property, the owner "shall" have the interest "entered in the personal property book." *Id*. at W. VA. CODE § 11-5-1. These statutes, contrary to the AMP suggestion,

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the Court and the parties in *Collingwood* viewed the "oil and gas royalty" as indistinguishable from "oil and gas" in the sense that the royalty interest is an inherent part of the oil and gas, and that it is a real property interest. Indeed, the entire underpinning of *Collingwood* is that the royalty interest in question was real estate, was properly assessed as real estate, and the tax sale as real estate was valid. Respondents argue that the Court and the parties referred to the term royalty but meant to exclude royalty interests from the property interests that were assessed and sold as property. Petitioners have not made false statements of fact or law, failed to disclose controlling authority adverse to their position, or offered false evidence, *see* West Virginia Rules of Professional Conduct 3.3(a), and AMP's baseless accusations are unbefitting officers of the court practicing in West Virginia.

do not attempt to define what is real property and what is personal property. Rather, that question is left to common law as determined by the courts. Compare for example *L&D Invs., Inc. v. Mike Ross, Inc.*, 818 S.E.2d 872 (W. Va. 2018), in which the Court examined the proper ownership of oil and gas interests that had been taxed and sold as real property, as contrasted with a removable coal tipple that had been transferred by bill of sale which was held to be personal property in *Blair v. Freeborn Coal*, 253 S.E.2d 547, 552 (W. Va. 1979).

AMP cites a portion of Article 4, Chapter 11 of the West Virginia Code for the standard proposition that when a tract of land is severed into surface and mineral estates, the assessor shall assess each estate to its respective owners. W. VA. CODE § 11-4-9. This Article goes on to state,

> When any person or persons are, or become, the owner or owners of any undivided interest or interests in land, or in the surface, coal, oil, gas, ore, limestone, fireclay, timber or other estate or estates therein, the owner or owners of such undivided interest or interests shall have their land, or estate or interest or undivided interest in such land, or in such estate in land, entered on the land books of the county in which it or a part of it is situated, and cause himself to be charged with taxes legally levied on such interest or undivided interest . . ..

Id. The tax laws clearly contemplate that there can be various owners of various severed interests in a single tract and that each "shall" have its interest entered for taxation. The nonparticipating royalty interest is simply one of these interests, it being a carve-out property interest that may be separately assessed under this Article, just as the right to receive rent, the right to develop, the right to lease and the right to receive bonuses in oil and gas that are in the ground, and every other type of ownership with potential value may be assessed and taxed as real estate. The ultimate penalty for non-entry or non-payment is a sale for the taxes. Correspondingly, any owner who has its interest separately assessed and who pays taxes is protected from a tax sale. Indeed, these statutes

only require owners to have property assessed for taxes, they do not define which is personal and which is real.[4]

The AMP Response suggests that "there are many interests in real estate that are not taxed as real property." AMP Resp. 12. In support, it cites cases holding that leasehold interests are considered personal property for purposes of taxation and fixtures on land are personal property. *See Blair v. Freeburn Coal Corp.*, 253 S.E.2d 547, 551 (W. Va. 1979); *Drainer v. Travis*, 180 S.E. 435, 436 (W. Va. 1935); *Harvey Coal & Coke Co. v. Dillon*, 53 S.E. 928, 939 (W. Va. 1905). The Venable Parties agree that leasehold estates and removable fixtures are taxed as personal property, but these interests are different than ownership of key attributes of real property. Importantly, none of these cases involve severable interests in a mineral estate, such as the right to receive royalties, the right to develop, or any of the other recognized attributes of ownership. The cases cited in the AMP Response simply do not address the issue in this case.

Tellingly, in this case the only property assessments for the McGary royalty interest were real property assessments, and these were entered immediately after the 1907 severance deed, and continue to the present in the successive owners. While each of the Respondents argues that the interest in question is a personal property interest, none assert that they had their interest assessed as personal property or that they paid personal property taxes. Thus, while the AMP Respondents

[4] The AMP Response cites several cases to support the argument that the tax code prohibits treating nonparticipating royalty interests as real property, but these cases simply affirm that oil and gas interests may be taxed as real estate, personal property may not be taxed as real estate, and that duplicative assessments of unsevered interests are void. *See Hill v. Lone Pine Operating Co.*, No. 16-0219, 2016 WL 6819787, at *2 (W. Va. Nov. 18, 2016) (affirming circuit court ruling that interests in mineral leases created from "production reports rather than from a deed, will, or court order" were duplicate assessments, and their tax sale was void); *Orville Young, LLC v. Bonacci*, 246 W. Va. 26, 35, 866 S.E.2d 91, 100 (2021) (where oil and gas were never severed from surface, separate taxation of oil and gas was in error).

have a misplaced reliance on the statutes governing taxation of property, it is certainly notable that they did not prove or even argue that they had their interest assessed as personal property as opposed to the Venable Parties, whose interest has been on the land books since the 1907 severance by McGary.

D. It is Appropriate for this Court to Consider Concerns of Public Policy and Practical Consequences of Affirming the Circuit Court.

Respondents insist that it is not the purview of this Court to consider public policy and practical ramifications to upholding the circuit court's ruling. This is simply not true. This case puts a significant issue of oil and gas estate law and interpretation before the Court. In fact, a significant role of the judiciary in West Virginia, as in other states, has been to adjudicate land titles and the estates created by deeds. The legal precedents cited by all parties in this case demonstrates that fact. This case simply builds on the precedents already in place.

A public policy often articulated by the West Virginia court and other courts is the policy or principal of *stare decisis* and this principal has particular significance with respect to the certainty and stability of land titles. *Armstrong v. Ross*, 55 S.E. 895, 897 (W. Va. 1906). In 1907, William McGary conveyed property and reserved to himself a nonparticipating royalty interest by recorded deed. JA 27-28, 60-61. As there were no limitations to this reservation, the intent was to make this a perpetual, conveyable interest. The parties apparently agree on this. Also, such a reservation is not uncommon. *See, e.g., Davis*, 133 S.E.2d at 78-79; *Manufacturers' Light & Heat Co. v. Lemasters*, 112 S.E. 201, 203 (W. Va. 1922); *Gain v. S. Penn Oil Co.*, 86 S.E. 883, 883 (W. Va. 1915); *Haught Fam. Tr. v. Williamson*, No. 19-0368, 2020 WL 1911459, at *2 (W. Va. Apr. 20, 2020); *Anderson v. Jones*, No. 15-0460, 2016 WL 6756803, at *4 (W. Va. Nov. 15, 2016).

Respondents do not address the incongruity of reserving an interest using an instrument and process that applies only to real property, and then characterizing that right as personal

property. The transformation of a reservation in a deed from real to personal property is counter to the laws of exceptions and reservations.

> "An exception by a grantor having title is a mere withholding of title to part of the property described in the deed. Hence, if he declares in the deed that he does not grant or undertake to convey part of such property, he excepts the designated part. The form of an exception is immaterial. It may be effected by the use of any words expressing intention to except."

Sally-Mike Properties v. Yokum, 332 S.E.2d 597, 601 (W. Va. 1985) (quoting *White Flame Coal Co. v. Burgess*, 102 S.E. 690, 692 (W. Va. 1920)).

Respondents' argument concerning public policy assumes that their position is the default, and that this Court would be upsetting settled law and venturing into legislative territory if it ruled in Respondents' favor. This assumption couldn't be further from the truth. First, there is ample historical context and support for finding that the reservation of a nonparticipating royalty interest in a mineral estate is an interest in realty. Second, affirming the circuit court's decision would upend more than a century of nonparticipating royalty interest reservations, calling into question the method by which conveyances can be made. Third, a ruling that nonparticipating royalty interests in mineral estates can be transferred as personal property will mean that title searches of real estate records are meaningless, and worse, there being no registry for such interests, no claimant, including those in this litigation, will have a basis to prove their title, or more problematic, disprove that no prior owner sold the interest by a document that did not need to be recorded. There is good reason why all of the precedent has treated oil and gas, and any interest in the oil and gas, as real estate transferrable by deed and subject to the protections of the recording act.

The laws in West Virginia and virtually all other states are designed to protect real property interests and conveyance with recording acts. Proof of title is simple. If a deed for realty is not

recorded it is void as against subsequent purchasers for value without actual notice. If a deed is recorded, it is notice to the world of the title created in it. Tellingly, all interests claimed by all parties in this case were created in deeds (applicable only to real estate), that were recorded, and further tellingly, Respondents' very claim to the McGary Interest rests on 2021 recorded deeds, instruments for conveying real property.

If the Court reverses the circuit court's decision then it will be following the majority of jurisdictions that have held that the reservation of a nonparticipating royalty interest is a presently vested interest in realty, and also following and recognizing the decisions by our Supreme Court of Appeals. If the Court affirms the circuit court's decision, it will be following Kansas, which has held that a nonparticipating royalty interest is personal property that vests once the oil is severed from the ground, and any conveyance thereof is void as violating the rule against perpetuities. *Cosgrove v. Young*, 642 P.2d 75, 83-84 (Ks. 1982).

II. CONCLUSION

For the reasons set forth herein, Petitioners ask this Court to reverse the circuit court's ruling and award judgment in favor of the Petitioners.

Respectfully submitted by,

VENABLE ROYALTY, LTD.,
a Texas limited partnership, and
V14, LP, a Texas limited partnership,

By Counsel,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this **10th** day of **January 2024**, the foregoing ***Reply Brief of Petitioners Venable Royalty, LTD., and V14, LP*** was served using the electronic File & ServeXpress system, which will send copies of such filings to registered counsel of record.

/s/ J. Mark Adkins
J. Mark Adkins (WVSB #7414)