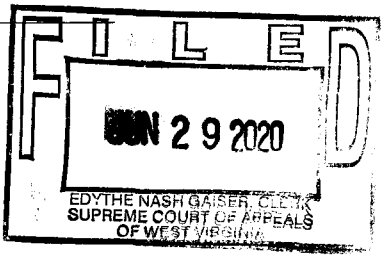
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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.

PETITIONERS' REPLY BRIEF

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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.

SUMMARY OF REPLY ARGUMENT

1. Petitioners' appeal addressed the bases upon which the Circuit Court of Marshall County granting summary judgment in favor of the Bonaccis. The Circuit Court ruled that the September 13, 1949 tax deed to Petitioners' remote predecessor in title was void and that all subsequent deeds devolving therefrom were likewise void. The Circuit Court reached this decision by concluding that West Virginia law did not authorize the Marshall County Assessor to separately assess the surface and oil and gas in the same tract of land absent a severance of ownership of the surface and subjacent oil and gas. Petitioners argue that in so ruling, the Circuit Court erred as a matter of law.

2. Respondents' argument that West Virginia law prohibits assessors from separately assessing surface and subjacent mineral estates absent a severance of ownership of those estates is not supported by the Code. West Virginia Code §11-4-9 (1935) explicitly authorizing the separate assessment of fractional ownership of estates in land and the separate assessment of different estates in a tract of land owned by different persons was enacted pursuant to an amendment to the West Virginia Constitution. The enactment of §11-4-9 was therefore not intended to limit the power of assessors to assess fractional or different estates but rather authorized such assessments.

3. Respondents' brief does not clarify the basis of Respondents' claims regarding the location of the 202 acres oil and gas for which they seek to quiet title or their ownership thereof.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners reiterate the need for oral argument. This appeal involves assignments of error regarding an issue of first impression. Given that this case raises issues regarding how the Marshall County Assessor assesses real property, substantial public policy concerns are implicated by this appeal. As such, Petitioners believe oral argument is appropriate per Rule of Appellate Procedure 19(a)(3) and (4).

REPLY ARGUMENT

I. THE BONACCIS ERRONEOUSLY CLAIM THAT PETITIONERS FAILED TO ADDRESS ALTERNATE AND INDEPENDENT GROUNDS RELIED ON BY THE CIRCUIT COURT IN GRANTING SUMMARY JUDGMENT

Before addressing the issues raised in Petitioners' brief, Respondents briefly contend that Petitioners' appeal did not address what Respondents claim are "alternate and independent grounds" Respondents say the Circuit Court relied on in granting them summary judgment. Respondents' brief, p. 17. The Bonaccis contend that having failed to do so, the appeal must be dismissed. This argument finds no support in the record and must be rejected.

The "alternate and independent grounds" cited by the Bonaccis are contained in Paragraphs 71 through 76 of the Circuit Court's December 16, 2019 summary judgment. Respondent' brief, p. 17. Those paragraphs state:

> 71. Although the Bonaccis contend - and the Court agrees - that the 1949 deed is void, if the 1949 deed conveyed any type of interest, that interest at most could only have been the royalty interest to a 1919 shallow well lease, which no longer is in effect.
>
> 72. In West Virginia, an oil and gas royalty is considered to be personal property and can only be taxed in accordance with the general provisions of law covering other classes of personal property. *Cole v. Pond Fork Oil & Gas Co.*, 127 W.Va. 762, 770, 35 S.E.2d 25, 29 (1945).

73. Royalty interests are created by contract. "The word 'royalty,' as used in connection with oil, gas, and mineral leases, means an agreed return paid for the oil, gas, and minerals, or either of them, reduced to possession and taken from the leased premises." *Robinson v. Milam*, 125 W. Va. 218, 24 S.E.2d 236, 237 (1942). "The general rule as to oil and gas leases is that such contracts will generally be liberally constructed in favor of the lessor, and strictly against the lessee." Syl. pt. 1, *Martin v. Consolidated Coal & Oil Corp.*, 101 W.Va. 721, 133 S.E. 626 (1926).

74. "W.Va.Code 36-1-9a [1994] creates a rebuttable legal presumption that if a lessee fails to produce and sell (or produce and use for the lessee's own purposes) oil or gas from the leased premises, pursuant to an oil and gas lease, for a period greater than 24 months, then the lessee shall be deemed to have intended to abandon any oil or gas well situated on the premises." Syl. pt. 3, *Howell v. Appalachian Energy, Inc.*, 205 W. Va. 508, 510, 519 S.E.2d 423, 425 (1999).

75. The evidentiary record is completely void of any evidence that the shallow wells to the 1919 lease have produced any oil or gas in the last 24 months.

76. On the contrary, the 2013 Affidavit of Frank Bonacci stated that there were no producing oil and gas wells on the property at issue at that time. Moreover, West Virginia Department of Environmental Protection records show the plugging of wells 4-630 and 3-629, which were located on the farm of Albert M. Schenk (described as containing 204 acres in the Well Location Map).

Appx. 566-67.

This Court has long held that courts of record in this State speak through their orders. *State ex rel Kaufman v. Zakaib,* 207 W.Va. 662, 535 S.E.2d 727 (2000). When such orders are the subject of appeal, this Court has indicated "we are left to decide this case within the parameters of the Circuit Court's order." *State v. White,* 188 W.Va. 534, 425 S.E.2d 210 (1992), n. 2. A review of the Circuit Court's December 16, 2019 order establishes that the foregoing paragraphs are not an alternate and independent basis upon which the Circuit Court relied in granted summary judgment.

The December 16, 2019 order is 30 pages long and contains 106 numbered paragraphs. The order was prepared by Respondents' counsel. As noted in Petitioners' brief, the order is laden with findings having no bearing on the issues presented in Respondents' motion for summary

judgment. Petitioners' brief, n. 5.[1] Over Petitioners' objections to the inclusion of these immaterial findings, the Circuit Court entered the order without modification. Appx. 529.

The Circuit Court's conclusions of law begin on Paragraph 40 of the summary judgment order. The Circuit Court's grant of relief is contained in paragraphs 99 through 106. In Paragraph 99 of the order, the Circuit Court ruled that the September 13, 1947 tax deed to Everett Moore was void. Paragraphs 100 through 102 hold that deeds to Moore's successors were therefore likewise void. The Circuit Court reached these conclusions **for one reason**. Specifically, the Circuit Court found that under West Virginia law, assessors cannot make separate property tax assessments for the surface and for subjacent mineral estates unless there had been a severance of ownership of the surface and the subjacent minerals. December 16, 2019 order, ¶¶48-57. Appx. 559-63.

Given this determination, the Circuit Court then concluded that the Marshall County Assessor's separate assessments of the surface and the oil and gas within property owned by Albert Schenck were erroneous duplicate assessments. December 16, 2019 order, ¶¶58-59, 68, 70. Appx. 563-566. The Circuit Court concluded that the assessments in the name of Albert Schenck included the value of the surface and the subjacent oil and gas. The Circuit Court reasoned that since Schenck paid the assessments on the surface, the property taxes due on the subjacent oil and gas did not go delinquent. Absent such delinquency, the Circuit Court concluded the 1947 tax deed to Moore conveyed no title and was therefore void. December 16, 2019 order, ¶¶60-65. Appx. 564-65.

The Circuit Court's December 16, 2019 order establishes that the Circuit Court's statements in Paragraphs 71 through 76 did not constitute an alternate and independent basis upon which the Circuit Court granted summary judgment. The Circuit Court ruled that the 1947 tax deed

1. Respondents' brief includes the same immaterial matters. Respondents' brief, pp. 8-10.

to Moore was **void** and therefore **conveyed no title** because the Marshall County Assessor made separate assessments of the surface and oil and gas in the same parcel in derogation of West Virginia law. In its grant of relief, the Circuit Court **did not rule** in the alternative; that is, it did not hold that the 1947 tax deed to Moore was in fact valid but only conveyed a royalty interest which subsequently terminated for nonproduction. Given that Respondents' counsel drafted the order, counsel would presumably have included a grant of relief reflecting the "alternate and independent" basis they now claim the Circuit Court relied on in granting the Bonaccis' summary judgment.

Authorities cited by Respondents do not support the Bonaccis' claim that this appeal must be dismissed. *Noland v. Virginia Insurance Reciprocal,* 224 W.Va. 372, 683 S.E. 2d 23, (2009) concerned an insurance coverage dispute. Noland was an employee of Beckley Appalachian Regional Hospital. In 1998, Noel brought a medical malpractice action against the hospital in the Circuit Court of Kanawha County which included a bad faith claim against the hospital's liability insurance carrier, Virginia Insurance Reciprocal. On May 24, 2000, the hospital filed a third-party complaint against its employee Noland asking that Noland be assessed a percentage of fault for Noel's injuries. On August 1, 2000, Noel reached a settlement with the hospital and Virginia Insurance. On July 25, 2001, Noland brought suit against Virginia Insurance and others in the Circuit Court of Raleigh County. Noland sought a declaration regarding whether Virginia Insurance had a duty to defend Noland in the third-party action brought by the hospital. Noland's Complaint also included insurance bad faith claims against other defendants. On February 8, 2002, the Circuit Court of Kanawha County consolidated the malpractice case with Noland's declaratory judgment action and transferred the consolidated case to the Circuit Court of Raleigh County. 224 W.Va. at __, 683 S.E. 2d at 27.

After consolidation, Virginia Insurance and Nolan filed cross-motions for summary judgment regarding the duty to defend issue. By order entered on July 25, 2003, the Circuit Court of Raleigh County granted partial summary judgment in Noland's favor, finding that the Virginia Insurance owed Noland a duty to defend through the date the hospital settled with Noel. The Circuit Court also ruled that Virginia Insurance had no duty to defend after settlement of the malpractice claim. By order entered December 8, 2006, the Circuit Court of Raleigh County dismissed the defendants against whom Noland had asserted insurance bad faith claims. Noland appealed from the partial summary judgment order finding that Virginia Insurance had no duty to defend after the malpractice settlement date and from the Circuit Court's dismissal of the insurance bad faith claims. 224 W.Va. at __, 683 S.E. 2d at 28.

On appeal, this Court noted that Virginia Insurance had not appealed the Circuit Court's ruling that it had a duty to defend Noland before the settlement of the malpractice claim, and that therefore, the Circuit Court's ruling on that issue had become the law of the case. 224 W.Va. at __, 683 S.E. 2d at 29. This Court nevertheless considered the other issues Noland raised on appeal. Thus, *Noland* provides no support for the Bonaccis' contention that Petitioners' appeal should be dismissed.

The other West Virginia Supreme Court decisions cited by the Bonaccis also provide no support for their request that this appeal be dismissed. In *Siddy W.* v. *Charles W.*, No. 17-0416, 2018 (W.Va. Feb. 2, 2018)("*Siddy II*"), an unpublished memorandum decision, this Court considered whether a spousal support order entered earlier in the proceeding and from which no appeal was taken controlled the calculation of spousal support in a subsequent support modification proceeding. Citing *Noland, supra*, this Court noted that lower court rulings from which no appeal had been taken generally constitute the law of the case binding on the parties.

This Court affirmed the Circuit Court's award of modified spousal support as being consistent with the earlier spousal support order. *Id,* p. 4. *Siddy II* does not stand for the proposition that the failure to appeal the initial spousal support award required dismissal of an appeal of a subsequent order modifying spousal support.

Finally, as noted in Petitioners' brief, summary judgment may be granted in favor of a nonmoving party. *Employer's Liability Insurance Corporation v. Hartford Accident and Indemnity Company,* 154 W.Va. 1062, 158 S.E.2d 212 (1967). In addition to the substantive arguments concerning the proper assessment of mineral estates, Petitioners make two procedural arguments in support of their claim that the Circuit Court's award of summary judgment in favor of the Bonaccis was in error. First, Petitioners argue that the Bonaccis failed to establish the location of the 202 acres for which they seek to quiet title. Having failed to do so, Petitioners argue that the Bonaccis lack standing to bring a quiet title action. Petitioners' brief, pp. 24, 28. Both arguments are included among Petitioners' assignments of error. Petitioners' brief, pp. 2, 24, 28. Petitioners assert that even had the Circuit Court ruled, in the alternative, that the 1947 tax deed was valid but conveyed only a royalty interest, such conclusion does not prevent reversal of the Circuit Court's grant of summary judgment on the procedural grounds cited by Petitioner. *Weisel v. Beaver Springs Owners Assn, Inc.* 152 Idaho 519, 272 P. 3d 491 (2012) cited by Respondents supports this conclusion.

Weisel concerned a dispute involving a real estate development project. Weisel entered into a contract with Beaver Springs regarding the development. Weisel subsequently sought to rescind the contract claiming, among other things, that the agreement was void due to a mutual mistake. Weisel also claimed, in the alternative, that the agreement was void for lack of consideration; failure of consideration; breach of contract; and estoppel. 152 Idaho at ___, 272 P. 3d at 495-96.

The parties filed cross-motions for summary judgment. The trial court granted Beaver Springs summary judgment on all Weisel's claims. Regarding Weisel's claim that the contract was void because of a mutual mistake, the trial court found that the record demonstrated no mutual mistake. In the alternative, the trial court found that any mutual mistake claim was time-barred. 152 Idaho at ___, 272 P. 3d at 496. Weisel appealed. However, Weisel did not appeal the trial court's alternate ruling that is mutual mistake claim was time-barred. The Idaho Supreme Court held that Weisel's failure to appeal the trial court's finding that the mutual mistake claim was time-barred precluded it from considering Weisel's appeal of the trial court's ruling that the record did not demonstrate the existence of a mutual mistake. 152 Idaho at ___, 272 P. 3d at 497. The Idaho Supreme Court did not dismiss the appeal but rather considered the remaining appellate issues raised by Weisel.

If this Court concludes that the Circuit Court made an alternate and independent finding that the 1947 tax deed was not void but rather conveyed only a royalty interest, such finding does not preclude reversal of the Circuit Court's summary judgment award on the procedural grounds raised by Petitioners in this appeal. Respondents' request that this appeal be dismissed must be rejected.

II. THE WEST VIRGINIA CODE DOES NOT SUPPORT RESPONDENTS' ARGUMENT THAT WEST VIRGINIA LAW PROHIBITS ASSESSORS FROM SEPARATELY ASSESSING SURFACE AND SUBJACENT MINERAL ESTATES ABSENT SEPARATE OWNERSHIP OF THOSE ESTATES

Respondents cite West Virginia Code §11-4-9 (1935) as the sole statutory support for the proposition that an assessor is prohibited from separately assessing surface and subjacent mineral estates absent separate ownership of those estates. Respondents' brief, p. 18. Section 11-4-9 (1935) stated:

> 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.

Reciting the rule of statutory construction stating *expressio unius est exclusio alterius,* the express mention of one thing implies the exclusion of another, Respondents argue that the statute's authorization of separate assessments of surface and subjacent minerals when different persons own those estates necessarily precludes such separate assessments where no severance of ownership exists. Respondents' brief, p. 19.

The goal of all rules of statutory construction is to determine the Legislature's intent in enacting the statutory scheme in question. *See, Banker v. Banker,* 196 W.Va. 353, 474 S.E. 2d 465 (1996). In so doing, individual portions of a statutory enactment "should not be read as an unrelated and isolated provision." 196 W.Va. at 545, 474 S.E. 2d at 475. West Virginia Code §11-4-9 was enacted in 1935 in response to the West Virginia Supreme Court's then recent decision in *LaFollett v. Nelson*, 113 W.Va 906, 170 S.E. 168 (1933). *LaFollett* held that statutes then in force authorizing assessors to assess undivided interests in realty were unconstitutional. In response, the Legislature undertook the process of amending the West Virginia Constitution to explicitly provide for the assessment of undivided interests in realty. Article XIII, §6 of the West Virginia Constitution was ratified on November 6, 1934 and provided in relevant part:

> It shall be the duty of every owner of land, or of an undivided interest therein, to have such land, or such undivided interest therein, entered on the land books of the county in which it, or a part of it, is situated, and to cause himself to be charged with taxes legally levied thereon and pay the same...

West Virginia Code §11-4-9, enacted in 1935 pursuant to authority granted by Article 13, §6 of the Constitution, is titled "Assessment of Different Estates; Undivided Interests. Read in its entirety, Section 11-4-9 (1935) authorized assessors to separately assess persons owning fractional interests in the same piece of land. Where different persons owned the surface estate and subjacent minerals, §11-4-9 also authorized assessors to separately assess the owners of those separate

estates. The enactment of §11-4-9 was therefore **not intended to limit** the power of assessors to assess fractional or different estates but rather authorized such assessments. In enacting §11-4-9, the Legislature plainly did not intend to prohibit an assessor from making separate assessments for surface and mineral estates where those estates were owned by the same person.

III. RESPONDENTS' BRIEF SHEDS NO LIGHT ON THE LOCATION OF THE DISPUTED 202 ACRES OIL AND GAS OR THE RESPONDENTS' CLAIM OF OWNERSHIP THEREOF

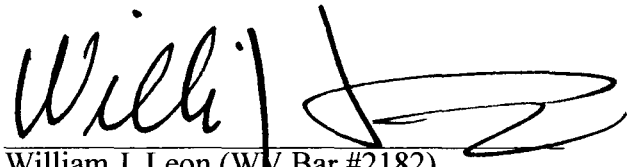
In their recitation of facts, the Bonaccis reference the appraisement filed in the estate of their grandfather, Albert Schenck III. Noting that the appraisement indicated Albert Schenk owned 698.8254 acres of realty in Marshall County, "[t]he Respondents contend that the portion of the 698.8254-acre tract conveyed by the 1957 Deed contains the 202-acre tract of oil and gas that is the subject of the underlying action." Respondents' brief, p.3. As they did before the Circuit Court, Respondents' brief points to a group unrelated maps and plats to support the conclusion that "the Circuit Court's order quieting title to the oil and gas within and beneath the 202 acres adequately described the configuration or location of the realty and, therefore, should not be reversed." Respondents' brief, p. 34. In fact, the Circuit Court's order contains no such description.

Respondents' contentions regarding the location and their ownership of the disputed 202 acres oil and gas can be summarized as follows. Respondents' grandfather owned 698.8254 acres of land in Marshall County. The disputed 202 acres oil and gas is located within that 698.8254 acres. Even though Respondents own a combined 162.78 acres carved out of the 698.8254 acres, they believe at least some of the disputed 202 acres oil and gas is located beneath our 162.78 acres surface. On that basis, Respondents contend that the Circuit Court of Marshall County acted correctly in stripping Petitioners of any ownership they may have of the disputed 202 acres oil and gas.

CONCLUSION

For the reasons stated herein, and in their previously filed brief, 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' Reply Brief via facsimile transmission and by placing the same in the United States Mail, first class and postage prepaid, upon counsel at the addresses listed below this 26th of June 2020.

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