In the Intermediate Court of Appeals of West Virginia

Venable Royalty, LTD, and V14, LP, Plaintiffs, Below, Petitioners vs.) No. 23-ICA-351 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)

BRIEF OF RESPONDENTS STEVEN A. SNODGRASS AND NANCY J. BARKER

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CROSS-ASSIGNMENT OF ERROR

1. Though the Circuit Court of Wetzel County correctly determined that the non-participating royalty interest in question was not taxable as real property and that the purported tax sale thereof was void, the Circuit Court erred in its description of the fractional percentages of this non-participating royalty interest in its July 5, 2023 Order.

COUNTER-STATEMENT OF THE CASE

1. Procedural History

Steven A. Snodgrass and Nancy J. Barker ("Snodgrass and Barker") submit that the recitation of the procedural history presented by Venable Royalty, Ltd., and V14, LP (the "Venable Parties") is generally unobjectionable other than its framing and characterization of the July 5, 2023 Order (the "Subject Order") of the Circuit Court of Wetzel County, West Virginia (the "Circuit Court"). The Subject Order is the Order from which the Venable Parties have appealed and the Circuit Court's reasoning and conclusions speak for themselves.

2. Factual History

Snodgrass and Barker respectfully submit that Footnote 1 to the Venable Parties' "Statement of Facts" is inaccurate insofar as it refers to legal authority and presents legal conclusions that are not germane to the *facts* in this case.

SUMMARY OF ARGUMENT

Despite the asserted complexity suggested by the Venable Parties, the inquiry at-hand is straightforward and this Honorable Court should affirm the Circuit Court's conclusion that the royalty interest in question (the "McGary Interest") was personal property and the purported tax sale thereof was void.

In 1907, William McGary reserved the McGary Interest pertaining to approximately 181 acres of oil and gas. The McGary Interest was assessed in the Wetzel County land books and purportedly sold in a tax sale for unpaid real property taxes. The operative question here is whether the tax sale of the McGary Interest for unpaid real property taxes was void or not. The Venable Parties premise their claim to the McGary Interest on the theory that the tax sale was not void. Snodgrass and Barker premise their claim to the McGary Interest on the theory that the tax sale was void.

The Circuit Court correctly concluded that the tax sale of the McGary Interest was void because the McGary Interest should not have been assessed as real property and sold for nonpayment of real property taxes. That conclusion is in accord with settled West Virginia law that should not be disturbed. While the Venable Parties may disagree with this outcome, it is premised on the application of the law. The Venable Parties' belief that there are bigger-picture policy concerns that purportedly dictate a different result are properly addressed to the legislature, not the courts, and should not impact the disposition of this matter.

A determination that the McGary Interest is *not* vested in the Venable Parties implicates the need to allocate the McGary Interest among the heirs of William McGary, which includes Snodgrass and Barker. On this limited factual question, this Honorable Court should remand to the Circuit Court because the Circuit Court's allocation of percentages of the McGary Interest in and among the heirs of William McGary in the Subject Order used imprecise and unclear language that the Circuit Court should further address.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Snodgrass and Barker request that this appeal be calendared for oral argument under W.V.R.App.P. 19 as this matter involves the application of settled law on a narrow issue. While the principal legal issue at-hand, the entry of the McGary Interest in the land books, is straightforward, this Honorable Court's decisional process may be aided by oral argument, particularly as to the differing chains of title claiming to be entitled to shares of the McGary Interest. *See,* W.V.R.App.P. 18(a). Snodgrass and Barker believe that this case is appropriate for a Memorandum decision from this Honorable Court.

ARGUMENT

The McGary Interest was improperly assessed as real property and the purported tax sale thereof was void as a matter of law. That conclusion of the Circuit Court is consistent with settled West Virginia law and should be affirmed. That eliminates any claim by the Venable Parties to the McGary Interest.[1] Upon affirming those points of law, this Honorable Court should remand this matter to the Circuit Court to clarify and confirm the fractional entitlement to the McGary Interest held by heirs of William McGary, which include Snodgrass and Barker.

1. The McGary Interest is a Royalty Interest, Which is Not Real Property

The Venable Parties are clear that the property interest they claim, the McGary Interest, is a royalty interest. [*e.g.* Venable Parties' Brief at p. 3 (Tables)]. In the Introduction to their Brief, the Venable Parties summarize the *gist* of their theory, writing that:

> This appeal arises from the wrongful determination by the Circuit Court that a royalty interest in oil and gas is personal property, and the holding that, being personal property, an assessment of the royalty interest as real estate in the land books was improper, and a resulting tax sale was void.

[Venable Parties' Brief at p. 1]. The fundamental substantive problem with the Venable Parties' argument is that a royalty is personal property in West Virginia.

[1] The Venable Parties' Brief does not include any formal Assignments of Error required by rule. W.V.R.App.P. 10(c)(3). The Argument presented herein is based on Snodgrass and Barker's reasonable understanding of the errors that the Venable Parties complain-of through the context of the arguments in the Venable Parties' Brief. Snodgrass and Barker reserve all rights, and waive none, to further develop their responsive arguments in the event that the Venable Parties' Assignments of Error are more specifically presented.

West Virginia distinguishes between oil and gas "in place" in the ground and the oil and gas when it has been severed from the ground, brought to the surface and sold. In McIntosh v. Vail, 126 W.Va. 395, 28 S.E. 2d 607, 610 (W.Va. 1943), the Supreme Court of Appeals stated that "[w]hen oil and gas is produced and marketed from said lands, it loses its character of real property and, as shown in the Warren case, assumes the quality of personal property." Indeed, in Warren v. Boggs, 83 W.Va. 89, 97 S.E. 589 (W.Va. 1918), the Supreme Court of Appeals expressed that

> To reverse the decree and to sustain their claim to equitable relief plaintiffs in part assert and rely upon their right to have a decree to partition the oil royalty derived from the well in controversy, an interest conditionally conceded to them by the compromise agreement. They possess and have no interest, and do not pretend to claim any interest, in the surface of the 94 acres or any part of it, or of the oil contained therein. Their only claim in that respect is to seven–eighths of one–eighth of the oil as and when produced therefrom. Oil in place, of course, is part of the land in which it is found or from which it is obtained. When brought to the surface and reduced to possession it ceases to be real estate, and becomes personal property, and as such may be the subject of partition among its joint owners.

See also, Collins v. Stalnaker, 131 W.Va. 543, 48 S.E. 2d 430, 432 (W.Va. 1948). As such, the royalty is an interest in personal property that is inherently different than an interest in the oil and gas "in place" in the ground, which is real property. The right to receive a royalty necessarily arises only *if* and *when* the oil and gas loses its status as real property and becomes personal property.

Since a royalty interest is personal property and is *not* real property, a royalty interest should not be assessed in the land books and treated as real property. In West Virginia, ". . . the legislature has clearly provided that only real property is to be assessed

on the land books" separate from personal property books. Blair v. Freeburn Coal Corp., 163 W.Va 23, 253 S.E. 2d 547, 551 (W.Va. 1979). Thus, the McGary Interest, which the Venable Parties acknowledge to be a royalty interest, should not have been and *could not have been* assessed in the land books because a royalty is personal property. *See*, McIntosh, 126 W.Va. 395, 28 S.E. 2d at 610 (W.Va. 1943). "Personal property erroneously entered upon the land books as real property constitutes a void assessment and can serve as no valid basis for the sale thereof by the Commissioner of Forfeited and Delinquent Lands." Blair. Syl. Pt. 3, 163 W.Va. at 23; 253 S.E. 2d at 549. "A deed made pursuant to a tax sale under a void assessment is void." Id., Syl. Pt. 4.

The Circuit Court correctly concluded that the McGary Interest was not taxable as real property and that the purported sale thereof for unpaid real property taxes was void. That conclusion is based on long-settled law and should not be disturbed. The Venable Parties offer no compelling legal basis to depart from the settled authority on this point.

2. The Venable Parties Do Not Credibly Explain Why a Royalty Interest is Personal Property

The Venable Parties offer a broad discussion of the history and nature of oil and gas interests in West Virginia and other states that is simply not germane to the question at-hand. In order to prevail, the Venable Parties must demonstrate that the McGary Interest, which they acknowledge to be a royalty, was appropriately taxed as real property, even though royalties have been recognized as personal property in West Virginia for over a century. *See*, Warren, 83 W.Va. 89, 97 S.E. 589 (W.Va. 1918). The

Venable Parties have not done so because they cannot do so; they cannot make a personal property interest a real property interest for taxation purposes.

The Venable Parties rely heavily on Davis v. Hardman, 148 W.Va 82, 133 S.E.2d 77 (W. Va. 1963) for the proposition that West Virginia recognizes the ability to sever attributes of oil and gas. The Davis decision does not aid the Venable Parties because Davis plainly recognizes the difference between ownership of oil and gas in place (real property) versus the royalty interest (personal property), including nonparticipating royalty interests like the McGary Interest here. The Davis court explained that:

> The distinguishing characteristics of a non-participating royalty interest are: (1) Such share of production is not chargeable with any of the costs of discovery and production; (2) the owner has no right to do any act or thing to discover and produce the oil and gas; (3) the owner has no right to grant leases; and (4) the owner has no right to receive bonuses or delay rentals. Conversely, the distinguishing characteristics of an interest in minerals in place are: (1) Such interest is not free of costs of discovery and production; (2) the owner has the right to do any and all acts necessary to discover and produce oil and gas; (3) the owner has the right to grant leases, and 4) the owner has the right to receive bonuses and delay rentals.

Id., 148 W.Va. at 90; 133 S.E.2d at 81-82 (citing Mounger v. Pittman, 108 So. 2d 565 (Miss. 1959)). The Davis court's differentiation among the attributes of a nonparticipating royalty interest versus an ownership interest in the oil and gas "in place" provides ample rationale for why a royalty interest cannot be taxed as real estate – because the holder of a nonparticipating royalty interest, like the McGary Interest, has no ability to develop, use, produce, sell or lease the real property. The royalty interest is an entirely different species of rights than ownership of the oil and gas real property "in

place" and this distinction cannot be ignored for assessment purposes because the interests are fundamentally different.

The Davis court's view of the difference between a nonparticipating royalty interest and ownership of oil and gas "in place" was affirmed more recently in Gastar Exploration, Inc. v. Contraguerro, 239 W.Va. 305, 800 S.E.2d 891 (W.Va. 2017). There, the Supreme Court of Appeals observed that:

> 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. See 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) ("An NPRI is a nonpossessory interest, which means that the NPRI owner does not own the minerals in place but instead holds only a presently vested right to a stated fraction of production from any and all minerals produced.")

Id., 239 W.Va. at 308; 800 S.E.2d at 894. Consistent between Davis and Gastar is the clear recognition that the rights associated with a nonparticipating royalty interest are of a completely different character than the rights to ownership of the oil and gas in place, which is real property. Likewise, neither Davis nor Gastar change the baseline reality that a royalty is personal property. The Venable Parties cannot prevail if a royalty is personal property. The Venable Parties do not demonstrate how or why a nonparticipating *royalty* interest is not a *royalty* interest.

The Venable Parties place a great deal of emphasis on the recent Collingwood Appalachian Minerals III, LLC v. Erlewine, 248 W.Va. 615, 889 S.E.2d 697 (W.Va. 2023) decision. That reliance is misplaced. According to the Venable Parties, the

Collingwood decision stands for the proposition that the Supreme Court of Appeals "confirmed that an oil and gas royalty interest may be taxed as real estate and that a subsequent tax deed is valid." [Venable Parties' Brief at p. 12]. The Collingwood decision is not that broad and its posture precludes any reliance on that decision for the arguments that the Venable Parties advance.

Collingwood dealt with tax sale questions involving oil and gas, but not in the context of whether the interests at-hand were properly taxed in the land books, which is the issue here. In their Brief, the Venable Parties write that ". . . the parties in *Collingwood* did not question whether the royalty interest in the oil and gas was real estate or personal property. . ." [Venable Parties' Brief at p. 13]. However, the Collingwood decision includes a footnote explaining this, stating:

> The parties maintain, and the circuit court found, that all of the interests at stake in this appeal are total of a fifty percent interest in the oil and gas. But, as noted in the facts below, the deeds in the record prior to the 1991 and 1995 tax deeds refer to these interests as interests in the "oil and gas royalty." To avoid confusion, we will refer to these interests as the parties did, rather than as the deeds provided.

Collingwood, 889 S.E.2d at 700, fn.2 (W. Va. 2023). Based on this clear statement from the Collingwood decision, it reasonably appears that the Supreme Court of Appeals did not believe that a question about the character of the interest, as real property or personal property, was before it. Therefore, it is unreasonable to interpret Collingwood as having approved that the property interests in that case were real property. The rationale and holding of that case simply do not extend that far. That is confirmed by the absence of any reference to either Davis or Gastar, which one would reasonably expect the Supreme

Court of Appeals to have mentioned if it was substantively addressing the nature of oil and gas interests and establishing new law on this front.

3. The Venable Parties' Public Policy Concerns are not Credible and Those Arguments are Misdirected to this Court

An overarching theme of the Venable Parties' Brief is an explanation of their view as to how West Virginia *should* tax non-participating royalty interests like the McGary Interest. Snodgrass and Barker submit that "how" property should be taxed is a policy question that is solely within the province of the legislature, not the judiciary.

"It is the duty of the legislature to consider facts, establish policy, and embody that policy in legislation." State ex rel. Cooper v. Tennant, 229 W.Va. 585, 594, 730 S.E. 2d 368, 377 (W.Va. 2012). Moreover, the ". . . balancing of legitimate policies is to be made by the legislature, not by this court." State v. Louk, 237 W.Va. 200, 228, 786 S.E. 2d 219, 228 (W.Va. 2016) (quoting Arms v. State, 471 S.W. 3d 364 (Ark. 2015)). In this appeal, however, the Venable Parties ask this Honorable Court to engage in this deliberative process to balance competing interests and establish a taxation regime. Respectfully, that is beyond the ambit of this Honorable Court's jurisdiction.

The Venable Parties' argument confirms that their policy concerns cannot be resolved with a judicial determination. They recognize the significant distinctions between ownership of oil and gas in place and ownership of a nonparticipating royalty interest expressed in Davis. The Davis decision clearly identifies that the rights of owners of oil and gas "in place" are far more expansive than the exceedingly limited rights of holders of non-participating royalty interests. Davis v. Hardman, 148 W.Va at 90, 133

S.E.2d at 81-82 (W. Va. 1963). Under Davis, the Venable Parties recognize that holders of nonparticipating royalty interests cannot physically access the oil and gas, cannot drill for the oil and gas, cannot produce the oil and gas, cannot lease the oil and gas and cannot sell the oil and gas. Id. Yet, the Venable Parties propose that these completely different interests must be taxed as real property. Thus, a finding for the Venable Parties necessitates the need to decide how nonparticipating royalty interests would be fairly assessed as real property in comparison to assessments of ownership of oil and gas in place. This goes beyond the jurisdiction of this Honorable Court.

"[T]here can be no doubt that the general power of taxation is vested exclusively in the legislative branch of the government of this State." State ex rel. Winter v. Brown, 143 W.Va. 617, 622, 103 S.E.2d 892, 894 (W. Va. 1958) (citing Lingamfelter v. Brown, 132 W.Va. 566, 52 S.E.2d 687 (W.Va. 1949)). This Honorable Court is simply not the venue for weighing competing policy considerations about the details of how property interests should be specifically assessed. The Venable Parties must go to the legislature for that relief.

The Venable Parties also broadly suggest that the "ramifications of the decision in this case are huge" because of purported concerns about documenting interests in the public record. [Venable Parties' Brief at p. 7]. But, royalties have been considered personal property in West Virginia for over a century and the Davis court differentiated nonparticipating royalty interests from oil and gas ownership "in place" over a half century ago. Simply put, the ramifications and widespread issues that the Venable Parties predict have not taken place. Development has not been thwarted. And holders of

nonparticipating royalty interests can be located through the public records, as demonstrated by the Venable Parties' ability to name the other parties in this case. The Venable Parties' policy concerns are not a basis for reversing the Circuit Court.

4. The Circuit Court Erred in its Description of Fractional Participation in the McGary Interest and This Matter Should be Remanded for the Limited Purpose of Clarifying and Confirming Percentages in the McGary Interest.

By affirming the Circuit Court's conclusion that the McGary Interest was not taxable as real property and that the purported tax sale thereof was void, this Honorable Court eliminates any claim by the Venable Parties to the McGary Interest. The resulting inquiry involves the entitlement of heirs of William McGary, like Snodgrass and Barker, to fractional percentage shares of the McGary Interest. On this front, limited remand is needed for resolution of ownership percentages.

In its Subject Order, the Circuit Court identified the fractional interests of a number of parties to the McGary Interest. [J.A. 744]. With respect to Snodgrass and Barker, the Circuit Court expressed that "Douglas Snodgrass, Steven Snodgrass, Nancy Snodgrass Barker, and Vicki Snodgrass Star are vested with a 1/96 NPRI in the oil and gas produced from the Subject tract." [J.A. 744]. This phraseology may suggest a collective share in that $1/96^{th}$ interest among these enumerated parties, versus each of the enumerated parties individually having a 1/96 NPRI. Clarification is needed as to this point.

The Venable Parties' assert that the McGary Interest was one-half of the royalty. [Venable Parties' Brief at p. 6]. Therefore, the percentages of the McGary Interest identified in the Circuit Court's Subject Order [J.A. 744] should equal one-half of the

royalty interest. But, when the fractions in the Subject Order are read so that enumerated individuals *collectively* own the identified percentage, the sum of those fractions is less than the total amount of the McGary Interest. However, if the fractions identified in the Subject Order are viewed as being vested in each enumerated individual, the total equals the entirety of the McGary Interest. [J.A. 744]. Snodgrass and Barker moved the Circuit Court to clarify these calculations pursuant to Rule 60(a). [J.A. 15]. No clarifying order was entered by the Circuit Court.

Complicating this ownership question is the Venable Parties' Notice of Appeal. In their second Assignment of Error in that Notice of Appeal, the Venable Parties suggest that the Circuit Court incorrectly calculated entitlements to the McGary Interest by missing an heir of William McGary. [Venable Parties' Notice of Appeal]. Although those fractional interests do not pertain to the Venable Parties, the proposed percentages are different than the Circuit Court's findings in its Subject Order. [J.A. 744]. Accordingly, this creates a limited question of fact about entitlement to percentages of the McGary Interest, which does not relate to the Venable Parties. That is best resolved in the Circuit Court. Accordingly, this matter should be remanded for the limited purpose of confirming the participation percentages of William McGary's heirs in the McGary Interest *based on* the affirmance that the Venable Parties have no claim thereto.

CONCLUSION

The Circuit Court's order should be affirmed because all agree that the McGary Interest is a royalty interest and West Virginia considers royalty intersts to be personal property. Additionally, West Virginia has long differentiated nonparticipating royalty interests from ownership of oil and gas in place. The Circuit Court applied settled law and it should not be disturbed.

After affirming that the McGary NPRI was a personal property interest and could not have been assessed taxes or sold for delinquent real property taxes, this Honorable Court should remand this matter for the limited purpose of resolving the open factual questions regarding the ownership percetntage of the McGary Interest among the heirs of William McGary, including Snodgrass and Barker.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of December 2023, true and accurate copies of the foregoing Respondent's Brief of Steven A. Snodgrass and Nancy J. Barker was served as follows:

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