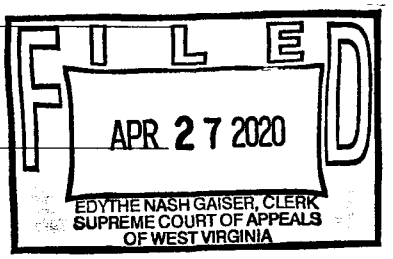
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Case No. 20-0030



Orville Young, LLC,
and Rolaco, LLC,

Respondents below, Petitioners,

v.

Frank A. Bonacci;
Brian F. Bonacci;
Petitioners' below, Respondents

and

Louise S. Coulling;
Clark H. Coulling;
Heidi Schenk Bruhn;
Mary Schenk Hamilton;
Gary P. Hamilton;
Karen Schenk Sugar;
Terry B. Sligar; and
White Horse Farm, LLC,

Respondents below and on appeal

Appeal from the Circuit Court of Marshall County
Civil Action 18-C-16

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ASSIGNMENTS OF ERROR

1. The Circuit Court erred in concluding, as a matter of law, that West Virginia law prohibited separate assessments of surface and subjacent mineral estates absent severance of the surface and subjacent mineral estates.

2. The Circuit Court erred in finding that the assessment of the disputed 202 acres oil and gas was a duplicate assessment and further that the disputed 202 acres did not go delinquent for nonpayment of property taxes.

3. The Circuit Court's order quieting title to the 202 acres does not adequately describe the configuration or location of the realty and must therefore be reversed

4. Respondents Frank and Brian Bonacci did not possess the right to enforce claims on behalf of other heirs of Albert M. Schenk

STATEMENT OF THE CASE

This case presents an issue of first impression in West Virginia. The question posed is whether, when the assessments at issue were made, West Virginia law allowed an assessor to make separate *ad valorem* property tax assessments for the surface estate and for the subjacent oil and gas estate of a given tract of land where there was no severance of ownership of the surface and subjacent oil and gas estates. The Circuit Court of Marshall County concluded, as a matter of law, that such separate assessments were not permissible under West Virginia law. Petitioners Orville Young, LLC and Rolaco, LLC assert that the Circuit Court's conclusion was erroneous and must be reversed.

I. PROCEDURAL HISTORY

On January 31, 2018, Petitioners below, Frank Bonacci and Brian Bonacci, filed suit in the Circuit Court of Marshall County seeking declaratory relief and an order quieting title to a 202 acre oil and gas tract located in Union District, Marshall County. The Complaint named Petitioner Orville Young, LLC and others as respondents. Appx. 003. The Bonaccis filed an amended complaint on March 19, 2018 adding Petitioner Rolaco, LLC as a respondent below. Appx. 015. The Bonaccis claim to have acquired title to a portion of the disputed 202 acres oil and gas via a deed from their mother, Kathleen Bonacci. Rolaco LLC claims it acquired the disputed 202 acres

oil and gas via a January 2, 2018 quitclaim deed from Petitioner Orville Young, LLC. Orville Young, LLC and Rolaco, LLC filed their answer on April 30, 2018. Appx. 029.

On March 1, 2019, the Bonaccis filed a motion for summary judgment. Appx. 043. Orville Young LLC and Rolaco filed a memorandum in opposition on April 2, 2019. Appx. 276. The Bonaccis filed a reply memorandum on April 5, 2019. Appx. 399. The Bonaccis' motion for summary judgment was heard by the Circuit Court on April 26, 2019. The Circuit Court directed that the parties submit supplemental memoranda addressing issues raised during the hearing. Appx. 446. The Bonaccis filed a supplemental memorandum on May 3, 2019. Appx. 449. Orville Young and Rolaco filed their supplemental memorandum on May 13, 2019. Appx. 489.

By email dated September 11, 2019, the Circuit Court advised it had decided to grant the Bonaccis' motion for summary judgment and directed Bonaccis' counsel to prepare a proposed order. Appx. 496. On October 2, 2019, Bonaccis' counsel emailed a proposed order to the Circuit Court. Appx. 497. On October 15, 2019, Orville Young and Rolaco filed objections to the proposed order. Appx. 529. On December 16, 2019, the Circuit Court entered the proposed order without modification. Appx. 545. In granting the Bonaccis summary judgment, the Circuit Court found that a September 13, 1949 tax deed to Rolaco's remote predecessor in title, Everett F. Moore conveying the disputed 202 acres oil and gas was void. Orville Young, LLC and Rolaco filed their notice of appeal on January 14, 2020.

II. THE PARTIES

Petitioners on appeal, Orville Young, LLC and Rolaco LLC are limited liability companies formed under Florida law with their principal places of business located in Cape Coral, Florida. Ronald E. Young is a member and manager of Orville Young LLC and Rolaco, LLC. All other parties named in this litigation are the descendants of Albert Schenck III and his wife Kathleen Mary Schenck. Albert Schenck III died testate on June 18, 1995 and was survived by his wife

Kathleen and their six daughters. One of their daughters, Kathleen Schenck Bonacci, now deceased, was the mother of Respondents Frank and Brian Bonacci.

In addition to Orville Young, LLC and Rolaco, Frank and Brian Bonacci named their aunts and White Horse Farms, LLC as respondents in the Marshall County action.[1] Frank and Brian Bonaccis' amended complaint indicate that their aunts and White Horse Farms may own an interest in the disputed 202 acres oil and gas. Amended complaint, ¶¶5-12. Appx. 016-17. Despite having been served with process, neither their aunts nor White Horse Farms appeared or otherwise participated in this litigation.

III. STATEMENT OF FACTS

The realty in dispute was once owned by Albert M. Schenck. Albert M. Schenck is the great-great-grandfather of Frank and Brian Bonacci. Albert M. Schenck acquired the majority of his Marshall County land holdings from the heirs of Charles A. Seabright. Seabright died intestate in 1905. Seabright's heirs filed a chancery proceeding in Marshall County which resulted in the appointment of special commissioners who were directed to sell Seabright's lands. Appx. 310. Albert M. Schenck purchased three parcels of Seabright's land located in Union District, Marshall County. A deed from the Seabright special commissioners to Albert M. Schenck dated June 5, 1906 conveyed the three parcels. Appx. 310. The first parcel in said deed is described as a "parcel of land containing 204 acres, two roods (sic) and 37 poles...". The other two tracts conveyed by the deed are identified as Lot 1 and Lot 2. Lot 1 is described as "containing 176 acres and 14 poles, more or less." Lot 2 is described as containing "177 acres, 26 poles, more or less". The coal and related mining rights were excepted and reserved from the conveyances of the three parcels. In

[1]. The other five daughters and heirs of Albert Schenk III are Karen Schenk Sligar, Mary Schenk Hamilton, Heidi Schenk Bruhn, Louise Schenck Coulling, and Nancy Schenck Casey. Nancy Schenck Casey owns White Horse Farms, LLC.

total, the 1906 special commissioners' deed conveyed approximately 558 acres to Albert M. Schenck.

By deed dated October 5, 1916 from Goetze and others, Albert M. Schenck acquired an additional 58.19 acres located in Union District. The coal and related mining rights were excepted and reserved from the conveyance. Appx. 313.

On May 28, 1919, Albert Schenck and his wife Emma granted an oil and gas lease to James Wilson. The lease describes a tract consisting of 202 acres located in Union District. Appx. 317. The leasehold is not described by metes and bounds but rather by "adjoiners"; that is, by reference to parcels that border the parcel being leased. The lease from Schenck to Wilson described the land being leased as follows:

> ALL that certain tract of land, situated in Union District Marshall County and the State of West Virginia, on the waters of ..... (sic) bounded substantially as follows:
>
> > On the North by the lands of Big Wheeling Creek
> > On the east by lands of William Happy & J. E. Black
> > On the south by lands of McConnell heirs & Sebright (sic)
> > On the west by lands of Anna Sebright (sic) & A. M. Schenck
>
> containing two hundred & two (202) acres, more or less,...

The description of the leasehold contained in the lease does not correspond with the descriptions of the three parcels conveyed to Albert Schenck by the June 1906 special commissioners' deed or with the description of the 58.91 acre tract conveyed by Goetze to Schenck in October 1916. The lease contained no "back reference" identifying the source of Schenck's title. The May 29, 1919 lease from Schenck to Wilson provided for a 10 year primary term. Thus, to keep the lease in force, lessee had to drill a producing well on the leasehold by May 28, 1929.

Albert M. Schenck died testate on September 27, 1928. Schenck left all his property in trust for the benefit of his wife Emma and their son Albert F. Schenck. Appx. 319. Albert Schenck's will appointed Hilton Mann and the Citizens Mutual Trust Company of Wheeling, West

Virginia as trustees. Schenck's will directed that income from the trust be distributed to Albert's widow Emma and to their son Albert during their lifetimes. The will directed that the trust corpus be distributed to Albert and Emma's grandson, Albert Schenck III, upon his reaching age 40.

On December 30, 1932, Albert Schenck's estate and heirs entered into an agreement with Natural Gas Company of West Virginia which reduced the $400.00 annual royalty due for a gas well identified as Well 4-630 that had been drilled on the 202 acre leasehold. The agreement states:

> WHEREAS, the parties of the first part are now the owners of a certain tract of land situate in Union District, Marshall County W.Va. containing 202 acres, more or less, known as A. M. Schenk farm, and
>
> WHEREAS, on the 23rd day of May, 1919, the then owners of the said tract of land did lease and let the same to James Wilson for oil and gas purposes, and which said lease is duly recorded in the Office for the Recording of Deeds in Marshall County, W. Va., in Lease Book 160, at page 185, and is now owned by the party of the second part; and,
>
> WHEREAS, the party of the second part has drilled upon the said premises its Well No. 4-630, which produces natural gas, but not in sufficient quantities to justify the party of the second part in maintaining its equipment at said well and its connection with its transportation system, and in paying to the parties of the first part the gas rental or royalty mentioned in said lease, to-wit:-the sum of Four Hundred and no/100 Dollars, ($400.00), per year ....

Appx. 322. On October 17, 1933, Albert M. Schenck's estate and heirs entered into a second royalty reduction agreement with Natural Gas Company of West Virginia concerning another well drilled pursuant to the May 23, 1919 lease and identified as Well 3-629. Appx. 324.

A. ASSESSMENT OF THE 202 ACRES OIL AND GAS

For several years after his death, the Marshall County Assessor continued to assess realty in Albert M. Schenck's name. The 1935 Union District Land Book contains the first assessment of the 202 acres at issue. Appx. 330. Albert M. Schenck was assessed as owning "527.66 acres Whg Creek". Handwritten notations added in the Land Book indicated that Schenck was also assessed as owning realty described as "202 Royalty Wells #629-630 Nat Gas Co W.Va.". Wells 629 and 630 referenced in the assessment are apparently the wells identified in the 1932 and 1933

royalty reduction agreements between the Schenck Estate and Natural Gas Company of West Virginia. *See* page 4 *supra*.

Creation of the separate assessment for oil and gas in the name of Albert M. Schenck in the 1935 Land Book was consistent with the long-standing policy of the Marshall County Assessor. Specifically, that policy was and is that from the assessor's perspective, ownership of mineral interests is established and assessment of the mineral estate for property taxes begins when a landowner signed an oil and gas lease. Appx. 376. The Circuit Court acknowledged its familiarity with these assessment practices.[2]

The 1936 Union District Land Book also assessed Albert Schenck as owning 527.66 acres "Whg Creek" and "202 acres Royalty Wells #629-630 Nat Gas Co W.Va.". Appx. 330. While the Schenck estate, trust or heirs paid the 1935 assessment concerning the 202 acres, the 1936 taxes assessed on the 202 acres were not paid. As a result, that interest became delinquent and was offered for sale at the annual Sheriff's delinquent tax sale held in December 1937. There were no purchasers for this interest at the Sheriff's sale. Pursuant to provisions of the West Virginia Code governing delinquent real estate taxes then in effect, the Sheriff purchased the 202 acres for the State of West Virginia. Appx. 333.

B. 1949 TAX DEED TO EVERETT MOORE

In 1949, Albert M. Schenck's interest in the 202 acres oil and gas, along with other delinquent Marshall County properties, were referred by the State Auditor to Thomas Wilkerson in his capacity as Deputy Commissioner of Forfeited and Delinquent Lands for Marshall County. As required by West Virginia Code §11A-4-12 (1949) then in effect, Wilkinson commenced a

[2]. Petitioners subpoenaed the acting Marshall County Assessor to testify at the April 26, 2019 hearing on the Bonaccis' motion for summary judgment. The Circuit Court indicated it did not believe it needed to hear testimony from the assessor, stating "I'm familiar with the procedures of the assessor's office with regard to taxing, particularly with regard to oil and gas interests, and severance, and how they create a new tax ticket. I don't think it's necessary for today." April 26, 2019 hearing transcript, p. 22. Appx.436.

chancery proceeding in the Circuit Court of Marshall County. The purpose of that suit was to authorize Wilkerson to sell the 202 acres oil and gas and other delinquent Marshall County properties.

By order entered June 14, 1949, Wilkinson was authorized to offer the delinquent properties for sale. Appx. 337. Everett Moore purchased Schenck's 202 acres oil and gas. Wilkinson's sales were approved by order entered September 12, 1949. Appx. 337. Moore received a tax deed from Deputy Commissioner Wilkinson dated September 13, 1949. Appx. 337. The deed describes the realty conveyed to Moore as follows:

> **Being all the oil and gas under the land described in the lease granted by A. M. Schenck, et ux, to James Wilson**, bearing the date 23rd day of May, 1919, and recorded in the office of the Clerk of the County Court of said Marshall County in Deed Book No. 160 at page 185. This deed is made subject to all existing oil and gas leases on the property described herein. (emphasis added)

Thereafter, Moore was assessed as owning the 202 acres oil and gas. Appx. 337. The Bonaccis do not claim that Wilkinson's conduct of the delinquent land sale that resulted in Moore receiving the 1949 tax deed for the disputed 202 acres oil and gas was deficient or otherwise did not conform with West Virginia law.

C. BONACCIS' CHAIN OF TITLE

As directed by Albert M. Schenck's will, by deed dated June 12, 1957, the trustees conveyed three tracts of realty located in the Union and Sand Hill Districts of Marshall County to Albert Schenck III. Appx. 339. The descriptions of the Union District tracts in this deed differ from the descriptions of the Union District tracts acquired by Albert Schenck via the 1906 special commissioners' deed. The June 1957 deed to Albert Schenck III indicates that the descriptions of the parcels therein were based on a survey made by Stegman and Schellhase, Inc. civil engineers located in Wheeling, West Virginia. Appx. 342-344. Tract One described in the 1957 deed to Albert Schenck III contained 539.321 acres and is "all of the remainder of the three tracts of land

that were conveyed by Henry A. Nolte And C. E. Morris, Special Commissioners to Albert M. Schenck by deed dated June 5, 1906..." Appx. 343.

Albert Schenck III died testate on June 18, 1995 leaving an estate valued at nearly $50 million. Appx. 347. Schenk bequeathed all his real and personal property to his wife Kathleen. Appx. 088. The appraisement concerning Schenck's estate described the West Virginia realty owned by Schenck as follows:

> Family residence property, commonly known as Elm Knoll, situated on Big Wheeling Creek Rd. in Marshall County, West Virginia, and containing 698.8254 acres more or less, according to the records in the office of the Assessor of Marshall County, West Virginia.

Appx. 350.

On April 4, 2000, Albert Schenck III's widow Kathleen executed deeds in favor of her daughters conveying portions of the land Kathleen inherited from her husband. In each deed, Kathleen Schenck conveyed a parcel to a daughter as sole owner and conveyed an undivided 1/6 interest in a 204.29 acre tract identified as the "Schenck Preserve". Thus, on April 4, 2000, Kathleen conveyed to her daughter Kathleen Schenck Bonacci a 162.78 acre parcel located in Union District along with a 1/6 undivided interest in the 204.29 acre Schenck Preserve. Appx. 147.

By deed dated March 16, 2011, Kathleen Schenck Bonacci conveyed the 162.78 acres she had received from her mother to her sons, Brian and Frank Bonacci as tenants in common. Appx. 156. By deed dated September 8, 2012, Kathleen Schenck Bonacci conveyed to Frank and Brian her 1/6 undivided interest in the Schenck Preserve. Appx. 160. By deeds dated June 25, 2015, Brian and Frank Bonacci partitioned the 162.78 acres they had received from their mother. Appx. 166. As a result, Frank and Brian Bonacci each own an 81.39 acre parcel and a 1/12 undivided interest in the Schenck Preserve. Brian and Frank Bonacci claim that their respective 81.39 acre

parcels overlay a portion of the 202 acre oil and gas tract in dispute and that they are the owners of the subjacent oil and gas.

D. ROLACO'S CHAIN OF TITLE

Petitioner Rolaco claims that it owns the disputed 202 acres oil and gas. Rolaco contends that its remote predecessor in title, Everett F. Moore acquired the 202 acres oil and gas via a September 13, 1949 tax deed. Appx. 337. Moore or his heirs failed to pay the taxes assessed on the 202 acres oil and gas for the year 1994. As a result, a tax lien in the amount of the delinquent taxes assessed on the 202 acres was offered for sale at the annual tax lien held by the Marshall County Sheriff in November 1995. Orville W. Young purchased the tax lien at the Sheriff's sale. Orville W. Young received a tax deed dated May 20, 1997 concerning Moore's interest in the subject 202 acres oil and gas. Appx. 370. By quitclaim deed dated March 2, 2013 Orville W. Young conveyed the 202 acres oil and gas to Orville Young, LLC.[3] Appx. 244. By quitclaim deed dated January 2, 2018, Petitioner Orville Young, LLC conveyed the 202 acres oil and gas to Petitioner Rolaco. Appx. 253.

E. BONACCIS' MOTION FOR SUMMARY JUDGMENT

In their motion for summary judgment, the Bonaccis argued that since ownership of the surface and oil and gas estates concerning the 202 acres was not severed, West Virginia law did not empower the Marshall County Assessor to make separate property tax assessments for the surface and for subjacent 202 acres oil and gas. Alternatively, the Bonaccis argued that the property tax assessments for 202 acres oil and gas was a duplicate assessment because, they argued, the value of the oil and gas was included in the assessments of the surface made in the

[3]. Orville W. Young died on July 1, 2015. His son, Ronald Young is a member and manager of Orville Young, LLC and Rolaco, LLC. Appx. 230-31.

name of Albert Schenk. Since the property taxes assessed on the surface estate were paid, the Bonaccis argued property taxes on the 202 acres oil and gas never went delinquent. Appx. 060.

Orville Young and Rolaco argued that the Marshall County Assessor properly assessed Albert M. Schenck's estate as owning the oil and gas in the subject 202 acre tract. Orville Young and Rolaco further argued that the Union District Land Books unambiguously establish that the assessment of the 202 acres oil and gas was not a duplicate assessment. Orville Young and Rolaco also argued that the Bonaccis failed to offer evidence establishing the boundaries of the disputed 202 acres oil and gas, thereby making it impossible for the Circuit Court to fashion an order describing the realty to which the Bonaccis sought to quiet title. Orville Young and Rolaco also argued that the Bonaccis failed to establish the location of the disputed 202 acres oil and gas and could not establish they were real parties in interest entitled to seek a declaration regarding ownership of the disputed 202 acres oil and gas.

The Circuit Court agreed with all arguments made by the Bonaccis and ruled that the 1947 tax deed to Rolaco's remote predecessor in title, Everett Moore, was void and that, therefore, Rolaco owned no interest in the disputed 202 acres oil and gas. The Circuit Court further ordered that the Bonaccis owned the oil and gas within their respective 81.39 acre parcels and that the heirs of Albert Schenk owned the remaining portion of the 202 acres oil and gas. December 16, 2019 order, ¶¶104-05 Appx. 573.

SUMMARY OF ARGUMENT

1. The Circuit Court erred in concluding that West Virginia law prohibited an assessor from creating separate assessments for surface and subjacent minerals in a tract where the estates are owned by the same person. The West Virginia Supreme Court has not addressed this issue. The West Virginia Code in effect at the time of the assessments did not prohibit separate assessments.

2. The Circuit Court erred in finding, in the alternative, that the 1935 and 1936 assessments of the disputed 202 acres were duplicate assessments. The Circuit Court concluded that the 202 acres oil and gas was located somewhere within 527.76 acres owned by Albert Schenck and further that the assessment of the 527.76 acres was "in fee" and therefore included the value of the 202 acres oil and gas. Since the Schenck estate paid the taxes assessed on the 527.76 acres, the Circuit Court reasoned that the 202 acres oil and gas did not go delinquent for nonpayment of taxes and, therefore, the September 1949 tax deed to Moore concerning the 202 acres oil and gas was void. These findings are unsupported by the record.

First, in discovery responses, the Bonaccis admitted their remote predecessors in title were only assessed as owning the **surface** of the 527.76 acres. Second, the assessments of 202 acres oil and gas were separate from and in addition to contemporaneous assessments of the surface overlying the oil and gas. Third, the Circuit Court disregarded undisputed evidence of the long-standing practice of the Marshall County Assessor that mineral interests were assessed only when the Assessor learned that the owner of the minerals had leased the same.

3. A genuine issue of material fact exists regarding the location of the 202 acres in dispute. For example, the 202 acre oil and gas leases may be located within the Schenck Preserve or within lands owned by some or all of the Respondent aunts of the Bonaccis. The Circuit Court erred in entering an order quieting title to the 202 acres oil and gas without describing the location or boundaries of the same.

4. Related to argument 3, the Bonaccis were not authorized to seek to quiet title to portions of the 202 acres oil and gas they did not own but which were instead owned by their relatives. The Circuit Court therefore erred in granting relief to those relatives.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This appeal involves assignments of error regarding an issue of first impression in West Virginia and claims of a result against the weight of evidence. As such, Petitioners believe oral argument is appropriate per Rule of Appellate Procedure 19(a)(3) and (4).

ARGUMENT

I. STANDARD OF REVIEW

A circuit court's entry of summary judgment is reviewed de novo. *Painter v. Peavy,* 192 W.Va. 189, 451 S.E.2d 755 (1994). In *Blake v. Charleston Area Medical Center,* 201 W.Va. 469, 498 S.E.2d 41 (1997) this Court stated "[w]hen employing the *de novo* standard of review, we review anew the findings and conclusions of the circuit court, affording no deference to the lower court's rulings." 201 W.Va. at _____, 498 S.E.2d at 47.

Rule 56 of the West Virginia Rules of Civil Procedure governs summary judgment. A motion for summary judgment must be granted where the record contains no genuine issue of material fact to be resolved by a court or jury and inquiry concerning the facts is not desirable to clarify the application of the law. *Jochum v. Waste Management of West Virginia, Inc.,* 224 W.Va. 44, 680 S.E.2d 59 (2009). Rule 56(c) provides that a motion for summary judgment may be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

In *Jividen v. Law*, 194 W.Va. 705, 461 S.E.2d 451 (1995), the West Virginia Supreme Court defined what constitutes a "genuine issue of material fact" in the context of a motion for summary judgment:

> Roughly stated, a "genuine issue" for purposes of West Virginia Rule of Civil Procedure 56(c) is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a

> reasonable jury to return a verdict for that party. The opposing half of a trialworthy issue is present where the non-moving party can point to one or more disputed "material" facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law.

Id., syl.pt. 5.

If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure. *Stonewall Jackson Memorial Hosp. Co. v. American United Life Ins.* Co., 206 W.Va. 458, 525 S.E.2d 649 (1999). The nonmoving party must come forward with specific facts, not simply inferences or speculation, that demonstrates a genuine, material fact in controversy. *Crum v. Equity Inns, Inc.*, 224 W.Va. 246 685 S.E.2d 219 (2009). The nonmoving party need not come forward with evidence in a form that would be admissible at trial to avoid summary judgment. Rather, the nonmoving party must show there will be enough competent evidence available at trial to enable a finding favorable to the nonmoving party. *Wilson* v. *Daily Gazette Co.,* 214 W.Va. 208 588 S.E.2d 197 (2003).

When granting summary judgment, West Virginia law requires that the circuit court make detailed findings and conclusions to facilitate review on appeal. In *Fayette County National Bank v. Lilly,* 199 W.Va. 349, 484 S.E.2d 232 (1997), overruled on other grounds, *Sostaric v. Marshall*, 234 W.Va. 449, 766 S.E.2d 396 (2014), the Supreme Court stated:

> Although our standard of review for summary judgment remains *de novo*, a circuit court's order granting summary judgment must set out factual findings sufficient to permit meaningful appellate review. Findings of fact, by necessity, include those facts which the circuit court finds relevant, determinative of the issues and undisputed.

Id, syl. pt. 3. The Supreme Court further stated "the circuit court's order must provide clear notice

to all parties and the reviewing court as to the rationale applied in granting or denying summary judgment." 199 W.Va. at 354, 484 S.E.2d at 237.

Finally, West Virginia law provides that summary judgment may be rendered in favor of the nonmoving party. *In Employer's Liability Insurance Corporation v. Hartford Accident and Indemnity Company,* 154 W.Va. 1062, 158 S.E.2d 212 (1967) this Court held:

> When it is found from the pleadings, depositions and admissions on file, and the affidavits of any party, in a summary judgment proceeding under Rule 56 of the West Virginia Rules of Civil Procedure, that a party who has moved for summary judgment in his favor is not entitled to such judgment and that there is no genuine issue as to any material fact, a summary judgment may be rendered against such party in such proceeding.

Id., syl. pt. 6. This holding was recently reaffirmed in *Gastar Exploration Inc. v. Rine,* 239 W.Va. 792, 806 S.E.2d 448 (2017)

As discussed herein, the Circuit Court failed to recognize the existence of several genuine issues of material fact which required denial of the Bonaccis' motion for summary judgment. Finally, the Circuit Court made erroneously conclusions regarding West Virginia law. The correct application of West Virginia law requires the entry of summary judgment in favor of Rolaco.

II. THE CIRCUIT COURT ERRED IN CONCLUDING THAT WEST VIRGINIA LAW PROHIBITED SEPARATE ASSESSMENTS OF SURFACE AND SUBJACENT OIL AND GAS ESTATES ABSENT A SEVERANCE OF OWNERSHIP OF THE ESTATES

The Circuit Court concluded, as a matter of law, that absent a severance of ownership of surface and mineral estates, West Virginia law did not allow an assessor to make separate assessments of the surface and subjacent mineral estates. December 16, 2019, ¶58 Appx. 517. In reaching this conclusion, the Circuit Court failed to discuss the statutes governing property tax assessment in effect at the time of the assessments in question. Instead, the Circuit Court relied on opinions of the West Virginia Attorney General. December 16, 2019 order, ¶ ¶49,50. Appx. 513.

The disputed 202 acres oil and gas was first assessed for property taxes in 1935. The assessment of realty for *ad valorem* property taxes then was controlled by West Virginia Code

§11-4-1, *et seq* (1935). West Virginia Code §11-4-1 (1935) required the assessor to create land books "in such form as the tax commissioner may prescribe...." West Virginia Code §11-4-4 (1935) described the process to be followed by an assessor when preparing the land book entries:

> The land books for every county shall be made out by the assessor of such county. In making such land books in each year such officer shall be governed, as far as is proper, by the copy of the land books last made out in his county. **But he shall correct errors and mistakes which he may have made in any such land books** as to the names of the persons properly chargeable with taxes on any tract or lot of land therein, and enter and charge the same with taxes thereon to the person or persons properly chargeable therewith, **whether such correction be rendered necessary by the conveyance of such tract or lot by the person last charged with taxes thereon or otherwise**. He shall also correct all errors and mistakes he may find in such land books as to the local description thereof, and all clerical errors of every sort which he may find therein. (Emphasis added)

Regarding the assessment of different estates in the same parcel of realty, West Virginia Code §11-4-9 (1935) provided, in pertinent part:

> When any person becomes the owner of the surface, and another or others become the owner or owners of the coal, oil, gas, ore, limestone, fire clay, or other minerals or mineral substances in and under the same, or of the timber thereon, the assessor shall assess such respective estates to the respective owners thereof at their true and actual value, according to the rule prescribed in this chapter.

The Circuit Court cited a 1966 opinion of the West Virginia Attorney General as authority for the proposition that absent a severance of ownership of the surface and subjacent minerals estates, West Virginia law did not allow for separate assessments of the surface and subjacent mineral estates. However, the Attorney General conceded that there was no West Virginia statutory authority or case law controlling the issue, stating:

> There is not found any statute which, as to such situations as here, where there has been no severance of minerals from the land, prescribe specifically any method for the separate entry in valuation, for tax purposes, of the mineral interests within and underlying the surface of the land; neither is there found any judicial pronouncements which expressly govern the point.

Appx. 484. Despite this lack of authority, the Attorney General concluded that absent a severance of ownership of the surface and underlying minerals, separate assessments for the surface and

underlying mineral estates was not permissible under West Virginia law.[4] Appx. 487.

Then as now, assessors were required to assess property "at its true and actual value; that is to say at the price for which such property would sell if voluntarily offered for sale by the owner thereof, upon such terms as such property, the value which is sought to be ascertained, is usually sold and not the price which might be realized if such property were sold at a forced sale..." West Virginia Code §11-3-1 (1935). There was nothing in West Virginia's statutory tax assessment scheme that required an assessor to conduct the title examination or make an independent determination regarding the extent of a landowner's ownership of a parcel of land. In fact, as a part of the annual appraisement process, West Virginia Code §11-3-2 (1935) required that each **property owner** "furnish to such assessor, or his deputy, a full and correct description of all real and personal property of which he was the owner as of the first day of July of the current year...". Where, as in the present case, the property was held in trust, West Virginia Code §11-3-3(d) (1935) required that either the trustee or trust beneficiary provide such information to the assessor. The record contains no indication that Albert M. Schenk, his estate, the trustee of his testamentary trust, or the trust beneficiaries advised the Assessor that Schenk owned the oil and gas in his Marshall County properties.

Neither the Bonaccis nor the Circuit Court offered any policy rationale for why such separate assessments should not be permitted. As indicated in West Virginia Code §11-3-1 (1935), *supra*, the assessor's responsibility is to determine the true and accurate value of property for purposes of property tax assessment. From a public policy standpoint, there is no reason to prohibit assessors from separately valuing the surface and the mineral estates within a given tract of land

[4]. *Dyer v. United Fuel Gas Co.*, 90 F. Supp. 859 (S.D. W.Va 1950) indicated, *in dicta*, that absent severance of ownership of the surface and subjacent minerals, West Virginia Code §11-4-9 did not permit the separate assessment of surface and subjacent minerals estates. The Fourth Circuit Court of Appeals thereafter reversed the holding in *Dyer.* 185 F. 2d. 99 (4th Cir. 1950)

and issuing separate property tax assessments where those estates are owned by the same person if the end result is that those interests are correctly valued and taxed.

For the foregoing reasons, Petitioners assert that the Circuit Court erred in concluding, as a matter of law, that the Marshall County Assessor acted improperly in separately assessing Albert M. Schenk as owning the surface and as owning oil and gas within Schenk's Union District property. Petitioner's further request that this Court find that the separate assessments of surface and oil and gas made in 1935 and 1936 by the Marshall County Assessor were lawful and appropriate under West Virginia law.

III. THE CIRCUIT COURT ERRED IN CONCLUDING THAT THE ASSESSMENT OF 202 ACRES WAS A DUPLICATE ASSESSMENT AND FURTHER THAT SUCH ASSESSMENT DID NOT GO DELINQUENT FOR NONPAYMENT OF TAXES

The Circuit Court's order granting summary judgment concluded, in the alternative, that the assessment of 202 acres oil and gas was a duplicate assessment because the value of the oil and gas was included in the assessment of the 527.66 acres assessed in the name of Albert M. Schenk. In reaching this conclusion, the Circuit Court made numerous findings of fact that are at odds with the record. For example, the Circuit Court concluded:

> For all times relevant to this Complaint, all *ad valorem* taxes assessed against the subject real property in its entirety have been paid in full by Albert M. Schenk, the trustees under his Last Will and Testament, or his family members who were successors in title. That is, at the time the "202 A Royalty Wells #629-630 Nat Gas Co WVA" entry appeared in the Marshall County land books in 1935, **Albert M. Schenk (or the trustees under his Last Will and Testament) was being assessed, and had been paying since 1919, taxes against the fee interest in the 527.76-acre tract of land on Wheeling Creek** which contained the 202 acres that were subject to the oil and gas lease with James Wilson. (Emphasis added)

December 16, 2019 order, ¶21. Appx. 550. The Circuit Court also found "Marshall County assessed taxes against Albert M. Schenk's surface interest, which included the oil and gas estate." December 16, 2019 order, ¶41. Appx. 556.

West Virginia law defines ownership of realty in fee simple as ownership of every interest

in realty. *Meadows v. Belknap*, 199 W.Va. 243, 483 S.E.2d 826 (1997). Assuming the Circuit Court was referring to assessment of the 527.76 acres in fee simple, the record establishes that Albert M. Schenk **never** so owned the 527.76 acres "in fee" because the 1906 deed from the Seabright commissioners to Schenk excepted and reserved the coal.

Moreover, in responses to discovery, the Bonaccis admitted that Albert M. Schenk was assessed as owning only the **surface** of the 527.66 acres. On January 18, 2019, the Bonaccis served responses to Petitioners' combined set of discovery. Interrogatory 6 inquired:

> State all facts that support your contention that the property at issue in this litigation was subject to an erroneous duplicate assessment as alleged in Paragraph 31 of the Amended Complaint. Further identify each and every person possessing knowledge or information that supports your response to this interrogatory.

The Bonaccis responded, in relevant part:

> From 1919 until 1935, the Marshall County land books contained an entry in the name of A.M. Schenk which read "527.76 A Whg Creek". Beginning in 1935, a separate land book entry was listed in the name of A. M. Schenk for "202A Royalty Wells #629-630 Nat Gas Co WVA" despite there having never been a severance of the mineral estate from the surface estate in said land; therefore, this entry does not and has never represented ownership of any oil and gas or other minerals. This entry remained on the Marshall County land books through 1938. **During this same time period, the 527.66 acre surface estate was separately taxed in the name of A.M. Schenk.**
>
> ***
>
> Thus, over the period in question, **taxes were consistently assessed against the 527.66 acre surface estate**, while over the same period there were periodic duplicate assessments for a purported 202-acre oil and gas interest, despite there having never been a severance of the mineral estate from the surface estate in the subject land. (emphasis added)

Appx. 384-86. In *State v. McWilliams,* 177 W.Va. 369, 352 S.E.2d 120 (1986) the Supreme Court held "[a] judicial admission is a statement of fact made by a party in the course of the litigation for the purpose of withdrawing the fact from the realm of dispute." *Id*, syl. pt. 4. Petitioners argued this discovery response constituted a judicial admission. Appx. 303. The Circuit Court's order granting summary judgment made no mention of Bonaccis' discovery response nor explained why the concession was not binding on the Bonaccis.

At a bare minimum, the Land Book entries demonstrate that a genuine issue of material fact exists regarding whether Albert M. Schenk and his trust were assessed as owning the 527.66 acres Union District "in fee". For example, the forms used by the Marshall County Assessor to create the 1920 Land Books contained columns wherein the Assessor could indicate whether the landowner was assessed as owning acreage as "Fee or Surface" (column 3) and "Minerals or Timber" acreage (column 4). Appx. 327. The 1920 Land Book states that Albert M. Schenck was assessed as owning "527.76 acres Wheeling Creek", listing the acreage in the column titled "Fee or Surface". Importantly, in 1920, the Assessor did not assess Schenk as owning "Mineral or Timber" acreage. The 1925 Union District Land Book again assessed Albert Schenck as owning 527.76 acres Wheeling Creek "Fee or Surface" and did not assess Schenk as owning "Mineral or Timber" Appx. 327.

Despite Albert Schenck having died in 1928, the realty he had owned continued to be assessed in his name. In 1930, Schenck was again assessed as owning 527.66 acres "Whg Creek" with the acreage being listed in the column titled "Fee or Surface". Again, Schenk was not assessed as owning "Mineral or Timber" acreage. Appx. 329.

Having concluded that Albert M. Schenk and then his estate was always assessed as owning the 527.66 acres "in fee" and/or that the assessment of his "surface interest" included the subject oil and gas, the Circuit Court concluded that the assessment of 202 acres was a duplicate assessment. Again, this conclusion is not supported by the record.

The first assessment of the 202 acres appeared in the 1935 Union District Land Book. By 1935, the forms used by assessors to create land books had been changed, apparently as the result of the enactment of West Virginia Code §11-4-2 in 1933. West Virginia Code §11-4-2 (1935) provided, in relevant part:

> The tax commissioner shall prescribe a form of land book and the information and itemization to be entered therein, which shall include separate entries of:
>
> > (1) All real property owned, used and occupied by the owner exclusively for residential purposes; (2) all farms including land used for agriculture, horticulture and grazing occupied by the owner or bona fide tenant; (3) all other real property; and, for each entry there shall be shown;. (4) the value of land, the value of buildings, and the aggregate value; (5) the character and estate of the owners, the number of acres or lots, and the local description of the tracts or lots; (6) the amount of taxes assessed against each tract or lot for all purposes.

Columns C and D of the 1935 Land Book pages were titled "Number of Acres Fee or Surface". Appx. 330. It appears that an assessor was to use Column C to identify acreage held in fee while Column D was to be used by an assessor to designate ownership of the surface estate.

The 1935 Union District Land Book assessed Albert M. Schenck as owning "527.66 acres Whg Creek". The Assessor used both columns C **and** D to list the 527.66 acres; "527" being listed in Column C and "66" in Column D. Petitioners argue that given that Schenk did not own the 527.66 acres in fee because the 1906 deed conveying the Seabright realty to Schenck excepted and reserved the coal, the 1935 assessment of the 527.66 acres was necessarily an assessment of the surface estate. The 1935 assessment lists Schenck's 527.66 acres as "Class 2" property defined as "All Property Occupied by the Owner Exclusively for Residential Purposes and All Farms Occupied and Cultivated by the Owners or Bona Fide Tenants". Appx. 330. The Assessor valued the 527.66 acres at $15,900.00, attributing $15,300.00 to the value of the land (Column F) and $600.00 to the buildings located thereon (Column G).

The 1935 Land Book entry for Schenck contains handwritten notations adding property described as "202 Royalty Wells #629-630 Nat Gas Co W.Va.". Wells 629 and 630 referenced in this assessment are evidently the wells operated by the Natural Gas Company of West Virginia and identified in the 1932 and 1933 royalty reduction agreements between the Albert M. Schenck estate and Natural Gas Company of West Virginia. *See* page 4 *supra.* The handwritten notations

indicate the Assessor valued said 202 acres at $1,600.00. Importantly, the Assessor identified the 202 acres as "Class 3" property; that is, "All Other Real Property Situated outside Municipalities". The Assessor listed the $1,600.00 value of the oil and gas under Column I. Appx. 330.

Analyzing the 1935 Land Book entries establishes the following facts. First, the Assessor characterized Schenk's 527.66 acres as Class 2 property with a total value of $15,900.00. The Assessor added "202 Royalty Wells #629-630 Nat Gas Co W.Va." and characterized that property as Class 3 property with a value of $1,600.00. If, as the Circuit Court found, the Assessor had assessed the 527.66 acres "in fee", the value of $15,900.00 assigned to the 527.66 acres would necessarily have included a value for the oil and gas in place. If the assessment for the 202 acres added in the 1935 Land Book concerned oil and gas within the 527.66 acres, one would expect to see notations by the Assessor **reducing** the value of the assessment of the 527.66 acres by $1,600.00. However, the Land Book contains no such reduction in assessed value for the 527.66 acres. Rather, the $1,600.00 assessed value for the 202 acres is plainly an amount in excess of the $15,900.00 value set by the Assessor for the 527.66 acres.

The 1936 Union District Land Book assessed Albert Schenck as owning 527.66 acres Wheeling Creek and "202 Royalty Wells #629-630 Nat Gas Co W.Va.". Appx. 332. As in 1935, Schenck's 527.66 acres was appraised at $15,900.00. While the 527.66 acres was initially listed as Class 2 property, notations in the Land Book changed the classification of the 527.66 acres to Class 3 property, noting "Country Club-not a farm" In 1936, as in 1935, the Assessor assessed the 202 acres separately at $1,600.00 and again classified the 202 acres as Class 3 property.

The Circuit Court relied heavily on this Court's memorandum decision in *Hill v. Lone Pine Operating Company,* No. 16-0219 (W.Va. Supreme Court, November 18, 2016) to support the conclusion that the assessment of the 202 acres was a duplicate assessment. December 16, 2019

order, ¶¶43-45. Appx. 557-58. *Lone Pine* and the case at bar are distinguishable. *Lone Pine* involved a quiet title action brought by Hill concerning a 376.5 acre oil and gas tract located in Harrison County. The 376.5 acres was located within a 1300 acre tract. The 1300 acre tract was subject to an 1899 oil and gas lease granted by the then owner, Hammond. In 1988, the Harrison County Assessor created an assessment that read "Interest in 1300 as lease oil and gas (Bruce Hammond)" and issued that assessment to each of Mitchell, his aunt Rapp and Sigmond. Between them, Mitchell, Rapp and Sigmond apparently owned the disputed 376.5 acres oil and gas. In addition to their each receiving the "lease" assessments, Mitchell, Rapp and Sigmond were assessed as owning the 375.6 acres oil and gas. *Id.* at 3.

In 1989, Mitchell and Rapp paid the assessments on the 376.5 acres oil and gas but did not pay the taxes on the "Interest in 1300 as lease oil and gas (Bruce Hammond)" assessment. A tax lien on Mitchell and Rapp's delinquent 1989 "lease" assessment was offered for sale by the Harrison County Sheriff and was sold to the State. *Id.* at 2. Hill received a January 1994 tax deed concerning the Mitchell and Rapp "lease" assessments that had been sold to the State. Hill claimed that said tax deed conveyed ownership of the 376.5 acres oil and gas to him.

The Circuit Court of Harrison County found that because Mitchell and Rapp had received separate assessment as owners of the oil and gas, the "lease" assessments did not represent ownership of the oil and gas. Since Mitchell and Rapp paid the taxes assessed on the oil and gas, their failure to pay the "lease" assessments did not result in delinquency of the property taxes due on their respective interests in the 376.5 acres oil and gas. *Id.* at 2.

Unlike the assessments in *Hill*, the 1935 and 1936 assessments in Schenck's name do not reference an oil and gas lease. Nor do the 1935 and 1936 Land Books assess Schenk as **owning** both oil and gas in place and as having **leased** that oil and gas. West Virginia recognizes a

presumption regarding the accuracy of valuations and assessments prepared by assessors. In *In re Tax Assessments Against Pocahontas Land Co,* 172 W.Va. 52, 303 S.E. 2d 691 (1983), the Supreme Court held:

> It is a general rule that valuations for taxation purposes fixed by an assessing officer are presumed to be correct. The burden of showing an assessment to be erroneous is, of course, upon the taxpayer, and proof of such fact must be clear.

Id, syl. pt. 7. See also, *In Western Pocahontas Properties, Ltd v. County Commission of Wetzel County*, 189 W.Va. 322, 431 S.E. 2d 661 (1993). Here, the 1935 and 1936 assessments in the name of Schenck were consistent with the long-standing policy of the Marshall County Assessor which assessed a person as owning oil and gas upon the Assessor receiving information indicating that the person had signed oil and gas lease. Under that policy, the Assessor's becoming aware of the existence of a lease signed by Schenk resulted in Schenk's being assessed as owning the oil and gas in place, not an assessment of the oil and gas lease or of the royalties payable pursuant thereto as concluded by the Circuit Court.[5]

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[5]. Petitioners believe that it bears noting that the Circuit Court's wholesale adoption of the proposed order granting summary judgment submitted by Bonaccis over Petitioners' objection resulted in other erroneous or unsupported findings of fact. For example, the Circuit Court found:

> 15. Despite the fact that there was never a severance of the oil and gas estate from the surface estate, the land books of Marshall County, West Virginia, for the years 1935 through 1938 contained an entry in the name of A. M. Schenk for "202 A Royalty Wells #629-630 Nat Gas Co WVA."
>
> 16. This entry is absent from the land books for the years 1940 through 1946.

December 16, 2019 order, ¶¶16, 17. Appx. 503. Surprisingly, this finding is contradicted by documents submitted **by the Bonaccis** in support of their motion for summary judgment.

West Virginia Code §11-4-13 (1935) required that assessors list delinquent properties purchased by the State in the land books until such interests were either redeemed or sold by the State. Section 11-4-13 stated, in relevant part:

> Real estate purchased for the State at a sale for taxes shall not be omitted from the land books but the officer whose duty it is to make out the same, shall duly enter, classify and value annually such real estate, as though no such sale had occurred, until such real estate is redeemed or otherwise disposed of by the State, but no taxes shall be extended thereon while the same remains the property of the State; and there shall be noted on the land books by the officer whose duty it is to make out the same, opposite the name of the former owner, the time when the same was purchased by the State and for what year's taxes sold, and such

In summary, the record does not support the Circuit Court's conclusion that the assessment of the 202 acres was a duplicate assessment and/or was an assessment of a royalty interest rather than the oil and gas in place. Rather, the record supports the conclusion that the assessment of the 202 acres was a separate assessment of the oil and gas in place.

IV. THE CIRCUIT COURT'S ORDER QUIETING TITLE TO THE 202 ACRES DOES NOT ADEQUATELY DESCRIBE THE CONFIGURATION OR LOCATION OF THE REALTY AND MUST THEREFORE BE REVERSED

Count II of Bonaccis' amended complaint sought an order quieting title to the oil and gas located beneath their respective 81.39 acre parcels. Amended complaint, ¶43. Appx. 025. Research identified no West Virginia Supreme Court decision discussing the burden of proof borne by a party seeking to quiet title. *Green v. J.P. Morgan Chase Bank,* 937 F. Supp. 2d 849 (N.D. Tex. 2013) is representative of cases from other jurisdictions addressing the issue. Citing Texas law, *Green* stated:

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officer shall continue such memorandum in the land books for succeeding years and until such real estate is redeemed or otherwise disposed of by the State;...

The record establishes that the Marshall County Assessor complied with this requirement. The disputed assessment on the 202 acres was purchased for the State by the Sheriff at the Sheriff's tax lien sale held in December 1937. Appx. 326. In support of their motion for summary judgment, the Bonaccis submitted portions of Union District Land Books for numerous years, including 1940 through 1949. March 1, 2019 motion for summary judgment, Exhibit K. Appx.174. The 1940, 1941 in 1942 Union District Land Books excerpts submitted by the Bonaccis included the portions of those Land Books where the assessor listed properties that had been "Purchased by State", including the disputed 202 acres that had been assessed in the name of Albert Schenk. Appx.188, 190, 193. Had similar portions of the Union District Land Books for the years 1943 through 1949 been submitted, those documents would have indicated that the Assessor correctly listed the disputed 202 acres as "Purchased by State" in those years as well.

The Circuit Court's wholesale adoption of the Bonaccis' proposed order also resulted in numerous findings on matters having no bearing on the issues before the Circuit Court. For example, ¶26 of the order found that no title examinations were conducted before Orville Young quitclaimed numerous oil and gas properties to Orville Young LLC. Paragraph 26 includes a finding that these quitclaim deeds were acknowledged before the daughter of Orville's son, Robert Young and further that no money was exchanged as a part of the conveyances. Paragraphs 30 and 31 make similar findings regarding the subsequent quitclaiming of the parcels by Orville Young LLC to Rolaco; note that a six week delay occurred between the execution of the deed for the 202 acres and its recording; and that "no attorneys or tax accountants were hired to assist with the conveyance". Appx. 552. Petitioners can only conclude that by including these and similar findings in their proposed order, the Bonaccis hoped to create the impression that the conveyances from Orville Young to Orville Young LLC and from Orville Young LLC to Rolaco were somehow suspect.

> A plaintiff in a quiet title claim must prove that (1) he has an interest in a specific property, (2) title to the property is affected by a claim by the defendant or defendants, and (3) the claim, although facially valid, is invalid or unenforceable. ... In a quiet title action, a plaintiff can only recover on the strength of his or her own title, not the weakness of any defendant's title. (internal citations omitted) (emphasis added)

937 F. Supp. 2d at 863. *See also*, *Robertson v. Lees,* 189 S.W. 3d 463 (Ark. App. 2004). A plaintiff seeking to quiet title must establish the location and boundaries of the realty for which he or she seeks to quiet title. *Robertson v. Lees, supra,* is instructive in this regard. Robertson and Lees owned adjoining properties. Robertson claimed that a fence line corresponded with the location of the boundary between their respective properties. Lees removed the fence. Robertson brought an action to quiet title, asking that the court declare that the fence line constituted the boundary between their respective properties. Lees counterclaimed, also seeking to quiet title regarding the location of the disputed boundary. 189 S.W. 3d at 465-66.

The trial court found that Robertson had not offered sufficient evidence to establish the location of the disputed boundary line and denied his claim for relief. However, the trial court found in favor of Lees, quieting title to his tract. 189 S.W. 3d at 469. Robertson appealed.

The Arkansas Appellate Court reversed. Agreeing with Robertson that Lees had offered no evidence establishing the location of the disputed boundary, the Arkansas Court stated:

> Finally, Robertson contends that the trial court erred in quieting title in Lees without the introduction of the survey or without determining where the boundary line was. **Robertson argues that, because appellee did not introduce a survey, there is no proof in the record from which to ascertain whether the line of iron fence posts placed by Lees does, in fact, correspond with the true boundary line. We agree.** (emphasis added)

189 S.W. 3d at 471. *Seitz v. Pennsylvania Railroad Company,* 116 A. 57 (Pa. 1922) is to like effect.

Decisions of the West Virginia Supreme Court of Appeals indicate that West Virginia law requires that orders quieting title to realty contain adequate descriptions of the location and boundaries of the realty in question. In *O'Daniels v. City of Charleston,* 200 W.Va. 711, 490 S.E.2d

800 (1997), the Supreme Court reversed an order of the Circuit Court of Kanawha County requiring that the City of Charleston remove fences and other obstructions from a portion of a public road. The description of the portion of the road impacted by the Circuit Court's order was described generally and without reference to monuments or other descriptors. 200 W.Va. at 714-15, 490 S.E.2d at 804-05. On appeal, the Supreme Court reversed, noting:

> Because the Circuit Court's order fails to define the boundaries of Ledge Hill Drive now under the control of the City, it cannot be effectively enforced in the future. Potential third-party purchases of land bordering Ledge Hill Drive will be unable to determine where the City right of way ends and their land begins, and they would receive no guidance from reading the Circuit Court's order.

200 W.Va. at 717, 490 S.E.2d at 806.

Here, the Circuit Court acknowledged that the record contains no plats or maps depicting the boundaries of the 202 acres. December 16, 2019 order, ¶80. Appx. 568. The Bonaccis offered no expert testimony to establish the location of their realty in relation to the disputed 202 acres. Nevertheless, the Circuit Court found that the 202 acres "comprises the eastern portion of the approximately 558-acre tract acquired by Schenk and formerly owned by Seabright." December 16, 2019 order, ¶83. Appx. 599. The Circuit Court reviewed and compared various maps. Comparing a "farm line" map of Marshall County (Appx. 411); a 1957 map depicting the Schenk Farm (Appx. 409)[6]; and a current tax map prepared by the Marshall County Assessor (Appx. 440) the Circuit Court found "one gains a clearer sense that the surface of the 202-acre tract described in the 1919 lease is owned, at least in part, by [the Bonaccis]." December 16, 2019 order, ¶85. Appx. 569. Petitioners respectfully assert that a comparison of these three maps does not support the Circuit Court's "sense" regarding the location of the 202 acres.

[6]. During the April 26, 2019 hearing on the Bonaccis' motion for summary judgment, Orville Young and Rolaco objected to this plat, noting that it had not been authenticated. Appx. 425.

The Circuit Court also relied on well location maps (Appx. 471, 74, 77) filed with the West Virginia Department of Environmental Protection. December 16, 2019 order, ¶¶86-89 Appx. 570. The Circuit Court concluded that the maps depict the location of wells 629 and 630 apparently drilled pursuant to the 1919 lease from Schenk to Wilson. However, two of the well plats describe a tract consisting of 204 acres. The 1919 lease from Schenk to Wilson created a leasehold described as consisting **of 202 acres**. The record establishes that the "Schenck Preserve" carved out of the Schenk Farm contained **204 acres**. Appx. 148, 409.

Having reviewed and compared these maps, the Circuit Court concluded "it becomes clear that the location of the 202 acre tract at issue is ascertainable to a degree allowing this Court to craft an order quieting title to the oil and gas within and underlying the same." December 16, 2019 order, ¶90. Appx. 571. In its grant of relief, the Circuit Court ruled that the Bonaccis were the rightful owners of the oil and gas within their respective 81.39 acre tracts which, in turn, compromised a portion of the 202 acres in dispute. Attempting to quiet title to the remaining 39.22 acres oil and gas, the Circuit Court ruled "[t]he rightful owners of the remaining oil and gas within and beneath the remainder of the 202 acre tract at issue in this action are the descendants of Albert M. Schenk that owned the oil and gas within and underlying said remainder." December 16, 2019 order, ¶¶104-105. Appx. 573.

As the Court indicated in *O'Daniels, supra*, a third-party wishing to acquire the disputed 202 acres oil and gas will receive no guidance from the Circuit Court's order regarding the location of that oil and gas. Circuit Court's lack of precision in identifying the location of disputed 202 acres oil and gas requires reversal of the December 16, 2019 order granting summary judgment.

V. THE BONACCIS DO NOT POSSESS THE RIGHT TO ENFORCE CLAIMS ON BEHALF OF OTHER HEIRS OF ALBERT M. SCHENK

Rule 17 of the West Virginia Rules of Civil Procedure requires that "[e]very action shall be prosecuted in the name of the real party in interest." The Amended Complaint states "[w]hile the Bonaccis bring this action on their own behalf, if the Bonaccis prevail on their claims, then such would inure to all those whose interests derive from Albert M. Schenk." Amended Complaint, n. 1. Appx. 016. The Bonacci's did not hold powers of attorney empowering them to pursue this quiet title action on behalf of their relatives. Indeed, the other heirs of Albert M. Schenk have chosen not to participate in this litigation.

Keesecker v. Bird, 200 W.Va. 667, 490 S.E.2d 754 (1997) discusses application of Rule 17 of the West Virginia Rules of Civil Procedure and stated, in relevant part:

> We therefore hold that the purpose of W.Va.R.Civ.P. Rule 17(a) is to ensure that the party who asserts a cause of action possesses, under substantive law, the right sought to be enforced. W.Va.R.Civ.P. Rule 17(a) **allows circuit courts to hear only those suits brought by persons who possess the right to enforce a claim and who have a significant interest in the litigation**. ..... The requirement that claims be prosecuted only by a real party in interest enables a responding party to avail himself of evidence and defenses that he has against the real party in interest, to assure him of finality of judgment, and to protect him from another suit later brought by the real party in interest on the same matter...
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> ***
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> The language of Rule 17(a) expressly authorizes a real party in interest to sue on behalf of, **or for the benefit of, another.** Many of the examples of real parties in interest listed in the rule are individuals with some fiduciary interest (executors, administrators, guardians, bailees, trustees of an express trust, etc.), individuals who are charged with the responsibility of adequately representing another's interests...
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> ***
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> [T]he mere fact that plaintiff falls within one of the classes of persons enumerated in Rule 17(a) is not dispositive of the real party in interest question, for that rule assumes that the enumerated persons are granted the right to sue by the applicable substantive law. (citations omitted) (emphasis added)

200 W.Va. at 677, 490 S.E.2d 764.

Petitioners do not dispute that the Bonaccis possess the right to assert a claim regarding

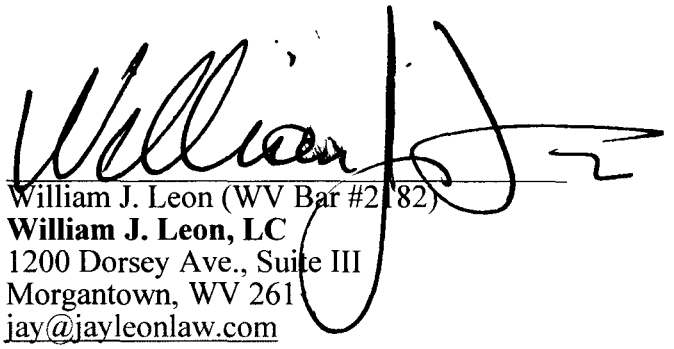
ownership of some portion of the disputed 202 acres oil and gas. However, the Bonaccis identified 5 individuals and one limited liability company whom they indicate may have an interest in the disputed oil and gas. In bringing this action, the Bonaccis are not acting as executors, administrators, guardians, bailees, trustees or other persons identified in Rule 17(a) as persons empowered to act on behalf of the other six stakeholders. However, the Bonaccis' requested belief that will "inure to all those whose interests derive from Albert M. Schenk". The Bonaccis' had no right to seek relief on behalf of anyone besides themselves. The persons who arguably have the right to seek such relief have chosen not to do so. The Circuit Court's order quieted title to property the Bonaccis do not own. In this regard, the Circuit Court ordered "the rightful owners of the remaining oil and gas within and beneath the remainder of the 202-acre tract at issue in this action are the descendants of Albert M. Schenk that owned the oil and gas within and underlying said remainder." December 16, 2019 order, ¶104. Appx. 573. The order does not identify who among the six additional stakeholders the Court concluded own the remaining acreage.

Petitioners therefore asserts that the Circuit Court committed reversible error in granting relief to parties who chose not to assert claims regarding the ownership of the disputed oil and gas.

CONCLUSION

For the reasons stated herein, the Circuit Court of Marshall County erred in granting the Bonaccis' motion for summary judgment. Rather, the record establishes that September 13, 1949 deed to Rolaco's remote predecessor in title, Everett F. Moore, conveyed title to 202 acres oil and gas. Petitioners Orville Young LLC and Rolaco LLC therefore request that this Court REVERSE the December 16, 2019 order of the Circuit Court of Marshall County; that this action be REMANDED to the Circuit Court of Marshall County with directions that it enter judgment in favor of Defendant Rolaco; and for such other and further relief as the Court deems appropriate.

Respectfully submitted.
ORVILLE YOUNG LLC,
and ROLACO, LLC,
Respondents,
By Counsel.



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CERTIFICATE OF SERVICE

I certify that I served the attached Petitioners' Brief by placing the same in the United States Mail, first class and postage prepaid, upon counsel at the addresses listed below this 9th of April 2020.

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