IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 20-0030

ORVILLE YOUNG, LLC, and
ROLACO, LLC,

Petitioners,

v.

Appeal from a final order of the Circuit Court of Marshall County (18-C-16 C)

FRANK A. BONACCI and BRIAN F. BONACCI;

and

LOUISE S. COULLING; CLARK H. COULLING;
HEIDI SCHENK BRUHN; MARY SCHENK HAMILTON;
GARY P. HAMILTON; KAREN SCHENK SLIGER;
TERRY B. SLIGAR; AND WHITE HORSE FARM, LLC,

Respondents.

RESPONDENTS' BRIEF

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I. ASSIGNMENTS OF ERROR

Assignment No. 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.

Assignment No. 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.

Assignment No. 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.

Assignment No. 4. Respondents Frank and Brian Bonacci did not possess the right to enforce claims on behalf of other heirs of Albert M. Schenk.

II. STATEMENT OF THE CASE

A. Factual Background

Frank Bonacci and Brian Bonacci (the "Respondents") are brothers. Their great-great grandfather, Albert M. Schenk, owned real property in Marshall County, West Virginia, including the property interests at issue in the underlying civil action from which the instant appeal is taken.

1. The Schenk Family Chain of Title

By deed dated June 5, 1906, and recorded in the office of the Clerk of the County Commission of Marshall County, West Virginia, on July 21, 1906, in Deed Book 113, at page 263 (the "1906 Deed"), Henry A. Nolte and C.E. Morris, Special Commissioners, pursuant to authority granted by the Circuit Court of Marshall County, West Virginia, conveyed to Albert M. Schenk three (3) tracts of land containing (i) 204 acres, 2 roods and 37 poles; (ii) 176 acres, 14 poles; and

(iii) 177 acres, 26 poles, respectively. Joint Appendix ["Appx."] at 0067. The Respondents contend that the property conveyed by the 1906 Deed contains the 202-acre tract at issue in the underlying litigation. The 1906 Deed did not contain any reservation of oil and gas, and there were no prior reservations or conveyances of said oil and gas. Importantly, the Petitioners have never pointed to any severance of the oil and gas and surface estates in the subject property.

Albert M. Schenk died testate a resident of Ohio County, West Virginia, in or around July 1930. Pursuant to his Last Will and Testament dated September 27, 1928, and probated September 3, 1930, of record in the office of the Clerk of the County Commission of Ohio County, West Virginia, in Will Book 16, at page 560, and also of record in the office of the Clerk of the County Commission of Marshall County, West Virginia, in Will Book 18, at page 222, Mr. Schenk devised and bequeathed the residue of his estate – real, personal, and mixed – in trust, and directed that his trustees turn over all of the assets remaining in trust to Albert Schenk, III, (identified therein as Albert Schenk, 3d), at such time as he attained the age of 40 years. Appx. 0072.

Hilton H. Mann and Wheeling Dollar Savings & Trust Co., Trustees under the Last Will and Testament of Albert M. Schenk, by deed dated June 12, 1957, and recorded in the Marshall County Clerk's office in Deed Book 322, at page 433 (the "1957 Deed"), conveyed to Albert Schenk, III, three (3) tracts of land, the first of which contained 539.321 acres, more or less. Appx. 0078. Respondents contend that the 539.321-acre tract contains the 202-acre tract at issue in the underlying action.

Albert Schenk, III, also known as Albert M. Schenk, III, also known as Albert M. Schenk, died testate a resident of Marshall County, West Virginia, on June 18, 1995. Pursuant to his Last Will and Testament dated February 10, 1993, and recorded in the Marshall County Clerk's office

in Will Book 62, at 270, Albert Schenk, III, devised all of his interests in real property to his wife, Kathleen Mary Schenk. Appx. 0088.

The Appraisement of the Estate of Albert Schenk, III, of record in the aforesaid Clerk's office in Appraisement Book 186, at page 112, lists real property commonly known as "Elm Knoll," situate on Big Wheeling Creek Road in Marshall County, West Virginia, as containing in the aggregate 698.8254 acres, more or less. Appx. 0118. The Appraisement indicates that all but 30.06 acres of the 698.8254 tract is the same property conveyed to Albert Schenk, III under the 1957 Deed. Appx. 0119. The 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. Appx. 0019, 0050, 0501-02, 0547-48.

By deed dated April 4, 2000, and recorded in the Marshall County Clerk's office in Deed Book 619, at page 370, Kathleen Mary Schenk conveyed to her daughter, Kathleen Schenk Bonacci, the following interests in real property: (i) a tract of land consisting of 162.78 acres, more or less, situate on the Northerly side of Sorghum Ridge Road; (ii) an undivided 1/6 interest in a tract of land consisting of 204.29 acres, more or less, commonly known as the Schenk Preserve; and (iii) a tract containing 1.537 acres, which includes a right of way for Big Wheeling Creek Road. Appx. 0147. The Respondents contend that the real property described in the April 4, 2000 deed constitutes a portion of the 202-acre tract at issue.

By deed dated March 16, 2011, and recorded in the Marshall County Clerk's office in Deed Book 727, at page 7, Kathleen Schenk Bonacci conveyed to the Respondents, who are Kathleen Schenk Bonacci's sons, as tenants in common the 162.78 acre tract situate on the Northerly side of Sorghum Ridge Road. Appx. 0156.

By deed dated September 8, 2012, and recorded in the Marshall County Clerk's office in Deed Book 776, at page 79, Kathleen Schenk Bonacci conveyed to the Respondents as tenants in common, all of her right, title and interest in and to the Schenk Preserve and Schenk Drive, which had previously been conveyed to Kathleen Schenk Bonacci by the April 4, 2000 deed. Appx. 0160.

By deed dated June 25, 2015, and recorded in the Marshall County Clerk's office in Deed Book 868, at page 381, the Respondents conveyed to Frank A. Bonacci individually a tract of land consisting of 81.39 acres, more or less, essentially partitioning the surface of the 162.78-acre tract referenced above, leaving each of the Respondents not only with a 81.39-acre surface tract, but also an undivided 50% interest in and to the oil and gas lying within and beneath the entirety of the 162.78-acre tract. Appx. 0166.

Louise S. Coulling, Heidi Schenk Bruhn, Mary Schenk Hamilton, and Karen Schenk Sligar are the sisters of Kathleen Schenk Bonacci, the Respondents' late mother.[1] Appx. 0004, 0016. White Horse Farm, LLC, is a West Virginia limited liability company. Appx. 0005, 0017.[2] Ms. Coulling, Ms. Bruhn, Ms. Hamilton, and Ms. Sligar are all descendants of Albert M. Schenk and their interests are aligned with Respondents as the current owners of the remainder of the oil and gas interests acquired by Albert M. Schenk under the 1906 Deed. Appx. 0048, 0500, 0546.

2. The Oil and Gas Interests to the 202 Acres, More or Less

On or about May 23, 1919, Albert M. Schenk and Emma Schenk, his wife, entered into an oil and gas lease with James Wilson covering 202 acres, more or less, situate in Union District, Marshall County, West Virginia, bounded substantially on the North by Big Wheeling Creek, on

[1] Louise S. Coulling's husband, Clark; Mary Schenk Hamilton's husband, Gary; and Karen Schenk Sligar's husband, Terry, were also named as defendants.

[2] White Horse Farm, LLC is owned by Nancy S. Casey, and her children, Justin S. Casey and Sara E. Yanko. Nancy Casey is also a sister of Kathleen Schenk Bonacci.

the East by lands of William Happy and J.D. Black, on the South by lands of McConnell Heirs and Anna Sebright, and on the West by lands of Anna Sebright and A.M. Schenk, which oil and gas lease is of record in the Marshall Clerk's office in Deed Book 160, at page 185 (the "1919 Lease"). Appx. 0172. The Respondents contend that the 202-acre tract described in the 1919 Lease is part of the real property conveyed to Albert M. Schenk by the 1906 Deed. It is the oil and gas in and under said 202-acre tract that it is the subject of this appeal.

In order to orient the Circuit Court and to aid in its analysis of the issues before it, the Respondents submitted a farm line map of Marshall County obtained from the Library of Congress's website (the "Farm Line Map"). Appx. 0411. The Farm Line Map depicts a 558.17-acre tract owned by a "C.A. Seabright," bordered on the North by Big Wheeling Creek, on the East by J. Black and I. Black, and on the South by M. McConnell. *Id.* Based on the Farm Line Map, one can see that the boundaries of the approximately 558-acre tract once owned by Charles A. Seabright, a/k/a C.A. Seabright – the same tract acquired by Albert M. Schenk under the 1906 Deed and which the Respondents contend contains the 202-acre tract under the 1919 Lease – correspond substantially with the borders described in the 1919 Lease. Additionally, since the 1919 Lease did not encompass the entirety of the acreage owned by Albert M. Schenk, the Respondents contended that it would be reasonable for one to conclude, as the Circuit Court did, that the 202-acre tract was part of the larger tract acquired by Albert M. Schenk under the 1906 Deed and, thus, it is reasonable that the 202-acre tract would be bordered "on the West by lands of Anna Sebright and A.M. Schenk" (i.e., the remainder of the tract acquired under the 1906 Deed that was included in the 1919 Lease).

To further aid the Circuit Court in its analysis, the Respondents submitted a 1939 well location map from the West Virginia Department of Mines, Oil and Gas Division. Appx. 0471.

The 1939 map depicts wells numbered 3-629 and 4-630 belonging to Natural Gas Co. of W.Va. located on a 204-acre tract owned by Albert M. Schenk. *Id.* Petitioners agree that these wells were drilled pursuant to the 1919 Lease. Appx. 0281-0282. As with the Farm Line Map, the 1939 well location map depicts the Schenk property as being bordered on the North by Big Wheeling Creek, on the East by "J. Black" and "I. Black," and on the South by "M. McConnell." Additionally, it depicts the subject parcel as being bordered on the West by lands of "A.C. Seabright" and "A.M. & E. Schenk." Appx. 0471. A well location map dated December 2, 1938, that was also submitted to the Circuit Court likewise depicts the Albert M. Schenk farm as being bordered on the North by Wheeling Creek, on the East by J. Black, on the South by M. McConnell, and on the West by A.C. Seabright and A.M. and E. Schenk. Appx. 0474.

An "Affidavit of Plugging and Filling Well" submitted to the Court indicates that the work of plugging and filling "Well No. 630" on the "A.M. & Schenk Farm" was completed on January 9, 1939. Appx. 0475. Additionally, the 1939 well location map shows that Well No. 3-629 was abandoned at some point prior to September 5, 1939, as indicated by the "ABD" to the left of the date stamp. Appx. 0471.

Additionally, a 1975 well location map submitted to the Circuit Court depicts a "Seabright Well No. 630" on a parcel marked "Shank" [sic] and containing a reference in parentheses to "322/433," which Respondents contend is a reference to the 1957 Deed. Appx. 0477, 0454.

Finally, to further aid the Circuit Court, the Respondents submitted historical maps relating to Albert M. Schenk's Marshall County real property interests, including a map of the Schenk Farm dating to 1957 [Appx. 0409], a tax map of Union District, Marshall County, dated October 7, 2011 [Appx. 0410], and a plat depicting the subdivision of the Lizzie Happy Farm [Appx. 0538].

3. The Taxes

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." Appx. 0177-0182.

This entry is absent from the land books for the year 1939. Appx. 0184. In 1940, an entry in the name of "Schenk Albert M" for "202 Royalty Wells #629-630 Nat Gas Co W Va (1936)" appears in the "Purchased by State" section of the land books for the years 1940 through 1947. Appx. 0188-0203.

For the year 1948, the land books contain an entry for the A.M. Schenk Estate for "202 Roy Well #629-630 Nat Gas Co WVA (1936)." Appx. 0204.

For the year 1949, the land books contain a similar entry for the A.M. Schenk Estate; however, the entry has a line drawn through it and written thereon is the notation "To Everett F. Moore DB 265, p. 272." Appx. 0205-0206.

For the year 1950, the land book entries for the A.M. Schenk Estate do not contain any reference regarding the 202 acres; however, the land book entries for Everett F. Moore for that year contain an entry "202 Roy Oil & Gas Natural Gas Co WVA Wells 629-630" with a notation of "From State of WVA DB 265 P 272 (Shenk [sic])." Appx. 0208-0209.

For all times relevant to this appeal, all ad valorem taxes assessed against the subject real property in its entirety have been paid in full by Albert M. Schenk, his estate, 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 his Estate) was being assessed – and had been paying since 1919 – taxes against Schenk's or

his estate's interest in the 527.76-acre tract of land on Wheeling Creek, which the Circuit Court found to contain the 202 acres that were subject to the 1919 Lease.

To illustrate the consistent payment of such property taxes, Respondents presented a certified copy of the Marshall County land records as an attachment to the Memorandum of Law in support of their Motion for Summary Judgment. Appx. 0056, 0175-0211. The certified records demonstrate that taxes were consistently assessed against the 527.76-acre tract (in various configurations) in the name of Albert M. Schenk or his estate beginning in 1919 through 1950, and in the name of Albert Schenk III in 1982. Appx. 0175-0211. Property tax receipts attached to and made a part of the Appraisement of the Estate of Albert Schenk III show that that the property taxes assessed against the subject real property were paid in full for tax year 1996. Appx. 0130-0140. Finally, copies obtained from the Marshall County Sheriff's website were submitted to the Circuit Court demonstrating that the Respondents' real property taxes were paid current through tax year 2018. Appx. 0213-0226.

4. Orville Young, Orville Young LLC, Rolaco LLC, and Their Purported Interest

In the latter part of the 1970s, Orville Young, a/k/a O.W. Young, a/k/a Orville W. Young ("Mr. Orville Young") began purchasing oil and gas interests at tax sales. Appx. 0234. Mr. Orville Young lived in Kanawha County, West Virginia, but purchased delinquent oil and gas interests at tax sales in Marshall, Tyler, Pleasants, Putnam, and Kanawha counties. Appx. 0233-0234. When Mr. Orville Young's health deteriorated, an entity named "Orville Young LLC" was purportedly created in Florida in January 2013 and registered with the Florida Secretary of State on March 28, 2013. Appx. 0231-0232.

The three members of Orville Young LLC were and continue to be Mr. Orville Young's children: Ronald Young, Charles Young, and Jeffrey Young. Appx. 0231. Mr. Orville Young

was never a member of Orville Young LLC. Appx. 0232. The purpose of Orville Young LLC was to receive Mr. Orville Young's real property interests in West Virginia. *Id.* In March 2013, Mr. Orville Young quitclaimed dozens of Marshall County properties and/or property interests to Orville Young LLC. *Id.* As a result of these transactions, all of the West Virginia property and/or property interests Mr. Orville Young claimed to own were quitclaimed to Orville Young LLC. Appx. 0234. No attorneys prepared the deeds relating to these conveyances. Appx. 0232. Notably, Orville Young LLC did not conduct any title searches in relation to these conveyances. Appx. 0233. The quitclaim deeds' signatures were notarized by Ronald Young's daughter, Latisha Davis. Appx. 0240. No money was exchanged in relation to any of these conveyances. Appx. 0232.

Mr. Orville Young passed away on August 9, 2013. Appx. 0230. The quitclaim deeds between Mr. Orville Young and Orville Young LLC were not recorded in the Marshall County Clerk's Office until October or November of 2013, after Mr. Orville Young had passed away and after Ronald Young found the unrecorded deeds at his father's residence without any clerk's stamps on them. Appx. 0232. One of the deeds between Mr. Orville Young and Orville Young LLC, dated March 2, 2013, purports to convey the oil and gas in and under said 202-acre tract that it is the subject of the underlying action. Appx. 0232, 0244.

On November 25, 2013, Rolaco LLC became registered with the Florida Secretary of State. Appx. 0248. The three members of Rolaco LLC were and have continued to be Ronald Young, Charles Young, and Jeffrey Young, the same three individuals who are the members of Orville Young LLC. Appx. 0239-0241. Ronald Young has always been the managing member of both limited liability companies. Appx. 0235-0236. Both limited liability companies claim as their

address 1210 SW 52nd Terrace, Cape Coral, Florida, which is Ronald Young's personal residence. Appx. 0231, 0240.

By quitclaim deed dated January 2, 2018, Orville Young LLC purported to convey to Rolaco LLC the oil and gas in and under the 202-acre tract that it is the subject of this action. The quitclaim deed was not recorded in the Clerk's Office until February 28, 2018. Appx. 0253. Similar to the conveyance between Mr. Orville Young and Orville Young LLC, no attorneys prepared the deed relating to this purported conveyance. Appx. 0236, 0242. No attorneys or tax accountants were hired to assist with the conveyance. Appx. 0236. Notably once again, Rolaco LLC did not conduct any title search in relation to this purported conveyance. Appx. 0241. Ronald Young's signature on the quitclaim deed was notarized by his daughter, Latisha Davis. Appx. 0240. As was the case previously, no money was exchanged in relation to this conveyance. Appx. 0241.

The following is the chain of title that stems from the assessment that Respondents contend was erroneous and duplicative (and, therefore, void) which culminates in Rolaco LLC purportedly owning the oil and gas within and underlying the 202-acre tract.

By deed dated September 13, 1949, and recorded in the aforesaid Clerk's office in Deed Book 265, at page 272 ("1949 Tax Deed"), Thomas E. Wilkinson, Deputy Commissioner of Forfeited and Delinquent Lands for Marshall County, West Virginia, purportedly conveyed to Everett F. Moore "all of the oil and gas within and underlying" the 202-acre tract described above, "being all the oil and gas under the land described in a lease granted by A.M. Schenk, et ux, to James Wilson, bearing date the 23rd day of May, 1919, and recorded in the office of the Clerk of the County Court of Marshall County in Deed Book No. 160 at page 185." Appx. 0257.

Everett F. Moore died on or about January 1, 1965. The Appraisement of Mr. Moore's estate lists an interest in "202 ac nat gas co of WVA Roy O&G Well 629-630." Appx. 0263.

By deed dated May 20, 1997, and of record in the aforesaid Clerk's office in Deed Book 596, at page 268, Norma G. Cline, Clerk of the County Commission of Marshall County, West Virginia, purportedly conveyed to Orville W. Young the oil and gas beneath the 202-acre tract referenced above, the taxes purportedly assessed against such oil and gas having gone delinquent in the name of the Everett F. Moore Heirs. Appx. 0267.

By quitclaim deed dated March 2, 2013, but not recorded with the Clerk of the Marshall County Commission until October 31, 2013, in Deed Book 808, at page 190, Orville W. Young, a/k/a O.W. Young, a/k/a Orville Young, quitclaimed to Orville Young LLC all of his purported right, title, and interest in and to the oil and gas within and beneath the 202-acre tract referenced above. Appx. 0244.

By quitclaim deed dated January 2, 2018, but not recorded with the Clerk of the Marshall County Commission until February 28, 2018, in Deed Book 961, at page 452, Orville Young LLC quitclaimed to Rolaco LLC all of its purported right, title, and interest in and to the oil and gas within and beneath the 202-acre tract referenced above. Appx. 0253.

B. Procedural History

On January 31, 2018, Respondents filed a Complaint in the Marshall County Circuit Court seeking, among other things, to quiet title to the oil and gas within and beneath a 202-acre tract located in Marshall County. The Complaint did not name Rolaco LLC, as the deed conveying Orville Young LLC's purported interest in the oil and gas had not yet been recorded in Marshall County. The quitclaim deed, dated January 2, 2018, was not recorded in the Clerk's Office until February 28, 2018. Appx. 0253.

On March 19, 2018, Respondents filed their Amended Complaint adding Rolaco LLC as a named defendant. Appx. 0015.

After the close of the discovery period, Respondents filed a Motion for Summary Judgment on March 1, 2019, contending that the Circuit Court should quiet title to the oil and gas within and beneath the 202-acre tract. Appx. 0043.

Petitioners filed a response in opposition to the Motion for Summary Judgment on April 2, 2019. Appx. 00276.

On April 5, 2019, Respondents filed a reply in support of their Motion for Summary Judgment.

On April 26, 2019, the Court entertained argument on the Motion for Summary Judgment. At the hearing, which was memorialized by an order entered on May 6, 2019, the Court ordered the parties to file supplemental briefs addressing issues raised at the hearing. Appx. 0446.

On May 3, 2019, the Respondents filed a supplemental memorandum in support of their Motion for Summary Judgment. Appx. 0449.

On May 13, 2019, the Petitioners filed a supplemental memorandum in opposition of the Motion for Summary Judgment. Appx. 0489.

On September 11, 2019, the Circuit Court sent email correspondence to counsel for Petitioners and Respondents informing them that the Court was granting the Motion for Summary Judgment and directing counsel for Respondents to prepare and email to the Court a proposed order. Appx. 0496.

On October 2, 2019, Respondents emailed a proposed order to the Court. Appx. 0497.

On October 15, 2019, Petitioners filed objections to the proposed order. Appx. 0529.

On October 18, 2019, Respondents filed a reply to Petitioners' objections to the proposed order. Appx. 0541.

On December 16, 2019, the Circuit Court entered an order granting Respondents' Motion for Summary Judgment (the "Order"), concluding as a matter of law that, among other things, inasmuch as title to the oil and gas estate was never severed from the title to the surface estate in the entire 527.66-acre tract, the purported assessment of Mr. Schenk's estate for the oil and gas beneath the 202-acre tract that was a part thereof based on the 1919 Lease was erroneous, contrary to the law, and therefore, void. Appx. 0563. The Circuit Court found also that since the duplicate assessment was void, the 1949 Tax Deed to Everett F. Moore was also void, and all subsequent purported deeds and conveyances that flow from and depend on the validity of the 1949 tax deed are also void. *Id.* The Circuit Court also concluded, alternatively and independently, that even if the 1949 tax deed were not void – a proposition with which the Respondents and the Circuit Court disagree – the most the 1949 deed could have conveyed was a royalty interest to a 1919 shallow well lease, which no longer is in effect. *Id.* The Circuit Court also concluded that the location of the realty at issue is ascertainable from various documents contained in the evidentiary record. *Id.* The Circuit Court also concluded that it could declare the validity or lack thereof to all of the 202 acres' oil and gas interest, not just that belonging to the Respondents. *Id.* It is from the December 16, 2019 Order that Petitioners appeal.

III. SUMMARY OF ARGUMENT

First, the Order from which this appeal stems granted the Respondents' Motion for Summary Judgment on alternative and independent bases. Petitioners failed to appeal one of the alternative and independent bases set forth in the Circuit Court's Order. The non-appealed basis

remains the law of the case. By failing to raise and challenge the independent ground, Petitioners have waived this issue and conceded it as a valid basis for the Circuit Court's decision. Therefore, no further analysis by this Court is necessary. Without waiving this fatal error, Respondents address and counter the four assignments of error contained in Petitioners' brief.

Second, the Marshall County Assessor lacked legal authority to assess A.M. Schenk for the 202-acre oil and gas interest in addition to the assessment of the surface of the 527.66-acre tract, without a severance of ownership. The Petitioners' reliance on W.Va. Code § 11-4-9 (1935) and 52 W.Va. Op. Atty. Gen. 135 (1966) 1966 WL 87441 (W.Va.A.G. Oct. 27, 1966) to support the actions of the Marshall County Assessor is entirely misplaced. Simply stated, there was never a severance of the oil and gas estate from the surface estate.

Third, because there was never a severance of the oil and gas estate from the surface estate, the assessment of the oil and gas estate was a void duplicate assessment. No failure to pay the taxes for this void duplicate assessment can dispossess the rightful owners of title to the oil and gas. This Court has previously held in *Hill v. Lone Pine Operating Co.*, No. 16-0219, 2016 WL 6819787 (W.Va. Nov. 18, 2016) (memorandum decision) that the failure to pay taxes arising out of an erroneously-created duplicate assessment will not result in forfeiture of the interest erroneously assessed by way of a tax sale.

Fourth, there is no legal precedent that required the Circuit Court to precisely describe the configuration and location of the subsurface oil and gas interest in this case where the issue was not a boundary dispute but rather an ownership dispute of the entire estate. Further, the Circuit Court made specific and adequate findings regarding its ability to ascertain the surface boundaries of the 202 acres of oil and gas at issue through the use of numerous historical maps and documents contained in the evidentiary record.

Fifth, Petitioners' claim that the Circuit Court erred in quieting the title of realty not owned by the Respondents mischaracterizes the Respondents' request of the Circuit Court and asks this Court to ignore established principles concerning indispensable parties and res judicata. Simply stated, if the Petitioners do not own the oil and gas under Respondents' respective 81.39 acres of the 202-acres, then the Petitioners also do not own the oil and gas under the remaining approximately 39 acres of the 202 acres. The Circuit Court's quieting title to the entire 202 acres was proper.

IV. STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 18(a), Respondents maintain that oral argument is unnecessary because the dispositive issues have been authoritatively decided by previous precedent and because the facts and legal arguments have been adequately presented in the briefs and record on appeal and oral argument would not significantly aid the decisional process.

V. ARGUMENT

A. Standard of Review

A circuit court's entry of summary judgment is reviewed de novo. Syl. Pt. 1, *Davis v. Foley*, 193 W. Va. 595, 596, 457 S.E.2d 532, 533 (1995). Similarly, a "circuit court's entry of a declaratory judgment is reviewed de novo." Syl. Pt. 3, *Cox v. Amick*, 195 W. Va. 608, 466 S.E.2d 459 (1995). As the *Cox* Court explained, "because the purpose of a declaratory judgment action is to resolve legal questions, a circuit court's ultimate resolution in a declaratory judgment action is reviewed de novo." *Cox*, 195 W. Va. at 612, 466 S.E.2d at 463. Concerning findings of fact in a declaratory judgment action, this Court has stated that "any determinations of fact made by the

circuit court in reaching its ultimate resolution are reviewed pursuant to a clearly erroneous standard." *Mountain Lodge Ass'n v. Crum & Forster Indem. Co.*, 210 W. Va. 536, 545, 558 S.E.2d 336, 345 (2001) (*quoting Cox v. Amick*, 195 W. Va. 608, 466 S.E.2d 459 (1995)) (internal citations omitted). However, "ostensible findings of fact, which entail the application of law or constitute legal judgments which transcend ordinary factual determinations, must be reviewed de novo." Syl. Pt. 1, in part, *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 470 S.E.2d 162 (1996).

B. Petitioners' Appeal Fails to Challenge All Alternate and Independent Grounds Upon Which the Circuit Court Granted Summary Judgment and, Therefore, the Circuit Court's Order Stands

Rulings of lower courts that are not appealed become the law of the case and are conclusive in subsequent proceedings in that case. *Siddy W. v. Charles W.*, No. 17-0416, 2018 WL 679597 at *3 (W.Va. Feb. 2, 2018) (memorandum decision). That is, as a consequence of a party's failure to challenge a circuit court's finding in an appeal, any error in that ruling has been waived for purposes of the appeal and, therefore, this Court treats the non-appealed ruling as the law of the case. *Noland v. Virginia Ins. Reciprocal*, 224 W.Va. 372, 378, 686 S.E.2d 23, 29 (2009).

When an appealed order sets forth independent grounds for summary judgment, a petitioner's failure to address an independent ground for a grant of summary judgment is fatal to the appeal. *Weisel v. Beaver Springs Owners Ass'n, Inc.*, 152 Idaho 519, 525-26, 272 P.3d 491, 497-98 (2012). The fact that one of the grounds may be in error is of no consequence and may be disregarded if the judgment can be sustained upon one of the other grounds. *Andersen v. Prof'l Escrow Servs., Inc.*, 141 Idaho 743, 746, 118 P.3d 75, 78 (2005). Simply stated, this Court's "cases have made clear that this Court ordinarily will not address an assignment of error that was not raised in a petition for appeal. *Canterbury v. Laird*, 221 W.Va. 453, 457, 655 S.E.2d 199, 203

(2007) (*citing Koerner v. West Virginia Dep't of Military Affairs & Pub. Safety*, 217 W.Va. 231, 617 S.E.2d 778 (2005)).

Here, Petitioners fail to contest the alternative ground relied upon by the Circuit Court in granting summary judgment. Specifically, Petitioners fail to appeal the alternative ground set forth in paragraphs 71 through 76 wherein the Court concluded as a matter of law that even if the 1949 deed is not void and conveyed any type of interest, a contention with which Respondents and the Circuit Court disagreed, that interest at the most could only have been the royalty interest to a 1919 shallow well lease, which is no longer in effect, as the West Virginia Department of Environmental Protection records show the plugging of wells 4-630 and 3-629 located on the farm of Albert M. Schenk. Appx. 0566-67; 0471; 0475.

This conclusion of law provides an adequate and independent basis for the order granting the Motion for Summary Judgment. By failing to raise and challenge this ground on appeal, Petitioners have waived this issue and conceded a valid basis for the court's decision. As such, the Circuit Court's order granting Respondents' Motion for Summary Judgment must stand.

Without waiving this fatal error, Respondents address the four assignments of error contained in Petitioners' brief.

C. The Circuit Clerk Correctly Concluded that West Virginia Law Prohibited Separate Assessments of Surface and Subjacent Oil and Gas Estates Absent a Severance of Ownership of the Estates

Because there was no legal authority for it do so, the Marshall County Assessor's attempt to assess A. M. Schenk for the 202-acre oil and gas interest in addition to the assessment of the surface[3] of the 527.66-acre tract, without a severance of ownership, was erroneous, contrary to law, and therefore, void. Any argument by Petitioners to the contrary is without merit.

[3] It should be noted that the word "surface" is employed in the context of an entry of land for assessment purposes to indicate a landowner's entire remaining taxable interest. *See* 42 W.Va. Op. Atty. Gen. 309,

In their argument, Petitioners' cite to West Virginia Code § 11-4-9 (1935) in support of their position that the Circuit Court was incorrect in reaching its conclusion. However, this citation blunts Petitioners' argument, and instead strengthens the Respondents' contention and Circuit Court's conclusion that absent a severance, there was simply no authority that would permit the Marshall County Assessor to separately assess Schenk's oil and gas interest in the 202-acres subject to the 1919 Lease. Appx. 456, 461-463; Order at ¶57, Appx. 563. Consider the plain language of the pertinent part of the statute cited in the Petitioners' Brief:

> 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.

W.Va. Code § 11-4-9 (1935); Petitioners' Brief at 15. (Emphasis added). Petitioners seemingly close their eyes to the fact that the statute expressly authorizes the assessment of separate owners of separate estates in land (i.e., once there has been a severance); however, the statute expresses no such authority for separate assessments of separate estates when owned by the same landowner.

Petitioners also suggest that "[d]espite [a] 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." Petitioners' Brief at 15-16. However, in reading the 1966 Attorney General Opinion, it appears that it is precisely the lack of express authority permitting separate assessments of the surface estate from the oil and gas estate, absence of a severance, that led the Attorney

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1948 WL 31589 *3 (W.Va.A.G. Apr. 20, 1948). ("The amount of the assessment would not be varied by entering lands as 'surface plus oil and gas' or 'fee less coal.'"); Appx. 457. *See also, State v. Guffey*, 82 W.Va. 462, 95 S.E. 1048, 1049 (1918) ("[T]he owners of these tracts, entered as 'surface,' for all the years for which forfeiture is claimed, continued to own undivided interests in the oil and gas, and presumptively the value of their interests therein was included in the valuation of the land entered as 'surface.'").

General to correctly conclude that "[u]ntil there has been a severance of an estate in the gas mineral, there is no authority for a separate assessment of the gas underlying such land. There cannot be any separate assessment of unsevered interests in land." 52 W.Va. Op. Atty. Gen. 135 (1966), 1966 WL 87441 at *5 (W.Va.A.G. Oct. 27, 1966). Appx. 458.[4]

This Court has stated on numerous occasions that in the interpretation of statutory provisions, the familiar maxim *expressio unius est exclusio alterius*, the express mention of one thing implies the exclusion of another, applies. *Christopher J. v. Ames*, 214 W.Va. 822, 832, 828 S.E.2d 884, 894 (2019); Syl. Pt. 3, *Manchin v. Dunfee*, 174 W.Va. 532, 327 S.E.2d 710 (1984). This Court has stated, "[c]ritically, we have found that [t]he *expressio unius* maxim is premised upon an assumption that certain omissions from a statute by the Legislature are intentional." *Young v. Apogee Coal Co., LLC*, 232 W.Va. 554, 562, 753 S.E.2d 52, 60 (2013) (internal quotation marks and citation omitted). Additionally, this Court has held that "[i]t is not for this Court arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted." *Banker v. Banker*, 196 W.Va. 535, 546-47, 474 S.E.2d 465, 476-77 (1996). Finally, "*[e]xpressio unius est exclusio alterius* . . . is a well-accepted canon of statutory construction. If the Legislature explicitly limits application of a doctrine or rule to one specific factual situation and omits to apply the doctrine to any other situation, courts should

[4] In their brief, Petitioners state that *Dyer v. United Fuel Gas Co.*, 90 F.Supp. 859 (S.D.W.Va. 1950) indicates in dicta that absent a 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 mineral estates. Petitioners' Brief at 16, n 4. Petitioners go on to state that the Fourth Circuit Court of Appeals "thereafter reversed the holding in *Dyer*." To the extent this statement carries with it the implication that the Fourth Circuit Court of Appeals disagreed with the District Court's observation that absent a severance of ownership of the surface and subjacent minerals, West Virginia law does not permit the separate assessment of the surface and subjacent mineral estates, such is not the case. The Fourth Circuit in *United Fuel Gas Co. v. Dyer*, 185 F.2d 99 (4th Cir. 1950) expressly limited its review to questions relating to adverse possession and made no mention of the issue of separate assessments. *Dyer*, 185 F.2d at 100.

assume the omission was intentional; courts should infer the Legislature intended the limited rule would not apply to any other situation. Hence, a statute which specifically provides that a thing is to be done in a particular manner, normally implies that it shall not be done in any other manner." *State ex rel. Riffle v. Ranson*, 195 W.Va. 121, 128, 464 S.E.2d 763, 770 (1995) (citations omitted).

While the Attorney General did not expressly invoke the *expressio unius* maxim, it seems clear that the 1966 Attorney General Opinion is rooted in this familiar canon of statutory construction. To paraphrase, West Virginia Code § 11-4-9 (1935) only expressly authorizes separate assessments for separate estates in land (e.g., surface on the one hand, and oil and gas estate on the other) when those estates are owned by different persons. As this Court observed in *Haynes v. Antero Resources Corp.*, No. 15-1203, 2016 WL 6542734 (W.Va. Oct. 28, 2016) (memorandum decision), "West Virginia Code § 11-4-9, enacted in 1863 and last amended in 1935, provides that an assessor *may* impose more than one assessment on the same real property if the owners' interests are separate and distinct." *Haynes*, 2016 WL 6542734 at *4 (italics in original). It does not so provide with respect to situations where the separate estates are owned by one and the same landowner.

Except for the constitutional mandate that taxes be equal and uniform, the functions and duties of an assessor "are left solely to the will of the Legislature." *In re Nat'l Bank of W. Va. at Wheeling*, 137 W.Va. 673, 680-81, 73 S.E.2d 655, 660–61 (1952), overruled in part on other grounds by *In re Kanawha Val. Bank*, 144 W.Va. 346, 109 S.E.2d 649 (1959). The Legislature easily could have authorized county assessors to make separate assessments for separate estates in land, period. It did not. The only permissible conclusion is that this omission was intentional, and that under West Virginia Code § 11-4-9 (1935), assessors do not have the authority to separately assess separate estates in land absent a severance of ownership.

Petitioners concede that there was never any severance of the surface estate from the subjacent oil and gas estate. Petitioners' Brief, Statement of the Case, at 1. It is also black letter law in West Virginia that an ordinary oil and gas lease, such as the 1919 Lease, vests in the lessee only the inchoate right to explore the premises for the oil and gas, but vests in the lessee no estate in the oil and gas in place. *Lowther Oil Co. v. Miller-Sibley Oil Co.*, 53 W. Va. 501, 44 S.E. 433 (1903); *South Penn Oil Co. v. Haught*, 71 W.Va. 720, 78 S.E. 759 (1913); *Smith v. Root*, 66 W.Va. 633, 66 S.E. 1005 (1910). Therefore, the 1919 Lease did not result in a severance. Appx. 60. Thus, because there has never been a severance of the surface and oil and gas estates in the subject land, the Circuit Court correctly concluded that the Marshall County assessor's attempt to assess A. M. Schenk for the 202-acre oil and gas interest in addition to the assessment of the surface of the 527.66-acre tract, was erroneous, contrary to law, and therefore, void. Order at ¶56, Appx. 562-63.

In addressing their first assignment of error, Petitioners additionally cite several statutes relating to property tax assessments that are irrelevant to the issues before the Court, apparently in an attempt to divert the Court's attention away from the one factor that is determinative to the underlying action, and which is fatal to the Petitioners' cause: there cannot be any separate assessment of unsevered estates in land. These statutes need not be addressed here.

Finally, the Petitioners assert that neither the Respondents nor the Circuit Court offer any policy rationale for why such separate assessments should not be permitted, stating further that from a public policy standpoint, there is no reason to prohibit assessors from separately valuing the surface and mineral estates within a given tract of land and issuing separate assessments where those estates are owned by the same person if the end result is that those interests are correctly valued and taxed. Petitioners' Brief at 16-17. It was not incumbent upon either the Respondents

or the Circuit Court to articulate a policy rationale for their conclusions. The Respondents and the Circuit Court merely reached their conclusions on the basis of a review of West Virginia law, and nothing more need be said. Merely because the Petitioners articulate an alternative point of view does not mean that the Circuit Court erred in its conclusion.

For the reasons stated above and that may be apparent to this Court, the Circuit Court correctly concluded that West Virginia law prohibited separate assessments of the surface and subjacent mineral estates absent a severance of title to the surface and subjacent mineral estates.

D. The Circuit Court Correctly Found that the Assessment of the Disputed 202 Acres Oil and Gas was a Duplicate Assessment and that the Disputed 202 Acres Did Not Go Delinquent for Nonpayment of Property Taxes

Contrary to the Petitioners' contention, as discussed more fully above, the Circuit Court was correct in finding that the assessment of the disputed 202 acres of oil and gas was erroneous, contrary to law, and, therefore, void. Order at ¶ 56, 58; Appx. 562-63. Because the assessment was an erroneous, contrary to law, and, therefore, a void duplicate assessment, there can be no obligation to pay the taxes assessed as a result. No failure to pay the taxes unlawfully and erroneously assessed can work to dispossess the rightful owners of title to the subject oil and gas.

Initially, Respondents did suggest that Albert M. Schenk owned the 527.66-acre tract in fee simple. Appx. 53, 60-61. Respondents no longer contend that Albert M. Schenk owned the 527.66-acre tract in fee simple, because of the coal exception and reservation described in the 1906 Deed. Rather, as expressed in their Supplemental Memorandum of Law in support of their Motion for Summary Judgment, Respondents recognized that Albert M. Schenk owned the surface estate and the oil and gas estate in the subject land. Appx. 459-460. Regardless of whether Albert M. Schenk owned the tract in "fee simple" or "fee, less coal," the fact remains that title to the surface

estate was never severed from title to the oil and gas estate, a contention that Respondents have maintained throughout and is undisputed. Appx. 52, 60, 460-462.

With respect to the Respondents' responses to Petitioners' interrogatories, while the Respondents' responses were perhaps imprecisely worded, Respondents did not "admit" that Albert M. Schenk was assessed as "owning only the surface" of the 527.66-acre tract. Petitioners' Brief 18. Never have Respondents contended that Albert M. Schenk ever owned only the surface of the 527.66-acre tract. In reviewing Respondents' discovery responses in total, instead of in a snippet specially selected by Petitioners, one can see that the Respondents have consistently maintained that: (i) ownership of the mineral estate in the 202-acre tract has never been severed from ownership of the surface estate [Appx. 384]; (ii) the interest purportedly conveyed under the 1949 Tax Deed was the interest described in the 1919 Lease, which did not result in a severance of the mineral estate subject to separate taxation [Appx. 384]; (iii) despite there having never been a severance, an erroneous and duplicate assessment of the 202-acre tract of oil and gas appeared in the Marshall County land books [Appx. 384-387], and (iv) taxes were consistently assessed and paid against the 527.66-acre tract [Appx. 383, 385-387].

Respondents have contended throughout this litigation that the assessments against the 527.66-acre tract were assessments against *the entire interest* possessed by A.M. Schenk and his successors in title in the subject real property, whether they have short-handedly referred to such interest as "fee" or "surface." For Petitioners to call the wording of the Respondents' discovery responses a "concession" by the Respondents is disingenuous at best, and to refer to such as a "judicial admission" is a gross mischaracterization.

It is important to note that a "judicial admission" is a "formal waiver of proof that relieves an opposing party from having to prove the admitted fact and bars the party who made the

admission from disputing it." *Black's Law Dictionary* 51 (8th ed. 2004). Respondents' imprecisely worded discovery response hardly rises to the level of a "formal waiver of proof."

Petitioners also spend several pages of their brief attempting to create the illusion of a genuine issue of material fact by painstakingly belaboring the layout of the Marshall County land books from 1920 on, and focusing especially on the land book entries for 1935 and 1936 for Albert M. Schenk's interest in the 527.66-acre surface tract and the 202-acre tract of oil and gas beneath the surface of a portion of the 527.66-acre tract.

Respondents demonstrated in the Circuit Court that the 202-acre tract was within the 527.66-acre surface tract. Appx. 450-455, 467, 469, 471-472, 474-475, 477. Title to the oil and gas estate was never severed from title to the surface estate. West Virginia Code § 11-4-9 (1935) does not authorize separate assessments of separate estates in land absent a severance of ownership. Therefore, the Marshall County Assessor lacked any authority to separately assess Albert M. Schenk's interest in both the surface and oil and gas estates. Therefore, regardless of how Petitioners wish to spin it, the assessment of the 202 acres of oil and gas was erroneous, duplicative, contrary to law, and, therefore, void.

Petitioners' argument in support of their second assignment of error hinges upon the Marshall County Assessor's assessment of the "surface" as being employed with the design of excluding all subjacent minerals from assessment. There simply is no evidence of such, and Petitioners have not presented any. Instead, Petitioners have asked the Circuit Court – and now this Court – to guess what the Marshall County Assessor meant when it assessed Albert M. Schenk with a "fee" or "surface" interest in 527.66 acres, and moreover, seemingly to conclude, illogically and without evidence, that the Assessor intended to assess the surface estate and only the surface estate of the land at issue.

The West Virginia Attorney General,[5] when faced with a question similar to that presented in this case, opined in 1948 that use of the word "surface," appearing in assessments, should be construed to include minerals. 42 W.Va. Opp. Atty. Gen. 309 (W.Va.A.G.), 1948 WL 31589 *3 (Apr. 20, 1948); Appx. 483.

The facts presented in the 1948 Attorney General Opinion were these: J. Philip Clifford, the Prosecuting Attorney of Harrison County, wrote to the Attorney General's office presenting the following question:

> On January 1, 1928, "A" owned a tract of land in Harrison County and was charged on the land books with "100 Acres - Fee."
>
> In July, 1928, he sold the coal within and under said 100 acres to "B".
>
> In 1929 "B" was charged upon the land books with "100 Acres - Coal."
>
> "A" was charged in 1929 on the land books with '100 Acres - Surface,' and the land has been carried on the land books ever since as '100 Acres - Surface' and taxes paid thereon as such.
>
> Now, the land has become valuable for oil and gas. Does charging the 100 acres upon the land books as "100 Acres - Surface" prevent a forfeiture to the State for non-entry of the oil and gas estate, or does the entry "surface" include the oil and gas so as to void a forfeiture as to it for non-entry on the land books?

1948 WL 31589 at *1, Appx. 457.

The Attorney General expressed his opinion that:

> It cannot reasonably be presumed that persons entering lands on the books as "surface", after the coal has been conveyed away, do so with an intent to withhold part of their interest from taxation. It is the more reasonable presumption that the word "surface" is employed with the intent to report the entire remaining taxable interest. The amount of the assessment would not be varied by entering lands as

[5] The Attorney General of the State of West Virginia is the State's chief legal officer, which status carries the constitutional responsibility for providing legal counsel to State officials and State entities. *State ex rel. McGraw v. Burton*, 212 W.Va. 23, 31-32, 569 S.E.2d 99, 107-108 (2002). Among the duties of the office is to advise the several prosecuting attorneys in matters relating to the official duties of their office. W.Va. Code § 5-3-2. Among the duties of prosecuting attorneys is to "advise, [or] attend to ... all matters ... in which [the] county [in which he or she is elected and qualified] ... is interested." W.Va. Code § 7-4-1.

> "surface plus oil and gas" or "fee less coal." The entire taxable interest is in fact assessed on the entry "surface." If the entire interest is in fact assessed we do not believe that there should be a forfeiture on the theory that part of the interest has not been presented for taxation.

Id. at *3, Appx. 457-458. The Attorney General went on to conclude that:

> If the word "surface" has no meaning invariable from the circumstances surrounding its use we believe that, when appearing in assessments, it should be construed to include minerals. Until there has been a severance of an estate in minerals there is no authority for a separate assessment of the mineral interest. Conversely there is no authority to omit from assessment an unsevered estate in minerals. **Could the owner of the fee in land have the land assessed as "surface less oil and gas?" We think not.** There is no authority for the separate assessment of unsevered interests in land. In the instant case therefore the owner and assessor must have intended to report for taxation the entire estate remaining after the severance of coal, including the unsevered interest in oil and gas.

Id. (emphasis added).

Applying that same logic to the matter presently before the Court, in assessing Albert M. Schenk and his successors in title's interest in "surface" of the 527.66-acre tract, such assessment must include Schenk's entire estate in the land remaining after the severance of the coal, which must include the subjacent oil and gas.

With respect to the Circuit Court's reliance on *Hill v. Lone Pine Operating Co.*, No. 16-0219, 2016 WL 6819787 (W.Va. Nov. 18, 2016) (memorandum decision), while it is true that the facts presented in this case are not precisely identical as those presented in *Lone Pine*, the same general principle that *Lone Pine* stands for – that the failure to pay taxes arising out of an erroneously-created duplicate assessment will not result in forfeiture of the interest erroneously assessed by way of a tax sale – is nevertheless applicable to this case.

This case, like *Lone Pine*; *L&D Investments, Inc. v. Mike Ross, Inc.*, 241 W.Va. 46, 818 S.E.2d 872 (2018); and *Haynes*, 2016 WL 6542734, stems from the creation of duplicate assessments of the oil and gas estate, and concerns the sale of the mineral interests in property for

delinquent taxes when, in fact, the taxes had been paid. In each case, this Court has consistently held that tax deeds resulting from erroneous duplicate assessments are void.

Again, as discussed more fully above, the Marshall County Assessor's assessment of Albert M. Schenk's interest in 202 acres of oil and gas and again for his interest in the 527.66-acre surface tract of which the 202-acre oil and gas tract is a part is an erroneous duplicate assessment, and the tax sale resulting from Schenk's or his successor's failure to pay the taxes arising from such erroneous duplicate assessment is void, as is every subsequent purported conveyance flowing from such void tax deed.

Petitioners do not dispute that the Marshall County Assessor indeed consistently assessed the interest encompassed by the assessment of the "surface," nor do Petitioners dispute that the taxes so assessed were consistently paid over the years. Therefore, insofar as the assessment of the "surface" of the 527.66-acre tract included the entire remaining estate in land owned by Albert M. Schenk and his successors in title following the severance of the coal estate, the consistent payment of such taxes over the years defeats any purported tax sale of the oil and gas. *See State v. Low*, 46 W.Va. 451, 459, 33 S.E. 271, 274 (1899) ("Payment by the owner, or any one entitled to make it, is an absolute defeat and termination of any statutory power to sell."). Appx. 61, 518, 564.

With respect to the general rule that valuations for taxation purposes fixed by an assessor are presumed to be correct, that presumption, as this Court stated in Syl. Pt. 7 of *In re Tax Assessments Against Pocahontas Land Co.*, 172 W.Va. 53, 303 S.E.2d 691 (1983), is expressly limited only to valuation. Valuation is not at issue here. As *Lone Pine*, *L&D Investments*, and *Haynes* demonstrate, assessors make mistakes. To the extent it was the Respondents' burden to prove clearly that the assessment of the 202-acres of oil and gas was in error, Respondents

respectfully submit that the evidence presented to the Circuit Court demonstrates Respondents satisfied this burden.

Finally, the purported "long-standing policy" of the Marshall County Assessor to assess a person as owning oil and gas upon the Assessor receiving information indicating that the person had signed an oil and gas lease is irrelevant. It appears that it had been the "long-standing policy" of the Marshall County Assessor to assess the surface and subjacent mineral estates in the same land separately despite there being no severance of ownership contrary to law, resulting in cases like the one presently before the Court. With all due respect to the Marshall County Assessor, its policy is entitled no deference by this Court. Instead, on the basis of controlling legal authority, the Circuit Court's Order should be affirmed.

At the end of the day, this Court need not become overburdened in trying to navigate the hall of mirrors that is Petitioners' second assignment of error. It is enough for Respondents to prevail on the basis that the Marshall County Assessor lacked the authority to assess separately Albert M. Schenk for his interest in the 527.66-acre surface tract **and** the 202-acre tract of oil and gas within its boundaries absent a severance of ownership. The assessment of the 202 acres of oil and gas was erroneous, duplicative, contrary to law, and, therefore, void. That ends the inquiry.

For the reasons stated above and that may be apparent to this Court, the Circuit Court correctly concluded that the assessment of the disputed 202 acres oil and gas was a duplicate assessment and that the disputed 202 acres did not go delinquent for nonpayment of property taxes.

E. The Circuit Court's Order Quieting Title to the 202 Acres Adequately Described the Configuration or Location of the Realty and Therefore Should Not Be Reversed

Respondents' Amended Complaint sought to quiet title to the oil and gas interest beneath the Bonaccis' respective 81.39 acre parcels, which are contained in the 202 acres. Petitioners

argue that the Circuit Court's order quieting title to the 202 acres of oil and gas does not adequately describe the configuration or location of the subsurface oil and gas interest and, therefore, must be reversed. Petitioners' Brief at 24-27. Petitioners point to four cases to support their proposition: *Green v. J.P. Morgan Chase Bank*, 937 F.Supp.2d 849 (N.D.Tex. 2013); *Robertson v. Lees*, 87 Ark. App. 172, 189 S.W.3d 463 (2004); *Seitz v. Pennsylvania R.R. Co.*, 272 Pa. 84, 116 A. 57 (1922); and *O'Daniels v. City of Charleston*, 200 W.Va. 711, 490 S.E.2d 800 (1997). None of these cases involve oil and gas interests. Rather, all of these cases involve boundary line disputes. Nevertheless, Petitioners argue that the Circuit Court's review, comparison of, and reference to various documents, including the Farm Line Map [Appx. 0411], a 1957 map depicting the Schenk Farm [Appx. 0409], a current tax map prepared by the Marshall County Assessor [Appx. 0410], and well location maps filed with the West Virginia Department of Environmental Protection [Appx. 0474, 0477, 0454], were insufficient to locate the 202 tract of land within and under which the oil and gas interest at issue is located and to craft an order quieting title to the oil and gas interest.

The only West Virginia case cited by Petitioners in their appeal brief to support their proposition that additional findings by the Circuit Court were necessary is *O'Daniels*, 200 W.Va. at 711, 490 S.E.2d at 800. However, *O'Daniels* did not involve the quieting of title to oil and gas interests. Instead, *O'Daniels* involved a petition for a writ of mandamus alleging that the City of Charleston had a mandatory and nondiscretionary duty to remove fences erected by private citizens on a public right-of-way and that inhibited vehicles from utilizing the public right-of-way. *Id.* Henry O'Daniels contended that the only access to his property was through the use of the public right-of-way known as Ledge Hill Drive. Mr. O'Daniels also contended that Mr. and Mrs. Lytle had erected two fences on the turnaround and catch basin portions of the right-of-way that hindered

the use of the right-of-way. *Id.* at 713-14, 802-03. The City contended that the fences were located on the Lytles' property and refused to have them removed. The circuit court granted the writ of mandamus, finding that the right-of-way contained the areas where the fences were located. *Id.* at 714, 803. This Court held that any order or decree establishing a public highway under West Virginia Code § 17-1-3 must define the right-of-way over land with a particular and definite line. This Court found that the circuit court did not make such specific findings regarding the right-of-way over land and, thus, remanded the action to allow the circuit court to make such findings. *Id.* at 717, 806.

In the instant case, the Circuit Court was not asked to establish the boundaries of a public highway under West Virginia Code § 17-1-3 and, therefore, was under no obligation to follow the dictates of the *O'Brien* opinion. Simply put, there is no law in West Virginia that required the Circuit Court to make the specific findings that Petitioners contend it should have made in this action. Indeed, the Petitioners admit that their "[r]esearch identified no West Virginia Supreme Court decision discussing the burden of proof borne by a party seeking to quiet title." Petitioners' Brief at 24.

Petitioners also reference the Arkansas case of *Robertson*, 87 Ark. App. at 172, 189 S.W.3d at 463, and claim that *Robertson* stands for the proposition that a plaintiff seeking to quiet title to oil and gas interests must establish the location and boundaries of the oil and gas interests. However, the *Robertson* opinion actually holds that in a boundary line dispute, quieting title of the disputed land requires proof of the location of the disputed boundary. *Id.* at 185-86, 472. The *Robertson* opinion involved a fence line dispute among neighbors, Robertson and Lees. Id. at 176, 465. Robertson argued on appeal that because Lees did not introduce a survey, there was no proof in the record from which to ascertain whether the line of iron fence posts placed by Lees

corresponded with the true boundary line. *Id.* at 185, 471-72. The appellate court agreed, stating that because Lees did not meet his burden of proving the location of the disputed boundary, the trial court clearly erred in its finding that any part of the disputed land should be quieted. *Id.* at 186, 472.

Petitioners also cite the Pennsylvania case of *Seitz v. Pennsylvania R.R. Co.*, 272 Pa. at 84, 116 A. at 57, another boundary dispute matter between neighboring property owners. Seitz sued the Pennsylvania R.R. Co., claiming that the railroad improperly raised a track on land that actually belonged to Seitz. *Id.* at 85, 57. The land owned by the Railroad and used for a track was once part of a canal and locks system, which no longer existed. *Id.* Recorded land documents utilized monuments that no longer existed. *Id.* at 85-87, 57-58. The lower court permitted a record for a part of the land, but on a motion for judgment n.o.v., held that there was no evidence of title in Seitz to any of the land. Seitz appealed. *Id.* at 85-86, 57. The appellate court ruled that with the inability to describe satisfactory monuments referred to in the recorded land documents, it was impossible to determine the boundary between the parties and whether any land had been taken wrongfully by the railroad. *Id.* at 88, 58.

However, the instant case before this Court is not a boundary line dispute. Here, the Respondents contend that Petitioners own none of the property at issue and never have owned any of the property at issue. Here, there is no need to determine where Respondents' properties begin and end because the dispute is not one concerning a boundary line but, rather, concerning a duplicate and void assessment that resulted in the Petitioners' owning absolutely no interest in **any** of the oil and gas interest at issue. Here, the dictates of the cited cases do not apply and are completely misplaced. For that reason, the Circuit Court's findings and conclusions are valid and should be affirmed.

Moreover, and contrary to Petitioners' contention, the Circuit Court made numerous specific findings regarding its ability to ascertain the surface boundaries of the 202-acres of oil and gas at issue through the use of historical maps and documents contained in the evidentiary record. Specifically, the Order set forth the following findings:

- The Circuit Court found that the 202-acre tract description was contained in the 1919 oil and gas lease between Albert M. and Emma Schenk and James Wilson. Appx. 0172, 0563. The 1919 oil and gas lease described the 202-acre tract as being bounded on the North by the lands of Big Wheeling Creek, on the East by lands of William Happy and J.D. Black, on the South by lands of McConnell Heirs and Ann Sebright, and on the West by lands of Anna Sebright and A.M. Schenk. *Id.*
- The Circuit Court found that the Farm Line Map of Marshall County maintained by the Library of Congress depicts the 558-acre tract once owned by Charles A. Seabright a/k/a C.A. Seabright, which was acquired by Albert M. Schenk by deed dated June 5, 1906, and which contains the 202-acre tract at issue. Appx. 0411, 0563. The Farm Line Map shows that the 558-acre tract is bordered on the North by Big Wheeling Creek, on the East by lands of J.Black, and on the South by lands of M. McConnell, and all correspond with the borders described in the 1919 lease. *Id.*
- The Circuit Court found that the recorded plat of the Lizzie Happy Farm assisted in ascertaining the location of the realty at issue. Appx. 0538, 0563. The recorded deed, dated October 30, 1920, from Lizzie Happy to Nelson C. Hubbard, indicates that Lizzie Happy is the widow of William Happy, who is referenced as owning the land located to the east of the 202-acre tract in the 1919 oil and gas lease. *Id.*

- The Circuit Court found that the Lizzie Happy Farm plat appears to depict a boomerang-shaped piece of land formerly owned by J. Black that follows the contours of Big Wheeling Creek and is located immediately to the east of the Seabright property as shown on the Library of Congress farm line map. *Id.* The Circuit Court also found that Department of Environmental Protection well records for certain abandoned and plugged wells describe property once owned by Albert M. Schenk. Appx. 0563. The 1938 and 1939 well location maps show that wells numbered 3-629 and 4-630 belonging to Natural Gas Co. of W.Va. – which Petitioners agree were drilled pursuant to the 1919 Lease – are located on land owned by Albert M. Schenk, bordered on the North by Big Wheeling Creek, on the East by lands of J. Black (and I. Black) and on the South by lands of M. McConnell, corresponding to the borders of the former C.A. Seabright land acquired by Schenk pursuant to the 1906 Deed, thus fixing the location of the wells on said land. Appx. 0281-0282, 0471, 0474. Similarly, the 1975 well location map also contains a reference to "Seabright Well No. 630" as being located on land belonging to "Shank" [sic], with a reference to "(322/433,)" which the Circuit Court interpreted as showing Well 4-630 drilled pursuant to the 1919 Lease on the land conveyed to Albert M. Schenk under the 1906 Deed, and further conveyed to Albert Schenk III under the 1957 Deed. Appx. 0477, 0454, 0570.

The Circuit Court found that in viewing the information and documents in their totality, especially the 1938 and 1939 well location maps, it becomes clear that the location of the 202-acre tract at issue is ascertainable to a degree allowing it to craft an order quieting title to the oil and gas within and underlying the same. Appx. 0563. These findings made by the Circuit Court are sufficient to ascertain the location of the 202-acre tract for purposes of quieting title to the oil and

gas within and beneath the tract, particularly in light of the legal dispute questioning whether or not Petitioners ever owned the oil and gas interest.

For these reasons, 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.

F. Petitioners' Claim that the Bonaccis Do Not Possess the Right to Enforce Claims on Behalf of Other Heirs of Albert M. Schenk Mischaracterizes the Bonaccis' Request of the Circuit Court and the Circuit Court's Ability to Find Whether Petitioners Own the 202 Acres of Oil and Gas Interests at Issue

Petitioners agree that Respondents Frank Bonacci and Brian Bonacci possessed the right to assert a claim regarding ownership of some portion of the disputed 202-acres of oil and gas interests. Petitioners' Brief at 28-29. However, Petitioners argue that the Circuit Court erred by quieting title to the portion of the oil and gas under and beneath the 202-acre tract that Respondents Frank Bonacci and Frank Bonacci do not own. *Id.*

Respondents Frank Bonacci and Brian Bonacci filed their Amended Complaint against the Petitioners, and also filed the claim against parties they believed own interest in part of the oil and gas under and beneath the 202-acre tract as a result of the Schenk chain of title ("Additional Parties"). As stated in the Amended Complaint, "While 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." Appx. 0015 at FN 1.

West Virginia law required Respondents to name the Additional Parties in the Amended Complaint. "When a court proceeding directly affects or determines the scope of rights or interests in real property, any persons who claim an interest in the real property at issue are indispensable parties to the proceeding." Syl. Pt. 1, *O'Daniels*, 202 W.Va. 711, 490 S.E.2d 800. Further, "[a]ny order or decree issued in the absence of those parties is null and void." *Id.*

Here, Petitioners contend that they are the rightful owners of the oil and gas under the 202 acres at issue. Respondents Frank Bonacci and Brian Bonacci contend that they are the rightful owners of the oil and gas interest beneath their respective 81.39 acre parcels, which are part of the 202 acres. Simply stated, any Circuit Court finding regarding Petitioners' ownership or lack of ownership of the 202 acres of oil and gas interest would serve as a finding regarding Respondents' respective 81.39 acre parcels **and** the remaining parcels comprising the total 202 acres owned by the Additional Parties. As this Court held in *Leslie Equipment Co. v. Wood Resources Co., LLC*, 224 W.Va. 530, 543, 687 S.E.2d, 109, 122 (2009), "once void, always void." If the 1949 deed is void as it relates to the interests claimed by Respondents, it is also void as it relates to the interests held by the Additional Parties, who have recorded interests to other portions of the 202-acre tract.

Otherwise, Petitioners and the Additional Parties would be required to relitigate their interests in the future to determine the rightful owners of the remaining portion of the 202 acre oil and gas interest, which would result in piecemeal litigation. The law disfavors piecemeal litigation. Under West Virginia law, the doctrine of *res judicata* or claim preclusion assures that judgments are conclusive, thus avoiding relitigation of issues that were or could have been raised in the original action. *Dan Ryan Builders, Inc. v. Crystal Ridge Development, Inc.*, 239 W.Va. 549, 559, 803 S.E.2d 509, 530 (2017). That is, *res judicata* "precludes piecemeal litigation by splitting a single cause of action or relitigation of the same cause of action on a different legal theory or for different relief." *Id.* Applying Petitioners' contention to the facts at hand would require the Additional Parties and Petitioners to violate the doctrine of *res judicata* in order to determine the ownership rights to the remaining portion of the 202 acre oil and gas interest in a separate suit.

Contrary to Petitioners' contention, the Respondents Frank Bonacci and Brian Bonacci have not sought relief on behalf of anyone besides themselves. Rather, the factual reality is simply that if Petitioners do not own the oil and gas interests under Respondents Frank Bonacci and Brian Bonacci's respective 81.39 acre parcels, then Petitioners do not own the oil and gas interests under the Additional Parties' parcels. A court ruling for or against Respondents would apply to the entire 202 acres of oil and gas interests, not just to Respondents Frank Bonacci and Brian Bonacci's respective 81.39 acres of oil and gas interests.

For the reasons stated above and that which may be apparent to this Court, the Circuit Court's findings regarding the oil and gas interest to the realty at issue properly and necessarily addressed all 202 acres and not just the portion of acreage owned by Respondents Frank Bonacci and Brian Bonacci.

VI. CONCLUSION

Based on the foregoing, Respondents Frank A. Bonacci and Brian F. Bonacci respectfully request that this Honorable Court:

A. AFFIRM the Order granting Respondents' motion for summary judgment, entered by the Circuit Court on December 16, 2019;

B. not reverse the Circuit Court's Order of December 16, 2019;

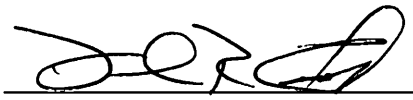
C. not remand this matter to the Circuit Court;

D. not instruct the Circuit Court to enter judgment in favor of Petitioner Rolaco; and

E. grant such other and further relief as this Court deems just and necessary.

FRANK A. BONACCI and BRIAN F. BONACCI

BY: SPILMAN THOMAS & BATTLE, PLLC



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CERTIFICATE OF SERVICE

I, David R. Croft, hereby certify that a copy of RESPONDENTS' BRIEF was served via U.S. Postal Mail (or by overnight delivery if indicated) upon the following this 9th day of June, 2020, as follows:

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